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Defending Foreclosure Actions

Marcia Johnson and Luckett Anthony Johnson *

Introduction

Markets are cyclical. Since the economic panic of 1797, which was instigated by a burst of the land speculation bubble, there have been more than 20 recessions of varying severity in the United States.¹ These recessions were driven by a number of things including government policies and cyclical changes in consumption, business, health, real estate and banking.² The economic collapse of 2007 was driven by a number of factors led by the downturn in real estate, based in part on the sub-prime market.³ Earlier downturns that suffered real estate crashes saw increased foreclosures, but not so great as resulting from the crash of 2007. Between 2002 and 2006, annual foreclosures averaged 455,000, representing less than 1% of all loans.⁴ However, between 2004 and 2006 the average number of all foreclosure starts

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was 950,000. Since the economic housing crash of 2007 up to the second quarter of 2009, foreclosures escalated to more than 2,152,000 annually, with the largest occurrences being in the states of California, Florida, Nevada, Utah, Arizona, Colorado, Ohio, Georgia, Michigan, Idaho and Pennsylvania. By the fourth quarter 2010, the number of mortgage delinquencies fell to the lowest level in two years. However, the number of loans in foreclosure remained at its highest level since the start of the mortgage crisis. Today, 9,000 Americans are losing their homes to foreclosure daily.

With the rising incidences of residential foreclosures, many homeowners are overwhelmed by the foreclosure process and anticipated costs and often opt to vacate the premises without offering any defense. The American justice system rests on the premise that no person will be deprived of their liberty or property without due process. Procedural due process requires that a person have notice of the charges against them as well as a reasonable opportunity to defend...

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5 Larry Cordell, Karen Dynan, Andreas Lehnert, Nellie Liang and Eileen Mauskopf, Designing Loan Modifications to Address the Mortgage Crisis and the Making Home Affordable Program, 42 UCC L.J. 1 (2009).

6 Id.

7 See Realty Trac (Anthony’s cite).


9 Id.

10 See Olefson and Kaniuk, Florida Foreclosure Defense Strategies: An Immediate Look at the Best Practices for Assisting Distressed Homeowners in Florida, 2009 Aspatpre Special Report 11 (2009) and stating that a total number of homes lost is anticipated to reach as many as six million with another two million Americans ending up underwater and an aggregate $4 million in home equity lost forever.

11 Cox, Foreclosure Reform Amid Mortgage Lending Turmoil: A Public Purpose Approach, 45 Hous. L. Rev. 683, 709 (2008) and see John Leland, Facing Default, Some Abandon Homes to Banks, N.Y. Times, Feb. 29, 2008, at A1 and see Pinkaton, In The Weeds: Homeowners Falling Behind on their Mortgages, Lenders Playing the Foreclosure Game, and Cities Left Paying the Price, 34 S. Ill. U. L.J. 621 (2010) stating that in certain circumstances homeowners lack the wherewithal, the finances, the incentive, or maybe all three, to fight foreclosure proceedings, and so the “choose” to abandon their property.

12 5th Amendment, United States Constitution, stating in pertinent part, “No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .”
against them. Reasonable opportunity is circumvented when the defendant is effectively without the means to defend. This is especially offensive to our notions of justice when the defendant has legitimate bases for defense but is effectively denied the opportunity to urge such defenses because of finances. This article is written to examine the defenses available to homeowners facing foreclosure and to provide a practical approach to defending against foreclosure.

13Id. and Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950) finding that there can be no doubt that the due process clause requires that deprivation of life, liberty or property by adjudication be preceded by notice and an opportunity for hearing appropriate to the nature of the case and citing their opinion in Grannis v. Ordean, 234 U.S. 385, 394, 34 S. Ct. 779, 783, 58 L. Ed. 1363 (1914) stating that the fundamental requisite of due process of law is the opportunity to be heard.

14See Kerrin Maureen McCormick, The Constitutional Right to Psychiatric Assistance: Cause for Reexamination of AKE, 30 Am. Crim. L. Rev. 1329 (1993) stating that “a state may not adopt procedures that restrict an indigent defendant’s ability to defend himself so that only those defendants with greater financial resources are afforded a ‘meaningful opportunity’ to defend themselves.” But see Freyermuth, Foreclosure By Arbitration?, 37 Pepp. L. Rev. 459, 465 (2010) stating that the constitutional challenge to non-judicial foreclosures on due process grounds as rejected by most courts primarily because it does not involve state action subject to due process requirements and see Kenneth Krock, The Constitutionality of Texas non-Judicial Foreclosure: stating that “traditionally, non judicial foreclosure sale notice procedures avoided constitutional scrutiny because they were not considered state action.” And finding that the supreme court has never been faced with a direct due process challenge to a power of sale.

15See Klevens, Poverty and Equal Access to the Courts: The Constitutionality of Summary Dispossess in Georgia, 20 Stan. L. Rev. 766, 773 (1968) distinguishing the effect of due process in the case where the defendant fails to defend his case at all from the effect on the litigant who, due to financial constraints are effectively denied a defense. The essence of due process is basic fairness in procedure. Jafay v. Board of County Com'rs of Boulder County, 848 P.2d 892 (Colo. 1993). Due process is not a technical concept with fixed content unrelated to time, place, and circumstance; rather it is flexible and calls for such procedural protections as the particular situation demands. Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). Whether particular procedures adopted to review determinations affecting property interests satisfy due process depends on the circumstance of the particular case. Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972).

16The Homeowner should assess the prudence of fighting to keep a home in certain circumstances, e.g. when they are substantially underwater. For an examination of the value of such assessment, see generally,
DEFENDING FORECLOSURE ACTIONS

It is noteworthy that homeowners are not the only persons seeking relief from lender practices during this era of increased foreclosures. Federal and state governments are also bringing actions against lenders under various legal theories. However, this article is limited to a discussion of the actions and defenses of the homeowner.

First, we examine the transactional documents that are commonly at issue in a residential foreclosure action. Second, we identify remedies alternative to foreclosure. Third, we look at foreclosure defense available in jurisdictions that provide judicial and non-judicial foreclosures. For each type of jurisdiction, we examine the plaintiff's (or creditor's) burden as well as viable responses from the defendant (or debtor/homeowner). Finally, we conclude that while many foreclosures are likely sustainable, there are those that can be successfully challenged and homeowners and their attorneys should be aware of the opportunities to defend.

Transactional Documents

Typically, the documents prerequisite to a residential foreclosure include the mortgage (or deed of trust) and the promissory (or real estate lien) note.

