Northwestern Journal of Law & Social Policy

Volume 7 | Issue 2 Article 7

Spring 2012

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Recommended Citation

Aleatra P. Williams, *Foreclosing Foreclosure: Escaping the Yawning Abyss of the Deep Mortgage and Housing Crisis*, 7 Nw. J. L. & Soc. Pol'y. 455 (2012).
http://scholarlycommons.law.northwestern.edu/njlsp/vol7/iss2/7

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Northwestern Journal of Law and Social Policy Volume 7 (Spring 2012)

Foreclosing Foreclosure: Escaping the Yawning Abyss of the Deep Mortgage and Housing Crisis

Aleatra P. Williams*

ABSTRACT

In 2007, Rick Sharga, vice president of marketing at RealtyTrac, stated that with more stringent lending and underwriting standards, "we will likely see a significant foreclosure decrease"[1] *within the next three years. However, a sustained and considerable decrease in foreclosures has yet to occur. In fact, the real estate market downfall and resulting mortgage and housing crisis have proven to be wider, deeper, and more serious than first anticipated. Since 2007, millions of homeowners faced, and continue to face, foreclosure proceedings.*[2] *To provide protections for homeowners, federal and state actors have attempted regulatory and legislative solutions to stem the foreclosure crisis. The attempted regulatory and legislative responses, such as foreclosure moratoria, have failed to pull the real estate housing market out of crisis and provide meaningful relief to homeowners facing foreclosure.*[3] *Many factors contribute to this failure, but namely, lack of uniform rules and policies among the relevant federal and state agencies for lenders, homeowners, and servicers. This Article contends that, with the rate of foreclosures predicted to steadily continue into 2015,*[4] *the need for standardized intervention remains imperative to sustain the goal of home ownership, safeguard consumers, guide lenders and servicers, and stabilize the real estate market.*

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[1] Maya Rooney, *The Forecast of Foreclosure*, BLOOMBERG.COM (Mar. 26, 2007, 12:00 AM), http://www.businessweek.com/bwdaily/dnflash/content/Mar2007/db2007/db20070326_901985.htm#fadetoblack. RealtyTrac describes itself as the "most trusted source of foreclosure information." REALTYTRAC, http://www.realtytrac.com/home/ (last visited Mar. 20, 2012).
[2] *See infra* Part II.
[3] *See infra* Part V.
[4] Mike Colpitts, *Housing Foreclosure Crisis Five More Years*, HOUSINGPREDICTOR (June 9, 2011), http://www.housingpredictor.com/2011/foreclosure-crisis-forecast.html.

INTRODUCTION

The turbulent mortgage and housing crisis has handicapped the national economy for nearly five years.[5] With an estimated 2.5 million foreclosures completed from 2007 to 2009 and another estimated 5.7 million homeowners in imminent risk of foreclosure,[6]

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[5] Benjamin S. Bernanke, Chairman, Bd. of Governors of Fed. Res. Sys., Monetary Policy and the Housing Bubble, Address at the Annual Meeting of the American Economic Association (Jan. 3, 2010) (dating the start of the current financial crisis to August 2007).

[6] Debbie Gruenstein Bocian, Wen Li & Keith S. Ernst, *Foreclosures by Race and Ethnicity: The Demographics of a Crisis*, CTR. FOR RESPONSIBLE LENDING 1, 7 (June 18, 2010), http://www.responsiblelending.org/mortgage-lending/research-analysis/foreclosures-by-race-and-ethnicity.pdf (acknowledging the Mortgage Bankers Association National Delinquency Survey that finds that the percentage of mortgages in the foreclosure process is at 4.63%, which is a historical high since 1979). The first quarter of 2011 still showed a high incidence of foreclosure. During this time, the ten states with the highest numbers of foreclosure were: 1) Nevada, 1 in 35 households were in foreclosure; 2) Arizona, 1 in 60 households were in foreclosure; 3) California, 1 in 80 households were in foreclosure; 4) Utah, 1 in 98 households were in foreclosure; 5) Idaho, 1 in 106 households were in foreclosure; 6) Georgia, 1 in 108 households were in foreclosure; 7) Michigan, 1 in 121 households were in foreclosure; 8) Florida, 1 in 152 households were in foreclosure; 9) Colorado, 1 in 157 households were in foreclosure; and

debtors and consumer advocacy groups have demanded comprehensive reformation of both mortgage and foreclosure laws. Among the chief complaints made by consumer advocacy groups were lenders' failure to communicate before and during foreclosure proceedings and debtors' inability to work toward loan modification without the continued threat of foreclosure.[7] Additionally, many debtors were victims of mortgagee robo-signing.[8] Consequently, thousands of Americans experienced severely tainted and possibly wrongful mortgage foreclosure processes. Moreover, even those consumers who have not yet entered the housing market are affected by being sidelined until this crisis is settled. The implications of the broader foreclosure crisis are even more far-reaching; the crisis additionally affects, for example, neighbors of the foreclosed debtors, homebuilders, and municipalities.[9]

The form and type of reformation utilized are vitally important. Reformers must be vigilant to create consistent and uniform standards, not piecemeal or conflicting standards. Non-uniform standards could lead to unpredictable foreclosure rules for lenders or servicers.[10] Also, having unclear rules or too many agencies involved in the reformation process will confuse or overburden lenders or servicers and inhibit consumers' ability to navigate through the process to receive much needed help.

Similarly, because the real estate market and national economy are inextricably tied, policing the foreclosure process as a reaction to the foreclosure crisis without considerable thought and study may lead to unforeseen ramifications for the national economy. Therefore, when promulgating new laws that completely bar a lender's ability

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10) Illinois, 1 in 160 households were in foreclosure. Melinda Fulmer, *Foreclosure Rates: 20 Cities with Highest Filings and State-by-State Rankings*, MSN REAL ESTATE, http://realestate.msn.com/article.aspx?cp-documentid=28364347 (last visited June 23, 2011). Though ranked third overall, cities in California dominate in the top ten cities with the most foreclosures list for the first quarter of 2011. The top ten foreclosure cities are: 1) Las Vegas-Paradise, Nevada (26,275 foreclosure filings, 1 in 31 households); 2) Modesto, California (3809 foreclosure filings, 1 in 46 households); 3) Stockton, California (4821 foreclosure filings, 1 in 47 households); 4) Phoenix-Mesa-Scottsdale, Arizona (36,422 foreclosure filings, 1 in 48 households); 5) Vallejo-Fairfield, California (3111 foreclosure filings, 1 in 48 households); 6) Riverside-San Bernardino-Ontario, California (29,859 foreclosure filings, 1 in 49 households); 7) Merced, California (1605 foreclosure filings, 1 in 52 households); 8) Reno-Sparks, Nevada (3369 foreclosure filings, 1 in 54 households); 9) Bakersfield, California (4729 foreclosure filings, 1 in 58 households); and 10) Fresno (4729 foreclosure filings, 1 in 62 households). *Id.*

[7] Alejandro Lazo & E. Scott Reckard, *Bank Agreements Address Foreclosure Complaints*, WICHITA EAGLE, Apr. 14, 2011, http://www.kansas.com/2011/04/14/1807247/bank-agreements-address-foreclosure.html.

[8] Robo-signing, in short, involves questionable mortgage paperwork or affidavits signed by mortgagees or their agents. In a typical foreclosure action, a mortgagee is required to file an affidavit that affirms that it has the right to foreclose and verifies the information alleged in the foreclosure paperwork. Due to being overwhelmed by the number of foreclosures or out of sheer laziness, many mortgagees took shortcuts. Thus, tens of thousands of mortgage documents contain suspect signatures, improper notarizations or were signed without a review of the actual paperwork. Many top lending institutions were guilty of robo-signing. They include Bank of America Corp., JPMorgan Chase & Co., and Wells Fargo & Co. Pallavi Gogoi, *Robo-Signed Mortgage Documents Date Back to Late 1990s*, ASSOCIATED PRESS, Sept. 1, 2011, http://articles.boston.com/2011-09-01/news/30102377_1_robo-signing-mortgage-paperwork-banks-and-other-mortgage.

[9] *See infra* Part III.

[10] Jeff Jeffrey, *Washington Firms Prepare for Boom in Foreclosure Work,* BLT: THE BLOG OF LEGALTIMES (Oct. 19, 2010, 4:03 PM), http://legaltimes.typepad.com/blt/2010 /10/washington-firms-prepare-for-boom-in-foreclosure-work-.html.

to foreclose, or delay the foreclosure process, courts and legislatures must not only cautiously consider the specific foreclosure and debtor but also the potential effect on the nation's economy and other arenas. For example, mortgagors, desperate to save their homes, could flood bankruptcy courts.[11]

To counterbalance the escalation of foreclosure filings, states began transforming their foreclosure procedures when filings escalated.[12] Courts and state legislatures set forth (or are in the process of setting forth) procedures that dramatically restrict a lender's right to foreclose on its security. These new procedures either: a) require consumer counseling;[13] b) require lenders to jump through procedural hoops as a prerequisite to foreclose;[14] c) cause substantial delays in the foreclosure process;[15] d) completely bar a lender from foreclosing for a period of time (or entirely);[16] or e) modify redemption periods.[17] These new policies signify to lenders that the "glory days" of quick and relatively easy foreclosure are most likely over.[18]

Arguably, these new procedures are appropriate in light of the epic number of foreclosures and the potential (and documented) misdeeds by lenders during the pre-foreclosure and foreclosure stages. For instance, in the age of robo-signing, new foreclosure procedures may be justified to prevent debtor abuse or bullying. Typically, debtors faced the foreclosure process without the requisite knowledge and were unassisted by legal counsel.[19] Moreover, because the likely victims of foreclosure are

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[11] Katherine Porter, *Consumer Debtor Class Actions: One More Windmill, or the Ultimate Remedy for the Subprime Mess?*, AMERICAN BANKRUPTCY INSTITUTE (Apr. 3, 2008) (stating that seeking bankruptcy might afford debtors "one last chance to save their homes").

[12] Starting in 2007, the State Foreclosure Prevention Working Group, which is comprised of states' attorneys general and bank regulators, formed and began gathering data on thirteen of the twenty largest subprime mortgage servicers during the last quarter of 2007. The attorneys general from Arizona, California, Colorado, Florida, Illinois, Iowa, Massachusetts, Nevada, North Carolina, Ohio, Texas, and Washington are a part of the multi-state coalition. Bank regulators from New York, North Carolina, and Maryland and the Conference of State Bank Supervisors also participate in the coalition. *Analysis of Subprime Mortgage Servicing Performance, Data Report No. 1*, STATE FORECLOSURE PREVENTION WORKING GROUP 3 (Feb. 2008), *available at* http://www.csbs.org/Content/NavigationMenu/Home/StateForeclosurePreventionWorkGroupDataReport.pdf.

[13] Indiana lawmakers introduced H.B. 1753, which became Public Law 176 (May 4, 2007). This law authorized the Indiana Housing and Community Development Authority to create a free mortgage foreclosure counseling and education to homeowners who are in or near default of their mortgages. IND. CODE § 5-20-6 (2007).

[14] In Maine, L.D. 1617, Public Law 391 (2007), repealed the strict foreclosure laws.

[15] S.B. 651, 26th Leg., Reg. Sess. (Haw. 2011).

[16] H.B. 331, 61st Leg., Reg. Sess. (Idaho 2011).

[17] *See, e.g.*, S.P. 278, 124th Leg., Reg. Sess. (Me. 2009) (died in committee) (proposing an extension of the mortgagor redemption period to one year for foreclosures initiated on or after October 1, 2009 instead of ninety days).

[18] Arguably, these days had passed by what is hopefully the apex of the foreclosure in 2009. The average time frame to transition a property through foreclosure increased from an average of 250 days in the beginning of 2008 to 450 days by the end of 2010. FED. RESERVE BD., INTERAGENCY REVIEW OF FORECLOSURE POLICIES & PRACTICES 6 (2011), *available at* http://www.federalreserve.gov/boarddocs/rptcongress/interagency/interagency.htm.

[19] Melanca Clark & Maggie Barron, *Foreclosures: A Crisis in Legal Representation*, BRENNAN CTR. FOR JUSTICE, 7–8 (2009), http://brennan.3cdn.net/a5bf8a685cd085cd0885f72_s8m6bevkx.pdf.

mortgagors who had subprime or high cost adjustable rate mortgages,[20] foreclosing a mortgagee's ability to foreclose prevents revictimization. Thus, lenders would be required to strictly adhere to the new procedures before a debtor loses his or her most prized and likely most valuable asset. Additionally, any new measures may be beneficial to lessen the burden on limited court resources due to heightened levels of unresolved foreclosure actions.[21]

State legislatures and courts are not the only actors generating loss mitigation strategies in the wake of the mortgage and foreclosure crisis. Other actors in reforming the foreclosure and lending processes include: the federal government, lenders, mortgage servicers, special mortgage groups, consumer advocacy groups, and borrowers.

The common thread among all recent mortgage and foreclosure reform efforts is the desire to stop the massive bleeding of the self-inflicted wounds caused by irresponsible borrowing, careless underwriting processes, reckless or discriminatory lending practices, deceptive appraisal of home values, broker misconduct, and sloppy foreclosure procedures.[22] However, the sheer number of parties involved in drafting reform legislation or regulation may prove challenging. As the old idiom goes, "too many cooks spoil the broth."[23] That is, with so many parties with conflicting interests all trying to create mortgage and foreclosure reform, it is likely that any legislation will be contradictory or puzzling, with inconsistent rules. Any such rules would undermine the reformers' intended purpose, providing no guidance to lenders/servicers or aid to desperate homeowners.

It is imperative that reformers strike a tender balance by creating stringent, but fair, solutions that address and protect homeowners' needs. For example, where a debtor is either disinterested in saving his or her home from foreclosure, or is financially unable to do so (even if the mortgage is modified), any foreclosure bar will serve as a burden on the

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[20] *Analysis of Subprime Mortgage Servicing Performance*, STATE FORECLOSURE PREVENTION WORKING GRP., 1–2 (2008), *available at* illinoisattorneygeneral.gov/pressroom/2008_09/SFPWGReport3.pdf (reporting that a "significant percentage of subprime adjustable rate loans are delinquent before they experience payment shock from their first adjustment, reflecting weak underwriting or fraud in the origination of the loan."); *Redefault Rates Improve for Recent Loan Modifications,* STATE FORECLOSURE PREVENTION WORKING GRP. (2010), *available at* http://www.csbs.org/regulartotyr/Documents/SFPWG/DataReportAug2010.pdf.

[21] *See, e.g.*, Nationwide Advantage Mortgage Co. v. Frazier, No. 2011-05-02-01 (C.P. Cnty. of Charleston, N.C. Aug. 15, 2011) (order regarding mortgage foreclosure actions).

[22] *See, e.g.*, Nathaniel Popper, *US Sues Deutsche Bank Over Mortgage Approvals*, L.A. TIMES (May 3, 2011), http://articles.latimes.com/2011/may/03/business/la-fi-deutsche-bank-20110504 (reporting that the federal government recently filed suit against Deutsche Bank due to its reckless approval of approximately 39,000 mortgages for government insurance, costing the Fair Housing Administration $386 million in bad mortgage claims). In the lawsuit, the government alleges that the loans were approved without any regard to whether the borrowers could pay the monthly payments. The government is seeking three times the amount it paid in bad mortgage claims plus punitive damages. *Id.*

[23] FRANK LESLIE, FRANK LESLIE'S PLEASANT HOURS 395 (New York, Frank Leslie's Publishing House 1878). Currently, there are seven federal agencies and multiple state agencies that oversee banking regulations and consumer protection. The seven federal agencies are: 1) Department of Housing and Urban Development; 2) Federal Reserve; 3) Office of Thrift Supervision; 4) Federal Deposit Insurance Corporation; 5) Federal Trade Commission; 6) Office of the Comptroller of the Currency; and 7) National Credit Union Administration. *See generally* 12 U.S.C.A. § 4545 (2011); 12 U.S.C.A. § 248 (2011); 12 U.S.C.A. § 1 (2011); 15 U.S.C.A. § 57a (2011); 12 U.S.C.A. § 92a (2011); 12 U.S.C.A. § 1752a (2011).

lender. Similarly, if a debtor is clearly and wantonly in default, then a lender should be able to foreclose without any impediments.[24] In both situations, delaying a foreclosure action produces only heavy burdens on a lender with no positive effects on a debtor.

With foreclosures not expected to significantly decrease in the near future, both lenders and borrowers are in serious need for changes with lending and foreclosure processes and procedures.[25] These reforms should have in mind the goals of sustaining homeownership, or the "American Dream," and maintaining the integrity of the mortgage process. The complexity of the mortgage and housing crisis requires a multifaceted and multi-partied review. However, at the same time, the governing system needs modification, modernization, and simplification.

Part II of this Article outlines the history of state and federal legislative and regulatory reform efforts. Part III examines the interrelationship between the real estate market and national economy on the whole. Because it is imperative to understand the deterioration of the real estate market, Part IV reviews the foreclosure processes available in most jurisdictions and discusses the shortcomings revealed by the financial downturn. The current and forecasted changes to these foreclosure and lending processes are discussed in Part V. Part VI concludes by arguing that successful transformation of the lending and foreclosure practices and procedures is difficult when there are too many parties involved in the process. Reform is possible if lenders and consumers take affirmative steps to mitigate losses by: 1) educating the public on credit, types of credit, and foreclosure before any consumer credit transaction for the purchase of a primary residence is consummated; 2) requiring lenders and their underwriters to offer the appropriate loan products to borrowers based on a borrower's current and provable financial status; 3) streamlining and standardizing banking and servicing regulations; and 4) modernizing foreclosure procedures. Further, any revisions should include steep penalties for noncompliance in order to establish lender accountability, which will ultimately give rise to a sustainable and stable housing market. Though many have speculated, the length of the yawn of this crisis is very uncertain. However, changes are

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[24] Many borrowers are choosing to "strategically default" when the property values have plummeted to levels far less than unpaid mortgage balances. *See* Brad Tuttle, *Strategic Mortgage Default*: *The Irresponsible, Amoral, but Best Strategy?*, TIME MONEYLAND (Jan. 11, 2010), http://moneyland.time.com/2010/01/11/strategic-mortgage-default-the-irresponsible-amoral-but-best-strategy/.

[25] It should be noted that not all economists agree as to when the real estate market will recover. *See Better, but Still Not Good Enough*, FREDDIE MAC, OFFICE OF THE CHIEF ECONOMIST, ECONOMIC OUTLOOK (May 2011), www.freddiemac.com/news/finance/docs/May_2011_public_outlook.pdf (forecasting that the real estate market will ultimately bottom out by Winter 2012); Vivien Lou Chen & Joshua Zumbrun, *Fed's Yellen Says U.S. Housing Market Will Undergo a "Drawn-Out" Recovery*, BLOOMBERG.COM (June 9, 2011), http://www.bloomberg.com/news/2011-06-09/fed-s-yellen-says-u-s-housing-market-to-have-long-drawn-out-recovery.html (quoting Federal Reserve Vice Chairperson Janet Yellen that once solutions for the housing crisis have been discovered, "recovery in the housing market will likely be a long, drawn-out process."); Colpitts, *supra* note 4; Gary Lucido, *Housing Market Not Likely to Recover Fast*, CHICAGO REAL ESTATE (June 23, 2010), http://www.chicagonow.com/blogs/chicago-real-estate-getting-real/2010/06/no-big-recovery-for-housing-market.html; Palash R. Ghosh, *Housing Market May Not Normalize for Another Five Years*, INT'L BUS.TIMES (Aug. 24, 2010), http://www.ibtimes.com/articles/45867/20100824/housing-recession.htm; William Alden, *Home Prices Could Drop for the Next Three Years: Report*, HUFFINGTON POST (Sept. 15, 2010), http://www.huffingtonpost.com/2010/09/15/home-prices-could-drop_n_717660.html.

underway to transform lending and foreclosure practices that will, hopefully, protect consumers from predatory or discriminatory lending practices, sustain and create new homeownership opportunities, adequately guide lenders or servicers, and stabilize the real estate market.

