GOING IT ALONE:
LEGAL MOBILIZATION AND EFFICACY IN THE FORECLOSURE CRISIS

A Dissertation

Presented to the Faculty of the Graduate School

of Cornell University

In Partial Fulfillment of the Requirements for the Degree of

Doctor of Philosophy

by

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May 2016

GOING IT ALONE:
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Cornell University 2016

In the past decade, the rate of residential foreclosure in the United States reached historic highs, with negative consequences for individuals and neighborhoods. Prior research shows that foreclosures are concentrated in economically disadvantaged and racially segregated areas, leading researchers to consider inequalities in mortgage lending, foreclosure initiation, and the administration of policy interventions. However, less attention has been afforded to the foreclosure process, despite its role as a potential source of inequality in the foreclosure crisis. This dissertation addresses this topic by investigating variation in individual homeowners' behavior within the legal foreclosure process, including their use of legal representation, and considering the implications for individual case outcomes and the foreclosure process more broadly.

Focusing on the judicial foreclosure process in New York State, I use a dataset of a representative random sample of foreclosure cases initiated in New York City between 2007 and 2011 to address three topics. First, I assess whether the empirical realities of the foreclosure process—specifically, the behavior of lenders, their lawyers, and homeowners—support assumptions embedded within the laws governing foreclosure. I find evidence that contradicts these assumptions, documenting a gap between the law on the books and law in action that has significant consequences for homeowners, the land title system, and the legitimacy of the legal system and the legal profession.

I then consider how homeowners' responses to civil actions to foreclose vary, and assess the consequences of these actions. I not only document patterns of behavior among homeowners facing foreclosure, which are associated with case outcomes, but develop a conceptual

framework for analyzing the dispute processing behavior of individuals who must respond to a legal claim. Finally, I focus specifically on the use of legal representation among homeowners. I find that cases where the homeowner was represented are less likely to result in foreclosure, but that this association is diminished after accounting for procedural reforms to the foreclosure process. The results of these analyses have important implications not only for the foreclosure context, but also for our understanding of dispute processing, inequality in the law, and the role of the legal profession.

BIOGRAPHICAL SKETCH

Emily S. Taylor Poppe received an AB in Public Policy and Spanish from Duke University in 2001 and a JD from Northwestern University School of Law in 2004. Her research focuses on inequality in the law and legal institutions, with a particular focus on the legal profession and lay engagement with the legal system.

For Clayton, Caris, and Gillian

ACKNOWLEDGMENTS

This project received financial support from the National Science Foundation under Grant No. 1233268 and the Center for the Study of Inequality at Cornell University. In addition, grants from the Cornell University Graduate School and the Cornell Population Center helped to fund my travel to the annual meetings of the Law and Society Association and American Sociological Association and to the Conference for Empirical Legal Studies, where I received valuable feedback on this work. Any opinions, findings, conclusions, or recommendations expressed in this material are my own and do not necessarily reflect the views of these organizations.

I also wish to acknowledge the many individuals who have assisted me during my graduate career. I offer particular thanks to the members of my special committee—Stephen Morgan, Valerie Hans, and Erin York Cornwell—who have offered significant (***) training, feedback, and encouragement. I would also like to acknowledge the ongoing support of Jeffrey Rachlinski and Albert Yoon. I learned a great deal through my research work with Kim Weeden and Laura Tach, and thank them both for the opportunity to learn from their examples. I also thank Matt Hall for his generosity, without which I might still be searching for a dataset on foreclosures. I received valuable research assistance from multiple undergraduates who bravely faced clerks of court across New York City and waded through piles of legal documents undeterred. Other members of the faculty of the sociology department and law school, and many graduate students, have been gracious in their willingness to provide feedback on my work and I thank them for their helpful comments. I offer a special thank you to Jessica Houston Su and Erin Lentz for their camaraderie and honesty, and, when it was needed, their dishonesty.

Finally, I thank my husband and daughters for backing this endeavor. Albert Camus once asked, "[W]hat is happiness except the simple harmony between a [wo]man and the life [s]he leads?" Thank you to Clayton, and to Caris and Gillian, for helping me find my happiness.

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CHAPTER 1: INTRODUCTION

Over the past decade, the rate of residential foreclosure in the United States has increased dramatically. At the peak of the foreclosure crisis in 2010, more than 10 percent of all mortgages were at risk of default (Mortgage Bankers Association 2014), and roughly one in twelve households has entered the foreclosure process since 2008 (Hall, Crowder, and Spring 2015). In states where foreclosures are handled within the court system, there has been a corresponding increase in foreclosure cases. In New York State, the focus of this dissertation, nearly one-third of all pending civil cases are foreclosures (Pfau 2010; Prudenti 2013). Because foreclosures have detrimental effects not only on individual wealth accumulation (Shapiro et al. 2013) and health (e.g. Houle 2014, Pollack and Lynch 2009), but also on surrounding housing values (e.g. Immergluck and Smith 2006, Gerardi et al. 2012), neighborhood crime rates (e.g. Ellen, Lacoe, and Sharygin 2013), and residential mobility (e.g. Sharp and Hall 2014), the social repercussions of the foreclosure crisis are far-reaching.

While standard economic factors contributed to the rise in mortgage defaults, the foreclosure crisis is largely the result of fundamental changes in mortgage lending and servicing (Engel and McCoy 2011). An emerging body of research documents the relationship between these trends and social inequality, with disproportionate numbers of socially disadvantaged homeowners entering the foreclosure process (Rugh and Massey 2010; Rugh 2015). Yet not all homeowners who enter the foreclosure process will lose their homes; rather, there is significant variation in the outcomes of foreclosure cases (Chan et al. 2012). In this dissertation, I consider whether homeowners' actions within the foreclosure process—including their use of legal representation—are associated with foreclosure case outcomes. Because individuals' behavior in response to legal problems is socially patterned (Miller and Sarat 1980) and consequential for

case outcomes (Genn 1999; Sandefur 2016), the foreclosure process may exacerbate existing inequalities in the foreclosure crisis.

To assess this possibility, I use a dataset on a random sample of 955 residential foreclosure cases initiated between 2007 and 2011 in New York City. New York State's judicial foreclosure process generates a documentary record that makes it possible to analyze homeowners' legal actions in ways that would not be possible in many other jurisdictions. Limiting the sample to New York City minimizes county-specific variation in court settings while covering a large population. To generate the dataset, I combined information from court documents for each case with publicly-available information on properties and lawyers as well as census data. The resulting dataset allows me to explore the judicial foreclosure process in greater detail than has previously been possible, and is the basis for the empirical research in each of the three chapters that follow.[1]

In the first chapter, I consider how the empirical realities of the foreclosure process compare with assumptions embedded in the laws governing foreclosure. I find evidence suggesting that many lenders failed to comply with legal standards regarding the assignment of mortgages, in contrast with the assumption that they would do so to protect their ability to enforce their security interests. I also document the role of plaintiffs' lawyers in these situations, in violation of the assumption that professional ethics regulations would prevent such behavior. Finally, I find that many homeowners failed to challenge lenders' actions, even though they stand to lose their homes if the plaintiff is successful. This gap between the law in action and the law on the books has implications not only for individual homeowners, but for the validity of the

[1] The three empirical chapters are independent articles collected here in compliance with Cornell's articles dissertation policy.

judicial foreclosure process, the clarity and reliability of the land title system, and the legitimacy of the legal profession.

In the second chapter, I identify patterns of behavior among homeowners facing foreclosure. I propose a conceptual framework for analyzing the actions taken by individuals, such as homeowners facing foreclosure, who must respond to a legal claim. I argue that this situation differs in important ways from that of individuals who are deciding whether to bring a legal action. Applying this framework to the context of foreclosure, I offer an explanation for homeowners' limited participation in the foreclosure process.

In the fourth and final chapter, I focus specifically on the consequences of homeowners' decisions to retain legal counsel. I find that cases where the homeowner had legal representation are less likely to end in foreclosure than cases where the homeowner was unrepresented. However, this association is diminished after accounting for reforms to the foreclosure process that increased homeowner participation and court intervention. These findings suggest that the design and implementation of the foreclosure process affect not only case outcomes, but the role of lawyers within that process. Viewed more broadly, the findings indicate that the design of legal procedures may mitigate inequalities that would otherwise emerge due to variation in access to legal representation.

Together these chapters present a novel picture of the foreclosure process, as it was carried out in the midst of the foreclosure crisis in New York State. In doing so, the dissertation deepens our understanding of the relationship between law and inequality in this context. In addition, the findings are relevant to legal disputes beyond foreclosure, in which individuals must decide how and when to engage with the legal system and in which scholars seek to evaluate the consequences of their decisions.

CHAPTER 2: FORMALITIES ON THE BOOKS, FORECLOSURES IN ACTION: AN EMPIRICAL INVESTIGATION OF ASSUMPTIONS UNDERLYING THE FORECLOSURE PROCESS

On March 7, 2006, Ramash Maraj borrowed $440,000 from IndyMac Bank, F.S.B. (Complaint, *Deutsche Bank v. Maraj*, No. 25981-07, N.Y. Sup. Ct. 2007) to purchase a six-bedroom, three-bath two-family row house in Brooklyn (Zillow.com 2016). The adjustable rate loan[1] was secured with a mortgage in favor of Mortgage Electronic Registration Systems, Inc. ("MERS"), as nominee for IndyMac (Complaint, *Deutsche Bank v. Maraj*, No. 25981-07, N.Y. Sup. Ct. 2007). At that time, IndyMac was the second largest independent mortgage lender in the United States (Reuters 2008), and was heavily involved in non-prime Alt A lending (Bajaj 2008).[2] MERS is the private company that served as agent for many large lenders in order to avoid the need to record repeated mortgage assignments in local land records (Whitman 2014). Less than a month after the loan was signed it was securitized, pooled with other "negative amortization adjustable-rate Alt-A mortgage loans," into a trust from which multiple tranches of asset-backed securities were issued (Moody's 2006).

Within a year, Maraj had defaulted on the loan. When he failed to submit payment for the principal and interest due on March 1, 2007, the loan was accelerated and the entire principal balance of $445,272.13, plus accrued interest, became due (Complaint, *Deutsche Bank v. Maraj*, No. 25981-07, N.Y. Sup. Ct. 2007). In July, 2007, a civil action to foreclose Maraj's right to redeem the loan was initiated in Kings County Supreme Court.

[1] The original interest rate of 2.45 percent adjusted monthly starting in the second month after origination and was capped at a maximum interest rate of 9.95 percent (Complaint, *Deutsche Bank v. Maraj*, No. 25981-07, N.Y. Sup. Ct. 2007).

[2] While more favorable than subprime loans, Alt A loans have higher interest rates than prime loans and are generally characterized by borrowers with lower credit scores or incomplete documentation and involve higher loan-to-value (LTV) ratios.

The plaintiff in the civil action, however, was not IndyMac. Instead, Deutsche Bank National Trust Company, as Trustee under the Pooling and Servicing Agreement Series INDX 2006-AR6 filed the summons and complaint (Complaint, *Deutsche Bank v. Maraj*, No. 25981-07, N.Y. Sup. Ct. 2007). The complaint, certified by Deutsche Bank's attorney, alleged that IndyMac had assigned the mortgage to Deutsche Bank (*Deutsche Bank v. Maraj*, No. 25981-07, N.Y. Sup. Ct. 2007). When Maraj, who was unrepresented, failed to file an answer in response to the complaint, Deutsche Bank moved for an order of reference (Decision and Order dated Jan. 31, 2008, *Deutsche Bank v. Maraj*, No. 25981-07, N.Y. Sup. Ct. 2008). Had the judge granted the order, the case would have been referred to a referee to compute the amount due to the bank. Deutsche Bank then could have moved for a judgment of foreclosure and sale, allowing the home to be sold at auction.

However, the motion was denied (Decision and Order dated Jan. 31, 2008, *Deutsche Bank v. Maraj*, No. 25981-07, N.Y. Sup. Ct. 2008). Perhaps tipped off by the fact that the assignment from IndyMac to Deutsche Bank allegedly took place on July 3, 2007, after the loan was already in default and the foreclosure action had commenced, the judge in the case reviewed the documents transferring the mortgage (Powell 2009). There he discovered that the *same* individual executed the assignment on behalf of both IndyMac and Deutsche Bank, from the *same* office, which was not the place of business for either IndyMac or Deutsche Bank (Decision and Order dated Jan. 31, 2008, *Deutsche Bank v. Maraj*, No. 25981-07, N.Y. Sup. Ct. 2008). In light of the "possible fraudulent activity" involved in the production of the documents assigning the mortgage to Deutsche Bank, and thus giving it standing to bring the foreclosure action, the court gave Deutsche Bank leave to proceed with the foreclosure action only if it could explain

the apparent discrepancies (Decision and Order dated Jan. 31, 2008, *Deutsche Bank v. Maraj*, No. 25981-07, N.Y. Sup. Ct. 2008: 5-6).

This case represents many of the phenomena that triggered the dramatic increase in mortgage defaults, and ultimately, the Economic Crisis. The loan, with its non-prime, adjustable rate and negative amortization, reflects the trends in mortgage lending that fueled the housing bubble. The quick securitization of the loan echoes the rise of asset-backed securities. And, the rapid default of the homeowner, leaving limited equity in the home and thus making alternatives to foreclosure less feasible in a depressed real estate market, is representative of the surge of mortgage defaults that followed.

These events challenged a series of assumptions underlying the rapid expansion of the subprime mortgage market and the rise of asset-backed securities. De-regulation of mortgage lending, assumed to offer a benefit to non-traditional borrowers by expanding access to credit, resulted in predatory lending and high rates of default. Adjustable rate loans, assumed to be eligible for refinancing when payments became unaffordable, sank underwater as the housing market failed to continue its dramatic gains. Mortgage securitization, assumed to spread the risk of mortgage default, failed to protect investors from the collapse of the housing bubble. These failures have been well documented and are the subject of significant attention from scholars and policy analysts (e.g. Engel and McCoy 2011; Financial Crisis Inquiry Commission 2011; Grusky, Western, and Wimer 2011).

However, this case also illustrates another series of assumptions challenged by recent events. First, the lender failed to comply with legal standards governing the assignment of mortgages. This contradicts the assumption that lenders, motivated by a desire to protect their security interest and enforce their right to foreclose, will maintain a clear chain of title and

comply with regulations governing the foreclosure process. Second, despite flaws with the plaintiff's claim, a law firm prepared a verified complaint on behalf of the plaintiff alleging the validity of the plaintiff's interest. This counters the assumption that professional ethical obligations, court requirements, and government oversight of the foreclosure process are sufficient to deter lawyers from submitting false documents to the court or otherwise violating their professional duties. Third, despite the potential problems with the lender's claim, the homeowner did not challenge the foreclosure action (and the case is unusual for the initiative taken by the judge). This calls into question the assumption that homeowners, because of the incentive to retain possession of their homes, will use the adversarial process to challenge problematic foreclosures.

This divergence between the assumptions embedded in the law and reality of the foreclosure process has serious implications. Lenders' failure to properly record transfers in real property can result in unnecessary and even wrongful foreclosures (Dana 2012; MFY 2011), with negative consequences for both individuals and communities (e.g. Ellen, Lacoe, and Sharygin 2013; Gerardi et al. 2012; Hall, Crowder, and Spring 2015; Houle 2014, Pollack and Lynch 2009; Ross and Squires 2011; Shapiro et al. 2013). This, in turn, threatens the legitimacy of the foreclosure process more broadly (Dana 2012). Yet, the implications are even more widespread. Lenders' actions also jeopardize the clarity of the land title system (Singer 2013). And the legal profession's claim to a monopoly on the practice of law, already under attack from alternative providers and in light of the profession's failure to meet the legal needs of the public, is further undermined by the inability to prevent systematic violations by members of the bar (Rhode 2015). Even more fundamentally, ignoring these tensions increases the risk that history will repeat itself, leaving us to face another foreclosure crisis.

Thus, the validity of these assumptions is important for the functioning and legitimacy of the foreclosure process, the clarity of land title records, the future of the legal profession, and the stability of the economic system. Yet for all of the attention to plaintiffs' apparent misdeeds, the alleged complicity of their legal representatives, and the expected inability of homeowners to respond, systematic empirical data on these topics is lacking. How often did lenders bring foreclosure actions in which they were unable to support their claim to standing? How many lawyers were involved in such cases? How frequently did homeowners respond to these situations by challenging lenders' actions? What happened in these foreclosure cases?

In this chapter, I address these questions using a unique dataset of a representative sample of 938 foreclosure cases initiated in New York City between 2007 and 2011. I investigate the characteristics of the plaintiffs and the content and timing of the pleadings they submit, finding evidence suggesting potential problems with plaintiffs' standing. I also consider the lawyers who represented plaintiffs, drawing attention to the significant role of one firm known to have alleged in improper behavior and the questionable practices adopted by a number of foreclosure prosecution firms. In addition, I analyze the locations of the properties to understand the likely characteristics of the homeowners, and evaluate homeowners' use of legal representation and the form and content of the answers they file. I find that most homeowners do not challenge lenders' standing to foreclose, even in situations where the plaintiff fails to offer documentary evidence of its interest in the underlying note or references situations that have been associated with faulty assignments. Finally, I identify the outcomes of these cases, and find a high number of discontinuances; rather than view these dispositions as favorable to homeowners, I consider the possibility that they are actually harmful to the eventual resolution of the mortgage default.

These results offer a rare empirical assessment of the foreclosure process as it was carried

out during the foreclosure crisis, and offer evidence that challenges a number of assumptions underlying the process. In light of these findings, I consider reforms to better align the foreclosure process with its intended design. Doing so could have important implications not only for homeowners facing foreclosure, but more broadly as well.

This chapter proceeds with a discussion of the assumptions described above, and how they are codified in existing laws and practices. The empirical study follows, beginning with a description of the data before the presentation of the empirical results. I then consider the implications of these findings and offer suggestions for potential reforms before concluding.

ASSUMPTIONS EMBEDDED IN THE FORECLOSURE PROCESS

In this section, I consider a series of assumptions embedded in the foreclosure process that have been challenged by recent events: (1) the assumption that lenders, motivated by a desire to maintain a clear right to security interests in property, will maintain a clear chain of title and comply with rules governing the foreclosure process; (2) the assumption that lawyers, due to the regulation of the profession, will comply with legal obligations regarding the foreclosure process; and (3) the assumption that homeowners, because of the incentive to retain possession of their homes, will use the adversarial process to challenge problematic foreclosures. While these assumptions are relevant to non-judicial foreclosure, they are particularly important in states where foreclosures take place within the court system. New York State, the focus of this chapter, is one such *judicial foreclosure* state,[3] and foreclosures account for approximately one-third of all pending civil cases (Pfau 2010; Prudenti 2013; Prudenti 2015).

[3] While non-judicial foreclosure is permitted in New York State, it is very rarely used (Kaye and Pfau 2008).

Lenders' Assignment of Mortgages and Foreclosure Litigation Practices

Greater activity in the secondary mortgage market and the rise of mortgage-securitization have increased the frequency with which interests in residential loans, and the mortgages securing them, are transferred (Engel and McCoy 2011). Lenders' ability to enforce homeowners' obligation to repay borrowed principal by attaching the mortgaged property relies on the documentation evidencing such transfers (Dillon 2012). For this reason, lenders are assumed to have an incentive to ensure that mortgage interests are properly transferred.

Yet lenders' failure to comply with established rules and practices regarding the assignment of mortgages over the past decade has been widely noted (e.g. Davis 2013; Whitman 2014). In part, this was the result of lenders' reliance on MERS to avoid having to record multiple assignments (Peterson 2011). This proved problematic when MERS failed to transfer the physical note, or in cases where the assignments from MERS to the lender were invalid (Dillon 2012). Even more troublesome, however, was the discovery that many lenders had attempted to cover up problems in the chain of assignments giving rise to their interests by generating fraudulent assignments. The pervasiveness of this behavior was suggested by the largest mortgage servicers' agreement to pay $25 billion to settle litigation brought by the Department of Justice and the attorneys general of 49 states (*U.S. v. Bank of America*, No. 02-0361, D.D.C. March 14, 2012).[4] At the same time, lenders' internal reviews of foreclosure filings

[4] The complaint, brought by the Justice Department, the Department of Housing and Urban Development, and the attorneys general of 49 states, alleged that Bank of America Corporation, J.P. Morgan Chase & Co., Wells Fargo & Company, Citigroup Inc., and Ally Financial Inc., the nation's five largest mortgage servicers, engaged in "misconduct related to their origination and servicing of single family residential mortgages." (*U.S. v. Bank of America*, No. 02-0361, D.D.C. March 14, 2012: 8). This misconduct was alleged to have resulted in "the issuance of improper mortgages, premature and unauthorized foreclosures, violation of service members' and other homeowners' rights and protections, the use of false and deceptive affidavits and other

claimed to find few such problems (e.g. Schwartz and Martin 2010).

Thus, there is reason to suspect that there may be problems with some plaintiffs' legal claim to standing among the foreclosure cases filed in New York City during the period of this study, in violation of the assumption that lenders will protect their interests by complying with legal requirements. Yet less is known about the frequency of such problems.

Lawyers' Behavior in the Foreclosure Context

The second assumption challenged by the foreclosure crisis is that lenders' lawyers will act in accordance with their professional obligations. As in other states, lawyers' behavior in New York is governed by rules of professional conduct that prevent them from making a "false statement of fact or law to a tribunal" (22 NYCRR Part 1200, 3.3.(a)). In addition, the rules of civil procedure, by requiring that attorneys verify the allegations contained in a complaint, placed a further duty on lawyers to "state[] under oath that the pleading is true" (CPLR §3020(a)). Finally, the federal government offered an additional layer of oversight of lawyers' behavior in some foreclosure cases, by requiring that banks use only approved lawyers to foreclose on government-backed mortgages (Federal Housing Finance Agency 2011).

Yet court data from New York State suggests that these rules were insufficient to prevent systematic abuse in the foreclosure context. Noting that, "During and after August 2010, numerous and widespread insufficiencies in foreclosure filings . . . were reported by major mortgage lenders and other authorities, including failure to review documents and files to

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documents, and the waste and abuse of taxpayer funds." (*U.S. v. Bank of America*, No. 02-0361, D.D.C. March 14, 2012: 8-9). In settling the case, the defendants agreed to pay $5 billion to state and federal governments and to provide more than $20 billion in financial relief for homeowners, making it the largest ever federal-state civil settlement. (Department of Justice 2012).

establish standing and other foreclosure requisites," the Chief Administrative Judge issued Administrative Order 548-10 on October 20, 2010.[5] The order required plaintiffs' counsel in residential foreclosure actions to affirm the accuracy of the court filings and to identify the representatives of the plaintiff with whom they had spoken who had personally reviewed the underlying documents (NY AO 431-11, 2011).

