

“TO BORROW, TO BORROW . . . SHOULD NOT CAUSE SUCH SORROW”: WHY NEW JERSEY SHOULD ENACT LEGISLATION INCORPORATING A HOMEOWNER BILL OF RIGHTS (HBOR) AND A SERVICER’S DUTY OF LOSS MITIGATION

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Foreclosures blight neighborhoods, put financial pressure on families and drive down local real estate values, and consumers, made more cautious by a crippled housing market, spend less freely, curbing the economy's growth. . . . In fact, the Urban Institute estimates that a single foreclosure costs \$79,443 after aggregating the costs borne by financial institutions, investors, the homeowner, their neighbors, and local governments. However, even this number may understate the true costs, since it does not reflect the impact of the foreclosure epidemic on the nation's economy or the disparate impact on lower-income and minority communities¹

In 2012, California legislators, facing a grim economic situation which experts blamed, to a large extent, on the state's high rate of foreclosures, had the foresight to pass a Homeowner's Bill of Rights, resulting in a steep decline in foreclosures.² Given New Jersey's fragile economy, sluggish housing market, and the continued high rate of foreclosures, the state stands precipitously on the edge of a financial downward spiral.³ Now is the time for New Jersey legislators to return economic stability to the state, protect its homeowners, and ensure a brighter future by passing legislation incorporating a Homeowner's Bill of Rights and a servicer's duty of loss mitigation.

Part I of this Article will discuss the different events leading up to the national foreclosure crisis, including widespread fraudulent lenders' practices, which resulted in the National Mortgage Settlement. This Article will highlight President Obama's attempt to bring attention to the troubled housing market, Congress's failure to respond to that attempt, and how, in the absence of a federal solution, California made the decision to pass groundbreaking legislation, with other states following suit. Part II will analyze New Jersey's recent grim foreclosure statistics and forecasts, which reflect the need for action. Part III will present the findings of an important independent report outlining the insufficiency of

¹ S.B. 900, CONF. REP. 1, 2011–2012 Reg. Sess. (Cal. 2012), available at http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_0851-0900/sb_900_cfa_20120702_103745_sen_floor.html.

² *Id.*; Travis Waldron, *California's New Homeowner Protections Help Reduce Foreclosures By 62 Percent*, THINKPROGRESS (Feb. 14, 2013, 3:15 PM), <http://thinkprogress.org/economy/2013/02/14/1595601/california-homeowner-bill-of-rights-reduce-foreclosure>; see Kerri Ann Panchuk, *LPS: Homeowner Bill of Rights Slows California Foreclosure Sales*, HOUSINGWIRE (May 6, 2013, 1:42 PM), <http://www.housingwire.com/articles/lps-homeowner-bill-rights-slows-california-foreclosure-sales>.

³ See, e.g., Prashant Gopal, *Foreclosures Surging in New York-New Jersey Market*, BLOOMBERG (Feb. 26, 2014, 9:01 AM), <http://www.bloomberg.com/news/articles/2014-02-26/foreclosures-climaxing-in-new-york-new-jersey-market-mortgages>.

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current legislation and will also look to other states’ legislative proposals for ideas that New Jersey could incorporate in new legislation. Part IV will note the disparate impact that foreclosures have on minority communities and the need to protect New Jersey’s most vulnerable citizens from suffering a disproportionate share of the foreclosure problem. Part V will conclude that New Jersey should enact a Homeowner Bill of Rights and a servicer’s duty of loss mitigation so as to ensure that the brewing financial “perfect storm” passes over New Jersey’s landscape without wreaking havoc on our economy, real estate market, and homeowners.

I. BACKGROUND

A. *At the Federal Level*

In October 2008, Congress passed the Emergency Economic Stabilization Act of 2008 (“Act”).⁴ A few months later, in February 2009, the Obama Administration, via the United States Department of the Treasury, utilized the authority granted under Sections 101 and 109 of the Act to launch the Making Home Affordable (“MHA”) Program with the central component of the MHA being the Home Affordable Modification Program (“HAMP”).⁵ The MHA’s stated goal is to help struggling homeowners avoid foreclosure and strengthen the housing market.⁶

The United States Government cites that HAMP helped nearly 1.3 million families and performed more than 3.9 million private-sector mortgage modifications through October 2013; however, as new government initiatives were enacted, foreclosure rescue and mortgage modification scams became a growing concern, and the program’s

⁴ Emergency Economic Stabilization Act of 2008, 12 U.S.C. § 5201 (2012).

⁵ *Making Home Affordable: Home Affordable Modification Program (HAMP)*, U.S. DEP’T TREAS., <http://www.treasury.gov/initiatives/financial-stability/TARP-Programs/housing/mha/Pages/hamp.aspx> (last updated July 22, 2012, 2:26 PM); *Making Home Affordable: Program Purpose and Overview*, U.S. DEP’T TREAS., <http://www.treasury.gov/initiatives/financial-stability/TARP-Programs/housing/mha/Pages/default.aspx> (last updated Mar. 6, 2015, 1:39 PM). HAMP is authorized by sections 101 and 109 of the Emergency Economic Stabilization Act of 2008, amended by section 7002 of the American Recovery and Reinvestment Act of 2009 (collectively “The Acts”). See Emergency Economic Stabilization Act of 2008 § 5201, 12 U.S.C. §§ 101, 109 (2012); see also American Recovery and Reinvestment Act of 2009 § 5219(a), 12 U.S.C. § 7002 (2012) (amending the Emergency Economic Stabilization Act of 2008).

⁶ *Making Home Affordable*, U.S. DEP’T TREAS., <http://www.treasury.gov/initiatives/financial-stability/TARP-Programs/housing/mha/Pages/default.aspx> (last updated Oct. 3, 2014, 1:08 PM).

effectiveness has been questioned.⁷

In October 2010, the media began widely reporting on “robo-signed” documents used in foreclosure proceedings throughout the country, and some people were soon dubbing the crises “Foreclosure-gate.”⁸ Upon further investigation, the California Attorney General discovered “deceptive practices regarding loan modifications, foreclosures occurring due to the servicer’s failure to properly process paperwork, and the use of incomplete paperwork to process foreclosures in both judicial and non-judicial foreclosure cases,” and as a result, subsequently filed a complaint.⁹ The federal government and forty-nine attorneys general reached a National Mortgage Settlement (“NMS”) with the five largest mortgage servicers in February 2012, providing both additional protections for borrowers and new requirements for loan servicers.¹⁰

⁷ *Id.*; see Neighborworks, *Loan Modification Scam Alert Home Page*, LOAN MODIFICATION SCAM ALERT, <http://www.loanscamalert.org/> (last visited Feb. 1, 2015) (illustrating an example of a government funded, non-profit organization created to issue advice to consumers as a result of numerous scams); see also Peter S. Goodman, *Homeowner Hell Continues: Mortgage Companies Fail to Abide Foreclosure Settlement*, HUFFPOST (Aug. 7, 2012), http://www.huffingtonpost.com/2012/08/08/foreclosure-settlement-fails-mortgage_n_1754018.html; Dunstan Prial, *Mortgage Programs Target Many, Help Few*, FOX BUS. (May 16, 2012), <http://www.foxbusiness.com/industries/2012/05/02/mortgage-programs-target-many-help-few/>; Susan Stocks, *Consumer Advisory: Don’t Fall for a Foreclosure Relief Scam or Bogus Legal Help*, CONSUMER FIN. PROTECT. BUREAU (July 23, 2014), <http://www.consumerfinance.gov/blog/category/foreclosure/>.

⁸ Stephen Gandel, *Will Bankers Go To Jail for Foreclosure-gate?*, TIME (Oct. 19, 2010), <http://business.time.com/2010/10/19/will-bankers-go-to-jail-for-foreclosure-gate/?xid=rss-topstories/>.

⁹ S.B. 900, CONF. REP. 1, 2011–2012 Reg. Sess. (Cal. 2012), available at http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_0851-0900/sb_900_cfa_20120702_103745_sen_floor.html.

¹⁰ See Attorneys General on the Executive Committee, *About the Settlement*, JOINT STATE-FEDERAL NAT’L MORTGAGE SERVICING SETTLEMENTS, <http://www.nationalmortgagesettlement.com/about> (last visited Mar. 17, 2015) (providing, *inter alia*, immediate aid to homeowners needing loan modification; payments to borrowers who lost their homes to foreclosure; immediate aid to borrowers who are current but whose mortgages currently exceeds their current value; immediate payments to signing states to help fund consumer protection and state foreclosure protection efforts; first ever nationwide reforms to servicing standards; and State Attorney General oversight of national banks for the first time); *The National Mortgage Settlement*, U. S. DEP’T OF JUSTICE (Dec. 17, 2012), http://www.justice.gov/ust/eo/public_affairs/consumer_info/nms/. But see Gretchen Morgenson, *Borrowers Beware: The Robo-Signers Aren’t Finished Yet*, N.Y. TIMES (Nov. 15, 2014), <http://www.nytimes.com/2014/11/16/business/borrowers-beware-the-robo-signers-arent-finished-yet.html> (detailing the resurgence of robo-signers and lenders’ corresponding fraudulent practices).

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Despite this settlement, states continued to suffer from a “foreclosure crisis.”¹¹ In his 2012 State of the Union Address, President Obama briefly touched on the hardships that the average American homeowner was facing due to factors such as irresponsible lending practices and declining home values.¹² The President laid out a “Blueprint for an America Built to Last,” calling for action to help responsible borrowers and support a housing market recovery.¹³ Key aspects of the President’s plan included a Homeowner Bill of Rights, which set forth a plan to simplify the mortgage disclosure form, mandate disclosure of all fees and penalties, provide protections for families against inappropriate foreclosures, and more.¹⁴ The United States Fiscal Year 2012 Budget, which also referenced the unfolding foreclosure crisis, included a discussion of funding foreclosure assistance, the NeighborWorks’ National Foreclosure Mitigation Counseling Program, and the Federal Housing Administration (“FHA”)’s loss mitigation program for minimizing the risk of struggling borrowers who might otherwise fall into foreclosure.¹⁵ Unfortunately, members of Congress, who first broached the subject a year later when Representative Marcy introduced House Resolution 26, titled “Expressing the sense of the House of Representatives that the States should enact a temporary moratorium on residential mortgage foreclosures,” did not share the President’s sense of urgency.¹⁶

¹¹ Marcy Gordon, *US Foreclosure Filings Hit 5-Year Low in September*, TODAY (Oct. 11, 2012, 4:16 AM), http://economywatch.today.com/_news/2012/10/11/14362557-us-foreclosure-filings-hit-5-year-low-in-september.

