

# STALLED SETTLEMENT CONFERENCES:

## Banks Frustrate New York's Foreclosure Settlement Conferences

A REPORT ON RESIDENTIAL FORECLOSURE SETTLEMENT CONFERENCES IN NEW YORK CITY

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## Introduction

New York has coped with the foreclosure crisis by implementing a pioneering settlement conference process administered by the court system, designed to promote negotiation of affordable home-saving solutions. These conferences present a remarkable opportunity for lenders and borrowers to meet face-to-face in a court supervised settlement conference at which creative solutions can be forged, and have allowed thousands of New Yorkers to avert foreclosure. But banks routinely flout the law by appearing without required information or settlement authority, causing delays that cost borrowers money and can make home-saving settlements impossible. The process can be far more effective, and less prone to delay, if the courts rigorously enforce the requirements of the settlement conference law, as this report recommends.

Notwithstanding media reports about rebounding real estate markets, New York remains mired in a foreclosure crisis. In fact, in 2013 foreclosure cases represented approximately one third of the judiciary's civil case load.<sup>1</sup> New York State's courts experienced a significant increase in foreclosure filings during 2013, with the pending inventory increasing more than 16% in 2013, with over 84,000 foreclosure cases pending as of the last report issued by the judiciary, and with 44,035 projected new filings for calendar year 2013 (representing an increase of nearly 20,000 new filings over 2012).<sup>2</sup>

Non-profit legal services attorneys representing low-income New York City homeowners in New York State Supreme Courts<sup>3</sup> recently concluded a survey to monitor compliance with New York State's law requiring that lenders and the law firms representing them appear at foreclosure settlement conferences with full authority to settle and resolve such cases.<sup>4</sup> This paper reports on the observation of 252 residential settlement conferences held in Brooklyn, the Bronx, Queens, Staten Island and Manhattan during September, October and November 2013. The survey confirmed what homeowners' advocates in the settlement conference have long-known:

- The banks routinely violate the settlement conference law requiring them to appear at conferences with full authority to negotiate settlements and with required information needed for meaningful settlement conferences—***they violated the law in 80% of the observed settlement conferences.***
- The banks' systemic violation of clear law frustrates New York's policy to foster the early settlement of foreclosure actions as a means of preserving homeownership.
- The delay caused when the banks violate the settlement conference law harms homeowners, because interest and fees add up with each month that banks delay the process.
- Courts should rigorously enforce the settlement conference law and deter banks from violating it by penalizing parties who appear in court without the authority and information needed to negotiate in good faith.

<sup>1</sup> 2013 Report of the Chief Administrator of the Courts Pursuant to Chapter 507 of The Laws of 2009, State of New York Unified Court System, 1 (available at <https://www.nycourts.gov/publications/pdfs/2013ForeclosureReport.pdf>)

<sup>2</sup> Id. at 2.

<sup>3</sup> Attorneys from the following legal services providers in New York City participated in this survey: Bedford-Stuyvesant Community Legal Services; CAMBA; City Bar Justice Center; Grow Brooklyn; JASA/Legal Services for the Elderly in Queens; Legal Aid Society; Legal Services NYC-Bronx; MFY Legal Services, Inc.; NYLAG; South Brooklyn Legal Services; St. Vincent's De Paul Legal Program Inc., Consumer Justice for the Elderly Litigation Clinic, St John's University School of Law; Staten Island Legal Services; Queens Legal Services and Queens Bar Association Volunteer Lawyers Project.

<sup>4</sup> New York Civil Practice Law and Rules 3408(c).

Banks routinely flout the law by appearing without required information or settlement authority, causing delays that cost borrowers money and can make home-saving settlements impossible.

Indeed, while the mortgage industry complains regularly about the length of New York's judicial foreclosure process, what those complaints never mention is how the banks and their lawyers themselves are largely responsible for prolonging the process, as the violation of the basic requirements of the settlement conference law is what causes settlement conferences to drag on, in many cases, for a year or more.

