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# **Report on New York's Foreclosure Process**

*New York State Department of Financial Services*

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## PREFACE

This report is the culmination of data collection from, and conversations with, many different constituencies about the foreclosure process in New York State. The result of these efforts is the identification of a surprising amount of common ground among many differing parties in both identifying and resolving unnecessary delays in the foreclosure process.

It is not intuitive that delays in the foreclosure process harm New Yorkers every day, but indeed that is just what our analysis has found. An inefficient process prevents struggling borrowers from getting their day in court to negotiate face-to-face with their lenders as interest and fees pile up. Courts are overburdened by a glut of slow-moving cases, delaying justice for other litigants and creating extra expense for the state's taxpayers. Communities across the state are blighted by abandoned homes mired in litigation, which become increasingly uninhabitable over time, bringing down local property values. Local governments and their taxpayers are stretching already tight budgets to maintain these properties just enough to avoid safety hazards. Mortgage investors are unable to return properties to the market, even when they have been long abandoned.

Through data analysis and extensive discussions with various constituencies, the Department has identified common ground and developed common sense recommendations to alleviate unnecessary delays in the foreclosure process.

We wish to thank the following people and groups for their assistance in gathering data and informing our analysis in this report: the mortgage servicers that participated in our surveys, the Empire Justice Center, the Center for New York City Neighborhoods, Staten Island Legal Services, Bronx Legal Services, the New York Bankers Association, the Mortgage Bankers Association, the New York State Office of Court Administration, Jeanna Composti, David Atlas, and Kitty Kay Chan.

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## I. EXECUTIVE SUMMARY

In this report, the Department of Financial Services analyzes New York State's foreclosure process, which is one of the longest in the nation with an average length of nearly three years. This report reaches a counterintuitive yet inescapable conclusion: Unnecessary delays in the foreclosure process harm nearly all New Yorkers, including borrowers, and not just the banks and mortgage investors who are unable to obtain returns on their investments.

First, the report confirms the existence of the "shadow docket," which emerged after an affirmation requirement went into effect in response to the robo-signing scandal. The data reveal an average of 168 days in Downstate New York and 162 days in Upstate New York between filing the service of process and the request for judicial intervention ("RJI"). With thousands of foreclosure actions languishing in the system, in 2013 Governor Andrew M. Cuomo signed legislation to move these cases forward and ultimately eliminate the shadow docket.

Second, the report identifies significant delays in both scheduling and completing the mandatory settlement conference process. Despite the New York Civil Practice Law and Rules ("CPLR") requirement to hold the mandatory settlement conference within 60 days of filing the RJI, in Downstate New York the conference is scheduled on average 161 days after the filing of the RJI. With an average of another 110 days to complete the settlement conferences, the entire process takes nine months.

Third, the report reveals that the longest delay in the foreclosure process occurs between the conclusion of the mandatory settlement conference and the entry of judgment of foreclosure and sale—an average of 430 days Downstate and 343 days Upstate. The Department speculates that this lengthy delay is due to the general backlog of foreclosure cases in New York State's court system, but recommends that the Office of Court Administration investigate the underlying causes.

Fourth, the report confirms that thousands of New York State properties start out vacant or become vacant at some point during the foreclosure process, particularly in Upstate New York. Approximately 31% of homes in the foreclosure process Upstate started out vacant or became vacant at some point during foreclosure, compared with approximately 8% Downstate.

These delays harm New York’s borrowers, communities, lenders and investors, courts, and housing recovery. Borrowers are often denied their opportunity to complete the potentially home-saving settlement conference process until nearly a year after the filing of the foreclosure case—too late for some who by that time have fallen too far behind to be helped with an affordable modification. Meanwhile, abandoned homes languishing in foreclosure drag down property values and create safety hazards, forcing local communities to shoulder the burden of maintaining these properties while the foreclosure process inches along. At the same time, lenders and investors lose value in their investments as properties fall into disrepair. New York’s courts are buried in foreclosure cases, and other litigants are delayed their day in court. And this foreclosure backlog prevents people from moving into now-vacant homes, leaving New York trailing other states in its efforts to emerge from the recession-induced housing slump.