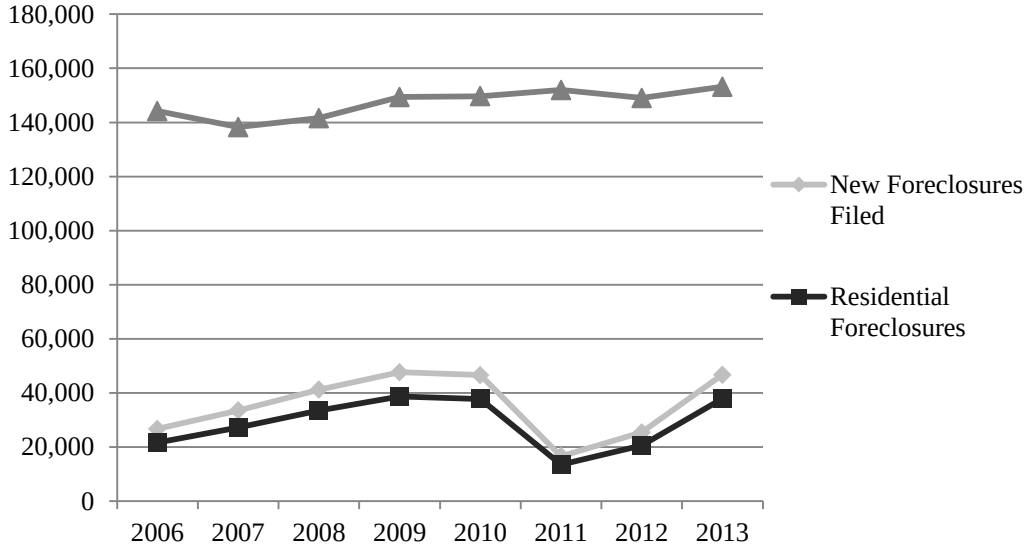
After the adoption of this affirmation requirement, foreclosure filings dropped precipitously (Pfau 2011). Figure 2.1 traces foreclosure filings from 2006 through 2013, and highlights the decline in filings in 2011 after the adoption of the affirmation requirement in late 2010. In the annual foreclosure report, the court noted that prior to the adoption of the affirmation requirement there were approximately 3,500 new foreclosure filings each month, in contrast to only 775 per month after the requirement (Pfau 2011).

The validity of this order was challenged on the grounds that it exceeded the authority of the Chief Administrative Judge, and eventually a split emerged between Supreme Courts across the state regarding the enforceability of the affirmation requirement (Smith and Hall 2011). The issue was resolved in 2013, when the state legislature amended the foreclosure process to require the filing of a Certificate of Merit, which not only overrode the objections to the affirmation requirement but also increased the requirements for plaintiffs and their representatives (Chapter 306 of the Laws of New York, 2013). Yet the debate over the validity of the law is striking in light of the underlying professional obligations and civil procedural requirements that should have ensured the validity of pleadings submitted by lawyers. Thus, there is reason to suspect that

[5] This order was modified *nunc pro tunc* on March 2, 2011 by Administrative Order 431-11 ("NY AO 431-11"), effective as of November 18, 2010.

some plaintiffs' lawyers did not comply with their professional obligations, but systematic data on this point is lacking.

Figure 2.1. New York State Foreclosure Case Filings, 2006-2013



Note: Data drawn from the NY State Unified Court System Annual Reports and the Reports of the Chief Administrator of the Courts pursuant to chapter 507 of the laws of 2009. Proportion of residential foreclosures estimated using data from these reports.

A second issue with lawyers' behavior in New York State foreclosure cases is lawyers' actions with respect to foreclosure settlement conferences.[6] In response to high rates of homeowner default, foreclosure settlement conferences began in 2008 and were expanded in 2010.[7] After the adoption of foreclosure settlement conferences, court administrators and legal

[6] In addition to the Shadow Docket described here, a consortium of legal aid providers has also documented the failure of many lenders' representatives to attend the conferences with knowledge and authority to settle the dispute, as required by statute (JASA et al. 2014).

[7] Legislation adopted in 2008 required that the court schedule a mandatory settlement conference within 60 days of the filing of the proof of service of the complaint in all residential foreclosure cases involving a "subprime" or "high-cost" loan originated between 2003 and 2008 where the defendant was a resident of the property (Chapter 472). Defendant homeowners in similar ongoing cases could request a settlement conference (Chapter 472). This program was expanded to require courts to schedule mandatory settlement conferences in all new residential foreclosure cases where the defendant occupied the property, regardless of loan type, as of February 13,

aid attorneys found many foreclosure cases in which complaints had been filed, but there was no Request for Judicial Intervention (MFY Legal Services, Inc. 2011). Because it is the filing of the Request for Judicial Intervention that gives the court jurisdiction over the case and triggers the court to schedule a settlement conference, conferences were not scheduled in these cases. The rise of this Shadow Docket suggests that some plaintiffs' attorneys were intentionally delaying the foreclosure process and seeking to avoid settlement conferences. This counters the assumption that lawyers will seek to advance plaintiffs' rights to foreclose as expediently as possible.

These behaviors offer an unflattering portrait of plaintiffs' legal representatives that opposes the model of behavior prescribed by law. However, it is unclear from existing data whether this applies to a vast number of lawyers or a select group, and whether the behavior affected a substantial number of foreclosure cases.

Homeowners' Use of the Adversarial Process

The behavior of lenders and their legal representatives suggests the potential importance of the judicial foreclosure process as a forum in which homeowners can challenge lenders' right to foreclose. While subject to some additional requirements under the laws governing real property, foreclosure actions in New York State have traditionally followed the course of general civil litigation; thus New York State law envisions foreclosure as an adversarial process between the lender, the homeowner, and any other parties with a claim to the property.

The limited role of judges and other court actors underscores the court system's reliance

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2010, and permitted defendant homeowners in similar ongoing cases to request conferences (Chapter 509).

on the adversarial process. Some judges, one Brooklyn trial court judge in particular, have moved *sua sponte* to dismiss foreclosure actions when the lender was unable to validate its claim to standing (Powell 2009). However, appellate courts have repeatedly overturned these decisions and reinstated cases when judges have identified issues not raised by the defendant homeowner.

Thus, homeowners are uniquely situated to challenge plaintiffs. As with all civil actions, defendants may raise the plaintiff's lack of standing as a defense. Similarly, failure to comply with notice requirements is a valid defense, with foreclosure actions subject to expanded notice requirements that force plaintiff to give earlier notice of an impending action and to include information about the case and resources for homeowners (NY RPAPL 1304 and 1303). Foreclosures are unique in that the HAMP program also provides a defense in some circumstances, because lenders are required to evaluate eligible homeowners for a loan modification before pursuing a foreclosure (Making Home Affordable 2016). Finally, homeowners deemed incompetent or protected from suit because of their status as active military may have claims against them dismissed, although the foreclosure action is likely to be re-filed against another party or at a later time.

Because the stakes are so high for homeowners, who stand to lose their homes if the foreclosure action is successful, homeowners are assumed to have an incentive to raise all potential defenses to foreclosure. Concerns have even been raised that such "technical" defenses may prevent large numbers of foreclosures (Whelan 2010). Yet it is not clear whether these beliefs are realistic.

Socio-legal research on individuals' behavior when faced with a legal problem shows that the likelihood that individuals will engage in a legal dispute is influenced by the characteristics of the individual and of the dispute (Miller and Sarat 1981). Most plaintiffs in foreclosure

actions are a classic example of a repeat player (Galanter 1974). They frequently use the courts to protect their interests, have anticipated the possibility of foreclosure and drafted the note and mortgage in their favor, and have ready access to legal expertise. The stakes in any one case are also low, allowing them to litigate strategically. In contrast, the stakes for the homeowner are tremendously high, but they are unlikely to be familiar with the foreclosure process. Their access to legal representation is restricted by their financial circumstances; there is no such thing as a contingent-fee arrangement for foreclosure defense.

Moreover, because foreclosure is an enforcement mechanism, homeowners may believe that participation in the foreclosure process offers little benefit. If they have defaulted on the loan and the loan payments remain unaffordable, hiring a lawyer, filing an answer, or appearing in court may not offer homeowners any benefit. If homeowners want to retain their home, modifying the loan or negotiating forbearance are the likely paths to this outcome. Challenging the lenders' standing to sue could force the lender to discontinue the suit and repair the defect. However, it will only offer a permanent victory for the homeowner if the lender remains unable to document its interest in the note.

For these reasons, many homeowners may not choose to engage in the foreclosure process at all. Of those that do, it is not clear whether their goal will be to challenge the lender's claim, or to negotiate an alternative to foreclosure. As a result, it is not clear that homeowners' behavior in practice will accord with assumptions regarding their willingness and ability to use the adversarial process to challenge foreclosures.

Thus, assumptions regarding the behavior of lenders, their lawyers, and homeowners are embedded in laws relevant to the foreclosure process, but there is reason to question the accuracy of these assumptions. In the section that follows, I offer an empirical assessment of the

divergence between the required foreclosure formalities on the books and the foreclosure process in action.

DATA

To address this topic, I use a representative random sample of residential foreclosure cases (n=951) initiated in the five boroughs of New York City—the Bronx, Brooklyn (Kings County), Queens, Manhattan (New York County), and Staten Island (Richmond County)—between 2007 and 2011. To generate a representative sample of foreclosure cases, I used a proprietary dataset acquired from RealtyTrac that identified all *lis pendens* filed between 2007 and 2011 in connection with residential properties in the five boroughs. Because a *lis pendens* is filed prior to the initiation of a foreclosure case, this identified the universe of potential foreclosure cases.[8] From this dataset, I drew a random sample of *lis pendens*, stratified by year and county. Counties with a lower incidence of foreclosure were sampled at a higher rate in order to generate a sample size sufficient for statistical analysis.[9] In all analyses, the observations are weighted to be representative of the overall population of foreclosure cases.

I matched the *lis pendens* to court cases by plaintiff and defendant name and date of filing using the New York State Court System's online case summary. In doing so, I excluded non-foreclosure cases and foreclosure cases involving non-individual defendants and non-lender

[8] During this time period, the New York State Unified Court System did not offer a means of identifying foreclosure cases, making it impossible to generate a representative sample. Data on *lis pendens* filings offered a solution, but because *lis pendens* are filed for multiple kinds of litigation involving property, not just foreclosures, it required that I subsequently limit the sample to foreclosure cases.

[9] The percent of foreclosure filings in each county and year that were included in the sample of *lis pendens* was: Bronx 1.6%, Brooklyn 0.8%, Manhattan 4.1%, Queens 0.8%, Staten Island 1.6%.

plaintiffs (e.g. tax liens). For those cases remaining in the sample where a court case was identified, the court records were manually retrieved from online sources (Brooklyn and Manhattan) and county clerks' offices (Bronx, Queens, and Staten Island).

These court records, including the complaint and any appearance, answer, order, order of reference, or judgment of foreclosure and sale, were reviewed. From this review, the identities of the parties and their representatives were coded, as was information about the timing, form, and content of any pleadings they filed. The outcome of each case was also determined. In addition, the terms of the loan and its history, from origination through default, were noted. The location of the property that secured the loan was drawn from the complaint and matched to census block and block groups, providing information about the characteristics of the population in the area where the property is located.

Because I was unable to collect documents for some cases, I rely on a slightly reduced analytic sample for most analyses (n=938). Table 2.1 describes the proportion of cases in the sample filed in each county and the year of case filing. The year of case filing represents the start of the legal action to foreclose and is the year in which the Request for Judicial Intervention was filed, or if none was filed (n=24), the date on which the complaint was signed. Because there is often a delay between the filing of the *lis pendens* in anticipation of the civil action and the filing of the Request for Judicial Intervention, the year of case filing ranges from 2007 to 2013, even though the sample of *lis pendens* ranged from 2007 to 2011.

Table 2.1. Distribution of sample by county and year of filing.

	N	%
County		
Bronx	123	0.13
Brooklyn	351	0.37
Manhattan	37	0.04
Queens	326	0.35
Staten Island	102	0.11
Year of Case Filing		
2007	111	0.12
2008	190	0.20
2009	268	0.29
2010	198	0.21
2011	72	0.08
2012	72	0.08
2013	27	0.03
Total	938	100

N=938.

RESULTS

The goal of the empirical study is to use these data to describe the foreclosure process in New York City during the foreclosure crisis and to compare this reality to empirical assumptions embodied in the law.

Plaintiffs' Behavior

I first describe the plaintiffs involved in the foreclosure actions and their behavior, to assess whether the empirical evidence supports the assumption that plaintiffs will comply with regulations that protect their property interests and claims to foreclose.

Plaintiff Identities and Roles

The identities and roles of the plaintiffs bringing foreclosure actions reflect the increasing complexity of mortgage lending. Table 2.2 identifies the plaintiffs that appear most frequently and lists the number of cases in which they appear. Here I make no distinction between parent companies and subsidiaries or between lenders, servicers, or trustees. I also report the plaintiffs as they were named in the foreclosure complaints; taking into account bank mergers, failures, and sales that occurred during this time period would increase the number of cases attributed to some large banks. For example, LaSalle Bank, which brought 22 cases (2.31 percent) and Countrywide, which was plaintiff in 10 cases (1.02 percent) are both now part of Bank of America, which on its own brought 53 cases (5.65 percent).

Keeping these caveats in mind, the cases involved 107 different lead plaintiffs. Not surprisingly, large national banks appear most frequently. Wells Fargo is plaintiff in the largest number of cases (134 cases, 14.26 percent), followed by US Bank (127 cases, 13.59 percent), and Deutsche Bank (113 cases, 12.01 percent). However, there are also 63 plaintiffs that each brought only 1 case.

Rarely is the plaintiff the originator of the loan; at least 76 percent of the loans were assigned after origination.[10] In addition, 42 percent of cases involve loans that have been securitized, and many actions are brought by a loan servicer. The complaints reflect this complexity, with 538 cases (57.36 percent) identifying a lender as the plaintiff, 23 cases (2.44 percent) identifying both a lender and a servicer, 343 cases (36.57 percent) identifying a trustee and the underlying

[10] The number may be even higher. In the remaining cases, the plaintiff is a lender, but if the complaint does not indicate whether the plaintiff originated the loan or subsequently acquired it, it is impossible to determine whether the loan has been assigned.

Table 2.2. Plaintiffs

	N	%
Plaintiff		
Wells Fargo	134	14.26
US Bank	127	13.59
Deutsche Bank	113	12.01
JP Morgan Chase	84	8.96
HSBC	71	7.54
Bank of America	53	5.65
Citibank	52	5.53
Bank of New York Trust Company	33	3.53
Onewest Bank	22	2.37
LaSalle Bank	22	2.31
Aurora	19	2.02
IndyMac Bank	15	1.58
GMAC Mortgage	10	1.05
Countrywide	10	1.02
Washington Mutual	9	1.01
Flagstar Bank	8	0.82
Emigrant Mortgage Company	7	0.77
Freemont Investment and Loan	7	0.70
Wachovia	6	0.65
Nationstar Mortgage	6	0.59
Meritt Funding	5	0.59
Other (86 other plaintiffs named)	126	13.47
Total	938	100.00

Note: Each of the plaintiffs listed appeared in at least five cases. Subsidiaries and parent companies are joined, and there is no distinction made between lenders, servicers, and trustees. Plaintiffs are identified as described in the foreclosure case complaints and do not account for subsequent changes in ownership: LaSalle Bank and Countrywide are now part of Bank of America; Wachovia is part of Wells Fargo; IndyMac was sold to Onewest after going through federal receivership; and GMAC Mortgage was renamed Allly and then purchased by Ocwen Financial.

security, 16 cases (1.69 percent) identifying the trustee but not the security, and another 14 cases (1.44 percent) identifying the servicer but neither a trustee nor a lender.

Thus, most loans have been transferred since origination, nearly half have been securitized, and many are serviced by a party other than the lender or the trustee, raising the potential for faulty assignments of the mortgages in many cases. It may also influence the resolution of foreclosure cases. The variation in the role of the plaintiff is a function of the trends in mortgage lending that preceded the foreclosure crisis and may influence the feasibility of alternatives to foreclosure. In addition, servicers, trustees, and investor-beneficiaries in mortgage-backed securities have differing incentives regarding foreclosure, which can reduce the availability of loan workouts (Twomey and Levitin 2011). It is also possible that assignments over time and the presence of multiple entities as plaintiffs make it more difficult for homeowners to identify and contact lenders to negotiate alternatives to foreclosure. Finally, homeowners may be less likely to pursue affirmative defenses relating to the loan's origination if the loan has subsequently been assigned, although this possibility has not been investigated empirically.

Plaintiffs' Actions

I now turn to plaintiffs' actions within the foreclosure process. Not surprisingly, the pleadings filed by lenders are largely standardized. The complaints are comprised primarily of boilerplate language, including information specific to the case only to satisfy pleading requirements. Yet even where the pleadings satisfy these requirements, they may raise questions about the validity of the lenders' claim.

Without investigating facts of each case that are not available in court records, it is impossible to know whether the plaintiff had standing to bring the action or whether the lawyer

was appropriately diligent in verifying the claims made by the plaintiff. However, it is possible to assess whether the plaintiff supported its position through documentary evidence and whether the pleadings make reference to situations particularly likely to involve potential problems. Table 2.3 describes the incidence of such issues.

Table 2.3. Frequency of Inclusion of Documentary Evidence and Content in Foreclosure Complaints Suggestive of Valid Assignments and Standing

	Yes (%)	No (%)	Unclear (%)
Note Attached as Exhibit	28	70	2
Mortgage Recorded at Complaint Date	27	46	27
Description of Chain of Title for Loan			
Origination Details Present	55	44	0
Intermediate Details Present	28	63	9
Current Details Present	91	8	0
Non-MERS Plaintiff	99	1	0
Mortgage Never Held by MERS	67	33	0
No Complaint Issues	10	86	4

N = 938.

Lenders can establish a prima facie case for foreclosure by filing a copy of the note with the complaint (the note being the evidence of the underlying financial obligation to repay and the mortgage securing that obligation by giving the lender an interest in the real property). Providing the court with a copy of the note not only supports the plaintiffs' claim of having an interest in the note, but also provides the referee with details necessary to calculate the interest and fees due to the plaintiff. However, a copy of the note was attached as an exhibit to the complaint in only 28 percent of cases.

To have standing to foreclose, the plaintiff must have had the interest in the note at the time that the foreclosure action was initiated. The right to foreclose is based upon the transfer of

the note, not the mortgage, and many lenders have traditionally not recorded a mortgage assignment except in anticipation of foreclosure. However, during the time period in question, some notes were not transferred until after the initiation of the foreclosure action and fraudulent mortgage assignments were generated by some lenders to establish a chain of title in the absence of the underlying note. Thus, the timing of the assignment of the mortgage may be, although are not necessarily, an indicator of problems with the assignment of the note.

In this sample, the complaint makes clear that the assignment transferring the mortgage to the plaintiff were recorded prior to the date of the complaint in only 27 percent of cases. In 46 percent of cases, the complaint instead alleges that the plaintiff has the right to enforce the note, but the assignment evidencing the transfer of the mortgage "is to be assigned" or the assignment "is to be recorded." In 27 percent of cases, it is not clear from the complaint when, or if, the mortgage assignment was recorded.

Many complaints also provide a limited or incomplete description of the chain of assignments giving rise to the plaintiff's interest in the note. While 91 percent of cases described the most recent transaction involving the note, only 55 percent of complaints described the origination of the loan (including the date and the identity of the originating lender), and only 28 percent provided details of any intermediate transfers. It is not mandatory that a complaint include this information, but it may be suggestive of gaps in the note's chain of assignments.

The use of MERS has also raised significant complications regarding plaintiffs' standing to bring foreclosure actions. MERS is the lead plaintiff in only 1 percent of cases. However, MERS is identified in the complaint as having been assigned the mortgage at some point in the chain of ownership of the underlying loan in 33 percent of cases. Given the incomplete

information provided in the complaints regarding the history of the loans, it is possible that this number is actually higher.

Finally, many cases involve multiple overlapping issues. Only 10 percent of the cases in the sample were free of all of the issues described above, with an additional four percent involving some uncertainty. Thus, 86 percent of cases had a complaint that failed to offer documentary evidence of standing, indicated that the assignment giving the plaintiff standing was not recorded prior to the initiation of the foreclosure action, failed to accurately trace the chain of title for the underlying loan, or referenced the assignment of the loan to MERS.

These results suggest that some lenders may have been unable to establish their interest in the underlying note. In the section that follows, I evaluate the actions of their counsel within this context.

Plaintiffs' Lawyers and their Actions

All organizations must be represented in civil actions (NY CPLR § 321) and all plaintiffs in the sample have legal representation. Table 2.4 lists the top 20 plaintiffs' law firms and the number of cases in which they appear. There are 73 different law firms providing representation for the plaintiffs in the sample, but a small number of firms had an incredible share of the market. For example, just three firms served as counsel in more than half of all cases: Steven J. Baum, P.C. represented the plaintiff in 269 cases (29 percent); Rosicki, Rosicki & Associates served in 131 cases (14 percent); and Fein, Such & Crane, LLP was plaintiff's counsel in 92 cases (10 percent). In contrast, 53 firms were involved in five or fewer cases.

The primary firms specialize in foreclosure cases and reduce costs by automating, and in some cases even outsourcing, the preparation of standardized pleadings. This high-volume

approach has earned them the disparaging moniker "foreclosure mills," but they offer plaintiffs a means of managing costs associated with processing a large number of mortgage defaults.

There have been problems with this approach, however. The largest foreclosure firm in New York State during the time covered by this study was the Steven J. Baum firm. The firm and its affiliated business, Pillar Processing, LLC ("Pillar"), were investigated by the New York State Attorney General and found to have routinely filed foreclosures without verifying the accuracy of the plaintiffs' claims, relied on non- attorney employees to prepare complaints,

Table 2.4. Plaintiff Law Firms

	N	%
Steven J. Baum P.C.	269	28.70
Rosicki, Rosicki & Associates	131	13.99
Fein, Such & Crane, LLP	92	9.86
Shapiro & DiCaro [and Barak], LLP	60	6.40
Frenkel, Lambert, Weiss, Weisman	54	5.78
McCabe, Weisberg & Conway, P.C.	40	4.26
Druckman Law Group	25	2.63
Berkman, Henoch, Peterson [& Peddy]	25	2.63
Stein, Wiener & Roth, LLP	21	2.23
Sweeney, Gallo, Reich & Bolz	19	2.00
Jordan S. Katz, Esq.	17	1.82
Gross, Polowy & Orlans	15	1.65
Knuckles & Komosinski [& Elliott], P.C.	15	1.64
Davidson Fink [Cook, Kelly], LLP	15	1.59
Stiene & Associates, P.C.	13	1.44
Leopold & Associates, PLLC	12	1.32
Alan H. Weinreb	11	1.21
Sheldon, May & Associates, P.C.	10	1.03
Zavatsky Mendelsohn & Levy	7	0.73
Doonan & Graves [Longoria], Esqs.	6	0.68
Other (53 firms)	79	8.41
Total	938	100.00

and had employee attorneys pre-sign complaint verifications and other legal documents to be notarized later without the presence of the signing attorney. The firm ultimately agreed to pay $4 million in penalties, costs, and fees and closed in 2011 (NY AG 2014).[11]

Thus, in nearly one-third of the cases in this sample, the plaintiff was represented by a law firm known to have consistently engaged in robo-signing and other faulty practices. The Attorney General negotiated an agreement with a number of large lenders to reduce the financial impact on homeowners of the delay while plaintiffs found alternate counsel after the closing of the Baum firm. However, the legal pleadings submitted by the Baum firm have not been subject to additional scrutiny.[12]

An additional consideration is the timing of the filing of the Request for Judicial Intervention, which triggers the foreclosure settlement conference (among eligible cases). In this sample, there are 24 cases in which no Request for Judicial Intervention was ever filed. In many other cases, it was filed, but after a delay. The median time between the date on which the complaint was signed and the filing of the Request for Judicial Intervention is a little over three months. Because of the time required for notice, we would expect a period of time to elapse. However, 10 percent of cases involved a period of more than a year between the verification of the complaint and the filing of the Request for Judicial Intervention. The longest delays lasted for years, with up to four and one-half years passing between the complaint date and the filing of the Request for Judicial Intervention.

