



LEGAL HOTLINE FOR TEXANS

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RESIDENTIAL PROPERTY FORECLOSURE

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The Legal Hotline for Texans (LHT) is a telephone hotline providing free legal advice and consultation and other free legal services to Texans Age 60 and Older or Eligible for Medicare; Texans Age 60 and Older , Disabled , or Nursing Home or Assisted Living Facility Residents, and their Family Members and Authorized Claimants, who qualify for services through the Texas Crime Victims Civil Services Program (CVCLS); and Pension and Retirement Plan Employees, Participants and Beneficiaries.

Eligible Clients can consult with an attorney of the Legal Hotline for Texans free of charge by calling one of the phone numbers listed above. If clients would like to consult with an attorney in their communities, or if ongoing representation by an attorney is needed, the Legal Hotline for Texans may be able to make a referral. Depending on individual circumstances and local availability, such a referral may be to an organization providing free attorneys to low income persons, or may be to an attorney on the Legal Hotline for Texans' reduced-fee panel, or may be to a statewide or local lawyer referral service.

The Legal Hotline for Texans is a project of the Texas Legal Services Center with support from the Texas Department of Aging and Disability Services (DADS), the U.S. Centers for Medicare and Medicaid Services (CMS), the U.S. Administration on Aging (AoA), and the Texas Equal Access to Justice Foundation through the Texas Basic Civil Legal Services Program (BCLS) and the Texas Crime Victims Civil Legal Services Program (CVCLS).

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RESIDENTIAL PROPERTY FORECLOSURE

These are some of the more frequently encountered questions regarding residential real property foreclosure. Further details are found in [Chapter 51](#) of the [Texas Property Code](#), and in the article "Defending Nonjudicial Residential Foreclosure Actions," 47 Texas Bar Journal 1196.

For advice that is specific to your particular circumstances, you should consult a lawyer.

There are various types of residential real estate financing agreements in Texas. The most common financing agreement is the deed of trust mortgage with a vendor's lien, which provides for non-judicial foreclosure. In this transaction, the buyer purchases a home from a seller, such as an individual or builder. The buyer borrows the purchase money from a lender, such as a bank. The buyer pays the seller with the borrowed money and the seller conveys the home to the buyer by executing a deed, usually a general warranty deed or a special warranty deed. A vendor's lien on the purchased property in favor of the lender is reserved in the deed from the seller to the buyer. The buyer then executes a deed of trust whereby the buyer conveys a power of sale of the purchased property to a third party trustee. In the event of a default, the lender may foreclose upon and sell the property without having to go to court, as discussed below. The trustee or substitute trustee under the deed of trust conducts the foreclosure sale. If the price at which the real property is sold at a non-judicial foreclosure sale is less than the unpaid balance of the indebtedness secured by the real property, resulting in a deficiency, an action may be brought by the lender against the buyer who defaulted to recover the deficiency within two years of the foreclosure sale. If no deficiency judgment is obtained against the buyer and the lender instead forgives the debt, the amount forgiven is considered taxable income to the buyer.

Q: Must I be delinquent by more than one payment before my mortgage company can initiate foreclosure proceedings?

A: This depends upon the exact language of the real estate lien note you signed at the time you bought your home. Almost without exception, all loan notes (excluding FHA- and VA- insured loans) provide that the purchaser is in default upon failing to make any installment that comes due. Therefore, as a strict legal matter, a mortgage company may initiate foreclosure proceedings upon default in payment of even one installment.

As a practical matter, however, most mortgage companies will not immediately institute foreclosure proceedings. They will generally first make some efforts to contact the borrower and attempt to have the borrower bring the account up to date. If these efforts prove unsuccessful, then the mortgage company will institute foreclosure proceedings.

If your mortgage is FHA-insured or VA-insured, the mortgage company may not institute foreclosure proceedings until you are at least three payments delinquent.

Q: What must a mortgage company do to foreclose on my home?

A: The mortgage company must first serve you with written notice by certified mail. The notice must inform you that you are in default under the deed of trust and give you at least twenty days to cure the default. If you fail to cure the default within the twenty-day period, the mortgage company may then declare the entire debt due and post the property for sale. The mortgage company must give you at least twenty-one days notice of the date of the sale. Notice runs from the date the mortgage company places the notice in the mail to you by certified mail and not the day you receive the notice.

Q: Am I protected if I refuse to claim the certified mail notices that the mortgage company sends to me?