¹² Office of the Press Secretary, *Remarks by the President in State of the Union*, THE WHITE HOUSE (Jan. 24, 2012, 9:10 PM), <http://www.whitehouse.gov/the-press-office/2012/01/24/remarks-president-state-union-address>.

¹³ BARACK OBAMA, BLUEPRINT FOR AN AMERICA BUILT TO LAST 1, 8 (2012), available at http://www.whitehouse.gov/sites/default/files/blueprint_for_an_america_built_to_last.pdf.

¹⁴ See Office of the Press Secretary, *FACT SHEET: President Obama’s Plan to Help Responsible Homeowners and Heal the Housing Market*, THE WHITE HOUSE (Feb. 1, 2012), <http://www.whitehouse.gov/the-press-office/2012/02/01/fact-sheet-president-obama-s-plan-help-responsible-homeowners-and-heal-h>.

¹⁵ FISCAL YEAR 2012 BUDGET OF THE U.S. GOVERNMENT 94, OFFICE OF MGMT. & BUDGET (2012), available at <https://www.aau.edu/WorkArea/DownloadAsset.aspx?id=11798>.

¹⁶ *All Bill Information (Except Text) for H.R. 26 – Expressing the Sense of the House of Representatives that the States Should Enact a Temporary Moratorium on Residential Mortgage Foreclosures*, LIBRARY OF CONG., <https://www.congress.gov/bill/113th-congress/house-resolution/26/all-info> (last updated Jan. 14, 2013).

In January 2013, the Consumer Financial Protection Bureau (“CFPB”) issued final rules to implement laws to establish additional protections for homeowners facing foreclosure, which took effect in January 2014.¹⁷ These rules were designed to give consumers additional, timely information about their loans such as periodic billing statements, interest rate adjustment notices for adjustable rate mortgages (“ARMs”), prompt payment crediting and payoff statements, early and continuous intervention with delinquent borrowers, prohibitions on dual tracking (a process whereby the lender/servicer simultaneously processes a borrower’s loan modification application while continuing to pursue the foreclosure lawsuit), and specific loss mitigation procedures.¹⁸ Regarding preemption caused by inconsistencies between state and federal law, the CFPB deliberately structured the rules to be consistent with the NMS and mirror requirements set out in the California HBOR and currently imposed on loan servicers by federal law.¹⁹

Thereafter, there was a year of silence in Congress that ended when Representative Matt introduced House Resolution 4255, entitled the “Stop Foreclosures due to Congressional Dysfunction Act of 2014.”²⁰ Two weeks later, Representative Grisham introduced House Resolution 4334, the “Foreclosure Fairness Act of 2014,” which was followed a month later by Representative Cohen’s House Resolution 4596, “Limiting Investor and Homeowner Loss in Foreclosure Act of 2014.”²¹ In fact, Congress ignored President Obama’s 2012 vision for creating a Homeowner’s Bill of Rights until late June 2014, when Representative

¹⁷ See *CFPB Rules Establish Strong Protections for Homeowners Facing Foreclosure*, CFPB (Jan. 17, 2013), http://files.consumerfinance.gov/f/201301_cfpb_servicing-fact-sheet.pdf.

¹⁸ *Id.*

¹⁹ *Law Alert!: CFPB Mortgage Loan Servicing Regulations Became Effective January 10, 2014*, CONTINUING EDUC. OF THE CAL. BAR, http://ceb.com/lawalerts/CFPB_MLLoanServicesRegs.asp?utm_nooverride=1 (last visited Feb. 4, 2015).

²⁰ *All Bill Information (Except Text) for H.R. 4255 – Stop Foreclosures Due to Congressional Dysfunction Act of 2014*, LIBRARY OF CONG., <https://www.congress.gov/bill/113th-congress/house-bill/4255/all-info> (last updated Mar. 14, 2014).

²¹ *Id.*; *All Bill Information (Except Text) for H.R. 4334 – Foreclosure Fairness Act of 2014*, LIBRARY OF CONG., <https://www.congress.gov/bill/113th-congress/house-bill/4334/all-info> (last updated Apr. 16, 2014); *All Bill Information (Except Text) for H.R. 4596 – Limiting Investor and Homeowner Loss in Foreclosure Act of 2014*, LIBRARY OF CONG., <https://www.congress.gov/bill/113th-congress/house-bill/4596/all-info> (last updated July 21, 2014).

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Grisham finally sponsored another bill, House Resolution 4963, entitled the “National Homeowners Bill of Rights Act of 2014.”²²

Most recently, on November 20, 2014, the CFPB proposed additional regulations to “ensure that homeowners and struggling borrowers are treated fairly by mortgage servicers,” to which the public had ninety days to respond.²³ Some of these protections include requiring servicers to allow certain borrowers more than one chance at certain loss mitigation options; extending consumer protections to surviving family members and other homeowners; requiring servicers to notify borrowers when their loss mitigation applications are complete; maintaining borrower protections during servicing transfers; requiring that servicers take reasonable steps to avoid dual tracking, failure of which would result in the dismissal of a pending foreclosure action; providing more protective rules for when a borrower becomes delinquent; and providing more information to borrowers in bankruptcy.²⁴ Important consumer rights groups praised this “second crack” at proposed mortgage servicing rules to add additional protective regulations.²⁵

B. *At the State Level*

Whether due to the ineffectiveness of enacted legislation or to its limited scope in protecting struggling homeowners from foreclosures, states started to pass their own proactive legislation to address the foreclosure crisis. Washington was one of the earliest adopters, passing the Foreclosure Fairness Act (“FFA”) in 2011, and amending it in 2012.²⁶

²² *All Bill Information (Except Text) for H.R. 963 – National Homeowners Bill of Rights Act of 2014*, LIBRARY OF CONG., <https://www.congress.gov/bill/113th-congress/house-bill/4963/all-info> (last updated June 25, 2014).

²³ *CFPB Proposes Expanded Foreclosure Protections*, CONSUMER FIN. PROTECT. BUREAU (Nov. 20, 2014), <http://www.consumerfinance.gov/newsroom/cfpb-proposes-expanded-foreclosure-protections/>.

²⁴ *Id.*

²⁵ Alys Cohen, *NCLC Statement on CFPB’s Second Crack at Proposed Mortgage Servicing Rules*, NAT’L CONSUMER L. CNTR. (Nov. 20, 2014), http://www.nclc.org/images/pdf/foreclosure_mortgage/mortgage_servicing/statement-servicing-rules-2014.pdf (“Today, by issuing proposed revisions to mortgage servicing rules, the CFPB took an important step toward improving protections for distressed borrowers.”).

²⁶ WASH. REV. CODE § 61.24.005–177; H.B. 1362, 62nd Reg. Sess. (Wash. 2011), available at <http://apps.leg.wa.gov/documents/billdocs/2011-12/pdf/bills/house%20bills/1362-S2.pdf>; see also ROGERS WEED, FORECLOSURE FAIRNESS PROGRAM: ANNUAL REPORT ON PROGRAM PERFORMANCE, WASH. STATE DEP’T COMMERCE (Dec. 2012), available at <http://www.commerce.wa.gov/Documents/Foreclosure-Fairness-Program-2012.pdf>; Lili Sotelo, *Foreclosure Fairness Act: An Overview for Homeowner*

The foreclosure crisis most severely affected, among other states, California, which compiled statistics reporting that more than 1,000,000 homes were already foreclosed upon, that there were an additional 700,000 homes facing foreclosure, and that there was a significant cost to the local governments for each foreclosure (totaling nearly \$20,000 per foreclosure), during which California residents sent over 40,000 letters to the California Attorney General's office urging action against mortgage fraud.²⁷

As a result of the dire foreclosure situation facing California, Attorney General Harris, recognizing that homeowners and consumers needed even more protections for the non-judicial foreclosure process, announced a legislation package to address this need on February 29, 2012, known as the Homeowner's Bill of Rights, with the core segment known as the "Foreclosure Reduction Act" ("the Act").²⁸ Four months later, on July 11, 2012, Governor Brown signed Assembly Bill 278 and Senate Bill 900 into law and mandated that the laws go into effect by the beginning of 2013.²⁹

The California Homeowner Bill of Rights ("HBOR"), extending the impact of the NMS, enabled all homeowners to have the same protections and rights regardless of which bank serviced their loan.³⁰ Among the most significant aspects of the California HBOR's provisions are the following: requiring servicers to provide notice to borrowers and service-members of their right to foreclose; restricting dual tracking (which was being done in over thirty percent of California foreclosures); mandating

Advocates, NORTHWEST JUSTICE PROJECT, *available at*
http://www.wsba.org/~media/Files/Legal%20Community/Volunteer%20Opportunities/Training/Foreclosure%20Prevention%204_20%20_Presentation.ashx.

²⁷ See Donna L. Wilson, Jay S. Laifman & John W. McGuinness, *California's Homeowner Bill of Rights*, http://www.buckleysandler.com/uploads/36/doc/BuckleySandler%20Presentation_CA%20HBOR.pdf (last visited Apr. 14, 2015).

²⁸ Assemb. B. 278, 2011–2012 Reg. Sess. (Cal. 2011), *available at* http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201120120AB278&search_keywords; S.B. 900, 2011–2012 Reg. Sess. (Cal. 2011), *available at* http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201120120SB900&search_keywords.

²⁹ Assemb. B. 278; S.B. 900; *Governor Brown Signs California Homeowner Bill of Rights*, OFFICE OF GOVERNOR EDMUND G. BROWN JR. (July 11, 2012), <http://gov.ca.gov/news.php?id=17627>; Justin T. Hilley, *Homeowner Bill of Rights Signed into Law*, HOUSINGWIRE (July 11, 2012, 3:34 PM), <http://www.housingwire.com/articles/homeowner-bill-rights-signed-law>.

³⁰ See Assemb. B. 278; S.B. 900.