I. Background

Legislators, responding to distressed homeowners' cries and witnessing the devastating impact on their states' economies, scrambled to introduce and enact legislation to halt the economic downward spiral. From January 2007 to June 2011, lawmakers across the country progressively introduced and enacted foreclosure reform legislation. In 2007, twenty-six states and the District of Columbia presented foreclosure legislation; nineteen states and the District of Columbia enacted legislation.[26] Legislators became more active in 2008. Thirty jurisdictions plus the District of Columbia generated foreclosure legislation.[27] In 2009, forty-six states, the District of Columbia, and Puerto Rico considered legislation related to foreclosures; thirty-three jurisdictions and Puerto Rico enacted legislation.[28] Lawmakers in forty states and the District of Columbia introduced foreclosure legislation in 2010.[29] That same year, twenty-six jurisdictions and the District of Columbia enacted foreclosure legislation.[30] Every year, it appears that states become more aggressive in pursuing foreclosure reform. From January to June 2011, state legislators in forty-five jurisdictions have proposed foreclosure legislation.[31]

These reformation measures respond to delinquent debtors and consumer advocacy groups' demands for mortgage foreclosure reform in light of extremely flawed foreclosure procedures. These groups argue that the current procedures are fundamentally unfair to defaulting debtors, riddled with inaccuracies and lack of oversight.[32] As such, they have demanded an overhaul of foreclosure processes.[33]

The mortgage and housing meltdown has highlighted other issues such as flawed lending processes. For instance, certain types of loan products, such as adjustable rate

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[26] *Foreclosure 2007 Legislation,* NAT'L CONF. OF STATE LEGISLATURES, http://www.ncsl.org?tabid=12513 (last updated Jan. 21, 2009).
[27] *Foreclosure 2008 Legislation*, NAT'L CONF. OF STATE LEGISLATURES, http://www.ncsl.org?tabid=12510 (last updated Jan. 21, 2009).
[28] *Foreclosure 2009 Legislation*, NAT'L CONF. OF STATE LEGISLATURES, http://www.ncsl.org?tabid=12513 (last updated Jan. 5, 2010).
[29] *Foreclosure 2010 Legislation*, NAT'L CONF. OF STATE LEGISLATURES, http://www.ncsl.org?tabid=12513 (last updated Jan. 25, 2011).
[30] *Id.*
[31] *Foreclosures 2011 Legislation,* NAT'L CONF. OF STATE LEGISLATURES, http://www.ncsl.org/issues-research/banking/foreclosures-2011-legislation.aspx (last updated Sept. 13, 2011) (stating that "lawmakers in [forty-five] jurisdictions and the District of Columbia have introduced legislation regarding foreclosure" in 2011 and that twenty-two "states, the District of Columbia and Puerto Rico have enacted legislation or adopted resolutions" as of June 29, 2011).
[32] *The Need for National Mortgage Servicing Standards: Hearings Before S. Subcomm. on Housing, Transportation and Community Development of the U.S. S. Comm. on Banking, Housing and Urban Affairs*, 112th Cong. 2 (May 12, 2011), *available at* http://www.nclc.org/images/pdf/foreclosure_mortgage/mortgage_servicing/testimony-thompson-mortgage-servicing-standards.pdf (written testimony of Diane E. Thompson) [hereinafter Testimony of Thompson].
[33] Lazo & Reckard, *supra* note 7.

mortgages, have proven problematic. Though the foreclosure process has touched the prime market, its effect on the subprime market is quite lopsided.[34] Numerous borrowers who purchased their homes with subprime adjustable rate mortgages are unable to repay their loans.[35] Accordingly, these borrowers must decide whether they should refinance, sell, or walk away from their homes.[36] This has been called a "kind of devil's dilemma."[37]

Many of the reformers seem to ignore the fact that lenders are in the lending business. That is, lenders lend money to make profits over the life of a loan or upon its sale—it is the lifeblood of their business. Like any other business, it has a balance sheet that must remain "in the black" to survive and thrive. One way it remains so is by the repayment of debts with interest. However, if a debtor defaults by not repaying the debt or otherwise, then a lender heavily relies on its ability to foreclose on the security given for the debt.[38] The security given is typically the property for which the loan was used to purchase, such as a home, in residential cases.[39] Thus, if lenders are unable to foreclose on their debts, then they may choose to further tighten credit terms or forgo lending in a particular area entirely.

If foreclosure reform efforts are too stringent, lenders' decisions to tighten credit criteria could lead to the continued decline of housing values.[40] If housing prices remain low, then it could potentially prolong the real estate market downturn.[41] The real estate market becomes cyclical and self-sustaining.[42] If lenders tighten their lending prerequisites or require 20% down payments, then fewer consumers would qualify.[43] Foreclosures further increase the supply of vacant homes, which lowers home prices and hinders new construction.[44] Lower home prices may result in home equity losses, strategic defaults, and foreclosure filings.[45] Therefore, and debatably, the longer the real estate market slump persists, the longer the national financial condition remains unstable.[46] To steady the real estate market, and, consequently, the national economy,

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[34] *Analysis of Subprime Mortgage Servicing Performance, supra* note 12, at 1–2.
[35] *Id.*
[36] *See* Wells Fargo Bank, N.A. v. Hughes, 897 N.Y.S.2d 605, 607 (N.Y. Sup. Ct. 2010).
[37] *Id.*
[38] GRANT NELSON & DALE WHITMAN, REAL ESTATE FINANCE LAW § 2.1 (5th ed. 2007) (stating that it is "axiomatic that a mortgage is security for the performance of an act, that is the very nature of a mortgage").
[39] *Id.* at § 1.1.
[40] *See* Rob Garver, *Rule That Could Kill Housing Market*, MSN MONEY (Oct. 1, 2011), http://money.msn.com/home-loans/rule-that-could-kill-housing-market-fiscaltimes.aspx (quoting Bruce Schultz, vice president at Spirit Bank in Bristow, Oklahoma, "If the stated policy goal here is to have a default rate of 1% or less on qualifying residential mortgages, I am sure they will get to that goal. But you could also get to a default of zero by making no loans.").
[41] CONG. BUDGET OFFICE, THE OUTLOOK FOR HOUSING STARTS 2009–2012 16 (2008), *available at* www.cbo.gov/sites/default/files/cbofiles/ftpdocs/98xx/doc9885/11-17-housingstarts.pdf (recognizing that high unemployment, tightened credit standards, or declines in home prices are factors that could cause a cyclical downturn market).
[42] *Id.*
[43] *Id.*
[44] *Id.* at 19.
[45] Tuttle, *supra* note 24.
[46] The argument is as follows. If the real estate market persists to have a flood of available inventory, then housing prices will continue to fall. Consequently, lower housing prices will lead to more foreclosures. If

drastic steps must be taken to halt the foreclosure crisis.[47]

II. The Ties that Bind: The Relationship Between the Real Estate Market and National Economy

The classic explanation of financial crises, going back hundreds of years, is that they are caused by excesses—frequent monetary excesses—that lead to a boom and an inevitable bust. In the recent crisis we had a housing boom and bust, which in turn led to financial turmoil in the United States and other countries.[48]

The tie between the real estate market and the overall national economy is both undeniable and complex. According to Chairman Benjamin Bernanke of the Federal Reserve, "[d]eclining house prices, delinquencies and foreclosures, and strains in mortgage markets are now symptoms as well as causes of our general financial and economic difficulties. These interlinkages imply that policies aimed at improving broad financial and economic conditions and policies focused specifically on housing may be mutually reinforcing."[49] As the Department of Housing and Urban Development (HUD) reported in its Fiscal Year 2010–2015 Strategic Plan, "[t]he state of the housing market plays a big role in . . . the strength of our national economy."[50] Hence, if the housing market is feeble, then the national economy will be correspondingly feeble.

Without question, the high foreclosure rates have adversely affected the broader economy at large.[51] The cause of the current real estate market meltdown has been debated. Many pundits believe that the demise of the real estate market is due to lenders making risky subprime mortgages.[52] Undoubtedly, the increase in subprime mortgages played a role in the real estate market upheaval, along with a decline in home prices, and a higher incidence of predatory lending and lax loan underwriting standards.[53]

The deterioration of the housing market has a rippling effect on several segments of the economy. Together, these segments, in turn, have a tangible and devastating effect on the national economy. For instance, as a result of the housing market downfall, the

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foreclosures continue at its current pace or increase, then the overall economic market will remain unstable, prolonging the national recession. *See* Edward V. Murphy, Cong. Research Serv., RL 34653, Economic Analysis of a Mortgage Foreclosure Moratorium 8 (2008).

[47] The Department of Housing and Urban Development (HUD) has listed stemming the foreclosure crisis as its number one sub-goal in its overall goal of strengthening the housing market. HUD Strategic Plan—FY 2010–2015 (2010), *available at* http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_4441.pdf.

[48] John B. Taylor, Getting Off Track: How Government Actions and Interventions Caused, Prolonged, and Worsened the Financial Crisis 1 (2009).

[49] Benjamin S. Bernanke, Chairman, Bd. of Governors of the Fed. Reserve Sys., Housing, Mortgage Markets, and Foreclosures (Dec. 4, 2008), http://www.federalreserve.gov/newsevents/speech/bernanke20081204a.htm.

[50] HUD Strategic Plan, *supra* note 47.

[51] Bernanke, *supra* note 49.

[52] Clyde Ashley & Krystal Wilson, *The Credit Crunch and the Impact on the U.S. Economy and Global Markets: How Damaging Will It Be?*, 16 Proc. of Am. Soc'y of Bus. & Behav. Sci. 1 (2009), *available at* http://www.asbbs.org/files/2009/PDF/A/AshleyC2.pdf (suggesting that when the ill-perceived stability of the mortgage-backed security market began to falter in 2006, the fallout was declining home process and defaulting mortgagors, which together caused the real estate market meltdown).

[53] HUD Strategic Plan, *supra* note 47.

housing market is flooded with inventory in a number of states.[54] This affects the new homebuilders market.[55] New homebuilders must take drastic steps to get rid of their inventory because of the competition caused by the influx of foreclosed homes. Due to high level of inventory, homebuilders go to extremes to move their new home inventory and reduce the number of new homes they build.[56] One source estimates that the building industry will reduce its output by one-half.[57] Such reductions will cause a loss of millions of jobs, which would consequently affect the national economy.[58]

Also, due to high levels of defaults, lenders are increasingly more reluctant to lend and are holding on tight to their resources.[59] Not only are lenders extremely wary in extending mortgages, but they are also overly cautious in all other types of lending,[60] such as extending small business loans or other consumer loans.[61] Additionally, lenders are reducing the number of private education loans they offer.[62] One of the main reasons is that these debts are unsecured.[63] Students unable to qualify for private education loans may be required to stay in school longer, causing them to increase their federal education loans and over debt loads. Accordingly, then, there will be a large number of future homebuyers with exorbitant education loans who will be unable to qualify for lower cost home loans.[64] Consequently, a segment of the population is shut out of the housing

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[54] On May 26, 2011, the Associated Press reported that an estimated "872,000 homes that have been repossessed by lenders, but have yet to be sold." RealtyTrac estimates that it will take three years to clear the inventory of the 1.9 million properties already in some stage of foreclosure. *Report: Sales of Foreclosed Homes Fell in 1Q*, AARP (May 26, 2011), http://www.aarp.org/home-garden/housing/news-05-2011/report_sales_of_foreclosed_homes_fell_in_1q.html.

[55] CONG. BUDGET OFFICE, *supra* note 41.

[56] David Streitfeld, *Bad Times Linger in Home Building as Economy Rises*, N.Y. TIMES (Apr. 23, 2011), http://www.nytimes.com/2011/04/23/business/economy/23housing.html (illustrating that homebuilders drastically cut home prices or resort to gimmicks such as giving away credit towards new cars).

[57] Ashley & Wilson, *supra* note 52.

[58] *Id.*

[59] Tara Seigel Bernard, *Need a Mortgage? Don't Get Pregnant*, N.Y. TIMES (July 20, 2010), http://www.nytimes.com/2010/07/20/your-money/mortgages/20mortgage.html (reporting that strict lending guidelines resulting from the mortgage crisis permit lenders to reject loans when there is any temporary suspension of income, even if the suspension is due to maternity or paternity leave).

[60] Reportedly, lending fell 40% from $2.65 trillion in 2007 to $1.61 trillion in 2008. *See* Dennis Cuevas, *Federal Response to the Mortgage Foreclosure Crisis: The Homeowner Affordability and Stability Plan*, NAT'L ASS'N OF ATT'YS GEN., http://www.naag.org/federal-response-to-the-foreclosure-crisis-the-homeowner-affordability-and-stability-plan.php (last visited Feb. 20, 2012).

[61] Ashley & Wilson, *supra* note 52 (stating that "[t]he crisis has had a major impact on the economy at large. Rather than lending money for business growth and consumer spending, it forced lenders to hoard cash or invest in stable assets."); *see also Small Business Lending: Hearing Before the H. Comm. on Financial Services and H. Comm. on Small Business*, 111th Cong. (2009) (statement of Elizabeth A. Duke, Member, Board of Governors of the Fed. Reserve System), *available at* http://www.federalreserve.gov/newsevents/testimony/duke20100226a.htm (claiming that large commercial bank loans to small businesses dropped 2%, or $14 billion, from June 30, 2008 to June 30, 2009); David Goldman, *Banks Still Reluctant to Lend*, CNN MONEY (Aug. 18, 2009), http://money.cnn.com/2009/08/17/news/economy/fed_senior_loan_officer_survey/index.htm.

[62] Ashley & Wilson, *supra* note 52.

[63] *Id.*

[64] Student loans are included in a potential mortgagor's debt to income ratio, which, in turn, makes it difficult for mortgagors to qualify. The higher a mortgagor's debt is relative to his or her income, the higher a mortgagor will pay for a loan, if he or she still qualifies. *See* Erin Peterson, *Debt-to-Income Ratio*

market, which may profoundly affect the national economy. Foreclosures increase the inventory of resale homes on the market.[65] Strict lending standards prevent consumers from purchasing real estate or other products, which keeps the housing market in its downturn due to flooding of inventory. Likewise, tight lending in other areas, such as small business loans or educational loans, prolongs unemployment and potentially inhibits technological innovations.

As Sarah Raskin of the Federal Reserve asserts, "The wave of foreclosures is one of the factors hindering a rapid recovery in the economy. Traditionally, the housing sector . . . has played an important role in propelling economic recoveries."[66] Arguably, if there is resolution of the foreclosure crisis, then recovery of the national economy should soon follow.

III. State Foreclosure Processes

Though the primary purpose behind each foreclosure law, i.e., to protect consumers,[67] remains unswerving, foreclosure processes vary from jurisdiction to jurisdiction. States' processes fall into one of the following classifications: non-judicial foreclosure, judicial foreclosure, or mixed judicial/non-judicial foreclosure jurisdictions.[68] The rationales for selecting one of the classifications also differ from jurisdiction to jurisdiction. As one author previously noted, states might be more lender- or more debtor-centric.[69] The more debtor-friendly states tend to be judicial foreclosure or mixed jurisdictions. The lender-friendly states tend to be non-judicial foreclosure jurisdictions. Consequently, the highest rates of foreclosure are in non-judicial foreclosure states.[70]

A. Judicial Foreclosures

Judicial foreclosure is believed to be the dominant method of foreclosure in approximately forty percent of all jurisdictions.[71] It requires a lender to file a court action

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Important as Credit Score, BANKRATE.COM (Jan. 24, 2007), http://www.bankrate.com/brm/news/mortgages/20070116_debt_income_ratio_a2.asp.

[65] Tami Luhby, *How to Rescue the Housing Market: Foreclosures!*, CNN MONEY (Aug. 31, 2011), http://money.cnn.com/2011/08/31/real_estate/housing_market _foreclosures/index.htm.

[66] Sarah Bloom Raskin, Member, Board of Governors of the Fed. Reserve System, Creating and Implementing an Enforcement Response to the Foreclosure Crisis, Speech at the Am. Assoc. of Law Schools Annual Meeting (Jan. 7, 2012), *available at* http://www.federalreserve.gov/newsevents/speech/raskin20120107a.htm.

[67] *Foreclosure Laws*, FORECLOSURERADAR, http://www.foreclosureradar.com/foreclosure-guides/foreclosures-101/foreclosure-laws (last visited Oct. 9, 2011).

[68] Yianni D. Lagos, *Fixing a Broken System: Reconciling State Foreclosure Law with Economic Realities*, 7 TENN. J. L. & POL'Y 84, 103 (2011) (noting that the jurisdictions are characterized as follows: twenty-nine are non-judicial foreclosure states, eleven are judicial foreclosure states, nine are mixed judicial/non-judicial foreclosure states, and one permits strict foreclosure).

[69] *Id.* at 103.

[70] Fulmer, *supra* note 6.

[71] NELSON & WHITMAN, *supra* note 38, at § 7.11. Judicial foreclosure is the predominant foreclosure method in Arkansas, Connecticut, Delaware, Florida, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Montana, Nebraska, New Jersey, New Mexico, New York, Ohio, Pennsylvania, South Carolina, Vermont,

to initiate a foreclosure proceeding.[72] It is universally permitted in all jurisdictions either by statute or in equity.[73] Courts oversee the detail-oriented foreclosure process. Due to this oversight, the foreclosure process in judicial foreclosure takes more time to complete.[74] In order to foreclose, a lender must take several steps, including a title search to identify the parties interested in the property, filing of the foreclosure action and lis pendens, notice of sale and entry of decree for deficiency, among other things.[75] Skipping necessary requirements of judicial foreclosure may result in complication for a creditor or its assigns.[76]

B. Power of Sale Foreclosures

Power of sale foreclosures are authorized in a large number of jurisdictions.[77] The non-judicial foreclosure process has very limited, if any, court involvement.[78] To institute a foreclosure action, a lender must simply provide notice to the debtor before the property is sold in a public forum.[79] Typically, this method of foreclosure is less costly, rigorous and time-consuming.[80] As such, lenders, if given a choice, would likely choose this method of foreclosure.

During the current crisis, there has been an apparent correlation between a jurisdiction's type of foreclosing method and its number of foreclosures. There are higher incidences of foreclosures in non-judicial foreclosure states than in judicial foreclosure jurisdictions.[81] Presumably, this is because of the relative ease, lower cost, and rapid conclusion of this type of claim.[82] The five states with the highest number of foreclosures in the first quarter of 2011 are Nevada, Arizona, California, Utah, and Idaho.[83] All of these states permit non-judicial foreclosures.[84]

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and Wisconsin. *Id.*

[72] *Id.*

[73] *Id.* (stating that "even in jurisdictions where power of sale foreclosure is dominant, judicial foreclosure is required in certain special situations").

[74] *Id.*

[75] *Id.*

[76] Problems may further delay a foreclosure's conclusion or cause it to be ineffective as to a particular party. These include omitting an interested party, failing to provide proper notice to the debtor or interested party, inadequacy of the sales price, problems with bidding and/or noncompliance with statutes. *See* NELSON & WHITMAN, *supra* note 38, at §§ 7.11–7.18.

[77] *Id.* at § 7.19 (stating that power of sales are "permitted in 60% of [all] jurisdictions"). Jurisdictions that permit non-judicial foreclosures are Alabama, Alaska, Arizona, Arkansas, California, Colorado, District of Columbia, Georgia, Guam, Hawaii, Idaho, Minnesota, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nevada, New Hampshire, North Carolina, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Texas, Utah, Washington, West Virginia, and Wyoming. *Id.*

[78] *Id.* (acknowledging that non-judicial foreclosures do not require court supervision).

[79] The property may be sold by a lender, a sheriff, or an authorized third party. *Id.*

[80] *Id.*

[81] Fulmer, *supra* note 6.

[82] *Id.*

[83] *Id.*

[84] Four states—California, Arizona, Nevada, and Utah—recognize both judicial and non-judicial foreclosures, while one state, Idaho, uses non-judicial foreclosure exclusively.

C. *Inadequacies of Modern Foreclosure Process*

Irrespective of whether a jurisdiction is a judicial or non-judicial foreclosure system, the foreclosure process seems to be riddled with systemic flaws. Common foreclosure errors include: a) a mortgage servicer's inadvertent misapplication of a debtor's mortgage payments;[85] b) failure to recognize a debtor's exemption from foreclosure under the Servicemembers Civil Relief Act;[86] c) failure to prove a foreclosing party's title to a promissory note;[87] d) improper endorsements of mortgage notes;[88] e) backdating paperwork or assignments; f) affidavits without signatures filed or personal knowledge of its contents;[89] g) claiming inflated legal fees associated with foreclosure;[90] or h) lost or missing promissory notes.[91] There are many reports of courts granting or enforcing a foreclosure decree or sheriff's deed that had been improper due to lender error or an intervening event.[92]

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[85] Michelle Conlin, *Foreclosure Errors Are Hitting More Innocent Homeowners*, USA TODAY (Dec. 13, 2010), http://www.usatoday.com/money/economy/housing/2010-12-11-foreclosure-wrong-people_N.htm; *see, e.g.*, *In re* Prince, Bankr. No. 197-11992, 2009 WL 2584769, **3–4 (Bankr. M.D. Tenn. 2009) (reinstating debtors' mortgage and awarding compensatory damages in light of servicer's admitted misapplication of mortgage payments).

[86] War and National Defense Act, 50 U.S.C. §§ 501–596 (2011). The U.S. Department of Justice reached a settlement with Bank of America and Saxon Mortgage (a subsidiary of Morgan Stanley) for at least $22 million in relief for wrongfully foreclosed servicemembers. *See* Press Release, U.S. Department of Justice, Justice Department Settles with Bank of America and Saxon Mortgage for Illegally Foreclosing on Servicemembers (May 26, 2011), http://www.justice.gov/opa/pr/2011/May/11-crt-683.html; *see, e.g.*, Hurley v. Deutsche Bank Tr. Co. Americas, No. 1:08-CV-361, 2009 WL 701006 (W.D. Mich. 2009).

[87] Michael Estrin, *Finding Common Foreclosure Errors*, BANKRATE.COM (Nov. 4, 2010), http://www.bankrate.com/finance/mortgage/finding-common-foreclosure-errors.aspx; *see, e.g.*, Foreclosure by David A. Simpson, No. COA10-361 (N.C. App. 2011) (denying a foreclosure to a mortgagee who failed to prove ownership of the note).

[88] Estrin, *supra* note 87; *see, e.g.*, U.S. Bank Nat'l Ass'n v. Ibanez, 941 N.E.2d 40, 49–50 (Mass. 2011).

[89] Estrin, *supra* note 87; *see, e.g.*, Jamie Smith Hopkins, *False Signatures Cloud Maryland Foreclosure Cases,* BALTIMORE SUN, (Oct. 12, 2010), http://articles.baltimoresun.com/2010-10-12/business/bs-bz-foreclosure-attorneys-20101012_1_foreclosure-cases-corrective-affidavits-maryland-and-florida-homeowners; OFFICE OF THE COMPTROLLER OF THE CURRENCY, OFFICE OF THRIFT SUPERVISION & FEDERAL RESERVE SYSTEM, INTERAGENCY REVIEW OF FORECLOSURE POLICIES & PRACTICES 8 (2011), *available at* http://www.occ.gov/news-issuances/news-releases/2011/nr-occ-2011-47a.pdf [hereinafter FORECLOSURE POLICIES & PRACTICES] (pointing out that examiners discovered that third party law firms often filed lost note affidavits despite most of the notes being discoverable).

[90] Estrin, *supra* note 87; *see, e.g.*, Gretchen Morgenson*, Dubious Fees Hit Borrowers in Foreclosures*, N.Y. TIMES (Nov. 6, 2007), http://www.nytimes.com/2007/11/06/business/06mortgage.html?pagewanted=all.

[91] Estrin, *supra* note 87; *see, e.g.*, Country Place Cmty Ass'n, Inc. v. J.P. Morgan Mortgage Acquisition Corp., 51 So. 3d 1176 (Fla. App. 2010). Foreclosure affidavits typically include information related to the names of the owner of the loan, a debtor's default status, interest, penalties and fees associated to the debt, and principal amount due and owing. *See supra* note 89 (noting that examiners found that many affidavits were inadequate and were expeditiously signed without personal knowledge of the materials within).

