

Foreclosures: Introduction and Update

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UNC
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- Review of Foreclosure Procedure
 - Clerk's Role
 - Judge's Role (Appeal, Injunction)
- 2008 Legislation (Subprime Focus)
 - What and why
 - Results so far
- Proposed 2009 Legislation (Broader Focus)

In the past six months, I have dealt with _____ appeals of a clerk's foreclosure sale order.

1. 0
2. 1 to 5
3. 6 or more

In the past six months, I have dealt with at least one action to enjoin a foreclosure.

1. Yes
2. No
3. Not sure

Clerk's Jurisdiction

- Homeowner defaults
- Lender (through Trustee) files Notice of Hearing
- Hearing by Clerk of Court
 - Clerk makes required findings, issues Order of Sale
- Sale by trustee
- Report of sale
- Upset bid periods
- Resale if bidder defaults
- New upset bid periods
- Final report by trustee
- Clerk audits report
- Clerk receives surplus proceeds

Five

Clerk's ~~Four~~ Findings:

- (1) Proper Notice
- (2) Right to Foreclose
- (3) Valid Debt
- (4) Default
- (5) Was loan subprime?
Did subprime lender
comply with new
notice requirement?

New in
2008. Until
10/31/10.

Appeal to Judge

NCGS 45-21.16(d1)

- Homeowner defaults
- Lender (through Trustee) files Notice of Hearing
- Hearing by Clerk of Court
 - Clerk makes required findings, issues **Order of Sale**
- Sale by trustee
- Report of sale
- Upset bid periods
- Resale if bidder defaults
- New upset bid periods
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- Clerk audits report
- Clerk receives surplus proceeds

Appeal

- To Superior (or District) Court within 10 days.
- Bond required and set by clerk.
- Review is *de novo*.
- Heard by next term.
- Review limited to same five findings as clerk.

- (1) Proper Notice
- (2) Right to Foreclose
- (3) Valid Debt
- (4) Default
- (5) Was loan subprime?
Did subprime lender comply with new notice requirement?

Question

- Clerk issues Order of Sale based on two-month default. Debtor appeals to Superior Court.
- At de novo hearing, Debtor asserts no default because Lender had always accepted late payments (10+ years), thus waiving the right to prompt payment under the Note.
- Superior Court judge is satisfied that evidence demonstrates waiver.

Based on waiver, the judge may refuse to find default.

1. True
2. False

- Only legal defenses to foreclosure sales should be considered in appeals from clerk's Order of Sale. *Meehan v. Cable*, 127 N.C. App. 336 (1997).
 - E.g., improper notice of hearing, not proper “holder” of debt, substitute trustee not authorized to exercise sale power (authority not recorded)
 - Clerk's hearing is “not intended to settle all matters in controversy between the parties.” *Golf Vistas, Inc. v. Mortgage Investors*, 39 N.C. App. 230 (1978).
- Equitable defenses (e.g., waiver, undue influence) may only be considered in separate action to enjoin. *In re Helms*, 55 N.C. App. 68, (1981).

Actions to Enjoin Foreclosure

NCGS 45-21.34, 35.

- Homeowner defaults
- Mortgage company (through Trustee) files Notice of Hearing
- Hearing by Clerk of Court
 - Clerk makes required findings, issues Order of Sale
- Sale by trustee
- Report of sale
- Upset bid periods
- Resale if bidder defaults
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- Action brought in Superior Court.
- Any time before “rights of parties to the sale...become fixed.”
- Bases:
 - Amount bid is inadequate or inequitable and will irreparably harm the owner
 - Any other legal or equitable ground the court may deem sufficient (e.g., waiver).
- Court may order TROs and injunctions as appropriate to provide relief. Orders resale as appropriate.
- Bond required to protect mortgagee against harm (if any).

2008 Session Legislation

- Starting in early 2008, major increase in foreclosure filings in NC.
- Like national trend, many were **subprime** loan foreclosures.
 - Loans in which interest rates were significantly above general market (often short ARMs with significant upward adjustments).
- Legislature responded with new steps in subprime foreclosure process that might encourage other solutions

2008 Session Legislation (2008-226)

“Emergency Program to Reduce Home Foreclosures Act”

Effective November 1, 2008; Expires October 31, 2010

- Requires lenders on subprime loan foreclosures to give **45-day notice** to borrowers before foreclosure action.
 - So, clerks now required to make fifth finding at foreclosure hearing.
- Creates AOC database for subprime loan information. Lenders required to submit basic information on the subprime loans within 3 days after 45-day borrower notice.
- Creates State Home Foreclosure Prevention Project for Commissioner of Banks (“COB”) to review AOC database filings to:
 - Help borrowers seek alternatives to foreclosure
 - Help identify violations of lending laws.

