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SENATE BILL 406

50TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2011

INTRODUCED BY

Michael S. Sanchez

AN ACT

RELATING TO PROPERTY; ENACTING THE MORTGAGE FAIR FORECLOSURE
ACT; PROVIDING PENALTIES; DECLARING AN EMERGENCY.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. SHORT TITLE.--This act may be cited as the
"Mortgage Fair Foreclosure Act".

SECTION 2. LEGISLATIVE FINDINGS.--The legislature finds
it to be the public policy of New Mexico that homeowners should
be given reasonable notice of the fact of and basis for an
alleged default on their mortgage, apprised of all loss
mitigation methods available to them in connection with their
home loans prior to the loss of their home and afforded a
meaningful opportunity to participate in loss mitigation to
prevent the loss of homeownership. Further, the legislature
finds that it is the public policy of this state, and to the

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1 benefit of consumers and businesses operating in this state, to
2 facilitate whenever possible the cure of any default on
3 residential mortgage loans and thereby preserve homeownership.

4 SECTION 3. DEFINITIONS.--As used in the Mortgage Fair
5 Foreclosure Act:

6 A. "creditor" means a person that makes or holds a
7 residential mortgage, including a servicer as defined in
8 Subsection F of this section, or any of their agents, and a
9 person to which a mortgage is assigned, but "creditor" does not
10 include the seller in a real estate sales contract that is
11 otherwise binding pursuant to New Mexico law;

12 B. "debtor" means a natural person shown on the
13 record of a mortgage creditor as being obligated to pay the
14 obligation secured by that mortgage;

15 C. "loss mitigation" means any process designed to
16 explore and pursue alternatives to foreclosure, including an
17 evaluation of the facts and circumstances of a loan secured by
18 residential property to determine:

19 (1) whether a mortgagor or grantor qualifies
20 for a financially sustainable loan modification to preserve
21 homeownership; and

22 (2) if there will be no loan modification,
23 whether any other loss mitigation program may be available to
24 the mortgagor or grantor;

25 D. "mortgage" means a mortgage, security interest,

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1 deed of trust or the like but not a real estate sales contract
2 that is otherwise binding under New Mexico law, in which the
3 security is a residential property in New Mexico such as a
4 house, real property or condominium that is occupied, or is to
5 be occupied, by the debtor, who is a natural person, or a
6 member of the debtor's immediate family, as that person's
7 primary residence;

8 E. "net present value analysis" means a comparison
9 of the net financial proceeds from a judicial sale on the
10 schedule estimated by the creditor compared to the estimated
11 accumulated net financial proceeds from loss mitigation, while
12 considering the value of future net financial proceeds from a
13 judicial sale in the event the loss mitigation is unsuccessful;
14 and

15 F. "servicer" means a person that, whether for
16 compensation or gain from another or on its own behalf, engages
17 in the business of receiving any scheduled periodic payments
18 from a debtor pursuant to the terms of any mortgage, including
19 amounts for escrow accounts, and making the payments of
20 principal and interest and such other payments with respect to
21 the amounts received from the debtor as may be required
22 pursuant to the mortgage loan, the mortgage servicing loan
23 documents or the servicing contract with a lender.

24 SECTION 4. WRITTEN NOTICE OF INTENT TO ACCELERATE LOAN OR
25 FORECLOSE.--

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1 A. Upon a failure to perform any obligation of a
2 mortgage by a debtor and before any creditor accelerates the
3 maturity of a mortgage obligation and commence a foreclosure or
4 other legal action to take possession of the property that is
5 the subject of the mortgage, the creditor shall give the debtor
6 written notice of such intention at least forty-five days in
7 advance of such action.

8 B. Notice of intent to accelerate the maturity of a
9 mortgage obligation, commence a foreclosure or initiate any
10 other legal action to take possession of the property that is
11 the subject of the mortgage shall be in writing and either
12 served personally on the debtor or sent to the debtor by
13 registered or certified United States mail, postage prepaid and
14 return receipt requested, at the debtor's last known address,
15 and if different, to the address of the property that is the
16 subject of the mortgage. If notice is accomplished by mail,
17 notice shall also be sent to any alternative address that the
18 debtor has provided to the creditor. The notice is deemed to
19 have been effectuated on the date the notice is served
20 personally on the debtor or seven days following the date the
21 notice is mailed.

