

# Homeowners' Foreclosure Handbook:

**A Consumer's Guide to the S.C.  
Residential Foreclosure Process**



## Purpose

This guide is intended primarily to answer questions frequently asked by consumers who are living in property that is being foreclosed and who have signed a promissory note or mortgage for the loan being foreclosed.

Information is general in scope and should not be considered as a substitute for advice about any particular set of facts.

Capitalized words are defined in the Definitions section.

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# COMMON QUESTIONS PEOPLE HAVE ABOUT RESIDENTIAL FORECLOSURES

## What is foreclosure?

Foreclosure occurs when a borrower can't keep up with their mortgage payments and the bank or lender takes ownership of the home. Foreclosure is a legal process the lender uses to have the home sold at public auction to pay the mortgage. The foreclosure also ends your right to redeem the property by paying off the mortgage and also allows a lender to seek a deficiency judgment if the home sells for less than you owe. In some states, lenders can foreclose without going through court, but in SC, it must go through the courts.

While some other states allow the Mortgage company to foreclose without going through the courts, South Carolina does not allow that. In South Carolina, all foreclosures must be ordered by the courts as part of a foreclosure Lawsuit.

## What laws apply?

The primary state laws governing the foreclosure process are located in S.C. Code sections 29-3-610 through 29-3-800. Other laws may come into play depending on the specific facts of a particular case.

## How do I know when I am in foreclosure?

From a legal perspective, you are in foreclosure once you have been served with the foreclosure Lawsuit. The documents served on you to begin the Lawsuit are a Summons and a Complaint.

From a loan Servicer's perspective, you are in foreclosure once the Servicer has decided to retain an attorney to file a foreclosure Lawsuit against you. Your Servicer might tell you that you are "in foreclosure" before you have been served with the Summons and Complaint.

## How do I know when I've been served?

Generally, you will be served in one of three ways: (1) by personal service (2) by substitute service or (3) by publication. Personal service means that a process server has handed the Summons and Complaint directly to you. Substitute service means that the process server has given the Summons and Complaint to someone who is of suitable age and discretion who lives with you. Service by publication means that the Mortgage company's attorney serves you by publishing a notice in a local newspaper once a week for three weeks. Service by publication is a last resort. It occurs only after the Mortgage company's attorney has first made reasonable efforts to locate a Defendant and the Defendant cannot be found.



## What am I supposed to do after I have been served with the Summons and Complaint?

You have options. You have thirty days to officially Answer the Complaint. You must Answer the Complaint within thirty days to avoid being in Default.

## What happens if I do not Answer the Summons and Complaint?

If you do not respond to the Summons and Complaint at all in the thirty days after you are served, then you will be in Default in the Lawsuit. When that happens, the foreclosure Lawsuit will move forward without you. If you are in Default for failure to respond, you may not present a defense or counterclaim, although you may still be able to contest at a final hearing the amount of money the Plaintiff claims that you owe.

## If I do not Answer, will the cops show up in thirty days to put me out?

No. The police will not show up in thirty days if you fail to respond to the Summons and Complaint. The Plaintiff must still comply with all legal procedures. These include obtaining a court-approved Judgment of Foreclosure and having the house auctioned off before you are at risk of law enforcement physically evicting you from the property.

# LOSS MITIGATION

## What is Loss Mitigation?

Loss mitigation refers to programs that Servicers or lenders might offer to delinquent Borrowers that will allow them to come current on a Mortgage loan.

## Is my loan Servicer required to consider me for Loss Mitigation?

Maybe. From 2011 to 2023 South Carolina's Supreme Court had in place an Administrative Order (number 2011-05-02-01) allowing certain Mortgage foreclosure Defendants to participate in something called Foreclosure Intervention prior to being required to Answer the Summons and Complaint. Participating in Foreclosure Intervention gave those Defendants the ability to apply for Loss Mitigation from their Servicer at the very outset of a foreclosure Lawsuit. The Foreclosure Intervention process was discontinued on May 17, 2023.

However, under regulations issued by the Consumer Financial Protection Bureau, most Servicers are

required to review a completed Loss Mitigation application from a Borrower. Servicers are only required to do this once. The Borrower must submit the completed application at least thirty-eight (38) days before a foreclosure sale to be entitled to one review.

