
STATE BAR OF MICHIGAN

REAL PROPERTY LAW SECTION



MORTGAGE FORECLOSURE

Overview

A mortgage is a document where a person that borrows money (usually called the *mortgagor*) gives real estate, such as a home, as collateral for repayment of the loan to a lender (usually called the *mortgagee*).

Foreclosure is the process in which the lender (the mortgagee) sells or repossesses the real estate (such as a home) due to the borrower's (the mortgagor's) failure to comply with the terms of the mortgage. A common violation of the mortgage (also called a breach or default of the mortgage) is the failure to pay the loan or the failure to pay property taxes or maintain property insurance.

The mortgage will determine what steps the lender must follow before starting a foreclosure. The mortgage usually provides that when the borrower defaults, such as missing a payment, the lender must give written notice of the default and a chance to correct the default (to make the payment). The number of days that the borrower has to correct the default after getting the default notice is stated in the mortgage.

If the borrower fails to correct the default within the required time, the lender may start the foreclosure process. Most lenders typically begin the foreclosure process when a loan is 90 days past due, although there is nothing stopping lenders from beginning earlier. The amount that is owed is determined by the concept of *acceleration*, which allows the lender to declare the entire amount of the loan due. In other words, if the borrower misses a \$500 monthly payment on a loan that has a \$60,000 balance, the lender can demand that the entire \$60,000 be paid immediately. While the lender only has the right of acceleration if it is written in the mortgage, almost all mortgages include it. There are two types of foreclosures in Michigan.

Foreclosure by Advertisement

The first type of foreclosure is *foreclosure by advertisement*. This may only be done if the mortgage contains a "power of sale," but almost all do. A "power of sale" paragraph typically gives the lender "the power to sell at public sale" or the "power of sale by advertisement" or has similar words. Most foreclosures being done today are this type of foreclosure, as the process takes less time and is less expensive than that of a judicial foreclosure. If the borrower is in the military, special protections are provided under the federal Servicemembers Civil Relief Act.

Once the borrower has failed to correct a default following any required default notice from the lender, the lender may start a foreclosure by advertisement. The lender must publish a foreclosure notice in a

newspaper in the county where the real estate is located once a week for four consecutive weeks. The notice must include the names of the borrowers, the name of the lender, the amount due, the legal description of the property and the length of the redemption period. Within 15 days after the first publication, a copy of the notice must be posted in a conspicuous place on the real estate. The lender may also send the borrower a copy of the foreclosure notice, but is not required to do so. Often, a lender will allow a borrower to *reinstate* the mortgage (that is, to bring it back to good standing) even after acceleration, by just paying the lender the missed payments, plus certain costs and fees. Once the foreclosure sale takes place, the entire accelerated amount (that is, the entire loan balance) will typically be required.

At the sale (called a *sheriff's sale*), the public may bid to buy the real estate. Usually, only the lender makes a bid, and it is for the entire loan balance. If a person bids more than the entire loan balance, the excess goes to the court and may end up going back to the borrower (or to other persons who have mortgages or liens on the property). If the highest bid is less than the entire loan balance, the lender may still sue the borrower for this difference (sometimes called the deficiency). A foreclosure deed is given to the high bidder. This deed only goes into effect after the *redemption period* expires. The borrower may occupy the real estate during that time.

The borrower may, within a certain period of time known as the *redemption period*, buy back (or redeem) the real estate by paying the party who purchased the property at the foreclosure sale the sum bid, plus interest. The borrower would also have to pay amounts like taxes, insurance, and homeowners' association dues that were paid by the purchaser during the redemption period. Generally, the redemption period for a residence is six months, unless the property is more than three acres or the remaining balance of the loan is less than $\frac{2}{3}$ of the original loan. In those cases, the redemption period is one year. The redemption period for *abandoned* residential property can be shortened to 30 days.

If the borrower does not redeem the real estate within the redemption period, the buyer at the foreclosure sale is entitled to occupy the property by taking the persons living there to court to evict them.

Foreclosure by Judicial Sale

The second type of foreclosure is *foreclosure by judicial sale*. It involves the sale of the real estate under the supervision of the court. It will take place in the circuit court of the county where the real estate is located. After

receiving a default notice or notices from the lender and a notice that the loan has been accelerated, the borrower will be served with a complaint for foreclosure. This is a document that names the plaintiff (e.g., the lender bringing the foreclosure), the defendant (e.g., the borrower and any other person who claims an interest in the real estate), the reason for the default, and the amount due, and asks for the right to sell the real estate if the borrower does not pay the amount due. It may also ask for taxes and insurance that the lender pays during the foreclosure process if the borrower fails to pay them. Again, if the borrower is in the military, special protections are provided under the federal Servicemembers Civil Relief Act.

If the borrower pays the total amount owed as required by the mortgage, the complaint (e.g., the foreclosure action) is terminated. If the lender has accelerated the loan, the entire loan balance is due, and payment of only the missed payments is not sufficient.

If the court finds that the lender is entitled to be paid, the court will enter a judgment in favor of the lender, allowing the lender to take the property to foreclosure sale. The foreclosure sale may not occur sooner than six months after the complaint was filed with the court.

After the judgment, notice of a foreclosure sale must be published in a newspaper in the county where the real estate is located for at least 42 days. The foreclosure sale process will be the same as for a foreclosure by advertisement.

The borrower may redeem (that is, buy back) the real estate at any time within six months from the date of the sale by paying the buyer at the foreclosure sale the sum bid plus interest. The borrower would also have to pay amounts like taxes, insurance, and homeowners' association dues that were paid by the purchaser during the redemption period.

If the borrower does not redeem the real estate within the six-month redemption period, the buyer at the foreclosure sale is entitled to occupy the property by taking the persons living there to court to evict them.

Tips for Avoiding Foreclosure

- 1. DON'T IGNORE THE PROBLEM.**
2. Contact your lender once you realize you have a problem. Ask for the lender's LOSS-MITIGATION DEPARTMENT.
3. Open all mail from your lender and keep copies of it.

4. Know your mortgage rights.
5. Contact free or low-cost counseling sources, such as the new toll-free number for MSHDA, 1-866-946-7432, or United Way's 2-1-1 by dialing 2-1-1 or 1-800-552-1183. Both MSHDA (www.michigan.gov/mshda) and HUD (www.hud.gov) have websites that list counseling agencies.
6. Prioritize your spending.
7. Explore other assets available.
8. Be wary of foreclosure prevention companies that charge hefty fees.
9. Contact a real estate attorney if foreclosure proceedings are started.
10. If you cannot afford an attorney, consider the following options: a) contact Legal Aid listed in the government section of your telephone book by county; b) contact the State Bar of Michigan at 1-800-968-0738 for an attorney referral; c) if over age 60, contact Legal Hotline for Michigan Seniors at 1-800-347-5297.



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This pamphlet may be obtained individually or in bulk from the State Bar of Michigan Membership Services Department
306 Townsend Street
Lansing, Michigan 48933-2012
www.michbar.org

You may call
1-800-968-1442 ext. 6326
to obtain price information.

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