

Mortgage Loan Modification
and
Dual-tracking in Real World Scenarios

February 14, 2019

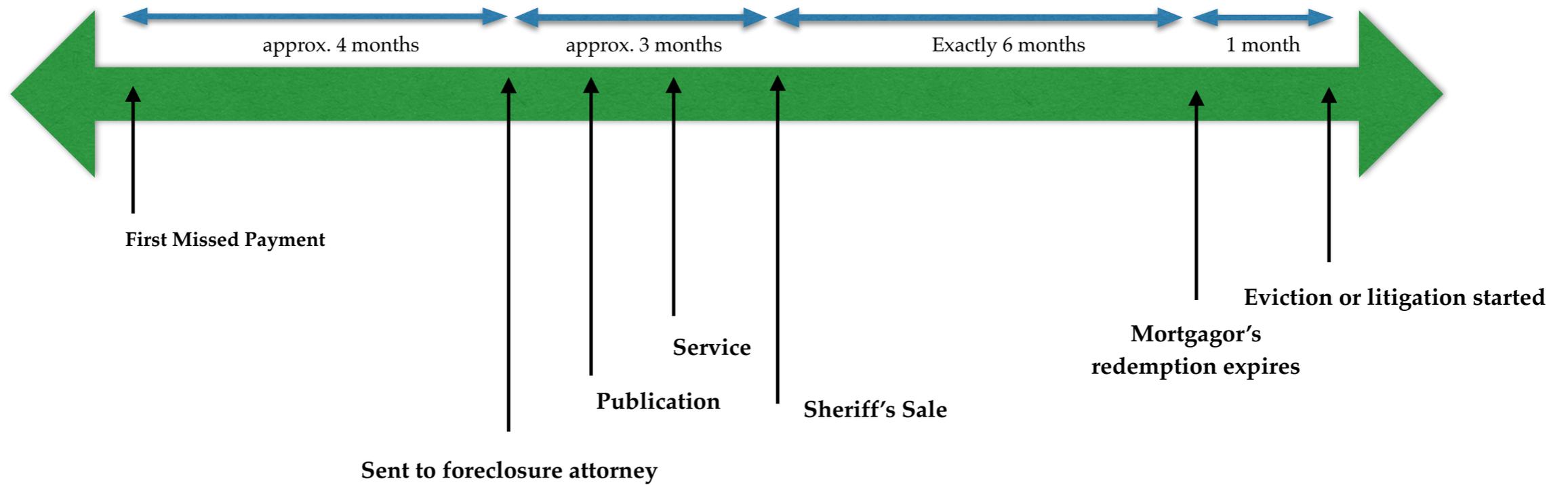
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Possible Pre-Foreclosure Homeowner Options

1. Reinstatement Assistance
2. Postponement of the Sheriff's Sale
3. Loan Modification Assistance
4. Dual-tracking Litigation
5. Strict Compliance (Analysis of Foreclosure Process; Chapter 58)
6. Bankruptcy
7. Sale (traditional or short sale or sale of junior interest)
8. Refinancing
9. Deed-in-lieu
10. Just letting it go... ("strategic default")

Minnesota's Foreclosure Process

(Chapter 580 Typical Foreclosure by Advertisement Timeline)



Everyone's circumstances are unique. Contact an attorney to discuss your rights and options today: 612-285-3052.



1. Reinstatement

- ... if at any time before the sale of the premises...the mortgagor... shall pay...the amount actually due thereon and constituting the default actually existing in the conditions of the mortgage at the time of the commencement of the foreclosure proceedings... the mortgage shall be fully reinstated and further proceedings in such foreclosure shall be thereupon abandoned... Minn. Stat. § 580.30
- Mortgagee/servicer must provide the reinstatement figure within three days of request. *Id.*
- Reinstatement figure is good for seven days or date of foreclosure. *Id.*
- Even if the loan has been accelerated, borrower must only pay amount in arrears. *Davis v. Davis*, 196 N.W.2d 473, 475 (Minn. 1972)

1. Reinstatement

“[T]he foreclosure-advice notice listed a reinstatement amount as of January 9, 2012. But the notice was not served on McGraw until December 12, 2012—nearly a year later—and thus the notice did not identify the amount that McGraw had to pay to reinstate her mortgage as of the time that she received the notice.” McGraw v. Fannie Mae, No. 14-CV-0142 (PJS/HB), (D. Minn. July 23, 2015)

Notice Required by 580.041.

