

Stalling the Foreclosure Process: The Complexity Behind Bank Walkaways

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Introduction

Recent reports in the media raise concerns that banks are walking away from foreclosed houses, leaving the owners and houses in limbo.² While media reports document specific instances of presumed bank walkaways, it has proven difficult to quantify the problem because the term lacks clear definition and local data sources do not contain information specifying the cause of creditors' actions. Moreover, there are many factors that can delay or disrupt the foreclosure process, but over time these factors may be resolved, raising the possibility that the foreclosure may eventually be completed. This report takes an in-depth look at stalled foreclosure cases in Cuyahoga County in order to describe the factors involved in these delays and determine whether it is possible to recognize potential bank walkaways using public records.

It is important to learn more about foreclosure cases that remain unresolved for long periods of time because they can result in serious spillover damages if both a lender (or subsequent noteholder) and a homeowner abandon their interest in a property.³ Costs can include unpaid taxes, unpaid utility bills, nuisance abatement assessments, maintenance, and in the most severe cases, could include fire damage or demolition. These properties have the potential to be costly and dangerous to communities, and cause considerable distress to the homeowner who remains owner of record of the property. Further research is needed to define and track these properties to aid in their eventual remediation. This report is intended to inform the first step needed for prevention—to define and identify foreclosure cases that are at risk of becoming walkaways so that they can be put onto a more productive path.

The foreclosure process and stalled foreclosures

We begin with a brief description of the foreclosure process in Ohio, which will guide the analysis to follow. Residential foreclosure is a judicial process often pursued in a county court of common pleas. Figure 1 (page 4) is a simplified version of the typical path a foreclosure case takes, illustrating the key points in a complicated legal process in which the plaintiff's (the mortgage lender or subsequent note holder) action can slow down, stall, or derail the case.

After obtaining a decree of foreclosure, the plaintiff may then request an order of sale from the court, which orders the sheriff to sell the property at a public auction (in Ohio, property with a foreclosed mortgage lien is sold by the sheriff, and this process is known as sheriff's sale). In this paper, we refer to this process as foreclosure sale.

² Saulny, S. (2009, March 30). Banks starting to walk away on foreclosures. *The New York Times*, p. A20.

Spivak, C. (2009, July 11). Lenders abandoning foreclosed properties: 'Walkaway' properties quickly deteriorate, dragging down borrowers and neighborhoods. *Journal Sentinel*, WI: Milwaukee. Accessed August 2, 2010 from <http://www.jsonline.com/watchdog/watchdogreports/50548282.html>

Livingston, S. (2009, July 19). Bank 'walkaways' from foreclosed homes are a growing, troubling trend. *The Plain Dealer*, p. A1.

