Relief Foreclosed: Defending Residential Foreclosures In A Post-CARES Act COVID-19 World

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ABSTRACT

In response to the COVID-19 pandemic and subsequent loss of employment and closure of numerous businesses, Congress enacted the Coronavirus Aid, Relief and Economic Security Act ("CARES" Act), which allowed homeowners on demand to obtain temporary forbearance from making their monthly mortgage payments. The forbearances are for a limited duration but are subject to a degree of ambiguity concerning terms of repayment and other issues. The U.S. House of Representatives has held hearings, however, in which difficulties in implementation were documented, particularly some mortgage servicers providing misleading or incorrect information or raising unnecessary barriers to applications for forbearance. This, together with economic incentives to sell delinquent loans to remote investors, or otherwise push such loans through foreclosure, will likely trigger a wave of foreclosure filings over the next year. This article proposes a strategy for homeowners to defend such actions where loan servicers have intentionally or negligently failed to conform to federal regulations governing loan servicing activities, whether under the CARES Act or other, prior regulations of general applicability. In particular, this article argues that the equitable duty of good faith and fair dealing can serve as an effective defense to a foreclosure action.

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I. THE FEDERAL CARES ACT MORTGAGE FORBEARANCE PROGRAM

The COVID-19 pandemic, and the largely inept governmental response, have caused millions of people to lose their employment and resulted in numerous business failures. Congress recognized that the inability to earn a living has resulted in such financial hardship that millions of homeowners have found it difficult to make their monthly mortgage payments in full and on time. Accordingly, Congress passed the "Coronavirus Aid, Relief, and Economic Security Act," or "CARES" Act, which became public law on March 27, 2020.[2] Together with a moratorium on all residential foreclosures for federally-backed mortgage loans for a 60-day period beginning on March 18, 2020, Congress created a process whereby homeowners with such mortgage loans could request a forbearance from making payments on their mortgage for a period of up to 180 days after affirming that they have been experiencing a financial hardship as a result of the COVID-19 emergency.[3] Homeowners may request an second, additional 180 day extension as well.[4] Further, no "fees, penalties, or interest beyond the amounts scheduled or calculated as if the borrower made all contractual payments on time and in full under the terms of the mortgage contract, shall accrue on the borrower's account."[5] Thus, during the forbearance, only the usual interest rate shall accrue without additional penalties or late fees. Requests for forbearance must be granted by a mortgage holder or its designated loan servicer agent without requiring additional documentation other than the borrower's attestation of hardship.[6] Nor do borrowers have to be current on their mortgage to qualify for forbearance.[7]

A wave of foreclosures is expected after Congress granted temporary forbearance relief.

Interestingly, nowhere is the term, "forbearance," defined in the Act. Black's Law Dictionary defines forbearance as:

> Refraining from doing something that one has a legal right to do. Giving of further time for repayment of obligation or agreement not to enforce claim at its due date. A delay in enforcing a legal right. Act by which creditor waits for payment of debt due him by debtor after it becomes due.[8]

Nor does the Act provide for administrative agencies to define the term "forbearance" or otherwise issue regulations clarifying any ambiguities in this specific section.[9] Nevertheless, consistent with the Black's definition, it is generally accepted by the industry that a forbearance merely temporarily halts and postpones the obligation to pay one's mortgage, and that one would be required to pay the arrears at

2. Public Law 116-136 (H.R. 748) (March 27, 2020).
3. *Id*., Sec. 4022.
4. *Id*., Sec. 4022(b)(2).
5. *Id*., Sec. 4022(b)(3).
6. *Id*., Sec. 4022(c).
7. *Id*., Sec. 4022(b)(1).
8. Black's Law Dictionary, Sixth Ed.
9. By way of contrast, other portions of the Act do provide delegated authority to administrative agencies to clarify those provisions. *See, e.g*., Sec. 1106(k) ("Not later than 30 days after the date of enactment of this Act, the Administrator shall issue guidance and regulations implementing this section.") and Sec. 1109(d) ("The Secretary may issue regulations and guidance as necessary to carry out the purposes of this section").

