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REGULATORY TRENDS

NEW JERSEY OVERHAULS ITS MORTGAGE FORECLOSURE LAWS

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New Jersey Governor Phil Murphy signed into law on April 29, 2019, nine bills which collectively form a comprehensive legislative package aimed at ending the state's foreclosure crisis. The package is a bi-partisan response to a 2018 report issued by the Special Committee on Residential Foreclosures. The committee reviewed New Jersey's response to the foreclosure crisis and made seventeen recommendations for how the state should deal with foreclosures going forward.¹

Over a decade after the housing market crash in 2008, New Jersey still has the highest foreclosure rate of any state, with approximately one foreclosure action for every 1,117 homes.² Commenting on the package, Governor Murphy stated that, “[t]he foreclosure crisis has hurt our economy and jeopardized [the] economic security of too many New Jersey families. ... I am proud to sign these bills into law today and get New Jersey closer to ending [this] crisis.”³

The nine bills, while generally pro-consumer, nevertheless reflect input from creditors and others having a stake in the foreclosure process. Among other things, they encourage and expand mediation, create additional licensing requirements, require creditors to provide additional information to homeowners and governmental agencies, change notice requirements, and shorten the statute of limitations applicable to foreclosures.

They also include provisions that:

- Increase the number of times a court can reinstate foreclosure actions dismissed without prejudice.
- Permit creditors to use the expedited foreclosure process even after a complaint is filed.
- Hopefully will speed-up sheriffs' sales.

Set forth below is a brief summary of the most significant changes made in each bill, some of which merely codify current judicial practice, while others substantively change the law.⁴

The N.J. Foreclosure Mediation Act

A.B. A664 created a new act, the New Jersey Foreclosure Mediation Act,⁵ which codifies the 2008 Foreclosure Mediation Program. The FMP was the result of a collaboration between several branches of government.⁶ First instituted by New Jersey Courts via the Civil Practice Division, then run by the Public Defender's Office of Dispute settlement, and later by the Superior Court Clerk's office,⁷ the FMP allowed homeowners facing foreclosure to stay the sheriff's sale and enter into mediation.⁸

By Order dated Nov. 17, 2008, the New Jersey Supreme Court relaxed several rules of court to permit the establishment and operation of the FMP and require homeowners to be notified of the availability of HUD-certified foreclosure prevention counseling as part of the program.⁹ Lower courts were instructed to use the program whenever a homeowner contested a foreclosure proceeding.¹⁰

The FMP Act makes several relatively minor changes to the FMP. It requires lenders to provide homeowners facing foreclosure with information about the FMP, in English and Spanish, both with lender's initial notice of intention to foreclose and the summons and complaint, as opposed to only with the summons and complaint.¹¹

It also expands the availability of foreclosure mediation by allowing for mediation in cases involving an “owner-occupied one-to four-dwelling unit residence, one of which is occupied, or is planned to be occupied, by the homeowner-borrower, or a member of the homeowner-borrower's immediate family.”¹² Under the FMP, mediation was available only for 1-3 family dwellings, one of which had to be occupied by the borrower as his/her primary residence.

Finally, the FMP Act creates a funding mechanism for the program by requiring plaintiffs to pay a \$155 fee to the Judiciary when filing a foreclosure complaint and authorizes the court to sanction a party or attorney for failing to attend a foreclosure mediation session by ordering the offending party to pay a civil penalty of up to \$1,000 or the other party's reasonable attorney's fees or litigation expenses, or both.¹³

Mortgage servicer licensing requirements

A.B. A4997 creates the Mortgage Servicers Licensing Act¹⁴, which requires entities that engage in mortgage servicing to be licensed and subjects them to supervision by the New Jersey Department of Banking and Insurance. It seems intended only to require nonbank mortgage servicers that do not already hold a New Jersey residential mortgage lender license to obtain a mortgage servicer license.

