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Please send your request to: zuckergoldberg.com/pr*

REPLY TO NEW JERSEY ADDRESS

FOUNDED IN 1923
AS ZUCKER & GOLDBERG

MAURICE J. ZUCKER (1918-1979)
LOUIS D. GOLDBERG (1923-1967)
LEONARD H. GOLDBERG (1929-1979)
BENJAMIN WEISS (1949-1981)

Pennsylvania Office:
P.O. Box 650
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OF COUNSEL:

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¥ MEMBER OF PA BAR ONLY

October 21, 2011

VIA HAND DELIVERY

Clerk of Court
Supreme Court of New Jersey
Hughes Justice Complex
25 Market Street
Trenton, NJ 08625

RE: U.S. Bank National Association, as Trustee for CSAB
Mortgage-Backed Pass-Through Certificates, Series
2006-3 v. Guillaume
Docket No. 068176

Dear Madam/Sir:

Enclosed please find an original and eight (8) copies of
the following:

1. Notice of Motion to Appear Amicus Curiae, filed on behalf
of the Mortgage Bankers Association of New Jersey;
2. Certification of Counsel in Support of Motion;
3. Brief;
4. Request for Oral Argument; and
5. Certification of Service.

Kindly file the originals and return a "filed" stamped copy
in the return envelope provided for this purpose. Thank you for
your kind attention to this matter.

Respectfully submitted,
ZUCKER, GOLDBERG & ACKERMAN, LLC

By: _____

Jaime R. Ackerman, Esq.

cc: Alan J. Baldwin, Esq. Attorney for Appellants
Diane Bettino, Esq, Attorneys for Respondents
Margaret Lambe Jurow, Esq.

All By Hand

Zucker, Goldberg and Ackerman, LLC
200 Sheffield Street
Suite 301
Mountainside, New Jersey 07092
908-233-8500

Attorneys for Amicus Curiae Mortgage Bankers Association of New Jersey

**SUPREME COURT OF NEW JERSEY
DOCKET NO. 068176**

US BANK NATIONAL)
ASSOCIATION, AS TRUSTEE)
FOR CSAB MORTGAGE-BACKED)
PASS-THROUGH CERTIFICATES,)
SERIES 2006-3,)

Plaintiff/Respondent,)

v.)

MARYSE GUILLAUME, MR.)
GUILLAUME, HUSBAND OF)
MARYSE GUILLAUME, EMILIO)
GUILLAUME, MRS. EMILIO)
GUILLAUME, HIS WIFE, CITY)
OF EAST ORANGE,)

Defendants/Petitioners.)

On Certification from the Superior
Court of New Jersey, Appellate
Division, granted September 27, 2011

Civil Action

Sat Below:

Appellate Division:

Hon. Clarkson S. Fisher, Jr., J.A.D.
Hon. Douglas M. Fasciale, J.A.D.

Trial Court:

Hon. Harriet Farber Klein, J.S.C.

**NOTICE OF MOTION FOR LEAVE TO APPEAR
AS AMICUS CURIAE**

TO:
Mark Neary, Clerk
Supreme Court of New Jersey
Hughes Justice Complex
25 W. Market Street
Trenton, New Jersey 08625-0970

Reed Smith, LLP
Henry F. Reichner, Esq.
Mark Melodia, Esq.
Diane Bettino, Esq.
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Princeton, NJ 08540
Attorneys for Respondents

Broderick, Newmark & Grather, P.C.
20 South Street
Morristown, NJ 07960
Attorneys for Appellants

Margaret Lambe Jurow, Esq.
Legal Services of New Jersey
100 Metroplex Drive
Edison, NJ 08818

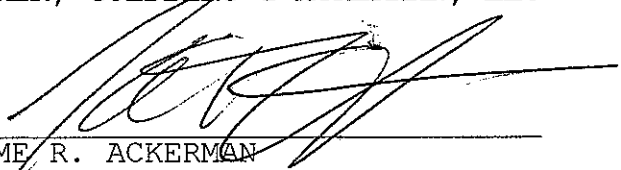
PLEASE TAKE NOTICE that Zucker, Goldberg and Ackerman LLC,
on behalf of the Mortgage Bankers Association of New Jersey,

shall move before the Justices of the Supreme Court of the State of New Jersey for an Order, pursuant to Rule 1:13-9, granting leave to file a brief amicus curiae in the above captioned matter.

PLEASE TAKE FURTHER NOTICE THAT, in support of this application, movant shall rely upon the attached amicus brief, and attached Certification of Counsel as to the interest of the Amicus Curiae.

Respectfully submitted,

ZUCKER, GOLDBERG & ACKERMAN, LLC



JAI ME R. ACKERMAN

Dated: October 21, 2011

professional experience and familiarity with the foreclosure laws, protocols and procedures of this State.

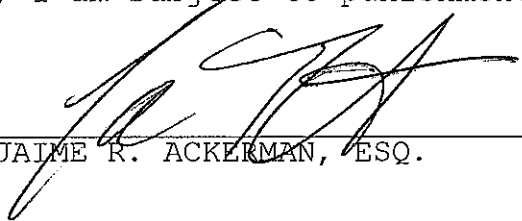
3. The Mortgage Bankers Association of New Jersey represents the Real Estate Finance Industry in the State of New Jersey. (See The Mortgage Bankers Association of New Jersey Constitution and Bylaws, attached hereto as Exhibit A.)

4. In this role, the Mortgage Bankers Association of New Jersey is dedicated to promoting growth and ethical business practices among its membership, providing an informative resource for its membership, acting as a representative spokesperson in Trenton and in Washington, D.C. on behalf of the Real Estate Finance Industry in New Jersey, and providing timely information to its members regarding changes in conditions, laws, administrative regulations and rules affecting the mortgage business. (See id.; see also, "Benefits of MBA-NJ/NJAMB Membership" attached hereto as Exhibit B.)

5. As the largest membership organization in the State of New Jersey representing the Mortgage Banking industry, we respectfully submit that the Mortgage Bankers Association of New Jersey has a unique understanding of the principles involved in this foreclosure action, which contains a substantial public interest due to the nature of the case presented, and are able, therefore to provide this Honorable Court with useful information for its consideration. We respectfully request, therefore, that leave be granted to appear as amicus curiae and to argue the position of the Mortgage Bankers Association of New Jersey in writing before this Honorable Court.

6. No party will be prejudiced by the Mortgage Bankers Association of New Jersey's participation in the instant action.

7. I hereby certify the foregoing statements made by me are true. I understand that if any of the foregoing statements made by me are willfully false, I am subject to punishment.



JAI ME R. ACKERMAN, ESQ.

Dated: October 21, 2011

EXHIBIT A



... your business partner

Mortgage Bankers Association of New Jersey

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MBA-NJ Bylaws

**Canons of Ethics
& Standards**

MBA-NJ Board

**Membership &
Committees**

**MBA-NJ Past
Presidents**

**Legislative &
Regulatory Insights**

**MBA-NJ Educational
Foundation**

**NJ Rules /
Regulations**

THE MORTGAGE BANKERS ASSOCIATION OF NEW JERSEY Constitution and Bylaws As Last Amended November 17, 2004

ARTICLE 1. Name

This Association shall be called "The Mortgage Bankers Association of New Jersey."

ARTICLE II. Objects of Association

The objects of this Association shall be:

To promote the expansion of the mortgage banking business in the State of New Jersey;

To promote sound and ethical business practices among the members;

To provide timely information to the members regarding changes in conditions, laws, administrative regulations and rules affecting the mortgage business; and To hold meetings for the purpose of enabling members to discuss problems and other matters of common interest.

ARTICLE III. Membership

Section 1. The membership of this Association shall consist of Regular Members, Associate Members, Limited Members, and Special Individual Members, defined as follows:

(a) Regular Members shall be selected from:

1. Mortgage Bankers (individual and corporate) whose principal business, or an important part thereof, is the originating, financing, closing with one's own funds and selling of mortgage loans on real estate.
2. Mortgage Brokers, whose principal business is the origination and closing of mortgage loans using the funds of others or acting as an intermediary between originators and borrowers.
3. Life Insurance Companies.
4. Banks (Commercial and Savings), Savings and Loan Associations, and Trust Companies.
5. Fire and Casualty Insurance Companies investing a substantial portion of their assets in first liens on real estate, which are in accord with the aims, objectives and standards of The Mortgage Bankers Association of New Jersey and Private Mortgage Insurance Companies.
6. Abstract Companies investing a substantial portion of their assets in first liens on real estate, which are in accord with the aims, objectives and standards of The Mortgage Bankers Association of New Jersey and Title Agencies and Companies.
7. Colleges, Public or Private Investment Funds, Pension Funds and other institutions investing a substantial portion of their assets in first liens on real estate, which are in accord with the aims, objectives and standards of The Mortgage Bankers Association of New Jersey.
8. Credit Reporting Agencies.

(b) Associate Members shall be selected from:

1. Persons, firms or corporations having their principal office outside the State of New Jersey and no office within such State provided that they otherwise meet the requirements for regular or associate membership under any paragraph of subsection(a) or subsection(b) of this Section 1.
2. Environmental Firms who regularly perform services for or act as consultants to regular members of the Association and who are in accord with the aims, objects and standards of

The Mortgage Bankers Association of New Jersey.

(c) Limited Members shall be selected from:

1. Attorneys, accountants, investment banks and other persons, firms and corporations who regularly perform financial or other professional services for, or act as consultant to, regular members and who are in accord with the aims, objects and standards of The Mortgage Bankers Association of New Jersey; or
2. Unemployed individuals whose last employment was with a firm which was then a member of the Association; provided however, that such individual membership shall be limited to a six-month period or until the individual becomes employed, whichever occurs first. A Limited Individual Membership can be renewed for successive six-month periods at the Board's discretion;
3. Individuals who have received scholarship awards from The Mortgage Bankers Association of New Jersey Educational Foundation, who have indicated an interest in becoming employed in the mortgage banking industry in the State of New Jersey;
4. Individuals who have shown an interest in promoting the expansion of the mortgage banking business in the State of New Jersey and who would, in the opinion of the Board of Governors, represent an asset to the Association as a member, based upon their status in the community.

(d) Special Individual Membership

An individual who has been an active participant in Association activities either as an officer, board member, committee chairperson or vice chairperson, or committee member, whose company was a member of the Association but can no longer continue such membership because of the actions of any regulatory body, can be approved as a special individual member of the Association. Such membership shall be in the same category under Article III, Section 1, as his company's previous membership category. The term of a special individual membership shall continue for a period of time coincident with the control of the employer by such regulatory body and for a period of 90 days thereafter or until the individual becomes employed by another entity, whichever occurs first.

(e) The status of any members as of March 11, 1954, shall remain unchanged.

(f) Associate Members shall have no right to vote or to hold office; the right to vote and to hold office being restricted to Regular Members. Associate Members can be appointed to chair committees.

(g) Limited Members shall have no right to vote, hold office or chair any committee.

(h) No member shall be liable, either jointly or severally, for the debts of the corporation in excess of his unpaid current membership dues as fixed by the Bylaws.

Section 2. Each Regular member of this Association may delegate one of its officers or employees as its representative, and each representative shall vote in person or by written proxy; each regular member being entitled to but one vote. The representative of each regular member shall have power to appoint in writing an alternate to represent him at any specified meeting of the Association with the right on the part of the alternate to vote in the place and stead of the representative for whom he is acting as alternate.

Section 3. Any person, firm or corporation seeking membership shall be considered for election only when proposed in writing by a member in good standing, who shall submit to the Membership Committee such information as may be required by the Membership Committee to investigate the qualifications of the candidate. In making its investigation, the Membership Committee, among other things, shall give due regard to the credit standing of the candidate, its general reputation in the community and the extent to which the applicant, in its general business operations, conforms to the Canons of Ethics and Standards of Practice of the Association.

Applications for membership shall be processed in the following manner:

(a) Applications shall first be reviewed by the Membership Committee, which shall determine by a majority vote, whether an application shall be recommended for approval or disapproval.

(b) Recommendations for approval or disapproval of an application shall be made at the next regular meeting of the Board of Governors following the Membership Committee meeting at which a recommendation has been decided upon. The Executive Director shall be advised of the recommendation, prior to the meeting.

(c) The Board of Governors shall vote upon each application recommended for approval or disapproval and a vote of at least two-thirds of the Board members present shall be required in order to approve an applicant for membership; provided, however, that in the event the Board, by a majority vote, determines that it wishes additional time to consider an application, a vote on the application shall be held over until the next regular Board meeting, at which time a vote shall be taken on the application. The Executive Director of the Association shall conduct the election of members, keeping no record of any of the votes cast, recording only the fact of the election or rejection of a candidate.

(d) For the purpose of determining the integrity of an applicant for membership, the Board shall accept the Department of Banking's licensure of the applicant as a rebuttable presumption that the applicant has sufficient integrity to meet MBA-NJ's requirements. This presumption can be rebutted by a presentation setting forth specific facts based upon which the Board can make a finding that the applicant does not meet MBA-NJ's standards.

Section 4. Any member may be suspended or expelled from this Association for due cause, upon two-thirds vote of the members of the Board of Governors of the Association, but no member shall be suspended or expelled until the member shall have had due notice thereof and a reasonable opportunity to make defense.

Section 5. From time to time, the members may be required to supply informational data to the Association, on a form to be provided. The data shall be used for public relations purposes and shall be submitted directly to the Executive Director. Each member's informational form shall be considered confidential and shall not be revealed publicly or to any other member of the Association. The data provided shall only be used by reference to groups of members and then only to the combined or aggregate data supplied by each group referred to.

ARTICLE IV. Officers and Board of Governors

Section 1. The officers of this Association shall consist of a President, First Vice President, Second Vice President, and a Treasurer, all of whom shall be elected annually. The affairs of the Association shall be administered by a Board of Governors, consisting of the elected officers and fifteen (15) other members of the Association to be elected by ballot. The three classes of Board members in existence as of November 10, 1987, shall comprise the structure of the Board, establishing the terms of office of the Board members. At each annual meeting thereafter, commencing with 1988, five members shall be elected to the Board of Governors for a term of three years each, filling the seats vacated by those Board members whose terms of office have expired, and other members shall also be elected to fill the unexpired terms of any members of the Board who shall have died, resigned or for any other reason will not complete their terms of office. Any member of the Board who is absent from three consecutive regularly called meetings of the Board without having applied to the President in advance of such meetings to be excused from attendance thereat for good cause shall be automatically dropped from membership on the Board. Each officer of the Association and each member of the Board of Governors to be eligible as such shall be the representative of the person, firm or corporation holding membership. The term of office of an officer or member of the Board of Governors shall automatically terminate whenever the principal business employment of such person shall change in such manner as to make him/her ineligible to be or to represent a Regular Member of the Association. The Board of Governors shall appoint an Executive Director to serve at the pleasure of the Board, and on such terms of compensation as the Board may prescribe. Such Executive Director shall not be a member of the Board of Governors.

Section 2. The Board of Governors shall each year, at least thirty (30) days before the date of the next ensuing annual meeting of the Association, appoint a Nominating Committee consisting of not less than three nor more than five representatives of members in good standing, no two of whom shall be associated with the same person, firm or corporation member, which Committee shall prepare a slate of nominees for the several offices (including members of the Board of Governors) to be filled at the annual meeting. Such slate of nominees shall be filed with the Executive Director in time for him to forward a copy thereof to each member of the Association at

least ten (10) days in advance of the annual meeting. Any member shall be privileged to make a nomination from the floor at the annual meeting of any representative of a member to any office proposed to be filled at such meeting, for which such representative is eligible under the provisions of this Constitution and Bylaws.

Section 3. The newly elected President of the Association following his/her election shall appoint the members of the various committees to serve during his/her administration and they shall thereupon organize and enter upon their respective responsibilities following the installation of the newly elected officers.

Section 4. All officers and members of the Board of Governors shall continue in office and exercise the function thereof until their successors have been elected or appointed and have duly qualified.

Section 5. Vacancies among the officers and the Board of Governors shall be filled by successors selected by the Board of Governors to serve until the election and installation of a successor at the ensuing Installation of Officers meeting.

Section 6. The elected officers shall serve for a period of not more than two years in their respective offices and shall not again be eligible for such office until at least one year has elapsed following the expiration of their term in such office; provided, however, that any officer who has filled an unexpired term of less than one year shall not be barred from reelection by reason of such service.

Section 7. The Board of Governors may establish an Executive Committee consisting of five (5) voting members and the Executive Director. The voting members of the Committee shall be as follows:

1. The President of the Association, who shall be the Chairman of the Committee.
2. The First Vice President of the Association.
3. The Second Vice President of the Association.
4. The Treasurer of the Association.
5. The Immediate Past President of the Association.

The Executive Committee shall conduct the affairs of the Association between regular Board of Governors meetings and may meet at such times and places as the Committee in its discretion shall determine. The Committee shall establish its own rules and procedures. A majority of the members of the Executive Committee shall constitute a quorum thereof. Meetings of the Committee shall be called into session by the Executive Director upon request of the Chairman or a majority of the members of the Committee. Where reasonable written notice of such meeting is not possible, the Executive Director shall communicate with the office of each Executive Committee member by telephone, advising of the time and place for the meeting, and the reason therefor.

It is understood that the Executive Committee shall be bound to carry out the policies and philosophies of the Association, as expressed by the Board of Governors at its regular monthly meetings, and as set forth in these Bylaws. Where sufficient policy guidelines are not available to guide the decisions of the Executive Committee, such decisions, except in emergent matters, shall await discussions by the Board of Governors at its next meeting. Subject to the provisions of the Constitution and Bylaws of the Association, the Executive Committee may exercise all of the powers of the Board of Governors with respect to the affairs of the Association, except that the Executive Committee shall not:

1. Exercise such powers while a quorum of the Board of Governors is actually convened to conduct the business of the Association;
2. Authorize the making, alteration or repeal of any of the Bylaws of the Association;
3. Elect, appoint or remove any Officer, Board of Governors member or the Executive Director;
4. Exercise any power which is not necessary and incidental to the functions of the Executive Committee.

