

**Saving the Dream of Home Ownership - Are New England
Lawmakers Stepping Up or Striking Out ?**

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Owning a home has been a central part of the American Dream for generations. One might argue that the longing of the average American to own a home was the driving force behind the sub prime mortgage industry. Lenders found a more than willing market for interest-only or low principal reduction loans which promised easy payments with little money down and the eagerly anticipated opportunity to cash and trade up, or more importantly to some borrowers, use the property as a personal ATM, as it appreciated in value, seemingly endlessly. With the burst of the housing bubble, record numbers of homeowners are facing the loss of their dream through foreclosure and are looking desperately for help. This article shall briefly outline the actions lawmakers in the New England states are taking to attempt to stem the rising tide of foreclosures.

CONNECTICUT

The General Statutes of Connecticut Title 49, Chapter 846 Sections 49-31d- n provide limited foreclosure protection through the state courts, including delay of foreclosure, and mortgage restructure to homeowners who meet specific criteria as noted below, and who file an application for such protection.

The homeowner must be given notice by the lender of the availability of foreclosure protection at the time the foreclosure action is commenced and must make application for protection within

twenty- five (25) days of the return day of the foreclosure action¹

1) Conditions Precedent to Applying:²

a) The mortgage being foreclosed must be on residential real property which has been the homeowner's principal residence for not less than two (2) years immediately preceding the commencement of the foreclosure action:

b) There has been no foreclosure action commenced against the homeowner in the preceding (7) years: and

c) the homeowner has not received an emergency mortgage assistance loan and has not applied for emergency mortgage assistance for two (2) years before the application.

2) Income Qualifications-³

if the property is owned by more than one person, the aggregate earned income of all of the homeowners during the twelve (12) month period immediately preceding the foreclosure action must be less than \$50,000.00 and less than 75% of the average aggregate earned income of such homeowners during the two years immediately preceding the 12 month period. A financial affidavit must be filed.

1 See CT Gen Stat. Title 49, Ch 846 Sec 49-31e

2 See CT Gen Stat. Title 49, Ch 846 Sec 49-31f (a)

3 See CT Gen Stat. Title 49, Ch 846 Sec 49-31f (b)

3) Filing a defense to foreclosure prohibited⁴ A homeowner who files a defense to foreclosure action is not eligible to file an application for protection.

4) Additional Considerations for the Determination of Eligibility for Protection

Assuming that the homeowner meets all of the above criteria, the state court must then consider the following⁵

a) the likelihood that timely payments will be able to be made on the restructured mortgage after the end of the restructuring period; and

b) any substantial prejudice to the lender or to any junior lien holder or encumbrance as a result of the restructure;

The above considerations would be findings of fact based upon the likely future income of the homeowners and an appraisal of the property.

After the state court has determined that the homeowner is eligible for protection, the court has the discretion to order the restructure of the mortgage to eliminate any payment arrears and may allow a restructure period not to exceed six (6) months.⁶ As a condition of issuing the restructure order, the court has the discretion to order the homeowner to pay as much as 25% of the homeowner's net monthly income to reduce the mortgage debt.⁷ The amount of the restructured debt at the end of the restructure period can not exceed the amount of the original mortgage debt

4 See CT Gen Stat. Title 49, Ch 846 Sec 49-31f (g)

5 See CT Gen Stat. Title 49, Ch 846 Sec 49-31f (d)

6 See CT Gen Stat. Title 49, Ch 846 Sec 49-31g

7 See CT Gen Stat. Title 49, Ch 846 Sec 49-31h

or 90% of the appraised fair market value of the property at the time of the restructure, whichever is greater. The provisions for restructure of the mortgage debt and the staying of foreclosure applies only if the restructured debt conforms to the above conditions. The court must add to the existing principal balance all interest due to the lender and which will be due at the end of the restructure period, at the rate provided in the mortgage note, property taxes, court costs, legal fees, and any mortgage insurance premiums.⁸ After adding all those amounts, the court must then apply either a composite interest rate based upon a weighted average of the original interest rate and the prevailing interest rate at the time of restructure or in the case of an adjustable rate mortgage, the provisions of the redetermination of the rate of the underlying note shall apply⁹

While the concept of the Statute is laudable and no doubt, well intended, it would appear that the number of borrowers eligible for protection is somewhat limited. The median income in Connecticut is among the highest in the United States, and the aggregate income level which is allowed in order to obtain foreclosure protection is well under that median income. It must also be questioned whether a court order restructured debt under the Statute offers any meaningful relief.

⁸ See CT Gen Stat. Title 49, Ch 846 Sec 49-31i

⁹ See CT Gen Stat. Title 49, Ch 846 Sec 49-31i

Perhaps realizing the limitations of a court ordered restructure under the Statute, the Connecticut legislature in its Year 2008 Session, enacted Public Act 08-176, entitled “ An Act Concerning Responsible Lending and Economic Security”, effective July 1, 2008. The Act is quite extensive and authorizes several foreclosure prevention programs to provide refinancing opportunities for qualified borrowers and a program which provides temporary loans for mortgage payments. These programs are administered by the Connecticut Housing Finance Authority. In order to qualify, a borrower must have experienced a significant reduction of at least 25% of the aggregate household income which can not be alleviated by a liquidation of assets, and which is related to one or more of a) unemployment, b) loss of federal, state, and municipal benefits, c) divorce, d) disability, illness, or death of a member of the borrower's family, e) expenses related to the disability, illness or death of a member of the mortgagor's family, but is not related to accumulation of installment debt incurred for recreational or nonessential items prior to the occurrence of the alleged circumstances beyond the mortgagor's control in an amount that would have caused the mortgagor's total debt service to exceed sixty per cent of aggregate family income at that time, or f) a significant increase in the periodic payments due under a mortgagee¹⁰

¹⁰ See Connecticut Pub. Act 08-176

In conjunction with Public Act 08-175, Connecticut enacted through Connecticut General Statute Title 49 Ch 846 Sec. 49-311, a mortgage mediation program which is designed to have the homeowner and the lender address all foreclosure issues, essentially bringing the parties to the negotiation table. The program runs to July 1, 2010. The lender must give the homeowner notice of the mediation program at the time of commencement of the foreclosure action. If the homeowner requests mediation, a mediator employed by the Court attempts to craft a voluntary resolution. The mediation period can extend for 60 days after the return day for the foreclosure action, and at the discretion of the court good cause, or upon request of the mediator, extend the mediation period for an additional 30 days. Foreclosure is stayed for the period of the mediation. The consent of the lender is required for any changes to the payment terms of the mortgage.

