

Michigan's New Foreclosure Law¹

Lorray S.C. Brown
Michigan Foreclosure Prevention Project
(a project of Michigan Poverty Law Program)

On May 20, 2009, the Governor signed into law amendments to the Michigan foreclosure by advertisement statute. The new law requires a mandatory 90-day pre-foreclosure process to allow the borrower and the mortgage holder to work together to avoid foreclosure. Frequently asked questions about the new law follow:

When does this law begin?

The new law takes effect July 5, 2009 – 45 days after it was enacted into law.

Is this a permanent change in Michigan's foreclosure law?

No. The law expires July 5, 2011 – 2 years after the effective date.

Does it apply to all foreclosures?

The 90-day pre-foreclosure process applies when the first notice of foreclosure by advertisement is published after July 5, 2009 and before July 5, 2011.

It does not apply if pursuant to these provisions the borrower and the mortgage holder previously agreed to modify the mortgage loan and for less than a year the borrower failed to comply with the terms of the loan modification.

What properties are covered?

It applies to property the borrower claims as a principal residence exempt from taxes.

¹ Act No. 29, Public Acts of 2009, amends MCL 600.3204 and adds section 3205, and sections 3205a to 3205e.

When can a mortgage holder or servicer begin proceedings to foreclose by advertisement?

Generally, before beginning proceedings to foreclosure by advertisement, a mortgage holder or servicer must comply with a 90-day pre-foreclosure process to attempt to avoid foreclosure. The mortgage holder or servicer first must serve a written notice on the borrower informing the borrower of his or her rights and the opportunity to avoid foreclosure.

What information must be included in the written notice?

The written notice must contain all of the following information:

- Why the mortgage loan is in default, as well as the amount due and owing under the mortgage loan.
- The names, addresses, and telephone numbers of the mortgage holder, servicer or agent designated by mortgage holder or servicer.
- A designated contact person who has the authority to make agreements to modify the loan or other loss mitigation alternatives.
- A list of housing counselors approved by the United States Department of Housing and Urban Development (HUD) or the Michigan State Housing Development Authority (MSHDA).
- Notice that within 14 days after the written notice is mailed, the borrower may request a meeting with the designated agent to attempt to work out a loan modification to avoid foreclosure and also request a housing counselor to attend the meeting.
- Notice that if the borrower requests the meeting, foreclosure proceedings will not begin until 90 days after the date the notice is mailed to the borrower.
- Notice that if the borrower and the designated agent agree to modify the loan, and the borrower complies with the terms of the loan, the mortgage will not be foreclosed.
- Notice that if the borrower and the designated agent do not agree to modify the loan but it is determined that pursuant to the statute the borrower is eligible for a loan modification, the mortgage holder or servicer cannot foreclose by advertisement, and must instead foreclose by filing a court action.

- Notice that the borrower has a right to contact an attorney along with the telephone numbers of the state bar of Michigan's lawyer referral service and a local legal office.

How must the mortgage holder or servicer provide notice to the borrower?

The mortgage holder or servicer must mail the notice by regular first-class mail and by certified mail, return receipt requested, with delivery restricted to the borrower, both sent to the borrower's last known address.

Is the mortgage holder or servicer also required to notify the borrower through publication?

Yes. Within 7 days after mailing the written notice, the mortgage holder or servicer must publish a notice informing the borrower of his or her rights 1 time in a newspaper published in the county where the premises is located. If no newspaper is published in the county, the notice shall be published in a newspaper published in an adjacent county.

The publication notice shall contain all of the following information:

- The borrower's name and property address.
- A statement that informs the borrower of all of the following:
 - The borrower has a right to request a meeting with the mortgage holder or servicer.
 - The name of the person designated as the contact person with authority to enter into loan modification agreements.
 - The borrower may contact a housing counselor by visiting MSHDA's website or calling MSHDA.
 - MSHDA's website address and telephone number.
 - If the borrower requests a meeting, foreclosure proceedings will not begin until 90 days after the date the notice is mailed to borrower.
 - If the borrower and the designated agent reach an agreement to modify the loan, the mortgage will not be foreclosed if the borrower abides by the terms of the agreement.
 - The borrower has a right to contact an attorney. The telephone numbers of the state bar of Michigan's lawyer referral service and a local legal office must also be included.

What happens if the mortgage holder or servicer does not serve the borrower with the written notice?

