

## **OHIO FORECLOSURE PROCESS AND TIMELINE**

Ohio utilizes the process of judicial foreclosure in connection with the enforcement of both commercial and residential mortgages and liens on real property.<sup>1</sup> In general, the process is the same, regardless of whether it occurs in the commercial or residential context. Currently, it is not unusual for even uncontested foreclosures to take a year or more to complete.

The following outline provides a brief summary of the Ohio foreclosure process, together with a hypothetical timeline. The timing of the foreclosure process depends substantially upon whether and to what extent the borrower contests the proceeding. In addition, the actions of the applicable courts in the State of Ohio are not always predictable and a court may derail the foreclosure process based on its own preferred method of proceeding with a matter. In addition, with the recent uptick in the number of foreclosures generally in Ohio, many courts are somewhat overwhelmed and delays frequently occur as a result. For these and other reasons, the time frames set forth in this outline are by no means set in stone. The periods described herein are intended to be *minimum* time periods. Actual time frames usually are longer.

### ***SUMMARY ESTIMATED MINIMUM TIMELINE***

- Complaint filed (D = 0)
- Achieving service of process (D + 10)
- Answer of defendants due (D + 30)
- Motion for Default/ Motion for Summary Judgment filed (D + 45-60)
- Judgment Decree in Foreclosure (D + 90-210) (J=0)
- Sheriff's Appraisal completed (J + 30-60)
- Sheriff's Sale (J + 120+210) (S=0)
- Confirmation/Distribution of Proceeds (S + 30-90)

#### **I. DECISION TO FORECLOSE**

Obviously the decision to seek foreclosure must begin with a default in the underlying loan obligation secured by the mortgage. That default can be as simple as nonpayment or based on breaches of various covenants in the promissory note, loan agreement or mortgage. In addition, factors such as priority of liens, value of property, potential for environmental liability, possible counterclaims, deficiencies in documentation, nature of interest held by mortgagor, and cost of

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<sup>1</sup> Ohio, unlike several other states, does not permit nonjudicial foreclosure of real property in any circumstances. It is possible under Ohio law to enforce an assignment of rents contained in either the mortgage or separate assignment of rents through issuance of a "direct pay" letter to tenants, but that may result in an awkward situation requiring immediate recourse to judicial action if the borrower/owner of the property decides to terminate utilities or take similar action. With respect to personal property, Ohio follows the Uniform Commercial Code and does allow self help by secured creditors in certain circumstances and also provides the remedy of replevin which offers an expedited procedure for regaining possession of the personal property collateral. A Complaint may seek both foreclosure and replevin of relevant collateral, as well as money judgment, all in a single action.

litigation should be considered before pursuing the foreclosure remedy. Once the decision to foreclose is made, the lender will need to provide its attorney with copies of all relevant loan documents and prior title work, together with a payoff balance.

Once the lender decides to foreclose, the lender must examine all related contractual documents to determine all of the rights and obligations of the parties. For example, the lender must obtain and scrutinize the note, mortgage, any assignments or endorsements, deeds, addenda and/or modifications, and any separate assignment of rents. The lender must pay close attention to terms specifying procedure for notice of default. On VA, FHA and SBA mortgages, applicable government regulations may require certain notices to the borrower before a foreclosure can be filed. The lender must also verify compliance with the Fair Debt Collection Practices Act (*see* 15 U.S.C. § 1692) in consumer transactions.

**A. Notifying Borrower of Default and Complying with Any Applicable Cure Periods.** The lender and/or the lender's attorney should send<sup>2</sup> the borrower, and any guarantors a demand letter referencing the default, any applicable cure periods, and the amount owed, as well as demanding payment within a specific time. It is very important to comply with any specific manners of notifying the borrower of the default set forth in any of the loan documents; the same is also true with respect to any specified cure periods. The demand letter should be sent by both regular and certified mail.

**B. Obtaining Title Work.** While waiting for any applicable time periods to expire, title work should be obtained to determine the other lienholders and parties in interest who should be named in the foreclosure action. If prior title work can be provided to the title agency, this step will usually take less time and may be less expensive.

**1. Residential Foreclosures.** In any action demanding a judicial sale of a one to four family residential real property, a Preliminary Judicial Report (PJR) must be filed in the case within 14 days of the filing of the Complaint. The effective date of the PJR report cannot be earlier than thirty (30) days prior to the filing of the Complaint. The significance of this is that the cost of a preliminary judicial report is based upon the principal balance of the subject obligation being foreclosed.