some point after the conclusion of the forbearance period.[10] In this regard, missed payments are not forgiven. Yet it is unclear when forborne payments would be due. While the Act does not provide any guidance on when such payments would be due, some federal regulators have issued guidance to servicers that lenders are not permitted to require repayment of postponed mortgage payments in a lump sum at the end of the forbearance period.[11]

II. FORBEARANCE REQUESTS AND THE MORTGAGE INDUSTRY MISMANAGEMENT

As of June 21, 2020, a mere three months after enactment of the CARES Act, 4.2 million mortgages fell into forbearance, or 8.5% of all mortgages.[12] By August 17, 2020, the Mortgage Bankers Association reported this figure had fallen to 3.6 million mortgages or 7.21% of servicers' portfolio volume.[13] Further, industry observers reported optimistically that loss mitigation tools used by mortgage holders and their servicers, which have reduced the impact on borrowers who have faced reduced income, together with remaining equity in the borrowers' homes, which has increased due to demand of urban residents fleeing cities for the suburbs, have cushioned the economic impact on borrowers and expected default rates.[14]

However, information presented to the U.S. House of Representatives, House Financial Services Committee, Subcommittee on Oversight and Investigations, tells a much bleaker story. For instance, the subcommittee's own investigation revealed that "not all servicers provided borrowers the option of an initial 180-day forbearance," choosing instead to provide an initial three-month forbearance with extensions available only if the borrower had been prescient enough to request it.[15] The subcommittee also revealed that "some servicers failed to inform borrowers that they could obtain up to one year of forbearance," as required under the Act.[16] Additionally, the investigation discovered that despite administrative guidance that no lump sum payment was required immediately after the conclusion of the forbearance period, some servicers stated or implied otherwise in their public materials.[17]

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10. *See, e.g.* CSBS, "Consumer Relief Guide—Your Rights to Mortgage Payment Forbearance and Foreclosure Protection Under the Federal CARES Act," (May 15, 2020), https://www.csbs.org/mortgage-relief-coronavirus. *See also* Gabriella Cruz-Martinez, Money, "4 Million Homeowners Are in Mortgage Forbearance After the CARES Act Loosened Rules. Is it Right for You?" (May 27, 2020). *See also* Consumer Financial Protection Bureau, video, *available at*: https://www.consumerfinance.gov/coronavirus/mortgage-and-housing-assistance/.

11. Memorandum, FSC Majority Staff, "July 16, 2020, Protecting Homeowners During the Pandemic: Oversight of Mortgage Servicers' Implementation of the CARES Act," (July 13, 2020), p. 3, United States House of Representatives Committee on Financial Services, Subcommittee on Oversight and Investigations, citing Federal Housing Finance Agency (FHFA), "No Lump Sum Required at the End of Forbearance" says FHFA's Calabria (April 27, 2020) and FHA, VA and USDA, CARES Act Forbearance Fact Sheet for Mortgagees and Servicers of FHA, VA or USDA Loans, at 2 (May 2020).

12. Lance Lambert, "More than 4 million mortgages are in forbearance. What are your housing protections?" Fortune (July 2, 2020), citing Mortgage Bankers Association, *available at* https://fortune.com/2020/07/02/mortgage-forbearance-cares-act-protections/.

13. Adam DeSanctis, "Share of mortgage loans in forbearance decreases for the ninth straight week to 7.21%," Mortgage Bankers Association (August 17, 2020), *available at* https://www.mba.org/2020-press-releases/august/share-of-mortgage-loans-in-forbearance-decreases-for-the-ninth-straight-week-to-721.