Even if you have applied and been denied for Loss Mitigation due to financial circumstances such as inadequate income, it is never a bad idea to apply again if your financial circumstances change.



## If I apply for Loss Mitigation, is the Mortgage company required to work something out with me?

Generally speaking, if you do not meet the Servicer's financial or hardship criteria for qualifying for a Loss Mitigation program, then the Servicer is not required to offer one. If the Servicer has Loss Mitigation programs, then it is required to accurately review your application to see whether you qualify for a Loss Mitigation program. These programs can include Loan Modification, Repayment Plans, Forbearance Agreements, a Short Sale, or a Deed in Lieu of Foreclosure.

## How do I know if my Servicer or if the Owner/Investor/Mortgagee offers Loss Mitigation programs?

The Servicer should be able to tell you what loss mitigation options are available. For many loans, you will not be able to look up or review the eligibility criteria for your Servicer's Loss Mitigation programs. However, some loans that are either insured by a federal government agency such as the FHA, or owned by Fannie Mae and Freddie Mac, have Loss Mitigation rules that are published on the Internet. Anyone can look at those rules and look at their own situation to figure out whether they ought to qualify for one of the programs authorized by these entities.

## What happens if the Servicer offers me a Loss Mitigation option and I want to accept?

You should comply with the terms of the program offered, including responding by any deadline, making any trial payment plans, and signing any required agreement or other paperwork.

## What happens if I do not want to accept a Loss Mitigation that the Servicer offers?

You should reject the offer in writing. But carefully consider your alternatives before rejecting the offer because you may not get a better one.

## What happens if I do not qualify for anything that the Servicer offers?

If you do not qualify for any Loss Mitigation program that your Servicer offers, then you will not be able to avoid foreclosure with a Loss Mitigation option. If the reason you are turned down for a Loss Mitigation program is due to a lack of income or another situation that you can change, you should reapply for Loss Mitigation if your income increases or your situation changes such that you have a better shot at qualifying. You also might consider whether a Chapter 13 Bankruptcy is an option to avoid foreclosure.



## ANSWERING THE COMPLAINT AND DEFENDING THE LAWSUIT

### What do I do to officially Answer the Complaint?

You should seek assistance from an attorney to respond to a Complaint. Answering requires you to assert in writing any legal defenses or counterclaims that you have against the Plaintiff. This can be complicated, and it is a good idea to have an attorney familiar with Mortgage servicing practices and foreclosure law review the facts of your case. You will need to file your Answer at the courthouse and mail a copy to the Plaintiff's attorney.



### What defenses are there to prevent a foreclosure?

You should seek assistance from an attorney to determine whether you have viable defenses. Defenses come in many shapes and sizes. It is not possible to list all of them here. Some issues you might want to bring up to your lawyer might include that the Plaintiff handled your payments improperly, that they don't actually own the loan or have the right to foreclose, that they misrepresented

important facts to you, or they didn't follow the loss mitigation rules. Just because you assert a defense does not mean it will be successful. In the end, the judge will decide which side will prevail unless the parties can reach a settlement first.

### If I go to the final court hearing, will I be able to present my case?

This depends on whether you have filed an Answer or not. If you did not Answer timely, you are in Default in the Lawsuit. At a final hearing, you can challenge the amount of money that the Plaintiff says you owe, but you cannot present any other defenses or counterclaims. If you did file an Answer, then you will be required to present to the Court any evidence that you have to support your defense or counterclaim.

### What do I do when I am in the courtroom?

SC Legal Services has produced two videos that you can watch to see how a generic foreclosure hearing plays out that does not involve defenses or counterclaims. You can find those videos in the classroom titled "Roadmap to the Foreclosure Process in S.C." found at <https://www.lawhelp.org/sc/learnlawclasses> or by scanning the QR code. The videos give an example of a hearing where the Borrower is present and one where the Borrower is not present.



When you are in the courtroom before the judge comes to the bench, the Mortgage company's attorney might ask to speak with you before the hearing. The typical courtroom will have two tables. The Mortgage company's attorney will sit at one table. Once the judge calls your case, you will take a seat at the other table. The Mortgage company's attorney will present the



Mortgage company's case. If you have asserted any defenses or claims against the Mortgage company in your Answer, this is your opportunity to present evidence to the judge. If you have no defenses or claims, the judge still might allow you to discuss whether you have had any conversations with the Mortgage company about Loan Modifications or other Loss Mitigation.

