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

CENTER FOR SURVIVOR AGENCY & JUSTICE

CSAJ's Mission & Vision

Mission:

The Center for Survivor Agency and Justice promotes advocacy approaches that remove systemic barriers, enhance organizational responses, and improve professional practices to meet the self-defined needs of domestic and sexual violence survivors.

Vision:

The Center for Survivor Agency and Justice envisions a world where all people have equal access to physical safety, economic security, and human dignity.

Consumer Rights for Domestic and Sexual Violence Survivors Initiative

- A national project that enhances economic justice for survivors by building the capacity of lawyers and advocates to provide consumer and economic civil legal advocacy and engage in systemic advocacy to remove barriers to economic security for survivors.
- Began in 2007 with funding from OVC.
- Technical Assistance Project funded by OVW, since 2011.
- Partners include:
  - National Consumer Law Center
  - Home Free
  - Center for Court Innovation
  - Wider Opportunities for Women
  - Expert Advisors

Program Activities

- Guidebook & Advocacy Briefs
  - Stay tuned! Advocacy Brief on Survivor Centered Economic Advoacy
- Consumer Practice Webinars
  - Survivor Centered Economic Advocacy: Expanding Our Approach to Safety
  - Building Partnerships for Economic Justice: A Report on CSAJ's Innovative Pilot Projects
  - Credit Reporting & Repair for Survivors
  - Credit Checks: An Illegitimate Barrier to Employment for Survivors
  - Federal Tax Advocacy for Survivors
  - TODAY!
- Individualized Technical Assistance
- Innovative Demonstration Sites
  - Texas Council on Family Violence
  - Women's Resource Center
  - Indiana Legal Services, Low-Income Taxpayers Clinic
  - University of Denver School of Law, Civil Litigation Clinic

You should leave being able to...

- Describe basic elements of a mortgage and the mortgage foreclosure process.
- Understand and compare options for survivors in foreclosure defense, including bankruptcy.
- Identify and apply legal and nonlegal advocacy strategies for loss mitigation, safety planning, and intersections with family/DV court.

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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/

Mortgage Basics: the Documents

- Two key documents:
  - The Note—this is the actual loan agreement
  - The Mortgage or Deed of Trust—this is the real estate document that authorizes the mortgage lien
  - Know which documents your client has signed!
  - Other closing documents may contain useful information, for example the HUD1 Settlement Statement will show how the loan proceeds were disbursed

Mortgage Basics: Who is Who

- Mortgage Broker
- Originating Lender
- Investor/owner (Fannie/Freddie, Trust)
- 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

Meet our client, Janet

- You are working with a survivor, Janet, 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. She is worried that she will lose the house.
  - What information do you need to know from Janet?
  - What can we tell Janet about the foreclosure process and time lines?

Mortgage Basics: Gathering the Information

- Survivor's Paperwork:
  - Monthly statements, escrow analysis, correspondence, closing packet
- Request from the mortgage servicers:
  - Request for Information (RFI) under CFPB Regulation X
  - Can also send a Notice of Error (NOE) if there is a dispute with mortgage servicer
  - Should be an exception under Gramm Leach Bliley Act, 15 USC 6802(e) to access information if have a "beneficial interest" i.e successor owner of the home.
- Subpoenas:
  - Third parties (servicer, title office)
- Discovery to spouse:
  - Provide information, i.e. monthly statements
  - Request the court order that spouse sign an authorization to allow mortgage servicer to release info directly to survivor

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.

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.

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, unconsionability
    - UDAP (Unlawful and deceptive acts and practices)

Basic Foreclosure Defenses

- Defenses related to the servicing of the loan/post closing issues
  - Payment application, forced place insurance, other escrow issues, inappropriate charges
  - Failure to comply with servicing and loss mitigation obligations under RESPA/CFPB Regulations
    - Loss mitigation evaluation
    - Dual tracking violations
  - 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 2nd 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?

The Problem of not signing the Note…

- This is a huge issue in these cases—where batterer has signed the note but survivor has not
- Transfer of ownership to survivor should NOT trigger due on sale clause
- CFPB Regulations: offer some guidance for widows, but not divorces. Proposed regulations offer some protections. Complain to build the record for regulation.
- Assumptions: survivor should have a right to assume even if the loan is in default without further credit screening. Investors generally now have guidance that allow for a simultaneous assumption/loan modification process.
- Many possible legal claims

Next steps for Janet

- Janet has decided she would like you to advocate for her to prevent the foreclosure, and would like to know what her options are.
  - What do you need to know in order to assist her?
  - What are her options?
  - How to tailor options to fit within her larger safety plan?