14. Fitch Wire, "US Mortgage market positioned to withstand forbearance programs," (July 23, 2020), *available at* https://www.fitchratings.com/research/non-bank-financial-institutions/us-mortgage-market-positioned-to-withstand-forbearance-programs-23-07-2020.

15. Memorandum, July 16, 2020, "Protecting Homeowners During the Pandemic: Oversight of Mortgage Servicers' Implementation of the CARES Act," (July 13, 2020), p. 4.

16. *Id.*

17. *Id.* at p. 5.

Further, the subcommittee noted the HUD Office of Inspector General's own review concluded that 10 of the 30 top servicers of FHA loans did not have information about forbearance readily available on their websites, and that 14 lacked any information about the length of the forbearance period.[18] Others gave the misleading impression that lump sum payments were required immediately after the conclusion of the forbearance period.[19]

Testimony before the subcommittee provided additional support that the loan servicing industry was mismanaging the forbearance process in many critical respects. For instance, a coalition of housing and consumer advocates reported that requests for forbearance were being denied both on the basis that the borrower had not provided sufficient evidence of financial hardship, and on the basis that the borrower's account was previously delinquent,[20] even though the CARES Act specifically states that nothing other than an attestation from the borrower is required to qualify for a forbearance and that forbearance should be granted even if the account was previously delinquent before the COVID emergency occurred.[21] Testimony also revealed that certain loan servicers made forbearance applications difficult by only accepting online applications, and that many borrowers who did communicate via telephone experienced "long wait times, sudden disconnections, multiple transfers to untrained staff, inability to reach a live person, and inconsistent information."[22] Still other servicers wrongly informed borrowers that they would be required to pay the forborne payments in a single lump sum immediately at the end of the forbearance period[23] or warned incorrectly that accepting a forbearance would disqualify them from refinancing in the future.[24]

Further, when faced with the possibility of not receiving payments, penalties or interest for up to a year, mortgage holders have an economic incentive simply to unload their non-performing portfolios by packaging them as securities and selling them to willing investors. For instance, during the forbearance period, mortgage holders will still be contractually required to "continue to make advances to in-

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18. *Id*. at p. 3-4, citing Memorandum from Brian T. Pattison, Assistant Inspector General for Evaluation, HUD Office of Inspector General, to Joseph M. Gormley, Deputy Assistant for single family housing HUD (April 27, 2020).

19. *Id*. at p. 4, citing Pattison, *supra*, n. 18.

20. Testimony of Alys Cohen, Staff Attorney, National Consumer Law Center, House Financial Services Committee, Subcommittee on Oversight and Investigations, (July 16, 2020), p. 18-19; and Testimony of Marcia Griffin, President & Founder of HomeFree-USA, House Financial Services Committee, Subcommittee on Oversight and Investigations, (July 16, 2020), p. 4 ("Denial of CARES Act or other forbearance requests due to the loan delinquency status or recent resolution (in trial payment or otherwise recent modification)").

21. The Act states:

> "(b) FORBEARANCE – (1) IN GENERAL – During the covered period, a borrower with a Federally backed mortgage loan experiencing a financial hardship due, directly or indirectly, to the COVID-19 emergency may request forbearance on the Federally backed mortgage loan, regardless of delinquency status, by –
>
> (A) Submitting a request to the borrower's servicer; and
> (B) Affirming that the borrower is experiencing a financial hardship during the COVID-19 emergency.
>
> Sec. 4022(b). The Act also similarly states:
> (c) REQUIREMENTS FOR SERVICERS-
> (1) IN GENERAL – Upon receiving a request for forbearance from a borrower under subsection (b), the servicer shall with no additional documentation required other than the borrower's attestation to a financial hardship caused by the COVID-19 emergency . . . provide the forbearance. . . ."
> Sec. 4022(c).

22. Cohen testimony, *supra*, n. 20, p. 19; and Griffin testimony, *supra*, n. 20, p. 4 ("long call wait times, and non-responsive or unattended email boxes").