Also, in many counties in South Carolina, foreclosures are handled by lawyers who have been appointed by the court to act as a judge for the foreclosure case. **These lawyers are called "Special Referees" and do not act as attorneys but act in place of the judge for your case.** If you have a Special Referee in your case, the foreclosure hearing might be held at that lawyer's office instead of in a courthouse.

### My Mortgage company told me my house has a sale date. Is that true?

Maybe or maybe not. The only person who can set an official sale date is the judge. Many Servicers will project a sale date based on their own expectation of when it will be. And when you call customer service, the representative may tell you there is a sale date based on the Servicer's projection of when the sale will occur even before a judge has scheduled one. If you have not had a final foreclosure hearing at which a judge has set a sale date, then your house does not have a sale date under the law.

### When will my house be sold?

Your house cannot and will not be scheduled for a sale until a judge says when it will be sold. After the Court issues a Judgment of Foreclosure, a Notice of Sale will be published in a local newspaper for the three weeks leading up to the sale date.

Generally, foreclosure sales are held once a month. **Often, they are held on the first Monday of each month, but the sale date can vary.** You can check with the local Master in Equity's office or the Clerk of Court for your county to find out when foreclosure sales are held in that county.

It is not possible to say when a house will be sold early in the case because a judge must set the sale date. In some cases it can take 4-6 months after the foreclosure Lawsuit is filed. In others it might take longer. If you do nothing after you are served with the Summons and Complaint, you likely will have at least four months from the date you are served before a sale date. If you contest the foreclosure by asserting legal defenses you have, this can extend the length of the foreclosure process. Know that the police will not show up unannounced at your door to throw you out if you have been served with the Summons and Complaint within the last 30 days.



### How does a foreclosure sale work?

Each county may have slightly different procedures. Review the Notice of Sale and the Judgment of Foreclosure. A foreclosure sale is a public auction. People will bid, and the highest bid wins. The winning bidder will be required to pay as a deposit a percentage of the winning bid. This is usually five percent. **The winning bidder will then be required to pay the remainder within the time period specified**

in the Notice of Sale or Judgment of Foreclosure. The Plaintiff also can bid up to the amount of debt that you owe as determined by the Judgment of Foreclosure.

### When will I no longer own the house?

You will no longer be the owner of the house as soon as the foreclosure sale is final and a deed is issued to the winning bidder. When the sale becomes final depends on whether or not the Mortgage company has asked for a Deficiency Judgment. If the Mortgage company asks for a Deficiency Judgment, then the sale does not end on the date of the original auction. The bidding will remain open for thirty days and another auction will be held at the end of that time. The highest bidder will win the auction. If the Mortgage company does not ask for a Deficiency Judgment, the sale will become final on the first sale date.

### Once the sale becomes final, when will I have to leave?

Once you are no longer the legal owner, the new buyer has a legal right to put you out. The buyer might be the Mortgage company, or it might be someone else. Once the sale becomes final, the buyer (unless it is the Mortgage company) has to pay the bid and the judge has to execute a deed to the buyer that will then be recorded. Usually, you have about 10 to 14 days after the sale before this is done.

### What happens if I stay too long after the sale becomes final?

If you do not vacate the property timely, one of three things can happen. Whoever buys the house may file a request with the foreclosure judge asking for an order called a writ of assistance. This order directs the sheriff to put the buyer in possession of the foreclosed property by a specified date. Second, the buyer might initiate another legal process to have you evicted through the Magistrate's Court. This takes much less time than the foreclosure, usually taking only a month or so. Third, the Judgment of



Foreclosure might already empower the County Sheriff to put the purchaser into possession of the property without the need for a separate eviction. If you know you are going to need additional time after the foreclosure sale to vacate the property, it is best to file a written request with the foreclosure judge asking for more time. You need to send a copy of that written request to the Mortgage company's attorney. The court will then hold a hearing to determine how much more time, if any, is reasonable.

