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SENATE BILL 1

51ST LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2013

INTRODUCED BY

Michael S. Sanchez

ENDORSED BY THE COURTS, CORRECTIONS AND JUSTICE COMMITTEE

AN ACT

RELATING TO PROPERTY; ENACTING THE MORTGAGE FAIR FORECLOSURE
ACT; REQUIRING WRITTEN NOTICE PRIOR TO FORECLOSURE; REQUIRING
AN ACCOUNTING; PROVIDING OPPORTUNITY FOR MITIGATION OF LOSS;
PROVIDING FOR SANCTIONS; 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 loans, apprised of all loss
mitigation methods available to them in connection with their
mortgage loans prior to the loss of their home and afforded a
meaningful opportunity to participate in loss mitigation to

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1 prevent the loss of homeownership. Further, the legislature
2 finds that it is the public policy of this state, and to the
3 benefit of consumers and businesses operating in this state, to
4 facilitate whenever possible the cure of any default on
5 residential mortgage loans and thereby preserve homeownership.

6 SECTION 3. DEFINITIONS.--As used in the Mortgage Fair
7 Foreclosure Act:

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

13 B. "creditor's representative" means a person who
14 is designated by a creditor to have the authority to negotiate
15 the terms of and modify a mortgage loan;

16 C. "debtor" means a natural person shown on the
17 record of a mortgage loan creditor as being obligated to pay
18 the obligation secured by that mortgage loan;

19 D. "dwelling" means a residential structure that
20 contains one to four units, whether or not that structure is
21 attached to real property, and includes an individual
22 condominium unit, as defined in the Condominium Act, and an
23 individual cooperative unit, a mobile home or a trailer if used
24 as a residence;

25 E. "loss mitigation" means any process designed to

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1 explore and pursue alternatives to foreclosure, including an
2 evaluation of the facts and circumstances of a mortgage loan
3 secured by residential property to determine:

4 (1) whether a mortgagor or trustor qualifies
5 for a financially sustainable loan modification to preserve
6 homeownership; and

7 (2) if there will be no mortgage loan
8 modification, whether any other loss mitigation program may be
9 available to the mortgagor or trustor;

10 F. "mortgage loan" means any loan primarily for
11 personal, family or household use that is secured by a
12 mortgage, deed of trust or other equivalent consensual security
13 interest on a dwelling or residential real estate upon which is
14 constructed or intended to be constructed a dwelling as defined
15 in the Mortgage Fair Foreclosure Act. "Mortgage loan" does not
16 include a real estate sales contract or reverse mortgage that
17 is otherwise binding under New Mexico law;

18 G. "net present value analysis" means a comparison
19 of the net financial proceeds from a judicial sale on the
20 schedule estimated by the creditor compared to the estimated
21 accumulated net financial proceeds from loss mitigation while
22 considering the value of future net financial proceeds from a
23 judicial sale in the event the loss mitigation is unsuccessful;
24 and

25 H. "servicer" means a person that collects or

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1 receives payments, including principal, interest and trust
2 items such as hazard insurance, property taxes and other
3 amounts due, on behalf of a note holder or investor in
4 accordance with the terms of a residential mortgage loan and
5 that works with the debtor on behalf of a note holder or
6 investor, when the debtor is in financial hardship or default
7 to modify, either temporarily or permanently, the terms of an
8 existing mortgage loan. "Servicer" does not include a person
9 or business entity whose business is strictly limited to
10 collecting and distributing payments without contractual
11 obligations to perform any other requirements of the mortgage
12 loan.

13 SECTION 4. APPLICATION.--

14 A. The Mortgage Fair Foreclosure Act applies to the
15 foreclosure of all mortgage loans, wherever made, that have as
16 their security a dwelling in New Mexico; provided that the
17 dwelling that is the subject of the mortgage loan:

18 (1) at the time the mortgage is executed, was,
19 or was planned to be, occupied by the debtor or a member of the
20 debtor's immediate family as the debtor's or family member's
21 primary residence; and

22 (2) was used as a primary residence by the
23 debtor or a member of the debtor's immediate family within the
24 twelve months preceding the date of the initial notice of
25 default.

