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LEGISLATIVE RESPONSES TO THE FORECLOSURE
CRISIS IN NONJUDICIAL FORECLOSURE STATES

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Introduction

The foreclosure crisis of the early twenty-first century continues to defy simple solutions and predicted ending points. It began as a surge in subprime foreclosures in a limited number of weaker housing markets as early as 2004 and 2005 and was initially suppressed in many areas by rapidly rising home values. By the second half of 2006, however, home prices in most places had either flattened out or turned down, and foreclosures began to spike in more places, especially in metropolitan areas that had previously experienced rapid price appreciation fueled by subprime and exotic home loans.¹ Vicious cycles set in quickly, and, within months, the sand states (Florida, Arizona, Nevada, and California) led the nation in foreclosure rates.² In 2009, as unemployment continued to rise, the

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¹ Soo Youn, *Market's New Face: Home Prices Flatten*, WASH. POST, Dec. 14, 2006, at T1.

² Shayna M. Olesiuk & Kathy R. Kalser, *The 2009 Economic Landscape*, FDIC,

number of foreclosures of prime loans began to overtake the number of subprime foreclosures.³ This meant that in many cities the foreclosure problem spread both geographically and demographically. Although delinquency rates have generally stabilized, and in some places declined, serious delinquencies remain at historically high rates.⁴ With continuing weaknesses in most housing markets, the prospects for a substantial decline in foreclosures remain dim.

This article focuses on the legislative responses to the foreclosure crisis among states with nonjudicial foreclosure systems—where mortgage foreclosures are conducted largely outside of the court system. The goal of this article is to identify efforts to modify or improve the single-family (one to four unit) residential foreclosure process—usually with the aim of reducing foreclosures—in response to the crisis and to identify states with more aggressive legislation. Because state policy in this area interacts heavily with federal efforts to reduce foreclosures, especially during the mortgage crisis, we first review federal foreclosure prevention initiatives, which began in earnest in 2007. In addition, changes to state law are not the only sort of measures that states can take, and because local responses can serve as important complements to state action, we also review examples of other, non-legislative forms of state and local efforts to reduce foreclosures. This is critical context for understanding the limits and advantages of legislative responses to rapidly rising foreclosures. After reviewing some recent literature on state foreclosure laws, we then analyze changes to state foreclosure laws in nonjudicial states from January 2005 through May 2010.⁵ After

http://www.fdic.gov/bank/analytical/quarterly/2009_vol3_1/AnatomyPerfectHousing.html (last updated Apr. 27, 2009).

³ Diana Olick, *It's Prime Time in Foreclosures*, CNBC, May 28, 2009, http://www.cnbc.com/id/30984467/It_s_Prime_Time_In_Foreclosures.

⁴ *Serious Mortgage Delinquency Rates Stabilize in U.S. Metros, but Share of Loans in Foreclosure Grows*, NATIONAL HOUSING CONFERENCE, Aug. 16, 2011, <http://www.nhc.org/media/August-2011-Foreclosure-Response-Metro.html>.

⁵ Note that our data collection period ended prior to widespread media coverage of the problems involving fraudulent or missing foreclosure documentation and improper procedure, which began in the latter part of 2010 and implicated many major loan servicers, including Bank of America. See, e.g., Jill Treanor & Julia Kollewe, *Robo-Signing Eviction Scandal Rattles Wall Street*, GUARDIAN, Oct. 14, 2010, at 32 (“Bank of America, JP Morgan and GMAC are among those to have halted foreclosures after discovering that ‘robo-signers’ had approved thousands of documents.”).

identifying states with relatively high levels of legislative activity in this area, we describe some of the more significant changes that occurred in some of these states.

I. Nonjudicial vs. Judicial Foreclosure

Each state is unique in its mortgage foreclosure system. In general, however, state foreclosure regimes tend to be classified as judicial or nonjudicial. In a judicial state, the foreclosure process goes through the court system. Lenders are typically required to give notice before filing the foreclosure complaint. After allowing the buyer time to respond to the notice, the complaint is served. If the borrower does not respond to the complaint, her case proceeds to a default judgment and the court authorizes a foreclosure sale. If a borrower files a response, the case goes to trial, resulting in a decision authorizing a foreclosure sale, or an order dismissing the complaint and forcing the lender to recommence the action at a future date.⁶ On the other hand, in the majority of states, where nonjudicial foreclosure is the predominant method, the lender typically only needs to send a notice of sale to the homeowner, place an advertisement in a local paper, and hire an auctioneer to sell the property.⁷ To stop a foreclosure sale in a nonjudicial state, the homeowner must file an affirmative court action.⁸

⁶ See, e.g., DEL. CODE ANN. tit. 10, § 5061 (2011) (providing for a judicial foreclosure process).

⁷ See, e.g., WASH. REV. CODE § 61.24.030(8) (2011) (requiring that written notice of default be transmitted to the borrower at least thirty days before notice of sale); *id.* § 61.24.031(1)(a) (providing for thirty days between initial contact with borrower and notice of default); *id.* § 61.24.040(3) (requiring that the notice of sale be published in a local newspaper).

⁸ Borrowers may also file for bankruptcy to interrupt the foreclosure process by seeking an automatic stay. 11 U.S.C. § 362(a)(1) (2006). The automatic stay is “one of the fundamental debtor protections provided by the bankruptcy laws,” which “gives the debtor a breathing spell from his creditors,” permits the debtor to attempt a repayment or reorganization plan, or simply allows the debtor to be relieved of the financial pressures that drove him or her into bankruptcy. 2 WILLIAM L. NORTON, JR. & WILLIAM L. NORTON, III, NORTON BANKRUPTCY LAW AND PRACTICE § 43:4 (3d ed. 2010). The automatic stay process, however, can entail significant costs to the borrower, including those of a damaged credit record in some jurisdictions. See NANCY C. DREHER, BANKRUPTCY LAW MANUAL § 7:10

A key difference between nonjudicial states and judicial states is that the foreclosure process tends to move more quickly in nonjudicial states, giving borrowers less time to respond to the foreclosure notice, obtain counseling or legal advice, seek a loan modification, or obtain another foreclosure alternative.⁹ One measure of the speed of the foreclosure process in a state is the total time required from the date of the initial notice of default or foreclosure to the date of the foreclosure auction or sale—what we call the minimum “notice-to-sale period.”¹⁰ This period typically begins with some sort of notice that the lender provides to the borrower that the loan is in default and that foreclosure may be pursued, or with an initial advertisement announcing the date of the pending foreclosure sale.¹¹ Assuming a property goes through a foreclosure sale, the “notice-to-sale period” ends on the date of the foreclosure sale or auction.

Nonjudicial foreclosure regimes are generally less friendly to the borrower and more advantageous to the lender than judicial regimes. They provide borrowers with substantially shorter notice periods and fewer opportunities to seek loan modifications or legal assistance. Moreover, states with nonjudicial systems tend to impose fewer duties on the part of the lender and place the burden on the

(5th ed. 2011) (explaining the split in authorities over whether a creditor’s reporting of a debtor’s prepetition debts violates the automatic stay).

⁹ Compare Connecticut, a judicial foreclosure state with a notice-to-sale period of 157 days, with North Carolina, a nonjudicial foreclosure state with a notice-to-sale period of eighty-nine days. Amy Crews Cutts & William Merrill, *Interventions in Mortgage Default: Policies and Practices to Prevent Home Loss and Lower Costs*, in *BORROWING TO LIVE: CONSUMER AND MORTGAGE CREDIT REVISITED* 203, 233-36 (Nicholas Retsinas & Eric Belsky eds., 2008) (depicting state-by-state foreclosure statistics).

¹⁰ The statutorily prescribed minimum notice-to-sale period may differ substantially from the actual time that a borrower is considered to be in the foreclosure process. In general, the latter will tend to be a longer period, especially when the foreclosure process slows down significantly as it has in many states since the foreclosure crisis began. See Tami Luhby, *How to Rescue the Housing Market: Foreclosures!*, CNNMONEY (Aug. 31, 2011, 5:27 AM), http://money.cnn.com/2011/08/31/real_estate/housing_market_foreclosures/index.htm (“[M]any mortgage servicers have slowed foreclosure efforts as they resolve shoddy paperwork practices.”).

¹¹ See, e.g., WASH. REV. CODE § 61.24.030(8) (2011) (requiring that written notice of default must be transmitted to the borrower at least thirty days before notice of sale may be recorded).

borrower to slow or challenge the foreclosure process. Nonjudicial foreclosure regimes provide no structured opportunity for a borrower to have a judicial hearing to contest issues of default or the validity of a foreclosure.¹²

The recently publicized problems with improper foreclosure procedures and fraudulent or missing documentation constitute a prime example of the advantages of a judicial foreclosure process to the borrower.¹³ The suspensions of foreclosure proceedings by large servicers that occurred in late 2010 began in judicial states only, having been prompted by court cases in those states.¹⁴ Such problems are very difficult to detect in most nonjudicial states because borrowers must generally initiate extraordinary interventions in the foreclosure process by filing suit to stop the regular foreclosure proceedings—a difficult and expensive process in most nonjudicial states. Moreover, because foreclosure law in nonjudicial states tends to include fewer borrower protections,¹⁵ the potential for success in the courtroom is often more limited, which also makes legal representation harder to obtain.

Many of the recent, more substantive efforts to reduce foreclosures, including mediation programs, have been commonly

¹² See *Robo-Signing, Chain of Title, Loss Mitigation and Other Issues in Mortgage Servicing: Hearing Before the Subcomm. on Hous. and Cmty. Opportunity of the H. Comm. on Fin. Servs.*, 111th Cong. 7 (2010) (statement by Elizabeth Duke, Member, Board of Governors of the Federal Reserve System), available at <http://financialservices.house.gov/Media/file/hearings/111/Duke111810.pdf> (explaining the differences between the two types of regimes in waiting periods, notice requirements, methods of challenging foreclosure, etc.).

¹³ See, e.g., Treanor & Kollwe, *supra* note 5 (reporting allegedly improper foreclosure procedures).

¹⁴ See TIMOTHY MCKENNA & DR. CHUDOZIE OKONGWU, NERA ECON. COUNSELING, FORECLOSURE SUSPENSIONS AND OTHER MORTGAGE DISPUTES 3 (2010), available at http://www.nera.com/nera-files/PUB_Residential_Mortgage_Foreclosure_1210.pdf (asserting that all of the twenty-three states in which these suspensions have taken place allowed for a judicial foreclosure process, although three of them also allowed nonjudicial proceedings).

¹⁵ Compare DEL. CODE ANN. tit. 10, § 5061(a) (2011) (providing that the borrower may show cause, if there is any, why the mortgaged premises ought not to be seized and taken in execution for payment of the mortgage), with WASH. REV. CODE § 61.24.030(8) (2011) (requiring only that the lien holder provide the borrower with a notice of default and notice of sale).

found in judicial foreclosure states.¹⁶ There are at least two key reasons for this. First, the nonjudicial/judicial status of a state is itself an outcome of the state's historical political environment. That is, states that tend to have stronger consumer protection laws and banking and finance regulations tend to have judicial foreclosure systems. However, this is not an ironclad relationship, as some nonjudicial states exhibit more rigorous consumer protection laws and lending regulations than some judicial states. On average, though, this correlation holds and is generally the result of differences in ideologies and balances of power in the legislative and executive branches across different states. Nonjudicial states often have state legislatures where it has been historically more difficult to pass strong foreclosure laws favoring borrowers. While some change might be expected in light of the foreclosure crisis, state legislative environments in this arena are unlikely to shift quickly.¹⁷

A second reason why judicial states are more likely to initiate efforts to slow or reduce foreclosures is systematic inertia. That is, the judicial process fundamentally offers more time and opportunity for incremental interventions, such as mediation programs, than does the nonjudicial process, where such interventions are more difficult to design and implement without making major changes to the foreclosure process. One example is the issue of timing. Adding a mediation requirement to a foreclosure regime may lengthen the typical foreclosure process by a few weeks or months.

¹⁶ ANDREW JAKABOVICS & ALON COHEN, CTR. FOR AM. PROGRESS, *IT'S TIME WE TALKED: MANDATORY MEDIATION IN THE FORECLOSURE PROCESS* 7 (2009) [hereinafter *IT'S TIME WE TALKED*], available at http://www.americanprogress.org/issues/2009/06/pdf/foreclosure_mediation.pdf.

¹⁷ In response to the late 2010 media attention to foreclosure documentation and process problems, there have already been some proposals in nonjudicial states to switch to a judicial process. In Massachusetts, for example, the Secretary of State proposed a judicial foreclosure process in 2010. Jenifer B. McKim, *Bill Calls for Court OK to Foreclose*, BOSTON GLOBE, Dec. 6, 2010, at 1; see generally H. 503, 187th Gen. Court, Reg. Sess. (Mass. 2011); S. 809, 187th Gen. Court, Reg. Sess. (Mass. 2011). In Virginia, Senator Don McEachin has introduced a bill calling for a transition to a judicial foreclosure process. S.B. 798, 2010 Leg., Reg. Sess. (VA. 2010) (providing for a transition to a judicial foreclosure process after July 1, 2011). The bill provides that a court must order the sale of property subject to foreclosure for deeds of trust entered into on or after July 1, 2011; however, property secured by deeds of trust entered into prior to July 1, 2011, may still be foreclosed upon using current nonjudicial procedures. *Id.*

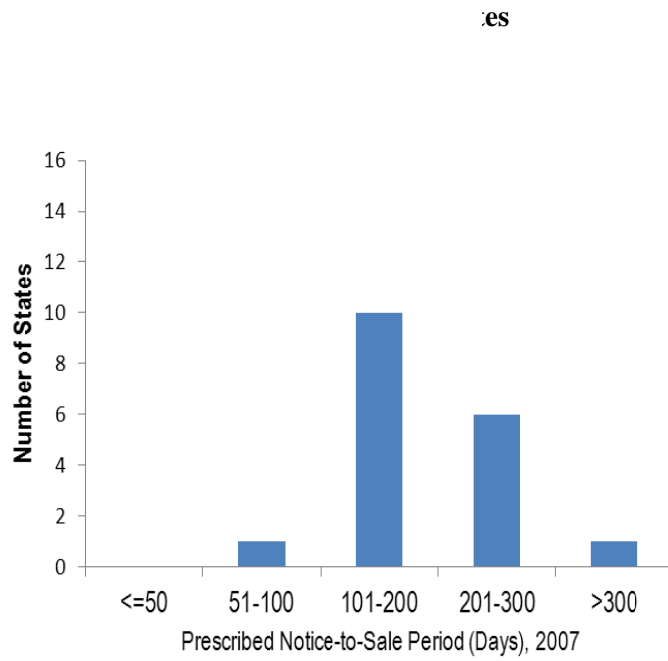
In many nonjudicial states this would mean increasing the foreclosure notice period by 100% or more, while in many judicial states this would be a substantially smaller proportional increase in the overall foreclosure timeline.¹⁸ A second example is that the judicial process affords a borrower the opportunity to challenge not only the existence of an underlying default in payment of the debt, but also the opportunity to challenge the authority of the lender to initiate a foreclosure.¹⁹ Judicial authority and discretion create far greater latitude to respond to sudden changes.

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

¹⁸ Compare New Mexico, a judicial foreclosure state with a notice-to-sale period of 155 days, with North Carolina, a nonjudicial foreclosure state with a notice-to-sale period of eighty-nine days. Adding a sixty-day mandatory mediation period to the New Mexico notice-to-sale period would increase the notice-to-sale period by over 38%, whereas adding a sixty-day mandatory mediation period to the North Carolina notice-to-sale period would increase the notice to sale period by 67%. Cutts & Merrill, *supra* note 9, at 234 tbl. 7-7.

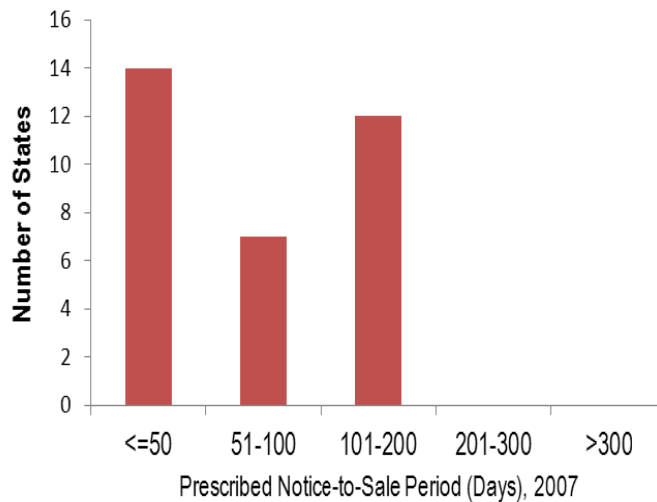
¹⁹ *See, e.g.*, DEL. CODE ANN. § 5061(a) (2011) (providing that the borrower may show cause, if there is any, why the mortgaged premises ought not to be seized and taken in execution for payment of the mortgage).

Figure 1. Distribution of Prescribed Notice-to-Sale Period for Judicial and Nonjudicial States²⁰



²⁰ Cutts & Merrill, *supra* note 9, at 234 tbl. 7-7.

Nonjudicial States



Much more is known about foreclosure prevention and mitigation efforts in judicial states, in part because many of the most substantive and radical changes to the process have occurred in such states. From the borrower's perspective, pushing more states to adopt judicial foreclosure procedures would certainly seem desirable, especially in light of the documentation and legitimacy problems so well publicized over the last few months.²¹ However, achieving such a profound shift will be extremely difficult in many states, at least in the near term. In many cases, it may be more politically viable to work towards incremental changes in existing foreclosure law that might tilt the foreclosure process in favor of the borrower and help mitigate foreclosures.

Even among nonjudicial foreclosure states, there is a great deal of variation in state foreclosure policies. Some nonjudicial states require much longer notice periods than others.²² In some states

²¹ See, e.g., Treanor & Kollewe, *supra* note 5 (reporting allegedly improper foreclosure procedures).

