JUSTICE IN AGING
FIGHTING SENIOR POVERTY THROUGH LAW

CHAPTER SUMMARY

Legal Basics: Foreclosure Prevention

CHAPTER SUMMARY • MARCH 2017

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The National Consumer Law Center

The National Consumer Law Center uses its expertise in consumer law and energy policy to work for consumer justice and economic security for low-income and other disadvantaged people, including older adults and people of color. NCLC works with nonprofit and legal services organizations, private attorneys, policymakers, and federal and state government and courts across the nation to stop exploitive practices, help financially stressed families build and retain wealth, and advance economic fairness.

Key Lessons

1. Older homeowners in default and foreclosure face a number of unique challenges;
2. Careful counseling is necessary to successfully resolve the default and put in place a sustainable alternative to foreclosure;
3. The foreclosure avoidance options are changing as a major federal anti-foreclosure initiative sunsets; and
4. Homeowners should seek the assistance of knowledgeable and skilled counselors early.

Section 1: What is Foreclosure?

Foreclosure occurs when real property is sold to satisfy an unpaid debt. The debt is often a home mortgage, but foreclosure can also happen because of other debts as well. Tax liens, mechanics' liens, condominium or homeowner association liens or other types of debt can lead to foreclosure.

Foreclosure, the process by which the home is sold, is governed by state law. State laws vary widely and different laws may apply to different types of foreclosure.[1] An important first step is to identify what type of foreclosure the client is facing. This summary focuses on foreclosure due to default on a regular mortgage.

Mortgages or deeds of trust typically are foreclosed either by judicial or non-judicial process. Judicial foreclosure requires a court action prior to foreclosure in which the borrower can raise defenses to foreclosure. In states permitting non-judicial foreclosure by "power of sale," there is little to no court supervision of the foreclosure process. In order to defend against a non-judicial foreclosure the borrower must file an action in court to stop the process.

1 For manufactured homes, state law determines whether the home must be foreclosed upon as real property or repossessed as personal property. Another type of foreclosure (or forfeiture) may occur pursuant to a real estate installment sales contract. Some states regulate land installment sales contracts by statute, detailing procedures for termination, forfeiture, or foreclosure. The procedure for foreclosing a condominium or homeowner association lien is determined by state statute. Lastly, tax lien foreclosures generally differ from other types of foreclosure and the sale process varies by locality.

In response to historically high rates of foreclosure accompanying the recession some states changed the foreclosure process to require that lenders participate in supervised conferences, mediation or other forms of negotiation with homeowners prior to foreclosure.[2] In most instances, a third party supervises the conference. The conferences focus on providing alternatives to foreclosure including options to keep the home and catch up on missed payments. The conference and mediation process, which were added in states with judicial and non-judicial foreclosure, vary significantly from program to program.

The foreclosure timeline

Depending on the state, the foreclosure process can proceed very quickly. Advocates should determine at the outset if a foreclosure sale has been scheduled. A foreclosure sale cuts off the homeowner's right to the property and the ability, in most cases, to raise defenses to the validity of the mortgage. It is important to seek a delay of the sale before or while pursuing alternatives to foreclosure. In some cases the foreclosure sale must be put on hold while the borrower is being considered for other options.

Homeowners who have missed two or more monthly payments should be encouraged to seek assistance as soon as possible. Many of the options discussed below are also available to homeowners who have not missed a payment, but anticipate falling behind due to imminent unemployment or other financial disruption. Getting assistance early avoids the difficulty of negotiating at the last minute with a potential foreclosure sale date pending; it makes the borrower appear more responsible in trying to prevent the problem from getting out of hand; and in some cases, it avoids the extra layer of complexity when a foreclosure lawyer is involved on behalf of the lender.

Section 2: Assessing the Needs of Older Homeowners

Older homeowners face a number of challenges in maintaining a household. The illnesses, death or disability of a spouse or other family member can put a strain on household budgets. Cognitive decline or physical incapacity can make keeping up with day-to-day financial housekeeping difficult. Moreover, homeowners are aging with more debt, including mortgage and non-housing debt, and fewer resources than prior generations.

The importance of pre-foreclosure counseling

Older homeowners benefit from intensive default and delinquency counseling that evaluates the reason for default, current and expected income, and other challenges that may arise as homeowners age. A counselor may also evaluate the homeowner for any benefits that she qualifies for but has not yet accessed. Declines in income or increases in other necessary expenses will limit the resources available to devote to a foreclosure avoidance plan or imperil the success of a plan that is in place.

