

UNDERSTANDING FORECLOSURE IN TEXAS

The requirements for foreclosure of real property in Texas depend on the type of mortgage that is being foreclosed upon. There are several types of mortgages, but there are three that are by far the most common:

- * (1) a purchase money mortgage;
- * (2) a purchase money second lien and;
- * (3) a home equity loan or home equity line of credit.

A purchase money loan is what it sounds like – a loan to purchase the home. In a “conventional loan,” the borrower/buyer of the home typically makes a down payment of at least 10% of the purchase price. The mortgage is in the amount of the balance of the purchase price.

Many borrowers are unable to make a down payment of 10% or 20% so they have to resort to alternative sources of financing. These may include government guaranteed loans where the borrower/buyer makes a minimal or no down payment but the government guarantees the loan so the mortgage lender is assured of payment. These may also include “80/20” loans or “80/15/5” loans. In these cases, the borrower/buyer makes a down payment of 5% or less of the purchase price and executes a first lien of 80% and a second lien of 15% or 20%.

Homeowners may also borrow against the equity in their home by taking out a home equity loan or home equity line of credit. There are many restrictions on equity lending in Texas, but most of those technicalities are beyond the scope of this article.

Texas residents can also obtain a home improvement loan to make repairs or improvements to the home. Unlike a home equity loan, which can be used for virtually anything, a home improvement may only be used to make improvements to the home. As a result, home equity loans are far more common than home improvement loans.

If a lender is foreclosing on a purchase money lien (whether it is a first lien or second lien), there is a two step process that the lender must comply with.

- First, the lender must send a notice letter to the borrower(s) that notifies him that the loan is in default and that if the borrower does not cure the default, the lender intends to accelerate the balance of the loan and foreclose on the property.

“Accelerate” means that the lender is calling the promissory note due. After acceleration, instead of owing monthly payments for many years, the borrower now owes the entire principal balance plus any accrued interest and collection costs.

How much notice the lender is required to give is controlled by the loan documents. Approximately 90% of residential mortgages in the U.S. are on FNMA forms which require 30 days notice, so we commonly call this notice a

“30 day notice.” If the loan documents are not standard forms, the notice requirements may be different.

- After the lender sends the 30 day notice, the lender must then send the actual foreclosure notice. In Texas, that notice is called a “Notice of Trustee’s Sale.” The lender must give at least 21 days notice of the sale. In Texas, notice starts on the date of mailing of the notice, not the date of receipt. A mortgage lender may only foreclose on real property on the first Tuesday of the month, so timing can be an issue. For instance, if the lender sends the 30 day letter on March 20, the 30 days to cure the default ends on April 19. There is not enough time to give 21 days notice to foreclose in May, so the lender would have to wait until at least June to foreclose.
- Most major mortgage lenders do not start the actual foreclosure process until the loan is at least 90 days delinquent. After the borrower reaches 90 days delinquent, the lender sends the 30 day letter and the actual legal process starts. The result is that most foreclosures take *at least* 5 months from default to the actual foreclosure.

If the mortgage is a home equity loan or home equity line of credit, there is an additional step to foreclose the loan. After the lender sends the 30 day letter, the lender must file an application for an order allowing the foreclosure in the state district court in the county where the property is located. The application must be served on the borrower and the borrower has 38 days from mailing of the application to file a response. If the borrower files a response to the application, the court has to set a hearing on the application. The Texas Rules of Civil Procedure provide that the application must be set for hearing on an expedited basis. The reality is that the hearing is set for expedited hearing only if the lender requests an expedited hearing. We routinely see cases where the lender files the application, we file a response for the borrower and the lender waits weeks or months to set the application form hearing. Once the application is granted, the lender still has to send the actual foreclosure notice, so the process takes at an absolute minimum of 89 days (30 days, plus 38 days, plus 21 days). The practical reality is that the process may take several more months.