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1 B. The Mortgage Fair Foreclosure Act shall not
2 apply to:

3 (1) a mortgage loan on which the default
4 occurred less than one hundred twenty days after the date on
5 which the subject mortgage loan was executed; or

6 (2) an investment property or residence other
7 than a primary residence or residential property taken in whole
8 or in part as collateral for a commercial loan.

9 **SECTION 5. WRITTEN NOTICE.--**

10 A. No later than five days after the first notice
11 of default is sent to the debtor, the creditor shall send in a
12 written manner reasonably calculated to apprise the debtor:

13 (1) a notice of foreclosure prevention
14 options;

15 (2) copies of any applicable loss mitigation
16 applications, procedures or guidelines that will be used to
17 evaluate loss mitigation, including all applicable deadlines
18 and a list of documents required to be submitted by the debtor;

19 (3) the phone number for the New Mexico
20 housing and foreclosure hotline, upon implementation by the
21 office of the attorney general;

22 (4) a statement explaining the debtor's right
23 to seek counsel from an attorney of the debtor's own choosing
24 concerning the debtor's mortgage loan default, and if the
25 debtor is unable to obtain or afford an attorney, the debtor's

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1 right to contact the state bar of New Mexico or lawyer referral
2 services or a legal services program in the county in which the
3 dwelling securing the mortgage loan is located;

4 (5) a statement explaining the debtor's right
5 to submit a loss mitigation request or application, if
6 applicable, to the creditor and a list of any documents and
7 information required;

8 (6) a list of any loss mitigation housing
9 counselors certified by the federal department of housing and
10 urban development located in New Mexico available to discuss
11 loss mitigation options;

12 (7) the name and address of the creditor and
13 the current telephone number, email address and facsimile
14 number of the creditor's representative or the designated
15 servicing department whom the debtor may contact:

16 (a) if the debtor disagrees with the
17 assertion that a default has occurred;

18 (b) to contest the accuracy of the
19 calculation of the amount required to cure the default; or

20 (c) to request loss mitigation; and

21 (8) an accounting of the mortgage loan
22 obligation covering the twelve-month period prior to the date
23 of the alleged default that shall include:

24 (a) a history of all payments made
25 during the twelve-month period prior to the date of the alleged

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1 default and the creditor's allocation of those payments to
2 principal, interest, attorney fees and any other applicable
3 fees; and

4 (b) written certification that the
5 information contained in the accounting is true and accurate to
6 the best of the creditor's knowledge and that the information
7 provided has been relied upon as the basis for the claim of
8 default.

9 B. The documents listed in Subsection A of this
10 section shall be served on the debtor by personal service or
11 sent to the debtor by regular mail and by registered or
12 certified United States mail, postage prepaid and return
13 receipt requested.

14 C. Documents sent by mail shall be sent to all
15 addresses that the debtor has provided to the creditor,
16 including the debtor's last known address and to the address of
17 the dwelling that is the subject of the mortgage loan.

18 D. Notice is deemed to have been effectuated on the
19 date that the notice is served personally on the debtor or
20 seven days following the date that notice is mailed.

21 E. The duty of the creditor to serve notice of
22 foreclosure prevention options is independent of any other duty
23 to give notice pursuant to common law, principles of equity,
24 state or federal statute or rule of court.

25 F. The documents listed in Subsection A of this

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1 section shall be printed in at least twelve-point type, in both
2 English and Spanish, and identify that the notice is being sent
3 pursuant to the requirements set forth in the Mortgage Fair
4 Foreclosure Act.

5 G. The documents listed in Subsection A of this
6 section shall not be required to be sent if the debtor has in
7 writing voluntarily surrendered the dwelling that is the
8 subject of the mortgage loan that is in default.

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

10 A. Notwithstanding the provisions of any law to the
11 contrary, a creditor shall make good-faith efforts to contact
12 the debtor to ascertain the debtor's current income, afford the
13 debtor the opportunity to participate in loss mitigation and
14 evaluate whether an affordable and sustainable alternative to
15 foreclosure is feasible.

