



Legal Update

A WRA Publication Exclusively for the Designated REALTOR®

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Mortgage Foreclosures

The topic of mortgage foreclosures is one that most people generally hope will never become familiar to them. But REALTORS® working with sellers in financial straits and with buyers making offers on properties scheduled for sheriff's sale do need to have a general understanding of the process, particularly the timing involved. While a few REALTORS® may specialize in working with financially distressed owners, most will only occasionally encounter the mortgage foreclosure scenario.

Some of the material in this *Update* is legalistic, so an attempt has been made to impart the general concepts involved and explain legal terminology whenever possible. Accordingly, any member needing precise legal information on a specific point or statute should not strictly rely upon this *Update* because of the generalized nature of the discussion. REALTORS® should contact private legal counsel or the WRA Legal Hotline for specific or detailed information.

Some of the material in this *Update* is also quite technical and complicated. This material has been included in order to preserve accuracy and provide a resource for future reference by REALTORS®.

The *Update* examines the anatomy of a mortgage foreclosure, following the process from beginning to end. A general understanding of the entire process will equip members to better understand the position of those

clients and customers in the midst of a mortgage foreclosure, and to serve their interests more effectively.

Mortgage Foreclosures

The process of a mortgage foreclosure is a long and winding trail that goes through many stages. The first stage is usually a default by the borrower, followed by commencement of the legal action, reaching judgment in the action, the redemption period, the sheriff's sale, and judicial confirmation of the sheriff's sale.

The Borrower's Default

The process of a mortgage foreclosure typically begins with the borrower breaching the terms of the promissory note and/or the mortgage. This usually means that the borrower is behind in making his or her monthly mortgage payments.

Contractual Default

A lender may foreclose only if the borrower has committed a contractual default such as a failure to pay installments of principal and/or interest when due; failure to pay taxes, insurance premiums, or the monthly escrow payment for these amounts; or the sale of the mortgaged property without the lender's prior written consent (assuming there is a due-on-sale clause in the mortgage).

Notice of Default

If the borrower is in default, the lender may have to give him or her a notice of default and a right to cure. This is required, for instance, under the Wisconsin Consumer Act, and may be required by the courts in some counties, even if the mortgage

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agreement expressly waives the right to notice. For example, the State Bar Form 6-L Mortgage provides that “Mortgagee shall mail notice to Mortgagor specifying: (a) the default; (b) the action required to cure the default; (c) a date, not less than 15 days from the date the notice is mailed to Mortgagor by which date the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration.”

Acceleration

Implementation of the **acceleration** provision found in most mortgages causes the full amount of the loan to become immediately due and payable. Acceleration is triggered when the lender gives notice to the borrower that the lender is accelerating the loan. This is a serious and significant step that most lenders do not take lightly. A borrower generally has been behind in his or her payments, or in breach of some other mortgage provision over a period of several months before the lender will send out an acceleration notice.

Once the balance due has been accelerated, the borrower generally is not entitled to any relief by merely tendering the amounts in default, although that is the case under some Freddie Mac and Fannie Mae loans. The lender must give notice to the borrower that the loan is being accelerated unless the agreement otherwise provides.

For example, the State Bar Form 6-L Mortgage provides that the borrower “agrees that time is of the essence with respect to payment of principal and interest when due and in the performance of any of the covenants and promises of the Mortgagor [borrower] contained herein or in the note(s) secured hereby. In the event of default, Mortgagee [lender] may, at his option and subject to the notice provisions of the Mortgage, declare the whole amount of the unpaid principal and accrued interest due and

payable and collect it in a suit at law or by foreclosure of this Mortgage . . . , and Mortgagee may sell the Property at public sale and give deeds of conveyance to the purchasers pursuant to the statutes.”

Although a lender may foreclose without accelerating the balance due, a borrower’s receipt of a notice of acceleration generally signals an impending foreclosure action. The lender is going to sell the property at sheriff’s sale and apply the proceeds to the accelerated balance due on the borrower’s mortgage loan.

