

Florida Foreclosure Survival Guide

Defending Your Rights,
Defending Your Home



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Dedication

To my wife, Louise, who makes life beautiful.

Introduction

Your home is your castle. It's where you and your family live and play, perhaps it's also where you work. When you're threatened with the loss of your home, it can create a feeling of panic and helplessness unlike any other life event. At a time when you need to be calm and clear-headed, the emotions you are feeling rob you of the ability to think clearly.

With this book I hope to give you some clarity into the mortgage foreclosure process. Much of the distress felt by people involved in the foreclosure process is caused by a fear of the unknown. They say knowledge is power. I'd like to share some knowledge with you, and give you power over your situation.

The most important piece of knowledge I will share with you is this: You have options. In fact, you have plenty of them. Once you identify the best option for your situation, and begin to pursue that option, you will become unstoppable. It won't be simple, and it won't be easy, but you can do it.

Just as there are two sides to every coin, there are two sides to every law. If you've received a letter from a lender, filled with references to rules, regulations, and statutes, it can seem like every law was written for them, and none of them are going to protect you. That's not the case, but it's what lenders want you to think. In fact, a lender's greatest fear is that you might learn the laws they are using against you, and turn the tables.

This book can be a first step on the journey to gaining a better understanding of those laws that lenders are currently using against you and, with a better understanding of such laws, you can begin your journey from a feeling of helplessness to a feeling of hope and success.

Let's begin that journey.

Tom Algeo

Melbourne, Florida

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Chapter 1 – Where Are You in the Process?

Although this book focuses on foreclosures in Florida, the process is quite similar in most other states. Perhaps the most valuable information in this book is not the discussion of state and federal laws – although that is important – but rather the insights into the mind of the lender, and the tactics you can deploy while defending against foreclosure. In that sense, this book can be helpful to anyone in foreclosure who lives almost anywhere.

A recurring theme in this book is the value of having an experienced foreclosure defense attorney on your team. Whether you live in Florida or another state, commonwealth, or territory, it's important for you to contact a lawyer as soon as you receive that foreclosure complaint from your lender. In fact, I urge you to do so as soon as you miss your first mortgage payment.

You should also contact an experienced foreclosure defense attorney if you are current on your mortgage payments, but are considering stopping your mortgage payments. There are certain things you can do, prior to missing that first payment, that will position you for a greater chance of success, should you go into foreclosure.

In Chapter 2 we'll examine the foreclosure process from start to finish. There are some important milestones along the way that present opportunities for the borrower, and others that the borrower needs to understand in order to keep the process moving in their favor.

Chapter 3 emphasizes the importance of knowing what your mortgage paperwork says. The devil, as they say, is in the details. You will be dealing with a lender whose attorneys probably haven't read your paperwork (they're too busy filing foreclosure complaints). You and your attorney, on the other hand, can become experts on the

details of your mortgage, catch the mistakes of the lender's team, and turn those mistakes to your advantage.

Next, in Chapter 4, we are going to discuss the foreclosure complaint, and some of the common mistakes made by lenders' attorneys. These attorneys are so busy cranking out foreclosure complaints, that they simply don't have the time to spend on any one complaint. (We'll also discuss why they don't have to.) Armed with your intimate knowledge of your particular mortgage paperwork, the errors in the foreclosure complaint that they serve on you will jump off the page.

Chapter 5 covers some of the most common defenses to a mortgage foreclosure. There are many more than those covered here, and an experienced foreclosure defense attorney can point out the ones that will help you in your specific situation.

Chapter 6 discusses some of the best alternatives to foreclosure for a borrower. Defending against the foreclosure is what buys you enough time to put one or more of these options into action. Each alternative is designed to achieve one or more of your personal goals. Some of them require the cooperation of the lender. In such cases, your best chance of success is an aggressive defense of the foreclosure. This makes the lender sit up and take notice, and makes them more inclined to agree to a settlement.

Chapter 7 gives you a step-by-step action plan to launch you on your journey through, and past, the challenges of the foreclosure process.

Chapter 8 includes some final insights, suggestions, and best wishes to any of you who are caught in the foreclosure process, but are now determined to use what you've learned in this book to take back control of your life.

Let's get started.

Chapter 2 – The Foreclosure Process

Let's take a look at the foreclosure process from start to finish. I will assume you have no prior experience with foreclosures. I'll focus on the major steps in the process – the ones that directly affect people in, or about to enter, foreclosure.

The Mortgage Loan

People who take out a loan to purchase residential property in Florida typically sign a promissory note and a mortgage. A ***promissory note***, or ***note***, is the borrower's promise to repay the loan, and the terms for repayment (e.g., \$1,178.82 per month for 360 months).

A ***mortgage*** is a document signed by the owner of the home. It is recorded at the county courthouse and gives the lender a security interest in the property.

For the sake of brevity, throughout this book, whenever I say ***mortgage***, I am referring to both the ***mortgage*** and the ***note***.

Missing a Mortgage Payment

If you miss a payment deadline (i.e. the first of the month), most loans include a grace period of five to ten days to make your payment. If you don't pay by the end of the grace period the lender will charge you a late fee. Lenders generally wait until you miss three payments before beginning their pre-foreclosure process.

