

## FORECLOSURES

This handout was prepared by Legal Services of the Florida Keys (LSFK) with support from the Institute for Foreclosure Legal Assistance. LSFK represents homeowners in foreclosure and homeowners having problems with their mortgage. Unemployment, divorce, death, and abusive lending practices put many homeowners at risk of losing their home. If you are facing foreclosure, you may be tempted to give up and walk away from your home. Don't give up! You should consult with an attorney to find out about your options. This flyer is intended to give only general advice about your possible options and may not cover your specific situation. It is not intended as a substitute for individual advice. If you have a question about the information in this flyer, you should contact an attorney as soon as possible. If you cannot afford an attorney, you can contact LSFK at the locations listed at the end of the flyer, to see if you qualify for our services.

### **I'm behind in my mortgage payments, what should I do?**

Contact your mortgage company to find out if they will assist you. You should ask to speak with the loss mitigation department. This department works with homeowners that are behind in their mortgage payments. Generally, it is better to contact the mortgage company as soon as you have a problem.

The mortgage company may offer you a repayment agreement which would allow you to catch up with your mortgage over time. If your payments are not affordable, try to negotiate with the lender to restructure the terms of your loan to make your monthly payments temporarily or permanently affordable. The lender might also agree to place the missing payments at the end of the mortgage.

Many borrowers have complaints about the loss mitigation process. Most likely you will have to make several phone calls to the mortgage company and the mortgage company will ask you to send proof of your income. Many homeowners have problems finding an employee from the mortgage company that will help them. You may speak to a different person each time you call the mortgage company. To avoid problems, you should always write down the full name, job title, and phone number of each person you speak to. Keep copies of any papers you send to the mortgage company. If you reach an agreement on the phone, you should write a letter to the mortgage company confirming the terms of your agreement. If the mortgage company sends you an agreement to sign, be sure you understand the entire agreement. Do not agree to a payment plan that you cannot afford.

In May 2009 President Obama expanded the *Making Homes Affordable Program (HAMP)* to make it more attractive to mortgage companies to participate. Through this program, residential homeowners may have their mortgage modified or refinanced so that the terms are better. If your mortgage company denied you relief in the past, or said that they were not participating in any program, you should contact your lender again. You can also go to the government website <http://makinghomeaffordable.gov/> for more information.

If you have an FHA (Federal Housing Administration) mortgage, you are entitled to additional help. Call 1-888-297-8685 for more information. VA (Veteran's Affairs) mortgages also have additional assistance for homeowners. Call 1-800-827-1000 for more information.

### **What is a foreclosure?**

A foreclosure is a lawsuit filed by a mortgage company when the borrower has not made payments. Through the foreclosure, the mortgage company asks the Court to sell the property so the mortgage company can recover its money.

### **I was served with court papers for foreclosure. What happens next?**

Once the mortgage company files a foreclosure, you will be served with the Summons and Complaint. Either the sheriff or a process server will deliver the complaint to you. The Summons and Complaint can also be left with anyone in your home over 16 years old.

You should talk to an attorney immediately if you are served with a foreclosure lawsuit. This is especially important if you fear that you may have been taken advantage of by the lender or are the victim of a foreclosure-related scam. To find an attorney that represents consumers, you can contact the National Association of Consumer Advocates (<http://members.naca.net/findanattorney.php>) You can also check the yellow pages of the phone book for the names of private attorneys. We also suggest that you check with friends and relatives for the names of attorneys that they can recommend. LSFK also represents low-income people in foreclosure.

You can also call the Florida Bar Lawyer Referral Service at 1-800-342-8011 and ask for a referral to the Low Cost Panel. The clerk will ask you about your income. If you qualify, you will be referred to a private attorney who charges a reduced fee. If you do not qualify for the Low Cost Panel reduced-fee attorney, you will be given the name of an attorney who charges regular fees, however, the first half hour consultation will only be \$25.