16 B. Notwithstanding the provisions of any law to the
17 contrary, upon a request by the debtor for loss mitigation, the
18 creditor shall designate a creditor's representative with
19 authority to modify or otherwise affect the debtor's obligation
20 pursuant to the subject security interest and shall provide to
21 the debtor the current contact information, including the name,
22 address, telephone number, facsimile number and email address
23 of the designated creditor's representative. The creditor or
24 the creditor's representative shall participate in good faith
25 in loss mitigation efforts with the debtor prior to the

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1 commencement of any foreclosure proceeding.

2 C. Any loss mitigation conducted pursuant to
3 Subsections A and B of this section may, at the request of the
4 debtor, include the participation of a housing counselor
5 certified by the federal department of housing and urban
6 development, an attorney or other authorized representative to
7 assist the parties or negotiate on behalf of the debtor
8 potential options to be considered for loss mitigation.

9 D. The loss mitigation required pursuant to
10 Subsections A and B of this section shall afford the debtor an
11 opportunity to pursue a variety of alternatives to foreclosure
12 consistent with the debtor's current financial circumstances
13 and willingness and ability to pursue such alternatives. These
14 alternatives to foreclosure may include:

15 (1) any loss mitigation program offered by the
16 federal government in which the creditor participates and any
17 other loss mitigation program offered by the creditor;

18 (2) reinstatement of the mortgage loan and
19 dismissal of the foreclosure action upon the debtor's payment
20 of applicable fees and demonstration that the debtor can bring
21 the mortgage loan current;

22 (3) a repayment plan whereby the debtor agrees
23 to resume making monthly payments, plus a portion of the past
24 due payments each month, until the mortgage loan is brought
25 current;

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

3 (a) suspension or reduction of payments
4 for a period sufficient to allow the debtor to recover from the
5 cause of default;

6 (b) a period during which the debtor is
7 only required to make the regular monthly mortgage loan payment
8 before beginning to repay the arrearage;

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

11 (d) allowing reasonable foreclosure
12 costs and late fees accrued prior to the execution of the
13 forbearance agreement to be included as part of the repayment
14 schedule;

15 (5) an extension agreement whereby the debtor
16 pays a portion of the amount of the total arrearage, and the
17 remaining portion of the arrearage amount is added to the end
18 of the mortgage loan;

19 (6) a mortgage loan modification plan that
20 would permanently change one or more terms of the defaulted
21 mortgage loan obligation, including:

22 (a) extending the amortization period of
23 the mortgage loan;

24 (b) converting an adjustable rate
25 mortgage loan into a fixed rate mortgage loan;

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1 (c) reducing the mortgage loan interest
2 rate temporarily or permanently;

3 (d) adding missed payments to the
4 existing mortgage loan balance;

5 (e) principal forbearance or
6 forgiveness; or

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

9 (7) a reasonable refinancing period of no
10 fewer than sixty days during which the creditor agrees not to
11 pursue foreclosure and gives the debtor an opportunity to seek
12 refinancing of the mortgage loan obligation with a third-party
13 lender;

14 (8) a principal reduction agreement in those
15 cases in which the debtor's mortgage loan obligation has a
16 negative amortization;

17 (9) a principal forbearance agreement;

18 (10) a mortgage loan assumption agreement
19 whereby a qualified third-party individual or entity can assume
20 the mortgage loan's payment obligation and the creditor waives
21 any applicable "due on transfer" provision;

22 (11) an agreement by the debtor to execute a
23 deed in lieu of foreclosure in exchange for the creditor
24 canceling the debt owed on the mortgage loan;

25 (12) a short sale;

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1 (13) a voluntary surrender of the home in
2 exchange for cash consideration; or

3 (14) any other loss mitigation program for
4 which the debtor is otherwise eligible.