MAINE

The statutes governing foreclosure in Maine are contained in Maine Revised Statutes Title 14, part 4 Chapter 403, entitled "Title to Real Estate by Levy and Execution". Residential foreclosures are commenced by filing a complaint in either District or Superior Court. After a judgment is entered on behalf of the lender, the lender must then wait until the end of a redemption period. Mortgages which were written after October 1, 1975 are subject to a three

(3) month right of redemption. The redemption period effectively acts as built in delay of the foreclosure process.

At the end of the redemption period, assuming that the borrower has not redeemed by paying the amount owed or that the parties have not negotiated a Workout or forbearance, the lender may sell the property by publishing for three weeks and then holding an auction sale. The auction sale must be held 30-45 days after the initial notice of publication.

Maine has a waiver procedure that can be helpful to a borrower. If the lender accepts money or anything of value on the mortgage debt after the foreclosure has begun and before the redemption time period has expired, then the lender waives the foreclosure procedure. As a result of the waiver mechanism, it would be fair to assume that a lender would be reluctant to accept a partial payment from a borrower without the partial payment being part of a workout or a forbearance agreement.

Maine also has a statute which regulates sub prime mortgages. Enacted in 2007. Title 9-A, Maine Consumer Credit Code, Article 8 Chapter 206-C prohibits the financing of points or fees, prepayment fees and penalties, payments which are more than twice as large as the average of earlier payments, the increase of principal balance or accrued interest, and the increase of an interest rate after default.¹¹ Additionally, the borrower must obtain counseling from an approved

¹¹ Maine Revised Statutes, Title 9-A Sec.8-206 -C-1 et seq

3rd party non profit organization on the advisability of the loan, and provide the lender with certification of such counseling¹²

As part of the statute regulating sub prime mortgages, Maine also gives borrowers the right to pursue remedies against any subsequent purchaser of the mortgage.¹³

Although foreclosures in Maine increased during the last quarter of 2008, the increase was relatively modest compared to other increases outside of the Northeast. With the relatively strong protection of the three month redemption period effectively delaying foreclosure actions, there is no significant action pending, as of the date of the submission of these materials, to require lenders to modify loans or enact modification guidelines

MASSACHUSETTS

On November 27, 2007, in response to a significant increase in foreclosures in Massachusetts coupled with a relatively sharp decrease in housing value, in many areas in the states, the Massachusetts Legislature enacted Chapter 206 of the Acts of 2007, entitled 'An Act Protecting and Preserving Homeownership' (the “ Act”) to provide protection to mortgagors of properties consisting of owner occupied 1-4 family houses. The Act provides that a lender can not make a

12 Maine Revised Statutes Title 9-A Sec. 8-206-C-1 G

13 Maine Revised Statutes Title 9- A Sec. 8-206- C- 1 B

sub prime loan to a first time borrower unless the borrower affirmatively opts for a such a loan in writing, and the lender has been presented with evidence prior to, or at the closing of the loan, that the borrower has received counseling by an independent third party non profit counseling agency which has been approved by 1) the United States Department of Housing and Urban Development; (2) a housing financing agency of the commonwealth; (3) the Massachusetts Homeownership Collaborative; (4) or the regulatory agency which has jurisdiction over the lender.¹⁴ Even more significantly, the Act provides protection from foreclosure to mortgagors of a dwelling of 4 or less households occupied in whole or in part by the mortgagor, by mandating a 90 day right to cure a payment default. The right to cure is limited to one time during a five year period. The Act also prevents acceleration and enforcement of a payment default unless at least a 90 day notice is given to the borrower. The 90 day notice is required to provide the borrower with information concerning the nature of the default, the amount needed to cure the default, the time for curing the default (which shall not be less than 90 days from the date of the notice), the actions which the lender may take if the default is not cured, as well as the name of the lender and the identity of any other holder of the mortgage whom the borrower can contact if there is a disagreement concerning the calculation of the default, the name of the originator of the mortgage or the mortgage broker, and that the borrower may be eligible for assistance from the Division of Banks, or the Massachusetts Housing Finance Agency together with the local and toll free telephone numbers¹⁵

14 See Chapter 206 of the Acts of 2007 of the Commonwealth of Massachusetts Sec 7 amending M.G.L Ch 184

15 See Chapter 206 of the Acts of 2007 of the Commonwealth of Massachusetts Sec 11 amending M.G.L Ch 244

The Act prohibits any fees or charges for curing the default or the charging of attorneys fees prior to the expiration of the 90 day cure period. The lender is required to file an affidavit of compliance when filing any action to foreclose the property.

The Act also provides for the examination by the Division of Banks of a lender's records of loans to residential borrowers and establishes a rating system and for licensing and regulation of mortgage brokers. On April 27, 2009, shortly before the submission of these materials, the Division of Banks issued a letter addressing the question of whether a mortgage broker may receive compensation in connection with providing assistance or a referral to obtain a loan modification on behalf of a borrower. In the letter, the Commissioner of the Division of Banks stated that as it was the Legislature's clear intent to not increase a borrower's outstanding mortgage debt with fees and charges (other than late fees and per diem interest) due to the 90 day moratorium on foreclosure imposed by the Act, any compensation to a mortgage broker for providing loan modification assistance or a referral would be not be allowed.

