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Foreclosure in the Heartland: What Did We Learn?

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FORECLOSURE IN THE HEARTLAND: WHAT DID WE LEARN?

Abigail Lawlis Kuzma*

I. INTRODUCTION

Indiana is still reeling from the foreclosure crisis. In January 2015, Indiana was listed within the top ten highest foreclosure states in the nation.¹ Earlier, in December 2014, one in every 1033 housing units received a foreclosure filing, while nationally, the rate was one in every 1153 housing units.² Further, the Indianapolis homeownership rate has fallen 13.5%—second only to Las Vegas in homeownership decline.³ This is a particularly significant decline because eight years ago, Indianapolis boasted the highest homeownership rate in the nation.⁴

This Article examines the causes and impact of the foreclosure crisis in Indiana and the Midwest. It also identifies the federal and state responses to the crisis and analyzes their effectiveness. The Attorney General Mortgage Multistate, combined with state efforts such as mediation and settlement conference legislative reforms, housing counseling networks, foreclosure hotlines, the Indiana Supreme Court Foreclosure Task Force, and court facilitator programs, have assisted homeowners to avoid foreclosure or at least minimize its financial devastation.

II. CAUSES OF THE FORECLOSURE CRISIS

The decade-long housing bubble that burst in late 2007 initiated a foreclosure crisis across America. The crisis was felt across the country, but was particularly acute in Midwestern states such as Indiana. The causes of the crisis, which are still debated today, are discussed below. Before examining the possible causes of the crisis, one must comprehend the enormity of the foreclosure crisis in the Midwest, particularly in Indiana. This Article introduces the impact of the foreclosure crisis on

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¹ U.S. Foreclosures, REALTYTRAC, <http://www.realtytrac.com/mapsearch/us.html> (last visited Jan. 16, 2015), archived at <http://perma.cc/2Q8V-JA8J>.

² Stacy Jones, *Top Foreclosure States December: Indiana*, BANKRATE (Jan. 16, 2015), <http://www.bankrate.com/finance/real-estate/state-foreclosures-indiana/>, archived at <http://perma.cc/L8EH-4F65>.

³ See Jeff Swiatek, *Home, Not So Sweet Home*, INDIANAPOLIS STAR, June 25, 2012, at A1, available at 2012 WLNR 13210576 (referring to Census Bureau data compiled since 2006).

⁴ *Id.*

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the Midwest, followed by general causes of the financial crisis, and will specifically delve into the impact of mortgage fraud schemes in Indiana.

A. *Impact of the Foreclosure Crisis on the Midwest*

The Midwest was devastated by foreclosures when the 1997–2007 housing bubble burst, resulting in the 2008 financial crisis.⁵ When RealtyTrac released its October 2007 U.S. Foreclosure Market Report, Indiana ranked among the top ten states with the most foreclosures, along with Michigan, Ohio, and Illinois.⁶ The worst-hit states fell into two categories: states where speculators walked away from investment properties or states where a miserable economy exacerbated the effect of the housing crisis.⁷ The Midwestern states, including Indiana, fall into the second category.⁸

In 2008, Michigan, Illinois, and Ohio remained in the top ten states with the most foreclosures alongside states with significant investment housing, such as Nevada, Arizona, Florida, California, and Colorado.⁹

⁵ See Melinda Fulmer, *State Ranked By Foreclosure Rates*, MSN, <http://realestate.msn.com/article.aspx?cp-documentid=13107814> (last visited Aug. 22, 2014), archived at <http://perma.cc/HR72-NJYD> (listing the markets most affected by foreclosure filings); Peter J. Wallison, *The True Story of the Financial Crisis*, 44 AM. SPECTATOR 12, 14 (May 2011) (discussing the financial crisis and subsequent housing bubble deflation and attributing the latter to the government's housing policy). See generally *U.S. Foreclosure Activity Increases 2 Percent in October 2007*, REALTYTRAC (Dec. 6, 2007), <http://www.realtytrac.com/content/press-releases/us-foreclosure-activity-increases-2-percent-in-october-2007-3465>, archived at <http://perma.cc/9LJG-56FH> (providing foreclosure statistics and ranking states based on those statistics).

⁶ *Id.*; see also Fulmer, *supra* note 5 (ranking the states by 2007 foreclosure rates).

⁷ See *U.S. Foreclosure Activity Increases 2 Percent in October 2007*, *supra* note 5 (suggesting that states such as Florida, Nevada, and California are examples of states where speculators walked away because the states posted the top foreclosure rates).

⁸ See Dina ElBoghdady, *Housing Crisis Knocks Loudly in Michigan: Foreclosures Hit Record Numbers as Region Continues to Lose Jobs*, WASH. POST (Mar. 31, 2007), available at http://www.washingtonpost.com/wp-dyn/content/article/2007/03/30/AR2007033002127_pf.html, archived at <http://perma.cc/N2ZG-44YC> [hereinafter ElBoghdady, *Housing Crisis Knocks*] (stating that the Midwest mortgage crisis was “exacerbated by fundamental problems with [that region’s] economy”).

⁹ See generally *id.* (suggesting that in the industrial Midwest there are “a record number of people missing their mortgage payments and [thus] losing their homes”); Steve McLinden, *Top 10 States for Foreclosure*, BANKRATE.COM (Jan. 12, 2010), <http://www.bankrate.com/finance/real-estate/top-10-states-for-foreclosure-1.aspx>, archived at <http://perma.cc/AT69-8AY9>, <http://perma.cc/KCA6-2RCM> (noting the housing boom’s effect on investment in Nevada, Florida, California, Arizona, and Michigan); Luke Mullins, *The Top 10 Foreclosure States (as of August)*, U.S. NEWS & WORLD REPORT (Sept. 24, 2008, 4:07 PM), <http://money.usnews.com/money/blogs/the-home-front/2008/09/24/the-top-10-foreclosure-states-as-of-august>, archived at <http://perma.cc/7U85-U9QN> (listing the top ten foreclosure states as of August 2008, including Nevada, California, Arizona, Florida, Michigan, Ohio, Illinois, and Indiana). See also Aldo Svaldi,

Detroit had the tenth highest metropolitan foreclosure rate in the nation, “[w]ith 4.52% of its housing units (one in [twenty-two]) receiving a foreclosure filing” in 2008.¹⁰

Unemployment exacerbated foreclosure woes in the Midwest.¹¹ Indiana’s unemployment rate remained above 8% for over four and a half years, from December 2008 to August 2013.¹² For sixteen consecutive months in 2009 and 2010, the rate swelled above 10%.¹³ Other Midwest states, such as Ohio and Wisconsin, suffered similar fates.¹⁴ In Illinois, the unemployment rate started rising sharply in 2008, hovered over 11% for six months in 2009 and 2010, and remains above 8% according to the latest data.¹⁵ Michigan’s unemployment rate peaked at 14.2% in mid-2009, and also remains above 8%.¹⁶

B. Causes of the Financial Crisis

Before we can determine the effectiveness of responses to the foreclosure crisis, it is critical to understand the causes, and thereby have the ability to determine, whether these responses have truly addressed the core problems. Many authors have analyzed the housing and financial crisis which resulted in the ongoing foreclosure debacle. Barry

Colorado Bank Failures Exceed Expectations When Measured by Assets, DENV. POST (Aug. 28, 2011), http://www.denverpost.com/business/ci_18773942, archived at <http://perma.cc/PH4X-4CNS> (questioning the housing bubble’s effect on Colorado, but recognizing that a couple of key Colorado counties had “robust development” during the housing bubble).

¹⁰ *Foreclosure Activity Up 81% in ‘08*, BUS. J. (Jan. 6, 2009), <http://businessjournaldaily.com/foreclosure-activity-81-08-2009-1-6>, archived at <http://perma.cc/Q6HM-NP7G>.

¹¹ See Renae Merle, *Rising Unemployment Levels Help Push Record Numbers of Homeowners into Delinquency or Foreclosure*, WASH. POST (May 29, 2009), available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/05/28/AR2009052801712.html>, archived at <http://perma.cc/LM3D-ST5Y> (reviewing the effect of rising unemployment levels on foreclosure rates across the U.S.).

¹² U.S. DEP’T. OF LABOR, BUREAU OF LABOR STATISTICS, *Local Area Unemployment Statistics (Indiana)* (Apr. 5, 2014), <http://data.bls.gov/timeseries/LASST1800000000000003>, archived at <http://perma.cc/T4UY-64VS>.

¹³ *Id.*

¹⁴ U.S. DEP’T. OF LABOR, BUREAU OF LABOR STATISTICS, *Local Area Unemployment Statistics (Ohio)* (Apr. 5, 2014), <http://data.bls.gov/timeseries/LASST3900000000000003>, archived at <http://perma.cc/NXA7-9PZA>; U.S. Dep’t of Labor, Bureau of Labor Statistics, *Local Area Unemployment Statistics (Wisconsin)* (Apr. 5, 2014), <http://data.bls.gov/timeseries/LASST5500000000000003>, archived at <http://perma.cc/7UUR-7HNE>.

¹⁵ U.S. DEP’T. OF LABOR, BUREAU OF LABOR STATISTICS, *Local Area Unemployment Statistics (Illinois)* (Apr. 5, 2014), <http://data.bls.gov/timeseries/LASST1700000000000003>, archived at <http://perma.cc/6J54-79SV>.

¹⁶ U.S. DEP’T. OF LABOR, BUREAU OF LABOR STATISTICS, *Local Area Unemployment Statistics (Michigan)* (Apr. 5, 2014), <http://data.bls.gov/timeseries/LASST2600000000000003>, archived at <http://perma.cc/7T9R-FQSY>.

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Ritholtz and Aaron Task list seven factors that led to the crisis, including the lack of regulatory oversight over instruments such as credit-default swaps and collateralized-debt obligations.¹⁷ They also list other causes, such as the Nationally Recognized Statistical Rating Organizations' inaccurate ratings, a payment structure in which investment banks pay their regulators, and investment banks' increased leverage.¹⁸ Another author lists the banks' ability to forum shop from an "alphabet soup" of bank regulators—the Office of Thrift Supervision, the Federal Deposit Insurance Corporation, and the Comptroller of the Currency.¹⁹

Julia Patterson Forrester attributes the rise in subprime loans to the originate-to-distribute model of mortgage financing, which reduced the risk to mortgage originators and facilitated the proliferation of higher-risk mortgages and the fragmentation of the mortgage originator market.²⁰ She also cites the federal government's preemption of state usury ceilings and consumer credit protection laws that restricted alternative mortgage financing as contributing factors.²¹

¹⁷ Barry Ritholtz, *7 Factors That Led to Crisis*, THE BIG PICTURE (June 4, 2009, 11:48 AM), <http://www.ritholtz.com/blog/2009/06/7-factors-that-led-to-crisis/>, archived at <http://perma.cc/HYW4-LHDF>; see also Stephen J. Dubner, *How Would You Simplify the Financial-Reform Bill? A Freakonomics Quorum*, FREAKONOMICS (Aug. 19, 2010, 11:00 AM), <http://www.freakonomics.com/2010/08/19/how-would-you-simplify-the-financial-reform-bill-a-freakonomics-quorum/>, archived at <http://perma.cc/S6W-RHD4> (discussing the *Bailout Nation* authors' ideas on what could have been done to prevent the financial crisis). "The Commodity Futures Modernization Act of 2000 (CFMA) exempted derivatives such as Credit Default Swaps (CDSs) and Collateralized Debt Obligations (CDOs) from all regulatory oversight. There were no reserve requirements, capital minimums, [and no] exchange listings[.]" *Id.* (emphasis removed).

¹⁸ See BARRY RITHOLTZ & AARON TASK, *BAILOUT NATION: HOW GREED AND EASY MONEY CORRUPTED WALL STREET AND SHOOK THE WORLD ECONOMY* 132, 143–44, 157–58 (John Wiley & Sons, Inc. 2009) (discussing the ratings agencies' power, and using Enron as an example of the rating agencies' incompetency); Dubner, *supra* note 17 (suggesting Ritholtz and Task's criticism of ratings agencies indicated that rating agencies were essentially giving triple-A ratings to "junk" in return for payment from investment banks). "Prior to 2004, Wall Street firms were limited to 12-to-1 leverage by the 1975 net capitalization rule. In 2004, the five largest banks received a waiver, allowing their leverage to go up to 25, 30, even 40, to 1." *Id.*

¹⁹ Adam Davidson & Melissa Block, *U.S. Eyes Single Bank Regulator*, NPR (May 28, 2009), <http://www.npr.org/templates/story/story.php?storyId=104679069>, archived at <http://perma.cc/R9W9-ZTHH>.

²⁰ Julia Patterson Forrester, *Mortgaging the American Dream: A Critical Evaluation of the Federal Government's Promotion of Home Equity Financing*, 69 TUL. L. REV. 373, 381–83, 390–91, 396 (1994).

²¹ See *id.* at 398–401 (discussing Congress' preemption of state law in an attempt to benefit the home mortgage market).

The Financial Crisis Inquiry Commission issued its report in January 2011.²² The Commission's purpose was to explain the financial crisis' cause, and all the members agreed that "the crisis was caused largely by the losses to financial institutions arising from the high rates of [mortgage] delinquency and failure among subprime and other low-quality mortgages in the 1997–2007 housing bubble."²³ The Commission majority concluded "there was untrammelled growth in risky mortgages" and "[u]nsustainable, toxic loans polluted the financial system and fueled the housing bubble."²⁴ The report condemned abusive broker practices such as yield-spread premiums and toxic mortgage products.²⁵

Peter Wallison, a member of the commission minority, credited "the wholesale failure of bank and financial-institution managements," and recognized the twenty-seven million subprime and other risky loans that existed in the U.S. financial system leading up to the financial crisis: "never in the past were half of all mortgages in the United States in

²² FIN. CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES (2011), available at <http://www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf>, archived at <http://perma.cc/4U6G-JMCC> [hereinafter referred to as FINANCIAL CRISIS INQUIRY REPORT].

²³ PETER J. WALLISON, AM. ENTER. INST. FOR PUB. POLICY RESEARCH, THE LOST CAUSE: THE FAILURE OF THE FINANCIAL CRISIS INQUIRY COMMISSION, FIN. SERV. OUTLOOK 1, 1 (Jan.–Feb. 2011), available at <http://www.aei.org/files/2011/02/10/FSO-2011-02-g.pdf>, archived at <http://perma.cc/4LZ-KEDQ> [hereinafter WALLISON, LOST CAUSE]. Wallison was a member of the Financial Crisis Inquiry Commission and wrote a dissent in the Commission's Final Report. *Id.*; see FINANCIAL CRISIS INQUIRY REPORT, *supra* note 22, at 452 (Wallison, dissenting) (arguing that U.S. housing policies—not "deregulation or lack of regulation, . . . predatory lending" or other factors cited in the report of the Financial Crisis Inquiry Commission's majority—were the major factors contributing to the 2008 financial crisis).

²⁴ FINANCIAL CRISIS INQUIRY REPORT, *supra* note 22, at 101.

²⁵ See Tom Petrino, *Mozilo Knew Hazardous Waste When He Saw It*, L.A. TIMES (June 4, 2009, 5:12 PM), http://latimesblogs.latimes.com/money_co/2009/06/the-use-of-toxic-to-describe-high-risk-mortgages-has-been-de-rigueur-for-the-last-two-years-now-it-looks-like-countrywide.html, archived at <http://perma.cc/QF8C-3A2K> (stating that the term "toxic" is generally applied to loans that are disadvantageous to the borrower). For example, in *State v. Countrywide Financial Corporation*, Countrywide agreed to compensate homeowners who received Pay Option adjustable rate mortgages ("ARMs"), defined as ARMs that, during an initial period (and subject to Recast) permit the borrower to choose among two or more payment options, including an interest-only payment and a minimum (or limited payment)—which may result in negative amortization—and Subprime Mortgage Loans defined as first-lien residential mortgage loans that combine higher risk features (such as low or no documentation, low equity, adjustable interest rates, prepayment penalties, cash-out financing) with higher risk borrower profiles (lower FICO scores, recent bankruptcies/foreclosures, major derogatory credit) resulting in a loan that could not reasonably be underwritten and approved as a "prime" loan. *State Farm v. Countrywide Financial Corp.*, No. 76C01-0808-PL-0652, slip op. at 9 (Ind. Cir. Ct. 2008).

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danger of delinquency and default when a housing bubble deflated.”²⁶ Given these facts as a backdrop, Wallison focused on other factors, including the deterioration of underwriting standards, which were influenced by government programs beginning in the early 1990s when Congress “imposed . . . affordable housing requirements on Fannie Mae and Freddie Mac.”²⁷ Further, the U.S. Department of Housing and Urban Development (“HUD”) “tightened and extended these requirements so that by 2007, [55%] of all loans had to qualify as affordable-housing loans to [low- and moderate-income (LMI)] borrowers.”²⁸ This practice put Fannie and Freddie into competition for these loans with other banks who are required to make similar loans under the Community Reinvestment Act, causing the decline of underwriting standards.²⁹

C. *The Impact of Mortgage Fraud Schemes in Indiana*

Besides the relaxed origination standards, proliferation of abusive sub-prime lending products, and a lack of regulatory oversight, mortgage fraud also contributed to the Midwest housing crisis.³⁰ Unfortunately, Indiana had its share of mortgage fraud cases that ultimately led to homeowner default and foreclosure, and the criminal conviction of the perpetrator(s).³¹

²⁶ PETER J. WALLISON, AMERICAN ENTERPRISE INSTITUTE, STATEMENT BEFORE THE HOUSING FINANCIAL SERVICES COMMITTEE ON THE FINANCIAL CRISIS INQUIRY COMMISSION, 16 (Feb. 16, 2011) [hereinafter WALLISON, STATEMENT]; WALLISON, LOST CAUSE, *supra* note 23, at 3.

²⁷ WALLISON, LOST CAUSE, *supra* note 23, at 3–4 (internal quotation marks omitted).

