Foreclosing Erie County: 2015 Update

Homeowner's and neighborhoods are better off when banks don't drag their feet through the foreclosure process.

Overview:

In May 2015, the New York State Department of Financial Services (DFS) published their "Report on New York's Foreclosure Process." Their analysis focused on average lengths of most phases of the foreclosure process, specifically from the filing of the foreclosure action to the auction of the foreclosed property. As that data clearly showed, a longer foreclosure process is associated with greater debt and a lower likelihood of the homeowner obtaining a loan modification. Furthermore, the DFS report concluded that many homeowners experience frequent and unnecessary delays throughout the process. This report supplements those findings by focusing on an earlier and more specific time frame—from the initial default date to the first mandatory settlement conference. The number of days that are allowed to pass between the initial default and the filing of foreclosure action is crucial to include, as it is a period of time during which the homeowner is accruing debt. This report aims to provide a more accurate understanding of how far homeowners are behind when they first have access to the mandatory settlement conference, further contextualizing data regarding ultimate case outcomes.

Current New York State Legislation:

- CPLR §3408 (Mandatory Settlement Conferences): Requires that a mandatory settlement conference is held no more than sixty days after proof of service has been filed with a county clerk for all foreclosure cases involving residential, owner-occupied properties. Borrower and lender are required to negotiate "in good faith" in their efforts to reach a mutually agreeable and affordable solution that would allow the borrower to repay their debt and retain the property.

- RPAPL §1304 (90-Day Pre-Foreclosure Notice): Requires that a lender send a pre-foreclosure notice to a borrower at least 90 days before commencing a foreclosure action. This notice must include information about possible steps that could help the borrower avoid losing their home, exact details about the amount owed and the number of days in default, as well as the contact information for five agencies that provide free or affordable housing counseling.

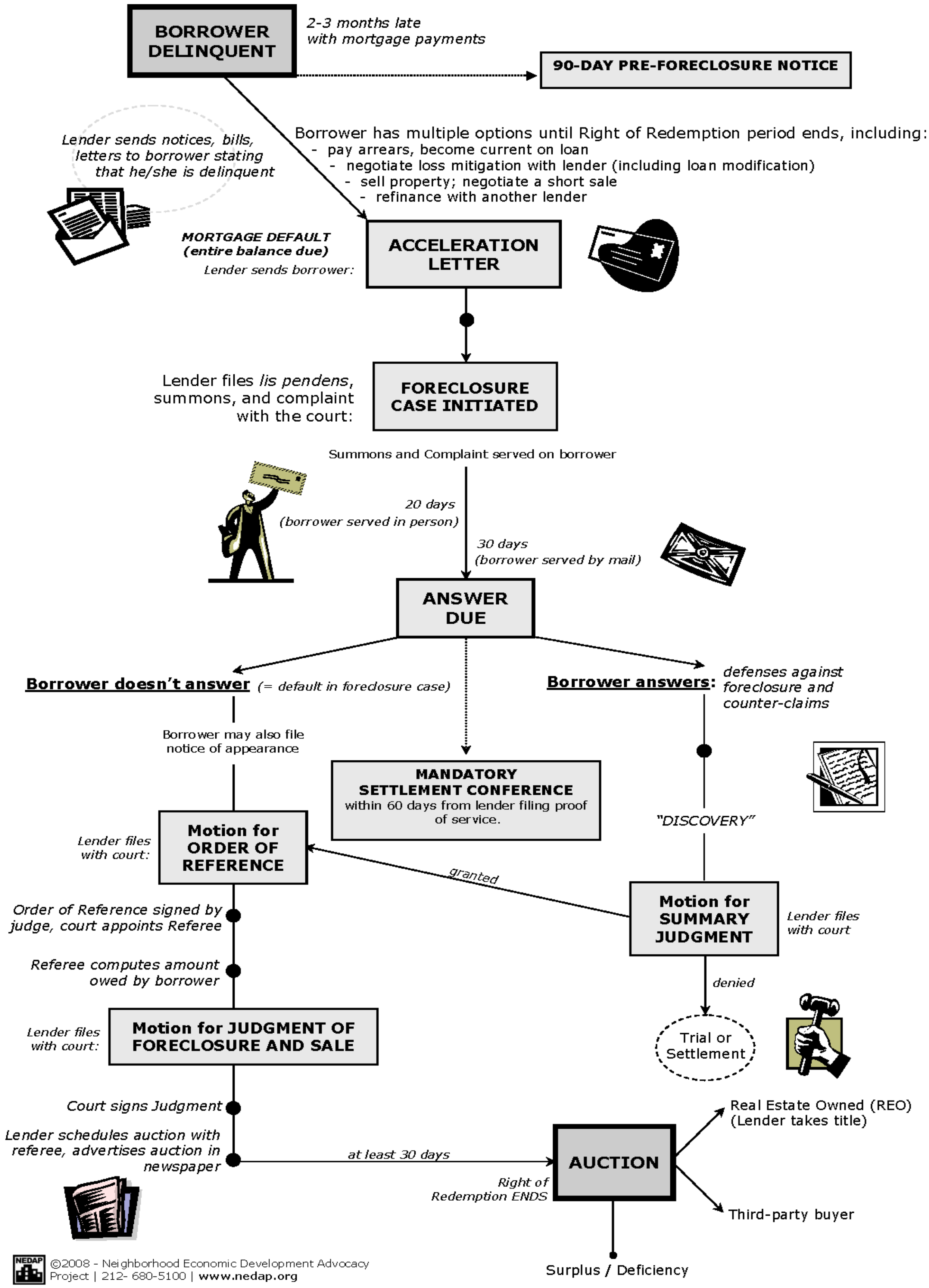
Proposed New York State Legislation:

