



FACING FORECLOSURE

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“Facing Foreclosure” has been prepared as a public service by the Texas Young Lawyers Association and is distributed by the State Bar of Texas. This pamphlet provides a brief overview of Texas law as it pertains to foreclosure. The information in this brochure is for educational and informational purposes only and is not intended to replace legal advice from an attorney. If you have specific legal questions, you should seek counsel from an attorney in your area. The laws in this pamphlet are subject to change.

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INTRODUCTION

Purchasing a home may be one of the most significant investments a person or family will make in their lives. Looking for a suitable home and making an offer to purchase it can be an exciting and nerve-racking experience. Fortunately, a real estate agent, mortgage broker, and escrow agent are often present to guide you through the process and ensure that the proper paperwork is prepared and executed. However, after the sale is complete, you may search for someone to consult with if you experience financial troubles and face foreclosure. In many situations, a homeowner cannot afford to hire an attorney and does not possess enough knowledge about the law to feel comfortable communicating with the lender alone.

This pamphlet is designed to provide a basic introduction and description of the foreclosure process, the laws governing foreclosure, and possible options and sources of further guidance for those facing foreclosure. This pamphlet is focused on foreclosures of residential properties by mortgagees and/or mortgage servicers, which are collectively referred to as “lenders” in this pamphlet.

At the time of the revision of this pamphlet, there was a foreclosure ban on most federally insured, financed, or owned mortgages, which expired June 30, 2021. This ban originated in the CARES Act, passed in response to the COVID-19 pandemic, and could be extended again. However, this pamphlet will not cover any CARES Act protections. More information on these protections can be found by going to [texaslawhelp.org](https://www.texaslawhelp.org) and searching for homeowner protection and COVID-19.

DEFINITIONS:

Below are several key terms that you may encounter in the foreclosure process. Several of these are discussed in greater detail later in this pamphlet.

Collateral – Property pledged to the lender in the Deed of Trust as security for the repayment of the loan.

Deed of Trust – Mortgage instrument that creates a lien on the collateral and allows the trustee to sell it to satisfy the loan debt in the event of a default.

Default – The failure of the borrower to make the loan payments as agreed in the Promissory Note or workout plan, as declared by the loan servicer.

Delinquency – A loan payment that is not paid on the due date, but within the period allowed before actual default is declared.

Lender – The entity that gave you the mortgage loan. It may not be the same entity to whom you send your payments.

Mortgagee – Lender or holder of the security interest in the property; the lienholder; the mortgage servicer under certain conditions.

Mortgagor – Debtor, borrower and grantor of the security interest in the collateral; owner of the property.

Mortgage Servicer – The entity to whom you send your monthly payments. The lender or investor has contracted with the servicer to handle your loan after closing. The servicer is your contact for any issues you have with your mortgage loan. The original mortgagee or lender may be the mortgage servicer if it still receives payments from the debtor.

Nonjudicial Foreclosure – Foreclosure process that involves no judicial intervention and is free of court involvement.

Security Instrument – The Deed of Trust creating the lender's lien on the collateral and giving the trustee the power of sale. In other states, the security instrument can also be known as the mortgage.

Substitute Trustee – Person appointed by the current mortgagee or mortgage servicer to exercise the power of sale in lieu of the original trustee designated in the Deed of Trust.

Trustee – Person or persons authorized to exercise the power of sale under the terms of the Deed of Trust.

WHAT ARE THE DIFFERENT TYPES OF FORECLOSURES?

In Texas, the type of foreclosure process that is used by a lender depends on the type of debt that is owed. There are two general classes of foreclosure: (1) a nonjudicial foreclosure; and (2) a judicial foreclosure. There is also a third type of foreclosure that combines parts of the nonjudicial and judicial foreclosures and is used only for specific types of loans.