The promissory note (also referred to as a real estate lien note in some states) is an agreement between two parties, where one (the payor, maker or borrower) promises to pay money to the other (the payee or lender). It should specify any conditions to payment. Commonly, for a promissory note to be valid and enforceable it is required to provide: (1) the identity of the parties to the note, (2) be in writing as prescribed by the statute of frauds, (3) state clearly the promise to pay, (4) specify the payment terms including the rate of interest to be charged, (5) be signed by the borrow-


For example, the federal government has filed numerous investigations into mortgage fraud, misdeeds and lender practices, some of which represent a cost to taxpayers of an amount estimated to be $363 billion paid in subsidies by the end of 2013. State attorney generals in almost all states have also been investigating financial industry lending practices thought responsible in large measure for the financial crisis.

See for e.g. Willis V. Carpenter and Holly S. Hoxeng, Mortgages and Financing, Colorado Real Estate Practice, Evidence of Debt, 2009; Yanfag v. Cyfred, Ltd., 2009 Guam 16, 2009 WL 5214891 (Guam 2009).

See Saft, Commercial Real Estate Leasing 2d § 26:3.
er(s) and (6) be delivered by the borrower to and accepted by the lender.\textsuperscript{20}

Generally, the lender will protect its interests by requiring the borrower to sign a security instrument. The security instrument is commonly in the form of a mortgage or deed of trust.\textsuperscript{21} The purpose of the security instrument is to convey real property as security for the repayment of the debt evinced by the promissory note.\textsuperscript{22} Thus, to properly secure realty, there needs to be a mortgage or deed of trust in addition to the promissory note.\textsuperscript{23} Whether the lender uses the mortgage or the deed of trust is dictated by the law of the state where the property is located.

Mortgages are documents that borrowers sign and deliver to their accepting lender to secure the debt on their real estate. The mortgage involves two parties, the borrower and the lender, and effectively creates a lien against the property.\textsuperscript{24} The mortgage is commonly filed in the real property records in the county or parish where the property is located.\textsuperscript{25}

Three theories exist regarding the identity of the legal title holder of the mortgaged property and which theory prevails is determined by the state practice. The three theories are the title theory, the lien theory and the intermediate or modified lien theory. In states that subscribe to the title theory, a mortgagee (lender) has the right to possess the mortgaged premises upon execution of the mortgage. The mortgage generally provides that title reverts back to the


\textsuperscript{22}Id.

\textsuperscript{23}See Robinson v. Saxon Mortgage Services, Inc., 240 S.W.3d 311, 313 (Tex. App. Austin 2007) holding that a deed of trust is construed along with the note it is intended to secure also see In re Perry, 425 B.R. 323 (Bankr. S.D. Tex. 2010) holding that under Texas law, a deed of trust is simply a mortgage with the power of sale.

\textsuperscript{24}James Buchwalter, J.D. et.al., Mortgages, 59 C.J.S., Mortgages § 17 (2010 updated) and see B. E. Witkin, Deed of Trust, 4 Witkin, Summary 10th Sec Trans—Real, § 5, p 795 (2005).

\textsuperscript{25}See Lefcoe, supra n. 22 at page 175.
borrower when the loan is paid in full. In those states that follow the lien theory, the mortgage is recognized as a lien on the property. The mortgagee holds the lien while the mortgagor (borrower) has the right to possess the property until foreclosure. The remaining states describe the mortgage as a conveyance of a defeasible fee, but substantively limit its use beyond that of a security interest in the land. These states are considered modified lien theory or intermediate theory states. In these states, title remains with the borrower and the lender's right to title occurs only if the borrower defaults.

The deed of trust also serves the purpose of securing the debt on the home by using the home as collateral. Like the mortgage, the deed of trust identifies the parties to the transaction, states the original loan amount, and specifies when the loan begins and ends (matures). The deed of trust also states the legal description of the property that secures the mortgage, and provides for any conditions and terms (including late fees). Unlike the mortgage, the deed of trust has three parties to it—the trustor (or maker or borrower), the trustee (who holds the power of sale) and the beneficiary (the lender). Another important distinction from the mortgage is that the deed of trust provides a power of sale clause. The power of sale clause permits the lender to foreclose on the property without having to go to court. Upon default, the trustee is instructed to use the “power of sale” clause to sell the property without the necessity of going to court. The power of sale clause gives the trustee the right to foreclose and sell the property and convey ownership to the purchaser. This right to invoke a non-judicial foreclosure in

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27 Id. and see Sturges and Clark, Legal Theory and Real Property Mortgages, 37 Yale L.J. 691, 704 (1928).

28 Id. and see Grant S. Nelson and Dale A. Whitman, An Introduction to the Law of Mortgages, 1 Real Est Fin L § 1.5 (5th ed.) 2010 update.


30 Grant S. Nelson, supra n 30 at § 1.6.
the event of default has historically been considered one of
the key advantages to a deed of trust over a mortgage.\footnote{The Hazard of Fraud in Deeds of Trust, 48 Yale L.J. 892 (1939) and see Beyer, 14 West’s Texas Forms: Real Property § 10.2 (2d ed.) 2010 updated.}

Whether the lender’s interest is secured by a mortgage or
deed of trust, when the borrower defaults on the payment of
the note, the lien is subject to foreclosure.

**PRE-FORECLOSURE REMEDIES**

For many homeowners at risk of foreclosure, there may be
no option to waiting for the foreclosure process to take its
course. But that is not the only remedy and there are benefits
to the homeowner, lender, community at large and the
government to working out the problem rather than permit-
ting foreclosure.

Before foreclosure is started or gets to the point of sale,
the borrower can take action that may avoid foreclosure
altogether. Among those considerations are (1) working with
the lender to renegotiate the terms of the note resulting in
amended (including forbearance) agreements, (2) deeds in
lieu of foreclosure, and (3) government interventions.

There are a number of reasons that a lender might be will-
ing to renegotiate the terms of a loan to avoid foreclosure.
Lenders are not in the business of owning and managing
properties, the costs of which include payment of taxes and
securing the property from vandalism. Consequently, they
may have an interest in renegotiating loan terms that the
borrower can pay. Additionally, lenders are increasingly
concerned about the quality of their loans, particularly in
judicial foreclosure states. A renegotiated loan allows them
the opportunity to correct those mistakes and create an en-
forceable note and mortgage.