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that the lender provide a single point of contact (hereinafter referred to as a “SPOC”) to the borrower; adopting civil penalties of up to \$7,500 per loan for multiple and repeated recordings of unverified foreclosure documents; authorizing borrowers to seek legal redress of “material” violations of the legislation; and warning that material violations by lenders or servicers may put those institutions at risk for continuing to do business in California.³¹

Soon after the law passed, it was tested in the courts in *Singh v. Bank of America (Reconstrust Co.)*.³² In *Singh*, the plaintiff applied for a temporary restraining order (“TRO”) to prevent the defendant lender from selling his home on grounds that the defendant had violated California’s new ban against dual tracking.³³ The Eastern District of California, citing the California Homeowner Bill of Rights provisions prohibiting dual tracking, granted an injunction against the lender, thereby preventing the lender from proceeding with a foreclosure sale and awarding plaintiff legal fees and costs.³⁴

At about the same time as the passage of California’s legislation, Massachusetts passed emergency legislation entitled “An Act Preventing Unlawful and Unnecessary Foreclosures.”³⁵ This law expanded important consumer protections for homeowners in Massachusetts by introducing a series of new steps that lenders must take before foreclosing on homeowners who have fallen behind in mortgage payments and creating a task force to study potential solutions for preventing unnecessary vacancies following foreclosures and for evaluating existing mediation programs throughout the United States.³⁶

It soon became apparent to other state legislators that although the 2013 CFPB Rules were a step in the right direction, these rules were still insufficient to meet the overwhelming problems facing their residents. As a result, in 2013, two other states addressed the need for a Homeowner

³¹ *Id.*

³² *Singh v. Bank of Am., N.A.*, No. 2:13–CV–00729–MCE–AC, 2013 WL 1858436, at *1 (E.D. Cal. May 2, 2013).

³³ *Id.*

³⁴ *Id.* at *2.

³⁵ H.B. 4323, 187th Gen. Ct. Reg. Sess. (Mass. 2012). For a plain language summary, see *Massachusetts Imposes Additional Restrictions on Residential Mortgages Foreclosures; May Now Require Loan Modification in Lieu of Foreclosure*, NAT’L L. REV. (Sept. 12, 2012), <http://www.natlawreview.com/article/massachusetts-imposes-additional-restrictions-residential-mortgage-foreclosures-may->

³⁶ H.B. 4323, 187th Gen. Ct. Reg. Sess. (Mass. 2012).

Bill of Rights. The first state, Minnesota, prohibited dual tracking of foreclosure and required lenders to offer loan modifications to eligible homeowners, assist homeowners in their submission of loss mitigation documentation, communicate all loss mitigation options to homeowners, and give borrowers a private right of action to stop a wrongful foreclosure sale.³⁷ The second state, Nevada, offered similar protections: it required lenders to contact homeowners directly prior to initiating foreclosure, mandated a timely review of the borrower's loan modification application, allowed homeowners to appeal a denial of assistance, established a single point of contact, allowed homeowners to participate in foreclosure mediation if sued in foreclosure and imposed a private right of action by borrowers against lenders.³⁸

In fact, the issue even trickled down to the local governance level when the city of Lynn, Massachusetts, passed its own Homeowner Bill of Rights in an attempt to reduce the blight caused by excessive foreclosures in Lynn's neighborhoods.³⁹ This ordinance required, *inter alia*, that lenders engage in pre-foreclosure mediation with borrowers in order to come up with an alternative to foreclosure and that lenders allow the former owners to become renters at a reasonable market rate until a new owner purchased the property.⁴⁰

What of New Jersey? New Jersey passed legislation back in 1995 to protect residential mortgage debtors with the Fair Foreclosure Act (hereinafter referred to as the "FFA").⁴¹ Since then, the New Jersey

³⁷ See S.F. 1276, 88th Leg. Sess. (Minn. 2013); see also Jennifer Bjorhus, *Minnesota to Get Stricter Law on Home Foreclosures*, STAR TRIB. (May 23, 2013, 8:55 PM) (praising passage of Bill, citing ISALAH – an interfaith nonprofit organization active on racial and economic justice issues).

³⁸ S.B. 321, 77th Reg. Sess. (Nev. 2013).

³⁹ Lynn, Mass., *Homeowner Bill of Rights Ordinance* (2013), available at <http://www.mcs360.com/documents/compliancedoc/CO/Lynn,%20MA%20-%20Homeowner%20Bill%20of%20Rights.pdf>.

⁴⁰ *Id.*; see also John Laidler, *Lynn, Lawrence Act to Reduce Foreclosures*, BOS. GLOBE (June 13, 2013), <http://www.bostonglobe.com/metro/regionals/north/2013/06/12/lynn-lawrence-act-reduce-foreclosures/jRuMDuZXdCX5nFXvDpWliK/story.html> (discussing how the cities of Lawrence, Massachusetts, and Springfield, Massachusetts adopted similar ordinances). For a similar ordinance adopted by the city of Lawrence, Massachusetts, see LAWRENCE, MASS., MUN. CODE ch. 8:30 (2013), available at <http://www.cityoflawrence.com/SharedFiles/Download.aspx?pageid=168&mid=604&fileid=6122>.

⁴¹ N.J. STAT. ANN. § 2A:50-53–73. (2013). For a comprehensive discussion of the FFA and related case law, see Robert Lorfink, *Revisiting Mortgage Procedures in New Jersey*, at 5–10 (2014) (unpublished student scholarship paper 148, Seton Hall Univ. Sch. of Law) (on file with Seton Hall University eRepository at

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Legislature’s failure to revisit the issue has left its residents insufficiently protected, with ensuing negative economic results.

II. ANALYSIS OF NEW JERSEY’S FORECLOSURE STATISTICS

In October 2012, an analysis of national foreclosure rates revealed that despite a five-year low of home foreclosure filings, New Jersey’s foreclosure starts were among the largest annual increases.⁴² The Mortgage Bankers Association released a report categorizing New Jersey as having a “seriously delinquent loan rate” of greater than ten percent, one of the highest in the nation alongside Florida, New York, Nevada, and Illinois.⁴³

Moreover, many recent articles have been written forecasting a gloomy economic picture for New Jersey’s future. According to one 2014 article published in Bloomberg, the “epicenter of the U[nited] S[tates] foreclosure crisis is shifting to New Jersey and New York, threatening a housing rebound in one of the country’s most densely populated areas.”⁴⁴ “New Jersey has surpassed Florida in having the highest share of residential mortgages that are seriously delinquent or in foreclosure . . .”⁴⁵ “The number of New Jersey homeowners losing their houses reached a three-year high in 2013.”⁴⁶ According to the New Jersey Administrative Office of the Courts, almost 10,000 cases in New Jersey headed to a sheriff sale in 2013, forty-seven percent more than the year before and the highest level since 2009.⁴⁷ Furthermore, the statistics reveal that the real estate market in New Jersey trails the rest of the country— according to the Federal Housing Finance Agency, prices in New Jersey climbed only 2.9 percent in the fourth quarter from a year

http://erepository.law.shu.edu/student_scholarship/148).

⁴² Marcy Gordon, *US Foreclosure Filings Hit 5-Year Low in September*, TODAY (Oct. 11, 2012), http://economywatch.today.com/_news/2012/10/11/14362557-us-foreclosure-filings-hit-5-year-low-in-september (discussing the October 11, 2012, report by foreclosure listing firm Realty Trac Inc.).

⁴³ See CLOSING THE GAPS: WHAT STATES SHOULD DO TO PROTECT HOMEOWNERS FROM FORECLOSURE, CNTR. RESPONSIBLE LENDING, at 6 Fig. 1 (last revised May 2013) (recommending a brief like the joint policy brief issued by The Center for Responsible Lending and the Consumers Union), available at <http://www.responsiblelending.org/mortgage-lending/policy-legislation/states/Final-Servicing-Policy-Brief-4-8-2013.pdf>.

⁴⁴ Gopal, *supra* note 3.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

earlier, compared with a 7.7 percent jump for the United States overall.⁴⁸

Numerous financial media sources have reported negative indicators regarding the trending of New Jersey foreclosures. NJ Spotlight reported that New Jersey “has consistently ranked second, behind only Florida, in percentage of homes already in foreclosure or with mortgages listed as more than 90 days delinquent.”⁴⁹ Despite a large wave of foreclosure dismissals, lenders filed more than 49,000 cases in New Jersey in 2013, the fourth highest total in New Jersey history.⁵⁰

According to Mark Fleming, chief economist for the real estate data firm Core Logic, “there is concern over whether or not we can maintain this pace of improvement as the foreclosure inventory becomes more concentrated in judicial states [such as New Jersey] with lengthier, more complex processes and timelines.”⁵¹ Marketwired summarized the findings of a United States Foreclosure Market Report for July 2014, issued by RealtyTrac, the nation’s leading source for comprehensive housing data, as follows: (a) despite the annual decrease of foreclosure auctions nationally, scheduled foreclosure auctions increased by up to 105 percent since July 2013, in 20 states, including New Jersey and (b) despite the decrease in bank repossessions nationally, bank repossessions increased by up to twelve percent since July 2013, in seven states, including New Jersey.⁵² Business Wire reported that only three states, Florida, New Jersey, and New York, remain in the moderate risk category for declining housing prices and that “these states are of the greatest concern primarily due to higher-than-average unemployment and mortgage delinquencies.”⁵³ Finally, the Mortgage Monitor Report issued

⁴⁸ *Id.*

⁴⁹ Joe Tyrell, *New Jersey Breaks Foreclosure L43, Yields Flood of Dismissals*, NJ SPOTLIGHT (Mar. 3, 2014), <http://www.njspotlight.com/stories/14/03/02/new-jersey-breaks-foreclosure-logjam-yields-flood-of-dismissals/?p=all>.

⁵⁰ *Id.*

⁵¹ Chris Matthews, *U.S. Housing Market: Stuck in a Multi-year Hangover*, FORTUNE (Aug. 21, 2014), <http://fortune.com/2014/08/04/housing-foreclosures>.

⁵² *U.S. Foreclosure Activity Increases 2 Percent in July According to RealtyTrac Foreclosure Market Report*, YAHOO! FIN. (Aug. 14, 2014), http://finance.yahoo.com/news/u-foreclosure-activity-increases-2-040100865.html;_ylt=AwrBEiRz9_RTkxoAWifQtDMD.

