



## **Restoring Neighborhoods:** **New York State's 2016 Zombie Property and Foreclosure Prevention Act**

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*Revised July 21, 2016*

On June 23, 2016, Governor Andrew Cuomo signed into law [Chapter 73 of the Laws of New York 2016](#) the final omnibus bill of the session ([A.10741/S.8159](#)).<sup>1</sup> The last section of the bill, [Part Q](#), includes provisions which address vacant and abandoned properties, establish timelines for the sale of property post-foreclosure judgment, and update and enhance protections for homeowners in default and foreclosure. The new act includes provisions and intentions that were part of several bills introduced throughout the session to address the zombie property and foreclosure crises in New York State.<sup>2</sup> All provisions of the law go into effect on December 20, 2016.

### **I. VACANT AND ABANDONED PROPERTY PROVISIONS**

#### **A. Introduction**

Chapter 73 includes three significant provisions regarding vacant and abandoned residential real property: property maintenance, an expedited foreclosure process, and the creation of a statewide electronic registry.

#### **Definition of Vacant and Abandoned Residential Real Property**

Chapter 73 establishes a new definition of “vacant and abandoned property” that applies to all three sections (set forth in NY Real Property Actions and Proceedings Law (RPAPL) § 1309).

Residential real property<sup>3</sup> shall be deemed vacant and abandoned where:

1. The plaintiff has proven by a preponderance of the evidence, that it has conducted at least 3 inspections, each between 25 to 35 days apart and at different times of the day, and at each inspection:
  - (A) No occupant was present and there was no evidence of occupancy; evidence of a lack of occupancy includes but is not limited to:

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<sup>1</sup> Chp. 73 of the Laws of New York 2016, available at [http://assembly.state.ny.us/leg/?default\\_fld=&leg\\_video=&bn=A10741&term=&Summary=Y&Text=Y](http://assembly.state.ny.us/leg/?default_fld=&leg_video=&bn=A10741&term=&Summary=Y&Text=Y).

<sup>2</sup>See generally Empire Justice Center, *Blueprint of Legislation to Address Vacant and Abandoned (“Zombie”) Properties in NYS* (May 26, 2016) (outlining legislation introduced during 2015-16 session to address vacant and abandoned properties statewide), available at <http://www.empirejustice.org/assets/pdf/issue-areas/foreclosure-prevention/2016-vacant-and-abandoned.pdf>.

<sup>3</sup>RPAPL § 1305(a) defines “residential real property” as “real property located in this state improved by any building or structure that is or may be used in whole or in part, as the home or residence of one or more persons, and shall include any building or structure used for both residential and commercial purposes.”

- i. Overgrown vegetation,
  - ii. Accumulation of newspapers or flyers,
  - iii. Past due utility notices, disconnected utilities or utilities not in use,
  - iv. Accumulation of trash or other debris,
  - v. Absence of window coverings,
  - vi. Boarded, missing or broken windows,
  - vii. Property is open to entry to trespass, *or*
  - viii. A structurally unsound structure exists that poses a potential hazard or danger; *and*
  - ix. There is evidence that the property was not being maintained in a manner consistent with the standards set forth in [New York State Property Maintenance Code](#)<sup>4</sup> chapter 3 sections: 301, 302 (excluding 302.2, 302.6, 302.8), 304.1, 304.3, 304.7, 304.10, 304.12, 304.13, 304.15, 304.16, 307.1, and 308.1; *OR*
2. A court or government entity has formally determined, with due notice to the borrower, that the property is vacant and abandoned; *OR*
  3. Each borrower and owner has separately issued a sworn statement expressing their intent to vacate and abandon the property.

Residential real property shall not be deemed vacant and abandoned where there is a building:

1. Undergoing construction, renovation or rehabilitation that is proceeding diligently, *OR*
2. Used on a seasonable basis but is otherwise secure, *OR*
3. Subject of a probate action, action to quiet title or other ownership dispute of which the servicer has notice, *OR*
4. Damaged by natural disaster but owner intends to repair and reoccupy, *OR*
5. Occupied by mortgagor, a relative or a lawful tenant.