Sometimes referred to as the friendly foreclosure, the
"**deed in lieu of foreclosure**" is an instrument whereby
the borrower voluntarily conveys the mortgaged property
back to the lender instead of requiring a full foreclosure
proceeding.\footnote{Murray, Clogging Revisited, 33 Real Prop. Prob. & Tr. J. 279, 287 (1998); Murray, Deeds in Lieu of Foreclosure: Practical and Legal
Considerations, 26 Real Prop. Prob. & Tr. J. 459 (1991) and see Ripp, The
New Treatment of Real Estate Tax Shelter Losses Resulting from Deeds in Lieu of Foreclosure, 57 Notre Dame L. 704, 708 (1982).} This type transfer is generally accompanied by
a full release of lien and tax consequences to the borrower, which should be considered before making the conveyance.\footnote{See Gomez, Bankruptcy and the Tax Impact of Foreclosure for Consumer Debtors, 30 Cal. Bankr. J. 73 (2009) stating that under I.R.C. § 61(a)(12) cancellation of debt is taxable income.}

The short sale is a device where the besieged borrower sells the mortgaged property at a price less than the amount owed on the loan.\footnote{See, generally, Cordell, Dynan, Lehnert, Liang and Mauskopf, Designing Loan Modifications to Address the Mortgage Crisis and the Making Home Affordable Program, 42 UCC L.J. 1 (2009) discussing various government programs designed to prevent foreclosure.} The lender must approve the short sale so that the borrower does not remain indebted for the difference in price. With so many borrowers “upside down” on their mortgages, this vehicle presents one way for the borrower to avoid foreclosure, but the borrower should consider the potential tax consequences of such a decision.\footnote{Pub. L. No. 110-289, 122 Stat. 2654, enacted July 39, 2008.}

Additionally, there are government incentives that encourage lenders to work out the loan rather than foreclose it.\footnote{Title II National Housing Act, 12 U.S.C.A. §§ 1707, 257(m).} The Housing and Economic Recovery Act of 2008 (HERA)\footnote{Title II National Housing Act, 12 U.S.C.A. §§ 1708, 257(b)(1) to (7).} was enacted to assist homebuyers who had subprime mortgage loans. HERA authorized the federal housing administration to guarantee up to $300 billion in new 30-year fixed rate mortgages for qualified buyers contingent on the lenders agreement to write-down the principal loan balances to 90% of the appraised value of the property.\footnote{Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343.} The United States Federal Housing Authority Hope for Homeowners Program (HOPE)\footnote{Supra n. 37.} and the United States Treasury Home Affordable Modification Plan (HAMP)\footnote{Braucher, Humpty Dumpty and the Foreclosure Crisis: Lessons from the Lackluster first year of the Home Affordable Modification Program (HAMP), 52 Ariz. L. Rev. 727, 743 (2010).} are two pieces of federal legislation designed to help relieve homeowners from foreclosure.

HOPE was established under HERA and provides opportunities for the homeowner to modify or refinance their existing mortgage to make monthly payments more affordable. HOPE includes a program called the Home Af-

\footnote{Supra n. 37.}
fordable Foreclosure Alternatives to assist homeowners who are interested in short sales or deeds-in-lieu of foreclosure. The stated purposes of the Act are to create a voluntary federal program that helps distressed borrowers avoid foreclosure by working with their lenders to refinance loans, reduce principal balances outstanding, reduce interest rates charged in the original note and to provide servicers of delinquent mortgages with alternatives to foreclosure in a primary effort to support long-term sustainable homeownership.  

HAMP provides up to $75 billion including $50 billion in funds under the Troubled Asset Relief Program (TARP) to aid homeowners in reducing foreclosures.  

HAMP provides funds to (1) modify first-lien mortgages of homeowners in danger of foreclosure, (2) encourage loan modifications in certain areas, (3) reduce or pay off qualified second lien-mortgages, (4) arrange deeds in lieu of foreclosure or short sales, and (5) incentive payments to encourage refinancing under HOPE. HAMP also includes a home price decline protection (HPDP) program aimed at encouraging investors to modify mortgages. In July 2009, the United States Government Accountability Office (GAO) issued a report identifying treasury actions needed to make home affordable modification program accountable.  

However, the most likely

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43 Id.

44 See United States Treasury Department Supplemetal Directive 09-04. HAMP is one component of the Obama administration’s comprehensive plan to stabilize the United States housing market. The HPDP and Home Affordable Refinancing Program are part of the plan.

45 Troubled Asset Relief Program, Treasury Actions Needed to Make Home Affordable Modification Program More Transparent and Accountable, United States Government Accountability Office Report to Congres-
concern about these programs is how effective they have been since enacted.\textsuperscript{46}

**Community Interest**

What may appear to be a simple foreclosure of a defaulted loan can seriously impact persons and communities not parties to the foreclosure.\textsuperscript{47} A home foreclosure can negatively affect the selling price of nearby homes.\textsuperscript{48} The foreclosed home reportedly suffers physical neglect before and after repossession, which encourages nearby homeowners to neglect their homes.\textsuperscript{49} The resulting blight results in lowered valuation of the foreclosed homes as well as neighboring homes, creating comparable sales that can result in a lowered appraisal for other homes in the community.\textsuperscript{50} These effects may cause flight away from the community by existing homeowners and also discourage new buyers, creating

\textsuperscript{46}Robert Wassmer, The Recent Pervasive External Effects of Residential Home Foreclosure, July 19, 2010 at 25–26, http://www.csus.edu/oppa/faculty/samplescholarship/The%20Recent%20Pervasive%20External%20Effects%20of%20Residential%20Home%20Foreclosure.pdf. Recognizing the significant need for sweeping reform but faced with a deadlocked congress, President Obama announced that he would enact executive orders to provide additional support for some qualified homeowners. The program would allow the homeowners to refinance their mortgages notwithstanding the fact that the home is valued less than the mortgage. The program opened to mixed reviews. See generally, President Obama announces refinancing plan, http://www.wwmt.com/articles/president-1397444-obama-plan.html; Editorial: Obama’s mortgage plan won’t be enough, http://www.fresnobee.com/2011/10/28/2594595/editorial-obamas-mortgage-plan.html.

\textsuperscript{47}Relman, Foreclosures, Integration, And the Future of the Fair Housing Act, 41 Ind. L. Rev. 629, 633 (2008).

\textsuperscript{48}Robert W. Wassmer, supra n. 41 at p. 5.

\textsuperscript{49}Id. and see Pinkston, In the Weeds, supra n. 13.

