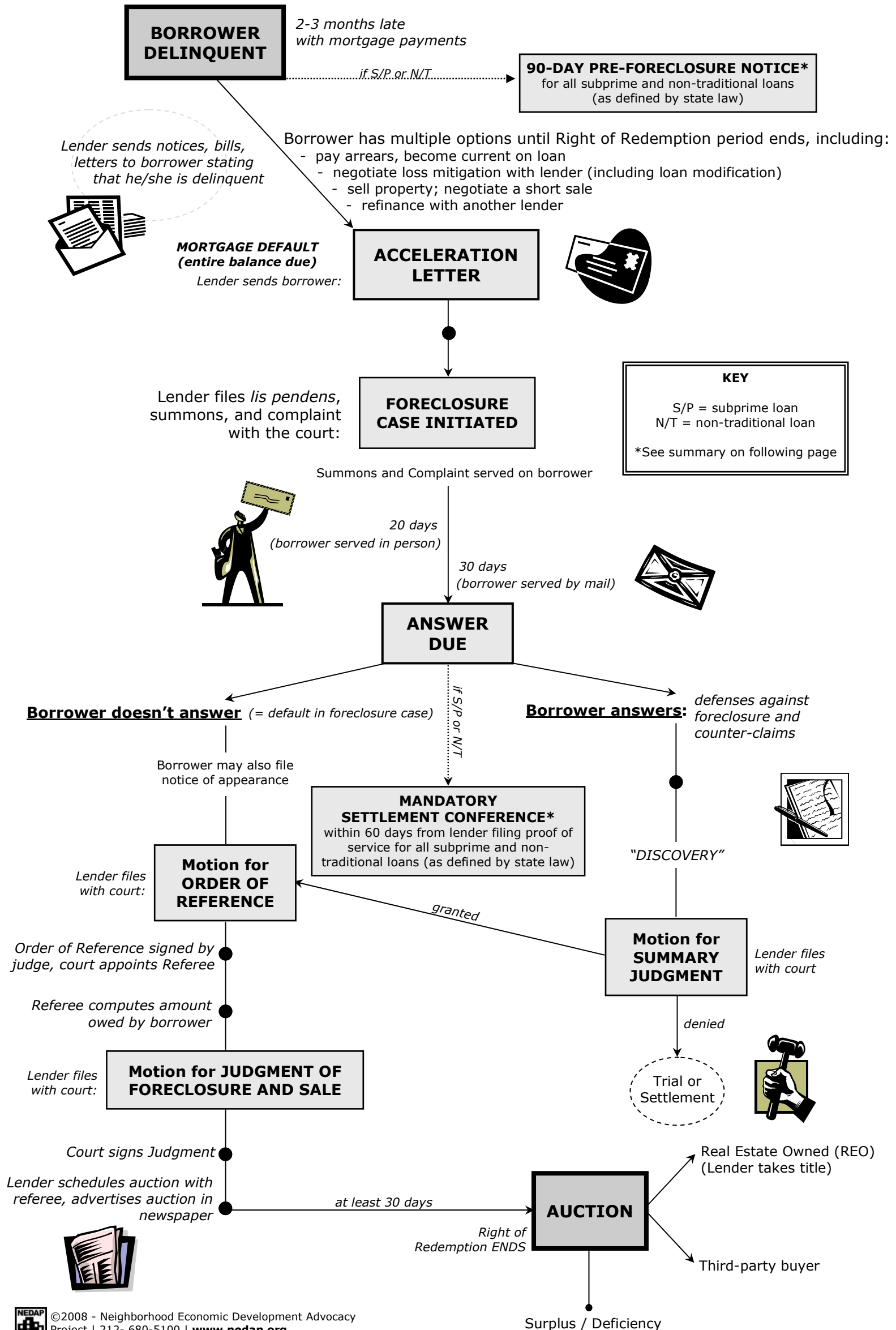


PATHS OF A FORECLOSURE IN NEW YORK STATE



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Summary of Provisions of NY State Law Pertaining to 90-day Pre-Foreclosure Notices and Mandatory Settlement Conferences

90-Day Pre-Foreclosure Notice (RPAPL §1304)

Effective September 1, 2008, mortgage loan servicers are required to send homeowners with “subprime”, “non-traditional”, or “high-cost” home loans (defined below) a notice at least 90 days prior to the commencement of a foreclosure case. Notices must be sent to the last known address of the borrower by registered or certified mail, in addition to first-class mail.

