

Real Property Issues:
Judicial Foreclosure, Sales
During the Redemption
Period, MERS Issues

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**Real Property Issues:
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Sales During the Redemption Period, and
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- I. The MERS Decision: *Residential Funding Co., LLC v. Saurman*, No. 290248, No. 291443, __Mich. App.__, 2011 Mich. App. LEXIS 719 (Mich. Ct. App. Apr. 21, 2011).

A. Overview and Debtors' perspective:

1. The *Saurman* decision: In *Saurman*, the Michigan Court of Appeals held that MERS cannot foreclose a mortgage by advertisement. Foreclosure by advertisement is governed by Mich. Comp. Laws § 600.3204(1)(d) which provides that a foreclosing party must either be: (i) the owner of the indebtedness, (ii) owner of an interest in the indebtedness secured by the mortgage, or (iii) the servicing agent of the mortgage. The parties in *Saurman* agreed that MERS was neither the owner of the indebtedness nor a servicing agent. The appellant (Residential Funding), however, argued that MERS was "owner of an interest in the indebtedness." The Court reviewed MERS's status and held that MERS had no interest in the indebtedness and thus could not foreclose by advertisement.
2. Important Note: In *Saurman*, the mortgage held by MERS was not invalidated.
3. *Saurman's* impact: The practical effect of the *Saurman* decision is that debtors may continue to reside in the property while a second foreclosure takes place, which may allow them time to sell the property, or refinance and redeem the mortgage.
4. Cases since *Saurman*: Debtors' ability to challenge a MERS mortgage, which is foreclosed by advertisement, has been limited by a recent Michigan Court of Appeals decision: *Richard v. Schneiderman & Sherman*, No. 297353, __Mich App__, 2011 Mich. App. LEXIS 1522 (Mich. Ct. App. Aug. 25, 2011). The holding in *Richard* provides:

"However, given the unique nature of foreclosure by advertisement, there is long-standing caselaw that limits the application of *Saurman*. First, our Supreme Court has held that a mortgagor must challenge the validity of a foreclosure by advertisement promptly and without delay. *See White v Burkhardt*, 338 Mich 235, 239, 60 NW2d 925 (1953) (Claim too late where redemption period expired prior to filing of complaint); *Fox v Jacobs*, 289 Mich. 619, 625, 286 N.W. 854 (1939) (Twenty months after foreclosure sale too late). In addition, in *Hogan v Hester Investment Co*, 257 Mich 627, 241 NW 881 (1932), our Supreme Court held that the validity of a foreclosure by advertisement may not be challenged after the property is sold to a bona fide purchaser. Thus, *Saurman* does not apply in an action to recover title or possession of property if the mortgagor failed to challenge the foreclosure by advertisement during the redemption period or any proceedings seeking an order of eviction, or if the foreclosed property has been sold to a bona fide purchaser."

5. What it means: Debtors may only challenge a MERS mortgage that is foreclosed by advertisement while they retain rights in the property—either the right of redemption or possession.

B. Secured Creditor perspective:

1. Mortgage Industry Response: The majority of mortgage servicers now require an Assignment of Mortgage out of MERS before beginning a foreclosure by advertisement. This can cause a delay in the foreclosure process.
2. Supreme Court Review: The Michigan Supreme Court granted the request for an expedited hearing on appeal. Oral argument is anticipated in November 2011.
3. Position of Secured Creditor Counsel: Taking a conservative approach in recommendation to clients while waiting for the Supreme Court to rule. Taking the position that where the former lender/servicer obtained a Judgment of Possession or any court order that validated the sale—regardless of whether the MERS issue was specifically litigated—that the sale is protected from a *Saurman* challenge. Also, the *Saurman* ruling has not resulted in an increase in judicial foreclosures.

C. Trustee perspective:

1. No big change in approach: Trustees are monitoring cases for MERS re-foreclosures. And if an underbid occurs at the re-foreclosure sale, then Trustees will attempt to sell the house, as they are already currently doing with underbid houses.
2. But maybe for closed cases: If a MERS re-foreclosure results in an underbid regarding a closed bankruptcy case, then Trustees will seek to reopen those cases and revoke the “technical abandonment” of the property. As discussed later, as things stand, Judges Rhodes, Tucker, and Opperman allow cases to be reopened—under certain circumstances—with a revocation of abandonment to allow Trustees to sell underbid houses. In contrast, Judges Shefferly, Shapero, and McIvor, have categorically said no to reopening cases to allow Trustees to sell underbid houses.
3. Because: Judge Shefferly’s major rationale for not allowing the reopening of cases was that underbidding represents a change in facts, not a change in law; and only changes in law suffice to allow a case to be reopened. The MERS situation, however, is a change in law, which was not foreseeable. Thus, Trustees may seek to reopen cases with Judges Shefferly, Shapero, and McIvor if there is a MERS re-foreclosure with an underbid.