23. Cohen testimony, *supra*, n. 20, p. 19; and Griffin testimony, *supra*, n. 20, p. 4-5.

24. Griffin testimony, *supra*, n. 20, p. 5.

vestors and pay taxes and insurance," regardless of the lack of payments being received from the borrower.[25] This would "strain the liquidity of even well-capitalized servicers."[26] In such situations, the economic incentive is great for the servicer to throw the risk of a non-performing mortgage to a potential buyer. Alternatively, if a servicer and its client agree to retain the mortgage, in markets where the real estate values are increasing due to growing demand from urbanites moving to the suburbs, "A lender may calculate that the home is worth a great deal more than the outstanding mortgage and decide that offering the home on the inventory-starved market may yield more profit than would be lost in the administrative burden of eviction and foreclosure."[27] Accordingly, whether owned by the mortgagee or a subsequent purchaser, these mortgages will likely be thrown instantly into default and aggressively pushed through foreclosure. Consequently, within a year of the height of the COVID-19 medical and financial crisis, and shortly after the period of forbearance expires, the nation will most likely be experiencing an unprecedented wave of foreclosures. What can borrowers in Pennsylvania do to defend against these actions and keep their homes?

III. MORTGAGE FORECLOSURES IN PENNSYLVANIA

Pennsylvania is a "judicial" foreclosure state, which means that a mortgage holder whose mortgage is in arrears must file a formal, written complaint in equity, *in rem*, to recover the real estate as security for the promise to pay underlying the promissory note. The action is basically against the security itself, the real estate, and flows from the promissory note, which expresses the promise to repay sums advanced for purchase or refinance of real property, and a mortgage, which expresses the security relationship whereby borrowers mortgage their real estate as security to ensure payments pursuant to the promissory note. In non-judicial foreclosure states, a mortgage holder may initiate foreclosure through self-help, but, in Pennsylvania, a legal action must be filed and reduced to judgment.

Prior to the filing of such a legal action, the mortgage holder must, with some exceptions, provide any borrower who is 60 days delinquent in making payment a notice of the delinquency that describes the arrears, how it was calculated and how it may be cured, as well as attaching a list of local credit counseling centers with which the borrower may consult for 33 days prior to the commencement of any foreclosure.[28] If a lender files for foreclosure without providing the appropriate notice, the case can be dismissed without prejudice until such notice is appropriately provided.[29] At any point up to one hour before the sheriff's sale of the real estate, a borrower may tender the amount in arrears to reinstate the loan.[30] Additionally, a borrower may file an Answer to the complaint in foreclosure, challenging the calculation of arrears or raising any other defenses. Generally, counterclaims are not allowed in mortgage foreclosure actions in Pennsylvania, unless based on the origination of the loan itself.[31]

As a means to facilitate settlements, many local Pennsylvania counties have mediation or diversion programs in place that delay the issuance of a default judgment

25. Cohen testimony, *supra*, n. 20, p. 19-20.
26. *Id*. at p. 20.
27. Griffin testimony, *supra*, n. 20, p. 6-7.
28. 35 P.S. §1680.403c.
29. 35 P.S. §1681.5.
30. 41 P.S. §404.
31. *See* Pa.R.C.P. 1148 and Rearick v. Elderton State Bank, 97 A.3d 374, 380 (Pa. Super. 2014).

against borrowers until such time as it is apparent that a negotiated solution would be unlikely. Negotiated solutions can include a reinstatement, a lender-sponsored refinance (called a "loan modification"), the sale of the home if equity exceeds arrears, a "short sale" where the borrower sells the home for less than the value of the loan with the consent of the lender, or consensual return of the property with releases.

