

NEW YORK STATE BAR ASSOCIATION

Saving Your Home from Foreclosure

*(For quick guide on where to go
for help, see back cover)*



Introduction

In 2008, New York State made some important changes in its foreclosure laws. Those changes give you new protections, but you may need help from a trained counselor or a lawyer to make sure these protections work for you.

Fortunately, the state's **housing agency** has made sure that housing counselors are available in your area to help. The odds are good that there is a non-profit counseling or legal services office near you. These counselors and lawyers will help you either without charge or at low cost.

You may feel there is no hope, but help is available. There is no reason to give up. Ignoring the situation by walking away from your house is likely to ruin your credit and may create even more problems for you that would make it much harder for you to eventually get back on your feet.

Not all foreclosures can be stopped, but there is a good chance you will be able to save your home. It doesn't help either you or your lender if you lose your home. It's in everyone's best interest if things can be worked out in a way that allows you to continue to pay off your mortgage while you stay in your home.

Remember this: you are not alone! Tens of thousands of New Yorkers all across the state are finding they can't pay their

SAVING YOUR HOME FROM FORECLOSURE

mortgages. Maybe you've lost a job or you are working fewer hours. Or maybe the monthly payment has just gone up too much for you to afford. But regardless of the cause, what is important is to see if a solution can be worked out. There is no longer any excuse for losing your home because you didn't know what to do, or because you didn't know whom to call.

What is a Foreclosure?

Foreclosure is a type of lawsuit.

In a foreclosure the holder of your mortgage asks a court to let them sell your house in order to pay off your debt. *If that happens, you could lose your home.*

The mortgage holder is often the bank that you borrowed the money from to buy the house, but it could be another bank or company that has taken over the mortgage. The mortgage holder will be the **"plaintiff"** in the lawsuit and you will be named as the **"defendant."**

You may not recognize the name of the "plaintiff" because you may be making payments to some other company that works for your lender called a **"mortgage servicer."**

How close are you to losing your home?

Situation 1: *Maybe you aren't behind on your payments yet, but you already know*

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you won't be able to continue paying the full amount due. If that's your situation, get in touch with your bank or mortgage company right away. Even a year ago they probably would not have agreed to new payment arrangements, but at this time they are much more likely to work with you. If so, make sure you get a written summary of any new arrangements that you both agree upon, even if they are temporary.

Situation 2: If you are *already late on your payments* the stakes are much higher. Even if you have not gotten any delinquency notices yet, they will be coming soon. Therefore, if your payments are *already* overdue, you still have the option to call your bank or the company handling your mortgage directly. If the bank refuses to work with you directly, you will need expert help right away and need to contact a **local non-profit housing counselor**—especially if you know that your inability to make payments will *NOT* be temporary. A reputable housing counselor likely is in a better position to help you arrive at a workable solution, than you trying to deal with the bank on your own.

Situation 3: You may have *already received legal papers* called a foreclosure **“Summons and Complaint.”** If you have gotten these already, see a lawyer **IMMEDIATELY!**

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If you cannot afford an attorney, contact your local legal services program. *The court papers will include information on how to find a lawyer who can help you.* Many of these programs are receiving funding from the state to help homeowners in trouble.

To find an attorney, call your local bar association. Or, to locate an agency that provides free or reduced cost legal services, go to: www.LawHelp.org/NY.

Who can help you?

Local non-profit **housing counselors** have received specialized training to assist homeowners who are in jeopardy of losing their homes. Importantly, housing counselors provide free assistance to troubled homeowners. To locate a *free* housing counselor near where you live, go to the state Division of Housing and Community Renewal (DHCR) Web site at: www.nysdhcr.gov/Programs/ForeclosurePrevention/CounselListing.htm.

If you do not have a computer, most libraries do and you can ask your local librarian to help you access this site.

WARNING – there are many people who may contact you and promise they can help you. Many of these people will charge you fees without being able to help you. Worse, they may even try to trick you into signing over your house to them. In most cases, better services than

SAVING YOUR HOME FROM FORECLOSURE

the ones they would give you are already available for free. In fact, when you sign a contract with one of these “consultants” they are now required by state law to give you information on how to get free counseling. Also, they must tell you how to cancel your contract with them. *You should not sign a contract with any of these people without first contacting an attorney or an approved housing counselor.*

You may also telephone the state’s Banking Department at: **1-877-BANK-NYS (1-877-226-5697)** to get the name and contact information for a free housing counselor in your area.