Federally insured banks and credit unions, their subsidiaries, and residential mortgage lenders licensed under the New Jersey Residential Mortgage Loan Act¹⁵, among others, are not subject to this licensing requirement.¹⁶ However, sections 5 and 9-12, set forth certain requirements, restrictions and prohibitions that may or may not be applicable to these exempt entities.¹⁷

Lastly, sections 13 through 17 of the act, which appear to be applicable to all mortgage servicers, expand the department's enforcement jurisdiction, authorizing it to pursue enforcement actions against licensees and exempt entities that commit servicing violations and, in connection therewith, to impose heavy penalties.¹⁸

Creditor contact information filing requirements

A.B. A4999 amends N.J.S.A. 46:10B-51 so that it now requires creditors:

- Within 10 days after serving a summons and foreclosure complaint regarding NJ residential property, to file with the clerk *and the mayor or other chief executive officer* of the municipality in which the property is located *the full name, address, and telephone number* of (1) the creditor's representative, and, if the creditor is out-of-State, its in-State representative or agent, who is responsible for receiving complaints of property maintenance and code violations in the event the property is *or becomes* vacant or abandoned, (2) anyone the creditor retains to maintain the property, and (3) if the creditor is out-of-State, an in-State individual authorized to accept service of process on its behalf.
- Within 10 days of a change in any of the above information, to update the municipal clerk regarding the change.
- To file the same information as set forth above, plus the name, address and telephone number of any servicer responsible for receiving complaints of property maintenance and code violations, with the foreclosure summons and complaint in Superior Court and the lis pendens filed with the county clerk or registrar of deeds, and to update both regarding any change in that information within 10 days.

It also amends N.J.S.A. 40:48-2.12s, which authorizes municipalities to adopt ordinances to regulate the care, maintenance, security, and upkeep of the exterior of vacant and abandoned residential properties on which a summons and foreclosure

complaint has been filed, to mandate that any such ordinance require an out-of-State creditor to include the full name and contact information of its in-State representative or agent, and any other person or entity retained by the creditor or a representative of the creditor, in the notice required by the statute.

Several of the requirements set forth above represent the changes effected by the bill. Our understanding is that these changes were pursued on behalf of in-state creditors that often found themselves the targets of criticism by municipalities and in the press for the lack of responsiveness to local property maintenance issues by out-of-state creditors.

Statute of limitations

A.B. A5001 changes the statute of limitations on residential foreclosure actions involving mortgages executed on or after the bill's April 29, 2019 effective date. Previously, the statute of limitations on foreclosure actions was the earliest of: (1) six years from the date the last payment is due or the maturity date, (2) thirty-six years from the date the mortgage was recorded, or (3) twenty years from the date of default.¹⁹

Now, the law provides that the statute of limitations is the earliest of:

- Six years from the date the last payment is due or the maturity date;
- 36 years from the date the mortgage was recorded, or
- Six years from the date of default.²⁰

This change is significant because it essentially prevents lenders from instituting a foreclosure action if more than six years has passed from the date of default.

Lien priority for common interest community assessments

A.B. A5002 amends the Condominium Act²¹ in several regards. First, it allows associations to file liens to cover, in addition to unpaid assessments, interest thereon and any late fees, fines and reasonable attorney's fees that are authorized by the master deed or bylaws, any other late fees, fines and reasonable attorney's fees, as well as any expenses imposed or incurred in the collection of the unpaid assessment that are authorized by the master deed or bylaws.²²

Second, it allows association liens for "customary condominium assessments,"²³ which the Condominium Act gives a limited priority over prior recorded mortgages and other liens (except municipal liens or federal tax liens) up to the value of the unpaid assessments for the 6-month period prior to their recording, to be "cumulatively renewed on an annual basis as necessary."²⁴

This ability to cumulatively renew such assessments exists notwithstanding that (1) the limited priority ordinarily expires on the first day of the 60th month following the date of the lien's recording, or (2) an association's lien ordinarily has no priority over a prior recorded mortgage if the association recorded a prior lien for unpaid assessments that had priority over the prior recorded mortgage for a period of 60 months from the date the prior lien was recorded.²⁵

