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SENATE BILL 75

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

INTRODUCED BY

Stephen H. Fischmann

AN ACT

RELATING TO FORECLOSURES; ENACTING THE FORECLOSURE MEDIATION ACT; PROVIDING FOR FORECLOSURE MEDIATION PROGRAMS TO ASSIST HOMEOWNERS AND CREDITORS; REQUIRING GOOD FAITH LOSS MITIGATION REVIEW; AMENDING A SECTION OF THE NMSA 1978 TO CLARIFY APPLICATION OF THE FORECLOSURE MEDIATION ACT; MAKING AN APPROPRIATION.

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

SECTION 1. [NEW MATERIAL] SHORT TITLE.--Sections 1 through 8 of this act may be cited as the "Foreclosure Mediation Act".

SECTION 2. [NEW MATERIAL] LEGISLATIVE FINDINGS--PURPOSE OF ACT.--

A. The legislature finds that the rate of home foreclosures continues to rise to unprecedented levels, both .187659.2

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1 for prime and subprime loans. A new wave of foreclosures has
2 occurred due to rising unemployment, job loss and higher
3 adjustable loan payments. Prolonged foreclosures contribute to
4 the decline of the state's housing market, loss of property
5 values and other loss of revenue to the state. The legislature
6 further finds that New Mexico's current judicial and
7 nonjudicial foreclosure processes do not provide a mechanism
8 for homeowners to readily access a neutral third party to
9 assist them in a fair and timely manner. A foreclosure
10 mediation process will assist courts in managing the explosion
11 of foreclosure cases on their dockets and provide a more
12 efficient administration of justice while helping New Mexico's
13 most vulnerable homeowners who face the prospect of losing
14 their homes. Several jurisdictions across the nation have
15 foreclosure mediation programs that provide a cost-effective
16 process for the homeowner and lender, with the assistance of a
17 trained mediator, to reach a mutually acceptable resolution
18 that may avoid foreclosure.

19 B. Therefore, the purposes of the Foreclosure
20 Mediation Act are to:

21 (1) encourage and strengthen the communication
22 between homeowners and lenders and to assist homeowners in
23 navigating through the foreclosure process;

24 (2) encourage homeowners to utilize the skills
25 and professional judgment of housing counselors as early as

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1 possible in the foreclosure process;

2 (3) create a framework for homeowners,
3 beneficiaries and mortgagees to communicate with each other so
4 as to reach a resolution and, when possible, avoid foreclosure;
5 and

6 (4) provide a mediation process for
7 individuals facing foreclosure when a housing counselor or
8 attorney determines that mediation is appropriate.

9 SECTION 3. [NEW MATERIAL] DEFINITIONS.--As used in the
10 Foreclosure Mediation Act:

11 A. "borrower" means a mortgagor of a mortgage loan
12 or a trustor of a deed of trust by way of mortgage;

13 B. "borrower's representative" means a housing
14 counselor or contractor of a nonprofit organization that is
15 certified by the United States department of housing and urban
16 development or an employee or contractor of a counseling agency
17 that has received approval from the New Mexico mortgage finance
18 authority;

19 C. "creditor" means a person or entity that holds
20 or controls, partially, wholly, indirectly or directly, a
21 mortgage loan securing a residential property, including,
22 without limitation, an originator, holder, investor, assignee,
23 successor, trust, trustee, beneficiary nominee holder, mortgage
24 electronic registration systems or mortgage servicer, including
25 the federal national mortgage association or the federal home

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1 loan mortgage corporation. "Creditor" also means any servant,
2 employee or agent of a creditor;

3 D. "creditor's representative" means a person who
4 has the authority to negotiate the terms of and modify a
5 mortgage loan;

6 E. "director" means the director of the
7 administrative office of the courts;

8 F. "mediation" means a process in which a mediator
9 facilitates communication and negotiation between parties to
10 assist them in reaching a voluntary agreement regarding their
11 dispute;

12 G. "modified mortgage loan" means a mortgage
13 modified from its original terms including, but not limited to,
14 a loan modified pursuant to one of the following:

15 (1) the federal home affordable modification
16 program;

17 (2) the federal deposit insurance
18 corporation's loan modification program; or