Housing counselors approved by the U.S. Department of Housing and Urban Development (HUD) provide free or low cost assistance to homeowners.[2] The availability of counseling greatly impacts the homeowner's ability to apply for the options outlined below, including loan modifications, and successfully negotiate a resolution with the lender. Many of these options require the repeated submission of financial paperwork and other documentation. If the homeowner is not able to sustain homeownership, counseling may help her avoid foreclosure by recommending or assisting with short sales and other options to transition from the home. Moreover, counselors can assess homeowners' need for additional services such as legal assistance or mental health counseling or provide such wrap-around services to support struggling homeowners.

What is the homeowner's objective?

Homeowners facing foreclosure may seek assistance for many reasons. A homeowner may seek assistance proving that she has made a particular payment to the lender on time, and therefore has not defaulted on the loan. While

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2 Consumers may locate a HUD-approved housing counseling agency at: hudexchange.info/programs/housing-counseling/customer-service-feedback/

some homeowners may wish to age in place and remain in their homes indefinitely, others may be willing to give up their homes and downsize or move to a property that requires less care and upkeep. **Care should be taken to understand the homeowner's objectives and needs and to craft a plan consistent with those needs.** The plan may, for example, call for rewriting the terms of the loan to make payments more affordable and exploring other sources of income or benefits available to ease the financial crunch. If the homeowner's objective is clearly unobtainable, an advocate should be prepared to discuss alternative housing and other resources that might be available.

Section 3: Options to Save the Home from Foreclosure

The options available to the homeowner will depend in part on who owns, invests or insures the loan. Fannie Mae and Freddie Mac are the biggest investors in the mortgage market and set the policies for the loans they own. The options, called *workout* or *loss mitigation* options, will be negotiated with a servicer. The servicer administers the loan on behalf of the lender or owner of the loan. In this summary we use *lender* and *servicer* interchangeably.

Options to keep the home

1. Repayment plan. Homeowners may catch up on missed mortgage payments by paying the entire amount due or by entering a repayment plan. *Repayment plans* (also known as *reinstatement agreements*) involves repaying the amounts past due (including fees and costs) over time plus making regular mortgage payments as they come. Homeowners need to have extra income to commit to the mortgage beyond the regular monthly payment.

2. Forbearance. A forbearance plan is generally a more formal agreement that allows homeowners who have missed several loan payments due to a serious event (illness, divorce, natural disaster, etc.) to repay the arrears over a period of time while concurrently making their regular monthly mortgage payments. While similar to a repayment plan, a forbearance plan is usually long-term, and offers options unavailable in a repayment plan, such as a period of reduced or suspended payment to allow the homeowner to recover from the event that caused the financial hardship. A written agreement is usually required.

3. Loan modification. A loan modification is a written agreement between the lender and the homeowner to change one or more terms of the note. The modification may reduce the interest rate or principal amount, change the mortgage product (for example, from an adjustable to a fixed rate loan), extend the term of the loan, or capitalize delinquent payments. An agreement of this type occurs most frequently when the borrower can no longer afford the original loan terms due to a permanent change in circumstances, and it is not in the lender's financial interest to foreclose. The biggest loan modification initiative to date, the federal Home Affordable Modification Program (or HAMP), expired at the end of 2016. Lenders will be developing more modification programs and options in the future.

Other options to keep the home

1. Refinancing. Homeowners may consider refinancing with a *reverse* or *forward mortgage*, if feasible. Reverse mortgages allow older homeowners to convert equity in their homes into cash without having to move out and or make monthly mortgage payments. The lender advances funds to a borrower as a lump sum, monthly payment, through a line of credit, or a combination of these options. The borrower does not make monthly payments on this loan. Instead, over time, the reverse mortgage balance rises as a result of additional advances, accruing interest, and fees. For most reverse mortgages maturity occurs when the borrower dies, sells, or permanently relocates from the home. Most reverse mortgages are insured by the FHA under the Home Equity Conversion Mortgage (HECM) program. HUD, which oversees the program, has made a number of changes which make it more difficult for homeowners in default on a forward mortgage to access this option.