[92] *See* Ann Woolner, *Foreclosure Error May Bring Home Break-In by Bank,* BLOOMBERG (Oct. 10, 2010), http://www.bloomberg.com/news/2010-10-15/foreclosure-error-may-lead-to-break-in-by-bank-commentary-by-ann-woolner.html. The FDIC has proposed that servicers should contribute to a single fund to compensate wrongfully foreclosed consumers. Mark Huffman, *Top Regulator Pushes Settlement for Foreclosure Errors*, CONSUMERAFFAIRS.COM (Jan. 19, 2011), http://www.consumeraffairs.com/news04/2011/01/top-regulator-pushes-settlement-for-foreclosure-errors.html.

Depending upon when the borrower discovers the error and whether he or she is cognizant of his or her rights, a court may remedy these blunders. A debtor may receive injunctive relief, a voided sale, or damages.[93] On the other hand, some debtors do not contest wrongful foreclosures, either because they are unrepresented by legal counsel or financially incapable.[94]

Another concern related to current foreclosure processes is the possibility of dual-track foreclosure. Dual-track foreclosures occur when lenders/servicers or their agents continue with foreclosure procedures even though they were in discussion with borrowers for loan modification or had already approved loan modification.[95] This dual-track foreclosure is deceptive to homeowners. Homeowners may believe that the foreclosure proceeding is on hold because the lender or servicer agreed to work towards a modification.[96] On the other hand, some servicers deny a mortgagor the opportunity to modify the loan, to make it more affordable and avoid foreclosure.[97]

However, more disturbing defects in the foreclosure process have come to light. With the increased volume of foreclosures, lenders and their foreclosure agents, determined to move the process along quickly, have been unable to input safeguards to ensure strict compliance with foreclosure laws and requirements. One of the major defects that came to light during the crisis is the high level of "robo-signing."[98] Robo-signing occurs when a small group of servicer/lender's employees signs a plethora of foreclosing affidavits and/or other foreclosure documents on the lender's behalf; these documents are then submitted to courts or other agencies in order to aid in the foreclosure process.[99] Due to the high number of foreclosures, the signers attest to having read the affidavits or debtors files, but did not, in fact, ever read the affidavits or files; in some instances, the signers might not have been employees of the foreclosing creditor/servicer.[100]

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[93] NELSON & WHITMAN, *supra* note 38, at § 7.22.
[94] Clark & Barron, *supra* note 19.
[95] Alejandro Lazo, *Banks are Foreclosing While Homeowners Pursue Loan Modifications*, L.A. TIMES, Apr. 14, 2011, http://articles.latimes.com/2011/apr/14/business/la-fi-dual-tracking-20110415.
[96] *Id.* (noting that lenders view dual track foreclosure as protecting its investment asset, while debtors see it as a "double cross").
[97] Editorial, *Settling Foreclosure Abuses*, N.Y. TIMES, Mar. 19, 2011, at A22.
[98] *Robostop: The Fuss over Poorly Reviewed Repossessions Exposes Deeper Problems*, ECONOMIST (Oct. 14, 2010), http://www.economist.com/node/17257787 (noting the emergence of "Foreclosuregate" "when an employee at GMAC Mortgage, part of Ally Financial, admitted to having approved thousands of repossessions without properly reviewing the documents. The company responded by halting sales of seized homes in the 23 states where court approval is required to foreclose while it gets to the bottom of its 'robo-signing' problem. JP Morgan Chase and several other servicers, which manage loans and distribute payments to investors in mortgage-backed securities, quickly followed suit. Bank of America has called a stop in all 50 states.").
[99] DAVID H. CARPENTER, CONG. RESEARCH SERV., RL 41491,"ROBO-SIGNING" AND OTHER ALLEGED DOCUMENTATION PROBLEMS IN JUDICIAL AND NON-JUDICIAL FORECLOSURE PROCESSES 1 (2010).
[100] The facts typically attested to by the robo-signers were that original notes were lost or missing and could not be produced or that the signer actually read the affidavit. *Id.* at 1 (reporting that a GMAC employee testified that he signed up to 10,000 foreclosure affidavits a month, or approximately 500 affidavits per business day); *see also* Zachary Karabell, *The Robosigning Scandal: Foreclosing on Recovery?*, TIME MAG. (Nov. 6, 2010), http://www.time.com/time/magazine/article/0,9171,2026915,00.html; *Mortgage Electronic Registration Systems (MERS), Inc.*, N.Y. TIMES (Oct. 14, 2010),

Alarmingly, the vast majority of subprime mortgages, which are more prone to default, were made to minorities.[101] There are numerous explanations as to why minorities disproportionately received subprime mortgages. Historically, minority groups living in mostly minority neighborhoods had been excluded from mainstream mortgage lending opportunities.[102] The exclusion was due to lender "redlining." Redlining is a form of institutional discrimination whereby services like mortgage lending is restricted in certain areas, such as predominantly minority neighborhoods.[103] When HUD attempted to eradicate redlining by saturating minority neighbors with HUD mortgage alternatives, many borrowers became prey of savvy and predatory lenders due to lax or nonexistent oversight and imprudent underwriting criteria.[104] Compounding the problems further, investors often did not express any concerns with underwriting standards because of the presence of mortgage insurance.[105] As a consequence of limited regulation, many brokers steered their prey, minorities and the elderly, to subprime mortgages, resulting in "reverse redlining."[106] The steering often occurred even when debtors were qualified for conventional, prime mortgages.[107]

Because the rate of mortgage defaults exponentially increases for subprime mortgages, many racial minorities faced more foreclosures than any other groups, decimating minority communities.[108] One court recently found that a mortgage granted to a minority buyer to purchase a home in a predominately minority area, "which carries an interest rate exceeding 9.00%, creates a rebuttable presumption of discriminatory practice."[109] Though a large number of subprime mortgages fell into default and foreclosure more regularly during the early days of the market meltdown, there seems to be an escalation in the number of prime and FHA mortgage defaults and foreclosures in more recent years.[110] Because of these and other shortfalls, the United States is on the

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http://topics.nytimes.com/top/news/business/companies/mortgage_electronic_registration_systems_inc/index.html?scp=2&sq=robo-signers&st=cse.

[101] *See* U.S. DEP'T OF HOUS. & URBAN DEV., UNEQUAL BURDEN; INCOME AND RACIAL DISPARITIES IN SUBPRIME LENDING (Jan. 20, 2009), *available at* http://archives.hud.gov/reports/subprime/subprime.cfm.

[102] NAT'L COMM. ON FAIR HOUSING & EQUAL OPPORTUNITY, THE FUTURE OF FAIR HOUSING 31 (Dec. 2008), *available at* http://www.civilrights.org/publications/reports/fairhousing/.

[103] *Redlining*, INVESTOPEDIA, http://www.investopedia.com/terms/r/redlining.asp#axzz1akry4jk3 (last visited Oct. 9, 2011).

[104] NAT'L COMM. ON FAIR HOUSING & EQUAL OPPORTUNITY, *supra* note 102, at 32.

[105] *Id.*

[106] *Id.*

[107] *Id.* at 33 (referencing Rick Brooks & Ruth Simon, *Subprime Debacle Traps Even Very Credit-Worthy: As Housing Boomed Industry Pushed Loans to a Broader Market*, WALL ST. J. (Dec. 3, 2007), http://online.wsj.com/article/SB119662974358911035.html). A subprime mortgage study conducted by the *Wall Street Journal* found that of the subprime mortgages obtained since 2000, 55% of the borrowers had credit scores that qualified for conventional mortgages; by 2001, that number jumped to 61%. *Id.*

[108] Christine Riccardi, *40% of Subprime Mortgages Stand Delinquent, Can Prime Be Next?*, HOUSINGWIRE.COM (Sept. 7, 2010), http://www.housingwire.com/2010/09/07/40-of-subprime-mortgages-stand-delinquent-can-prime-be-next.

[109] Wells Fargo Bank, N.A. v. Hughes, 897 N.Y.S.2d 605, 608–609 (N.Y. Sup. Ct. 2010) (quoting M & T Mortgage Corp. v. Foy, 858 N.Y.S.2d 567 (N.Y. Sup. Ct. 2008)). Higher interest rate mortgages in a predominantly minority neighborhood typically indicate discriminatory lending practices and warrants further investigation. *See M & T Mortgage Corp.*, 858 N.Y.S.2d at 569–70.

[110] Elizabeth A. Duke, Member, Board of Governors of the Fed. Reserve System, Rebalancing the Housing Market, Speech Before the Fed. Reserve Bd. Policy Forum: The Housing Market Going Forward: Lessons

frontier of new mortgage lending and foreclosure processes.

D. Unforeseen Consequences of Foreclosures

From the thousands of reported foreclosure fiascos, it becomes clear that foreclosure procedures and processes must be rehabilitated in order to provide adequate protections for the consumer-at-large and lenders. However, any modification to the processes must be thoughtful, examining the implications of such changes on other areas.

1. Prolonged Market Crisis

The foreclosure crisis has had a domino effect in other sectors of the economy. According to Federal Reserve Chairman Bernanke, as a result of the depressed housing market, the construction industry is destabilized.[111] Even though homeownership is the most affordable it has been in recent history, due to low home prices and record low interest rates, innumerable Americans are unable to qualify for loans due to tightened lending criterion.[112] If lenders continue to tighten credit terms, thereby shrinking the credit supply and making it nearly impossible for consumers to qualify for loans, then one result is the continuation of the market depression.[113] Furthermore, potential homebuyers have been timid about entering into the housing market due to uncertainties pertaining to home values and/or the job market.[114] Subsequently, the market would be left with a large inventory of available homes, which floods the housing market, further lowers home values and stalls new home construction.[115] Because the state of the national economy is, in large part, tied to the health of the real estate market, an unhealthy real estate market will prolong the stabilization of the national economy.[116]

2. Burden on Other Resources

Today's foreclosures are not only a lender or borrower's problem; the fallout has had an effect on other governmental resources. As the number of foreclosure filings surges, burdens on resources in other areas increase, such as bankruptcy courts, municipal governments, and sheriffs' departments. There appears to be a direct parallel between the number of bankruptcy filings and the number of foreclosure filings. Since

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Learned From the Recent Crisis (Sept. 1, 2011), *available at* http://www.federalreserve.gov/newsevents/speech/duke 20110901a.htm; Shane M. Sherlund, *Mortgage Defaults*, FED. RESERVE 9 (Mar. 8, 2010), http://www.chicagofed.org/digital_assets/others/region/foreclosure_resource_center/more_mortgage_defaults.pdf.

[111] Benjamin S. Bernanke, Chairman, Bd. of Governors of the Fed. Res. Sys., The U.S. Economic Outlook, Speech at the International Monetary Conference (June 7, 2011), *available at* http://www.federalreserve.gov/newsevents/ speech/bernanke20110607a.htm.

[112] *Id*.

[113] Ashley & Wilson, *supra* note 52 (arguing that a "credit crunch makes it nearly impossible for companies to borrow, because lenders are afraid of bankruptcies and defaults that result in higher interest rates. The consequence is a prolonged recession (or slower recovery) and it occurs as a result of the shrinking credit supply.").

[114] Bernanke, *supra* note 111.

[115] *Id*.

[116] *Id*.

2006, bankruptcy filings, both commercial and consumer filings, have steadily increased from 617,660 to 1,593,081 in 2010.[117] Due to the economic issues many faced, bankruptcy filings increased to over 6000 per day in May 2009.[118] Many bankruptcy filings are likely due to the same reason for mortgage delinquency and foreclosures: lack of income due to job loss.

Once faced with a foreclosure action, a mortgagor might choose to save his or her home by filing bankruptcy under either Chapter 7 or 13.[119] In the ten states with the highest rates of foreclosures in the first quarter of 2011, a surge appeared in bankruptcy filings from 2007 to 2010, with significant growth in 2009.[120] For example, bankruptcy filings for the top three states of Nevada, Arizona, and California either doubled or tripled during the relevant time period. In Nevada, consumer bankruptcy actions rose from 10,632 in 2007 to 29,161 in 2010 while consumer actions jumped from 10,441 in 2007 to 41,193 in 2010 in Arizona.[121] California consumer bankruptcy filings escalated from 69,110 in 2007 to 251,396.[122]

Similarly, municipalities are burdened when foreclosures cause a large concentration of distressed properties in one area. As a recent study on foreclosures in Chicago points out, "the focus on credit impaired and higher risk borrowers leads to a natural tendency for nonprime foreclosures to cluster in lower-income and largely minority distressed urban areas."[123] The study further states that "[t]his tendency for nonprime foreclosures to cluster generates significant negative spillover effects."[124] The spillover effects include those ills that typically accompany vacant foreclosed properties,

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[117] Press Release, Admin. Office of the U.S. Courts, Office of Public Affairs, Growth in Bankruptcy Filings Slow in Calendar Year 2010 (Feb. 15, 2011), http://www.uscourts.gov/News/NewsView/11-02-15/Growth_in_Bankruptcy_Filings_Slows_In_Calendar_Year_2010.aspx. The new release shows the pace of bankruptcy filings slowing down, but does not demonstrate a decrease in number of filings. The number of Chapter 7 bankruptcies increased as follows: 1) 360,890 in 2006; 2) 519,364 in 2007; 3) 744,364 in 2008; 4) 1,050,832 in 2009; and 5) 1,139,601 in 2010. Chapter 13 filings also increased over time as follows: 1) 251,179 in 2006; 2) 324,771 in 2007; 3) 362,705 in 2008; 4) 406,962 in 2009; and 5) 438,912 in 2010. *Id.*; *see also* Press Release, Am. Bankruptcy Inst., Consumer Bankruptcy Filings Increase 9 Percent in 2010 (Jan. 31, 2011), http://www.abiworld.org/AM/Template.cfm?Section=Home&CONTENTID=62756&TEMPLATE=/CM/ContentDisplay.cfm.

[118] Christine Dugas, *Bankruptcy Filings Rise to 6,000 a Day as Job Losses Take Toll*, USA TODAY (June 3, 2009), http://www.usatoday.com/money/economy/2009-06-03-bankruptcy-filings-unemployment_N.htm.

[119] *See* 11 U.S.C. §§ 701–784 (2011); 11 U.S.C. §§ 1101–1174 (2011); Les Christie, *Bankruptcy Can Save Your House from Foreclosure*, CNN MONEY (July 24, 2010), http://money.cnn.com/2010/07/21/real_estate/bankruptcy_and_foreclosure/index.htm (noting that bankruptcy might be an aid to those with ongoing income over foreclosure).

[120] *Bankruptcy Filing Statistics by State, Table: Annual Business and Non-Business Filings by State (2007–2010)*, AMERICAN BANKRUPTCY INSTITUTE, http://www.abiworld.org/AM/AMTemplate.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=63179 (last visited Mar. 20, 2012) [hereinafter *Bankruptcy Filing Statistics by State, 2007–2010*].

[121] *Id.*

[122] *Id.*

[123] William C. Apgar, Mark Duda & Rochelle N. Gorey, *Municipal Cost of Foreclosures: A Chicago Case Study*, REPORT FOR HOMEOWNERSHIP PRESERVATION FOUNDATION 2 (Feb. 27, 2005), http://www.995hope.org/wp-content/uploads /2011/ 07/Apgar_Duda_Study_Full_Version.pdf.

[124] *Id.*

such as, crime, violence and vagrancy.[125]

In non-judicial foreclosures, sheriffs preside over foreclosure sales.[126] Sheriffs' departments may also deliver service of process, including eviction notices or writs of possession and unlawful detainer.[127] For example, after the number of eviction notices delivered nearly tripled, the Virginia Sheriffs' Association held a press conference to focus on the mounting burden on their sheriffs' departments due to the increase in foreclosure filings.[128]

E. Pre-Lending Reform Efforts

While it is apparent that our country is in dire need of restructured mortgage and foreclosure mechanisms, there are several other areas that need attention as well. First, it is important to note that a large number of foreclosures arose from systemic defects during the pre-lending phase. Complications associated with delinquency and foreclosure will continue unless consumers are educated more thoroughly about credit and the consequences of credit default. Many homeowners now face foreclosure because they accepted mortgages that they could not afford to pay in the first place.

Similarly, numerous borrowers are uneducated about differences between the types of loan products available. As such, some lenders were able to prey on this lack of sophistication and offer subprime adjustable rate mortgages. Lawmakers in a few jurisdictions unsuccessfully introduced legislation requiring lenders to either make prudent determinations of borrowers' ability to repay the loan or make borrowers aware of the ramifications of the loan choices.[129] Massachusetts legislators tried to impose a ban on subprime adjustable rate mortgages unless mortgagors received qualified counseling on the potential consequences of those loans.[130] Likewise, Maryland state senators tried to prohibit a lender or other credit grantor from "completing an application for a subprime loan until the lender or credit grantor receives proof that the borrower completed home buyer education or housing counseling."[131]

Also, some mortgage brokers were encouraging real estate appraisers to improperly appraise homes for more than they were worth.[132] These inflated appraisals resulted in

[125] *Id*.

[126] *What Does Sheriff Sales Mean in Foreclosure*, S.F. CHRON., http://homeguides.sfgate.com/sheriff-sales-mean-foreclosures-9082.html (last visited Sept. 24, 2011).

[127] Richard Foster, *Evictions Are Keeping Sheriff's Office Busy*, CHESTERFIELD OBSERVER (July 29, 2009), http://www.chesterfieldobserver.com/news/2009-07-29/home/002.html.

[128] *Id*.

[129] *See, e.g.*, H.B. 2517, 48th Leg., 2d Reg. Sess. (Ariz. 2008); H.F. 2449, 82nd Gen. Assemb., Reg. Sess. (Iowa 2008); S.B. 186, 2008 Leg., Reg. Sess. (Ky. 2008); H.B. 279, 2008 Leg., Reg. Sess. (La. 2008); A.B. 1764, 2008 Leg., 213th Sess. (N.J. 2008); A.B. 1879, 2008 Leg., 213th Sess. (N.J. 2008); S.B. 1090, 74th Leg. Assemb., Spec. Sess. (Or. 2008); H.B. 1093, 2008 Leg., Reg. Sess. (Va. 2008); and H.B. 1097, 2008 Leg., Reg. Sess. (Va. 2008).

[130] S.B. 2299, 2007 Reg. Sess. (Mass. 2008); *see also* H.B. 3345, 105th Gen. Assemb., Reg. Sess. (Tenn. 2008); and S.B. 3834, 105th Gen. Assemb., Reg. Sess. (Tenn. 2008).

[131] H.B. 944, 2008 Leg., Reg. Sess. (Md. 2008).

[132] *See, e.g.*, Michael D. Larson, *Appraisers Can Burst Your Bubble by Inflating the Value of Your Home*, BANKRATE.COM (Nov. 14, 2002), http://www.bankrate.com/brm/news/mtg/20000525.asp (noting that there is an "acknowledged problem" that loan originators, who may be paid on commission, might "sometimes pressure appraisers to fudge their numbers to make mortgages work").

borrowers being upside down in their mortgages. A borrower who owes more than his home's worth is unable to refinance and may choose to default on his mortgage, resulting in a foreclosure. Additionally, foreclosure on overinflated home values will ultimately cause banks losses. For example, it is estimated that Washington Mutual Bank lost $284 million on mortgages related to inflated real estate appraisals.[133]

IV. REFORMATION OF FORECLOSURE PROCESSES IN THE MODERN MORTGAGE AND HOUSING CRISIS

There are many philosophies on what is necessary to reform the embattled lending and foreclosure systems. As the new systems take shape, state and federal legislators and policymakers have drawn inspiration from historical models and designed new mechanisms as well. Because issues related to the housing and foreclosure collapse affect various aspects of the federal and state governments, many legislators and policymakers have rushed to find solutions. Some of the proposed solutions include uniform servicing guidelines, mandatory or voluntary settlement conferences or mediation, delays in the foreclosure process or foreclosure moratoria.[134]

A. Too Many Cooks: Spoiled Foreclosure Reform?

As stated previously, there have been many actors, state and federal, involved in foreclosure reform efforts.[135] Legislatures in nearly every state and Puerto Rico have introduced legislation in response to the foreclosure and housing crisis.[136] States' attorneys general have similarly proposed solutions to modify current mortgage and foreclosure procedures.[137] Consumer advocacy groups and lenders are also taking part in

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[133] Mark Puente, *Lawsuit Says Unqualified Property Appraisers Inflated Values*, TAMPA BAY TIMES (June 11, 2011), http://www.tampabay.com/news/business/realestate /lawsuit-says-unqualified-property-appraisers-inflated-values/1174676.

[134] Some lending institutions have also been proactive in making necessary adjustments to curb foreclosures. Two major lending institutions have readily admitted to committing errors during the foreclosure process. In 2010, both GMAC and JP Morgan Chase suspended their foreclosure procedures in twenty-three states due to "legal missteps." *See* David Streitfeld, *Foreclosures Slow as Document Flaws Emerge,* N.Y. TIMES (Sept. 30, 2010), http://www.nytimes.com/2010/10/01/business/01mortgage.html?adxnnl=1&adxnnlx=1316307736yXaQdV0xaGfebBEckl2SMA. In New York, seventeen members of the armed services recently settled a lawsuit accusing Morgan Stanley of improperly foreclosing against their property between January 2006 and June 2009 for $2.35 million. Dawn Kopecki, *JP Morgan Ousts Mortgage Chief Lowman,* BLOOMBERG (June 14, 2011), http://www.bloomberg. com/news/2011-06-14/jpmorgan-ousts-mortgage-chief-david-lowman-after-lapses-over-foreclosures.html. Critics argue that these voluntary moratoria are not too altruistic, but are due to the firestorm and external pressures that followed the exposure of the robo-signing or other foreclosure missteps. Peter Miller, *Did Unsafe and Unsound Practices Lead to Foreclosure Robo-Signing?*, MONEYRATES (June 1, 2011), http://www.money-rates.com/advancedstrategies/mortgages/did-unsafe-and-unsound-practices-lead-to-foreclosure-robo-signing.htm.