II. Sales during the Redemption Period

A. Overview and Debtors’ perspective:

1. Debtors may not be able to obtain a loan modification and retain the property: If a Trustee leaves a bankruptcy case open for any reason—including to await a possible underbid at foreclosure—then all the debtors’ property, including real property, remains property of the estate, unless it is abandoned under one of the provisions of Bankruptcy Code § 554. This may thwart Debtors’ intent to modify mortgage loans.
2. The Debtor cannot “short sell” the property: In addition, because the property has not been abandoned, it remains property of the estate. Thus, under Bankruptcy Code § 363(b), only the Trustee has the right to sell the property.
3. The Debtor cannot redeem the foreclosed mortgage: Under Bankruptcy Code § 541(a)(6) (proceeds, product, offspring, rents, or profits of or from property of the estate), the right to redeem the foreclosed mortgage is property of the estate. *See, e.g., Armstrong v.*

Harris (In re Harris), 886 F.2d 1011, 1013 (8th Cir. 1989) (Redemption rights that attached post-petition are property of the bankruptcy estate because they are either proceeds, product, offspring, rents, or profits of estate property). Thus, again, under Bankruptcy Code § 363(b), only the Trustee has the right to sell the house and redeem as part of the sale process.

4. Issues with third parties and redemption rights: Again, in an open bankruptcy case, because the right to redeem is property of the bankruptcy estate, only the Trustee has the right to redeem the property as part of any contemplated sale. In a closed case, however, the redemption right has been “technically” abandoned to the debtors, which means the right of redemption belongs to the debtors, unless the Trustee reopens the case and revokes the abandonment. In closed cases, third parties may approach debtors and offer to buy the redemption rights or make some other kind of deal. Debtors should call their attorney before selling their redemption rights to third parties or making any deals. Sometimes, the third party approaching the debtors is the party that bought the property at foreclosure and wants to prevent redemption. If a property has been underbid in a closed case, then debtors may be able to redeem the house or sell it themselves. Again, debtors are cautioned to call their attorneys when approached by third parties.
5. Debtors must cooperate with a Trustee who wants to sell a house: Under Bankruptcy Code § 521(a)(3), debtors are obligated to “cooperate with the Trustee as necessary to enable the Trustee to perform the Trustee’s duties under this title.” Because the Trustee has a duty to “collect and reduce to money the property of the estate” under Bankruptcy Code § 704(a)(1), the debtors’ refusal to cooperate with the Trustee’s listing and showing of the property is a breach of the debtors’ duties.
6. Debtors may have to move out of a property before the redemption period expires: Under 11 U.S.C. §521(a)(4), debtors are obligated to “surrender to the Trustee all property of the estate.” Thus, if debtors are residing at the property, then debtors have a duty to vacate the property if the Trustee sells it.
7. Debtors may not “strip” a property of all fixtures before moving out: Fixtures—like interior doors, shower heads, toilets, light-socket coverings, etc.—are property of the bankruptcy estate. Thus, debtors may not remove them if the Trustee sells the house. Indeed, removing fixtures jeopardizes a Trustee’s ability to sell a house. And, by extension, the ability to pay exemptions.
8. Debtors may claim exemptions for the property, which ameliorates having to move out: Trustees will have to negotiate with debtors regarding the amount of the exemptions if the claimed exemptions exceed the potential net sale proceeds.

B. Trustee perspective:

1. Trustees are leaving cases open: As mentioned earlier, Judges Shefferly, Shapero, and McIvor, have categorically said no to reopening cases to allow Trustees to sell underbid houses. *See In re Reiman*, 431 B.R. 901 (Bankr. E.D. Mich. 2010). (*Reiman* was followed, in part, by Judge Shapero. *See In re Pioch*, Case No. 08-61-173, 2010 Bankr. LEXIS 2952 (Bankr. E.D. Mich. Sept. 1, 2010). *Reiman* was also followed by Judge Melvor without any additional analysis.) As a result of these three Judges’ refusal to reopen cases to allow a sale of foreclosed property, Trustees are leaving cases open to determine if houses are sold at foreclosure with an underbid.