- Clarifying Homeowner's Rights in RPAP L Homeowner Notice: This proposed bill would amend the current RPAP L Homeowner Notice to include language informing homeowners of their right to remain in their property until the foreclosure sale and their right to a settlement conference to negotiate with their lender to remain in their home. The RPAP L Homeowner notice is required by NYS to be attached to the Summons and Complaint that the homeowners are served with at the beginning of the foreclosure action. By informing homeowners of their rights, this bill aims to decrease the number of properties abandoned by their owners under the misconception that they are required to leave at the beginning of the foreclosure process. This bill has been proposed by New York State Assemblyman, Michael Kearns.

Proposed Federal Legislation:

- Vacant Homes Act of 2015: This recently proposed bill seeks to expedite the sale of vacant homes, or "zombie foreclosures" (see section titled "Beyond the Homeowner"). In the event that a legitimate short sale offer is made on a property in foreclosure, the lender is given a maximum of 90 days to respond. If the lender chooses to reject the offer, they must provide the prospective buyer with an economic analysis of the property indicating that the property's current fair-market price exceeds the offer, or that they can expect a better offer within 12 months. If passed, this bill would require banks to review legitimate offers to purchase a home in foreclosure within a timely manner and would encourage homeowners who know they can no longer afford their home to apply for a short sale rather than wait for a foreclosure to be completed. This bill has been proposed by Congressman Brian Higgins.

PATHS OF A FORECLOSURE IN NEW YORK STATE



Note: This diagram applies to foreclosures in New York State. Each state has its own laws and regulations governing the process.

Updated Jan. 2010

New York State Foreclosure Process:

Initial default → filing of foreclosure action	• Borrower misses first payment. • Lender sends late notices to borrower letting them know that they are delinquent. • Lender <u>must</u> send the 90-day pre-foreclosure notice, which contains the exact amount owed and contact information for at least five groups that can help the homeowner through the foreclosure process. This notice must be sent to the borrower 90 days before the foreclosure action is commenced. • Lender mails acceleration letter, letting borrower know that at this point the entire balance of the loan is due. • Lender files lis pendens (meaning *suit pending*) with the county clerk's office, which marks the start of the foreclosure action.
Filing of foreclosure action → filing of Request for Judicial Intervention (RJI)	• Service of process, meaning the borrower is served with a summons and complaint in person or when attempted service in person fails, by leaving a copy at the property and mailing another copy. • Proof of service is filed with the clerk's office. • Borrower may file an answer if they believe the suit is based on inaccurate information, or if they wish to file a countersuit. • Request for judicial intervention (RJI) is filed with the clerk's office. This document notifies the courts that the action has been filed.
Filing of RJI → first mandatory settlement conference	• After filing of RJI, a settlement conference must be scheduled by the court within 60 days. Vacant and non-owner occupied properties do not qualify for the settlement conference phase of the foreclosure and the bank's attorney may file an affidavit stating why the case does not qualify and the case will bypass the conference phase.

