

Creditor Bankruptcy

Debtor Bankruptcy

Estate Planning
and Probate

Real Estate

Business Law
and Commercial
Transactions

Civil Litigation

**Collections and
Foreclosures**

New Foreclosure Deferment Law

By Beverly L. Edwards, Esq.

This past legislative session, the Colorado legislature enacted H.B. 1276 (the "Act"). The Act establishes a foreclosure deferment program for borrowers that meet the qualifications set out in the Act. The Act applies to all public trustee foreclosures commenced on or after August 1, 2009. The Act is intended as temporary relief since the Act will sunset on June 30, 2011.

Definition of Foreclosure Deferment

The Act defines a "foreclosure deferment" as a period, not to exceed 90 calendar days, during which the Public Trustee continues the scheduled sale date of a property subject to a pending foreclosure action.

Eligibility for Foreclosure Deferment

In order to be eligible for a foreclosure deferment, the borrower must:

1. Reside at the property which is the subject of the foreclosure action on the date the foreclosure was filed
2. Occupy the property as the borrower's primary residence on the date the foreclosure was filed
3. Intend to continue to reside on the property
4. Be personally obligated on the debt, which was incurred primarily for personal, family or household purposes and which had an original principal amount of \$500,000.00 or less.

Notification to borrower— posting

No later than 15 days after the foreclosure is commenced with the Public Trustee, the foreclosing lender, or the attorney for the foreclosing lender, must post a Notice of Opportunity for Foreclosure Deferment in a "conspicuous" place on the property. The Act is very specific about the contents of the Notice of Opportunity for Foreclosure Deferment, and instructs the Division of Housing in the Department of Local Government to make available a standard form in English and Spanish that meets the requirements of the Act. The Notice has been developed and is available on the agency's web site.

Posting on the front door is preferable, but if access to the front door is not possible or is restricted, then the Notice must be posted at an alternative conspicuous location.

No later than 20 calendar days after the foreclosure is commenced with the Public Trustee, an affidavit must be filed with the Public Trustee confirming that the posting has been made pursuant to the Act.

Procedures for Foreclosure Deferment

Initial Contact by Borrower to Foreclosure Counselor

If a borrower desires to take advantage of the deferment provisions of the Act, the borrower must then take affirmative action. An eligible borrower must contact a "foreclosure counselor" within 20 days after the Notice of Opportunity for Foreclosure Deferment is posted. This initial



contact is for the purpose of obtaining a qualification decision from the foreclosure counselor. The initial contact may be by telephone, electronically, or in person. A foreclosure counselor is a housing counselor employed by an agency approved by the U.S. Department of Housing and Urban Development. Foreclosure counselors include housing counselors affiliated with the Colorado Foreclosure Hotline and the Hope Now Alliance.

Foreclosure Counselor to Contact Foreclosing Lender/Lender to Contact Foreclosure Counselor and Borrower

Once the Borrower has made the initial contact with the foreclosure counselor, the foreclosure counselor is required to contact the foreclosing lender “promptly” and advise the lender that the foreclosure counselor has been contacted by the borrower. The foreclosing lender is then given 10 calendar days to notify the foreclosure counselor and the borrower in writing of the address to which payments would be made if the borrower qualifies for a foreclosure deferment and information on how payments can be made electronically.

Determination of Qualification for Foreclosure Deferment

No later than 30 calendar days after the borrower’s initial contact with the foreclosure counselor, the foreclosure counselor is required to determine whether the borrower is qualified for a foreclosure deferment. The foreclosure counselor must then advise the borrower and the foreclosing lender of the counselor’s decision. If the foreclosure counselor determines that the borrower qualifies for a foreclosure deferment under the Act, the foreclosure counselor must also notify the Public Trustee within the same 30 day period.

If the borrower is eligible for the deferment program, as certified by the foreclosure counselor, the Public Trustee must immediately cancel all publications and shall continue the sale from week to week until receipt of certification by the foreclosure counselor that the foreclosure deferment has been terminated. If no certification is received, then the sale is continued for 90 calendar days.

Foreclosure Deferment Assessment Standards

The Act specifies the assessment standards which the foreclosure counselor must use in determining whether a borrower qualifies for a foreclosure deferment. The general guideline is as follows: whether, considering the borrower’s household expenses and gross monthly income, the nature of the loan, any written loan modification agreement between the eligible borrower and the foreclosing lender entered into during the preceding 12 months, and any other relevant factors, there is a reasonable likelihood that the foreclosing lender and the borrower can come to a mutually acceptable agreement to avoid foreclosure. The foreclosure counselor is instructed to use analytical tools that show both what the borrower is able to pay in monthly expenses, and whether the foreclosing lender would be likely to receive greater revenue from a modification of the loan than the foreclosing lender would receive from a completed foreclosure. The Act requires that the analytical tools be consistent with the net present value test set out in the FDIC Loan Modification Program Guidelines, effective October, 2008.

Disqualification of a Borrower

It should be noted that there are circumstances where an otherwise eligible borrower would not qualify for a foreclosure deferment. Those circumstances are:

- a. The borrower has abandoned the property;
- b. The borrower has provided materially false information to obtain credit;
- c. The borrower has engaged in gross waste of the property, has been cited for major code violations, or has used the property for illegal purposes;
- d. The borrower is currently in a bankruptcy proceeding in which the property is property of the estate, or the borrower was discharged in a Chapter 7 bankruptcy within the previous 12 months; or
- e. The borrower has been discharged from a Chapter 13 bankruptcy case within the previous 24 months which involved a modified loan agreement for the property.

If the borrower receives a foreclosure deferment under the Act, the borrower will not qualify for a subsequent foreclosure deferment on the same obligation.

Foreclosure Deferment

Mandated Negotiation of Terms

Once the foreclosing lender has received notice from the foreclosure counselor that the borrower qualifies for a foreclosure deferment, the foreclosing lender and the borrower “shall negotiate” the terms of the debt obligation secured by the deed of trust. No further guidance is provided by the legislature on how to meet the requirements of this section of the Act.

Payments During Foreclosure Deferment

The Act requires the borrower to make monthly loan payments to the foreclosing lender during the foreclosure deferment, in an amount equal to 66 $\frac{2}{3}$ % of the monthly payment amount due prior to delinquency (excluding any portion of the monthly payment that was required for taxes and insurance). If the terms of the loan require the borrower to make monthly payments for taxes and insurance, the borrower must also make a monthly payment of $\frac{1}{12}$ th of the annual amount due for taxes and insurance.

The first payment is due by the fifth day following the foreclosure counselor’s certificate of qualification for the foreclosure deferment. Subsequent payments are due every 30 calendar days thereafter during the foreclosure deferment.

Early Termination of Foreclosure Deferment

A foreclosing lender can seek early termination of a foreclosure deferment. The foreclosing lender would request that the foreclosure counselor make a determination that early termination is appropriate based upon the grounds set forth in the Act, and request that the foreclosure counselor issue a certificate to the Public Trustee. The grounds for early termination of a foreclosure deferment are:

1. The borrower has abandoned the property;
2. The borrower has failed to comply with the conditions of foreclosure deferment, including failure to make payments on time;
3. The borrower has conveyed or further encumbered the property in violation of the deed of trust;
4. Foreclosure has been initiated by another lender on the same property; or
5. The borrower has filed bankruptcy during the foreclosure deferment. ❖

Beverly L. Edwards is a member of the law firm of Edwards & Taylor, LLC. She has represented creditors in bankruptcy proceedings for over 20 years. Bev can be reached at 303-750-2303, or by e-mail at bedwards@et-law.com.