1. Reinstatement

Reinstatement tools and alternatives:

- Qualified written request (QWR)
- Postponement
- Chapter 13 bankruptcy

2. Postponement

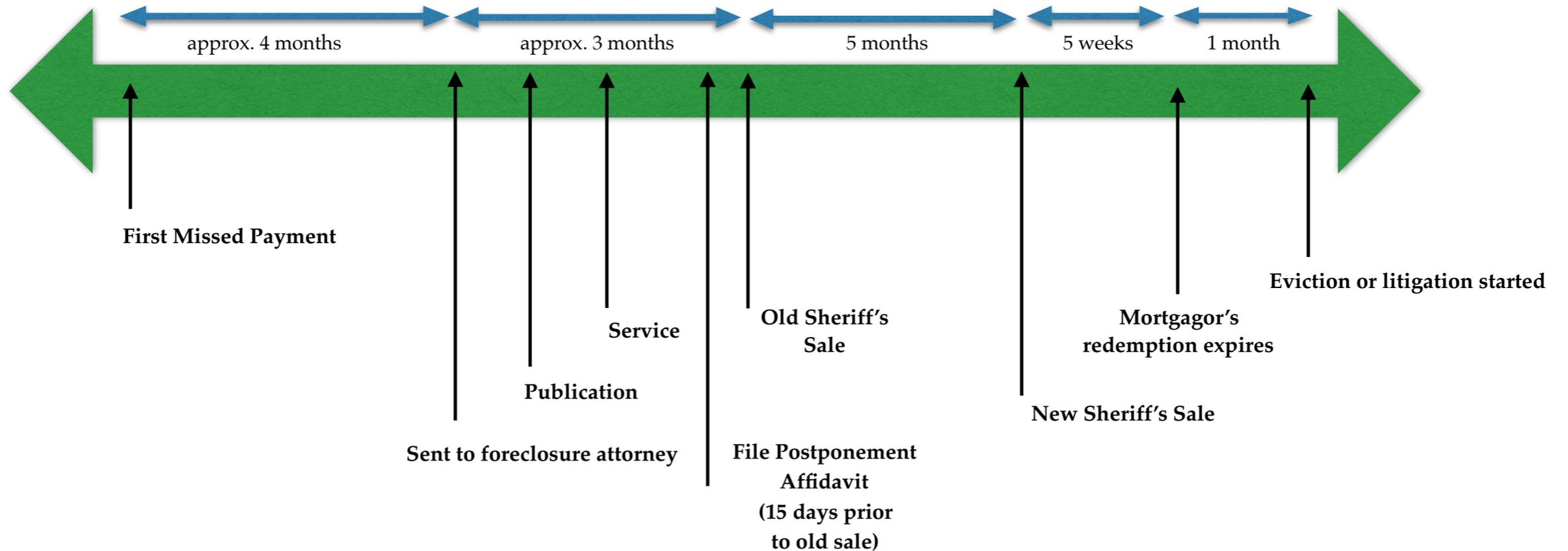
- Homestead for tax purposes; 1-4 dwelling units; mortgagor or owner
- Must i) record an affidavit of postponement, ii) file with the sheriff conducting the sale, and iii) deliver to foreclosure attorney, at least 15 days prior to the scheduled sale.

Minn. Stat. § 580.07, subd. 2(a)(2).

- Duration of postponement: 5 or 11 months.
- In any scenario, redemption period is shortened to five weeks.
- Exercised only once, regardless of reinstatement (unless allowed?)
- If bankruptcy stay stops sale after postponement, 5 weeks reduction
- Allows extra time for: loan modification, reinstatement, sale, refinancing, etc.
- *Gleason v. Deutsche Bank Nat'l Trust Co.*, 13-704 ADM/FLN

Minnesota's Foreclosure Process with Postponement

(Chapter 580 Typical Foreclosure by Advertisement Timeline)



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3. Loss Mitigation / 4. Dual Tracking

- Minn. Stat. § 582.043
- Subd 1. A servicer must:
 - Notify mortgagor in writing of options before referring to foreclosure.
 - Exercise reasonable diligence in obtaining documents and information from the mortgagor, facilitate submission and review of applications, and give mortgagor reasonable time to provide required documents.
 - Evaluate the mortgagor for all available loss mitigation options before a loan to an attorney for foreclosure.
 - Timely offer the mortgagor a loan modification or other loss mitigation if eligible.