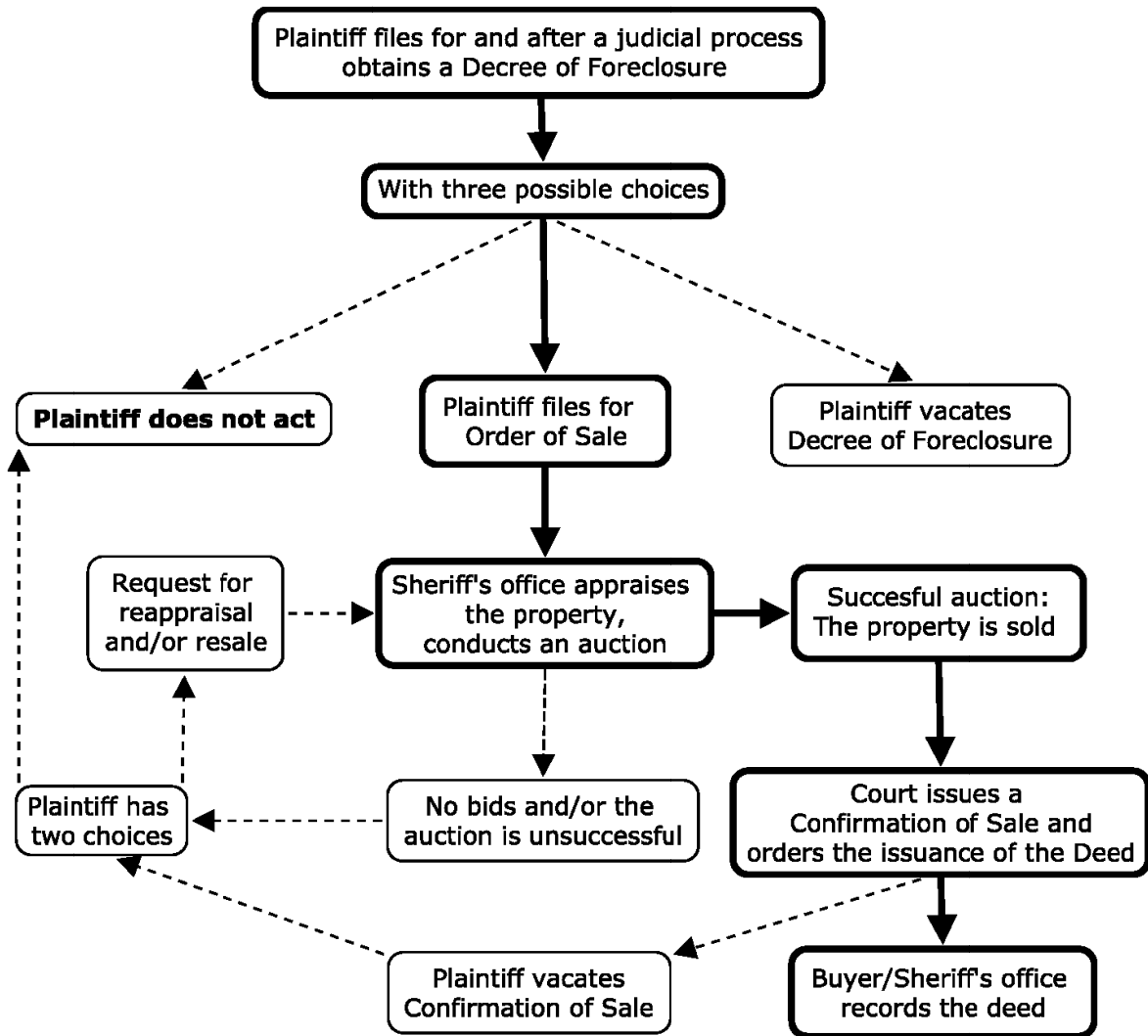
³ Apgar, W.C., Duda, M., & Gorey, R.N. (2005). The municipal costs of foreclosures: A Chicago case study. Report prepared for the Homeownership Preservation Foundation. Available online at http://www.995hope.org/content/pdf/Apgar_Duda_Study_Full_Version.pdf

Prior to foreclosure sale, the sheriff's office appraises the property's value to determine the minimum starting bid at the sale, which in Ohio is two-thirds of the property's appraised value.⁴ The property is advertised and put up for foreclosure sale. If the property gets no acceptable bids, the plaintiff may request resale or a reappraisal of the property, repeating the foreclosure sale process. If the property receives a successful bid and is sold to an interested buyer, a confirmation of sale is issued by the court. Often, because of a plaintiff's lien on the property, plaintiffs successfully bid the remaining amount owed to them (called a credit bid) at the foreclosure sale, but the plaintiff is not required to use their credit bid. Properties that are acquired by lending institutions are classified by the lender as real estate owned (REO). Following a successful foreclosure sale, the mortgage lien is satisfied and released by law. After the sheriff reports to the court that the sale was completed, the court issues a judgment confirming the sale and ordering the sheriff to issue a deed to the purchaser. It is the acceptance and recording of the deed from the sheriff that removes the previous homeowner's name from the property title. Until this point, the homeowner in foreclosure remains owner of record of the home.

The plaintiff initiates and leads the case through this sale process; without its initiation, cases stall or stop moving through this process. In addition to stalling the process, the plaintiff may also walk away from the process by dismissing the case or vacating the court's previous judgments related to the case. If actions are dismissed without prejudice, the plaintiff retains both its mortgage interest in the property and the right to refile a foreclosure case. The case does not necessarily have to be resolved through court, however; if the property owner can pay off the mortgage lien through selling the house or otherwise obtaining the necessary payment required by the lender, or if the plaintiff is willing to accept a deed in lieu of foreclosure, or title to the house, the plaintiff's interest in the property can be dissolved.