**B. Inspecting, Securing and Maintaining Vacant and Abandoned Residential Real Property (adds RPAPL § 1308)**

Since April 2010, a mortgagee who acquires a judgment in a residential mortgage lending action is required to maintain the property if it is vacant and abandoned property.<sup>5</sup> The new law extends the property maintenance requirement to the point in time the servicer<sup>6</sup> determines (or should have determined) the property is vacant and abandoned, even if a foreclosure action has not yet been filed.<sup>7</sup>

*Application:* The law is intended to cover the majority of first lien mortgage holders on 1 to 4 family residential real property that is vacant and abandoned as defined in RPAPL § 1309. Banks, credit unions and savings and loan associations which “originate, own, service and maintain their mortgages or a portion thereof,” and which have only a very small percentage of

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<sup>4</sup> 2015 International Property Maintenance Code - 4th Printing (adopted by NYS), available at [http://codes.iccsafe.org/app/book/toc/2015/I-Codes/NY/2015\\_IPMC\\_HTML/index.html](http://codes.iccsafe.org/app/book/toc/2015/I-Codes/NY/2015_IPMC_HTML/index.html).

<sup>5</sup> RPAPL § 1307.

<sup>6</sup> NYS laws, including within Chp. 73, use a number of different terms to describe the entity which owns and holds the mortgage and note: RPAPL § 1307 references “mortgagee;” § 1308 uses “servicer,” and “first lien mortgage holder;” RPAPL § 1309 uses “plaintiff,” as well as “lender, assignee, mortgage loan servicer;” RPAPL § 1310 uses “lender, assignee or mortgage loan servicer;” RPAPL § 1304 adds a reference to “lender, assignee(including purchasing investor) or mortgage loan servicer.”

<sup>7</sup> RPAPL § 1308.

the market in New York State are exempt from coverage.<sup>8</sup> For banks, credit unions and savings and loan associations with a slightly higher percentage of the market, the law applies prospectively.<sup>9</sup>

*Requirements:*

1. Inspection: A servicer must conduct an inspection within 90 days of delinquency and thereafter every 25 to 35 days at different times of the day to determine if the property is vacant and abandoned.<sup>10</sup>
2. Notice: Once a property is determined to be vacant and abandoned, the servicer must post a notice within 7 business days “on an easily accessible part of the property that would be reasonably visible to the borrower, property owner or occupant. . .”<sup>11</sup> that includes the servicer’s toll free number or similar contact information. The servicer must monitor to ensure the notice remains posted.
3. Maintenance: If the servicer is not contacted for 7 calendar days from the date the notice was posted, or if there is an “emergent property condition” that could cause harm to the property, and the servicer has a “reasonable basis” to believe the property is vacant and abandoned, the servicer must maintain the property.<sup>12</sup> Maintenance requirements include:
  - a. Replace one door lock, if there are two different entry points;
  - b. Secure, replace or board up broken doors or windows;
  - c. Secure anything deemed an “attractive nuisance” including but not limited to pools, wells, septic tanks, refrigerators, and outbuildings;
  - d. Take reasonable steps to prevent the discharge of harmful gases, steam, vapor;
  - e. Winterize the home;
  - f. Provide basic utilities, as appropriate (such as to run a sump pump);
  - g. Remove and remediate health and safety issues, including code violations;
  - h. Prevent the growth of mold, through reasonable efforts;
  - i. Respond to government inquiries regarding the property; *and*
  - j. Ensure the notice remains posted.
4. Ongoing maintenance: A servicer is responsible for ongoing “reasonable and necessary” maintenance actions including, but not limited to:

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<sup>8</sup> RPAPL § 1308 carve out for banks with the smallest market share, states “For each calendar year this section shall not apply to state or federally chartered banks, savings banks, savings and loan associations, or credit unions which: (1) originate, own, service and maintain their mortgages or a portion thereof; and (2) have less than three-tenths of one percent of the total loans in the state which they either originate, own, services, or maintain for the calendar year ending December thirty-first of the calendar year ending two years prior to the current calendar year.” Under RPAPL § 1308(11), any agreements a lender in this category may have had with DFS remain in full force and effect.

<sup>9</sup> RPAPL § 1308 applies prospectively for banks with a slightly higher market share, defined as, “For any state or federally chartered banks, savings banks, savings and loan associations, or credit unions which originate, own, service and maintain between three-tenths of one percent and five-tenths of one percent of the total loans in the state which they either originate, own, service, or maintain for the calendar year ending December thirty-first of the calendar year ending two years prior to the current calendar year, the application of this section shall be prospective only.” Under RPAPL § 1308(11), any agreements a lender in this category may have had with DFS remain in full force and effect.

<sup>10</sup> RPAPL § 1308(2). The inspection requirement is subject to bankruptcy filings, cease and desist orders, threats of violence, and active loss mitigation efforts. RPAPL § 1308(1).