1. NONJUDICIAL FORECLOSURE

A nonjudicial foreclosure is used when the loan was used to purchase the home or to refinance the original purchase loan. In a nonjudicial foreclosure, the foreclosure is performed without involving a court or judge. The nonjudicial foreclosure is often performed by attorneys hired by the lender. As discussed in more detail below, the nonjudicial foreclosure occurs at the courthouse on the first Tuesday of the month after at least two notices have been sent to the homeowner. Nonjudicial foreclosures are the most common type and will most likely be the type of foreclosure that a homeowner will encounter.

2. JUDICIAL FORECLOSURE

A judicial foreclosure generally occurs when a government entity is seeking to collect taxes owed on the property. The government will file a lawsuit with the court seeking to have your property sold to pay for property taxes that are owed. If the government proves that the taxes are owed and the judge signs an order for foreclosure, the property will be sold by the sheriff or constable at the courthouse on the first Tuesday of the month. A private lender could choose this method instead of a nonjudicial foreclosure, but it is unlikely because it usually takes longer than a nonjudicial foreclosure and the lender has less control.

If you are served with a lawsuit seeking foreclosure of your property for failure to pay taxes, it is recommended that you contact an attorney in your area to assist you in filing a proper response. If you cannot afford an attorney, the State Bar of Texas maintains a referral directory of legal services for low-income Texans. You can find the directory at [texasbar.com/referraldirectory](https://www.texasbar.com/referraldirectory). If you are unable to receive assistance from a legal aid center, you should contact the government office that has filed the lawsuit because they may be willing to work out a payment plan or enter into some form of payment agreement. Obtaining legal advice in these situations is strongly encouraged because there are special rules for senior citizens and the

disabled that may stop the foreclosure. Also, a homeowner has a limited right of redemption for two years following the foreclosure sale, but a premium will have to be paid in addition to the amount owed for taxes and maintenance.

3. COMBINATION FORECLOSURE

If a homeowner received a home equity loan or a loan that was used to pay property taxes, the lender must obtain a court order approving the foreclosure before performing a nonjudicial foreclosure. After the lender provides the First Notice (see description below) and the homeowner does not pay the debt owed, the lender must file an application with the court requesting an order of foreclosure. Unlike a typical lawsuit, the application does not have to be served on the homeowner by a sheriff or constable, but instead can be delivered by certified mail. The homeowner has 38 days to file a response to the foreclosure application. If a response is filed, the court will hold a hearing to determine whether the lender is entitled to foreclosure. If a foreclosure order is signed by the court, the lender will then be allowed to continue with a nonjudicial foreclosure by providing the Second Notice (Notice of Sale) as discussed below.

WHAT DOCUMENTS DO I NEED TO LOCATE IF I AM FACING A NONJUDICIAL FORECLOSURE?

Anyone who has purchased a home or refinanced a home loan knows that there were numerous loan documents signed at the closing. These documents are usually prepared by the lender and presented to you by the title company at closing. The homeowner generally does not review the documents in advance or at the closing, but rather signs everywhere the title agent indicates a signature is needed. When the closing is complete, the title company provides the homeowner with a set of copies that are often placed in a drawer or cabinet. If everything goes well, it may not be necessary to look at these documents again, but they become very important if you are unable to make a mortgage payment and the lender begins the foreclosure process. It is important that the homeowner know where their loan documents are kept and become familiar with the primary documents discussed below when foreclosure begins to become a reality.

In Texas, there are three primary documents that serve as the heart of a home purchase: (1) the Warranty Deed; (2) the Promissory Note; and (3) the Deed of

Trust. This assumes that the purchaser made a down payment and has borrowed the remainder of the purchase price from a bank or mortgage lender.

1. WARRANTY DEED

The Warranty Deed is the document that transfers ownership of the property from the seller to the buyer. At the closing, the purchaser will provide a certain amount of money as the down payment and to pay the closing costs. Down payments can vary from 5% of the total purchase price to as much as 20%. The larger the down payment, the smaller the loan needs to be from the bank. In addition to the down payment from the purchaser, the lender will arrange for the remaining sales price to be paid to the seller. Because the seller is receiving the total sales price for the home at the closing, the seller will sign the Warranty Deed transferring legal ownership of the property to the buyer. The individual seller no longer has any rights or claims to the property. The Warranty Deed will be recorded in the property records of the county where the home is located giving notice to the world that the buyer is now the legal owner of the home.