\textsuperscript{50}Id. and see McKinney, The North Carolina Banking Institute Symposium on the Foreclosure Crisis: Municipalities fight Effects of Foreclosure with Litigation and Neighborhood Stabilization Program Grants, 14 N.C. Banking Inst. 257 (2010) stating that experts predict that foreclosure blight could ultimately cost governments hundreds of billions of dollars and see Schilling, Code Enforcement and Community Stabilization: The Forgotten First Responders to Vacant and Foreclosed Homes, 2 Alb. Govt. L. Rev. 101, 111 (2009) reporting the lost of tax revenue in seven Ohio cities to be $49 million and an additional $15 million annual cost in city services including code enforcement, demolition, property maintenance, police and fire runs and boarding buildings.
ghost towns.\textsuperscript{51} Aside from the increased ownership of the properties by banks and other lenders in the blighted community, the loss of revenue to the local government can be critical as well.\textsuperscript{52} In most circumstances foreclosure actions do proceed and often without challenge by the mortgagor.

In order to help restore communities at risk of devaluation from foreclosure activity, some non-profit organizations have begun providing assistance to financially troubled homeowners. One group is the Neighborhood Assistance Corporation of America (NACA). NACA is primarily designed to “build strong, healthy neighborhoods in urban and rural areas nationwide through affordable homeownership.”\textsuperscript{53} It offers two foreclosure resistance programs, a home purchase program and a Home Save Program.\textsuperscript{54} To participate in either program NACA requires “becoming a NACA Member, attending a workshop and participating in advocacy.”\textsuperscript{55} The home purchase program offers members a mortgage that makes homeownership affordable without the need for perfect credit.\textsuperscript{56} The mortgage may be used to either purchase or refinance a home and requires “no down payment, no closing costs, no fees and a below-market interest rate.”\textsuperscript{57} The HomeSave program provides “solutions for homeowners with


\textsuperscript{54} Id.

\textsuperscript{55} NACA’s Free Services, https://www.nacalynx.com/nacaweb/about_naca/nacaServiceFree.aspx (accessed September 17, 2011) NACA reports that membership requires payment of an annual fee, currently $20 per household. The workshop introduces the members to NACA programs and services, and provides important information about real estate, housing and the purchase process.

\textsuperscript{56} supra note 63.

\textsuperscript{57} Id.
an unaffordable mortgage."\(^{58}\) To avoid foreclosure NACA counselors work with the homeowner's lender to "achieve a mortgage [re]structure or forbearance."\(^{59}\)

Regional non-profits also assist homeowners at risk of foreclosure to keep their homes.\(^{60}\)

**Judicial Foreclosure Jurisdictions**

In Connecticut, Delaware, Florida, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Nebraska, New Jersey, New Mexico, New York, North Dakota, Ohio, Pennsylvania, South Carolina, and Vermont judicial foreclosure is the primary or only method of foreclosing on residential property.\(^{61}\) A judicial foreclosure is often viewed as costly and time-consuming requiring standard legal steps such as the filing of a complaint, service of

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NACA uses a "character lending" approach to evaluate an applicant's credit worthiness which includes "using criteria other than just credit score." According to NACA, character lending considers the homebuyer's "particular circumstances and needs." NACA assists with a thorough analysis of the situation to determine whether the homebuyer is ready to make monthly mortgage payments and how much he or she can afford.

\(^{59}\) Id. Since its implementation the program advertises that it has "many thousands of homeowners working with NACA have had their mortgages restructured with interest rates reduced to 4%, 3% and as low as 2% and where necessary the outstanding principal reduced." Additionally, NACA's Membership Assistance Program "provides comprehensive counseling for members who are delinquent on their home payments, including establishing payment agreements and providing financial assistance to help members avoid foreclosure." Currently, NACA has taken its programs and services on a traveling tour stopping in major cities across the country. This "Save the Dream Tour" offers homeowners and purchasers an opportunity to sit face-to-face with NACA counselors and receive assistance with participating in their programs.

\(^{60}\) For example, See Boston Community Capital which offers its SUN (Stabilizing Urban Neighborhoods) to Massachusetts families facing home foreclosure [http://www.sunhomehelp.org/](http://www.sunhomehelp.org/). In the San Diego, California area, Picture Perfect San Diego reports an option for people who have had their homes foreclosed to buy back their homes from the bank. See [http://pictureperfectsandiego.com/2009/05/15/buy-back-your-home-after-foreclosure/](http://pictureperfectsandiego.com/2009/05/15/buy-back-your-home-after-foreclosure/). Also the National Mortgage Help Center advertises that it provides foreclosure assistant through their national network of foreclosure prevention specialists. Additional resources include [http://www.mortgagewalkawayoptions.com/](http://www.mortgagewalkawayoptions.com/).

process, notice, and a hearing before the mortgaged property can be sold.\textsuperscript{62} While specific foreclosure procedures vary depending on the state’s laws, in judicial foreclosures states, the foreclosure of the property is initiated when the mortgagor (lender) files a complaint against the mortgagor (borrower) due to a default—commonly a failure of payment on the mortgage and/or the promissory note. In judicial foreclosure states, the instruments that are frequently used to secure the debt are the mortgage and the promissory note. The complaint will state the alleged default, the debt owed, and rationales for why the default should allow the mortgagor to foreclose on and be delivered the property pursuant to state law. In general, after the mortgagor files the complaint, the mortgagor records a \textit{lis pendens} (a written notice that a lawsuit has been filed) with the court for the property.\textsuperscript{63} The mortgagor should receive notice from the mortgagor pursuant to state law, generally by personal service, mail or publication. Once the mortgagor has been served notice, the mortgagor must answer timely or the judge will likely grant a default judgment for the mortgagor. If a default judgment is granted then the property will go to foreclosure sale. But if a mortgagor desires to pursue remedies that she may have available to her, she must timely file an answer. The answer should allege all defenses and/or counterclaims. Because the answer contests the mortgagor’s right to foreclose, the case follows general civil procedures to trial.\textsuperscript{64} Commonly, a mortgagor does not know that she has an affirmative defense against the complaint, which would stop the foreclosure. Several defenses to a foreclosure action that can prevent the mortgagor from being able to successfully foreclose on the property are discussed later in this paper.

\textbf{Non-Judicial Foreclosure Jurisdictions}

In the remaining states, non-judicial foreclosure is the primary foreclosure method.\textsuperscript{65} A non-judicial foreclosure is based on the terms of the mortgage instrument and state

\textsuperscript{62}Black’s Law Dictionary 295 (3rd Pocket ed., 2006).
\textsuperscript{64}Some jurisdictions provide foreclosure mediation.
statute. A public official, mortgagee or trustee, without the prerequisite of a judicial proceeding, sells the mortgaged property at a public sale.\textsuperscript{66} The major difference between a non-judicial and a judicial foreclosure is that the non-judicial foreclosure does not require a proceeding before the court.\textsuperscript{67} Another difference is that the instrument used to secure the payment of the debt in a non-judicial jurisdiction is generally a deed of trust rather than a mortgage.\textsuperscript{68} The deed of trust contains what is called the power of sale clause. The power of sale clause gives the trustee the power to sell the property without judicial intervention.\textsuperscript{69} In case of a default, the trustee is merely required to give notice of default to the borrower, which informs them of the intent to foreclose and sell. The borrower can choose not to respond in which case the property will be sold.