## Background

In response to a foreclosure crisis of proportions not seen since the Great Depression, New York State has enacted a series of measures designed to blunt the impact of the crisis on both the individual families and the neighboring communities affected when homes are needlessly lost to foreclosure. Among those measures is New York's pioneering court-administered settlement conference program—subsequently emulated by other states—which provides homeowners at risk of foreclosure the opportunity to negotiate face-to-face with their lender in order to negotiate affordable loan modifications or other solutions that benefit both lenders and borrowers. Lenders benefit from such loan modification settlements as defaulted loans become performing assets again; homeowners benefit because affordable home-saving solutions are achieved; and communities as a whole benefit because the destabilizing effects of foreclosures—blight, and declining tax revenues and property values—are avoided.

Since their inception in 2009, foreclosure settlement conferences have allowed thousands of New York homeowners to achieve settlements and loan modifications, thereby averting foreclosures and sparing New York's communities the adverse effects of foreclosures. But settlement conferences could be even more effective, less prone to delays, and less burdensome to the court system if the banks, their servicing representatives and the law firms representing them were compelled to comply with the very clear requirements of the settlement conference law and if the courts enforced those requirements more vigorously. Those requirements, enacted by the legislature in 2008 and codified in the New York Civil Practice Law and Rules, are unequivocal:

***“At any conference held pursuant to this section, 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.”*** NY CPLR 3408(c). The settlement conference law, furthermore, imposes an affirmative duty of good faith negotiation at the settlement conferences:

***“Both the plaintiff and defendant shall negotiate in good faith to reach a mutually agreeable resolution, including a loan modification, if possible.”*** NY CPLR 3408 (f).

The Legislature's clearly-expressed policy to foster settlement of foreclosure cases can hardly be achieved if foreclosing lenders do not appear at the conferences with authority to negotiate a settlement, and the statutorily-mandated good faith negotiations cannot take place if foreclosing plaintiffs routinely appear at conferences through counsel lacking any knowledge about the case or authority to negotiate.

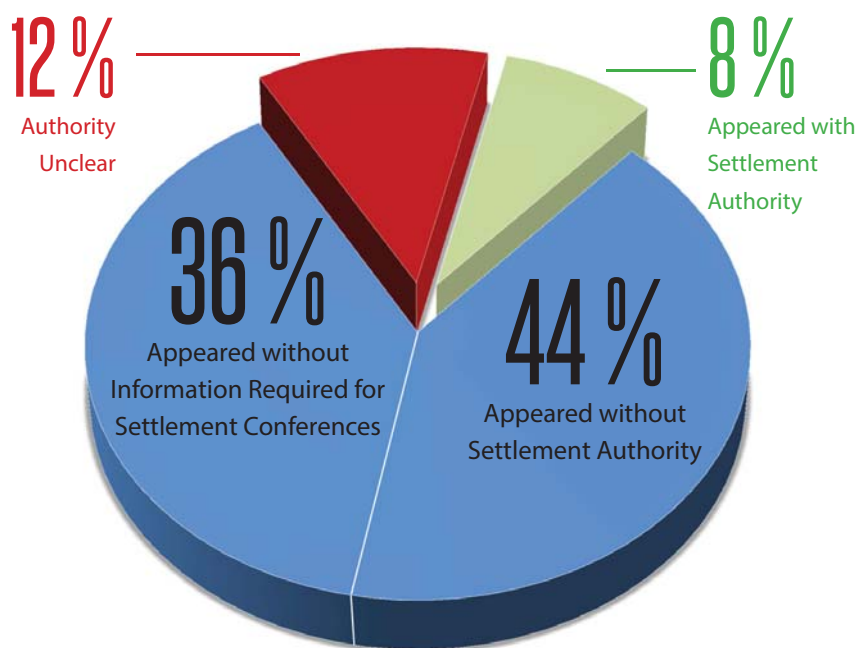
While the mortgage industry complains regularly about the length of New York's judicial foreclosure process, what those complaints never mention is how the banks and their lawyers themselves are largely responsible for prolonging the process.

In 80% of the cases observed, foreclosing plaintiffs appeared at settlement conferences with either counsel or a plaintiff's representative lacking authority to dispose of the case or without crucial information required for meaningful settlement negotiations.

## Findings

Advocates representing distressed homeowners in New York's foreclosure settlement conferences have long known that in the vast majority of cases plaintiffs and their counsel violate the settlement conference law and appear at settlement conferences without the legally-required settlement authority and/or information.

