

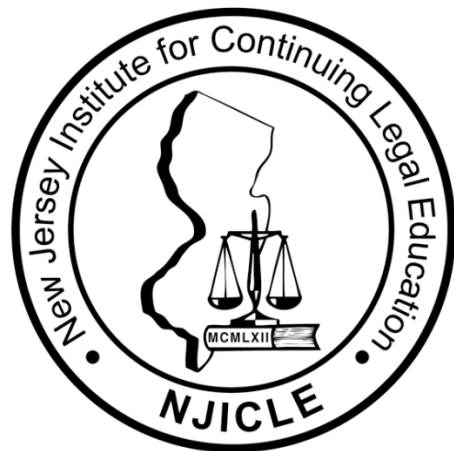
MORTGAGE FORECLOSURE UPDATE 2022

2022 Seminar Material

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MORTGAGE FORECLOSURE UPDATE 2022

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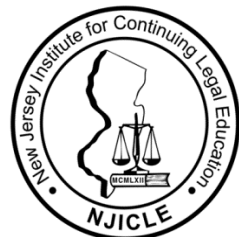
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CHAPTER 1

APPLICATION OF ACT; DEFINITIONS; CONSTITUTIONALITY; FEDERAL PREEMPTION

§ 1.01 Title of Act

The act is entitled “An Act concerning mortgage foreclosure, amending various sections of the New Jersey Statutes and supplementing Chapter 50 of Title 2A of the New Jersey Statutes.” L.1995, c.244.

§ 1.02 *Fair Foreclosure Act* (Short Title) - *N.J.S.A. 2A:50-53*

Section 1 of the act (*N.J.S.A. 2A:50-53*) provides:

“This act shall be known and may be cited as the ‘*Fair Foreclosure Act*.’”

Analysis

The term “fair” is presumably derived from the fact that the act entails a balancing of interests between lender and debtor, so as to benefit both. The lender is benefited by the return of the residential mortgage loan to performing status, while the debtor is benefited by being able to keep the residential mortgaged premises, *e.g.*, the debtor's home.¹

§ 1.03 When Does the Act Take Effect?

The act takes effect on or after December 4, 1995.

Analysis

The “Historical and Statutory Note” to *N.J.S.A. 2A:50-53* provides:

“L.1995, c.244, § 19, approved September 5, 1995 provided: This act shall take effect on the 90th day after enactment [eff. Dec. 4, 1995] and shall apply to foreclosure actions commenced on or after the effective date.”

In terms of application of the act to the “foreclosure” process, the date of the mortgage, the date of the obligation, and date of default are immaterial. The date when foreclosure is instituted controls. If a residential mortgage foreclosure action is instituted on or after *December 4, 1995* and the requirements of the act are met, the act applies.

§ 1.04 Public Policy Behind the Act

The Legislature hereby finds that it is the public policy of this State, that homeowners should be given every opportunity to pay their home mortgages, and thus keep their homes; and

¹ See Greenberg, “Foreclosure Act: Good for consumers, lenders” 4 *NJL* 1869 (September 18, 1995).

APPLICATION OF ACT

that lenders will be benefited when residential mortgage debtors cure their defaults and return defaulted residential mortgage loans to performing status.

Analysis

This statement of policy reinforces the purpose of the *Fair Foreclosure Act*, which is to give residential mortgage debtors the right to cure their mortgage defaults. Unquestionably, the act will be liberally construed by New Jersey courts to effectuate its purpose.

The *Fair Foreclosure Act* is invested with the strongest form of public policy; it is salutary, social legislation designed in part to help distressed homeowners in New Jersey. Attorneys must be careful, “super-careful,” not to underestimate the pervasive application of the act. The act is non-waivable except in compliance with the act.²

As the Appellate Division said in *Wells Fargo Home Mortg., Inc. v. Stull*.³

As can be seen, this legislative declaration [N.J.S.A. 2A:50-54] unmistakably indicates that there is no public policy that favors the rapid judicial sale of homes.... Instead, the *Fair Foreclosure Act* was designed to make clear the rights and remedies of both borrowers and lenders prior to and throughout the foreclosure process. The Acts ultimate goal is to allow mortgage lenders their remedies while giving borrowers 'every opportunity' to pay their mortgages and keep their homes.

It is interesting that this statement of legislative policy is at odds with the terminology of the act itself. The act does not refer to the “homeowner” and “mortgage” but rather to the “debtor” and “obligation.” In fact, the term “mortgagor” is not in the act's vocabulary.

Prior to the act, the right to cure a mortgage default in New Jersey was entirely “discretionary” with the lender, unless the right was expressly provided for in the mortgage documents. While lenders in New Jersey were presumably liberal in granting a mortgagor the right to cure, the right to cure was not automatic and varied greatly from lender to lender.

In many instances, however, mortgagors had trouble communicating with lenders, especially out-of-state lenders, about their mortgage defaults and found themselves at the mercy of lenders who would simply ignore their pleas. The *Fair Foreclosure Act* remedies this problem and places the duty on the lender to furnish the name and address of the lender and telephone number of a representative whom the debtor may contact prior to acceleration of the mortgage debt and institution of foreclosure, N.J.S.A. 2A:50-56c(11). This is a major innovation and will, by itself, promote substantial justice. Failure of a lender to talk to the debtor in good faith will presumably give rise to defenses on the part of the residential debtor, such as “unclean hands” and the like, which may postpone or otherwise defeat the particular foreclosure action of an offending lender. This will be a high price for any lender to pay.

The *Fair Foreclosure Act* institutionalizes the right to cure a residential mortgage default in New Jersey and establishes uniformity with respect to such cures.

The act clearly recognizes that it is “acceleration” - where all sums secured by the mortgage are immediately due and payable in full - which is the critical event and culprit in the

² N.J.S.A. 2A:50-61.

³ 378 N.J. Super. 449, 876 A.2d 298 (App. Div. 2005).

loss of homes in New Jersey through foreclosure.

The *Fair Foreclosure Act* requires that the residential mortgage lender give the residential debtor the opportunity to cure the default and *prevent acceleration* pursuant to the 30-day notice of intention and *defeat acceleration* once it has occurred and cure and reinstate the loan up until entry of the judgment in a conventional mortgage foreclosure with sale.

In *Luciani v. Hill Wallack*,⁴ Judge Gibson said:

In assessing the charges here, one must also consider the impact, if any, of the *Fair Foreclosure Act*. *N.J.S.A.* 2A:50-53 to 50-68. As that statute makes clear, it is the public policy of this State that homeowners be given “every opportunity” to pay their home mortgages and thus keep their homes. *N.J.S.A.* 2A:50-54. To further that policy the legislature has created an elaborate scheme of procedural protections for homeowners, including a liberalization of the circumstances in which such a person can cure a default. *N.J.S.A.* 2A:50-57.

Surprisingly enough, the pervasive *Fair Foreclosure Act* policy above was used by the court to justify limiting counsel fees in a foreclosure action which the court viewed as excessive, but which were otherwise in compliance with the mandatory rule, in order to facilitate *redemption* (not a cure) by the mortgagor. The court found:

Although one may argue that the Act adds nothing that *R.* 4:42-9(a)(4) does not already mandate, at the least, the Act underscores the notion that the maximum allowable is not mandatory. More importantly, where a lender imposes a legal fee which is six times higher than the reasonable value of the time expended as a condition of a pay-off, it seems clear that such a charge would constitute a penalty and thus violate *N.J.S.A.* 2A:50-57(c). The imposition of such a charge would also undermine the public policy of the Act that homeowners be given “every opportunity” to pay their mortgages.⁵

Judge Gibson also found:

“Although the fees charged here were part of a total payoff of the mortgage, not simply a payment of the arrearage, it is my view that both steps represent a cure of the default and thus *N.J.S.A.* 2A:50-57(b)(3) would apply in either setting.”⁶

§ 1.05 What Does the Act Do?

The *Fair Foreclosure Act* is complex legislation and does many things. The act, for

⁴ 329 *N.J. Super.* 170, 176, 746 A.2d 1097, 1100-01 (Ch. Div. 1999).

⁵ *Id.* at 176, 746 A.2d 1101.

⁶ *Id.*

APPLICATION OF ACT

example, contains uniform sheriff sale procedures applicable to *all mortgage foreclosure sales*, not just residential sales. The act also contains the *optional procedure* - a novel statutory strict mortgage foreclosure remedy without sale; *deed in lieu of foreclosure* requirements for residential lenders; a partial payment provision; statutory form of *sheriff's deed*, and other miscellaneous provisions.

The heart of the act, however, is the foreclosure notification requirements and the rights afforded the residential debtor pending foreclosure. The notice of intention, which must be mailed to the residential mortgage debtor at least 30 days prior to acceleration of the maturity date and institution of foreclosure, gives the residential debtor the *unlimited* right to cure the mortgage default (and prevent acceleration and institution of foreclosure) within the period specified in the notice. Thereafter, the debtor may cure (and defeat acceleration and reinstate the loan) up until entry of judgment in a conventional foreclosure with sale but is responsible for court costs and counsel fees. The latter right to cure is limited to once every eighteen months. The sums, fees and charges which may be included in the cure amount are strictly controlled by the act.

Prior to entry of judgment, the act requires that the debtor be given a 14-day notice of entry of judgment, advising the debtor of his or her rights and giving the debtor one last chance to cure (and a 46-day period to cure if the debtor responds) before judgment.

Prior to the *Fair Foreclosure Act*, the right to cure was discretionary with the lender unless the mortgage documents provided for that right.

The uniform instruments, which are used in the majority of residential mortgage transactions in New Jersey, provide for "cure" and "reinstatement"⁷ by the borrower prior to entry of judgment similar to the *Fair Foreclosure Act*. Thus, notwithstanding the provisions of the *Fair Foreclosure Act*, in many instances mortgagors are guaranteed these rights *contractually* by virtue of the mortgage instruments.

The contractual right to cure, however, under the mortgage documents has historically not been enforced to the same extent that the statutory right to cure has under the act, so the act has provided homeowners with valuable protection in New Jersey.

§ 1.06 "Arrearages" Legislation in Other States

In large measure, the *Fair Foreclosure Act* is "arrearages" legislation, similar in many respects to the legislation enacted in other states, which permits a mortgagor to cure the default or to defeat acceleration and reinstate, once acceleration has occurred. Such arrearages legislation is becoming increasingly common in the United States. Some states, like New Jersey, limit the right to cure and defeat acceleration to residential mortgagors, others grant the right to all mortgagors.⁸

Many provisions of New Jersey's *Fair Foreclosure Act*, especially the notice of intention and cure requirements, are substantially similar to Pennsylvania's Act No. 6 (Loan Interest &

⁷ Paragraph 19 of the Uniform Covenants-Borrower's Right to Reinstate. New Jersey - Single Family - Fannie Mae/Freddie Mac Uniform Instrument (Form 3031 1/01).

⁸ See 1 Nelson and Whitman, REAL ESTATE FINANCE LAW 567 at 13-16 (3rd Ed. 1993).

Protection Law), 41 P.S. 101 *et seq.*, which permits a residential mortgagor to cure the default up until one hour before the foreclosure sale.⁹

Act No. 6, however, is limited to a security document creating a lien on real property and securing an obligation to pay a sum of money in an original bona fide principal amount of \$50,000 or less and is therefore intended for owners of relatively “modest homes.”¹⁰

§ 1.07 The Right to “Cure” Versus the Right to “Redeem”

The right to “cure” is the right to pay arrearages — *e.g.*, ordinarily overdue installments plus late fees. If the default is cured pursuant to the notice of intention, acceleration by the residential mortgage lender is prevented by the act. If the default is subsequently cured prior to entry of judgment, the obligation and mortgage are reinstated (*i.e.*, the loan is de-accelerated), the foreclosure is dismissed, and the borrower can continue making monthly payments.

The “equity of redemption,”¹¹ on the other hand, is the right of the mortgagor, owner, or a subordinate interest holder under certain circumstances to pay-off all sums due under the mortgage with interest and other lawful charges, thereby satisfying the mortgage. In New Jersey, the original mortgagor has the absolute right to redeem (*e.g.*, pay off the mortgage debt, with interest and costs) up until 10 days¹² after the foreclosure sale (or until entry of an order of confirmation where court confirmation¹³ of the sale is otherwise required).

In *Luciani v. Hill Wallack*,¹⁴ however, the Chancery Division blurred the distinction between “cure” and “redemption” by using *N.J.S.A. 2A:50-57(c)* to limit counsel fees in a foreclosure action, which the court viewed as excessive, but which were otherwise in compliance with the mandatory rule, in order to facilitate *redemption* (not cure) by the homeowner. In this respect, the Judge Gibson ruled:

“Although the fees charged here were part of a total payoff of the mortgage, not simply a payment of the arrearage, it is my view that both steps represent a cure of the default and thus *N.J.S.A. 2A:50-7(bX3)* would apply in either setting.”¹⁵

§ 1.08 Application of Act to Specific Statutory Sections - *N.J.S.A. 2A:50-55*

⁹ 41 P.S. § 404(b)(1).

¹⁰ *Continental Bank v. Rapp*, 485 A.2d 480, 336 P.A. Super. 160 (1984); 41 P.S. § 101 *et seq.*

¹¹ *BLACK’S LAW DICTIONARY*, 541 (6th Ed. 1990).

¹² *Hardyston National Bank v. Tartamella*, 56 N.J. 508 (1970); *Carteret Savings and Loan Association, F.A. v. Davis*, 105 N.J. 344 (1987). Redemption after sale is a court-created right in New Jersey, not a statutory right.

¹³ Confirmation of the sale by the court is only required where the selling officer is a person other than the sheriff (*e.g.*, special master) or where objections to sale are raised within the 10 day period after the sale. *R. 4:65-6(b)*; *R. 4:65-5*.

¹⁴ 329 N.J. Super. 170, 746 A.2d 1097 (Ch. Div. 1999).

¹⁵ *Id.* at 176, 746 A.2d 1101.

APPLICATION OF ACT

It is important to note that while the foreclosure provisions of the *Fair Foreclosure Act* apply exclusively to *residential mortgages*, many other provisions of the act apply to *all mortgage foreclosure* actions, not just residential ones.

The requirements for application of sections 1 through 9 and 11 of the act - the sections relating to a residential mortgage and a residential mortgage foreclosure action - are controlled by the definition of “residential mortgage” in section 3 (*N.J.S.A.* 2A:50-55). This definition is comprehensive and also contains the definition of “residential property.” For the act to apply, the definition requires that the debtor who occupies or is to occupy the residential property at the time the loan is originated, be a “natural” person. The family member of such a debtor must, of course, be a natural person.

Sections 1 through 9 and 11 of the act - the sections relating to a residential mortgage and a residential mortgage foreclosure action - are controlled by the definition of “residential mortgage” in section 3 (*N.J.S.A.* 2A:50-55). This definition is comprehensive and also contains the definition of “residential property.” For the act to apply, the definition requires that the *debtor* (or debtor's immediate family member) who occupies or is to occupy the residential property at the time the loan is originated, be a “natural” person. Thus, at the time of loan origination if there is no debtor who is a natural person, the act does not apply.

Section 19 of the act provides that the act applies to “foreclosure actions commenced on or after the effective date.”

Section 10¹⁶ provides in part “The provisions of sections 1 through 9 of this act shall not apply to the foreclosure of a non-residential mortgage...”

The Legislature thus made a distinction with respect to the various sections of the act, those sections applicable only to a *residential mortgage* (e.g., sections 1 through 9) and subsequent sections (with exceptions)¹⁷ applicable to *mortgages generally*. The language of section 10 would have no meaning were the provisions of each and every section of the act (section 12 included) applicable only to a residential mortgage.

As set forth in section 10, therefore, sections 1 through 9 of the act apply only to a “residential” mortgage.

Section 10 (*N.J.S.A.* 2A:50-62) itself contains a jurisdictional statement as to the exclusive application of sections 1 through 9 of the act to a residential mortgage.

Section 11 - the Optional Procedure - (*N.J.S.A.* 2A:50-63) applies only to the foreclosure of a *residential mortgage*.¹⁸

Section 12 - Uniform Sheriff's Procedures - (*N.J.S.A.* 2A:50-64) applies to *all sheriff*

¹⁶ *N.J.S.A.* 2A:50-62.

¹⁷ Sections 14 and 16 effect general statutory amendments to *N.J.S.A.* 2A:17-36 and *N.J.S.A.* 2A:15-11, respectively, whether or not a foreclosure action is involved. Section 11 (optional procedure) applies exclusively to a residential mortgage as does section 17 (partial payment) in the author's opinion.

¹⁸ Notwithstanding the provisions of section 10, and that section 11 is a subsequent section, the optional procedure applies exclusively to a residential mortgage. This is clear from paragraphs (1), (2) and (3) of subsection 63b which refer exclusively to “residential” mortgage.

sales in mortgage foreclosure actions held on or after December 4, 1995.¹⁹

Section 13 - Judgment Creditor to Provide Current or Change of Address for Service (*N.J.S.A.* 2A:50-65) applies to service on judgment creditors “in any foreclosure proceeding.”

Section 14 - Adjournments (*N.J.S.A.* 2A:17-36) applies to adjournments given on or after December 4, 1995 in *all sheriff's sales*.²⁰

Section 15 - Letters In Lieu of Appearances by the U.S. Attorney and Attorney General of New Jersey (*N.J.S.A.* 2A:50-66) applies to *all mortgage foreclosure actions*.²¹

Section 16 - *Lis Pendens* (*N.J.S.A.* 2A:15-11) is applicable to all notices of *lis pendens*.²²

Section 17 - Partial Payment (*N.J.S.A.* 2A:50-67) applies, in the author's opinion, to a *residential mortgage*.²³

Section 18 - Attorney General to Promulgate Regulations (*N.J.S.A.* 2A:50-68) is applicable to the entire act.

Section 19 - Effective Date of Act - contains a general statement as to the effective date of the act, *e.g.*, December 4, 1995.²⁴

§ 1.09 “Residential Mortgage” (Definition) - *N.J.S.A.* 2A:50-55

“Residential mortgage” means a mortgage, security interest or the like, in which the

¹⁹ Section 12 is a subsequent section and therefore applicable to both residential and non-residential mortgages. The section applies to the “sale of a mortgaged premises,” *e.g.*, sheriff sales in all mortgage foreclosure actions. Since section 12 does not apply exclusively to a residential mortgage, whether or not a foreclosure action was instituted on or after December 4, 1995 is immaterial to the application of the section.

²⁰ L.1995, c.244, § 14. Section 14 effects a general amendment to *N.J.S.A.* 2A:17-36 immediately applicable to all sheriffs' sales. Since section 14 does not apply exclusively to a residential mortgage, but rather to any sheriff's sale, whether or not a foreclosure action was instituted on or after December 4, 1995 is immaterial to the application of the section.

²¹ Section 15 is a subsequent section and immediately applicable, in the author's opinion, to letters sent by the Attorney General and U.S. Attorney on or after the effective date of the act in mortgage foreclosure actions. This section refers to “plaintiff”, not “debtor”, “lender” or the like, and therefore the terminology of the section is not limited to a residential mortgage. Since section 15 does not apply exclusively to a residential mortgage, whether or not a foreclosure action was instituted on or after December 4, 1995 is immaterial to the application of the section.

²² L.1995, c.244, § 16. Sections 16 effects a general statutory amendment to *N.J.S.A.* 2A:15-11 and is immediately applicable to all notices of *lis pendens*, *N.J.S.A.* 2A:15-6, whether or not a mortgage foreclosure action is involved.

²³ Even though this is a subsequent section, section 17 refers to “a debtor may tender, and a lender accept” (*e.g.*, “debtor” and “lender”). Section 1 of the act, *N.J.S.A.* 2A:50-53, defines “debtor” and “lender” exclusively in terms of a residential mortgage. Notwithstanding the provisions of section 10, the author therefore believes that this section applies exclusively to a residential mortgage.

²⁴ L.1995, c.244, § 19. The terminology of section 19, “This act... shall apply to foreclosure actions commenced on or after the effective date [December 4, 1995],” is primarily intended to apply, in the author's opinion, to the “foreclosure” and “notification” sections of the act, *e.g.*, sections 4, 5, 6 and 11 of the act. It is unfortunate that the terminology of section 19 was not qualified to take into account other sections of the act which were intended to be applicable irrespective of whether or not a residential mortgage foreclosure action was instituted and to which this terminology has no logical application or meaning.

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security is a residential property such as a house, real property or condominium, which is occupied, or is to be occupied, by the debtor, who is a natural person, or a member of the debtor's immediate family, as that person's residence. This act shall apply to all residential mortgages wherever made, which have as their security such a residence in the State of New Jersey, provided that the real property which is the subject of the mortgage shall not have more than four dwelling units, one of which shall be, or is planned to be, occupied by the debtor or a member of the debtor's immediate family as the debtor's or member's residence at the time the loan is originated.

Analysis

The definition of “residential mortgage” is critical to application of the act. As respects the foreclosure process, the act applies to the foreclosure of all residential mortgages instituted on or after December 4, 1995, on real estate with not more than four dwelling units, one of which is occupied or planned to be occupied by the debtor (who must be a natural person), or a member of the debtor's immediate family, as that person's residence at the time the loan is originated.

The definition of “residential mortgage” requires the coming together of two fundamental conditions before there can be a “residential mortgage” under the act: (1) that the mortgaged premises consist of not more than four dwelling units and (2) that the requisite occupation (or intention to occupy) by the debtor (a natural person) or by the debtor's immediate family member exists at the time the loan is originated.

The definition of “residential mortgage” assumes the existence of a “debtor” within the meaning of the act (*i.e.*, a person obligated to pay the note or bond); for without a debtor, the requisite occupation under the act cannot be met and there can be no residential mortgage within the meaning of the act.

It is interesting that there is no separate definition of “residential property” under the act.

The definition of "residential property" is contained in the definition of residential mortgage.

The definition of “residential mortgage” does not refer to the “obligation” secured by the mortgage - or even that there is a secured obligation. That the secured obligation is implicit in the definition of residential mortgage is clear from the definition's reference to “debtor” and “loan.” The debtor is a person “obligated to pay the obligation *secured by the mortgage*, 'obligation' being defined as the note, bond or other similar evidence of a *duty-to-pay*.” (Emphasis supplied.) A “loan” presumably refers to a loan of money. Thus, as noted, the secured obligation is implicit in the definition of residential mortgage.

A major ambiguity in the definition of “residential mortgage” is its failure to set forth when the “mortgage” (not the loan) must be originated or closed. The definition refers to a “mortgage, security interest or the like” but is silent as to whether the mortgage must be in existence at the time of loan origination. Presumably, it must be; otherwise the definition of “residential mortgage,” without a mortgage in being at the time of loan origination, would have no meaning. It would have made more sense, in the author's opinion, for the definition to refer to “the time the *mortgage is executed*.” By referring to the time the “loan” is originated and not to the time the “mortgage” is executed, the definition may create an inference that, in fact, the loan and mortgage need not be executed at the same time or as part of the same transaction.

It should be noted that the definition of “residential mortgage” refers to “debtor” and “loan” not mortgagor (or owner) and mortgage. Thus, the definition fundamentally relies upon (1) the “personal obligation” secured by the mortgage and (2) the “person” obligated to pay the obligation, *e.g.*, the note maker or obligor on the bond.

This definition is remarkable in that it leaves entirely up in the air situations where: (a) the mortgage does not secure an obligation for the payment of money, (b) there is no debtor, (c) there is no *obligation*, or (d) *the residential mortgage secures an antecedent debt*.

Presumably, if a lender releases the debtor-mortgagor from personal liability under the note or bond and mortgage, expressly reserving the right to foreclose the mortgage,²⁵ there is no “debtor” under the act and thus compliance with the act, at least as to the notice of intention and other “debtor” requirements, would not be required. Similarly, if the debt has been discharged in bankruptcy or enforcement of the debt is barred by the statute of limitations, there is no “debtor” and, practically speaking, no “obligation” under the act.²⁶

According to the author's analysis, where there is no “obligation” or “debtor” *ab initio* - when the loan is originated - the act has no application. Where the act initially applies but due to subsequent events there is no “debtor” or “obligation” within the meaning of the act, the act would still theoretically apply - *i.e.*, the transaction would still be a residential mortgage. But absent a “debtor” or “obligation,” the notice of intention and other debtor requirements would appear inapplicable.

Unlike the definition of “residential mortgage” which is dependent upon statutory conditions being met at the time of loan origination, the definition of “debtor” and “obligation” do not depend upon loan origination. Thus, facts or circumstances subsequent to loan origination may remove the personal liability of the debtor (now non-debtor) or negate the obligation secured by the mortgage.

Another question mark in the definition of “residential mortgage” is the fact that the definition does not specify that the mortgage be in “default” or even that a foreclosure action be instituted or contemplated. Thus, the meaning of the term is dependent upon the context in which it is used and may in fact apply to situations outside of the foreclosure process, such as a deed in lieu of foreclosure.

(a) “Security Interest or the Like”

Reference in the definition of “residential mortgage” to “security interest or the like” adds little, if nothing, to the definition, in the author's opinion, as the “mortgage” is the almost

²⁵ Giving a “general” release to the mortgagor discharges the mortgage. See *Atwater v. Underhill*, 22 N.J. Eq. 599 (E. & A. 1872); *Massinger v. Geering*, 129 N.J. Eq. 385, 19 A.2d 460 (Ch. 1940).

²⁶ Where enforcement of the debt is barred by the statute of limitations or the debt has been discharged in bankruptcy, the debt itself subsists. See 29 *New Jersey Prac. Sec. 4.1* (Weinstein) (2nd Ed. 2001), where the author argues that “[i]t would undoubtedly be preferable to a band on the assumption that an ‘obligation’ is essential to the validity of a mortgage,” where there is no personal liability on the part of any one under the obligation. Also, 1 *REAL ESTATE FINANCE LAW*, Nelson and Whitman 17-19, where the authors state (atp. 19) that where the obligation is not accompanied by personal liability, “it is much more natural to construe it as negating the existence of any independent obligation except in so far as the land itself can be looked upon as owing a ‘real’ obligation.”

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exclusive real property security device used in New Jersey.²⁷

(b) “Time the Loan” is Originated

As the *Fair Foreclosure Act* relates to the “foreclosure” of a residential mortgage, limiting the act's application to the time when the “loan” is closed is illogical. The requirements of the act should apply at the time when the mortgage is enforced - when foreclosure is instituted; that is when the mortgagor needs the protections of the act. As noted, the term “loan,” per se, relates to the personal obligation, not to the residential mortgage being foreclosed.

In *Bank v. Kim*,²⁸ the Appellate Division used “when mortgage obligation was incurred” as the test for the time of loan origination under *N.J.S.A. 2A:50-55*.

While there is no specific requirement in the definition that the loan be secured by the residential mortgage, the definition of “debtor” clearly refers to the “obligation secured by the residential mortgage” and this requirement, therefore, must be viewed as implicit in the definition.

Reference in the definition to “loan” (“the time the *loan* is originated”) and “debtor” (the person obligated *to pay the obligation*) makes it clear that a residential mortgage *debt* must arise from a “loan”²⁹ and must be evidenced by an obligation to pay a sum of money. This limits a *residential mortgage* to that point in time when the *loan is closed* and to a mortgage which secures a *monetary* obligation. This is also in accord with the act's definition of “obligation” defining the term to mean “a note, bond, or other similar evidence of a *duty-to-pay*.”

The author of a leading practice book on mortgages in New Jersey notes the following:³⁰

The mortgage debt generally arises from a loan of money, but it may arise from an extension of credit on open account, a fidelity bond, an indemnity agreement, an agreement for future advances, an annuity contract, an agreement for support, executory contracts or other types, a settlement of accounts, taxes, a breach of trust, or as collateral security. The debt may be that of a third party. It may have been created before the mortgage was given, at the same time, or later.

Presumably, where the mortgage debt does not arise from a “loan” (e.g., a loan of money), the provisions of the act relating to a “residential mortgage” would not apply, because the definition of residential mortgage explicitly refers to “the time the loan is originated” as the critical event when all the requirements for a residential mortgage must be met. If there is no

²⁷ 361 *N.J. Super.* 331, 346, 825 A.2d 566, 575 (App. Div. 2003).

²⁸ *BLACK'S LAW DICTIONARY*, 6th Ed. 936 (1990) defines “loan” as “Delivery by one party to and receipt by another party of *sum of money* upon agreement express or implied, to repay it with or without interest.” (Emphasis supplied.) Loan includes: (1) the creation of the debt by the lender's payment of or agreement to pay money to the debt or to a third party for the account of the debtor; (2) the creation of debt by a credit to an account with the lender upon which the debtor is entitled to draw immediately; (3) the creation of debt pursuant to a lender credit card or similar arrangement; and (4) the forbearance of debt arising from a loan. *Uniform Consumer Credit Code*, § 3-106.

²⁹ 29 *N.J. Prac.* (Weinstein) Sec. 4.1 (2001, 2nd Ed.).

³⁰ Sections 4 through 7, 9 and 11 (*N.J.S.A. 2A:50-56 through 58, 61 and 63*).

“loan,” there can be no residential mortgage.

Under the Pennsylvania Loan Interest and Protection Law, 41 P.S. § 101, a residential mortgage must secure an obligation “to pay a sum of money” in an original bona fide principal amount of \$50,000 or less and therefore, like the New Jersey act, appears limited to a mortgage securing a loan of money.

(c) Necessity of a Mortgage in “Default”

It is interesting that the definition of “residential mortgage” under section 3 (*N.J.S.A.* 2A:50-55) is not limited to a residential mortgage “in default” but refers to “all residential mortgages” meeting the criteria of the act. Certainly, the sections³¹ of the act which require service of a notice of intention on the debtor presuppose the existence of a default as a condition precedent to their application.

(d) Residential Property - A House, Real Property, or Condominium

The language “residential property such as a house, real property or condominium” in the definition of residential mortgage easily supports the view that the protections of the act were meant to apply to vacant land or partially improved property where the requirements of the act were met, otherwise reference to “real property” would be entirely redundant. (Emphasis supplied.) However, the definition appears to contain an inconsistency in this regard. It initially refers to “real property” in addition to a “house” or “condominium,” making it appear that the act applies to vacant or partially improved land. But the definition then goes on to refer to residential mortgages which have as their security “such a residence” in New Jersey, making it appear that only improved property, *i.e.* property capable of being lived in at the time of loan origination, is included in the definition of residential property (and residential mortgage) under the act.

Under the Pennsylvania Loan Interest and Protection Law, 41 P.S. § 101, the situation is much clearer because the definition of residential mortgage refers to real property “containing two or fewer residential units or on which two or fewer residential units are to be constructed and shall include...a residential condominium unit.” The statute thereby applies to vacant land meeting its criteria.

(e) “Shall Not Have More than Four Dwelling Units”

The statutory requirement that the residential property “shall not have more than four dwelling units” makes it clear, in the author's opinion, that the property may have any number of commercial or non-dwelling units, so long as it does not have “more” than four dwelling units. It is the author's opinion that application of the act is not limited to property with “one to four family dwellings.”³² Thus, a series of stores (or strip mall) with four dwelling units overhead would fall within the purview of the act where the debtor or a member of the debtor's immediate family either occupied or intended to occupy at least one of the units as a residence at the time the loan was originated. It is not clear whether the drafters of the act intended the above result or

³¹ Other statutes in Chapter 50, such as *N.J.S.A.* 2A:50-2.3 for example, use the language “two, three or four dwelling units” where the intention is to limit the application of the statute to “two to four” dwelling units. The language “not more than four dwelling units” evidences a legislative intention, in the author's opinion, to apply the act a broad context, *e.g.*, to properties which may have commercial units but which have no more than four dwelling units. From a public policy standpoint, and from the standpoint of homeowner protection, this makes good sense.

³² 26 D. & C. 3d 571 (1982).

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intended to limit the act's application to one to four dwelling units. As a matter of policy it should make little difference, since the homeowner in either situation needs protection.

An interesting situation arose in *Greater Delaware Valley Savings and Loan Association v. Diehl*³³ decided under Pennsylvania's Loan Interest and Protection Law, 41 P.S. § 101 *et seq.* The mortgagee (which had given a notice of intention to foreclose to the debtor) attempted to convince the court that a garage on the property with living quarters overhead constituted a third residential unit and that the protections of the statute, therefore, were not applicable.

The court in *Diehl* defined “residential unit”³⁴ as “a place fit and intended for human habitation” and ruled against the mortgagee on the basis of estoppel - that the lender had already given the debtor a notice of intention affording rights under the statute and was estopped to deny those rights. The court also noted that if quarters over a garage were considered a residential unit within the meaning of the Pennsylvania statute many older duplexes with garages would be denied protection under the loan interest and protection law.

While the New Jersey act does not define “dwelling unit,” the definition of “residential unit” in *Diehl* would appear highly relevant in this regard.

(f) “Planned to be Occupied”

The language in the definition of residential mortgage under the act, “planned to be occupied by the debtor or a member of the debtor's immediate family,” makes the state of mind of the debtor (or debtor's immediate family member) the test of whether the act applies. Such a subjective standard will create inevitable ambiguity. Foreclosing attorneys must therefore be strongly guided by common sense, information contained in the debtor's loan application and other papers in the lender's file. In doubtful cases, the application of the act should be assumed. It would have made more sense if the act required actual occupancy by the debtor prior to institution of foreclosure as the test.

Where “occupancy”³⁵ by the debtor-mortgagor is a condition to the granting of a mortgage, certainly the requisite intention to occupy exists at time of loan origination so that, irrespective of whether the debtor has actually occupied the property, the foreclosing attorney should comply with the provisions of the act in all respects.

The uniform instruments³⁶ provide that the borrower shall occupy the property as a principal residence within 60 days after execution of the mortgage and continue to occupy it for at least one year after the date of occupancy. Where the mortgage documents so provide, failure of the mortgaged premises to be owner-occupied will permit the mortgagee to accelerate and foreclose the mortgage.³⁷

(g) Occupying Debtor - A “Natural” Person

³³ *Id.* at 573.

³⁴ Some mortgages contain an attached “Occupancy Rider.”

³⁵ Paragraph 6 of the Uniform Covenants-Occupancy, etc. New Jersey, Single Family - Fannie Mae/Freddie Mac Uniform Instrument (Form 3031 9/90).

³⁶ *Investors Savings & Loan Association v. Gantz*, 174 N.J. Super. 356, 416 A.2d 918 (Ch. Div. 1980).

³⁷ *Black's Law Dictionary* 1473 (4th Ed. 1957).

The definition of “residential mortgage” requires, as a jurisdictional prerequisite, that the “debtor” who occupies or is to occupy the residential property be a “natural” person. Where the “sole” debtor is a corporation or partnership, the act would not apply, irrespective of the number of dwelling units and whether all other requirements of the act were met. However, if a natural person in conjunction with a corporate debtor signs the mortgage containing a covenant to pay the mortgage debt, or cosigns the note (or other personal instrument), and, at the time the loan is originated, occupies or intends to occupy the property as a residence, the act would apply if the other requirements of the act were met.

For example, if property is owned and mortgaged in the name of a partnership, and a partner signs the mortgage individually (containing a covenant to pay the mortgage debt) or cosigns the note and resides or intends to reside at the residential property at the time the loan is closed, the act would apply if all other conditions of the act were met. This is so, irrespective of the fact that the partner (*e.g.*, debtor) is not the owner. The same would hold true if a corporation executes a mortgage and note on residential property and a corporate officer cosigning the note resides or intends to reside at the property when the loan is closed. If the partner and officer in the foregoing examples, merely guarantee the business obligation, it is possible that the act would also apply if these persons are, by virtue of their contracts of guaranty, deemed to be “debtors.” If not, the act would not apply.

(h) Debtor's “Immediate Family”

The definition of “immediate family” under the act, “the debtor, the debtor's spouse, or the mother, father, sister, brother or child of the debtor or debtor's spouse,” is extremely broad and certainly goes beyond the commonly understood meaning of the term. Grandchildren of the debtor, however, are not included in the term *immediate family*.

(i) “Residence”

The terminology “residence” in the definition of residential mortgage makes it clear that the act is referring to real estate occupied or planned to be occupied as the “dwelling place” or “abode” of the debtor or member of the debtor's immediate family.

Theoretically, the act can apply to vacant land, boarded up or abandoned property, and even to condemned property if, at the time the loan is closed, the debtor or a member of the debtor's immediate family plans to build a house or refurbish or rehabilitate the property in order to occupy the property as a residence.

The term “residence” can also have a broader meaning. It can mean only a “bodily presence as an inhabitant of a place,”³⁸ and therefore does not necessarily denote domicile or the intention to inhabit a place as a domiciliary. Attorneys must be cautious, then, in the application of the act.

(j) “Originated”

The language “at the time the loan is originated” in the definition of residential mortgage is absolutely critical to the application of the act. The term “originated,” however, is not specifically defined in the act. It is assumed that “originated” means the time when the loan is “closed,” and that the “loan” referred to is the “obligation” secured by the residential mortgage,

³⁸ 361 *N.J. Super.* 331, 346, 825 A.2d 566, 575 (App. Div. 2003).

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although the definition does not say this. By virtue of this terminology, all requirements for the application of the act, *i.e.*, requirements for the existence of a residential mortgage, are either met or not met at the time when the loan is closed (*e.g.*, originated).

In *Bank v. Kim*,³⁹ the Appellate Division said: “If defendants were indeed residents of 39 Brodil Court when this mortgage obligation was incurred, FFA was applicable, and R 4:50-1 relief should have been afforded.” So when the “mortgage obligation was incurred” was the test under *Kim* for the time of loan origination under *N.J.S.A.* 2A:50-55.

(k) Partial Interest Mortgage

Nothing in the act requires that a residential mortgage encumber an undivided 100 percent of the residential property. Thus, a one-half interest mortgage may, where the requirements of the act are otherwise met, be a residential mortgage within the meaning of the act.

(l) Interest of Debtor in Property

There is nothing in the act that requires that the debtor actually *own* the residential mortgaged property, or, alternatively, that such person hold a full title interest in the property. Thus, a debtor living in residential property secured by a corporate mortgage may, if the requirements of the act are otherwise met, be a residential mortgage debtor entitled to the protections of the act, although that person holds no title interest in the property. Similarly, if a debtor holding a one-half ownership interest in residential property executes a mortgage on that property, then, that mortgage, if the requirements of the act are otherwise met, will be a residential mortgage within the meaning of the act.

(m) “All Residential Mortgages Wherever Made”; “Choice of Law” in the Mortgage Documents

The language “this act shall apply to all residential mortgages *wherever made* which have as their security such a residence in the State of New Jersey” makes it clear that the provisions of the act apply to the foreclosure of a “residential” mortgage in New Jersey, no matter where the mortgage is executed. (Emphasis supplied.) However, even in the absence of such a provision,

³⁹ *Clinton Capital Corp. v. Straeb*, 248 N.J. Super. 19, 31, 589 A.2d 1363 (Ch. 1990) (the note and mortgage were executed in New York and provided they were to be construed in accordance with New York law; however, as the mortgage was secured by New Jersey property and foreclosure must necessarily be brought in New Jersey, construction of the instruments should be controlled by New York law but the remedies to be provided are those provided by the law of New Jersey). See also *Guardian Life Ins. Co. of America v. Rita Realty Co.*, 17 N.J. Misc. 87, 5 A.2d 45, 49 (Sup. Ct. 1939), where the court stated: “The principle of comity does not require a state to regard the laws of any other state, so far as they may affect contracts in relation to real estate situated in the former state [citation omitted]. Since the lien of a mortgage upon the land can be enforced only in the state or other territorial jurisdiction where the land is situated, the law of the place where the mortgaged premises are controls as to foreclosure proceedings and statutory provisions as to foreclosure does not apply as to lands lying in another state.... It is a general principle that real property or immovables is governed by the law of the place where it is situated. The *lex rei sitae* is universally recognized... It is also a general principle of law that the *lex fori*, or law of the jurisdiction in which relief is sought, controls as to all matters pertaining to remedial, as distinguished from substantive rights, [citation omitted].... It may safely be accepted that the legal principle of *lex rei sitae* applies only so far as it concerns laws that relate distinctly and primarily to real property or real property contracts...in so far as it treats of covenants which never attach to the soil but are essentially personal and in these cases the laws of the state where the contract is made should as a general rule control.”

this result would be mandated by traditional conflict of law principles.⁴⁰

In *Citibank N.A. v. Errico*,⁴¹ the Appellate Division held that New York's deficiency law provisions were *substantive*, but even if they were procedural, there is no bar to the parties agreeing to apply the New York deficiency provisions to the non-title aspects of the financing arrangements. The court ruled that there is no impediment to applying a contractual choice of substantive law provision as long as the public policy of the forum state is not violated; that the parties may expressly provide that the validity and interpretation of the mortgage and note are governed by the substantive laws of a state other than New Jersey.

New Jersey's *Fair Foreclosure Act*, which controls the foreclosure process in New Jersey as respects residential mortgages, is clearly *remedial* (i.e., procedural). Even if this were not so, the Legislature by virtue of the provisions of *N.J.S.A. 2A:50-61* has declared that waivers by the debtor of rights provided in the act are *against public policy*, unlawful and void, unless given after default pursuant to a workout agreement in a separate written document signed by the debtor. Thus, any choice of law provision in the mortgage documents inconsistent with the act, by definition, would be void, as is an unlawful waiver of rights provided in the act.

(n) Vacation Residence

It is assumed that the act applies to a debtor's "vacation" residence, where the requirements of the act are otherwise met, as the term "primary" was deleted from "primary residence" in the definition of "residential mortgage" in the final draft of the bill.⁴²

(o) Time Share Property

It is not clear whether the act would apply to a mortgage on time-share property. There are no applicable judicial decisions. Since "residence," however, "requires only bodily presence as an inhabitant of a place,"⁴³ it is possible, if the other statutory requirements are met, for a mortgage on a time share unit to be a residential mortgage within the meaning of the act.

(p) Residential Property Definition as Applying to Each Separate Parcel or Tract

In the author's opinion, for the definition of residential property to make any sense under the act, it must be applied to each separate parcel or tract of a mortgage and not to the mortgage as a whole. For example, a debtor mortgaging five separate residential houses would not automatically be excepted from the act's application because the mortgage contained more than five dwelling units. The definition should be applied to each separate parcel or tract, with each parcel qualifying or not qualifying on its own merits.

Thus, one or two of the parcels may qualify as a residential mortgage under the act, in which case those parcels must be foreclosed in compliance with the act. The other parcels, however, constituting a non-residential mortgage may be foreclosed in a separate action (or in a separate count) without complying with the act.

(q) Condominium Association Lien

⁴⁰ 251 *N.J. Super.* 236, 597 A.2d 1091 (App. Div. 1991).

⁴¹ See Appendix A.

⁴² *Black's Law Dictionary* 1473 (4th Ed. 1957).

⁴³ *N.J.S.A.* 46:8B-21. R.4:64-1 and 2.

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Because the definition of “residential mortgage” refers to “mortgage,” “security interest,” “or the like,” a condominium association lien (on residential property) for unpaid assessments, which is neither a mortgage nor a security interest, and which may be foreclosed in the same manner⁴⁴ as a mortgage is not, in the author's opinion, a residential mortgage within the meaning of this section.

(r) Cooperative Apartment

It is clear that a “cooperative apartment” is not covered by the act as the term “cooperative apartment” was stricken from the final draft of the bill.⁴⁵ There is no judicial foreclosure process in Jersey for the foreclosure of a “lender's lien” on a cooperative apartment, *i.e.*, where the funds loaned by the lender are secured by a promissory note, pledge of stock and proprietary lease on the cooperative unit.⁴⁶

(s) Security Interest Covering Personal Property

A security interest covering personal property on the residential premises is not, in the author's opinion, a “residential mortgage” within the meaning of the act, although it may constitute additional collateral for the mortgage debt.⁴⁷

(t) Residential Leasehold Mortgage

There is nothing in the act which requires that the “debtor” be a title holder. Thus, where the requirements of the act are otherwise met, nothing would prevent the act from applying to a “leasehold” residential mortgage.

(u) “Recordation” of Residential Mortgage

There is no requirement that the residential mortgage be “recorded” in order to qualify as a residential mortgage under the act. An unrecorded mortgage in New Jersey is valid between the parties and may be foreclosed in the ordinary course. If a mortgage has not been recorded, it may lose priority to subsequent judgment creditors without notice, and subsequent bona fide purchasers and mortgagees for value who record first without notice of the unrecorded mortgage.⁴⁸

It has been held⁴⁹ under Pennsylvania's Loan Interest and Protection Law, which requires

⁴⁴ See Appendix A.

⁴⁵ *N.J.S.A.* 46:8D-14. A lender loaning money on a cooperative apartment in New Jersey is relegated to a personal action on the note or a non-judicial Uniform Commercial Code foreclosure, *e.g.*, a commercially reasonable sale of the debtor's shares of stock. The mechanics of just how the purchaser becomes the new lessee is not clear. Presumably, after the lender has obtained a money judgment against the debtor, the lender can execute against the debtor's leasehold estate and stock in the cooperative apartment.

⁴⁶ *Bennett v. Seave*, 554 A.2d 886, 520 Pa. 431 (1989).

⁴⁷ *N.J.S.A.* 46:22-1.

⁴⁸ *Anderson Contracting Co. v. Daugherty*, 417 A.2d 1227, 274 Pa. Super. 13 (1979), *appeal dismissed*, 425 A.2d 329, 492 Pa. 630. Recording a mortgage does not create the lien on real property, as between the original parties the execution of the mortgage does that. Recordation merely gives the mortgage the protection of the recording acts - *e.g.*, priority with respect to a subsequent bona fide purchaser and mortgagee for value and subsequent judgment creditor.

⁴⁹ *N.J.S.A.* 2A:35-1. See 30 *N.J. Prac.* SEC.27.9 (Weinstein) (2nd Ed. 2000).

the obligation to be secured by a “lien” on real property, that emphasis should not be on the necessity of recording a document but on whether the document can be recorded.

(v) Other Applications; Real Estate Sales Contract

Under the Pennsylvania Loan Interest and Protection Law, 41 P.S. § 101, a residential mortgage includes a real estate sales contract. However, an “installment contract for the sale of land” in New Jersey is not foreclosed as a mortgage - an action for possession of land, at law, is used for this purpose.⁵⁰

In order to more fully understand the application of the act, the reader should also refer to subsections 4a and 4d of the act (*N.J.S.A.* 2A:50-56a, d), which specify when a notice of intention is required to be given to a debtor under the *Fair Foreclosure Act*, and related sections of this book.

§ 1.10 “Obligation” (Definition) - *N.J.S.A.* 2A:50-55

“Obligation” is defined as a promissory note, bond or other similar evidence of a duty to pay.

Analysis

The “obligation” is not the “debt” itself; it is primary evidence of the debt.⁵¹ The definition of “obligation” under the act, limits the term to the *payment of money* in accordance with the note, bond or other instrument of obligation. Where the mortgage does not secure an obligation to pay money, there is no residential mortgage under the act.

In the author's opinion, the language of the definition, “or other similar evidence of a duty to pay,” is broad enough to include any instrument of obligation other than a note or bond, including a “covenant to pay the debt” in the mortgage itself.

Obligation, as defined, is limited to the personal “duty to pay” by the debtor under the note or bond or other instrument of obligation.⁵² Presumably, where there is no “personal” obligation to pay the mortgage debt on the part of anyone, *e.g.*, where the debtor's personal liability has been released, barred by bankruptcy or the statute of limitations, practically speaking there is no “obligation” or “debtor” under the act.⁵³

A lender, in the author's opinion, can easily get around the act simply by releasing the debtor from personal liability under the note or bond and mortgage (expressly reserving the right to foreclose the mortgage) or having the non-debtor mortgagor waive the provisions of the act.⁵⁴ This procedure, however, has not been approved or permitted by any court decision to the

⁵⁰ 59 *C.J.S. Mortgages* § 160.

⁵¹ If the mortgage contains a covenant to pay the debt, a person signing the mortgage will have personal liability, although that person does not sign the note, bond, or separate instrument of obligation.

⁵² Although enforcement of the debt is barred, there is still theoretically a “debt.”

⁵³ Section 9 only prohibits waiver of rights under the act by the debtor. Presumably, a non-debtor mortgagor may waive the provisions of the act with impunity.

⁵⁴ 29 *N.J. Prac.* (Weinstein) Sec. 4.1 (2nd Ed. 2001).

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author's knowledge.

It is especially hard to understand why the concept of “personal” liability is so pivotal to the act, if, in fact, its stated purpose is to promote the cure and reinstatement of residential mortgages. The existence or non-existence of personal liability on the part of the mortgagor has little, if anything, to do with the mortgagor's need for protection under the act.

The existence of “personal” liability on the part of someone is not even essential to the validity of a mortgage.⁵⁵

In fact, the author of the leading practice book on mortgages in New Jersey questions the necessity of an “obligation.” “It would undoubtedly be preferable to abandon the assumption that an “obligation” is essential to the validity of a mortgage and recognize that a valid mortgage arises from the effective transfer of a security interest subject to defeasance upon the performance of an act.”⁵⁶

The Appellate Division has upheld the validity of a mortgage given as a gift,⁵⁷ where donative intent is shown, the mortgage is executed in recordable form by the mortgagor (owner) and delivered to the mortgagee (girlfriend) - thus evidencing an irrevocable relinquishment of the mortgagor's dominion and control over the mortgage - subject to his or her right to obtain its release in accordance with the terms of the mortgage.

It is interesting that the definition does not specifically require that the obligation be “secured” by the residential mortgage. This requirement is part of the definition of “residential mortgage debtor.”

§ 1.11 Debtor; “Residential Mortgage Debtor” (Definition) - *N.J.S.A. 2A:50-55*

“Residential mortgage debtor” or “debtor” means any person shown on the record of the residential mortgage lender as being obligated to pay the obligation secured by the residential mortgage.

Analysis

The language “obligated to pay the obligation” (obligation being defined as the note, bond, or other similar evidence of a duty to pay) makes it clear that the “debtor” must have “personal” liability to pay the mortgage debt. Where the personal liability of the debtor has been released, barred by bankruptcy or the statute of limitations, or where the debtor simply has no personal liability, there is no “debtor” under the act.

The person signing the note, bond or other personal instrument has personal liability to pay the mortgage debt. In absence of a covenant in the mortgage to pay the debt, the mortgage

⁵⁵ 29 *N.J. Prac.* (Weinstein) Sec. 4.1 (2nd Ed. 2001).

⁵⁶ *Jennings v. Cutler*, 288 *N.J. Super.* 553, 672 A.2d 1215 (App. Div. 1996).

⁵⁷ *Birkenfeld v. Cocalis*, 129 *N.J.L.* 382, 29 A.2d 902 (E. & A. 1943).

instrument does not import personal liability,⁵⁸ so that the mortgagor in this instance will have no personal liability by virtue of signing the mortgage instrument alone.

If the mortgage, however, contains a *covenant to pay the debt* - which is true of virtually all mortgages in New Jersey - a person signing the mortgage will have personal liability for the debt, although that person may not have signed the note, bond or other separate instrument of obligation. If the mortgage contains covenants for payment of taxes, insurance, commission of waste and the like, a person signing the mortgage will also have personal liability for failure to comply with these covenants as well.⁵⁹

Personal liability to pay the mortgage debt can be established by proof of an oral contract to pay the debt, and an implied promise to repay if the circumstances show a loan.⁶⁰

The Uniform Mortgage Instrument⁶¹ contains a covenant to pay the mortgage debt, as does the *Allstate Note Mortgage*⁶² and the *Horn-Blumberg Mortgage*.⁶³ Thus, it appears certain that the mortgagor in New Jersey has personal liability for payment of the mortgage debt - making the mortgagor a “debtor” within the meaning of the act - whether or not the mortgagor signs the note or bond.

The uniform mortgage instrument, however, contains an important provision⁶⁴ which provides in substance that a person *co-signing the mortgage only* and not the note is not personally obligated to pay the mortgage debt. Such person is therefore not a “debtor.” The purpose of this provision, no doubt, is meant to follow the expectations of the parties where a spouse, for example, co-signs the mortgage to subordinate his or her marital rights to the mortgage and does not otherwise intend to assume personal liability for the mortgage debt. Without this provision, that would be the result.

Where the promised performance secured by the mortgage is not the payment of

⁵⁸ Paragraph 7 of The Uniform Mortgage Instrument - PROTECTION OF LENDER'S RIGHTS IN THE PROPERTY-NEW JERSEY - Single Family - Fannie Mae/Freddie Mac Uniform Instrument (Form 30319/90) provides that if the Borrower fails to perform the covenants and agreements in the mortgage, or there is a legal proceeding significantly affecting Lender's rights, the Lender may do and pay whatever is necessary to protect the property. Any sums advanced by the Lender with interest become part of the debt secured by the mortgage and “shall be payable, with interest, upon notice from Lender to Borrower requesting payment.” Thus, the mortgagor may be held personally liable for any sums advanced by the lender pursuant to this mortgage covenant. However, the right to sue the mortgagor in a personal action may be restricted by New Jersey's foreclosure first doctrine. It is not clear whether *N.J.S.A. 2A:50-2* applies only to a personal action where the debt is evidenced by a note or bond or whether the statute applies as well to a personal action based solely on a mortgage covenant.

⁵⁹ 29 *N.J. Prac.* (Weinstein) Sec. 4.1 (2nd Ed. 2001).

⁶⁰ NEW JERSEY – Single Family – Fannie Mae/Freddie Mac Uniform Instrument (Form 30311101). Paragraph 1 of the Uniform Covenants.

⁶¹ 204-NOTE MORTGAGE, Ind. Or Corp. - Plain Language. Copyright 1982 by ALLSTATE LEGAL SUPPLY CO., One Commerce Drive, Cranford, N.J. 07018

⁶² 902 - Mortgage plain language. Individual or corporation. 4-84. Copyright 1984 Arthur S. Horn, a New Jersey Attorney. Julius Blumberg, Inc. Publisher. NYC 10013

⁶³ New Jersey Single Family Fannie Mae/Freddie Mac UNIFORM INSTRUMENT Form 30313/99 (Para. 13. Joint and several Liability; Co-signers; Successors and Assigns Bound).

⁶⁴ *Washington Mut. Bank, FA v. Webb*, 2006 WL156882 (N.J. Super. Ct. Ch. Div. 2006).(Unpublished).

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“money” by the debtor, there is no “obligation” and no “debtor” within the meaning of the act. Theoretically, the act should have no application in these situations. There is no decisional law in New Jersey, however, supporting this interpretation.

Under the Pennsylvania Loan Interest and Protection Law, 41 P.S. § 101, the “personal liability” dilemma is avoided by the definition of residential mortgage debtor, *i.e.*, “a non-corporate borrower who is obligated to a residential mortgage lender to repay in whole or in part a residential mortgage.” Thus, the Pennsylvania definition is tied to payment of the “mortgage,” not exclusively to payment of the “obligation.”

The language “any person” in the definition makes it clear that “any one” debtor constitutes “debtor” within the meaning of the act. This is poor statutory draftsmanship. Under a literal reading of the definition, the requirements of the act need only be given to any “one” debtor, not all debtors - a husband, for example, and not his wife. This makes little sense and obviously was not intended by the drafters.

The qualifying language of the definition “shown on the record of the residential mortgage lender” presumably means that the lender need not look any further than its own records to identify the debtor. It relieves the lender of inquiry in connection with ascertaining the names of debtors who may not be shown on the lender's records. Thus, an assuming grantee acquiring title without the knowledge or consent of the lender (ordinarily this would be a default under the mortgage) would not be a “debtor” under the act, because that person would not be reflected in the “lender's records.”

If a debtor has died, and the lender has no record of that fact in its files, presumably the personal representative, heirs or devisees of the decedent debtor would not be “shown on the record of the residential mortgage lender” and therefore would not be debtors within the meaning of the act. This, no doubt, will be the subject of judicial clarification.

In *Washington Mutual Bank, FA v. Webb* (unpublished),⁶⁵ the Chancery Division required that the devisee be joined in the foreclosure and be given a notice of intention under the act.

Since “residential mortgage lender” includes any lender in the chain of mortgage assignments - assignee as well as assignor - the term “lender's records” include, not only the records of the current lender, but the records of all predecessor lenders as well. Taken literally, this places an unreasonable burden on the current holder of the mortgage and, as to a particular mortgage, charges the current holder with knowledge of the contents of all predecessor lender files.

The language of the definition “obligated to pay the obligation” makes it clear that the “debtor” is the “obligor” under the bond, the “maker” of the note, and any other person obligated to pay the obligation secured by the residential mortgage. In the author's opinion, “debtor” would include a “cosigner,” “endorser,” and “surety” but not a “guarantor.”⁶⁶ However, this, no doubt, will be the subject of almost certain judicial determination.

An assuming grantee, acquiring title in accordance with the mortgage documents, would

⁶⁵ A guarantor is secondarily liable on the underlying obligation while a surety is primarily liable.

⁶⁶ *Feitlinger v. Heller*, 112 N.J. Eq. 209 (E. & A. 1932).

clearly be a “debtor” within the meaning of the act.

Ordinarily, the residential mortgage debtor will also be the “mortgagor,” but this may not necessarily be the case. Because “debtor” is defined in terms of the obligation secured by the residential mortgage, and not in terms of the mortgage itself, the debtor and mortgagor may be two entirely different persons. There is nothing in the act which requires that the debtor actually *own* the residential mortgaged property. If the original mortgagor has conveyed title to a new owner who does not assume the mortgage, the new owner (or grantee) is not a debtor under the act. If the grantee assumes the mortgage, the grantee becomes primarily liable to pay the debt whereas the original mortgagor becomes a surety.⁶⁷ It is the author's opinion that both the original mortgagor and grantee assuming the mortgage would be debtors under the act.

It is anomalous, in the author's opinion, that the act defines “debtor” in terms of the secured “obligation,” the personal instrument, and not in terms of the residential mortgage which is, after all, the ultimate focus of the *Fair Foreclosure Act*. The personal obligation secured by the mortgage, if there ever was one, may be wholly unenforceable. The original mortgagor, obligor, or maker may have been released from personal liability, discharged in bankruptcy, removed from personal liability by the statute of limitations, or may have died, so that there may be no person capable of meeting the criteria of debtor - a person obligated to pay the note or bond - within the meaning of the act.

It would appear that the act assumes that there will always be a debtor, because it provides no alternative person to be served with the notice of intention and to receive rights under the act where there is none. The act thus fails to address the many situations where there may be no debtor.

Because, as previously noted, the act defines “debtor” as “any” person obligated to pay the obligation, the foreclosing residential mortgage lender is under absolutely no obligation to give required notices and rights to “all” debtors, or even to any one person in title. The “debtor” may be a corporation, or defunct corporation, while the mortgagor may be a living, breathing person. The actual title holder, the person who would most benefit from the various rights and notices under the act, may be several steps removed from the mortgagor-debtor, or may be the original mortgagor who never signed the note or bond.

Oddly enough, the terms “mortgagor” or “borrower” do not appear in the act, although the act was presumably passed for the mortgagor's (or borrower's) benefit.

Under the Pennsylvania Loan Interest and Protection Law, 41 P.S. § 101, the definition of residential mortgage debtor is far more practical than the New Jersey definition and includes “a successor record owner of the property, if any, who gives notice thereof to the residential mortgage lender.” Pursuant to this definition, purchasers of property at a tax upset sale, as successive record owners who notified the mortgagee of their interest in the property, were found to be “residential mortgage debtors” within the meaning of § 403 and entitled to a notice of intention.⁶⁸

⁶⁷ *Marra v. Stocker*, 615 A.2d 326, 532 Pa. 187 (1992).

⁶⁸ *First National Bank of Palmerton v. Nagley*, 7 D. & C. 3d 789 (1978).

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§ 1.12 “Immediate Family” (Definition) - *N.J.S.A. 2A:50-55*

“Immediate family” means the debtor, the debtor's spouse, or the mother, father, sister, brother or child of the debtor or debtor's spouse.

Analysis

This definition is self-explanatory and relates to that point in time when the loan is originated, not when the mortgage is made or foreclosed. Under this definition, a “grandchild” would not be a member of the debtor's immediate family but a “brother-in-law” would be.

§ 1.13 “Residential Mortgage Lender” (Definition) - *N.J.S.A. 2A:50-55*

A “residential mortgage lender” is any person, corporation or other entity which makes or holds a residential mortgage and the assignee of such persons.

Analysis

The definition of lender, which includes a person, corporation or entity which “makes or holds” a residential mortgage, embraces both assignee and assignor of the mortgage. Thus, a mortgagee which has wholly assigned the mortgage and no longer holds an interest in it is still a lender under the act. Of course, it is assumed that the language “which makes or holds a residential mortgage” relates to a person or entity capable of holding title to a mortgage in New Jersey, *e.g.*, an individual, corporation or partnership.

Under the Pennsylvania Loan Interest and Protection Law, 41 *P.S.* § 101, the term “residential mortgage lender” appears to be better defined. § 101 provides “The term shall also include the holder at any time of a residential mortgage obligation” and thus limits the term to the “present” holder of the mortgage.

§ 1.14 “Non-Residential Mortgage” (Definition) - *N.J.S.A. 2A:50-55*

“Non-residential mortgage” is defined as a mortgage which is not a residential mortgage. If a mortgage includes separate tracts or properties, those portions of the mortgage covering the non-residential tracts or properties shall be a non-residential mortgage.

Analysis

This definition essentially makes two mortgages out of one, a residential mortgage and a non-residential mortgage, where the mortgage contains separate residential and non-residential tracts.

Of course, the provision here is that the residential and non-residential tracts are entirely *separate*. If you have a strip mall with three dwelling units overhead, obviously you cannot invoke this section to foreclose a portion of the tract as a non-residential mortgage, *e.g.*, the strip mall minus the three dwelling units, because they are not separate tracts. If, however, you have a mortgage containing a separate tract for a strip mall and a separate tract containing residential property (all securing the same debt), you can invoke this section together with section 10, *N.J.S.A. 2A:50-62*, to foreclose the qualifying residential and non-residential properties in separate actions.

Where plaintiff instituted foreclosure against residential and non-residential tracts in the

same action without sufficient compliance with Pennsylvania's Act 6, 41 P.S. § 403, which has no provision comparable to the New Jersey act, dismissal of the residential property from the proceeding was required.⁶⁹

§ 1.15 “Deed In Lieu Of Foreclosure” (Definition) - *N.J.S.A. 2A:50-55*

“Deed in lieu of foreclosure” means a voluntary, knowing and uncoerced conveyance by the residential mortgage debtor to the residential mortgage lender of all claim, interest and estate in the property subject to the mortgage. In order for a conveyance to be voluntary, the debtor shall have received notice of, and be fully apprised of the debtor's rights as specified in section 4 of this act. For purposes of this act, “voluntarily surrendered” has the same meaning as “deed in lieu of foreclosure.”

Analysis

This is an important definition under the act. There is substantial ambiguity with respect to the application of the act generally to a deed in lieu of foreclosure. Section 3 of the act (*N.J.S.A. 2A:50-55*) contains a “general” definition of “deed in lieu of foreclosure” which, ostensibly, is applicable to the act in general apart from the optional procedure.

Subsection 11d (*N.J.S.A. 2A:50-63d*) also contains a “special” definition of deed in lieu of foreclosure - containing a seven day right of rescission by the debtor - applicable only where a deed in lieu is given as a basis for the optional procedure.

It is doubtful whether the drafters intended the above result. But the statutory language is absolutely clear and mandates it.

As noted, by virtue subsection 11d above, we now have a “general” and “special” definition of deed in lieu of foreclosure. The *general* definition merely requires that the deed in lieu of foreclosure be a voluntary, knowing and uncoerced conveyance of all claim, interest and estate of the debtor in the mortgaged premises and that the debtor shall have received notice of and been fully apprised of the debtor's section 4 rights. The *special* definition, applicable where a deed in lieu of foreclosure is followed by the optional procedure without sale, provides that the deed in lieu is only effective if the deed “clearly and conspicuously” provides for a seven day right of rescission by the debtor.

The language used in the section 3 definition that “the debtor shall have received notice of, and been fully apprised of the debtor's rights as specified in section 4” in order for a conveyance to be “voluntary,” shows that the drafters had in mind the situation where (a) the debtor had defaulted and (b) the lender had not yet instituted foreclosure. Obviously, giving the debtor notice of, and fully apprising the debtor of, its section 4 rights under the act (*i.e.*, the notice of intention) was meant to inform the debtor of the debtor's right to cure and reinstate the loan in a foreclosure action - thus, potentially eliminating the debtor's need to give a deed in lieu of foreclosure to the lender where the debtor has the ability to cure the default. There would be no other purpose in giving the debtor notice of, and apprising the debtor of, its section 4 (*N.J.S.A.*

⁶⁹ Where the deed is given pending foreclosure and a notice of intention has previously been served on the debtor, little purpose is served by giving the debtor notice of its section 4 rights. However, the statute appears to require such notice in any case.

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2A:50-56) rights at this time.⁷⁰

The language “shall have received notice of” in the definition of deed in lieu of foreclosure is unclear. The author does not interpret this language to mean that the debtor must be given a notice of intention, for subsection 4b (*N.J.S.A.* 2A:50-56b) provides that a notice of intention is “inapplicable” where the debtor has voluntarily surrendered the property. The debtor by virtue of a deed in lieu of foreclosure is attempting to avoid foreclosure. Moreover, the 30 day period in the notice of intention to foreclose is inconsistent with the seven day right of rescission given to the debtor under section 11 (*N.J.S.A.* 2A:50-63) where the deed in lieu of foreclosure is to be followed by the optional procedure to foreclose. Presumably, the debtor would not need the seven day period to rescind if, pursuant to the notice of intention, the debtor has 30 days and the attendant rights in the notice.

Where a lender is taking a deed in lieu of foreclosure and does not intend to subsequently utilize the optional procedure, it is the author's recommendation that (a) a copy of section 4 of the act be given to the debtor prior to execution of the deed in lieu of foreclosure and (b) an “affidavit of title” be obtained from the debtor-grantor which provides that the debtor has “received notice of and been fully apprised of the debtor's rights under section 4 of the act.”

Where the lender takes a deed in lieu of foreclosure with respect to residential property covered by the act, intending to subsequently utilize the optional procedure without sale, it is necessary for the deed to contain the required seven day right of rescission language set forth in subsection d (*N.J.S.A.* 2A:50-63d). The lender should also comply with the procedure outlined above by giving the debtor a copy of section 4 (*N.J.S.A.* 2A:50-56) of the act prior to execution of the deed and by obtaining an affidavit of title signed by the debtor after the seven day period has expired which should include a statement that the debtor did not rescind the deed.

Under current practice in New Jersey, a mortgagee may take a deed in lieu of foreclosure containing a *non-merger* provision⁷¹ (i.e., that the lien of the mortgage will not merge into the fee) from the mortgagor prior to or during the pendency of foreclosure and then institute or continue foreclosure against outstanding persons in interest. Presumably, this can still be done.⁷² Non-merger may also be expressly provided for by agreement.⁷³ An anti-merger clause in the

⁷⁰ *Stohl v. Stohl*, 138 *N.J. Eq.* 220, 47 A.2d 559 (Ch. 1946).

⁷¹ It seems pointless to the author for a lender to take a deed in lieu of foreclosure from a debtor where there are subordinate interests on the property which must be subsequently cutoff by foreclosure and sale. Why take a deed in lieu of foreclosure if you have to institute or continue foreclosure anyway? Some attorneys argue that a subsequent bankruptcy by the mortgagor will not affect or stay the foreclosure action in this instance.

⁷² See Nelson & Whitman, 1 *REAL ESTATE FINANCE LAW* 538 (3rd Ed. 1993) (“if there is an express agreement that it [conveyance to the mortgagee] shall not operate to extinguish the mortgage, the agreement will be given effect.”).

⁷³ See *Schradin v. Harry W. Bealer Co.*, 114 *N.J. Eq.* 459, 168A. 854 (Ch. 1933), *aff'd*, 117 *N.J. Eq.* 443, 176A. 321 (E. & A. 1934), for an anti-merger clause which is self-executing in the event that there are intervening encumbrances of record. The deed in lieu of foreclosure contained the provision - “provided that there are no judgments, mortgages, conveyances, or other liens or claims of record, which might affect the title to said premises before this deed is recorded... In the event of the happening of any of the contingencies mentioned in the above provision, the right of the said party of the second part in the bond and mortgage so held by it shall not be deemed to have been extinguished by the acceptance and recording of this deed, but shall be and remain in full force and effect.” The court in dismissing the foreclosure action by the complainant, former mortgagee, which was undertaken solely to hold the defendant liable for a deficiency after foreclosure, held that taxes and assessments which were the

deed may even be conditioned upon the existence of intervening liens and if there are none provide for extinguishment of the debt and mortgage.⁷⁴ However, a lender taking a deed in lieu of foreclosure from a residential mortgage debtor with respect to property covered by the act must make sure the conveyance is “voluntary” within the meaning of the act, *e.g.*, that the debtor has “received notice of and been fully apprised of the debtor's rights under section 4 of the act.”

The question arises whether a lender taking a deed in lieu of foreclosure from a debtor where no foreclosure action is pending or about to be instituted need comply with the requirements of the act. In this respect, it should be noted that the definition of “residential mortgage” does not require that a foreclosure be instituted, intended to be instituted, or that the residential mortgage loan even be in default. The act only speaks to a *deed* given by a debtor to a lender involving property subject to a *residential mortgage*. Thus, the act on its face applies to such a transaction.

It is the author's opinion that the act's deed in lieu of foreclosure requirements should not apply where there is no foreclosure, as the transaction is wholly outside of the foreclosure process. However, as a deed in lieu of foreclosure constitutes an alternative to the remedy of foreclosure, the practical effect of which is identical to foreclosure, *i.e.*, the debtor loses title, it is entirely conceivable that the Legislature intended to protect the debtor in this situation as well. By requiring the lender to advise the debtor of its *right to cure* if foreclosure is eventually instituted, the debtor's need to execute a deed in lieu of foreclosure may possibly be obviated.

Presumably, the deed in lieu of foreclosure provisions of the act apply to deeds given after December 4, 1995. However, where foreclosure has actually been commenced against the debtor prior to the effective date of the act, or where the act does not apply, logically the notice provisions should not be required because, presumably, in these instances the debtor has no right to cure under the act and no good purpose is served by giving the debtor a notice advising of rights the debtor does not have.

The act requires that the deed in lieu of foreclosure be given “by the residential mortgage debtor to the residential mortgage lender.” Where the deed is given by a person other than the debtor (*i.e.*, a person not obligated to pay the note or bond), the requirements of the act would not apply. If the debtor has been released from personal liability, or enforcement of the debt is barred by bankruptcy or the statute of limitations, then the act's deed in lieu of foreclosure requirements would appear inapplicable because there is no “debtor,” *i.e.*, a person obligated to pay the obligation. There are, however, no applicable judicial decisions supporting this interpretation.

There is no provision in the act waiving the 14 day notice of entry of judgment (or entry of the redemption order under the optional procedure) under section 6 of the act (*N.J.S.A.* 2A:50-58) with respect to a debtor who has previously given the lender a deed in lieu of foreclosure. In this instance the 14-day notice is clearly inapplicable, as the act exempts a debtor who has given

only claims of record did not prevent extinguishment of the debt pursuant to the clause in the deed, because such liens were paramount to the mortgage and in no way affected complainant's title under the mortgage or deed.

⁷⁴ In the author's opinion, the deed in lieu of foreclosure provisions of the act do not apply where foreclosure has been commenced prior to December 4, 1995, and the notice of intention, therefore, is not applicable. The requirement that the deed be voluntary, *e.g.*, that the debtor has “received notice of and been fully apprised of the debtor's rights under section 4 of the act,” makes it clear that the deed in lieu of foreclosure provisions of the act presuppose application of the notice of intention - otherwise, reference to section 4, the notice of intention requirements, would have no meaning.

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a deed in lieu of foreclosure from the notice of intention requirement, *N.J.S.A. 2A:50-56d*. If the debtor has no right to cure, what possible purpose is served in giving the debtor a notice of entry of judgment advising the debtor of a nonexistent right to cure?

It is not clear under the act whether less than all debtors may give a deed in lieu of foreclosure, as the act refers to a conveyance of “all claim, interest and estate in the property.” However, the author sees no impediment to a conveyance by less than all debtors so long as the conveyance constitutes “all claim, interest and estate” of that particular debtor or debtors.

May a debtor giving a deed in lieu of foreclosure to a lender *waive* the provisions of the act at the same time the debtor executes the deed, thereby obviating the lender's need to comply with the act's deed in lieu of foreclosure requirements? The answer in the author's opinion is *no* for two reasons.

First, waiver of the deed in lieu requirements is inconsistent with the waiver provisions of the act. And second a deed in lieu by its very nature is inconsistent with the act's waiver provisions.

Section 9 (*N.J.S.A. 2A:50-61*) specifies that a waiver is void unless given after default *pursuant to a workout agreement* in a separate written document signed by the debtor. It would be hard to imagine how a debtor giving up all rights in the mortgaged premises pursuant to a deed in lieu of foreclosure could be giving such a deed in order to effectuate a workout agreement. A workout agreement implies that the debtor is trying to keep the property, not give it up.

Of course, if a debtor actually defaults under a workout agreement pursuant to which the debtor had previously waived its rights under the act, there would be nothing prohibiting a lender, in the author's opinion, from taking a deed in lieu of foreclosure at that time, while still retaining the benefit of the debtor's waiver. There are no judicial decisions, however, supporting this interpretation.

§ 1.16 “Office of Foreclosure” (Definition) - *N.J.S.A. 2A:50-55*

“Office” means the Office of Foreclosure within the Administrative Office of the Courts.

Analysis

The foreclosure practitioner should refer to *R. 1:34-6* and *R. 4:64-1* and 2 for the general powers of the Office of Foreclosure. The Office is empowered to enter orders and judgments in uncontested foreclosure actions. The Office of Foreclosure is located in the Hughes Justice Complex, 6th Floor, North Wing, CN 971, Trenton, NJ 08625. It is presently headed by Irene Komandis, Assistant Chief, Office of Foreclosure. Inquiries can be directed to **609-421-6100** or E-mail us at **SCCO.Mailbox@njcourts.gov**

The Office of Foreclosure is described on the court's website as:⁷⁵

The foreclosure process in New Jersey is a two-tiered system involving both Superior Court General Equity judges and the staff of the Office of Foreclosure. The Office of Foreclosure is a unit in

⁷⁵ <https://www.njcourts.gov/courts/superior/foreclosure.html?lang=eng>

the Superior Court Clerk's Office. The Office of Foreclosure handles seven types of foreclosure actions: (1) residential mortgage foreclosure; (2) multi-family/commercial mortgage foreclosure; (3) in personam tax certificate foreclosure; (4) municipal in rem tax certificate foreclosure; (5) condominium lien foreclosure; (6) strict foreclosure (to remedy foreclosure action errors) and (7) *Fair Foreclosure Act* optional foreclosure procedures.

The Office is granted authority under R. 1:34-6:

Office of Foreclosure

(a) There shall be an Office of Foreclosure within the Administrative Office of the Courts. This office shall be responsible for recommending the entry of orders or judgments in uncontested foreclosure matters pursuant to R. 4:64-1 and R. 4:64-7 subject to the approval of a Superior Court judge designated by the Chief Justice. The Office of Foreclosure may also recommend the entry of the following orders in uncontested actions:

- (1) correcting clerical errors in court documents and metadata;
- (2) correcting the defendant's name;
- (3) correcting venue;
- (4) substituting the plaintiff if, during the course of the foreclosure action, the original plaintiff reorganizes, merges with another entity, is acquired by another entity, or assigns the mortgage to another entity;
- (5) entering default;
- (6) extending time to answer;
- (7) filing an amended complaint, provided no new cause of action or claim for relief is set forth in the amended complaint;
- (8) vacating a default entered by the clerk;
- (9) vacating judgment and execution, reinstating bond or note and mortgage and, with the consent of answering defendants, dismissing the proceedings;
- (10) authorizing sheriff to collect additional lawful sums;
- (11) dismissing the tax foreclosure action as to any parcel redeemed;
- (12) vacating an in rem foreclosure judgment upon application of the municipality owner;
- (13) correcting minor technical irregularities in the mortgage, note or legal description, if a substantial right of a party is not prejudiced;
- (14) substituting heirs and personal representative for deceased defendants;
- (15) disbursing surplus foreclosure money; and
- (16) vacating a dismissal for lack of prosecution and reinstating the matter.

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(b) Where a motion is filed with the Office of Foreclosure, that motion must contain only one form of requested relief.

§ 1.17 “Commercial” Versus “Non-Commercial” Loan (Application of Act)

Application of the act is not tied to the “purpose” of the loan, *e.g.*, whether a loan is commercial or non-commercial. It is the nature of the security that controls the act's application (“not more than four dwelling units”) and whether the requisite occupation or intention to occupy by the debtor (“a natural person”) or the debtor's immediate family member exists at the time the loan is originated. Thus, a commercial loan can be secured by a mortgage on residential property to which the act applies.

This question was specifically addressed in *Bank v. Kim*.⁷⁶ In finding that a residential mortgage securing a commercial loan was subject to the act, the court said:

“Clearly, the legislative language protects the interests of a homeowner whose residence is mortgaged, without reference to his or her reasons for the mortgage.”⁷⁷

§ 1.18 Relationship of Act to Deficiency Action Statutes

There is no relationship between application of the *Fair Foreclosure Act* (N.J.S.A. 2A:S0-53 *et seq.*) and foreclosure first and the deficiency action statutes (N.J.S.A. 2A:S0-2 *et seq.*).

Although the deficiency action statutes apply primarily to residential property, nevertheless these statutes may apply where the *Fair Foreclosure Act* does not and vice versa.

§ 1.19 Person Signing Note or Bond; Importance

The person signing the note or bond is the “debtor” within the meaning of the act, not necessarily the person signing the mortgage. If the mortgage contains a covenant to pay the mortgage debt, the mortgagors will be debtors whether or not they signed the note, bond or other instrument of obligation.

In the case of a Fannie Mae/Freddie Mac *Uniform Mortgage Instrument*, however, the mortgage contains a provision⁷⁸ that a person co-signing *the mortgage only* and not the note has no personal liability. Such person co-signing the uniform mortgage only and not the note is not a debtor under the act and not entitled to a notice of intention and other protections under the

⁷⁶ 361 N.J. Super. 331, 343, 825 A.2d 566, 573 (App. Div. 2003).

⁷⁷ New Jersey, Single Family, Fannie Mae/Freddie Mac UNIFORM INSTRUMENT Form 30313/99 (Para. 13. Joint and Several Liability; Co-signers; Successors and Assigns Bound).

⁷⁸ That a covenant to pay the debt in a mortgage binds the heirs of the mortgagor is clear from the statutory short form covenant, N.J.S.A. 46:9-4. Covenant to pay indebtedness. A covenant in any mortgage in the words, “That..... will pay the indebtedness as herein before provided” shall be construed to have the same force and effect as the following words: “And the said.....for himself, *his heirs, executors, administrators or successors* covenants and agrees to pay unto the said party of the second part, his heirs, executors, administrators, successors or assigns, the said sum of money and interest as mentioned above and expressed in the conditions of the said bond.” (Emphasis supplied.)

statute. There are no judicial decisions supporting this interpretation which may work a hardship on a spouse who cannot cure a mortgage default to protect his or her right of joint possession in the principal matrimonial residence.

It is absolutely critical that the foreclosing attorney carefully review the note or bond. Ordinarily, all persons signing the note or bond will also sign the mortgage, but this may not be true in all cases. All persons signing the note or bond must be given rights under the act, whether or not such persons signed the mortgage.

The act's application may, in fact, depend upon who signs the obligation. Suppose a corporation executes a mortgage on residential property and is also the maker of the note. On its face, the act would not apply, because there is no debtor who is a natural person. However, if a corporate officer cosigns the note and intends to occupy the property as a residence at the time the loan is closed, the act would then apply. Unless the foreclosing attorney carefully reviews the instrument of obligation and takes notice of all persons who signed it, it is possible for the act's application to go unnoticed.

§ 1.20 Debtor (Natural Person Requirement)

Pursuant to section 3 of the act (*N.J.S.A.* 2A:50-55), “debtor” or “residential mortgage debtor” is defined as any person shown on the record of the residential mortgage lender as being obligated to pay the obligation secured by the residential mortgage. Residential mortgage as part of its definition requires that the residential property be occupied or planned to be occupied “by the debtor, who is a *natural person*” (Emphasis supplied.)

While the definition of “debtor” does not require that the debtor be a “natural” person, the definition of a “residential mortgage” (and residential property) require that the debtor “occupying” or “intending to occupy” the residential property at the time the loan is originated be a natural person for the act to apply. Obviously, a member of the debtor's “immediate family” will be a natural person.

Presumably, you can have debtors under the act (*e.g.*, “persons obligated to pay the obligation”) who are not natural persons, so long as you have at least one debtor (or debtor's immediate family member) occupying or intending to occupy the property at the time the loan is originated, who is a natural person.

It is unclear from a reading of the act what was actually intended by the drafters. The author believes that the drafters may have intended to include only natural persons in the definition of debtor. This follows from the definition of “lender,” which refers to “any person, corporation or other entity,” whereas the definition of “debtor” refers only to “any person,” omitting any reference to “corporation or other entity.” This may illustrate that the drafters used “person” to mean “natural person” in the definition of debtor, so as to exclude a corporation or partnership. The drafters may have believed that because the act was “residential” in nature, intended to protect the individual homeowner, that a corporate debtor, being a commercial person, had no place in the definition of debtor. This is further reinforced by the fact that “debtor” and “residential mortgage debtor” are used synonymously in the act.

From an economic standpoint, however, it makes good sense to include persons other than natural persons in the definition of debtor. A corporate debtor may have a strong economic motive to cure a residential mortgage default and should be served with a notice of intention and

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permitted to cure.

The definition of debtor does not contain the qualification “natural.” On its face, therefore, the definition is broad enough to embrace corporation and partnership and, until judicial clarification, should be applied to any person obligated to pay the secured obligation, whether such person be an individual, partnership or corporation.

Under the Pennsylvania Loan Interest and Protection Law, 41 P.S. § 101, the term residential mortgage debtor is limited to a “non-corporate borrower.”

§ 1.21 Deceased Debtor (Personal Representatives, Heirs, Devisees as Debtors)

While the deceased debtor is not specifically addressed in the act, it is the author's opinion that the debtor's heirs, devisees, and personal representative stand in the shoes of the deceased debtor and are entitled to the rights conferred by the act on the debtor. Any other policy seems patently unfair.

It is the author's opinion that both the “personal representative” of a deceased debtor's estate and the “heirs and devisees” of such estate are “debtors” within the meaning of the act. While the obligation of such persons to pay the deceased debtor's debts is not absolute, nevertheless, within the scope of the law, such an obligation to pay exists.⁷⁹

The Chancery Division addressed the question of the devisee of a deceased debtor under the act in an unpublished opinion. In *Washington Mutual Bank, FA v. Webb*,⁸⁰ plaintiff instituted foreclosure but did not join David T. Webb, the property owner and devisee, and the Estate of Betty Webb. The Chancery Division held that these parties must be joined in the foreclosure as they are “necessary and proper parties,” citing *N.J.S.A.* 3B:1-3 and *R.* 4:28-1. Further, as to the notice of intention, the court adopted the procedure set forth in *GE Capital Mortgage v. Weisman*.⁸¹ It ordered that Webb and the Estate be served with the notice of intention within fifteen days and that they be given thirty days to reinstate the loan or respond. To the author, this is clear-cut recognition by the Chancery Division that a devisee is a “debtor” within the meaning of the act.

By statute, *N.J.S.A.* 3B:22-40, the heirs and devisees of a deceased debtor are liable for the contractual debts of the deceased debtor and may be liable on the bond;⁸² this is also true for the personal representative of a deceased mortgagor.⁸³ This liability, however, extends only to

⁷⁹ *Washington Mut. Bank, FA v. Webb*, 2006 WL156882 (N.J. Super. Ct. Ch. Div. 2006). (Unpublished).

⁸⁰ *GE Capital Mortg. Services, Inc. v. Weisman*, 339 N.J. Super. 590, 773 A.2d 122 (Ch. Div. 2000).

⁸¹ *Asher v. Hart*, 128 N.J. Eq. 1, 14 A.2d 781 (Ch. 1940) (heirs or devisees of one liable on a bond secured by a mortgage are proper and necessary parties to a foreclosure action if a further proceeding for a deficiency arising from the foreclosure is to be instituted against them); *Pilgrim Building & Loan Association v. McGuinness*, 117 N.J. Eq. 438, 176 A. 604 (E. & A. 1935) (devisees answerable on bond).

⁸² *United Security Life Ins. & Trust Co. v. Vandergrift's Adm'r*, 51 N.J. Eq. 400, 26A. 985 (Ch. 1893).

⁸³ *Reinhardt v. Calhoun*, 9 N.J. Misc. 914, 156 A. 12 (1931).

the amount collectable from the lands devised or inherited.⁸⁴ Where the lands have been sold by the heir or devisee to a purchaser for value, the heir or devisee is liable to the creditor for the decedent's debts only to the extent of the value of the lands.⁸⁵

It is unnecessary for the creditor to present a claim to the personal representative of the debtor's estate before pursuing an action at law against the heirs and devisees, as such action is an entirely independent remedy.⁸⁶ It makes no difference whether there are sufficient assets remaining in the hands of the personal representative or in the estate.⁸⁷

Where the lands inherited or devised are sold at a foreclosure sale for no more than the amount of the mortgage, the devisee or heir is not liable for the decedent's debts, as the amount brought by the sale is presumed to be the value of the property.⁸⁸

With respect to the personal representative of a deceased debtor's estate, by statute, *N.J.S.A.* 3B:22-9, any claim not presented to the personal representative within the 6 month period fixed by the order limiting creditors is barred as to any assets, devises or distributive shares delivered or paid in satisfaction of lawful claims before presentation of the claim. Where the personal representative has remaining assets after payment of claims, a creditor failing to present a claim within the period fixed by the order, may present a claim at any time before such assets have been lawfully distributed or paid.⁸⁹ After the assets have been paid over to legatees, devisees or heirs, a barred creditor may proceed against the devisees and heirs under the refunding bond given by the devisees or heirs,⁹⁰ or against a fiduciary giving a bond.⁹¹

Independent of statute, a creditor, in equity, has a direct right of action against the distributee of an estate to the extent of assets received by the distributee. The distributee, it is said, stands in the shoes of the decedent and is bound to pay his or her debts.⁹² The equitable remedy, however, will not lie if there is surplus remaining in the hands of the personal representative.⁹³

The act's definition of "debtor" (*N.J.S.A.* 2A:50-55) requires that the debtor be "shown on the record of the residential mortgage lender." It is assumed that the "record" refers to the record of the lender "prior" to institution of foreclosure. In many instances, the personal representative

⁸⁴ *N.J.S.A.* 3B:22-43 (the judgment against the heirs or devisees shall be general for the amount so found due, but only to the value of the estate descended or devised, and sold or transferred). See *Fredericks v. Isenman*, 41 *N.J.L.* 212 (1879).

