LOCKED OUT:

LITTLE RELIEF FOR NYC HOMEOWNERS IN THE FORECLOSURE SETTLEMENT PROCESS

2009 Report

Who We Are

The Center for New York City Neighborhoods (CNYCN) was created in 2008 to assist homeowners at risk of foreclosure by connecting them to free local, housing counseling and legal services. Our network, composed of more than 30 nonprofit partners working in the neighborhoods most impacted by the foreclosure crisis, receives funding, training and coordination through CNYCN. In addition, CNYCN pilots new initiatives to prevent and lessen the effects of foreclosures through research, policy and innovation in best practices. As part of our efforts, CNYCN works with the legal service providers on the front lines of the new mandatory settlement conference process.

In the face of escalating numbers of foreclosures in New York communities, the state legislature created a new state law which went into effect in September 2008. This law, the "Foreclosure Prevention and Responsible Lending Act of 2008,"[1] was designed "to help the defendant avoid losing his or her home." A key requirement is that a **mandatory settlement conference** is held to bring both sides together at the court to explore the facts and negotiate a solution, before any case may proceed to a foreclosure.

We undertook this survey to collect objective facts about the new law and its implementation. What we found was distressing: these required conferences are far from effective in achieving their stated purpose. While we are concerned by the current state of the settlement conference process, we remain hopeful that much can be done to improve it. This report also provides detailed recommendations based upon our findings.

We believe that homeowners, courts, and lenders will benefit from greater consistency, stronger guidance, and full compliance with the law. More importantly, we also believe that this will result in more homes being saved from foreclosure.

[1] CPLR, Rule 3408; Chapter 472 of Laws of NY, 2008, Sec. 3.

All photography by Diane Bondareff

FRONT COVER: Staten Island homeowner Dolores Galloway, who received a loan modification, is still waiting for her new loan documents two months later.

EXECUTIVE SUMMARY

The Foreclosure Prevention and Responsible Lending Act of 2008,[2] signed into law by Governor Paterson in August of that year, created a court-based "mandatory settlement conference" with the express goal of reducing foreclosures and keeping more families in their homes. This innovative process, however, has not yet lived up to the legislation's promise. Intended to give homeowners a chance to negotiate directly with their lenders and reach a workable solution, our survey documents a system in which lenders are unprepared to comply with the law, subcontracted attorneys collect fees without adequate preparation (passing these costs along to homeowners), the courts have infrequently demanded accountability from the lenders, and homeowners are prevented from negotiating because no one from the lender attends with authority to accept offers. **Of the nearly 800 settlement conferences reviewed during this study, only 3% resulted in any kind of settlement.**

Why is this happening? The main difficulty, as in so many other aspects of the foreclosure crisis, lies in working with the loan servicing units of the lenders. In spite of the law's explicit obligation that attorneys for the lenders attend conferences with appropriate documentation and authorization to negotiate, lenders frequently send attorneys who know little about the case, have little or no documentation pertaining to its history or status, and lack authority to reach a deal on the lender's behalf:

- Only **3%** of the time was a copy of an offer already made by the homeowner actually in the attorney's file;
- The attorney knew the status of an offer with the lender a mere **6%** of the time;
- In only **13%** of the conferences did the attorney have a phone number to call to reach a person with actual authority to settle.

Far more frequently the attorney called a general number, only to be put on hold, transferred to another representative, or told that someone with authority was not available. **Notably, in only 2% of cases observed in our study did the court request that someone with authority appear the next time the case was called.** In light of the extraordinarily low level of preparation by the lender, it is surprising that court orders to penalize lack of compliance with the law are scarce.

[2] **CPLR, Rule 3408; Chapter 472 of Laws of NY, 2008, Sec. 3.**

Defining Terms

Home Affordable Modification Program (HAMP)
The Obama administration's primary foreclosure prevention program. It requires certain lenders to make reasonable bargains with homeowners in distress. For more information go to www.makinghomeaffordable.gov.

Loan modification
Alterations to the terms of a mortgage, typically executed by changing the interest rate, the payment structure, or the term of the repayment plan. Loan modifications may be accomplished by lenders regardless of whether the Making Home Affordable federal plan is applicable.

Dismissal
This ends the case. It may be "without prejudice," which means a lender may re-file and start over. Dismissal differs from "marking a case off calendar," in that marking off a case means that it is removed from the court's schedule of hearings until a motion is made to reschedule the case.

Settlement
An enforceable contract between opposing parties to end litigation in exchange for certain mutually agreed upon terms.

Why aren't the courts better enforcing the law? We found that the court staff, already overwhelmed by many other demands, are working with little clear guidance on how to implement the new law. In addition, they frequently function without complete knowledge of what powers they have to impose the law's requirements. As a result, the courts apply very little pressure on lenders to negotiate in good faith:

- In only **5%** of cases did the courts take the essential step of determining how far apart the parties' offers were;
- The courts asked lenders to produce a "payment history," detailing what the homeowner paid and what they still owed only **8%** of the time. Without this, a homeowner cannot make an informed decision to settle.

How are the homeowners fairing in this process? For most homeowners, attending a hearing to defend their home means entering an intimidating environment with nearly impenetrable terms and procedures. In spite of this, homeowners are making an earnest effort:

- At least 45% have spoken with an attorney before the conference;
- Homeowners also arrived with documentation or questions in hand 45% of the time;
- Finally, 29% have already submitted a loan modification request or were actively working on one at the time of their conference.

In short, considering the relative resources of the parties, homeowners who attend the conferences are better prepared and more likely to comply with the law than the lenders foreclosing on them.

Our study did find a silver lining in the courts. In Queens and Brooklyn, where personnel have received some training about federal foreclosure prevention programs, they have informed homeowners about the programs between 36-49% of the time. This compares very favorably to the Bronx and Staten Island, where no training has occurred and where these programs are explained between 5-9% of the time. This demonstrates that training can produce good results, and broader training could cure some of the challenges and improve uniformity.

CNYCN and its partners propose to work with the courts and lenders to ensure greater compliance with the law. To do this, we recommend several important reforms. These could be implemented through procedural changes under current law by the courts, and could be strengthened by expanding the existing law with new, more detailed provisions. We believe such changes will substantially improve the likelihood of settlements being reached more quickly, with less cost, and with more homeowners able to stay in their homes.