The housing stock in Massachusetts consists of a large number of multi-family residences, particularly in inner cities. As a result a significant number of foreclosures in Massachusetts affect tenants, many of whom have subsidized tenancies. In an effort to alleviate the hardship

and uncertainty that tenants face when living in a building which has been foreclosed or is under the threat of foreclosure, the Act provides that upon a foreclosure of residential real property a tenant residing in the property shall be deemed a tenant at will and that foreclosure shall not affect the tenancy agreement of a tenant whose rental payment is subsidized under state or federal law.¹⁶ As of the date of the submission of these materials, there is legislation pending in Massachusetts which will prohibit the eviction of tenants from foreclosed property until there is a signed purchase and sale agreement for the property, as long as the tenants are current with rent payments and are in violation of any other terms of their tenancy.

The Office of the Massachusetts Attorney General has issued a number of regulations concerning foreclosure. Addressing the subject of charging borrowers fees in connection with avoiding foreclosure, the Attorney General's regulations prohibit foreclosure-rescue schemes, the acceptance of any advance fees in connection with offering, arranging or providing foreclosure-related services, defined as "any goods or services related to, or promising assistance in connection with: (a) avoiding or delaying actual or anticipated foreclosure proceedings concerning residential property; or (b) curing or otherwise addressing a default or failure to timely pay, with respect to a residential mortgage loan obligation". This regulation also prohibits advertising a foreclosure-related service without disclosing, clearly and conspicuously the precise goods and/or services offered and to be provided by the promoter and a precise

¹⁶ See Chapter 206 of the Acts of 2007 of the Commonwealth of Massachusetts Sec 11 amending M.G.L Ch 186 Sec 13

description of how the promoter will assist persons in avoiding or delaying foreclosure or curing or otherwise addressing a default or failure to timely pay a residential mortgage loan obligation¹⁷.

It also is now deemed to be an unfair and deceptive practice for a lender to provide a loan or a mortgage broker to arrange a loan unless, based upon available documented information at the time the loan is made, the lender or the broker reasonably believes that the borrower will be able to repay the loan.¹⁸

The Massachusetts judiciary has dealt a significant blow to subprime lenders. On December 9, 2008, the Massachusetts Supreme Judicial Court, in a unanimous decision, Commonwealth v. Fremont Investment & Loan & another, 452 Mass. 733 (Mass. 2008) held that a lender can not foreclose a mortgage having the following characteristics: 1) the loan is an Adjustable Rate Mortgage loan with an introductory rate period of 3 years or less; 2) the introductory rate was at least 3% below the fully indexed rate; 3) the borrower's debt to income ratio is exceeded by 50% when measured by the monthly payment due under the fully indexed rate instead of under the introductory rate; and 4) the loan to value ratio was 100% or the loan contained a substantial pre-payment penalty or a pre-payment penalty which extended beyond the introductory period.¹⁹ The Court found that even if the characteristics of the loan may have been permitted separately by statute or regulatory authority, "it was Fremont's choice to combine them into a package that it

17 See 940 CMR 25.00

18 See 940 CMR 8.06(15) effective January 1, 2008

19 See Commonwealth v. Fremont Investment & Loan & another, 897 N.E. 2nd 548, 452 Mass.733 (Mass. 2008)

should have known was "doomed to foreclosure"²⁰;

The Act, the Attorney General's regulations, and the Supreme Judicial Court's decision in Fremont, have motivated many lenders to be much more inclined to enter into voluntary agreements to address mortgage delinquency.

NEW HAMPSHIRE

New Hampshire lenders have two courses of action to foreclose on a property. The lender can either file suit and obtain a court judgment and a Decree for Sale or the lender can sell under a Power of Sale contained in the Mortgage.²¹ A sale under the Power of Sale can occur fairly quickly, usually in about 60 days. The borrower has the right to bring suit to try to enjoin the foreclosure sale. Although the borrower has no right of redemption, the lender must hold title for one year in order for the title to be final in the name of the lender.

Recognizing that foreclosures were increasing in New Hampshire, and along with that rise, the evolution of foreclosure assistance scams, the Legislature enacted House Bill 365, chaptered as Chapter 479-B of the New Hampshire Revised Statutes. The legislation establishes the regulation of foreclosure consultants and pre-foreclosure conveyancing in the following

manner:

²⁰ See Id. 452 Mass. At 751

²¹ See New Hampshire Revised Statutes Vol. 4, Sections 479.19 et seq.

A. Foreclosure Consulting

Foreclosure Consulting is defined in Ch 479-B :1 as

(a) An effort undertaken on behalf of or for the benefit of a homeowner to delay or prevent the loss of a home because of a mortgage default, delinquency, foreclosure, or execution of a tax deed.

(b) Receiving money for the purpose of distributing it to creditors in payment or partial payment of any obligation secured by a lien on a residence in foreclosure;

(c) Contacting mortgagees or other creditors secured by a homeowner's primary residence on behalf of the homeowner;

(d) Arranging or attempting to arrange for an extension of the period within which a homeowner may cure the homeowner's default and reinstate the homeowner's obligation;

(e) Arranging or attempting to arrange for any delay or postponement of the sale of a residence in foreclosure;

(f) Arranging or facilitating the purchase of a homeowner's legal or equitable title or any property interest in a homeowner's residence within 30 days of:

(1) The publication or letter of notice of a foreclosure sale; or

(2) The letter notice of a municipality's intent to execute a tax deed.

(g) Arranging or facilitating any transaction through which a homeowner will become a

lessee, optionee, life tenant, partial homeowner, or vested or contingent remainderman of the homeowner's residence;

(h) Arranging or facilitating the sale of a homeowner's residence or transfer of legal title and any property interest in a homeowner's residence, in any form, to another party as an alternative to foreclosure;

(i) Arranging for a homeowner to have an option to repurchase the homeowner's residence after a sale or transfer; or

(j) Arranging for or facilitating a homeowner remaining in the homeowner's residence as a tenant, renter, or lessee.