⁸⁵ *Stone v. Todd*, 49 *N.J.L.* 274, 8 A. 300 (Sup. 1887).

⁸⁶ *Dodson v. Taylor*, 53 *N.J.L.* 200, 21 A. 293 (E. & A. 1891). See generally 7 Clapp *N.J. Prac.* §§ 1312-1319 (Rev. 3rd Ed.).

⁸⁷ *Byrne v. Condon*, 68 *N.J.L.* 439, 53 A. 385 (Sup. 1902).

⁸⁸ *N.J.S.A.* 38:22-10.

⁸⁹ *N.J.S.A.* 38:22-16. See generally 7 Clapp *N.J. Prac.* Rev. 3rd Ed. §§ 1328 to 1335.

⁹⁰ *N.J.S.A.* 38:22-18.

⁹¹ *Carter v. Fidelity Union Trust Company*, 120 *N.J. Eq.* 578, 187 A. 334 (E. & A. 1936).

⁹² 7 Clapp *N.J. Prac.* § 1335 at n.8 (Rev. 3rd Ed.)

⁹³ See Chapter 1.

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of a deceased debtor and his or her heirs or devisees may not be identified on the lender's records prior to commencement of foreclosure.

Taking the language of the act literally, the personal representative, heirs or devisees, if any, of the deceased debtor not shown on the lender's records need not be given a notice of intention. However, after commencement of foreclosure, service of process, inquiry and the like, where the personal representative, heirs and devisees are known, it is the author's strong suggestion that such persons be given a 14-day notice of entry of judgment, notwithstanding that they were not previously given a notice of intention. This subsequent identification of heirs or devisees of a deceased mortgagor is a rather commonplace situation often faced by foreclosure practitioners, yet the act utterly fails to address it.

Many New Jersey practitioners are not treating the heirs, devisees and personal representatives of a deceased debtor as a *debtor* under the act. Thus, decedent's heirs or devisees as the case may be, even where they are known and have been joined and served in the foreclosure action, are not given a 14-day notice of entry of judgment ("notice to cure") prior to entry of judgment. The Office of Foreclosure is apparently permitting this. This, of course, is a dangerous practice and will ultimately be resolved by judicial decision. The theory behind this is not entirely clear to the author. Either such debtor successors are not viewed as debtors, *i.e.*, not personally obligated to pay the mortgage obligation, or are not debtors because not identified as debtors on the "lender's records."

It is important to realize that the *Fair Foreclosure Act* is salutary social legislation aimed, in part, at better enabling mortgage debtors to cure mortgage defaults and retain their homes. Given the overall purposes of the act, it is hard to imagine heirs, devisees and personal representatives not being viewed by the courts as persons entitled to step into the shoes of the deceased debtor and entitled, thereby, to the same protections afforded the original debtor.

§ 1.22 Does the Debtor Have to be a Party to the Foreclosure?

As previously noted,⁹⁴ the "debtor," the person "obligated to pay the obligation" (*i.e.*, the note maker or obligor on the bond), may have no interest in the property being foreclosed. The debtor may not be the title holder, may never have been a title holder, or may have conveyed out all right, title and interest and, therefore, may not be an indispensable party to a foreclosure action.

The act does not require that the debtor be a party to the foreclosure action, but only that the debtor be given the required rights and notices under the act, *e.g.*, a notice of intention to foreclose (*N.J.S.A.* 2A:50-56) and a 14-day notice of entry of judgment (*N.J.S.A.* 2A:50-58).

The irony here is that the debtor, the person continuously referred to under the act for required notices, rights and the like, may not be the mortgagor or may be the original mortgagor now out of title, a person having absolutely no title interest in the mortgaged premises. The debtor, the original obligor, or note maker may be a totally unnecessary party and may not be joined in the foreclosure action. Yet, this non-party is the focus of the act and is the very person who must receive all required notices and rights. Failure to notice the debtor in a foreclosure action in which the debtor may not even be a party, and which may not affect any interest of the

⁹⁴ See *Bank v. Kim*, 361 *N.J. Super.* 331, 343, 825 A.2d 566, 573 (App. Div. 2003). See also prior section.

debtor, may void the foreclosure or otherwise render the action voidable.

§ 1.23 Corporate Obligation Secured by Officer's Residence; Guarantor (Application of Act)

Where a corporate officer *executes* a residential mortgage on the officer's residence in order to secure a corporate debt, application of the act should be assumed by the foreclosing attorney - assuming other requirements of the act have been met - even if the corporate officer has not signed the note or bond. This is because the mortgage ordinarily contains a covenant to pay the debt, making the mortgagor a debtor within the meaning of the act and personally liable to pay the mortgage debt. If the mortgage covers the officer's *residence*, the residential property will normally be no more than 4 dwelling units and, by definition, the requisite occupancy requirements will also be met. The fact that a "commercial" loan is involved has no bearing on the application of the act if the requirements of the act are met.⁹⁵

Where the mortgage is executed by the corporation (or other entity) alone and the officer signs no other personal instrument other than a "guaranty," the act does not apply in the author's opinion. This is addressed in the next section. For the act to apply, the guarantor (a natural person) must be deemed a "debtor" at the "time" the loan is originated; otherwise, there is no (natural) debtor capable of meeting the act's requirements.

§ 1.24 Is a Guarantor a "Debtor" Under the Act?

It is the author's opinion that a guarantor, by virtue of signing the guaranty *alone*, should not be considered a "debtor" under the act. Where the mortgage is executed by a corporation (or other entity) alone and the officer signs no other personal instrument other than a "guaranty," the act does not apply in the author's opinion. For the act to apply, there must be a debtor (a natural person) in existence at the time of loan origination.

A guaranty is a *collateral* and conditional undertaking. At the time the loan is originated, a guarantor is not obligated to pay the note or bond and is therefore not a debtor within the meaning of the act. A guarantor merely has potential liability for payment of the debt in accordance with guarantor's contract of guaranty. Where the guarantor has signed a guaranty of "collection" as opposed to a guaranty of "payment," the situation is even clearer, because, in that instance, the liability of the guarantor is much further removed and only arises if the proceeds from the sale of the mortgaged premises are insufficient to satisfy the debt after completion of foreclosure.⁹⁶

According to its dictionary definition, a "guaranty"⁹⁷ is a collateral agreement for performance of another's undertaking. It is the guarantor's own separate contract, not merely an engagement jointly with the principal to do the thing. The original contract of the principal is not his contract. A guarantor is not a surety. A surety undertakes to do the very thing which the

⁹⁵ See 29 *N.J. Prac.* (Weinstein) Sec. 11.6 , 39.4 (2nd Ed. 2001).

⁹⁶ *BLACK'S LAW DICTIONARY* 705 (6th Ed. 1990).

⁹⁷ *Id.*

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principal promised to do, if the principal defaults.⁹⁸ A guarantor is secondarily liable on the underlying obligation of the principal obligor while a surety is primarily liable on the obligation.

Recent changes, however, in the law have attempted to reduce the technical distinction between surety and guarantor.⁹⁹ The Uniform Commercial Code, *N.J.S.A.* 12A:1-101, *et seq.*, now includes guarantor within the definition of surety, and the *Restatement (Third) of Suretyship and Guaranty* refers to both guarantor and surety as a “secondary obligor.”¹⁰⁰ A distinction between the terms still exists though.

It is entirely possible that a court may interpret “guarantor” in accordance with the overall salutary social purposes of the act and find that a guarantor is a person “obligated to pay the obligation” and therefore a debtor within the meaning of the act.

The single family Uniform Secured Note¹⁰¹ makes no distinction between the liability of the borrower, guarantor, surety or endorser; they are all fully and personally obligated to keep all of the promises made in the Note, including the promise to pay the full amount owed.¹⁰²

As noted in the previous section, the foreclosing attorney should assume application of the act where a corporate officer executes a mortgage on the officer's residence to secure a corporate debt. This should be the case unless the residential property consists of more than four dwelling units or the requisite occupancy requirements are simply not met at the time of loan origination.

§ 1.25 Priority of Mortgage and Act's Application

The priority of the mortgage has nothing to do with the act's application. The residential mortgage may be a first lien, second lien and so forth. For the act to apply, all that matters is whether the requirements of the act have been met, *e.g.*, whether the residential property has not more than four dwelling units, occupied or intended to be occupied by the debtor (or a member of the debtor's immediate family) as the debtor's or member's residence at the time the loan is originated. It is quite possible - depending upon the intention of the debtor when the loan is closed - for a second mortgage to be subject to the act, while the first is not.

⁹⁸ See Rosenthal and Duignan, “Recent Changes Affect Guarantors and Sureties,” 5 *NJL* 1955 (September 16, 1996). There have been recent amendments to the Bankruptcy Code and the Uniform Commercial Code and the American Law Institute has published a “Restatement (Third) of Suretyship and Guaranty.”

⁹⁹ *Id.*

¹⁰⁰ MULTISTATE FIXED RATE NOTE - Single Family - FNMA/FHLM – Uniform Instrument (Form 320012/83). Paragraph 8 (“Obligations of Persons Signing This Note”).

¹⁰¹ “**8. OBLIGATION OF PERSONS UNDER THIS NOTE** If more than one person signs this Note, each person is fully and personally obligated to keep all of the promises made in this Note, including the promise to pay the full amount owed. Any person who is a guarantor, surety or endorser of this Note is also obligated to do these things. Any person who takes over these obligations, including the obligations of a guarantor, surety or endorser of this Note, is also obligated to keep all of the promises made in this Note. The Note Holder may enforce its rights under this Note against each person individually or against all of us together. This means that anyone of us may be required to pay all of the amounts owed under this Note.”

¹⁰² *Sturdy Sav. Bank v. Roberts*, 46 A.3d 632, 639 (N.J. Super. Ch. 2012).

§ 1.26 “Once a Residential Mortgage, Not Always a Residential Mortgage”; Conversion to Non-Residential Use

With limited exceptions, the provision - “once a residential mortgage always a residential mortgage” - is true and serves to underscore that all rights under the act arise at the time the loan is originated (*e.g.*, closed). As long as the requirements of the act are met at the time the loan secured by the residential mortgage is closed, the mortgage will remain a residential mortgage under the act, notwithstanding any subsequent matter affecting the property.

Thus, where the residential property consists of four dwelling units at the time the loan is closed but five dwelling units at time of foreclosure, it would appear that the application of the act will remain unchanged, notwithstanding the increase in the number of units. Absent a controlling judicial determination, the converse would also appear to be true - that the act would not apply where the property consists of five dwelling units at the time of loan origination but dwindles to four by the time foreclosure is instituted.

However recently, this view has come into question. In *Sturdy Savings Bank v. Roberts*, the court had to determine if the FFA applied where the mortgagor or his family “did occupy or intended to occupy the property” when the loan was originated but chose to vacate the property without intending to return as of the date of filing a foreclosure complaint. The court concluded the phrase “is occupied or is to be occupied” by the debtor or his family” from *N.J.S.A. 2A:50–55* “defines the term ‘residential mortgage’ in terms of current occupancy.” The court further concluded applying the FFA to properties the mortgagor no longer occupies would not serve the purpose of the Act. The court accordingly held that the act did not apply.¹⁰³

Additionally, in an unpublished opinion, after declaring an appeal moot, the court quoted *N.J.S.A. 2A:50–55*, which said “[r]esidential mortgage means a mortgage ... in which the security is a residential property ... which is occupied ... by the debtor, who is a natural person ... as that person's residence.” The court accordingly concluded the FFA did not apply because defendant is not a natural person debtor in residence.

In past practice, if the original residential property has been entirely converted to a commercial use, or the residential property has been condemned, boarded up, or demolished, it would appear that, absent judicial clarification, the past, the property would still be residential property for purposes of the *Fair Foreclosure Act*. However, given the recent decisions, they may no longer be the case.¹⁰⁴

Where the requirements of the act have been legally waived, the act of course would have no application.

The act would not apply where its requirements are not met at the time the loan is originated, irrespective of the subsequent use to which the property is put by the debtor, the debtor's family, or a new owner. Where, for example, the debtor signs a purchase money mortgage on residential property which the debtor intends to rent out and use as investment property at the time the loan is originated, the subsequent use of that property by the debtor as a residence would not serve to make the act applicable.

¹⁰³ *Amboy Nat. Bank v. 556 First Street, LLC*, 2011 WL3628894,*1 (N.J. Super. A.D. 2011)(per curiam) (unpublished).

¹⁰⁴ R. 4:30A.

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It is submitted that establishing all rights under the act at a point in time when the loan is originated makes little sense for salutary social legislation such as The *Fair Foreclosure Act* intended, at least in part, to benefit distressed homeowners whose interests may come into being well after the loan is closed. Loan origination appears to have little correlation to residential home ownership. The protections of the act should be tied to the residential homeowner at the time of institution of foreclosure, not to the note or bond maker at time of loan origination.

§ 1.27 Mortgage Covering Residential and Non-Residential Property - N.J.S.A. 2A:50-55, 62

Section 3 of the act (N.J.S.A. 2A:50-55) provides that if a mortgage includes separate residential and non-residential tracts, those portions of the mortgage covering the non-residential tract or tracts shall be a non-residential mortgage. Section 10 (N.J.S.A. 2A:50-62) further provides that a lender shall not be required to foreclose a residential and non-residential mortgage securing the same obligation in the same action. Thus, taken together, these sections permit separate foreclosure actions to be instituted with respect to the same mortgage, one action for the residential property and another for the non-residential property. The act, in effect, creates separate mortgages for the residential and non-residential tracts and permits each to be foreclosed in a separate action.

Without Section 10 (N.J.S.A. 2A:50-62), such a splitting of actions would certainly run afoul of the entire controversy doctrine¹⁰⁵ and other doctrines prohibiting the institution of multiple suits on the same cause of action, thereby putting the mortgagor to the expense and trouble of defending multiple suits.¹⁰⁵

The statute expressly permits separate actions only where the mortgage includes “separate” residential and non-residential tracts or properties and where the residential and non-residential mortgages secure the “same” obligation. Mortgages securing different obligations on different properties can always be foreclosed in separate actions and therefore this situation was not addressed in the statute.

Where plaintiff instituted foreclosure against residential and non-residential tracts in the same action without sufficient compliance with Pennsylvania's Act 6, 41 P.S. § 403, which is substantially similar to the New Jersey statute, dismissal of the residential property from the proceeding was required.¹⁰⁶ Sections 3 and 10 of the New Jersey act avoid this result by permitting the lender to split the residential and non-residential actions, so as to proceed against the non-residential property separately without compliance with the act. Without these sections, if any one of the properties in a mortgage were qualifying residential property, compliance with the act would be required for all the properties.

Presumably, utilizing separate actions for the residential and non-residential tracts is not absolutely necessary. The same result can be reached by utilizing *separate counts* in the same complaint, although a lender may wish to use separate actions in order to institute foreclosure against the residential and non-residential tracts at different times.

Where separate actions are brought on the residential and non-residential tracts at the

¹⁰⁵ *Indiana Inv. Co. v. Evans*, 121 N.J. Eq. 72, 77 (Ch. 1936).

¹⁰⁶ *First National Bank of Palmerton v. Nagley*, 7 D. & C. 3d 789 (1978).

same time, there may be substantial problems with the prosecution of the non-residential action where the debtor cures and decelerates the obligation in the residential action. It may therefore be advisable to foreclose the non-residential tract first.

This procedure is, of course, permissible only with respect to a residential and non-residential mortgage within the purview of *N.J.S.A. 2A:50-62* and not to mortgages or foreclosure actions in general.

§ 1.28 Concurrent Actions on a Residential and Non-Residential Mortgage Securing the Same Obligation; Inconsistent Results

If separate actions are instituted for the residential and non-residential tracts securing the same obligation in accordance with the foregoing section, or if separate counts in the same action are used to foreclose the residential and non-residential tracts securing the same obligation, what is the effect of a cure and reinstatement of the obligation in the residential action or count on the non-residential action.

Section 5d (*N.J.S.A. 2A:50-57d*) provides: "Cure of default reinstates the debtor to the same position as if the default had not occurred. It nullifies, as of the date of cure any acceleration of any obligation under the mortgage, note or bond arising from the default."

If the debtor is restored to "the same position as if default had not occurred," is an action on the non-residential mortgage still possible? Presumably, if default had not occurred with respect to the obligation secured by the mortgage, an action on the non-residential mortgage could not have been commenced. It appears illogical to talk about a secured obligation which has been "decelerated," cured and reinstated for residential purposes but which remains in default for non-residential purposes.

If "*any acceleration* of any obligation under the mortgage, note or bond *arising from the default*" is nullified, is it meaningful to talk about another cause of action which may be brought or continued with respect to the non-residential mortgage for that same obligation. (Emphasis supplied.)

If pursuant to the statute, "any acceleration" arising from the default is nullified, the author questions how another action can be maintained on the same debt for the same default. Clearly inconsistent results are possible. For example, if another action can be maintained on the debt notwithstanding a cure in the residential action, why couldn't the lender, if permitted to do so by *N.J.S.A. 2A:50-2.3*, bring an action on the note at law, reduce it to a judgment and levy execution against the same residential mortgaged premises, under the very same obligation, for which a cure had previously been effected. Presumably, a court would stay or dismiss such an action as it would clearly undermine the effect of the cure in the residential action. Similarly, a court may be predisposed to taking the same action with respect to a pending non-residential foreclosure.

The evident purpose of section 10 is to permit a lender, in separate actions, to foreclose the residential tracts of a mortgage in compliance with the act, while foreclosing the non-residential tracts securing the same debt without complying with the act. But in the residential action, the debtor has the right to cure and reinstate the loan. Thus, foreclosing both tracts concurrently seems misplaced. Obviously, a cure in the residential action will end both actions.

The author's suggestion is for the lender to foreclose the non-residential tract first.

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Presumably, if that is done, the mortgage debt is merged in the judgment. Suppose the lender then forecloses the residential tract under the act. What right to cure can the debtor possibly have if the mortgage debt has already been reduced to a judgment. Certainly, the debtor has no right to cure and vacate the foreclosure judgment? Suppose the secured debt has been reduced to a judgment in an action at law? These matters are not addressed in the act.

As a matter of equity, it may be that where residential and non-residential mortgages are secured by the same obligation, the Chancery Division may require that the residential mortgage be foreclosed first to *exhaust* the debtor's right to cure under the act. Otherwise, inconsistent results are possible if the residential mortgage is foreclosed last.

§ 1.29 Mortgage Modification (Addition of Residential Property)

In the ordinary situation, the modification of a secured residential loan will have no bearing on the application of the act. If the act applied when the loan was originated, it will continue to apply.

What about the situation where a non-residential mortgage is modified to bring in residential property thereby making it, at least in part, a residential mortgage. Does the act apply in this situation?

It is not clear whether this, by itself, would mandate the application of the act where the act was not previously applicable. It is not known whether in this instance the “modification” will be regarded as a loan “origination” within the meaning of the act. If substance trumps form, it would seem that it would be.

If a mortgage is modified and qualifying residential property is added to the mortgage, and the requisite occupation or intention to occupy by the debtor exists at the time of the modification, it is entirely possible that the “modification” will constitute a loan “origination” within the meaning of the act, so as to make the act applicable to the added property - whether or not it applied to the original mortgage. There are, however, no applicable judicial decisions addressing this situation, and the run-scared, run-safe policy is certainly recommended.

If a residential mortgage is modified to bring in additional residential property, in a subsequent foreclosure the practitioner, in the author's opinion, should assume that the act applies to the added property, unless the foreclosing attorney can demonstrate in the clearest possible terms that it is non-residential property.

§ 1.30 Condominium Association Lien (Residential Mortgage?)

Because the definition of “residential mortgage” refers to “mortgage,” “security interest,” “or the like,” a condominium association “claim of lien” (on residential property) for unpaid assessments, which is neither a mortgage nor a security interest, and which may be foreclosed in the same manner as a mortgage (pursuant to *N.J.S.A.* 46:8B-21 and *R.* 4:64-1 and 2) is not, in the author's opinion, a residential mortgage within the meaning of the act.

It is highly unlikely that the Legislature or the drafters intended that a condominium claim of lien for unpaid assessments be included in the definition of residential mortgage. Certainly, there is nothing in the legislative history of the act, terminology, or otherwise, to suggest that this is the case.

§ 1.31 Common Law Strict Mortgage Foreclosure (Application of Act)

It is the author's opinion that a common law strict mortgage foreclosure action does not fall within the purview of the *Fair Foreclosure Act*. In most cases, a strict mortgage foreclosure action, or foreclosure without sale, is a curative action undertaken after a conventional mortgage foreclosure and sale in order to cut off an inadvertently omitted subordinate encumbrance. In such a subsequent strict foreclosure, the “debtor” is not a defendant and, in any event, the debtor-owner (whose interest in the property has been wholly terminated) would have no right to cure.

Since, in most instances, a judgment of foreclosure has been entered prior to institution of the strict foreclosure action, the debtor's right to cure has been statutorily terminated; so it would be hard to understand how the act could apply and, if it did, to what purpose. Additionally, the defendants in a strict foreclosure action are ordinarily lien holders with no right to cure under the act, and the debtor-owner by law cannot be joined in the action. Thus, application of the act to this remedy would be wholly meaningless.

§ 1.32 Foreclosing a Security Interest on Personal Property (Application of Act)

A Pennsylvania court¹⁰⁷ has ruled that a creditor enforcing a security interest solely against personal property is not required to comply with the notice of intention requirements of Pennsylvania's Act 6 (41 P.S. § 403) and Act 91 (Homeowners Emergency Assistance Act, 35 P.S. § 1680.403c), although residential real property is also mortgaged to secure the same debt. The court found that not every security interest created in conjunction with a consumer loan transaction is a mortgage obligation under the acts simply because additional collateral is pledged along with real property to secure the debt.

Presumably, the same result would be reached under New Jersey's *Fair Foreclosure Act*. Section 10 (*N.J.S.A.* 2A:50-62) provides, “the provisions of sections 1 through 9 of this act shall not apply . . . to collection of the obligation by means other than enforcing the lender's lien on the *residential property*.” (Emphasis supplied.) Since enforcing a security interest against “personal property” is not “enforcing the lender's lien on the residential property,” the notice of intention requirement and other requirements of the act would not apply.

It should be noted, however, that the Pennsylvania statute contains more compelling language than the New Jersey act in this regard. § 403(a) of the Pennsylvania statute requires, in part, that a notice of intention be given to the debtor before a lender may “take possession of *any security* of the residential mortgage debtor for such residential mortgage obligation.” (Emphasis supplied.) Thus, on its face, § 403(a) appears to require a notice of intention for the enforcement of a security interest against personal property pledged as collateral for the mortgage debt. The New Jersey statute does not.

§ 1.33 Playing it Safe; Uncertainty as to Act's Application; Giving Notice Erroneously

¹⁰⁷ *Bennett v. Seave*, 554 A.2d 886, 520 Pa. 431 (1989).

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If the foreclosing attorney is unsure as to whether the act applies, the general rule to be followed is: comply with it. This way there is never a possibility that the lender will be subjected to needless litigation or that the validity or regularity of the foreclosure action will be called into question at a later date because of the failure to comply. After all, in order to comply, the lender need only give the debtor two statutory notices: the notice of intention to foreclose and the 14-day notice of entry of judgment (or entry of the redemption order under the optional procedure).

If the attorney can actually determine that the act does not apply, it makes more sense and better lawyering not to comply with it. However, a conservative approach by the foreclosing attorney is definitely dictated here.

But let us assume that the act does not apply and a person is nevertheless served with a notice of intention ostensibly giving that person rights under the act. What happens? Can the lender rescind those rights.

While there is no judicial decision on the question in New Jersey, as a matter of practice foreclosing attorneys in New Jersey faced with the issue have filed certifications at time of judgment establishing that the act does not apply. The Office of Foreclosure has accepted such certifications and permitted plaintiffs in these cases to proceed to judgment without giving debtors a 14-day notice of entry of judgment.

It is the author's view that the lender's accidental or erroneous mailing of a notice of intention to a person not entitled to the notice should not serve to establish rights in that person where none exist under the act. But New Jersey courts have not yet spoken on the issue.

Under Pennsylvania's Act 6, 41 P.S. § 101, *et seq.*, a mortgagee holding a residential mortgage who sent a notice of intention to a mortgagor under the authority of the act was estopped from denying that authority, where the mortgagee later claimed the act did not apply because the property contained more than two residential units.¹⁰⁸

§ 1.34 Questions and Answers (Application of Act)

1. Question: John and Beth sign a purchase money mortgage and note for residential property which they rent out for 2 years. They now live at the mortgaged premises. If the mortgage is foreclosed, does the act apply?

Answer: *No. At the time the loan was originated, the debtors did not occupy or intend to occupy the residential mortgaged premises as their residence. The fact that they now occupy the property is immaterial.*

2. Question: John and Beth sign a residential mortgage and note on property to be occupied by their granddaughter, Judith, and her husband, Bill who do not sign the note. If the mortgage is foreclosed, does the act apply?

Answer: *No. Judith and Bill are not debtors because they did not sign the note. Moreover, Judith*

¹⁰⁸ *Greater Delaware Valley Savings and Loan Association v. Diehl*, 26 D. & C. 3d 571 (1982). The mortgagee attempted to convince the court that a garage with living quarters above was a third residential unit and that the loan interest and protection law, therefore, did not apply.

is not a member of John and Beth's immediate family because "granddaughter" does not fall within the definition of "immediate family" under the act.

3. Question: Same facts as 2 above except Judith and Bill also co-sign the note. Does the act apply?

Answer: Yes. Judith and Bill are now debtors intending to occupy the property at the time the loan is closed.

4. Question: Same facts as 3 must Judith and Bill be parties defendant in the foreclosure of the mortgage.

Answer. No. They have no title. They must be joined as parties only if the deficiency action statutes apply (N.J.S.A. 2A:50-2 et seq.) and you want to hold them personally liable in a later deficiency action.

5. Question: John and Beth sign a residential mortgage and note on property they intend to occupy as their residence. They are later discharged from any personal liability on the note in a bankruptcy proceeding. If the mortgage is foreclosed, does the act apply?

Answer: Probably, yes. While John and Beth are not presently "debtors" within the meaning of the act, and while technically speaking there is no "obligation" within the meaning of the act, they were debtors and there was an obligation when the loan was closed. In the author's opinion, a court would find that the act applies in order to further the stated purpose of the act under section 2, "that homeowners should be given every opportunity to pay their home mortgages, and thus keep their homes."

6. Question: John and Beth sign a mortgage on their residence to secure the obligation (note) of their wholly owned corporation, Micromush. If the mortgage is foreclosed, does the act apply?

Answer: Yes. The mortgage will in all probability contain a covenant to pay the debt, making John and Beth debtors.

7. Question: John and Beth sign a construction mortgage and note on vacant (subdivided) land on which they intend to build 10 residential houses. John and Beth are subsequently released from any personal liability on the note. They are now living in one of the three houses built on the property. If the mortgage is foreclosed, does the act apply?

Answer: In all probability, no. At the time the note and mortgage were closed, it does not affirmatively appear that John and Beth intended to occupy any one of the houses as their residence. Moreover, it is not altogether clear whether the act even applies to vacant land. In the author's opinion, the fact that John and Beth were subsequently released from persona/liability is not critical to the act's application. The fact that 10 houses or properties are involved is not material. The author interprets the act to mean that each separate property can have no more than four dwelling units. You can always treat the separate residential tract to which the act applies as a separate residential mortgage.

8. Question: Same facts as 6 above, however, assume that the act applies. What is the lender's best foreclosure strategy?

Answer: If the act were deemed to apply, the lender could treat the residential property occupied by John and Beth as one residential mortgage, and the other nine subdivided lots as one non-residential mortgage and foreclose each mortgage in separate actions pursuant to section 10 of

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the act, or in separate counts of the same complaint. This would be the best lender strategy in the author's opinion.

9.Question: John and Beth sign a purchase money mortgage and note for residential property which they rent out. They subsequently sell the property to Sam and Mary who assume the mortgage (with prior written approval of the lender) and immediately occupy the property as their residence. If the mortgage is foreclosed, does the act apply?

Answer: No. At the time the note and mortgage were closed, John and Beth did not plan to occupy the property as their residence. The act therefore does not apply. The fact that subsequent owners Sam and Mary assume the mortgage and occupy the property has no bearing.

10. Question: John and Beth sign a commercial mortgage and note secured by property they own containing a grocery store and salon with two apartments overhead. Their son, David, lives in one apartment when the loan is made. If the mortgage is foreclosed, does the act apply?

Answer: Yes. The property has "no more" than four dwelling units (in fact it has two), one of which is occupied by a member of the debtors' "immediate family," their son David, at the time of loan origination.

11. Question: A lender is foreclosing on property which contains a church and a separate house in which the minister lives. If the mortgage is foreclosed, does the act apply?

Answer. No. Not unless the minister signed the note or other instrument of obligation at the time the loan was closed.

12.Question: Is a lender taking a deed in lieu of foreclosure with respect to a residential mortgage in default, now required to comply with the *Fair Foreclosure Act*, even if the lender is not going to utilize the optional procedure?

Answer: Yes, in all probability. However, a lender not intending to subsequently utilize the optional procedure need only comply with section 3 (N.J.S.A. 2A:50-55) and give the debtor notice of, and fully apprise the debtor of, his or her rights pursuant to section 4 of the act. Where the lender intends to subsequently utilize the optional procedure, the deed must contain a seven day right of rescission pursuant to subsection d (N.J.S.A. 2A:50-63d).

13. Question: Must a lender foreclosing a residential mortgage which has matured (i.e., a balloon mortgage) comply with the act?

Answer: Yes, in all probability, even though a strong argument can be made, based upon the act's terminology, that the act does not apply. Since there is no provision in the act specifically excepting a mortgage which has matured from the application of the act, it is far safer to take a conservative approach and comply with the act. Of course the right to cure is non-existent in such an instance and the only right the debtor has is to pay all sums secured by the mortgage. The notice of intention should simply set forth the total amount due under the mortgage as the amount required to cure, even though the right to cure is inapplicable and the notice's terminology is at best awkward.

§ 1.35 Constitutionality of Act

The constitutionality of Pennsylvania's Act 6, 41 P.S. §§ 403 and 404 (e.g., those sections relating to the notice of intention and right to cure), where the mortgage was executed

prior to the effective date of the act but default occurred subsequent to that date, was upheld under the contract clauses of the United States¹⁰⁹ and Pennsylvania¹¹⁰ Constitutions by an appellate court in *Missionaries Ben. Bd. of Am. Baptist Churches v. Goldsworthy*.¹¹¹ The court in *Goldsworthy* stated:

Appellee urges us to hold that Act No. 6 abrogates a mortgagee's right to accelerate the mortgage debt and that a substantive right is thereby destroyed. Our reading, however, leads us to conclude that sections 403 and 404 [the notice of intention and right to cure sections] do not alter the ordinary legal effect of clauses of acceleration. Rather, they merely postpone the exercise of the right to accelerate until after the mortgagor has received notice of an opportunity to cure a default.

While adequate tender will enable the mortgagor to prevent foreclosure and avoid acceleration, the mortgagee is restored to the same position it would have been in had the default not occurred. Any harm resulting from late payments or performance is cured by the requirement that the mortgagor pay certain fees incurred by the mortgagee. Moreover, to discourage a mortgagor from assuming a casual attitude toward defaults, our Legislature has limited the frequency with which a mortgagor may avail himself of benefits of the statute. We, therefore, find that applications of sections 403 and 404 to mortgages executed prior to the effective date of Act No. 6 will pass constitutional muster.¹¹²

In the author's opinion, there is no reason to believe that New Jersey courts would hold any differently than the Pennsylvania appellate court with respect to the constitutionality of New Jersey's *Fair Foreclosure Act*.

Under the New Jersey act, however, there is no limitation on how many times a debtor may cure prior to the cure date under the notice of intention. A debtor may literally default on every payment and force the lender to send a notice of intention for every installment before making payment under the notice of intention; and the lender cannot exact any additional charge, fee or penalty for such a cure. The lender, as to a monetary default, may collect only the accrued payment or payments in arrears plus late fees and any other lawful charges. The lender in such cases is hardly restored to the same position it would have held had default not occurred; for it cannot recover its expenses for compiling information for the notice of intention, preparing and mailing the notice, and having a telephone number and person available to answer questions.

§ 1.36 Federal Preemption of Notification Requirements of Act

Federal preemption is an ever present danger for notification requirements (deemed procedural) contained in arrearage legislation similar to New Jersey's "*Fair Foreclosure Act*." The federal courts in such instances appear to be applying the three-pronged test established by the Supreme Court in *United States v. Kimbell Foods, Inc.*, whether uniformity is required,

¹⁰⁹ Article 1 Section 10.

¹¹⁰ Section 17, Article 1.

¹¹¹ 85 A.2d 358, 253 Pa. Super. 321 (1978).

¹¹² *Id.* at 363.

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whether application of state law would frustrate the specific objectives of the federal programs, and whether application of a federal rule would disrupt commercial relationships predicated on state law.¹¹³ In *Kimbell*, the court held that the “priority” of various liens should be governed by state rather than federal law, because of the affect such priority has on the expectations of third party commercial creditors. In *U.S. v. Walter Dunlap & Sons, Inc.*,¹¹⁴ following the *Kimbell* analysis, the Third Circuit Court of Appeals reached a similar result and held that Pennsylvania law should determine the status of a lien held by the Fanners Home Administration on collateral sold by a lienholder pursuant to the Pennsylvania statutes - otherwise, the rights of commercial third parties routinely relying on such law in their business dealings would be adversely affected.

In a leading case in the area of state foreclosure “notification” requirements, *United States v. Spears*,¹¹⁵ the Third Circuit Court of Appeals ruled that the Fanners Home Administration (“FmHA”), where it was the foreclosing mortgagee in federal court, did not have to comply with Act 6 of the Pennsylvania statutes (41 P.S. § 101 *et seq.*) requiring a 30-day notice prior to acceleration or commencement of foreclosure. FmHA had sent a letter to the Spears notifying them that because of their default failure to take curative action within twenty days would result in foreclosure. The Court of Appeals held that due process was observed by FmHA, that Doris Rivera (formerly Doris Rivera) had received notice on more than one occasion, and “there was no need to resort to the state notification procedures.” The Court observed that where the controversy does not affect third parties but involves only the United States and the debtor, does not threaten commercial relationships or private business practices, and where the notification procedures utilized by FmHA were substantially equivalent to that mandated by state law, the *Kimbell-Dunlap*¹¹⁶ analysis requiring application of state law is not controlling.

In *Ayers v. Philadelphia Housing Authority*,¹¹⁷ the Third Circuit Court of Appeals followed *Spears* in holding that the Pennsylvania eviction statutes (Pennsylvania's Act 6 and Pennsylvania's Act 91) were preempted by federal law. In *Ayers*, the Philadelphia Housing Authority brought eviction proceedings against Michelle and Carlton Ayers in state court to evict them from a Department of Housing and Urban Development (“HUD”) sponsored housing program known as Turnkey ill. The Court held that the Pennsylvania statutes were incompatible with the HUD regulations and that since no commercial interests or third parties were affected by utilization of federal procedures, the *Kimbell-Dunlap* analysis was not controlling.

Again, in *United States v. Jones-Williams*,¹¹⁸ the most recent case to rule on this question, the District Court, in a foreclosure action brought by the Department of Housing and Urban Development (HUD) in federal court, followed *Spears supra*, and held that the notice provisions of the Pennsylvania statutes, 41 P.S. § 403(c), *e.g.*, the notice of intention to foreclose

¹¹³ 440 U.S. 715, 728-29, 99 S. Ct. 1448, 1459, 59 L. Ed. 2d 711 (1979).

¹¹⁴ 800 F.2d 1232 (3rd Cir. 1986).

¹¹⁵ 859 F.2d 284 (3rd Cir. 1988).

¹¹⁶ *Kimbell Foods*, 440 U.S. 715, 99 S. Ct. 1448 (1979); *United States v. Walter Dunlap & Sons, Inc.*, 800 F.2d 1232 (3rd Cir. 1986).

¹¹⁷ 908 F.2d 1184 (3rd Cir. 1990).

¹¹⁸ 870 F. Supp. 90 (M.D. PA. 1994).

requirements similar to those of New Jersey's *Fair Foreclosure Act*, were preempted by the federal notice requirements of the National Housing Act § 130, even though the defendants Jones-Williams had not answered the complaint and raised this issue.

In accordance with the consistent line of cases above, a federal agency foreclosing in federal court is not bound by state foreclosure notification statutes, such as the notice of intention to foreclose requirement, unless there is a compelling reason to employ state law, such as a threat to commercial relationships founded on expectations of third parties relying on existing state law.¹¹⁹ As noted in *Ayers, supra*, this principle of preemption, is also applicable to federal agencies in state court proceedings as well, where state law is inconsistent with federal regulations.

In the author's view, if generalizations can be made about federal preemption, it appears that in the area of state mortgage foreclosure “notification” requirements, federal decisions have more or less consistently approved federal preemption in accordance with the standards set forth in *Spears, supra*, while decisions dealing with “priority” of state liens versus federal liens have consistently denied federal preemption and deferred to state law.¹²⁰

§ 1.37 Statute of Limitations

Effective August 6, 2009, *N.J.S.A.* 2A:50-56.1 provides:

An action to foreclose a residential mortgage shall not be commenced following the earliest of:

- a. Six years from the date fixed for the making of the last payment or the maturity date set forth in the mortgage or the note, bond, or other obligation secured by the mortgage, whether the date is itself set forth or may be calculated from information contained in the mortgage or note, bond, or other obligation, except that if the date fixed for the making of the last payment or the maturity date has been extended by a written instrument, the action to foreclose shall not be commenced after six years from the extended date under the terms of the written instrument;
- b. Thirty-six years from the date of recording of the mortgage, or, if the mortgage is not recorded, 36 years from the date of execution, so long as the mortgage itself does not provide for a period of repayment in excess of 30 years; or
- c. Twenty years from the date on which the debtor defaulted, which default has not been cured, as to any of the obligations or covenants contained in the mortgage or in the note, bond, or other obligation secured by the mortgage, except that if the date to perform any of the obligations or covenants has been extended by a written instrument or payment on account has been made, the action to foreclose shall not be commenced after 20 years from the date on which the default or payment on account thereof occurred under the terms of the written

¹¹⁹ *United States v. Spears*, 859 F.2d 284, 290 (3rd Cir. 1988).

¹²⁰ See generally 2 Nelson and Whitman, *REAL ESTATE FINANCE LAW* § 11.6 (3rd Ed. 1993).

instrument.

§ 1.38 Recent Developments, *US Bank Nat. Ass'n v. Guillaume*

The biggest development in recent years was the New Jersey Supreme Court's decision in *US Bank Nat. Ass'n v. Guillaume*.¹²¹

In *US Bank Nat. Ass'n v. Guillaume*, the New Jersey Supreme Court held that the *Fair Foreclosure Act*, N.J.S.A. 2A:50-56(c)(11), requires that the notice of intention include "the name and address of the actual lender," in addition to "contact information for any loan servicer."¹²² In *Guillaume*, the original notice of intention did not include the lender's name and address, and the first and second revised notices contained the name of the lender but omitted the address. The Court ruled that such omissions were not substantial compliance with the *Fair Foreclosure Act*'s requirements, N.J.S.A. 2A:50-56(c)(11).¹²³

The main issue in *Guillaume* was whether a notice of intent was defective if it did not include the name, address and phone of the plaintiff, but only referred to the name, address and phone number of the loan's servicer. The Court stated "N.J.S.A. 2A:50-56(a) requires lenders contemplating foreclosure [provide] defaulting homeowners notice of such intention at least 30-days in advance of such action as provided in this section."¹²⁴ N.J.S.A. 2A:50-56(c) sets forth "eleven specified categories of information" that the notice must contain, including the lender's name and address.¹²⁵ In *Guillaume*, the notice "substitute[d] the loan servicer for the lender."¹²⁶ The FFA defines lender as "any person, corporation, or other entity which makes or holds a residential mortgage, and any person, corporation or other entity to which such residential mortgage is assigned." In this case, it was the loan servicer that had "responsibility to collect mortgage payments and negotiate with homeowners on U.S. Bank's behalf," but was "not the maker or holder of the ...mortgage, or the assignee of any lender." Since legislative intent was "to protect homeowners at risk of foreclosure," the court concluded the Legislature "has unmistakably directed that a homeowner shall be advised of the exact entity to which he or she owes the balance of the loan."¹²⁷ Thus, the loan servicer was not the lender, which meant the notice in was defective.

Although the plaintiff and Amicus asserted substantial compliance with the FFA, the Court disagreed and said "[e]ven if N.J.S.A. 2A:50-56(c)(11) permitted substantial compliance as a substitute for strict compliance," substantial compliance did not apply to this case.¹²⁸ The court had five reasons for this statement. First, "the lender's identity is equally important to the Legislature's objective of ensuring that homeowners at risk of foreclosure are thoroughly

¹²¹ *U.S. Bank Nat. Ass'n v. Guillaume*, 38 A.3d 570, 574 (N.J. 2012).

¹²² 30 *N.J. Prac., Law of Mortgages* § 14.16 (2nd Ed.)

¹²³ *Id.*

¹²⁴ *Id.* at 582.

¹²⁵ *Id.*

¹²⁶ *Id.* at 584.

¹²⁷ *Id.* at 583.

¹²⁸ *Id.*

informed” as “the loan servicer’s name, address and [p]hone number.”¹²⁹ Second, plaintiff did not attempt to identify the name of the lender in the notice.¹³⁰ Third, the legislative purpose of the FFA was to provide a homeowner the chance “to negotiate a resolution of a default, and thereby to retain his or her home.”¹³¹ The court concluded the purpose required notice of the lender’s identity and strict compliance with the statutory text. Fourth, the lender’s identity “is a crucial aspect of reasonable notice of a foreclosure claim” and the notice in did not advise the mortgagors “of the identity of the party that would ultimately be pled as the plaintiff in the action and would pursue foreclosure.”¹³² Fifth, the party alleging substantial compliance did not show “strict compliance with *N.J.S.A.* 2A:50–56(c)(11) would be impractical or unduly burdensome” and did not even offer a reasonable explanation of its failure to satisfy the statutory text.¹³³

The Supreme Court utilized *Guillaume* to resolve a conflict between lower courts regarding whether dismissal without prejudice is the only remedy for violation of *N.J.S.A.* 2A:50–56(c)(11). The Court stated that “A trial court that permits a foreclosure plaintiff to cure a defective notice...has...discretion to reduce the fees and costs owed by the homeowner under *N.J.S.A.* 2A:50–57(b)(3) to adjust for the lender’s service of a noncompliant notice of intention.”¹³⁴ Moreover, *N.J.S.A.* 2A:50–56(c)(11) does not specify a remedy for noncompliance.¹³⁵ The Court accordingly held New Jersey courts “may dismiss the action without prejudice, order the service of a corrected notice, or impose another remedy appropriate to the circumstances of the case” for violation of *N.J.S.A.* 2A:50–56(c)(11).¹³⁶

The Appellate Division affirmed a trial court’s dismissal without prejudice of a foreclosure complaint for failure to provide notice under the FFA.¹³⁷ In its analysis the court disapproved of an earlier decision of a Chancery judge that allowed the mortgagee “to cure the technical deficiency without prejudice to the [mortgagor’s] rights” and concluded the deficiency did not require dismissal.¹³⁸ The deficiency before the Chancery judge was mailing the notice via first class mail, not registered or certified mail as *N.J.S.A.* 2A:50–56(a) requires.¹³⁹

Two decisions, albeit unpublished, of the Appellate Division provide some guidance regarding what remedies are appropriate for violations of *N.J.S.A.* 2A:50–56(c)(11). *Bank of Am., N.A. v. Limato*; *HSBC Bank v. Polanco*. *Limato* not only featured a notice that did not “notify the mortgagor of its status as...lender” but also featured “insufficient proofs [from

¹²⁹ *Id.*

¹³⁰ *Id.* at 584.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 587.

¹³⁵ *Id.*

¹³⁶ *Id.* at 585.

¹³⁷ *EMC Mortg. Corp. v. Chaudhri*, 946 A.2d 578, 586–87 (N.J. Super A.D. 2008).

¹³⁸ *Id.*

¹³⁹ *Id.*

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plaintiff] regarding its claimed status as holder.”¹⁴⁰ Thus, the court affirmed the trial court’s dismissal without prejudice.

These insufficient proofs include lack of facts showing “plaintiff’s entitlement to enforce the instrument as a holder under *N.J.S.A.* 12A:1–201... or a nonholder in possession of the instrument who has the rights of a holder.”¹⁴¹ They also include the inability of certifications from employees of the loan servicer to attest to facts regarding plaintiff’s ownership status.¹⁴² Finally, certifications of personal knowledge of plaintiff’s entitlement to file a foreclosure action “as the assignee of the mortgage or holder of the negotiable promissory note because their assertions or facts were based on assumptions or inferences gleaned from the servicing file, which [constitutes] inadmissible hearsay.”¹⁴³

Polanco also featured notice that “listed the name, address, and contact information of the loan servicer, not the lender.”¹⁴⁴ However, the defendants “attempted a short sale...after service of the foreclosure complaint.”¹⁴⁵ They were in “contacted plaintiff’s counsel...to explore a loan modification after they were advised of the scheduled sheriff’s sale and were provided the phone number of plaintiff’s loss mitigation department.” Finally they “obtained two statutory adjournments of the sheriff’s sale.” These actions led the court to conclude defendants had thorough familiarity with their mortgage’s status.¹⁴⁶ While “not requested or phrased as such” the Appellate Division was “satisfied the [trial] court, in essence, granted the remedy of a cure to the FFA violation by its emergent three month stay of the February 17, 2010 sheriff’s sale to allow defendants the opportunity to participate, with counsel, in loan modification mediation with plaintiff in May 2010.”¹⁴⁷ The court accordingly concluded the FFA did not give defendants a meritorious defense under Rule

The Appellate Division has evaluated when violation of the notice requirement of the FFA is a sufficient reason to grant a motion to vacate default judgment. *Mortgage Elec. Registration Sys., Inc. v. Ronghi* featured proper service of defendants with the summons and complaint and final judgment of default; defendant’s admission of stoppage of making payments and acknowledgment of an arrearage of \$30,000.¹⁴⁸ It also featured defendant’s testimony of awareness of the completion of a “Sheriff’s sale of the property;” and defendants’ filing the motion approximately four months after occurrence of the sale.¹⁴⁹ These features meant “any alleged deficiencies in the notice” requirements of the FFA did not warrant granting the

¹⁴⁰ *Bank of Am., N.A. v. Limato*, 2012 WL 2505725 (N.J. Super. A.D. 2012) (per curiam)

¹⁴¹ *Id.**4.

¹⁴² *Id.*

¹⁴³ *Id.* at *2,*4.

¹⁴⁴ *HSBC Bank v. Polanco*, 2012 WL932054 (N.J. Super. A.D. 2012)(per curiam).

¹⁴⁵ *Id.*at*6.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Mortgage Elec. Registration Sys., Inc. v. Ronghi*, 2008 WL4092824, *4-*5 (N.J. Super. A.D. 2008)(per curiam) (unpublished).

¹⁴⁹ *Id.* at*4.

motion.¹⁵⁰

However, noncompliance with the FFA does not prevent the trial court from granting plaintiff's summary judgment motion "where defendants appeared in the action; where the contents of the Note, Mortgage, and Assignment were undisputed; where [plaintiff] established its standing based upon those undisputed documents; and where defendants did not raise [plaintiff's] failure to identify the actual lender in its notice of intention or assert that [such] noncompliance...deprived them of timely and clear notice that immediate action was necessary to forestall foreclosure."¹⁵¹

On April 4, 2012, the New Jersey Supreme Court issued the following order dealing with the implementation of the *Guillaume* decision:

SUPREME COURT OF NEW JERSEY

In furtherance of the Court's holding in U.S. Bank N.A. v. Guillaume, A-11-11 (February 27, 2012), it is ORDERED that Hon. Paul Innes, P.J.Ch., Mercer Vicinage, and Hon. Margaret Mary McVeigh, P.J.Ch., Passaic Vicinage, are each authorized to entertain summary actions by Orders to Show Cause as to why plaintiffs in any uncontested residential mortgage foreclosure actions filed on or before February 27, 2012 in which final judgment has not yet been entered, who served Notices of Intention to Foreclose that are deficient under the Fair Foreclosure Act, N.J.S.A. 2A:50-56, should not be allowed to serve corrected Notices of Intention to Foreclose on defendant mortgagors and/or parties obligated on the debt. Such summary actions should be filed with the Clerk of the Superior Court and assigned to each judge upon filing.

It is FURTHER ORDERED that, if approved by the court, any corrected Notice of Intention to Foreclose served pursuant to an order issued as a result of such an action must be accompanied by a letter to the defendant mortgagor and/or parties obligated on the debt setting

¹⁵⁰ *Id.* at*4-*5.

¹⁵¹ *HSBC Bank USA v. Ulversoy*, 2012 WL3021460, *9 (N.J. Super. A.D. 2012)(per curiam)(unpublished).

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forth the reasons why the corrected Notice of Intention to Foreclose is being served, the procedure to follow in the event a defendant wishes to object to the Notice of Intention to Foreclose, the individuals to contact with any questions, and that the receipt of the corrected Notice of Intention to Foreclose allows defendant mortgagors and/or parties obligated on the debt 30 days in which to object or to cure the default.

It is FURTHER ORDERED that any Rule 4:64-1(a) or Rule 4:64-2(d) Certification of Diligent Inquiry filed by a plaintiff who has served a corrected Notice of Intention to Foreclose pursuant to an order issued as a result of such summary action shall list therein with specificity the steps taken to cure the deficient Notice of Intention to Foreclose.

It is FURTHER ORDERED that the Office of Foreclosure is authorized to recommend the entry of final judgment pursuant to Rule I :34-6 in uncontested actions in which the procedures set forth in this Order have been followed.

For the Court,

Chief Justice

Dated: April 4, 2012

CHAPTER 2

DEFAULT; NOTICE OF INTENTION; UNIFORM INSTRUMENTS; HUD REGULATIONS

§2.01 Introduction

The “notice of intention” is really the heart of the Fair Foreclosure Act.

It puts the debtor in contact with the protections of the act, gives the debtor a period of at least 30-days to cure the mortgage default, prevent acceleration and initiation of foreclosure; provides the debtor with a telephone number of a lender’s representative whom the debtor may call; and summarizes many debtor’s rights under the act. The *form* and *service* of the notice are critical to the lender’s compliance with the act.

§2.02 Establishment of a “Default” Under the Act; Expiration of Grace Period; Accrual of Right to Mail Notice of Intention

(a) Establishment of a Default under the Act

The language of subsection 4a (*N.J.S.A.* 2A:50-56a) provides that, “Upon failure to perform any obligation of a residential mortgage by the residential mortgage debtor,” the lender may *accelerate* the maturity of the obligation and *foreclose* by giving the debtor the requisite notice of intention to foreclose. Thus, the debtor must be in “default” (*i.e.* failure to perform any obligation) before the notice of intention may be sent to the debtor.

If the obligation and mortgage¹ contain a “grace period,” plaintiff must wait for the grace period to expire before mailing the notice of intention to the debtor, because the debtor is technically not in default prior to expiration of that period.² A notice of intention given to the debtor during the grace period is premature.

Of course, if the lender has extended the grace period or waived the default, a notice of intention cannot be sent until the extended period has expired or another default has occurred. Presumably, the grace period may be waived or extended verbally.³

¹ If the mortgage documents provide for a grace period, the note or bond and mortgage should, of course, contain identical or consistent provisions in this regard. In some instances only the note may contain a grace period. Ordinarily, however, the terms of the note are made part of the mortgage making the grace period operative with respect to the mortgage as well.

² BLACK’S LAW DICTIONARY 697 (6th Ed. 1990) defines “grace period” as follows: “May also refer to period of time provided for in a loan agreement during which *default will not occur* even though payment is overdue.” (Emphasis supplied.)

³ *Bell v. Romaine*, 30 *N.J. Eq.* 24, 28 (Ch. 1878). See also 1 Nelson and Whitman, REAL ESTATE FINANCE LAW, 562 & n. 6 (3rd. ed. 1993). As of April 4, 1991, the statute of frauds (*N.J.S.A.* 25:1-5g) bars the following unless in writing: “An agreement by a creditor to forbear from exercising remedies pursuant to a contract, promise, undertaking or commitment which is subject to the provisions of subsection f. of this section.” Subsection f., however, does not relate to contracts, promises and the like for \$100,000 or less, not primarily for personal, family or household purposes.

Now, we are not talking here about a grace period prior to the mortgagee's right to "accelerate." This type of grace period--a pre-acceleration period--does not prevent the lender from declaring a default; it merely prevents acceleration.

In fact, the notice of intention itself provides for such a pre-acceleration period. That's one of its primary purposes. The *Horn-Blumberg* form of note and mortgage set forth below contain this type (pre-acceleration) grace period.⁴ Thus, the lender's attorney, in order to insure that the notice of intention is not served prematurely, must read the mortgage documents carefully to ascertain when "default" may be declared. In most instances this will not be a problem because presumably the lender will wait at least a month or two after default before sending out the notice of intention. But in situations where the debtor repeatedly defaults and the lender is anxious to immediately serve the notice of intention, the lender must be careful to comply with the mortgage documents so that service of the notice of intention is not premature.

The uniform instruments (*i.e.*, The uniform secured note)⁵ do not contain a grace period as to the declaration of a default. The uniform note merely provides "If I do not pay the full amount of each monthly payment on the date it is due, I will be in default." Payments are ordinarily due on the first day of each month. Thus, where the uniform instruments are applicable, a notice of intention to foreclose may be mailed to the debtor immediately upon failure by the borrower to make an installment payment.

The *Allstate* Note Mortgage,⁶ on the other hand, contains a grace period which provides: "The Lender *may declare that I am in default* on the Note and this Mortgage if: (a) I fail to make any payment required by the Note and this Mortgage within days after its due date" (Emphasis supplied.) A lender under the *Allstate* form may not mail a notice of intention to the debtor until the grace period — *i.e.*, the particular number of days inserted in the blank in paragraph (a) — has expired.

The *Horn-Blumberg* form of Mortgage⁷ provides: "The Lender has the right, called acceleration, to declare the entire unpaid principal and interest under the Note and this Mortgage due immediately for any one of the following causes: (a) The failure of the Borrower to make any payment of principal or interest under the Note within ___ days after its due date." Thus, a lender under the *Horn-Blumberg* form may mail a notice of intention to the debtor immediately upon default; only acceleration is postponed for the number of days specified in paragraph (a).

(b) Breaches under Obligation as Giving Rise to Notice of Intention under Act

The language of subsection 4a of the act (*N.J.S.A.* 2A:50-56a), taken literally, which provides that, "Upon *failure to perform any obligation* of a residential mortgage by the

⁴ See M902—Mortgage plain language. Individual or corporation. 4-84. Copyright 1984 Arthur S. Horn, a New Jersey Attorney. Julius Blumberg, Inc. Publisher. NYC 10013.

⁵ Multistate Fixed Rate Note—Single Family—FNMA/FHLMC UNIFORM INSTRUMENT Form 3200 12/83. The terms of the Note are incorporated into and secured by the Uniform Mortgage Instrument.

⁶ 204-NOTE MORTGAGE, Ind. or Corp.—Plain Language. Copyright 1982 by ALL STATE LEGAL SUPPLY CO., One Commerce Drive, Cranford, N.J. 07018

⁷ M902—Mortgage plain language. Individual or corporation. 4-84. Copyright 1984 Arthur S. Horn, a New Jersey Attorney. Julius Blumberg, Inc. Publisher. NYC 10013.

residential mortgage debtor and before any residential mortgage lender may accelerate the maturity of *any residential mortgage obligation* and commence any foreclosure,” limits the application of the notice of intention requirements to breaches of the “obligation” (*i.e.*, the note or bond), not to breaches *generally* of any covenant or condition in the mortgage. (Emphasis supplied.)

Of course it can be argued that the drafters used the term “obligation” in the expression “upon failure to perform any obligation of a residential mortgage” to mean “duty,” and that the term was not used in a technical sense. This is unlikely, however, given the terminology and structure of the act.

The subsection does not say, for example, “upon debtor’s breach of any covenant or agreement in this mortgage.” This is the terminology used in the uniform mortgage instrument. And it is submitted that the drafter’s certainly would have used this terminology—not failure to perform any obligation—if they meant to utilize the notice of intention for breach of “any covenant or agreement” in the mortgage.

The statute refers to failure by the debtor to perform solely under the “obligation.” That subsection 4a applies to breaches under the *obligation* (*i.e.*, the note or bond) and not the mortgage appears certain from: (1) the parallel use of the term *obligation* in the subsection, *e.g.*, “upon failure to perform *any obligation* ⁸ *of a residential mortgage*” and *before the lender may “accelerate the maturity of any residential mortgage obligation*; (2) the definition of “obligation” under the act which defines the term to mean “a promissory *note, bond* or other similar evidence of *a duty to pay*”; and (3) the definition of “debtor” under the act, a person “obligated *to pay the obligation*.” (Emphasis supplied.)

Thus, “obligation” and “debtor” under the act are unequivocally tied to the note, bond or other personal instrument. The language “any” in “any obligation” presumably refers to a mortgage securing more than one obligation.

Continuous references in the subsection to “obligation” and “debtor,” as well as references to the failure to perform any “obligation” and accelerate the maturity of any “obligation,” clearly negate any intention on the part of the Legislature to apply the notice of intention requirements *generally* for breaches of *any* covenant or agreement in the mortgage. While it is hard to imagine what good purpose is served by such a distinction, the language of the subsection clearly speaks to the obligation (*i.e.*, the note or bond) and not to the security instrument or mortgage.

This distinction is clearly evident in paragraph (1) of subsection 4c, *N.J.S.A. 2A:50-56c(1)*, where the statute refers to “the particular *obligation* or real estate *security instrument*.” As noted, subsection 4a could just as easily have said “upon debtor’s breach of any covenant or agreement in the mortgage” but it did not. It chose to frame an event of default solely in terms of the note or bond.

⁸ *N.J.S.A. 2A:50-53*. The bill originally provided “upon failure to perform any obligation of a *note or* residential mortgage.” (Emphasis supplied.) However, at the author’s request the terminology “note or” was deleted from the bill to broaden the statutory language to include “bond” and any other instrument of obligation secured by the mortgage. See Appendix A.

DEFAULT; NOTICE OF INTENTION; ACCELERATION; UNIFORM INSTRUMENTS

Ordinarily, a default under the instrument of obligation, *i.e.*, the secured note or bond, and this includes a default under the uniform secured note,⁹ refers to a monetary default--the debtor's failure to pay an installment of principal or interest (or both) when due.

A default under the mortgage, on the other hand, may occur for breach of any covenant or agreement in the mortgage and includes not only the failure to pay an installment of principal or interest, but also breaches of other covenants such as: failure to pay taxes, to pay or maintain property or hazard insurance, to occupy the property, to refrain from waste, to keep the property in good repair, to convey the property without lender's prior written consent, a bankruptcy, forfeiture or other legal proceeding against the mortgagor and the like.

Given the terminology of the subsection, it is questionable whether breach of a covenant or agreement contained solely in the mortgage and not in the obligation — *i.e.*, a non-debt related default — would trigger the notice of intention requirements under the act.

Default under Mortgage Alone

In *Poultrymen's Service Corp. v. Brown*,¹⁰ the only New Jersey decision to address this point, the court held that an event of default and acceleration under the mortgage does not, depending upon the terms of the note, automatically accelerate the maturity of the note. Thus, it is possible to foreclose the mortgage without accelerating or affecting the maturity date of the note.

A leading authority has stated:

If an acceleration is declared for breach of a mortgage covenant . . . and *a comparable event of default* permitting acceleration of the mortgage note is not set forth in such note, in many states the mortgagee can foreclose his mortgage but he cannot obtain a deficiency judgment.¹¹ (Emphasis supplied.)

Uniform Mortgage Instrument

As noted, the single family uniform mortgage instrument¹² avoids the *obligation* dilemma by providing "Lender shall give notice to the Borrower prior to acceleration following Borrower's breach of *any covenant or agreement in this Security Instrument*." (Emphasis supplied.) Thus, where the uniform mortgage instrument is used, which, by the author's estimation is in the vast majority of residential mortgage transactions in New Jersey, the borrower has an independent contractual right¹³ to receive a 30 day pre-acceleration notice (which includes the right to cure and reinstate) prior to acceleration for breaches of *any mortgage covenant and agreement*, not just for monetary breaches under the obligation.

⁹ The Uniform Secured Note—Fixed Rate Note—Single Family—FNMA/FHLMC UNIFORM INSTRUMENT, FORM 3200 12/83 AMENDED 5/91 defines "Default:" "If I do not pay the full amount of each monthly payment on the date it is due, I will be in default," thus limiting a default under the Note to the failure to pay principal or interest when due.

¹⁰ 77 N.J. Super. 198, 185 A.2d 706 (Ocean Cty. Ct., Law Div. 1962).

¹¹ Kratovil, MODERN MORTGAGE LAW AND PRACTICE 84 (1972).

¹² NEW JERSEY—Single Family—Fannie Mae/FreddieMac UNIFORM INSTRUMENT (Form 3031 1/01). Paragraph 22 of Uniform Covenants—"Acceleration; Remedies."

¹³ N.J.S.A. 2A:50-56e.

Similarly, the *Horn-Blumberg Note*¹⁴ permits a lender to accelerate the unpaid indebtedness under the Note for “[a]ny cause that gives the Lender the right of acceleration under the Mortgage.”

(c) Other Reasons Why there May be No Default Under the Act

There may be other reasons why, strictly speaking, there is no “default” under the “obligation” within the meaning of the act. The debtor, for a variety of reasons, may have no “personal” liability under the note or bond — e.g., the debt may have been discharged in bankruptcy, barred by the statute of limitations, or the debtor may have been released from personal liability under the note or bond. In fact, the debtor may have died and there may be no debtor within the meaning of the act, or the mortgage may never have secured an obligation for the payment of a sum of money in the first place. Thus, there may be no possibility of a default by the residential mortgage “debtor” under the “obligation,” because there may be no debtor, no obligation, or both.

(d) Accrual of Right to Mail Notice of Intention

After a “default” by the debtor has occurred and any grace periods, if any, have expired, the lender or lender’s attorney may send a notice of intention to the debtor in accordance with the provisions of the act.

§2.03 Compliance with the Fair Debt Collection Practices Act (“FDCPA”)

If the notice of intention to foreclose is given to the debtor by the foreclosing attorney, it is the author’s opinion that the attorney should comply with the Fair Debt Collection Practices Act. If the notice of intention is the *first communication*, the (1) “notice of debt”¹⁵ and (2) so-called “Miranda” warning¹⁶ should be included as follows:

¹⁴ P814–Mortgage note plain language. Individual or corporation. 4-84. Copyright 1981 Arthur S. Horn, a New Jersey Attorney. Julius Blumberg, Inc. Publisher. NYC 10013.

¹⁵ 15 U.S.C.A. Sec. 1692g.

Validation of debts

(a) Notice of debt; contents

Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing--

- (1)** the amount of the debt;
 - (2)** the name of the creditor to whom the debt is owed;
 - (3)** a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;
 - (4)** a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and
 - (5)** a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.
- (b) Disputed debts**

THE AMOUNT OF THE DEBT IS \$ _____. THE NAME OF THE CREDITOR TO WHOM THE DEBT IS OWED IS _____. UNLESS YOU NOTIFY US IN WRITING WITHIN THIRTY (30) DAYS AFTER RECEIPT OF THIS NOTICE THAT THE DEBT, OR ANY PART OF IT, IS DISPUTED, WE WILL ASSUME THAT THE DEBT IS VALID. IF YOU DO NOTIFY US OF A DISPUTE, WE WILL OBTAIN VERIFICATION OF THE DEBT AND MAIL IT TO YOU. ALSO UPON YOUR WRITTEN REQUEST WITHIN THIRTY (30) DAYS, WE WILL PROVIDE YOU WITH THE NAME AND ADDRESS OF THE ORIGINAL CREDITOR IF DIFFERENT FROM THE CURRENT CREDITOR. THIS COMMUNICATION IS AN ATTEMPT TO COLLECT A DEBT AND ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE.

This same practice would apply where the loan (*i.e.*, the debt) is obtained by a servicing agent or assignee of the mortgage *after default* and that servicing agent or assignee mails the notice of intention to foreclose to the debtor. Contrary to popular opinion, a servicing agent (or assignee) obtaining a loan in the ordinary course *prior to default* is not a debt collector under the FDCPA.

Subsequent communications between the debt collector and consumer need only provide the so-called “mini-Miranda” warning: **THIS COMMUNICATION IS FROM A DEBT COLLECTOR.**¹⁷

The original creditor initiating the debt¹⁸ is not a “debt collector” within the meaning of the FDCPA.

If the debt secured by the residential mortgage is not a *consumer* debt (*i.e.*, a debt incurred for personal, family or household purposes), the FDCPA does not apply and no disclosure notices are required.

If the consumer notifies the debt collector in writing within the thirty-day period described in subsection (a) of this section that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the original creditor, the debt collector shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or a copy of a judgment, or the name and address of the original creditor, and a copy of such verification or judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector. Collection activities and communications that do not otherwise violate this subchapter may continue during the 30-day period referred to in subsection (a) of this section unless the consumer has notified the debt collector in writing that the debt, or any portion of the debt, is disputed or that the consumer requests the name and address of the original creditor. Any collection activities and communication during the 30-day period may not overshadow or be inconsistent with the disclosure of the consumer's right to dispute the debt or request the name and address of the original creditor.

¹⁶ 15 U.S.C. 1692e(11).

The failure to disclose in the initial written communication with the consumer and, in addition, if the initial communication with the consumer is oral, in that initial oral communication, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose in subsequent communications that the communication is from a debt collector, except that this paragraph shall not apply to a formal pleading made in connection with a legal action.

¹⁷ 15 U.S.C. 1692e(11).

¹⁸ 15 U.S.C. § 1692a(6)(F)(ii).

The Fair Debt Collection Practices Act is discussed in a later chapter.¹⁹

§2.04 The Notice of Intention (General Application) — *N.J.S.A. 2A:50-56*

Subsection 4a of the act (*N.J.S.A. 2A:50-56a*) provides:

a. Upon failure to perform any obligation of a residential mortgage by the residential mortgage debtor and before any residential mortgage lender may accelerate the maturity of any residential mortgage obligation and commence any foreclosure or other legal action to take possession of the residential property which is the subject of the mortgage, the residential mortgage lender shall give a notice of intention, which shall include a notice of the right to cure the default as provided in section 5 of P.L.1995, c.244 (*C.2A:50-57*), at least 30 days, but not more than 180 days, in advance of such action as provided in this section, to the residential mortgage debtor, and, if the mortgage is secured by a residence for which a restriction on affordability was recorded in the county in which the property is located, the clerk of the municipality in which the subject property is located, the municipal housing liaison, if one has been appointed by the municipality pursuant to the regulations of the Council on Affordable Housing, and the Commissioner of Community Affairs. For the purposes of this section, “restriction on affordability” means any conditions recorded with a mortgage or a deed which would limit the sale of such property to income qualified households pursuant to the rules adopted to effectuate the “Fair Housing Act,” P.L.1985, c. 222 (*C.52:27D-301 et al.*).

Except as to a debtor who has given the lender a deed in lieu of foreclosure, the act requires that prior to (a) “acceleration” of the residential mortgage obligation, and (b) “institution” of any (i) “foreclosure” or (ii) other “legal action to take possession” of the residential mortgaged premises, the lender must give a written notice of such intention to the debtor at least 30 days, but no more than 180 days in advance of commencing action.

The provisions of subsections 4a and 4d of the act (*N.J.S.A. 2A:50-56a,d*) are substantially similar to subsections 403(a) and (d) of Pennsylvania’s (Loan Interest and Protection Law), *P.S. § 403*.²⁰ Under the Pennsylvania statute, the notice requirements pertaining to foreclosure proceedings are a prerequisite to the court’s subject matter jurisdiction.²¹ However, it has also been held ²² that a mortgagee’s rights with respect to the notice of intention should not be significantly adversely affected by technical Act 6 violations.

¹⁹ See Chapter 4 *infra*.

²⁰ **§ 403 Notice of Intention to foreclose** (a) Before any residential mortgage lender may accelerate the maturity of any residential mortgage obligation, commence any legal action including mortgage foreclosure to recover under such obligation, or take possession of any security of the residential mortgage debtor for such residential mortgage obligation, such person shall give the residential mortgage debtor notice of such intention at least thirty days in advance as provided in this section. (d) The notice of intention to foreclose provided in this section shall not be required where the residential mortgage debtor, has abandoned or voluntarily surrendered the property which is the subject of a residential mortgage.

²¹ *Bankers Trust Co. v. Foust*, 621 A.2d 1054, 424 Pa. Super 89 (1993), *appeal den.*, 631 A.2d 1007, 535 Pa. 635; *Philadelphia Housing Authority v. Barbour*, 592 A.2d 47, 405 Pa. Super. 140 (1991), *aff’d*, 615 A.2d 339,

In *GE Capital Mortg. Services, Inc. v. Weisman*,²³ the Chancery Division held that where a foreclosing lender could not prove that it gave the debtor a notice of intention in compliance with the act, the appropriate remedy was not dismissal of the action, but rather an order directing the lender to send a new notice of intention within 10 days, giving the mortgagors 30 days from the mailing of the notice of intention the right to reinstate the mortgage without liability for costs and attorney fees.

In *Bank v. Kim*,²⁴ the Appellate Division reversed an order denying R. 4:50-1 relief, dismissed the foreclosure judgment, and remanded, in part because of plaintiff's failure to comply with the notice of intention requirements of the Fair foreclosure Act.

(a) Exclusive Statutory Requirements for Residential Mortgage Foreclosures; “Judicial” Foreclosure Required

The use of the language “any foreclosure” in subsection 4a — e.g., “before any residential mortgage lender may accelerate the maturity of *any residential mortgage obligation* and commence *any foreclosure*” — makes it clear that the act prescribes exclusive statutory requirements with respect to the foreclosure of a residential mortgage in New Jersey. (Emphasis supplied.)

The term “residential mortgage obligation” is not defined in the act, but it is assumed that the term refers to the “obligation” secured by the residential mortgage. The language “any” in “any residential mortgage obligation” again underscores the fact that the act prescribes an exclusive remedy for the foreclosure of a residential mortgage securing an obligation.

The language of subsection 5a “at least 30 days in advance of such *action*” — taken in conjunction with the language of Paragraph 6 of the notice of intention, *N.J.S.A. 2A:50-56c(6)* “that if the debtor does not cure the default . . . the lender may take steps to terminate the debtor’s ownership in the property *by commencing a foreclosure suit in a court of competent jurisdiction*” — makes it absolutely clear that the Fair Foreclosure Act requires a “judicial” foreclosure of a residential mortgage. (Emphasis supplied.)

(b) 30 Day Period

Because the notice of intention contains a date by which the debtor may cure the default to avoid the initiation of foreclosure proceedings — the cure date — which cannot be less than 30 days after the date the notice is mailed, the lender must give the debtor a minimum of 30 full days to cure, including the 30th or last day, before filing the foreclosure complaint no earlier than the 31st day.

532 Pa. 212; *Main Line Federal Sav. and Loan Ass’n v. Joyce*, 632 F.Supp.9 (E.D. Pa.1986); *General Electric Corp. v. Slawek*, 409 A.2d 420, 269 Pa. Super. 171 (1979).

²² *In re Panas*, 100 B.R. 734, 740 (Bkrcty. E.D.Pa.1989), citing *In re Vitelli*, 93 B.R. 889, 897-99 (Bkrcty. E.D.Pa.1988), and *In re Mosley*, 85 B.R. 942, 951 at n.7 (Bkrcty. E.D.Pa.1988).

²³ 339 N.J. Super. 590, 773 A.2d 122 (Ch. Div. 2000).

²⁴ 361 N.J. Super. 331, 344-5, 825 A.2d 566, 574 (App. Div. 2003).

(c) Debtor to Receive Notice of Intention

Subsection 4a requires that the *debtor and debtor only* be served with the notice of intention, not the mortgagor. This is a serious shortcoming of the act, in the author's opinion.

The uniform instruments²⁵ require that a 30 day pre-acceleration notice be given to the "borrower" (e.g., the mortgagor), and thus where the mortgage documents utilize the uniform instrument forms, which, to the author's experience, are in the vast majority of residential mortgage transactions in New Jersey, the "mortgagor" has an independent²⁶ contractual right to receive a pre-acceleration notice prior to commencement of foreclosure.

If the debtor has been released from personal liability under the obligation, or the debt is barred by bankruptcy or the statute of limitations — so that there is no person "obligated to pay the obligation" — presumably the notice of intention requirements would be inapplicable. There are no judicial decisions supporting this interpretation.

Because subsection 4a refers to failure by the "residential mortgage debtor" to perform any "obligation" of a residential mortgage, it limits the application of the notice of intention requirements to performance by the "debtor" with respect to the secured "obligation." Taken literally, this would mean that where there is no debtor, or where someone other than the debtor defaults, the notice of intention requirements would not apply because default would not be occasioned by "failure" of the "debtor" to perform the obligation.

A notice of default in a mortgage is ordinarily narrowly construed. It has been held that where a mortgage provides for a default notice to be sent to the "mortgagor," mailing to the "owner" is not required.²⁷ This further reinforces the fact that mailing the notice of intention to a non-debtor owner, for example, would not be required under the act.

(d) Obligation

The terminology of subsection 4a, "upon failure to perform *any obligation* of a residential mortgage by the residential mortgage debtor," is highly questionable terminology. (Emphasis supplied.) "Obligation" under the act refers solely to the note, bond or other similar evidence of a "duty to pay." This language precludes the application of the notice of intention requirements to a default based solely on the breach of a covenant contained in the mortgage and not in the obligation, e.g., the failure to pay taxes and insurance, maintain the property and the like.

It may be that the drafters of the act used "obligation" to mean all promises in the note or bond and all "covenants and conditions" in the mortgage. However, there is no support for this definition of obligation anywhere in the act. "Obligation" and "debtor" as defined in the act consistently refer to the personal instrument and person "obligated to pay the obligation," *i.e.*, the obligor on the bond or maker of the note.²⁸

²⁵ Uniform Mortgage Instrument. Paragraph 21 of the Non-Uniform Covenants–Acceleration; Remedies. New Jersey–Single Family–Fannie Mae/Freddie Mac Uniform Instrument (Form 3031 9/90).

²⁶ *N.J.S.A.* 2A:50-56e.

²⁷ *Continental Bank & Trust Co. v. Fulton Realty Co.*, 10 N.J. Misc. 1105, 162 A. 560 (Ch. 1932).

²⁸ *N.J.S.A.* 2A:50-53.

Where there is no “obligation,” the notice of intention requirements would not apply because there can be no “failure to perform” the “obligation” in accordance with the provisions of the subsection. Where the promised performance secured by the mortgage is *not* the payment of money, it is axiomatic that there is no obligation under the act.

(e) Maturity of Obligation

The terminology “before any residential mortgage lender may accelerate *the maturity of any residential mortgage obligation* and commence foreclosure” is problematic. (Emphasis supplied.) The statute refers to the secured obligation and not the mortgage. If the debtor has been released from personal liability under the obligation, or the debt has been discharged in bankruptcy or barred by the statute of limitations (so that the “maturity” of the “obligation” cannot be accelerated prior to foreclosure or otherwise), then the notice of intention requirements would, by virtue of the act’s own terminology, appear inapplicable.

(f) Notice of Intention--Matured Obligation; Applicability

The language of subsection 4a, “accelerate the maturity of any residential mortgage obligation,” makes it clear that the notice of intention requirements apply only to an “unmatured” obligation, a note or bond capable of being *accelerated*. Where the mortgage note or bond has *matured*, or the mortgage debt is otherwise due in full, such as in a *demand note* situation, then acceleration is not required because all sums secured by the mortgage are immediately due and payable. The notice of intention, then, by virtue of the act’s own terminology is inapplicable.

A strong and perhaps irrefutable argument can be made that the notice of intention requirements are only applicable to (1) an “unmatured” obligation, e.g., a note or bond capable of being accelerated, *and* (2) commencement of foreclosure or other legal action to take possession. This is clear from the *and* appearing between “acceleration” *and* “foreclosure.” The act requires service of a notice of intention before a lender may “accelerate” *and* “commence” foreclosure. Where the note or bond has matured, acceleration is not required and foreclosure can be commenced without acceleration. In this instance, the notice of intention requirements by virtue of the act’s own terminology are inapplicable.

The terminology of Pennsylvania’s Act 6, however, differs from the New Jersey statute. § Section 403(a) of the Pennsylvania statute requires that a 30 day notice of intention be given to the debtor “before a residential mortgage lender may *accelerate* the maturity of any residential mortgage, *commence* any legal action including mortgage foreclosure . . . or take *possession* . . .” (Emphasis supplied.) The provisions of the Pennsylvania statute, unlike the provisions of § 4a of the New Jersey act, are used disjunctively. The word “and” does not appear between “accelerate” and “commence,” as it does under the New Jersey act. Presumably, different results thereby may be reached under the Pennsylvania and New Jersey statutes.

The use of the word “and” between “accelerate” and “commence any foreclosure” by the New Jersey Legislature was intentional. The initial drafts of the act contained “or,” similar to the Pennsylvania statute; however, “and” replaced “or” in the final draft ²⁹ signed into law on September 5, 1995.

²⁹ See Appendix A.

(g) Notice of Intention Not Required Where Property Voluntarily Surrendered

Subsection 4d (*N.J.S.A.* 2A:50-56d) provides that a notice of intention is not required where the debtor has “voluntarily surrendered” the residential mortgaged premises, e.g., given a deed in lieu of foreclosure to the lender.

Pennsylvania’s Act 6, *P.S.* § 403 (d), provides that a notice of intention is not required where the debtor has “abandoned” the residential property. The Fair Foreclosure Act has no comparable provision.

(h) Lender’s Self-Help Possession Remedy on Default

Because the subsection refers to commencement of any foreclosure “or other *legal action* to take possession,” it is assumed that the act leaves unimpaired the lender’s “non-judicial” remedy to take possession by self-help in New Jersey, which is after all not a “legal action” to take possession. (Emphasis supplied.) Specifically, this entails the lenders right on or after default by the mortgagor to take possession³⁰ of the mortgaged premises non-judicially, through self-help, if it does not involve a breach of the peace.³¹

Pennsylvania’s Act 6, § 403(a) provides that a notice of intention must be given to the debtor before “any legal action including mortgage foreclosure to recover under such obligation, or *take possession of any security* of the residential mortgage debtor for such residential mortgage obligation, and therefore appears to require a notice of intention for the judicial as well as non-judicial taking of possession.

(i) Lender’s Action for Possession (formerly ejectment)

The terminology of the section--“or other legal action to take possession” makes it clear that a notice of intention is required to be given to the “debtor” before a lender may institute an action for possession of land. It is rare today for a lender to institute an action for possession apart from foreclosure. The debtor, however, may not be the person in possession. If that is the case, it would seem that a notice is not required.

If a third party purchaser at the foreclosure sale brings a possessory action against the debtor-owner or someone else, a notice of intention would not appear necessary because that person is not the residential lender.

(j) Contractual Obligation to Give Pre-Acceleration Notice

Of course, apart from the provisions of the act, the mortgage documents may provide for pre-acceleration notification to the mortgagor and the right of the mortgagor to cure a default and reinstate where acceleration has already taken place. In this instance, the mortgagor would have an independent³² contractual right to receive notice and cure the default even if the provisions of the Fair Foreclosure Act do not apply.

³⁰ 30 N.J. PRAC. (Weinstein) § 21.1 (2d ed. 2000).

³¹ See Chapter 1.

³² *N.J.S.A.* 2A:50-56e and 57f.

The “*Fannie Mae/Freddie Mac*” uniform instruments³³ which are commonly used for the mortgage documents in New Jersey and in other states and which are used in the vast majority of residential mortgage transactions in New Jersey require service of a 30 day pre-acceleration notice on the borrower (the mortgagor) prior to commencement of foreclosure. This notice, like the notice of intention under the Fair Foreclosure Act, includes the right to cure the default and reinstate the obligation and mortgage if acceleration has already taken place.

A Pennsylvania case, *Second Federal S & L v. Brennan*,³⁴ illustrates an interesting application of a mortgagee’s contractual obligation to give notice and just how pervasive this obligation can be. In *Brennan*, the mortgage provided that the lender: “Upon Borrower’s breach of any covenant or agreement of Borrower in this mortgage . . . shall mail notice to Borrower *as provided by applicable law* . . .” (Emphasis supplied.) Because the amount of the mortgage exceeded \$50,000, applicable Pennsylvania law at the time of making of the mortgage, *i.e.*, 41 P.S. § 101, did not require that notice be given.

Nevertheless, the court found that notice was required for it is unlikely “that the lender would insert a notice clause that had no effect if ‘applicable law’ did not mandate notice, and which was superfluous if ‘applicable law’ mandated notice.” The court ruled, however, that the mortgagee had complied with the mortgage by mailing the notice by certified mail (and subsequently by ordinary mail) to the mortgagor’s last known address.

§2.05 Fair Debt Collection Practice Act (Notice of Intention)

While the Fair Debt Collection Practices Act (FDCPA) as amended, 15 U.S.C.A. § 1692e(11)³⁵ does “not apply to a formal pleading made in connection with a legal action,” the statutory pre-action “notice of intention” is technically not a “formal pleading made in connection with a legal action.” At the time the notice of intention is given, a foreclosure or judicial action has not yet been instituted.

The FDCPA has been addressed above and in a later chapter.

§2.06 Bankruptcy of Debtor (Notice of Intention)

The filing of a bankruptcy petition by the debtor operates as an automatic stay pursuant to 11 U.S.C. § 362 (a) of the commencement or continuation of a judicial,

³³ Uniform Mortgage Instrument. Paragraph 21 of the Non-Uniform Covenants–Acceleration: Remedies. (New Jersey–Single Family–Fannie Mae/Freddie Mac Uniform Instrument, Form 3031, 1/01).

³⁴ 598 A.2d 997, 409 Pa. Super. 581 (*Super.* 1991).

³⁵ (a) IN GENERAL.–Section 907(11) of the Fair Debt Collection Practices Act (15 U.S.C. 1692e(11)) is amended to read as follows:“(11) The failure to disclose in the initial written communication with the consumer and, in addition, if the initial communication with the consumer is oral, in that initial oral communication, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose in subsequent communications that the communication is from a debt collector, except that this paragraph does not apply to a formal pleading made in connection with a legal action.” (b) EFFECTIVE DATE.–The amendment made by subsection (a) shall take effect 90 days after the date of enactment of this Act and shall apply to all communications made after that date.”

administrative, or other action or proceeding against the debtor that was or could have been commenced before the bankruptcy (except as to a foreclosure by the Secretary of Housing and Urban Development ³⁶ with respect to a federally insured mortgage held by the Secretary on property improved with more than four dwelling units).

Absent abandonment of the property, or action by the bankruptcy court to lift the stay, the stay remains in effect until the bankruptcy case is closed.³⁷

Strictly speaking, the mailing of a notice of intention to the debtor is not the “commencement” or “continuation” of a foreclosure action against the debtor. The filing of the foreclosure complaint constitutes “commencement” of the action. This was the position taken in a Pennsylvania decision, *Mellon Bank, N.A. v. Lee*,³⁸ which held that mailing of a default notice by the mortgagee under Pennsylvania’s Homeowner Emergency Assistance Act (35 P.S. § 1680.401c *et seq.*) was not the commencement or continuation of an action or proceeding against the debtor under 11 U.S.C. 362(a), so as to render the notice a nullity. Under Pennsylvania’s Act 91,³⁹ the mortgagor must be sent a 30 day notice of default prior to commencement of foreclosure which gives the mortgagor time to apply for financial assistance before foreclosure may proceed.

Of course, it is not the author’s suggestion that a lender intentionally serve a notice of intention on a debtor in bankruptcy. The Office of Foreclosure has indicated that it will not process judgment papers where it can determine that a debtor was served with a notice of intention while the debtor was in bankruptcy.⁴⁰

Where the notice of intention has been properly served and the debtor files for bankruptcy after the cure date, it can be argued that when the stay is lifted or bankruptcy resolved (assuming the loan has not been reinstated) the notice of intention need not be resent to the debtor because the debtor still has the right to cure and reinstate pursuant to section 5, which is the same right the debtor had when he or she filed for bankruptcy.

Where the debtor files for bankruptcy prior to the cure date, it can be argued that the notice must be given anew, because the debtor has not received the full 30 days under the notice of intention, and the cure date has passed prejudicing the debtor’s right to cure without penalty under the act. However, these are questions which cannot be definitively answered at this time.

It is the author’s suggestion, however, that the lender send a new notice of intention to the debtor in the above examples when the stay is lifted or bankruptcy resolved. This way there never is any question. It is far easier to mail another notice to the debtor than to become involved in costly, time-consuming litigation and foreclosure defenses.

³⁶ 11 U.S.C. Sec. 362(b)(8).

³⁷ *Bank v. Kim*, 361 N.J. Super. 331, 339, 825 A.2d 566, 570 (App. Div. 2003).

³⁸ 561 A.2d 41 (*Pa. Super.* 1989).

³⁹ 35 P.S. § 1680.401c *et seq.*

⁴⁰ Communication from Jim Colasurdo received February 3, 1997.

§2.07 Notice of Intention (Specific Paragraphs Discussed) — *N.J.S.A. 2A:50-56c*

(See *Sample Form No. 2, Appendix C*)

Subsection 4c (*N.J.S.A. 2A:50-56c*) provides that the written notice must clearly and conspicuously state in a manner calculated to make the debtor aware of the situation the following:

(1) the particular obligation or real estate security interest;

Analysis

Paragraph (1) requires that the notice of intention set forth (a) the particular obligation, “or” (b) real estate security interest — i.e., the note (or bond) or mortgage. It is peculiar that only one or the other — the “obligation” or “mortgage” — is required and that the mortgage, which is after all the instrument to be foreclosed, is not absolutely required to be recited in the notice of intention. Presumably, a particular obligation could be secured by more than one mortgage and only reciting the “obligation” in the notice of intention would not be enough. This terminology was no doubt taken from the Pennsylvania statute (41 P.S. § 403) which uses identical language.