First mandatory settlement conference → last mandatory settlement conference	• Purpose of the settlement conference phase of the foreclosure is to see if the homeowner wants to keep the home, and if so, if they meet the criteria for an outcome other than losing the home. • Most counties have legal service attorneys at the settlement conferences that can represent homeowners that wish to utilize their services. • Delays are common during this stage because of paperwork being incomplete or incorrectly filed by the borrower, or because of paperwork going "stale" due to the lender's failure to review it in a timely manner.
Last mandatory settlement conference → ultimate conclusion of case	• If a homeowner qualifies for a workout agreement, the foreclosure action would be cancelled once the paperwork is finalized. If the homeowner isn't eligible for a loan modification or any other form of resolution, the case is removed from the settlement conference phase and the bank's attorney is allowed to proceed with the foreclosure action. • The bank's attorney gets an order of reference from the court to calculate what is owed. • A judgment of foreclosure and sale is entered against the homeowner and the bank can schedule a foreclosure auction. • Once the home is sold, it must be vacated. The homeowner has the responsibility to keep the property up to code until the bank or third party purchaser takes ownership.

Possible Outcomes for mortgage default and foreclosure:

- Loan modification: a mutually beneficial agreement between the borrower and the lender. The lender agrees to add the past due payments, fees and costs into a new principal balance and change the terms of the original mortgage (generally the interest rate or term of the loan) so that they can recoup their investment and the borrower can resume payments and remain in their home. A loan modification is based on a review of the borrower's current financials and not contingent on credit eligibility.
- Payoff: the borrower pays arrears, meaning the sum of all late payments and associated fees, as well as the entire remaining balance of the original loan. This is almost always accomplished through refinancing the loan, in hopes of making the debt more manageable long-term. This option is not often available to homeowners because their credit is not good enough to qualify for a new loan after they've defaulted on their mortgage.
- Reinstatement: the borrower pays all arrears, then resumes making normal monthly payments. This is usually only a possible solution when the problem that led to the foreclosure was short-lived.
- Short sale: the homeowner sells the property to a third party and the lender agrees to accept the payment in lieu of the full amount owed. This usually occurs when the debt balance substantially outweighs the actual worth of the property.
- Deed-in-lieu: agreement in which the homeowner voluntarily returns the deed to the lender, who then sells the property in an attempt to minimize their loss. If the lender agrees to accept this solution, it is faster than obtaining a judgment, and can save the homeowner from severely harming their credit score.
- Judgment of Foreclosure: occurs when the judge signs an order giving the bank the legal right to auction off the house to recoup what they can from their original investment (the mortgage). If no one bids at the auction, the bank will take title to the property and then try to sell it at a later date.
- Canceled, other: foreclosure action is canceled, most frequently because of the lender recognizing low property equity or the lender or judge requesting that it be canceled.
- Canceled, not listed: foreclosure action is canceled without a reason being provided. It is usually safe to assume that the cause is one of the ones listed above, and simply not stated on paper.