### Plaintiff's Lack of Authority or Information at Settlement Conferences



252 Conferences were observed between September and November 2013.

In the recently-concluded survey, city-wide, plaintiffs appeared with the required settlement conference authority in only 8% of the conferences monitored between September and November 2013; in 80% of the cases observed, foreclosing plaintiffs appeared at settlement conferences with either counsel or a plaintiff's representative lacking authority to dispose of the case or without crucial information required for meaningful settlement negotiations.<sup>5</sup>

Banks and their counsel routinely frustrate the settlement conference process, and impede the negotiation of settlements at the conferences, by appearing at the conferences unprepared and without basic information needed to negotiate or even to determine if a loan modification is feasible. This causes delays, as courts typically adjourn conferences with instructions to appear with authority or the required information at a rescheduled date, often several months later.

<sup>5</sup> In 44% of the observed conferences plaintiffs' counsel (who often appear through per diem attorneys who are not even employees of the law firms on whose behalf they appear) or representative admitted they lacked settlement authority, and in 36% of the conferences, they appeared without basic information required for settlement conference negotiations, making the conduct of a settlement conference impossible.

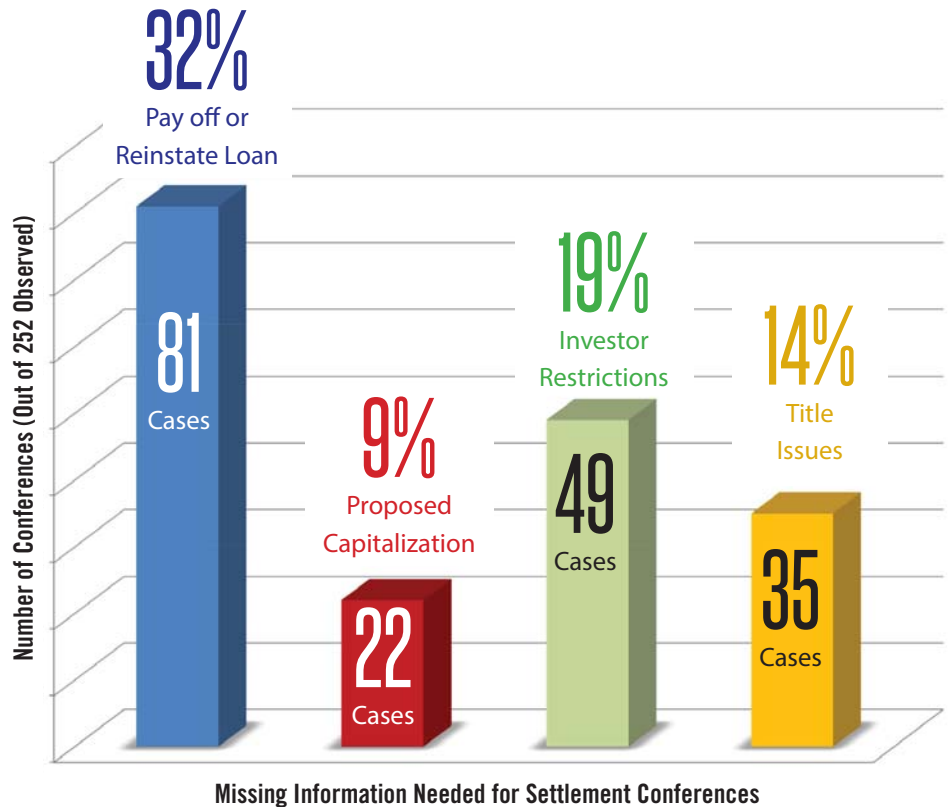
The settlement conference law specifically obligates plaintiffs to bring to the conference, among other things, “an itemization of the amounts needed to cure and pay off the loan...” (NY CPLR 3408 (e)), yet in over 32% of the observed settlement conferences plaintiffs appeared at the conference without such basic pay-off or reinstatement information. Similarly, plaintiffs appeared at the observed conferences without other required information in surprisingly high numbers of cases.