Paragraph (1) also refers to the “real estate security *interest*” not “instrument. (Emphasis supplied.) This is peculiar because the real estate security “interest” is a “mortgage” in general, whereas the “instrument” is a specific document with recording information and the like.

Needless to say, notwithstanding the terminology of the statute, it is advisable for the lender or attorney to set forth information relating to both the note or bond and mortgage in the notice of intention.

The term “particular” in the statute is, no doubt, meant to require that the specific obligation or mortgage be identified. The terms “obligation” and “security interest” as used in the paragraph are not plural. Thus, it is not clear whether a lender may include multiple mortgages in default in one notice of intention. This will be discussed more fully in a later section.

In *Bank v. Kim*,⁴¹ the Appellate Division reversed and remanded, dismissing the foreclosure judgment, in part because of plaintiff’s failure to comply with this subsection.

The provisions of subsection 4c (*N.J.S.A. 2A:50-56c*) are substantially similar to *P.S. § 403(c)* of Pennsylvania’s Act 6.⁴²

⁴¹ 361 *N.J. Super.* 331, 345, 825 A.2d 566, 575 (App. Div. 2003).

⁴² § 403 Notice of Intention to foreclose (c) The written notice shall clearly and conspicuously state: (1) The particular obligation or real estate security interest; (2) The nature of the default claimed; (3) The right of the debtor to cure the default as provided in section 404 of this act and exactly what performance including what sum of money, if any, must be tendered to cure the default; (4) The time within which the debtor must cure the default; (5) The method or methods by which the debtor’s ownership or possession of the real estate may be

Under the Pennsylvania statute, 41 P.S. § 403, it has been held that the notice of intention need not be in the exact language of the statute.⁴³

Simply incorporating a statement of the debtor's rights in a letter without any emphasis does not satisfy the "clearly and conspicuously" requirement of § 403 of the Pennsylvania statute, which requires that the statement be in relatively large letters, or underscored, or in a different color or emphasized in some other way to catch the attention of a reader of ordinary intelligence.⁴⁴

Under the Pennsylvania statute, the term "conspicuously" has been interpreted to mean that the notice must be clearly stated in language which is easily understood and that the six items of information required to be in the notice must be paragraphed in the same number and sequence as in the act, but to place them all in capital letters or italics or with underlining would be meaningless.⁴⁵ It has been held that a notice is properly conspicuous under § 403 of the Pennsylvania statute if it satisfies the definition of that term in the Uniform Commercial Code, 12A P.S. § 1-201(10). The notice may be properly printed with legible characters of typescript size.⁴⁶ However, it has also been held that "conspicuously" in § 403 of the Pennsylvania statute need not be interpreted in accordance with the Uniform Commercial Code.⁴⁷

Under the Pennsylvania statute, a notice of intention, while it may be "conspicuous," is insufficient if it fails to give "clear" notice of the mortgagor's obligations in language readily understandable by a lay person and not couched in the complex and turgid language of the statute.⁴⁸

(2) the nature of the default claimed;

Analysis

As to a monetary default for failure to pay one or more monthly installments, the particular month or months in default should be set forth in the notice of intention. Failure to pay taxes or insurance premiums, where applicable, should also be set forth. Any other default should also be set forth.

Under Pennsylvania's Act 6, 41 P.S. § 403, a notice of intention, which merely specified that monthly payments were in default in a specified amount without enumerating the actual months in default, was held insufficient.⁴⁹

terminated; and (6) The right of the debtor, if any, to transfer the real estate to another person subject to the security interest or to refinance the obligation and of the transferee's right, if any, to cure the default.

⁴³ *Kennedy Mortgage Co. v. Washington*, 12 D. & C. 3d 476 (1979).

⁴⁴ *Charles H. Salmon Building and Loan Association v. Mroz*, 6 D. & C. 3d 59 (1977).

⁴⁵ *Piper v. Oakes*, 10 D. & C.3d 722 (1979).

⁴⁶ *Federal National Mortgage Association v. Ayala*, 8 D. & C. 3d 712 (1978).

⁴⁷ *Gettysburg National Bank v. Trace*, 13 D. & C.3 d 679 (1980).

⁴⁸ *Mid-Penn Consumer Discount Co. v. Chamberlain*, 8 D. & C. 3d 752 (1979).

⁴⁹ *Kennedy Mortgage Co. v. Washington*, 12 D. & C. 3d 476 (1979).

In *Bank v. Kim*,⁵⁰ the Appellate Division reversed and remanded, dismissing the foreclosure judgment, in part because of plaintiff's noncompliance with this subsection—i.e., failure to give the debtor a “clear and conspicuous” statement of the nature of the default claimed.”

Any non-monetary default should also be set forth in the notice. It is unclear how a non-monetary default which cannot be cured is to be handled under the act.

**(3) the right of the debtor to cure the default as provided
in Section 5 of this act;**

Analysis

The notice should either summarize the debtor's right to cure under the act or have annexed a copy of section 5. The former is probably the better alternative. A Pennsylvania court interpreting §403 of Act 6, which is substantially similar to subsection 4c (*N.J.S.A.* 2A:50-56c) of New Jersey's Fair Foreclosure Act, ruled that a notice of intention is insufficient if it fails to give “clear” notice of the mortgagor's obligations in language readily understandable by a lay person and not couched in the complex and turgid language of the statute.⁵¹ Thus, merely attaching a copy of the section of the act may be insufficient.

Paragraph (3), in the author's opinion, refers to the general right of the debtor to cure a default in accordance with section 5 of the act, not to the procedure to be used to cure a default by the “cure date” set forth in the notice of intention. Paragraph (4) controls that procedure. In other words, Paragraph (3) ordinarily relates to a situation after the date to cure has passed in the notice of intention where the lender has already accelerated payment of all sums secured by the residential mortgage. A cure and reinstatement in accordance with section 5 of the act (*N.J.S.A.* 2A:50-57) will defeat that acceleration.

Where the debtor has previously cured a default within the 18 month period, and therefore is not entitled to any further right to cure until the expiration of the 18 month period, the notice should explain this with clarity. The notice of intention should also make it clear that this limitation of the right to cure once every 18 months does not affect the unlimited right of the debtor to cure prior to or on the date to cure specified in the notice.

**(4) what performance, including what sum of money, if
any, and interest, shall be tendered to cure the default as
of the date specified under paragraph 5 of this
subsection c;**

Analysis

Paragraph (4) is a critical paragraph in the notice of intention because, as to a monetary default, it sets forth the “sum of money” required to cure and, as to a non-monetary default, sets forth “what performance” is required to cure the default. The terminology of the paragraph “if any” is somewhat ambiguous. Presumably, “if any” modifies “what sum of money,” the obvious meaning here is that other performance not payment of a sum of money

⁵⁰ 361 *N.J. Super.* 331, 345, 825 A.2d 566, 575 (App. Div. 2003).

⁵¹ *Kennedy Mortgage Co. v. Washington*, 12 D. & C. 3d 476 (1979). *Mid-Penn Consumer Discount Co. v. Chamberlain*, *supra*.

may be required to cure the default. This language accords with subsection 5b(2), *N.J.S.A.* 2A:50-57b(2), where any and all defaults under the mortgage must be satisfied in order to effectuate a cure. However, “if any” may qualify both “what performance” and “what sum of money,” either individually or in conjunction with each other, in which case the language of this paragraph would address an impossibility of cure situation where there is no performance by the debtor and no sum of money capable of “curing” the default.

(a) “Tender” of performance by debtor

Paragraph 4 refers to the “tender” of performance by the debtor to cure not “payment” or actual performance. This accords with section 3b of the act, *N.J.S.A.* 2A:57-3b, where paragraphs (1) and (3) refer to “pay or tender.”

The dictionary definition of tender⁵² requires a “cash offer.” However, the author of a leading practice book on Mortgages in New Jersey state:⁵³

[T]he sufficiency of tender or payment must be determined with reference to business custom as well as the exact terms of the contract. Where payment by check is customary, a tender of payment by check is an effective tender if the creditor does not expressly object to the medium of payment and if the check would be honored on proper presentation to the drawee bank; and the same is true of a tender in non-legal currency.

Section *N.J.S.A.* 2A:50-57b(1)—the section referring to a cure effected after the expiration of the date in the notice of intention—requires that payment or tender be made “in the form of cash, cashier’s check or certified check.” There is no comparable provision, however, in section 4, the notice of intention section.

It is therefore the author’s opinion that, until further judicial or legislative clarification, the notice of intention not contain the “cash, cashier’s check or certified check” requirement.

Presumably, the mailing of a check by the debtor covering all sums in arrears as set forth in the notice of intention, prior to or on the cure date specified in the notice, will constitute a proper tender of performance within the meaning of this paragraph.

In New Jersey, where a mortgagee impliedly, because of a course of conduct or otherwise, consents to receive payment by mail, risk of loss in the event of non-receipt falls on the mortgagee not the mortgagor.⁵⁴ However, it has been held that the mailing of a check by a debtor for the amount due is not, in the absence of an expressed or implied agreement to that effect, a payment or discharge of the debt; and the mere fact that a creditor accepts a check forwarded him by mail, in one instance, does not indicate that he desires all future payments to be made in that manner.⁵⁵ Under common law a check received for the payment

⁵² “Essential characteristics of tender are unconditional offer to perform coupled with manifested ability to carry out the offer and production of subject matter of tender [citation omitted] . . . The actual proffer of money, as distinguished from mere proposal or proposition to proffer it. Hence mere written proposal to pay money, without offer of cash, is not ‘tender.’” BLACK’S LAW DICTIONARY 1467 (6th ed. 1990).

⁵³ 29 NEW JERSEY PRAC. (Weinstein) Sec.13.3 (2d ed. 2001).

⁵⁴ *Balmoral Arms v. Rutkin*, 104 N.J. Super. 354, 250 A.2d. 50 (Ch. Div. 1969).

⁵⁵ *Weisberger v. J.G. Corporation*, 107 N.J. Eq. 61, 151 A. 612 (E. & A. 1930).

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of a debt is not in fact payment unless the check is paid, except in cases where it is positively agreed to be received as payment.⁵⁶

The uniform mortgage instrument⁵⁷ does not refer to “tender;” it requires that Borrower “pays Lender all sums which then would be due” in order to effectuate cure and reinstatement. New Jersey’s Fair Foreclosure Act would presumably override⁵⁸ the uniform instruments in this instance making “tender of performance” the applicable requirement.

(b) Cure Amount--Monetary Default

Ordinarily, a default under the obligation and mortgage will result from the mortgagors failure to pay one or monthly installments of principal and interest. In this instance, the notice of intention should itemize the amount in arrears and give a breakdown for late charges and any other lawful charges that may be due and owing.

Installments in arrears	\$ 3,600.00
3 months (April, May, June/1997) @ \$1,200	
Late charges	\$ 180.00
3 months (April, May, June/1997) @ \$60 per month	
Other charges	\$.
Total	\$ 3780.00

It is the author’s opinion that the above itemization of sums due should include any other amounts (e.g., scheduled installments) which will become due as of the date to cure, even though such installments may not be due as of the date of the notice of intention. This is discussed below.

In the ordinary course, the amount required to cure in the notice of intention will not contain a separate “interest” figure. The unpaid “installment” amount already contains principal and interest and, in most cases, a portion of the real estate taxes owed. The only other additions will normally be “late charges” and any other amount the lender may lawfully charge.

Now, in the schedule above, suppose the lender has mailed the notice of intention to the debtor on *May 15, 2007*. As of the date of mailing, the April and May (2007) payments are delinquent. The lender in the notice of intention establishes a date to cure of *June 18, 2007*.

An installment payment by the mortgagor covers the month immediately preceding the month payment is due. As of June 18th, the April, May and June installments are due (covering March, April and May), together with the late charges for these months. Amounts for June (the period June 1st to June 30th) will not become due until on or after July 1st and

⁵⁶ *State v. United States Steel Corp.*, 12 N.J. 38, 45, 95 A.2d 734 (1953).

⁵⁷ Uniform Mortgage Instrument. Paragraph 19 of the Uniform Covenants–Borrower’s Right to Reinstate. (New Jersey–Single Family–Fannie Mae/Freddie Mac Uniform Instrument, Form 3031, 1/01).

⁵⁸ *Id.* Paragraph 15–Governing Law; Severability.

therefore cannot be included in the cure amount unless a date to cure of July 1st or later is established.

In the author's opinion, the sum of money specified in the notice of intention required to cure a default as of a specific date (the "cure date"), should include *all scheduled installments and late charges which will become due on or prior to the cure date*, even though such installment or installments may not be due at the time the notice is mailed. The amount required to cure, in the author's opinion, should be self explanatory, *i.e.*, should not be conditioned upon payment of additional sums which are not specified in the notice, and should not require the debtor to perform additional mathematical calculations or communicate with another person.

If all scheduled installments and late charges which will become due as of the cure date are not included in the cure amount, the cure amount stated in the notice will be of little practical value to the debtor (unless, of course, the debtor actually pays the amount prior to the time the next installment becomes due). If the debtor pays or tenders the amount to cure stated in the notice on or before the cure date, and the lender rejects it as insufficient because a subsequent installment has become due, the debtor will be prejudiced if the cure date passes before the debtor can tender the correct amount.

If taxes are in arrears and are not, by virtue of the mortgage instruments, to be included in an installment payment, then all taxes, interest and penalty interest due as of the cure date must be specified in the notice, including amounts owed on any tax sale certificates with interest on such certificates figured to the cure date.

It is clear that the lender cannot be reimbursed for search and counsel fees out of the sum specified in this paragraph to cure, as the act does not authorize such reimbursement.

A debtor may presumably default and cure, prior to or on the cure date without limitation under the statute and the lender cannot exact any charge, penalty or fee to defray the lender's expenses in this regard. This may result in debtor abuses as there is nothing in the statute to discourage such defaults.

Under Pennsylvania's Act 6, 41 P.S. § 403(c)(3), the provision "the right of the debtor to cure the default . . . and exactly what performance including what sum of money, if any, must be tendered to cure the default" has been interpreted to mean that the notice of intention need only provide the amount to cure the default which has accrued as of the "date of the notice."⁵⁹ The court reasoned:

Should a mortgagor be left with any questions regarding the amount due because of his or her continued default after the date of the notice, the mortgagee's inclusion of a phone number to provide assistance sufficiently cures any potential notice defects.⁶⁰

⁵⁹ *Bankers Trust Co. v. Foust*, 621 A.2d 1054, 424 Pa. Super 89 (1993), *appeal den.*, 631 A.2d 1007, 535 Pa. 635.

⁶⁰ *Id.* at 1057-58.

This differs from the New Jersey act where the amount to cure must be specified as of the “cure date,” which must be at least 30 days after the date of mailing of the notice of intention.

Under Pennsylvania’s Act 6, a mortgagee need not provide in the notice of intention all necessary formulas to enable the mortgagor to calculate interest fees and other charges that accrued from the date of default up to the date of cure.⁶¹ The failure of a notice of intention under §403 of the Pennsylvania statute to provide an explanation of the manner in which the amount to cure is calculated and a formula to compute future amounts does not render the notice invalid,⁶² nor does the failure to give a breakdown of principal and interest⁶³ and specify how late charges were calculated.⁶⁴

Similarly, it has also been held that a notice of intention under the Pennsylvania statute need not set forth the exact amount of money needed to cure a default since that amount varies depending upon the date of payment, as long as the notice indicates that the amount required to cure can be ascertained by contacting the mortgagee or its representative.⁶⁵

It has also been held, however, that failure of the notice of intention to provide a formula to allow the mortgagor to calculate the exact amount due to cure the default violated §403⁶⁶

A notice of intention, in which the nature of the default and calculation of arrearages was confusing to the mortgagee, was held to substantially comply with the Pennsylvania statute where the mortgagee sent a loan amortization schedule and log sheets to the mortgagor which clearly and conspicuously set forth how the arrearage figure was calculated.⁶⁷

A notice of intention which set forth a cure amount of \$2,623.60 but which failed to explain how the mortgagee arrived at a total figure greater than \$2,324.16, which was the amount of the monthly payments in arrears plus late charges, was held deficient under §403 of Pennsylvania’s Act 6.⁶⁸

A notice of intention to foreclose which was not clear as to what sum of money had to be tendered at a particular time and which contained various incorrect and threatening statements was held violative of §403 of the Pennsylvania statute.⁶⁹ In the same vein, a notice of intention which ambiguously stated the sum of money to be paid by the debtor to cure the

⁶¹ *Id.*

⁶² *Chrysler First Consumer Discount Co. v. Babb*, 2 D. & C. 4th 282 (1989).

⁶³ *First Federal Savings and Loan Association of Pittsburgh v. Prinkley*, 38 D. & C. 3d 273 (1985).

⁶⁴ *Federal National Mortgage Association v. Woody*, 25 D. & C. 3d 604 (1982).

⁶⁵ *Influential Savings & Loan Association v. Valentine*, 25 D. & C. 3d 760 (1982).

⁶⁶ *In re Mosley*, 85 B.R. 942 (Bkrtcy. E.D.Pa.1988); *In re Miller*, 90 B.R. 762 (Bkrtcy. E.D.Pa.1988).

⁶⁷ *Mihalac v. Schneider*, 42 D. & C. 3d 93 (1986).

⁶⁸ *Main Line Federal Sav. and Loan Ass’n v. Joyce*, 632 F. Supp.9 (E.D. Pa.1986).

⁶⁹ *Werts v. Federal National Mortgage Association*, 48 B.R. 980 (D.C. Pa. 1985).

default violated §403 and both the notice of intention and subsequent complaint were held to be invalid.⁷⁰

(c) *Performance Required to Cure a Non-Monetary Default*

Where the performance required to cure the default by the debtor does not entail the payment of money, or requires other performance in addition to the payment of money, the situation is more complicated. In this situation, the debtor will have breached covenants and conditions in the mortgage either alone or in conjunction with the failure to pay installments.

By virtue of paragraph (4), it will be necessary for the lender to set forth with specificity exactly what affirmative steps the debtor must take in order to cure the default. In this respect, it will be necessary for the lender to carefully set forth the particular mortgage covenant in default and what must be done to remedy the default as set forth in the covenant.

For example, the uniform mortgage instrument,⁷¹ widely used in residential mortgage transactions in New Jersey, contains covenants relating to a wide variety of matters, such as maintenance of hazard or property insurance,⁷² occupancy by the borrower, preservation, maintenance and protection of the property, giving materially false or inaccurate information or statements to the lender during the loan application process, forfeiture actions and legal proceedings which “may significantly affect Lender’s rights in the property,”⁷³ presence of hazardous substances⁷⁴ and sale of the property without the prior written consent of the lender⁷⁵ (*i.e.*, violation of the due-on-sale clause). A default may be declared by the lender for breach of these covenants. What performance is required to cure the default, if in fact default can be cured, depends upon the terms and conditions of the mortgage instrument. The lender should strictly follow the requirements of the particular mortgage covenant in default and should demand only such performance in the notice of intention as may be indicated in the covenant and mortgage.

(d) *A Default which Cannot be Cured*

Here is a real problem not addressed by the act. What if there is no performance by the debtor capable of curing the default? How is the lender to word the notice of intention?

Violation of the due-on-sale clause, for example, under the uniform mortgage instrument⁷⁶ cannot be cured by the borrower. It is not clear whether failure of the borrower to occupy the property as a principal residence for at least one year after the date of occupancy or the giving of materially false or inaccurate information and statements during

⁷⁰ *Beneficial Consumer Discount Co. v. Leipold*, 11D. & C.3d 659 (1979).

⁷¹ NEW JERSEY—Single Family—Fannie Mae/Freddie Mac Uniform Instrument (Form 3031 1/01).

⁷² *Id.* at ¶5 (Uniform Covenants).

⁷³ *Id.* at ¶6, 7, 8, 9. (Uniform Covenants).

⁷⁴ *Id.* at ¶21 (Uniform Covenants).

⁷⁵ *Id.* at ¶17 (Uniform Covenants).

⁷⁶ *Id.* at ¶18 (Uniform Covenants). Where an adjustable rate note is given under the uniform instruments, the borrower may transfer title to the property under certain stated conditions. However, this does not apply if the borrower is in default.

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the loan process may be cured by the borrower or whether breach of these covenant constitutes an irrevocable default.

It is the author's opinion that, where default cannot be cured, the notice of intention should set forth, as the amount required to cure under paragraph (4) of the notice, *N.J.S.A. 2A:50-56c(4)*, the entire principal amount due under the obligation and mortgage with contract rate interest computed to the cure date set forth in the notice, together with advances and lawful charges.

Of course, if the obligation has matured, cure and reinstatement are no longer possible, only payment in full of the unpaid mortgage indebtedness. And as previously noted, according to a literal reading of the statute, a notice of intention is not required where the debt has matured, or the secured note is a demand note, or where foreclosure can be instituted without accelerating all sums due and owing under the mortgage.

(5) the date by which the debtor shall cure the default to avoid initiation of foreclosure proceedings, which date shall not be less than 30 days after the date the notice is effective, and the name and address and phone number of a person to whom the payment or tender shall be made;

Analysis

The author terms the "date" in the notice of intention by which the debtor may cure to avoid the initiation of foreclosure proceedings, the "cure date." This date is of immense importance to the debtor. If the debtor cures by the cure date in the notice of intention, the lender cannot accelerate and foreclose the residential mortgage. This is a no-penalty cure. The lender may not include court costs and attorneys fees in the cure amount under this section

It is clear that the lender must give the debtor the full 30 day period to cure before instituting foreclosure. The filing of the foreclosure complaint must be coordinated with the cure date and cannot be filed until after the cure date has passed. The minimum time periods for both the cure date and filing of the complaint are the same, e.g., at least 30 days after the date the notice is effective (delivery or mailing).

It is interesting that Paragraph (5) of subsection 4c, *N.J.S.A. 2A:50-56c(5)*, refers to "the date by which the debtor may cure to avoid foreclosure." No mention is made of the lender's right to merely "accelerate" once the date has passed. This terminology is consistent with the provisions of subsection 4a, *N.J.S.A. 2A:50-56a*, which provide that service of the notice of intention is a condition precedent to "acceleration *and* foreclosure," not to acceleration alone.

There is no procedure in the act for changing the name, address or telephone number of the person to whom payment or tender must be made. This will prove awkward for lenders where the mortgage has been assigned, the servicing agent has changed, or the named person is no longer working in this position.

The provisions of the Uniform Instruments,⁷⁷ however, provide that if there is a change of the Loan Servicer the borrower will be given written notice of the change, stating the name and address of the new Loan Servicer and the address to which payments should be made. Thus, where the provisions of the uniform instruments apply, the mortgagor has an independent right by virtue of the mortgage contract to receive the name of the current Loan Servicer and current address for payment.

The name of the person specified under this paragraph should be a person working within the organization of the lender.

In *Bank v. Kim*,⁷⁸ the Appellate Division reversed and remanded, dismissing the foreclosure judgment, in part because of plaintiff's failure to comply with this subsection.

A notice under the Pennsylvania statute, 41 P.S. § 403, which provided that a person had 32 days to cure instead of up to one hour before the foreclosure sale was held to violate the statute.⁷⁹

A letter sent by certified mail to the defendants, advising them of the exact amount of the default, giving them 30 days notice to foreclose, notifying them that payment of the stated sum within the 30 day period would correct the default, but which did not inform the defendants of the provisions of the act, was held to be in noncompliance with § 403 of the Pennsylvania statute, even though plaintiff's attorney personally informed the defendants of the provisions of the act.⁸⁰

(6) that if the debtor does not cure the default by the date specified under paragraph (5) of this subsection c, the lender may take steps to terminate the debtor's ownership in the property by commencing a foreclosure suit in a court of competent jurisdiction;

Analysis

Reference in the statute to a "court of competent jurisdiction" is not altogether clear, unless the intended reference is to a residential mortgage foreclosure action commenced in federal court. A state court foreclosure can only be commenced in the Superior Court of New Jersey, which is a court of state-wide jurisdiction.⁸¹

Paragraph 6 of the notice of intention specifies that if the debtor does not cure "by the date" specified in the notice of intention, the lender may commence foreclosure. The statute does not say "on or before" the date specified in the notice of intention. The question arises as to whether the debtor has the right to cure on the cure date itself in order to avoid foreclosure. The author believes that the terminology of the statute permits the debtor to cure right up to and on the cure date itself. The foreclosure complaint, therefore, should not be filed until the

⁷⁷ Paragraph 20 of the Uniform Covenants-Sale of Note; Change of Loan Servicer. New Jersey-Single Family-Fannie Mae/Freddie Mac Uniform Instrument (Form 3031 1/01).

⁷⁸ 361 N.J. Super. 331, 345, 825 A.2d 566, 575 (App. Div. 2003).

⁷⁹ *In re Rowe*, Bkrcty. E.D. Pa., 110 B.R. 712 (1990).

⁸⁰ *Market Street National Bank of Shamokin v. Staniszewski*, 2 D. & C. 3d 283 (1977).

⁸¹ N.J. Const. Art. VI, § 3.

date to cure specified in the notice of intention has passed. The author believes the drafters would have used the terminology “before the date” specified in the notice of intention if the debtor did not have the right to cure “on” the cure date to avoid commencement foreclosure.

The Uniform Mortgage Instrument⁸² provides “if default is not cured *on or before* the date specified in the notice,” the lender may accelerate payment of all sums secured by the mortgage. (Emphasis supplied.) Thus, where the Uniform mortgage Instrument is used for the form of the residential mortgage, the borrower has an independent⁸³ contractual right to cure the default “on” the cure date.

Paragraph (6) provides that if default is not cured by the date to cure in the notice of intention, “the lender may take steps to terminate the *debtor’s ownership* in the property.” (Emphasis supplied.) Suppose the property is not owned by the debtor, but by another person. This provision in the notice will be inaccurate and confusing to a debtor receiving the notice who is not a title holder, as well as to a non-debtor title holder who is not required by the act to be served with the notice. The Uniform Mortgage Instrument⁸⁴ requires that the “Borrower” (e.g., the mortgagor) receive a pre-acceleration notice.

Consistent with the provisions of Paragraph (5), Paragraph (6) provides that if default is not cured “the lender may take steps to *terminate* the debtor’s ownership in the property” (e.g., the commencement foreclosure). (Emphasis supplied.) Like the Paragraph (5) terminology, no mention is made of the lender’s right to merely “accelerate” payment of the residential mortgage debt. Thus, there is apparently no prohibition under the act against “acceleration” of the residential mortgage debt, merely the institution of “foreclosure” in connection with that acceleration.

Pursuant to §403 of the Pennsylvania statute, a notice of intention was not defective because it did not indicate in what “sequence” the remedies must be taken against the mortgagors if they fail to cure the default.⁸⁵ There is no provision in the New Jersey act comparable to the Pennsylvania statute, 41 P.S. § 403 (c)(5), which requires the notice of intention to set forth “The method or methods by which the debtor’s ownership or possession of the real estate may be terminated.”

(7) that if the lender takes the steps indicated pursuant to paragraph (6) of this subsection c., a debtor shall still have the right to cure the default pursuant to section 5 of this act, but that the debtor shall be responsible for the lender’s court costs and attorneys’ fees in an amount not to exceed that amount permitted pursuant to the Rules Governing the Courts of the State of New Jersey;

Analysis

⁸² NEW JERSEY–Single Family–Fannie Mae/Freddie Mac Uniform Instrument (Form 3031 9/90). Paragraph 21 of the Non-Uniform Covenants–Acceleration; Remedies.

⁸³ N.J.S.A. 2A:50-56e.

⁸⁴ NEW JERSEY–Single Family–Fannie Mae/Freddie Mac Uniform Instrument (Form 3031 1/01). Paragraph 22 of the Non-Uniform Covenants–Acceleration; Remedies.

⁸⁵ *First Savings and Loan Association v. Prinkley*, 38 D. & C. 3d 273 (1985).

Court costs,⁸⁶ which include a statutory allowance of \$50.00,⁸⁷ the filing fee of the complaint (\$175.00), fees for searches, lis pendens filing fees,⁸⁸ publication fees, sheriff's service fees, certified copies of documents,⁸⁹ guardian ad litem fees (\$5.00)⁹⁰ and the like, are customarily taxed on entry of the foreclosure judgment. Attorneys fees in accordance with the rule formula⁹¹ are separately awarded in the foreclosure judgment and included in the total costs set forth on the Tax Cost Sheet and in the writ of execution.

It is not clear whether the act, by virtue of Paragraph (7), authorizes the inclusion of court costs and attorneys fees in the cure amount without a court order or judgment, where the debtor effects a cure after the filing of the foreclosure complaint. It may be necessary until further court clarification to make application to the vicinage chancery judge or Office of Foreclosure where the debtor cures after the filing of the complaint but prior to judgment and plaintiff desires to have court costs and attorneys' fees included in the cure amount.

The uniform instruments⁹² authorize "reasonable attorneys' fees" on cure and reinstatement without court order, since attorneys' fees may be recovered under the uniform instruments for cure and reinstatement on or before the date to cure in the notice of intention (e.g., prior to institution of foreclosure).

Where the lender (or lender's attorney) has asked for the full amount of attorneys fees authorized by the rule but has not earned the full fees, e.g., where default has been cured shortly after the complaint has been filed and plaintiff's attorney has performed no other work, presumably, the debtor could have reduced fees awarded.⁹³

Under the Pennsylvania statute, 41 P.S. § 403, a notice of intention which stated that defendants would have to pay fees and costs without specifying any amounts, and that such figures would be provided on request, was held to be in compliance with the statute.⁹⁴ A notice of intention under the Pennsylvania statute need not set forth the amount of attorney's fees due at each stage of the foreclosure proceeding.⁹⁵

A notice of intention under § 403 of the Pennsylvania statute, 41 P.S. § 403, which contained many defects, including the failure to specify what the debtor's obligations might be regarding attorneys' fees, was held insufficient under the statute.⁹⁶

⁸⁶ R. 4:42-8.

⁸⁷ N.J.S.A. 22A:2-10.

⁸⁸ N.J.S.A. 2A:15-3.

⁸⁹ N.J.S.A. 22A:2-8.

⁹⁰ N.J.S.A. 22A:2-14.

⁹¹ R. 4:42-9(a)(4).

⁹² Paragraph 19 of the Uniform Covenants-Borrower's Right to Reinstate. New Jersey-Single Family-Fannie Mae/Freddie Mac Uniform Instrument (Form 3031 9/01).

⁹³ *Collective Federal Savings and Loan Association v. Toland*, 207 N.J. Super. 157 (Ch. Div. 1985).

⁹⁴ *Piper v. Oaks*, 10 D. & C. 3d 722 (1979).

⁹⁵ *Federal National Mortgage Association v. Ayala*, 8 D. & C. 3d 712 (1978).

⁹⁶ *Charles H. Salmon Building and Loan Association v. Mroz*, 6 D. & C. 3d 59 (1977).

(8) the right, if any, of the debtor to transfer the real estate to another person subject to the security interest and that the transferee may have the right to cure the default as provided in this act, subject to the mortgage documents;

Analysis

Paragraph (8) sets forth the right of the debtor to transfer the mortgaged premises to another person. The language “if any” makes it clear that this provision does not authorize the sale or transfer of ownership by the mortgagor in derogation of the terms and conditions of the mortgage documents. Thus, transfer of ownership without the prior written consent of the lender may, and ordinarily does, constitute a default under the mortgage (e.g., a violation of the due-on-sale clause). The language of the paragraph appears to say that where the debtor transfers ownership in accordance with the mortgage documents, the transferee, e.g., a new owner assuming the mortgage, would also have the right to cure the default in accordance with the act. Of course, the new assuming grantee would also be a debtor under the act.

In *Bank v. Kim*,⁹⁷ the Appellate Division reversed and remanded, dismissing the foreclosure judgment, in part because of plaintiff's failure to comply with this subsection.

A notice of intention under § 403 of the Pennsylvania statute, 41 P.S. § 403, was not defective because it provided that a debtor's house “will” rather than “may” be sold at a sheriff's sale for failure to make mortgage payments.⁹⁸ It has been held⁹⁹ that 41 P.S. § 403 of Pennsylvania's Act 6, which, like the New Jersey statute, provides “The right of the debtor, if any, to transfer the real estate to another person subject to the security interest” did not require that the notice of intention specifically include a statement that there was an absolute right to have a purchaser assume the mortgage.

It has been held that a notice of intention is not deficient under § 403 of the Pennsylvania statute, 41 P.S. § 403, for failing to provide information as to the mortgagor's right to transfer the property, if the mortgagors have already transferred the mortgaged premises.¹⁰⁰ Similarly, a notice of intention was not defective under the Pennsylvania statute because it was sent after acceleration, where a due-on-sale clause was breached permitting the mortgagee to immediately declare all sums due and payable.¹⁰¹ However, these decisions were criticized by the Pennsylvania Supreme Court in *Marra v. Stocker*¹⁰² and presumably no longer constitute good law in that state.

Tenants who obtained title by virtue of a tax sale, and were therefore residential mortgage debtors within the meaning of the Pennsylvania statute and entitled to a notice of intention to foreclose under 41 P.S. § 403, on appeal were permitted to set aside a sheriff's

⁹⁷ 361 N.J. Super. 331, 345, 825 A.2d 566, 575 (App. Div. 2003).

⁹⁸ *Influential Savings & Loan Association v. Valentine*, 25 D. & C.3d 760 (1982).

⁹⁹ *Bankers Trust Co. v. Foust*, 621 A.2d 1054, 424 Pa. Super 89 (1993), *appeal den.*, 631 A.2d 1007, 535 Pa. 635.

¹⁰⁰ *Missionaries Ben. Bd. of Am. Baptist Churches v. Goldsworthy*, 385 A.2d 358, 253 Pa. Super. 321 (1978).

¹⁰¹ *New Home Federal Sav. and Loan Ass'n v. Trunk*, 482 A.2d 625, 333 Pa. Super. 393 (1984).

¹⁰² 15 A.2d 326, 532 Pa. 187, *rev'g* 566 A.2d 320, 389 Pa. Super. 5, (1989).

sale based upon their failure to receive a notice of intention, even though the property was transferred to them in violation of a due-on-sale clause.¹⁰³

(9) that the debtor is advised to seek counsel from an attorney of the debtor's own choosing regarding the debtor's residential mortgage default situation, and that, if the debtor is unable to obtain an attorney, the debtor may communicate with the New Jersey Bar Association or Lawyer Referral Service in the county in which the residential property securing the mortgage loan is located; and that, if unable to afford an attorney, the debtor may communicate with the Legal Services Office in the county in which the property is located;

Analysis

Unlike *R. 4:4-2* (e.g., the summons rule), this paragraph does not require the lender to set forth the actual telephone numbers of the Lawyer Referral Service and Legal Services Office of the county in which the mortgaged premises are located.

In *Bank v. Kim*,¹⁰⁴ the Appellate Division reversed and remanded, dismissing the foreclosure judgment, in part because of plaintiff's failure to comply with this subsection.

(10) the possible availability of financial assistance for curing a default from programs operated by the State or federal government or non-profit organizations, if any, as identified by the Commissioner of Banking. This requirement shall be satisfied by attaching a list of such programs promulgated by the commissioner; and

Analysis

In *Bankers Trust Company of California, N.A. v. Dayan*,¹⁰⁵ the Appellate Division (in an unpublished opinion) affirmed an unreported Chancery Division decision holding that the notice of intention need not contain a "list" of financial assistance programs; that the list a recommendation, not a requirement.

Dayan has now been effectively overruled by the statutory amendment effective January 14, 2006 (L.2003, c. 298, § 1, eff. Jan. 14, 2004) making the list mandatory.

Attorneys are cautioned to check with the Commissioner from time to time for updated lists.

A list promulgated by the Commissioner of Banking is attached to the sample form in Appendix C¹⁰⁶ and also at the end of this section.

¹⁰³ *Marra v. Stocker*, 615 A.2d 326, 532 Pa. 187 (1992).

¹⁰⁴ 361 N.J. Super. 331, 345, 825 A.2d 566, 575 (App. Div. 2003).

¹⁰⁵ A-1673-00T3 (N.J. Super. App. Div. Nov. 28, 2001), *certif. denied*, 791 A.2d 222 (Table), 171 N.J. 44.

¹⁰⁶ See Appendix C.

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In *Bank v. Kim*,¹⁰⁷ the Appellate Division reversed and remanded, dismissing the foreclosure judgment, in part because of plaintiff's failure to comply with this subsection.

Below is the latest list, as of this writing, of programs promulgated by the Commissioner.

American Credit Alliance, Inc.
26 South Warren Street, Trenton, NJ 08608
(609) 393-5400

Atlantic Human Resources, Inc.
1 South New York Avenue, Atlantic City, NJ 08401
(609) 348-4131

Consumer Credit Counseling Service of Central New Jersey
1931 Nottingham Way, Hamilton, NJ 08619
(609) 586-2574

Consumer Credit Counseling Service of New Jersey
185 Ridgedale Avenue, Cedar Knolls, NJ 07927-1812
(973) 267-4324

Fair Housing Council of Northern New Jersey
131 Main Street, Hackensack, NJ 07601
(201) 489-3552

Garden State Consumer Credit Counseling, Inc.
225 Willowbrook Road, Freehold, NJ 07728
1-800-992-4557

Jersey Counseling and Housing Development, Inc.
29 South Blackhorse Pike, Blackwood, NJ 08012
(856) 227-3683

Jersey Counseling and Housing Development, Inc.
1840 South Broadway, Camden, NJ 08104
(856) 541-1000

Mercer County Hispanic Association
200 E. State Street-2nd Floor, Trenton, NJ 08607

¹⁰⁷ 361 *N.J. Super.* 331, 345, 825 A.2d 566, 575 (App. Div. 2003).

(609) 392-2446

Middlesex County Economic Opportunities Corporation
1215 Livingston Avenue, North Brunswick, NJ 08902
(732) 790-3344

Monmouth County Human Services Housing Services Unit
P.O. Box 3000, Freehold, NJ 07728
(732) 431-7998

NJ Citizen Action (main office/financial education center)
744 Broad St., Suite 2080, Newark, NJ 07102
973-643-8800
1-800-NJ-OWNER
1-888-TAXES-11 (free tax preparation assistance)

NJ Citizen Action (Central Jersey)
85 Raritan Ave., Suite 100, Highland Park, NJ 08904
732-246-4772

NJ Citizen Action (South Jersey)
2 Riverside Drive, Suite 362, Camden, NJ 08103
856-966-3091

Ocean Community Economic Action Now, Inc.
22 Hyers Street, Toms River, NJ 08753-0773
(732) 244-2351, ext. 2

Paterson Coalition for Housing, Inc.
262 Main Street, 5th Floor, Paterson, NJ 07505
(973) 684-5998

Paterson Task Force for Community Action, Inc.
155 Ellison Street, Paterson, NJ 07505
(973) 279-2333

Puerto Rican Action Board
Housing Coalition Unit,
90 Jersey Ave., New Brunswick, NJ 08903
(732) 249-9700

Tri-County Community Action Agency, Inc.
110 Cohansey Street, Bridgeton, NJ 08302
(856)451-6330

Urban League for Bergen County

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106 West Palisade Avenue, Englewood, NJ 07631
(201) 568-4988

Urban League for Essex County
508 Central Avenue, Newark, NJ 07101
(973) 624- 9535

Urban League of Union County
288 North Broad Street Elizabeth, NJ 07208
(908)351-7200

Homelessness Prevention Program, New Jersey Department of Community Affairs
(866) 889-6270

*Basic eligibility is limited to: (a) single family owner/occupied dwellings with all those on the deed and mortgage occupying the house; (b) no more than one mortgage or lien encumbrance on the property; (c) no initiated or ongoing bankruptcy. Assistance will be in the form of a loan, and a lien will be placed on the property. The family must document the financial reason for nonpayment. At the time of the eligibility decision, the household must have and document sufficient income to support the household and repay the loan. There is a fee for the credit check and property search.

(11) the name and address of the lender and the telephone number of a representative of the lender whom the debtor may contact if the debtor disagrees with the lender's assertion that a default has occurred or the correctness of the mortgage lender's calculation of the amount required to cure the default.

Analysis

Paragraph 11 requires the notice of intention to set forth the name and address of the lender and the telephone number of the lender's representative whom the debtor may contact. Unlike Paragraph 5 of the notice of intention, *N.J.S.A. 2A:50-56c(5)*, relating to payment or tender of the cure amount, this Paragraph does not require the "name" of the lender's representative be set forth in the notice. This makes sense, because the name of the lender's representative is subject to change.

In *Bank v. Kim*,¹⁰⁸ the Appellate Division reversed and remanded, dismissing the foreclosure judgment, in part because of plaintiff's failure to comply with this subsection.

A notice of intention was not defective under § 403 of the Pennsylvania statute, 41 P.S. § 403, for failure to name the mortgagee so long as it identified the mortgaged premises.¹⁰⁹ However, the Pennsylvania statute does not have a provision comparable to the New Jersey statute requiring that the name of the lender be set forth in the notice of intention.

¹⁰⁸ 361 *N.J. Super.* 331, 345, 825 A.2d 566, 575 (App. Div. 2003).

¹⁰⁹ *Federal National Mortgage Association v. Woody*, 25 D. & C. 3d 604 (1982).

From the standpoint of the lender, paragraph (11) may prove to be the proverbial thorn in the lender's side. It will, in all probability, be ever-present in a majority of debtor defenses under the act.

There is no provision in the act for changing the name, address and telephone number under this paragraph. The telephone number of the lender's representative should be a person working within the organization of the lender, having immediate access to the records of the lender, not the lender's attorney or similar person who may have a conflict acting in this capacity.

Presumably, the statute places a good faith burden on the lender to handle all debtor calls in a reasonable manner, to investigate all reasonable facts and assertions made by the debtor, and, if applicable, to call the debtor back with confirming facts or other information related to the original call by the debtor. The lender's representative should keep a complete record of all telephone conversations with a debtor, including the date, time, content and tone of the discussions. The representative should limit the scope of the telephone conversation to: (a) the fact that a default has occurred and (b) the calculation of the amount due to cure the default. The representative should be careful not to be argumentative and not to give any legal advice.

There is no requirement under the statute that the lender's representative speak to any one other than the debtor. Where the debtor has conveyed title to another, it is not clear under the act what the lender's responsibilities are with respect to a non-debtor title holder under this Paragraph.

(12) that if the lender takes the steps indicated pursuant to paragraph (6) of this subsection, the debtor has the option to participate in the Foreclosure Mediation Program following the filing of a mortgage foreclosure complaint by initiating mediation pursuant to paragraph (2) of subsection a. of section 4 of P.L.2019, c. 64 (C.2A:50-77). Notice of the option to participate in the Foreclosure Mediation Program shall adhere to the requirements of section 3 of P.L.2019, c. 64 (C.2A:50-76) and any court rules, procedures, or guidelines adopted by the Supreme Court.

(13) that the debtor is entitled to housing counseling, at no cost to the debtor, through the Foreclosure Mediation Program established by the New Jersey Judiciary, including information on how to contact the program.

(14) that if the property which is the subject of the mortgage has more than one dwelling unit but less than five, one of which is occupied by the debtor or a member of the debtor's immediate family as the debtor's or member's residence at the time the loan is originated, and is not properly

maintained and meets the necessary conditions for receivership eligibility, established pursuant to section 4 of the “Multifamily Housing Preservation and Receivership Act,” P.L.2003, c. 295 (C.2A:42-117), the residential mortgage lender shall file an order to show cause to appoint a receiver.

(15) that the lender is either licensed in accordance with the “New Jersey Residential Mortgage Lending Act,” sections 1 through 39 of P.L.2009, c. 53 (C.17:11C-51 through C.17:11C-89) or exempt from licensure under the act in accordance with applicable law

§2.08 Notice of Intention—Form¹¹⁰

Via Certified Mail RRR #

Name of Individual Debtor

Street Address

Municipality, State, Zip Code

RE: Lender’s Name

Lender’s Account Number

Address of Mortgaged

Property

NOTICE OF INTENTION TO FORECLOSE

(N.J.S.A. 2A:50-56)

Dear _____:

The *(Note/Bond/Other Obligation)* you executed on *(Date of Obligation)*, which is secured by a mortgage on the above referenced property dated *(Date/Month/Year)* in the principal amount of \$_____ is in default, because we have not received the installments due for the months of (itemize month/year of overdue payments).

RIGHT TO CURE DEFAULT

¹¹⁰ 30 N.J. Prac., Law of Mortgages § 24.15

You may cure your default by paying or tendering \$_____ to us, on or before *(not less than 30 days after mailing of notice)*. This amount includes any other scheduled installment and late charge, which will become due to us during this period, even though such installment may not presently be due. Your payment must be mailed to *(Name/Address/Phone Number Of The Person To Whom Payment Must Be Made)*.

FAILURE TO CURE

If you do not cure the default by _____, we may initiate foreclosure proceedings against you and take steps to terminate your ownership in the property by commencing a foreclosure suit in a court of competent jurisdiction.

RIGHT TO CURE AFTER FORECLOSURE COMMENCED

In the event that we commence a foreclosure action against you, you will still have a right to cure the default prior to entry of the foreclosure judgment pursuant to Section 5 of the “Fair Foreclosure Act;” however, you will be responsible for our court costs and attorneys’ fees in an amount not to exceed that amount permitted pursuant to the Rules Governing the Courts of the State of New Jersey.

RIGHT TO TRANSFER OWNERSHIP

In the event that you transfer the real estate to another person, the transfer is still subject to our rights in the mortgage covering the property. The new owner of the property may have the right to cure the default as provided in the “Fair Foreclosure Act,” subject to the mortgage documents

RIGHT TO SEEK LEGAL COUNSEL

You are advised to seek counsel from an attorney of your own choosing concerning your mortgage default situation. If you are unable to obtain an attorney, you may communicate with the New Jersey Bar Association or Lawyer Referral service in the county in which the mortgaged premises is located. If you are unable to afford an attorney, you may communicate with the Legal Services Office in the county in which the mortgaged premises is located. These numbers are listed on the attached Schedule.

POSSIBLE FINANCIAL ASSISTANCE

DEFAULT; NOTICE OF INTENTION; ACCELERATION; UNIFORM INSTRUMENTS

You are advised that there may be the possible availability of financial assistance for curing a default from programs operated by the State or federal government or non-profit organizations, if any, as identified by the Commissioner of Banking. Section 5 of the “Fair Foreclosure Act” provides that this requirement may be satisfied by attaching a list of such programs promulgated by the Commissioner. Such a list is attached.

[Effective Nov. 1, 2019]

RIGHT TO PARTICIPATE IN THE FORECLOSURE MEDIATION PROGRAM

In the event that we commence a foreclosure action against you, you have the option to participate in the Foreclosure Mediation Program after the filing of a mortgage foreclosure complaint by initiating mediation pursuant to the New Jersey Foreclosure Mediation Act and the New Jersey Court rules.

[Effective August 1, 2019]

RIGHT TO HOUSING COUNSELING AT NO COST

You are entitled to housing counseling, at no cost to you, through the Foreclosure Mediation Program established by the New Jersey Judiciary, including information on how to contact the program.

[Effective August 1, 2019]

APPOINTMENT OF RECEIVER

If the mortgaged property has more than one dwelling unit but less than five, one of which is occupied by you or a member of your immediate family as yours or your member’s residence at the time the loan was originated, and is not properly maintained and meets the necessary conditions for receivership eligibility, under the “Multifamily Housing Preservation and Receivership Act,” we are required to file an order to show cause to appoint a receiver.

[Effective April 29, 2019]

LENDER LICENSING

[Choose the correct option]

We are licensed in accordance with the “New Jersey Residential Mortgage Lending Act.” sections 1 through 39 of P.L.2009, c. 53 (C.17:11C-51 through C.17:11C-89).

or

We are exempt from licensure under the “New Jersey Residential Mortgage Lending Act” in accordance with applicable law.

IF YOU DISAGREE WITH US

If you disagree with our assertion that (1) a default has occurred or (2) the correctness of our calculation of the amount required to cure the default, you may contact *(Name And Address Of The Lender/ Telephone Number Of A Representative Of The Lender)*.

LENDER’S NAME

The following is a list of governmental and non-profit entities that may provide financial assistance or counseling to borrowers in foreclosure. It is recommended that you consult with your attorney.

American Credit Alliance, Inc.

26 South Warren Street

Trenton, NJ 08608

(609) 393-5400

Atlantic Human Resources, Inc.

1 South New York Avenue

Atlantic City, NJ 08401

(609) 348-4131

Citizen Action (Offices statewide)

400 Main Street

Hackensack, NJ 07601

1-800-NJ OWNER

(201) 488-2804

Consumer Credit Counseling Service of Central New Jersey

1931 Nottingham Way

Hamilton, NJ 08619

(609) 586-2574

Consumer Credit Counseling Service of New Jersey

185 Ridgedale Avenue

Cedar Knolls, NJ 07927-1812

(973) 267-4324

Fair Housing Council of Northern New Jersey

131 Main Street

Hackensack, NJ 07601

(201) 489-3552

Garden State Consumer Credit Counseling, Inc.

225 Willowbrook Road

Freehold, NJ 07728

1-800-992-4557

Housing Coalition of Central Jersey

78 New Street

DEFAULT; NOTICE OF INTENTION; ACCELERATION; UNIFORM INSTRUMENTS

New Brunswick, NJ 08901
(732) 249-9700
Jersey Counseling & Housing Development, Inc.
29 South Blackhorse Pike
Blackwood, NJ 08012
(856) 227-3683
Jersey Counseling & Housing Development, Inc.
1840 South Broadway
Camden, NJ 08104
(856) 541-1000
Mercer County Hispanic Association
200 E. State Street—2nd Floor
Trenton, NJ 08607
(609) 392-2446
Middlesex County Economic Opportunities Corporation
1215 Livingston Avenue
North Brunswick, NJ 08902
(732) 790-3344
Monmouth County Human Services
Housing Services Unit
P.O. Box 3000
Freehold, NJ 07728
(732) 431-7998
Ocean Community Economic Action Now, Inc.
22 Hyers Street
Toms River, NJ 08753-0773
(732) 244-2351, ext. 2
Paterson Coalition for Housing, Inc.
262 Main Street, 5th Floor
Paterson, NJ 07505
(973) 684-5998
Paterson Task Force for Community Action, Inc.
155 Ellison Street
Paterson, NJ 07505
(973) 279-2333
Tri-County Community Action Agency, Inc.
110 Cohansey Street
Bridgeton, NJ 08302
(856) 451-6330
Urban League for Bergen County
106 West Palisade Avenue
Englewood, NJ 07631
(201) 568-4988
Urban League for Essex County
508 Central Avenue
Newark, NJ 07101

(973) 624-9535
 Urban League of Union County
 288 North Broad Street
 Elizabeth, NJ 07208
 (908) 351-7200
 Homelessness Prevention Program
 New Jersey Department of Community Affairs
 (866) 889-6270*

* Basic eligibility is limited to: (a) single family owner/occupied dwellings with all those on the deed and mortgage occupying the house; (b) no more than one mortgage or lien encumbrance on the property; (c) no initiated or ongoing bankruptcy. Assistance will be in the form of a loan, and a lien will be placed on the property. The family must document the financial reason for nonpayment. At the time of the eligibility decision, the household must have and document sufficient income to support the household and repay the loan. There is a fee for the credit check and property search.

Editor's Note: If the lender (the original creditor) does not give the notice to the debtor and the notice is sent by the lender's attorney or the lender's servicing agent after default, and the notice constitutes the debt collector's first communication with the consumer, then Fair Debt Collection Practices Act (15 U.S.C.A. Sec. 1601 as amended) notice of debt and Miranda warning should be set forth in the notice of intention as follows:

THE AMOUNT OF THE DEBT IS \$_____. THE NAME OF THE CREDITOR TO WHOM THE DEBT IS OWED IS _____. UNLESS YOU NOTIFY US IN WRITING WITHIN THIRTY (30) DAYS AFTER RECEIPT OF THIS NOTICE THAT THE DEBT, OR ANY PART OF IT, IS DISPUTED, WE WILL ASSUME THAT THE DEBT IS VALID. IF YOU DO NOTIFY US OF A DISPUTE, WE WILL OBTAIN VERIFICATION OF THE DEBT AND MAIL IT TO YOU. ALSO UPON YOUR WRITTEN REQUEST WITHIN THIRTY (30) DAYS, WE WILL PROVIDE YOU WITH THE NAME AND ADDRESS OF THE ORIGINAL CREDITOR IF DIFFERENT FROM THE CURRENT CREDITOR. THIS COMMUNICATION IS AN ATTEMPT TO COLLECT A DEBT AND ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE.

Editor's Note: The notice of intention must be addressed to each debtor separately, and mailed to each debtor in separate envelopes.

§2.09 Service of Notice of Intention; On Whom; Address; When Effective — N.J.S.A. 2A:50-56b

Subsection 4b of the act provides:

b. Notice of intention to take action as specified in subsection a. of this section shall be in writing, sent to the debtor by registered or certified mail, return receipt requested, at the debtor's last known address, and, if different, to the address of the property which

is the subject of the residential mortgage. The notice is deemed to have been effectuated on the date the notice is delivered in person or mailed to the party.

Analysis

The provisions of subsection 4b (*N.J.S.A.* 2A:50-56c) are almost identical to P.S. § 403(b) of Pennsylvania's Act 91.¹¹¹

In *Bank v. Kim*,¹¹² the Appellate Division reversed and remanded, dismissing the foreclosure judgment, in part because there was an absence of proof by plaintiff of the certified or registered mailing of the notice of intention.

And in *Washington Mutual Bank v. Novack*,¹¹³ the Appellate Division affirmed the chancery judge's refusal to vacate a foreclosure action, judgment and sale, even though the judge held that plaintiff had not complied with this section of the statute giving proper notice of its intention to foreclose; but that plaintiff's inability to produce the "green card" postal receipt was the result of defendants' laches, since defendants had not claimed lack of notice and effective service for five years after the foreclosure complaint was filed and two years after entry of judgment. Moreover, defendants had never set forth a meritorious defense to the foreclosure.

In *GE Capital Mortg. Services, Inc. v. Weisman*,¹¹⁴ the Chancery Division held that where a foreclosing lender could not prove that it gave the debtor a notice of intention in compliance with the act, the appropriate remedy was not dismissal of the action, but rather an order directing the lender to send a new notice of intention to the mortgagors within ten days, and giving the mortgagors 30 days from the mailing of the notice of intention to reinstate the mortgage without liability for costs and attorney fees. However, this practice has been called into question. In *EMC Mortgage Corporation v. Chaudhri*, the Appellate Division held that a violation of Fair Foreclosure Act's pre-suit notice requirement cannot be cured by proper mailing during pendency of suit.

Needless to say, plaintiff must retain the original, signed, registered or certified mail, return receipt cards in its file or unclaimed certified mail envelopes, as the case may be. Proof of mailing of the notice of intention need not be filed in the foreclosure action. Compliance need only be alleged in the foreclosure complaint.

Subsection 4b requires that the notice of intention be mailed to the *debtor*. The debtor, however, may not be the mortgagor or owner.

The terminology of the statute "if different" presumably means "if different from the address of the mortgaged premises." Where the last known address of the debtor is not the address of the mortgaged premises dual mailing is required. It is interesting that "ordinary"

¹¹¹ § 403 Notice of Intention to foreclose (b) Notice of intention to take action as specified in subsection (a) of this section shall be in writing, sent to the residential mortgage debtor by registered or certified mail at his last known address and, if different, at the residence which is the subject of the residential mortgage.

¹¹² 361 *N.J. Super.* 331, 345, 825 A.2d 566, 575 (App. Div. 2003).

¹¹³ *Washington Mut. Bank FA v. Novack*, 2006 WL 1687400 (*N.J. Super. Ct. App. Div.* 2006). (Unpublished)

¹¹⁴ 339 *N.J. Super.* 590, 773 A.2d 122 (Ch. Div. 2000).

mailing of the notice of intention is not required under the act. In fact, ordinary mailing is not required under any section of the act (except with respect to the redemption order under subsection 63h).¹¹⁵ This is a mistake. Mortgagors in default notoriously do not accept registered or certified mail and an ordinary mailing requirement would have made great practical sense. Of course, the lender always has the option of utilizing ordinary mail in addition to certified mail.

The uniform instruments¹¹⁶ require mailing of notices by "first class mail *unless applicable law requires use of another method.*" (Emphasis supplied.) Thus, it would appear that the Borrower where the uniform instruments apply would *not* have an independent contractual right to receive the notice of intention by ordinary first class mail.

If the debtor is a husband and wife, and the wife, for example, lives at the mortgaged premises but the husband does not, the lender should mail the notice of intention by registered or certified mail, return receipt requested, in *separate envelopes* to (a) the wife at the mortgaged premises, (b) the husband at his address, and (c) the husband at the mortgaged premises.

If the mortgaged premises consist of several tracts with separate mailing addresses, presumably the notice of intention must be mailed to the debtor at each address and additionally to the debtor's current address if that address is different from the address of the mortgaged premises. If the mortgaged premises consist of vacant land, the author cannot understand why a notice of intention must be mailed to the vacant property if the current address of the debtor is available and known to the lender.

The necessity of ordinary mailing the notice of intention (although it is not a statutory requirement) is underscored by the recent U.S. Supreme Court case *Jones v. Flowers*.¹¹⁷ In *Jones*, involving a tax sale and state notification requirements, the Supreme Court held that when a certified mailed notice is returned unclaimed (there was no regular mailing requirement), "due process" requires the sender to take additional reasonable steps to attempt to provide notice to the property owner, such as, resending the notice by regular mail, posting notice on the front door, or regular mailing to "occupant." The Court noted that "the use of certified mail might make actual notice less likely in some cases."

In *Jones*, the tax sale statute required certified mailing to an address that the property owner was "responsible for keeping up to date"; and the Court did not require that the sender search for a new address.

The *Jones* scenario bears a striking resemblance to service of notices under the Fair Foreclosure Act. Like *Jones*, the New Jersey statute requires certified mailing alone to the debtor's last known address (and additionally to the mortgaged premises if the addresses differ). Pursuant to the *Jones* decision, it is the author's strong recommendation that the notice of intention (and any other Fair Foreclosure Act notices) always be mailed by ordinary or regular mail simultaneously with the registered or certified mailing. Regular mailing (or

¹¹⁵ N.J.S.A. 2A:50-63h(1).

¹¹⁶ Paragraph 14 of the Uniform Covenants–Notices. Single Family–Fannie Mae/Freddie Mac Uniform Instrument (Form 3031 9/90).

¹¹⁷ *Jones v. Flowers*, 126 S.Ct. 1708 (2006).

other reasonable steps to effectuate notice) would now appear to be a constitutional requirement where the certified mail is unclaimed.

The notice of intention is effective on the date the notice is “delivered” in person or “mailed to the party.” Subsection 4b (*N.J.S.A.* 2A:50-56b), however, requires *mailing* in every case. In an unpublished opinion, the Appellate Court stated The statute deems notice “to have been effectuated on the date the notice ... is mailed to the party.”¹¹⁸ Thus, even if the notice is personally delivered it should also be mailed.

The use of the terminology in the statute “mailed to the party” appears inaccurate. The debtor (e.g., the obligor on the bond or maker of the note) need not be a party to the foreclosure action if that person has no title interest in the mortgaged premises; although that person, as debtor, must receive all Fair Foreclosure Act notices under the act.

Under the Pennsylvania statute it has been held ¹¹⁹ that the notice of intention to foreclose may not be personally handed to the debtors and that service by certified or registered mail is required; however, the Pennsylvania statute has no provision comparable to subsection 4b providing that the notice is effective on “the date the notice is delivered in person ... or mailed.” The foreclosure action, however, will not be set aside under Pennsylvania law, even where the notice is not mailed, if the debtors have obviously received it.¹²⁰

The author has long criticized the act’s requirement of a registered or certified mailing alone of the notice of intention. Certainly, such a statutory service provision is not reasonably calculated to give the debtor notice where the certified mail is unclaimed.

The statute requires mailing to the debtor at the debtor’s “last known address.” Presumably, the lender may mail to the debtor’s address in its file. It is assumed that additional inquiry by the lender to ascertain an address or new address is not required. There are, however, no judicial decisions addressing this point.

Under the uniform instruments, the “Borrower” (e.g. the mortgagor) is the person entitled to service of the pre-acceleration notice.¹²¹ Thus, where the provisions of the uniform instruments are applicable, it would appear that the borrower-mortgagor (not the debtor) has an independent ¹²² contractual right to be served with the notice.

It has been held that the failure of a mortgagee to make a good investigation to ascertain the last known address of the debtors pursuant to Pa. R.C.P. No. 3129, 42 Pa. C.S.A. (as to the mailing of the notice of sale), as well as failing to comply with the notice of

¹¹⁸*MTGLQ Investors, LP v. Min Woo Park*, 2018 WL 4761882, *2 (N.J. Super. Ct. App. Div. 2018)

¹¹⁹ *Gettysburg National Bank v. Tracr*, 13 D. & C. 3d 679 (1980).

¹²⁰ *Piper v. Oaks*, 10 D. & C. 3d 722 (1979).

¹²¹ Paragraph 22 of the Non-Uniform Covenants–Acceleration; Remedies. New Jersey–Single Family–Fannie Mae/Freddie Mac Uniform Instrument (Form 3031 1/01).

¹²² *N.J.S.A.* 2A:50-56e.

intention provisions of the Pennsylvania statutes, required that the foreclosure sale be set aside.¹²³

If a lender has no duty of inquiry under the act, the lender can simply mail to the debtor's last known address as reflected in the lender's records and, if different, also to the mortgaged premises.

Under the Pennsylvania statute it has been held that "actual receipt" of the notice of intention by the mortgagor is not required where the mortgagee complies with § 403 by sending the notice to the mortgagors' last known address by certified mail,¹²⁴ especially where the mortgagors deliberately refused receipt¹²⁵ and the mortgagee had subsequently sent the notice by ordinary mail. However, failure to mail the notice of intention to the mortgagors' last known address is a violation of the Pennsylvania statute, which is substantially similar to the New Jersey statute.¹²⁶ Judgment will be stricken under Pennsylvania law where the notice of intention to foreclose under § 403 is sent to the wrong address.¹²⁷

If the lender's records, however, reflect the death of a debtor and the identity of a personal representative, e.g., executor or administrator, and the heirs or devisees of the debtor, the lender should unquestionably mail the notice of intention to such persons. The personal representative, in all probability, is a debtor within the meaning of the act, and the decedent's heirs or devisees may have personal liability to the extent of property inherited or received under decedent's will, which will presumably make them debtors. The cardinal rule here is overkill. It is always better to mail to too many persons and addresses than too few. Common sense is an important consideration here.

If the lender (or lender's attorney) is aware of possible additional addresses for a debtor, no matter what the source, it is always safer to mail to those addresses as well.

§2.10 Who Should Mail the Notice of Intention: Attorney or Lender, Whither the Difference?

The question of who can mail the notice of intention is an important one. Taken literally, only the "lender" can mail the notice of intention. Subsection 4a (*N.J.S.A.* 2A:50-56a) provides "the *residential mortgage lender* shall give the residential mortgage debtor notice of such intention." (Emphasis supplied.) However, the entire act continuously refers to the "lender" and not to the lender's "attorney" or "agent." This subsection also refers to the lender as commencing the foreclosure action. Does this mean that the lender's attorney cannot file the foreclosure complaint? Obviously, the term "lender" as used in the act is unquestionably meant to include the "lender's attorney."

¹²³ *In re Sharp*, 24 B.R. 817 (1982).

¹²⁴ *First Federal Savings & Loan Association of Wilkes-Barre v. Van Why*, 29 D. & C. 3d 675 (1983).

¹²⁵ *Second Federal S & L v. Brennan*, 598 A.2d 997, 409 Pa. Super. 581 (Super. 1991).

¹²⁶ *In re Smith*, C.A. 3(Pa.), 866 F.2d 576 (1989).

¹²⁷ *Olyphant v. Mantyka*, 15 D. & C. 4th 97 (1992).

In the first reported case under the Fair Foreclosure Act, *Federal National Mortgage Association v. Bracero*,¹²⁸ the court stated:

We find that although the statute states that the response is to be mailed to the lender, the response should more appropriately be sent to counsel for the lender. *Principles of agency and efficiency mandate this result.*

The legislature could not have intended to abrogate agency principals. There is no dispute that plaintiff's attorneys are clearly plaintiff's agents for purposes of the foreclosure action and notice to the attorney is equivalent to notice to the lender. (Emphasis supplied.)

The terminology in *Bracero*, "that plaintiff's attorneys are clearly plaintiff's agent's for purposes of the foreclosure action," makes it clear that the court was referring to principles of agency within the context of a foreclosure "action." As of the date of the mailing of the notice of intention, there is technically no foreclosure action. The author believes, however, that "principles of agency and efficiency" as set forth in *Bracero* authorize the mailing of the notice of intention by the lender's attorney. In *Bracero*, the court implicitly approved of the mailing of the 14 day notice of intention by the lender's attorney, while expressly requiring that the debtor's response be sent to the lender's attorney.

The author cannot imagine why the act would prohibit the lender's legal representative from mailing the notice of intention to the debtor. Presumably, the act permits either lender or lender's attorney to mail the notice of intention. However, in terms of actual practice, because the information contained in the notice of intention must be supplied by the lender, and because all responses to the notice must go to the lender, it is far more practical for the lender to prepare and mail the notice. This is the preferred practice.

The only possible downside to a lender's attorney mailing the notice of intention is that the attorney must not forget to include the required Fair Debt Collection Practices Act *warning* and *debt validation notice* in the notice of intention. Failure to do this may subject the attorney to civil liability.¹²⁹

With respect to New Jersey's Tax Sale Law, *N.J.S.A.* 54:5-97.1 requires "plaintiff" to mail a written notice of commencement of the action to persons entitled to redeem, in order to recover search fees, counsel fees and certified mailing fees. It has been the almost universal practice for plaintiff's attorney, not plaintiff, to effectuate this mailing.

¹²⁸ 297 *N.J. Super.* 105 (Ch. Div. 1996).

¹²⁹ 15 *U.S.C.* § 1692k.

§2.11 Mailing (Separate Envelopes)

The notice of intention should be mailed to each debtor in a separate ¹³⁰ envelope, even if the debtors are husband and wife living at the same address. This is a long-standing equity rule. Mailed service to a husband and wife in a single envelope is not good service on either person.

Mailing a notice of intention to both mortgagors in a single envelope is a violation of the Pennsylvania's Act 6, 41 P.S. § 403,¹³¹ with provisions substantially similar to New Jersey's Fair Foreclosure Act, *N.J.S.A. 2A:50-53 et seq.*

§2.12 Duration (Notice of Intention)

Previously there was no maximum time limit under the act as to when the notice of intention to foreclose may be mailed to the debtor prior to the filing of the foreclosure complaint. In *Washington Mutual Bank FA v. Shlafer*,¹³² the issue of the duration of the notice of intention was addressed by the Chancery Division. The debtor-mortgagors argued that since the foreclosure was commenced some ten months after the notice of intention was sent to them the notice was stale or ineffective. The Chancery Division, however, refused to read such a requirement into the statute and declined "to stray into the purview of the legislature or the civil practice committee." There is no maximum time period set forth in the statute, after which the notice of intention becomes stale or ineffective and another notice is required.

However, *N.J.S.A. 2A:50-56a* was amended, effective June 24, 2019, to set forth a maximum amount of time when the notice intention to foreclose must be mailed to the debtor prior to the filing of the foreclosure complaint. *N.J.S.A. 2A:50-56a* now requires that the residential mortgage lender shall give a notice of intention at least 30 days, **but not more than 180 days**, in advance of such action. In light of this change, the notice cannot be mailed more that 180 days prior to the commencement of the action.

N.J.S.A. 2A:50-56g requires that it more than 180 days have elapsed since the date the notice required pursuant to this section is sent, and any foreclosure or other legal action to take possession of the residential property which is the subject of the mortgage has not yet been commenced, the lender shall send a new written notice at least 30 days, but not more than 180 days, in advance of that action.

¹³⁰ *Henry C. McCandless, Inc. v. Schaffer*, 103 N.J. Eq. 170, 142 A. 566.

¹³¹ *Central Savings & Loan Association v. Reckart*, 15 D. & C. 4th 105 (1992), citing *Ertel v. Seitzer*, 31 D. & C3d 332 (1982). However, the complaint will not be dismissed where non-receipt is not alleged and the mortgagors will be given 30 days to cure the default.

¹³² *Washington Mut. Bank, FA v. Shlafer*, 2005 WL 2385947 (N.J. Super. Ct. Ch. Div. 2005). (Unpublished)

§2.13 Computing the Thirty Day Period

Even though the 30 day period is statutory and not controlled by *court rule*, it is the author's opinion that the period should be counted in accordance with the *ordinary computation of time* rule set forth in R. 1:3-3 — *the first day out, last day in formula*. Thus, if the notice is mailed to the debtor on October 1, 2007, you start the count on October 2nd and 30 days takes you to October 31st, a Wednesday, and you could file the complaint on November 1, 2007.

R.1:3-3 specifies that where the last day of the period falls on a weekend or legal holiday, you must go to the next day which is not a weekend or legal holiday.

You must always give the debtor, at a minimum, the full 30 days to cure the default. The complaint cannot be filed until the next day — the 31st day.

Of course, nothing would prevent a lender from giving the debtor a longer period, such as 35 or 40 days for example to cure the default.

The filing of the complaint must be coordinated with the cure date. You cannot file the complaint until the day after the date to cure in the notice. Presumably, the debtor may cure the default on the last day of the period, the cure date. If you have already filed the complaint, your filing is premature.

§2.14 Necessity of Adding Three Additional Days For Mailing

Because the 30 day requirement for mailing of the notice of intention prior to commencement of foreclosure is not an “ordinary” mailing requirement, and because the requirement is “statutory” and not required by “rule” or “court order,” R. 1:3-3 is inapplicable and three extra days are not required.

§2.15 Service of Notice of Intention; Independent of Any Other Duty to Give Notice or Right or Remedy

Subsection 4e (*N.J.S.A. 2A:50-56e*) provides:

e. The duty of the lender under this section to serve notice of intention to foreclose is independent of any other duty to give notice under the common law, principles of equity, State or federal statute, or rule of court and of any other right or remedy the debtor may have as a result of the failure to give such notice.

Subsection 4e is an extremely important statutory provision, although at first glance it appears redundant and unnecessary. The purpose of subsection 4e is twofold: First, it clearly provides that service of a notice of intention under the Fair Foreclosure Act is an independent duty of the lender, e.g., that sending a similar notice under another state or federal law, rule of court, or other legal or equitable requirement will not suffice. And second, since the notice of intention is an independent requirement, it is not intended to be *exclusive* and cannot act as a substitute for any other notice a lender may be required to give under any other law or legal requirement.

Thus, the subsection makes it clear that the rights afforded by the notice of intention are “cumulative” and are intended to be given to the debtor in addition to other rights to which the debtor may be entitled. This accords with the view of the authors¹³³ of the leading treatise on mortgages in the United States that legislation regulating acceleration is ordinarily not exclusive and may be supplemented by more protective contractual rights in the mortgage documents themselves.

The language of subsection 4e refers to the duty of the lender as being “independent of any other duty to give notice under the common law, principles of equity, State or federal statute, or rule of court.” What about a lender’s “contractual” or “legal” obligation to give notice by virtue of the mortgage documents, such as the pre-acceleration notice required by the uniform instruments?

The terms of the statute do not directly address this point. Presumably, this is addressed indirectly in the statute by reference to the “common law” and “principles of equity.” Certainly, the covenants and agreements in a mortgage give rise to legal obligations on the part of the mortgagee which are part of the “common law” of New Jersey. Non-statutory “contract” law, by itself, is a species of the common law.¹³⁴ And certainly “equitable principles” would dictate that failure by a mortgagee to give a pre-acceleration notice to a mortgagor pursuant to the provisions of the mortgage would result in denial by a court of foreclosure.

Thus, subsection 4e specifically recognizes the obligation of a lender to give notice pursuant to the provisions of the mortgage documents, notwithstanding the notice required by the Fair Foreclosure Act.

In any event, the last part of the subsection, which reads “and of any other right or remedy the debtor may have as a result of the failure to give such notice,” bears on this, as presumably the debtor, by virtue of the failure of the lender to give a required contractual notice, would have a remedy, e.g., a legal defense to “acceleration” or “commencement” of foreclosure or both.

Although the subsection does not specifically so provide, it is assumed that the notice referred to in the subsection is a notice required to be given by lender to “debtor” and not another person, as the Fair Foreclosure Act only requires service of the notice of intention on the debtor. Thus, subsection 4e does not speak to notices that may be given to a non-debtor mortgagor, title holder or the like.

A similar provision with respect to the right to cure is contained in subsection 5f of the act (*N.J.S.A.* 2A:50-57f) and contains substantially the same language as subsection 4e.

The duty of a lender to give “separate” notices to the debtor under both the uniform instruments and the Fair Foreclosure Act is addressed in a subsequent section.

¹³³ See 1 Nelson and Whitman, *REAL ESTATE FINANCE LAW* 572 (3rd. ed. 1993), where the author’s in discussing the importance of the uniform instruments state: “Thus vast numbers of mortgagors in states that have not enacted legislation regulating acceleration, or whose legislation or case law is less restrictive than the requirements of the form [FNMA–FHLMC form], will nevertheless have substantial protection against abuse of the acceleration process.”

¹³⁴ *BLACK’S LAW DICTIONARY* 276 (“Common law”) (6th ed. 1990).

§2.16 Notice of Intention (Not to be Combined with Other Notices)

Because service of a notice of intention to foreclose on the debtor under the Fair Foreclosure Act is independent of any other duty the lender may have to give notice to the debtor (*N.J.S.A.* 2A:50-56e), the notice of intention should not be *combined* with any other notice required to be given by lender to debtor, or served in the *same envelope* with any other notice. The combining of notices may serve to confuse the debtor and run afoul of the subsection 4c (*N.J.S.A.* 2A:50-56c) requirement that the notice “clearly and conspicuously state in a manner calculated to make the debtor aware of the situation” the eleven particulars required to be included in the notice.

Separate 30 day notices, however, which are required to be sent to the debtor prior to the filing of a foreclosure action under Pennsylvania’s Act 6, 41 *P.S.* § 403(a), and Act 91, 35 *P.S.* § 1680.403c, may be sent simultaneously.¹³⁵

§2.17 Dual Notices; Necessity of Sending (FNMA-FHLMC) Pre-Acceleration Notice

Because the notice of intention under the Fair Foreclosure Act is “more protective” of the rights of the debtor — that is, it provides equivalent or better rights than the notice required by the FNMA-FHLMC (“FannieMae/FreddieMac”) uniform instruments with respect to pre-acceleration notification and the ability of the mortgagor to defeat acceleration — there is ample justification, in the author’s opinion, for a lender where the Fair Foreclosure Act applies not to give a separate pre-acceleration notice to the mortgagor pursuant to the uniform instruments.¹³⁶ In fact, for a lender to give such a notice, in addition to the notice of intention required by the Fair Foreclosure Act, would appear to be both meaningless and confusing to the debtor.

Under the uniform instruments, the “Borrower” (e.g., the mortgagor) is the person entitled to service of the pre-acceleration notice.¹³⁷ Thus, where the provisions of the uniform instruments are applicable, the mortgagor (not the debtor) has an independent¹³⁸ contractual right to be served with the notice of intention to foreclose.

¹³⁵ *Dauphin Deposit Bank and Trust Co. v. Crowe*, 19 D. & C. 4th 92 (1993).

¹³⁶ In certain instances, the provisions of the uniform instruments may be more protective of the mortgagor’s rights with respect to pre-acceleration notification and the ability to defeat acceleration: First, there is no 18 month limitation on the Borrower’s right to cure under the uniform instruments, whereas there is such a limitation under the Fair Foreclosure Act, *N.J.S.A.* 2A:50-57a. Second, notices and rights under the uniform instruments run in favor of the Borrower (the mortgagor), whereas such notices and rights under the Fair Foreclosure Act run only to the “debtor” and the debtor in certain instances may not be Third, the uniform instruments require a pre-acceleration notice to the borrower for breach of any mortgage covenant, not just default under the obligation. However, this does not change the general principle, in the author’s opinion, that the notice of intention required by the Fair Foreclosure Act is far more protective of the debtor’s rights than the notice required by the uniform instruments.

¹³⁷ Paragraph 21 of the Non-Uniform Covenants–Acceleration; Remedies. New Jersey–Single Family–Fannie Mae/Freddie Mac Uniform Instrument (Form 3031 9/90).

¹³⁸ *N.J.S.A.* 2A:50-56e.

A recent version of the uniform mortgage instrument¹³⁹ provides: “If any notice required by this Security Instrument is also required under Applicable Law, the Applicable Law requirement will satisfy the corresponding requirement under this Security Instrument.” This uniform mortgage instrument also provides that the pre-acceleration notice to be given also contain “(f) any other disclosure required under the Fair Foreclosure Act, codified under § 2A:50-53 *et seq.* of the New Jersey Statutes, or other Applicable Law.”¹⁴⁰

Thus, where both the Fair Foreclosure Act and uniform instruments are applicable, dual notices are not required.

§2.18 Multiple Mortgages; Separate Notices of Intention

It is the author’s opinion that a separate notice of intention should be mailed to each debtor, in a separate envelope, for each mortgage being foreclosed on the “same” property. While this is not addressed by the act, any other procedure may give rise to confusion and subject the lender to potential defenses in a foreclosure action.

There are at least three basic scenarios here: first, the situation where the lender holds multiple residential mortgages in default (e.g., a first and second) with no intervening encumbrances; second, where the lender holds multiple residential mortgages in default (e.g., a first and third), with intervening encumbrances; and third, where the lender holds multiple residential mortgages (e.g., a first and second for example), where the subordinate mortgage or mortgages are not in default.

(a) Multiple mortgages in default — no intervening liens

If the lender is foreclosing a first and second mortgage, for example, it is the author’s opinion that separate notices should be served on the debtor for each mortgage. The notice for the junior should make it clear, however, that curing the junior will not prevent foreclosure unless the senior is cured.

This is the safe approach. While a lender may claim that it is merely foreclosing the first and that the second is a subsequent encumbrance in the action, it is still safer to treat both mortgages as being foreclosed together and serving two notices.

Both mortgages should be set forth in the same count. Utilizing separate counts for mortgages on the same property is improper practice.

(b) Multiple mortgages — Subordinate Mortgage Not in Default

Where the lender holds a senior and junior mortgage and only the senior is in default, the lender should set up both mortgages in the same count and foreclose them together as above.. The act does not address this situation and appears to assume that all mortgages being foreclosed must necessarily be in default. This, of course, is not true.

Obviously, the right to cure is inapplicable with respect to a lender’s junior mortgage which is not in default. It is not clear what the lender’s responsibilities are under the act in this

¹³⁹ New JerseyCSingle FamilyCFannie Mae/Freddie Mac UNIFORM INSTRUMENT Form 3031 1/01 (Para. 15. Notices).

¹⁴⁰ New Jersey- Single Family-Fannie Mae/Freddie Mac UNIFORM INSTRUMENT Form 3031 1/01 (Para. 22. Acceleration; Remedies).

instance. It is the author's suggestion that the lender give the debtor a notice of intention for the junior mortgage not in default. Of course, the notice of intention in this instance cannot specify a default or an amount to cure. The notice should merely advise the debtor that the notice is served for informational purposes because, although the mortgage is not presently in default, by law it may be pled as a subordinate lien in the foreclosure complaint.

(c) Multiple Mortgages in default — Intervening liens

If the lender is foreclosing a first and third mortgage, for example, separate notices need not be served. It is clear that plaintiff's position with respect to the third mortgage is that of a subsequent encumbrancer in its own action. As such, plaintiff's remedy with respect to the third is a claim for surplus funds if any bare generated by the sale. Technically, the third is being cut-off not foreclosed; and the foreclosure judgment will not refer to this mortgage or award counsel fees with respect to it.

Of course, nothing would prevent the lender from sending a notice of intention with respect to the third. The notice should make it clear, however, that curing the junior will not prevent foreclosure unless the senior is cured.

(d) Miscellaneous

There are, of course, an infinite number of variations possible on this theme. There may be a single mortgage securing multiple obligations. In this instance, one notice should be used.

Or there may be several mortgages on the same property being foreclosed together securing a single obligation. In this instance, separate notices should be used, but each notice should contain a note or proviso that tender or payment of the amount required to cure, by the cure date, will cure all mortgages (specifying the particular mortgages involved).

§2.19 Defective Notice of Intention; Failure of Proof of Mailing — GE Capital Doctrine

Where the notice of intention is ineffective for any reason — such as the form, content or manner of service — and the foreclosure complaint has already been filed, according to a literal reading of the act a new notice of intention must be served on the debtor, the old action dismissed and a “new action” instituted. An amended complaint cannot be used in this situation, the rationale being that the lender cannot amend a void action and the filing of a foreclosure complaint based upon a defective notice of intention constitutes a void complaint.

This also follows from the language of subsection 4a (*N.J.S.A.* 2A:50-56a), which requires that before any residential mortgage lender may “commence” any foreclosure it must first serve a notice of intention. The filing of an amended complaint would not technically constitute the “commencement” of a new action and would not appear to satisfy the literal requirements of the act.

In *GE Capital Mortg. Services, Inc. v. Weisman*,¹⁴¹ held that where a foreclosing lender could not prove that it gave the debtor a notice of intention in compliance with the act, the appropriate remedy was not dismissal of the action, but rather an order directing the lender to send a new notice of intention within ten days, with mortgagors entitled to 30 days from the

¹⁴¹ 339 *N.J. Super.* 590, 773 A.2d 122 (Ch. Div. 2000).

mailing of the notice of intention during which they could reinstate the mortgage without liability for costs and attorney fees.

In *GE Capital* plaintiff was unable to produce: (a) a postal service certified mail receipt indicating that plaintiff sent the notice of intention via certified mail; or (b) a signed certified mail return receipt card verifying that defendants received the notice of intention or (c) a certification of mailing signed by a bank employee who mailed the notice of intention, contemporaneously memorializing that fact. The Judge Clyne stated: “we are not dealing with either total noncompliance with the FFA’s NOI requirements, or bad faith on the part of the plaintiff, but merely plaintiff’s inability to locate the records demonstrating service.”¹⁴²

In *EMC Mortgage Corporation v. Chaudhri*,¹⁴³ the Appellate Court disapproved of *GE Capital*. The Appellate Court stated:

"We disapprove of the remedy employed in that case, and reinforce the statutory mandate that lenders send proper notice, by registered or certified mail, at least thirty days prior to the initiation of a foreclosure action. *N.J.S.A. 2A:50–56(a)*. The Legislature specifically intended that lenders faithfully comply with the FFA provisions and articulated that “[w]aivers by the debtor of rights provided pursuant to [the FFA] are against public policy, unlawful, and void, unless given after default pursuant to a workout agreement in a separate written document signed by the debtor.” *N.J.S.A. 2A:50–61*. Accordingly, courts are not free to deviate from the unambiguous statute"

The Appellate Court held that a violation of Fair Foreclosure Act's pre-suit notice requirement cannot be cured by proper mailing during pendency of suit

In *US Bank Nat. Ass'n v. Guillaume*, the New Jersey Supreme Court held that the Fair Foreclosure Act, N.J.S.A. 2A:50-56(c)(11), requires that the notice of intention include “the name and address of the actual lender,” in addition to “contact information for any loan servicer.”¹⁴⁴ In *Guillaume*, the Court held that the FFA requires that a notice of intention include the name and address of the actual lender, in addition to contact information for any loan servicer who is charged by the lender with the responsibility to accept mortgage payments and/or negotiate a resolution of the dispute between the lender and the homeowner.

The Court reviewed the notice of intention applying the equitable doctrine of substantial compliance, considering the following factors:

“(1) the lack of prejudice to the defending party; (2) a series of steps taken to comply with the statute involved; (3) a general compliance with the purpose of the statute; (4) a reasonable notice of petitioner's claim; (5) a reasonable explanation why there was not a strict compliance with the statute."

The Court concluded the notice of intention listing the loan servicer instead of the

¹⁴² *Id.* at 592, 773 A.2d 123.

¹⁴³ *EMC Mortg. Corp v. Chaudhri*, 400 N.J. Super. 126, 946 A.2d 578, 587 (App. Div. 2008).

¹⁴⁴ *US Bank Nat. Ass'n v. Guillaume*, 209 N.J. 449, 38 A.3d 570 (2012).

lender did not achieve substantial compliance with N.J.S.A. 2A:50-56(c)(11).¹⁴⁵

Dealing with remedy was appropriate for a violation of N.J.S.A. 2A:50-56(c)(11). the Court held that dismissal without prejudice is not the exclusive remedy for the service of a notice of intention that does not satisfy N.J.S.A. 2A:50-56(c)(11). A trial court adjudicating a foreclosure complaint in which the notice of intention does not comply with N.J.S.A. 2A:50-56(c)(11) may dismiss the action without prejudice, order the service of a corrected notice, or impose another remedy appropriate to the circumstances of the case.¹⁴⁶ The Court stated, The Legislature did not expressly require dismissal, or otherwise prescribe a remedy, in the event that a notice of intention is timely served but is noncompliant with one or more of the eleven subsections set forth in N.J.S.A. 2A:50-56(c).¹⁴⁷

§2.20 Partial Payment (Resending Notice Not Required)

Where a mortgagee has properly sent a notice of intention to the debtor, and the debtor pays less than the amount necessary to cure, either before or after the date to cure, there is no cure within the meaning of the act and the mortgagee should be able to institute or continue foreclosure without interruption. After all, the purpose of the notice of intention and cure provisions under the act is to set forth with specificity just what sum is necessary to cure the default. Anything less than that sum, absent an express agreement between the parties, should have no effect on the lender's right to institute or continue foreclosure; otherwise the cure provisions of the act would have no purpose.

It is the law in New Jersey that a default for failure to pay taxes¹⁴⁸ or insurance¹⁴⁹ may be cured prior to the filing of the foreclosure complaint. The act would not appear to adversely affect this principle, as in these instances the notice of intention would set forth the amount of such taxes or insurance in arrears as the amount required to cure. Similarly, failure by the mortgagor to establish an escrow fund for taxes and insurance pursuant to the provisions of the mortgage¹⁵⁰ has been held not to justify acceleration and foreclosure.