### Once the house is sold at the foreclosure auction, will I owe anything else?

This depends. You might if the Mortgage company has demanded a Deficiency Judgment against you. A Deficiency Judgment lasts for ten years. It also acts as a Lien against your real estate in any county where it is recorded. A Deficiency Judgment cannot be collected through wage garnishment or through the criminal law. If the Mortgage company cancels the remaining debt, you could end up owing a tax debt. A Mortgage company can in some circumstances tell the IRS that it has cancelled a debt that you owe. The Mortgage company is supposed to send you a 1099-C form if it cancels your debt. This is how you

know that the IRS will consider the waived debt to be income to you. The problem is that the Mortgage company may send the 1099-C form to the house you just lost. So be sure to have your mail forwarded. Also, in the tax year following your foreclosure, check with your old Mortgage company or with the IRS to see if a 1099-C has been issues.

### The house sold for more than I owed on the Mortgage. Am I entitled to the surplus?

Maybe. If there is money left over after the costs of the sale and the Mortgage debt is paid, then there is a surplus. The foreclosure judge will file a statement saying whether there are any surplus funds to be claimed. Anyone who believes they are entitled to some or all of the surplus must file a claim with the foreclosure judge within forty-five (45) days of the date that the foreclosure judge files the statement that says whether there is a surplus or not.

### What if the Mortgage company did get a Deficiency Judgment but my house is worth more than what it sold for at the Foreclosure auction?

In South Carolina, you have what are called Appraisal Rights. These rights, if exercised in accordance with the Appraisal statutes, could result in a reduction or elimination of a Deficiency Judgment. The Appraisal statutes allow you to have the house appraised after the Foreclosure sale and to have the appraised value substituted for the auction sale price when calculating the amount of the Deficiency. A petition to assert Appraisal Rights must be filed within thirty days after the sale along with depositing with the clerk a sufficient sum to pay the costs of the appraisal proceedings.



Here's an example of how Appraisal Rights work. Assume the Mortgage debt owed is \$100,000. The house sells at auction for \$30,000. That leaves a Deficiency Judgment of \$70,000. You, the Defendant, timely exercise your Appraisal Rights by petitioning the court. The house then appraises for \$150,000. The Deficiency will be reduced to \$0 because the value of the house (\$150,000) minus the amount of the sale price (\$30,000) equals \$120,000, exceeding the Deficiency Judgment of \$70,000. If the value of the house as appraised minus the sale price is less than the Deficiency Judgment amount, then the Deficiency Judgment will be reduced to the difference between the appraised value and the foreclosure sale price. These rights are found in S.C. Code Sections 29-3-680—29-3-770.

## BANKRUPTCY

### I was told I need to file bankruptcy. What is that? Should I do it?

Bankruptcy is complex and is beyond the scope of this handbook. You should consult an attorney to determine whether bankruptcy is a viable option for you.

## DEFINITIONS

### What do all these words mean?

#### Legal Terms

The participants in the Lawsuit:

- Defendant(s)—the individual(s) or entity(ies) being sued
- Master in Equity Special Referee—The titles for the type of judges that most commonly decides foreclosure cases. A Master in Equity is a sitting judge. A Special Referee is a member of the South Carolina bar who the court appoints to hear a particular foreclosure case.
- Plaintiff—The individual or entity who brought the Lawsuit

The documents in a Lawsuit:

- Answer—A written document prepared by a Defendant, to respond to a Plaintiff's Complaint. An Answer must be mailed to the Plaintiff's attorney and filed with the court.
- Complaint—A written document that the plaintiff's attorney files that starts a Lawsuit. A standard foreclosure complaint typically asserts that the Plaintiff holds a Note and a Mortgage, that the Mortgagor Defaulted under the terms of the Note or Mortgage. It will ask the court for a Judgment of Foreclosure against the Defendant(s).
- Judgment of Foreclosure—A court order that will determine that a Mortgagor Defaulted under the terms of the Note or Mortgage, establish how much money is owed on the Note and Mortgage and will order a sale of the real estate described in the Mortgage to pay the debt.
- Lis Pendens—A document filed by the Plaintiff to let everyone who is not already a participant in the Lawsuit know that a Lawsuit has been filed against a certain piece of real estate.
- Summons—The document filed with the Complaint that tells Defendants that they must Answer the Complaint within 30 days of being served with the Complaint or else they will be in Default.