2. Reduction in motions to reopen: By leaving cases open, the need to reopen cases has diminished, but still occasionally happens. As mentioned earlier, as things stand, Judges Rhodes, Tucker, and Opperman allow cases to be reopened—under certain circumstances—with a revocation of abandonment to allow Trustees to sell underbid houses. Judges Rhodes, Tucker, and Opperman each issued bench opinions, which are too voluminous to include in material, but are available by request to Jordan Sickman.
3. Possible reopening for MERS: As mentioned earlier, Trustees may try to reopen cases with Judges Shefferly, Shapero, and McIvor if a mortgage is re-foreclosed with an underbid and was previously foreclosed by MERS. The rationale is that the MERS decision—invalidating MERS foreclosures—is a change in law as opposed to a change in facts, which was an important distinction to Judges Shefferly and Shapero. (For a general discussion of revocation of abandonment *see LPP Mortgage, Ltd. v. Brinley*, 547 F.3d 643 (6th Cir. 2008).)

III. Judicial Foreclosures—Why the Increase?

A. Overview and Secured Creditor Perspective:

1. Uptick in Judicial Foreclosures: In July of 2009, Trott & Trott had only two judicial foreclosure actions that did not involve title curative counts. As of the beginning of October 2011, Trott has 920 open judicial foreclosures as a direct result of a 2009 statutory change.
2. MCL 600.3205a: This statute, which took effect in July of 2009, added requirements to the foreclosure-by-advertisement process. Mortgagors (homeowners) of homestead property are now entitled to an invitation from the servicer/lender to participate in a meeting to discuss loss-mitigation options. The mortgagors must submit financial information to determine if they “qualify” for a loan modification, under the statutory scheme. Government-sponsored enterprises (“GSEs”) are partially exempt from the statute, in that they may use their own criteria to determine if a mortgagor “qualifies,” such as HAMP. Under Mich. Comp. Laws § 600.3205a(1)(g):

“[I]f the borrower and the person designated under subdivision (c) do not agree to modify the mortgage loan but it is determined that the borrower meets criteria for a modification under section 3205c(1) and foreclosure under this chapter is not allowed under section 3205c(7), the foreclosure of the mortgage will proceed before a judge instead of by advertisement.”

B. What Debtors’ Counsel and Trustees should know about Judicial Foreclosures:

1. Timeframe: Under Mich. Comp. Laws § 600.3115, a judicial-foreclosure plaintiff must wait at least 6 months after the complaint date for the foreclosure sale.
2. Reinstatement of mortgage: Under Mich. Comp. Laws § 600.3110, if a defendant borrower reinstates a mortgage after a judicial foreclosure is filed but before judgment is entered, then the plaintiff must dismiss the action. But if a defendant borrower reinstates after a judgment has been entered, then the action is stayed rather than dismissed. And under Mich. Comp. Laws § 600.3120, a plaintiff can move to reopen the case upon a future default and proceed immediately with publication and posting of notice of a foreclosure sale.