<sup>11</sup> *Id.* at § 1308(3).

<sup>12</sup> *Id.* at § 1308(4).

- a. Ensuring the property remains secure pursuant to this law, *and*
- b. Ensuring the property is maintained consistent with the following sections of the [New York State Property Maintenance Code](#)<sup>13</sup>: 301, 302 (excluding 302.2, 302.6, 302.8), 304.1, 304.3, 304.7, 304.10, 304.12, 304.13, 304.15, 304.16, 307.1, and 308.1.<sup>14</sup>
5. **Personal property:** The servicer may not remove personal property unless it poses a significant risk to health and safety, or if a government entity has ordered removal.<sup>15</sup>
6. **End of maintenance obligation:** A servicer’s obligation to maintain ends when:
  - a. An occupant asserts their right to occupy, or if servicer receives threats of violence;
  - b. Borrower files for bankruptcy;
  - c. A court orders the servicer to stop;
  - d. Servicer is prevented from gaining access by an association or cooperative;
  - e. Property is sold or transferred to a new owner;
  - f. Servicer or investor has released the lien, *or*
  - g. Mortgage note is assigned, transferred or sold.<sup>16</sup>

*Penalties and Enforcement:*

A civil penalty up to \$500 per day for each day the violation persists is available. The New York State Department of Financial Services (DFS) is authorized to bring an action in court, after it has provided the servicer with at least 7 days’ notice. Municipalities<sup>17</sup> are also authorized to bring enforcement actions and retain any penalties awarded and they also must provide the servicer with 7 days’ notice of bringing an action (unless there is an emergency), and provide DFS written notice at least 10 days prior.<sup>18</sup> Servicers are immune from liability where they peacefully enter a property and the servicer “is making reasonable efforts to comply with the statute.”<sup>19</sup>

*Regulations:*

DFS must promulgate regulations to implement this section, including reporting requirements by financial institutions.<sup>20</sup> DFS also may promulgate regulations regarding enforcement.<sup>21</sup>

*Preemption:*

All provisions of the law are subject to federal laws, court orders and investor and insurer guidelines.<sup>22</sup> There is a narrow preemption provision that prohibits localities from imposing duties, penalties or monetary obligations “in a manner inconsistent with the provisions” of the law against a “. . . bank, savings and loan association or credit union that originates, owns, services or maintains a mortgage related to such property.”<sup>23</sup>

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<sup>13</sup> 2015 International Property Maintenance Code - 4th Printing (adopted by NYS), available at [http://codes.iccsafe.org/app/book/toc/2015/I-Codes/NY/2015\\_IPMC\\_HTML/index.html](http://codes.iccsafe.org/app/book/toc/2015/I-Codes/NY/2015_IPMC_HTML/index.html).

<sup>14</sup> RPAPL § 1308(7). Provisions are subject to the servicer being able to obtain necessary permits or approvals.

<sup>15</sup> *Id.* at § 1308(5).

<sup>16</sup> *Id.* at § 1308(6).

<sup>17</sup> Pursuant to NY General Municipal Law § 2, a “municipal corporation” includes a county, town, city and village.

<sup>18</sup> RPAPL § 1308(8)(c). Failure to comply with the notice requirements shall not be deemed a defense. *Id.*

<sup>19</sup> *Id.* at § 1308(9).

<sup>20</sup> *Id.* at § 1308(12).

<sup>21</sup> *Id.* at § 1308(8)(d).

<sup>22</sup> *Id.* at § 1308(10).

<sup>23</sup> *Id.* at § 1308(13). Localities are also prohibited from imposing penalties inconsistent with the law against banks that are exempt from coverage under RPAPL § 1308; Chp. 73 of the Laws of New York 2016, § 10.

**C. Expedited Application for Judgment of Foreclosure and Sale for Vacant and Abandoned Property (adds RPAPL 1309)**

Chapter 73 establishes an expedited process that plaintiffs may elect to use when bringing a foreclosure action on a vacant and abandoned property, as defined in this section.