Finally, the bill adds a new section to the New Jersey "Planned Real Estate Development Full Disclosure Act,"²⁶ which extends essentially the same rights to file liens for assessments as are now afforded condominium associations in the Condominium Act to all other types of "common interest community associations," except cooperatives.²⁷

Additional time constraints for providing NOIs; new reinstatement constraints

A.B. S3411 amends the New Jersey Fair Foreclosure Act²⁸ to cap the time frame within which a mortgage lender can provide a homeowner with a notice of intent to foreclose. Previously, under the FFA notice had to be given at least 30 days in advance of taking such action, but there was no outer time limit after which a creditor would have to file a new NOI.

Now, the NOI must still be given at least 30 days, but also no more than 180 days, before filing the foreclosure complaint.²⁹ For example, if the mortgagee delivers its NOI to the homeowner and does not file the foreclosure complaint within the next 180 days, it would have to start all over again; i.e., file a new NOI and wait another 30 days before filing the foreclosure complaint.

The bill also requires lenders: (1) to file an order to show cause for the appointment of a receiver “if the property which is the subject of the mortgage has more than one dwelling unit but less than five, one of which is occupied by the debtor or a member of the debtor's immediate family as his/her residence at the time the loan is originated” and is eligible for receivership under New Jersey's Multifamily Housing Preservation Receivership Act; and (2) to include in any NOI information about this obligation and about the homeowner's right to free housing counseling under the FMP.³⁰

In addition, the bill adds a new section to the FFA, which essentially codifies existing court rules that permit, on motion to the court and for good cause shown, up to two reinstatements of foreclosure actions dismissed without prejudice. The new section:

- Allows a residential mortgage foreclosure action that has been dismissed without prejudice to be reinstated only upon a motion for good cause shown.
- Sets the number of reinstatements that may be initiated at three (not counting any dismissal that was due to the plaintiff's compliance with federal law).
- Establishes the fee for reinstatement at twice the fee for filing the foreclosure complaint.³¹

Application of RMLA to out-of-state-lenders, brokers and loan originators

A.B. S3416 clarifies that the requirements set forth in the RMLA apply to “residential mortgage lenders, residential mortgage brokers, mortgage loan originators, and other persons that are located out-of-State, provided they are otherwise required to be licensed pursuant to the provisions of [the RMLA] in the State.”³² One wonders why the legislature thought this change was needed, since the RMLA, prior to its amendment by this bill, applied on its face to any person who engaged in origination activities regarding covered loans secured by New Jersey properties, without regard to where they are located.³³

The bill also amends the FFA to require lenders, before accelerating the maturity of a residential loan and filing a foreclosure action, to include in any NOI they provide to the borrower a representation that they are licensed under the RMLA or exempt from licensure.³⁴

Sheriff's sale procedural changes

A.B. S3464 amends provisions in the FFA related to the sale of foreclosed properties. Specifically, it requires a sheriff sale of a foreclosed property to be conducted within 150 days of the sheriff's receipt of the writ of execution from the court, as opposed to the prior requirement of being scheduled within 120 days after receipt of the writ, with no time limit within which the sale must actually be conducted.³⁵

It also enhances from a financial perspective the debtor's right to apply to the Office of Foreclosure for an order to appoint a Special Master to hold foreclosure sales in instances where the sheriff cannot complete the sale on a timely basis, by allowing a Special Master to be appointed to sell *multiple properties* within the same vicinage.³⁶ Previously, such an appointment could only be to sell one property. And it requires (rather than allows) the plaintiff's attorney to prepare the prescribed form of deed

for the property being sold and deliver it to the sheriff within 10 days following the sale, and requires the sheriff to deliver that deed to the successful bidder.³⁷

The bill also amends N.J.S.A. 2A:17-36, the statute that authorizes and limits sheriffs' ability to adjourn sales of foreclosed real estate. It increases (1) the number of adjournments that a "sheriff or other officer" selling foreclosed real estate may make from two to five (two if requested by the lender, two if requested by the debtor, and one if both parties request it), and (2) the maximum length of any adjournment from 14 days to 30 days.³⁸ However, it did not change the pre-existing provision that allows a court of competent jurisdiction to order further adjournments.