At each meeting of the Board of Governors, the Executive Committee Chairman shall make a report as to the activities of the Committee since the last Board of Governors meeting. The Board of Governors thereafter shall give the Executive Committee such further instructions as it may deem appropriate relative to the conduct of its future activities.

ARTICLE V. President

The President shall preside at all meetings, perform such acts as are incident to the office and appoint the following committees: Bylaws Committee, Education Committee, Ethics and Standards of Practice Committee, Legislative/Legal Committee, and such other committees as the Board of Governors may, from time to time, deem necessary and desirable unless otherwise provided for by these Bylaws. The President shall be an ex-officio member of all committees.

ARTICLE VI. Vice President

The Senior Vice President in attendance shall act in the absence or disability of the President.

ARTICLE VII. Treasurer

The Treasurer shall receive and disburse all Moines of the Association and render an account thereof at each meeting of the Board of Governors and at each meeting of the members of this Association, and shall deposit all Moines in the name of the Association in a bank or trust company to be selected by the Board of Governors. All withdrawals of the Association's funds shall be by check signed by any two officers of the Association, one of which shall be the Treasurer except that in his absence the President or a Vice President may be substituted for the Treasurer.

ARTICLE VIII. Executive Director

The Executive Director shall record the minutes of all meetings, give notice of all meetings of the Association and shall perform such other duties as may be assigned by the President or the Board of Governors.

ARTICLE IX. Advisory Committee of Past Presidents

Upon expiration of his term of office, the President, so long as he remains a member in good standing of this Association, shall become a life member of the Advisory Committee of Past Presidents, the members of which shall meet with the Board of Governors at all of its regular or special meetings and shall be entitled to cast, collectively, only one vote upon any question or matter voted upon at any such meeting. The immediate past president of the Association shall serve as chairman of the Advisory Committee and shall cast any vote on behalf of the Committee at meetings of the Board of Governors. In the event of his absence, the senior past president present in point of service shall be substituted as Chairman.

ARTICLE X. Dues

Every member of this Association shall pay dues as fixed by the Board of Governors from time to time which dues shall require approval of not less than two-thirds of those Regular and Associate members actually voting on any dues proposal, but in no event shall the dues of the Association be established by a vote of less than a majority of the entire regular and associate membership of the Association.

Notwithstanding the provisions of Article III., Section 4, any member failing to pay membership dues established as herein provided, within a period of three months after due notice has been mailed to him, shall have membership suspended or terminated at the election of the Board of Governors. A suspended member may be reinstated to full and active membership upon application to the Board of Governors and upon payment of all items which the Board of Governors shall establish as being due the Association.

ARTICLE XI. Budget

At least ten days prior to the Board meeting at which the annual budget is considered, the Executive Director shall forward to each member of the Board a copy of the budget to be proposed by the Budget Committee. A copy shall also be forwarded to each past president who indicates to the Executive Director that he will attend the Board meeting.

ARTICLE XII. Meetings

The annual meeting of the members of this Association shall be held in November at the place on the date, and at the time selected by the Board of Governors. Notice of the place, date and time of the annual meetings shall be given to each member at least thirty (30) days in advance of such meeting. Four regular meetings of the members of this Association shall be held each year, in the months of November (which shall be the annual meeting and the election of officers and members of the Board of Governors to fill terms of office then expiring and any vacancies therein), January (at which time the officers and members of the Board of Governors chosen at the annual meeting shall be installed), April and June at the place, date and time selected by the Board of Governors; provided, however, that the Board of Governors or the Executive Committee shall have the authority to reschedule any meeting of the Association to any convenient date and time, as close as possible to the meeting previously scheduled, in the event of any exigent circumstances requiring the cancellation of the meeting. Special meetings of the members of this

Association may be called by a majority of the Board of Governors and shall be called at any time upon the request of a majority of the members. All meetings of the members of this Association, either regular or special, shall be called upon not less than five days notice by mail unless otherwise provided by the Bylaws. A quorum shall be a majority of the membership. All questions before meetings of members of the Association shall be decided by a majority of the members present.

Regular meetings of the Board of Governors shall be held each month other than in the months of June, July and August at the place and at a time and on the date selected by the Board of Governors. Special meetings of the Board of Governors may be called by the President and shall be called at a time upon request of a majority of the Board of Governors. All meetings of the Board of Governors, either regular or special, shall be called upon not less than two days' notice by mail or otherwise. A quorum shall be a majority of the Board of Governors. All questions before the Board of Governors shall be decided by a majority of the Board members present.

ARTICLE XIII. Amendments

This Constitution and Bylaws may be amended at any regular meeting of the members of this Association or at any special meeting of the members of this Association called for that purpose, provided that the notice of the regular or special meeting shall contain a statement of the proposed amendment or amendments, and provided further that no amendments shall be made except upon the affirmative vote of two-thirds of the members at such regular or special meeting.

ARTICLE XIV. Canons of Ethics

The Board of Governors shall, by a vote of two-thirds of those present, promulgate Canons of Ethics and Standards of Practice which shall be applicable to all members of the Association. The Board of Governors shall have the power to amend the Canons of Ethics and Standards of Practice from time to time in its discretion by a vote of two-thirds of those present, and shall notify all members of the Association of such amendments in writing.

ARTICLE XV. Committee Functions

The Board of Governors shall delegate such functions to each committee established, pursuant to Article V herein, as it deems necessary to properly conduct the affairs of the Association.

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1460 Route 9N, Suite 301, Woodbridge, NJ 07095 - (732) 596-1619 - Fax (732) 596-1625

EXHIBIT B



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Mortgage Bankers Association of New Jersey

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MBA-NJ Bylaws

Canons of Ethics & Standards

MBA-NJ Board

Membership & Committees

MBA-NJ Past Presidents

Legislative & Regulatory Insights

MBA-NJ Educational Foundation

NJ Rules / Regulations

BENEFITS OF MBA-NJ/NJAMB MEMBERSHIP:

Recognized as one of the leading mortgage bankers associations in America, the Association provides a multitude of functions for its members, including the following:

- A spokesperson for real estate finance.
- A representative voice in Trenton and Washington, D.C. to ensure that its members' point of view is recognized.
- A liaison with government agencies that ensures decisions are made with full knowledge of the impact they will have upon the real estate finance industry.
- An education provider, the premier source for state-of-the-art instruction in real estate finance in the State of New Jersey.
- An opportunity for member participation through MBA-NJ's committees.
- An information resource that provides ongoing communications via its newspaper, e-mail and bulletins.
- A forum for discussion, decision and timely action on issues affecting its members' livelihood.
- A networking opportunity for establishing and nurturing successful business relationships among colleagues with similar interests. Exchanges among members take place at general Membership Meetings, Network Night Receptions, Seminars, an annual Golf Outing, the March Regional Conference in Atlantic City, the Fall League Conference, also in Atlantic City, and the Tri-State trade show in July.

HOW TO JOIN THE MBA:

There are three categories of membership to the MBA-NJ: Regular, Associated and Limited. The 2005 membership roster consists of approximately **300 members** in the mortgage banking and brokerage industry. Related businesses of limited members include attorneys, environmental consultants, appraisal companies, and credit reporting agencies. To request an application and membership packet, contact Monica Ceden, mcedeno@mbanj.com at the MBA-NJ office, at 973-379-7447.



[View our Membership Directory](#)

COMMITTEES:

The MBA-NJ/NJAMB has committees which meet regularly to serve its members. Committee Bulletin Reports are published regularly to keep members informed of committee activities

2009 MBA-NJ/NJAMB Committees:

| | Chair | Vice Chair |
|-------------------------------------|--|------------|
| 1. Loan Originations | Paul Logan Franklin American Mortgage | Vacant |
| 2. Membership/Emerging Leaders | Michael DiSalvio Genworth | Vacant |
| 3. Mortgage Fraud/Quality Assurance | Bob Knuth NCS Credit Central | Vacant |
| 4. FHA Committee | | |

| | | |
|---|---|-------------------------------------|
| | Carl Markman Security Atlantic Mortgage | <i>Vacant</i> |
| 5. Advertising | | |
| | Scott Agnoli ISBNJ | <i>Vacant</i> |
| 6. FNMA/FHLMC | | |
| 7. Legislative/Legal/Compliance | Maureen Erwin | <i>Vacant</i> |
| | Laura Borrelli Barrister Mortgage & Investment | Wayne Watkinson Levy & Watkinson |
| 8. Underserved Markets & Affordable Housing | | |
| | Nelson Ramos SunTrust Mortgage | <i>Vacant</i> |
| 9. MORPAC | | |
| | Joseph Sheridan Intercounty Mortgage | <i>Vacant</i> |
| 10. Financial Literacy | | |
| | Richard W. Miller Cenlar | <i>Vacant</i> |
| 11. Commercial Property Division | | |
| | Kevin Taub M&T Bank | Bert Owen |
| 12. Professional Women's | | |
| | Diane Lombardi Mindbulge | <i>Vacant</i> |
| 13. Loan Administration | | |
| | Jeffrey Hillman Cenlar | <i>Vacant</i> |
| 14. Institutional Lenders | | |
| | James Richmond Equity Source Home Loans | <i>Vacant</i> |

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PRELIMINARY STATEMENT

Mortgage Bankers Association of New Jersey (the "Association") is an Association devoted to promoting ethical practices in the lending industry. The issue before the Court has an effect on all the members of the Association.

It will be demonstrated that the Appellate Division in Laks did not properly construe the statute requiring the Notice of Intention to Foreclose. In that, the specific subsection of the statute at issue is permissive rather than mandatory.

Further, it will be shown that applying the Laks holding retroactively will create an unmanageable burden on the Court system itself.

LEGAL ARGUMENT

POINT I

A. THE LEGISLATIVE HISTORY OF THE FAIR FORECLOSURE ACT SUPPORTS THE APPELLATE DIVISION'S HOLDING BECAUSE THE BORROWERS WERE GIVEN SUFFICIENT NOTICE OF THEIR DEFAULT AND OPPORTUNITY TO CURE; FOR THIS COURT TO HOLD OTHERWISE WOULD IGNORE THE ACT'S DUAL PURPOSE OF ACCELERATING NEW JERSEY'S FORECLOSURE PROCESS

When the courts typically opine on the purpose of New Jersey's Fair Foreclosure Act (hereinafter referred to as "the Act" or "the FFA"), N.J.S.A. 2A:50-53, et seq., they focus on that piece of the legislative history that dealt with providing

additional protection to defaulting homeowners. However, in so doing, some courts have ignored the other, equally important component of the Act's history, which was to expedite the State's foreclosure process. A review of the FFA's history reveals that this second purpose was just as important as the first. To allow the Appellate Division's recent decision in Bank of New York as Trustee for the Certificate Holders CWALT 2004 26T1 v. Laks, 2011 WL 3424983 (App. Div. Aug. 8, 2011), which is in direct conflict with the Appellate Division's decision in this action, would be tantamount to eviscerating that second vital goal from the Act's history.

The Act's notice provisions were always designed to advise a borrower of his default and afford him the opportunity to cure before a foreclosure was initiated. The notice of intention to foreclose ("NOI") also served to inform a borrower of his rights in the event that a foreclosure was filed against him. However, as recognized by then Governor Christie Whitman in her press release regarding the signing of the Act, "This legislation will help lenders to complete the residential foreclosure process in a more timely manner, bringing New Jersey in line with its neighboring states." (Aa32). The press release went on to recognize that, based upon Federal National Mortgage Corporation statistics, "New Jersey ranks last among all 50 states for

average time needed to complete a residential foreclosure action." (Id.).

Elizabeth Randall, the Banking Commissioner, also recognized the importance of this legislation to lending institutions. "Expediting the foreclosure process will encourage financial institutions to increase their residential mortgage lending in New Jersey, thereby fulfilling Gov. Whitman's commitment to opening New Jersey for business." (Id.). It is readily apparent that the ability of lending institutions to timely complete a residential foreclosure in New Jersey was an essential component both to the Act and its history. Governor Whitman intended for this legislation to provide an incentive to banks to do business in the State, to help foreclosures move in a more streamlined process and to make New Jersey more friendly for businesses.

However, the recent decision of the Appellate Division in Laks seeks to undermine this equally significant purpose of the Act in favor of providing more protections to the borrower than was ever intended by the Legislature. The Appellate panel in Guillaume, in contrast, recognized the fundamental dual purposes of the Act and reached the correct conclusion in its decision, finding that the "the NOI satisfied the purpose of the FFA because ASC is the appropriate party for the Guilllaumes to contact to cure their default. N.J.S.A. 2A:50-56(c)

provides...that the written notice...shall clearly and conspicuously make the debtor aware of the situation." U.S. Bank v. Guillaume, 2011 WL 3424983 (App. Div. Aug. 8, 2011).

For this court to hold otherwise and reverse the Appellate panel's decision below in this matter would result in a gross miscarriage of justice and support the distortion of the Act's legislative history found by the appellate panel in Laks. Such a conclusion would be disastrous to New Jersey's economy, as well as the efficient administration of foreclosures in this State.

**B. THE APPELLATE DIVISION COMITTED REVERSABLE ERROR
BY HODLING A DEFECT IN THE NOTICE OF INTENTION
IS JURISDICTIONAL**

The recent Appellate Division opinion in Laks, held that the Notice of Intention to Foreclose must contain all the elements in N.J.S.A. 2A:50-56 as a pre-condition for the Court to entertain a foreclosure action. The Court indicated "thus compliance with this notice provision is, in effect, a condition the lender must satisfy in order to either 'accelerate the maturity of any residential mortgage obligation' or commence any foreclosure or other legal action to take possession of the residential property which is the subject of the mortgage." (citation omitted.) In fact, with narrow exceptions inapplicable here, compliance with N.J.S.A. 2A-50-56 shall be

set forth in the pleadings of any legal action to foreclose a residential mortgage. Laks, 2011 W.L. 2424983 at 2.

It is respectfully submitted that the Appellate Division misconstrued the Notice of Intention to Foreclose requirement in the Fair Foreclosure Act. N.J.S.A. 2A:50-56 sets forth:

a. Upon failure to perform any obligation of a residential mortgage by the residential mortgage debtor and before any residential mortgage Lender may accelerate the maturity of any residential mortgage obligation and commence any foreclosure or other legal action to take possession of the residential property which is the subject of the mortgage, the residential mortgage lender shall give the residential mortgage debtor notice of such intention at least 30 days in advance of such action as provided in this section.

b. Notice of intention to take action as specified in subsection a. of this section shall be in writing, sent to the debtor by registered or certified mail, return receipt requested, at the debtor's last known address, and, if different, to the address of the property which is the subject of the residential mortgage. The notice is deemed to have been effectuated on the date the notice is delivered in person or mailed to the party.

c. The written notice shall clearly and conspicuously state in a manner calculated to make the debtor aware of the situation:

- (1) the particular obligation or real estate security interest;
- (2) the nature of the default claimed;
- (3) the right of the debtor to cure the default as provided in section 5 of this act;
- (4) what performance, including what sum of money, if any, and interest, shall be tendered to cure the default as of the date specified under paragraph (5) of this subsection c.;
- (5) the date by which the debtor shall cure the default to avoid initiation of foreclosure proceedings, which date shall not be less than 30 days after the date the notice is effective, and the name and address and phone number of a person to whom the payment or tender shall be made;
- (6) that if the debtor does not cure the default by the date specified under paragraph (5) of this subsection c., the lender may take steps to terminate the debtor's ownership in the property by commencing a foreclosure suit in a court of competent jurisdiction;
- (7) that if the lender takes the steps indicated pursuant to paragraph (6) of this subsection c., a debtor shall still have the right to Cure the default pursuant to section 5 of this act, but that the debtor shall be responsible for the lender's court costs and attorneys' fees in an amount not to exceed that amount permitted pursuant to the Rules Governing the Courts of the State of New Jersey;

(8) the right, if any, of the debtor to transfer the real estate to another person subject to the security interest and that the transferee may have the right to cure the default as provided in this act, subject to the mortgage documents;

(9) that the debtor is advised to seek counsel from an attorney of the debtor's own choosing concerning the debtor's residential mortgage default situation, and that, if the debtor is unable to obtain an attorney, the debtor may communicate with the New Jersey Bar Association or Lawyer Referral Service in the county in which the residential property securing the mortgage loan is located; and that, if the debtor is unable to afford an attorney, the debtor may communicate with the Legal Services Office in the county in which the property is located;

(10) the possible availability of financial assistance for curing a default from programs operated by the State or federal government or nonprofit organizations, if any, as identified by the Commissioner of Banking and Insurance. This requirement shall be satisfied by attaching a list of such programs promulgated by the commissioner; and

(11) the name and address of the lender and tile telephone number of a representative of the lender whom the debtor may contact if the debtor disagrees with the lender's assertion that a default has occurred or the correctness of the mortgage lender's calculation of the amount required to cure the default.

d. The notice of intention to foreclose required to be provided pursuant to this

section shall not be required if the debtor has voluntarily surrendered the property which is the subject of the residential mortgage.

e. The duty of the lender under this section to serve notice of intention to foreclose is independent of any other duty to give notice under the common law, principles of equity, State or federal statute, or rule of court and of any other right or remedy the debtor may have as a result of the failure to give such notice.

f. Compliance with this section shall be set forth in the pleadings of any legal action referred to in this section. If the plaintiff in any complaint seeking foreclosure of a residential mortgage alleges that the property subject to the residential mortgage has been abandoned or voluntarily surrendered the plaintiff shall plead the specific facts upon which this allegation is based.