Section 17 (N.J.S.A. 2A:50-67) of the act provides: "In the absence of an express agreement between the parties to the contrary, a debtor may tender, and a lender may accept, partial payment of any sum owing and due without either party waiving any rights."

In Pennsylvania, it has been held¹⁵¹ that acceptance of additional payments from the mortgagor after default does not automatically trigger a duty on the part of the mortgagee to mail out a second notice of the mortgagor's possible right to relief under the Pennsylvania

¹⁴⁵ *Deutsche Bank National Trust Company Americas as Trustee for Mortgage Asset-Backed Pass-Through Certificates, Series 2006-Q09 v. Spinelli*, N.J.Super.A.D., October 16, 2018

¹⁴⁶ *US Bank Nat. Ass'n v. Guillaume*, 209 N.J. 449, 38 A.3d 570 (2012).

¹⁴⁷ *Id.*

¹⁴⁸ 30 N.J. PRAC. (Weinstein) Sec. 23.8 (2d ed. 2000).

¹⁴⁹ *Kaminski v. London Pub., Inc.*, 123 N.J. Super. 112, 301 A.2d 769 (App. Div. 1973).

¹⁵⁰ *Sanguigni v. Sanguigni*, 197 N.J. Super. 505, 485 A.2d. 332 (Ch. Div. 1984).

¹⁵¹ *In re: Miller*, 90 B.R. 762 (Bkrtcy. E.D. Pa. 1988).

Homeowners' Farming Mortgage Assistance Act, 35 P.S. § 1680.401c *et seq.*. The case against a second notice is even stronger in New Jersey because Pennsylvania, unlike New Jersey, does not have a statutory provision comparable to section 17, *N.J.S.A.* 2A:50-67.

§2.21 Corrective Notice of Intention (Resending Notice)

There is no provision in the act for a “corrective” or “amended” notice. The act does not address this situation. Where a notice of intention is defective and an action has not yet been instituted, the lender has no alternative but to serve new notice containing the correct information with a letter of explanation and to proceed accordingly.

However, as of January 15, 2014, pursuant to the Notice to Bar, lender-plaintiffs may still seek authorization to correct Notices of Intention to Foreclose by filing motions in individual actions in the appropriate counties of venue.

NOTICE TO THE BAR RESIDENTIAL MORTGAGE FORECLOSURES — CONCLUSION OF ORDER-TO-SHOW-CAUSE PROCEDURE FOR SERVING CORRECTED NOTICES OF INTENTION TO FORECLOSE (IMPLEMENTATION OF *GUILLAUME* DECISION)

In furtherance of its decision in *U.S. Bank National Association v. Guillaume*, 209 N.J. 449 (2012), the Supreme Court issued an order on April 4, 2012 authorizing General Equity Presiding Judges Margaret Mary McVeigh (Passaic) and Paul Innes (Mercer) “to entertain summary actions by Orders to Show Cause as to why plaintiffs in any uncontested residential mortgage foreclosure actions filed on or before February 27, 2012 [*the date of the Guillaume decision*] in which final judgment has not yet been entered [*and*] who served Notices of Intention to Foreclose that are deficient under the Fair Foreclosure Act, *N.J.S.A.* 2A:50-56, should not be allowed to serve corrected Notices of Intention to Foreclose on defendant mortgagors and/or parties obligated on the debt.”

The April 4, 2012 order allowed lender-plaintiffs to file summary actions to seek wholesale correction of deficient Notices of Intent to Foreclose across their entire portfolio of foreclosure actions. As of today, in the more than seventeen months that have elapsed since the date of the order, 46 summary actions have been filed, encompassing 31,484 individual foreclosure actions to correct Notices of Intent to Foreclose.

On the recommendation of the General Equity Presiding Judges, the Supreme Court has concluded that sufficient time has elapsed for those lender-plaintiffs who desire to make use of this order to show cause procedure to do so. Accordingly, the Court on November 6, 2013 issued the attached order rescinding the provisions of the April 4, 2012 order, effective January 15, 2014. Under the terms of the order, those applications that are pending as of January 15, 2014 will be permitted to be completed. After January 15, 2014, lender-plaintiffs may still seek authorization to correct Notices of Intention to Foreclose by filing motions in individual actions in the appropriate counties of venue.

Questions concerning this order may be directed to Kristi Jasberg Robinson, Chief, Civil

Practice Liaison, at (609) 292-8470 or Kristi.Robinson@judiciary.state.nj.us.

Glenn A. Grant
 Glenn A. Grant, J.A.D.
 Acting Administrative Director of the Courts
 Dated: November 15, 2013

§2.22 Impossibility of Cure; Matured Debt; (Necessity of Notice of Intention)

The act does not address situations where the default cannot be cured. The act — by requiring that the debtor “perform any other obligation which the debtor would have been bound to perform in the absence of default” as a condition of cure and reinstatement ¹⁵² — appears to assume that any default can be cured, which is not necessarily the case.

Since there is no exception in the act for a default which cannot be cured, the act apparently illogically requires that a notice of intention--promising cure and reinstatement--be served on the debtor.

(a) Impossibility of Cure

The uniform mortgage instrument ¹⁵³ has covenants dealing with occupancy, preservation, maintenance and protection of the property, superior liens, ¹⁵⁴ forfeiture actions ¹⁵⁵ and “legal proceedings that may significantly affect Lender’s rights.” ¹⁵⁶ These covenants are structured in a flexible manner, so as not to precipitate an automatic impossibility of cure situation for the Borrower.

The only clear-cut examples under the uniform mortgage instrument where an automatic impossibility of cure situation exists is (1) for violation of the due-on-sale clause and (2) where the obligation has matured. Due-on-sale clauses are addressed in the next section.

¹⁵² *N.J.S.A.* 2A:50-57b(2).

¹⁵³ NEW JERSEY—Single Family—Fannie Mae/Freddie Mac UNIFORM INSTRUMENT (Form 3031 1/01).

¹⁵⁴ Paragraph 4 of the Uniform Covenants—Charges; Liens; New Jersey—Single Family—Fannie Mae/Freddie Mac Uniform Instrument (Form 3031 1/01) provides in part as follows: “Borrower shall promptly discharge any lien which has priority over this Security Instrument unless Borrower: (a) agrees in writing to the payment of the obligation secured by the lien in a manner acceptable to Lender; (b) contests in good faith the lien by, or defends against enforcement of the lien in, legal proceedings which in the Lender’s opinion operate to prevent the enforcement of the lien; or (c) secures from the holder of the lien an agreement satisfactory to Lender subordinating the lien to this Security Instrument. If Lender determines that any part of the Property is subject to a lien which may attain priority over this Security Instrument, Lender may give Borrower a notice identifying the lien. Borrower shall satisfy the lien or take one or more of the actions set forth above within 10 days of the date on which that notice is given.”

¹⁵⁵ Paragraph 9 of the Uniform Covenants—Occupancy, Preservation, Maintenance and Protection of the Property; New Jersey—Single Family—Fannie Mae/Freddie Mac Uniform Instrument (Form 3031 1/01)

¹⁵⁶ Paragraph 9 of the Uniform Covenants—Protection of Lender’s Rights in the Property and Rights Under this Security Instrument. New Jersey—Single Family—Fannie Mae/Freddie Mac Uniform Instrument (Form 3031 1/01).

Where the borrower has given false or inaccurate information to the lender during the loan process or where the borrower has not occupied the property as a principal residence for one year in accordance with the terms of the uniform mortgage instrument,¹⁵⁷ it is not clear whether a default for breach of these covenants can be cured or whether default is irrevocable.

As previously noted, in situations where default cannot be cured, it would appear that the lender must still give the residential mortgage debtor a notice of intention to foreclose under the act prior to filing of the foreclosure complaint, because no exception is provided in the act for this type of default. In such cases, the notice of intention should set forth, as the amount required to cure under paragraph (4) of the notice, *N.J.S.A.* 2A:50-56c(4), the entire principal amount due under the obligation and mortgage with contract rate interest computed to the cure date set forth in the notice, together with other advances, charges and the like which the lender may lawfully add to the amount due under the mortgage as of the cure date in the notice.

This, of course, may be confusing to the debtor who, by virtue of the boilerplate language contained in the notice of intention, will believe that he or she also has the right to cure the default.

The Pennsylvania Supreme Court in *Marra v. Stocker*¹⁵⁸ has ruled that a notice of intention must be given to the debtor, even for a non-monetary default—i.e., the violation of a due on sale clause--which cannot be cured.

In *Marra v. Stocker*,¹⁵⁹ the Pennsylvania Supreme Court set aside a sheriff's sale and reversed the trial court holding which provided that purchasers of property at a tax upset sale were not entitled, as successor owners of the property, to a 30-day notice of intention to foreclose under Act 6, 41 *P.A.* § 403. The Supreme Court in its opinion criticized two Superior Court cases, *Ministers & Missionaries Benefit Board v. Goldsworthy*¹⁶⁰ and *New Home Federal Savings & Loan v. Trunk*.¹⁶¹

In *Goldsworthy*, the notice of intention did not contain all the information required by Act 6 but the court reasoned that since § 404 (the right to cure section) applied almost exclusively to monetary defaults, where acceleration is predicated on a default which cannot be cured the reason and necessity for this information disappears. In *Goldsworthy*, the mortgage, in part, was in default for violation of the due on sale clause.

In *Trunk*, the court held that a notice of intention which was given to the residential mortgage debtor after, rather than before, acceleration was not defective, because the default (e.g., violation of the due-on-sale clause) could not be cured by the debtor acting alone but required action by a third party transferee.

¹⁵⁷ Paragraph 6 of the Uniform Covenants—Occupancy—Single Family—Fannie Mae/Freddie Mac Uniform Instrument (Form 3031 1/01).

¹⁵⁸ 615 A.2d 326, 532 Pa. 187 (1992).

¹⁵⁹ 615 A.2d 326, 532 Pa. 187 (1992).

¹⁶⁰ 85 A.2d 358, 364, 253 *Pa. Super.* 321 (1978).

¹⁶¹ 33 *Pa. Super.* 393, 482 A.2d 625 (1984).

The Pennsylvania Supreme Court in *Marra* held that since there is no exception for this type of default in the notice requirements of Act 6, and thus the statute applies to all defaults not just monetary ones.

The Court ruled that the Marras were prejudiced by not receiving a notice of intention because of interest, court costs, sheriff's costs, attorneys fees, and the like which attach upon commencement of a mortgage foreclosure action. Thus, even though there was nothing the Marras could do to cure the default, by the terms of the statute they were entitled to a notice of intention to foreclose.

The holding in *Marra* can be criticized on several grounds. First, the decision fails to address the practicalities of the situation. The debtor can always avoid additional interest and sheriff's fees by redeeming (e.g., paying off all sums due under the mortgage with interest and costs). A notice of intention is not needed for that purpose. Second, as to the imposition of court costs and attorney fees, these amounts are ordinarily minuscule in proportion to paying off the entire mortgage debt. And in fact if redemption is made when foreclosure is first instituted, the lender obviously has not earned its right to full counsel fees. Whether the debtor, by way of a notice of intention or otherwise, is given actual notice of an impending foreclosure, ordinarily has little to do with the debtor's ability to redeem, pay off the debt, and avoid these charges.

Further, the Pennsylvania Supreme Court in *Marra* did not provide any guidelines as to what language a lender must use in a notice of intention where the default cannot be cured, since there is no sum of "money" and no "performance" which the debtor may tender in order to "cure" the default. The court did not address the fact that much of the language required to be used in the notice of intention presupposes the existence of a default capable of being cured. In fact, the form of the notice of intention with its boilerplate terminology and continuous references to the right to cure the default will be entirely confusing and misleading to the debtor.

Under the uniform mortgage instrument (securing a fixed rate note), a notice of acceleration alone—not a notice promising cure of the mortgage default—giving the borrowers 30 days to pay all sums secured by the mortgage is all that is required. This makes more sense.

In any event, many of the provisions of Act 6, 41 P.S. 101 *et seq.*, interpreted by the Pennsylvania Supreme Court in *Marra* are substantially similar or identical to comparable provisions of New Jersey's Fair Foreclosure Act.

(b) If the Mortgage Debt has Matured

In situations where the mortgage debt has matured, the right to cure is obviously inapplicable, as anything less than full payment of all sums due under the obligation and mortgage would not be in compliance with the mortgage contract. If the mortgage debt has matured, so that all sums due under the mortgage are already payable in full, the lender need not utilize an acceleration clause to declare all sums secured by the mortgage as immediately due and payable.

It is the author's opinion that the notice of intention requirement by virtue of its own terminology is inapplicable to situations where the debt has matured and foreclosure may be commenced without "acceleration." For the statute (*N.J.S.A.* 2A:50-56b) says—"before any

residential mortgage lender may accelerate the maturity of any residential mortgage obligation and commence any foreclosure.” Although the statutory language appears absolutely clear on the matter, there are no judicial decisions establishing this proposition.

It has been held that cure and reinstatement for arrearages are not possible with respect to a mortgage which has matured prior to the filing of a bankruptcy petition, because all sums secured by the mortgage are immediately due and payable.¹⁶²

If a “balloon” note and mortgage have been given in accordance with the uniform instruments, there are mandatory notification and other rights which must be given to the borrower before the lender can require payment in full of all secured sums.¹⁶³

Uniform Instruments

The uniform mortgage instrument¹⁶⁴ provides “Lender shall give notice to the Borrower *prior to acceleration* following Borrower’s breach of any covenant or agreement in this Security Instrument.” (Emphasis supplied.) If the mortgage debt has already matured--*i.e.*, is no longer capable of being accelerated--the uniform mortgage instrument logically does not require a pre-acceleration notice prior to institution of foreclosure. This, of course, recognizes the reality of the situation.

However, Para. 20 of the uniform mortgage,¹⁶⁵ it would appear still requires that a notice be given to the borrower prior to institution of foreclosure--affording “a reasonable period after the giving of such notice to take corrective action.”

§ 3.23 Violation of Due On Sale Clause (Necessity of Notice Of Intention)

A due-on-sale (or due-on-transfer) clause of a mortgage is a provision which most commonly provides that the mortgagee may immediately declare all sums secured by the mortgage as due and payable, if the mortgagor *transfers ownership* of the property or a beneficial interest in the property without the *prior written consent* of the mortgagee.

New Jersey court decisions are split on the enforcement of due-on-sale clauses, although on principle such clauses are enforceable.¹⁶⁶

¹⁶² *In re Manocchia*, 157 B.R. 45 (Bkrcty. D.R.I.1993).

¹⁶³ If a “balloon” note and mortgage have been given in accordance with the uniform instruments, the Multistate Balloon Rider (MULTISTATE BALLOON RIDER–Single Family–FREDDIE MAC UNIFORM INSTRUMENT (Form 3190 6/90), amending and supplementing the Uniform Mortgage Instrument and the Multistate Balloon Note Addendum (MULTISTATE BALLOON NOTE ADDENDUM–Single Family–FREDDIE MAC UNIFORM INSTRUMENT (Form 3291), amending and supplementing the Balloon Note (MULTISTATE BALLOON FIXED RATE NOTE–Single Family–FHLMC UNIFORM INSTRUMENT (Form 3290 6/30). require that the lender notify the borrower at least 60 days prior to the “Note Maturity Date” of the total sum due on that date and of the right of the borrower to exercise the “Conditional Modification and Extension Agreement.” Failure of a lender to comply with these requirements may give rise to foreclosure defenses.

¹⁶⁴ NEW JERSEY–Single Family–Fannie Mae/Freddie Mac UNIFORM INSTRUMENT (Form 3031 9/90). Paragraph 21 of the Non-Uniform Covenants–“Acceleration; Remedies.”

¹⁶⁵ NEW JERSEY—Single Family—Fannie Mae/Freddie Mac UNIFORM INSTRUMENT Form 3031 1/01. (Section 20—“Sale of Note; Change of Loan Servicer; Notice of Grievance”).

Federal law now restricts the exercise of such clauses.¹⁶⁷

In terms of the Fair Foreclosure Act, a violation of a due-on-sale clause creates an *impossibility* of cure situation for the mortgagor. The mortgagor has in fact transferred ownership of the mortgaged premises to another person in violation of the mortgage documents and cannot cure the default. The transfer of ownership triggers the mortgagee's right to accelerate all sums due under the mortgage and foreclose it.

A due-on-sale clause has been held enforceable in New Jersey despite a later reconveyance by the transferee to the mortgagor.¹⁶⁸ It has also been held that a reconveyance of the land to the mortgagor, as soon as the mortgagor became aware that the mortgagee

¹⁶⁶ *Columbia Sav. & Loan v. Easterlin*, 191 N.J. Super. 327, 466 A.2d 968 (Ch. Div. 1983) (due-on-sale prohibition or restriction is an open question in New Jersey. Thus section of Federal Depository Institutions Act providing that in states where enforcement of due-on-sale clauses was either prohibited or restricted by state law prior to effective date of federal statute, Act is inapplicable for three years, does not apply in New Jersey. Act is presently applicable in the State so that acceleration of a due-on-sale clause is permitted without necessity of proving impairment to security insofar as banks and savings and loan association mortgages upon dwellings are concerned. Garn-St. Germain Depository Institutions Act of 1982, 12 U.S.C.A. Sec. 1701j-3(c)(1); *Century Fed. S. & L. Ass'n v. Van Glahn*, 144 N.J. Super. 48, 53-55, 364 A.2d 558 (Ch. Div. 1976) (long-term contract for sale entered into between mortgagors and purchasers constituted a "change in ownership" of the premises for purpose of acceleration clause in mortgage); *Poydan, Inc. v. Kiriaki*, 130 N.J. Super. 141, 325 A.2d 838 (Ch. Div. 1974), *aff'd o.b.*, 139 N.J. Super. 365, 354 A.2d 99 (App. Div. 1976) (where note, which was secured by real estate mortgage on restaurant, security agreement covering personalty in the restaurant, its liquor license and by pledge of the restaurant stock, provided for acceleration of the due date of the unpaid balance of the note in the event of any change of the ownership in the mortgaged property, a sale of the corporate stock amounted to a sale of the mortgaged property and the creditor was entitled to accelerate the due date); *Shalit v. Investors S. & L.*, 101 N.J. Super. 283, 244 A.2d 151 (Law Div. 1968) (payment of fee for mortgagee's waiver of its right to accelerate was not usury). *But see, Egner v. Egner*, 183 N.J. Super. 326, 443 A.2d 1104 (Ch. Div. 1982), *aff'd o.b.*, 185 N.J. Super. 1, 447 A.2d 182 (App. Div. 1982) (where mortgage instrument contained due-on-transfer clause, but also provided that mortgage would inure to and bind heirs, legatees, devisees, administrators, executors, successors and assigns of parties, it was clear that acceleration of mortgage debt was not intended to occur when mortgaged property passed to devisees or descended to heirs of mortgagor); *Fogel v. S.S.R. Realty Associates*, 183 N.J. Super. 303, 443 A.2d 1093 (Ch. Div. 1981) (where mortgage provision permitted transfer of premises to third party subject only to mortgagee's approval which was not to be unreasonably withheld and where transfer of title would not impair mortgagee's security, withholding of consent was not reasonable); *Fidelity Land Development Corp. v. Rieder & Sons Bldg. & Development Co., Inc.*, 151 N.J. Super. 502, 377 A.2d 691 (App. Div. 1977) (where land which had been conveyed by corporate mortgagor to its principal stockholder was reconveyed to mortgagor as soon as mortgagor became aware that mortgagee regarded transfer as basis for acceleration, the reconveyance eliminated condition permitting acceleration).

¹⁶⁷ 12 CFR § 545.8-3(f). Restrictions on the exercise of due on transfer clauses have also been imposed by the Garn-St. Germain Act and by new FHLMM regulations adopted thereunder in 1983. The Garn-St Germain Act prohibits enforcement of a due on sale clause for: (1) creation of a subordinate lien or encumbrance (not amounting to transfer of occupancy rights); (2) creation of a purchase money security interest in household appliances; (3) transfer by operation of law on the death of a joint tenant or tenant by the entirety; (4) granting a leasehold interest of not more than 3 years (with no purchase option); (5) transfer to a relative on death of a borrower; (6) transfer of ownership to the spouse or children of the borrower; (7) transfer from a decree of dissolution of marriage, legal separation or incidental property settlement agreement where spouse of borrower becomes the owner; (8) transfer to an inter vivos trust where the borrower is a beneficiary and no transfer of occupancy rights are involved; and (9) any other transfer or disposition described by the Federal Home Loan Bank Board.

¹⁶⁸ *Columbia S. & L. v. Easterlin*, 191 N.J. Super. 327 (Ch. Div. 1983), *aff'd o.b.*, 198 N.J. Super. 174 (App. Div. 1985).

regarded the transfer as the basis for acceleration, eliminated the condition permitting acceleration.¹⁶⁹ However, the latter case involved land which had been conveyed by a corporate mortgagor to its principal stockholder and was therefore a paper transfer only.

As noted in the previous section, “Impossibility of Cure,” the Pennsylvania Supreme Court in *Marra v. Stocker*,¹⁷⁰ ruled that a notice of intention must be given under Act 6, 41 P.A. § 403, for a violation of the due on sale clause, even though the default cannot be cured.

The Supreme Court in *Marra* criticized two Superior Court cases, *Ministers & Missionaries Benefit Board v. Goldsworthy*¹⁷¹ and *New Home Federal Savings & Loan v. Trunk*,¹⁷² which also involved violations of due on sale clauses, and held that notices of intention need not be given for non-monetary defaults which cannot be cured.

Fair Foreclosure Act

In terms of the Fair Foreclosure Act, since there is no exception under the notice of intention requirements for this type of default, it is assumed that the act requires that a notice of intention be given to the debtor prior to institution of foreclosure.

The notice of intention in such cases must set forth the entire amount due under the mortgage, and should contain a note explaining that anything to the contrary notwithstanding the debtor has no right to cure and must pay the full amount due by the date to cure in the notice to avoid foreclosure.

Little, if anything, is gained by giving the mortgagor (or debtor) a notice of intention to foreclose for violation of a due-on-sale clause because the default cannot be cured, and receipt by the debtor of a notice of intention with boilerplate language promising cure will be entirely confusing to the debtor.

Uniform Instruments

The uniform mortgage instrument and note¹⁷³ under the *fixed rate* approach require that a “notice of acceleration” be given to the borrower prior to commencement of foreclosure for the borrower’s violation of the due-on-sale clause. The borrower pursuant to this notice is given a 30 day period to pay off all sums secured by the mortgage.¹⁷⁴

The uniform instruments in this instance do not require that a notice be given to the borrower promising cure of the mortgage default.

¹⁶⁹ *Fidelity Land Development Corp. v. Rieder & Sons Bldg. & Development Co., Inc.*, 151 N.J. Super. 502, 377 A.2d 691 (App. Div. 1977).

¹⁷⁰ 615 A.2d 326, 532 Pa. 187 (1992).

¹⁷¹ 85 A.2d 358, 364, 253 Pa. Super. 321 (1978).

¹⁷² 33 Pa. Super. 393, 482 A.2d 625 (1984).

¹⁷³ Uniform Mortgage Instrument. Paragraph 17 of the Uniform Covenants—Transfer of the Property or a Beneficial Interest in Borrower—Fannie Mae/Freddie Mac Uniform Instrument (Form 3031 9/90).

¹⁷⁴ Uniform Mortgage Instrument. Paragraph 17 of the Uniform Covenants—Transfer of the Property or a Beneficial Interest in Borrower—Fannie Mae/Freddie Mac Uniform Instrument (Form 3031 9/90).

DEFAULT; NOTICE OF INTENTION; ACCELERATION; UNIFORM INSTRUMENTS

In the *adjustable rate* approach,¹⁷⁵ the uniform instruments, prior to exercise by the borrower of the Fixed Rate Conversion Option of the Note, limit the lender's right to accelerate and foreclose for violation of the due on sale clause, in accordance with certain stated conditions of the Adjustable Rate Note¹⁷⁶ and Rider.¹⁷⁷

Conflict between Fair Foreclosure Act and Uniform Instruments

Where there is a conflict between the Fair Foreclosure Act and the uniform instruments, the provisions of the Fair Foreclosure Act control.

There are several provisions in the uniform mortgage instrument which bear on this.

The *Governing Law; Severability* uniform covenant provides—"This Security Instrument shall be governed by federal law and the law of the jurisdiction in which the Property is located. All rights and obligations contained in this Security Instrument are subject to any requirements and limitations of Applicable Law." The term "Applicable Law" includes "all controlling applicable federal, state and local statutes." Thus, in the absence of controlling federal law, the Fair Foreclosure Act would trump any inconsistent provision in the uniform instruments.

Also the *Notices*¹⁷⁸ uniform covenant provides in part—"If any notice required by this Security Instrument is also required under Applicable Law, the Applicable Law requirement will satisfy the corresponding requirement under this Security Instrument." Thus, where the Fair Foreclosure Act is applicable, the notice to be sent to the debtor-borrower on default is the notice of intention required by the act.

And the "*Acceleration; Remedies*"¹⁷⁹ non-uniform covenant provides for the mailing of a "notice to the Borrower prior to acceleration for Borrower's breach . . . but not prior to acceleration under Section 18 [Due on Sale Clause] unless Applicable Law provides otherwise." Under this provision as well, the applicable notice to be sent to the debtor for violation of the due-on-sale clause is the notice of intention.

¹⁷⁵ If an adjustable rate note and mortgage are given in accordance with the uniform instruments, the Multistate Convertible Adjustable Rate Note and the Multistate Convertible Adjustable Rate Rider (amending and supplementing the Uniform Mortgage Instrument) provide that the borrower, prior to the exercise of the "Fixed Interest Rate Conversion Option," may prevent acceleration for violation of the due-on-sale clause by complying with certain stated conditions in the Multistate Convertible Adjustable Rate Note and Multistate Convertible Adjustable Rate Rider. After exercise of the "Fixed Interest Rate Conversion Option" by the borrower, the borrower cannot prevent acceleration by the mortgagee for the borrower's default under the due on sale clause. In this instance, the lender need only give the borrower a 30 day notice of acceleration (without the right to cure and reinstate) prior to acceleration of all sums secured by the mortgage.

¹⁷⁶ MULTISTATE CONVERTIBLE ADJUSTABLE RATE NOTE—Single Family—Fannie Mae Uniform Instrument (Form 3508 1/89). Paragraph 12 (A)—"Transfer of the Property or a Beneficial Interest in Borrower."

¹⁷⁷ MULTISTATE CONVERTIBLE ADJUSTABLE RATE RIDER—Single Family—Fannie Mae Uniform instrument Form 3118 1/89. Paragraph 5C.

¹⁷⁸ New Jersey—Single Family—Fannie Mae/Freddie Mac Uniform Instrument, Form 3031, 3/99)--Para. 15.

¹⁷⁹ New Jersey—Single Family—Fannie Mae/Freddie Mac Uniform Instrument, Form 3031, 3/99)--Para. 22.

§2.24 Deed in Lieu of Foreclosure (Notice of Intention Not Required) — *N.J.S.A. 2A:50-56d*

d. The notice of intention to foreclose required to be provided pursuant to this section shall not be required if the debtor has voluntarily surrendered the property which is the subject of the residential mortgage.

Analysis

This, of course, makes good sense. Where the debtor has given a deed in lieu of foreclosure to the lender, the debtor no longer has title to, or ownership of, the mortgaged premises and, therefore, giving the debtor a notice of intention and attendant rights is altogether meaningless because the debtor no longer has any interest in the property to protect.

Of course, the *caveat* here is that the debtor has “voluntarily surrendered” the property in strict accordance with the requirements of the act. Where the act has not been complied with, it is questionable whether the deed in lieu of foreclosure is effective.

Because the debtor must *voluntarily* surrender the property (e.g., the debtor must have received notice of and be fully apprised of its Section 4 rights), there is no question that the debtor has been furnished with all necessary information to make an intelligent decision.

Unfortunately, this section contains no other exceptions to service of the notice of intention requirement, such as, where the debtor has “abandoned” the property or “waived” its rights under the act.

Pennsylvania’s Act 6, *P.S. § 403 (d)*, wisely provides that a notice of intention is not required where the debtor has abandoned the residential property. The Fair Foreclosure Act has no comparable exception.

§2.25 Notice of Intention Independent of Other Notices — *N.J.S.A. 2A:50-56e*

e. The duty of the lender under this section to serve notice of intention to foreclose is independent of any other duty to give notice under the common law, principles of equity, State or federal statute, or rule of court and of any other right or remedy the debtor may have as a result of the failure to give such notice.

Analysis

In light of the above section, the question arises: is it necessary to give dual notices under the Fair Foreclosure Act and uniform instruments where they both apply. The answer is “no.”

The uniform mortgage instrument¹⁸⁰ provides inter alia with respect to the content of the “notice of acceleration” under Paragraph 22--“(f) any other disclosure required under the Fair Foreclosure Act, codified at Section 2A:50-53 et seq. of the New Jersey statutes, or other Applicable Law.” Thus, all disclosures under the Fair Foreclosure Act are required under the uniform instruments where they both apply.

¹⁸⁰ NEW JERSEY—Single Family—Fannie Mae/FreddieMac UNIFORM INSTRUMENT (Form 3031 1/01). Paragraph 22 of Non-Uniform Covenants—“Acceleration; Remedies.”

Further, Paragraph 15 (“Notices”) of the uniform mortgage instrument¹⁸¹ provides—“If any notice required by this Security Instrument is also required under Applicable Law, the Applicable Law requirement will satisfy the corresponding requirement under this Security Instrument.”

As to notice provisions contained in mortgage instruments other than the uniform mortgage instrument, the situation is not so clear. Presumably, if the provisions of the notice of intention under the Fair Foreclosure Act are “more protective”¹⁸² of the debtor than comparable provisions in the mortgage instrument—and normally they will be--then it is the author’s view that only the notice of intention need be given. Otherwise, if there is any doubt, it is better to error on the side of safety and give dual notices.

§2.26 Compliance with Section to be Set Forth in Pleadings—*N.J.S.A. 2A:50-56f*

f. Compliance with this section shall be set forth in the pleadings of any legal action referred to in this section. If the plaintiff in any complaint seeking foreclosure of a residential mortgage alleges that the property subject to the residential mortgage has been abandoned or voluntarily surrendered, the plaintiff shall plead the specific facts upon which this allegation is based.

Analysis

Pursuant to this section, plaintiff need merely allege in the complaint that the debtor received notice in accordance with Section 4 of the Fair Foreclosure Act in order to be in compliance with the act.

An allegation in the complaint that “the debtor has received notice in accordance with Section 4 of the Fair Foreclosure Act if applicable” was rejected by the Office of Foreclosure as not being in compliance with the act. The statute requires that the foreclosing plaintiff definitively state that notice has been given in accordance with the act. A conditional statement will not suffice.

A copy of the notice of intention need not be attached to the complaint—and in fact it would be erroneous to do so—nor should proofs of mailing of the notice be attached. These items should be retained in lender’s file should the debtor claim that he or she never received proper notice under the act.

The statute refers to “pleadings” but amended *R. 4:64-1(b)(13)* now requires that the necessary allegation of compliance with the act be included in the “complaint.”

The second sentence of the section requires specificity in the pleadings with regard to property being “abandoned” or “voluntarily surrendered.” Primarily, this refers to the optional procedure without sale discussed in a later chapter where abandonment and a deed in lieu of foreclosure are grounds justifying use of the procedure. Ordinarily, where a lender receives a deed in lieu of foreclosure, it will not institute a foreclosure action.

¹⁸¹ NEW JERSEY—Single Family—Fannie Mae/FreddieMac UNIFORM INSTRUMENT (Form 3031 1/01). Paragraph 15--Notices.”

¹⁸² See 1 Nelson and Whitman, *REAL ESTATE FINANCE LAW* 572 (3rd. ed. 1993).

The statute also refers to “the pleadings of any legal action referred to in this section.” Since Paragraph a. of Section 4, *N.J.S.A. 2A:50-56a*, requires that a notice of intention be given to the debtor before a lender may “commence any foreclosure *or other legal action to take possession*,” a notice of intention must be given and alleged in the lender’s action for possession of land formerly ejectment apart from foreclosure of the mortgage. (Emphasis supplied.) This is discussed in the next section.

Section 10, *N.J.S.A. 2A:50-62*, provides in part “The provisions of sections 1 through 9 of this act shall not apply to the foreclosure of a nonresidential mortgage *nor to collection of the obligation by means other than enforcing the lender’s lien on the residential property*.” (Emphasis supplied.)

Presumably, the language—“nor to collection of the obligation by means other than enforcing the lender’s lien on the residential property” was meant to rule out non-foreclosure type actions, such as deficiency actions and the like. But the terminology “nor to collection of the obligation” makes this language inapplicable to an action for possession of land which is a possessory action not an action to “collect on the obligation.”

The language is even broad enough to apply to a lender’s rent receiver action. These actions, however, are always combined with a foreclosure action.

§2.27 Lender’s Action for Possession (Notice of Intention)

As noted above, since Section 4a *N.J.S.A. 2A:50-56a*, expressly requires that a notice of intention be given to the debtor before a lender may “commence any foreclosure *or other legal action to take possession*,” a lender must give the residential debtor a notice of intention before instituting an action for possession of land.¹⁸³ Admittedly, though, it is rare today for a lender to institute an action for possession apart from foreclosure.

A lender in New Jersey is entitled to possession of the mortgaged premises on or after default and may institute an independent action for possession of land at law, quite apart from the lender’s remedy of foreclosure.¹⁸⁴

The problem here is that the required content of the notice of intention as expressly set forth in subsection 4c (*N.J.S.A. 2A:50-56c*) in no way refers to the mortgagee’s possessory right. In fact, Paragraph (6) of the notice of intention¹⁸⁵ only refers to the lender’s remedy of foreclosure, not possession. Thus, a debtor receiving a notice of intention in connection with a lender’s separate action for possession will be entirely confused and misled by the terms of the notice of intention.

The Pennsylvania statute¹⁸⁶ is much better in this respect, because Paragraph (5) of the notice of intention provides “The method or methods by which the debtor’s ownership or

¹⁸³ *N.J.S.A. 2A:35-1 et seq.*

¹⁸⁴ A mortgagee, on breach of the condition in the mortgage, had a right to possession of the mortgaged premises, enforceable through an action of ejectment. *Fidelity Union Trust Co. v. 75 Prospect Co-op. Apartment*, 131 *N.J. Eq.* 387, 25 A.2d 508 (Ch. 1942).

¹⁸⁵ *N.J.S.A. 2A:50-56c(6)*.

¹⁸⁶ 41 P.S. § 403 (5).

possession of the real estate may be terminated” and thus addresses the lender’s possessory right. (Emphasis supplied.)

The Uniform Mortgage Instrument ¹⁸⁷ does not, in the author’s opinion, require service of a 30 day pre-acceleration notice on the borrower prior to commencement of an action for possession of land by the lender, because such an action does not require that the mortgage debt be accelerated, ¹⁸⁸ and presumably the pre-acceleration notice only applies to the institution of a foreclosure action not a possessory action.

§2.28 The Uniform Instruments

(a) Uniform Instruments Generally

The “uniform instruments,” ¹⁸⁹ approved by the Federal National Mortgage Association (FNMA) and Federal Home Loan Mortgage Corporation (FHLMC) — the Fannie Mae/Freddie Mac Uniform Instruments — govern the form of the note and mortgage in most residential mortgage transactions in New Jersey.¹⁹⁰ Such forms are required to be used for all mortgages purchased by Federal National Mortgage Association and Federal Home Loan Mortgage Corporation. These are highly regulated federally sponsored private corporations which provide a huge secondary mortgage market in the United States. The majority of residential institutional lenders in New Jersey, to the author’s experience, use the uniform instruments for their mortgage documents.

The “uniform covenants” of the uniform instruments are applicable to all states, while the “non-uniform covenants” are tailored to the particular jurisdiction in which they are used. These are highly sophisticated, plain language forms which have standardized mortgage documents throughout the United States.

Paragraph 19, the “*Borrower’s Right To Reinstate*” clause (of the “uniform covenants”) and Paragraph 22, the “*Acceleration; Remedies*” clause (of the “non-uniform covenants”) ¹⁹¹ are in substantial accord with the provisions of the Fair Foreclosure Act.

In fact, subparagraph (f) of Para.22 of the uniform mortgage instrument, which prescribes the form of notice to be sent to the borrower prior to acceleration, provides: “any other disclosure required under the Fair Foreclosure Act, *N.J.S.A. 2A:50-53 et. Seq.* of the New Jersey Statutes, or other Applicable Law.” It is submitted that subparagraph (f) is only operative where the Fair Foreclosure Act applied.

¹⁸⁷ NEW JERSEY–Single Family–Fannie Mae/Freddie Mac Uniform Instrument (Form 3031 1/01). Paragraph 22 of the Non-Uniform Covenants–“Acceleration; Remedies.”

¹⁸⁸ *Id.* The operative language of Paragraph 22 provides “Lender shall give notice to the Borrower *prior to acceleration* following Borrower’s breach of any covenant or agreement in this Security Instrument.” (Emphasis supplied.)

¹⁸⁹ See generally 29 N.J. PRAC. (Weinstein) § 3.5 (2d ed. 2001); and 2 Nelson and Whitman, REAL ESTATE FINANCE LAW, Chapter 14 (3rd. ed. 1993).

¹⁹⁰ The author estimates that the “uniform instruments” are used in over 75% of the notes and mortgages reviewed by the author in issuing certificates of regularity in New Jersey.

¹⁹¹ Uniform Mortgage Instrument. NEW JERSEY–Single Family–Fannie Mae/Freddie Mac Uniform Instrument (Form 3031 1/01).

The “*Borrower’s Right to Reinstate*” (Paragraph 19) gives the borrower the right to cure the default and reinstate the mortgage *after acceleration* has taken place until entry of judgment, by paying all sums in arrears plus the enforcement expenses of the lender including reasonable attorneys’ fees.

The “*Acceleration; Remedies*” (Paragraph 22) provides for the mailing of a pre-acceleration notice to the Borrower, similar to the notice of intention under the act, and gives the borrower the right to prevent acceleration and commencement of foreclosure by curing the default on or before the date specified in the notice, which cannot be less than 30 days after the date the notice is given to the borrower — *i.e.*, 30 days after the date of mailing.

Thus, even without the Fair Foreclosure Act, a mortgagor in New Jersey by virtue of the uniform instruments would receive virtually the same right to cure and reinstate afforded by the act.

It may be that the drafters of the Fair Foreclosure Act — *i.e.*, the banking industry — believed that because pre-acceleration notices were already being sent out to borrowers pursuant to the uniform instruments, the notice of intention provisions of the act, which are closely patterned after the uniform instruments, in effect, added little to the burdens already faced by foreclosure practitioners in New Jersey.¹⁹²

(b) Differences between Fair Foreclosure Act and Uniform Instrument Requirements

There are differences between the provisions of the uniform instruments and the Fair Foreclosure Act with respect to pre-acceleration notification and the mortgagor’s ability to reinstate and defeat acceleration once default has occurred. Further, the lender’s obligations under the Fair Foreclosure Act’s notice of intention are much more extensive than those contained in the pre-acceleration notice of the uniform instruments.

First, the uniform instruments, unlike the Fair Foreclosure Act, do not limit the number of times a borrower may cure a default.

Second, the uniform instruments as a condition of reinstatement provide for recovery of “all expenses” by the lender in enforcing the security instrument, including “reasonable counsel fees” and “search fees.” Under the Fair Foreclosure Act, counsel fees and costs are only recoverable by the lender in an amount not to exceed the rule amount.¹⁹³ State law, however, would limit the former as well.

Third, the notice under the uniform instruments must be given to the borrower (*i.e.*, the mortgagor) not the debtor.

Fourth, there is no 14 day notice of entry of judgment under the uniform instruments, nor are there any requirements with respect to when and under what conditions final judgment papers may be submitted to the court.¹⁹⁴

Fifth, the uniform instruments do not regulate a deed in lieu of foreclosure.

¹⁹² *Id.*

¹⁹³ *N.J.S.A.* 2A:50-56c(7).

¹⁹⁴ *N.J.S.A.* 2A:50-58.

And sixth, there is no provision in the uniform instruments prohibiting waiver of rights by the borrower.

As previously noted, where there is a conflict between the uniform instruments and State law, the latter controls.

§2.29 Mortgage Documents; Other Notification Requirements; HUD Regulations and Guidelines

The lender must, of course, comply with any pre-acceleration notification requirements and any other conditions precedent to acceleration and foreclosure set forth in the mortgage documents; otherwise *acceleration* may be defective and the resulting foreclosure premature.¹⁹⁵

The notification requirements of the uniform instruments have been discussed in the preceding section.

The FHA New Jersey Mortgage Form ¹⁹⁶ gives the Borrower the right to reinstate ¹⁹⁷ after foreclosure has been commenced and “does not authorize acceleration or foreclosure if not permitted by regulations of the Secretary.”

The Federal Housing Administration (FHA) ¹⁹⁸ and the Veterans Administration (VA) ¹⁹⁹ have promulgated post-default pre-foreclosure guidelines to be followed with respect to loans insured and guaranteed by these entities.

¹⁹⁵ Where a foreclosure complaint has been filed before the effective date of the act but the lender has not complied with the pre-acceleration requirements of the uniform instruments, a valid acceleration has not taken place and the action is premature. It should not be automatically assumed that the lender can just give the required pre-acceleration notice and file an amended complaint. If the filing of the action is void, which in all probability it is, a void action cannot be amended and the action should be dismissed and a new action instituted after a proper pre-acceleration notice has been given. Suppose, in the interim, the Fair Foreclosure Act has gone into effect? It is the author's opinion that, without a judicial order providing to the contrary, a notice of intention must be given to the debtor under the act and a new action instituted. An amended complaint cannot automatically be used for this purpose without a court order.

¹⁹⁶ 9. “**Grounds for Acceleration of debt.** (d) Regulations of HUD Secretary. In many circumstances regulations issued by the Secretary will limit Lender's rights, in the case of payment defaults, to require immediate payment in full and foreclose if not paid. This Security Instrument does not authorize acceleration or foreclosure if not permitted by regulations of the Secretary.” FHA New Jersey Mortgage Form, Item 6600 (9103).

¹⁹⁷ 10. **Reinstatement.** Borrower has a right to be reinstated if Lender has required immediate payment in full because of Borrower's failure to pay an amount due under the Note or this Security Instrument. This right applies even after foreclosure proceedings are instituted. To reinstate the Security Instrument, Borrower shall tender in a lump sum all amounts required to bring Borrower's account current including, to the extent they are obligations of Borrower under this Security Instrument, foreclosure costs and reasonable and customary attorneys' fees and expenses properly associated with the foreclosure proceeding. Upon reinstatement by Borrower, this Security Instrument and the obligations that it secures shall remain in effect as if Lender had not required immediate payment in full. However, Lender is not required to permit reinstatement if: (i) Lender has accepted reinstatement after the commencement of foreclosure proceedings within two years immediately preceding the commencement of a current foreclosure proceeding, (ii) reinstatement will preclude the foreclosure on different grounds in the future, or (iii) reinstatement will adversely affect the priority of the lien created by this Security Instrument.” FHA New Jersey Mortgage Form, Item 6600 (9103).

The VA regulations require the lender to give the mortgagor a notice of intent to foreclose at least 30 days prior to commencement of foreclosure²⁰⁰ and the Department of Housing and Urban Development (HUD) regulations²⁰¹ require that a notice of any delinquency be given to the mortgagor prior to institution of foreclosure.

The authors of the leading treatise on mortgages in the United States state that by the clear weight of authority these guidelines are advisory and not a condition precedent to foreclosure,²⁰² and that foreclosure issues are matters traditionally relegated to state law and that such guidelines and procedures do not give rise to an affirmative cause of action on behalf of the defaulting mortgagor.²⁰³

The Agricultural Credit Act of 1987²⁰⁴ provides borrowers from the Farmers Home Administration (FmHA) with substantial protections prior to acceleration and foreclosure which include a certified mailed notice with required information to any borrower at least 180 days in default. Failure of the lender to comply with the Act may result in foreclosure defenses.²⁰⁵

HUD Regulations and Guidelines

Seemingly competing trial court opinions in *Associated East Mortgage Co. v. Young*²⁰⁶ and *Heritage Bank, N.A. v. Ruh*²⁰⁷ as to whether a lender's failure to follow the HUD regulations and procedures constitute a defense to foreclosure in New Jersey were found to be consistent as a matter of law by the Appellate Division in *Prudential Insurance Company of New Jersey v. Jackson*.²⁰⁸ The court stated:

We are satisfied that the principles stated by *Associated, supra*, and *Heritage Bank, supra*, are the same. Both held that while the mortgagee's violation of HUD regulations and guidelines respecting the averting of foreclosure did not create an affirmative cause of action

¹⁹⁸ 4 CFR §§ 203.500-203.683.

¹⁹⁹ 8 CFR 36.4314, 36.4315 and 36.4317.

²⁰⁰ 8 CFR 36.4315 and 36.4317.

²⁰¹ 4 CFR §203.602.

²⁰² Nelson and Whitman, REAL ESTATE FINANCE LAW 569-72 (3rd. ed. 1993).

²⁰³ *Simpson v. Cleland*, 640 F.2d 1354, 1360 (D.C. Cir. 1981).

²⁰⁴ 12 U.S.C.A. §§ 2202-2202a.

²⁰⁵ See generally 1 Nelson and Whitman, REAL ESTATE FINANCE LAW, 572-3 (3rd. ed. 1993) for an excellent and authoritative discussion of this subject.

²⁰⁶ 163 N.J. Super. 315, 394 A.2d 899 (Ch. Div. 1978) (foreclosure barred by unclean hands; in seeking foreclosure, lender failed to comply with legally binding HUD regulations or with their counterparts in handbook issued by HUD to lenders).

²⁰⁷ 91 N.J. Super. 53, 465 A.2d 547 (Ch. Div. 1983) (foreclosure permitted; HUD Regulations and procedures in the HUD Handbook held to be discretionary, not mandatory, and are not a legal prerequisite to foreclosure which is determined by state law).

²⁰⁸ 70 N.J. Super. 510, 637 A.2d 573 (App. Div. 1994).

in favor of the mortgagor, such violations could nevertheless justify withholding the equitable remedy of foreclosure from the mortgagee. The disparate results in the two cases rested on factual differences, not legal differences.

While a detailed discussion of the HUD regulations and guidelines is beyond the scope of this book, the author believes that *Young* was wrongly decided. At the time of the *Young* decision, the HUD regulations were designed to protect HUD not defaulting mortgagors and were subsequently changed.

While the author believes that *Ruh* was properly decided, the court's holding in *Ruh*--that the HUD regulations and procedures in the HUD Handbook are "discretionary"--is incorrect. At the time of the *Ruh* decision, §§ 203.651-203.654 imposed *mandatory* requirements.²⁰⁹ Currently, ²¹⁰ §§ 203.600 through 203.656 of the HUD regulations (amended in late 1982) are *mandatory* and include a notice of default to the mortgagor, a face to face interview, initial determination regarding the availability of foreclosure relief to the mortgagor, and subsequent notices to the mortgagor and Secretary.

It is the author's view that courts should not ignore "mandatory federal regulations designed to protect mortgagors after default on insured mortgages" and that mortgagors should be considered third party beneficiaries of such *mandatory* regulations.

In an effort to get lenders to comply with its mandatory requirements, HUD has recently imposed treble damages for a lender's failure to follow these HUD regulations and guidelines. Effective May 26, 2005, HUD adopted a final rule ²¹¹ amending HUD's civil money penalty regulations, which imposes "treble damages" on a mortgagee for failing to engage in appropriate loss mitigation actions where the mortgagee had the duty to do so. The penalty is equal to three times the amount of any insurance benefits claimed by a mortgagee. The regulations were enacted in response to the civil money penalty amendments of the National Housing Act Section 230(a) of title II of the NHA,²¹² as amended, which make it mandatory for the mortgagee upon default of a single family mortgage to engage in loss mitigation actions (including but not limited to special forbearance, loan modification, and deeds in lieu of foreclosure for the purpose of providing alternatives to foreclosure.

²⁰⁹ Mandatory language was initially added May 5, 1980. 45 FR 29574.

²¹⁰ 30 N.J. PRAC. Sec. 23.10 (Weinstein) (2d ed. 2000).

²¹¹ 70 FR 21572-01, 2005 WL 943437 (F.R.) "Treble Damages for Failure To Engage in Loss Mitigation."

²¹² 12 U.S.C. 1715u, 12 U.S.C. 1735f-14(a)(2), and 12 U.S.C. 1735f-14(b)(1).

CHAPTER 3

THE RIGHT TO CURE; 14 DAY NOTICE; WAIVER

§3.01 The Right to Cure — *N.J.S.A. 2A:50-57a*

a. Notwithstanding the provisions of any other law to the contrary, as to any residential mortgage for which a notice of intention to foreclose is required to be given pursuant to section 4 of this act, whether or not such required notice was in fact given, the debtor, or anyone authorized to act on the debtor's behalf, shall have the right at any time, up to the entry of final judgment or the entry by the office or the court of an order of redemption pursuant to subsection g. of section 11 of this act, to cure the default, de-accelerate and reinstate the residential mortgage by tendering the amount or performance specified in subsection b. of this section. The payment or tender shall be made to the person designated in the notice pursuant to paragraph (5) of subsection c. of section 4 of this act. The debtor may exercise the right to cure a default as to a particular mortgage and reinstate that mortgage only once every 18 months, provided, however, that this limitation shall not apply if the mortgage debtor cures a default by the date specified in paragraph (5) of subsection c. of section 4 of this act. The 18- month time period shall run from the date of cure and reinstatement.

Analysis

Subsection 5a (*N.J.S.A. 2A:50-57a*) sets forth when and to whom the debtor may effectuate a cure under the act. A debtor, as to any residential mortgage for which a notice of intention is required to be given, may cure the default once every eighteen months up until entry of judgment (or entry of a redemption order under the optional procedure), except where a cure is effectuated on or before the date to cure in the notice of intention, in which case the right to cure is unlimited.

The amount required to cure the default on or before the cure date in the notice of intention, after that date but *prior to foreclosure*, and *pending foreclosure* are discussed in subsequent sections.

The Pennsylvania statute (*P.S. § 404*)¹ permits a default to be cured only three times in any calendar year and up until one hour before the commencement of bidding at a sheriff sale other judicial sale.

Where default is cured on or before the cure date in the notice of intention, *N.J.S.A. 2A:50-56b(5)*, and presumably before the foreclosure complaint is filed, there is no acceleration and technically no need to de-accelerate and reinstate the loan.

¹ **§ 404. Right to cure a default** (a) Notwithstanding the provisions of any other law, after a notice of intention to foreclose has been given pursuant to section 403 of this act, at any time at least one hour prior to the commencement of bidding at a sheriff sale or other judicial sale on a residential mortgage obligation, the residential mortgage debtor or anyone acting in his behalf, not more than three times in any calendar year, may cure his default and prevent sale or other disposition of the real estate and avoid acceleration, if any, by tendering the amount or performance specified in subsection (b) of this section.

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The right to cure may be exercised by the “debtor” or by anyone authorized to act on behalf of the debtor. This permits a third person to tender performance on behalf of the debtor. Clearly, the debtor’s attorney, as legal representative, would have this right.

Under the uniform instruments,² the “Borrower” (e.g., the mortgagor) is the person who has the right to cure and reinstate. Thus, where the provisions of the uniform instruments apply, the “mortgagor” would have an independent³ contractual right to cure, notwithstanding the provisions of the Fair Foreclosure Act which give this right solely to the “debtor.”

Perhaps the most striking thing about the language of subsection 5a is that it purports to give the debtor the right to cure with respect to “any residential mortgage for which a notice of intention to foreclose is required to be given.” This is remarkable in light of the fact that a notice of intention under subsection 4a (*N.J.S.A.* 2A:50-56) is presumably required to be given to the debtor in situations where the default cannot be cured, e.g., for violation of a due-on-sale-clause.

It is interesting that the statute says that the right to cure exists for any mortgage for which a notice of intention is required “whether or not such required notice was in fact given.” Thus, a lender cannot hide behind its own failure to give a notice to justify its refusal to permit the debtor to cure. It also underscores the fact that a debtor who has given the lender a deed in lieu of foreclosure—and is therefore not entitled to a notice of intention—also has no right to cure under this section as well.

Subsection 5a (*N.J.S.A.* 2A:50-57a) refers to “payment or tender.” Thus, it is the “tender”⁴ of performance — the actual *offer* of money or other act — not necessarily “payment” or “receipt” which will cure a default. Since payment or tender must be made to the person identified in paragraph 5 of the notice of intention (*N.J.S.A.* 2A:50-56c(5)), presumably mailing the amount necessary to cure in the form of cash, cashier’s check or certified check to such person is all that is required, as the act does not specify “personal” delivery of the funds. As previously noted, there is no requirement in the act that the person identified in paragraph (5) actually be located in-state, so personal delivery of funds could never have been intended by the Legislature.

However, it is not known with certainty whether tender will be deemed complete on the “posting” of the ordinary or certified mail or only on actual “receipt” by the designated person. It would appear, however, that, absent any specific requirement in the act, tender should be complete on mailing. This may make a difference where the funds necessary to cure a default are mailed on, or immediately before, entry of the foreclosure judgment. Whether a wire transfer of funds will be deemed “payment” or “tender” within the meaning of section 5 is not addressed by the act, but it appears that it should.

² Paragraph 19 of the Uniform Covenants–Borrower’s Right to Reinstate. New Jersey–Single Family–Fannie Mae/Freddie Mac Uniform Instrument (Form 3031 1/01).

³ *N.J.S.A.* 2A:50-57f.

⁴ BLACK’S LAW DICTIONARY 1467-8 (6th Ed. 1990).

The uniform instruments⁵ require “payment” not “tender” of sums necessary to cure. Thus, in this instance, the Fair Foreclosure Act gives greater protection to the mortgagor than the uniform instruments.

It has been held that where a mortgagee accepts payments by mail, risk of loss in the event the mortgagee fails to receive a payment is on the mortgagee. Moreover, the mortgagee cannot declare a default for the lost payment.⁶

Where the person identified in paragraph 5 of the notice of intention is no longer in being, or has been replaced, or another lender has taken over the loan, transmission of funds to the original paragraph (5) person is all that is required to effectuate a tender within the meaning of subsections 5a and b (*N.J.S.A.* 2A:50-57a,b). This can create hardships for lenders.

A cure under subsection 5b may be effected by the debtor a significant period of time, say six months or more, after receipt of the notice of intention. Where the debtor has filed for bankruptcy, it may be years later. In the interim, the mortgage may have been assigned. Yet, pursuant to subsections 5a and b, payment or tender must be made to the person identified in paragraph (5) of the original notice of intention. Hence, the present holder of the mortgage, the assignee, may not receive any funds or may not be aware that a cure has been effected by the debtor. However, a debtor tendering sums to any other person may not be protected. These questions are not addressed in the act.

The uniform instruments⁷ require that the name and address of a new “Loan Servicer” and the address to which payments are to be made must be given to the Borrower.

The amount or performance required to cure under section 5 is considered in a subsequent section.

A major definitional limitation in the act is that the right to cure is given only to the *debtor* (or person authorized to act on behalf of the debtor), ordinarily the note maker or obligor on the bond. This limitation is also true of other sections in the act where only the debtor is referenced, not other persons who may be in interest. The statute does not define the right to cure in terms of the “mortgagor,” “borrower,” or “owner,” and leaves in limbo the rights of all persons who are not technically debtors.

It is also important to note that the unlimited right to cure by the debtor is only applicable where the debtor cures prior to or on the actual date to cure specified in the notice of intention. Where the date to cure and filing of the foreclosure complaint substantially coincide, this makes sense. However, if the foreclosure complaint is filed substantially after the cure date this is unfair to the debtor, who should have the unlimited right to cure right up until the time the lender has either accelerated the mortgage debt or filed a foreclosure complaint.

The statutory terminology “The 18-month time period shall run from the date of *cure and reinstatement*” is somewhat unclear. (Emphasis supplied.) Subsection 5d (*N.J.S.A.* 2A:50-57d) provides that cure of the default reinstates the debtor to the same position as if

⁵ Paragraph 19 of the Uniform Covenants–Borrower’s Right to Reinstate. New Jersey–Single Family–Fannie Mae/Freddie Mac Uniform Instrument (Form 3031 1/01).

⁶ *Balmoral Arms v. Rutkin*, 104 N.J. Super. 354, 250 A.2d 50 (Ch. Div. 1969).

⁷ Paragraph 19 of the Uniform Covenants–Sale of Note; Change of Loan Servicer. New Jersey–Single Family–Fannie Mae/Freddie Mac Uniform Instrument (Form 3031 9/90).

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default had not occurred. Reinstatement is therefore automatic whenever there is a cure. The use of the language “cure and reinstatement” in the statute is apparently redundant. It implies that some action must be taken to reinstate in addition to effectuating a cure, which does not seem to be the case. In any event, since tender (not payment) of the amount necessary to cure will effectuate a cure, the 18-month period, according to a literal reading of the act, runs from the date of *tender* by the debtor.

If the Fair Foreclosure Act is inapplicable, and the uniform mortgage instrument is used, the borrower has an unlimited right to cure until entry of judgment.⁸

By virtue of the clear-cut language of the act, a debtor is always entitled to cure under the act prior to or on the cure date in the notice of intention, whether or not the debtor has cured within the last 18 months.

Under a straightforward reading of the subsection, where a lender forecloses multiple mortgages, such as a first and second mortgage, the debtor would have the right to cure each mortgage once every eighteen months under state law.

§3.02 The Amount and Other Performance Required to Cure (No Charge, Fee or Penalty) — *N.J.S.A. 2A:50-57b,c*

Subsection 5b and 5c provide:

b. To cure a default under this section, a debtor shall:

(1) pay or tender to the person identified pursuant to paragraph (5) of subsection c. of section 4 of this act, in the form of cash, cashier's check, or certified check, all sums which would have been due in the absence of default, at the time of payment or tender;

(2) perform any other obligation which the debtor would have been bound to perform in the absence of the default or the exercise of an acceleration clause, if any;

(3) pay or tender court costs, if any, and attorneys' fees in an amount which shall not exceed the amount permitted under the Rules Governing the Courts of the State of New Jersey; and

(4) pay all contractual late charges, as provided for in the note or security agreement.

c. To cure a default under this section, a debtor shall not be required to pay any charge, fee or penalty attributable

⁸ Paragraph 19 of the Uniform Covenants–Borrower’s Right to Reinstate. New Jersey–Single Family–Fannie Mae/Freddie Mac Uniform Instrument (Form 3031 1/01).

to the exercise of the right to cure a default as provided for in this act.

Analysis

Section 5b (*N.J.S.A.* 2A:50-57b) contains the general requirements to cure a default “after the date to cure” in the notice of intention has passed. This section, then, applies to cures effectuated (a) after the “institution” of foreclosure, or (b) during the “interval” of time between the “expiration of the date to cure” in the notice of intention and “commencement of foreclosure.”

This section is divided into four paragraphs: Paragraph (1) relates to curing a monetary default; Para. 2 refers to non-monetary defaults; Para. 3 relates to allowable court costs and attorneys fees; and Para. 4 refers to allowable late fees in the cure amount.

The provisions of subsection 5b are almost identical to subsection 404(b) of Pennsylvania’s Act 91 *P.S.* § 404(b).⁹

Obviously, tender by the debtor of less than the amount necessary to cure will not effect a cure within the meaning of the act and will not prevent continuation of foreclosure proceedings.¹⁰

Paragraph (1) - Amount to Cure

Paragraph (1) requires that “tender or payment” be made in cash, cashier’s check or certified check of “all sums which would have been due in the “absence of default,” at the time of payment or tender” to the person identified in paragraph (5) of the notice of intention. Contractual late fees are allowed under paragraph (4) of the subsection.

The terminology “all sums which would have been due in the absence of default” makes it clear that where the obligation has “matured,” so that “all sums” are immediately due and payable, the right to cure is the right to pay off the mortgage debt in full, e.g., to redeem. It is also clear that stepped-up or default rate interest is not permitted with respect to the cure amount, since all sums necessary to effectuate a cure are calculated as if default had not occurred.

Paragraph (1) requires that all sums due be computed “as of” the time of “payment” or “tender.” Thus, a successful “tender” will prevent the accrual of additional interest and other sums to the amount necessary to cure.

Since subsection 5b refers to the cure of a default “under this section” —referring to section 5 —the “cash, cashier’s check or certified check” requirement is technically not applicable to a cure on or before the date specified in paragraph (5) of the notice of intention, as

⁹ § 404. **Right to cure a default**

(b) To cure a default under this section, a residential mortgage debtor shall:

- (1) Pay or tender in the form of cash, cashier’s check or certified check, all sums which would have been due at the time of payment or tender in the absence of default and the exercise of an acceleration clause, if any;
- (2) Perform any other obligation which he would have been bound to perform in the absence of default or the exercise of an acceleration clause, if any;
- (3) Pay or tender any reasonable fees allowed under section 406 and the reasonable costs of proceeding to foreclose as specified in writing by the residential mortgage lender actually incurred to the date of payment.
- (4) Pay any reasonable late penalty, if provided for in the security document.

¹⁰ *In re Jones*, 91 B.R. 725 (Bankr. W.D.Pa. 1988), *rev’d on other grounds*, 122 B.R. 246.

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this is a section 4 cure. Until further court clarification, it is the author's suggestion that the notice of intention not require that payment be made by cash, cashier's check or certified check.

Lawful advances made by the lender and authorized by the mortgage contract (e.g., taxes and insurance) may be included in the cure amount under Para. 1 of this section, if these sums are due at the time of "payment or tender."

Any lawful advances made by the lender "after" payment or tender by the debtor would not be includable in the cure amount, although failure to pay such sums constitutes another default under the mortgage for which the lender has recourse under the act.

"Dishonored check fees" are not permitted unless allowed by the mortgage documents or statute. There is no provision in the uniform instruments that the author can find that specifically permits this.

Paragraph 2 - Any Other Obligation

Paragraph (2) of subsection 5b requires that the debtor perform "any other obligation which the debtor would have been bound to perform in the absence of default or . . . acceleration." This is entirely confusing, unless "obligation" is used here in a general sense to denote "duty." Under *N.J.S.A. 2A:50-55*, "obligation" is defined to mean the "personal" instrument--"a promissory note, bond or other similar evidence of a duty to pay." Paragraph 2, on the other hand, deals with performance other than the payment of a sum of money, i.e., non-monetary performance. Taken literally, it is questionable whether a purely non-monetary duty would constitute an obligation under the statute, and whether such performance could be required of the debtor as a condition of cure and reinstatement.

With respect to the notice of intention, the act merely provides "what *performance*, including what sum of money, if any" and avoids reference to "obligation." (Emphasis supplied.)

The applicable paragraph of the uniform mortgage instrument ¹¹ dealing with non-monetary performance and cure requires that the borrower "(b) cures any default of any other covenants or agreements." This is much more accurate terminology.

Paragraph (3) - Court Costs and Attorneys' Fees

Paragraph (3) provides that "costs, if any, and attorneys' fees in an amount which shall not exceed the amount permitted under the Rules Governing the Courts of the State of New Jersey." However, attorneys' fees cannot be included in the cure amount prior to the institution of the foreclosure action.¹² A cure under the Fair Foreclosure Act prior to institution of foreclosure is deemed to be a "no penalty" cure because court costs and attorneys fees cannot be included.¹³

Court costs are typically filing fees (for complaint, motions, etc.), lis pendens recording fees, service fees, etc. Attorney fees are calculated under Rule 4:42-9(a)(4).

¹¹ NEW JERSEY—Single Family—Fannie Mae/FreddieMac UNIFORM INSTRUMENT (Form 3031 1/01). Paragraph 19 of Uniform Covenants—"Borrower's Right to Reinstate After Acceleration."

¹² *Spencer Sav. Bank, SLA v. Shaw*, 401 N.J. Super. 1, 949 A.2d 218 (App. Div. 2008).

¹³ *Id.*

Paragraph (4) - Late Charges

Paragraph (4) requires payment of all contractual late charges in the cure amount provided for in the “note” or “security agreement.” The drafters believed this paragraph was necessary because Para. (1) refers to all sums which would have been due in the “absence of default” which would not include late fees which ordinarily become due thereafter.

Interestingly, the statute omits any reference to a “bond.” In situations, therefore, where the mortgage secures a bond, and the mortgage itself does not contain a provision for late charges, presumably, late charges would not be includable in the cure amount. Unlike paragraphs (1) and (3), paragraph (4) requires the debtor to “pay” not tender all contractual late charges.

The uniform instruments ¹⁴ provide that a late charge be collected “only once on each late payment.” This has also been the policy of the New Jersey Judiciary.¹⁵ In a foreclosure action, the Office and court will not permit late charges after the filing of the complaint.¹⁶ However, Paragraph (1) requires the debtor, as a condition of reinstatement, to pay “all sums which would have been due in the absence of default, at the time of payment or tender” and thus appears to permit the inclusion of late charges in the cure amount right up to reinstatement. Moreover, Paragraph (4) which permits the inclusion of “contractual” late charges in the cure amount would also appear to authorize this, since contractually a debtor making installment payments is required to pay late charges on those installments accruing at time of payment.

The uniform instruments do not provide for “tender” by the borrower in order to reinstate, merely “payment.” Moreover, the uniform instruments, ¹⁷ provide, as a condition of reinstatement, that the borrower “takes such action as Lender may reasonably require to assure that the lien of this Security Instrument, Lender’s rights in the Property and Borrower’s obligation to pay the sums secured by this Security Instrument shall continue unchanged.” Thus, the lender may require execution of additional documents by the borrower and additional information as a condition of reinstatement. Where the provisions of the uniform instruments apply, this would appear to be an independent ¹⁸ contractual right of the lender.

Section 5c says that “a debtor shall not be required to pay any charge, fee or penalty attributable to the exercise of the right to cure a default” under the act. This makes it clear that the lender can only include sums in the cure amount specified in section 5b. Any other charge is unlawful, especially a penalty or charge to the debtor for curing. Thus, the residential lender may not require an extra month payment or “cushion” as insurance against future defaults by the debtor. Not only is such a charge illegal under the Fair Foreclosure Act, but would be actionable under the Fair Debt Collection Practices Act (FDCPA).

Inspection Fees

¹⁴ Paragraph 8—Borrower’s Failure To Pay As Required. Multistate Convertible Rate Note—Single Family—Fannie Mae Uniform Instrument (Form 3508 1/89).

¹⁵ Notice to the Bar Re: Foreclosure Matters, 110 *N.J.L.J.* 325 (Sept. 16, 1982). Also reprinted in Chapter 10 *infra*.

¹⁶ *Id.*

¹⁷ Paragraph 18 of the Uniform Covenants—Borrower’s Right to Reinstate. New Jersey—Single Family—Fannie Mae/Freddie Mac Uniform Instrument (Form 3031 9/90). Specifically see Paragraph 18(d).

¹⁸ *N.J.S.A.* 2A:50-57f.

It is not clear whether “inspection fees” may be included in the cure amount. Paragraph 7 of the uniform mortgage instrument¹⁹ provides that the lender “may make reasonable entries upon and inspections of the Property.” And Paragraph 9²⁰ provides that the “Lender may do and pay for whatever is reasonable or appropriate to protect Lender’s interest in the Property. . . including protecting and/or assessing the value of the property.” It also authorizes the lender to “enter” the property for purposes of “securing” it.

Fees for “winterizing” and “boarding up” the property would clearly be includable under Paragraph 9 of the uniform mortgage instrument²¹ as costs of “securing” the property.

The uniform mortgage instrument²² expressly provides for recovery of “inspection fees” by the lender as a condition of reinstatement by the borrower

Under Pennsylvania law, it has been held that “inspection fees” could not be included in the arrearage amount necessary to cure, as they were not “foreclosure costs” for which pass through is authorized by the statute.²³

On the other hand, it has also been held that Chapter 13 debtor-mortgagors were required to pay inspection fees as foreclosure costs recoverable under the mortgage instruments.²⁴

In New Jersey, the Office of Foreclosure has historically not permitted a lender to include “inspection fees” in the proof of amount due under the theory that these are costs incurred to protect the lender’s interest not the property. In the author’s opinion, absent a judicial determination, the matter is unsettled under New Jersey law.

§3.03 Search Fees

Pursuant to Para. 7 of the notice of intention (*N.J.S.A.* 2A:50-56c(7), “court costs” in an amount not to exceed the court rules, are only allowable in the cure amount “after” the commencement of foreclosure. Although the statute refers to “court costs” generally, it is altogether clear that search fees are costs (or taxed costs) under the rules. The statute provides:

(7) that *if the lender takes the steps indicated pursuant to paragraph (6) of this subsection c.*, [commencement of foreclosure] a debtor shall still have the right to cure the default pursuant to section 5 of this act, but that the debtor shall be responsible for the lender’s *court costs and attorneys’ fees* in an amount not to exceed that amount permitted pursuant to the

¹⁹ NEW JERSEY–Single Family–Fannie Mae/FreddieMac UNIFORM INSTRUMENT (Form 3031 1/01).

²⁰ NEW JERSEY–Single Family–Fannie Mae/FreddieMac UNIFORM INSTRUMENT (Form 3031 1/01).

²¹ NEW JERSEY–Single Family–Fannie Mae/FreddieMac UNIFORM INSTRUMENT (Form 3031 1/01).

²² NEW JERSEY–Single Family–Fannie Mae/FreddieMac UNIFORM INSTRUMENT (Form 3031 1/01). Paragraph 19 of Uniform Covenants–“Borrower’s Right to Reinstatement After Acceleration.”

²³ *In re Burwell*, 107 B.R. 62 (Bankr. E.D.Pa. 1989).

²⁴ *In re Garnett*, 99 B.R. 293 (Bankr. E.D.Pa. 1989).

Rules Governing the Courts of the State of New Jersey.
(Emphasis supplied.)²⁵

Search fees are not permitted by the statute where a cure is effected (a) under the notice of intention or (2) during the interval of time between the expiration of the date specified in the notice of intention and the institution of foreclosure.

Under present practice, this can be costly to lenders. *R. 4:64-1(a)* now requires that a certification of compliance with the title search requirement be annexed to the foreclosure complaint certifying that a search has been received and reviewed by plaintiff prior to the filing of the complaint for the purpose of joining all proper parties in interest.

Thus, plaintiff must requisition a full title search (county and upper court searches) prior to the filing of the foreclosure complaint, and will not be reimbursed for these expenses if the debtor cures the default prior to commencement of foreclosure. This is patently unfair to residential lenders.

§3.04 Counsel Fees

Pursuant to Para. 7 of the notice of intention (*N.J.S.A. 2A:50-56c(7)*), attorneys' fees in an amount not to exceed those permitted by the court rules, are only allowable in the cure amount "after" the commencement of foreclosure.

Paragraph (3) of Section 5b (*N.J.S.A. 2A:50-57b(3)*), permits inclusion of attorneys' fees in the cure amount in an amount not to exceed the amount permitted under the court rules.²⁶

It is not clear whether lenders must obtain an order taxing costs in order to receive "attorneys' fees" or whether lenders can merely calculate attorneys' fees on their own, in accordance with the rules, for inclusion in the cure amount. The latter alternative is the preferable one.

Court costs are discussed in a subsequent section.

What is the base amount on which attorneys' fees are to be calculated — the cure amount or the loan amount? It is the author's opinion that the "loan amount" is controlling for calculation of attorneys' fees. After acceleration, there is only a single accelerated mortgage debt. In order to de-accelerate the obligation, the only applicable sum would be the amount of the obligation.

This principle was confirmed by the Chancery Division in *National City Mortg. v. Smith*,²⁷ in which the court ruled that the amount of the fully accelerated, outstanding principal balance of the underlying debt--rather than the actual amount necessary to cure the debtor's default--was the base amount on which to calculate counsel fees under the statute.

²⁵ *N.J.S.A. 2A:50-56c(7)*

²⁶ *R. 4:42-9(a)(4)*.

²⁷ 324 *N.J. Super.* 509, 735 A.2d 1221 (Ch. Div. 1999).

In *Luciani v. Hill Wallack*, Judge Gibson reduced counsel fees of \$5,984.42 which were included in the pay-off a mortgage, pending foreclosure, with a total amount due of \$583,441.69, even though the fees did not exceed the rule amount, because they were viewed by the court as a penalty. Judge Gibson concluded that the reasonable value of services rendered, according to the law firm's own admission was \$962.50, six times higher than the maximum fee permitted by the rules.

Surprisingly, in reaching his result, Judge Gibson cited the Fair Foreclosure Act for the following proposition:

More importantly, where a lender imposes a legal fee which is six times higher than the reasonable value of the time expended as a condition of a pay off, it seems clear that such a charge would constitute a penalty and thus violate *N.J.S.A. 2A:50-57(c)*. The imposition of such a charge would also undermine the public policy of the Act that homeowners be given "every opportunity" to pay their mortgages. *N.J.S.A. 2A:50-54*. Indeed, it would run counter to the liberal attitude toward redemption, in general.²⁸

Judge Gibson also found: "Although the fees charged here were part of a total payoff of the mortgage, not simply a payment of the arrearage, it is my view that both steps represent a cure of the default and thus *N.J.S.A. 2A:50- 57(b)(3)* would apply in either setting."²⁹

Thus, *Luciani* stands for the proposition that the Fair Foreclosure Act serves to limit excessive counsel fees in residential mortgage foreclosure actions, whether those fees are imposed as part of the "cure" amount or as part of the "redemption" sum pending foreclosure, because, in the court's view, "both steps represent a cure of the default."

It is submitted by the author that reference to the Fair Foreclosure Act was not needed by the court to reach the above result. Chancery has ample discretion to limit counsel fees prior to entry of judgment.³⁰

As previously noted, "cure" and "redemption" are entirely separate and distinct concepts, although both are obviously part of the foreclosure process.

Uniform Instruments—Non Fair Foreclosure Act

Paragraph 22 of the uniform mortgage instrument "Acceleration; Remedies" provides that "Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in Section 22 including, but not limited to, attorneys' fees and costs of title evidence permitted by Rules of Court." On its face, this provision, in the author's opinion, permits attorneys' fees and search fees in the cure amount "prior" to the institution of foreclosure.

Paragraph 19 of the uniform mortgage instrument "Borrower's Right to Reinstate After Acceleration"³¹ permits "reasonable attorneys' fees as a condition of reinstatement by the borrower. It is clear, however, that New Jersey law limits such fees to the rule amount."³²

²⁸ 329 *N.J. Super.* 170, 746 A.2d 1097 (Ch. Div. 1999).

²⁹ *Id.* at 176, 746 A.2d 100.

³⁰ See *Collective Fed. Sav. & Loan Ass'n v. Toland*, 207 *N.J. Super.* 157, 504 A.2d 59 (Ch. Div. 1985) for a comprehensive discussion.

³¹ NEW JERSEY—Single Family—Fannie Mae/FreddieMac UNIFORM INSTRUMENT (Form 3031 1/01).

³² *R. 4:42-9(a)(4)*.

§3.05 Court Costs

Pursuant to Para. 7 of the notice of intention (*N.J.S.A. 2A:50-56c(7)*), “court costs” are only allowable in the cure amount “after” the commencement of foreclosure.

Paragraph (3) of Section 5b (*N.J.S.A. 2A:50-57b(3)*), permits inclusion of “court costs” in the cure amount.³³

“Search fees and counsel fees” are normally a component of “costs” awarded in a foreclosure action by the court or clerk and have been discussed in previous sections.

“Court costs” ordinarily can only be awarded by the court or clerk and are normally taxed³⁴ by the Office of Foreclosure at time of judgment. It is not clear whether it is absolutely necessary for plaintiff to apply to the Office for an order taxing costs in order to include these fees in the cure amount or whether plaintiff can include them on its own. It is submitted by the author that an order taxing costs should be obtained from the Office of Foreclosure.

§3.06 Cure (On or Before the Cure Date) — *N.J.S.A. 2A:50-56c*

This cure is controlled by the terms of the notice of intention, Section 4c, *N.J.S.A. 2A:50-56c* and was discussed in the previous chapter.

A cure under Section 4c prevents “acceleration” and the “commencement” of foreclosure.

This is a so-called “no-penalty” cure because court costs and attorneys’ fees cannot be included in the cure amount.

The eighteen month limitation³⁵ on the right to cure is not applicable to a cure in this situation.

§3.07 Cure (After the Cure Date but Prior to Foreclosure); During the Interval — *N.J.S.A. 2A:50-57b*

A cure after the date to cure has passed in the notice of intention but prior to institution of foreclosure is controlled by Section 5b (*N.J.S.A. 2A:50-57b*).

In the author’s opinion, this is a so-called “no-penalty” cure because court costs and attorneys’ fees cannot be included in the cure amount.

It is the author’s opinion that the eighteen month limitation on the right to cure is applicable in this situation.

³³ *R. 4:42-9(a)(4)*.

³⁴ *R. 4:42-8*. Such costs include: \$200.00, filing fees for the complaint; \$50.00 statutory allowance, *N.J.S.A. 22A:2-10*; search fees, *R. 4:42-10*; fees paid for service of process; fees for publication; and lis pendens filing fees, *N.J.S.A. 2A:15-13*.

³⁵ *N.J.S.A. 2A:50-57a*.

§3.08 Cure (After Commencement of Foreclosure) — *N.J.S.A. 2A:50-57b*

There is a so-called “penalty” cure—even though the lender cannot exact any charge, fee, or penalty attributable to the debtor’s right to cure—because court costs and attorneys’ fees may be included in the cure amount.

Attorneys’ fees includable in the cure amount are calculated on the total amount of the obligation to be reinstated.

The eighteen month limitation on the right to cure is applicable in this situation.

§3.09 Cure (After Judgment)

The debtor has no right to cure under the act “after” judgment³⁶ or after the order fixing the amount, time and place for redemption under the optional procedure. The debtor’s only right in this situation is redemption, e.g., payment of all sums secured by the mortgage.

Under the uniform mortgage instrument as well, cure and reinstatement terminates with the judgment.³⁷

Of course, the lender may permit the debtor to cure at any time. But, after judgment, cure and reinstatement are “discretionary” with the lender.

In the absence of an agreement to the contrary, acceptance of a partial payment by the mortgagee in this instance should not affect the mortgagee’s right to continue foreclosure.

Of course, if the judgment (or order fixing the amount, time and place for redemption) is vacated for any reason, it is axiomatic that the right to cure once again arises under the act.

Under Chapter 13 of the bankruptcy code, 11 *U.S.C.* § 1322(c)(1), a debtor may cure a default with respect to a mortgage on the debtor’s principal residence until such residence is sold at the foreclosure sale and possibly until actual delivery of the deed to the successful purchaser, but this is a cure under “federal” not state law and is separate and distinct from the right to cure under the Fair Foreclosure Act.³⁸

§3.10 The Effect of the Cure — *N.J.S.A. 2A:50-57d*

d. Cure of a default reinstates the debtor to the same position as if the default had not occurred. It nullifies, as of the date of cure, any acceleration of any obligation under the mortgage, note or bond arising from the default.

Analysis

³⁶ This is consistent with the merger doctrine, e.g., that the judgment merges the mortgage into the judgment; hence, there is no mortgage and attendant right to cure and reinstate the mortgage contract.

³⁷ NEW JERSEY—Single Family—Fannie Mae/FreddieMac UNIFORM INSTRUMENT (Form 3031 1/01). Para. 19—“Borrower’s Right to Reinstatement After Acceleration.”

³⁸ *N.J.S.A. 2A:50-59*.

Reference in Section 5d (*N.J.S.A. 2A:50-57d*) to a cure as nullifying “any acceleration” of “any obligation” makes it clear that the all-or-none rule applies to a cure under the act — i.e., all obligations then in default must be performed.

A mortgage default, therefore, cannot be cured in part under the act. Presumably, the default must be cured with a lump sum payment of all arrearages, interest and other charges. This underscores the importance of a workout agreement in applicable situations between lender and debtor, where the debtor may enter into a more flexible arrangement, e.g., a stipulation of payment arrangement which will provide a more practical solution to the debtor’s default and reinstatement prospects.

The terminology of subsection 5d is almost identical the Pennsylvania statute.³⁹

The uniform instruments⁴⁰ provide for the same result on reinstatement—that the mortgage and obligations “shall remain fully effective as if no acceleration had occurred.”

Subsection 5d makes it clear that the cure nullifies “any acceleration of any obligation” under the *mortgage, note or bond* arising from the default. This terminology has particular relevance to section 10 of the act (*N.J.S.A. 2A:50-62*) which permits foreclosure of a residential and non-residential mortgage securing the same obligation in separate actions. If the mortgage and note or bond have been de-accelerated and reinstated by virtue of a cure in the residential mortgage foreclosure action, and the debtor is restored to the same position *as if default had not occurred*, it is the author’s opinion that the non-residential action cannot be maintained, since the debtor has cured the very obligation pursuant to which the non-residential action is maintained.

It is entirely clear that since a cure nullifies any acceleration under the *mortgage, note or bond* arising from the default, an independent personal action on the *note or bond* secured by the mortgage cannot be maintained for that default.

Since *N.J.S.A. 2A:50-57d* only provides that cure nullifies any acceleration of any obligation under the *mortgage, note or bond*, presumably, where the deficiency action statutes do not apply, *N.J.S.A. 2A:50-2 et seq.*, an independent action on the debt could be instituted on a *guaranty or other instrument of obligation* apart from the note or bond.

§3.11 Dismissal or Non-Initiation of Foreclosure on Cure — *N.J.S.A. 2A:50-57e*

e. If a default is cured prior to the filing of a foreclosure action, the lender shall not institute a foreclosure action for that default. If a default is cured after the filing of a foreclosure action, the lender shall give written notice of the cure to the court. Upon such notice, the court shall dismiss the action without prejudice.

Analysis

If the debtor cures the default prior to the filing of the complaint, the lender cannot institute foreclosure for that default. If the debtor thereafter defaults again with respect to a

³⁹ § 404. **Right to cure a default** (c) Cure of a default pursuant to this section restores the residential mortgage debtor to the same position as if the default had not occurred.

⁴⁰ NEW JERSEY—Single Family—Fannie Mae/FreddieMac UNIFORM INSTRUMENT (Form 3031 1/01). Paragraph 19 of Uniform Covenants—“Borrower’s Right to Reinstatement after Acceleration.”

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subsequent installment or payment, the lender must give another notice of intention to the debtor before instituting foreclosure. The cure, as it were, sets the odometer back to zero and the debtor must be given another notice of intention *de novo* before commencing foreclosure.

Absent an express agreement between the parties to the contrary, payment by the debtor of less than all sums due under the act to cure (a partial payment) ⁴¹ will not prevent the lender from instituting or continuing the foreclosure action, as the mortgage is still in default.

Where the debtor cures the default during the pendency of the foreclosure, the action, by virtue of subsection 5e (*N.J.S.A. 2A:50-57e*), must be dismissed.⁴² If the action is uncontested, the proper judicial office to send the “notice of cure” to ⁴³ — notwithstanding the provisions of this section which specifies “court” — is the Office of Foreclosure (CN971, Trenton, NJ 08625).

If the action is contested, written notice should be given to the vicinage chancery judge, *R. 1:5-6*. The action of course should not be dismissed where the cure relates only to a particular count, mortgage or property, or where there may be other unresolved claims pending in the action. The act fails to address these situations.

§3.12 The Right to Cure (Independent Right) — *N.J.S.A. 2A:50-57f*

Subsection 5f (*N.J.S.A. 2A:50-57f*) provides:

f. The right to cure a default under this section is independent of any right of redemption or any other right or remedy under the common law, principles of equity, State or federal statute, or rule of court.

Analysis

Section 5f (*N.J.S.A. 2A:50-57f*) is analogous to Section 4e (*N.J.S.A. 2A:50-56e*), discussed in the previous chapter, which contains a comparable provision relating to the notice of intention.

The purpose of this section is twofold: First, it provides that the right to cure under the Fair Foreclosure Act is independent of any “other” right or remedy the debtor may have under applicable law. And second, since the right to cure is an independent right, it is not intended to be “exclusive.”

Thus, the right to cure afforded by the Fair Foreclosure Act is “cumulative” and intended to be given to the debtor in “addition” to any other right or remedy to which the debtor may be entitled.

Subsection 5f underscores the uniqueness of rights provided under the act. It also underscores an important principal: when referring to the “right to cure” in a written document of waiver or otherwise, it is important to specifically refer to the “right to cure” under the “Fair Foreclosure Act” and “uniform mortgage instrument,” as the case may be. Otherwise, merely

⁴¹ *N.J.S.A. 2A:50-69*.

⁴² See Appendix C.

⁴³ See Appendix C.

waiving the debtor's rights under the former will not affect rights under the latter, since these rights are deemed independent.

The right to assert an independent right to cure, however, may be subject to the priority position of State law and the Fair Foreclosure Act.

Under the uniform mortgage instrument,⁴⁴ for example, the right to cure and reinstate extends up until entry of judgment. This is the same as the right to cure under the Fair Foreclosure Act. This is an independent right of the borrower under the uniform mortgage. But there is no eighteen month limitation under the uniform mortgage. If the uniform mortgage is deemed to be in conflict with the Fair Foreclosure Act in this regard, the Fair Foreclosure Act would control.⁴⁵

§ 4.13 14 Day Notice of Entry of Judgment—*N.J.S.A. 2A:50-58a(1)*

a. (1) If a plaintiff's action to foreclose a residential mortgage is uncontested, pursuant to R.4:64-1(a) of the Rules Governing the Courts of the State of New Jersey and the plaintiff chooses not to use the optional procedure for the disposition of foreclosed premises pursuant to section 11 of this act, a lender shall apply for entry of final judgment and provide the debtor with a notice, mailed at least 14 calendar days prior to the submission of proper proofs for entry of a foreclosure judgment, providing the debtor with the name and address of the lender and the telephone number of a representative of the lender whom the debtor may contact to obtain the amount required to cure the default, and advising that, absent a response from the debtor pursuant to paragraph (2) of this subsection a., proper proofs will be submitted for entry of final judgment in the foreclosure action and that upon entry of final judgment, the debtor shall lose the right, provided pursuant to section 5 of this act, to cure the default. The lender shall attach a copy of the required 14-day notice to the application for final judgment. The manner and address for mailing and the effective date of the notice shall be the same as set forth in subsection b. of section 4 of this act.

