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SENATE BILL 1

**50TH LEGISLATURE - STATE OF NEW MEXICO - SECOND SESSION, 2012**

INTRODUCED BY

Michael S. Sanchez

ENDORSED BY THE COURTS, CORRECTIONS AND JUSTICE COMMITTEE

AN ACT

RELATING TO PROPERTY; ENACTING THE MORTGAGE FAIR FORECLOSURE  
ACT; REQUIRING WRITTEN NOTICE PRIOR TO FORECLOSURE; REQUIRING  
AN ACCOUNTING; PROVIDING OPPORTUNITY FOR MITIGATION OF LOSS;  
PROVIDING FOR SANCTIONS; DECLARING AN EMERGENCY.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

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

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

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1 prevent the loss of homeownership. Further, the legislature  
2 finds that it is the public policy of this state, and to the  
3 benefit of consumers and businesses operating in this state, to  
4 facilitate whenever possible the cure of any default on  
5 residential mortgage loans and thereby preserve homeownership.

6 SECTION 3. DEFINITIONS.--As used in the Mortgage Fair  
7 Foreclosure Act:

8 A. "creditor" means a person that makes or holds a  
9 residential mortgage, including a servicer as defined in  
10 Subsection F of this section, or any of their agents, and a  
11 person to which a mortgage is assigned, but "creditor" does not  
12 include the seller in a real estate sales contract that is  
13 otherwise binding pursuant to New Mexico law;

14 B. "debtor" means a natural person shown on the  
15 record of a mortgage creditor as being obligated to pay the  
16 obligation secured by that mortgage;

17 C. "loss mitigation" means any process designed to  
18 explore and pursue alternatives to foreclosure, including an  
19 evaluation of the facts and circumstances of a loan secured by  
20 residential property to determine:

21 (1) whether a mortgagor or grantor qualifies  
22 for a financially sustainable loan modification to preserve  
23 homeownership; and

24 (2) if there will be no loan modification,  
25 whether any other loss mitigation program may be available to

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1 the mortgagor or grantor;

2 D. "mortgage" means a mortgage, security interest,  
3 deed of trust or the like in which the security is a  
4 residential property in New Mexico such as a house, real  
5 property or condominium that is occupied, or is to be occupied,  
6 by the debtor, who is a natural person, or a member of the  
7 debtor's immediate family, as that person's primary residence.  
8 "Mortgage" does not include a real estate sales contract that  
9 is otherwise binding under New Mexico law;

10 E. "net present value analysis" means a comparison  
11 of the net financial proceeds from a judicial sale on the  
12 schedule estimated by the creditor compared to the estimated  
13 accumulated net financial proceeds from loss mitigation while  
14 considering the value of future net financial proceeds from a  
15 judicial sale in the event the loss mitigation is unsuccessful;  
16 and

17 F. "servicer" means a person that, whether for  
18 compensation or gain from another or on its own behalf, engages  
19 in the business of receiving any scheduled periodic payments  
20 from a debtor pursuant to the terms of any mortgage, including  
21 amounts for escrow accounts, and making the payments of  
22 principal and interest and such other payments with respect to  
23 the amounts received from the debtor as may be required  
24 pursuant to the mortgage loan, the mortgage servicing loan  
25 documents or the servicing contract with a lender. "Servicer"

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

5 SECTION 4. RESIDENCE LOCATION--TYPE.--

6 A. The Mortgage Fair Foreclosure Act applies to the  
7 foreclosure of all mortgages wherever made that have as their  
8 security a residence in New Mexico; provided that the real  
9 property that is the subject of the mortgage:

10 (1) consists of no more than four dwelling  
11 units;

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

16 (3) was used as a primary residence by the  
17 debtor or a member of the debtor's immediate family within the  
18 twelve months preceding the date of the initial notice of  
19 default.

20 B. The Mortgage Fair Foreclosure Act shall not  
21 apply to a mortgage on which the default occurred less than one  
22 hundred twenty days after the date on which the subject  
23 mortgage was executed.

24 SECTION 5. WRITTEN NOTICE OF INTENT TO ACCELERATE LOAN OR  
25 FORECLOSE.--

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1           A. Upon a failure to perform any obligation of a  
2 mortgage by a debtor and before any creditor accelerates the  
3 maturity of a mortgage obligation and commences a foreclosure  
4 or other legal action to take possession of the property that  
5 is the subject of the mortgage, the creditor shall give the  
6 debtor written notice of such intention to be received by the  
7 debtor not less than thirty days in advance of such action.

