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Get **FREE** No-Obligation Help Now:

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Bankruptcy's Automatic Stay Only Temporarily Stops a Pending Foreclosure

Homeowners facing foreclosure often turn to bankruptcy to take advantage of a statutory protection known as the automatic stay. The stay acts as an injunction, which stops attempts by the mortgagor (and other creditors) to proceed with foreclosure, collect debts or enforce liens during the bankruptcy case. In some cases, the automatic stay isn't available to a mortgagee, or the lender successfully asks the court to lift the automatic stay.



The Foreclosure Process

When you buy a home, as a part of the mortgage contract you agree that if you default on the loan, the lender can sell the home at auction and apply the proceeds to your loan balance. But, before the house goes to auction, the lender must follow the procedures found in federal and state law in a process called *foreclosure*.

After the expiration of federal and state waiting periods required to allow homeowners time to cure the default by making the past due payment, getting a loan modification or one of the other alternatives to foreclosure available through the bank's loss mitigation department, the lender can proceed with foreclosure by complying with state foreclosure laws.

A lender can use one of two types of foreclosure, depending on state law:

- **Judicial foreclosure** – All states allow the lender to use a “judicial” foreclosure process that begins when the bank files a lawsuit in court. The homeowner can respond to and defend the suit. The matter will proceed through the litigation process, and, if the bank wins, the court will order the home sold at auction.
- **Nonjudicial foreclosure** – Some states allow a lender to use a streamlined “nonjudicial” foreclosure procedure that consists of following steps outlined in state law. In many cases, the bank will be required to give the homeowner time to bring the account current. Additionally, the lender must notify the owner of the sale date, and, in some cases, publish the sale date by advertising it in a newspaper or posting it in a public place. After completing the steps, the lender is free to sell the home at auction without first receiving approval from the court.

— See Appendix 1 & 2 for more detailed information. —



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Filing for Bankruptcy Will Stop Either Type of Foreclosure Process as Long as the Foreclosure Sale Hasn't Occurred

When the Automatic Stay Doesn't Apply

Filing for Chapter 7 or 13 bankruptcy automatically triggers the stay. No additional action is required for the automatic stay to go into effect.

However, two exceptions to the automatic stay exist to prevent debtors from interfering with a creditor's right to foreclose by filing and dismissing successive bankruptcy cases. Here are the rules.



- One previous bankruptcy case dismissed within the past year. The automatic stay goes into effect for only 30 days after you file bankruptcy.
- Two or more previous bankruptcy cases dismissed within the past year. The automatic stay doesn't go into effect at all.

Mortgagees who fall within the exceptions to the automatic stay can ask the bankruptcy court to impose the automatic stay and stop the foreclosure. To prevail, the mortgagee would need to prove by clear and convincing evidence (a relatively high standard) that the previous bankruptcy cases weren't filed in bad faith.

The exceptions to the automatic stay for repeat or serial filers won't apply if you initially filed under Chapter 7 bankruptcy but then moved to a Chapter 13 because the means test showed that your income was too high to qualify for Chapter 7.

How the Automatic Stay Can Help with Foreclosure

The automatic stay provides additional time to try to deal with a pending foreclosure. The options for dealing with a pending foreclosure depend in large part on whether you file for bankruptcy under Chapter 7 or 13.



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Chapter 7 Bankruptcy

Chapter 7 bankruptcy doesn't have a mechanism that will help you catch up on payments and keep your house. So if you're behind, and want to stay in your home, this tactic will only buy you more time to implement one of the alternatives to foreclosure and is generally used at the 11th hour to stop foreclosure when all other attempts have failed.



Chapter 13 Bankruptcy

In Chapter 13 bankruptcy, the automatic stay can give you time to catch up on any mortgage arrears and stay in the home. You'll repay debts (some in part and some in full) over a period of three to five years—including delinquent payments on a home mortgage.

