Combating Foreclosures and the Mortgage Crisis in Communities of Color
American Bar Association
Coalition on Racial and Ethnic Justice

Foreclosure and the Mortgage Crisis

Saturday, February 12, 2011
1st Panel – 2–4 p.m.
2nd Panel – 4–6 p.m.

Atlanta Marriott Marquis Hotel
Marquis Ballroom, Salon D
265 Peachtree Center
Atlanta, GA 30303
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American Bar Association

Coalition on Racial & Ethnic Justice

Fifth Third Bank

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Co-Sponsors: 10COREtm Real Estate Law Society Student Organization (Thomas M. Cooley Law School), National Bar Association, ABA Entities: Commission on Hispanic Legal Rights & Responsibilities, Commission on Racial and Ethnic Diversity in the Profession, Forum Committee on Affordable Housing and Community Development Law, Section of Real Property, Trust and Estate Law, Section of State and Local Government Law, Section of Individual Rights and Responsibilities, and the Standing Committee on Pro Bono and Public Service

Presents

“Combating Foreclosures and the Mortgage Crisis in Communities of Color”

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TAB 1
Welcome
Dear Conference Participant:

On behalf of the ABA Coalition on Racial Ethnic Justice, the 10COREtm Real Estate Law Society Student Organization (Thomas M. Cooley Law School), and all of our illustrious co-sponsors (See the List of Sponsors), we wish to extend our sincere note of thanks to you for participating in this significant symposium. We are excited about the dynamic and dedicated panelists that will share with you their experiences strategies and recommendations for addressing one of the most devastating crises in communities of color.

We are honored that Professor Florise Neville-Ewell is spearheading this significant and cutting-edge panel presentation, and that some of the student participants from the 10COREtm program at Cooley Law School are in attendance today. Professor Neville-Ewell has designed the two-part panel to address the issues from an educational perspective; we have an educational panel that is geared to lawyers; and an educational panel that is geared for the public.

Thank you for your participation, interest and concern in these crucial issues that are confronting the entire nation. With your continued support and assistance, we will collectively and individually assist thousands of families who are confronted with the challenges of foreclosure and the mortgage crisis.

Sincerely,

David A. Perkins
Chairperson
ABA Coalition on Racial & Ethnic Justice (COREJ)
TAB 2
List of Sponsors
“Combating Foreclosure and the Mortgage Crisis in Communities of Color”

Sponsor

Co-Sponsored by:

National Bar Association

10COREtm Real Estate Law Society Student Organization, Thomas M. Cooley Law School

ABA Co-Sponsoring Entities:

Commission on Hispanic Legal Rights & Responsibilities

Commission on Racial and Ethnic Diversity in the Profession

Forum on Affordable Housing & Community Development Law

Section of Individual Rights and Responsibilities

Section of Real Property, Trust and Estate Law

Section of State and Local Government Law

Standing Committee on Pro Bono and Public Service
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2010-2011 COALITION ON RACIAL & ETHNIC JUSTICE

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A presidential Task Force on Minorities in the Justice system was created in 1992 in the aftermath of the Rodney King disturbances. Shortly thereafter, a report was issued with recommendations by the Task Force. The In 1994 the Task Force was re-named the Council on Racial and Ethnic Justice (now the Coalition or COREJ). The Coalition was designed to implement the recommendations and develop partnerships among community groups, civil rights organizations, businesses, religious organizations, and bar associations for the purpose of eliminating racial and ethnic bias in the justice system. Its primary goal is to serve as a catalyst for eliminating racial and ethnic bias in the justice system with a focus on systemic change.

COREJ (1) assists with the development of educational programs; (2) provides public forums for dialogue between legal institutions and non legal groups; and (3) provides technical assistance and advice on how to implement specific programs, strategies, and partnerships that eliminate racial and ethnic bias.

Since its inception, COREJ has been on the cutting edge of social justice issues. It has focused on a number of substantive and diverse issues such as racial profiling, access to the justice system, overrepresentation of juveniles of color, indigent defense, racial profiling and the war on terrorism, voting disenfranchisement and the impact of technology, election protection, injustices and discrimination in Tulia, Texas and restoring justice and equity by providing strategies for disaster preparedness and response that reduce patterns of discrimination and unfairness in the delivery of disaster aid and services e.g. Katrina Project.

RECENT PROGRAMS

- Stop Teen Violence: Time To Deliver (May 3, 2010, Youthville Detroit, Detroit, MI)
- Stop Teen Violence: Time To Deliver (November 20, 2009, Chicago State University, Chicago, IL)
- Stop Teen Violence: Time To Deliver (August 7, 2010, Golden Gate Law School, San Francisco, CA)

SIGNIFICANT PROJECTS

- **Overrepresentation of Juveniles of Color in the Juvenile Justice System**
  After an alarming number of national studies and reports revealed evidence that there is an overrepresentation of juveniles of color in the juvenile justice system and the justice system, the Coalition implemented a two-prong attack on the problems confronting juveniles of color. The first prong focuses on strategies that prevent young people of color from being trapped in the justice system; and the second prong focuses on strategies that divert young people of color and prevent their initial entrance into the juvenile justice system. A complete listing of juvenile justice programs sponsored by COREJ is attached.

- **Election Protection Project**
  COREJ developed a partnership in conjunction with the Lawyers’ Committee and five ABA sections, divisions and entities to remove barriers to the electoral process for citizens of color who sought to participate in the 2004 election. COREJ, along with the Section of Individual Rights & Responsibilities and the Election Law Committee renewed their partnerships for the 2008 Elections and broadened the scope of the Project.

  The goals of the 2008 Election Protection Project were: (1) Safeguard voters’ rights before, during and after Election Day by giving voters the information and resources they needed to cast meaningful ballots; and (2) Provide a comprehensive support system for eligible voters across the country that included support for registration programs, developing voter education materials, and providing direct legal assistance to protect the rights of voters. A primary goal for COREJ was to train volunteer lawyers who worked with voters on a national and local level to monitor polling places, educate voters, facilitate dialogues with state and local election officials, provide legal support to poll monitors and help answer the Lawyers’ Committee Hotline.

  The three primary ABA Partners for the Election Project developed a plan for recruiting volunteer lawyers and law students and the major activities began in June 2008. An Election Protection website was launched on the ABA website.

- **Katrina Project**
The goal of the project was to educate, conduct outreach and coordinate resources and services across the country to assist those survivors that received disparate treatment in the midst and aftermath of Hurricane Katrina. These goals were accomplished by holding a national conference and three CLE programs, conducting outreach, and publishing a Report.

NATIONAL CONFERENCES

- **Third National Conference – "Making the Invisible Visible: A Dialogue About Lessons Learned In the Aftermath of Katrina"**

  **Conference Overview:** The Coalition brought together approximately 200 judges, lawyers and their clients, health care workers, social workers, doctors, psychiatrists, psychologists, high school, college and law students, community groups, religious organizations, public and private leaders, survivors, responders and others who have devoted time to assisting victims of Katrina. The primary goals of the Conference: (1) conduct a productive dialogue among the survivors, planners (commissioners), and the participants; (2) produce a Report which identifies the type of problems that might emerge due to race and ethnicity, how to avoid inequities based on race and ethnicity, and how to mitigate the problems; and (3) assist the survivors of Katrina with the rebuilding of their lives, restore justice and provide equity and respect to those victims that have been treated unjustly.

  **Educational Programs:** Three successful panel presentations have been presented (1) ABA Midyear Meeting in Chicago, 2006 titled "Equity for Racial & Ethnic Survivors of Katrina;" (2) a jointly sponsored program with the National Bar Association as a Webcast Program “Hurricane Relief Seminar,” March, 2006 in Chicago; and (3) “Surviving Together; Healing Together” COREJ convened this special panel of experts in New Orleans to provide an in-depth status report of the communities that suffered disproportionately economically, legally, educationally and medically from Hurricane Katrina.

  **Report:** The Final Report of the Conference contains specific recommendations from the speakers, participants and survivors. The Report titled “Making the Invisible Visible: A New Approach to Disaster Planning and Response,” contains an analysis of issues ranging from communications and language skills, to resource allocation, to pre-existing economic and social inequities. A number of excellent recommendations were received from the Conference. The recommendations were included in the Report that was issued in August 2007

- **Second National Conference on the Impact of Race and Ethnicity on the Justice System**

  In March 2002, the Coalition held a highly successful conference in Baltimore. The conference was diverse, intergenerational, interactive and action-oriented. Recommendations from the Conference were used as blueprints for COREJ programs and projects. A report is available on the Conference.

- **First National Conference on the Impact of Race and Ethnicity on the Justice System**

  In Los Angeles, CA 1999, after holding two "think tank" meetings, COREJ convened an extraordinary conference. Two reports are available: Report on the Impact of Race and Ethnicity on the Justice System provides a brief overview; and the Draft of the National Conference Proceedings with Recommendations.

Several major follow-up projects were developed from the 1999 conference:

1. Enhancing Access to the Justice System through Technology: Would Technology Have Changed the Outcome of the Vote in Florida?
2. Data Collection Project on Color/Racial Profiling: The Tulia, Texas Project
3. Friends of the Council

Hon. David A. Perkins, Chairperson
Rachel Patrick, Director
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Website: http://new.abanet.org/centers/diversity/Pages/SocialJustice.aspx
TAB 4
Overview 10COREtm
MEMORANDUM

TO: Rachel Patrick, ABA
FROM: Professor Florise R. Neville-Ewell
RE: Executive Summary of the Ten Commandments of Real Estate Law Society Student Organization (10CORE™)
DATE: February 7, 2011

OVERVIEW OF 10CORE™

The Ten Commandments of Real Estate Law Society Student Organization has one goal, educating the public about real estate issues. 10CORE™ seeks to accomplish this goal through three dimensions, as reflected in its Scholarship, Oral Advocacy and Educational Outreach, and Computer Donations committees reflected below.

In addition to its primary goal, which is particularly needed given the dire state of our country’s real estate market, additional benefits exist; namely

- it encourages lawyers and law students to recognize the importance of pro bono activities;
- through synergy created with lawyers and law students working together, projects are more likely to continue and get completed;
- through joint activities, lawyers will simultaneously mentor students;
- by coordinating activities, supervised students will expand the network of information available to the public through existing organizations within the community;
- by using the web as a medium, it will make information accessible to those who may never connect to outreach efforts; and
- by translating information provided to the public, it will recognize and celebrate the diversity of our communities.

ROLE OF 10CORE™ IN THE LAW SCHOOL ENVIRONMENT

As structured, 10CORE™ can exist in conjunction with existing clinical programs (designed to help the public combat real estate issues) or it can exist in law schools which lack such programs. In the latter case, since students, along with faculty, spearhead activities, the organization can thrive without funding typically needed for clinical programs.

My colleague, Professor Johnson, and I also propose extending 10CORE™ to include a post graduate clinic for recent graduates who, with supervision, can use their skills to help the public during these tumultuous times. Essentially, this clinic would indirectly assist understaffed legal aid offices who work diligently to assist people with real estate challenges.

Attachment
The Ten Commandments of Real Estate Law Society Student Organization (“10CORE™” or “Society”) is a student organization in accordance with the regulations of the Thomas M. Cooley Law School.

ARTICLE I

SECTION I — Purpose

A. 10CORE’s primary educational mission is to provide the community with practical and comprehensive information about real estate issues.

B. Specifically, the primary educational mission shall be accomplished through work completed by the following three committees:

1. SCHOLARSHIP: 10CORE’s mission shall be accomplished via the publication of articles written by attorneys with the assistance of law students who have completed Property I and II (with a B average in those courses or with approval from the faculty advisor). The Vice President of this committee shall work with the faculty advisor to ensure that students are matched with outside lawyers who address timely issues involving homeowners, investors, nonprofit developers and developers. Articles may be published on the 10CORE.COM website (“Website”) as resources for the community at large;

2. ORAL ADVOCACY and EDUCATIONAL OUTREACH: Although participants will not provide legal advice, lawyers, supervised students, government officials, and recognized experts will provide presentations about relevant and timely real estate issues through scheduled "town-hall" gatherings. The Vice President of this committee shall schedule sessions and invite people from the community and local organizations.

3. COMPUTER DONATIONS: To help close the digital divide that inhibits people from gaining access to information, the Vice President of this committee shall spearhead locating businesses to donate computers to those in need. This committee will ultimately distribute computers within the community, with a special focus on assisting families who lack computer access.

C. Given its purpose, and to realize its goals, 10CORE will also welcome distinguished guest speakers involved in the real estate industry to enhance the learning environment at the law school and within the community. Speakers may include local attorneys, governmental officials and other recognized real estate professionals.

1 10CORE™ is a trademark of NEVILLE COMMUNICATIONS CORPORATION (NCC). NCC has granted a royalty free license to The Ten Commandments of Real Estate Law Society for this sole purpose.
TAB 5
Panel Information
Hon. David A. Perkins

Hon. David A. Perkins is the Chair of the Coalition on Racial and Ethnic Justice. As a member of COREJ Hon. Perkins was involved in the development and implementation of several Juvenile Justice Programs that were presented at ABA meetings around the Country.

Hon. Perkins is a Referee for the Third Circuit Court of Wayne County Michigan, where he presides over Delinquency, Neglect and Abuse cases in Juvenile Court. Hon. Perkins has held this position for over 13 years. He previously held the position of Magistrate for the 30th District Court, located in Highland Park Michigan. He served as an Assistant Corporation Counsel for the County of Wayne Michigan before going into private practice. As an Assistant Corporation Counsel he represented the County in civil law suits and provided legal advice to various departments within the County. Hon. Perkins while in private focused on general civil matters, probate and juvenile cases. Additionally, Hon. Perkins has also served as a Judge Advocate in the Michigan Air National Guard where he provided legal advice and representation to Base Commanders and members of the unit.

Hon. Perkins received a degree in biology from Rutgers University and his law degree from Howard University. Since graduating from Howard University, he has actively been involved in: the American Bar Association; State Bar of Michigan (SBM); Wolverine Bar Association; D. Augustus Straker Bar Association; SBM Young Lawyers and the General Practice Section of the SBM. Hon. Perkins is a past president of both the D. Augustus Straker Bar Association and the Association of Black Judges of Michigan. He has also a past Chair of the SBM Young Lawyers, and the General Practice Section of the SBM. He is a former delegate for the SBM to the ABA House of Delegates. Hon. Perkins also served as an elected member of the Representative Assembly of the SBM. The Michigan Supreme Court appointed him in September 2010 to the SBM Board of Commissioners. Hon. Perkins was a member of the ABA Steering Committee for the Unmeet Legal Needs Of Children. As a member of the Steering Committee he contributed to the report “America’s Children Still at Risk.”

Hon. Perkins volunteers on Monday evenings to preside over a Juvenile Drug Court Docket for the Third Judicial Circuit Court. This docket allows young people who have been charged with a matter in Juvenile Court and have substance abuse issues an opportunity at sobriety. Hon. Perkins serves as a mentor for at risk youth. He has also served as an instructor for the ABA/CLEO summer program. Hon. Perkins was a volunteer jurist for a Saturday morning teen-court program that was conducted in Wayne County. Further, Hon. Perkins has also served as a volunteer for two hospice organizations.

Hon. Perkins is an active member of several civic and community organizations. He presently serves on the board of directors for The Reggie McKenzie Foundation and The LifeSKills School Board. Additionally Hon. Perkins is a charter member of the Detroit Chapter of the NAADPC. Hon. Perkins is a lay minister in his Church. Hon. Perkins has received several awards for his work with youth. Hon. Perkins frequently acts as motivational speaker for youth.

Hon. Perkins is very passionate about making a better way for the youth in our society. Further he is determined that all young voices in our society shall have a forum to be heard.
Speaker Roster

Panel 1

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Florise R. Neville-Ewell

Biography

Florise R. Neville-Ewell is an Associate Professor of Law at Thomas M. Cooley Law School. At Cooley, she teaches Contracts and Ethics. Professor Neville-Ewell has published articles for academia and the public. As an academic, her most recent article awaiting publication is entitled *A Slice of History Underlying the Current Financial Pandemic: Black Women and Property 1800-1850 - Black Women as Property*. Sequels to the article are in progress. For the lay community, Professor Neville-Ewell has also published multiple articles regarding real estate issues in publications sponsored by Charter One Bank. In conjunction with being a faculty advisor for the Ten Commandments of Real Estate Law Society at Cooley Law School (Real Estate Law Society), a student organization dedicated to educating the public through outreach and articles released through 10CORE.COM™, Professor Neville-Ewell continues to also write for the public.

Before joining the faculty at Cooley, Professor Neville-Ewell started her career as a law clerk for the Honorable Julian A. Cook, Jr., a federal District Court judge in the Eastern District of Michigan. A native Chicagoan, she returned to Chicago after the clerkship to work as an associate at Sidley and Austin. After marrying the Honorable Edward Ewell, Jr., she returned to Michigan to work as an associate at Honigman Miller and later joined the faculty at Wayne State Law School where she taught Property and Real Estate Finance. During the interim period, after teaching at Wayne State but before joining the Cooley faculty, she worked as General Counsel for the Detroit Housing Commission and as Chief of Contracts for the City of Detroit Law Department; and, in private practice, as counsel for multiple nonprofits, churches, private entities, and municipalities involved in residential, affordable housing, and commercial real estate development projects.

A frequent speaker, President Obama’s Financial Fraud Enforcement Task Force recently selected Professor Neville-Ewell to participate as a panelist at a Mortgage Fraud Summit. In addition, she periodically speaks on a radio program sponsored by the Detroit Area Agency on Aging, was once responsible for providing weekly commentary about mortgage issues on a radio program sponsored by Comerica Bank, and has spoken at events sponsored by AARP, the NAACP, the Michigan Attorney General’s Office, and Fifth Third Bank.

Professor Neville-Ewell has received multiple awards and acknowledgments for her work and pro bono projects. Most recently in 2010, Cooley law students were instrumental in helping her become the recipient of the *Great Deeds Award* because of her commitment to serving others and the *Equal Access to Justice Award* because of her commitment to improving justice for all. As a result of work done with the Real Estate Law Society in 2010, Michigan State Bar President, Charles R. Toy and United States Attorney (for the Eastern District of Michigan) Barbara L. McQuade acknowledged her work and the student organization’s significance. Specifically, U.S. Attorney McQuade stated “[this] program . . . will make a big difference not only in the lives of the citizens you educate, but in the lives of law students who will see the value of public service.” In connection with select prior projects, the State of Michigan issued a *Moment of Tribute* in 2006 (for work done as an appointed member and chairperson of the Michigan State Housing Development Authority). In 1995, former City of Detroit Mayor Dennis W. Archer gave her a *Making It Better Proclamation* for work done on behalf of the city.

Professor Neville-Ewell received her B.A. cum laude and J.D. from Yale Law School in 1981 and 1984, respectively. She and her husband have two children, Edward Neville Ewell and Simone-Alyse Ewell.
Michelle T. García

Biography

Michelle T. García is a Trial Attorney in the Office of General Counsel at HUD where she specializes in lending discrimination cases. She provides counsel to HUD on fair lending investigations and on federal statutory and regulatory initiatives. Prior to joining HUD, Ms. García was an Assistant Attorney General in Illinois, where she litigated lending discrimination, consumer protection, and mortgage fraud cases. From 2007 through 2010, Ms. García was lead attorney for Illinois’ investigations and later, lawsuits against Countrywide Financial Corp., and its subsidiaries, and Wells Fargo & Co. and its subsidiaries, for lending discrimination. Ms. García began her legal career as a bilingual staff attorney at the Legal Assistance Foundation of Metropolitan Chicago, where for over four years, she litigated housing, consumer, and family law cases on behalf of indigent clients.
James Charles Smith

Biography

James Charles Smith is the John Byrd Martin Professor of Law at the University of Georgia, where he has taught since 1984. He grew up in Waukesha, Wisconsin, and graduated from Saint Olaf College in 1974, majoring in Math and History. After graduation from the University of Texas School of Law in 1977, he served as Law Clerk for Judge Walter Ely, U.S. Court of Appeals for the Ninth Circuit, in Los Angeles. He then practiced law for four years with the law firm of Baker Botts in Houston, Texas, specializing in commercial real estate. In 1982 he left private practice to go into teaching. From 1982 to 1984 Professor Smith taught at the Ohio State University College of Law. He is author of five books (Property: Cases and Materials; Real Estate Transactions: Problems, Cases, and Materials; Federal Taxation of Real Estate; Neighboring Property Owners; and Contracts and Conveyances of Real Property) and numerous articles and book chapters dealing with commercial law, lending, property, and taxation. His current research focuses on the homeowners’ associations and other community associations. He has run the Boston Marathon four times.
Tracie R. Porter  
Assistant Professor of Law

Biography

Prior to joining the faculty of the Southern Illinois University School of Law in 2009, Professor Porter held the position of Visiting Assistant Professor of Law at Chicago-Kent College of Law where she taught legal writing to first-year law students as well as an upper level course in real estate transactions. Before beginning her full-time teaching career, she was an adjunct professor at Chicago-Kent College of Law and the John Marshall School of Law in Chicago. After serving as an adjunct professor and realizing her passion for teaching at the law school level, she decided that full-time teaching was her ideal career choice.

Professor Porter's previous professional experience included positions in both government and private sector settings which allowed her to enhance her skills as a transactional lawyer and litigator and to represent individuals, corporations, and lenders in a variety of transactions. Before joining the legal academy, she was the principal of the Law Offices of Tracie R. Porter, LLC, with a practice focused on diverse areas of real estate and business law, including transactional and litigation cases, corporate law, and probate proceedings. She handled a broad range of transactions, from a small vacant lot purchase to a multi-million dollar commercial acquisition to residential acquisitions and construction projects for developers. Before starting her own law firm, she acquired litigation experience and client interaction skills while a litigator with the United States Department of Labor in Chicago immediately after graduating from law school in 1994. She was a senior real estate/litigation associate at the law firm of Brown Udell & Pomerantz, Ltd. and, prior to that position, a real estate associate at Barnes and Thornburg, working in its Chicago office.

Professor Porter earned her JD from Drake University Law School where she was an NAACP Earl Warren Scholar and a Sadie T.M. Alexander Law Scholar. While at Drake, she was awarded the prestigious American Jurisprudence Award in International Comparative Law, inducted into the Order of Barristers for Moot Court Competitiveness, and selected by her classmates for the Tollefson Leadership Award (awarded to only one graduating student who demonstrates stellar leadership qualities). She holds a BA in International Business from Cornell College. She has studied French and European Community law abroad at the University de Paris/Sorbonne.

Professor Porter has held numerous leadership positions in national and local bar associations, including the ABA Section of Real Property, Trust and Estate Law and the Young Lawyers Division, the Cook County Bar Association of Chicago, the Chicago Bar Association, the Black Women Lawyers Association of Chicago, the Illinois State Bar Association’s Real Estate Law Section Council, and the Illinois Real Estate Lawyers Association.
Connie Stokes
Biography

Connie Stokes, former State Senator and Dekalb County Super District Commissioner, announced her run for the U.S. Congress to represent the people of the Fourth Congressional District. “The people of the fourth district need someone in Washington who will get things done”, said Commissioner Stokes. She is known for getting things done. Connie Stokes, a history maker, became the first African-American woman elected to the DeKalb County Board of Commissioners representing over half of the 730,000 people who live in DeKalb County. Stokes defeated ten opponents in a special election to represent Super District 7, which runs north to south from Doraville to the Henry County line and borders Gwinnett and Rockdale County. After her landslide victory in 2006 to serve her second term as DeKalb’s Super District 7 Commissioner, the Atlanta Business Journal added Commissioner Connie Stokes to the list of “Most Influential African American Women in Metro Atlanta”. Commissioner Connie Stokes states that “The American Dream is under Siege”, and I am running for Congress to “Reclaim the American Dream for the people of the fourth Congressional District. I am running for Congress to” Reclaim the American Dream” of jobs, education, homeownership, and healthcare.

As the chairwoman of the DeKalb County Board of Commissioners’ Budget and Finance Committee, she has demonstrated leadership in fiscal responsibility, and accountability to the people. Stokes has repeatedly stated, “My goal is to stretch the taxpayer’s dollars as far as I can, and spend their money as prudently and frugally as I do my own.” She continues to work vigilantly in pursuit of this commitment. Stokes is an advocate for public participation and works tirelessly to get the people to add their voice to the small chorus of community leaders who actively participate in government.

Connie Stokes has over 16 years of experience working as a policy maker/legislator. She was first elected to office in 1994 as the State Senator from Georgia’s 43rd Senate District where she served for ten years. While there, she distinguished herself in many ways. She was the first woman to chair the sought after Senate Health and Human Services Committee. She was also the first woman in the Senate to join the Governor’s Leadership Team. As a State Senator, she served on the Appropriations Committee where she worked on a budget of over 16 billion dollars. “I am proud of my legacy of legislative experience well documented in Georgia history,” says Stokes.

Connie Stokes has a proven record of working to create jobs through supporting the development of small businesses. She is keeping her promise to create jobs by recruiting new businesses, and expanding existing business in the community. She continues to be a strong advocate for health care by working with the Board of Health on initiatives to improve the status of health for the people. She has worked hard to bring more sidewalks, parks, greenspace, libraries, and road improvements to the people of Dekalb County. Her outstanding leadership landed her an appointment to the national board of directors of the National Association of Counties (NACO) for 2006-2007. As Budget and Finance chair of the
Board of Commissioners for 2010 she was instrumental in forging a partnership of cooperation between the CEO and the commissioners to pass a budget with no tax increase by unanimous vote. Commissioner Stokes said "I work hard every day to improve the quality of life for the people.

Connie Stokes has a long history of supporting programs such as: The Legacy Girls, Leadership Academy, Youth V.I.B.E., YMCA Seniors Initiative Program, National Congress of Black Women, and Women's Resource Center to End Violence against Women, College for Kids, and many other organizations.

Stokes is the recipient of a long list of awards for her years of public service including the YWCA Academy of Women Achievers, the Gender Justice Award, the ABL Women of Vision, and the Acme Award, just to name a few. She has served on numerous Boards of Directors both on the local and national level. She is a member of several organizations including the National Association of Realtors, and The National Association of Real Estate Brokers.

Stokes is a Toll Fellow and a Fleming Fellow, as well as a graduate of Leadership DeKalb, Leadership Atlanta, Leadership Rockdale, and the Regional Leadership Institute. Commissioner Stokes is a long time advocate for affordable housing, which stems from being an accomplished businesswoman celebrating years of success in the area of real estate, economic development, and marketing.

Commissioner Stokes produced and hosted a television talk show for twelve years entitled “DeKalb Today,” which provides information about people, places, events, and activities to enhance their quality of life. “DeKalb Today”.

Commissioner Stokes is also a highly sought-after public speaker. She is an experienced moderator, keynote speaker, mistress of ceremonies and has spoken at various workshops and panel discussions. She is also a Distinguished Toastmaster (DTM).

Commissioner Stokes is a graduate of David T. Howard High School in Atlanta. She received an Associate’s Degree from the Art Institute of Atlanta. She graduated from Georgia State University where she earned a Bachelors of Business Administration degree in Marketing. She also holds a Master’s Degree in Public Administration from California State University. She is married to Dr. James A. Stokes and they have three adult sons. They reside in Lithonia, Georgia and are members of St. Philip AME Church. Commissioner Stokes is a self proclaimed “health enthusiast.” She has stated, “I appreciate the increased sense of health and wellness received from a consistent fitness program."
Tia A. McCoy

Biography

National Trainer, Consultant
HomeOwnership Center Manager for RRC (Resources for Residents and Communities)

Tia A. McCoy is a highly skilled trainer and homeownership consultant with more than 18 years of experience. Her ability to inspire individuals to bring about change comes from her compassion and energy.

Since 2006 Tia has served as the HomeOwnership Center Manager for Resources for Residents and Communities of Georgia, (formerly Reynoldstown Revitalization Corporation). Prior to joining RRC Tia served at DASH for LaGrange, Housing Authority of the City of Atlanta, The Atlanta Center for Homeownership and National City Bank.

Tia’s experience includes mortgage lending, retail banking, financial fitness and credit training and all aspects of homeownership counseling. Tia has a strong passion for and enjoys educating, training and preparing families for sustainable homeownership. This is evident in her 2009 testimony before Congress at the subcommittee field hearing: “Examining the continuing crisis in residential foreclosures and the emerging commercial real estate crisis: Perspectives from Atlanta.”

Tia is a faculty member of the NeighborWorks® Training Institute and is a regular instructor for place-based trainings offered by NeighborWorks America®. She has also assisted in the design of curricula related to homeownership counseling.