Analysis

Section 6a sets forth the so-called "notice to cure" requirement in which the lender must give the residential debtor a notice to cure, or 14 day notice of entry of judgment, prior to the lender's application for final judgment. The purpose of the section is obvious: to give the debtor one last chance to cure before entry of final judgment which terminates the debtor's right to cure.

The original purpose of this section was somewhat different. As originally formulated, this section was meant to give the debtor one last chance to go bankrupt before judgment. The original idea behind section 6 was to give the debtor one last chance to go bankrupt before the final cut off date, which was "final judgment." However, 11 U.S.C. § 1322(c)(1) of the Bankruptcy Reform Act of 1994, which permits the debtor to cure a home mortgage default

⁴⁴ NEW JERSEY—Single Family—Fannie Mae/FreddieMac UNIFORM INSTRUMENT (Form 3031 1/01). Paragraph 19 of Uniform Covenants—"Borrower's Right to Reinstate after Acceleration."

⁴⁵ NEW JERSEY—Single Family—Fannie Mae/FreddieMac UNIFORM INSTRUMENT (Form 3031 1/01). Paragraph 16 and 19 (c) of Uniform Covenants—"Borrower's Right to Reinstate after Acceleration."

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through the foreclosure sale, clearly renders this concern moot. The judgment is no longer the final cut-off date for filing bankruptcy.

Nevertheless, this section still remained in the act. It is the author's view that this section is unnecessary, redundant, and adds more time and complexity to a remedy already fraught with too much delay and complexity.

Pennsylvania's Act 6 and Act 91 contain no comparable provision, nor does the uniform mortgage instrument.

In *Bank v. Kim*,⁴⁶ the Appellate Division vacated the foreclosure judgment in part because of the lender's failure to comply with this section and give a 14 day notice of entry of judgment to the debtors.

Under this section, the residential lender must mail a notice of entry of judgment to the residential mortgage debtor, at least 14 calendar days prior to the submission of proper proofs for entry of a foreclosure judgment. The notice must advise the debtor that (a) absent a response from the debtor pursuant to paragraph (2) of subsection 6a, *N.J.S.A.* 2A:50-58a(2), (b) proper proofs will be submitted for judgment and (c) upon entry of judgment the debtor will lose the right to cure the default provided in section 5 of the act. All that is required is a statutory notice, not a notice of motion.

On or after July 16, 2006,⁴⁷ the 14 day notice must provide "the debtor with the name and address of the lender and the telephone number of a representative of the lender whom the debtor may contact to obtain the amount required to cure the default; and, additionally, the lender must attach "a copy of the required 14-day notice to the application for final judgment." The latter requirement is met by attaching a copy of the notice or notices to plaintiff's certification of mailing of the notice.

The 14 day notice must be mailed to the debtors by registered or certified mail, return receipt requested to the same address or addresses the notice of intention to foreclose was mailed (to the debtor's last known address and is different to the mortgaged premises). The notice is effective on mailing. It is also the author's strong suggestion that the notice be mailed simultaneously by ordinary mail pursuant to the Supreme Court's latest constitutional notice case.⁴⁸

The 14 day notice must be mailed at least 14 calendar days prior to submission of "proper proofs" for the entry of judgment. It is assumed that "proper proofs" mean plaintiffs moving papers — i.e., papers, proofs and instruments regular in form and content conforming to the requirements of *R.4:64-1(b)* and 2 — together with required notices of motion for judgment, if any, which have return dates no earlier than the date the papers are entitled to be submitted to the Office of Foreclosure (or court) for judgment.

If the debtor responds to the notice, the statute gives the debtor 45 days from the date of mailing of the notice to cure.⁴⁹ The debtor's response is addressed in the next section.

⁴⁶ *Bank v. Kim*, 361 *N.J. Super.* 331, 339, 825 A.2d 566, 570 (App. Div. 2003).

⁴⁷ L.1995, c. 244, § 6. Amended by L.2006, c. 13, § 1, eff. July 16, 2006.

⁴⁸ *Jones v. Flowers*, 126 S.Ct. 1708 (2006).

⁴⁹ *N.J.S.A.* 2A:50-58a(2),(3).

Section 6a (*N.J.S.A.* 2A:50-58a) states that after the action is deemed uncontested, “a lender *shall* apply for final judgment.” (Emphasis supplied.) This is incorrect terminology. Whether or not a lender applies for final judgment is always discretionary with the lender. It is presumed that this language means if plaintiff applies for judgment, the 14 day notice is mandatory.

Notice to Heirs, Devisees, Personal Representatives

Although not directly addressed by the statute, it is the author’s strong suggestion that the 14-day notice be mailed to the heirs, devisees and personal representatives of a deceased debtor, even if such persons have not been given a notice of intention to foreclose. Although debtor is defined as “any person shown on the record of the residential mortgage lender as being obligated to pay the obligation,” the statute does not say when such persons must be shown on the lender’s records. Presumably, if plaintiff’s inquiry subsequently discloses heirs, devisees, and/or a personal representative of a deceased debtor pending foreclosure, that information can be viewed as being shown on the record of the lender.

In the author’s view, heirs, devisees, and/or a personal representative of a deceased debtor are debtors under the act and are entitled to step into the shoes of the debtor insofar as protections under the act are concerned. In *Washington Mutual Bank, FA v. Webb* (unpublished),⁵⁰ the Chancery Division required that the devisee be joined in the foreclosure and be given a notice of intention under the act. Practitioners should therefore be forewarned.

§ 4.14 Debtor's Statement of Ability to Cure Default —45 Day Period (*N.J.S.A.* 2A:50-58a(2),(3)).

(2) A debtor may, no later than 10 days after receipt of the notice required pursuant to subsection a. of this section, mail to the lender a statement in which the debtor in good faith certifies as true that there is a reasonable likelihood that the debtor will be able to provide payment necessary to cure the default within 45 days of the date the notice required pursuant to paragraph (1) of this subsection a. became effective. This statement shall be sent registered or certified mail, return receipt requested, to the address of the lender who gave notice as required pursuant to subsection a. of this section.

(3) A lender who receives a statement sent by the debtor pursuant to paragraph (2) of this subsection a., shall not submit proper proofs for entry of final judgment in foreclosure with a return date earlier than 46 days after the date the notice required pursuant to paragraph (1) of this subsection a. became effective.

Analysis

Section 6a(2) gives the debtor 10 days after receipt of the 14 day notice to mail (by registered or certified mail, return receipt requested) a statement, in which the debtor in good faith certifies as true that there is a reasonable likelihood that the debtor will be able to provide payment necessary to cure the default within 45 days of the date the notice was mailed.

⁵⁰ *Washington Mut. Bank, FA v. Webb*, 2006 WL 156882 (*N.J. Super. Ct. Ch. Div.* 2006). (Unpublished)

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Pursuant to Section 6a(3), a lender who receives a statement in accordance with the section cannot submit proper proofs for entry of final judgment in foreclosure with a return date earlier than 46 days after the date of mailing of the notice.

The use of the terminology “that there is a reasonable likelihood that the debtor will be able to provide *payment* necessary to cure the default” makes it clear that Section 6a (2) relates solely to the cure of a “monetary” default. (Emphasis supplied.)

The statute gives the debtor “10 days after receipt of the notice” to respond. But this language is not clear. Since the statute only requires that the debtor be given a registered or certified mailing, the notice may be “received” by the debtor many weeks after mailing, or may not be received at all. Since registered or certified mailing alone is statutorily required, there is no presumption of receipt on mailing, even if ordinary mailing is also used.⁵¹ Suppose the 14 day notice is never received by the debtor, or is received late, when does the debtor’s response period end.

Section 6a(1) requires that the “lender” mail the 14 day notice to the debtor, and Section 6a(2) requires that the statement or response by the debtor go to the “lender.” There is no reference in the section to lender’s “agent” or “attorney.” This appears to be an oversight.

In *Federal Nat. Mortg. Ass'n v. Bracero*,⁵² the Chancery Division ruled that, under agency principles, the mortgagors were required to send their response to the 14 day notice to the lender’s “attorney,” not the lender.

Under present practice, the lender’s attorney, not the lender, mails the 14 day notice to the debtor. Under the principles set forth in *Bracero*, it is submitted that this is the correct practice.

Return Dates on Motions vis a vis 14 Day Notice

Section 6a(a)(3) provides that a lender who receives a statement from debtor cannot “submit proper proofs for entry of final judgment in foreclosure with a return date earlier than 46 days after the date the notice. . . became effective.” The notice is effective on mailing. This language ostensibly prevents plaintiff from submitting judgment papers to the court or Office prior to the forty sixth day—and motions containing return dates earlier than the forty sixth day.

After all, if the debtor is given 45 days to cure by virtue of serving a certified statement on the lender, plaintiff is certainly prevented from filing judgment papers with the court until the 45 day period has expired. Further, for plaintiff to serve a motion for judgment with a return date earlier than the forty sixth day, when plaintiff is statutorily bound to wait 45 days before submitting judgment papers, is certainly erroneous.

Thus, if there is an answering encumbrancer in the action, a 30 day notice of motion for judgment (plus three days for mailing) must be given to the defendant’s attorney or to the defendant pro se. But if the debtor has served a “statement” on the lender in accordance with the act, the 45 day period must be taken into account, and plaintiff cannot make the motion for judgment returnable before the forty sixth day.

⁵¹ *Hammond v. Paterson*, 145 N.J. Super. 452, 368 A.2d 373 (App. Div. 1976). Where a statute or contract requires notice by certified mail, no presumption of receipt arises from mailing by ordinary mail, as the very reason for providing for certified mail or actual receipt is to avoid such a presumption.

⁵² *Federal National Mortgage Association v. Bracero*, 297 N.J. Super. 105 (Ch. Div. 1996).

Although the facts are far from clear, in *Bankers Trust Company of California, N.A. v. Dayan*,⁵³ an unpublished opinion, a notice of application for judgment with a return date of May 12, 2000 was apparently pending when plaintiff subsequently served a statutory 14 day notice for judgment on May 22, 2000 (a “notice to cure”) on the Dayans. More than 14 days elapsed, however, after service of the notice to cure before plaintiff submitted proofs for judgment.

The Chancery Division in *Bankers Trust*, though, found that the statutory deadlines had been complied with and seemed not to be concerned with the apparently premature return date on the notice of application for judgment. The Appellate Division affirmed the Chancery judge’s ruling.⁵⁴

§ 4.15 14 Day Notice of Entry of Judgment (“Notice to Cure”)—Form

(LETTERHEAD OF LENDER’S ATTORNEY)

(Date)

Via Certified Mail RRR#

Name of Individual Debtor

Street Address

Municipality, State, Zip Code

RE: Lender’s Name

Lender’s Account Number

Address of Mortgaged Premises

NOTICE OF ENTRY OF FINAL JUDGMENT

Dear *(Name of Debtor)*:

This is to advise you that absent a response from you in accordance with paragraph 2 of subsection 6a of the Fair Foreclosure Act, *N.J.S.A.* 2A:50-58a(2), we will submit proper proofs for entry of final judgment in the above foreclosure action on or after *(Day/Month/Year—At least 14 days after date of mailing of Notice)* and that upon entry of final judgment you will lose your right provided pursuant to section 5 of the act to cure the default.

Paragraph 2 of subsection 6a of the Fair Foreclosure Act provides that you may, no later than 10 days after receipt of the within notice for entry of final judgment, mail to us a statement in which you in good faith certify as true that there is a reasonable likelihood that you will be able to provide payment necessary to cure the default within 45 days of the date that this notice became effective. The date this notice became effective was the date we mailed it to you on *(Day/Month/Year)*. This statement must be sent by registered or certified mail, return receipt requested, to our address. The name and address you may mail your statement to is: *(Name of*

⁵³ No. A-1673-00T3 (*N.J. Super. App. Div.* Oct. 29, 2001), *certif. denied*, 171 *N.J.* 44 (2002).

⁵⁴ *Id.*

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Lender/C/O Name of Lender's Attorney/Address/Attention: Name of Person). If we receive such a timely statement from you, we cannot submit proper proofs for entry of final judgment in foreclosure earlier than *(Day/Month/Year—At least 46 days after date of mailing of notice)*.

The name and address of the lender and the telephone number of a representative of the lender whom you may contact to obtain the amount required to cure the default is set forth below:

Lender's name: _____

Lender's address: _____

Phone number of a representative of the lender: _____

(PLEASE NOTE: If a servicer is handling the loan, its contact information should be provided)

Servicer's name: _____

Servicer's address: _____

Phone number of a representative of the servicer: _____

(Name of Law Firm)

By: _____

(Name of Attorney)

Editor's Note: For actions instituted on or after July 16, 2006, the 14-day notice of entry of judgment must include the name and address of the lender and the telephone number of the lender's representative whom the debtor may contact to obtain the amount required to cure the default.

Editor's Note: A separate notice should be used for each debtor and mailed to each debtor in separate envelopes (even if husband and wife) by the lender's attorney. The notice should direct the debtor to respond to the lender's attorney. See Federal National Mortgage Association v. Bracero, 297 N.J. Super. 105 (Ch. Div. 1996).

THIS COMMUNICATION IS FROM A DEBT COLLECTOR

§ 4.16 Default Cured Under Bankruptcy Repayment Plan (Reinstatement of Mortgage Relationship) — *N.J.S.A. 2A:50-59*

Section 7 of the act provides:

If a debtor is successful in curing the default under a repayment plan approved by the United States Bankruptcy Court, the residential mortgage relationship between the parties is reinstated, and the debtor is restored to the same position held before the default or acceleration.

Analysis

This section establishes the same result for a cure and reinstatement under the Bankruptcy Code as under the Fair Foreclosure Act⁵⁵: The debtor is restored to the same position held before the default or acceleration.

11 U.S.C. § 1322(c)(1) now provides “a default with respect to, or that gave rise to a lien on the debtor’s principal residence may be cured . . . until such residence is sold at a foreclosure sale that is conducted in accordance with applicable nonbankruptcy law.”

It has been held that by virtue of this provision of The Bankruptcy Reform Act of 1994, effective October 22, 1994, a debtor has the right to cure and reinstate a residential mortgage “until the actual delivery of the deed to the successful purchaser.”⁵⁶ There is a division of opinion on this issue in the Third Circuit.⁵⁷

Where bankruptcy is filed within the 10 day period after sale, the debtor’s state law right of redemption is extended for 60 days under the Bankruptcy Code.⁵⁸

It has also been held that cure and reinstatement for arrearages are not possible with respect to a mortgage which has *matured* prior to the filing of the bankruptcy petition, because all sums secured by the mortgage are immediately due and payable.⁵⁹

Of course, § 1322(c)(1) sets forth a cure and reinstatement right under Chapter 13 of the Bankruptcy Code, not a cure under the Fair Foreclosure Act. This is an independent right, the consequence of which is also cure and reinstatement under New Jersey law.

Under the Fair Foreclosure Act, the debtor has no right to cure after entry of the foreclosure judgment (or entry of the order fixing, the amount, time and place for redemption under the optional procedure), *N.J.S.A. 2A:50-58*. Under the optional procedure, there is no foreclosure “sale.” The debtor loses title on entry of the foreclosure judgment.

§ 4.17 Federal Law Regarding Availability of Homeownership Counseling Unaffected — *N.J.S.A. 2A:50-60*

⁵⁵ *N.J.S.A. 2A:50-57d* provides: “Cure of a default reinstates the debtor to the same position as if default had not occurred.”

⁵⁶ *In re Ross*, 191 B.R. 615 (Bankr. D.N.J.1996); *In re Macavia*, No. 95-34118 (Bankr. D.N.J. October 19, 1995).

⁵⁷ See Gardner and DeLucia, “Sheltering the Shelter, The Significant Bankruptcy Decisions of 1996” 147 *N.J.L.J.* 485, citing *In re Little*, 201 B.R. 98, 102 (D. N.J. 1996) and *In re Ziyambe*, 200 B.R. 790, 794 (D. N.J. 1996) for the proposition that the debtor’s residence is sold at the time of the sheriff’s sale, not when the deed is delivered.

⁵⁸ 11 U.S.C. § 108(b).

⁵⁹ *In re Manocchia*, 157 B.R. 45 (Bkrty. D.R.I.1993).

Nothing herein is intended to limit or modify any provision of federal law regarding notice of the availability of homeownership counselling.

Analysis

This section would appear to add nothing to state of law regarding the notice of availability of homeownership counselling under any provision of federal law. Presumably, a state statute attempting to limit or modify notice of the availability of homeownership counselling under federal law would be invalid.

No doubt, this section, in part, was intended to apply to the Department of Housing and Urban Development (HUD) servicing guidelines and regulations and the lender's counselling obligations under those guidelines and regulations.

This section also ties into paragraph (10) of the notice of intention, *N.J.S.A.* 2A:50-56, whereby the lender must advise the debtor of "the possible availability of financial assistance for curing a default from programs operated by the State or federal government or nonprofit organizations, if any, as identified by the Commissioner of Banking and Insurance. This requirement shall be satisfied by attaching a list of such programs promulgated by the commissioner."

§3.18 Waiver of the Act — *N.J.S.A.* 2A:50-61

Waivers by the debtor of rights provided pursuant to this act are against public policy, unlawful, and void, unless given after default pursuant to a workout agreement in a separate written document signed by the debtor.

L.1995, c.244, Sec. 9

Analysis

In *Bank v. Kim*,⁶⁰ the Appellate Division said:

The Legislature has signaled the importance with which it regards the foregoing rights of the debtor under FFA by declaring that even waivers by the debtor of rights under that Act are "against public policy, unlawful, and void...." If the debtor cannot waive the statute, we would hesitate to endorse its judicial waiver or modification in any case. . . .

Section 9 (*N.J.S.A.* 2A:50-61) makes waiver of the Act's provisions by the debtor, and by the debtor only, void, absent compliance with the act. Presumably, a person who is not technically a *debtor* can waive the provisions of the act with impunity.

If the debtor is released from personal liability under the note, bond, and mortgage, there is no debtor and waiver should not be a problem. There are no judicial decisions, however, approving this procedure. Similarly, where the debtor's secured debt has been discharged in bankruptcy or its enforcement is barred by the statute of limitations, technically there is no debtor under the act.

⁶⁰ 361 *N.J. Super.* 331, 346, 825 A.2d 566, 575 (App. Div. 2003).

The statute provides that a waiver of rights under the act may be given after “default.” Thus, a waiver may lawfully be given by a defaulting debtor prior to the mailing of the notice of intention to foreclose. The act merely prohibits “acceleration” and “institution” of foreclosure without giving the debtor a notice of intention, not the establishment of a “default.”

It goes without saying, that any waiver of the act by the residential mortgage debtor in the original mortgage documents is prohibited, since there is no default at that time.

Of course, the debtor’s right to cure under the uniform mortgage instrument,⁶¹ if applicable, being a wholly independent⁶² right, would not be terminated by waiver of the debtor’s rights under the Fair Foreclosure Act alone.

It is assumed that the language “in a separate written document” means that the debtor cannot waive his or her rights in the workout agreement itself, or in any other document which is not exclusively a document of waiver, such as a deed or assumption agreement or the like.

The document of waiver should also specifically refer to the particular workout agreement involved, identifying it, so it will be clear that the waiver was made “pursuant to a workout agreement” which is a requirement of the statute.

This section also requires that the waiver of rights under the act be signed by the debtor, so that the signature of the debtor’s attorney will not suffice. Presumably, an attorney-in-fact could sign on behalf of the debtor. Obviously, where the debtor is a mentally incapacitated person or a minor, waiver of rights under the act would not be possible because the debtor’s signature and consent could not be lawfully obtained.

If a lender has entered into a workout agreement with the residential mortgage debtor, any provisions of the agreement which are inconsistent with the act will be deemed void, absent compliance with the act. Thus, a “waiver of rights” under the act is essential to a workout agreement.

Certainly, any waiver by the debtor of rights under the act is not good forever. Presumably, if a debtor waives his or her rights, performs successfully under the workout agreement and the loan is reinstated and the foreclosure action dismissed, then any subsequent foreclosure action by the lender would require a new waiver.

If a debtor has lawfully waived his or her rights prior to the filing of the foreclosure complaint, the complaint⁶³ should contain an allegation to that effect, setting forth that a notice of intention is not required to be given to the debtor by virtue of the waiver.

The same idea would apply to the 14 day notice of entry of judgment (or entry of the redemption order under the optional procedure) and waiver by the debtor. A certification of waiver (e.g., that 14 day notice not required)⁶⁴ should be furnished to the Office or court by the foreclosing attorney at time of judgment (or entry of the redemption order under the optional

⁶¹ Paragraph 18 of the Uniform Covenants-Borrower’s Right to Reinstate. New Jersey-Single Family-Fannie Mae/Freddie Mac Uniform Instrument (Form 3031 9/90).

⁶² *N.J.S.A.* 2A:50-57f.

⁶³ See Appendix C.

⁶⁴ See Appendix C.

THE RIGHT TO CURE

procedure) setting forth that the required 14 day notice is inapplicable and attaching a copy of the separate document of waiver signed by the debtor.

It is the author's strong opinion that section 9 applies only to a residential mortgage.

Under Pennsylvania's Act 6, 41 *P.S.* § 408, waiver of the provisions of the act is unconditionally prohibited.

N.J.S.A. 2A:50-2.2 provides:

Any express agreement made or entered into by a borrower at the time of or in connection with the making of or renewal of any loan secured by a mortgage, or thereafter, whereby the borrower agrees to waive the rights, or privileges conferred, upon him by chapter 50 of Title 2A of the New Jersey Statutes shall be void and of no effect.

Technically, the Fair Foreclosure Act, *N.J.S.A.* 2A:50-53 et seq., is part of Chapter 50. Is *N.J.S.A.* 2A:50-61 inconsistent with *N.J.S.A.* 2A:50-2.2? Or is the former to be deemed the more specific statute and therefore the applicable one.

§3.19 Inapplicability to foreclosures of non-residential mortgages— *N.J.S.A.* 2A:50-62

The provisions of sections 1 through 9 of this act shall not apply to the foreclosure of a non-residential mortgage nor to collection of the obligation by means other than enforcing the lender's lien on the residential property. A lender shall not be required to foreclose a residential mortgage and a non-residential mortgage securing the same obligation in the same proceeding.

L.1995, c. 244, Sec.9

Analysis

The first sentence of the section reinforces the fact that the sections 1 through 9 of the act do not apply to the foreclosure of a non-residential mortgage. The second part of the sentence "nor to collection of the obligation by means other than enforcing the lender's lien on the residential property" makes it clear that the foregoing sections have no applicability to money judgment actions in the Law Division on the secured obligation.

The second sentence provides that if a mortgage includes separate residential and non-residential tracts, those portions of the mortgage covering the non-residential tract or tracts shall be a non-residential mortgage. Section 10 (*N.J.S.A.* 2A:50-62) further provides that a lender shall not be required to foreclose a residential and non-residential mortgage securing the same obligation in the same action. Taken together, these sections permit separate foreclosure actions to be instituted with respect to the same mortgage, one action for the residential property and another for the non-residential property. The act, in effect, creates separate mortgages for the residential and non-residential tracts and permits each to be foreclosed in a separate action.

Without Section 10 (*N.J.S.A.* 2A:50-62), such a splitting of actions would certainly run afoul of the entire controversy doctrine⁶⁵ and other doctrines prohibiting the institution of

⁶⁵ *R.* 4:30A.

multiple suits on the same cause of action, thereby putting the mortgagor to the expense and trouble of defending multiple suits.⁶⁶

The statute expressly permits separate actions only where the mortgage includes “separate” residential and non-residential tracts or properties and where the residential and non-residential mortgages secure the “same” obligation. Mortgages securing different obligations on different properties can always be foreclosed in separate actions and therefore this situation was not addressed in the statute.

Where plaintiff instituted foreclosure against residential and non-residential tracts in the same action without sufficient compliance with Pennsylvania’s Act 6, 41 *P.S.* § 403, which is substantially similar to the New Jersey statute, dismissal of the residential property from the proceeding was required.⁶⁷

Sections 3 and 10 of the New Jersey act avoid the above result by permitting the lender to split the residential and non-residential actions, so as to proceed against the non-residential property separately without compliance with the act. Without these sections, if any one of the properties in a mortgage were qualifying residential property, compliance with the act would be required for all the properties.

Presumably, utilizing separate actions for the residential and non-residential tracts is not absolutely necessary. The same result can be reached by utilizing *separate counts* in the same complaint, although a lender may wish to use separate actions in order to institute foreclosure against the residential and non-residential tracts at different times.

Where separate actions are brought on the residential and non-residential tracts at the same time, there may be substantial problems with the prosecution of the non-residential action where the debtor cures and de-accelerates, and reinstates the obligation in the residential action. It may therefore be advisable to foreclose the nonresidential tract first.

This procedure is, of course, permissible only with respect to a residential and non-residential mortgage within the purview of *N.J.S.A.* 2A:50-62 and not to mortgages or foreclosure actions in general.

⁶⁶ *Indiana Inv. Co. v. Evans*, 121 *N.J. Eq.* 72, 77 (Ch. 1936).

⁶⁷ *First National Bank of Palmerton v. Nagley*, 7 D. & C. 3d 789 (1978).

CHAPTER 4

COMMENCEMENT OF ACTION; SERVICE OF PROCESS; ANSWERS

§ 4.01 Filing Foreclosure Papers with the Court

Papers in mortgage foreclosure actions are filed through the eCourts system. When the action is deemed contested a notification will be sent to the vicinage judge.

As of this writing, Michelle M. Smith is the Clerk of the Superior Court.

There is a Foreclosure Processing Services office in the Superior Court Clerk's Office of the New Jersey Judiciary, which docket and files foreclosure pleadings and performs other functions.¹

The function of the Foreclosure Processing Services Team is to docket pleadings (*e.g.*, complaints, answers and requests for default) in foreclosure cases, perform general foreclosure case management functions, and transfer contested cases to General Equity Judges in the vicinages for disposition.²

The Office of Foreclosure is empowered under *R. 1:34-6*, which states:

(a) There shall be an Office of Foreclosure within the Administrative Office of the Courts. This office shall be responsible for recommending the entry of orders or judgments in uncontested foreclosure matters pursuant to *R. 4:64-1* and *R. 4:64-7* subject to the approval of a Superior Court judge designated by the Chief Justice. The Office of Foreclosure may also recommend the entry of the following orders in uncontested actions:

- (1) correcting clerical errors in court documents and metadata;
- (2) correcting the defendant's name;
- (3) correcting venue;
- (4) substituting the plaintiff if, during the course of the foreclosure action, the original plaintiff reorganizes, merges with another entity, is acquired by another entity, or assigns the mortgage to another entity;
- (5) entering default;
- (6) extending time to answer;

¹ www.njcourts.gov/courts/superior/foreclosureservices.html?lang=eng

² *Id.*

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- (7) filing an amended complaint, provided no new cause of action or claim for relief is set forth in the amended complaint;
- (8) vacating a default entered by the clerk;
- (9) vacating judgment and execution, reinstating a bond or note and mortgage and, with the consent of the answering defendants, dismissing the proceedings;
- (10) authorizing the sheriff to collect additional lawful sums;
- (11) dismissing the tax foreclosure action as to any parcel redeemed;
- (12) vacating an *in rem* foreclosure judgment upon application of the municipality owner;
- (13) correcting minor technical irregularities in the mortgage, note or legal description, if a substantial right of a party is not prejudiced;
- (14) substituting heirs and personal representative for deceased defendants;
- (15) disbursing surplus foreclosure money; and
- (16) vacating a dismissal for lack of prosecution and reinstating the matter.

(b) Where a motion is filed with the Office of Foreclosure, that motion must contain only one form of requested relief.

A paper stamped “Received but not Filed (date)” is deemed to have been filed on the stamped “receipt” date if the paper is retransmitted with the required document or fee “within ten days after the date of the clerk’s notice.”³

Defendant’s Answer filed after default

In a foreclosure action, the Clerk will not file an answer by a defendant against whom default has been entered. This is because the rule⁴ provides that “if an answer is presented by a defendant against whom default has been entered, the clerk shall return the same stamped “Received but not Filed (date)” with notice that the defendant may move to vacate the default.”

In such an instance, defendant must have the default vacated prior to the answer being filed.

³ R. 1:5-6(c)(1).

⁴ R. 1:5-6(c)(2).

§ 4.02 When Can You Proceed Before the Vicinage Chancery Judge

As noted in the previous section, on *contested* matters you must proceed before the vicinage chancery judge. Also, matters that involve judicial discretion, such as establishing or validating service, entering an order to show cause, appointing a rent receiver, setting aside a sale and the like.

The chancery judge has all the authority the Office has to enter judgment plus a lot more authority. If an attorney is aggrieved because the Office will not enter judgment, or is requiring something that the attorney believes is erroneous or not necessary, then the attorney always has the option of proceeding before the vicinage chancery judge. Many times the Office itself will tell an attorney to do this.

The Office need not be given any notice when this is done. The judge has full authority to decide any matter pertaining to the case.

§ 4.03 Jurisdiction and Venue in Foreclosure Actions; Filing of Complaint; Federal Foreclosures

A foreclosure action should ordinarily be brought in the Chancery Division of the Superior Court of New Jersey.⁵ Bringing the action in the Law Division, however, will not deprive the court of jurisdiction, as the Superior Court is a single court of state-wide jurisdiction.⁶

The foreclosure complaint should be filed with the Clerk of the Superior Court, Chancery Division, P.O. 971, Hughes Justice Complex, Trenton, New Jersey 08625. The filing fee is \$405.00. Copies of all filed pleadings will be available through eCourts.

In Superior Court actions, venue should be laid in the county in which all or a part of the mortgaged premises is situated.⁷ If the mortgaged premises is located in more than one county, venue may be laid in any county where the premises is located. If the plaintiff holds multiple mortgages in different counties, provided the mortgages are related to an overall transaction, the mortgages can be named in one action. However, if the mortgages are not related, the plaintiff should file separate actions in each county.

Federal foreclosure action

A foreclosure action involving New Jersey land may be brought in the United States District Court for the District of New Jersey, if the proper jurisdictional amount is involved and there is diversity of citizenship of the parties.⁸ If jurisdiction is based on diversity of citizenship, there must be diversity as to each party and corporate defendants can have dual citizenship.⁹ Thus, the matter can be tricky in a mortgage foreclosure action,

⁵ R. 4:3-1(a)(1) (1969).

⁶ Art. VI, § 3, par.. 2, New Jersey Constitution of 1947.

⁷ R. 4:3-2(a) (1969).

⁸ 28 U.S.C.A. § 1332.

⁹ 28 U.S.C.A. § 1332 (c)(1): “a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business”

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because the practitioner normally does not know at the outset the identity of all persons to be joined as defendants in the action. There would seem to be little advantage to bringing a foreclosure action in federal court.

If the United States is the plaintiff, however, a mortgage foreclosure action may be brought in the United States District Court without establishing diversity of citizenship because the action arises under the laws of the United States.¹⁰

Normally, a public sale at the courthouse of the county, parish, or city in which the greater part of the property is located¹¹ is required, subject to “such terms and conditions as the court directs,” but the court can order a private sale after a hearing and notice to interested parties, which must be confirmed.¹²

A notice of sale¹³ must be published once a week for at least four weeks prior to the sale in at least one newspaper regularly issued and of general circulation in the county, state, or judicial district of the United States where the realty is situated. The sale is usually made by a marshal.¹⁴

Although state redemption rights do not apply to judicial foreclosures in federal courts of mortgages held by federal agencies the court can impose an equitable period of time to redeem from the date of sale.¹⁵

§ 4.04 Multi-State Foreclosure; Ancillary Foreclosure¹⁶

Where land lies in New Jersey and partly in another State, the recommended method of foreclosure as to the out-of-state lands is ancillary foreclosure. The procedure has been described by one authority as follows:

The practice is simple of outline. The mortgagee brings a plenary suit, praying foreclosure, in each jurisdiction. The suit first brought is the primary proceeding, and the others are ancillary; but each action must be plenary on its face. . .¹⁷

The suits run on parallel lines, but I repeat that they are independent of each other in the sense that each cause must proceed upon its own pleadings, orders and decrees. They are by no means “thrown into hotshot” so that an order or decree made in one has any binding effect upon the other.

¹⁰ 28 *U.S.C.A.* §§ 1345. See generally 30 *N.J. Prac.* (Weinstein, *Law of Mortgages*) § 28.8 & text at nn. 7-15 (2nd Ed. 2000).

¹¹ 28 *U.S.C.A.* § 2001(a).

¹² 28 *U.S.C.A.* § 2001(b).

¹³ 28 *U.S.C.A.* § 2002.

¹⁴ 28 *U.S.C.A.* § 2003.

¹⁵ *U. S. v. Montgomery*, 268 *F.Supp.* 787 (D.C. Kan. 1967).

¹⁶ This section taken verbatim from 30 *N.J. Prac.* (Weinstein, *Law of Mortgages*) § 28.5A (2nd Ed. 2000).

¹⁷ 3 Glenn, *Mortgages* § 135.2 (1943).

On the other hand, comity requires that the ancillary court await, at each turn of the case, the decision on the primary court on similar papers and proofs. When the primary court, being thus moved, decides a question, the ancillary court should treat that ruling as *res judicata*, and thereupon make its own order or decree to the same effect.¹⁸

Where the mortgaged premises extends over the State line or is otherwise located in another State, there is chancery precedent for bringing a single action, in which the foreclosure judgment directs that the foreclosure sale be made by a master and compels the mortgagor to join in the master's deed.¹⁹ The judgment, therefore, acts purely in personam and not in rem. Moreover, the defendant's failure to obey the judgment and execute the deed does not destroy the validity of the procedure - as between the parties, the record is *res judicata* on the merits and binding on the courts of another State.²⁰ This would not, however, be the recommended practice in modern times, although the writer of a leading treatise has advocated the use of this procedure where the mortgaged premises lies partly in-state and out-of-state.²¹

§ 4.05 Computation of Time (Under Court Rules); Extra Days for Mailing

In counting time under the court rules, the *first day out, last day in* is followed. In other words, the first day of the period is not included and the last day is include. For example, if you are computing a 16-day period for a motion to be serve by mail, the day of mailing (first day) would not be counted while the last day of the period, the 16th day, would be included.²²

If last day of the period falls on a *Saturday, Sunday or legal holiday*, you go to next day which is not a Saturday, Sunday or legal holiday. For a period of less than 7 days, you exclude Saturday, Sunday and legal holidays from the count.

Three (3) days must be *added to the period*, where a paper or notice is served by ordinary mail.²³ In this instance, a 10-day motion period would be a 13-day period.

As to motion papers under *R. 1:6-3*, however, receipt of the ordinary mailing is presumed "on the third business day after mailing." The rules do not define "business" day. Thus, a 16-day motion period under *R. 1:6-3*, where service of motion papers is made by ordinary mail, requires that *3 business days be counted off first* before

¹⁸ 3 Glenn, Mortgages § 135.2 (1943). See *Equitable Trust Co. of New York v. Standard Cordage Co.*, 84 A. 207 (Ch. 1912)(mortgage covered property in three states; separate actions brought in each state).

¹⁹ 3 Glenn, Mortgages § 135 (1943).

²⁰ 3 Glenn, Mortgages § 135 & n.22 (1943). Citing *Bullock v. Bullock*, 42 N.J. Eq. 561 (Divorce case in which New York court ordered defendant to execute mortgage on New Jersey lands as part of alimony decree. Bill to compel defendant to execute mortgage to complainant pursuant to New York decree was dismissed).

²¹ 3 Glenn, Mortgages § 135 & n.22 (1943).

²² *R. 1:3-1*.

²³ *R. 1:3-3*.

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computing the 16-day period. This differs from the foregoing paragraph (non-motion periods) where the three days are merely added to the period. For example, if you mail *R.* 1:6-2 motion papers on a Friday, you would not start the 16-day count until Tuesday (the third business day). In foreclosure actions, *R.* 1:6-2 motions include *orders for default out of time*, *R.* 4:43-1 and orders for judgment out-of-time, *R.* 4:64-1(d).²⁴

It should be noted that the *Fair Foreclosure Act* is statutory, so technically computation of time under the court rules would not control. However, the author believes that the methodology for computing time under the court rules should still be used.

§ 4.06 Certifications vs. Affidavits; *R.* 1:4-4(a), (b)

When filing papers in foreclosure actions, it is helpful to use *certifications* instead of affidavits. Affidavits require a notarization stamp and signature of the notary. The latter involve added time and effort, that a specific person, a notary public, affix the notarization, and many times either the stamp or signature is omitted so that the affidavit may be defective.

The *certification* format avoids the foregoing affidavit problems and the affiant, the person making the declaration, merely has to use the following certification immediately preceding the affiant's signature:

I certify that the foregoing statements made by me are true.
I am aware that if any of the foregoing statements made by
me are wilfully false, I am subject to punishment.

§ 4.07 Facsimile Signatures (Certifications or Affidavits); *R.* 1:4-4(c)

Another very helpful rule is *R.* 1:4-4(c) which permits the filing of an affidavit or certification with a *faxed* (instead of an original) signature provided the attorney offering the document:

certifies that the affiant acknowledged the genuineness of
the signature and that the document or a copy with an
original signature affixed will be filed if requested by the
court or a party.

A foreclosing attorney, for example, may file a faxed copy of a proof of amount due signed by an officer of the bank (without waiting for the original) if the attorney includes the certification set forth above.

§ 4.08 Effect of Signing or Filing a Paper; *R.* 1:4-8

Even though most foreclosure actions are not actively contested and are uncontested matters, foreclosing attorneys must be aware that, even in default cases, there

²⁴ This procedure comports with Office of Foreclosure requirements in such cases.

are important duties imposed by law on the attorney when he or she *signs or files* a paper in a foreclosure action.²⁵ Signing or filing constitutes a certificate as to the matters contained in the rule.

An attorney filing or signing a paper or pleading in a foreclosure action has an independent obligation to the court and to the profession to make sure the filed paper is offered in good faith. The factual allegations in the complaint, for example, must have evidentiary support. Simply, alleging something which has no support, either in law or fact, violates the above rule, even though the attorney believes that he or she may be able to get away with it because the action is likely to be uncontested.

Many times the Office of Foreclosure *sua sponte* will question allegations or matters in papers or proofs and will refuse to process cases where it believes there is no reasonable support for an allegation or proof. Many times the Office will bluntly say to an attorney - "This is a false affidavit." And, in fact, item No. 29 of the Office's Return Notice provides - "Certification is postdated and is therefore a false oath."

In, *In re Jenny Rivera*,²⁶ the bankruptcy court, the Hon. Morris Stern presiding, held that Bankruptcy Rule 9011 was violated by the long-standing practice of a law firm in having presigned certifications by the mortgagees it represented in support of motions for relief from voluminous bankruptcy stays. These supporting certifications were never reviewed by the persons signing them and, in some cases, the signatories actually left the mortgage lender's employment some months earlier. The certifications were attached to subsequently prepared summaries of debtors' mortgage payments and defaults. The court imposed a \$500 fine on the particular attorney and a \$125,000 on the law firm in question. Further, the court found that not only was the threshold factual contention in each certification untrue - that the signatory had reviewed the documents to which the certification was attached - but that the certifications were submitted for an improper purpose: to lead the court to believe that they were proper certifications.

§ 4.09 Caption - Necessity of Naming All Defendants

In the complaint, the title of the action must include the names of all the parties, but in other papers it need only state the name of the first party on each side with an appropriate indication that there are other parties (*e.g.*, et al.).

If additional defendants are added by way of amendment, the caption in the amendment should set forth the names of all defendants, that way at least the caption of one pleading will contain the names of all parties.

The notice of *lis pendens* must contain a full caption (otherwise the action may not be *lis pendens* as to unnamed defendants), and the notice in lieu of summons served on the State of New Jersey, by law, must contain a full caption.²⁷ The writ of execution when issued should also contain the names of all defendants in the body of the execution,

²⁵ See R. 1:4-8.

²⁶ 342 B.R. 435 (D.N.J. 2006).

²⁷ N.J.S.A. 2A:45-2.

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so the sheriff's deed will contain a recitation of all party defendants.

§ 4.10 Notice of Intention - If *Fair Foreclosure Act* Applies

If the *Fair Foreclosure Act* applies, unless a deed in lieu of foreclosure has been given by the residential mortgage debtor to lender, a notice of intention must be mailed to the debtor or debtors, by certified mail, return receipt requested, at least 30-days, but no more than 180-days, prior to the filing of the mortgage foreclosure complaint. (See Chapter 2)

§ 4.11 Necessity of Pre-Filing Title Search

Pursuant to new paragraphs *R. 4:64-1(a)*²⁸ and *R. 1:5-6(c)(1)(E)*, effective September 1, 2006, a "certification of compliance" (with the pre-filing title search requirements) must be attached to the complaint in order for the complaint to be filed.

§ 4.12 Certification of Compliance (Title Search)(Form)

Certification of Compliance (Title Search)

I, the undersigned, am an Attorney At Law of New Jersey with the law firm of *(Insert Name)*, attorneys for Plaintiff in the within action, and the person actually entrusted with the conduct and management of the case. I aver that prior to the filing of this mortgage foreclosure complaint, I have received and reviewed a title search of the public record for the purpose of identifying any lienholder or other persons and entities with an interest in the property that is subject to the within foreclosure.

The effective date of the title search is *(Day/Month/Year)*.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

(Name of Attorney)

Date:

[Editor's Note: This certification must be attached to the foreclosure complaint. Without it, the complaint cannot be filed, R. 1:5-6(c)(1)(E).]

[Editor's Note: The rule terminology - "have received and reviewed a title search of the

²⁸ **4:64-1 Uncontested Judgment: Foreclosures Other Than In Rem Tax Foreclosures**

(a) **Title Search.** Prior to filing an action to foreclose a mortgage, a condominium lien, or a tax lien to which *R. 4:64-7* does not apply, the plaintiff shall receive and review a title search of the public record for the purpose of identifying any lienholder or other persons and entities with an interest in the property that is subject to foreclosure and shall annex to the complaint a certification of compliance with the search requirements of this rule.

public record for the purpose of identifying any lienholder or other persons and entities with an interest in the property” - appears incorrect. Ordinarily, a mortgage foreclosure search covers only interests “subsequent” to the mortgage being foreclosed. See R. 4:42-10(b). Taken literally, identifying “any lienholder or other persons . . . with an interest in the property” could include prior lienholders which are inapplicable in a mortgage foreclosure action.]

§ 4.12A Recording of Mortgage/Assignment Require Prior to Commencement.

Under N.J.S.A. 46:18-13, the original mortgagee is not the “established holder of a mortgage” entitled to take action to foreclose the mortgage unless the original mortgage is recorded or unless the mortgagee is otherwise “found to be the holder of the mortgage” in a civil action.

§ 4.13 Complaint and Commencement of Action

A foreclosure action is commenced with the filing of the complaint with the Clerk of the Superior Court in Trenton.²⁹

The filing fee for the complaint and all subsequent papers to be filed is \$405.00, except a \$50.00 fee for each motion filed. An answer requires a \$175.00 filing fee.

As of September 1, 2006, a foreclosure complaint cannot be filed without a certification of title search.³⁰ If a complaint is submitted to the Clerk without the required affidavit the Clerk will stamp the complaint “received, but not filed” and will return it pursuant to R. 1:5-6(c). This rule provides that if the conforming paper is resubmitted within 10-days of the date of the notice, filing will be deemed to have been made on the stamped/received date.

The foreclosure complaint is governed by the same rules generally applicable to all civil actions.³¹ The purpose of the complaint is to disclose plaintiff’s grounds for relief to bring before the court all interested parties whose rights and interests in the mortgaged premises are sought to be foreclosed.³²

A caption to the complaint is necessary, followed by the name and residence of the plaintiff or, if plaintiff is a corporation, the principal place of business.³³ The caption to the complaint must contain the names of all parties (ordinarily the owner is named as the first defendant) but other papers need only state the name of the *first party on each side* followed by, “et al.,” if there are other parties.³⁴ If an amendment is filed joining new parties, the amendment should contain a full caption with the names of all parties.

²⁹ R. 4:2-2 (1969).

³⁰ R. 1:5-6(c)(1)(E).

³¹ There is only one form of civil action, known simply as a “civil action.” R. 4:2-1 (1969).

³² *Kiernan v. Jersey City*, 80 N.J.L. 273, 281, 78 A. 228, 231–232, 31 L.R.A.N.S., 1023 (E. & A. 1910).

³³ R. 1:4-1(a) (1969).

³⁴ R. 1:4-1(a)(1).

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The caption, though, is not controlling as to the defendants in the action; for the complaint is valid as to all defendants named in the body of the complaint.³⁵

The complaint should contain a statement of the facts upon which the plaintiff's claim is based and should set forth that plaintiff is entitled to the relief sought.³⁶ All allegations of claim in the complaint must be contained in numbered paragraphs, each limited as far as practicable to a single set of circumstances.³⁷ Statements in one paragraph may be adopted by reference in another paragraph of the complaint.³⁸

Although not required by the rules, it is helpful to consecutively number all pages of the complaint.

Copies of bonds, mortgages, and assignments thereof should not be annexed to the complaint.³⁹

Historically, a mortgage foreclosure complaint set forth the following: (1) the allegation of the execution of the obligation, bond or note, the amount, and other details; (2) the execution of the mortgage, date, parties, and recording data; (3) plaintiff's title to the obligation and mortgage and recitation of any assignments; (4) the description of the mortgaged premises and any releases of portions;⁴⁰ (5) pertinent clauses in the obligation or mortgage which give the plaintiff the right to accelerate the debt; (6) defaults upon which plaintiff's right to foreclose is based (or a general allegation that there has been a default);⁴¹ (7) expiration of the grace period, if any, and plaintiff's election to accelerate the maturity of the obligation (if unmatured) and require payment in full; otherwise, if the obligation has matured, that the mortgage is payable in full;⁴² (8) the subordinate interests of the various defendants, with a paragraph joining and stating a cause for each defendant; (9) if the *Fair Foreclosure Act* applies, a statement of compliance with *N.J.S.A. 2A:50-56*—e.g., “that a written notice of intention to foreclose was mailed to the debtor at least 30-days prior to the

³⁵ *Motor Credit Corp. v. Ray Guy's Trailer Court*, 6 *N.J. Super.* 563, 567, 70 A.2d 102, 104 (Law Div. 1949).

³⁶ *R. 4:5-2* (1969).

³⁷ *R. 1:4-2* (1969). Each allegation of a pleading shall be simple, concise and direct, and no technical forms of pleading are required. *R. 4:5-7* (1969).

³⁸ *R. 1:4-3* (1969).

³⁹ *Ibid.*

⁴⁰ The description in the complaint is generally that which is included in the mortgage.

⁴¹ A common form of complaint used by practitioners in New Jersey for the past thirty years does not specify the date of default or the particular default or defaults upon which the right to foreclose is based. Practitioners are concerned that if the lender accepts payments from the mortgagor and the particular default mentioned in the complaint is cured, or if the particular default mentioned is incorrect, the complaint will fail to state a claim upon which relief may be granted. The *Fair Foreclosure Act* requires that the lender in the notice of intention particularize the defaults claimed, *N.J.S.A. 2A:50-53c(2)*. This statutory requirement would not be necessary if the mortgagee was absolutely required by New Jersey law to set forth the particular defaults in the complaint.

However, as of September 1, 2006, particularization with respect to defaults - *i.e.*, the facts establishing the default(s) - is required.

⁴² All conditions precedent to the plaintiff's right to foreclose must, of course, be alleged to have been performed or to have occurred. See *R. 4:5-8(b)* (1969).

filing of the complaint in accordance with the *Fair Foreclosure Act* (N.J.S.A. 2A:50-53 *et seq.*);⁴³ (10) a general allegation that the interests of the defendants are subordinate to the lien of the plaintiff's mortgage (the so-called "priority" paragraph); (11) demands for judgment: (a) to fix the amount due on the obligation and mortgage, (b) directing payment thereof, (c) adjudging that the lands be sold,⁴⁴ (d) barring and foreclosing the defendants from all equity of redemption; and (e) for appointment of a receiver (if desired); and (12) second count for possession,

As of September 1, 2006, new requirements for foreclosure complaints go into effect. These requirements are set forth below.

The Administrative Office of the Courts has advised that the Office of Foreclosure may review newly filed mortgage foreclosure complaints "to confirm that the contents specified in R. 4:64-1(b) are included therein." (See Letter dated August 18, 2006 from Kevin M. Wolfe, Appendix). The Office recommends that where a deficient complaint has been filed than an amended complaint be filed before service is attempted "to avoid the Office of Foreclosure rejecting subsequent requests to enter default." A non-conforming notice form from the Office and Clerk is also included in the Appendix.

§ 4.13A Water Boundaries - Caveat

In a recent decision, *Panetta v. Equity One, Inc.*,⁴⁵ the Appellate Division held that a riparian tract (Lot 23.03) abutting the mortgage premises (Lot 23.01), and not described in the deed to the mortgagors, George and Carolyn Francis, from George's mother, or in the mortgage itself, passed as an "appurtenance" by operation of law in the deed and mortgage under N.J.S.A. 46:3-16.

As a result, the abutting riparian tract, although not described in the deed and mortgage, was included in the foreclosure judgment and passed along with the upland to the successful purchaser at the foreclosure sale.

Certification was granted by the New Jersey Supreme Court but as of this writing there has been no decision by the Court. Practitioners are therefore forewarned when dealing with mortgaged lands abutting water to take *Panetta* into account.

§ 4.13B Manufactured or Mobile Homes⁴⁶

When can a manufactured or mobile home be mortgaged as real property? Under

⁴³ N.J.S.A. 2A:50-56f. This statement of compliance is only required if a residential mortgage subject to the *Fair Foreclosure Act* is being foreclosed.

If the debtor has given a deed in lieu of foreclosure to the lender, a notice of intention to foreclose is not required.

⁴⁴ The foreclosure judgment usually orders foreclosure and sale. *Ely v. Perrine*, 2 N.J. Eq. 396, 401 (Ch. 1841).

⁴⁵ *Panetta v. Equity One, Inc.*, 378 N.J. Super. 298, 875 A.2d 991 at p.10 (App. Div. 2005).

⁴⁶ This section taken from 29 N.J. Prac. (Weinstein) Sec. 5.18 (2nd Ed. 2001)(Supp.).

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New Jersey law, if a mobile home is located in a “mobile home park,” it is essentially treated like an automobile (personalty), and it must be registered and a certificate of ownership obtained from the Director of the Division of Motor Vehicles.⁴⁷ Security interests on such mobile homes are strictly regulated by the Director and in the case of a sale subject to a security interest, a certificate of ownership, with the name and address of the holder of the secured party or his assignee recorded on it, must be delivered to the secured party or his assignee and a copy must be delivered to the buyer.⁴⁸

However, a person with a certificate of ownership issued by the Director for a mobile or manufactured home located in a mobile home park that has been relocated to land on which the owner of the home has an interest in or title to the land, must, at least 10-days prior to that relocation, file with the Director a notice of relocation in proper form. If the director accepts the notice as complete, the Director must cancel the certificate of ownership.⁴⁹ Mobile or manufactured homes not located in mobile home parks (and subject to real property taxation) are considered real property⁵⁰ and, therefore, the owners would receive property titles and have no need of a certificate of ownership issued by the Director.⁵¹ In other words, since the manufactured or mobile home is treated as realty the normal laws and instruments governing conveyancing of real property, such as deeds, mortgages etc., would apply.

§ 4.14 Complaint - Mandatory Allegations - 2006 Rule Changes

4:64-1. Uncontested Judgment: Foreclosures Other Than In Rem Tax Foreclosures

(a) Title Search; Certifications

(1) Prior to filing an action to foreclose a mortgage, a condominium lien, *or a* tax lien to which R. 4:64-7 does not apply, the plaintiff shall receive and review a title search of the public record for the purpose of identifying any lienholder or other persons and entities with an interest in the property that is subject to foreclosure and shall annex to the complaint a certification of compliance with the title search requirements of this rule.

⁴⁷ *N.J.S.A.* 39:10-1 *et seq.*

⁴⁸ *N.J.S.A.* 39:10-11.

⁴⁹ *N.J.S.A.* 39:10-11.

⁵⁰ *N.J.S.A.* 39:10-2 includes in the definition of "new motor vehicle" and "used motor vehicle" manufactured homes not subject to real property taxation pursuant to 1983 N.J. Laws ch. 400 (*N.J.S.A.* 54:4-1.2 *et seq.*), the "Manufactured Home Taxation Act."

N.J.S.A. 54:4-1.5. Manufactured homes subject to taxation as real property.

a Except as otherwise provided for in subsection b. of this section and in 1982 N.J. Laws ch. 220 (C. 54:4-23a), a manufactured home shall be subject to taxation as real property under chapter 4 of Title 54 of the Revised Statutes when that home:

(1) Is affixed to the land on which it is sited by a permanent foundation; or
 (2) Is affixed to that land by a nonpermanent foundation and connected to utility systems in such manner as to render the home habitable as a dwelling unit on a permanent basis.

b A manufactured home which is installed in a mobile home park shall not be subject to taxation as real property.

⁵¹ See Committee Statement under *N.J.S.A.* 39:10-2.

(2) In all residential foreclosure actions, plaintiff's attorney shall annex to the complaint a certification of diligent inquiry:

(A) confirming that the attorney has communicated with an employee or employees of the plaintiff or the plaintiff's mortgage loan servicer who (i) personally reviewed the complaint and confirmed the accuracy of its content, as mandated by paragraphs (b)(1) through (b)(10) and (b)(12) through (b)(13) of this Rule, based on business records kept in the regular course of business by the plaintiff's mortgage loan servicer, (a) identified the relationship between the mortgage loan servicer and the plaintiff, and (b) confirmed the authority of the mortgage loan servicer to act on behalf of the plaintiff; and

(B) stating the date and mode of communication employed and the name(s), title(s) and responsibilities in those titles of the plaintiff's or plaintiff's mortgage loan servicer's employee(s) with whom the attorney communicated pursuant to paragraph (2)(A) of this rule.

(3) Plaintiff's attorney shall also annex to the complaint a certification, executed by the attorney, attesting that the complaint and all documents annexed thereto comport with the requirements of R. 1:4-8(a).

(b) Contents of Foreclosure Complaint. In an action in the Superior Court to foreclose a mortgage, the complaint shall state:

- (1) the name of the obligor, mortgagor, obligee and mortgagee;
- (2) the amount of the debt secured by the mortgage;
- (3) the dates of execution of the debt instrument and the mortgage;
- (4) the recording date, county recording office, and book and page recording reference of the mortgage securing the debt;
- (5) whether the mortgage is a purchase money mortgage;
- (6) a description of the pertinent terms or conditions of the debt instrument or mortgage and the facts establishing the default;
- (7) the default date;
- (8) if applicable, the acceleration of the debt's maturity date;
- (9) if applicable, any prepayment penalty;
- (10) if the plaintiff is not the original mortgagee or original nominee mortgagee, the names of the original mortgagee and a recital of all assignments in the chain of title;
- (11) the names of all parties in interest whose interest is subordinate or affected by the mortgage foreclosure action and, for each party, a description of the nature of the interest, with sufficient particularity to give the court and parties notice of the transaction or occurrence on which the interest is based including recording date of the lien, encumbrance, or instrument creating the interest;
- (12) a description of the subject property by street address, block and lot as shown on the municipal tax map and a metes and bounds description stating whether the recorded

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mortgage instrument includes that description; and

(13) if applicable, whether the plaintiff has complied with the pre-filing notice requirements of the *Fair Foreclosure Act* or other notices required by law.

When a married person who has not executed the mortgage is made a party defendant, the plaintiff shall set out the particular facts relied on to bar the married person's rights and interest in the subject property, including whether the married person's rights and interest in the property were acquired before or after the date of the mortgage.

a Except as otherwise provided for in subsection b. of this section and in 1982 N.J. Laws ch. 220 (C. 54:4-23a), a manufactured home shall be subject to taxation as real property under chapter 4 of Title 54 of the Revised Statutes when that home:

(1) Is affixed to the land on which it is sited by a permanent foundation; or

(2) Is affixed to that land by a nonpermanent foundation and connected to utility systems in such manner as to render the home habitable as a dwelling unit on a permanent basis.

b. A manufactured home which is installed in a mobile home park shall not be subject to taxation as a real property.

§ 4.15 Certification of Diligent Inquiry

In 2010, the "Robo-sign" scandal rocked the foreclosure industry nationwide. New Jersey was not immune to its reaches. Due the irregularities that were uncovered, an Order-to-Show Cause issued by Judge Mary Jacobson - Residential Mortgage Foreclosures - Robo signing, Administrative Order Directing Submission of Information from Residential Mortgage Foreclosure Plaintiffs Concerning Their Document Execution Practices to a Special Master, Notice and Order - Emergent Amendments to *Rules* 1:5-6, 4:64-1, and 4:64-2 - Residential Mortgage Foreclosures. The result of these, was a freeze in all residential foreclosure filings. A special master was appointed to review the named banks foreclosure practices. Copies of Order-to-Show-Cause issued by Judge Mary Jacobson - Residential Mortgage Foreclosures - Robo signing, Administrative Order Directing Submission of Information from Residential Mortgage Foreclosure Plaintiffs Concerning Their Document Execution Practices to a Special Master, and Notice and Order - Emergent Amendments to *Rules* 1:5-6 and 4:64-1 and -2 - Residential Mortgage Foreclosures are included in the appendixes.

Pursuant to the Supreme Court's December 20, 2010 order, every complaint must have a certification of diligent inquiry as to the accuracy of foreclosure documents and factual assertions affixed to the complaint. The Notice to Bar from January 7, 2011 states:

Rule 4:64-1(a)(2) provides that:

The December 20, 2010 amendments to *Rule* 1:5-6(c)(1)(E) and *Rules* 4:64-1(a)(2) and (3) require that plaintiffs' attorneys affix to foreclosure complaints a certification of

diligent inquiry as to the accuracy of foreclosure documents and factual assertions, specifically, (1) that the attorney has communicated with employee(s) of the plaintiff who (a) personally reviewed the documents being submitted and (b) confirmed their accuracy, (2) the name(s), title(s) and responsibilities in those titles of the plaintiff's employee(s) with whom the attorney communicated, and (3) that the complaint and all annexed documents comport with the provisions of *Rule 1:4-8(a)*. Please note that the Court was specific in requiring the communication to be with "employee(s)" of plaintiff rather than "representative(s)" of plaintiff. This certification is required on any new residential mortgage foreclosure complaint filed after the December 20, 2010 effective date of the amended rules.

Rule 4:64-1(a)(2) and (3) were amended to set forth

(2) In all residential foreclosure actions, plaintiff's attorney shall annex to the complaint a certification of diligent inquiry:

(A) that the attorney has communicated with an employee or employees of the plaintiff who (i) personally reviewed the documents being submitted and (ii) confirmed their accuracy; and

(B) the name(s), title(s) and responsibilities in those titles of the plaintiff's employee(s) with whom the attorney communicated pursuant to paragraph (2)(A) of this rule

Based on the notice and the amended rule, the foreclosing attorney must now communicate with an employee of the plaintiff. That employee must have personally reviewed the documents being submitted and confirm their accuracy. When the standardize forms were released in the January 7, 2011 Notice to the Bar, only an employee of the plaintiff could confirm the accuracy of the documents. This made it virtually impossible to the lenders to file any complaints, as it is common practice for the plaintiff to have a servicer handle the foreclosure of the loan. However, by the Supreme Court Order, dated June 9, 2011, *Rule 4:64-1* further amended to allow the plaintiff's servicer to confirm the accuracy of the documents to be file.

Rule 4:64-1(a)(2) was further amended to set forth:

(2) In all residential foreclosure actions, plaintiff's attorney shall annex to the complaint a certification of diligent inquiry:

(A) confirming that the attorney has communicated with an employee or employees of the plaintiff or the plaintiff's mortgage loan servicer(i) who personal reviewed the complaint and confirmed the accuracy of

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its content, as mandated by paragraphs (b)(1) through (b)(10) and (b)(12) through (b)(13) of this Rule, based on business records kept in the regular course of business by the plaintiff's mortgage loan servicer, (a) identified the relationship between the mortgage loan servicer and the plaintiff, and (b) confirmed the authority of the mortgage loan servicer to act on behalf of the plaintiff; and

(B) stating the date and mode of communication employed and the name(s), title(s) and responsibilities in those titles of the plaintiff's or plaintiff's mortgage loan servicer's employee(s) with whom the attorney communicated pursuant to paragraph (2)(A) of this rule.

The standardized form that must be annexed to the complaint set forth below:

RULE 1:5-6(c)(1)(E) AND RULE 4:64-1(a)(2) and (3)

CERTIFICATION OF DILIGENT INQUIRY

, Esq., of full age, hereby certifies and says:

1. On (insert date), I communicated by (insert mode of communication) with the following named employee(s) of the (insert the plaintiff's name or insert the plaintiff's mortgage loan servicer's name), who state that he/she personally reviewed the complaint to be filed with the court and that he/she confirmed compliance with *Rule 4:64-1(b)(1) through (b)(10) and (b)(12) through (b)(13)*.

2. The name, tile and responsibilities of the plaintiff's employee(s) or plaintiff's mortgage loan servicer's employee(s) with whom I communicated are: (insert the employee's name) (insert the employee's title) (insert the employee's responsibilities).

3. (If an employee of the plaintiff's mortgage loan servicer) The above-named employee(s) stated that the relationship between his/her employer and the plaintiff is: (insert description of the relationship), and confirmed that his/her employer is authorized to act on behalf of the plaintiff in this action.

3/4. Based on my communication with the above-named employee(s) of plaintiff or plaintiff's mortgage loan servicer, as well as my own inspection of the loan

information supplied by the plaintiff or the plaintiff's mortgage loan servicer and other diligent inquiry, I execute this certification to complaint with the requirements of *Rules* 1:4-8(a), 1:5-6(c)(1)(E), and 4:64-1(a)(2) and (3).

4/5. I am aware that I have a continuing obligation under *Rule* 1:4-8 to amend this certification if a reasonable opportunity for further investigation or discovery indicates insufficient evidentiary support for factual assertions proffered by plaintiff in any court filings or documents in this case.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated:

(Plaintiff's Attorney)

§ 4.16 Analysis - *Rule* 4:64-1(a) and (b)(1) through (13)

Paragraph (a). Certification of title search.

While the mandatory allegations of amended *R.* 4:64-1 look very much like the conventional allegations that practitioners are using today, there are notable and subtle changes.

Amended *R.* 4:64-1(a), as of September 1, 2006, requires a *certification of pre-filing title search* to be attached to a mortgage and tax foreclosure complaint. The *effective date* of the search should be included. Otherwise, as to subsequent liens and interests attaching in the interval *between the date of the search and filing of the complaint*, the Office of Foreclosure may say that such matters should have been included in the original complaint not an amendment.

The title search should include both *county* and *upper court* searches. The primary purpose of the title search requirement is to make sure the complaint contains all necessary information and joins all persons holding interests at time of filing.

Remember, the cost of title searches cannot be included in the notice of intention. See *N.J.S.A.* 2A:50-56c(7). Such fees are recoverable only after the filing of the foreclosure complaint.

A foreclosure complaint which does not have attached the required *certification of title search* is a non-conforming paper and, on or after September 1, 2006, is not entitled to be filed, *R.* 1:5-6(c)(1)(E).

Presumably, the purpose of the certification of search is to eliminate the so called “blank” complaints which are commonly and currently filed. These are complaints which are *skeleton* pleadings which do not contain specific mortgage recordation information

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and do not set forth subsequent encumbrancers. These complaints which are then followed up by a comprehensive “amendment” setting forth specific information and additional parties are deemed confusing and improper. The attempt here is to require that attorneys set forth as much information as possible in the original complaint.

Paragraph (b). Contents of Foreclosure Complaint.

Although the thirteen (13) subparagraphs of paragraph (b) contain *mandatory allegations*, there is no provision made under the new scheme for *strict mortgage* foreclosure complaints, *condominium association* lien foreclosure complaints, and *equitable mortgage* foreclosure complaints. It is assumed, however, that such complaints are still legal.

Practitioners must be cautious when drafting complaints of two factors. First, compliance with amended R. 4:64-1 will undoubtedly be enforced by the Office of Foreclosure. It is assumed that complaints will not be fully reviewed by Office personnel until the final judgment stage. Thus, failure to comply with the pleading and search requirements of this rule may well mean problems for the foreclosing attorney at time of judgment. If a complaint is non-conforming, the Office may well refuse to process plaintiff's final judgment papers. This can spell trouble and delay. The Office may require a formal amendment and proof of service.

The second consideration is that these new pleading requirements may well establish *mortgagor defenses* to a foreclosure action. Presumably, such defenses may even be utilized by other persons. For example, amended R. 4:64-1(b) now requires that “the facts establishing the default” be pled. This, in all probability, requires that plaintiff, in a conventional monthly payment mortgage, set forth the specific months in default and dates when the pertinent payments were due. If the complaint does not specifically allege these matters, a mortgagor in default may file a contesting answer seeking to dismiss the complaint for failure to state a claim. This, of course, can cause problems and delays for plaintiffs. Non-compliance with the amended rule may even form the basis of a Federal Debt Collection Practices Act (FDCPA) violation.

Para. (b)(1)

This subparagraph requires the name of the *obligor, mortgagor, obligee and mortgagee*. This accords with the current practice. It should be noted that the rule does not require that these persons be joined but merely that they be *named*. Guarantors and the like are not required to be named. Plaintiff must make sure that the holder of the mortgage *at time of filing of the complaint* is plaintiff in the action. The Office may be unwilling to change this name, if incorrect, without a formal amendment and proof of service.

Para. (b)(2)

This subparagraph requires the *amount of the debt* secured by the mortgage. This accords with the current practice.

Para. (b)(3)

This subparagraph requires the *dates of execution* of the *debt instrument* and the

mortgage. This accords with the current practice. There need not be a separate debt interest to have a valid mortgage.

Para. (b)(4)

This subparagraph requires the *recording date, county recording office, and book and page* recording reference of the *mortgage* securing the debt. This changes the current practice in so far as “blank” complaints are concerned. Mortgage recording information must be set forth in the complaint not an amendment. A mortgage, however, need not be recorded to be foreclosed.

Para. (b)(5)

This subparagraph requires an allegation as to whether the mortgage is a *purchase money mortgage*. This accords with the current practice.

Para. (b)(6)

This subparagraph requires a description of the pertinent *terms or conditions* of the *debt instrument or mortgage* and the *facts establishing the default*.

This provision is somewhat unclear. It refers to the debt instrument “or” mortgage. Taken literally, this means that only the terms and conditions of the secured note (not the mortgage) need be referenced. This, of course, would be erroneous. Further, what are the pertinent terms and conditions of the mortgage. Presumably, any *specific or unusual* matter which plaintiff will rely upon in the foreclosure action should be set forth. Under current law, the complaint need not paraphrase the terms and conditions of the mortgage. The author doubts that the amended rule changes this.

This subparagraph also requires the *facts establishing the default* to be pled. This, in all probability, changes the current and historical practice which provides that the default may be *generally* alleged. It is the author’s strong opinion that a mortgage foreclosure complaint, where applicable, should now set forth the specific months in default, the dates when the monthly payments were due, and the failure by the mortgagor to make payments on these dates. Moreover, if the mortgage documents contain an applicable grace period - which is not that common today - the complaint should allege expiration of the period. It should be noted that a default cannot legally be declared until expiration of any grace period.

Para. (b)(7)

This subparagraph requires that the *default date* be pled. This changes current practice which does not require this. Also, this may create a trap for the unwary. The Office of Foreclosure will certainly compare the default date in the complaint with plaintiff’s proof of amount due and other papers to make sure they are internally consistent.

If the debt has matured, there is no date of default per se.

Para. (b)(8)

This subparagraph requires, if applicable, the *acceleration of the debt’s maturity* date to be pled. This accords with the current practice.

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Para. (b)(9)

This subparagraph requires any *prepayment penalty*, if applicable, to be pled. The Office of Foreclosure currently requires this.

Para. (b)(10)

This subparagraph requires, where applicable, the names of the original mortgagee and a *recital of all assignments* in the chain of title. Historically, practitioners did not set forth all intermediate assignments with particularity, and, of course, the so-called “blank” complaints did not do this. Now, all assignment information must be pled with particularity in the complaint. Failure to do this may require plaintiff to amend and furnish proof of service; thereby, delaying plaintiff’s action.

Para. (b)(11)

This subparagraph requires that the complaint allege the names of *all parties in interest* whose interest is *subordinate or affected* by the mortgage foreclosure action and, for each party, a description of the nature of the interest, with sufficient *particularity* to give the court and parties notice of the transaction or occurrence on which the interest is based including *recording date* of the lien, encumbrance, or instrument creating the interest.

This provision mandates that all persons in interest be set forth in the complaint. This changes the current practice where many interest holders are set forth in an amendment. Also, the rule refers to interests *subordinate or affected* by the mortgage foreclosure action. It is submitted that the term *affected* is vague, undefined, and should not have been used in the rule. The rule also requires that subordinate parties in interest be set forth in the complaint with particularity.

It should be noted that the amended rule does not require that all persons in interest be *joined* in the action but only that they be *named*. Under current practice, the mortgagee need not join all subordinate persons in interest but may foreclose subject to certain interests. For example, under current practice, the mortgagee need not join all subordinate tenants; but may pick and choose which tenants, if any, are to be joined in the action. Tenants which benefit the property may be left in place. The author does not believe that the 2006 amendment changes this, although the language of the rule, taken literally, may support a contrary interpretation.

It is not clear whether the current fictitious tenant practice will be permitted under the rule amendment as such practice may lack *particularity*.

Certainly, joining the State of New Jersey *generally* for any interest it may have is clearly prohibited by the rule.

Para. (b)(12)

This subparagraph requires the description in the complaint to contain a *street address*, the *tax lot and block* designation, and a *metes and bounds* description stating whether the recorded mortgage instrument includes that description.

The author finds this provision to be remarkable. There may be no metes and bounds description available, in which case plaintiff cannot be required to include one.

The rule makes no reference to a filed map description which certainly is just as valid as a metes and bounds description. This provision runs contrary to current practice and makes little sense.

It is not clear what the language “stating whether the recorded mortgage instrument includes that description” means. Does this requirement apply only with respect to the metes and bounds description or to the lot and block and street address as well. The former is most likely the case. In any event, it is suggested that plaintiff first set forth the original mortgage description in the complaint and, if that description is further supplemented, the complaint should so state.

Para. (b)(13)

Description requirements

This subparagraph requires an allegation if applicable, whether the plaintiff has complied with the pre-filing notice requirements of the *Fair Foreclosure Act* or other notices required by law. As to the *Fair Foreclosure Act*, this is the current statutory requirement.

The subparagraph also refers to “or other notices required by law.” This language presumably means that other *default notices* and the like required to be given to the mortgagors (and/or others) by the mortgage documents must now be specifically pled in the complaint.

The Fannie Mae/Freddie Mac uniform mortgage instruments require that a default notice be given to the borrowers prior to acceleration and foreclosure similar to the notice of intention under the *Fair Foreclosure Act*. In these instances, it would seem, that only compliance with the statutory notice of intention requirement need be alleged in the complaint, since the notice of intention is the more restrictive requirement.

It is not clear whether the terminology - “other notices required by law” - requires that the FDCPA notice and disclosure requirements of federal law, where applicable, be specifically pled in the complaint.

Married persons - joinder requirements

This subparagraph requires that when a married person (who has not signed the mortgage) is made a party, plaintiff must set out the *particular facts* relied on to *bar the married person’s rights, including whether the married person’s rights were acquired before or after the date of the mortgage*.

By statute, *N.J.S.A. 3B:28-3.1*, the right of joint possession to the principal matrimonial residence is *subordinate* to the lien of a mortgage if: (a) the mortgage was placed on the residence prior to the time title was acquired by the married person; or (b) the mortgage was placed on the residence prior to the marriage; or (c) the mortgage is a purchase money mortgage; or d. the married persons have joined in the mortgage.

Thus, where a *purchase money mortgage* is being foreclosed the terminology - “whether the married person’s rights were acquired before or after the date of the mortgage” - would appear immaterial because a purchase money mortgage always has priority, whether or not the marital right was acquired before or after marriage. Moreover, plaintiff may not know when such rights were acquired.

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Where the mortgage being foreclosed is not a purchase money mortgage, (unless the mortgage was signed by the married person) the mortgage has priority only if: (a) the mortgage was placed on the residence prior to the time title was acquired by the married person; or (b) the mortgage was placed on the residence prior to the marriage. Thus, in non-purchase money mortgage situations, joinder of a non-signing spouse will be a problem unless plaintiff can ascertain and can allege with certainty in the complaint that *the mortgage is prior to the marriage or the spouse's acquisition of title*.

It is not clear whether a *fictitious spouse* can now be joined in a non-purchase money situation since, by definition, in such cases plaintiff does not have the pertinent marital information.

§ 4.17 N.J.S.A.46:10B-51d. - New Requirements to be included in a Complaint.

Under *N.J.S.A. 46:10B-51d*, a creditor that institutes a foreclosure proceeding on residential property pursuant to the “*Fair Foreclosure Act*,” *P.L.1995, c. 244 (C.2A:50-53 et seq.)*, shall file with the summons and complaint in Superior Court, and with the *lis pendens* filed with the office of the county clerk or register of deeds and mortgages, the following information:

- (1) the full name, address, and telephone number for the representative of the creditor and any servicer who is responsible for receiving complaints of property maintenance and code violations pursuant to subsection b. of this section;
- (2) if the creditor or servicer is located out-of-State, the full name, address, and telephone number of an in-State representative or agent who shall be responsible for the care, maintenance, security, and upkeep of the property if it becomes vacant and abandoned; and
- (3) if there is any change in the information required to be filed pursuant to paragraph (1) or (2) of this subsection following the filing of the summons and complaint or the *lis pendens*, the updated name, address, or telephone number, to be filed with the Superior Court, the office of the county clerk or register of deeds and mortgages, and all other parties, within 10-days of the change in that information.

§ 4.17 Complaints - Other General Requirements

Ordinarily, the foreclosing attorney will add a second count for *possession*. This count should reiterate the paragraphs of the first count for foreclosure which grant the plaintiff the right of possession and should then set forth: when the right to possession accrued, the names of persons in possession, and a demand judgment for (a) possession of the lands and (b) mesne profits.

It is the practice to recite in chronological order in the complaint the interest of each defendant. However, the erroneous statement of the interest of a defendant in the complaint or the failure to state all subordinate interests of a defendant has no effect on the

foreclosure.⁵² Of course, the State of New Jersey and United States must be joined with particularity.⁵³

If plaintiff is joined in several capacities, plaintiff should set this forth these capacities in the complaint.⁵⁴ However, plaintiff, cannot be both plaintiff and defendant in the same action.

Describing defendants by means of “defined terms” should be avoided, as it may result in confusion and makes reading the complaint difficult.

It is essential that plaintiff demand all relief sought, for if judgment by default is entered against a defendant, the relief granted is limited to that prayed for in the demand for judgment.⁵⁵ If a mortgagee requires relief in addition foreclosure, the mortgagee should set up the facts in the complaint justifying his claim and request such relief in a separate count or counts:

- reformation of the mortgage as to description or parties;⁵⁶
- setting aside a cancellation or discharge of a mortgage and for reinstatement;⁵⁷
- foreclosure of a security interest on personal property located on the mortgaged premises together with foreclosure of the mortgage;⁵⁸
- for subrogation,⁵⁹ etc.

Of course, only “germane” claims may be joined in a mortgage foreclosure action. A money judgment claim on the note or bond, guarantees or assumption agreement may not be joined action without order of court, for good cause shown.⁶⁰

The complaint must be signed by the attorney of record or his associate (or by a *pro se* party). Signatures of a firm may be typed, followed by the signature of a partner or associate; signatures on any duplicate original or carbon copy required to be filed may be typed; and the complaint must bear the date on which it was signed.⁶¹ Names shall be typed or stamped beneath all signatures on the complaint (and on all papers to be filed or

⁵² *Kiernan v. Jersey City*, 80 N.J.L. 273, 78 A. 228, 31 L.R.A.N.S., 1023 (E. & A. 1910). *City of Trenton v. Howell*, 132 N.J. Eq. 125, 129, 27 A.2d 609, 611 (Ch. 1942).

⁵³ N.J.S.A. 2A:45-1 *et seq.*; 28 U.S.C.A. § 2410.

⁵⁴ *Shippee v. Shippee*, 122 N.J. Eq. 570, 571, 195 A. 728, 729 (Ch. 1937).

⁵⁵ R. 4:43-2(c) (1969).

⁵⁶ *Elizabethport Banking Co. v. Delmore Realty Co.*, 116 N.J. Eq. 270, 173 A. 331 (Ch. 1934); *Scully v. Bergen Valley Builders, Inc.*, 76 N.J. Super. 124, 183 A.2d 865 (Ch. Div. 1962), *aff'd* 82 N.J. Super. 378, 197 A.2d 704.

⁵⁷ *General Motors Acceptance Corp. v. Larson*, 110 N.J. Eq. 305, 159 A. 819 (Ch. 1932); *Rosenblatt v. Horn*, 111 N.J. Eq. 468, 162 A. 884 (Ch. 1932).

⁵⁸ R. 4:64-1(g). *Cf. Bankers' Trust Co. v. Maxson*, 100 N.J. Eq. 1, 134 A. 875 (Ch. 1926).

⁵⁹ *Home Owners' Loan Corp. v. Collins*, 120 N.J. Eq. 266, 184 A. 621 (Ch. 1936).

⁶⁰ R. 4:64-5.

⁶¹ R. 1:4-5 (1969).

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served).⁶²

No verification of the complaint is necessary unless *ex parte* relief is sought upon the complaint, such as the appointment of a rent receiver.

R. 4:64-1(g) permits a plaintiff by *separate count* in the foreclosure complaint, to foreclose plaintiff's security interest in personal property located on the mortgaged premises together with the foreclosure of the mortgage. The foreclosure judgment will then direct a single sheriff's sale of the real and personal property.

Multiple Tracts

Where plaintiff forecloses multiple tracts in one foreclosure complaint, it is the author's suggestion that separate tracts of land be foreclosed in separate counts. This way, all judgments, liens and so forth affecting each tract can be included only in that count, making it easier to read the complaint and ascertain which liens affect which properties. If the same note, mortgage and other instruments pertain to several properties, this information need not be repeated verbatim in each count; the pertinent paragraphs from prior count or counts can be incorporated by reference.

Optional Procedure (Alternative)

If plaintiff wants the option of converting the foreclosure action into an optional foreclosure procedure without sale, plaintiff, may add an additional count for the optional procedure where grounds exist.⁶³

If "abandonment" or "deed in lieu of foreclosure," are the grounds for the optional procedure, the statute⁶⁴ requires that plaintiff "plead the specific facts" upon which these allegations are based.

§ 4.18 Separate Residential and Non-Residential Tracts (*Fair Foreclosure Act*) - Separate Actions Possible.

If the *Fair Foreclosure Act* applies, and a mortgage contains *separate* residential and non-residential tracts securing the *same obligation*, by specific statute those tracts (deemed to be a separate residential and non-residential mortgage)⁶⁵ may be foreclosed in *separate actions*.⁶⁶ Compliance with the *Fair Foreclosure Act* is not required as to the non-residential count or counts. This is only an option if the *Fair Foreclosure Act* applies, not with respect to foreclosures in general.

The same result can be reached by including the residential and non-residential tracts in separate counts of the same complaint.

⁶² R. 1:4-6 (1969).

⁶³ See Weinstein and Lorenzini, "New Jersey's Fair Foreclosure Act and Related Practice," Appendix C, Form No. 14 (2nd Ed. ICLE 2003).

⁶⁴ N.J.S.A. 2A:50-56f.

⁶⁵ N.J.S.A. 2A:50-55 ("definition of non-residential mortgage").

⁶⁶ N.J.S.A. 2A:50-62.

§ 4.19 Certification of Compliance with Title Search Requirement (Attachment to Complaint)

Applicable on or after September 1, 2006.

§ 4.20 R. 4:5-1 Certification; Notice of Other Actions; Designation of Trial Counsel (Attachment to Complaint)

Rule 4:5-1(b)(2) requires that each party include with its first pleading a certification as to whether the matter in controversy is the subject of any other action or arbitration proceeding or whether such action or proceeding is contemplated; and the party “shall disclose in the certification the names of any other party who should be joined in the action.”

The action may be dismissed for failure to file the certification.⁶⁷

This certification should be separately signed and dated.

Designation of Trial Counsel

Counsel may designate trial counsel in the party's first pleading⁶⁸ or may, in the Trial Information Statement (TIS) required by *R. 4:36-2*, notify or confirm with the court that designated counsel is to try the case, and set forth the name specifically.⁶⁹

§ 4.21 Case Information Statement (CIS)

R. 4:5-1(b)(1), provides as follows:

(1) Case Information Statement. A Case Information Statement in the form prescribed by Appendix XII-B(1) (Civil Actions General) or Appendix XII-B(2) (Foreclosure Actions) shall be annexed as a cover sheet to each party's first pleading in all civil actions except civil commitment actions brought pursuant to *Rule 4:74-7*, probate actions, and all non-foreclosure general equity actions.

In September of 2008, *Rule 4:5-1(b)(1)* was revised to require a Case Information Statement (FCIS) in the prescribed in Appendix XII-B(2). The FCIS should list the plaintiff and defendant. It must also list the name of the foreclosing firm, foreclosing attorney, the firms address and phone, and venue. The FCIS has to indicate the type of pleading, if the mortgage was a purchase money mortgage, if there are any other pending actions, and whether the foreclosure case is a in personam tax foreclosure;

⁶⁷ *Tall Timbers Property Owner Association v. Tall Timbers, Inc.*, 217 N.J. Super. 119, 524 A.2d 1315 (App. Div. 1987) (purchasers' action against certain vendors was dismissed where the purchasers failed to certify to the pendency of another chancery action by the vendors, and failed to issue the summons within 10 days).

⁶⁸ *R. 4:5-1(c)*.

⁶⁹ *R. 4:25-4*.

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an in rem tax foreclosure; a residential mortgage foreclosure; commercial mortgage foreclosure; a condominium or homeowner's association lien foreclosure; a strict foreclosure; an optional foreclosure procedure; or a timeshare foreclosure. The full physical address of the property has to be included, as well as the tax lot and block. The FCIS requires a municipality code. A list of the municipality codes is available at http://www.judiciary.state.nj.us/forms/11343_municodes.pdf.

The Case Information Statement can now be generated through eCourts, when the attorney is filing the complaint.

§ 4.22 Filing Notice of the *Lis Pendens*

After the foreclosure complaint has been filed, and the foreclosing attorney receives a docket number for the foreclosure action, the very next thing the attorney should do is file a *notice of lis pendens*, with the county recording officer, in each county where all or a part of the mortgaged premises is located.

Failure to do this will mean that liens, judgments and other non-lien claims will attach to the real estate (up to the entry of judgment) and the foreclosing attorney will be required to amend the foreclosure action and join these additional interest holders as parties, otherwise the foreclosure will be defective.

An amendment to the complaint will require the filing of a new notice of *lis pendens* if the amended pleading adds (a) new property, (b) new parties or (c) a new or additional claim for relief. If a new *lis pendens* is not filed, the foreclosure will not be *lis pendens* as to the new party, property or claim for relief.⁷⁰

If a notice of *lis pendens* is not filed, the foreclosure action will not be *lis pendens* - i.e., will not be constructive notice and binding on a bona fide purchaser or mortgagee or person acquiring a lien on the property before final judgment.⁷¹ However, if a person acquiring the interest of a defendant has actual notice of the litigation he will be bound by the outcome.⁷²

Since December 4, 1995, a notice of *lis pendens* is effective for *five years* after filing;⁷³ prior to that, three years from the date of filing. Even after the notice of *lis pendens* expires, however, the person or persons originally bound by the notice remain bound notwithstanding that judgment is entered after its expiration.⁷⁴

The notice of *lis pendens* in a foreclosure action must contain: (a) the title of the

⁷⁰ *Trus Joist Corp. v. Treetop Associates, Inc.*, 97 N.J. 22, 477 A.2d 817 (1984); *Turner v. Houpt*, 53 N.J. Eq. 526, 564, 33 A. 28, (Ch. 1898), *rev'd other grounds* 55 N.J. Eq. 593, 39 A. 1114 (E. & A. 1897).

⁷¹ *N.J.S.A.* 2A:15-8. Where such a notice is not filed, parties to the action can deal with the property untrammelled.

⁷² *Wood v. Price*, 79 N.J. Eq. 620, 81 A. 983 (E. & A. 1911). *Thatelbaum v. Neidorf*, 100 N.J. Eq. 236, 135 A. 57 (Ch. 1926).

⁷³ *N.J.S.A.* 2A:15-11. Amended by L.1995, c. 244, § 16. It would appear that no new notice can be filed after such period of time has expired, for there is no provision for an extension of time.

⁷⁴ *Manzo v. Shawmut Bank*, 291 N.J. Super. 194, 677 A.2d 224 (App. Div. 1996).

action (docket number, full caption, names of all defendants); (b) the date the complaint filed; (c) a description of the realty; (d) the mortgage book and page; and (e) the general object of the action.⁷⁵

A notice of *lis pendens* filed before the filing of the complaint is a nullity.⁷⁶

The *lis pendens* notice terminates upon entry of the final judgment⁷⁷ and serves no purpose after entry of judgment.

The notice of *lis pendens* is not binding upon the heirs or devisees of a deceased owner who dies prior to entry of the foreclosure judgment, and the action must be amended to join them as parties.⁷⁸

The notice of *lis pendens* is binding even upon the United States of America.⁷⁹

Plaintiff should file a warrant of satisfaction of the notice if the foreclosure is discontinued or the judgment is paid.⁸⁰

§ 4.23 Continuation Searches

After the filing of the notice of *lis pendens*, the foreclosing attorney have continuation searches made (from the date or dates of the original searches) to the *day after* the filing date of the *lis pendens*; this includes both *county* and *upper court* searches.

If any new judgments, liens or interests arise in the intervening period between the date of the original searches and the filing date of the *lis pendens*, an amendment must be filed (as noted in the next section) joining those interest holders in the foreclosure action.

§ 4.24 Amendments; Supplemental Complaint

The complaint may be amended as a matter of course at any time before a responsive pleading; and thereafter only by written consent of the adverse party⁸¹ or by leave of court.⁸²

In the normal course, plaintiff will file an “amendment” rather than an “amended”

⁷⁵ N.J.S.A. 2A:15-6, -7, -9.