5 E. Within seven days of terminating a loss
6 mitigation effort, a creditor shall provide a written notice to
7 the debtor signed by the person responsible for the decision to
8 terminate loss mitigation. This notice shall:

9 (1) state that a loss mitigation alternative
10 could not be implemented despite repeated attempts and shall
11 set forth all efforts to inform the debtor of loss mitigation
12 alternatives; or

13 (2) document that a loss mitigation effort was
14 performed and shall set forth:

15 (a) all efforts to evaluate loss
16 mitigation alternatives;

17 (b) a summary of any information relied
18 upon as the basis for termination of the loss mitigation
19 effort, including the specific loss mitigation calculations
20 performed;

21 (c) the results of any net present value
22 analysis and any information considered by the creditor in
23 making the net present value analysis; and

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

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1 F. The loss mitigation required pursuant to
2 Subsections A and B of this section shall include, if
3 available, written notice to the debtor of any administrative,
4 regulatory or internal review or protest process for the debtor
5 to contest the creditor's factual basis or decision on loss
6 mitigation. Any review or protest process afforded shall
7 provide a reasonable opportunity for the debtor to pursue the
8 review or protest process prior to initiation of the
9 foreclosure action by the creditor.

10 G. A review or protest process provided by the
11 creditor shall not in any way bar the right of the debtor to
12 contest the foreclosure action and to challenge the loss
13 mitigation and decision of the creditor in any court
14 proceeding.

15 H. A creditor shall retain copies of all
16 communications or records of communications between the
17 creditor or the creditor's representative and the debtor or
18 agent of the debtor until the mortgage has been satisfied or
19 the final sale of the dwelling has been completed. The
20 creditor shall transmit a copy of all such communications or
21 records of communications to any subsequent servicer.

22 **SECTION 7. CONDITIONS PRECEDENT TO FORECLOSURE.--**

23 A. In the initial foreclosure pleading filed by a
24 creditor, the creditor shall certify that it has complied with
25 the notice requirements of the Mortgage Fair Foreclosure Act

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1 and any applicable federal laws or guidelines and that:

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

4 (2) if the debtor has requested loss
5 mitigation, the creditor has made a good-faith effort to
6 negotiate loss mitigation, but loss mitigation was terminated
7 as of a stated date, which date shall be the date upon which
8 notice of loss mitigation termination was provided to the
9 debtor.

10 B. In the event that the creditor alleges that the
11 debtor has abandoned or voluntarily surrendered the dwelling,
12 the creditor shall plead the specific facts upon which that
13 allegation is based.

14 C. Prior to entry of judgment in a foreclosure
15 action, the court shall find that the creditor has met all
16 certification requirements of the Mortgage Fair Foreclosure
17 Act, has notified all interested parties and that one of the
18 following conditions has been met:

19 (1) the debtor has voluntarily relinquished
20 the dwelling to the creditor in writing in return for valuable
21 consideration;

22 (2) no loss mitigation is pending;

23 (3) the debtor is at least ninety days in
24 default on a mortgage loan modification agreed to by the debtor
25 and creditor and no subsequent loss mitigation efforts are

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1 pending; or

2 (4) the home has been abandoned and:

3 (a) the debtor is in default; or

4 (b) the debtor has not taken any action
5 to request loss mitigation.

6 D. After commencement of a foreclosure proceeding,
7 a debtor may request loss mitigation. Upon the debtor's
8 request for loss mitigation, the court may, in its discretion
9 and for good cause shown, stay the foreclosure proceedings or
10 the sale of the dwelling until the loss mitigation is
11 completed.

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

16 **SECTION 8. VIOLATIONS--SANCTIONS.**--If a court finds that
17 there has been a material violation of any provision of the
18 Mortgage Fair Foreclosure Act by the creditor, the court may,
19 in its discretion, dismiss the action, impose sanctions, assess
20 attorney fees and costs and order any other relief provided by
21 law.

22 **SECTION 9. SEVERABILITY.**--If any part or application of
23 the Mortgage Fair Foreclosure Act is held invalid, the
24 remainder or its application to other situations or persons
25 shall not be affected.

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SECTION 10. EMERGENCY.--It is necessary for the public
peace, health and safety that this act take effect immediately.