Under Chapter 479- B:2, a foreclosure consulting contract must fully disclose all of the services to be provided and the total amount and terms of any compensation to be received by the foreclosure consultant or any other person involved in the transaction. Chapter 479-B:2 sets forth provisions which are required for the protection of the homeowner such as identification of the consultant, a notice of cancellation, and that the homeowner be given a signed and dated copy of the contract upon execution of the contract.²² Chapter 479-B:2 also provides the homeowner with the unconditional right to cancel the foreclosure consulting contract at any time, and makes the foreclosure consultant a fiduciary to the homeowner.

B. Pre- Foreclosure Conveyance

A Pre-Foreclosure conveyance is defined in Chapter 479 B:1 as

²² See New Hampshire Revised Statutes vol 4 Chapter 479 B:2 II-V

(a) The transfer of title to real property or a beneficial interest in the property by a homeowner to delay or prevent a mortgage default or delinquency, foreclosure, or execution of a tax deed, either by transfer of any interest from the homeowner to another party or by creation of a mortgage, trust, or other lien or encumbrance during the foreclosure process, that allows the acquirer to obtain legal or equitable title to all or part of the property; and

(b)(1) The transaction includes the subsequent conveyance, the promise of a subsequent conveyance, or a right to a subsequent conveyance of an interest back to the homeowner from the acquirer or a person acting in participation with the acquirer, including an interest in a contract for deed, purchase agreement, land installment sale, contract for sale, option to purchase, sale/leaseback, trust, or other contractual arrangement; or

(2) The transaction does not pay or otherwise fully satisfy the homeowner's obligations under any existing note and mortgage securing such note.

Chapter 479-B:3 provides for a 72 hour “notice of loss of ownership” to the homeowner which must a) contain the entire agreement of the parties b) be written in the same language spoken by the homeowner c) be dated and signed by the homeowner and the pre-foreclosure purchaser and notarized d) describe the pre-foreclosure purchase in detail²³ The statute also requires a complete description of the terms of any related agreement designed to allow the homeowner to remain in the home, and a disclosure of the amount of any repurchase price or fee associated with any transfer of title or deed back to the homeowner and how that fee will be calculated.

²³ See New Hampshire Revised Statutes vol 4 Chapter 479-B:3 I-V

The actions of the New Hampshire Legislature represent a move in the right direction for distressed homeowners. The enactment of a “cooling off” period would be helpful, particularly in cases where foreclosure is being pursued under a Power of Sale.

RHODE ISLAND

As of the date of the submission of these materials, there is no statute in Rhode Island which governs loan modification. The foreclosure process in Rhode Island is set forth in Rhode Island General Laws Chapter 34, Section 27 et seq. Any person entitled to foreclose the equity of redemption in any mortgaged property may file a complaint to foreclose. The complaint may be heard, tried, and determined according to the usages of chancery and the principles of equity²⁴

Under the Statutory Mortgage Condition defined in R.I. Gen. Laws § 34-11-21 and incorporated in any mortgage by reference to the words “statutory mortgage condition”, the borrower has up to the time of the sale to pay the entire balance of the note secured by the mortgage, plus all taxes, costs, fees and charges associated with the collection of the loan amount. This right does not vary depending on the type of property. Redemption rights are only available before the sale of the property at foreclosure.

²⁴ SEE R.I. GEN. LAWS § 34-27-1.

Rhode Island has enacted a Home Loan Protection Act²⁵ designed to prohibit predatory lending practices while still allowing access to the sub prime loan market. Among other things, the Home Loan Protection Act prohibits: loan flipping within 60 months, encouraging default of an existing mortgage or other existing debt, and limits the financing of points and fees. Like similar statutes enacted by other states, there is a provision requiring certification of third party non profit counseling, conspicuous notice, and mandating that a lender must have a reasonable belief at the time of the closing of the loan, that the borrower is able to repay the loan.²⁶

Unlike Massachusetts, Rhode Island does not have a requirement of a right to reinstate a mortgage or cure a mortgage default prior to commencement of the foreclosure process.

As of the date of the preparation of these materials, there are several foreclosure and foreclosure-protection bills pending in the Rhode Island General Assembly – some of which contain foreclosure protections that range from foreclosure moratoriums, to lenders being required to conduct mediation prior to any foreclosure, to post-foreclosure protections for tenants in foreclosed properties requiring lenders to post a bond in favor of the city/town worth 25% of the purchase price at foreclosure so that the city/town can look to the bond to keep the foreclosed property safe and repaired for the benefit of the tenants. With the unemployment rate in Rhode Island being amongst the highest per capita in the United States, the pressure to enact

25 SEE R.I. GEN. LAWS § 34-25.2 .

26 SEE R.I. GEN. LAWS § 34-25.2-6

foreclosure moratoriums and other foreclosure relief measures will likely increase in proportion to a continued rise in the foreclosure rates.

VERMONT

Vermont allows foreclosure either by filing a lawsuit to obtain strict foreclosure, in which the title given to the lender by deed will be ruled to be final, or by filing a lawsuit to foreclosure under a power of sale clause in a deed of trust. Both procedures are governed by the Vermont Rules of Civil Procedure.²⁷ The Vermont Statute governing foreclosure does provide a borrower with a redemption period. If a court decree is made foreclosing the right of redemption, the time of redemption shall be six months from the date of the decree unless a shorter time is ordered. The court shall fix the period of redemption taking into consideration whether there is value in the property in excess of the mortgage debt and debt owed to junior lien holders, any assessed but unpaid property taxes, the condition of the property, and any other equities.²⁸ There is presently no Vermont statute governing loan modification, although as of the date of the submission of these materials, the Vermont Legislature is moving ahead with a bill, House Bill 171 to strictly regulate and license mortgage loan originators. The bill is similar in scope to the bill to the 2006 Rhode Island statute.