Commencement of a Foreclosure Action

The procedures for a foreclosure action are stated in Chapter 846 of the Wisconsin Statutes. The object of the action is to eliminate the interests of the borrower and those holding any junior or subordinate liens. A judgment of foreclosure is binding only upon the parties named in the foreclosure action. The judgment confirms that the borrower is in default, that the lender has the right to have the property sold by sheriff’s sale, the time and place of the sale, the notice required for the sale, and any right of the lender to secure a deficiency judgment. A **deficiency judgment** is a judgment for the lender against the borrower for any amounts still owed on the mortgage loan after the proceeds of the sheriff’s sale have been applied to the debt.

Purposes of Foreclosure

A lender may foreclose a mortgage in order to secure repayment of the debt owed, to prevent deterioration in the value of the mortgaged property, to collect any rents and profits, to obtain occupancy and possession of the property, to obtain title to the property, to terminate all subordinate and junior liens and interests, to determine priorities and redemption rights, and/or to obtain a deficiency judgment.

For a lender, the drawbacks of a foreclosure include legal fees and costs which may not be recoverable, time delays, adverse publicity, property deterioration during the time required for the legal action, lender reluctance to obtain title and possession, causing the borrower to file bankruptcy, overcoming the borrower's defenses, and potential environmental liability.

Lien Priority

When a lender intends to file a foreclosure action, the lender will have some sort of title work done to determine who holds liens that are junior or subordinate to the mortgage - all of these parties must be named in the foreclosure complaint so that when and if judgement of foreclosure is entered, all of the junior liens can be foreclosed, i.e., eliminated or wiped off of the title. Generally, liens have priority based upon when they were filed, subject to several exceptions, including the following:

- Real Estate Taxes and Special Assessments always have first priority and are superior to all other liens.
- Real estate mortgages have priority from the date the mortgage is recorded over all bona fide (legitimate) purchasers for value and all subsequently recorded liens.
- Purchase money mortgages that are executed at the time the deed is delivered to the buyer take priority over all other claims and liens against the buyer, even if the claims and liens were recorded prior to the purchase money mortgage.
- State tax warrants for delinquent taxes create a lien against real estate when the warrant is docketed in the office of the Clerk of Circuit Court where the property is located. Federal tax

liens are created when a notice of federal tax liens is filed in the office of the Register of Deeds in the county where the real estate is located. These tax liens, however, do not have any special priority over preexisting lienholders.

- Judgment liens on real estate are created by the docketing of a judgment in the office of the Clerk of Courts and are effective for ten years thereafter on all real estate owned or acquired by the individual in that county.
- The borrower may have a homestead exemption for any residence occupied by him or her. The homestead is exempt from judgment liens, and from liability for the debts of the owner, up to \$40,000. The homestead exemption, however, does not apply to mortgages, laborer's liens, mechanics' liens, purchase money liens, and taxes.
- A condominium association's lien for a unit owner's unpaid common expenses is prior to all other liens except tax liens, first mortgages and mechanic's liens recorded or filed prior to the condominium assessment, and state Veteran's secondary mortgage loans.
- Construction liens are prior to any lien that originates after the visible commencement of work on the property improvement.

Proper Parties

The proper parties to be named by the lender as the defendants in a foreclosure action include the borrower; the borrower's spouse if the property is homestead or marital property; any guarantors on the mortgage loan who may be liable for any deficiency judgment; the borrower's personal representative if the borrower is deceased; all persons holding liens on the property; any land contract buy-

ers; all tenants with recorded leases or in possession of the property pursuant to unrecorded leases or periodic tenancies; The United States of America, the State of Wisconsin, and any other taxing authority claiming a lien in the property; and any other persons who may claim any other interest which arose after the recording of the mortgage.