N.J.S.A. 2A:50-56 does impose new duties on residential mortgage lenders, however those duties are not as expansive as the Appellate Division interpreted them to be. Section 50-56 of the statute is very specific, the Notice of Intention shall:

- a) be in writing;
- b) sent to the debtor by registered or certified mail;
- c) the Notice of Intentions must be mailed to the mortgagor's last known address,

and if different to the property
address as well

Subsection (c) of the statute states: "The written notice shall clearly and conspicuously state in a manner calculated to make the Debtor aware of the situation". This provision does create a duty on the residential mortgage lender to ensure that the mortgagor is aware that the mortgagor is in default, and to further inform the mortgagor that if the account is not reinstated there will be a foreclosure filed.

The Laks court states that the Notice of Intention must include certain information. This is simply an erroneous interpretation. The legislature did not mandate any of the items in subsection (c)(1) to (11) be contained in the Notice of Intention to Foreclose. Conspicuously absent from the language in subsection (c) is language to the effect that the Notice of Intention shall contain or the Notice of Intention must clearly and conspicuously state certain information. The statute as written leaves a great deal of discretion to a residential mortgage lender as to what information to include in the Notice of Intention to Foreclose. The only requirement is that the Notice of Intent to Foreclose states information "in a manner calculated to make the debtor aware of the situation." Id.

Giving the lender discretion to determine what information should be in the Notice of Intention to Foreclose does not make subsections (c)(1) to (11) superfluous. What subsection (c)(1) through (11) does is give a residential mortgage lender a list of the components to include in a Notice of Intention to Foreclose which would make the Notice of Intention to Foreclose *per se* calculated to make the debtor aware of the situation. If all of the items specified in subsections (c)(1) through (11) are included in a Notice of Intention, no further analysis would be needed to determine that issue.¹ The Notice of Intention to Foreclose would *per se* be in compliance with the statute.

Where the Appellate Division erred was in not remanding the matter and allowing the trial court to hear evidence as to the issue of whether the Notice of Intention to Foreclose clearly and conspicuously informed the mortgagor of the situation the mortgagor faced. For example, deposition testimony and phone records from the servicer could have proven that the mortgagor was aware of the situation and how to remedy that situation. If that showing was made to the trial court, the foreclosure should have been allowed to proceed. While a Notice of Intention to Foreclose that has all the elements of subsection (c)(1) through

¹ It is ironic that the Laks court indicated that if the legislature wanted to let a lender's agent suffice it knew how to say so. Laks at 4. Similarly but not stated by the Appellate Division is that the legislature is certainly aware of how to make statutory provisions mandatory and choose to not include that language in subsection (c).

(11) obviates the need for judicial review, if some of the subsection (c)(1) through (11) elements are missing from the Notice of Intention to Foreclose then the Court should review the Notice of Intention to Foreclose and allow the residential mortgage lender the opportunity to prove that the Notice of Intention met the statutory mandates in N.J.S.A. 2A:50-56, rather than simply dismissing the complaint outright.

The doctrine of mandatory versus directory statutes has direct application in this case. Both types of statutory language can be found in a single statute. Sutherland on Statutory Constructions details the difference between the two types of statutory wording:

This distinction grows out of the fundamental difference in the intention of the legislature in enacting the two statutes. Although directory provisions are not intended by the legislature to be disregarded, the seriousness of noncompliance is not considered too great that liability automatically attached for failure to comply. The question of compliance remains for judicial determination. If the legislature considers the provisions sufficiently important that exact compliance is required then the provision is mandatory. If the statute is merely a guide for the conduct of business and for orderly procedure rather than a limitation of power, it will be construed as directory.

There is no universal rule by which directory provisions may under all circumstances, be distinguished from those which are mandatory. The intention of the legislature, however, should be controlling and no formalistic rule of grammar or word form should stand in the way of carrying out the legislative intent. In the words of a Minnesota court:

"Consideration must be given to the legislative history, the language of the statute, its subject matter, the importance of its provisions, their relation to the general object intended to be accomplished by the act, and finally whether or not there is a public or private right involved"

Sutherland Statutory Construction, 5th Ed. Volume 1A § 25.03.

Hence, N.J.S.A. 2A:50-56 mandates that a Notice of Intention to Foreclose must be filed; however, the legislature did not mandate the contents of that Notice of Intention to Foreclose. The list contained in subsection (c)(1) through (11) are directory provisions and specifically were not mandated by the legislature. Since the Notice of Intention to Foreclose was not *per se* compliant with the statute due to its failure to include all of the items listed in subsections (c)(1) through (11), the Appellate Division should have remanding the matter to

the trial court to allow evidence on the issue of whether the Notice of Intention to Foreclose achieved its statutory purpose despite not including all the elements itemized in subsection (c)(1) though (11).

POINT II

THE RETROACTIVE APPLICATION OF THE LAKS DECISION WAS CLEAR ERROR BY THE APPELLATE DIVISION

"Retroactivity questions are among the most difficult problems that engage the attention of courts." New Jersey Election Law Enforcement Commission v. Citizens to Make Mayor-Council Government Work, 107 N.J. 380, 387 (1987), quoting Coons v. American Honda Motor Co., 96 N.J. 419 (1984). A retroactivity analysis is the same regardless of whether a case is a civil or criminal matter. The retroactive application of a new rule of law is influenced by the procedural context in which the decision is made, with the primary concern being consideration of fairness and justice, related to reasonable surprise, and prejudice to those affected, New Jersey Election Law Enforcement Commission, supra., 107 N.J. at 388, quoting Oxford Consumer Discount Co. v. Stefanelli, 104 N.J. Super. 512; State v. Burstein, 85 N.J. 394 (1981).

Retroactive analysis is generally appropriate if there is an announcement of a new rule of law. Rutherford Educ. Ass'n. v.

Bd. of Educ. of the Borough of Rutherford, 99 N.J. 8, 21 (1985). In State v. Feal, 194 N.J. 292, 308 (2008), quoting State v. Purnell, 161 N.J. 44, 53 (1999), the court ruled that a new rule of law is created for retroactive application "if there is a 'sudden and generally unanticipated repudiation of a long-standing practice.'" In State v. Burstein, 85 N.J. 394, the court ruled that "where the meaning of a statute as determined by prior decision has changed the court decision changing it is the equivalent of a new rule of law." Id. at 406,

Once there has been a determination that there is a new rule of law, a court can then consider whether to apply the new law retroactively. This analysis includes the balancing of three factors: 1) reviewing whether the purpose of the new rule would be advanced by its retroactive application; 2) by reviewing how reliant parties and the community were on the old rule; and 3) by reviewing what effects retroactive application would have on administering justice. Rutherford Educ. Ass'n, *supra*, 99 N.J. at 22.

While each of the factors may be considered, the three factors are not weighed equally. Rather, the purpose of the new law is the factor that is analyzed first, and afforded the most weight. "[W]e have emphasized that the second and third factors come to the forefront of the retroactivity analysis when the

inquiry into the purpose of the new rule does not, by itself, reveal whether retroactive application of the new rule would be appropriate." Dock, supra., 205 N.J. at 255. The Court in Dock was dealing with a criminal case however the Court's emphasis on the second and third factors, can easily be applied to civil matters in that "the second factor inquires whether ...[litigants] justifiably relied on the old rule," while the third factor centered on the responsibility of the courts "not [to] impose unjustified burdens on our... [civil] justice system." Id.

Here, the purpose in the new interpretation of N.J.S.A. 2A:50-56 is to compel lenders to give "clear and conspicuous" notice of the situation to mortgagors, especially notice of default under the terms of the note and how the mortgagors may cure that default. By failing to list the lender's information in the Notice of Intention to Foreclose, the purpose of the new rule is still achieved. The doctrine of substantial compliance applies². The mortgagor can contact the servicer who maintains the books and records regarding the loan and is the entity with which the mortgagor usually interacts. Having the mortgagor contact the "residential mortgage lender" would have little, if any effect in assisting mortgagors who are attempting to reinstate the loan pursuant to a Notice of Intention to

² The doctrine of substantial compliance will not be briefed here as Amicus is aware other parties have briefed this issue.

Foreclose. The residential mortgage lender simply does not have information regarding the day-to-day operation of the loan and relies on the servicer for that information, just as the Mortgagor would.

Once the court determines the purpose of the new rule the court then moves on to determine whether the retroactivity option should be applied, weighing "considerations of fairness to the litigants as well as the dictates of sound public policy." New Jersey Election Law Enforcement Commission, supra., 107 N.J. at 388. The court's four choices would be 1) apply the new rule prospectively, applying it only to cases where the operative facts arise only after the rule has been announced; 2) apply the new rule to all future cases and to the case in which the rule has been announced and continue to apply the old rule to all other pending and past litigation; 3) apply the new rule prospectively and to pending cases where the parties have not yet exhausted all avenues of direct review also called "pipeline retroactivity"; and 4) apply the new rule with complete retroactive effect, including cases in which final judgment has been entered and all avenues of direct review have been exhausted. Id. See also: State v. Dock, 205 N.J. at 255.

However, a new rule is generally not applied retroactively if the rule's purpose is to be exclusionary, Rutherford Educ.

Ass'n, supra, 99 N.J. at 23, because past misconduct cannot be deterred. State v. Burstein, 85 N.J. 394, 406 (1981). See also: State v. Nash, 64 N.J. 464, 471 (1974); State v. Burstein, 85 N.J. 394 (1981), Mirza v. Filmore Corp., 92 N.J.390, 397-398 (1983).

Here, just as in Rutherford Education Association, supra, 99 N.J. at 23, a mortgagee's past misconduct cannot be remedied and that conduct did not hamper the statutory remedy contemplated by the legislature in enacting N.J.S.A. 2A:50-56. Most, if not all the lenders in New Jersey essentially use the same "Notice of Intention to Foreclose". Thus, a retroactive application of the holding in Laks, supra, and in the matter before the court would create complete and utter chaos in our court system. In 2009 and 2010 there were approximately 120,000 foreclosures filed.³ If full retroactive effect is given to Laks and Guillane virtually all of these cases will be subject to dismissal, simply to invariably be re-filed. All of these cases will be filed in the foreclosure unit. The system should not be taxed to this extent when residential mortgage lenders made a good faith effort to make the mortgagor aware of the situation via the "old" Notice of Intention to Foreclose.

³ This approximation does not include the foreclosures that were not filed due to the stay imposed by the Supreme Court and the subsequent confusion by the holdings in Lake.

At present, New Jersey foreclosures have the longest delay to complete a foreclosure in the United States. It takes approximately 900 days from the filing of the Complaint until sheriff sale. Given that the vast majority of the 120,000 cases pending in New Jersey would have to be re-filed, and another 60,000 cases that were delayed by the injunction issued by this court are ready to be filed as well, the delay in foreclosures in New Jersey would be more astronomical than it is now. The time to process a foreclosure could conceivably be extended to over five (5) years. The question that must be asked is when does due process consideration arise? A mortgage is an interest in property, when does the inability to foreclosure become an unconstitutional taking?

Further, the retroactive application of the Appellate Division's decision will continue the precipitous decline of New Jersey's real estate market. As this large amount of cases finally proceeds to sheriff sale, the availability of homes will outstrip demand causing housing prices to further decline.

In State v. Burstein, supra, 85 N.J. 394, the court is discussing the effect of granting retroactivity in that case on the administration of justice held:

Finally, even limited retroactive application ... would have a drastic effect on the administration of justice. The State

has represented that, in Essex County alone, retroactivity would require the retrial of or dismissal of counts against at least 60 defendants. On a statewide basis, even limited retroactivity would presumably require additional retrials and dismissals that might burden our courts and other branches of our criminal justice system. As for complete retroactivity, the costs such application would inflict on our administration justice are virtually incalculable.

Id. at 410.

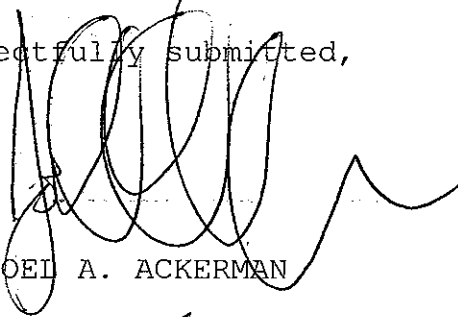
In this case, we are discussing almost 3000 times the number of cases that was a cause for concern for the Burstein court. The balancing of the three factors overwhelmingly indicates that the amendments to the court rules should only be applied prospectively, or the first or second of the court's four choices. Applying it retroactively to all cases in which avenues of direct review are still available would subject thousands of cases in the foreclosure "pipeline" to uncertainty, inequitable challenges, and further backlog of the judicial system.

CONCLUSION

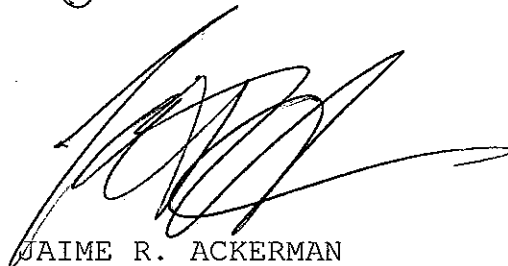
The Appellate Division correctly held in Guillaume that the borrower received appropriate notice under the FFA because it

was provided with all the information necessary to cure their default and who to contact in the event they disputed the default. For this Court to hold otherwise would create a chilling effect on the rights of lenders to foreclose in this State. The differing decisions of appellate panels has not only led to confusion, but has led to the continued inability of foreclosures to be efficiently processed in this state.

Respectfully submitted,

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke at the end.

JOEL A. ACKERMAN

A handwritten signature in black ink, featuring a large, sweeping initial 'J' followed by several loops and a long horizontal stroke.

JAIME R. ACKERMAN

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2A:50-53 to 68

LEGISLATIVE HISTORY CHECKLIST
Compiled by the NJ State Law Library

(**"Fair Foreclosure Act"**)

NJSA: 2A:50-53 to 68

LAWS OF: 1995 **CHAPTER:** 244

BILL NO: A1064

SPONSOR(S): Vandervalk

DATE INTRODUCED: January 24, 1994

COMMITTEE: **ASSEMBLY:** Financial Institutions
SENATE: State Management

AMENDED DURING PASSAGE: Yes Amendments during passage
Second reprint enacted denoted by superscript numbers

DATE OF PASSAGE: **ASSEMBLY:** November 14, 1994
SENATE: June 26, 1995

DATE OF APPROVAL: September 5, 1995

FOLLOWING STATEMENTS ARE ATTACHED IF AVAILABLE:

SPONSOR STATEMENT: Yes

COMMITTEE STATEMENT: **ASSEMBLY:** Yes
SENATE: Yes

FISCAL NOTE: No

VETO MESSAGE: No

MESSAGE ON SIGNING: Yes

FOLLOWING WERE PRINTED:

REPORTS: No

HEARINGS: No

See newspaper clipping:
"New Foreclosure Act: more complexity, uncertainty," 142 NJLJ 823

KBG:pp

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[SECOND REPRINT]
ASSEMBLY, No. 1064

STATE OF NEW JERSEY

INTRODUCED JANUARY 24, 1994

By Assemblywoman VANDERVALK, Assemblymen ROBERTS,
Bateman and Lustbader

1 AN ACT concerning mortgage foreclosure ¹amending various
2 sections of the New Jersey Statutes¹ and supplementing
3 Chapter 50 of Title 2A of the New Jersey Statutes.

4
5 BE IT ENACTED by the Senate and General Assembly of the
6 State of New Jersey:

7 1. ¹(New section)¹ This act shall be known and may be cited
8 as the "Fair Foreclosure Act."

9 2. ¹(New section)¹ The Legislature hereby finds and declares
10 it to be the public policy of this State ²[that homelessness is to
11 be prevented;]² that homeowners should be given every
12 opportunity to pay their home mortgages, and thus keep their
13 homes; ²[that the State will be benefitted if homeowners keep
14 their homes and do not become public welfare recipients;]² and
15 that lenders will be benefitted when residential mortgage debtors
16 cure their defaults and return defaulted residential mortgage
17 loans to performing status.

18 3. ¹(New section)¹ As used in this act:

19 "Deed in lieu of foreclosure" means a voluntary, knowing and
20 uncoerced conveyance by the residential mortgage debtor to the
21 residential mortgage lender of all claim, interest and estate in
22 the property subject to the mortgage. In order for a conveyance
23 to be voluntary, the debtor shall have received notice of, and
24 been fully apprised of the debtor's rights as specified in section 4
25 of this act. For purposes of this act, "voluntarily surrendered"
26 has the same meaning as "deed in lieu of foreclosure."

27 "Immediate family" means the debtor, the debtor's spouse, or
28 the mother, father, sister, brother or child of the debtor or
29 debtor's spouse.

30 ²"Non-residential mortgage" means a mortgage, security
31 interest or the like which is not a residential mortgage. If a
32 mortgage document includes separate tracts or properties, those
33 portions of the mortgage document covering the non-residential
34 tracts or properties shall be a non-residential mortgage.

35 "Obligation" means a promissory note, bond or other similar
36 evidence of a duty to pay.²

37 "Office" means the Office of Foreclosure within the
38 Administrative Office of the Courts.

39 "Residential mortgage" means a mortgage, security interest or
40 the like, in which the security is a ²residential property such as
41 a² house, real property ²[,] or² condominium ²[, or cooperative

EXPLANATION--Matter enclosed in bold-faced brackets [thus] in the
above bill is not enacted and is intended to be omitted in the law.

Matter underlined thus is new matter.

Matter enclosed in superscript numerals has been adopted as follows:

¹ Assembly AFI committee amendments adopted September 29, 1994.

² Senate SSH committee amendments adopted May 8, 1995.