19 (3) any modification program that a lender
20 uses that is based on accepted principles and the safety and
21 soundness of the institution and that is recognized by the
22 national credit union administration, the financial
23 institutions division of the regulation and licensing
24 department or any other instrumentality of the state, a federal
25 housing agency or a similar federal refinancing plan;

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1 H. "mortgage loan" means a loan to a natural person
2 that is made primarily for personal, family or household
3 purposes and that is secured wholly or partially by a mortgage
4 or a deed of trust by way of mortgage on residential property;

5 I. "net present value" means the net present value
6 of a residential property based on a calculation using one of
7 the following:

8 (1) the federal home affordable modification
9 program base net present value model; or

10 (2) the federal deposit insurance
11 corporation's loan modification program; and

12 J. "residential property" means real property that
13 is located in the state, that is used for residential purposes,
14 that is a single-family dwelling, duplex, triplex, quadraplex
15 or a unit as defined in the Condominium Act and that is
16 occupied, in whole or in part, by the trustor or obligor on the
17 mortgage debt; provided, however, that "residential property"
18 is limited to the principal residence of a person; and provided
19 further that "residential property" does not include an
20 investment property or residence other than a primary residence
21 or residential property taken in whole or in part as collateral
22 for a commercial loan.

23 SECTION 4. [NEW MATERIAL] FORECLOSURE MEDIATION OFFERED
24 TO BORROWER.--Upon default by the borrower on a mortgage loan,
25 the creditor shall in writing and as provided in Section 8 of

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1 the Foreclosure Mediation Act offer the borrower the
2 opportunity to participate in a court-supervised foreclosure
3 mediation program established pursuant to the provisions of the
4 Foreclosure Mediation Act. The borrower or the creditor, or
5 both, may request participation in the mediation program.

6 SECTION 5. [NEW MATERIAL] DUTY TO ENGAGE IN LOSS
7 MITIGATION.--

8 A. A creditor shall not initiate a foreclosure of a
9 residential property unless it has made a good faith review of
10 the borrower's financial situation and offered, whenever
11 feasible, a loan modification or other option to assist the
12 borrower in bringing the arrears current. A good faith review
13 of the borrower's financial situation includes, but is not
14 limited to:

15 (1) an evaluation of the borrower's
16 eligibility for a modified mortgage loan program established
17 pursuant to the federal government or the mortgage industry;

18 (2) an evaluation of the net present value of
19 the residential property; and

20 (3) upon the establishment of a foreclosure
21 mediation program in the district court in the county in which
22 the residential property is located, an offer to the borrower
23 to participate in the foreclosure mediation program established
24 pursuant to the Foreclosure Mediation Act.

25 B. Failure to comply with this section constitutes

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1 a defense to the foreclosure.

2 SECTION 6. [NEW MATERIAL] FORECLOSURE MEDIATION PROGRAM

3 ESTABLISHED--MINIMUM REQUIREMENTS--PENALTIES FOR NON-
4 ATTENDANCE.--The director shall cause to be established in each
5 state judicial district, not later than December 1, 2012, a
6 foreclosure mediation program for use in residential
7 foreclosures. Each state judicial district court shall develop
8 a foreclosure mediation program and, at a time determined by
9 the director, notify the director of the program developed. In
10 developing the program, each district shall, at a minimum:

11 A. establish a court-approved confidentiality
12 agreement and form for requesting foreclosure mediation;

13 B. establish duties and responsibilities for
14 mediators, borrowers and creditors participating in the
15 mediation;

16 C. provide the borrower and the creditor a list of
17 any documents or information required by each of them for
18 participation in the mediation;

19 D. in accordance with the provisions of Subsection
20 D of Section 7 of the Foreclosure Mediation Act, establish a
21 time period within which each foreclosure dispute mediated
22 under the program shall commence and conclude;

23 E. establish a fee for the mediation services based
24 on reasonable costs to be paid by the creditor;

25 F. provide that mediations be conducted by

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1 mediators who are approved by or employed by the court, trained
2 in mediation and all relevant aspects of the law, have
3 knowledge of the community-based resources that are available
4 in the state and have knowledge of any assistance programs
5 established by the state or other sources. Such mediators may
6 refer borrowers who participate in the foreclosure mediation
7 program to community-based resources and assistance programs
8 when appropriate; and

9 G. provide for penalties for acts related to the
10 mediation by the borrower or the creditor that constitute bad
11 faith, including but not limited to the penalties for failure
12 to attend a scheduled mediation session as follows:

13 (1) if a borrower fails to attend any
14 scheduled mediation session, the mediation process will
15 automatically terminate and the foreclosure process will
16 resume; and

17 (2) if a creditor or the creditor's
18 representative fails to attend any scheduled mediation session,
19 the mediation process will automatically be extended for an
20 additional thirty days.