You can also get a referral by going to the Florida Bar Lawyer Referral website at <http://www.floridabar.org>. Simply click on the "Find a Lawyer" button and then follow the instructions on the right side of page where it states "Lawyer Referral Service."

If you do not have an attorney, and respond to the foreclosure yourself, follow these instructions:

- **Read the Summons and Complaint**

To begin, you should read the Summons and Complaint for Foreclosure. The Summons and Complaint will give you important information about the lawsuit, including the claims made by the mortgage company and directions for you to follow. The mortgage company will be called the "Plaintiff" (the party filing the lawsuit) and you will be called the "Defendant" (the party being sued). Once you have read the Summons and Complaint, you can begin to prepare your Answer.

- **Write an Answer to the Complaint**

An "Answer" is your written response to the claims made against you by the mortgage company in the Complaint. It is also your chance to explain why the lender should not be entitled to force the sale of your home. You must file the Answer with the Clerk of Court. Your Answer is due 20 calendar days after you were served with the Summons and Complaint. If the deadline falls on a weekend or holiday, the Answer will be due on the next day the Court is open.

Your Answer should point out anything in the Complaint that you believe is untrue or wrong. Your Answer should also explain any reason that would make it unfair for your house to be foreclosed. These are called "Affirmative Defenses." For example, if you believe the lender did not do what it was supposed to do concerning your mortgage or refused to work with you to avoid foreclosure, you should give the details in your Answer. Also, if you think the amount demanded in the Complaint is incorrect, you should explain why it is wrong. If you have proof that you paid the mortgage, you should attach copies to your Answer.

At the end of your Answer, sign your name and include your address and telephone number. You must also write that you have mailed a copy of your

Answer to the mortgage company's attorney and the date you mailed it. You can mail the Answer by regular U.S. Mail.

- **File the Answer with the Clerk of Court**

Take your original answer and two copies to the Courthouse in which the Complaint and Summons were filed. There are three courthouse branch locations:

- 1) Plantation Key Courthouse - 88820 Overseas Highway, Tavernier, FL. 33070
- 2) Marathon Courthouse - 3117 Overseas Highway, Marathon, FL 33050
- 3) Key West Courthouse - 302 Fleming Street, Key West, FL 33040

Hand the clerk the original answer to be filed and ask the clerk to date-stamp your two copies so you can prove that you filed your Answer on time. Mail one of the date stamped copies of the Answer to the plaintiff's attorney. Keep the other date-stamped copy for your records.

**I make my mortgage payments to "Florida Mortgage Company." Why did "National Bank, as Trustee for XYZ Trust" file the foreclosure against me?**

Mortgages are frequently sold and transferred by the banks that hold them. Your mortgage may have been sold to a trust. In Florida, to file a foreclosure, the plaintiff must own the mortgage and note (your promise to pay money back to the mortgage company).

**After I file an Answer in the foreclosure, what is the next step?**

While the foreclosure is pending, you should continue trying to negotiate with your mortgage company or the attorney for the mortgage company.

The 16<sup>th</sup> Judicial Circuit which covers Monroe County, issued an Administrative Order, effective June 29, 2010, stating that there must be mediation in mortgage foreclosures for all residential occupied homes on foreclosure cases filed after July 1, 2010. This mediation program is called Residential Mortgage Foreclosure Mediation Program (*RMFM*). The Administrative Order is available at <http://www.clerk-of-the-court.com/Docs/3.005.pdf>. If your foreclosure case was filed before July 1, 2010, your case will most likely not be part of *RMFM*.