Proper Place for Filing

A foreclosure is typically filed in the county where the property is located. However, it may also be filed in the county where the defendant resides or does substantial business, or in the county where the lender's claim for foreclosure arose. The *lis pendens, however, must be filed in the county or counties where the property is located.

A *lis pendens [action pending] is a notice filed with the Register of Deeds to indicate that a lawsuit involving the described property has been filed. The lis pendens includes the names of all the parties to the lawsuit, and the legal description of the property. The lis pendens is to be filed immediately after the summons and complaint are filed. The lis pendens is in the nature of an encumbrance, and it generally prevents any further conveyances of the property because good title cannot be given until the lis pendens is removed. Any person recording a conveyance or a lien after the filing of the lis pendens is bound by the foreclosure proceedings, and thus may have his or her interest foreclosed or eliminated.

Service of the Summons & Complaint

Once the lender has filed the original foreclosure summons and complaint with the Clerk of Courts, the lender has 90 days in which to serve all of the defendants. This may be a lengthy list because all lienholders and persons with an interest in the property must be named as defendants.

Service of the foreclosure summons

and complaint may be by personal service, substituted service (leaving the documents at the defendant's usual place of abode with a family member at least 14-years-old, or with some other competent adult who resides there), or by publication in the newspaper plus mailing. Substituted service can be used only if – with reasonable diligence – the defendant cannot be personally served. Service by publication cannot be used unless both personal service and substituted service have proved unsuccessful after trying those forms of service with reasonable diligence.

The reasonable diligence standard is taken seriously by the courts. In one case, the court indicated that trying twice to personally serve the defendant was insufficient and that substituted service thus was not permitted in that situation. Note that this reasonable diligence standard also appears in Wis. Stat. § 704.21 concerning a landlord's service of notices to tenants. Consequently, landlords should be aware that they should not give a 5-day notice to a tenant by posting the notice on the premises and mailing it unless they have tried more than twice to personally give the notice to the tenant, and/or to another person living in the premises.

What happens if the service on a defendant is not proper? The foreclosure action will not be binding on that party because the court will have no jurisdiction. If a lienholder were not properly served, his or her lien would arguably survive the foreclosure and remain on title.

A Borrower's Possible Defenses to the Foreclosure Action

A borrower must answer the lender's complaint and state any defenses that he or she may have, including any of the following:

- The mortgage fails to comply with Wis. Stat. § 706.02 requirements for a valid conveyance.

Note that these are the same standards used to determine whether an offer to purchase or deed is valid. The mortgage must identify the parties, the land, and the interest conveyed (the mortgage/security interest); it must be signed by, or on behalf of, all parties; and it must be delivered.

- Failure of the spouse to sign if the property is homestead and the mortgage is not a purchase money mortgage. Only the buyer must sign a purchase money mortgage.
- The mortgage was procured by fraud, duress, forgery, negligent conduct or misrepresentation.
- The debt has been paid in full. Note that payment of the delinquent amounts alone does not entitle the mortgagor to any relief from the foreclosure action.
- Violations of the consumer protection laws such as the federal Truth-in-Lending Act, the federal Equal Credit Opportunity Act, Wis. Stat. Chapter 428 regarding first mortgage loans of \$25,000 or less, the Wisconsin Consumer Act (applies to second mortgages for consumer purposes under \$25,000), and the Wisconsin statutes controlling residential mortgages.
- Breach of the duty of good faith and fair dealing. This duty is implied in every contract in Wisconsin.

Foreclosure Judgments

In a foreclosure action, there may be a **default judgment**, a **summary judgment**, or a judgment upon trial to the court or a jury. If the defendant fails to answer the complaint by the applicable deadline, or if there are no legal or factual issues raised by the defendant's answer, the court may grant a default judgment, giving the lender the relief requested in the

complaint. If the defendant(s)' answers, together with affidavits offering additional proof of facts, are sufficient to show that there is no genuine issue as to any material fact, a motion for a summary judgment may be made; the court then decides the legal issues involved and grants a judgment. Default judgments and summary judgments will typically shorten the amount of time involved in reaching judgment as opposed to foreclosure cases that go to trial.