Federal law requires most mortgage lenders to contact, by phone and in writing, borrowers who have missed one or more payments (12 C.F.R. § 1024.39). In most cases, federal law requires the lender to wait until you're more than 120 days delinquent on payments before filing a complaint in foreclosure at the courthouse.

The Breach Letter

Most Florida mortgages contain a clause that requires the lender to send the borrower a breach letter. The letter must inform the borrower that the loan is in default and specify: the default, the action required to cure the default, a date (usually not less than 30 days from the date the notice is given to the borrower) by which the default must be cured, and that failure to cure the default on or before the date specified in the notice may result in acceleration of the debt and sale of the property.

Acceleration of the debt means that the entire balance that you owe on the mortgage is due immediately. Sale of the property won't occur for several months, at the earliest, or, if you defend the foreclosure, perhaps several years – or maybe never, if you successfully defend the foreclosure and work out a settlement with your lender!

How Florida Foreclosures Work

In Florida, foreclosures are judicial, which means the lender (the plaintiff) must file a lawsuit against the borrower (defendant) in state court. The lender's attorney initiates the foreclosure by filing a complaint with the court in the county in which the property is located and serving the complaint on the borrower, along with a summons that provides 20 days to file an answer.

If you don't respond to the lawsuit by the deadline, the lender can ask the court for a default judgment. On the other hand, if you file an answer, then the lender can't get a default judgment. At this point the lender usually files a motion for summary judgment.

If you file an answer to the foreclosure complaint and a counterclaim against the lender, and the court denies the lender's motion for summary judgment, the foreclosure will proceed to discovery and trial. If you lose at trial, the court will enter a final judgment of foreclosure against you.

The Difference Between an Answer and a Counterclaim

The **answer** to the foreclosure complaint is your response to the allegations within the complaint. In Florida, allegations must be answered with specificity. A general denial, without further detail, is considered an admission.

If Count 1 of the complaint alleges that the name of the borrower/defendant is Roger T. Anderson, and this is true, the correct reply is “Admitted.” If the correct name is Roger B. Anderson, the correct reply is “Denied. The name of the defendant is Roger B. Anderson.” If the correct name of the borrower/defendant is Roger B. Anderson, and the borrower/defendant answers “Denied” without additional detail, then the court will take the answer as an admission.

This is important because, if the court accepts the allegation that the defendant’s name is Roger T. Anderson, then defendant Roger B. Anderson, by not denying the allegation with specific details, has waived the right to use the mis-naming of the borrower as a defense in the proceedings. If the mortgage paperwork was prepared in a name that isn’t that of the defendant, any defense based on this mistake cannot be used by the borrower/defendant.

When filing an answer, the defendant can file a **counterclaim** against the plaintiff. A counterclaim is a complaint against the plaintiff which the plaintiff must defend, or else a default judgment could be entered against the plaintiff.

An example of a counterclaim in a foreclosure proceeding would be a claim by the borrower/defendant that the lender failed to comply with state or federal law during the pre-foreclosure or foreclosure proceedings. Like a denial, a counterclaim must also be asserted with specificity. In the example of failing to comply with state and federal law, the borrower/defendant must state the specific law and what the plaintiff did to violate that law.

The Expedited Foreclosure Process in Florida

Florida law provides a procedure designed to speed up the foreclosure process in uncontested cases or in cases where the homeowner does not have a genuine defense. This is bad news for a borrower who is trying to prevent or delay foreclosure. For this reason, it is critical for a borrower to file an answer to the complaint in foreclosure, a reply to any motions made by the lender, and to actively participate in the entire legal process until it is concluded – whether by settlement with the lender, or sale of the property as ordered by the court.

The Foreclosure Sale

If the lender gets a judgment of foreclosure, the court schedules a sale of the property not less than 20 days, but no more than 35 days, after the judgment (unless the plaintiff or plaintiff's attorney consents to additional time). See Florida Statute §45.031.

At the foreclosure sale, the property will be sold to the highest bidder, which is often the foreclosing lender. The lender usually makes a bid at the foreclosure sale that is equal to the amount owed. If the lender is the highest bidder, the property is deeded to them.

Deficiency Judgment Following Sale

In Florida, a lender may obtain a deficiency judgment as part of the foreclosure action or in a separate action within one year. A **deficiency judgment** is a judgment against the borrower for an amount of money that is equal to the total amount due from the borrower on the day of the foreclosure sale (including costs and other amounts due to the lender), minus the amount the lender received at the sale from a third party buyer, or the market value of the property, if the lender was the highest bidder at the sale.

Redeeming Your Home in a Florida Foreclosure

A borrower can redeem their home any time before the filing of a certificate of sale by the clerk of the court or the time specified in the judgment, whichever is later. This is accomplished by the borrower paying the amount of money specified in the judgment, or, if there is no judgment, by paying all amounts due to the lender, including all of the lender's costs and expenses.