3. **Effect of bankruptcy:** If a debtor files for bankruptcy, and a judicial foreclosure is pending, rather than dismiss the action, the plaintiff will typically administratively close the case. As a rule, a plaintiff will dismiss the civil action if a *confirmed* Plan proposes to cure the mortgage arrearage. Where a plaintiff has obtained an administrative stay in the civil action, that plaintiff can reopen the case upon submission of a 1 page SCAO Motion to Reopen Case after Bankruptcy, which the circuit courts enter without hearing.
4. **Issues for Trustees:** Where a Trustee wishes to sell a property after a complaint is filed, he or she may face title insurance resistance as a result of the Lis Pendens that is recorded after commencement of the civil action. Plaintiffs will not release the Lis Pendens unless they dismiss the case, which only happens upon: (1) receipt of funds sufficient to reinstate the mortgage or pay off the debt in full, (2) or confirmation of a Chapter 13 Plan that proposes to cure the arrearage.
5. **Who conducts Judicial Foreclosure sales:** Judicial foreclosure sales are conducted by the county sheriff or deputy sheriff or a clerk of the court that issued the foreclosure judgment.
6. **Effect of Judicial Foreclosure:** The Judgment of Foreclosure will include language that cures all prior title defects and validates the mortgage, implicating lien avoidance and preference issues.
7. **Redemption period:** The redemption period is fixed at 6 months. It cannot be shortened if the property is abandoned. The size of the parcel does not affect the length of redemption. The exceptions to this fixed rule are situations where a plaintiff is unable to record the deed within 20 days of the sale. If this occurs and unless the circuit court issues an order to the contrary, the 6 month redemption period will not begin to run until the deed is recorded. Certain counties have local customs that increase the difficulty of timely recording, relative to judicial foreclosures.
8. **Issues regarding the foreclosure sale:** Judicial foreclosure sales must be confirmed by the circuit court for title to be “marketable” after expiration of redemption. A defaulted mortgagor may object to confirmation of a sale, without moving to set aside the default. Interested parties have an opportunity to object to the manner of sale and to the amount of the successful bid. A court will not upset a sale absent extraordinary circumstances or a bid that “shocks the conscience.”
9. **Deficiency Judgment:** The plaintiff will take a deficiency judgment at the time that the sale is confirmed. Neither defendants nor their attorneys are entitled to notice, apart from notice of Motion to Confirm Sale. Under Mich. Comp. Laws § 600.3150, a defendant may argue for an “offset” if they are able to prove that the bid was shockingly low.
10. **Other effects of bankruptcy:** There is a question as to whether the filing of a bankruptcy by a mortgagor stays the plaintiff's ability to confirm a sale of Michigan property. Other jurisdictions have cases falling on both sides of the issue. Some cases hold that a plaintiff must obtain relief from the stay in order to proceed with the sale-confirmation process. A bankruptcy Trustee is limited to challenging the sale itself and may not challenge the judgment, absent a showing of no personal or subject matter jurisdiction, or demonstrating that the debtor had good cause in failing to answer the complaint, along with meritorious defenses.

IV. On the Horizon: Carve outs for bankruptcy estates based on an agreement with the first mortgage company.

Trustees in this District have been approached by a consulting firm from California regarding carve out sales on behalf of the first mortgage holder. So far, this consulting firm has arranged with one mortgage company (Carrington Mortgage) to allow sales of delinquent properties where a bankruptcy has occurred. Rather than foreclose, Carrington has agreed that the Trustees will sell the properties on Carrington's behalf, with a "carve out" to the estate equal to the greater of 3% or \$7,500. In these sales, the debtors are not entitled to an exemption. Thus, unlike underbid cases, debtors may have to move out, with no exemption as a cushion.



Michigan Compiled Laws Annotated [Currentness](#)

Chapter 600. Revised Judicature Act of 1961 ([Refs & Annos](#))

[Revised Judicature Act of 1961 \(Refs & Annos\)](#)

[Chapter 32. Foreclosure of Mortgages by Advertisement \(Refs & Annos\)](#)

→→ 600.3205a. Loan modification proceedings; notice to borrower; action by borrower to enjoin foreclosure; inapplicability of section and §§ 600.3205b and 600.3205c

Sec. 3205a. (1) Subject to subsection (6), before proceeding with a sale under this chapter of property claimed as a principal residence exempt from tax under section 7cc of the general property tax act, 1893 PA 206, [MCL 211.7cc](#), the foreclosing party shall serve a written notice on the borrower that contains all of the following information:

- (a) The reasons that the mortgage loan is in default and the amount that is due and owing under the mortgage loan.
 - (b) The names, addresses, and telephone numbers of the mortgage holder, the mortgage servicer, or any agent designated by the mortgage holder or mortgage servicer.
 - (c) A designation of 1 of the persons named in subdivision (b) as the person to contact and that has the authority to make agreements under sections 3205b and 3205c. [\[FN1\]](#)
 - (d) That enclosed with the notice is a list of housing counselors prepared by the Michigan state housing development authority and that within 14 days after the notice is sent, the borrower may request a meeting with the person designated under subdivision (c) to attempt to work out a modification of the mortgage loan to avoid foreclosure and that the borrower may also request a housing counselor to attend the meeting.
 - (e) That if the borrower requests a meeting with the person designated under subdivision (c), foreclosure proceedings will not be commenced until 90 days after the date the notice is mailed to the borrower.
 - (f) That if the borrower and the person designated under subdivision (c) reach an agreement to modify the mortgage loan, the mortgage will not be foreclosed if the borrower abides by the terms of the agreement.
 - (g) That if the borrower and the person designated under subdivision (c) do not agree to modify the mortgage loan but it is determined that the borrower meets criteria for a modification under section 3205c(1) and foreclosure under this chapter is not allowed under section 3205c(7), the foreclosure of the mortgage will proceed before a judge instead of by advertisement.
 - (h) That the borrower has the right to contact an attorney, and the telephone numbers of the state bar of Michigan's lawyer referral service and of a local legal aid office serving the area in which the property is situated.
- (2) A person who serves a notice under subsection (1) shall enclose with the notice a list prepared by the Michigan state housing development authority under section 3205d [\[FN2\]](#) of the names, addresses, and telephone numbers of housing counselors approved by the United States department of housing and urban development or the Michigan state housing development authority.