Tia holds a Bachelor of Science degree in Business Administration from the University of Kentucky. She has served as a Board Member of the Reynoldstown Civic Improvement League and the Reynoldstown Square Condominium Association. She is a charter member of the Georgia Housing Counseling Coalition and the Atlanta Foreclosure Prevention Task Force. She has served as a Grants Reviewer for the Fulton County Arts Council and is a community leader. Tia enjoys photography and likes to capture nature in its purest form.
Karen E. Brown

Biography

Karen Brown is the director of the Home Defense Program of the Atlanta Legal Aid Society. She represents low and moderate income homeowners and home buyers in cases that primarily involve predatory mortgage lending and more recently HAMP modifications. Other cases have involved home improvement scams, home purchase fraud, lease purchase scams, foreclosure assistance fraud, and variations of these schemes. She trains and educates lawyers, housing counselors, homeowners and home buyers on these schemes and on rights and remedies provided under federal and state consumer protection laws. Karen has also presented oral and written testimony and comments to federal and state regulatory agencies and legislative bodies on various proposals to stop predatory mortgage lending. Karen received her B.A. from Smith College in 1985 and her J.D. from the University of Georgia School of Law in 1990. Karen also served as the 1998-1999 John Heinz Senate Fellow with the United States Senate. During her fellowship, she worked for U.S. Senator Christopher J. Dodd and the Senate Committee on Banking, Housing and Urban Affairs, where she developed legislative policy and strategy on consumer and housing issues, including predatory mortgage lending.
David Casas

Biography

David Casas Bilingual Housing Counselor. David is currently working with the Impact Group providing financial counsel for home owners at risk of foreclosure. He has been working with the Latino community for several years. Davis has been interviewed in Latino local radios and newspapers. David has also help in creating partnerships with other non-profit organizations to deliver a more holistic solution to home-owners facing a financial crisis.
Robert Hamor, a second year law student, is President of 10CORE™. As President, he is responsible for making sure that the organization’s mission, providing the community with practical and comprehensive information about real estate issues, is accomplished. Mr. Hamor brings over ten years of experience in the real estate and financing industries to the organization. As a result, he recognizes the importance of pro bono service and feels that it is his responsibility to share what he has learned with the community. A native of Troy, Michigan, he plans to take the Michigan bar exam.

Deon Browning, a second year law student, is Vice President of the Computer Donations Committee. In that capacity, he is responsible for finding companies to donate computers so they can be given to those in need within the community. Mr. Browning is actively involved because he understands the impact of the mortgage crisis and recognizes the need for pro bono service to help educate and advocate for those who have been hardest hit by this crisis. A native of Philadelphia, he plans to take the Pennsylvania and New Jersey bar exams.

Sarah Thomas, a second year law student, is Vice President Elect of the Scholarly Writing Committee. In this position, she will be responsible for coordinating unions between lawyers and law students to make sure that articles are published for the community regarding important real estate issues. Ms. Thomas recognizes the importance of educating people regarding their basic rights during this crisis and will accomplish this through the committee. A native of metro Detroit, Ms. Thomas is also a strong advocate for its revitalization, and plans on taking the Michigan bar exam.

Choi Portis, a third year law student, was one of the organization’s incorporators. In that capacity, she participated in meetings about the housing crisis and was ultimately instrumental in helping establish the organization once students decided that pro bono service was the only option. Ms. Portis is actively involved because she cares about the current housing foreclosure dilemma in America and knows that the organization is needed to help struggling families. A native of Detroit, she plans to take the Michigan bar exam.
TAB 6

Articles and Power Point Presentation
STATE LEGISLATIVE (AND JUDICIAL) RESPONSES TO THE FORECLOSURE CRISIS AND PROPOSALS FOR THE FUTURE

ABA MIDYEAR CONFERENCE
PROFESSOR FLORISE R. NEVILLE-EWELL
February 12, 2011
OVERVIEW

I. BACKGROUND OF THE FORECLOSURE PANDEMIC

A. GENERAL IMPACT

B. STATES WITH THE HIGHEST FORECLOSURE RATES/MORTGAGE FRAUD RATES/COMMUNITIES OF COLOR
II. EXISTING FORECLOSURE PROCEDURES

A. JUDICIAL

This procedure begins as a civil lawsuit and culminates with the court entering a judgment for foreclosure, then ordering a sale, and typically monitoring the same.

B. NON-JUDICIAL

If the mortgage contains a “power of sale” provision, a mortgagee can complete the foreclosure sale without court intervention. The mortgagee is required to proceed in accordance with relevant statutes that proscribe how the auction of the property must be conducted. Ultimately, the sale leads to a transfer of the property to the highest bidder.
III. MODIFICATIONS OF PROCEDURES: STATE LEGISLATIVE (AND JUDICIAL) RESPONSES TO THE CRISIS

A. SIMILARITIES: MEDIATION PROGRAMS FORECLOSURE DIVERSION, CONFERENCES

B. JUDICIAL (SAMPLE STATES)

1. MANDATORY COURT SUPERVISED SETTLEMENT CONFERENCES
   *New York: subprime loans (STATUTE)

2. COURT SUPERVISED
   *Pennsylvania - Philadelphia County: residential properties are automatically scheduled (STATUTE/ADMIN. RULES)
   *New Jersey: homeowner must timely elect to participate (AUTHORITY OF JUDICIARY)
III. MODIFICATIONS OF PROCEDURES:
STATE LEGISLATIVE (AND JUDICIAL)
RESPONSES TO THE CRISIS, CONTD.

C. NON-JUDICIAL (SAMPLE STATES)

1. UNSUPERVISED CONFERENCE BETWEEN SERVICER AND HOMEOWNER BEFORE FILING

*California: servicer must initiate contact (STATUTE)
*Michigan: borrower can request 90 day pre-foreclosure negotiation before foreclosure can begin (STATUTE HAS A SUNSET PROVISION: JULY 3, 2011)

2. COURT SUPERVISED MEDIATION

*Nevada: homeowner must elect to participate (STATUTE)
IV. PROPOSED SOLUTIONS

A. LEGISLATIVE: UNIFORM FORECLOSURE STANDARDS FOR JUDICIAL AND NON-JUDICIAL STATES

1. PURPOSE
2. GOALS
3. TEST TO DETERMINE EFFECTIVENESS

B. PROFESSIONAL: PRO BONO INITIATIVES TO SUPPLEMENT STANDARDS

1. PURPOSE
2. GOALS
3. TEST TO DETERMINE EFFECTIVENESS
IV. PROPOSED SOLUTIONS: PRO BONO INITIATIVES, CONTD.

4. MODELS: LAW SCHOOLS

a. HOUSING CLINIC(S)

(1) EXISTING MODEL/STRUCTURE FOR LAW STUDENTS TO WORK WITH CLINICAL PROFS.
4. MODELS: LAW SCHOOLS, CONT'D.

(2) PROPOSED:
SUPPLEMENTAL POST GRADUATE CLINIC(S) FOR NEWLY LICENSED LAWYERS: 10CORE™ POST GRADUATE CLINIC

b. LITERACY TRAINING FOR THE PUBLIC WITH LAWYERS/STUDENTS/FACULTY THROUGH TOWNHALL MEETINGS AND ARTICLES: 10CORE™ STUDENT ORGANIZATION
SECTION I — Purpose OF 10CORE™ Law Society

A. The primary educational mission is to provide the community with practical and comprehensive information about real estate issues.

B. Specifically, 10CORE’s™ mission shall be accomplished through work completed by the following three committees:

1. SCHOLARSHIP: 10CORE’s™ mission shall be accomplished via the publication of articles written by attorneys with the assistance of law students who have completed Property I and II (with a B average in those courses or with approval from the faculty advisor). The Vice President of this committee shall work with the faculty advisor to ensure that students are matched with outside lawyers who address timely issues involving homeowners, investors, nonprofit developers and developers. Articles may be published on the 10CORE.COM website (“Website”) as resources for the community at large;
2. **ORAL ADVOCACY and EDUCATIONAL OUTREACH**: Although participants will not provide legal advice, lawyers, supervised students, government officials, and recognized experts will provide presentations about relevant and timely real estate issues through scheduled "town-hall" gatherings. The Vice President of this committee shall schedule sessions and invite people from the community and local organizations.

3. **COMPUTER DONATIONS**: To help close the digital divide that inhibits people from gaining access to information, the Vice President of this committee shall spearhead locating businesses to donate computers to those in need. This committee will ultimately distribute computers within the community, with a special focus on assisting families who lack computer access.

C. Given its purpose, and to accomplish its mission, 10CORE™ will also welcome distinguished guest speakers involved in the real estate industry to enhance the learning environment at the law school and within the community. Speakers may include local attorneys, governmental officials and other recognized real estate professionals.
V. PROPOSED NEXT STEPS

A. COMMISSION TO DESIGN/DRAFT TEMPLATE FOR UNIFORM FORECLOSURE STANDARDS FOR JUDICIAL AND NON-JUDICIAL STATES (RECOGNIZING THAT STATES WILL HAVE TO SUPPLEMENT THE BASE DOCUMENTS BECAUSE ONE SIZE WON'T FIT ALL)

B. NATIONAL IMPLEMENTATION OR EXPANSION OF PRO BONO PROJECTS IN LAW SCHOOLS - TO EDUCATE AND REPRESENT THE COMMUNITY
SPECIAL ACKNOWLEDGMENTS

Research Assistants:

Cooley Law Students

Nicole Coleman and Robert Hamor
PARTIAL BIBLIOGRAPHY

5. *See also*, Bibliography in Handouts

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Legislative Responses to the Foreclosure Crisis in Nonjudicial States

Dan Immergluck*, Frank Alexander+, Katie Balthrop+, Philip Schaeffing*, and Jesse Clark*

January, 2011

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+ Emory University School of Law

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Acknowledgements

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About the Authors

Dan Immergluck is Associate Professor in the School of City and Regional Planning at Georgia Institute of Technology, where he conducts scholarly and applied research on mortgage finance, foreclosures, fair lending, community development finance, and related public policies. He has authored three books, more than 30 articles in scholarly journals, and dozens of applied research and policy reports. His most recent book, *Foreclosed: High-Risk Lending, Deregulation and the Undermining of the American Mortgage Market*, will be reissued in paperback by Cornell University Press in 2011. He has been a visiting scholar at the Federal Reserve Bank of Atlanta, and currently serves as a Senior Fellow of the Center for Community Progress and on the Research Advisory Council of the Center for Responsible Lending.

Frank Alexander is the Sam Nunn Chair in Ethics and Professionalism at Emory Law School. He is the co-founder and general counsel for the Center for Community Progress, a nonprofit organization focused on helping governments develop strategies to return vacant and abandoned properties to productive use. He is author or editor of eight books and more than 40 articles in real estate finance and law, community development, and law and theology, including *Georgia Real Estate Finance and Foreclosure Law* (2010-2011 edition). He has served as a fellow of The Carter Center, commissioner of the State Housing Trust Fund for the Homeless, interim dean of Emory Law and a visiting fellow at the Joint Center for Housing Studies of Harvard University.

Katie Balthrop is an attorney in private practice in Atlanta, Georgia. She graduated from Emory University School of Law in May 2010 with honors and is a member of the Order of the Coif.

Philip Schaeffing is a graduate student in the School of City and Regional Planning at the Georgia Institute of Technology. He has a bachelors in Architecture from the University of Notre Dame and has worked as a planner for the City of Atlanta and in the private sector.

Jesse Clark is a graduate student in the School of City and Regional Planning at the Georgia Institute of Technology. He has a bachelors in Finance and Real Estate from the University of Central Florida and has more than five years’ experience in the real estate industry.
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Executive Summary

The context for foreclosure prevention and mitigation hinges critically upon whether a state operates in a judicial or nonjudicial regime. Nonjudicial foreclosure regimes allow mortgage lenders to foreclose on homes without substantial court supervision. In these states, the time from the borrower receiving an initial notice of foreclosure to the date of the completed foreclosure sale tends to be substantially shorter than in states with judicial foreclosure systems. Moreover, nonjudicial foreclosure regimes tend to offer borrowers fewer legal protections and make it more difficult for homeowners to slow or intervene in the routine foreclosure process. For example, many of the more well-known efforts to reduce foreclosures, including mediation programs in which lenders must meet with borrowers in the presence of a mediator, have occurred in judicial states.

This report examines legislation affecting the mortgage foreclosure process adopted in states with nonjudicial foreclosure processes from January 2005 through May of 2010. Little is known about how policymakers in nonjudicial states have responded to the foreclosure crisis. In general, borrowers in nonjudicial states are at a significant disadvantage when compared to those in judicial states and, short of changing to a judicial foreclosure regime, efforts to reduce foreclosures run up against a different set of constraints and challenges. The primary purpose of this report is to understand how policymakers in nonjudicial states have attempted to respond in terms of legislative modifications to the foreclosure process in the face of the national foreclosure crisis. We do this by analyzing state legislative activity during the study period. In particular we identified all legislation enacted during this period that concerns the regulation and administration of the default and foreclosure process for single-family residential mortgages. We quantify and classify this legislation, and identify states that were relatively active in this area during the study period. We then focus on eight of the most active states, describing some of the key provisions adopted in these states.

We complement this original research by reviewing a number of recent reports on state efforts to reduce foreclosures and on state foreclosure law. For critical context, we also review recent federal programs to reduce foreclosures and describe other state and local foreclosure prevention efforts and programming in nonjudicial states, such as foreclosure task forces, governmental agreements with loan servicers, homeowner counseling, legal and financial assistance, and community organizing. The primary focus of the report, however, is on changes to state foreclosure statutes.

Some of the key findings from our analysis of changes in state foreclosure statutes include:

- As a whole, legislatures in the 33 nonjudicial states and the District of Columbia adopted a substantial number of changes to foreclosure statutes, especially as the national foreclosure crisis swelled in 2008 and 2009. We identified almost 200 substantive provisions in legislation that concern mortgage default, servicing and foreclosure


processes that were adopted between January 2005 and May 2010. There was a large increase in legislative activity in this area from 2006 through 2009. The number of adopted provisions increased from just 12 in 2006, to 19 in 2007, 38 in 2008 and 70 in 2009.

- There was considerable variation in the level of legislative activity across states, with some states passing no statutory amendments with substantive provisions during the study period and others passing laws with ten to twenty substantive provisions. The three most active states (CO, MN, NV) accounted for 25 percent of the adopted provisions among the 33 nonjudicial states and the District of Columbia. The ten most active states accounted for 60 percent of the adopted provisions.

- In many nonjudicial states, there was little substantive legislative response, even in the face of a national foreclosure crisis. In some states, this is at least partly explained by the fact that the state was not hit very hard by the foreclosure crisis. However, some states that experienced high rates of foreclosure during this period did little to change their foreclosure process.

- The majority of the increased legislative activity concerned preforeclosure-sale processes, while smaller shares of activity concerned foreclosure sale and post-sale processes, servicer regulation, or recordation and ancillary/supportive (e.g., data collection) issues.

- While a number of states adopted statutes that had the effect of lengthening the preforeclosure period, only two states passed laws that reduced the period in any way (and these changes were minor and sometimes more than offset by other provisions increasing the period). It is important to note however, that many nonjudicial states already had relatively brief preforeclosure periods, especially compared to most judicial states.

- In general, states with the highest foreclosure rate during the second half of 2007 and all of 2008 (e.g., Arizona, California, Nevada) adopted the greatest number of provisions during 2009 and the first five months of 2010. In keeping with this pattern, states with very low levels of foreclosures (e.g., Alaska, Montana, and Wyoming) saw no subsequent legislative activity. However, among states with relatively moderate levels of foreclosures in the earlier period there was a substantial variation in legislative activity. Some (e.g., Idaho, Virginia) saw only one or two provisions adopted during the latter period while others (e.g., Oregon, Colorado) saw seven or eight provisions adopted. Moreover, there were a few states (Georgia, Mississippi, and Rhode Island) that had moderately high foreclosure levels but very small amounts of subsequent legislative activity. It is likely that, in addition to how hard a state was hit by foreclosures, other characteristics (e.g., state political environments, preexisting foreclosure and mortgage laws) were important determinants of legislative activity.
• No nonjudicial state made a substantial move (during the study period at least) to shift toward adopting a judicial foreclosure process

A closer examination of the nature of changes in foreclosure law in eight legislatively active states (CA, CO, MI, MN, NC, OR, NC, WA) reveals the following:

• The adopted changes in legislatively active states were largely in favor of the borrower. While some states (e.g., Washington) focused on temporary changes to foreclosure law, others made at least some permanent changes in the foreclosure process.

• At the same time, most of the changes did not dramatically alter the foreclosure process. Some were restricted to loans originated over a specified period, and other changes were quite marginal. Many involved increases in notice periods or detailed directions to lenders/servicers to take particular steps.

• Many of the provisions concerning the preforeclosure process were components of larger efforts to increase opportunities for loan modifications. Few of these efforts involved third-party mediation. More focused on longer notice-to-sale periods, but also on additional notices, connections to hotlines and housing counselors, and related procedures. Some of the efforts to encourage modifications involved mediation, but some of these laws, such as those in California, provided for exemptions from mediation requirements if servicers were involved in other loan modification programs such as the federal HAMP program.

• The two states with relatively long post-sale redemption periods (Michigan, Minnesota) moved towards either shortening these periods for abandoned properties or essentially converting post-sale redemption time into presale notice time.

• Very little legislative activity addressed the regulation of servicers or processes that would directly address the problems with mortgage and foreclosure document issues that have become so well publicized since the last quarter of 2010. While the increased media attention will likely spur at least some increased attention to these issues in state legislatures, in nonjudicial states at least, little to no attention was being paid to these problems prior to the summer of 2010.
Introduction

The foreclosure crisis of the early twenty-first century continues to defy simple solutions and predicted ending points. It began as a surge in subprime foreclosures in a limited number of weaker housing markets as early as 2004 and 2005, and was initially suppressed in many areas by rapidly rising home values. By the second half of 2006, however, home prices in most places had either flattened out or turned down, and foreclosures began to spike in more places, especially in metros that had previously experienced rapid price appreciation fueled by subprime and exotic home loans. Vicious cycles set in quickly, and within months, the formerly hot sand state regions (FL, AZ, NV, CA) led the nation in foreclosure rates. By 2009, as unemployment continued to rise, the number foreclosures of prime loans had begun to overtake the number of subprime foreclosures (due in large part to a declining number of still-active subprime loans). In many cities this meant that the foreclosure problem spread both geographically and demographically. As of early 2011, while delinquency rates had generally stabilized, and in some places declined a bit, serious delinquencies remain at historically high rates. With continuing weaknesses in most housing markets, the prospects for substantial declines in foreclosures remains somewhat dim in the near term.

This report focuses on legislative responses among states with nonjudicial foreclosure regimes – where mortgage foreclosures are conducted largely outside of the court system – during the second half of the 2000s. The goal is to describe the sorts of measures that legislators took to modify or improve the single-family (1-4 unit) residential foreclosure process – usually with the aim of reducing foreclosures – in response to the crisis and to identify some of the places where more aggressive legislative responses were mounted.

Nonjudicial foreclosure regimes are generally less friendly to the borrower and more advantageous to the lender than judicial regimes. They tend to provide borrowers with substantially shorter notice periods and fewer opportunities to seek loan modifications or legal assistance. Moreover, states with nonjudicial systems tend to impose fewer duties on the part of the lender and place the burden on the borrower to slow or challenge the foreclosure process. Nonjudicial foreclosure regimes provide no structured opportunity for a borrower to have a judicial hearing in which to contest issues of default or the validity of a foreclosure.

The recently publicized problems with improper foreclosure procedures and fraudulent or missing documentation constitute a prime example of the advantages of a judicial foreclosure process to the borrower. The suspensions of foreclosure proceedings by large servicers that occurred in late 2010 began in judicial states only, having been prompted by court cases in these states. Such problems are very difficult to detect in most nonjudicial states because borrowers must generally initiate extraordinary interventions in the foreclosure process by filing suit to stop the regular foreclosure proceedings – a difficult and expensive process in most nonjudicial states. Moreover, because foreclosure law in nonjudicial states tends to include fewer borrower
protections, the potential for success in the courtroom is often more limited, which also makes legal representation harder to obtain.

Many of the recent, more substantive efforts to reduce foreclosures, including mediation programs, have been commonly found in judicial foreclosure states. ¹ There are at least two key reasons for this. First, the nonjudicial/judicial status of a state is itself an outcome of the state’s historical political environment. That is, states that tend to be more oriented towards consumer protection and the regulation of banking and finance tend to have judicial foreclosure systems. This is not an ironclad relationship, as some nonjudicial states exhibit stronger sets of consumer protection and lending regulations than some judicial states. On average, however, this correlation tends to hold and is generally the result of differences in ideologies and balances of power in the legislative and executive branches across different states. Nonjudicial states often have state legislatures where it has been historically more difficult to pass strong borrower-oriented foreclosure laws. While some change might be expected in light of the foreclosure crisis, state legislative environments in this arena are unlikely to shift very quickly. ²

A second reason why judicial states are likely to have seen more efforts to slow or reduce foreclosures is one of systematic inertia. That is, the judicial process fundamentally offers more time and opportunity for incremental interventions, such as mediation programs, than nonjudicial systems where such interventions are more difficult to design and implement without making major changes to the foreclosure process. One example is the issue of timing. Adding a mediation requirement to a foreclosure regime may add a few months to the typical foreclosure process. In many nonjudicial states this would mean increasing the foreclosure notice period by 100 percent or more, while in many nonjudicial states this would be a substantially smaller proportional increase in the overall foreclosure timeline. A second example is that judicial process affords a borrower opportunity to challenge not only the existence of an underlying default in payment of the debt, but also opportunity to challenge the authority of the lender to initiate a foreclosure. Judicial authority and discretion create far greater latitude to respond to sudden changes.

Much more is known about foreclosure prevention and mitigation efforts in judicial states, in part because many of the most substantive and radical changes to the process have occurred in such states. From the borrower’s perspective, pushing more states to adopt judicial foreclosure

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procedures would certainly seem desirable, especially in light of the documentation and legitimacy problems so well publicized over the last few months. However, achieving such a profound shift will be extremely difficult in many states, at least in the near term. In many cases, it may be more politically viable to work towards incremental changes in existing foreclosure law that might help to tilt the foreclosure process more in favor of the borrower and help mitigate foreclosures.

The goal of this paper is to identify efforts to reduce foreclosures in nonjudicial states given the constraints typically faced in such markets. Because state policy in this area interacts heavily with federal efforts to reduce foreclosures, especially during the mortgage crisis, we first review federal foreclosure prevention initiatives, which began in earnest in 2007. In addition, changes to state law are not the only sort of measures that states can take, and because local responses can serve as important complements to state action, we also review examples of other, nonlegislative forms of state and local efforts to reduce foreclosures. This is critical context for understanding the limits and advantages of legislative responses to rapidly rising foreclosures. After reviewing some recent literature on state foreclosure laws, we then analyze changes to state foreclosure laws in nonjudicial states from January 2005 through May 2010. After identifying states with relatively high levels of legislative activity in this area, we describe some of the more significant changes that occurred in some of these states.

Nonjudicial vs. Judicial Foreclosure

Each state is unique in precisely how foreclosures are handled. In general, however, state foreclosure regimes tend to be classified as judicial or nonjudicial. In a judicial state, the foreclosure process goes through the court system. Lenders are typically required to give notice before filing the foreclosure complaint. After allowing the buyer time to respond to the notice, the complaint is served. If the borrower does not respond to the complaint, her case proceeds to a default judgment and the foreclosure sale is authorized by the court. If a borrower files a response, the case goes to trial, resulting in decision authorizing a foreclosure sale, or an order dismissing the complaint and forcing the lender to recommence the action at a future date. On the other hand, in the majority of states, where nonjudicial foreclosure is the predominant method, the lender typically only needs to send a notice of sale to the homeowner, place an advertisement in a local paper, and hire an auctioneer to sell the property. In order to stop a foreclosure sale in a nonjudicial state, the homeowner must file an affirmative court action to try to stop the sale.

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3 Note that the end of our data collection period was significantly before the widespread media coverage of documentation and procedural issues in the latter part of 2010.

4 Borrowers may also file for bankruptcy to interrupt the foreclosure process, although this entails significant costs to the borrower, including those of a damaged credit record.
It is important to note that, even among nonjudicial foreclosure states, there is a great deal of variation in state foreclosure policies. Some nonjudicial states require much longer notice periods than others, for example. In some states lenders have the option – sometimes contingent on the nature of the loan or property – of utilizing either a judicial or nonjudicial foreclosure process. Depending on the state, choosing nonjudicial foreclosure may mean that the lender gives up some of its claims during or after the foreclosure process, such as the ability to pursue a deficiency judgment. In states where nonjudicial foreclosure is an option for residential, single-family foreclosures, most lenders tend to use the nonjudicial process when it is available. In all states, including the nonjudicial foreclosure states, a lender always has the option of pursuing foreclosure through a judicial process.

Due to the particularities and variations in state foreclosure law, the distinction between “judicial” and “nonjudicial” states is not completely definitive and is subject to gray areas. For the purposes of this study, we have chosen to err on being over-inclusive when determining which states to classify as nonjudicial. As a result, we consider 33 states and the District of Columbia as nonjudicial, leaving 17 states classified as judicial. The nonjudicial states are listed in Table 1.

A key difference between foreclosures in nonjudicial versus judicial states is that the foreclosure process tends to move much more quickly in nonjudicial states, giving borrowers less time to respond to the foreclosure notice, obtain counseling or legal advice, seek a loan modification, or obtain another foreclosure alternative. One measure of the speed of the foreclosure process in a state is the summation of times that are required by the steps of the process prescribed by statute, from the date of the initial notice of default or foreclosure to the date of the foreclosure auction or sale – what we call the statutorily prescribed minimum “notice-to-sale period.” This period typically begins with some sort of notice that the lender provides to the borrower that the loan is in default and that foreclosure may be pursued or an initial advertisement announcing the date of the pending foreclosure sale. Assuming a property goes through a foreclosure sale, the “notice-to-sale period” ends on the date of the foreclosure sale or auction.

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5 A deficiency judgment, when it is allowed, occurs when the lender is not able to recover the full amount of the outstanding balance and fees by selling the foreclosed property. It allows the lender to pursue the borrower for the balance of the debt in excess of either the foreclosure sale price, or the fair market value of the property at the time of foreclosure.

6 Our list is similar to that in John Rao and Geoff Walsh, 2009, *Foreclosing a dream: State laws deprive homeowners of basic protections*, February, Washington DC: National Consumer Law Center, retrieved December 2, 2010 from http://www.nclc.org/images/pdf/foreclosure_mortgage/state_laws/foreclosing-dream-report.pdf. Rao and Walsh categorize 30 states and the District of Columbia as nonjudicial. Our list is deliberately a bit more inclusive in favor of the nonjudicial category. The three states that we categorize as nonjudicial that they do not include are Colorado, North Carolina and North Dakota. Colorado and North Carolina foreclosure processes have very minimal roles for the courts and essentially follow a nonjudicial process. North Dakota permits some residential mortgages to go through nonjudicial foreclosure but most go through a judicial process.

7 The statutorily prescribed minimum notice-to-sale period may differ substantially from the actual time that a borrower is considered to be in the foreclosure process. In general, the latter will tend to be a longer period, especially when the foreclosure process slows down significantly as it has in many states since the foreclosure crisis began.
Table 1. Nonjudicial Foreclosure States

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Figure 1 shows that judicial states tend to have substantially longer prescribed notice-to-sale periods than nonjudicial states. The bulk of judicial states have periods of over 100 days and a substantial number have periods over 200 days. Conversely, no nonjudicial states have prescribed notice-to-sale periods of over 200 days and most are under 100 days.

The Context for State Legislative Response: Federal Policy and State and Local Nonlegislative Actions

Before examining state legislative efforts to reduce residential foreclosures during the latter half of the 2000s, it is important to consider the policy context in which legislative actions were being considered. For example, it is possible that state legislative efforts to slow the foreclosure process or provide better notice to homeowners would have been less common if federal foreclosure prevention and loan modification efforts had been more successful early on. Local efforts to reduce foreclosures, such as programs reaching out to borrowers to provide counseling or legal assistance, might have been more promising if federal loan modification efforts had been designed differently or if servicers had been held more accountable for their performance in the modification process. As discussed below, the presence of bankruptcy modification for owner-occupied, principal residence mortgages may have made the greatest difference to foreclosure prevention efforts because it would have given lenders a strong disincentive for failing to achieve sustainable loan modifications. Conversely, federal resources were key to funding the housing counseling services made available for foreclosure prevention because states and localities had
Figure 1. Distribution of Prescribed Notice-to-Sale Period for Judicial and Nonjudicial States

few resources to devote to such activity, especially as the recession worsened. At the same time, legal assistance for borrowers did not receive commensurate increases in support, so that many borrowers did not have access to the legal resources that they needed.

**Federal Policy Efforts to Reduce Foreclosures**

As the subprime crisis intensified in the spring of 2007, Federal Reserve Chairman Ben Bernanke and HUD Secretary Alphonso Jackson called for federal funding for foreclosure prevention counseling. In the fall, Senator Richard Durbin (D-IL) introduced the Helping Families Save Their Homes in Bankruptcy Act, which would have allowed bankruptcy judges to modify the balance owed on owner-occupied home loans, an action called a “cramdown.” Without this change, bankruptcy judges could modify the balance due on a vacation home or an investment property but not on a loan secured by an owner-occupied primary residence. The Durbin bill would have removed this exclusion temporarily, providing direct relief to those filing for bankruptcy and giving lenders and servicers an incentive to modify loans voluntarily before the borrower filed for bankruptcy. Such a change would, in essence, have created a maximum net present value to the residential loan, a benchmark by which to measure loan modifications. Industry lobbyists successfully blocked the bill however.

At roughly the same time as Durbin introduced his bill, the Bush administration announced the Hope Now Alliance, which included lenders, industry groups, NeighborWorks America, and other organizations. Hope Now focused on encouraging borrowers to call a 1-800 number to receive telephone credit counseling. In December, 2007, while opposing continued calls for bankruptcy modification legislation, the Administration announced an effort to promote “streamlined,” but voluntary, modifications for a subset of subprime mortgages. The plan was developed in conjunction with the American Securitization Forum, the structured finance trade group. Its voluntary nature and other problems with the initiative limited its impact. Servicers and the Hope Now Alliance were under pressure to report large numbers of modifications, but Alan White found that only 35 percent of modifications resulted in reduced payments, and in 45 percent of cases payments actually increased.