Refusing to Move

If the foreclosed borrower doesn't vacate the property following the foreclosure sale, the new owner (often the foreclosing lender) may either pay the borrower to leave or begin eviction proceedings.

The eviction process is typically part of the foreclosure action with the right to possession included in the judgment. After the lender gets title to the property, they file a motion for a writ of possession. When the motion is granted, the clerk of court issues the writ, which gives you 24 hours to move out. The sheriff posts the writ to the property and, if you don't move out, the sheriff physically removes you from the property.

Options

Fortunately, you have options. You can negotiate with your lender for forbearance, which means they will suspend foreclosure for an agreed upon amount of time, during which you can renegotiate the terms of your loan, sell the property and pay off the mortgage, sell the property at a short sale (where the lender accepts less than the full amount as payoff of the mortgage), deed the property to the lender (deed in lieu of foreclosure), or simply continue to live in the home for a period of time until you can find other arrangements. We'll discuss these options in more detail below.

With any of these options an experienced foreclosure defense attorney will make the process smoother, easier, and more likely to achieve your personal goals.

Chapter 3 - Read Your Mortgage

Now that we've seen how the foreclosure process works, I want to discuss something that I often see when representing foreclosure clients. It's what I call *The False Narrative of Foreclosing Lenders*, and its impact on a borrower can be profound. It's a silent enemy that lenders plant in the mind of the borrower.

Actually, it's not planted by the lender, it's planted by society during our childhood. In its most basic form, it can be described by the saying: "Honest people pay their bills!" Well, by implication, that would mean that people who *don't* pay their bills are *dishonest*.

Don't fall for this scam. Let's restate the saying to reflect reality: "Honest people pay their bills, if they can!" It's important to distinguish between people who won't pay their bills and people who can't pay their bills.

Now, we could talk forever about how bad choices lead people to a point where they can't pay their bills, but that won't change the fact that now, today, they can't pay their bills. And, speaking of bad choices, let's dig a little deeper there. I think we'll be surprised by what we find.

In my experience, very few clients have gotten into foreclosure just because they made bad choices. In most cases, they reacted to a situation that was imposed on them, like the loss of a job, the death of spouse, or a real estate market crash. Maybe, if they had reacted differently, they wouldn't have gone into foreclosure, but who among us knows that for sure? Who among us would have made a better decision? Who among us is even sure there was a "right" decision to make?

I've never had a client in foreclosure who wasn't doing the best they could, and making the best decisions they could, given the situation.

I said earlier that the lenders don't plant these generalizations in our minds. But they do feed them. They remind us at every turn that we borrowed the money, we owe it to them, and – as honest people – we are obligated to pay it back. Let's break that idea down.

I'll begin by sharing an old saying in the mortgage industry, which goes like this: "If you pay, you stay. If you don't, you won't." It certainly encapsulates the borrower-lender relationship. There's more to it than that, but it's a good starting point. Let apply it to a typical borrower.

If your mortgage looks anything like the millions of mortgages out there, it probably shares some of the fundamental characteristics of mortgages everywhere. It has one paragraph explaining what will happen if you pay your mortgage. It's the one that says you owe \$1,200.00 per month for 360 months. Or, in other words, "If you pay, you stay."

But what about the other two dozen paragraphs? What's their purpose? It's simple. They describe exactly what will happen if you don't make your payments, or, as they say: "If you don't, you won't." Let's think about that for a moment. One paragraph about what happens if you pay, and 24 paragraphs about what happens if you don't. In legal terminology, those two categories of contract clauses are called "elections," because you can elect to choose one or the other. Simply put, paying or not paying is a choice. And it's a choice that the *lender*, not the borrower, has decided to include in the mortgage.

When you decide to stop paying your mortgage, or, as is usually the case, when you find yourself *unable* to pay your mortgage, you are agreeing to play by the rules that the lender has established (in the mortgage document) and the law has established (in the statutes). In other words, when you stop making mortgage payments, you have agreed to play by other people's rules. You are making a *choice* to play by their rules. Rules that you had no say in making. Rules that, in some cases, you might not completely understand. It's a rigged game, and the odds are in the lender's favor.

So let's put those snobbish, I'm-better-than-you generalizations to rest. No, even better, let's destroy them completely. Release any negative feelings you have about being in foreclosure. Get the lender, and much of society, out of your head. And, most of all, understand that you aren't just along for the ride. Wherever you are in the process – whether you are considering stopping your mortgage payments, you're behind in your mortgage payments, or you're already in the foreclosure process – you have options.

Plenty of them. Let's talk about them.

Chapter 4 - Read the Complaint in Foreclosure

I admit it. I'm a mortgage nerd. Most people don't read their mortgages. Why would they? It's not like you can say to the lender "A five-day grace period doesn't work for me. Make it 15." Or "No fireworks allowed on the premises? That clause has to go." A mortgage is what's known as an adhesion contract, which means "Take it or leave it."

I, on the other hand, have read every word of every mortgage I've ever signed. Not because I wanted to know what it said, but because I find it fun! And, by the way, I've never gotten a lender to change a single word of a mortgage either.

