



Legal Insurance



Dealing with *Foreclosure*

Unfortunately these days, many homeowners are already stretched thin financially. So a job loss, unexpected health care costs or mounting debt could knock them behind on mortgage payments, quickly putting their home ownership in jeopardy.

Foreclosure on a home is an incredibly stressful and disruptive event and often leads to additional legal and financial hardships. If you're currently facing foreclosure or feel you may be at risk, this guidebook provides valuable information and key steps to help you learn as much as you can about the process and your options.

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What Is Foreclosure?

Mortgage foreclosure is a legal process a lender uses to make up for losses if a borrower can't make all the payments. The lender's goal is to encourage the borrower to either pay off the mortgage debt and charges or face losing all ownership rights in the home. If the debt isn't repaid, the lender will probably sell the real estate in order to recoup its losses from the loan.

The foreclosure process

Most states have a step-by-step process lenders have to follow to tell homeowners that they intend to foreclose. Lenders are also usually required to give the homeowner a series of dates by which the homeowner can defend against the foreclosure, redeem the real estate and appeal the process. The entire process can take anywhere from a few months to a year.

There are basically two types of foreclosure processes in the United States:

- **Judicial foreclosure:** All states allow judicial foreclosure. It involves a lawsuit filed by the mortgage holder to secure a court order of foreclosure. Because it's a judicial process, it can take a while – there are required steps and time frames.
- **Non-judicial foreclosure:** Most states allow this. Non-judicial foreclosures don't involve the court if the mortgage or deed of trust has a power of sale clause – letting the lender sell the mortgaged real estate after notices of default and of sale. Unlike judicial foreclosures, non-judicial foreclosures can proceed quickly.

Judicial foreclosure process

Here's how judicial foreclosure works:

1. The lender files a complaint and records the lis pendens, or a notice impending of legal action. The complaint lists the type and amount of debt and why the default should give the lender the right to foreclose and take possession of the property.
2. The homeowner is served notice of this complaint (by mail, process server, sheriff and/or publication).
3. If the court determines that there's a default on a valid debt, it issues a judgment for the total amount owed.
4. Once judgment is entered, a writ (a type of court-issued command) will be issued allowing the real estate to be sold.
5. A public auction is held to sell the real estate. Once the sale is complete, a deed is issued to the new legal owner.

Non-judicial foreclosure process

Here's how non-judicial foreclosure works:

1. The lender provides notice of the default and the amount of time the homeowner has to pay off any past due payments.
2. The notice of trustee sale is sent to the homeowner. It lists the auction date, time, location and in some states, the opening bid amount.
3. A trustee sale auction is held, and the real estate is sold.
4. Once the sale is complete, the new owner receives a deed.

Causes of Foreclosure

Most foreclosures happen because the homeowner hasn't paid the mortgage. Unless your mortgage loan is in forbearance or some sort of non-collection status, not paying the mortgage payment triggers the acceleration clause. Once the acceleration clause is triggered, the entire note becomes due. (In other words, you have to pay off the mortgage in full.)

Sometimes, the lender can recover the entire balance through the foreclosure sale. If not, they can sue the homeowner for the difference (also called a deficiency).

Tax liens filed against your home are another reason why a home may be foreclosed. The Internal Revenue Service (IRS), as well as state and local governments, can file and execute upon matured tax liens. The threat of their liens to a lender's security is often a basis for foreclosure.

Assessment liens imposed by planned community, condominium or homeowners associations can also trigger foreclosure. In some states, homeowners associations may foreclose if the owners haven't paid association dues or abided by established rules such as maintaining the character, standards or nature of the real estate within the subdivision. These liens may be a threat to the security interest in the home and may be a basis for a lender's own foreclosure action.



Avoiding Foreclosure

If you're at risk of foreclosure, you may have options to avoid defaulting on your mortgage. First, you can ask for loan forbearance from the bank. This is when the lender extends the period within which you have to pay off back payments. This is usually for a short period of time – such as six months to a year.

If you ask for forbearance, try to continue making payments on the mortgage until the forbearance request is approved by the lender in writing. This will help you avoid further complications.

Another tactic is a loan modification. Loan modifications are usually used in cases of limited incomes or negative equity. This is when the balance of the mortgage loan is higher than the fair market value of the property, or what's commonly referred to as being “underwater” on the mortgage.