In July of 2008, with foreclosures continuing to escalate, Congress passed the Housing and Economic Recovery Act (HERA) of 2008. HERA was a complex bill that included the formation of a stronger regulator for Fannie Mae and Freddie Mac, the authorization of the Neighborhood Stabilization Program, tax breaks for residential builders, a first-time homebuyer’s tax credit, and other initiatives. The largest foreclosure prevention component in HERA was the $300 billion

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Hope for Homeowners program, commonly referred to as the “H4H” program. H4H was to be run by the Federal Housing Administration (FHA) to refinance distressed borrowers. As initially implemented, H4H required lenders to write-down existing mortgages and refinance borrowers into loans for not more than 90 percent of their homes’ current values. However the program was not designed to deal with the many borrowers, especially in high-cost areas, who had second and sometimes third mortgages layered on top of their primary loans. Holders of junior loans were not inclined to agree to refinancings that would wipe out their interests. As a result of this and other problems, the program received only 312 applications from across the entire country in its first two and one half months of operation. HUD modified the program in November 2008 by increasing the maximum loan amount to 96.5 percent of appraised value for some loans, but the changes did not make the program effective.

In September 2008, Treasury Secretary Henry Paulson proposed the $700 billion Troubled Asset Relief Program (TARP) and, after some fits and starts, it was included in the Emergency Economic Stabilization Act (EESA), which was signed into law in October. However, in implementing EESA, the Bush Administration declined to use any TARP funds for a direct program to assist homeowners at risk of foreclosure even though EESA gave it the authority to do so. In January 2009, the incoming Obama administration obtained Congressional approval to draw down the second half of the $700 billion TARP, even before President Obama officially took office. The incoming director of the National Economic Council wrote to Congress that the new administration would use $50 to $100 billion of the funds for foreclosure mitigation. The letter also suggested that the new administration would seek to change bankruptcy laws to permit cramdowns of primary residence loans.

In February 2009, the Obama Administration announced its much-anticipated plan to reduce foreclosures, the Making Home Affordable (MHA) program. In addition to pledging more capital to the government-sponsored enterprises (GSEs), MHA included two primary programs. One program, the Home Affordable Refinance Program (HARP) allowed for the refinancing of existing GSE loans up to 105 percent of the current value of the home. The second and more ambitious component of MHA, the Home Affordable Modification Program (HAMP), called on lenders to reduce mortgage payments to 38 percent of borrower income, after which the federal government would pay 50 percent of the cost of reducing them to 31 percent of income. The plan

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provided some compensation to servicers and annual incentives to borrowers who remained current. HAMP also provided a federally sanctioned protocol for evaluating borrower claims for loan modifications and for implementing the modification process. The hope was that this protocol would increase the pace of payment-reducing modifications.

The announcement of HAMP was complemented by the near simultaneous introduction of HR 1106, which, among other things, resurrected the bankruptcy modification proposal. The Senate rejected the cramdown provision however. The final bill, the Helping Families Save Their Homes Act (HFSTHA) did include a requirement that, for most mortgages, lenders would now be required to provide tenants of foreclosed properties with 90-day notice prior to eviction. This was an important part of the bill, not only due to its intended protection for tenants, but also because it represented the first time that federal law intervened directly in the foreclosure process. While some states have adopted their own tenant notification laws, HFSTHA set a new floor for tenant protections in the event of foreclosures and so may have reduced the level of state activity in this area.

Without the stick of bankruptcy modification, HAMP relied chiefly on modest carrots—small incentive payments to servicers and borrowers. The Administration hoped that HAMP would result in more than three million permanent mortgage modifications. Although it was a more substantive and ambitious effort than the industry-led Hope Now alliance, HAMP took a very long time to generate any results. As of October 2010 HAMP had produced almost 1.4 million initial modifications, but fewer than 500,000 of these had moved past the trial period and become permanent. Moreover, by late 2010, even the pace of temporary modifications had begun to slow.

Besides the challenges of growing numbers of unemployed borrowers, HAMP also was not well suited to dealing with the problem of underwater borrowers whose homes were now worth less than their outstanding mortgage. Without realigning loan balances with property values, borrowers with severe negative equity had limited motivation to maintain ownership of their houses, especially if it meant defaulting on other debts or placing severe strains on household finances. At the same time, without the threat of bankruptcy modification, servicers and investors had limited incentive to make sustainable loan modifications in numbers large enough to affect foreclosure volumes. Moreover, unemployment became an increasingly important driver of foreclosures, and the portion of foreclosures that could be prevented via modest interventions declined.

Another TARP-funded program was the Housing Finance Agency Innovation Fund for the Hardest Hit Housing Markets (or the “Hardest Hit Fund”). In February 2010, the Obama…

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13 The tenant notification provisions in HFSTHA sunset at the end of 2012.
Administration announced that $1.5 billion in TARP funds would be made available to five states hit hard by the foreclosure crisis. These funds were aimed at promoting “innovative measures” to help families directly affected by the foreclosure crisis. The five states—Arizona, California, Florida, Michigan and Nevada—were those that experienced house price declines of more than 20 percent from their peak values. The funding would flow through state housing finance agencies, which have a great deal of experience with designing and implementing mortgage revenue bond and homeownership financing programs.

In late March, 2010, the Administration announced a second round of the Hardest Hit Fund (HHF) involving $600 million in additional funding to five more states, including North Carolina, Ohio, Oregon, Rhode Island, and South Carolina. These states qualified for funding based on having large numbers of people in counties with high unemployment rates. Two additional rounds of HHF funding followed. Round 3, which was awarded to states with high unemployment rates, included $2 billion for 17 states and the District of Columbia, including additional funding for nine of the ten states in Rounds 1 and 2 (all except Arizona). A fourth round of funding which was announced in late September included $3.5 billion in additional funds for states funded in Rounds 1, 2 or 3. The third round of HHF funds was designated specifically for programs to help unemployed homeowners make their mortgage payments over a specified period, while the fourth round was somewhat more flexible and could be allocated to existing programs by Round 1 and 2 states.

State and Local Nonlegislative Action

The most common state and local foreclosure prevention efforts include outreach and counseling, financial assistance, and legal assistance programs, all of which tend to rely heavily on federal resources. These efforts are sometimes coordinated or organized via statewide or local foreclosure prevention task forces or networks. They may also be complemented by community organizing aimed at holding lenders more accountable so that they can increase responsiveness to borrowers’ needs and circumstances and help borrowers move through loss mitigation and loan modification programs with greater opportunities for success.

- Outreach and Counseling

Housing counselors help assess the financial hardship of borrowers, determine the options available to them, advocate for borrowers, and serve as a liaison between borrowers and lenders. Federal legislation was created in 2007 to fund a national network of counselors through the National Foreclosure Mitigation Counseling (NFMC) program, administered by NeighborWorks

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America. Some states and cities have supplemented this funding through their own initiatives, and nonprofit organizations have responded by augmenting their staff and programs to attempt to meet much higher demand for services.

Foreclosure prevention counseling appears to make a significant difference in reducing foreclosures. The Urban Institute’s recent evaluation of the NFMC program found that in the first two years of the program, the odds of counseled borrowers curing their loans and avoiding foreclosure were 70 percent higher than if they had not received counseling via the program. This translates to 32,000 homeowners avoiding foreclosure by the end of 2009 than would have been the case without having been served by NFMC counselors.

One of the key challenges for foreclosure prevention counseling programs is to reach out effectively to at-risk homeowners. Counselors and foreclosure prevention task forces have employed innovative approaches to attempt to reach these borrowers. In Grand Rapids, Michigan, local residents and organizations created Foreclosure Response, a comprehensive clearinghouse made up of a diverse group of stakeholders to disseminate information and coordinate interventions. Its Eyes Wide Open Program enlists the help of neighborhood residents as “volunteer monitors” to spread the word about counseling to neighbors having trouble making payments and to report neglected vacant homes. Foreclosure Response has also implemented place-based targeted marketing, outreach, and education efforts.

The Michigan AmeriCorps Foreclosure Corps program was created by the Michigan Coalition Against Homelessness, the Michigan Foreclosure Task Force, and the Community Economic Development Association of Michigan. It employs AmeriCorps members to conduct volunteer training, community outreach, client intake, and educational workshops. AmeriCorps has partnered with NeighborWorks nationally to provide 168 VISTA volunteers at 67 organizations in 35 states to help provide organizational capacity to nonprofits stretched thin responding to their local foreclosure issues. Other volunteer organizations and university internships could be pursued to provide a low-cost staffing alternative to help provide the number of people necessary to implement short-handed programs.

- Financial Assistance

Another intervention that has been attempted in some nonjudicial states is providing direct financial assistance to borrowers. Prior to the advent of the Hardest Hit Fund program, most state


and local efforts to provide direct financial assistance involved attempts to refinance borrowers into lower-cost, fixed rate loans, or to provide emergency loans to borrowers with arrearages that were preventing them from getting current on their mortgages. States such as Maryland, Massachusetts, and Michigan were among those that created refinance programs. In general, the scale of these sorts of refinancing programs tended to remain modest for at least two reasons. First, many borrowers had loans that were simply too large to refinance without first receiving a principal reduction from the existing lender (i.e., getting what is known as a “short refinance”). Also, as foreclosures became more associated with unemployment and less with high-cost loans, the opportunities to resolve problems by simply replacing high-cost with low-cost financing declined.

Some states have provided short-term emergency assistance programs to cover late payments and other arrearages for borrowers who, once these arrearages were resolved, could afford their existing loan or could qualify for some sort of loan modification. For example, even before receiving resources from the federal Hardest Hit Fund, which is being used by some states to fund such programs, North Carolina had already established its Homeowner Protection Program to provide loans to homeowners who had lost their jobs.\(^\text{19}\)

- **Legal Assistance**

Borrowers in most nonjudicial states are often faced with rapid foreclosure processes, and already financially strapped homeowners must take affirmative legal action against their lenders in order to prevent or delay the foreclosure process. These homeowners are often unable to afford legal counsel or navigate the legal system on their own, and may be unsure of where to turn to for legal advice. This can make homeowners particularly vulnerable to foreclosure rescue scams. Moreover, most legal aid programs are income- or age-restricted. Even when income or age restrictions are not an issue, the very high levels of foreclosures mean that most legal aid programs have to ration resources toward those seen as most deserving or most capable of keeping their homes. In addition, the availability in of legal assistance lawyers who are adequately trained in foreclosure law is uneven in some regions.\(^\text{20}\) Some states and localities have responded by partnering with bar associations to provide pro bono assistance to homeowners at risk of foreclosure. For example, Arizona’s Lawyers Helping Homeowners (LHH) is coordinated by the State Bar of Arizona, Arizona Foundation for Legal Services and

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Education, and the Arizona Supreme Court. The program assigns pro bono attorneys to income-eligible homeowners facing foreclosure.\textsuperscript{21}

Unfortunately, it is usually difficult to build a strong program of legal assistance for homeowners via solely pro-bono efforts. Substantial increases in legal aid funding are required. While federal funding for housing counseling has increased significantly since the advent of the foreclosure crisis, efforts to increase funding for legal-assistance-based foreclosure prevention have not received as much support. In awarding more than $7 billion to states through the Hardest Hit Fund, the Treasury Department has allowed some of those funds to be used for counseling but has expressly prohibited states from devoting any of their HHF resources to legal assistance for borrowers.\textsuperscript{22} Moreover, as federal, state and local budget pressures continue, legal aid programs may face even greater resource constraints.

- \textit{Community Organizing and Advocacy}

One of the weaknesses in many of the efforts to reduce foreclosures has been the heavy reliance on incentives alone to encourage banks to work with borrowers, modify loans, and otherwise mitigate foreclosure problems. Federal policymakers have refrained from compelling lenders or servicers to modify mortgages or to employ any sort of substantive “stick” in encouraging more loan modifications.

One approach that some locally based organizations have taken is to combine housing counseling with targeted community organizing and advocacy, aimed either at changing public policy or at persuading lenders and servicers to work more aggressively to reduce foreclosures. Around the country, perhaps no other group has been viewed as more effective in this area than Empowering and Strengthening Ohio’s People (ESOP). Formerly called the East Side Organizing Project because of its focus on the east side of Cleveland, ESOP has a long history of negotiating with banks around local lending practices. In response to the foreclosure crisis, ESOP developed a strategy called “rank ‘em and spank ‘em”.\textsuperscript{23} It calls meetings of homeowners to decide which lender is the worst to deal with and then campaigns to get the lender to sign a commitment to systemic modifications. By the fall of 2008, ESOP had 12 signed agreements to modify mortgages that covered roughly 20 lenders and servicers. ESOP also participated in counseling, with workout rates of more than 75 percent.

While ESOP operates in Ohio, a judicial foreclosure state, there have been significant organizing campaigns to reduce foreclosures in nonjudicial states. In California, the Contra Costa Interfaith

\begin{footnotesize}
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\item National Governors Association. \textit{Emerging trends: State actions to tackle the foreclosure crisis}. February 2009.
\item Swanstrom, Chapple, and Immergluck (2009).
\end{enumerate}
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Supporting Community Organization (CCISCO) has demanded meetings with lenders and servicers. CCISCO has also tried to persuade the county to slow down the foreclosure process by not allowing its sheriffs to deliver foreclosure notices unless the servicer has made a good faith effort to do a loan modification. They also engaged in a campaign to persuade the City of Richmond to stop doing business with banks with high local loan default rates.

In Georgia, the Atlanta Fighting Foreclosures Coalition (AFFC) is a group of approximately 40 organizations including unions, housing groups, civil rights groups and others who have advocated to change public policy and to pressure large servicers to work with borrowers towards better and more loan modifications. AFFC was successful in getting one servicer to halt its foreclosures temporarily and drew the national leadership of the AFL-CIO into discussions with another servicer.

- The Role of State Leadership

State political leaders have taken a variety of nonlegislative steps to attempt to reduce foreclosures. These include establishing statewide task forces and negotiating agreements with servicers to improve loan modification and loss mitigation efforts. At least 24 states—both judicial and nonjudicial—have organized comprehensive task forces to address the foreclosure problem. These task forces bring together public and private stakeholders to identify priorities and work toward solutions to reduce foreclosures and mitigate their impacts. The Massachusetts Division of Banks organized a task force that focused on rules and enforcement, consumer education, and foreclosure assistance. In Colorado, a task force created a foreclosure hotline as one defense against unnecessary foreclosures. Some of the work of these task forces may eventually lead to changes in state foreclosure law.

Several governors have established agreements with banks that service large numbers of loans in their states. The specific terms of the agreements include freezing adjustable interest rates, streamlining loan modification efforts, and reporting progress back to state government. Nonjudicial states that have implemented these types of agreements include California, Michigan, Minnesota, and Maryland. Maryland’s governor negotiated an agreement with six servicers to provide homeowners a timely answer after submitting loss mitigation packages, halt foreclosure while considering the mitigation, designate representatives who will serve as point of


contact during the foreclosure process, and establish staff incentives for loan modifications. These six servicers make up 23 percent of the loans in Maryland.28

Michigan’s governor reached an agreement with four major servicers. The servicers agreed to reach out to at-risk borrowers, streamline modifications, and offer a five-year interest rate freeze. They also agreed to make regular reports to the Michigan Office of Financial Insurance on their outreach and modification efforts.29 Minnesota’s Department of Commerce created the Minnesota Foreclosure Prevention Compact with lenders and servicers in the state. The compact involves voluntary mediation, prevention workshops, working with counselors, streamlined modification, and reporting progress to the Department of Commerce. It also requires lenders to submit homeowner contact information to counselors when the foreclosure process is initiated.30

Besides governors, attorneys general in some states – including some nonjudicial states – have been key leaders in addressing the foreclosure crisis. They have pursued mortgage lenders and servicers over violations of consumer protection and fair lending laws. One of the outcomes they often seek in pursuing these issues is the establishment of a program to improve and increase loan modifications.

In October 2010, for example, eight attorneys general – from Arizona, Illinois, Florida, Colorado, Nevada, New Jersey, Texas and Washington – reached a settlement with Wells Fargo, which agreed to pay $24 million and reduce by about $400 million the amount owed on certain mortgages. The settlement followed an investigation of the marketing of risky, payment-option mortgages by Wachovia Corp. and Golden West Financial Corp., the operations of which had been eventually assumed by Wells Fargo.31 For loans covered by the agreement, Wells Fargo would initially reduce a loan's balance to 150 percent of the home's value. Additional steps could include reducing the loan's interest rate, extending the term of the loan and other changes that reduce a borrower's monthly payment to no more than 31 percent of gross monthly income. Borrowers who make three years of timely payments could qualify for an additional principal reduction.

Key Findings from Recent Studies of State Foreclosure Law

Over the last two years, there have been a number of analyses of state foreclosure law and efforts to modify such law to reduce foreclosure levels. These include reports issued by the National Governors’ Association, the National Consumer Law Center, the Center for American Progress,

28 Pierce. 2009.
and the Pew Center on the States. Together, these studies provide excellent information on state foreclosure systems and on some of the efforts aimed at reducing foreclosures. They differ significantly from this report however. Some focus on particular types of policies, such as mediation, or on developing normative ratings of the various state foreclosure regimes. None of these studies focuses particularly on nonjudicial states and most do not aim to provide a comprehensive picture of legislative actions during the foreclosure crisis.

In this section, we describe some selected, key findings from these previous studies, with an emphasis on their assessment of changes in state foreclosure law in recent years. Taken as a whole, this recent literature tends to focus on efforts to improve loan modification and loss mitigation efforts, especially via interventions such as mandatory or voluntary mediation programs. The National Consumer Law Center report is somewhat unique in that it evaluates – at a point in time – the adequacy of state foreclosure procedures from the borrower’s perspective.

A number of states have taken action to halt the foreclosure process for a period to allow the opportunity for loan workouts and mediation. California, Colorado, Michigan, and Nevada are among states that have issued temporary delays at some point. In the summer of 2009 California imposed a 90-day moratorium on foreclosure proceedings but loopholes in the law compromised its effect. All the major loan servicers were allowed to continue unabated because they had comprehensive loan modification programs already in place. As a result, most foreclosures were unaffected and the law had minimal impact. Nevada's law provides that the borrower's election to participate in an optional mediation program can halt foreclosure proceedings until the mediation is complete, allowing the time necessary to conduct a thorough loan evaluation.

A number of states have sought to protect distressed homeowners from foreclosure rescue scams that prey on their confusion and fear. These states have enacted greater restrictions on programs that promise to avoid foreclosure through various means but are in fact scams designed to exploit a distressed homeowner. The laws typically require full disclosure of a program's terms and conditions, a 'right to rescind' period for homeowners, a limitation on the consulting fees that can

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33 Some of these reports also cover changes in lending and consumer protection policies aimed at the originations of new loans.

34 Rao and Walsh, 2009.

35 Stewart, 2010.

36 Cohen and Jakobovics. 2010
be charged, and terms that prevent the transfer of property to the consultant. The legislation often includes penalties for violating these regulations to allow greater enforcement.\textsuperscript{37} Maryland was one of the first states to pass such a law in 2005 and several other states have followed suit, including Colorado, Massachusetts, Minnesota, and New Hampshire. Maryland's emergency legislation prohibits predatory behavior from foreclosure consultants and allows homeowners to collect damages if those provisions are violated. Colorado's Foreclosure Protection Act prohibits up-front fees, requires agreements to be made in writing, and creates a three-day rescission period for any contract signed with a foreclosure consultant.

Many states have passed mediation program legislation in an effort to have servicers and homeowners explore mutually beneficial alternatives to foreclosure. The goal of these programs is to avoid unnecessary foreclosures by reaching solutions that benefit all parties: homeowners get to remain in their homes more often and servicers reduce their losses from the foreclosure process. Such settlements occur in up to 70 percent of mediation cases.\textsuperscript{38} In other cases when a mortgage is too onerous for a homeowner even after mediation, the process can facilitate a quicker resolution by negotiating a 'graceful exit' for the homeowner such as the lender agreeing to accept a deed-in-lieu or a short sale.

Twenty-one states—most with judicial foreclosure regimes—had implemented foreclosure mediation programs by mid-2010 and several more were considering similar legislation, up from 14 states less than a year earlier.\textsuperscript{39} These states vary in their approach, but all are striving to provide workable alternatives to foreclosure.

Nevada is the first nonjudicial state to institute a mediation program.\textsuperscript{40} The state legislature passed the law in May 2009 in an effort to stem the flood of foreclosures there. The program began two months later and refers non-judicial foreclosures to a court-supervised mediation process. It is a voluntary program that the homeowner must elect to enter within 30 days of being served a notice of intent to foreclose. Both parties, the servicer and the borrower, must contribute equally to the mediation fee before the process begins. The servicer must provide a current appraisal of the property and documentation proving their standing as mortgage-holder during the mediation process. They must be represented by someone with the authority to finalize a settlement and must negotiate in good faith. Once in the program, the foreclosure


\textsuperscript{40} Cohen and Jakabovics, 2010.
proceedings are suspended until the mediator certifies either a settlement or that the parties acted in good faith but could not reach an agreement.

Two features are particular to the Nevada program: the documentation requirement and the good faith requirement. Producing documentation of loan ownership has proved difficult for many servicers and may be contributing to a lower foreclosure rate since the program was instituted. The good faith requirement allows better enforcement of the intent of the program. If the mediator determines that the servicer is not negotiating in good faith he can recommend the case to the court to impose sanctions including the forced acceptance of a settlement determined by the judge. However, there have been some complaints that the program’s mediation administrator has impeded enforcement of this provision.

California has a very different, and arguably less effective, approach to loan negotiation than Nevada. California law only requires a telephone conference between the parties before foreclosure instead of formal face-to-face mediation with a neutral third-party. The law does not require the servicer to include someone with the authority to modify the loan on the phone call, thus limiting the extent of changes that can be made. The homeowner has 14 days from being served the notice to call a 1-800 number that will provide a list of local housing counselors to assist them but contacting the counselor is not required by law either. Because there is no third-party supervision, the servicer only has to certify that it made an attempt to contact the homeowner. This significantly weakens the implementation of the law. In light of negative feedback from participants and an unchanging rate of foreclosure, some have tried to revise the law by including a third-party monitor with the power to participate in the discussions. These measures have met with resistance in the state legislature due to funding concerns because the program, unlike Nevada’s, does not charge any fees.

A survey of these and other existing mediation programs identifies several important considerations for states moving forward with these efforts. Two of the biggest issues are how mediation is scheduled and how the results of the programs are tracked. Most states utilizing mediation have made it voluntary instead of automatically scheduled and have suffered from low participation rates as a result. After ten months of implementation, Nevada's program only had a 21 percent participation rate. Automatically scheduling mediation efforts is crucial to creating

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42 Some critics of the implementation of the program have argued that administrator has prohibited mediators from effectively sanctioning lenders even though the authorizing statute specifically provides for such sanctions. Comments by Phil Olsen on KNPR Nevada Public Radio, Mortgage Mediation Program, January 3, 2011. Retrieved on January 12 from http://www.knpr.org/son/archive/detail2.cfm?SegmentID=7465&ProgramID=2131.


44 Cohen and Jakabovics, 2010.

45 Cohen and Jakabovics, 2010.
greater participation among eligible borrowers. The other significant issue is a lack of adequate outcome reporting in many existing programs. California, Nevada, and Michigan have no formal reporting requirements at all and other programs tend to collect only broad information that does not provide useful detail. This makes it difficult to assess programs, recognize trends or problems in a locality, and share best practices among states.

Another issue is the distinction between negotiation and mediation programs. States like California, Michigan, and Oregon that utilize negotiation lack a neutral third party to monitor the proceedings. Mediation is likely to provide greater accountability by requiring a neutral third party. A fourth issue is the timing of mediation within the foreclosure process. It should occur as early as possible to maximize its benefits and permit enough time to complete the process.

The Center for Responsible Lending (CRL) recommends a loan modification strategy called mandatory loss mitigation. This method requires the servicer to conduct an analysis of potential alternatives to foreclosure. Loss mitigation is part of some state foreclosure laws but is often not adequately enforced. CRL recommends including a loss mitigation application with any formal pre-foreclosure communication in order to gather necessary borrower information such as income and other debt obligations that help determine eligibility.

The CRL report also suggests requiring a loss mitigation analysis as early in the preforeclosure process as possible. The standards to conduct such an analysis should build off of existing regulations such as the federal HAMP requirements or those of other programs such as Fannie Mae, Freddie Mac, and FHA since doing so would avoid the need for each state to develop their own standards. Another recommendation is to require an affidavit which would explain to the homeowner why they did or did not qualify for a loan modification. This form would provide accountability for the homeowner to confirm the servicer used the correct inputs and would allow judicial intervention if necessary. The CRL strongly recommends including enforcement standards in the loss mitigation process that hold servicers responsible to both the borrower and the general public while giving states the power to police these efforts. Finally, mediation should be incorporated into the appeals process when a homeowner is denied a loan modification.

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An Analysis of Legislative Activity in Nonjudicial States

We now directly examine changes in state laws that affect the servicing, default and foreclosure processes of single-family (1-4 unit) residential mortgages. The intent is to understand the scale, scope and nature of the changes that state legislatures adopted as the foreclosure crisis developed and spread nationally. After first analyzing the numbers and types of adopted laws, as well as their relationship to a state’s foreclosure rate, we then identify a set of legislatively active states in different parts of the country and examine policy changes in these states more closely. The state legislative provisions that are the focus of this analysis cover practices and processes concerning previously originated mortgages and especially the handling of loans at some stage of delinquency, default or foreclosure. For contextual purposes we also analyze the frequency of laws affecting the origination of mortgage loans and, in particular, provisions to tighten the regulation of high-risk lending or to improve consumer protections in the origination process. However, the focus is primarily on nearer-term efforts to reduce foreclosures among loans that have already been originated.

Our primary approach was to begin by building a data set of all legislation adopted in nonjudicial foreclosure states from January 2005 to May 2010. For each of the 33 nonjudicial states and the District of Columbia, we used Westlaw to identify potentially relevant changes in law by searching the legislative service as well as the bill summaries databases since 2005. Depending upon the theory of mortgage law followed in a given jurisdiction, we searched for terms such as "deed of trust," "mortgage," "security deed," and "foreclosure." We reviewed thousands of enacted bills and code sections relating to the foreclosure process, culling the results to include only relevant pieces of enacted legislation. Once all enacted legislation was identified, each act was coded for the types of provisions that it contained. (These categories and subcategories are detailed in Figure 2.) Then, summations were tabulated across various categories of provisions and over the five-year period.

Figure 2 illustrates the categories and subcategories that were used to classify provisions enacted into state law from January 2005 to May of 2010. It also provides the distribution of the provisions across categories and subcategories. The four main categories of legislative provisions are those concerning: 1) the foreclosure sale/auction process itself, and processes and issues

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48 Not included here are legislative measures aimed at the problems associated with vacant, foreclosed homes and the spillover problems they impose on neighborhoods. These laws include statutes permitting localities to adopt vacant property registration ordinances, for example.

49 Our actual search terms were slightly different than these words, as they conformed to requirements of Westlaw's search function.

50 The term legislative “provisions” is used specifically to mean provisions within acts that were deemed to change some aspect of the mortgage process or requirements in the state. The number of such provisions is not equivalent to the “number of adopted bills” or the “number of acts” because one act may include multiple measures affecting different aspects of the mortgage or foreclosure process. Each act was coded for whether it had a substantive impact on each of the categories and subcategories identified. Thus, one act might be coded as falling into several categories.
Figure 2. Breakdown of Adopted Legislative Provisions: January 2005 to May 2010

immediately following the foreclosure sale/auction; 2) the preforeclosure-sale process,\(^{51}\) such as the establishment of mediation programs, notice requirements and procedures, rights to cure and reinstate, and direct efforts to slow or stop foreclosures such as forbearance programs or moratoria; 3) ancillary processes, including data collection and recording requirements; and 4) regulation of loan servicers. Figure 2 breaks out the second category into five subcategories, including those concerning: a) the availability or scope of nonjudicial versus judicial foreclosure;\(^{52}\) b) the availability of preforeclosure-sale mediation or counseling; c) changes to preforeclosure-sale notice or advertising requirements; d) presale rights of borrowers or tenants, including rights to cure or reinstate; and e) direct measures to prevent foreclosures such as forbearance, loan modification, or moratoria.

Provisions concerning preforeclosure-sale processes such as notice and advertising requirements, moratoria or forbearances, modifications, and other similar issues constituted 61 percent of the provisions enacted during the study period (January 2005 to May 2010). The next largest

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\(^{51}\) By “preforeclosure-sale process” we mean activities that occur between the time a loan becomes delinquent or in default and the time a foreclosure sale occurs and the property is auctioned either to a third party or to the mortgagee.

\(^{52}\) In some nonjudicial states, nonjudicial foreclosure is only available for certain types of loans.
categories were provisions concerning foreclosure sale, post-sale and deficiency issues, which accounted for 17 percent of all provisions, and various provisions concerning supportive processes such as data collection and recording issues, at 15 percent. Only 13 provisions (7 percent) concerned servicer regulation.