The report concludes that the foreclosure process can and must become more efficient, without sacrificing important consumer protections. To that end, the Department recommends: (1) defining “failure to negotiate in good faith” in the context of the mandatory settlement conferences and imposing penalties for such failure, (2) requiring foreclosure plaintiffs to inform homeowners about their rights and obligations with respect to remaining in and maintaining their homes, (3) streamlining the foreclosure process for properties that are truly vacant and have been abandoned by their owners, and (4) offering a non-judicial process for uncontested mortgage foreclosures of commercial properties.

## **II. INTRODUCTION**

Years after the height of the financial crisis, many homeowners nationwide are still reeling from the housing fallout as hundreds of thousands continue down the path toward foreclosure. In many cases, this path has proven to be riddled with systemic deficiencies, characterized by inefficient and ineffective use of homeowner, bank, and judicial resources, and widespread delays in the foreclosure process. Far from being immune to these problems, New York State has been reported to have the fourth longest foreclosure timeline in the nation, averaging 934 days from the date of the filing of the foreclosure action to the sale of the property at auction—nearly a year

longer than the national average of 604 days.<sup>1</sup> New York also reached a record high in the rate of new foreclosure filings in mid-2013.<sup>2</sup> This surge in foreclosures, coupled with the lengthy foreclosure process, has caused a backlog of foreclosure cases in the New York State court system. With more than 83,000 pending in the last quarter of 2014, foreclosure cases make up nearly a third of New York's civil caseload.<sup>3</sup>

The New York State Department of Financial Services has a keen interest in ensuring that the foreclosure process actively aids in New York State's housing recovery, while still protecting consumer rights. In doing so, we aim to strike a balance between protecting homeowners from foreclosure abuses and promoting an efficient foreclosure process that facilitates the return of foreclosed properties to the market in a timely manner. To assist the Department in targeting areas for further analysis and improvement, the Department conducted a survey of mortgage servicers concerning their foreclosure practices in connection with owner-occupied one-to-four family residential foreclosure proceedings in Upstate and Downstate New York from January 1, 2010 through September 30, 2013.<sup>4</sup> Twenty-six institutions engaged in mortgage servicing in New York participated in the survey, representing approximately 80% of foreclosure actions filed in New York State court during that time period.<sup>5</sup>

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<sup>1</sup> RealtyTrac, *2014 Year-End U.S. Foreclosure Report*, January 15, 2015, <http://www.realtytrac.com/news/foreclosure-trends/1-1-million-u-s-properties-with-foreclosure-filings-in-2014-down-18-percent-from-2013-to-lowest-level-since-2006/>.

<sup>2</sup> Mortgage Bankers Ass'n, *National Delinquency Survey Q2 2013*, 2 (2013).

<sup>3</sup> A. Gail Prudenti, 2014 Report of the Chief Administrator of the Courts 4, 8(2014).

<sup>4</sup> "Downstate" is defined as Westchester, Rockland, Bronx, New York, Richmond, Kings, Queens, Nassau, and Suffolk counties. "Upstate" is defined as all other New York State counties.

<sup>5</sup> Although 26 institutions participated in the survey, not every institution provided data for every survey question. Therefore, the average response for each survey question may reflect data from fewer than 26 institutions.

### **III. TRENDS IN THE FORECLOSURE PROCESS**

The data collected have revealed several trends concerning the foreclosure process:

1. There is a considerable dichotomy between foreclosure practices in Upstate and Downstate New York, with the most significant delays in the foreclosure process occurring Downstate. The process is almost 30% slower Downstate.
2. Repeated adjournments of the mandatory settlement conference substantially delay the foreclosure process.
3. There is an average delay of 430 days Downstate and 343 days Upstate between the conclusion of the mandatory settlement conference and the entry of a judgment of foreclosure and sale. This phase of foreclosure accounts for 40% of the foreclosure process.
4. Approximately 31% of homes in the foreclosure process Upstate started out vacant or became vacant at some point during foreclosure, compared with approximately 8% Downstate.