2. PROMISSORY NOTE

The Promissory Note is the document that authorizes the loan from the lender for the purchase of the property. The Promissory Note includes information on the lender who made the loan; the payment terms of the loan such as the payment amount, number of payments; and interest rate, and the terms that the lender must follow if the homeowner fails to make the required loan payments, or otherwise defaults under the Promissory Note.

The Promissory Note describes when a missed payment becomes a default; the notices, if any, that the lender must provide to you before a missed payment becomes default; and whether the lender must provide you an opportunity to cure the default before beginning foreclosure. The exact terms will depend on the language of the Promissory Note making it important for you to review this information to ensure that the lender has complied with the terms of the Promissory Note before initiating a nonjudicial foreclosure.

3. DEED OF TRUST

The Deed of Trust is the document that authorizes the lender to perform a nonjudicial foreclosure on your home if you default in making payments under the

Promissory Note. This provision is referred to as the power of sale clause. The Deed of Trust is not an actual deed as described above because it does not give the lender legal title to your home like the Warranty Deed. Instead, the Deed of Trust gives the lender certain rights in your home in exchange for the lender giving you the loan to complete the purchase. One of those rights is the right to foreclose on your home if you default in making your monthly mortgage payments under the Promissory Note.

It is important to be familiar with the payment and default provisions of the Promissory Note because the lender cannot foreclose under the Deed of Trust until you have defaulted under the Promissory Note. A lender performing a nonjudicial foreclosure is bound to follow the provisions in the Deed of Trust regarding foreclosure as well as the statutes governing foreclosure in the Texas Property Code.

WHAT LAWS MUST A LENDER FOLLOW WHEN PERFORMING A NONJUDICIAL FORECLOSURE?

In addition to the provisions in the Deed of Trust that will set the rules for foreclosure of your property, there are statutes that set certain minimum requirements that apply to all nonjudicial foreclosures of residential properties in Texas.

These laws are contained in Chapter 51 of the Texas Property Code. Because compliance with these statutes has been established as the minimum requirements for a lender, most Deeds of Trust do not impose any additional requirements on lenders above and beyond the minimums found in Chapter 51 of the Texas Property Code.

However, it is possible that your Deed of Trust may contain terms that require the lender to provide additional notices before performing the foreclosure sale, that provide you with a right to pay the missed mortgage payments to stop the foreclosure sale, or that provide you with the right to redeem your property after the foreclosure sale occurs. Again, it is very important that you review and become familiar with your rights under the Deed of Trust to ensure that the lender has not violated any of those rights in performing the foreclosure. The discussion that follows regarding the foreclosure process will assume that your Deed of Trust only requires the lender to follow the requirements of Chapter 51, which is probably the most common scenario for most residential properties.

WHAT STEPS ARE INVOLVED IN A NONJUDICIAL FORECLOSURE?

Once a homeowner is in default under the Promissory Note, the lender may attempt several unofficial steps to resolve the problem such as collection calls, letters, acceptance of partial payments, or negotiating a temporary payment plan. Assuming that these efforts have not resolved the problem and the lender is ready to proceed with a nonjudicial foreclosure, the following actions must be performed by the lender:

1. NOTICE OF DEFAULT AND INTENT TO ACCELERATE (FIRST NOTICE)

Your lender or its attorney must send you a letter by certified mail notifying you that you have at least 20 days to cure the default (or 30 days if the Deed of Trust is on a FNMA form), or in other words, to make any payments that were missed plus any late charges that may have been assessed. There is no requirement that the homeowner receive the letter so simply ignoring certified mail letters or refusing to sign for them will not protect you. Instead, you should read all letters and mailings from your lender carefully to ensure that you do not miss a deadline or opportunity to fix the problem. If the back due payments are not brought current within the 20 days, the lender has the right to demand that the entire loan amount be paid immediately.