Our Key Recommendations Are:

- Court rules should be implemented by the Office of Court Administration to standardize settlement conference proceedings (See attached Model Rules);

- Referees, Judicial Hearing Officers and other court employees conducting the settlement conferences should use a standard Report and Recommendation (R&R)

form before returning any cases to the Judge to ensure that the law is followed. The R&R should include the name, title and phone number of the person with authority to settle for the lender, acknowledgement that the case was carefully examined, an estimate of what the homeowner can actually afford, any loan modification submitted, and other indicators that the law was followed (Model R&R form is attached);

- The Office of Court Administration should clarify to the foreclosure parts that foreclosure cases can be recommended for dismissal if the lender does not comply with the law and negotiate in good faith;

- Lenders should be required to bring to the conference the necessary materials, such as the loan documents, a complete payment history and any pending modification offer, and have their settlement position in hand;

- Courts should automatically adjourn the first conference (if a settlement is not reached) in order for the homeowner to obtain counsel and prepare. This should be combined with easier access in the courthouse to existing free legal services for people facing foreclosure;

- Attorney fees for appearances should not be charged to the homeowner if the attorneys are not adequately prepared and able to negotiate in good faith;

- The Office of Court Administration should increase judicial training, and include direct oversight by well-trained trial judges;

- Courts should ensure that when a homeowner qualifies for any federal foreclosure prevention plan, that the settlement conference is not dismissed until it has been determined whether a modification may be obtained under the program; and

- The New York State Legislature should enact laws consistent with these recommendations, to ensure that the courts have clear authority to dismiss cases where the Foreclosure Prevention and Responsible Lending Act of 2008 has not been followed, and to expand coverage to all residential homeowners in New York.

In summary, we believe that lenders should experience negative consequences if they fail to attend a settlement conference without proper documentation, preparation and authority to negotiate. We believe the Office of Court Administration should substantially expand training to court personnel and provide clearer guidance regarding existing procedures. We also believe these procedures should be strengthened in a number of ways, in particular by the reasonable application of dismissals when plaintiffs fail to adhere to the process. We request that additional resources be made available to the courts, as well as to housing counseling and legal services providers to ensure that homeowners have the best possible opportunity to access supports before and during the settlement conference process. Finally, we call for legislative action to codify these recommendations and provide additional strength to both the procedures and intent of the existing law. We have no doubt that implementing such changes will result in more homes being saved.

Adjournment
Rescheduling the case to another date, where the proceedings will pick up where they left off.

Termination
Sending a case back to trial and litigation. If a settlement conference is terminated, the trial judge will oversee the case and the case moves toward foreclosure.

Annual Percentage Rate (APR)
Represents the true cost of credit as a yearly rate and includes both the loan interest rate on the note and a wide range of other fees. Additional fees typically included in an APR include prepaid finance charges paid during or before the loan's closing, which may include origination points; service fees or credit fees; commitment or discount fees; buyer's points; and any private mortgage insurance.

Payment history
A complete list of all the charges, fees and payments associated with the life of a loan; gives homeowner the ability to verify the amount owed.

Pay-off letter
A letter indicating the amount the lender would accept to pay off the loan. This does not provide the homeowner with the opportunity to verify the amount owed.

BACKGROUND

A Groundbreaking Law—With Limited Impact

In September 2008, New York State enacted a sea change in foreclosure law, moving to help homeowners keep their homes. Known as the "Foreclosure Prevention and Responsible Lending Act of 2008,"[3] the legislation requires that residential foreclosure actions involving subprime loans (often referred to as "high cost" or "nontraditional" loans) be referred to a settlement conference before a foreclosure case can move forward to trial or judgment. Conferences offer an opportunity for parties to speak freely about the strengths and weaknesses of their case, since nothing discussed in a conference can be admitted as evidence at a trial. If the parties cannot come to an agreement, the case will still go to trial. Typically, conferences are overseen by officials other than the trial judge in order to ensure objectivity if the case ends up in trial anyway.

Settlement conferences are now mandated with the intent of providing a process that can help people, whenever possible, keep their homes.

For New York State, this is a major transformation in the handling of foreclosures. Before the foreclosure crisis, nearly 90% of the foreclosure actions in New York State were executed by court order, usually after a homeowner failed to appear in court

Settlement Conferences: How and Who

In New York City, the conferences are primarily handled by court employees, either Judicial Hearing Officers (JHOs) or court referees, in a separate track from the trial judge.[4]

Settlement Conference
A court-supervised process, attempted before a case moves to trial, intended to avoid unnecessary (and costly) litigation in court. Both parties present their cases informally and negotiate a deal; frank discussion is encouraged because information presented at settlement conferences cannot come into evidence at a trial. Upon completion of the conference, the presiding official makes a recommendation to the trial judge.

Trial Judge
The judge who oversees the main litigation of the case, e.g., decides motions, instructs the jury, and dismisses the case. The trial judge must sign off on any deal reached via a settlement conference; if a settlement conference fails to produce a deal, the case moves back to the judge.

Judicial Hearing Officer (JHO)
JHO's are not judges, but hearing officers who conduct hearings such as settlement conferences and make recommendations to the judge.

Referee
Like a JHO, a referee is a court employee who conducts hearings and conferences and then makes recommendations to the judge.

Plaintiff
The plaintiff files the foreclosure case and, in a conference, bears the burden of producing evidence to prove their case. This is usually the lender or loan servicer.

Defendant
This is the homeowner or the person obliged to pay the debt under the mortgage.

Servicer
A company hired to conduct tasks for a lender such as sending monthly payment statements and collecting monthly payments from the borrower. Servicers are compensated by retaining a percentage of each periodic loan payment made by the homeowner. For clarity in this report, we will often refer to the lender and servicer industries as simply "lender."

Per Diem Attorney
An attorney hired for certain tasks, but not representing the lender for all purposes. Often these attorneys are not members of a legal firm, but are "of counsel" to a firm that has been retained to handle a mass number of cases.

[3] CPLR, Rule 3408; Chapter 472 of Laws of NY, 2008, Sec. 3.

[4] The context of the June and July settlement conferences that CNYCN observed is important to note. The mandatory settlement conferences began while many lenders were waiting for details about a plan by the Obama administration that would encourage lenders to provide modifications. We therefore observed conferences during the initial implementation of this plan by the lenders. During this critical time, it was important not to deprive litigants of a meaningful opportunity to begin settlement talks in earnest because these new possibilities for settlement were emerging. The hope was that foreclosures could be avoided while stays on the proceedings allowed time to explore workouts. In reality this did not occur.

after receiving a foreclosure notice. In short, homeowners were nearly always absent from the process of losing their own home.

This is no longer the case. Under the new law, both parties are now required to come to a settlement conference prepared to settle the case — to sign off, with authority, on an arrangement agreeable to both the lender and the homeowner. The law makes explicit that the claims and defenses, the loan documents, potential modifications or workouts, and other issues must be dealt with specifically:

> *… for the purpose of holding settlement discussions pertaining to the relative rights and obligations of the parties under the mortgage loan documents, including but not limited to … determining whether the parties can reach a mutually agreeable resolution to help the defendant avoid losing his or her home, and evaluating the potential for a resolution in which payment schedules or amounts may be modified or other workout options may be agreed to, and for whatever other purposes the court deems appropriate."* [5]

Those issues are the minimum that must be covered at the conference. The law also mandates that a representative of the lender must appear at the conference prepared to discuss these specifics and with the authority to sign off on modifications with the homeowner. The law states:

> *… [T]he plaintiff shall appear in person or by counsel, and if appearing by counsel, such counsel shall be fully authorized to dispose of the case … Where appropriate, the court may permit a representative of the plaintiff to attend the settlement conference telephonically or by videoconference.*[6]

Plainly put, this isn't happening. Despite the clear intentions of the law, settlements are not being negotiated in good faith, and the process enforcing those negotiations remains very weak.