22 C. The written notice required pursuant to
23 Subsection A of this section shall be printed in at least
24 twelve-point type, be printed in English and Spanish and
25 identify that the notice is being sent pursuant to the

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1 requirements set forth in this section. The written notice
2 shall clearly and conspicuously state in a manner reasonably
3 calculated to apprise the debtor of the following:

4 (1) the property that is the subject of the
5 mortgage being foreclosed upon, the particular obligation or
6 real estate security interest being foreclosed upon and the
7 parties to any such obligation or interest;

8 (2) the nature of the default claimed;

9 (3) the right of the debtor to cure the
10 default;

11 (4) what performance, including the sum of
12 money, if any, is required to cure the default as of the date
13 specified pursuant to Paragraph (6) of this subsection;

14 (5) the allocation of money due and owing to
15 principal, interest, fees and any other applicable allocation,
16 including a projection of the change in money due as a result
17 of daily accrual of interest during the thirty-day period set
18 forth in Paragraph (6) of this subsection;

19 (6) the date by which the debtor shall cure
20 the default to avoid initiation of foreclosure proceedings or
21 the initiation of any other legal action to take possession of
22 the property that is the subject of the mortgage, which date
23 shall not be less than thirty days after the notice is
24 effectuated, and the name, address and telephone number of a
25 person to whom the payment or tender shall be made;

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1 (7) the creditor's right to take steps to
2 terminate the debtor's ownership in the property by commencing
3 a foreclosure suit in a court of competent jurisdiction, or by
4 taking other legal action to take possession of the property
5 that is the subject of the mortgage if the debtor does not cure
6 the default by the date specified pursuant to Paragraph (6) of
7 this subsection;

8 (8) the right, if any, of the debtor to
9 transfer the real property that is the subject of the mortgage
10 to another person, subject to the security interest, which
11 transferee shall have the right to cure the default as provided
12 in the Mortgage Fair Foreclosure Act, subject to the provisions
13 of the mortgage documents;

14 (9) the debtor's right to seek counsel from an
15 attorney of the debtor's own choosing concerning the debtor's
16 mortgage default, and if the debtor is unable to obtain or
17 afford an attorney, the debtor's right to contact the state bar
18 of New Mexico or lawyer referral services or legal services
19 program in the county in which the real property securing the
20 mortgage loan is located;

21 (10) the debtor's right to submit a loss
22 mitigation or application, if applicable, request to the
23 creditor and a list of any documents and information required;

24 (11) a listing of any loss mitigation
25 counselors certified by the federal department of housing and

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1 urban development located in New Mexico available to discuss
2 loss mitigation options;

3 (12) the name and address of the creditor and
4 the telephone number of a representative of the creditor whom
5 the debtor may contact if the debtor disagrees with the
6 assertion that a default has occurred or to contest the
7 accuracy of the calculation of the amount required to cure the
8 default;

9 (13) the name, address and telephone number of
10 a person with the authority to modify or otherwise affect the
11 debtor's obligation under the subject security interest; and

12 (14) the debtor's right, including the time
13 frame and procedure, to redeem a foreclosed mortgage
14 obligation.

15 D. The creditor shall provide to the debtor, at the
16 same time as the notice required pursuant to Subsection A of
17 this section, copies of any applicable loss mitigation
18 application, procedure or guidelines that will be used to
19 evaluate loss mitigation, including all applicable deadlines
20 and a list of documents required to be submitted.

21 E. The notice of intent to foreclose required to be
22 provided pursuant to this section shall not be required if the
23 debtor has voluntarily surrendered in writing the real property
24 that is the subject of the mortgage that is in default.

25 F. The duty of the creditor pursuant to this

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1 section to serve written notice of intent to accelerate the
2 loan or to foreclose is independent of any other duty to give
3 notice pursuant to common law, principles of equity, state or
4 federal statute or rule of court.

5 SECTION 5. ACCOUNTING.--In conjunction with the notice
6 required pursuant to Subsection C of Section 4 of the Mortgage
7 Fair Foreclosure Act, the creditor shall also provide the
8 debtor with an accounting of the mortgage obligation covering
9 the twelve-month period prior to the date of the alleged
10 default. The accounting shall include, at a minimum, a history
11 of all payments made during the twelve-month period prior to
12 the date of the alleged default and the creditor's allocation
13 of those payments to principal, interest, attorney fees and any
14 other applicable fees. The creditor shall certify in writing
15 that the information contained in the accounting is true and
16 accurate to the best of its knowledge and that the information
17 provided has been relied upon as the basis for the claim of
18 default.

19 SECTION 6. PRE-FORECLOSURE LOSS MITIGATION OBLIGATIONS.--

20 A. Notwithstanding the provisions of any law to the
21 contrary, with respect to a mortgage for which a notice of
22 intent to foreclose is required pursuant to Section 4 of the
23 Mortgage Fair Foreclosure Act, a creditor shall make good-faith
24 efforts to contact the debtor to ascertain the debtor's current
25 income, afford the debtor the opportunity to participate in

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1 loss mitigation and evaluate whether an affordable and
2 sustainable alternative to foreclosure is feasible.