*Process:*

1. Plaintiff must file a foreclosure action and wait for time for defendant to answer to expire.<sup>24</sup>
2. Plaintiff files a motion or order to show cause (OSC) for judgment of foreclosure and sale on the grounds that the property is vacant and abandoned. The motion or OSC must:
  - a. Include the last known address of the borrower and the property address,
  - b. Be served on the defendant regardless of whether the defendant filed an answer or appeared in the case,
  - c. State in bold letters on the first page:
    - i. “The plaintiff in this lawsuit has applied for an expedited judgment of foreclosure and sale of your property on the ground that it is vacant and abandoned.”
    - ii. “Your property may be foreclosed upon and sold without any further proceedings if you do not respond to this motion by or on the return date which is \_\_\_\_.”
    - iii. “You have the right to stay in your property until a court orders you to leave.” *and*
    - iv. “You may respond to this motion by either submitting a written document or by appearing in court on the return date.”
  - d. Include an affidavit and other proof including at least proof of ownership of the mortgage and note, photographs, and utility records if available, and other documentation evidencing the property is vacant and abandoned,
  - e. State the principal balance and sums alleged due and include a “detailed and itemized account of each fee, each cost, and a calculation of interest accrued,” *and*
  - f. Request that the court compute the total amount due without the appointment of a referee.<sup>25</sup>
3. The court must send a separate notice (prescribed by the Office of Court administration or developed on its own) to the defendant letting them know that the plaintiff has filed an application to expedite the foreclosure and sale on the ground that the property is vacant and abandoned.<sup>26</sup>
4. The court may require the plaintiff to appear and provide testimony, though it is not required;<sup>27</sup>
5. Only if the defendant fails to file an answer, appearance, written objection, fails to appear on the return date or otherwise fails to demonstrate any intention to contest the action,<sup>28</sup> the court shall make a written finding “as soon as practicable” setting forth:
  - a. the court’s determination if the property is vacant and abandoned, and the evidence relied upon, as provided by the plaintiff,

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<sup>24</sup> See *Id.* at § 1309(1) stating, notwithstanding CPLR 3408(m) (regarding a defendant’s right to file a late answer if they appear at first conference), “no such application may be made until the defendant’s time to answer the complaint in the foreclosure proceedings shall have expired.”

<sup>25</sup> *Id.* at § 1309(1).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at § 1309(3).

<sup>28</sup> *Id.* at § 1309(5)(a).

- b. evidence reviewed and relied upon by the court to determine that the plaintiff is the owner of mortgage note, *and*
  - c. the sums reviewed by the court and determined to be due and owed.<sup>29</sup>
6. If judgment is denied, it shall be on the motion or OSC only, and shall not be deemed on the merits for purposes of any other proceeding.<sup>30</sup>

*Prohibition and Liability:*

Lenders are strictly prohibited from attempting to intimidate, coerce, or otherwise try to get a lawful occupant to vacate the property. A lender may be immune from liability if they are making “reasonable efforts” to comply with this section.<sup>31</sup>

*Regulations:*

The Office of Court Administration (OCA) may adopt rules deemed necessary to implement.<sup>32</sup>

**D. Statewide Vacant and Abandoned Property Electronic Registry (adds RPAPL § 1310)**

A lack of information regarding vacant and abandoned properties has been a great obstacle for the state and for municipalities trying to address “zombie properties.” Chapter 73 provides for the creation of a statewide registry, accessible to municipalities to determine who is responsible for a property and whether the property is in foreclosure.

*Registry:*

The law requires DFS to maintain a statewide registry in the form of an electronic database of vacant and abandoned residential property (either on their own or through a contractor). A lender must submit information within 21 days of when it “learns, or should have learned, that such property is vacant and abandoned,” as defined by RPAPL § 1309 or otherwise defined by DFS.<sup>33</sup> A lender is required to update information submitted to the registry within 30 days of when it “learns, or reasonably should have learned, of the new or changed information.”<sup>34</sup>

DFS shall set forth the information to be provided but at a minimum, lenders must include:

1. Name, address and contact information for lender or its agent responsible for maintenance;
2. Date foreclosure was filed, if applicable; *and*
3. The last known address and contact information for the mortgagor(s).<sup>35</sup>

*Access and Hotline:*

Information in the registry shall be deemed confidential,<sup>36</sup> however DFS may release information if determined to be in the “best interest of the public,” and shall release information to public officials regarding their district upon written request.<sup>37</sup> DFS must establish

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<sup>29</sup> *Id.* at § 1309(4).

<sup>30</sup> *Id.* at § 1309(5)(b).

<sup>31</sup> *Id.* at § 1309(6).

<sup>32</sup> *Id.* at § 1309(7).

<sup>33</sup> *Id.* at § 1310(2).

<sup>34</sup> *Id.* at § 1310(3).

<sup>35</sup> *Id.* at § 1310(2).