²⁸ *Id.* at 4. LMI borrowers are “home buyers whose income was at or below the median income in the areas where they lived.” *Id.*

²⁹ *Id.* Countrywide and other lenders were similarly operating under another HUD program, and “[w]ith all these agencies and firms seeking the same loans from the same group of potential borrowers, it was inevitable that underwriting standards would decline.” *Id.* at 1.

³⁰ See FINANCIAL CRISIS INQUIRY REPORT, *supra* note 22, at 447 (discussing the role of predatory borrowers, who engaged in mortgage fraud, as another contributing factor to the financial crisis); see also Dennis Norman, *Mortgage Fraud Continues to Climb – Midwest Leads the Way*, ST. LOUIS REAL EST. NEWS (Apr. 27, 2010), <http://stlouisrealestatenews.com/financing/mortgage-fraud-continues-to-climb-midwest-leads-the-way/>, archived at <http://perma.cc/U38K-F4ZK> (discussing reported incidents of mortgage fraud in 2008 and 2009 and stating that Midwestern states have some of the highest concentrations of fraud).

³¹ See Indictment at A6, *United States v. Ross*, No. 1:08-cr-0018-LJM-KPF (S.D. Ind. Jan. 30, 2008) [hereinafter *Ross Indictment*] (describing that in 2008, Ross and Locke were indicted on one count of conspiracy to commit wire fraud and thirty-six counts of wire fraud and aiding and abetting). Ross was also indicted for bankruptcy fraud based on allegations that she filed bankruptcy petitions in family members’ names without their consent. Press Release, *Living the High Life*, FBI (May 17, 2011),

The Beverly Ross and Donella Locke multi-million dollar mortgage-fraud scheme is a classic example of the type of mortgage fraud committed from 2004 through 2008.³² Ross and Locke recruited buyers to purchase residential properties, who agreed to buy the identified property “in exchange for a sum of money” at closing.³³ Often, a buyer was led to believe he or she was temporarily lending his or her credit information to assist someone with a lower credit score to buy a property.³⁴

Ross and Locke worked with “mortgage brokers, title companies, and appraisers to accomplish the sale of these properties to the recruited buyers [and] borrowers” and then received funds they were not entitled to receive from the closings.³⁵ The investigation revealed that Ross and Locke falsified a variety of information on documents to defraud lenders, including income amounts, rent verifications, employment verifications, social security numbers, and business names.³⁶

“Throughout the [mortgage-fraud] scheme Donella Locke was a licensed real estate broker who operated Locke and Key Real Estate.”³⁷ The Office of the Attorney General (“OAG”) brought charges before the

<http://www.fbi.gov/indianapolis/about-us/history-1/living-the-high-life>, archived at <http://perma.cc/T5X9-75T3>.

³² See *United States v. Locke*, 643 F.3d 235, 236–37 (7th Cir. 2011) (describing the defendant’s actions and circumstances surrounding the mortgage fraud); *Living the High Life*, *supra* note 31 (reporting that Ross and Locke were part of a mortgage fraud scheme involving over \$23 million).

³³ Ross Indictment, *supra* note 31, at A2. The homes ranged in price from \$300,000 to \$1.4 million, and the aggregate loan value on these thirty-six properties was \$23.5 million. *Id.* at A7–A10.

³⁴ *Id.* at A2–A3; Press Release, FBI, Second Defendant Sentenced in Mortgage Fraud Scheme (Feb. 12, 2010), <http://www.fbi.gov/indianapolis/press-releases/2010/ip021210a.htm>, archived at <http://perma.cc/F5N6-DXED>.

³⁵ Ross Indictment, *supra* note 31, at A2. This mortgage fraud scheme also involved three other individuals: an appraiser, a loan broker, and a settlement agent. *Id.* The article also describes two transactions in which Locke and Ross received illicit funds, including \$28,980 in one and \$204,500 in another. *Id.* at A5–A6. See Gabrielle J. Owens & Laura A. Turner, *Regulatory Roundup from the Office of the Indiana Attorney General: Case Closed*, IND. REALTOR ADVOC. (Aug. 2010), available at http://indianarealtors.com/Uploads/Indiana_Realtor_Advocate/Attorney_General_8_20_10.pdf, archived at <http://perma.cc/SJB5-PTNF> (describing the investigation and the resulting charges filed against the other individuals involved).

³⁶ See *Second Defendant Sentenced in Mortgage Fraud Scheme*, *supra* note 34 (noting that these false statements induced lenders to make loans they otherwise would not have made); Gabrielle J. Owens, *Regulatory Roundup from the Office of the Indiana Attorney General: Case Closed*, IND. REALTOR ADVOC. (Mar. 2010), available at http://www.indianarealtors.com/uploads/indiana_realtor_advocate/Attorney_general_3_19_10.pdf, archived at <http://perma.cc/FGK6-R3HA> (explaining the false and misleading documents used to mislead lenders).

³⁷ Owens, *supra* note 36.

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Indiana Professional Licensing Board in an administrative proceeding against Locke, and the Indiana Real Estate Commission summarily suspended her real estate broker's license in April 2008.³⁸ The commission found that Locke would "represent[] a clear and immediate danger to the public if she were allowed to continue to practice as a principal broker in the State of Indiana."³⁹ On September 18, 2009, a federal jury convicted Locke on five counts of wire fraud, and she was sentenced to prison for five years and eleven months and ordered to pay \$2.3 million in restitution to thirteen lenders.⁴⁰

Mortgage defrauders also target people in financial trouble who are facing foreclosure. For example, in *State v. Shrader*, the Respondent, Shrader, preyed on financially distressed homeowners who needed to sell their homes quickly.⁴¹ Shrader promised the homeowner that he could resolve their financial problems by "creat[ing] a trust, nam[ing] Shrader as the trustee, and then [have the homeowner] assign all beneficial interest in the trust to Shrader."⁴² Instead of purchasing the home outright, Shrader convinced the homeowner that he would pay the mortgage with funds collected through leasing (or providing a lease with an option to purchase) to persons who needed to improve their credit.⁴³ In fact, Shrader did not make the mortgage payments but instead collected and pocketed the rent.⁴⁴ Through this scheme, Shrader violated the Indiana Deceptive Consumer Sales Act, the Home Loan Practices Act, and Indiana licensing law.⁴⁵

Shrader also committed mortgage fraud using short sales as his vehicle.⁴⁶ In a scheme that has been coined "flopping," the perpetrator buys real estate via the short sale process and then sells the real estate to a buyer who is willing to pay an amount higher than the short sale

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* The Seventh Circuit Court of Appeals upheld Locke's conviction, but reversed the sentencing and restitution order. *United States v. Locke*, 643 F.3d at 235, 248 (7th Cir. 2011). The court held that the trial court improperly considered conduct underlying charges against Locke that had been dismissed and ordered restitution without making sufficient findings of fact to support the order. *Id.* at 245, 248.

⁴¹ Complaint at 5-23, *State v. Shrader*, No. 29D01-1005-PL-570 (Sup. Ct. Hamilton Co. 2010); Owens & Turner, *supra* note 35.

⁴² Owens & Turner, *supra* note 35.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *See id.* (explaining that the court enjoined Shrader "from committing deceptive acts in connection with real estate transactions" but noting that the matter was still pending at the time the piece was written).

price.⁴⁷ In these transactions, Shrader approached distressed homeowners facing foreclosure and offered to negotiate a short sale with the lender.⁴⁸ Meanwhile, he listed the property with a realtor at the same time that he entered into a purchase agreement with the homeowner.⁴⁹ Under this scheme, he “closed on the [short sale] [only] if he was able to locate a buyer who would pay more than the negotiated price of the short sale.”⁵⁰ Then, after conducting back-to-back closings, he pocketed the difference between the short sale price and the true market sale price, defrauding both the lender and the homeowner.⁵¹ In this case, the court found that Shrader violated the Indiana Mortgage Rescue Protection Fraud Act by taking power of attorney from the homeowner for improper purposes, and also for “taking an equitable interest in the property to secure payment of his services.”⁵²

Many people who engage in flopping set up a limited liability company (“LLC”) to act as the straw buyer.⁵³ The floppers also hide from the original seller the fact that there is a legitimate potential buyer for the property at the time of the floppers’ offer.⁵⁴ Perpetrators may even advise property owners to stop paying an otherwise current mortgage to make the property eligible for a short sale.⁵⁵ Floppers harm everyone involved in the transaction: the property owner ends up potentially liable for the difference between the mortgage balance and the short sale price, the legitimate buyer pays an inflated price, and the lender takes a loss on a mortgage on a property for which there was a willing buyer.⁵⁶

⁴⁷ See Dina Elboghady, *Inspector General Says Changes to Making Home Affordable May Impede Help*, WASH. POST (Apr. 21, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/20/AR2010042005182.html>, archived at <http://perma.cc/DF2F-P2DH> (noting that short sales involving struggling borrowers are vulnerable to flopping schemes).

⁴⁸ Owens & Turner, *supra* note 35.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ Nick Carey, *Special Report: Flipping, Flopping and Booming Mortgage Fraud*, REUTERS (Aug. 17, 2010), <http://www.reuters.com/article/2010/08/17/us-housing-usa-fraud-idUSTRE67G1S620100817>, archived at <http://perma.cc/5L7P-A35C>.

⁵⁴ See Lew Sichelman, *Short-Sale 'Flopping' May Be Next Big Housing Scam*, L.A. TIMES (Sept. 5, 2010), <http://articles.latimes.com/2010/sep/05/business/la-fi-lew-20100905>, archived at <http://perma.cc/77U6-MEN7> (alerting homeowners to be wary if advised that the lender agrees to a price well below the home’s market value).

⁵⁵ *Mortgage Scams: Protect Yourself from Mortgage Fraud*, MORTGAGE-FORECLOSURE.ORG (2011), <http://web.archive.org/web/20111207231947/http://www.mortgage-foreclosure.org/mortgage-scam.html>, archived at <http://perma.cc/L6V2-JL56>.

⁵⁶ Catherine Reagor, *Phoenix Real Estate Strategy of 'Flopping' Examined*, AZCENTRAL.COM (Nov. 14, 2010), <http://www.azcentral.com/business/realestate/articles/2010/11/14/>

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Since the foreclosure crisis hit Indiana, another common fraud is the mortgage-consultant scam.⁵⁷ The OAG has sued almost 100 mortgage-consultant companies involved in this scam.⁵⁸ In a recent case filed against Foreclosure Assistance USA, Inc., the OAG's complaint alleged that the mortgage-consultant company took up-front money from Indiana consumers without having a surety bond and made misrepresentations to Indiana consumers.⁵⁹ The lawsuit identified nearly 600 consumers across Indiana who had contracts with Foreclosure Assistance USA.⁶⁰ In the years since the foreclosure crisis hit Indiana, however, both federal and state governments have taken actions to lessen the impact of the crisis.

III. FEDERAL EFFORTS TO MITIGATE THE FORECLOSURE CRISIS

The federal government took several steps to mitigate the foreclosure crisis. Though none have been perfect, the programs, described below, responded to specific concerns raised by the foreclosure crisis. First, Part III.A discusses the Home Affordable Modification Program ("HAMP").⁶¹ Next, Part III.B introduces the

20101114phoenix-real-estate-short-sale-flopping.html, archived at <http://perma.cc/TVM4-NYM2>.

⁵⁷ See Mark Huffman, *Indiana Stepping Up Anti-Foreclosure Efforts*, CONSUMER AFFAIRS (Oct. 11, 2011), <http://web.archive.org/web/20120503133748/http://www.consumeraffairs.com/news04/2011/10/indiana-stepping-up-anti-foreclosure-efforts.html>, archived at <http://perma.cc/YN5U-NFBT> (discussing the Indiana Attorney General's efforts to combat scams by mortgage modification consultants).

⁵⁸ See Press Release, Office of the Ind. Att'y Gen., Attorney General's Office Sues Four Foreclosure Rescue Companies (Feb. 8, 2012), http://www.in.gov/activecalendar/EventList.aspx?view=EventDetails&eventidn=51948&information_id=104151&type=&syndicate=syndicate, archived at <http://perma.cc/GV7L-ZHSB> (noting that as of February 2012, the number of lawsuits initiated against the mortgage rescue companies had risen to ninety-five); see also Press Release, Office of the Ind. Att'y Gen., Attorney General Targets Illegal Florida-Based Foreclosure Company (Aug. 10, 2011), http://www.in.gov/portal/news_events/72230.htm, archived at <http://perma.cc/TQP5-7WEP> (noting that the OAG had opened over five hundred investigations on foreclosure consultants since 2009).

⁵⁹ Complaint for Injunction, Restitution, Costs, and Civil Penalties at 4-5, 10, *State v. Foreclosure Assistance USA, Inc.*, No. 2C01-1005-PL-50 (Cir. Ct. Allen Co. May 27, 2010) [hereinafter *Foreclosure Assistance USA Complaint*]. The case was dismissed after Foreclosure Assistance USA agreed to an Assurance of Voluntary Compliance and \$20,000 in consumer restitution. Moe Bedard, *FA USA: Indiana AG Goes after Ohio Loan Modification Firm with the Long Arm of the Law*, LOANSafe.ORG (May 27, 2010), <http://www.loansafe.org/fa-usa-loan-modification>, archived at <http://perma.cc/YQU8-32TT>.

⁶⁰ *Foreclosure Assistance USA Complaint*, *supra* note 59. On March 4, 2009, AVC signed the complaint, which included a claim for \$20,000 in consumer restitution. *Id.*

⁶¹ See *infra* Part III.A (providing an overview of HAMP).

amendments made to Regulation Z.⁶² Finally, Part III.C ends with a discussion of the Dodd-Frank Act.⁶³

A. *The HAMP Program*

The U.S. Treasury Department announced the details of HAMP on March 4, 2009.⁶⁴ HAMP, a loan modification program, is part of the Making Home Affordable Program, and its purpose is “to reduce delinquent and at-risk borrowers’ monthly mortgage payments.”⁶⁵ Mortgages with an origination date before January 1, 2009 are eligible for HAMP and the program will remain in effect until December 31, 2015.⁶⁶

Individual mortgage companies had long set up loss-mitigation departments within their companies to contact homeowners who were in default and assist those homeowners in catching up or modifying their mortgage contracts so they could continue to pay their mortgages and stay in their home.⁶⁷ In fact, long before HAMP was implemented, loss-mitigation requirements existed that provided loan products guaranteed by the Federal Housing Administration (“FHA”) or the Veterans Administration.⁶⁸ These loss-mitigation alternatives included assisting the homeowner with entering into a repayment agreement with the

⁶² See *infra* Part III.B (introducing the amendments that were made to Regulation Z).

⁶³ See *infra* Part III.C (analyzing the effect of the Dodd-Frank Act).

⁶⁴ *Home Affordable Modification Program*, FREDDIE MAC (2014), http://www.freddiemac.com/singlefamily/service/mha_modification.html, archived at <http://perma.cc/92HH-9YSA>.

⁶⁵ *Id.*; see W. Justin Jacobs, Note, *Help or Hamp(er)? The Courts’ Reluctance to Provide the Right to a Private Action Under HAMP*, 47 VAL. U. L. REV. 267, 273 (2012) (discussing the implementation of HAMP).

⁶⁶ Jacobs, *supra* note 65; Press Release, U.S. Dep’t of the Treasury, Obama Administration Extends Application Deadline for the Making Home Affordable Program (May 30, 2013), available at <http://www.treasury.gov/press-center/press-releases/Pages/jl1959.aspx>, archived at <http://perma.cc/U8RQ-VMHF>.

⁶⁷ See Harriet Newburger, *Servicers Key to Limiting Loan Losses*, FED. RES. BANK OF PHILA. (2007), http://www.philadelphiafed.org/community-development/publications/cascade/66/01_limiting-loan-losses.cfm, archived at <http://perma.cc/QW6M-P3N6> (discussing servicers’ increase in loss mitigation activity, including the addition of units to their loss mitigation departments, as the number of delinquent loans increased).

⁶⁸ See, e.g., *Loss Mitigation Policy & Guidance*, U.S. DEP’T HOUS. & URBAN DEV., http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/sfh/nsc/1mmltrs (last visited Apr. 4, 2014), archived at <http://perma.cc/57T6-YIJZ> (providing a list of loss mitigation documents, some of which pre-date HAMP); VETERANS BENEFITS ADMIN., CIRCULAR 26-10-6, REVISED VA MAKING HOME AFFORDABLE PROGRAM 1 (2010), available at http://www.benefits.va.gov/HOMELOANS/circulars/26_10_6.pdf, archived at <http://perma.cc/RHT4-5YDH> (indicating a history of loss-mitigation options before HAMP).

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mortgage company.⁶⁹ The homeowner might also be offered a loan modification, under which the lender would extend the loan term of the loan or reduce the loan's interest rate so the homeowner could afford the monthly payments.⁷⁰ FHA loss-mitigation also included a partial claim where funds would be advanced for a mortgagor to reinstate the delinquent loan, but that amount was not to exceed twelve months' worth of principal, interest, taxes, and insurance.⁷¹ Finally, upon determining that the homeowner is not eligible for an alternative allowing the homeowner to remain in the home, the mortgagee may offer the homeowner a short sale or a deed in lieu of foreclosure.⁷² Under these options, the homeowner must leave the home, but the arrearage that the homeowner would normally owe upon a judgment for foreclosure is waived.⁷³ The homeowner is eligible for these loss-mitigation options only if he or she demonstrates a hardship.⁷⁴ Mortgage companies outside of the HUD program could offer a loss-mitigation option to homeowners with non-FHA loans.⁷⁵ However,

⁶⁹ Letter from John C. Weicher, Asst. Sec'y Hous.-Fed. Hous. Comm'r, to All Approved Mortgagees, Mortgagee Letter 2002-17, at 1-2 (Aug. 29, 2002), available at http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_16808.doc (noting that under the repayment agreement, the homeowner paid the regular mortgage payment along with an additional amount per month for a stated period of time until the homeowner repaid the arrearage).

