Commercial and Residential Foreclosure by Advertisement and Reinstatement and Redemption (MN)

A Practical Guidance® Practice Note by Mark W. Vyvyan, Fredrikson & Byron P.A.

Mark W. Vyvyan
Fredrikson & Byron P.A.

This practice note discusses foreclosure of Minnesota mortgages by advertisement. In Minnesota, foreclosure by advertisement is a creature of statute. See Minn. Stat. Ann. Ch. 580. Foreclosure by advertisement involves publication of a notice of sheriff's sale for the period required by statute. You must also serve the notice of sale on the occupants of the property to be sold. If the defaults under the mortgage, statutory attorney's fees, and costs are not paid before the sheriff's sale, the sheriff sells the property to the highest bidder. If the property is not redeemed during the period of redemption prescribed by statute, the purchaser at the sheriff s sale becomes the owner of the property you are foreclosing on.

For guidance on foreclosure by action in Minnesota, see Commercial and Residential Foreclosure by Action (MN). For guidance on lending in Minnesota, see Commercial Real Estate Financing Transactions (MN) and Commercial Real Estate Financing (MN).

Preliminary Concerns

Foreclosure by advertisement is available only if certain prerequisites exist. If those requirements are not met, your client will need to foreclose its mortgage by commencing a lawsuit, a process called foreclosure by action. For a detailed review of foreclosure by action in Minnesota, see Commercial and Residential Foreclosure by Action (MN).

The statutory prerequisites necessary to entitle your client to foreclose by advertisement are as follows:

- Foreclosure must occur within 15 years of maturity of the mortgage (or the date of the mortgage if no maturity date is stated therein). Minn. Stat. Ann. § 580.01, Minn. Stat. Ann. § 541.03.
- The mortgage must contain a power of sale. Minn. Stat. Ann. § 580.01.
- A default must have occurred by which the power of sale has become operative.
- No lawsuit has started, or if started it has been discontinued, or if judgment has been rendered, an execution has been returned unsatisfied. Minn. Stat. Ann. § 580.02.
- The mortgage and assignments, if any, must be recorded prior to starting foreclosure. Minn. Stat. Ann. § 580.02; Ruiz v. 1st Fid. Loan Servicing, LLC, 829 N.W.2d 53 (Minn. 2013). In Ruiz, the Minnesota Supreme Court made clear that failing to comply with even seemingly minor statutory requirements in a foreclosure by advertisement renders the foreclosure void, not simply voidable. Accordingly, you will need to ensure compliance with all statutory requirements. The result in *Ruiz* has caused some practitioners to favor foreclosure by action in order to obtain the certainty of judicial imprimatur. See Lindberg v. Gebo, 381 N.W.2d 905 (Minn. Ct. App. 1986) (creditor's rights to foreclose vest after Section 580.02 elements are satisfied).

Before foreclosing a mortgage, you should ensure that the following procedural first steps have been completed:

- Record or register mortgage and assignments, if any, if not already recorded or registered.

- If the property is owner-occupied residential real property, provide the borrower with notice of opportunity for foreclosure prevention counseling under Minn. Stat. Ann. § 580.021. For owner-occupied residential real property, also ensure compliance with the loss mitigation / dual tracking provisions of Minn. Stat. Ann. § 582.043.
- A power of attorney must be executed, acknowledged, and recorded before sale in the county where foreclosure sale occurs. Minn. Stat. Ann. § 580.05. Use Minnesota Uniform Conveyancing (MUC) Blank 60.1.1 for individual mortgagee or 60.1.2 for corporate mortgagee.
- If registered (so-called Torrens) land is involved, the power of attorney must be recorded before publishing the foreclosure notice. Minn. Stat. Ann. § 508.57.
- A notice of pendency must be recorded before the first date of publication of the notice of sale but not more than six months before the first date of publication. Minn. Stat. Ann. § 580.032, subd. 5.
- The abstract should be continued or a registered property abstract must be obtained to determine the status of title and holders of interest in property. Alternatively, the tract index or the certificate of title should be checked and name searches as to all owners must be obtained. These searches will reveal any bankruptcies that could prevent commencement of foreclosure proceedings.

Notice of Foreclosure Sale, Homestead Rights, and Separate Tracts

Notice of Sale

The requisites of notice of the sale are provided in Minn. Stat. Ann. § 580.04. Pursuant to Minn. Stat. Ann. § 580.025, the notice of sale should include the foreclosure data specified therein. However, the omission of that data does not invalidate the foreclosure. Id.

As mentioned above, strict compliance with the statute is required. Ruiz, 829 N.W.2d at 59. You should review each of the items required to be included in the notice pursuant to Minn. Stat. Ann. §§ 580.04 and 580.045.