⁷⁶ *White v. White*, 61 N.J. Eq. 629, 634, 47 A. 628, 630 (E. & A. 1900). See also, *Schwartz v. Grunwald*, 174 N.J. Super. 164, 415 A.2d 1203 (Ch. Div. 1980).

⁷⁷ N.J.S.A. 2A:15-8. (Notice is required only before final judgment.)

⁷⁸ *In re Admiral Sampson Building & Loan Ass'n*, 136 N.J. Eq. 292, 293, 41 A.2d 378, 379 (Ch. 1945).

⁷⁹ *Puritan Dairy Products Co. v. Christoffers*, 54 N.J. Super. 102, 148 A.2d 223 (Ch. Div. 1959), noted 15 Rutgers L.Rev. 308 (1960). See also *United States v. Brosnan*, 363 U.S. 237, 80 S.Ct. 1108, 4 L.Ed.2d 1192 (1960)

⁸⁰ N.J.S.A. 2A:15-17

⁸¹ Question: is a defendant filing an uncontested answer an “adverse” party? The author does not believe so.

⁸² R. 4:9-1 (1969).

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complaint. If the changes to the original complaint are extensive, or if the original complaint has not been served, then the filing of an “amended complaint” is preferred. An *amendment* to the original complaint or an *amended* complaint should be referenced in the summons, if they are filed before issuance of the summons.

An answer to an amended pleading must be filed “within the time remaining for response to the original pleading or within 20 days after service of the amended pleading, whichever period is longer, unless the court otherwise orders.”⁸³

The practice of filing and serving a complaint with incomplete joinder paragraphs, followed by a complex amendment served on defendants by mail several weeks later should be avoided as pleadings served in this manner may be entirely confusing to the defendant or defendants.

Supplemental Complaint

On motion and by leave of court, a supplemental complaint may be filed by plaintiff to set forth transactions or events which occurred *after* the filing of the complaint.⁸⁴

§ 4.25 Service of Amendments

Amendments must be served on all attorneys of record and parties appearing pro se, but no service need be made on parties in default for failure to appear. If, however, an amended pleading asserts a *new or additional claim for relief*, a copy must be served on each defendant in the same manner as original service.⁸⁵ An amendment which merely adds a new party or parties is not, according to ordinary practice, deemed to be a new or additional claim for relief.

Amendments are normally served on an attorney by ordinary mail at the attorney’s office and on parties pro se by *simultaneous* ordinary and certified mail, return receipt requested in accordance with the rule.⁸⁶

Personal service by commercial courier is now permitted by the rules.⁸⁷

§ 4.26 The Summons

The summons⁸⁸ is the type of process used in civil actions in New Jersey, except those actions initiated with an order to show cause, where a certified copy of the order to

⁸³ R. 4:9-1.

⁸⁴ R. 4:9-4 (1969). A supplemental complaint may be used to set up subsequent defaults by the defendant.

⁸⁵ R. 1:5-1(a) (1969).

⁸⁶ R. 1:5-2.

⁸⁷ R. 1:5-4(b).

⁸⁸ R. 4:4-2 (1969). The summons may contain an abbreviated caption, *i. e.*, the name of the first plaintiff and the initial defendant. R. 1:4-1(a) (1969).

show cause constitutes process.⁸⁹

The summons must be “issued be issued within 15-days from the date of the Track Assignment Notice” or the action may be dismissed.⁹⁰ But there are no track assignments in probate, foreclosure and general equity actions.⁹¹ Thus, this provision would seem inapplicable to foreclosure actions.

The summons is normally issued by plaintiff's attorney, although it may be issued by the clerk of the court.⁹² The summons should be signed in the name of the clerk,⁹³ directed to the defendant or defendants to be served,⁹⁴ and must contain the particulars set forth in the rule.⁹⁵

If the State of New Jersey is joined for a subordinate lien, a *notice in lieu of summons* must be used.⁹⁶ This is covered in the next section.

R. 4:4-2 states the face of the summons shall be in the form prescribed by Appendix XII-A to these Rules. It shall be in the name of the State, signed in the name of the Superior Court Clerk and directed to the defendant. It shall contain the name of the court and the plaintiff and the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the time within which these rules require the defendant to serve an answer upon the plaintiff or plaintiff's attorney, and shall notify the defendant that if he or she fails to answer, judgment by default may be rendered for the relief demanded in the complaint. It shall also inform the defendant of the necessity to file an answer and proof of service thereof with the deputy clerk of the Superior Court in the county of venue, except in mortgage and tax foreclosure actions an answer shall be filed with the Clerk of the Superior Court in Trenton unless and until the action is deemed contested and the papers have been sent by the Clerk to the county of venue in which event an answer shall be filed with the deputy clerk of the Superior Court in the county of venue. If the defendant is an individual resident in this state, the summons shall advise that if he or she is unable to obtain an attorney, he or she may communicate with the Lawyer Referral Service of the county of his or her residence, or the county in which the action is pending, or, if there is none in either county, the Lawyer Referral Service of an adjacent county. The summons shall also advise defendant that if he or she cannot afford an attorney, he or she may communicate with the Legal Services Office of the county of his or her residence or the county in which the action is pending or the Legal Services of New Jersey statewide toll free hotline at 1-888-LSNJ-

⁸⁹ R. 4:52-1; R. 4:67-3.

⁹⁰ R. 4:4-1.

⁹¹ R. 4:5A-1.

⁹² R. 4:4-1 (1969).

⁹³ R. 4:4-1 (1969).

⁹⁴ R. 4:4-2.

⁹⁵ R. 4:4-2.

⁹⁶ N.J.S.A. 2A:45-2.

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LAW (1-888-576-5529).⁹⁷

In 2010, Appendix XII-A as revised to include the Legal Services of New Jersey statewide toll free hotline at 1-888-LSNJ-LAW (1-888-576-5529). Additionally, the required form summons used to include on the reverse side or second page a listing of Legal Services Office and the Lawyer Referral Office serving each county and the Legal Services of New Jersey. However, the new revised form, effective September 4, 2012, includes a website that directs the defendant to the contact information. Practitioners must make sure they use this form of summons, as set forth in the next section.

The time within which a defendant must file an answer to the complaint and amended complaints, if any, must be set forth in the summons. A 35-day answering period is required for all summonses,⁹⁸ except a summons used for service on the United States where 60-days is required⁹⁹ and except as to service on the State of New Jersey in a mortgage foreclosure action where a 60-day answering period is also required.¹⁰⁰

If an amended complaint is to be served together with the complaint, the term “amended complaint” or “second amended complaint,” as the case may be, should be typed into and added to the boilerplate language in the summons, right after “complaint.” Otherwise, the defendant is technically not being summoned to file an answer in response to the amended pleading.

The proper official with whom to file an answer to the complaint in a foreclosure action is the Clerk of the Superior Court in Trenton.¹⁰¹

§ 4.27 The Summons (New Form)

APPENDIX XII-A. SUMMONS

Attorney(s):

Office Address & Tel. No.:

Attorney(s) for Plaintiff(s)

SUPERIOR COURT OF NEW JERSEY

_____ COUNTY

_____ DIVISION

Plaintiff(s)

Docket No. _____

⁹⁷ R. 4:4-2.

⁹⁸ R. 4:6-1(a).

⁹⁹ 23 U.S.C. § 2410. R. 4:64-1(i)

¹⁰⁰ R. 4:64-1(i).

¹⁰¹ R. 4:4-2.

vs.

CIVIL ACTION

Defendant(s)

SUMMONS

From The State of New Jersey To The Defendant(s) Named Above:

The plaintiff, named above, has filed a lawsuit against you in the Superior Court of New Jersey. The complaint attached to this summons states the basis for this lawsuit. If you dispute this complaint, you or your attorney must file a written answer or motion and proof of service with the deputy clerk of the Superior Court in the county listed above within 35-days from the date you received this summons, not counting the date you received it. (A directory of the addresses of each deputy clerk of the Superior Court is available in the Civil Division Management Office in the county listed above and online at http://www.njcourts.gov/forms/10153_deptyclerklawref.pdf.) If the complaint is one in foreclosure, then you must file your written answer or motion and proof of service with the Clerk of the Superior Court, Hughes Justice Complex, P.O. Box 971, Trenton, NJ 08625-0971. A filing fee payable to the Treasurer, State of New Jersey and a completed Case Information Statement (available from the deputy clerk of the Superior Court) must accompany your answer or motion when it is filed. You must also send a copy of your answer or motion to plaintiff's attorney whose name and address appear above, or to plaintiff, if no attorney is named above. A telephone call will not protect your rights; you must file and serve a written answer or motion (with fee of \$175.00 and completed Case Information Statement) if you want the court to hear your defense.

If you do not file and serve a written answer or motion within 35 days, the court may enter a judgment against you for the relief plaintiff demands, plus interest and costs of suit. If judgment is entered against you, the Sheriff may seize your money, wages or property to pay all or part of the judgment. If you cannot afford an attorney, you may call the Legal Services office in the county where you live or the Legal Services of New Jersey Statewide Hotline at 1-888-LSNJ-LAW (1-888-576-5529).

If you do not have an attorney and are not eligible for free legal assistance, you may obtain a referral to an attorney by calling one of the Lawyer Referral Services. A directory with contact information for local Legal Services Offices and Lawyer Referral Services is available in the Civil Division Management Office in the county listed above and online at http://www.njcourts.gov/forms/10153_deptyclerklawref.pdf.

Clerk of the Superior Court

DATED:

Name of Defendant to Be Served:

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Address of Defendant to Be Served:

[As amended on September 4, 2012]

§ 4.28 Notice in Lieu of Summons - State of New Jersey

If the State of New Jersey is joined for a *subordinate lien*, a 60-day¹⁰² *notice in lieu of summons* must be used. The notice should have a full caption and must recite with *particularity*, either in the notice itself or by attachment, why the State is joined.¹⁰³ Merely referring to the various paragraphs of the complaint in the notice is not satisfactory. The State must be told in the notice why it is joined. In this regard, the practitioner can merely attach the Charles Jones upper court search to the notice and cross-off judgments not pertaining to the State.

Where the State of New Jersey is joined for *escheat* subsequent to the mortgage, a summons is used.¹⁰⁴ In this instance, a subordinate lien is not involved.

§ 4.29 Persons Authorized to Serve Process; Sheriff; Private Process Servers

The original and one copy of the summons for each defendant, together with a copy of the complaint for each defendant, are usually delivered to the sheriff of each county where any defendant is to be served.¹⁰⁵

The Rule now provides that summons and complaint shall be served by the sheriff, or by a person specially appointed by the court for that purpose or by plaintiff's attorney or the attorney's agent, or by any other competent adult not having a direct interest in the litigation.¹⁰⁶ Thus, service by a "private process server" is authorized.

While the rule specifically mentions "sheriff," it is clear that a duly authorized sheriff's officer - e.g., a deputy sheriff¹⁰⁷ or sheriff's officer¹⁰⁸ - may serve process. The statute now specifically mentions "serving court processes" as within the scope and duties of a "sheriff's officer." A deputy sheriff statutorily has the rights, privileges and immunities of a sheriff's officer.¹⁰⁹

¹⁰² R. 4:64-1(a).

¹⁰³ N.J.S.A. 2A:45-2.

¹⁰⁴ N.J.S.A. 2A:37-9.

¹⁰⁵ R. 4:4-3(a).

¹⁰⁶ R. 4:4-3(a)(2000).

¹⁰⁷ 40A:9-117.3.

¹⁰⁸ 40A:9-117.6.

¹⁰⁹ 40A:9-117.3, 6. *Allen v. Smith*, 12 N.J.L. 159 (Sup. Ct. 1831); *State v. Silverstein*, 76 N.J. Super. 536, 541, 185 A.2d 45, 47-48 (App. Div. 1962), *aff'd* 41 N.J. 203, 195 A.2d 617 (1963).

If service is made by a person other than the sheriff or a court appointee (*e.g.*, by a private process server), proof of service must be made by “affidavit” not a “return” of service.¹¹⁰

There is a special form of affidavit of service

All writs and process, however, to enforce a judgment or order, unless otherwise ordered by the court, must be served by the sheriff.¹¹¹

§ 4.30 Service of Process; General

Service of process is effectuated under *Rules* 4:4-3, 4:4-4 or 4:4-5. Service under *Rules* 4:4-3 and -4 will establish *in personam* jurisdiction over a defendant; this is jurisdiction sufficient to support a money judgment. In a foreclosure action, however, *in personam* jurisdiction is not absolutely required. *Quasi in rem* jurisdiction will suffice under *R.* 4:4-5, if service cannot be made under *R.* 4:4-4.

If an order to show cause¹¹² is used for process, the order, verified complaint, and any supporting affidavits may be served pursuant to *R.* 4:4-3 and *R.* 4:4-4; however, it is customary for the court to provide for another manner of service in the order, such as mailing or personal delivery by a process server.

§ 4.31 *R.* 4:4-3(a) - Mailed Service; Abode; Business; In State Only

If personal service cannot be effected after a reasonable and good faith attempt, service may be made by mailing a copy of the summons and complaint by registered or certified mail, return receipt requested, to the “usual place of abode” of the defendant or a person authorized by rule of law to accept service for the defendant. Mailed service may also be made to defendant's place of business or employment - “with postal instructions to deliver to addressee only.”

Mailing should be made simultaneously by registered or certified mail and ordinary mail, and if the addressee refuses to claim or accept delivery of registered mail and if the ordinary mailing is not returned, the simultaneous mailing will constitute effective service. In this instance, then, in support of the rule, where the certified mailing is unclaimed, plaintiff's proof of service should state that the ordinary mailing was not returned. Other mailing provisions of the rules do not require this for unclaimed certified mail.¹¹³

Mail may be addressed to a post office box in lieu of a street address “only if the sender cannot by diligent effort determine the addressee's street address or if the post office does not make street-address delivery to the addressee.”¹¹⁴

¹¹⁰ *R.* 4:4-7.

¹¹¹ *R.* 4:4-3(b).

¹¹² *R.* 4:52-1; *R.* 4:67-2.

¹¹³ See *R.* 4:4-4(b)(1)(C) and *R.* 4:4-5(b).

¹¹⁴ *R.* 1:5-2.

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This is an in-State service rule only.

In *Jones v. Flowers*,¹¹⁵ in the context of a tax sale and state notification thereto, the U.S. Supreme Court held that when a certified mailed notice is returned unclaimed (there was no regular mailing requirement), “due process” requires the sender to take additional reasonable steps to attempt to provide notice to the property owner, such as, resending the notice by regular mail, posting notice on the front door, or regular mailing to “occupant.” The Court noted that “the use of certified mail might make actual notice less likely in some cases.

§ 4.32 R. 4:4-4 - Primary Mode of Service; and Substituted Service

Rule 4:4-4 is divided into three paragraphs; (a), (b) and (c). Paragraph (a) sets forth in-State sheriff’s service - this is the primary method of obtaining in *personam jurisdiction*,¹¹⁶ and is divided into eight subparagraphs, (a)(1) through (a)(8), covering service on individuals and different types of entities.

Paragraph b, provides for substituted and constructive service, *i.e.*, personal¹¹⁷ and mailed service¹¹⁸ out-of-state, and the “catch-all” provision, service as may be provided by law¹¹⁹ or court order.¹²⁰

Paragraph c contains optional mailed service, not to be confused with mailed service under *Rules 4:4-3(a)*, *R. 4:4-4(b)(1)(C)* and *R. 4:4-5(b)*. A defendant cannot be defaulted under the optional mail mode of service and therefore this paragraph is ordinarily useless in a foreclosure action and should not be used.

Paragraph (a) of R. 4:4-4.

Paragraph (a) contains subparagraphs (1) through (3).

Subparagraph (a)(1) provides for service on a competent individual 14-years or over *paragraph (a)(2)* for service on a minor under the age of 14; *paragraph (a)(3)* for service on a mentally incapacitated person; *paragraph (a)(4)* for service on individual proprietors and real property owners; *paragraph (a)(5)* for service on partnerships and unincorporated associations; *paragraph (a)(6)* for service on corporations; *paragraph (a)(7)* for service on the State of New Jersey; and *paragraph (a)(8)* for service on other public bodies.

Individual 14-years or over

Pursuant to *R. 4:4-4(a)(1)*, service is made “upon a competent individual of the age of 14 or over, by delivering a copy of the summons and complaint to the individual

¹¹⁵ 126 S.Ct. 1708 (2006).

¹¹⁶ *Citibank v. Estate of Simpson*, 290 N.J. Super. 519, 676 A.2d 172 (App. Div. 1996).

¹¹⁷ *R. 4:4-4(b)(1)(A)* and (B).

¹¹⁸ *R. 4:4-4(b)(1)(C)*.

¹¹⁹ *R. 4:4-4(b)(2)*.

¹²⁰ *R. 4:4-4(b)(1)(3)*.

personally, or by leaving a copy thereof at the individual's dwelling house or usual place of abode with a competent member of the household of the age of 14 or over then residing therein, or by delivering a copy thereof to a person authorized by appointment or by law to receive service of process on the individual's behalf."

It should be noted that a minor, 14-years of age or older, can be served personally under *R. 4:4-4(a)(1)*, in the same manor as an adult individual. However, to enter judgment (or a redemption order in a strict foreclosure) against that minor,¹²¹ the minor must be represented by a guardian or guardian *ad litem*¹²² in the action

Where one person is served for another pursuant to *R. 4:4-4(a)(1)*, the *caveat* is that service must be made at defendant's "dwelling house" or "abode."

Service on a Minor

Pursuant to *R. 4:4-4(a)(2)*, service is made upon "a minor under the age of 14, by delivering a copy of the summons and complaint personally to a parent or the guardian of the minor's person or to a competent adult member of the household with whom the minor resides."

Mentally Incapacitated Person

Pursuant to *R. 4:4-4(a)(3)*, service is made upon a mentally incapacitated person, by delivering a copy of the summons and complaint personally to the guardian of that person or to a competent adult member of the household with whom that person resides, or if the mentally incapacitated person resides in an institution, to the director or chief executive officer thereof."

Proprietors; Real Property Owners

R. 4:4-4(a)(4) provides for service "upon individual proprietors and real property owners, provided the action arises out of a business in which the individual is engaged within this State or out of any real property or interest in real property in this State owned by the individual" by serving a managing or general agent or employee. This rule is universally not used in foreclosure actions.

Partnerships; Unincorporated Associations

Pursuant to *R. 4:4-4(a)(5)* service is made "upon partnerships or unincorporated associations subject to suit under a recognized name, by serving a copy of the summons and complaint in the manner prescribed by paragraph (a)(1) of this rule on an officer or managing agent or, in the case of a partnership, a general partner."

Corporations

Pursuant to *R. 4:4-4(a)(6)*, service is made "upon a corporation, by serving a copy of the summons and complaint in the manner prescribed by paragraph (a)(1) of this rule on any officer, director, trustee or managing or general agent, or any person authorized by appointment or by law to receive service of process on behalf of the corporation, or on a person at the registered office of the corporation in charge thereof, or, if service cannot

¹²¹ *R. 4:64-1(h)*.

¹²² *R. 4:64-1(h)*.

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be made on any of those persons, then on a person at the principal place of business of the corporation in this State in charge thereof, or if there is no place of business in this State, then on any employee of the corporation within this state acting in discharge of his or her duties, provided, however that a foreign corporation may be served only as herein prescribed subject to due process of law.”

State of New Jersey

Pursuant to *R. 4:4-4(a)(7)* (and *N.J.S.A. 2A:45-1* to *-5*) service is normally made on the State of New Jersey by serving the Attorney General in Trenton through the Mercer County sheriff or by acknowledgment of service by the Attorney General. The State must be served with a 60-day notice in lieu of summons in a foreclosure action (in other actions only 35-days is required).

If the Attorney General is served only by mail, the State of New Jersey cannot be defaulted on that service. Thus, service by mail on the State in a foreclosure action is normally worthless.

If the State of New Jersey holds a lien or encumbrance which arises by reason of a recognizance entered in the Superior Court or any criminal judgment rendered in that court, then the notice in lieu of summons and a copy of the complaint, must be served on the applicable county prosecutor.

Pursuant to *N.J.S.A. 2A:45-1 et seq.* where the State is joined in a foreclosure action for a subordinate lien, the notice in lieu of summons to be served on the State must set forth the reason why the State is joined in the body of the notice or by attachment. The concept here is that the State cannot be forced to read the complaint in order to find out why it is joined. If the State is joined for possible inheritance taxes because of the death of a party, or other taxes, the notice in lieu of summons must contain and particularize certain information.¹²³

Other Public Bodies

And pursuant to *R. 4:4-4(a)(8)*, service is made “upon other public bodies, by serving a copy of the summons and complaint in the manner prescribed by paragraph (a)(1) of this rule on the presiding officer or on the clerk or secretary thereof.”

Judgment Creditors

And pursuant to *R. 4:4-4(a)(9)*, service is make upon a junior judgment creditor defendant in a foreclosure action, by delivering a copy of the summons and complaint via mail to the last known address or by publication when the last known address cannot be ascertained after diligent inquiry.

¹²³ The notice should state the names of all the parties, (full caption), and recite the time to answer (within 60-days of its service). The notice additionally must set forth with particularity, if the lien is for an inheritance tax by reason of death, the name of the decedent, the date of his death, the county and state wherein he resided at death, the names and addresses of his personal representatives or, if none have been appointed, then the names and addresses of the decedent's heirs, or if for corporation taxes, the name of the corporation against whom the same was assessed.

R. 4:4-4(a)(9) was effective as of May 1, 2019. It is now much easier to serve a judgment creditor that it was in the past. If the plaintiff's attorney as a good address for the creditor, service can now be mailed with the inquiry requirement. However, if a good address is not available, the creditor may be served via publication, with the usual diligent inquiry.

Paragraph (b) of R. 4:4-4

As noted above, Paragraph b, provides for substituted and constructive service - *i.e.*, personal¹²⁴ and mailed service¹²⁵ out-of-state - and service as may be provided by law¹²⁶ or court order.¹²⁷

Subparagraph (b)(1) provides for *personal service* or by *mail* outside of the State, consistent with due process, based upon an *affidavit of inquiry* that despite diligent effort service cannot be made in accordance with paragraph (a).¹²⁸

In another state or District of Columbia

Sub subparagraph *(b)(1)(A)*¹²⁹ provides for *personal service in another state or the District of Columbia* in the same manner as if service were made within this State, by an attorney at law of New Jersey or of the state where service is made, or a person specially appointed by the court.

Outside United States

Sub subparagraph *(b)(1)(B)*¹³⁰ provides for personal service outside of the territorial jurisdiction of the United States, "in accordance with any governing international treaty or convention to the extent required thereby."

Out-of-State Mailed service

¹²⁴ R. 4:4-4(b)(1)(A) and (B).

¹²⁵ R. 4:4-4(b)(1)(C).

¹²⁶ R. 4:4-4(b)(2).

¹²⁷ R. 4:4-4(b)(1)(3).

¹²⁸ R. 4:4-4(b)(1). "By mail or personal service outside the State. If it appears by affidavit satisfying the requirements of R. 4:4-5(c)(2) that despite diligent effort and inquiry personal service cannot be made in accordance with paragraph (a) of this rule, then, consistent with due process of law, in personam jurisdiction may be obtained over any defendant as follows:"

¹²⁹ R. 4:4-4(b)(1)(A). "personal service in a state of the United states or the District of Columbia, in the same manner as if service were made within this State, except that service shall be made by a public official having authority to serve civil process in the jurisdiction in which service is made or by a person qualified to practice law in this state or in the jurisdiction in which service is made or by a person specially appointed by the court for that purpose; or"

¹³⁰ R. 4:4-4(b)(1)(B). "personal service outside the territorial jurisdiction of the United states, in accordance with any governing international treaty or convention to the extent required thereby, and if none, in the same manner as if service were made within the United states, except that service shall be made by a person specially appointed by the court for that purpose; or"

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Sub subparagraph (b)(1)(C)¹³¹ provides for mailed service outside of the State (by simultaneous ordinary and certified or registered mail, return receipt required) to (i) a competent individual of the age of 14 or over (“addressed to the individual's dwelling house or usual place of abode” only) (ii) a minor under the age of 14 or a mentally incapacitated person (“addressed to the person or persons on whom service is authorized” under R. 4:4-4(a)(2) and (3), or (iii) a corporation, partnership or unincorporated association (“addressed to a registered agent for service, or to its principal place of business, or to its registered office” only). Mailing to a post office box in lieu of a street address is authorized in accordance with R. 1:5-2 (*i.e.*, where the addressee’s address cannot be determined after “diligent effort” by the sender, or the post office does not make street address delivery to the addressee).

As provided by law

Pursuant to subparagraph (b)(2) service may be made upon any defendant “as may be provided by law.”

As provided by court order

And pursuant to subparagraph (b)(2), “if service cannot be made by any of the modes provided by this rule, any defendant may be served as provided by court order, consistent with due process of law.”¹³² This is the catch-all provision by which a court can create, so to speak, a mode of service in unusual situations where the rules do not provide for service. Where the court rules provide for a mode of service, there is no need to have a judge order service, and doing so will not make the service any better. Thus, having a judge order service by publication in a foreclosure action is ordinarily not needed where publication can be made pursuant to R. 4:4-5(c).

For out-of-state service it is easier to mail in accordance with subsubparagraph (b)(1)(C), above, then to try and use an out-of-state sheriff. Mailed service in accordance with this rule will afford *in personam* jurisdiction the same as if defendant had been personally served.

If mailed service is made out of the country, registered mail, return receipt requested, should be used as the foreign country may not have certified mail. Again, mailed service in accordance with subparagraph (b)(1)(c) will confer the same *in personam* jurisdiction.

Paragraph (c) of R. 4:4-4 - Optional Mailed Service

¹³¹ R. 4:4-4(b)(1)(C). “mailing a copy of the summons and complaint by registered or certified mail, return receipt requested and simultaneously, by ordinary mail to: (i) a competent individual of the age of 14 or over, addressed to the individual's dwelling house or usual place of abode; (ii) a minor under the age of 14 or an incompetent, addressed to the person or persons on whom service is authorized by paragraphs (a)(2) and (a)(3) of this rule; (iii) a corporation, partnership or unincorporated association that is subject to suit under a recognized name addressed to a registered agent for service, or to its principal place of business, or to its registered office. Mail may be addressed to a post office box in lieu of a street address only as provided by R. 1:5-2.”

¹³² R. 4:4-4(b)(3). “By court order. If service can be made by any of the modes provided by this rule, no court order shall be necessary. If service cannot be made by any of the modes provided by this rule, any defendant may be served as provided by court order, consistent with due process of law.”

*Paragraph (c)*¹³³ provides for “Optional Mailed Service.” This is not practical for service in a foreclosure action, as a defendant served by mail under this paragraph cannot be defaulted. Also, mailed service under this paragraph requires a 60-day summons.

Mailed service under this paragraph should not be confused with mailed service under *R. 4:4-3(a)* and *R. 4:4-4(b)(1)(c)*, discussed before, pursuant to which a non-answering defendant may be defaulted.

§ 4.33 Service of Process Authorized by Statute

There are a number of statutes authorizing service of process in specific circumstances - *e.g.*, service on registered agent of corporation;¹³⁴ service on a State official or agency on behalf of a business entity, domestic or foreign required to register in this State (Department of Treasury);¹³⁵ service on a dissolved corporation;¹³⁶ service on unauthorized insurers;¹³⁷ service on the surrogate or clerk for a fiduciary¹³⁸ and foreign fiduciary;¹³⁹ service on a county or municipality;¹⁴⁰ service on the county clerk as appointee for an entity with trade name or assumed name;¹⁴¹ joinder of the Clerk of the Superior Court for a judgment held by Superior Court;¹⁴² service on non-profit association;¹⁴³ and service on Saturday and Sunday.¹⁴⁴

§ 4.34 *R. 4:4-5. Service of Process on Absent Defendants: Quasi In Rem Jurisdiction*

Service under this rule requires an “affidavit of inquiry. *Quasi-in rem* service is obtained in a mortgage foreclosure action under this rule. As noted before, *in personam* jurisdiction is not absolutely required in a mortgage foreclosure action. The rule provides

¹³³ *R. 4:4-4(c)* “Optional Mailed Service. Where personal service is require to be made pursuant to paragraph (a) of this rule prescribed by paragraph (a)(1) of this rule, service, in lieu of personal service, may be made by registered, certified or ordinary mail, provided, however, that such service shall be effective for obtaining in personam jurisdiction only if the defendant answers the complaint or otherwise appears in response thereto. If defendant does not answer or appear within 60-days following mailed service, service shall be made as is otherwise prescribed by this rule, and the time prescribed by *R. 4:4-1* for issuance of the summons shall begin to run anew.”

¹³⁴ *N.J.S.A. 14A:4-2.*

¹³⁵ *N.J.S.A. 2A:15-30.1.*

¹³⁶ *N.J.S.A. 14A:12-9.*

¹³⁷ *N.J.S.A. 17B:33-1.*

¹³⁸ *N.J.S.A. 3B:14-46 et seq.*

¹³⁹ *N.J.S.A. 3B:14-29.*

¹⁴⁰ *N.J.S.A. 2A:15-36.*

¹⁴¹ *N.J.S.A. 56:1-2.*

¹⁴² *N.J.S.A. 2A:2-9.*

¹⁴³ *N.J.S.A. 15:1-5.*

¹⁴⁴ *N.J.S.A. 2A:15-21 and 21.1.*

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that if it shall appear by affidavit of the plaintiff's attorney or other person having knowledge of the facts that a defendant cannot, after diligent inquiry, be served within the State, service may, consistent with due process of law, be made by any of the following 4 methods: (a) personal service outside this State as prescribed by *R. 4:4-4(b)(1)(A)* and (B); or (b) service by mail as prescribed by *R. 4:4-4(b)(1)(C)*; or (c) service by publication, as described below, or (d) "as may be provided by court order."

Service by publication entails publication of a "notice to absent defendants" once in a newspaper published or of general circulation in the county of venue and also by mailing, within 7-days after publication, a copy of the notice and complaint and amendments, if any, by ordinary mail, to the defendant's residence or place where the defendant usually receives mail, unless it appears by affidavit that such residence or place is unknown.¹⁴⁵

The notice shall state briefly: (A) the object of the action, the name of the plaintiff and defendant followed by et al., if there are additional parties, the name of the person or persons to whom the notice is addressed, and the basis for joining such person as a defendant; and (B) if the action concerns real estate, the municipality in which the property is located, its street address, if improved, or the street on which it is located, if unimproved, and its tax map lot and block numbers; and (C) if the action is to foreclose a mortgage, tax sale certificate, or lien of a condominium or homeowners association, the parties to the instrument and the date thereof, and the recording date and book and page of a recorded instrument; and (D) the information required by *R. 4:4-2* regarding the availability of Legal Services and Lawyer Referral Services together with telephone numbers of the pertinent offices in the vicinage in which the action is pending or the property is located;¹⁴⁶

An order is not required to publish under *R. 4:4-5*.

§ 4.35 The Affidavit of Inquiry

The inquiry required by *R. 4:4-5(b)* shall be made by the plaintiff, plaintiff's attorney actually entrusted with the conduct of the action, or by the agent of the attorney; it shall be made of any person who the inquirer has reason to believe possesses knowledge or information as to the defendant's residence or address or the matter inquired of; the inquiry shall be undertaken in person or by letter enclosing sufficient postage for the return of an answer; and the inquirer shall state that an action has been or is about to be commenced against the person inquired for, and that the object of the inquiry is to give notice of the action in order that the person may appear and defend it. The affidavit of inquiry shall be made by the inquirer fully specifying the inquiry made, of what persons and in what manner, so that by the facts stated therein it may appear that diligent inquiry has been made for the purpose of effecting actual notice.¹⁴⁷

The affidavit of inquiry must fully detail the steps taken to locate the absent

¹⁴⁵ *R. 4:4-5(a)*.

¹⁴⁶ *R. 4:4-5(a)((3)*.

¹⁴⁷ *R. 4:4-5(b)*.

defendant, the persons contacted and so forth “so that by the facts stated therein it may appear that diligent inquiry has been made for the purpose of effecting actual notice.”¹⁴⁸ Simply saying - “I couldn’t find him” - or language to that effect is not satisfactory.

If service is made by mail pursuant to *R. 4:4-3(a)*, by any mode pursuant to *R. 4:4-4(b)(1)*, personal service outside of New Jersey or service by mail, or pursuant to *R. 4:4-5*, by mail or publication, an *affidavit of inquiry* is required in order for the party making service to have jurisdiction to use that mode of service.

The affidavits required by *R. 4:4-3(a)*, *R. 4:4-4* and *R. 4:4-5* must, pursuant to *R. 4:4-7*, be filed *with the proof of service*, *i.e.*, within the defendant’s answering period.

If service is made by mail pursuant to *R. 4:4-3(a)*, a supporting affidavit of inquiry must be filed establishing that despite a “reasonable and good faith attempt” (described with specificity) defendant could not be personally served, and the affiant’s diligent inquiry regarding defendant’s place of abode, business or employment.”¹⁴⁹

If substituted service by mail is made under *R. 4:4-4(b)(1)*, an affidavit of “diligent inquiry” must be filed by “plaintiff’s attorney or any person having knowledge of the facts” in order to establish that, “despite diligent effort and inquiry,” personal service could not be made upon the individual, corporation, or partnership or unincorporated association, and the affiant’s diligent inquiry regarding defendant’s place of abode, business or employment.”¹⁵⁰

Under *R. 4:4-5*, a similar affidavit must be filed in an *in rem* or *quasi in rem* action where “a defendant cannot, after diligent inquiry, be served within the State.”¹⁵¹ Such an inquiry will be necessary whenever a defendant’s whereabouts are unknown or a defendant is absent from the State and cannot be served in person or by mail outside the State;¹⁵² or it is impossible to ascertain the marital status of a defendant or the name of a defendant’s spouse, or whether a defendant is still the owner of the mortgaged property or any interest therein, or the names and residences of any successor in interest of a defendant, or whether a defendant is alive or, if he is dead, who are his heirs, devisees or personal representatives.¹⁵³

R. 4:4-5(b) requires that inquiry be made in “person” or by “letter.” However, it is customary for the inquirer to also use telephone inquiry, although not specifically authorized by the rules.

To a great extent the sufficiency and adequacy of inquiry is subjective, as there is no objective standard or methodology set forth in the rules.

Some helpful inquiry steps are outlined as follows: As to the *Mortgagor/Owner*: (a) check plaintiff’s records; deed; mortgage; mortgage application etc. (b) check the

¹⁴⁸ *R. 4:4-5(b)*.

¹⁴⁹ *R. 4:4-7*.

¹⁵⁰ *R. 4:4-7*.

¹⁵¹ *R. 4:4-5*.

¹⁵² *R. 4:4-5(b)*.

¹⁵³ *R. 4:4-5(b)* and *R. 4:26-5(c)*.

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mortgaged premises; tenants, neighbors, condo. association; (c) postal inquiry; (d) DMV; (e) tax collector (to see where tax bills are mailed); (f) telephone inquiry in the county of venue and county where defendant last resided; (g) surrogate in county and where defendant last resided; (h) check other deeds and mortgages, by or from mortgagor, recorded in the county of venue and where mortgagor last resided; (i) check with attorney who prepared the mortgage instruments or to whom the recorded mortgage was returned; (j) databases (Westlaw).

As to a *Corporate* defendant: (a) as above; (b) Business Services Bureau, Department of Treasury (formerly Commercial Recording)/registered agent/corporate standing; (c) annual report (officers); (d) check place of business, if any; (e) New Jersey Lawyers Diary. As to *Mortgage Holder*: (a) check the mortgage instruments; (b) attorney preparing mortgage; (c) telephone inquiry; yellow pages - check with bank at same address; (d) other deeds and mortgages, by or from defendant corporation, recorded in county; (e) Department of Banking and Insurance and annual statistical report; (f) Federal - comptroller of currency, Wash., D.C.; need address and yr. of mortgage; \$50 fee.

While the rules do not require or even mention internet searches, the practitioner should not ignore the benefits and efficiency of such searches. There are many established databases (*e.g.*, switchboard.com, whitepages.com, ancestry.com and many others) where information can be obtained cheaply and quickly. A discussion of this subject is beyond the scope of this seminar book.¹⁵⁴

In *Modan v. Modan*,¹⁵⁵ a husband seeking divorce failed to establish that he made diligent inquiry where he failed to mention in his affidavit of inquiry that he knew his wife's e-mail address in Pakistan and did not attempt to notify her of service by e-mail.

It must be remembered that the burden to make valid service is always on plaintiff; it never shifts to the defendant.

§ 4.36 Service on the United States - Dual Service; Federal Deposit Insurance Corporation ("FDIC")

The United States of America has waived sovereign immunity and consented to be sued in a foreclosure action where it holds a subordinate lien or encumbrance. The United States requires dual service, by (1) serving the United States Attorney for the District of New Jersey (or an assistant or an employee designated in a writing filed with the clerk of the Superior Court), in Newark, with a 60-day summons, through the Essex County sheriff, and additionally by mailing, (2) by registered or certified mail, return receipt requested, a copy of the summons and complaint (and amendments if any) to the Attorney General of the United States of America, Department of Justice, Civil Division, Judgment Enforcement Unit, 10th & Constitution Ave., N.W., Washington, D.C. 20530).¹⁵⁶

¹⁵⁴ See 30 *N.J. Prac. (Weinstein, Law of Mortgages)* Sec. 30.25 (Supp. 2004) for a list of internet databases.

¹⁵⁵ 327 *N.J. Super.* 44, 742 A.2d 611 (App. Div. 2000).

¹⁵⁶ 28 *U.S.C.A.* § 2410(b); Fed. R. of Civ. Proc. 4(d)(4). *Messenger v. U. S.*, 231 F.2d 328 (2nd Cir. 1956). (Mailing to the Attorney-General of the United States is mandatory).

The Federal Deposit Insurance Corporation can be served by serving the registered agent in New Jersey. FDIC, Att: Kevin Glueckert, 2 Kennedy Blvd., Suite 202, East Brunswick, N.J. 08816. Tele. 732-214-8974. A 60-day summons should be used.

§ 4.37 Service on State Official or Agency for Business Entity, Domestic or Foreign, Required to Register in this State - Department of Treasury (formerly Secretary of State)¹⁵⁷

The statutes relating to service on the Secretary of State¹⁵⁸ for a corporation and the Commissioner of Banking and Insurance¹⁵⁹ for foreign insurance companies and financial institutions were repealed by law effective January 6, 2000.¹⁶⁰

The new statute relating to service on “business entities” provides as follows:

2A:15-30.1. Service of process; certain registered entities

1. a. If a business entity, foreign or domestic, is required to register with a State official or agency to transact business in this State and is required to register an address or an agent in this State for the service of process, process in any action in any court of this State directed to the business may be served at the address or on the agent registered.

b. If a business entity, foreign or domestic, is required to register with a State official or agency to transact business in this State and is required to register an address or an agent in this State for the service of process, process in any action in any court of this State directed to the business may be served on the State official or agency, if:

(1) The business entity has failed to register or re-register as required by law; or

(2) The business entity has failed to maintain a registered address or a registered agent in this State for service of process, as required by law.

c. The official or agency upon which substituted service has been made, within two days after service, shall notify the business entity to which the process was directed, by a letter to its registered office, if any, or to any officer of the entity

¹⁵⁷ Information in this section taken from 30 *N.J. Prac.* (Weinstein, *Law of Mortgages*) Sec. 30.26 (2nd Ed. 2000).

¹⁵⁸ 2A:15-26 to 2A:15-30. Repealed by L.1999, c.319, § 2, eff. Jan. 6, 2000.

¹⁵⁹ 2A:15-35. Repealed by L.1999, c. 319, § 2, eff. Jan. 6, 2000.

¹⁶⁰ L.1999, c.319, § 2, eff. Jan. 6, 2000.

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known to the official or agency. A copy of the process or other paper served shall be enclosed with the letter.

d. Service of process as provided in subsection (a) shall be as effective in any action as if the business entity had entered its general appearance in the action.

Pursuant to a Reorganization Plan¹⁶¹ issued by the Governor pursuant to statute,¹⁶² effective June 30, 1999, the Division of Commercial Recording, created pursuant to *N.J.S.A.* 52:16A-35 and -36¹⁶³ and its functions, powers and duties and personnel were continued and transferred to the *Department of the Treasury*. These functions, powers and duties and personnel are now organized and implemented within the Department of the Treasury as determined by the State Treasurer.

The Division of Commercial Recording is responsible for recording and keeping documents pertaining to all corporate charters, other commercial filings, other filings requiring public notice, filings concerning notaries public, collecting the fees associated with such filings and preparing monthly abstracts of corporate certificates for use by the Division of Taxation in computing annual corporate license fees and franchise taxes. The official who would most appropriately exercise this authority is the State Treasurer who is responsible for collection of revenue, and other corporate, business and tax filings.¹⁶⁴

By virtue of the transfer of the Division of Commercial Recording, Office of the Secretary of State to the Department of Treasury, the latter now performs the duties and functions of the Secretary of State with respect to commercial recordings. These duties include all corporate filings and registrations on behalf of corporations previously performed by the Secretary of State. The Division of Commercial Recording - now named the "Business Services Bureau" of the Department of Treasury - now handles service of process on the Treasurer or Department of Treasury on behalf of corporations. The Business Services Bureau¹⁶⁵ consists of the same personnel as the former Division of Commercial Recording of the Secretary of State.

§ 4.38 Appearance or Acknowledgment of Service

A general appearance or an acceptance of the service of a summons, signed by the defendant's attorney or signed and acknowledged by the defendant (other than an infant or incompetent), has the same effect as if the defendant had been properly served.¹⁶⁶

¹⁶¹ A PLAN FOR THE TRANSFER, CONSOLIDATION AND REORGANIZATION OF CERTAIN FUNCTIONS OF THE DEPARTMENT OF STATE issued March 30, 1998. Reorganization Plan No. 004-1998.

¹⁶² *N.J.S.A.* 13:1B-15.111. L.1967, c. 124, § 4, eff. June 21, 1967. Amended by L.1983, c. 562, § 1, eff. Jan. 17, 1984; Amended by L.1995, c. 217, § 1, eff. Aug. 14, 1995; L.1999, c. 152, § 44, eff. June 30, 1999.

¹⁶³ P.L. 1982, c.150, as amended (C.52:16A-35 *et seq.*).

¹⁶⁴ See *N.J.S.A.* 13:1B-15.111 - General Statement of Purpose.

¹⁶⁵ Tele. No. 609-633-8189. Business Services Bureau, Division of Revenue, Att: Service of Process Unit, 225 W. State Street, 3rd Floor, Trenton, NJ 08625.

¹⁶⁶ *R.* 4:4-6 (1969).

An out-of-state attorney may not represent a defendant in a New Jersey action except in compliance with the rules,¹⁶⁷ and therefore should not take an acknowledgment of service in a New Jersey action without rule authorization.

The signature of a defendant pro se acknowledging service must be acknowledged (*i.e.*, it must be signed before a notary and notarized). An out-of-state notary may take an acknowledgment under this rule.¹⁶⁸

A valid acknowledgment of service may constitute a waiver of defects in acquiring jurisdiction over a person.¹⁶⁹

Although technically any acknowledgement executed on behalf of a corporation, partnership or other business entity must be by a New Jersey attorney,¹⁷⁰ the practice today is for an officer to acknowledge service on behalf of a corporation (with the officer's signature notarized).

A minor of any age cannot bind himself or herself by an acknowledgment of service or voluntary waiver of personal service.¹⁷¹

The attorney of record for plaintiff, should *not* acknowledge service for one or more defendants.¹⁷²

§ 4.39 Service of Mediation Documents with the Summons and Complaint

Pursuant to the Notice Bar, dated July 16, 2018, R. 4:4-4 was relaxed and supplemented so as to require that the Notice of Foreclosure Mediation Availability, Foreclosure Mediation Financial Worksheet, and combination HUD-Certified Housing Counselor Instruction Form and Foreclosure Mediation Recommendation Statement be served with all residential mortgage foreclosure complaints and summonses and 60-days thereafter informing defendant that Foreclosure Mediation will be available until entry of final judgment; if a request for mediation is not served by that date mediation will no longer be available to defendant homeowner, absent exceptional circumstances.

Plaintiffs should service with the complaint and summons the following: (1) the "Notice of Foreclosure Availability" (CN 11284) and (2) the updated kit on "How to

An attorney of record for the plaintiff should not acknowledge service for a defendant, since representation of both plaintiff and defendant by the same attorney is not approved. *Flemington Nat. Bank & Trust Co. v. Sindlinger*, 1 N.J. Super. 581, 584, 62 A.2d 498, 499 (Ch. Div. 1948).

¹⁶⁷ R. 1:21-1(a).

¹⁶⁸ *Mackay v. Avison*, 82 N.J. Super. 92, 196 A.2d 691 (App. Div. 1964). 2 Schnitzer and Wildstein, N.J. Rules Service, A IV - 68 - 69.

¹⁶⁹ *Mackay v. Avison*, 82 N.J. Super. 92, 196 A.2d 691 (App. Div. 1964).

¹⁷⁰ R. 1:21-1(c).

¹⁷¹ *Mackay v. Avison*, 82 N.J. Super. 92, 196 A.2d 691 (App. Div. 1964).

¹⁷² *Flemington Nat. Bank & Trust Co. v. Sindlinger*, 1 N.J. Super. 581, 584, 62 A.2d 498 (Ch. 1948); *Vide, Morris v. Glaser*, 106 N.J. Eq. 570, 151 A. 760; *Ertag v. Cavallo Construction Co.*, 104 N.J. Eq. 331, 145 A. 627.

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Apply for Foreclosure Mediation” (CN 11270).

§ 4.40 Service of Notice of Residential Tenants Rights

Under *N.J.S.A.* 2A:50-70e, service on any tenant of a summons and complaint in an action to foreclose a mortgage on any residential property by any person, or the initial written or verbal communication by a foreclosing creditor to a tenant in a residential property subject to ongoing foreclosure proceedings, or any written or verbal communication that seeks to induce the tenant to vacate the property prior to the transfer of the property through sheriff's sale or a deed in lieu of foreclosure, shall include a copy of the notice regarding residential tenant rights during foreclosure as required by the Rules Governing the Courts of the State of New Jersey, as adopted by the Supreme Court of New Jersey.

The notice must be in the form of Appendix XII-K of the court rules. Appendix XII-K is as follows:

NOTICE TO RESIDENTIAL TENANTS OF RIGHTS DURING FORECLOSURE

A FORECLOSURE ACTION HAS BEEN FILED CONCERNING (*INSERT ADDRESS OF PROPERTY*), AND THE OWNERSHIP OF THE PROPERTY MAY CHANGE AS A RESULT. UNTIL OWNERSHIP OF THE PROPERTY CHANGES OR YOU ARE OTHERWISE INFORMED BY THE COURT OR THE MORTGAGE HOLDER, YOU SHOULD CONTINUE TO PAY RENT TO THE LANDLORD OR TO A RENT RECEIVER, IF ONE IS APPOINTED BY THE COURT. YOU SHOULD KEEP RECEIPTS OR CANCELED CHECKS OF YOUR RENT PAYMENTS. IF YOU ARE NOT SURE HOW OR WHERE TO PAY RENT, SAVE YOUR RENT MONEY SO THAT YOU WILL HAVE IT WHEN THE OWNER DEMANDS IT. NONPAYMENT OF RENT IS GROUNDS FOR EVICTION.

FORECLOSURE ALONE IS GENERALLY NOT GROUNDS TO REMOVE A BONA FIDE RESIDENTIAL TENANT. TENANTS WHO WANT TO STAY IN THEIR HOMES CAN BE REMOVED ONLY THROUGH A COURT PROCESS. WITH LIMITED EXCEPTIONS, THE NEW JERSEY “ANTI-EVICTION ACT” PROTECTS RESIDENTIAL TENANTS' RIGHTS TO REMAIN IN THEIR HOME. THIS LAW INCLUDES PROTECTION FOR TENANTS WHO DO NOT HAVE WRITTEN LEASES.

IT IS UNLAWFUL FOR ANYONE TO TRY TO FORCE YOU TO LEAVE YOUR HOME OUTSIDE THE COURT PROCESS, INCLUDING BY SHUTTING OFF UTILITIES OR FAILING TO MAINTAIN THE PREMISES.

§ 4.41 Municipal clerk, mayor, or other chief executive officer to be notified of service of summons and complaint in an action to foreclose on mortgage

A creditor serving a summons and complaint in an action to foreclose on a mortgage on residential property in this State shall, within 10-days of serving the summons and complaint, notify the municipal clerk and the mayor or other chief

executive officer of the municipality in which the property is located that a summons and complaint in an action to foreclose on a mortgage has been filed against the subject property.¹⁷³

The notice shall contain the full name, address, and telephone number for the representative of the creditor who is responsible for receiving complaints of property maintenance and code violations and the full name and contact information for any person or entity retained by the creditor or a representative of the creditor to be responsible for any care, maintenance, security or upkeep of the property. The notice may contain information about more than one property, and shall be provided by mail or electronic communication, at the discretion of the municipal clerk.¹⁷⁴

In the event the creditor that has served a summons and complaint in an action to foreclose on a residential property is located out-of-State, the notice shall also contain the full name, address, and telephone number of an in-State representative or agent who shall be responsible for the care, maintenance, security, and upkeep of the exterior of the property if it becomes vacant and abandoned.¹⁷⁵

In the event that the property being foreclosed is an affordable unit pursuant to the “Fair Housing Act,” *N.J.S.A. 52:27D-301 et al.*, then the creditor shall identify that the property is subject to the “Fair Housing Act.”

The notice shall also include the street address, lot and block number of the property, and the full name, address, and telephone number of an individual located within the State who is authorized to accept service on behalf of the creditor. The notice shall be provided to the municipal clerk and the mayor or other chief executive officer within 10-days of service of a summons and complaint in an action to foreclose on a mortgage against the subject property.

If the owner of a residential property vacates or abandons any property on which a foreclosure proceeding has been initiated or if a residential property becomes vacant at any point subsequent to the creditor's filing the summons and complaint in an action to foreclose on a mortgage against the subject property, but prior to vesting of title in the creditor or any other third party, and the exterior of the property is found to be a nuisance or in violation of any applicable State or local code, the local public officer, municipal clerk, or other authorized municipal official shall notify the creditor or the representative or agent of an out-of-State creditor, as applicable, which shall have the responsibility to abate the nuisance or correct the violation in the same manner and to the same extent as the title owner of the property, to such standard or specification as may be required by State law or municipal ordinance.¹⁷⁶

¹⁷³ *N.J.S.A. 46:10B-51(a)(1)*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *N.J.S.A. 46:10B-51(b).*

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N.J.S.A. 46:10B-51(d) requires a creditor that institutes a foreclosure proceeding on residential property pursuant to the “*Fair Foreclosure Act*,” P.L.1995, c. 244 (C.2A:50-53 *et seq.*), shall file with the summons and complaint in Superior Court, and with the *lis pendens* filed with the office of the county clerk or register of deeds and mortgages, the following information:

- (1) the full name, address, and telephone number for the representative of the creditor and any servicer who is responsible for receiving complaints of property maintenance and code violations pursuant to subsection b. of this section;
- (2) if the creditor or servicer is located out-of-State, the full name, address, and telephone number of an in-State representative or agent who shall be responsible for the care, maintenance, security, and upkeep of the property if it becomes vacant and abandoned; and
- (3) if there is any change in the information required to be filed pursuant to paragraph (1) or (2) of this subsection following the filing of the summons and complaint or the *lis pendens*, the updated name, address, or telephone number, to be filed with the Superior Court, the office of the county clerk or register of deeds and mortgages, and all other parties, within 10-days of the change in that information.

§ 4.42 46:10B-49.3. Notice of service of summons and complaint; actions to foreclose

A residential mortgage lender that serves a summons and complaint in an action to foreclose on a mortgage on a residential property in this State pursuant to the “*Fair Foreclosure Act*,” P.L.1995, c. 244 (C.2A:50-53 *et seq.*), shall, within 10-days of serving the summons and complaint, notify the Department of Community Affairs, the municipal clerk, the municipal tax collector, and the chief of police in the municipality in which the property is located, and all public utilities as defined in *N.J.S.A.* 48:2-13 which provide services in the municipality in which the property is located, and the county executive in the county in which the property is located, that a summons and complaint in an action to foreclose on a mortgage has been filed against the property.¹⁷⁷

Effective April 1, 2020, a residential mortgage lender must not, within 10-days of serving the summons and complaint, notify:

- 1) the Department of Community Affairs,
- 2) the municipal clerk,
- 3) the municipal tax collector,
- 4) the chief of police in the municipality
- 5) all public utilities

¹⁷⁷ *N.J.S.A.* 46:10B-49.3.

§ 4.43 Service Outline - Practical Suggestions

1. Primary Method. The primary method of service is (a) personal service, (b) in-State, by (c) the sheriff or private process server, *Rule 4:4-4(a)*. Paragraph (a) of the rule tells you how to personally serve each individual or entity. (See paragraphs 1 through 10 below).

2. You can personally serve an individual who is (a) competent and (b) 14 years of age or over by having the sheriff or private process server hand the summons and a copy of the complaint to the *individual* ("hand service"); or by leaving summons and complaint at the individual's dwelling house or usual place of abode with a *competent member of the individual's household* who is 14 years or over residing therein.

Note: If you are serving one person for another, service must be made at the individual's *abode*.

Note: A minor 14 years of age or older can be personally served under this rule.

3. A minor (other than above) is personally served by serving a *parent*, or *guardian* of the minor's person or a *competent adult household member* with whom the minor resides.

4. A mentally incapacitated person is served by serving the person's *guardian*, or a *competent adult household member* with whom the mentally incapacitated person resides, or if the mentally incapacitated person resides in an institution by serving the *director or chief executive officer* of the institution.

5. A partnership or unincorporated association are personally served by serving an *officer or managing agent* or a *general partner* of a partnership.

Note: The above individuals may also be served by leaving summons and complaint at the individual's dwelling house or usual place of abode with a competent member of the individual's household who is 14-years or over residing therein.

6. A corporation may be personally served by serving any officer, director, trustee, or managing or general agent, or the person in charge at the registered office, or on any person authorized by appointment or law.

Note: These individuals may also be served by leaving summons and complaint at the individual's dwelling house or usual place of abode with a competent member of the individual's household who is 14-years or over residing therein.

Note: If the foregoing persons cannot be served, then service may be made on the person in charge at the corporation's principal place of business.

7. The State of New Jersey may be served by having the Mercer County sheriff serve the notice in lieu of summons and complaint on the Attorney General of New Jersey or Attorney General's designee. In most instances, service on the State of New Jersey is made by having the Attorney General's designee acknowledge service.

Note: The State of New Jersey cannot be defaulted if served by mail.

8. If the lien or encumbrance held by the State of New Jersey arises by reason of a *recognizance or criminal judgment* entered in any Superior Court proceeding, then service of the notice in lieu of summons and complaint is made on the *county prosecutor*.

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9. Other public bodies may be personally served by serving the *presiding officer or clerk or secretary* of the public body.

10. It is now much easier to serve a judgment creditor than it was in the past. If the plaintiff's attorney has a good address for the creditor, service can now be mailed with the inquiry requirement. However, if a good address is not available, the creditor may be served via publication, with the usual diligent inquiry.

11. Acknowledgment of Service. In personam jurisdiction over a defendant can also be obtained by means of an acceptance of service signed by the defendant's attorney (not a minor or mentally incapacitated person) or signed and acknowledged by the defendant.

Note: If the acknowledgment of service is executed by the defendant himself or herself, the defendant's signature must be acknowledged (*e.g.*, notarized).

Note: An acknowledgment of service by a corporation should be signed by a *New Jersey attorney*, or signed and acknowledged by an officer.

12. If personal service cannot be made (paragraphs 1 through 9 above) after a reasonable and good faith attempt, service may be made by mailing summons and complaint by registered or certified mail, return receipt requested to (a) a defendant's usual place of abode or a person authorized by rule of law to accept service for the defendant, or (b) to defendant's place of business or employment (addressee only). If the addressee refuses to claim or accept delivery, service may be made by ordinary mail to defendant's usual place of abode. *R. 4:4-3(a)*

a. Service by registered or certified mail and ordinary mail may be made simultaneously, and if the ordinary mailing is not returned, the simultaneous mailing constitutes effective service.

b. Mail may be addressed to a post office box only if (a) the sender cannot by diligent effort determine the street address or (b) if the post office does make street address delivery to the addressee; the latter also requires an affidavit of inquiry, *R. 1:5-2*.

Note: Mailed service may be made under this rule only if a supporting affidavit of inquiry is filed; and if service is mailed to the abode, the affidavit must show that the defendant actually "resides" at the address to which service is mailed.

Note: The fact that a defendant receives mail at a particular address does not mean that the defendant resides there and that mailed service under this rule is automatically supported.

c. Mailed service under this rule will provide in personam jurisdiction over a defendant.

13. **Substitute Service.** If personal service cannot be made under para. (a) of *Rule 4:4-4* (paragraphs 1 through 9 above) despite diligent effort and inquiry, consistent with due process, personal service may be made outside of New Jersey (but within the United States) in the same manner as if service had been made within this State (*i.e.*, by a private process server, a public official having authority to serve civil process in that jurisdiction, or an attorney at law of New Jersey. *Rule 4:4-4(b)(1)(A)*).

14. **Substitute/Constructive Service; Out of State.** If personal service cannot be made

under paragraph (a) (paragraphs 1 through 9 above) despite diligent effort and inquiry, consistent with due process, personal service may be made by mailing, by registered or certified mail, return receipt requested and simultaneously by ordinary mail to (i) a competent individual, 14-years or older, addressed to the individual's dwelling house or usual place of abode; (ii) a minor under 14-years or a mentally incapacitated person addressed to a person on whom service is authorized under paragraph (a) (paragraphs 3-4 above); (iii) a corporation, partnership or unincorporated association addressed to its registered agent, its principal place of business, or to its registered office. *Rule 4:4-4(b)(1)(C)*

a. Mailed service under this rule requires the filing of an *affidavit of inquiry*.

b. Mail may be addressed to a post office box only if (a) the sender cannot by diligent effort determine the street address or (b) if the post office does make street address delivery to the addressee; the latter also requires an affidavit of inquiry, *R. 1:5-2*.

Note: Mailing to an individual under this rule requires mailing to the person's *abode*. Simply, mailing to a person's mailing address is insufficient.

Note: Mailed service under this rule will provide in personam jurisdiction over a defendant.

15. Substitute/Constructive Service. Service may be made "as provided by law." *Rule 4:4-4(b)(2)*

16. Substitute/Constructive Service. If service cannot be made by any mode provided by this rule, service may be made by "court order." *Rule 4:4-4(b)(2)*

Note: If the rules don't provide for service, application may be made to the vicinage judge for an order authorizing a particular mode of service; otherwise, application to the judge is improper.

17. Publication; *Rule 4:4-5.* If a defendant cannot be served within New Jersey, with an affidavit of diligent inquiry and consistent with due process, a defendant may be served by *publishing a notice* once in a newspaper published or circulating in the county of venue; *and also by mailing* a copy of the notice and complaint *within 7 days* after publication to the defendant's residence or place where the defendant usually receives mail. Mailing is not required if defendant's residence or mailing address is unknown.

Note: Mailing is required in connection with publication unless defendant's residence or mailing address is unknown.

18. Summary. These are practical suggestions for service of process. It involves a four step procedure.

First, attempt personal service under paragraphs 1-9 above.

Second, if this cannot be done and defendant's (or a corporate person's) in-State *abode* is definitely known, mail summons and complaint by certified and ordinary mail to that address. An affidavit of inquiry is required proving that the address mailed to is the person's place of abode).

Third, if the above is not possible and defendant cannot be served in-State: (a) serve an out-of-State defendant, but within the United States, through a "private" process

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server (or out-of-state sheriff but not recommended), in the same manner as if service is made in this State; or (b) if defendant's out-of-state abode address is definitely known, or in the case of a corporation, partnership or association, defendant's principal place of business, registered office or registered agent is known, simultaneously mail summons and complaint by certified and ordinary mail to such address. An affidavit of inquiry is required proving that the address mailed to is defendant's abode, principal place of business, registered office or agent as the case may be). (Note: if mailed service is made out of the United States, use registered not certified mail).

Fourth, if a defendant cannot be served in-State, publish a notice to absent defendants once in a newspaper circulating in the county of venue and mail the notice and a copy of the complaint and amendments, if any, to any and all addresses you have for the defendant within 7-days after publication. Mailing is not required if your affidavit of inquiry shows that you have no address for the defendant. An affidavit of diligent inquiry is required detailing the steps taken to find defendant's whereabouts or address for service.

§ 4.44 Proof of Service - Original Service; Return; Proof of Mailing; Publication

The sheriff uses a "return of service" for proof of service. The rule provides that proof of service must be made on the original process and also on the copy, and promptly filed with the court within the time during which the person served must respond thereto.¹⁷⁸

The proof of service must state the name of the person served, and the place, mode and date of service, and a copy forthwith furnished to plaintiff's attorney by the person serving process.¹⁷⁹ If service is made on a member of the household pursuant to R. 4:4-4 that person's name must be stated in the proof or, if the name cannot be ascertained, the proof must contain that person's description.

The sheriff must keep a book in which returns of service are kept,¹⁸⁰ and a record of the transcript thereof is prima facie evidence of the return.¹⁸¹ Although a sheriff's return is not conclusive, it raises a presumption that the facts recited are true,¹⁸² and such return is generally conclusive to establish jurisdiction against a collateral attack by a third person.¹⁸³

If service is made by a person other than a sheriff or a court appointee, proof of service shall be by *affidavit* which shall include the facts of the affiant's diligent inquiry regarding defendant's place of abode, business or employment.¹⁸⁴

¹⁷⁸ R. 4:4-7 (1969).

¹⁷⁹ R. 4:4-7 (1969).

¹⁸⁰ N.J.S.A. 2A:15-23.

¹⁸¹ N.J.S.A. 2A:15-24.

¹⁸² *Goldfarb v. Roeger*, 54 N.J. Super. 85, 90, 148 A.2d 189, 191-192 (App. Div. 1958).

¹⁸³ *C & D Building Corp. v. Griffithes*, 109 N.J. Eq. 319, 157 A. 137 (Ch. 1931).

¹⁸⁴ R. 4:4-7.

The Administrative Director of the Courts has prescribed an official form of affidavit of service to be used by *private process servers*.¹⁸⁵

The person serving the process may file an additional or amended proof of service within the time provided by R. 4:4-7, and the court may thereafter allow any process or proof of service thereof to be amended upon such terms as it deems appropriate unless such amendment would materially prejudice the rights of the party against whom process is issued.¹⁸⁶

If service is made by mail, the party making service shall make proof by affidavit which shall also include the facts of the failure to effect personal service and the facts of the affiant's diligent inquiry to determine defendant's place of abode, business or employment.¹⁸⁷

With the proof shall be filed the affidavit or affidavits of inquiry, if any, required by R. 4:4-4 and R. 4:4-5.

Proof of service in connection with original *service by mail* ordinarily consists of (a) plaintiff's certification of inquiry; (b) a certification of mailing together with (c) the original signed return receipt card or unclaimed registered or certified mail envelope.¹⁸⁸

Proof of service in connection with *service by publication* ordinarily consists of (a) plaintiff's certification of inquiry and mailing together with (b) an affidavit of publication from the newspaper together with the published notice.

R. 4:4-7 expressly provides that failure to make proof of service does not affect the validity of the service,¹⁸⁹ but title to the foreclosed property will not be approved unless proper proof of service on all non-answering defendants has been filed.

Where service is made by registered or certified mail and simultaneously by regular mail, the *original* return receipt card or the unclaimed registered or certified mail envelope must be filed as part of the proof.

§ 4.45 When Service Complete

When service is complete is important because this is the date the defendant's answering period runs. This is the date from which default is computed (*i.e.*, 36-days or 61-days) after the date service is complete.

Service, if made by the sheriff or a private process server, is complete on the *date of service* - when summons and complaint are actually served (hand-delivered) on the proper person for service. The date of service will appear on the return of service or affidavit of service. Otherwise the return or affidavit is incomplete.

¹⁸⁵ R. 4:4-7.

¹⁸⁶ R. 4:4-8 (1969). See also *Dinsmore v. Westcott*, 25 N.J. Eq. 302 (Ch. 1874).

¹⁸⁷ R. 4:4-7.

¹⁸⁸ R. 4:4-7.

¹⁸⁹ R. 4:4-7.

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If an acknowledgment of service is used, service is complete on *acceptance* of service (*i.e.*, the date the acknowledgment is signed).

If service is made by publication, the *date of publication* is when service is complete. The date of ordinary mailing in connection with publication is considered ancillary and not controlling.

If service is made by mail, and summons and complaint are mailed simultaneously, by registered or certified mail, return receipt requested, and by ordinary mail, service is complete *on the ordinary mailing*.¹⁹⁰ If service is made by certified mail, return receipt requested, alone, service is complete on *acceptance* of the registered or certified mail.

§ 4.46 Proof of Service - Private Process Server; Official Affidavit Form

The Administrative Director of the Courts has prescribed¹⁹¹ a form of affidavit of service which must be used by *private process servers* serving process under the New Jersey court rules.

§ 4.47 Subsequent Papers - Service

Rules 1:5-1 and -2 control here and are extremely important as, unless otherwise provided by rule or court order, they control service of subsequent papers, such as amendments, motions (not ex parte), orders, judgments, pleadings and the like.

R. 1:5-1 provides subsequent papers shall be served on all attorneys of record and parties appearing pro se but “no service need be made on parties who have failed to appear except that pleadings asserting new or additional claims for relief against such parties in default shall be served upon them in the manner provided for service of original process.”

Ordinarily, an *attorney* is served under *R.* 1:5-1 by ordinary mail to the attorney at the attorney’s office and a party pro se is served by ordinary and certified mail, return receipt (simultaneously) to the party’s “last known address,” and if no address is known, “despite diligent effort,” by ordinary mail to the clerk.

Mail may be addressed to a post office box in lieu of a street address only if the sender cannot by diligent effort determine the addressee’s street address or if the post office does not make street-address delivery to the addressee.

The requirement of “diligent effort” went into effect under the amendment to *R.* 1:5-2 effective September 1, 2004. The specific facts underlying the diligent effort required by this rule must be recited in the proof of service required by *R.* 1:5-3.

The 2004 amendment also provides:

¹⁹⁰ *R.* 1:5-4(b). Although the author has not been able to find any rule actually establishing this for original service, the author believes that *R.* 1:5-4(b) contains the correct standard. See *Gladstone v. Berk*, 233 N.J. Super. 228, 558 A.2d 512 (App. Div. 1989), *certif. den.* 117 N.J. 166 (1989).

¹⁹¹ *R.* 4:4-7.

If, however, proof of diligent inquiry as to a party's whereabouts has already been filed within six months prior to service under this rule, *a new diligent inquiry need not be made* provided the proof of service required by R. 1:5-3 asserts that the *party making service has no knowledge of any facts different from those recited in the prior proof of diligent inquiry*. (Emphasis supplied.)

Thus, there is a 6-month window after an affidavit of inquiry for a defendant has been filed within which further inquiry is not required under this rule. Pursuant to R. 4:4-7, however, the affidavit of inquiry must be filed “within the time during which the person served must respond” - *i.e.*, within the answering period. This is at the beginning of the action. It is not the practice to do this, however, and the affidavit of inquiry is normally filed with plaintiff's judgment papers much later. Question: Will the late filing of the affidavit affect the application of this rule?

This “inquiry” provision, strongly impacts on papers required to be served on defaulting defendants, such as service of a *notice of motion for default*,¹⁹² service of the *filed default*,¹⁹³ service of the *entered foreclosure judgment*,¹⁹⁴ and service of the *notice of sale* (where the owners are absent). At time of service of a notice of motion for default, for example, ordinarily there is no inquiry on file. If that is the case, R. 1:5-2 now requires that an affidavit of inquiry be filed with proof of service of the motion, where the address of a defendant is not known and mailing to the clerk is required.

Further, if there is an affidavit of inquiry on file within the last 6-months, proof of service of subsequent papers for defendants whose addresses are unknown must recite that “the party making service has no knowledge of any facts different from those recited in the prior proof of diligent inquiry.”

Thus, an affidavit or affidavits of inquiry should be filed at the beginning of the action within the absent defendant's answering period.

Presumably, the 14-day notice of entry of judgment (“notice to cure”)¹⁹⁵ under the *Fair Foreclosure Act*, being a statutory notice, would not be affected by the rule.

How about the scenario, say, where the owner-mortgagors are defaulting defendants served by publication. The affidavit of inquiry is filed with plaintiff's judgment papers. The *notice of sale* is mailed to the clerk two months later under R. 1:5-2 because defendants' address or addresses are not known. Thereafter, the owners file a motion to vacate the sale because they did not receive a notice of sale. They argue that if plaintiff's affidavit of inquiry had been filed in accordance with R. 4:4-7 - *i.e.*, within defendants' answering period - six months would have expired when the notice of sale was mailed to the clerk, thereby necessitating a new inquiry and affidavit. If this had been done, the owner's contend, an address for them would have been found in which case

¹⁹² R. 4:43-1.

¹⁹³ R. 4:43-1.

¹⁹⁴ R. 4:43-2(c).

¹⁹⁵ N.J.S.A. 2A:50-58.

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they would have received notice and been able to protect their interests in the property.

§ 4.48 Subsequent Papers - When Service Complete

Service of a subsequent paper is complete on the ordinary mailing. If no ordinary mailing is made, service is complete on acceptance of the certified or registered mail.¹⁹⁶ Service by a commercial courier is complete upon receipt of the paper from the sender (if the courier guarantees next business day delivery).¹⁹⁷

Service of a subsequent paper, therefore, is normally complete on the ordinary mailing, since an attorney is usually served under the rule by ordinary mail, and a party pro se is usually served by certified mail, return receipt requested and ordinary mail.¹⁹⁸

If a rule or court order allows the party served by ordinary mail a period of time within which to take some action (see motions below), 3-days must be added to the period.

Motions

Motions are complete only on “receipt” (at the office of adverse counsel and the address of a party pro se).¹⁹⁹ As to 16-day notice of motions pursuant to *R. 1:6-3* (*i.e.*, a default out-of-time motion and a motion for judgment out-of-time), if service is made by mail, receipt is presumed on the third business day after mailing. Thus, as to these motions, service of the notice is complete on the third business day after mailing.²⁰⁰ The 3 business days are counted off first before computing the 16-day motion period. There is no definition in the rules of business day.

As to other motions, the practice before the Office of Foreclosure is as follows: where the motion period is specified in another rule (*e.g.*, the 10-day or 30-day notice of motion to answering and appearing parties under *R. 4:64-1(d)*), if the notice of motion is served by ordinary mail, 3-days must be added to the period. These motions, then, become 13-day and 33-day notices respectively. It is more likely, however, that as to these motions as well, the rules intend that service of the notice is deemed complete only on “receipt” and that receipt is presumed on the third business day after mailing.

§ 4.49 Subsequent Papers - Proof of Service

Proof of service of subsequent papers is ordinarily made by an affidavit or certification of the person making service, or by a certification of service attached to the paper to be filed by the attorney for the party making service.²⁰¹

¹⁹⁶ *R. 1:5-4(b)*.

¹⁹⁷ *R. 1:5-4(c)*.

¹⁹⁸ *R. 1:5-2*.

¹⁹⁹ *R. 1:6-3(c)*.

²⁰⁰ *R. 1:6-3(c)*.

²⁰¹ *R. 1:5-3*.

If service has been made by mail, the affidavit or certification shall state that the mailing was to the last known address of the person served; and must state the name and address of each attorney served (identifying the party represented) and the name and address of each party pro se served.²⁰²

Where service has been made by registered or certified mail, filing of the return receipt card, or unclaimed envelope, with the court is not required. This, differs from original service.

Failure to make proof of service does not affect the validity of the service, and the court at any time may allow the proof to be amended or supplied unless an injustice would result.²⁰³

§ 4.50 Answers

A defendant (other than the United States and State of New Jersey) must serve an answer (including a counterclaim) within 35-days after service of summons and complaint on that defendant.²⁰⁴

There is a \$175.00 filing fee for an answer. As of September 1, 2006, the summons advises a defendant that the required filing fee must be payable to the Treasurer, State of New Jersey.

It should be noted that the rule refers to “service” of the answer not “filing.” A subsequent paper can be “filed either before service or promptly thereafter.”²⁰⁵

Service of the answer, however, is complete on the ordinary mailing, if no ordinary mailing is made, service is complete on acceptance of the certified or registered mail.²⁰⁶ Service by a commercial courier is complete upon receipt of the paper from the sender (if the courier guarantees next business day delivery).²⁰⁷

Thus, service of an answer will normally be complete on the ordinary mailing.²⁰⁸

The United States²⁰⁹ and the State of New Jersey²¹⁰ have 60-days to answer.

In a mortgage foreclosure action, answers of two types: contested and uncontested. An answer is deemed *contested* if it disputes the validity or priority of plaintiff's mortgage or lien being foreclosed or create an issue with respect to plaintiff's right to foreclose it.

²⁰² R. 1:5-3.

²⁰³ R. 1:5-3.

²⁰⁴ R. 4:6-1.

²⁰⁵ R. 1:5-6(a).

²⁰⁶ R. 1:5-4.

²⁰⁷ R. 1:5-4(c).

²⁰⁸ Service may be made on an attorney by ordinary mail to his office and on a party pro se by ordinary and certified mail, return receipt requested. R. 1:5-2, R. 1:5-6(a).

²⁰⁹ 28 U.S.C.A. Sec. 2410(b).

²¹⁰ R. 4:64-1(i).

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Only contested foreclosure answers are listed for trial and placed on the general equity calendar.²¹¹ An uncontested answer permits plaintiff to proceed, on motion, before the Office of Foreclosure for an uncontested judgment pursuant to the rule;²¹² it does not require disposition by the vicinage chancery judge.

All *contested* answers, on the other hand, must be resolved by court action (by order striking answer or summary judgment) or rendered uncontested by voluntary agreement of the parties, or by withdrawal of the answer, in order for the Office or court to have jurisdiction to enter an *uncontested foreclosure* judgment under the court rule.²¹³ Of course, if a contested answer raises a valid defense and is sustained by the court, the court cannot enter a final judgment of foreclosure.

An *uncontested* answer can be simple; it does not have to be a complex document. It is not necessary for the answer to reference or plead with respect to each and every paragraph of the complaint. The answer can merely say that defendant admits the allegations of the complaint and requests that its encumbrance be reported upon in the judgment.

An answer in a foreclosure action is governed by the rules applicable generally to all civil actions.²¹⁴ The defendant must set forth in the answer every defense, legal or equitable, in law and fact to the plaintiff's claim for relief except those that may be asserted by motion.²¹⁵

The answer should particularize misrepresentation, fraud, mistake, breach of trust, willful default and undue influence, with dates and items so far as is practicable.²¹⁶ A denial of performance of conditions precedent must be pleaded specifically and with particularity.²¹⁷ Where illegality is pleaded the details and bases of such illegality should be pleaded.²¹⁸

Certain defenses, at the option of the defendant, may be made by motion with briefs: (a) lack of jurisdiction over the subject matter, (b) lack of jurisdiction over the person, (c) insufficiency of process, (d) insufficiency of service of process, (e) failure to state a claim upon which relief can be granted, (f) failure to join a party without whom the action cannot proceed; or they may be specifically set forth in the answer.

It is important to note that defenses (b) (c) and (d) in R. 4:6-2 (which go to *in personam* jurisdiction) - *i.e.*, lack of jurisdiction over the person, insufficiency of process or service of process - must be raised by motion either before filing an answer, or in the

²¹¹ Formerly R. 4:36-2. See R. 4:64-1(c) for definition of uncontested foreclosure action.

²¹² R. 4:64-1(d).

²¹³ R. 4:64-1(c).

²¹⁴ R. 4:5-3 (1969); R. 1:4-1(a); and R. 1:4-5 (1969).

²¹⁵ R. 4:6-2 (1969).

²¹⁶ R. 4:5-8(a) (1969).

²¹⁷ R. 4:5-8(b) (1969).

²¹⁸ *Edelstein v. City of Asbury Park*, 51 N.J. Super. 368, 388, 143 A.2d 860, 871 (App. Div. 1958). Allegations of time and place are material. R. 4:5-8(e) (1969).

answer and again by motion within 90-days after service of the answer.²¹⁹ A defendant, therefore, cannot just raise the aforesaid defenses in its answer and wait for trial. The defendant must also file a motion.

In a foreclosure action, an allegation in an answer that a party is without knowledge or information sufficient to form a belief as to the truth of an allegation in the complaint does not have the effect of a denial but rather of leaving the plaintiff to its proofs. Such an answer, then, without more is uncontestable.²²⁰

If a defendant holds a subsequent encumbrance and desires to contest the lien of another defendant, that defendant must serve and file an answer and cross-claim against such other defendant.²²¹

A party holding a subsequent encumbrance for a sum certain and filing an uncontestable answer may, in proper cases,²²² have the encumbrance included for payment in the foreclosure judgment on the filing of proofs.²²³ But the defendant encumbrancer must comply with the mandatory conditions of rule.²²⁴

Defenses as to liability for a deficiency may not be raised in a foreclosure action.²²⁵

An answer may be amended, as of course, at any time before a responsive pleading is served; otherwise, the defendant can amend the answer only with written consent of the adverse party by leave of court, which shall be freely given when justice so requires.²²⁶

A supplemental answer may be served and filed to set up transactions or occurrences which have happened since the filing of the answer, on motion and leave of court.²²⁷ Amendments or supplements to the answer may be included in pretrial order;²²⁸ or if issues not raised by pleadings or pretrial order are tried by consent or without objections of parties, they shall be treated as if they had been raised.²²⁹

The party filing a responsive pleading or the party's attorney shall certify thereon, or in an acknowledgment, proof or certificate of service, that the pleading was served within the time period allowed by R. 4:6 or other rule specified in the certificate.²³⁰

²¹⁹ R. 4:6-3. 260 N.J. Super. 458, 1616 A.2d 1328 (App. Div. 1992), *certif. den.* 133 N.J. 434 (1993); *Wohlegmuth v. 560 Ocean Club*, 302 N.J. Super. 306, 310-11, 695 A.2d 345, 347 (App. Div. 1997).

²²⁰ R. 4:64-1(c).

²²¹ R. 4:64-5. 4:7-5(a) (1969). See *Brinkerhoff v. Franklin*, 21 N.J. Eq. 334 (Ch. 1871).

²²² R. 4:64-1(e).

²²³ R. 4:64-2. Affidavit of amount due (R. 4:64-1(d)).

²²⁴ R. 4:64-1(e). See later section on the requirements for including an encumbrancer in the judgment.

²²⁵ *Montclair Sav. Bank v. Sylvester*, 122 N.J. Eq. 518, 194 A. 811 (E. & A. 1937).

²²⁶ R. 4:9-1 (1969).

²²⁷ R. 4:9-4 (1969).

²²⁸ R. 4:25-1(b)(6) (1969).

²²⁹ R. 4:9-2 (1969).

²³⁰ R. 4:6-1.

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§ 4.51 Answers (Late) Filed After Default

If an answer is presented by a defendant against whom default has been entered, the clerk shall return the same stamped “Received but not Filed (date)” with notice that the defendant may move to vacate the default.²³¹

§ 4.52 Counterclaims - Germane Requirement

The rules now allow a pleading “to state as a counterclaim any claim against the opposing party whether or not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.”²³² Under R. 4:7-1 and 4:7-2, a counterclaim includes both the former setoff and the former recoupment remedies, but it is broader and more liberal. A counterclaim, however, must be asserted affirmatively.²³³

In foreclosure actions, “only germane counterclaims and cross-claims may be pleaded.”²³⁴ “Non-germane” counterclaims may be pleaded *with* leave of court. But the rule²³⁵ and statute²³⁶ provide that a defendant failing to set off a liquidated debt or demand, or a debt or demand capable of being ascertained by calculation, “shall thereafter be precluded from bringing any action for such debt or demand which might have been so set off.”²³⁷ Such claims, therefore, should always be asserted in a foreclosure action, and, even if a debt or demand is unliquidated, and not capable of being ascertained by calculation, if there is a possibility that it is “germane,” it should be pleaded or it will be barred in a subsequent action under the entire controversy rule.²³⁸ In the author’s opinion, the “germane” requirement should trump everything - unless a debt or demand is “germane” it should not be permissible in a mortgage foreclosure action.

If a counterclaim recovery exceeds the amount due the mortgagee, the defendant will be entitled to a judgment for the excess.²³⁹ If the defendant's counterclaim recovery exceeds the amount due the mortgagee, the court should clearly dismiss the foreclosure action and award to the defendant the excess due him.²⁴⁰

Assertion of unliquidated claims is permissive rather than mandatory,²⁴¹ however such claims may be barred under the doctrine of *res judicata* or collateral estoppel if not

²³¹ R. 1:5-6(c)(1)(E)(2).

²³² R. 4:7-1 (1969).

²³³ *Deerhurst Estates v. Meadow Homes*, 64 N.J. Super. 134, 165 A.2d 543 (App. Div. 1960) *on remand* 71 N.J. Super. 255, 176 A.2d 555 (counterclaim of a mortgage in an action for damages for alleged breach of warranty in sales contract).

²³⁴ R. 4:64-5. See also, *Nester v. O'Donnell*, 301 N.J. Super. 198, 693 A.2d 1214 (App. Div. 1997).

²³⁵ R. 4:7-1.

²³⁶ N.J.S.A. 2A:15-48.

²³⁷ R. 4:7-1.

²³⁸ R. 4:30A. R. 4:7-1 cross-references R. 4:30A.

²³⁹ R. 4:7-2 (1969). See *Curtis-Warner Corp. v. Thirkettle*, 99 N.J. Eq. 806, 134 A. 299 (Ch. 1926), *aff'd* 101 N.J. Eq. 279, 137 A. 408 (E. & A. 1927).

²⁴⁰ R. 4:7-2.

²⁴¹ R. 4:7-1.

asserted by way of counterclaim.²⁴²

A counterclaim generally is contained in the answer of the defendant²⁴³ and served within the same time required for an answer;²⁴⁴ it is governed by the rules applicable to the pleading of a claim for relief.²⁴⁵ If a defendant mistakenly designates a counterclaim as a defense, the court, may, if justice so requires, shall treat the pleading as if there had been a proper designation.²⁴⁶ A claim not treated as a counterclaim but litigated by consent or without objection of parties will be treated as if a counterclaim had been served.²⁴⁷ A defendant failing to plead a counterclaim through oversight, inadvertence or excusable neglect may, when justice requires, by leave of court, set up a counterclaim by amendment.²⁴⁸

§ 4.53 Cross-Claim - Germane

A defendant in a foreclosure action who has a claim against a *co-defendant* must state the same by way of cross-claim.²⁴⁹

Only germane cross-claims may be pleaded in a foreclosure action.²⁵⁰

A defendant who chooses to contest the validity, priority or amount of any alleged *prior encumbrance* must do so by filing a cross-claim against that encumbrancer, if a co-defendant, and the issues raised by the cross-claim shall be determined, unless the court otherwise directs, upon application for surplus moneys pursuant to R. 4:64-3.²⁵¹ Additional parties may be brought in, by order, as defendants to a counterclaim or cross-claim.²⁵²

One served with a counterclaim or cross-claim must serve an answer within 35-days after service upon him.²⁵³

A separate trial may be ordered as to a counterclaim or cross-claim in furtherance of

²⁴² See *Massari v. Einsiedler*, 6 N.J. 303, 78 A.2d 572 (1951). *Middlesex Concrete Products and Excavating Corp. v. Borough of Carteret*, 35 N.J. Super. 226, 239-240, 113 A.2d 821 (App. Div. 1955).

²⁴³ See R. 4:5-1, which does not authorize any responsive pleading to the complaint except an "answer." R. 4:5-1 also authorizes a plaintiff to file "an answer to a counterclaim, denominated as such."

²⁴⁴ See R. 4:6-1.

²⁴⁵ See R. 4:5-1, 4:5-2, 4:5-6, 4:5-7, 4:5-8 (1969); R. 1:4-5 to 1:4-9 (1969). The counterclaim must be pleaded as completely and with the same requisites as if the defendant were suing directly on the claim.

²⁴⁶ R. 4:5-4 (1969).

²⁴⁷ R. 4:9-2 (1969). An amendment is permitted in the pretrial order to include the counterclaim. R. 4:25-1(b)(6) (1969).

²⁴⁸ R. 4:7-4 (1969).

²⁴⁹ R. 4:64-5.

²⁵⁰ R. 4:64-5.

²⁵¹ R. 4:64-5. The rule requires a defendant to file a cross-claim only where the claim of an alleged "prior" encumbrance is contested.

²⁵² R. 4:7-6 (1969).

²⁵³ R. 4:6-1(a) (1969).

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convenience or to avoid confusion, delay or undue prejudice, and a separate judgment may be entered.²⁵⁴

§ 4.54 Set-Off and Recoupment

Recoupment is distinguishable from setoff in that a setoff involves an affirmative recovery on a claim that may be independent of the transaction upon which the plaintiff's claim is based. While recoupment may be utilized only to reduce or extinguish the plaintiff's recovery, setoff may be awarded for any amount to which the defendant is entitled.²⁵⁵

New Jersey cases define recoupment as “the reduction of a claim because of an offsetting claim arising out of exactly the same transaction”²⁵⁶ The distinction between set-off and recoupment can be critical, because, if a setoff counterclaim is barred by the statute of limitations, a recoupment counterclaim, not being subject to the statute of limitations, is not.²⁵⁷

Recoupment by definition, it would seem, is a “germane” claim whereas a set off is not.

In an action by the assignee of a mortgage, the mortgagor or owner can set off any claim which could be set off against the original mortgagee.²⁵⁸ However, this statute, which permits the mortgagor to raise personal defenses against the assignee of a mortgaged, does not permit the mortgagor to raise personal defenses and claims against a holder in due course of the mortgage note.²⁵⁹ If the mortgage secures a negotiable instrument, a transferee who takes as a holder in due course may take free of the defendant's right of setoff.²⁶⁰

§ 4.55 Reply

A reply is unauthorized unless the answer contains affirmative defenses and plaintiff wishes to allege matters in avoidance of such defenses.²⁶¹ If no reply is served and

²⁵⁴ R. 4:38-2, 4:42-2, 4:7-7 (1969).