Mandatory Settlement Conference Attendance and Ultimate Outcomes:

Out of 1672 total residential foreclosures filed in Erie County in 2012, the following analysis is based on only those cases in which:

a) mandatory settlement conference(s) took place

b) an ultimate outcome was reached

c) data indicated whether or not the homeowner attended mandatory settlement conference(s), and

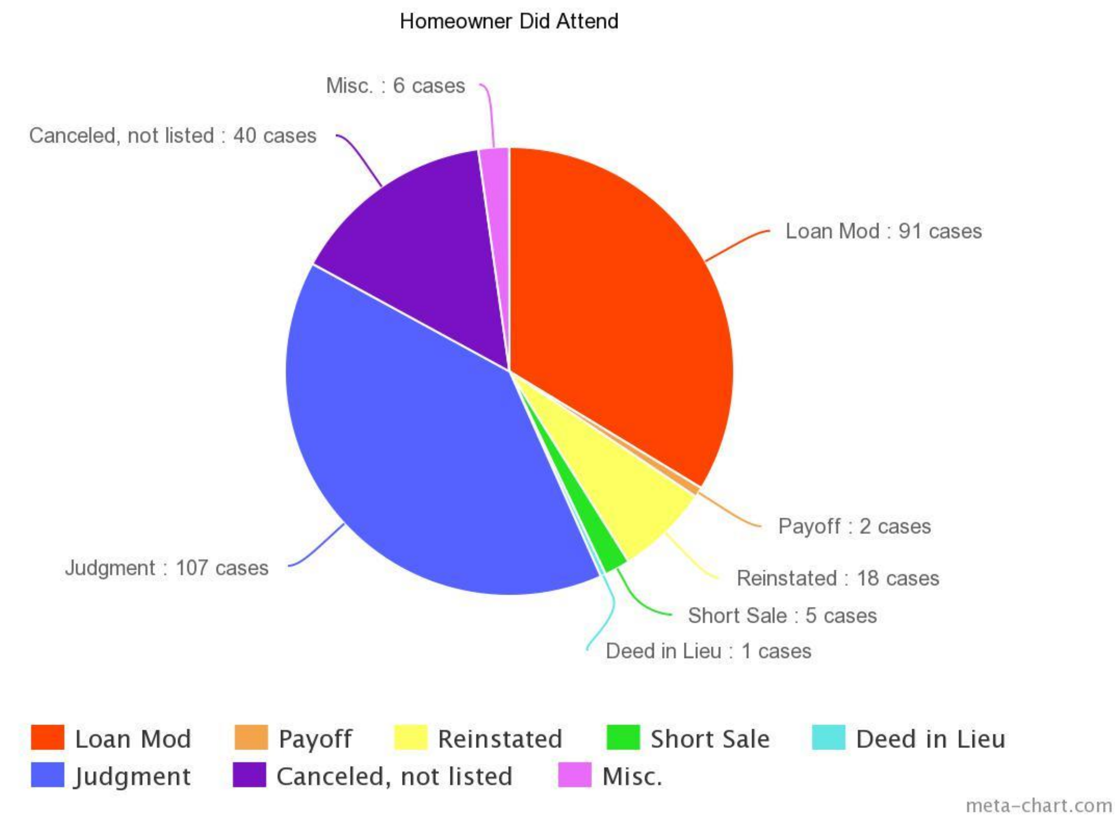
d) data indicated what the ultimate outcome of the case was.

