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## FACING FORECLOSURE: First Steps

*This tract is intended for those who, perhaps without warning, now find themselves facing the prospect of losing their home through foreclosure. It is not intended to be a comprehensive guide; the issues involved are numerous and complex and far beyond the scope of a short paper. Rather, it seeks to provide a place to begin, a guide to the first steps to be taken in response to the sobering reality that millions of Americans have found themselves facing over the past decade.*

**1) DON'T GIVE UP? When the banks tell you they have all the cards, they are LYING!**

Contrary to what many people (and unfortunately, some lawyers) believe, there are defenses to foreclosure lawsuits. Florida law does not take lightly the loss of a person's home and the banks have a number of hurdles to cross before they can make this happen. Not only are there technical defenses when the banks fail to dot the i's and cross the t's, there are often equitable defenses that can be raised when the banks (or the servicers) have acted to mislead the homeowner or otherwise act improperly. These are in addition to legal defenses such as where, for example, the bank and not the homeowner caused the default.

Moreover, the banks are generally willing (and sometimes required) to engage in workout methods designed to either save the home or to extricate the homeowner from the situation with the least damage possible (both to their finances and to their lifestyle). This can be a long and tedious process, but it often leads to good results. This process can occur either before, or during, a lawsuit. In fact, the defense of the lawsuit is often what gives homeowners the time to improve their financial (and/or life) situation and to negotiate an acceptable resolution. The types of such resolutions are varied and range from mortgage modifications that keep the party in the home to agreements to vacate the premises, but at a time and manner that is far less disruptive to the lives of the residents. A vigorous defense can be the key to bringing the banks to the table to negotiate an acceptable resolution.

However, the banks are counting on you to give up, hoping that you will believe that since you are in default, they can just step in and take your house. You do not have to give up. We encourage you NOT to give up. You can achieve a far better result by taking your time and consulting an attorney.

**2) EDUCATE YOURSELF** - Homeowners are at their most vulnerable when they do not understand the system. The banks count on this and most foreclosure cases are easy wins for the banks because the homeowners do not fight for their rights. Know your rights and strive to learn as much about the process as possible. This is both to help in dealing with the banks and their servicers, and with those entities who will tell you they are there to help you (in exchange for your hard earned money). Not all attorneys, and not all companies, are legit; mortgage rescue scams abound. Protect yourself. You can't know TOO much. So -

a) Go online - there are multiple sources of good information on the web (though one should, of course, be careful of the source, there is a lot of bad information out there). You might want to start with Fannie Mae's [www.knowyouroptions.com](http://www.knowyouroptions.com). Check out your bank/servicer's website.

b) Speak to foreclosure defense attorney (or two, or three) and ask questions. Understand the basics of deeds and promissory notes and mortgages and learn how a foreclosure works. Know your options and (when ready) seek competent counsel whom you trust and with whom you can work. Be clear on the fees involved and the services to be rendered.

c) Stay in touch with your servicer, and open your mail! Ask about your options. Take notes about what the representative tells you. Keep a notebook with date and time of the call, the identity of the person with whom you are speaking and the substance of the conversation.

**3) COLLECT YOUR DOCUMENTS** – Your attorney will want to inspect the documents related to your loan, from your closing document, to the most recent mortgage statements through all communications since the loan difficulties began. For example, in most Florida mortgages, certain notices must be sent, in the proper form, before the bank can bring a foreclosure action. Even without an attorney, having quick access to the records can be of significant benefit. Getting them organized will save you time later, and money, if you retain counsel who charges by the hour.

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Your lawyer will certainly want the following documents usually found in a big 8 ½ x 14 inch folder that the title company gave you at the closing. Your lawyer will probably want the entire file, but at a minimum will want the following:

a) the deed - this is the document that legally sets forth who owns a specific piece of real property.

b) the promissory note (often just called "the note") - this is basically an IOU that creates the obligation of a person or entity to pay a sum of money to another person or entity.

c) the mortgage - this is the lien (or claim) on a piece of property that allows a person or entity to take (foreclose on) a specific piece of property if a debt (usually a note) is not paid, or the terms of the mortgage are otherwise violated.

Note that while in many cases the deed will be in favor of a specific person, who has also signed the note and mortgage, this is often NOT the case with married couples (or other person who are jointly involved). For example, even if a person co-owns the property and signed the mortgage, this person is NOT liable for a money judgment against them if they did not sign the note. In another common example, even if one spouse owns the property, the other spouse will sign the mortgage giving permission for a lien to be put on their homestead, but will not sign the note and therefore will not be personally liable for the debt that is secured by that homestead.

**4) RESPOND TO THE COMPLAINT** – Most homeowners give up by failing to respond to the complaint within the required 20 days. Don't be one of them!! This makes the bank's task much, much easier. And remember, this response MUST go to the COURT. Contacting the bank/servicer is NOT a proper response, *no matter what the bank representative may tell you*. We suggest that you retain counsel at this point, because a proper response is a legal one. However, put *something* in the court file, even if it only a request for more time. Be sure to include the case number and have it signed by the defendant(s). Be sure to send a copy to the bank's lawyers, who are noted on the complaint. **IMPORTANT – do not admit anything in your response.**

**5) CREATE A DETAILED INCOME/EXPENSE STATEMENT** – You will likely need one of these later when you start the workout process, but it is important for you to know early whether or not you can actually afford to pay a mortgage payment at this time. If you

cannot afford the home at this time, you may wish to pursue other options such as selling the home, or fight the foreclosure while at the same time working to improve your financial situation and then seek a modification. Timing can be everything. Your attorney may be able to help you with that timing.

**6) COME UP WITH A PLAN** – With or without counsel or other advisor (hopefully with,) develop a plan of action that can lead to an acceptable result. Discover what is possible and then take the necessary steps. A plan might also be in stages, where the one tries for one result and then another if the first one proves impossible. For example, one might seek a loan modification but, if unsuccessful, later seek a short sale where the remainder of the debt is forgiven. Or, one might fight the bank in state court (the foreclosure action) for, say 18 months, and then, when appropriate, seek a modification or file a bankruptcy. Possible plans vary with the circumstances. The point is to **HAVE ONE**.

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Remember: it is possible to frustrate the banks in their attempts to take your house. Defense counsel should seek to have the bank's case dismissed and to raise defenses that promise long drawn out fights; fights that, hopefully, tend to encourage the banks to be more reasonable in negotiating a possible settlement.

Keep in mind that time is your friend. While the case is being litigated, the homeowner lives in their house while the bank collects no payments. This puts pressure on the bank to resolve matter and gives the homeowner time to resolve the financial issues that put them in this situation. In parallel to the legal defense, negotiations are conducted seeking the best possible settlement. Most homeowners seek a loan modification that will keep them in the home. However, if this is unwanted, or cannot be achieved, negotiations proceed seeking to shield the homeowner from a potential money judgment after the foreclosure concludes (the deficiency judgment) or to arrange the best possible move-out date.