### **IV. THE FORECLOSURE TIMELINE**

To isolate the phases of the foreclosure timeline that delay the process and ultimately contribute to New York's backlog of foreclosure cases, the Department's survey requested data concerning the average number of days for targeted phases of a foreclosure action.<sup>6</sup>

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<sup>6</sup> The survey data reflect the average number of calendar days for the nearly four-year period from January 1, 2010 through September 30, 2013.

The data are telling:

PHASE OF FORECLOSURE	AVERAGE NUMBER OF CALENDAR DAYS	
	DOWNSTATE	UPSTATE
Filing of Foreclosure Action to Filing of Service of Process	33	30
Filing of Service of Process to Filing of Request for Judicial Intervention	168	162
Filing of Request for Judicial Intervention to First Mandatory Settlement Conference	161	39
First Mandatory Settlement Conference to Last Mandatory Settlement Conference	110	80
Last Mandatory Settlement Conference to Entry of Judgment of Foreclosure and Sale	430	343
Entry of Judgment of Foreclosure and Sale to Auction of Foreclosed Property	172	148

#### **A. DELAY IN FILING THE REQUEST FOR JUDICIAL INTERVENTION**

With an average of 168 days Downstate and 162 days Upstate between filing the service of process and the request for judicial intervention (“RJI”), the data confirm the existence of the “shadow docket” and its delay of the foreclosure process.<sup>7</sup> The shadow docket emerged after the Chief Judge of the State of New York instituted a new filing rule on October 20, 2011, in response to the “robo-signing” scandal whereby bank representatives were attesting to the accuracy of thousands of foreclosure documents in unrealistically short periods of time. To combat this mass production of inaccurate, false, or forged foreclosure documents, the new rule

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<sup>7</sup> The survey data include the nearly two-year period prior to the institution of the Affirmation requirement discussed below. Consequently, the average number of days between filing the service of process and the RJI is likely longer than the averages reflected in the data.

required foreclosure law firms to file an affirmation attesting to the accuracy of foreclosure documents filed with the court (the “Affirmation”) simultaneously with the service of process and the RJI. The new rule had an unintended result: foreclosure law firms would initiate a foreclosure action with a summons and complaint, but delay or altogether fail to file the RJI, which places the action before the court and triggers the scheduling of the mandatory foreclosure conference. This left thousands of foreclosure actions in limbo, or on the shadow docket, preventing struggling homeowners from gaining access to the mandatory settlement conference.

According to the Office of Court Administration (“OCA”), the delay or failure to file the RJI was likely the result of foreclosure plaintiffs’ inability to comply with the Affirmation requirement.<sup>8</sup> Recognizing the need to ensure that all borrowers have access to a court-supervised opportunity early in the foreclosure process to help avoid unnecessary foreclosures, Governor Andrew M. Cuomo signed into law legislation to help address the problem. As of August 30, 2013, foreclosure plaintiffs are required to file the Affirmation with the summons and complaint. The intended result is that foreclosure plaintiffs will not file foreclosure actions until they are ready and able to comply with the Affirmation requirement, thereby eliminating the shadow docket and the accompanying delay in the foreclosure process.

## **B. MANDATORY SETTLEMENT CONFERENCE DELAYS**

In response to the foreclosure crisis, New York enacted subprime lending reform legislation, which provided additional protections and foreclosure prevention opportunities to borrowers of “high-cost,” “subprime,” and “non-traditional” home loans. As part of this legislation, CPLR Rule 3408(a) established a mandatory settlement conference before the court for borrowers with “high-cost” home loans made between January 1, 2003 and September 1, 2008. The settlement conference process is required to take place within 60 days of the filing of the proof of service of the complaint with the county clerk. CPLR Rule 3408 also requires the parties to “negotiate in good faith to reach a mutually agreeable resolution.” Due to the ongoing foreclosure crisis and the need to provide more borrowers with a meaningful opportunity to negotiate loan modifications or other loss mitigation solutions, CPLR Rule 3408(a) was

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<sup>8</sup> A. Gail Prudenti, 2012 Report of the Chief Administrator of the Courts 2 (2012).

subsequently amended in 2009 to extend the mandatory settlement conference to all borrowers regardless of loan type or time of origination. Initially this extension was set to expire on February 13, 2015 but has since been extended an additional five years.