Alternatively, the borrower can respond by filing suit in a court of competent jurisdiction. The suit would need to aver allegations against the trustee sufficient to stop foreclosure. Any interested person seeking to enjoin the exercise of the power of sale can effectively convert the non-judicial foreclosure into a judicial foreclosure by filing for injunctive relief. The most common grounds for seeking such an injunction are: (1) general equitable grounds, such as unconscionability and absence of an adequate remedy at law; (2) fraud, hardship, oppression, and breach of agreement; (3) payment or tender; (4) dispute as to amount due; (5) want of, or defect in, the notice or advertising; and (6) dispute as to title or pending litigation.\textsuperscript{70} The borrower must state a legitimate claim upon which relief can be granted or the sale will commence.

Commonly, a borrower does not know that they have a legitimate claim against the trustee that could stop the foreclosure. However, there are several defenses that could

\textsuperscript{68} Some states also use a promissory note along with the deed of trust to secure the debt.
\textsuperscript{69} See Shari Olefsons & Ronald Scott Kaniuk.
prevent the trustee from being able to successfully foreclose the lien and sell the property.

**FORECLOSURE DEFENSES**

The Lost Promissory Note

In judicial foreclosures the mortgagee needs to produce both the mortgage and the promissory note to successfully bring a foreclosure suit. The mortgage and the promissory note are both instruments for security of payment of a debt. Because the promissory note is assignable or transferable from one lending institution to another, the plaintiff mortgagee may no longer be in possession of the note. In those cases where the original documents have been lost or misplaced, most judicial jurisdictions will allow alternate forms of evidence to prove actual ownership of the note and mortgage. Some states strictly construe the requirement to produce the note. For example, Florida considers a promissory note to be considered a mortgage statutorily. Florida requires the mortgagee to produce the original promissory note or seek to reestablish the lost note before a foreclosure.

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71 It is important for homeowners facing foreclosure and their attorneys to look cautiously at the likelihood of successfully pursuing their claims and defenses. Care should be taken to conduct due diligence and to adequately assess the case. See, for example, discussion in Michael Bracamontes, Understanding the Foreclosure Trend on the West Coast, Andrews Financial Crisis Litigation Reporter, September 18, 2009.


76 Florida Real and Personal Property Code § 697.01(1) (All conveyances, obligations conditioned or defeasible, bills of sale or other instruments of writing conveying or selling property, either real or personal, for the purpose or with the intention of securing the payment of money, whether such instrument be from the debtor to the creditor or from the debtor to some third person in trust for the creditor, shall be deemed and held mortgages, and shall be subject to the same rules of foreclosure and to the same regulations, restraints and forms as are prescribed in relation to mortgages.)
may take place. The "produce the note" defense is not available in non-judicial foreclosure states.

**The Truth in Lending**

The Truth in Lending Act (TILA) requires creditors to make certain disclosures to borrowers, and the failure to do so gives the borrowers certain rights to rescind the loan transaction and to make claims for damages. However, the act does not protect a significant number of borrowers in foreclosure because they are generally outside the applicable statute of limitations. On the other hand, for those borrowers who are within the TILA statute of limitations, the act's rescission remedy has proved to be the most useful of all the regulations that are imposed by TILA.

TILA allows for the right to rescind "until midnight of the third business day following the consummation of the transaction, or the delivery of the information and rescission forms required under this section together with a statement containing the required material disclosures." Also, TILA allows the borrower to rescind the loan for up to three years after the closing date if there is a material disclosure violation. The rescission remedies have strictly adhered to statutes of limitations. A TILA rescission claim suit must have commenced before the three-year period, not just notice given to the possible parties that a rescission claim will happen. However, the rescission after the three-day period just needs notification to the creditor. TILA imposes a one-year statute of limitations for damages claims and it begins

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to run from the date the violation occurs.\textsuperscript{85} The failure to bring the claim in the appropriate time frame is one of the more common reasons that TILA rescission defenses fail.\textsuperscript{86} In \textit{Yamamoto v. Bank of New York} the court decided “The statute adopts a sequence of rescission and tender that must be followed unless the court orders otherwise: within twenty days of receiving a notice of rescission, the creditor is to return any money or property and reflect termination of the security interest; when the creditor has met these obligations, the borrower is to tender the property.”\textsuperscript{87} The \textit{Yamamoto} ruling has caused some courts to analyze the courts discretion when it comes to rescission. This apparently arises from some judges’ concern that the borrower is at fault for failure to pay its mortgage. However, the TILA legislation is unambiguous in eliminating the need for tender as a prerequisite for rescission. Seen as the strongest remedy to combat predatory lending, TILA requires the lender to take affirmative steps to ensure its rights of relief, forcing the lender to be the real creditor in interest with the actual authority to foreclose a mortgage. In the event the lender cannot meet its burden under TILA, the security interest is void, converting the debt from secured to unsecured.\textsuperscript{88}

\textbf{Home Ownership and Equity Protection Act}\textsuperscript{89}

The Home Ownership and Equity Protection Act (HOEPA) was enacted as an amendment to TILA and requires credi-
tors to make additional disclosures to borrowers or be subject to relief under TILA. The purpose of the additional disclosures is to ensure transparency in the transaction. For example, HOEPA requires disclosures of the amount of monthly payments for a loan as well as the annual percentage rate when the loan is offered at high interest rates or excessive fees.\textsuperscript{90} HOEPA only applies to loans secured for a borrower’s primary residence in which either the interest rate exceeds a certain threshold or the fees and costs exceed eight percent of the total loan amount.\textsuperscript{91}

**Fair Debt Collection Practices Act (FDPCA)\textsuperscript{92}**

Congress passed the fair debt collection practices act in 1977. FDPCA provides remedies for borrowers who have been subject to abusive debt collection practices. The FDPCA provides remedies against debt collectors for specific legal acts and omissions toward borrowers who undertook a consumer debt.\textsuperscript{93} Under the FDPCA, a creditor is not allowed to use a name that might lead the debtor into believing that a third party is trying to collect on the debt. The FDPCA applies in foreclosure situations where a mortgage servicer obtains an assignment of the note and or mortgage after the debt is in default.\textsuperscript{94} However, the act does affect mortgage servicers who obtained the note and/or mortgage that was not in default when assigned.\textsuperscript{95}

The FDPCA expressly makes it illegal to falsely represent “the character, amount, or legal status of any debt,” the “compensation which may lawfully be received by a debt collector for collection of a debt,” and to collect “any amount” unless “expressly” authorized by the agreement creating the debt or permitted by law.\textsuperscript{96} It is to be noted that there is a little indecision amongst courts into whether a mortgage is


\textsuperscript{91} See James v. Bridge Capital Corp.