1 apartment]², which is occupied, or is to be occupied, by the
2 debtor, who is a natural person, or a member of the debtor's
3 immediate family, as that person's ¹[primary]¹ residence. This
4 act shall apply to all residential mortgages wherever made, which
5 have as their security such a residence in the State of New
6 Jersey, provided that the real property which is the subject of the
7 mortgage shall not have more than four dwelling units, one of
8 which shall be, or is planned to be, occupied by the debtor or a
9 member of the debtor's immediate family as the debtor's or
10 member's ¹[primary]¹ residence at the time the loan is
11 originated.

12 "Residential mortgage debtor" or "debtor" means any person
13 shown on the record of the residential mortgage lender as being
14 obligated to pay the ²[note] obligation² secured by the residential
15 mortgage.

16 "Residential mortgage lender" or "lender" means any person,
17 corporation, or other entity which makes or holds a residential
18 mortgage, and any person, corporation or other entity to which
19 such residential mortgage is assigned.

20 4. ¹[New section]¹ a. Upon failure to perform any obligation
21 of a ²[note or]² residential mortgage by the residential mortgage
22 debtor and before any residential mortgage lender may
23 accelerate the maturity of any residential mortgage obligation
24 ²[or] and² commence any foreclosure or other legal action to
25 take possession of the residential property which is the subject of
26 the mortgage, the residential mortgage lender shall give the
27 residential mortgage debtor notice of such intention at least 30
28 days in advance of such action as provided in this section.

29 b. Notice of intention to take action as specified in subsection
30 a. of this section shall be in writing, sent to the debtor by
31 registered or certified mail, return receipt requested, at the
32 debtor's last known address, and, if different, to the address of
33 the property which is the subject of the residential mortgage.
34 The notice is deemed to have been effectuated on the date the
35 notice is delivered ²in person or mailed² to the party ²[in person,
36 the date of the acceptance of the certified or registered mail, or,
37 if the party refuses to claim or accept delivery of the certified or
38 registered mail, or if neither the return receipt or the original
39 envelope is returned to the sender within 15 calendar days of
40 mailing, the date of the mailing of the notice by ordinary first
41 class mail. Notice by certified or registered mail and by ordinary
42 first class mail may be made concurrently]².

43 c. The written notice shall clearly and conspicuously state in a
44 manner calculated to make the debtor aware of the situation:

- 45 (1) the particular obligation or real estate security interest;
46 (2) the nature of the default claimed;
47 (3) the right of the debtor to cure the default as provided in
48 section 5 of this act;
49 (4) what performance, including what sum of money, if any,
50 and interest, shall be tendered to cure the default as of the date
51 specified under paragraph (5) of this subsection c.;

52 (5) the date by which the debtor shall cure the default to avoid
53 initiation of foreclosure proceedings, which date shall not be less
54 than 30 days after the date the notice is ²[given] effective², and

1 the name and address and phone number of a person to whom the
2 payment or tender shall be made;

3 (6) that if the debtor does not cure the default by the date
4 specified under paragraph (5) of this subsection c., the lender may
5 take steps to terminate the debtor's ownership in the property by
6 commencing a foreclosure suit in a court of competent
7 jurisdiction;

8 (7) that if the lender takes the steps indicated pursuant to
9 paragraph (6) of this subsection c., a debtor shall still have the
10 right to cure the default pursuant to section 5 of this act, but
11 that the debtor shall be responsible for the lender's court costs
12 and attorneys' fees in an amount not to exceed that amount
13 permitted pursuant to the Rules Governing the Courts of the
14 State of² New Jersey;

15 (8) the right, if any, of the debtor to transfer the real estate
16 to another person subject to the security interest and that the
17 transferee may have the right to cure the default as provided in
18 this act, subject to the mortgage documents;

19 (9) that the debtor is advised to seek counsel from an attorney
20 of the debtor's own choosing concerning the debtor's residential
21 mortgage default situation, and that, if the debtor is unable to
22 obtain an attorney, the debtor may communicate with the New
23 Jersey Bar Association or Lawyer Referral Service in the county
24 in which the residential property securing the mortgage loan is
25 located; and that, if the debtor is unable to afford an attorney,
26 the debtor may communicate with the Legal Services Office in
27 the county in which the property is located;

28 (10) the possible availability of financial assistance for curing
29 a default from programs operated by the State or federal
30 government or non-profit organizations, if any, as identified by
31 the Commissioner of Banking. This requirement may be satisfied
32 by attaching a list of such programs promulgated by the
33 commissioner; and

34 (11) the name and address of the lender and the telephone
35 number of a representative of the lender whom the debtor may
36 contact if the debtor disagrees with the lender's assertion that a
37 default has occurred or the correctness of the mortgage lender's
38 calculation of the amount required to cure the default.

39 d. The notice of intention to foreclose required to be provided
40 pursuant to this section shall not be required if the debtor has
41 voluntarily surrendered the property which is the subject of the
42 residential mortgage ²[prior to the time at which the lender is
43 permitted to send a notice of intention to foreclose pursuant to
44 subsection a. of this section]².

45 e. The duty of the lender under this section to serve notice of
46 intention to foreclose is independent of any other duty to give
47 notice under the common law, principles of equity, State or
48 federal statute, or rule of court and of any other right or remedy
49 the debtor may have as a result of the failure to give such notice.

50 f. Compliance with this section shall be set forth in the
51 pleadings of any legal action referred to in this section. If the
52 plaintiff in any complaint seeking foreclosure of a residential
53 mortgage alleges that the property subject to the residential
54 mortgage has been abandoned or voluntarily surrendered, the
55 plaintiff shall plead the specific facts upon which this

1 allegation is based. ²[The plaintiff shall attach to the complaint
2 a copy of the notice required to be served together with proof of
3 service as these are required pursuant to subsections a. and b. of
4 this section.]²

5 5. ¹[New section]¹ a. Notwithstanding the provisions of any
6 other law to the contrary, as to any residential mortgage for
7 which a notice of intention to foreclose is required to be given
8 pursuant to section 4 of this act, whether or not such required
9 notice was in fact given, the debtor, or anyone authorized to act
10 on the debtor's behalf, shall have the right at any time, up to the
11 entry of final judgment ²or the entry by the office or the court of
12 an order of redemption pursuant to subsection g. of section 11 of
13 this act², to cure the default, de-accelerate and reinstate the
14 residential mortgage by tendering the amount or performance
15 specified in subsection b. of this section. The payment or tender
16 shall be made to the ²[lender, holder or servicing agent] person
17 designated in the notice pursuant to paragraph (5) of subsection c.
18 of section 4 of this act². The debtor may exercise the right to
19 cure a default as to a particular mortgage and reinstate that
20 mortgage only once every 18 months, provided, however, that this
21 limitation shall not apply if the mortgage debtor cures a default
22 by the date specified in paragraph (5) of subsection c. of section 4
23 of this act. The 18-month time period shall run from the date of
24 cure and reinstatement.

25 b. To cure a default under this section, a debtor shall:

26 (1) pay or tender to the person identified pursuant to
27 paragraph (5) of subsection c. of section 4 of this act, in the form
28 of cash, cashier's check, or certified check, all sums which would
29 have been due in the absence of default, at the time of payment
30 or tender;

31 (2) perform any other obligation which the debtor would have
32 been bound to perform in the absence of default or the exercise
33 of an acceleration clause, if any;

34 (3) pay or tender court costs, if any, and attorneys' fees in an
35 amount which shall not exceed the amount permitted under the
36 Rules Governing the Courts of the State of New Jersey; and

37 (4) pay all contractual late charges, as provided for in the note
38 or security agreement.

39 c. To cure a default under this section, a debtor shall not be
40 required to pay any charge, fee or penalty attributable to the
41 exercise of the right to cure a default as provided for in this act.

42 d. Cure of default reinstates the debtor to the same position
43 as if the default had not occurred. It nullifies, as of the date of
44 cure, any acceleration of any obligation under the mortgage, note
45 or bond arising from the default.

46 e. If default is cured prior to the filing of a foreclosure action,
47 the lender shall not institute a foreclosure action for that
48 default. If default is cured after the filing of a foreclosure
49 action, the lender shall give written notice of the cure to the
50 court. Upon such notice, the court shall dismiss the action
51 without prejudice.

52 f. The right to cure a default under this section is independent
53 of any right of redemption or any other right or remedy under the
54 common law, principles of equity, State or federal statute, or
55 rule of court.

1 6. ¹(New section)¹ a. ²(1)² If a plaintiff's action to
2 foreclose a residential mortgage is uncontested, pursuant to
3 R.4:64-1(a) of the Rules Governing the Courts of the State of
4 New Jersey ²and the plaintiff chooses not to use the optional
5 procedure for the disposition of foreclosed premises pursuant to
6 section 11 of this act², a lender shall apply for entry of final
7 judgment and provide the debtor with a notice, mailed at least 14
8 calendar days prior to the submission of proper proofs for entry
9 of a foreclosure judgment, advising that, absent a response from
10 the debtor pursuant to ²[subsection b. of this section] paragraph
11 (2) of this subsection a.², proper proofs will be submitted for
12 entry of final judgment in the foreclosure action and that upon
13 entry of final judgment, the debtor shall lose the right, provided
14 pursuant to section 5 of this act, to cure the default. The manner
15 and address for mailing and the effective date of the notice shall
16 be the same as set forth in subsection b. of section 4 of this act.
17 ²[b.] (2)² A debtor may, no later than 10 days after receipt of
18 the notice required pursuant to subsection a. of this section, mail
19 to the lender a statement in which the debtor in good faith
20 certifies as true that there is a reasonable likelihood that the
21 debtor will be able to provide payment necessary to cure the
22 default within 45 days of the date the notice required pursuant to
23 ²[subsection a. of this section] paragraph (1) of this subsection a.²
24 became effective. This statement shall be sent registered or
25 certified mail, return receipt requested, to the address of the
26 lender who gave notice as required pursuant to subsection a. of
27 this section.
28 ²[c.] (3)² A lender who receives a statement sent by the debtor
29 pursuant to ²[subsection b. of this section] paragraph (2) of this
30 subsection a.², shall not submit proper proofs for entry of final
31 judgment in foreclosure ¹with a return date¹ earlier than ¹[the
32 46th day] 46 days¹ after the date the notice required pursuant to
33 ²[subsection a. of this section] paragraph (1) of this subsection a.²
34 became effective.
35 ²b. (1) If a plaintiff's action to foreclose a residential
36 mortgage is uncontested, pursuant to R.4:64-1(a) of the Rules
37 Governing the Courts of the State of New Jersey and the lender
38 chooses to use the optional procedure for the disposition of the
39 foreclosed premises pursuant to section 11 of this act, the lender
40 shall provide the debtor with a notice, mailed at least 14 calendar
41 days prior to filing an affidavit or certification with the office or
42 court pursuant to subsection f. of section 11 of this act. The
43 notice shall advise the debtor that, absent a response from the
44 debtor pursuant to paragraph (2) of this subsection b., the lender
45 shall file an affidavit or certification with the office or court
46 requesting the office or court to enter an order of redemption
47 and that upon the entry of the order of redemption the debtor
48 shall lose the right provided pursuant to section 5 of this act, to
49 cure the default. The manner and address for mailing and the
50 effective date of the notice shall be the same as set forth in
51 subsection b. of section 4 of this act.
52 (2) A debtor may, no later than 10 days after receipt of the
53 notice required pursuant to paragraph (1) of this subsection b.,
54 mail to the lender a statement in which the debtor in good faith

1 certifies as true that there is a reasonable likelihood that the
 2 debtor will be able to provide payment necessary to cure the
 3 default within 45 days of the date the notice required pursuant to
 4 paragraph (1) of this subsection b. became effective. This
 5 statement shall be sent registered or certified mail, return
 6 receipt requested, to the address of the lender who gave notice as
 7 required pursuant to paragraph (1) of this subsection b.

8 (3) A lender who receives a statement sent by the debtor
 9 pursuant to paragraph (2) of this subsection b., shall not file an
 10 affidavit or certification with the office or court earlier than 46
 11 days after the date the notice required pursuant to paragraph (1)
 12 of this subsection b. became effective.²

13 7. ¹[New section]¹ If a debtor is successful in curing the
 14 default under a repayment plan approved by the United States
 15 Bankruptcy Court, the residential mortgage relationship between
 16 the parties is reinstated, and the debtor is restored to the same
 17 position held before the default or acceleration.

18 8. ¹[New section]¹ Nothing herein is intended to limit or
 19 modify any provision of federal law regarding notice of the
 20 availability of homeownership counselling.

21 9. ¹[New section]¹ Waivers by the debtor of rights provided
 22 pursuant to this act are against public policy, unlawful, and void,
 23 unless given after default pursuant to a workout agreement in a
 24 separate written document signed by the debtor.

25 ²10. (New section) The provisions of sections 1 through 9 of
 26 this act shall not apply to the foreclosure of a non-residential
 27 mortgage nor to collection of the obligation by means other than
 28 enforcing the lender's lien on the residential property. A lender
 29 shall not be required to foreclose a residential mortgage and a
 30 non-residential mortgage securing the same obligation in the
 31 same proceeding.²

32 ²[10.] ^{11.}² ¹[New section]¹ a. An optional ²[sale]
 33 foreclosure² procedure ²without sale² for the disposition of a
 34 foreclosed premises is hereby established pursuant to subsection
 35 b. of this section, wherein a lender may²[, after entry of final
 36 judgment in foreclosure,]² elect to proceed according the
 37 provisions of this act ²[rather than as provided in accordance
 38 with applicable law governing foreclosure sales and sales of real
 39 property generally]² and ²R.4:64-1(d) of² the Rules Governing
 40 the Courts of the State of New Jersey.

41 b. Use of the optional ²[sale]² procedure ²without sale², as
 42 provided in this section, shall be permitted only when:

43 (1) the debtor has abandoned the property which is the subject
 44 of the residential mortgage;

45 (2) the debtor has voluntarily surrendered the property which
 46 is the subject of the residential mortgage by signing a deed in lieu
 47 of foreclosure in favor of the lender; or

48 (3) there is no equity in the property which is the subject of
 49 the residential mortgage, as defined in subsection e. of this
 50 section.

51 c. Pursuant to paragraph (1) of subsection b. of this section,
 52 and for purposes of this section only, abandonment of the
 53 property subject to the residential mortgage shall be established
 54 by an affidavit or certification from an individual having personal

1 knowledge of the contents thereof, setting forth the specific
 2 facts upon which that conclusion is based. The affidavit or
 3 certification shall be submitted to the ²office or the² court at
 4 the same time that the lender ²[makes application to proceed
 5 with the optional sale procedure established by this section]
 6 applies to the office or the court for the order fixing the amount,
 7 time and place for redemption².

8 d. Pursuant to paragraph (2) of subsection b. of this section
 9 and for purposes of this section only, if the lender receives a deed
 10 in lieu of foreclosure, the conveyance shall be effective only if
 11 the deed clearly and conspicuously provides: that the debtor may,
 12 without penalty, rescind the conveyance within ¹[three] ¹seven¹
 13 days, excluding Saturdays, Sundays and legal holidays; and that
 14 such rescission is effective upon delivery of a written notice to the
 15 lender or its agent or upon mailing of such notice to the lender or
 16 its agent by certified or registered mail, return receipt requested.

17 e. ¹(1)¹ For purposes of paragraph (3) of subsection b. of this
 18 section, a property subject to a residential mortgage shall be
 19 deemed to have no equity if the total unpaid balance of all
 20 ²[properly recorded]² liens ¹and encumbrances¹ against the
 21 property, including mortgages, tax liens ²[,] and² judgments ²[in
 22 which execution has issued] actually² against the property ²[not
 23 including similar name judgments]², and any other ²[properly
 24 recorded]² lien, is equal to or greater than 92 percent of the fair
 25 market value of the property ¹[as that value is determined by an
 26 appraiser licensed pursuant to P.L.1991, c.68 (C.45:14F-1 et
 27 seq.). A certified copy of the appraisal and an] An¹ affidavit
 28 setting forth with specificity ¹the fair market value of the
 29 property,¹ the unpaid balance of the obligation, including all
 30 mortgages and liens ¹and the method by which the lender
 31 determined that the property has no equity¹, shall be ²[attached
 32 to the petition to proceed with the optional sale procedure
 33 established by this section] submitted to the office or the court
 34 at the time the lender applies for the order fixing the amount,
 35 time and place for redemption².

36 ¹(2) If a lender proceeds with the optional ²[sale]² procedure
 37 under this subsection, and if the debtor has not objected and
 38 requested a public sale pursuant to this section, when the
 39 ²foreclosed² property ²[in question]² is resold by the lender
 40 following ²[receipt of the order of conveyance as provided
 41 pursuant to subsection l. of this section,] judgment² and provided
 42 the resale price received by the lender is in excess of the amount
 43 necessary to repay the debt², interest and reasonable costs² of
 44 the lender, ²[all liens and obligations superior to the lender]² and
 45 all carrying charges, including, but not limited to, the
 46 ²reasonable² costs of maintenance and resale, the lender shall
 47 deposit any such excess in accordance with R.4:57 et seq. of the
 48 Rules Governing the Courts of ²the State of² New Jersey.

49 (3) Upon deposit of any such excess with the Superior Court,
 50 the lender shall notify the debtor and any lien holder who held a
 51 lien junior to the lender and whose lien was lost ²in whole or in
 52 part² as a result of the foreclosure. Such notification shall be by
 53 certified mail, return receipt requested, to the last known
 54 address of the debtor and such lien holders. The debtor and the

1 lien holders shall then have six months to make an application to
 2 the Superior Court, in the form of an application for surplus
 3 funds, upon appropriate notice to all other parties in interest, to
 4 seek an order for turnover of the excess funds.¹ ²Failure of a
 5 lender to comply with the provisions of paragraphs (2) and (3) of
 6 this subsection e. shall not affect title to the foreclosed
 7 property.²

8 f. (1) ²[Following entry of judgment of foreclosure pursuant to
 9 section 6 of this act] In accordance with the provisions of
 10 R.4:64-1(d) of the Rules Governing the Courts of the State of
 11 New Jersey, and subject to compliance with the provisions of this
 12 act², a lender may elect to proceed with the optional ²[sale]²
 13 procedure by filing ²[a petition and proposed order] an affidavit
 14 or certification² with the office or the court.