Lenders Do Not Comply With The Law

(1) Lenders' counsel rarely prepared

In all the boroughs we surveyed, the plaintiffs' attorneys demonstrated a lack of preparation and communication with the lenders and servicers. We asked a series of questions about what the plaintiffs' attorneys knew at the settlement conference:

In 3% of the cases the lender's attorney had a copy of an offer in the file;

In 6% of the cases the lender's attorney knew the status of an offer.

This lack of preparation runs counter to basic and essential standards of settlement conference appearances expected across courts and areas of law. In order to comply with the law's mandate to discuss workouts, the lender or servicer must become familiar with the strengths and weaknesses of their case before the settlement conference and must know what "bottom line" offer they would accept. In other areas of the law, even without a statutory definition of the conference, that is the *sine qua non* of preparation for a settlement conference. Failure to do so can result in contempt of court.

[5] **CPLR, Rule 3408; Chapter 472 of Laws of NY, 2008, Sec. 3. (emphasis added).**
[6] **CPLR, Rule 3408; Chapter 472 of Laws of NY, 2008, Sec. 3. (emphasis added).**

Executive Director Nancy Goldhill of Staten Island Legal Services and her staff, who help homeowners with the foreclosure settlement conference process.

"I was approved for a loan modification in July when I first appeared in court, but I never received the loan modification packet in the mail. I tried calling the lender several times but got nowhere, and I ended up going back to court in the end of August. After two hours on the phone, we finally reached the right person at the bank. He told the attorney that the lender was backlogged. It is so hard to get information and especially correct information. Thank heavens for Legal Services of Staten Island who helped me with the court proceedings because I can't afford a private attorney."

Dolores Galloway, homeowner
in Staten Island, NY

Yugo Nakai, Observer

"Even when plaintiffs' attorneys got someone on the phone, they did not pin down the name or position or how they fit in the hierarchy to figure out who had authority… The lenders were using the corporate bureaucracy as a shield to avoid having to move forward to settlement."

Yugo Nakai, Observer

(2) Lenders rarely appear with authority to settle

The settlement conference law makes clear that the party who has filed the foreclosure action – the lender or servicer – must appear with actual authority to settle the case, so that if an acceptable offer is made the case can be disposed of in court.[7] In order to have actual authority, there must be a prior discussion between the lender and their representative about what types of offers they could accept, and precisely where they will draw the line. For example, the lender's representative should know what the lender thinks the house is worth, what is owed, and what sort of modification would be acceptable. In our survey, we found:

13%

In just 13% of the cases the plaintiff's attorney knew who to call for settlement authority;

2%

Despite this, in only 2% of cases did the court request that someone with authority appear the next time the case was called.

During the observation period, lenders appeared at conferences most often via *per diem* attorneys, who are typically subcontracted attorneys without previous knowledge of the case. Not only were *per diem* attorneys unlikely to know much about the case itself, they are not themselves vested with any authority to agree to a settlement with the homeowner.

Instead of sending authorized representatives, lenders have relied heavily on telephone appearances, wherein the attorney places phone calls to the lender — though rarely reaching a person with actual authority. This runs counter to the intent of the law, which treats personal appearances as the default while allowing "where appropriate … a representative of the plaintiff to attend the settlement conference telephonically." A telephone appearance has been routinely accepted without excuse by the judges, allowing the conference to proceed even when the telephone call does not produce a person with actual authority.

Our observers rarely saw phone calls placed by lenders' *per diem* representatives reach a person with authority to dispose of the case. Frequently, the attorney would dial a main number for the servicer, and speak with someone to inform them an offer would be transmitted soon. Sometimes they received a better fax number for the homeowner to use to re-submit a modification package that the lender said had been lost or mis-delivered. Less frequently, an attorney stated that an investor must be consulted, or that an offer could not be located in the file at that time (investors are the ultimate owners of mortgages and exercise final say in any decisions regarding loan modifications). Most often, no actual conversation ensued about the substance of the offer or what the lender was counter-offering. In fact, in phone calls placed by the *per diem* attorneys, it frequently appeared that a mere customer service representative was the main point of contact.

(3) Lenders face no penalties

One reason for the low rate of good faith preparation for settlement may be that servicers have little financial incentive to seek sustainable loan modifications. It costs servicers money to complete a loan modification, however they receive fees for pursuing foreclosures.[8] In the New York City market, where housing prices have remained

[7] **The law states, "…the plaintiff shall appear in person or by counsel, and if appearing by counsel, such counsel shall be fully authorized to dispose of the case."**

[8] **"It costs servicers money to complete a loan modification (as cited in *Inside B & C Lending*), while servicers receive fees for foreclosures." Congressional Testimony of NEDAP at hearing on Effects of the Subprime Mortgage Crisis in New York City and Efforts to Help Struggling Homeowners, February 11, 2008, http://www.nedap.org/resources/documents/Congressionaltestimony2-11-08-1--JZ.pdf.**

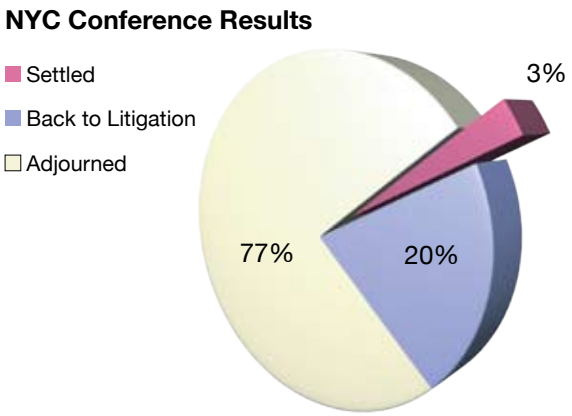
somewhat more resilient than in other areas of the country, lenders may be more inclined to move toward foreclosure instead of a loan modification. Given potential financial disincentives, and the lack of court enforcement of standards, lenders may be behaving predictably when they choose not to prepare to negotiate. As previously stated, 97% of the cases observed were either adjourned or sent back to the regular litigation track to move toward foreclosure. Lenders who failed to comply with the law apparently suffered little consequence.

If lenders fail to attend with authority to settle, or are not prepared to discuss the case, then we recommend that they should be subject to customary sanctions. Courts have the power to dismiss and mark off cases, which effectively stops the foreclosure and requires the plaintiffs to re-initiate proceedings. These courses of action, however, are not being used: **in none of the observed cases did the court say it would recommend dismissal.**

Courts Achieve Few Settlements

(1) Settlements achieved in only 3% of cases

When a case is settled, both parties have agreed to terms of repayment or other solutions that may save a home – the primary intent of the new law. Yet, of the nearly 800 non-default cases we observed in Brooklyn, Queens, Staten Island, and the Bronx, just 3% were settled, a trend that held in each borough.