\textsuperscript{93} Bergia, No Shelter From The Storm: Dangers From the Fair Debt Collection Practices Act the Mortgage Industry Attorneys and a Call for Legislative Action, 29 Rev. Litig. 391, 393 (2010) (University of Texas School of Law Publications Inc. 2010).


\textsuperscript{96} Weinstein, 30 New Jersey Practice: Law of Mortgages § 25.1 (2d ed.).
considered a debt according to the FDCPA. In non-judicial foreclosure cases the courts have waivered on whether they consider creditors debt collectors under the FDCPA.

**Texas Fair Market Value Statutes and Deficiency Judgments**

In some states, statutes have been enacted that allow a party to recover a judgment against the defaulting mortgagor where there is a residue of the mortgage debt remaining unsatisfied after a foreclosure sale. Described as a deficiency judgment, it is defined as a personal judgment against the debtor for the difference between the unpaid balance of the debt and the proceeds received by the creditor from the sale of the security at a foreclosure sale. In Texas, the fair market value statutes deal with deficiency judgments. A deficiency judgment is a judgment against a debtor for the unpaid balance of the debt if a foreclosure sale or a sale of repossessed personal property fails to yield the full amount of the debt due. The deficiency judgment can create a double recovery by causing the lender to receive the profits from foreclosure sale as well as having a financial obligation from the debtor. This occurs because the lender is able to purchase the property with a low bid at sale and then turn around and sell the property on the open market at a higher price. The lender is still able to sue the debtor for a deficiency, which causes the double recovery. The debtor, whom the recovery is sought, can request that the court determine the fair market value of the property as of the date of the

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98 See Thepvongsa v. Regional Trustee Service Corp.


100 See for example Harry Miller and Marvin Starr, Judicial Foreclosure Proceedings, Ch. 10 Deeds of Trusts and Mortgages, 4 Cal. Real Est. § 10.233 (3d ed.).


102 Black’s Law Dictionary (3rd ed.).


foreclosure.\textsuperscript{105} If the fair market value is determined to be greater than the foreclosure sale price, the debtor is allowed an offset against the deficiency.\textsuperscript{106} Judicial foreclosures use the same method in determining the fair market value as non-judicial foreclosures.\textsuperscript{107} In judicial foreclosure cases anybody who is obligated on the indebtedness can bring a suit for determining the fair market value of the property as long as it is within the statutory defined period after the foreclosure sale.\textsuperscript{108} A guarantor who did not have notice of the sale before it occurred may also bring timely suit.\textsuperscript{109} Under current law, a deficiency judgment action must be brought within two years of the foreclosure sale.\textsuperscript{110} The deficiency judgment constitutes post foreclosure relief available to the lender that can be avoided if the borrower entered a short sale agreement, deed in lieu of foreclosure agreement or other agreement whereby the lender foregoes any right to recover a deficiency judgment. States have different approaches to addressing deficiencies caused after the sale of the property. In some states, statutes have been enacted that allow the lender to only receive the property without claim to deficit that might arise after sale of the property, called anti-deficiency statutes.

Robo-Signing

A number of states are taking notice of the growing problem created when process mortgage servicers fail to conduct a required review of loan documents before generating affidavits in support of judicial foreclosures. Generally, the purpose of the affidavit is to ensure that the entity that seeks foreclosure is authorized to foreclose the lien. This process has become known as “robo signing” and occurs when loan servicers use highly automated processes to generate affidavits in the foreclosure process without the affiant having reviewed facts contained in the affidavit or having the af-

\textsuperscript{105}Tex. Prop. Code Ann. § 51.003.

\textsuperscript{106}Tex. Prop. Code Ann. § 51.003.


\textsuperscript{108}Tex. Prop. Code Ann. § 51.004.

\textsuperscript{109}Tex. Prop. Code Ann. § 51.004.

fiant’s signature witnessed in accordance with state laws." 111 Recently, these insufficiencies have caused fraud allegations against lenders in foreclosure filings throughout the country. 112 Actionable insufficiencies include: failure of plaintiffs and their counsel to review documents and files necessary to establish standing and other foreclosure requisites; filing of notarized affidavits which falsely attest to such review and to other critical facts in the foreclosure process; and “robo-signing” of documents by parties and counsel. Moreover, the wrongful filing and prosecution of foreclosure proceedings, which are discovered to suffer from these defects, may be cause for disciplinary and other sanctions upon participating counsel. 113

State Foreclosure

The foreclosure epidemic that has spread across the United States has cause state legislatures to enact or propose legislation that would curb the foreclosure rates.

In the summer of 2011, Hawaii's governor signed Senate Bill 651. Senate bill 651 is one of the most comprehensive foreclosure bills in the country to date. The bill does not eliminate foreclosures but sends foreclosures to be settled out of court where the “home-owners” are not kicked out of their homes. The bill arranges for a mortgage foreclosure dispute resolution program, the ability to change from non-judicial to judicial foreclosures in certain circumstances, voiding of foreclosures by certain mortgage providers, as well as other amendments.

Nevada has been one of the leaders in foreclosure rates in the nation for a number of years. In 2011, Nevada passed several bills to try to address the foreclosures throughout the state. Assembly Bill 284 gives residents access to the information on the companies that hold their mortgages which

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112 For example see Joe Rauch, SunTrust finds problems in foreclosures, Feb 25, 2011 available at http://www.reuters.com/article/2011/02/25/us-suntrust-foreclosure-idUSTRE71O50R20110225 and reporting that SunTrust Banks Inc.’s internal review found that thousands of cases in judicial states had documents robo-signed by employees who had never reviewed the documentation. The article further reports that SunTrust is one of 14 U.S. mortgage lenders under investigations by state and federal authorities.

will allow the parties being foreclosed on to make sure that whomever has filed to foreclose has the right to exercise the power of sale. Assembly Bill 273 makes sure that individuals being foreclosed on do not have deficiency judgment and insurance payments that they have to pay to the banks or financial institution. Senate Bill 414 prohibits a bank or other financial institution from unreasonably delaying a response to an offer for a sale in lieu of a foreclosure sale on real property secured by a residential mortgage loan.