8           B. Notice of intent to accelerate the maturity of a  
9 mortgage obligation, commence a foreclosure or initiate any  
10 other legal action to take possession of the property that is  
11 the subject of the mortgage shall be in writing and either  
12 served personally on the debtor or sent to the debtor by  
13 regular mail and by registered or certified United States mail,  
14 postage prepaid and return receipt requested, at the debtor's  
15 last known address, and if different, to the address of the  
16 property that is the subject of the mortgage. If notice is  
17 accomplished by mail, notice shall also be sent to any  
18 alternative address that the debtor has provided to the  
19 creditor. The notice is deemed to have been effectuated on the  
20 date the notice is served personally on the debtor or seven  
21 days following the date the notice is mailed.

22           C. The written notice required pursuant to  
23 Subsection A of this section shall be printed in at least  
24 twelve-point type, be printed in English and Spanish and  
25 identify that the notice is being sent pursuant to the

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1 requirements set forth in this section. The written notice  
2 shall clearly and conspicuously state in a manner reasonably  
3 calculated to apprise the debtor of the following:

4 (1) the property that is the subject of the  
5 mortgage being foreclosed upon, the particular obligation or  
6 real estate security interest being foreclosed upon and the  
7 parties to any such obligation or interest;

8 (2) the nature of the default claimed;

9 (3) the right of the debtor to cure the  
10 default;

11 (4) what performance, including the sum of  
12 money, if any, is required to cure the default as of the date  
13 specified pursuant to Paragraph (6) of this subsection;

14 (5) the allocation of money due and owing to  
15 principal, interest, fees and any other applicable allocation,  
16 including a projection of the change in money due as a result  
17 of daily accrual of interest during the thirty-day period set  
18 forth in Paragraph (6) of this subsection;

19 (6) the date by which the debtor shall cure  
20 the default to avoid initiation of foreclosure proceedings or  
21 the initiation of any other legal action to take possession of  
22 the property that is the subject of the mortgage, which date  
23 shall not be less than thirty days after the notice is  
24 effectuated, and the name, address and telephone number of a  
25 person to whom the payment or tender shall be made;

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1                   (7) the creditor's right to take steps to  
2 terminate the debtor's ownership in the property by commencing  
3 a foreclosure suit in a court of competent jurisdiction, or by  
4 taking other legal action to take possession of the property  
5 that is the subject of the mortgage if the debtor does not cure  
6 the default by the date specified pursuant to Paragraph (6) of  
7 this subsection;

8                   (8) the debtor's right, if any, to transfer  
9 the real property that is the subject of the mortgage to  
10 another person, subject to the security interest, which  
11 transferee shall have the right to cure the default as provided  
12 in the Mortgage Fair Foreclosure Act, subject to the provisions  
13 of the mortgage documents;

14                   (9) the debtor's right to seek counsel from an  
15 attorney of the debtor's own choosing concerning the debtor's  
16 mortgage default, and if the debtor is unable to obtain or  
17 afford an attorney, the debtor's right to contact the state bar  
18 of New Mexico or lawyer referral services or legal services  
19 program in the county in which the real property securing the  
20 mortgage loan is located;

21                   (10) the debtor's right to submit a loss  
22 mitigation request or application, if applicable, to the  
23 creditor and a list of any documents and information required;

24                   (11) a listing of any loss mitigation  
25 counselors certified by the federal department of housing and

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1 urban development located in New Mexico available to discuss  
2 loss mitigation options;

3 (12) the name and address of the creditor and  
4 the telephone number, email address and facsimile number of a  
5 representative of the creditor or designated servicing  
6 department whom the debtor may contact:

7 (a) if the debtor disagrees with the  
8 assertion that a default has occurred;

9 (b) to contest the accuracy of the  
10 calculation of the amount required to cure the default; or

11 (c) to request loss mitigation; and

12 (13) the debtor's right, including the time  
13 frame and procedure, to redeem a foreclosed mortgage  
14 obligation.

15 D. The creditor shall provide to the debtor, at the  
16 same time as the notice required pursuant to Subsection A of  
17 this section, copies of any applicable loss mitigation  
18 application, procedure or guidelines that will be used to  
19 evaluate loss mitigation, including all applicable deadlines  
20 and a list of documents required to be submitted.

21 E. The notice of intent to foreclose required to be  
22 provided pursuant to this section shall not be required if the  
23 debtor has voluntarily surrendered in writing the real property  
24 that is the subject of the mortgage that is in default.

25 F. The duty of the creditor pursuant to this

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1 section to serve written notice of intent to accelerate the  
2 loan or to foreclose is independent of any other duty to give  
3 notice pursuant to common law, principles of equity, state or  
4 federal statute or rule of court.