⁵³ The State-and MSA-Level risk indices analyze the likelihood of home prices in a state or metropolitan statistical area (“MSA”) being lower in two years, based on recent economic and housing market data. *Arch Mortgage Insurance Releases Summer Edition of Housing and Mortgage Market Review*, YAHOO! FIN. (Aug. 6, 2014), http://finance.yahoo.com/news/arch-mortgage-insurance-releases-summer-120000894.html;_ylt=AwrBJSBZ.PRtIQwAqSrQtDMD (detailing the Housing and Mortgage Market Review and the latest Arch MI Risk Index by the Arch Mortgage Insurance

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by the Data and Analytics division of Black Knight Financial Services looked at data as of the end of June 2014 and found that “[t]he states with the highest number of average days past due for loans in foreclosure are all judicial states . . .”⁵⁴ Among these judicial states, New Jersey ranked among the top four states with an average of 1,200 days past due and among five states with the highest percentage of non-current loans.⁵⁵

Thus, one can readily conclude from all of these reports that New Jersey is at a higher risk of stagnant or increasing foreclosure rates due to the combined, cumulative negative effects of New Jersey’s status as a judicial state for foreclosure, as well as its high unemployment rates and its high default rates.⁵⁶

Finally, based on an analysis of the data prepared by the New Jersey Department of Banking Insurance, although the total numbers for foreclosures decreased uniformly throughout New Jersey from the second quarter of 2013 to the second quarter of 2014, the total number of foreclosures increased almost uniformly (excluding Cumberland and Mercer Counties) from the first quarter of 2014 to the second quarter of 2014.⁵⁷ Another disturbing finding in the reports is that comparing the rates of foreclosure of mortgages executed in the current year, almost half (10 of 21) of those rates reflected an increase between 2013 and 2014; an additional six counties decreased minimally (just by 1) or stayed the

Company (“Arch MI”), a leading provider of private mortgage insurance and a wholly owned subsidiary of Arch Capital Group Ltd., which released its Summer 2014 Edition of its Housing and Mortgage Market Review and the latest Arch MI Risk Index).

⁵⁴ *Black Knight’s June Mortgage Data: Foreclosure Inventory Significantly Higher in Judicial States; Short Sale Percentages, Discounts Decreasing*, YAHOO! FIN. (Aug. 4, 2014), <https://ca.finance.yahoo.com/news/black-knights-june-mortgage-data-130000771.html>.

⁵⁵ *Id.*; see also *Judicial Versus Non-Judicial Foreclosure*, MORTG. BANKERS ASS’N, available at <http://www.mbaa.org/files/resourcecenter/foreclosureprocess/judicialversusnon-judicialforeclosure.pdf> (noting that outdated totals combine foreclosures and delinquencies as a percent of active loans in that state and that there are 22 states that do judicial foreclosures).

⁵⁶ See *supra* notes 54–55.

⁵⁷ See *infra* Appendix, Table 1 (citing *Residential Mortgage Foreclosure Statistics*, N.J. DEP’T BANKING & INS.), available at https://www20.state.nj.us/DOBI_MRT4CLSR/ForeclosureReports [hereinafter “Table 1”]; Table 2 (citing *Residential Mortgage Foreclosure Statistics*, N. J. DEP’T BANKING & INS.) available at https://www20.state.nj.us/DOBI_MRT4CLSR/ForeclosureReport [hereinafter “Table 2”]. Note that, while information used in the preparation of these reports was obtained from sources that are considered reliable, use of this information does not constitute an endorsement of its accuracy by the State of New Jersey. Given the fact that the New Jersey Department of Banking and Insurance only collects data from New Jersey chartered banks and not from federally regulated banks, this information has limited utility.

same, and less than a quarter (only 5 of 21) rates decreased noticeably.⁵⁸ By adding these sums together, one can deduce that in 16 of the 21 counties (seventy-three percent of the counties), people who took out mortgages in 2014 were more likely to be foreclosed almost immediately upon default than people who took out mortgages in 2013.⁵⁹ The 2013 and 2014 foreclosure rates illustrate that not only are people defaulting early on in their mortgages, but banks are increasing the speed with which they are aggressively pursuing foreclosure on delinquent loans.

III. DISPARATE IMPACT ON MINORITY COMMUNITIES

The high rate of foreclosures in New Jersey disparately impacts the state's minority communities. Research by the Center for Responsible Lending found that nationwide, more than half of the lost wealth resulting from living in close proximity to foreclosures was borne by minority homeowners and that this rate was even higher for minority homeowners in New Jersey.⁶⁰

Furthermore, although investors help the overall market, those investors are avoiding hard-hit neighborhoods in cities such as Newark, Irvington, Elizabeth, Trenton, and Camden, creating a crisis in urban neighborhoods "where unemployment is highest, credit scores are lowest and investor appetite is non-existent."⁶¹ Moreover, at least one expert suggests that the foreclosure crisis is not confined to the lower class, but also impacts middle and upper middle class communities.⁶²

⁵⁸ See *infra* Table 3 (citing *Residential Mortgage Foreclosure Statistics*, N.J. DEP'T BANKING & INS.), available at https://www20.state.nj.us/DOBI_MRT4CLSR/ForeclosureReports) [hereinafter "Table 3"].

⁵⁹ *Id.*

⁶⁰ Charlene Crowell, *Homeowners Bill of Rights Emerge as Remedy to Foreclosure*, NEW PITTSBURGH COURIER (May 31, 2013), <http://newpittsburghcourieronline.com/2013/05/31/homeowners-bill-of-rights-emerge-as-remedy-to-foreclosure>.

⁶¹ *Id.*; Gopal, *supra* note 3.

⁶² See Gopal, *supra* note 3 (citing remarks by Seton Hall University Law Professor Linda Fisher).

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IV. ADDITIONAL IDEAS TO INCORPORATE INTO A NEW JERSEY HOMEOWNER BILL OF RIGHTS

In May 2013, neutral policy experts at the Center for Responsible Lending and the Consumers Union issued a joint policy brief entitled *Closing the Gaps: What States Should Do to Protect Homeowners From Foreclosure*, which offered a careful review and analysis of existing foreclosure rules and concluded that the rules do not go far enough to protect homeowners.⁶³ The report noted that despite the applicability of the NMS and the CFPB rules in all states, homeowners do not currently have the right to prevent unlawful foreclosure sales while servicers correct legal violations.⁶⁴ Thus, according to the report, there is room for states to build on these reforms to help avoid unnecessary foreclosures by adopting stronger private enforcement provisions through legislation or regulation.⁶⁵

Additionally, the report outlined three areas in which California’s HBOR provides more protections to homeowners than do the CFPB rules.⁶⁶ The report proposed that these protections should be available to all homeowners in all states.⁶⁷ The report further noted the importance of state action in mandating a duty on the part of the servicer to engage in loss mitigation before commencing the foreclosure process.⁶⁸ A few states, including New York, North Carolina, Massachusetts, and Maryland, have already implemented a mandate requiring the servicer to engage in such loss mitigation prior to foreclosure.⁶⁹

Taking a step in the right direction, the CFPB has recently, in November 2014, set forth new proposals to add even more protections for borrowers.⁷⁰ The National Consumer Law Center (“NCLC”), a consumer rights groups, acknowledged the importance of this development.⁷¹ However, the NCLC also criticized that the proposals did

⁶³ See CLOSING THE GAPS: WHAT STATES SHOULD DO TO PROTECT HOMEOWNERS FROM FORECLOSURE, *supra* note 43 (recommending the joint policy brief issued by The Center for Responsible Lending and the Consumers Union).

⁶⁴ *Id.* at 1.

⁶⁵ *Id.*

⁶⁶ *Id.* at 5.

⁶⁷ *Id.* at 11.

⁶⁸ *Id.* at 1.

⁶⁹ CLOSING THE GAPS: WHAT STATES SHOULD DO TO PROTECT HOMEOWNERS FROM FORECLOSURE, CNTR. RESPONSIBLE LENDING, *supra* note 43, at 5–6.

⁷⁰ CFPB Proposes Expanded Foreclosure Protections, *supra* note 23.

⁷¹ Cohen, *supra* note 25.

not go far enough, noting that: (a) the protections were not triggered until borrowers had submitted a complete application; (b) homeowners still needed “clear guidance on what they need to submit in order to have their request for assistance reviewed;” and (c) “homeowners would continue to incur fees and interest while they worked on their applications.”⁷²

Thus, keeping in mind the above suggestions, New Jersey legislators could supplement the FFA by adopting at least some of the following ideas introduced by other state legislators.⁷³ Maine legislators proposed that if the mortgagee does not prevail in a foreclosure action, or if the action was not brought in good faith, the court is required to order the mortgagee to pay reasonable attorney’s fees and court costs to the mortgagor, unless such payment would be unjust.⁷⁴ Additionally, Maine legislators proposed that the lender would be required to produce the original mortgage note evidencing the right to foreclose within 90 days of service of the foreclosure summons and complaint.⁷⁵

Legislators in Rhode Island and New York passed bills mandating that borrowers be provided with an opportunity to meet with the lender regarding modification of a mortgage loan on a principal residence before foreclosure proceedings may begin.⁷⁶ However, in New York, there has been criticism of the inefficient and lengthy pre-judicial settlement conferences and the small percentage of successful settlements.⁷⁷

⁷² *Id.*

⁷³ See *Foreclosures 2013 Legislation*, NAT’L CONF. STATE LEGS. (July 22, 2014), <http://www.ncsl.org/research/financial-services-and-commerce/foreclosures-2013-legislation.aspx>.

⁷⁴ See H.B. 788, 126th Leg., 1st Reg. Sess. (Me. 2013).

⁷⁵ See H.B. 267, 126th Leg., 1st Reg. Sess. (Me. 2013). From the defense practitioner’s perspective, it would be helpful to also have all subsequent assignments of the mortgage provided within the same time period.

⁷⁶ See N.Y. C.P.L.R. 3408 (Consol. 2014) (requiring the mortgagee to participate, in good faith, in a conciliation conference 60 days prior to initiating foreclosure proceedings and mandating that lender and borrower negotiate in good faith to reach resolution); H.B. 5335, Jan. Sess. (R.I. 2013). *But see* H.B. 11, 2013 Reg. Sess. (Miss. 2013), available at <https://legiscan.com/MS/bill/HB11/2013> (proposing an Act requiring that the borrower be provided with an opportunity to meet with a lender regarding a loan modification on a principle residence before foreclosure proceedings may be begun, but the bill died in Committee).