[135] For an excellent overview of state and federal foreclosure legislation, see Julie R. Caggiano et al., *Developments in State and Federal Mortgage Lending Laws: Predatory Lending and Beyond*, 65 BUS. LAW. 383 (2010).

[136] *Id*.

[137] *See Redefault Rates Improve, supra* note 20.

the reformation.[138]

On the federal level, there are several federal regulators and agencies that oversee mortgage lending and consumer protection. For instance, the mission of the U.S. Department of Housing and Development (HUD) is to "create strong, sustainable, inclusive communities" in addition to strengthening "the housing market to bolster the economy and protect consumers."[139] Along with the Treasury Department, HUD administers numerous programs designed to assist new homeowners and avoid foreclosure. Making Homes Affordable is one of HUD's most recognizable programs, from which HAMP and HARP spring.[140] HUD's Office of Housing oversees the Fair Housing Administration (FHA). Within the FHA, the National Servicing Center provides foreclosure assistance and avoidance strategies to FHA-insured homeowners.[141]

Like HUD, the Federal Reserve Board (FRB) regulates "banking institutions to ensure the safety and soundness of the nation's banking and financial systems to protect the credit rights of consumers."[142] One of FRB's expressed functions includes administering nationwide banking and credit policies.[143] Similarly, the Federal Deposit Insurance Corporation's (FDIC) stated mission is to examine and supervise financial institutions for safety and soundness and consumer protection.[144] The FDIC issues guides for banks and consumer educational publications.[145]

Another federal regulator that plays a role in foreclosure reform is the Office of Comptroller of the Currency (OCC). The OCC regulates and supervises all national banks and federal savings associations. The goal of the OCC is to ensure that the banks and savings associations it regulates "operate in a safe and sound manner and in compliance with laws requiring fair treatment of their customers and fair access to credit and financial products."[146] The OCC is also authorized to issue rules and regulations regarding lending and other practices, such as debt collecting or foreclosures.[147]

In 2010, the four federal bank regulators—OCC, OTS, FRB, and FDIC—conducted on-site reviews of the foreclosure policies and procedures at fourteen

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138 Testimony of Thompson, *supra* note 32.

139 *Mission*, U.S. DEPT. OF HOUSING & URB. DEV., http://portal.hud.gov/hudportal/HUD?src=/about/mission (last visited Mar. 20, 2012).

140 *Avoiding Foreclosure*, U.S. DEPT. OF HOUSING & URB. DEV., http://portal.hud.gov/hudportal/HUD?src=/topics/avoiding_foreclosure (last visited Sept. 23, 2011).

141 *FHA National Servicing Center Loss Mitigation Services*, U.S. DEPT. OF HOUSING & URB. DEV., http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/sfh/nsc/lossmit (last visited Mar. 20, 2012).

142 *The Federal Reserve System Purposes & Functions*, BD. OF GOVERNORS OF THE FED. RES. SYS. 1 (9th ed. 2005) http://www.federalreserve.gov/pf/pdf/pf_complete.pdf.

143 *Id.* at 6.

144 *FDIC Mission, Vision, and Values*, FED. DEPOSIT INSURANCE CORP. (May 4, 2009), www.fdic.gov/about/mission/index.html.

145 *Id.*

146 *About the OCC*, OFFICE OF THE COMPTROLLER OF THE CURRENCY, http://www.occ.treas.gov/about/what-we-do/mission/index-about.html (last visited Apr. 3, 2012).

147 *Id.* The Office of Thrift Security (OTS) took part in savings association regulation until July 21, 2011, when it became a part of the Office of the Comptroller of the Currency (OCC). *History*, OFFICE OF THE COMPTROLLER OF THE CURRENCY, http://www.occ.treas.gov/about/what-we-do/history/history.html (last visited Apr. 3, 2012).

nationwide, federally regulated mortgage servicers.[148] In April 2011, the regulators issued a report of their on-site review findings.[149] In the report, the examiners exposed several critical foreclosure process shortcomings by the collective servicers. These deficiencies include problems with servicers' governance processes, management and control of third party vendors (e.g., law firms and MERS, etc.), and foreclosure documentation and preparation.[150] According to the bank regulators, these shortfalls "resulted in unsafe and unsound practices and violations of applicable federal and state law and requirements."[151]

Following the examiners' review, the FRB issued formal enforcement actions to the four mortgage servicers it regulates, requiring the servicers to address the inadequate foreclosure processes and deficient residential mortgage loan servicing practices in 2011.[152] Parent holding companies of ten banks were ordered to improve management of all residential mortgage loan servicing and foreclosure processes.[153] Primarily, the FRB mandated that servicers submit plans that: a) improve communications with borrowers by providing borrowers with the name of a single point of contact; b) safeguard against engaging in foreclosure activities when a servicer has previously approved loan modification; c) set forth oversight procedures over third party vendors, such as law firms; d) establish a remediation process for borrowers who incurred financial losses as a result of wrongful foreclosure; and e) warrant compliance with state and federal servicing and foreclosure laws.[154] Further, the FRB issued formal enforcement actions against Lender Processing Services and MERSCORP.

In 2010, the federal government added another player to the bank regulation and consumer protection arena. The Consumer Financial Protection Bureau (CFPB) developed out of the Dodd-Frank Act.[155] The CFPB drafts rules, supervises, and enforces federal consumer protection laws.[156] Title III of Dodd-Frank abolished one of the federal regulators, OTS, and expanded duties of others, such as the FRB.

With so many involved, state legislatures, attorneys general, federal regulators and agencies, there will undoubtedly be inconsistent and various rules and regulations because all have broad authority to create and implement rules and regulations. Ideally

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[148] FORECLOSURE POLICIES & PRACTICES, *supra* note 89. The bank regulators reviewed the foreclosure practices and procedures from January 1, 2009 through December 31, 2010 at the following banks: Ally Bank/GMAC, Aurora Bank, Bank of America, Citibank, EverBank, HSBC, JPMoganChase, MetLife, OneWest, PNC, Sovereign Bank, Sun Trust, US Bank, and Wells Fargo. The aim of the review was to "evaluate the adequacy of controls and governance over servicers' foreclosure processes and assess servicers' authority to foreclose." *Id.*

[149] *Id.*

[150] *Id.*

[151] *Id*.

[152] Press Release, Bd. of Governors of Fed. Res. Sys., Federal Reserve Issues Enforcement Actions Related to Deficient Practices in Residential Mortgage Loan Servicing and Foreclosure Processing (Apr. 13, 2011), http://www.federalreserve.gov/newsevents/press/enforcement/20110413a.htm.

[153] *Id.* The ten banks to which this request applied are Bank of America, Citigroup, Ally Financial, HSBC North America, JPMorganChase, MetLife, PNC, SunTrust, US Bancorp, and Wells Fargo. *Id.*

[154] *Id.*

[155] Dodd-Frank Wall Street Reform Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010). The CFPB must confer with the applicable prudential regulator or agency before proposing a rule or regulation. *Id.* at § 1002 (24). Prudential regulators or agencies include the FDIC, OCC, FRB, and National Credit Union Administration. *Id.*

[156] *Id.* at § 311.

state and federal officials could jointly modify foreclosure processes and develop mechanisms to supervise servicers and protect homeowners. Both sides initially began working together, but progress stalled when the parties reached a deadlock.[157]

One hindrance is that states and the federal government want foreclosure reform, but have no collective thought on how to accomplish it. The federal government has no preemptive power over states, who may draft their own reformation rules without consulting with or seeking prior approval from federal regulators, OCC and FRB.[158] Thus, tensions are natural as states invade the OCC and FRB's territory of foreclosure reform.[159] Moreover, even though there are natural tensions between state and federal governments, even states have been unable to compromise to create uniform state regulation.[160] As states are generally in parity, no one state may emerge as the "leader" in the reform effort.[161] Consequently, there is choppy federal and state regulation.

B. Uniform Mortgage Servicing Guidelines

Federal regulatory agencies are striving to create uniformity in at least one area: mortgage servicing. Sarah Raskin of the Federal Reserve Board declares "[t]he longer it takes for mortgage servicers to make the operational adjustments necessary to fix their sloppy and deceptive practices, the costlier, more difficult it becomes for them to sort them out and correct them."[162] Thus, federal agencies are in the process of generating uniform mortgage servicing guidelines to address the current system of capricious standards for loan modification by servicers.

Mortgage loan servicers handle the daily aspects of a mortgage loan, such as posting mortgage loan payments.[163] Mortgage loan servicers may be lenders, but could also be separate entities entirely.[164] Servicers are required to notify borrowers on which company serves as the mortgage loan servicer.[165] Borrowers, upon proper notice, make mortgage payments to the servicer, which credits the appropriate account. However, upon default, a servicer has the authority to negotiate mortgage workouts or modifications or commence foreclosure proceedings.[166]

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157 Maxwell Strachan, *State Officials, Federal Regulators Could Issue Separate Orders for Foreclosure Reform*, HUFFINGTON POST (June 12, 2011), http://www.HuffingtonPost.com/2011/04/2/mortgage-settlement-state-federal_n_847934.
158 *Id*.
159 *Id*.
160 Michael King, *Foreclosures, Loan Modification Reform May Stall Due to Lack of Leadership*, TOTAL MORTGAGE SERVICES (Mar. 22, 2011), http://www.totalmortgage.com/blog/Foreclosures/Foreclosure-Loan-Modification-Reform-May-Stall-Due-To-Lack-Of-Leadership/111129.
161 *Id.* (quoting Iowa Attorney General Tom Miller, "Nobody is driving the bus. Or to put it more certainly, each agency gets an hour to drive the bus.").
162 Raskin, *supra* note 66.
163 *Mortgage Servicing: Making Sure Your Payments Count*, FED. TRADE COMM. (2010), http://www.ftc.gov/bcp/edu/pubs/consumer/homes/rea10.shtm.
164 Glen Setzer, *Mortgage Servicing Rights: Traded Like Baseball Cards?*, MORTGAGE NEWS DAILY (June 6, 2005), http://www.mortgagenewsdaily.com/662005_Mortgage_Servicing.asp
165 *Id*.
166 U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-93, MORTGAGE FORECLOSURES: ADDITIONAL MORTGAGE SERVICER ACTIONS COULD HELP REDUCE THE FREQUENCY AND IMPACT OF ABANDONED FORECLOSURES 1–2 (2010).

One major problem that consumers encounter when seeking mortgage workouts or modifications is that the identity of loan servicers might change a number of times as the mortgage is sold repeatedly on the secondary mortgage market.[167] Thus, a borrower may struggle to find the proper party to contact for help. In some instances, even though a loan servicer is known by the borrower, requests for relief may fall on deaf ears due to a servicer's unwillingness to meet borrowers' needs.[168]

The year 2009 proved to be a year of major change with the enactment of several federal foreclosure protection regulations coming into fruition.[169] Perhaps sensing a change in the tide, in 2009, borrowers began complaining that although mortgage servicers had the ability to negotiate loan workouts or modifications, a large majority of loan servicers failed to do so, causing foreclosure numbers to escalate.[170] For example, in 2009, the Ohio Attorney General filed suit against American Home Mortgage Servicing, Inc. (American Home), which serviced approximately 17,000 subprime loans in the state, for violating the Ohio Consumer Sales Practice Act.[171] The Attorney General alleged that American Home ignored "requests for assistance," provided "incompetent and inadequate customer service," failed "to modify loans in a timely fashion," and provided "unfair and deceptive terms when it did modify loans."[172]

Unwilling to take responsibility for issues related to borrowers' complaints, some loan servicers "passed the buck" by using the secondary mortgage market as an excuse for not modifying a borrower's mortgage. For example, servicers would argue that only the investors, who owned the borrower's mortgage in an investment pool, could modify loans.[173] Some made this argument even when the agreement between the mortgage loan servicer and investors did not bar a servicer's ability to modify or work out a loan.[174]

Though 2009 was an active year for federal intervention, the federal government had played a somewhat limited role in addressing the mortgage foreclosure catastrophe in years prior. Beginning in 2008, however, it became apparent that the roaring fire of the crisis was gaining strength and the Housing and Economy Recovery Act (HERA) became law.[175] Part of HERA included the Neighborhood Stabilization Program, which provided

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[167] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-90-62, HOME OWNERSHIP: MORTGAGE SERVICING TRANSFERS ARE INCREASING AND CAUSING BORROWER CONCERN 5 (1989).

[168] *See generally* Adam J. Levitin & Tara Twomey, *Mortgage Servicing*, 28 YALE J. ON REG. 1 (2011).

[169] *See, e.g.*, *Housing Programs*, U.S. DEPT. OF THE TREASURY, http://www.treasury.gov/initiatives/financial-stability/programs/housing-programs/Pages/default.aspx (last visited Apr. 2, 2012).

[170] Stephanie Armour, *Foreclosures Grind on as Lenders Fail to Modify Loans*, USA TODAY (June 19, 2007), http://www.usatoday.com/money/economy/housing/2009-06-18-obama-plan-mortgages_N.htm (reporting on the delay, misinformation, and miscommunication from lenders as borrowers seek loan modifications); Steve Wartenberg, *Ohio Alleges Mortgage Servicer Failing to Modify Loans*, COLUMBUS DISPATCH (Nov. 6, 2009), http://www.dispatch.com/content/stories/business/2009/11/06/Mortgage_Servicer_Sued.ART_ART_11-06-09_A12_K9FJ8A5.html.

[171] *Id.*

[172] *Id.*

[173] Karen Weise, *When Denying Loan Modifications, Mortgage Servicers Often Wrongly Blame Investors*, PROPUBLICA (July 23, 2010, 7:50 AM), http://www.probulica.org/article/when-denying-loan-mods-loan-servicers-often-blame-investors-wrongly.

[174] *Id.*

[175] Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654 (2008).

local and state governments with $4 billion "for the redevelopment of abandoned and foreclosed upon homes and residential properties."[176]

Subsequently, the Obama Administration introduced the Making Homes Affordable Program (MHA) to reduce the number of foreclosures many Americans faced in March 2009.[177] Under the MHA, qualified borrowers could get help in negotiating lower monthly payments or refinancing interest rates.[178] Although many programs compose the MHA, the two most significant are the Home Affordability Modification Program (HAMP) and Home Affordable Refinance Program (HARP).[179]

The Obama Administration hoped to give homeowners an economic "do-over" through modification or refinance. Unfortunately, however, both HAMP and HARP proved to be less than the panacea that the Administration anticipated.[180] Program flaws with HAMP and HARP became fairly apparent by 2010.[181] The weaknesses included "poor execution, repeated program restructuring, inadequate bank manpower and paperwork delays."[182] Further, only a small percentage of all eligible, affected homeowners have actually received relief under HAMP and HARP.[183]

On May 12, 2011, Diane Thompson, legal counsel for the National Consumer Law Center, testified before a subcommittee of the U.S. Senate Banking Committee regarding the need for more regulation on mortgage loan servicers, noting their "rogue-ness" and lack of accountability.[184] According to Thompson,

> Servicers have been and remain largely unaccountable to all stake holders for their actions. Servicers do not believe that the rules that apply to

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[176] *Id*. at § 2301(a).
[177] *Home Affordability Modification Program*, FREDDIE MAC, http://www.freddiemac.com/singlefamily/service/mha_modification.html (last visited Apr. 28, 2012).
[178] *Id*.
[179] *Id.*
[180] Acknowledging that the Home Affordability Modification Program (HAMP) has not worked, the Obama Administration introduced a plan, which allowed some unemployed borrowers to miss up to a year of payments on government-insured mortgages while the borrower seeks employment. *See* Jim Puzzanghera, *Obama Administration Boosts Aid for Unemployed Homeowners*, L.A. TIMES (July 27, 2011), http://articles.latimes.com/2011/jul/07/business/la-fi-foreclosure-aid-20110708.
[181] After it modified HAMP to add a modification component for second liens on August 13, 2009, the Treasury Department totally revamped the policy guidelines by replacing Supplemental Directive 09-05 with Supplemental Directive 09-05 Revised. Fannie Mae, Announcement SVC-2010-14, Home Affordability Modification Program: Introduction of Second Lien Modification Program (Sept. 21, 2010), https://www.efanniemae.com/sf/guides/ssg/annltrs/pdf/2010/svc1014.pdf. However, these modifications did not help achieve the hoped-for results.
[182] Lauren Tara La Capra, *Mortgage Mayhem: Homeowners Stranded*, THE STREET (Aug. 18, 2010), http://www.thestreet.com/story/10835727/1/mortgage-mayhem-homeowners-stranded.html.
[183] Craig D. Robins, *Problems Continue with HAMP and Federal Mortgage Programs—Is HAMP Dying?*, LONG ISLAND BANKR. BLOG (May 18, 2010), http://long islandbankruptcyblog.com/problems-with-ham-federal-mortgage-programs-is-hamp-dying/ (posting that only 295,348 homeowners have obtained permanent loan modification out of the 3.2 million eligible mortgagors and mounting frustrations from those still seeking relief); *see also* Duke, *supra* note 110; Testimony of Thompson, *supra* note 32 (stating that many of the problems she mentioned were due to servicers' actions, including, but not limited to, extensive noncompliance with HAMP requirements, wrongful denial of HAMP benefits, pressuring borrowers to opt out of HAMP benefits, or repeatedly ignoring HAMP applications) .
[184] Testimony of Thompson, *supra* note 32.

> everyone else apply to them. This lawless attitude, supported by financial incentives and too-often tolerated by regulators, is the root cause of the failure of HAMP and the wrongful foreclosure of countless American families.[185]

Thompson argued that HAMP began to fail almost from its inception.[186]

Along with others, Thompson endorsed a uniform mortgage servicing system "to rein in servicer abuses and restore transparency to our mortgage markets."[187] In her view, the national mortgage servicing program should do several things. Thompson argues that a uniform mortgage servicing system should: a) eradicate the dual track foreclosure system by initiating modification prior to the start of a foreclosure procedure or by staying foreclosure proceedings;[188] b) offer permanent and affordable modifications to eligible homeowners;[189] c) include an appeals mechanism for homeowners denied modification;[190] d) include full documentation of investor restrictions and a required waiver of any prohibitions against modification;[191] e) be principal reductions if there is a net benefit to investors;[192] f) eliminate the conflict between servicers and homeowners by limiting servicers' fees to a reasonable amount, permitting a servicer to conduct its duties;[193] g) permit homeowners to seek the help of a community mediator to resolve out-of-litigation problems;[194] and h) help lower income homeowners receive increased funding for legal services representation.[195]

As Thompson advocates, federal bank regulating agencies are developing uniform mortgage servicing guidelines to "promote safe and sound operation of mortgage servicing and foreclosure processing, including standards for accountability and responsiveness to borrower concerns."[196] In July 2011, the Federal Reserve Board and other bank regulators conducted a horizontal review of fourteen large federally regulated mortgage servicers.[197] The review exposed serious flaws on multiple levels. The

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[185] *Id*.
[186] *Id.* at 8.
[187] *Id.* at 9. Mortgage Bankers Association CEO David Stevens emphasized that truly national mortgage servicing guidelines are needed. Stevens stated, "Of paramount importance to the industry is that any national servicing standard be truly national and not yet another requirement on top of the myriad existing obligations. Servicers would not have the burden of looking to varying standards created by different entities." Jon Prior, *Uniform Servicing Standards Prove Fractious to the Mortgage Market*, HOUSINGWIRE (May 12, 2011), http://www.housingwire.com/2011/05/12/new-servicing-standards-proving-not-to-be-so-national.
[188] Testimony of Thompson, *supra* note 32, at 9.
[189] *Id.*at 44–49.
[190] *Id.* at 59.
[191] *Id.* at 51–52.
[192] *Id.* at 18.
[193] *Id.* at 55.
[194] *Id.* at 62.
[195] *Id*.
[196] FORECLOSURE POLICIES & PRACTICES, *supra* note 89, at 8.
[197] *On Mortgage Servicing: Hearing Before the Subcomm. on Financial Institutions and Consumer Credit, Subcomm. on Oversight and Investigations and the H. Comm. on Financial Servs.*, 112th Cong. 3 (2011) (statement of the Fed. Res. Bd.) [hereinafter Fed. Res. Bd. Statement]. The regulators reviewed the following servicers' foreclosure procedures: Aurora Bank, Bank of America, Citibank, EverBank,

shortcomings were related to "foreclosure governance practices, foreclosure-documentation processes, and oversight and monitoring of third party law firms and other vendors."[198] Additionally, there were "deficiencies in loan files, inadequate staffing and training, undue emphasis on quantitative production and timeliness instead of quality and adequate workload monitoring."[199] The Board and federal bank regulators recommended stronger policy and control procedures and more expansive monitoring of servicing activities.[200] Drawing from the findings and recommendations of the horizontal review, the federal bank regulators[201] will develop uniform mortgage servicing guidelines that "are expected to address the proper handling of both performing and non-performing loans, including loss-mitigation procedures and foreclosure processing . . . ."[202] The overall goal of the uniform mortgage servicing guideline is to improve "customer treatment" and provide "better transparency and oversight of mortgage servicers' processes."[203]

As of January 2012, however, no uniform servicing rules have been adopted.[204] All states' attorneys general submitted a report that provided for an alternative of principal reduction as a part of the uniform servicing rules.[205] However, in March 2011, Bank of America, J.P. Morgan Chase, Wells Fargo, Citigroup, and GMAC proposed "Draft Alternative Uniform Servicing Standards."[206] The banks proposed "timelines for processing modifications, third party review of foreclosures, and single point contact for financially troubled borrowers."[207] With the number of parties involved in creating these uniform standards, reaching consensus might prove both complicated and far-off.