²² See *supra* Figure 1 (depicting the distribution of notice-to-sale periods in judicial states).

lenders have the option—sometimes contingent on the nature of the loan or property—of utilizing either a judicial or nonjudicial foreclosure process.²³ Depending on the state, choosing nonjudicial foreclosure may mean that the lender gives up some of its claims during or after the foreclosure process, such as the ability to pursue a deficiency judgment.²⁴ In states where nonjudicial foreclosure is an option for residential, single-family foreclosures, most lenders tend to use the nonjudicial process when it is available. In all states, including the nonjudicial foreclosure states, a lender always has the option of pursuing foreclosure through a judicial process.

Due to the particularities and variations in state foreclosure law, the distinction between “judicial” and “nonjudicial” states is not completely definitive and is subject to gray areas. For the purposes of this study, we chose to err on being over-inclusive when determining which states to classify as nonjudicial. As a result, we consider 33 states and the District of Columbia as nonjudicial,²⁵ leaving 17 states classified as judicial.²⁶

²³ *See, e.g.*, WASH. REV. CODE § 60.10.020 (2011) (providing that any lien on certain personal property may be foreclosed by action in district court, superior court or summary action).

²⁴ *See, e.g.*, OR. REV. STAT. § 86.770(2) (2011) (providing that an action for deficiency may not be brought against the grantor after a nonjudicial or judicial foreclosure of a residential trust deed). A deficiency judgment, when it is allowed, occurs when the lender is not able to recover the full amount of the outstanding balance and fees by selling the foreclosed property. It allows the lender to pursue the borrower for the balance of the debt in excess of either the foreclosure sale price, or the fair market value of the property at the time of foreclosure. *See* WASH. REV. CODE § 61.12.070 (“[T]he court shall direct in the decree of foreclosure that the balance due on the mortgage, and costs which may remain unsatisfied after the sale of the mortgaged premises, shall be satisfied from any property of the mortgage debtor . . .”).

²⁵ The states that we classify as nonjudicial foreclosure states are Alabama, Alaska, Arkansas, Arizona, California, Colorado, Georgia, Hawaii, Idaho, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Texas, Utah, Virginia, Washington and Wyoming.

²⁶ Our list is similar to that described in JOHN RAO & GEOFF WALSH, NAT. CONSUMER LAW CTR., *FORECLOSING A DREAM: STATE LAWS DEPRIVE HOMEOWNERS OF BASIC PROTECTIONS 12* (2009) [hereinafter *FORECLOSING A DREAM*], available at http://www.nclc.org/images/pdf/foreclosure_mortgage/

II. The Context for State Legislative Response: Federal Policy and State and Local Non-Legislative Actions

Before examining state legislative efforts to reduce residential foreclosures during the latter half of the 2000s, it is important to consider the overall policy context for such legislative actions. For example, legislative efforts among states to slow the foreclosure process or lengthen the notice-to-sale period might have been less common if federal foreclosure prevention and loan modification programs had been more successful. Specifically, state efforts to reduce foreclosures might have been more successful if they were designed differently or if servicers were held more accountable for their loan modification services.

A. Federal Policy Efforts to Reduce Foreclosures

As the subprime crisis intensified in the spring of 2007, Federal Reserve Chairman Ben Bernanke and Housing and Urban Development (“HUD”) Secretary Alphonso Jackson called for federal funding for foreclosure prevention counseling.²⁷ In the fall, Senator Richard Durbin of Illinois introduced the Helping Families Save Their Homes in Bankruptcy Act, which would have allowed bankruptcy judges to modify the balance owed on owner-occupied home loans, an action called a “cramdown.”²⁸ The Durbin bill would have provided direct relief to those filing for bankruptcy and given lenders and servicers an incentive to modify loans voluntarily before

state_laws/foreclosing-dream-report.pdf. However, our list is deliberately a bit more inclusive in favor of the nonjudicial category. The three additional states that we categorize as nonjudicial are Colorado, North Carolina and North Dakota. Colorado and North Carolina foreclosure processes have very minimal roles for the courts and essentially follow a nonjudicial process. North Dakota permits some residential mortgages to go through nonjudicial foreclosure but most go through a judicial process.

²⁷ Press Release, Joint Econ. Comm., Momentum Builds for JEC Chairman Schumer’s Call for Additional Federal Funds to Avert Subprime Foreclosure Crisis (June 5, 2007), *available at* <http://jec.senate.gov/public/index.cfm?p=PressReleases> (browse by “June 2007”; then follow the hyperlink dated “06/05/07”).

²⁸ Helping Families Save Their Homes in Bankruptcy Act of 2007, S. 2136, 110th Cong. § 101(a)(3) (as introduced by Sen. Richard Durbin, Oct. 3, 2007).

the borrower filed for bankruptcy. Such a change would, in essence, have created maximum net present values for residential loans, a benchmark by which to measure loan modifications. Ultimately, however, industry lobbyists blocked the bill.

At roughly the same time as Durbin introduced his bill, the Bush administration announced the Hope Now Alliance, which included lenders, industry groups and other organizations.²⁹ The Alliance encouraged borrowers to call a 1-800 number to receive telephone credit counseling. In December 2007, while opposing continued calls for bankruptcy modification legislation, the Administration announced that it would promote “streamlined,” but voluntary, modifications for a subset of subprime mortgages.³⁰ The plan was developed in conjunction with the American Securitization Forum, a structured finance trade group.³¹ Participation in the program was voluntary in nature, however, and it suffered from various other problems which ultimately limited its impact.³²

In July of 2008, with foreclosures continuing to escalate, Congress passed the Housing and Economic Recovery Act of 2008 (HERA).³³ HERA was a complex bill that included the formation of

²⁹ STEPHANIE CASEY PIERCE, NGA CTR. FOR BEST PRACTICES, EMERGING TRENDS: STATE ACTIONS TO TACKLE THE FORECLOSURE CRISIS 9 (2009), available at <http://www.nga.org/files/live/sites/NGA/files/pdf/0902FORECLOSUREREPORT.PDF>.

³⁰ *Bush Unveils Plan to Help Subprime Borrowers*, MSNBC.COM (Dec. 6, 2007, 4:19 PM), http://www.msnbc.msn.com/id/22132648/ns/business-real_estate/t/bush-unveils-plan-help-subprime-borrowers/#.TqDJBd6InqE.

³¹ See AMERICAN SECURITIZATION FORUM, STREAMLINED FORECLOSURE AND LOSS AVOIDANCE FRAMEWORK FOR SECURITIZED SUBPRIME ADJUSTABLE RATE MORTGAGE LOANS 2 (2007), available at <http://www.americansecuritization.com/uploadedFiles/FinalASFStatementonStreamlinedServicingProcedures.pdf> (“We believe that applying the framework outlined in this Statement will streamline the loss mitigation efforts of servicers, and will maximize trust proceeds to investors as compared to the proceeds typically realized through foreclosure.”).

³² Servicers and the Hope Now Alliance were under pressure to report large numbers of modifications, but Alan White found that only forty-seven percent of modifications resulted in reduced payments, and in thirty-five percent of cases payments actually increased. Alan M. White, *Deleveraging the American Homeowner: The Failure of 2008 Voluntary Mortgage Contract Modifications*, 41 CONN. L. REV. 1107, 1116-17 (2009).

³³ Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2264 (2008).

a stronger regulator for Fannie Mae and Freddie Mac,³⁴ the authorization of the Neighborhood Stabilization Program,³⁵ tax breaks for residential builders, a first-time homebuyer's tax credit,³⁶ and other initiatives. The largest foreclosure prevention component in HERA was the \$300 billion Hope for Homeowners program, commonly referred to as the "H4H" program.³⁷ H4H was to be run by the Federal Housing Administration (FHA) to refinance distressed borrowers.³⁸ As initially implemented, H4H required lenders to write-down existing mortgages and refinance borrowers into loans for not more than ninety percent of their homes' current values.³⁹ However, the program was not designed to deal with the many borrowers that had second and sometimes third mortgages layered on top of their primary loans.⁴⁰ Holders of junior loans were not inclined to agree to refinancings that would wipe out their interests. As a result of this and other problems, the program received only 312 applications from across the entire country in its first two and one half months of operation.⁴¹

³⁴ *Id.* § 1101.

³⁵ *Id.* § 2301.

³⁶ *Id.* § 3011.

³⁷ *Id.* § 1402.

³⁸ *Id.* §§ 1402, 257(b)(1).

³⁹ *Id.* §§ 1402, 257(e)(2)(B).

⁴⁰ For example, the proportion of senior mortgages with associated junior mortgages increased in Massachusetts from twenty six percent in 2003 to sixty-five percent in 2005. Eric S. Rosengren, President and CEO, Fed. Reserve Bank of Bos., Current Challenges in Housing and Home Loans: Complicating Factors and the Implications for Policymakers, Address at the New England Economic Partnership's Spring Economic Outlook Conference on Credit, Housing, and the Consequences for New England 11 (May 30, 2008) (transcript available at <http://www.bos.frb.org/news/speeches/rosengren/2008/053008.htm>).

⁴¹ Dina ElBoghdady, *HUD Chief Calls Aid on Mortgages a Failure*, WASH. POST, Dec. 17, 2008, at A1. HUD modified the program in November 2008 by increasing the maximum loan amount to 96.5% of the appraised value for some loans, but the changes did not make the program effective. See Press Release, U.S. Dep't of Hous. and Urban Dev., Bush Administration Announces Flexibility for "Hope for Homeowners" Program (Nov. 19, 2008), available at <http://archives.hud.gov/news/2008/pr08-178.cfm>; Les Christie, *HOPE Prevents 1 Foreclosure*, CNNMONEY (Mar. 25, 2008, 12:25 PM), [_http://money.cnn.com/2009/03/25/real_estate/new_hope_plan/](http://money.cnn.com/2009/03/25/real_estate/new_hope_plan/) (reporting that the program had since its inception helped prevent only one foreclosure).

In September 2008, Treasury Secretary Henry Paulson proposed the \$700 billion Troubled Asset Relief Program (TARP), which was included in the Emergency Economic Stabilization Act (EESA) that was signed into law in October of that year.⁴² In implementing EESA, however, the Bush Administration declined to use TARP funds to provide direct assistance to homeowners at risk of foreclosure.⁴³ In January 2009, the incoming Obama administration obtained Congressional approval to access the second half of the \$700 billion in TARP funds.⁴⁴ The incoming director of the National Economic Council wrote to Congress that the new administration would use \$50 to \$100 billion of the funds for foreclosure mitigation.⁴⁵ The letter also suggested that the new administration would seek to change bankruptcy laws to permit cramdowns of primary residence loans.⁴⁶

In February 2009, the Obama Administration announced its much-anticipated plan to reduce foreclosures, the Making Home Affordable (MHA) program.⁴⁷ In addition to pledging more capital to Fannie Mae, Freddie Mac and other government-sponsored enterprises (GSEs), MHA included two primary programs.⁴⁸ One

⁴² Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, §§ 101-36, 122 Stat. 3765, 3767-800 (2008).

⁴³ See *id.* § 110 (directing federal agencies to “implement a plan that seeks to maximize assistance for homeowners . . . to minimize foreclosures.”); Mark Mooney, *Bush to Ask for TARP; Obama to ‘Rebrand’ It*, ABCNEWS.COM (Jan. 12, 2009), <http://abcnews.go.com/GMA/Economy/story?id=6626721&page=1> (explaining Congress’ disapproval over how little of the TARP funds had been spent on helping homeowners).

⁴⁴ *Id.*

⁴⁵ Letter from Lawrence Summers, Dir.-Designate, Nat’l Econ. Council, to Nancy Pelosi, Speaker of the U.S. House of Representatives, John Boehner, U.S. Representative, Harry Reid, U.S. Senator & Mitch McConnell, U.S. Senator (Jan. 15, 2009), available at http://change.gov/newsroom/entry/letter_from_lawrence_h_summers_to_congressional_leaders/.

⁴⁶ *Id.*

⁴⁷ *Obama Administration to Expand Housing Plan*, MSNBC.COM (May 14, 2009, 11:30 AM), http://www.msnbc.msn.com/id/30744879/ns/business-real_estate/t/obama-administration-expand-housing-plan/; see generally MAKING HOME AFFORDABLE, <http://www.making-homes-affordable.com/> (last visited Aug. 21, 2011).

⁴⁸ *Making Home Affordable Program Guidelines*, MAKING HOME AFFORDABLE, <http://www.making-homes-affordable.com/Guidelines/making-home-affordable-guidelines.htm> (last visited Oct. 21, 2011) [hereinafter *Making Home Affordable*].

program, the Home Affordable Refinance Program (HARP), allowed for the refinancing of existing GSE loans up to 125% of the current value of the home.⁴⁹ The second and more ambitious component of MHA, the Home Affordable Modification Program (HAMP), called on lenders to reduce mortgage payments to thirty-one percent of borrower income, after which the federal government would pay fifty percent of the cost of reducing them to thirty-eight percent of income.⁵⁰ The plan provided some compensation to servicers and annual incentives to borrowers who remained current.⁵¹ HAMP also implemented a procedure for evaluating borrower claims for loan modifications and for implementing the modification process.⁵²

HAMP was complemented by the near simultaneous introduction of HR 1106, which, among other things, resurrected the bankruptcy modification proposal contained in the earlier proposal by Senator Durbin.⁵³ The Senate, however, rejected the cramdown provision.⁵⁴ The final bill, the Helping Families Save Their Homes Act (HFSTHA),⁵⁵ did include a requirement that, for most mortgages, lenders provide tenants of foreclosed properties with 90-day notice prior to eviction.⁵⁶ This was an important provision, not only due to its intended protection for tenants, but also because it represented the first time that federal law intervened directly in the foreclosure process. While some states have adopted their own tenant notification laws, HFSTHA set a new floor for tenant protection in the event of foreclosures and may have reduced the level of state activity in this area.

Without the stick of bankruptcy modification, HAMP relied chiefly on modest carrots in the form of small incentive payments to

⁴⁹ *HARP—Home Affordable Refinancing Program*, MAKING HOME AFFORDABLE, <http://www.making-homes-affordable.com/harp-program.htm> (last visited Aug. 21, 2011).

⁵⁰ *Making Home Affordable*, *supra* note 48.

⁵¹ *Id.*

⁵² *Id.*

⁵³ Helping Families Save Their Homes Act, H.R. 1106, 111th Cong. § 103 (2009).

⁵⁴ The amendment was proposed on April 30, 2009, but failed to achieve the required 60 votes in the affirmative and was later withdrawn from the Senate. *Senate Vote # 174*, GOVTRACK.US (Apr. 30, 2009, 2:47 PM), <http://www.govtrack.us/congress/vote.xpd?vote=s2009-174>.

⁵⁵ Helping Families Save Their Homes Act of 2009, Pub. L. No. 111-22, 123 Stat. 1632 (2009).

⁵⁶ *Id.* § 702(a)(1).

servicers and borrowers. The Administration hoped that HAMP would result in more than three million permanent mortgage modifications.⁵⁷ Although it was a more substantive and ambitious effort than the industry-led Hope Now alliance, HAMP was slow to generate any results: as of October 2010 HAMP had produced almost 1.4 million initial modifications, but fewer than 500 thousand of these had moved past the trial period and become permanent.⁵⁸ Moreover, by late 2010, even the pace of temporary modifications began to slow.⁵⁹

Unfortunately, HAMP was not well suited to deal with delinquencies and foreclosures driven by growing unemployment and borrowers whose homes were worth less than their outstanding mortgage. Without realigning loan balances with property values, borrowers with severe negative equity⁶⁰ had limited motivation to maintain ownership of their houses, especially if it meant defaulting on other debts or placing severe strains on household finances. At the same time, without the threat of bankruptcy modification, servicers and investors had limited incentive to make sustainable loan modifications in numbers large enough to affect foreclosure volumes.

Another TARP-funded program was the Housing Finance Agency Innovation Fund for the Hardest Hit Housing Markets (or the “Hardest Hit Fund”):

In February of 2010, the Obama Administration announced that \$1.5 billion from Troubled Asset Relief Program (TARP) funds would be made available to five states hit hard by the foreclosure crisis. These funds were aimed at promoting “innovative measures” to help families directly

⁵⁷ See U.S. DEP’T OF THE TREASURY, MAKING HOME AFFORDABLE PROGRAM: SERVICER PERFORMANCE REPORT THROUGH OCTOBER 2010 7 (2010), available at <http://www.treasury.gov/initiatives/financial-stability/results/MHA-Reports/Documents/Oct%202010%20MHA%20Public%20Final.pdf> (explaining that forty-one percent to fifty-five percent of the program’s goal of three to four million modification offers had been met).

⁵⁸ *Id.* at 2.

⁵⁹ Although ninety-four thousand HAMP trials were started in January 2010, only 29,764 were started in December 2010. *Id.* at 2.

⁶⁰ “Negative equity” refers to the situation in which the total amount of indebtedness secured by all mortgages on a parcel of property exceeds the fair market value of the property.

affected by the foreclosure crisis. The five states, which include Arizona, California, Florida, Michigan and Nevada, were those experiencing house price declines of more than twenty percent from their peak values. . . . The funding would flow through state housing finance agencies (HFAs), which have a great deal of experience with designing and implementing mortgage revenue bond and homeownership financing programs. . . . In late March 2010, the Administration announced a second round of the Hardest Hit Fund (HHF) involving \$600 million in additional funding to five more states⁶¹

The five states covered by the second round—North Carolina, Ohio, Oregon, Rhode Island and South Carolina—were states with areas of dense unemployment.⁶² A third round of HHF funding, which was awarded to states with high unemployment rates, provided \$2 billion to seventeen states and the District of Columbia, including nine of the ten states in rounds one and two.⁶³ The third round of HHF funding was designated specifically for programs to help unemployed homeowners make their mortgage payments over a specified period.⁶⁴ Finally, a fourth round of funding provided an additional \$3.5 billion to states funded in rounds one, two or three.⁶⁵

B. State and Local Nonlegislative Action

The most common state and local foreclosure prevention efforts include outreach and counseling, financial assistance and legal assistance programs, all of which tend to rely heavily on federal resources. These efforts are sometimes coordinated or organized via statewide or local foreclosure prevention task forces or networks. They may also be complemented by community organizations aimed

⁶¹ Dan Immergluck, *State Foreclosure Mitigation Strategies: A Comparison of Round 1 and 2 Hardest Hit Fund Plans in States With Nonjudicial Foreclosure Processes 1* (Oct. 20, 2010) (unpublished manuscript) [hereinafter *State Foreclosure Mitigation Strategies*], available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1695217.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

at holding lenders more accountable so that they can increase responsiveness to borrowers' needs and help borrowers progress through loss mitigation and loan modification programs.