[11] The firm also attracted national attention through a series of articles in the *New York Times,* including a column that included photos from a Halloween party at the firm showing costumes and decorations mocking homeowners facing foreclosure (Nocera 2011).

[12] Perhaps law firms can also be too big to fail, in the sense that pleadings prepared by an enterprise known to have engaged in fraud are allowed to stand. Or, the court system assumed that lawyers taking over the cases would review the pleadings and respond appropriately.

In these extreme cases, the Request for Judicial Intervention was generally filed in response to court interventions designed to clear the Shadow Docket that developed as a result of lenders' failures to prosecute the complaints that had been filed. It is possible that these delays affected the ultimate resolution of the claims by denying homeowners the benefit of a timely settlement conference, when eligibility for a loan modification is likely to be higher. Here I attribute this behavior to lenders' counsel, on the assumption that plaintiffs' law firms are responsible for prosecuting foreclosures once referred to them by the lender, but this could reflect decisions on the part of the lender.

These findings raise significant questions about the validity of a large number of foreclosure cases filed during this time period, and offer evidence of delay in the processing of foreclosure cases. In the next section I consider how homeowners respond, taking into account the circumstances and resources available to them.

Homeowners' Use of the Adversarial Process

I begin by describing the property location and loan characteristics of the cases, followed by an exploration of homeowners' use of legal representation, and the challenges homeowners' raise to foreclosure.

Property and Loan Characteristics

Because the data were drawn from court records, I know the identities, but not the demographic or socioeconomic characteristics of the defendant homeowners. However, I am able to describe the locations of the properties subject to foreclosure. Given that individual characteristics are related to residential location, this offers some insight into the likely characteristics of the homeowners.

Consistent with prior research, I find the properties are disproportionately located in areas with higher minority populations. Matching Decennial 2010 Census data to the property locations indicates that the properties in the foreclosure actions are located on blocks where, on average, 42 percent of the population is black and 24 percent of the population is Hispanic. Mapping the location of each property and the proportion of the block population that is black (Figure 2.2) or Hispanic (Figure 2.3) offers further evidence of these patterns. (Both maps use the full sample of cases).

The property and loan characteristics are also likely associated with the financial circumstances of the homeowners. The median income in the block groups where the properties are located was $57,680, although it ranges from $15,270 to $215,143 (in 2012 inflation-adjusted dollars). The average principal amount of the underlying loan is $444,102. The average interest rate at the time the foreclosure case was initiated was 7.26 percent; because many of the loans had interest rates that were subject to adjustment, the original interest rate may have been different and, had the homeowner not defaulted, it might have changed over time.

The loan terms and repayment behavior of the homeowners also suggest their potential disadvantage. Figure 2.4 presents smoothed histograms of the frequencies of homeowner default dates and loan origination dates, by year of case filing. The majority of the loans are recent, and the time between origination and default is generally short. As expected, the date on which the homeowner defaulted is generally later among cases filed later. In contrast, the most common origination date remains constant among all cases. Most of the cases in the sample were originated in late 2006—as evidenced by the peak of the distributions—regardless of the year in which the foreclosure case was filed, although the distribution widens among the later cases as

Figure 2.2. Foreclosure Case Property Locations with Proportion of Block Population that is Black

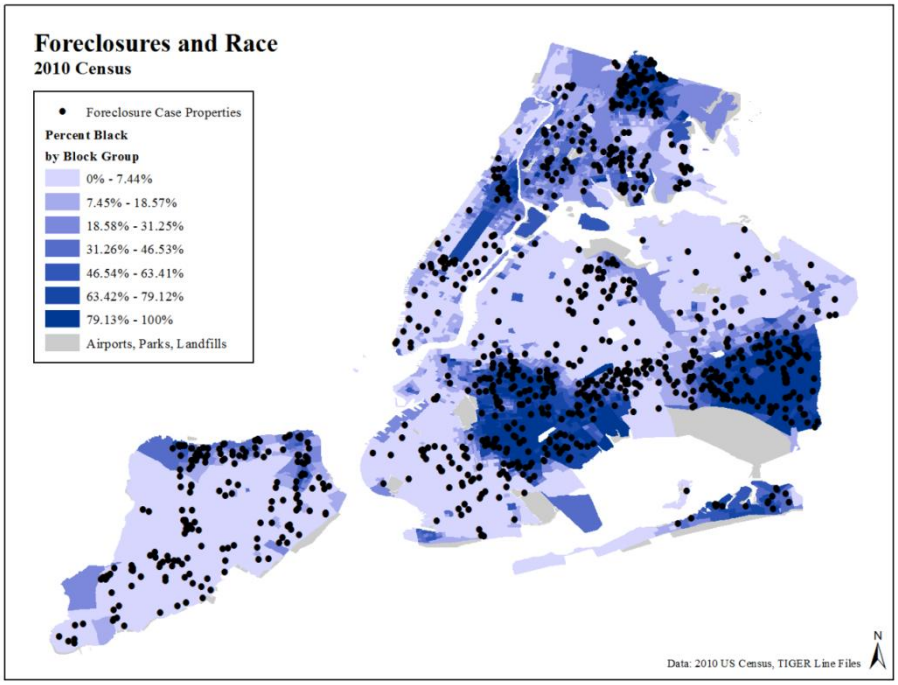
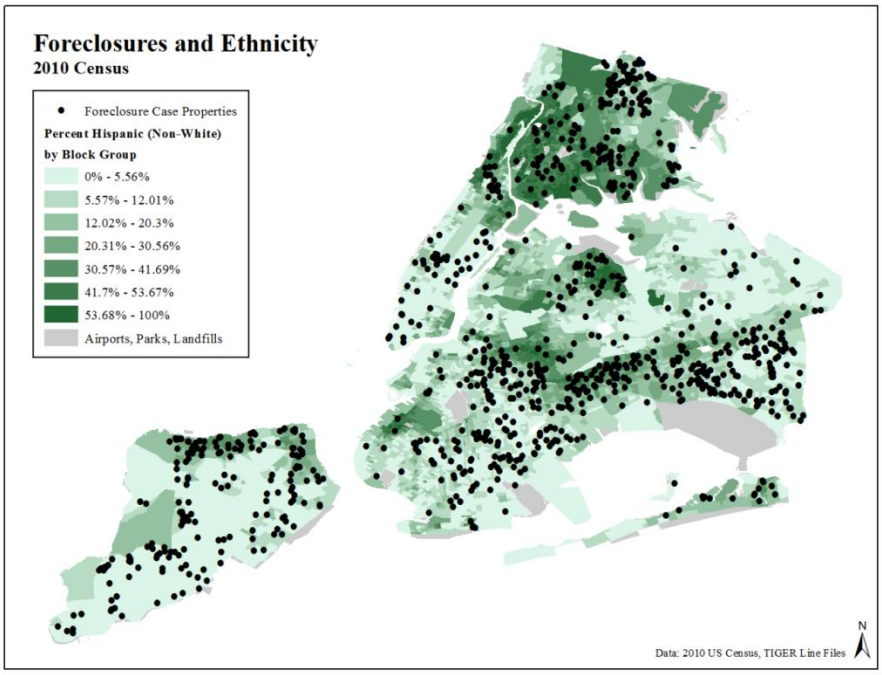


Figure 2.3. Foreclosure Case Property Locations with Proportion of Block Population that is Hispanic



earlier and later loans entered the foreclosure process. These trends are consistent with the growing literature on mortgage default during the Great Recession that highlights systematic differences in the risk of default across loans of different vintages.

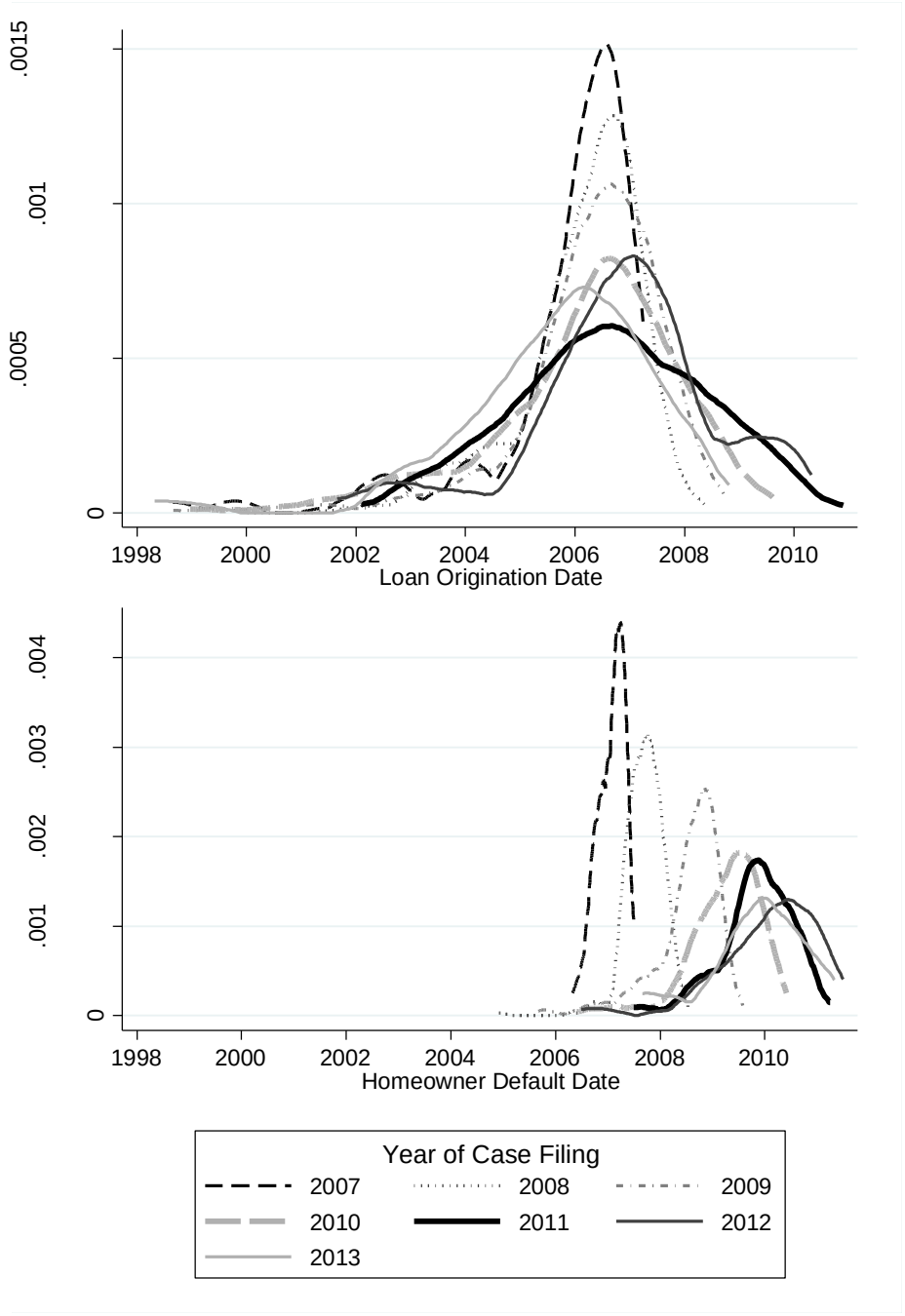
Homeowner Legal Representation

In addition to the socio-demographic characteristics of homeowners, their ability to obtain legal representation may also influence their probability of engaging in the legal foreclosure process. While all lenders must be represented, homeowners face no such requirement, and only 21 percent of the homeowners had any type of legal representation. This includes limited representation, such as for the purpose of drafting an answer or appearing at a settlement conference. The number of homeowners who had traditional attorney-client relationships with lawyers is even lower. However, homeowners' use of lawyers increased over time. Only 7 percent of homeowners had representation among cases filed in 2007, compared with a high of 39 percent among cases filed in 2011.

Legal representation for homeowners varies significantly from that retained by plaintiffs. Of those homeowners with legal representation, 60 percent are represented by solo practitioners. Lawyers that are part of law firms—most are small firms—provide representation in another 39 cases (20 percent of homeowner legal representation) and legal aid and pro bono programs are the source of homeowners' legal representation in 30 cases (15 percent of homeowner legal representation). In five cases homeowners had representation through a union employee prepaid legal assistance plan (3 percent of homeowner legal representation).

While only a few firms represent most plaintiffs, there is far less consolidation among lawyers representing homeowners. Table 2.5 lists all lawyers or firms that appeared on behalf of

Figure 2.4. Kernal Density Estimate of Loan Origination Date and Homeowner Default Date, by Year of Case Filing



Note: For display purposes, includes only cases with loans originated on or after January 1, 1998 (N=921).

the defendant in more than one case. One hundred fifty-eight solo practitioners or law firms provided representation in the 198 cases where the homeowners were represented. Only 17 of these lawyers or law firms appeared in more than one case, and the legal provider who appeared most often appeared in only 6 cases. Because each homeowner in the sample is unique but some plaintiffs appear in multiple cases, it is not surprising that the network between homeowners and their lawyers is less centralized than that of plaintiffs and their legal representatives.

However, it is also indicative of the structural context of foreclosure litigation. Plaintiffs benefit from the increased efficiency of filing multiple similar claims, but individual homeowners do not. This is not only because homeowners are one-shotters, but the reality that foreclosure defense work requires more individualized attention, and is thus more time-consuming and expensive, than foreclosure prosecution, especially where lenders are not attempting to find alternatives to foreclosure. This makes it more difficult for foreclosure defense lawyers to adopt the high-volume model used by plaintiffs' lawyers. Given that homeowners facing foreclosure are likely to face financial difficulty, their ability to afford the expense of legal representation is reduced.

The lack of consolidation among foreclosure defense counsel may also limit their ability to identify and respond to patterns of behavior among plaintiffs. For example, it was largely through the work of a legal aid agency that the Shadow Docket was identified (MFY 2012). Because the private foreclosure defense bar is so heavily comprised of solo practitioners, it may be more difficult for homeowners to identify and challenge any systematic legal violations committed by plaintiffs.

Table 2.5. Homeowners' Lawyers

	N	%
Todd P. Arbesfeld, Esq.	6	3.04
DC 37 Municipal Employees Legal Services	5	2.53
Cabanillas & Associates, P.C.	5	2.37
Brooklyn Legal Services Corporation A	4	2.20
The Legal Aid Society	4	1.86
Rubin & Licatesi, P.C.	3	1.31
Staten Island Legal Services	2	1.16
MFY Legal Services, Inc.	2	1.16
Urban Justice Center	2	1.15
Queens Legal Services	2	1.15
Queens Volunteer Lawyers Project, Inc.	2	1.15
Cohen & Slamowitz, LLP	2	1.09
Alice A. Nicholson, Esq.	2	1.09
Warren Sussman, Esq.	2	0.93
Boris H. Linares, Esq.	2	0.93
Jose A. Polcano, Esq.	2	0.93
PLC Law Group, LLP	2	0.93
Craig A. Fine, Esq.	2	0.87
Other (139 lawyers or firms)	145	74.14
Total	198	100.00

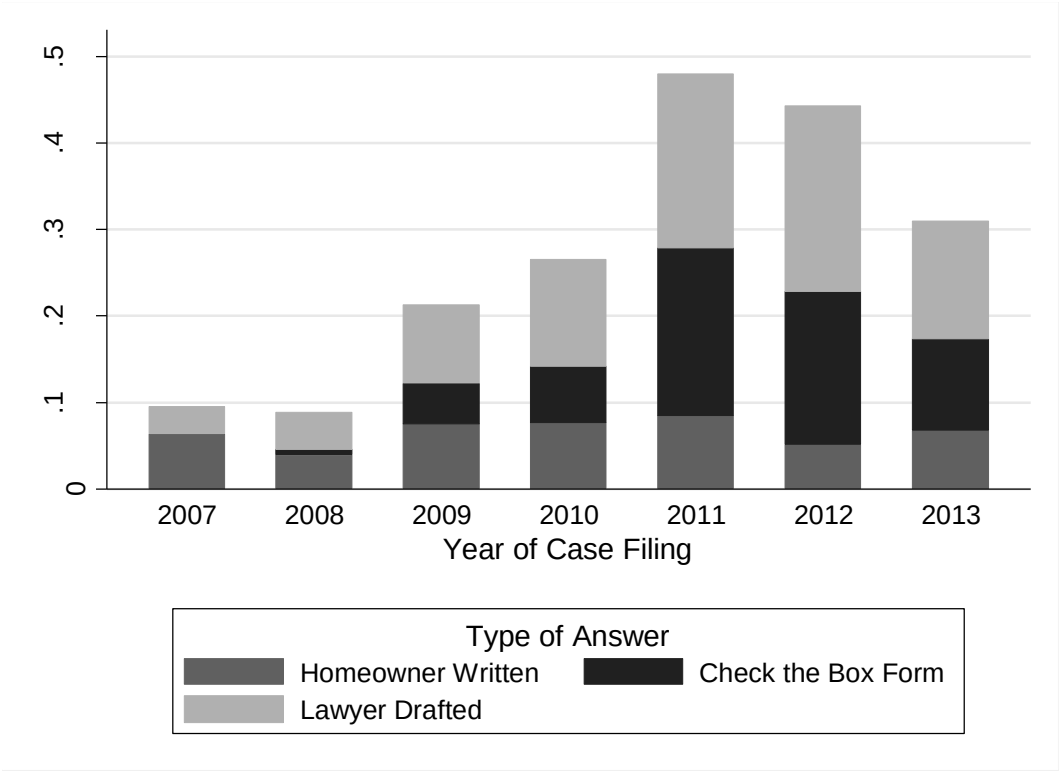
Homeowners' Answers

The formal means of challenging the plaintiff's right to foreclose is through an answer. Homeowners filed an answer in only 24 percent of cases, but as with legal representation, the rate increased over time. While filing an answer is important for avoiding default and raising any available defenses, the value of the answer depends on both the legitimacy of the claims asserted and the homeowners' ability to pursue them.

The form of the answers filed in these cases raises some question as to their value. Although lawyers drafted 41 percent of the answers filed by homeowners, 25 percent were check-the-box forms such as those attached as Appendix 4.A1 and homeowners without legal assistance wrote 27 percent. Figure 2.5 shows the proportion of cases in which the homeowner filed an answer, by year of case filing, and type of answer filed. The results indicate that while there was a substantial increase over time in the proportion of cases with an answer drafted by attorneys, much of the rest of the increase in the answer rate was the result of check-the-box answer forms. If homeowners are able to file these answers but unable to defeat a plaintiff's motion for summary judgment, they may not influence the outcome of the case; on the other hand, having raised defenses to the action may provide homeowners an advantage in negotiating an alternative to foreclosure, even if they are not able to prove the defenses raised. This raises an empirical question regarding the benefit of these forms that merits additional research.

Lack of standing is the most common defense raised by homeowners, with half of all answers (50.3 percent) including this defense. The defense may rest on the assertion that the plaintiff does not own the note, was not the owner and holder of the note at the time the action was initiated, or that the plaintiff failed to affirmatively allege its standing (applicable only in cases for which this was statutorily mandated). Thus, those homeowners who file an answer

Figure 2.5. Proportion of Cases with Homeowner Answer, by Type of Answer and Year of Case Filing



frequently allege that the plaintiff lacks standing, but such homeowners account for only about 12 percent of all defendants.

In most answers, homeowners raise multiple defenses or counterclaims. Homeowners allege that the plaintiff failed to provide proper notice to the homeowner in 46 percent of answers. In 28 percent of answers, the homeowner claims to be entitled to, or in the process of being considered for, a loan modification under the HAMP program. Twenty-six percent of answers raised allegations regarding predatory lending, and 20 percent claimed that the plaintiff failed to credit payments received. In addition, 16 percent of answers sought equitable relief on the basis of bad faith on the part of the plaintiff, in a variety of circumstances. Nearly half of all

answers also included additional defenses or claims not described here (which may or may not have been legally valid).

These results show that there was limited adversarial action taken by homeowners, but that standing is the most common defense raised when homeowners do challenge the lender's right to foreclose. This raises a question as to whether homeowners' action—or inaction—is the result of strategic behavior or whether homeowners fail to realize the applicability of potential defenses. With these observational data, it is impossible to determine this for any individual case. However, it is useful to explore whether homeowners are more likely to file answers that allege a lack of standing when the complaint fails to offer documentary evidence supporting its claim or references situations that may indicate lapses in the chain of assignment giving rise to its interest.

Table 2.6 presents the estimated coefficients from a logistic regression model in which the characteristics of the complaint predict the probability that the homeowner in a foreclosure case will file an answer alleging that the plaintiff lacks standing. The year and county of case filing are also included. The analysis uses an analytic sample (n=933) that excludes the small number of observations in which it was not clear whether the complaint described the origination or current assignment of the loan.

The results indicate that cases are more likely to have a homeowner that alleges a lack of standing if MERS was the holder of the loan at some point. This may also be more likely if it is unclear whether the complaint describes the chain of assignments between the loan's origination and the transfer generating the plaintiff's interest, although this relationship is only marginally statistically significant. However, the year of case filing is a stronger predictor of the presence

Table 2.6. Estimated Coefficients from Logistic Regression Model Predicting Presence of Homeowner Answer Alleging Plaintiff's Lack of Standing

	β	SE
MERS Held Mortgage	0.80**	0.27
Mortgage Assignment Recorded Pre-Complaint		
No (*ref.*)		
Yes	-0.29	0.30
Unclear	-0.64	0.35
Loan Attached as Exhibit to Complaint		
No (*ref.*)		
Yes	-0.10	0.27
Unclear	-0.21	0.76
Complaint Describes Loan Origination	-0.29	0.31
Complaint Desribes Intermediate Assignmets		
No (*ref.*)		
Yes	-0.28	0.30
Unclear	-0.31	0.52
Complaint Descibes Assignment to Plaintiff	0.40	0.51
Court		
Brooklyn (*ref.*)		
Bronx	0.33	0.37
Manhattan	0.76	0.45
Queens	1.001**	0.39
Staten Island	0.34	0.38
Year of Case Filing		
2007 (*ref.*)		
2008	0.43	0.69
2009	1.66**	0.59
2010	2.70***	0.58
2011	3.35***	0.61
Constant	-4.59	0.73

N=933. The analytic sample excludes the small number of observations in which it was not clear whether the complaint described the origination or current assignment of the loan.

of such an answer, and there is significant variation across counties. Individual bivariate analyses result in similar findings.

With only a quarter of homeowners filing an answer, it does not appear that homeowners consistently use the adversarial process to challenge foreclosures. Moreover, there is limited evidence that homeowners are responding to the content of plaintiffs' pleadings in deciding whether to file an answer that alleges a lack of standing, the defense that has the potential to offer the greatest benefit. In contrast, it suggests that the context in which the case was litigated has a larger impact on homeowners' actions.

Case Outcomes

The evidence presented above suggests that many of the assumptions underlying the foreclosure process may not be valid. In this section, I consider the implications of these failures for case outcomes.

Of the 938 cases in this sample, 153 cases (16 percent) were still ongoing at the end of data collection, 189 cases (20 percent) ended in foreclosure, and the majority, 596 (64 percent), were discontinued or dismissed. Dismissals are rare relative to discontinuances and all are without prejudice, reducing the substantive difference between them. The high rate of discontinuance is surprising given the advantages favoring plaintiffs in foreclosure actions. Do these cases represent instances where plaintiffs decided to forego the possibility of foreclosure in favor of alternatives benefitting both the homeowner and the plaintiff? Or are these cases where the plaintiff was unable to successfully prosecute its claim?