Of the 61 percent of provisions concerning preforeclosure-sale process issues, a bit more than half (32 percent of the 61 percent) concerned preforeclosure-sale notice and advertising requirements. The next largest subcategory, accounting for 13 percent of all provisions and just over 20 percent of the preforeclosure-sale process category, was that of provisions that directly prevented foreclosures at least on a temporary basis, such as moratoria or forbearance initiatives. Perhaps somewhat surprisingly, provisions calling specifically for the availability of counseling or mediation accounted for only 6 percent of all provisions. This is likely explained by the difficulty of requiring mediation or counseling activities within the structure of a nonjudicial foreclosure system. Such initiatives have been much more common in judicial states.\footnote{Jakobovics and Cohen. 2009.}

Changes in Legislative Activity over Time

Using the same underlying data described in Figure 2, we can identify the changes in adopted legislative provisions over time as the national foreclosure crisis developed in the late 2000s. Because legislative calendars vary across states and legislative activity ebbs and flows at different times in the year, however, rather than looking at the entire timeframe for which we have data (January 2005 through May 2010), for this part of the study we only look at laws enacted through calendar year 2009.

Figure 3 describes the changes in the number of adopted legislative provisions that were aimed at the foreclosure problem. The red line with circles is presented only for comparison purposes and shows the legislative provisions aimed at regulating the lending process and lending terms, including antipredatory lending laws, broker licensing, and other regulations affecting the origination of loans. It illustrates the level of activity aimed at the problem of predatory and high-risk loan originations, rather than on nearer-term efforts to reduce foreclosures among outstanding mortgages.

Figure 3 shows that the largest increase in legislative provisions aimed at the foreclosure problem, other than lending and consumer protection laws, were those concerning the preforeclosure-sale process, including those encouraging mediation efforts or loan modification, those requiring increased or earlier notices to borrowers, those changing the foreclosure timeline (typically expanding it), and those imposing some sort of a moratorium on foreclosures. These provisions remained essentially flat from 2005 to 2007 at seven to ten provisions adopted per year, but they increased quite rapidly in 2008 and 2009 as the national foreclosure crisis peaked. Nonjudicial states adopted 25 such provisions in 2008 and 45 in 2009.
The rise in lending and consumer protection provisions began earlier than the rise in the preforeclosure-sale process provisions, doubling from 21 to 42 from 2006 to 2007. These sorts of provisions continued to accelerate as the magnitude and nature of the subprime crisis and poor underwriting became more widely known. Of course, the collapse of many of the subprime originators and the retrenchment of mortgage market investors from the high-risk loan market were likely also factors in the greater adoption of such provisions, as the number, resources and political strength of opponents of such regulation diminished over this period.

In addition to changes in the preforeclosure-sale process, Figure 3 shows that there were modest changes in the number of provisions addressing the regulation of loan servicers and supportive processes such as data collection and reporting, and the recordation of foreclosure sales. The former increased from zero in 2006 (and one in 2005) to five in 2009 while the latter increased modestly from two to four in 2005 through 2007 to six in 2008 and 11 in 2009.

The one category in Figure 3 that does not show any consistent pattern of increased activity is that concerning foreclosure sale, post-sale, and deficiency issues. The annual number of these provisions bounced around from three to nine over the 2005 to 2009 period. It is important to note that this period (as well as the slightly longer period through May 2010 used in other analyses in this report) predates the high-profile attention given to problems with the foreclosure processes of many major lenders. Widespread awareness of this problem began in the fall of 2010 after the end of our data collection efforts. However, the results here suggest that some
legislatures gave at least modest attention to the loan servicing and foreclosure process even before these problems received national media attention.

Figure 4 breaks out the preforeclosure-sale process category shown in Figure 3 (purple line, square markers) into the five subcategories used in Figure 2. It shows that the preforeclosure-sale notice and advertising subcategory (subcategory c) experienced the largest increase in legislative activity and accounted for the greatest amount of activity in the 2007 to 2009 period. The number of provisions in this subcategory increased from 3 in 2006 and 5 in 2007 to 16 in 2008 and 19 in 2009. Legislative activity also increased noticeably in the area of foreclosure forbearance, modification and moratoria (from 0 to 1 in 2005 through 2007 to 7 in 2008 and 11 in 2009) and in the area of the availability of mediation and counseling (from 0 in 2005 through 2007 to 1 in 2008 and 8 in 2009). There was less increase in activity in the remaining two categories, presale rights of borrowers and tenants and the availability of nonjudicial foreclosure.

Provisions that Lengthened or Shortened the Preforeclosure-sale Process

One problem that distressed borrowers face in many nonjudicial states is a relatively short foreclosure timeline. In general, the notice-to-sale period in judicial states tends to be significantly longer than in nonjudicial states. (See Figure 2 above.) In places with brief notice-to-sale periods, opportunities for obtaining a loan modification or attaining some more favorable alternative to foreclosure (e.g., short sales) are more constrained. Cutts and Merrill (2008) find that when preforeclosure-sale periods are less than four months, cure rates (the rate at which distressed borrowers recover from severe delinquency or default before losing their home via foreclosure, short-sale or deed-in-lieu of foreclosure) fall, so that foreclosure completion rates increase.

A good number of states did take steps during the latter half of the 2000s to add additional notice periods or lengthen existing periods in order to provide for more opportunities to avoid foreclosure, and only two states reduced the preforeclosure-sale period. In one of these states, however, the change was not substantial (five days) and in the other state it was a temporary measure intended for abandoned properties or cases where borrowers requested an expedited foreclosure.

Figure 5 compares the number of acts that effectively increased the foreclosure notice-to-sale period (the preforeclosure-sale period) versus those that effectively decreased it. During 2005 to 2009, no acts effectively decreased the period (two did in early 2010). However a total of 20 acts between 2005 and 2009 effectively increased the period. Moreover, most were enacted in 2008 (6) and 2009 (8). Most of these changes were on the order of a few days to 30 days, with a couple of exceptions. In California, for example, an act in 2009 increased the time between a notice of default and a notice of foreclosure sale for mortgages originated from 2003 to 2007 by
Figure 4. Legislative Provisions Addressing Preforeclosure-sale Process by Subcategory

- availability of non-judicial foreclosure
- availability of pre-foreclosure mediation, counseling
- preforeclosure notice/advertising
- pre-sale rights of borrowers/others, right to cure/reinstate
- direct prevention of foreclosures; e.g., forbearance, modification, moratoria

Figure 5. Number of Acts Increasing/Decreasing the Foreclosure Notice-to-Sale Period

Increasing
Decreasing
90 days. Other nonjudicial states that adopted laws that had the effect of increasing the preforeclosure-sale process by more than 30 days included Maryland, Massachusetts and Michigan. Some of these acts only applied to certain subsets of loans or borrowers, however, such as loans originated over a specified period.

Analysis of Legislative Activity across States

In addition to analyzing the composition of legislative provisions across all nonjudicial states and changes in the number and types of these provisions as the national foreclosure crisis developed, we also examined which states saw the greatest amount of legislative activity and which states saw the most activity in different categories of legislation. Figures 6 and 7 break out the number of adopted legislative provisions across the different nonjudicial states for the January 2005 to May 2010 period.

Figure 6 indicates the level of the legislative activity across the nonjudicial states with the states adopting the most substantive provisions at the top of the chart. Colorado, Minnesota and Nevada each adopted laws containing 15 or more provisions and together accounted for 25 percent of all of the adopted provisions. Oregon, North Carolina, Arizona and California adopted laws containing 10-14 provisions, and another 10 states adopted between five and nine provisions. Thirteen states adopted fewer than five provisions during this period, and three states and the District of Columbia adopted no substantive provisions during the period.

Figure 6 also breaks out legislative activity by major categories. Of the 30 states with some level of legislative activity, in 15 of them the category of preforeclosure-sale processes (shown in red) accounted for at least half of the provisions adopted. Provisions in two other categories—foreclosure sale and post-sale processes and supportive processes including data/recording provisions—were fairly widely distributed across states. Fifteen states adopted provision(s) addressing foreclosure sale and post-sale processes, and 19 states adopted provision(s) concerning supportive processes such as data reporting or recording requirements. Servicer regulations, the smallest category of activity, were more concentrated. Only six states (Colorado, North Carolina, Arizona, Virginia, Hawaii, and New Mexico) adopted any provisions concerning servicer regulation during the study period.

Figure 7 breaks out the provisions concerning preforeclosure-sale processes (the red category in Figure 6) and ranks states according to how many provisions were adopted in this category during the January 2005 to May 2010 period. This is the category where we expect to find some of the more aggressive provisions to stem foreclosures, including moratoria, increasing notice
Figure 7. Adopted Provisions Concerning Preforeclosure-sale Processes, January 2005 to May 2010

- Dark red bars: has the effect of directly preventing a foreclosure, forbearance, modification, moratorium
- Orange bars: availability of pre-foreclosure mediation, counseling
- Light pink bars: preforeclosure notice/advertising
- Light blue bars: pre-sale rights of borrowers/others, right to cure/reinstate
- Black bars: availability of non-judicial foreclosure
periods, and other efforts. Colorado again led the pack, having adopted 12 such provisions. Nevada, Minnesota, Michigan and California adopted between 8 and 11 provisions in this category, and Washington, Tennessee, Oregon, Utah and Arizona adopted 6 to 7 such provisions. Another five states adopted four to five provisions, and 11 states adopted one to three provisions. Seven states and the District of Columbia adopted no provisions in this category.

Overall, as shown in Figure 2, the most common types of preforeclosure-sale provisions were those concerning preforeclosure notice and advertising requirements (accounting for over 50 percent of preforeclosure-sale provisions) and provisions aimed at the direct prevention of foreclosures such as forbearance or moratoria (accounting for over 20 percent of preforeclosure-sale provisions). Provisions specifically aimed at providing for counseling or mediation in the preforeclosure process accounted for just 10 percent of the preforeclosure provisions and were more prevalent in some of the most active states, including Nevada, Minnesota, and Michigan. The paucity of such initiatives in most other nonjudicial states contrasts with the prevalence of high-profile mediation programs in many judicial states, most notably Connecticut, Florida, New York, and Pennsylvania.

Figure 8 describes the degree to which different states took steps to lengthen or shorten the notice-to-sale period. The vast majority of these provisions were aimed at lengthening the presale process. There were only two exceptions. California adopted a provision that effectively shortened the prescribed notice-to-sale period by five days, although the state adopted other measures that effectively lengthened the foreclosure process. Colorado adopted a law in 2010 that, until 2013, provided for an expedited foreclosure process for abandoned properties or in cases where the borrower requests an expedited process. In terms of the process-lengthening provisions, most of these made relatively modest changes to the notice-to-sale period of 30 days or less, although in some states with very quick foreclosure processes, even 15 to 30 days can be a substantial increase in percentage terms. Many of the states that effectively increased the notice-to-sale period did so in conjunction with efforts to provide increased notice or opportunities for loan modifications and mediation.

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54 One possible explanation for Colorado’s high level of adopted legislative activity is the fact that the state’s foreclosure problems predated the rise of foreclosures in many other states. This is because Colorado’s foreclosures were related partly to the weakened state economy following the dot-com bust in the early 2000s. Given the nature of state legislative processes and behavior, it may well take more than one legislative session to get a proposed measure through the legislature. Moreover, there is also a natural lag between the timing of a problem and the legislative response. For these reasons, the 2005 to early 2010 period may coincide more with the peak of the Colorado’s legislative activities, while in other states high levels of activity did not begin until the later part of this period and may be extending well beyond the period. This explanation is consistent with the fact that a relatively large share of the measures in Colorado was adopted before 2009 as compared to other states.

55 A number of states took measures to shorten post-sale redemption periods. These are not covered in this analysis of preforeclosure notice-to-sale periods.
Figure 8. Adopted Provisions that Effectively Lengthen or Shorten the Notice-to-Sale Period

- Colorado
- California
- Maryland
- Michigan
- Nevada
- Tennessee
- Arizona
- Georgia
- Hawaii
- Mass.
- Minnesota
- N. Carolina
- North Dakota
- Rhode Is.
- Virginia
- Wyoming
- Alabama
- Alaska
- Arkansas
- DC
- Idaho
- Mississippi
- Missouri
- Montana
- Nebraska
- New Hamp.
- New Mexico
- Oklahoma
- Oregon
- S. Dakota
- Texas
- Utah
- W. Virginia
- Washington

Number of Adopted Bills, January 2005 to May 2010

- Increased Notice-to-Sale Period
- Decreased Notice-to-Sale Period
Identifying “Legislatively Active” Nonjudicial States

To identify states that have been legislatively active during the foreclosure crisis, one approach is simply to detect states that adopted many provisions to reduce foreclosures among outstanding mortgages. To do so, we could look only at Figures 6 and 7. However, some states may be expected to be more active than others simply because the foreclosure problem is larger in those states. One would not expect to see similar levels of response in Montana as in Nevada, for example. To at least partially control for foreclosure rates in various states, we can look at foreclosure data over a period and then compare legislative activity following that period.56

To do this, we used data from the Mortgage Bankers Association National Delinquency Survey to estimate the percent of outstanding loans entering the foreclosure process over the 18-month period prior to the end of 2008 and then compared these data to the number of adopted provisions from January 2009 through May of 2010. Figures 9 and 10 measure legislative responses in two ways. Figure 9 includes only those provisions aimed at outstanding loans; the data in Figure 9 are therefore consistent with those in Figures 6 and 7. Figure 10 includes all legislative provisions including those aimed at regulating new originations. Figure 10 is shown to incorporate a broader notion of state responses than what has been a focus of this paper to see if it makes a noticeable difference in the patterns of response.

Figures 9 and 10 show how the states fell on the plots of legislative activity versus the foreclosure start rate. As expected, in both plots, states with very high foreclosure rates tended to have higher levels of legislative activity. However, there is a substantial amount of variance in legislative activity that is not explained by foreclosure rate.57 In Figure 9, California had higher levels of legislative activity than Arizona despite similar high foreclosure rates. Some states with more moderate foreclosure rates, such as Oregon and Colorado, had significantly higher amounts of legislative activity than states with somewhat higher foreclosure rates such as Georgia, Mississippi and Rhode Island. As might be expected, states with very low foreclosure rates (North Dakota, Wyoming, Montana, South Dakota and Alaska, e.g.), however, all saw very little legislative activity.

The differences between Figures 9 and 10 are not very substantial. This is because most of the legislative activity during the January 2009 to May 2010 period was focused on outstanding loans and not on regulating new originations and because legislative activity in the two areas is somewhat positively correlated. States that were active in one area tended to be active in the other as well.

56 A more sophisticated goal would be to model legislative activity over time and across states controlling for multiple factors that might be expected to affect such activity. The effort here is much less ambitious; there is no attempt to identify or control for all of the various causes of such activity or to predict legislative activity.

57 The straight line in each figure is a linear bivariate regression line. The R-square, which gives the proportion of the variance in legislative activity that is explained by the foreclosure rate, is approximately 0.40 for both plots.
Figure 9. Adopted Provisions Concerning Outstanding Loans versus Foreclosure Starts

Figure 10. Adopted Provisions Concerning All Loans versus Foreclosure Starts
Scoping In: Policy Change in Selected States

Relying primarily on the analyses above, we identified eight legislatively active states to investigate in more depth: California, Colorado, Michigan, Minnesota, Nevada, North Carolina, Oregon, and Washington. These are meant to be a sampling of the more active states in adopting legislation and not an exhaustive or definitive list. Some of these states were chosen because they adopted a substantial number of provisions in relation to their overall foreclosure rates. Others were chosen based more on the raw number of provisions adopted. Still others were included partly on these criteria but also in order to provide some geographic balance. (There was a tendency for western states to adopt more foreclosure-related provisions during this period). In the following sections we qualitatively describe the activity in each state, identifying the major changes and determining whether the changes in foreclosure law in the state, on net, tended to favor the borrower/homeowner or the lender/servicer.

California

The first step in California’s previous non-judicial foreclosure procedure was the filing of a notice of default in the office of the county recorder. Within ten days of the recordation, the lender had to mail notice of the recording date to each borrower and to each person who had requested such notice. After filing the notice of default, the lender had to wait three months before giving notice of the sale. A written notice of the time and place of the pending foreclosure sale had to be posted on the property and in the city or judicial district where the property was to be sold at least 14 days before the foreclosure sale. The notice also had to be recorded with the county recorder at least 14 days prior to the sale date.

In the period from January 2005 to May 2010, the state of California adopted ten foreclosure-related provisions, eight of which addressed the preforeclosure process. The most significant change to existing mortgage law was contained in Assembly Bill 7, the Foreclosure Prevention Act of 2009. From May 21, 2009 until January 1, 2011, a lender must wait an additional 90 days after the three-month statutory period has expired before giving the notice of sale if the mortgage is a first mortgage on an owner-occupied home and was recorded between January 1, 2003 and January 1, 2008. The purpose of this additional delay is to allow the parties to pursue a loan modification. The lender can avoid this additional 90-day delay, however, if it has obtained an order of exemption by implementing a comprehensive loan modification program. Such a program must be intended to keep borrowers in their principal residence when the expected recovery from modification is greater than the expected recovery from foreclosure. The servicer must seek to achieve long-term sustainability for a borrower pursuing modification by limiting the ratio of their housing-related debt to their gross income to 38 percent or less. Finally, the program must include some combination of an interest rate reduction, a term extension, deferral of some portion of the principal amount, reduction of principal, or compliance with a federally mandated modification program such as HAMP.
Another law adopted the year before the Foreclosure Prevention Act was the first in the state to extend the preforeclosure timeline. Senate Bill 1137 states that prior to filing a notice of default for a mortgage executed or recorded between January 1, 2003 and December 31, 2007, the lender must first contact the borrower in person or by telephone to assess their financial situation and explore options to avoid foreclosure. During this required contact, the borrower must be advised of her right to request a subsequent meeting, which then must occur within 14 days. The borrower must also be provided a toll-free telephone number to find a HUD-certified housing counseling agency. The lender is able to meet this contact requirement despite failing to contact the borrower so long as contact was attempted with due diligence, a statutorily defined standard involving a series of mailing and telephone attempts. The notice of default cannot be filed until 30 days after the initial contact is made or after satisfying the due diligence requirement.

Senate Bill 306, passed in late 2009, extended the notice of sale requirements from 14 days to 20 days. More significantly, it clarified the intent of pooling and servicing agreements (PSAs) regarding the responsibilities of the servicer to the investors of mortgage-backed securities. This was intended to promote beneficial loan modifications and address concerns that some PSAs might impede loan modifications. The statute states that any duty a servicer has to maximize net present value (NPV) for investors should be interpreted as requiring maximization of NPV for all investors as a group and not any one particular investor. If it is determined that the expected recovery from a loan modification exceeds the expected recovery from a foreclosure on a net present value basis then the servicer can implement the modification in the best interests of all the investors.

Senate Bill 1137 mentioned earlier also extended an advanced notice of sale to renters of a foreclosed property. Until January 1, 2013, notice of a pending foreclosure sale must also be provided to the residents of the foreclosed property if the billing address on the mortgage does not match the property address. The notice must inform the residents that the property will be sold no less than 20 days from receipt of the notice and inform the residents that if they are renters, they are entitled to 60 days notice of eviction or a new lease agreement with the new property owner. This is an extension from the previous 14-day notice of sale and 30-day notice of eviction. Since this law was passed, however, the federal Helping Families Save Their Homes Act (HFSTHA) was passed. HFSTHA includes a requirement that, for most mortgages, lenders are now required to provide tenants of foreclosed properties with 90-day notice prior to eviction.

Several other laws adopted during this period made changes to the foreclosure process. Assembly Bill 2678 prevents a notice of sale from being posted while the servicer is in negotiations with the borrower to modify a loan. Senate Bill 1221 reduces the period for a notice of sale to be filed by no more than five days before the end of the statutory three-month waiting period.

Overall, most of the provisions passed by California between January 2005 and May 2010 were intended to favor the borrower. However, the effectiveness of some of these provisions has been
The Foreclosure Prevention Act is notable in this regard since it allowed all of the major servicers to gain an exemption from the 90-day waiting period because they already had comprehensive loan modification programs that complied with the HAMP guidelines.

**Colorado**

Colorado’s foreclosure process is essentially a hybrid of a judicial and nonjudicial process because the lender has to obtain an initial court order authorizing the foreclosure. Colorado's pre-2005 foreclosure procedure provided that at least 30 days after default on a deed of trust the debt holder could file a notice of election and demand with the public trustee of the county where the property was located. The combined notice, which included the notice of sale, the right to cure, and the right to redeem, had to be mailed no more than 20 days after the recording of this notice. Between 60 and 45 days before the sale, the combined notice also had to be published once per week for five consecutive weeks.

The lender’s initial motion to foreclose has to be accompanied by a copy of the instrument containing the power of sale, a description of the property, and an explanation of the default justifying the foreclosure. The clerk sets a time between 20 and 30 days after the filing of the motion for a hearing. Notice of this hearing had to be posted in a conspicuous place on the property and has to be served on each person named in the motion at least 15 days before the date set for the hearing. If the court grants the lender’s motion based on its findings, the lender has to submit a bid to the officer no later than the second day before the foreclosure sale. Prior to the changes discussed here, the sale had to occur between 45 and 60 days after the recording of the notice of election and demand.

Colorado was the most active state adopting provisions to change the foreclosure process and timeline between January 2005 and May 2010. It enacted many measures early in our study period. We identified 19 provisions, 12 of which directly affected the preforeclosure process. The first significant change came in 2006 when Colorado passed House Bill 1387. This law increased the time between the filing of the notice of election and demand and the date of the foreclosure sale by 65 days. The new law required the sale to take place between 110 and 125 days after the notice, instead of just 45 to 60 days after. The contents of the notice of election and demand were also expanded. It had to contain specific information such as the names of the original parties to the deed of trust, the name of the holder of the note, the remaining outstanding balance on the loan, a legal description of the property, and a statement of the default that justifies the foreclosure.

In 2008, another important piece of legislation was passed. House Bill 1402 extended the preforeclosure timeline by 30 days and required notification of certain foreclosure counseling

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58 Cohen and Jakobovics. 2010.
programs. The law required that the lender/servicer mail a notice of intent to foreclose to the borrower at least 30 days prior to filing the formal notice of election and demand, thus increasing the foreclosure timeline. The notice of intent to foreclose must also contain the telephone number of the Colorado foreclosure hotline and the direct telephone number of the holder’s loss mitigation department.

A few months later in 2009, the state legislature passed House Bill 1276 which created additional requirements to notify the borrower of opportunities for foreclosure deferment. The law stated that within 15 days of filing the notice of election and demand, the holder must post a notice of the opportunity for foreclosure deferment on the home. Within 20 days of the posting the borrower has to contact a foreclosure counselor who must inform them of the federal HAMP program. The counselor then has 30 days to determine whether the borrower is eligible for a foreclosure deferment. This determination includes an assessment of the borrower's ability to pay and the probability of reaching a mutually beneficial loan modification.

If the borrower is eligible for deferment, she must make payments to the lender equal to at least two-thirds of the monthly payment that was due prior to the delinquency throughout the term of the deferment, which is initially 90 days. During this period all published and mailed notifications of the foreclosure sale must be suspended. The deferment can be terminated early under a number of circumstances, including if the borrower abandons the property or fails to comply with the conditions of deferment.

In 2010, House Bill 1249 created a temporary procedure to shorten the foreclosure process for certain properties. Beginning on August 1, 2010 and continuing until August 1, 2013, a lender filing a foreclosure may request an expedited sale at the same time. The lender must file a motion with the court stating that the lender is eligible, that the deed of trust secures an eligible debt, and that the property has been abandoned or that the borrower requests the order for an expedited foreclosure. A notice of the hearing must be posted at least 15 days prior to its occurrence. If the court finds the evidence clear and compelling and no one objects, the lender must then set a date of sale between 45 and 60 days after the recording of the notice of election and demand.

Colorado also passed several provisions during our study period that did not affect the foreclosure timeline. For example, House Bill 1197 in 2009 created an official county-level foreclosure database that would report at least quarterly on notices of election and demand, properties sold at auction, and instances of curing. It was designed to provide the public and policy makers with accurate information and allow trend forecasts and analysis of regional differences. House Bill 1207 made several minor changes to the cure and redemption procedures and added certain parties to the list of those required to receive notifications of the foreclosure.

Colorado's adopted provisions favored the borrower by extending the notice-to-sale period by almost three months and mandating notification of foreclosure hotlines and deferment options.
House Bill 1387 (2006), House Bill 1402 (2008), and House Bill 1276 (2009) were the key pieces of legislation in this shift toward a somewhat more borrower-friendly foreclosure process. One important aspect of the deferment process created by House Bill 1276 is the requirement for borrowers to pay two-thirds of the required monthly mortgage payments while in deferment. Supporters suggest that this requirement focuses effort on those most likely to succeed with a loan modification, but it may also unnecessarily exclude other candidates thus limiting the number of people who benefit from the program.

**Michigan**

In Michigan, notice of a pending non-judicial foreclosure sale must be published for four consecutive weeks, at least once per week, in a local newspaper. The notice must state the following: the names of the borrower, the originating lender, and the current lender/mortgagee; the date of the mortgage and of its recordation; the amount due; the description of the house; and the length of the post-sale redemption period. Fifteen days after the first published notice, a copy of that notice must be posted in a conspicuous place on any part of the home. Within 20 days of sale, the purchaser must record the foreclosure deed. A post-sale redemption period ranges from one month for residential mortgages on abandoned property with greater than two-thirds of the original indebtedness outstanding to one year for occupied residential properties with less than two-thirds of the original indebtedness outstanding.

Michigan adopted eight foreclosure-related provisions from January 2005 to May 2010, all of which affected the preforeclosure process. Six of these provisions were contained in a series of three statutes enacted in mid-2009: House Bills 4453, 4454, and 4455. These bills comprised a package of legislation passed to require foreclosing lenders to offer modification negotiations to borrowers. The key provisions require the lender to provide written notice to the borrower containing an explanation of the default and the amount outstanding on the mortgage, the contact information for the lender/servicer, and a designated party for modification discussions. The notice must also provide a list of approved housing counselors and inform the borrower that she may request a meeting with the lender’s designee within 14 days of the notice to attempt to work out a modification. The notice must inform the borrower that if she pursues modification discussions, foreclosure proceedings are deferred for 90 days after the notice was mailed. The notification must also indicate that, if the borrower meets statutory modification criteria but cannot reach a modification agreement, then the lender must proceed via a judicial foreclosure process.

Within seven days of mailing this notice to the borrower, the lender/servicer must also publish a notice informing the borrower of her rights as described above. If the lender fails to comply with the preforeclosure notice requirements, including notice of the right to mediation, before commencing the foreclosure process, the borrower may seek a judicial foreclosure process. The

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59 Pierce, 2009.
borrower must elect to engage in modification discussions by contacting a housing counselor within 14 days after the notice was mailed by the lender. The housing counselor must notify the lender of the borrower’s request within ten days of being contacted by the borrower. The counselor must then schedule a meeting for modification discussions and attend the meeting if the borrower so requests.

If no loan modification results from the discussions, the housing counselor must work with the borrower to determine whether she qualifies for a modification based on a criteria similar to federal HAMP requirements. If the borrower is eligible, the lender may not proceed with nonjudicial foreclosure but can pursue judicial foreclosure. The borrower has fourteen days from notification of any proposed modification to accept it. If the lender attempts to proceed with the non-judicial foreclosure process in violation of this procedure, the borrower may file suit to convert the proceeding to a judicial foreclosure. One important aspect to note is that the calculations made to determine the borrower's eligibility must be made available to them, a requirement not present in some other states.

In addition to these changes, Michigan adopted Senate Bill 749, which disallowed non-judicial foreclosure against service members during active duty or six months thereafter. This was one of the very few changes in state laws during this period that added restrictions on the use of nonjudicial foreclosure.

The adopted provisions in Michigan generally favored the interests of the borrower by creating requirements to notify them of various foreclosure mediation opportunities.

Minnesota

In Minnesota, the lender must give six weeks’ published notice of the pending foreclosure sale and must serve the homeowner with a copy of the notice at least four weeks before the sale. Along with the notice of foreclosure sale, and with every subsequent written communication regarding the foreclosure mailed to the borrower, the lender must also include a foreclosure advice notice. Within six months of the foreclosure sale, the borrower may redeem the property by paying the foreclosure sale price plus interest.

Minnesota adopted 16 foreclosure-related provisions in the period between January 2005 and May 2010, nine of which affected the preforeclosure process. Most of the provisions made small changes to existing law. The state is notable for failing to pass optional mediation legislation in 2009, when the state legislature could not override Governor Tim Pawlenty's veto.60

One important provision was contained in 2008 House File 3420, which requires notification to the borrower of available foreclosure counseling services. The notice may be sent concurrently with the notice of default and must state that such services are available from authorized

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60 Cohen and Jakobovics. 2010.
foreclosure counseling agencies and that the lender will transmit the borrower’s contact information to an approved agency within one week. If an authorized foreclosure prevention agency is in contact with a borrower, it must provide notice of such counseling assistance to the lender by way of a specified form. The lender must return this form within 15 days with the contact information for the agent authorized to discuss the terms of the mortgage and negotiate a resolution to the default.