<sup>36</sup> *Id.* at § 1310(1).

<sup>37</sup> *Id.* at § 1310(1), stating “The department of financial services shall, upon written request, provide public officials of any state district, county, city, town or village with access to information specific to such public official’s district,

and maintain a toll-free hotline, posted on its website, for neighbors and community residents to report concerns regarding vacant and abandoned properties.<sup>38</sup>

*Regulations:*

DFS may adopt regulations governing access to the registry, the manner and frequency of registration, and the information to be provided.<sup>39</sup>

*Preemption:*

There is a narrow preemption provision that prohibits localities from imposing a duty to register, penalties or monetary obligations “in a manner inconsistent with the provisions” of the law against a “. . . bank, savings and loan association or credit union that originates, owns, services or maintains a mortgage related to such property.”<sup>40</sup>

## II. TIMELINES FOR SALE OF PROPERTY

In an attempt to ensure that foreclosed properties are being brought to sale timely rather than languishing as “zombie properties,”<sup>41</sup> Chapter 73 instills timelines for when properties must be sold post foreclosure judgment.

- A. Chapter 73 amends [RPAPL § 1351](#), the provision that directs a judgment in a mortgage foreclosure, to require that a property be sold within 90 days of the date of the judgment. Current law contains no timeline.
- B. Chapter 73 amends [RPAPL § 1353](#), the provision that states after a foreclosure sale the deed must be transferred to the purchaser, to require that if the purchaser is the plaintiff from the foreclosure action, the purchaser must place the property on the market for sale within 180 days, or if repairs are being made, within 90 days from the date the repairs are completed, whichever comes first. A court may grant an extension for good cause.

## III. ENHANCED PROTECTIONS FOR HOMEOWNERS IN DEFAULT AND FORECLOSURE

New York State legislation passed in 2006,<sup>42</sup> 2008<sup>43</sup> and 2009<sup>44</sup> created protections for homeowners in default and foreclosure. Among those protections are a notice that must be sent to homeowners at least ninety days before a lender can commence a foreclosure action including a referral list to reputable non-profit agencies, a notice to be sent by the lender at the time the foreclosure complaint is filed warning them about scams, and mandatory settlement conferences in all residential mortgage foreclosure cases. Chapter 73 updates and provides enhancements and

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county city, town or village maintained on such database to further the purposes of this section, section 1307 of this article or article 19-A of this chapter, or any other related law, code, rule, regulation or ordinance.”

<sup>38</sup> *Id.* at § 1310(5).

<sup>39</sup> *Id.* at § 1310(4).

<sup>40</sup> *Id.* at § 1310(5). Localities are not prohibited from imposing registration requirements for banks that are exempt from coverage under RPAPL § 1308; Chp. 73 of the Laws of New York 2016, § 10.

<sup>41</sup> See NYS Dept. of Financial Svcs., *Report on New York’s Foreclosure Process*, (May 2015) at 7, (finding the average number of days it takes a property to move from judgment to sale is 172 downstate and 148 upstate), available at [http://www.dfs.ny.gov/reportpub/fore\\_proc\\_report\\_052015.pdf](http://www.dfs.ny.gov/reportpub/fore_proc_report_052015.pdf).

<sup>42</sup> Chp. 308 of the Laws of New York 2006.

<sup>43</sup> Chp. 472 of the Laws of New York 2008.

<sup>44</sup> Chp. 507 of the Laws of New York 2009.

additional protections to these existing laws and provides for the creation of a “Consumer Bill of Rights” for homeowners.

**A. Consumer Bill of Rights (amends RPAL § 1303 to add subdivision 3-a)**

DFS must draft and publish a new “Consumer Bill of Rights” with input from stakeholders, within 60 days of enactment of the law (by August 22, 2016). The Consumer Bill of Rights must “detail the rights and responsibilities of the plaintiff and defendant in a foreclosure proceeding” and be updated annually and as appropriate.<sup>45</sup>

**B. Notice to Homeowners at time of foreclosure filing (amends RPAPL § 1303)**

Since 2007,<sup>46</sup> RPAPL § 1303 has required a prescribed notice to be sent to homeowners by the lender at the time the foreclosure is filed. The notice must be sent in a separate envelope from the foreclosure and must be on a different colored piece of paper. The original purpose of the notice was to warn homeowners about scams and solicitations for assistance and inform them about protections under New York State law.<sup>47</sup>

Chapter 73 amends the notice, adding language to let homeowners know they have the right to remain in their home until the foreclosure and sale are completed. The new notice reads (emphasis added, new language is in bold):

“Help for Homeowners in Foreclosure

New York State Law requires that we send you this notice about the foreclosure process. Please read it carefully.