1. Outreach and Counseling

Housing counselors help assess the financial hardship of borrowers, determine the options available to them, advocate for borrowers, and serve as a liaison between borrowers and lenders. Federal legislation was created in 2007 to fund a national network of counselors through the National Foreclosure Mitigation Counseling (NFMC) program, which is administered by NeighborWorks America.⁶⁶ Some states and cities have supplemented this funding through their own initiatives, and nonprofit organizations have responded by augmenting their staff and programs to attempt to meet a much higher demand for services.

Foreclosure prevention counseling appears to make a significant difference in reducing foreclosures. The Urban Institute's recent evaluation of the NFMC program found that in the first two years of the program, the odds of counseled borrowers curing their loan defaults and avoiding foreclosure were seventy percent higher than if they had not received counseling.⁶⁷ According to the evaluation, thirty-two thousand homeowners avoided foreclosure as a direct result of NFMC counseling between 2008 and 2009.⁶⁸

One of the key challenges for foreclosure prevention counseling programs is to reach out effectively to at-risk homeowners. Counselors and foreclosure prevention task forces have employed innovative approaches to reach these borrowers. In Grand Rapids, Michigan, local residents and organizations created Foreclosure Response, a comprehensive clearinghouse made up of a diverse group of stakeholders to disseminate information and coordinate

⁶⁶ *National Foreclosure Mitigation Counseling Program*, NEIGHBORWORKS AMERICA, <http://www.nw.org/network/foreclosure/nfmcp/> (last visited Oct. 21, 2011).

⁶⁷ NEIL MAYER ET AL., NATIONAL FORECLOSURE MITIGATION COUNSELING PROGRAM EVALUATION: PRELIMINARY ANALYSIS OF PROGRAM EFFECTS, SEPTEMBER 2010 UPDATE, URBAN INSTITUTE 34 (2010), *available at* <http://www.urban.org/uploadedpdf/412276-prelim-analysis-program-effects-Sep-2010.pdf>.

⁶⁸ *Id.* at 35.

interventions.⁶⁹ Its Eyes Wide Open Program enlists the help of neighborhood residents as “volunteer monitors” to spread the word about counseling to neighbors having trouble making payments and to report neglected vacant homes.⁷⁰ Foreclosure Response has also implemented place-based targeted marketing, outreach, and education efforts.⁷¹

The Michigan AmeriCorps Foreclosure Corps program was created by the Michigan Coalition Against Homelessness, the Michigan Foreclosure Task Force, and the Community Economic Development Association of Michigan.⁷² It employs AmeriCorps members to conduct volunteer training, community outreach, client intake, and educational workshops.⁷³

2. Financial Assistance

Some nonjudicial foreclosure states provide direct financial assistance to borrowers. Prior to the advent of the Hardest Hit Fund program, most state and local efforts to provide direct financial assistance involved refinancing borrowers into lower-cost, fixed rate loans, or providing emergency loans to borrowers. Generally, the scale of these refinancing programs was modest for two reasons. First, many borrowers had loans that were simply too large to refinance without first receiving a principal reduction from the existing lender (i.e., receiving what is known as a “short refinance”). Second, as unemployment, rather than high-cost loans, began to cause foreclosures the opportunities to resolve problems by simply replacing high-cost with low-cost financing declined.

Some states provide short-term emergency assistance programs to cover late payments and other arrearages for borrowers who, once these arrearages are resolved, can afford their existing

⁶⁹ *Organizing for Action in Kent County, Michigan*, FORECLOSURE-RESPONSE.ORG, http://www.foreclosure-response.org/policy_guide/coordinated_response.html?tierid=315 (last visited Oct. 17, 2011).

⁷⁰ *You Can Help Protect Your Neighborhood and Property Values*, FORECLOSURERESPONSE.ORG, http://www.foreclosurereponse.org/?page_id=166 (last visited Oct. 17, 2011).

⁷¹ *Organizing for Action in Kent County, Michigan*, *supra* note 69.

⁷² *Michigan AmeriCorps Foreclosure Prevention Corps*, COMMUNITY ECONOMIC DEVELOPMENT ASSOCIATION OF MICHIGAN, <http://cedam.info/resources/mftf/mafc.php> (last visited Oct. 17, 2011).

⁷³ *Id.*

loan or can qualify for a loan modification. For example, North Carolina established its Homeowner Protection Program to provide loans to homeowners who had lost their jobs.⁷⁴

3. Legal Assistance

Borrowers in most nonjudicial states are often faced with rapid foreclosure processes, and already financially strapped homeowners must take affirmative legal action against their lenders to prevent or delay the foreclosure process. These homeowners are often unable to afford legal counsel or navigate the legal system on their own. Additionally, the availability of legal assistance lawyers who are adequately trained in foreclosure law is uneven in some areas.⁷⁵ Some states and localities have responded by partnering with bar associations to provide pro bono assistance to homeowners at risk of foreclosure. For example, Arizona's Lawyers Helping Homeowners (LHH), a program that assigns pro bono attorneys to income-eligible homeowners facing foreclosure, is coordinated by the State Bar of Arizona, Arizona Foundation for Legal Services and Education and the Arizona Supreme Court.⁷⁶

Unfortunately, building a strong program of pro bono legal assistance for homeowners is difficult. Such programs would require significant additional funding to provide direct legal assistance to the large volume of homeowners facing foreclosure. While federal funding for housing counseling has increased significantly since the advent of the foreclosure crisis, efforts to increase funding for legal-assistance-based foreclosure prevention have not received as much support. In awarding more than \$7 billion to states through the Hardest Hit Fund, the Treasury Department allocated some funding to counseling but prohibited states from devoting the funding to legal assistance for borrowers.⁷⁷ Moreover, as federal, state, and local

⁷⁴ *Summary of N.C. Housing Finance Agency Programs*, NORTH CAROLINA HOUSING FINANCE AGENCY, <http://www.nchfa.com/About/facts.aspx> (last visited Oct. 10, 2010).

⁷⁵ See PIERCE, *supra* note 29, at 11-12 (comparing the legal training of foreclosure lawyers in multiple states).

⁷⁶ *Id.* at 11.

⁷⁷ See *State Foreclosure Mitigation Strategies*, *supra* note 61, at 6 n.4; Katrina vanden Heuval, *Treasury Blocks Legal Aid for Homeowners Facing Foreclosure*, THE NATION. (Dec. 9, 2010, 10:06 AM), <http://www>.

budget pressures continue, legal aid programs may face even greater resource constraints.

4. Community Organizing and Advocacy

The federal government's heavy reliance on incentives alone has hindered its efforts to encourage banks to work with borrowers, modify loans, and otherwise mitigate foreclosure problems. One approach that some locally based organizations have taken is to combine housing counseling with targeted community organizing and advocacy, aimed either at changing public policy or at persuading lenders and servicers to work more aggressively to reduce foreclosures. Around the country, perhaps no other group has been viewed as more effective in this area than Empowering and Strengthening Ohio's People (ESOP).⁷⁸ Formerly called the East Side Organizing Project because of its focus on the east side of Cleveland, ESOP has a long history of negotiating with banks around local lending practices. ESOP developed a strategy called "rank 'em and spank 'em".⁷⁹ Under this approach, ESOP meets with homeowners to determine which lenders are most difficult to deal with and then campaigns to get the lender to sign a commitment to systematic modifications.⁸⁰ By the fall of 2008, ESOP had arranged twelve signed agreements that covered roughly twenty lenders and servicers.⁸¹ ESOP also participated in counseling, with workout rates of more than seventy-five percent.⁸²

While ESOP operates in Ohio, a judicial foreclosure state, there have been significant organizing campaigns to reduce foreclosures in nonjudicial states. In California, the Contra Costa Interfaith Supporting Community Organization (CCISCO) has demanded meetings with lenders and servicers.⁸³ CCISCO has also

thenation.com/blog/156973/treasury-blocks-legal-aid-homeowners-facing-foreclosure.

⁷⁸ ESOP, <http://www.esop-cleveland.org/> (last visited Aug. 24, 2011).

⁷⁹ Todd Swanstrom et al., *Regional Resilience in the Face of Foreclosures: Evidence from Six Metropolitan Areas* at 14 (MacArthur Found. Research On Building Resilient Regions, Working Paper No. 2009-05), available at <http://metrostudies.berkeley.edu/pubs/reports/2009-05.pdf>.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ CONTRA COSTA INTERFAITH SUPPORTING CMTY. ORG., BANK ACCOUNTABILITY: THE KEY TO KEEPING FAMILIES IN THEIR HOMES 2 (2010)

tried to slow down the foreclosure process by encouraging counties to prohibit sheriffs from delivering foreclosure notices unless the servicer has made a good faith effort to modify the loan.⁸⁴ They also engaged in a campaign to persuade the City of Richmond to stop doing business with banks with high local loan default rates.⁸⁵

In Georgia, the Atlanta Fighting Foreclosures Coalition (AFFC) is a group of approximately forty organizations including unions, housing groups, civil rights groups and others that advocate public policy changes and pressure large servicers to work with borrowers through loan modifications. AFFC was successful in getting one servicer to halt its foreclosures temporarily and drew the national leadership of the AFL-CIO into discussions with another.⁸⁶

5. The Role of State Leadership

State political leaders have taken a variety of nonlegislative steps to reduce foreclosures. Such steps include establishing state-wide foreclosure prevention task forces and negotiating agreements with servicers to improve loan modification and loss mitigation efforts. At least twenty-four states—both judicial and nonjudicial—have organized comprehensive task forces to address the foreclosure problem.⁸⁷ These task forces bring together public and private stakeholders to identify priorities and work toward solutions to reduce foreclosures and mitigate their impact.⁸⁸ The Massachusetts Division of Banks organized two working groups, one that focused on rules and enforcement, while the other focused on consumer education and foreclosure assistance.⁸⁹ In Colorado, a task force

available at <http://ccisco.org/wp-content/uploads/2010/03/Bank-Accountability-The-Key-to-Keeping-Families-in-Their-Homes.pdf>.

⁸⁴ Swanstrom et al., *supra* note 79, at 29.

⁸⁵ *Id.*

⁸⁶ Katrina vanden Heuvel, *AFL Takes on Foreclosures and Payday Lending*, THE NATION. (Aug. 19, 2010, 10:30 AM), <http://www.thenation.com/blog/154076/afl-takes-foreclosures-and-payday-lending>.

⁸⁷ PIERCE, *supra* note 29, at 49.

⁸⁸ *See id.* at 10 (describing the role of task forces in Arizona and Colorado).

⁸⁹ *See Mortgage Summit Working Groups Release Report*, MASS.GOV (Apr. 11, 2007), <http://www.mass.gov/ocabr/mortgage-summit-working-groups-release-report.html> (“[T]wo Working Groups were formed in December 2006 and began meeting in January 2007: one looking at rules and enforcement and the second focusing on consumer education and foreclosure assistance.”).

created a video to help train foreclosure counselors.⁹⁰ Some of the work of these task forces may eventually lead to changes in state foreclosure law.

Several governors of nonjudicial states have established agreements with banks that service large numbers of loans in their states.⁹¹ The specific terms of the agreements include freezing adjustable interest rates, streamlining loan modification efforts and reporting progress back to state government. Nonjudicial states that have implemented these types of agreements include California, Michigan, Minnesota and Maryland.⁹² Maryland's governor negotiated an agreement with six servicers requiring that they (1) provide homeowners a timely answer after submission of loss mitigation packages, (2) halt foreclosures while considering the mitigation, (3) designate representatives who serve as a point of contact during the foreclosure process, and (4) establish staff incentives for loan modifications.⁹³

Michigan's governor reached an agreement with four major servicers who agreed to reach out to at-risk borrowers, streamline modifications and offer a five-year interest rate freeze.⁹⁴ They also agreed to report regularly to the Michigan Office of Financial Insurance on their outreach and modification efforts.⁹⁵ The Minnesota Department of Commerce and state servicers and lenders created the Minnesota Foreclosure Prevention Compact. The compact involves voluntary mediation, prevention workshops, housing counselors, streamlined loan modification and progress reports. It also requires that lenders submit homeowner contact information to counselors when the foreclosure process is initiated.⁹⁶

Besides governors, attorneys general in some states—including some nonjudicial states—have been key leaders in

⁹⁰ PIERCE, *supra* note 29, at 10.

⁹¹ *See id.* (“Beginning in 2007, governors began working directly with loan servicers and lenders to create plans for lowering the number of foreclosures.”).

⁹² *Id.* at 19.

⁹³ *Id.* at 20.

⁹⁴ *Radio Address: Granholm Meets with Mortgage Servicers to Ensure They Will Help Avoid Foreclosures*, MICHIGAN.GOV, <http://www.michigan.gov/som/0,1607,7-192-50778-183346--,00.html> (last visited Oct. 17, 2011).

⁹⁵ *Id.*

⁹⁶ Press Release, Minn. Dep't of Commerce, Governor Pawlenty Announces Additional Actions To Assist Homeowners Facing Foreclosure (Apr. 14, 2008) (on file with author).

addressing the foreclosure crisis. They have investigated mortgage lenders and servicers over violations of consumer protection and fair lending laws. One of the outcomes they often seek is the establishment of a program to improve and increase loan modifications. In October 2010, attorneys general from Arizona, Illinois, Florida, Colorado, Nevada, New Jersey, Texas and Washington reached a settlement with Wells Fargo, which agreed to pay \$24 million and reduce the amount owed on certain mortgages by about \$400 million.⁹⁷ The settlement followed an investigation into the marketing of risky, payment-option mortgages by Wachovia Corp. and Golden West Financial Corp., both of which were acquired by Wells Fargo.⁹⁸ For these loans Wells Fargo agreed to reduce the loan's balance to 150% of the home's value.⁹⁹ Wells Fargo also agreed to additional steps that could reduce a borrower's monthly payment to no more than thirty-one percent of his or her gross monthly income.¹⁰⁰ Borrowers who make three years of timely payments could qualify for an additional principal reduction.¹⁰¹

III. Key Findings from Recent Studies of State Foreclosure Law

Over the last two years, there have been a number of analyses of state foreclosure law and efforts to modify such law to reduce foreclosure levels. These include reports issued by the National Governors' Association,¹⁰² the National Consumer Law Center,¹⁰³ the Center for American Progress,¹⁰⁴ and the Pew Center

⁹⁷ *Wells Fargo Mortgage Balances Reduced in 8 States*, MYBANKTRACKER.COM, <http://www.mybanktracker.com/bank-news/2010/10/07/wells-fargo-mortgage-balances-reduced-8-states/> (last visited October 19, 2011).

⁹⁸ Ruth Simon, *Mortgage Pact Set for Wells, Eight States*, WALL ST. J., Oct. 7, 2010, at C3.

⁹⁹ *Wells Fargo Mortgage Balances Reduced in 8 States*, *supra* note 97.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *See, e.g.*, PIERCE, *supra* note 29; LAUREN STEWART, NAT'L GOVERNORS ASS'N CTR. FOR BEST PRACTICES, 2009 STATE RESIDENTIAL MORTGAGE FORECLOSURE LAWS (2010), available at <http://www.nga.org/files/live/sites/NGA/files/pdf/1001FORECLOSURELAWS2009.PDF>.

¹⁰³ FORECLOSING A DREAM, *supra* note 26.

¹⁰⁴ *See, e.g.*, IT'S TIME WE TALKED, *supra* note 16; ALON COHEN & ANDREW JAKABOVICS, CTR. FOR AM. PROGRESS, NOW WE'RE TALKING: A LOOK AT CURRENT STATE-BASED FORECLOSURE MEDIATION PROGRAMS

on the States.¹⁰⁵ Taken as a whole, this recent literature focuses on efforts to improve loan modification and loss mitigation efforts, especially via interventions such as mandatory or voluntary mediation programs. The studies do not focus on nonjudicial foreclosure states, however, and most do not aim to provide a comprehensive picture of legislative actions during the foreclosure crisis.

Many states, including California, Colorado, Michigan and Nevada, have temporarily halted the foreclosure process to facilitate loan workouts and mediation.¹⁰⁶ In the summer of 2009, California imposed a ninety-day moratorium on foreclosure proceedings.¹⁰⁷ However, all the major loan servicers were allowed to continue unabated because they had comprehensive loan modification programs already in place.¹⁰⁸ As a result, most foreclosures were unaffected, and the law had minimal impact.¹⁰⁹ Conversely, Nevada's law provides that the borrower's election to participate in an optional mediation program can halt foreclosure proceedings until the mediation is complete, allowing the time necessary to conduct a thorough loan evaluation.¹¹⁰

A number of states have sought to protect distressed homeowners from foreclosure rescue scams that prey on their confusion and fear. These states have enacted greater restrictions on programs that promise to avoid foreclosure but are in fact scams designed to exploit distressed homeowners. The laws typically require full disclosure of a program's terms and conditions, a 'right to rescind' period for homeowners, a limitation on the consulting fees that can be charged, and terms that prevent the transfer of property to the consultant.¹¹¹ The legislation often includes penalties

AND HOW TO BRING THEM TO SCALE (2010) [hereinafter NOW WE'RE TALKING], available at http://www.americanprogress.org/issues/2010/06/pdf/foreclosure_mediation.pdf.