3. Loss Mitigation / 4. Dual Tracking

- Minn. Stat. § 582.043
- Subd 2. Dual tracking:
 - Servicer cannot refer a loan to an attorney for foreclosure if have received a loss mitigation application unless:
 - Has determined mortgagor is not eligible for an loss mitigation.
 - Borrower has not accepted offer by deadline (at least 14 days)
 - If loan has already been referred to attorney, mortgagee cannot hold sheriff's sale unless:
 - Servicer denied loss mitigation, notified borrower in writing, and appeal period has passed or appeal has been denied.
 - Borrower has not accepted offer by deadline (at least 14 days)

3. Loss Mitigation / 4. Dual Tracking

- Minn. Stat. § 582.043
- Subd 2. Dual tracking:
 - If servicer receives loss mitigation application “before midnight of the seventh business day prior to the foreclosure sale date”, mortgagee cannot hold sheriff’s sale unless:
 - Servicer denied loss mitigation, notified borrower in writing, and appeal period has passed or appeal has been denied.
 - Borrower has not accepted offer by deadline (at least 14 days)
 - Servicer cannot hold sheriff’s sale if:
 - Mortgagor is performing in trial or permanent modification.
 - Short sale approved.

3. Loss Mitigation / 4. Dual Tracking

- Minn. Stat. § 582.043
- Subd 3. Relief:
 - Cause of action to set aside sheriff's sale
 - Attorney fees
 - Must record lis pendens (and therefore commence case) prior to expiration of redemption period.

3. Loss Mitigation / 4. Dual Tracking

- Minn. Stat. § 582.043, subs. 7 - conclusive presumption

Litterer v. Rushmore Loan Mgmt. Servs., LLC, 905 N.W.2d 623 (Minn. 2018): “At issue is whether extending the lis pendens deadline using the excusable neglect provision of Rule 6.022 would ‘abridge, enlarge, or modify the substantive rights of any litigant.’” Minn. Stat. § 480.051 (2016).

Presumptions are of two general types: “Those creating conclusive presumptions of law or fact, and those creating rebuttable presumptions of fact or “*prima facie*” proof. Those of the first type have met the almost uniform fate of being declared unconstitutional, as denying due process of law. (See, 20 Am. Jur., Evidence, § 10; *Juster Bros. Inc. v. Christgau*, 214 Minn. 108, 7 N.W. [2d] 501.)” *State v. Kelly*, 218 Minn. 247, 250, 15 N.W.2d 554, 557 (Minn. 1944)(citations in the original).

3. Loss Mitigation / 4. Dual Tracking

- RESPA; 12 CFR 1024.41
 - Similar, but not usually as useful to homeowner as MN state law (compare to Minn. Stat. § 582.043)
 - Requires “complete package,” but “A servicer shall exercise reasonable diligence in obtaining documents and information to complete a loss mitigation application.”
 - Must receive loss mitigation application 37 days prior to sale, (45 days before in other provisions).

3. Loss Mitigation / 4. Dual Tracking

- **Dual Tracking:** “Receives a loss mitigation application...”
Minn. Stat. § 582.043, subd. 6
- Having received Plaintiffs' Loan Modification Application more than seven days in advance of the Sheriff's Sale, including "**core documents**," a plain reading of the statute counsels that Defendant was obligated to halt the sale.
Mann v. Nationstar Mortg., LLC, No. 14-99 (MJD/HB), 2015 U.S. Dist. LEXIS 87772, at *10 (D. Minn. July 7, 2015)
- Core documents (signed and dated) could include:

Loan Modifications

- RMA or servicer application
- 4506-T tax form
- Hardship letter/information
- Past two months bank statements
- Past two months pay stubs
- Profit and loss statement for last quarter (optional)
- Utility bill
- Past two years federal taxes
- Property tax statement

Submit to servicer via fax, and also to foreclosure law firm

Forbearance

- Allowance for no payments
- Reduced payments over a period of time
- Downsides of forbearance?
- When is forbearance the most appropriate option?

Repayment Plans

- Give homeowners the opportunity to pay back arrears.
- Difference from forbearance?
- When is forbearance the most appropriate option?
- vs. Chapter 11 or 13 Bankruptcy

Foreclosure Alternatives Expiring

- HARP 2.0 (expired December 31, 2016)
- Originated before January 1, 2009; expired December 31, 2016:
 - Home Affordable Modification Program
 - HAMP Tier 2
 - Home Affordable Unemployment Program
 - Second Lien Mortgage Program

Practical Tips for Loan Modifications

- Make copies of everything submitted.
- Have confirmation receipts of submissions (i.e. e-mail or fax is preferred method).
- Mark loan number on each page.
- Handwrite the RMA application.
- HAMP Guidelines still abound?

“Tests” for a Successful Application

- Assume new payment is 31% (or 25% - 45% pending packages lenders offer) of gross monthly income:
 - 1. Will payment be large enough to support monthly PITI payment with terms of at least 2% interest and 40 years?
 - 2. Will the PI be lower than the old payment?
 - 3. Is the old payment unsustainable when reviewing the budget? Will the new payment be sustainable in the budget?
- Passing these three items indicates a high likelihood of success for the loan modification application.

