



Mortgage Foreclosure Legislation Summary

Despite our best efforts, this week during special session, mortgage foreclosure legislation passed both houses of the Legislature. Importantly, some key improvements urged by NYBA throughout the process were included, such as scaled back notice and maintenance requirements. **More significantly, the legislation that passed did not contain a moratorium on foreclosures.** While NYBA continues to work for amendments to the bill to improve it further, we are providing a summary of the key provisions of the legislation that passed in the special session. Although the Governor has not yet signed this legislation (as of November 20, 2009), we expect that he will shortly; as many of the provisions go into effect 30 days after the signing of this legislation, we urge you to begin planning for implementation. NYBA plans to hold a webinar to aid in your implementation efforts, shortly after the legislation is signed.

NOTICE REQUIREMENTS:

All homeowners will now be required to receive a **90 day pre-foreclosure notice**. This requirement was previously applicable only to high cost, subprime and nontraditional loans (made between September 1, 2003 and September 1, 2008). The requirement also now applies not only to the original lender but to assignees as well, where applicable. This provision becomes effective 30 days from enactment. *This provision, which in prior drafts was permanent, will now sunset in five years.*

Every homeowner in foreclosure will now be entitled to a **mandatory settlement conference within 60 days after proof of service** has been filed with the county clerk. (Previously this conference requirement was only applicable to high cost, subprime and nontraditional loans - made between September 1, 2003 and September 1, 2008.) This provision becomes effective 60 days after the effective date and generally applies to foreclosures filed on or after that date. *This provision, which in prior drafts was permanent, will now sunset in five years.*

The current obligation of a foreclosing party to provide notice to the mortgagor of an owner-occupied one-to-four family dwelling (along with the summons and complaint) regarding the **availability of help for homeowners in foreclosure, has been extended to any tenant** in a dwelling unit. However, the tenant notice can be delivered within ten days of the summons and complaint and notices to tenants in buildings with five or more dwellings need only be posted on the outside of each entrance and exit of the building. This requirement becomes effective thirty days from the date of enactment. *In prior drafts, all tenants in any sized building would have been required to receive personal service of this notice.*

Successors in interest of residential real property must provide **notice to tenants that they have the right to stay on the premises** for 90 days after mailing of the notice or (with some specific exceptions) for the remainder of the lease term. This requirement becomes effective thirty days after enactment and applies to actions where a judgment of foreclosure and sale is issued on or after such date. (For further details regarding this provision, see below).

All notice obligations have been **extended to co-ops**.

TENANT PROTECTIONS

Tenants will now, generally, have the **right to stay in their dwellings** for 90 days after mailing of the notice by the successor in interest or for the remainder of their lease terms (see above). While to a great extent this provision mirrors new federal requirements, the right of tenants to stay until the end of the lease term has been extended in this legislation to renters with “oral or implied” leases. Also the ability under federal law for leases to be terminated after 90 days if the successor in interest plans to make the dwelling his principal residence, has been altered to only allow such an outcome for the specific “unit” the successor in interest will be occupying. *Prior drafts had no exception at all for successors in interest who planned to make the dwelling their principal residence.*

Tenants will now receive **notice of the foreclosure proceeding** within 10 days of service of the summons and complaint (see above).

Tenants will be entitled to **enforce the maintenance obligations** being imposed upon plaintiffs under this legislation, when the property has been abandoned by the mortgagor. (see below).

DUTY TO MAINTAIN

A plaintiff who obtains a judgment of foreclosure and sale on property which is **vacant, becomes vacant after the issuance of the judgment, or is abandoned by the mortgagor but is occupied by a tenant**, has a duty to maintain that property until ownership has been transferred and the deed has been duly recorded.

Plaintiffs must maintain the premises in a manner consistent with selected provisions of **New York’s property maintenance code** relating primarily to the property’s structure and exterior. When tenants are on the premises, the property must also be maintained in a safe and habitable condition.

The maintenance requirements become effective 120 days after the enactment of this legislation.

Previous drafts contained more extensive provisions of the New York property maintenance code.

Governmental entities, homeowners associations and tenants may enforce the maintenance provisions and recoup their costs for maintaining such property

The duty to maintain does not apply when a receiver is serving, or during the pendency of a bankruptcy proceeding commenced by the mortgagor.

The receiver exception to the maintenance requirements was not originally in the legislation.

The legislation specifically states that it is not intended to diminish or reduce any right of the parties under existing law against the mortgagor for his failure to maintain the property. *This language has been included to address our concerns that the lender could not otherwise seek recompense from the mortgagor for maintenance expenses incurred by the mortgagee.*

OTHER ISSUES

Filing with Banking Department: Each lender, assignee or mortgage loan servicer must electronically file with the Banking Superintendent within 3 business days of the mailing of the 90 day pre-foreclosure notice, such information as will enable the Superintendent to ascertain the type of loan at issue.

The Superintendent may also subsequently request such readily available information as may be necessary to facilitate a review of whether the borrower might benefit from counseling or other foreclosure prevention services.

The requirements to file with the Superintendent become effective 60 days after the date of enactment (and will apply to notices required by section 1304 of the real property actions and proceedings law mailed on or after such date. These are the notices to mortgagors and tenants which are required at the time of the servings of the summons and complaint)

Fully Indexed Rate: The definition of fully indexed rate contained in section 6-m(1)© of the Banking Law (which defines “subprime” home loans) has been amended with the purpose of more accurately reflecting the intent of the law to determine whether a loan is subprime or whether the borrower has the ability to repay the loan, based on the rate that would apply after any introductory period “teaser rate” has terminated. This section takes effect 60 days after enactment of the legislation.