- **First, the quality of the settlements is unclear.** Six were loan modifications, six were temporary forbearances, and four did not have discernable outcomes. The remaining five were agreements by the lender to consider a loan modification. These final five cases were incorrectly described as a settlement to the homeowners. They are not actually settlements, not readily enforceable, and do not prevent litigation from continuing.

- **Second, twelve of the settlements were reached on the first appearance.** Given the infrequency of an actual appearance by the lender representative with authority to settle, this suggests that the parties came to an agreement outside of court which was then reported to the court at the conference. Observers reported to us that several times the homeowner was the first to inform the lender's attorney that the lender had actually already agreed to a loan modification.

"In Staten Island one day the plaintiff's attorney was 'of counsel to of counsel' and did not have authority. She refused to call someone with authority citing privilege, but eventually did go make a call in the hallway."
Suzanne Martindale, Observer

"In Brooklyn, I only saw a payment history ordered one time. All the other cases, it was just a bank's payoff letter presented."

John Post, Observer

(2) Legal requirements often ignored

The law clearly requires a meaningful settlement conference: the judge should address "the relative rights and obligations of the parties," the "mortgage loan documents," resolutions "to help the defendant avoid losing his or her home," and potential new "payment schedules," modifications and other potential workout options.[9] Unfortunately, CNYCN monitors typically observed judges asking the parties what had transpired, but rarely saw them probe beyond a vague answer to determine the elements listed in the law, or other critical information needed to advance toward a settlement. This is typical of a "status conference," which is an opportunity for the court to determine if the case is moving along, or if parties are conforming to a scheduling order. But, as the law makes explicitly clear, the settlement conference is not meant to be a mere status conference, but rather an active negotiation.

The courts inconsistently made efforts to inquire into the status of a loan modification — seeking information in **26%** of the cases heard. Additionally, courts did some kind of an affordability analysis (i.e., asked the homeowner about their income and their payments) **28%** of the time. While these inquiries are both logical and important, their lack of frequency is troubling in itself. Furthermore, these efforts will achieve nothing if unprepared plaintiffs' attorneys do not know the lenders' position. For instance, the court determined how far apart the parties were **only 5% of the time.** Determining how far apart the parties are is crucial to a settlement conference's success because it calls for each party to take stock of their case, its merits and weaknesses, and determine what their bottom line is and what modified terms they may offer or accept. Without that analysis, meaningful settlement discussions will rarely happen.

The court ordered production of a payment history **only 8% of the time.** Providing a payment history is a prerequisite to an informed settlement decision by the borrower because it is the only way to ensure that the amount claimed to be owed is accurate. Judges in federal courts have been dismayed to find "that major mortgages servicers regularly mess up basic accounting, improperly credit payments and charge unwarranted fees. They've not done a very good job of keeping the records."[10] In New York City courts, homeowners are not routinely provided with payment histories and the opportunity to scrutinize them before settling. Given this recalcitrance by the lenders, it is troubling that in 5% of cases, the JHO or Referee resorted to placing his or her own call to the lender.

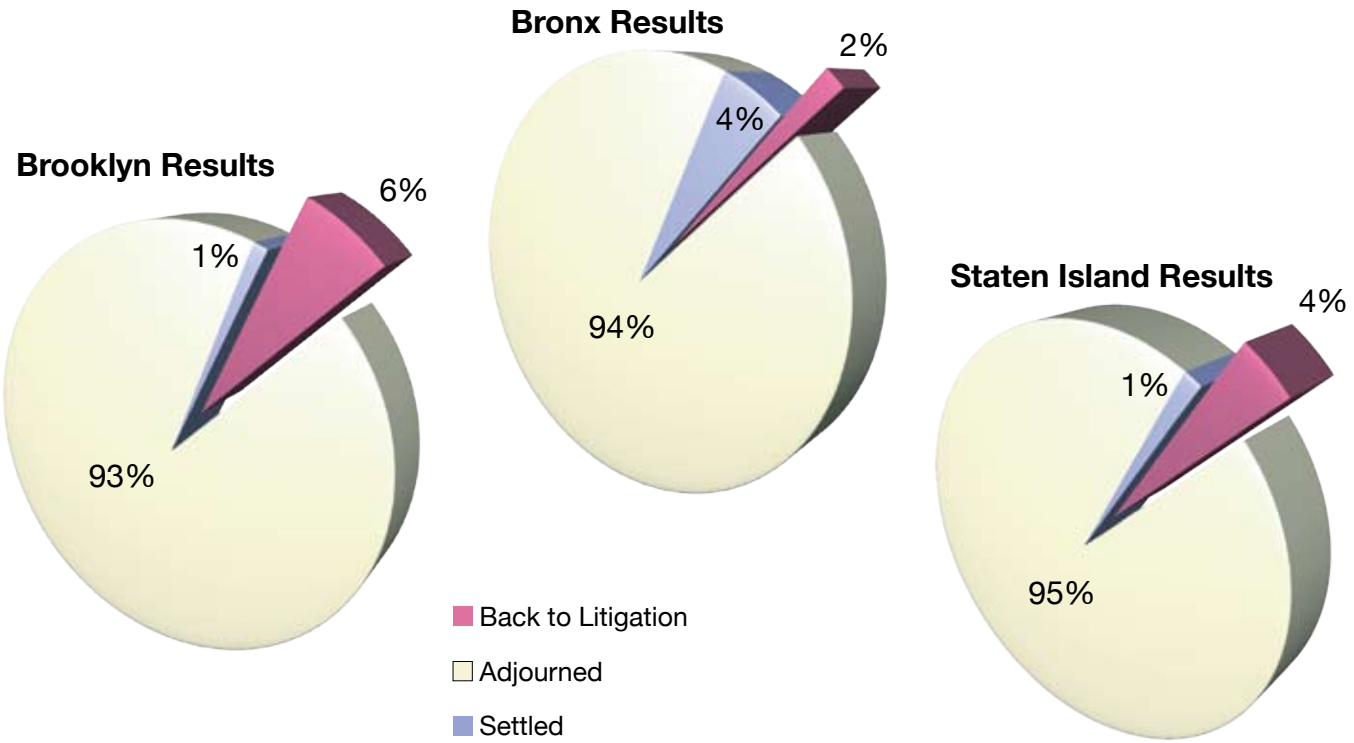
(3) Courts inconsistent across boroughs

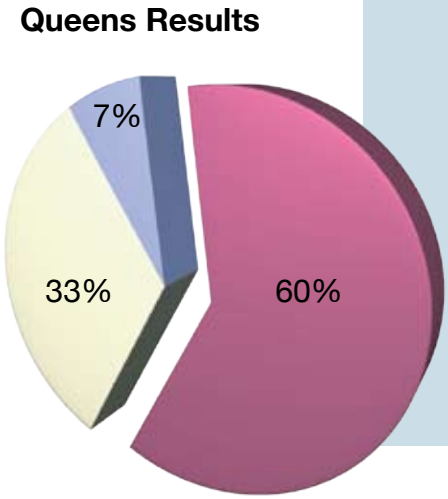
Overall, 20% of conferences were terminated and sent back to litigation. However, these terminations were concentrated in the Queens court, which was following problematic and perhaps inappropriate procedures. In the Queens process, most conferences began with a re-examination of a homeowner's eligibility for the conference, despite the fact that the homeowner's eligibility had already been determined by the lender. Queens terminated 60% of the cases referred to conference – compared to roughly 6% in other boroughs – which may be the result of this focus on eligibility. As a result of this inconsistency, the outcomes of conferences varied dramatically across the city: a homeowner who was told in Queens they had no right to a conference may have been granted one had they lived in Brooklyn. These disparities cannot be explained by the varied staffing levels or length of experience of the various courts. Although each borough has staffed the courts differently (varying between

