

1 SENATE CORPORATIONS AND TRANSPORTATION COMMITTEE SUBSTITUTE FOR
2 SENATE BILL 1

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4 **51ST LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2013**
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10 AN ACT

11 RELATING TO PROPERTY; ENACTING THE MORTGAGE FAIR FORECLOSURE
12 ACT; REQUIRING WRITTEN NOTICE PRIOR TO FORECLOSURE; REQUIRING
13 AN ACCOUNTING; PROVIDING OPPORTUNITY FOR MITIGATION OF LOSS;
14 PROVIDING FOR SANCTIONS; DECLARING AN EMERGENCY.
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16 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

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

19 SECTION 2. LEGISLATIVE FINDINGS.--The legislature finds
20 it to be the public policy of New Mexico that homeowners should
21 be given reasonable notice of the fact of and basis for an
22 alleged default on their mortgage loans, apprised of all loss
23 mitigation methods available to them in connection with their
24 mortgage loans prior to the loss of their home and afforded a
25 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

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; and

18 G. "servicer" means a person that collects or
19 receives payments, including principal, interest and trust
20 items such as hazard insurance, property taxes and other
21 amounts due, on behalf of a note holder or investor in
22 accordance with the terms of a residential mortgage loan and
23 that works with the debtor on behalf of a note holder or
24 investor, when the debtor is in financial hardship or default
25 to modify, either temporarily or permanently, the terms of an

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1 existing mortgage loan. "Servicer" does not include a person
2 or business entity whose business is strictly limited to
3 collecting and distributing payments without contractual
4 obligations to perform any other requirements of the mortgage
5 loan.

6 SECTION 4. APPLICATION.--

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

11 (1) at the time the mortgage is executed, was,
12 or was planned to be, occupied by the debtor or a member of the
13 debtor's immediate family as the debtor's or family member's
14 primary residence; and

15 (2) was 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 B. The Mortgage Fair Foreclosure Act shall not
20 apply to:

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

24 (2) an investment property or residence other
25 than a primary residence or residential property taken in whole

1 or in part as collateral for a commercial loan.

2 SECTION 5. WRITTEN NOTICE.--

3 A. No later than the forty-fifth day of
4 delinquency, the creditor shall send in a written manner
5 reasonably calculated to apprise the debtor:

6 (1) the phone number for the New Mexico
7 attorney general's housing and foreclosure hotline or, if no
8 longer available, any federally sponsored foreclosure hotline;

9 (2) a statement explaining the debtor's right
10 to seek counsel from an attorney of the debtor's own choosing
11 concerning the debtor's mortgage loan default, and if the
12 debtor is unable to obtain or afford an attorney, the debtor's
13 right to contact the state bar of New Mexico or lawyer referral
14 services or a legal services program in the county in which the
15 dwelling securing the mortgage loan is located;

16 (3) a statement explaining the debtor's right
17 to submit a loss mitigation request or application, if
18 applicable, to the creditor and a list of any documents and
19 information required;

20 (4) a list of any loss mitigation housing
21 counselors certified by the federal department of housing and
22 urban development, as provided on the federal department of
23 housing and urban development's web site, located in New Mexico
24 and available to discuss loss mitigation options; and

25 (5) an accounting of the mortgage loan

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1 obligation covering the twelve-month period prior to the date
2 of the alleged default that shall include:

3 (a) a history of all payments made
4 during the twelve-month period prior to the date of the alleged
5 default and the creditor's allocation of those payments to
6 principal, interest, attorney fees and any other applicable
7 fees; and

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

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

18 C. Documents sent by mail shall be sent to the
19 address that the debtor has provided to the creditor, the
20 debtor's last known address and the address of the dwelling
21 that is the subject of the mortgage loan.

22 D. Notice is deemed to have been effectuated on the
23 date that the notice is served personally on the debtor or
24 seven days following the date that notice is mailed.

25 E. The duty of the creditor to serve notice of

1 foreclosure prevention options is independent of any other duty
2 to give notice pursuant to common law, principles of equity,
3 state or federal statute or rule of court.

4 F. The documents listed in Paragraphs (1) through
5 (4) of Subsection A of this section shall be printed in at
6 least twelve-point type, in both English and Spanish, and
7 identify that the notice is being sent pursuant to the
8 requirements set forth in the Mortgage Fair Foreclosure Act.

9 G. The documents listed in Subsection A of this
10 section shall not be required to be sent if the debtor has in
11 writing voluntarily surrendered the dwelling that is the
12 subject of the mortgage loan that is in default.

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

20 **SECTION 6. CONDITIONS PRECEDENT TO FORECLOSURE.--**

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

25 (1) the debtor has not requested, verbally or

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1 in writing, loss mitigation; or

2 (2) if the debtor has requested loss
3 mitigation, the creditor has made a good-faith effort to
4 negotiate loss mitigation, but loss mitigation was terminated
5 as of a stated date.

6 B. In the event that the creditor alleges that the
7 debtor has abandoned or voluntarily surrendered the dwelling,
8 the creditor shall plead the specific facts upon which that
9 allegation is based.

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

15 (1) the debtor has voluntarily relinquished
16 the dwelling to the creditor in writing in return for valuable
17 consideration;

18 (2) no loss mitigation is pending;

19 (3) the debtor is at least ninety days in
20 default on a mortgage loan modification agreed to by the debtor
21 and creditor and no subsequent loss mitigation efforts are
22 pending; or

23 (4) the home has been abandoned and:

24 (a) the debtor is in default; or

25 (b) the debtor has not taken any action

1 to request loss mitigation.

2 D. After commencement of a foreclosure proceeding,
3 a debtor may request loss mitigation. In addition to any
4 protection provided by federal regulation or law, the court
5 may, in its discretion and for good cause shown, stay the
6 foreclosure proceedings or the sale of the dwelling until the
7 loss mitigation is completed.

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

12 SECTION 7. VIOLATIONS--SANCTIONS.--If a court finds that
13 there has been a material violation of any provision of the
14 Mortgage Fair Foreclosure Act by the creditor, the court may,
15 in its discretion, dismiss the action, impose sanctions, assess
16 attorney fees and costs and order any other relief provided by
17 law.

18 SECTION 8. SEVERABILITY.--If any part or application of
19 the Mortgage Fair Foreclosure Act is held invalid, the
20 remainder or its application to other situations or persons
21 shall not be affected.

22 SECTION 9. EMERGENCY.--It is necessary for the public
23 peace, health and safety that this act take effect immediately.