While the vast majority of the discontinued cases were terminated at the request of the plaintiff and with the consent of the homeowner (in those cases where the homeowner appeared),

upon the filing of a Stipulation of Discontinuance, the reasons for the discontinuances vary. Table 2.7 describes the reason for the discontinuances. Just over seven percent of the cases (n=70) were discontinued because the loan was reinstated or satisfied or another settlement was reached. Another 17 percent (n=161) involved loan modifications, short sales, forbearance, or bankruptcy. Just under ten percent of cases (n=93) were dismissed due to improper action on the part of the plaintiff. This includes 60 cases (6.39 percent) dismissed for failure to prosecute; these cases were part of the Shadow Docket in which the Request for Judicial Intervention was not timely filed.

Plaintiffs' lack of standing is cited as the reason for the discontinuance in only 9 cases (1.01 percent). However, nearly 30 percent of the cases in the sample (n=281) were discontinued without providing a reason. In these cases, the affidavit filed in support of the Stipulation of Discontinuance, in which the plaintiff's representative must provide a reason for the requested relief, simply states that the "plaintiff elected not to move forward with the case." Given there is no reference in the court record or court summary of a loan modification, loan reinstatement, or other negotiated alternative to foreclosure in these cases, there is little reason to expect that they were discontinued for these reasons. Rather, it appears likely that these cases may represent instances where lenders were unable to move forward with the foreclosure action. One New York City Legal Aid organization has found that cases discontinued in these circumstances, lenders frequently re-file, with deleterious consequences for homeowners:

> "MFY's recent review uncovered . . . an excessive number of discontinuances [] filed by foreclosure law firms without providing any grounds for the discontinuance. . . . In our experience, when a foreclosure action is filed but later discontinued without settlement, a homeowner has more difficulty negotiating a loan modification than he would had he not been sued in the first instance." (MFY 2012: 2).

Table 2.7. Distribution of Foreclosure Case Outcomes

	N	%
Discontinued or Dismissed		
Loan Reinstated	27	2.88
Loan Satisfied	24	2.57
Loan Reinstated or Satisfied	1	0.12
Settled	18	1.91
Loan modification	124	13.20
Short sale	34	3.66
Forebearance	3	0.28
Bankruptcy	1	0.06
Dismissed for Failure to Prosecute	60	6.39
Lack of Standing	9	1.01
Improper Notice	8	0.90
Plaintiff Default	2	0.19
Prior Action Ongoing	1	0.16
Lack of Signature	1	0.16
Service Members Civil Relief Act	1	0.12
Reason for Discontinuance Unclear	281	29.97
Foreclosure	189	20.14
Ongoing	153	16.28
Total	938	100.00

DISCUSSION

Taken as a whole, these results offer a disturbing picture of the foreclosure process, and one that fails to comport with assumptions upon which the process relies. Yet the significance of these results depends on whether they are an unfortunate aberration—reflecting a perfect storm of economic and legal circumstances unlikely to occur again—or markers of a new reality.

Galanter proposes the concept of a case *congregation*, defined as "a group of cases that . . . share common features, that are shaped by a common history, that are subject to shared contingencies, and that lean into a common future" (1990: 372). The foreclosure cases described here are undoubtedly such a congregation, as evidenced by the shared circumstances of the underlying loans' origination and the fact that they were subject to a court foreclosure process altered by the influx of so many similar cases. In this sense, these cases may not be representative of foreclosure cases to come, especially if the mortgage lending process is effectively reformed.

Yet, in other ways, it is not clear that the issues underlying these results have been resolved. The secondary mortgage market remains active, prompting scholars to call for a national registry of transferable records to avoid the privatization of mortgage recording while standardizing practices across states (e.g. Davis 2013). The closing of the Steven J. Baum Firm has simply boosted the role of other large foreclosure firms, and the incentive to reduce costs by streamlining the foreclosure process remains in place. However, reforms to the foreclosure process can place a larger burden on lenders to substantiate their interests. For example, New York State now requires that lenders submit the note to the court in support of the Certificate of Merit, and plaintiffs must file the Request for Judicial Intervention at the same time as the complaint (Chapter 306 of the Laws of New York, 2013). However, some of the other reforms to

the foreclosure process are set to sunset in 2020, making them temporary responses to problems that may be ongoing.

If reforms are able to ensure that lenders have a valid claim that is appropriately litigated by their legal representatives, low rates of homeowner participation in the foreclosure process may be less concerning. After all, widespread access to mortgage lending relies on lenders being able to enforce their security interests when homeowners default. On the other hand, if changes in mortgage lending have distorted the traditional economic incentives that prevented lenders from engaging in uneconomic foreclosures, there may still be reason to promote homeowners' involvement in the foreclosure process. However, it is only temporary loan modification programs that have provided homeowners with a right to a loan modification that offers a greater net present value than a foreclosure (e.g. Making Home Affordable 2016). It is unclear whether an adversarial legal process, in which the homeowner has no *right* to a loan workout, would address this issue.

Thus, the results suggest the importance of reforms not only to mortgage lending and servicing practices, but to the actions of lenders and their representatives within the foreclosure process as well. However, it is not clear whether such reforms will be able to overcome the structural disadvantages that impede homeowners' use of the adversarial legal process.

CONCLUSION

This study offers a rare opportunity to investigate the foreclosure process as it was carried out during the foreclosure crisis and to evaluate whether the empirical reality comports with a series of assumptions upon which the process is based. Specifically, I consider whether lenders were sufficiently incentivized to comply with regulations regarding the assignment of mortgage

interests, whether their lawyers' actions were consistent with professional responsibilities, and whether homeowners used the foreclosure process to challenge lenders' actions. Using a dataset of a representative sample of 938 foreclosure cases initiated in New York City between 2007 and 2011, I find evidence that challenges each of these presumptions.

This divergence between law on the books and law in action has important implications. Lenders' failures to comply with regulations governing the assignment of interests in real property threaten the clarity of the land title system, the legal bedrock upon which the real estate market is built. There is also a potential that homeowners have lost their homes in spite of lenders' failures to comply with the requirements of the foreclosure process. Such injustices challenge the legitimacy of the legal system and, in some cases, the validity of the legal profession's claim to self-regulation. Moreover, because foreclosures have negative implications not only for individuals, but for families and neighborhoods, the social implications are far-reaching.

Appendix 2.A1. Sample Foreclosure Defendant Answer Form

SUPREME COURT
County of _____: State of New York

_____

Plaintiff,

v.

Defendant(s).

Index No.:_____

VERIFIED ANSWER TO FORECLOSURE COMPLAINT

_____

Defendant _____ answers as follows:

General Denial.

☐ Plaintiff, upon information and belief, does not own the note and mortgage. Because ownership is an element of a foreclosure cause of action, Plaintiff has no right to foreclose.

I plead the following Defenses and Affirmative Defenses:

☐ Lack of Standing to Sue: Plaintiff does not have standing to sue because it was not the legal owner of the Note and/or Mortgage at the time it commenced this foreclosure lawsuit.

☐ I have no knowledge that the plaintiff was assigned my debt or there was no Affirmative Allegation of Standing (NY Real Property Actions and Proceedings Law § 1302, high-cost and subprime home loans): Plaintiff failed to allege in the Foreclosure Complaint that it is the legal owner and holder of the Note and/or Mortgage or has the authority to foreclose.

☐ Improper Service of the Summons and Complaint (NY Civil Practice Law and Rules § 308) for the following reason:_____

_____

☐ I did not receive the notice of default required by my mortgage agreement, and the mailing of this notice is a condition precedent to the foreclosure.

☐ 90-Day Pre-Foreclosure Notices (NY Real Property Actions and Proceedings Law § 1304) were inadequate because (*check one or both if applicable*):

- ☐ Two copies not delivered.
- ☐ Foreclosure lawsuit filed within 90 days of Pre-Foreclosure Notices.

☐ I did not receive the notice "Help for Homeowners in Foreclosure" that was supposed to be served with the Foreclosure Summons and Complaint (NY Real Property Actions and Proceedings Law Section 1303).

☐ An active servicemember is an owner of the property and is on the mortgage and qualifies for Active Military Service protections under state or local law (Federal Servicemembers Civil Relief Act, 50 App. U.S.C. 501 et seq.; and New York State Soldiers' and Sailors' Civil Relief Act, NY Military Law Section 300 et seq.)

☐ Homeowner's Mental Disability or Incompetence (NY Civil Practice Law and Rules Section 1202)

☐ I am eligible for the Home Affordable Modification Program ("HAMP") because my loan is secured by a one-to-four unit property, coop, or condo, this is my principal residence, the loan was originated on or before January 1, 2009, and I cannot afford my monthly mortgage payments. The loan servicer failed to comply with HAMP for the following reason(s) (*check one or both if applicable*):

- ☐ Chapter II, Section 3 of the MHA Handbook prohibited the servicer from referring my loan to foreclosure. To my knowledge, I have not been evaluated for HAMP or determined ineligible for the program; I did not fail a HAMP trial period plan; I have responded to all reasonable requests for information; and I have not refused help under the program.
- ☐ Other reason: _____

Compliance with HAMP is a condition precedent to foreclosure and failure to comply with HAMP gives rise to equitable defenses to this action.

☐ My loan is insured by the Federal Housing Administration ("FHA"). The loan servicer has not complied with regulations of the Department of Housing and Urban Development requiring pre-foreclosure and loss mitigation evaluation for FHA-insured mortgage loans. Compliance with these regulations is a condition precedent to foreclosure. Further, failure to comply with these rules gives rise to equitable defenses to this action.

☐ Partial or Full Payment:

- ☐ I have made payments in the amount of $_____which have not been properly credited and are not reflected in the Complaint.
- ☐ Other explanation: _____

☐ On information and belief, Plaintiff did not file a Request for Judicial Intervention (RJI) as required by Uniform Rule 202.12-a(b) and did not file the Affirmation required by AO/431/11.

☐ On information and belief, Plaintiff's Attorney did not file a Certificate of Merit as required by CPLR 3012-b attesting that he or she reviewed the facts of the case and based on a consultation with representatives of the plaintiff identified in the certificate and the attorney's review of pertinent documents, including the mortgage, security agreement and note or bond underlying the mortgage executed by defendant and all instruments of assignment, if any, and or any other instrument of indebtedness including modification, extension or consolidation, to the best of his or her knowledge, information or belief there is a reasonable basis for commencement of this action and that plaintiff is the creditor to enforce rights under such document.

☐ As required by CPLR 3012-b, copies of the mortgage, security agreement and note or bond underlying the mortgage executed by defendant and all instruments of assignment, if any, and any other instrument of indebtedness including modification, extension, and consolidation were not attached to the complaint nor the Certificate of Merit.

☐ Other:

_____

_____

OTHER FACTS CONCERNING YOUR MORTGAGE, YOUR HOME, OR OTHER DEFENSES OR COUNTERCLAIMS (*ATTACH ADDITIONAL PAGES IF NEEDED*)_____

Wherefore, Defendant requests that the Complaint be dismissed; that the relief requested by Defendant be granted in its entirety; that Defendant be granted costs and attorneys' fees if he or she retains counsel; and any other relief allowed by law and considered just by this Court.

DATE: _____

DEFENDANT'S NAME: _____

DEFENDANT'S ADDRESS: _____

_____

_____

DEFENDANT'S PHONE NO. _____

Appearing Pro Se

VERIFICATION

I, _____, being duly sworn, state that the within Answer is true to the best of my knowledge, except as to those matters alleged upon information and belief, which I believe to be true.

_____
Defendant (Print Name)

_____
Defendant (Signature)

Sworn to and subscribed before me this
____ day of _____, 20_____

_____
Notary Public

AFFIDAVIT OF SERVICE

I, _____, served the within Verified Answer on Plaintiff's attorney as follows (*attorney's name and address*):

_____

_____

_____

_____.

I served the Verified Answer by the following method (*check all that apply*):

☐ first class mail
☐ certified mail
☐ certified mail, return receipt requested
☐ overnight delivery service
☐ facsimile
☐ personal delivery.

on the _____ day of _____, 20_____.

I am eighteen years or older and I am not a Defendant in this lawsuit.

Signature:_____

Print Name:_____

Sworn to and subscribed before me on this
_____ day of _____, 20___

_____
Notary Public

CHAPTER 3: REACTING TO 'NAMING, BLAMING, AND CLAIMING': DEFENDANT HOMEOWNERS' ACTIONS IN RESPONSE TO FORECLOSURE

As the housing bubble of the early 2000s collapsed, the rate of residential foreclosures in the United States has reached historic levels.[1] At the peak of the foreclosure crisis in 2010, more than 10 percent of all mortgages were at risk of default (Mortgage Bankers Association 2014), and foreclosures have directly affected nearly one in twelve households nationally (Hall, Crowder, and Spring 2015). In those states where foreclosures are handled within the court system, there has been a corresponding increase in foreclosure cases. In New York State, the focus of this chapter, foreclosure cases account for nearly one-third of all pending civil cases (Pfau 2010; Prudenti 2013).

The dramatic rise in foreclosures reflects the increase in subprime and predatory lending and the collapse of the housing market (Gerardi et al. 2011), which was exacerbated by high rates of unemployment (Been et al. 2011) and changes in the servicing of mortgages (Levitin and Twomey 2011). Because foreclosures have detrimental effects not only on individual wealth accumulation (Shapiro et al. 2013) and health (e.g. Houle 2014, Pollack and Lynch 2009), but also on surrounding housing values (e.g. Immergluck and Smith 2006, Gerardi et al. 2012), neighborhood crime rates (e.g. Ellen, Lacoe, and Sharygin 2013), and residential mobility (e.g. Sharp and Hall 2014), the social repercussions of the foreclosure crisis are far-reaching.

Yet, not all cases that enter the foreclosure process will end with the sale of the home at auction. Instead, many homeowners who enter the foreclosure process are able to avoid

[1] In foreclosure, the holder of a note that is secured by an interest in real property seeks to recoup the unpaid principal of the loan, plus any accrued interest or fees, from the proceeds of a forced sale of the property. In residential foreclosure, this generally involves a bank trying to recover the funds loaned to an individual for the purchase of a home when the individual homeowner fails to repay the loan.

foreclosure by negotiating forbearance, modifying the loan, obtaining alternate financing, or arranging a short sale or transfer of the deed in lieu of foreclosure (Chan et al. 2012). However, while there is a growing body of research on the foreclosure crisis focused on lending patterns (e.g. Gerardi, Shapiro, and Willen 2009; Hyra et al. 2013; Rugh 2014; Rugh and Massey 2010), foreclosure initiation (Chan et al. 2012; Doviak and McDonald 2011; Iwanisziew and Ludwig 2012), and foreclosure prevention efforts (e.g. Collins and Reid 2011; Immergluck 2013), there has been less attention to the foreclosure process. In this chapter, I explore homeowners' actions within this process.

Identifying the actions taken by homeowners is important for our understanding of legal culture more generally (Friedman 1969). The question of how and when individuals decide to engage with the legal system is a fundamental topic in socio-legal research (Eisenberg 2009). However, most research on individual dispute processing behavior has focused on the actions of claimants (Kritzer, Bogart, and Vidmar 1991; Kritzer, Vidmar and Bogart 1991; May and Stengel 1990; Nielsen and Nelson 2005), relying heavily on the "Naming, Blaming, and Claiming" framework (Felstiner et al. 1980-1981) and the concept of the dispute pyramid (Miller and Sarat 1980-1981). This work has largely ignored the more common situation (Galanter 1975) in which individuals must respond to a claim made against them.

In this chapter I extend existing research by focusing on how individuals navigate the dispute process in a situation when they are responding rather than claiming. While I focus on foreclosure, individual respondents are involved in many other types of disputes, including divorce, civil actions between neighbors, debtor/creditor cases, landlord/tenant litigation, and tax cases (Galanter 1974). I first identify four potential dispute processing pathways that respondents may follow after a formal legal claim has been made against them, and consider how

the distribution of respondents among those pathways will vary across different kinds of disputes. Building on this discussion, I focus on dispute processing behavior among individual homeowners against whom a formal legal claim to foreclose has been filed. Finally, using a dataset of a representative sample of foreclosure cases initiated in New York City between 2007 and 2011, I investigate the dispute processing behavior of individual homeowners in the foreclosure process and evaluate its relationship to case duration and outcome.

RESPONDENT DISPUTE PROCESSING

Just as individual claimants face a series of decisions that influence the trajectory of disputes, so do individual respondents. However, the situations of individual claimants and respondents differ (Galanter 1974; Genn 1999). While claimants "name, blame, and claim" to transform injurious experiences into formal legal claims (Felstiner et al. 1980-1981, Miller and Sarat 1980-1981),[2] respondents named in these claims must react.

Respondent Dispute Processing Pathways

Respondents named in a civil action are bound by the strictures of the legal forum, unlike claimants who may choose from a variety of formal and informal means for addressing grievances (Albiston et al. 2014). Upon receipt of the complaint, a respondent must decide whether to *defend* against the formal legal claim or *default*. To defend themselves, respondents must answer the claim and satisfy any other procedural requirements. Those who fail to do so

[2] While these studies represent the dominant conceptualization of dispute processing, they are not without proposed modification (e.g. Goldman, Paddock, and Cropanzano 2009; Hirsh and Kornrich 2008; Lloyd-Bostock 1991; Merry and Silbey 1984) or alternatives (e.g., Albiston, Edelman, and Milligan 2014, Cooter and Rubinfeld 1989, Earl 2009, Silberman 1985, Zemans 1982, see also Smith and Lloyd-Bostock 1991 for a bibliography).

default, losing their right to contest the allegations made in the complaint. These respondents are faced with the consequences imposed by a third party, unlike potential claimants who lump it—taking no action (Felstiner 1974) and suffering nothing worse than the status quo.

In addition, respondents face a related question of whether to *lawyer up* and retain legal representation, or to *go it alone*. This decision need not follow their decision to defend or default; some individuals will retain legal counsel immediately upon being notified of the legal claim while others may not obtain representation until later. Unlike claimants, who may be more inclined to obtain legal representation in order to generate a formal legal claim, respondents are not required to file an answer or, in many cases, to appear. Moreover, respondents must compensate their lawyers out of pocket, unlike some claimants who have access to legal representation through contingent fee arrangements.

Combining these two dimensions of respondent disputing behavior—engagement and legal representation—generates four possible pathways for formal legal disputes. Respondents can (i) defend, with legal representation; (ii) defend, without legal representation; (iii) default, with legal representation; or (iv) default, without legal counsel. These pathways are ideal types that represent four poles of potential behavior among respondents, rather than precise summaries of the myriad behaviors that respondents may exhibit. However, they offer a helpful heuristic for considering variation in respondent dispute processing after a formal legal claim has been made.

We would expect that respondents who engage in the formal legal process will fare better than those who default, although empirical research suggests that the extent of this benefit varies depending on the quality of the answer (Caplovitz 1974). At best, individuals who file an answer

can have the claim dismissed or bring counterclaims of their own; at worst, their participation may help to reduce the severity of any judgment entered against them.

Among respondents who file an answer, the behavior of those in the first category, who defend with legal representation, is most closely aligned with the expectations of an adversarial system. However, individual respondents who engage the formal legal claim, but without representation, are increasingly common in many types of civil cases (Landsman 2012; Swank 2004). While there is concern about unrepresented litigants' ability to effectively represent themselves in civil cases (Engler 2009, Sandefur 2010), research suggests that the benefit of legal representation varies by substantive area (Taylor Poppe and Rachlinski 2016).

Presumably, those who default are more likely to have judgments entered against them. However, among these respondents, legal representation may be an important distinction. Respondents who take the third pathway, defaulting with legal representation, may be in one of two situations. In the first, the respondent obtains legal representation after the deadline for filing an answer. In this case the ability of the lawyer to alter the outcome of the case is diminished because the respondent has lost the opportunity to deny the assertions of the claim, but a lawyer may still moderate the outcome through negotiation or advocacy. In the second scenario, the respondent consults a lawyer and then decides to default. Where there is no defense available, this may be a reasonable action to take.

Both of these situations differ from that of the last group of respondents, who take no action, defaulting without legal counsel. Scholars consistently find that when faced with a justiciable problem (Genn 1999), many individuals do nothing (American Bar Association 1994; Bogart and Vidmar 1990; Pleasence, Balmer, and Sandefur 2013). While such inaction may indicate a rational strategic decision on the part of the respondent, it may also result from a lack

of resources or knowledge about the legal process, or from feelings of shame, fear, or resignation (Kritzer 2008; Sandefur 2007).

Variation in Respondent Dispute Processing

While some respondents will pursue each of these pathways in response to a formal legal claim, the distribution likely varies across different types of disputes (Bogart and Vidmar 1990; Miller and Sarat 1980-1981). This variation reflects both the characteristics of the individuals who encounter particular types of disputes and the characteristics of the disputes themselves (Miller and Sarat 1980-1981).

Research documents that demographic and socioeconomic characteristics, including age, ethnicity, family structure, income, education, and employment, are associated with the likelihood that individuals will face a particular type of legal problem (ABA 1994, Bogart and Vidmar 1990, Genn 1999), or group of problems (Pleasance et al. 2004). For example, tenants in eviction hearings are disproportionately low-income, minority women (Engler 2009) and consumer debtors named in civil actions are more likely to have less education and lower income than the general population (Caplovitz 1974). Even where the nature of the underlying conflict is the same, there may be socio-demographic differences in the kind of formal legal claim that arises. The dissolution of a romantic relationship requires divorce among those who are married, but may be resolved informally for those who cohabitate; to the extent that there are demographic disparities between these groups (Brown 2005), they will be reflected in the composition of litigants.

Socio-demographic characteristics are also associated with dispute processing behavior (American Bar Association 1994; Genn 1999; Miller and Sarat 1980-1981; Sandefur 2008; May

and Stengel 1990; Morrill et al. 2010). Economically disadvantaged individuals are less likely to engage with the legal system (American Bar Association 1994). They are also assumed to be less able to afford legal counsel (Yoon 2010), and have less familiarity with lawyers and legal institutions (Silberman 1985) and reduced access to legal expertise through network ties (York Cornwell and Cornwell 2008). In addition, members of disadvantaged minority groups are less likely to turn to the law (Bogart and Vidmar 1990; Nielsen 2000). Because socio-demographic characteristics are associated not only with the types of legal problems that individuals encounter, but also their responses, the composition of respondents involved in different kinds of legal disputes is likely to generate divergent dispute processing patterns. Thus, the legal process may exacerbate existing social inequalities.

However, the characteristics of disputes have been shown to be an even stronger influence on these patterns than many litigant characteristics (Kritzer 2008; Miller and Sarat 1980). In part this reflects variation in the structural context of litigation across different kinds of disputes (Galanter 1974). While some individual respondents face formal legal claims brought by other one-shotters, many face claims brought by repeat players (Galanter 1975). One-shotters are actors who rarely use the courts and for whom the stakes involved are high; repeat players, in contrast, are those parties, usually larger, with less at stake in any single case. As Galanter (1975: 363) notes:

> "Basically the distinction is between the casual participant for whom the game is an emergency and the party who is equipped to do it as part of his routine activity. The sailor overboard and the shark are both swimmers, but only one is in the swimming business."