The language of the notice is set forth in the statute, and must state the number of days in default, the amount owed and the telephone number of the lender or servicer. The servicer must attach a list of at least five government approved housing counseling agencies in the homeowner’s geographic region that provide free or low-cost counseling. The notice also directs the homeowner to call the Banking Department’s Toll-Free Helpline or go to their website for more information.

Mandatory Settlement Conferences (CPLR §3408)

Effective September 1, 2008, for residential foreclosure actions involving a subprime, nontraditional, or high-cost high-cost home loan originated between January 1, 2003 and September 1, 2008, the court must hold a mandatory settlement conference within sixty days after the date proof of service of the foreclosure is filed with the county clerk. The court may also hold the conference on an adjourned date agreed to by the parties. If the defendant appears *pro se* at the conference, the court may assign counsel. A representative of the plaintiff/ lender who is fully authorized to settle the case must appear for the conference, but the court may allow this representative to participate by telephone or video conference.

For foreclosure cases filed before September 1, 2008 involving a subprime, nontraditional, or high-cost loan, where there is no final judgment of foreclosure, the borrower has the right to request a settlement conference. The courts shall request that all plaintiffs identify whether the subject loan falls into any of the covered categories, and will send a notice to the borrower if applicable. When requested, the conference must be held as soon as practicable.

Threshold definitions

For purposes of these provisions:

“**Subprime home loan**” is defined as a home loan originated between January 1, 2003 and September 1, 2008 where the terms of the loan are in excess of the threshold. The



threshold for a first lien mortgage loan includes loans where the annual percentage rate (APR) of the home loan when originated, exceeds 3 percentage points over the yield on treasury securities which have similar periods of maturity to the loan maturity on the fifteenth day of the month that the loan was originated, or exceeds 5 percentage points for subordinate lien loans. If the APR will rise after an introductory period (such as with subprime adjustable rate mortgages), the APR to be considered is the one that applies after the introductory period ends. The threshold will be determined based on the listing of constant maturity yields for U.S. Treasury securities, published on the Banking Department's website. (The listing will include the securities for all months between January 1, 2003 and September 1, 2008.)

"Non-traditional home loan" is defined as a payment option adjustable rate mortgage or interest only loan created between January 1, 2003 and September 1, 2008.

"High-cost home loans," as defined in Banking Law §6-l, that are made before January 1, 2003 are subject to the 90-day notice provision. For purposes of the mandatory settlement conferences, all high-cost home loans are a subset of "subprime" home loans.



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Glossary of Terms:

Acceleration letter: A letter sent from the lender (or its representative) to the borrower, which "calls in" the loan – effectively stating that the borrower must pay the entire loan amount by a specified date, otherwise the lender will file a foreclosure lawsuit. Once the mortgage has been accelerated, the lender is no longer compelled to accept arrears, though may still do so.

Answer: A written response to the complaint, submitted by the borrower to the lender's attorney, and filed with the court. The answer is due 20 calendar days from the date of service if the borrower is served in person, or 30 calendar days if the borrower is not personally served. The answer can be submitted with the help of an attorney, or *pro se* (representing yourself without an attorney). The answer contains defenses to the foreclosure and may also include counterclaims.

Arrears: The amount of back payments - plus late fees and other charges - owed by the borrower to the lender.