Florida is preparing to propose a piece of legislation in 2012 that will make foreclosures in the state easier to obtain by changing the state from a judicial foreclosure state to a non-judicial foreclosure state. This type of legislation was proposed in 2011 but was never enacted. The proposed bill could make foreclosures easier to obtain by taking them out of the courts.

Arizona is one of the top five foreclosure states and in its 2011 legislative session a proposed bill in the state senate set out help slow foreclosures. The bill was championed to help the individuals being foreclosed upon to keep their houses. Arizona Senate bill 1259 passed the senate with a 29-3 vote however, when it was in the states house the bill was amended to change the entire bill completely. Though the bill maintained its bill number it no longer dealt with foreclosures in the state. The new bill was passed and signed by the governor.

California was one of the few states with a high foreclosure rate that failed to pass any of the proposed legislation that addresses foreclosure. There were several proposed bills including SB 1275, SB 729, AB 935, and AB1321 that failed to make its way through the legislature.

**U.S. Bank National Association v. Antonio Ibanez**

In October 2009, a Massachusetts trial court entered an order regarding the plaintiff’s motion to vacate the court’s earlier judgment that mortgagees were not entitled to foreclosure of defaulted residential mortgages notwithstanding power of sale provisions. In Ibanez, the court was faced with facts common to the mortgage industry’s practice of selling

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114 Commonwealth of Massachusetts Trial Court, MISC 08-384283 along with 08 Misc 386755 (KCL): Wells Fargo Bank, N.A., as trustee for ABFC 2005-OPTI Trust, ABFC Asset Based Certificates Series 2005-OPTI v. Mark A. Latace and Tammy L Laree.
and reselling mortgages as part of a portfolio comprised of mortgages that are packaged as a single asset backed security. The court, finding that the power of sale was contractual held that the proper parties to the foreclosure must be traceable back to the original parties to the contract. In other words, the burden was on the plaintiff to show that they were the parties with the right to foreclose the lien. To meet their burden, the plaintiff must be able to produce the executed mortgage, the signed note and one or more legally recognized mortgage assignments showing that they had the authority to exercise the power of sale.

It is noteworthy that Massachusetts follows the title theory of mortgages. Thus, to meet the burden the plaintiff must show that the assignment constituted a valid conveyance of the mortgagee’s interest in the land with all the deed requirements that that entails. Further, the court opined that the laws regarding foreclosure must be strictly followed because of the import of the act to both the mortgagor and mortgagee.

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115 Id.
116 Id.
117 Id.; also see In re Foreclosure Cases, 2007 WL 3232430 (N.D. Ohio 2007) where the federal district court dismissed 14 home foreclosure actions because the lender could not show that it owned the mortgages at issue.
118 Ibaniz, supra n. 105 citing Faneuil Investors Group, L.P. of Selectmen of Dennis, 75 Mass. App.Ct. 260, 264–265 (2009) holding that “Under our title theory of mortgages, a mortgage of real estate is a conveyance of the title or of some interest therein defeasible upon the payment of money or the performance of some other condition. Literally, in Massachusetts, the granting of a mortgage vests title in the mortgagee to the land placed as security for the underlying debt. The payment of the mortgage note terminates the interests of the mortgagee and revests the legal title in the mortgagor.”
119 Ibaniz, supra n 105.
120 The court stated that “what is at stake is of utmost importance and finality — the complete extinguishment of a person’s rights in his or her property (often the home where that person and his or her family live) and the transfer of those rights to someone who wants (and is entitled) to complete assurance of good title to that property so that he or she can live there without concern . . . [requiring] strict compliance and a failure to do so means that the foreclosure is invalid.”
ACEVES v. U.S. BANK

Promissory Estoppel and Fraud

Plaintiff homeowner filed an action against U.S. Bank in a California court claiming relief on the grounds that the bank had failed to renegotiate her loan in good faith. The plaintiff, Claudia Aceves argued that the bank promised to work with her to reinstate and modify her mortgage loan, that she relied on the bank’s promise by foregoing chapter 13 bankruptcy proceedings, and that the bank breached its promise by foreclosing on the property causing her damage.

The trial court dismissed her complaint, but the appellate court reversed on the grounds of promissory estoppel and fraud. The court found that the plaintiff had met her burden to show promissory estoppel by showing that (1) the bank had made a clear and unambiguous promise, (2) the plaintiff had relied on that bank’s promise, (3) plaintiff’s reliance was both reasonable and foreseeable, and (4) the plaintiff was injured by her reliance.

Specifically, the court found that U.S. Bank’s promise to “work with Aceves on a mortgage reinstatement and loan modification was clear indication that the bank would not foreclose on Aceves’s home without first engaging in negotiations. The court found that the bank’s failure to engage in negotiations constituted a breach of their promise. Moreover, Aceves had filed a chapter 7 bankruptcy claim that was pending in bankruptcy court which she was converting to a chapter 13 proceeding. Relying on the bank’s promise, Aceves chose not to oppose the bank’s motion to lift the bankruptcy stay. The court found that the bank expected her to rely and that it was foreseeable that she would rely on their promise. The court held that Aceves’ reliance was reasonable since a chapter 13 action could not produce as favorable results as a bank

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122 Id.
123 Id.
124 Id.
125 Id. citing Advanced Choices, Inc. v. Department of Health Services, 182 Cal. App. 4th 1661, 1672, 107 Cal. Rptr. 3d 470 (2d Dist. 2010).
modification of the terms of the loan. By asserting promissory estoppel, the court held, Aceves had avoided the need for consideration in the usual sense of something bargained for and given in exchange.

The court also found that Aceves’ claim of fraud was also viable holding that “the elements of fraud are similar to the elements of promissory estoppel, with the additional requirements that a false promise be made and that the promisor know of the falsity when making the promise.”

**Garret v. Bankwest**

**Waddell v. Dewey County Bank**

**Breach of Fiduciary Duty**

Generally, the relationship between a bank and its borrower is arms-length and considered a debtor-creditor relationship, which imposes no special or fiduciary duties on a bank. However, where the borrower reposes faith, confidence and trust in the bank; the borrower is in a position of inequality, dependence, weakness or lack of knowledge; and the bank exercises dominion, control or influence over the borrower's affairs then a fiduciary relationship between the banker and debtor could be satisfied. Generally, a lender must be more than just a lender to owe a fiduciary duty to the borrower. For example, one court has held that a fiduciary relationship was created when the bank served as a financial advisor to the borrower and the two relationships were not maintained separately.