Under *RMFM*, when the foreclosure case is filed, the mortgage company must file with the Court a form that includes all your contact information. The mortgage company must also give you a notice explaining your right to mediation. Performance Mediation, the company that has been hired by the Court to assist in facilitating settlement negotiations between the parties, will then contact you to see if you will be participating in mediation procedures. If you are not contacted by Performance Mediation, you can contact them directly at 1-305-445-2842. To participate in mediation, at some point you will have to provide financial information to the mediator and meet with an approved foreclosure counselor. The services of the counselor and the mediator are at no cost to the homeowner. Performance Mediation will explain more about the mediation program when you call. Once all procedures have been met, a mediation date is set. The mortgage company's attorney and the homeowner attend the mediation and try to work out a settlement of the foreclosure case. The mediator is an impartial person who is trained to help the parties work out a settlement. If a settlement is reached, it is written down and the foreclosure process stops.

If no settlement is reached at mediation or the homeowner does not participate in the mediation, the mortgage company will most likely file a Motion for Summary Judgment. This document tells the Judge that there are no facts in dispute and asks the Judge to schedule a foreclosure sale. If you receive a Motion for Summary Judgment and you disagree with any facts raised by the mortgage company, you should file an Affidavit opposing Summary Judgment. An Affidavit is your version of the facts. For example, if you do not owe what the mortgage company says you owe, you should write this in your affidavit. By signing the affidavit, you are swearing that everything you write is true and correct. The Affidavit must be signed in front of a notary. You should file the Affidavit with the Clerk of Court and mail a copy to the attorney at least five days before the hearing on the Motion for Summary Judgment. Keep a copy of your Affidavit for your records.

You should then receive a notice of hearing for the Motion for Summary Judgment by mail. You must attend the hearing. Bring a copy of your Answer and any other documents you filed. If you filed an Affidavit, you should be prepared to explain what facts are in dispute. If you and the mortgage company disagree about the facts, the Judge should not enter Summary Judgment and the case will go to trial at a later time.

If the Judge decides there are no facts in dispute, the Judge will enter Judgment against you and tell the Clerk to schedule the sale of your home. The sale is

supposed to be scheduled within 35 days, but you can ask the Judge to have the sale scheduled at a later date.

### **How does a foreclosure sale work?**

The Final Judgment of Foreclosure will still set a specific date on which the foreclosure sale will take place. In Monroe County, foreclosure sales take place in-person on the courthouse steps at 500 Whitehead Street, Key West, FL 33040. To get more specific information about any activity or hearings in your case, or to inquire as to whether your home is set for sale, please contact Monroe County Clerk of the Court directly at 305-292-3540 or visit

<http://www.clerk-of-the-court.com/searchCivilCases.asp> and input your name or case number.

### **Once the house is sold, do I have to move out right away?**

The new owner must wait 10 days after the foreclosure sale before asking the Court to issue a Writ of Possession to remove you from the property. A Writ of Possession is a document where the Court orders the Sheriff to remove you and all of your belongings from the property. It is illegal for the new owner to change the locks or shut off the utilities to force you out.

The Court can not issue a Writ of Possession in foreclosure actions involving homestead or non-homestead residential properties without evidence that you were properly served with the foreclosure case. You have to be provided a notice of hearing when the new owner asks for the Writ of Possession and a hearing has to be held before the Judge. You should attend that hearing and explain to the Judge why you may need more time to move out of the house.

### **Am I entitled to any money if my house is sold at a foreclosure sale?**

The money made at the foreclosure sale will be given out according to the Final Judgment. If there is money left over, you may be entitled recover these funds. You do not need an attorney or assistance to recover these funds. You can contact the Monroe County Clerk of the Court directly at 305-292-3540 to determine if your house was sold for more than you owed the mortgage company. If your house was sold for more than you owed, you are entitled to receive the extra money. This is called a "surplus."