2. NOTICE OF SALE AND ACCELERATION OF DEBT (SECOND NOTICE)

After the 20-day period has expired, the lender must send a second letter by certified mail notifying you that the entire loan balance is now due, and the failure to pay will result in the sale of your home. Again, there is no requirement that you receive or read the notice as long as it was sent by certified mail to the last known address on file with the lender. This reinforces the importance of notifying your lender if your mailing address changes after you purchase your home. This Notice of Sale will provide the details surrounding the foreclosure sale including the date, time, and location of the sale, as well as the name and address of the Trustee, who will perform the sale. The notice must be provided at least 21 days before the sale occurs. The Notice of Sale must also be posted at the county courthouse in the designated location and filed with the County Clerk's office.

It is possible that after receiving the First Notice or the Second Notice you are contacted by your lender offering to negotiate a resolution, delay the foreclosure, or other possible solution. These individuals may not be working with or

communicating with the attorneys who are performing the foreclosure. If you communicate with anyone other than the Trustee or attorney who sent the First Notice or Second Notice, you should contact the Trustee or attorney who sent the foreclosure notices to make sure that they are aware of the offer made by the lender and ask them to confirm in writing that the foreclosure sale will be postponed. Unless you have written confirmation from the Trustee or attorney that the sale will be delayed, you should assume that it will occur at the time and date in the Second Notice. It is a good idea to get all offers, promises, or other representations from the lender or Trustee in writing so that you have a complete and accurate history of the communications.

3. FORECLOSURE SALE

In Texas, foreclosure sales must occur on the first Tuesday of the month at the designated area of the county courthouse.

If the first Tuesday of the month is a holiday, the sale will proceed as usual and will not be delayed until the next business day. The designated area for foreclosure sales is usually the front steps of the courthouse, but may be located elsewhere in the courthouse. The County Clerk's office will be able to direct you to the proper location. The sale must occur between 10 a.m. and 4 p.m. The Notice of Sale will state the earliest time at which the sale will begin, and the actual sale must take place no later than three hours from the time stated in the Notice of Sale. For example, if the Notice of Sale states that the foreclosure sale will begin at 11 a.m., the actual sale cannot occur after 2 p.m. If the Trustee does not perform the foreclosure sale on the proper date, at the proper time, and at the proper location, he or she must start the whole process over at the beginning by reissuing the required notices.

The Trustee named in the Deed of Trust and Notice of Sale will announce the property being sold by reading the Notice of Sale out loud. At this time, the Trustee will announce the rules for the auction and will accept bids for the property. Generally, property sold at foreclosure sale is sold to the highest bidder for cash. The lender will be able to bid an amount up to the debt owed without producing any cash at the sale. If the bids exceed the debt owed, then the lender will have to produce enough cash to account for the difference between the sales price and the debt. Once the sale is complete, the Trustee will record a Foreclosure Deed or Trustee's Deed in the real property records. This deed will have a similar effect as the Warranty Deed described above in that it will transfer legal title to the property from the current homeowner to the high bidder at the foreclosure sale.

4. DISTRIBUTION OF PROCEEDS

Once the sale concludes, the Trustee divides the proceeds. First, expenses relating to the sale are paid. These include advertising the sale, sending and filing the required notices, and trustee's and attorneys' fees other than those provided in the Promissory Note. Next, the unpaid principal, interest, late fees, attorneys' fees, and other unpaid charges as provided in the Promissory Note are paid followed by any junior or inferior lienholders. Any remaining funds will be paid to you as the homeowner.