What are your options?

Banks are under a lot of pressure to reduce the numbers of foreclosures, and that can help you. Banks realize they need to settle as many cases as possible instead of trying to take ownership of thousands of houses. That means that they are eager to consider all reasonable, workable options. What kind of help can they give you? Lenders have lots of options, depending on your loan and your situation. The legal papers you receive will describe your specific options. Among others, some options may include:

- Setting up a repayment agreement
- Agreeing to let you postpone payments

SAVING YOUR HOME FROM FORECLOSURE

- Modifying your loan to reduce the interest rate, or even the amount owed on your mortgage (especially if the value of the house has dropped).

But you will need the help of someone who knows what solution fits your situation in order to get the best result. That's why you need to work with one of the approved housing counseling agencies.

Options for Subprime Loans

A **subprime loan** is when the **APR** on the 1st lien exceeds 3% over the yield on treasury securities with comparable maturity periods measured as of the 15th day of the month in which the loan was consummated. Alternatively, where a 2nd lien is involved, a subprime loan is defined as when the **APR** exceeds 5% over the yield on treasury securities with comparable maturity periods measured as of the 15th day of the month in which the loan was consummated.

“Subprime loans,” get special treatment in foreclosures. If you have a subprime loan, you may be entitled to a **“Settlement Conference”** once the foreclosure has been filed.

A **Settlement Conference** is a meeting with you, the lender or its attorney and the judge or someone else from the court. The purpose of the Settlement Conference is to bring the parties together to see if the problem can be resolved.

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You do not have to have a lawyer to go to the Settlement Conference. The purpose of the conference is to help you. You should take advantage of this important opportunity. There is no reason to avoid the Settlement Conference.

If you are entitled to a Settlement Conference, you will receive a **notice** from the court. The notice will tell you the procedures to follow. Make sure to meet the timelines listed.

Most important, make sure you return on time any forms the courts give you to send back. Talk to a housing counselor or a lawyer *BEFORE* the Settlement Conference. They can help you prepare for the conference. In some cases the housing counselor or lawyer may even be available to go to the Settlement Conference with you.

What information do you need to have ready?

First, gather all the papers and notes you have about your loan. The more information that's available, the better you will be able to help your counselor come up with a workable proposal. You'll also be more likely to be able to answer any questions that come up. There are some records that will be especially useful. The following is a list of the most important documents you need to put together.

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Loan documents—You may still have copies of the loan papers that were given to you when you bought or refinanced your house. If so, make sure to get them together. If you don't have the original file, gather whatever loan documents you have. Also, locate a recent payment statement that you received from your lender or a payment coupon.

Income verification—You'll also need current income information. Bring last year's W-2 forms or tax returns and two or three months of your most recent pay stubs and/or bank statements.

Payment verification—If you disagree about the amounts the mortgage company says you owe, it will be very important to have all of your records dealing with any payments you have made (such as cancelled checks, receipts, or bank statements). That's true for tax payments and other charges that may have been added to what you owe as well. When you call the housing counseling agency, ask them if there is anything else they want you to bring.

Proof of insurance—You may also need to show that you have fire and other property insurance that is still in effect. So, get your home insurance papers together. If you don't have them, call your insurance agent for a copy of your policy or a statement showing what coverage you have.

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Property tax information—Know the amount of your yearly property and school taxes. If you do not have a statement from the past year, contact your local tax assessor’s office to find out the amount.

Hardship letter—If you haven’t been able to make your full payments because of a temporary disruption in your income, put together a statement that shows when and how you fell behind and how that situation has improved. If your income situation hasn’t gotten any better and you don’t expect it to, you should still put down on paper something that shows how much you *CAN* afford to pay. You need to prepare a *REALISTIC* budget. (No wishful thinking here—that won’t help in the long run).

When do you need to take action?

You need to act *NOW!!!* No matter what your situation, you will *ALWAYS* be better off if you act sooner rather than later. **REMEMBER**—If you are late on payments *CALL ONE OF THE APPROVED HOUSING COUNSELORS OR AN ATTORNEY*; if you have already been served with court papers *CONTACT AN ATTORNEY DIRECTLY*.