⁷⁰ Letter from William C. Apgar, Asst. Sec'y Hous.-Fed. Hous. Comm'r, to All Approved Mortgagees, Mortgagee Letter 00-05, at 18 (Jan. 19, 2000), available at <http://api.ning.com/files/Y7XrEGzfaFcG-bsyrZlZSrXcKUJYI2SwJqF27S4YHYQ5LvHdc6fDCCaFirVLPganSTQdeZVTzDW03baM4EUSIS72XKINywOt/MORTGAGEELETTER0005.pdf>, archived at <http://perma.cc/L2U3-2DYZ> [hereafter Apgar Letter].

⁷¹ See Letter from John C. Weicher, Asst. Sec'y Hous.-Fed. Hous. Comm'r, to All Approved Mortgagees, Mortgagee Letter 2003-19, at 1 (Nov. 20, 2003), available at <http://www.mortgagebankers.org/files/Residential/2003/fha-03-19.pdf>, archived at <http://perma.cc/2JF7-TRDF> (stating that when the mortgagor accepted the partial claim advance, he or she had to sign, "upon acceptance of the advance, . . . a promissory note and subordinate mortgage payable to HUD").

⁷² See Apgar Letter, *supra* note 70, at 29 (noting that under the short sale option, the mortgagee agrees to a sale of the home to a third party, under certain conditions or procedures, for a price below the arrearage owed). Under the deed in lieu of foreclosure option, the mortgagee agrees by contract to accept the home. *Id.* at 35.

⁷³ *Id.*

⁷⁴ *Id.* at 30, 36. In other words, the homeowner must demonstrate that a hardship event occurred that caused the homeowner to get behind on the mortgage payments, such as the death of a spouse, the loss of a job, or an illness. See *id.* (listing some circumstances that constitute a hardship).

⁷⁵ See, e.g., Bulletin from Patricia J. McClung, Vice Pres. Offerings Mgt., to All Freddie Mac Servicers, Bulletin No. 2009-28 (Dec. 14, 2009), available at <http://www.freddiemac.com/singlefamily/guide/bulletins/pdf/bl10928.pdf>, archived at <http://perma.cc/Z5G4-446G> (announcing Freddie Mac's changes to its own servicing guidelines in light of recent changes to HAMP); Announcement from Gwen Muse-Evans, Vice Pres. & Chief Risk Officer Credit Portfolio Mgmt., Fannie Mae, Updates to Fannie

these communications place the homeowner in an unequal negotiating position because he or she is not represented by a housing counselor, and the mortgage company has the upper hand with respect to information and power, which often results in unfavorable terms to the homeowner and frequently ends in default.⁷⁶

The HAMP program extends many of these loss-mitigation options to homeowners with loans held by mortgagees who agreed to comply with the HAMP program.⁷⁷ HAMP, however, has not been as effective as expected in reducing foreclosure rates, and the program continues to receive criticism. For example, “[t]he biggest complaint is that servicers take so long to review and approve short sales that potential buyers give up or walk away . . . even after the agent has spent hundreds of hours collecting paperwork and sending it to the servicer for approval.”⁷⁸

Another complaint is that servicers ignore guidelines altogether.⁷⁹ The June 2011 Treasury Report (“Report”) on the HAMP mortgage modification program rated Bank of America the worst in three of four categories, along with Wells Fargo and Chase.⁸⁰ In fact, the Treasury Department suspended payment to these banks until they improved their compliance under the HAMP contracts.⁸¹ Further, the Report

Mae’s Mortgage Modification Requirements, Announcement SVC-2011-03 (Apr. 4, 2011), available at <https://www.efanniemae.com/sf/guides/ssg/annltrs/pdf/2011/svc1103.pdf>, archived at <http://perma.cc/JL5J-5YQW> (explaining an update to Fannie Mae’s guidelines requiring loan servicers to consider a range of loss mitigation options for defaulting borrowers).

⁷⁶ *April Housing Scorecard Shows Growing Evidence of Economic Progress*, RIS MEDIA (May 10, 2011), <http://rismedia.com/2011-05-09/april-housing-scorecard-shows-growing-evidence-of-economic-progress/>, archived at <http://perma.cc/X82L-JH49> (explaining that HAMP loan modification programs have proven more sustainable than traditional industry loan modifications).

⁷⁷ *Home Affordable Foreclosure Alternatives Program: Overview*, FANNIE MAE, https://www.hmpadmin.com/portal/programs/foreclosure_alternatives.jsp (last visited Nov. 19, 2011), archived at <http://perma.cc/8X5A-WYL9>.

⁷⁸ See Kate Berry & Marc Hochstein, *Shortchanged?*, 176 AM. BANKER 6, 6 (Jan. 6, 2011) (discussing complaints about HAFA).

⁷⁹ *Id.*

⁸⁰ Alan White, *Too Big to Comply*, CREDIT SLIPS (June 9, 2011, 10:40 AM), <http://www.creditslips.org/creditslips/2011/06/too-big-to-comply.html>, archived at <http://perma.cc/AY63-5AK6>.

⁸¹ DEP’T OF TREASURY, MAKING HOME AFFORDABLE: PROGRAM PERFORMANCE REPORT THROUGH APRIL 2011, at 16 (June 9, 2011), available at <http://www.treasury.gov/initiatives/financial-stability/results/MHA-Reports/Documents/April%202011%20MHA%20Report%20FINAL.PDF>, archived at <http://perma.cc/DEJ6-BZ7R>. Treasury resumed making HAMP incentive payments to Wells Fargo after one quarter, but continued to withhold payments to Bank of America and Chase. DEP’T OF TREAS., MAKING HOME AFFORDABLE: PROGRAM PERFORMANCE REPORT THROUGH JULY 2011, at 18 (Sept. 1, 2011), available at <http://www.treasury.gov/initiatives/financial-stability/results/MHA-Reports/Documents/July%202011%20MHA%20Report%20FINAL.PDF>, archived at

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provided confirmation of what many homeowners, housing counselors, and lawyers had been experiencing: “temporary agreements that never become permanent, servicers losing and misrecording borrower information, and not communicating effectively with homeowners about applications and decisions.”⁸²

The program is not reaching enough homeowners. As noted by Alan White in June 2011:

Only 30,000 HAMP modifications are being added each month, while new foreclosure starts hover around the 150,000 to 200,000 per month level. The number of temporary modifications in limbo past the [three month] program limit before becoming permanent is way down, except at the big three banks, which now account for half of all temporary [modifications] passing their six month mark.⁸³

Through November 2013, approximately 1.3 million borrowers received a permanent HAMP modification, less than 125,000 received a second-lien modification under the Second Lien Modification Program (“2MP”), and less than 250,000 exited their homes through a short sale or deed in lieu of foreclosure under the HAFA program.⁸⁴ This falls well short of the program’s goal of three to four million first lien modifications.⁸⁵

<http://perma.cc/B4EU-4CJQ>. In its fourth quarter report, the Treasury noted that Bank of America had substantially remediated identified compliance issues and Chase had made progress in remediating compliance issues and withheld HAMP incentive payments would be paid to these servicers. DEP’T OF TREAS., MAKING HOME AFFORDABLE: PROGRAM PERFORMANCE REPORT THROUGH JANUARY 2012, at 20 (Mar. 3, 2012), available at http://www.treasury.gov/initiatives/financial-stability/results/MHA-Reports/Documents/Jan%202012%20MHA%20Report_WITH_SERVICER_ASSESSMENTS_FINAL.PDF, archived at <http://perma.cc/8MVN-KCS7>.

⁸² White, *supra* note 80.

⁸³ *Id.*

⁸⁴ DEP’T OF TREAS., MAKING HOME AFFORDABLE PROGRAM PERFORMANCE REPORT THROUGH NOVEMBER 2013, at 1 (Jan. 10, 2014), available at <http://www.treasury.gov/initiatives/financial-stability/reports/Documents/November%202013%20MHA%20Report%20Final.pdf>, archived at <http://perma.cc/8YFD-9J6N>. The 2MP was created to work in tandem with HAMP to assist homeowners who have a modification under HAMP but have a second mortgage on the same property and may provide a modification or principal reduction for that second mortgage. *Second Lien Modification Program (2MP)*, MAKINGHOMEAFFORDABLE.GOV (May 23, 2013) http://www.makinghomeaffordable.gov/programs/lower-payments/Pages/lien_modification.aspx, archived at <http://perma.cc/FG7Y-JJBB>.

⁸⁵ Press Release, Dep’t of Treas., Secretaries Geithner, Donovan Announce New Details of Making Home Affordable Program, Highlight Implementation Progress (May 14, 2009),

B. Amendments to Regulation Z

In another response to the financial crisis, the Federal Reserve Board (“FRB”) promulgated amendments to Regulation Z, implementing regulations for the Truth in Lending Act, effective October 1, 2009.⁸⁶ The FRB recognized that the low- or no- documentation loans contributed to the burgeoning default rates and subsequent housing crisis by providing high-priced mortgages to high-risk borrowers.⁸⁷ The Regulation Z amendments include restrictions on higher priced mortgage loans, which have a lower APR floor and contemplate purchase money mortgages.⁸⁸ The amendments also target deceptive advertising, which further clouds the already difficult to understand subprime mortgage packages, prohibits lenders and brokers from influencing appraisers, and prohibits servicers from engaging in unfair servicing practices related to fees and billing.⁸⁹

C. The Dodd-Frank Act

In July 2010, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”).⁹⁰ Title X of Dodd-Frank creates the Consumer Financial Protection Bureau (“CFPB”) and details its duties and powers.⁹¹ Besides creating the CFPB, Dodd-Frank provides significant prohibitions and standards in mortgage lending. The Mortgage Reform and Anti-Predatory Lending Act, found in Title XIV of Dodd-Frank, substantially revises the Truth in Lending Act, including mortgage origination and servicing practices, as well as strengthens remedies available when lenders violate the law.⁹² For example, Title XIV builds upon the FRB’s 2008 reforms and delineates “qualified mortgage[s],” which are mortgages with safe underwriting practices, lower fees, and an absence of risky features.⁹³ Because these

available at <http://www.treasury.gov/press-center/press-releases/Pages/tg131.aspx>, archived at <http://perma.cc/XC6E-G4V9>.

⁸⁶ See Truth in Lending, 73 Fed. Reg. 44,522 (July 30, 2008) (to be codified at 12 C.F.R. pt. 226) (indicating that Section 226.35(b)(3) had a separate effective date of April 1, 2010).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 44,586–90, 44,563.

⁹⁰ See generally Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified at 12 U.S.C. § 5301 et seq.).

⁹¹ *Id.* at 1964–2035.

⁹² *Id.* at 2136–2212.

⁹³ *Id.* at 2145–48. On January 30, 2013 and June 12, 2013, the CFPB issued final regulations amending Regulation Z and implementing the ability-to-repay and qualified mortgage standards effective January 10, 2014. Ability-to-Repay and Qualified Mortgage Standards Under the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 6408–20 (Jan. 30,

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qualified mortgages are sufficiently reliable and safe, the lender is entitled to a “safe harbor,” i.e., a conclusive presumption that it satisfied ability-to-pay requirements and a rebuttable presumption for higher-priced mortgage loans under regulations implementing these statutory amendments.⁹⁴

Dodd-Frank also prohibits steering incentives and yield spread premiums, which are “payments made by a lender to a mortgage broker upon origination for placing the borrower in a loan with riskier terms . . . or a higher interest rate than the minimum rate required by the lender.”⁹⁵ Yield spread premiums have long been considered predatory because they “provide[] a financial incentive for brokers to place borrowers into more expensive, and oftentimes typically more risky, mortgages” —the broker makes more money when he or she can convince the homeowner to purchase this less-desirable mortgage product.⁹⁶

Further, Dodd-Frank amended the Truth in Lending Act to require lenders to both verify the borrower’s income and ensure the borrower has the ability to repay the loan over its full term.⁹⁷ While this provision seems perfectly logical, in the height of the housing boom of 2006 through 2007, lenders were not verifying either the borrower’s ability to repay or the borrower’s income.⁹⁸ As a result, “low-[document] loans accounted for roughly 40% of newly[-]issued mortgages . . . [.]” and “[f]or even riskier subprime loans, stated income loans may have

2013) (to be codified at 12 C.F.R. pt. 1026); Ability-to-Repay and Qualified Mortgage Standards Under the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 35,430–506 (June 12, 2013) (to be codified at 12 C.F.R. pt. 1026).

⁹⁴ See generally Qualified Mortgage Definition for HUD Insured and Guaranteed Single Family Mortgages, 78 Fed. Reg. 59,890 (Sept. 30, 2013) (to be codified at 24 C.F.R. pts. 201, 203, 1005, 1007) (discussing the safe harbor presumptions). Clearly, a tension exists with respect to making loans available to qualified buyers while also ensuring that the buyer has the ability to pay. In October 2014, federal agencies loosened regulations to increase the flow of housing credit. “The government is in a tight spot. Some six years after the financial crisis, thousands of apparently creditworthy borrowers are being shut out of the housing market because they cannot get mortgages.” Peter Eavis, *U.S. Loosens Reins, but Mortgage Lenders Want More Slack*, N.Y. TIMES (Oct. 22, 2014), available at <http://dealbook.nytimes.com/2014/10/22/u-s-loosens-reins-but-mortgage-lenders-want-more-slack/>, archived at <http://perma.cc/C5Z7-6TAG>.

⁹⁵ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 2139–41 (2010) (codified at 15 U.S.C. § 1639b); Linda Singer, Zachary Best, & Nina Simon, *Breaking Down Financial Reform: A Summary of the Major Consumer Protection Portions of the Dodd-Frank Wall Street Reform and Consumer Protection Act*, 14 J. CONSUMER & COM. L. 2, 6 (2010).

⁹⁶ Singer, *supra* note 95, at 6.

⁹⁷ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 2142–43 (codified at 15 U.S.C. § 1639c(a)).

⁹⁸ Singer, *supra* note 95, at 7.

exceeded 50%.”⁹⁹ Moreover, evidence suggests that some banks were not only willing to accept falsified loan applications, but were even willing to help create them.¹⁰⁰ A sample of 100 stated-income loans, when compared to IRS records, found that “90% of the income was exaggerated by 5% or more . . . [and] almost 60% of the stated amounts were exaggerated by more than 50%.”¹⁰¹

Dodd-Frank also bans prepayment penalties for adjustable rate and higher cost mortgages that are not “qualified mortgage[s],” and a lender may not offer a fixed rate qualified loan with a prepayment penalty without also offering the borrower a loan without a prepayment penalty.¹⁰² Further, it addresses the teaser, or initial low payment rate, which is often dramatically adjusted upward after the introductory period.¹⁰³ Under Dodd-Frank, lenders must provide a good faith estimate of the amount the monthly payment will be *after* it adjusts or resets.¹⁰⁴

The Act also provides additional protections. Another predatory practice Dodd-Frank addresses is including premiums, financed into the mortgage’s principal, for expensive and often worthless credit or other insurance.¹⁰⁵ The Act also requires six months’ notice before the mortgage interest rate resets from a fixed to a variable rate, as well as the establishment of an escrow account for payment of taxes and insurance

⁹⁹ Stephane Fitch, *No-Doc Mortgages Are Back?!*, FORBES (July 2, 2010), available at http://www.forbes.com/2010/07/02/return-liar-loans-personal-finance-no-doc_print.html, archived at <http://perma.cc/945V-2DD5>; Singer, *supra* note 95, at 7.

¹⁰⁰ Singer, *supra* note 95, at 7.

¹⁰¹ Statement by Steven Krystofiak, Pres., Mortg. Brokers Ass’n for Responsible Lending, to the Federal Reserve (Aug. 1, 2006), available at http://www.federalreserve.gov/secrs/2006/august/20060801/op-1253/op-1253_3_1.pdf, archived at <http://perma.cc/LG8E-37RQ> (emphasis removed).

¹⁰² Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 2149–53 (2010).

¹⁰³ *Id.* at 2153–54.

¹⁰⁴ *Id.* at 2154.

¹⁰⁵ Singer, *supra* note 95, at 7. Before Dodd-Frank, it was common practice in the subprime market to charge exorbitant premiums for unnecessary insurance, such as credit insurance, and finance these premiums into the mortgage principal. *Id.* But see 124 Stat. at 2151 (stating that residential mortgage loans are to include credit unemployment insurance where “the unemployment insurance premiums are reasonable, the creditor receives no direct or indirect compensation in connection with the unemployment insurance premiums, and the unemployment insurance premiums are paid pursuant to another insurance contract and not paid to an affiliate of the creditor”). Under Dodd-Frank, no residential mortgage loan secured by the homeowner’s principal dwelling may include financing of “any credit life, credit disability, credit unemployment, or credit property insurance, or any other accident, loss-of-income, life, or health insurance[.]” 124 Stat. at 2149–50.

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for certain higher-cost mortgages.¹⁰⁶ Unfortunately, during the housing boom, many homeowners refinanced into a loan they believed had a lower monthly payment, only to discover that their payments were actually higher because of taxes and insurance.¹⁰⁷

The Dodd-Frank Act also puts restrictions on the use of force-placed insurance, another predatory practice previously used by lenders.¹⁰⁸ Housing counselors and pro bono attorneys frequently encounter homeowners in disputes with their lenders over this issue.¹⁰⁹ Force-placed insurance is expensive hazard insurance that the servicer imposes.¹¹⁰ While the mortgage contract may allow this insurance, all too frequently, homeowners discover that this expensive insurance has been force-placed even when the homeowner already has the required insurance or when the servicer fails to cancel the force-placed policy after the homeowner obtains the required insurance.¹¹¹

One of the most interesting and potentially most effective aspects of this legislation is that state attorneys general can enforce its provisions in state court.¹¹² It is too soon to assess Dodd-Frank's impact, but it

¹⁰⁶ *Id.* at 2154, 2178–81.

¹⁰⁷ Singer, *supra* note 95, at 8.

¹⁰⁸ 124 Stat. at 2182–84 (amending 12 U.S.C. § 2605 (2006)). CFPB issued regulations amending Regulation X and implementing the force-placed insurance restrictions, effective January 10, 2014. Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. 10891–92 (Feb. 14, 2013) (to be codified at 12 C.F.R. pt. 1024).