A few years back, I was primary closing attorney for a national mortgage lender. You probably saw their ads on TV – sometimes hourly, sometimes more. At the peak of the real estate boom I was doing 20 closings a week. Borrowers would sit across the table from me and ask questions, which I was always happy to answer. Sometimes they would turn the document around, slide it across the table, and point to a paragraph. "What does that mean," they would ask.

In order to answer the question, I would have to turn the document upside down. After answering questions at several hundred closings, looking at the documents upside down across the table, it was hard to read it any other way.

The point is, most people don't read their mortgage before, or even after, they sign it. But here's a dirty mortgage industry secret: The lenders don't read them either. They crank out the same document, day in, day out, and, frankly, they don't care what it says. They figure that's a problem for their attorneys, if and when it comes time to foreclose. As long as the borrower is adhering to that single paragraph – "If you pay, you stay" – the rest of the document could be written in Sanskrit, or even be blank, for all they care.

But it gets worse (for the lender). The lenders' attorneys don't read them either! "How can that be?" you might ask. Well, it goes like this: Lenders hire attorneys, often entire law firms, to process foreclosures. These firms often bid for the business at a flat rate. This much to file the complaint, this much to reply to a borrower's answer, this much to go to a hearing, etc. These firms make their money on the most common situation: They file a complaint in foreclosure and get a default if the borrower fails to reply. This is their bread and butter, and it's what the lender wants to see happen. If they have to pay their lawyers to reply to an answer or counterclaim, well, O.K. They don't like it, but they'll pay. It's when the borrower starts raising defenses that they can prove that things start to break down. The lender doesn't want to pay their lawyers for hearings, or for answering discovery requests, or requests for admission, or attending depositions.

So, an attorney who wants to keep a lenders business does two things:

1. Crushes a borrower who doesn't answer a foreclosure complaint by getting a default judgment the minute the borrower misses the deadline to file an answer, and,
2. Prices the less frequent, but higher overhead tasks at a loss. After the 2008 crash of the real estate market, entire law firms went out of business because they couldn't make a profit on all of the contested foreclosures (which were contested by foreclosure defense attorneys who knew that would happen).

We'll get into the fact-based, substantive defenses very soon. We're only talking tactics at the moment. And the thing to remember tactically is this: As long as you stay in the game, you are winning, they are losing. You are winning time, and they are losing money. You are winning time that can be spent living in your home until your teenager graduates from high school, or negotiating a loan modification with your lender, or finding a buyer for the property. They are losing money that they could spend on, well, anything.

It is very easy for a borrower to give the lender's lawyers easy money: Do nothing. It is also very easy for a borrower to take the lender's lawyers' money: Do something. Almost anything will work.

So the attorney who files the foreclosure complaint and is hoping for a default, has no need to read the mortgage. Just staple a copy of the mortgage to the complaint and, if they get a default, life is beautiful and reading the complaint would, in retrospect, have been a waste of time.

But, just as the lender's attorney, when filing a foreclosure complaint, doesn't care if the mortgage document is blank, a borrower filing a blank answer and counterclaim will gain the same tactical advantage as a borrower filing a reasoned, fact-based answer and counterclaim. I will admit that I am exaggerating, but not by much. A lender's attorney has to spend almost the same amount of time (and, thus, lose the same amount of money) answering a bad answer and counterclaim as they do answering a good answer and counterclaim.

The problem for the lender's attorney is that they don't know who's going to answer and who isn't. If they did, they might take some time to read the mortgage document, and craft their foreclosure complaint based upon what the borrower agreed to. But, as we've seen, that's not their business model. This creates great opportunities for the borrower. How? I'm glad you asked.

Let's imagine there is an attorney named Robert D. Partner, who is with the law firm of Brush & Sweep. They represent lenders in foreclosure actions. It is all they do. Therefore, they must do it efficiently. This means that they undertake litigation based on business decisions. And here is how that works ...

Bob Partner has just received 100 foreclosure files from Brush & Sweep's best client, Bank of Ocala, known as B of O. Bob knows the firm billed B of O more than \$500,000

last year, so it's important that he takes care of this client, while also keeping in mind the interests of Brush & Sweep.

Bob calls his paralegal into his office, and hands her the hundred files. "Do it," he says. She knows what that means, and sees to it that one hundred foreclosure complaints are filed.

Twenty days after the filing of the complaints, Bob calls his paralegal in again.

"How many answers," he asks.

"Twenty. All with counterclaims" his paralegal answers.

"Damn it!" he says, "they got lawyers."

His paralegal nods solemnly.

Bob sighs. "O.K." he says. "Take default against the 80. Prepare motions to dismiss against the 20."

"But," he adds, as his paralegal turns to leave, "don't prepare the motions until you file every one of the 80 defaults."

"Got it," says his paralegal as she leaves his office.

What just happened? Bob's reaching for the low hanging fruit. Defaults are easy and profitable. They are the priority. Any borrower who files an answer and counterclaim (and there is ALWAYS a counterclaim) just bought themselves weeks, months, or more, of time. Time is a borrower's best friend.

Fast forward weeks, months (or more) later.