The imbalance between an individual respondent and a repeat player claimant makes it more likely that the claimant will prevail (Galanter 1974, Fiss 1983). Concern for the likelihood

of an unfavorable outcome could lead to higher rates of defending and obtaining legal representation among individual respondents in these disputes. On the other hand, many individuals forego legal action when they feel their actions will have no effect (Genn 1999), which may be more likely when facing a repeat player (Sandefur 2007).[3]

Civil procedural requirements are also likely to influence respondent dispute processing. Claimants are more likely to obtain legal representation in disputes requiring court action (Genn 1999; Kritzer 2008). Where respondents are required to appear, they may be more likely to obtain legal representation, and may also be more likely to file an answer, either because they receive assistance in doing so, or because they have overcome the inertia that would otherwise encourage them to do nothing. On the other hand, evidence from the criminal context suggests that where appearances are too onerous, required participation may discourage active dispute processing behavior (Feeley 1992).

The nature of the underlying dispute may also affect patterns of respondent dispute processing. Individuals are more likely to engage in the legal process and to obtain legal representation when there is more at stake (Kritzer 2008; May and Stengel 1990; Miller and Sarat 1990), suggesting that dispute types involving larger economic claims may involve greater participation by respondents. However, the qualitative nature of what is at stake, including whether respondents are likely to view a dispute as purely economic or a disagreement on principles, may also influence behavior (MacFarlane 2010). Moreover, disputes differ in their cultural meaning (Merry and Silbey 1984), which may influence feelings of self-blame and the

[3] For example, in her qualitative study exploring individuals' inaction in the face of legal problems, Sandefur (2007: 123) quotes one respondent as saying, "I felt, hey, how do I beat my insurance company? Even if I have a lawyer, they've got 20."

appropriateness of engaging in a legal dispute (Calavita and Jenness 2014; Coates and Penrod 1980).

Finally, it is also important to note that patterns of respondent dispute processing after a formal legal claim has been filed are also the product of prior events. The Naming, Blaming, Claiming framework suggests that a formal legal claim occurs only if a prior informal claim is denied or otherwise unsatisfied (Felstiner et al. 1980-1981, see also Conley and O'Barr 2005 [1998]), and studies of claiming behavior confirm the importance of interactions between the parties (Lloyd-Bostock and Mulcahy 1994; May and Stengel 1990). Different kinds of disputes are likely to involve differing levels of pre-litigation interaction between the claimant and respondent. Divorce, for example, reflects a great deal of prior interaction, while tort cases may involve much less.

Thus, respondent dispute processing behavior is likely to vary in important ways across different types of disputes. Identifying dispute processing patterns can help to identify areas where the legal system is being abused (Spector 2011) or underutilized (Miller and Sarat 1980-1981; Nielsen and Nelson 2005),[4] and has important implications for efforts to expand access to justice. Moreover, just as the law evolves to reflect its interpretation (Edelman et al. 1999), legal processes are likely to both shape and be shaped by dispute processing behavior. And, because dispute processing behavior may influence individuals' satisfaction with the legal system (Tyler and Zimmerman 2010), it may also affect the legitimacy of law and legal intuitions. As a first step toward developing our understanding of respondent dispute processing, this chapter focuses

[4] However, studies of dispute processing have long struggled to identify a baseline against which to compare observed patterns (Miller and Sarat 1980-1981), making it difficult to identifying the "right" distribution of respondent dispute processing pathways.

on the behavior of individual respondents against whom a formal legal action to foreclose has been filed.

RESPONDENT DISPUTE PROCESSING IN FORECLOSURE

In this chapter, I consider the dispute processing behavior of individual homeowners against whom a civil action to foreclose has been filed. Research documents that many cases that enter the foreclosure process do not end with the sale of the property; in their work on mortgage defaults in New York City, Chan et al. (2012: 12) found that only 14 percent of foreclosure cases ended with the sale of the property at auction. Many homeowners are able to modify the loan, negotiate forbearance, or arrange a short sale or the transfer of the deed in lieu of foreclosure, and some homeowners successfully challenge the lender's right to foreclose. In this section, I describe the decisions facing homeowners involved in the foreclosure process in New York State, and consider the distribution of respondent dispute processing pathways among these homeowners and the likely impact of their behavior.

The New York State Foreclosure Process

In New York State, as in 21 other states, foreclosure is a judicial process involving the filing of a civil complaint against the homeowner (RealtyTrac 2015). To make a formal legal claim to foreclose, the lender must file a *lis pendens* with the county clerk of the county where the property is located, after providing required notice (CPLR Rule 6501; RPAPL§ 1331). The *lis pendens* notifies those with an interest in the property and potential purchasers that the property is the subject of litigation. The lender then serves the homeowner with a summons and complaint (RPAPL § 1302) and files these, along with a Request for Judicial Intervention

("RJI"), with the court. As of October, 2010, an attorney affirmation is also required.[5]

At this point in the process, the lender has made a formal legal claim, and the homeowner must respond. If the homeowner wishes to defend, he or she must file an answer responding to the allegations raised in the complaint. If the homeowner fails to file an answer, he or she defaults, and is barred from challenging the bank's right to foreclose (RPAPL § 1321). All lenders must be represented, but homeowners have no such obligation (CPLR § 321). Combining the homeowner's decision whether to retain legal counsel with the decision whether to defend or default generates the four respondent dispute processing pathways.

However, there is another important aspect of the foreclosure process that may interact with these pathways to influence the trajectory of disputes. In response to the low rate of homeowner participation in the foreclosure process at the start of the foreclosure crisis, the state legislature amended this process to include settlement conferences in cases where the loan being foreclosed was secured by an owner-occupied residential property (Pfau 2010). The goal of the newly-adopted settlement conferences is to provide homeowners and lenders an opportunity to reach a resolution other than foreclosure if possible, or in cases where an alternative is not available, to streamline the foreclosure process (Kaye and Pfau 2008; Wagner 2010).

Conferences were first adopted in a court-initiated pilot program in Queens County in June 2008 (Kaye and Pfau 2008). They were expanded statewide by legislation adopted in August 2008 that mandated conferences in all new cases involving subprime and high-cost loans, and permitted homeowners to request conferences in ongoing cases involving similar loans (Chapter 472 of the Laws of New York, 2008). Further legislation required that as of February

[5] Attorney affirmations were required under Administrative Order 548/10, issued by the New York State Chief Administrative Judge in response to widespread allegations of robo-signing practices, and were amended by Administrative Order 431/11.

13, 2010, the court must schedule settlement conferences in new residential foreclosure cases, regardless of loan type; defendant homeowners in ongoing cases were permitted to request a settlement conference (Chapter 509 of the Laws of New York, 2009).

Mandatory conferences are scheduled by the court within 60 days after the filing of the RJI. Homeowners and lenders are required to appear at conferences, and must be prepared to evaluate alternatives to foreclosure (CPLR Rule 3408). Court observers and scholars have highlighted the importance of these conferences for achieving loan modifications and other negotiated alternatives to foreclosure (Pfau 2010; Wagner 2010). This raises empirical questions regarding the relative influence of dispute processing behavior and court intervention in predicting case outcomes and highlights the importance of considering court processes in analyzing respondents' dispute processing behavior.

Responding to Foreclosure

We expect that some respondents will select each of the four dispute processing pathways, but that homeowners will not be evenly distributed across them. By its nature, those individuals who enter the foreclosure process are likely facing financial difficulty. While for some individuals this is a reflection of an unexpected event such as medical disability or the loss of a job, research on recent mortgage defaults reveals more structural patterns. Subprime loans (Capozza and Thomson 2006; Danis and Pennington-Cross 2008) and loans with predatory terms (Quercia, Stegman, Davis 2007) are more likely to enter the foreclosure process, as are those situations where homeowners have less equity in the home and higher loan balances (Chan et al. 2012). Reflecting the effect of residential segregation and the fact that lower-income and minority communities were targeted for predatory and subprime loans, African American and Hispanic

homeowners are more likely to enter the foreclosure process (Hyra et al. 2013; Rugh and Massey 2010; Rugh 2015). Because disadvantaged individuals are less likely to obtain legal representation and participate in legal disputes, the socio-demographic characteristics of respondents facing foreclosure predict a low incidence of defending and legal representation among homeowners facing foreclosure.

Many of the characteristics of the dispute also predict low levels of engagement and representation. Because banks frequently use the courts to protect their interests and individual homeowners rarely do, foreclosure is an instance where a repeat player brings a claim against a one-shotter (Galanter 1974). Consistent with this theory, the stakes for the bank are low in any given foreclosure case relative to the value of the bank's total holdings, and the bank's repeated experience provides numerous advantages. For example, the bank has anticipated the possibility of foreclosure in drafting the note and mortgage that shape much of the foreclosure process, such as by providing for the payment of the bank's attorney fees if the foreclosure action is successful. The bank also has access to expertise, including lawyers who specialize in this area of law and are able to reduce costs by handling a large volume of similar cases.

In contrast, the stakes for homeowners are tremendously high: they stand to lose their home, forego potential growth of equity in the home, and suffer restricted access to credit thereafter. Despite the high stakes, when faced with a repeat player opponent, some homeowners may decide that the cost of retaining legal counsel or filing an answer outweighs the potential benefit. The automated nature of many lenders' default processing may exacerbate this assessment.

However, this dynamic may have changed over time. Predatory lending practices, poor record-keeping, and robo-signing among lenders and their representatives provide some

homeowners with defenses to foreclosure. Homeowners may have become more aware of these potential defenses over time, particularly as the state attorneys general began pursuing servicers for some of these behaviors. Moreover, the national settlement reached with some of the nation's largest servicers ultimately resulted in funding for foreclosure prevention legal aid in New York State (NY Attorney General 2012). As the number of foreclosure cases increased, there was also an increase in the availability of private lawyers focused on foreclosure defense (Pettey 2012).[6]

In addition, some lenders developed loan modification programs, and a number of state and federal programs, such as the Home Affordable Modification Program ("HAMP"), were adopted to encourage lenders to accept loan modifications. While the success of these programs has been questioned (NY Department of Financial Services 2015; Immergluck 2013; White 2009), it is possible that they may have encouraged homeowners to seek alternatives to foreclosure.

Moreover, the court system and other service providers engaged in outreach efforts to educate homeowners about their rights (e.g. NY Department of Financial Services 2015). This may have influenced homeowners' behavior directly, but might also have had an indirect effect by changing the cultural significance of foreclosure. Scholars argue that stigma and fear help to explain why some homeowners do not strategically default (White 2010) or ask for help when facing foreclosure (Owens 2014). Research suggests that awareness of the frequency of mortgage default and the role of lenders in precipitating the foreclosure crisis may diminish

[6] Issacharoff and Witt (2004) suggest that the repeated nature of repeat player versus one-shotter litigation may generate opportunities for high-volume, cost-effective legal representation for individual respondents, although whether this benefit overcomes the structural disadvantages is unclear (Galanter 1974).

homeowners' feelings of self-blame (McCormack 2014), which may have increased their likelihood of engaging in the foreclosure process.

Thus, applying existing research on dispute processing behavior to the situation of individual homeowners facing foreclosure suggests that many homeowners are likely to default, often without representation. However, the proportion of homeowners defending is likely to increase over time, and more homeowners are likely to have obtained legal counsel among later cases. Next I consider the implications of these behaviors for case outcomes.

Dispute Processing Pathways and Foreclosure Case Outcomes and Duration

Homeowners' behavior in response to the formal legal action to foreclose is likely to influence case outcomes, but the relationship between the four dispute processing pathways and case outcomes may be different in the foreclosure context than in other types of civil litigation. Because the lenders' right to foreclose in the event of homeowners' default is a condition upon which the underlying loans were made, foreclosure actions are a contract enforcement mechanism. Thus, while the claimant's right to a legal remedy forms the basis of many civil disputes, this is often not the case in foreclosure actions, where many homeowners concede the lender's right to foreclose, but seek to negotiate an alternative outcome. Because completing the foreclosure process is so costly and generally results in a financial loss for the lender, lenders have an incentive to entertain these negotiations; [7] participation in loan modification programs requires lenders to consider alternatives to foreclosure.

[7] Although, as Levitin and Twomey (2011) point out, the incentive structure for lenders has been distorted by changes in the loan servicing industry.

These dynamics are likely reflected in the relationship between homeowners' dispute processing behavior and case outcome. Table 3.1 describes the outcomes that are likely to result in cases involving each dispute processing pathway, with and without a foreclosure settlement conference. As Table 3.1 indicates, foreclosure is a possible outcome in each scenario. However, the probability that cases end in foreclosure is likely to decrease as the number of potential alternative outcomes increases, and the availability of these alternatives is related to homeowners' actions.

Table 3.1. Respondent Dispute Processing Pathways and Likely Case Outcomes

Pathway	Settlement Conference	Foreclosure	Negotiated Alternative	Settlement	Dismissal
Defend with Lawyer	Yes	X	X	X	X
	No	X	X	X	X
Defend Alone	Yes	X	X	X	X
	No	X	X	X	X
Default with Lawyer	Yes	X	X		
	No	X			
Default Alone	Yes	X	X		
	No	X			

Homeowners who defend, regardless of the presence of counsel or a settlement conference, are likely to have the greatest number of alternatives to foreclosure available. By filing an answer, these homeowners have retained the right to challenge the lender's right to foreclose. If successful, they may ultimately have the case dismissed or may extract a

settlement from the lender during litigation; if they are unsuccessful, they may still be able to negotiate an alternative outcome from the lender.[8]

In contrast, lenders who default are likely to have lost the chance to contest the foreclosure and are thus unlikely to have their cases end with a dismissal or settlement. However, among these cases, there remains a possibility that the homeowner will be able to negotiate an alternative outcome with the lender. Where the court does not intervene in the process in the form of a settlement conference, this is less likely, although having a lawyer may make up for the lack of a conference. Thus, those who default alone, and do not have a settlement conference, are the most likely to have their cases end in foreclosure because they have not raised any defense and lack the structural support of a conference, or the individual support of a lawyer, to negotiate an alternative.

While this does not preclude the possibility of variation in individual cases, it suggests a pattern in the overall relationship between homeowner dispute processing behavior, court intervention, and case outcome. These patterns may also have implications for the burden imposed on the court system. Cases where the homeowner defaults, is unrepresented, and has no settlement conference, are most likely to proceed *ex parte* (without the involvement of the homeowner) and thus may be disposed most quickly. In contrast, cases with settlement conferences are likely to take longer, as are cases where the lender's right to foreclose is litigated. This raises empirical questions regarding the relationship between dispute processing behavior and case outcome and case duration. Do cases where homeowners take an active part

[8] While a negotiated alternative also represents a form of settlement, I distinguish the two potential outcomes here. Settlements occur after the filing of an answer, and are thus more likely to involve concessions from the lender as a result of challenges to their right to foreclose. Negotiated alternatives need not take place in the midst of litigation following the filing of an answer, and are more likely to concede the lender's right to foreclose.

in the legal dispute take longer to reach a disposition? Is the outcome of the case any different? Is there a tension between foreclosure avoidance and reducing the strain on the court system? I address these questions in the empirical analysis that follows.

EMPIRICAL STUDY

To explore homeowners' dispute processing behavior in residential foreclosure cases, I use a dataset of a representative sample (n=954) of residential foreclosure cases initiated in New York City between 2007 and 2011. New York State's judicial foreclosure process generates a documentary record that makes it possible to analyze homeowners' legal actions in ways that would not be possible in other jurisdictions. Limiting the sample to New York City minimizes county-specific variation in court settings while covering a large population.

To generate the sample, I used a proprietary dataset acquired from RealtyTrac that identified all *lis pendens* filed between 2007 and 2011 in connection with residential properties in the five boroughs of New York City: the Bronx, Brooklyn (Kings County), Queens, Manhattan (New York County), and Staten Island (Richmond County). Because a *lis pendens* must be filed prior to the initiation of a foreclosure case, this identified the universe of potential foreclosure cases.[9] From this dataset, I drew a representative random sample of *lis pendens*, stratified by year and county.

The *lis pendens* were then matched to court cases by plaintiff and defendant name and date of filing using the New York State Court System's online case filing summary. This

[9] During this time period, the New York State Unified Court System did not offer a means of identifying foreclosure cases, making it impossible to generate a representative sample. Data on *lis pendens* filings offered a solution, but because *lis pendens* are filed for multiple kinds of litigation involving property, not just foreclosures, it required that I subsequently limit the sample to foreclosure cases.

process refined the sample by excluding non-foreclosure cases and foreclosure cases involving non-individual defendants and non-lender plaintiffs (e.g. tax liens). For those cases remaining in the sample where a court case was identified, the court records were manually retrieved from online sources (Brooklyn and Manhattan) and county clerks' offices (Bronx, Queens, and Staten Island). These documents were reviewed and coded.

The data indicate whether a homeowner was represented at any point during the legal proceeding and whether an answer was filed, which together form the variable for the respondent dispute processing pathway for each case. The court records also indicated whether a foreclosure settlement conference was scheduled. While this does not indicate whether the homeowner attended, court estimates suggest that only about 10 percent of homeowners fail to attend any settlement conferences (Pfau 2011). In addition, the date on which the RJI was filed is used to show trends over time, and is also combined with the date of disposition to generate a measure of case duration for completed cases. It is important to note that while the foreclosure process was begun in all cases between 2007 and 2011, when the *lis pendens* was filed, the formal legal claim, represented by the filing of the RJI, may not have taken place until later.

The dataset also includes information on the loan, including the interest rate in effect when the complaint was filed, the principal amount of the loan at the time of origination, and the number of months that elapsed between loan origination and default. Finally, the address of the property was used to identify the characteristics of the area where the property is located. The proportion of the population on the block that is African American or Hispanic was calculated using 2010 Decennial Census data, the median income of the block group was measured using the 2008-2012 five-year American Community Survey estimates, and the indicator for a

completed foreclosure on the block in the year that the *lis pendens* was filed or in the two years prior was generated using data from Hall et al. (2015).

Table 3.2. Summary Statistics of Analytic Sample

	Mean or Proportion	SD	Min.	Max.
Court				
Bronx	0.13		0	1
Brooklyn	0.37		0	1
Manhattan	0.04		0	1
Queens	0.34		0	1
Staten Island	0.11		0	1
RJI Filing Year				
2007	0.12		0	1
2008	0.20		0	1
2009	0.28		0	1
2010	0.21		0	1
2011	0.08		0	1
2012	0.08		0	1
2013	0.03		0	1
Disposed	0.67		0	1
Loan Characteristics				
Interest Rate	7.25	1.53	1.09	15
Principal	444,692	266,990	20,000	4,000,000
Days to Default	950	917	26	10857
Property Characteristics				
Proportion African American	0.42	0.36	0	1
Proportion Hispanic	0.24	0.23	0	1
Median Income	57,866	24,165	9,485	215,143
Incidence of Foreclosure	0.37		0	1

N=954.

The data are weighted to account for sampling design and the match rate during the data collection process (See Table 3.2 for summary statistics of the analytic sample and Appendix Table 3.A1 for information about the sampling process). Missing values were imputed using

single imputation.[10] The resulting dataset is unique in its coverage of the legal foreclosure process.

RESULTS

When faced with a formal legal action to foreclose, homeowners must decide whether to defend and whether to obtain legal representation. I begin by exploring the rates at which homeowners take these actions. Table 3.3 describes the rates at which homeowners filed answers and obtained legal representation, by year of RJI filing. Overall, less than 24 percent of homeowners filed an answer, but the rate ranges from about 8 percent among cases filed in 2007 to almost 49 percent among cases filed in 2011. Similarly, the rate of legal representation is only 22 percent overall, but increased from 7 percent among cases filed in 2007 to 38 percent of cases filed in 2011. Taking these two dimensions into account yields the four respondent dispute processing pathways. Table 3.3 reports the proportion of cases where the homeowner chose to defend with representation, defend alone, default with representation, and default alone, by year of RJI filing. By far, the most common choice is to default alone, accounting for 68 percent of all cases. In contrast, only 14 percent of homeowners retained legal counsel and filed an answer, nearly 10 percent filed an answer without legal representation, and almost 8 percent defaulted but had some legal representation. Figure 3.1 illustrates the distribution of pathways over time, indicating a decrease in the proportion of homeowners who defaulted alone, although the

[10] There were 25 cases (2.6 percent) where an RJI was not filed. An RJI date was imputed using the date of the note, the default date, the *lis pendens* date, and the court of filing. Excluding these cases does not substantially alter the results. Missing data for interest rate (n=150, 15.7 percent), loan principal (n=21, 2.2 percent), and time to default (162, 16.9 percent) were also imputed.

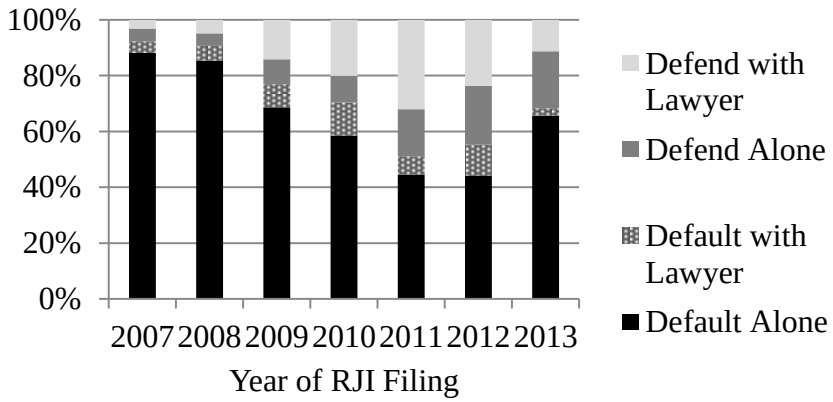
proportion increases among cases where the RJI was filed in 2013. In their place, the proportion of homeowners filing an answer, either with or without representation, increases.

Table 3.3. Number and Percentage of Respondent that Filed Answers, Retained Legal Counsel, and Selected Each Dispute Processing Pathway, by Year of RJI Filing

	2007	2008	2009	2010	2011	2012	2013	Total
Answer	9	18	62	59	38	33	8	227
	7.73	9.30	23.01	29.53	48.88	44.75	31.65	23.77
Lawyer	8	20	60	64	30	25	4	211
	7.18	10.06	22.33	31.97	38.49	34.65	13.89	22.07
Pathway								
Fight with Help	4	9	38	40	25	17	3	136
	3.11	4.82	14.05	20.10	31.99	23.63	11.23	14.25
Fight Alone	5	9	24	19	13	15	5	91
	4.62	4.48	8.96	9.43	16.89	21.12	20.41	9.53
Default with Help	5	10	22	24	5	8	1	75
	4.07	5.24	8.28	11.87	6.50	11.02	2.66	7.82
Ignore	100	166	184	118	34	32	18	653
	88.20	85.46	68.71	58.60	44.62	44.23	65.70	68.40

N=954.

Figure 3.1. Distribution of Dispute Processing Pathways, by Year of RJI Filing



Pathways, Disposition, and Duration

I next consider whether homeowners' dispute processing behavior is linked to the duration of foreclosure cases. While the duration of the foreclosure process has been a topic of general concern during the foreclosure crisis, it has received particular attention in New York State, where the foreclosure process is among the lengthiest in the nation (RealtyTrack 2014). A long foreclosure process ties up court resources and may delay the housing market's recovery, but can be beneficial for homeowners, since it allows them to remain in the home while the suit is pending.