For example, plaintiffs appeared without crucial information about asserted “investor restrictions” impacting the availability of loss mitigation options (reported missing in more than 19% of the observed conferences); title issues required to be cleared before a loan modification is possible (reported missing in nearly 14% of the observed conferences); and proposed capitalization of arrears (reported missing in nearly 9% of the observed conferences).<sup>6</sup>

## Settlement Conferences

The settlement conference process still represents the best opportunity available to New York homeowners to save their homes from foreclosure, and the courts have gained experience and developed expertise about loan modification options, including modifications under the federal Home Affordable Modification Program (“HAMP”). But the courts should not tolerate rampant violation of the settlement conference law and should enforce the law as it is written vigorously. They should penalize foreclosing plaintiffs when their delay, failure to negotiate in good faith, or failure to appear at conferences with full settlement authority or required information is clear, with such remedies as tolling or barring collection of interest, penalties and fees accrued as a result of delays caused by plaintiffs’ violations of the statute or staying foreclosure actions until plaintiffs comply with their obligations under the settlement conference law. Doing so, which is entirely consistent with courts’ traditional powers in foreclosure actions, would streamline the settlement conference process, make it more productive, and conserve judicial resources.

<sup>6</sup> All of this information is required for meaningful settlement conferences, and plaintiffs often appeared at the observed conferences lacking more than one piece of information needed for the conduct of a meaningful settlement conference. Additionally, the observations concerning missing information do not encompass all conferences in which plaintiffs appeared without required information because observers who reported on plaintiff’s admitted lack of settlement authority did not necessarily also report on the absence of required information once plaintiffs’ lack of settlement authority was determined.



In the 252 settlement conferences observed between September and November 2013, plaintiffs often appeared lacking more than one type of necessary information.

## Recommendations

The most appropriate form of relief needed to directly redress the tangible harm occasioned by failure to appear with settlement authority is tolling of interest, costs and fees, as it is those charges that accrue as a result of the offending violations which needlessly delay resolution. Moreover, as arrears grow, home-saving solutions like loan modifications become more difficult to achieve. Plaintiffs, furthermore, should not be able to proceed to a judgment of foreclosure if they have failed to comply with the requirements of the settlement conference law. When plaintiffs violate the settlement conference law by appearing without required settlement authority or information, or by failing to negotiate in good faith, the courts should consistently employ the authority they already possess in foreclosure actions by:

- tolling interest, costs and fees when plaintiffs violate the settlement conference law; and
- staying foreclosure actions until plaintiffs comply with their obligations under the settlement conference law.

Doing so will not only redress the wrong inflicted on homeowners attending the conferences in a good faith effort to negotiate a settlement when plaintiffs and their counsel violate both the spirit and letter of the settlement conference law, but will also incentivize the banks and mortgage servicing companies to take the settlement conference process seriously, and to attend the conferences with the kind of settlement authority and required information expected of anyone ordered to attend a court-sponsored settlement conference.

If the courts insist on compliance with the existing law, and impose consequences for its violation, foreclosing plaintiffs will be far less likely to brazenly violate the requirements of the settlement conference law, the settlement conference process will be completed far more quickly, and the courts will expend far fewer resources in administering settlement conferences.

## Methodology and Acknowledgements

Advocates representing homeowners at mandatory foreclosure settlement conferences tracked lenders' compliance with the requirements of the settlement conference law at 252 conferences held during September, October and November 2013 by completing a Settlement Conference Authority Checklist on which they recorded the appearances on behalf of the parties, whether plaintiffs' representative had authority to dispose of the case at the conference, and whether plaintiff's representatives appeared with such required information as the amount needed to pay off or reinstate the loan, proposed capitalization (for loans in trial modification agreements), investor restrictions affecting availability of loan modifications or other loss mitigation options, and title issues requiring clearance prior to modifications, as well as any other issues or indicia of violation of the settlement conference law.

The most effective form of relief needed to directly redress the tangible harm occasioned by failure to appear with settlement authority is tolling of interest, costs and fees.

The following groups participated in this settlement conference monitoring project:

- **Bedford- Stuyvesant Community Legal Services**
- **Brooklyn Legal Services Corp. A**
- **City Bar Justice Center**
- **Grow Brooklyn**
- **JASA/Legal Services for the Elderly in Queens**
- **Legal Aid Society**
- **Legal Services NYC**
- **Legal Services NYC - Bronx**
- **MFY Legal Services, Inc.**
- **New York Legal Assistance Group**
- **Queens Legal Services**
- **South Brooklyn Legal Services**
- **Staten Island Legal Services**

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