Despite the CPLR requirement to hold the mandatory settlement conference within 60 days of the filing of the RJI, the data reveal an average of 161 days Downstate from the filing of the RJI to the mandatory settlement conference. The data also reveal an average of 110 days to complete the mandatory settlement conference process once the first conference takes place, for a total average of 271 days, or nine months, from the filing of the RJI to the completion of the settlement conference process.

During the settlement conference process, the court-appointed referee guides the parties' settlement negotiations to facilitate a resolution short of foreclosure, including a loan modification. Mortgage servicers attribute the delays in the settlement conference process to repeated 60- to 90- day adjournments to allow borrowers to correct defective documents or submit missing documents necessary for a loan modification application. Consumer advocacy groups attribute the delays to the plaintiffs' failure to timely process loan modification applications, timely inform borrowers of missing or defective paperwork, and appear at conferences with a representative with authority to settle the case. Regardless of the reasons for the delays, both mortgage servicers and consumer advocates agree that repeated adjournments contribute to loan modification documentation becoming stale. Loan modification applications typically require borrowers to submit current documentation proving income, expenses, and occupancy, among other things. That documentation is often considered stale or invalid after 90 days. According to mortgage servicers and consumer advocates, lengthy settlement conference adjournments frequently result in submitted documents becoming stale under applicable investor guidelines, further contributing to a cycle of delay. Some mortgage servicers indicated that this pattern of adjournments can go on for as long as two years.

Mortgage servicers and consumer advocates also agree that holding the parties accountable for negotiating in good faith under CPLR Rule 3408 will discourage unnecessary delays. While CPLR Rule 3408 requires the parties to negotiate in good faith, it does not define what it means to negotiate, or fail to negotiate, in good faith. Nor does it provide the parties with

relief for failure to negotiate in good faith. Consequently, many mandatory settlement conferences result in fruitless negotiations and unnecessary delays without recourse. These delays are reflected in the data.