**Summons and Complaint**

You are in danger of losing your home. If you fail to respond to the summons and complaint in this foreclosure action, you may lose your home. Please read the summons and complaint carefully. You should immediately contact an attorney or your local legal aid office to obtain advice on how to protect yourself.

**Sources of Information and Assistance**

The State encourages you to become informed about your options in foreclosure. In addition to seeking assistance from an attorney or legal aid office, there are government agencies and non-profit organizations that you may contact for information about possible options, including trying to work with your lender during this process.

To locate an entity near you, you may call the toll-free helpline maintained by the New York State Department of Financial Services at (enter number) or visit the Department's website at (enter web address).

**Rights and Obligations**

**YOU ARE NOT REQUIRED TO LEAVE YOUR HOME AT THIS TIME. You have the right to stay in your home during the foreclosure process. You are not required to leave your home unless and until your property is sold at auction pursuant to a judgment of foreclosure and sale. Regardless of whether you**

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<sup>45</sup> RPAPL § 1303(3-a).

<sup>46</sup> Chp. 308 of the Laws of New York 2006 (effective 2/1/07).

<sup>47</sup> See generally Keefe, Kirsten, *New State Law Addresses Mortgage Foreclosure Crisis and Subprime Lending Abuses*, (explaining RPAPL § 1303 notice, and RPL § 265-b providing protections for consumers against “distressed property consultants”), available at [https://www.nclc.org/images/pdf/foreclosure\\_mortgage/foreclosure\\_med\\_prog\\_by\\_state/ny\\_summary\\_08.pdf](https://www.nclc.org/images/pdf/foreclosure_mortgage/foreclosure_med_prog_by_state/ny_summary_08.pdf); Keefe, Kirsten, *New York State Passes the “Home Equity Theft Prevention Act,”* (August 1, 2006), (explaining protections for consumers against deed theft), available at <http://www.empirejustice.org/issue-areas/consumer/mortgage-lending--foreclosure-prevention/foreclosure-prevention-scams/articles/new-york-state-passes.html#.V3VChKJCh-8>.



**choose to remain in your home, YOU ARE REQUIRED TO TAKE CARE OF YOUR PROPERTY and pay property taxes in accordance with state and local law.**

Foreclosure rescue scams

Be careful of people who approach you with offers to "save" your home. There are individuals who watch for notices of foreclosure actions in order to unfairly profit from a homeowner's distress. You should be extremely careful about any such promises and any suggestions that you pay them a fee or sign over your deed. State law requires anyone offering such services for profit to enter into a contract which fully describes the services they will perform and fees they will charge, and which prohibits them from taking any money from you until they have completed all such promised services."

### **C. Ninety Day Pre-Foreclosure Notice (amends RPAPL § 1304)**

Since 2009,<sup>48</sup> lenders have been required to send a prescribed notice to borrowers with home loans at least 90 days prior to the initiation of a foreclosure lawsuit. A list of at least five non-profit housing counseling agencies serving the geographic region (now county) of the borrower must be attached to the notice.

Chapter 73 includes a number of technical and substantive amendments to the RPAPL 1304 90 day pre-foreclosure filing notice:

1. Requires lender to send the notice to the borrowers at any other address on record, in addition to the property address as formerly required.<sup>49</sup>
2. Shifts the responsibility for maintaining the list of approved housing counseling agencies serving each county (to be included with the notice) from the NYS Division of Housing and Community Renewal to DFS.<sup>50</sup>
3. Clarifies language to make clear that a lender is not required to send the notice "if the borrower has filed for bankruptcy protection under the law."<sup>51</sup>
4. Clarifies that the notice must be sent one time, per loan, in a twelve month period in connection with a delinquency, but if a borrower cures and then re-defaults, even within a twelve month period of the first notice being sent, the lender is obligated to send a new 1304 notice in connection with the new delinquency.<sup>52</sup>
5. Adds a requirement that for borrowers with limited English proficiency (LEP), the notice must be sent in the native (or proficient) language of the borrower if that language is one of the top six most common non-English languages in New York State. DFS must determine and post those languages on its website.<sup>53</sup>
6. Amends and updates the prescribed notice, including:
  - i. adding language regarding the borrower's right to remain in the home until a court orders them to leave and that they remain responsible for the home until such time;