You should date the notice of sale after the power of attorney. Some practitioners find it safest to use the pre-printed form of sale (MUC Blank 60.2.1). If registered land is included, you should state in the notice when and where the mortgage was registered and the fact of registration.

For certain abandoned, nonagricultural, residential dwellings of less than five units and less than 10 acres, the time allowed for redemption by the mortgagor may be reduced to five weeks pursuant to judicial order (See Minn. Stat. Ann. § 582.032). If these circumstances are present in your foreclosure, you should ensure that the notice contains the information set forth in Minn. Stat. Ann. § 580.04, subd. 7.

You will need to determine the period of redemption. While a six-month period of redemption is most common, other periods may apply. Minn. Stat. Ann. § 580.24. Redemption is discussed in more detail below.

You will need to work with the sheriff's office to determine the time and place that the sale will be conducted. Make sure you schedule the sale far enough in advance to permit proper service of notice. You may need to give notice of the foreclosure to junior lienholders. Minn. Stat. Ann. § 580.032 allows other lienholders to request notice of a foreclosure by advertisement. If such a notice has been recorded in the real estate records, you will need to provide notice to the party requesting notice at least 14 days prior to the sheriff's sale. Minn. Stat. Ann. § 580.032, subd. 4. You must also give notice to mechanic's lien claimants. Minn. Stat. Ann. § 580.032, subd. 1.

Failure to give notice does not invalidate the foreclosure. If the notice of sale is not provided to a person with a properly recorded request for notice, however, the person requesting notice has a cause of action against the person foreclosing the mortgage for money damages for the lesser of (1) the equity in the mortgaged premises that would have been available to the person if the person had redeemed and (2) the value of the person's redeemable interest. An action for damages resulting from failure to mail notice must be brought within two years of the date of the sheriff's sale.

Even if the notice of sale was not given to a person requesting notice, the person requesting notice has no cause of action against the person foreclosing the mortgage if, at least 60 days before the mortgagor's period of redemption expires, you mail a copy of the sheriff's certificate of sale to the person requesting notice. Minn. Stat. Ann. § 580.032, subd. 7.

Notice of Homestead Rights

If the mortgage being foreclosed is on real property containing the homestead of the mortgagor, Minn. Stat. Ann. § 582.041, subd. 2(a) requires that you serve notice of the homestead rights of the mortgagor (in 10-point capitalized letters) with the notice of foreclosure sale on the person in possession of the property. As provided in Minn. Stat. Ann. § 582.041, subd. 2, you do not need to publish the homestead notice. This provision regarding notice of homestead rights may have been intended to apply only to foreclosures of mortgages on agricultural property but, by its terms, applies to foreclosures on any property containing the homestead of the mortgagor. Also, if the mortgage you are foreclosing is on agricultural property, you will need to determine whether Minnesota's Farmer-Lender Mediation Act (see Minn. Stat. Ann. Ch. 583) applies to the subject property and then ensure compliance with the act if necessary.

Notice of Separate Tracts

If the mortgage is on property that is agricultural land and the property contains separate tracts, Minn. Stat. Ann. § 582.042 requires that the person in possession of the property be notified that the separate tracts may be sold and redeemed separately. You must serve this notice of the ability to designate separate tracts with the notice of foreclosure sale. The form of the notice is provided in Minn. Stat. Ann. § 582.042.

Additional Residential Notices

For residential properties, you must also serve additional notices with the notice of sale. These notices include statutory notices for "Help for Homeowners," "Notice of Redemption Rights," and "Foreclosure Advice to Tenants." Minn. Stat. Ann. § 580.041, subds. 1(a), 1(b), 2(a), and 2(b) and Minn. Stat. Ann. § 580.042. You should review these statutory provisions closely as they require specific requirements, such as using colored sheets of paper. In addition, Minn. Stat. Ann. § 580.041, subd. 1(b) also requires that you provide the notices under that section to the mortgagor with each subsequent communication about the foreclosure up to the date of sale.

Publishing Notice of Sale

You must publish the notice once a week in a qualified newspaper for six weeks. Minn. Stat. Ann. § 580.03. See Minn. Stat. Ann. § 645.11 for publication requirements.

As a best practice, you should send a letter or email to the publisher requesting publication, identify specific dates of publication. When clippings of the first publication are received, you should review them and have corrections made immediately. Errors in the first publication are common.

Service of Notice of Mortgage Foreclosure Sale

Minn. Stat. Ann. § 580.03 requires that you serve the notice of sale on the person in possession of the mortgaged premises, if the premises are occupied, at least four weeks prior to sale. Service is made in same manner as in a civil action in district court. Minn. R. Civ. P. 4 sets forth the manner of service.