For the Chapter 13 restructuring process to be effective, you must have enough income to keep up with current mortgage installments as well as make payments on arrearages that accrued before you filed bankruptcy. Once the court approves a Chapter 13 repayment plan that provides for repayment of mortgage arrears, the lender cannot foreclose. But if you fail to keep up on mortgage or arrearage payments after your plan is approved, the lender will be able to move forward with the foreclosure.

Lifting the Automatic Stay

A lender can file a motion asking the bankruptcy court to lift the automatic stay (terminate it) and allow it to proceed with foreclosure. You are entitled to file a response, and if you oppose the motion, the bankruptcy court will hold a hearing before it rules on whether or not to lift the stay. If the court lifts the stay, the lender can proceed with foreclosure efforts except as otherwise ordered by the bankruptcy court.



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APPENDIX 1: Judicial Foreclosures

A judicial foreclosure typically takes several months or more, giving you time to look for another place to live, and to save some money for the future. Another advantage is that you can raise in court any legal defenses you may have to the foreclosure—without having to file your own lawsuit.

States Using Judicial Foreclosure:

With some exceptions, foreclosures go through court in the following states: Connecticut, Delaware, District of Columbia (sometimes), Florida, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Nebraska, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma (if the homeowner requests it), Pennsylvania, South Carolina, South Dakota (if the homeowner requests it), Vermont, and Wisconsin.

Here's How a Typical Judicial Foreclosure Might Proceed

- **You get behind in your mortgage payments.** Under federal law, in most cases, the bank must wait until you are more than 120 days delinquent in payments before starting a foreclosure.
- **The bank sends a letter notifying you of its intent to begin foreclosure.** In many cases, as required by the loan contract, the bank sends a letter (a "breach" letter) informing you that a foreclosure will begin unless you make up the missed payments, plus costs and interest. The letter may be sent during the 120-day pre-foreclosure period.
- **The bank files a lawsuit.** If you don't make up the missed payments, the bank will then go to court and file a lawsuit asking the court for the right to sell the home and apply the proceeds from the sale to the debt. If state law allows for it, the complaint might also ask the court to grant a deficiency judgment if selling the property won't fully pay off the debt. If granted, you remain responsible for the outstanding balance left on the loan after the foreclosure sale. Some states don't allow deficiency judgments under certain circumstances.
- **The bank gives you notice of the lawsuit.** The bank does this by delivering a summons and complaint to you (called "serving" you with a summons and complaint in legalese).
- **You have a chance to respond.** The summons and complaint give you a period of time within which you must respond if you choose to contest the lawsuit—usually between 20 and 30 days. Whether or not you file a response is up to you. If you don't respond, the bank will ask the court for a default judgment and will automatically win the suit. The court then issues a default judgment authorizing the bank to sell your home.

If you do respond to the suit, you'll have the opportunity to tell a judge just why you think you have a legal right to keep your house and that foreclosure is not warranted. The better your defenses, the longer the process will drag out in court. Even if you win, though, it might be a temporary victory if the bank can fix whatever problem caused it to lose this time.



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- **The court enters a judgment in favor of the bank and a foreclosure sale is held.** If the court decides in favor of the bank, it will enter a judgment ordering the sale of your home to satisfy the debt. At the sale the bank will likely make a credit bid. (A "credit bid" means that the bank bids the debt that the borrower owes.) If no one makes a higher bid on your home at the foreclosure sale, the bank wins ownership of the property.
- **Right to redeem.** A few states give you some time after the foreclosure auction to redeem the property (to recover ownership of the property by paying off the successful bidder or paying off the entire mortgage debt).
- **You leave voluntarily or get evicted.** If you don't leave the property when your legal right to remain in the home ends (which depends on state law), you will receive an official, written notice to leave the property.

Getting Help

If you're facing a foreclosure and want to avoid a potential deficiency judgment:

- Contact us to learn more about loan modification and other foreclosure alternatives.
Home Loan Advocates offers a FREE, NO OBLIGATION consultation.
- You can also contact a foreclosure attorney.