¹⁰⁹ See generally Stacy Johnson, *Next Bank Scandal? Forced-Placed Homeowners Insurance*, MONEY TALKS NEWS (Nov. 15, 2010), <http://www.moneytalksnews.com/2010/11/15/next-bank-rip-off-forced-place-homeowners-insurance>, archived at <http://perma.cc/U3HU-PLR7> (discussing problems that are present when individuals are forced into foreclosure).

¹¹⁰ Singer, *supra* note 95, at 8.

¹¹¹ See Jeff Horwitz, *New Questions About Banks' Force-Placed Insurance Deals*, AM. BANKER (Apr. 11, 2011), http://www.americanbanker.com/issues/176_70/force-placed-insurance-1035821-1.html?zkPrintable=1&nopagination=1, archived at <http://perma.cc/44RH-ZP3L> (analyzing the concept of forced-placed insurance); Jeff Horwitz, *Ties to Insurers Could Land Mortgage Servicers in More Trouble*, AM. BANKER (Nov. 9, 2010), http://www.americanbanker.com/issues/175_216/ties-to-insurers-servicers-in-trouble-1028474-1.html, archived at <http://perma.cc/SQ2E-PBHF> (explaining the problems that are present with forced-placed insurance). See generally Johnson, *supra* note 109 (describing forced-placed insurance). Force-placed insurance is generally much more expensive and covers much less than homeowners insurance obtained by a borrower. See *What's in a Mortgage Payment?* MORTG. BANKERS ASS'N, <http://www.homeloanlearningcenter.com/mortgagebasics/whatsinamortgagepayment.htm> (last visited Nov. 19, 2011), archived at <http://perma.cc/VQW8-YWYQ> (providing a description of what a mortgage payment is).

¹¹² Singer, *supra* note 95, at 11. Singer discusses:

State attorneys general, and, as applicable, state regulators, can enforce not only their own non-preempted state laws against federally-chartered banks and thrifts, but also the CFPB regulations (though not

specifically addresses many of the predatory practices seen during the housing boom—abuses that have contributed to the foreclosure crisis we continue to experience.¹¹³

In addition to provisions outlined above, Dodd-Frank responded to criticisms that relaxed oversight and regulation contributed to the foreclosure crisis. Specifically, Section 312 of Dodd-Frank mandates the transfer of all functions of the Office of Thrift Supervision (“OTS”) by merging it with the Office of the Comptroller of the Currency (“OCC”), the Federal Deposit Insurance Corporation (“FDIC”), the Federal Reserve Board, and the CFPB.¹¹⁴ The OTS was a government agency but did not receive a budget; instead, it was funded or paid by the financial institutions it regulated, thus creating a potential conflict of interest since it “depend[ed] on fees paid by the banks it regulates and compete[d] with other regulators to land the largest financial firms,” and was considered to have “an aggressively deregulatory stance toward the mortgage lenders it regulated.”¹¹⁵ A program of “This American Life” described a meeting where federal regulators were announcing a campaign to lessen regulation to attract clients. At this meeting, a photo was taken with OTS Director Gilleran holding a chainsaw to indicate OTS’ willingness to cut through regulations.¹¹⁶ Not surprisingly, some of the mortgage lenders with the most notorious and toxic mortgage products—such as Countrywide and Washington Mutual—were among the financial institutions regulated by OTS.¹¹⁷ Despite this regulatory change, some argue that these rules may not prevent the next crisis. For example, while the regulation tightened oversight of larger financial

the general ban on unfair, deceptive, or abusive acts or practices in the absence of the rule). Act §§ 1042(a)(2), 1047. Thus, federal law and regulations provide both an engine and a floor, not a ceiling, for enforcement.

Id. (footnote omitted).

¹¹³ *Id.* at 13. The Financial Crisis Inquiry Commission’s report suggested that predatory practices during the housing boom, such as lenders offering complex mortgage products while targeting high-risk buyers, contributed to the current foreclosure crisis. FINANCIAL CRISIS INQUIRY REPORT, *supra* note 22, at 447.

¹¹⁴ Dodd-Frank Wall Street Reform and Consumer Protection Act, § 312, Pub. L. No. 111-203, 124 Stat. 1376, 1522 (2010) (to be codified at 12 U.S.C. § 5412).

¹¹⁵ Binyamin Appelbaum & Ellen Nakashima, *Banking Regulator Played Advocate over Enforcer: Agency Let Lenders Grow Out of Control, Then Fail*, WASH. POST (Nov. 23, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/11/22/AR2008112202213.html>, archived at <http://perma.cc/P5M9-CXGH>.

¹¹⁶ *This American Life: The Watchmen*, THE AMERICAN LIFE (June 5, 2009), <http://www.thisamericanlife.org/radio-archives/episode/382/transcript>, archived at <http://perma.cc/963M-4JD5>.

¹¹⁷ See Appelbaum & Nakashima, *supra* note 115 (analyzing OTS’s effectiveness as a regulator).

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institutions, it exempted “small[] banks [who] could still choose their own regulator . . . [and] seek out the most lenient oversight.”¹¹⁸

As noted above, the credit rating agencies (“CRAs”), such as Moody’s, Standard & Poor’s, and Fitch, were also thought to contribute to the financial crisis through ratings of mortgage-backed securities which were ultimately found to be vastly less creditworthy than their original rating indicated, certainly not the “safe investment” that the rating implied.¹¹⁹ Similar to criticism of the payment system of the OTS, where the regulated entities choose and pay the agency that regulates them, the CRAs (aside from Egan-Jones) employ an “issuer pays” model: the “certified CRAs are paid by the issuers of the bonds that the CRA rates.”¹²⁰ In fact, the Justice Department, the District of Columbia, and sixteen states, including Indiana and Illinois, have joined together to sue Standard & Poor’s for “misrepresenting its independence and objectivity when it placed high ratings on what were, in many cases, ‘worthless securities.’”¹²¹

Alternatives to this payment model have been proposed, and Dodd-Frank required the “[Securities and Exchange Commission (SEC)] and the Government Accountability Office (GAO) [to] submit reports that would investigate alternative business (revenue [and] compensation)

¹¹⁸ Daniel Wagner & Stevenson Jacobs, *New Financial Rules Might Not Prevent the Next Crisis*, HUFF. POST (May 23, 2010), http://www.huffingtonpost.com/2010/05/23/new-financial-rules-might_n_586511.html, archived at <http://perma.cc/9H6J-RQZL>.

¹¹⁹ See generally Lawrence J. White, *Credit Rating Agencies: An Overview* 2, 20–23 (N.Y.U. Stern Sch. Bus., Working Paper, Revised Draft May 19, 2013), available at http://web-docs.stern.nyu.edu/old_web/economics/docs/workingpapers/2013/White_CRAsARFE_Jun2013.pdf, archived at <http://perma.cc/B8F9-25WV> (discussing CRAs and their role in the recent financial crisis).

¹²⁰ *Id.* at 9.

¹²¹ Complaint at 3–5, *State v. McGraw Hill Fin., Inc.*, No. 49D03-1306-PL-025757 (Marion Co. Sup. Ct. June 27, 2013); see Kristena Hansen, *Arizona, Other States Sue Standard & Poor’s Over Ratings on Mortgage Investments*, PHOENIX BUS. J. (Feb. 5, 2013), <http://www.bizjournals.com/phoenix/news/2013/02/05/arizona-other-states-sue-standard.html>, archived at <http://perma.cc/4HCE-QZP2> (discussing Arizona’s entry into the suit); see also Jessica M. Karmasek, *Majority of States Suing S&P Say They’re Handling Case In-House*, LEGAL NEWSLINE (Mar. 18, 2013), <http://legalnewsline.com/issues/financial-crisis/240202-majority-of-states-suing-sp-say-theyre-handling-case-in-house>, archived at <http://perma.cc/68FP-A3AK> (providing details on how many states have joined the lawsuit); Press Release, Office of the Ind. Att’y Gen., *Indiana Files Lawsuit Against Standard & Poor’s* (June 28, 2013), available at http://www.in.gov/activecalendar/EventList.aspx?view=EventDetails&eventidn=108778&information_id=183780&type=&syndicate=syndicate (last visited Apr. 12, 2014), archived at <http://perma.cc/89T-WC3W> (providing details about Indiana’s suit against Standard & Poor’s); Rob Varnon, *U.S. Ct and 15 States Suing S&P Over MBS Ratings During Housing Boom*, CONN. POST (Feb. 5, 2013), <http://blog.ctnews.com/financialmines/2013/02/05/its-official-u-s-suing-sp-over-mbs-ratings-during-housing-boom/>, archived at <http://perma.cc/MKG8-3QF6>.

models for CRAs”¹²² One proposal is to have the Securities and Exchange Commission (“SEC”) randomly select from a list of qualified CRAs for a particular bond issuer and that issuer would pay the CRA but also be able to hire additional CRAs.¹²³ Nonetheless, at this time, CRAs (except Egan-Jones) are still paid by the issuer that seeks to have its bond rated.¹²⁴

IV. STATE RESPONSES TO THE MORTGAGE CRISIS

States have also undertaken efforts to mitigate the effects of the foreclosure crisis. These efforts, described below, have made a significant contribution to addressing the fallout of the crisis and hardships faced by homeowners. Part IV.A starts by introducing robo-signing and servicer abuses.¹²⁵ Next, Part IV.B attempts to protect individuals from these practices.¹²⁶ Part IV.C further discusses the Midwestern attempts to solve the foreclosure problem.¹²⁷ Finally, Part IV.D introduces the release of the Indiana Foreclosure Prevention Network.¹²⁸

A. *Robosigning, Servicer Abuses, and the National Mortgage Foreclosure Multistate*

In October 2010, a number of newspapers began using the term “robo-signing” to refer to the practice of a Bank of America official signing up to eight thousand foreclosure documents a month without reading them.¹²⁹ Other allegations arose regarding improperly notarized documents and forged signatures.¹³⁰ Additional major banks, including GMAC Mortgage and JPMorgan Chase, joined Bank of America in halting tens of thousands of foreclosure cases after similar problems in

¹²² White, *supra* note 119, at 28–30.

¹²³ *Id.* at 30.

¹²⁴ *Id.* at 9.

¹²⁵ See *infra* Part IV.A (explaining the concept of robo-signing).

¹²⁶ See *infra* Part IV.B (discussing the Indiana Mortgage Task Force).

¹²⁷ See *infra* Part IV.C (analyzing Midwestern attempts to solve foreclosure problems).

¹²⁸ See *infra* Part IV.D (discussing the Prevention Network and other foreclosure hotlines).

¹²⁹ See, e.g., Jenifer B. McKim, *Lenders on Autopilot: Using Robo-Signers to Process Thousands of Foreclosures Opens Banks Up to Legal Risks*, BOS. GLOBE, Nov. 2, 2010, at B7 (defining “robo-signers” as employees of lenders who blindly initial foreclosure paperwork without reading the documents).

¹³⁰ See Ariana Eunjung Cha & Dina Elboghady, *50 State Attorneys General Announce Foreclosure Probe*, WASH. POST (Oct. 13, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/10/12/AR2010101205604.html>, archived at <http://perma.cc/T4UD-X6YE> (reporting on a multistate investigation aimed at determining whether lenders have been forging signatures and improperly notarizing documents).

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their foreclosure departments became public.¹³¹ A Bank of America executive admitted, “I typically don’t read them because of the volume that we sign.”¹³² In the twenty-three states that utilize a judicial foreclosure proceeding, this admission raised questions as to whether these entities were submitting fraudulent documents to the court.¹³³ The Summary Judgment and Default Judgment Affidavits, in which the issue arose, require the signer affirm, under penalty of perjury, that he or she has authorization to make the affidavit, he or she has personal knowledge of the content of the affidavit, and the information contained in the affidavit is factually correct.¹³⁴

The general outrage expressed in response to the robo-signing debacle is understandable given the importance and implications of this practice. It is critical to both the homeowner and the judicial process that the information in these affidavits be accurate. The affidavit states the critical elements of the plaintiff’s case: the plaintiff is the holder of the promissory note and thereby has the right to sue; the defendant is in default; and the total amount of the unpaid principal balance and the

¹³¹ See McKim, *supra* note 129 (discussing how other banks followed Bank of America’s lead in handling the foreclosure problems).

¹³² Alan Zibel, *Bank of America Delays Foreclosures in 23 States*, WASH. TIMES (Oct. 2, 2010), <http://www.washingtontimes.com/news/2010/oct/2/bank-america-delays-foreclosures-23-states/>, archived at <http://perma.cc/LMK5-5CUR>. The FHA suggests that Fannie Mae’s failure to oversee its attorney network through an operational risk management program contributed to the robo-signing debacle. See FED. HOUS. FIN. AGENCY, OFF. OF INSPECTOR GEN., EVALUATION OF FHFA’S OVERSIGHT OF FANNIE MAE’S MANAGEMENT OF OPERATIONAL RISK 12 (Sept. 23, 2011), available at <http://www.fhfa.gov/Content/Files/EVL-2011-004.pdf>, archived at <http://perma.cc/6ZF-5837> (discussing Fannie Mae’s lack of an operational risk management program).

¹³³ EVALUATION OF FHFA’S OVERSIGHT OF FANNIE MAE, *supra* note 132, at 20 (discussing the possibility of fraudulent documents being filed with the courts); Zibel, *supra* note 132 (distinguishing the “lengthy court process” in these twenty three states from non-judicial foreclosure states where lenders can quickly foreclose on delinquent borrowers).

¹³⁴ *Robo-Signing, Chain of Title, Loss Mitigation, and Other Issues in Mortgage Servicing: Hearing Before the Subcomm. on Hous. And Cmty. Opportunity*, 111th Cong. 13 (2010) (testimony of Adam J. Levitin, Professor of Law at Georgetown University of Law Center), <http://www.gpo.gov/fdsys/pkg/CHRG-111hhrg63124/pdf/CHRG-111hhrg63124.pdf>, archived at <http://perma.cc/JBD3-FVVH>. “When a servicer files an affidavit that claims to be based on personal knowledge, but is not in fact based on personal knowledge, the servicer is committing a fraud on the court, and quite possibly perjury.” *Id.* The affidavit must state: “I AFFIRM, UNDER THE PENALTIES FOR PERJURY, THAT THE FOREGOING REPRESENTATIONS ARE TRUE.” See, e.g., Memorandum in Support of Plaintiff’s Motion by Plaintiff, a “Person Entitled to Enforce” Note Pursuant to IC § 26-1-3.1-301, for Summary and Default Judgment Entry and Decree of Foreclosure at “Affidavit,” *Bank of N.Y. Mellon v. Smidt*, No. 29D01-1111-MF-11408 (Sup. Ct. Hamilton Co. Nov. 9, 2012) [hereinafter Smidt Memorandum].

due interest is owed.¹³⁵ The affidavit also delineates advances, late charges, and costs of collection.¹³⁶ Thus, if incorrect information is presented to the court, the homeowner may be adjudged to owe more money in arrearage after the home is sold than is actually owed, resulting in greater ongoing financial distress, and in many cases, the necessity that the homeowner file for bankruptcy protection.¹³⁷

Second, the homeowner is unrepresented in the vast majority of foreclosure cases.¹³⁸ While some jurisdictions may have pro bono services available to the homeowner, he or she is in financial distress by facing foreclosure and is typically unable to afford to hire a private attorney.¹³⁹ This is important because when both parties secure attorneys, the homeowner's attorney will raise issues of inaccuracy or

¹³⁵ *Robo-Signing, Chain of Title, Loss Mitigation, and Other Issues in Mortgage Servicing*, *supra* note 134, at 13.

¹³⁶ See Smidt Memorandum, *supra* note 134 (detailing the information that must be stated in an affidavit); *Robo-Signing, Chain of Title, Loss Mitigation, and Other Issues in Mortgage Servicing*, *supra* note 134, at 15 (providing commentary on the problem of servicers charging "junk fees" related to foreclosure actions and the "growing evidence of servicers requesting payment for services not performed or for which there was no contractual right to payment").

¹³⁷ A federal bankruptcy court found:

There is no doubt that the unrelenting actions of [the mortgage servicer] drove the [homeowners] into bankruptcy. They were not delinquent on any other debts, and they filed bankruptcy as an "eleventh hour" mechanism to prevent the loss of their home. [The mortgage servicer's] conduct throughout this factual scenario represents the most callous and egregious effort to collect an indebtedness that was never owed that this court has been called upon to review. Succinctly stated, [the mortgage servicer's] incompetent servicing tactics converted a loan transaction that was being paid like "clockwork" to a loan that was virtually impossible to pay, particularly for most modest income borrowers.

In re Cothorn, 442 B.R. 494, 499 (Bankr. N.D. Miss. 2010).

¹³⁸ *The Need for National Mortgage Servicing Standards: Hearing Before S. Subcomm. on Hous., Trans., and Cmty. Dev.* 22, n.1 (May 12, 2011) (testimony of Diane E. Thompson, counsel for the National Consumer Law Center, http://www.nclc.org/images/pdf/foreclosure_mortgage/mortgage_servicing/testimony-thompson-mortgage-servicing-standards.pdf, archived at <http://perma.cc/75CG-LR9K> [hereinafter *The Need for National Mortgage Servicing Standards*]).

¹³⁹ Brian Reed, *Lawyers Make Pro Bono Leap into Foreclosures*, NPR (May 17, 2009), <http://www.npr.org/templates/story/story.php?storyId=104063764>, archived at <http://perma.cc/6RAE-FWET>. In Indiana, the Supreme Court and the OAG partnered together to train more than 1000 pro bono attorneys to represent homeowners in foreclosure settlement conferences. Press Release, Sup. Ct. of Ind., 1000 Trained to Handle Foreclosure Cases: Indiana Supreme Court Offers New Pledge of Support (Oct. 19, 2009), available at <http://www.in.gov/judiciary/press/2009/1019b.html>, archived at <http://perma.cc/5AXG-V7M2>.