¹⁰⁵ See, e.g., THE PEW CHARITABLE TRUSTS, DEFAULTING ON THE DREAM: STATES RESPOND TO AMERICA'S FORECLOSURE CRISIS (2008) [hereinafter DEFAULTING ON THE DREAM], http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Subprime_mortgages/defaulting_on_the_dream.pdf.

¹⁰⁶ STEWART, *supra* note 102, at 4.

¹⁰⁷ NOW WE'RE TALKING, *supra* note 104, at 27.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Nev. Rev. Stat. § 107.086(3) (2011).

¹¹¹ DEFAULTING ON THE DREAM, *supra* note 105, at 22.

for violating these regulations.¹¹² Maryland was one of the first states to pass such a law in 2005,¹¹³ and several other states have followed suit, including Colorado,¹¹⁴ Massachusetts,¹¹⁵ Minnesota¹¹⁶ and New Hampshire.¹¹⁷ Maryland's emergency legislation prohibits predatory behavior from foreclosure consultants¹¹⁸ and allows homeowners to collect damages if those provisions are violated. Colorado's Foreclosure Protection Act prohibits up-front fees,¹¹⁹ requires agreements to be made in writing,¹²⁰ and creates a three-day rescission period for any contract signed with a foreclosure consultant.¹²¹

Many states have passed mediation program legislation in an effort to have servicers and homeowners explore mutually beneficial alternatives to foreclosure. The goal of these programs is to avoid unnecessary foreclosures by reaching solutions that benefit all parties: homeowners remain in their homes, while servicers reduce their losses from the foreclosure process. Such settlements occur in up to seventy percent of mediation cases.¹²² In other cases when a mortgage is too onerous for a homeowner even after mediation, the process can facilitate a quicker resolution by negotiating a 'graceful exit' for the homeowner which avoids a foreclosure, such as the lender agreeing to accept a deed-in-lieu of foreclosure or consenting to a short sale to a third party purchaser.¹²³ Twenty-one states—most with judicial foreclosure regimes—had implemented foreclosure mediation programs by mid-2010 and several more were considering similar legislation.¹²⁴ These states vary in their approach, but all are striving to provide workable alternatives to foreclosure.

¹¹² *Id.*

¹¹³ MD. CODE ANN. REAL PROP. §§ 7-305 to 309 (2011).

¹¹⁴ COLO. REV. STAT. §§ 6-1-1104 to 1110 (2011).

¹¹⁵ 940 MASS. CODE REGS. 25.00-03 (2011).

¹¹⁶ MINN. STAT. § 325N.01-.18 (2011).

¹¹⁷ N.H. REV. STAT. ANN. §479-B:1 to :11 (2011).

¹¹⁸ MD. CODE ANN. REAL PROP. §§ 7-305 to 309 (2011).

¹¹⁹ COLO. REV. STAT. §§ 6-1-1107 (2011).

¹²⁰ *Id.* §§ 6-1-1104.

¹²¹ *Id.* §§ 6-1-1104 to 1110.

¹²² ALON COHEN, CTR. FOR AM. PROGRESS, WALK THE TALK: BEST PRACTICES ON THE ROAD TO AUTOMATIC FORECLOSURE MEDIATION 2 (2010), available at http://www.americanprogress.org/issues/2010/11/pdf/walk_the_talk.pdf.

¹²³ *Id.*

¹²⁴ GEOFFRY WALSH, NAT'L CONSUMER LAW CTR., *Executive Summary of STATE AND LOCAL FORECLOSURE MEDIATION PROGRAMS: CAN THEY SAVE*

Nevada is the first nonjudicial state to institute a mediation program.¹²⁵ The state legislature passed the bill in May 2009,¹²⁶ and the program began two months later. Under Nevada's mediation program, nonjudicial foreclosures are referred to a court-supervised mediation program. It is a voluntary program that the homeowner must elect to enter within thirty days of being served with a notice of intent to foreclose.¹²⁷ Both parties, the servicer and the borrower, must contribute equally to the mediation fee before the process begins.¹²⁸ The servicer must provide a current appraisal of the property and documentation proving its standing as mortgage-holder during the mediation process.¹²⁹ The servicer must be represented by someone with the authority to finalize a settlement and must negotiate in good faith.¹³⁰ Once in the program, the foreclosure proceedings are suspended until the mediator certifies either a settlement or that the parties acted in good faith but could not reach an agreement.¹³¹

Two features are particular to the Nevada program: the documentation requirement and the good faith requirement. Producing documentation of loan ownership has proved difficult for many servicers and may be contributing to a lower foreclosure rate since the program was instituted.¹³² The good faith requirement allows better enforcement of the intent of the program. If the mediator determines that the servicer is not negotiating in good faith he can recommend the case to the court to impose sanctions including the forced acceptance of a settlement determined by the

HOMES?, at v (2009), available at <http://www.realestateconomywatch.com/wp-includes/upload-files/ReportS-Sept09.pdf>; NOW WE'RE TALKING, *supra* note 104, at 1.

¹²⁵ NOW WE'RE TALKING, *supra* note 104, at 10; *see generally* NEV. REV. STAT. §§ 107.086(3), 107.086(8) (2011); Nev. Foreclosure Mediation R. 1 (2009).

¹²⁶ Assemb. 149, 75th Leg., Reg. Sess. § 2 (Nev. 2009).

¹²⁷ Nev. Foreclosure Mediation R. 5 (2011).

¹²⁸ *Id.* R. 16.

¹²⁹ *Id.* R. 8.

¹³⁰ *Id.* R. 5.

¹³¹ NEV. REV. STAT. §§ 107.086(3), 107.086(8) (2011); Nev. Foreclosure Mediation R. 5, 8, 10, 11, 17 (2011).

¹³² GEOFFRY WALSH, NAT'L CONSUMER LAW CTR., STATE AND LOCAL FORECLOSURE MEDIATION PROGRAMS: UPDATES AND NEW DEVELOPMENTS 3 (2010), available at http://www.nclc.org/images/pdf/foreclosure_mortgage/mediation/report-state-mediation-programs-update.pdf.

judge.¹³³ However, there have been some complaints that the program's mediation administrator has impeded enforcement of this provision.¹³⁴

California has a very different, and arguably less effective, approach to loan negotiation than Nevada.¹³⁵ California requires a telephone conference between the parties before foreclosure instead of formal face-to-face mediation with a neutral third-party.¹³⁶ The law does not require the servicer to include someone with the authority to modify the loan on the phone call, thus limiting the extent of changes that can be made.¹³⁷ The homeowner has fourteen days from being served the notice to call a 1-800 number that will provide a list of local housing counselors.¹³⁸ Contacting the counselor is not required by law, however.¹³⁹ Because there is no third-party supervision, the servicer only has to certify that it made an attempt to contact the homeowner.¹⁴⁰ All of these factors significantly weaken the efficacy of the law. In light of negative feedback from participants and the failure of the modification program to reduce the rate of foreclosure, some have proposed that the law should be revised to include a third-party monitor to moderate the discussions. These measures have met with resistance in the state legislature due to funding concerns

¹³³ See Nev. Foreclosure Mediation R. 6 ("A hearing shall be held, to the extent that the court deems necessary, for the limited purposes of determining bad faith, enforcing agreements made between the parties within the Program, including temporary modification agreements, and determining appropriate sanctions pursuant to NRS Chapter 107 as amended.").

¹³⁴ Some critics of the program have argued that the administrator has prevented effective sanctions even though the authorizing statute specifically provides for such sanctions. *Mortgage Mediation Program*, Nevada Public Radio (Jan. 3, 2011), available at <http://www.knpr.org/son/archive/detail2.cfm?SegmentID=7465&ProgramID=2131>.

¹³⁵ For further discussion on the California loan modification program, see IT'S TIME WE TALKED, *supra* note 16, at 27 (summarizing California's mandate to use a telephone hotline rather than mediation).

¹³⁶ *Id.*

¹³⁷ See *id.* ("Most importantly, the servicer may (but is not required to) involve loss mitigation personnel in the call.").

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ CAL. CIV. CODE § 2923.5(h), (g) (2011).

because California's program, unlike Nevada's, does not charge any fee for the mediation services.¹⁴¹

A survey of these and other mediation programs identifies several important considerations for states moving forward with these efforts. Two of the biggest issues regarding the effectiveness of mediation are how the mediation program is scheduled and how the results of such programs are tracked. Most states utilizing mediation have made it voluntary instead of automatically scheduled and have suffered from low participation rates as a result.¹⁴² After ten months of implementation, Nevada's voluntary program only had a twenty-one percent participation rate.¹⁴³ Thus, experience indicates that automatically scheduling mediation is crucial to creating greater participation among eligible borrowers. The other significant issue is a lack of adequate outcome reporting in many existing programs. California, Nevada, and Michigan have no formal reporting requirements and other programs tend to collect only broad information that does not provide useful detail. This makes it difficult to assess programs, recognize trends or problems in a locality, and share best practices among states.¹⁴⁴

Another issue is the distinction between negotiation and mediation programs. States that utilize negotiation—such as California, Michigan, and Oregon—lack a neutral third party to monitor the proceedings.¹⁴⁵ Mediation is likely to provide greater accountability by requiring a neutral third party.¹⁴⁶ A fourth issue is the timing of mediation within the foreclosure process. It should

¹⁴¹ Nev. Foreclosure Mediation R. 16 (2011); NOW WE'RE TALKING, *supra* note 104, at 28.

¹⁴² NOW WE'RE TALKING, *supra* note 104, at 4.

¹⁴³ *Id.* at 10

¹⁴⁴ See U.S. DEP'T OF JUSTICE, EMERGING STRATEGIES FOR EFFECTIVE FORECLOSURE MEDIATION PROGRAMS 7 (2010), available at <http://www.justice.gov/atj/effective-mediation-prog-strategies.pdf> (“The way to determine whether a mediation program is actually effective is through careful tracking and evaluation of program data. At a minimum, participation and settlement rates should be tracked. A more comprehensive approach would include tracking not just the occurrence of a settlement, but also the substance of the agreement . . . , the time period for achieving resolution . . . , and whether homeowners had the assistance of a counselor or attorney. . . .”).

¹⁴⁵ NOW WE'RE TALKING *supra* note 104, at 5.

¹⁴⁶ *Id.* at 5-6.

occur as early as possible to maximize its benefits and permit enough time to complete the process.

The Center for Responsible Lending (CRL) recommends a loan modification strategy called mandatory loss mitigation.¹⁴⁷ This method requires the servicer to conduct an analysis of potential alternatives to foreclosure. Loss mitigation is part of some state foreclosure laws but is often not adequately enforced. CRL recommends including a loss mitigation application with any formal pre-foreclosure communication in order to gather necessary borrower information such as income and other debt obligations that help determine eligibility.¹⁴⁸

The CRL report also suggests requiring a loss mitigation analysis as early in the pre-foreclosure process as possible. The standards to conduct such an analysis should build on existing regulations such as the federal HAMP requirements or those of Fannie Mae, Freddie Mac, and the FHA, because doing so would avoid the need for each state to develop their own standards.¹⁴⁹ Another recommendation is to require an affidavit explaining to the homeowner why they did or did not qualify for a loan modification. This form would provide accountability for the homeowner to confirm that the servicer used the correct inputs and would allow judicial intervention if necessary.¹⁵⁰ The CRL strongly recommends including enforcement standards in the loss mitigation process that hold servicers responsible to both the borrower and the general public while giving states the power to police these efforts.¹⁵¹ Finally, mediation should be incorporated into the appeals process when a homeowner is denied a loan modification.¹⁵²

¹⁴⁷ See SARA WEED & SONIA GARRISON, CTR. FOR RESPONSIBLE LENDING, FORECLOSURE AS A LAST RESORT: STATES CAN STABILIZE THE HOUSING MARKET BY PREVENTING UNNECESSARY FORECLOSURES 1 (2010), available at <http://www.responsiblelending.org/mortgage-lending/policy-legislation/states/20101021-State-Loss-Mit-Brief-Final.pdf> (suggesting that states use “an existing industry standard, ‘mandatory loss mitigation’”).

¹⁴⁸ *Id.* at 9.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 10.

¹⁵² *Id.*

IV. An Analysis of Legislative Activity in Nonjudicial States

A. The Scope of Legislative Changes

We now directly examine changes in state laws that affect the servicing, default and foreclosure processes of single-family (1-4 unit) residential mortgages. The intent is to understand the scale, scope and nature of the changes that state legislatures adopted as the foreclosure crisis developed and spread nationally. After first analyzing the numbers and types of adopted laws, as well as their relationship to a state's foreclosure rate, we then identify a set of legislatively active states in different parts of the country and examine policy changes in these states more closely. This analysis focuses on the state legislative provisions that cover practices and processes concerning both previously originated mortgages and the handling of loans at some stage of delinquency, default or foreclosure.¹⁵³ For contextual purposes, we also analyze the frequency of laws affecting the origination of mortgage loans and, in particular, provisions to tighten the regulation of high-risk lending or to improve consumer protections in the origination process.

¹⁵³ Not included here are legislative measures aimed at the problems associated with vacant, foreclosed homes and the spillover problems they impose on neighborhoods. These laws include statutes permitting localities to adopt vacant property registration ordinances. Our primary approach was to begin by building a data set of all legislation adopted in nonjudicial foreclosure states from January 2005 to May 2010. For each of the thirty-three nonjudicial states and the District of Columbia, we used Westlaw to identify potentially relevant changes in law by searching the legislative service as well as the bill summaries databases since 2005. Depending upon the theory of mortgage law followed in a given jurisdiction, we searched for terms such as "deed of trust," "mortgage," "security deed" and "foreclosure." We reviewed thousands of enacted bills and code sections relating to the foreclosure process, culling the results to include only relevant pieces of enacted legislation. Once all enacted legislation was identified, each act was coded for the types of provisions that it contained; these categories and subcategories are detailed in Figure 2. Then, summations were tabulated across various categories of provisions and over the five-year period. Because legislative calendars vary across states and legislative activity ebbs and flows at different times in the year, this part of the study only looks at laws enacted through calendar year 2009 instead of looking at the entire timeframe for which we have data (January 2005 through May 2010).

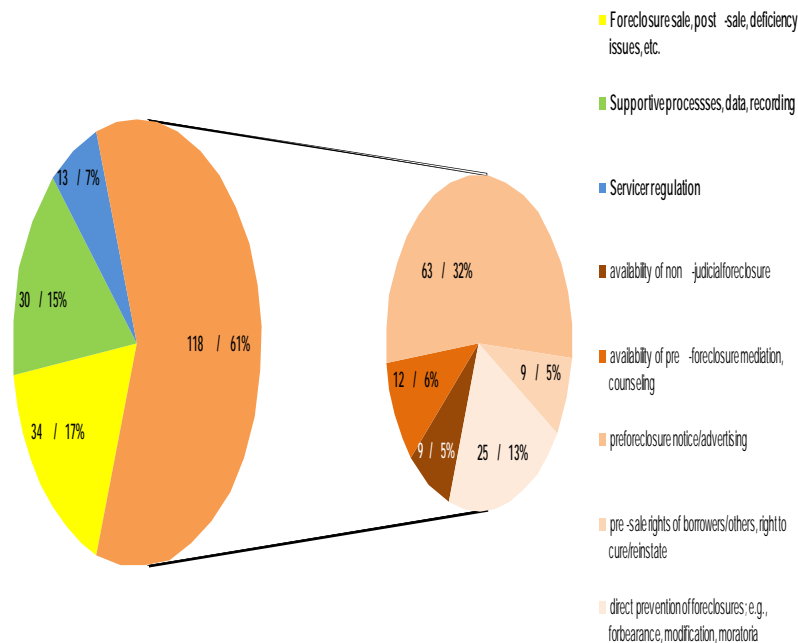
However, the focus is primarily on nearer-term efforts to reduce foreclosures among loans that have already been originated.

The four main categories of legislative provisions¹⁵⁴ are those concerning: (1) the foreclosure sale/auction process itself, and processes and issues immediately following the foreclosure sale/auction; (2) the pre-foreclosure sale process,¹⁵⁵ such as the establishment of mediation programs, notice requirements and procedures, rights to cure and reinstate, and direct efforts to slow or stop foreclosures such as forbearance programs or moratoria; (3) ancillary processes, including data collection and recording requirements; and (4) regulation of loan servicers.

¹⁵⁴ The term legislative “provisions” is used specifically to mean provisions within acts that were deemed to change some aspect of the mortgage process or requirements in the state. The number of such provisions is not equivalent to the “number of adopted bills” or the “number of acts” because one act may include multiple measures affecting different aspects of the mortgage or foreclosure process. Each act was coded for whether it had a substantive impact on each of the categories and subcategories identified. Thus, one act might be coded as falling into several categories.

¹⁵⁵ By “pre-foreclosure sale process,” we mean activities that occur between the time a loan becomes delinquent or in default and the time a foreclosure sale occurs and the property is auctioned either to a third party or to the mortgagee.

Figure 2. Breakdown of Adopted Legislative Provisions: January 2005 to May 2010



Provisions concerning pre-foreclosure sale processes constituted sixty-one percent of the provisions enacted during the study period. The next largest category was provisions concerning foreclosure sale, post-sale and deficiency issues, which accounted for seventeen percent of all provisions. Fifteen percent of provisions concerned supportive processes such as data collection and recording. Only thirteen provisions (seven percent) concerned servicer regulation.