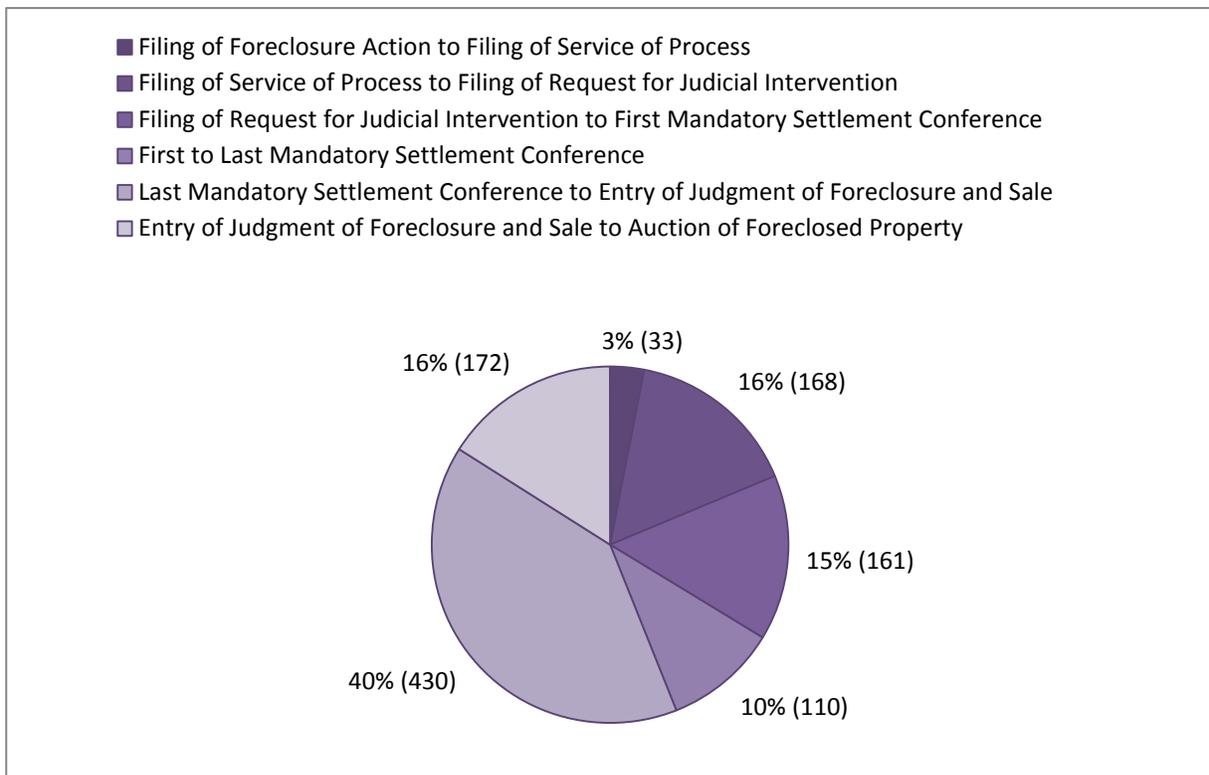
### **C. DELAY TO ENTRY OF JUDGMENT OF FORECLOSURE AND SALE**

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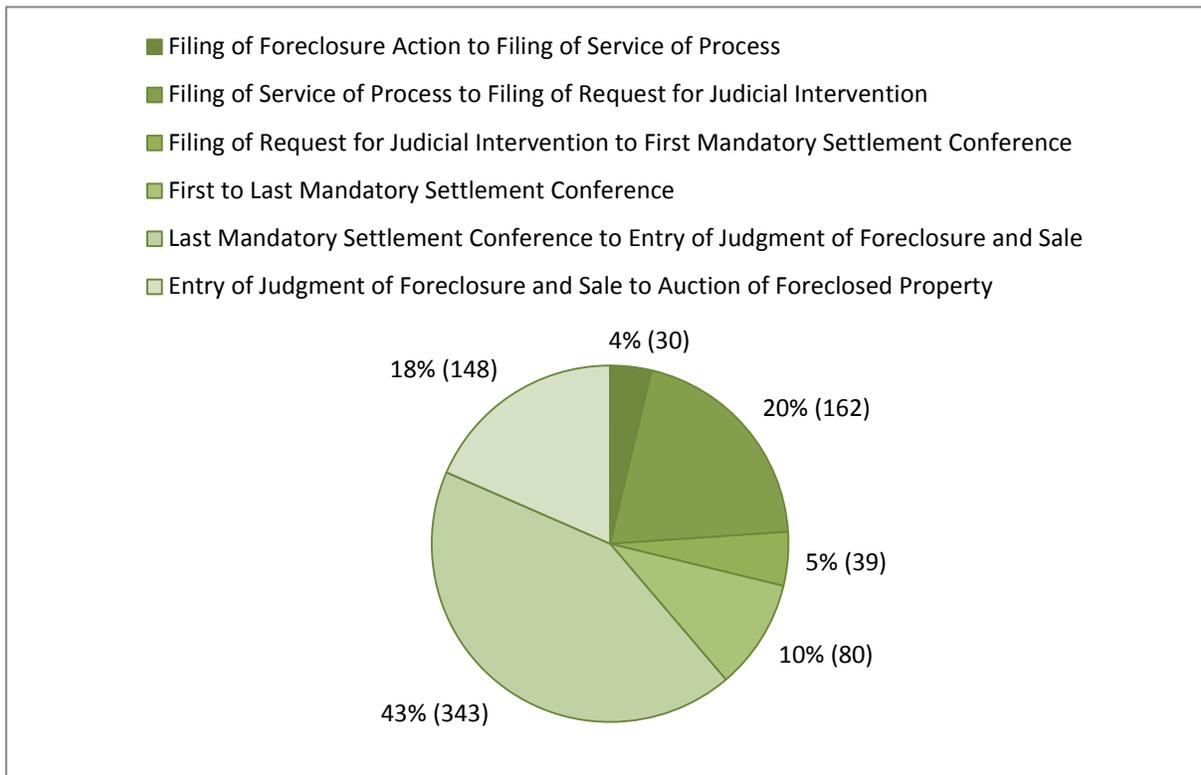
Perhaps most notably, the data reveal a significant delay between the conclusion of the mandatory settlement conference and the entry of a judgment of foreclosure and sale. At an average of 430 days Downstate and 343 days Upstate, the time between the end of an unsuccessful settlement conference process and the entry of judgment of foreclosure and sale is the longest phase of New York’s foreclosure timeline. In fact, this phase of foreclosure accounts for 40% of the foreclosure process (see Figures 1 and 2 below).