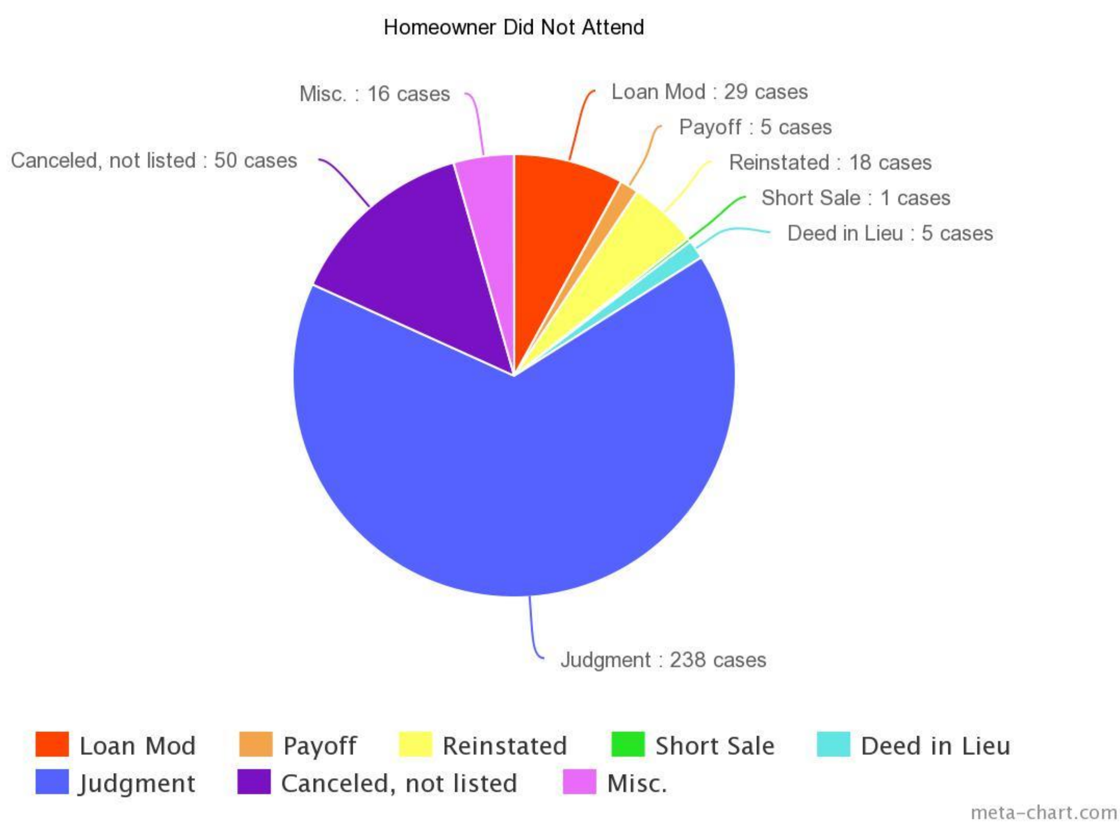
This constituted 632 total cases—270 in which the homeowner attended and 362 in which they did not.

As the following charts make clear, borrowers who attended their mandatory settlement conferences in 2012 fared much better than their peers who did not attend. Specifically, they avoided judgments of foreclosure, remained in their home, and became able to afford their mortgages at significantly higher rates.

Significant Findings:

- 65.7% of borrowers who did not attend mandatory settlement conferences received a judgment of foreclosure, as compared to 39.6% of borrowers who did attend.
- Borrowers whose case outcome allowed them to remain in their home include those whose case ended in a loan mod, payoff, reinstatement, or cancelation. These percentages do not include miscellaneous outcomes. 29.5% of borrowers who did not attend mandatory settlement conferences received one of these outcomes, as compared to 57.2% of borrowers who did.
- Borrowers whose case outcome allowed them to resume monthly payments (loan mod, payoff, or reinstatement) are considered to have become able to afford their mortgages. 14.4% of borrowers who did not attend mandatory settlement conferences received one of these outcomes, as compared to 41.1% of borrowers who did—a rate nearly three times higher.


Homeowner Did Attend
Misc. : 6 cases
Canceled, not listed : 40 cases
Loan Mod : 91 cases
Payoff : 2 cases
Reinstated : 18 cases
Short Sale : 5 cases
Deed in Lieu : 1 cases
Judgment : 107 cases
Loan Mod
Payoff
Reinstated
Short Sale
Deed in Lieu
Judgment
Canceled, not listed
Misc.
meta-chart.com


Homeowner Did Not Attend
Misc. : 16 cases
Loan Mod : 29 cases
Payoff : 5 cases
Reinstated : 18 cases
Short Sale : 1 cases
Deed in Lieu : 5 cases
Canceled, not listed : 50 cases
Judgment : 238 cases
Loan Mod
Payoff
Reinstated
Short Sale
Deed in Lieu
Judgment
Canceled, not listed
Misc.
meta-chart.com

From Default to Conference: Average Lengths of Initial Foreclosure Stages

Out of 1672 total foreclosures filed in Erie County in 2012, the following data considers only those cases in which all of the following information was available as of the writing of this report: dates of initial default, filing of foreclosure action, filing of RJI, first mandatory settlement conference, last mandatory settlement conference, and the ultimate outcome of the case. This constituted 504 total cases. The averages given below have been rounded to the nearest whole number.