Again, to find an attorney, call your local bar association or to locate an agency that provides free or reduced cost legal

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services, go to: www.LawHelp.org/NY or <http://nysdhcr.gov/Programs/ForeclosurePrevention/CounselListing.htm>.

Summary of Provisions of NY State Law Pertaining to 90-day Pre-Foreclosure Notices and Mandatory Settlement Conferences

90-Day Pre-Foreclosure Notice (RPAPL § 1304)

Effective September 1, 2008, mortgage loan servicers are required to send homeowners with “subprime”, “non-traditional”, or “high-cost” home loans (defined below) a notice at least 90 days prior to the commencement of a foreclosure case. Notices must be sent to the last known address of the borrower by registered or certified mail, in addition to first class mail.

The language of the notice is set forth in the statute, and must state the number of days in default, the amount owed and the telephone number of the lender or servicer. The servicer must attach a list of at least five government approved housing counseling agencies in the homeowner’s geographic region that provide free or low-cost counseling. The notice also directs the homeowner to call the Banking

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Department's Toll-Free Helpline or go to their website for more information.

Mandatory Settlement Conferences (CPLR § 3408)

Effective September 1, 2008, for residential foreclosure actions involving a subprime, nontraditional, or high-cost home loan originated between January 1, 2003 and September 1, 2008, the court must hold a mandatory settlement conference within 60 days after the date proof of service of the foreclosure is filed with the county clerk. The court may also hold the conference on an adjourned date agreed to by the parties. If the defendant appears pro se at the conference, the court may assign counsel. A representative of the plaintiff/ lender who is fully authorized to settle the case must appear for the conference, but the court may allow this representative to participate by telephone or video conference.

For foreclosure cases filed before September 1, 2008 involving a subprime, nontraditional, or high-cost loan, where there is no final judgment of foreclosure, the borrower has the right to request a settlement conference. The courts shall request that all plaintiffs identify whether the subject loan falls into any of the cov-

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ered categories, and will send a notice to the borrower, if applicable. When requested, the conference must be held as soon as practicable.

Threshold definitions

For purposes of these provisions:

“Subprime home loan” is defined as a home loan originated between January 1, 2003 and September 1, 2008 where the terms of the loan are in excess of the threshold. The threshold for a first lien mortgage loan includes loans where the annual percentage rate (APR) of the home loan when originated, exceeds 3 percentage points over the yield on treasury securities which have similar periods of maturity to the loan maturity on the fifteenth day of the month that the loan was originated, or exceeds 5 percentage points for subordinate lien loans. If the APR will rise after an introductory period (such as with subprime adjustable rate mortgages), the APR to be considered is the one that applies after the introductory period ends. The threshold will be determined based on the listing of constant maturity yields for U.S. Treasury securities, published on the Banking Department’s Web site.

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(The listing will include the securities for all months between January 1, 2003 and September 1, 2008.)

“Non-traditional home loan” is defined as a payment option adjustable rate mortgage or interest only loan created between January 1, 2003 and September 1, 2008.

“High-cost home loans,” as defined in Banking Law § 6-1, that are made before January 1, 2003 are subject to the 90-day notice provision. For purposes of the mandatory settlement conferences, all high-cost home loans are a subset of “subprime” home loans.

Glossary of Terms:

Acceleration letter: A letter sent from the lender (or its representative) to the borrower, which “calls in” the loan—effectively stating that the borrower must pay the entire loan amount by a specified date, otherwise the lender will file a foreclosure lawsuit. Once the mortgage has been accelerated, the lender is no longer compelled to accept arrears, though may still do so.

Answer: A written response to the complaint, submitted by the borrower to the lender’s attorney, and filed with the court. The answer is due 20 calendar days from the date of service if the borrower is served in person, or 30 calendar days if the borrower is not personally served. The answer can be submitted

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with the help of an attorney, or pro se (representing yourself without an attorney). The answer contains defenses to the foreclosure and may also include counterclaims.

Arrears: The amount of back payments—plus late fees and other charges—owed by the borrower to the lender.

Auction: A public sale of foreclosed properties. Anyone can place a bid to purchase a property. Properties are sold to the highest bidder. Once the property has been sold at auction, the original homeowner loses all “right of redemption,” or opportunity to regain ownership of the property by paying the amount due.