²⁷ Vermont Stat Ann. Title 12, Chapter 163 Sections 4526 through 4333

²⁸ See Vermont Stat Ann. Title 12, Chapter 163 Section 4528(a)

As Vermont presently has a relatively low incidence of foreclosure, there may not be as much public pressure for increased protection against foreclosure as there has been in Connecticut and Massachusetts.

A BRIEF WORD ABOUT SHORT SALES AND DEEDS IN LIEU OF FORECLOSURE.

Short sales, in which a lender permits a sale of a property for less than the amount owed on its mortgage, and Deeds in lieu of foreclosure, by which a lender accepts a deed from a borrower rather than going through the foreclosure process, are loan resolution mechanisms which have been options for troubled loans long before the present mortgage foreclosure crises. While there appears to be a common belief that lenders are anxious to consummate short sales rather than to bring a foreclosed property into their OREO (Other Real Estate Owned) portfolio, it has been the experience of this writer that the reality is often quite different from the perception. I have seen quite a few occasions over the past several months where prospective buyers have submitted “short” offers on properties to sellers who are on the brink of foreclosure, only to have those offers summarily rejected by the seller's lender and are countered with proposed purchase prices which are either right at the amount owed to the lender or slightly below, with a “take it or leave it” posture. In situations where there are multiple lenders or attaching creditors, a short sale will only work if the senior lien holder is not only willing to take less than what it is owed but is willing to allow junior lien holders to receive some value as well. The process is not without

tribulation and often requires the sellers to provide additional funds to settle, and/or promissory notes to address deficiencies owed to the mortgagees and attaching creditors.

A Deed in Lieu of Foreclosure appear to be attractive options at first glance. The borrower signs over the property, hands over the keys, and walks away. The lender gets the property without having to go through the foreclosure process, and perhaps is able to sell a property which may be left in better physical condition by a “cooperative” borrower rather than one who is evicted after a foreclosure sale. Complications arise when there are property taxes owed which trump a lender's position and where there are junior lien holders and attachments. Under such circumstances, a Deed in lieu is not a realistic option.

Loan Modification Generally

Any change to the terms of a mortgage is, as a technical matter, a modification; but as the term is used in this context, it refers to a change in one or more of the mortgage terms, allowing the loan to be reinstated to “current” status, and resulting in a more affordable monthly mortgage payment.

Mortgage modifications attempt to reduce the borrowers’ regular monthly mortgage payment to an affordable amount (between 31%-38% of the borrowers’ gross monthly income) by changing one or more of the following mortgage terms:

1. Reduction in interest rate, or a change from a floating to a fixed rate, or in how the floating rate is computed;
2. Reduction in late fees or other penalties;
3. Lengthening the term of the loan; and
4. Reduction in principal balance.

The borrower may be current, late, in default, in bankruptcy, or in foreclosure at the time the application for modification is made. The programs available will vary accordingly. There may be modifications made at the discretion of the lender. The lender is motivated to offer better terms to the borrower because of the expectation that the borrower might be able to afford a lower payment, and that a loan in which the payments are current will be more valuable ultimately than the proceeds obtained from a foreclosure sale.

The state and federal government may structure a mortgage modification program as *voluntary* on the part of the lender, but may provide incentives for the lender to participate. A *mandatory* mortgage modification program requires the lender to modify mortgages meeting the criteria with respect to the borrower, the property, and the loan payment history.

A variety of both public and private loan modification and refinance programs have sprouted within the past two years. A number of select programs are condensed and summarized¹ below to offer a glimpse of how the industry has progressed, and a clue as to where it’s headed.

¹ Text written in italics refers to a refinancing program. Text without italics refers to a modification program.

I. FHASecure Program

When FHASecure was launched in late August of 2007, administration officials suggested that the program could help 240,000 delinquent subprime mortgage holders avoid foreclosure. But by December of 2007, four months after its introduction, the program had only endorsed 266 loans for borrowers that were delinquent at the time of refinancing. Democratic lawmakers said that the Bush administration forced them to water down H4H, in part by showing FHASecure as a viable alternative.

The program ended on December 31, 2008.

II. IndyMac Federal Bank (initiated by the FDIC)

The FDIC initiated a systematic loan modification program at IndyMac Federal Bank to reduce first lien mortgage payments to as low as 31% of monthly income. The original goal was to apply the program to the estimated 1.4 million non-GSE mortgage loans that were 60 days or more past due as of June 2008, plus an additional 3 million non-GSE loans that are projected to become delinquent by year-end 2009.

Eligibility Requirements

- Borrowers with loans held in portfolio and controlled completely by IndyMac Federal Bank;
- The loan is at least 60 days delinquent where the loan is considered one day delinquent on the day following the next payment due date;
- Foreclosure sale is not imminent and the borrower is currently not in bankruptcy, or has not been discharged from Chapter 7 bankruptcy since the loan was originated;
- Applies only to primary residences.

Relief Offered

- Interest reduction;
- Extend, if necessary, the amortization process and/or term of the loan to 40 years;
- Reduce interest rate to as low as 3 percent;
- Reduce principal forbearance.

III. Hope for Homeowners (H4H) Program

The HOPE for Homeowners program was authorized by the Economic and Housing Recovery Act of 2008. The program was created by Congress to help those at risk of default and foreclosure refinance into more affordable, sustainable loans. H4H was an additional mortgage option designed to keep borrowers in their homes and was effective for endorsements on or about October 1, 2008, through September 30, 2011. The program provided new, 30-year or 40-year fixed rate mortgages that were insured by the Federal Housing Administration (FHA). Both lender(s) and borrower(s) must have agreed to participate.

In the first five months of existence, H4H helped exactly one homeowner to avoid foreclosure. This despite Congress having made \$300 billion available to back these loans and estimating that the program would benefit as many as 400,000 families. There had only been 752 applications. H4H has now been integrated into President Obama's Making Home Affordable Program.