²⁵⁵ 86 N.J. 602 at 609, 432 A.2d 512, 516 (1981).

²⁵⁶ *Beneficial Finance Co. v. Swaggerty*, 86 N.J. 602, 609, 432 A.2d 516 (1981), citing *Gibbins v. Kosuga*, 121 N.J. Super. 252, 258, 296 A.2d 557 (Law Div. 1972).

²⁵⁷ *Nester v. O'Donnell*, 301 N.J. Super. 198, 693 A.2d 1214 (App. Div. 1997). See *Associates Home Equity v. Troup*, 343 N.J. Super. 254, 778 A.2d 529 (App. Div. 2001)(counterclaim time-barred but treated as germane recoupment claim).

²⁵⁸ N.J.S.A. 46:9-9.

²⁵⁹ *Carnegie Bank v. Shalleck*, 256 N.J. Super. 23, 606 A.2d 389 (App. Div. 1992); overruling *Mellon Bank, N.A. v. Vienor Ltd. Corp.*, 245 N.J. Super. 413, 585 A.2d 985.

²⁶⁰ *Carnegie Bank v. Shalleck*, 256 N.J. Super. 23, 606 A.2d 389 (App. Div. 1992); overruling *Mellon Bank, N.A. v. Vienor Ltd. Corp.*, 245 N.J. Super. 413, 585 A.2d 985. Cf. *Magie v. Reynolds*, 51 N.J. Eq. 113, 117, 26 A. 150, 154 (Ch. 1893); *Werbel v. Mullen*, 11 N.J. 40, 43, 93 A.2d 367, 368 (1952).

²⁶¹ R. 4:5-1 (1969).

filed the affirmative defenses are deemed denied or avoided.²⁶²

A reply, if required, should be served within 20-days after the answer is served.²⁶³ If a reply is served, no further pleadings are necessary, because the averments contained in the reply are deemed denied or avoided and any defenses to them may be asserted at the trial.²⁶⁴ A late reply may be served by court order²⁶⁵ or the averments of a reply may be included in the pretrial order.²⁶⁶

§ 4.56 Amended and Supplemental Answers

An answer may be amended, as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is to be served, and the action has not been placed upon the trial calendar, at any time within 90-days after it is served. Thereafter, a party may amend a pleading only by written consent of the adverse party or by leave of court which shall be freely given in the interest of justice.

A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 20-days after service of the amended pleading, whichever period is longer, unless the court otherwise orders.²⁶⁷

A supplemental answer may be served to set up transactions or occurrences which took place after the date of the original answer, on motion and by leave of court.²⁶⁸

Amendments to the pleadings may be made in the pretrial order or may be ordered filed. No amendment to the pleadings may be allowed which would justify the adverse party in demanding additional time for investigation and further discovery and result in delay of the trial, unless the amendment is made on the court's own motion.²⁶⁹

§ 4.57 Entry of Default; Request and Affidavit

When the answering periods for one or more defendants have expired, either 35- or 60-days, it is time for entry of default.

Whenever a defendant has failed to plead or otherwise defend, the plaintiff's attorney requests the court clerk to enter a default as to that defendant on the docket. The request and certification of default, recites (a) service of process and complaint on the defendant or defendants (if more than one, naming them), (b) the date of service appearing

²⁶² R. 4:5-5 (1969).

²⁶³ R. 4:6-1(a) (1969). 3 days additional are allowed if the answer was served by mail. R. 1:3-3 (1969). The reply should be filed with the court either before service or promptly thereafter. R. 1:5-6(a) (1969).

²⁶⁴ R. 4:5-5 (1969).

²⁶⁵ R. 4:9-1 (1969).

²⁶⁶ R. 4:25-1(b) (1969).

²⁶⁷ R. 4:9-1 (1969).

²⁶⁸ R. 4:9-4 (1969).

²⁶⁹ R. 4:25-1(b)(6) (1969).

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on the return of process, and (c) that the time within which said defendant may answer or otherwise move as to the complaint has expired and has not been extended.²⁷⁰

Entry of default is important. If the record shows a judgment without a lawful default, the judgment is void on the face of the record.²⁷¹ No valid default judgment can be entered against a defendant until the defendant's time to answer has expired.²⁷²

The default must be entered within 6-months of the actual default (*i.e.*, expiration of defendant's answering period) and if not so entered, then it may be entered only by order, on 16-days notice of motion to the party in default.²⁷³

Separate defaults may be entered for each non-answering defendant, but it is more efficient merely to enter one default for all defendants who fail to answer.

Default cannot be entered until defendant's answering period has expired: 35-days after service is complete or, in the case of the State of New Jersey and United States, 60-days.²⁷⁴

Time is computed in accordance with *R.* 1:3-1, in which the first day of the period is not included in the count but the final day is included.²⁷⁵

Thus, a defendant cannot be defaulted until on or after the 36th or 61st day after service of process as the case may be. Even if the answering period has expired as to a defendant, if plaintiff's certification is dated before to 36th (or 61st day), the Office of Foreclosure will consider the default premature and refuse to enter default as to that defendant.

For good cause shown the court may set aside an entry of default.²⁷⁶

If plaintiff has served an amendment to the complaint, either with original process or separately, service of the amendment should be referred to in the certification of default. There is a 20-day answering period after service of an amendment, or whatever answering period remains under the original service, whichever is greater.²⁷⁷

§ 4.58 Default-Out-Time; Motion and Order

If default is not entered within 6-months of actual default must be entered by *order*. This requires a 16-day notice of motion²⁷⁸ plus 3 *business*²⁷⁹ days for mailing (the 3

²⁷⁰ *R.* 4:43-1 (1969).

²⁷¹ *Westfield Trust Co. v. Court of Common Pleas*, 115 *N.J.L.* 86, 91 (Sup. Ct. 1935).

²⁷² *Gladstone v. Berk*, 233 *N.J. Super.* 228, 558 A.2d 512 (App. Div. 1986).

²⁷³ *R.* 4:43-1. Service of a notice of motion is made as provided by *R.* 1:5-2. If the notice of motion is given by ordinary mail, receipt is presumed on the third business day after mailing. *R.* 1:6-3.

²⁷⁴ 28 *U.S.C.A.* Sec. 2410(b). *N.J.S.A.* 4:64-1(g).

²⁷⁵ It is helpful to use the computation of time tables in the current New Jersey Lawyer's Diary.

²⁷⁶ *R.* 4:43-3.

²⁷⁷ *R.* 4:9-1.

²⁷⁸ *R.* 4:43-1; *R.* 1:6-3.

business days to be counted off first). There are four customary documents: (a) the notice of motion for entry of the order entering default; (b) the proposed order for default; (c) a certification of default; and (d) proof of service of the notice of motion for default (on the defendant to be defaulted).

The notice of motion for default is directed only to the defendants against whom the order for default is to be entered.

The sixth month period for default out of time period is computed from the date defendant's answering period has expired. This is computed by adding (a) the required 36- or 61-days to the date of service, as the case may be, and then (b) 6-months from that date. It should be noted that bankruptcy does not stay the running of any time periods under the New Jersey's court rules. Default may, therefore, become out-of-time during this period.

Service of an Amended Complaint

Service of an amended complaint within the 6-month period will apparently start the period running anew from the filing of the amended complaint, and permit plaintiff to default, without an order, on both the original service and on the amended complaint, even where original service was made prior to the 6-month period. The Office of Foreclosure permits this questionable practice.

If the defendants are to be defaulted by order, the Office of Foreclosure requires that proof of "original service" including affidavits of inquiry be furnished. Proof of service is not required if defendants are defaulted by request and certification or affidavit.

Filed Non-Conforming

Rule 1:5-6 (c) states that the clerk shall file all papers presented for filing and may notify the person filing if such papers do not conform to these rules. In the past, if there was a problem with the default, it would have been marked "DD," for deficient default. However, now the Clerk will mark the default as FILED NONCONFORMING.

If the default is marked FILED NONCONFORMING, the pleading must be corrected and resubmitted.

Defaulting on Amended Complaints

Technically, a party need not be defaulted on an amended pleading, unless that pleading sets forth a new or additional cause of action requiring original service.²⁸⁰

A party has 20-days after service of an amended pleading to respond, or the time remaining after service of the original pleading, whichever is more.²⁸¹

§ 4.59 Entering Default at Time of Judgment

In *Fair Foreclosure Act* cases, however, default must actually be entered of

²⁷⁹ R. 1:6-3.

²⁸⁰ 49 C.J.S. (Judgments) 347.

²⁸¹ R. 4:9-1.

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record²⁸² prior to the mailing of the 14-day notice to cure to the debtor (which is prior to judgment), so default papers cannot be submitted with the final judgment papers.

In non-*Fair Foreclosure Act* cases, as of this writing, plaintiff's default papers (request and certification and order for default out-of- time) may be submitted to the Office at time of final judgment.

However, this practice is now subject to question. R. 4:43-1 requires a copy of the entered default to be mailed to defaulting defendants served personally or by mail. Obviously, if default is entered together with the judgment, this cannot be done until after judgment, which is obviously not what the rule intended. Obviously, the better rule is to default first, mail a copy of the default to pertinent parties, and then submit the judgment package to the Office.

Further, R. 4:43-2 now provides - “[a]fter a default has been entered in accordance with R. 4:43-1, except as otherwise provided by R. 4:64 (foreclosures), *but not simultaneously therewith*, a final judgment may be entered in the action.” (Emphasis supplied.) Obviously, the Civil Practice Committee does not believe that default should be entered simultaneously with final judgment and practitioners are therefore forewarned.

§ 4.60 Mailing Copy of filed Default to Defaulted Defendants Served Personally or By Mail

R. 4:43-1 provides:

If defendant was originally served with process either personally or by certified or ordinary mail, the attorney obtaining the entry of the default shall send a copy thereof to the defaulting defendant by ordinary mail addressed to the same address at which defendant was served with process.

Plaintiff's attorney must *ordinary* mail a copy of the filed default, *i.e.*, the request and certification of default and order entering default, if any, to each defaulting defendant served *personally* or by *mail*, at the address where the defendant was last served.

Service of the default should be made “promptly upon entry” of default.²⁸³

The rule is somewhat ambiguous. A defendant served by publication is also required to be served by ordinary mail within 7-days after publication unless the defendant's residence or place where the defendant usually receives mail are unknown.²⁸⁴ However, it is doubtful whether the filed default need be mailed to a defendant served by publication and mail.

²⁸² N.J.S.A. 2A:50-58; R. 4:64-1(c).

²⁸³ PRESSLER, Current N.J. COURT RULES, Comment R. 4:43-1, (GANN).

²⁸⁴ R. 4:4-5(c).

Fair Debt Collection Practices Act

While the Fair Debt Collection Practices Act²⁸⁵ does “not apply to a formal pleading made in connection with a legal action,” a copy of the filed default is not a “pleading” and therefore the cover letter (with the default attached) should contain the necessary *Miranda* or follow-up *Miranda* warning as the case may be.

§ 4.61 Guardian Ad Litem - Minors; Mentally Incapacitated Persons

No judgment or order for redemption may be entered under R. 4:64-1 against a minor or mentally incapacitated person who is not represented by a guardian or guardian ad litem appearing in the action.²⁸⁶

Default must first be entered against the minor or mentally incapacitated person, before a guardian *ad litem* may be appointed on plaintiff’s own motion in a foreclosure action.²⁸⁷ The guardian or guardian *ad litem* must appear in the action.

Minors and mentally incapacitated persons were addressed in a prior section. Reference should be had to that section for the procedure for appointment of a guardian *ad litem* to represent a minor or mentally incapacitated person in the foreclosure action.²⁸⁸

§ 4.62 Attorney for Defendant in Military Service²⁸⁹

No judgment or order for redemption shall be entered against a defendant in military service of the United States who has been defaulted for failure to appear unless that defendant is represented in the action by an attorney authorized by the defendant or appointed to represent the defendant in the action and who has appeared or reported therein.²⁹⁰

It should be noted that a military person must first be *defaulted for failure to appear*,²⁹¹ before an attorney can be appointed by the court or Office to represent that person. The appointed attorney must appear in the action.²⁹²

The court rules now require that plaintiff’s non-military affidavit have attached to it a statement from the Department of Defense stating that the defaulting defendant is not in military service.²⁹³

²⁸⁵ 15 U.S.C.A. § 1692e(11).

²⁸⁶ R. 4:64-1(h).

²⁸⁷ R. 4:26(b)(3).

²⁸⁸ Chapter 5, § 5.19 (N).

²⁸⁹ See generally, 30 N.J. Prac. (Weinstein, *Law of Mortgages*) Sec. 29.19 (Supp. 2004).

²⁹⁰ R. 4:64-1(f).

²⁹¹ N.J.S.A. 38:23C-4. 50 App. U.S.C.A. Sec. 521.

²⁹² R. 4:64-1(h).

²⁹³ R. 1:5-7.

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The appointment of an attorney to represent a military person, where required, is set forth in a prior section.²⁹⁴

§ 4.63 Answers; Resolution of Contested Answers

An *uncontested* answer will not prevent plaintiff from entering an uncontested judgment, but the answering defendant must be given a notice of motion for judgment. The motion period is 10-days (plus 3-days for mailing), but if *any* answering defendant is an encumbrancer (or tenant), a 30-day notice of motion (plus 3-days for mailing) must be given to all answering defendants.²⁹⁵

A contested answer, on the other hand, must be stricken or rendered non-contesting, ordinarily by order striking answer or summary judgment, or the answer must otherwise be resolved by voluntary agreement of the parties, before plaintiff may proceed to entry of an uncontested judgment.²⁹⁶ Most contested answers cannot stand up in a mortgage foreclosure action.

Defendant's attorney may sign a consent order or judgment removing the contest or may sign the foreclosure judgment itself consenting to the entry of judgment. The contest may be removed by stipulation of the parties without court action; or plaintiff's worst case scenario may be required, a full blown trial.²⁹⁷

In any case, a notice of motion for judgment, using the 10-day or 30-day time periods set forth above, must be given to the answering defendant (or that defendant's attorney if represented in the action by an attorney), even if that defendant's answer was stricken, before the court or Office has jurisdiction to enter a final judgment of foreclosure.²⁹⁸

§ 4.64 Foreclosure Mediation Program

In 2009, the New Jersey Foreclosure Mediation program was instituted. Initially it was implemented in certain counties, then on a statewide basis. The program is available to homeowners that filed a contested answer, and to homeowners that have not filed an answer. An individual homeowner-borrower can participate in the Court's free foreclosure mediation program if the following eligibility conditions are met: (1) the property is an owner-occupied one- to three- family residential property; (2) the property is the homeowner-borrower's primary residence; and (3) the homeowner-borrower is the borrower on the mortgage loan being foreclosed.²⁹⁹

²⁹⁴ Chapter 5, § 5.19 (N).

²⁹⁵ R. 4:64-1(d).

²⁹⁶ R. 4:64-1(d).

²⁹⁷ A discussion of this subject is beyond the scope of this seminar book. See 30A *N.J. Prac.* (Weinstein, *Law of Mortgages*) Chapter 32 (2nd Ed. 2000).

²⁹⁸ R. 4:64-1(d).

²⁹⁹ New Jersey Foreclosure Mediation Description, Revised 10/2009 11290 pp 1-2.

The New Jersey Foreclosure Mediation Act, effective November 1, 2019, ensures the continuation of mediation services provided under that program to assist homeowners and lenders in pursuing a mutually agreeable alternative to mortgage foreclosure litigation and to avoid the harmful effects of residential property foreclosure on homeowners, families, and communities.³⁰⁰

The Act requires notification of the mediation program to be included in the notice of intention to foreclosure. A homeowner-borrower shall receive written notice from the residential mortgage lender of the option to participate in the Foreclosure Mediation Program in accordance with the court rules, procedures, and guidelines adopted by the Supreme Court at the time the homeowner-borrower receives a notice of intention to foreclose, pursuant to section 4 of *P.L.1995, c. 244 (C.2A:50-56)*.³⁰¹

Upon the filing of a mortgage foreclosure complaint against an eligible property, the homeowner-borrower shall again receive written notice of the option to participate in the Foreclosure Mediation Program in accordance with the court rules, procedures, and guidelines adopted by the Supreme Court. The written notice required pursuant to this section shall be available in both English and Spanish.³⁰²

Whenever a homeowner-borrower initiates mediation or is ordered to participate in the mediation program, that homeowner-borrower shall be responsible for submitting a certification document to the court, confirming that they meet the definition of a homeowner-borrower and that the property being foreclosed upon continues to be an eligible property.³⁰³ The certification document submitted to the court shall also be signed by the trained foreclosure prevention and default mitigation counselor, verifying that the trained foreclosure prevention and default mitigation counselor is counseling the homeowner-borrower.³⁰⁴

The New Jersey Foreclosure Mediation Act also the Foreclosure Mediation Fund. In each action for foreclosure, the plaintiff shall pay \$155 to the clerk of the court in addition to the fee associated with the filing of the first paper. Of that \$155 payment, \$60 and all monies collected from each civil penalty imposed for violations of subsection b. of section 5 of *P.L.2019, c. 64 (C.2A:50-78)*, shall be deposited in the fund.³⁰⁵ The monies shall be appropriated for the purposes of the operation of the Foreclosure Mediation Program, including the compensation of mediators, and to enhance the integrity of the mortgage foreclosure review process. All interest or other income earned on monies deposited into the fund, and any monies that may be appropriated or otherwise become available for the purpose of the fund, shall be credited and deposited into the fund. The remaining \$95 collected from each filing fee shall be used to reimburse trained foreclosure prevention and default mitigation counselors for their services, pursuant

³⁰⁰ *N.J.S.A. 2A:50-75(a)*,

³⁰¹ *N.J.S.A. 2A:50-76*.

³⁰² *Id.*

³⁰³ *N.J.S.A. 2A:50-78*

³⁰⁴ *N.J.S.A. 2A:50-78*

³⁰⁵ *N.J.S.A. 2A:50-80*

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to *P.L.2019, c. 64 (C.2A:50-74 et al.)*.³⁰⁶

R. 4:64-1B, adopted April 1, 2019, effective May 1, 2019, outline the mediation process as follows:

(a) Purpose. Residential Foreclosure Mediation differs from other types of court sponsored mediation. Foreclosures are contractual disputes that arise from a homeowner's default of mortgage obligations. Residential foreclosure mediation shall explore whether an alternative solution is available to the parties, including but not limited to a loan modification agreement, repayment plan, reinstatement, or other acceptable form of home retention resolution, or a non-retention option such as a deed in lieu of foreclosure, cash of keys, short sale or market sale. Although the parties are not required to accept an alternative resolution, mediation may provide an opportunity for the homeowner to continue to reside in the mortgaged premises and may afford the lender an opportunity to avoid foreclosure costs and carrying charges, and to reduce the number of non-performing loans in their portfolio.

(b) Notification. Plaintiff's attorney shall provide notice to the homeowner of the Residential Foreclosure Mediation Program when the Summons and Complaint are served.

(c) Referral to Mediation.

(1) A homeowner may apply to participate in the Residential Foreclosure Mediation Program by submitting a completed Mediation Request Statement to the: Superior Court Clerk's Office, Foreclosure Mediation, P.O. Box 971, 25 Market Street, Trenton, New Jersey 08625, no later than 60 days from the date the homeowner is served with the Summons and Complaint.

(2) After 60 days from the date a homeowner is served with the Summons and Complaint, and at any time prior to the sale of the property, a homeowner may apply to participate in the Residential Foreclosure Mediation Program only by filing a Motion to Participate in Mediation. The homeowner shall file the motion with the Superior Court Clerk's Office in Trenton and notice the motion to the vicinage where the case is venued.

(3) A Superior Court judge may enter an order that requires the parties to attend a Residential Foreclosure

³⁰⁶ *N.J.S.A. 2A:50-80*

Mediation at any time following the filing of a complaint.

(d) Eligibility. Participation in the Residential Foreclosure Mediation Program is available only to qualified homeowners. To qualify, the homeowner must satisfy the following criteria:

- (1) The mortgaged premises must be the subject of an active and open residential mortgage foreclosure case. Mediation is not offered in connection with any other type of foreclosure litigation.
- (2) The homeowner must apply to participate in the Residential Foreclosure Mediation Program no later than 60-days from the date they are served with the Summons and Complaint unless a court order is entered directing the parties to attend mediation.
- (3) The mortgaged premises subject to foreclosure must be the homeowner's primary place of residence.
- (4) The mortgaged premises subject to foreclosure must be a one to four family dwelling.
- (5) All borrowers who execute the Note must agree to participate in the mediation. Absent a court order or an agreement by the lender or servicer that provides otherwise, Residential Foreclosure Mediation is not available unless each borrower is willing to participate.
- (6) The homeowner is not presently in bankruptcy.

(e) Initial Conference.

- (1) The Superior Court Clerk's Office shall issue a Letter of Mediation Acceptance to each homeowner deemed eligible to participate in the Residential Foreclosure Mediation Program and shall schedule an Initial Conference between the parties no later than 45-days from the date of the letter.
- (2) Prior to the date of the Initial Conference the plaintiff shall mail the defendant homeowner the following loss mitigation documents by regular and certified mail:
 - A. An itemized loan transaction history with accompanying information, written in plain language, to explain any codes used in the history which are not otherwise self-explanatory;
 - B. An itemized statement of the amount necessary

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to reinstate the mortgage loan;

C. A statement of the amount necessary to pay off the mortgage loan;

D. Copies of the Note, Mortgage and any agreements modifying such documents; and

E. The name, business mailing address, electronic mailing address, facsimile number and direct telephone number of an individual able to respond with reasonable adequacy and promptness to questions relative to loss mitigation process.

(3) A law clerk or other designated personnel assigned to the Superior Court Clerk's Office shall conduct the Initial Conference by telephone or other electronic means. The purpose of the Initial Conference is to facilitate the timely exchange of relevant financial documentation between the homeowner and the lender.

(4) If, following the Initial Conference, the parties have not exchanged all of the relevant financial documentation or are not otherwise ready to proceed to Residential Foreclosure Mediation, the Superior Court Clerk's Office shall schedule a Second Conference no later than 45-days from the date of the Initial Conference, unless deemed necessary by the mediator. Subsequent conferences shall only be scheduled if deemed necessary by the Superior Court Clerk's Office.

(5) In the event that a homeowner misses the Initial Conference due to an emergency or other unforeseen circumstances, the Superior Court Clerk's Office may, at its discretion, schedule another Initial Conference for the homeowner.

(6) If the parties are not ready to proceed to Residential Foreclosure Mediation at the conclusion of a Second Conference due to a failure of the homeowner to exercise best efforts to provide complete financial documentation or to attend the scheduled session(s), the case shall be removed from the Residential Foreclosure Mediation Program.

(7) If the parties are not ready to proceed to Residential Foreclosure Mediation at the conclusion of a Second Conference due to a failure of the lender to review the homeowner's financial documentation or to attend the scheduled session(s), the case shall be deemed a contested foreclosure and shall be referred to a Superior

Court Judge for review.

(f) Residential Foreclosure Mediation.

(1) Upon timely submission of the necessary documentation to lender and the completion of the Conference, the Superior Court Clerk's Office shall enter an Administrative Order scheduling a Residential Foreclosure Mediation no later than 30-days from the date the Conference was completed. The Superior Court Clerk's Office shall provide the parties with a copy of the Administrative Order and shall upload the Order to the electronic case jacket.

(2) Designated judicial staff shall conduct the Residential Foreclosure Mediation. The purpose of the mediation is to explore whether an alternative resolution is available to the parties, including but not limited to a loan modification agreement, repayment plan, reinstatement, or other acceptable form of home retention resolution, or non-retention option such as a deed in lieu of foreclosure, cash for keys, short sale or market sale. The mediation shall be attended by a representative of the lender and by each homeowner who executed the Note, unless otherwise agreed to by the lender or servicer or ordered by the court.

(3) Residential Foreclosure Mediation shall be conducted at the courthouse where the case is venued. The parties are required to communicate special needs, such as an interpreter or handicapped access, to the vicinage where the mediation will be conducted.

(4) If, following the first scheduled mediation session, the parties have been unable to agree to an alternative resolution, the mediator may in his or her discretion schedule a second mediation session no later than 15-days from the date of the first scheduled mediation. No third mediation session shall be scheduled absent a court order.

(5) If the parties are unable to reach a mediated resolution at the conclusion of a second mediation session due to a failure of the lender to timely review the homeowner's financial documentation the case shall be deemed a contested foreclosure and shall be referred to a Superior Court Judge for review.

(g) Stay of Proceedings. Absent a court order to the contrary, the commencement of Residential Foreclosure

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Mediation proceedings shall not stay the underlying foreclosure litigation.

(h) Good Faith. Both the lender and the homeowner shall negotiate in good faith to reach a mutually agreeable resolution. At a minimum, good faith requires:

(1) Compliance with this rule and applicable court rules, court orders, and directives by the court or its designee pertaining to the Residential Foreclosure Mediation Program;

(2) Compliance with applicable mortgage servicing laws, rules, regulations, and investor directives;

(3) Conduct consistent with efforts to reach a mutually agreeable resolution, including but not limited to, avoiding unreasonable delay, appearing at the mediation with complete settlement authority and providing accurate information to the court and the parties.

(i) The court may impose appropriate sanctions against the non-complying party including:

(1) Tolling of interest, fees and costs;

(2) Reasonable attorney's fees;

(3) Monetary sanctions;

(4) Any other relief that the court deems just and proper.

(j) A party to a foreclosure action may not charge, impose or otherwise require payment from the other party for any cost, including but not limited to attorney's fees for the participation at or in the Residential Foreclosure Mediation Program, except by court order.

The mediation documents that should be served on the homeowners are available the New Jersey Courts website at the following link:

<https://www.njcourts.gov/selfhelp/catalog.html?keywords=Foreclosure%20Mediation&customer=Attorneys>

Rule Relaxation

Court Rules have been relaxed to implement the foreclosure mediation program. These are:

Rule 4:4-4, to require inclusion of a brochure or notice explaining court's mediation program and attachments to

be served with foreclosure complaint and summons.³⁰⁷

Rule 4:64-4 (Abandonment of Action by Plaintiff; Right of Defendant to Proceed), to suspend the right of a subordinate encumbrancer to prosecute an abandoned foreclosure action, if the primary mortgagee agrees to a workout in mediation.³⁰⁸

³⁰⁷ New Jersey Foreclosure Mediation Description, Revised 10/2009 11290 p. 5

³⁰⁸ New Jersey Foreclosure Mediation Description, Revised 10/2009 11290 p. 5

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CHAPTER 5

PROCEDURE FOR JUDGMENT; WRITS EXECUTION/POSSESSION; POST-JUDGMENT ADVANCES; ENVIRONMENTAL

§ 5.01 Procedure for Judgment

The procedure for entry of an uncontested judgment is controlled by *R. 4:64-1(d)* which reads as follows:

(1) Application for Judgment. The application for entry of judgment shall be accompanied by proofs as required by *R. 4:64-2*. In lieu of the filing otherwise required by *R. 1:6-4*, the application shall be filed with the Office of Foreclosure in the Administrative Office of the Courts.

(2) Prejudgment Notices. Notice of motion for entry of judgment in the form prescribed by *R. 4:64-9* shall be served within the time prescribed by subparagraph (d)(4) of this rule on mortgagors, on all other named parties obligated on the debt, and on all parties who have appeared in the action, including defendants whose answers have been stricken or rendered non-contesting. The notice shall have annexed a copy of the affidavit of amount due filed with the court. Any other defaulting parties shall be noticed only if application for final judgment is made six months or more after the entry of default. If the premises are residential, the notice of motion for entry of judgment shall be served on each tenant, by personal service or registered or certified mail, return receipt requested, accompanied by the notice of tenants' rights during foreclosure in the form prescribed by Appendix XII-K of the rules of court. Said notice of tenants' rights shall be contained in an envelope with the following text in bold and in at least 14-point type: "Important Notice about Tenants Rights." If the name of the tenant is unknown, the notice may be addressed to Tenant.

(3) Objections to Amount Due. Any party having the right of redemption who disputes the correctness of the affidavit of amount due may file with the Office of Foreclosure an objection stating with specificity the basis of the dispute and asking the court to fix the amount due. On receipt of a specific objection to the calculation of the amount due, the Office of Foreclosure shall refer the matter to the judge in the county of venue, who shall schedule such further proceedings and notify the parties or their attorneys of the time and place thereof.

(4) Entry of Judgment. The court, on motion on 10-days' notice and subject to paragraph (h) of this rule, may enter final judgment upon proofs as required by *R. 4:64- 2*. The Office of Foreclosure may recommend entry of final judgment pursuant to *R. 1:34- 6*.

But first the action must be deemed *uncontested* in accordance with *R. 4:64-1(c)* which provides:

An action to foreclose a mortgage or to foreclose a condominium lien for unpaid assessments pursuant to *N.J.S.A. 46:8B-21* shall be deemed uncontested if, as to all defendants,

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- (1) a default has been entered as the result of failure to plead or otherwise defend; or
- (2) none of the pleadings responsive to the complaint either contest the validity or priority of the mortgage or lien being foreclosed or create an issue with respect to plaintiff's right to foreclose it; or
- (3) all the contesting pleadings have been stricken or otherwise rendered noncontesting.

R. 4:64-1 and 2 also control entry of judgment in a condominium association lien foreclosure pursuant to *N.J.S.A. 46:8B-21* as well as the entry of judgment in a strict mortgage foreclosure action.¹

Now it should be noted that the rule refers to an *uncontested* judgment. These are judgments entered through the Office of Foreclosure in Trenton. Virtually all foreclosure judgments are entered by the Office in Trenton, even in contested matters. In most contested matters, the answer or answers are first stricken by the chancery judge of the vicinage. The matter is then referred to the Office of Foreclosure in Trenton for entry of the uncontested judgment. Thus, in terms of the actual practice, *R. 4:64-1(d)* contains a blueprint for entry of foreclosure judgments in both contested and uncontested matters.

It should also be noted that *R. 4:64-1(d)* does not refer to the 14-day notice of entry of judgment - the notice to cure - which must be sent to the debtors prior to judgment in residential actions subject to the *Fair Foreclosure Act*. This is a statutory notice, not a rule notice, and is dealt with in subsequent sections.

§ 5.02 Uncontested action Date

Since the entire procedure for judgment depends upon the action being deemed “uncontested,” it is important to know when the action becomes uncontested. Pursuant to *R. 4:64-1(c)* above, the action becomes uncontested on the latest of the following dates: *the entry of the last default, the filing of the last uncontested answer, if any, or the date the last contested answer stricken or rendered noncontesting.*

Thus, if the last default was filed on August 5th, 2007; the last contested answer was stricken on August 15th, 2007; and the last uncontested answer was filed on August 18th, 2007, the uncontested action date (or date when the action became uncontested for purposes of *R. 4:64-1(c)*) would be August 18th, 2007. Until August 18th, 2007, plaintiff would have no authority under the rule to proceed to judgment.

§ 5.03 Notice to the bar - Foreclosure actions (Administrative Office of the Courts)

Although the following Notice to the Bar is almost twenty five years old, it still sets forth Judiciary foreclosure policy which is for the most part still in effect.

The Administrative Director of the Courts has issued the following guidelines for

¹ *R. 4:64-1(f)*.

“uncontested” foreclosures:²

1. Late Charges must show (1) the correct monthly charge on a payment in default and (2) the total number of months in default. Only one late charge for each payment in arrears is allowed. Late charges are not allowable after the filing of the foreclosure complaint, because the foreclosure accelerates the total mortgage indebtedness, making monthly payments no longer the applicable form of satisfaction. To obtain late charges in a judgment of foreclosure, they must be provided for in the debt instrument or mortgage.
2. Escrow Deficit must give a breakdown of the uses to which the escrow monies have been applied.
3. Unearned Interest Credit must be taken into account and subtracted from the amount due, where the face amount of the mortgage to be foreclosed contains advance or precomputed interest to be collected on future loan installments.
4. Plaintiffs’ and Defendants’ Proofs - Pursuant to *Rule* 4:64-2, proofs must consist of original instruments (bond, note, mortgage, assignments, tax sale certificates etc.) to be marked as exhibits and returned to you, together with the affidavit of amount due. Certified copies by the county clerk are acceptable for documents of record. If the original note or bond is lost, an affidavit of lost note or bond must be submitted. Judgment creditors holding Superior Court judgments need only submit an affidavit of amount due. County court judgment holders customarily submit an abstract of judgment with their proof.
5. Recognizance - Service must be made on the county prosecutor where the State is made a party defendant because of a recognizance held by it. *Rule* 4:4-4(f).
6. Acknowledgment of Service when made by the defendant himself (who is not a New Jersey attorney) is required to be acknowledged as in the case of a deed. *Rule* 4:4-6.
7. U.S.A./Dual Service Required as follows: (1) Serve 60-day summons and a copy of the complaint on the U.S. Attorney for the District of New Jersey in Newark through the Essex County Sheriff and file proof of service or acknowledgment of service pursuant to *Rule* 4:4-6; and (2) Mail copy of summons and complaint by registered or certified mail to the U.S. Attorney General, Washington, D.C. and file an affidavit of mailing together with the original return receipt card in the foreclosure action. It should be noted that the form letter forwarded by the U.S. Attorney in response to service does not technically constitute either an acknowledgment of service or an appearance. The U.S.A. must still be defaulted in the action and dual proof of service as outlined above must be filed.
8. Order Striking Answer should also direct the Clerk to enter default against the pertinent party, otherwise a separate default must subsequently be entered upon request and affidavit filed under *Rule* 4:43-1.
9. Affidavits of Non-Military Service are still required under *Rule* 1:5-7 and must be filed, where required, against each defendant who has been defaulted for failure to

² Notice to the Bar Re: Foreclosure Matters, 110 *N.J.L.J.* 325 (Sept. 16, 1982).

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appear.

10. Condominium Association Liens

a. Such liens can only be foreclosed through the Clerk's office as per the exact monetary amount set forth in the claim of lien recorded pursuant to *N.J.S.A. 46:8B-21*, together with interest thereon where authorized. We are not aware of any authority that would allow subsequent indebtedness, not reduced to a recorded claim of lien under the statute, to be added to the total amount due in the action. Moreover, we also are not aware of any body of law that would give the right of possession to a condominium association upon default or failure of the owner to pay assessments. The Clerk will therefore not enter a judgment awarding possession in such matters. Where needed, the attorney is advised to obtain an order for possession pursuant to *Rule 4:59-2*.

b. A certified copy (by the county clerk) of the recorded claim of lien must be submitted and marked as an exhibit pursuant to *Rule 4:64-2*.

c. It should be noted that the statute provides that such claims of lien are subordinate to any mortgage to which the unit is subject. The Clerk will therefore observe the following standards in processing such matters.

(1) Where the condominium lien claimant appears in the foreclosure action as a subsequent encumbrancer and seeks priority over a subsequent, co-defendant mortgage, the Clerk will not report either the claim of lien or the mortgage, but will leave payment of such parties to surplus money proceedings, if any. (2) Where the condominium lien claimant brings the foreclosure action as plaintiff, and one or more mortgages are named as party defendants therein, the Clerk will not enter judgment because of the statutory provision, but will refer plaintiff to the judge of the vicinage for final disposition.

11. Payment of Defendants in Plaintiff's Judgment: Priorities

a. A defendant, such as a subsequent encumbrancer, can only be paid in the foreclosure judgment where: (1) his priority is determined; (2) he is next in line to be paid, that is the liens and encumbrances of all prior defendants have been paid in the judgment, so that there are no intervening unpaid lienors ahead of the defendant; (3) the lien or encumbrance held by defendant is unanimous against all mortgagors; and (4) defendant is an answering party who has submitted his proofs.

b. It should be noted that under *Rule 4:64-2* (last sentence), non-answering, defaulted defendants do not lose their priority of claim under the judgment, simply because of their failure to answer. The rights and claims of such non-answering defendants, who are entitled to priority of claim as set up in the complaint, cannot be displaced in the judgment by answering defendants without priority. Priority is determined, as of the commencement of the action, by the order of recording, entry, filing, or docketing dates set up in the complaint, or by other facts distinctly set forth in the complaint.

c. All defendants not paid in the judgment may apply for surplus monies, if any, under *Rule 4:64-3*, and all such defendants are entitled to notice upon application by

any other defendant for the payment of surplus funds.

12. Non-Adversary Answers filed by subsequent encumbrancers need not be multi-page documents. Such answers can consist of a simple statement that (1) the defendant has no knowledge or information upon which to form a belief as to all of the allegations of the complaint, other than the particular paragraph referring to such defendant's encumbrance, which is admitted, and (2) the defendant merely desires to have his encumbrance reported upon. There is no need to file such a non-adversary answer where the Clerk cannot report the priority of defendant's encumbrance, as where such defendant is not next in line to be paid, or where the lien or encumbrance is against less than all mortgagors (see paragraph 11, *supra*).

13. Amendments to the Complaint may be made as a matter of course, without any order, at any time before an answering pleading is served under *Rule* 4:9-1.

14. In Rem Actions - The original return receipt card(s), together with an affidavit of mailing, must be filed in the action, as proof of certified mailing to owners or persons filing notices pursuant to *Rule* 4:64-7(c) and *Rule* 1:5-3.

15. Registered or Certified Service - *Rule* 1:5-3 states that where service is made by registered or certified mail, the return receipt card shall be filed as part of the proof of service.

16. Prior Encumbrancers and Lienors are not proper parties in a mortgage foreclosure action, except where a purchase money mortgage is being foreclosed. Municipal tax liens are paramount liens by statute, *N.J.S.A.* 54:5-9, and cannot properly be cut out in a mortgage foreclosure action. In such cases, the Clerk will require that the municipality be dismissed before entering the uncontested judgment.

17. Action on Note or Bond Prior to Foreclosure - As of May 1, 1980 a foreclosure of the mortgage is first required before an action on a note or bond secured by a mortgage can be commenced. *N.J.S.A.* 2A:50-2. There are four special statutory exceptions where the mortgage debt is evidenced by a note. *N.J.S.A.* 3A:50-2.3. A personal deficiency judgment cannot be obtained in a mortgage foreclosure action.

18. Writ of Execution, like the complaint, should contain the names of all parties to the action. The writ information will be used in the Sheriff's deed and become part of the record title to the property.

In uncontested foreclosure actions, if at all possible, all moving papers should be submitted at the same time to the Clerk of the Superior Court, Foreclosure Unit, R.J. Hughes Justice Complex, CN 971, Trenton, N.J. 08625. Such papers include proof of services not previously filed, affidavits of inquiry and mailing, request and affidavit of default, affidavit of non-military service, affidavit of amount due, affidavit of search fees, original instruments (together with stamped, self-addressed envelope), proposed judgment, writ of execution and/or possession.

The 10-day and 30-day notices for application for judgment given to all answering and appearing parties pursuant to *Rule* 4:64-1(b) and *Rule* 4:43-2(b) should be returnable before the Superior Court of New Jersey, Chancery Division, R.J. Hughes Justice Complex, Trenton, New Jersey.

There is no charge for the issuance of a writ of execution and/or possession by the Clerk of

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the Superior Court in Chancery actions.

Guidelines of the Administrative Director of the Courts are entitled to respectful consideration, but are not law.³

§ 5.04 14-Day Notice of Entry of Judgment (“Notice to Cure”) - *Fair Foreclosure Act* cases only; 2006 Amendment

If the mortgage foreclosure action is subject to the *Fair Foreclosure Act*,⁴ after the action is deemed *uncontested*⁵ plaintiff’s attorney should serve the 14-day notice of entry of judgment (“notice to cure”) on the debtors. If the *Fair Foreclosure Act* does not apply to your action, you can skip this step.

The *Fair Foreclosure Act* requires that the lender, if the action is deemed uncontested pursuant to R. 4:64-1(c), provide the debtor with a notice, mailed at least 14-calendar days prior to the submission of proper proofs for entry of the foreclosure judgment, advising that, absent a response from the debtor pursuant to the statute, proper proofs will be submitted for entry of final judgment in the foreclosure action and that upon entry of final judgment, the debtor will lose the right to cure the default as provided in section 5 of the *Fair Foreclosure Act*. The manner and address for mailing and the effective date of the notice are the same as those of the notice of intention.⁶

By statutory amendment⁷ effective July 16, 2006, the 14-day notice, as to residential mortgage foreclosure actions filed on or after the effective date, “shall provide the debtor with the name and address of the lender and the telephone number of a representative of the lender whom the debtor may contact to obtain the amount required to cure the default.”

The amendment also provides that “the lender shall attach a copy of the required 14-day notice to the application for final judgment.” This latter requirement, in the author’s opinion, is satisfied by attaching a copy of the 14-day notice (mailed to each debtor) to plaintiff’s proof of mailing of the 14-day notice, together with plaintiff’s final judgment papers. If there are more than one debtor, copies of all notices sent should be attached.

A debtor may, no later than 10-days after receipt of the notice, mail to the lender’s attorney⁸ a statement in which the debtor in good faith certifies as true that there is a reasonable likelihood that the debtor will be able to provide payment necessary to cure the default within 45-days of the date the notice became effective. This statement shall be sent registered or certified mail, return receipt requested, to the address of the lender’s attorney.⁹

³ *Crest Sav. & Loan Ass’n v. Mason*, 243 N.J. Super. 646, 581 A.2d 120 (Ch. Div. 1990).

⁴ N.J.S.A. 2A:50-53 *et seq.*

⁵ R. 4:64-1(c).

⁶ N.J.S.A. 2A:50-58a.

⁷ L.1995, c. 244, § 6. Amended by L.2006, c. 13, § 1, eff. July 16, 2006.

⁸ *Federal National Mortgage Association v. Bracero*, 297 N.J. Super. 105, 687 A.2d 802 (Ch. Div. 1996). N.J.S.A. 2A:50-58a(2).

⁹ *Id.*

A lender who receives such a statement sent by the debtor cannot submit proper proofs for entry of final judgment in foreclosure with a return date earlier than 46-days after the date the notice became effective.¹⁰

It must be emphasized that the 14-day notice cannot be sent to the debtor until the action is deemed *uncontested* in accordance with R. 4:64-1(c). This is the latest of the following dates - (a) the date the last default was entered “of record,” or (b) the date the last uncontested answer was filed, or (c) the date the last contested answer was stricken or rendered non-contesting. On or after the last date, as aforesaid, the 14-day notice may be mailed to the debtors. If the notice is sent earlier, it is premature and must be sent again.

The 14-day notice of entry of judgment (“notice to cure”) is not a filed paper; it is a statutory notice requirement, not a pleading. The notice must be mailed to the debtors (the persons shown on the lender’s record as being obligated to pay the secured obligation),¹¹ - ordinarily the persons signing the mortgage and note or bond - whether or not such persons are defendants in the foreclosure action.

The 14-day “notice to cure” must be sent by registered or certified mail, return receipt requested, to the debtor at the debtor’s *last known address* and, if different from the address of the mortgaged premises, *also to the address of the mortgaged premises*.¹² The notice must be mailed to each debtor in a separate envelope.¹³

Pursuant to case law, the 14-day notice of entry of judgment may be mailed to the debtor by the lender’s attorney.¹⁴

The notice is effective when it is delivered in person or mailed.¹⁵

Absent a response from the debtor, or notice of motion requiring a later return date, final judgment papers may be submitted to the Office or court on the 14th day after mailing or delivery of the notice.¹⁶

If the debtor timely mails such a certified statement of the ability to cure to the lender’s attorney, plaintiff cannot submit its final judgment papers to the Office or court earlier than the 46th day after mailing or delivery of the notice¹⁷ and *the return date or dates for any required motions, for judgment cannot have any return dates earlier than the forty sixth day*.

It must be emphasized that whether the debtor responds or not, the debtor never receives more than 45-days under the statute and, subject to applicable motion periods requiring a later return date, judgment papers may always be submitted on or after the 46th day after mailing or delivery of the notice.

¹⁰ N.J.S.A. 2A:50-58a(3).

¹¹ N.J.S.A. 2A:50-55.

¹² N.J.S.A. 2A:50-58a(1); N.J.S.A. 2A:50-56b.

¹³ *Henry C. McCandless, Inc. v. Schaffer*, 103 N.J. Eq. 170, 142 A. 566. This is a basic equity principle.

¹⁴ *Federal National Mortgage Association v. Bracero*, 297 N.J. Super. 105, 687 A.2d 802 (Ch. Div. 1996).

¹⁵ N.J.S.A. 2A:50-58(a)(1); 2A:50-56b.

¹⁶ N.J.S.A. 2A:50-58(a)(1).

¹⁷ N.J.S.A. 2A:50-58(a)(3).

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The proofs to be submitted to the Office at time of judgment evidencing compliance with the mailing requirements of the notice to cure statute¹⁸ are: (a) a certification of mailing of the 14-day notice to cure (with a copy of the notice sent to the debtor(s) attached for actions instituted on or after July 16, 2006); and (b) a certification of no response (but only if proofs for judgment are submitted prior to 46th day).

By attaching a copy of the notice or notices to the application for judgment, Office of Foreclosure personnel may now verify that the notice used complies with the statutory requirements. Thus, it is extremely important for practitioners to use the correct form of notice; otherwise, the Office may not process the judgment. For example, the name of lender set forth in the 14-day notice should be the same as the plaintiff in the action; otherwise, the Office will certainly question the notice as well as the named plaintiff. A separate notice should be used for each debtor and, under no circumstances, should the notice be directed to more than one debtor. If the Office finds the form of the notice to be deficient, it will certainly require that a new notice be given.

Deceased Debtors; Heirs - Notice to Cure

If the debtor is deceased, it is the authors strong opinion that the notice to cure should be given to the heirs, devisees and personal representative, if any, of the deceased debtor. These persons certainly stand in the place of the deceased debtor. If, however, the debtors hold title to the mortgaged premises as tenants by the entirety, the predeceasing tenant's heirs or devisees should not be noticed as notice to the surviving tenant should suffice.

The statute¹⁹ does not expressly cover a deceased debtor and currently, if all debtors are deceased, the Office of Foreclosure will apparently enter judgment without a notice to cure being given to anyone - not the debtor's heirs, devisees or even the debtor's executor or administrator. Attorneys, however, are cautioned against this practice as it is fraught with danger.

The Chancery Division addressed the deceased debtor issue in an unpublished opinion - *Washington Mutual Bank, FA v. Webb*.²⁰ In *Webb*, plaintiff instituted foreclosure but did not join David T. Webb, the property owner and devisee and the Estate of Betty Webb. The Chancery Division held that these parties must be joined in the foreclosure as they are "necessary and proper parties," citing *N.J.S.A. 3B:1-3* and *R. 4:28-1*. Further, as to the notice of intention, the court adopted the procedure outlined in *GE Capital Mortgage v. Weisman*²¹ and ordered that Webb and the Estate be served with the notice within fifteen days and that they be given thirty days to reinstate or respond.

¹⁸ *N.J.S.A. 2A:50-58(a)*.

¹⁹ *N.J.S.A. 2A:50-58*. "Debtor," is not defined under the statute to include "heirs, executors, administrators or successors." *N.J.S.A. 2A:50-55*.

²⁰ *Washington Mutual Bank, FA v. Webb*, F-16303-05, 2006 WL 156882 (Ch. Div. 2006). (Unpublished).

²¹ 339 *N.J. Super.* 590, 773 A.2d 122 (Ch. Div. 2000).

§ 5.05 14 Day Notice (Notice to Cure) - Amended Form

**14 DAY NOTICE OF ENTRY OF JUDGMENT
(NOTICE TO CURE)
(LETTERHEAD OF LENDER'S ATTORNEY)**

(Date)

Via Certified Mail RRR#

Name of Individual Debtor

Street Address

Municipality, State, Zip Code

RE: Lender's Name

Lender's Account Number

Address of Mortgaged Premises

NOTICE OF ENTRY OF FINAL JUDGMENTDear *(Name of Debtor)*:

This is to advise you that absent a response from you in accordance with paragraph 2 of subsection 6a of the *Fair Foreclosure Act*, N.J.S.A. 2A:50-58a(2), we will submit proper proofs for entry of final judgment in the above foreclosure action on or after *(Day/Month/Year—At least 14-days after date of mailing of Notice)* and that upon entry of final judgment you will lose your right provided pursuant to section 5 of the act to cure the default.

Paragraph 2 of subsection 6a of the *Fair Foreclosure Act* provides that you may, no later than 10-days after receipt of the within notice for entry of final judgment, mail to us a statement in which you in good faith certify as true that there is a reasonable likelihood that you will be able to provide payment necessary to cure the default within 45-days of the date that this notice became effective. The date this notice became effective was the date we mailed it to you on *(Day/Month/Year)*. This statement must be sent by registered or certified mail, return receipt requested, to our address. The name and address you may mail your statement to is: *(Name of Lender/C/O Name of Lender's Attorney/Address/Attention: Name of Person)*. If we receive such a timely statement from you, we cannot submit proper proofs for entry of final judgment in foreclosure earlier than *(Day/Month/Year—At least 46-days after date of mailing of notice)*.

The name and address of the lender and the telephone number of a representative of the lender whom you may contact to obtain the amount required to cure the default is set forth below:

Lender's name: _____**Lender's address:** _____

Phone number of a representative of the lender: _____

(PLEASE NOTE: If a servicer is handling the loan, its contact information should be provided)

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Servicer's name: _____

Servicer's address: _____

Phone number of a representative of the servicer: _____

(Name of Law Firm)

By: _____

(Name of Attorney)

Editor's Note: For actions instituted on or after July 16, 2006, the 14-day notice of entry of judgment must include the name and address of the lender and the telephone number of the lender's representative whom the debtor may contact to obtain the amount required to cure the default.

Editor's Note: A separate notice should be used for each debtor and mailed to each debtor in separate envelopes (even if husband and wife) by the lender's attorney. The notice should direct the debtor to respond to the lender's attorney. See Federal National Mortgage Association v. Bracero, 297 N.J. Super. 105 (Ch. Div. 1996).

Editor's Note: The date set forth in the first paragraph which the lender may use in the absence of a response from the debtor should take into account any motion periods which may require that additional time be given to the debtor. In other words, this date cannot be prior to the return dates of any motions required to be given, because proper proofs for judgment cannot be submitted until the expiration of such periods.

§ 5.06 Suppose Debtor Given a Notice of Intention and *Fair Foreclosure Act* Not Applicable

This is a fairly common occurrence, attorneys sometimes give a debtor a notice of intention to foreclose, prior to the filing of the complaint and then by judgment time find that the action is not subject to the *Fair Foreclosure Act*.

Currently, the Office of Foreclosure in such a circumstance will permit plaintiff to enter judgment without mailing a "notice to cure" to the debtor. But plaintiff's attorney must file a certification establishing that the action is not subject to the *Fair Foreclosure Act*.

In the event that the Office will not do this, plaintiff, in order to enter judgment, will be required to either give the notice or proceed before the vicinage chancery judge.

§ 5.07 Motions for Judgment

A notice of motion for final judgment is required in all residential mortgage foreclosure actions to sent to all mortgagors, on all other named parties obligated on the debt, and on all parties who have appeared in the action, including defendants whose answers have been stricken or

rendered non-contesting.²² Additionally, any defendant that was defaulted six months or more prior the application for final judgment should be included in the notice of motion. *R. 4:64-1(d)(2)* also provides:

If the premises are residential, the notice of motion for entry of judgment shall be served on each tenant, by personal service or registered or certified mail, return receipt requested, accompanied by the notice of tenants' rights during foreclosure in the form prescribed by Appendix XII-K of the rules of court. Said notice of tenants' rights shall be contained in an envelope with the following text in bold and in at least 14-point type: "Important Notice about Tenants Rights." If the name of the tenant is unknown, the notice may be addressed to Tenant.

Rule 4:64-9 was revised to set forth the contents of the motion. *Rule 4:64-9(a)* now states:

A notice of motion filed with the Office of Foreclosure pursuant to *Rules 1:34-6, 4:64-1, and/or 4:64-2* shall not state a time and place for its resolution. The notice of motion shall state the address of the Office of Foreclosure and that the order sought will be entered in the discretion of the court unless the attorney or pro se party on whom it has been served notifies in writing the Office of Foreclosure and the attorney for the moving party or the pro se party within ten days after the date of service of the motion that the responding party objects to the entry of the order.

Rule 4:64-9(b) requires specific language. *Rule 4:64-9(b)* now states:

(b) Notices of Motion for Entry of Final Judgment; Objection to Amount Due. Every notice of motion for entry of Final Judgment in a foreclosure action filed with the Office of Foreclosure pursuant to *Rules 1:34-6, 4:64-1 and 4:64-2* shall include the following language:

"IF YOU WANT TO OBJECT TO THE CALCULATION OF AMOUNT DUE, YOU MUST DO SO IN WRITING WITHIN 10-DAYS AFTER THE DAY YOU RECEIVED THIS MOTION. ANY OBJECTION TO THE CALCULATION OF THE AMOUNT DUE MUST ADDRESS AND DETAIL WITH SPECIFICITY THE BASIS OF THE OBJECTION TO THE AMOUNT DUE. YOU MUST FILE YOUR OBJECTION WITH THE OFFICE OF FORECLOSURE, P.O. BOX 971, 25 MARKET STREET, TRENTON, NEW JERSEY 08625, AND SERVE A COPY ON THE MOVING PARTY. THE OFFICE OF FORECLOSURE DOES NOT CONDUCT HEARINGS. YOUR PERSONAL APPEARANCE AT THE OFFICE WILL NOT QUALIFY AS AN OBJECTION. IF YOU FILE A SPECIFIC OBJECTION TO THE CALCULATION OF THE AMOUNT DUE, ON RECEIPT OF A SPECIFIC OBJECTION TO THE CALCULATION OF THE AMOUNT DUE PURSUANT TO *R. 4:64-1(d)(1)(A)*, THE OFFICE OF FORECLOSURE SHALL REFER THE MATTER TO THE JUDGE IN THE COUNTY OF VENUE, WHO SHALL SCHEDULE SUCH FURTHER PROCEEDINGS AND NOTIFY THE PARTIES OR THEIR ATTORNEYS OF THE TIME AND PLACE THEREOF."

If a party is represented in an action by an attorney, the notice of motion, where required,

²² *R. 4:4-64(d)(2)*.

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must be given to the party's attorney not the party. Failure to do so may result in vacation of the judgment.²³

Motion papers should not be mailed to parties until the action is deemed uncontested pursuant to R. 4:64-1(c).

Because motion no list return date, the papers may ordinarily be submitted to the eCourts on or after the expiration of the notice period.

The fee for filing a motion is \$50.00. Original motion papers are of course served on affected parties.

Notice of Motion to Tenants

If there are residential tenants at the mortgage property, the notice shall be served on each tenant, by personal service or registered or certified mail, return receipt requested, accompanied by the notice of tenants' rights during foreclosure in the form prescribed by Appendix XII-K of the rules of court. Said notice of tenants' rights shall be contained in an envelope with the following text in bold and in at least 14-point type: "Important Notice about Tenants Rights." If the name of the tenant is unknown, the notice may be addressed to Tenant.

Appendix XII-K

NOTICE TO RESIDENTIAL TENANTS OF RIGHTS DURING FORECLOSURE

A FORECLOSURE ACTION HAS BEEN FILED CONCERNING (INSERT ADDRESS OF PROPERTY), AND THE OWNERSHIP OF THE PROPERTY MAY CHANGE AS A RESULT. UNTIL OWNERSHIP OF THE PROPERTY CHANGES OR YOU ARE OTHERWISE INFORMED BY THE COURT OR THE MORTGAGE HOLDER, YOU SHOULD CONTINUE TO PAY RENT TO THE LANDLORD OR TO A RENT RECEIVER, IF ONE IS APPOINTED BY THE COURT. YOU SHOULD KEEP RECEIPTS OR CANCELED CHECKS OF YOUR RENT PAYMENTS. IF YOU ARE NOT SURE HOW OR WHERE TO PAY RENT, SAVE YOUR RENT MONEY SO THAT YOU WILL HAVE IT WHEN THE OWNER DEMANDS IT. NONPAYMENT OF RENT IS GROUNDS FOR EVICTION.

FORECLOSURE ALONE IS GENERALLY NOT GROUNDS TO REMOVE A BONA FIDE RESIDENTIAL TENANT. TENANTS WHO WANT TO STAY IN THEIR HOMES CAN BE REMOVED ONLY THROUGH A COURT PROCESS. WITH LIMITED EXCEPTIONS, THE NEW JERSEY "ANTI-EVICTION ACT" PROTECTS RESIDENTIAL TENANTS' RIGHTS TO REMAIN IN THEIR HOME. THIS LAW INCLUDES PROTECTION FOR TENANTS WHO DO NOT HAVE WRITTEN LEASES.

IT IS UNLAWFUL FOR ANYONE TO TRY TO FORCE YOU TO LEAVE YOUR HOME OUTSIDE THE COURT PROCESS, INCLUDING BY SHUTTING OFF UTILITIES OR FAILING TO MAINTAIN THE PREMISES.

There are two customary documents submitted to the Office of Foreclosure in connection with this motion: (a) the notice of motion for entry of judgment; and (b) proof of service of the notice of motion (to the appearing parties or their attorneys, if represented).

This motion for judgment is directed to and served on all parties appearing pro se and

²³ R. 4:4-64(d)(2).

attorneys filing answers or appearances.

A defendant whose answer has been stricken is entitled to the notice of motion, even if default has been entered against that defendant.

Service of Motion Papers

Motion papers are ordinarily served on an attorney by ordinary mail and on a party pro se by registered or certified mail, return receipt requested and by ordinary mail, or if no address is known, to the clerk of the court.²⁴ See the previous section entitled “Service of Papers Subsequent to the Complaint.”

Papers Included With the Notice of Motion

R. 4:64-(d)(2) requires that the notice shall have annexed a copy of the affidavit of amount due filed with the court. If the premises are residential, the motion must be accompanied by the notice of tenants’ rights during foreclosure in the form prescribed by Appendix XII-K of the rules of court.

R. 4:64-2(d) requires that Plaintiff’s counsel shall annex to every motion to enter judgment in a residential mortgage foreclosure action an affidavit of diligent inquiry . This inquiry is referred as the R. 4:64-2(d) Certification of Diligent Inquiry and Accuracy of Foreclosure Documents and Factual Assertions.

R. 4:64-2(d) Certification of Diligent Inquiry and Accuracy of Foreclosure Documents and Factual Assertions

Pursuant to R. 4:64-2(d):

Plaintiff’s counsel shall annex to every motion to enter judgment in a residential mortgage foreclosure action an affidavit of diligent inquiry stating: (1) that the attorney has communicated with an employee or employees of the plaintiff or the plaintiff’s mortgage loan servicer who (A) personally reviewed the affidavit of amount due and the original or true copy of the note, mortgage and recorded assignments, if any, being submitted and (B) confirmed their accuracy; (2) the date and mode of communication employed; (3) the name(s), title(s) and responsibilities in those titles of the plaintiff’s employee(s) or the employee(s) of the plaintiff’s mortgage loan servicer with whom the attorney communicated pursuant to this rule; and (4) that the aforesaid documents comport with the requirements of R. 1:4-8(a).

The Office of Foreclosure will not enter judgment if the Certification of Diligent Inquiry is not annexed to the motion. This requirement was a result of the “robo-signing” scandal.

Coordinating Motions with 14-Day Notice (Fair Foreclosure Act)

If the *Fair Foreclosure Act* applies, any notice of motion submitted with plaintiffs final judgment package must be coordinated with the requirements of the 14-day notice to cure. If plaintiff can submit papers for judgment on or after the 14th day (after mailing of the 14-day notice), then any motion for judgment cannot be returnable until on or after the 14th day. Moreover, if

²⁴ R. 1:5-2.

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plaintiff must wait until on or after the 46th day to submit papers for judgment, then any motion for judgment cannot be returnable until on or after the 46th day - otherwise, the return date of the motion will be premature.²⁵

§ 5.08 Affidavit of Costs

Plaintiff may submit an affidavit or certification of costs or search fees at time of final judgment. It must contain an itemized statement of the fees and charges for which taxation is requested.²⁶

Search fees are permitted for fees actually paid or incurred for searches relative to the title being foreclosed, but not for searches *prior to the mortgage being foreclosed* without order of court. Search fees are limited to one percent of the amount found due, or \$500, whichever is less.²⁷ There is a \$75 minimum, if \$75 was paid for searches.

The Office of Foreclosure taxes the costs on entry of judgment and, if specified in plaintiff's certification of costs, includes fees for sheriff's and private process server's services, certified mailing costs for certified service (original only), publication costs,²⁸ and *lis pendens* filing fees.²⁹ The Office fills out a "taxed cost sheet" and returns a filed copy to plaintiff's attorney with the executed judgment, which itemizes and totals the various items included in taxed costs including counsel fees.

§ 5.09 Certification of Amount Due and Non-Military Service

Plaintiff must submit proof establishing the amount due on plaintiff's mortgage or mortgages being foreclosed.³⁰ Pursuant to R. 4:64-2, such proof may be submitted by affidavit, unless the court otherwise requires. See the *Office of Foreclosure's Requirements for the Proof of Amount Due* below.

The affidavit or certification of amount due tells the court the amount due and owing under the mortgage being foreclosed as of a *specified date*. This is the amount the court will use in the judgment, and the date to which interest is figured in the proof will become the *lawful interest* date in the judgment, the date after which the lawful interest rate (the post judgment rate specified in R. 4:42-11) will accrue on the judgment amount.³¹ Counsel fees should not be included in plaintiff's certification of amount due, as these fees are separately awarded by the Office or court as part of taxed costs.

Rule 4:64-2 (b) and (c) were revised to set forth:

²⁵ N.J.S.A. 2A:5-58.

²⁶ R. 4:42-10.

²⁷ R. 4:42-10.

²⁸ N.J.S.A. 22A:2-8.

²⁹ N.J.S.A. 2A:15-13.

³⁰ R. 4:64-1(d).

³¹ R. 4:42-11(a).

(b) Contents of Proof of Amount Due. If the action is uncontested, the plaintiff shall file with the Office of Foreclosure an affidavit of amount due, which shall have annexed a schedule as set forth in Appendix XII-J of these rules. The schedule shall state the principal due as of the date of default; advances authorized by the note or mortgage for taxes, hazard insurance and other stated purposes; late charges, if authorized by the note or mortgage, accrued to the date of the filing of the complaint; a computation of accrued interest; a statement of the per diem interest accruing from the date of the affidavit; and credit for any payments, credits, escrow balance or other amounts due the debtor. Prejudgment interest, if demanded in the complaint, shall be calculated on rate of interest provided by the instrument of indebtedness. A default rate of interest, if demanded in the complaint and if reasonable, may be used to calculate prejudgment interest from the date of default to the judgment. The schedule shall include notice that there may be surplus money and the procedure for claiming it. The proof of amount due affidavit may be supported by computer-generated entries.

(c) Time: Signatory. The affidavit or certification shall be made either by an employee of the plaintiff, if the plaintiff services the mortgage, on the affiant's knowledge of the plaintiff's business records kept in the regular course of business, or by an employee of the plaintiff's mortgage loan servicer, on the affiant's knowledge of the mortgage loan servicer's business records kept in the regular course of business. In the affidavit or certification, the affiant shall confirm: (1) that he or she is authorized to make the affidavit on behalf of the plaintiff or the plaintiff's mortgage loan servicer; (2) that the affidavit is made based on a personal review of business records of the plaintiff or the plaintiff's mortgage loan servicer, which records are maintained in the regular course of business; (3) that the financial information contained in the affidavit is accurate; and (4) that the default remains uncured. The affidavit or certification shall also include the name, title, and responsibilities of the individual, and the name of his or her employer. If the employer is not the named plaintiff in the action, the affidavit or certification shall provide a description of the relationship between the plaintiff and the employer.

The affidavit or certification of proof is made by the plaintiff or an authorized officer or agent of the plaintiff, regarding facts about which the person is competent to testify.³² The affidavit of proof should disclose the amount due on the mortgage and any payments made on account or other credits, and the interest due, and the net amount due the plaintiff. There may be included any advances for taxes by the mortgagee or other expenditures properly incurred by the mortgagee. A schedule is normally attached to plaintiff's certification of amount due summarizing the amount due, payments or credits, interest calculations and the net balance due.

The schedule must contain an itemization and breakdown. It should itemize: (a) principal due at time of default; (b) interest (specifying the period with "from" and "to" dates) and the rate used; (c) late charges (not beyond the filing of the complaint) setting forth the number of charges and amount of each charge; (d) advances (separately itemizing amounts paid for taxes, insurance, property maintenance and the like); (e) escrow advances (separately itemizing what the advances were used for); and (f) the total or net balance due.

³² R. 1:4-4(a), 1:6-6 (1969). A certification may be used in lieu of an oath. R. 1:4-4(b) (1969).

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Pursuant to *R. 1:4-4(c)*, an affidavit or certification of amount due may be filed with a facsimile (faxed) signature, if the attorney offering it certifies that the affiant acknowledged the genuineness of the signature and that the document or a copy with an original signature will be filed if requested by the court or a party. This can save the foreclosing attorney time, as the attorney need not wait to receive an original certification from the mortgagee.

If the mortgage utilizes a variable rate interest schedule, the rate charged for each particular period must be set forth in the proof, so the Office of Foreclosure or court can verify the actual interest rates permitted and whether the amount set forth in the proof is correct.

The principal sum due cannot exceed the face amount of the mortgage unless the loan documents provide for *negative amortization* or unless the loan amount has been subsequently *modified*. If the loan has been modified, the Office of Foreclosure requires that the modification information appear in the pleadings. See Office of Foreclosure's "Return Checklist" (Sec. 10.23 *supra*) for other proof of amount due requirements.

SAMPLE PROOF OF AMOUNT DUE INTRODUCTORY PARAGRAPHS & REQUIRED SCHEDULE

PROOF OF AMOUNT DUE AFFIDAVIT AND SCHEDULE AFFIDAVIT OF AMOUNT DUE TO ANNEXED TO NOTICES OF MOTION FOR JUDGMENT IN RESIDENTIAL MORTGAGE FORECLOSURE ACTIONS PURSUANT TO RULE 4:64-2 AND THAT MUST BE SUBMITTED IN FORECLOSURE ACTIONS PENDING AS OF JUNE 9, 2011

[Abbreviated Caption]

_____, of full age, being duly sworn according to law, depose and say:

1. *(If by an employee of the plaintiff)* I, *(insert the affiant's name)*, am employed by the plaintiff as its *(insert the city/state location where the affiant works)* office as a *(inset the affiant's title/position)*. My responsibilities in this position are *(insert the affiant's responsibilities)*. I am authorized to make this affidavit on the behalf of the plaintiff.

2. *(If by an employee of plaintiff's mortgage loan servicer)* I, *(insert affiant's name)* am employed by *(insert plaintiff's mortgage servicer's name)* at its *(insert the city/state location where the affiant works)* office as a *(inset the affiant's title/position)*. My responsibilities in this position are *(insert the affiant's responsibilities)*. Said company is a mortgage servicing company authorized to service and handle mortgage transactions on behalf of the plaintiff involving the mortgage debtor(s) named in the plaintiff's complaint. The plaintiff has not revoked said mortgage servicing company's authority and, as such, I have the authority to make, on behalf of the plaintiff, the computation of amount due herein set forth.

3. I have thoroughly reviewed *(insert the plaintiff's or plaintiff's mortgage servicing company's)* books and records concerning the note and mortgage loan described in the plaintiff's complaint.

4. Said books and business records indicate that the default of the defendants-borrowers, _____, remains uncured and there is due to the plaintiff in this action the sum of \$_____, as set forth in the Proof of Amount Due schedule annexed hereto. I have reviewed all entries and calculations, and they are correct. *Per diem* interest, as set forth in the annexed schedule, will

accrue on the principal from __, 20__.

5. The property described in the complaint in action cannot be divided and should be sold as a single tract.

6. There are no just debts, set-offs, credits or allowances due or to become due from the plaintiff to the defendant-borrower(s), other than those set forth herein.

7. The plaintiff is the owner/holder the aforesaid note and mortgage

8. I understand that the court will rely upon this affidavit in support of the plaintiff's application for a judgment in the within action.

sign above and type/print below

Sworn to and subscribed before me, this

_____ day of _____, 20_____

Notary Public of the State of _____

My Commission Expires: _____

[NOTARY SEAL]

AMOUNT DUE SCHEDULE

NOTE AND MORTGAGE DATED: _____

Recorded on _____, in _____, County, in Book _____, Page _____.

Property Address: _____

Mortgage Holder: _____

STATEMENT OF AMOUNT DUE

Unpaid Principal Balance as of _____ \$ _____

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Interest from _____ to _____ \$ _____

Interest rate = _____ % per year; \$ _____ per day x _____ days)

Late Charges from _____ to _____
(\$ _____ /mo. x _____ mos.) \$ _____

Advances through _____ for:

Real Estate Taxes \$ _____

Home Owners Insurance Premiums \$ _____

Mortgage Insurance Premiums \$ _____

Inspections \$ _____

Winterizing/Securing \$ _____

Sub-total of Advances \$ _____**Less Escrow Advances** \$ _____**Net Advances** \$ _____ \$ _____

Interest on advances from _____ to _____ \$ _____

Other Charges (specify) \$ _____

Total Due as of _____ \$ _____

Surplus Money: If after the sale and satisfaction of the mortgage debt including costs and expenses, there remains any surplus money, the money will be deposited into the Superior Court Trust Fund and any person claiming the surplus, or any part thereof, may file a motion pursuant to Court *Rules 4:64-3* and *4:57-2* stating the nature and extent of that person's claim and asking for an order directing payment of the surplus money. The Sheriff or other person conducting the sale will have information regarding the surplus, if any.

/s/ _____
Type or Print Lender's or Servicing Agent's Employee's
name

Date:

It should be noted that all orders or judgments taken by or on behalf of a party to the proceedings to which the party is entitled as of course or on default are taken at the risk and peril of the attorney and his client.³³

§ 5.10 Separate Affidavit of Non-Military

By virtue of an amendment to *R. 1:5-7*, effective September 1, 2006, the rule now reads:

Before entry of judgment by default, an affidavit, which may be filed as part of the affidavit of proof, shall be filed as required by law setting forth facts showing that the defendant is not in military service. Unless based on facts admissible in evidence, the affidavit shall have attached to it a statement from the Department of Defense or from each branch of the armed forces that the defendant is not in the military service. If the plaintiff is unable to determine whether the defendant is in military service, the affidavit shall so state, and the court, before entering judgment, may require the plaintiff to post a bond in an amount approved by the court to indemnify the defendant, if later found to have been in military service, against any loss or damage resulting from the judgment should it be set aside. The bond shall remain in effect until expiration of the time for appeal and setting aside of the judgment.

The Administrative of the Courts has advised:

The Office of Foreclosure will be looking for a Department of Defense statement, a statement from each military branch that the defendant is not in military service or an affidavit on personal knowledge as to the defendant's military status. Where plaintiff is unable to determine whether defendant is in the military, the court may require the plaintiff to post a bond.³⁴

Pursuant to *R. 1:5-7*, the Office now requires a "separate" non-military affidavit/certification, even if the proof of amount due (includes a non-military averment or certification).

See the Notice to the Bar, effective Aug. 7, 2006 regarding the rule change reprinted in the next section.

With respect to *mortgagors, owners and debtors*, Office policy, as of this writing, is to require that the non-military affidavit or certification must have attached to it a *Department of Defense Statement* that the defaulted defendant is not in military service. The general rule is that if plaintiff or the plaintiff's attorney have the defendant's social security number (required to run a Dept. of Defense) a search should be conducted. If that information is not available, you must include a statement in the certification

³³ *Kaufman v. Jurczak*, 102 N.J. Eq. 66, 139 A. 716 (Ch. 1927). See also Sec. 31.21 regarding the refusal by the Office to enter judgments *sua sponte*.

³⁴ See letter from the Administrative Office of the Courts, dated August 18, 2006, by Kevin M. Wolfe, in the Appendix.

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stating that neither the plaintiff or attorney, after searching their records, does not have defendants' *social security number* or other pertinent information he or she could not determine whether the defendant or defendants are in military service but believes they are not in military service. This is applicable to *subsequent encumbrancers*.

Both the "New Jersey Soldiers' and Sailors' Civil Relief Act of 1979"³⁵ and the federal "Servicemembers Civil Relief Act of 2003"³⁶ require a non-military affidavit for all non-appearing male or female defendants before judgment can be entered against them.³⁷ An affidavit is, of course, not required for corporations, partnerships and other non-male or female defendants.

Department of Defense Information

Military status searches and statements may be obtained from the Defense Manpower Data Center's (DMDC) Military Verification service which maintains a Web site in accordance with the Director's November 6, 2003 Notification reproduced in part below. The Web site address is: **<https://scra.dmdc.osd.mil/scra/#/home>**.

NOTIFICATION OF THE NEW SOLDIERS AND SAILORS RELIEF ACT WEB SITE

To alleviate the highly labor-intensive effort required to deal with this workload, DMDC has developed a Web site that will enable our customers to perform the checks themselves. An additional benefit is that the site will be available to you on a 24-hour basis. When you perform a check at this site, you will obtain written documentation containing the Department of defense seal and my signature as the Director of the DMDC.

In order to provide your company access to the Soldiers' and Sailors' Civil Relief Act (SSCRA) Web site, you need to identify all employees (use the following form) who will be doing these checks and complete the form by typing all the required information for each person on the form. We also need a requesting letter accompanying the form on your Company Letterhead that also states your company and these individuals with accounts **will not use this information for any other reason than SSCRA searches.**

The Form asks for:

Company name and address

FAX and telephone number

Full name with middle initial of employees doing checks

E-mail of employees doing checks

Phone numbers of employees doing checks

³⁵ N.J.S.A. 28:23C-1 to -26.

³⁶ 50. U.S.C.A. §§ 501 to 596.

³⁷ N.J.S.A. 38:23C-4. 50 U.S.C.A. § 521.

Mother's maiden name of employees doing check

This information above can be faxed to 703-696-4156 or mailed to: DMDC, Military Verification, 1600 Wilson Blvd., Suite 400, Arlington, VA 22209. Details on how to use the site and other pertinent information will be provided via e-mail and on the introductory screen on the site.

If you find the Web site does not satisfy your needs, please contact Military Verification, 703-696-5790, and we will explore other options with you. We are also available to address other comments and questions you may have.

Sincerely,

Kenneth C. Scheffler

Director

§ 5.11 Notice to the Bar—Administrative Director (August 7, 2006)

NOTICE TO THE BAR

AFFIDAVIT OF NON-MILITARY SERVICE

NOTE: This notice supersedes the August 9, 2004 Notice to the Bar on this subject.

Pursuant to *Rule 1:5-7* and in accordance with the Servicemembers' Civil Relief Act, 50 *U.S.C.* Appx. 521, unless otherwise based on facts admissible in evidence, an affidavit of non-military service must have appended thereto a statement from the Department of Defense or from each branch of the armed services that the defendant is not in military service. The Defense Manpower Data Center maintains a website at <https://www.dmdc.osd.mil/scra/owa/home>³⁸ that is searchable for information regarding an individual's military status. Use of that website requires entry of the last name and social security number of the person whose military status is being verified, which results in electronic generation of a report with the seal of the Department of Defense and the signature of the Center's Director.

If the website cannot be accessed or otherwise used, a statement still may be obtained from the Defense Manpower Data Center at no cost by mailing a request setting out the same information noted above, along with a pre-addressed and stamped return envelope, to the following address:

Defense Manpower Data Center

Attn: Military Verification

1600 Wilson Boulevard, Suite 400

Arlington, Va. 22209-2593

Certificates from the individual branches of the armed services may be obtained from the addresses listed below. Requests for such certificates should contain the

³⁸ Current website is <https://scra.dmdc.osd.mil/scra/#/home>

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defendant's full name, social security number, and date of birth. If the social security number is not known, this fact should be noted. A statement of why the information is needed and a pre-addressed and stamped return envelope must also be included. A postal money order or a certified, cashier's or personal check, made payable as indicated below in the amount of \$5.20 for each defendant, must accompany each request.

AIR FORCE

Worldwide Locator

HQ AFPC/DPDXIDL

550 C Street, West, Suite 50

Randolph AFB, TX 78150-4752

[Note: Make check payable to DAQ-DE.]

ARMY

Commander USA EREC

Attn: AHRC-ERP

8899 East 56th Street

Indianapolis, IN 46249-5031

[Note: Make check payable to Finance Officer.]

COAST GUARD

USCG – Personnel Command

Military Records Branch (ADM-3)

4200 Wilson Blvd., Suite 1100

Arlington, VA 22203-1804

Attn: Coast Guard Locator Assistant

[Note: Make check payable to U.S. Coast Guard.]

MARINE CORPS

Headquarters U.S. Marine Corps

Personnel Management

Support BRMMSB 10, Suite 201

2008 Elliott Road Suite 203

Quantico, VA 22134-5030

[Note: Mark bottom of envelope

“Official Business” and make check

payable to United States Treasurer.]

NAVY

Naval Personnel Command

5720 Integrity Drive

Millington, TN 38055-3120

[Note: Make check payable to
United States Treasurer.]

Also, effective September 1, 2006, the Supreme Court has amended *Rule 1:5-7* to give the trial court discretion to require the posting of a bond when the military status of a defendant cannot be determined. That provision mirrors the language of the Servicemembers' Civil Relief Act.

/s/ Philip S. Carchman

Philip S. Carchman, J.A.D.

Acting Administrative Director of the Courts

Dated: August 7, 2006

§ 5.12 Form--Non-Military Certification (with Department of Defense Statement attached).

[Abbreviated Caption]

_____ does hereby certify:

I am a member or associate of the law firm of -
_____, attorneys for the plaintiff in the above entitled
action, and have full charge thereof.

1. None of the defendants (natural persons) in the action defaulted for failure to appear are in the military service of the United States, or its allies.

2. Attached hereto is a Department of Defense Statement(s) for the debtors, mortgagors or borrowers.

I certify that the foregoing statements made by me are true; I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

(Name of Attorney)

Date:

§ 5.13 Form - Non-Military Certification or Inability to Ascertain Military Status of Defendant

PROCEDURE FOR JUDGMENT

[Abbreviated Caption]

_____ does hereby certify:

I am a member or associate of the law firm of -
_____, attorneys for the plaintiff in the above entitled
action, and have full charge thereof.

1. I have been unable to obtain Department of Defense Statements for the following non-debtor, mortgagor or borrower defendants because they are subsequent encumbrancers and I have no social security numbers for them.

[List names of defendants]

2. To the best of my knowledge, none of the above defendants are in the military service of the United States, or its allies.

I certify that the foregoing statements made by me are true; I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

(Name of Attorney or Employee)

Date:

§ 5.14 Certified or Original Instruments

R. 4:64-2 provides “the moving party shall produce the original mortgage, evidence of indebtedness, claim of lien (*N.J.S.A.* 46:8B-21), and any other original document upon which the claim is based.” A recorded or filed document, certified as a true copy by the recording or filing officer or by a New Jersey attorney, or, if unfiled, a copy of an original document certified as a true copy by a New Jersey attorney.

If a New Jersey attorney produces a certified copy of a recorded mortgage, it must be a “recorded” copy with recording information on each page (unless the county recording officer does not make such notation). The rule also refers to production of “any other original document upon which the claim is based.” Thus, the original, or certified copy of, the note or bond must be furnished and, if the mortgage has been modified, the original or certified copy of the modification agreement must be furnished.

While the rule requires production of the original or certified copies of the mortgage, note (or bond) and assignments, if any, a *prima facie* case for foreclosure is complete on proof (or admission) of execution and delivery of the note or bond and mortgage and the devolution of title to the mortgage to plaintiff. Nonproduction of the note or bond and mortgage and the circumstances of loss thereof are immaterial in a foreclosure action, if no relevant and material issue is raised in the action.³⁹ But the

³⁹ *Wilson v. Stevens*, 105 N.J. Eq. 377, 148 A. 392 (Ch. 1929).

Office will now not enter the judgment in such a circumstance. See the next section.

§ 5.15 Counsel Fees

Counsel fees⁴⁰ in a mortgage foreclosure action are calculated pursuant to the mandatory rule⁴¹ on the amount adjudged due plaintiff as follows: 3.5% percent of the first \$5,000; 1.5% of the next \$5,000, and 1% of any amount in excess of \$10,000. There is a minimum fee of \$75 and a maximum of \$7,500. The court, however, with an *affidavit of services* may award an additional fee in excess of \$7,500 in accordance with the rule formula. The fee allowance cannot exceed the limitations of the rule.⁴²

An easy way to compute counsel fees is as follows: \$250 for the first \$10,000 and one percent of the excess over \$10,000, to a maximum of \$7,500. Thus, if plaintiff's proof of amount due totals \$110,690, counsel fees would be \$250 plus \$1,006.90 or \$1,256.90.

In the usual case, the Office of Foreclosure computes counsel fees in foreclosure actions so practitioners need not be concerned with such calculations.

The court rule does not control counsel fees which an attorney may charge his or her client. Counsel fees controlled by the rule are fees includable in the judgment amount which are recoverable by plaintiff on redemption.

A contractual provision in a mortgage providing for attorney's fees to be included in the foreclosure judgment will not be given effect to overcome the rule of court.⁴³ Where the secured note provides for attorney or collection fees, the mandatory rule governs in the foreclosure action, not the terms of the note.⁴⁴

The Court may not make any further allowance to the plaintiff, even in a contested foreclosure action.⁴⁵ Yet, no matter what the rule provides it seems practitioners never tire of attempting to beat the rule, so to speak, and obtain higher allowances which are strictly prohibited.

The only exception to the mandatory counsel fee rule is under the frivolous claim statute, *N.J.S.A.* 2A:15-59.1, where *additional expenses* may be awarded for litigations

⁴⁰ R. 4:42-9(a)(4).

⁴¹ R. 4:42-9(a)(4).

⁴² *Levine v. Levine*, 210 N.J. Super. 585, 510 A.2d 286 (Law Div. 1986).

⁴³ *Bergen Builders v. Horizon Developers*, 44 N.J. 435, 436, 210 A.2d 65 (1965); *Alcoa Edgewater No. 1 Fed. Credit Union v. Carroll*, 44 N.J. 442, 446, 210 A.2d 68, 71 (1965). *Coastal State Bank v. Colonial Wood Products, Inc.*, 172 N.J. Super. 320, 411 A.2d 1172 (App. Div. 1980) (rule applies to limit recovery); *First Peoples National Bank of New Jersey v. Brown*, 178 N.J. Super. 549, 429 A.2d 623 (Ch. Div. 1981); *Hatch v. T & L Associates*, 319 N.J. Super. 644, 726 A.2d 308 (App. Div. 1999) (attorney fees limited to rule amount in foreclosure action).

⁴⁴ *Coastal State Bank v. Colonial Wood Products, Inc.*, 172 N.J. Super. 320, 411 A.2d 1172 (A.D. 1980).

⁴⁵ *Thorpe v. Floremoore Corp.*, 20 N.J. Super. 34, 89 A.2d 275 (App. Div. 1952); *Equitable Life Assur. Soc. v. Bagin*, 45 N.J. 206, 209, 212 A.2d 25 (1965), *rev'd other grounds* 384 U.S. 323, 86 S.Ct. 1561, 16 L.Ed.2d 593 (1966).

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costs and counsel fees incurred as a result of *frivolous defenses* filed by a defendant.⁴⁶

A foreclosing mortgagee is entitled to an attorney's fee - although not the full rule amount - where the foreclosure action was not prosecuted to judgment because the mortgagor redeemed while the action was pending.⁴⁷

This rule is not controlling with respect to a condominium lien foreclosure where pursuant to statute⁴⁸ "reasonable attorney's fees" may be awarded if authorized by the master deed or bylaws.⁴⁹ Application for such fees, however, must be made to the vicinage chancery judge.

Where multiple mortgages are being foreclosed in the same action, counsel fees are figured on the total *aggregate* sum due any party mortgagee and not by calculating each counsel fee anew for each mortgage.⁵⁰

No counsel fee may be awarded to a defendant in a foreclosure action, for there is no fund in court.⁵¹

§ 5.16 Affidavit of Lost Assignment of Mortgage; Lost Note

As of this writing, the Office of foreclosure will no longer accept an affidavit or certification of "lost assignment of mortgage" or "lost note," if the final assignment of mortgage to plaintiff or the secured note or bond, or copies certified to be true by the attorney, cannot be produced in the action.

In this circumstance, plaintiff should proceed before the vicinage chancery judge, with appropriate proof, for entry of final judgment, or for an order directing the Office to enter judgment.

Nonproduction, however, of the note or bond and mortgage is immaterial if no relevant and material issue thereto is raised in the action. Plaintiff's case may be established by other evidence.⁵² The bond is not the debt, but only evidence of the debt. Its loss or nonproduction cannot, *per se*, defeat complainant's right to foreclose the mortgage.⁵³

⁴⁶ *Somerset Trust Co. v. Sternberg*, 238 N.J. Super. 279, 569 A.2d 849 (Ch. Div. 1989).

⁴⁷ In *Collective Fed. Sav. & Loan Ass'n v. Toland*, 207 N.J. Super. 157, 504 A.2d 59 (Ch. Div. 1985).

⁴⁸ N.J.S.A. 46:8B-21.

⁴⁹ *Island House Condominium Ass'n v. Feldman*, 245 N.J. Super. 407, 585 A.2d 982 (Ch. 1990); *Park Place East Condominium Ass'n v. Hovbilt, Inc.*, 279 N.J. Super. 319, 652 A.2d 781 (Ch. 1994); *Holbert v. Great Gorge Village South Condominium Council, Inc.*, 281 N.J. Super. 222, 656 A.2d 1315 (Ch. 1994).

⁵⁰ *First Peoples National Bank of New Jersey v. Brown*, 178 N.J. Super. 549, 429 A.2d 623 (Ch. Div. 1981).

⁵¹ See *Thorpe v. Floremoore Corp.*, 20 N.J. Super. 34, 89 A.2d 275 (App. Div. 1952). Such a counsel fee could be awarded prior to the present Rules. *Riverside Apartment Corp. v. Capitol Const. Co.*, 107 N.J. Eq. 405, 152 A. 763 Ch. 1930), *aff'd o. b.* 110 N.J. Eq. 67, 158 A. 740 (E. & A. 1932).

⁵² *Wilson v. Stevens*, 105 N.J. Eq. 377, 381, 148 A. 392, 394 (Ch. 1929).

⁵³ *Wilson v. Stevens*, 105 N.J. Eq. 377, 382, 148 A. 392, 395 (Ch. 1929) citing *Stimis v. Stimis*, 60 N. J. Eq. 313, 321, 47 A. 20 (Ch. 1900).

