



## Weisleder: A couple of lessons on mortgage default

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If the current buyers' market continues, we will start to see some sellers under pressure to maintain their existing mortgage payments. This will result in defaults when payments cannot be made on their due date.

Over the next few weeks, I will explain the options open to lenders when a borrower defaults on their mortgage, what a seller can do to work with their lender to prevent this from occurring, and what a buyer can do to protect themselves when they are buying a home from a bank.

In most provinces, when a borrower defaults on a mortgage payment, the lender has two main remedies to consider: power of sale and foreclosure.

Under a power of sale, the lender, most often a bank, sells the property to recover the mortgage. If there are insufficient funds from the sale to pay the balance, the bank can sue the borrower for any difference. If the sale yields excess funds, the bank must send the extra money to the borrower.

For example, if the mortgage debt is \$250,000 and the bank sells the property and, after all the expenses are paid, the sale only nets \$225,000, the bank can sue the borrower for the remaining \$25,000. If the bank nets \$300,000, the bank sends \$50,000 to the borrower.

In a foreclosure action, the bank is seeking a court order to take over ownership of the property. If the bank gets the ownership, the entire mortgage debt is extinguished. Therefore, if after the foreclosure the bank sells the house and gets less than the borrower owed them, the bank can't sue the borrower for the difference. If the bank sells the house for more, they can keep the profit.

The main difference between a power of sale and foreclosure proceeding is time. It takes a lot longer for a lender to complete a foreclosure proceeding. If the borrower contests the foreclosure, the process can take up to two years. A power of sale can typically be completed within six months.

Foreclosures are typically used as a remedy when the property has fallen greatly in value and the borrower is facing bankruptcy. The bank may decide to foreclose then wait until the market improves before selling the home.

How does a power of sale work? In Ontario, once a mortgage has been in default for a minimum of 15 days, the lender may issue a power of sale notice. This is a warning and gives the owner 35 days to put the mortgage into

good standing. This means that the owner has to pay all outstanding mortgage payments as well as the lender's legal costs.

If the owner fails to pay, the lender has the right to sell the property. During this 35-day notice period, the lender is not permitted to take any other steps to sell the property, including, having the house appraised, signing any listing agreement or advertising the property for sale.

In a separate process, the lender applies to the court for an order to obtain possession of the property. Once the lender obtains possession, and the 35-day time period expires, the lender will then appraise, list and try to sell the home.

Lenders have a legal obligation to act reasonably in obtaining a fair price for the property. They will appraise the property and then try and sell the property at a value as close as possible to the appraisal.

However, if the market turns, the bank is not under any obligation to wait until the market improves. They can sell the property at the current market price. The law indicates that on the date the bank signs an unconditional agreement of purchase and sale with a buyer, the original borrower has no further legal right to pay off his mortgage. But the borrower's rights may be extended by the lender in certain circumstances.

Next week we will examine the options and opportunities available to buyers and sellers when a bank is attempting to sell a home after a mortgage default.

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