Bob's paralegal enters Bob's office.

"I have an update of the B of O files," she says.

"Give it to me," says Bob.

"Eighty defaults."

Bob smiles. "That's good. That's very good."

His paralegal frowns.

"What's wrong?" asks Bob.

"Out of the 20 answers with counterclaims, 15 have requested discovery, and five of those want to schedule depositions."

"Depositions?" Bob is halfway out of his chair. "Discovery is bad enough, but depositions? The senior partners are going to eat me alive!"

"Um"

"What?!"

"Of the 15, three are slam dunks."

"No. How?"

"One is the wrong name."

“O.K. We can fix that with an amended complaint. Everybody gets one amended complaint without leave of court.”

“Well ...”

“What?”

“The name on the foreclosure complaint is correct. The mortgage is wrong.”

“The mortgage has the wrong name? The lender loaned money to someone who doesn’t exist?”

“Yes. And as for the other two, it’s worse. They ...”

Bob raised a hand. “That’s enough for one day. I’m going home early.”

What happened? Simple. The lawyers for 20 of the borrowers read the mortgage. Buried deep in the complaints of the 80 borrowers who suffered defaults, there were, very likely, dozens of mistakes in the mortgage documents and the foreclosure complaints. They could have filed compelling answers and counterclaims to the foreclosure complaint. But no one read the mortgage, and, if you don’t read the mortgage, it doesn’t do you any good to read the complaint. Reading the mortgage is the only way to know the foreclosure complaint is wrong.

The same problems will dog the lender’s lawyers in discovery, in depositions, in hearings. What’s a lender’s lawyer to do? Punt.

The lawyers weren’t at the lender’s office when the documents were drafted. They weren’t at the closing when the title clerk misread the borrower’s driver’s license. The lender can’t blame Brush & Sweep.

The lender's lawyers are going to go to the lender and advise them that they, the lender, made a mistake, and they, the lender, have to agree to cut a deal with the borrower. Of course, they won't tell the borrower's lawyer this, but a sharp foreclosure defense attorney will know when it's game over.

Remember, they almost always get something wrong. It doesn't have to be a BIG thing, it just has to be a SOME-thing.

Chapter 5 - Defenses to Foreclosure

There are a number of defenses available to a borrower in foreclosure. As we've discussed, the first step in preparing an answer is to read the mortgage. When I say "read the mortgage" I mean read the mortgage documents. This includes the mortgage, the note, and every other document you signed or were given at the closing on your mortgage. There are many opportunities for errors on the part of the lender when creating these documents, and some of those errors could form a basis for a defense to the foreclosure.

Basic Errors

The first type of errors that lenders make are what I call basic errors. These are the simplest of mistakes that, ironically, can be some of the best grounds for a defense to the foreclosure. These include having the wrong:

- Name(s) of the borrower(s)
- Address of the property
- Tax parcel number of the property
- Loan amount
- Interest amount
- Monthly payment amount
- And many, many more

To discover these mistakes, take out your mortgage documents and simply move from one piece of information to the next and ask yourself "Is this true?" You'll be surprised how often the answer is "No!"

If you had a typical mortgage closing, you came away with a rather thick stack of documents. Look at that stack of documents as your opportunity to defend the foreclosure.

Advanced Errors

The next type of errors, advanced errors, are more subtle. They are difficult to identify without considerable knowledge of the law. These may include errors such as lack of jurisdiction, lack of venue, and improper service of the foreclosure complaint. At a higher level you'll find errors that include failure to allege possession of the original note, failure to give proper notices to the borrower before filing the foreclosure complaint, and failure to comply with the numerous consumer protection requirements of state and federal law.

Identifying these more subtle errors, and analyzing the best way to lawfully exploit them in a foreclosure defense proceeding, requires the skill and knowledge of a foreclosure defense attorney. Drafting an answer and counterclaim to the foreclosure complaint *pro se* (on your own behalf) is a mistake. The lender's attorney has a duty to their client, the lender, to lawfully exploit the mistakes of opposing counsel, which, in the case of a *pro se* litigant, would be you.

One temptation a borrower might have is to start out *pro se*, and when the going gets tough, hire a lawyer. It's understandable that a borrower wants to save some legal fees, but the damage they do will often far outweigh the money they save on legal fees. In many cases the borrower will have to pay their attorney to fix what they broke. And in some cases, a *pro se* borrower will cause irreparable damage. An example might be helpful.

When a borrower receives a foreclosure complaint, they will sometimes send a letter to the judge, explaining why they are unable to pay their mortgage. Their thinking is that, if they can just explain to the judge why this happens, the judge won't foreclose on their

home. There are two major problems with this. First, the judges aren't parties to the proceedings, they are just referees. They simply apply the law to the facts, and issue an order based on that.

But, secondly, and more importantly, in Florida a letter to the judge is considered an answer to the foreclosure complaint. In one way this works in favor of the borrower, since it avoids a default judgment for failure to answer the foreclosure complaint. The problem is that certain legal rights of the borrower must be included in the answer to the complaint. These are called affirmative defenses and, if they are not included in the borrower's letter/answer, the law considers them to be waived, and they are lost to the borrower forever.