### **Can I file bankruptcy to stop the foreclosure?**

A Chapter 13 bankruptcy case can be filed up until the day of the sale to stop the foreclosure sale of your home. With this type of bankruptcy you must have enough monthly income to meet all your regular monthly expenses and have enough money left over each month so that you can bring your mortgage current within 60 months. Under most circumstances, when the bankruptcy is filed, the foreclosure process stops and if any foreclosure sale is scheduled, it is canceled. You must obtain debt counseling prior to filing of the bankruptcy so you cannot wait until the day of the sale to make a decision about filing a Chapter 13 bankruptcy. You should consult a bankruptcy attorney for more information. You can find a bankruptcy attorney from the National Association of Consumer Bankruptcy Attorneys (<http://www.nacba.org/attorneyfinder/>).

### **I have decided that I can't afford my house. What are my options?**

If you decide that you cannot afford to keep your house, do not walk away from the mortgage. If the house is sold at a foreclosure sale, you run the risk of losing any equity you may have and further damaging your credit record. Here are other options:

- **Sell your home**

You may sell your home even after a foreclosure is filed. You should consider this option especially if you have owned your home a long time or the house is worth much more than the amount you owe on your mortgage. You should contact a real estate agent with a good reputation for assistance in listing and selling your home. You should also hire an attorney to review all of the sales paperwork and to represent you at the closing. If you have a contract to sell your home, but you will not complete the sale before the foreclosure sale, you should file a "Motion to Cancel Foreclosure Sale." This is a letter to the Judge asking that the foreclosure sale be rescheduled so you can complete your sale of the property. You should attach a copy of the sales contract to the Motion.

- **Shortsale**

If you find a buyer for your home, but the buyer will not pay you enough money to pay off the mortgage, you may want to consider a short sale. For example, the buyer is willing to purchase the property for \$140,000 but you owe \$150,000 to the mortgage company. In this case, you should contact the mortgage company to see if it will accept a reduced payoff. Generally, the bank will not allow this if you receive any money from the sale.

- **Deed in lieu of foreclosure**

Instead of selling your home, you could execute a deed in lieu of foreclosure. By doing this, you would give your house to the mortgage company. You might want to consider this option if you have no equity in your home and you have found no other way to avoid foreclosure. By executing a deed in lieu of foreclosure, you can avoid the time, expense of a foreclosure lawsuit and you may be able to avoid having a foreclosure judgment entered against you. However, you should not do this unless you first obtain written confirmation from the mortgage company that you will not owe it any more money. You should have your own attorney review this agreement.

If you choose a short-sale or deed in lieu of foreclosure, it could affect the amount of income reported to the IRS. You should consult with a tax professional or a Low Income Taxpayer Clinic. Clinic locations are available on the Taxpayer Advocate's website (<http://www.irs.gov/advocate>). Legal Services of Greater Miami, Inc.'s Low Income Taxpayer Clinic may also be able to advise you concerning the tax consequences of a deed in lieu of foreclosure or a short sale.

### **Can I refinance to avoid foreclosure?**

Yes. If you refinance your mortgage, you will stop the foreclosure. If you are currently having a problem paying your mortgage, you will want to review whether you can afford the potential new mortgage. Any refinance will only increase the amount owed on your property. If you are significantly reducing your interest rate, it might make sense to refinance. However, many refinancing options that look helpful may, on closer inspection, be far more costly or a scam. Have a knowledgeable advisor review the proposed loan before signing anything.

If you are over 62 years old, you may want to consider obtaining a reverse mortgage. A reverse mortgage is a mortgage product for senior citizens which allows you to live in your home without making mortgage payments, as long as it is your primary residence. With a reverse mortgage, you are only responsible for property taxes and property insurance. The amount of reverse mortgage you qualify for is based upon your age and the value of your home. AARP has more information about reverse mortgages on their website: <http://www.aarp.org/money/revmort/>

**I was contacted by someone who claims they can help me save my home from**

**foreclosure. Can they help me?**

After a foreclosure is filed you will get many offers to help you “save your home.” You should avoid any transaction where an “investor” will take over the home and you will “get the home back” after a period of time. Most of these offers are fraudulent. These transactions are never set up to succeed and these companies are only looking to steal money from your property and take your home.

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