3 B. Notwithstanding the provisions of any law to the
4 contrary, with respect to a mortgage for which a notice of
5 intent to foreclose is required pursuant to Section 4 of the
6 Mortgage Fair Foreclosure Act, upon a request by the debtor for
7 loss mitigation, a person with authority to modify or otherwise
8 affect the debtor's obligation pursuant to the subject security
9 interest identified as required in Paragraph (13) of Subsection
10 C of Section 4 of the Mortgage Fair Foreclosure Act shall be
11 required to participate in good faith in loss mitigation
12 efforts with the debtor prior to the commencement of any
13 foreclosure proceeding.

14 C. Any loss mitigation conducted pursuant to
15 Subsections A and B of this section may, at the request of the
16 debtor, include the participation of a counselor certified by
17 the federal department of housing and urban development, an
18 attorney or other authorized representative to assist the
19 parties or negotiate on behalf of the debtor potential options
20 to be considered for loss mitigation.

21 D. The loss mitigation required pursuant to
22 Subsections A and B of this section shall afford the debtor an
23 opportunity to pursue a variety of alternatives to foreclosure
24 consistent with the debtor's current financial circumstances
25 and willingness and ability to pursue such alternatives. These

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1 alternatives to foreclosure may include:

2 (1) any loss mitigation program offered by the
3 federal government in which the creditor participates and any
4 other loss mitigation program offered by the creditor;

5 (2) reinstatement of the loan and dismissal of
6 the foreclosure action upon the debtor's payment of applicable
7 fees and demonstration that the debtor can bring the loan
8 current;

9 (3) a repayment plan whereby the debtor agrees
10 to resume making monthly payments, plus a portion of the past
11 due payments each month, until the loan is brought current;

12 (4) a forbearance agreement that may include
13 one or more of the following features:

14 (a) suspension or reduction of payments
15 for a period sufficient to allow the debtor to recover from the
16 cause of default;

17 (b) a period during which the debtor is
18 only required to make the regular monthly mortgage payment
19 before beginning to repay the arrearage;

20 (c) a repayment period of at least six
21 months for accrued arrearages, penalties or other fees; or

22 (d) allowing reasonable foreclosure
23 costs and late fees accrued prior to the execution of the
24 forbearance agreement to be included as part of the repayment
25 schedule;

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1 (5) an extension agreement whereby the debtor
2 pays a portion of the amount of the total arrearage, and the
3 remaining portion of the arrearage amount is added to the end
4 of the loan;

5 (6) a loan modification plan that would
6 permanently change one or more terms of the defaulted loan
7 obligation, including:

8 (a) extending the amortization period of
9 the loan;

10 (b) converting an adjustable rate
11 mortgage into a fixed rate mortgage;

12 (c) reducing the mortgage interest rate
13 temporarily or permanently;

14 (d) adding missed payments to the
15 existing loan balance;

16 (e) principal forbearance or
17 forgiveness; or

18 (f) interest forbearance on some or all
19 of the interest accrued or that may accrue in the future;

20 (7) a reasonable refinancing period of no
21 fewer than sixty days during which the creditor agrees not to
22 pursue foreclosure and gives the debtor an opportunity to seek
23 refinancing of the loan obligation with a third-party lender;

24 (8) a principal reduction agreement in those
25 cases in which the debtor's loan obligation has a negative

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1 amortization;

2 (9) a principal forbearance agreement;

3 (10) a mortgage loan assumption agreement

4 whereby a qualified third-party individual or entity can assume

5 the loan's payment obligation and the creditor waives any

6 applicable "due on transfer" provision;

7 (11) an agreement by the debtor to execute a

8 deed in lieu of foreclosure in exchange for the creditor

9 canceling the debt owed on the loan;

10 (12) a short sale;

11 (13) a voluntary surrender of the home in

12 exchange for cash consideration; or

13 (14) any other loss mitigation program for

14 which the debtor is otherwise eligible.

15 E. Within seven days of terminating a loss

16 mitigation effort, a creditor shall provide a written notice to

17 the debtor signed by the person responsible for the decision to

18 terminate loss mitigation. This notice shall:

19 (1) state that a loss mitigation alternative

20 could not be implemented despite repeated attempts and set

21 forth all efforts to inform the debtor of loss mitigation

22 alternatives; or

23 (2) document that a loss mitigation effort was

24 performed and set forth:

25 (a) all efforts to evaluate loss

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1 mitigation alternatives;

2 (b) a summary of any information relied
3 upon as the basis for termination of the loss mitigation
4 effort, including the specific loss mitigation calculations
5 performed;

6 (c) the results of any net present value
7 analysis and any information considered by the creditor in
8 making the net present value analysis; and

9 (d) the specific reasons for the alleged
10 non-feasibility of loss mitigation alternatives.