Defending a foreclosure action is not something one should attempt unless they are skilled and experienced litigators. Each step in the proceedings is often more complex than the one before.

Chapter 6 – Alternatives

A common question a borrower asks when facing foreclosure is “Can I keep my house?” A good foreclosure defense attorney understands that this question only addresses a single issue, when there are many issues to consider.

First of all, if a borrower does not defend a foreclosure, they will not be able to keep their house. There will be a default judgment, and they will be forced to move. So the first step toward having a chance of keeping their house is defending the foreclosure action.

The next thing to consider is whether keeping their house is really their ultimate goal. When asked why they want to keep their house, they will often say something like “Our son is graduating from high school in the spring, and we don’t want to move.”

That’s helpful information. I point out to them that there are several ways for their son to graduate from his current school even if the family moves. They could move somewhere else within the school district, or their son could live with a friend or relative. Yes, ideally they would remain in their home, but if doing so is not the best alternative for them from a strategic mortgage foreclosure defense standpoint (and we’ll discuss some alternatives shortly), it’s important to understand that moving from their home and their son graduating from his current school are not mutually exclusive options.

I know everyone understands that you can move from your home and stay in the same school district, but when people are faced with foreclosure, they tend to focus their efforts on keeping their home. One reason they do this is that their home is their castle, and they feel they must protect it, no matter what. But another reason is that the typical homeowner doesn’t know they have a number of options when they’re facing foreclosure.

This is where an experienced foreclosure defense attorney can be an extremely valuable asset. They can provide the homeowner with alternative solutions tailored to their specific situation, specific needs, and specific goals. In a moment, we'll look at some of the options a borrower has when facing foreclosure. But first I want to talk about the tactics of defending a foreclosure.

Yes, a borrower in foreclosure has many options – but only if they have time to do what they need to do in order to make that option work. The number one goal in any foreclosure defense is to buy time. It is the critical component of every single alternative the borrower has. Without an aggressive foreclosure defense, time will quickly run out for the borrower and their home will be sold. The ideal foreclosure defense is undertaken immediately and aggressively. Such a defense will buy a borrower the most time, and time is a borrower's best friend.

One last point before discussing a borrower's alternatives to foreclosure. Banks have foreclosure departments and they have workout departments. They go by various names, but the foreclosure department is always working on moving ahead with the foreclosure, and the workout department is always trying to save the lender time and money by striking a deal with the borrower.

It is important for a borrower to understand that these two departments do not work together. They do not coordinate their actions. Neither cares what the other is doing. The reason this is important is that, if someone in the workout department tells you not to worry about the foreclosure, they are either lying or stupid. The only department that can stop or slow the foreclosure process is the foreclosure department, represented by their lawyers.

Often, the effect of a soothing assurance from the workout department that the foreclosure process is "just a formality" is for the borrower to fail to defend the foreclosure action. The result is, ultimately, the sale of the property at a foreclosure

auction. Was the person from the workout department a liar or merely stupid? From the borrower's point of view, it doesn't really matter. The result is the same either way.

Borrowers must beware of such tactics on the part of the lender, and continue to aggressively defend a foreclosure action until a deal is made, in writing, between the borrower and the lender, and the foreclosure action is dismissed.

I'll list some of the alternatives to foreclosure, and then explain them one by one:

- Straight Sale
- Short Sale
- Renegotiate Loan Terms
- Forbearance
- Deed in Lieu
- Walk away

Straight Sale

A straight sale is the most straightforward alternative to mortgage foreclosure.

In a short sale, which we'll discuss below, you have to involve the lender. In a straight sale, you put your home on the market, someone buys it, and you pay off the bank with the proceeds.

The best thing about a straight sale is that it doesn't involve the lender. As long as the proceeds of the sale cover the mortgage balance, plus penalties and the lender's litigation costs, you are done. You do, however, have to have enough equity in your home to do this, or, alternatively, have enough cash to bring to the table to cover any shortfall between the proceeds of the sale and the full amount due to the lender.

Another wrinkle that can occur in a straight sale is that buyer's will often know that the property is in foreclosure when they make their offer. And they will always know it by

the time of closing, because the title company conducts a search of court records to determine any legal actions against the property. A buyer who knows about the foreclosure at the time of their offer may lowball the amount of their offer, knowing that the clock is ticking on the foreclosure action. A buyer can even try to negotiate a discount at the closing table, knowing that you are even closer to foreclosure than you were when they made their offer.

Short Sale

In a short sale, the lender agrees to take less than the full amount of the mortgage balance. A short sale requires the borrower to find a buyer, confirm the buyer has the funds or can get a mortgage, and get approval from the lender as to the amount of proceeds the lender will receive from the sale, and the terms and conditions of the sale.

The biggest sticking point of a short sale is a deficiency judgment. This is a judgment against the borrower for any difference between the amount of the short sale proceeds, and the total amount due to the lender. For example, let's say we have a \$250,000 mortgage and \$20,000 in lender's foreclosure costs, for a total of \$270,000. We find a buyer willing to pay \$200,000 for the property. The amount of the deficiency is \$70,000.