Eligibility Requirements

- *The existing mortgage was originated on or before January 1, 2008;*
- *Existing mortgage payment(s) as of March 1, 2008 exceeded 31 percent of the borrowers gross monthly income for fixed-rate mortgages; for ARMs, the existing mortgage payment(s) exceeded 31 percent of the borrowers gross monthly income as of March 1, 2008 OR the date of the new loan application;*
- *Borrower must have made a minimum of 6 full payments on their existing first mortgage;*
- *The homeowner did not intentionally default, did not have an ownership interest in other residential real estate and had not been convicted of fraud in the last 10 years under Federal and state law; and;*
- *The homeowner did not provide materially false information (e.g., lied about income) to obtain the mortgage being refinanced into the H4H mortgage.*

Costs Consumers Must Pay

- *The new H4H mortgage will be no more than 96.5% of the new appraised value of borrower's home with the lender essentially writing down the current mortgage to that amount. The lender may have chosen not to write down borrower's mortgage, in which case borrower could not participate in the program.*
- *In addition to an upfront mortgage insurance payment of 3%, borrower was responsible to pay a 1.5% annual mortgage insurance premium on the outstanding mortgage balance. This premium was included in borrower's monthly payments.*

IV. The Streamlined Modification Program (SMP)

The SMP was developed in collaboration with the Federal Housing Finance Agency (FHFA), the Department of Treasury, Freddie Mac, and members of the HOPE NOW Alliance. The program was implemented as of December 15, 2008.

Eligibility Requirements

- Conforming conventional or jumbo conforming mortgage loans originated on or before January 1, 2008;
- At least three payments past due;
- The loan is secured by a one-unit property that is the borrower's primary residence;
- Current LTV of 90% or more, property is not abandoned, vacant, condemned, or in a serious state of disrepair.

Relief Offered

- Capitalize accrued interest, escrow advances and costs, if allowed by state law;
- Extend the term of the mortgage loan by up to 480 months;
- Reduce the mortgage loan interest rate in increments of .125% to a fixed rate that is not less than 3% (if this exercise results in a below market rate, it will, after 5 years, step up in annual increments to a market rate);
- As a last resort, provide for principal forbearance, which will result in a balloon payment fully due and payable upon borrower's sale of the property or payoff or maturity of the loan.
- \$800 paid to servicers upon successful completion of the borrower's trial period and modification process.

V. FDIC Mortgage Loan Modification Program

The FDIC's Loan Modification Program is based on two principles:

- 1) Determining a payment the borrower can afford by multiplying the borrower's gross monthly income times the appropriate housing-to-income (HTI) ratio, less taxes and insurance to achieve a minimum payment reduction of 10 percent, and
- 2) Protecting investors' interests by requiring that the cost of the modification is less than the estimated cost of foreclosure (the Net Present Value (NPV) floor).

Eligibility Requirements

- Loan must be 60 days delinquent;
- Foreclosure sale not imminent;
- Borrower not in bankruptcy and has not received a bankruptcy discharge since the origination of the loan;
- Loan was not originated as a second home investment property.

Relief Offered

- Interest reduction;
- Extend the term of the mortgage loan;
- Principal forbearance.

Key Features

- **Incentives:**
 - Paying servicers \$1,000 to cover expenses for each loan modified according to the required standards;
 - Sharing up to 50% of losses incurred if a modified loan should subsequently re-default.

VI. President Obama's Program

a) Making Home Affordable Program

The Making Home Affordable program is part of President Obama's strategy to get the economy and the housing market back on track. The plan could help up to 9 million families restructure or refinance their mortgages to avoid foreclosure. The key components of the Making Home Affordable plan are:

- Refinancing for up to 5 million families unable to take advantage of lower interest rates because of falling home values;
- \$75 billion in incentives to provide loan modifications for up to an additional 4 million families, bringing monthly payments to sustainable levels;
- Clear and consistent guidelines for loan modifications;
- Support for judicial modification of certain home mortgages through bankruptcy;
- Strengthening Hope For Homeowners and other FHA programs;
- Strengthening communities hardest hit by the foreclosure crisis through an additional investment of \$2 billion dollars in Neighborhood Stabilization Grants.

What are the Home Affordable Modification and Home Affordable Refinance?

The Home Affordable Modification and Home Affordable Refinance are the parts of MHA that use refinancing and loan modifications to reduce monthly mortgage payments to a level that borrowers can afford today and into the future.

Are all loan types eligible for the Home Affordable Refinance and Home Affordable Modification options?

The refinancing option is only available for conforming loans owned or securitized by Fannie Mae and Freddie Mac. Most conventional loans including prime, subprime, adjustable, loans owned by lenders and loans in securities are eligible for a Home Affordable Modification.

b) Making Home Affordable Refinancing Plan

The Making Home Affordable was developed in collaboration with the Federal Housing Finance Agency (FHFA), the Department of Treasury, Freddie Mac, and members of the HOPE NOW Alliance. The program was implemented as of December 15, 2008 and expires June 10, 2010.

Eligibility Requirements

- One to four (1-4) unit home;
- Loan guaranteed by Fannie Mae or Freddie Mac;
- Loan is current and no late payments (30 days or more) within last 12 months;
- Loan is no more than 105% of home value;
- Sufficient income.

c) Home Affordable Modification Program

The Home Affordable Modification program is a loan modification program designed to reduce at-risk borrowers' monthly mortgage payments and is effective immediately for mortgages originated on or before January 1, 2009, and will expire December 31, 2012.

The main part of the plan calls for spending up to \$75 billion of Treasury's TARP funds to restructure the loans of homeowners who are behind on their mortgages or at immediate risk of falling behind.

Based on estimates concerning the relationship between foreclosures and home prices, with the average house in the U.S. valued around \$200,000, the average homeowner could see his or her home value stabilized against declines in price by as much as \$6,000 relative to what it would otherwise be absent the Home Affordable Modification program.