⁷⁷ William Glaberson, *Push to Avert Foreclosures Hits Court Logjam*, N.Y. TIMES (Feb. 8, 2012), <http://www.nytimes.com/2012/02/09/nyregion/push-to-avert-foreclosures-hits-court-logjam.html?pagewanted=all> (noting that, according to a 2012 report by the chief administrator of the state courts, out of the 82,000 settlement conferences, with many cases taken up multiple times, only 4,253 cases reached settlements, and some of the homes were lost anyway).

Additionally, in New York, legislators proposed that lenders and loan servicers would have to provide notice to mortgagors of foreclosure prevention activities and payments.⁷⁸ New York also created a State Foreclosure Prevention Fund, which provides free legal representation in certain mortgage foreclosure actions where the homeowner is financially unable to obtain counsel and requires notice of such availability.⁷⁹ Finally, in Pennsylvania, legislators have tasked the Legislative Budget and Finance Committee with the affirmative duty to examine the causal factors of home foreclosure and to make recommendations on best practices for mitigating foreclosure.⁸⁰

In New Jersey, state legislators, obviously recognizing the increasingly untenable situation for many homeowners, have already made some proposals to ease the burdens of homeowners. However, these proposals have not, to date, achieved legislative status.⁸¹ For example, legislators have proposed that lenders be obligated to permit homeowners to remain in their homes as renters during and after foreclosure for a certain period of time.⁸² Another proposal was to mandate that creditors seeking to foreclose on an “underwater” residential mortgage loan must grant a residential borrower a six-month period of forbearance unless the creditors offer a sustainable mortgage modification.⁸³

⁷⁸ See, e.g., Assemb. B. 3892, 236th Leg., Reg. Sess. (N.Y. 2013) (providing additional protections to borrowers pre-foreclosure, i.e., servicers must ensure that homeowners aren’t required to submit multiple copies of relevant documents, servicers must avoid foreclosure action if homeowner seeks permanent modification and servicers must employ adequate staffing and draw up procedures and methods for handling consumer inquiries and complaints regarding loss-mitigation options); see also N.Y. COMP. CODES R. & REGS. tit. 3, §§ 419.1–419.14 (2015) (requiring notification to borrowers; imposing duties on the lenders; prohibiting activities by the lender).

⁷⁹ Assemb. B. 3892, 236th Leg., Reg. Sess. (N.Y. 2013); see also Assemb. B. 4193, 237th Leg., Reg. Sess. (N.Y. 2015); S.B. 1723, 237th Leg., Reg. Sess. (N.Y. 2015).

⁸⁰ See, e.g., H. Res. 118, 197th Leg. (Pa. 2013).

⁸¹ See, e.g., Assemb. Con. Res. 145, 215th Leg., 1st Ann. Sess. (N.J. 2012); S. Con. Res. 113, 215th Leg., 1st Ann. Sess. (N.J. 2012); S.B. 1746, 215th Leg., 1st Ann. Sess. (N.J. 2012).

⁸² See, e.g., Assemb. Con. Res. 145, 215th Leg., 1st Ann. Sess. (N.J. 2012); S. Con. Res. 113, 215th Leg., 1st Ann. Sess. (N.J. 2012). This would be particularly helpful for homeowner parents with minor children, whose rights should be protected by allowing the parents and children to stay in their homes until the completion of the academic school year so as not to disrupt the children’s academic success and personal peer relationships.

⁸³ See, e.g., S.B. 1746, 215th Leg., 1st Ann. Sess. (N.J. 2012). This would be particularly helpful for those who are recently unemployed for, i.e., less than six (6) months, and are actively seeking new employment.

New Jersey borrowers are often stymied when trying to take steps to avoid foreclosure by filling out a loan modification application or requesting short-sale approval.⁸⁴ Thus, this Article proposes adding more legal protections for borrowers during the loss-mitigation process, which would include requiring: (a) all communications from the lender or servicer contain notices of important legal deadlines, due dates for paperwork submission and relevant information to be in conspicuous print; (b) lenders provide notice to borrowers of their legal right to contact a higher level administrator if the assigned “single point of contact” (SPOC) is non-responsive; (c) both lender and servicer act in good faith throughout the pre-foreclosure, that is, loss mitigation process, and (d) servicers and lenders who do not act in good faith face penalties.⁸⁵

V. CONCLUSION

As New Jersey continues to see a high rate of foreclosures, accompanied by the ensuing negative repercussions discussed above, homeowners will continue to lose faith in a system where they feel no one is looking out for their rights. New Jersey legislators have the ability to turn the tide, especially so as to ensure that the minority community does not bear a higher burden of the economic fallout, which would have the unfortunate effect of further dividing our state along racial lines.

This Article proposes that New Jersey model its legislation on the groundbreaking California Homeowner Bill of Rights (or similar legislation enacted by a handful of other states and cities). As noted

⁸⁴ See S. Rep. Comm. Conf. Rep. 1 at 15 (Cal. 2012) (noting that, “[d]espite the apparent mutual interest of loan holders and borrowers, many distressed homeowners report obstacles when trying to obtain a loan modification or short-sale approval”) (citing Robert Lewis, *Loan Modifications Elude Local Homeowners*, SACRAMENTO BEE, Jan. 2011, at A1).

⁸⁵ See *U.S. Bank Nat’l Ass’n v. Williams*, 995 N.Y.S.2d 172, 177 (App. Div. 2014) (demonstrating the first appellate court in New York state to approve a penalty for a bank’s failure to negotiate in good faith at mandatory settlement conferences as required per N.Y. C.V.P. Law sec. 3408); see also *Appellate Ruling Dooms CPLR 3408*, N.Y.L.J. (Nov. 23, 2010), <http://www.newyorklawjournal.com/id=1202475217528/Appellate-Ruling-Dooms-CPLR-3408>slreturn=20141110114719> (stating that, since the court indicated there was no acceptable basis for relieving the homeowner of her contractual obligations to the bank, the lenders could refuse to modify any loans); Douglas Lieberman, *Indy-Mac Banks, F.S.B. v. Yano-Horoski*, NASSAU LAW (Apr. 2011), <https://www.nassaubar.org/Articles/Archive/Article387.aspx> (bemoaning the evisceration of the law). *But see* *Indy-Mac Banks, F.S.B. v. Yano-Horoski*, 912 N.Y.S.2d 239, 240 (App. Div. 2010) (reversing the lower court’s equitable decision to cancel the debt and discharge of the underlying mortgage and vacating the Judgment of Foreclosure and Sale in response to lender’s egregious conduct and lack of good faith).

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above, the main benefits of a Homeowner’s Bill of Rights include: the avoidance of unnecessary foreclosures as “fewer foreclosures are better for real estate market values,” reduced governmental expenses, increased quality of life for citizens, and fairness and protections for consumers and borrowers.⁸⁶ Ideally, the legislation should also include a servicer’s duty of loss mitigation.⁸⁷

Although this proposal is written from the perspective of the defendant borrower, lenders and servicers would stand to benefit as well. Given that the litigation process is a lengthy, time-consuming, and expensive one, a more efficient and streamlined pre-litigation non-judicial process would help to resolve pending defaults with the goal of avoiding litigation whenever possible, which would benefit lenders and servicers greatly in the long run.

Since this Article was written, I have brought this issue to the attention of Assemblyman Patrick Diegnan (District 18), who has reviewed it and drafted a bill (see attached at end) to be introduced in the General Assembly in the next few months.⁸⁸ This proposed legislation is a good start in adding some protections for borrowers; however one could argue that there are gaps and missed opportunities in this legislation, which could better protect borrowers and truly impact the rate of foreclosures. An analysis of the bill is as follows.

Section 1 changes the way the Foreclosure Mediation program currently operates in which the homeowner initiates the request to enter into the program.⁸⁹ Instead, this proposed legislation now shifts the burden to the servicer or lender filing for foreclosure to initiate the Foreclosure Mediation process.⁹⁰ This is a positive development for the borrower, as explained below. Currently, the court’s rule is that the borrower must file the request to participate in the foreclosure mediation program within sixty (60) days of the filing of the summons and

⁸⁶ See COLLATERAL DAMAGE: THE SPILLOVER COSTS OF FORECLOSURES, CNTR. RESPONSIBLE LENDING (Oct. 24, 2012), <http://www.responsiblelending.org/mortgage-lending/research-analysis/collateral-damage.html>.

⁸⁷ See CLOSING THE GAPS: WHAT STATES SHOULD DO TO PROTECT HOMEOWNERS FROM FORECLOSURE, *supra* note 43, at 6 Fig. 1.

⁸⁸ Assemblyman Patrick Diegnan has served as Parliamentarian of the General Assembly since 2005 and as Deputy Speaker since 2008. *Biography*, PATRICK J. DIEGNAN, JR.: N.J. GEN. ASSEMB. (last visited Mar. 4, 2015), <http://www.assemblymanpatrickdiegnan.com/>.

⁸⁹ See *New Jersey Foreclosure Mediation*, ADMIN. OFFICE OF THE CTS. (Apr. 2014), http://www.judiciary.state.nj.us/civil/foreclosure/11290_foreclosure_med_info.pdf.

⁹⁰ Exhibit 1, Draft Assemb. B., § 2(2)(d)–(e) (N.J. 2015).

complaint.⁹¹ The problem with this requirement is that there is an additional requirement that the request to enter the program must be accompanied by a complicated financial worksheet with all supporting documents.⁹² Thus, the current system places a very onerous burden on borrowers who are often already in the midst of the frustrating process of filling out a loan modification application. If the borrower fails to meet this sixty (60) day deadline, the borrower's only recourse is to file a motion (which the servicer could oppose) with a court of equity. This motion requires an accompanying certification stating that there were extraordinary circumstances warranting the delayed submission. Currently, if the court denies the motion, the borrower is denied his only opportunity to participate in a mediation conference with the servicer. This is not a particularly "equitable" outcome for the borrower. By shifting the onus to the servicer or lender to file the request, the proposed legislation would now guarantee the borrower an opportunity to participate in a mediation conference with the servicer or lender.⁹³

Although this is an admirable development for the borrower, there is a missed opportunity in this Section to address the significant subset of individuals who have the unfortunate status of being both a borrower (already or imminently) facing foreclosure, as well as a debtor (already or imminently) facing bankruptcy. Specifically, in the current system, numerous duplicative, burdensome requests for the borrower/debtor's financial information are made pre-litigation and post-litigation: during the loan modification application process, a lender's or servicer's unique financial worksheets must be completed; during foreclosure litigation, a plaintiff's unique interrogatories must be responded to; during the foreclosure mediation process, a court-mandated financial worksheet must be completed; and in bankruptcy court, the borrower/debtor has to resubmit the same or substantially similar financial information.