**2. Commercial Foreclosures.** In commercial foreclosures, in many counties in Ohio, the plaintiff lender can file either a PJR or a title commitment with the court as evidence of title. This is important because the cost of a title commitment will be significantly less than the cost of a PJR. Cuyahoga (Cleveland), Summit (Akron/Canton), and Lorain County in particular require a PJR.

**C. Selecting a Receiver.** In commercial foreclosures of income producing property, often it is appropriate to seek the appointment of a receiver to manage the property and collect rents. Although the identity of the individual selected to be the receiver is a matter of discretion

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<sup>2</sup> If any obligor is in bankruptcy, that obligor should not be sent a demand letter. If the owner of the property is in bankruptcy, relief from stay will need to be obtained before proceeding with foreclosure.

for the court, it is important for the lender to present a recommendation to the court. In most, but by no means all, cases, the Court will appoint the lender's recommended choice. Local Rules of Court vary considerably regarding the compensation permitted to be paid a receiver and several other aspects of the receiver's responsibility; it is accordingly important to choose someone familiar with the pertinent court's rules. Many prospective receivers have retention agreements that will need to be reviewed by the lender before the Complaint is filed. Information regarding the identity, background, and experience of the lender's preferred choice for receiver, together with contact information and compensation arrangements needs to be communicated by the lender to its attorney. Affidavits from the proposed receiver and the representative of the lender will also be required.

## **II. PREPARATION AND FILING OF FORECLOSURE COMPLAINT**

Once stay relief has been obtained in any pending bankruptcy, if applicable, and any required cure periods have expired, the foreclosure action can be commenced. If desired, a Complaint seeking foreclosure can also seek money judgment against the borrower(s) and any guarantor(s), as well as replevin of personal property, if applicable, enforcement of any separate assignment of rents, appointment of a receiver and any other claims the lender may have against these parties. Because Ohio is one of a handful of states permitting cognovit judgments with respect to commercial loans, money judgment is frequently obtained contemporaneously with the time the Complaint is filed.

**A. Jurisdiction and Venue/Where to File.** Traditionally, foreclosures in Ohio are filed in state Common Pleas Court in the county in which the subject real property is located. However, if diversity and amount in controversy requirements can be met, the lender may also file a foreclosure action in federal court in some cases. As a practical matter, this seems to happen most often in the Cleveland area of the state.

Pursuant to the federal Fair Debt Collections Practices Act, foreclosures of property securing a consumer loan *must* be filed in the county in which the mortgaged property is located. Foreclosures of real property securing a commercial loan may be brought in any county in which a portion of the property is located. In this event, or if the foreclosure was filed in federal court, a certified copy of the Complaint must be filed with the Clerk of Court of the Commons Pleas Court in the other county or counties the property being foreclosed upon is located.

**B. Parties.** The Sheriff's deed received following foreclosure sale will not convey clear title unless all parties with a potential ownership interest in the real property being foreclosed are joined in the action. Interests of parties not joined will survive the foreclosure sale and continue to encumber the property. The title work should provide a roadmap of the necessary parties which will include other lienholders and others with interests in the property. Ohio courts are divided as to whether the interests of tenants not joined survive the foreclosure.

**C. Appointment of Receiver.** If appointment of a receiver is desired, the Complaint should be accompanied by a motion to that effect and a hearing date on the motion should be sought. In some counties, it is very difficult to obtain an expedited hearing date.

Receivership in Ohio may be obtained pursuant to statute (see R.C. § 2735.01 *et seq.*) or under principles of equity. The statute authorizes appointment of a receiver, among other things, during the pendency of a foreclosure action when it appears that the mortgaged property is in danger of being lost, removed, or materially injured, or where the conditions of the mortgage have not been performed and the value of the mortgaged property is likely insufficient to discharge the mortgage debt. In a common law receivership action, the plaintiff need not meet all elements required under the statute, but must show that receivership will prevent waste of assets. Lender's counsel must examine the loan documents carefully to ascertain whether the borrower has contractually agreed to the appointment of a receiver and under what terms.

Securing appointment of a receiver may allow the lender to ensure that income generated from the property is secured and that the value of the property is maintained. The lender must balance these interests against the expense of the receivership. Receivership expenses generally include insurance, attorneys' fees, the premium for the receiver's bond, and the fee for the receiver's services. At the close of the foreclosure action, the receiver files a final accounting, which is subject to court approval. The lender may move to have any funds held by the receiver paid to the lender in partial payment of the judgment rendered.

**D. Mediation.** In some of the smaller counties, courts are now requiring mandatory mediation in residential foreclosures before they are allowed to proceed.