Another important provision was Senate File 2559, adopted in 2010, that allows the borrower to postpone the foreclosure sale of a property classified as a homestead according to Minnesota statute in exchange for agreeing to reduce the post-sale redemption period to five weeks. If the original redemption period was six months, the borrower can postpone the foreclosure sale by five months if the original redemption period was 12 months, the borrower can postpone the sale for 11 months. This was intended to provide more time for the borrower to cure the default.

Other provisions were adopted that made changes to the foreclosure process or content of the notices. Senate File 1533 allowed the post-sale redemption period for an abandoned property to be shortened from one year to five weeks. This information must be included in the notice of pending foreclosure sale posted on the subject property. Senate File 1302 required the foreclosing lender to provide the borrower's contact information to a foreclosure prevention agency.

Minnesota's changes also favored the borrower. The most significant provisions required notification of modification opportunities and allowed postponement of the foreclosure sale in exchange for a shortened redemption period. However, the state failed to pass mediation legislation to provide a more structured method to prevent foreclosures.

**Nevada**

In Nevada, lenders must file a notice of default that describes the deficiency with the county recorder. The foreclosure sale cannot occur until at least three months after the filing of the notice of default. After the three-month period has expired, the lender must file a notice of the foreclosure sale stating the time and place of the sale. According to Senate Bill 172 (adopted in 2005), a copy of this notice must be provided to the borrower, posted in three public places for 20 consecutive days, and published once per week for three consecutive weeks in a local newspaper. A copy of the notice must be posted in a conspicuous place on the property no later than three business days after the notice of sale is recorded, and a separate notice must also be mailed to any tenant or subtenant within the same three-day period.

Nevada was a very active state during our study period and was the most active state during 2009 and the first five months of 2010. Given the magnitude of their foreclosure problem, however, the state reacted slowly. From January 2005 to May 2010 the state adopted 15 provisions regarding the foreclosure process, 11 of which directly affected the preforeclosure process. The
most significant action was the creation of a foreclosure mediation program in 2009, the first in a non-judicial foreclosure state.

The Nevada Supreme Court and the state legislature created the foreclosure mediation program, which began in July 2009. Assembly Bill 149 authorizes the program, which applies to any owner-occupied residential foreclosure and permits lenders and borrowers to exchange information and proposals to avoid foreclosure with the assistance of a mediator. During mediation the foreclosure process is suspended and no further action can be taken by the lender. The Supreme Court rules state that mediation must take place within 90 days after recording the notice of default.

The mediation program is mandatory if a homeowner requests it by completing the Election/Waiver of Mediation Form within thirty days after being served the notice of default. Failure to act within this prescribed time period waives the borrower’s right to mediation. The parties are entitled to a total of four hours for mediation and each must pay a $200 fee before entering the program. The lender must be represented by someone with the authority to modify the loan and must provide prior to mediation the original deed of trust, the note, documentation of each assignment of the deed of trust and note, and a recent appraisal. The lender's representative must be physically present at the meetings unless the mediator determines otherwise. A party to mediation may file a petition for judicial review seeking a determination of bad faith participation and sanctions. Such petitions must be filed within 15 days of the date of the mediator’s statement and must be reviewed by the court within 60 days.

Other legislation made more modest changes to the foreclosure process. Assembly Bill 65 was adopted to provide additional funding for the foreclosure mediation program by assessing a $50 fee for filing a notice of default and election to sell. Assembly Bill 140 was passed in 2009 to better protect and inform renters of foreclosed properties. Notices of default and of sale must be posted on the property and sent to the tenants along with information of their rights to remain in the unit or leave after the foreclosure sale. Senate Bill 128 created new recording requirements for the foreclosure deed after a sale is executed. The lender must record it within 30 days of the sale or deliver it to the winning bidder within twenty days; the winning bidder must then record it within another ten days.

Nevada's adopted provisions clearly favored the borrower. The mediation program was designed to provide alternatives to foreclosure by forcing lenders to negotiate modifications. While the required mediation fee may be a burden for some borrowers, many other aspects of the program provide a clear benefit to borrowers such as requiring the lender to produce the original deed of trust, the mortgage note, and documentation of each assignment. Other provisions adopted by the state offer better protection for renters or have minimal impacts on both parties.
North Carolina

North Carolina, like Colorado, has a foreclosure process that is a hybrid of nonjudicial and judicial processes. The lender must send the borrower a detailed statement of the amount of principal, interest, fees, expenses, and disbursements claimed due as of the date of the statement. At least 30 days after sending this written statement, the lender must file notice of hearing with the clerk of court. At least ten days before the hearing, a notice specifying the time and place for the hearing must be served on the borrower. If, after a reasonable and diligent effort, the borrower cannot be personally served, the notice may be posted in a conspicuous place on the property no less than 20 days before the date of the hearing. The hearing is held before the clerk of court who must find the existence of a valid debt, a default, a right to foreclose, and the requisite notice before authorizing the lender to proceed.

Once authorized, the lender must then give notice of the sale, which must designate the date, hour, and place of sale and provide other required information. The notice must be mailed at least 20 days prior to the date of sale to the borrower as well as any occupants of a property of fewer than 15 units. Notice of the sale must also be published weekly for at least two successive weeks in a local newspaper. Within five days after the sale, the foreclosing party must file a report of the foreclosure sale with the clerk of the superior court.

North Carolina adopted 11 provisions related to foreclosures in the state, five of which changed the preforeclosure process. Several of the provisions created significant new procedures that extended the timeline by offering more opportunities to negotiate a loan modification. The first of these was enacted in 2008. House Bill 2623 stated that at least 45 days prior to the filing of a notice of hearing in a foreclosure proceeding for a primary residence, lenders/servicers of subprime loans must send written notice by mail to the borrower to inform him of the availability of resources to avoid foreclosure. This notice must include an itemization of all past due amounts causing the loan to be in default, an itemization of any other charges that must be paid in order to bring the loan current, a statement regarding negotiation and foreclosure counseling options, and the contact information for the party who is authorized to work with the borrower to attempt to avoid foreclosure.

House Bill 2623 also established the State Home Foreclosure Prevention Project, which empowered the Commissioner of Banks to evaluate subprime loans to determine which were most suitable for foreclosure prevention efforts. The Commissioner could extend the allowable filing date for any subprime foreclosure proceeding by up to 30 days beyond the earliest filing date established by the preforeclosure notice in order to allow more time for mediation and loan modification efforts.

Another important provision applicable to a wider range of foreclosure proceedings was contained in Senate Bill 974, adopted in 2009. This provision gave more power to the clerk of courts during the preforeclosure hearing to inquire into efforts the lender had made to
communicate with the debtor to attempt to resolve the matter voluntarily before the foreclosure proceeding. For owner-occupied homes, the clerk must order the hearing continued up to 60 days if he finds there is good cause to believe that additional time or measures have a reasonable likelihood of resolving the delinquency without foreclosure. The clerk could base this decision on the quality of communication between the two parties, whether the borrower had the intent and ability to resolve the delinquency after a modification, or whether the lender had offered appropriate resolution options such as forbearance and loan modification.

A third provision extended deficiency judgment protections to a wider class of mortgages. House Bill 1057, adopted in 2009, prohibited deficiency judgments for owner-occupied residential loans originated or modified on or after January 1, 2005 that are subject to negative amortization or permit deferred payments of principal or interest. These loans must also qualify as conforming loans according to the standards published by Fannie Mae.

North Carolina's actions favored the borrower. They created the opportunity to extend the preforeclosure timeline by up to 60 days for many owner-occupied properties and focused on protecting subprime borrowers. Legislation also offered certain borrowers greater protection from deficiency judgments.

Oregon

In Oregon, upon default by the borrower, the lender must file a notice of default in the county clerk’s office. After recording the notice of default and at least 120 days before the foreclosure sale, a notice of sale must be served upon or mailed to the borrower. The notice of sale must name all the parties to the trust deed, describe the property, state the default and the amount owed, and set forth the date, time, and place of sale. A notice must be addressed to each residential tenant as well, providing certain statutory statements regarding their rights and tenancy. Finally, a copy of the notice of sale must be published in a newspaper in each of the counties in which the property is situated once per week for four successive weeks. On the tenth day after the foreclosure sale, the purchaser (the lender or any third party) is entitled to possession of the premises.

Oregon adopted 12 foreclosure-related provisions between January 2005 and May 2010, mostly towards the end of the study period. Seven of these affected the preforeclosure process. Senate Bill 628 required that a form to request a loan modification be sent with or before the notice of sale. The borrower must return the form within 30 days of receiving it in order to initially qualify for the loan modification. Once the lender receives the completed form, it has 45 days to determine the borrower's eligibility based on information contained on the form such as income and expenses. During this period, the foreclosure process is suspended and the borrower can request a meeting to discuss loan modification options. If requested, this meeting must include a representative of the lender authorized to modify the loan terms. House Bill 3610 was adopted in 2010 to add a requirement that borrowers who are denied a modification must be informed as
to the reason why they were not eligible. The loan modification review and meeting requirement is currently set to expire January 1, 2012.

Senate Bill 239, adopted in 2009, gave certain rights to borrowers who did not receive timely notice of the foreclosure sale. If the borrower did not receive the notice prior to 25 days before the sale took place, then the borrower retains the same rights as a junior lien holder that was not joined in a judicial foreclosure filing. Senate Bill 301 provided alternative ways to meet the requirement to serve notice of sale to interested parties. If diligent efforts were unsuccessful, the law allowed the notice to be conspicuously posted on the subject property and then mailed to their last known address. House Bill 2980 stated that a notice of sale becomes effective as of the date it was mailed.

Oregon's adopted provisions generally favored the borrower. Senate Bill 628 and House Bill 3610, in particular, were intended to offer the borrower an alternative to foreclosure and a way to keep lenders accountable in their efforts. Other provisions protect borrower rights if proper notice is not served.

Washington

In Washington state, notice of default must be sent by the lender to the borrower at her last known address. Notice must also be either posted in a conspicuous place on the premises or served personally on the borrower. The notice must contain a description of the property, a statement of the default, an account of any amounts in arrears, and an explanation of the effect of foreclosure. At least 30 days after the notice of default, the lender must record the notice of sale in the office of the county auditor. The notice of sale must be sent to the borrower and any occupants of the property and must provide the date and time of the sale, describe the default, list any cure amount and the deadline to cure, explain the effect of the sale, and provide contact information for the lender. The notice of sale must also be published in a local newspaper, once on or between the 35th and 28th day before the date of sale, and once on or between the 14th and 7th day before the sale. The sale may not occur less than 190 days after the date of default or less than ninety days after the recording of the notice of sale. On the date and at the time set for the sale, the lender must sell the property at public auction to the highest bidder. The sale is final as of the time the lender accepts a bid, so long as the deed is recorded within 15 days. The lender or other winning bidder is entitled to possession of the property on the 20 day following the sale. The purchaser of tenant-occupied property must provide written statutory notice to the occupants and tenants. The tenant in possession must be given 60 days’ written notice to vacate.

Washington adopted eight provisions concerning foreclosure procedures, seven of which affected the preforeclosure process. Senate Bill 5810 created special requirements for owner-occupied loans made between January 1, 2003 and December 31, 2007. Upon default, the lender must contact the borrower to ascertain her ability to repay the loan and discuss options for avoiding foreclosure. The borrower has a right to request a subsequent meeting with the
beneficiary, which must occur within 14 days of the request and which may occur telephonically. In addition, the notice of default must indicate that this required first contact with the borrower occurred or that the beneficiary tried with due diligence to contact the borrower but was unsuccessful.

Senate Bill 6711 was adopted in 2008 to create the Smart Homeownership Choices Program, which was modified a year later by Senate Bill 6033 to become the Prevent or Reduce Owner-Occupied Foreclosure Program. This program is intended to assist homeowners facing foreclosure by pursuing loan workouts and modifications. Borrowers making less than 140 percent of the county median income are targeted for assistance. Attorneys, mortgage brokers, housing counselors, and other relevant housing professionals would volunteer with the program to provide advice to at-risk borrowers. This program is currently set to expire June 30, 2011.

While not as active as some of the other states profiled here, Washington did take some modest steps to reduce foreclosures and shift the foreclosure process slightly in favor of the borrower. However, the principal measures only impacted a certain subset of mortgage foreclosures or were temporary in nature.

Conclusions

Overall, legislatures in nonjudicial states adopted a substantial number of changes to foreclosure law, especially as the national foreclosure crisis swelled in 2008 and 2009. We identified almost 200 substantive provisions in legislation that concern mortgage default, servicing and foreclosure processes that were adopted between January 2005 and May 2010. There was a large increase in legislative activity in this area from 2006 through 2009. The number of adopted provisions increased from just 12 in 2006, to 19 in 2007, 38 in 2008, and 70 in 2009.

The majority of this increased activity concerned preforeclosure-sale processes, while smaller shares of activity concerned foreclosure sale and post-sale processes, servicer regulation, or recordation and ancillary/supportive (e.g., data collection) issues. There was considerably less activity in the area of servicer regulation, changes to the foreclosure sale procedures or post-sale or deficiency issues, or in terms of recordation or ancillary/supportive issues.

There was considerable variation in the level of legislative activity across states. Some states passed no laws with substantive provisions during the study period while others passed laws with ten to twenty substantive provisions. Three states accounted for 25 percent of the adopted provisions, and ten states accounted for 60 percent.

In general, states with the highest foreclosure rate during the second half of 2007 and all of 2008 (e.g., Arizona, California, Nevada) adopted the greatest number of provisions during 2009 and the first five months of 2010. In keeping with this pattern, states with very low levels of foreclosures (e.g., Alaska, Montana, and Wyoming) saw no subsequent legislative activity. However, among states with relatively moderate levels of foreclosures in the earlier period there
was a substantial variation in legislative activity. Some (e.g., Idaho, Virginia) saw only one or two provisions adopted during the latter period while others (e.g., Oregon, Colorado) saw seven or eight provisions adopted. Moreover, there were a few states (Georgia, Mississippi, and Rhode Island) that had moderately high foreclosure levels but very small amounts of legislative activity. It is likely that, in addition to how hard a state was hit by foreclosures, other characteristics (e.g., state political environments, preexisting foreclosure and mortgage laws) were important determinants of legislative activity.

While a number of states adopted laws which had the effect of lengthening the preforeclosure period, only one state passed a law that reduced the period (this state passed laws containing provisions that increased the period as well). It is important to note however, that most nonjudicial states already have relatively brief preforeclosure periods, especially compared to most judicial states.

A closer examination of the nature of the changes in foreclosure law in eight legislative active states shows that there were some commonalities in the sorts of changes made in state foreclosure law in these states. As expected, the adopted changes were largely in favor of the borrower. Most of these changes occurred during 2008 and 2009, a time when policymakers were under significant pressure to respond to the local and national foreclosure crisis.

At the same time, many of the changes would have to be considered quite marginal. Many involved small changes in notice periods or directions to lenders/servicers to take particular steps, some of which they may already have been doing.

Some of the provisions concerning the preforeclosure process were components of larger efforts to increase opportunities for loan modifications. Relatively few of these efforts involved third-party mediation. More focused on longer notice-to-sale periods, but also on additional notices, connections to hotlines and housing counselors, and related procedures.

Few states passed legislation addressing issues of the details of the foreclosure sale itself, such as minimum bid requirements, the availability of deficiency judgments, or other issues. Moreover, no nonjudicial state made a substantial move (during the study period at least) to shift toward adopting a judicial foreclosure process.

Some states with substantial post-sale redemption periods (Michigan, Minnesota) did move towards either shortening these periods for abandoned properties or essentially converting post-sale redemption time into presale notice time.

Given the time period of our study (through May of 2010), it is perhaps not surprising that very little legislative activity concerned the regulation of servicers or processes that would directly address the problems with loan and mortgage documentation issues that have become so well understood since the last quarter of 2010. While the increased media attention will likely spur increased attention to these issues in state legislatures, in nonjudicial states at least, little to no attention was being paid to these problems prior to the summer of 2010.
This study shows that significant numbers of nonjudicial foreclosure states did take some steps to try to reduce foreclosures, including changes in foreclosure law. Moreover, some of the more legislatively active states took steps to make the foreclosure process favor borrowers a bit more than it had before the crisis. However, many of these provisions constituted quite marginal changes, many were temporary measures aimed only at loans originated during the subprime boom, and others were effectively redundant with federal foreclosure mitigation efforts. Furthermore, in many nonjudicial states, there was little substantive legislative response, even in the face of a national foreclosure crisis. In some states, this is at least partly explained by the fact that the state was not hit very hard by the foreclosure crisis. However, some states with high rates of foreclosure during this period did little to change their foreclosure process.
Modern Mortgage Markets and How Mortgage Fraud Has Flourished

By James Charles Smith

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Mortgage fraud consists of dishonest conduct, engaged in by a borrower or another person before the funding of the loan, that impairs the value of the loan. The past decade has witnessed an explosion of mortgage fraud, with reports to the federal government of suspected criminal behavior rising by a magnitude of over 18 times from 2000 to 2008. Financial Crimes Enforcement Network (FinCEN), 12 The SAR Activity Review—By the Numbers 5 (June 2009), www.fincen.gov/news_room/rp/files/sar_by numb_12.pdf. Mortgage fraud is currently the number one white collar crime in the United States. It is a key contributor to the unprecedented growth of toxic mortgage assets, which led to the implosion of the subprime lending market. The Mortgage Asset Research Institute estimates the 2008 losses at between $15 and $25 billion. Denise James et al., Mortgage Asset Research Inst., Eleventh Periodic Mortgage Fraud Case Report to Mortgage Bankers Ass’n 7 (LexisNexis 2009), www.aarmr.org/pdf/Sharick.pdf. Mortgage fraud also has ripple effects, causing harm in addition to direct losses to lenders and investors that buy mortgage assets. Communities in which fraud-affected properties are situated incur substantial losses, including depreciation of nearby homes and increased crime.

The downturn in the domestic housing sales market from its peak in 2007 has perhaps made mortgage fraud more difficult to accomplish, but mortgage fraud rates have not declined. In fact, the distress in the U.S. housing sales market has proven to be fertile ground for mortgage fraud, with reported incidents of fraud continuing to rise, notwithstanding the overall decline in the number of sales of residences and new mortgage loans. New market conditions have led some perpetrators of fraud to develop new schemes and to modify older ones. Reported mortgage fraud and misrepresentation increased 7% from 2008 to 2009. Denise James & Jennifer Butts, Mortgage Asset Research Inst., Twelfth Periodic Mortgage Fraud Case Report 3 (LexisNexis 2010), www.lexisnexis.com/risk/fraudreport.

This article will discuss several of the methods typically used to commit the crime of mortgage fraud. Unfortunately, mortgage fraud is relatively easy to perpetrate. This article explains why this is so by focusing on key characteristics of modern residential mortgage markets that reflect a growing distance between borrowers and lenders along several dimensions. The article concludes by discussing several reforms that could reduce this borrower-lender distance or ameliorate its negative effects.

Mortgage Fraud Schemes

The Federal Bureau of Investigation (FBI) defines mortgage fraud as “the intentional misstatement, misrepresentation, or omission by an applicant or other interested parties, relied on by a lender or underwriter to provide funding for, to purchase, or to insure a mortgage loan.” FBI, 2007 Mortgage Fraud Report (Apr. 2008), www.fbi.gov/publications/fraud/mortgage_fraud07.htm. It resembles predatory lending in that both refer to tainted residential mortgage loans, but in predatory lending the wrongdoer and victim are switched. Predatory lending refers to improper behavior by the lender or by persons acting for the lender that results in a loan with unfavorable terms that victimizes the borrower. For example, common types of predatory loan practices, see Debra Pogrund Stark, Become a Hero to a Family in Need: Predatory Lenders Beware, Prob. & Prop., July/Aug. 2004, at 8. Nevertheless, the two phenomena tend to occur in the same geographical communities that experience a lack of neighborhood stability because of factors such as high rates of market sales, high foreclosure rates, and high vacancy rates.

Mortgage fraud consists of two main types, “fraud for property” and “fraud for profit.” Fraud for property occurs when a loan applicant intentionally overstates his income or misrepresents other relevant facts for the purpose of purchasing a property to occupy as a residence. Usually the scheme involves the purchase of a single property, with the borrower taking possession at closing and intending to make regular monthly payments thereafter. Modern mortgage products, such as low-documentation loans and stated income loans, which were commonly available during the heyday of the subprime market before the latter part of 2008, made it much easier for borrowers to engage in fraud for property. Often, fraud for property goes undetected for a long time. In fact, if the borrower never defaults, the lender does not incur an actual loss, and it is highly probable that the borrower’s fraud will never surface.

Fraud for profit refers to a more complicated scheme in which the fraudster’s purpose is to cause a lender to make a loan, after which the fraudster escapes with the money. Many variations on fraud for profit have succeeded. Often fraud for profit involves multiple transactions and the use of one or more “industry insider” intermediaries, such as a corrupt mortgage broker, real estate appraiser, or settlement agent. Identity theft is frequently one ingredient. Fraud

Flipping is a common fraud for profit technique. It occurs when a property is sold multiple times between fake sellers and buyers at inflated prices to create the illusion of a market value drastically higher than the property’s real value. For example, a house worth $180,000 may be sold several times during a two-year period “on paper,” with the last sale displaying a price of $400,000. Immediately after the last sale, which is financed by an unsuspecting lender, the seller absconds with the loan proceeds. With flipping, sometimes the lender holds a mortgage obligation of a bona fide buyer, who believed that the purported sale immediately before his purchase was an indicator of true value. Other times flipping results in a mortgage obligation that is wholly worthless: the buyer is fictitious, or, if a real person, the buyer is insolvent or has hidden his true identity. In such a case, no payment is even made on the loan. Foreclosure results, causing a large loss—more than the usual loss stemming from a distressed sale—because even with normal marketing the property is worth far less than the value asserted in the appraisal submitted to the lender.

Other prominent fraud-for-profit schemes include builder bailouts, short sales, foreclosure rescues, credit enhancements, air loans, reverse mortgage fraud, equity skimming, and the double sale of loans to secondary mortgage market investors. Fraudsters also have exploited the first-time homebuyer $8,000 tax credit program, adopted as part of the federal government’s stimulus program, by submitting false claims.

Geographical Distance

The residential mortgage system suffered virtually a total collapse during the Great Depression of the 1930s. Early in the New Deal, the federal government moved to enact reforms that radically transformed monetary policy, the banking system, and the operation of credit markets. The Federal Housing Administration (FHA) induced private institutional lenders to make new residential mortgages by introducing federal mortgage insurance. Later, in 1944, the Veterans Administration (VA) crafted a similar mortgage guarantee program, with some features that were more generous to borrowers, in order to satisfy the housing needs of returning veterans.

The federal programs had two major consequences. First, lenders for the first time were willing to make long-term loans (20 to 30 years), with much smaller requirements for down payments. Interest rates were fixed for the loan duration, with monthly payments fully amortizing the loan principal. A second consequence was the development of national, standardized terms and documentation that originating lenders had to use to qualify for the FHA and VA programs. Previously there had been substantial diversity in mortgage terms for interest rates, payment schedules, and maturity.

National markets for the origination and holding of mortgage loans did not develop until much later. Under the FHA and VA programs, mortgage lenders that participated chiefly made loans in the local markets where they had a “bricks and mortar” presence. Proximity between lenders and borrowers remained the norm, as it had been before development of the FHA and VA programs.

Geographical proximity between lenders and borrowers was epitomized by the lending operations of Bailey Building & Loan Association in the classic Jimmy Stewart movie, It's a Wonderful Life, released in 1947. That locally owned institution took deposits from residents of Bedford Falls, which it recycled as capital by making home loans to other Bedford Falls residents. Saving, lending, and borrowing were all geographically localized transactions.

Locally based home lending, which engendered close proximity between borrowers and residential mortgage lenders, began to wane in the late 1970s. Savings and loan associations, the backbone of home lending, and banks lost much of their capital when depositors moved billions of dollars to newly created money market funds and similar investment vehicles, which offered much higher interest rates than the traditional regulated savings accounts. In response, in the early 1980s the federal government eased restrictions on traditional lenders, allowing them to compete with financial institutions that offered the newer products.

At the same point in time, the secondary mortgage market emerged, which allowed widespread sales of home mortgages through pooling and securitization. The secondary mortgage market largely solved the problem of inadequate capital held by many mortgage lenders. A lender’s deposits do not limit the quantity of mortgage loans it can make if the lender “cashes out” by selling the mortgages it originates. Gradually lenders sold more and more of the home mortgages they originated through secondary mortgage market channels, so that by the 1990s it was rare for lenders to eschew that market by keeping mortgages in their own portfolios. Local mortgage loan origination, followed by immediate sales in the secondary mortgage market, created geographical distance between borrowers and lenders. Although the local originating institution may retain the role of servicing the loan, the real owner or owners of the loan (usually institutional investors) are located in other communities, states, and nations.

Another market change created further distance between lender and borrower. Today an increasing number of
borrowers obtain their mortgages from out-of-town originators, rather than from local lenders. From the standpoint of many borrowers, doing business with a local lender is not a priority; the main point is to obtain the required mortgage money at the best terms (cheapest cost) possible, and in today’s competitive marketplace for home mortgage money, often an out-of-town source offers the best financial terms. A borrower may deal with a mortgage broker, who has access to multiple foreign lenders, or a borrower may shop for a mortgage loan directly, typically obtaining information and submitting applications through the Internet.

The geographical distance created between lenders and borrowers has substantially increased mortgage fraud risks for lenders (including the ultimate purchasers of mortgage loans) for two reasons. First, today’s lender (or loan buyer) typically has had no direct contact with the borrower and has no personal information about the borrower. Unlike loans made by Bailey Building & Loan, where George Bailey personally knew his customers (where they worked, where they lived, their reputations, and so on), today’s lender possesses only a name, a Social Security number, and a record prepared by third parties, such as credit reporting agencies and appraisers. The lender relies solely on records (paper or electronic) that display purportedly accurate information about the borrower.

Second, today’s lender typically has no direct, personal knowledge about the collateral for the loan, that is, the house. With loans made by Bailey Building & Loan, the principals and employees of the local lender knew their hometown, Bedford Falls, and all the neighborhoods in which their customers bought homes. It would have been difficult for a loan applicant to defraud Bailey by submitting documentation that indicated, for example, a market hometown, Bedford Falls, and all the neighborhoods in which their customers bought homes. It would have been difficult for a loan applicant to defraud Bailey by submitting documentation that indicated, for example, a market

The geographical distance created between lenders and buyers. Not only does the mortgage broker select the lender, or select a small list of prospective lenders for 45% of all U.S. residential mortgage loans. The percentage was even higher in the subprime market bubble, among market participants and the creation of new credit products. As of 2006, mortgage brokers arranged for 45% of all U.S. residential mortgage loans. The percentage was even higher in the subprime market bubble, when mortgage brokers originated 71% of the subprime loans. Mortgage brokers function to eliminate direct contact between lenders and buyers. Not only does the mortgage broker select the lender, or select a small list of prospective lenders for the borrower to consider, but the broker typically serves as the conduit for all communication between the borrower and lender until the closing of the loan.

Transactional Distance
Along with geographical proximity, parties to the traditional mortgage loan had “transactional proximity,” meaning that borrower and lender dealt with one another directly for the loan application and most of the other requirements that had to be satisfied before the lender funded the loan. Often the principal parties had significant face-to-face contact, which proceeded easily because they resided in the same community. When necessary, the principals hired agents, but their roles were circumscribed and their presence did not have the effect of taking control of the transaction away from the principals or reducing direct contact between the principals on the key elements of the contemplated loan transaction.

At the same time in the late 1970s and early 1980s that the secondary mortgage market began to take off, the roles of third parties in mortgage loan origination also were changing. Over time, intermediaries assumed new or expanded roles in facilitating residential loans. Transactional distance between borrower and lender became the new norm. Today most lenders and borrowers have little direct contact. Instead, intermediaries separate and isolate the principal parties. These intermediaries, who sometimes serve as agents for one or both of the parties and sometimes serve as non-agent middlemen, include mortgage brokers, appraisers, closing officers, title insurers, surveyors, credit reporting agencies, and participants in the secondary mortgage market.

Residential mortgage brokerage did not begin in the United States until the 1980s, when banking and lending law reform reconfigured the markets, with a philosophy of deregulation that allowed substantially more competition among market participants and the creation of new credit products. As of 2006, mortgage brokers arranged for 45% of all U.S. residential mortgage loans. The percentage was even higher in the subprime market bubble, when mortgage brokers originated 71% of the subprime loans. Mortgage brokers function to eliminate direct contact between lenders and buyers. Not only does the mortgage broker select the lender, or select a small list of prospective lenders for the borrower to consider, but the broker typically serves as the conduit for all communication between the borrower and lender until the closing of the loan.
Real estate appraisers perform the vital role of certifying the market value of the house, which serves as the collateral for the mortgage loan. For residential loans to be traded on the secondary market, the documentation must include an appraisal by an appraiser who meets federal guidelines. In relatively few cases does the borrower select the appraiser. Usually the originating lender picks the appraiser, and today the appraiser is usually an intermediary rather than an “in-house appraiser” (an employee of the lender). In principle, the appraiser’s duty to his principal (the lender) should protect the lender from overestimating the value of the collateral. To the extent that the appraiser must exercise judgment in reaching a professional opinion about value, the appraiser should estimate a conservative value, to assist the lender in making sure that adequate collateral value will back the loan.