Emergency Program to Reduce Home Foreclosures Act (November 1, 2008–October 31, 2010)



The screenshot shows a Windows Internet Explorer browser window displaying the NC State Foreclosure Prevention Project website. The address bar shows the URL <https://www.nccob.org/online/fcs/default.aspx>. The page features a blue header with the North Carolina Commissioner of Banks logo and the text "STATE HOME FORECLOSURE PREVENTION PROJECT". Below the header, there is a navigation bar with the text "Login for Counselors, External Legal and AOC Clerks". The main content area includes several sections:

- Forgot Password?**
[Click here to request reset your password.](#)
- Phone Duty Person / Counselor / External Legal / AOC**
[Login to State Foreclosure Prevention System.](#)
 - ▶ Phone Duty Personnel can connect a borrower to a counselor and assign a pre-foreclosure filing to a counselor agency.
 - ▶ Counselors can login to work on the filings assigned to them.
 - ▶ Counselor Administrators can administer counselor accounts, assign pre-foreclosure filings to counselors at their agency and work on assigned filings.
 - ▶ External Legal Team can work on the pre-foreclosure filings assigned to them.
 - ▶ AOC Clerks can view all pre-foreclosure notices submitted by the Servicers.
- AOC**
[Request a login username for an AOC Clerk](#)
 - ▶ Request Login to State Foreclosure Prevention Project
- External Legal Team**
[Request a login username for a member of the External Legal Team](#)
 - ▶ Request Login to State Foreclosure Prevention Project
- Phone Duty (Connect Inc.)**
[Request a login username for a Phone Duty Person](#)
 - ▶ Request Login to State Foreclosure Prevention Project

The browser status bar at the bottom shows "Done" and "Internet" with a 100% zoom level.

Emergency Program to Reduce Home Foreclosures Act

(November 1, 2008–October 31, 2010)

What is a “**subprime** loan” under the Emergency Act?

- Originated on or after January 1, 2005 and before December 31, 2007
- A “home loan”
 - NOT equity line of credit; loan to entity other than individual; loan on commercial, rental, or vacation property
- Meets definition of rate spread home loan under GS 24-1.1F(a)(7)
 - Generally above 8% at time of origination (for first lien)
 - Chart provided to lenders by COB

Emergency Program to Reduce Home Foreclosures Act

(November 1, 2008–October 31, 2010)

Foreclosure Prevention Project:

Borrower defaults on subprime loan.

Lender gives 45-day notice to borrower.

Lender submits information to new AOC subprime database.

COB obtains information; sends letter to borrower informing of available help

Borrower contacts hotline.
Borrower connected with one of 30 local agencies.

Counselors assist borrower and lender in potential modifications or alternatives to foreclosure.

COB also reviews for lending law violations.

Clerk's new fifth finding.