A: You are not protected if you refuse to claim any certified mail notices. The mortgage company's only obligation under the law is to place the notices, properly addressed, to you in the mail by certified mail. If you refuse to claim properly addressed notices, you simply will not know of the actions being taken by the

mortgage company. For that reason, you should always claim any certified mail you may receive from your mortgage company.

Q: What will the notice of sale from the mortgage company tell me?

A: The notice must inform you that your property will be sold at a public sale at an auction held between 10:00 A.M. and 4:00 P.M. of the first Tuesday of a month. The sale must begin at the time stated in the notice of sale or not later than three hours after that time.

Q: Must notice of the sale be given to anyone else by the mortgage company?

A: In addition to sending you notice, the mortgage company must, at least twenty-one days before the date of the sale, post notice of the sale at the courthouse door of the county in which the property is located and file a copy of the notice in the office of the county clerk of the county in which the property is located.

Q: Do I have a right to buy back my property after a foreclosure sale?

A: Texas does not have a right of redemption after a foreclosure sale except if property is sold by a taxing entity for nonpayment of taxes. Thus, a mortgage company is under no obligation to sell back the property to you after the foreclosure sale.

Q: Do I have to move out of the property on or before the date of the foreclosure sale?

A: You do not have to move before the date of the foreclosure sale. If you are still in the property after the foreclosure sale, the buyer at the foreclosure sale cannot simply set you out. The buyer must first give you a three-day notice to vacate the premises. If you do not vacate within the time period given to you by the buyer, the buyer may file an eviction lawsuit with the justice of the peace court. You will receive a copy of the eviction papers from the constable. Those papers will tell you what you must do to request a hearing.

Q: Do I have a right to sell my property prior to a foreclosure sale?

A: You have an absolute right to sell the property before any foreclosure sale. Of course, once the mortgage company has accelerated the indebtedness, it can insist on payment of the entire accelerated unpaid remaining principal balance and refuse to allow reinstatement upon payment of the delinquent balance.

Q: What are my choices in the event I face foreclosure?

A: You have a number of choices.

1. If you wish to keep your home, you should first attempt to work out a reinstatement agreement with the mortgage company. You should do this as soon as you fall behind on your payments. DO NOT wait until you are many months delinquent. Many mortgage companies will allow the buyer to resume future monthly payments and pay the delinquency over a period of months.
2. You can explore refinancing and other residential real estate finance options.
3. You can file a Chapter 13 bankruptcy and keep your home, provided you have sufficient monthly income to make future monthly payments as they come due and also pay some additional amount each month on the delinquent balance. You should resort to a Chapter 13 bankruptcy only if you have attempted to work out a reinstatement agreement with the mortgage company and it has been unwilling to accept an agreement that you can keep. With a Chapter 13 bankruptcy, you will propose a plan to the court under which you will pay the full delinquent balance in a period not to exceed five years. Whether a Chapter 13 bankruptcy is possible will also depend on what other debts you may have.
4. You can sell your home, provided you can do so before a foreclosure sale. This will require that you examine the deed of trust to see whether it requires the permission of the mortgage company to approve any

sale or the credit of the buyer. If you have considerable equity in your home and have decided that you will be unable to make future monthly payments, you should seriously consider selling in order that you may realize at least part of your equity.

If you decide to sell, you should work with a realtor who can advise you about the value of your home and price needed for a quick sale. NOTE: If you do sell to someone who does not pay off the note but assumes the note, you need to keep in mind that you remain liable on the note. This means that if the buyer should default in the future on the payments, the mortgage company has a right not only to look to the buyer for payment of the note but also to look to you.

5. You can approach the mortgage company and ask whether it will accept a deed in lieu of foreclosure. You should consider this choice only if you have decided that you simply cannot keep your home and either have no equity or do not have sufficient equity to make a sale worthwhile. If you use this approach, you should try to get the mortgage company to agree that the deed in lieu of foreclosure is in consideration of full and complete satisfaction of the entire debt. If the deed in lieu of foreclosure does not recite that it is in full satisfaction of the debt, you remain liable for any deficiency.