(3) A person shall serve a notice under subsection (1) by mailing the notice by regular first-class mail and by certified mail, return receipt requested, with delivery restricted to the borrower, both sent to the borrower's last known address.

(4) Within 7 days after mailing a notice under subsection (3), the person who mails the notice shall publish a notice informing the borrower of the borrower's rights under this section. The person shall publish the information 1 time in the same manner as is required for publishing a notice of foreclosure sale under section 3208. [\[FN3\]](#) The notice under this subsection shall contain all of the following information.

(a) The borrower's name and the property address.

(b) A statement that informs the borrower of all of the following:

(i) That the borrower has the right to request a meeting with the mortgage holder or mortgage servicer.

(ii) The name of the person designated under subsection (1)(c) as the person to contact and that has the authority to make agreements under sections 3205b and 3205c.

(iii) That the borrower may contact a housing counselor by visiting the Michigan state housing development authority's website or by calling the Michigan state housing development authority.

(iv) The website address and telephone number of the Michigan state housing development authority.

(v) That if the borrower requests a meeting with the person designated under subsection (1)(c), foreclosure proceedings will not be commenced until 90 days after the date notice is mailed to the borrower.

(vi) That if the borrower and the person designated under subsection (1)(c) reach an agreement to modify the mortgage loan, the mortgage will not be foreclosed if the borrower abides by the terms of the agreement.

(vii) That the borrower has the right to contact an attorney, and the telephone number of the state bar of Michigan's lawyer referral service.

(5) A borrower on whom notice is required to be served under this section who is not served and against whom foreclosure proceedings are commenced under this chapter may bring an action in the circuit court for the county in which the mortgage property is situated to enjoin the foreclosure.

(6) If the borrower and the person designated under subsection (1)(c) have previously agreed to modify the mortgage loan under section 3205b, this section and sections 3205b and 3205c do not apply unless the borrower has complied with the terms of the mortgage loan, as modified, for 1 year after the date of the modification.

CREDIT(S)

P.A.1961, No. 236, § 3205a, added by [P.A.2009, No. 30, Eff. July 5, 2009](#).

[\[FN1\] M.C.L.A. §§ 600.3205b and 600.3205c.](#)

[\[FN2\] M.C.L.A. § 600.3205d.](#)

[\[FN3\] M.C.L.A. § 600.3208.](#)

REPEAL

<This section is repealed effective January 5, 2012, pursuant to [M.C.L.A. § 600.3205e.](#)>

HISTORICAL AND STATUTORY NOTES

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P.A.2009, No. 30, enacting §§ 1 and 2, provide:

“Enacting section 1. This amendatory act takes effect 45 days after the date it is enacted into law.

“Enacting section 2. This amendatory act does not take effect unless all of the following bills of the 95th Legislature are enacted into law:

“(a) House Bill No. 4453.

“(b) House Bill No. 4455.”

House Bill No. 4453 was enacted as P.A.2009, No. 29, and was approved May 20, 2009, and filed May 21, 2009, eff. July 5, 2009.

House Bill No. 4455 was enacted as P.A.2009, No. 31, and was approved May 20, 2009, and filed May 21, 2009, eff. July 5, 2009.

P.A.2009, No. 30, was ordered to take immediate effect, and was approved May 20, 2009, and filed May 21, 2009.

CROSS REFERENCES

Definitions, see [§ 600.3205](#)

Foreclosure, prerequisites, loan modification notice and proceedings, see [§ 600.3204](#).

List of approved housing counselors, see [§ 600.3205d](#).

Loan modification meeting and agreement, see [§ 600.3205b](#).

Loan modification program or process in absence of agreement under [section 600.3205b](#), see [§ 600.3205c](#).