Service on a Corporation

Regarding service on a corporation, see Minn. Stat. Ann. § 302A.901.

Tenant-Occupied Property

If property is occupied by tenants, your safest course is to serve the tenants. In R.I. Hosp. Tr. Co. v. Calhoun Beach Holding Co., 191 Minn. 354, 254 N.W. 466 (1934), however, service on a "resident manager found to be in possession of grounds" was held sufficient. Moreover, service upon an owner-mortgagor occupying a part of the property was sufficient even if the tenant occupying the other portion of property was not served. Holmes v. Crummett, 30 Minn. 23, 13 N.W. 924 (1882). Yet, where the owner or its agent cannot be found, tenants must be served. Skartum v. Koch, 174 Minn. 47, 218 N.W. 446 (1928).

Service on Person in Possession

You are only required to serve the person in possession if the premises are "actually occupied." Minn. Stat. Ann. § 580.03. You must serve notice on the occupant if evidence of possession, such as closed and locked windows and doors, household goods and chattels, furnishings and kitchen utensils exist, even if no one is actually residing on the property. St. Paul Swimming Club v. First State Bank, 148 Minn. 430, 182 N.W. 514 (1921).

In making a determination of whether the premises are actually occupied, consider that an owner of property was held not entitled to service as "a person in possession of the mortgaged premises" where the trial court found that its occupancy of the property was "sporadic and incidental." Varco-Pruden Bldgs. v. Becker & Sons Constr., Inc., 361 N.W.2d 457 (Minn. Ct. App. 1985).

Service of notice on a "caretaker" was sufficient where the caretaker resided regularly on the mortgaged property over the course of a summer. United States v. House, 100 F. Supp. 2d 967 (D. Minn. 2000). In finding service sufficient, the *House* court cited a series of Minnesota decisions finding that where the rights of the mortgagor were not prejudiced by a lack of notice, service was generally considered valid. House, 100 F. Supp. 2d at 977. You may not wish to rely on the *House* decision in light of the *Ruiz* court's determination that a lack of prejudice did not excuse statutory noncompliance. Ruiz, 829 N.W.2d at 59.

If premises are vacant and unoccupied, an affidavit of vacancy should be obtained from your process server. You may also wish to direct your process server to take pictures documenting the lack of occupation.

If premises are occupied, but service cannot be effected on the occupant, the mortgagee can consider service by publication under Minn. R. Civ. P. 4.04, but your safest course is to foreclose by action.

It is best practice to serve all persons who may claim to be in possession. However, service on a person with an interest inferior to the interest of other persons in possession is not required when the lack of service does not prejudice the party complaining of the lack of service. Farm Credit Bank v. Kohnen, 494 N.W.2d 44 (Minn. Ct. App. 1992), rev. denied.

Tax Liens

To ensure clean title following the foreclosure, you will need to follow the steps necessary to extinguish any state and federal tax liens. Tax liens, although junior to the mortgage being foreclosed, may survive foreclosure unless the statutory notices explained in this section are given or a discharge is granted under 26 U.S.C. § 6325(b).

Thirty days prior to the date of sheriff's sale, you should have a state and federal tax lien search done. If a federal lien is present, at least 25 days prior to the sale, you should give notice of the sale containing the information required in the statute to the district director of the IRS by certified mail. 26 U.S.C. § 7425(c)(1) and Treas. Reg. § 301.7425-3(d). If a state tax lien is present, at least 25 days prior to the sale, you should give notice of the sale containing the information required in the statute to the Minnesota Commissioner of Revenue. Minn. Stat. Ann. § 270C.63, subd. 11.

If a sale occurs and the taxing authority did not receive the required notice, the lien survives but conflicting authority exists regarding the effect of the sale. See, e.g., Baldwin County Savings & Loan Ass'n v. U.S., 81-2 U.S.T.C. ¶ 9619 (S.D. Ala. 1981) (mortgage cannot be re-foreclosed and tax liens are promoted to senior status; property may be sold at public auction to satisfy the liens). But see Ridgway v. Mirkovich, 194 Minn. 216, 260 N.W. 303 (1935) (judgment sale, regularly conducted, cannot be voided even though judgment creditor inadvertently failed to realize that property was subject to a prior mortgage); Gerdin v. Princeton State Bank, 371 N.W.2d 5 (Minn. Ct. App. 1985), aff'd on other grounds, 384 N.W.2d 868 (Minn. 1986) later proceeding, 414 N.W.2d 765 (Minn. Ct. App. 1987) (the purchaser at a foreclosure sale may set aside the sale because the mortgagee failed to give proper notice to state and federal taxing authorities so as to eliminate state and federal tax liens; rationale is that sale has failed in its essential purpose); and Bartels v. Blattner, 595 N.W.2d 527 (Minn. Ct. App. 1999) (A contract for deed vendor's failure to notify the IRS of the cancellation of a contract for deed to property subject to an IRS lien does not void the cancellation. The property, however, remains subject to the IRS lien.).