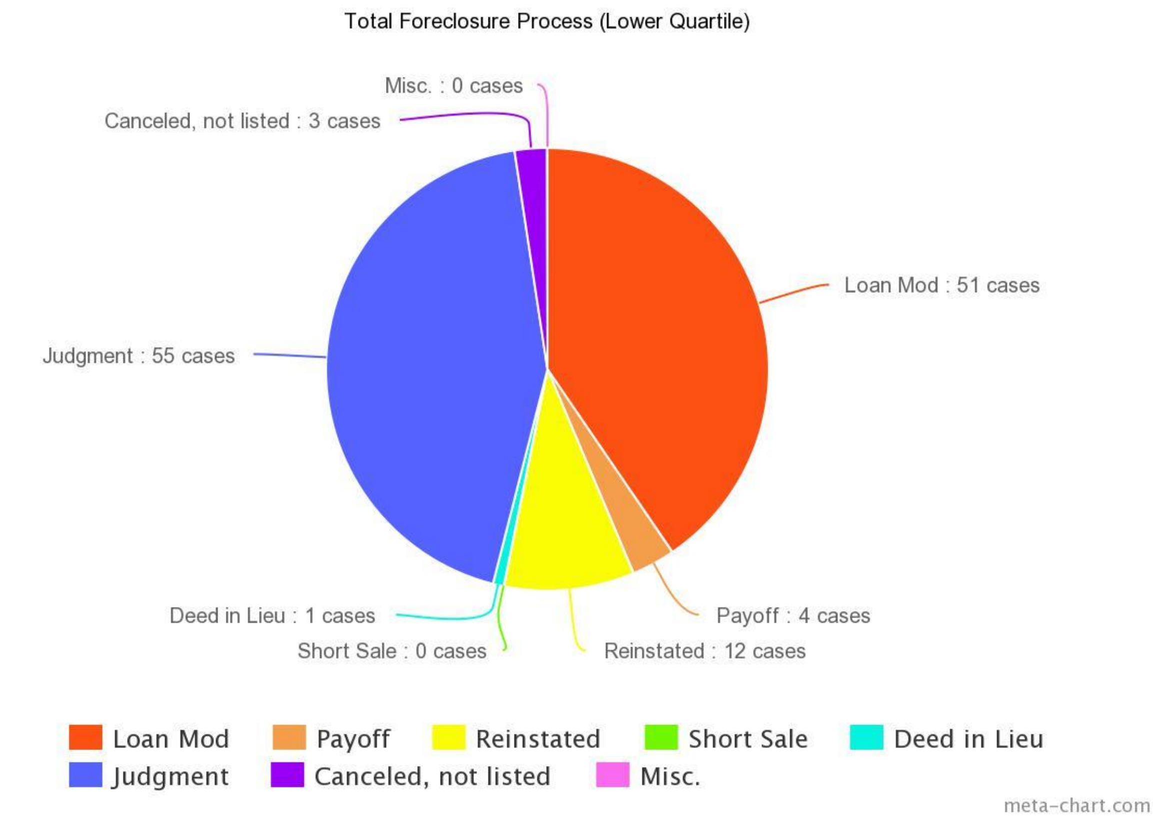
Stage of Foreclosure Process	Average # of days
Default to filing of foreclosure action	*460*
Filing of foreclosure action to filing of RJI	*121*
Filing of RJI to first mandatory settlement conference	*31*
First MSC to last MSC (when multiple conferences occurred)[1]	*147*
Total default-conference (single conferences)	*612*
Total default-last conference (multiple conferences)	*759*