### **III. OBTAINING DECREE OF FORECLOSURE**

If a borrower does not contest the foreclosure, the process can move somewhat more quickly although delays, particularly with obtaining a sale date following entry of the decree of foreclosure, often occur. Even in this event, however, a creditor should expect a minimum time frame of at least 7-10 months. Given the uncertainties of litigation, it is impossible to conclusively estimate how long a contested foreclosure case might last. Much depends upon how clear the default and the damages are in the given case. Perhaps the most significant factor relates to the time associated with workout and settlement negotiations. In any case, a creditor should expect a minimum time frame of more than a year in a contested foreclosure case.

**A. Service of Process and Complaint.** If the defendants' addresses are good, this typically occurs within 5-10 days if by certified or regular mail. If service is made by certified mail, the clerk of court often will send the certified mailing for the foreclosing creditor soon after the complaint is filed. Returns on the certified mailings are usually received within 10 days. In some cases, it may be necessary or desirable to obtain personal service by having the sheriff's office deliver a copy of the Complaint to the defendant; this will obviously take longer.

If service cannot be obtained by one of these methods, the lender will have to resort to service by publication which involves advertising in a newspaper of general circulation in the applicable county. Service by publication is more expensive and will probably add at least another month to the process.

**B. Lis Pendens.** Third parties who obtain an interest in the property after the Complaint is filed are bound by the foreclosure decree and sale thereunder, pursuant to the doctrine of *lis pendens* (see R.C. 2703.26). The title evidence on the real estate is updated after the Complaint is filed to determine if any liens or interests have subsequently attached to the property before *lis pendens* attaches. If the updated title evidence reveals that liens or interests attached before the *lis pendens* date, the lender must amend its complaint to add the parties to the foreclosure suit.

**C. Responsive Pleadings by Defendants.** Defendants (other than the U.S. government which has a slightly longer period of time in which it must respond) have twenty-eight (28) days after they have been served to respond to the foreclosure Complaint. Sometimes the borrower or other lienholder defendant will seek an extension of time in which to answer which may add a month or so to the process. The mortgagor's Answer may be accompanied by cross-claims, counterclaims or affirmative defenses. If additional claims are alleged, time frames associated with the response to such claims must be factored into the timing of the matter.

**D. Procedure for Obtaining Judgment.** How long it will take to obtain judgment once the foreclosure Complaint is filed depends upon whether, and how vociferously, the borrower/mortgagor elects to defend against the lender's claims.

**1. Default Judgment.** If the defendant borrower/guarantor/mortgagor fails to file a timely response to the Complaint and good service has been obtained, the lender can seek a default judgment decree in foreclosure by filing a motion, accompanied by an affidavit from lender's representative regarding the then current balance. A proposed Decree in Foreclosure will also be submitted. If any lienholders have answered setting up their interest, it is customary to circulate the proposed Decree in Foreclosure among them for their approval prior to submitting same to the Court. *Minimum* time period of 90 to 120 days after Complaint is filed.

**2. Summary Judgment.** If the defendant borrower/guarantor/mortgagor has timely filed an Answer to the Complaint, the appropriate procedure is to seek summary judgment alleging that the lender is entitled to judgment as a matter of law and that there are no material facts in dispute. An Affidavit from the lender's representative responsive to any issues raised by the defendant's Answer will be required. Once the Motion for Summary Judgment is filed, the defendant(s) have fourteen (14) days to respond<sup>3</sup> and the lender has seven days after any Memorandum Contra to its Motion is served upon the lender's attorney. Adding in mailing times, this essentially amounts to about three (3) weeks. Extensions of time to respond are sometimes sought which will add additional time to the process. *Minimum* time period of 120 to 210 days after Complaint is filed.

**3. Waiting for the Court to Rule.** Whether the lender is seeking a default judgment or a summary judgment, once the appropriate pleadings are filed, the lender is at the mercy of the Court. Some judges are relatively prompt in entering judgment; others

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<sup>3</sup> Plus a few additional days if the Motion was served by mail.

are not. Generally, an actual hearing is not required for either a Motion for Default Judgment or a Motion for Summary Judgment. Once obtained, the Decree of Foreclosure is a final appealable order. If the Court rules against the lender with respect to summary judgment, then a full-blown trial will have to occur which will add considerable time to the completion of the foreclosure.