15 (2) The ²[petition] affidavit or certification² shall set forth
 16 ²[under oath]² the facts which the ²[petitioner] lender² alleges
 17 show that the ²[petitioner] it² is entitled to proceed under one or
 18 more paragraphs of subsection b. of this section and shall be
 19 supported by the proofs required by this section and such other
 20 proofs as may be required by the office or the court.

21 g. ²[If the office or the court grants the petition to proceed by
 22 the optional sale procedure, it shall] In accordance with the
 23 provisions of R.4:64-1(d) of the Rules Governing the Courts of
 24 the State of New Jersey, and subject to compliance with the
 25 provisions of this act, the office or the court may² enter an order
 26 fixing the amount, ²[date] time², and place for redemption, which
 27 shall be not less than 45 days nor more than 60 days after the
 28 date of the order. The office or the court may grant an extension
 29 of time for good cause shown. The order shall provide that:

30 (1) the redeeming defendant pay to the plaintiff's attorney
 31 the amount fixed by the office or the court for redemption,
 32 ²[which shall be the amount of the judgment]² together with
 33 interest ²[, from the date of the order]² to the date of
 34 redemption, plus all court costs;

35 (2) redemption shall be by cash, cashier's check or certified
 36 check and made at the office of the plaintiff's attorney, if such
 37 office is located in the county where the property is situated, or
 38 at such other place as designated by the office or the court,
 39 between the hours of 9:00 a.m. and 4:00 p.m. of the date set by
 40 the office or the court in the order; and

41 (3) in the absence of redemption, the defendants shall stand
 42 absolutely debarred and foreclosed from all equity of redemption.

43 h. (1) The order for redemption or notice thereof shall be
 44 mailed to each defendant's last known address and, if different,
 45 ²also² to the address of the property ²[which is the subject of the
 46 residential mortgage] being foreclosed². The order for
 47 redemption or notice thereof shall be sent by ordinary mail and
 48 certified mail, return receipt requested, ²[not more than five]
 49 within 20² days after the date the order is ²[issued] entered²,
 50 except that, as to defendants ²whose addresses are unknown and²
 51 who were served ²[only]² by publication ²[and thereafter did not
 52 appear in the action]², no ²further² publication of the order for
 53 redemption ²or notice thereof² need be made.

54 (2) The notice shall:

- 1 (a) inform the defendants that the plaintiff is proceeding
2 under an optional ²[sale]² procedure authorized by section ²[10]
3 ¹¹² of ¹[P.L. , c. (C.)](now pending before the
4 Legislature as this bill)] this act¹ and set out the steps of the
5 optional ²[sale]² procedure;
- 6 (b) inform all defendants of the terms and conditions under
7 which a defendant may request a public sale of the mortgaged
8 premises pursuant to subsection i. of this section; and
- 9 (c) clearly state that no request for a public sale made after
10 30 days from the date of service will be granted, except for good
11 cause shown.
- 12 i. In any matter in which the office or the court has issued an
13 order for redemption and the lender is permitted to proceed by
14 the optional ²[sale]² procedure, a defendant who wishes to object
15 to the optional ²[sale]² procedure and request a public sale with
16 respect to the mortgaged premises ²being foreclosed², shall
17 submit to the office or the court a written request for a public
18 sale within 30 days of the date the order or notice thereof is
19 served. If a defendant requests a public sale within the required
20 time period, ²and subject to compliance with the provisions of
21 this act,² the office or court shall ²[order a public sale which
22 shall be held in accordance with applicable law governing
23 foreclosure sales and sales of real property generally and the
24 Rules Governing the Courts of the State of New Jersey] enter a
25 judgment of foreclosure which provides for a public sale of the
26 premises in accordance with applicable law². Any such defendant
27 who requests a public sale, other than a natural person who is the
28 owner or a voluntary transferee from that owner, shall be
29 required to post a cash deposit or bond prior to the ²[return]²
30 date ²[of the petition to proceed by optional sale procedure] fixed
31 for redemption². This cash deposit or bond shall be in an amount
32 which is 10% of the ²[plaintiff's judgment] amount found due in
33 the order fixing the amount, time and place for redemption² and
34 shall be held to secure the plaintiff against ¹any¹ additional
35 interest and costs, as well as any deficiency, as a result of the
36 public sale. The office or the court may dispense with this
37 requirement for good cause shown. The defendant who requests a
38 public sale, other than a natural person who is the owner or a
39 voluntary transferee from that owner, shall pay all expenses and
40 costs associated with the public sale, including, but not limited
41 to, all sheriff's fees and commissions.
- 42 j. In the event of any dispute among defendants over the right
43 to redeem, the court shall enter such order as is necessary to
44 secure the plaintiff pending the resolution of the dispute,
45 including, but not limited to, payment of plaintiff's additional
46 interest and costs which accrue as a result of the dispute.
- 47 k. Upon redemption, the plaintiff shall furnish the
48 redemptioner with an appropriate certificate of redemption and
49 the redemptioner shall acquire all rights provided by law and
50 equity but shall not be entitled to a deed or title to the
51 mortgaged premises solely by virtue of the redemption. A
52 redemptioner ²in proper cases² may proceed to foreclose the
53 redemptioner's interest.
- 54 l. In the absence of redemption, and on proof of mailing of the

1 order for redemption or notice thereof pursuant to subsection h.
2 of this section and an affidavit of non-redemption, the plaintiff
3 shall be entitled to ²[an order of conveyance] a judgment²
4 ²[awarding possession and barring] debarring² and foreclosing
5 ²the² equity of redemption of ²[any defendant] the defendants
6 and each of them² and any person claiming by, through or under
7 them, and adjudging the plaintiff be vested with a valid and
8 indefeasible estate in the mortgaged premises. ²[The order of
9 conveyance] Anything to the contrary notwithstanding,
10 redemption shall be permitted at any time up until the entry of
11 judgment including the whole of the last day upon which judgment
12 is entered. A certified copy of the judgment² shall be accepted
13 for recording ²[as a deed]² by the county recording officer
14 pursuant to P.L.1939, c.170 (C.46:16-1.1)

15 m. Upon entry of ²[an order of conveyance] a judgment²
16 vesting title in the plaintiff pursuant to subsection ²[k.]1² of this
17 section, the debt which was secured by the foreclosed mortgage
18 shall be deemed satisfied, and the plaintiff shall not be permitted
19 to institute any further or contemporaneous action for the
20 collection of the debt.

21 ²[~~11.~~] 12.² (New section) a. With respect to the sale of a
22 mortgaged premises under foreclosure action, each Sheriff in this
23 State shall provide for, but not be limited to, the following
24 uniform procedures:

25 (1) Bidding in the name of the assignee of the foreclosing
26 plaintiff.

27 (2) That adjournment of the sale of the foreclosed property
28 shall be in accordance with N.J.S.2A:17-36.

29 (3) ²(a) The sheriff shall schedule a sale date within 120 days
30 of the sheriff's receipt of any writ of execution issued by the
31 court in any foreclosure proceeding.

32 (b) If it becomes apparent that the sheriff cannot comply with
33 the provisions of subparagraph (a) of this paragraph (3), the
34 foreclosing plaintiff may apply to the office for an order
35 appointing a Special Master to hold the foreclosure sale.

36 (c) Upon the foreclosing plaintiff making such application to
37 the office, the office shall issue the appropriate order appointing
38 a Special Master to hold the foreclosure sale.

39 (4)² That the successful bidder at the sheriff's sale shall pay a
40 20 percent deposit in either cash or by a certified or cashier's
41 check, made payable to the sheriff of the county in which the
42 sale is conducted, immediately upon the conclusion of the
43 foreclosure sale. If the successful bidder cannot satisfy this
44 requirement, the bidder shall be in default and the sheriff shall
45 immediately void the sale and proceed further with the resale of
46 the premises without the necessity of adjourning the sale, without
47 renotification of any party to the foreclosure and without the
48 republication of any sales notice. Upon such resale, the
49 defaulting bidder shall be liable to the foreclosing plaintiff for
50 any additional costs incurred by such default including, but not
51 limited to, any difference between the amount bid by the
52 defaulting bidder and the amount generated for the foreclosing
53 plaintiff at the resale. In the event the plaintiff is the successful
54 bidder at the resale, the plaintiff shall provide a credit for the
55 fair market value of the property foreclosed.

1 ²[(4) That] (5) It is permissible, upon consent of the sheriff
 2 conducting the sheriff's sale, that² it shall not be necessary for
 3 an attorney or representative of the person which initiated the
 4 foreclosure to be present physically at the sheriff's sale to make
 5 a bid. A letter containing bidding instructions may be sent to the
 6 sheriff in lieu of an appearance.

7 ²[(5)] (6)² That each sheriff's office shall use a deed which
 8 shall be in substantially the following form:

9
 10 THIS INDENTURE,

11
 12
 13 made this (date) day of (month), (year). Between
 14 (name), Sheriff of the County of (name), in the
 15 State of New Jersey, party of the first part
 16 and (name(s)).

17
 18
 19
 20 party of the second part, witnesseth.

21
 22 WHEREAS, on the (date) day of (month), (year), a
 23 certain Writ of Execution was issued out of the
 24 Superior Court of New Jersey, Chancery Division-
 25 (name) County, Docket No. _____ directed and
 26 delivered to the Sheriff of the said County of
 27 (name) and which said Writ is in the words or to
 28 the effect following that is to say:

29 THE STATE OF NEW JERSEY to the Sheriff of the County
 30 of (name) .

31 Greeting:

32
 33 WHEREAS, on the (date) day of (month), (year), by a
 34 certain judgment made in our Superior Court of New
 35 Jersey, in a certain cause therein pending, wherein the
 36 PLAINTIFF is:

37
 38
 39
 40 and the following named parties are the DEFENDANTS:

41
 42
 43
 44 IT WAS ORDERED AND ADJUDGED that certain mortgaged
 45 premises, with the appurtenances in the Complaint, and
 46 Amendment to Complaint, if any, in the said cause
 47 particularly set forth and described, that is to say:
 48 The mortgaged premises are described as set forth upon
 49 the RIDER ANNEXED HERETO AND MADE A PART HEREOF.

50
 51 BEING KNOWN AS Tax Lot (number) _____ in Block
 52 (number) COMMONLY KNOWN AS (street address) .

1 TOGETHER, with all and singular the rights, liberties,
 2 privileges, hereditaments and appurtenances thereunto
 3 belonging or in anywise appertaining, and the reversion
 4 and remainders, rents, issues and profits thereof, and
 5 also all the estate, right, title, interest, use,
 6 property, claim and demand of the said defendants of,
 7 in, to and out of the same, to be sold, to pay and
 8 satisfy in the first place unto the plaintiff,

9
 10
 11 the sum of \$ (amount) being the principal, interest
 12 and advances secured by a certain mortgage dated (date,
 13 month, year) and given by (name) together
 14 with lawful interest from

15
 16
 17
 18 until the same be paid and satisfied and also the costs
 19 of the aforesaid plaintiff with interest thereon.

20
 21 AND for that purpose a Writ of Execution should issue,
 22 directed to the Sheriff of the County of (name)
 23 commanding him to make sale as aforesaid; and that the
 24 surplus money arising from such sale, if any there be,
 25 should be brought into our said Court, as by the
 26 judgment remaining as of record in our said Superior
 27 Court of New Jersey, at Trenton, doth and more fully
 28 appear; and whereas, the costs and Attorney's fees of
 29 the said plaintiff have been fully taxed at the
 30 following sum: \$ (amount).

31
 32 THEREFORE, you are hereby commanded that you cause to
 33 be made of the premises aforesaid, by selling so much
 34 of the same as may be needful and necessary for the
 35 purpose, the said sum of \$ (amount) and the same you
 36 do pay to the said plaintiff together with contract and
 37 lawful interest thereon as aforesaid, and the sum
 38 aforesaid of costs with interest thereon.

39
 40 And that you have the surplus money, if any there be,
 41 before our said Superior Court of New Jersey, aforesaid
 42 at Trenton, within 30 days after pursuant to
 43 R.4:59-1(a), to abide the further Order of the said
 44 Court, according to judgment aforesaid, and you are to
 45 make return at the time and place aforesaid, by
 46 certificate under your hand, of the manner in which you
 47 have executed this our Writ, together with this Writ,
 48 and if no sale, this Writ shall be returnable within 12
 49 months.

50
 51 WITNESS, the Honorable (name), Judge of the
 52 Superior Court at Trenton, aforesaid, the (date) day
 53 of (month), (year).

54 Attorneys /s/ Clerk
 55 Superior Court of New Jersey

1
2
3
4
5 As by the record of said Writ of Execution in the
6 Office of the Superior Court of New Jersey, at Trenton,
7 in Book (number) of Executions, Page (number) etc.,
8 may more fully appear.

9
10 AND WHEREAS I, the said (name) as such
11 Sheriff as aforesaid did in due form of law, before
12 making such sale give notice of the time and place of
13 such sale by public advertisement signed by myself, and
14 set up in my office in the (name) Building in
15 (name) County, being the County in which said real
16 estate is situate and also set up at the premises to be
17 sold at least three weeks next before the time
18 appointed for such sale.

19
20 I also caused such notice to be published four times
21 in two newspapers designated by me and printed and
22 published in the said County, the County wherein the
23 real estate sold is situate, the same being designated
24 for the publication by the Laws of this State, and
25 circulating in the neighborhood of said real estate, at
26 least once a week during four consecutive calendar
27 weeks. One of such newspapers, (name of newspaper) is
28 a newspaper with circulation in (name of town), the
29 County seat of said (name) County. The first
30 publication was at least twenty-one days prior and the
31 last publication not more than eight days prior to the
32 time appointed for the sale of such real estate, and by
33 virtue of the said Writ of Execution, I did offer for
34 sale said land and premises at public vendue at the
35 County (name) Building in (name of town) on
36 the (date) day of (month) (year) at the hour of
37 (time) in the (a.m. or p.m.).

38
39 WHEREUPON the said party of the second part bidding
40 therefore for the same, the sum of \$ (amount) and no
41 other person bidding as much I did then and there
42 openly and publicly in due form of law between the
43 hours of (time) and (time) in the (a.m. or p.m.),
44 strike off and sell tracts or parcels of land and
45 premises for the sum of \$ (amount) to the said party
46 of the second part being then and there the highest
47 bidder for same. And on the (date) of (month) in
48 the year last aforesaid I did truly report the said
49 sale to the Superior Court of New Jersey, Chancery
50 Division and no objection to the said sale having been
51 made, and by Assignment of Bid filed with the Sheriff
52 of (name) County said bidder assigned its bid to:
53
54

1
2 NOW, THEREFORE, This Indenture witnesseth, that I,
3 the said (name), as such Sheriff as aforesaid
4 under and by the virtue of the said Writ of Execution
5 and in execution of the power and trust in me reposed
6 and also for and in consideration of the said sum of \$
7 (amount) therefrom acquit, exonerate and forever
8 discharge to the said party of the second part, its
9 successors and assigns, all and singular the said tract
10 or parcel of lands and premises, with the
11 appurtenances, privileges, and hereditaments thereunto
12 belonging or in any way appertaining; to have and hold
13 the same, unto the said party of the second part, its
14 successors and assigns to its and their only proper
15 use, benefit, and behoof forever, in as full, ample and
16 beneficial manner as by virtue of said Writ of
17 Execution I may, can or ought to convey the same.

18
19 And, I, the said (name), do hereby covenant,
20 promise and agree, to and with the said party of the
21 second part, its successors and assigns, that I have
22 not, as such Sheriff as aforesaid, done or caused,
23 suffered or procured to be done any act, matter or
24 thing whereby the said premises, or any part thereof,
25 with the appurtenances, are or may be charged or
26 encumbered in estate, title or otherwise.

27
28 IN WITNESS WHEREOF, I the said (name) as such
29 Sheriff as aforesaid, have hereunto set my hand and
30 seal the day and year aforesaid.

31
32
33
34 Signed, sealed and delivered
35 in the presence of

36
37 _____ L.S.)

38 (Signature of Sheriff), Sheriff

39
40 State of New Jersey) ss
41 County)

42 I, (name), Sheriff, of the
43 County of (name), do solemnly swear that the real
44 estate described in this deed made to

45
46
47
48 was by me sold by virtue of a good and subsisting
49 execution (or as the case may be) as is therein
50 recited, that the money ordered to be made has not been
51 to my knowledge or belief paid or satisfied, that the
52 time and place of the same of said real estate were by
53 me duly advertised as required by law, and that the
54 same was cried off and sold to a bonafide purchaser for

1 the best price that could be obtained and the true
 2 consideration for this conveyance as set forth in the
 3 deed is \$ (amount).

4 _____
 5 (Name of Sheriff), Sheriff

6
 7 Sworn before me, (name) , on this (date) day of
 8 (month), (year), and I having examined the deed above
 9 mentioned do approve the same and order it to be
 10 recorded as a good and sufficient conveyance of the
 11 real estate therein described.