⁴ O.R.C. § 323.28(A)(2)

Figure 1: The foreclosure process in Ohio



A closer look at bank walkaways

This report investigates foreclosure cases in which complaints have been filed and a decree of foreclosure has been granted, but a successful foreclosure sale has not occurred. We refer to these cases as stalled foreclosures. Throughout the foreclosure process described above, until a foreclosure deed is recorded, the defendant (homeowner) remains the owner of record of the home. In addition, in the cases we examined, lending institutions retain the right to continue to pursue their interests in a foreclosed property at any time.

We examined public court records of a subset of foreclosure cases in the Cuyahoga County Court of Common Pleas, looking for similarities and differences between each case's progression through the foreclosure process and points of stalling. After a brief description of our methods and the study sample, we present a categorization of cases within the sample. Each

category represents the status of the case at the time it was examined, and to the extent that could be determined from the documentation available in public record.

Methods and Sample

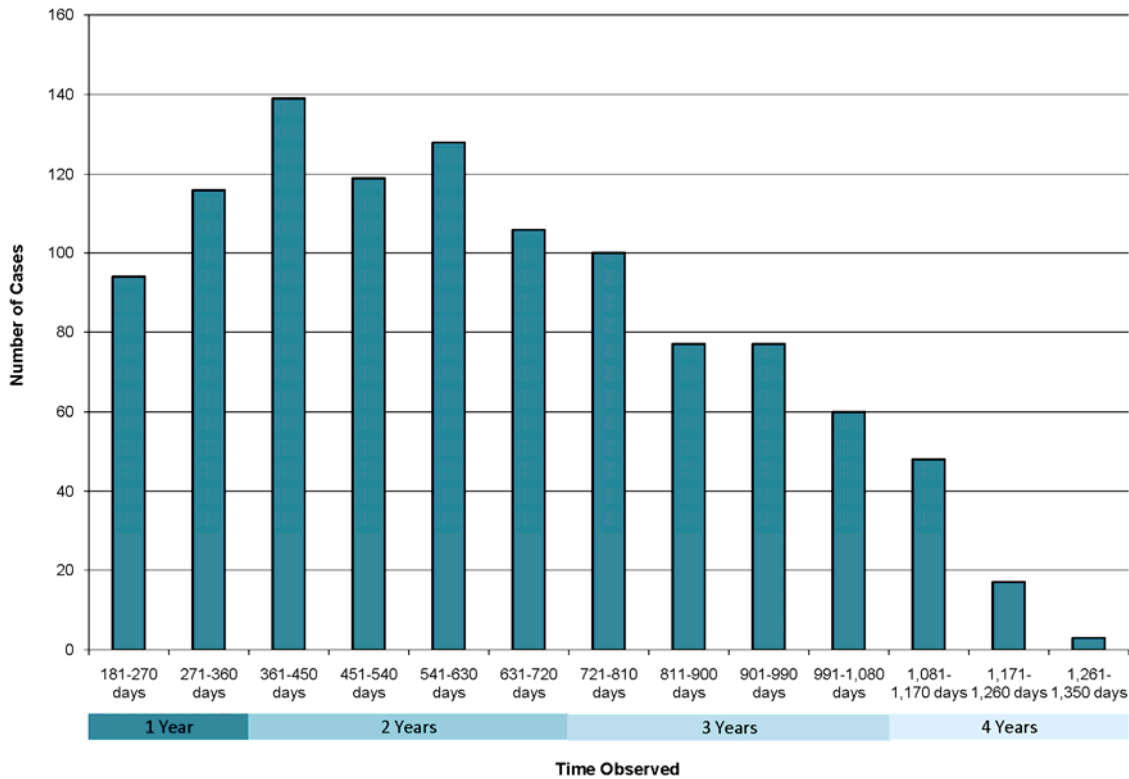
In Cuyahoga County, Ohio, 85 percent of residential mortgage foreclosure cases with decree of foreclosure result in a confirmation of sale within 180 days. For this study, we focus on the 15 percent of cases that did not sell within 180 days. We refer to these cases as *stalled foreclosures*. Specifically, we identified all residential mortgage foreclosure cases with a decree of foreclosure granted between November 1, 2005 and April 15, 2009 that had no confirmation of sale by October 15, 2009. The pool of cases was then filtered to remove those that have other reasons for not proceeding through the foreclosure process to a confirmation of sale, and those cases where the plaintiff's interest in the property has been eliminated. Cases that were removed exhibited the following characteristics: the foreclosure has been dismissed with prejudice (meaning the plaintiff cannot re-file the case); the property has a new mortgage; the property has been transferred to a new owner (shown through a deed transfer in the public record); the property has been through the Cuyahoga County Foreclosure Prevention Program; or the foreclosure case is currently in mediation. The remaining 5,211 cases, where a foreclosure decree has been sought and granted, but the property has not continued through the process to successful foreclosure sale and recorded deed, represent the universe of stalled foreclosures for further analysis.