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mortgage fraud to the judge's attention.¹⁴⁰ In contrast, an unrepresented homeowner is not in a position to know if he or she has been victimized by fraud or if the information the plaintiff presented is correct—not only does the homeowner fail to raise objections, but in many instances, he or she does not even enter an appearance in the case.¹⁴¹

It is not the judge's role to represent the homeowner, and many judges rely on the honesty and integrity of the lender-plaintiffs and their attorneys.¹⁴² In fact, before the robo-signing debacle, many judges assumed the paperwork presented to them was correct and therefore did not examine the claims of lender-plaintiffs carefully, almost rubber-stamping uncontested foreclosure actions.¹⁴³ Not surprisingly, attorneys representing lenders in foreclosure cases have also come under fire for allegedly filing fraudulent documents in foreclosure actions.¹⁴⁴

In response to the serious allegations involved in the execution of robo-signed documents, attorneys general from all fifty states, as well as a number of federal agencies, joined together in a multistate investigation in October 2010 to examine the practices of mortgage lenders implicated in the robo-signing debacle.¹⁴⁵ This investigation ended in a joint federal

¹⁴⁰ See *The Need for National Mortgage Servicing Standards*, *supra* note 138, at 22 (“Judges are unlikely to detect errors in a servicer's documentation where the homeowner goes unrepresented”).

¹⁴¹ *Robo-Signing, Chain of Title, Loss Mitigation, and Other Issues in Mortgage Servicing*, *supra* note 134, at 12–13. Levitin explains that “the norm in foreclosure cases is a default judgment.” *Id.* at 12. Further, “[m]ost borrowers do not appear in court or contest their foreclosures, and not all of those who do are represented by competent counsel, not least because of the difficulties in paying for counsel.” *Id.* at 12–13.

¹⁴² *The Need for National Mortgage Servicing Standards*, *supra* note 138, at 22.

¹⁴³ See Dean Calbreath, *Foreclosure Procedure in Review: ‘Foreclosure Mills’ and ‘Robo-Signers’ Raise Questions About Integrity of the Paperwork with Homeowners, Buyers and Investors*, SAN DIEGO UNION-TRIB., Oct. 31, 2010, at C1 (discussing the judges’ lack of a role in foreclosures).

¹⁴⁴ John Schwartz, *Judges Berate Bank Lawyers in Foreclosures*, N.Y. TIMES, Jan. 10, 2011, at A1, available at <http://www.nytimes.com/2011/01/11/business/11lawyers.html?page-wanted=all&r=0>, archived at <http://perma.cc/R4WT-GY7R>.

¹⁴⁵ See PHILIP A. LEHMAN, NATIONAL MORTGAGE SETTLEMENT: EXECUTIVE SUMMARY OF MULTISTATE/FEDERAL SETTLEMENT OF FORECLOSURE MISCONDUCT CLAIMS 1, available at http://www.atg.wa.gov/uploadedFiles/Home/About_the_Office/Cases/National_Mortgage_Settlement/National_Settlement_Executive_Summary.pdf, archived at <http://perma.cc/8VRS-ZXE5> (discussing the nationwide effort to investigate mortgage lenders); Press Release, Nat’l Ass’n of Attorneys Gen., 50 States Sign Mortgage Foreclosure Joint Statement (Oct. 13, 2010), available at <http://www.naag.org/joint-statement-of-the-mortgage-foreclosure-multistate-group.php>, archived at <http://perma.cc/N7HJ-5BQH> (“Fifty state Attorneys General have joined this coordinated multistate effort.”). This group includes the Department of Justice and the Department of Housing and Urban Development. Press Release, Dep’t of Justice, Office of Public Affairs, Federal Government and State Attorneys General Reach \$25 Billion Agreement with Five Largest Mortgage Servicers to Address Mortgage Loan Servicing and Foreclosure Abuses (Feb. 9, 2012),

and multistate settlement against the five largest lending servicers, and is the second-largest civil settlement ever obtained by the state attorneys general.¹⁴⁶ The results of this investigation confirmed bank representatives routinely executed documents without personal knowledge of the facts contained therein and, frequently, without the presence of a notary public, in violation of law.¹⁴⁷

The settlement includes five major programs. First, \$1.5 billion will be distributed to homeowners who were victims of unfair mortgage servicing or foreclosure practices, each of whom will receive approximately \$2000.¹⁴⁸ Second, \$2.5 billion will be distributed to the forty-nine participating states, which is to be used for state foreclosure prevention efforts such as housing counseling, help lines, mediation programs, legal services, and assistance for blighted neighborhoods.¹⁴⁹

Third, under the settlement, the banks are required to expend at least \$3 billion on refinance programs “[t]o assist homeowners who are not delinquent on their payments but cannot refinance to lower rates because of negative equity.”¹⁵⁰ To qualify for this refinance program, eligible homeowners “must be current on mortgage payments, have a

available at <http://www.justice.gov/opa/pr/2012/February/12-ag-186.html>, archived at <http://perma.cc/3MAA-66LP>.

¹⁴⁶ *Federal Government & Attorneys General Reach Landmark Settlement with Major Banks*, NAT’L MORTGAGE SETTLEMENT (DEC. 8, 2014), <http://www.nationalmortgage-settlement.com/>, archived at <http://perma.cc/T3QC-MLBC>. Bank of America Corp., Citigroup Inc., J.P. Morgan Chase & Company, Residential Capital, LLC, and Wells Fargo & Company represent approximately 60% of the mortgage servicing market. Adam J. Levitin & Tara Twomey, *Mortgage Servicing*, 28 YALE J. ON REG. 1, 25, n.73 (2011) (indicating that 60% of the market is comprised of the five largest mortgage providers); Nat’l Ass’n of Attorneys Gen. State Attorneys General, *Feds Reach \$25 Billion Settlement with Five Largest Mortgage Servicers on Foreclosure Wrongs* (2013), available at <http://naag.org/state-attorneys-general-feds-reach-25-billion-settlement-with-five-largest-mortgage-servicers-on-foreclosure-wrongs.php>, archived at <http://perma.cc/KLT7-R23P> (explaining the \$25 billion settlement with the mortgage servicers); LEHMAN, *supra* note 145, at 1 (claiming that the settlement “represents the largest financial recovery obtained by the attorneys general except for the 1998 Master Tobacco Settlement”).

¹⁴⁷ Evan Bedard, *Problems in Mortgage Servicing from Modification to Foreclosure, Part II; Statement by Sheila C. Bair*, LOANSAFE.ORG (Dec. 1, 2010), <http://www.loansafe.org/problems-in-mortgage-servicing-from-modification-to-foreclosure-part-ii-statement-by-sheila-c-bair>, archived at <http://perma.cc/73XU-SPZ2>.

¹⁴⁸ LEHMAN, *supra* note 145, at 4. These homeowners do not have to release any private claims they may have against their lender to receive this payment. *Id.*

¹⁴⁹ *Id.* Oklahoma was the only state that did not join in the foreclosure settlement. Loren Berlin & Emily Peck, *National Mortgage Settlement: States, Big Banks Reach \$25 Billion Deal [Update]*, HUFF. POST (Feb. 9, 2012), http://www.huffingtonpost.com/2012/02/09/national-mortgage-settlement_n_1265292.html, archived at <http://perma.cc/45NC-MPJK>.

¹⁵⁰ LEHMAN, *supra* note 145, at 2.

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loan to value ratio in excess of 100%, and must have a current interest rate in excess of 5.25%.”¹⁵¹

Fourth, the settlement provides for an enhanced loss-mitigation program, in which the five banks will expend approximately \$17 billion in relief for persons who are delinquent on their mortgages.¹⁵² The banks are required to spend 60% of the \$17 billion to reduce the principal balance of under-water home loans (principal reduction), and an additional \$5.2 billion for other forms of homeowner relief, such as facilitation of short sales and homeowner unemployment payment forbearance which defers payments for homeowners who have lost or are between jobs.¹⁵³

Finally, the settlement includes more than forty pages of significant reforms of mortgage loan servicing. Besides the robo-signing allegations, homeowners have long been plagued by a variety of servicer errors and abuses.¹⁵⁴ The Indiana OAG, as well as other offices of attorneys general, legal services programs, and housing counselors, receive thousands of homeowner complaints against servicers.¹⁵⁵ Many of these borrowers are facing foreclosure and are seeking to save his or her home through a loss-mitigation option.¹⁵⁶ Certainly the worst servicer abuse is wrongful or erroneous foreclosure. One expert analyst in the foreclosure arena explains it this way:

At this week’s hearings on mortgage servicing and robo-signing . . . members of Congress asked the usual unimaginative question, “[A]ren’t all these borrowers delinquent, so that foreclosure is inevitable?” The answer to this question comes in two parts:

- (1) No.
- (2) Even homeowners who are indeed delinquent should not be foreclosed in the current housing market if any reasonable workout is possible.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 3.

¹⁵⁵ Press Release, Nat’l Consumer Law Ctr., Mortgage Servicers Continue to Wrongfully Foreclose on Homeowners According to a Recent National Survey of Consumer Attorneys (Feb. 22, 2012), <http://www.nclc.org/images/pdf/pr-reports/pr-wrongful-foreclosure-survey-results.pdf>, archived at <http://perma.cc/SK8F-ZTXK>.

¹⁵⁶ *RoboSigning, Chain of Title, Loss Mitigation, and Other Issues in Mortgage Servicing*, supra note 134, at 7 (explaining that, “[l]oss mitigation is considered an *alternative to foreclosure*, and includes activities such as repayment plans, loan modifications, short sales, and deeds in lieu of foreclosure”).

Erroneous foreclosures thus come in two flavors. Foreclosing someone who is not actually behind, or whose default was precipitated by junk fees, unnecessary or overpriced forced-place insurance, or payment application errors (common in bankruptcy cases) is obviously wrong. Equally wrong, however, are foreclosures of homeowners who have sufficient income to fund a modified loan that will produce significantly higher investor returns than a distressed foreclosure sale. Contrary to the pronouncements of servicers and Treasury officials, modification and workout consideration is not happening before foreclosure starts, it runs on a parallel track with foreclosure processes. Frequently, the foreclosure train wins the race.¹⁵⁷

The Servicing Standards contain a number of critical reforms, found in Exhibit A of the settlement Consent Judgment.¹⁵⁸ First, in response to the robo-signing debacle, the settlement delineates standards for documents used in foreclosure and bankruptcy proceedings.¹⁵⁹ For example, the servicer must ensure that factual assertions made in foreclosure pleadings or bankruptcy proofs of claim are accurate, complete, and supported by reliable evidence that substantiates the homeowner's default and the servicer's right to foreclose.¹⁶⁰ Further, all affidavits, sworn statements, and declarations must be based on personal knowledge and submitted in accordance with the applicable state and federal law.¹⁶¹

Another important reform requires servicers to send homeowners a notice before foreclosure that includes a summary of loss-mitigation options that were offered to the homeowner, facts supporting the lender's right to foreclose, and a plain-language account summary.¹⁶² The notice must also inform the homeowner that he or she may receive certain documents upon request, such as a copy of the loan note and the identity of the investor holding the loan.¹⁶³

¹⁵⁷ Alan White, *Erroneous Foreclosures*, CREDIT SLIPS (Nov. 18, 2010, 9:38 AM), <http://www.creditslips.org/creditslips/2010/11/erroneous-foreclosures.html>, archived at <http://perma.cc/X7R2-4Z59>.

¹⁵⁸ See generally *United States v. Bank of Am.*, No. 1:2012cv00361, Ex. A (D.D.C. 2012), <http://www.justice.gov/opa/documents/bank-of-america-consent-judgement.pdf>, archived at <http://perma.cc/624L-TTQD> (providing the critical reforms).

¹⁵⁹ LEHMAN, *supra* note 145, at 3.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

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One of the most important reforms restricts “dual-tracking,” a practice in which the lender continues to pursue a judgment for foreclosure in court while simultaneously negotiating with the homeowner to preserve his or her home through a loss-mitigation option.¹⁶⁴ Needless to say, this practice creates a tremendous amount of confusion at best and the appearance of deceit and unfairness at worst.¹⁶⁵ Under this dual-track system, the homeowner may receive a judgment for foreclosure while working in earnest with the servicer to provide information about the homeowner’s eligibility for a loss-mitigation workout.¹⁶⁶

Under the settlement, banks must thoroughly evaluate the homeowner for available loss-mitigation options before referral to an attorney to file for foreclosure.¹⁶⁷ The servicer must cease all collection efforts if the homeowner is under review for a modification, and the servicer must halt foreclosure activities if the homeowner is current on a trial modification, forbearance, repayment plan, or if a short sale or deed-in-lieu of foreclosure has been approved by all parties.¹⁶⁸ Further, if a sheriff sale is delayed for loss-mitigation purposes, the servicer must notify the homeowner of any new sale date.¹⁶⁹

Another important contribution of the settlement is the establishment of specific timelines for loan modification and short sale applications.¹⁷⁰ Further, the servicer must assign a single point of contact (“SPOC”) to most first-lien borrowers and establish e-portals so that homeowners may be informed of their loan modification status and to ensure that documents submitted for loan modification consideration may be tracked.¹⁷¹

These servicer reforms will be of tremendous assistance because one of the most problematic and ubiquitous of servicer abuses involves the

¹⁶⁴ See Dean Calbreath, *Some Want to Stop Dual Track of Loan Mods, Foreclosures: Vargas Stopped Bill That Would Have Held Off Home Auctions*, SAN DIEGO UNION-TRIB. (Sept. 17, 2011), <http://www.signonsandiego.com/news/2011/sep/17/some-want-stop-dual-track-loan-mods-foreclosures/>, archived at <http://perma.cc/9TSB-AA2M> (explaining the “dual-track system”).

¹⁶⁵ See *id.* (noting that the dual-track system can be “unnecessarily confusing”).

¹⁶⁶ *Id.*

¹⁶⁷ LEHMAN, *supra* note 145, at 3.

¹⁶⁸ See *id.* at 1, 3 (noting servicers’ deceptive practices and the settlement’s attempt to curb those practices).

¹⁶⁹ *Id.* at 2–3.

¹⁷⁰ *Id.* at 3.

¹⁷¹ *Id.*

difficulty homeowners have in communicating with servicers.¹⁷² To become eligible for a modification or other loss-mitigation option, the homeowner must fax a great deal of information to the lender and the court, including, among other things, recent bank account information and tax returns.¹⁷³ Frequently, the servicer tells the homeowner the servicer failed to receive the information and the homeowner is repeatedly asked to send it again.¹⁷⁴ In some instances, this communication error involves the transmission of a required signature on the document in which the homeowner accepts a loss-mitigation option.¹⁷⁵ The homeowner sends the signed document to the servicer, often more than once, and then receives a notice that his or her loan modification was denied because the signed document was not sent in a timely manner.¹⁷⁶ Homeowners are not the only ones who experience communication problems in the foreclosure process; the OAG, housing counselors, and legal services attorneys also experience communication breakdowns with servicers.¹⁷⁷ Thus, the settlement also requires the establishment and use of a secure online e-portal system to enhance and track loss mitigation related communication.¹⁷⁸

¹⁷² Complaint at 28, *United States v. Bank of Am.*, No. 1:12-cv-00361 (D.D.C. 2012), available at http://www.justice.gov/crt/about/hce/documents/scra_global_servicing_comp.pdf, archived at <http://perma.cc/ARF3-ZSLR>.

¹⁷³ See IND. CODE § 32-30-10.5-4.7 (2012) (defining the “loss mitigation package”); *Foreclosure Notices and Loss Mitigation Package*, IND. FORECLOSURE PREVENTION NETWORK (July 7, 2011), <http://www.877gethope.org/news/foreclosure-notices-and-loss-mitigation-package>, archived at <http://perma.cc/HQ9P-A8UR> (discussing the requirement that the borrowers provide the lender and the court with a loss mitigation package); see also *Settlement Conference Loss Mitigation Package Checklist*, IND. FORECLOSURE PREVENTION NETWORK, <http://www.877gethope.org/generated/Loss-Mitigation-Package.pdf> (last visited Feb. 12, 2015), archived at <http://perma.cc/4QEL-2FAJ> (providing a checklist of required documents for the Loss Mitigation Package, including recent bills for all expenses, pay stubs for all employment, current bank statements, and tax returns from the last two years).

¹⁷⁴ See Press Release, Sup. Ct. of Ind., *Secure Network Set-Up to Help Housing Lenders and Borrowers Exchange Information* (Apr. 11, 2011), available at <http://www.in.gov/judiciary/files/media-press-releases-2011.pdf>, archived at <http://perma.cc/JA2N-5BZ8> (discussing communication problems between major parties involved in foreclosure actions and suggesting that the implementation of the Mediation Portal Project will reduce these communication errors).

¹⁷⁵ See *id.* (noting that parties frequently fail to exchange important documents and communications in loss mitigation programs).

¹⁷⁶ See *id.* (suggesting that most of the loss mitigation efforts during the relevant periods were unsuccessful because the parties were unprepared).

¹⁷⁷ See *id.* (acknowledging instances where parties were failing to exchange proper documents and communications because of communication problems).

¹⁷⁸ See *id.* (explaining that the Mediation Portal Project is designed to improve communication between borrowers, counsel, and servicers in loss mitigation efforts).

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Finally, the settlement imposes important restrictions on default fees, late fees, third-party fees, and force-placed insurance.¹⁷⁹ For example, a servicer cannot charge loan modification application fees for proprietary (first or second liens) modifications, and attorneys may charge “reasonable and customary fees” for work actually performed.¹⁸⁰ Thus, if the foreclosure is terminated because the homeowner has been accepted for a loss-mitigation option, the homeowner may be charged only for attorney work that was actually performed.

The settlement will be enforced by an outside monitor who reports to state attorneys general, and servicers will have to pay significant penalties if found noncompliant with the settlement.¹⁸¹ The monitor has issued his fourth compliance report.¹⁸² Noncompliance may be enforced by the courts.¹⁸³

B. The Indiana Mortgage Foreclosure Task Force

More than a year before the robo-signing settlement was announced, the Indiana OAG acted quickly to protect homeowners from these ongoing servicer abuses and the robo-signing debacle by filing a petition to the Indiana Supreme Court to establish Best Practices for mortgage foreclosure cases.¹⁸⁴ The major substance of the Best Practices Petition grew out of a series of meetings and discussions of the Indiana Supreme Court Mortgage Foreclosure Task Force (“Task Force”), comprised of court employees, state judges, the OAG, legal services attorneys, and lender attorneys.¹⁸⁵ The Task Force examined the robo-signing issue as well as reported cases and common fact situations where homeowners

¹⁷⁹ LEHMAN, *supra* note 145, at 3.