In a case that goes to trial, there will be Findings of Fact, Conclusions of Law, and a Judgment rendered. Among the items addressed in these documents will be whether the property can be sold in parcels, the borrower's redemption period, and an order for a deficiency judgment, if requested by the lender.

When discussing foreclosure judgments, different terms are used to refer to different steps in the judgment process. A judgment is granted when it is given orally in court by the judge. A judgment is rendered when the judge or the Clerk of Court signs it. A judgment is entered when it is filed with the office of the Clerk of Court.

Sale in Parcels

When granting judgment, the court should determine whether the mortgaged property could be sold in parcels. If sale in parcels is possible, the judgment should specify the parcels and the order in which they should be sold. Sale in parcels should not be ordered if it would cause injury to the interests of any party or if a sale of the whole parcel would be more beneficial.

The court must consider whether the property consists of separate lots or parcels, whether separate parcels go together to form one business site, whether the property is easily capable of subdivision, whether the sale of less than the entire property will be

sufficient to pay the mortgage debt, the relative location of the parcels and buildings, whether different parcels are used for different purposes, and the form most likely to attract the most bidders and the highest price.

Right of Redemption

The foreclosure judgment will specify the length of the borrower's redemption period. The redemption period is the amount of time given to the borrower to pay the entire mortgage debt and thus prevent the sheriff's sale of the property. The redemption period also determines when the lender may start publishing notice of the sheriff's sale if the borrower fails to redeem.

The length of the redemption period is determined by statute, and depends upon the type of the property involved, the date of the mortgage, whether the lender is seeking a deficiency judgment, whether the property is occupied, and other factors.

For the purposes of this discussion, it is helpful to divide all properties into two classifications. Class R includes all one- to four-family owner-occupied residential properties, farms, churches, and other properties owned by tax-exempt charitable organizations. Class C includes all other properties such as commercial, retail, and industrial properties, as well as residential properties that are not owner-occupied or with more than four units. All redemption periods are measured from the date that the foreclosure judgment is entered, that is, when the written judgment, signed by the judge, is filed with the Clerk of Courts.

12 months

The redemption period will be 12 months for all Class R properties if the lender is seeking a deficiency judgment or if the mortgage was recorded on or before January 22, 1960. The redemption period will be

12 months for all Class C properties where the mortgage was recorded on or before May 12, 1978, regardless of whether the lender is seeking a deficiency judgment.

6 months

The redemption period will be 6 months for all Class R properties that are 20 acres or less if the lender is not seeking a deficiency judgment and if the mortgage was recorded after January 22, 1960. The redemption period will be 6 months for all Class C properties if the lender is seeking a deficiency judgment and if the mortgage was recorded after May 12, 1978.

3 months

The redemption period will be 3 months for all Class C properties if the lender is not seeking a deficiency judgment and if the mortgage was recorded after May 12, 1978.

2 months

The redemption period will be 2 months for all Class R and Class C properties if the property is abandoned. The lender may still seek a deficiency judgment. A finding that the property is abandoned will require more than just a showing that the property is vacant. There must be a relinquishment of possession and control. For example, if a property is listed for sale, the property may be vacant, but the owner is still exercising possession and control via the efforts of the listing broker marketing the property.

The period of redemption is an important factor to be considered by a broker listing the property for sale and for a broker with a buyer for the property. It gives some indication of how long the brokers have to get the property sold and closed for a price that pays off the owner's mortgage debt and thus stops the foreclosure from progressing. Note, however, that the final deadline for getting the property sold and closed extends

beyond this redemption period.

The right of the owner to redeem the property by paying off the total amount due runs until the judicial confirmation of the sale. A sale can still close after the sheriff's sale, as long as it closes before the court confirms the sheriff's sale. It is only then that title to the property passes to the purchaser at the sheriff's sale.

