



Banking, Finance & Real Estate Law Alert

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Widespread Changes in Ohio Foreclosure Procedures

House Bill 138, which changes many of the procedural and substantive aspects of foreclosures in Ohio, was recently signed into law by Governor Strickland and became effective September 11, 2008. This law alert summarizes and highlights the major changes presented by the new law; the full text of the bill can be found at http://www.legislature.state.oh.us/bills.cfm?ID=127_HB_138

Although the actual implementation of these new standards may vary and each county's procedures must be verified for all current and future foreclosure cases, those currently in progress as of September 11, 2008 should be subject to the former statutes as to substantive matters but will be subject to procedural changes in the new legislation.

Major changes, along with statutory references, include:

Lis Pendens, Service & Mediation

- The *lis pendens* date is changed from the date service is perfected on the principal defendant(s) to the date the complaint is actually filed. R.C. §2703.46.
- The change in the *lis pendens* date does not affect the requirement that service be made on all interested parties as otherwise set forth in the Ohio Rules of Civil Procedure. If service must be made by publication, the published notice must now contain the legal description, address and parcel number of the foreclosure property, or, alternatively, the address and parcel number with an indication that the full legal description can be obtained from the county auditor. Publication is required for only three weeks, rather than six. R.C. §2703.141.
- The court may require mediation of any foreclosure at any point during the proceeding and may require the personal attendance of both the mortgagor and mortgagee. R.C. §2323.06.

Title

- Within 14 days of filing a foreclosure complaint against residential real estate consisting of one to four single-family units, a Prelimi-

nary Judicial Report (PJR) must also be filed with the court. The PJR must be issued by a licensed title insurance agent on a form approved by the Ohio Department of Insurance and must contain all of the following information:

- o A legal description of each parcel to be sold at the judicial sale;
 - o The street address of the real estate (or, if no address, the names of the frontage and immediately adjoining streets);
 - o The county treasurer's permanent parcel number or other tax identification number of the real estate;
 - o The name of the real estate's owners of record;
 - o A reference to the volume and page or instrument number of the recording by which the owners acquired title to the real estate;
 - o A description of the record title to the real estate; however, easements, restrictions, setback lines, declarations, conditions, covenants, reservations, and rights-of-way that were filed for record before the lien being foreclosed are not required to be included; and
 - o The name and address of each lienholder and the name and address of each lienholder's attorney, if any, as shown on the recorded lien. R.C. §2329.191(B).
- Before submitting any order or agreed entry for the sale of residential real estate, the foreclosing party must file a Final Judicial Report that updates the state of the record title from the effective date of the PJR through the date of *lis pendens*. R.C. §2329.191(B).
 - Either a PJR or an owner's title insurance commitment may be used for residential foreclosures of more than four single-family units and for commercial foreclosures. If a commitment is used, it must include the PJR information and be updated after the sale. R.C. §2329.191(C).

Advertising

- Advertising of the sale must begin at least three weeks before the sale, rather than 30 days before the sale as under the former statute. R.C. §2329.26. Advertisements shall, if applicable, include the web address of the officer making the sale. R.C. §2329.23.

Sale & Confirmation

- After an order of sale is issued, a local building inspector may inspect the property before the sale. R.C. §2329.17. In addition, an officer who handles the sale of property that is vacant or abandoned may hold an open house, which must be advertised in the published notice of sale and paid for from the proceeds of the sale. R.C. § 2329.272.
- By placing a bid at a sale, the purchaser appoints the officer who makes the sale as agent to take delivery of the deed. R.C. §2329.26(B).
- The officer making the sale is required to collect purchaser information pursuant to R.C. §2329.271, including the following, all of which shall be part of the court records and open for inspection:
 - o The name, address, and telephone number of the purchaser;
 - o If the purchaser is an entity, the required information must be submitted by:
 - The trustee, in the case of a trust or business trust;
 - An executor or administrator, in the case of an estate;
 - A general partner, in the case of a general partnership or limited partnership;

- A member, manager, or officer, in the case of a limited liability company;
 - An associate, in the case of an association;
 - An officer, in the case of a corporation; or
 - A member, manager, or officer, in the case of any other business entity.
- o A statement indicating whether the purchaser will occupy the lands and tenements.
 - o In addition, if the property foreclosed upon is not residential rental property and the purchaser is not an individual, the purchasing organization must designate a natural person to receive notices and inquiries about the property.
- The court will confirm the sale within 30 days after the return of the order of sale, and the officer making the sale shall require the purchaser, including any lienholder, to pay the balance due on the purchase price within 30 days of that confirmation. R.C. §2329.31. The purchaser’s failure to pay the balance due within that time period may be treated as contempt of court and may result in forfeiture of the deposit. R.C. §2329.30.
 - Notwithstanding these confirmation procedures, the court may, in its discretion, stay confirmation to give the defaulting borrower time to redeem the property or for any other reason the court deems appropriate. R.C. §2329.31.
 - In addition to the purchase price, all unpaid and delinquent taxes must be paid, and taxes and special assessments for the current year must be prorated to the date of the confirmation of sale and paid to the treasurer. R.C. §323.47. Because current year taxes won’t be determined in most cases by the time of sale, how the proration will be made and whether an overproration will be refunded or credited remains to be seen.
 - No later than seven days after confirmation of the sale, the attorney who filed the writ of execution must prepare a deed for the purchaser and deliver it to the officer making the sale. The officer may review and approve the deed as to form or content and must record the deed within 14 business days of payment in full by the purchaser. The purchaser is responsible for paying for deed preparation and recording. R.C. §2329.36(A). When mortgage financing is involved, closing logistics may be cumbersome unless the selling officer cooperates in funding and recording arrangements.
 - When registered land is sold by the sheriff under order of court, the sheriff must file with the recorder a certificate that the terms of the sale have been complied with and attach to that certificate a certified copy of the order of sale, its return, and a certified copy of the order of confirmation. The property can then be transferred to the purchaser, the title registered, and a new owner’s certificate of title issued. R.C. §5309.64.

Some of the foregoing changes – such as the revised *lis pendens* date – will speed the foreclosure process along and make title examination much easier. Other changes will benefit consumers and title agents, such as the residential PJR requirements. Lenders should note, however, that there are a number of pitfalls in this legislation that have the potential to extend foreclosure proceedings. First, the possibility of mediation could result in delay, particularly when the borrower gives at least the appearance of being able to bring the loan current. In addition, the court now has the discretion to stay a sale confirmation to give the defaulting borrower *additional* time to redeem the property or for *any other reason* the court deems appropriate. How courts will use this apparently unfettered discretion remains to be seen. In all events lenders will be saddled with additional costs and delays in what is already a time-consuming process.