FFA amendments governing expedited foreclosure sales

Finally, A.B. S3413 amends the provisions of the FFA that govern expedited (or summary) foreclosures of properties determined by a court to be "vacant and abandoned." The bill:

- Gives sheriffs a little more time to sell such properties, i.e., 90 days rather than 60 days after receiving the writ of execution.
- Requires rather than simply allows plaintiffs to apply to the court for an order appointing a Special Master or another judicial officer to hold the sale within 90 days of the application in cases where the sheriff cannot effect a timely sale.
- Most importantly, allows plaintiffs essentially to convert a regular foreclosure action into a summary action whenever they have reason to believe the property has become vacant and abandoned and they file a certification to that effect with the court detailing the basis for their belief.³⁹

Previously, plaintiffs could only pursue the expedited foreclosure process when they filed the foreclosure complaint. If the property was not then vacant and abandoned but only became so later, there was no way for them to avail themselves of the expedited process.

The effective dates for the above bills vary:

- A-5001, A 5002 and S3416 became effective immediately upon signing on April 29, 2019 (with A-5001 being applicable only to mortgages executed on or after that date).
- S3413 became effective on May 29, 2019.
- A4997, A4999 and S3464 became effective on July 29, 2019 (with A4999 applying only to foreclosure actions commenced on or after that date).
- S-3411 became effective on Aug. 1, 2019.
- A664 will not become effective until Nov. 1, 2019.

A few final thoughts

Overall, this package of bills, while not a "game changer," appears to represent a positive development for the state and particularly for the state's municipalities, which have had to deal with a myriad of problems resulting from homes being in foreclosure for lengthy periods of time. Many of these homeowners and/or their loan servicers (in cases where the homes were vacated and abandoned) failed to properly maintain the exterior and grounds.

In some cases, homeowners simply left their homes without securing them, leaving them at the mercy of squatters and thieves, or trashed them on their way out. The result was often neighborhood blight, an increase in crime and reduced property values.

The package should help to some extent to speed foreclosures and sales of foreclosed properties. In addition, it should enable municipalities to quickly contact servicers and/or their vendors and get them to do what is necessary to secure and maintain the exteriors and grounds of vacant and abandoned homes during the foreclosure and sale process. This should benefit the municipalities' residents, and creditors as well, since it helps to preserve the value of these homes pending foreclosure and sale.

Moreover, while some of the provisions in the package may make it more difficult and/or time consuming for creditors in particular cases to obtain foreclosure judgments and have the properties sold at sheriff's sale, none appear to be particularly onerous. Good policies and procedures and careful monitoring of the activities of everyone involved -- including employees, outside vendors and, most importantly, foreclosure counsel -- should help to keep the process on schedule and prevent serious problems. Also, quickly shifting *contested* foreclosures to counsel experienced in defending and defeating the myriad types of claims and defenses asserted on behalf of homeowners trying to stave off foreclosure can help as well.

Finally, looking at these bills in a broader context, it seems possible that lawmakers in other states may consider pushing some of these provisions for possible enactment in their states, particularly those provisions that seek to preserve the value of vacant and abandoned homes in foreclosure and the well-being of the neighborhoods in which they are located.

Footnotes

1 *Governor Murphy Signs Legislative Package to Address New Jersey's Foreclosure Crisis*, OFFICE OF THE GOVERNOR (Apr. 29, 2019), <https://www.nj.gov/governor/news/news/562019/approved/20190429b.shtml> ("Press Release"). See also NEW JERSEY JUDICIARY REPORT OF THE SPECIAL COMMITTEE ON RESIDENTIAL FORECLOSURES, (Aug. 2018) [JUDICIARY REPORT], <https://www.njcourts.gov/courts/assets/supreme/reports/2018/resforeclosure.pdf>.

2 *New Jersey Real Estate Trends & Market Info*, REALTYTRAC (last visited June 18, 2019), <https://www.realtytrac.com/statsandtrends/foreclosuretrends/nj/>.