5. EVICTION

The new owner of the property, who is usually the lender, must provide the previous homeowner with three days to vacate the property. If the homeowner refuses to leave the property, the new owner can file an eviction lawsuit in the justice of the peace (JP) court. The JP will usually schedule a hearing within seven to 14 days. If the JP determines that the homeowner is improperly occupying the property, the judge will enter an eviction order providing five days to vacate the property at which time the sheriff or constable will remove the homeowner from the property.

6. DEFICIENCY ACTION

After completion of a nonjudicial foreclosure, the lender has two years from the foreclosure sale to file a deficiency lawsuit if the high bid at the foreclosure sale is not enough to pay the lender the debt owed to and the expenses associated with the foreclosure. For example, if the homeowner owes the lender \$100,000 and the lender purchases the property at the foreclosure sale for \$75,000, then the lender could file a lawsuit seeking a judgment for the \$25,000 deficiency. A deficiency lawsuit is not permitted for lenders who foreclose on a home equity loan.

However, as the homeowner, you can challenge the lender's lawsuit if you believe that the value of the property is greater than the amount bid at the foreclosure sale. Using the example above, if you believe that the fair market value of the property is \$95,000, you may submit evidence of the value to the court. If the court finds that the fair market value is \$95,000, then the lender will only be able to collect the difference between the debt owed and the fair market value, in this case \$5,000. This law is in place to prevent lenders from making low bids at the foreclosure sale and then going after the borrower for large deficiencies. If you are served with a lawsuit seeking a deficiency judgment after a foreclosure, you should contact an attorney to determine if the lender is seeking an amount greater than what it is entitled to and to

assist you in presenting evidence of the home's fair market value to reduce the amount that the lender can collect.

7. NO RIGHT OF REDEMPTION FOR NONJUDICIAL FORECLOSURE

In Texas, there is no right of redemption for homeowners after a nonjudicial foreclosure. A right of redemption is where the homeowner can buy back their home for a certain time period after the foreclosure sale occurs. Rights of redemption do exist in other states and in Texas when dealing with a foreclosure by the government for the nonpayment of property taxes. However, there is no right of redemption in a nonjudicial foreclosure of a residence.

WHAT OPTIONS ARE AVAILABLE TO AVOID A NONJUDICIAL FORECLOSURE?

1. LOAN MODIFICATION/ALTERNATIVE PAYMENT PLAN

A foreclosure can be cancelled, delayed, or avoided at any time prior to the sale at the courthouse. Obviously, the best time to reach a resolution is during the 20-day period after receipt of the First Notice. During this time, you are only required to pay the past due amounts and not the entire loan amount. If you believe that you will be able to gather the necessary funds to bring the loan current, it would be wise to contact the lender and keep them informed on your progress, as they may be willing to extend the 20-day period if they believe that the matter can be resolved without further action. If you cannot pay the entire amount that is due, your lender may be willing to agree to a payment plan, loan modification, or other arrangement to bring the loan current and ensure that you will be able to make future payments.

In certain situations, it is possible that your lender must consider modification if your home loan qualifies under new laws passed to provide relief from rising foreclosures.

Only your lender or mortgage servicer can confirm whether you qualify for a modification so it is important to contact them immediately upon receipt of a First Notice or other notice indicating that you may be in default under your Promissory Note. In fact, you may contact your lender prior to missing a payment if you are struggling financially to make your monthly mortgage payments.

2. REQUEST FORBEARANCE

A forbearance can stop a foreclosure or it can stop mortgage payments for a certain amount of time. To request a forbearance, you must state that you are experiencing a financial hardship. If a foreclosure is anticipated, then the lender agrees to “pause” the foreclosure proceedings. This should be evidenced by a signed forbearance agreement or a “standstill agreement.” If your negotiations with the lender do not result in any signed agreement, then the original terms of the Promissory Note and Deed of Trust still apply, and the foreclosure will proceed as originally noticed.

If the forbearance is modifying the underlying loan payment terms, be sure to get the following in writing: 1) the number of months in which payments will be postponed; 2) the due date for the deferred payments (generally due as either one lump sum at the end of the deferred period or added to the end of the loan term); and 3) reversal of any late fees.