Repeal, see [§ 600.3205e](#).

M. C. L. A. 600.3205a, MI ST 600.3205a

The statutes are current through P.A. 2011, No. 209, of the 2011 Regular Session, 96th Legislature.

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Chapter 600. Revised Judicature Act of 1961 ([Refs & Annos](#))

[Revised Judicature Act of 1961 \(Refs & Annos\)](#)

[Chapter 32. Foreclosure of Mortgages by Advertisement \(Refs & Annos\)](#)

→ → 600.3205b. Loan modification proceedings; borrower's request for negotiations; furnishing of documents by borrower; arrangement and conduct of meetings

Sec. 3205b. (1) A borrower who wishes to participate in negotiations to attempt to work out a modification of a mortgage loan shall contact a housing counselor from the list provided under section 3205a [\[FN1\]](#) within 14 days after the list is mailed to the borrower. Within 10 days after being contacted by a borrower, a housing counselor shall inform the person designated under section 3205a(1)(c) in writing of the borrower's request.

(2) After being informed of a borrower's request to meet under this section, the person designated under section 3205a(1)(c) may request the borrower to provide any documents that are necessary to determine whether the borrower is eligible for a modification under section 3205c. [\[FN2\]](#) The borrower shall give the person designated under section 3205a(1)(c) copies of any documents requested under this section.

(3) A housing counselor contacted by a borrower under this section shall schedule a meeting between the borrower and the person designated under section 3205a(1)(c) to attempt to work out a modification of the mortgage loan. At the request of the borrower, the housing counselor will attend the meeting. The meeting and any later meetings shall be held at a time and place that is convenient to all parties, or in the county where the property is situated.

CREDIT(S)

P.A.1961, No. 236, § 3205b, added by [P.A.2009, No. 30, Eff. July 5, 2009](#).

[\[FN1\] M.C.L.A. § 600.3205a.](#)

[\[FN2\] M.C.L.A. § 600.3205c.](#)

REPEAL

<This section is repealed effective January 5, 2012, pursuant to [M.C.L.A. § 600.3205e](#).>

HISTORICAL AND STATUTORY NOTES

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For contingent effect and effective provisions of P.A.2009, No. 30, see the Historical and Statutory Notes following [M.C.L.A. § 600.3205a](#).

CROSS REFERENCES

Definitions, see [§ 600.3205](#)

Foreclosure, prerequisites, loan modification notice and proceedings, see [§ 600.3204](#).

List of approved housing counselors, see [§ 600.3205d](#).

Loan modification program or process in absence of agreement under section 600.3205b, see [§ 600.3205c](#).

Notice to borrower, see [§ 600.3205a](#).

Repeal, see [§ 600.3205e](#).

M. C. L. A. 600.3205b, MI ST 600.3205b

The statutes are current through P.A. 2011, No. 209, of the 2011 Regular Session, 96th Legislature.

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Chapter 600. Revised Judicature Act of 1961 ([Refs & Annos](#))

[Revised Judicature Act of 1961 \(Refs & Annos\)](#)

[Chapter 32. Foreclosure of Mortgages by Advertisement \(Refs & Annos\)](#)

→ → 600.3205c. Loan modification proceedings; loan modification program or process in absence of agreement under § 600.3205b; loan modification guidelines; alternative loan modification terms or loss mitigation strategies; provision of information to borrower; proceedings by mortgage holder or servicer under chapter 31; action by borrower to convert foreclosure proceeding to judicial foreclosure; orders by court for injunction and chapter 31 proceedings

Sec. 3205c. (1) If a borrower has contacted a housing counselor under section 3205b [\[FN1\]](#) but the process has not resulted in an agreement to modify the mortgage loan, the person designated under section 3205a(1)(c) [\[FN2\]](#) shall work with the borrower to determine whether the borrower qualifies for a loan modification. Unless the loan is described in subsection (2) or (3), in making the determination under this subsection, the person designated under section 3205a(1)(c) shall use a loan modification program or process that includes all of the following features:

(a) The loan modification program or process targets a ratio of the borrower's housing-related debt to the borrower's gross income of 38% or less, on an aggregate basis. Housing-related debt under this subdivision includes mortgage principal and interest, property taxes, insurance, and homeowner's fees.

(b) To reach the 38% target specified in subdivision (a), 1 or more of the following features:

(i) An interest rate reduction, as needed, subject to a floor of 3%, for a fixed term of at least 5 years.