**FIGURE 1: PHASES OF FORECLOSURE – DOWNSTATE**

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**FIGURE 2: PHASES OF FORECLOSURE – UPSTATE**



After a foreclosure case is released from the settlement conference process, the plaintiff is responsible for filing certain motions to advance the case toward a judgment of foreclosure and sale. Most commonly, these include a motion for summary judgment, a motion for order of reference (whereby a referee is appointed to compute the amount owed by the borrower), and a motion for judgment of foreclosure and sale. Mortgage servicers report that the delay between the conclusion of the mandatory settlement conference and the entry of a judgment of foreclosure and sale is two-pronged: (1) after filing the motion for order of reference, the court can take two months to one year to actually appoint a referee to compute the amount due, and (2) after the amount due is computed and the plaintiff files a motion for judgment of foreclosure and sale, it can take an additional two months to one year for the court to rule on the motion. Consumer advocates suggest an additional contribution to the delay: foreclosure plaintiffs delay filing the motions necessary to move the case forward once the action is released from the settlement conference process.

The Department recommends that the New York State Office of Court Administration investigate the causes of the significant delay between the conclusion of the mandatory settlement process and the entry of a judgment of foreclosure and sale. If the OCA's investigation reveals that plaintiffs are delaying the filing of motions necessary to advance the case, the Department recommends that the OCA adopt guidelines requiring courts to impose strict motion schedules. Also, if the OCA finds that the courts are delaying decisions on such motions, the Department recommends that the OCA determine the feasibility of a judicial "surge" to decrease the backlog of foreclosure actions pending in these phases of foreclosure by, for example, (i) urging judges to prioritize foreclosure decisions, (ii) requiring foreclosure movants to alert the court of any motions pending for more than 60 days, or (iii) requiring judges to report to OCA on a regular basis any foreclosure motions outstanding for more than 60 days. These are tactics that have proven effective at reducing congestion-related court backups in other jurisdictions.

## **V. VACANT AND ABANDONED PROPERTIES**

Millions of homes in the foreclosure process across the nation are reportedly vacant and abandoned. The data from the Department's survey confirm that thousands of those homes are located in New York State, particularly Upstate. In Upstate New York, approximately 31% of properties underlying the foreclosure actions filed from January 1, 2010 through September 30, 2013, started out vacant or became vacant at some point during the foreclosure process, compared with approximately 8% Downstate. Servicers also reported that they have not initiated a foreclosure action in the first instance on approximately 47% of already-vacant Upstate properties and approximately 34% of already-vacant Downstate properties. Some servicers explained that they decline to initiate a foreclosure based on an analysis of the potential recovery measured against the cost of foreclosing. The longer a vacant and abandoned property remains in foreclosure, the greater the deterioration of the property, which results in a lower expected recovery upon foreclosure sale. The lower the expected recovery, the less likely such recovery will sufficiently offset the legal costs required to complete the lengthy foreclosure process. Similarly, some servicers reported voluntarily discontinuing foreclosures where the underlying property was vacant at the time of the discontinuance.