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

CFPB Loss Mitigation Rules

- CFPB Regulations establish a process by which mortgage servicers must process loss mitigation requests, but does not mandate outcomes.
- Covers most first mortgages for owner occupied homes
  - Exceptions: small servicer, reverse mortgages, HELOCS, non-primary residences.
- 12 C.F.R. 1024, effective January 10, 2014
- Mandates notices at certain stages of delinquency; foreclosure hold for 120 days

CFPB Loss Mitigation Rules

- Once an application is submitted, servicer must give notice that packet is complete or, if incomplete, what additional information is required with a reasonable deadline
- If application is submitted more than 37 days before foreclosure sale, then servicer must evaluate for available loss mitigation options and submit written decision to borrower within 30 days.
- Some appeal rights depending on timeline.
- Dual tracking rules: If borrower submits complete loss mitigation application during 120 day period or before the servicer has made first notice/foreclosure filing, then servicer shall not initiate foreclosure process until loss mitigation review is complete. If after initiation of foreclosure but 37 days before sale date, supposed to hold off on sale while evaluating.

Loss Mitigation Packet

- Loss Mitigation Package Includes:
  - Financial Analysis/budget (Request for Mortgage Assistance or RMA)
  - 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.
- Looking to get in a "complete" application for CFPB protections.

CSAJ comments to CFPB

Proposed amendments to 2013 Mortgage Rules enhance survivor autonomy and privacy protections when taking over mortgage. CSAJ comments recommended the following:

- Enforcement mechanism
- Protections and limitations on Notices released to abusive partner
- Increased written communication to successor in interest (survivor)
- Enhance loss mitigation options for successor in interest (survivor)

CENTER FOR SURVIVOR AGENCY & JUSTICE

March 16, 2015

Monica Jackson, Office of the Executive Secretary
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

RE: **Docket No. CFPB-2014-0033**
Amendments to the 2013 Mortgage Rules under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z)

Dear Ms. Jackson:

Thank you for the opportunity to comment on these important proposed rule changes.

The Center for Survivor Agency and Justice (CSAJ) is a national organization dedicated to enhancing advocacy for survivors of intimate partner violence (IPV).[1] We develop transformative advocacy approaches that match institutional structures, organizational programs, and professional practices with IPV survivors' lived realities. These approaches guide our efforts to improve the work of attorneys, to organize communities, and to provide leadership on critical issues facing survivors and advocates across the country.

Economic abuse is a distinct yet common form of harm experienced by women in abusive relationships, and such economic abuse is a significant component in the system of tactics used by abusive partners to gain power and maintain control.[2] "Economic abuse involves behaviors that control a woman's ability to acquire, use, and maintain economic resources, thus threatening her economic security and potential for self-sufficiency."[3]

The Consumer Rights for Domestic Violence Survivors Initiative is a national project of CSAJ, based on the understanding that partnerships between domestic violence and consumer rights advocates and attorneys are critical to achieving the joint goals of physical and economic safety for survivors. In the course of developing these partnerships, CSAJ has learned how difficult it can be for IPV survivors to work with a mortgage loan servicer and/or investors. These difficulties can result in an opportunity

[1] For more information abuot CSAJ, please see our website at www.csaj.org
[2] A. E. Adams, C. M. Sullivan, D. Bybee, and M. R. (2008). Greeson Development of the Scale of Economic Abuse. *Violence Against Women*, 14(5), pp. 563-588.
[3] Id.

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.

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**

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, investor programs (i.e. Fannie Mae and Freddie Mac modification programs).
- **Partial Claim**: (FHA, state insured, PMI insured loans) The insurer may grant an interest free loan for the delinquent amount to bring the account.

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.

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
  - "Hardest Hit" or other financial assistance programs

Advocating for Janet

- 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 encourage his cooperation?
  - What can the mortgage company do *without* his cooperation?
  - What can you do to assist with safety planning?

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.

Other Resources

- Sussman, 2011. *Risk Analysis & Safety Planning with Survivors.* (training slides)
- Davies, J. (1999). *Safety Planning*

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 some state laws, is often not acceptable to the mortgage industry. Get a quit claim deed signed!
  - Problems with removing a name from a mortgage loan

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
  - Consolidation of foreclosure into the divorce proceeding
  - 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 to fashion a more appropriate process or remedy

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.

Questions?

Thank you!

Who helps with loss mitigation?