Ironically, however, the proximity between appraiser and lender has generally failed to serve this purpose in modern transactions. Originating lenders make profits only if they originate loans; they must originate high volumes of loans to obtain significant profits. If an appraiser delivers an appraisal that is below the contract price agreed to by seller and buyer, the mortgage loan in the requested amount and loan-to-value ratio is not approved, and thus the transaction usually collapses. During most of the past decade, lenders applied an increasing amount of pressure on appraisers to hit or exceed a predetermined value. Appraisers that failed to deliver sufficiently high appraisals often lost business, with lenders shifting their business to appraisers that would confirm the target values. This behavior posed little risk to the lender because the large majority of originating lenders sell their loans on the secondary mortgage market. As a result, it is the purchasers of mortgage-backed securities that ultimately bear the risk from overinflated real estate appraisals.

Closing practices have also evolved in the direction of transactional distance. Closings were often held at the savings and loan association or bank building, and even when closings were held elsewhere, such as at a title company, an employee of the lender often attended. This gave the lender direct control over the closing and the ability to approve all documentation and to deal with any last-minute changes or complications before parting with control over the loan funds. Nowadays, the norm is for an intermediary to close the loan, acting under loan instructions issued by the lender. The intermediary is usually a title company employee, an attorney, or an independent closing officer. Most lenders have their loans closed by many different individuals, and as a consequence the lender usually cannot acquire sufficient information to ascertain the quality of a particular individual that closes its loans.

The pervasive use of intermediaries or middlemen that create transactional distance between borrowers and lenders substantially adds to lender risk. Not only are borrowers and lenders separated, but the lender relies substantially on the work product of persons with whom the lender generally has no significant prior and no continuing long-term relationship and no objective reason to believe that their work is competent and meets professional standards for quality. Most intermediaries have no long-term stake in the assets they generate. Most do not rely on any particular lender for a substantial proportion of their business, and therefore their incentives to produce quality work are weak.

The presence of many intermediaries in a typical transaction enables mortgage fraud because fraudsters are able to corrupt intermediaries in a sizeable number of transactions. Even when an intermediary is not corrupted in the sense of being induced to prepare a record that the intermediary knows to be false, a fraudster can exploit an intermediary—especially one whose level of competence is minimal—by providing the intermediary with false information, which the intermediary turns into a record that appears to be fine on its face.

**Financial Distance**

The relationship between parties to the traditional mortgage loan once was marked by “financial proximity,” meaning that borrower and lender had significant financial interests in the mortgage loan transaction. Both had and kept skin in the game. Both had significant financial interests after loan funding, and those interests persisted until repayment of the loan at maturity or by refinancing. Lenders generally required the borrower to make a meaningful down payment; thus the borrower had an equity stake from day one. The borrower’s equity gradually grew every month because loan payments were set at an amount high enough to amortize the loan principal. Such amortization in effect amounted to a forced savings plan, which augmented the owner’s equity even if the property did not appreciate in value at all.

By funding the loan, the originating lender acquired a substantial financial asset. It had fully performed its commitment by advancing all of the loan proceeds, and it was relying on the borrower’s promise to repay in installments, backed by collateral that it expected was sufficient to protect its investment. Before the development of the secondary mortgage market, most originating lenders held the large majority of loans they made in their own portfolios. Thus, the lender had a direct, substantial stake in the borrower’s performance that lasted until retirement of the loan.

Today many residential borrowers still have substantial equity in their properties, but an enormous number of borrowers have no equity (or negative equity) in their homes. Lenders began offering mortgage products with extremely small down payment requirements—for example, conventional loans with a 3% down payment. More
recently, 100% financing and mortgage loans that allowed the borrower to finance the closing costs by adding them to the initial principal balance became common. In addition, many newer loan products depart from the norm of level amortization over the loan period. Interest-only loans, which resulted in no amortization, and negative amortization loans, in which payments during the first years of the loan were less than the accrued interest, became increasingly popular. A borrower with one or both of these features—little or no down payment and no or negative amortization—can still develop substantial equity over time but only if the property appreciates substantially in value.

During the past two decades, many lenders and borrowers, as well as purchasers of mortgage-backed securities, ignoring history, have acted as if appreciation in home values is guaranteed and always will have an upward slope to some degree. Beginning in 2008, the U.S. housing bubble burst, with substantial losses in housing values in virtually every community in the nation. In the aggregate, U.S. homeowners lost close to $8 trillion of housing equity between the high-water mark for housing prices at the end of 2006 and the end of the first quarter of 2009. Federal Reserve Statistical Release 104, at line 48 (June 10, 2010) (owners’ equity in household real estate declined from $13.210 trillion to $5.187 trillion), www.federalreserve.gov/releases/z1/20100610/z1.pdf. Many owners that in fact had made significant down payments when they bought homes found themselves with negative equity. Such loans are said to be “underwater.” As of March 2009, 26% of homeowners with mortgage debt owed more than the current value of their homes. Al Yoon, About Half of U.S. Mortgages Seen Underwater by 2011, REUTERS, Aug. 5, 2009, www.reuters.com/article/idUSTRE5745JP20090805.

The Problem of Securitization

From the lender’s perspective, the key change involves the identity of the real stakeholder and, perhaps more important, the manner in which the investment is held. Because of the securitization of loans through the secondary mortgage market, few originating lenders retain a stake in the loans they create. Instead, originators generate new capital through securitization, selling their loans in the secondary mortgage market. This, of course, completely changes the identity of the person who has a reason to care about the borrower’s performance and the value of the house as collateral. If the borrower defaults and a loss ensues, that loss is borne not by the originating lender but by the purchasing investor or the mortgage insurer or those two persons in some combination.

Securitization through the secondary mortgage market also transforms the manner in which the loan is held, with a dramatic effect on the holder’s incentives. A prime value of mortgage securitization is that, from the investor’s perspective, risk is diluted. Rather than owning entire loans, an investor owns a beneficial interest in a pool containing many loans, usually thousands. This hedges risk: a default by any one borrower under any one loan has a small effect on the value of the investor’s interest. That risk, even if it is a large loan (for example, $400,000) is shared with other investors that have purchased interests in the mortgage pool. But this raises a tragedy of the commons problem. Although dilution of the percentage of beneficial ownership has the benefit of hedging risk, at the same time it inevitably reduces the incentive that an owning investor has for monitoring the performance of any single loan and, if the loan becomes nonperforming, for intervening to attempt to rectify the situation. Rather, when a mortgage in a pool is in default, the investor relies solely on the efforts of the loan servicing firm and the issuer of the security. Those firms lack sufficient incentives to attempt to restructure nonperforming loans, as demonstrated by the recent mortgage securitization crisis. Appropriately, such securities are now called toxic assets.

One of the reasons they have become toxic is the commons problem: the decentralization of risk results in the phenomenon that no lender or investor has a meaningful long-term interest in discrete loans. Financial distance, rather than financial proximity, is now the defining feature of many modern mortgage transactions. Once, borrowers and lenders had compatible long-term financial incentives for the performance of their loans. Today, for many modern loans, that compatibility has disappeared, being replaced by financial distance in which neither borrower nor investor has sufficient incentives.

Suggested Reforms

Mortgage fraud has flourished because the residential mortgage market has adopted institutions and practices that create distance between borrowers and lenders. To combat mortgage fraud, reforms should reduce that distance. When it is not feasible to reduce distance, reforms instead should seek to mitigate the risks associated with distance.

For geographical distance, it is neither feasible nor prudent to eliminate or drastically curtail the secondary mortgage market, but other reform measures are possible. A prime ingredient of mortgage fraud involves deceiving the lender about the borrower’s true identity, accomplished through identity theft, straw buyers, or other means. Loan closing practices generally consist of no more than the viewing by a notary public of a borrower’s driver’s license, typically coupled with the display of a borrower’s Social Security number on a credit report and other loan-related documents. Better closing procedures for verifying borrower identity could include requiring the borrower’s birth certificate, an identity card in addition to a driver’s license, or copies of utility bills at the borrower’s current or previous residence. Also, taking digital photographs of the borrowers who appear at the closing may be worth...
considering.

The market could attach a premium to loans made by community lenders to borrowers residing within their discrete geographical market. Such loans bear less risk of mortgage fraud and less risk generally. The community lender may know the borrower from a previous banking relationship, and, if not, the nearness makes it easier for the lender to verify the borrower’s identity and other underwriting-related characteristics, such as employment history and history of prior residences. Moreover, the lender’s geographical proximity to the house that serves as collateral makes it less likely that the lender will be deceived about value. The premium could be reflected by the price paid for such loans in the secondary mortgage market. Such loans might also properly bear a reduced mortgage insurance premium, commensurate with the reduced risk. The proposal for attaching a premium to community-bank loans made to local borrowers also will serve to reduce transactional distance because such loans typically will not be made through a mortgage broker.

Another reform aimed at transactional distance is recasting the lender-appraiser relationship. Inaccurate appraisals that overstate value, either because of fraud, mere exaggeration, or other factors, are a critical component of many mortgage fraud schemes. Under present practice, the lender usually contracts with an independent appraiser or appraisal firm. Lenders should be held liable for the work product of lender-hired independent appraisers to the same extent as if they were employees. This practice would empower secondary market buyers to hold lenders liable when the buyers incur losses resulting from appraisers’ intentional or negligent overstatement of values. Such a measure would significantly increase the incentive of lenders to monitor appraiser behavior.

The third type of borrower-lender distance, financial distance, represents the misalignment of incentives to perform between borrower and originating lender. Reforms on both sides of the lending equation seem necessary. So far, some attention has been given to the borrower side, with underwriting criteria reformed to require some meaningful down payment for virtually all borrowers. No changes, however, have served to give originating lenders a sufficient, immediate interest in how the loans they make perform after sale in the secondary mortgage market. In the event of a loss to a loan purchaser stemming from a borrower default, allowing the purchaser full recourse against the originating lender could, under some circumstances, serve as a powerful incentive for the lender not to make and sell bad loans. In effect, the originating lender would become a guarantor of the purchaser’s performance. If the loan is subject to mortgage insurance, perhaps the insurer should take by subrogation the right of recourse against the originating lender. One potential weakness of a full recourse rule is that recourse is only as good as the solvency of the guarantor. As the current financial crisis has demonstrated, many U.S. financial institutions lack the cash reserves and capitalization to weather a significant economic slump. Accordingly, to serve as a meaningful incentive to avoid originating weak loans, assets would need to be set aside to cover some percentage of the potential recourse liability.

Conclusion

Mortgage fraud will always be present. The mortgage lending process, however, can and should be reformed to decrease the occurrence of tainted mortgage loans.
RESIDENTIAL REAL ESTATE FORECLOSURE

A White Paper analyzing the national residential real estate foreclosure crisis, its impact on the African-American community and how Federal and State governments are using mortgage modification programs to cope with the problem.

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I. Introduction.

For Americans of all backgrounds, the American dream means owning their own home. And for most Americans, especially African-Americans, homeownership is their primary means of accumulating wealth. Simply stated, homeownership means more than mailing in a monthly mortgage payment. Homeownership symbolizes privacy, stability, responsibility and security. Homeownership increases the feeling of control over one’s life. Homeownership represents that a family has roots in its community and that the family is socially tied into its neighborhood, city and state. Most importantly, homeownership represents a long-term financial investment in the future of one’s family, community and municipality.

The current foreclosure crisis threatens these very ideals, all of which are imbedded in the fabric of American culture. Through foreclosure, millions of Americans are losing their homes and are literally being thrown out on the street. The goal of this white paper is to provide an overview of foreclosure, its impact on homeowners and how federal and state governments are addressing the problem. Section II defines the various types of foreclosure. Section III provides an overview of the current economic landscape in America. Section IV highlights the costs of foreclosure. Section V analyzes foreclosure’s impact on the African-American community. Section VI breaks down mortgage modification programs. Specifically, this section will discuss the Obama administration’s Home Affordable Modification Program (HAMP) and the Philadelphia Residential Mortgage Foreclosure Diversion Pilot Program.

II. Types of Foreclosure.

If a person has a mortgage on real property and that individual fails to make mortgage payments, that person will be in default on the mortgage and the mortgage is subject to foreclosure. As a general concept, real estate foreclosure is the legal right where a party (a mortgage holder or mortgagee or third party lien holder) who has loaned money secured by a mortgage or deed of trust on real property (or has an unpaid judgment), requires the sale of real property by the property owner (the mortgagor) to recover the money due, unpaid interest, plus the costs of foreclosure, when the debtor fails to make payment. Originally, foreclosure law provided that a mortgage default resulted in the automatic ownership of real property by the mortgagee. However, the law has since developed to allow mortgagors the opportunity to pay off the overdue payments before the property is taken away, i.e., repossessed. Each state handles foreclosure differently; however, there two widely used types of foreclosure.

Judicial foreclosure, or foreclosure by judicial sale, is available in every state and required by many. Judicial foreclosure involves the sale of mortgaged property under court supervision. After the sale of the mortgaged property, the proceeds are then used to satisfy the underlying mortgage and any amounts due to other lien holders with the remaining proceeds going to the mortgagor. The judicial foreclosure process is typically governed by state law, however, as a general matter the process is as follows: (1) a mortgagor signs a mortgage where real property secures the mortgage; (2) the mortgagor defaults on the mortgage; (3) the mortgagee files a foreclosure complaint against the mortgagor in the county where the property is located; (4) a trial (or a settlement) takes place and a judgment is entered; (5) a writ of sale is issued by the court clerk; (6) the real property is secured, notice of sale is given and the property is sold; (7) if the sale price is less than the amount owed the mortgagee can obtain a deficiency judgment against mortgagor; and (8) in some cases the mortgagor can execute a right of redemption and redeem the real property within a specific amount of time provided by law. 
Non-judicial foreclosure or foreclosure by power of sale involves the sale of the property by the mortgagee but without court supervision. With this type of foreclosure, the mortgagee exercises a power of sale clause contained in the mortgage. Due to the lack of court intervention, non-judicial foreclosures typically take place faster than judicial foreclosures. Non-judicial foreclosures are processed in varying ways, however, in general they proceed as follows: (1) a mortgagor signs a mortgage where real property secures the mortgage; (2) the mortgagor defaults on the mortgage; (3) the mortgagee sends the mortgagor a notice of default; (4) the notice of default is recorded in the county recorder of deeds office; (5) after a period specified by law, the mortgagee may give notice of sale if default has not been cured; (6) at the expiration of the notice period the mortgagee has the option of selling the real property.

III. Current Economic Landscape in the United States.

The present economic state of mortgages is dismal. At the heart of this problem is the combination of negative equity, high unemployment, and resets on complex mortgages. According to the Mortgage Bankers Association, in the third quarter of 2009 the amount of U.S. homeowners in foreclosure was 4.5 percent. Additionally, 9.6 percent of borrowers were at least one payment behind during the same period. Stated another way, approximately five million households were behind in their mortgage obligations. The percentage of homes that were delinquent or in foreclosure in the third quarter of 2009 was 14.41 percent. This translates to 7.4 million households. To place this in perspective, this is the highest delinquency rate since the Association began tracking this statistic in 1972. In October 2009, 332,292 properties, or 1 in every 385 households, received a default or auction notice or were seized by banks. One-sixth of FHA mortgages were delinquent; and 3.32 percent were in foreclosure, the highest since 1979.

Other statistics also provide a grim picture. Prime loans were largely affected; 5.8 percent were delinquent, and the foreclosure inventory rose to 1.95 percent, the highest since 1972. RealtyTrac, a foreclosure listing service, predicts that lenders will issue 4 million foreclosure notices in 2010. Almost 2.4 million homes will actually be lost in 2010, and home prices are expected to drop by 10 percent. According to the FDIC, U.S. banks in the second quarter of 2009 held $34 billion in properties through foreclosure. In 2009, 777,630 properties were seized by banks. There are about 7 million more properties which are likely to be seized by the banks. Mortgage foreclosure filings are most prevalent in the Sun Belt states of Nevada, California, Florida, and Arizona. In Florida, one in four mortgagors are behind in payments.

The high foreclosure rate might be explained by the high number of homes which are “underwater.” A home is underwater if the borrower owes more on the mortgage than the house is worth. According to First American CoreLogic, a real estate research firm, 10.7 million homes were underwater, representing 23 percent of homeowners. The negative equity that many homeowners have in their homes decreases the incentive to meet their mortgage obligations. The foreclosure of underwater properties will further depress housing prices because it will increase the glut of housing inventory. Homes with negative equity represent a disproportionate amount of foreclosures; although only 12 percent of homes had negative equity, they represented 47 percent of foreclosures.
With unemployment over 10.2 percent in October 2009, the highest since 1983, many homeowners are defaulting on their mortgages on account of job loss. Besides the official unemployment statistics, others paint a worse picture. The true underemployment rate is 17.5 percent, and average employee wages continue to decline. Some housing specialists warn that a federal response that does not address unemployment will fail. Jay Brinkmann, chief economist with the Mortgage Bankers Association, bluntly states that “job losses continue to increase and drive up delinquencies and foreclosures because mortgages are paid with paychecks, not percentage point increases.”

Despite these dreary statistics, there are some promising indications of recovery. In November 2009, the number of foreclosure filings dropped by 8 percent from 332,292 in October 2009 to 306,627 or one in every 417 houses. Some warn, however, that this drop was artificially created through mandatory mortgage mediation programs, which delay foreclosures. In the third quarter of 2009, U.S. home prices fell 3.8 percent from a year earlier. This is the smallest decline since the first quarter of 2008. One commentator hypothesizes that the drivers of the decrease in the home price depreciation rate are: (1) the increase in demand due to the first-time homebuyer tax credit and (2) the decrease in foreclosure-driven price drops. Dennis Capozza, professor of finance and real estate at the University of Michigan, predicts that foreclosures will peak at about 2.75 million in 2009 and will fall to 1.75 million in 2010. This prediction is based on his assumption that: (1) the nation’s economy will improve, (2) home price depreciation will decrease, and (3) underwriters will tighten lending standards.

IV. **Costs of Foreclosure.**

The natural response when one hears that another household has gone through foreclosure is “I’m glad it’s not me!” This type of response is short-sighted in that it ignores some obvious and not so obvious effects of foreclosure. This section summarizes some of these costs of foreclosure:

1. **Families Suffer**—The loss of a house through foreclosure uproots a family from their community, schools, employment, social activities and support systems. It also divests the family of any financial stake in their home, i.e., equity. As a result, a family’s net worth is severely impacted. Credit histories are negatively impacted which in turn make it more difficult to secure employment, obtain educational loans, as well as secure future home ownership and/or property rental. Older family members are hit hard as well; the AARP reports that in the last half of 2007 more than one of every four mortgage delinquencies and foreclosures involved homeowners over the age of fifty. Elderly people who go through foreclosure have little time to recover lost income. Historically, the elderly rely on the equity in their homes for financial security and as a retirement safety net. Likewise, younger family members suffer. Foreclosure causes families to move. Moving causes instability at home and undermines academic performance, social adjustment and emotional development.

2. **Neighborhoods Suffer**—When one house in a neighborhood goes through foreclosure all of the houses in the neighborhood are adversely impacted because neighborhood property values decrease. It is estimated that 40.6 million homes that are next door to a foreclosed property will suffer an average price decline of $8,667. This equates to an aggregate $352 billion dollar decline in property values.
The risk of crime is also a potential outcome of foreclosure. Besides the decline in property values, the appearances of neighborhoods with foreclosed properties deteriorate. When a property is foreclosed it becomes vacant. When a property is vacant upkeep of the property suffers. This results in neighborhood blight which signals neighborhood distress. Vacant properties can undermine the security of a neighborhood. These properties can be overtaken by squatters, become vandalized or robbed. This appearance of insecurity may increase the risk of crime for all residents of the neighborhood. A 1 percent increase in foreclosure signals a 2.33 percent increase in violent crime, due in part to vacant and abandoned buildings. A study performed in the Charlotte, North Carolina region indicated that in 13 neighborhoods with high clusters of foreclosure during the 2003-2007 period, those neighborhoods experienced higher rates of violent crime and property damage than a group of similar neighborhoods that did not have the same level of foreclosure.

3. **Municipalities Suffer**—Higher levels of foreclosure cause lost tax revenue, unpaid utilities as well as extra municipal costs (e.g., police, fire, maintenance and other essential services). The cost for cities or states to deal with vacant houses can stretch already thin municipal budgets. For example, in Atlanta the city property tax estimates are 15.5 percent below projections. The State of California estimates lost tax revenue from foreclosures to be $4 billion dollars for 2008.

V. **Impact of Foreclosure on the African-American Community.**

The mortgage foreclosure crisis has impacted the African-American community far more acutely than other race. Studies have revealed that a high number of African-American home owners are in foreclosure. According to the Center for Responsible Lending, in 2009 the total number of projected foreclosures for African-Americans will be 301,459. Over the next four years, the number of projected foreclosures for African-Americans will be 1,003,670. These high foreclosure rates are due in large part to lenders who targeted and sold African-American borrowers subprime loans.

It is well-documented that African-Americans are substantially more likely than whites to receive a high cost subprime mortgage. Subprime mortgages refer to “home loans that are made to borrowers who do not meet the requirements for competitive, prime loans.” These loans are designed for people with limited or spotty credit histories and are associated with higher interest rates. The costs of these loans to borrowers are huge. Subprime loans cost $50,000 to $100,000 more than comparable prime loans. This extra cost translates to a loss in equity which in turn translates to a loss in the borrower’s ability to use that equity to, among other things, fund an education, start a business or forestall foreclosure. Instead of building wealth the borrower uses the same money to pay the mortgage company.

A Federal Reserve study indicates that African-American home buyers received higher priced loans three times as often as non-Hispanic white buyers. Another study found that low to moderate income African-Americans were 2.1 times as likely as low to moderate income whites to receive subprime loans. The same study found that middle to upper income African-Americans were 2.7 times more likely than middle to upper income whites to receive subprime loans. Simply put, these types of loans are “steered” toward African-Americans on a systematic basis. This intentional targeting of African-American borrowers was confirmed in a
study by the United States Department of Housing and Urban Development which concluded that “there is a growing body of anecdotal evidence that an unscrupulous subset of these subprime actors—lenders (often those not subject to federal banking supervision) as well as mortgage brokers, realtors, and home improvement contractors—engage in abusive lending practices.” The African-Americans were less familiar with fair loan pricing, desperate for credit, which made them vulnerable targets of these unscrupulous lenders.

Another tangible impact of the foreclosure crisis is the resulting loss of wealth in the African-American community. There are many positive virtues to homeownership. Besides building strong families and communities, homeownership also creates and sustains generational and community wealth. As compared to renters, homeowners are twelve times as wealthy and 66 percent of their wealth is in their home. Homeowners also accumulate an average of $44,000 in wealth in their first ten years of homeownership. With respect to community wealth, homeownership increases the value of all homes in a community. Homeownership produces home related goods and services such as: realtor fees; construction costs; tax revenues; and revenues for banks, lenders and servicers. In one single bound foreclosure destroys all of this.

Nationwide, 47.2 percent of African-Americans are homeowners. Primarily because of the foreclosure crisis the number of African-American homeowners has declined 2 percent between 2004 and 2007. The question is how is this tied into net worth? The answer is simple: the predominance of African-American wealth is tied into homeownership. Specifically, two-thirds of net worth held by African-Americans consists of home equity. Among African-American homeowners, the median family holds 88 percent of its total wealth in the form of home equity. Thus, homeownership is critical in developing and maintaining economic progress in the African-American community. The NAACP estimates that the total loss of wealth in the African-American community because of the discriminatory practices that, in part, led to the foreclosure crisis will be at least $164 billion dollars. With respect to African-American subprime borrowers, they are estimated to lose between $72 billion and $93 billion as a result of the predatory home loans made over the last eight years.

In addition to the economic losses and disproportionate number of foreclosures affecting the African-American community, there are other losses as well. African-American communities, with their high poverty rates, limited municipal services and high rate of unemployment are especially vulnerable to the mass destabilization of their neighborhoods that foreclosure can cause. There is evidence that suggests that property values in low income neighborhoods are destabilized by foreclosure sales. Foreclosure places a strain on city services. Also, foreclosed homes which are not sold lead to rundown and blighted neighborhoods which further decreases property values and staves off investment. Additionally, there are early studies suggesting that foreclosure can possibly cause adverse health effects and may increase the risk of mental and physical health conditions. These studies are not fully developed but there is a school of thought that exists which suggests that “while the literature has not fully explicated the health effects of foreclosure, related exposures have been linked with increased risk for several mental and physical health conditions. This, combined with the frequent finding that home ownership has largely positive associations with health and well-being, suggests that the current raft of home foreclosures may represent an increasing health threat.” All combined, the end impact of foreclosure on the African-American community
does not bode well for community investment, new investment and African-American wealth building.

VI. **Mortgage Modification: A Potential Solution to the Foreclosure Crisis.**

A. **Federal Government Response to the Foreclosure Crisis.**

The Obama administration, as part of its Financial Stability Plan, has instituted a program called “Making Home Affordable.” This program’s aim is to stabilize the housing market by helping up to 7 to 9 million homeowners refinance their mortgages or modify their monthly mortgage payments to affordable levels. The Home Affordable Modification Program (HAMP) has at its disposal $75 billion for loan modifications to keep up to 3 or 4 million Americans who are facing foreclosure in their homes. Loan modifications generally entail reducing the interest rate of the loans or increasing the loan’s term to make the loan more affordable.

To be eligible for a mortgage modification under HAMP, the homeowner must:

1. Be the owner-occupant of a one to four unit home;
2. Have an unpaid principal balance that is equal to or less than:
   a) 1 Unit: $729,750
   b) 2 Units: $934,200
   c) 3 Units: $1,129,250
   d) 4 Units: $1,403,400;
3. Have a first lien mortgage that was originated on or before January 1, 2009;
4. Have a monthly mortgage payment (including taxes, insurance, and home owners association dues) greater than 31 percent of monthly gross (pretax) income; and
5. Have a mortgage payment that is not affordable due to a financial hardship that can be documented.

It is worth noting that a homeowner need not be behind on mortgage payments; one must only be in “imminent risk of default.” For example, a homeowner may be eligible if s/he is 1) suffering serious hardship, 2) experiencing a decline in income, 3) facing an increase in expenses, 4) undergoing an interest rate readjustment, 5) facing a high mortgage debt compared to income, or 5) owing more than the house is worth. Thus, the HAMP program does not penalize those who have been diligent in their payment obligations.

The following procedure is used by servicers to determine whether modification is applicable:
1. Evaluate whether the loan meets the eligibility requirements above;

2. Determine whether the borrower cannot meet the current mortgage payment obligations, based on income, assets, and expenses;

3. Evaluate whether the first lien mortgage payment is greater than 31% of the borrower’s gross monthly income;

4. Determine whether the present value of the loan to the investor would be greater if modified, including government incentive payments;

5. If the modified loan is of greater value to the investor, i.e., the present value of the stream of payments under the modified loan is greater than what the investor can get through foreclosure, the servicer must offer a trial modification;

6. If the borrower makes all the required payments and the submitted documentation is deemed accurate, the lender must offer a permanent modification.

The Treasury Department’s incentives will help servicers write down the interest rate to as low as 2 percent, but the interest rate will only be reduced to a point where the modified payment will equal 31 percent of the borrower’s gross monthly income. In addition to interest rate modification, banks may stretch the loan term to as long as 40 years.

The administration reports that at the end of November 2009, there were 728,000 modifications in process nationwide. Borrowers who are in loan modifications save an average of $550 per month. The administration is, however, disappointed that only 31,382 trial modifications have since been converted to permanent modifications. Phyllis Caldwell, Chief of Treasury’s Homeownership Preservation Office (HPO) said, “Our focus now is on working with servicers, borrowers and organizations to get as many of these eligible homeowners as possible into permanent modifications.”

As a new program, HAMP has room for improvement. Assistant Treasury secretary Michael S. Barr said, “The banks are not doing a good enough job.” House Financial Services Chairman Barney Frank criticized the administration’s efforts, saying, “We have a great frustration with the failure of the combined efforts of elements of the federal government to make a substantial impact on the foreclosure crisis.” One potential reason that banks have failed to make many loans permanent is because it would forego lucrative fees from long-term delinquency. Servicers collect fees from investors of the mortgages that increase the longer a borrower is delinquent. Another potential reason is that there is no process of triaging the 7.5 million delinquent loans.

There is anecdotal evidence that the reason why trial modifications have not been made permanent is because of the lack of diligence by homeowners to provide required documentation, such as pay stubs and tax returns, to make it permanent. According to Jack Schakett, a Bank of America risk management executive, of the 65,000 customers who have met their obligation of making three payments during the trial period, 50,000 are ineligible for permanent modification.
because they did not provide the required documentation. Similarly, at J.P. Morgan Chase, 51 percent of those offered trial modifications failed to submit required documentation to make them permanent. Some borrowers complain that the servicers are not being diligent themselves; they report servicers losing documentation and failing to respond to phone calls.

In addition to failing to provide necessary documentation, many homeowners under the modification program are failing to meet their reduced mortgage payments. According to government data, 25 percent of HAMP-modified borrowers are late on their mortgage payments. J.P. Morgan Chase noted that of its 178,000 modified loans, 22 percent of the borrowers failed to make their first payment. There are several hypotheses for why homeowners are failing to make the modified payments. Some commentators suggest that homeowners are confused by the modification process, especially with respect to the process of making the modified payments. Another possible explanation is a further deterioration in the borrower’s financial status after the application; borrowers are not permitted to a second modification for changed circumstances. Some commentators, such as Mark A. Calabria of the Cato Institute, posit that some borrowers are gaming the system by using the modification program to save their home or live for free in avoidance of foreclosure. In order to receive a trial modification, a borrower need only declare their income without providing confirmatory evidence. Further studies on why temporary modifications are not being converted into permanent ones would inform policymakers on how best to improve the operation of the system.