3 Press Release, *supra* note 1.

4 Several court rule changes have also been implemented as a result of the Committee's recommendations. While this article does not address these rule changes, they are nevertheless important, particularly for attorneys involved in foreclosure actions.

5 N.J.S.A. 2A:50-74 et seq.

6 See *US Bank Nat. Ass'n v. Williams*, 1 A.3d 857, 863 (N.J. Super. Ct. App. Div. 2010) for a detailed history of the program. See also JUDICIARY REPORT, *supra* note 1 at 2-3.

7 JUDICIARY REPORT, *supra* note 1 at 3.

8 *Id.*

9 Order available at <https://njcourts.gov/notices/2008/n081120a.pdf>. The HUD-certified counseling provided in connection with the FMP often included mortgage loan modification activities, which under normal circumstances requires a New Jersey debt adjuster license. However, several months after issuance of the New Jersey Supreme Court's Order, the New Jersey Department of Banking and Insurance issued a Bulletin finding that HUD-certified counselors would not need a license to engage in the FMP since the debt adjuster act included an exemption for "person[s] acting pursuant to any order... of court." Steven M. Goldman, State of New Jersey, Bulletin No. 09-04, DEPARTMENT OF BANKING AND INSURANCE LEGISLATIVE AND REGULATORY AFFAIRS (Mar. 2, 2009), https://www.nj.gov/dobi/bulletins/blt09_04.pdf.

10 *Williams*, 857 A.3d at 865.

11 N.J.S.A. 2A:50-76; see *Williams* at 864 (citing Notice to the Bar, Residential Foreclosure Mediation Program Rule Relaxation Order 2-3 (Nov. 19, 2008), <http://www.judiciary.state.nj.us/notices/2008/n081120a.pdf>).

- 12 N.J.S.A. 2A:50-75(b) (def'n of "eligible property").
- 13 *See* A-664, Legislative Fiscal Estimate (Second Reprint), available at https://www.njleg.state.nj.us/2018/Bills/A1000/664_E1.PDF; N.J.S.A. 2A:50-78(b).
- 14 N.J.S.A. 17:16F-27 et seq.
- 15 N.J.S.A. 17:11C-51 et seq.
- 16 Specifically, the legislation exempts from licensing all federally insured banks and credit unions, their wholly owned subsidiaries, their operating subsidiaries (provided all of the owners of the operating subsidiary are wholly owned by the same bank or credit union), the New Jersey Housing and Mortgage Financing Agency, and persons licensed as residential mortgage lenders under the New Jersey Residential Mortgage Lending Act that fulfill the Act's supplemental surety and fidelity bond, as well as errors and omissions insurance coverage requirements. N.J.S.A.17:16F-29. It also exempts persons who service 5 or fewer residential mortgage loans within any period of 12 consecutive months, and any federal, state or municipal governmental or quasi-governmental agency that services residential mortgage loans under the specific authority of any state or federal law. N.J.S.A.17:16F-29.
- 17 Section 9 applies to licensees and exempt residential mortgage lenders, and sections 5 and 10-12 apply to "mortgage servicers" generally. N.J.S.A. 17:16F-35. *See also*, section 3(c), which states that the provisions of sections 9 through 12 "shall apply to any person, including a person exempt from licensure pursuant to [section 3(b) of the act]." N.J.S.A. 17:16F-29(c). But *see* section 19, which provides that the provisions of sections 3 through 12 "shall not apply to," among others, "[exempt licensed] residential mortgage lender[s] ... while servicing residential mortgage loans made pursuant to the exemption," and federally insured banks and credit unions and their subsidiaries. N.J.S.A. 17:16F-45(1), (4).
- 18 *See* N.J.S.A. 17:16F-37, - 46. For more detailed information about the MSLA, *see* Bob Jaworski, *New Jersey Expands Regulation of Mortgage Services*, HOLLAND & KNIGHT (Apr. 30, 2019), available at <https://www.hklaw.com/en/insights/publications/2019/04/new-jersey-expands-regulation-ofmortgage-servicers>.
- 19 *See* Assembly Housing and Community Development Committee Statement To Assembly, No. 5001 State Of New Jersey (Mar. 6, 2019), https://www.njleg.state.nj.us/2018/Bills/A9999/5001_S1.PDF.
- 20 N.J.S.A. 2A:50-74 as amended by P.L.2019, c.67, § 1.
- 21 N.J. S.A. 46:8B-1 et seq.
- 22 N.J.S.A. 46:8B-21(a) as amended by P.L. 2019, c. 68, § 1.
- 23 "Customary condominium assessments" are assessments for periodic payments due the association for regular and usual operating and common area expenses pursuant to its annual budget, not including amounts for reserves for contingencies, late charges, penalties, interest or any fees or costs for the collection or enforcement of the assessment or any lien arising therefrom. *See* N.J.S.A. 46:8B-21(b).
- 24 N.J.S.A. 46:8B-21(b)(1) as amended by P.L. 2019, c. 68, § 1.
- 25 N.J.S.A. 46:8B-21(b)(4), (5) as amended by P.L. 2019, c. 68, § 1.
- 26 N.J.S.A. 45:22A-21 et seq.
- 27 N.J.S.A. 45:22A-44.1.
- 28 N.J.S.A. 2A:50-53 et seq.