IV. DEFENDING RESIDENTIAL MORTGAGE FORECLOSURES: THE EQUITABLE DEFENSE OF LACK OF GOOD FAITH AND FAIR DEALING

If, however, negotiated solutions are not possible, and homeowners wish to defend the foreclosure, what defenses may they raise, particularly within the context of a COVID-related forbearance? In view of the mortgage industry's mismanagement of the CARES Act forbearance right, and established standards for proper management of delinquent mortgages, a homeowner may raise equitable defenses that the lenders and their servicers have violated the duty of "good faith and fair dealing."

The duty of good faith and fair dealing is inherent in every contract entered into in Pennsylvania and is expressed in Section 205 of the Restatement (Second) of Contracts, which holds that "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."[32] As Comment (a) to the Restatement explains, "Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed upon common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving "bad faith" because they violate community standards of decency, fairness or reasonableness."[33]

Within the mortgage foreclosure context, Pennsylvania courts have described this as a defense in equity where the lender has in some form failed to conform its actions to objective community standards of decency, fairness or reasonableness otherwise expected of it.

In *Fleet Real Estate Funding Corp.* v. *Smith*,[34] the borrowers obtained a mortgage on their newly purchased home, and the mortgage was insured against default by the Federal Housing Administration (FHA), which required all participants in its insurance program to follow certain guidelines issued by the Department of Housing and Urban Development (HUD), which administered the FHA mortgage insurance program.[35] The regulations and HUD handbook identified certain methods of forbearance relief that the lender's assignee had refused, or failed, to follow.[36] In particular, the defendant alleged that at no time since default occurred did the mortgage company ever offer to help with mitigation efforts.[37] This noncompliance was raised as an equitable defense to a subsequent foreclosure action brought by the lender's assignee. In reversing the trial court's grant of summary judgment in favor of the lender, the Pennsylvania Superior Court held that although federal law did not

32. Creeger Brick and Building Supply, Inc. v. Mid-State Bank, 385 Pa. Super 30, 560 A.2d 151, 153 (Pa. Super. 1989). *See also* Hanaway v. Parkesburg Grp., LP, 132 A.3d 461 (Pa.. Super. 2015) (discussing the concept and its application over several cases).
33. *See generally* Hanaway, *supra*, n. 32.
34. 530 A.2d 919 (Pa. Super. 1987).
35. *Id*. at 921.
36. *Id*.
37. *Id*. at 924, n. 4.

mandate that the mortgagee comply with the HUD regulations and Handbook, "we believe that trial courts in Pennsylvania may exercise their equity powers to restrict a mortgagee who has not, within the **reasonable expectations of good faith and fair dealing**, followed or applied the forbearance provisions of the HUD regulations and Handbook."[38] Relying upon prior federal decisions, the court agreed that these provisions contain "sensible, equitable standards of conduct, consistent with, and issued in furtherance of the national housing goals."[39] To the extent that a matter of disputed fact was raised concerning the mortgagee's compliance, summary judgment was inappropriate.

Two years later, the Superior Court affirmed this equitable defense in *Union Nat'l Bank* v. *Cobbs*.[40] Cobbs had taken out a federally insured Veterans Administration mortgage and fell into default. In defense to foreclosure, Cobbs averred that he had called the lender's 800 number and was told that someone would get back to him, but nobody ever did. He also alleged that he had called the lender again and was told he would be sent a questionnaire, which he never received. And he stated that no one from the mortgage company ever suggested a lower payment plan to help him until he found full-time employment.[41] Accordingly, like the defendant in *Fleet*, Cobb raised the equitable defense that the lender's behavior failed to follow accepted standards of loan servicing and specific requirements to explore alternatives to default as expressed in the VA Lenders' Handbook.[42] The court reviewed the *Fleet* decision extensively and agreed that while the VA Handbook did not create enforceable legal requirements, it did serve as "sensible, equitable standards of conduct," the violation of which could serve as a defense.[43] The court therefore held, largely on the reasoning of *Fleet*, that Cobbs could raise the lender's failure to comply with the VA Handbook as an equitable defense to foreclosure, and that because disputes of material fact were raised in this regard, summary judgment was inappropriate.[44]