The Treasury Department is not idly watching the HAMP modification fail from the sidelines. In an effort to ensure that servicers are diligently requesting and processing documentation, it will send in “SWAT teams” to monitor the eight largest servicers and will request twice-daily reports from them. In addition, Treasury warns that it will withhold payments to servicers as a penalty for failing to make modifications permanent. Treasury Secretary Michael Barr said that it would also use shame to induce banks to improve their modification process; it will publicly list those servicers who move slowly in modifying loans. Thus, efforts are being made to ensure that banks meet their obligations, but there is a long way forward.

B. State Government Response to the Foreclosure Crisis.

As the foreclosure crisis deepens, many states are implementing their own mortgage modification programs. Foreclosure mediation programs are relatively new with the oldest programs having been in effect for a little over one year. However, implementation of these programs has been accelerated. Currently, there are at least 25 foreclosure mediation programs in operation in 14 states. Some programs refer residential foreclosures to the court’s existing alternative dispute resolution systems while other programs require special court supervised settlement conferences. Other programs do not involve formal mediation or mediators at all. For example, the Superior Court of the State of Delaware established a residential mortgage foreclosure mediation program on August 31, 2009. In the Delaware program, lenders must send notice of the program with the notice of foreclosure. Before participating in mediation, homeowners must meet with a HUD approved housing counselor and develop a good faith proposal where monthly mortgage payments will not make up more than 38% of their monthly income.
In New Mexico, the First Judicial District court in Santa Fe established a foreclosure mediation program as part of its alternative dispute resolution program. After serving a complaint and a summons, plaintiffs are required to provide a notice to the homeowner that provides information about where the homeowner can receive help. Both the plaintiffs and defendants may request a referral to foreclosure mediation.

Michigan enacted the Michigan Home Foreclosure Prevention Act. The Act authorizes a commissioner to review the lender’s and borrower’s information to determine whether foreclosure can be avoided. An extension of the filing date for a foreclosure can be up to 90 days or the commissioner may impose a requirement that the borrower and lender participate in mediation if new terms can be worked out.

While each of these and many other foreclosure mediation programs seek the same result, which is to prevent additional foreclosures, the Philadelphia Residential Mortgage Foreclosure Diversion Pilot Program has emerged as a national model that has enabled hundreds of troubled borrowers to retain their homes.

1. Philadelphia Residential Mortgage Foreclosure Conciliation Program.

On September 16, 2008, the Court of Common Pleas of Philadelphia County established the Residential Mortgage Foreclosure Diversion Pilot Program, an experiment which has drawn national attention. It was spearheaded by Judge Annette M. Rizzo, who organized a task force to address the mortgage foreclosure issue locally. The local court regulation mandates that all owner-occupied residential properties subject to foreclosure must be scheduled for a conciliation conference before the property is sold at a sheriff sale. A conciliation conference is an in-person meeting between the borrower and the lender designed to encourage compromise through such options as lower monthly payments, increased loan terms, or graceful exit, in which the borrower receives cash in exchange for vacating the property. Every homeowner is provided with a counselor, and some are provided with legal representation. Recognizing that homeowners facing foreclosure may be overwhelmed by the process, the city advertises the program through housing advocates and public service messages displaying the Save Your Home Philly Hotline. According to the city, the program has saved about 1,800 homes from foreclosure, and 3,500 homes are in-process.

At the conciliation conference, the borrower and lender must address:

1. Whether the Defendant is represented and if not represented, whether volunteer counsel may be available and appointed;

2. Whether Defendant(s) met with a Housing Counseling Agency, as required;

3. Whether the Housing Counseling Agency has prepared an assessment or report providing available loan work-out for the Defendant;

4. Defendant’s income and expense information;

5. Defendant’s employment status;
6. Defendant’s qualifications for any of the available work-out programs, upon review and application of guidelines established pursuant to this General Court Regulation;

7. Assistance with preparation of work-out programs, upon review and application of guidelines established pursuant to this General Court Regulation;

8. Assistance with preparation of work-out plans and required Court Orders, as appropriate;

9. The necessity of subsequent Conciliation Conference;

10. Whether the case may proceed to Sheriff Sale if there is no prospect of an amicable resolution; and

11. Any other relevant issue.115

If the conciliation is unproductive, a homeowner may request a mediation with a volunteer attorney, who then provides a recommendation to the Judge. The Court of Common Pleas issued this regulation in recognition of its ability under the Pennsylvania Rules of Civil Procedure to “assist the Court and the litigants in the simplification of the issues involved, and to address such other matters which may aid in the timely and efficient disposition of the action.”116 If the borrower fails to appear at a conciliation conference, the court may proceed with the sheriff sale upon proof of mailing the required notice.117

Volunteer lawyers are essential to the success of Philadelphia’s program. The Philadelphia Volunteers for the Indigent Program (VIP) regularly sponsors CLEs on mortgage foreclosure negotiation training to assist and encourage volunteer lawyers to represent those facing foreclosures at conciliation conferences. They educate attorneys on the essential aspects of the program, including a primer on mortgage foreclosure and pointers on how to negotiate a settlement. They also coordinate with local attorneys to ensure that the conciliation conferences are adequately staffed with pro bono counsel.

There are mixed reviews of this experiment. Philadelphia’s efforts have been lauded by the U.S. Conference of Mayors, which awarded Philadelphia the Outstanding Achievement Award for its mortgage diversion program.118 It has drawn national attention because it is a unique method of addressing the issue. However, some commentators, such as Philadelphia lawyer Matthew B. Weisberg, argue that it is an “ineffective stopgap prolonging what appears to be the inevitable, which is the loss of homes.”119 Unfortunately, many homeowners face tremendous financial pressures through the loss of employment or illness and are unable to make adequate concessions to which a lender would agree.
VII. Conclusion.

The severity of the foreclosure crisis permeates throughout America and shows no signs of abating. The dismal state of the economy combined with unemployment and high risk subprime mortgages have created an economic tsunami for many homeowners, especially African-Americans. This has resulted in disproportionately high rates of foreclosure in the African-American community. The resulting impact has caused an extraordinary loss of wealth in the African-American community.

This loss of wealth is not limited to finances either. Communities are suffering as foreclosed homes have created blighted blocks in neighborhoods. Municipalities are suffering because the dwindling number of homeowners continually shrinks the tax base. Foreclosure has also placed a strain on municipal services. Mortgage modification programs, on both the state and federal levels, may provide a necessary antidote to this problem. Because these mortgage modification programs are new, it is too early to determine whether they are effective. Only time will tell whether these modifications will help people survive the foreclosure crisis. Given the enormity of the crisis, the fact that banks, homeowners, legislatures and the courts are attacking the problem is promising.

At this point, however, there appear to be far more questions than answers: does mortgage modification work; can African-Americans rebuild their lost wealth; will the neighborhoods which have been decimated by foreclosure be rebuilt; should lenders issue a temporary moratorium on mortgage foreclosures; are lenders serious about resolving the foreclosure crisis or are they paying “lip service” to the issue; will state and federal legislatures draft laws to prevent this crisis from repeating itself in the future? One thing is clear, something drastic has to be done to fix this crisis. The future of African-Americans depends on it.

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98 Id.
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HOW TO BUILD PRACTICE WITH PRO BONO

CLIENTS, SKILLS, REPUTATION, RELATIONSHIP, AND MEANING FOR YOUR LAW PRACTICE

By Nelson P. Miller
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The Foreclosed

Home Protection and Mortgage Relief—
Helping Families Save Their Homes

Homeowners have always faced the risk of foreclosure of a residence because of loss of income due to poor health, job loss, divorce, and other causes. Pro-bono service to some of those clients has long been necessary and appropriate. The loss of a home to foreclosure can destroy a family’s finances, security, future and relationships. When a client does not have the income to keep a roof over the client’s family, there is a good chance that there is no income to retain a lawyer. The recent collapse of the residential-real-estate market has greatly increased the need for legal services to homeowners facing foreclosure and greatly increased the need for pro-bono service. The nation has faced and continues to face a foreclosure crisis. The substantial percentage of homeowners who have no equity in their home and owe more than their home’s value suggests that the crisis will continue indefinitely into the future. The worst of the foreclosure crisis is not necessarily behind us. In addition to the fall in real-estate values, the temporary interest-rate advantages of nontraditional subprime mortgages continue to expire, resulting in rate increases and balloon payments. Even if the mortgage crisis is over, and even if home prices begin once again to rise, foreclosures will continue for the traditional reasons, meaning loss of income from job loss, disability, divorce, and similar reasons.
There are substantial opportunities for legal service in general and pro-bono service in particular to make a difference to the homeowner facing foreclosure. Pro-bono service to homeowners facing foreclosure introduces you to potentially productive professional and client networks, both among lenders and homeowners. Banks have substantial interests in keeping homeowners in their homes. Foreclosed homes sell below mortgage value, meaning that banks lose money on foreclosures. If there was any equity in the home, then the homeowner would have sold the home, realized the equity, and avoided the embarrassment, stress, and long-term credit effects of foreclosure. Banks have substantial incentives to work with homeowners not only to avoid foreclosure but to keep the homeowner in the home. Empty houses decline in value precipitously compared to occupied homes, due to the ravages of vandalism and effects of weather. Communities have a similar interest in keeping homes occupied for their tax revenue, neighborhood home values, and community aesthetics and safety. There are also regional, state, and national interests in home ownership. Effective pro-bono service can in many cases draw on this alignment of interests and the programs and opportunities the interests create and support, to keep a client in a threatened home. Consider an approach and attitude toward the pro-bono client facing foreclosure, before considering more concrete steps.

**Approach.** The pro-bono client facing foreclosure is in a highly fluid situation surrounding one of life’s most fundamental needs, meaning a roof over one’s head. The real prospect for homelessness may be either substantial or insubstantial. The client may have income with which to rent an apartment or relatives with whom to live. Yet the sense of uncertainty, loss, disruption, and displacement can loom larger than the actual risks. There is an emotional component to losing one’s home. That emotional component can, if not recognized and managed, affect the client’s prospects in other areas, particularly in gaining or maintaining employment and leading a family. The homeowner typically has multiple responsibilities. When foreclosure threatens one of them (keeping a roof over the family’s head), it threatens others. It is a time when legal advice needs to identify reliable actions. Security can take different forms. Families facing loss of a home can take security in a plan to remain together, maximize the benefit from current financial resources, minimize crippling financial obligations, put into place sound financial principles, and in the future lead a better, more stable life. The adversity principle applies here, too, that it can bring about needed and beneficial deeper change. Shape your legal advice to this approach, and you should find it producing benefits beyond the immediate legal challenge for foreclosure. Now consider the specific legal issues.

**Initial Planning.** First consider an outline of foreclosure assistance. Whether pro bono or compensated, foreclosure assistance follows an ordinary course. That course begins by determining where the lender believes that the
client borrower stands with respect to the borrower’s actual and claimed obligations. Ask the pro-bono client to show you the latest correspondence or other documents, including especially any court papers. Next, review any available transaction documents (note, deed, mortgage, and closing documents) for possible defects in execution or recording (incorrect or omitted names, missing signatures or notarization, incorrect property identification or description). Next, discern the mortgage balance, monthly payment, and amount in arrears necessary to bring the mortgage current. Try to get a reliable appraisal or estimate of the property value. Compare the estimated property value to the mortgage balance to determine if the borrower is “upside down” or “under water” with a larger mortgage debt than property value, considering probable costs of sale. Reviewing loan administration is a sensible next step, examining account representations and other communications as to the adjustment or waiver of terms. Discerning the lender’s and borrower’s goals is a good next step, including whether one or both parties wants the borrower to remain in the home, why or why not, and the reasons. Gathering this information, even generally in the first encounter with the pro-bono client, can help you generate options and evaluate proposals. You should also have or develop a sense of the local real-estate and lending markets. Finally, it helps to have a relatively clear sense of the property itself including its features and marketability, and the extent to which it is mortgaged.

Foreclosure Concepts. Next understand the key concepts surrounding foreclosure. While pro-bono clients may think of foreclosure as a single course of action that the lender takes, foreclosure in the broadest sense involves two options that the lender may take alone or together. The first is to take title to the home itself (literally to foreclose the homeowner’s interest), while the second is to pursue an action on the mortgage debt. The lender need not necessarily file a court action in order to take title to the home, that is, to foreclose. The lender’s foreclosure action may be by notice or court action (that is, foreclosure by notice or judicial foreclosure), depending on the terms of the mortgage, state law, and the lender’s strategy. If on the other hand, the lender wishes to pursue an action on the debt, then the lender must do so by filing a court action. In that case, the lender is almost certain to make that court action one for both foreclosure and a money judgment on the debt, unless the lender has already foreclosed by notice. The lender’s choice is likely to depend on how the lender hopes to manage any deficiency between the amount it realizes from the foreclosure and sale of the home and the amount the borrower owes after the lender applies those proceeds to the mortgage debt. If you understand these basic concepts and especially strategy regarding deficiencies, then you are likely to be able to help a pro-bono client with foreclosure. You must consult the applicable state law, which varies
widely, for specific procedures, but economics inform the strategic choice of procedures. The question of price adequacy is much, if not everything.

**Required Notices.** Your state’s foreclosure law may give you tools to help the pro-bono client avoid or manage foreclosure. Notice provisions are one of those tools. Some states have enacted special provisions requiring that the lender notify the defaulting borrower 90 days or a like period in advance of a foreclosure action. See, e.g., N.Y. REAL PROP. ACTS L. §1304. Those laws may require that the notice include the mortgage servicer’s contact information for workout options, contact information for housing counseling agencies, and warnings regarding losing the home to foreclosure. State law may require similar notices in the summons and complaint commencing the foreclosure action, see, e.g., N.Y. REAL PROP. ACTS L. §1320, and may even require a separate notice with the summons and complaint more specifically detailing the borrower’s procedural obligations, the available agency resources to meet those obligations, and the need to avoid foreclosure-rescue scams, see, e.g., N.Y. REAL PROP. ACTS L. §1302. State law may also require the foreclosing plaintiff to include in the complaint a statement that the plaintiff by assignment holds the note and mortgage at the time of the action’s commencement or otherwise has the mortgage holder’s authority, and that the mortgage complies with the state’s laws. See, e.g., N.Y. REAL PROP. ACTS L. §1302. State law may make the lender’s failure to give these notices a defense that pro-bono counsel can raise to a subsequent foreclosure action.

**Procedure.** The pro-bono lawyer unfamiliar with foreclosure proceedings may be heartened to know that foreclosure procedures tend to be like those for instituting and pursuing other civil actions. The lender must file the action in a court having jurisdiction and venue, typically in the county where the real property is located. The lender must serve the summons and complaint on the borrower, filing proof of service. The borrower must answer or otherwise defend within the usual period provided by the state’s rules of civil procedure, or suffer default. In instances where the borrower does not intend to remain in the home, default may be appropriate. The lender’s ability to take a prompt judgment of foreclosure and more quickly sell the home may prevent arrearages from accumulating and may result in the home’s preservation for sale and a higher sale price on the home, all to the borrower’s advantage. On the other hand, if the borrower has yet to exhaust available options and resources for remaining in the home, then the case may warrant an answer raising available defenses. An answer raising genuine issues of material fact as to the mortgage’s validity, the plaintiff’s assigned right to maintain the action, the lawfulness of the form of notice and timing of foreclosure, or the amount of the mortgage obligation, will likely place the case on the usual civil-litigation track, gaining the borrower additional time over default proceedings. Specific legal and equitable defenses to a foreclosure action may include fraud, breach of fiduciary duty, unclean hands,
unconscionability, Truth in Lending Act violations, or violation of statutory foreclosure and settlement procedures.

Settlement Procedure. State law may mandate special settlement procedures for foreclosure actions. If not, then the usual court rules will apply and may provide a similar opportunity. Settlement conferences for foreclosure actions are a good opportunity to exchange mortgage-modification proposals. The lender’s attorney will likely have a mortgage-modification application available. Conference orders typically require attendance of lender representatives who have authority to settle but may allow attendance by telephone. State law may require the lender’s representative’s attendance. See, e.g., N.Y. C.P.L.R. §3408(c). As is true in other settlement conferences, the critical aspect of a foreclosure-action settlement conference is ensuring that attendees have authority to negotiate.

Settlement Options. Depending on the lender’s authority and evaluation, the borrower’s settlement options may include: (1) reinstatement of the mortgage and loan with waiver of fees and penalties; (2) the borrower’s short sale of the home with the proceeds conveyed to the lender; (3) default allowing foreclosure to proceed uncontested by the borrower; (4) deed to the lender in lieu of foreclosure; or (5) modification of the mortgage for reduction of the monthly payment, by altering the interest rate or term, or even the principal balance. Reinstatement is generally possible only when the borrower has obtained other resources such as family assistance, there has been little delay, and the arrearage is not substantial. Deed in lieu of foreclosure has the advantage over default of avoiding foreclosure’s full effect on the borrower’s credit, although deed in lieu of foreclosure has its own effect on credit, and in both instances the borrower loses the home. Fortunately, under the Mortgage Debt Relief Act of 2007, Pub. L. 110-142 (Dec. 20, 2007), federal law now treats as non-taxable a lender’s forgiveness of a homeowner’s note to purchase or improve a primary residence. If a settlement conference generates one or more settlement options especially including renegotiation of the mortgage interest, term, or principal balance, then attempt to get the lender’s counsel to agree to accept negotiation communications rather than requiring the borrower to deal with an unfamiliar and potentially unresponsive and unaccountable lender representative.

Recourse. Consider closely in your pro-bono counsel whether the lender retains a right of recourse against the borrower after workouts in which the borrower vacates the home. An important aspect of any option involving the homeowner’s relinquishing the home, including in particular default or deed in lieu of foreclosure, is whether the bank retains recourse against the borrower for the loan deficiency after foreclosure sale. Unless the borrower intends a prompt bankruptcy, the borrower should avoid recourse settlements because of the lender’s ability to enforce the deficiency judgment through garnishment of wages and accounts or execution on non-exempt
assets. Non-recourse settlement for deed in lieu of foreclosure may be the borrower’s preferred option, especially if the mortgage balance substantially exceeds the home’s value. Note, though, that some states bar judgments for deficiency after a trustee’s sale, for foreclosure of smaller, single-family or duplex residential properties, instead requiring judicial foreclosure and sale for deficiency judgment. See, e.g., ARIZ. REV. STAT. §33-814(G). Some states also mandate through anti-deficiency statutes that purchase-money mortgages are non-recourse, effectively barring deficiency judgment unless the homeowner allowed the home’s waste (damage by flooding, for instance). See, e.g., ARIZ. REV. STAT. §33-729. Some states may also bar deficiency judgments after the lender agrees to a short sale by the homeowner unless the homeowner expressly agrees to pay the deficiency. See, e.g., Tanque Verde Anesthesiologists v. Proffer Group, Inc., 836 P.2d. 1021 (Ariz. Ct. App. 1992). Other states permit deficiency judgment after foreclosure by notice, but only if the lender applies to the court promptly after the deficient sale. See, e.g., GEORGIA CODE §44-14-161. It can certainly help that you know and rely on these statutes, but your practice should also be to make the parties’ agreement as to recourse or non-recourse clear in any settlement documentation.

Redemption. Lawyers representing homeowners faced with foreclosure should generally also know their state’s statutory law (if any) on the right of redemption. When a homeowner falls behind on payments, the homeowner retains an equitable right of redemption, meaning that the homeowner may pay the whole debt (extinguishing the mortgage) and retain the home so long as the lender has not foreclosed. In practice, lenders frequently reinstate the mortgage loan when the homeowner brings the mortgage current before any foreclosure. Foreclosure ends the equitable right of redemption. Yet about two-thirds of the states have statutes providing for a period for redemption after foreclosure. Those statutes permit a homeowner to pay the whole debt (extinguishing the mortgage) and retain the home even if the lender has foreclosed, so long as the homeowner does so with the defined period after foreclosure. Redemption periods range from a few months to as long as 18 months. In many states having statutory post-foreclosure redemption periods, the homeowner retains the right to remain in the home during the redemption period. A few states require the homeowner to post bond against waste, to retain possession. In other states, the buyer takes possession at the foreclosure sale subject to the borrower’s right to redeem. These rights may affect how long the foreclosed pro-bono client may remain in the home while attempting to redeem, arrange a buyout, or secure other housing including gathering the necessary finances.

Modification. In representing pro bono a homeowner facing foreclosure who wants to remain in the home, do not underestimate the lender’s incentive to modify the mortgage. Empirical study of tens of thousands of recent foreclosure sales suggests that foreclosure nets banks on
average as little as 35 centers on each dollar of mortgage-loan obligation. Loan modifications can save banks huge sums over foreclosure. Loan modifications can also reduce litigation and sale costs, and liability risks associated with foreclosure and sale. Bank modifications to date have largely been to repayment terms, not to the principal balance. There are political, legal, and economic incentives for banks to reduce principal balances. The legal incentive arises out of the federal Home Affordable Modification Program that pledged $75 billion to spur residential mortgage-loan modifications. Under the program, the federal government pays loan servicers $1,000 initially followed by $1,000 for each of three years for qualifying trial reductions, meaning in general those that reduce loan payments to 31% of the borrower’s gross income enabling the borrower to keep the obligation current. The program has so far had limited success, with far fewer than expected qualifying for permanent modification and high re-default rates even for those who do qualify, but the program may have accelerated banks’ willingness and ability to offer modifications. The mechanisms for modification may now be in place, even if housing-market and employment conditions have not yet supported widespread permanent mortgage reductions. The federal government continues to propose and plan home-mortgage subsidies for the unemployed and other measures to reduce foreclosures.

Modification Process. Because of the size of the foreclosure crisis and the unique circumstances that it presents to banks, you and the pro-bono client should expect delay, confusion, and frustration in any modification process. The work of modifying mortgages on this scope and to this extent is new to lenders. Lenders may only have just put modification mechanisms in place without fully staffing and training staff to make those mechanisms effective. Lenders may also be modifying the mechanisms to meet new conditions or to improve on poorly designed initial systems. Do not let frustration defeat your pro-bono service. Use the skills that you have learned in other equally uncertain circumstances. Keep the ball in the lender’s court. Respond promptly and completely to any lender request for information or documentation. Give frequent reminders without burdening or harassing the lender’s office. After submitting documentation, telephone to ensure receipt and processing. On the occasion of any delay, telephone to inquire as to the reason and then take the appropriate action to end the delay. If you have the resource available to you, then rely on legal assistants for these and similar forms of administrative monitoring. Document the lender’s egregious mishandling in the event that a trial judge will provide the borrower relief in foreclosure litigation.

Financial Counsel. The limited success (or failure) of the federal Home Affordable Modification Program and similar private programs highlights
that what borrowers tend to need most to save their homes from foreclosure is income, meaning jobs. The foreclosure crisis got as bad as it did and has remained as bad as it has because of a significant increase in unemployment. Pro-bono lawyers are not vocational experts and may not even be particularly effective or efficient at giving financial counsel. Referring pro-bono clients for career counseling and training in maintaining a household budget can be appropriate. Yet even if you are not particularly skilled or experienced in either subject (employment and personal finances), you can still reinforce some of the basic messages that pro-bono clients get from those other sources. Whether for general counsel or especially in evaluating legal options, explore with your pro-bono client the client’s mortgage-to-income ratio. Help the client understand and be realistic about the income that it takes to support a home mortgage and the income that a household must reserve for other necessities and contingencies. It may only take a few minutes of financial estimates to show the client that a mortgage payment or modified payment is within reach or outside of the client’s reach on a reasonable budget. As the Home Affordable Modification Program has proven, it does little good and can instead do harm to keep a homeowner in a house on modified mortgage terms that remain beyond the homeowner’s reasonable reach, particularly when those modifications extend the mortgage term and add fees and interest to the principal balance.

**Mortgage Counseling.** Your pro-bono client may find reliable sources for mortgage counseling in addition to your pro-bono service. There are many private for-profit, charitable nonprofit, and governmental agencies offering mortgage-assistance services. The federal government established the National Foreclosure Mitigation Counseling Program especially to reach low-income and minority homeowners facing foreclosure. There are many charitable nonprofit organizations providing similar services. The local Fair Housing Center may offer contact information for a network of those services or provide some services itself, particularly with respect to predatory-lending practices within its anti-discrimination mission. Counseling before foreclosure has proven successful. See Justin Wagner, *Assisting Distressed Homeowners to Avoid Foreclosure: An Advocate’s Role in an Evolving Judicial and Policy Environment*, 17 GEO. J. ON POVERTY L. & POLICY 423, 445-446 (2010). Consider encouraging your pro-bono client to access these additional resources. Your pro-bono service may prove valuable to the distressed homeowner simply by helping them locate reliable assistance from other organizations devoted to saving families from foreclosure.

**Scams.** Your pro-bono service may also prove worthwhile simply for helping the client avoid foreclosure-assistance scams. Unfortunately, some foreclosure-assistance offers are fraudulent, intended to dupe distressed homeowners out of much-needed cash reserves or, in some cases, remaining home equity. The fact that scam artists may discover mortgage-foreclosure
information through court filings and credit services and that distressed homeowners may have some assets and income and be desperate for assistance, makes those homeowners even more attractive targets. Scam perpetrators will advertise, telephone, and visit the homeowner’s home, possibly multiple times. Counsel the homeowner to avoid dealing with anyone who requires a substantial cash payment before providing any service. Many states prohibit any individual other than a lawyer from charging fees in advance of mortgage-modification services. Homeowners should ordinarily avoid paying substantial fees for completing a mortgage-modification application, that service requiring relatively routine skills the exercise of which does not generally justify substantial charges. If your pro-bono client did engage and pay a mortgage-assistance service, then contact the lender to determine what documentation the service submitted. If the service did not perform as promised, then help the client demand and obtain a refund of substantial amounts paid.

These are some of the ways in which you can assist a pro-bono client in avoiding foreclosure. Although the scope and depth of the foreclosure crisis may make the work look daunting, your effort on behalf of individual clients can be worth it. There are few legal services more worthwhile and immediate than saving a family’s home from foreclosure. Pro-bono efforts by lawyers, particularly those in sole practice or smaller law firms where conflicts of interest do not exist, can make a difference. The federal government has supported a pilot program of encouraging banks to waive conflicts for pro-bono lawyers from larger law firms who have corporate and banking clients. Professor Florice Neville-Ewell at the author’s law school has made a professional cause of foreclosure assistance, helping hundreds of families avoid or make the best of foreclosure, and deal more effectively with its consequences. The Grand Rapids Bar Association recently honored the local charitable nonprofit Home Repair Services with the Liberty Bell Award for its foreclosure-prevention program. Consider representing one individual or family with mortgage-foreclosure assistance and then building on your experience by representing multiple others.

The lawyer closed his laptop computer’s lid and set aside the file that he had brought with him to the community center when he heard and then saw the pro-bono client approach. His tiny office was just big enough to push a small desk up against one wall, leaving room for one small chair behind the desk and another beside it, but too small for the wastebasket that was outside the door. The office opened out onto the empty activities room with its gleaming linoleum floor. The community center was
in a drug-ravaged urban neighborhood, too poor to replace the stolen street signs. Although the lawyer had been serving here twice a month for nearly a year, he still had no good idea of what to quite expect each time. The pro-bono service seemed to be as unpredictable as the streets outside and the future of the neighborhood.

The lawyer noticed that the client was dressed for work in cheerful nurse's scrubs. As the client neared the lawyer, she shifted a manila folder from her right hand to under her left arm, with her left hand holding her purse. Before she had quite reached the lawyer who was now standing at the office door, she was already introducing herself while looking the lawyer straight in the eye, extending her free right hand before the lawyer could do so himself. Everything about the client bespoke competence, perhaps even fastidiousness, the lawyer thought. He wondered what the legal issue might be, already heartened by the client's neat appearance and confident demeanor.

The lawyer squeezed back into the tiny office to sit at the desk. The client settled respectfully on the lone chair beside the desk. The proximity of lawyer and client accentuated their every move. The lawyer made sure that he had a blank intake form at the ready and that there was nothing else visible to the client on the desk. The client placed her manila envelope on the corner of the desk and opened it to reveal neat notes. The lawyer also guessed that the client was a good bit younger than he had first surmised from her confident demeanor.

The client then began to explain her dispute with the bank that held her mortgage. She had taken two week's leave from work to care for her mother and then, a month later, two more weeks. She knew that her paychecks would be smaller, but they had been smaller than she thought. She had missed a mortgage payment and been late on another, and had not yet paid the bank this month's payment because of their dispute. The client began pulling the bank's notices from under her neat notes in the manila folder, handing each notice to the lawyer in order, as she explained the dispute over late charges. The bank was now claiming that she was three payments behind, not one, and threatening foreclosure. She had been in the house for a little more than a year and fixed it up some, and did not want to lose it. She had always kept her finances straight, but the bank personnel were not being helpful, even when she went in to speak to them in person.

The lawyer, too, had not been able to follow the bank's figures while listening to the client's explanation. "How much time do you have?" the lawyer asked the client. She explained that she was on her break from work and expected back in 20 minutes. "May I have copies of your papers and your permission to speak to the bank?" the lawyer asked. The client
explained that she had already made copies and that the manila folder and its contents were for the lawyer.