Your safest course is to request that the taxing authority acknowledge receipt of the required notice.

After notice is given, you should prepare an affidavit setting forth the fact of such notice and file it as part of the sheriff's certificate and foreclosure record. Minn. Stat. Ann. § 580.15(4).

Sheriff's Sale

Prior to the sheriff's sale, you should do the following:

- Working with your client, calculate the bid amount, which will include the amount of mortgage debt (principal and interest), escrow shortages, and statutory attorneys' fees and costs in connection with the foreclosure.
- If a deficiency is desired, the bid should not be the full amount of the mortgage debt, but instead only the desired amount, usually the value of the property.

The sale is a public auction conducted by the sheriff. The mortgage holder is the seller, and sale is to highest bidder. You should attend the sale and bid on behalf of your client. Usually, the only bidder at the sale is the holder of the mortgage.

Time and Place of Sale

The sale is conducted by the sheriff or the sheriff's deputy in the county where the property, or some part thereof, is located, between 9:00 a.m. and setting of the sun. Minn. Stat. Ann. § 580.06. The time and place of the sale are determined by the foreclosing party and are specified in its notice of foreclosure. You will need to work with the sheriff with regard to the timing of the sale. Most sales are held at the county courthouse at 10:00 a.m.

If the mortgage covers real estate in more than one county, the sale may be conducted in one of those counties and the record of the foreclosure proceedings should be recorded in all counties where the property is located. Minn. Stat. Ann. § 580.13.

Postponement of Sale

The sale may be postponed, by the party conducting the foreclosure, by publishing a notice of such postponement in the newspaper in which the original notice was published, mailing the occupant notice of the postponement and the date on which the occupant will need to vacate the premises. Minn. Stat. Ann. § 580.07, subd. 1. For homestead properties, the mortgagor or owner can postpone the sale for five or eleven months (depending on the applicable redemption period). However, that postponement does not extend the redemption period. Minn. Stat. Ann. § 580.07, subd. 2.

Separate and Distinct Tracts

If the mortgaged premises consist of separate and distinct farms or tracts, they must be sold separately, and no more can be sold than are necessary to satisfy the amount due the mortgage, plus interest; taxes paid; and costs of sale. Minn. Stat. Ann. § 580.08. In order for a farm or tract to be considered "distinct," there must be some natural boundary or separation. Leeco, Inc. v. Cornerstone Bank, 898 N.W.2d 653 (Minn. Ct. App. 2017), rev. denied. When making the decision whether to sell parcels together, you should keep in mind that Minnesota courts have found that a failure to strictly comply with this requirement voids the sale. Hunter v. Anchor Bank, N.A., 842 N.W.2d 10 (Minn. Ct. App. 2013), rev. denied. Yet the mortgagor's right to have separate and distinct tracts sold separately may be waived. John W. Swenson & Sons, Inc. v. Aetna Life Ins. Co., 571 F. Supp. 895 (D. Minn. 1983); In re Kjeldahl, 52 B.R. 916, on remand, 52 B.R. 926 (D. Minn. 1985).

Credit Bid

If the mortgagee is the purchaser at the sale, it need not pay cash to the sheriff. Rather, mortgagee can make a "credit bid." Any other purchaser, however, must pay cash or other terms satisfactory to the seller (except as to surplus, which must be paid in cash).

Deficiency

If the amount paid for the property at sale is less than the amount owed on the mortgage debt and costs of sale, the difference is a "deficiency." Whether the mortgagee can collect this deficiency from the mortgagor depends on application of Minn. Stat. Ann. § 582.30.

Surplus

If the amount paid for the property is greater than the amount owed on the mortgage debt and the costs of sale, the difference is a "surplus":

- The sheriff must pay the surplus to the mortgagor or the mortgagor's "assigns."
- "Assigns" includes, among others, junior mortgagees. Fuller v. Langum, 37 Minn. 74, 33 N.W. 122 (1887); Brown v. Crookston Agricultural Ass'n, 34 Minn. 545, 26 N.W. 907 (1886). "Assigns" have first priority to proceeds and any remainder is paid to the owner.
- If the sheriff has any doubt regarding entitlement to a surplus, it shall be paid into the district court pursuant to Minn. R. Civ. P. 67.02. Op. Atty. Gen. 301 c-1, Nov. 24, 1959.