[9] **CPLR, Rule 3408; Chapter 472 of Laws of NY, 2008, Sec. 3.**

[10] **"Bankruptcy Judges, Justice Department Rip Mortgage Companies," by Karen Weise, ProPublica, August 11, 2009. http://www.propublica.org/ion/bailout/item/bankruptcy-judges-justice-dept.-rip-mortgage-companies-811.**

1 and 8 judges in each borough), and the conferences were first implemented in sequence (Queens, Brooklyn, then Staten Island[11] and the Bronx) each borough had at least 6 months of experience implementing the law prior to our observations. Varying procedures, such as the Queens focus on eligibility discussed above, seem more likely to account for the inconsistent outcomes.





The Queens Exception

In Queens, the risks of limited oversight were made clear. During the period of observation, the court appeared to use the wrong document to determine the true rate of the loan, and inadvertently removed cases from the settlement process which were actually entitled to stay. Instead of using the annual percentage rate (APR), which includes both the loan rate and prepaid fees ranging from mortgage insurance to service fees, the court consulted the loan note – which always lists a lower rate. This practice likely turned away homeowners who may well have had a subprime or otherwise qualifying loan.[12] Whatever the cause, this large disparity in outcomes between the boroughs illustrates a need for enhanced oversight to ensure that the law is followed in all boroughs.

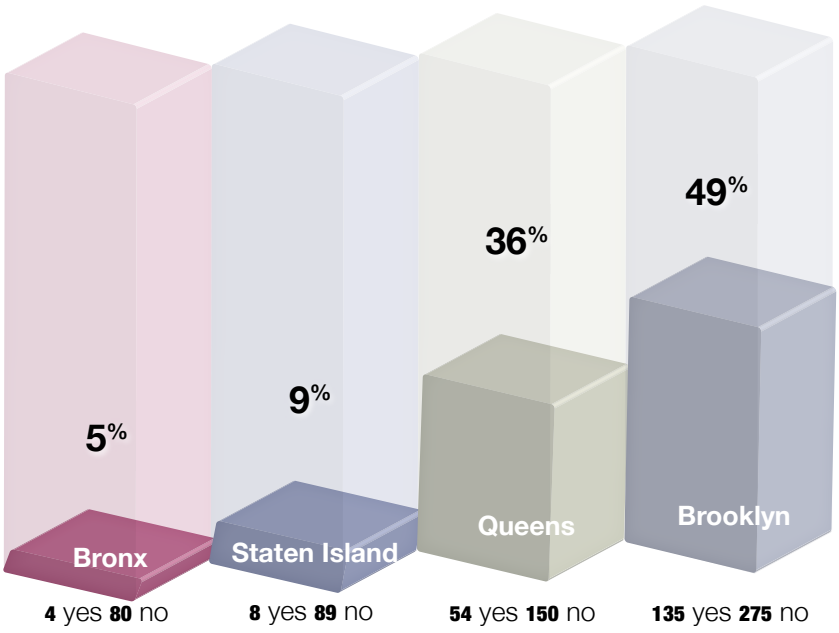
[11] Staten Island began by having trial judges handle the conferences, then switched to a model similar to the other boroughs.

[12] CNYCN immediately notified administrators of this error, and requested that the 60% of Queens cases removed from the conferences be re-examined.

(4) Training is effective, but rare

Training appears to have a direct impact on how the courts administer the settlement conferences. In Brooklyn and Queens, for example, the **Neighborhood Economic Development Advocacy Project (NEDAP)** was invited to train court officials in assessing eligibility for assistance under the Obama administration's foreclosure mitigation program, the Home Affordable Modification Plan (HAMP). Meanwhile, officials in the Bronx and Staten Island did not receive the training. The difference in conferences was clear: in Brooklyn and Queens, the courts explained HAMP to homeowners four to five times as often as those in Staten Island and the Bronx. This suggests that training works, and the courts would benefit from ongoing training across more subject areas, including uniform best practices for conducting the conferences in compliance with state law.

Did the Judge Explain HAMP?



"In the Bronx I spoke with a referee and a clerk after the proceedings, and they were happy to talk to someone. They said, 'we really don't have much guidance or training, and we're so understaffed. If you have any best practices from other boroughs, give us something in writing and we would implement it."
Yugo Nakai, Observer

Homeowners Prepared Despite Odds And Limited Resources

(1) Homeowners prepare more thoroughly than lenders

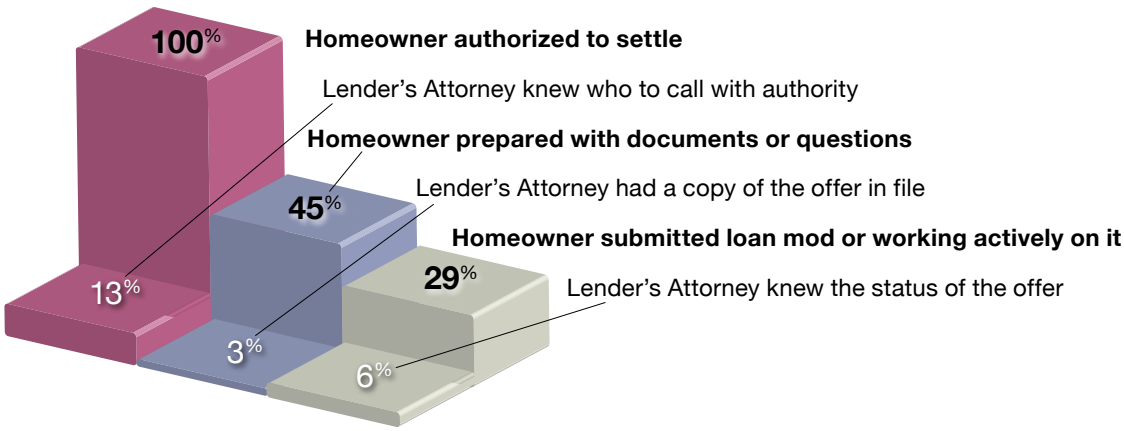
Homeowner participation in foreclosure cases has increased substantially under the new law. Advocates in Brooklyn who have handled a large number of cases report that 70-80% of homeowners are now appearing in court for the settlement conferences. As noted previously, before the mandatory settlement conference, homeowner participation was as low as 10%.