Of the sixty-one percent of provisions concerning pre-foreclosure sale processes, a bit more than half concerned pre-foreclosure sale notice and advertising requirements. The next largest subcategory, accounting for thirteen percent of all provisions and just over twenty percent of the pre-foreclosure sale process provisions, was provisions that directly prevented foreclosures at least on a temporary basis, such as moratoria or forbearance initiatives. Perhaps

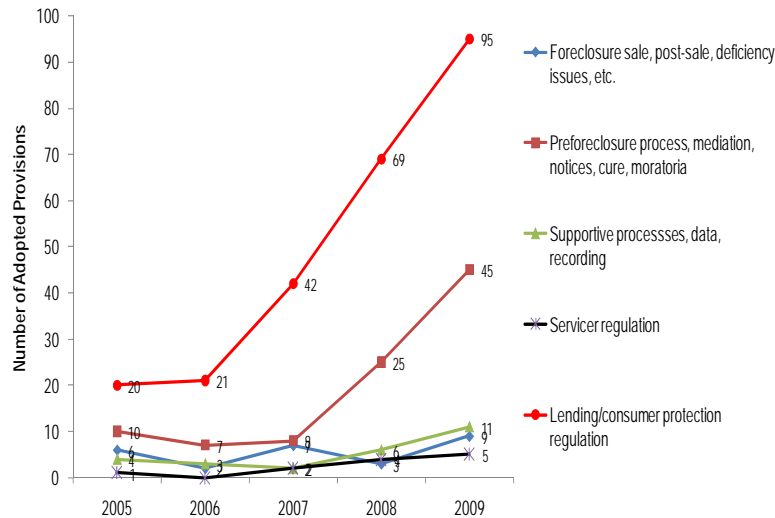
somewhat surprisingly, provisions calling specifically for the availability of counseling or mediation accounted for only six percent of all provisions. This is likely explained by the difficulty of requiring mediation or counseling activities within the structure of a nonjudicial foreclosure system. Such initiatives have been much more common in judicial states.¹⁵⁶

B. Changes in Legislative Activity over Time

The largest increase in legislative provisions aimed at the foreclosure problem, other than lending and consumer protection laws, were those concerning the pre-foreclosure sale process, including those encouraging mediation efforts or loan modification, those requiring increased or earlier notices to borrowers, those changing the foreclosure timeline (typically expanding it), and those imposing some sort of a moratorium on foreclosures. These provisions remained essentially flat from 2005 to 2007 at seven to ten provisions adopted per year, but they increased quite rapidly in 2008 and 2009 as the national foreclosure crisis peaked. Nonjudicial states adopted twenty-five such provisions in 2008 and forty-five in 2009.

¹⁵⁶ IT'S TIME WE TALKED, *supra* note 16, at 7.

Figure 3. Number of Legislative Provisions Adopted in Nonjudicial States, 2005 – 2009



The rise in lending and consumer protection provisions began earlier than the rise in pre-foreclosure sale process provisions, doubling from twenty-one to forty-two from 2006 to 2007. These sorts of provisions continued to accelerate as the magnitude and nature of the subprime crisis intensified and the consequences of poor underwriting became more widely known. Of course, the collapse of many subprime originators and the retrenchment of mortgage market investors from the high-risk loan market were likely also factors in the growing adoption of such provisions, as the number, resources and political strength of opponents of such regulation diminished over this period.

In addition to changes in the pre-foreclosure sale process, there were modest changes in the number of provisions addressing the regulation of loan servicers and supportive processes, such as data collection, reporting and the recordation of foreclosure sales. The former increased from zero in 2006 to five in 2009. The latter decreased modestly from two to four between 2005 and 2007, before increasing to six in 2008 and eleven in 2009.

Legislative activity affecting foreclosure sales, post-sale activities, and deficiency issues, however, does not show any

consistent pattern of growth. The annual number of these provisions bounced around from three to nine between 2005 and 2009.¹⁵⁷ Nonetheless, the results here suggest that some legislatures gave at least modest attention to the loan servicing and foreclosure process even before these problems received national attention.

Among the legislative activities seeking to impact the pre-foreclosure sale process, legislation regulating the foreclosure notice and advertising process grew most between 2007 and 2009. The number of provisions in this subcategory increased from three in 2006 and five in 2007 to sixteen in 2008 and nineteen in 2009. Legislative activity also increased noticeably in the area of foreclosure forbearance, modification and moratoria (from zero to one in 2005 through 2007 to seven in 2008 and eleven in 2009) and in the area of mediation and counseling (from zero in 2005 through 2007 to one in 2008 and eight in 2009). Activity affecting the presale rights of borrowers and tenants and the availability of nonjudicial foreclosure increased less.

C. Provisions That Lengthened or Shortened the Pre-foreclosure Sale Process

One problem that distressed borrowers face in many nonjudicial states is a relatively short foreclosure timeline. In general, the notice-to-sale period in judicial states tends to be significantly longer than in nonjudicial states. In places with brief notice-to-sale periods, opportunities for obtaining a loan modification or attaining some more favorable alternative to foreclosure (e.g., short sales) are more constrained. In fact, cure rates (the rate at which distressed borrowers recover from severe delinquency or default before losing their home via foreclosure, short-sale or deed-in-lieu of foreclosure) fall and foreclosure completion rates increase when pre-foreclosure sale periods are less than four months.¹⁵⁸

During the latter half of the 2000s, several states took steps to add notice periods or lengthen existing periods to provide more opportunities to avoid foreclosure, and only two states reduced the pre-foreclosure sale period. In one of these states, however, the

¹⁵⁷ This period predates the attention given to problems of false or fraudulent documentation and improper foreclosure procedures involving many major lenders. Widespread awareness of these issues did not occur until the fall of 2010, after the focus period of this study.

¹⁵⁸ Cutts & Merrill, *supra* note 9, at 203.

change was not substantial (five days),¹⁵⁹ and in the other state it was a temporary measure intended for abandoned properties or cases where borrowers requested an expedited foreclosure.¹⁶⁰ A total of twenty acts between 2005 and 2009 increased the notice-to-sale period. Moreover, most were enacted in 2008 (six) and 2009 (eight). Most of these changes ranged from a few days to thirty days, with a couple of exceptions. In California, for example, an act in 2009 increased the time between a notice of default and a notice of foreclosure sale by ninety days for mortgages originated between 2003 and 2007. Other nonjudicial states that adopted laws that increased the pre-foreclosure sale process by more than thirty days included Maryland, Massachusetts and Michigan. Some of these acts only applied to certain subsets of loans or borrowers, however, such as loans originated over a specified period.

¹⁵⁹ CAL. CIV. CODE § 2924(a)(4) (West 2011) (providing that the person authorized to take a sale may file a notice of sale up to five days before the lapse of the three-month notice-to-sale period).

¹⁶⁰ COLO. REV. STAT. § 38-38-903(1)(c) (2011) (providing that an eligible debt holder may file a motion for an order for expedited sale if “the property has been abandoned or, in the alternative, the grantor of the deed of trust requests the order for expedited sale”).

Figure 4. Legislative Provisions Addressing Pre-foreclosure Sale Process by Subcategory

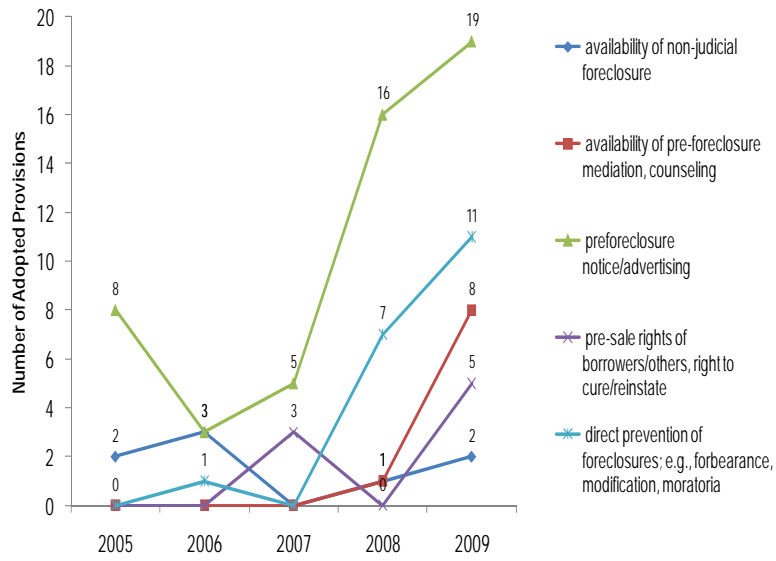
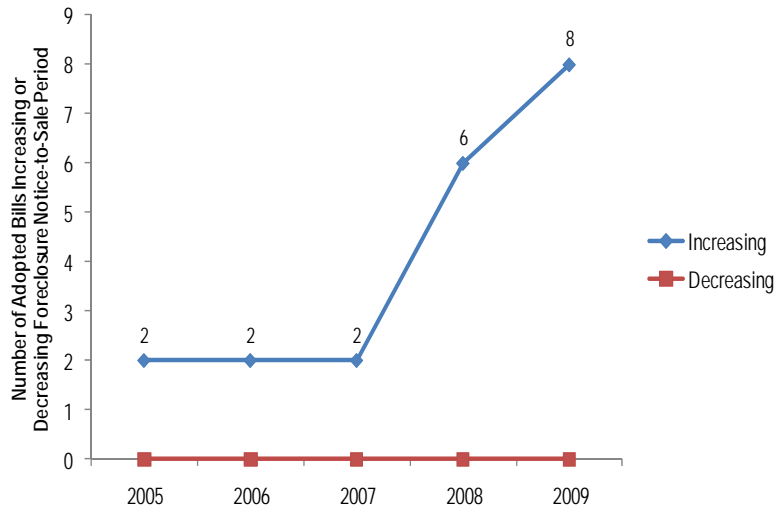


Figure 5. Number of Acts Increasing/Decreasing the Foreclosure Notice-to-Sale Period



D. Analysis of Legislative Activity across States

Thirty nonjudicial states enacted legislation affecting the national foreclosure crisis. Colorado, Minnesota and Nevada adopted the most substantive changes, each adopting laws containing fifteen or more provisions and together accounting for twenty-five percent of all provisions. Oregon, North Carolina, Arizona and California adopted laws containing ten to fourteen provisions, and another ten states adopted between five and nine provisions. Thirteen states adopted fewer than five provisions during this period, and three states and the District of Columbia adopted no substantive provisions.

Provisions affecting the pre-foreclosure sale processes accounted for at least half of the provisions adopted in twenty-one states. Provisions affecting foreclosure sale and post-sale processes, as well as supportive processes, including data recording provisions, were fairly widely distributed across states. Fifteen states adopted one or more provisions addressing foreclosure sale and post-sale processes, and nineteen states adopted one or more provisions concerning supportive processes such as data reporting or recording

requirements. Servicer regulations, the smallest category of activity, were more concentrated. Only six states (Colorado, North Carolina, Arizona, Virginia, Hawaii and New Mexico) adopted any provisions concerning servicer regulation.

Colorado enacted the most legislation affecting the pre-foreclosure sale process, having adopted twelve such provisions.¹⁶¹ Nevada, Minnesota, Michigan and California adopted between eight and eleven provisions in this category, and Washington, Tennessee, Oregon, Utah and Arizona adopted six to seven such provisions. Another five states adopted four to five provisions, and eleven states adopted one to three provisions. Seven states and the District of Columbia adopted no provisions in this category.

¹⁶¹ One possible explanation for Colorado's high level of activity is the fact that the state's foreclosure problems predated the rise of foreclosures in many other states. This is because Colorado's foreclosures were related partly to the weakened state economy following the dot-com bust in the early 2000s. Given the nature of state legislative processes and behavior, it may well take more than one legislative session to get a proposed measure through the legislature. Moreover, there is also a natural lag between the timing of a problem and the legislative response. For these reasons, the 2005 to early 2010 period may coincide more with the peak of Colorado's legislative activities, while in other states high levels of activity did not begin until the later part of this period and may be extending well beyond the period. This explanation is consistent with the fact that a relatively large share of the measures in Colorado was adopted before 2009 as compared to other states.

Figure 6. Adopted Provisions by State, January 2005 to May 2010

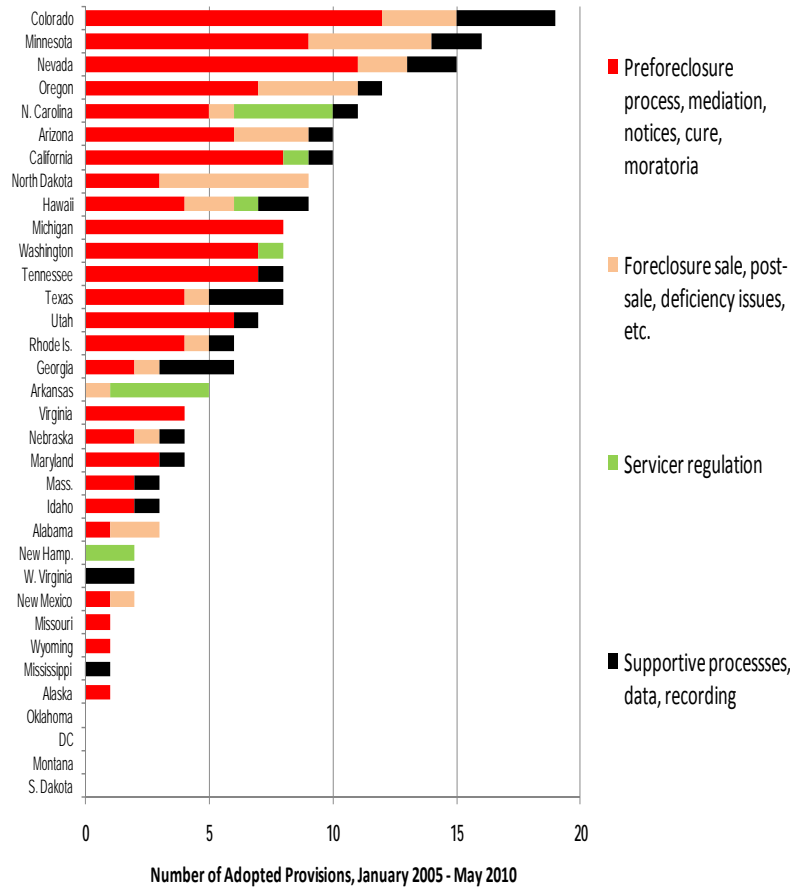
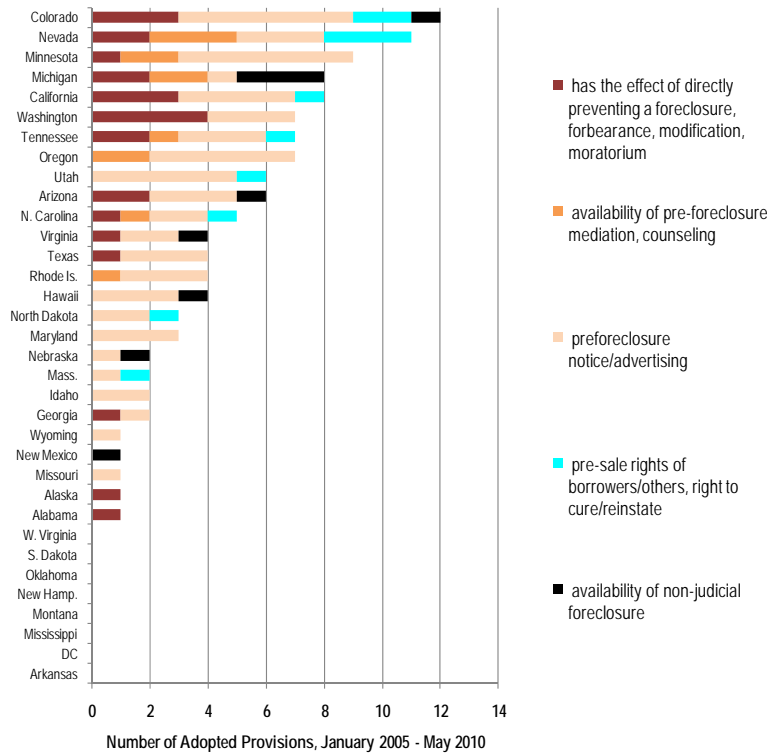


Figure 7. Adopted Provisions Concerning Pre-foreclosure Sale Processes, January 2005 to May 2010



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

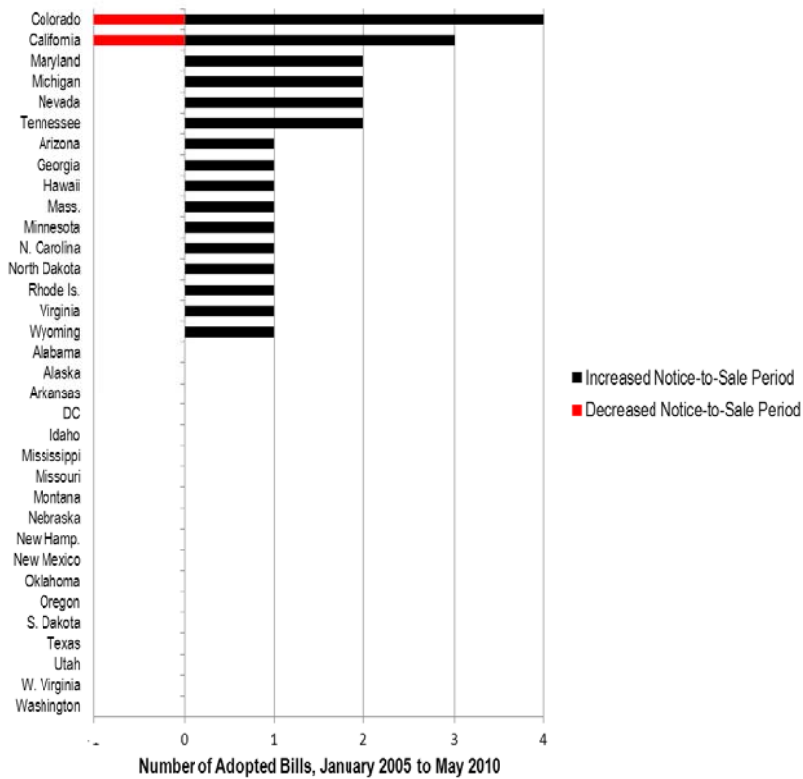
Several states took steps to lengthen or shorten the notice-to-sale period.¹⁶² The vast majority of these provisions were aimed at lengthening the presale process. There were only two exceptions. California adopted a provision that effectively shortened the prescribed notice-to-sale period by five days, although the state adopted other measures that effectively lengthened the foreclosure process.¹⁶³ Colorado adopted a law that, until 2013, provides for an expedited foreclosure process for abandoned properties or in cases where the borrower requests such a process.¹⁶⁴ Most of the process-lengthening provisions made relatively modest changes (thirty days or less) to the notice-to-sale period, although in some states with very quick foreclosure processes, even fifteen to thirty days can be a substantial increase. Many of the states that effectively increased the notice-to-sale period did so in conjunction with efforts to provide increased notice or opportunities for loan modifications and mediation.

