

# "ANTIQUATED" LAWS IN MOST STATES TILTED AGAINST HOMEOWNERS ARE FUELING THE U.S. HOME MORTGAGE FORECLOSURE CRISIS

## *"Homeowner Unfriendly" Laws Abound: Three Out of Five States Allow "Fast Track" Foreclosure; 33 States Do Not Require Direct Notification of Homeowners When Foreclosure Process Begins.*

WASHINGTON, D.C., February 26, 2009. While many states have taken steps in recent years to strengthen the rights of renters, only a handful of states have updated their home foreclosure laws, which are now "tilted against homeowners" and acting as a little-understood factor that is helping to accelerate the U.S. home foreclosure crisis, according to a major new report by the National Consumer Law Center (NCLC). Based on a survey of existing state laws, the NCLC report identifies some of the most antiquated state law provisions, including "fast track" foreclosures without any court oversight in 30 states and no requirement of direct notification to homeowners in 33 states upon the initiation of foreclosure proceedings.

Titled "[Foreclosing A Dream: State Laws Deprive Homeowners of Basic Protections](#)," the new NCLC report concludes: **"In recent months, a wave of foreclosures has swept millions of American families from their homes. The magnitude of this crisis defies easy comprehension: more than 8 million American families are expected to lose their homes to foreclosure in the next four years. Much has been written about the financial and economic causes of this disaster. Much less notice has gone to another factor that has accelerated and multiplied this grave loss of homes and savings: antiquated state laws that in some ways afford fewer protections to homeowners than to renters."**

According to the NCLC report, examples of state laws tilted against homeowners include the following:

- **"Fast track" foreclosure.** In 30 states and the District of Columbia, mortgage holders who allege that homeowners have fallen behind in their payments can bypass the courts and move directly to take away and auction off homes. This denies homeowners due process protection comparable to that given many tenants. It also places upon homeowners the heavy burden to get a judge to review the mortgage holder's claims and stop the foreclosure.
- **No direct notification of foreclosure proceedings.** In 33 states and the District of Columbia, there is no requirement that homeowners be personally served with a foreclosure notice or legal documents that start a court foreclosure case.
- **No effort required to find solutions short of foreclosure.** In every state but California and Connecticut, mortgage holders can move directly to foreclosure without being required by state law to consider or discuss ways to avoid loss of the home with homeowners, such as through modification of the terms of the loan.
- **Eleventh-hour payments can be ignored.** In 29 states, a mortgage holder has no obligation under state law to stop foreclosure even if the homeowner, just before the house has been sold, comes up with the money to catch up on the owed payments and all incurred penalties and fees.
- **Heaping on of penalties that can send homeowners over the edge.** In every state but Massachusetts, New Jersey, and Pennsylvania, a mortgage holder who claims a

homeowner has fallen behind in payments can immediately impose default fees and costs that reduce the chances that the homeowner can catch up by making the payments owed.

- ***More penalties even after home is lost and sold at auction.*** In 36 states and the District of Columbia, mortgage holders can pursue so-called "deficiency judgment" claims against homeowners even after the foreclosed home has been sold at auction. These claims, seeking to recover the difference between the amount owed on the loan and the amount collected from the foreclosure auction, can be pursued without conditions in 15 states and the District of Columbia, and only under certain conditions in the other 21 states.

John Rao, staff attorney and report co-author, National Consumer Law Center, said: **"The bottom line is that most state laws are not part of the foreclosure crisis solution today; they are a big part of the problem. Most Americans not well-versed in property law would assume that homeowners have greater rights than renters, or at least equal rights. The stark reality is that while most states updated their landlord/tenant laws decades ago to give renters basic due process protections in the eviction process, no similar reform effort has been made to assist homeowners in the foreclosure process. Many state foreclosure laws were enacted in the 19th and 20th centuries and have gone largely unchanged since that time. These laws came into effect at a time when the residential mortgage industry, to the extent it existed at all, bore no relation to what exists today. Significantly, these laws pre-date the enormous changes in the mortgage market that began in the 1980s."**

#### **RECOMMENDATIONS FOR ACTION**

Geoff Walsh, staff attorney and report co-author, National Consumer Law Center, said: **"The foreclosure crisis continues to spin out of control. Modernization and improvement of state foreclosure laws can significantly help blunt the impact of the crisis on individual homeowners and communities. The method by which homes are foreclosed in this country is almost exclusively controlled by state law. States have historically decided under what circumstances a homeowner can lose a home to foreclosure and what procedure a mortgage holder must follow. This traditional role for states presents a tremendous opportunity for state policymakers to take a fresh look at their foreclosure laws. While reform of state foreclosure laws will not end the current foreclosure crisis, it can significantly reduce the number of foreclosures."**