Sheriff's Sale

A notice announcing the sheriff's sale of the property must be published in a newspaper in the county where the property is located, once a week for six full weeks. In other words, there must be at least seven weeks between the first time the notice is published and the date of the sheriff's sale. A notice of the sale must also be posted at least three weeks before the sale in at least three public places in the municipality where the property is located and in the city where the sale is to take place. No notice, however, is served upon any of the parties to the foreclosure action.

At the sheriff's sale, the minimum downpayment is \$100. The sheriff or the court, however, may require a larger amount. The customary amount is 10% down. This may be desirable to exclude frivolous bidders who will not follow through and complete the purchase. The downpayment is forfeited and applied to the judgment if the successful bidder does not pay the balance into the court within ten days after the confirmation of the sale.

Typically, the only bidder at the sheriff's sale is the lender holding the mortgage. The lender may apply the amount of its judgment as the downpayment. If the lender bids in excess of the amount of its judgment, the difference must be paid at the time of the sale.

REALTORS® should note that even

if the process has reached the sheriff's sale stage, there is still time to close on a sale to a purchaser and thus permit the borrower to redeem.

Confirmation of Sale

The court will hold a hearing concerning the judicial confirmation of the sheriff's sale. Notice of the hearing must be given to all parties that have appeared in the foreclosure action and to the purchaser at the sheriff's sale. The notice must state the amount of the foreclosure judgment, the price paid at the sheriff's sale, the amount of any deficiency and the name of the party liable to pay any deficiency judgment, and the time and place of the hearing. Notice is given by personal service or by registered or certified mail with return receipt requested. If the notice is served by mail, it must be sent at least five days before the hearing.

Preliminary Analysis

In the court's preliminary analysis of the sheriff's sale, the court may deny confirmation of the sale if the price is inadequate as a result of mistake, misapprehension, or inadvertence on the part of any interested party or prospective bidder. The court should not initially deny confirmation based upon an inadequate price alone. If none of these factors are present, the court's analysis precedes along one of two lines of reasoning, depending upon whether the lender is seeking a deficiency judgment.

No Deficiency Judgment

If the lender is not seeking a deficiency judgment, the court should confirm the sheriff's sale unless the price is so grossly inadequate as to shock the conscience of the court. The following are examples from case law:

- 1) An appraiser testified that the value was \$36,000 but the sale for \$29,000 was confirmed.
- 2) Confirmation of a sale for \$87,000 was denied where other bidders had

been prepared to bid at least \$100,000 but had been discouraged because of procedural irregularities.

3) The sheriff's sale of a farm for \$32,000 was confirmed even though it had been appraised at \$52,000. The same appraisers had valued another parcel at \$28,500 but it sold for \$51,000.

4) Confirmation of a sale for \$27,112.46 was denied where the foreclosure judgment provided that the value for all purposes of the foreclosure was to be \$42,000.

Deficiency

REALTORS® should note that even if the process has reached the sheriff's sale stage, there is still time to close on a sale to a purchaser and thus permit the borrower to redeem.

Judgment Sought

The court must be satisfied that the successful bid at the sheriff's sale was a "fair value." "Fair value" is the price that a person who is willing and able to buy the property would reasonably pay for it, not for purposes of speculation, but for the use to which the property has been put, or reasonably may be put. Thus offers to purchase may be good evidence of what a willing buyer would reasonably pay, provided the offers are shown to be bona fide and the buyer is shown to be ready, willing and able. Appraisals are also excellent evidence of fair value as long as the appraiser applies the correct standard.

The property should not be valued as an empty shell. "Fair value" does not mean "market value," the value that the property might have at some

remote future time, or the assessed value of the property.

For example, in one Wisconsin case, the court denied confirmation of a sale for \$2,350 where the fair value was set at the amount of the mortgage debt (\$4,800), the property was assessed at \$4,525 and two real estate brokers had testified that the property could bring in about \$4,500 - 5,000 at a private, as opposed to a distress, sale.