C. Strict Compliance with Loan Documents and/or Foreclosure Procedures or Related Laws

In the midst of economic disaster, and with no uniform guidelines before them, numerous courts are ensuring proper foreclosure by insisting on strict compliance with foreclosure laws and loan agreements. One of the main pre-foreclosure limitations is that

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GMAC/Ally Bank, HSBC, OneWest, J.P. Morgan Chase, MetLife, PNC Bank, Sovereign Bank, Sun Trust, US Bank, and Wells Fargo. *See Recent Developments: Defects in Mortgage Servicing and Foreclosure Processes: Hearing Before the Subcomm. on Financial Institutes and Consumer Credit, Subcomm. on Oversight and Investigations of the H. Comm. on Financial Services*, 112th Cong. 3 (2011) (Julie L. Williams, First Sr. Deputy Comp. & Chief Counsel, Office of the Comptroller of the Currency).

198 Fed. Res. Bd. Statement, *supra* note 197.

199 *Id.*

200 *Id.*

201 The federal bank regulators involved in designing the uniform mortgage servicing guidelines are the Federal Reserve Bank, U.S. Department of Treasury, U.S. Department of Housing and Urban Development, Federal Deposit Insurance Corporation, Federal Housing Administration, Office of the Comptroller of the Currency, Office of Thrift Supervision, and Federal Housing Agency. *Id.* All fifty state attorneys general are also involved in drafting the uniform foreclosure and servicing rules.

202 *Id.*

203 *Id.*

204 The Regulation of Mortgage Servicing Bill, S. 967, 112th Cong. (2011), is still in committee.

205 Dan Fitzpatrick, *Banks Offer Own Mortgage-Servicing Plan*, WALL ST. J., Mar. 29, 2011, http://online.wsj.com/article/SB10001424057622931293172884.html.

206 *Id.*

207 *Id.*

the mortgagee must act in strict compliance with the power of sale language in non-judicial foreclosure jurisdictions.[208] Courts have addressed these issues recently.

In *Hooker v. Northwest Trustee Services, Inc.*,[209] a federal court in Oregon required strict compliance with its statute and dismissed a non-judicial foreclosure action due to a lender's failure to properly record all note assignments.[210] In *Hooker*, the debtors, Ivan and Katherine Hooker, obtained a loan from GN Mortgage, LLC. (GN). GN secured the loan by a trust deed which listed GN as the lender, MERS[211] as the beneficiary and Regional Trustee Services Corp. as trustee.[212] The trust deed was recorded in the county where the land was situated.[213] As is common on the secondary market, the beneficiary interest switched hands several times.[214] Following the debtors' default, MERS assigned the trust deed to Bank of America.[215] This assignment was also recorded in the county land records where the property was located.[216] However, the court discovered that there were two beneficiary interest transfers that were not recorded in the county land records, but were noted in MERS.[217] Strictly adhering to applicable Oregon statutes,[218] the court held that MERS could not pursue a non-judicial foreclosure, but could elect to pursue a judicial foreclosure.[219]

In the same vein, Massachusetts courts will not confirm valid title if a mortgagee is unable to show the required proof that it was the mortgage holder at the time of foreclosure.[220] In *U.S. Bank v. Ibanez*,[221] U.S. Bank and Wells Fargo, as purported

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[208] *See, e.g.*, U.S. Bank Nat'l Ass'n v. Ibanez, 941 N.E.2d 40 (Mass. 2011) (recognizing the rule that "one who sells under a power [of sale] must follow strictly its terms. If he fails to do so there is no valid execution of the power, and the sale is wholly void.")

[209] Hooker v. Northwest Trustee Services, No. 10-3111-PA, 2011 WL 2119103 (D. Or. May 25, 2011).

[210] *Id.* at *3.

[211] To facilitate recording of mortgages that were being resold as securities, the mortgage industry created the Mortgage Electronic Registration System, Inc., or MERS. However, MERS announced that it will no longer participate in foreclosure and bankruptcy businesses effective July 22, 2011. *See* Carrie Bay, *MERS Bows Out of Foreclosure and Bankruptcy Proceedings*, DSNEWS.COM (July 27, 2011), http://www.dsnews.com/articles/mers-bows-out-of-foreclosure-and-bankruptcy-proceedings-2011-07-27.

[212] *Hooker,* No. 10-3111-PA, 2011 WL 2119103, at *1.

[213] *Id.*

[214] *Id.*

[215] *Id.*

[216] *Id.*

[217] *Id.* at *3–5; *see also California Orders GMAC Mortgage to Suspend Foreclosures*, CONSUMER AFFAIRS (Sept. 24, 2010), http://www.consumeraffairs.com/news04/2010/09/california-orders-gmac-mortgage-to-suspend-foreclosures.html (noting that the California governor demanded that GMAC/Ally Financial prove that it is in compliance with state law as a prerequisite to filing a foreclosure action); James v. U.S. Bank Nat'l Ass'n, 272 F.R.D. 47, 48–49 (D. Me. 2011) (finding GMAC liable for monetary sanctions because it submitted an affidavit without personal knowledge); GMAC Mortgage, LLC v. McCarthy, No. S1543-09, 2010 WL 4155261 (Vt. Super. Ct. 2010) (involving the submission of a revised affidavit when the first affidavit was filed without personal knowledge or in the presence of a notary public).

[218] OR. REV. STAT. § 86.735(1) (2011) (allowing a trustee to foreclose using a trust deed by advertisement and sale if: "trust deed, any assignments of the trust deed by the trustee or the beneficiary . . . are recorded in the mortgage records in the counties in which the property described in the deed is situated.").

[219] *Hooker,* No. 10-3111-PA, 2011 WL 2119103, at *6-7 (quoting *In re* McCoy, 2011 WL 477820, at *4 (D. Or. 2011) that "Oregon law permits foreclosure without the benefit of a judicial proceeding only when the interest of the beneficiary is clearly documented in a public record.").

[220] *See, e.g.*, U.S. Bank v. Ibanez, 941 N.E.2d 40 (Mass. 2011).

[221] *Id.* at 44.

assignees, foreclosed on properties in two separate actions in 2007.[222] After their non-judicial foreclosure sales, the lenders filed separate complaints in the Land Court requesting it to quiet title in them so that they could convey clear title to third parties.[223] Massachusetts law, in actions for declaration of clear title following non-judicial foreclosure sales, requires plaintiffs to prove entitlement to the relief sought.[224] Thus, the Court held that U.S. Bank and Wells Fargo needed to prove that they were assignees and holders of the mortgages at the notices of sale and subsequent foreclosure sales stages.[225]

Because the mortgages were sold several times, there was a substantial delay by the record holder of the mortgages to execute the assignments.[226] In fact, it took more than a year after each foreclosure sale for executed assignments to U.S. Bank and Wells Fargo to be recorded.[227] Accordingly, the Court denied the relief sought and refused to clear the title.[228] The Court adhered to the rule that "one who sells under a power [of sale] must follow strictly its terms. If he fails to do so there is no valid execution of the power and the sale is wholly void."[229] Similarly, New York law protects a homeowner against fraud, unfair dealing and theft of its home equity. This law is called the Home Equity Theft Prevention Act (HETPA).[230] HETPA requires a foreclosing lender to "deliver statutory-specific notice to the homeowner, together with the summons and complaint."[231] During a foreclosure action, a mortgagee or assignee has the burden to substantiate strict compliance with HETPA.[232] Mortgagee's failure to prove strict compliance may result in a court's dismissal of the foreclosure action.[233] Furthermore, homeowners may allege noncompliance or require proof of compliance as an affirmative defense or at any stage of the action.[234]

Due to the mortgage and foreclosure downfall, mortgagees, trustees, and/or beneficiaries are quickly discovering that courts are being more stringent pertaining to compliance with foreclosure laws or related laws as conditions precedent to enforcement of foreclosure rights.[235] Lender or servicer noncompliance will result in dismissal of a foreclosure action, either immediately or years after a foreclosure action.[236] Therefore,

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[222] *Id.* at 47.
[223] *Id.*
[224] *Id.* at 48.
[225] *Id.* at 51.
[226] *Id.* at 52.
[227] *Id.*
[228] *Id.*
[229] *Id.* at 49–50 (quoting Moore v. Dick, 72 N.E.2d 967, 968 (Mass. 1905)). This rule only applies because there is limited judicial oversight in non-judicial foreclosures.
[230] N.Y. PROPERTY § 265-a (McKinney 2011).
[231] *See* First Nat'l Bank of Chicago v. Silver, 899 N.Y.S.2d 256, 258 (N.Y. App. Div. 2010). In *U.S. Bank Nat'l Ass'n v. Martha Flynn*, the court blocked the eviction of a former mortgagor more than a year after the foreclosure because the foreclosing party could not prove that it held the beneficiary interest at the time of foreclosure. No. 11-8011 (Columbia Cnty. Or. Cir. Ct. June 23, 2011), *available at* http://media.oregonlive.com/business_impact/other/usbank%20v%20flynn%20fed%20win%20oregon(1).pdf.
[232] *Silver*, 899 N.Y.S at 259.
[233] *Id.*
[234] *Id.* at 165.
[235] *Id.*
[236] *See, e.g.*, U.S. Bank v. Ibanez, 941 N.E.2d 40 (Mass. 2011).

mortgagees must start the foreclosure process over again. The costs of the unenforceable foreclosure are borne by the mortgagee. Hence, lenders have more setbacks with non-judicial foreclosures than they did traditionally, impeding a mortgagee's ability to foreclose quickly.

D. Loan Modifications, Settlement Conferences, and Penalties for Lenders' Failure to Act in Good Faith

1. Loan Modifications

i. State Loan Modification Efforts

Some courts and legislatures are not simply delaying the process of foreclosure, but are hoping to avoid them altogether by affording mortgagors an opportunity to reach a work-out or loan modification.

California. California law requires lenders to engage in loan modification discussions with their borrowers to avoid foreclosures.[237] The amended law clearly states that the legislature's intent is "that the mortgagee, beneficiary, or authorized agent offer the borrower a loan modification or workout plan if such a modification or plan is consistent with its contractual or other authority."[238] However, this law does not adequately help borrowers avoid foreclosure because it neither explicitly imposes a duty on lenders to modify a mortgage nor gives borrowers a right to sue under the statute.[239]

Oregon. The Oregon legislature sought to prevent the high number of homeowner foreclosures by amending Oregon's foreclosure laws in 2009.[240] Senate Bill 628 amended Oregon Revised Statutes § 86.740 by mandating mediation between the trustee and grantor before a foreclosure sale based on a residential trust deed.[241] The purpose of the mediation is to avoid a foreclosure sale. Therefore, either a trustee or grantor may offer a reasonable settlement proposal that amends the original loan agreement.[242] Failure to comply with the mandatory mediation requirements may result in the beneficiary's ability to foreclose on the trust deed.[243] Unfortunately, however, legislators soon discovered that modified law was not the anecdote to the state's foreclosure problems; more revisions were necessary.

In 2011, legislators revisited the issues and introduced Senate Bill 827[244] to solve the problems unaddressed by the 2009 amendments. Particularly, the legislators discovered three main issues with the 2009 law. First, many homeowners did not participate in the mediation sessions; some simply failed to file requests for modifications

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[237] CAL. CIV. CODE § 2923.6 (West 2011).
[238] CAL. CIV. CODE § 2923.6 (b) (West 2011).
[239] *See* Argueta v. J.P. Morgan Chase, No. CIV. 2:11–441, 2011 WL 1376701, at *6 (E.D. Cal. Apr. 12, 2011) (following Farner v. Countrywide Home Loans, No. 08cv2193, 2009 WL 189025, at *2 (S.D. Cal. 2009)).
[240] S.B. 628, 75th Leg. Assemb., Reg. Sess. (Or. 2009).
[241] OR. REV. STAT. § 86.740 (4) (2009).
[242] OR. REV. STAT. § 86.740 (5) (2009).
[243] OR. REV. STAT. § 86.740 (5)(1) (2009).
[244] S.B. 827, 76th Leg. Assemb., Reg. Sess. (Or. 2011).

and reviews within the requisite timeline.[245] Countless numbers of homeowners failed to identify the lender or beneficiary.[246] Also, because they were in loan modification discussions with their lender, some homeowners were under the misperception that they did not have to submit to modification form.[247] Second, there was no statewide oversight over compliance with the 2009 law.[248] Beneficiaries were merely required to file compliance affidavits with the county records office.[249] Furthermore, the information was one-sided, showing only the beneficiary's perspective of the mediation process and not the homeowner's viewpoint.[250] Third, the 2009 amendment did not eliminate the risk of dual track foreclosure and settlement; the foreclosure clock still ran even though a grantor and beneficiary were in negotiations to modify their loan agreements, or if the grantor was in a trial modification period and making trial payments.[251]

Oregon legislators hoped that Senate Bill 827 addressed the above problems by proposing the following five amendments. First, modification forms needed to be standardized.[252] By standardizing the loan modification form, the legislators believed that homeowners would more readily identify it in the enormous stack of papers that usually accompanies foreclosure notifications.[253] Further, it would more clearly alert homeowners that they needed to fill out a modification form for participation in the mediation program, even if verbal discussions of modification were in progress.[254] Second, the new rules required borrowers to file a declaration with the county records office that verified that they requested a loan modification and review in accordance with state law and within the required timeline.[255] Third, a beneficiary would be mandated to send a copy of its compliance affidavit to the state's Department of Justice upon filing affidavits with the county's recorder of deeds. Fourth, all beneficiary affidavits would be amended and standardized as well. Finally, and most importantly, beneficiaries would not be permitted to move forward with the foreclosure process until five days after they filed the compliance affidavits.[256] Thus, no public notice of the foreclosure would be possible until day eighty-two under the new proposal.[257] These new changes, if adopted, would offer the broadest protections to homeowners and hopefully curtail the number of foreclosures in Oregon.

Failure to comply with the proposed law would impede a lender's ability to commence a non-judicial foreclosure action of a principal residence mortgage if: 1) after notice was mailed to the borrower, the housing counselor's deadline to notify the designated contact person of the borrower's modification request has not expired;[258] 2)

[245] *Id.*
[246] *Id.*
[247] *Id.*
[248] *Id.*
[249] *Id.*
[250] *Id.*
[251] *Id.*
[252] *Id.*
[253] *Id.*
[254] *Id.*
[255] *Id.*
[256] *Id.*
[257] *Id.*
[258] *Id.*

within fourteen days after the lender mailed the notice to the borrower, the borrower has requested a meeting with the designated contact person and it has not been ninety days after notice was mailed;[259] 3) the borrower had requested a meeting with the designated contact person and provided necessary documents if requested, but the designated person had not met or negotiated with the borrower;[260] 4) the borrower and mortgagee had agreed in writing to modify the mortgage loan and the borrower was not in default under the agreement;[261] and 5) calculations under § 3205c (1) show that the mortgagor is eligible for a loan modification, and non-judicial foreclosure is not allowed under § 3205c (7).[262]

Michigan. Michigan, one of the economies hardest hit by the modern recession,[263] has tenaciously sought to slow the progression of foreclosure filings by enacting three temporary laws in 2009: Public Acts 29, 30, and 31.[264] Within fourteen days of receiving notice of a foreclosure, a borrower must request a meeting with an approved housing counselor.[265] Upon doing so, the foreclosure sale may not commence until ninety days after the notice is mailed.[266]

Under Public Act 29,[267] a lender or its agent is halted from commencing a non-judicial foreclosure of a principal residence mortgage if the foreclosing party failed to mail the requisite notice to the borrower under Public Act 30 of 2009.[268] The notice to borrower must include, among other things, the name of the lender's designated contact authorized to settle with the borrower.[269] Michigan's Public Act 30 requires the foreclosing party to notify the borrower of his rights within seven days after mailing a notice of default/sale.[270] The notice must be published once "in the same manner as is required for publishing a notice of foreclosure sale."[271] The notice warns the borrower of his or her ability to seek a loan modification.[272] Should a borrower seek loan modification, he or she is required to contact an approved housing counselor within

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259 *Id.*
260 *Id.*
261 *Id.*
262 *Id.*
263 According to the 2010 U.S. Census, Michigan is the only state to have its population decline between 2000 and 2010. It is estimated that over the past ten years, Detroit has lost 25% of its residents. *See* Lauren Knapp, *Detroit's Population Decline: 1 Person Departed Every 22 Minutes,* PBS NEWSHOUR (Mar. 23, 2011), http://www.pbs.org/newshour/rundown/2011/03/-sarah-hulett-of-michigan.html.
264 MICH. COMP. LAWS ANN. § 600.3205 (a), § 600.3205 (b), and § 600.3205 (c) *repealed by* MICH. COMP. LAWS ANN. § 600.3205 (e) (West 2011). These new laws will only affect foreclosures on primary residence mortgages started after July 5, 2009. These laws mimic the federal loan modification plan, the Making Homes Affordable Program. *Legislation and Policy*, FORECLOSUREDETROIT.ORG, http://www.foreclosuredetroit.org/pages/Legislation_Policy_Foreclosure_Detroit (last visited Apr. 8, 2012).
265 MICH. COMP. LAWS ANN. § 600.3205 (a), § 600.3205(c) (West 2011).
266 MICH. COMP. LAWS ANN. § 600.3205 (a)(1)(e).
267 2009 Mich. Pub. Acts 29.
268 2009 Mich. Pub. Acts 29 (a)–(h).
269 2009 Mich. Pub. Acts 29.
270 2009 Mich. Pub. Acts 30 (k)(4).
271 *Id.*
272 *Id.* at (d)

fourteen days after the list is mailed.[273] Within ten days of being contacted by a borrower, a housing counselor must contact a lender's designated contact of a borrower's decision to modify.[274] Upon being contacted by a housing counselor, a mortgage holder or its servicer must determine the borrower's modification or work out eligibility.[275] Eventually, a housing counselor will schedule a meeting between the borrower and lender.[276] A housing counselor will attend the meeting only if the borrower specifically requests it.[277] The meeting(s) must "be held at a time and place that is convenient to all parties, or in the county where the property is situated."[278]

Public Act 31 "provides that if the meeting specified in Public Act 30 does not result in an agreement to modify the mortgage loan, the lender/servicer or its agent shall, with some exceptions, work with the borrower under Section 3205c to apply a loan modification program" or other settlement that complies with relevant paragraphs of § 3205c.[279] A lender may use the loan modification program to lower the "ratio of the borrower's housing-related debt (including principal and interest, taxes, insurance and association fees) to the borrower's gross income of 38% or less, on an aggregate basis."[280] The goal is to make mortgages more affordable. Public Act 31 outlines mortgagor housing-related debt-reduction methods.[281] If a lender improperly denies a mortgagor's loan modification request, then the lender will be forced to pursue judicial foreclosure only.[282]

Washington. Creating an emergency law to reduce foreclosure action filings, the State of Washington created the "Prevent or Reduce Owner-Occupied Foreclosure Program."[283] Legislators created this program to help borrowers, who are actually in foreclosure or on the verge of foreclosure, achieve "work-outs, loan modifications, or other results that keep them in their homes."[284] This emergency law sunset on June 30, 2011.[285]

These state efforts, along with the federal government's loan modification or loss mitigation programs, have pulled thousands of families out of foreclosure.[286]

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[273] *Id.*
[274] *Id.*
[275] 2009 Mich. Pub. Acts 31 (1).
[276] *Id.*
[277] *Id.*
[278] *Id*.
[279] 2009 Mich. Pub. Acts 31.
[280] *Id.* at (1)(a)
[281] *Id.* at (b). These methods include:

> (i) An interest rate reduction, as needed, subject to a floor of 3%, for a fixed term of at least 5 years; (ii) An extension of the amortization period for the loan term, to 40 years or less from the date of the loan modification; (iii) Deferral of some portion of the amount of the unpaid principal balance of 20% or less, until maturity, refinancing of the loan, or sale of the property; (iv) Reduction or elimination of late fees.

Id.
[282] Press Release, TheLendingEdge.com, Michigan Tries to Slow Foreclosures with New Laws, (June 18, 2009), *available at* http://www.free-press-release.com/news/200906/1245382343.html.
[283] WASH. REV. CODE ANN. § 43.320.160 (West 2011).
[284] *Id.* at (1).
[285] *Id.*
[286] *See, e.g.,* Jocelyn Cockrum, *National Foreclosure Rate Slows, Denver Rate Also Down,* DENVER POST

Unfortunately, though, the loan modification programs do not require lenders to actually modify any loan agreements.[287] The programs simply provide homeowners with an opportunity to talk with mortgagees to possibly avoid foreclosure or modify their loans.[288] However, servicers or mortgagees have ignored requests for modification or inconsistently applied modification standards.[289] Thus, without penalties or good faith requirements to encourage modification, millions of homeowners will still lose their homes, prolonging the housing crisis and annihilating the national economy.

ii. Federal Loan Modification and Refinance Programs

a. Home Affordability Modification Program (HAMP)

HAMP, as a part of the Making Homes Affordable Program, was designed to reduce delinquent and at-risk borrowers' monthly mortgage payments.[290] For qualified borrowers, HAMP could reduce a borrower's monthly payments to a more affordable amount, no more than 31% of a borrower's verified gross monthly income.[291] Borrowers apply for HAMP modifications by filling out and submitting an application to their mortgage loan servicers.[292] The request for modification is included in the standard application.[293]

To be eligible for HAMP, a borrower must: a) occupy the mortgaged property as its primary residence; b) have received its mortgage prior to January 1, 2009; c) have mortgage payments that exceed 31% of its monthly gross income; d) owe no more than $729,750 on the mortgaged property; e) be delinquent (or in danger of imminent delinquency) in its mortgage payments; f) have documented and sufficient information that supports sufficient income to make modified payments; and g) not have been convicted, within the last ten years, of felony larceny, theft, fraud or forgery, money laundering, or tax evasion, in connection with a mortgage or real estate transaction.[294]
HAMP has been essentially ineffective since its genesis[295] and criticism of the program has gained strength.[296] In March 2011, the U.S. House of Representatives moved to cut

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(Mar. 30, 2012), http://yourhub.denverpost.com/denver/national-foreclosure-rate-slows-denver-rate-also-down/Uc9TEPOyg3xNmCzJqvMOcJ-ugc?hl. *See generally Avoiding Foreclosure*, *supra* note 140.

[287] *See* Armour, *supra* note 170.