It would be much more efficient if there were a unified system or process whereby, prior to all state or federal litigation, there would be just one joint request made by creditors/servicers or lenders for all relevant financial information and just one response by the debtor/borrower

⁹¹ *Id.*

⁹² See *Mediation Request Statement Form*, N.J. CTS. (last revised Mar. 26, 2014), available at http://www.judiciary.state.nj.us/civil/forms/11270_hud_njhmfa_borrower_instruct.pdf.

⁹³ Note that this proposed solution differs from New York's mandated settlement conference discussed above, which is required to take place prior to the initiation of the foreclosure lawsuit.

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necessary, which would be copied to all parties. Ideally, this would be followed by a joint comprehensive mediation session with all parties—that is, debtor or borrower, creditors, lenders, and servicers.

The additional requirement in Section 2 for the provision of the copy of the mortgage, all assignments, and the note with all endorsements, allonges, and certifications is a provision that will be welcomed by the foreclosure defense attorney who currently often has to make numerous requests to the plaintiff’s attorney to obtain same documentation and often does not receive them in a timely manner, thereby impeding the borrower’s legal defense.⁹⁴ Further, by requiring all notices to be in plain language that is clear, conspicuous, and readily understandable, this draft legislation has taken an important step in ensuring that New Jersey consumers will be well informed of their rights.⁹⁵

A significant flaw of the proposed legislation is that while it has good intentions, it has no teeth. While the draft legislation provides, in Section 5(b), for a minimal civil penalty of \$1,000 and \$2,500 for offenses related to the provision of proof of owning the mortgage, there is not even this minimal penalty imposed for the lender or servicer’s failure to act in good faith throughout the loss mitigation proceedings.⁹⁶ Although Section 4 requires the lender or servicer to certify that it has made good faith efforts to contact the borrower and also to participate in good faith in the mediation program and loss mitigation options, there are no enumerated penalties for failure to do so.

Notably, New York courts recently imposed penalties on lenders who exhibit bad faith during the loss mitigation process, although there has been controversy over these courts’ decisions.⁹⁷ In California,

⁹⁴ Exhibit 1, Draft Assemb. B., § 2(2)(d)–(e).

⁹⁵ *Id.* § 2(b)(2)(f).

⁹⁶ Note that this is separate from the penalty discussed herein above in section six which only refers to the instance where the servicer instituted legal proceedings in foreclosure against a borrower without having the legal authority to do so.

⁹⁷ *See, e.g.,* Wells Fargo Bank, N.A. v. Meyers, 966 N.Y.S.2d 108 (App. Div. 2013) (noting that there are certain limits and the court must apply appropriate remedies where a lender acts in bad faith); *New York v. HSBC Bank USA*, No. 001660/2013 (N.Y. Sup. Ct. June 4, 2013) (seeking damages for homeowners injured by these illegal practices and compelling bank to file required documentation where lender purposefully delayed filing requests for judicial intervention, which triggers the settlement conference scheduling, so that lender was able to continue charging homeowners interest and fees); *Bank of Am., N.A. v. Lucido*, 950 N.Y.S.2d 721 (Sup. Ct. 2012) (granting Defendant exemplary damages and barring Plaintiff from collecting interest, attorney’s fees, legal fees or costs); *One West Bank, FSB v. Greenhut*, 957 N.Y.S.2d 265 (Sup. Ct. 2012) (sanctioning Plaintiff in the amount of \$1,000); *IndyMac Bank, F.S.B. v. Yano-Horoski*, 912 N.Y.S.2d 239 (App. Div. 2010)

legislators, recognizing the danger of lenders and servicers lacking credibility, both: (a) imposed a \$50,000 civil money penalty or treble damages upon a court's finding of willful, reckless, or intentional material violations committed by a mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent; and (b) deemed material violations of the Homeowner's Bill of Rights to be a violation of a California charter or lender license and subject to agency administrative enforcement that could jeopardize continued engagement in California lending or servicing business.⁹⁸ Contrast these states' strong legislative measures with the current proposed legislation, which does not impose any significant legal or monetary consequences for those servicers or lenders who do not act in good faith to prevent borrowers from losing their homes. One can readily conclude that, as there is no consequential "punishment" for a lender or servicer's failure to act in good faith, the proposed legislation will, unfortunately, fail to achieve, to its fullest effect, its stated goal of assisting struggling homeowners.

Until something is done on a national level, New Jersey homeowners deserve a Homeowner Bill of Rights that protects their interests and gives them every opportunity to stay in their home.⁹⁹ A house is the most emotionally and financially important investment of most people's lives. The sooner that the New Jersey Legislature addresses this issue, the better.

(reversing lower court's equitable decision to cancel debt and discharge underlying mortgage while also vacating the Judgment of Foreclosure and Sale because of lender's egregious conduct lacking good faith); *see also* U.S. Bank N.A. v. Williams, 995 N.Y.S.2d 172 (App. Div. 2014) (illustrating the first appellate court in the state to approve a penalty for a bank's failure to negotiate in good faith at mandatory settlement conferences as required per N.Y. C.P.L.R. 3408).

⁹⁸ CAL. CIV. CODE §§ 2924.12(b), 2924.12(d), 2924.19(b), 2924.19(d) (West 2015).

⁹⁹ For a summary of New Jersey's current foreclosure laws, see FORECLOSURE REPORT: SURVEY OF STATE FORECLOSURE LAWS, NAT'L CONSUMER L. CNTR., at 76–78, *available at* http://www.nclc.org/images/pdf/foreclosure_mortgage/state_laws/survey-foreclosure-card.pdf.

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TABLE 1

	2013-2 nd Quarter	2014-2 nd Quarter	Rate of Foreclosures
Atlantic	363	350	↓
Bergen	479	364	↓
Burlington	402	355	↓
Camden	597	457	↓
Cape May	108	99	↓
Cumberland	144	109	↓
Essex	713	495	↓
Gloucester	314	262	↓
Hudson	349	266	↓
Hunterdon	61	47	↓
Mercer	303	212	↓
Middlesex	527	409	↓
Monmouth	474	335	↓
Morris	249	212	↓
Ocean	579	466	↓
Passaic	425	316	↓
Salem	75	65	↓
Somerset	199	123	↓
Sussex	247	194	↓
Union	473	351	↓
Warren	109	99	↓

TABLE 2

	2014-1 st Quarter	2014-2 nd Quarter	Rates of Foreclosure
Atlantic	331	350	↑
Bergen	329	364	↑
Burlington	326	355	↑
Camden	436	457	↑
Cape May	75	99	↑
Cumberland	126	109	↓
Essex	489	495	↑
Gloucester	209	262	↑
Hudson	222	266	↑
Hunterdon	42	47	↑
Mercer	226	212	↓
Middlesex	342	409	↑
Monmouth	315	335	↑
Morris	168	212	↑
Ocean	394	466	↑
Passaic	286	316	↑
Salem	46	65	↑
Somerset	129	123	↑
Sussex	170	194	↑
Union	335	351	↑
Warren	96	99	↑

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TABLE 3

	Mortgages Executed in 2 nd Quarter of 2013	Mortgages Executed in 2 nd Quarter of 2014	Rates of Foreclosure
Atlantic	7	13	↑
Bergen	15	14	
Burlington	18	31	↑
Camden	13	40	↑
Cape May	6	3	
Cumberland	8	13	↑
Essex	25	25	Same
Gloucester	7	21	↑
Hudson	17	8	
Hunterdon	2	1	
Mercer	15	11	
Middlesex	19	29	↑
Monmouth	12	18	↑
Morris	10	10	Same
Ocean	17	21	↑
Passaic	15	14	
Salem	4	5	↑
Somerset	2	1	
Sussex	8	5	
Union	17	11	
Warren	6	8	↑

AN ACT concerning foreclosure of residential properties and amending and supplementing P.L.1995, c. 244.

BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:

1. Section 3 of P.L.1995, c.244 (C.2A:50-55) is amended to read as follows:

3. As used in this act:

"Commissioner" means the Commissioner of Community Affairs.

"Deed in lieu of foreclosure" means a voluntary, knowing and uncoerced conveyance by the residential mortgage debtor to the residential mortgage lender of all claim, interest and estate in the property subject to the mortgage. In order for a conveyance to be voluntary, the debtor shall have received notice of, and been fully apprised of the debtor's rights as specified in section 4 of this act. For purposes of this act, "voluntarily surrendered" has the same meaning as "deed in lieu of foreclosure."

"Foreclosure Mediation Program" or "mediation program" means the New Jersey Judiciary's Foreclosure Mediation Program as authorized by the Supreme Court of New Jersey.

"Foreclosure prevention assistance" means the provision of payments on behalf of a debtor to a servicer on an eligible mortgage secured by real estate, and the training of counselors and other foreclosure prevention providers.

"Immediate family" means the debtor, the debtor's spouse, or the mother, father, sister, brother or child of the debtor or debtor's spouse.

"Loan modification agreement" means the waiver, modification or variation of any material term of a residential mortgage loan, that changes the interest, forbears or forgives the payment of principal or interest, or extends the final maturity date of the loan.

"Loss mitigation option" means an alternative to foreclosure, including a loan modification agreement, a deed in lieu of foreclosure, and a short sale.

"Nonprofit foreclosure assistance provider" or "provider" means a corporation organized under the provisions of "New Jersey Nonprofit Corporation Act," which provides foreclosure prevention assistance.

"Non-residential mortgage" means a mortgage, security interest or the like which is not a residential mortgage. If a mortgage document includes separate tracts or properties, those portions of the mortgage document covering the non-residential tracts or properties shall be a non-residential mortgage.

"Obligation" means a promissory note, bond or other similar evidence of a duty to pay.