Homeowner participation in the new conferences has improved in part due to the new court notices being sent to homeowners, and an expanding network of free legal service providers and community based organizations, coordinated by CNYCN, who are engaged in outreach by phone, door-knocking, mailings, and educational events. The

quality of preparation in the conferences by homeowners is surprising, given their limited resources. Increasingly, homeowners are seeking out legal advice and housing counseling prior to appearing, or obtaining counsel at the courthouses themselves:

45% had spoken with an attorney prior to the conference;
45% came with documents or questions prepared;
13% had spoken with a housing counselor prior to the conference;
29% had already submitted a loan modification request or were actively working on one.

Compare the Parties' Good Faith

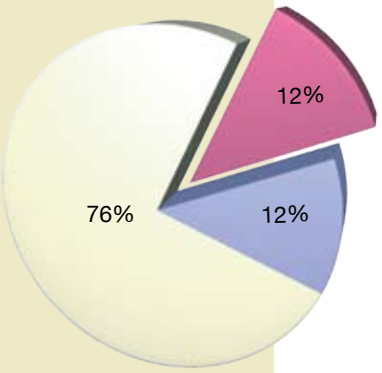


Does Anyone Do It Better? Lessons from outside New York City

New York is not the only state exploring ways to help homeowners keep their homes through the courts. Court sponsored mediation or settlement conference programs have begun in Philadelphia; Allegheny County of Pennsylvania; several Florida jurisdictions; Ohio; Connecticut; and counties in New Jersey. As in New York, these programs are very young; as such, little data analysis is available.[13]

In Suffolk County, New York, local rules require parties to bring specific documents (such as the loan documents) to the conference and mandate preparation by the lender's counsel, including the appearance of a representative with direct authority to settle. Failure to comply can result in dismissal, providing a significant incentive for lenders to participate in good faith. Also, the conference process has been broken into two parts, with an automatic preliminary conference where homeowners can obtain counsel and prepare to negotiate prior to appearing before a judge. Of the 34 full conferences we observed in Suffolk County, most appeared to be more productive because fewer cases were removed from the conference process, and the share of cases settled was four times what we saw in New York City's outer boroughs.

Suffolk County Results



[13] **"Foreclosing a Dream, State Laws Deprive Homeowners of Basic Protections," John Rao and Geoff Walsh, National Consumer Law Center Inc., February 2009.**

Observers, Nicole Cohen and Rina Dorfman, at the Brooklyn Supreme Court

"The homeowners seemed intimidated by the process and didn't seem to understand what was happening. It was a deer in the headlights kind of a situation."
Nicole Cohen, Observer

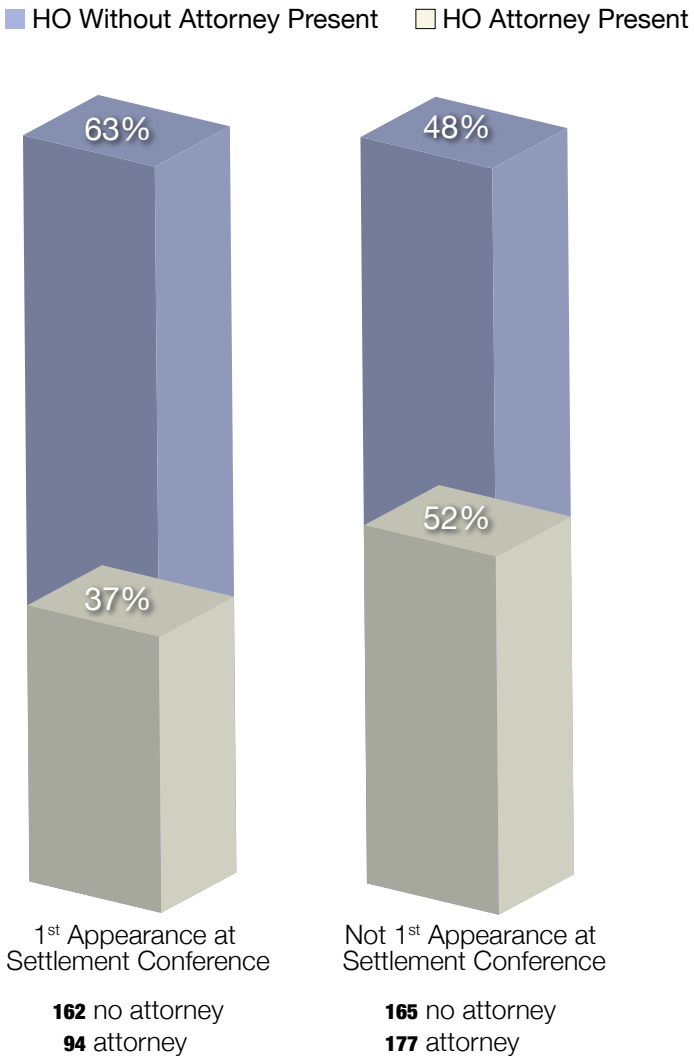
"In Brooklyn the court showed me what appeared to be a bar association pamphlet for homeowners, but it was written in such legalese that as a lawyer I found it confusing. They need to offer plain language materials so the homeowners can understand what's happening."
Rina Dorfman, Observer

(2) Majority of homeowners lack counsel at first conference

Adjourning the first conference, i.e. using the initial meeting to assess which documents are missing and whether parties are adequately prepared, appears to increase the likelihood that the homeowner will obtain a lawyer. Less than half of homeowners had an attorney at hearings that were first appearances, while nearly two-thirds of homeowners had an attorney at hearings that came after an adjournment.[14]

This suggests that an adjournment may actually help homeowners receive a fair conference with adequate representation if they are unable to achieve a settlement at their initial conference.

Importance of Adjournment for Counsel



[14] **Here, we analyzed only approximately 300 cases where the question about representation was answered by the observer. Also, it should be noted that many of the appearances were for limited representation at the settlement conference, not for the entire foreclosure case. It is clear that the majority of homeowners qualified for conferences are still unable to obtain counsel.**

CONCLUSIONS

We are making several recommendations in order to ensure that the settlement conferences function uniformly, comply with the law, and save more homes. First, we feel strongly that plaintiffs must experience consequences for failing to participate in good faith. In other contexts, violating pre-trial rules may result in sanctions, contempt of court, and dismissal of the case.[15] Removing foreclosure cases from the calendar would not deprive the lender of the right to bring their case, as they could file again or move to have the case restored upon a showing that they have complied with the settlement conference law.[16] Without the threat of dismissal, however, we believe that lenders have very little incentive to comply.

