

This guide is prepared to provide the reader with information regarding foreclosure. Unfortunately, the financial crisis left many homeowners unable to pay their mortgage and precipitated foreclosures on a scale not seen in the US since the Great Depression of 1929 to 1939.

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## Q What happens if I can't pay my mortgage?

A Falling behind on your home mortgage is very serious. Once this happens, it is very difficult to catch up. The bank will start foreclosure and your home will most likely be lost without intervention.

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## Q What is a foreclosure?

A Legally, it happens when your lender seeks to cut off (foreclose) your right of ownership resulting in sale of your home by the sheriff. While the foreclosure process takes many months, your case moves slowly but surely through the Courts to the day when your home is sold.

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## Options Facing the Homeowner Facing Foreclosure

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### 1. CHAPTER 13 BANKRUPTCY

Chapter 13 Bankruptcy will stop foreclosure, even after the process has begun, because an Automatic Stay stops all collection activity relating to the foreclosure. It gives the homeowner several possibilities in working out the mortgage problem:

- a. CURE PLAN is one that allows you to catch up on your overdue payments by paying them over an extended period (as long as 60 months, without interest).
- b. STRIP OFF eliminates a Second Mortgage if the home's value is less than owed on the first mortgage. This is extremely important, and can save homeowners many thousands of dollars.
- c. CRAM DOWN reduces secured debt to the value of the collateral. That means if the property is now worth \$100,000, but has a \$150,000 mortgage, the borrower only need pay back the \$100,000 secured component and the \$50,000 unsecured portion is eliminated as a secured debt. Unfortunately, current Law places severe restrictions on this Cram Down for primary homes but investment properties, 2-family and multi family homes, and vacation homes are cram-downable.
- d. Chapter 13 DISCHARGES most common household debt (credit cards, medical bills, etc) thus freeing up the homeowner's income to make mortgage payments. The debt is eliminated, with no taxes owed on the amount saved.

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### 2. DEFENDING THE FORECLOSURE LAWSUIT

The foreclosure is a lawsuit similar to any other. Before the lender can sell your home, it must obtain a Judgment. First, suit is instituted, then the SUMMONS and COMPLAINT is delivered to the owner. Unless the homeowner files an ANSWER defending the foreclosure, the case proceeds on a default basis. The ANSWER may challenge the lender's right to foreclose due to violations of the Federal Truth in Lending Act or the NJ Consumer Fraud Act or engagement in other Predatory Lending activities. Lender's abuses were widespread in recent years. Additional discrepancies may arise in the lenders right to foreclose by failure to have the necessary documents. Homeowners have 35 days after service of the Summons & Complaint to file an Answer, so it is very important to meet with a competent attorney as soon as possible to explore this option. Additionally, certain statutes have limitation periods, such as generally 3 years for Truth in Lending Act.

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### 3. LOAN MODIFICATION

Many lenders have programs that purport to assist homeowners in easing the repayment terms; typically the homeowner will be contacted by the lender with an invitation to submit an application. Certain problems commonly encountered with loan modifications are:

- a. SMALL LIKELIHOOD OF SUCCESS. Only a very small percentage of the loan modification applications convert into permanent modifications
- b. LOSS OF ABILITY TO CHALLENGE THE FORECLOSURE. The homeowner has 35 days after receiving the SUMMONS and COMPLAINT to file an ANSWER challenging the lender's right to foreclose, and the homeowner may fail to have his or her legal defenses examined during the permissible time and therefore be cut out of defending the foreclosure by working instead on the modification application process.
- c. LOSS OF TRIAL MODIFICATION PAYMENTS. Typical modification process involves TRIAL MODIFICATION, where the homeowner makes payments for 3 months, submits additional documents, several more months pass (with additional payments being made) only to be declined outright or offered a modification with too little benefit to help. It is indeed unfortunate that the choice presented is to pay the typical 6 months payments before being informed of the decision. Imagine making any other substantial purchase without knowing the price!
- d. FORECLOSURE CONTINUES TO PROGRESS. The foreclosure proceeds on its course during the trial period, so the homeowner receives no additional time for their payments.

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### 4. FORECLOSURE MEDIATION

In early 2009 the NJ Courts started this system whereby a meeting is set up between the homeowner and the lender's attorney with a court-designated mediator. The mediation process can start any time during the foreclosure process, and has the benefit that it can temporarily stop the sheriff's sale. A statewide network of housing counselors is available to assist the homeowner without cost. Unfortunately, most cases involve referral to TRIAL MODIFICATIONS with the typical problems outlined in the section under that title.

## 5. RIDE OUT FORECLOSURE

Since the Foreclosure will take many months, homeowners may seek to take advantage of the free occupancy of their home by remaining until after the sheriff's sale. Benefits include the ability to save substantial sums while the process winds through the courts. Although first mortgage holders are legally permitted to sue homeowners for any losses from the foreclosure, in New Jersey practice, they do not. However, we anticipate second mortgage lenders will pursue the homeowners after the foreclosure, but this liability can be eliminated through Bankruptcy.

## 6. SHORT SALE

Given the real estate market's decline, many homes are worth less than their mortgages, a condition known as being "under water" Lenders and brokers will frequently encourage the homeowner to market and sell the property by SHORT SALE, with the expectation that the lender will approve the sale in spite of receiving less than its debt. While promises are made about the short sale's supposed beneficial effect on the credit report relative to a completed foreclosure, these may or may not be true. What is certain is the homeowner will suffer the inconvenience of their house being marketed, and if sold, lose the payment-free time that they would have had if they just rode out the foreclosure. Many consumer advocates believe that Short Sale benefits only the lender and broker at the cost to the homeowner and therefore recommend strongly against it.

## 7. CHAPTER 7 BANKRUPTCY

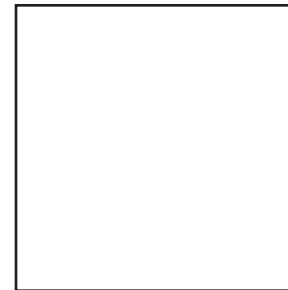
Chapter 7 Bankruptcy gives the homeowner the AUTOMATIC STAY stopping the foreclosure at any time during the foreclosure, but only for a few months. Therefore, the primary benefit is the discharge of most of homeowner's other debts (credit cards, medical, etc.), thus increasing the homeowner's ability to pay the mortgage. Liability to the mortgage lenders for a deficiency is also discharged. Bankruptcy also incurs no tax liability for the eliminated debts, unlike when the debts are voluntarily forgiven.

### Need for Competent Legal Representation

While there is no legal requirement to have a lawyer, Foreclosure is a serious legal matter and I recommend that the homeowner immediately have a consultation with a lawyer with the knowledge and experience with all of the above alternatives to assist in making the right decision for the homeowner and family. There are time limits that are easily passed and many homeowners find themselves facing the sheriff's sale without ever finding out their best alternative.

**The Law Firm of Ronald I LeVine provides a full range of legal services. Please feel free to call or visit our website at [www.FormerJudge.com](http://www.FormerJudge.com)**

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