2. Government or private assistance. Some states and municipalities have long-standing programs to help homeowners in financial distress. For example, Pennsylvania has a mortgage assistance program that provides loans to homeowners to pay part of the monthly mortgage payment for several years.[3] Homeowners who are behind in their payments for reasons beyond their control and who are likely to be able to resume full home loan payments in several years are eligible. Some unions and social service organizations also have mortgage assistance programs.

Section 4: Alternatives to Foreclosure

Homeowners may wish to move from the property rather than fight the foreclosure or cure the default. Homeowners have a number of alternatives to foreclosure, however many of these options require the approval of the lender.

1. Short sale. With a "short sale" a lender will accept the proceeds of a sale even if the proceeds will not cover the amount due on the mortgage. Properties that are "underwater," meaning that the amount owed on the mortgage exceeds the fair market value of the property, may be sold through this process. A short sale helps the lender avoid greater potential losses at a foreclosure sale. The homeowner may be required to make cash contributions in addition to the sales price in exchange for a waiver of the balance of the deficiency.

2. Deed-in-lieu of foreclosure. A homeowner may negotiate with a lender to accept the voluntary return of the property as an alternative to foreclosure. This option—called a deed in lieu of foreclosure—may not be accepted by the lender if there are other liens on the property, unless those liens can be paid off. Some lenders may provide cash incentives to borrowers and tenants in exchange for the property being vacated in a decent condition. Deeds in lieu may be a poor choice for a homeowner if there is significant equity in the property; this equity may be realized by a sale of the property rather than a voluntary transfer.

Note that debt forgiven in connection with short sales, deeds in lieu of foreclosure and other pre-foreclosure workout options may have tax consequences. Homeowners should seek the assistance of a knowledgeable tax professional.

3. Sell the home. If a home can be sold for more than the balance owed on the mortgage the homeowner may be better served by a regular sale of the property. This is particularly important for homeowners with substantial equity in the property who have little likelihood of being able to afford a reinstatement or modification of their loan. A delay of the foreclosure sale may be necessary to complete the transaction.

Conclusion

Foreclosure deprives older homeowners of their largest financial asset, and the stability and comfort of a home to age in place. Preventing such foreclosures requires a holistic evaluation of the elder's current and future resources and other needs. The options available must be tailored to the needs of older homeowners and anticipate any financial or other challenges that they may face in the future.

Additional Resources

- U.S. Department of Housing and Urban Development (HUD): hud.gov
    - Find a HUD-approved housing counseling agency: hudexchange.info/programs/housing-counseling/customer-service-feedback
- Other Government Sites

3 Information about the Pennsylvania Homeowner's Emergency Mortgage Assistance Program (HEMAP) is available at phfa.org/hop/programs/hemap_info.aspx

    - Consumer Financial Protection Bureau: consumerfinance.gov
    - USDA Rural Housing Service
        - Single-Family Housing Guaranteed Loans: rd.usda.gov/programs-services/single-family-housing-guaranteed-loan-program
        - Single-Family Housing Direct Loans: rd.usda.gov/programs-services/single-family-housing-direct-home-loans
    - U.S. Department of Veterans Affairs: benefits.va.gov/homeloans
- Legal Assistance
    - National Association of Consumer Advocates: naca.net
    - Legal services/Legal aid: lsc.gov/what-legal-aid/find-legal-aid
    - Volunteer lawyers: americanbar.org/groups/legal_services/flh-home/flh-free-legal-help.html
- Advocacy & Housing Counseling Organizations
    - National Housing Resource Center: hsgcenter.org
    - NeighborWorks America: neighborworks.org/Home.aspx
    - NCLR Homeownership Network: nclr.org/issues/economy/asset-building/housing
    - National Consumer Law Center: nclc.org
- Publications
    - National Consumer Law Center, Foreclosure and Mortgage Servicing (5th ed. 2014)
    - National Consumer Law Center, Mortgage Lending (2012)
    - National Consumer Law Center, Surviving Debt (2016 ed.)

Case consultation assistance is available for attorneys and professionals seeking more information to help older adults. Contact NCLER at NCLER@justiceinaging.org.

This Chapter Summary was supported by a contract with the National Center on Law and Elder Rights, contract number HHSP233201650076A, from the U.S. Administration on Community Living, Department of Health and Human Services, Washington, D.C. 20201.