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<sup>48</sup> Chp. 472 of the Laws of NY 2008 established the notice pursuant to RPAPL § 1304 and applied it to "high-cost," (as defined in Banking Law § 6-l) "subprime" and "nontraditional" home loans (defined in RPAPL § 1304(5)). Chp. 507 of the laws of NY 2009 extended application to all "home loans" with a sunset date in five years for the extension. Chp. 62 of the Laws of NY 2011 extended the sunset date by five years. Chp. 73 maintains that sunset date but provides that all amendments except the LEP provision (§ 1304(5)) will continue should provisions under Chp. 507 of the Laws of NY 2009 expire.

<sup>49</sup> RPAPL § 1304(1).

<sup>50</sup> *Id.* at § 1304(2).

<sup>51</sup> *Id.* at § 1304(3). Prior language stated the notice was not required if, "an application for the adjustment of debts of the borrower or an order for relief from the payment of debts."

<sup>52</sup> *Id.* at § 1304(4).

<sup>53</sup> *Id.* at § 1304(5).

- ii. listing the New York State Office of the Attorney General's Homeowner Protection Program (HOPP) toll-free consumer hotline.

Following is the [notice](#) with the amendments (emphases added, new language in bold):

**"YOU [~~COULD LOSE YOUR HOME~~] MAY BE AT RISK OF FORECLOSURE.  
PLEASE READ THE FOLLOWING NOTICE CAREFULLY"**

"As of \_\_\_\_, your home loan is \_\_\_\_ days **and** \_\_\_\_ **dollars** in default. Under New York State Law, we are required to send you this notice to inform you that you are at risk of losing your home. [~~You can cure this default by making the payment of \_\_\_\_\_ dollars by \_\_\_\_\_.~~]

[~~If you are experiencing financial difficulty, you should know that there are several options available to you that may help you keep your home.~~] Attached to this notice is a list of government approved housing counseling agencies in your area which provide free [~~or very low cost~~] counseling. [~~You should consider contacting one of these agencies immediately. These agencies specialize in helping homeowners who are facing financial difficulty. Housing counselors can help you assess your financial condition and work with us to explore the possibility of modifying your loan, establishing an easier payment plan for you, or even working out a period of loan forbearance.~~] **You can also call the NYS Office of the Attorney General's Homeowner Protection Program (HOPP) toll-free consumer hotline to be connected to free housing counseling services in your area at 1-855-HOME-456 (1-855-466-3456), or visit their website at <http://www.ahomehelp.com/>. A statewide listing by county is also available at <http://www.dfs.ny.gov/consumer/mortg ny np counseling agencies.htm>. Qualified free help is available; watch out for companies or people who charge a fee for these services.**

**Housing counselors from New York-based agencies listed on the website above are trained to help homeowners who are having problems making their mortgage payments and can help you find the best option for your situation.** If you wish, you may also contact us directly at \_\_\_\_ and ask to discuss possible options.

While we cannot assure that a mutually agreeable resolution is possible, we encourage you to take immediate steps to try to achieve a resolution. The longer you wait, the fewer options you may have.

If [~~this matter is not resolved~~] **you have not taken any actions to resolve this matter** within 90 days from the date this notice was mailed, we may commence legal action against you (or sooner if you cease to live in the dwelling as your primary residence.)

If you need further information, please call the New York State Department of Financial Services' toll-free helpline at (show number) or visit the Department's website at (show web address).

**IMPORTANT: You have the right to remain in your home until you receive a court order telling you to leave the property. If a foreclosure action is filed against you in court, you still have the right to remain in the home until a court orders you to leave. You legally remain the owner of and are responsible for the property until the property is sold by you or by order of the court at the conclusion of any foreclosure proceedings. This notice is not an eviction notice, and a foreclosure action has not yet been commenced against you."**

**D. Mandatory Settlement Conferences in Residential Foreclosure Actions (amends CPLR Rule 3408, and adds subdivisions (i), (j), (k), (l), (m))**

CPLR 3408, passed in 2008 applicable to "high-cost," "subprime," and "nontraditional" home loans, and amended in 2009 to cover all "home loans," requires courts to hold mandatory settlement conferences to see if the parties can reach a mutually agreeable resolution to avoid foreclosure.<sup>54</sup> The settlement conferences have had a tremendous impact on keeping families

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<sup>54</sup> Chp. 472 of the Laws of NY 2008 established the mandatory settlement conference requirement in foreclosure actions involving a "high-cost," (defined in Banking Law § 6-l) "subprime" and "nontraditional" home loan (defined in RPAPL § 1304(5)). Chp. 507 of the Laws of NY 2009 extended application to all "home loans" and added

in their homes. Chapter 73 amends five existing provisions and adds six provisions in an effort to clarify unclear provisions and instill efficiency in the conferences.