¹⁸⁰ WASH. ATT’Y GEN, RETURN INTEGRITY & ACCURACY TO FORECLOSURE AND BANKRUPTCY PROCEEDINGS 8, available at http://www.atg.wa.gov/uploadedFiles/Home/About_the_Office/Cases/National_Mortgage_Settlement/Servicing%20Standards%20Highlights.pdf (last visited Feb. 12, 2015), archived at <http://perma.cc/PJ7S-J9GL>.

¹⁸¹ *Id.*; LEHMAN, *supra* note 145, at 3–4.

¹⁸² *Continued Oversight*, OFFICE OF MORTGAGE SETTLEMENT OVERSIGHT (Dec. 16, 2014), <https://www.jasmithmonitoring.com/omso/reports/continued-oversight/>, archived at <https://perma.cc/7V6M-RBPF>.

¹⁸³ LEHMAN, *supra* note 145, at 1.

¹⁸⁴ Am. Pet. for an Order, *In re Mortg. Foreclosure Best Practices*, No. 94 S 00-1101-MS-00003 (Ind. Jan. 5, 2001), available at http://www.in.gov/portal/news_events/files/Petition_SC_MortgageForeclosureBestPractices.FILESTAMPED.1.3.11.pdf, archived at <http://perma.cc/KSC8-499K> [hereinafter *In re Mortg. Foreclosure Best Practices*].

¹⁸⁵ Press Release, Office of Ind. Att’y Gen., Best Practices Sought to Thwart Foreclosure Violations: Zoeller Petitions Indiana Supreme Court to Set New Requirements for Lenders (Jan. 3, 2011), available at http://www.in.gov/portal/news_events/65076.htm, archived at <http://perma.cc/QKA5-2BJW>.

faced abusive tactics by servicers.¹⁸⁶ The Task Force developed Best Practices whereby Indiana courts could ensure the rule of law was being followed and homeowners facing foreclosure were properly protected.¹⁸⁷

The first few paragraphs of the Best Practices address the issue of documentation—has the plaintiff filed the appropriate paperwork to prove that he or she has the right to sue?¹⁸⁸ A lender must do the following: (1) demonstrate that it is a “person entitled to enforce” the mortgage; (2) state which Indiana code section it seeks to enforce, i.e., as a holder of the note or as a transferee; and (3) provide the proper documentation for that claim, including producing the original note if requested by the court or a copy of the note with endorsements as required by Indiana law.¹⁸⁹ If the original note has been lost, the plaintiff must follow the required procedures and attach an affidavit setting forth the appropriate assertions.¹⁹⁰

While this documentation was already required under Indiana law, some lenders’ attorneys were flouting the law by failing to provide this necessary paperwork.¹⁹¹ Because most foreclosures are uncontested, and therefore, the homeowner is not represented by an attorney, lenders were unable to file adequate paperwork.¹⁹² Like robo-signing, when the inadequate paperwork issue came to light, it created public outrage. The

¹⁸⁶ See *id.* (providing Attorney General Greg Zoeller’s description of the issues requested to be addressed by Indiana Supreme Court in the Petition).

¹⁸⁷ *Id.* The OAG Petition contained stronger language than the Best Practices. For example, the Petition sought to make the Best Practices requirements in foreclosure actions and it used the mandatory “shall” rather than the permissive “should.” Am. Pet. for an Order, *supra* note 184, at 4. The Petition called attention to the practice of robo-signing and servicer abuses and prompted legislative changes. Ultimately, in its Order, the Indiana Supreme Court concluded that, “in light of the relatively frequent changes within the mortgage industry . . . it would be more advantageous to keep these Best Practices fluid, and to request that they be continually updated by the Supreme Court’s Mortgage Foreclosure Task Force.” In re Mortg. Foreclosure Best Practices, No. 94 S 00-1101-MS-3, slip op. at 2 (Ind. Oct. 7, 2011), available at <http://www.in.gov/judiciary/files/order-other-2011-94s00-1101-ms-3a.pdf>, archived at <http://perma.cc/8QL5-6ZT3>.

¹⁸⁸ See DIV. OF STATE CT. ADMIN., MORTGAGE FORECLOSURE BEST PRACTICES 2 (Nov. 2012), available at <http://www.in.gov/judiciary/admin/files/mortgage-mortgage-foreclosure-best-practices.pdf>, archived at <http://perma.cc/C9ZD-F8MB> [hereinafter MORTGAGE FORECLOSURE BEST PRACTICES] (delineating the assertions and documentation a, “person entitled to enforce,” a negotiable interest must provide to the court in a foreclosure action).

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ See *Robo-Signing, Chain of Title, Loss Mitigation, and Other Issues in Mortgage Servicing*, *supra* note 134, at 18 (noting that filing foreclosure complaints without attaching the note “appears to be routine practice” for some law firms).

¹⁹² See *id.* at 12–13, 18 (discussing default judgments in foreclosure cases and noting that “[m]any foreclosure complaints are facially defective and should be dismissed because they fail to attach the note”).

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press highlighted cases where courts voided foreclosures when it determined that the lender had failed to demonstrate a proper chain of title.¹⁹³

The Best Practices also require the courts to send a separate third notice to homeowners, alerting them of their right to seek a settlement conference.¹⁹⁴ This additional notice enhances the effectiveness of the Mortgage Foreclosure Trial Court Assistance Project (“MFTCAP”), which was “created to assist trial courts in scheduling and conducting mortgage foreclosure settlement conferences.”¹⁹⁵ Under this program, court-appointed facilitators contact homeowners facing foreclosure to “ensure they are aware of their right to a settlement conference, and to bring both parties to the table to try to find a mutually-agreeable settlement, or workout.”¹⁹⁶ The MFTCAP began as a pilot program in February 2010, and its success has been striking.¹⁹⁷ In MFTCAP pilot counties, nearly 47% of homeowners request a settlement conference,

¹⁹³ See Gretchen Morgenson, *Massachusetts Ruling on Foreclosures is a Warning to Banks*, N.Y. TIMES (Jan. 7, 2011), available at <http://www.nytimes.com/2011/01/08/business/08mortgage.html>, archived at <http://perma.cc/Q8UQ-4R6T> (discussing a Massachusetts court’s decision to void foreclosures based on incomplete paperwork).

¹⁹⁴ MORTGAGE FORECLOSURE BEST PRACTICES, *supra* note 188, at 3. This would be the third notice requirement. See IND. CODE § 32-30-10.5-8 (providing pre-suit notice requirements for creditors filing actions for foreclosure in Indiana). The lender sends the first and second notices to the homeowner. *Id.* The first notice, sent thirty days before foreclosure is filed, informs the homeowner that foreclosure is imminent and gives information about contacting a housing counselor. *Id.* The homeowner receives the second notice as part of the summons attached to the foreclosure complaint. *Id.*; see also DIV. ST. CT. ADMIN., MORTGAGE FORECLOSURE TRIAL COURT ASSISTANCE PROJECT, SAMPLE SUMMONS (FOR CREDITOR ATTORNEYS), available at <http://www.in.gov/judiciary/admin/files/mortgage-summons.pdf> (last visited Feb. 12, 2015), archived at <http://perma.cc/K9T5-UBJM> (providing a sample summons). The summons states:

All courts should send a separate communication to each mortgage foreclosure defendant informing the defendant of his or her right to participate in a settlement conference. The notice sent by the lender as required by the statute does not routinely generate an appreciable response rate, whereas the single-sheet notice sent by our pilot courts has resulted in a settlement conference request rate of approximately 45 percent.

MORTGAGE FORECLOSURE BEST PRACTICES, *supra* note 188, at 3; see *supra* Part IV (explaining how mortgage fraud contributed to the Midwest housing crisis).

¹⁹⁵ James F. Maguire, *Mortgage Foreclosure Trial Court Assistance Project*, IND. CT. TIMES (Sept. 13, 2010), <http://indianacourts.us/times/2010/09/mftcap/>, archived at <http://perma.cc/HDC3-E469>. See Rebecca Berfanger, *Court Programs, Economy Among Focuses of Foreclosure Conference*, IND. LAWYER (Nov. 24, 2010), <http://www.theindianalawyer.com/court-programs-economy-among-focuses-of-foreclosure-conference/PARAMS/article/25214>, archived at <http://perma.cc/L2NW-BPJK> (noting that the MFTCAP has been helping Indiana homeowners since March 2010).

¹⁹⁶ Maguire, *supra* note 195 (internal quotation marks omitted).

¹⁹⁷ See *id.* (praising the program’s success).

compared with fewer than 15% in counties without MFTCAP.¹⁹⁸ Further, 51.2% of the settlement conferences that take place in these pilot counties result in a workout.¹⁹⁹ In short, though only twenty-six of the ninety-two Indiana counties participate in MFTCAP, 25% all Indiana borrowers negotiate a foreclosure-prevention agreement under this program.²⁰⁰ In contrast, the workout rate in counties without MFTCAP is substantially lower.²⁰¹

To further facilitate the MFTCAP's effectiveness, the Best Practices also include a provision requiring lenders to provide more contact information for the homeowner than just the homeowner's address.²⁰² To preserve the homeowner's privacy and avoid further exposing the homeowner to foreclosure rescue scams, any additional contact information beyond the address is not publicly available.²⁰³ The Best Practices require the lender to file an affidavit regarding evidence that the homeowner no longer resides at the home and attach an exhibit detailing any default of an earlier foreclosure prevention agreement.²⁰⁴

¹⁹⁸ *The Mortgage Foreclosure Task Force and Settlement Conference Statistics*, DIV. STATE CT. ADMIN., <http://www.in.gov/judiciary/admin/2364.htm> (last visited Aug. 17, 2014), archived at <http://perma.cc/9QE5-T425>.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.* The Indiana Supreme Court estimates that "each averted foreclosure saves local communities and stakeholders around \$40,000." *Id.* Thus, "from April 2010 to December 2013, the MFTCAP has preserved more than \$217 million of value in Indiana communities." *Id.*

²⁰² MORTGAGE FORECLOSURE BEST PRACTICES, *supra* note 188, at 2.

²⁰³ *Id.* The Best Practices state:

At the time the Complaint is filed, Plaintiff should provide to the Clerk a service list, including the name, address, and, if available, the telephone number and/or email address for each individual defendant debtor who signed the mortgage. Because many defendant debtors have been and continue to be targeted by illegal foreclosure "rescue agencies[,"] this service list should comport with the public access exclusions of Administrative Rule 9(H)(1).

Id. See *supra* Part IV.D (explaining the rise of foreclosure fraud by rescue agencies).

²⁰⁴ MORTGAGE FORECLOSURE BEST PRACTICES, *supra* note 187, at 3. Best Practices further reads:

If Plaintiff maintains that the Defendant does not qualify for a settlement conference under § 32-30-10.5-8(e)(1), loan secured by a dwelling not the debtor's primary residence, then Plaintiff's counsel should attach as an Exhibit to the Complaint any evidence in Plaintiff's possession establishing that the debtor does not personally reside at such address. If counsel cannot provide such evidence, the debtor should be sent a copy of the "Get Help—Get Hope" form prescribed by §§ 32-30-10.5[.]

If Plaintiff maintains that the Defendant does not qualify for a settlement conference under §§ 32-30-10.5-8(e)(2), default of a prior

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A false claim that the homeowner abandoned his or her home or that the homeowner defaulted on a previous loss-mitigation opportunity may result in the denial of the homeowner's rights.²⁰⁵ Affidavits involved in the robo-signing scandal contained mistakes where the lender incorrectly reported the terms of the note or stated an incorrect amount owed by the homeowner.²⁰⁶

Like the multistate settlement resolving the robo-signing debacle, the Indiana Best Practices also addresses a dual-track system.²⁰⁷ Under the Best Practices, if the homeowner requests a settlement conference to be reviewed for loss-mitigation eligibility, "no dispositive motions should be granted" until the conclusion of the settlement conference process.²⁰⁸ Thus, the lender may not proceed with a motion for summary judgment, a motion for default, or a judgment for foreclosure.²⁰⁹ Further, "[i]f, at

foreclosure prevention agreement under this chapter, then its counsel should attach as an Exhibit to the Complaint a copy of the foreclosure prevention agreement and a record of payments substantiating default.

Id.

²⁰⁵ See generally *Indiana Foreclosure Laws*, REALTYTRAC, <http://www.realtytrac.com/real-estate-guides/foreclosure-laws/indiana-foreclosure-laws/indiana-foreclosure-laws/> (last visited Mar. 22, 2012), archived at <http://perma.cc/QYP6-9DUN> (discussing Indiana foreclosure laws). In Indiana, "[t]he foreclosure process begins [when] the lender files a complaint in court against the borrower." *Id.* "The date the mortgage was executed controls the pre-foreclosure period between filing the complaint and the foreclosure sale." *Id.* However, "[t]here is no waiting period for abandoned properties." *Id.* Therefore, if a lender wrongly concludes that a home has been abandoned, a homeowner may lose his or her right to a waiting period. See Calbreath, *supra* note 164 (describing situations where lenders wrongly denied loss mitigation options to homeowners and eventually foreclosed on their homes even after the homeowners made timely payments under their supposed loan modification plans).

²⁰⁶ Am. Pet. for an Order, *supra* note 184, at 2 (recognizing frequent mistakes on affidavits filed in Indiana courts, including failures to list the proper amount of the loan or the correct interest rate); see *supra* Part IV.A (noting that affidavits supporting summary judgment and default judgment were "robo-signed" by employees, leading to many critical mistakes in these documents, which negatively impacted homeowners).

²⁰⁷ MORTGAGE FORECLOSURE BEST PRACTICES, *supra* note 188, at 3 (disallowing dispositive motions once the defendant properly requests a settlement conference until the plaintiff, the defendant, or a court-appointed facilitator files a settlement conference report with the court).

²⁰⁸ *Id.* Best Practices states:

If [the] Defendant requests a settlement conference under []§ 32-30-10.5-9, no dispositive motions should be granted until one of the following occurs: 1) The court receives notice that the debtor and creditor have agreed to enter into a foreclosure prevention agreement; or 2) The court receives notice that the debtor and creditor are unable to agree on the terms of a foreclosure prevention agreement.

Id.

²⁰⁹ See A. Benjamin Spencer, *CIVIL PROCEDURE: A CONTEMPORARY APPROACH* 704, 745 (2d. ed., 2008) (explaining that summary judgment and default judgment are mechanisms to dispose of claims without a trial). See also *Foreclosure*, IND. LEGAL SERVICES, (2004),

the settlement conference, the parties commence discussions regarding loss mitigation alternatives and conclude that additional information or documentation should be exchanged," before the homeowner's eligibility can be established, the settlement conference will be reconvened at a later date.²¹⁰

The Best Practices also clarify that if a homeowner requests a settlement conference, it will be treated as the homeowner's appearance in the case so the homeowner will receive notice of any future court filings.²¹¹ However, these provisions only protect homeowners who request a settlement conference.²¹² While this is a welcomed safeguard, fewer than 42% of Indiana homeowners exercise their right for a settlement conference, leaving 58% of Indiana homeowners without these protections.²¹³ If these remaining homeowners do not seek assistance from the OAG, a housing counselor, or a legal services attorney, they are likely to lose their homes.²¹⁴ The Best Practices also

available at http://archive-org.com/page/600935/2012-11-07/http://www.indianajustice.org/Data/DocumentLibrary/Documents/1099151393.21/view_article_publicweb?topic_id=1621200&library=PublicWeb, archived at <http://perma.cc/EF95-R5J4> (stating what a lender may not do).

²¹⁰ See MORTGAGE FORECLOSURE BEST PRACTICES, *supra* note 188, at 3 (explaining that this creates cause to "reconvene the settlement conference at a later date, and dispositive motions should not be granted pursuant to § 32-30-10.5-8.5(b) until the settlement conference report has been submitted to the Court by the Plaintiff(s), Defendant(s), or a court-appointed facilitator").

²¹¹ See *id.* ("If Defendant requests a settlement conference under [§] 32-30-10.5-9, the court shall treat this request as the entry of an appearance in accordance with T.R. 3.1(B).").

²¹² See *id.* (establishing that these provisions only apply to homeowners who have actually requested a settlement conference).

²¹³ See Elizabeth Daulton, *Robo-Signing and Settlement Conferences Among Issues Addressed in Recently Published Best Practices Guide* (Jan. 31, 2011), <http://indianacourts.us/times/2011/01/mortgage-foreclosure/>, archived at <http://perma.cc/HFR3-93KZ> (noting that more than 40% of Indiana homeowners facing foreclosure have requested settlement conferences since the Mortgage Foreclosure Trial Assistance Program was introduced in the participating counties).

²¹⁴ See GEOFF WALSH, NAT'L CONSUMER L. CTR. REBUILDING AMERICA: HOW STATES CAN SAVE MILLIONS OF HOMES THROUGH FORECLOSURE MEDIATION 6 (Feb. 2012), available at http://www.nclc.org/images/pdf/foreclosure_mortgage/mediation/report-foreclosure-meditation.pdf, archived at <http://perma.cc/GXU2-ZJUA> (noting a 2011 study's finding that "homeowners who received counseling were 1.7 times more likely to avoid a foreclosure sale than those who did not."). The OAG receives hundreds of complaints each year from homeowners struggling with servicers to find a loss mitigation option to save their home. Here are some common examples:

(1) *Arbitrary Behavior on the Part of the Servicer.* The loan servicer placed the borrower in a three-month trial modification under HAMP with a permanent modification to follow. The borrower made her first payment when due. Two weeks later, however, the servicer unexpectedly removed the borrower from HAMP, claiming that securitization-related agreements between the investor and the

contain sanctions for attorneys or homeowners who do not comply with the legal requirements or who fail to abide by court directives.²¹⁵ Specifically, the Best Practices prohibit a lender from asking a

servicer prevented the agreement with the borrower; subsequently, the borrower was denied her HAMP modification request. Upon advice from her housing counselor, the borrower contacted the OAG. After OAG intervention, the servicer agreed to abide by the HAMP trial modification agreement. Note that the housing counselor was unable to resolve the crisis without the assistance of OAG attorneys. In another case, the loan servicer offered to modify the borrowers' FHA loan. After the borrowers entered into a written loan modification agreement with the servicer, however, they were informed that FHA had not approved the loan modification, and it was denied. After OAG intervention, the servicer offered the borrowers a four-month trial modification under FHA-HAMP, to be followed by a permanent modification. The borrowers made their required four months of payments, but the servicer failed to send them a permanent modification until three months later. The borrowers signed and returned the contract to the servicer, but they were rejected due to an issue with the agreement's notarization. The servicer informed the borrowers that it was going to proceed with foreclosure. Again, after the OAG intervention, the servicer agreed to send a mobile notary to the borrowers' house so that they could re-sign, and the notary could correctly notarize the modification. The borrowers' modification has now been applied to their account and they are current on their mortgage payments.