- 29 N.J.S.A. 2A:50-56(a), as amended by P.L.2019, c.69, § 1.
- 30 N.J.S.A. 2A:50-56(c), as amended by P.L.2019, c.69, § 1 (adding new pp 13 and 14) and N.J.S.A. 2A:50-56(h) (added by P.L.2019, c.69, § 1). The Multifamily Housing Preservation Receivership Act, N.J.S.A. 2A:42-114 et seq., essentially allows occupied residential buildings with serious code violations to go into receivership in order to prevent abandonment.
- 31 N.J.S.A. 2A:50-56.3 (added by P.L.2019, c.69, § 2).
- 32 N.J.S.A. 17:11C-54(e), as added by P.L.2019, c.70, § 1; SENATE COMMUNITY AND URBAN AFFAIRS COMMITTEE STATEMENT TO SENATE, NO. 3416, STATE OF NEW JERSEY (Feb. 7, 2019), https://www.njleg.state.nj.us/2018/Bills/S3500/3416_S1.PDF.
- 33 *See* N.J.S.A. 17:11C-54(a)(1), (c)(1)(a) (requiring all non-exempt residential mortgage lenders, brokers and loan originators to be licensed); N.J.S.A. 17:11C-53 (defining residential lenders, brokers and loan originators essentially as persons who engage in origination activities regarding consumer purpose loans to individuals that would be secured by a 1-4 family dwelling constructed or to be constructed on real property located in New Jersey). Nothing in the RMLA appears to limit the licensing requirement to companies or individuals who are located in New Jersey. *See also*, N.J.S.A. 17:11C-66a (stating the residential mortgage lenders and broker are not required to maintain an office in New Jersey.)
- 34 N.J.S.A. 2A:50-56(c) as amended by P.L.2019, c.70, § 2.
- 35 N.J.S.A. 2A:50-64(a)(3)(a) as amended by P.L.2019, c.71, § 1; SENATE COMMUNITY AND URBAN AFFAIRS COMMITTEE STATEMENT TO SENATE, NO. 3464, STATE OF NEW JERSEY (Feb. 7, 2019), https://www.njleg.state.nj.us/2018/Bills/S3500/3464_S1.PDF.
- 36 N.J.S.A. 2A:50-64(a)(3)(c) as amended by P.L.2019, c.71, § 1.
- 37 N.J.S.A. 2A:17-36(a)(6)(b) as amended by P.L.2019 c. 71, § 1.
- 38 N.J. S.A. 2A:17-36 as amended by P.L.2019, c.71, § 2.
- 39 N.J.S.A. 2A:50-73(c), (j) as amended by P.L.2019, c.72, § 2.
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