If the court finds that the price from the sheriff's sale is inadequate, the court may increase the amount bid to the amount of the fair value as a condition of confirmation and enter a deficiency judgment for the difference between the fair value and the foreclosure judgment amount. On the other hand, the court may choose to order a resale of the property. In the event of a resale, the court may set the fair value as the upset or minimum price.

In the event of a resale, a broker who has the property listed has been given a reprieve - he or she has additional time to get the property sold and closed.

Foreclosure Alternatives

Every property owner facing financial problems involving his or her mortgage will not necessarily face foreclosure. Lenders sometimes are inclined to find other solutions when borrowers have difficulties making their mortgage payments.

Workouts as Alternative to Foreclosure

Sometimes a lender and the borrower may negotiate a workout instead of going through the indignities of a foreclosure. A workout is a negotiated modification of the original loan agreement. Workouts are most often successful when both parties are motivated to reach a settlement.

Borrowers will often prefer a workout over a foreclosure if they want to keep the mortgaged property and wish to

avoid bankruptcy, the costs of litigation, the adverse publicity that foreclosure may bring, deficiency claims, and the tax consequences of selling property.

Lenders may prefer workouts so they can avoid paying litigation costs, leasing costs, capital expenditures, and costs of collateral disposition; save time by bypassing foreclosure redemption periods; save personnel hours; avoid lender liability exposure; and even better their relative collateral positions. Lenders will also consider unpaid real property taxes, other liens, and environmental factors, all of which tend to motivate lenders to negotiate a workout.

Deeds in Lieu of Foreclosures

In a deed in lieu of foreclosure, the borrower deeds the property to the lender in full or partial settlement of the mortgage debt. The lender will consider this option only when the title to the real estate is clear – any mortgages, judgements, or other liens filed against the property or created by the borrower will likely remain on the property if conveyed to the lender.

If the property is deeded to the lender, the deed should be accompanied by an affidavit of fair dealing. This affidavit typically recites that the deed is being given voluntarily, that the borrower has had the opportunity to consult with legal counsel, and that the conveyance is being made without any fraud, duress, and undue influence by the lender. The fair market value of the property should be established because the lender's forgiveness of debt is often considered ordinary income to the borrower for tax purposes.

Appointment of a Receiver

A receiver may be appointed pursuant to the terms of most mortgages, but it is rarely done for residential properties. Receivers are most often used for commercial properties or farms. A receiver may be appointed to prevent waste and preserve the rents and profits of the property as security for the loan.

For instance, the State Bar Form 6-L Mortgage states that "Upon default or during the pendency of any action to foreclose this Mortgage, Mortgagor consents to the appointment of a receiver of the Property, including homestead interest, to collect the rents, issues, and profits of the Property, during the pendency of such an action, and such rents, issues, and profits when so collected, shall be held and applied as the court shall direct." The appointment of a receiver would serve to enforce the Assignment of Rents provision whereby the borrower assigns all rents, issues, and profits of the Property to the lender as additional security for the loan.

Conclusion

Understanding the mortgage foreclosure process may help members to better serve their clients and customers. REALTORS® needing precise legal information on a specific point should not strictly rely upon the generalized discussion in this *Update*, but rather should contact private legal counsel or the Legal Hotline for detailed information.

Acceleration Implementation of the acceleration provision causes the full amount of the loan to become immediately due and payable.

Deficiency Judgment A deficiency judgment is a judgment for the lender against the borrower for any amounts still owed on the mortgage loan after the proceeds of the sale have been applied to the debt.

Lis pendens A lis pendens is a notice filed with the Register of Deeds to indicate that a lawsuit involving the described property has been filed.

Default Judgment A default judgment may be granted to a lender, if the defendant fails to answer the complaint by the deadline, or if there are no issues raised by the defendant's answer.

Summary Judgment If a defendant's answers show that there is no genuine issue as to any material fact, a motion for a summary judgment may be made.

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