¹⁶² A number of states took measures to shorten post-sale redemption periods. These are not covered in this analysis of pre-foreclosure notice-to-sale periods.

¹⁶³ CAL. CIV. CODE § 2924(a)(4) (West 2011).

¹⁶⁴ COLO. REV. STAT. § 38-38-903(1)(c) (2011).

Figure 8. Adopted Provisions that Effectively Lengthen or Shorten the Notice-to-Sale Period



E. Identifying “Legislatively Active” Nonjudicial States

To identify states that have been legislatively active during the foreclosure crisis, one approach is simply to detect states that adopted many provisions to reduce foreclosures among outstanding mortgages. However, some states may be more active than others simply because the foreclosure problem is larger in those states. One

would not expect to see similar responses in Montana and Nevada, for example.¹⁶⁵

Indeed, states with very high foreclosure rates tended to have higher levels of legislative activity. However, there is a substantial amount of variance in legislative activity that is not explained by foreclosure rate.¹⁶⁶ For example, California had higher levels of legislative activity than Arizona despite similarly high foreclosure rates. Some states with more moderate foreclosure rates, such as Oregon and Colorado, had significantly higher amounts of legislative activity than states with somewhat higher foreclosure rates such as Georgia, Mississippi and Rhode Island. As might be expected, states with very low foreclosure rates (e.g., North Dakota, Wyoming, Montana, South Dakota and Alaska) saw very little legislative activity.

Most of the legislative activity between January 2009 and May 2010 focused on outstanding loans and not on regulating new originations because legislative activity in the two areas is positively correlated. States that were active in one area tended to be active in the other as well.

¹⁶⁵ A more sophisticated goal would be to model legislative activity over time and across states, controlling for multiple factors that might affect such activity. The effort here is much less ambitious; there is no attempt to identify or control for all of the various causes of such activity or to predict legislative activity.

¹⁶⁶ The straight line in each figure is a linear bivariate regression line. The R-square, which gives the proportion of the variance in legislative activity that is explained by the foreclosure rate, is approximately 0.40 for both plots.

Figure 9. Adopted Provisions Concerning Outstanding Loans versus Foreclosure Starts

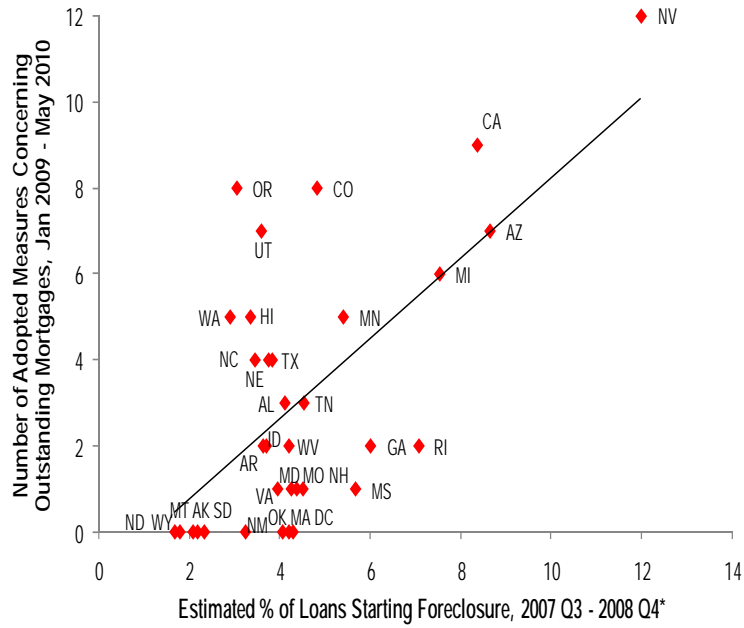
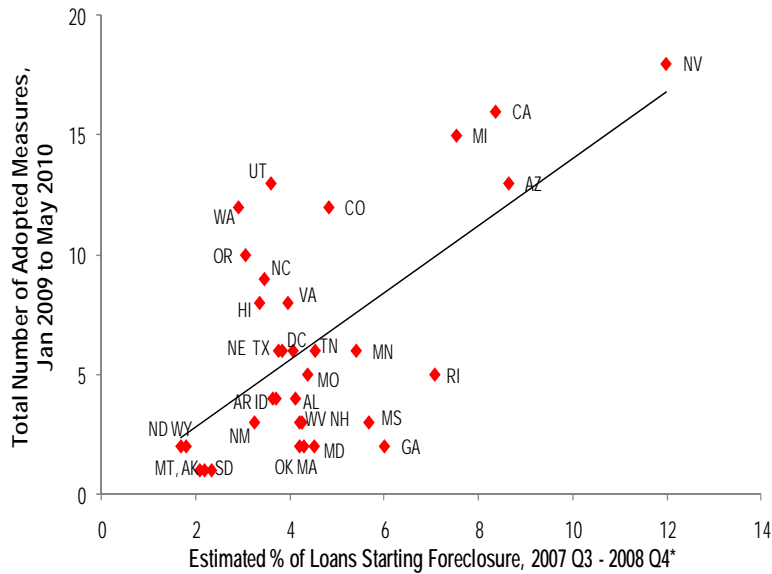


Figure 10. Adopted Provisions Concerning All Loans versus Foreclosure Starts



V. Policy Change in Selected States

In-depth analyses of California, Colorado, Michigan, Minnesota, Nevada, North Carolina, Oregon and Washington are revealing. The following profiles qualitatively describe the activity in each of these states, identifying the major changes and determining whether the changes in foreclosure law in the state, on net, tended to favor the borrower or the lender. The profiles are not an exhaustive or definitive list, however, and are meant to serve as a sample of the states that were most active.

A. California

Prior to the enactment of California's recent foreclosure legislation, the first step in California's nonjudicial foreclosure procedure was the filing of a notice of default in the office of the

county recorder.¹⁶⁷ Within ten days of the recordation, the lender mailed a notice of the recording date to each borrower and to each person who had requested such notice.¹⁶⁸ After filing the notice of default, the lender had to wait three months before giving notice of the sale.¹⁶⁹ A written notice of the time and place of the pending foreclosure sale had to be posted on the property, posted in the city or judicial district where the property was to be sold, and recorded with the county recorder at least fourteen days before the foreclosure sale.¹⁷⁰

From January 2005 to May 2010, California adopted ten foreclosure-related provisions, eight of which addressed the pre-foreclosure process. The most significant change to existing mortgage law was contained in Assembly Bill 7, the Foreclosure Prevention Act of 2009.¹⁷¹ Between May 21, 2009, and January 1, 2011, a lender had to wait an additional ninety days after the three-month statutory period expired before providing notice if the mortgage was a first mortgage on an owner-occupied home and was recorded between January 1, 2003, and January 1, 2008.¹⁷² This additional delay was intended to allow the parties to pursue a loan modification.¹⁷³ The lender could avoid this additional ninety-day delay if the lender had obtained an order of exemption by implementing a comprehensive loan modification program.¹⁷⁴ Such a program was intended to keep borrowers in their principal residence when the expected recovery from modification was greater than the expected recovery from foreclosure.¹⁷⁵ The servicer must have sought to achieve long-term sustainability for a borrower pursuing modification by limiting the ratio of their housing-related debt to their gross income to thirty-eight percent or less.¹⁷⁶ Finally, the

¹⁶⁷ CAL. CIV. CODE § 2924(a)(1) (West 2011).

¹⁶⁸ *Id.* § 2924b(b)(1).

¹⁶⁹ *Id.* §§ 2924(a)(2)-(3).

¹⁷⁰ *Id.* § 2924f(b)(1).

¹⁷¹ The California Foreclosure Prevention Act added sections 2923.52 and 2923.53, the effects of which are discussed in this paragraph. These sections were subject to sunset provisions, however, and expired on January 1, 2011. California Foreclosure Prevention Act, Assemb. 7, 2009-2010 Leg., 2nd Extraordinary Sess. (Cal. 2009).

¹⁷² CAL. CIV. CODE § 2923.52(a) (West 2009) (repealed Jan. 1, 2011).

¹⁷³ *Id.*

¹⁷⁴ *Id.* § 2923.53(a) (repealed Jan. 1, 2011).

¹⁷⁵ *Id.* § 2923.53(a)(1) (repealed Jan. 1, 2011).

¹⁷⁶ *Id.* §§ 2923.53(a)(2) (repealed Jan. 1, 2011).

program had to include some combination of an interest rate reduction, term extension, deferral of some portion of the principal amount, reduction of principal, or compliance with a federally mandated modification program such as HAMP.¹⁷⁷

Another law adopted the year before the Foreclosure Prevention Act extended the pre-foreclosure timeline.¹⁷⁸ Senate Bill 1137 states that prior to filing a notice of default for a mortgage executed or recorded between January 1, 2003, and December 31, 2007, the lender must first contact the borrower in person or by telephone to assess their financial situation and explore options to avoid foreclosure.¹⁷⁹ During this required contact, the borrower must be advised of her right to request a subsequent meeting, which must occur within fourteen days.¹⁸⁰ The lender must provide a toll-free telephone number to a HUD-certified housing counseling agency.¹⁸¹ The lender is able to meet this contact requirement despite failing to contact the borrower if contact was attempted with due diligence, a statutorily defined standard involving a series of mailing and telephone attempts.¹⁸² The lender cannot file the notice of default until thirty days after either the initial contact or the satisfaction of the due diligence requirement.¹⁸³

Senate Bill 1137 also extended an advanced notice of sale to renters of a foreclosed property.¹⁸⁴ Until January 1, 2013, notice of a pending foreclosure sale must also be provided to the residents of the foreclosed property if the billing address on the mortgage does not match the property address.¹⁸⁵ The notice must inform the residents that the property will be sold no less than twenty days from receipt of the notice and inform the residents that if they are renters, they are entitled to sixty days notice of eviction or a new lease agreement with the new property owner.¹⁸⁶ This is an extension from the previous fourteen-day notice of sale and thirty-day notice of eviction.

¹⁷⁷ *Id.* § 2923.52(a)(3) (repealed Jan. 1, 2011).

¹⁷⁸ *Id.* § 2923.5(a)(2).

¹⁷⁹ S. 1137, 2007-2008 Leg., Reg. Sess. § 2 (Cal. 2008).

¹⁸⁰ CAL. CIV. CODE § 2923.5(h) (West 2011).

¹⁸¹ *Id.*

¹⁸² *Id.* § 2923.5(g).

¹⁸³ *See id.* § 2923.5(a)(1) (outlining when a trustee, mortgagee, or other authorized agent may file a notice of default).

¹⁸⁴ S. 1137, 2007-2008 Leg., Reg. Sess. § 4 (Cal. 2008).

¹⁸⁵ CAL. CIV. CODE § 2924.8(a) (West 2011).

¹⁸⁶ *Id.* § 2924.8(a).

Since this law was passed, however, HFSTHA was passed. HFSTHA includes a requirement that, for most mortgages, lenders are now required to provide tenants of foreclosed properties with a ninety-day notice prior to eviction.¹⁸⁷

Senate Bill 306, passed in late 2009, also extended the notice of sale requirements from fourteen days to twenty days.¹⁸⁸ More significantly, it clarified the intent of pooling and servicing agreements (PSAs) regarding the responsibilities of the servicer to the investors of mortgage-backed securities.¹⁸⁹ This was intended to promote beneficial loan modifications and address concerns that some PSAs might impede loan modifications.¹⁹⁰ The statute states that any duty a servicer has to maximize net present value (NPV) for investors should be interpreted as requiring maximization of NPV for all investors as a group and not any one particular investor.¹⁹¹ Thus, if the expected recovery from a loan modification exceeds the expected recovery from a foreclosure on a net present value basis then the servicer can implement the modification in the best interests of all the investors.¹⁹²

Several other laws adopted during this period altered the foreclosure process. Assembly Bill 2678 prevents a notice of sale from being posted while the servicer is in negotiations with the borrower to modify a loan.¹⁹³ Senate Bill 1221 reduces the period for a notice of sale by no more than five days before the end of the statutory three-month waiting period.¹⁹⁴

Overall, most of the provisions passed by California between January 2005 and May 2010 were intended to favor the borrower. However, the effectiveness of some of these provisions has been called into question.¹⁹⁵ The Foreclosure Prevention Act is notable in this regard: it allowed all of the major servicers to gain an exemption

¹⁸⁷ Helping Families Save Their Homes Act of 2009, Pub. L. No. 111-22, § 702(a), 123 Stat. 1632, 1660-61 (2009).

¹⁸⁸ S. 306, 2009-2010 Leg., Reg. Sess. (Cal. 2009).

¹⁸⁹ CAL. CIV. CODE § 2923.6(a) (2011).

¹⁹⁰ *Id.* § 2923.6(b).

¹⁹¹ *Id.* § 2923.6(a).

¹⁹² *Id.* § 2923.6(a)(2).

¹⁹³ Assemb. 2678, 2009-2010 Leg., Reg. Sess. (Cal. 2009).

¹⁹⁴ S. 1221, 2009-2010 Leg., Reg. Sess. (Cal. 2009).

¹⁹⁵ For example, the effectiveness of California's loan modification program has been undermined by that state's failure to involve a neutral third-party mediator in the modification process. NOW WE'RE TALKING, *supra* note 104, at 27-28.

from the ninety-day waiting period because they already had comprehensive loan modification programs that complied with HAMP guidelines.¹⁹⁶

B. Colorado

Colorado's foreclosure process is essentially a hybrid of judicial and nonjudicial processes because the lender must obtain an initial court order authorizing the foreclosure.¹⁹⁷ Before 2005, Colorado's foreclosure procedure provided that at least thirty days after default on a deed of trust, the debt holder could file a notice of election of remedies with the public trustee of the county where the property was located.¹⁹⁸ The combined notice, which included the notice of sale, the right to cure, and the right to redeem, had to be mailed no more than twenty days after the recording of this notice.¹⁹⁹ The combined notice also had to be published once per week for five consecutive weeks prior to the sale.²⁰⁰

Currently, the lender's initial motion to foreclose has to be accompanied by a copy of the instrument containing the power of sale, a description of the property, and an explanation of the default justifying the foreclosure.²⁰¹ The clerk sets a time between twenty and thirty days after the filing of the motion for a hearing.²⁰² Notice of this hearing has to be posted in a conspicuous place on the property and has to be served on each person named in the motion at least fifteen days before the date set for the hearing.²⁰³ If the court

¹⁹⁶ CAL. CIV. CODE §§ 2924-2924b (2011); HOME AFFORDABLE MODIFICATION PROGRAM, MAKING HOME AFFORDABLE PROGRAM: HANDBOOK FOR SERVICERS OF NON-GSE MORTGAGES §§ 1.1-1.2 (Jun. 1, 2011), *available at* https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/mha_handbook_32.pdf.

¹⁹⁷ COLO. REV. STAT. § 38-38-105(2)(a) (2011).

¹⁹⁸ *See id.* § 38-38-101(a)-(h) (stipulating that, "[w]henever a holder of an evidence of debt declares a violation of a covenant of deed of trust and elects to publish all or a portion of the property therein described for sale, the holder or the attorney for the holder shall file . . . with the public trustee of the county where the property is located").

¹⁹⁹ *Id.* § 38-38-103(1)(a).

²⁰⁰ *Id.* § 38-38-103(5)(a).

²⁰¹ COLO. R. CIV. P. 120(a) (2011).

²⁰² *Id.*

²⁰³ *Id.* 120(a)-(b); *see also* COLO. REV. STAT. § 38-38-105(3) ("Not less than fifteen days before the date set for the hearing . . . the holder or the attorney

grants the lender's motion based on its findings, the lender must submit a bid to the officer no later than the second business day before the foreclosure sale.²⁰⁴ Prior to the changes discussed here, the sale had to occur between forty-five and sixty days after the recording of the notice of election and demand.

In the period between January 2005 and May 2010, Colorado was the most active state in adopting provisions to change the foreclosure process and timeline. The Colorado legislature enacted many measures early in this period. In total, Colorado enacted nineteen such provisions, twelve of which directly affected the pre-foreclosure process. The first significant change came in 2006, when Colorado passed House Bill 1387.²⁰⁵ This law increased the amount of time required between the filing of the notice of election and demand and the date of the foreclosure sale by sixty-five days.²⁰⁶ The new law requires that the sale take place between 110 and 125 days after the notice, instead of just forty-five to sixty days after the notice.²⁰⁷ The contents of the notice were also expanded.²⁰⁸ Under House Bill 1387, a notice of election must contain specific information, including the names of the original parties to the deed of trust, the name of the holder of the note, the remaining outstanding balance on the loan, a legal description of the property and a statement of the default that justifies the foreclosure.²⁰⁹

In 2008, another important piece of legislation was passed. House Bill 1402 extended the pre-foreclosure timeline by thirty days and required the lender to notify the borrower of certain foreclosure counseling programs.²¹⁰ The law requires that the lender or servicer

for the holder seeking an order authorizing sale under this section for a residential property shall cause a notice of hearing . . . to be posted in a conspicuous place on the property that is the subject of the sale.”).

²⁰⁴ *Id.* § 38-38-106(1).

²⁰⁵ *See* H.R. 1387, 65th Gen. Assemb., 2nd Reg. Sess. (Colo. 2006) (adding definitions to the foreclosure chapter and repealing and re-enacting foreclosure procedure statutes).

²⁰⁶ COLO. REV. STAT. § 38-38-108(1)(a) (2011).

²⁰⁷ *Id.*

²⁰⁸ *Id.* § 38-38-101(4)(a)-(j).