Other terms that may come up in a Lawsuit:

- Appraisal Rights—the right to have a property appraised after foreclosure sale to possibly reduce or eliminate the amount of a Deficiency Judgment.
- Default—What happens when a Defendant does not Answer a Summons and Complaint timely. This permits a court to accept as true whatever the Plaintiff says in the Complaint.
- Deficiency Judgment—a money judgment taken against a Borrower if the real estate does not sell for enough to pay off the entire debt owed to the Plaintiff. If a Plaintiff seeks a Deficiency judgment, it usually will be requested in the Complaint and granted in the Judgement of Foreclosure.



- Foreclosure Intervention—was a process established by Supreme Court Administrative Order 2011-05-02-01 that required the Plaintiff and Defendant to engage in Loss Mitigation or attempt to come to a negotiated settlement, at the Defendant's request, before a final hearing occurs in the Lawsuit. The process was rescinded on May 17, 2023 by Supreme Court Administrative Order 2023-05-17-01.

- Lawsuit or Suit—The name for the legal proceeding in which a Plaintiff asks a court to grant some type of relief against a Defendant. A Lawsuit begins with the filing and service of the Summons and Complaint.
- Notice of Sale—The Notice published in a local paper after the court enters a Judgment of Foreclosure. This Notice describes the parcel of land to be sold, the date and time of sale, and will give instructions how the winning bidder must pay the winning bid.

## Mortgage Industry Terms

The parties involved in a Mortgage loan:

- Borrower—The person(s) who signs the promissory Note as part of the financial transaction to borrow money. This person agrees to be personally responsible for repaying the money borrowed. The Borrower and Mortgagor can be the same person, or they might be different people. A Deficiency Judgment can be entered only against a Borrower.
- Mortgagor—The person(s) who signed the Mortgage as part of the financial transaction to borrow money. If the Mortgagor is not also the Borrower, then (s)he only stands to lose his or her real estate if the Note is not repaid. (S)he is not personally responsible for repaying the Note unless (s)he is also a Borrower.
- Owner/Investor/Mortgagee—The party on the other side of the Note and Mortgage. This is the person or company that is entitled to receive the payments made pursuant to the

Note and also entitled to foreclose the Mortgage if payments are not made according to the terms of the Note. This company or person usually does not deal directly with the Mortgagor. Two common Owners/Investors that purchase many mortgages are Fannie Mae (Federal National Mortgage Association) and Freddie Mac (Federal Home Loan Mortgage Corporation).

- Servicer—The company that collects payments from the Borrower or Mortgagor and sends them to the Owner/Investor/Mortgagee. The Servicer does many other things such as sending notices, conducting Loss Mitigation, initiating foreclosure through an attorney, and managing the foreclosure process for the Owner/Investor/Mortgagee.
- Mortgage Insurer—A company that has agreed to pay insurance proceeds to the Owner/Investor/Mortgagee if the Mortgagor Defaults on the Mortgage and the terms of the Mortgage insurance policy are triggered. A common Mortgage Insurer the Federal Housing Administration (FHA). Mortgage insurance is not the same as homeowners insurance or title insurance.

Common lending and servicing documents:

- Forbearance Agreement—A legal contract whereby the Owner or Servicer agrees to forbear, i.e. defer, collection of payments that are otherwise due based on the payment schedule in the Note. These payments are often due in full at the end of the forbearance period.
- Deed in lieu of foreclosure—An agreement between a Borrower/Mortgagor who cannot pay the Mortgage anymore and an Owner or Servicer where the Borrower/Mortgagor agrees to deed the real estate to the Owner or Servicer in exchange for the Owner or Servicer not pursuing a foreclosure Lawsuit.
- Loan Modification Agreement—A legal contract that adjusts the terms of the Note. Typically, it modifies one or more of the following Note terms: Interest rate, Loan Term, loan balance, and/or Mortgage payment amount.
- Mortgage—The legal contract that a Borrower signs saying that the Mortgagee can force a sale of the real estate described in the Mortgage if a Borrower Defaults under the terms of the Mortgage, such as by not paying the full Mortgage payment, not paying property taxes, not keeping the property insured, etc.