One year later, the Superior Court reaffirmed this principle in yet another FHA-insured mortgage foreclosure case. In *Commonwealth School Employee's Retirement Fund* v. *Terrell*,[45] the court again reversed a trial court's grant of summary judgment in favor of a lender. Here, the borrower fell into arrears due to unemployment, but when she found new employment, she proposed several alternative repayment plans to the lender which rejected them all.[46] Terrell argued this constituted a failure to properly service the mortgage in accordance with the loss mitigation requirements described in the FHA regulations and handbook. Citing *Fleet* and *Cobbs*, the court agreed that the allegation raised a disputed material fact sufficient to overcome summary judgment, because violating HUD regulations and policies would constitute an equitable defense if proven true.[47]

Similarly, in 2017, the Pennsylvania Superior Court held in *Bank of New York Mellon* v. *Brooks*,[48] that the failure of a loan servicer to process a loss mitigation application

38. *Id*. at 923 (emphasis added).
39. *Id*. at 923, citing and discussing Brown v. Lynn, 385 F. Supp. 986 (N.D. Ill. 1974) (Brown I) and Brown v. Lynn, 392 F. Supp. 559 (N.D. Ill. 1975) (*Brown II*).
40. 567 A.2d 719 (Pa. Super. 1989).
41. *Id*. at 720-721.
42. *Id*. at 721.
43. *Id*. at 722.
44. Id. at 723.
45. 582 A.2d 367 (Pa. Super. 1990).
46. *Id*. at 367.
47. *Id*. at 368. *See also* Green Tree Consumer Disc. Co. v. Newton, 909 A.2d 811 (Pa. Super, 2006) ("case law indicates that it is not beyond the power of the courts to exercise their powers of equity in foreclosure actions") (citing *Fleet*, *supra*).
48. 169 A.3d 667 (Pa. Super, 2017).

(a "short payoff" request) on the pretext of failing to receive documentation even after the borrower's lawyer unsuccessfully attempted to communicate several times with the servicer to ask what documentation was needed, violated Regulation X as promulgated by the federal Consumer Financial Protection Bureau[49] long before the COVID-19 pandemic. The court reversed summary judgment in favor of the lender because a genuine dispute of fact existed concerning the lender's compliance with this federal regulation designed to encourage loss mitigation.[50] In doing so, the court favorably cited to the *Fleet* case for the principle that failure to comply with federal regulations raised an equitable defense to foreclosure.[51]

In each of the above cases, the equitable defense of good faith and fair dealing is grounded in pre-existing regulatory rules or policies that the loan servicer allegedly violated to the detriment of the borrower. To effectively use this equitable defense to CARES Act forbearance abuses, a practitioner should be aware of the range of federal regulatory standards and policies that apply.

V. THE FEDERAL REGULATORY BACKGROUND: APPLYING A DOCTRINE OF DEFENSE IN EQUITY TO CARES ACT FORBEARANCE ABUSES

In the context of the CARES Act, the Consumer Financial Protection Bureau (CFPB), the Federal Housing Finance Agency (FHFA), as well as the FHA, the Veterans Administration and the U.S. Department of Agriculture, have implemented joint and separate policies related to the forbearance provisions of the Act. For instance, CFPB and the Conference on State Bank Supervisors (CSBS) have jointly confirmed that borrower applicants for forbearance need not provide financial documentation to qualify for a forbearance, and that servicers should not steer borrowers away from requesting forbearance or grant forbearance terms shorter than the 180 day period, unless requested by the borrower.[52] Additionally, the FHFA has also made it clear that "borrowers in forbearance with a Fannie Mae or Freddie Mac (the Enterprises)-backed mortgage are not required to repay the missed payments in one lump sum."[53] Similarly, the FHA, VA and USDA have also ruled that no documentation is required of applicants, that prior delinquency status is irrelevant to granting a forbearance, that forbearance terms must be granted for the amount of time the borrower requests up to the initial 180 days plus an additional 180 days on request, that borrowers should not be required to repay forborne payments in one lump sum unless at the end of the loan term, and that no later than 30 days prior to the end of the forbearance period lenders must explore with the borrower all possible loss mitigation options.[54]

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49. Codified at 12 C.F.R. 1024.30 *et. seq*.