²⁰⁹ *Id.*

²¹⁰ *See* H.R. 1402, 66th Gen. Assemb., 2nd Reg. Sess. (Colo. 2008) (requiring mortgagee to provide mortgagor with a notice containing the phone number of the Colorado foreclosure hotline and “the direct telephone number of the holder’s loss mitigation representative or department” at least thirty days before filing notice of demand and election).

mail a notice of intent to foreclose to the borrower at least thirty days prior to filing the formal notice of election and demand, thus increasing the foreclosure timeline.²¹¹ The notice of intent to foreclose must also contain the telephone number of the Colorado foreclosure hotline and the direct telephone number of the holder's loss mitigation department.²¹²

In 2009, the state legislature passed House Bill 1276, which created additional requirements to notify the borrower of opportunities for foreclosure deferment.²¹³ The law states that within fifteen days of filing the notice of election and demand, the holder must post a notice of the opportunity for foreclosure deferment in a conspicuous place on the property or personally serve the borrower with such notice.²¹⁴ Within twenty days of the posting, the borrower must contact a foreclosure counselor, who must inform them of the federal HAMP program.²¹⁵ The counselor then has thirty days to determine whether the borrower is eligible for a foreclosure deferment.²¹⁶ This determination includes an assessment of the borrower's ability to pay and the probability of reaching a mutually beneficial loan modification.²¹⁷

If the borrower is eligible for deferment, she must make payments to the lender equal to at least two-thirds of the monthly payment that was due prior to the delinquency throughout the term of the deferment, which is initially ninety days.²¹⁸ If the borrower qualifies for a foreclosure deferment, all remaining published and mailed notifications of the foreclosure sale must be cancelled.²¹⁹ The deferment can be terminated early under a number of circumstances, including if the borrower abandons the property or fails to comply with the conditions of deferment.²²⁰

In 2010, the Colorado legislature passed House Bill 1249, creating a temporary procedure to shorten the foreclosure process for

²¹¹ COLO. REV. STAT. § 38-38-102.5(2) (2011).

²¹² *Id.*

²¹³ H.R. 1276, 67th Gen. Assemb., 1st Reg. Sess. (Colo. 2009).

²¹⁴ COLO. REV. STAT. § 38-38-802(1) (2011).

²¹⁵ *Id.* § 38-38-803(2)-(3).

²¹⁶ *Id.* § 38-38-803(5)(a).

²¹⁷ *Id.* § 38-38-804(1)(a)-(b).

²¹⁸ *Id.* § 38-38-803(6); *id.* § 38-38-805(2)(a).

²¹⁹ *Id.* § 38-38-803(6).

²²⁰ *Id.* § 38-38-805(4)(a)-(e).

certain properties.²²¹ Beginning on August 1, 2010, and continuing until August 1, 2013, a lender filing a foreclosure may request an expedited sale at the same time.²²² The lender must file a motion with the court stating that the lender is eligible, that the deed of trust secures an eligible debt, and that the property has been abandoned or that the borrower requests the order for an expedited foreclosure.²²³ A notice of the hearing must be posted on the property or personally served on the borrower at least fifteen days prior to its occurrence.²²⁴ If the court finds the evidence clear and compelling and no one objects,²²⁵ the lender must then set a date of sale between forty-five and sixty-five days after the recording of the notice of election and demand.²²⁶

Colorado also passed several provisions between January 2005 and May 2010 that did not affect the foreclosure timeline. For example, House Bill 1197 created an official county-level foreclosure database that would report notices of election and demand, properties sold at auction and instances of curing.²²⁷ The bill was intended to provide the general public and policy makers with accurate information, help facilitate trend forecasts and make it easy to analyze regional differences.²²⁸ In addition, House Bill 1207 made several minor changes to the cure and redemption procedures and added certain parties to the list of those required to receive notifications of the foreclosure.²²⁹

Overall, the provisions adopted in Colorado favored the borrower by extending the notice-to-sale period by almost three months and mandating notification of foreclosure hotlines and deferment options. House Bill 1387 (2006), House Bill 1402 (2008) and House Bill 1276 (2009) were the key pieces of legislation in this shift toward a more borrower-friendly foreclosure process. As explained above, one important aspect of the deferment process created by House Bill 1276 is the requirement that borrowers pay 66.66% of the required monthly mortgage payments while in

²²¹ H.R. 1249, 67th Gen. Assemb., 2nd Reg. Sess. (Colo. 2010).

²²² COLO. REV. STAT. § 38-38-902(1)(a) (2011).

²²³ *Id.* § 38-38-903(1)(a)-(c).

²²⁴ *Id.* § 38-38-903(2).

²²⁵ *Id.* § 38-38-903(3).

²²⁶ *Id.* § 38-38-902(2).

²²⁷ H.R. 1197, 67th Gen. Assemb., 1st Reg. Sess. (Colo. 2009).

²²⁸ *Id.*

²²⁹ H.R. 1207, 67th Gen. Assemb., 1st Reg. Sess. (Colo. 2009).

deferment.²³⁰ Supporters suggest that this requirement focuses efforts on those most likely to succeed with a loan modification,²³¹ but it may also unnecessarily exclude other candidates, thus limiting the number of people who benefit from the program.

C. Michigan

The adopted provisions in Michigan favored the interests of the borrower by requiring notice of various foreclosure mediation opportunities. In Michigan, notice of a pending nonjudicial foreclosure sale must be published in a local newspaper at least once a week for four consecutive weeks.²³² The notice must state (1) the names of the borrower, the originating lender and the current lender or mortgagee; (2) the date of the mortgage and of its recordation; (3) the amount due; (4) a description of the house; and (5) the length of the post-sale redemption period.²³³ Fifteen days after notice is first published, a copy of that notice must be posted in a conspicuous place on any part of the home.²³⁴ Within twenty days of sale, the purchaser must record the foreclosure deed.²³⁵ The post-sale redemption period ranges from one month for residential mortgages on abandoned property with greater than two-thirds of the original indebtedness outstanding,²³⁶ to one year for occupied residential properties with less than two-thirds of the original indebtedness outstanding.²³⁷

Between January 2005 and May 2010, Michigan adopted eight foreclosure-related provisions, all of which affected the pre-foreclosure process. Six of these provisions were contained in three statutes enacted in mid-2009: House Bills 4453, 4454 and 4455.²³⁸ These bills comprised a package of legislation requiring foreclosing lenders to offer modification negotiations to borrowers. The key

²³⁰ H.R. 1276, 67th Gen. Assemb., 1st Reg. Sess. § 5 (Colo. 2009).

²³¹ PIERCE, *supra* note 29, at 24.

²³² MICH. COMP. LAWS § 600.3208 (2011).

²³³ *Id.* § 600.3212.

²³⁴ *Id.* § 600.3208.

²³⁵ *Id.* § 600.3232.

²³⁶ *Id.* § 600.3240(7)-(12).

²³⁷ *Id.* § 600.3240(12); *see also id.* § 600.3241a (providing that abandonment is determined by a statutory procedure and scheme of presumptions).

²³⁸ H.R. 4453, 95th Leg., Reg. Sess. (Mich. 2009); H.R. 4454, 95th Leg., Reg. Sess. (Mich. 2009); H.R. 4455, 95th Leg., Reg. Sess. (Mich. 2009).

provisions of the legislation require that the lender provide written notice to the borrower containing an explanation of the default and the amount outstanding on the mortgage, the lender or servicer's contact information and a designated party for modification discussions.²³⁹ The notice must also provide a list of approved housing counselors and inform the borrower that she may request a meeting with the lender's designee within fourteen days of the notice to attempt to work out a modification.²⁴⁰ The notice must inform the borrower that if she pursues modification discussions, foreclosure proceedings will be deferred for ninety days after the notice was mailed.²⁴¹ The notification must also indicate that the lender must proceed via a judicial foreclosure if the borrower meets statutory modification criteria but the parties cannot reach a modification agreement.²⁴²

Within seven days of mailing this notice to the borrower, the lender or servicer must also publish a notice informing the borrower of her rights as described above.²⁴³ If the lender fails to comply with the pre-foreclosure notice requirements—including notice of the right to mediation—before commencing the foreclosure process, the borrower may bring an action to enjoin the foreclosure.²⁴⁴ A borrower who wishes to work out a modification of a mortgage loan must elect to engage in modification discussions by contacting a housing counselor within fourteen days of the lender mailing the notice of default.²⁴⁵ Furthermore, the housing counselor must notify the lender of the borrower's request within ten days of being contacted by the borrower.²⁴⁶ The counselor must then schedule a meeting for modification discussions and attend the meeting if the borrower so requests.²⁴⁷

If no loan modification results from the discussions, the housing counselor must work with the borrower to determine whether she qualifies for a modification based on criteria similar to

²³⁹ MICH. COMP. LAWS §§ 600.3205a(1)(a)-(c) (2011).

²⁴⁰ *Id.* § 600.3205a(1)(d).

²⁴¹ *Id.* § 600.3205a(1)(e).

²⁴² *Id.* § 600.3205a(1)(g).

²⁴³ *Id.* § 600.3205a(4).

²⁴⁴ *Id.* § 600.3205a(5).

²⁴⁵ *Id.* § 600.3205b(1).

²⁴⁶ *Id.*

²⁴⁷ *Id.* § 600.3205b(3).

federal HAMP requirements.²⁴⁸ If the borrower is eligible, the lender may not proceed with nonjudicial foreclosure but can pursue judicial foreclosure.²⁴⁹ The borrower has fourteen days from notification of any proposed modification to accept it.²⁵⁰ If the lender attempts to proceed with the nonjudicial foreclosure process in violation of this procedure, the borrower may file suit to convert the proceeding to a judicial foreclosure.²⁵¹ One important aspect is that the calculations made to determine the borrower's eligibility must be made available to the borrower, a requirement not present in some other states.²⁵²

In addition to these changes, Michigan adopted Senate Bill 749, which disallowed nonjudicial foreclosure against service members during active duty or six months thereafter.²⁵³ This was one of the very few changes in state laws during this period that added restrictions on the use of nonjudicial foreclosure.

D. Minnesota

In Minnesota, the lender must give six weeks' published notice of the pending foreclosure sale and must serve the homeowner with a copy of the notice at least four weeks before the sale.²⁵⁴ Along with the notice of foreclosure sale, and with every subsequent written communication regarding the foreclosure mailed to the borrower, the lender must also include a foreclosure advice notice.²⁵⁵ Within six months of the foreclosure sale, the borrower may redeem the property by paying the foreclosure sale price plus interest.²⁵⁶

Minnesota adopted sixteen foreclosure-related provisions in the period between January 2005 and May 2010, nine of which affected the pre-foreclosure process. Most of the provisions made small changes to existing law. The state is notable for failing to pass

²⁴⁸ *Id.* § 600.3205c(1); *see also* HOME AFFORDABLE MODIFICATION PROGRAM, *supra* note 196, at §§ 1.1-1.2 (codifying eligibility criteria for a loan).

²⁴⁹ MICH. COMP. LAWS § 600.3205c(6) (2011).

²⁵⁰ *Id.* § 600.3205c(7)(b).

²⁵¹ *Id.* § 600.3205c(8).

²⁵² *Id.* § 600.3205c(5)(a).

²⁵³ S. 749, 94th Leg., Reg. Sess. (Mich. 2008).

²⁵⁴ MINN. STAT. § 580.03 (2011).

²⁵⁵ *Id.* § 580.041(1)(b); *see also id.* § 580.041(2) (stating the required content of every foreclosure advice notice).

²⁵⁶ *Id.* § 580.23(1)(a); *see also id.* § 582.032 (abandoned residential property is subject to a shorter, five week redemption period).

optional mediation legislation in 2009, when the state legislature could not override Governor Tim Pawlenty's veto.²⁵⁷

One important provision was contained in 2008 House File 3420, which requires notification to the borrower of available foreclosure counseling services.²⁵⁸ The notice may be sent concurrently with the notice of default and must state that such services are available from authorized foreclosure counseling agencies and that the lender will transmit the borrower's contact information to an approved agency within one week.²⁵⁹ If an authorized foreclosure prevention agency is in contact with a borrower, it must provide notice of such counseling assistance to the lender by way of a specified form.²⁶⁰ The lender must return this form within fifteen days along with the contact information for the agent authorized to discuss the terms of the mortgage and negotiate a resolution to the default.²⁶¹

Another important provision was contained in Senate File 2559, which allows the borrower to postpone the foreclosure sale of a property classified as a homestead in exchange for agreeing to reduce the post-sale redemption period to five weeks.²⁶² If the original redemption period was six months, the borrower can postpone the foreclosure sale by five months.²⁶³ If the original redemption period was twelve months, the borrower can postpone the sale for eleven months.²⁶⁴ This was intended to provide more time for the borrower to cure the default.

Minnesota adopted other provisions that changed the foreclosure process or content of the notices. Senate File 2918 allowed the post-sale redemption period for an abandoned property to be shortened from one year to five weeks.²⁶⁵ Sufficient evidence of abandonment must be included in the notice of pending foreclosure sale posted on the property.²⁶⁶ Senate File 1302 required the

²⁵⁷ NOW WE'RE TALKING, *supra* note 104, at 33.

²⁵⁸ H.R. File 3420, 85th Leg. Sess., 2nd engrossment art. 5 § 7 (Minn. 2008).

²⁵⁹ MINN. STAT. § 580.021(2)-(3) (2011).

²⁶⁰ *Id.* § 580.021(4).

²⁶¹ *Id.*

²⁶² S. File 2559, 86th Leg. Sess., Reg. Sess. § 1 (Minn. 2010).

²⁶³ MINN. STAT. § 580.07(2)(a)(1) (2011).

²⁶⁴ *Id.* § 580.07(2)(a)(2).

²⁶⁵ S. File 2918, 85th Leg. Sess., 2nd Engrossment § 1 (Minn. 2008).

²⁶⁶ MINN. STAT. § 582.032(6)-(7) (2011).

foreclosing lender to provide the borrower's contact information to a foreclosure prevention agency.²⁶⁷

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

E. Nevada

In Nevada, lenders must file a notice of default that describes the deficiency with the county recorder.²⁶⁸ The foreclosure sale cannot occur until at least three months after the filing of the notice of default.²⁶⁹ After the three-month period expires, the lender must file a notice of the foreclosure sale stating its time and place.²⁷⁰ A copy of this notice must be provided to the borrower, posted in three public places for twenty consecutive days, and published once per week for three consecutive weeks in a local newspaper.²⁷¹ A copy of the notice must be posted in a conspicuous place on the property no later than three business days after the notice of sale is recorded, and a separate notice must also be mailed to any tenant or subtenant within the same three-day period.²⁷²

Nevada was a very active state during the study period and was the most active state during 2009 and the first five months of 2010. From January 2005 to May 2010, the state adopted fifteen provisions regarding the foreclosure process, eleven of which directly affected the pre-foreclosure process. Nonetheless, the state may have reacted slowly, given the magnitude of its foreclosure problem.

The most significant action was the creation of a foreclosure mediation program in 2009, the first in a nonjudicial foreclosure state.²⁷³ The state legislature and the Nevada Supreme Court

²⁶⁷ S. File 1302, 86th Leg. Sess., 3rd Engrossment § 4 (Minn. 2009).

²⁶⁸ NEV. REV. STAT. § 107.080(3)(a) (2011).

²⁶⁹ *Id.* § 107.080(2)(d).

²⁷⁰ *Id.* § 107.080(4).

²⁷¹ S. 128, 75th Leg., Reg. Sess. § 1 (Nev. 2009).

²⁷² NEV. REV. STAT. § 107.087 (1)(a) (2011).

²⁷³ *See id.* § 107.086(3)-(8) (providing that the debtor may elect to enter into a mediation and that each mediation must be conducted by a senior justice,

promulgated rules for the foreclosure mediation program.²⁷⁴ The authority to issue rules for the program was contained in Assembly Bill 149, which applies to any owner-occupied residential foreclosure and permits lenders and borrowers to exchange information and proposals to avoid foreclosure with the assistance of a mediator.²⁷⁵ During mediation, the foreclosure process is suspended, and the lender can take no further action against the borrower.²⁷⁶ The Nevada Supreme Court rules state that mediation must take place within 135 days after recording the notice of default.²⁷⁷

The mediation program is mandatory if a homeowner requests it by completing the Election/Waiver of Mediation Form within thirty days after being served the notice of default.²⁷⁸ Failure to act within this prescribed time period waives the borrower's right to mediation.²⁷⁹ The parties are entitled to a total of four hours for mediation²⁸⁰ and each must pay a \$200 fee before entering the program.²⁸¹ The lender must be represented by someone with the authority to modify the loan²⁸² and must provide, prior to mediation, the original deed of trust, the note, documentation of each assignment of the deed of trust and note, and a recent appraisal.²⁸³ The lender's representative must be physically present at the meetings unless the

judge, hearing master or other designee pursuant to the foreclosure mediation rules adopted by the Nevada Supreme Court).

²⁷⁴ See generally *id.*; Nev. Foreclosure Mediation R. 1 (2011) ("Pursuant to the jurisdictional authority provided by Chapter 107 of the Nevada Revised Statutes and the Nevada Supreme Court's inherent power to create rules for the efficient administration of justice, these rules are enacted to apply to the mediation of any owner-occupied residential foreclosure arising from the recording of a notice of default and election to sell on or after July 1, 2009").

²⁷⁵ Assemb. 149, 75th Leg., Reg. Sess. § 2 (Nev. 2009).

²⁷⁶ NEV. REV. STAT. § 107.086(3) (2011).

²⁷⁷ Nev. Foreclosure Mediation R. 1 (2011).

²⁷⁸ NEV. REV. STAT. § 107.086(3) (2011); Nev. Foreclosure Mediation R. 1.3, 8 (2011).

²⁷⁹ NEV. REV. STAT. § 107.086(3) (2011); Nev. Foreclosure Mediation R. 8.4 (2011).

²⁸⁰ Nev. Foreclosure Mediation R. 13.2 (2011).

²⁸¹ *Id.* R. 5, 6.

²⁸² *Id.* R. 10(a).