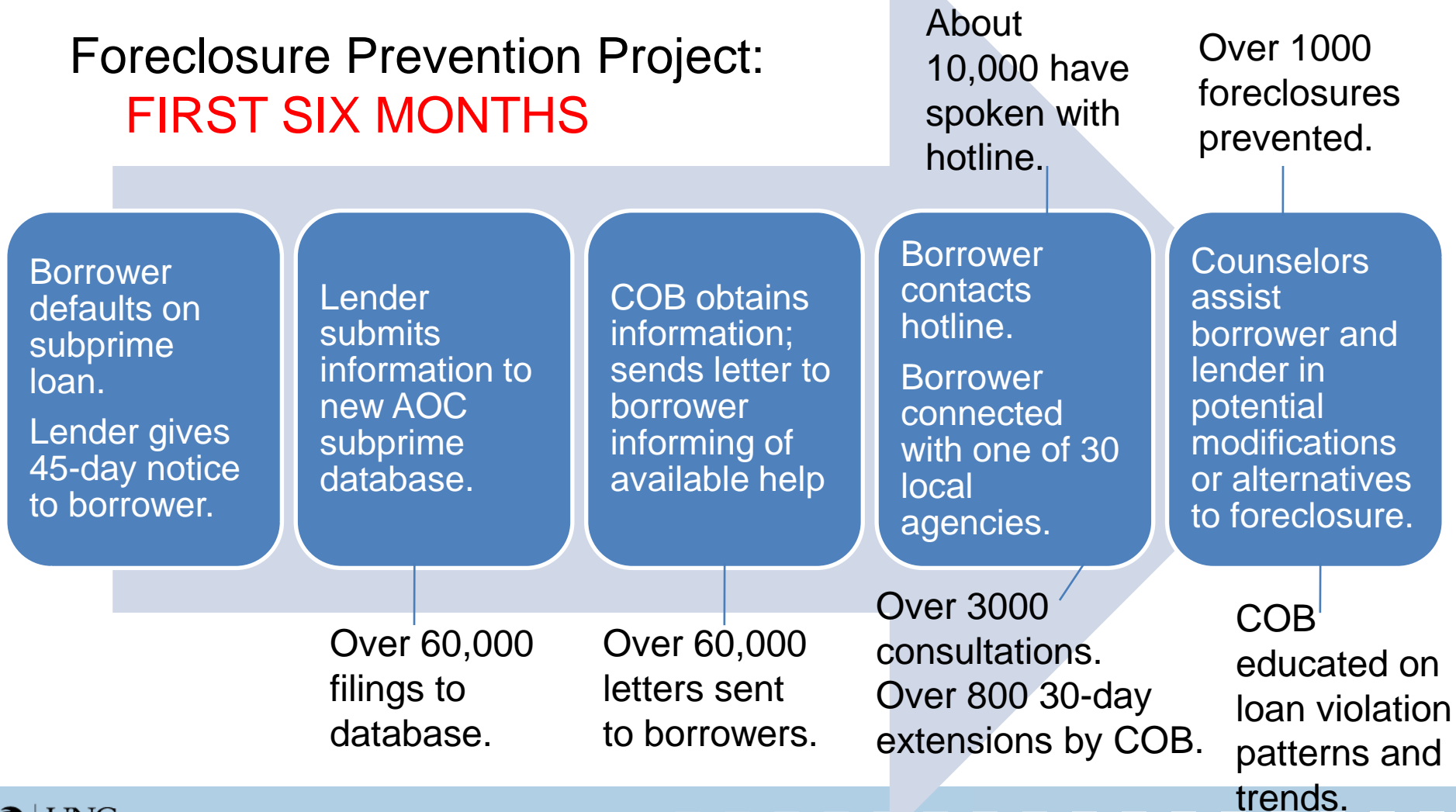
COB may extend foreclosure filing another 30 days.

COB may suspend foreclosure 60 days to investigate violations.

Emergency Program to Reduce Home Foreclosures Act

(November 1, 2008–October 31, 2010)

Foreclosure Prevention Project: **FIRST SIX MONTHS**



Emergency Program to Reduce Home Foreclosures Act (November 1, 2008–October 31, 2010)

The screenshot shows the website for the Office of Governor Bev Perdue, State of North Carolina. The header features a photo of Governor Perdue and the state seal. A navigation menu includes links for HOME, FIRST FAMILY, NEWS ROOM, TOWNHALL, GOVERNOR'S OFFICE, and CABINET. The main content area is titled "Press Release" and contains the following information:

6/16/2009 Raleigh Contact: Chrissy Pearson (919) 733-5612

Gov. Perdue Announces State Home Foreclosure Prevention Project Prevents More Than 1,000 Foreclosures in NC
NC has lowest foreclosure rate in the region

Governor Bev Perdue and the N.C. Office of the Commissioner of Banks (NCCOB) today announced that the State Home Foreclosure Prevention Project ("NC Foreclosure Project") has helped more than 1,000 North Carolina homeowners avoid foreclosure since the program's inception in November 2008.

"North Carolina is committed to helping our citizens avoid foreclosure," said Gov. Perdue. "This program is critical to many families in our state as we continue to do all we can to help homeowners stay in their homes."

Last year, the General Assembly enacted the emergency program to reduce foreclosures on subprime loans and directed NCCOB to develop and implement the program (<http://www.ncleg.net/EnactedLegislation/SessionLaws/HTML/2007-2008/SL2008-226.html>). The program requires mortgage companies to file notices with the State in advance of foreclosure on subprime loans and authorizes the Commissioner of Banks to delay a foreclosure filing by 30 days, if the Commissioner believes a foreclosure can be prevented.