State-level legal reforms recommended in the NCLC report are as follows:

- Mandate judicial supervision over foreclosures of all residential mortgages. Many states now allow mortgage holders to bypass the courts and use non-judicial procedures to take away homes from their owners. These procedures create enormous barriers for homeowners who want to assert legal claims and raise defenses against lenders, servicers, and mortgage holders. States should either completely abandon the power of sale method and require judicial foreclosure, or they should incorporate essential due process protections into the existing non-judicial procedure.
- Require mortgage holders to consider loss mitigation, including loan modification and other workout alternatives, as a condition to allowing the foreclosure of a home. States have broad authority to set conditions upon a mortgage holder's right to foreclose. For example, states have always had the authority to require mediation in certain categories of disputes, and they can require mediation in home foreclosure cases.
- Require that homeowners be given a right to cure a default by catching up on missed payments, without penalty, at least 60 days before a mortgage holder demands

immediate full payment of the entire mortgage balance and before beginning any foreclosure proceeding. Homeowners should be sent a notice that clearly informs them that before the end of the designated time period, they can stop the foreclosure by paying up the installments they are behind without payment of any default-related costs or fees.

- Guarantee homeowners the right to reinstate the mortgage by paying the arrearage and costs up to the time of a foreclosure sale. Nearly half of the states have enacted statutes that provide for this right to reinstate after the mortgage holder demands payment of the entire loan balance (acceleration). Such laws are cost neutral for the mortgage holder because borrowers typically pay all reasonable foreclosure costs incurred up to the time of reinstatement. State law should mandate a form of notice to homeowners that provides detailed information about the foreclosure process and steps the homeowner can take to avoid foreclosure, including the right of reinstatement and loan modification options.
- Require that homeowners be personally served with the notice of sale or foreclosure complaint. State laws should require that no matter which type of foreclosure proceeding is permitted, the mortgage holder must provide proof of personal service of the legal documents which both commence the foreclosure proceeding and schedule the sale, or the mortgage holder must document repeated good faith attempts to make personal service on the homeowners.
- Create and adequately fund programs that provide emergency financial assistance to homeowners facing foreclosure. At least eight states already have statewide programs offering such assistance to homeowners experiencing temporary financial difficulties such as loss of employment, illness, disability, death, divorce or legal separation.
- Provide homeowners with a statutory right to redeem and reacquire title to their home, for a fixed period of time after a foreclosure sale. "Redemption" after a foreclosure sale allows a homeowner a fixed period of time in which to set the foreclosure sale aside and regain title to the home by paying the sale price, interest and costs of the sale. The payment compensates the mortgage holder or other purchaser for their financial outlay. The right to redeem after sale should uniformly apply to all residential mortgage foreclosures.
- Prohibit mortgage holders from pursuing homeowners for deficiency judgments after foreclosures. Deficiency judgments can drive former homeowners into bankruptcy or burden them with an insurmountable debt obligation. Deficiency judgments can also create an unfair windfall for mortgage holders and reward them when their lack of marketing and publicity leads to a foreclosure sale at a winning bid far below market value. All states should simply enact outright bars on deficiency judgments after home foreclosures.
- Require judicial supervision over the accounting of foreclosure sale proceeds and a prompt release of any surplus to the borrowers. In many states, the accounting of sale proceeds and the distribution of any surplus left after payment of the mortgage debt are handled almost entirely by the mortgage holder or a private trustee, without any explicit procedures or formal court review.

For the full text of the NCLC report, go [here](#).

## **ABOUT NCLC**

The National Consumer Law Center®, a nonprofit corporation founded in 1969, assists consumers, advocates, and public policy makers nationwide on consumer law issues. NCLC works toward the goal of consumer justice and fair treatment, particularly for those whose poverty renders them powerless to demand accountability from the economic marketplace. NCLC has provided model language and testimony on numerous consumer law issues before

federal and state policy makers. NCLC publishes an 18-volume series of treatises on consumer law, and a number of publications for consumers. Visit <http://www.consumerlaw.org> for more information.

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**EDITOR'S NOTE:** A streaming audio replay of the news event will be available on the Web at <http://www.consumerlaw.org> as of 4 p.m. ET on February 26, 2009.