We also strongly recommend that the Office of Court Administration (OCA) ensures settlement conferences are consistent statewide. Our survey of state courts in New York City shows that they are not mandating uniform requirements and expectations for both parties. To improve implementation of the state law, we suggest adoption of best practices such as a Report & Recommendation (R&R) form for court employees and creation of local rules which clarify enforcement procedures in the law. In this report, we include model court rules and a model R&R form that could be used to ensure that each hearing is consistent and meaningful. Such forms are commonly used to create uniformity in other court processes. In the settlement process, the R&R form would help ensure that referees and JHOs hold a complete conference before sending the case back to the trial judge.

Some common sense changes appear to be in order: homeowners need better access to counsel so they can participate fully in their conferences; and they need more access to materials crafted in layman's terms before they arrive. In addition, our proposed amendments to the court rules would borrow Suffolk County's two-step process in order to help homeowners find counsel by creating an automatic adjournment of the first conference.

It is important to note that this year advocates, policy-oriented organizations, and government officials across New York State have been working toward legislative changes that would both strengthen the law and make every homeowner facing foreclosure in New York eligible for a mandatory settlement conference. We support these changes. The proposed legislation is consistent with the recommendations in this report, and would make it absolutely clear that the courts must implement the law.

We feel strongly that reforms outlined below, based on the findings of this initial monitoring process, would substantially increase the likelihood of more settlements

[15] For example, Suffolk County Residential Mortgage Foreclosure Part Rules provide that an attorney with authority must appear and "the failure of Plaintiff and/or counsel to appear at a scheduled conference without good cause … may subject Plaintiff and/or counsel to appropriate remedial action including but not limited to default, non-suit, dismissal with prejudice and monetary sanctions," New York CPLR 3216 allows dismissal for want of prosecution, New York CPLR 3404 concerns procedures for "marking off" the calendar, New York CPLR 2201 authorizes the court to grant a stay of proceedings "upon such terms as may be just," and 22 NYCRR sec. 130-2.1 allows sanctions for failure to appear at a conference.

[16] One trial judge has recently spoken out about the importance of dismissing cases where the lender has not complied with pre-trial requirements. We recommend that the JHOs and referees routinely advise the trial courts whether the lenders have followed the law and whether this might be an appropriate sanction. "A 'Little Judge' Who Rejects Foreclosures, Brooklyn Style," Michael Powell, New York Times, August 30, 2009.

"I first went to court in mid-June with my documents and a budget, but it was adjourned to August because I needed to submit more paperwork. I sent the bank a three-page hardship letter telling them why I needed help with arrears and asked them to lower my interest rate. They took a long time to get back to me and finally I got two pieces of mail from them. The first letter asked for the same information that I was asked for in April. The other letter stated that the bank was not going to offer me the help I needed in adjusting my mortgage. I am 65 years old and retired and live on a small pension and social security."

Darryl Montgomery,
homeowner in Brooklyn, NY

The home of Darryl Montgomery in Crown Heights, Brooklyn, NY

being reached. Furthermore, the changes we recommend could happen now, even before further legislation. If they are not adopted, homes that might have been saved will continue to be lost to foreclosure.

Finally, CNCYN plans to continue to survey the settlement process to study the conferences this upcoming fall and winter. This will allow CNYCN to evaluate the engagement of the lenders within the court process, and track the courts' implementation of innovative strategies.

RECOMMENDATIONS

OCA should implement court rules now which provide the following:

Court rules should clarify that the referee, JHO, or judge may recommend dismissal of the case if the plaintiff does not comply with the law by negotiating in good faith at the conference.

WHY This study has shown that courts are not exercising their power to sanction parties who do not comply with the law.

Court rules should mandate a stay in the underlying foreclosure proceedings while the settlement conference process is ongoing, and no dispositive motions should be accepted by the trial court.

WHY Better communication between the trial judges and the referees would enhance the effectiveness of the proceedings by ensuring houses don't go to auction during the settlement phase.

Court rules should standardize proceedings (see attached Model Rules). At minimum, court rules should require that the plaintiff bring certain documents, such as a complete payment history, copies of correspondence and offers, to ensure preparation and meaningful participation by the plaintiff.

WHY This study has shown that the plaintiffs are not complying with the law, which requires that the loan documents, defenses, and potential workouts be examined at the conferences.

Court rules should require courts to provide monthly reports to the OCA on the outcome of the conferences, so that the law's effectiveness can be monitored.

WHY We did not have adjournment rates for each borough at the time of this writing, and we believe the courts should make this information publically available. As this area of law develops, and the courts work to implement the settlement conferences, OCA oversight can ensure that all courts have the resources and information they need.

Courts should staff the settlement conference parts to meet the needs of the communities served.

WHY In Queens, there is a single referee handling all of the settlement conferences. In contrast, in Brooklyn there are three JHOs and referees hearing cases, in Staten Island there are eight (though not exclusively assigned to conferences), and in the Bronx there are four. OCA should examine the rates of foreclosure filings and assign personnel to correspond to need.

Courts should ensure that when a homeowner qualifies for HAMP, or any other program, no settlement conference is dismissed until the lender/servicer has given a definitive answer as to whether the borrower qualifies for a modification under the program.

WHY New federal programs hold promise and may save homes, and the servicers are required in some instances to follow them.

Operational changes the courts should make now:

OCA should establish best practices for notices to homeowners to ensure consistency, quality, and appropriate translation of the documents.

WHY Although the default rate has dropped in some boroughs, homeowners who are receiving a notice that is unclear, or not in their language, may not understand the notice or may believe it is simply another scam.

Courts should issue a letter to all plaintiffs (lenders) and plaintiffs' firms advising them of the New York State law, and the consequence of failure to obey the law, including dismissal.

WHY The lenders and servicers must comply with the law, and this courtesy letter would warn them that stronger enforcement is coming, and remove any excuse that they were not aware of the law.

Courts should use a Standard R&R form before returning a case to the judge for litigation, to ensure that the settlement conference law has been followed. (See attached model R&R form.)

WHY This will achieve uniformity in practices and ensure the settlement conference has been held in accordance with the law.

Courts should automatically adjourn the first conference if a settlement is not reached, which would increase the homeowners ability to access free legal services in the courthouse; provide a better chance to obtain counsel; and more time to prepare.

WHY As shown above, an adjournment helps increase access to counsel, and because free legal services are increasingly available.

Courts should provide clearer documents for pro se homeowners in the form of pamphlets written in laypersons terms, which explain the process, HAMP, how to request a payment history, etc.

WHY Homeowners do not currently have access at the courthouse to clear information about the court process and remedies.

Courts should increase judicial training and oversight of the conferences, including direct oversight by a well-trained trial judge.

WHY This study has shown troubling inconsistencies in practice between the boroughs, and that training can make a difference.

Courts should ensure that when a homeowner qualifies for HAMP, or any other program, no settlement conference is dismissed until the lender/servicer has given a definitive answer as to whether the borrower qualifies for a modification under the program.