- Note (or Promissory Note)—The legal contract signed by the Borrower where the Borrower agrees to repay a certain amount of money over a period of time at a given Interest rate.

- Repayment Plan—A legal contract between the Borrower/Mortgagor and the Owner or Servicer whereby the Owner or Servicer agrees to permit the Borrower/Mortgagor to catch up past due payments by paying part of the past due amount over a period of time, usually 3 months or more. This partial payment is in addition to the ongoing regular monthly payment.
- Short Sale Agreement—A legal contract between a Borrower/Mortgagor who cannot pay the Mortgage anymore and an Owner or Servicer where the Owner or Servicer agrees to accept less than the total amount of the debt under the Note and Mortgage. Typically, a Short Sale will satisfy all outstanding debt the Borrower owes under the Note.
- Trial Plan—A short term agreement between a Borrower/Mortgagor and the Owner or Servicer that usually precedes a permanent Loan Modification Agreement. The primary purpose of the Trial Plan is to ensure that the Borrower/Mortgagor can make the estimated payments under the Loan Modification Agreement.



#### Other Legal and Financial Terms

- Acceleration—The legal term for a right that the Owner/Investor/Mortgagee has under the Note/Mortgage after a Borrower/Mortgagor Defaults. Acceleration permits the Owner/Investor/Mortgagee to stop accepting regular payments and instead demand payment of all sums due under the Note and Mortgage in one lump sum.
- Balloon—A financial term for a large, one time payment due at the end of a Loan Term that is usually much higher than the regular monthly Mortgage payment. A Balloon is created when the regular monthly Mortgage payment is not large enough to pay off the Mortgage's Principal Balance by the end of the Loan Term.
- Closing—The legal term for what occurs when a Borrower reviews and officially signs the Note, Mortgage and other Closing documents.
- Default—A legal term describing a circumstance where the Mortgagor/Borrower has breached a term of the Note or Mortgage. Default leads to Acceleration.
- Interest—The amount of money that a lender charges for the use of money. Money paid as Interest does not pay down the Principal balance.
- Lien—A term for a legal right that one person has to have property sold in order to satisfy a debt. Also called a security interest. A Mortgage is a type of lien.



- Loan Term—The length of time that a Borrower or Mortgagor has to pay the Note and Mortgage. This is usually several months or years. During the Loan Term, the Borrower or Mortgagor may make regular monthly payments instead of paying the entire amount of debt all at once. Once a Loan Term is Accelerated, the Borrower/Mortgagor must pay all amounts due at once.
- Loss Mitigation—Generally a term for any process or program that a Servicer uses to permit a Borrower/Mortgagor who is behind on a loan to come current without having to pay the entire past due amount in one lump sum.
- Origination—The process that a Mortgage company used to underwrite approve a Mortgage loan. Many statutes and regulations govern what kind of information Borrowers must receive during the Origination process, including at Closing.
- Principal—The amount of money that a Borrower borrows under the Note. Most conventional Mortgage payments include both an Interest payment and a Principal payment.



## RESOURCES

Frequently Asked Questions (FAQs) in South Carolina Master-in-Equity Court

<http://www.sccourts.org/selfhelp/FAQMIE.pdf>

S.C. Lawyer Referral Service <https://www.scbar.org/public/get-legal-help/find-lawyer-or-mediator/find-a-lawyer/>

S.C. Legal Services Telephone Intake Line---1-888-346-5592 and Online application linked through [www.sclegal.org](http://www.sclegal.org)

SCLS's Residential Foreclosure Classroom

<https://www.lawhelp.org/sc/learnlawclasses>

SCLS YouTube Videos

Foreclosure: Getting Mortgage Information And Correction of Their Errors (2021)

<https://www.youtube.com/watch?v=sldWpc2BVuc>

What is a Reverse Mortgage and How Does It Work? (2021)

<https://www.youtube.com/watch?v=0TzypCKPjyg>

Foreclosure Rescue Scams: If You're In Foreclosure, You're A Target!

<https://www.youtube.com/watch?v=TKwEUTWbGK4>

Find out if Fannie Mae owns your loan

<https://www.knowyouroptions.com/loanlookup>

Find out if Freddie Mac owns your loan

<https://loanlookup.freddiemac.com/>