[288] *Id.*

[289] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-634, TROUBLED ASSET RELIEF PROGRAM: FURTHER ACTIONS NEEDED TO FULLY AND EQUITABLY IMPLEMENT FORECLOSURE MITIGATION PROGRAMS 14 (2010).

[290] Home Affordability Modification Program, *supra* note 177. The Obama Administration also created programs similar to HAMP, such as Home Affordable Foreclosure Alternative, FHA Loan Modification, and Second Lien Modification Program. MAKING HOME AFFORDABLE, http://www.makinghomeaffordable.gov/Pages/default.aspx (last visited Mar. 13, 2012).

[291] *Homeowner Modification Program*, MAKING HOME AFFORDABLE, http://www.makinghomeaffordable.gov/programs/lower-payments/Pages/hamp.aspx (last visited Mar. 15, 2012).

[292] *Id.*

[293] *Id.*

[294] *Id.*

[295] Testimony of Thompson, *supra* note 32, at 3.

[296] Jennifer Liberto, *House Votes to Kill Obama Mortgage Plan*, CNN MONEY (Mar. 29, 2011), http://money.cnn.com/2011/03/29/news/economy/republicans_kill_hamp/index.htm.

any new funding to the program by a vote of 252 to 170.[297] Many legislators attacked the program because "[m]ore homeowners have been kicked out of the program than have received permanent relief."[298] Furthermore, failure to comply with HAMP does not give homeowners a private right of action against mortgage loan servicers or the ability to switch to a different servicer. As one legislator stated, "Homeowners cannot choose their mortgage servicing, and lawsuits (outside of bankruptcy) to impose liability on servicers for mistreatment of consumers have largely floundered, in part because the servicers argue they have no contractual duty to the homeowners—only to the trusts or banks that pay them."[299] Therefore, without uniform rules that create mortgage loan servicer accountability and liability, HAMP will continue to fall short of its goals.[300]

b. Home Affordable Refinance Program (HARP)

In 2009, the Obama Administration introduced HARP "to assist millions of struggling home owners make their mortgage payments and hold on to their property."[301] While HAMP helps homeowners who are past due or in default,[302] HARP provides a remedy for homeowners who are "performing" on their home loans.[303] Under HARP, qualified homeowners, whose loans are guaranteed by Freddie Mac or Fannie Mae, may refinance their mortgages at lower interest rates.[304]

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[297] H.R. 839, 112th Cong. (2011).

[298] Liberto, *supra* note 296 (quoting Representative Darrell Issa).

[299] Andrew Martin, *A Critic's Take on the Mortgage Modification Program*, N.Y. TIMES BLOG (June 10, 2011, 12:48 PM), http://bucks.blogs.nytimes.com/2011/06/10/a-critics-take-on-the-mortgage-modification-program/ (quoting law professor Katherine Porter).

[300] *See generally* Lorraine Woellert, *Anti-Foreclosure Program Shows Participation Gains*, BLOOMBERG (Jan. 26, 2011), http://www.bloomberg.com/news/2011-01-26/foreclosure-prevention-program-shows-gains-amid-criticism.html (noting that HAMP has helped approximately 579,650 borrowers out of the millions of foreclosure filings in 2010, short of its goal to help three to four million homeowners).

[301] *Progress of the Making Home Affordable Program: What Are the Outcomes for Homeowners and What Are the Obstacles to Success?: Hearing Before the Subcomm. on Housing and Community Opportunity and U.S. H. Comm. on Financial Services*, 111th Cong. (2009) (written testimony of Dave Stevens, Asst. Sec'y for Housing and Fed. Housing Auth. Comm'r for U.S. Dep't of Housing & Urb. Dev.), *available at* http://www.hud.gov/offices/cir/test090909.cfm.

[302] *Home Affordable Refinance Program*, MAKING HOME AFFORDABLE, http://www.makinghomeaffordable.gov/programs/lower-rates/Pages/harp.aspx (last updated Jan. 6, 2012). Similar refinance programs include Making Homes Affordability Program (MHAP), Mortgage Refinance Program, Federal Mortgage Home Refinance Program, Bad Credit Mortgage Refinance, FHA Streamline Refinance Program, Mortgage Foreclosure Rescue Plan, Refinance with Little Equity Plan, No Document Mortgage Refinance Program, Mortgage Relief Plan, and Short Refinance Program. *See, e.g., Explore Programs,* MAKING HOME AFFORDABLE, http://www.makinghomeaffordable.gov/programs/view-all-programs/Pages/default.aspx (last updated Mar. 29, 2012).

[303] *Home Affordable Modification Program*, MAKING HOME AFFORDABLE, http://www.makinghomeaffordable.gov/programs/lower-payments/Pages/hamp.aspx (last updated Apr. 25, 2012); *Home Affordable Refinance Program*, *supra* note 302.

[304] In addition to having mortgages guaranteed by Fannie Mae or Freddie Mac, homeowners qualify for HARP if: 1) the mortgage was sold to Fannie Mae or Freddie Mac on or before May 31, 2009; 2) the mortgage was not refinanced previously under HARP, unless it was a Fannie Mae loan refinanced under HARP between March and May 2009; 3) the loan-to-value ratio is greater than 80%; 4) they are current on their mortgage payments, with no late payments made in the past six months, and no more than one late payment in the last year; 5) the refinance improves the "long-term affordability or stability" of their

The housing and mortgage crisis has devastated housing prices, eating up homeowner equity.[305] Homeowners may be unable to refinance their mortgage loans if they have low or negative equity in their homes. That is, if their mortgage balance is nearly equal to or exceeds the value of their homes, then traditional refinancing may be unobtainable.[306] Thus, without any assistance, homeowners may decide to "strategically default," even though they are current on their mortgages.[307]

It is reported that "more than 800,000 borrowers" have taken advantage of the HARP refinancing program by refinancing their mortgages.[308] However, this pales in comparison to the estimated 4 million borrowers who "appear to meet the basic eligibility for HARP refinancing."[309]

Elizabeth Duke, a member of the Board of Governors for the Federal Reserve Board, believes that low HARP participation is due to other resistance or impediments to refinancing.[310] Duke suggests "four possible frictions" to HARP refinancing.[311] First, Duke believes that loan-level pricing adjustments (LLPA) may discourage homeowners from participating in HARP.[312] LLPAs may substantially raise refinancing costs, which may deter some homeowners.[313] Second, Duke suspects that participation levels are likely related to "limited lender competition" for HARP refinancing.[314] Duke opines that lenders are cautious in adopting prior underwriting "putback" risks.[315] Third, another friction Duke credits for low participation in HARP is that junior lienholders refuse to

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mortgages; and 6) they have the ability to make the refinanced loan payments. *Frequently Asked Questions,* HOME AFFORDABLE REFINANCE PROGRAM, http://www.harpprogram.org/faq.php#5 (last visited Apr. 3, 2012).

[305] Office of Policy Dev. & Research, *U.S. Housing Market Conditions*, U.S. DEP'T OF HOUS. & URBAN DEV., 3 (Aug. 2011), http://www.huduser.org/portal/periodicals/ushmc/summer11/USHMC_2q11_summary.pdf (noting a decline rate in home values of 2.5% for existing homes during the first quarter of 2011 and a 5.5% decrease from 2010).

[306] *See* Tuttle, *supra* note 24.

[307] *Id. But see* Jessica Silver-Greenberg, *House Is Gone but Debt Lives On*, WALL ST. J. (Oct. 1, 2011), http://online.wsj.com/article/SB10001424053111904060604576572532029526792.html (reporting a surge in the pursuit of deficiency judgments by lenders in general and mainly against borrowers who strategically defaulted on their mortgages).

[308] Duke, *supra* note 110.

[309] *Id.*

[310] *Id.*

[311] *Id.*

[312] *Id.* "LLPAs are upfront fees that are added to the refinancing costs of loans that are judged to have higher risk characteristics, such as high loan-to-value ratios." *Id.*

[313] *Id.*

[314] *Id.*

[315] *Id.* A mortgage "putback" means that the loan originator repurchases the mortgage from the entity currently holding the security. *See, e.g.*, Ash Bennington, *Citi Could Face a $22 Billion Loss on Put-Back Mortgage Bonds,* CNBC (Oct. 19, 2010), http://www.cnbc.com/id/39737924/Citi_Could_Face_A_22_Billion_Loss_On_Put_Back_Mortgage_Bonds. An originator typically repurchases the mortgage upon fraud or misrepresentations of a mortgagor's creditworthiness or appraised value of the security. *Id.* According to Duke, under these circumstances, "lenders who process HARP refinancings have putback risk both from the refinance and from the original underwriting, even if the refinancing lender did not underwrite the original loan." Duke, *supra* note 110. Many lenders may be hesitant to refinance loans in which they took no part in the loan origination. Consequently, many mortgagors are unable to participate in HARP, even though they may qualify. *Id.*

subordinate to the new HARP refinanced loan.[316] Fourth, mortgage insurers guarantee or agree to take on any risk of default with a lender in making a loan.[317] Duke suspects that the final obstacle to HARP refinancing might be mortgage insurers' refusal to re-underwrite their policies.[318]

Although it could help lower defaults and foreclosures by making mortgages more affordable, HARP, like HAMP, has floundered, failing to make any noteworthy changes for a majority of distressed homeowners. Perhaps more homeowners would participate if the four impediments to HARP refinancing were removed.[319] However, many queries linger, including: 1) who may remove these obstacles to refinancing; and 2) how may these impediments be removed.

In response to the criticism of Duke and others, the Federal Housing Finance Agency (FHFA), with Fannie Mae and Freddie Mac, announced changes to HARP in October 2011.[320] The FHFA modified HARP in the following five ways. First, more underwater debtors are now eligible for HARP refinancing because the FHFA removed the 125% loan-to-value cap for fixed-rate mortgages backed by Fannie Mae and Freddie Mac.[321] Irrespective of a homeowner's loan-to-value ratio, a borrower who meets HARP's other requirements may now qualify for HARP refinancing. Second, the FHFA waived upfront loan-level fees for borrowers who refinance into shorter-term mortgages,

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316 Duke, *supra* note 110. Generally, when a senior lienholder modifies its mortgage, it retains its priority unless the modification increases the debt amount or interest rate. *See* NELSON & WHITMAN, *supra* note 38, at § 9.4. Modifications, as anticipated under HARP, could potentially benefit a junior lienholder. HARP modifications could reduce the likelihood that a mortgagor will default, causing the senior lienholder to foreclose and wipe out the junior lienholder's security interest. *Id.* However, many junior lienholders might be cautious of HARP refinancings and how it affects their priority status. Therefore, they may hold up a homeowner's refinancing process to investigate the effects. Duke, *supra* note 110 (stating that junior lienholder can hold "up the HARP process" by refusing to "remain subordinate to a proposed new refinance loan").

317 *MGIC's Underwriting Guide*, MORTGAGE GUARANTY INSURANCE CORP., 7–8 (2011), http://www.mgic.com/pdfs/71-40600_uwguide.pdf. Before agreeing to underwrite a mortgage, a mortgage insurer will usually thoroughly assess a mortgagor's likelihood of default. *Id.* at 7. During the underwriting process, a mortgage insurer will review: "the borrower's willingness and ability to repay the loan"; "the borrower's commitment to the property"; "the housing and economic conditions in the property's market; the marketability of the property and justification of its value as documented in the appraisal or other acceptable alternative; and the loan program (for example, ARM vs. fixed payment)." *Id.* Upon mortgagor default, a lender, who paid a premium initially, suffers a loss and is paid by the mortgage insurer for the loss. *Id.*

318 Duke, *supra* note 110. This refusal to re-underwrite is "despite presumably diminished default risk after the refinancing." *Id.* Though there are no reports on this issue, a mortgage insurer may hesitate to re-underwrite a mortgage because: 1) of the costs to the insurer, such as re-investment of time and resources to evaluate the mortgagor's background; 2) concerns related to a mortgagor's ability to pay; or 3) trepidations that the housing market has not yet bottomed out. As Duke pointed out, the risks of HARP refinancing only presumably diminishes the risk of default, but does not guarantee it. Guaranteeing against default is, in fact, a mortgage insurer's responsibility. Mortgage insurers may not feel that the timing is yet ripe or prudent to re-underwrite policies. *Id.*

319 *Id.*

320 News Release, Fed. Housing Finance Agency, FHFA, Fannie Mae and Freddie Mac Announce HARP Changes to Reach More Borrowers (Oct. 24, 2011), *available at* http://www.fhfa.gov/webfiles/22721/HARP_release_102411_Final.pdf

321 *Id.*

i.e., those less than twenty years, and lowered other borrower fees.[322] Third, the FHFA no longer mandates new property appraisals if a reliable Fannie Mae or Freddie Mac automated valuation model estimate exists.[323] Fourth, to increase lender participation, the FHFA waived certain lender representations and warranties liabilities related to making original loans owned or guaranteed by Fannie Mae or Freddie Mac.[324] Finally, for mortgages originally sold to Fannie Mae or Freddie Mac on or before May 31, 2009, the FHFA extended the availability of HARP until December 31, 2013.[325]

2. Alternative Dispute Resolution

i. Mediation

Foreclosures not only result in losses to mortgagors, but can also burden a judicial system with extraordinary influxes of foreclosure filings. To ease this burden, a few jurisdictions have created mandatory or voluntary mediation programs. The below programs are illustrative of some of the state alternative dispute resolution efforts undertaken.

Connecticut. In Connecticut, the Chief Court Administrator created a residential foreclosure mediation program for each state judicial district.[326] The Connecticut residential foreclosure mediation program was designed to "address all issues of foreclosure, including, but not limited to, reinstatement of the mortgage, assignment of law days, assignment of sale date, restructuring of the mortgage debt and foreclosure by decree of sale."[327] Only court-specified mediators can conduct the mediation.[328] Along with their mediation duties, the mediators can refer participating mortgagors to "community-based resources when appropriate" and other "mortgage assistance programs."[329]

Delaware. Delaware also created a court-based mediation program in 2008 in response to an upturn in foreclosure filings.[330] A group of lawyers (for mortgagors and mortgagees), bankers, consumer advocates, and housing counselors worked to create a foreclosure mediation program for Delaware courts.[331] Under the mediation program, a

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[322] *Id.*
[323] *Id.*
[324] *Id.*
[325] *Id.*
[326] *Notice Regarding the Foreclosure Mediation Program P.A. 09-209,* STATE OF CONN. JUD. BRANCH, http://www.jud.ct.gov/external/news/press270.htm (last visited Sept. 23, 2011).
[327] *Id.*
[328] *Id.*
[329] *Id.* In June 2009, Maine's Supreme Judicial Court created a mandatory foreclosure mediation program modeled after Connecticut's mediation program. 2009 Me. Laws ch. 402.
[330] Press Release, Del. State Housing Auth., State Launches New Program to Help Homeowners Facing Foreclosure (Sept. 10, 2009). The residential foreclosure mediation program

> is limited to homeowners who own a one to four unit home and reside in the home as their primary residence or reside in one of the units of a one to four unit home as their primary residence and the mortgage on that property which is their primary residence is being foreclosed.

Residential Mortgage Foreclosure Mediation Program, No. 2011-2, 2–3 (Del. Super. Ct. Jan. 20, 2011) (admin. directive).
[331] Del. State Housing Authority, *supra* note 330.

plaintiff, upon initiating a foreclosure action, must notify the homeowner and send him a "Special Notice Hotline Flyer, providing a hotline number . . . , a Universal Intake Form, . . . and a Foreclosure Intervention Counseling Client's Checklist . . . ."[332] The Special Notice Hotline Flyer will implore the mortgagor to contact a HUD-certified housing counselor.[333] The HUD counselor will then "provide the homeowner with information pertaining to the Residential Mortgage Foreclosure Program."[334] Also, the flyer will "encourage the homeowner" to stay in touch with the foreclosing party.[335]

Florida. Similarly, in Florida, a task force created and presented a model, uniform mediation program to be implemented by each circuit chief judge.[336] Under the Florida mediation program, all residential homestead foreclosures are referred to mediation, "unless the plaintiff and borrower agree otherwise or unless effective pre-suit mediation that substantially complies" with the mediation program has already taken place.[337] The Florida Supreme Court adopted the recommendation "as the best method to open communication and facilitate problem-solving between the parties to foreclosure cases while conserving limited judicial resources."[338] Included within the mediation program is the ability of the parties to opt out of mediation

> if they participated in pre-suit mediation either directly through the managed mediation program or through a Supreme Court-certified circuit civil mediator specially trained to mediate residential mortgage foreclosure actions, providing the borrower has participated in foreclosure counseling, there has been a supervised exchange of plaintiff and borrower disclosures, and mediation resulted in either settlement or impasse. In order to qualify as an opt-out from the managed mediation program, pre-suit mediation must share characteristics of the managed mediation program; that is, it must be independent, genuine, fair and impartial.[339]

Nevada. Nevada law gives mortgagors the option to choose mediation to circumvent foreclosures by power of sale and modify their mortgages.[340] In Nevada, a mortgagor is given a form accompanied with an envelope addressed to the Mediation Administrator if he or she chooses mediation or a waiver of mediation form if he or she does not choose mediation.[341] The Mediation Administrator then assigns the mediation to

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[332] Residential Mortgage Foreclosure Mediation Program, *supra* note 330.
[333] *Id.*
[334] *Id.*
[335] *Id.*
[336] Final Report and Recommendations on Residential Mortgage Foreclosure Cases, No. AOSC09-54, (Fla. Dec. 28, 2009) (admin. order). The mediation program "applies to all residential mortgage foreclosure actions filed against homestead property involving loans that originated under federal truth in lending regulations." *Id.*
[337] *Id*. Only the mediators who are specially trained in residential mortgage foreclosure matters will be assigned to mediate cases under the uniform Florida mediation program. *Id.*
[338] *Id.*
[339] *Id.*
[340] NEV. REV. STAT. § 107.086 (2011).
[341] § 107.086 (2)(a)(3).

a justice, judge, hearing master, or other designee for scheduling.[342] A mortgagee may not exercise its power of sale foreclosure until the completion of the mediation.[343] Further, by dangling mediation as a prerequisite to exercising a power of sale foreclosure, mortgagees are incentivized to attend mediation sessions, bring required documents to the mediation, and, most importantly, participate in good faith. The court may impose a sanction for the failure to do any of these actions.[344] The sanctions may be whatever the court deems appropriate, including requiring a loan modification.[345]

Rhode Island. Rhode Island legislators passed new legislation in 2009 that provides for optional foreclosure counseling.[346] When Rhode Island mortgagors receive a notice of default, they are also informed of the right to seek foreclosure counseling by a HUD-approved mortgage counselor.[347] If a mortgagee fails to provide a mortgagor the right to foreclosure mediation, then a foreclosure sale may be deemed void.[348] The new law does not, however, instruct the parties on how to reach a conclusion or describe what happens if the parties fail to reach an agreement.

Washington. Upon contacting a housing counselor, qualified Washington mortgagors might be recommended for Washington's Foreclosure Mediation Program.[349] Explicitly stated in the law is the requirement that both the mortgagor and beneficiary/trustee act in good faith.[350] Failure to act in good faith will cause dire consequences for either party. While the mortgagor may be unable to modify the terms of the mortgage agreement, the beneficiary/trustee right to foreclose might be impaired.[351]

ii. Mandatory Settlement Conference

A few jurisdictions have attempted other remediation efforts, such as mandatory settlement conferences. After noting a 150% increase in foreclosure filings from January 2006 to April 2008, all of the branches of government in New York individually proposed loss mitigation strategies related to foreclosure.[352] The New York judicial system enacted an early court intervention action plan to deal with its high level of foreclosures.[353] In the executive branch, New York Governor David Patterson initiated an interagency task force, "Halt Abusive Lending Transactions" (HALT), to stop predatory lending practices and foreclosures in 2008.[354]

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[342] § 107.086 (2)(b).
[343] § 107.086 (3).
[344] § 107.086 (5).
[345] *Id.*
[346] R.I. GEN. LAWS ANN. § 34-27-3.1 (b) (West 2011).
[347] *Id.*
[348] § 34-27-3.1 (c).
[349] WASH. REV. CODE ANN. § 61.24.0002 (West 2011) (entitled the "Foreclosure Fairness Act of 2011").
[350] § 61.24.0002 (iv).
[351] *Id*. For more information on foreclosure mediation and federal support, see Melanca Clark & Daniel Olmos, *Foreclosure Mediation: Emerging Research and Evaluation Practices*, U.S. DEPT. OF JUSTICE, (2011).
[352] Judith S. Kaye & Ann Pfau, *Residential Mortgage Foreclosures: Promoting Early Court Intervention*, N.Y. STATE UNIFIED COURT SYS., 2–4, (2008), http://www.nycourts.gov/whatsnew/pdf/ResidentialForeclosure6-08.pdf..
[353] *Id.*
[354] Press Release, Office of Governor David A. Patterson, Governor Patterson Announces Request for

Finding the HALT report's numbers unacceptable, the New York legislature reformed its subprime lending legislation. Among other changes, the legislature amended the New York Civil Practice Law and Rules § 3408.[355] For foreclosures involving residential mortgages originated

> between January 1, 2003 and September 1, 2008, or sub-prime, or non-traditional loan where the defendant [mortgagor] is a resident of the property, the court must hold a voluntary conference within sixty (60) days after the date proof of service of the foreclosure is filed with the county court clerk, or on an adjourned date agreed to by the parties, if the defendant-homeowner requests a conference.[356]

With this change, when lenders and borrowers begin negotiations for loan modification, failure to act in good faith could have dire consequences for either party, but especially lenders.