3. DEED IN LIEU OF FORECLOSURE

A deed in lieu of foreclosure involves a scenario where the homeowner voluntarily transfers ownership of the property to the lender. Deeds in lieu of foreclosure have certain advantages over nonjudicial foreclosures such as they are quicker to complete, cost less money for the lender, and are more confidential than a public sale. However, this is usually only an option where ownership of the property is free and clear of mortgages, liens, and encumbrances. A lender will not want to accept a deed in lieu of foreclosure when the property is burdened with debts to other parties or when there will be a potential for a large deficiency judgment. Ultimately, exercising this option is at the discretion of the lender and the homeowner will be left with the same final result as with a foreclosure – the loss of their residence.

4. BANKRUPTCY

The filing of a bankruptcy petition will immediately stop a foreclosure sale from occurring as of the filing of the petition. However, you will be required to continue making some type of regular payments and make some payments toward the delinquency as part of your bankruptcy plan. Filing for bankruptcy is a major event and should not be taken lightly or performed without careful consideration. If you believe that this may be the option to stop a foreclosure, you should consult an attorney with experience in bankruptcy or consumer law to determine if you will be able to successfully complete a bankruptcy plan.

CONCLUSION

Dealing with the potential loss of your home is a stressful and traumatic experience. While there are certain situations where foreclosure cannot be avoided, there are several actions that can be taken before trouble arises to avoid the foreclosure of your home. The Texas Foreclosure Prevention Task Force offers the following tips to avoid foreclosure:

- Don't ignore the problem.
- Contact your servicer sooner rather than later if you think there may be a problem.
- Don't ignore communications from your servicer. Return their calls and open mail from them.
- Understand foreclosure prevention options.
- Contact a HUD-approved non-profit housing counselor for assistance.
- Review your budget and make changes as necessary. If you don't have a budget, create one and stick to it!
- Be aware of foreclosure scams and don't become a victim.
- Know your mortgage rights.

It is our hope that this pamphlet will provide assistance in accomplishing at least a few of the tips listed here. There are many resources available for homeowners facing foreclosure including those listed in this pamphlet although this pamphlet should not be considered a complete list of resources for assistance with foreclosures. To take advantage of the available resources and to place themselves in the best position to avoid foreclosure, all homeowners should educate themselves on the terms of their loan documents and basic foreclosure law, actively work with their lenders to resolve the problem early in the process, and seek out assistance from qualified groups. While it will not always result in success, ignoring the problem and refusing to communicate with the lender will certainly result in foreclosure.

RESOURCES

Texas Department of Housing and Community Affairs:
tdhca.state.tx.us/homeownership/foreclosure/index.htm

U.S. Housing and Urban Development:
hud.gov/topics/avoiding_foreclosure

LEGAL ASSISTANCE

Lawyer Referral Information Service: If you do not qualify for legal aid, you can contact the State Bar of Texas Lawyer Referral information Service online at texasbar.com/LRIS by phone at 1-800-252-9690. Through the Lawyer Referral Information Service, a person may have a 30-minute consultation with an attorney for \$20. At the end of the consultation, the attorney and individual may discuss possible representation and price structure. Please understand that the Lawyer Referral Information Service is not a pro bono or reduced-fee program. Hours of operation: Monday through Friday 8:30 a.m. to 4:30 p.m. The call-in service is closed on legal holidays.

Legal Services and Other Advocacy in Texas: For an online listing of legal service providers, see the Referral Directory for Low-Income Texans at texasbar.com/referraldirectory.

Texas Access to Justice Commission: Call 1-800-204-2222, ext. 1855, visit texasatj.org, or write to P.O. Box 12487, Austin, Texas 78711.

Texas Law Help: Texas Law Help is an online resource for free and low-cost civil legal assistance for those who cannot afford legal help. Learn about your rights, self-help resources, and legal aid at texaslawhelp.org.

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