Complaint: A written document served to the borrower by the lender’s attorney, indicating that the lender has filed a foreclosure lawsuit, and explaining the grounds for that action against the borrower.

Counterclaims: As part of the answer to the complaint, the borrower may include counterclaims, or claims that the lender owes the borrower money due to violations of the law, thereby reducing the amount that the borrower may owe the lender.

Deed-in-lieu of foreclosure: To avoid going through a foreclosure, the borrower voluntarily turns over the deed to the property to the lender. In exchange, the lender agrees that the borrower does not owe any additional debt—allowing him/her to walk away from the property without a deficiency judgment, and without a foreclosure sale on his/her credit

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report. This option, as well as other loss mitigation options, may have tax consequences.

Default: If the borrower fails to answer the complaint, the borrower has defaulted in the foreclosure case—meaning that the lender automatically prevails. The lender is not required to serve the borrower with any further notices as the foreclosure case proceeds through the courts.

Defendant: The person or entity who is being sued in court. In the case of a foreclosure proceeding, the defendant is the homeowner who has defaulted on his/her mortgage.

Defenses: As part of the answer to the complaint, the borrower includes defenses, or claims that contest the foreclosure. These claims may be based on deficiencies in the foreclosure process (e.g. improper service or lack of standing), or illegalities in the loan itself.

Deficiency: After a foreclosed property is sold at auction, the proceeds of the sale go to reimburse the lender and other lien-holders. If the sale price does not sufficiently cover the amount owed, the amount still owed to the lender is called a deficiency.

Delinquent: When the borrower initially falls behind on the mortgage (usually 2-3 months), but before the mortgage has defaulted, he/she is said to be “delinquent” on the mortgage.

Discovery: The process by which parties gather information through document requests, written questions (called interrogatories), and depositions. Discovery can take a long time.

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Forbearance: An agreement between the lender and a delinquent borrower wherein the borrower typically pays a lump sum up front, and then enters into a payment plan for the remainder of the arrears. Borrowers need to be cautioned that when they enter into these agreements, they usually waive certain key rights, such as their ability to raise defenses to contest a foreclosure case.

Foreclosure: The legal process by which a lender forces a property to be sold, in order to collect on a mortgage loan it claims is owed.

Judgment of Foreclosure and Sale: Once signed by a judge, this legal order gives the lender permission to sell the property through a referee, and confirms the total amount owed by the borrower to the lender.

Lien / Lien holder: A lien is a legal claim placed on a property as security to repay a debt. For example, if a homeowner does not pay his/her property taxes, the city can place a lien on the property for the amount owed. In New York City, these tax liens are typically sold to private entities, which can lead to foreclosure. The entity that owns the lien on the property is called the lien holder.

Lis pendens: Literally meaning, “suit pending” in Latin, lis pendens is a filing with the county clerk that indicates to the public that the property’s ownership is being disputed. This notice formally begins the foreclosure process.

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Loan Modification: An agreement between the lender and the borrower wherein one or more of the original terms of the mortgage is changed in order to make the mortgage more affordable to the borrower. As with forbearance agreements, borrowers who agree to loan modifications usually waive many key rights, such as their ability to raise defenses to contest a foreclosure case. This option, as well as other loss mitigation options, may have tax consequences.

Loss Mitigation: The process by which a lender and borrower who is behind on his/her mortgage attempt to negotiate a deal that is mutually agreeable to both parties. Some possible avenues of loss mitigation include: loan modification, forbearance, short sale, and deed-in-lieu of foreclosure. The earlier the borrower pursues loss mitigation the better, since negotiating a workable deal also becomes more and more difficult as time passes and arrears accumulate. Loss mitigation becomes more difficult when the borrower has multiple mortgages. For example, the borrower may be able to negotiate a loan modification for one loan that is sustainable and affordable. However, if the borrower is also in default on a second mortgage, and the lender is not willing to negotiate, this second lender may still initiate a foreclosure case against the borrower.

Motion: A legal term for a formal request to the court to take action in a case.

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Mortgage Default: After a delinquent borrower's loan is accelerated by the lender, he/she is said to be in default.

Notice of Appearance: If the borrower does not have any defenses or counter-claims to contest the foreclosure, but still wants to be served with all legal papers during the course of the foreclosure case, he/she can file a Notice of Appearance with the court. A copy of the Notice of Appearance must also be sent to the lender's attorney.

