

# MORTGAGE FORECLOSURE IN SOUTH CAROLINA

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South Carolina Legal Services

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Presentation to

Consumer Credit Counseling & Mortgage Brokers CPE

# Topics Covered

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1. Overview of a mortgage foreclosure case
2. Defenses and counterclaims
3. Borrower's choice of remedy
4. Pitfalls/Beware
5. Homes Affordable Modification Program and the S.C. Supreme Court Administrative Order
6. Examples from lawsuits

# Overview of a Mortgage Foreclosure

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1. In default of loan payments
2. In foreclosure
3. Sued/Served with a foreclosure lawsuit
4. In default of answering the lawsuit

# In default of loan payments

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1. One or more payments is missed

This is the best time to workout a modification or refinance.

Attorneys fees, costs and extra late fees and other servicing charges haven't piled up to increase the past due balance.

# “In Foreclosure”

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1. The lender is at some stage of sending the account to collections or a foreclosure lawyer.

This is different from being in default in a foreclosure lawsuit.

# Sued/Served with a lawsuit

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1. The clock is ticking once the lawsuit has been filed and served.

Ignoring it or trying to file bankruptcy in a hurry is not the answer.

“You owe the money” and “There is no defense” are views that are no longer valid in most cases. Balance due is inflated and legitimate shortcomings in how the closing was done often exist.

# In default of answering lawsuit

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Don't let this happen!!

Don't try to play lawyer!! You can make it worse for borrower and get yourself in trouble.

Encourage clients to get a lawyer.

No foreclosure lawsuit should go unanswered.

There is always a defense! Even if it is just making sure the Plaintiff and the amount claimed are correct.

# Defenses and Counterclaims

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1. Prove the account and the charges that have been added to the balance.  
Especially attorneys fees and costs.
2. Failure to comply with state and federal statutory laws
3. Common law defenses and causes of action

# Some of Borrower's Options

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1. Defend the foreclosure; sue any wrongdoers in the closing process. Often if disclosure laws had been followed, the borrower would not have signed on for a loan they could not afford.
2. Bankruptcy
  - a. Ch. 13
  - b. Ch. 7

# Beware of Pitfalls

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1. Follow the rules. Don't fudge on any information; honor required formalities in witnessing and notarizing.
2. Parking lots and other places where you should not do a closing.
3. Don't turn your head to improper activity of others.

# More Pitfalls

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Make sure the client gets a set of closing papers that were copied after all of the signing is completed.

Borrowers should not use equity in their home to turn credit card and other unsecured debt into secured debt.

# Homes Affordable Modification Program and the S.C. Supreme Court Administrative Order

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1. What is covered?
2. How does it work?

# What is Covered?

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- Fannie Mae, Freddie Mac, FHA and loans with lenders or servicers who have agreements to participate
- Residential loans on primary residence

# How does it work?

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- Case pending on May 4, 2009
  - Lender must attempt modification on eligible loans and file affidavit outlining result
  - Borrower can file counter affidavit
  - Court decides contested issues on compliance
  - While modification is pending, lender must keep court informed

# How does it work? (continued)

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- Case filed after May 4, 2009
  - Complaint must allege specific facts that demonstrate compliance with the Court's order.
  - Order requires a good faith attempt to modify the mortgage pursuant to HAMP.
  - Foreclosure is subject to Motion to Dismiss if it does not lay out the specific facts showing eligibility, analysis and explanation of no resulting modification

# Tenants at Foreclosure Act of 2009

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1. Property sold at foreclosure sale
2. Notice must be given to tenant in possession
3. Tenant is allowed to continue tenancy for 90 days or the remainder of their lease, whichever is longer
4. Exception when buyer at foreclosure will reside in the home.

# Some defenses counterclaims and third party complaints that may be available to borrower

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- Lost or missing payments
- Force placed insurance
- Accepting payments after filing foreclosure
- Notice of acceleration of note
- Loss mitigation requirements
- Breach of contract
- Set off and recoupment

## More examples

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- SC Attorney preference
- SC Insurance agent preference
- Underlying transaction unconscionable—  
damages up to twice finance charge
- Violation Residential Mortgage Loan  
Brokers Restrictions SC High Cost and  
Consumer Home Loan Act

# More examples

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- Negligence
- Negligent misrepresentation
- Breach of fiduciary duty
- Civil Conspiracy
- Breach of duty of good faith and fair dealing
- Fraud omission and/or misrepresentation

# More examples

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- violations of the Unfair Trade Practices Act
- Violation of the Truth in Lending Act
- Violation of the Home Ownership and Equity Protection Act
- Violation of Real Estate Settlement Procedures Act
- Violation of Equal Credit Opportunity Act

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