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A program of Elder Law of Michigan, Inc.*

## Mortgage Foreclosure

What happens in the foreclosure process depends on what type of foreclosure is being used. In Michigan, there are two types of foreclosure: foreclosure by advertisement and judicial foreclosure. Judicial foreclosures almost never occur because they are costly and time consuming for the lender. If your property mortgage is being foreclosed upon by a judicial foreclosure you will be served with a Summons and a Complaint and you should get legal help as soon as possible.

Foreclosure by advertisement, sometimes referred to as non-judicial foreclosure, is the type of foreclosure action that is most commonly used in Michigan. It is based on a state law that must be followed strictly. Foreclosure by advertisement may be used when the contract (your mortgage document) between you and your lender has a *power of sale* clause. This clause allows the lender to begin the foreclosure by an advertisement process when you default on payments. In legal jargon the borrower is known as the *mortgagor* and the lender is called the *mortgagee*.

### **1. You Default on Payments**

A default on payments means you haven't made a payment on time and is the most common reason for a mortgage foreclosure, although there are other reasons that allow a lender to begin a foreclosure. Lenders vary on how much they will work with the borrower and when they will turn the matter over to an attorney to begin the foreclosure proceeding. Usually, no later than the beginning of the third month after which a payment has not been made, the lender will send the borrower a letter, referred to as a "breach" or "demand" letter, spelling out that the terms of the mortgage have been violated. With this demand letter, a range of acceleration procedures are triggered including: refusal by lender to accept any partial

payments; requiring that the past due balance on the mortgage be paid in full; and even that the lender will void any payment agreement and call the loan due in full.

## **2. Lender Publishes Notice of the Foreclosure**

Foreclosure proceedings can start any time after the acceleration notice is sent, but usually happen when the loan is 90 or more days past due. When the lender refers the matter to an attorney, the attorney's fees can be added in and these are usually substantial, amounting to about \$1,500 or more. The foreclosure by advertisement process is started when a notice of the foreclosure is published in a general circulation newspaper for 4 consecutive weeks. The lender does not have to personally notify you that the mortgage is being foreclosed. But a notice must be posted in plain sight, on the premises being foreclosed.

The notice must contain:

- The names of the mortgagor (borrower)
- The name of the original mortgagee (lender)
- The name of the foreclosing assignee (if the loan was assigned)
- Date of the mortgage and date it was recorded
- Amount due on the day of notice
- Description of the property being foreclosed

## **3. Sale of the Property**

A minimum of 28 days must pass between the first publication of notice and the sale of the property. The Sheriff or the Deputy Sheriff generally conducts the sale of the property. It occurs at the circuit courthouse in the county where the property is located between 9:00a.m. and 4:00 p.m. Sometimes the sale is adjourned; if this occurs, the notice of the adjournment and the new date of sale will be published in the same newspaper which published the original notice. You have the right to repurchase the property at this sale but you will have to pay what is due on the balance of the mortgage plus whatever costs and fees have been added on. Usually, there is only one "buyer" at the foreclosure sale--the lender, who "buys" the property by making a bid for the amount that is owed.

## **4. Statutory Right of Redemption Begins**

The deed to the property must be delivered to the purchaser immediately following the foreclosure sale. This deed is not operative--but it must be

recorded with the register of deeds within 20 days. This is because a statutory right of redemption exists following the foreclosure sale. This means that for a specific period of time after the foreclosure sale, you can still redeem (get it back) your house. In Michigan there are different redemption periods based on different types and sizes of property. For most residential properties the redemption period is 6 months running from the date of the sale. The time can be substantially less if the property being foreclosed upon is abandoned. Abandonment is presumed when: The lender (or their representative) has made a personal inspection of the premises and the inspection does not reveal anyone who is presently occupying or about to occupy the premises, or the borrower fails to respond to a proper notice as defined by the following: The lender has posted a notice at the time the personal inspection was made, and mailed it by certified mail, return receipt requested, to the borrowers last known address. The notice must state that the lender considers the premises to be abandoned, and that the redemption period in such event will be only 30 days. If the borrower does not respond to these notices within 15 days by mailing to the lender, (first class mail) a letter stating the premises are not abandoned, then the premises are considered abandoned. Because foreclosures are becoming more and more frequent, lenders are being more aggressive about taking possession of abandoned properties; if you are not living in your home while it is under foreclosure (for example, you may be trying to sell it while living elsewhere), in order to preserve your statutory right of redemption you need to be vigilant in responding to any notices and may need to file a Notice of Occupancy with the Register of Deeds.

After the foreclosure sale, the only way to get your property back is by paying the redemption price which is what is owed on the mortgage plus all of the fees (attorney fees, sale fees, etc) that have been added on. There is a basic formula for the redemption price which varies depending on the situation. The redemption price is paid to either the Register of Deeds, or to the person that bought the property at the sale. If you don't pay the redemption price within the statutory right of redemption, you will lose your property for good.

## **5. Remedies**

It is difficult to find a way out of foreclosure. Generally speaking the earlier you seek help after missing a payment, the better. It may be possible to arrive at a "workout" with your lender to reform your mortgage agreement. Sometimes a new loan to refinance the existing one is possible, although the longer you wait after a payment is missed, the worse off you are in the likelihood of finding a new lender

to help you. If the indebtedness doesn't exceed the value of the property you may be able to sell, pay off the loan and after expenses of sale, still walk away with something. Currently the real estate market is very poor and it may be extremely difficult or impossible to realize enough from a sale to cover what is owed. A sale for less than what is owed has to be approved by the lender and is often referred to as a "short sale" and is sometimes possible. Filing a Chapter 13 bankruptcy (before the sheriff's sale) can save your home but there are attorney fees and filing fees as well as a required amount of monthly income to make such a plan work.

Many homeowners are simply unable to take advantage of any of the options there are in response to a foreclosure and so they just live in the home "rent free" during the redemption period and move out at the end, walking away from the problem. The lender must file a separate court action for eviction if the homeowner is still occupying the premises after the redemption period ends. If the lender resells the home after taking possession but is not able to fetch what was owed, the lender can come after the borrower for the "deficiency" in a separate lawsuit for collection. This is seldom done but if the lender senses the borrower may have assets, then the lender may decide to proceed against the debtor towards collection of a deficiency judgment.

If you find yourself facing a foreclosure, try to get help as soon as possible as this is the best way to keep all of your options open. Lawyers who work with foreclosures can advise you. The Legal Hotline for Michigan Seniors can answer questions and give you advice. Moreover, there are a few other nonprofit organizations that can help you. The state of Michigan has established a program called "Save the Dream" which is providing free foreclosure counseling. Their number is (866) 946-7432. The Homeownership Preservation Foundation, at (888) 995-4673, is a national organization offering free help to Michigan residents. There may also be local organizations in your area that can help. Check with the County Treasurer's office in your community for possible resources to help.

*The Legal Hotline is a program of Elder Law of Michigan, Inc., a non-profit organization. If you would like to support our work, please consider sending a tax deductible donation to the Legal Hotline, 3815 W St. Joseph Street, Suite C-200, Lansing, MI 48917. Thank You.*