Auction: A public sale of foreclosed properties. Anyone can place a bid to purchase a property. Properties are sold to the highest bidder. Once the property has been sold at auction, the original homeowner loses all "right of redemption," or opportunity to regain ownership of the property by paying the amount due.

Complaint: A written document served to the borrower by the lender's attorney, indicating that the lender has filed a foreclosure lawsuit, and explaining the grounds for that action against the borrower.

Counterclaims: As part of the answer to the complaint, the borrower may include counterclaims, or claims that the lender owes the borrower money due to violations of the law, thereby reducing the amount that the borrower may owe the lender.

Deed-in-lieu of foreclosure: To avoid going through a foreclosure, the borrower voluntarily turns over the deed to the property to the lender. In exchange, the lender agrees that the borrower does not owe any additional debt -- allowing him/her to walk away from the property without a deficiency judgment, and without a foreclosure sale on his/her credit report. This option, as well as other loss mitigation options, may have tax consequences.

Default: If the borrower fails to answer the complaint, the borrower has defaulted in the foreclosure case -- meaning that the lender automatically prevails. The lender is not required to serve the borrower with any further notices as the foreclosure case proceeds through the courts.

Defendant: The person or entity who is being sued in court. In the case of a foreclosure proceeding, the defendant is the homeowner who has defaulted on his/her mortgage.

Defenses: As part of the answer to the complaint, the borrower includes defenses, or claims that contest the foreclosure. These claims may be based on deficiencies in the



foreclosure process (e.g. improper service or lack of standing), or illegalities in the loan itself.

Deficiency: After a foreclosed property is sold at auction, the proceeds of the sale go to reimburse the lender and other lien-holders. If the sale price does not sufficiently cover the amount owed, the amount still owed to the lender is called a deficiency.

Delinquent: When the borrower initially falls behind on the mortgage (usually 2-3 months), but before the mortgage has defaulted, he/she is said to be "delinquent" on the mortgage.

Discovery: The process by which parties gather information through document requests, written questions (called interrogatories), and depositions. Discovery can take a long time.

Forbearance: An agreement between the lender and a delinquent borrower wherein the borrower typically pays a lump sum up front, and then enters into a payment plan for the remainder of the arrears. Borrowers need to be cautioned that when they enter into these agreements, they usually waive certain key rights, such as their ability to raise defenses to contest a foreclosure case.

Foreclosure: The legal process by which a lender forces a property to be sold, in order to collect on a mortgage loan it claims is owed.

Judgment of Foreclosure and Sale: Once signed by a judge, this legal order gives the lender permission to sell the property through a referee, and confirms the total amount owed by the borrower to the lender.

Lien / Lien holder: A lien is a legal claim placed on a property as security to repay a debt. For example, if a homeowner does not pay his/her property taxes, the city can place a lien on the property for the amount owed. In New York City, these tax liens are typically sold to private entities, which can lead to foreclosure. The entity that owns the lien on the property is called the lien holder.

Lis pendens: Literally meaning, "suit pending" in Latin, *lis pendens* is a filing with the county clerk that indicates to the public that the property's ownership is being disputed. This notice formally begins the foreclosure process.

Loan Modification: An agreement between the lender and the borrower wherein one or more of the original terms of the mortgage is changed in order to make the mortgage more affordable to the borrower. As with forbearance agreements, borrowers who agree to loan modifications usually waive many key rights, such as their ability to raise defenses to contest a foreclosure case. This option, as well as other loss mitigation options, may have tax consequences.

Loss Mitigation: The process by which a lender and borrower who is behind on his/her mortgage attempt to negotiate a deal that is mutually agreeable to both parties. Some possible avenues of loss mitigation include: loan modification, forbearance, short sale, and deed-in-lieu of foreclosure. The earlier the borrower pursues loss mitigation the better, since negotiating a workable deal also becomes more and more difficult as time passes and arrears accumulate. Loss mitigation becomes more difficult when the borrower has multiple mortgages. For example, the borrower may be able to negotiate a loan modification for one loan that is sustainable and affordable. However, if the borrower is also in default on a



second mortgage, and the lender is not willing to negotiate, this second lender may still initiate a foreclosure case against the borrower.