(2) *Property taxes.* One loan servicer paid a borrower's property tax installment three times over the course of a month, creating a deficiency in the borrower's escrow account of over \$1,500. This caused the borrower's monthly payment to increase drastically, and he was unable to persuade the servicer to fix the problem and readjust his payment. After OAG intervention, the servicer obtained a refund of the overpayment from the county and reanalyzed the borrower's escrow to bring his payment down to the correct amount.

Notes of Abigail Kuzma (unpublished) (on file with author).

²¹⁵ MORTGAGE FORECLOSURE BEST PRACTICES, *supra* note 188, at 5. The Best Practices state:

If either party fails to attend the settlement conference or fails to abide by other court directives, appropriate sanctions may be considered. Judges in St. Joseph and Allen counties have levied sanctions ranging from \$150 to \$2,500 on plaintiffs who repeatedly failed to attend a settlement conference or who refused to provide documents as requested by the court-appointed facilitator. A homeowner defendant who fails to attend the settlement conference may be perceived as waiving his or her right to a settlement conference, and the foreclosure should proceed as otherwise allowed by law.

Id.

homeowner to waive his or her right to a settlement conference.²¹⁶ This provision dissuades lenders from asking homeowners to waive their settlement conference rights to be considered for loss mitigation.²¹⁷

Further, the Best Practices contain provisions for post-judgment motions.²¹⁸ These provisions resolve concerns that an attorney may attempt to overturn a previous loss-mitigation agreement, such as a short sale or a previously granted deed-in-lieu of foreclosure, to make the homeowner liable for forgiven indebtedness. The Best Practices requires post-judgment motions to set aside a mortgage foreclosure judgment to state the reason for the request so the judge may be aware of the potential danger and may examine the motion.²¹⁹ In addition, following the robo-signing debacle, banks now review the veracity of previously filed affidavits and file a supplemental or substitute affidavit when a mistake is found.²²⁰ The Best Practices requires that any motion to overturn a short sale or deed-in-lieu of foreclosure “be noticed to all parties, including previously defaulted parties, and set for hearing.”²²¹

²¹⁶ *Id.* “Defendant should not be asked by Plaintiff to waive his or her right to a settlement conference. Such action on the Plaintiff’s behalf may be considered a sanctionable offense.” *Id.*

²¹⁷ See Evan Bedard, *Indiana AG Fights to Protect Borrowers’ Rights During Foreclosure*, LOAN SAFE (Jan. 4, 2011), <http://www.loansafe.org/indiana-ag-fights-to-protect-borrowers-rights-during-foreclosure>, archived at <http://perma.cc/64B3-9PTL> (noting that the Indiana Supreme Court’s task force made recommendations based on a concern that some borrowers were not given the full opportunity to pursue loss mitigation options).

²¹⁸ See MORTGAGE FORECLOSURE BEST PRACTICES, *supra* note 188, at 5. The Best Practices states:

Any motion to set aside a mortgage foreclosure judgment should state the reason for the request. The borrowers/homeowner should be sent notice of the request. A petition to set aside a judgment that attempts to reinstate the loan should be allowed because of reinstatement or modification of the loan or other foreclosure prevention or loss mitigation agreement.

Id.

²¹⁹ See *id.* (explaining that a motion to set aside a mortgage foreclosure judgment must include a reason for the request).

²²⁰ See *Robo-Signing Continues; Foreclosures Could Be Affected*, PELLEY LAW OFFICE, LLP (Sept. 28, 2011), <http://knowledgebase.findlaw.com/kb/2011/Sep/380253.html>, archived at <http://perma.cc/S5KH-WUAV> (discussing robo-signing settlements that require financial institutions to investigate their internal procedures and stop filing incorrect affidavits); see also *supra* Part IV (describing the nationwide investigation and settlement of the robo-signing allegations and the various requirements ensuring protection for homeowners facing foreclosure).

²²¹ MORTGAGE FORECLOSURE BEST PRACTICES, *supra* note 188, at 5 (“A party seeking to file a supplemental affidavit or substitute a previously filed affidavit must file a motion stating the grounds for the substitution.”).

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Finally, before the robo-signing settlement, the Indiana Division of State Court Administration developed a secure online portal system (“e-portal”) to enable servicers and their local counsel to “effectively communicate with borrowers and their representatives regarding their mutual loss[-]mitigation efforts.”²²² The goal is to “facilitate the exchange of necessary documents . . . [and] provid[e] a direct communication channel between all of the stakeholders[.]”²²³ The intended result is that “mediation sessions will become more productive and lead to more resolutions in less time.”²²⁴ The e-portal provides confirmation to both the homeowner and the servicer that a particular document was sent and has been received by the other party.²²⁵ Therefore, the e-portal should reduce the communication disputes and errors that commonly plague the loss-mitigation process.

C. *Indiana Settlement Conference Legislation and Other Midwest Mediation Programs*

As noted above in Part IV.B, the Indiana Best Practices have assisted in preventing unneeded foreclosures and six of the Best Practices were

²²² See Secure Network Set-Up to Help Housing Lenders and Borrowers Exchange Information, *supra* note 174 (discussing communication problems between major parties involved in foreclosure actions and suggesting that the implementation of the Mediation Portal Project will reduce these communication errors). The portal may be accessed at www.dclmwp.com. The basic procedures for the portal are as follows: the Default Counsel electronically files a record of any new foreclosure and uploads the necessary documents from the Borrower. *Id.* A notification of the new foreclosure is then forwarded to a court-designated facilitator through the Portal, and the facilitator contacts the Borrower to determine if the Borrower wants to request a settlement conference. *Id.* If the Borrower requests a settlement conference, the facilitator refers the Borrower to a designated housing counselor, and the court issues an order requiring the conference. *Id.* Next, the Default Counsel notifies the designated housing counselor through the Portal and gives the counselor access to the Borrower’s documents using a unique invitation code. *Id.* The housing counselor works with the Borrower to upload any additional necessary documents to the Portal before the settlement conference. *Id.* Finally, after all of the Borrower’s documents have been uploaded, the Portal will automatically notify the Default Counsel that the Borrower’s package is complete. Secure Network Set-Up to Help Housing Lenders and Borrowers Exchange Information, *supra* note 174. The Default Counsel will then review the package to ensure it is complete, and the settlement conference will proceed. *Id.*; see also *Welcome to The DMM Loss Mitigation Web Portal*, DEFAULT MITIGATION MGMT., LLC (2014), <https://www.dclmwp.com/Home>, archived at <http://perma.cc/C8KW-LA5V> (providing the web portal).

²²³ Secure Network Set-Up to Help Housing Lenders and Borrowers Exchange Information, *supra* note 174.

²²⁴ *Id.*

²²⁵ See *id.* (describing the basic procedures of the Portal and the process of uploading documents).

codified into Indiana's settlement conference law.²²⁶ According to the National Consumer Law Center, settlement conference and mediation programs have proven effective in saving homes from foreclosure.²²⁷ "If these programs are strengthened and expanded, they can prevent millions of foreclosures that will otherwise take place over the next several years."²²⁸

In 2009, the Indiana legislature passed Senate Enrolled Act 492 ("SEA 492"), which became effective July 1, 2009 and strengthened Indiana's unfair-and-deceptive-practices laws and created a foreclosure settlement conference procedure.²²⁹ SEA 492 amended the Indiana Home Loan Practices Act to prohibit a person from making misrepresentations that the person "*reasonably should know*" are misrepresentations.²³⁰ Actual knowledge of misrepresentation, especially in complex mortgage transactions, is notoriously difficult to prove; thus, expanded liability for constructive knowledge of misrepresentation or fraud will ease enforcement of consumer protection laws and ideally cut down on predatory practices.

The stated purpose of the foreclosure settlement conference law "is to avoid unnecessary foreclosures [and to] facilitate the modification of residential mortgages in appropriate circumstances."²³¹ The law aims to achieve its purpose through increased notice and information requirements, a stay on foreclosure judgments, and a settlement conference provision that enables the homeowner to meet face-to-face with a lender's representative who has authority to negotiate a loss-mitigation workout on the lender's behalf.²³²

This law created two notice requirements.²³³ First, any creditor seeking to foreclose a debtor's primary residence must send notice to the debtor at least thirty days before filing the foreclosure action.²³⁴ The

²²⁶ In re Mortg. Foreclosure Best Practices, No. 94 S 00-1101-MS-3, slip op. at 2 (Ind. Oct. 7, 2011), available at <http://www.in.gov/judiciary/files/order-other-2011-94s00-1101-ms-3a.pdf>, archived at <http://perma.cc/8QL5-6ZT3>.

²²⁷ See generally GEOFFRY WALSH, NAT'L. CONSUMER L. CTR., STATE AND LOCAL FORECLOSURE MEDIATION PROGRAMS: CAN THEY SAVE HOMES? 30 (2009), http://www.nclc.org/images/pdf/foreclosure_mortgage/mediation/report-state-mediatio-n-programs.pdf, archived at <http://perma.cc/F7CG-2ABG> (analyzing whether mitigation programs are capable of preventing homes from being foreclosed).

²²⁸ WALSH, *supra* note 214, at 4.

²²⁹ The Indiana legislature passed SEA 582 in 2011, which further strengthened these laws. See generally IND. CODE § 32-30-10.5 (West Supp. 2013) (providing the foreclosure prevention agreements for residential mortgages).

²³⁰ *Id.* § 24-9-3-7 (emphasis added).

²³¹ *Id.* § 32-30-10.5-1(b).

²³² *Id.* §§ 32-30-10.5-8, 8.5(b), 10(d).

²³³ *Id.* § 32-30-10.5-8.

²³⁴ *Id.* § 32-30-10.5-8(a).

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notice must inform the debtor that he or she is in default and encourage him or her to seek mortgage foreclosure counseling.²³⁵ Second, the lender must include a notice with the complaint, which must be served on the homeowner.²³⁶ This notice informs the homeowner of his or her right to a settlement conference.²³⁷ The onus is on the debtor to exercise that right and notify the court, within thirty days of being served, of his or her intent to participate.²³⁸ The court then schedules the settlement conference to take place within twenty-five to sixty days of the notice and encourages the debtor to seek mortgage foreclosure counseling before that date.²³⁹ Foreclosure judgments are stayed until both parties determine they are unable to reach a settlement agreement or the debtor fails to schedule a settlement conference.²⁴⁰

In 2011, the Indiana General Assembly amended this settlement conference procedure to codify many of the provisions noted above in the OAG Best Practices Petition to the Indiana Supreme Court.²⁴¹ Despite the two-notice requirement already in existence and despite public awareness and homeowner efforts by the Indiana Foreclosure Prevention Network (“IFPN”), OAG, and the Indiana Supreme Court, few homeowners exercised their right to a settlement conference.²⁴² Therefore, SEA 582, passed in 2011, added an additional notice requirement whereby the court will contact all homeowners after a foreclosure has been filed.²⁴³ In addition, the lender must provide the court with the most recent contact information available for the homeowner to facilitate this contact by the court.²⁴⁴ Further, while the original settlement conference provisions outlined the documentation “needed to engage in good faith negotiations,” with the court facilitator—who makes contact with the homeowner under these recent

²³⁵ IND. CODE § 32-30-10.5-8(a)(1). The notice must also contain contact information for the IFPN. *Id.* § 32-30-10.5-8(a)(2).

²³⁶ *Id.* § 32-30-10.5-8(c).

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.* § 32-30-10.5-10(a)(1)(B); IND. CODE § 32-30-10.5-10(a)(1)–(2). This scheduling window is within forty to sixty days of the notice for all foreclosure actions filed after June 30, 2011.

²⁴⁰ *Id.* § 32-30-10.5-9(a)(2)(A)–(B).

²⁴¹ See *supra* Part IV.C (discussing various provisions of the Petition and explaining the servicer abuses the provisions seek to correct).

²⁴² Elizabeth Daulton, Michael Gotsch & Nancy Boyer, *Settling for Foreclosure? The Mortgage Foreclosure Settlement Conference* (2010), available at <http://www.in.gov/judiciary/center/files/jedu-lib-foreclosure-mortgage-foreclosure.pdf>, archived at <http://perma.cc/453W-RB6N>.

²⁴³ IND. CODE § 32-30-10.5-8(d)(2) (West Supp. 2013).

²⁴⁴ *Id.* § 32-30-10.5-8(d)(2)(B).

amendments— will also assist in gathering this required documentation and, where possible, the Portal is then used to eliminate confusion.²⁴⁵

Similarly, there is confusion about the requirement that foreclosure judgments are stayed until both parties determine they are unable to reach a settlement.²⁴⁶ Therefore, the new amendments codify the Best Practices Petition provision providing that dispositive motions are stayed until the court receives notice regarding the outcome of negotiations at the conclusion of the settlement conference.²⁴⁷ Thus, the dual-track issue is resolved for those who seek a settlement conference. Further, SEA 582 codified the Best Practices provision that deems the homeowner's request for a settlement conference as an appearance.²⁴⁸ This Act also codified the Best Practices provision that allows the judge to award civil penalties or sanctions when he or she deems it appropriate.²⁴⁹ These funds will benefit programs that promote foreclosure prevention.²⁵⁰

Finally, SEA 582 introduces an entirely new concept into the settlement conference arena. During the foreclosure proceeding, the court may issue a provisional order to collect payments from homeowners, based on the homeowner's ability to pay.²⁵¹ Homeowners will pay these funds to the clerk of the court or into an attorney trust account.²⁵² As soon as a homeowner goes into default, the lender will often refuse further monthly payments unless the homeowner can bring the loan current.²⁵³ In some instances, this may mean that the homeowner is not making a regular monthly housing payment for months. This provision allows the homeowner to continue making affordable monthly payments while the homeowner's loss-mitigation eligibility is being processed; however, SEA 582 also clarifies that the

²⁴⁵ *Id.* § 32-30-10.5-10(a)(3)(B)(i); see Secure Network Set-Up to Help Housing Lenders and Borrowers Exchange Information, *supra* note 174 (discussing the online portals and the importance of communication); see also *The Mortgage Foreclosure Task Force and Settlement Conference Statistics*, *supra* note 198 (providing statistics of the settlement conference statistics from the Mortgage Foreclosure Task Force).

²⁴⁶ IND. CODE § 32-30-10.5-9(a)(2)(B).

²⁴⁷ *Id.* § 32-30-10.5-8.5(b)(2).

²⁴⁸ *Id.* § 32-30-10.5-8.5(c).

²⁴⁹ *Id.* § 32-30-10.5-10(b)(2).

²⁵⁰ *Id.* § 5-20-1-27(b).

²⁵¹ *Id.* § 32-30-10.5-8.6(b)(1).

²⁵² IND. CODE § 32-30-10.5-8.6(c) (West Supp. 2013).

²⁵³ See *Frequently Asked Questions About Foreclosures*, COLO. LEGAL SERVICES (May 2012), <http://www.coloradolegalservices.org/lawhelp/resource/frequently-asked-questions-about-foreclosures?ref=qVArX>, archived at <http://perma.cc/5PKT-NJUW> (concluding that this does not mean the homeowner is living in the house for free as monthly payments, interest, and penalties continue to accrue and are charged to the homeowner under the terms of the homeowner's loan documents).

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lender may not charge the homeowner for costs associated with the settlement conference process.²⁵⁴

Other Midwest states also have settlement conferences or mediation procedures.²⁵⁵ In Illinois, both Cook County (including Chicago) and Will County (including Joliet) have a mediation program.²⁵⁶ Further, the Illinois Homeowner's Rights Act requires lenders to provide homeowners notice of their legal rights and options and provide borrowers with an accurate statement of the outstanding mortgage balance within ten business days of the borrower's request.²⁵⁷ This provision's goal is to ensure that homeowners know "exactly how much they must pay to avoid foreclosure, . . . [thereby permitting] homeowners to quickly explore their options, such as refinancing [their] loan or selling their home to protect their equity."²⁵⁸

Iowa does not have a legislated mediation provision, but Iowa Mediation Service, a nonprofit organization, works with Iowa homeowners and lenders on foreclosure prevention and refinancing in five cities throughout the state.²⁵⁹ This is a joint program with the Iowa

²⁵⁴ IND. CODE § 32-30-10.5-10(b)(1). The Act also provides that "a person who is not the owner of real property . . . and who suspects that the [land or] property may be vacant or abandoned, may enter upon the premise[]" to secure it, remove trash from it, or maintain it, as long as the person does not enter any structure on the property. *Id.* § 34-30-26-5(a).

²⁵⁵ See generally HEATHER SCHEIWE KULP, RESOLUTION SYSTEMS INSTITUTE, FORECLOSURE DISPUTE RESOLUTION PROGRAM MODELS STATE-BY-STATE, http://www.abouttsi.org/pfimages/ForeclosureMediationProgramModels_September2012.pdf (last visited Feb. 12, 2015), archived at <http://perma.cc/K7GE-4XLU> (outlining alternative dispute resolution programs in various states).