Table 3.4. Foreclosure Frequency and Rate, by Pathway

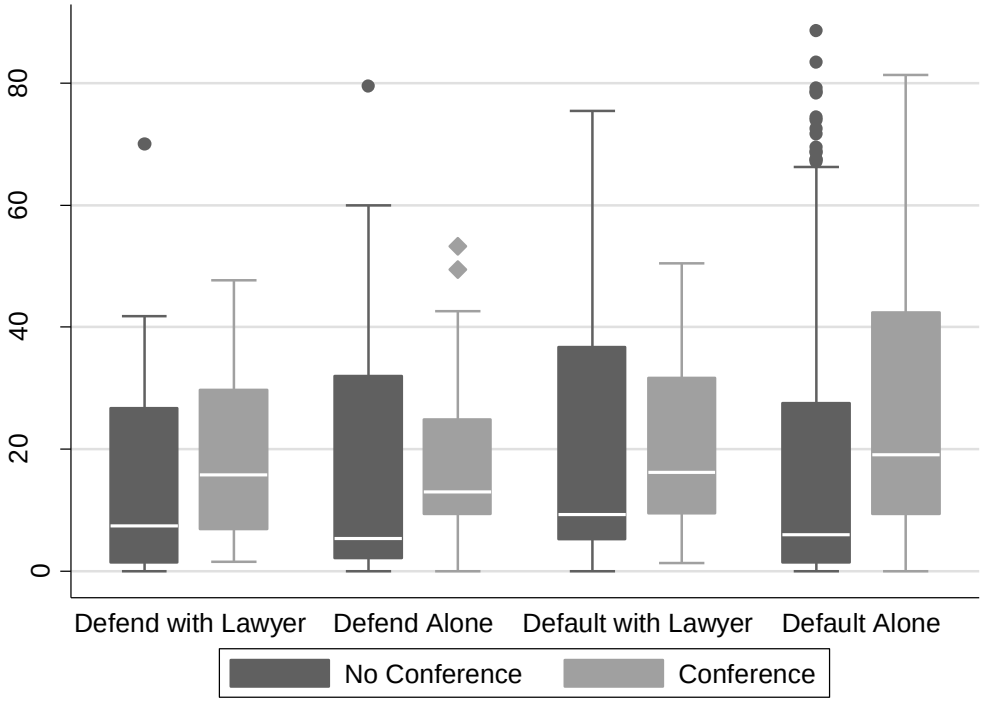
	Pathway Frequency	Rate in Sample	Disposed Frequency	Disposal Rate	Foreclosure Frequency	Foreclosure Rate
Fight with Help	136	14.25	68.04	50.06	9	12.88
Fight Alone	91	9.53	45.86	50.46	6	12.65
Default with Help	75	7.82	49.41	66.20	9	16.57
Ignore	653	68.40	478.86	73.38	151	30.23
Total	954	100	642	67	174	26.09

N=954. Foreclosure rate calculated among disposed cases.

Table 3.4 reports the number and proportion of cases in each pathway that have been disposed. While 67 percent of the cases had reached a disposition by the end of data collection in the winter of 2015, the proportion of cases remaining ongoing varies across the pathways. In cases where the homeowner failed to file an answer or retain legal counsel, 73 percent have been disposed, compared to only 66 percent of those cases where the homeowner defaulted but had counsel. Half of all cases where the homeowner filed an answer remain ongoing.

Among disposed cases, an average of 20 months (SD 20.66) elapsed between the date on which the RJI was filed and the date that the case was disposed, with the fastest cases being resolved within a month and the longest taking over seven years. Figure 3.2 shows the distribution of case duration by dispute processing pathway and settlement conference. Not surprisingly, the median duration of cases involving settlement conferences was higher across all pathways. Variation in the duration of disposed cases across pathways is less clear, particularly since ongoing cases are not evenly distributed across all pathways.

Figure 3.2. Box Plots of Case Duration for Disposed Cases, by Pathway and Conference



Pathways and Case Outcome

Finally, I consider whether dispute processing behavior is linked to case outcome. Among those cases that have ended, only 26 percent ended in foreclosure, with the other cases ending in

dismissal or discontinuance. Table 3.4 reports the incidence of foreclosure and the foreclosure rate for each of the respondent dispute processing pathways. The foreclosure rate is highest (30 percent) among cases where there was no answer filed and no legal representation, which accounts for 68 percent of the total sample. The lowest rates of foreclosure are found among those cases where an answer was filed, either with legal representation (13 percent) or without legal representation (13 percent).

To further evaluate the relationship between respondent dispute processing and case outcomes, Table 3.5 presents the estimated coefficients from a series of logistic regression models predicting the likelihood that disposed cases ended in foreclosure. Model 1, which includes only the pathways, indicates that the probability of foreclosure is highest among cases where the homeowner defaulted alone. The average predicted probability of foreclosure among these cases (probability = .30, SE = 0.02) is more than twice that of cases where the homeowner defended with a lawyer (probability = .13, SE = 0.04). Individuals who default but obtain legal representation also are more likely to have their cases end in foreclosure, relative to those who defend with a lawyer, although the magnitude of the association is smaller and fails to reach statistical significance. In contrast, the probability of foreclosure is lower among cases where the homeowner defended alone, although the effect size is small and only half the size of the estimated standard error.

Because case outcomes are likely to reflect a number of other factors, and because homeowners' decisions to pursue a particular pathway may reflect the likely outcome of the case, Model 2 also includes a number of loan and property characteristics, the date of RJI filing, and court. The data do not include homeowner characteristics. Given this, and owing to the complexity of individual dispute processing behavior, the model is not able to fully account for

Table 3.5. Estimated Coefficients from Logistic Regression Models Predicting Likelihood of Foreclosure among Disposed Cases

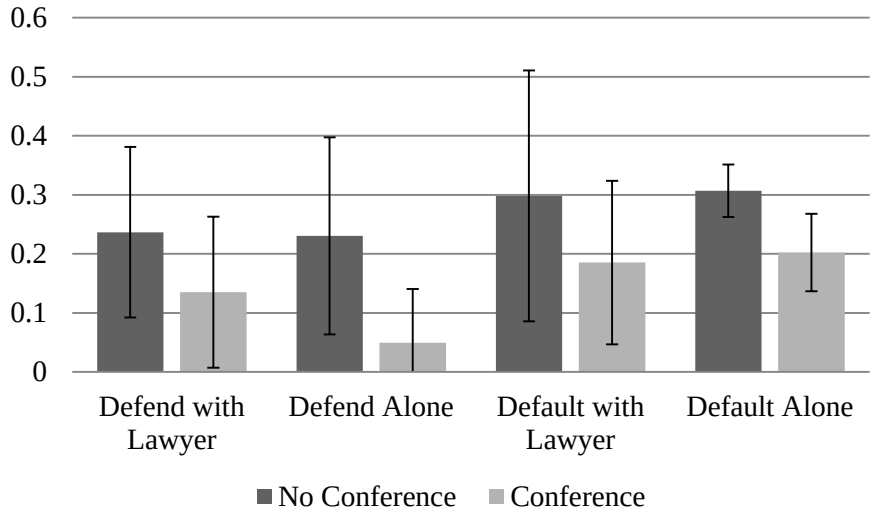
	Model 1	Model 2	Model 3	Model 4
Defend Alone	-0.02	-0.27	-0.31	-0.04
	(0.56)	(0.62)	(0.62)	(0.79)
Default with Lawyer	0.30	0.42	0.42	0.40
	(0.50)	(0.58)	(0.60)	(0.83)
Default Alone	1.08**	0.60	0.49	0.46
	(0.36)	(0.42)	(0.43)	(0.53)
Conference			-0.77**	-0.82
			(0.28)	(0.81)
Defend Alone*Conference				-1.18
				(1.43)
Default with Lawyer*Conference				0.04
				(1.18)
Default Alone*Conference				0.12
				(0.84)
LR X^2(DF)	28.72(3)	281.17(14)	292.82(15)	294.26(18)
Loan Characteristics	No	Yes	Yes	Yes
Property Characteristics	No	Yes	Yes	Yes
RJI Date	No	Yes	Yes	Yes
Court	No	Yes	Yes	Yes

N=668. Robust standard errors in parentheses. Estimates for dispute procesing pathways are relative to the omitted category of Defend with Lawyer. Loan characteristics are interest rate, loan principal, and days to default. Property characteristics are proportion of block population that is African American and proportion Hispanic, median income of block group, and presence of at least one completed foreclosure on the block. *** $p<0.001$, ** $p<0.01$, * $p<0.05$.

selection into particular pathways. However, the parameter estimates for the relationship between the pathways and the probability of foreclosure remain relatively stable even after taking these loan and property characteristics into account. The estimated probability of foreclosure remains highest among cases where the homeowner defaults alone, followed by cases where the homeowner defaults with a lawyer. However, none of the parameter estimates achieves statistical significance.

Model 3 includes a variable indicating whether a foreclosure settlement conference was held. The parameter estimate indicates that a settlement conference is associated with a significant decrease in the probability of foreclosure, even after adjusting for the homeowners' dispute processing actions and the control variables. In Model 4, I consider the relationship between settlement conferences and pathways by including interaction terms. The association between settlement conferences and the probability of foreclosure does not differ significantly by pathway. However, the lack of statistical significance may be due to the sample size.

Figure 3.3. Average Predicted Probability of Foreclosure, by Pathway and Conference



Note: Error bars represent the 95% confidence interval. N=668.

In Figure 3.3, I estimate the average predicted probability of foreclosure, by pathway and conference from Model 4. The overlapping error bars reflect the uncertainty regarding the mean differences. The figure illustrates that cases where the homeowner failed to file an answer are more likely to end in foreclosure, and the probability of foreclosure is greatest among cases where the homeowner defaulted without a lawyer. However, the probability of foreclosure is lower across all pathways when there is a settlement conference. In cases where the homeowner failed to file an answer and was unrepresented, the difference in the average predicted probability between cases where there was a settlement conference (probability = 0.20, SE= 0.03) and where there was not a conference (probability = 0.31, SE = 0.02) approaches statistical significance.

DISCUSSION

These results indicate that many homeowners facing foreclosure in New York City failed to defend themselves against the lender's claim and forego legal representation, although the distribution of pathways changed over time. I also find that the dispute processing pathway taken by respondents is related to case duration and case outcome, providing initial evidence of the importance of respondent dispute processing behavior. These findings are discussed in greater detail below.

The results of this empirical analysis document a reality that differs significantly from the conventional image of active disputing. The adversarial process is premised on the idea of two advocates actively engaged in a dispute on behalf of their clients. However, this analysis illustrates that few legal claims are maximally litigated in the foreclosure context, with only 14 percent of homeowners filing an answer and obtaining legal counsel.

At the same time, I find that patterns of behavior evolved over time. A larger proportion of homeowners filed answers and obtained legal representation in later cases. This result may reflect greater awareness of foreclosure defenses and alternatives, the increase in the supply of legal aid and private attorneys for foreclosure defense, the impact of policy reforms aimed at increasing loan modifications, or a decrease in the stigma associated with mortgage default. Additional research on homeowners facing foreclosure is needed to enhance our understanding of the relative impact of these changes.

The analysis also suggests that homeowners' dispute processing actions are associated with case duration. The rate of disposition varies across the four pathways, with a greater proportion of cases where the homeowner defended remaining ongoing. Among disposed cases, there is some evidence of variation in case duration by pathway, although that pattern is less clear. The data more strongly indicate that cases involving a settlement conference take longer, on average, than those without a conference. Given that mandatory settlement conferences must be scheduled before the lender can move forward with the foreclosure process, and most cases involve multiple adjournments while in conference, this is not surprising.[11] What is important to note is that the settlement conference extends the duration of the case across all pathways, even where the homeowner failed to file an answer and lacked a legal representative. This may indicate that settlement conferences serve as a second chance for homeowners to avoid foreclosure, even when they have otherwise failed to engage in the formal legal process.

I also find that dispute processing actions are associated with case outcome, with the probability of foreclosure highest among cases where homeowners default without legal

[11] While the length of the foreclosure process in New York State is a concern, court data indicate that much of the delay occurs after the completion of settlement conferences (Department of Financial Services 2015).

representation. However, after taking into account loan and property block characteristics, the statistical uncertainty surrounding the relationship between dispute processing pathways and case outcomes increases. Thus, while the results are suggestive of the importance of homeowner dispute processing behavior, the fact that the regression models fail to offer evidence of a large and statistically significant association between all pathways and the probability of foreclosure, the results should not be overstated. Moreover, additional research is needed to better understand whether homeowners are more likely to obtain representation and participate in foreclosure proceedings when they are better able to avoid foreclosure.

Finally, settlement conferences are associated with case outcomes. This result is likely due to the fact that many homeowners are interested not in defending against the claim, but in negotiating an alternative outcome. This may also help to explain why legal representation is not more strongly associated with case outcome. In this way, the substance of the underlying dispute lessens the importance of dispute processing behavior and increases the importance of court intervention.

CONCLUSION

While the importance of understanding individuals' behavior when faced with a legal problem is well established, researchers have primarily focused on the actions of individual claimants. In this chapter I focus instead on the actions of individuals who must respond to a formal legal claim made against them. I extend existing research by identifying key decisions facing individual respondents and considering how the dispute processing behavior of respondents might vary across different types of disputes.

As an increasingly important example of respondent dispute processing, this chapter

focuses on the actions of individual homeowners against whom a formal legal action to foreclose has been initiated. I find evidence of variation in homeowners' dispute processing behavior and consider how this variation is tied to case duration and outcome. I also consider how court intervention may interact with dispute processing behavior, particularly among homeowners seeking to avoid foreclosure by negotiating an alternative outcome. This is important for enhancing our understanding of the foreclosure process and its role in post-default outcomes.

By demonstrating the importance of homeowners' behavior in the legal process and its evolution over time, this chapter also raises a number of empirical questions for future research. These results are limited to the legal jurisdiction, geographic location, and time period that they address. Additional research is needed to explore the behavior of homeowners in non-judicial foreclosure states, in different periods, and in jurisdictions involving different policy interventions. In addition, this research is focused on homeowner behavior after the filing of a formal legal claim. However, foreclosure cases follow a long history of interaction between the lender and homeowner, from loan origination through delinquency and default, and there is much we do not know about how these interactions influence the ultimate outcome.

The significance of this research is not limited to the context of residential foreclosures. Rather, this chapter highlights the need for theoretical and empirical work on respondent dispute processing more generally. Just as claiming behavior varies across substantive areas and structural contexts, foreclosures are unlikely to be representative of all other instances of respondent dispute processing. Given that foreclosures are just one situation in which individuals must respond to a formal civil legal claim made against them, additional research is needed to consider what respondents do in other situations. How do structural and social forces influence this behavior? Does this behavior exacerbate existing social inequalities? What role do

legal processes and institutions play in shaping these behaviors, and how do these behaviors influence legal actors, processes, and institutions? This larger research agenda has important implications for policies regarding lay interaction with the legal system as well as the legitimacy of law and legal institutions.

Table 3.A1. Description of Data Collection Process

	N (%)
Lis Pendens Sample	1680
Court Case Identification	
Court Case Not Matched	429 (26%)
Court Case Matched and Excluded	264 (16%)
Court Case Matched	987 (59%)
Court Document Retrieval	
Court Documents Not Found	15 (<1%)
Court Documents Found	972 (98%)
Census Data Merge	
Census Data Missing	5 (<1%)
Case Excluded per Census Data	8 (<1%)
Census Data Complete and Valid	959 (99%)
Nonresponse	
Dependent Variable Missing, Invalid	5 (<1%)
Dependent Variables Complete	954 (>99%)

CHAPTER 4: HOMEOWNER REPRESENTATION IN THE FORECLOSURE CRISIS

The past decade has brought levels of residential foreclosure not seen in many areas since the Great Depression. At the peak of the foreclosure crisis in 2010, one in every 10 mortgages was at risk of default (Mortgage Bankers Association 2014), and, all told, nearly one in 12 households has entered the foreclosure process (Hall, Crowder, and Spring 2015). This rise in foreclosures has wide-ranging repercussions for both individuals and communities. Not only are foreclosures detrimental for individuals' wealth (Shapiro et al. 2013) and health (Houle 2014, Pollack and Lynch 2009), but foreclosures are associated with reductions in surrounding housing values (Immergluck and Smith 2006, Gerardi et al. 2012), increases in residential instability (Hall et al. 2015), and heightened rates of neighborhood crime (Ellen, Lacoe, and Sharygin 2013). In states where foreclosures take place within the judicial system, the dramatic influx of foreclosure cases has also exacted a heavy burden on the court system. In New York State, one such "judicial state"[12] and the focus of this chapter, foreclosures now account for nearly one-third of all pending civil cases (Pfau 2010; Prudenti 2013; Prudenti 2015).

Yet while many homeowners enter the foreclosure process, only a fraction of foreclosure starts end with the sale of the property at auction (Chan et al. 2012). Instead, many homeowners are able to avoid foreclosure by remedying the default, negotiating forbearance, modifying the terms of the loan, selling the property, obtaining alternate financing, or challenging the plaintiff's claim (Chan et al. 2012; Collins and Reid 2011; Doviak and McDonald 2011; Iwanisziew and Ludwig 2012). These outcomes reduce collateral damage to both individuals and communities,

[12] Non-judicial foreclosure is permitted in New York State, but very rarely used (Kaye and Pfau 2008).

since many of these individuals are able to stay in their homes and, even where homes are sold, the outcomes can mitigate the loss of wealth or damage to credit.

There is reason to believe that legal representation may help homeowners to achieve these more favorable outcomes. Poor record-keeping practices within the mortgage industry and the failure of firms' representatives to comply with civil practice rules have generated grounds for dismissal of some foreclosure actions (Pfau 2011). However, alleging such a defense requires familiarity with both substantive law and civil procedure, which lawyers are more likely than homeowners to possess. Even where foreclosure actions are proper, lawyers can assist homeowners pursuing alternative outcomes such as short sales or loan modifications (e.g. Charn and Selbin 2013, Wagner 2010).

While this is consistent with the prevailing assumption that legal representation is associated with more favorable outcomes, empirical research suggests that the benefit of legal representation in civil cases varies across different types of disputes (Sandefur 2015; Taylor Poppe and Rachlinski 2016) and may be less straightforward than is assumed. Research on the relationship between legal representation and the outcomes of housing cases, for example, offers conflicting evidence regarding the relationship between legal representation and case outcomes (Seron et al. 2001, Steinberg 2011, Greiner et al. 2012, Greiner et al. 2013, Monsma and Lempert 1992).

A complicating factor in assessing the role of legal representation in foreclosure is that the process varies across states and over time. New York State, the focus on this chapter, adopted reforms to its legal foreclosure process that increased court intervention and homeowner participation in foreclosures. New York State is therefore an important setting in which to

consider the relationship between homeowner legal representation, the foreclosure process, and foreclosure case outcomes.

This chapter examines the role of homeowners' lawyers in residential foreclosure cases filed in New York City. The chapter begins with an overview of the New York State foreclosure process, including the reforms adopted in response to the foreclosure crisis. I then draw on existing research on the effect of legal representation on civil case outcomes to consider the potential benefit offered by lawyers in the context of New York State foreclosures. Building on this research, I describe a counterfactual framework for identifying the causal effect of legal representation in foreclosure cases.

I explore the relationship between legal representation and foreclosure case outcomes empirically using data on a representative sample of foreclosure cases initiated in the five boroughs of New York City between 2007 and 2011. In this observational study, I find that homeowner legal representation is associated with decreased probability that cases will end in foreclosure, relative to the probability of being discontinued without the lender winning the right to foreclose. This finding is robust to the inclusion of controls for observed case and property characteristics. However, accounting for the reforms to the foreclosure process diminishes the association between legal representation and the probability of foreclosure. I conclude by considering the implications of these findings for our understanding of the foreclosure crisis and the role of lawyers in civil cases.

THE NEW YORK STATE FORECLOSURE PROCESS

New York State law envisions foreclosure as an adversarial proceeding involving the lender, the homeowner, and any other parties with a claim to the property. The lender begins this process

by filing a *lis pendens* (CPLR Rule 6501; RPAPL §1331) with the county clerk in the county where the property is located (CPLR Rule 507), providing notice of the impending litigation. To initiate the civil action to foreclose, the lender serves the homeowner with a summons and complaint (RPAPL§1320), after providing required notice. The lender then files the summons, complaint, and proof of service, as well as a Request for Judicial Intervention with the court in the county where the property is located. The vast majority of foreclosure cases are filed in the state trial court, the New York State Supreme Court (Wagner 2010).

After the homeowner is served with the complaint, he or she may respond by filing an answer. If the homeowner answers the complaint, the lender will generally move for summary judgment. If the court grants the lender's motion for summary judgment, or if the homeowner does not file an answer or admits the allegations of the complaint, the court appoints a referee. The referee computes the balance due to the bank, which is confirmed in the order of reference (RPAPL§1321). A judgment of foreclosure and sale is then entered, giving the lender the right to sell the property at a court-sanctioned auction. If, in contrast, the homeowner and lender are able to negotiate an alternative to foreclosure, the lender may discontinue the case (CPLR Rule 3217), generally without prejudice (CPRL Rule 3217(c)).

Despite the adversarial nature of these procedural requirements, the reality of the foreclosure process at the start of the Great Recession was far more one-sided. With 90 percent of defendant homeowners failing to appear, foreclosure was essentially a "paper process" (Pfau 2010: 1). Concerned with the lack of homeowner participation and alarmed by allegations of wrongdoing by banks and their representatives, the New York State court system (Kaye and Pfau 2008) and legislature adopted a series of reforms designed to avoid unnecessary foreclosures

(Chapter 472 of the Laws of New York, 2008 (hereinafter "Chapter 472"), Chapter 509 of the Laws of New York, 2009 (hereinafter "Chapter 509")).

These reforms introduced expanded notice and filing requirements for lenders wishing to foreclose on owner-occupied one-to-four family residences (Chapter 472; Chapter 509), as well as court-facilitated settlement conferences designed to provide homeowners and lenders an opportunity to reach a resolution other than foreclosure (Kaye and Pfau 2008). The 2008 legislation instituted mandatory settlement conferences in all residential foreclosure cases involving a "subprime" or "high-cost" loan originated between 2003 and 2008, and permitted homeowners in similar ongoing cases to request a conference (Chapter 472). This program was expanded to require mandatory settlement conferences in all new residential foreclosure cases, regardless of loan type, as of February 13, 2010, and allow defendant homeowners in similar ongoing cases to request conferences (Chapter 509).

The effect of these reforms was notable. The courts became more directly involved in the substance of foreclosure cases, even without homeowners answering the lenders' complaint. After the reforms, the New York State foreclosure process became longer, and now ranks among the lengthiest in the nation (RealtyTrac 2014). In addition, court data reveal an increase in the rate of homeowner participation in foreclosure proceedings after these reforms (Prudenti 2012, Prudenti 2013, Prudenti 2014). However, less is known about the effect of these reforms on foreclosure case outcomes, and whether they led to a shift in the importance of legal representation for homeowners.

It is possible that these reforms increased unrepresented homeowners' ability to challenge flawed foreclosures and to resolve mortgage defaults without recourse to foreclosure. Or, the reforms may have provided tools that lawyers were best equipped to employ. In the next section,

I consider these possibilities in light of existing research on the effect of legal representation on civil case outcomes.

PRIOR RESEARCH

There is a substantial body of empirical research focused on the link between legal representation and civil case outcomes (see Engler 2009; Sandefur 2010, 2015; Taylor Poppe and Rachlinski 2016), but research on foreclosure cases is limited. Charn and Selbin (2013) report that of 61 foreclosure cases handled by the WilmerHale Legal Services Center at Harvard Law School, 40 of the client homeowners were able to retain their homes and 16 avoided foreclosure by selling the property (Charn and Selbin: 166), but we know little about the outcomes of similarly-situated homeowners who were not represented. Thus, it is difficult to assess the role of legal representation in foreclosure cases because no other prior work has directly evaluated the benefit of legal representation during foreclosure.