Sheriff's Certificate

The purchaser at the sale receives a sheriff's certificate, which you should prepare prior to the sale. The contents are specified in Minn. Stat. Ann. § 580.12. In general, the certificate must be recorded within 20 days after the sale. However, if the certificate indicates a five-week redemption period under Minn. Stat. Ann. § 582.032, the certificate must be recorded within 10 days after the sale. Failure to record the certificate within the required time likely invalidates the sale. See Hudson v. Upper Michigan Land Co., 165 Minn. 172, 206 N.W. 44 (1925).

Post-sale Filings

To establish the foreclosure process of record, you should record evidence of the sale. Minn. Stat. Ann. § 580.15. Evidence includes affidavits of publication of the notice of sale and publication of the notice of postponement; affidavits reciting service of notice or affidavits of vacancy; affidavits regarding the military status of the owner of the property at the time of sale (under the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. App. § 532, no foreclosure can occur while the mortgagor is in the military or within three months thereafter); and affidavits regarding notice to taxing authorities holding filed tax liens.

Within 10 days of filing of the sheriff's certificate of sale, you must file with the county recorder or registrar of titles an affidavit setting forth the costs and disbursements of the foreclosure, including attorneys' fees. Minn. Stat. Ann. § 580.17. Make sure this affidavit is ready at the sheriff's sale.

Reinstatement and Redemption

Minnesota law allows two ways for a foreclosed-upon mortgagor to bring the loan current and stop the foreclosure. The first is reinstatement, which applies before the sheriff's sale, and requires the mortgagor to cure any missed payments. The second method, redemption, applies after the sheriff's sale and requires the mortgagor to pay the amount bid at sale, plus interest. Reinstatement and redemption rights are basically the same in both foreclosure by action and advertisement, unless otherwise noted. Minn. Stat. Ann. § 580.30 is expressly applicable to redemption rights in both foreclosure by action and advertisement. Minn. Stat. Ann. §§ 580.23 and 582.032 are applicable to foreclosures by advertisement and Minn. Stat. Ann. § 581.10 makes those sections applicable to foreclosures by action.

Reinstatement

Reinstatement Timing

At any time before the sheriff's sale, the mortgagor, owner, or any holder of a subsequent encumbrance or lien may reinstate the mortgage. Minn. Stat. Ann. § 580.30. Within three days of a request from the mortgagor, the mortgagee must inform the mortgagor of the amount necessary to reinstate. Minn. Stat. Ann. § 580.30, subd. 1.

Reinstatement may occur even if the mortgage debt has been accelerated. Davis v. Davis, 293 Minn. 44, 196 N.W.2d 473 (1972). In this situation, only delinquent payments, as distinguished from amounts due because the mortgagee has invoked the acceleration clause, must be paid to reinstate.

In In re Norwest Bank Metrowest Nat'l Asso., 396 N.W.2d 896 (Minn. Ct. App. 1986), the Minnesota Court of Appeals held that a vendee on a contract for deed had validly reinstated the vendor-mortgagor's mortgage debt. In addition, the court found that neither the acceleration clause nor the due-on-sale provision in the mortgage prevented reinstatement by the contract vendee.

Reinstatement Payment Amount

To reinstate, the following may be paid to the holder of the mortgage, the attorney foreclosing the mortgage, or the sheriff:

- 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 proceeding, including insurance and delinquent taxes
- Interest to the date of payment
- Cost of publication and service of process or notices
- Attorneys' fees in the amount of the greater of $150.00 or one-half of the amount authorized in Minn. Stat. Ann. § 582.01 (see generally Poppler v. O'Connor, 306 Minn. 539, 235 N.W.2d 617, 619 (1975); In re Borden, 104 BR 167, 170 (Bankr. D. Minn. 1989)) –and–
- Other lawful disbursements necessarily incurred in connection with the foreclosure

In First Trust Co., Inc. v. Leibman, 445 N.W.2d 547 (Minn. 1989) (reversing 430 N.W.2d 257 (Minn. Ct. App. 1988)), the Minnesota Supreme Court interpreted Minn. Stat. Ann. § 580.30 to require payment of "all amounts actually due upon the mortgage at the time of the tender [of the reinstatement], plus interest on the delinquent payments from the due date to the date of tender and statutory costs." This decision reversed the court of appeals' previous interpretation that Minn. Stat. Ann. § 580.30 required payment of only the amount due when the foreclosure proceedings were commenced. The court of appeals also determined that "other lawful disbursements necessarily incurred in connection with the proceedings by the party foreclosing" included inspection and abstract fees. Although most foreclosing attorneys have always included such fees in the amount necessary to reinstate, the decision has eliminated any doubt on that issue.