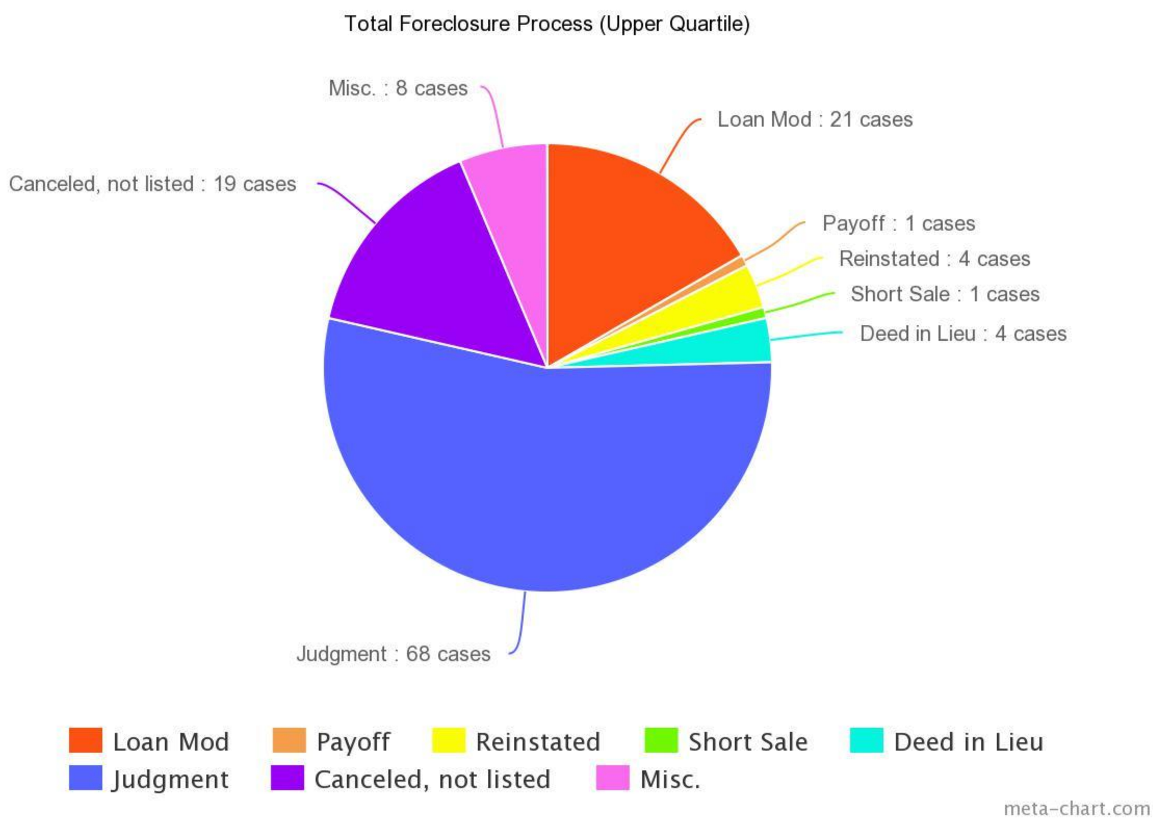
The two longest stages of the process are also the two during which a borrower going through a foreclosure has relatively little control over the process. Once the homeowner is considered officially "in default," lenders will no longer accept partial payments—borrowers must either pay the entire sum (which most are unable to do), try to apply on their own for assistance from their bank (which is incredibly difficult) or simply wait for the lender to initiate a foreclosure action. As interest and late fees continue to accrue during this period of waiting, the length of which is out of the borrower's control, it becomes more difficult for the borrower to find a solution once the foreclosure process eventually begins. Furthermore, during the settlement conference phase, lenders often fail to look over paperwork to determine whether or not a homeowner is eligible for a loan modification program before the documents become "stale," or outdated. The borrower is then required to submit new documents, often causing repeated delays. The following analysis will more closely examine the relationship between the length of a foreclosure process and that foreclosure's ultimate outcome, using the same 504 cases as the calculations above.

[1] In 312 of the 504 cases used to determine these averages, only one settlement conference occurred, so the average number of days between the first and last conferences was zero. This number does not factor in a zero for each of these cases.