50. Brooks, *supra* n. 48, at 672.

51. *Id*. at 672, n. 4.

52. CFPB, "CFPB and State Regulators Provide Additional Guidance to Assist borrowers Impacted by the COVID-19 Pandemic," June 4, 2020), *available at*: https://www.consumerfinance.gov/about-us/newsroom/cfpb-and-state-regulators-provide-guidance-assist-borrowers-covid-19/; CFPB Guidance,"CARES Act Forbearance & Foreclosure," (May 2020), *available at*: https://files.consumerfinance.gov/f/documents/cfpb_csbs_industry-forbearance-guide_2020-06.pdf; and "CFPB Consumer Relief Guide – Your Rights to Mortgage Payment Forbearance and Foreclosure Protection Under the Federal CARES Act," *available at*: https://files.consumerfinance.gov/f/documents/cfpb_csbs_consumers-forbearance-guide_2020-05.pdf.

53. FHFA, "No Lump Sum Required at the End of Forbearance," says FHFA's Calabria (April 27, 2020), *available at*: https://www.fhfa.gov/Media/PublicAffairs/Pages/No-Lump-Sum-Required-at-the-End-of-Forbearance-says-FHFAs-Calabria.aspx.

54. FHA, VA, & USDA, CARES Act Forbearance Fact Sheet for Mortgagees and Servicers of FHA, VA or USDA Loans, (May 2, 2020), *available at*: https://www.hud.gov/sites/dfiles/SFH/documents/IACOVID19

Additionally, the FHA still maintains several loss mitigation requirements of more general scope.[55] The FHA requirements include mandated attempts to contact the delinquent borrower several times and through several means at different times of the day, whether by telephone, electronic communications or traditional mail. It also requires analysis of specific loss mitigation measures and their communication to the borrower. It further mandates face-to-face interviews with borrowers, unless impractical, re-evaluation of loss mitigation each month, and an assignment of specific personnel, communicated to the borrower, for purposes of loss mitigation, among other requirements.[56]

Similarly, the Home Affordable Modification Program (HAMP) administered by the Department of the Treasury maintains its own very detailed loss mitigation requirements that applied prior to the COVID-19 pandemic.[57] These policies require mortgage lenders and their servicers to offer a loan modification to the borrower consistent with the Home Affordable Modification Program policies prior to initiating any action in foreclosure. It also states that with some limited exceptions, servicers may not refer the case to foreclosure, or otherwise pursue foreclosure, while a HAMP loan modification application is pending.[58] While there is no private right of action to enforce the federal rules and policies that govern this HAMP Program, several courts have held that a borrower may still raise a defense based on state law principles of equity where these federal standards are violated. For instance, in *Wigod* v. *Wells Fargo Bank, N.A.*,[59] the Seventh Circuit Court of Appeals held that, "The absence of a private right of action from a federal statute provides no reason to dismiss a claim under a state law just because it refers to or incorporates some element of the federal law."[60]

Further, Regulation X, as promulgated by the federal Consumer Financial Protection Bureau long before the COVID-19 pandemic, also provides additional standards of general applicability.[61] In particular, among other requirements, Regulation X provides for detailed loss-mitigation requirements.[62] These include requiring a

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FB_FactSheetServicers.pdf; "Extended Relief Under the CARES Act for those Affected by COVID-19," Circular 26-20-12 (April 8, 2020), *available at* https://www.benefits.va.gov/HOMELOANS/documents/circulars/26_20_12.pdf; and "USDA Implements Immediate Measures to Help Rural Residents, Businesses and communities Affected by COVID-19," (April 8, 2020), *available at* https://www.rd.usda.gov/sites/default/files/USDA_RD_SA_COVID19_ProgramImmediateActions04082020.pdf.