A random sample of these stalled foreclosure cases (N= 999) were examined in detail. After examining the electronic docket entries of the sample cases, individual case files at the Cuyahoga County Court of Common Pleas were physically examined between November 2009 and March 2010 for documented evidence of the proceedings in each case.⁵

Because of the way the sample was drawn, cases we studied had been pending for varying amounts of time depending on when the decree of foreclosure was granted (between November 1, 2005 and April 15, 2009) in a particular case. Figure 2 (page 6) shows how some cases were pending long enough for us to examine their trajectory of more than a thousand days while others were pending for shorter periods of time. It is also important to note that a legal case is a process extending over time. The status of a particular case may have changed following our analysis.

⁵ Two recent law school graduates associated with the Center for Social Justice of the Case Western Reserve University School of Law and several current students, with expert legal training and guidance, thoroughly reviewed each case file.

Figure 2: Number of days observed, sample of cases



Results of case reviews

Inspection of case files revealed some details about the failure of the foreclosure cases to resolve within the usual timeframe, but there were many files where the information was thin, and the exact reasons for stalling could not be determined. Nevertheless, an effort was made to utilize the information that was available in the case records to explore the subject matter. After initial examination, all cases in the sample were classified into five different categories based on the available documentation as described below.

- Bankruptcy:** Cases were classified as *bankruptcy* if a stay (a temporary stop of the foreclosure case) was imposed on the foreclosure proceeding due to a bankruptcy case. Bankruptcy cases are filed in a federal bankruptcy court. A homeowner’s successful filing of bankruptcy will place an automatic stay on the foreclosure process until the bankruptcy case is successfully resolved or the property in foreclosure is released to the mortgagee by the trustee in bankruptcy. If a foreclosure sale is conducted by mistake while a stay is in place, the sale will be declared void.

Approximately 16 percent of our sample is made up of cases stalled due to bankruptcy. Unfortunately, information about a bankruptcy is not always readily available within a foreclosure case’s documentation. In many cases where a bankruptcy stay halted court

proceedings, the information was made available to the court by the plaintiff. For example, in one 2006 case docket entry, the plaintiff notified the court of the defendant's bankruptcy case and a stay was put on the foreclosure case. Because information about a bankruptcy may not be available in the foreclosure docket, there may be other cases within our sample that are stalled due to bankruptcy, but not reflected in public record.

- **Possible/Probable workout:** Cases were classified as *possible/probable workout* if the court documentation suggested a potential loan modification, the defendant resolving or reinstating the loan, a forbearance agreement, or a loss mitigation agreement. The availability of information about potential case resolutions varied widely from case to case. For example, one 2007 case docket entry describes a workout in detail, stating that in the settlement agreement the defendant agreed to pay a \$2,262.20 settlement sum and \$200 per month, and that this settlement agreement was approved by the judge trying the case. The case was dismissed without prejudice (meaning that the plaintiff can file the case again).

In other cases, information about a resolution was vague, and whether or not the case was actually resolved may be questionable. For example, a 2006 case docket entry uses very vague language in asking the court to dismiss the case, stating that the "Plaintiff is exploring alternative ways to resolve this matter with defendants and therefore asks the court to vacate the judgment." The case was dismissed without prejudice. Approximately 28 percent of our sample is made up of cases resolved with a possible/probable workout.

