

## Domestic Violence in Foreclosure: The Foreclosure Process, Defenses and Alternatives for Survivors

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### Poll:

Do you consider yourself:

1. A domestic violence attorney/advocate;
2. A consumer law/foreclosure attorney/advocate; or
3. Do some of both

## Poll:

- How would you rate your level of knowledge about foreclosure?
  1. Beginner
  2. Intermediate
  3. Expert

## Overview of Mortgage Foreclosures

- **Beware!!** Every state handles foreclosures differently—the terms used and timeframes vary significantly. You need to learn how your state handles foreclosures.
- National Consumer Law Center has summarized each state's procedures. See [www.consumerlaw.org/](http://www.consumerlaw.org/)
- There are two basic procedures
  - Judicial foreclosure
  - Nonjudicial foreclosure

## Question:

- You are working with a survivor who is going through a divorce proceeding. She contacts you and indicates that she received a notice from a bank that the mortgage payments have not been made.
  - What information do you need to know?

## Mortgage Basics: Who is Who

- Mortgage Broker
- Originating Lender
- Assignee (and/or trustee for securitization)
- Investor (Fannie/Freddie)
- Servicer (this is who your client will know)
- Insurer (FHA, VA, PMI)
- Mortgage Electronic Registration System (MERS)

## Mortgage Basics: Who is who?

- Mortgage Servicer Departments: make sure you are dealing with someone who can assist you:
  - Customer Service
  - Collections
  - Loss Mitigation
  - Foreclosure
  - Escalations

## Mortgage Basics: the Documents

- Two key documents:
  - The Note—this is the actual loan agreement
  - The Mortgage—this is the real estate document that authorizes the mortgage lien
  - Know which documents your client has signed! They may have signed the mortgage but not the note (which is going to result in complications)
  - Other closing documents may contain useful information, for example the HUD1 Settlement Statement will show how the loan proceeds were disbursed

## Judicial foreclosures

- Lender must file suit to obtain court order to foreclose
- Lender's attorney files a lawsuit against borrower to establish the default amount (usually the accelerated balance on the mortgage loan) and the right to have the home sold and the proceeds applied toward the loan
- If court finds the debt valid and in default, it will issue a judgment for amount owed plus the costs of the foreclosure process. The house is then sold to apply to the judgment amount. Some states will allow a deficiency judgment, others will not.

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## Nonjudicial foreclosures

- Based on a deed of trust or mortgage that contains a power-of-sale clause—this clause allows the sale without a court order.
- Some states use a trustee to do the sale process, in other states the mortgage company attorneys handle the process.
- Lender is typically required to record a notice of default and mail the borrower a copy
- If the borrower does not cure the default, the trustee or mortgage company initiates steps for conducting the foreclosure sale of the home.

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## Asserting Foreclosure Defenses

- Who is doing this work?
  - Many local legal aid offices have foreclosure prevention projects
  - National Association of Consumer Advocates maintains list of consumer attorneys. See <http://members.naca.net/findanattorney/>

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## Question:

- After reviewing the paperwork, it appears your client has not been receiving proper notices related to the mortgage loan from the very beginning. It also appears that multiple banks have tried to collect on this mortgage loan and she is confused about who she is supposed to be working with. Additionally, she believes that her husband had worked out some sort of loan modification to lower the payment but no one seems to have a record of that at the current mortgage company.
  - What sort of legal claims would you want to investigate bringing at this point?
  - Where, when, and how will you raise these claims in a non-judicial foreclosure state versus a judicial foreclosure state?
  - Are there other safety concerns or opportunities for advocacy here apart from the legal claims?