5 SECTION 6. ACCOUNTING.--In conjunction with the notice  
6 required pursuant to Subsection C of Section 5 of the Mortgage  
7 Fair Foreclosure Act, the creditor shall also provide the  
8 debtor with an accounting of the mortgage obligation covering  
9 the twelve-month period prior to the date of the alleged  
10 default. The accounting shall include, at a minimum, a history  
11 of all payments made during the twelve-month period prior to  
12 the date of the alleged default and the creditor's allocation  
13 of those payments to principal, interest, attorney fees and any  
14 other applicable fees. The creditor shall certify in writing  
15 that the information contained in the accounting is true and  
16 accurate to the best of its knowledge and that the information  
17 provided has been relied upon as the basis for the claim of  
18 default.

19 SECTION 7. PRE-FORECLOSURE LOSS MITIGATION OBLIGATIONS.--

20 A. Notwithstanding the provisions of any law to the  
21 contrary, with respect to a mortgage for which a notice of  
22 intent to foreclose is required pursuant to Section 5 of the  
23 Mortgage Fair Foreclosure Act, a creditor shall make good-faith  
24 efforts to contact the debtor to ascertain the debtor's current  
25 income, afford the debtor the opportunity to participate in

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1 loss mitigation and evaluate whether an affordable and  
2 sustainable alternative to foreclosure is feasible.

3 B. Notwithstanding the provisions of any law to the  
4 contrary, with respect to a mortgage for which a notice of  
5 intent to foreclose is required pursuant to Section 5 of the  
6 Mortgage Fair Foreclosure Act, upon a request by the debtor for  
7 loss mitigation, the creditor shall designate a person with  
8 authority to modify or otherwise affect the debtor's obligation  
9 pursuant to the subject security interest and shall provide to  
10 the debtor the contact information, including the name,  
11 address, telephone number, facsimile number and email address  
12 of the person designated. The creditor shall participate in  
13 good faith in loss mitigation efforts with the debtor prior to  
14 the commencement of any foreclosure proceeding.

15 C. Any loss mitigation conducted pursuant to  
16 Subsections A and B of this section may, at the request of the  
17 debtor, include the participation of a counselor certified by  
18 the federal department of housing and urban development, an  
19 attorney or other authorized representative to assist the  
20 parties or negotiate on behalf of the debtor potential options  
21 to be considered for loss mitigation.

22 D. The loss mitigation required pursuant to  
23 Subsections A and B of this section shall afford the debtor an  
24 opportunity to pursue a variety of alternatives to foreclosure  
25 consistent with the debtor's current financial circumstances

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1 and willingness and ability to pursue such alternatives. These  
2 alternatives to foreclosure may include:

3 (1) any loss mitigation program offered by the  
4 federal government in which the creditor participates and any  
5 other loss mitigation program offered by the creditor;

6 (2) reinstatement of the loan and dismissal of  
7 the foreclosure action upon the debtor's payment of applicable  
8 fees and demonstration that the debtor can bring the loan  
9 current;

10 (3) a repayment plan whereby the debtor agrees  
11 to resume making monthly payments, plus a portion of the past  
12 due payments each month, until the loan is brought current;

13 (4) a forbearance agreement that may include  
14 one or more of the following features:

15 (a) suspension or reduction of payments  
16 for a period sufficient to allow the debtor to recover from the  
17 cause of default;

18 (b) a period during which the debtor is  
19 only required to make the regular monthly mortgage payment  
20 before beginning to repay the arrearage;

21 (c) a repayment period of at least six  
22 months for accrued arrearages, penalties or other fees; or

23 (d) allowing reasonable foreclosure  
24 costs and late fees accrued prior to the execution of the  
25 forbearance agreement to be included as part of the repayment

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1 schedule;

2 (5) an extension agreement whereby the debtor  
3 pays a portion of the amount of the total arrearage, and the  
4 remaining portion of the arrearage amount is added to the end  
5 of the loan;

6 (6) a loan modification plan that would  
7 permanently change one or more terms of the defaulted loan  
8 obligation, including:

9 (a) extending the amortization period of  
10 the loan;

11 (b) converting an adjustable rate  
12 mortgage into a fixed rate mortgage;

13 (c) reducing the mortgage interest rate  
14 temporarily or permanently;

15 (d) adding missed payments to the  
16 existing loan balance;

17 (e) principal forbearance or  
18 forgiveness; or

19 (f) interest forbearance on some or all  
20 of the interest accrued or that may accrue in the future;