Along with the legislative and executive branches, New York courts also addressed deficiencies in loan modification negotiations. In *IndyMac Bank F.S.B. v. Yano-Horoski*,[357] the Supreme Court in Suffolk County, New York took a hardline stance against a lender after it failed to "even find so much as a scintilla of good faith" on lender's behalf while negotiating a loan modification with a mortgagor.[358] The mere filing of a foreclosure action by a lender invokes the court's equity jurisdiction.[359] At that juncture, the court must review the evidence on the whole to determine if equitable relief for the lender will be permissible.[360] If a lender's conduct is "willful or unconscionable" or "of such a nature that honest and fair minded folk would roundly denounce such actions as being morally or ethically wrong,"[361] then a court may decide to dismiss the lender's action, finding a lender is without recourse in a court of equity.[362]

The *Yono-Horoski* court found that the lender's conduct was "greatly egregious and so completely void of good faith that equity cannot be permitted to intervene on its

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Proposal to Assist Homeowners Facing Foreclosure (June 16, 2008*), available at* http://www.banking.state.ny.us/pr080619a.htm. In a December 2008 report, the HALT task force found a correlation between the type of mortgage and rate of delinquency and foreclosure. *Id.* The task force further observed a definite link between the high level of delinquency and adjustable rate mortgages. *Id.* It suggested that subprime adjustable rate mortgages were "the primary driver, with nearly one-third of such loans listed as seriously delinquent during the third quarter of 2008." *Id.*

[355] N.Y. C.P.L.R. 3408 (McKinney 2009).

[356] Wells Fargo Bank, N.A. v. Hughes, 897 N.Y.S.2d 605, 608 (N.Y. Sup. Ct. 2010) (noting that the legislature amended the statute in 2009 to expressly require lenders to negotiate settlements in good faith).

[357] IndyMac Bank F.S.B. v. Yano-Horoski, 890 N.Y.S.2d 313, 313 (N.Y. Sup Ct. 2009). *But see* IndyMac Bank F.S.B. v. Yano-Horoski, 912 N.Y.S.2d 239, 240 (App. Div. 2010) (reversing trial court's order canceling mortgage and debt).

[358] *IndyMac Bank F.S.B.*, 890 N.Y.S.2d at 317 (taking notice that the lender rejected all of the mortgagor's reasonable settlement offers, including a modification of the interest rate, a short sale, and deed in lieu of foreclosure).

[359] *Id.* at 318.

[360] *Id.* at 317.

[361] *Id.* at 318.

[362] *Id.* at 319 (quoting Eastman Kodak Co. v. Schwartz, 133 N.Y.S.2d 908 (N.Y. Sup. Ct. 1954) and York v. Searles, 90 N.Y.S. 37 (N.Y. App. Div. 1955), *aff'd*, 82 N.E. 1134 (N.Y. 1907)).

behalf."[363] Moreover, the court held that the lender's behavior was severe enough to warrant monetary sanctions under title 22 of the New York Code, Rules and Regulations § 130-1.1 *et seq*.[364] Thus, the court cancelled the mortgagor's indebtedness, $292,500, and set it aside, making the mortgage unenforceable.[365] Additionally, the court cancelled and discharged the mortgagee's recorded mortgage.[366] Consequently, neither the lienholder nor its successors or assigns would be able to enforce the note or mortgage against the mortgagor/debtor.[367]

Similarly, in *Wells Fargo Bank, N.A. v. Hughes*,[368] another New York case, a lender sought to modify the mortgage agreement with an adjustable rate component.[369] As a result, the Erie County Superior Court rejected the loan modification, announcing that inclusion of an adjustable rate component flew "in the face" of CPLR § 3408 *inter alia*.[370] Moreover, the court found that Wells Fargo acted in bad faith and contrary to CPLR § 3408 by proposing this modification.[371] Thus, the court dismissed Wells Fargo's foreclosure action, without prejudice; it also noted that should the bank pursue another action, no additional costs or attorney fees would be awarded absent good cause.[372]

Another case that illustrates New York courts' disdain for subprime adjustable rate mortgages is *Emigrant Mortgage Co. v. Corcione*.[373] In *Corcione*, the Suffolk County Supreme Court found that subprime adjustable rate mortgages are products of unequal bargaining positions in virtually all circumstances, due to the customs and practices of the mortgage lending industry.[374] Due to unequal bargaining position and mortgagor's inability to freely negotiate a mortgage, the court viewed the mortgage at issue and its documentation as a contract of adhesion, construing it against the mortgagee as the drafter.[375] In addition to limiting the lender's ability to collect on interest for a certain time period, legal fees, costs, etc., the *Corcione* court awarded the mortgagor exemplary damages in the amount of $100,000, related to the lender's "shockingly inequitable, bad faith conduct."[376]

E. Deferment

1. Delays

Attempting to provide time for lenders and borrowers to engage in settlement discussions, a few jurisdictions permitted delays in foreclosures. In 2007, foreclosure and

[363] *Id.*
[364] *Id.*; *see also* N.Y. COMP. CODES R. & REGS. tit. 22, § 130-1.1 (2011).
[365] *IndyMac Bank F.S.B.*, 890 N.Y.S.2d at 319.
[366] *Id.*
[367] *Id.* at 320.
[368] Wells Fargo Bank, N.A. v. Hughes, 897 N.Y.S.2d 605 (N.Y. Sup. Ct. 2010).
[369] *Id.* at 632.
[370] *Id.* at 634.
[371] *Id.*
[372] *Id.*
[373] Emigrant Mortgage Co. v. Corcione, 900 N.Y.S.2d 608, 608 (N.Y. Sup. Ct. 2010).
[374] *Id.* at 610.
[375] *Id.*
[376] *Id.* at 614.

default rates in California markedly climbed.[377] Lenders foreclosed on over 84,375 foreclosed properties; more than 250,000 properties were in default.[378] In July 2008, Governor Arnold Schwarzenegger signed emergency foreclosure reform into law to address the high number of foreclosures.[379] Senate Bill 1137 required mortgagees, trustees, beneficiaries or their authorized agents to wait thirty days before filing a notice of default.[380] During this time, lenders are directed to contact borrowers to evaluate borrowers' "financial situation[s]" and "explore options for the borrower to avoid foreclosure."[381] Though, at first glance, the law appears to help mortgagors avoid foreclosure, it does not require lenders to engage in extensive discussions with the mortgagors to modify the loan.[382]

In 2009, Colorado enacted House Bill 1276, which gave eligible borrowers a ninety-day foreclosure deferment option.[383] During the deferment period, a borrower was obligated to seek financial counseling from an approved foreclosure counselor[384] and make partial note payments.[385]

Similar to modification programs, delays, as instituted in California and Colorado, give mortgagors opportunities to explore settlement options before a foreclosure sale. Further, they also allow mortgagors to become better educated concerning the foreclosure process by seeking counseling with an approved foreclosure counselor. However, the mandatory delay does not require a mortgagee or its servicer to settle; it just provides time to settle.

2. Foreclosure Moratoria

i. During the Great Depression

Replicating the foreclosure moratoria models used during the Great Depression, some state lawmakers have urged their own legislatures to adopt a mandatory foreclosure moratorium. To date, they have been unsuccessful in lobbying the Obama Administration

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[377] *U.S. Foreclosure Activity Increases 75 Percent in 2007*, REALTYTRAC (Jan. 30. 2008), http://www.realtytrac.com/content/press-releases/us-foreclosure-activity-increases-75-percent-in-2007-3604 (reporting that California had the highest number of foreclosure filings and ranked among the top ten in the nation for foreclosures in 2007).

[378] S.B. 1137, ch. 69, § 1(a), 2008 Leg., Reg. Sess. (Cal. 2008).

[379] *See, e.g.*, CAL. CIV. CODE § 2923.5 (a)(1) (West 2011).

[380] *Id.* This law applied to residential mortgage loans made between January 1, 2003 and December 31, 2007 for owner-occupied residences. California law imposed an additional delay of foreclosure that sunset on Jan. 1, 2011. See CAL. CIV. CODE § 2923.52 (West 2010), now repealed, which delayed the time before a lender could give a borrower a notice of sale, under certain circumstances, for 90 days.

[381] CAL. CIV. CODE § 2923.5 (a)(1) (West 2011).

[382] Mehta v. Wells Fargo, N.A., 737 F. Supp. 2d 1185, 1193 (S.D. Cal. 2010) (quoting Mabry v. Super. Ct. of Orange Cnty., 185 Cal. App. 4th 208, 212 (N.D. Cal. 2010) and finding that the requirements of § 2923.5 are "very minimal" in that it does not "require the lender to modify the loan or do very much more than have minimal conversations with the debtor to assess their position and inform them of various options to avoid foreclosure.").

[383] COLO. REV. STAT. ANN. § 38-38-803 et seq. (West 2011).

[384] § 38-38-803 (2).

[385] § 38-38-805 (2)(a) (stating that lenders are required to pay 66.67% of monthly payments to holder's designated receiver).

for the imposition of a nationwide foreclosure moratorium.[386] The proponents of foreclosure moratoria believe that this drastic step is imperative to impede the housing and mortgage markets from further collapse.

During the Great Depression, a record number of homeowners faced foreclosure.[387] It was reported that foreclosures swelled from 134,900 to 252,400 from 1929 through 1933.[388] According to the Federal Home Loan Bank Board, banks foreclosed on approximately 1000 mortgages per day.[389] By the beginning of 1934, many homeowners were being foreclosed upon, and many more—an estimated 50% of all urban homeowners—were delinquent and in danger of foreclosure.[390] Due to the historic foreclosure and housing crisis, states attempted resolution by "encouraging lenders and borrowers to renegotiate loan terms through mediation boards and other voluntary arrangements."[391] Many promoted foreclosure moratoria when foreclosure numbers increased further.[392]

On February 8, 1933, Iowa became the first state to impose a foreclosure moratorium.[393] Iowa courts granted a homeowner's request for deferment of a foreclosure action unless the lender could show good cause for not granting such relief.[394] Twenty-six other states soon followed, enacting legislation to substantially delay or halt mortgage foreclosures.[395] In New York, all foreclosure actions due to payment of principal default were halted until after July 1, 1937.[396] Similarly, an Arizona statute specified that in current or future mortgage foreclosure actions, a "court may order a two-year continuance unless good cause to the contrary is shown."[397]

Minnesota became the second state to enact a statute that postponed foreclosure sales for two years.[398] The Minnesota statute also extended post-sale redemption periods for mortgagors.[399] If the court imposed a moratorium, then the court could mandate that the debtor pay fair rental value or a portion of income received from the property.[400]

A mortgagee challenged the constitutionality of the Minnesota statute in *Home Building Loan Assoc. v. Blaisdell*.[401] In *Blaisdell*, the mortgagors applied for an extension

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[386] *See* H.R. 344, 112th Cong. (2011).
[387] David C. Wheelock*, Changing the Rules: State Mortgage Foreclosure Moratoria During the Great Depression*, 90 FED. RES. BANK OF ST. LOUIS REV. 569, 570 (2008), *available at* http://research.stlouisfed.org/publications/review/08/11/Wheelock.pdf.
[388] *Id*.
[389] *Id*.
[390] *Id*.
[391] *Id.* at 573.
[392] *Id.* at 570.
[393] *Id.* at 573.
[394] *Id.*
[395] In addition to Iowa, states enacting foreclosure moratoria were Arizona, Arkansas, California, Delaware, Idaho, Illinois, Kansas, Louisiana, Michigan, Minnesota, Montana, Nebraska, New Hampshire, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, Vermont, and Wisconsin. *See id.*
[396] *Id*. at 574.
[397] *Id.*
[398] Minnesota Foreclosure Moratorium Law of 1933, 1933 Minn. Laws ch. 339.
[399] *Id.*
[400] *Id.*
[401] Home Bldg. Loan Assoc. v. Blaisdell, 290 U.S. 398 (1934).

of their redemption period under the Minnesota Foreclosure Moratorium Law.[402] The mortgagee attacked the law as violating the Contracts Clause, Equal Protection, and Due Process Clauses of the Fourteenth Amendment.[403]

The U.S. Supreme Court upheld the Minnesota Foreclosure Moratorium Law on four grounds. First, the Court found that an economic emergency existed for the state.[404] Second, the Court opined that the law addressed legitimate state ends in that the law was "not for the mere advantage of particular individuals but for the protection of a basic interest of society."[405] Third, the statutory relief was appropriate when compared to the nature of the emergency.[406] Fourth, the Court believed that the legislation was justified, temporary in operation, and limited to the "exigency which called it forth."[407] Therefore, the Court held, the statute was constitutional and did not violate the powers afforded to a state to address emergency crises.[408]

ii. Modern State and Federal Foreclosure Moratoria Movement

Once more, the nation faced widespread foreclosure actions. However, the lessons from the past were not heeded. Following the 2009–2010 robo-signing scandal, a number of states again endorsed either substantial delays or complete moratoria of mortgage foreclosures.[409] The following states demonstrate how moratoria take form.

Iowa. Iowa's 1937 statute still remains effective, authorizing a court to halt a foreclosure under certain circumstances.[410] According to the statute, a homeowner in "all actions for the foreclosure of real estate mortgages, deeds of trust of real property, and contracts for the purchase of real estate" may request a stay upon filing an answer that admits at least some of the indebtedness and breach, if the homeowner's default or inability to pay or perform is "mainly due or brought about by reason of drought, flood, heat, hail, storm, or other climatic conditions or by reason of the infestation of pests which affect the land in controversy."[411] Additionally, a homeowner may petition for a moratorium if the governor declared "a state of economic emergency."[412]

Hawaii. Hawaii lawmakers introduced thirty-two pieces of legislation related to foreclosures in 2011.[413] On May 5, 2011, the governor of Hawaii signed into law a key piece of legislation, Senate Bill 651.[414] Senate Bill 651 imposes an absolute moratorium

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402 *Id.* at 415.
403 *Id.* at 415–16.
404 *Id.* at 444.
405 *Id.* at 445.
406 *Id.* at 447.
407 *Id.*
408 *Id.* at 447–48. A state's right to protect its economic interest may be justified even if it interferes with a private contract. *Id.* at 437.
409 David Streitfield & Gretchen Morgenson, *Foreclosure Furor Rises; Many Call for a Freeze*, N.Y. TIMES, Oct. 5, 2010, at B1.
410 *See* IOWA CODE § 654.15 (2007).
411 § 654.15 (1).
412 § 654.15 (2).
413 *Foreclosures 2011 Legislation, supra* note 31.
414 Michael Borger, *Abercrombie Signs Hawaii Foreclosure Moratorium Bill SB 61,* HAWAII HOUSING NEWS (May 16, 2011), http://hawaiihousingnews.com/abercrombie-signs-hawaii-foreclosure-moratorium-bill-sb-651/.

on all new non-judicial foreclosures on owner-occupied residences through July 1, 2012.[415] The bill allows homeowners an opportunity to meet with lenders to negotiate a foreclosure avoidance agreement or mitigate losses associated with the avoidable foreclosure.[416] The new law also requires mortgagees, at mortgagor's election, to participate in the Mortgage Foreclosure Dispute Resolution Program (MFDRP) before mortgagee may conduct any public sale.[417]

Senate Bill 651 thoroughly outlines how to participate in Hawaii's MFDRP. For instance, when providing foreclosure notice, mortgagees must notify mortgagors of the right to participate in the MFDRP, using no less than a fourteen-point font.[418] The notice must also include a list of approved housing or budget counselors with whom the mortgagor must consult at least thirty days before the first day of a scheduled dispute resolution session.[419] Furthermore, within three days of filing its foreclosure action, a mortgagee must pay to Hawaii's Department of Commerce and Consumer Affairs a $250 filing fee, which goes into a mortgage dispute resolution special fund.[420] Likewise, a mortgagor pays the Department of Commerce and Consumer Affairs a $300 fee upon electing to MFDRP.[421] In addition to the fee, the application includes a statement that the mortgagor is an owner-occupant.[422] During the mediation period, all non-judicial foreclosures are stayed.[423] Any failure, on behalf of the mortgagee, to act in compliance with the requirements of the MFDRP, constitutes a violation of the state's unfair and deceptive trade practices act.[424] If a mortgagor chooses to participate in the MFDRP, then a mortgagee will have tremendous incentive to act in good faith: a potential treble damages award.[425] Thus, the penalty for noncompliance is quite substantial.

Illinois. The courts and attorney general in Illinois also reviewed their state's foreclosure procedures.[426] Courts there formed a mortgage fairness committee "to review lending and foreclosure procedures in the state."[427] The committee's main focus is to examine the foreclosure process, thereby making it slower and tougher by amending a lender's prerequisites for foreclosure.[428]

South Carolina. In May 2011, Chief Justice Jean Toal of the South Carolina Supreme Court instituted a mandatory foreclosure intervention program, which, in

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[415] S.B. 651, 2011 Legis., 26th Sess. (Haw. 2011) (amending HAW. REV. STAT. § 667 (2010)).
[416] *See* HAW. REV. STAT. § 667-C (a) (2010).
[417] *See* § 667-D.
[418] *See* § 667-G.
[419] *Id*.
[420] *See* § 667-F.
[421] *See* § 667-H (3).
[422] *See* § 667-H (1)–(2).
[423] *See* § 667-M.
[424] *See* § 667-F (b). Hawaii's Unfair and Deceptive Trade Practice Act, HAW. REV. STAT. § 480-2 (2002), applies to mortgage loans to consumers. Haw. Cmty. Fed. Union v. Keke, 11 P.3d 1, 15 (Haw. 2000).
[425] Christine Daleiden, *A Report of Consumer Protection in Hawaii*, HAW. B. J., Sept. 11, 2007, at 4, 6 (noting that an increase in the number of practices that are now included under the Act may be "due to the deterrent effect: of the potential threat of a treble damages award").
[426] *See* Press Release, ForeclosureDeals.com, New Legislation Could Slow Illinois Foreclosures Further (May 5, 2011), *available at* http://www.prnewswire.com/news-releases/new-legislation-could-slow-illinois-foreclosures-further-121311414.html.
[427] *Id.*
[428] *Id.*

essence, stayed all pending foreclosure action in South Carolina.[429] This was Chief Justice Toal's second administrative order related to foreclosure since the start of 2009. The court's first administrative order was in May 2009.[430] The 2009 order was based on the creation of HAMP.[431] However, because of HAMP's ineffectiveness, Chief Justice Toal noted that the number of foreclosure actions actually increased since 2009.[432] Further, South Carolina trial courts were overly burdened because of HAMP's inability to set the stage for actual loss mitigation, thereby increasing the number of foreclosure filings.[433] Therefore, a stay of foreclosure actions was critical for two reasons: 1) societal benefits, helping debtors avoid foreclosure and homelessness, and 2) judicial economy.

The goal behind the 2011 administrative order is two-fold. First, a stay of all pending foreclosure actions will afford eligible debtor-mortgagors and lender-servicers the opportunity to modify their loan agreement under the revised HAMP standards.[434] The stay also permits some state uniformity in how foreclosure actions are handled "so that mortgage foreclosure actions are not unnecessarily dismissed, delayed or inappropriately concluded while loan modification or other loss mitigation efforts are being pursued."[435] Second, a stay of foreclosure actions will lessen the burden on court resources.[436]

Federal. Advocating a temporary national moratorium on residential mortgages, Representative Marcy Kaptur submitted a resolution on July 8, 2011, which is currently before the U.S. House of Representative's Committee on Financial Services.[437] Kaptur stated that a national foreclosure moratorium is justified because: 1) unemployment rates remain high at a rate of nine percent;[438] 2) housing sales remain poor;[439] 3) construction activities are scant;[440] and 4) the excess number of vacant homes remains constant, which lowers home values and makes the value of homes less than any outstanding mortgage balance.[441] Consequently, upside-down mortgagors are more likely to become delinquent, which could further increase the number of foreclosures.[442]

It is highly unlikely that the Obama Administration will adopt the proposed resolution because it previously rebuffed earlier pressures for a national foreclosure moratorium. In October 2010, despite lobbying by many legislators and consumer advocacy groups, the Obama Administration rejected a proposal for a national

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[429] Mortgage Foreclosure Actions, No. 2011-05-02-11 (S.C. 2011) (admin. order).
[430] Mortgage Foreclosure Actions, No. 2009-05-22-01 (S.C. 2009) (admin. order).
[431] *Id.*
[432] *Id.*
[433] *Id.*
[434] *Id.*
[435] Christine Ricciardi, *South Carolina Supreme Court Stops Foreclosure Enforcement*, HOUSINGWIRE (May 3, 2011), http://www.housingwire.com/2011/05/ 03/south-carolina-supreme-court-stops-foreclosure-enforcement.
[436] Mortgage Foreclosure Actions, No. 2011-05-02-11 (S.C. 2011) (admin. order).
[437] H.R. 344, 112th Cong. (2011).
[438] *Id*. The resolution points out that there are nearly 6,900,000 fewer jobs as of that date than at the start of the economic recession. *Id.*
[439] *Id.*
[440] *Id.*
[441] *Id.*
[442] *Id.*

foreclosure moratorium.[443] The Administration denounced the national moratorium because it believed that the negative consequences to the national economy of mandatory foreclosure stays outweighed any benefits to homeowners.[444]

iii. The Pros and Cons of Foreclosure Moratoria

The Administration's conclusion is consistent with what historical moratoria have illustrated. As the Obama Administration suggested, foreclosure moratoria have advantages and disadvantages. An advantage, according to one economist, is that it would "provide all market participants with more time to assess asset prices and evaluate alternatives."[445] In other words, it gives the relevant parties—mortgagors, mortgagees, or servicers—the opportunity to sit down and discuss their state of affairs and find solutions. Because a hefty percentage of defaults and subsequent foreclosures are due to adjusted interest rates after the expiration of the introductory rate period, a foreclosure moratorium would permit homeowners to adjust their personal finances accordingly.[446] Further, lenders, builders, and other sellers will be able to determine house prices and make decisions on whether to lower home prices, build homes, modify loan agreements, or sell under the current conditions.[447]

On the other hand, however, a disadvantage might include a prolonged down market for the housing industry. In a housing crisis, there is an overabundance of inventory, which in turn causes housing prices to further decline.[448] If a state imposed a foreclosure moratorium, then that state may "delay the ability of markets to clear excess inventories," which would arguably "restore [its] financial stability."[449]

While some homeowners (and farmers) were able to save their properties from foreclosure during the stay in the Depression, the costs of the moratorium were passed on to prospective mortgagors.[450] After the moratoria, lenders changed their lending rules, making loans more difficult to obtain. [451] Prospective mortgagors paid higher costs for any mortgages received or had to put up more security for loans than previous mortgagors due to the lenders' changes. [452] Thus, prospective mortgagors ultimately paid a penalty for harsh market conditions not related to or created by their actions.