"The success of this program shows that foreclosures can be prevented if homeowners, lenders, counselors and the State work together," said Mark Pearce, Deputy Commissioner of Banks. "In these tough economic times, stopping unnecessary foreclosures not only benefits individual homeowners, but stabilizes property values for neighborhoods across the State."

6/16/2009



Emergency Program to Reduce Home Foreclosures Act

(November 1, 2008–October 31, 2010)

- How does clerk make “fifth finding”?
 - Lender provides notarized “Non-Subprime Certificate”.
 - Lender admits loan is subprime and submits Conditional Certificate of Compliance with 45-day notice requirement.
 - Clerk requires notice to be attached to Certificate and reviews notice.
 - Clerk checks COB database to be sure 45 days passed before filing.
 - Lender provides no certificates; unclear whether subprime.
 - Clerk requires evidence of necessary rate information (AOC has relevant information for clerks to calculate rate spread).
 - If subprime, clerk verifies 45-day notice requirement was met and time has passed.
- If lender fails to meet new subprime requirements (filing, notice, or certification), clerk should dismiss without prejudice.

What's next?

In 2009, studies from COB and others report that:

- Subprime crisis continues but is steadying.
- On the rise in NC are:
 - Foreclosures on “prime” loans due to poor economy, rising unemployment
 - Foreclosure rescue scams taking advantage of the vulnerable or desperate

2009 Proposed Legislation (selected)

- S 974 “Consumer Economic Protection Act of 2009”
 - More new steps in foreclosure procedure
- H 1523 “S.A.F.E. Mortgage Licensing Act”
 - Tighter regulation of servicers, greater authority for COB
- S 1015 “Homeowner and Homebuyer Protection Act”
 - To prevent certain rescue scams

S 974 “Consumer Economic Protection Act of 2009”

- New requirements of clerk at foreclosure hearing (NOT JUST SUBPRIME CASES):
 - Determine whether property is debtor’s currently-occupied principal residence
 - If so, determine efforts lender has made to resolve prior to foreclosure
 - If clerk finds good cause to believe additional time/measures have “reasonable likelihood” of forestalling foreclosure, **shall** continue the hearing to date certain 30 and 120 days out.

Foreclosure Process:

- Homeowner defaults
- Lender (through Trustee) files Notice of Hearing
- Hearing by Clerk of Court
 - Clerk makes required findings, issues Order of Sale
- Sale by trustee
- Report of sale
- Upset bid periods
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Proposed new step:

Clerk must first make determination whether to continue the hearing for possible resolution.

S 974 “Consumer Economic Protection Act of 2009”

- Questions for Clerks and Judges:
 - Is this a new basis for appeal by debtors? Does clerk’s refusal to grant a continuance provide debtor grounds for appealing clerk’s Order of Sale?
 - If so, what is the standard for reviewing clerk’s decision not to continue the hearing?

H 1523 “S.A.F.E. Mortgage Licensing Act”

- Brings North Carolina’s existing mortgage licensure act into compliance with federal law.
- Establishes licensure requirement for mortgage loan originators (mortgage companies)
- Sets out prohibited practices (operating without license, unfair practices toward consumers and mortgagors, etc.)
- Establishes broad enforcement jurisdiction by Commissioner of Banks

H 1523 “S.A.F.E. Mortgage Licensing Act”

- Provides for foreclosure suspension:
 - If COB has evidence of violation of law in origination or servicing of a loan under or in threat of foreclosure; and that violation is sufficient as a defense in law or equity against foreclosure, COB may notify clerk, who **MUST** suspend foreclosure proceeding for 60 days.
 - If violation is cured or COB is satisfied, foreclosure may resume.
 - **QUESTIONS:**
 - What if violation not cured? Does foreclosure resume after 60 days?

S 1015 “Homeowner and Homebuyer Protection Act”

- Designed to help prevent certain foreclosure rescue scams
- Makes engaging in a foreclosure rescue transaction for financial gain a violation of Chapter 75-1.1 (Unfair and Deceptive Trade Practices Act).
 - Presumably creates a cause of action under Chapter 75 by the scam victim against the scam perpetrator

Closing Thoughts

- More complicated foreclosure process for clerks may lead to more complicated appeals to superior court judges.
- Proliferation of subprime and other poorly underwritten loans may expand the arguments for use of injunctive relief from foreclosure.
- New legislation may create some unanswered questions about civil remedies for violations.