The lawyer then advised the client that he would request an accounting from the bank showing each charge and payment. The bank had likely applied the client’s late mortgage payment to charges and interest, the lawyer explained, so that from the bank’s perspective the client may well have been three payments behind. Because the client had the income to pay the mortgage and wanted to remain in the house, she should continue making mortgage payments during the dispute. Banks occasionally waived late charges, especially with customers who had always been on time and were communicating regularly with the bank, as the client had done. The lawyer would ask the bank for the documentation to show that the client had agreed to late charges when the bank made the loan. The lawyer would also examine the loan agreement for relief provisions and request a waiver of late charges.

The lawyer also asked the client if she had a household budget. She did not. The lawyer had discerned that as conscientious as the client was about her appearance, demeanor, affairs, and relationships, she had little financial experience and probably no financial training. In this community in particular, it would not have been surprising if the client had made her own way into a career but missed acquiring some of the financial skills that are more common in households in affluent communities. The lawyer asked the client if she would be interested in working with the lawyer’s assistant on a household budget and some financial skills. The client was delighted at the offer. It was time for her to return to work, but she looked forward to it. She would make a payment immediately and was sure that she could catch up on her mortgage. The client rose quickly but politely, shook the lawyer’s hand again, stepped out of the tiny office, and walked briskly across the gleaming linoleum floor toward the exit. The lawyer thought, if all consultations were only that simple.
Chapter Thirteen

The Soldier

Servicemember Laws—
Helping the Soldier Return Home

The significance of servicemembers’ contributions, together with the substantial economic and social costs servicemembers and their families bear because of those service commitments, make servicemembers and their families highly deserving pro-bono clients. United States military service is critical to national and international security. We have come to depend on an all-volunteer military force and come to depend on it ever more heavily. Many servicemembers have been pressed into multiple tours of duty, extending their volunteer service beyond what they initially anticipated and prepared to serve, and imposing costs they did not expect. The percentage of veterans in the United States population continues to shrink, so that fewer of our families share the burden of military service. The demographic of an all-volunteer military force has shifted from a general demographic touching all socioeconomic segments and geographic regions toward members of military families especially in the South, away from the affluent and middle class. The shift runs the risk of creating a divide between the national consciousness of military sacrifice and the individual experience of it. Servicemembers receive modest compensation for their risk and sacrifice. Agencies, employers, retailers, industries, and professions recognize and reward servicemembers’ sacrifice through benefits, discounts, and other programs. The legal profession should do likewise.
**Approach.** First, though, consider an approach or attitude toward serving the soldier. Military service can be hugely rewarding. Servicemembers choose it for that reason. Military service is voluntary. There is no draft. You should be prepared to celebrate, not denigrate, the servicemember’s voluntary military commitment. Because military service also involves personal sacrifice for national benefit, you should be prepared to recognize and show gratitude for the servicemember pro-bono client’s military commitment. Yet military service also has a fear factor. Military service carries with it a real risk of serious injury and death. The servicemember client and family members know and respect it. You should, too. Frivolity is rarely appropriate. There is a seriousness about helping the servicemember with legal issues affecting lives and relationships, even while one wants to avoid being morose. Military service is not a death sentence. It is a hugely valuable, voluntary commitment to sacrifice for the welfare of others, while gaining honor and respect for one’s self. Lawyers should be adept at setting the right tone for consultation with servicemembers, in ways that support and recognize the servicemember client’s ethic. Doing it right can be a highly satisfying professional effort.

**Common Issues.** Servicemembers face additional legal issues because of their service commitments. Legal service to soldiers has three general goals: (1) to help soldiers transition from civilian life to military service; (2) to keep soldiers’ minds clear of legal issues during their service so that they can effectively serve the country and safely return; and (3) to help soldiers transition from military service back to civilian life. Legal service to soldiers can involve virtually anything that legal service to others involves, from assistance with real and personal property rights including vehicle and apartment leases, mortgages, and home sales, through family-law issues like separation, divorce, and child custody and support, to personal injury, probate, and business matters. The goals of helping soldiers transition in and out of service, and maintain peace of mind in between, changes the usual perspective for those common legal services. Achieving the goals often requires suspending or modifying the soldier’s contractual and financial obligations, while confirming and preserving the soldier’s property rights and family status around a status quo. Servicemembers can benefit from pro-bono legal service before, during, and after active-duty service to achieve these goals. Pro-bono service to soldiers introduces you to a productive professional and client network. Although there are some more prominent categories or characteristics, servicemembers still come from all professions and demographics.

**Servicemember Law.** Both state and federal law can help a soldier achieve these legal goals. The principal federal law on which soldiers rely to manage their civil legal affairs while on active duty in the military service is the Servicemembers Civil Relief Act, 50 U.S.C. App. §§501-596. The Act’s
purpose is to help servicemembers on active duty “devote [their] entire energy to the defense needs of the nation” by providing for certain rights and procedural safeguards in civil litigation. 50 U.S.C. App. §502. The Act protects members of all four military branches including reserves, members of the Coast Guard and National Guard, and some other commissioned federal officers, when under federal orders to active duty, while extending some protections to servicemembers’ dependents. The Act applies to federal and state civil and administrative proceedings, though not criminal proceedings. 50 U.S.C. App. §512. This chapter summarizes the Act, suggesting how you may help a soldier pro-bono client rely on it. Another helpful resource on the Act is the Judge Advocate General’s School of the United States Army’s THE SERVICEMEMBERS CIVIL RELIEF ACT GUIDE (2006), available online. With United States Department of Defense support, some states have adopted family-law provisions to preserve the status quo as to child custody. This chapter also addresses those laws. First, though, consider two basic legal documents with which you can help ready a soldier pro-bono client for active duty.

**Wills.** Deploying military units routinely hold readiness events where the units gather for a variety of administrative activities. The legal-services aspect of those readiness events can include preparation and execution of a will for each deploying servicemember, with the support of volunteer lawyers. Soldiers face an increased risk of death. A will may not make much sense to the ordinary 25 year old but can give much peace of mind to a 25-year-old servicemember. A will’s thoughtful designation of beneficiaries and guardians for minor children can also demonstrate to a spouse and family members that the servicemember is thinking of them and their well-being in the servicemember’s absence. Wills for servicemembers look a lot like wills for nonmilitary individuals, although they will typically include a provision regarding military benefits like the following:

I have served in the Armed Forces of the United States. I therefore request that my personal representative make appropriate inquiries to ascertain whether there are any benefits to which I, my dependents, or my heirs may be entitled by virtue of any military affiliation. I specifically request that my personal representative consult with a retired-affairs officer at the nearest military installation, the Department of Veterans Affairs, and the Social Security Administration.

**Power of Attorney.** It can also greatly aid a servicemember to leave a general power of attorney with a spouse, parent, or other responsible family member or friend. The servicemember may while on active duty desire to sell a vehicle, bring a small claim to collect on a debt, join a class action regarding consumer rights, claim an inheritance, open or close an account, or pursue any number of other legal rights and claims while away. Federal law grants
special authority to a military power of attorney, as the following standard clause for those powers of attorney recites:

This document is a MILITARY POWER OF ATTORNEY prepared pursuant to 10 U.S.C. 1044b and executed by a person authorized to receive legal assistance from the military services. Federal law exempts this power of attorney from any requirement of form, substance, formality, or recording prescribed for powers of attorney by the laws of a state, the District of Columbia, or a territory, commonwealth or possession of the United States. Federal law specifies that this power of attorney shall be given the same legal effect as a power of attorney prepared and executed in accordance with the laws of the jurisdiction where it is presented.

**Stays of Civil Actions.** The Servicemembers Civil Relief Act’s key procedural protection, 50 U.S.C. App. §522, offers the servicemember a minimum 90-day stay of civil court and administrative proceedings. The soldier pro-bono client may require your assistance in obtaining the stay. Perhaps surprisingly, the Act’s stay is not automatic. Rather, the stay arises in actions in which the servicemember receives notice of the action and requests the stay, unless the court grants the stay on its own motion. 50 U.S.C. App. §522(b)(1). The servicemember’s application for stay must show that active duty materially affects the servicemember’s ability to appear, state a date when the servicemember will be available, and include the commanding officer’s confirming statement adding that leave is also not available. 50 U.S.C. App. §522(b)(2). If the servicemember’s request meets those conditions, then the stay is mandatory. A stay request does not constitute an appearance and waiver of objections to jurisdiction. 50 U.S.C. App. §522(c). If the court grants only the minimum 90-day stay and the servicemember’s active duty continues beyond that period to materially affect the servicemember’s ability to appear and defend, then the servicemember may request an extension. 50 U.S.C. App. §522(d)(1). Another section of the Act, 50 U.S.C. App. §524, protects servicemembers against garnishment, attachment, and other forms of execution on judgments, where active duty interferes with the servicemember’s ability to comply with the judgment.

**Terms of Stay.** Consider the terms of stay for any stay that you assist a servicemember in obtaining. The terms of a stay may be critical to its effectiveness, particularly where there are joint obligors to the obligation that the plaintiff seeks to enforce against the defendant servicemember. Courts have the discretion to allow an action to proceed against non-servicemembers. 50 U.S.C. App. §525(b). Keep in mind that the court’s allowing the plaintiff to proceed against a servicemember’s spouse, other relative, or business partner may defeat the purpose and effect of a stay as to the joint claim against a servicemember. Courts have the discretion under the Act to stay a proceeding for the entire duration of active duty plus 90 days after release, or for shorter
periods. 50 U.S.C. App. §525(a). The Act tolls limitations periods to protect plaintiffs who have rights and claims against servicemember defendants. 50 U.S.C. App. §526; Conroy v. Aniskoff, 507 U.S. 511, 517 (1993). Other than for Internal Revenue Service obligations, servicemembers gain no limitations-period bar by having stayed or avoided a civil action during active duty.

**Default Judgments.** Another important procedural protection, 50 U.S.C. App. §521, limits the circumstances and effect of default judgments taken against servicemembers while on active duty. The Act requires the plaintiff in a civil action to file an affidavit stating whether the defendant is in the military service, 50 U.S.C. App. §521(b)(1), authorizing fine and imprisonment for false affidavits, 50 U.S.C. App. §521(c). The Act also makes it the court’s duty to determine whether a defendant is on active duty, which the court can do with an inquiry to the Defense Manpower Data Center or the Department of Defense’s Servicemembers Civil Relief Act website. The Act does not bar a default judgment where the servicemember has appeared. Where the servicemember fails or refuses to appear, the Act authorizes the court to appoint an attorney for the military defendant. The Act stays the proceeding for at least 90 days if appointed counsel shows or the court on its own determines that there is a defense to the action that requires the defendant’s presence or that counsel has been unable to locate the defendant. 50 U.S.C. App. §521(d). The appointed attorney’s actions do not bind the defendant if the attorney is unable to locate the defendant. 50 U.S.C. App. §521(b)(2).

**Vacating Defaults.** You may be able to help a servicemember avoid a default judgment, but as in the case of other Servicemembers Civil Relief Act rights, doing so requires affirmative action. Under certain conditions, servicemembers may void default judgments taken in violation of the Act while the servicemember is on active duty or within 60 days after active duty. 50 U.S.C. App. §521(g). The servicemember must within 90 days of release from active duty file a motion to vacate the default judgment. 50 U.S.C. App. §521(g)(2). The motion must show not only a meritorious defense but also that active duty materially affected the servicemember’s ability to raise that defense. 50 U.S.C. App. §521(g)(1).

**Installment Contracts.** Some of the Act’s more significant provisions have to do with motor-vehicle leases, cell-phone contracts, apartment leases, and other installment contracts. See U.S.C. App. §532. Importantly, the installment-contract provisions protect not only the servicemember but also the servicemember’s dependents. 50 U.S.C. App. §538. The first important right is for servicemembers and their dependents to terminate installment contracts after the servicemember received orders for active duty. 50 U.S.C. App. §535(a). The right essentially gives the servicemember and dependents the opportunity to restructure a household budget to meet the limitations of military income, burden of military assignments, and fortuity of military
housing and other benefits. To terminate, the servicemember and dependent need not show that the military service materially affects their ability to perform the contract obligations. In most instances, they do need to show that they entered the contract before the military orders. 50 U.S.C. App. §535(b). Servicemembers must pay arrearages accumulating before the orders but are entitled to refund of prepaid amounts after termination. 50 U.S.C. App. §535(f). If the servicemember or dependent chooses not to terminate the contract, then the Act requires the court to order a stay and permits the court to adjust the contract, provided that the servicemember show that active duty materially affects the servicemember’s or dependent’s ability to perform the contract. 50 U.S.C. App. §532(c). Special provisions apply to cell-phone contracts, providing for suspension of the contract without early termination or reactivation fee. 50 U.S.C. §535a(b).

Evictions. As to another form of installment contract, residential leases, the Act prohibits evictions from a residence without court order, provided that the servicemember’s monthly rent does not exceed the annually adjusted rate set at $2,932 for 2009. 50 U.S.C. App. §531(a)(1)(A). A servicemember may seek to enforce the Act’s prohibition by court fine or imprisonment, or by private right of action for conversion. 50 U.S.C. App. §531(c). If a property owner brings an action to evict, then the court must, on the servicemember’s request, either stay the action for 90 days or adjust the lease obligations to preserve both the servicemember tenant’s and property owner’s interests. 50 U.S.C. App. §531(b)(1). The Act’s general stay provisions do not apply to eviction proceedings, which have their own stay proceedings. 50 U.S.C. App. §522(f). The Act also protects against foreclosure of a storage lien and sale of a servicemember’s stored household goods or other personal property, during and 90 days after active duty, without court order. 50 U.S.C. App. §537(a)(1). The court must stay those actions on the servicemember’s request and may adjust the storage contract, provided that the servicemember shows that active duty materially affects the ability to pay. 50 U.S.C. App. §537(b).

Mortgages. The Act also prohibits foreclosure without court order, during and up to nine months after active duty, of a servicemember’s residential mortgage entered into before active duty. 50 U.S.C. App. §533. In a court action to foreclose, the court must on the servicemember’s application either stay foreclosure or adjust the mortgage obligation, provided that the servicemember shows that military service materially affects the servicemember’s ability to comply with the terms of the mortgage. 50 U.S.C. App. §533(b). Conditional stays typically provide for partial payments within the servicemember’s military compensation. The Act prohibits mortgage late charges and other penalties during a stay. 50 U.S.C. App. §523(a). Importantly, active duty also tolls the statutory redemption period, effectively extending the redemption period for the time of active duty plus the statutory
period. 50 U.S.C. App. §526(b). If able to obtain alternative financing or otherwise satisfy mortgage arrearages, then a servicemember can redeem foreclosed property after active duty ends, within the statutory period for redemption. The Act tolls the redemption period whether or not active duty materially affects the servicemember’s ability to pay the mortgage obligations. Conroy v. Aniskoff, 507 U.S. 511, 517 (1993). It is important that the servicemember give notice of these active-duty rights because the Act does not protect the servicemember against bona fide purchasers for value. 50 U.S.C. App. §521(h).

**Interest Cap.** Another significant protection with which you can help a servicemember pro-bono client is the Act’s 6% cap on interest rates for debts incurred before active duty. 50 U.S.C. App. §527. Given the prevalence of substantial credit-card debt among the general population, you can expect many servicemembers to enter active duty with substantial credit-card debt on which they are paying double-figure interest rates. Adjusting that interest rate down to 6% can substantially reduce the payment and prevent the debt from accumulating during military service. The cap applies to the servicemember’s sole obligations, obligations the servicemember incurs jointly with a spouse, and obligations the servicemember incurs in the name of the servicemember’s business. The Act defines interest to include service charges, renewal charges, and late fees. 50 U.S.C. App. §527(d)(1). The interest-rate cap ends with the end of active duty except for mortgage debt, in which case the cap continues for a period one year beyond the end of active duty. 50 U.S.C. App. §527(a)(1). Your pro-bono advice and assistance can be especially helpful here because the cap is not self-executing. The servicemember must notify the creditor within 180 days of the end of active duty to be entitled to an interest-rate adjustment. 50 U.S.C. App. §527(b)(1). The Act permits a creditor to object to an interest-rate reduction but places the burden on the creditor to show that active duty did not materially affect the servicemember’s payment of the higher rate. 50 U.S.C. App. §527(c).

**Insurance.** The Act also protects a servicemember’s interest in health, life, and professional-liability insurance. 50 U.S.C. App. §§544, 593, 594. The Act entitles a servicemember to immediate reinstatement of a health-insurance policy suspended during active duty, provided that the servicemember applies for reinstatement within 120 days after release from active duty. 50 U.S.C. App. §594. Health insurers may generally not exclude coverage for conditions that arise because of the active-duty service. 50 U.S.C. App. §594(b)(3). Life-insurance providers may not reduce coverage or increase premiums during a servicemember’s active duty, provided that the servicemember had the insurance in place at least 180 days before the call to active duty. 50 U.S.C. App. §541(1)(A). The insurer may not forfeit, cancel, or otherwise terminate life insurance if the servicemember fails to pay premiums, during active duty and for two years after release from active duty, 50 U.S.C. App. §541(b)-(c),
provided that the servicemember or beneficiary applies for this protection through the Veterans Administration, 50 U.S.C. App. §543. Servicemembers who are professionals may on written request to the insurer suspend their liability insurance during active duty. 50 U.S.C. App. §593(b)(2).

Child Custody. The military may require a deploying soldier who has custody of children apart from the children’s other parent to complete a family care plan. Plans typically include temporary guardianship of the minor children, often with the servicemember’s parents or current spouse. A servicemember’s active duty may trigger the non-custodial parent’s request for a change in custody. The Servicemembers Civil Relief Act stay provisions apply explicitly to actions to change child custody. 50 U.S.C. App. §522(a). However, case law suggests that courts are reluctant to stay actions when considering the best interests of the child. As a consequence, about a dozen states have adopted their own specific provisions preserving the status quo as to child-custody orders. See, e.g., ARK. CODE §9-13-110; MICH. COMP. L. 722.27; N.C. GEN. STAT. §50-13.7A(a). Those provisions tend to prohibit courts from modifying child-custody orders or issuing new orders that alter custody while the servicemember is on active duty, raise the burden of proof for doing so, or require restoration of the servicemember’s custody rights on release. For example, under the Michigan provision, if the court has clear and convincing evidence that a change is in the child’s best interest, then the court may order that change but must reinstate the prior custody order when the servicemember returns from active duty. To ensure that the servicemember loses no right because of active duty, the provision also prohibits the court from considering the servicemember’s absence for active duty in making any subsequent change in custody. If your pro-bono client faces custody issues, then check your state’s law for these provisions. See Sara Estrin, The Servicemembers Civil Relief Act: Why and How this Act Applies to Child Custody Proceedings, 27 LAW & INEQ. 211 (2009).

Veterans Disability Benefits. Veterans, especially those disabled by service injuries, can benefit from pro-bono counsel. According to the National Center for Veterans Analysis & Statistics, there are about 23 million veterans of United States military service, about 3 million of whom receive disability compensation following active duty service and other-than-dishonorable discharge. Reserve and National Guard servicemembers qualify for federal veterans’ benefits if serving active duty under a federal order. A veteran can receive disability benefits on showing a current disability caused by disease or injury incurred or aggravated during service. 38 U.S.C. §1110. Federal law gives the benefit of the doubt to the veteran in making that showing. 38 U.S.C. §5107(b).

Procedure. Veterans make their disability-benefits claims to Veterans Administration Regional Offices, which must assign a percentage disability and effective date to qualifying claims. Litigation of benefits claims often
arises over the assigned percentage disability and effective date, and also over reratings of disability as the veterans’ condition changes. Veterans who disagree with the findings may appeal to the Veterans Administration by filing a notice of disagreement, entitling them to an informal hearing before a Decision Reviewing Officer at the Regional Office. 38 C.F.R. §20.201. Veterans who disagree with the informal-hearing decision may take a formal appeal to the Board of Veterans Appeals, and from there to the Court of Appeals for Veterans Claims, and then to the United States Court of Appeals for the Federal Circuit.

**Representation.** Veterans do not receive assigned counsel relating to disability-benefits claims. Veterans may retain counsel beginning at the informal-hearing stage. Attorneys may represent veterans disability-benefits claimants under a contingency-fee agreement presumptively reasonable in amount if limited to 20%. See 38 U.S.C. §5904(a)(5). Because of the paucity of counsel in early cases before the Court of Appeals for Veterans Claims and the substantial percentage of appeals involving avoidable error, the Veterans Consortium Pro Bono Program now recruits and coordinates pro-bono legal services for veterans appearing before the Court of Appeals for Veterans Claims. Several law schools also now have clinics assisting veterans with disability-benefits claims. See Steven K. Berenson, Legal Services for Struggling Veterans—Then and Now, 31 HAMLINE J. PUB. L. & POLICY 101 (2009). Some of those clinics recruit and support pro-bono counsel. Consider coordinating your pro-bono service to a veteran with one of these programs.

**Agency Assistance.** Assisting a veteran with a disability-benefits claim is not like litigating worker’s compensation, disability-insurance, and other personal-injury claims. Federal law requires the Veterans Administration to assist the veteran in establishing the claim. 38 U.S.C. §§5102-5103A, 5107. The Veterans Administration must give the veteran notice of what additional information is necessary for the veteran to establish the claim, what the Veterans Administration will provide, and what the veteran must provide. 38 C.F.R. §3.159(b). Litigation of veterans-benefits claims is often over whether the Veterans Administration gave the requisite notices. See Shinseki v. Sanders, ___ U.S. ___, 129 S.Ct. 1696 (2009). Federal law may also impose a duty on the Veterans Administration to attempt to obtain complete original medical records, particularly when counsel so requests. See Moore v. Shinseki, 555 F.3d 1369 (2009). That obligation can prove critical, given that hearing officers and courts decide veterans disability-benefits claims and appeals on the medical records. Federal law also grants the veteran several presumptions when proving a disability-benefits claim. Those presumptions include that the in-service injury or disease occurred in the line of duty and was not due to the veteran’s disqualifying misconduct, and that the veteran was of sound condition when entering military service. 38 U.S.C. §105(a); Holton v. Shinseki, 557 F.3d 1362, 1366-1367 (2009). The first of those presumptions
removes any issue (familiar to worker’s compensation counsel) whether the
injury or disease occurred within the course or scope of service, establishing
instead that soldiers are always at work when on active duty.

Other Benefits. Military service carries with it a variety of rights and
benefits. Pro-bono counsel can assist the veteran in discovering, interpreting,
and obtaining those benefits. Military benefits can relate to finances
(discounts, Veterans Administration loans, life insurance, and the Thrift
Savings Plan), compensation (standard pay, allowances, special pay,
allowments, retired pay, and disability pay), healthcare (Veterans
Administration facilities and Tricare), perks (military travel and lodging,
burial benefits, and family benefits), education (tuition reimbursement,
education loans, and assistance), military career (enlistment and re-enlistment
bonuses, pay grades, advanced enlistment rank, deployment, mobilization, and
relocation), and family (relocation, spouse education and training, family
support, and support organizations). See publications like CHRISTOPHER P.
MICHEL & TERRY HOWELL, THE MILITARY ADVANTAGE: THE
MILITARY.COM GUIDE TO MILITARY AND VETERANS BENEFITS (2009), for
comprehensive resources on veterans benefits.

Veterans Court. Several states and local county courts have created
veterans courts as diversionary programs from the usual criminal-court
docket. For a variety of reasons having to do with the length and violence of
their military service, isolation from family and other social systems of
support, financial and employment issues created by the service interruption,
and mental and physical disability due to service, veterans can face unique
issues reintegrating after active duty. Veterans courts recognize the unique
experiences of veterans and their concomitant needs in sentencing and
rehabilitation. Mentor, substance-abuse, mental-health, and vocational
programs are key rehabilitation components. Because veterans courts handle
primarily or solely criminal-law matters in which the defendant veteran faces
the prospect of incarceration, the court is likely to have assigned counsel and
arranged for that counsel’s compensation. Direct individual pro-bono service
is often not necessary. Yet pro-bono counsel can support local and state-wide
efforts to establish veterans courts.

These are some of the specific laws and issues that affect pro-bono
service to soldiers. There are plenty of opportunities for that service. For
example, the assistant director of the Center for Ethics, Service, and
Professionalism at the author’s law school organizes the legal-services
component for Grand Rapids’ annual Stand Down project serving veterans.
At that event, area practitioners and faculty from the Grand Rapids campus
help veterans with a variety of issues including family law, housing,
bankruptcy, and collections. The school’s Public Sector Law Clinic is also
helping to investigate a Veterans Court. The school also conducts a Service
to Soldiers program that serves hundreds of soldiers on active duty or
preparing for or returning from active duty. Service to Soldiers refers individual soldiers to a network of school faculty and alumni, and other practitioners, for pro-bono legal assistance. The program also offers legal services to deploying soldiers at military readiness events and to returning soldiers. In 2010, Director Heather Spielmaker of the Center for Ethics, Service, and Professionalism won the United States Department of Military and Veterans Affairs Legion of Merit recognition for creating and leading Service to Soldiers. Consider serving the soldier on your own or through an organized program like Service to Soldiers.

The lawyer rose, straightened and buttoned his suit coat, and leaned across his office desk to shake the pro-bono client's hand. The assistant who had shown in the client and his wife made sure that they were seated comfortably and then took a seat herself, politely out of the way. The assistant had already explained to the lawyer before the client and wife arrived that the client was in the National Guard and preparing to deploy to, well, war. The lawyer could not remember if the assistant had said Afghanistan or Iraq. The military had somehow mis-scheduled the client out of the usual readiness event. His commander had instead told him what he needed to do, including to get a will and power of attorney. The lawyer, who had done pro bono at Service to Soldier readiness events in the past, had gladly agreed to the assistant's request to help this client individually at the lawyer's office.

Since the moment that the assistant had shown in the client and his wife, the lawyer had been thinking how young and innocent they both were, and how precious. The lawyer had immediately discerned their faith and excitement, from the client's eager handshake and straight look, and the wife's equal effort to show confidence. He could also sense that fear tinged their faith and excitement, from the slightly forced nature of their confidence and, more obviously, from the client's shaking hand and voice. Later, the lawyer would realize that he made this intuitive assessment of every client as they walked in the door, as to what their condition reflected and how he should respond. In this instance, the lawyer immediately committed to do everything he could to preserve and if possible increase the couple's confidence, helping (as so many others would along the way) to turn it into rooted assurance. The couple would be drawing heavily on that assurance throughout the next years, the lawyer knew.

In this case, the lawyer could instantly tell that the assistant's heart had also gone out to the young couple. The assistant was ordinarily
cheerful, fresh air to all whom she served. With this young couple, though, the assistant was positively ebullient. The lawyer suspected the cause: the assistant had a son who was preparing to deploy. Realizing that it was going to be a hard for the assistant to get through the consultation without crying in maternal care for this precious young couple, the lawyer caught the assistant’s eye as she prepared to sit, nodded graciously to her, and told her thank you. Let’s both save the crying for later, the lawyer was thinking and knew from the assistant’s brief look of acknowledgment that she was thinking the same thing, too.

They finished in exactly one hour. Lawyers must have an internal one-hour clock. The lawyer felt in retrospect that everything had gone well. Certainly, they had completed and executed the standard military will and power of attorney that Service to Soldiers uses. The client and his wife understood and much appreciated the documents. As is often the case, they had most appreciated discussing and agreeing on the guardianship designation. The young couple already had two children. The lawyer had carefully explained that the guardianship designation was only in the event of the demise or disability of both parents. The lawyer had anticipated a difficult moment. Instead, it appeared to have given the young couple another bond, that the husband was not the only one whose mortality was a possibility. It was also heartening to hear that the young couple was surrounded by trustworthy family and friends who could care for their children in their absence.

Playing on their relief at the session’s conclusion, the lawyer had gotten a hearty laugh from them by joking that he would forego the usual drawing of blood, on account of the client’s military service. In fact, the lawyer had realized part way into the session that the client appreciated a little levity. Preparing one’s own will is an emotional task for anyone. It must be acutely emotional for a young soldier leaving behind a wife and two infant children, for a highly uncertain and dangerous war zone. The client had understandably adopted a little bravado. Yet given his youth and natural humility, it was also understandable that the client would attempt to leaven that bravado with youthful humor. The lawyer had worked with that youthful humor. When they had prepared the power of attorney in favor of the client’s wife, the lawyer had told the client not to let any of his unmarried fellow soldiers sign one of these in favor of a girlfriend. The young couple had laughed and briefly hugged in the session’s most endearing moment.

The lawyer felt in retrospect that every interaction but one had added to, rather than drawn from, the young couple’s reservoir. The lawyer had long ago learned how to avoid insensitivity in directly addressing the client’s potential death. Thankfully, there had been no
stumbles in that respect. The lawyer's one regret was when he had politely asked about the client's military assignment. When the client straightened in his chair and his face stiffened slightly to answer Afghanistan, the lawyer knew that he had unnecessarily stolen from the young couple a moment's peace. Yet the moment had passed quickly and not dampened the hour.

The assistant had given both the client and his wife huge hugs and all kinds of encouragement as they had left the office with their documents. She had then turned briefly back to the lawyer, said a quick thank you as she pulled a tissue from her pocket, and nearly bolted from the office, the lawyer was sure to find a private place to cry and pray for so magnificent and precious a young couple.
TAB 7
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