Motion: A legal term for a formal request to the court to take action in a case.

Mortgage Default: After a delinquent borrower's loan is accelerated by the lender, he/she is said to be in default.

Notice of Appearance: If the borrower does not have any defenses or counter-claims to contest the foreclosure, but still wants to be served with all legal papers during the course of the foreclosure case, he/she can file a Notice of Appearance with the court. A copy of the Notice of Appearance must also be sent to the lender's attorney.

Order of Reference: An Order of Reference sends a foreclosure case to a referee, who will then determine the full amount owed by the borrower to the lender.

Plaintiff: A person or entity suing another in court. In the case of a foreclosure action, the plaintiff is the owner of the mortgage.

Pro se: When a defendant represents him/herself in a court case (as opposed to having an attorney represent him/her). *Pro se* is Latin for "for self."

Real Estate Owned (REO): When a foreclosed property does not sell at auction, the lender takes title to the property. The property is then said to be in REO status. The lender may then try to evict the former homeowner, which the lender usually does through the Housing Court.

Referee: Once an Order of Reference is signed, a foreclosure case is sent to a referee. The referee computes the total amount owed to the lender by the borrower. Once the lender has obtained a Judgment of Foreclosure and Sale, the referee oversees the auction of the property. This responsibility includes physically conducting the sale, as well as distributing the proceeds following the sale. Referees are typically attorneys.

Right of Redemption period: The period in which a borrower may avert a foreclosure through a number of means, including selling the property or refinancing the mortgage. The right of redemption period ends the moment the property is sold at auction. In other states, there is a redemption period even *after* auction, but not in New York State.

Service of Process: The delivery of the summons and complaint to the borrower is called service of process. The lender, through a process server, must attempt to serve the borrower in person. If the process server cannot serve the borrower at his/her home, he may deliver the summons and complaint to another adult residing at the borrower's address. The process server must then send another copy by mail. If no one is home, the process server may leave the notice at the door, as well as send it by mail. This is often called "nail and mail" service.

Settlement: The lender and borrower may decide to resolve a foreclosure case outside of court by negotiating a agreement, or settlement.

Short-sale: When the amount due on the loan is more than the value of the property, lenders will sometimes agree to accept a short sale. In a short sale, the homeowner sells the property to a third party at fair market value and the lender agrees to accept less than



the full balance in satisfaction of the loan. This option, as well as other loss mitigation options, may have tax consequences.

Summary Judgment: A decision granted by a judge based on a motion filed by one of the parties. In a foreclosure case, the judge can issue a summary judgment if he/she decides that the facts in the case are not in dispute, and therefore there is no need for the case to proceed to trial.

Summons: A plaintiff in a legal case must file and serve a summons along with a complaint. The summons advises the defendant that they must either appear in court on a specified date, or answer the complaint within a specified period of time.

Surplus: After a foreclosed property is sold at auction, the proceeds of the sale go to reimburse the lender and other lien-holders. If the sale price exceeds the amount owed, the extra amount is called a surplus. This money goes to the clerk of the court for keeping. The borrower must file a motion to claim this money.

Stay: A stay is a temporary stop to a foreclosure. Borrowers may file an emergency motion with the court to stay the foreclosure sale (called an Order to Show Cause) , but must show that they have a meritorious defense and a compelling reason for the stay. Filing for a Chapter 13 bankruptcy can automatically stay a foreclosure sale.

Trial: If the facts of the case are in dispute - the borrower has presented defenses or counter-claims to the foreclosure - the case may go to trial, and ultimately be decided by a judge (where fraud is alleged, a jury may decide the case). If the judge decides in favor of the lender, then the lender proceeds with filing a motion for an Order of Reference, as a first step towards a foreclosure sale. If the judge decides in favor of the borrower, then the foreclosure may be averted.