²⁵⁶ See *Mortgage Foreclosure Mediation Program*, CIR. CT. OF COOK CNTY. (2010), <http://cookcountyforeclosurehelp.org/>, archived at <http://perma.cc/6NT2-PCL7> (stating the goals of the Cook County mediation program). See generally PAMELA J. MCGUIRE, CLERK CIR. CT. WILL CNTY. NOTICE OF MANDATORY MEDIATION (2010), available at <http://www.willcountycircuitcourt.com/forms/mediation/116.pdf>, archived at <http://perma.cc/K678-CS3S> (explaining the Will County mediation program). The Cook County mediation program reports that "38% of homeowners going through the [mediation program] have been able to save their homes" and an additional "12% have reached . . . a dignified exit." STATE OF ILLINOIS, CIRCUIT COURT OF COOK COUNTY, CHANCERY DIVISION MORTGAGE FORECLOSURE MEDIATION PROGRAM PROGRESS REPORT (June 27, 2012), available at [http://www.cookcountycourt.org/Portals/0/Chancery%20Division/Foreclosure%20Mediation/Foreclosure%20Mediation%20Progress%20Report%20June%202012%20\(with%20Appendixes\).pdf](http://www.cookcountycourt.org/Portals/0/Chancery%20Division/Foreclosure%20Mediation/Foreclosure%20Mediation%20Progress%20Report%20June%202012%20(with%20Appendixes).pdf), archived at <http://perma.cc/8PAL-42T4>.

²⁵⁷ 735 ILL. COMP. STAT. ANN. 5/15-1504.5, 1505.5 (West 2009).

²⁵⁸ *Homeowner's Rights*, ILL. ATT'Y GEN. (2010), http://illinoisattorneygeneral.gov/consumers/homeowners_rights.html, archived at <http://perma.cc/PT4Y-CDSL>.

²⁵⁹ See generally *Information on Iowa Mediation Service's Mortgage Mediation Program*, IOWA MED. SERV. (2008), <http://iowamediationservice.com>, archived at <http://perma.cc/43BS-XN5P> (providing an overview of the services provided by Iowa Mediation Services).

Attorney General and is a voluntary program whereby borrowers and lenders meet with a neutral third party mediator to seek a resolution.²⁶⁰

In 2008, Michigan enacted the Michigan Home Foreclosure Prevention Act, which permitted the commissioner to evaluate information about the lender and borrower and decide whether foreclosure action was necessary.²⁶¹ Where suitable, the commissioner had the option to “extend the filing date for a foreclosure for up to [ninety days or] require the lender and the borrower to participate in mediation.”²⁶² Effective December 22, 2011, House Bill 4543 required that a list of approved counselors accompany the complaint.²⁶³ A debtor had thirty days to contact one of these approved counselors and set up a negotiation with his or her lender.²⁶⁴ However, in December 2012, the Michigan legislature repealed these provisions.²⁶⁵

Wisconsin has eleven counties with foreclosure mediation programs.²⁶⁶ In each of these programs, mediation is voluntary; both the homeowner and the lender must agree to mediate.²⁶⁷ For example, Dane County Circuit Court requires lenders to tell homeowners that they have an option to mediate their foreclosure cases and notify them of available resources, including a University of Wisconsin law student clinic.²⁶⁸ There are also a number of websites available to assist Wisconsin homeowners.²⁶⁹ Indiana’s settlement conference legislation is not the

²⁶⁰ *Id.*

²⁶¹ AM. BAR ASS’N, RESIDENTIAL FORECLOSURE MEDIATION RESOURCES FOR ADR PROFESSIONALS (Feb. 9, 2009), available at www.americanbar.org/content/dam/aba/migrated/DR_Foreclosure_Resource_Page.authcheckdam.doc, archived at <http://perma.cc/4H24-PG2F>.

²⁶² *Id.*

²⁶³ MICH. COMP. LAWS ANN. § 600.3205a(2) (West Supp. 2013).

²⁶⁴ *Id.* § 600.3205b(1).

²⁶⁵ 2012 MICH. PUB. ACTS 521 (effective June 30, 2013).

²⁶⁶ *Two More Counties Launch Foreclosure Mediation Programs*, 18 THE THIRD BRANCH 3 (Summer 2010), available at <http://www.wicourts.gov/news/thirdbranch/docs/summer10.pdf>, archived at <http://perma.cc/38Z5-DY8K>. Under the Milwaukee program nearly 50% of mediated cases are resolved with a modification of the loan. *Attorney General J.B. Van Hollen and The Metro Milwaukee Foreclosure Mediation Program Announce New, Improved Process for Homeowners Seeking Mediation Services*, WIS. DEP’T. OF JUSTICE (Feb. 26, 2013), <http://www.doj.state.wi.us/media-center/2013-news-releases/february-26-2013-0>, archived at <http://perma.cc/LDL3-M7DF> [hereinafter *Milwaukee Foreclosure Mediation Program*].

²⁶⁷ See generally *Milwaukee Foreclosure Mediation Program*, *supra* note 266 (discussing how foreclosure problems are solved through mediation).

²⁶⁸ Karen Rivedal, *UW Law Students to Give “Lifeline” through Foreclosure Mediation Program*, WIS. ST. J. (Jan. 27, 2010), http://www.law.wisc.edu/news/Articles/UW_law_students_give_lifeline_th_2010-01-28, archived at <http://perma.cc/G9KX-72RN>.

²⁶⁹ See generally HOMEOWNERSHIP PRESERVATION FOUND., <http://www.995hope.org> (last visited June 10, 2012), archived at <http://perma.cc/3XZQ-FU8Y> (providing an example of a website aimed to assist Wisconsin homeowners); TAKE ROOT MILWAUKEE,

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state's only response to the foreclosure crisis; it has also established a foreclosure prevention network.

D. Indiana Foreclosure Prevention Network and Other Midwest Foreclosure Hotlines

As soon as the foreclosure crisis hit and thousands of families faced foreclosure, homeowner advocates recognized that homeowners were ill-prepared to represent themselves in the loss-mitigation process. In response, Indiana and other states established foreclosure hotlines for homeowners to call a toll-free number for a referral to a housing counselor in their area, who would advise homeowners on what loss-mitigation relief might be available to them and assist in their negotiations with their lender.²⁷⁰ In Indiana, the foreclosure prevention hotline is administered by the IFPN.²⁷¹

In early 2006, the Indiana Housing and Community Development Authority ("IHCDA") met with various government agencies and industry leaders to discuss the foreclosure crisis and propose potential foreclosure-reducing solutions.²⁷² The IHCDA developed the IFPN, which "worked with [state] elected officials to enable legislation for a [multi-tiered] solution to delinquency and foreclosure."²⁷³ In November 2007, the IFPN initiative was implemented, which "included a [targeted] public awareness campaign, a telephone helpline, and a statewide network of trained mortgage foreclosure counselors."²⁷⁴

The public awareness campaign encouraged homeowners facing foreclosure to seek help by visiting the program's website at www.877gethope.org or calling the telephone helpline at 1-877-GET-

<http://takerootmilwaukee.com/about-take-root-milwaukee.html> (last visited Mar. 26, 2012), *archived at* <http://perma.cc/6WC8-RBZL> (listing another example of a website that is focused on helping homeowners); WIS. FORECLOSURE MEDIATION NETWORK, http://www.mediatemilwaukee.com/Home_Page.html (last visited Mar. 26, 2012), *archived at* <http://perma.cc/6J9Y-S543> (demonstrating that there are a variety of websites that are available to provide help to homeowners); WIS. HOUS. & ECON. DEV. AUTH., *available at* <http://www.wisconsinforeclosureresource.com> (last visited June 10, 2012), *archived at* <http://perma.cc/LCH3-XL8T> (providing another example of a website aimed at benefiting homeowners).

²⁷⁰ See *About*, IND. FORECLOSURE PREVENTION NETWORK, <http://877gethope.org/about/> (last visited Mar. 26, 2012), *archived at* <http://perma.cc/K3BK-63SR> (discussing Indiana's foreclosure hotline, which connects homeowners with a certified foreclosure prevention specialist).

²⁷¹ *Id.* The Indiana Housing and Community Authority created the IFPN to help reduce the amount of foreclosures after it conducted a series of meetings with government agencies regarding the foreclosure crisis. *Id.*

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.*

HOPE.²⁷⁵ When homeowners call the helpline, they are referred to a “foreclosure prevention specialist” from a nonprofit organization to guide them through the foreclosure process and assist them with loss-mitigation options.²⁷⁶ This “Don’t Let the Walls Foreclose in on You” public awareness campaign distributed over 350,000 marketing pieces.²⁷⁷ The campaign also included radio, print, and billboard communications that targeted communities with the highest foreclosure concentrations.²⁷⁸ Additionally, the IFPN hosted multiple events specifically designed to facilitate contact between borrowers, lenders, and housing counselors.²⁷⁹ There were over 900 borrowers who met with their lenders or housing counselors during these events.²⁸⁰ The IFPN also partnered with other agencies to host a “Phone-A-Thon,” which provided homeowners the opportunity to seek foreclosure prevention advice from various agencies by simply placing a call.²⁸¹ According to the Indiana Housing & Community Development Authority, over sixty thousand Hoosiers have received assistance from the IFPN, 3000 of which came from the “Phone-A-Thon.”²⁸²

The OAG and the Indiana Supreme Court also partnered together in additional foreclosure efforts, and have recruited and trained over a thousand pro bono attorneys to represent homeowners at settlement conferences.²⁸³ In addition, between 2009 and 2011, the OAG presented at forty-six foreclosure prevention seminars, including twenty-three Continuing Legal Education (“CLE”) programs training pro bono attorneys and judges.²⁸⁴ Through these seminars and CLE programs, the OAG educated more than 2000 attorneys and judges.²⁸⁵ Including community fairs and other events, the OAG reached nearly 12,700

²⁷⁵ *About, supra* note 270.

²⁷⁶ *Id.*

²⁷⁷ IND. HOUS. & CMTY. DEV. AUTH., *Indiana Foreclosure Prevention Network: Marketing and Resource Development Services Request for Proposals 3* (2010), available at [http://www.in.gov/ihcda/files/RFP_IFPN_Marketing_and_Resource_Development_\(2\).pdf](http://www.in.gov/ihcda/files/RFP_IFPN_Marketing_and_Resource_Development_(2).pdf), archived at <http://perma.cc/4VPM-VSB5>.

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ 1000 Trained to Handle Foreclosure Cases: Indiana Supreme Court Offers New Pledge of Support, *supra* note 139.

²⁸⁴ Memorandum from Michelle Mayer, Outreach Section Chief, St. of Ind. Office of Att’y Gen., to Abigail Kuzma, Chief Counsel & Dir. of Consumer Prot., St. of Ind. Office of Att’y Gen., Outreach Totals for Mortgage Foreclosure Prevention Events (Feb. 1, 2012) (copy on file with *Valparaiso University Law Review*).

²⁸⁵ *Id.*

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Hoosiers.²⁸⁶ Furthermore, the OAG distributed more than 9000 handouts and other educational materials on mortgage fraud and foreclosure prevention to Hoosiers across Indiana.²⁸⁷ Recently, the IFPN received funding through the “Hardest Hit Fund” to assist unemployed homeowners in keeping their homes when their primary residence is subject to foreclosure.²⁸⁸

Other Midwest states also developed a foreclosure hotline to assist homeowners facing foreclosure. For example, Iowa Mortgage Help is sponsored by the Iowa Home Ownership Education Project, the Iowa Office of the Attorney General, Iowa Finance Authority, and the Iowa Mediation Service, Inc. (“IMS”).²⁸⁹ Homeowners seeking foreclosure prevention information may call a toll-free number, which will connect them with trained housing counselors prepared to assist them through the foreclosure process.²⁹⁰ Group counseling classes are also available in Des Moines and Cedar Rapids.²⁹¹

The Michigan State Housing Development Authority (“MSHDA”) operates a toll-free hotline that directs homeowners to a foreclosure prevention specialist in their county.²⁹² This program also includes information on the website to assist homeowners who are experiencing financial difficulties or facing foreclosure, including information concerning Michigan’s statewide network of homeownership counselors, a second mortgage program to assist current MSHDA borrowers, and refinance programs for eligible homeowners.²⁹³

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ See generally *Indiana’s Hardest Hit Fund*, IND. H. REPUBLICANS, http://www.in.gov/legislative/house_republicans/2298.html (last visited Sept. 7, 2014), archived at <http://perma.cc/X6YQ-CV4W> (discussing how the “Hardest Hit Fund” gives financial assistance to individuals who have been most negatively affected by the recent poor economy).

²⁸⁹ IOWA FIN. AUTH., available at <http://www.iowamortgagehelp.com/> (last visited Nov. 8, 2011), archived at <http://perma.cc/FA63-Q5E5>; Press Release, Iowa Dep’t of Justice, Off. of the Att’y Gen., “Iowa Mortgage Help” Will Aid Home Owners Struggling with Mortgage Payments (Feb. 28, 2008), http://www.state.ia.us/government/ag/latest_news/releases/feb_2008/Iowa_Mortgage_help.html, archived at <http://perma.cc/C8HW-3MPV>.

²⁹⁰ *Help for Homeowners*, IOWA FIN. AUTH. (2014), <http://www.iowamortgagehelp.com/homeowners/>, archived at <http://perma.cc/RWD7-8VMW>; *Supporting Home Ownership Education in Iowa: Iowa Mortgage Help*, IOWA HOME OWNERSHIP EDUC. PROJECT (2008), <http://www.ihoep.com/newsdetails.php?newsId=2>, archived at <http://perma.cc/J3WU-CH96>.

²⁹¹ *Supporting Home Ownership Education in Iowa: Iowa Mortgage Help*, *supra* note 290.

²⁹² *Homeowner Education*, MICH. STATE HOUS. DEV. AUTH., available at http://www.michigan.gov/mshda/0,4641,7-141-45866_62889_47905-177801--,00.html (last visited Nov. 19, 2011), archived at <http://perma.cc/6JS8-MCCB>.

²⁹³ *Id.*

The “Save the Dream Ohio” hotline provides Ohioans facing foreclosure with legal assistance and contacts for HUD-certified housing agencies.²⁹⁴ Hotline operators also connect callers with the Ohio Benefit Bank, which helps the callers determine their eligibility for additional support in alleviating their financial burdens.²⁹⁵ In 2007, the Ohio Housing Financing Agency (“OHFA”) and the Ohio Department of Development’s Office of Housing and Community Partnerships established the Ohio Home Rescue Fund Program.²⁹⁶ The Ohio Home Rescue Fund Program aids homeowners by providing financial assistance to those who are “struggling to make their mortgage payments due to unforeseen, temporary life circumstances.”²⁹⁷ Between the 2006 and 2008 fiscal years, the program aided 762 households comprising roughly 2056 people.²⁹⁸

The Wisconsin Housing and Economic Development Authority provides a toll-free hotline, Homeowner’s HOPE, which is answered twenty-four hours a day by trained housing (credit) counselors who assist homeowners to “establish a budget, understand the terms of [their] loans, and talk with [their] financial institution.”²⁹⁹ Homeowner’s HOPE is also represented by its own website, which provides information and resources.³⁰⁰ In Illinois, programs have been developed for specific counties with high concentrations of foreclosure instead of statewide programs. For example, in Cook County, homeowners who have received a foreclosure summons may call a toll-free help line to schedule a free meeting with a housing counselor.³⁰¹

V. CONCLUSION

The Midwest’s high unemployment and preexisting economic slump has exacerbated the foreclosure crisis. Both federal and state governments have responded with extensive foreclosure-prevention efforts. While no single effort has been a panacea and each effort has

²⁹⁴ *Save the Dream Ohio: Stats, Facts, and Accomplishments*, SAVE THE DREAM OHIO, <http://www.savethedream.ohio.gov/Progress.aspx> (last visited June 21, 2012), archived at <http://perma.cc/CKY4-V9AE>.

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ *Save the Dream Ohio: History*, SAVE THE DREAM OHIO, available at <http://savethedream.ohio.gov/History.aspx> (last visited June 21, 2012), archived at <http://perma.cc/V7V9-YEYX>.

²⁹⁸ *Save the Dream Ohio: Stats, Facts, and Accomplishments*, *supra* note 294.

²⁹⁹ WIS. HOUS. ECON. DEV. AUTH., *supra* note 269.

³⁰⁰ See generally HOMEOWNERSHIP PRESERVATION FOUND., *supra* note 269 (providing a link to the website set up by the Home Ownership Preservation Foundation).

³⁰¹ *Mortgage Foreclosure Mediation Program*, *supra* note 256.

needed extensive amendments to improve its effectiveness, Indiana has developed an effective combination of programs. These programs, combined with the OAG Robosigning Multistate Servicing Standards, the federal laws implemented in HAMP and HAFA, and the Dodd-Frank Act, have helped homeowners facing foreclosure. However, the federal government still has not reformed the rating system, which also contributed to the foreclosure crisis and recession. Moreover, while Dodd-Frank tightened some of the underwriting practices that led to some homeowners purchasing homes without the ability to pay, there is a difficult tension between strict underwriting standards on the one hand, and ensuring that lower income families and first time homeowners have the opportunity for home ownership, on the other. Recently, Fannie Mae and Freddie Mac have come under criticism that they may be beginning to move toward some of the lending practices that contributed to large losses during the mortgage crisis.³⁰²

Like other Midwest states, Indiana introduced a toll-free foreclosure prevention hotline that refers homeowners to trained housing counselors. Nevertheless, Indiana is only now seeing significant improvement in the number of homeowners saving their homes through loss-mitigation efforts. This is because of a critical combination of efforts, including the OAG Multistate and Best Practices Petition that responded to robosigning and other servicer abuses; legislation to provide homeowners with a right to a settlement conference where they meet face-to-face with their lender to determine their eligibility for a workout to save their home; and finally, the MFTCAP project, where Indiana courts take an active role in contacting the homeowner and facilitating the settlement conference process.

³⁰² See Joe Light, *Fannie and Freddie See Potential for Thaw in Mortgage Access* (Nov. 6, 2014), available at <http://online.wsj.com/articles/fannie-mae-profit-falls-55-1415277851>, archived at <http://perma.cc/WD3V-FWMB> (indicating that Fannie Mae and Freddie Mac may have contributed to the losses incurred during the mortgage crisis).