Eligibility Requirements

- Loans originated on or before January 1, 2009;

- First-lien loans on owner-occupied properties with unpaid principal balance up to \$729,750. Higher limits allowed for owner-occupied properties with 2-4 units;
- All borrowers must fully document income, including signed IRS 4506-T, two most recent pay stubs, and most recent tax return, and must sign an affidavit of financial hardship;
- Property owner occupancy status will be verified through borrower credit report and other documentation; no investor-owned, vacant, or condemned properties;
- Incentives to lenders and servicers to modify at risk borrowers who have not yet missed payments when the servicer determines that the borrower is at imminent risk of default;
- Modifications can start from now until December 31, 2012; loans can be modified only once under the program.

Relief Offered

In summary, participating servicers will (in order):

- Determine that a loan meets the minimum eligibility criteria (owner occupied, originated before January 1, 2009, UPB equal to or less than \$729,750). If yes:
- Obtain sufficient income information to determine if the borrower has a front-end debt-to-income (DTI) ratio of 31% or greater (verbal income may be accepted for initial evaluation subject to verification prior to final approval). If yes:
- Capitalize (add to the loan amount) accrued interest, past due taxes and insurance, delinquency charges paid to third parties (e.g., for inspecting the property), and escrow advances by the servicer – but not late fees or other default fees charged by the servicer;
- Determine how much of an interest rate reduction is required to get the borrower's mortgage payment to 31% DTI, and if the DTI still exceeds 31% at the rate floor of 2%, modify the loan in other respects specified in the Guidelines;
- Apply a Net Present Value (NPV) test to determine if modification (including the incentive payments) provides the investor with a better financial outcome than foreclosure. If yes:
- Put the borrower on a trial modification at the new interest rate and payment for three months;
- If the borrower is current at the end of the trial modification period, the servicer will execute a modification agreement that includes escrows for taxes and insurance even if the prior loan was not escrowed.

Payments to Servicers, Lenders, and Responsible Borrowers

- The program will share with the lender/investor the cost of reductions in monthly payments from 38% DTI to 31% DTI;
- Servicers that modify loans according to the guidelines will receive an up-front fee of \$1,000 for each modification, plus “pay for success” fees on still-performing loans of \$1,000 per year;
- Homeowners who make their payments on time are eligible for up to \$1,000 of principal reduction payments each year for up to five years;
- The program will provide one-time bonus incentive payments of \$1,500 to lender/investors and \$500 to servicers for modifications made while a borrower is still current on mortgage payments;
- The program will include incentives for extinguishing second liens on loans modified under this program;
- No payments will be made under the program to the lender/investor, servicer, or borrower unless and until the servicer has first entered into the program agreements with Treasury’s financial agent;
- Similar incentives will be paid for Hope for Homeowner refinances;
- An incentive payment of up to \$1,000 is available to pay off junior lien holders. Servicers are eligible to receive an additional \$500 incentive payment for efforts made to extinguish second liens on loans modified under this program.

d) Making Home Affordable --- UPDATED on April 28, 2009: Second Lien Program and Support for Hope for Homeowners

Second Lien Program to Create a Comprehensive Affordability Solution for Homeowners

- The Second Lien Program coordinates with the first mortgage modification program to lower payments on second liens. In some cases where appropriately tailored to the borrower, servicers may also choose to accept a lump-sum payment from the Treasury to extinguish some or all of a second lien.
- A Second Lien Program to Reach up to 1 to 1.5 Million Homeowners
 - Making Home Affordable will share the cost with lenders of reducing payments for homeowners on second mortgages.
 - Reducing interest rate;
 - Extend term of modified second mortgage to match the first;
 - Forebear on principal.
 - Pay-for-Success Incentives for Servicers, Investors and Borrowers
 - Will have a pay-for-success structure similar to the first lien modification program, aligning incentives to reduce homeowner payments in a way most cost effective for taxpayers;
 - Servicers can be paid \$500 up-front for a successful modification and then success payments of \$250 per year for three years, as long as the modified first loan remains current;

- Borrowers can receive success payments of up to \$250 per year for as many as five years. These payments will be applied to pay down principal on the first mortgage, helping to build the borrower's equity in the home.
- Automatic Modification of a Second Lien When a First Lien is Modified

Support for Hope for Homeowners

- *Inclusion of Hope For Homeowners in the Making Home Affordable Program*
 - *When a borrower is in a trial Home Affordable Modification, a servicer will be required to evaluate a borrower for a Hope for Homeowners refinance and to offer the refinancing opportunity to the borrower if he or she qualifies. If a servicer determines the borrower is eligible for a Hope for Homeowners refinance in the initial discussion with the borrower, the servicer is required to also offer the refinance at the same time as the trial modification offer.*
 - *Servicers and lenders who help make mortgages more affordable for struggling homeowners through Hope for Homeowners will receive pay-for-success incentive payments similar to the incentive payments offered for Home Affordable Modifications.*
 - *Servicers can receive a \$2,500 up-front incentive payment for a successful Hope for Homeowners refinancing;*
 - *Lenders who originate the new Hope for Homeowners refinanced loans are eligible for success fees of up to \$1,000 per year for up to three years, so long as the refinanced loan remains current;*
 - *These incentive payments will only be available to servicers and originators who are participants in the Making Home Affordable Program.*

VII. Massachusetts Home Loan Modification Program

The Home Modification Loan Program (HMLP) is a publicly financed loan program that was initially established by the State Legislature in 1999. As of 2007, the HMLP has issued \$16.2 million in loans to over 750 households across Massachusetts. The HMLP provides loans to make modifications to the primary, permanent residence of elders, adults with disabilities, and families with children with disabilities. Such modifications allow people to remain in their homes and live more independently in their communities.