It is important to consider the role of legal representation in foreclosure cases because prior work points to variation in the contributions of legal representation to case outcomes across different types of civil disputes (Taylor Poppe and Rachlinski 2016). Moreover, even within a particular area of law, the benefit of legal representation is not as straightforward as prevailing assumptions would suggest. For example, research on landlord/tenant disputes offers mixed evidence for the benefit of legal representation, with some studies documenting a lower incidence of eviction among represented tenants (Greiner et al. 2013, Gunn 1995, Lawyers Committee 1996, Monsma and Lempert 1992, Seron et al. 2001, Steinberg 2011), while others conclude that unrepresented and represented tenants obtain similar outcomes (Bolton and Holtzer 1973, Greiner et al. 2012, Lawyers Committee 2003). Housing cases are the area of law most

similar to foreclosure where scholars have evaluated the benefit of legal representation, but the substance of foreclosure disputes, the legal procedures, and parties involved differ in important ways.

Indeed, research confirms the importance of procedural context in assessing the impact of legal representation (Taylor Poppe and Rachlinski 2016). In her meta-analysis of studies on the impact of lawyers on civil case outcomes, Sandefur (2015) finds that lawyers offer the greatest benefit in disputes that are more procedurally complex. She argues that lawyers not only help clients to comply with procedural requirements, but that the presence of a lawyer serves as an "endorsement" of individuals' claims, helping to ensure that other court actors observe the formal legal process (Sandefur 2015: 924).

This endorsement is particularly important for litigants who are lower-status or otherwise stigmatized (Sandufur 2015), as homeowners facing foreclosure are likely to be. Such individuals are often stigmatized for having failed to repay a loan (Owens 2014; McCormack 2014; White 2010), are typically in a precarious financial situation, and are more likely to be disadvantaged minorities (Darden and Wyly 2013, Hyra et al. 2013, Rugh and Massey 2010, Rugh 2014). They are also likely to have less experience with the legal system compared to the lenders bringing the claim against them (Galanter 1974). As a result, homeowners with legal representation may be better able to comply with the requirements of the formal legal foreclosure process than those who are unrepresented.

But do these operational benefits translate to better outcomes in foreclosure cases? Foreclosures differ from many other disputes in that they are a contract enforcement mechanism. As long as the homeowner has failed to make payments as required by the note and the lender's claim is consistent with the terms of the mortgage, the court will enforce the lenders' right to sell

the property to satisfy the homeowner's debt. Given that few homeowners deny having defaulted on the loan, the availability of legal defenses has traditionally been limited. However, lenders' failure to successfully transfer mortgages through repeated sales on the secondary market and securitization offers some homeowners affirmative defenses (Pfau 2011). Because these affirmative defenses require familiarity with both civil procedure and substantive law, homeowners with legal representation may be more likely to pursue them.

Even more important for most homeowners, however, is the fact that foreclosures are generally not economically efficient for lenders. It may be in the best interests of both lender and homeowner to avoid foreclosure, but there are a number of challenges in coming to such an agreement. Communicating with lenders is difficult (Wagner 2010), and many lenders failed to increase staffing and services to handle the high volume of mortgage defaults during the financial crisis (Engel and McCoy 2011). The securitization of mortgages further complicates negotiations and distorts incentives to avoid foreclosure because additional parties have a financial interest in the mortgage default (Levitin and Twomey 2011). Policies designed to encourage lenders to engage in more loan modifications have been difficult for homeowners to access (NY Department of Financial Services 2015; Immergluck 2013). However, lawyers representing homeowners are likely to bring substantive knowledge of relevant programs, skill in compiling necessary information and documents, and an ability to use the legal foreclosure process to pressure lenders to consider alternative outcomes. As a result, we would expect that homeowners with legal representation would be more likely to have their case discontinued than those homeowners who proceed *pro se*.

At the same time, it is possible that changes to the foreclosure process such as those adopted in New York State may have mitigated some of the disadvantages facing unrepresented

homeowners. For example, these reforms mandated that lenders provide pre-foreclosure notices to homeowners containing information about housing counseling and other forms of aid, which may have helped some homeowners to obtain information or assistance even without consulting a lawyer. Moreover, settlement conferences offer homeowners an opportunity to directly communicate with lenders' representatives (Wagner 2010), and thus may have helped qualified homeowners obtain loan modifications. Finally, additional reforms requiring that lenders' lawyers verify the propriety of the claim[13] may have increased compliance with existing laws, even without homeowners raising legal challenges (Pfau 2011). Thus, the difference in the outcomes obtained by represented and unrepresented homeowners may have decreased after reforms increased court intervention in the foreclosure process.

Of course, case outcomes are also likely to vary across characteristics of the case, the parties involved, and the broader context within which foreclosures take place. Research on loan modifications and the outcomes of foreclosure starts more generally document the relationship between loan characteristics, repayment behavior, and the probability of foreclosure (Been et al. 2011, Chan et al. 2012, Collins and Reid 2011, Danis and Pennington-Cross 2005, 2008, Gerardi et al. 2007, Gerardi 2009, Pennington-Cross 2010). The interplay between predatory lending and patterns of residential racial segregation leads to a disproportionate incidence of foreclosure among disadvantaged minorities (Darden and Wyly 2013, Hyra et al. 2013, Rugh and Massey 2010; Rugh 2014) and also suggests that foreclosure cases involving properties in racially-segregated areas may be more likely to end in foreclosure. Cases involving properties located in areas with a higher incidence of foreclosure may also be more likely to end in foreclosure given

[13] Heightened filing requirements were adopted after the exposure of robo-signing practices (Administrative Order 548-10, later modified by Administrative Order 431-11).

patterns of predatory lending and the spillover effect of foreclosures on surrounding housing values (Immergluck and Smith 2006, Gerardi et al. 2012).[14] Variation in lenders' willingness to work with homeowners to resolve mortgage defaults may also influence the outcomes of foreclosure cases (Collins et al. 2011). This suggests the possibility of heterogeneity in the effect of legal representation across types of foreclosure cases. In the next section I consider the analytical challenges presented by this situation.

CAUSAL IDENTIFICATION OF THE EFFECT OF HOMEOWNER REPRESENTATION

Scholars have demonstrated the utility of the potential outcomes framework (Rubin 2005) for analyzing legal phenomena (Ho and Rubin 2011).[15] Much of the benefit of this framework lies in its ability to clarify the connection between substantive law, observed facts, and empirical data (Greiner 2008; Ho and Rubin 2011).

The potential outcomes approach requires that we estimate the effect of a treatment—here legal representation—by comparing the observed outcomes for treated and untreated individuals with their unobserved counterfactual potential outcomes. In this case, we seek to compare the outcome achieved by homeowners with representation to the outcome the homeowners would have obtained without representation, and the outcome that unrepresented homeowners would have achieved with representation.

Because we never observe the counterfactual outcomes, the central challenge to causal

[14] However Owens (2014) also highlights the potential benefit of gaining information from others who are experiencing foreclosure.
[15] For a review of the potential outcomes framework and related approaches, see Morgan and Winship (2015).

inference is to find a way to estimate them. If legal representation were randomly assigned, we could compare the outcome of cases where homeowners were represented to those where the homeowners were *pro se*. If our sample was large enough, we could assume that the only difference between the cases within each subgroup was whether the homeowner had a lawyer because all other factors that affect case outcomes would be distributed similarly for the two groups.

Unfortunately, lawyers in foreclosure cases are not randomly assigned.[16] Rather, homeowners' desire and ability to obtain representation may be related to the likely outcome of the case (e.g. Priest and Klein 1984; May and Stengel 1990; Hoffman, Rubin, Shepherd 2005), with those individuals who are better situated to avoid foreclosure being more likely to obtain representation. Moreover, researchers expect that "different levels of personal resources, skills, and general experiences" will influence individuals' actions in the disputing context, including their probability to seek legal representation (Miller and Sarat 1980: 546). These individual characteristics may also be related to the case outcome if they are linked to individuals' ability to advocate on their own behalf or are otherwise relevant to the facts of the case. In addition, we know that representation requires the agreement of a lawyer, and representation is likely to reflect some amount of strategic selection on the part of lawyers (Kritzer 1997; Monsma and Lempert 1992; Spier and Dana 1993). Lawyers may be less likely to take on a case they believe has a low probability of success or to accept a client they fear may prove unable to afford their services.

[16] Although a few studies have randomized offers of legal representation in civil cases (Greiner and Pattanayak 2012, Greiner et al. 2012, Greiner et al. 2013, Seron et al. 2001, Stapleton and Teitelbaum 1972), researchers have yet to find a way to randomize actual representation in civil disputes.

Moreover, even if we were able to randomize the use of legal counsel, we would still need to contend with any systematic variation in the effect of the treatment. Here, given that the foreclosure process changed so significantly as a result of the legislative reform, transitioning from a lender-dominated formality to a longer, more dynamic process in which far more homeowners participated, it is possible that the effect of legal representation also changed. In its simplest form, this requires taking into account not only the presence or absence of legal representation, but the procedural practices in effect. Finally, even if we were able to account for that variation, we could still face challenges resulting from heterogeneity in the quality of the legal representation that was provided to different homeowners (Abrams and Yoon 2009; Shinall 2010).

Thus, the potential outcomes framework makes clear the inherent challenge to estimating the effect of legal representation on case outcomes. The observational data used in this study will not allow for definitive estimation of the causal effect of legal representation for homeowners on foreclosure case outcomes. Instead, I focus on estimating the association between homeowner legal representation and foreclosure case outcomes, taking into account variation in case characteristics and the context in which cases are filed. Considering the results of this analysis in light of the potential outcomes framework helps to clarify the inferences that may be drawn from the study, and to highlight areas for future research.

EMPIRICAL STUDY

In the primary analysis, I use a series of logistic regression models to estimate the association between legal representation for the homeowner and the probability that the case ended in foreclosure. I also consider how this association changes in light of the characteristics of the loan

and property involved in the case as well as modifications to the foreclosure process. Specifically, the probability that case *i* ended in foreclosure, relative to being discontinued, is estimated by

$$P(F_i) = \frac{e^{\alpha_i + \delta_j D_i + \beta_j X_{ji}}}{1 + e^{\alpha_i + \delta_j D_i + \beta_j X_{ji}}}$$

where D_i indicates whether the homeowner in case *i* had legal representation and δ_j is the estimated coefficient for the association between representation and foreclosure, X_{ji} are additional explanatory variables and β_j are their estimated coefficients.

For this analysis, I use a dataset of residential foreclosure cases initiated in New York City between 2007 and 2011. Unlike most research on the foreclosure crisis that relies on data from lenders or land records, I use data drawn primarily from court records. Because the foreclosure process in New York State takes place within the court system, it produces a documentary record that makes it possible to analyze homeowners' actions in ways that would not be feasible in jurisdictions where foreclosures happen outside of the court system (and may enhance the role of lawyers). Limiting the sample to New York City minimizes county-specific variation in court settings while accounting for approximately 40 percent of all foreclosure cases filed in New York State (Pfau 2012).

To generate the dataset, I used proprietary data acquired from RealtyTrac to draw a representative random sample of *lis pendens* filed between 2007 and 2011 in connection with residential properties in the five boroughs of New York City: the Bronx, Brooklyn (Kings County), Queens, Manhattan (New York County), and Staten Island (Richmond County). The *lis pendens* in the sample were then individually matched to court cases by plaintiff and defendant name and date of filing using the New York State Unified Court System's online case

summaries. This process refined the sample by excluding non-foreclosure cases and foreclosure cases involving non-individual defendants and non-bank plaintiffs (e.g. tax liens). Where a court case was identified, the court records were manually retrieved from online sources (Brooklyn and Manhattan) and county clerks' offices (Bronx, Queens, and Staten Island). These documents were reviewed and coded. The addresses of the properties in question were then geocoded and matched to census data at the block and block-group level.

The resulting analytic sample (N=951) is weighted to account for the sampling design and the rate at which *lis pendens* were matched to court cases (see Table 4.A1). Missing values were imputed.[17] For all analyses, the unit of analysis is the foreclosure case.

Outcome Variable: Case Outcome

Case outcomes were determined from a review of the court records and online court summary. Cases are coded as disposed by foreclosure, disposed by discontinuance, or remaining ongoing as of the end of data collection in the fall of 2015.[18]

Primary Independent Variable: Homeowner Legal Representation

The variable for homeowner legal representation indicates whether the homeowner was represented by a lawyer at any point during the foreclosure proceedings, including instances

[17] Missing values for loan principal (n=12), loan interest rate (n=76), date of default (n=23), and date of note origination (n=15) were imputed using single imputation. Excluding observations with missing data from the analysis does not substantively alter the results.

[18] Dismissed cases are included in the discontinued category. Although they are legally distinct, the substantive difference between dismissals and discontinuances in this sample is small. Cases in both categories were terminated before a note of issue (which presents a formal legal question to the court) was filed and the decisions were entered without prejudice, meaning that the case can be re-filed. Combining the smaller number of dismissals with the discontinued cases does not substantively alter the results.

where the homeowner received limited legal representation (such as for the purpose of attending a settlement conference or drafting an answer). Because limited representation may offer less of a benefit than full representation, it is a conservative measure of legal assistance.

Covariates

Additional independent variables that may predict case outcome, or are potential confounders, are included in the analysis as covariates. A copy of the note was not tendered to the court in many cases, and the analytic strategy is to use only those loan characteristics that were consistently identifiable within the court records.[19] The interest rate variable indicates the interest rate in effect at the time of the homeowner's default. This measure has the benefit of being consistent across all cases, but it does not necessarily represent the interest rate that would be in effect over the entire term of the loan.[20] The principal value of the loan is measured in thousands of dollars and logged to reduce its skewed distribution.[21] Repayment behavior is measured using the number of months that elapsed between the origination of the loan and the date of the

[19] For about half of the cases in the sample I am able to identify whether the loan had a fixed or adjustable interest rate, but in supplemental analysis I find no evidence of an association between loan type and the probability of foreclosure or homeowner representation.

[20] A few cases involved loans with very low interest rates that likely represent introductory "teaser" rates on adjustable rate loans. Given that the homeowner defaulted while this rate was still in effect, however, it is not clear that an impending rate change precipitated the default. I also explored the interest rate as it related to the thirty-year fixed rate mortgage at the time of the loan's origination, which generated similar results.

[21] To the extent possible, the dataset is composed of loans that were originated for the purchase of the home or the subsequent refinancing of such loans. In a few cases, the low principal amount of the loan makes it unclear whether the loan may have been originated for another purpose, but where there was no other reason included in the court records to exclude the loan it remained in the sample. Excluding outliers (high or low) from the analysis does not substantively alter the results.

homeowner's default. Where there is evidence of a non-linear relationship, the variable is centered and a squared term is included.

Measures for the racial composition and economic status of the neighborhood where the property is located, as well as the presence of other foreclosures, are generated from census data and data drawn from land records. Using 2010 Decennial Census data, I calculate the proportion of the population on the block where the property is located that self-identifies as African American or Hispanic. The median income for the block group where the property is located is drawn from the American Community Survey 2008-2012 five-year estimates, and is measured in 2012 dollars. Finally, using data generated from land records by Hall, Crowder, and Spring (2015), there is an indicator denoting the presence of at least once completed foreclosure on the block where the property is located in the year in which the *lis pendens* was filed or the two preceding years. These variables are all measured at the block or block group level, which are the most precise geographic units available for these data and are likely more meaningful in New York City than might be the case in other areas.

Because I rely on administrative data the individual characteristics of the homeowners are not observed. However, these characteristics are likely correlated with observed loan and property characteristics.[22] Research on mortgage defaults in New York City also suggests that neighborhood characteristics may be more predictive of foreclosure patterns than individual homeowner characteristics (Chan et al. 2013).

[22] For many cases, I am able to observe the number and gender of homeowners, but in supplemental analysis find no evidence of an association between these characteristics and case outcomes or the probability that the homeowner is represented. I also matched the surnames of the first defendant in each case to a dataset of surnames drawn from the 2000 Census that indicates the proportion of individuals with that surname who are black, white, Hispanic, or Asian. Ultimately I rejected this approach to identifying homeowner race because of the non-random nature of the missing data.

The identity of the party bringing the suit is measured with a variable indicating whether the plaintiff's lawyer is one of the six law firms that appear most frequently in the sample (in order of frequency of appearance): Steven J. Baum, P.C.; Rosicki, Rosicki & Assoc., P.C.; Fein, Such & Crane, LLP; Shapiro, Dicaro & Barak, LLC; Frenkel Lambert; and McCabe, Weisburg & Conway, P.C.[23] These six firms provide legal representation for the plaintiff in nearly 70 percent of all cases and are more likely to represent large lenders with a significant volume of foreclosure cases. Because of the large number of lenders in the sample and significant variation in the role of the party bringing the claim (servicer, trustee, lender, or "nominee"), I do not include additional characteristics of the plaintiff.

Additional independent variables describe the judicial process. The court variable indicates the county Supreme Court in which the case was filed (which is also the county where the property is located). The settlement conference variable indicates whether a settlement conference was scheduled in the case. While I am not able to determine whether the homeowner attended the conference, court data indicate that homeowners fail to attend all settlement conferences in only 10 percent of cases (Pfau 2011). I also include an indicator for the settlement conference eligibility policy that applied to each case, based on the date on which the Request for Judicial Intervention was filed and, if terminated, the date of disposition. This variable distinguishes between three periods of settlement conference eligibility: Pre-reform, in which cases were not subject to the reforms and thus ineligible for settlement conferences; Varied Eligibility, in which cases may have been eligible for optional or mandatory conferences

[23] The Steven J. Baum firm was once the largest foreclosure firm in New York State, but was investigated by the New York State Attorney General over allegations of robo-signing and other abusive practices. The firm agreed to pay $4 million in penalties, costs, and fees, and eventually ceased operations. I use the second-most-frequently used firm as the reference category in the analyses.

depending on whether they were new or ongoing when the statutory changes were enacted and depending on the type of loan involved; and Mandatory Conferences, in which cases were eligible for mandatory settlement conferences regardless of loan type, as long as they were owner-occupied residences.

Some analyses include a control for the year in which the case was filed. This reflects the year in which the Request for Judicial Intervention was filed or, for cases where this document was not filed (n=25), the date on which the complaint was signed. Because there is often a delay between the filing of a *lis pendens* and the start of the civil action, these dates range between 2007 and 2013.

EMPIRICAL RESULTS

Descriptive results

Table 4.1 provides summary statistics. Reflecting variation in the prevalence of foreclosure across counties, Brooklyn cases comprise the largest portion of the sample (37 percent), followed closely by Queens (34 percent). The Bronx and Staten Island each contribute about half as many cases (13 percent and 11 percent of the sample, respectively), while Manhattan cases constitute only a small portion of the sample (4 percent). The properties involved in the cases are disproportionately located on blocks with significant minority populations; on average, 42 percent of the population on the block where the property is located is black and 24 percent is Hispanic. Thirty-seven percent of the properties are located on blocks where there had been at least one completed foreclosure at the time that the foreclosure case was initiated.

The loans are largely recent, and rapid defaults are common. On average, less than three years elapsed between the note's origination and the homeowner's default, and some

homeowners defaulted immediately. The average interest rate at the time of default is 7.26 percent (SD = 1.67), although the rates range from 1-18 percent. The mean principal amount is $443,475 (SD = 266,817), while there are both unusually large and small loans.

Only 20 percent of the cases end in foreclosure, while 64 percent are discontinued. An additional 16 percent remained ongoing at the end of data collection. Homeowners were represented in only 21 percent of cases. However, as Table 4.2 reveals, representation is not evenly distributed across outcomes. Rather, cases where the homeowner has legal representation are more frequently discontinued or ongoing. This offers preliminary evidence of an association between legal representation and case outcome, which is explored in greater depth in the regression analysis below.

Logistic Regression Analysis

I focus on the relationship between homeowner legal representation and case outcome among disposed cases in the regression analysis. Table 4.3 presents a series of logistic regression models predicting the probability that a case will end in foreclosure, relative to being discontinued. Model 1A presents the results of a bivariate analysis, including only legal representation for the homeowner as an independent variable. Consistent with the descriptive results above, legal representation is associated with a decrease in the probability that the case will end in foreclosure. This naïve model indicates that the probability that a case will end in foreclosure where the homeowner is represented is, on average, 0.15 (SE = 0.03), compared to 0.26 (SE = 0.02) when homeowners are *pro se*.

Model 1B adds indicators for conference eligibility to the model. The parameter estimates for the Varied Eligibility and Mandatory Conference periods are large, negative, and highly

Table 4.1. Summary Statistics

	Mean	*SD*	*Min.*	*Max.*
Homeowner lawyer	.21		0	1
Case Outcome				
Disposed by foreclosure	.20		0	1
Disposed by discontinuance	.64		0	1
Case ongoing	.16		0	1
Note interest rate (%)	7.26	1.67	1	18
Note principal ($)	443,475	266,817	20,000	4,000,000
Months from origination to default	32	31	0	366
Block population median income ($)	57,778	24,178	9,485	215,143
Proportion block population black	.42	.36	0	1
Proportion block population Hispanic	.24	.23	0	1
Completed foreclosure on block	.37		0	1
Plaintiff law firm				
Steven J. Baum, P.C.	.29		0	1
Rosicki, Rosicki & Assoc., P.C.	.14		0	1
Fein, Such & Crane, LLP	.10		0	1
Shapiro, Dicaro & Barak, LLC	.06		0	1
Frenkel Lambert	.05		0	1
McCabe, Weisburg & Conway, P.C.	.04		0	1
Other firm	.31		0	1
Court				
Bronx	.13		0	1
Brooklyn	.37		0	1
Queens	.34		0	1
Manhattan	.04		0	1
Staten Island	.11		0	1
Settlement conference	.56		0	1
Conference eligibility				
Pre-reform	.12		0	1
Varied eligibility	.52		0	1
Mandatory conferences	.37		0	1
Year of case filing				
2007	.12		0	1
2008	.20		0	1
2009	.28		0	1
2010	.21		0	1
2011	.08		0	1
2012	.08		0	1
2013	.03		0	1

N = 951.

Table 4.2. Distribution of Case Outcomes, by Homeowner Legal Representation

	Foreclosure	Discontinuance	Ongoing	Total	
	%	%	%	%	N
No lawyer	22.42	63.54	14.04	100	748
Lawyer	11.47	64.67	23.85	100	203
Total	20.08	63.78	16.14	100	951

statistically significant, indicating the probability of foreclosure is lower among cases litigated after the reforms to the foreclosure process. The average predicted probability of foreclosure is 0.62 (SE = 0.05) for cases litigated prior to the reforms, 0.22 (SE = 0.02) among cases in the Varied Eligibility period, and 0.10 (SE = 0.02) for cases in the Mandatory Conference period, when homeowner legal representation is held at its mean. The parameter estimate for homeowner legal representation remains negative—consistent with a benefit from legal representation—but the magnitude is decreased and the coefficient fails to reach statistical significance. Thus, the results indicate that the probability of foreclosure decreased after the foreclosure process was altered, and this difference exceeded the marginal effect of legal representation.