12
 13
 14 _____
 15 (Attorney or Notary Public)

16 STATE OF NEW JERSEY) ss.
 17 (Name) County)

18 On this (date) day of (month), (year), before me, the
 19 subscriber, (name) personally appeared (name) ,
 20 Sheriff of the County of (name) aforesaid, who is,
 21 I am satisfied, the grantor in the within Indenture
 22 named, and I having first made known to him the
 23 contents thereof, he did thereupon acknowledge that he
 24 signed, sealed and delivered the same on his voluntary
 25 act and deed, for the uses and purposes therein
 26 expressed.

27
 28 _____
 29 (Attorney or Notary Public)

30
 31
 32
 33 b. At the conclusion of the sheriff's sale, the attorney for the
 34 plaintiff may prepare and deliver to the sheriff a deed in the
 35 form provided pursuant to paragraph (5) of subsection a. of this
 36 section for the sheriff's execution and the deed shall be delivered
 37 to the sheriff within 10 days of the date of the sale. The sheriff
 38 shall be entitled to the authorized fee, as a review fee, even if
 39 the plaintiff's attorney prepares the deed.

40 c. The sheriff's office shall, within two weeks of the date of
 41 the sale, deliver a fully executed deed to the successful bidder at
 42 the sale provided that the bidder pays the balance of the monies
 43 due to the Sheriff by either cash or certified or cashier's check.
 44 In the event a bid is satisfied after the expiration and additional
 45 interest is collected from the successful bidder, the sheriff shall
 46 remit to the plaintiff the total amount, less any fees, costs and
 47 commissions due the sheriff, along with the additional interest.¹

48 ²[¹12.] ²13.2 (New section) Any judgment creditor shall, upon
 49 entry of judgment in the office of the Clerk of the Superior
 50 Court, provide the Court with its current address for service. If
 51 the judgment creditor's address for service changes, it shall be
 52 incumbent upon the judgment creditor to effect a change of
 53 address for service by filing an appropriate form with the court in
 54 a timely manner. If any judgment creditor fails to provide the

1 Court with a current or change of address for service, in any
 2 foreclosure proceeding, the plaintiff may, without having to first
 3 make a more diligent inquiry or publish notice in a newspaper,
 4 serve the judgment creditor by ordinary mail and certified mail
 5 at the address that is reflected in the records of the Clerk of the
 6 Superior Court. The judgment creditor shall, if known, provide
 7 the Clerk of the Court with the judgment creditor's social
 8 security number or tax payer identification number.¹

9 ²[13.] ^{14.}² N.J.S.2A:17-36 is amended to read as follows:

10 2A:17-36. Adjournments of sale of real estate. A sheriff or
 11 other officer selling real estate by virtue of an execution may
 12 make [2] two adjournments of the sale, and no more, to any time,
 13 not exceeding [1 month] 14 calendar days for each adjournment.
 14 However, a court of competent jurisdiction may, for cause, order
 15 further adjournments.¹

16 (cf: N.J.S.2A:17-36)

17 ²[14.] ^{15.}² (New section) a. The United States Attorney for
 18 the District of New Jersey may send a letter to the Clerk of the
 19 Superior Court of New Jersey which notes the appearance of the
 20 Attorney General of the United States and states that neither an
 21 answer will be filed nor a default opposed. This letter shall be
 22 accepted by the Clerk of the Superior Court of New Jersey in lieu
 23 of an appearance by the Attorney General of the United States.
 24 The acceptance by the Clerk shall allow the foreclosing plaintiff
 25 to proceed as if the United States had filed a non-contesting
 26 answer.

27 b. The Attorney General of New Jersey may send a letter to
 28 the Clerk of the Superior Court of New Jersey which notes the
 29 appearance of the Attorney General of New Jersey and states
 30 that neither an answer will be filed nor a default opposed. This
 31 letter shall be accepted by the Clerk of the Superior Court of
 32 New Jersey in lieu of an appearance by the Attorney General of
 33 New Jersey. The acceptance by the Clerk shall allow the
 34 foreclosing plaintiff to proceed as if the State of New Jersey had
 35 filed a non-contesting answer.¹

36 ²[15.] ^{16.}² N.J.S.2A:15-11 is amended to read as follows:

37 2A:15-11. Notice of lis pendens. No notice of lis pendens
 38 shall be effective after [3] five years from the date of its filing.¹
 39 (cf: N.J.S.2A:15-11)

40 ¹[11.] ²[16.] ^{17.}² (New section)¹ In the absence of an express
 41 agreement between the parties to the contrary, a debtor may
 42 tender, and a lender may accept, partial payment of any sum
 43 owing and due without either party waiving any rights.

44 ¹[12.] ²[17.] ^{18.}² (New section)¹ The Attorney General¹, in
 45 consultation with the Commissioner of Banking,¹ shall
 46 promulgate regulations pursuant to the "Administrative
 47 Procedure Act," P.L.1968, c.410 (C.52:14A-1 et seq.) necessary
 48 to implement this act, including, but not limited to, regulations
 49 governing the form and content of notices of intention to
 50 foreclose.

51 ¹[13.] ²[18.] ^{19.}² This act shall take effect on the 90th day
 52 after enactment and shall apply to foreclosure actions
 53 commenced on or after the effective date.

(1994)

1 and barring and foreclosing equity of redemption of any
2 defendant and any person claiming by, through or under them, and
3 adjudging the plaintiff be vested with a valid and indefeasible
4 estate in the mortgaged premises. The order of conveyance shall
5 be accepted for recording as a deed by the county recording
6 officer pursuant to P.L.1939, c.170 (C.46:16-1.1)

7 m. Upon entry of an order of conveyance vesting title in the
8 plaintiff pursuant to subsection k. of this section, the debt which
9 was secured by the foreclosed mortgage shall be deemed
10 satisfied, and the plaintiff shall not be permitted to institute any
11 further or contemporaneous action for the collection of the debt.

12 11. In the absence of an express agreement between the
13 parties to the contrary, a debtor may tender, and a lender may
14 accept, partial payment of any sum owing and due without either
15 party waiving any rights.

16 12. The Attorney General shall promulgate regulations
17 pursuant to the "Administrative Procedure Act," P.L.1968, c.410
18 (C.52:14A-1 et seq.) necessary to implement this act, including,
19 but not limited to, regulations governing the form and content of
20 notices of intention to foreclose.

21 13. This act shall take effect on the 90th day after enactment
22 and shall apply to foreclosure actions commenced on or after the
23 effective date.

24
25

26 *SPONSORS'* STATEMENT

27

28 This bill, the "Fair Foreclosure Act," would provide additional
29 protection for homeowners at risk of foreclosure on their homes
30 because of defaults in the mortgage payments. The bill requires
31 residential mortgage lenders to provide residential mortgage
32 debtors with a notice at least 30 days prior to taking any legal
33 action to take possession of the mortgaged property and by giving
34 mortgage debtors a statutory right, not currently available, to
35 cure a default by paying all amounts due under the mortgage
36 payment schedule and, if applicable, other court costs and
37 attorneys' fees in an amount not to exceed the amount permitted
38 pursuant to the Rules Governing the Courts of New Jersey.

39 More specifically, the bill provides that before accelerating the
40 mortgage loan or taking any other legal action to take possession
41 of the residential property which is the subject of the mortgage,
42 the lender is required to give the debtor a warning notice at least
43 30 days in advance, providing the debtor with the following
44 information: the particular obligation or real estate security
45 interest; the nature of the default claimed; the right of the
46 debtor to cure the default; what performance is required by the
47 debtor to cure the default; the date by which such cure must take
48 place without the lender taking further legal steps to take
49 possession of the property; that if the debtor does not cure the
50 default by the time specified, the right to cure will still be
51 present but additional costs are likely to be incurred by the
52 debtor; advice to seek counsel; the name and phone number of the
53 person whom the debtor can contact to dispute a lender's
54 assertion that default has occurred or the correctness of the

1 lender's calculation of the amount required to cure a default.

2 Under the bill, a debtor would have the statutory right to
3 "cure" a mortgage default and reinstate a mortgage at any time
4 after default and up to a time just prior to entry of final
5 judgment of foreclosure. The debtor would be able to cure the
6 default and reinstate the mortgage by paying all sums in arrears,
7 performing any other obligation the debtor would have been
8 required to perform under the mortgage, paying the lender's
9 court costs and attorneys' fees, if any, in an amount which does
10 not exceed the amount permitted under the Rules Governing the
11 Courts of the State of New Jersey, and pay all contractual late
12 charges as provided for in the note or security agreements.

13 The bill provides that once a lender's action to foreclose is
14 uncontested, the lender is to apply for entry of final judgment
15 and send a notice to this effect at least 14 days prior to
16 submitting proper proofs for entry of a foreclosure judgment.
17 The notice also informs a debtor that the debtor has a final
18 chance to cure the default. A debtor has 10 days after receipt of
19 the notice concerning final judgment to inform the lender that
20 the debtor believes, in good faith, that within 45 days the debtor
21 will be able to cure the default. Upon receipt of this notice by
22 the lender, the lender has to give the debtor 45 days to cure the
23 default. Absent a cure, the lender may submit proper proofs for
24 foreclosure judgment on the 46th day following receipt of the
25 notice from the debtor.

26 Under the bill, lenders are provided an optional sale procedure
27 once entry of final judgment has taken place. This option may be
28 instituted after entry of final judgment and if one of the three
29 following conditions is present: (1) the property has been
30 abandoned; (2) the lender has received a deed in lieu of
31 foreclosure; or (3) the property has no net worth. With respect to
32 instituting this option, upon acceptance of a deed in lieu of
33 foreclosure, the conveyance will be effective only if the deed
34 clearly and conspicuously provides that the debtor may rescind
35 the conveyance within three days, excluding Saturdays, Sundays,
36 and legal holidays and that such rescision is effective upon
37 delivery of a written notice to the lender or its agent or upon
38 mailing of such notice to the lender or its agent. With respect to
39 net worth, "no net worth" means that the total unpaid balance of
40 all properly recorded liens against the property is equal to or
41 greater than 92 percent of the fair market value of the property
42 as that value is determined by an appraiser licensed pursuant to
43 P.L.1991, c.68 (C.45:14F-1 et seq.).

44 If the lender decides to take action under the alternative sale
45 procedure, the lender must file a petition and proposed order with
46 the Office of Foreclosure or the court with the facts which
47 provide the basis for the lender's action.

48 If the petition is granted, the office or the court will issue an
49 order for redemption fixing the amount, date, and place for
50 redemption. The date fixed for redemption shall be not less than
51 45 days nor more than 60 days after the date of the order. The
52 order or a notice of it is to be sent not more than five days after
53 the date the order for redemption is issued to each defendant
54 informing them: (1) that the plaintiff is proceeding under an

1 optional sale procedure; (2) of the steps in that procedure; and
2 (3) that a defendant may request a public sale of the mortgaged
3 premises by submitting such request in writing to the office or
4 the court not later than 30 days after receipt of the notice of the
5 redemption order. If a request for a public sale is received by the
6 office or the court within the time permitted, the office or the
7 court will order a public sale which will be held in accordance
8 with applicable law governing foreclosure sales and sales of real
9 property generally. Any defendant, other than a natural person
10 who is the debtor or a voluntary transferee from that debtor, who
11 requests a public sale, is required under the bill to post a bond or
12 cash deposit in an amount which is 10 per cent of the amount
13 fixed in the redemption order.

14 Upon redemption, the redemptioner will be furnished with a
15 certificate of redemption and acquire all rights provided by law
16 and equity but will not be entitled to a deed or title to the
17 mortgaged premises. The redemptioner may proceed to foreclose
18 the redemptioner's interest.

19 If the mortgaged premises is not redeemed, upon proof of
20 mailing of the order of redemption and an affidavit of
21 non-redemption, the plaintiff is entitle to an order of conveyance
22 awarding possession and barring and foreclosing equity of
23 redemption of any defendant. This order of conveyance will be
24 accepted for recording as a deed by the county recording officer
25 in the county of the premises being conveyed.

26 Once the order of conveyance has been entered, the debt which
27 was secured by the foreclosed mortgage is considered satisfied
28 and no further action may be taken by the plaintiff for the
29 collection of the debt.

30 This bill is intended to advance the public policies of the State
31 by giving debtors every opportunity to pay their home mortgages,
32 and thus keep their homes, and that lenders will be benefitted
33 when debtors cure their defaults and return the residential
34 mortgage loan to performing status. In situations in which the
35 property has been abandoned, the lender has received a deed in
36 lieu of foreclosure or there is no equity remaining in the
37 property, the bill will benefit communities and the economy by
38 providing an optional sale procedure that will eliminate
39 unnecessary costs and delays caused by sheriff's sales. Even
40 under the optional sale procedure, debtors are provided with
41 additional protection in that a timely request that the mortgaged
42 premises go to public sale will be honored.

43

44

45

46

47 Makes changes in foreclosure practices and allows use of optional
48 sale procedure in certain cases.

ASSEMBLY FINANCIAL INSTITUTIONS COMMITTEE

STATEMENT TO

ASSEMBLY, No. 1064

with committee amendments

STATE OF NEW JERSEY

DATED: SEPTEMBER 29, 1994

The Assembly Financial Institutions Committee reports favorably and with committee amendments Assembly, No. 1064.

This bill, the "Fair Foreclosure Act," as amended, would provide additional protection for homeowners at risk of foreclosure on their homes because of a default in mortgage payments, and advances the public policies of the State by giving debtors every opportunity to pay their home mortgages, and thus keep their homes. The bill requires residential mortgage lenders to provide residential mortgage debtors with a notice at least 30 days prior to taking any legal action to take possession of the mortgaged property and gives mortgage debtors a statutory right, not currently available, to cure a default by paying all amounts due under the mortgage payment schedule and, if applicable, other court costs and attorneys' fees in an amount not to exceed the amount permitted pursuant to the Rules Governing the Courts of New Jersey.

More specifically, the bill provides that before accelerating the mortgage loan or taking any other legal action to take possession of the residential property which is the subject of the mortgage, the lender is required to give the debtor a warning notice at least 30 days in advance, providing the debtor with the following information: the particular obligation or real estate security interest; the nature of the default claimed; the right of the debtor to cure the default; what performance is required by the debtor to cure the default; the date by which such cure must take place without the lender taking further legal steps to take possession of the property; that if the debtor does not cure the default by the time specified, the right to cure will still be present but additional costs are likely to be incurred by the debtor; advice to seek counsel; and the name and phone number of the person whom the debtor can contact to dispute a lender's assertion that default has occurred or the correctness of the lender's calculation of the amount required to cure a default.

Under the bill, a debtor would have the statutory right to "cure" a mortgage default and reinstate a mortgage at any time after default and up to a time just prior to entry of final judgment of foreclosure. The debtor would be able to cure the default and reinstate the mortgage by paying all sums in arrears, performing any other obligation the debtor would have been required to perform under the mortgage, paying the lender's court costs and attorneys' fees, if any, in an amount which does not exceed the amount permitted under the Rules Governing the Courts of the State of New Jersey, and paying all contractual late charges as provided for in the note or security agreements.

The bill provides that once a lender's action to foreclose is uncontested, the lender is to apply for entry of final judgment and send a notice to this effect at least 14 days prior to submitting proper proofs for entry of a foreclosure judgment. The notice also informs a debtor that the debtor has a final chance to cure the default. A debtor has 10 days after receipt of the notice concerning final judgment to inform the lender that the debtor believes, in good faith, that within 45 days the debtor will be able to cure the default. Upon receipt of this notice by the lender, the lender is required to give the debtor 45 days to cure the default. If a notice is not received from the debtor, the lender may submit proper proofs for entry of a foreclosure judgment on the 15th day after mailing the notice concerning such submission. If a notice is received, the lender may submit proper proofs for entry of final judgment, but the return date shall not be earlier than the 46th day after the date the notice is sent informing the debtor of the lender's intended action regarding entry of final judgment.

Under the bill, lenders are provided an optional sale procedure once entry of final judgment has taken place. This option may be instituted after entry of final judgment and if one of the three following conditions is present: (1) the property has been abandoned; (2) the lender has received a deed in lieu of foreclosure; or (3) the property has no equity.

With respect to instituting this option: 1) abandonment of the property is to be established by an affidavit or certification from an individual having personal knowledge of the contents thereof, which affidavit or certification is to be submitted to the court at the same time application to proceed with the alternative sale procedure is made; 2) upon acceptance of a deed in lieu of foreclosure, the conveyance will be effective only if the deed clearly and conspicuously provides that the debtor may rescind the conveyance within seven days, excluding Saturdays, Sundays, and legal holidays and that such rescission is effective upon delivery of a written notice to the lender or its agent or upon mailing of such notice to the lender or its agent; 3) with respect to net worth, "no net worth" means that the total unpaid balance of all properly recorded liens against the property is equal to or greater than 92 percent of the fair market value of the property. A lender is required to attach an affidavit to the petition to proceed with the optional sale procedure which sets forth with specificity the fair market value of the property, the unpaid balance of the obligation and the method by which the lender determined that the property has no equity.

If the lender decides to take action under the alternative sale procedure, the lender must file a petition and proposed order with the Office of Foreclosure or the court with the facts which provide the basis for the lender's action.

If the petition is granted, the office or the court will issue an order for redemption fixing the amount, date, and place for redemption. The date fixed for redemption shall be not less than 45 days nor more than 60 days after the date of the order. The order or a notice of it is to be sent not more than five days after the date the order for redemption is issued to each defendant informing them: (1) that the plaintiff is proceeding under an optional sale procedure; (2) of the terms and conditions under which a defendant

may request a public sale of the mortgaged premises; and (3) clearly state that no request for a public sale made after 30 days from the date of service will be granted, except for good cause shown. If a request for a public sale is received by the office or the court within the time permitted, the office or the court will order a public sale which will be held in accordance with applicable law governing foreclosure sales and sales of real property generally. Any defendant, other than a natural person who is the debtor or a voluntary transferee from that debtor, who requests a public sale, is required under the bill to post a bond or cash deposit in an amount which is 10 per cent of the amount fixed in the redemption order.