- **Plaintiff decision not to proceed:** Cases are classified as *plaintiff decision not to proceed* in the instances where the plaintiff filed a notice of intent not to proceed, or asked the court to set aside, dismiss, or vacate a judgment without a documented reason, or without a documented reason involving a resolution between parties (for example, the plaintiff moved to vacate judgment due to little or no equity in the property). These cases made up nearly 17 percent of our sample.

Among those cases that had a motion to set aside, dismiss, or vacate a judgment or order of sale, a majority of them had no documented reason for dismissing the case, or had general reasons listed. For example, one 2006 case docket entry states that the plaintiff "does not wish to proceed with execution of their judgment at this time and it would be inequitable to remain in effect."

In addition, the rationale provided by a plaintiff to the court for vacating judgment may or may not be accurate. In an interesting example of such a case, the initial motion to set aside filed by the plaintiff stated that "the parties had resolved the matter and the plaintiff wishes not to execute on its judgment at this time." The judge requested further information, and the plaintiff stated that the motion to set aside was not accurate in stating that the parties had resolved the matter, but that instead, low equity (represented by the sheriff's appraisal of the property being worth under \$20,000) was a factor in the plaintiff's motion to set aside the case.

It is important to note that some of these cases might have been resolved outside of the judicial foreclosure process. As noted earlier, if the property owner can resolve the loan default, negotiate a loan workout or payment plan, or if the plaintiff is willing to accept a deed in lieu of foreclosure, the loan can be resolved.⁶ This study was not able to uncover these types of arrangements unless they appeared in court or property records.

- **Ambiguous delay by plaintiff:** Cases are classified as *ambiguous delay by plaintiff* in the following instances: (1) the plaintiff asked the court to cancel, return, or withdraw an order of sale without a documented reason, or without a documented reason involving a resolution between parties, (2) the property was not sold for want of bidders, (3) an unreasonable⁷ amount of time has passed since any action was taken to move the case further along in the foreclosure process, or (4) a bankruptcy case preempted and stayed the foreclosure case, and the foreclosure case did not resume once the stay was lifted. Nearly 40 percent of our sample is made up of cases with these ambiguous delays.

In the first subcategory of ambiguous delay by plaintiff, plaintiffs repeatedly withdraw properties from foreclosure sale for no documented reason involving a resolution to the case. For example, one 2008 case was withdrawn from foreclosure sale four times in 2009.

In the second subcategory of ambiguous delay by plaintiff, plaintiffs bring properties to foreclosure sale, but properties are not sold for a lack of bids. In most cases, it is in a plaintiff's interest to bid on a property at foreclosure sale. However, Ohio law does not require the plaintiff to bid on the property, and plaintiffs may not want to incur the costs of owning and selling the property. For example, another 2008 case had been ordered to sell four times during the study period, and returned four times for lack of bidders.

In the third subcategory of ambiguous delay by plaintiff, a case remains in a court docket without any action for an unreasonable amount of time. For example, in one 2006 case, after the decree of foreclosure was granted on August 22nd, 2006, no documentation exists of any action taken by the plaintiff to move the property to foreclosure sale or otherwise resolve the case. As mentioned above, it is important to note that a bankruptcy stay could be preventing further action on the case, and would not necessarily be reflected in the foreclosure case information.

The fourth subcategory is similar to the third, where time passes with no action on the part of the plaintiff, but has the added element of a bankruptcy case. As indicated earlier, foreclosure proceedings are automatically stopped, at any point, by a defendant's declaration of bankruptcy. The foreclosure proceeding may resume either after a successful resolution of bankruptcy or if the lending institution (defendant in the

⁶ Cases where a plaintiff produced a deed in lieu of foreclosure or otherwise sold the property have been removed from our study where indicated in public record. If the receiver of the deed has not filed the deed, taking ownership of the property, it is not reflected in public record and would not be removed from our study.

⁷ Cases in this category are those where the last action was taken by the plaintiff over 180 days from the last date of our data gathering (March 31, 2010). In our sample, cases were inactive for 203 to 1,317 days.

foreclosure proceeding) succeeds in seeking relief from such automatic stay as per section 362(d) of the bankruptcy code. However, lending institutions must initiate action that resumes the previously halted case, and they do not always do so. This category includes cases where a bankruptcy stay was enacted, then lifted, and no further action has been taken on the case.