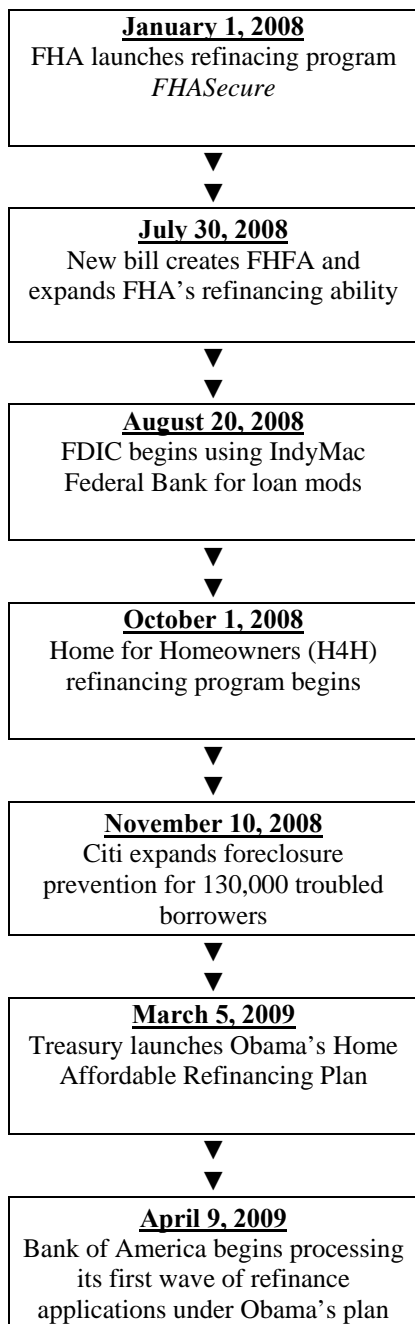
Eligibility Requirements

- Income guidelines are based on the total gross household income;
- The unit requiring modifications must be the primary, principal residence of the individual with the disability;

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- The modifications to be made to the residence must be necessary to allow the beneficiary to remain in the home and must specifically relate to their ability to function on a daily basis;
- The homeowner cannot have previously obtained an HMLP loan for the same property;
- The modifications cannot have already been made. HMLP does not reimburse for work previously completed.

Refinancing Programs



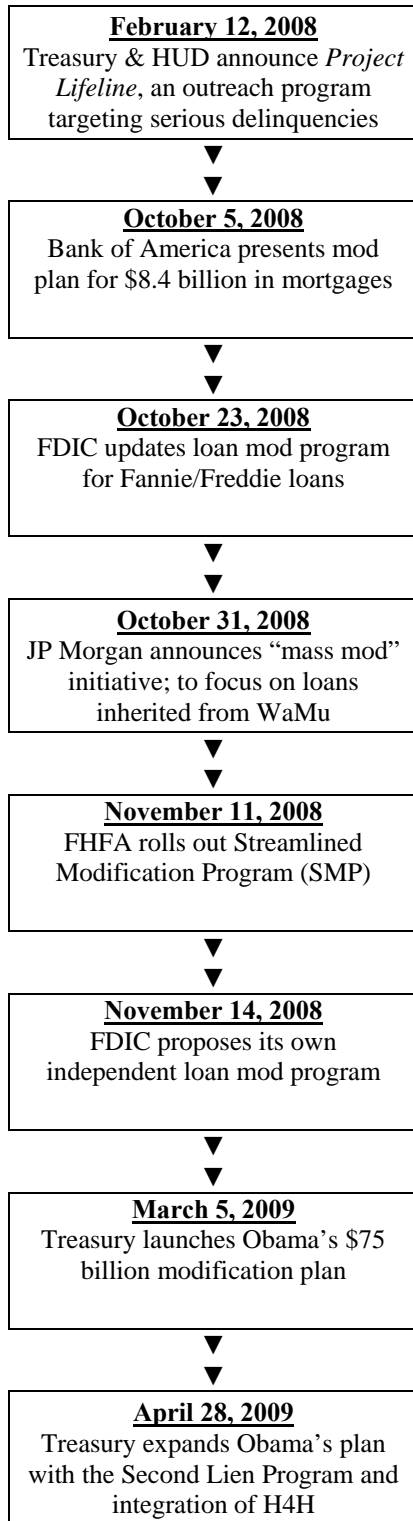
Refinance Homeowner Example: Brian & Lisa, Dallas, TX

Brian and Lisa have steady jobs – Brian is a high school teacher, Lisa is a nurse. They pay their bills on time, including their monthly mortgage payment. Like many homeowners, Brian and Lisa are unable to refinance to a lower interest rate because the value of their home value has declined.

Do Brian and Lisa qualify to refinance to a lower interest rate under the new plan? They may because they meet the following requirements:

- They own a one- to four-unit home.
- The loan on their home is owned or guaranteed by Fannie Mae or Freddie Mac.
- They are current on their mortgage payments and have not been 30 days late making a payment within the past 12 months.
- Their mortgage is no more than 105% of the value of their home; in this case they owe \$258,000 on their first mortgage but their home value dropped to \$250,000.

Modification Programs



Modification Homeowner Example: Jennifer Foster, Boston, MA

Jennifer is a single mother with two small children, has worked as a paralegal at the same law firm for the past 10 years. Recently, the firm downsized. Jennifer’s hours were cut and she has less money coming in each month. Jennifer is struggling to keep up with her bills and missed her last mortgage payment.

Does Jennifer qualify for a loan modification under the new plan? She may because she meets the following requirements:

- She is an owner of a one- to four-unit property.
- She has an unpaid principal balance of \$195,000, which is far less than the \$729,750 loan limit.
- Her current mortgage payment (including taxes, insurance, and homeowners’ association dues) is \$1,950 per month and her gross (pre-tax) monthly income is \$4200. Her monthly mortgage payment is 46% of her monthly income, which is greater than the 31% eligibility requirement.
- Jennifer has a mortgage payment that is no longer affordable because of a reduction in income.

Bibliography

<http://www.financialstability.gov>

<http://www.fdic.gov/consumers/loans/modification/indymac.html>

<http://www.housingwire.com>

<http://www.nationalmortgagenews.com>

<http://www.freddicmac.com>

<http://www.fanniemae.com>