6. If your mortgage is FHA-insured, you may request that the Department of Housing and Urban Development (HUD) accept assignment of your mortgage. Assignment is a right that is available only to those purchasers who have FHA-insured mortgages. The mortgage company must inform you of your right to request that HUD accept assignment of your mortgage. If your mortgage is accepted for assignment, HUD will pay off the mortgage company and will become your mortgage company. HUD may grant you a period of reduced or suspended payments for a period of up to three years. HUD must grant your request for assignment if:

- A. you are living in the home;
- B. you have fallen behind on your payment through no fault of your own; and
- C. you have a reasonable probability of being able to resume full monthly payments within a period not to exceed three years.

Q: Do I have any additional rights if my mortgage is FHA-insured or VA-insured?

A: If your mortgage is FHA-insured, you have an absolute right to reinstatement up to the date of the trustee's sale if you tender the full amount of the delinquent balance, late charges, attorney's fees, and other costs of the foreclosure sale.

If your mortgage is VA-insured, you have a right to reinstatement of your mortgage up to the time of the foreclosure sale if you tender the full amount of the delinquent balance, late charges, attorney's fees, and other costs of the foreclosure sale. Finally, the Veterans' Administration does have the discretion to pay off the mortgage company and become your lender and grant you forbearance relief. Depending on your circumstances, you may wish to ask the Veterans' Administration to do this. If you pursue this choice, you may wish to seek help from your Congressperson, since it is completely discretionary with the Veterans' Administration whether it will help you in this manner.

Q: Are there any consequences resulting from a foreclosure sale?

A: Yes, there are several possible consequences:

1. You will be liable for any deficiency resulting from the sale. In other words, if your property sells at the foreclosure sale for less than the amount owed, the mortgage company has the right to look to you for that difference. If it does decide to pursue its claim for a deficiency, it may sue you and obtain a judgment against you for the difference between the amount received and the amount you owe.
2. There are possible tax consequences from a foreclosure on your home. Lenders are required by the IRS to send a Form 1099-A--Information Return for Acquisition or Abandonment of Secured Property--to the IRS and the buyer. Those forms include the date the lender acquired the property or found out it had been

abandoned, the balance of principal outstanding, the appraised value, and a description of the property. The lender also states on the form whether the buyer is still considered liable for repayment of the debt.

The tax consequences vary depending on whether the lender sues you for a deficiency. If you are sued for the deficiency, you do not owe any taxes to the IRS on the deficiency because the lender has not "forgiven" the debt.

However, if the lender does not sue (i.e., forgives the debt), the difference between the fair market value of the property (not necessarily the amount paid at the foreclosure sale) and the amount you owe represents "income" to you.

For example, if you owe \$60,000.00 on property with a fair market value of \$50,000.00 that sells at a foreclosure sale for \$40,000.00, the income to you is the difference between the fair market value (\$50,000.00) and the sales price (\$40,000.00). (In most cases, however, the IRS will assume that the fair market value is the price paid at the foreclosure sale.)

There are two important exceptions which absolve you from having to pay taxes on the deficiency. If you file bankruptcy or are technically insolvent at the time of the sale, you are not liable for any taxes. In almost all cases, an individual whose home is sold at a foreclosure sale because he cannot make the payments should be able to show he was insolvent at the time of the sale.

It is less clear when the borrower is actually required to pay taxes on any forgiven debt. Since the lender has four years to file suit, you may not know if and when such action will be filed. The IRS apparently takes the position that you should pay the taxes in the year the foreclosure occurred unless you can show that the lender may sue you. Some tax experts disagree with IRS; they take the position that people should not be obligated to pay taxes until they are officially informed by the lender that the debt has been forgiven and a deficiency judgment will not be pursued. For further advice, you will have to consult with an accountant or tax attorney.

This discussion on the tax consequences applies to home foreclosures. The tax consequences on rental property foreclosures are different, and you will have to consult with an accountant or tax attorney.

3. The mortgage company may report the foreclosure to a credit reporting agency. This will result in a lower credit rating.

Q: Do I have any additional rights if I bought my home from the Farmers Home Administration (FmHA)?

A: Yes, you have important rights and remedies that may help you save your home. Depending on your circumstances, you may qualify for a moratorium on your payments or additional interest credit. With a moratorium, your payments can be stopped for up to two years. If you qualify for additional interest credit, your payments will be reduced. You should first talk to your county supervisor about a moratorium or additional interest credit.

For additional legal assistance, consult with an attorney.

As noted at the beginning, this pamphlet is general in nature and should not be relied on as advice for your particular circumstances. For advice that is specific to your particular circumstances, you should consult a lawyer.