EXPLANATION - Matter enclosed in bold-faced brackets **!thus!** in the above bill is not enacted and is intended to be omitted in the law.

Matter underlined thus is new matter.

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"Office" means the Office of Foreclosure within the Administrative Office of the Courts.

"Residential mortgage" means a mortgage, security interest or the like, in which the security is a residential property such as a house, real property or condominium, which is occupied, or is to be occupied, by the debtor, who is a natural person, or a member of the debtor's immediate family, as that person's residence. This act shall apply to all residential mortgages wherever made, which have as their security such a residence in the State of New Jersey, provided that the real property which is the subject of the mortgage shall not have more than four dwelling units, one of which shall be, or is planned to be, occupied by the debtor or a member of the debtor's immediate family as the debtor's or member's residence at the time the loan is originated.

"Residential mortgage debtor" or "debtor" means any person shown on the record of the residential mortgage lender as being obligated to pay the obligation secured by the residential mortgage.

"Residential mortgage lender" or "lender" means any person, corporation, or other entity which makes or holds a residential mortgage, and any person, corporation or other entity to which such residential mortgage is assigned.

"Servicer" means the person, corporation or other entity responsible for servicing a residential mortgage loan, including a residential mortgage lender who makes or holds a loan if the lender also services the loan.

"Servicing" means managing the mortgage loan account on a daily basis, including collecting and crediting periodic loan payments, managing escrow accounts, or enforcing the terms of the mortgage or note.

"Short sale" means the sale of real property in which the lender or servicer agrees to release the lien that is secured by a residential mortgage on the property upon receipt of a lesser amount than is owed on the mortgage.

(cf: P.L.1995, c.244, s.3)

2. (New section) a. A servicer that files and serves, pursuant to the "Fair Foreclosure Act," P.L.1995, c.244 (C.2A:50-53 et al.), a summons and complaint of foreclosure on a residential mortgage loan, shall initiate a process to consider loss mitigation options through the Foreclosure Mediation Program by:

(1) submitting a request for mediation to the court, in accordance with the court rules, procedures, and guidelines adopted by the Superior Court for the mediation program;

(2) establishing a single point of contact and providing the debtor with one or more direct means for communication with the single point of contact;

(3) providing the debtor with all of the following:

(a) a current mortgage loan payment history in a format that includes at least five years of payment history, that is plain and

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readily understandable by the general public, and that lists all payments, charges, credits, and fees, with specific details as to each;

(b) an accurate and specific month-by-month itemization of the amounts needed to cure the default;

(c) an accurate statement of the amount due to pay off the mortgage loan in full;

(d) a copy of the mortgage and all assignments of the mortgage;

(e) a copy of the note with all endorsements and allonges, including a certification setting forth the date of endorsement;

(f) a complete list of items that the debtor must supply to the servicer in order for the servicer to process an application for each type of loss mitigation option administered by the servicer; and

(g) a copy of the request for mediation submitted to the court; and

(4) provide the debtor with information about the availability of foreclosure prevention assistance from the State, pursuant to P.L. , c. (C.)(pending before the Legislature as this bill).

b. The servicer shall:

(1) make reasonable and good faith efforts to engage in appropriate loss mitigation options during the mediation program; and

(2) ensure that the single point of contact shall be responsible for and have sufficient authority to perform all of the following functions with respect to loss mitigation options:

(a) communicate the process by which a debtor may apply for an available loss mitigation option and the deadlines for any required submissions of applications or documentation to be considered for the option;

(b) coordinate receipt of all applications and documentation associated with an available loss mitigation option and notify the debtor of any missing items necessary for consideration for the option;

(c) maintain access to sufficient current information and appropriate personnel as necessary to timely, accurately, and adequately inform the debtor on an ongoing basis of the current status of a loss mitigation option for which the debtor is being considered;

(d) ensure that a debtor is considered for all loss mitigation options administered by the servicer;

(e) maintain access to individuals with the ability and authority to approve loss mitigation options, suspend foreclosure proceedings, or dismiss foreclosure complaints, as appropriate; and

(f) ensure that all notices provided to a debtor pursuant to the provisions of P.L. , c. (C.)(pending before the Legislature as this bill) shall be in plain language that is clear and conspicuous and readily understandable by the general public .

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3. (New section) a. In the event that a debtor fails to provide all of the items required by section 2 of P.L. , c. (C.) (pending before the Legislature as this bill) for consideration of loss mitigation options for the mediation program, the servicer shall be entitled to proceed with the foreclosure action.

b. (1) If a debtor and servicer enter into a loan modification agreement as a loss mitigation option pursuant to the mediation program, the agreement shall provide for a trial period during which payment for a set amount of principal and interest shall be made by the debtor each month for three months. If the debtor fails to make all three payments during the trial period, the servicer shall be entitled to proceed with the foreclosure action.

(2) If the debtor makes all three payments during the loan modification trial period, the servicer shall provide the debtor the option of entering into a final loan modification agreement and, upon entering such an agreement, the servicer shall dismiss the foreclosure action.

(3) If the debtor fails to make a payment under the terms of the final modification agreement, and the debtor contests the default under the modification agreement, the servicer may bring an action to foreclose pursuant to the "Fair Foreclosure Act," P.L.1995, c.244 (C.2A:50-53 et al.).

c. Within 30 days of a denial of any loss mitigation option pursuant to the mediation program a servicer shall provide the debtor with:

(1) the appraisal or other opinion or analysis regarding the fair market value of the property most recently relied upon by the servicer;

(2) an explanation for the denial of a loss mitigation option in sufficient detail for a reasonable person to understand why the option was denied; and

(3) the portion or excerpt of the pooling and servicing agreement or other agreement relating to the residential mortgage loan that limits or prohibits the servicer from implementing a loss mitigation option, if the servicer claims a loss mitigation option cannot be implemented due solely to those prohibitions or limitations, and the documentation or detailing the efforts of the servicer to obtain a waiver of the limitations.

4. (New section) a. A motion by a servicer seeking a final judgment of foreclosure, pursuant to R.4:64-1 et seq. of the Rules Governing the Courts of the State of New Jersey, in a foreclosure action shall not be accepted by the court unless it is accompanied by an affidavit by the servicer stating that the servicer has:

(1) contacted the debtor, or has attempted with due diligence to contact the debtor for consideration of loss mitigation options through the mediation program, consistent with the provisions of this section;

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(2) made reasonable and good faith efforts to participate in the mediation program and engage in appropriate loss mitigation options; and

(3) otherwise substantially complied with the provisions of P.L. , c. (C.)(pending before the Legislature as this bill).

b. In a manner consistent with the Rules Governing the Courts of the State of New Jersey, any interested party may present a defense in response to the foreclosure action within a time frame to be determined by the court, provided the defense is accompanied by an affidavit stating that the defense is not made solely for the purpose of delaying the relief requested pursuant to the foreclosure action.

c. Nothing in this section shall be construed to affect the rights of a tenant to possession of a leasehold interest under the Anti-Eviction Act, P.L.1974, c. 49 (C. 2A:18-61.1 et seq.), the "New Jersey Foreclosure Fairness Act," P.L.2009, c.296 (C. 2A:50-69 et seq.), or any other applicable law.

5. (New section) a. Upon failure to perform any obligation of a residential mortgage by a residential mortgage debtor and before any servicer may accelerate the maturity of any residential mortgage obligation and commence any foreclosure or other legal action to take possession of the residential property which is the subject of the mortgage, the servicer shall provide the court in which the action is to be brought with a signed affidavit that provides that the servicer has a bond or note secured by a mortgage on the residential property at least 30 days in advance of the foreclosure action.

b. Any servicer who violates this section is subject, upon order of the court, to a civil penalty of not more than \$1,000 for the first offense and not more than \$2,500 for the second and each subsequent offense. Any penalty imposed under this section may be recovered with costs in a summary proceeding pursuant to the "Penalty Enforcement Law of 1999," P.L.1999, c.274 (C.2A:58-10 et seq.).

6. (New section) a. Except as provided in subsection b. of this section, in any foreclosure action in which the servicer does not prevail, the court shall order the servicer to pay reasonable court costs and attorney's fees incurred by debtor in defending against the foreclosure action.

b. A court shall not order the servicer to make payments pursuant to subsection a. of this section if:

(1) the action ends in a stipulation of dismissal entered into by the parties, a motion to dismiss without prejudice to facilitate settlement, or successful mediation of the foreclosure action ; or

(2) the court finds specific circumstances that would make those payments unjust.

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7. (New section) a. Within the limit of funds available in the New Jersey foreclosure prevention fund, the commissioner is authorized to enter into contracts with nonprofit foreclosure assistance providers to provide foreclosure prevention assistance. The contracts shall be entered into after appropriate findings by the commissioner. The commissioner shall give preference to applications involving two or more nonprofit corporations when evaluating contract applications for the provision of foreclosure prevention assistance and shall, to the extent feasible, attempt to award contracts in a manner that ensures that every homeowner in the State resides within a geographic area defined in the proposal of at least one nonprofit foreclosure assistance provider.

b. Prior to entering into a contract with an existing provider, the commissioner shall have made a finding that the provider is in good standing and that there is a need for proposed assistance activities based on the documented submission of the provider.

c. A contract entered into pursuant to this section with a provider shall be limited in duration to a period of one year, but may be renewed, extended, or succeeded at the discretion of the commissioner.

d. Prior to renewing, extending, or succeeding a contract with a provider the commissioner shall determine that:

(1) the provider shall have substantially completed the foreclosure prevention assistance specified in the contract;

(2) the provider shall have received the sums and funds specified in this section; and

(3) the assistance carried out by the provider pursuant to its contract shall have resulted in a significant impact on the needs of the at risk existing and potential homeowners in the service area.

e. Prior to terminating a contract or making a determination not to renew a contract, the commissioner shall:

(1) determine that the provider is in violation of the terms and conditions of the contract or that funds provided pursuant to the contract are being expended in a manner not consistent with the terms or provisions of P.L. , c. (C.)(pending before the Legislature as this bill) or determine that the significant need in the service area no longer exists or all available funds have been expended; and

(2) provide the provider with written notice, at least 45 days in advance, of its intent to terminate or not renew the contract and provide the provider with the opportunity to appear and be heard before the commissioner with respect to the reasons for the proposed termination or non-renewal.

f. The commissioner may temporarily withhold payments and may elect not to enter into a succeeding contract with any nonprofit foreclosure assistance provider if the provider is not in compliance with the contract or has without good cause failed to submit the documentation required under the contract.