Upon redemption, the redemptioner will be furnished with a certificate of redemption and acquire all rights provided by law and equity but will not be entitled to a deed or title to the mortgaged premises. The redemptioner may proceed to foreclose the redemptioner's interest.

If the mortgaged premises is not redeemed, upon proof of mailing of the order of redemption and an affidavit of non-redemption, the plaintiff is entitled to an order of conveyance awarding possession and barring and foreclosing equity of redemption of any defendant. This order of conveyance will be accepted for recording as a deed by the county recording officer in the county of the premises being conveyed.

Once the order of conveyance has been entered, the debt which was secured by the foreclosed mortgage is considered satisfied and no further action may be taken by the plaintiff for the collection of the debt.

If the optional sale procedure results in an order of conveyance to the mortgage lender and upon the resale of the property by the mortgage lender, the price received is greater than that required to repay the debt of the mortgage lender, all liens superior to the mortgage lender and all carrying charges, the mortgage lender is to deposit such excess with the Superior Court of New Jersey where it will be available for the mortgage debtor and any junior lien holder upon application to the Superior Court for surplus funds.

Under the bill, the following uniform procedures are established with respect to the conduct of a sheriff's sale:

a. Bidding in the name of the assignee of the foreclosing plaintiff.

b. Adjournment of the sale of the foreclosed property is to be in accordance with N.J.S.2A:17-36.

c. The successful bidder at the sheriff's sale is to pay a 20 percent deposit in either cash or by a certified or cashier's check made payable to the sheriff of the county in which the sale is conducted, immediately upon the conclusion of the foreclosure sale. Current law requires only a 10% deposit. If the successful bidder cannot satisfy this requirement, the bidder shall be in default and the sheriff is to immediately void the sale and proceed with the resale of the premises without adjourning the sale, renotifying any party to the foreclosure or republishing any sales notice. Upon the resale, the defaulting bidder would be liable to the foreclosing plaintiff for any additional costs incurred including, but not limited

to, any difference between the amount bid by the defaulting bidder and the amount generated for the foreclosing plaintiff at the resale. In the event the plaintiff is the successful bidder at the resale, the plaintiff is to provide a credit for the fair market value of the property foreclosed.

d. It is not necessary for an attorney or representative of the institution which initiated the foreclosure to be present at the sheriff's sale to make a bid. A letter containing bidding instructions may be sent to the sheriff in lieu of an appearance.

e. Each sheriff's office is to use the standardized deed form printed in the bill.

f. The sheriff's office is to deliver a fully executed deed to the successful bidder at the sale within two weeks of the date of the sale, provided however, that the bidder pays the balance due within that time period. If a bid is satisfied after the expiration date and additional interest is collected, the plaintiff shall receive the total amount, less any fees, costs and commissions due the sheriff, along with the additional interest.

The bill requires judgment creditors to provide a current address, and any changes, along with its social security number or tax payer identification number to the Clerk of the Superior Court. Whatever address is on the record can be used by a plaintiff without the plaintiff having to make a more diligent inquiry or publishing a notice in a newspaper.

The bill further provides that where the United States Attorney General or the Attorney General of New Jersey receives notice with respect to a foreclosure proceeding, a letter indicating that an answer will not be filed or a default opposed may be sent to the Clerk of the Superior Court. This letter may be accepted in lieu of an appearance and shall allow the foreclosing plaintiff to proceed as if a non-contesting answer had been filed.

The bill amends current law to provide that a notice of lis pendens is effective for five years instead of three, and decreases the period of time for an adjournment of a sheriff's sale from one month to 14 calendar days.

The committee amended the bill in the following manner:

a. Deleted the word "primary" in relation to residence under the definition of residential mortgage;

b. Changed the wording with respect to a 45-day period as a final opportunity for curing a default once a foreclosure process has resulted in a no contest, and prior to the entry of final judgment;

c. Deleted the requirement regarding properties with no equity that the fair market value must be established by a licensed appraiser and instead requires the lender to attach to its optional sale procedure petition an affidavit stating the fair market value of the property, the unpaid balance of the obligation and the method by which the lender determined that the property has no equity;

d. Established certain uniform procedures with respect to sheriff's sales of foreclosed properties, including the use of a standard deed form.

e. Changed the period for adjournment of a sheriff's sale from one month to 14 calendar days.

f. Permits a foreclosing plaintiff to proceed as if a non-contesting answer has been filed if either the United States or New Jersey Attorney General, whichever is named in the action, formally declines in writing to file an answer and indicates that it will not oppose default.

g. Changed from three to five the number of years a lis pendens notice is effective.

h. Changed from three to seven, the number of days within which a debtor may rescind a deed in lieu of foreclosure given to the lender.

SENATE STATE MANAGEMENT, INVESTMENTS AND
FINANCIAL INSTITUTIONS COMMITTEE

STATEMENT TO

[FIRST REPRINT]
ASSEMBLY, No. 1064

with committee amendments

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STATE OF NEW JERSEY

DATED: MAY 8, 1995

The Senate State Management, Investments and Financial Institutions Committee reports favorably and with committee amendments Assembly Bill No. 1064(1R).

This bill, the "Fair Foreclosure Act," as amended, would provide additional protection for homeowners at risk of foreclosure on their homes because of a default in mortgage payments, and advances the public policies of the State by giving debtors every opportunity to pay their home mortgages, and thus keep their homes. The bill requires residential mortgage lenders to provide residential mortgage debtors with a notice at least 30 days prior to taking any legal action to take possession of the mortgaged property and gives mortgage debtors a statutory right, not currently available, to cure a default by paying all amounts due under the mortgage payment schedule and, if applicable, other court costs and attorneys' fees in an amount not to exceed the amount permitted pursuant to the Rules Governing the Courts of New Jersey.

More specifically, the bill provides that before accelerating the mortgage loan and taking any other legal action to take possession of the residential property, the lender is required to give the debtor a warning notice at least 30 days in advance, providing the debtor with the following information: the particular obligation or real estate security interest; the nature of the default claimed; the right of the debtor to cure the default; what performance is required by the debtor to cure the default; the date by which such cure must take place without the lender taking further legal steps to take possession of the property; that if the debtor does not cure the default by the time specified, the right to cure will still be present but additional costs are likely to be incurred by the debtor; advice to seek counsel; and the name and phone number of the person whom the debtor can contact to dispute a lender's assertion that default has occurred or the correctness of the lender's calculation of the amount required to cure a default.

Under the bill, a debtor would have the statutory right to "cure" a mortgage default and reinstate a mortgage at any time after default and up to a time just prior to entry of final judgment of foreclosure or, if the lender is proceeding under the alternative foreclosure option without sale, up to the time the court or office of foreclosure enters an order fixing the amount, time and place for redemption. The debtor would be able to cure the default and

reinstate the mortgage by paying all sums in arrears, performing any other obligation the debtor would have been required to perform under the mortgage, paying the lender's court costs and attorneys' fees, if any, in an amount which does not exceed the amount permitted under the Rules Governing the Courts of the State of New Jersey, and paying all contractual late charges as provided for in the note or security agreements.

The bill provides that once a lender's action to foreclose is uncontested and if the lender chooses not to use the optional procedure for the disposition of foreclosed premises, the lender is to apply for entry of final judgment and send a notice to this effect at least 14 days prior to submitting proper proofs for entry of a foreclosure judgment. The notice also informs a debtor that the debtor has a final chance to cure the default. A debtor has 10 days after receipt of the notice concerning final judgment to inform the lender that the debtor believes, in good faith, that within 45 days the debtor will be able to cure the default. Upon receipt of this notice by the lender, the lender is required to give the debtor 45 days to cure the default. If a notice is not received from the debtor, the lender may submit proper proofs for entry of a foreclosure judgment on the 15th day after mailing the notice concerning such submission. If a notice is received, the lender may submit proper proofs for entry of final judgment, but the return date shall not be earlier than the 46th day after the date the notice is sent informing the debtor of the lender's intended action regarding entry of final judgment.

The bill provides that once a lender's action to foreclose is uncontested and the lender chooses to use the optional procedure, the lender is to provide the debtor with a notice, mailed at least 14 calendar days prior to filing an affidavit or certification with the office or court, advising the debtor that, absent a timely response from the debtor, the lender shall file an affidavit or certification with the office or court requesting the office or court to enter an order of redemption and that upon the entry of the order of redemption the debtor shall lose the right to cure the default. A debtor may, no later than 10 days after receipt of the notice, mail to the lender a statement in which the debtor in good faith certifies as true that there is a reasonable likelihood that the debtor will be able to provide payment necessary to cure the default within 45 days of the date of the notice. A lender who receives this statement shall not file an affidavit or certification with the office or court earlier than 46 days after the date the notice sent to the debtor became effective.

The bill provides that once a lender's action to foreclose is uncontested, the lender may elect to proceed with an optional foreclosure procedure without sale, if the one or more of the following conditions exist: (1) the property has been abandoned; (2) the lender has received a deed in lieu of foreclosure; or (3) the property has no equity.

With respect to proceeding with this option: 1) abandonment of the property is to be established by an affidavit or certification from an individual having personal knowledge of the contents thereof, which affidavit or certification is to be submitted to the

court at the same time application to proceed with the alternative sale procedure is made; 2) upon acceptance of a deed in lieu of foreclosure, the conveyance will be effective only if the deed clearly and conspicuously provides that the debtor may rescind the conveyance within seven days, excluding Saturdays, Sundays, and legal holidays and that such rescission is effective upon delivery of a written notice to the lender or its agent or upon mailing of such notice to the lender or its agent; 3) with respect to net worth, "no net worth" means that the total unpaid balance of all liens against the property is equal to or greater than 92 percent of the fair market value of the property. A lender is required to attach an affidavit to the petition to proceed with the optional procedure which sets forth with specificity the fair market value of the property, the unpaid balance of the obligation and the method by which the lender determined that the property has no equity.

If the lender wants to use the optional procedure, the lender is to file an affidavit or certification with the office or court setting forth the facts which the lender alleges show that it is entitled to proceed under one or more of the conditions above and to provide the court or office with proofs required by the act and the court or office.

The office or the court may enter an order fixing the amount, time, and place for redemption. The time fixed for redemption shall be not less than 45 days nor more than 60 days after the date of the order. The order or a notice of it is to be sent within 20 days after the date the order for redemption is entered to each defendant informing them: (1) that the plaintiff is proceeding under an optional procedure; (2) of the terms and conditions under which a defendant may request a public sale of the mortgaged premises; and (3) clearly state that no request for a public sale made more than 30 days after the date of service will be granted, except for good cause shown. If a request for a public sale is received by the office or the court within the time permitted, the office or the court will order a public sale which will be held in accordance with applicable law governing foreclosure sales and sales of real property generally. Any defendant, other than a natural person who is the debtor or a voluntary transferee from that debtor, who requests a public sale, is required to post a bond or cash deposit in an amount which is 10 per cent of the amount fixed in the order of redemption.

Upon redemption, the redemptioner will be furnished with a certificate of redemption and acquire all rights provided by law and equity but will not be entitled to a deed or title to the mortgaged premises. The redemptioner in proper cases may proceed to foreclose the redemptioner's interest.

If the mortgaged premises is not redeemed, upon proof of mailing of the order of redemption and an affidavit of non-redemption, the plaintiff is entitled to a judgment debarring and foreclosing the equity of redemption of the defendants and each of them. A certified copy of the judgment shall be accepted for recording by the county recording officer in the county in which the property is located.

Once the judgment has been entered, the debt which was secured by the foreclosed mortgage is considered satisfied and no further action may be taken by the plaintiff for the collection of the debt.

If the optional sale procedure results in judgment vesting title in the lender and upon the resale of the property by the lender, the price received is greater than that required to repay the debt, interest and costs of the mortgage lender, including all carrying charges and costs of maintenance and resale, the mortgage lender is to deposit such excess with the Superior Court of New Jersey where it will be available for the mortgage debtor and any junior lien holder upon application to the Superior Court for surplus funds.

Under the bill, the following uniform procedures are established with respect to the conduct of a sheriff's sale:

a. Bidding in the name of the assignee of the foreclosing plaintiff.

b. Adjournment of the sale of the foreclosed property is to be in accordance with N.J.S.2A:17-36.

c. The sheriff is to schedule a sale date within 120 days of receipt of a Writ of Execution issued by the Court in a foreclosure proceeding. If it becomes apparent that this time limit cannot be met, the foreclosing plaintiff is permitted to apply to the Office of Foreclosure for an order appointing a Special Master to hold the foreclosure sale. Upon making such an application, the office is required to issue the appropriate order appointing a Special Master to hold the foreclosure sale.

d. The successful bidder at the sheriff's sale is to pay a 20 percent deposit in either cash or by a certified or cashier's check made payable to the sheriff of the county in which the sale is conducted, immediately upon the conclusion of the foreclosure sale. Current law requires only a 10% deposit. If the successful bidder cannot satisfy this requirement, the bidder shall be in default and the sheriff is to immediately void the sale and proceed with the resale of the premises without adjourning the sale, renotifying any party to the foreclosure or republishing any sales notice. Upon the resale, the defaulting bidder would be liable to the foreclosing plaintiff for any additional costs incurred including, but not limited to, any difference between the amount bid by the defaulting bidder and the amount generated for the foreclosing plaintiff at the resale. In the event the plaintiff is the successful bidder at the resale, the plaintiff is to provide a credit for the fair market value of the property foreclosed.

e. If the sheriff conducting the sale consents, it is not necessary for an attorney or representative of the institution which initiated the foreclosure to be present at the sheriff's sale to make a bid. A letter containing bidding instructions may be sent to the sheriff in lieu of an appearance.

f. Each sheriff's office is to use the standardized deed form printed in the bill.

g. The sheriff's office is to deliver a fully executed deed to the successful bidder at the sale within two weeks of the date of the sale, provided however, that the bidder pays the balance due within that time period. If a bid is satisfied after the expiration

date and additional interest is collected, the plaintiff shall receive the total amount, less any fees, costs and commissions due the sheriff, along with the additional interest.

The bill requires judgment creditors to provide a current address, and any changes, along with its social security number or tax payer identification number to the Clerk of the Superior Court. Whatever address is on the record can be used by a plaintiff without the plaintiff having to make a more diligent inquiry or publishing a notice in a newspaper.

The bill further provides that where the United States Attorney General or the Attorney General of New Jersey receives notice with respect to a foreclosure proceeding, a letter indicating that an answer will not be filed or a default opposed may be sent to the Clerk of the Superior Court. This letter may be accepted in lieu of an appearance and shall allow the foreclosing plaintiff to proceed as if a non-contesting answer had been filed.

The bill amends current law to provide that a notice of lis pendens is effective for five years instead of three, and decreases the period of time for an adjournment of a sheriff's sale from one month to 14 calendar days.

Amendments to the bill do the following:

a. Remove cooperative apartment from the definition of residential mortgage; add definitions for "non-residential mortgage" and "obligation;" and clarify the definition of property to which a residential mortgage applies.

b. Clarify and simplify the date on which a notice of intention to foreclose is effective, which is the date it is served in person or mailed to the debtor;

c. Remove the requirement to attach to the complaint a copy of the notice of intent to foreclose together with proof of service;

d. Clarify the time up to which a debtor has the right to cure a default which is up to the time of entry of final judgment in a regular foreclosure proceeding and under the optional procedure without sale, is up to the time the Office of Foreclosure or court enters a judgment fixing the amount, time and place for redemption.

e. Provide for notification to the debtor prior to filing an affidavit or certification requesting the office or court to enter an order of redemption and a final opportunity for the debtor to cure the default before an order of redemption is entered, at which time the debtor loses the right to cure.

f. Make certain procedural and technical changes to section 11 which is the section providing for the optional foreclosure procedure without sale;

g. Add a requirement that the sheriff, upon receipt of a Writ of Execution from a court, is to schedule a sale within 120 days. If it becomes apparent that this deadline cannot be met, the lender is permitted to apply to the Office of Foreclosure to have the sale take place under a Special Master appointed by the office. Once application has been made to the Office of Foreclosure, the office is to appoint a Special Master to conduct the sale; and

h. Make the right of the attorney representing the plaintiff in foreclosure not to appear in person at the sheriff's sale conditional upon consent of the sheriff.

IN PRACTICE

MORTGAGE LENDING

By MYRON C. WEINSTEIN

New Foreclosure Act: More Complexity, Uncertainty

You've heard the adage: "If it ain't broke don't fix it." New Jersey's Fair Foreclosure Act,¹ which becomes effective today, will prove the truth of the old saw for years to come.

After six years of record-breaking foreclosures, and with New Jersey's foreclosure process now up to date at the state and local levels, we now have a statute designed to save us time. But save us time it will not.

The fact is that New Jersey's foreclosure process is doing fine. It is rolling along in an efficient and effective manner, having adjusted superbly to the deluge of cases.

According to Jim Colasurdo, chief of the Office of Foreclosure in Trenton, foreclosure judgments are entered almost the day they come in. There are no delays at the state level and relatively short delays, if any, at the county sheriff's level.

What, then, is the impact of this new legislation?

The probable result will be more complexity and substantial uncertainty. The statute will not save time and only in rare instances will it appreciably benefit mortgagees. Because mortgagees typically do not have funds to make up arrearages in lump sum payments, they must ordinarily rely on work-out agreements. And in such cases, provisions of the new act may be waived.

Virtual Grab Bag

This is the most comprehensive change in foreclosure practice in New Jersey since 1820, and it certainly is the most unwelcome. The act, L. 1995-c. 244, is a virtual grab bag of ambiguities, and an article could be written about each of its 19 sections, all of which should be read carefully. A sampler:

Section 4, which requires a notice of intention to foreclose containing no fewer than 11 particulars, will become a blueprint for affirmative defenses by mortgagees, who probably will file contested answers at a very rapid rate.