A valid reinstatement ends the foreclosure. Minn. Stat. Ann. § 580.30.

Redemption

The mortgagor, or the mortgagor's personal representative or assigns, has the initial right of redemption.

Redemption Period

The period of redemption is set forth in Minn. Stat. Ann. §§ 580.23 and 582.032:

- The period is six months except as provided in Minn. Stat. Ann. § 580.23 subd. 2 or Minn. Stat. Ann. § 582.032.
- For mortgages executed after December 31, 1989, a five-week redemption period exists pursuant to court order for certain abandoned, nonagricultural, residential dwellings of less than five units and less than 10 acres. Minn. Stat. Ann. § 582.032.
- The period is 12 months if:
    - o The mortgage was executed prior to July 1, 1967
    - o The amount due and owing as of the date of the notice of foreclosure sale is less than 66 2/3% of the original principal amount secured by the mortgage
    - o The mortgage was executed prior to July 1, 1987, and the mortgaged premises, as of the date of execution of the mortgage, exceed 10 acres in size

- The mortgaged was executed prior to August 1, 1994, and the mortgaged property, as of the date of execution of the mortgage, exceeded 10 acres but did not exceed 40 acres in size and was in agricultural use as defined in Section 40A.02, subd. 3 (an affidavit signed by the mortgagor and a certificate signed by the county assessor stating that property is not in agricultural use as defined in Minn. Stat. Ann. § 40A.02, subd. 3 may be recorded as prima facie evidence of the facts contained in the affidavit and certificate (Minn. Stat. Ann. § 580.23, subd. 3))
- The mortgaged property, as of the date of execution of the mortgage, exceeded 40 acres in size (Minn. Stat. Ann. § 580.23, subd. 2)
- The mortgage was executed on or after August 1, 1994, and the mortgaged property, as of the date of execution of the mortgage, exceeded 10 acres but did not exceed 40 acres in size and was in agricultural use (for purposes of mortgages executed on or after August 1, 1994, "in agricultural use" means that at least a portion of the mortgaged property was classified for ad valorem tax purposes as either class 2a agricultural homestead property, class 2b rural or agricultural nonhomestead property, or class 1b agricultural homestead property under Minn. Stat. Ann. § 273.13, subd. 22–23, or exempt wetlands under Minn. Stat. Ann. § 272.02, subd. 1, clause (10)) –or–
- The mortgage qualifies as a "reverse mortgage" under Minn. Stat. Ann. § 47.58

For mortgages executed on or after August 1, 1994, a mortgagor, before or at the time of granting the mortgage, may waive in writing the mortgagor's right to have a 12-month redemption period based upon the mortgaged property being in agricultural use as of the date of execution of the mortgage. The written waiver must either be a separate document or a separately executed and acknowledged addendum on a separate page from the mortgage. Minn. Stat. Ann. § 580.23, subd. 4.

The redemption period commences at date of the sale for a foreclosure by advertisement, Minn. Stat. Ann. § 580.23, and from the date of the order of confirmation of the sale for a foreclosure by action, Minn. Stat. Ann. § 581.10.

Redemption Payment Amount

The amount to be paid includes the following:

- The amount for which property was sold at foreclosure sale
- Interest on the amount paid at the sale at the rate provided in the mortgage, and if no rate is provided in the mortgage, at the rate of 6% per annum
  - Note that prior to March 19, 1982, Minn. Stat. Ann. § 580.23 provided that interest was at the rate provided in the mortgage, not to exceed 8%. It is not clear whether the statutory change eliminating the 8% ceiling on interest applies to mortgages executed before March 19, 1982. See Hallibert v. Porter, 28 Minn. 496, 11 N.W. 84 (1881), where the Minnesota Supreme Court held that application of a statute changing the rate of interest payable on redemption would result in an impairment of obligation of contract as to mortgages executed before the enactment of the statute.
- Amounts paid pursuant to Minn. Stat. Ann. § 582.03
  - The purchaser at the sale may, during the redemption period, pay taxes, assessments, insurance premiums, and amounts in default on any prior or superior mortgage, and the amount so paid, with interest, shall be a part of the sum required to redeem. Such payments shall be proved by the affidavit of the purchaser or the purchaser's agent or attorney (MUC Blank 60.5.3), which must be filed with the county recorder or registrar of titles, and a copy thereof furnished to the sheriff at least 10 days before the expiration of the redemption period. Minn. Stat. Ann. § 582.03. (The sheriff should admit service on the reverse side of the original affidavit before recording).
- Amounts paid pursuant to Minn. Stat. Ann. § 582.031, subd. 3, which allows the holder of the mortgage or sheriff's certificate to add costs incurred to protect the vacant premises from waste to the principal balance of the mortgage (These costs are added to the redemption price if incurred after the foreclosure sale.)