## Basic Foreclosure Defenses

- Defenses related to origination or the making of the loan:
  - Truth in Lending Act (TILA) & Home Ownership and Equity Protection Act (HOEPA)
  - Other federal statutes such as RESPA
  - State law claims such as, e.g.:
    - Loan contained terms prohibited by state law
    - State predatory lending laws
    - Fraud, misrepresentation, unconscionability
    - UDAP (Unlawful and deceptive acts and practices)

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## Basic Foreclosure Defenses

- Defenses related to the servicing of the loan/ post closing issues
  - Payment application, forced place insurance, other escrow issues, inappropriate charges
  - Mortgage Company's failure to honor executed loss mitigation agreements such as a loan modification
  - Potential claims include breach of contract, promissory estoppel, breach of duty of good faith and fair dealing

## Basic Foreclosure Defenses

- Defenses related to the foreclosure proceeding itself:
  - Not in default/not properly accelerated
  - Standing/Who owns the note?
  - Defects in the foreclosure process
- Some states and localities have enacted mandatory negotiation and/or mediation procedures that the mortgage company must follow

## Foreclosure Defense: Procedure

- In a judicial foreclosure state, most if not all of these defenses and claims can be raised in the foreclosure proceeding as defenses or counter claims.
- In a non-judicial foreclosure state, will have to raise these issues in an affirmative lawsuit. This may mean obtaining an injunction to stop the foreclosure sale while the lawsuit is pending.
- Beware statute of limitations, statutes of repose, and other limitations related to specific claims.



## What about bankruptcy?

- Chapter 13 protects home by issuing an automatic stay and allowing a payment plan to catch up on missed payments and even “strip” a 2<sup>nd</sup> mortgage in some circumstances.
- Usually must be filed prior to the foreclosure sale
- However, bankruptcy courts currently do not have power to modify mortgages on primary residences and survivor will have to be able to make the monthly payment, plus a portion of the arrearage, plus a portion of other debts, plus fees.
- Chapter 7 options?

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## Question:

- Your client has decided she would like you to advocate for her to prevent the foreclosure, and would like to know what her options are.
  - What are her options
  - What do you need to know in order to assist her?

## Loss Mitigation

- **Two types of options:**
  - Those that will help keep the home
  - Those that don't keep the home
- Need to know if the homeowner's income situation is a short term or long term change.
- Options will vary depending on who holds or services the mortgage; loan-to-value ratio; how far behind the borrower is on payments; etc.
- When does this process occur?
  - Ideally before the borrower is in foreclosure, but it's possible throughout the foreclosure process

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## Loss Mitigation

- **Long Term:** Crisis that caused the homeowner to miss payments is on-going with no clear resolution.
- **Short Term:** Crisis that caused the mortgage to fall behind has passed or has a clear resolution timeframe.
- Homeowners must be honest with themselves and the mortgage company. Review budget carefully.

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## Loss Mitigation

- **Special Forbearance:** Allows for a suspension or reduction of payments for a set period of time so the homeowner may recover from a short term crisis. The delinquent amount is not forgiven and the borrower must have a plan.
- **Re-Payment Plan:** The amount that the homeowner is delinquent is spread out over a set period of time (usually 3-18 months) and added to the regular payment.
- **Moratorium:** Only for RHS Direct loans; allows for a break in payments and then re-amortization of the loan.
- **State based “Hardest Hit” or relief programs**

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## Loss Mitigation

- **Loan Modification:** adjusting the terms of the note to deal with the deficiency and make the payment affordable. Loan modification programs include the HAMP program and the AG/DOJ settlement program.
- **Partial Claim:** (FHA, state insured, PMI insured loans) The insurer may grant an interest free loan for the delinquent amount to bring the account.

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## Loss Mitigation

- **Pre-Foreclosure Sale:** Mortgage company may postpone the foreclosure sale to allow homeowner time to sell the property.
- **Short Sale:** Mortgage company may let the homeowner sell the home for less than the amount owed on the mortgage loan.
- **Deed-in-Lieu:** If homeowner unable to sell the home, the mortgage company may allow the homeowner to deed the home to the mortgage company preventing the foreclosure.