In all probability, the act will be deemed procedural and therefore not violative of antecedent mortgage contracts. However, some of the act's provisions — such as the right to cure and reinstate the loan — may be deemed substantive by the courts and therefore unconstitutional as to antecedent contracts.

The act is destined to become controversial. Even before its inception, an issue has been raised about whether foreclosure complaints can be filed during December and whether a residential mortgage foreclosure moratorium is mandated by the act.

As the argument goes, the act is not effective until Dec. 4, 1995, and thus it would be erroneous to send a notice of

intention before that date. The mailing of the notice is a condition precedent to the filing of the complaint. In other words, how can you give a debtor rights and require compliance with a law that has not come into being?

Foibly Argument

This argument is fallacious. The act provides that it "shall apply to foreclosure actions commenced on or after the effective date." The word "on" would be meaningless if the statute did not intend that a foreclosure action could actually be commenced — filed — on the effective date. For an action to be filed on the effective date, the act must implicitly permit a notice of intention to be mailed to the debtor before Dec. 4, 1995.

Initially, the act requires that a written notice of intention to foreclose be mailed to the debtor, by registered or certified mail, return receipt requested, at least 30 days before the filing of the complaint, unless the debtor has given a deed in lieu of foreclosure to the lender. A statement in the pleadings setting forth compliance with Section 4, the notice of intention section, is required.

The act permits the debtor to cure a mortgage default before the entry of the foreclosure judgment. It is an unlimited right if exercised before the filing of the complaint, otherwise once every 18 months, calculated from the date of cure, by paying all arrearages, late fees, costs, if any, and attorneys' fees.

The act requires that a 14-calendar-day notice of judgment be sent to the debtor by registered or certified mail, return receipt requested. Within 10 days after receipt, the debtor may mail a statement to the lender, by certified mail, return receipt requested, that there is a reasonable likelihood that the debtor will be able to cure the default within 45 days from the date of notice's mailing. If such a statement is sent by the debtor, the plaintiff cannot submit proper proofs for judgment until 46 days after the date of mailing.

The act also establishes an optional foreclosure procedure without sale, a major innovation in foreclosure practice in the United States, where the mortgaged premises has no equity, has been abandoned, or where the debtor has given a deed in lieu of foreclosure to the lender. The latter two grounds must be specifically pleaded.

Where judgment is entered under the optional procedure, the debt is deemed satisfied, a deficiency action is waived and, if the no-equity grounds for the optional procedure were used, any surplus on resale by the lender must be paid into court, subject to a surplus moneys action by any person in interest for a period of six months.

The act provides for uniform sheriff's sale procedures in all foreclosure actions, a uniform sheriff's deed, the preparation of the sheriff's deed by the plaintiff's attorney, the delivery of a fully executed sheriff's deed within two weeks, and the appointment of a special master by the Office of Foreclosure to hold the

foreclosure sale if it becomes apparent that the sheriff cannot schedule a sale within 120 days after receipt of a writ of execution.

The act requires a judgment creditor, upon entry of judgment, to provide the clerk with its current address for service and changes of address. Failure to do so will permit the plaintiff, in a foreclosure

This is the most comprehensive change in foreclosure practice in New Jersey since 1820, and it certainly is the most unwelcome.

action, to serve the creditor by certified and ordinary mail at the address in the clerk's records without further diligent inquiry or publication.

The act also provides that there be a reduction in the two, discretionary sheriff's adjournments to 14 calendar days each; that receipt by the clerk of a letter by the attorney general of New Jersey or U.S. attorney for the District of New Jersey noting their appearance and stating

that neither an answer will be filed nor a default opposed shall permit the plaintiff to proceed as if the state and United States had filed non-contesting answers; that a lis pendens shall have a 5-year duration after its date of filing; that acceptance of partial payments by the lender from the debtor shall not be deemed a waiver of rights by either party; and that the attorney general, in consultation with the banking commissioner, may promulgate regulations implementing the act.

Loose Terminology

The act applies to a "residential mortgage," the security for which is residential property (such as a house, real property, or condominium), not a cooperative apartment, occupied as a residence by the "debtor," who must be a natural not a corporate person, or a member of the debtor's immediate family. The real property securing the residential mortgage must not have more than four dwelling units. One of those, at the time the loan is originated, shall be or is planned to be occupied as a residence by the debtor or a member of the debtor's immediate family. That is loose terminology that may prove difficult for mortgagees.

Conceivably, the act could apply to vacant land "planned to be occupied as a residence" by the debtor. To make things

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The author, formerly the chief of the state judiciary's Office of Foreclosure, is the president of Garden State Legal Services Corp. in West Trenton, a firm that reviews foreclosure actions and issues certificates of regularity.

MORTGAGE LENDING

CONTINUED FROM PAGE 11

even trickier. "Immediate family" is defined by the act to mean the debtor, the debtor's spouse, or the mother, father, sister, brother or child of the debtor or debtor's spouse.

Thus, the act will not apply where the debtor is a corporation, where the mortgaged premises consist of more than four dwelling units, or where neither the debtor nor the debtor's immediate family resides in the property or intends to reside in the property at the time the loan is originated. In situations where the loan and mortgage are not closely contemporaneous, it may be difficult to determine the debtor's intentions and whether the act applies.

Presumably, it is the occupation or intention to occupy the premises as a residence by the debtor (or the debtor's immediate family) at the time the loan is "originated" that controls, not later use or intention with respect to the premises by the debtor or successor owner.

It is assumed that the act does apply to a debtor's vacation residence where the act's requirements have otherwise been met, as the term "primary" was deleted from "primary residence" in the final version of the bill.

Critical New in Definition of 'Debtor'

The fundamental flaw in the statutory scheme is the central term "debtor," around which all of the statutory Messings revolve. The term "debtor" is defined as "any" person shown on the record of the lender as obligated to pay the secured obligation. Thus, a debtor would include the original obligor, and, in the writer's opinion, a co-signer, indorser, surety and assuming grantee. I believe that "debtor" should not be construed to include "guarantor," as the contract of the guarantor is entirely collateral.

The Office of Foreclosure has advised, however, where a response officer secures a corporate debt with a mortgage on the officer's residence, and signs a guaranty, the officer will require compliance with the act in order to process plaintiff's judgment papers.

The term "obligation" is defined by the act as a promissory note, bond or other similar evidence of a "duty to pay." Thus, under a literal reading of the act, it is unlikely that a default for failure to perform a nonmonetary obligation can be enforced as a default.

The irony here is that the debtor, the person continuously referred to under the act for required notices, rights and the like, may not even be the mortgagor or may be the original mortgagor now out of title — a person having absolutely no title interest in the mortgaged premises. The debtor, or original obligor, may be a totally unnecessary party and may not be joined in the foreclosure action.

Yet, this nonparty is the very person under the act who must receive all required notices and rights. Failure to notice such a person in a foreclosure action in which the person may not even be a party, and may not affect any interest of the person, will presumably void the foreclosure.

Moreover, if the original debtor-mortgagor has died, who is the "debtor" under the act? The act does not address that problem. The Office of Foreclosure has advised that where the debtor has died, the personal representative of the estate must be noticed under the act in

order for the office to process judgment papers.

It is anomalous that the term "debtor" is defined in terms of the secured obligation, the personal instrument, and not in terms of the mortgage to be foreclosed which is, after all, the ultimate focus of the "Fair Foreclosure Act."

The best practice from a lender's standpoint is not to commingle residential and non-residential tracts in a single mortgage but to have separate mortgages executed for each.

The act contains a novel section, Section 13, dealing with Superior Court judgment creditors. The act provides that

This is a sad day for equity jurisprudence and for the judges who will inevitably be called on to unravel the act's ambiguities and inequities.

The personal obligation secured by the mortgage, if there ever was one, may be wholly unenforceable. The original mortgagor or other obligor may have been discharged in bankruptcy, so that there may be no person capable of meeting the criteria of debtor under the act — i.e., a person obligated to pay the note or bond. This is a serious shortcoming. In fact, there need not be a personal obligation or a debtor to have a valid mortgage in New Jersey or anywhere else.

The residential mortgage lender under the act is under absolutely no obligation to give required notices and rights to "all" debtors for the act says "any" debtor or even to any one person in title. The "debtor" may, in fact, be a corporation, or defunct corporation, while the mortgagor may be a living, breathing person. The actual title holders, the persons who would most benefit from the various rights and notices under the act, may be several steps removed from the original mortgagor. Oddly enough, the term "mortgagor" does not appear in the act, and "mortgage" only appears in Section 10, although the act was presumably passed for their benefit.

One can certainly question the workability of a mortgage foreclosure statute that is critically tied to the debt and personal obligation, instead of to the mortgagor (and title holder) and the mortgage. The act leaves in limbo the rights of all persons in interest who do not technically meet the act's definition of "debtor." This is a sad day for equity jurisprudence and for the judges who will inevitably be called upon to unravel the act's many ambiguities and inequities.

The act makes it clear that if a mortgage covers several tracts, the mortgage is considered a "non-residential mortgage" as to the non-residential tracts. Section 10 also provides that a lender shall not be required to foreclose a residential and non-residential mortgage securing the same obligation in the same proceeding. This means that a lender may enforce a single mortgage against residential and non-residential tracts in separate actions. Under current law, such a practice would offend the entire controversy doctrine.

Residential vs. Non-Residential Tracts

This creates the anomaly of requiring the plaintiff to comply with the act for residential, but not non-residential, tracts. It would have made more sense to require compliance with the act if any one of the mortgage tracts is residential.

"[a]ny judgment creditor" entering a judgment in the Superior Court Clerk's Office shall (a) provide the court with its current address for service, (b) provide the clerk with the judgment creditor's (obviously this should be judgment "debtor's") Social Security number or taxpayer identification number, if known, and (c) notify the court of a change of address for service by filing "in a timely manner" an appropriate form with the court.

If the judgment creditor fails to provide a current or change of address for service, the plaintiff "in any foreclosure proceeding" may serve the creditor by

ordinary and certified mail at the address reflected in the records of the Superior Court clerk, without first making a more diligent inquiry or publishing a notice in the newspaper.

This section is of doubtful constitutional validity and should not be followed. The state Supreme Court in *New Brunswick Savings Bank v. Markowski*, 123 N.J. 402 (1991) has already held that a judgment creditor possesses a property right entitled to due process protection comparable to that of a mortgage creditor.

Will the Fair Foreclosure Act be a panacea to mortgagors. Probably not. With respect to the debtor's principal residence, any right to cure that a debtor can secure under the new act, the debtor can secure, plus more, in a Chapter 13 bankruptcy proceeding.

Lenders, faced with the prospect of the act, will either be less flexible in granting discretionary workouts to debtors, forcing debtors to exercise their statutory rights, require debtors to first waive their statutory rights as a condition to granting discretionary workouts, and institute foreclosure more quickly to precipitate an earlier cure or an earlier exhaustion of debtors' statutory rights. Thus, the net result which is not likely to significantly alter the plight of mortgagors in New Jersey is more certain to add another layer of complexity to a process already fraught with too much complexity. ■

Endnotes

1. The statute, L.1995, c.244, becomes effective with respect to residential mortgage foreclosure suits commenced on or after Dec. 4, 1995.

2. While Assembly Bill No. 1064 is stamped "Approved 06/09/95," it was actually signed by the governor on Sept. 7, 1995, making Dec. 4, 1995 (90 days after enactment) the effective date.

LITIGATION

CONTINUED FROM PAGE 10

Brill, slip op. at 15: The court must concern itself not merely with the existence of any evidence favoring the nonmovant, it must necessarily evaluate the magnitude of the evidence in order to determine whether it could, to a rational jury, be sufficient to meet the nonmovant's burden of proof at trial. Thus, if there is a disputed fact which, even if resolved in the nonmovant's favor, would still not be enough to rationally carry the burden of proof at trial, summary judgment should be granted.

Second, adding the burden of proof into the summary judgment analysis can have a great impact on the motion's chances for success, especially with respect to causes of action requiring proof by clear and convincing evidence. In deciding a summary judgment motion involving such claims, the trial court must not simply determine whether the nonmovant's version of the evidence could, in the minds of a reasonable jury, tip the scales in the nonmovant's favor, but must judge that evidence in light of the stricter clear and convincing text. Thus, for example, where a plaintiff faces a summary judgment motion on its fraud claim, if anything else, the act's standard should force the plaintiff to put all its evidence on the table, and not hold back its best evidence for trial.

In fact, under the new summary judgment analysis, even where the preponderance of the evidence standard

applies, the nonmovant should be prone to come forward with much more of its evidence than in the past, because now it must do more than merely create reasonable doubt as to a factual issue. Many practitioners may recall having made a summary judgment motion not to end a case but to get to the bottom of it. At a minimum, the new summary judgment standard, with its added burden on the nonmovant, should help accomplish that objective.

It is impossible to ascertain whether the new standard, coupled with the Supreme Court's recent encouragement will, in practice, have a significant impact on the way trial judges view motions for summary judgment. We have already learned, however, of one trial court's oral argument on a summary judgment motion raising, *sub specie*, the issue of *Brill* and asking the litigants to assess its impact. Because the new standard mirrors that followed under Rule 4:37-2(b), trial judges are fully familiar with it and should have no difficulty applying it. Only time will tell whether the *Brill* standard will result in summary judgment being granted with greater frequency. The message, however, is clear. The Supreme Court wants trial judges to be more vigilant in granting summary judgment motions. The over-present "issue of fact," in and of itself, is not to be considered fatal to the summary judgment motion. Summary judgment should no longer be the disfavored method of resolving litigation. ■

Give and take in foreclosure revisions

By DAN WEISSMAN

Gov. Christie Whitman yesterday signed legislation that revamps the state's foreclosure laws by cutting to less than half the time it takes a bank to go from final judgment to sale of a residential property.

But the legislation, A-1084, sponsored by Assemblywoman Charlotte Vandervalk (R-Bergen) also gives homeowners who fall behind on mortgage payments more options to keep their homes by paying off the amount they are in default.

Under existing law, a homeowner could be required to satisfy the entire outstanding mortgage to avoid foreclosure.

The measure, which sailed through the Legislature with minimal opposition, was pushed by the state's banks and mortgage lenders, who said the foreclosure system took an average of 270 days to complete, making it the slowest in the nation. The changes will cut the time between a final judgment and a foreclosure sale to 120 days.

The legislation was also supported by consumer groups because of the broader rights it gives to homeowners facing foreclosure.

The most vigorous opposition came from the state's sheriffs, who complained that provisions of the legislation threatened to turn them into unpaid deputies for the banks and took away their options to give homeowners facing eviction time to clear up their debts and redeem their homes.

"I'm glad this legislation is finally enacted," Vandervalk said. "It's been in the works three years."

Assemblyman Joseph Roberts (D-Camden), who cosponsored the legislation, said the provisions giving home-

owners more options to avoid foreclosure will reduce the problem of homelessness.

Whitman, in a prepared statement, said this legislation will help lenders complete the residential foreclosure process in a more timely manner, bringing New Jersey in line with its neighboring states.

She said that according to the Federal National Mortgage Corp. (Freddie Mac), New Jersey ranks last among the 50 states for the time needed to complete a residential foreclosure.

Banking Commissioner Elizabeth Randall said that by expediting the foreclosure process, bankers will encourage lenders to increase their mortgage lending in New Jersey.

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Attorneys for Amici Curiae Mortgage Bankers Association of New Jersey

**SUPREME COURT OF NEW JERSEY
DOCKET NO. 068176**

US BANK NATIONAL)
ASSOCIATION, AS TRUSTEE)
FOR CSAB MORTGAGE-BACKED)
PASS-THROUGH CERTIFICATES,)
SERIES 2006-3,)

Plaintiff/Respondent,)

v.)

MARYSE GUILLAUME, MR.)
GUILLAUME, HUSBAND OF)
MARYSE GUILLAUME, EMILIO)
GUILLAUME, MRS. EMILIO)
GUILLAUME, HIS WIFE, CITY)
OF EAST ORANGE,)

Defendants/Petitioners.)

On Certification from the Superior Court of New Jersey, Appellate Division, granted September 27, 2011

Civil Action

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Hon. Douglas M. Fasciale, J.A.D.

Trial Court:

Hon. Harriet Farber Klein, J.S.C.

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25 W. Market Street
Trenton, New Jersey 08625-0970

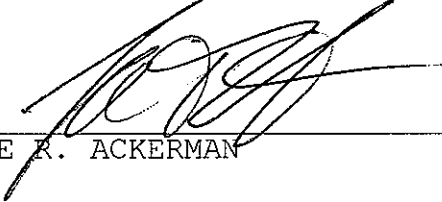
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PLEASE TAKE NOTICE that the applicants herein requesting leave to file Amici Briefs hereby request oral argument on the issues raised in the brief submitted herein.

ZUCKER, GOLDBERG & ACKERMAN, LLC



JAIME R. ACKERMAN

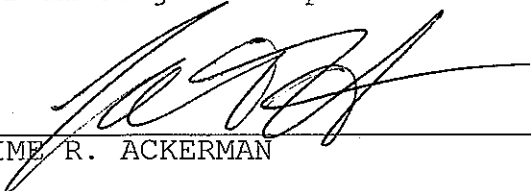
Dated: October 21, 2011

Jersey 08625.

3. On October 21, 2011, I caused two copies of the (i) Notice of Motion to Appear Amicus Curiae, (ii) request for oral argument; (iii) Brief in Support; (iv) Certification of E. Robert Levy, Esq. in Support, and (v) Certification of Service to be forwarded by hand delivery to all counsel of record.

4. I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

By:



JAIME R. ACKERMAN

Dated: October 21, 2011