According to a 2010 report by the Government Accountability Office, some homeowners vacate early in the foreclosure process because they are confused about their rights.<sup>9</sup> More specifically, many homeowners leave under the mistaken belief that the initial foreclosure notice requires them to immediately vacate their homes.<sup>10</sup> Others knowingly choose to leave to secure alternative housing.<sup>11</sup> Whatever the reason, homeowners who prematurely vacate their properties do so under the impression that their homes will be maintained by the servicer or lender until they are sold. However, under New York State law, a plaintiff in a foreclosure action is not required to maintain the property until after obtaining a judgment of foreclosure and sale. Vested with what some call “zombie title,” homeowners may discover months or even years later that they are responsible for back taxes, debt, code violations, and fees for services like trash removal, lawn mowing, cleaning, repairs, and demolition crews.

## **VI. IMPACT ON NEW YORK’S BORROWERS, COMMUNITIES, LENDERS & INVESTORS, COURTS, AND HOUSING RECOVERY**

New York’s protracted foreclosure process has unintended negative consequences for New York’s borrowers, communities, lenders and investors, courts, and housing recovery.

### **BORROWERS**

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Borrowers are harmed in particular by delays in the settlement conference phase of the foreclosure process. These delays contribute to stale loan modification applications and lead to further adjournments in a vicious cycle. For borrowers struggling to make ends meet, a modification delayed is often a modification denied. Each month of delinquency adds interest (often at a higher default rate), penalties, and fees to a borrower’s outstanding balance. To obtain a modification, those accruals are ordinarily capitalized into the unpaid principal balance of the loan. Depending on the modification programs available, mortgage holders and servicers may be able or willing only to reduce the borrower’s interest rate to 2%. If the new principal amount with

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<sup>9</sup> U.S. Gov’t Accountability Office, *Mortgage Foreclosures: Additional Mortgage Servicer Actions Could Help Reduce the Frequency and Impact of Abandoned Foreclosures*, 18 (Nov. 2010).

<sup>10</sup> *Id.* at 52.

<sup>11</sup> *Id.* at 19.

capitalized interest and fees is so high that monthly payments remain unaffordable even at a 2% interest rate, then the modification may be denied and the foreclosure action permitted to proceed. Take the following hypothetical:

In January 2007, Mr. and Mrs. Smith received an adjustable rate mortgage for \$480,000 with an initial interest rate of 4.5% to purchase a home. At the time, their combined income was \$8,000 per month. Their initial principal and interest payment, combined with taxes and insurance, was \$2,882.09 during the first 24 months.

In January 2009, the fixed rate period of their loan ended and the Smiths' monthly payment increased to \$3,998.41. In September 2009, Mr. Smith lost his job, decreasing the Smiths' combined income to \$5,000 per month. In January 2010, the Smiths defaulted on their mortgage. The Smiths had an unpaid principal balance of \$460,068.60 at the time of default.

The Smiths' lender filed a foreclosure action in January 2011. After one year of default interest at 8.25%, the Smiths owed \$43,355.66 in interest and escrow advances, for a total amount owed of \$504,424.24 when the foreclosure action was filed. At that time, the Smiths would have qualified for a HAMP modification at an interest rate of 2%. The modification would have included a non-interest-bearing principal forbearance of \$141,178.91, which is within HAMP program limits. The modification would have resulted in a monthly mortgage payment of \$1,550, which would have achieved a monthly mortgage payment that was no more than 31% of the Smiths' gross monthly income as required under HAMP.