In this situation, several things can happen. The lender can accept the \$200,000 and waive the deficiency, the lender can get a deficiency judgment from the court as part of the foreclosure proceedings, the lender can require you to sign a \$70,000 note with agreed upon terms of interest and payments, or the borrower and the lender can agree to an amount of deficiency less than \$70,000.

Short sales can work to a borrower's advantage, as long as they can meet the obligations of any settlement regarding the deficiency judgment. It doesn't do the borrower much good if they settle the foreclosure action but can't make the agreed upon payments on a deficiency note.

Renegotiate Loan Terms

Everything is on the table when it comes to alternatives to foreclosure. A borrower with adequate cash flow may be able to renegotiate the terms of their loan with the lender. Perhaps the borrower lost their job and fell behind on their mortgage payments. They've now gotten a new job, and can make their payments, but they don't have the cash to bring the missed payments, and the lender's foreclosure costs, current.

If the borrower can prove their income, the lender may add the missed payments and costs to the loan balance and adjust the monthly payments accordingly. If the numbers work for the borrower and the lender, this is a settlement that is in the interests of both parties, and allows the borrower to stay in their home.

A renegotiation only works if there is adequate equity in the home. Lenders have set performance standards for loans. If your mortgage was underwater (outstanding mortgage balance was less than the value of your property) when you began to miss mortgage payments, the bank will not be inclined to renegotiate your mortgage.

Deed in Lieu of Foreclosure

A deed in lieu of foreclosure is a situation where you deed the property to the lender, and they stop the foreclosure action. It only works under a narrow set of facts.

First, there can't be any liens on the property other than the first mortgage held by lender. This includes tax liens (state and federal), municipal liens (for new sidewalks in front of the property, for example), and judgment liens from other court actions (such as a collection action on a consumer loan).

In a foreclosure action on a first mortgage, all liens subordinate to the first mortgage are wiped out. If you have a second mortgage on a property, that lender gets nothing when

the home sells at the foreclosure auction. Same for a judgment on a consumer loan. Certain government liens survive foreclosure, but that's the case regardless. The lender simply has no motivation to accept a deed in lieu of foreclosure if there are subordinate liens on the property that will become the lender's problem if they accept the deed.

When the situation is right, a deed in lieu of foreclosure is a good deal for the borrower, but the right situation doesn't come along that often.

Walk Away

Just walking away from a property might work for some people, if they are willing to accept the consequences. But if a borrower plans to do this, it is important they take some steps to prepare for those consequences.

First, you must accept that your credit score will be damaged – sometimes severely so. This means you won't be able to get a loan for a car or other big-ticket items. You can assume you won't be able to get a mortgage from an institutional lender. And, in many cases, you may not even be able to rent an apartment. In today's information age, even the retired couple renting out the apartment over their garage will run a credit check on you.

If, however, you are willing to accept those consequences, prepare for them by finding a place to live before you walk away. This could be friends or family, but you could also rent an apartment before your foreclosure shows up on your credit report. Likewise, if you need a new car, get the car loan before you walk away.

But when in the process do you walk away? There's a conundrum here. If you walk away before you miss your first payment, the bank will continue to expect payments, and won't start the foreclosure process for at least three months. Also, if you walk away before the foreclosure process starts, you'll miss the opportunity to explore some of the

other options that are available to borrowers who have missed their payments. Lenders don't negotiate with borrowers who are current on their payments. If you walk away when your mortgage payments are current, you'll never know what kind of deal you (or your lawyer) could have negotiated.

If you decide to accept the consequences and walk away, consider letting the lender know your plans. Yes, they will still foreclose, and yes, you will be obligated to pay their costs and any deficiency amounts. But if you let them know you are leaving, they will often take steps to secure the property from squatters and vandals, and will maintain the exterior by cutting the grass, trimming the shrubbery, and fixing any hazards on the premises.

This preserves the value of the property and may result in a higher price at the foreclosure auction. Yes, they will add the maintenance expenses to their costs, but if those costs prevent vandals from setting the home on fire and burning it to the ground, you'll be way ahead in the end. (One last point: Even if you have paid your home insurance premium in advance, most policies will not pay for damages if the home is unoccupied.)

Walking away is not for everyone, but it will meet the needs of some borrowers in certain situations.

Chapter 7 – Action Plan

Congratulations! You now have your personal arsenal of foreclosure knowledge and are ready to face the foreclosure process head on.

You may have recognized some mistakes in your own mortgage documents, and perhaps you've even identified some interesting errors in the foreclosure complaint, if you've been served with one.

Some of you have spotted some available alternatives to foreclosure and thought "Hey, that might work for me."

But even if you simply gained a better understanding of the foreclosure process, and the options you have, this book will have served its purpose. Now it's time to turn your new knowledge into action. Here's an action plan to get you started:

1. Start a journal.

This is a critical first step. Get a blank journal, a three-ring binder with loose-leaf paper, or any similar product and start taking notes. Every time you receive a phone call regarding the foreclosure, regardless of who is calling, write down the date and time, their name, title, employer, phone number, email, everything they said to you, and everything you said to them.