To investigate how the relationship between legal representation and case outcome is influenced by other case characteristics, Model 2 adjusts for observed characteristics of the loan and the area where the property is located. This model indicates that homeowner legal representation is negatively associated with the log odds of foreclosure. The parameter estimates for the interest rate and principal of the note are both in the expected directions—higher interest rates are associated with an increase in the log odds of foreclosure while increases in the principal of the note (logged) are associated with a decline in the log odds of foreclosure—but

Table 4.3. Estimated Coefficients from Logistic Regression Models Predicting the Probability of Foreclosure among Disposed Cases

	Model 1A	*Model 1B*	*Model 2*	*Model 3*	*Model 4*
Homeowner lawyer	-0.69**	-0.22	-0.54*	-0.54*	-0.11
	(0.23)	(0.26)	(0.24)	(0.26)	(0.27)
Conference eligibility					
Pre-reform (*ref.*)		---			---
Varied eligibility		-1.78***			-1.03***
		(0.23)			(0.29)
Mandatory conferences		-2.65***			-1.87***
		(0.280)			(0.36)
Loan characteristics					
Note interest rate (%)			0.07	0.15*	0.09
			(0.06)	(0.06)	(0.07)
Note principal ($), log			-0.14	0.02	0.13
			(0.19)	(0.20)	(0.22)
Months from origination to default (centered)			-0.02***	-0.03***	-0.01*
			(0.01)	(0.01)	(0.01)
Months from origination to default squared			0.00***	0.00***	0.00*
			(0.00)	(0.00)	(0.00)
Property block characteristics					
Block population median income (log $)			1.03***	0.42	0.41
			(0.23)	(0.26)	(0.27)
Proportion block population black			-0.14	0.26	0.26
			(0.28)	(0.34)	(0.36)
Proportion block population Hispanic			1.79***	1.32*	1.39**
			(0.44)	(0.52)	(0.53)
Completed foreclosure on block			0.41*	0.33	0.29
			(0.18)	(0.20)	(0.21)
Court characteristics					
County					
Bronx				-0.07	0.34
				(0.27)	(0.30)
Brooklyn				-2.26***	-1.73***
				(0.37)	(0.37)
Queens (*ref.*)				---	---
Manhattan				0.82*	1.22**
				(0.36)	(0.40)
Staten Island				0.40	0.62*
				(0.26)	(0.29)

Table 4.3 (Continued)

	Model 1A	*Model 1B*	*Model 2*	*Model 3*	*Model 4*
Plaintiff law firm					
Steven J. Baum, P.C.				-0.53	-0.73*
				(0.31)	(0.34)
Rosicki, Rosicki & Assoc., P.C. (*ref.*)				---	---
Fein, Such & Crane, LLP				0.36	0.21
				(0.38)	(0.42)
Shapiro, Dicaro & Barak, LLC				0.14	0.08
				(0.42)	(0.45)
Frenkel Lambert				0.88	0.76
				(0.46)	(0.50)
McCabe, Weisburg & Conway, P.C.				0.46	0.54
				(0.51)	(0.54)
Other firm				0.00	-0.01
				(0.30)	(0.33)
Settlement conference					-0.59*
					(0.24)
Constant	-1.04	0.55	-11.83	-7.40	-7.10
LR χ^2(DF)	13.74(1)	168.44(3)	120.01(9)	278.17(19)	359.21(22)
N	810	810	810	810	810

Note: Estimates relative to being discontinued. Robust standard errors in parentheses under their respective coefficients. *** p<0.001, ** p<0.01, * p<0.05.

the coefficients are not statistically significant. In contrast, the model indicates a significant and non-linear relationship between the months from origination to default and the log odds of foreclosure.

Many of the characteristics of the block on which the property is located are also associated with the probability of foreclosure. Notably, the results indicate that cases involving properties located in areas with greater Hispanic populations are more likely to end in foreclosure. With all other variables held at their means, the estimated average predicted probability of a case ending in foreclosure is 0.15 (SE = 0.02) for properties on blocks with no Hispanic population, 0.18 (SE = 0.02) when Hispanics comprise 14 percent of the population (the median proportion block population that is Hispanic in the sample), and 0.25 (SE = 0.02) when the block population is 37 percent Hispanic (the 75th percentile of the block proportion Hispanic).

The presence of at least one completed foreclosure on the block where the property is located is associated with an increase of 0.41 (SE = 0.18) in the log odds of foreclosure. Surprisingly, Model 2 also indicates that an increase in the log of the median income for the block group where the property is located is positively associated with the probability of foreclosure. In contrast, the parameter estimate for the variable indicating the proportion of the population that is black is not statistically significantly different from zero.

Model 3 includes indicators for the county where the case was filed and for the plaintiff law firm. The results reveal variation in the probability of foreclosure across counties, with the highest average predicted probability of foreclosure in Manhattan (p = 0.47, SE = 0.08) and

lowest in Brooklyn ($p = 0.04$, $SE = 0.01$), with all other variables held at their means.[1] The probability of foreclosure also differs for cases where the plaintiff is represented by some law firms. The negative association between legal representation and the probability of foreclosure remains stable in this model.

In Model 4, the parameter estimates for the Varied Eligibility and Mandatory Conference periods, and for the settlement conferences themselves, are robust. The model predicts a reduction in the log odds of foreclosure among cases where a settlement conference was scheduled ($\beta = -0.59$, $SE = 0.24$) and among cases litigated after the reforms were adopted (Varied Eligibility period, $\beta = -1.03$, $SE = 0.29$) and expanded (Mandatory Conference period, $\beta = -1.87$, $SE = 0.36$).

In contrast, after adjusting for the occurrence of a settlement conference and settlement conference eligibility, the magnitude of the association between homeowner legal representation and case outcome is diminished. Once these legal reforms are taken into account, it is impossible to say with ninety-five percent confidence that there is an association between legal representation and the probability of foreclosure. However, the coefficient remains negative and the decrease in statistical certainty may result from sample size limitations and the relatively low probability of foreclosure overall.

These results offer strong evidence of an association between the characteristics of the foreclosure process and foreclosure case outcomes, and suggest that legal representation may also be associated with a decrease in the probability that a case will end in foreclosure.

[1] The variation in the distribution of outcomes across counties raises concerns about over-fitting. Supplemental analysis indicates that removing the controls for county does not substantially change the results.

Additional considerations

In this section I consider these findings in light of (i) unobserved sources of variation in the probability that homeowners obtain legal representation, (ii) data censoring, (iii) heterogeneity in the amount or quality of legal representation received by homeowners, and (iv) additional sources of variation in foreclosure case outcomes over time.

As noted in the potential outcomes discussion above, there is reason to suspect that case characteristics are a confounding factor, influencing both case outcomes and the probability that a homeowner will have legal representation. Although I include available loan and property characteristics as controls in the model, there may be additional unobserved sources of variation in homeowners' desire or ability to obtain legal representation.

Appendix Table 3.2 presents a series of logistic regression models estimating the probability that homeowners are represented. These models indicate that the characteristics of the judicial process are stronger predictors of legal representation than the observed loan and property characteristics. However, the observed characteristics explain only a small portion of the variation in legal representation across foreclosure cases. Thus, additional research is needed to understand the selection processes through which some homeowners obtain legal representation and others do not, and to evaluate the effect of differential selection on the relationship between legal representation and foreclosure case outcomes.

A second issue is the fact that 16 percent of the cases in the sample remained ongoing at the end of data collection. The primary results may not apply to the full population of foreclosure cases if the relationship between legal representation and the ultimate case outcome is substantially different for those cases that remain ongoing.

It is possible to investigate whether ongoing cases differ from those that have been discontinued or ended in foreclosure using observable characteristics. Appendix Table 3.3 presents the coefficients from a series of multinomial logistic regression models that predict whether cases end in foreclosure or remain ongoing, relative to being discontinued. The models incorporate the same covariates used in the primary analysis, except that the year of case filing is included to adjust for changes in time instead of indicators of settlement conference eligibility. This alternative specification provides more stable estimates for the full sample because all cases litigated prior to the legislative reform have been disposed.

The results offer some evidence that cases where the homeowner is legally represented are more likely to be ongoing than those where the homeowner is *pro se*. However, the coefficient for homeowner legal representation is reduced in magnitude once loan, property, and case characteristics are taken into account. This decline suggests that much of the association between legal representation and the probability of cases remaining ongoing is due to the fact that later cases are both more likely to remain ongoing and more likely to involve legal representation for the homeowner. Moreover, with a few exceptions—notably the variable indicating the proportion of the block population that is Hispanic—loan and property characteristics are not differentially associated with the probability that a case remains ongoing, relative to its alternatives. This offers little evidence of substantive differences between ongoing and disposed cases.

Assuming, however, that ongoing cases are more likely to involve legal representation for the homeowner, and remain ongoing as a result of the lawyer's presence, the results of the analysis might be altered. If the ongoing cases end in a manner similar to the cases already disposed, the parameter estimates would change slightly, but the results are unlikely to differ

dramatically. If, however, the ongoing cases where the homeowner is represented result in a substantially greater proportion of discontinuances than the cases already disposed, the association between legal representation and the probability of foreclosure would increase in magnitude from the primary result, and remain negative. This seems plausible given that longer cases among those already disposed less frequently end in foreclosure. If, in contrast, a disproportionate number of ongoing cases where the homeowner had legal representation end in foreclosure, the primary results would overstate the relationship between legal representation and foreclosure in the full sample. This would, however, raise questions about another potential benefit of legal representation: increased case duration. Longer cases are seen as favorable to homeowners because they indicate the potential for an alternative to foreclosure as well as additional time to relocate in the event of foreclosure.

The results are also a function of the measure of legal representation employed (recall that the analysis does not distinguish between limited and full legal representation). Research on the effect of legal representation in other types of civil litigation finds that limited representation offers less of a benefit than full representation (Steinberg 2011). If that is true in the foreclosure context, the magnitude of the association between legal representation and probability of foreclosure might be more extreme if only situations involving traditional attorney-client representation were used.

There is also reason to suspect that the average association estimated in the primary analysis hides significant heterogeneity in the association between legal representation and case outcome. Additional analysis presented in Appendix Table 3.4 estimates the probability of cases ending in foreclosure, taking into account whether homeowners were unrepresented, had a private lawyer, or were represented by a legal aid lawyer. There is no statistically significant

difference in the log odds that cases will end in foreclosure when the homeowner is unrepresented (β = -0.08, SE = 0.29), relative to when they are represented by a private foreclosure defense lawyer. However, representation by a legal aid lawyer is associated with a significant decrease in the log odds of foreclosure (β = -2.12, SE = 1.05). Sample size limitations require caution in interpreting these results, but they are consistent with research highlighting the benefit of representation by specialized lawyers who appear repeatedly in similar kinds of cases (Galanter 1974). However, it is not possible to conclusively determine whether the estimated associations reflect the quality of legal services provided or variation in the selectivity of legal aid and private lawyers on unobserved case characteristics. Nevertheless, it offers preliminary evidence that the magnitude of the association between legal representation and the probability of foreclosure may vary significantly across lawyers.

Finally, it is possible that the association between settlement conference eligibility and the probability of foreclosure is driven by unobserved changes in time. There were other policy shifts during this time period that may have influenced case outcomes, including the expansion of loan modification programs and changes to filing requirements.[2] In addition, there was significant media attention to the foreclosure crisis, which may have educated homeowners to seek alternatives to foreclosure. It may also have reduced feelings of self-blame (McCormack 2014), enhancing homeowners' likelihood of asking for help. Housing counseling programs were expanded, in part as a result of the national settlement reached with some of the nation's largest servicers (NY Attorney General 2012), and may have provided an alternate source of

[2] The requirement that lenders' representatives submit an attorney affirmation (later replaced with a certificate of merit) led to a temporary decline in foreclosure filings and the discontinuance of cases where the lender could not offer evidence of their standing to foreclose (Prudenti 2012).

assistance for homeowners. I am unable to consider the influence of these changes. However, supplemental analyses indicate that the measure of conference eligibility is a stronger predictor of case outcome than the year of case filing or controls for other policy changes, offering additional support for the relevance of the discussed reforms to the foreclosure process.

This observational analysis cannot adjust for all of the potentially confounding factors necessary to definitively estimate the causal effect of legal representation, and there are alternative explanations for the observed associations that are impossible to rule out. Yet while it is impossible to evaluate the influence of these additional considerations, the primary results are consistent with the observations of court administrators. The court system encourages homeowners to obtain legal representation and continues to argue for the expansion of legal aid for homeowners entering the foreclosure process, reflecting a belief in the benefit of legal representation for homeowners (e.g. Prudenti 2013). At the same time, court data document an increase in homeowner participation after the implementation of the foreclosure settlement conferences, and the court system has continued the program despite its substantial drain on court resources because of its perceived ability to avoid unnecessary foreclosures (e.g. Prudenti 2012, Prudenti 2011). Scholarly description of the practice of foreclosure defense in New York confirms the helpfulness of the settlement conference in this process (Wagner 2010).

CONCLUSION

This study is the first to consider the use and effect of legal representation in the judicial foreclosure process. Analyzing a representative sample of New York City foreclosure cases initiated between 2007 and 2011, I find that most homeowners are not represented. Yet cases where homeowners have legal representation end in foreclosure less frequently than cases where

the homeowner is unrepresented. The results of the logistic regression analysis indicate that legal representation is negatively associated with the probability of foreclosure, even when observed case and property characteristics are taken into account. However, this association is diminished once I adjust for reforms to the foreclosure process. In comparison, I find that cases litigated after the adoption of these reforms have a lower probability of ending in foreclosure than those initiated prior to their implementation, and that the probability of foreclosure is lower among cases where a settlement conference was scheduled.

By focusing on the role of legal representation and considering the impact of procedural reform, this study adds a new dimension to our understanding of the foreclosure crisis. While a growing body of research documents variation in the outcomes of mortgage defaults, research on the impact of the foreclosure process is limited. Additional research is needed to understand how homeowners navigate this process, and how interactions with lawyers and court actors influence their behavior.

Table 4.A1. Data Collection Process

	N (%)
Lis Pendens Sample	1680
Court Case Identification	
Court Case Not Matched	429 (26)
Court Case Matched and Excluded	259 (15)
Court Case Matched	992 (59)
Court Document Retrieval	
Court Documents Not Found	15 (2)
Court Documents Found and Excluded	9 (1)
Court Documents Found	968 (0.98)
Census Data Merge	
Census Data Missing	5 (1)
Case Excluded per Census Data	8 (1)
Census Data Complete and Valid	955 (0.99)
Nonresponse	
Dependent Variable Missing	4 (<1)
Dependent Variable Complete	951 (99)
Analytic Sample	951

Table 4.A2. Estimated Coefficents from Logistic Regression Models Predicting Homeowner Legal Representation

	Model 1	*Model 2*	*Model 3*	*Model 4*
Loan Characteristics				
Note interest rate (%), centered	-0.02	-0.02	-0.04	0.00
	(0.06)	(0.06)	(0.06)	(0.06)
Note interest rate (%), squared	0.02*	0.022*	0.02	0.02
	(0.01)	(0.01)	(0.01)	(0.01)
Note principal ($), log	0.17	0.13	0.15	0.01
	(0.17)	(0.17)	(0.19)	(0.21)
Months from origination to default, centered	0.02***	0.02***	0.02***	0.01
	(0.01)	(0.01)	(0.01)	(0.01)
Months from origination to default, squared	-0.00	-0.00	-0.00	-0.00
	(0.00)	(0.00)	(0.00)	(0.00)
Property Block Characteristics				
Block population median income ($), log		0.13	0.38	0.36
		(0.21)	(0.22)	(0.24)
Proportion block population black		-0.10	-0.32	-0.41
		(0.27)	(0.30)	(0.31)
Proportion block population Hispanic		-0.05	-0.10	-0.18
		(0.42)	(0.46)	(0.48)
Completed foreclosure on block		-0.23	-0.16	-0.06
		(0.19)	(0.19)	(0.19)
Court characteristics				
County				
Bronx			0.47	0.31
			(0.26)	(0.28)
Brooklyn			0.33	0.03
			(0.23)	(0.25)
Manhattan			-0.62	-0.78
			(0.40)	(0.41)
Queens (*ref.*)			---	---
Staten_Island			-0.18	-0.26
			(0.28)	(0.29)

Table 4.A2. (Continued)

	Model 1	*Model 2*	*Model 3*	*Model 4*
Plaintiff law firm				
Steven J. Baum, P.C.			-0.47	-0.24
			(0.29)	(0.31)
Rosicki, Rosicki & Assoc., P.C. (*ref.*)			---	---
Fein, Such & Crane, LLP			-0.59	-0.58
			(0.40)	(0.41)
Shapiro, Dicaro & Barak, LLC			-0.53	-0.39
			(0.43)	(0.44)
Frenkel Lambert			-0.04	0.06
			(0.43)	(0.43)
McCabe, Weisburg & Conway, P.C.			0.23	0.25
			(0.46)	(0.45)
Other firm			0.22	0.37
			(0.27)	(0.29)
Settlement conference				0.91***
				(0.21)
Conference eligibility				
Pre-reform (*ref.*)				---
Optional				0.61
				(0.54)
Mandatory				1.27*
				(0.56)
Constant	-3.34	-4.23	-7.13	-6.59
LR χ^2(DF)	49.70(5)	54.10(9)	89.14(19)	169.30(22)
N	951	951	951	951

Note: Robust standard errors in parentheses below their respective coefficents. *** p<0.001, ** p<0.01, * p<0.05

Table 4.A3. Estimated Coefficents from Multinomial Logistic Regression Predicting the Probability of Cases ending in Foreclosure or being Ongoing, Relative to the Probablity of being Discontinued

	Model 1		*Model 2*		*Model 3*	
	Foreclosure	Ongoing	Foreclosure	Ongoing	Foreclosure	Ongoing
Homeowner lawyer	-0.69**	0.51*	-0.25	0.38	-0.16	0.28
	(0.23)	(0.22)	(0.27)	(0.24)	(0.29)	(0.25)
Loan characteristics						
Note interest rate (%)			0.14*	0.04	0.10	0.11
			(0.07)	(0.06)	(0.08)	(0.06)
Note principal ($), log			0.15	0.51*	0.20	0.52*
			(0.20)	(0.23)	(0.22)	(0.24)
Months from origination to default, centered			-0.02***	0.01*	-0.01*	0.01
			(0.01)	(0.01)	(0.00)	(0.01)
Months from origination to default, squared			0.00**	-0.00	0.00	-0.00
			(0.00)	(0.00)	(0.00)	(0.00)
Property block characteristics						
Block population median income ($), log			0.35	0.28	0.31	0.32
			(0.25)	(0.27)	(0.26)	(0.28)
Proportion block population black			0.32	0.38	0.31	0.27
			(0.34)	(0.35)	(0.34)	(0.34)
Proportion block population Hispanic			1.21*	-0.16	1.24*	-0.31
			(0.53)	(0.63)	(0.54)	(0.63)
Completed foreclosure on block			0.27	-0.01	0.21	0.05
			(0.20)	(0.23)	(0.20)	(0.23)
Court characteristics						
County						
Bronx			-0.04	0.82*	0.11	0.73*
			(0.28)	(0.32)	(0.30)	(0.34)
Brooklyn			-2.07***	0.18	-2.19***	0.24
			(0.37)	(0.27)	(0.37)	(0.28)
Manhattan			0.85*	-0.21	1.16**	-0.45
			(0.35)	(0.51)	(0.37)	(0.58)
Queens (*ref.*)						
Staten Island			0.48	-1.29**	0.61*	-1.32**
			(0.27)	(0.43)	(0.28)	(0.43)

Table 4.A3. (Continued)

	Model 1		*Model 2*		*Model 3*	
	Foreclosure	Ongoing	Foreclosure	Ongoing	Foreclosure	Ongoing
Plaintiff law firm						
Steven J. Baum, P.C.			-0.64*	-0.65*	-0.72*	-0.34
			(0.32)	(0.32)	(0.33)	(0.34)
Rosicki, Rosicki & Assoc., P.C. (*ref.*)			---	---	---	---
Fein, Such & Crane, LLP			0.37	0.27	0.22	0.03
			(0.39)	(0.38)	(0.41)	(0.40)
Shapiro, Dicaro & Barak, LLC			0.16	-2.19***	0.05	-2.12**
			(0.42)	(0.63)	(0.43)	(0.68)
Frenkel Lambert			0.71	0.42	0.74	0.51
			(0.47)	(0.48)	(0.47)	(0.49)
McCabe, Weisburg & Conway, P.C.			0.63	0.56	0.54	0.44
			(0.56)	(0.48)	(0.58)	(0.53)
Other firm			-0.07	-0.73*	-0.06	-0.82*
			(0.30)	(0.32)	(0.32)	(0.33)
Settlement conference			-1.06***	0.47	-0.45	0.38
			(0.21)	(0.24)	(0.24)	(0.30)
Year of Case Filing						
2007 (*ref.*)					---	---
2008					-0.29	-0.10
					(0.31)	(0.58)
2009					-1.23***	0.29
					(0.32)	(0.58)
2010					-1.81***	0.53
					(0.42)	(0.62)
2011					-1.29**	0.81
					(0.48)	(0.64)
2012					-1.45**	1.10**
					(0.52)	(0.64)
2013					-2.00**	1.97**
					(0.74)	(0.73)
Constant	-1.04	-1.51	-7.71	-11.45	-6.96	-13.05
LR χ^2(DF)	29.83(2)		478.16(40)		588.21(52)	
N	951		951		951	

Note: Robust standard errors in parentheses below their respective coefficents. *** p<0.001, ** p<0.01, * p<0.05.

Table 4.A4. Estimated Coefficents from Logistic Regression Predicting the Probability of Cases ending in Foreclosure Relative to the Probablity of being Discontinued, Adjusting for Private and Legal Aid Lawyers for Homeowners

	Model 1	*Model 2*
Homeowner Legal Representation		
Unrepresented	0.47	-0.08
	(0.24)	(0.29)
Private lawyer (*ref.*)	---	---
Legal aid lawyer	-2.38*	-2.12*
	(1.04)	(1.05)
Loan characteristics		
Note interest rate (%)		0.09
		(0.06)
Note principal ($), log		0.11
		(0.22)
Months from origination to default, centered		-0.01*
		(0.01)
Months from origination to default, squared		0.00*
		(0.00)
Property block characteristics		
Block population median imcome ($), log		0.42
		(0.27)
Proportion block population black		0.30
		(0.36)
Proportion block population Hispanic		1.38**
		(0.53)
Completed foreclosure on block		0.28
		(0.21)
Court characteristics		
County		
Bronx		0.34
		(0.30)
Brooklyn		-1.73***
		(0.37)
Manhattan		1.20**
		(0.39)
Queens (*ref.*)		---
Staten Island		0.64*
		(0.29)

Table 4.A4. (Continued)

	Model 1	*Model 2*
Plaintiff law firm		
Steven J. Baum, P.C.		-0.73*
		(0.34)
Rosicki, Rosicki & Assoc., P.C. (*ref.*)		---
Fein, Such & Crane, LLP		0.19
		(0.42)
Shapiro, Dicaro & Barak, LLC		0.14
		(0.46)
Frenkel Lambert		0.76
		(0.51)
McCabe, Weisburg & Conway, P.C.		0.54
		(0.54)
Other firm		-0.02
		(0.33)
Settlement conference		-0.57*
		(0.24)
Conference eligibility		
Pre-reform (*ref.*)		---
Optional		-1.05***
		(0.29)
Mandatory		-1.90***
		(0.37)
Constant	-1.51	-6.75
LR X^2(DF)	23.97(2)	365.85(23)
N	810	810

Note: Robust standard errors in parentheses below their respective coefficents. *** p<0.001, ** p<0.01, * p<0.05.

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