

## Foreclosure Defense Critical Facts

It is impossible to determine how best to defend against a foreclosure proceeding without getting the key facts on the table. By doing so, you will quickly find out that you may not know some of the more critical facts that could be the key to your defense. Nearly ever homeowner facing a foreclosure is surprised by what they find out when taking a closer look at the actual facts; and, especially, the facts that are presently "missing."

Here are ten key questions, regarding your mortgage(s) being foreclosed, that you need to know, together with applicable notes (there is room after each question to record appropriate information):

### **1. Exactly who did you give the original Mortgage to?**

Answer:

*Notes: You'll find this information in the first few paragraphs of your mortgage document. Many folks are surprised that they didn't realize, at closing, who the exact entity that was originally given the mortgage really was. For example, it might be a "broker-lender" or, in many cases, "Mortgage Electronic Registration Systems, Inc." as a nominee for a lender. This may be very significant in determining whether the chain of title of mortgage interests is broken and/or whether or not the current party alleging to be the "holder in due course" of your mortgage has proper legal standing.*

### **2. Exactly who did you make the Mortgage Note payable to?**

Answer:

*Notes: Again, you'll find this information in the first few paragraphs of the promissory note you signed at closing. One of the first things you will want to check is whether the party you gave the note to (i.e. promised to make monthly payments to) is the same party that you gave the mortgage to (i.e. put up your property for collateral in the event you defaulted on the note). This can get quite complicated because your original note may have been assigned to one or more third parties - and your original mortgage may have been assigned to one or more third parties. What needs to be determined is EXACTLY who holds your note now, and who hold your mortgage now. This is crucial because, generally speaking, the foreclosing party has to hold BOTH to have the legal standing to foreclose. Unfortunately, legal standing is not often contested and many foreclosures are conducted by "mortgagees" (you are the "mortgagor") who simply didn't have legal standing.*

### **3. Have there been any assignments of the Mortgage or Mortgage Note?**

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Answer:

*Notes: Nearly all mortgages have been bought, sold, assigned, pledged, securitized, or otherwise transferred to third parties in the secondary mortgage market. A major unresolved question in the Courts all over the country, especially with respect to the mortgage crisis, is exactly how these transfers have compromised the ability for a given holder of a mortgage to foreclose that mortgage. In that determination, that the Courts are wrestling with, two very major factors are (a) exactly what assignment have been made of the subject Mortgage and Mortgage Note, and (b) whether those assignment were "legal" and can result in a "legal foreclosure." Identifying what assignments have been made can be an extremely complex task - since it is customary to record only the Mortgage (and Mortgage Assignments), but not the Mortgage Note. Therefore, it is sometimes all but impossible to determine who is actually the "holder in due course" of the Mortgage Note" without having the opportunity to examine the original; to actually view the assignments and endorsements thereto.*

### **4. Who is servicing the mortgage account?**

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Answer:

*Notes: Many time the homeowner never realizes that the servicer can be an entity separate and apart from the actual lender - and that the servicer may or may not have the right to foreclose. The worst-case scenario is when a homeowners is dealing with a servicer of his or her mortgage loan pursuant to, perhaps, a mortgage modification, while the actual mortgagee is taking steps to foreclose the property. Therefore, it is important to verify the servicer's relationship with the actual "mortgagee" and exactly what rights that servicer has to speak for the mortgagee with respect to a foreclosure proceeding. Many homeowners have been caught in the "mortgage-runaround" in the midst of a foreclosure proceeding when time is of the essence. When it's "crunch-time" (i.e. trying to achieve a satisfactory alternative to foreclosure before a scheduled auction takes place) it seems that documents are many times "lost," it's extremely difficult to talk to the same person twice in a row, and nobody seems to have the authority to do anything except collect money or ask you to "call back" for the information you are looking for. In any event, find out if your mortgage servicer is also the holder of your Mortgage and Mortgage Note and, if not, find out the scope and extent of your servicer's authority with respect to a pending foreclosure sale.*

**5. Exactly what is the current accounting for the mortgage loan?**

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Answer:

*Notes: At the very least, you should determine the current principal balance, the current arrearages (in interest, taxes, insurance, and/or any applicable escrow accounts). In other words, in accordance with all the information you have access to (including your own information), what is your best estimate of the amount it would take to bring your account current (whether or not that is an option)? Also, note the number of months that your mortgage payments are in arrears.*

**6. What are the total of all the other liens and encumbrances that are related to the Mortgage being foreclosed?**

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Answer:

*Notes: In addition to the Mortgage and underlying Mortgage Note, there are several other amounts which may be encumbrances on your property. These items include, but are not limited to, additional mortgages, tax liens, attachments, judgments, and/or any other debts or amounts that are attached to your property by way of any outstanding legal agreement or Court order.*

**7. What is your property currently worth in the current market?**

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Answer:

*Notes: In the current real estate market, there can be dramatic differences in assessed values, former appraised values, and current market values. You might make a note of the value of the property that the Mortgage Loan was based on as compared to your estimate of the property's current market value.*

**8. What is the positive or negative equity in your property?**

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Answer:

*Notes: The difference between the total “debts, liens, and encumbrances” related to your property versus the current value of your property is the equity in your property. Therefore, a significant consideration is going to be the manner with which that equity, positive or negative, weights into your final battle-plan regarding your net objectives final disposition of the property. Rest assured the equity calculation will weigh into the mortgagee’s preferences regarding the “best” disposition of your property.*

**9. What alternatives to foreclosure have you entertained or pursued?**

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Answer:

*Notes: One key consideration that often plays a role in foreclosure defense is the manner by which foreclosure alternatives were presented and processed. Unfortunately, all too many homeowners have disappointing, if not devastating, experiences with proposed mortgage modification, short-sales, deeds-in-lieu, and/or other forbearance arrangements. The facts and circumstances of these foreclosure alternative may be helpful in defending against a foreclosure.*

**10. Is there a pending foreclosure date scheduled?**

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Answer:

*Notes: If there is a foreclosure date and time scheduled, then “time is of the essence” in determining your defense to the foreclosure. Additionally, most homeowners don’t realize that foreclosures can be stopped, literally, minutes before a foreclosure. In many instances, a decision to stop or postpone a foreclosure is made well in advance of a foreclosure, but not disclosed to the homeowners; perhaps to keep the pressure on and hope the homeowner might “buy his way” out of the foreclosure. On the other hand, “foreclosure mills” are noted for pushing home to foreclosure in order to capitalize on a host of “extra-income-producing” opportunities.*

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