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126 A bankruptcy court could not modify the terms of the loan nor could a chapter 13 plan exceed five years where Aceves had 28 years left on her mortgage.


130 Garret, supra n. 122.

131 See Scott v. Dime Sav. Bank, 956 F.2d 1161 (2d Cir. 1992); 101 F.3d 107 (C.A.2-N.Y.-1996) unpubl disposition; and see Barry Capello, What is Lender Liability?, located at http://cappellonoel.com/what-is-lender-liability/ and reporting that “After a six-day trial, the jury found in favor of the Scotts on a claim for breach of fiduciary duty. The trial court, on a
National Association for the Advancement of Colored People (NAACP) v. Ameriquest Mortgage Company et al.\textsuperscript{132}

Reverse Redlining

In July 2007, the NAACP filed a class action lawsuit against 14 lending institutions arising from what they found to be a subprime mortgage crisis fueled by the discriminatory actions of the lenders who, they allege, illegally targeted African American homebuyers for subprime mortgage loans.\textsuperscript{133} The case is pending in the California District Court and has survived challenges including standing\textsuperscript{134} and mootness.\textsuperscript{135}

The suit claims that research indicates that overall lenders made high-cost subprime loans to higher-qualified African Americans and Hispanics at significantly greater rates than similarly situated Caucasians.\textsuperscript{136} The NAACP subsequent motion, acknowledged the rule that a debtor-creditor relationship does not alone create a fiduciary relationship. However, the court found the jury verdict of a fiduciary relationship was supported by the manner in which the bank: 1) extended credit to the Scotts, 2) used promotional devices to persuade them to invest loan proceeds with an affiliated company with whom the bank shared profits, and 3) continued to advise the Scotts about their investments through employees that worked for both the bank and the investment company.\textsuperscript{137}

\textsuperscript{132}NAACP v. Ameriquest Mortgage Company et al. C.A. 07-0794, USDC-Central Dist Cal.


\textsuperscript{134}National Ass’n for Advancement of Colored People v. Ameriquest Mortg. Co., 635 F. Supp. 2d 1096 (C.D. Cal. 2009), as amended, (Jan. 13, 2009), C.D.Cal., January 12, 2009 (No. SACV07-0794 AG (ANX)).


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541
lawsuit relies not only on claims of present discrimination but on the lending industry's long history of discrimination with mortgage loans, and further charges that the statistical disparities are evidence of an insidious and systematic policy of predatory targeting of African American borrowers.  

Other racial discrimination suits include one filed by the Department of Justice (DOJ) against American Insurance Group (AIG) subsidiaries, which settled for $6.1 million. The suit alleged that AIG had engaged in a pattern and practice of lending what discriminated against African-Americans. In 2010 Illinois attorney general led suit against Countrywide, a subsidiary of Bank of America for unlawful discrimination against African American and Latino borrowers in home mortgage sales. The suit also alleged violation of Illinois Human Rights Act and the Illinois Fairness in Lending Act. In Detroit, the Center for Community Justice and Advocacy led a lawsuit against RBS Citizens Bank and its subsidiary, CCO Mortgage, claiming federal fair lending laws violations within Detroit, Michigan.

**Challenging Acceleration**

It is not uncommon that once a debtor defaults in paying the mortgage, the lender exercises its right to elect to accelerate all payments unpaid under the note. However, some courts have held that a lender's actions constituting a consistent prior pattern of acceptance of late payments by

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140 Grant S. Nelson and Dale A. Whitman, Chapter 7. Foreclosure, 1 Real Estate Finance Law § 7.7 (5thed.).
the mortgagee relieves the debtor for defaults in payment of principal or interest. See FN 3 cases.

CONCLUSION

Most homeowners who face foreclosure face an uphill struggle in order to delay or avoid foreclosure altogether. Typically, the defaulting borrower allows the foreclosure without challenging the lender’s right to recovery at all. However, the homeowner might be wise to assess their position and consider possible claims and defenses that they may make that could result in the deferral or quashing of a foreclosure proceeding.

141 Id.
Appendix

Based on the November 2010 Foreclosure Rate report by Realty Trac, that tracked foreclosure filings in November 2010, ten states continue to lead the country in the number of foreclosure filings.

<table>
<thead>
<tr>
<th>State</th>
<th>% of Housing Units</th>
<th>Foreclosure Properties</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nevada</td>
<td>1 in every 99</td>
<td>11,371</td>
</tr>
<tr>
<td>California</td>
<td>1 in every 233</td>
<td>57,378</td>
</tr>
<tr>
<td>Utah</td>
<td>1 in every 221</td>
<td>4,279</td>
</tr>
<tr>
<td>Arizona</td>
<td>1 in every 262</td>
<td>10,384</td>
</tr>
<tr>
<td>Colorado</td>
<td>1 in every 433</td>
<td>4,970</td>
</tr>
<tr>
<td>Ohio</td>
<td>1 in every 486</td>
<td>10,458</td>
</tr>
<tr>
<td>Georgia</td>
<td>1 in every 270</td>
<td>14,423</td>
</tr>
<tr>
<td>Florida</td>
<td>1 in every 267</td>
<td>32,938</td>
</tr>
<tr>
<td>Michigan</td>
<td>1 in every 296</td>
<td>15,311</td>
</tr>
<tr>
<td>Idaho</td>
<td>1 in every 301</td>
<td>2,133</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>1 in every 969</td>
<td>5,672</td>
</tr>
</tbody>
</table>

RealtyTrac notes: Despite a 20 percent monthly decrease in foreclosure activity, Nevada posted the nation’s highest state foreclosure rate for the 47th straight month. One in
every 99 Nevada housing units received a foreclosure filing in November — nearly five times the national average.

Thanks in part to sharp monthly drops in foreclosure activity in Arizona, Florida, California and Michigan, Utah’s foreclosure rate leapfrogged to second highest among the states in November after being sixth highest the previous month. One in every 221 Utah housing units received a foreclosure notice during the month — more than twice the national average. Douglas A McIntyre, A Real Estate Silver Lining: Foreclosure Rates Plunge, Posted: December 16, 2010 at 6:15 am; http://247wallst.com/2010/12/16/a-real-estate-silver-lining-foreclosure-rates-plunge/

Realty Trac also reported 2,168,080 foreclosure homes on the market. http://www.realtytrac.com/trendcenter/