WHY New federal programs hold promise and may save homes, and the servicers are required in some instances to follow them.

Legislative changes

The legislature can enact many of the above mentioned reforms into state law. Currently, New York State officials are considering changes to the 2008 law to strengthen it and expand eligibility to all residential homeowners. We support the push for legislative changes to strengthen the settlement conferences, and also urge the New York State OCA to implement critical changes within its power immediately. Delaying will almost certainly cost people their homes.

For example, the proposed legislation may mandate a stay in the underlying proceedings, and may require that a party to an action may not charge, impose, or otherwise require payment from the other party for any cost, including but not limited to attorneys' fees, for appearance at or participation in a settlement conference.

METHODOLOGY

The survey designed by CNYCN and South Brooklyn Legal Services (SBLS) to evaluate the settlement conferences is available upon request. The questions focused on the actions of the court, plaintiffs and defendants, and the processes and outcomes of the settlement conferences.

In May of 2009, we recruited nearly 30 volunteer court observers through advertisements on www.idealist.org and www.pslawnet.org. Applicants were selected on the basis of their familiarity with courts, willingness to travel to the outer boroughs, and interest in the subject matter of the project; most were attorneys, legal workers, law students and interns. Every volunteer received a two hour training, and follow up technical assistance conference calls from CNYCN and SBLS to be effective silent, observers in the courtroom.

Observations began on June 2, 2009, and continued through July 31, 2009 in courts in Brooklyn, the Bronx, Staten Island, Queens, and Suffolk County. CNYCN staff monitored the volunteers' attendance, and ensured that each court was covered. In court, volunteers completed a hard copy version of the survey and then inputted their answers on an online platform.

The data was reviewed by CNYCN staff and three volunteers; incomplete or repeat entries were remedied or removed. Our surveys did not capture the default rates at the courts as this information was not consistently available through the courts. Therefore, data regarding stray defaults were removed. In total, we had complete records for 795 settlement conferences held in the four boroughs in June and July and 42 records of complete conferences in Suffolk County.

Narrative information in the report is drawn from the survey forms and from a debriefing meeting attended by the volunteers, CNYCN staff, city officials, and Judge Judith Kaye. An audio-visual recording of that meeting was reviewed, and volunteers and homeowners were interviewed after the survey results were tabulated.

PROPOSED REPORT & RECOMMENDATION FORM

This Report and Recommendation to Trial Judge _____ follows a full settlement conference proceeding held by _____ pursuant to Chapter 472, Laws of New York, 2008 (Foreclosure Prevention and Responsible Lending Act of 2008). The Settlement Conference Process commenced on _____, and ended on _____.

During the conference:

_____ It was determined how far apart the parties are and whether settlement discussions will be productive.

_____ It was determined whether the homeowner meets federal or other program guidelines, including HAMP.

_____ The Plaintiff produced:

_____ Proof that the Plaintiff holds the Note,
_____ A complete payment history,
_____ Copies of correspondence and offers,
_____ Mortgage Loan Application,
_____ Truth-in-lending Disclosure Statement,
_____ HUD-1 Settlement Statement,
_____ Other documents from the loan file. Specify: _____

_____ An affordability analysis was conducted, using ____% DTI.

_____ Plaintiff appeared with actual authority to settle, (and the party with authority to settle was _____

_____(name) _____(title) of _____(lender/servicer).

_____ The Defendant appeared ___ with counsel / ___ without counsel.

_____ The Plaintiff negotiated in good faith.

_____ The Defendant negotiated in good faith.

_____ A loan modification request (or other work-out plan) was submitted for consideration by the Plaintiff.

_____ Rejection of a loan modification application was followed by counter-offer or other good faith settlement discussions.

Therefore, a conference having been duly held, I recommend one or more of the following:

_____ An Order of Settlement be entered (drafted and signed by the parties) and "So Ordered",
_____ Monetary sanctions are imposed on the Plaintiff for non-compliance with Chapter 472 (with an Order that they are not to be charged to the homeowner by the lender),
_____ The case should be marked off the calendar until Plaintiff brings a motion showing that compliance with the material requirements of this rule and Chapter 472 will be achieved at the next scheduled conference date,
_____ The case be dismissed without prejudice,
_____ The case should be dismissed with prejudice, and
_____ The stay should be lifted and motion practice re-commence in the foreclosure action.

PROPOSED COURT RULES

These Model Local Rules are proposed for compliance with Chapter 472 of the Laws of 2008.

1. Plaintiff must appear in person or by phone with authority to settle at each settlement conference with their representative. If a representative of Plaintiff does not appear and attempt settlement in good faith, the case will be adjourned with a warning concerning the consequences described in Section 2.

2. If the Plaintiff has not complied with these rules within 60 days, the referee, JHO, or judge should file a Report & Recommendation to the trial judge that the case be:

a. Marked off the calendar until Plaintiff brings a motion showing that compliance with the material requirements of this rule and Chapter 472 will be achieved at the next scheduled conference date,
b. Monetary sanctions (with an Order that they are not to be charged to the Homeowner by the Lender),
c. Dismissed without prejudice, or
d. Dismissed with prejudice.

3. The Court shall adjourn the first conference for the purposes of the Homeowner obtaining counsel, and shall provide a current listing of free legal and housing counseling services. The Court may appoint counsel pursuant to CPLR 1102(a). The Court may exercise discretion to determine whether further adjournments are granted.

4. The case will be stayed during the pendency of the settlement conference proceedings, and the Trial Judge shall be apprised of progress toward settlement.

5. Plaintiff must bring to the initial settlement conference the following documents:

a. Proof that the Plaintiff holds the Note,
b. A complete payment history,
c. Copies of correspondence and offers,
d. The Mortgage Loan Application,
e. The Truth-in-lending Disclosure Statement,
f. The HUD-1 Settlement Statement, and
g. The entire loan file.

6. Defendant must be advised to bring to the settlement conference the following documents, if in their possession:

a. Documents concerning the loan,
b. Copies of correspondence, loan modification applications and offers, and
c. Homeowner income.

7. If documents are not made available at a conference, it should be adjourned for a reasonable amount of time and the documents must be provided at the next appearance. No fees for the appearance(s) should be charged by the Plaintiff to the Homeowner if the Plaintiff has not produced all of the documents described above.

8. No fees for appearances or sanctions will be charged to the Homeowner under this rule.

9. The referee or JHO managing the settlement conference shall inform the Homeowner that he or she will not be the Trial Judge, of the name of the Judge assigned to the litigation, and of the option to appeal to the Trial Judge.

10. The referee or JHO managing the settlement conference shall inform the *pro se* Homeowner that all communications made in the conference for the purposes of settlement are not admissible in the underlying proceedings.

11. Courts must provide monthly reports to the Office of Court Administration (OCA) on the outcomes of all conferences. Settlement Conference parts must also submit a monthly report to the Administrative Judge of their Court, in format chosen by the Administrative Judge.

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