21 SECTION 7. [NEW MATERIAL] MEDIATION PROGRAM--
22 COMMENCEMENT--TIMELINE--MEDIATOR'S REPORT.--

23 A. The mediation period under a foreclosure
24 mediation program established pursuant to the Foreclosure
25 Mediation Act shall commence when the court sends notice to the

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1 borrower and the creditor that a foreclosure mediation request
2 form has been submitted to the court. The notice shall be sent
3 not later than three business days after the court receives a
4 completed foreclosure mediation request form.

5 B. The first mediation session shall be held not
6 later than ten business days after the court sends notice to
7 all parties that a foreclosure mediation request form has been
8 submitted to the court.

9 C. The borrower and creditor or creditor's
10 representative shall appear in person at each mediation session
11 and shall have authority to agree to a settlement, except that
12 if the creditor is represented by the creditor's representative
13 or counsel, the creditor's representative or counsel may appear
14 in lieu of the creditor to represent the mortgagee's interests
15 at the mediation; provided that the creditor's representative
16 or such counsel has the authority to agree to a proposed
17 settlement and the creditor is available during the mediation
18 session by telephone or electronic means.

19 D. Not later than five business days after the
20 conclusion of the first mediation session, the mediator shall
21 file with the court, and send a copy to the borrower and the
22 creditor, a report stating the outcome of the mediation and, if
23 requested by both the borrower and the creditor, include a
24 request for an additional mediation session. Unless otherwise
25 approved by the court, a foreclosure dispute mediated pursuant

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1 to the Foreclosure Mediation Act shall not exceed two mediation
2 sessions.

3 E. If the mediator's report to the court, as
4 provided pursuant to Subsection D of this section, does not
5 include a request for an additional mediation session, the
6 mediation period shall terminate automatically. If the
7 mediator's report requests an additional mediation session, the
8 mediation period shall continue for an additional thirty days.

9 F. The director shall establish policies and
10 procedures to implement the provisions of this section. The
11 policies and procedures shall, at a minimum, provide that the
12 mediator shall advise the borrower at the first mediation
13 session that:

- 14 (1) during the mediation period, the
15 foreclosure process is suspended;
- 16 (2) if the parties are unable to come to an
17 agreement and the foreclosure process resumes, such mediation
18 does not suspend the borrower's obligation to respond to the
19 foreclosure action in accordance with applicable law; and
- 20 (3) a foreclosure sale may cause the borrower
21 to lose the residential property.

22 G. At the conclusion of the mediation process and
23 if no agreement is reached during the mediation, the creditor
24 shall, within five business days, provide written notice to the
25 borrower as to when the foreclosure proceeding will resume and

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1 a description of the ensuing procedure. An affidavit
2 demonstrating compliance with this subsection shall be filed
3 with the court by the creditor, or its assignee, in any action
4 or proceeding to foreclose on the residential property.

5 SECTION 8. [NEW MATERIAL] NOTICE OF FORECLOSURE MEDIATION
6 OPPORTUNITY.--Upon default by a borrower on a mortgage loan, a
7 creditor shall send a notice of the availability of the
8 foreclosure mediation program to the borrower. Using certified
9 mail, the creditor shall send the borrower a copy of the
10 following foreclosure mediation notice with a notice of
11 default. The foreclosure mediation notice shall be printed in
12 both English and Spanish and shall:

13 A. in bolded text, in both the opening and closing
14 body of the notice, inform the borrower of the opportunity to
15 participate in the foreclosure mediation and inform the
16 borrower that the borrower has fifteen business days from the
17 date of the notice to return the enclosed foreclosure mediation
18 request form to the court;