“Tests” for a Successful Application

Gross Monthly Income: \$5000

31% = \$1550.00. Is this enough to support PITI? Is there a second mortgage or HOA dues that need to be paid as well?

Assuming no HOA dues, and TI estimated at \$500/mth, \$1050.00 remains.

A \$1050.00 PI payment, with 30 year terms and a 4.5% interest rate, would support a principal balance of about \$207,229.22.

5. Analysis of Foreclosure Process

“The Minnesota Supreme Court is not kidding when it says that the foreclosure-by-advertisement statutes must be strictly construed. The Minnesota Supreme Court ‘require[s] a foreclosing party to ‘show exact compliance’ with the terms of the statutes.’”

McGraw v. Fannie Mae, No. 14-CV-0142 (PJS/HB), 2015 U.S. Dist. LEXIS 96730, at *5 (D. Minn. July 23, 2015)

Citing many cases, including *Ruiz v. 1st Fid. Loan Servicing, LLC*, 829 N.W.2d 53, 56 (Minn. 2013).

5. Analysis of Foreclosure Process

- Perform title search.
- Review and analyze mortgage's requirements.
- Review and analyze sheriff's certificate.
- Review any correspondence between servicer and homeowner.
- Review any loan modification submissions.
- Review any correspondence between foreclosure firm and homeowner.

5. Analysis of Foreclosure Process - Perform Title Search

- Check for accurate and linear assignments.
- Check for postponements.
- Check for recorded power of attorney to foreclosure firm to foreclose and notice of pendency:
 - Who signed the power of attorney to foreclose?
 - Is there a recorded power of attorney for that attorney-in-fact?

5. Analysis of Foreclosure Process - Review and Analyze Sheriff's Certificate

- When recorded?
- Checklist for publications:
 - Dates/times of publications
 - Postponements
 - Assignments
- Redemption period
- Date/time of sale
- Dollar amounts match up with bid and Help for Homeowner's notice?

5. Analysis of Foreclosure Process - Correspondence with Servicer

- Did homeowner receive foreclosure notices and how?
 - Review notices: Check for reinstatement figures, contact numbers, and dates.
 - When was the last time notices were received?
- Have there been requests for or loan modification?
Requests for additional docs? Trial payment plan?
Denial letter?
- Any promises, negligence or misrepresentations by servicer?

5. Analysis of Foreclosure Process

- Loan Modification Submissions

- Are there receipts of submission(s)?
- What was the date of submission(s)?
- What was included in the submission(s)?
- Was there an appeal period? If so, how long?

Minn. Stat. 580.02

580.02 REQUISITES FOR FORECLOSURE.

To entitle any party to make such foreclosure, it is requisite:

- (1) that some default in a condition of such mortgage has occurred, by which the power to sell has become operative;
- (2) that no action or proceeding has been instituted at law to recover the debt then remaining secured by such mortgage, or any part thereof, or, if the action or proceeding has been instituted, that the same has been discontinued, or that an execution upon the judgment rendered therein has been returned unsatisfied, in whole or in part;
- (3) that the mortgage has been recorded and, if it has been assigned, that all assignments thereof have been recorded; provided, that, if the mortgage is upon registered land, it shall be sufficient if the mortgage and all assignments thereof have been duly registered;
- (4) before the notice of pendency as required under section [580.032](#) is recorded, the party has complied with section 580.021; and
- (5) before the foreclosure sale, the party has complied with section [582.043](#), if applicable.

Minn. Stat. 58.01

58.01 CITATION.

This chapter shall be cited as the "Minnesota Residential Mortgage Originator and Servicer Licensing Act."

Commonly: MOSLA, "Chapter 58 claims"

Minn. Stat. 58.18

"Minnesota Statutes § 58.18, subd. 1, provides: 'A borrower injured by a violation of the standards, duties, prohibitions, or requirements of section [] 58.13 ... shall have a private right of action....' In other words, section 58.18 gives borrowers a private right of action to sue for violations of section 58.13. So, if Gretsch alleges a violation of section 58.13, the plain language of section 58.18 gives her standing to pursue that claim."