Although moratoria relief seemed like a tremendous help for homeowners in foreclosure or on the verge of foreclosure, it rarely was. On one hand, foreclosure moratoria had a societal benefit in that they curbed widespread homelessness.[453] On the other hand, however, there was no uniformity on how courts applied the remedy either

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[443] Caren Bohan & Corbett B. Daly, *White House Rejects Foreclosure Moratorium*, REUTERS (Oct. 12, 2010), http://in.reuters.com/article/2010/10/12/idINIndia-52144720101012.
[444] *Id.*
[445] MURPHY, *supra* note 46, at 1.
[446] *Id.*
[447] *Id.*
[448] *Id.*
[449] *Id.*
[450] Wheelock, *supra* note 387, at 581.
[451] *Id.*
[452] *Id.*
[453] *Id.*

within a jurisdiction or from state to state during the Great Depression.[454] As one author stated:

> Many courts determined that it was pointless to grant relief to borrowers who had no hope of refinancing their mortgage or making payments or who did not act in good faith toward their lender. In addition, courts often required borrowers to pay rent or interest to the lender, as well as taxes, as a condition for halting foreclosure proceedings.[455]

Historical mortgage foreclosure moratoria caused loans to be more expensive and hard to procure.[456] The inability to foreclose on their securities and receive deficiency judgments made lenders raise interest rates, tighten lending criterion and increase collateral requirements for their loans.[457] As recognized in a 1936 Central Housing Committee Report, a statute with "lengthy, expensive, complicated or otherwise burdensome foreclosure procedure," or long redemption periods before a mortgagee can realize its debt, caused mortgagees to raise costs.[458] According to the report, "prospective lenders naturally take into account the procedure available for realizing the debt out of the security when determining the conditions on which they will be willing to make loans."[459]

Another disadvantage of mortgage foreclosure moratoria is that they affect all mortgage servicers, both good and bad. So, both bad and proper acting lenders would equally be subject to a moratorium. Also, some courts may apply the rules for moratoria inconsistently as courts did during the 1930s.[460] Further, state-imposed foreclosure moratoria have not adequately solved all of the problems related to a mortgage or housing crisis historically. Although homeowners found some relief in no longer facing foreclosure, others who entered the housing market later "saw higher costs of credit and fewer loans compared with states" that did not impose moratoria.[461]

When a government interferes by piercing the mortgagee-mortgagor contractual relationship and creating a new mortgage agreement that disregards the consequence of default—foreclosure—the cost of future mortgages increases.[462] Given a lender's likely consternation that it will have losses if unable to foreclose, it is reasonable to increase costs or tighten credit requirements.[463] Thus, before a consumer enters onto the mortgage financing field, he or she may be more disadvantaged and foreclosed out of the housing market.

Moreover, foreclosure moratoria may only prolong the inevitable—borrower home loss—because a mortgagor may be unable to pay and that fact would not likely change at

[454] *Id.* at 574 (claiming that "the extent to which courts granted relief to delinquent borrowers varied widely, even within a state").
[455] *Id.*
[456] *Id.* at 580.
[457] *Id.*
[458] *Id.*
[459] *Id.*
[460] *See, e.g.*, Wheelock, *supra* note 387.
[461] *Id.* (noting that the above occurred following the Great Depression of the 1930s).
[462] *Id.* at 580.
[463] *Id.*

the expiration of the moratorium. This is especially true if the borrower is unable to repay the mortgage due to job loss or income shortages. Consequently, then, the outcome would be the same regardless of a moratorium.

During the Great Depression, the federal government did not impose a national foreclosure moratorium. Only states did. The federal government responded to the economic crisis by establishing new federal agencies to handle refinancing of defaulted mortgages and to "insure, and finance new mortgages."[464] The federal government's response to the modern market collapse is to create new federal agencies once again.[465] However, some states have sought other mitigation measures.

3. The Dodd-Frank Act

Acknowledging that restructuring must take place on the front-end, i.e., during the loan origination, President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) into law on July 21, 2010.[466] Dodd-Frank launched sweeping financial reforms in multiple areas. Under Title XIV of Dodd-Frank, the Mortgage Reform and Anti-Predatory Lending Act, also known as the Truth-in-Lending Act (TILA),[467] is amended. Dodd-Frank modifies TILA by setting forth prudent lending standards, consumer protections for both prime and subprime (high cost) mortgages, mortgage servicing guidelines, appraisal requirements, and loan modification/work-out procedures. The Act makes lenders accountable for their lending practices and seeks to protect consumers and stabilize the entire national economy, including the real estate market.

Pertaining to the prudent loan extension criteria, TILA was amended in six ways. First, mortgage originators are prohibited from advancing residential mortgages that a "consumer lacks a reasonable ability to repay" or "has predatory characteristics or effects (such as equity stripping, excessive fees or abusive terms)."[468] Second, new regulations prohibit mortgage originators from promoting a mortgage that is not qualified under § 129C (b)(2) to consumers who meet the standards for qualified mortgages.[469] Third, Dodd-Frank specifically bans abusive or unfair lending practices that result in disparate extensions of credit among consumers based on race, ethnicity, gender, or age.[470] Fourth, lenders may not mischaracterize "the credit history of a consumer or the residential loans available to a consumer."[471] Fifth, lenders are prohibited from improperly portraying the appraised value of the property securing the loan.[472] Sixth, a lender is barred from offering a mortgage if the mortgage originator is "unable to suggest, offer, or recommend to a consumer a loan that is not more expensive than a loan for which the consumer

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[464] *Id.* at 581.
[465] *See Building the CFPB: A Progress Report*, CONSUMER FINANCIAL PROTECTION BUREAU 1, 9 (July 18, 2011) http://files.consumerfinance.gov/f/2011/07/Report_BuildingTheCfpb1.pdf.
[466] Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 2136 (2010).
[467] 15 U.S.C. § 1631 (2011).
[468] Truth in Lending Act § 129B, 15 U.S.C. §1639B (West 2011).
[469] § 129B(c)(3)(B).
[470] § 129B(c)(3)(C).
[471] § 129B(c)(3)(D)(i).
[472] § 129B(c)(3)(D)(ii).

qualifies, discouraging a consumer from seeking a residential mortgage loan secured by a consumer's principal dwelling from another mortgage originator."[473]

Each of Dodd-Frank's prohibitions should result in more widespread consumer protection. Under §129B, creditors must make a "reasonable and good faith determination based on verified and documented information that, at the time the loan is consummated," that the "consumer has a reasonable ability to repay the loan . . . ," and costs associated with the mortgage, such as, taxes, insurance (guarantee insurance) and assessments.[474] Lenders must base their "reasonable and good faith determination" on a consumer's ability to pay based on "credit history, current income, expected income the consumer is reasonably assured of receiving, current obligations, [and] debt-to-income ratio . . . ."[475] Failure to comply with regulations will result in penalties. Consumers are either entitled to amounts that do not exceed a consumer's actual damages, or an amount equal to three times the total amount of direct and indirect compensation or gain the mortgage originator received in relation to the loan, plus costs and reasonable attorneys' fees.[476]

Mortgage servicers must follow specific guidelines under the Dodd-Frank Act. First, for verifying a consumer's income, a lender is obligated to review a consumer's "W-2 [forms], tax returns, payroll receipts, financial institutional records, or other third-party documents that provide reasonably reliable evidence of the consumer's income or assets . . . ."[477] Second, residential loans that are not "qualified mortgages" may not contain terms for prepayment penalties for paying all or part of the principal after a loan is consummated.[478] "Qualified mortgages," under Dodd-Frank, may not include: 1) adjustable interest rates;[479] or 2) annual percentage rates that exceed the average prime rate for a comparable transaction.[480] Third, if a state has consumer anti-deficiency protections, then a creditor must "provide a written notice to [a] consumer describing the protection provided by the anti-deficiency law" and significance of the loss of protection before a loan is consummated.[481] Further, if a consumer is seeking refinancing, which may cause loss of anti-deficiency protection, the lender must "provide a written notice to the consumer describing the protection provided by the anti-deficiency law[s]" and significance of the loss of protection before the refinance is consummated.[482] Finally, disclosures in monthly statements for residential mortgages are discussed in full detail in § 1420 of the Act.[483]

Dodd-Frank also transforms the Real Estate Settlement Procedures Act (RESPA)[484] and mortgage servicing procedures. In relation to mortgage servicing procedures, Dodd-

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473 § 129B(c)(3)(D)(iii).
474 § 129C(a)(1).
475 § 129C(a)(3).
476 § 129B(d)(2).
477 § 129C(a)(4).
478 § 129C(1)(A).
479 § 129C(1)(B)(i).
480 § 129C(1)(B)(ii).
481 § 129C(g)(2).
482 § 129C(g)(3).
483 § 1420.
484 12 U.S.C. §§ 2601–2617 (2011).

Frank first demands that before the consumer credit transaction is consummated, creditors set up an escrow or impound account in a federally insured depository institution "for the payment of taxes and hazard insurance, and, if applicable, flood insurance, mortgage insurance, ground rents, and any other required periodic payments or premiums with respect to the property or the loan terms . . . ."[485] Creditors are only mandated to take these measures if the consumer credit transaction is "secured by a first lien on the principal dwelling of the consumer."[486]

A creditor may be exempt from establishing an escrow or impound account under certain circumstances by regulation.[487] For instance, the regulating board may waive the escrow or impound account requirement if the creditor operates "predominantly in rural or underserved areas."[488] Additionally, if a creditor and all of its affiliates has a total annual mortgage loan origination that do not exceed a particular set limit, it may not be required to set up an escrow or impound account.[489]

A creditor must maintain the required escrow account for at least five years, beginning with the credit consummation date,[490] unless and until: 1) a debtor has established "sufficient equity in the dwelling securing the consumer credit transaction so as to no longer be required";[491] 2) a debtor "is delinquent";[492] 3) a debtor is in noncompliance;[493] or 4) the terms of the mortgage, which established the account, are terminated.[494]

Dodd-Frank revises RESPA by inserting additional new servicer prohibitions. Under the new revisions, servicers of federally related mortgages are prohibited from: 1) obtaining force-placed hazard insurance unless there is a reasonable belief that a debtor has breached its contractual obligation to maintain property insurance;[495] 2) charging fees when responding to a debtor's valid written request under RESPA;[496] 3) failing to timely respond to a debtor's request to correct errors of payment allocation, final balances relating to payoff, foreclosure avoidance, or a servicer's other standard duties;[497] 4) failing to timely respond to a debtor's request for information pertaining to its creditor's identity, address, or other relevant contact information;[498] or 5) failing to comply with the Bureau of Consumer Financial Protection's obligations.[499] Additionally, Dodd-Frank

[485] § 129D(a).
[486] *Id.*
[487] § 129D(c)(1) – (4).
[488] § 129D(c)(1).
[489] § 129D(c)(2).
[490] § 129D(d).
[491] § 129D(d)(1).
[492] § 129D(d)(2).
[493] § 129D(d)(3).
[494] § 129D(d)(4).
[495] 12 U.S.C. § 1463. Under RESPA, these new prohibitions are now found at 12 U.S.C. § 2605(a)–(k) (2011). Additional information related to force-placed insurance is found in 12 U.S.C. § 2605(k)(2)(1)(1)(A)(i)–(iv).
[496] 12 U.S.C. § 2605(k)(1)(B)(2011).
[497] 12 U.S.C. § 2605(k)(1)(C)(2011).
[498] 12 U.S.C. § 2605(k)(1)(D)(2011). A servicer must respond within ten business days for compliance. *Id.*
[499] 12 U.S.C. § 2605(k)(1)(E)(2011). From time to time, by regulation, the Bureau of Consumer Financial Protection may add new servicer duties to carry out the Act's consumer protection purposes. *Id.*

increases the penalty amounts for noncompliance of RESPA.[500]

To counterbalance issues related to inflated appraisal values, Dodd-Frank establishes new appraisal requirements for lower, moderate and higher risk mortgages; it also amends TILA by inserting a new section, 129H.[501] For an extension of credit for higher-risk mortgages, a creditor must first obtain a written appraisal of the property by a certified or licensed appraiser.[502] The certified or licensed appraiser must conduct a physical inspection of the mortgaged property's interior to satisfy the new appraisal requirements.[503] A second appraisal may be required for higher risk mortgages under certain circumstances.[504] In connection to any appraisal made for the extension of higher-risk mortgage loans, a creditor must provide a free copy of each appraisal conducted within at least three days prior to the transaction closing date.[505] All appraisals must be independent as described under § 129E. Willful noncompliance of the appraisal prerequisites by the creditor results in a fine of $2000.[506]

One of the most important developments from Dodd-Frank is the genesis of the Consumer Financial Protection Bureau (CFPB). The CFPB's core duty is to protect consumers through enforcing federal consumer financial laws.[507] In carrying out its duties, the CFPB may draft rules and regulations for all mortgage-related businesses and for bank and credit unions with assets of greater than $10 billion.[508] The CFPB may also: a) supervise and enforce federal consumer financial protection laws; b) address unfair, deceptive, and abusive practices or acts; c) receive consumer complaints; d) sponsor financial education for consumers; e) research consumer behavior; f) scrutinize financial markets for the latest consumer financial risks; g) reduce outdated, unnecessary, and overly burdensome regulations; and h) enforce antidiscrimination and other unfair treatment in consumer finance.[509]

The CFPB offers a "single point of accountability" for financial institutions.[510] Having one enforcer could potentially eliminate inconsistent and duplicative regulations. It could also provide consumers with consistent response times and information. Further,

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[500] § 1463. Under RESPA, these new prohibitions are set out in a note in 12 U.S.C. § 2605(f) (2011). Wherever $1000 appears, it has been replaced with $2000 and under paragraph (2)(B)(i), the new penalty amount is $1,000,000. Likewise, the response times are found under 12 U.S.C. § 2605(e) (2011).
[501] 12 U.S.C. §§ 1471–1473.
[502] 15 U.S.C. §§ 1631–1651 (2010).
[503] § 129H(b)(1).
[504] § 129H(b)(2)(A).
[505] § 129H(c).
[506] § 129H(e). Interference with appraisal independence requirements results in separate penalties described in § 129H(k)(1)–(3). Dodd-Frank addresses other deleterious concerns caused by foreclosure that previous efforts ignored. For example, the HUD Secretary is directed to create a new program under HUD to protect current and future tenants and at-risk multi-family properties. *See* § 1481. The program should be designed to accomplish the following four goals. First, it should create sustainable financing. *See* 12 U.S.C. § 1481(a)(1). Second, it ought to maintain subsidies on all levels: federal, state and local. *See* § 1481(a)(2). Third, it must provide funds for rehabilitation. *See* § 1481(a)(3). Finally, it should facilitate the transfer of the property to new responsible owners and ensure affordability. *See* § 1481(a)(4).
[507] *Building the CFPB*, *supra* note 465.
[508] *Building the CFPB*, *supra* note 465, at 9.
[509] *Building the CFPB*, *supra* note 465, at 9.
[510] Letter from Elizabeth Warren, Special Advisor to the Sec'y of the Treasury on the Consumer Financial Protection Bureau (July 18, 2011), *available at* http://www.consumerfinance.gov/a-strong-foundation/.

the CFPB recognizes that consumer education is crucial.[511] Thus, it has begun to educate consumers from student-level onward. To reduce the risk of partisanship, the CFPB is led by an independent director, appointed by the President and confirmed by the Senate.[512]

Dodd-Frank is not without its criticism. Dodd-Frank requires securitizers and originators to retain some of the risk, approximately 5%, of the mortgages sold to investors on the secondary mortgage market.[513] Opponents of this provision of Dodd-Frank believe that it could impede instead of facilitate the housing market recovery.[514] The concern is that lenders would make it virtually impossible for debtors to obtain consumer loans.[515] Of course, mortgage bankers, bank lobbyists, and some Senate Republicans criticize Dodd-Frank as being overly burdensome on mortgagees.[516]

VI. CONCLUSION

The housing market meltdown has exposed systemic problems with mortgage financing and foreclosure structures. As scholars previously argued, the mortgage financing system has racial and class biases.[517] For example, racial minorities and the poor were more likely to receive subprime or high cost mortgages. Similarly, a large amount of these subprime mortgages were adjustable rate mortgages with short teaser periods. As a result, these borrowers were forced out of their homes and into foreclosure when the mortgage adjusted to a rate beyond their affordability. The prolonged housing and foreclosure market crises reveal endemic shortcomings in the banking regulatory

[511] *Building the CFPB*, *supra* note 465, at 19.
[512] *Id.*
[513] Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, Tit. XIV, § 941, 124 Stat. 2136, 515–21 (2010). Dodd-Frank exempts financial institutions whose securities are backed exclusively by qualified residential mortgages from the 5% risk-retention requirement. *Id.*
[514] Rob Garver, *Rule That Could Kill Housing Market*, MSN MONEY (Oct. 1. 2011), http://money.msn.com/home-loans/rule-that-could-kill-housing-market-fiscaltimes.aspx.
[515] *Id.*
[516] Press Release, U.S. Sen. Jim DeMint, Senate Republicans Push to Repeal Dodd-Frank (Apr. 1, 2011), *available at* http://www.demint.senate.gov/public/index.cfm?p=PressReleases&ContentRecord_id=d6b067f8-122b-4a61-893d-0c6d58cc5e63&ContentType_id=a2165b4b-3970-4d37-97e5-4832fcc68398&Group_id=9ee606ce-9200-47af-90a5-024143e9974c&MonthDisplay=4&YearDisplay=2011 (noting the proposal of S. 712, The Financial Repeal Takeover Act of 2011, which is designed to repeal Dodd-Frank). Unexpectedly, the shared-risk provision of Dodd-Frank created strange bedfellows. Consumer groups, such as the National Community Reinvestment Coalition and the National Consumer Law Center, who are typically on the opposite side, have joined in the bellows of bankers and their lobbyists in criticizing this provision. Garver, *supra* note 514. Disapproval of Dodd-Frank is based in part on the belief that it would "narrow the range of loans that lenders are willing to originate to the point that only consumers with the best credit scores—meaning white and affluent consumers—are going to get loans." *Id.* (quoting David Berenbaum, chief program officer with the National Consumer Reinvestment Coalition). Recently, U.S. Senator Richard Shelby proposed a bill that would compel regulators to consider the economic effect of Dodd-Frank on the economy and job creation through a cost-benefit analysis. Katherine Reynolds Lewis, *The Push to Pull the Teeth Out of Dodd Frank*, FISCAL TIMES (Sept. 29, 2011), http://www.thefiscaltimes.com/Articles/2011/09/29/The-Push-to-Pull-the-Teeth-out-of-Dodd-Frank.aspx.
[517] *See, e.g.*, Helen J. Ladd, *Evidence on Discrimination in Mortgage Lending*, 12 J. ECON. PERSP. 41 (1998) (discussing lender discrimination against minority groups).

scheme.[518]

While in foreclosure, the predatory conduct by lenders or their agents continued. Some lenders refused to negotiate, in good faith, a loan modification or other settlement to prevent foreclosure. Also, some lenders wrongfully foreclosed where mortgagors were in compliance with the terms of their loan agreement. Additionally, foreclosures proceeded despite documentation errors or failure to prove that the foreclosing party had standing to do so. Thus, there were nationwide defects in the foreclosure system, irrespective of a jurisdiction's type of foreclosing method.

History shows that blanket mortgage foreclosure moratoria do not work. In fact, generic moratoria may actually cause more harm than good in terms of prolonging the housing crisis.[519] All in all, crises reveal "chinks in the armor" in the foreclosure process. Upon such revelation, jurisdictions can cautiously reform foreclosure processes and, hopefully in turn, halt the housing market and national economic crises. But recently, states, lenders, and the federal government have struggled to fix the problems, creating only a patchy resolution.

Even though they have clashing interests at times, it is fundamental that the relevant multiple actors play a role in determining these changes. The federal government must continue to act to correct the inadequacies of the current foreclosure system due to its implications on the national economy, either through legislation or regulation. Consumers must play a role so in educating themselves on how to protect their interests and avoid delinquencies and defaults. Lenders also need to play a role in the process because they are responsible for ensuring compliance with the new rules. All of these parties are necessary to create a healthy lending system, uniform servicing policies, foreclosure process, and, thus, a stable real estate market.

There is no magic bullet to prevent default, even under the most conservative underwriting standards. Circumstances change throughout the life of a mortgage that may make default and foreclosure unavoidable. However, regulations are needed to obstruct the creation of mortgage loans that are highly likely to result in default by using prudent underwriting standards. Laws like Dodd-Frank are commendable in that they provide extensive protections for consumers who are in default. However, they are also lamentable in that they "throw the baby out with the bath water." These laws regulate lender behavior so stringently that lenders restrict their liability by limiting loan availability, thereby injuring future debtors. Striking the right balance, whatever that looks like, may require years of research and should not be reactionary.

Determining the perfect harmony between consumer protection and lender accountability is very difficult. This is especially true if there are too many parties working on the solution at varying times. Economic crises typically trigger reformation. Therefore, the current economic crisis will, undoubtedly, spark unknown changes to the

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[518] Katherine Porter, a visiting professor at Harvard Law School, stated that the mortgage foreclosure crisis "cries out for a national regulatory response, these problems are systemic." *See* Christine Harper, *Foreclosure Crisis Needs Federal Response Harvard's Porter Says*, BLOOMBERG (Oct. 13, 2010), http://www.bloomberg.com/news/2010-10-13/foreclosure-crisis-needs-federal-response-harvard-s-porter-says.html.

[519] *See, e.g.*, Wheelock, *supra* note 387. This Article does not advocate blanket moratoria, but acknowledges that moratoria or delay under the right circumstances, such as history of foreclosure process abuses, might be warranted.

lending and foreclosure landscape. Hopefully, however, these changes will produce healthier lending and mortgage markets for consumers and lenders.