How Redemption Is Made

Redemption is made as follows (Minn. Stat. Ann. §§ 580.24–580.26):

- By paying the appropriate amount to the holder of the sheriff's certificate, or the sheriff –and–
- Also providing to such person or officer the following:
  - A certified copy of document (or original, etc.) evidencing the right of redemption, including assignments
  - An affidavit showing the amount due on the lien of the person seeking to redeem

The documents required to be produced for redemption must be recorded within 24 hours of redemption (or mailed as provided in the statute if redemption is made at a place other than the county seat). Minn. Stat. Ann. §§ 580.25, 580.26.

If an owner has redeemed, the certificate of redemption must be recorded within four days of the expiration of the owner's period of redemption; if a creditor redeems, the certificate of redemption must be recorded within four days after the redemption.

An owner's failure to record the certificate of redemption voids the redemption against a subsequent creditor's redemption. Tesch v. Drew, 177 Minn. 563, 225 N.W. 815 (1929).

While the essential requirements of the redemption statute must be strictly adhered to, only substantial compliance with some of the formal requirements is required. Timeline, LLC v. Williams Holdings No. 3, LLC, 698 N.W.2d 181 (Minn. Ct. App. 2005), rev. denied.

If the mortgagor does not redeem, creditors having a lien, legal or equitable, upon the mortgaged premises, or some part thereof, subsequent to the foreclosed mortgage, may redeem. Minn. Stat. Ann. § 580.24. To redeem, a creditor must record a notice of intention to redeem more than one week before expiration of the mortgagor's redemption period. Minn. Stat. Ann. § 580.24. First Nat'l Bank v. Boler, 291 Minn. 185, 190 N.W.2d 94 (1971). But see Remole v. Jonathan Development Corp., 277 N.W.2d 362 (Minn. 1979) (assignee of mortgagee's interest in sheriff's certificate had no standing to complain of a junior lienholder's late filing of notice of intent to redeem absent a showing of prejudice).

In addition to the notice of intention to redeem, a creditor must also file in the real estate records "all documents necessary to create the lien on the mortgaged premises and to evidence the creditor's ownership of the lien, including a copy of any money judgment necessary to create the lien." Minn. Stat. Ann. § 580.24(a)(2).

A creditor must also file an affidavit showing the amount then actually claimed due on the creditor's lien and required to be paid on the lien in order to redeem from the creditor. Minn. Stat. Ann. § 580.25.

If more than one creditor has filed a notice of intent to redeem, redemption is made in the order of priority of creditors:

- Each creditor, in order of priority, has a seven-day period to redeem, commencing with the expiration of previous periods of redemption. The most senior creditor's seven-day period commences on expiration of the mortgagor's period of redemption. The second most senior creditor's seven-day period of redemption commences upon expiration of most senior creditor's period, and so forth, until each creditor has had a seven-day period of redemption.
- Saturdays, Sundays, legal holidays, and the first day following the prior redemption period are to be included in computing the seven-day redemption period. If, however, the last day of the redemption period falls on a Saturday, Sunday, or a legal holiday, that day is omitted from the computation. Minn. Stat. Ann. § 580.24.
- All mechanics lienholders who have coordinate liens have one combined seven-day redemption period. Minn. Stat. Ann. § 580.24(b).
- Minn. Stat. Ann. § 580.24does not provide a mechanism to determine the priority of creditors to foreclosed property. That priority, however, for redemption purposes is determined by the time of recording of the creditor's lien, without regard to the nature of the lien. U.S. v. Dairy Farm Leasing Co., 747 F. Supp. 1335, 1338 (D. Minn. 1989); Lowe v. Reierson, 201 Minn. 280, 276 N.W. 224 (1937).

A creditor makes redemption as follows (Minn. Stat. Ann. §§ 580.23–580.25):

- From the purchaser at the foreclosure sale by paying the amount paid as provided in Minn. Stat. Ann. § 580.23 –and–
- From a prior redeeming creditor, by paying the amount paid by such prior redeeming creditor plus the amount of the lien of such prior redeeming creditor
  - o The amount due the prior redeeming creditor's lien is established in that creditor's affidavit presented as part of its redemption and recorded within 24 hours of redemption as provided in Minn. Stat. Ann. §§ 580.24(c) and 580.25.

A redeeming creditor need not take title to and possession of the foreclosed property in order for the redemption to be valid. City of St. Paul v. St. Anthony Flats Ltd. Partnership, 517 N.W.2d 58 (Minn. Ct. App. 1994).