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## Loss Mitigation Packet

- Loss Mitigation Package Includes:
  - Financial Analysis/budget
  - Authorizations/Disclosures
  - Letter of Hardship
  - Documentation of Income
  - Tax Returns and/or 4506T
  - Bank Statements
- If batterer is on the loan, may need his cooperation and sign off on any agreement/loan modification/sale especially if divorce proceedings not finalized/never married. Be prepared with a plan so he does not use this process as another way to abuse the survivor.
- The big issue here: Showing the *capacity* to make mortgage payments given the survivor's current financial status.

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## Who helps with loss mitigation?

- Local legal services
- HUD housing counselors are FREE—800-569-4287
- **WARNING:** Survivors may be particularly vulnerable to foreclosure rescue scams. Beware of anyone who asks you to pay a fee in exchange for housing counseling services or modification of a delinquent loan. Report such scams to your local prosecutors, Attorneys General, FTC, and CFPB.

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## Question:

- Your client is concerned that, when her husband finds out she is working with the mortgage company to try to keep the house, that he will at a minimum refuse to assist her and may even become violent as he realizes she is undertaking this without reliance upon him.
  - What can you do to try to require his cooperation?
  - What else can you do to ensure her safety?

## Safety Planning

- Know the batterer – partner with the survivor to identify retaliatory risks
  - For example, how will batterer react to requests to assist with loss mitigation process, sign required documents, etc.?
- Risk Assessment
- Is foreclosure prevention even possible? Sometimes we need to discuss with the survivor that it's ok to leave the house.

## Loss Mitigation Planning

- If survivor wants to try to keep the home, need to work on ways to access financial resources to illustrate future capacity
  - Spousal Support
  - Child Support
  - Government Benefits
  - Rent
  - Deferred sale of home order
  - Accessing employment

## Using the Family Court Proceedings to Prevent Foreclosure

- **Retaining the Property:**

- Using Family Courts to order mortgage payments by the abuser as part of or in lieu of spousal support
- Having Family Court order cooperation with loss mitigation efforts
- A Judgment of Divorce, although maybe sufficient to transfer real property under state law, is often not acceptable to the mortgage industry. Get a quit claim deed signed!

## Using the Family Court Proceedings to Prevent Foreclosure

- **Selling the Property**

- If the survivor and the batterer own the home together, in order to sell the survivor will need either:
  - a court order or
  - the batterer's consent
- **Economic Planning for the Sale**
  - If selling price does not cover the mortgage, will survivor have ability to pay remaining mortgage balance?

## Using the Family Court Proceedings to Prevent Foreclosure

- Other Creative Strategies to Consider:
  - Motion for Joinder of Third Parties
  - Compelling Signature
  - Temporary Restraining Orders
  - Order Sale of Home
  - Use Family Courts to Authorize the Survivor
  - Motion to Set Aside Agreement
  - Partition Action
  - Filing Bankruptcy with an Adversary Proceeding

## Working with Foreclosure Attorneys

- Educate Foreclosure Attorneys on the Nature of Domestic Violence and its Impact on Foreclosure
  - Economic Abuse
  - Beware of collusion between abuser and lender or purchaser
  - Devise plans for accessing info when it is in control of the abuser
  - Conflicts of Interest
- Encourage Foreclosure Attorney to Raise DV Early in the Foreclosure Proceeding—Foreclosure is by definition an equitable proceeding; use this as a reason for why the Court should exercise its equitable powers



## Working with Foreclosure Attorneys

### ✓ Assist in Gathering Documents for Foreclosure Defense

- Loan Documents, Mortgage Statement, Title Papers, Notice of Default, Household Income, Court Orders
- If survivor does not possess documents, then use online resources, county recorders office, discovery requests, etc.

## The Problem of Signing the Mortgage but not the Note...

- This is a huge issue in these cases—where batterer has signed the note but survivor has not
- Transfer of ownership pursuant to the divorce should not trigger default
- Lenders should recognize an assumption pursuant to divorce without requiring underwriting, etc.
- Garn St Germain Act
- In practice, these are going to be very tough cases to resolve without litigation.

Questions?

Thank you.