I must point out that you speaking to people on the phone doesn't help you as much as it helps the lender. Again, an experienced foreclosure defense attorney is an important member of your team. They can talk to whomever needs to contact you. But, if you do choose to listen to someone who calls, write down the details of what they say, and what you tell them.

Also, be very wary of agreeing to a recorded call. You will be speaking with someone who has been trained to trap you into admitting things that won't help you. Your attorney is trained as well, and is your best shield against these lender phone tactics.

2. Start a file.

Open a case file for your foreclosure proceedings. It doesn't have to be fancy, it just has to hold any and all paperwork that comes your way. If you're into organizing, great. Get a pocket folder and create individual file folders for court pleadings, correspondence, mortgage documents, file notes, and other supporting documentation.

If you're less inclined to that level of organization, that's O.K. As long as you capture every piece of paper that relates to the foreclosure, you'll be fine. Get a single file folder and put each document into it as you receive it.

When you do get a document, write down the time and date you received it. You can write this on the back of the document, or with a sticky note on the front. The goal is to not put any stray marks on the document. Your attorney will want to make copies of at least some of them, and I have had opposing counsel accuse my client of altering documents because of a scribbled note on the front of it.

3. Gather all of your mortgage documents.

Pull out your paperwork from your mortgage closing. Every piece of paper is important, including any paperwork and correspondence you received before and after closing. Gather all of your payment information, including any receipts for payment, payment coupon books, and your amortization schedule.

If you're missing documents, contact the title company that conducted closing

and ask them for copies. If you don't remember who they were, look up your recorded mortgage in the online courthouse records, and their name will appear somewhere on the mortgage.

Speaking of online courthouse records, Florida has an excellent online public records system. It's easy to use and has many documents related to your foreclosure proceeding, including both court records and property records. Type "Official Records Search [County Name]" into your search engine to get started. You can search for deeds, mortgages, pleadings, property tax information, property assessments, and many other papers related to your property and case. If you think you might be missing an important document, it might just be available online.

4. Contact an experienced foreclosure defense attorney.

I can't emphasize this enough. Most foreclosure defense attorneys offer a free initial consultation. If you hire them, they will probably require a retainer, and they will charge you a reasonable fee for their services. I encourage you to view their fees as an investment in your future. Weigh the possible outcomes with and without an attorney, and make a decision that is best for you. In the vast amount of cases, that decision will be to hire an attorney.

5. Catch your breath.

Whether the foreclosure has been in your life for months, or it is still over the horizon, but headed in your direction, you are now knowledgeable, organized, and ready to move forward with your foreclosure defense plan. Add one last thing to your new file: Your worries, concerns, doubts, and anxieties. They do you no good living in your head. Trust me, they'll be just fine tucked away in that file.

6. Look ahead.

This challenging time in your life will pass. In the meantime, do your best to live your life for *you*.

Chapter 8 – Conclusion

At the time I wrote this book, in late 2020, the COVID-19 pandemic had caused the Florida court system to have a backlog of nearly one million cases. Court administrators predicted that it would take three years to clear the backlog – *if* the courts received adequate funding, which wasn't guaranteed.

What does this mean to the borrower facing foreclosure? With such a huge backlog, the court will focus, first and foremost, on resolving cases any way they can. Florida law provides for an expedited process to quickly grant foreclosing lenders a default judgment. If you have been served with a foreclosure complaint, it's important for you to act quickly to defend yourself. Lender's won't hesitate. You shouldn't either.

But here's the bright side. If you do file an answer and counterclaim to the foreclosure complaint, it is very likely that your case will proceed at a pace slower than has ever been seen in the history of the Florida court system. This will mean more than just being able to continue living in your home. It will also mean that lenders, facing the prospect of their foreclosure cases taking years to be resolved, will be much more inclined to settle with the borrower, and such settlements are likely to be more favorable than they would be in normal times.

Maybe you are considering halting your mortgage payments. Maybe you have already missed one or more payments. Maybe you've already been served with a foreclosure complaint. If you are in any of these situations, I urge you to contact an experienced foreclosure defense attorney and discuss your situation. Most don't charge for an initial consultation, and the information you receive will allow you to make the best decisions for someone in your specific situation.

Thank you for taking the time to read this book. I hope it has been helpful. If you'd like to contact me to discuss your situation, you can reach me by email at

thomas@algeo.com, by phone at 561-329-8926, or through my website at www.algeo.com.

In the meantime, I wish you all the best and hope that your situation is resolved quickly and in your favor.

About Tom Algeo

Tom Algeo is admitted to the practice of law in Florida and Georgia. He has been practicing real estate law for over 25 years. A U.S. Naval Academy graduate and former naval aviator, Tom is an FAA certificated Airline Transport Pilot, Certified Flight Instructor, and Certified Instrument Flight Instructor. He has flown dozens of different aircraft over four continents, including flights over Africa and the Himalayas. He lives in Melbourne, Florida, with his wife, Louise.