Redemption of Federal and State Tax Liens

The Internal Revenue Service has the right to redeem from a mortgage foreclosure within the longer of (1) 120 days from the date of the foreclosure sale and (2) the period allowed for redemption under local law. Treas. Reg. § 301.7425-4(a)(1). Due to the length of the redemption periods under Minnesota law, the 120-day federal redemption period is only of concern where the redemption period has been reduced to five weeks due to the abandonment of the property or in the context of a voluntary foreclosure under Minn. Stat. Ann. § 582.32. If the IRS chooses to redeem, it must pay:

- The actual amount paid for the property at the sale
- Interest on the amount paid from the date of the sale at 6%
- Amounts necessarily incurred to maintain the property in excess of income derived from the property –and–
- Any payments made by the purchaser at the sale to holders of senior liens

Treas. Reg. § 301.7425(b)(1).

If the Minnesota Department of Revenue chooses to redeem from a mortgage foreclosure sale, it must follow the same procedure as any other junior creditor.

Effect of Redemption

Under Minn. Stat. Ann. § 580.27, if the mortgagor redeems, the foreclosure sale is annulled; creditors have no right to redeem, and all liens subordinate to the foreclosed mortgage are reinstated. See, e.g., *In* Re Joing, 61 B.R. 980 n.2 (Bankr. D. Minn. 1986), on remand, 82 B.R. 500 (Bankr. D. Minn. 1987).

If a creditor redeems, the creditor has the same rights as the purchaser at the foreclosure sale, subject to the rights of redemption of junior creditors.

A creditor holding more than one lien on the property must file separate notices of intent to redeem for each lien and redeem as provided by the statute even if such a course requires redeeming from itself (but if it redeems from itself no cash need be paid). If the creditor does not do so, its rights under the lien for which a notice of intent to redeem was not filed will be cut off. Graybow-Daniels Co. v. Pinotti, 255 N.W.2d 405 (Minn. 1977). See also Petition of Brainerd Nat'l Bank, 383 N.W.2d 284 (Minn. 1986), where the Supreme Court, reversing the court of appeals, held that redemption by the holder of a fourth mortgage cut off the liens of second and third mortgages, the mortgagees under which failed to file notices of intent to redeem.

Where a mortgagee holds two separate mortgages on the same mortgaged property, and has foreclosed its first mortgage, the mortgagee should file a notice of intent to redeem pursuant to its second mortgage in order to prevent a junior mortgage holder from redeeming the first mortgage foreclosure only, thereby extinguishing the mortgagee's second mortgage. See First National Bank of Glencoe/Minnetonka v. Pletsch, 543 N.W.2d 706 (Minn. Ct. App. 1996).

In In re Commercial State Bank of St. Paul, 388 N.W.2d 11 (Minn. Ct. App. 1986), the Minnesota Court of Appeals held that a mechanic's lien statement, filed after commencement of foreclosure proceedings, does not cause the lien to survive the foreclosure proceeding where the lienholder did not redeem and where the mortgagee did not intend to merge its respective interests as mortgagee and purchaser at the foreclosure to cause a lien claimant to have greater priority.

In order for a redemption to be timely, the party receiving the redemption funds (either the sheriff or holder of the sheriff's certificate) must receive the funds within the applicable redemption period. Sieve v. Rosar, 613 N.W.2d 789, 793–94 (Minn. Ct. App. 2000) (citing In re Petition of Nelson, 495 N.W.2d 200 (Minn. 1993)). Depending on the circumstances, however, a creditor making an untimely redemption payment may still claim that the holder of the sheriff's certificate is equitably estopped from asserting the defense of untimely payment. Sieve, 613 N.W.2d at 795.

Eviction

Eviction of persons from residential property that was the subject of a mortgage foreclosure is governed by Minn. Stat. Ann. § 504B.285, subd. 1(a). For guidance on Minnesota evictions, see Landlord and Tenant Rights and Remedies after Default (Commercial Lease) (MN).

Mark W. Vyvyan, Shareholder, Fredrikson & Byron P.A.

Mark is a litigator, known for winning important cases for his clients in areas like commercial landlord-tenant disputes, complex foreclosures, construction disputes, oil and gas litigation, and significant boundary and easement disputes.

Although Mark is a litigator and focuses his practice on real estate disputes, he also has experience handling real estate transactions, which makes him a more effective litigator. Mark has tried cases for both plaintiffs and defendants in states across the Upper Midwest. Mark also mediates real estate-related matters, including residential and commercial construction disputes, commercial landlord-tenant matters and boundary and easement disputes. Mark is well-known for his hard work, responsiveness and expertise in achieving great results for his clients.