²⁸³ *Id.* R. 11.3.

mediator determines otherwise.²⁸⁴ A party to mediation may file a petition for judicial review seeking a determination of bad faith participation and sanctions.²⁸⁵ Such petitions must be filed within thirty days of the date of the mediator's statement and must be reviewed by the court within sixty days.²⁸⁶

Other legislation made more modest changes to the foreclosure process. Assembly Bill 65 was adopted to provide additional funding for the foreclosure mediation program by assessing a \$50 fee for filing a notice of default and election to sell.²⁸⁷ Assembly Bill 140 was passed in 2009 to protect and inform renters of foreclosed properties.²⁸⁸ Notices of default and of sale must be posted on the property and sent to the tenants along with information of their rights to remain in the unit or leave after the foreclosure sale.²⁸⁹ Senate Bill 128 created new recording requirements for the foreclosure deed after a sale is executed.²⁹⁰ The lender must record it within thirty days of the sale or deliver it to the winning bidder within twenty days.²⁹¹ The winning bidder must then record the sale within ten days of the bidding.²⁹²

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

²⁸⁴ NEV. REV. STAT. § 107.086(5) (2011); Nev. Foreclosure Mediation R. 10.1(a) (2011).

²⁸⁵ Nev. Foreclosure Mediation R. 21.1 (2011).

²⁸⁶ *Id.* R. 21.2.

²⁸⁷ Assemb. 65, 75th Leg., Reg. Sess. § 5.8 (Nev. 2009).

²⁸⁸ *See* Assemb. 140, 75th Leg., Reg. Sess. § 3.2 (Nev. 2009) (criminalizing defacing a notice of foreclosure and establishing rights and duties of foreclosure sale purchasers and tenants in possession).

²⁸⁹ NEV. REV. STAT. § 107.087(3) (2011).

²⁹⁰ *See* S. 128, 75th Leg., Reg. Sess. § 1 (Nev. 2009) (requiring trustee to record sale within thirty days and sheriff to record sale within thirty days).

²⁹¹ NEV. REV. STAT. § 107.080(9)(a)-(b) (2011).

²⁹² *Id.* § 107.080(9)(b).

F. North Carolina

North Carolina, like Colorado, has a foreclosure process that is a hybrid of nonjudicial and judicial processes. The lender must send the borrower a detailed statement of the amount of principal, interest, fees, expenses and disbursements claimed due as of the date of the statement.²⁹³ At least thirty days after sending this written statement, the lender must file notice of hearing with the clerk of court.²⁹⁴ At least ten days before the hearing, a notice specifying the time and place of the hearing must be served on the borrower.²⁹⁵ If the borrower cannot be personally served despite reasonable and diligent efforts, the notice may be posted in a conspicuous place on the property provided that it is posted at least twenty days before the date of the hearing.²⁹⁶ The hearing is held before the clerk of court who must find the existence of a valid debt, a default, a right to foreclose and the requisite notice before authorizing the lender to proceed.²⁹⁷

Once authorized, the lender must give notice of the sale, which must provide the date, hour, and place of sale in addition to other information.²⁹⁸ The notice must be mailed at least twenty days prior to the date of sale to the borrower and to any occupants of a property of fewer than fifteen units.²⁹⁹ Notice of the sale must also be published weekly for at least two successive weeks in a local newspaper.³⁰⁰ Within five days after the sale, the foreclosing party must file a report of the foreclosure sale with the clerk of the superior court.³⁰¹

North Carolina adopted eleven provisions related to foreclosures in the state, five of which changed the pre-foreclosure process. Several of the provisions created significant new procedures that extended the timeline by offering more opportunities to negotiate

²⁹³ N.C. GEN. STAT. § 45-21.16(c)(5a) (2011).

²⁹⁴ *Id.* §§ 45-21.16(c)(5a), 45-21.16(a).

²⁹⁵ *Id.* § 45-21.16(a).

²⁹⁶ *Id.*

²⁹⁷ *Id.* § 45-21.16(c)(7)(d).

²⁹⁸ *See id.* § 45-21.16(a) (providing that the notice must contain a description of the property, state the terms of the sale, and provide certain statutory notices regarding rights of possession and the tenants' right to terminate the lease).

²⁹⁹ *Id.* § 45-21.17(4).

³⁰⁰ *Id.* § 45-21.17(1)(b)(1), (2)(b).

³⁰¹ *Id.* § 45-21.26(a).

a loan modification. Enacted in 2008, House Bill 2623 stated that at least forty-five days prior to the filing of a notice of hearing in a foreclosure proceeding for a primary residence, lenders and servicers of subprime loans must send written notice by mail to the borrower to inform him of the availability of resources to avoid foreclosure.³⁰² This notice must include an itemization of all past due amounts causing the loan to be in default, an itemization of any other charges that must be paid in order to bring the loan current, a statement regarding negotiation and foreclosure counseling options, and the contact information for the party who is authorized to work with the borrower to avoid foreclosure.³⁰³

House Bill 2623 also established the State Home Foreclosure Prevention Project, which empowered the Commissioner of Banks to evaluate subprime loans to determine which were most suitable for foreclosure prevention efforts.³⁰⁴ To provide more time for mediation and loan modification efforts, the Commissioner could extend the allowable filing date for any subprime foreclosure proceeding by up to thirty days beyond the earliest filing date established by the pre-foreclosure notice.³⁰⁵

Senate Bill 974, adopted in 2009,³⁰⁶ gave more power to the clerk of courts during the pre-foreclosure hearing. Specifically, the clerk can inquire into efforts the lender has made to communicate with the debtor to resolve the matter voluntarily before the foreclosure proceeding.³⁰⁷ For owner-occupied homes, the clerk must order the hearing continued up to sixty days if he finds that there is good cause to believe that additional time or measures have a reasonable likelihood of resolving the delinquency without foreclosure.³⁰⁸ The clerk could base this decision on the quality of communication between the two parties, whether the borrower had the intent and ability to resolve the delinquency after a modification, or whether the lender had offered appropriate resolution options such as forbearance and loan modification.³⁰⁹

³⁰² Emergency Program to Reduce Home Foreclosures, H.R. 2623, 2008 N.C. Sess. Laws 226 § 1 (2008).

³⁰³ N.C. GEN. STAT. § 45-102 (2011).

³⁰⁴ H.R. 2623, 2008 N.C. Sess. Laws 226 § 1.

³⁰⁵ N.C. GEN. STAT. § 45-105 (2011).

³⁰⁶ S. 974, 2009 N.C. Sess. Laws 974.

³⁰⁷ N.C. GEN. STAT. § 45-21.16C(a) (2011).

³⁰⁸ *Id.* § 45-21.16C(b).

³⁰⁹ *Id.*

A third provision extended deficiency judgment protections to a wider class of mortgages. House Bill 1057 prohibited deficiency judgments on any owner-occupied residential loans originated or modified on or after January 1, 2005, if the loan is subject to negative amortization or permits deferred payments of principal or interest.³¹⁰ These loans must also conform to the standards published by Fannie Mae.³¹¹

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

G. Oregon

Upon default by the borrower, an Oregon lender must file a notice of default in the county clerk's office.³¹² After recording the notice of default at least 120 days before the foreclosure sale, a notice of sale must be served upon or mailed to the borrower.³¹³ The notice of sale must name all the parties to the trust deed, describe the property, state the default and the amount owed, and set forth the date, time and place of sale.³¹⁴ A notice must be addressed to each residential tenant as well, and should include information regarding his or her rights and tenancy.³¹⁵ Finally, a copy of the notice of sale must be published in a newspaper in each of the counties in which the property is situated once per week for four successive weeks.³¹⁶ On the tenth day after the foreclosure sale, the purchaser is entitled to possession of the premises.³¹⁷

Oregon adopted twelve foreclosure-related provisions between January 2005 and May 2010, mostly towards the end of the

³¹⁰ H.R. 1057, 2009 N.C. Sess. Laws 441 § 1.

³¹¹ N.C. GEN. STAT. § 45-21.38A(a)(3) (2011).

³¹² OR. REV. STAT. § 86.735(3) (2009).

³¹³ *Id.* § 86.740(1) (providing that notice may be requested by any person by filing a request for a copy of any notice of sale or default); *id.* § 86.785 (providing that such request must be recorded after the trust deed was recorded and before notice of default was recorded).

³¹⁴ *Id.* §§ 86.745(1)-(7).

³¹⁵ *Id.* § 86.745(9).

³¹⁶ *Id.* § 86.750(2).

³¹⁷ *Id.* § 86.755(5)(a) (2009).

study period. Seven of these affected the pre-foreclosure process. Senate Bill 628 required that a form to request a loan modification be sent with or before the notice of sale.³¹⁸ The borrower must return the form within thirty days of receiving it to qualify for a loan modification.³¹⁹ Once the lender receives the completed form, it has forty-five days to determine the borrower's eligibility based on information relayed in the form, such as income and expenses.³²⁰ The lender may also request additional information from the borrower.³²¹ During this period, the foreclosure process is suspended and the borrower can request a meeting to discuss loan modification options.³²² If requested, this meeting must include a representative of the lender authorized to modify the loan terms.³²³ House Bill 3610 adds a requirement that borrowers who are denied a modification must be informed as to why they were not eligible.³²⁴ It is worth noting, however, that these loan modification review and meeting requirements are currently set to expire January 2, 2012.³²⁵

Senate Bill 239 gave certain rights to borrowers who did not receive timely notice of the foreclosure sale.³²⁶ If the borrower did not receive the notice prior to twenty-five days before the sale took place, then the borrower retained the same rights as a junior lien holder that was not joined in a judicial foreclosure filing.³²⁷ Senate Bill 301 provided alternative ways to meet the requirement to serve notice of sale to interested parties.³²⁸ If diligent efforts were unsuccessful, the law allowed the notice to be conspicuously posted on the property and then mailed to the last known address of the interested parties.³²⁹ House Bill 2980 stated that a notice of sale becomes effective as of the date it was mailed.³³⁰

³¹⁸ S. 628, 75th Leg. Assemb., Reg. Sess. § 1 (Or. 2009).

³¹⁹ *Id.*

³²⁰ S. 628, 75th Leg. Assemb., Reg. Sess. § 3 (Or. 2009).

³²¹ *Id.*

³²² *Id.*

³²³ *Id.*

³²⁴ H.R. 3610, 75th Leg. Assemb., Spec. Sess. § 1 (Or. 2010).

³²⁵ OR. REV. STAT. § 86.737 note (2009).

³²⁶ S. 239, 75th Leg. Assemb., Reg. Sess. § 3 (Or. 2009).

³²⁷ *Id.*

³²⁸ *See* S. 301, 74th Leg. Assemb., Reg. Sess. § 1 (Or. 2007) (permitting lenders to, *inter alia*, post notice if personal service cannot be effected).

³²⁹ *Id.*

³³⁰ H.R. 2980, 73rd Leg. Assemb., Reg. Sess. § 1(2) (Or. 2005).

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

H. Washington

In Washington, notice of default must be sent by the lender to the borrower at her last known address.³³¹ Notice must also be either posted in a conspicuous place on the premises or served personally on the borrower.³³² The notice must contain a description of the property, a statement of the default, an account of any amounts in arrears and an explanation of the effect of foreclosure.³³³ At least ninety days before the sale, the lender must record the notice of sale in the office of the county auditor.³³⁴ The notice of sale must be sent to the borrower and any occupants of the property and must provide the date and time of the sale, describe the default, list any cure amount and the deadline to cure, explain the effect of the sale and provide contact information for the lender.³³⁵ The notice of sale must also be published in a local newspaper, once between the thirty-fifth and twenty-eighth day before the date of sale, and once between the fourteenth and seventh day before the sale.³³⁶ The sale may not occur less than 190 days after the date of default or less than ninety days after the recording of the notice of sale.³³⁷ On the date and at the time set for the sale, the lender must sell the property at public auction to the highest bidder.³³⁸ The sale is final as of the time the lender accepts a bid, so long as the deed is recorded within fifteen days.³³⁹ The lender or other winning bidder is entitled to possession of the

³³¹ WASH. REV. CODE § 61.24.030(8) (2011); *see also id.* § 61.24.031 (requiring that written notice of default must be transmitted at least thirty days before notice of sale may be recorded and such notice of default may not be transmitted until at least thirty days after initial contact with the borrower has been made).

³³² *Id.* § 61.24.030(8).

³³³ *Id.* § 61.24.030(8)(a)-(l).

³³⁴ *Id.* § 61.24.040(1)(a).

³³⁵ *Id.* § 61.24.040(f).

³³⁶ *Id.* § 61.24.040(3).

³³⁷ *Id.* §§ 61.24.040(8), 61.24.040(1)(a).

³³⁸ *Id.* § 61.24.040(4).

³³⁹ *Id.* § 61.24.050.

property on the twentieth day following the sale.³⁴⁰ The purchaser of tenant-occupied property must provide written notice to the occupants and tenants.³⁴¹ The tenant in possession must be given sixty days' written notice to vacate.³⁴²

Washington adopted eight provisions concerning foreclosure procedures, seven of which affected the pre-foreclosure process. Senate Bill 5810 created special requirements for owner-occupied loans made between January 1, 2003, and December 31, 2007.³⁴³ Upon default, the lender must contact the borrower to ascertain her ability to repay the loan and discuss options for avoiding foreclosure.³⁴⁴ The borrower has a right to request a subsequent meeting with the beneficiary, which must occur within fourteen days of the request and which may occur telephonically.³⁴⁵ In addition, the notice of default must indicate that this required first contact with the borrower occurred or that the beneficiary tried with due diligence to contact the borrower but was unsuccessful.³⁴⁶

Senate Bill 6711 was adopted in 2008 to create the Smart Homeownership Choices Program, which was modified a year later by Senate Bill 6033 to become the Prevent or Reduce Owner-Occupied Foreclosure Program.³⁴⁷ This program is intended to assist homeowners facing foreclosure by pursuing loan workouts and modifications.³⁴⁸ The program targets borrowers that are making less than 140% of the county median income.³⁴⁹ Attorneys, mortgage brokers, housing counselors and other relevant housing professionals volunteer with the program to provide advice to at-risk borrowers.³⁵⁰

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

³⁴⁰ *Id.* § 61.24.060(1).

³⁴¹ *Id.* § 61.24.060(2)-(3).

³⁴² *Id.* § 61.24.146(1).

³⁴³ S. 5810, 61st Leg., Reg. Sess. § 2 (Wash. 2009).

³⁴⁴ WASH. REV. CODE § 61.24.031(1)(b) (2011).

³⁴⁵ *Id.* § 61.24.031(1)(c).

³⁴⁶ *Id.* § 61.24.031(5).

³⁴⁷ S. 6033, 61st Leg., Reg. Sess. (Wash. 2009) *modifying* S. 6711, 60th Leg., Reg. Sess. (Wash. 2008).

³⁴⁸ WASH. REV. CODE § 43.320.160(1) (2011).

³⁴⁹ *Id.*

³⁵⁰ *Id.* § 43.320.160(3).

VI. *Analysis*

Overall, legislatures in nonjudicial states adopted a substantial number of changes to foreclosure law, especially as the national foreclosure crisis swelled in 2008 and 2009. The states adopted almost two hundred substantive provisions that concern mortgage default, servicing and foreclosure processes between January 2005 and May 2010. In particular, there was a significant increase in legislative activity from 2006 through 2009. During that period, the number of adopted provisions increased from just twelve in 2006 to seventy in 2009. The majority of this increased activity concerned pre-foreclosure-sale processes, while smaller shares of activity concerned foreclosure sale and post-sale processes, servicer regulation and ancillary issues.

There was considerable variation in the level of legislative activity across states. Some states passed no laws with substantive provisions during the study period while others passed laws with ten to twenty substantive provisions. Three states accounted for twenty-five percent of the adopted provisions, and ten states accounted for sixty percent. In general, states with the highest foreclosure rate during the second half of 2007 and all of 2008 (e.g., Arizona, California and Nevada) adopted the greatest number of provisions during 2009 and the first five months of 2010. States with very low levels of foreclosures (e.g., Alaska, Montana and Wyoming) saw no legislative activity. However, among states with relatively moderate levels of foreclosures there was a substantial variation in legislative activity. Some (e.g., Idaho and Virginia) saw only one or two provisions adopted during the latter period while others (e.g., Oregon and Colorado) saw seven or eight provisions adopted. Moreover, there were a few states (Georgia, Mississippi and Rhode Island) that had moderately high foreclosure levels but very small amounts of legislative activity. Consequently, it appears that other characteristics besides a state's level of foreclosures, such as its political environment or preexisting foreclosure law, were also important determinants of legislative activity.

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

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

Some of the provisions concerning the pre-foreclosure process were components of larger efforts to increase opportunities for loan modifications. Relatively few of these efforts involved third-party mediation. More focused on longer notice-to-sale periods, but also on additional notices, connections to hotlines and housing counselors, and related procedures. Notably, only Colorado³⁵¹ passed a law that reduced the notice-to-sale period. It is important to note, however, that most nonjudicial states already had relatively brief pre-foreclosure periods, especially compared to most judicial states.

Few states passed legislation addressing issues of the details of the foreclosure sale itself, such as minimum bid requirements, the availability of deficiency judgments, or other issues. Moreover, no nonjudicial state made a substantial move to adopt a judicial foreclosure process.

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

Given the time period of our study, it is perhaps not surprising that very little legislative activity concerned the regulation of the servicers and processes that would directly address the loan and mortgage documentation issues that have recently become so well understood. While the increased media attention will likely spur increased attention to these issues, nonjudicial states paid little attention to these problems prior to the summer of 2010.

VII. Conclusion

This study shows that significant numbers of nonjudicial foreclosure states did take some steps to try to reduce foreclosures, including changes in foreclosure law. Moreover, some of the more legislatively active states took steps to make the foreclosure process favor borrowers more than it had before the crisis. However, many of these provisions constituted quite marginal changes; many were temporary measures aimed only at loans originated during the subprime boom and others were effectively redundant with federal

³⁵¹ See *supra* notes 160, 164 and accompanying text.

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

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