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APPENDIX 2: Nonjudicial Foreclosures

In a nonjudicial foreclosure, the lender—or subsequent loan owner—doesn't have to go to court in order to foreclose on your home. This means that the foreclosure typically proceeds more quickly than a judicial foreclosure, which goes through court.

Nonjudicial Foreclosures: No Court Involvement

If you're facing a nonjudicial foreclosure, you most likely signed two core documents when you bought or refinanced your home: a promissory note and a deed of trust (or similar document).

Deeds of trust: Creating a security interest in the home

The deed of trust turns the promissory note into a debt secured by a lien (legal claim) on your home, and authorizes the lender to foreclose on the property if you default by not making the payments or violating the loan contract in some other way. The deed of trust also typically allows the foreclosure to proceed outside of court, under state law.

States where nonjudicial foreclosures are the norm

Foreclosures are usually nonjudicial in the following states: Alabama, Alaska, Arizona, Arkansas, California, Colorado, District of Columbia (sometimes), Georgia, Idaho, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico (sometimes), North Carolina, Oklahoma (unless the homeowner requests a judicial foreclosure), Oregon, Rhode Island, South Dakota (unless the homeowner requests a judicial foreclosure), Tennessee, Texas, Utah, Virginia, Washington, West Virginia, and Wyoming.

The Nonjudicial Foreclosure Process: Different from State to State

State law sets out the specifics of a nonjudicial foreclosure procedure, including how much notice you get, how the property will be sold (typically at a public auction), and what rights, if any, you have to reinstate the loan before the foreclosure date or recover title to the property (redeem the home) after it's sold.

- **You get behind in your payments.** Under federal law, in most cases, the servicer must wait until you are more than 120 days delinquent in payments before starting a foreclosure.
- **You'll often get a letter notifying you of the lender's intent to begin foreclosure.** In many cases, as required by the loan contract, the lender sends a letter—a "breach" letter—informing you that a foreclosure will begin unless you make up the missed payments, plus costs and interest. The letter may be sent during the 120-day pre-foreclosure period.



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- **Nonjudicial Foreclosure Notices**

Depending on what state law requires, you may receive one of the following.

- **A notice of default** that gives you time to reinstate your loan by making up all the back payments, followed by a notice of sale (if you haven't reinstated your mortgage by the deadline)
 - **A combined notice of default and sale** stating that the property will be sold on a certain date unless you make up the missed payments
 - **Only one notice**—a notice of sale announcing that the property will be sold on a certain date unless you pay off the loan, or
 - **Notice only by publication and posting** — A notice may be posted in a local newspaper announcing the foreclosure date or the house to be foreclosed on.
- **Right to reinstate.** State law often provides a right to reinstate the loan by getting caught up on what you owe, plus fees and costs by a certain deadline prior to the sale. The deed of trust might also provide a certain amount of time to reinstate before a foreclosure sale. With some exceptions, however, once the sale occurs, your house is gone.
 - **The auction is held.** If you don't reinstate the loan, the home will be sold at auction. As with judicial foreclosures, the property often goes to the lender (or subsequent owner of the loan) when no one else bids on the property. The property is then known as "Real Estate Owned" (REO).
 - **Right to redeem.** A few states give you some time after the foreclosure auction to redeem the property (to recover ownership of the property by paying off the successful bidder or paying off the full loan debt).
 - **You leave voluntarily or get evicted.** If you don't leave the property when your legal right to remain in the home ends, which depends on state law, you'll receive an official, written notice to leave the property.
 - **Deficiency judgment.** The lender might—if allowed by state law—later file a suit against you to get a deficiency judgment if selling the property didn't fully pay off the debt. If granted, you remain responsible for the outstanding balance left on the loan after the foreclosure sale. Some states don't allow deficiency judgments under certain circumstances.

Getting Help

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