In all of the cases described above, the plaintiff retains a foreclosure judgment, but does not currently hold title to a property, and thus is not obligated to pay property taxes or otherwise bear the costs of maintenance or city code compliance of the foreclosed property. At the same time, the homeowner, having been notified of the foreclosure judgment terminating all his or her rights to the property, is also unlikely to be carrying out these responsibilities and has often left the property. It is important to note that a plaintiff may pursue other means of debt collection outside of the foreclosure case. Plaintiffs may sell the unpaid debt to debt collectors, sometimes noting to the court that the loan has been charged-off.

- **Unknown/Other:** Cases were classified as *unknown/other* if the case could not be classified in any of the other categories. Examples of cases in this category include one where the defendant died between the time of the decree of foreclosure and foreclosure sale, and one that was dismissed because the plaintiff did not prove that it had standing to bring the case to court. In addition, cases that were stalled at the time the sample was selected but had moved to resolution by the time the record review was completed are also included in this category. These cases make up only one percent of our sample.

Figure 3 (page 10) outlines our findings by category. Within our sample of cases the two largest percentages of cases fell into the ambiguous delay by plaintiff (391) and possible/probable workout (275) categories. Only a few cases, 13, were categorized as unknown/other.

A lack of detail in court records makes it difficult for any definitive statements to be made about whether or not a plaintiff intends to continue pursuing foreclosure in the future, especially since in these cases, the plaintiff retains the right to refile the case. However, because the plaintiff is driving the court process, we conclude that two of our categories represent a spectrum of what may be considered bank walkaway. Cases in the plaintiff decision not to proceed category (165) and in the ambiguous delay by plaintiff category (391) both represent instances where the plaintiff is not proceeding with the foreclosure case, though the reasons for this are varied and sometimes unknown. Therefore, given our definition, we concluded that 56 percent of our sample could be considered as a bank walkaway.

Condition of properties in the study

Court records reveal the status of the foreclosure case, but do not provide information about what is happening to the condition of the property. The most costly implications of stalled foreclosures occur when both the lender (or subsequent note holder) and the homeowner are not actively protecting their interests in the value of the property. Therefore, an important question is whether the home is still occupied and whether the taxes are being paid.

As a proxy for the status of a property, we examined current city and postal vacancy data along with property demolition records and tax delinquency information. When examining vacancy, demolition, and tax delinquency data by our case categorization, we found that rates differed across categories. Overall, 37 percent of properties in the sample were reported vacant with the highest rates of vacant properties found within the plaintiff decision not to proceed (53 percent vacancy) and the ambiguous delay by plaintiff (50 percent vacancy) categories. The highest rates of tax delinquency are also among the decision not to proceed and ambiguous delay by plaintiff categories, with 74 and 59 percent carrying a delinquent tax balance for over a year. Thirteen percent of our sample of properties that are located in the City of Cleveland properties had been demolished. Again, cases we found plaintiff decision not to proceed and ambiguous delay by plaintiff categories had the highest rates of demolition, with 17 and 15 percent of those cases demolished, respectively.

Figure 3: Condition of property by case type

| | Cases | | Vacancy | | Tax Delinquency | | Demolition (City of Cleveland Only) | |
|-----------------------------------|------------|-------------|------------|------------|-----------------|------------|-------------------------------------|-----------|
| | N | % | N | % | N | % | N | % |
| Bankruptcy | 155 | 16% | 15 | 10% | 41 | 26% | 2 | 3% |
| Possible/Probable workout | 275 | 28% | 67 | 24% | 90 | 33% | 11 | 8% |
| Plaintiff decision not to proceed | 165 | 17% | 88 | 53% | 122 | 74% | 22 | 17% |
| Ambiguous delay by plaintiff | 391 | 39% | 196 | 50% | 230 | 59% | 39 | 15% |
| Unknown/Other | 13 | 1% | 3 | 23% | 4 | 31% | 0 | 0% |
| Bank Walkaway | 556 | 56% | 284 | 51% | 352 | 63% | 61 | -- |
| Total | 999 | 100% | 369 | 37% | 487 | 49% | -- | -- |

Discussion

Solutions to bank walkaways and stalled foreclosure have been limited so far, and not much information is readily available about the actions of courts across the country. Judges in Milwaukee report sending letters to defendants in foreclosure cases if plaintiffs successfully vacate foreclosure judgments. This helps to inform owners that they are the current owner of record, and are responsible for the upkeep of their property.