If the mortgage holder or servicer does not serve the written notice upon a borrower but proceeds to foreclose by advertisement, the borrower may bring a court action to stop the foreclosure.

What is the borrower required to do?

A borrower who wishes to negotiate a loan modification must contact a housing counselor from the list provided within 14 days after the list is mailed to the borrower. The borrower may also contact the designated agent to request a meeting and also request a housing counselor to attend the meeting. Upon request, the borrower must give the designated agent, documents needed to determine whether the borrower is eligible for a loan modification.

What is the housing counselor required to do?

Within 10 days after being contacted by a borrower, a housing counselor must inform the designated agent in writing of the borrower's request to negotiate a loan modification. A housing counselor must also schedule a meeting between the borrower and the designated agent.

Where will the meeting take place?

The meeting must be held at a time and place that is convenient to all parties, or in the county where the property is located.

What happens if the process does not result in a loan modification agreement?

If the process does not result in a loan modification agreement, the designated agent must work with the borrower to determine whether the borrower would have otherwise qualified for a loan modification under the mortgage holder's loan modification program or process. The designated agent must then provide to the borrower a copy of any loan modification calculations made under this section.

What type of loan modification program will the mortgage holder use?

The mortgage holder must use a loan modification program that includes all of the following features:

- A debt-to-income ratio of 38% or less. The debt includes mortgage principal and interest, property taxes, insurance, and homeowner's fees.
- To reach the 38% target, the loan modification program may include 1 or more of the following features:
 - A reduction of interest rate (subject to a floor of 3%), for a fixed term of at least 5 years.
 - An extension of the loan term up to 40 years from the date of the loan modification.
 - Deferral of some portion of the unpaid principal balance up to 20%, until maturity, refinancing of the loan, or sale of the property.
 - Reduction or elimination of late fees.
- If the mortgage loan is pooled for sale to an investor that is a governmental entity (e.g. Government National Mortgage Association – Ginnie Mae), then the designated agent must use the modification guidelines dictated by the governmental entity.
- If the mortgage loan has been sold to a government-sponsored enterprise (e.g., Fannie Mae, Freddie Mac), then the designated agent must use the modification guidelines dictated by the government-sponsored enterprise.

How will the borrower know which loan modification program or guidelines are being used?

Upon the borrower's request, the designated agent must provide to the borrower a copy of the loan modification program or guidelines to be used.

Are the parties limited to loan modifications only?

No. The law does not prohibit a loan modification on other terms or another loss mitigation strategy if agreed to by the borrower and the designated agent.

What happens if the borrower is eligible for a loan modification?

If the results of the calculation are that the borrower is eligible for a loan modification, the mortgage holder or servicer cannot foreclose by advertisement but may foreclose by bringing a court action.

What happens if the borrower is not eligible for a loan modification?

If the calculations show that the borrower is not eligible for the modification the mortgage holder or servicer may foreclose by advertisement.

Can the mortgage holder or servicer foreclose by advertisement even when the borrower is eligible for a loan modification?

Yes. If the borrower is eligible for a modification, the mortgage holder or servicer may proceed to foreclose by advertisement if 1) the designated agent has in good faith offered the borrower a modification agreement prepared in accordance with the modification determination, and 2) for reasons not related to any action or inaction of the mortgage holder or servicer, the borrower did not execute and return the modification agreement within 14 days after the borrower received the agreement.

What happens if the mortgage holder or servicer does not comply with the new law?

If the mortgage holder or servicer begins to foreclose by advertisement in violation of the law, the borrower may file an action in circuit court to convert the foreclosure proceedings to a judicial foreclosure.

If a borrower files an action and the court determines that the borrower participated in the process, a modification agreement was not reached, the borrower is eligible for modification, and the borrower timely executed and returned the modification agreement, the court must enjoin the foreclosure by advertisement and order that the foreclosure proceed judicially.

How will the borrower know who owns the loan?

The law requires that the written notice to the borrower provide the name, address and telephone number of the mortgage holder or an agent designated by the mortgage holder. The law defines a mortgage holder as “the owner of the indebtedness or of an interest in the indebtedness that is secured by the mortgage.”

How can the borrower be assured that the person he or she is negotiating with has the authority to enter into any loan modification agreement?

The law requires that the written notice designate a person that the borrower must contact and that person must have the authority to make agreements.