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e. The commissioner shall establish eligibility criteria for use by the nonprofit prevention assistance. That criteria shall, based on the debtor's application for assistance, consider:

(1) need for assistance, including whether the debtor has insufficient household income or net worth to correct the existing delinquency or delinquencies within a reasonable period of time and make full mortgage payments and whether any other federal, State, local, or private sources of assistance exist that would be available to the debtor and would provide adequate assistance to the debtor to retain ownership of the home; and

(2) if there is a reasonable prospect that a loan modification agreement may be reached so that the mortgagor will be able to resume mortgage payments within a reasonable amount of time after the beginning of the period for which assistance payments are provided under P.L. , c. (C.)(pending before the Legislature as this bill) and pay the mortgage in full by its maturity date or by a later date agreed to by the servicer for completing mortgage payments.

8. (New section) a. No assistance may be provided under P.L. , c. (C.)(pending before the Legislature as this bill) unless all of the following are established:

(1) the debtor's loan is secured by a residential mortgage;

(2) the nonprofit foreclosure assistance provider has determined that the debtor is in need of mortgage counseling or assistance in engaging the servicer in the development of loan modifications or any other steps taken by a servicer with a debtor to resolve the problem of delinquent payments;

(3) the debtor has applied to the provider for assistance on an application form prescribed by the commissioner for this use which includes a financial statement disclosing all assets and liabilities of the debtor, whether held singly or jointly, and all household income regardless of source. Any debtor who intentionally misrepresents any financial information in conjunction with the filing of an application for assistance may be denied assistance;

(4) the servicer is not prevented by law from foreclosing upon the mortgage;

(5) the provider has determined, based on the mortgagor's financial statement, that the mortgagor has insufficient household income or net worth to correct the delinquency within a reasonable period of time and make full mortgage payments;

(6) except for the current delinquency, the debtor shall have had a reasonably favorable residential mortgage credit history; and

(7) the mortgagor meets any other procedural requirements established by the commissioner.

b. Upon a determination that the conditions of eligibility described in subsection a. of this section have been met by a debtor and money is available in the New Jersey foreclosure prevention

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fund, the debtor shall be eligible for the mortgage foreclosure assistance.

9. (New section) The commissioner shall establish a system by which the commissioner shall make, upon the recommendation of a participating nonprofit foreclosure assistance provider, payments to debtors who hold a residential mortgage on behalf of the debtor when those payments are in support of a negotiated settlement that allow a homeowner to remain in the homeowner's home and when the servicer has in concessions matched the amount of the authorized payments. In no instance shall payments to servicers exceed the total amount of the three monthly payments owed by the homeowner before the date the homeowner applied for assistance under P.L. , c. (C.)(pending before the Legislature as this bill).

10. (New section) a. Each contract entered into with a nonprofit foreclosure assistance provider shall provide payment to the provider for foreclosure prevention assistance.

b. Payments shall be made by the commissioner to the provider not less frequently than semiannually at or prior to the commencement of the contract, to compensate the provider for the assistance which it undertakes to provide.

11. (New section) The commissioner shall submit a report to the Legislature within one year of the effective date of P.L. , c. (C.)(pending before the Legislature as this bill), and annually thereafter, on the implementation of P.L. , c. (C.)(pending before the Legislature as this bill). The report shall include, but not be limited to, the specific foreclosure prevention assistance provided by the provider and the number of persons and households served by each provider.

12. (New section) In coordination with Department of Banking and Insurance and the Division of Consumer Affairs, the commissioner shall undertake outreach activities directed at eligible homeowners within this State. Outreach activities shall include, but not be limited to:

a. the production and broadcast of public service announcements using electronic media to inform the general public of the availability of financial assistance through the New Jersey foreclosure prevention fund. The public service announcements shall state the amount of financial assistance that may be available, who qualifies, and where the financial assistance may be obtained;

b. the establishment and maintenance of a toll-free telephone number to provide information on the New Jersey foreclosure prevention fund and respond to consumer's questions regarding the fund; and

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c. the inclusion of a description on the internet websites maintained by the commissioner, the Department of Banking and Insurance, and the Division of Consumer Affairs of the New Jersey foreclosure prevention fund. The description shall include the address and phone number of each nonprofit foreclosure assistance provider.

13. (New section) There is hereby established a special fund to be known as the New Jersey foreclosure prevention fund. The New Jersey foreclosure prevention fund shall consist of moneys appropriated to it from the general fund. Moneys from the fund shall be expended in accordance with P.L. , c. (C.)(pending before the Legislature as this bill) and the regulations promulgated pursuant to P.L. , c. (C.)(pending before the Legislature as this bill).

14. This act shall take effect immediately.

STATEMENT

This bill revises New Jersey's "Fair Foreclosure Act," P.L.1995, c.244 (C.2A:50-53 et seq.), to require mortgage loan servicers to initiate a process to consider loss mitigation options through the New Jersey Judiciary Foreclosure Mediation Program under certain circumstances and to establish the New Jersey foreclosure prevention fund.

While the "Fair Foreclosure Act" currently requires lenders to adhere to certain homeowner protection provisions during the foreclosure process, this bill expands homeowner protections to include mediation with respect to loss mitigation options and places certain responsibilities for participation on debtors, and both lenders and servicers, as defined in the bill, since servicers more typically manage mortgage loan accounts on a daily basis on behalf of lenders.

The bill requires a servicer who files a summons and complaint of foreclosure on a residential mortgage loan to initiate a process to assess the debtor's financial situation and appropriate loss mitigation options through the New Jersey Judiciary's Foreclosure Mediation Program. The bill defines "loss mitigation option" to mean an alternative to foreclosure, including a loan modification, a deed in lieu of foreclosure, and a short sale. Under these circumstances, the servicer must: (1) submit a request for mediation to the court; (2) establish a single point of contact with the debtor; (3) provide the debtor with certain information regarding the mortgage loan; and (4) provide the debtor with information about the availability of foreclosure prevention assistance from the State.

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The bill also requires the servicer to: (1) make reasonable and good faith efforts to engage in appropriate loss mitigation options; and (2) ensure that the single point of contact shall be responsible for and have sufficient authority to perform certain functions.

Under the bill, if a debtor and servicer enter into a loan modification agreement as a loss mitigation option pursuant to the mediation program, the agreement shall provide for a trial period during which payment for a set amount of principal and interest shall be made by the debtor each month for three months. If the debtor fails to make all three payments during the trial period, the servicer shall be entitled to proceed with the foreclosure action.

The bill also requires a servicer, within 30 days of a denial of any loss mitigation option pursuant to the mediation, to provide the debtor with certain information pertaining to the reasons for the denial.

Pursuant to the bill, a motion by a servicer seeking a final judgment of foreclosure, pursuant to R.4:64-1 et seq. of the Rules Governing the Courts of the State of New Jersey, shall not be accepted by the court unless it is accompanied by an affidavit by the servicer stating that the servicer has made certain efforts to participate in the mediation program and engage in appropriate loss mitigation options.

The bill also provides that, upon failure to perform any obligation of a residential mortgage by a residential mortgage debtor and before any servicer may accelerate the maturity of any residential mortgage obligation and commence any foreclosure or other legal action to take possession of the residential property which is the subject of the mortgage, the servicer must provide the court in which the action is to be brought with a signed affidavit that provides that the servicer has a bond or note secured by a mortgage on the residential property at least 30 days in advance of the foreclosure action.

The bill provides that, in any foreclosure action in which the servicer does not prevail, the court shall order the servicer to pay reasonable court costs and attorney's fees incurred by debtor in defending against the foreclosure action, unless the action ends in a stipulation of dismissal entered into by the parties, a motion to dismiss without prejudice to facilitate settlement, or successful mediation of the foreclosure action, or the court finds specific circumstances that would make that payment unjust.

The bill establishes a special fund to be known as the New Jersey foreclosure prevention fund. The New Jersey foreclosure prevention fund shall consist of moneys appropriated to it from the general fund.

The bill provides that, within the limit of funds available in the New Jersey foreclosure prevention fund, the commissioner is authorized to enter into contracts with nonprofit foreclosure assistance providers to provide foreclosure prevention assistance.

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The bill requires, prior to renewing, extending, or succeeding a contract with a nonprofit foreclosure assistance provider the commissioner shall determine that: (1) the provider shall have substantially completed the foreclosure prevention assistance specified in the contract; (2) the provider shall have received the sums and funds specified in this section; and (3) the assistance carried out by the provider pursuant to its contract shall have resulted in a significant impact on the needs of the at risk existing and potential homeowners.

Under the bill, prior to terminating a contract or making a determination not to renew a contract, the commissioner shall: (1) determine that the provider is in violation of the terms and conditions of the contract or the bill; and (2) provide the provider with written notice, at least 45 days in advance, of its intent to terminate or not renew the contract and provide the provider with the opportunity to appear and be heard before the commissioner.

The bill requires the commissioner to establish eligibility criteria for use by the nonprofit foreclosure prevention assistance. That criteria shall, based on the debtor's application for assistance, consider: (1) need for assistance, including whether the debtor has insufficient household income or net worth to correct the existing delinquency; and (2) if there is a reasonable prospect that a loan modification agreement may be reached so that the mortgagor will be able to resume mortgage payments within a reasonable amount of time.

In order for assistance to be provided under the bill, the debtor must supply certain information and meet certain criteria, and certain steps must be taken by the nonprofit foreclosure assistance provider. Upon a determination that the conditions of eligibility have been met by a debtor and money is available in the New Jersey foreclosure prevention fund, the debtor is eligible for the assistance.

The bill establishes a system to make, upon the recommendation of a participating nonprofit foreclosure assistance provider, payments to debtors support of a negotiated settlement allowing a homeowner to remain in the homeowner's home, when the servicer has in concessions matched the amount of the authorized payments, with certain limitations.

The bill requires, in coordination with Department of Banking and Insurance and the Division of Consumer Affairs, the commissioner to undertake certain educational outreach activities directed at eligible homeowners within this State.

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Revises residential property mortgage foreclosure process.