Case Outcomes for Short and Long Initial Foreclosures (Default-Conference):

- The more efficiently a case moves through the initial stages of a foreclosure, the better their chances of avoiding foreclosure. 43.6% of borrowers with default to last conference time spans in the lower quartile ("short foreclosures") received a judgment of foreclosure, as compared to 53.9% of borrowers with default to last conference time spans in the upper quartile ("long foreclosures").
- Even more strikingly, 55.6% of borrowers with short foreclosures received a case outcome that allowed them to remain in their home, as compared to 38.1% with long foreclosures. This includes those whose case ended in a loan mod, payoff, reinstatement, or cancelation. These percentages do not include miscellaneous outcomes.
- Borrowers whose case outcome allowed them to resume monthly payments (loan mod, payoff, or reinstatement) are considered to have become able to afford their mortgages. Most notably, 53.2% of borrowers with short foreclosures received one of these case outcomes, as compared to 22.0% with long foreclosures—a rate more than twice as high.
- Overall, it is clear that homeowners with shorter initial foreclosure stages tend to receive better case outcomes than homeowners with longer initial foreclosure stages. It is important to note that most 2012 foreclosure cases that were not included in this analysis were left out because these cases are still in progress. That implies that the actual average length of Erie County foreclosures far exceeds the numbers calculated above.


Total Foreclosure Process (Lower Quartile)
Misc. : 0 cases
Canceled, not listed : 3 cases
Loan Mod : 51 cases
Judgment : 55 cases
Deed in Lieu : 1 cases
Payoff : 4 cases
Short Sale : 0 cases
Reinstated : 12 cases
Loan Mod
Payoff
Reinstated
Short Sale
Deed in Lieu
Judgment
Canceled, not listed
Misc.
meta-chart.com


Total Foreclosure Process (Upper Quartile)
Misc. : 8 cases
Loan Mod : 21 cases
Canceled, not listed : 19 cases
Payoff : 1 cases
Reinstated : 4 cases
Short Sale : 1 cases
Deed in Lieu : 4 cases
Judgment : 68 cases
Loan Mod
Payoff
Reinstated
Short Sale
Deed in Lieu
Judgment
Canceled, not listed
Misc.
meta-chart.com

Beyond the Homeowner:

Although a foreclosure clearly impacts the homeowner most, the community in which the home is located is also affected. Due to poor communication between the lender and the borrower, as well as possible confusion introduced by collection calls, it is not uncommon for homeowners to be uncertain about their rights and obligations in the event of a foreclosure. Frequently, this leads to them vacating their home far before they are legally obligated to do so. Not only does the homeowner still have the right to live in the home, they also have the responsibility to maintain it until they lose title. Misinformation or uncertainty about these expectations has led to so-called “zombie foreclosures”—abandoned properties that decrease neighborhood property values and waste taxpayer dollars. In the event that the bank abandons the foreclosure, the homeowner may be called to appear in housing court because they are still liable for any code violations that have occurred. Furthermore, when homes are left vacant for long periods of time, decay and vandalism will often decrease the amount that the lender will be able to recoup on their investment. For this reason, it is in the best interests of the homeowner, the community, and the lender if borrowers are provided legal representation who can keep them fully aware of their rights and responsibilities at every stage of the foreclosure process.

Recommendations:

- Create a more specific definition of what it means for both parties to negotiate “in good faith” in mandatory settlement conferences, as CPLR §3408 requires. Furthermore, empower courts to take more effective legal action against parties who fail to comply.
- Require plaintiffs and collection agencies to make explicitly clear in communications with the homeowner that they have the right to remain in their home and the responsibility to maintain it until the plaintiff has obtained a judgment of foreclosure and subsequently sold the home.
- Pass the Clarifying Homeowner’s Rights in RPAP L Homeowner Notice bill, with the goal of informing homeowner’s of their rights and keep homes from becoming vacant.
- Pass the Vacant Homes Act of 2015, with the goal of improving Erie County neighborhoods by decreasing the prevalence of zombie foreclosures.
- Increase efforts to educate homeowners about their rights and responsibilities in the event of a foreclosure, and make them aware of the statistically significant benefits of responding promptly to the plaintiff’s requests for information and attending their mandatory settlement conferences.
- Conduct further research on common reasons for overly lengthy foreclosures, in order to better target future efforts to help the foreclosure process become increasingly efficient and ensure that as many homeowners as possible are able to remain in their homes and afford their mortgages.

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