

HOMEOWNERS: YOUR RIGHTS, LIABILITIES  
AND REMEDIES IN THE CASE OF FORECLOSURE

By Attorney Michael H. Wald

During the past several months there has been a considerable increase in foreclosures. You never think it is going to happen to you, but what if you lose your job and are forced to be late in making your monthly mortgage payment or you default on your note? This column will answer some of the basic questions. For specific questions please consult a practicing attorney.

Generally speaking creditors or mortgagees do not wish to foreclose on a property. If the homeowner has not paid his monthly mortgage payment, the creditor or mortgagee will send a letter which will state the following:

- a. a notice of default
- b. an opportunity to cure the default
- c. a notice of intent to "accelerate" the note if not brought current. Acceleration means the outstanding principal balance plus any accrued and unpaid interest and expenses are made currently due and payable.

If after receiving this notice a homeowner has not paid, then before foreclosing the creditor or mortgagee must first send a final notice advising the homeowner of:

- a. notice of acceleration of the note
- b. notice of the date and place of foreclosure sale. The law requires foreclosure sales of real property to be held only on the first Tuesday of each month, furthermore it can be held only between 10:00 a.m. and 4:00 p.m. at the courthouse in the county where the property is located. The law also

requires that the creditor or mortgagee give at least 21 days notice before the sale date, not counting the date the notice was mailed (before the first Tuesday of the month) and must comply with the following three things regarding the notice:

a. written certified notice must be given to the homeowner(s), principal obligor(s) and guarantor(s). Certified letter sent to the homeowner(s) at the last known address is sufficient notice; the fact that the letter was returned and unclaimed does not create a further duty to notify.

b. a copy of the notice of sale must be filed with the county clerk's office

c. a copy of the notice of sale must be posted at the county courthouse for 21 days, exclusive of the day of sale. The Deputy Sheriff will post such notices.

After the property is foreclosed the debtor's liability does not disappear. The debtor is liable for any difference between the foreclosure sale price and the mortgage balance, called the "deficiency." The deficiency plus the attorney's fees can be collected by the creditor or mortgagee by suing the debtor. In cases where there is an excess collected at foreclosure above the mortgage balance, the money will be returned to the debtor.

In the case of an improper foreclosure there are basically three remedies that the debtor has:

a. File suit at law for damages resulting from wrongful foreclosure. Grossly inadequate price, irregularities which tended to contribute to inadequacy of price, and failure to give proper notice of accelerations of the proposed sale as set forth above are grounds for wrongful foreclosure.

b. File for bankruptcy (Chapter 7 or 13) before the sale.

c. Sue in equity to rescind the sale. This remedy is sometimes available. To do this, the homeowner has to offer to pay the purchase price in full at the time he asks the court to set aside the sale.

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