A man wanted to downsize his home after his youngest child moved out to attend college. To finance the purchase, the man secured a loan from a bank and executed a promissory note in which he agreed to repay the bank's loan over a 30-year period. The loan was secured by a mortgage on the new home. The bank promptly and properly recorded the mortgage.

A year later, the man missed several mortgage payments and abandoned the home shortly thereafter. The bank initiated judicial foreclosure proceedings once it learned of the man's abandonment.

In a jurisdiction that follows the intermediate theory of mortgages, which of the following events first entitled the bank to take possession of the mortgaged property?

A. The man executing the mortgage.

B. The man defaulting on the mortgage.

C. The man abandoning the property.

D. The bank foreclosing on the property.

Explanation:

A lender's (mortgagee's) right to take **possession of mortgaged property** depends on the mortgage theory followed in that jurisdiction:

Lien theory (majority rule) – the mortgagor (borrower) is considered the owner of the mortgaged property, so the **lender *cannot* take possession prior to foreclosure**.

Title theory – the lender is considered the owner of the mortgaged property until the mortgage has been paid in full, so the **lender may take possession** at **any time**.*

Intermediate theory – the mortgagor is considered the owner of the mortgaged property until default, so the **lender obtains legal title** (ie, the right of ownership and possession) to the property **upon default**.

Since this jurisdiction follows the intermediate theory of mortgages, the man was entitled to possession of the home until he defaulted on the mortgage **(Choice A)**. Therefore, the bank first acquired the right of ownership and possession of the home upon default.

*However, mortgage agreements typically limit this right so that the lender may take possession only upon default.

(Choice C) Under any mortgage theory, a lender may take possession of mortgaged property if it is abandoned by the mortgagor. But here, the man defaulted on the mortgage loan *before* he abandoned the property, so the bank was entitled to possession prior to his abandonment.

(Choice D) The bank was first entitled to take possession of the home when the man defaulted on the mortgage, which occurred prior to foreclosure.

Educational objective:

Under the intermediate theory of mortgages, a mortgagor is entitled to possession until default, at which time the lender acquires legal title (ie, the right to own and possess) to the mortgaged property.

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Right to possess mortgaged property