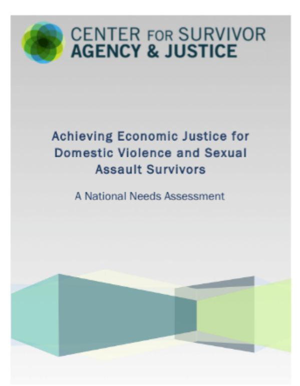
- Local legal services
- HUD housing counselors are FREE—800-569-4287
- **WARNING:** Survivors may be particularly vulnerable to foreclosure rescue scams. Beware of anyone who asks you to pay a fee in exchange for housing counseling services or modification of a delinquent loan. Report such scams to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

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/
  - Contact CSAJ
    - Technical Assistance
    - Partnership Building

Resources & Announcements

CSAJ Core Resources



CSAJ's National Needs Assessment Report

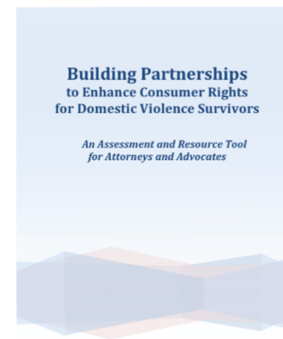

August/September 2013 Domestic Violence Report 83

Economic Ripple Effect of IPV: Building Partnerships for Systemic Change

Consumer law and other economic legal remedies have the potential to provide survivors with the legal tools to address issues such as debt collection, credit discrimination, bankruptcy, damaged credit, and foreclosure.

Economic Ripple Effect DV Report Article

CSAJ's Pilot Site Report



CSAJ's Assessment Tool for Attorneys & Advocates

- CSAJ's Resource Library
- Past webinars on consumer issues

Key Resources: Foreclosure

CSAJ Resources

- 2009 Supplement, Enhancing Advocacy for Survivors by Coordinating Domestic Relations and Foreclosure Cases.
- CSAJ Guidebook on Consumer & Economic Advocacy for Survivors, Foreclosure chapter
  - Forthcoming!

External Resources

- CFPB Mortgage Assistance information
- Making Home Affordable
- National Consumer Law Center
  - Foreclosures & Mortgages
  - Snapshotes of Struggle (Report)
- Michigan State University, Starting over after foreclosure

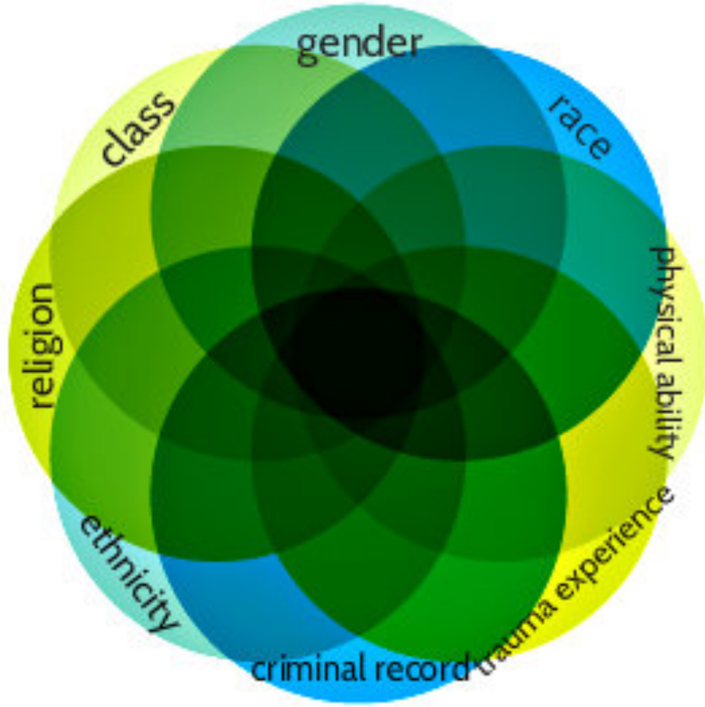
Coming Up!

- Demonstration Sites
  - Needs Assessment Toolkit
  - Report on Implementing Multilevel and Collaborative Economic Advocacy for Survivors
- Advocacy Briefs
  - Federal Tax Advocacy
  - Survivor Centered Economic Advocacy
- CSAJ Guidebook on Consumer & Economic Advocacy for Survivors

NEW! Legal Impact for Racial & Economic Equity of Survivors Project (REEP)

Seeks to remedy the systemic inequalities facing survivors of color that impair their access to economic justice.

- Coalition building with diverse anti-poverty, race equity, and violence against women practitioners.
- Engage communities in identifying systemic barriers
- Implementing legal and policy approaches that facilitate access to economic opportunity for survivors of color.



Partners Include:

- Women of Color Network, Inc., Southwest Center for Law and Policy, Asian Pacific Islander Institute on Gender-Based Violence, Casa de Esperanza, National Legal Aid & Defender Association, Legal Momentum, Bill Kennedy, Kirwan Institute

6/22/16

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