11 F. The loss mitigation required pursuant to
12 Subsections A and B of this section shall include, if
13 available, written notice to the debtor of any administrative,
14 regulatory or internal review or protest process for the debtor
15 to contest the creditor's factual basis or decision on loss
16 mitigation. Any review or protest process afforded shall
17 provide a reasonable opportunity for the debtor to pursue the
18 review or protest process prior to initiation of the
19 foreclosure action by the creditor.

20 G. A review or protest process provided by the
21 creditor shall not in any way bar the right of the debtor to
22 contest the foreclosure action and to challenge the loss
23 mitigation and decision of the creditor in any court
24 proceeding.

25 H. A creditor shall retain copies of all

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1 communications or records of communications between itself and
2 the debtor or agent of the debtor until final sale of the
3 property has been completed. The creditor shall transmit a
4 copy of all such communications or records of communications to
5 any subsequent servicer.

6 SECTION 7. CONDITIONS PRECEDENT TO FORECLOSURE.--

7 A. In the initial foreclosure pleading filed by a
8 creditor, the creditor shall certify that it has complied with
9 the notice requirements of the Mortgage Fair Foreclosure Act
10 and any applicable federal laws or guidelines and:

11 (1) the debtor has not requested, verbally or
12 in writing, loss mitigation; or

13 (2) if the debtor has requested loss
14 mitigation, that the creditor has made a good-faith effort to
15 negotiate loss mitigation, but loss mitigation was terminated
16 as of a stated date, which date shall be the date upon which
17 notice of loss mitigation termination was provided to the
18 debtor.

19 B. In the event that the creditor alleges that the
20 debtor has abandoned or voluntarily surrendered the property,
21 the creditor shall plead the specific facts upon which that
22 allegation is based.

23 C. Prior to entry of judgment in a foreclosure
24 action, the court shall find that the creditor has met all
25 certification requirements of the Mortgage Fair Foreclosure Act

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1 and that one of the following conditions has been met:

2 (1) the home has been abandoned;

3 (2) the debtor has voluntarily relinquished
4 the property to the creditor in writing in return for valuable
5 consideration;

6 (3) no loss mitigation is pending; or

7 (4) the debtor is at least ninety days in
8 default on a loan modification agreed to by the debtor and
9 creditor and no subsequent loss mitigation efforts are pending.

10 D. A debtor may request loss mitigation at any time
11 up to seven days prior to the sale of the property, and if so
12 requested, the foreclosure proceeding or the sale of the
13 property shall be stayed until the loss mitigation is completed
14 and certified to the court by the creditor.

15 E. A creditor's failure to timely certify as set
16 forth in Subsection A of this section or failure to comply with
17 any other provisions of the Mortgage Fair Foreclosure Act shall
18 be a defense to a foreclosure action.

19 **SECTION 8. VIOLATIONS--SANCTIONS.**--If a court finds that
20 there has been a material violation of any provision of the
21 Mortgage Fair Foreclosure Act by the creditor, the court may in
22 its discretion dismiss the action, void the sale, impose
23 sanctions or assess attorney fees and costs.

24 **SECTION 9. SEVERABILITY.**--If any part or application of
25 the Mortgage Fair Foreclosure Act is held invalid, the

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1 remainder or its application to other situations or persons
2 shall not be affected.

3 SECTION 10. APPLICABILITY.--

4 A. The Mortgage Fair Foreclosure Act applies to the
5 foreclosure of all mortgages wherever made that have as their
6 security a residence in New Mexico, provided that the real
7 property that is the subject of the mortgage:

8 (1) shall not have more than four dwelling
9 units; and

10 (2) at the time the mortgage is executed,
11 shall be or is planned to be occupied by the debtor or a member
12 of the debtor's immediate family as the debtor's or family
13 member's primary residence.

14 B. The Mortgage Fair Foreclosure Act applies to the
15 foreclosure of any property used as a primary residence by the
16 debtor or a member of the debtor's immediate family within the
17 twelve months preceding the date of the initial notice of
18 default.

19 C. The compiler shall compile this section.

20 SECTION 11. EMERGENCY.--It is necessary for the public
21 peace, health and safety that this act take effect immediately.

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