(ii) An extension of the amortization period for the loan term, to 40 years or less from the date of the loan modification.

(iii) Deferral of some portion of the amount of the unpaid principal balance of 20% or less, until maturity, refinancing of the loan, or sale of the property.

(iv) Reduction or elimination of late fees.

(2) In making the determination under subsection (1), if the mortgage loan is pooled for sale to an investor that is a governmental entity, the person designated under section 3205a(1)(c) shall follow the modification guidelines dictated by the governmental entity.

(3) In making the determination under subsection (1), if the mortgage loan has been sold to a government-sponsored enterprise, the person designated under section 3205a(1)(c) shall follow the modification guidelines dictated by the government-sponsored enterprise.

(4) This section does not prohibit a loan modification on other terms or another loss mitigation strategy instead of

modification if the other modification or strategy is agreed to by the borrower and the person designated under section 3205a(1)(c).

(5) The person designated under section 3205a(1)(c) shall provide the borrower with both of the following:

(a) A copy of any calculations made by the person under this section.

(b) If requested by the borrower, a copy of the program, process, or guidelines under which the determination under subsection (1) was made.

(6) Subject to subsection (7), if the results of the calculation under subsection (1) are that the borrower is eligible for a modification, the mortgage holder or mortgage servicer shall not foreclose the mortgage under this chapter but may proceed under chapter 31. [\[FN3\]](#) If the results of the calculation under subsection (1) are that the borrower is not eligible for a modification or if subsection (7) applies, the mortgage holder or mortgage lender may foreclose the mortgage under this chapter.

(7) If the determination under subsection (1) is that the borrower is eligible for a modification, the mortgage holder or mortgage servicer may proceed to foreclose the mortgage under this chapter if both of the following apply:

(a) The person designated under section 3205a(1)(c) has in good faith offered the borrower a modification agreement prepared in accordance with the modification determination.

(b) For reasons not related to any action or inaction of the mortgage holder or mortgage servicer, the borrower has not executed and returned the modification agreement within 14 days after the borrower received the agreement.

(8) If a mortgage holder or mortgage servicer begins foreclosure proceedings under this chapter in violation of this section, the borrower may file an action in the circuit court for the county where the mortgaged property is situated to convert the foreclosure proceeding to a judicial foreclosure. If a borrower files an action under this section and the court determines that the borrower participated in the process under section 3205b, a modification agreement was not reached, and the borrower is eligible for modification under subsection (1), and subsection (7) does not apply, the court shall enjoin foreclosure of the mortgage by advertisement and order that the foreclosure proceed under chapter 31.

CREDIT(S)

P.A.1961, No. 236, § 3205c, added by [P.A.2009, No. 31, Eff. July 5, 2009](#).

[\[FN1\] M.C.L.A. § 600.3205b.](#)

[\[FN2\] M.C.L.A. § 600.3205a.](#)

[\[FN3\] M.C.L.A. § 600.3101 et seq.](#)

REPEAL

<This section is repealed effective January 5, 2012, pursuant to [M.C.L.A. § 600.3205e](#).>

HISTORICAL AND STATUTORY NOTES

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P.A.2009, No. 31, enacting §§ 1 and 2, provide:

“Enacting section 1. This amendatory act takes effect 45 days after the date it is enacted into law.

“Enacting section 2. This amendatory act does not take effect unless all of the following bills of the 95th Legislature are enacted into law:

“(a) House Bill No. 4453.

“(b) House Bill No. 4454.”

House Bill No. 4453 was enacted as P.A.2009, No. 29, and was approved May 20, 2009, and filed May 21, 2009, eff. July 5, 2009.

House Bill No. 4454 was enacted as P.A.2009, No. 30, and was approved May 20, 2009, and filed May 21, 2009, eff. July 5, 2009.

P.A.2009, No. 31, was ordered to take immediate effect, and was approved May 20, 2009, and filed May 21, 2009.

CROSS REFERENCES

Definitions, see [§ 600.3205](#)

Foreclosure, prerequisites, loan modification notice and proceedings, see [§ 600.3204](#).

List of approved housing counselors, see [§ 600.3205d](#).

Notice to borrower, see [§ 600.3205a](#).

Repeal, see [§ 600.3205e](#).

M. C. L. A. 600.3205c, MI ST 600.3205c

The statutes are current through P.A. 2011, No. 209, of the 2011 Regular Session, 96th Legislature.

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