#### **IV. AUCTION OF MORTGAGED PROPERTY AT SHERIFF'S SALE.**

Once a Decree of Foreclosure is finally entered by the Judge, the lender can proceed with arrangements to have the mortgaged property being foreclosed upon sold at Sheriff's auctions. Most Ohio counties hold weekly sales, although some of the smaller counties may hold sales less frequently. Lengthy delays at this stage of the process are becoming increasingly common. The lender must begin with a praecipe requesting the Clerk of Court to issue an Order of Sale to the Sheriff. Multiple parcels may be sold separately or as a unit.

**A. Appraisal of the Property to Be Sold.** Before the Sheriff's Office will schedule a sale date for the property, it must be appraised pursuant to Ohio Rev. Code §2329.17 by "three disinterested freeholders of the county appointed by the Sheriff". This can take considerable time. The appraised value is important because, under Ohio law, bidding at sheriff's sale *must begin* at TWO-THIRDS of this amount. If no one is willing to bid at this price, the property will be reappraised and offered again at a subsequent sale following additional notice and advertisement of the new scheduled sale date.

**B. Notice and Advertisement of Sheriff's Sale.** Once the appraisal is done, the Sheriff's Office will eventually provide the lender with a scheduled sale date for the subject property. Ohio law requires that notice of the date, time, and place of the scheduled sheriff's auction be provided. Notice of the sale containing the legal description and address, as well as pertinent details as to date, time and place of sale, must be published three (3) consecutive weeks in a newspaper of general circulation in the county in which the property is located. It is the responsibility of the plaintiff lender to accomplish the required advertisement and at least seven (7) days before the sale, a lender must file a copy of the advertisement with the Court. Notice of the details of the scheduled sale must also be served upon any party which made an appearance in the foreclosure action. Many counties now also list properties to be sold on the website of their Sheriff's Office.

**C. Conduction of Sheriff's Sale.** Unlike some other states, it is not possible in Ohio to submit a bid for property being sold at Sheriff's sale prior to the scheduled sale date; one must be physically present to bid. You do not have to be a lawyer to bid. Some counties still conduct their sales literally on the courthouse steps. The amount of deposit required, typically 10%, will be set in the Order of Sale and is up to the plaintiff lender. Sheriff's sales procedures vary considerably from one county to the next so it is always wise to consult same before attending the sheriff's sale. Credit bidding by the lender or junior lienholder obviating the need to pay any deposit is permitted in some counties (particularly larger ones), but not in others; in some counties a deposit must nevertheless be paid and then refunded.. Generally (but not always), a law firm check is acceptable for payment of any costs or deposit.

#### IV. POST-SALE PROCEDURES

Once the foreclosure Sheriff's sale occurs, there are still a few other items which need to be addressed before the foreclosure process is complete in Ohio.

**A. Payment of Purchase Price.** The balance of the purchase price must be paid by the successful bidder to the Sheriff's Office within thirty (30) days following the sale.

**B. Assignment of Bid.** The successful bidder is permitted to assign his successful bid to any other party upon whatever terms it desires.

**C. Confirmation of the Sale.** Following the sheriff's sale, the plaintiff lender's attorney must prepare and submit to the Court an Order of Confirmation confirming the sale occurred in accordance with applicable law, ordering distribution of proceeds from sale in accordance with priority of liens, requesting the Sheriff to prepare the deed, requesting to Court to release liens, and authorizing a Writ of Possession to place the successful bidder in possession of the property. It is customary to circulate the Order of Confirmation among counsel for parties appearing in the lawsuit before submitting it to the Court. This is supposed to happen within thirty (30) days following the sale with the Court entering the Order shortly thereafter.

**D. Redemption.** Except for U.S. Government liens (which have a redemption period of 120 days from date of sale for IRS liens and a year for all other types), there is no right of redemption upon entry of the Order of Confirmation. Until that Order is entered, the mortgagor may redeem the property sold by paying the purchase amount plus costs and interest.

**E. Limitation on Collection of Deficiency Judgment in Residential Foreclosures.** In a foreclosure involving property used as a dwelling for not more than two (2) families and used in whole or in part as a dwelling or farm by the mortgagor, there are limitations on the period of time thereafter any deficiency judgment obtained in the action can be enforced. If a money judgment was obtained against the borrower(s) and/or guarantor(s) in addition to foreclosure of the real property in this situation, Ohio Rev. Code §2329.08 provides that any deficiency remaining after the sale of the property becomes unenforceable two years after the date the Order of Confirmation was entered. If the Complaint sought only foreclosure and did not seek money judgment, the rule does not apply, although any such action would still be subject to applicable statutes of limitations and laches considerations.

- For more information, contact Teri G. Rasmussen at [tgr@rasmuslaw.com](mailto:tgr@rasmuslaw.com) or (614) 353-8154