**Chapter 73 clarifies and enhances the following five subsections of CPLR 3408:**

3408(a) Coverage: Clearly sets forth the original intent of the law, that settlement conference discussions should include “loan modification, short sale, deed in lieu of foreclosure, or any other loss mitigation option” (in other words, cases should not be removed from the settlement conference part if loan modification is not possible but the parties are discussing alternatives).

3408(c) Appearance: Clarifies that both parties must appear in person or by counsel at the conference, and that either party may appear by telephone if the court permits.

3408(e) Documents: Changes a “should” to a “shall” regarding the parties having to bring documents to the conference, and adds document requirements for the plaintiff including application forms for the homeowner to apply for loss mitigation, and if applicable, a status report regarding loss mitigation applications with a list of documents that are required, an expected date of review. If an application was denied, plaintiff must provide the denial letter along with an explanation and input fields used to determine net present value, and the pooling and servicer agreement if it was denied because of an investor restriction.

3408(f) Good faith: Sets forth a “good faith” standard, to be determined based on “the totality of the circumstances,” and measured by:

1. Compliance with CPLR 3408, local court rules and other court directives;
2. Compliance with mortgage servicing rules, regulations, guidelines and standards for loss mitigation including loan modification, short sales, deeds in lieu of foreclosure;
3. Conduct regarding efforts to reach an agreement, not causing undue delay and providing accurate information to the court.

Neither party’s failure to make or accept an offer can be constituted as a failure to negotiate in good faith.

3408(g) Discontinuance: Reduces time for plaintiff to file notice of discontinuance and vacatur of lis pendens from 150 to 90 days after agreement is executed.

**Chapter 73 adds the following six subsections to Rule 3408:**

3408(i) Good faith determination: Failure to negotiate in good faith may be determined by motion or sua sponte by the court. Referees, judicial hearing officers or other court staff are authorized to “hear and report findings of fact and conclusions of law and may make reports and recommendations for relief to the court. . .”

3408(j) Plaintiff’s failure to negotiate in good faith: If the court finds the plaintiff failed to negotiate in good faith, the court shall at least toll interest, costs and fees for duration of

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protections, but also included a sunset date of five years for the provisions added through Chp. 507. Chp. 62 of the Laws of NY 2011 extended the sunset date by five years. Chp. 73 maintains that sunset date and includes in it all amendments to CPLR 3408 contained in Chp. 73 but for the amendment to CPLR 3408(1) mandating conferences include negotiations regarding loan modification, short sale, deed in lieu of foreclosure, or any other loss mitigation option.

any undue delay caused, and may: (1) compel production of documents, (2) impose a civil penalty up to \$25,000 (to go to state), and/or (3) award damages, fees, attorney fees and expenses.

3408(k) Defendant's failure to negotiate in good faith: If the court finds that the defendant failed to negotiate in good faith (after considering equitable factors such as whether the defendant was represented by counsel), the court shall remove the case from the settlement conference part.

3408(l) Notice by the court: If a defendant has not filed an answer, at the first conference, the court shall advise the borrower of the requirement to file an answer, explain what it means to file an answer and the repercussions if they do not, and provide information about available resources for foreclosure prevention assistance. The court must also provide the defendant with a copy of the "Consumer Bill of Rights" that DFS is required to develop pursuant to RPAPL § 1303(3-a).

3408(m) Right to file a late answer: Defendants who do not file an answer within the 20 or 30 day time period, but who appear at the conference, "shall be presumed to have a reasonable excuse for the default" and shall have an automatic 30 day extension to file an answer to the complaint "without any substantive defenses deemed to have been waived."

3408(n) Motions: Provides that any motions submitted during the pendency of the settlement conferences shall be held in abeyance, except motions concerning compliance with CPLR 3408 and its implementing rules.

#### **IV. CONCLUSION**

A severability clause is included to state that if any section or portion of the act is determined to be invalid, the rest of the act shall remain valid.

*For more information, contact Kirsten Keefe at [kkeefe@empirejustice.org](mailto:kkeefe@empirejustice.org), or (518) 462-6831.*