Within our sample of cases, some judges required additional proof when plaintiffs requested to dismiss a case with only a vague statement that the parties had come to some sort of agreement or workout. Some judges are refusing to grant motions to dismiss cases because of low equity, or other reasons that do not involve a resolution to the case. In one 2007 case, when a plaintiff moved to dismiss a case on the basis that the property was in poor condition and the loan had been charged off, the judge stated “[the plaintiff] should be prepared to address why the case should not be dismissed with prejudice and the mortgage satisfied of record.”

Cuyahoga County, Ohio, has been working to remove stalled foreclosures from court dockets, stepping in as an interested party when a case has remained unresolved for long periods of time, and the property has a tax lien. In these cases, the county asks the court to dismiss the case so that a tax foreclosure case can be pursued.

In Ohio, U.S. Senator Sherrod Brown in October 2009 called for an investigation into bank walkaways by the Government Accountability Office. The resulting report from the GAO uses mortgage loan data from six selected servicers and two government-sponsored enterprises to investigate the nature, prevalence, and impacts of abandoned foreclosures nationally. The GAO defines an abandoned foreclosure as the point at which a servicer decides to not continue pursuing its interest in a mortgage loan, looking at loans categorized as charged-off, and the home is vacant. The report investigates cases where loan foreclosure has been initiated or completed as well as cases where a loan was charged off before a foreclosure was initiated, finding that most often servicers will charge off a loan before initiating a foreclosure. The report finds that abandoned foreclosures, where a foreclosure has been initiated but the loan has been charged-off, are not numerous but are concentrated in economically distressed areas, with 20 areas containing 61 percent of all abandoned foreclosures.⁸

Our report suggests a definition of walkaways based on the status of the case in court, finding that there are many points within the foreclosure process where the status of a foreclosure case can become problematic and unclear. Using this broader definition, it is possible that a greater number of properties that could be considered bank walkaways would be found.

Conclusion

This brief reports the results of a preliminary investigation into the bank walkaway phenomenon. We examined cases in foreclosure that were pending for more than 180 days. Such cases are a small proportion (15 percent) of the total number of residential mortgage foreclosures. Though they make up a small percentage of all foreclosure filings, these cases are important because of the implications of their legal status for reclaiming and rehabilitating vacant foreclosed properties. Our research sample consisted of 999 such cases that were classified into five categories based on the information available in public records of the Cuyahoga County Court of Common Pleas in Cuyahoga County, Ohio.

We found that most cases in our sample were ambiguously delayed by the plaintiff; where inaction on the part of the plaintiff prevents the case from moving along. A number of cases contained more documentation of the intent of the plaintiff to not proceed with the foreclosure process. Several cases contained valid and meaningful documentation of a potential resolution.

Equally important are the actions of the defendant. This report does not thoroughly examine the actions of the homeowner in these cases. Few court records contained motions or answers filed by defendants. The involvement of the homeowner is an important factor to consider in regard to

⁸ United States Government Accountability Office. 2010. Mortgage Foreclosures: Additional Mortgage Servicer Actions Could Help Reduce the Frequency and Impact of Abandoned Foreclosures. GAO-11-93. Washington, D.C. Accessed November 15, 2010 from <http://www.gao.gov/products/GAO-11-93>.

both the viability of the property, and in regard to determining the effectiveness of foreclosure resolution processes in and outside of the court.

Most importantly, this preliminary investigation shows the need for more detailed court records. Detailed information about the reasons for a mortgage workout or other records indicating the plaintiff's intention for the property are necessary to understanding the status of the case and informing the homeowner of their rights and responsibilities in regards to the property. In addition, this information is needed in order to identify and address problematic cases, measure the magnitude of bank walkaways and stalled foreclosures, and evaluate the effectiveness of various national and local foreclosure assistance programs.