Order of Reference: An Order of Reference sends a foreclosure case to a referee, who will then determine the full amount owed by the borrower to the lender.

Plaintiff: A person or entity suing another in court. In the case of a foreclosure action, the plaintiff is the owner of the mortgage.

Pro se: When a defendant represents him/herself in a court case (as opposed to having an attorney represent him/her). Pro se is Latin for "for self."

Real Estate Owned (REO): When a foreclosed property does not sell at auction, the lender takes title to the property. The property is then said to be in REO status. The lender may then try to evict the former homeowner, which the lender usually does through the Housing Court.

Referee: Once an Order of Reference is signed, a foreclosure case is sent to a referee. The referee computes the total amount owed

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to the lender by the borrower. Once the lender has obtained a Judgment of Foreclosure and Sale, the referee oversees the auction of the property. This responsibility includes physically conducting the sale, as well as distributing the proceeds following the sale. Referees are typically attorneys.

Right of Redemption period: The period in which a borrower may avert a foreclosure through a number of means, including selling the property or refinancing the mortgage. The right of redemption period ends the moment the property is sold at auction. In other states, there is a redemption period even after auction, but not in New York State.

Service of Process: The delivery of the summons and complaint to the borrower is called service of process. The lender, through a process server, must attempt to serve the borrower in person. If the process server cannot serve the borrower at his/her home, he may deliver the summons and complaint to another adult residing at the borrower's address. The process server must then send another copy by mail. If no one is home, the process server may leave the notice at the door, as well as send it by mail. This is often called "nail and mail" service.

Settlement: The lender and borrower may decide to resolve a foreclosure case outside of court by negotiating a agreement, or settlement.

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Short-sale: When the amount due on the loan is more than the value of the property, lenders will sometimes agree to accept a short sale. In a short sale, the homeowner sells the property to a third party at fair market value and the lender agrees to accept less than the full balance in satisfaction of the loan. This option, as well as other loss mitigation options, may have tax consequences.

Summary Judgment: A decision granted by a judge based on a motion filed by one of the parties. In a foreclosure case, the judge can issue a summary judgment if he/she decides that the facts in the case are not in dispute, and therefore there is no need for the case to proceed to trial.

Summons: A plaintiff in a legal case must file and serve a summons along with a complaint. The summons advises the defendant that they must either appear in court on a specified date, or answer the complaint within a specified period of time.

Surplus: After a foreclosed property is sold at auction, the proceeds of the sale go to reimburse the lender and other lien-holders. If the sale price exceeds the amount owed, the extra amount is called a surplus. This money goes to the clerk of the court for keeping. The borrower must file a motion to claim this money.

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Stay: A stay is a temporary stop to a foreclosure. Borrowers may file an emergency motion with the court to stay the foreclosure sale (called an Order to Show Cause), but must show that they have a meritorious defense and a compelling reason for the stay. Filing for a Chapter 13 bankruptcy can automatically stay a foreclosure sale.

Trial: If the facts of the case are in dispute—the borrower has presented defenses or counter-claims to the foreclosure—the case may go to trial, and ultimately be decided by a judge (where fraud is alleged, a jury may decide the case). If the judge decides in favor of the lender, then the lender proceeds with filing a motion for an Order of Reference, as a first step towards a foreclosure sale. If the judge decides in favor of the borrower, then the foreclosure may be averted.

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Where to go for help:

- To find a qualified Housing Counselor, go to <http://nysdhcr.gov/Programs/foreclosureprevention/counselling.htm> on the Web, or phone: 1-877-BANK-NYS (1-877-226-5697).
- If you cannot afford to pay a lawyer, there may be a legal services organization that can help. To find a legal services office, go to <http://lawhelp.org/ny/> on the Web. If after visiting that Web site you still need further help in finding a legal service office that might assist you, contact Gloria Herron Arthur, Director of Pro Bono Affairs, New York State Bar Association, One Elk Street, Albany, NY 12207; phone (518) 487-5640, or send her an e-mail at garthur@nysba.org
- If you do not qualify for free legal services and need help finding an attorney, go to www.nysba.org/lr on the Web, or phone: 1 (800) 342-3661.
- To see a free video presentation on this topic, log onto the Web and visit the New York State Bar Association's online People's Law School at www.nysba.org/pls.



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