19 B. encourage the borrower to meet with a borrower's
20 representative or attorney prior to mediation;

21 C. inform the borrower of the name, title, current
22 mailing address, direct phone and fax numbers and current email
23 address of the creditor's representative;

24 D. provide the borrower with an itemization of all
25 past due amounts that cause the loan to be in default and an

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1 itemization of any other charges that must be paid to bring the
2 loan current;

3 E. provide the borrower with the name, address,
4 telephone number and other contact information for one or more
5 counseling agencies that are approved by the United States
6 department of housing and urban development or a counseling
7 agency that has received approval from the New Mexico mortgage
8 finance authority; and

9 F. include a court-approved foreclosure mediation
10 request form, with instructions for its use, to be completed by
11 the borrower in requesting the mediation, along with a
12 preaddressed envelope addressed to the court.

13 SECTION 9. A new section of Chapter 39, Article 5 NMSA
14 1978 is enacted to read:

15 "[NEW MATERIAL] RESIDENTIAL REAL PROPERTY FORECLOSURE--
16 FORECLOSURE MEDIATION ACT APPLIED.--A foreclosure on
17 residential real property initiated pursuant to a provision of
18 Chapter 39, Article 5 NMSA 1978 is subject to the provisions of
19 the Foreclosure Mediation Act."

20 SECTION 10. Section 48-10-10 NMSA 1978 (being Laws 1987,
21 Chapter 61, Section 10, as amended) is amended to read:

22 "48-10-10. SALE OF TRUST REAL ESTATE--POWER OF
23 TRUSTEE--FORECLOSURE OF DEED OF TRUST.--

24 A. By virtue of the trustee's position, a power of
25 sale is conferred upon the trustee of a deed of trust under

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1 which the trust real estate may, subject to the provisions of
2 the Foreclosure Mediation Act, be sold as provided in the Deed
3 of Trust Act after a breach or default in performance of the
4 contract for which the trust real estate is granted or
5 mortgaged as security or a breach or default in performance of
6 the deed of trust. Except as specifically provided in the Deed
7 of Trust Act, the trustee shall not delegate the duties of the
8 trustee as provided in the Deed of Trust Act. At the option of
9 the beneficiary, a deed of trust may be foreclosed in the
10 manner provided by law for the foreclosure of mortgages on real
11 estate. Either the beneficiary or the trustee shall constitute
12 the proper and complete party plaintiff in any action to
13 foreclose a deed of trust.

14 B. The trustee or beneficiary may commence an
15 action to foreclose a deed of trust at any time before the
16 trust real estate has been sold as provided in the power of
17 sale. A sale of trust real estate as provided in a power of
18 sale in a deed of trust shall not be held after an action to
19 foreclose the deed of trust has been commenced unless the
20 foreclosure action has been dismissed.

21 C. The power of sale of trust real estate conferred
22 upon the trustee shall not be exercised before the expiration
23 of ninety days from the recording of the notice of the sale.

24 D. The trustee need only be joined as a party in
25 separate civil actions pertaining to a breach of an obligation

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1 of a trustee as provided in the Deed of Trust Act or as
2 provided in the deed of trust. Any order of the court entered
3 against the beneficiary is binding upon the trustee with
4 respect to any actions that the trustee is authorized to take
5 by the deed of trust or by the Deed of Trust Act. If the
6 trustee is joined as a party in any other separate civil
7 action, other than an action in which the trustee is an
8 indispensable or necessary party, the trustee is entitled to be
9 immediately dismissed and to recover the costs and reasonable
10 attorney fees actually incurred by the trustee from the person
11 joining the trustee and from the beneficiary, jointly and
12 severally."

13 SECTION 11. APPROPRIATION.--Two million dollars
14 (\$2,000,000) is appropriated from the general fund to the
15 administrative office of the courts for expenditure in fiscal
16 year 2013 to establish the foreclosure mediation program
17 required pursuant to the Foreclosure Mediation Act. Any
18 unexpended or unencumbered balance remaining at the end of
19 fiscal year 2013 shall revert to the general fund.

20 SECTION 12. APPLICABILITY.--The provisions of the
21 Foreclosure Mediation Act apply to judicial and nonjudicial
22 mortgage foreclosure processes involving residential property
23 as defined in the Foreclosure Mediation Act.