21 (7) a reasonable refinancing period of no  
22 fewer than sixty days during which the creditor agrees not to  
23 pursue foreclosure and gives the debtor an opportunity to seek  
24 refinancing of the loan obligation with a third-party lender;

25 (8) a principal reduction agreement in those

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1 cases in which the debtor's loan obligation has a negative  
2 amortization;

3 (9) a principal forbearance agreement;

4 (10) a mortgage loan assumption agreement  
5 whereby a qualified third-party individual or entity can assume  
6 the loan's payment obligation and the creditor waives any  
7 applicable "due on transfer" provision;

8 (11) an agreement by the debtor to execute a  
9 deed in lieu of foreclosure in exchange for the creditor  
10 canceling the debt owed on the loan;

11 (12) a short sale;

12 (13) a voluntary surrender of the home in  
13 exchange for cash consideration; or

14 (14) any other loss mitigation program for  
15 which the debtor is otherwise eligible.

16 E. Within seven days of terminating a loss  
17 mitigation effort, a creditor shall provide a written notice to  
18 the debtor signed by the person responsible for the decision to  
19 terminate loss mitigation. This notice shall:

20 (1) state that a loss mitigation alternative  
21 could not be implemented despite repeated attempts and set  
22 forth all efforts to inform the debtor of loss mitigation  
23 alternatives; or

24 (2) document that a loss mitigation effort was  
25 performed and set forth:

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1 (a) all efforts to evaluate loss  
2 mitigation alternatives;

3 (b) a summary of any information relied  
4 upon as the basis for termination of the loss mitigation  
5 effort, including the specific loss mitigation calculations  
6 performed;

7 (c) the results of any net present value  
8 analysis and any information considered by the creditor in  
9 making the net present value analysis; and

10 (d) the specific reasons for the alleged  
11 non-feasibility of loss mitigation alternatives.

12 F. The loss mitigation required pursuant to  
13 Subsections A and B of this section shall include, if  
14 available, written notice to the debtor of any administrative,  
15 regulatory or internal review or protest process for the debtor  
16 to contest the creditor's factual basis or decision on loss  
17 mitigation. Any review or protest process afforded shall  
18 provide a reasonable opportunity for the debtor to pursue the  
19 review or protest process prior to initiation of the  
20 foreclosure action by the creditor.

21 G. A review or protest process provided by the  
22 creditor shall not in any way bar the right of the debtor to  
23 contest the foreclosure action and to challenge the loss  
24 mitigation and decision of the creditor in any court  
25 proceeding.

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1           H. A creditor shall retain copies of all  
2 communications or records of communications between itself and  
3 the debtor or agent of the debtor until final sale of the  
4 property has been completed. The creditor shall transmit a  
5 copy of all such communications or records of communications to  
6 any subsequent servicer.

7           **SECTION 8. CONDITIONS PRECEDENT TO FORECLOSURE.--**

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

12                       (1) the debtor has not requested, verbally or  
13 in writing, loss mitigation; or

14                       (2) if the debtor has requested loss  
15 mitigation, the creditor has made a good-faith effort to  
16 negotiate loss mitigation, but loss mitigation was terminated  
17 as of a stated date, which date shall be the date upon which  
18 notice of loss mitigation termination was provided to the  
19 debtor.

20           B. In the event that the creditor alleges that the  
21 debtor has abandoned or voluntarily surrendered the property,  
22 the creditor shall plead the specific facts upon which that  
23 allegation is based.

24           C. Prior to entry of judgment in a foreclosure  
25 action, the court shall find that the creditor has met all

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1 certification requirements of the Mortgage Fair Foreclosure Act  
2 and that one of the following conditions has been met:

3 (1) the home has been abandoned;

4 (2) the debtor has voluntarily relinquished  
5 the property to the creditor in writing in return for valuable  
6 consideration;

7 (3) no loss mitigation is pending; or

8 (4) the debtor is at least ninety days in  
9 default on a loan modification agreed to by the debtor and  
10 creditor and no subsequent loss mitigation efforts are pending.

11 D. After commencement of a foreclosure proceeding,  
12 a debtor may request loss mitigation. Upon the debtor's  
13 request for loss mitigation, the court may, in its discretion,  
14 stay the foreclosure proceedings or the sale of the property  
15 until the loss mitigation is completed.

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

20 **SECTION 9. VIOLATIONS--SANCTIONS.**--If a court finds that  
21 there has been a material violation of any provision of the  
22 Mortgage Fair Foreclosure Act by the creditor, the court may,  
23 in its discretion, dismiss the action, impose sanctions, assess  
24 attorney fees and costs and order any other relief provided by  
25 law.

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