55. HUD Handbook 4000.1, (October 24, 2019), *available at*: https://www.hud.gov/sites/dfiles/OCHCO/documents/4000.1hsgh_Update7.5.pdf.

56. *Id*. at p. 645, *et. seq*.

57. "Making Home Affordable Program Handbook for Servicers of Non-GSE Mortgages," Version 5.3 (February 3, 2019), *available at*: https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/mhahandbook_53.pdf.

58. *Id*. at p. 92.

59. 673 F.3d 547, 581 (7th Cir. 2012).

60. *See also* In re Bank of America Home Affordable Modification Program Contract Litigation, Multidistrict Litigation, Docket 1:10-md-02193-RWZ, 2011 WL 2637222, Memorandum of Decision denying motion to dismiss (D. Mass. July 6, 2011) (J. Zobel); Allen v. Citimortgage, Inc., Docket 1:10-cv-02740-CCB, Memorandum denying motion to dismiss, pp. 7-8, 2011 WL 3425665, *4 (D. Md. August 4, 2011), citing Bosque v. Wells Fargo Bank, N.A. 762 F. Supp. 2d 342, 2011 WL 304725, at *5 (D. Mass. 2011); Faulkner v. Onewest Bank, FSB, 2010 WL 2472275, Docket 3:10-cv-0012-JPB (N.D. Wv. 2010); Bosque v. Wells Fargo Bank, N.A., No 10-cv-10311-FDS, 762 F. Supp2d 342, 2011 WL 304725, (D. Mass. 2011). *See also* Stagikas v. Saxon Mortgage Services, No. 4:10-cv-40164-FDS, 795 F. Supp. 2d 129,135, 2011 WL 2652445 (D. Mass. 2011) (same), Belyea et. al. v. Litton Loan Servicing, LLP, 2011 WL 2884964, *6, Docket 1:10-cv-10931-DJC, p. 12 (D. Mass. 2011) (same), Wittenberg v. First Independent Mortgage et. al., 2011 WL 1357483, *20, (N.D. Wv. 2011) (same), and Bolone v. Wells Fargo Home Mortgage, Inc., et. al., 2011 WL 3706600, *5, Docket 2:11-cv-10663-LPZ-MKM, p. 9 (E.D. Mich. 2011) (same).

61. 12 C.F.R. 1024.30 *et. seq*.

62. 12 C.F.R. 1024.41.

loan servicer to "exercise reasonable diligence in obtaining documents and information to complete a loss mitigation application,"[63] prompt processing of the application and communication with the borrower,[64] and a reasoned explanation for any subsequent decision rejecting any such application.[65] The regulations also prohibit prosecuting a foreclosure or listing a home for sheriff's sale while an application for a loan modification is pending.[66]

IV. CONCLUSION

Taken together, these federal regulations form the basis for "sensible, equitable standards of conduct" that were recognized by the *Fleet, Cobbs* and *Terrell* courts as sufficient to form the basis for an equitable defense to foreclosure. Thus, if a homeowner experiences the kind of lender abuses documented by the congressional investigation and testimony set forth above, or if the lender or its servicer is guilty of violating any of the numerous federal regulations concerning post-CARES Act forbearance, or federal regulations of more general applicability, that homeowner may reasonably invoke the equitable defense of failure to engage in good faith and fair dealing. Faced with an intransigent mortgage holder, Pennsylvania homeowners in distress may effectively use these equitable principles to defend against unfair foreclosures in a post-COVID context.

63. 12 C.F.R. 1024.1(b)(1).
64. 12 C.F.R. 1024.1(b)(2).
65. 12 C.F.R. 1024.1(d).
66. 12 C.F.R. 10241(f) and (g).