However, after delays in the settlement conferences, the Smiths were still in the settlement conference process in January 2012. At that time, the Smiths no longer qualified for a HAMP modification because, following another year of default interest at 8.25% and additional escrow advances, the total amount owed increased to \$547,779.88. Even at a 2% interest rate—the lowest allowable interest rate under HAMP—the Smiths would have needed to forbear an amount exceeding HAMP program limits to achieve a monthly mortgage payment that was no more than 31% of their gross monthly income. The Smiths thus did not qualify for a modification, and the foreclosure action proceeded against them.

By the same reasoning, foreclosure delays can affect a borrower's ability to negotiate a "graceful exit" from a foreclosure action by proposing a short sale of the property for less than the amount owed, or a deed-in-lieu of foreclosure whereby the homeowner voluntarily vacates the property. Borrowers may prefer graceful exits over foreclosures to avoid being subject to a deficiency judgment for the remaining value of the home following the sale. When mortgage holders and servicers evaluate whether to accept such graceful exits, they typically compare the amount owed—including interest, penalties, and fees accrued over the course of the delinquency—to the market value of the home and the costs of continuing with foreclosure. Lengthy delinquencies make mortgage holders and servicers increasingly unlikely to accept these graceful exit overtures by borrowers and more likely to proceed with foreclosure in hopes of a greater recovery.

## **LOCAL COMMUNITIES**

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Because many borrowers see foreclosure as a foregone conclusion and therefore lose vested interest in their homes, lengthy foreclosures increase the likelihood that homeowners will prematurely vacate their homes. Vacant properties often deteriorate quickly and suffer from structural damage, mold, broken windows, and trash buildup, among other things, which lead to unsafe conditions, increased crime, and decreased property values in the local community. Furthermore, when neither the servicer nor the homeowner is maintaining the property, local governments must expend resources to inspect properties and mitigate the effects of their deteriorating conditions. Local governments also suffer because vacant properties erode the tax base.

## **LENDERS AND INVESTORS**

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Lenders and investors often can do nothing but watch their investments fall into disrepair and lose value due to an unnecessarily protracted foreclosure process. Unable to return foreclosed properties to the market while they may still be marketable, foreclosure plaintiffs either take a loss in the foreclosure sale or abandon their foreclosure actions and write off their investments, once again leaving the burden of maintaining abandoned properties with the surrounding communities.

## **THE COURTS AND THE STATE BUDGET**

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Repeated adjournments of settlement conferences increase the number of court appearances per case, which causes congestion in the court system and requires expending more of the court's limited resources.

## **THE NEW YORK HOUSING MARKET**

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Though New York represented only 4.7% of mortgage loans nationwide in Q1 2015, New York's share of the nation's loans in foreclosure was 11.6%, second only to Florida.<sup>12</sup> That same quarter, New York also had the second highest percentage of loans in foreclosure at 5.51%.<sup>13</sup> These data indicate that the foreclosure process continues to hinder New York's emergence from the housing crisis.

## **VII. RECOMMENDATIONS**

To alleviate the problems in the foreclosure process identified in this report, the Department recommends that the New York legislature adopt legislation that would provide protections and enhanced settlement opportunities to borrowers at risk of losing their homes while making efficiency improvements in the foreclosure process, including:

1. Defining what it means to "negotiate in good faith" pursuant to CPLR Rule 3408 and imposing penalties against parties that fail to do so.
2. Helping to prevent properties from becoming vacant and abandoned by requiring plaintiffs in foreclosure actions to inform homeowners that they have the right to remain in their home until a foreclosure sale occurs as well as an obligation to maintain their property until such a time.
3. Creating a streamlined foreclosure process for vacant and abandoned properties whereby (a) the plaintiff must prove that the property is, in fact, vacant and abandoned; and (b)

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<sup>12</sup> Mortgage Bankers Ass'n, *National Delinquency Survey Q1 2015*, 3 (2015).

<sup>13</sup> *Id.*

plaintiffs who take advantage of this expedited process must maintain vacant and abandoned properties prior to obtaining a foreclosure judgment.

4. Reinstating a streamlined, non-judicial process for uncontested mortgage foreclosures of commercial properties, to further alleviate the backlog of foreclosure actions in the New York State court system.