***Gretsch v. Vantium Capital, Inc.*, 846 N.W.2d 424 (Minn. 2014).**

Minn. Stat. 58.18

58.18 PRIVATE RIGHT OF ACTION.

Subdivision 1.**Remedies.** A borrower injured by a violation of the standards, duties, prohibitions, or requirements of sections [58.13](#), [58.136](#), [58.137](#), [58.16](#), and [58.161](#) shall have a private right of action and the court shall award:

- (1) actual, incidental, and consequential damages;
- (2) statutory damages equal to the amount of all lender fees included in the amount of the principal of the residential mortgage loan as defined in section [58.137](#);
- (3) punitive damages if appropriate, and as provided in sections [549.191](#) and [549.20](#); and
- (4) court costs and reasonable attorney fees.

Subd. 2.**Private attorney general statute.** A borrower injured by a violation of the standards, duties, prohibitions, or requirements of sections [58.13](#), [58.136](#), [58.137](#), [58.16](#), and [58.161](#) also may bring an action under section [8.31](#). A private right of action by a borrower under this chapter is in the public interest.

Subd. 3.**Remedies cumulative.** The remedies provided in this section are cumulative and do not restrict any other right or remedy otherwise available to the borrower.

Subd. 4.**Exemption.** This section does not apply to a residential mortgage loan originated by a federal or state chartered bank, savings bank, or credit union.

Minn. Stat. 58.13

58.13 STANDARDS OF CONDUCT.

Subdivision 1. **Generally.** (a) No person acting as a residential mortgage originator or servicer, including a person required to be licensed under this chapter, and no person exempt from the licensing requirements of this chapter under section [58.04](#), except as otherwise provided in paragraph (b), shall:

(3) unreasonably delay the processing of a residential mortgage loan application, or the closing of a residential mortgage loan...

(5) fail to perform in conformance with its written agreements with borrowers, investors, other licensees, or exempt persons;

(8) violate any provision of any other applicable state or federal law regulating residential mortgage loans including, without limitation, sections [47.20](#) to [47.208](#) and [47.58](#);

(9) make or cause to be made, directly or indirectly, any false, deceptive, or misleading statement or representation in connection with a residential loan transaction including, without limitation, a false, deceptive, or misleading statement or representation regarding the borrower's ability to qualify for any mortgage product;

(clauses (9) and (19), were found preempted for national banks by the federal National Bank Act in *Bohnhoff v. Wells Fargo Bank, N.A.*, 853 F.Supp.2d 849 (D. Minn. 2012)).

7. Short Sales

- Selling for less than the amount owed
- Does a short sale make sense?
 - Homeowner's sense of control
 - Funds for other liens or arrears?
 - Credit reporting
 - Profit?
 - Realtor transaction
- Community benefits

Post - Sheriff's Sale

- What was the bid at the sale?
- Who was the high bidder?
- Was the bid low or high?
 - If high, or the home is underwater, loan modification might be helpful, but other options such as cash for keys may be better.
 - If the bid was low, homeowner can look at selling home for profit or looking to investors.

7. Selling a redeemable interest..

- If the mortgagor does not redeem the property, junior creditors may redeem.
- Junior creditors must file notice of intent to redeem one week prior to expiration of redemption period. Minn. Stat. § 580.24
- Must deliver notice of intent to redeem to sheriff.
- If one junior creditor redeems, lower junior creditor must pay redemption amount plus senior creditor's lien - if senior creditor redeems.
- Each has seven days after senior lienholder's redemption

- This creates an opportunity for speculators to take and redeem the property without paying off other liens.
- Example:
 - First mortgage foreclosed, home has four junior liens. Second mortgage, mechanics lien, two judgments.
 - Foreclosing mortgagee underbids at sheriff's sale.
 - Home would be a good deal if could redeem without paying junior creditors.
 - Foreclosed homeowner and speculator enter into mortgage (which now has lowest position lien).
 - Speculator notifies intent to redeem.
 - If no other junior creditor's redeem, speculator takes home without other junior liens.
 - Opportunity for scammers to create fictional liens.
 - Otherwise legal.

Criminal Concerns...

United States v. Springer (Iowa)

"The indictment charged Smith and Steven with bank fraud for misrepresenting and concealing the fact that they had agreements to flip the properties after the short sale." *United States v. Springer*, 866 F.3d 949, 952 (8th Cir. 2017).

"The HUD-1s stated that Smith and Steven had brought a certain amount of cash to the settlement when in fact they had not; the money they used to pay for the properties arrived later, after the settlement. By completing the HUD-1s this way, they were able to conceal that they were about to close on a quick flip of the property." *United States v. Springer*, 866 F.3d 949, 956 (8th Cir. 2017).

9. Deeds-in-lieu of Foreclosure

- Avoid foreclosure in exchange for surrender of title to and possession of the property
- Issues to consider:
 - Assets of homeowner
 - Junior liens
 - Homeowner's delinquency status
 - Deficiency judgments

Questions?

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