In a loan modification, the lender agrees to change the existing terms of the loan by doing one or more of the following:

- Extending the repayment period
- Decreasing the homeowner's monthly payments
- Decreasing the rate of interest due on the note
- Reducing the mortgage loan principal to reflect the loss of the home's value

The lender can still foreclose on a homeowner even if a loan modification application is pending. So if you're asking for modifications, it's important to continue making payments if you can until the modifications are confirmed in writing.



Defense Against Foreclosure

Foreclosure is usually pretty complicated. If you're in a potential foreclosure situation, it's best to involve an attorney as soon as possible. This will help you understand any legal defense options.

Common options to defend against foreclosure include:



Defense on the action that triggered the foreclosure.

The mortgage company has to show that payments weren't made before being able to continue with foreclosure. If you can show that payments were made, you should be able to avoid foreclosure.



Notice. Lenders have to give homeowners adequate notice before foreclosing – and they have to follow specific steps when doing that. If you can show that the lender didn't follow the required steps, you can void the process and possibly get damages for failure to provide notice.



Unfair and deceptive trade practices. This defense is typically used against the lender. Examples of this behavior include misrepresenting terms and conditions to the homeowner or not providing important disclosures to the borrowers before they took on the loan.



Unconscionability or unreasonable mortgage terms.

Examples of this include a bank issuing a home loan based on an appraisal that's more than 100 percent of the fair market value of the home or issuing a loan that violates federal or state law.

Alternatives to Foreclosure

If the foreclosure process has started and litigation isn't an option, there may still be things you can do.

Short sale

With a short sale, the lender agrees to let you sell the home for less than what's owed on the mortgage. The lender has to approve the new buyer. And you'll still be responsible for any of the remaining portion of the note (unless the lender agrees to waive any deficiency).

Here's an example. Steve owes the bank \$400,000 on their home. They can't afford to keep the home and haven't been able to sell it for the amount they owe. Steve asks the bank's permission to sell the home for \$300,000. The bank agrees on the condition that they can approve the buyer and that Steve will remain liable for the remaining \$100,000 due on the note. After the short sale is complete, the lender can either forgive the remaining \$100,000 debt or (more likely) sue Steve for the \$100,000.

Keep in mind that a short sale can be just as bad for your credit as foreclosure. It can often decrease a person's credit score by as much as 200 points.

Deed in lieu of foreclosure

With a deed in lieu of foreclosure, the lender accepts the deed to property from the homeowner instead of foreclosing. As with a short sale, the bank will likely have a claim for deficiency balance.

Bankruptcy

Bankruptcy is one of the most common ways to prevent foreclosure. The filing of the bankruptcy petition creates a period in which creditors can't collect on the debt for at least 30 days. This is called the automatic stay. This type of relief is available for bankruptcy filers depending on the type of bankruptcy they file.

Foreclosure Scams

There's nothing wrong with getting help if you're facing foreclosure. Just make sure you get help from a reputable source. Here are some common red flags to avoid:

- **Paid “courses,” “boot camps” or “seminars.”** These companies or groups prey on financially distressed homeowners. They may sell them information that's already available for free or, even worse, give bad information.
- **Signing over title to a foreclosure recovery program.** This is a common scam. Not only will you lose your home, you'll be sued by the lender for fraud. It's against the mortgage agreement to transfer your interest in real estate without strict consent of the lender.
- **“Sell the real estate to us and have us lease it to you. Then you'll have the option to buy it back.”** In order to buy the real estate back, you'll have to get a new loan that's far more than the loan you had – and with a higher interest rate.
- **“We have relationships with banks and can stop your foreclosure.”** No matter how friendly someone is with bank officials, nothing short of valid legal defense will stop or prevent the foreclosure process.
- **“Pay your mortgage through us.”** The only way to make sure your mortgage payments go to the bank is to make those payments to the bank.



Getting Qualified Help

Where should you go for expert help with foreclosure issues? Look for attorneys who have experience with foreclosure defense and/or bankruptcy. They should be licensed in the state where you live and where the mortgaged real estate is located.

The U.S Department of Housing and Urban Development (HUD) also has officially approved counselors available for free or low cost, at both the national and state levels. Visit [hud.gov](https://www.hud.gov) for details.



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