Where there is a gap in mortgage assignments, so that an intermediate assignment cannot be produced, the *last intermediate assignee of record* before the gap should be joined as a defendant in the foreclosure.

§ 5.17 Inclusion of Encumbrancer in Plaintiff's Judgment

A subsequent encumbrancer holding an encumbrance for a sum certain and filing an uncontested answer may, in accordance with the five conditions set forth in R. 4:64-1(e),⁵⁴ be included for payment in the foreclosure judgment (and execution) after payment of plaintiff's judgment amount. In proper cases, the foreclosure judgment and resulting execution may order payment out of the sale proceeds to one or more subordinate encumbrancers, in order of their respective priorities, after payment of plaintiff's claim:

Where the execution orders payment to one or more subsequent encumbrancers in addition to plaintiff, the execution is multiform⁵⁵ in substance. That means, that the execution acts as a separate execution for plaintiff as well as each encumbrancer included for payment in the execution. Each encumbrancer, therefore, included for payment in the judgment and execution, has the right, without further order of court, to require the sheriff to sell the mortgaged premises on its own behalf if plaintiff (or a predecessor encumbrancer paid in the judgment and execution) fails to execute on its execution.⁵⁶

In order for a subordinate encumbrancer to qualify for payment in the foreclosure judgment the encumbrancer must have filed: (1) an uncontested answer and (2) *proofs* in accordance with R. 4:64-2 (*i.e.*, proof of amount due and, unless a judgment holder, certified instruments) and (3) the encumbrancers claim must be for a *sum certain*.

R. 4:64-1(e), requires that *all* of the five of the following conditions must be met:

(1) the priority of the encumbrance has been determined; and

⁵⁴ R. 4:64-1(e) provides: "Priorities; Subsequent Encumbrances. A party holding a subsequent encumbrance for a sum certain and filing an uncontesting answer may have the encumbrance included for payment in the foreclosure judgment on the filing of proofs pursuant to R. 4:64-2. The judgment shall not order payment to a subsequent encumbrancer unless (1) the priority of the encumbrance has been determined; and (2) the encumbrancer has filed an affidavit stating that notice of the amount claimed due on the encumbrance has been served on all defendants whose addresses are known or readily ascertainable and none of the defendants, whose names and addresses shall be listed in the affidavit, has, within 10-days after the date of service of the notice made written objection to the validity, priority or amount of the encumbrance; and (3) all prior encumbrances of parties to the action, including answering and defaulting parties, have been previously satisfied or ordered paid; and (4) the encumbrance extends to the entire interest being foreclosed; and (5) no cross-claim pursuant to R. 4:64-5 has been filed. No judgment by default shall be entered against a defendant postponing that defendant's rights or claims to those of any other defendant unless the priority of the right or claims of the latter and the facts upon which they depend are distinctly set forth in the pleadings. A controversy between such defendants may be settled upon application for surplus moneys pursuant to R. 4:64-3.

⁵⁵ *Welsh v. Lawler*, 73 N.J. Eq. 371, 68 A. 218 (E. & A. 1907).

⁵⁶ *Welsh v. Lawler*, 73 N.J. Eq. 371, 68 A. 218 (E. & A. 1907).

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(2) the encumbrancer has filed an affidavit stating that notice of the amount claimed due on the encumbrance has been served on all defendants whose addresses are known or readily ascertainable and none of the defendants, whose names and addresses shall be listed in the affidavit, has, within 10-days after the date of service of the notice made written objection to the validity, priority or amount of the encumbrance; and

(3) all prior encumbrances of parties to the action, including answering and defaulting parties, have been previously satisfied or ordered paid; and

(4) the encumbrance extends to the entire interest being foreclosed; and

(5) no cross-claim pursuant to *R. 4:64-5* has been filed. No judgment by default shall be entered against a defendant postponing that defendant's rights or claims to those of any other defendant unless the priority of the right or claims of the latter and the facts upon which they depend are distinctly set forth in the pleadings. A controversy between such defendants may be settled upon application for surplus moneys pursuant to *R. 4:64-3*.

The Office of Foreclosure cannot report the order of priority differently than it is set up in the complaint.⁵⁷ Priorities are determined as of commencement of the action.⁵⁸ If the priorities of the various defendants' claims are not set up clearly in the foreclosure complaint, even if a defendant submits its proofs, the Office of Foreclosure cannot include the claim of the defendant.

If a defendant has complied with *R. 4:64-1(e)* in all respects and submitted its proofs in time, but has not been included in the judgment due to no fault of its own, the Office, if the matter is brought to its attention, may sign an amendatory order including that defendant in the judgment.

Consequences to Defendant of Not Being Included in Judgment

A defendant suffers no detrimental consequences by not being included for payment in the judgment. This is not widely understood by many attorneys who, fearing that their client-defendant will otherwise forfeit its right to any surplus moneys produced at sale, believe they must be included in the judgment.

A defendant's priority, whether a defendant is an answering or defaulting party, remains intact for surplus moneys, if there be any surplus produced at the sale.⁵⁹ Filing an answer and being included in the judgment does not give a party any greater priority or rights to surplus than if it were a defaulting defendant.

Perhaps, the only practical reason to be included in the judgment is for bidding

⁵⁷ *Ocean County Nat. Bank v. J. Edwin Ellor & Sons*, 116 *N.J. Eq.* 287, 290, 173 *A.* 138, 139 (Ch. 1934); *Mulford v. Williams*, 8 *N.J. Eq.* 536, 539 (Ch. 1851).

⁵⁸ *R. 1:13-8*.

⁵⁹ *R. 4:64-1(e)*.

purposes at the sale. If included, a defendant is not required to put up its own funds at sale (as to its included claim) once the bidding exceeds plaintiff's debt, interest and costs and reaches defendant's amount in the judgment.

§ 5.18 Abandonment Rule - R. 4:64-4

R. 4:64-4 provides:

If the plaintiff makes prior or subsequent encumbrancers parties to the action to foreclose a mortgage, and they answer, and the plaintiff neglects or refuses to proceed, the defendants, or any of them, may make application to the court for an order permitting them to proceed with the action to judgment and execution. Plaintiff by such order shall not be allowed costs.

This rule permits an answering defendant or defendants to proceed to judgment and execution in the event plaintiff fails or refuses to do so. The defendant remains a defendant in the action, but is permitted to enter judgment in its own name and to be paid first in the judgment. The rule saves the defendant the time and expense of filing a new action where plaintiff does not proceed on its claim. Of course, the defendant may be substituted⁶⁰ as plaintiff in the action but this is not required.

The purpose of the abandonment rule is to prevent arrangements between plaintiffs in foreclosure suits and mortgagors which would result in inconvenience, delay and prejudice to the other encumbrancers joined as additional defendants and who had answered.⁶¹

The procedure is for the defendant to apply to the *vicinage chancery judge* (not the Office of Foreclosure) for an "order to proceed," by way of notice of motion to all defendants with a certification establishing defendant's claim and the facts of plaintiff's delay. Such an order is discretionary with the court and will not be granted where it would result in injustice.⁶²

Of course, the defendant takes judgment subject to existing priorities and prior liens and does not, by this procedure, attain priority over the plaintiff or any other defendant in the action entitled to priority.

It would seem that this rule is inapplicable to judgment creditors.⁶³

Relaxation of R. 64-4

Pursuant to the Supreme Court Order, effective January 5, 2008, *Rule 4:64-4* is not available if the primary mortgagee agrees to a workout in mediation.

§ 5.19 Dismissal of Action - Cure and Reinstatement (*Fair Foreclosure Act*)

⁶⁰ R. 4:34-1.

⁶¹ *Citizens First Nat. Bk. Of Ridgewood v. Grull*, 122 N.J. Super. 562 (Ch. Div. 1973).

⁶² *Citizens First Nat. Bk. Of Ridgewood v. Grull*, 122 N.J. Super. 562 (Ch. Div. 1973).

⁶³ See *Citizens First Nat. Bk. Of Ridgewood v. Grull*, 122 N.J. Super. 562 (Ch. Div. 1973).

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N.J.S.A. 2A:50-57e provides:

If a default is cured prior to the filing of a foreclosure action, the lender shall not institute a foreclosure action for that default. If a default is cured after the filing of a foreclosure action, the lender shall give written notice of the cure to the court. Upon such notice, the court shall dismiss the action without prejudice.

If the debtor *cures* the default pending foreclosure, this statute requires that a written notice of cure be given to the court and that the court shall dismiss the action with prejudice. If the action is uncontested, the notice of cure, together with a form of dismissal, should be sent to the Office of Foreclosure⁶⁴ If the action is contested, the written notice of cure and form of dismissal should be sent to the vicinage chancery judge.⁶⁵

This provision only applies to a “cure” under the *Fair Foreclosure Act*.

The action should not be dismissed where the cure relates to less than all properties being foreclosed, or where there may be other unresolved claims pending in the action.

This subsection - requiring a dismissal of the action on “cure” - appears to be in potential conflict with the abandonment rule (*R.* 4:64-4) discussed in the previous section, which permits a defendant encumbrancer filing an answer in the foreclosure action to proceed to judgment and execution in its own right, where plaintiff neglects or refuses to proceed.

§ 5.20 Dismissal of Foreclosure Action for Lack of Prosecution

R. 4:64-8 was amended December 2, 2019 to set forth:

(a) Dismissal for Lack of Prosecution. Except as otherwise provided by rule or court order, when a foreclosure matter has been pending for twelve months without any required action having been taken therein, the Clerk of the Superior Court shall issue written notice to the parties advising that the matter as to any or all defendants will be dismissed without prejudice 30-days following the date of the notice unless, within said period, an answer, motion for default, or motion for judgment or a motion setting time and place for redemption has been filed. If the plaintiff fails to respond as herein prescribed, the court shall enter an order of dismissal without prejudice as to any named party defendant who has not been served or has not answered and shall furnish the plaintiff with a copy thereof.

(b) Reinstatement After Dismissal. A matter may be reinstated after dismissal pursuant to paragraph (a) only on motion for good cause shown.

⁶⁴ *R.* 1:34-6. (CN971, Trenton, NJ 08625).

⁶⁵ *R.* 1:5-6(b)(3).

Upon such reinstatement, the plaintiff will be assessed a restoration fee equivalent to twice the filing fee for a foreclosure complaint. A matter may be reinstated only three times (not counting any dismissals based on federal

§ 5.21 Proof of Relief from Bankruptcy Stay

If the mortgagors or owners have filed for bankruptcy pending foreclosure, proof that the bankruptcy stay⁶⁶ is no longer in effect must be furnished to the Office of Foreclosure before judgment may be entered. The automatic stay continues in effect until vacated, annulled or modified; or the case is closed, dismissed, or a discharge is granted or denied, whichever is earliest,⁶⁷ or the property is no longer part of the debtor's estate.⁶⁸

Proof that the bankruptcy stay is no longer in effect should be furnished with plaintiff's final judgment package.

Apparently, the Office takes the position that a bankruptcy by the debtor-owner *prevents the continuation of foreclosure against "any" defendant in the action*, not just the debtor. The Office, therefore, may refuse to recognize any steps taken by plaintiff after the filing of the bankruptcy, including service of process on non-debtor defendants unless the stay has been previously lifted. It is not altogether clear whether this position is correct.⁶⁹ An attorney, of course, is always free to proceed before the vicinage chancery judge if the attorney disagrees with Office policy.

Most often plaintiff will submit a copy of an order vacating the stay or a "notice of proposed abandonment" by the trustee and a certification (from the clerk) of "no objection" filed.

If the owners have filed a Chapter 7, proof that the trustee has *abandoned* the property should also be furnished, although this may not be required.⁷⁰ If the bankruptcy

⁶⁶ 11 U.S.C. § 362.

⁶⁷ 11 U.S.C. § 362(c)(2).

⁶⁸ 11 U.S.C. § 362(c)(1).

⁶⁹ See *In Re March*, 140 B.R. 387 (E.D. Va. 1992).

⁷⁰ Abandonment by the trustee merely causes the property to revert to the debtor, with the result that the stay is not terminated but the property is independently protected by the provisions of 11 USCA § 362(a)(5). *In re Cornist*, 7 BR 118 (1980, BC SD Cal); and *Green v. National Cash Register Co.*, 15 BR 75

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court has entered an order vacating the stay that should suffice.

The conversion of a debtor's Chapter 13 case to a Chapter 7 does not operate as a new automatic stay, so as to affect the court's earlier order granting relief from the stay.⁷¹

After confirmation of a Chapter 11 reorganization plan, there is no stay in effect, because the property is no longer part of the debtor's estate⁷² and title is revested in the debtor. Moreover, the debtor is discharged from all dischargeable prepetition debts,⁷³ so the stay is no longer in effect. If the debtor, therefore, defaults under a confirmed plan, there is no bankruptcy stay in effect preventing the lender from commencing or continuing a foreclosure action.

§ 5.22 Final Judgment Package

Plaintiff's attorney seeking an uncontested judgment in a mortgage foreclosure action file on eCourts all his or her moving papers together in one package called a "final judgment package," together with all necessary proofs and exhibits for entry of judgment.

As previously mentioned, if the action is subject to the *Fair Foreclosure Act*, the judgment package cannot be submitted until default has been entered of record against all non-answering defendants, any motion periods have expired, and plaintiff has sent the 14-day notice of entry of judgment to the debtors - and either 14- or 46-days have elapsed from the date of mailing of the notice prior to submission of the package to the Office. Motion papers need not be pre-filed and should be submitted for filing with the judgment package, together with proof of service of the motion.

If the foreclosure is not subject to the *Fair Foreclosure Act*, any motion periods must have expired before submission of the final judgment package to the Office. Defaults to be entered, whether by certification and request or order, may be entered by the Office at time of judgment, even though as mentioned earlier, this may now be a prohibited practice. See section entitled "Submitting Default with Judgment Papers" *supra*.

The basic final judgment package in a *Fair Foreclosure Act* case consists of: (a) proof of mailing of a copy of the filed default to defaulting defendants served personally or by mail; (b) a certification of mailing of the 14-day notice; (c) a certification of no

(1981, BC SD Ohio); *In re Perry*, 29 BR 787 (1983, DC Md).

However, see *The Party Parrot, Inc. v. Birthdays and Holidays, Inc.*, 289 N.J. Super. 167, 673 A.2d 293 (App. Div. 1996) where Judge Dreier's opinion clearly establishes that once the trustee abandons the Chapter 7 debtor's property, the property reverts to debtor as if no bankruptcy petition had been filed and ceases to be part of bankruptcy estate. Once property of the bankrupt's estate has been abandoned, lienors are free to proceed against that property just as they normally would under applicable state law, as if no bankruptcy petition had been filed, 11 U.S.C.A. § 554(a).

⁷¹ *In Re Voron*, 157 B.R. 251 (Bkrcty. E.D. Va. 1993).

⁷² 11 U.S.C. §§ 1141(b) and 362(c)(1).

⁷³ 11 U.S.C. §§ 1141(d)(1)(A) and 362 (c)(2)(C). See *In re Paradise Valley Country Club*, 31 B.R. 613 (D.C. 1983).

response (if submitted prior to 46th day); (d) the original motion papers to be filed, if any, together with proof of mailing of the notice, and a \$50 check for each motion; (e) the proof of amount due and non-military certification; (f) a separate non-military affidavit with the Defense Department Statement attached (g) a certification of costs (optional); (h) certified copies of the note or bond, mortgage and assignments, if any; (i) proposed form of final judgment; and (j) proposed form of writ of execution, and \$50 check for each writ; and (k) proposed form of writ of possession if needed. A more complete final judgment package checklist is set forth below:

- Copies of all services (summonses and returns) and previously filed defaults
- Original acknowledgments of service which have not been filed. *R. 4:4-6*
- Certification of service of “notice to residential tenants” (Appendix XII-K) with summons and complaint. *N.J.S.A. 2A:50-70e*
- Certifications of mailing as to defendants served with summons and complaint by mail. *R. 4:4-3, 4:4-4(b) and 4:4-5(b)*
- Certification of publication and ordinary mailing as to absent defendants served by publication. *R. 4:4-5(c)*
- Miscellaneous orders, if any, to be entered by the Office of Foreclosure (*e.g.*, clerical orders; correcting defendant's name; substituting plaintiff, etc.). *R. 1:34-6*
- Proof of mailing of a copy of the filed default to defaulting defendants served personally or by mail. *R. 4:43-1*
- Certification of mailing of the 14-day notice of entry of judgment. *N.J.S.A. 2A:50-58(a)*
- Certification of no response (if judgment to be entered prior to 46th day)
- Original notice of motion where application for judgment is not made within six months of default, with a copy of the (1) affidavit of amount due (model form with Appendix XII-J schedule attached) to be filed with the court, (2) affidavit of inquiry (model form), and (3) and proof of mailing of notice to defaulted defendants. *R. 4:64-1(d), 4:64-2(d)*
- Original notice of motion for judgment to the mortgagors, appearing parties, all named parties obligated on the debt, and residential tenants, if any, with a copy of (1) the affidavit of amount due (model form with Appendix XII-J schedule attached) to be filed with the court, (2) affidavit of inquiry (model form), and (3) and proof of mailing of notice to defaulted defendants. *R. 4:64-1(d), 4:64-2(d)*
- Certification that residential tenants joined in action were given notice of motion in accordance with *R. 4:64-1(d)* including special notice (Appendix XII-K) and use of special envelope and proof of mailing
- As to residential homeowner-borrowers, a certification that the (a) Notice of Foreclosure Mediation Availability, (b) Foreclosure Mediation Financial Worksheet, and (c) combination HUD-Certified Housing Counselor Instruction Form and Foreclosure Mediation Recommendation Statement were served with the “summons and complaint.”

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- *R. 4:64-2(d)* Certification of Diligent Inquiry and Accuracy of Foreclosure Documents and Factual Assertions
- Certification of amount due (model form with Appendix XII-J schedule attached). *R. 4:64-1(d)*
- Affidavit of Non-Military. *R. 1:5-7*
- Certification of search fees and costs. *R. 4:42-10*
- Original or certified instruments (assignments of mortgage must be recorded). *R. 4:64-2*
- Proof of relief from bankruptcy stay (if applicable).
- Form of final judgment and writ of execution. *R. 4:64-1(d)*
- Form of writ of possession, if required, with Anti-Eviction Act certification attached. *R. 4:59-2*
- Proof of relief from any bankruptcy stay (if applicable).
- Form of final judgment and writ of execution. *Rule 4:64-1(d)*

§ 5.23 Denial of Entry of Judgment/Office of Foreclosure - Return Checklist

If the final judgment package is found to be deficient by the Office of Foreclosure, the judgment will be marked “denied.” The denied judgment will set for the reason for the denial. Once the corrections have been made, a new final judgment package, with new filing fees, must be submitted. If the package was denied in error, the Superior Court will issue an order vacating the denial, and enter the original submission.

Previously, if the Office of Foreclosure reviewed a final judgment package and rejected to its entry, it would return package with the below checklist indicated the deficiency. While it is no longer the practice, the checklist serves as good indication as what the Office of Foreclosure looks at when reviewing a final judgment application.

FORECLOSURE ACTION RETURN CHECKLIST

COMPLAINT

- Prior lien holders (save PMM judgment creditors) are not proper party defendants.
- Municipal tax liens cannot be extinguished in a mortgage foreclosure. *N.J.S.A. 54:5-9*.
- Fictitious name defendants must comply with *R. 4:26-5* naming protocol.
- Failure to plead mailing FFA NOI to debtor 30-days before filing of the complaint. *N.J.S.A. 2A:50-56(f)*.
- Order correcting defendant’s name not submitted.
- Venue is wrong. Property’s county location fixes venue.

- Complaint fails to assert prima facie case, missing allegation(s) _____.
- Abandonment by debtor must be specifically pleaded. *N.J.S.A. 2A:50-56(f)*.
- Other: _____

SERVICE

- Proof of service on _____ is missing/not filed.
- An affidavit of diligent inquiry is required for substituted service. *R. 4:43-3, R. 4:4-4(b), R. 4:4-5, R. 4:4-7*
- Affidavit of diligent inquiry must document good faith effort to locate defendant.
- Service on United States requires a 60-day summons. 28 *U.S.C.* Sec. 2410(b)
- Service on the United States requires dual service. (US Attorney in NJ and US Attorney Washington DC, 28 *U.S.C.* Sec. 2410(b)
- Service on State of New Jersey requires a 60-day summons served on Attorney General. *R. 4:64-1(i)*
- Service on county prosecutor when criminal recognizance, fine et cetera alleged as subordinate lien.
- Acknowledgment of Service by non-attorney must be acknowledged. *R. 1:5-3*.
- Submit proof that amended complaint was served.
- Submit proofs of service of amendment to complaint on _____.
- Mail Service - submit return receipt cards and copy of summons. *R. 4:4-3; R. 1:5-3 and 1:5-1* (original complaint)
- Mail Service - submit proofs that CM RRR was refused and, if applicable, ordinary mail was not returned.
- Submit newspaper affidavit of publication, copy of notice published and proofs of mailing to defendants last known address.
- Other: _____

ANSWER

- A satisfactory contesting answer was filed. The case has been sent to a General Equity judge. The Foreclosure Unit is unable to process until the dispute is resolved. *R. 1:34-6; R. 4:64-1*
- Answer incorporates a non-germane counterclaim. *R. 4:64-5*.

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- Answer has been determined to be a ‘non-contesting’ answer and matter will be handled by the Foreclosure Unit as a non-contested matter.
- Other: _____

DEFAULT

- Default is premature. The time to answer has not expired [as of the certification date]. *R. 4:64-1(c)*.
- Default period has expired as to _____. Submission of an order to enter default with notice [of motion] to the defaulting defendant(s) is required. *R. 4:43-1; R. 1:6-3*.
- Request and affidavit/certification of default must be submitted as to _____. *R. 4:42-1*.
- Submit proofs NOM to enter default sent CM RRR.
- Submit proofs that filed default was mailed
- Other: _____.

FAIR FORECLOSURE ACT

- Submit proofs of NOI sent 30-days before complaint filed.
- Submit proofs 14-day notice to cure sent CM RRR to debtors.
- Notice to cure sent prematurely. NTC must come after (1) defendants filing non-contested answers (2) all contesting answers stuck or rendered non-contesting and (3) as to all other defendants, defaults have been entered by clerk or court.
- Certification documenting that foreclosure is not subject to the Fair Foreclosure Act.
- Other: _____

PROOF OF AMOUNT DUE

- Principal may not exceed amount of face of note/mortgage unless explicitly delineated in note or mortgage.
- Schedule of amount claimed is not attached.
- Itemized schedule amount computation does not add up to final amount requested.
- Accrued interest amount appears excessive. Forward a computation explaining how the amount was reached that include the monthly amount, number of months late charge assessed and the date of last change (must not post-date the complaint filing date).
- Itemize any escrow advances (taxes, insurance maintenance fees et cetera) claimed. Note escrow deficiency is not a proper category.

- Default rate of interest is too high.
- Legal fees exceed amounts allowed by *R. 4:42-9(a)(4)*.
- Certification of search fees and lis pendens missing.
- Subordinate encumbrancer certification of notice to all defendants of seeking to be included in judgment is not filed.
- Submit original or certified copies of note, mortgage and all assignments in chain ending with the plaintiff.
- Other: _____

JUDGMENT

- Affidavit of Non-Military Service required for all primary defendants.
- Judgment cannot be entered less than 46-days after the Notice to Cure, unless a certification that debtor failed to give good faith cure response within 10-days is filed.
- Form of final judgment is deficient. See, for example, 30B *N.J. Practice App. G Form 123*.
- Notice of Motion for entry of judgment is required after 6-months. Submit notice and service proofs to all parties including defaulted parties. *R. 4:64-1(d); R. 1:6-3*
- Ten-day or thirty-day (other encumbrances) notice of motion for entry of judgment must be given to all appearing parties (even if answer was stricken or rendered non-contesting). *R. 4:64-1; R. 1:3-3*.
- Submit certification/proof that the bankruptcy stay has been lifted.
- Form of the writ of execution is deficient. See, for example, 30B *N.J. Practice App. G Form 142*.
- Other: _____

MISCELLANEOUS

- All pleadings filed must conform to the format requirements of *R. 1:4-1*.
- Substitution of attorney is required.
- The affidavit/certification is postdated and is an unacceptable false oath/certification.
- Consent of answering party is required.
- Please submit a filed copy of the following documents/pleadings previously submitted to the Foreclosure Unit: _____.
- Matter must proceed before the vicinage General Equity Judge for the relief requested.

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- Other: _____

§ 5.24 Entry of Judgment⁷⁴

Where the Office enters judgment, it recommends entry of the judgment and stamps the designated chancery judge's name on the signature line.⁷⁵ A foreclosure judgment must be served on all defendants, appearing and defaulting, in accordance with the rules (see next section).

Before entering judgment, the Office reviews the case and all services and proofs thoroughly. It reviews the judgment as to form, fills in the amount due and the date from which lawful or contract rate interest is computed in accordance with plaintiff's proof, and awards counsel fees by written amount in the judgment pursuant to the mandatory rule.⁷⁶ It also fills in the writ of execution and possession, taxes costs and completes a tax cost sheet.

If the Office finds any deficiencies and cannot enter judgment, it returns the papers with a "return notice."

A judgment in foreclosure ordinarily follows a conventional format. It should adjudicate the precise amount due to the plaintiff on its mortgage together with lawful interest (from the date specified in plaintiff's certification of amount due) or contract rate interest (see next subsection), plus costs and a counsel fee, to be raised and paid out of the mortgaged premises described in the complaint. Additionally, the amount found due plaintiff on the mortgage will normally include, all amounts properly advanced by the mortgagee to preserve the mortgaged premises, such as payment of municipal taxes, property insurance premiums, and the like.

Subsequent encumbrancers may be included in the judgment for payment upon compliance with the rule.⁷⁷

The judgment will order the sale of so much of the mortgaged premises as will be sufficient to satisfy the mortgage and subordinate liens, with interest thereon and costs;⁷⁸ that an execution issue to an officer (normally the county sheriff), designated by the court, commanding the officer to make sale,⁷⁹ according to law, of so much of the mortgaged premises as will be sufficient to satisfy such mortgages; that the officer pay the proceeds to the plaintiff and to the other defendants whose liens are ordered paid, that the officer pay

⁷⁴ Information in this section taken substantially from 30 *N.J. Prac.* (Weinstein, *Law of Mortgages*) Sec. 31.24 (2nd Ed. 2000).

⁷⁵ R. 1:34-6. The current chancery judge is Judge Neil H. Shuster, P.J.Ch. Div., Mercer County.

⁷⁶ R. 4:42-9(a)(4).

⁷⁷ R. 4:64-1(e).

⁷⁸ *N.J.S.A.* 2A:50-36.

⁷⁹ See, *N.J.S.A.* 2A:50-36, -37 as to execution and sale. No private sale may be ordered in a foreclosure action, *N.J.S.A.* 2A:61-3, other than a sale *pendente lite*, *N.J.S.A.* 2A:50-31.

the surplus into court,⁸⁰ and that the officer make report of sale as required by the rules.⁸¹

The judgment may direct that the mortgaged premises be sold in separate parcels, rather than as a whole, and the order in which the parcels shall be sold.

The foreclosure judgment must contain a “debarring and foreclosing clause” - an ordering paragraph that the “defendants in the action and each of them” stand debarred and foreclosed of all equity of redemption in and to the premises sold. This clause should not specifically name the defendants; it should merely refer to “defendants” generally. Otherwise, failure to name a particular defendant in the clause will result in an erroneous judgment.

A foreclosure judgment cannot be entered against a deceased person unless the decedent's heirs, devisees, or personal representatives, as the case may be, have been substituted as parties in the action.⁸²

A foreclosure judgment may grant such incidental relief, such as reformation of the mortgage as to description or parties and the like, if such relief is set up in the pleadings and a paragraph granting such relief is included in the judgment.

If personal property located on the mortgaged premises is to be foreclosed together with the real estate pursuant to *R. 4:64-1(e)*, and sold by the sheriff along with the real estate at a single sale, then the judgment should refer to the foreclosure and sale of personal property along with the mortgaged real estate. If this is not done, the sheriff will not have the authority to include this personal property in the foreclosure sale.

If the complaint contains a count for possession, the judgment will direct that the plaintiff recover possession of the premises described in the complaint from the defendants in possession. However, a judgment for possession cannot be granted against residential tenants protected by the New Jersey’s Anti-Eviction Act (*N.J.S.A. 2A:18-61.1 et seq.*) and the following statement must be included in the final judgment - “This judgment shall not affect the rights of any person protected by the New Jersey Tenant Anti-Eviction Act (*N.J.S.A. 2A:18-61.1 et seq.*).”

Compound Interest and Default Interest Rate in Judgment

Normally, compound interest is not allowed unless provided for in the note or bond⁸³ or by statute.⁸⁴ A mortgage note or bond may provide for a reasonable higher rate of interest after maturity or default than before unless the amount is unconscionable.⁸⁵

⁸⁰ As to surplus moneys, see also *R. 4:64-3* (1969).

⁸¹ As to report of sale, see *R. 4:65-6(a)* (1969).

⁸² *Rogan Equities, Inc. v. Santini*, 289 *N.J. Super.* 95, 99, 672 A.2d 1281 (App. Div. 1996). *R. 4:34-1(b)*.

⁸³ See *Crest Sav. and Loan Ass’n v. Mason*, 243 *N.J. Super.* 646, 581 A.2d 120 (Ch. Div. 1990)(mortgagee not entitled to charge compound interest absent express contractual provision authorizing it or express incorporation of statutory provision authorizing compound interest *N.J.S.A. 17:12B-48(14)*).

⁸⁴ *Crest Sav. and Loan Ass’n v. Mason*, 243 *N.J. Super.* 646, 581 A.2d 120 (Ch. Div. 1990)(there must be express incorporation into contract of statutory provision authorizing charging of compound interest).

⁸⁵ *Feller v. Architects Display Buildings, Inc.*, 54 *N.J. Super.* 205, 213, 148 A.2d 634, 639 (App. Div. 1959). *Stuchin v. Kasirer*, 237 *N.J. Super.* 604, 568 A.2d 907 (App. Div. 1990), *certif. denied* 121 *N.J.* 660,

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The New Jersey Supreme Court in *Metlife Financial Capital Corporation v. Washington Avenue Associates*,⁸⁶ under a commercial mortgage, sustained default rate interest of 12.55 percent (three percent over the contract rate) as reasonable liquidated damages.

In *Westmark Commercial Mortgage Fund IV v. Teenform Associates*,⁸⁷ the Appellate Division sustained a 10% default interest rate on commercial property. And in *Mony Life Ins. Co. v. Paramus Parkway Bldg., Ltd.*,⁸⁸ a 15% default interest rate was sustained on commercial property.

As of this writing, the Office of Foreclosure will permit “stepped-up” or default rate interest in the judgment not exceeding 5%. If a foreclosing attorney wants to include default rate interest in excess of that in the judgment, he or she must proceed before the vicinage chancery judge.

Contract Rate Interest in Judgment

Contract rate interest in the judgment is permissible in accordance with the following language: To pay plaintiff the sum of \$ (*Total Dollar Amount From Proof*) with (*Contract Rate Interest from Note and Mortgage*) % interest on \$ (*Add Principal Sum in Default Plus Advances*), being the principal sum in default plus advances, if any, from (*Date to which Interest Figured in Proof of Amount Due*) to (*Date of Judgment*) and lawful interest thereafter on the total sum due.

The purpose of contract rate interest in the judgment is to obtain higher interest, at the contract rate, in the judgment for that interval of time between (a) the date to which interest is figured in plaintiff’s proof of amount due and (b) the date of the final judgment. If contract rate interest is less than lawful interest, or if the interval of time in question is small, then it makes little sense to use this provision in the judgment.

*Unearned Interest*⁸⁹

Unearned interest must be subtracted from the amount due under a mortgage, where the face amount of the mortgage to be foreclosed contains advance or pre-computed interest to be collected on future loan installments.

If the United States a Defendant - Special Clauses in Judgment

If the United States is a defendant in the foreclosure action, the following language should be inserted in the foreclosure judgment:⁹⁰

583 A.2d 346 (1990)(an increase in interest of 15% on default remanded to trial judge for determination of whether such an increase was intended to be a penalty).

⁸⁶ 159 N.J. 484, 732 A.2d 493 (1999). See also *Stuchin v. Kasirer*, 237 N.J. Super. 604, 613, 568 A.2d 907 (App. Div.), *certif. denied*, 121 N.J. 660, 583 A.2d 346 (1990)(mortgage provision increasing interest rate on default from 9% to 24% viewed as a liquidated damage clause).

⁸⁷ 362 N.J. Super. 336, 827 A.2d 1154 (App. Div. 2003).

⁸⁸ 364 N.J. Super. 92, 834 A.2d 475 (App. Div. 2003).

⁸⁹ 30A N.J. Prac. § 31.25

⁹⁰ Current memo from U.S. Attorney's Office in Newark citing *Kimbell Foods*, 440 U.S. 715, 99 S. Ct. 1448 (1979).

(a) If the United States is a defendant, the language “except as provided by 28 *U.S.C.* § 2410” should always be inserted right after the debarring and foreclosing clause to give notice of the United States right of redemption after sale.⁹¹

(b) If the United States has been joined because it holds a federal tax lien, the judgment should provide - “The question of priority between plaintiff and the United States as to late charges and interest on advances shall await surplus money proceedings.”

(c) If the United States is joined for a non-consensual lien (*e.g.*, fines, recognizances, bonds and judgments), the following clause should be inserted in the judgment - “The question of priority between plaintiff and the United States as to counsel fees and advances shall await surplus money proceedings.”

(d) If the United States holds a consensual lien (*e.g.*, federally held mortgage, etc.) - no special priority clause is required in this instance, although the judgment must contain clause (a) above.

The Federal Deposit Insurance Corporation (“FDIC”) in its various capacities has, in mortgage foreclosure actions, waived⁹² its rights under 28 *U.S.C.* § 2410(c); therefore it would seem that the language – “except as provided by 28 *U.S.C.* § 2410” - does not have to be included in the foreclosure judgment if the FDIC is a defendant.

*Special Clauses - Foreclosure by HUD or its Contract Mortgagee*⁹³

Whenever the Secretary of HUD or a contract mortgagee (pursuant to its contract with the Secretary) forecloses on a Secretary-held single family mortgage in any Federal or State court, notwithstanding any State law to the contrary, there shall be no right of redemption (including any right to possession based on any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale in connection with a Secretary-held single family mortgage. In the case of a judicial foreclosure in any Federal or State court, *there shall be included in the petition and in the judgment of foreclosure a statement that the foreclosure is in accordance with 12 U.S.C. § 1710(l) and that there is no right of redemption in the mortgagor or any other person.*⁹⁴

Mortgaged Premises in More than One County

Where the mortgaged property is located in more than one county (but not overlapping the county line), the judgment should direct issuance of the executions to the respective sheriffs of the counties where the land is located. Thus, if the action is venued in Essex County but the lands are located in Essex and Union Counties, the judgment

⁹¹ See “Post-Sale Right of Redemption” post. This statutory right of redemption does not arise where the United States holds a lien acquired by assignment from a mortgagee under an F.H.A. or G.I. mortgage insurance or guaranty program, 12 *U.S.C.A.* § 1701k.

⁹² 57 FR 29491. Effective July 2, 1992.

⁹³ 30A *N.J. Prac.* § 31.25

⁹⁴ 12 *U.S.C.A.* § 1710(l)(1) to (3).

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would direct issuance of an execution to the Sheriff of Essex (for the Essex County lands) and the Sheriff of Union for the Union County lands.

In this situation, because more than one property ordinarily secures the same mortgage amount and separate sales are to be held, the Office of Foreclosure is concerned that successive sales may be held for same debt with the result that a double recovery or more may be had. To remedy this, the Office of Foreclosure will normally require that the judgment in this situation contain language to the effect that “anything to the contrary notwithstanding there shall be only one satisfaction of the debt.” This underscores the duty of plaintiff to reduce the amount due under successive sales by the bid price of any prior sales for the same debt. Thus, in the foregoing example, if the Essex property is sold first, plaintiff must make sure that the Union County sale is reduced by the bid price obtained in the Essex sale. If, for example, the Essex property was sold to plaintiff for one hundred dollars, then the amount due plaintiff under the Union sale must accordingly be reduced by one hundred dollars. Of course, if the properties to be sold secure separate debts, then the foregoing offset procedure is not required.

Property Overlapping the County Line - Special Master

The practice, where the mortgaged premises overlaps one or more county lines, is to direct issuance of the execution to a special master⁹⁵ to hold the foreclosure sale. A form of order is submitted to the Office of Foreclosure with the judgment package appointing a special master to hold the sale. Plaintiff may choose the attorney. The judgment and execution then direct issuance of the execution to the special master instead of the sheriff.⁹⁶

§ 5.25 Checklist (Conventional Action/*Fair Foreclosure Act*)

Step #1

1. Obtain foreclosure searches;
2. Mail notice of intention to foreclose - 30 days;
3. Prepare and file complaint;
4. Prepare and file lis pendens;
5. Obtain continuation searches through filing date of lis pendens;
6. Amend complaint if additional liens or interests are shown on continuation search;
7. Service
 - (a) complaint with summons on defendants whose addresses are known; and amendments

⁹⁵ *In re Rhodes*, 100 N.J. Eq. 370, 372, 136 A. 408, 409 (Ch. 1927). *Knickerbocker Trust Co. v. Carteret Steel Co.*, 81 N.J. Eq. 130, 86 A. 55 (Ch. 1912); *Hardyston Nat. Bank of Hamburg v. Tartamella*, 56 N.J. 508, 512, 267 A.2d 495, 497 (1970).

⁹⁶ See 30 N.J. Prac. (Weinstein, *Law of Mortgages*) 485, Practice Forms 161-168)(2nd Ed. 2000).

- (b) notice in lieu of summons and complaint/amendments to State of New Jersey
 - (c) publish notice to absent defendants in newspaper/mailing within 7 days - obtain proof of publication
8. Deal with any contesting answers filed by:
- (a) motion for summary judgment/motion to strike
 - (b) agreement (*e.g.*, change to non-contesting/withdrawal)

Step #2

Apply for entry of default with the following submissions to the Clerk's Office/Office of Foreclosure:

- a) Request and Certification of Default; and/or
- b) Notice of Motion for Entry After Six Months (if default not timely entered) with supporting Certification, Proof of Mailing, and Order;
- c) Ordinary mail entered default to defendants served personally or by mail.

Step #3

1. Appointment of: guardian *ad litem* for minor or incompetent defendant and attorney for defendant in military service. Filing of answer or appearance by guardian or attorney.
2. Action becomes “uncontested” on latest of three dates below:
3. Date last default entered;
4. Date last contested answer stricken or rendered non-contesting;
5. Date last uncontested answer filed.

Step #4

After action becomes “uncontested”:

Mail 14-calendar day notice of entry of judgment (“notice to cure”) to debtors.

Step #5

Final judgment may be entered prior to 46th day, if plaintiff files: (a) a certification of mailing of the 14-day notice to all debtors and (b) a certification of no response - *i.e.*, that within 10-days after receipt by the debtors of the 14-day notice, lender’s attorney has not received a certified statement from the debtors.

Final judgment cannot be entered prior to 46th day - all other cases.

Apply for entry of judgment by filing the following with the Office of Foreclosure:

1. If final judgment is to be entered prior to 46th day - a certification of (a) mailing of 14-day notice certifying that within 10-days after receipt by the debtors of the 14-day notice, lender’s attorney has not received a certified statement from the debtors, and (b) no response from debtor; or

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2. If redemption order is to be entered on or after 46th day - a certification of mailing of 14-day notice;
3. Certification of ordinary mailing of filed default (to defaulting defendants served personally or by mail);
4. Copies of all services, including answers or appearances filed and disposition order of contesting answers;
5. Any corrective orders;
6. Proof of relief from any bankruptcy stay, where applicable;
7. Certification of Service (as to defendants served with original process by mail);
8. Certification of Publication, Inquiry and Mailing (absent defendants);
9. Certification of Amount Due and Non-Military Service;
10. Separate Non-Military Affidavit with Dept. of Defense Statement;
11. Certification of Fees and Costs;
12. Copy of note or bond and recorded mortgage and assignments, if any, certified to be true copies;
13. Notice of Motion for Judgment (and proof of service) to attorneys for answering or appearing parties and parties appearing pro se;
14. Notice of Motion for Judgment out-of-time (and proof of service) to defendants defaulted more than 6-months prior to application for judgment;
15. Form of Judgment;
16. Form of Writ of Execution;
17. Form of Writ of Possession, if needed.

Step #7

Post Judgment

1. Mail copy of judgment to appearing parties and attorneys of record/within 7-days after judgment signed.
2. Mail copy of judgment (ordinary mail) to defaulting defendants/within 7-days after receipt of judgment by plaintiff.
3. Send original sealed writ and 3 copies to sheriff together with (a) required deposit; (b) affidavit of prior liens; and (3) concise description.
4. Mail notice of sale by certified mail, return receipt requested, at least 10-days before the date set for sale, to the property owners as of the date of commencement of the action, attorneys for appearing parties and parties appearing pro se.
5. Send representative to appear at the sale on behalf of plaintiff with bidding instructions.

6. If plaintiff is the high bidder, pick up deed from the sheriff, when ready (after 10-days) and record it in the county where the land located. Notify parties of any surplus.
7. If a third party is the high bidder, have sheriff forward balance due after the 10-day period has elapsed.

§ 5.26 Service of Judgment on Defendants (Appearing and Defaulting)

As to appearing parties, *R. 1:5-1* provides that a copy of the judgment must be served on all attorneys of record and parties appearing pro se within 7-days after it is signed. Service of papers under *R. 1:5-1* is ordinarily made by ordinary mail to attorneys and simultaneous ordinary and certified mail to parties pro se.⁹⁷

As to defaulting defendants, *R. 4:43-2(c)* provides, in part:

Within seven days after receipt of the executed judgment from the court, the proponent of the judgment shall serve a copy thereof on the *defaulting defendant* as required by *R. 1:5-2* except that service may be made by ordinary mail alone. (Emphasis supplied.)

The reference to *R. 1:5-2* (above) is misleading, as *R. 1:5-2* refers to *R. 1:5-1* which does not require service on defaulting defendants unless a new or additional claim for relief is asserted against the defendant. What this means is that service on a defaulting defendant must be made by ordinary mail in the manner prescribed by *R. 1:5-2*. Additionally, if a defaulting defendant's address is unknown “despite diligent effort” (e.g., where the defendant has been served by publication), *R. 1:5-2* requires that service be made by ordinary mail to the Clerk.

The practitioner must be careful to comply with the provisions of amended *R. 1:5-2* when mailing to a defaulting defendant. The rule now requires “diligent effort,” and now provides “the specific facts underlying the diligent effort . . . shall be recited in the proof of service required by *R. 1:5-3*. If, however, proof of diligent inquiry as to a party's whereabouts has already been filed within six months prior to service under this rule, a new diligent inquiry need not be made provided the proof of service required by *R. 1:5-3* asserts that the party making service has no knowledge of any facts different from those recited in the prior proof of diligent inquiry.”

While in most cases there will be an affidavit of inquiry for the defaulting defendant on file within the last 6-months (because such affidavits are customarily filed with the judgment), *R. 4:4-7* requires the affidavit of inquiry to be filed with the proof of service within the defendant's answering period. It is not clear how the late filing of an affidavit of inquiry will affect the operation of *R. 1:5-2* and whether such a circumstance will give rise to enforcement defenses with respect to the judgment. The cautious attorney, therefore, will be careful to file a new affidavit of inquiry in support of mailing a copy of the judgment to the clerk.

While it is not absolutely clear whether *R. 4:43-2(c)* applies to a foreclosure

⁹⁷ *R. 1:5-2*.

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action, as a foreclosure judgment is entered in accordance with R. 4:64 for which an exception is taken in this rule. It is still probable that this rule applies to a foreclosure judgment. Moreover, the exception for R. 4:64 relates to the “entry” of judgment, whereas paragraph (c) of the rule is a “post-judgment” requirement to which the exception ostensibly would not apply. Therefore, compliance with R. 4:43-2(c) is strongly recommended.

The obvious purpose in serving a copy of the judgment on defendants is to give them a chance to timely appeal.

Proof of mailing of a copy of the judgment to defendants should be filed in the foreclosure action.⁹⁸

§ 5.27 Stipulation of Payment Agreement (Forbearance Agreement)

The plaintiff, before or after judgment, may enter into a stipulation of payment arrangement with the owner to stay the foreclosure action pending satisfactory compliance by the owner, and that plaintiff, on non-compliance, will have the right to proceed in the foreclosure action, either to execution and sale or judgment as the case may be, without further notice to the owner, subject to the requirements of law.⁹⁹ Many such arrangements are signed by the vicinage judge and filed in the action although they need not be.

§ 5.28 Assignment of Judgment

A judgment of foreclosure is assignable as any other judgment.¹⁰⁰ The assignee acquires all the rights of the mortgagee-plaintiff and need not inquire whether the mortgagor has a defense not urged in the action.¹⁰¹

The assignee may be substituted as plaintiff or participate in post-judgment proceedings in the name of the plaintiff.¹⁰² One obtaining an assignment of the judgment should obtain a substitution of attorney from the plaintiff's attorney to the assignee's attorney.

Today, in light of the statutory provision,¹⁰³ an assignee of the foreclosing plaintiff may bid in its own name at the foreclosure sale. This may be done in any foreclosure, not just a residential action, and obviates the need to obtain a substitution of plaintiff for the assignee.

The assignment should be filed with the clerk of the court. It will be recorded and

⁹⁸ R. 1:5-3.

⁹⁹ See *Hudson Trust Co. v. Boyd*, 80 N.J. Eq. 267, 84 A. 715 (Ch. 1912); *Sandford v. Wellborn*, 85 N.J. Eq. 577, 96 A. 1018 (E. & A. 1916); *Elmora West End Bldg. & Loan Ass'n v. Strede*, 100 A. 344 (N.J. Ch. 1917).

¹⁰⁰ Judgments in all actions are assignable. N.J.S.A. 2A:25-1.

¹⁰¹ *Estate of Esther Inc. v. Veslor Realty Co.*, 122 N.J. Eq. 46, 193 A. 848, *aff'd* 193 A. 851 (E. & A. 1936).

¹⁰² R. 4:34-3 (1969).

¹⁰³ N.J.S.A. 2A:50-64a(1).

noted on the docket.¹⁰⁴ There is a statutory \$5 fee for recording an assignment of judgment.¹⁰⁵

§ 5.29 Amended Judgment; Correcting Judgment

R. 4:49-2 states:

A motion seeking to alter or amend a judgment or order shall be served not later than 20-days after service of the judgment or order upon all parties by the party obtaining it. The motion shall state with specificity the basis on which it is made, including a statement of the matters or controlling decisions which counsel believes the court has overlooked or as to which it has erred, and shall have annexed thereto a copy of the judgment or order sought to be reconsidered and a copy of the court's corresponding written opinion, if any.

R. 1:34-6 does not grant the Office of Foreclosure the authority to entered amended judgments. If a plaintiff seeks to have a judgment amended, an order from the vicinage judge will be required.

§ 5.30 Satisfaction; Reversal of Judgment

Should a foreclosure judgment be paid or otherwise satisfied, other than by a sale of the premises, a satisfaction of the judgment should be entered by the clerk by virtue of a duly acknowledged or proven warrant of satisfaction.¹⁰⁶ Upon filing the warrant, the clerk will record the satisfaction and note it on the record of the judgment.¹⁰⁷

When a foreclosure judgment is satisfied, it is also advisable to obtain and file or record a satisfaction or cancellation of the mortgage.¹⁰⁸ The notice of *lis pendens* should also be discharged by virtue of a warrant signed by the party filing it or his attorney.¹⁰⁹

An appeal of a judgment will not preclude its enforcement without a stay.¹¹⁰

The reversal of a foreclosure judgment operates only against the plaintiff-mortgagee to compel compensation to the party aggrieved for the full value of property, but will not affect the title of a bona fide purchaser of the foreclosed property while an appeal is pending and before the reversal.¹¹¹

¹⁰⁴ N.J.S.A. 2A:16-15.

¹⁰⁵ N.J.S.A. 22A:2-7.

¹⁰⁶ N.J.S.A. 2A:50-32. Also see N.J.S.A. 2A:16-15, 2A:16-46, -47.

¹⁰⁷ R. 4:48-2(a).

¹⁰⁸ See N.J.S.A. 46:18-5.1.

¹⁰⁹ N.J.S.A. 2A:15-17.

¹¹⁰ R. 2:9-5.

¹¹¹ N.J.S.A. 2A:17-44.

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The rule, however, protecting a bona fide purchaser has no application, where the purchaser is a party or privy to the action pursuant to which the foreclosure sale was ordered. Such a purchaser's title will be defeated by a reversal of the judgment, he will be ordered to restore the premises to the person entitled to it. Further, if the purchaser had actual notice of the appeal prior to his purchase, the rule may not apply.¹¹² On appeal, therefore, it is advisable for the person filing an appeal to file a *lis pendens*.

If the sale is set aside, a purchaser who has in good faith paid off previous valid liens may be entitled to be subrogated to the rights of the creditors paid off.¹¹³

§ 5.31 Vacating, Setting Aside Final Judgment

A foreclosure judgment, as any other judgment, may be vacated for cause pursuant to *R. 4:50* before the vicinage chancery judge. A complete discussion of this subject is beyond the scope of this seminar book.¹¹⁴

There is an extremely flexible *uncontested* practice, however, before the Office of Foreclosure.

If the foreclosure judgment is void because entered in violation of an automatic bankruptcy stay, the Office, if the foreclosure sale has not been held, will vacate the judgment and execution *ex parte* and enter and issue a new judgment and execution, where required. The Office will also vacate a judgment and reinstate the loan, with the consent of the answering parties, in accordance with its rule authority.¹¹⁵ The Office will also routinely vacate a judgment in order to add an omitted party or other matter with the consent of answering parties.

The Office of Foreclosure will not vacate a judgment if the foreclosure sale has taken place.

The rules authorize the setting aside of a default entry “for good cause shown;”¹¹⁶ and if a judgment by default has been entered, the court may set aside such a judgment for the reasons set forth in *R. 4:50–1*. The latter rule provides for setting aside a default judgment for several reasons including mistake, inadvertence, surprise or excusable neglect, fraud, etc. The defendant in addition must show that he has a meritorious defense.¹¹⁷ Any reasonable doubt should be resolved in favor of a trial on the merits.¹¹⁸ On

¹¹² *State Mut. Bldg. & Loan Ass'n v. O'Callaghan*, 67 N.J. Eq. 103, 57 A. 496, 501 (Ch. 1904).

¹¹³ *Junior Order Building & Loan Ass'n v. Sharpe*, 63 N.J. Eq. 500, 52 A. 832 (Ch. 1902).

¹¹⁴ See 30 N.J. Prac. (Weinstein, *Law of Mortgages*) § 31.38 (2nd Ed. 2000).

¹¹⁵ *R. 1:34-6(4)*.

¹¹⁶ *R. 4:43-3* (1969).

¹¹⁷ *Marder v. Realty Const. Co.*, 84 N.J. Super. 313, 318, 202 A.2d 175, (App. Div. 1964), *aff'd* 43 N.J. 508, 205 A.2d 744 (1964).

¹¹⁸ *Loranger v. Alban*, 22 N.J. Super. 336, 92 A.2d 77 (App. Div. 1952); *Foster v. New Albany Machine & Tool Co.*, 63 N.J. Super. 262, 269–270, 164 A.2d 492, 496 (App. Div. 1960).

vacating the judgment the court may impose such terms as are just.¹¹⁹

Practitioners must be careful. A final judgment may be vacated for failure to comply with the *Fair Foreclosure Act*. The Appellate Division, in *Bank v. Kim*,¹²⁰ reversed and remanded the Chancery Division's denial of a motion to vacate the judgment under R. 4:50-1 (the Chancery Division finding in favor of the Bank based upon substantial compliance) and ruled that if the *Fair Foreclosure Act* was applicable (to be determined by defendants' residential occupancy status at the time of the obligation), then, as in *GE Capital v. Weisman*,¹²¹ another notice of intention to foreclose was to be sent to defendants by certified mail, containing the information required by N.J.S.A. 2A:50-56. And depending upon defendants' response to that notice, the foreclosure action was then to proceed in the ordinary course under the *Fair Foreclosure Act*.

The court in *Kim* found that, as to the original notice of intention, there was no clear and conspicuous statement in the notice of the nature of the default claimed, no proof of the certified or registered mailing of the notice, no identification of the specific obligation in issue, no name and phone number of the person to whom payment could be made, no requisite statutory notices (subsections c(8) through (11), and a failure to send notice regarding entry of judgment in uncontested foreclosure actions.

Fair Foreclosure Act Considerations on Vacation; New Notice to Cure

It is the authors strong opinion that after a judgment is vacated, for any reason, a new 14-day notice of entry of judgment ("notice to cure") should be given to the debtors, in accordance with N.J.S.A. 2A:50-58, before a new judgment is entered. This, however, is currently not the practice; and once a notice to cure has been given, the Office of Foreclosure will apparently vacate the judgment, where required, and enter a new judgment without requiring that another notice to cure be given to the debtors.

Under the statute, there is no time-limit on the duration of a notice to cure.¹²²

§ 5.32 Setting Aside a Pre-Bankruptcy Foreclosure Sale as a Fraudulent Conveyance

The United States Supreme Court in *BFP v. Resolution Trust Corp.*¹²³ recently resolved a conflict between the circuits¹²⁴ on the issue of whether courts could set aside pre-bankruptcy foreclosure sales pursuant to § 548(a)(3) of the Bankruptcy Code which authorizes the trustee to set aside any transfer by the Debtor during the year prior to the

¹¹⁹ R. 4:50-1 (1969).

¹²⁰ 361 N.J. Super. 331, 825 A.2d 566 (App. Div. 2003).

¹²¹ 339 N.J. Super. 590, 773 A.2d 122 (Ch. Div. 2000).

¹²² N.J.S.A. 2A:50-58.

¹²³ 511 U.S. 531, 114 S.Ct. 1757, 128 L.Ed.2d 556 (1994), *reh'g denied* 512 U.S. 1247, 114 S.Ct. 2771, 129 L.Ed.2d 884 (1994).

¹²⁴ *Durrett v. Washington Nat'l Insurance Co.*, 621 F.2d 201 (5th Cir. 1980); *In re Madrid*, 725 F.2d 1197 (9th Cir. 1984), *cert. denied* 469 U.S. 833, 105 S.Ct. 125, 83 L.Ed.2d 66 (1984); *In the Matter of Bundles*, 856 F.2d 815 (7th Cir. 1988).

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bankruptcy petition if the Debtor “received less than a reasonably equivalent value in exchange for such transfer: and was either, (i) insolvent on the date the transfer was made ... or became insolvent as a result of such transfer or (ii) was about to engage in business’ or (iii) intended to incur ... debts that would be beyond the debtors ability to pay as such debt matured.”

In *BFP*, the court criticized *Durett v. Washington National Insurance Company*¹²⁵ and other cases following it, which held that a foreclosure sale completed less than one year before the mortgagors bankruptcy and producing less than 70% of the sale price was voidable as a fraudulent transfer.

Thus, if the foreclosure sale is held according to state law, it cannot be attacked as a fraudulent transfer. However, this does not preclude the use of § 548(a)(2)(A) where there are irregularities in the sale which allow the sale to be attacked under state law.

Nevertheless, in, *In re Ryker*, the Bankruptcy Court set aside a prepetition mortgage foreclosure sale as constructively fraudulent as to the creditors, although sale was conducted in accordance with New Jersey law. The court ruled this way because there was a postponement of the sale and payment by the debtor-mortgagor of approximately 75% of mortgage debt. The sale, however, was not readvertised to indicate that the debt had been substantially reduced; there was lack of competitive bidding, thereby, and the mortgagee was able to purchase the property for only \$100 over the remaining mortgage debt which was far less than its market value. The case was reversed and remanded by the District Court because the Bankruptcy Court did not address whether the Chapter 13 debtor had standing to commence a fraudulent transfer avoidance proceeding. On remand, the Bankruptcy Court held that the Chapter 13 debtor was not statutorily authorized to exercise trustee's avoidance powers, other than in aid of his exemption rights; no basis existed for according the Chapter 13 debtor equitable standing to pursue his claims; the debtor did not have standing to seek to avoid the foreclosure sale in aid of his alleged homestead exemption rights; but the proceeding would not be dismissed, until the debtor was given opportunity to request that the Chapter 13 trustee ratify, join or seek to be substituted as plaintiff.¹²⁶ The trustee ratified Ryker's actions and his Chapter 13 plan was confirmed on November 4, 2004.¹²⁷

§ 5.33 Appeal and Review of the Judgment

On July 1, 2013, the following Notice to Bar was issued outlining the procedures to be strictly enforced by the Appellate Division.

NOTICE TO THE BAR

¹²⁵ 621 F.2d 201 (5th Cir. 1980).

¹²⁶ 272 B.R. 602 (Bkrcty. D.N.J. 2002), *reversed* 301 B.R. 156 (D.N.J. 2003), *on remand* 315 B.R. 664 (Bkrcty. D.N.J. 2004).

¹²⁷ *Ryker v. Current*, 338 B.R. 642, 646 (D.N.J. 2006).

Appellate Division Procedures

Please be advised that effective July 1, 2013, the Appellate Division Clerk's Office will be strictly enforcing the following procedures:

1. Unless the time is tolled pursuant to *R. 2:4-3*, notices of appeal received after the 45-day periods set forth in *R. 2:4-1* will not be filed without a motion to file as within time pursuant to *R. 2:4-4*.
2. Motions for leave to appeal received after the 20-day periods set forth in *R. 2:5-6* will not be filed without a motion to file as within time pursuant to *R. 2:4-4*.
3. Motions for reconsideration received after the 10-day period set forth in *R. 2:11-6* will not be filed without a motion to file as within time.
4. Formal briefs that exceed the page limits set forth in *R. 2:6-7* will not be filed.
5. Letter briefs that exceed the 20-page limit set forth in *R. 2:6-2* will not be filed.
6. Motion briefs that exceed the 25-page limit set forth in *R. 2:8-1* will not be filed.
7. Briefs that contain a preliminary statement that exceeds the 3-page limit set forth in *R. 2:6-2* will not be filed.

Joseph H. Orlando
Clerk of the Appellate Division
Dated: May 1, 2013

As in ordinary civil actions, an appeal may be taken to the Appellate Division of the Superior Court from a final judgment in the foreclosure action.¹²⁸ The appeal must be taken within 45-days of the final judgment.¹²⁹ An appeal from a final judgment is taken by serving a copy of a notice of appeal and request for transcript upon all other parties who have appeared in the action, and by filing the originals with the Appellate Division and filing a copy of the notice and transcript request to the trial judge.¹³⁰ A case information statement must be attached to the notice of appeal. But in foreclosure actions there normally will not be such a statement.

An appeal from an interlocutory order may be allowed by the Appellate Division “in the interest of justice,” if a notice of motion for leave to appeal is filed with the Appellate Division within 15-days after entry of such order.¹³¹ An order striking answer or a summary judgment in a foreclosure action which merely strikes or removes the contest from a contested pleading is interlocutory and “not final” within the meaning of the rule.¹³²

¹²⁸ *R. 2:2-3(a)* (1972).

¹²⁹ *R. 2:4-1(a)* (1969).

¹³⁰ *R. 2:5-1(a), (b)* (1973).

¹³¹ *R. 2:2-4, R. 2:5-6(a)*.

¹³² *Eisen v. Kostakos*, 116 *N.J. Super.* 358, 282 A.2d 421 (A.D. 1961).

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An appeal cannot be taken in a foreclosure action while the mortgagor is in bankruptcy unless the automatic stay is lifted; and if taken while the mortgagor is in bankruptcy may be reinstated without costs upon completion of the bankruptcy or lifting of the stay.

The perfecting of an appeal does not, *per se*, stay or suspend the proceedings.¹³³ The pendency of an appeal, in absence of a supersedeas bond, will not prevent the execution of the judgment by sale of premises, the delivery of the deed to the purchaser or giving him possession, or distribution, to those entitled, of the proceeds of sale.

The Appellate Court will not ordinarily set aside the judgment of the trial court unless it is so manifestly unsupported by credible evidence as to result in a denial of justice.¹³⁴

The Appellate Division will affirm, reverse, or remand for further proceedings; or, if the determination of the Appellate Court is dispositive of the cause, it may enter a final judgment.¹³⁵ Petition for rehearing must be filed within 10-days of entry of judgment unless time is enlarged by the court.¹³⁶

A further appeal may be had to the Supreme Court if there is a dissent in the Appellate Division or there is a substantial constitutional question involved.¹³⁷ In all other cases further review by the Supreme Court may be had only by applying for certification, which will be granted only where there are special and important reasons therefore.¹³⁸ Rarely, if ever, is a foreclosure judgment certified to the Supreme Court.

§ 5.34 Writ of Execution; Alias; Pluries

The writ of execution is simply the process enforcing the judgment and should follow the judgment in all particulars. The final judgment having ordered a sale of the mortgaged premises and that an execution issue to an officer, commanding him to make sale of the mortgaged premises according to law,¹³⁹ it is the responsibility of the plaintiff's attorney to prepare and submit the execution to the clerk (via the Office of Foreclosure). The execution is the process which authorizes the sheriff or other officer to enforce the foreclosure judgment and make sale of the premises in satisfaction of it. There is a \$50 fee for the issuing of each writ of execution.

The execution should conform to the judgment upon which it is based; it cannot rise

¹³³ R. 2:9–5(a) (1972). *C.J.S. Mortgages* 1293 nn. 84–88.

¹³⁴ *Fagliarone v. North Bergen Twp.*, 78 N.J. Super. 154, 155, 188 A.2d 43 (App. Div. 1963), *cert. den.* 40 N.J. 221, 191 A.2d 61 (1963); *Associated Metals & Corp. v. Dixon Chemical*, 82 N.J. Super. 281, 300, 197 A.2d 569, 579 (App. Div. 1964), *on remand* 83 N.J. Super. 263, 199 A.2d 394.

¹³⁵ R. 2:11–3(b) (1969).

¹³⁶ R. 2:11–6(a).

¹³⁷ R. 2:2–1(a) (1969).

¹³⁸ R. 2:12–4 (1969).

¹³⁹ R. 4:59–1(a) (1969).

higher than the judgment and has no independent vitality.¹⁴⁰ The writ of execution is *issued*; it is not a filed paper until after it is returned to court by the selling officer at which time it is filed.

The writ of execution is ordinarily submitted with the judgment papers, and the Office normally issues the writ of execution (in the name of the Clerk) at this time and also taxes the costs in the writ. A writ of possession¹⁴¹ may also issue at this time.

The foreclosure execution should recite the names of all the parties¹⁴² to the action in the first paragraph, the amount due the plaintiff with lawful interest from a date certain and plaintiff's taxed costs, the amounts adjudged due other defendants on their encumbrances and their taxed costs, and their order of priority.¹⁴³

The description of the mortgaged premises should be the same as that contained in the complaint, unless the final judgment orders otherwise, and if practicable, the description should be followed by the street number.

Any direction in the judgment as to the sale of the mortgaged premises in parcels and the order in which they should be sold should be followed in the execution.¹⁴⁴ If properties are to be sold separately to satisfy the same indebtedness, it is the foreclosing attorney's responsibility to make sure that subsequent sales are reduced by the bid price of prior sales in order to insure that there is only one satisfaction of plaintiff's debt.

The execution issues as of course by the clerk. Before its issuance by the clerk, it must be recorded.¹⁴⁵ The execution must contain an endorsement¹⁴⁶ of the amount actually due on the judgment (before delivery to the sheriff or other officer) and costs taxed, and, on or after September 5, 2000, the execution is returnable in twenty four months after the date of its issuance (date of *teste*), except that in case of sale the sheriff must make return of the writ and pay to the clerk any remaining surplus within 30-days after the sale.¹⁴⁷ A failure to make a return does not affect the title of a purchaser.¹⁴⁸ No levy can be made after the

¹⁴⁰ *Giordano v. Wolcott*, 46 N.J. Super. 278, 282, 134 A.2d 593, 594 (App. Div. 1957).

¹⁴¹ See the next section.

¹⁴² This is what the sheriff will use to prepare the deed. If the names of all parties are recited in the execution, they will appear in the deed; the clerk or register of deeds will be able to index these names in the grantor index.

¹⁴³ See form of execution, Appendix G.

¹⁴⁴ N.J.S.A. 2A:17-34.

¹⁴⁵ N.J.S.A. 2A:17-2; 2A:50-36. The issuance of the execution is noted on the civil docket. R. 4:101-2(a) (1969). It will be entered as well in the Book of Executions. Today, it appears that entry of the execution on the computer docket fulfills this function. The execution is also assigned a specific execution number. The execution contains a stamp at the top right of the first page - "ENTERED IN THE RECORDS OF EXECUTIONS ISSUED IN THE SUPERIOR COURT CLERK'S OFFICE (NUMBER ASSIGNED ENDING WITH F AND CASE YEAR) (SIGNED) CLERK OF THE SUPERIOR COURT."

¹⁴⁶ R. 4:59-1(a).

¹⁴⁷ R. 4:59-1(a) (2000).

¹⁴⁸ C.J.S. Execution § 330.

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return date.¹⁴⁹

As of September 1, 2006, amended R. 4:59-1(a) provides:

The endorsement shall explain in detail the method by which interest has been calculated, taking into account all partial payments made by the defendant. A copy of the fully endorsed writ shall be served, personally or by ordinary mail, upon the judgment-debtor after a levy on the debtor's property has been made by the sheriff or other officer and in no case less than 10-days prior to turnover of the debtor's property to the creditor pursuant to the writ.

It is submitted that the amended rule provision (above) mainly relates to *personal property* writs not mortgage foreclosure writs. But the rule's application is not limited and its terminology is broad enough to apply to any writ of execution. For example, the terminology requiring service of the writ on the judgment-debtor "after a levy on the debtor's property has been made" is not clear. The term "levy" is not defined in the context of a mortgage foreclosure action. When is the levy in such an action? The dictionary definition of the term says to take or seize property; the seizure and sale of property.¹⁵⁰ When does this occur in a foreclosure? When the property is *advertised* for sale by the sheriff, when it is *posted*? The author's best guess is that the publication of the notice of sale can be deemed to be the levy in a foreclosure action.

The language that service on the judgment debtor must be made - "in no case less than 10-days prior to turnover of the debtor's property to the creditor" - also makes no sense in the context of a mortgage foreclosure action. Foreclosure property is ordinarily turned over to the successful purchaser many months after completion of the foreclosure action. What is the purpose of mailing the fully endorsed writ of execution to the judgment-debtor (the former owner) after the debtor is out of title. Moreover, the creditor may not be the successful purchaser at the foreclosure sale so there is no certainty that the debtor's property will be turned over to the *creditor*. Also, judgment-debtor in a mortgage foreclosure action can refer to all defendants in the action - multiple defendants - does this rule now require mailing to all defendants in the action?

In any event, in order to comply with the above mailing provision, plaintiffs should mail the fully endorsed writ to the mortgagor *after publication* of the notice of sale by the sheriff. Since the notice of sale must be mailed to owners and appearing parties (or their attorneys if any) at least 10-days prior to the date set for sale, mailing of the writ can be effectuated at that time.

A sheriff, who has begun to execute a writ for the sale of mortgaged property is authorized to complete the execution of it, notwithstanding the expiration of his term of office pending his proceedings.¹⁵¹

¹⁴⁹ *Kinmouth v. White*, 61 N.J. Eq. 358, 48 A. 952 (Ch. 1901); *Fredd v. Darnell*, 107 N.J. Eq. 249, 152 A. 236 (Ch. 1930).

¹⁵⁰ *Black's Law Dictionary* 1050-51 (4th Ed. 1957).

¹⁵¹ *Ayers v. Casey*, 72 N.J.L. 223, 61 A. 452 (E. & A. 1905).

A writ (or writs) will normally issue to the sheriff or sheriffs of the county or counties where the mortgaged property or any part is located. If the mortgaged premises is situate in more than one county and overlaps the county line, the practice is to direct the execution to an attorney at law as a master to make the sale, instead of the sheriff.¹⁵² The Chancery Division in unusual situations or emergencies has great discretion in directing the execution to a special master or referee instead of the sheriff.¹⁵³

Where an execution directs payment to the plaintiff and to defendants who hold subsequent encumbrances on mortgaged land, it is multiform in substance (*i.e.*, constitutes a separate execution in favor of each defendant) and the sheriff must execute it, unless it is satisfied or he obtains the consent of all the parties for whose benefit it has been issued.¹⁵⁴ If the plaintiff fails to proceed with the sale, the sheriff is obligated, without further proceedings, to sell the mortgaged premises to satisfy the encumbrancers debt in accordance with the execution.¹⁵⁵

If plaintiff's debt has been reduced prior to sale by payments under a bankruptcy plan, workout agreement or the like, plaintiff should obtain a follow-up order from the Office of Foreclosure or vicinage judge reducing the amount due accordingly. A certification and amended proof of amount due are normally submitted to the Office or court for that purpose.¹⁵⁶

An execution may issue any time within 20-years of the judgment.¹⁵⁷ Subsequent executions may issue if the original execution is not satisfied.¹⁵⁸ A subsequent writ is

known as an *alias* writ; others thereafter are designated as *pluries* writs.¹⁵⁹

¹⁵² *In re Rhodes*, 100 N.J. Eq. 370, 372, 136 A. 408, 409 (Ch. 1927). *Knickerbocker Trust Co. v. Carteret Steel Co.*, 81 N.J. Eq. 130, 86 A. 55 (Ch. 1912). *Hardyston Nat. Bank of Hamburg v. Tartamella*, 56 N.J. 508, 512, 267 A.2d 495, 497 (1970).

¹⁵³ *Galaxy Towers Condominium Ass'n v. Elsis*, 262 N.J. Super. 92, 619 A.2d 1330 (Ch. Div. 1993). See also Weinstein, "Sheriffs Need Help With Foreclosure Crisis," 133 N.J.L.J. 165 (1993) - for a history of the special master practice in New Jersey.

¹⁵⁴ *Welsh v. Lawler*, 73 N.J. Eq. 371, 68 A. 218, 133 Am.St.Rep. 737 (E. & A. 1907).

¹⁵⁵ *Id.*

¹⁵⁶ See 30B N.J. Prac. (Weinstein, *Law of Mortgages*) 467, Practice Form 143 (2nd Ed. 2000). The Office of Foreclosure will ordinarily have no problem reducing the amount due in this fashion but it will not increase the indebtedness.

¹⁵⁷ N.J.S.A. 2A:17-3.

¹⁵⁸ See *Sandford v. Wellborn*, 85 N.J. Eq. 577, 96 A. 1018 (E. & A. 1916).

¹⁵⁹ These writs should be the same as the original in so far as the amount due, lawful interest date and so forth are concerned. The writ should not be updated for interest, as interest will automatically accrue in accordance with the judgment. If any particulars of the original execution are changed without amending the judgment, the Office of Foreclosure will refuse to issue it.

PROCEDURE FOR JUDGMENT

Pursuant to Supreme Court Order, *R. 1:37-2* (seal), 4:60-6(a) and 4:60-6(b) have been relaxed, effective July 1, 2010, to provide for electronic filing of foreclosure papers as follows:

14. *Rule 1:37-2* (seal) so as to permit the printed reproduction of the court's seal on all papers required by the Rules of Court to contain a seal.

20. *Rules 4:60-6(a)* and 4:60-6(b) (issuance of writs) so as to permit the clerk or the clerk's designee to affix electronically a facsimile of the clerk's signature to all writs for the enforcement of judgments, and to permit the clerk to enter electronically signed writs into the Civil Order and Judgment docket.

§ 5.35 Endorsement(Regular) –Write of Execution (Form)

Endorsement

Attorney for Plaintiff

Levy:

\$ _____

Judgment for plaintiff

Lawful interest at _____ % on \$(*Judgment Amount*)

From (*Lawful Interest Date in Judgment/Execution*)
to (*Date Writ Sent to Sheriff*)

\$ _____

From (*Date sent to sheriff*) to (*Date of sale*)

\$ _____

Costs

\$ _____

Total (excluding sheriff's fees)

\$ _____

§ 5.36 Endorsement (Contract Rate Interest)—Writ of Execution (Form)

Endorsement

[*Contract Interest Rate Alt.*]

Endorsement

Attorney for Plaintiff

Levy:

Judgment for plaintiff \$ _____

Contract rate interest at % on \$(*Lesser Amount in Writ*) from (*Contract Interest Date in Writ*) to (*Date of Judgment*) \$ _____

Subtotal \$ _____

Lawful interest at % (*On Subtotal*) from (*Date of judgment*)

To (*Date sent to sheriff*) \$ _____

Lawful interest at % (*On Subtotal*) from (*Date Sent to Sheriff*) to (*Date of Sale*)

Costs taxed \$ _____

Total (excluding sheriff's fees) \$ _____

§ 5.37 Writ of Possession

A writ of possession can be obtained at the time of entry of judgment from the Office of Foreclosure, if a count for possession was included in the complaint and the judgment has a paragraph awarding possession to the plaintiff, assignee or purchaser at the sale.

The writ of possession is the process¹⁶⁰ which authorizes the sheriff or other officer to enforce that part of the foreclosure judgment awarding possession to the plaintiff; the judgment may also award possession to plaintiff's assignee and the purchaser at the sale.

The foreclosure judgment may only award possession if a count for possession is included in the foreclosure complaint.

By custom and practice, the return date of the writ is 3-months. If it should expire before the sheriff can execute the writ, an order extending the return date may be obtained from the court or an application may be made to the Office of Foreclosure for additional writs of possession. There are no *alias* or *pluries* writs of possession; additional writs are just termed writs of possession.

If the foreclosure judgment does not award possession, the purchaser at the sale may still obtain possession by means of an order for possession.¹⁶¹

The Office of Foreclosure will not issue a writ of possession unless an Anti-

¹⁶⁰ R. 4:59-2(b).

¹⁶¹ R. 4:59-2(b). Requires 10-day demand to persons in possession and 16-day notice of motion before the vicinage chancery judge; demand and notice may be served simultaneously to save time.

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Eviction Act affidavit (or certification) is attached to the writ, certifying the name or names of persons against whom possession is sought and that such persons are not tenants protected by the Act. The Office will require this even where the only defendants against whom possession is sought are the mortgagors. A form of certification is set forth in the next section.

The Office will not issue a writ of possession against persons who are not parties to the action, tenants of any kind, even commercial tenants, or persons whose status as residential tenants is disputed by plaintiff. In such instances, plaintiff or the purchaser at the sale, must proceed before the vicinage chancery judge for an order for possession,¹⁶² pursuant to which a writ of possession may issue by the Office of Foreclosure.

§ 5.38 Anti-Eviction Act Certification - Writ of Possession

I, the undersigned, Attorney for _____ hereby certify to the following in connection with the issuance of a Writ of Possession for F-_____.

1. The name or names of each individual against whom this writ is to issue are as follows: _____
2. The persons named above against whom this writ is to issue are not protected by the provisions of NJ Tenant Anti-Eviction statute, *N.J.S.A. 2A:18-61.1*, as enunciated in the N.J. Supreme Court case of *Chase vs. Josephson*.
3. The reason why the above-named persons against whom this writ is to issue are not protected by New Jersey's Anti-Eviction Act, *N.J.S.A. 2A:18-61.1 et seq.*, is because such persons are the [owners , former owners etc.] of the mortgaged premises, not tenants or former tenants protected by the act.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

(Name of Law Firm)

By: _____

(Name of Attorney)

Dated:

§ 5.39 Advances for Taxes and Insurance After Judgment - Order for Additional Sums

This is an extremely important item and is ordinarily the only way plaintiff can recoup post-judgment advances. If plaintiff had made advances for taxes and insurance after judgment but *before the sheriff's sale*, an "order authorizing sheriff to collect

¹⁶² R. 4:59-2(b).

additional lawful sums” may be obtained from the Office of Foreclosure pursuant to R. 1:34-6(5). The order must be delivered to the sheriff *before sale*, and will authorize the sheriff to add the sum specified in the order to the judgment and execution amount and to collect these sums out of the sale of the mortgaged premises. The order is entered *ex parte* with a supporting certification itemizing the advances made by plaintiff and explaining what they were for. The Office scrutinizes the certification carefully and if the sums seem excessive will request an additional breakdown or clarification.

This order for additional sums is now the preferred way for plaintiff to obtain subsequent advances for taxes and insurance, as the Appellate Division in *Virginia Beach Federal v. The Bank of New York*¹⁶³ has ruled that such amounts, by virtue of the merger of the mortgage into the judgment and its resulting finality, cannot be obtained by plaintiff by way of surplus moneys after sale.¹⁶⁴

In *Summit Business Capital Corp. v. Quinn-Woodbine*,¹⁶⁵ the Appellate Division, recognized the above R. 1:34-6(5) procedure by the Office of Foreclosure reimbursing plaintiffs for post-judgment advances and reversed the Chancery Division, holding that the mortgagee was entitled to reimbursement for post-judgment advances for taxes, utilities, and insurance but not for advances for an environmental inspection.

In ordinary situations, therefore, mortgagees should apply to the Office of Foreclosure not the chancery judge for reimbursement for post-judgment advances.

§ 5.40 Environmental Considerations¹⁶⁶

Contaminated property is an ever-increasing problem in New Jersey and elsewhere. Many lenders are afraid to foreclose on contaminated property - for fear of liability and clean-up costs - and wonder what the best strategy is. There are several approaches. To begin with, a mortgagee, to the author’s knowledge, is not an “owner or operator” of a contaminated facility merely by virtue of being a “mortgagee” or the “holder” of a foreclosure judgment. The problem arises where a mortgagee pursuant to a workout agreement oversees the operation of a facility and may become an “operator” thereby or acquires title by virtue of a deed in lieu of foreclosure.

A foreclosure judgment is good for 20-years. Thus, a foreclosing lender may enter judgment against one or more tracts and have 20-years within which to take out an execution or executions. The lender, if it does not want to acquire title, can wait and when it has a buyer can then have an execution issued and sale held. The third party buyer can purchase at the sale, or the mortgagee can purchase and assign the bid.

In any event, even if a mortgagee purchases contaminated property at a

¹⁶³ 299 N.J. Super. 181, 690 A.2d 1040 (App. Div. 1997).

¹⁶⁴ Weinstein, Court Voids Post-Judgment Advances for Mortgagees, 148 N.J.L.J. 176 (April 14, 1997). See also, 30A New Jersey Practice (Weinstein) Sec. 31.47 (2nd Ed. 2000).

¹⁶⁵ 2006 WL 1549791 (App. Div. 2006). Unpublished.

¹⁶⁶ Information in this section taken from 29 N.J. Prac. (Weinstein, *Law of Mortgages*) § 14.8 (2nd Ed. 2001).

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foreclosure sale and becomes the property owner, as long as the mortgagee holds title for security purposes, and does not “participate in the management” of the facility, it is exempt from liability under the federal Comprehensive Environmental Response, Compensation and Liability Act of 1980 (“CERCLA”),¹⁶⁷ the Resource Conservation and Recovery Act (“RCRA”),¹⁶⁸ New Jersey’s Spill Act,¹⁶⁹ the Industrial Site Recovery Act (“ISRA”)(formerly ECRA).¹⁷⁰

Both CERCLA and the New Jersey Spill Act have been extensively amended to include comprehensive secured creditor exemptions from liability in favor of security interest holders not participating in the management of the property. These exemptions also continue after foreclosure and acquisition of title by a lender and permit a lender to hold the property and resell it, and even maintain business activity on the property pending resale or disposition, without being subject to liability. Of course, any lender or lender’s attorney seeking to utilize these statutory exemptions from liability must consult the provisions of these statutes carefully. As one court found, the security interest exemption to the Spill Act requires proof of the same elements which are required by the CERCLA exemption.¹⁷¹

CERCLA provides that the term “owner or operator” does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.¹⁷² This is the so-called secured creditor (or security interest) exemption. CERCLA also contains an exclusion in favor of lenders not participants in management which provides - “The term ‘owner or operator’ does not include a person that is a lender that, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect the security interest of the person in the vessel or facility.”¹⁷³

Lenders are also given CERCLA protections under the RCRA (which regulates petroleum underground storage tanks).

The Spill Act exempts from liability “a person who maintains indicia of ownership of a vessel or facility primarily to protect a security interest in a vessel or facility and who does not participate in the management of the vessel or facility....”¹⁷⁴ The security interest exemption in the Spill Act, therefore, requires proof of the same elements which are required by the CERCLA exemption: (1) that indicia of ownership is held primarily to protect a security interest, and (2) that the secured creditor did not

¹⁶⁷ 42 U.S.C.A. §§ 9601 *et seq.*

¹⁶⁸ 42 U.S.C.A. §§ 6991 *et seq.*

¹⁶⁹ N.J.S.A. 58:10-23.11 *et seq.*

¹⁷⁰ N.J.S.A. 13:1K-6 *et seq.*

¹⁷¹ See *Kemp Industries, Inc. v. Safety Light Corp.*, 857 F.Supp. 373, 397 (D.N.J. 1991), citing *Bergsoe Metal Corp.*, 910 F.2d at 671.

¹⁷² 42 U.S.C.A. § 9601(20)(A).

¹⁷³ 42 U.S.C.A. § 9601(20)(E)(i).

¹⁷⁴ N.J.S.A. § 58:10-23.11g5.

participate in the management of the subject property.¹⁷⁵

ISRA regulates and controls the “owner or operator” of an industrial establishment planning to “close operations or transfer ownership or operations.” “Owner” or “operator” under ISRA do not include the holder of a mortgage or security interest. Further, the secured creditor exemption under the Spill Act, above, *N.J.S.A.* § 58:10-23.11g4 *et al.*, is incorporated by reference into ISRA.

New Jersey also has an act regulating the storage of hazardous substances, namely - New Jersey’s Underground Storage of Hazardous Substances Act (the “act”).¹⁷⁶

“Operator” is defined under the act as any person in control of, or having responsibility for, the daily operation of a facility.¹⁷⁷ And “owner” means any person who owns a facility, or in the case of a nonoperational storage tank, the person who owned the nonoperational storage tank immediately prior to the discontinuation of its use.¹⁷⁸

The act provides for penalties, injunctive relief and civil administrative penalties against any person violating the act.¹⁷⁹

The reader is referred to the practice book for more detailed information on this subject.¹⁸⁰

¹⁷⁵ See *Kemp Industries, Inc. v. Safety Light Corp.*, 857 F.Supp. 373, 397 (D.N.J. 1991), citing *Bergsoe Metal Corp.*, 910 F.2d at 671.

¹⁷⁶ *N.J.S.A.* 58:10A-21 *et seq.*

¹⁷⁷ *N.J.S.A.* 58:10A-22i.

¹⁷⁸ *N.J.S.A.* 58:10A-22j.

¹⁷⁹ 58:10A-24.6.

¹⁸⁰ See 29 *N.J. Prac.* (Weinstein, *Law of Mortgages*) §§ 14.8 and 9 (2nd Ed. 2001).

CHAPTER 6

FORECLOSURE SALE; SHERIFF'S PRACTICE ¹

§ 6.01 Overall Procedure—What to Send to the Sheriff ²

The next step in the foreclosure is a judicial public sale by the sheriff (or other officer) to whom the writ issued.³ Plaintiff's attorney must submit to the sheriff:

- Original sealed writ of execution and two copies,
- Concise statement of description or full legal description,⁴
- Executed affidavit of consideration pursuant to *N.J.S.A.* 46:15-6.1. (statement of prior liens)⁵
- Required sheriff's deposit. (Check with sheriff's office as to the amount.)
- Announcements. Some sheriff's require a copy of the standard announcements to be made by plaintiff at the sale. (Check with sheriff's office.)
- List of defendants. Some sheriff's require a list of names and addresses of all defendants for adjournment purposes. (Check with sheriff's office.)
- Atlantic County. The sheriff requires that an endorsement be attached to the writ of execution calculating the amount due to date of mailing of the execution to the sheriff.

The selling officer must sell pursuant to the writ and execute a deed for the premises sold.⁶ A foreclosure sale is a "judicial" sale. The Chancery Division has discretion in appointing a selling officer and has the authority, where required, to appoint a "special master" or "special referee" to conduct the foreclosure sale.⁷

If there is a report of sale by a sheriff and no objections to the sale are served upon the sheriff within 10 days of sale or before delivery of a deed, no confirmation is necessary and a deed may be delivered by such official.⁸ If the selling officer is a person other than

¹ Much of the information in this chapter taken from 30A N.J. Prac. (Weinstein, Law of Mortgages) Chapter 35 (2d ed. 2000).

² See 30A N.J. Prac. (Weinstein, Law of Mortgages) § 35.5A (2d ed. Supp. 2004).

³ *N.J.S.A.* 2A:50-19, -37.

⁴ *R.* 4:65-3. *N.J.S.A.* 46:15-6.1.

⁵ *N.J.S.A.* 46:15-6.1.

⁶ *N.J.S.A.* 2A:50-19, -37.

⁷ *N.J.S.A.* 2A:50-37. *Bramblewood Investors, Ltd. v. C. & G. Associates*, 262 N.J. Super. 96, 619 A.2d 1332 (Law Div. 1992). See also *Galaxy Towers v. Elsis*, 262 N.J. Super., 619 A.2d 1330 (Law Div. 1993). And Weinstein, "Sheriffs Need Help With Foreclosure Crisis," 133 N.J.L.J. 165 (1993).

⁸ *R.* 4:65-5 (1969). In all other cases a confirmation of the sale is necessary.

FORECLOSURE SALE; SHERIFF'S PRACTICE

the sheriff, confirmation of the sale is required.⁹

The sheriff or selling officer has considerable discretion in the execution of the writ,¹⁰ although subject to order of the court.

Today, by virtue of the Fair Foreclosure Act there are uniform sheriff's sale procedures,¹¹ *applicable to all mortgage foreclosure sales conducted by sheriffs* (not other selling officers),¹² which have greatly unified sheriff's sale practice in New Jersey.

§ 6.02 Notice of Sale-Contents

The notice must contain the time and place of the sale. If the notice does not contain the full legal description, it must state that the diagram or concise statement does not constitute a full description and shall also state where the full legal description can be found.¹³ The concise statement sets forth the municipality in which, and the street or road on which the premises are located, and specifies the tax lot and block, the number of feet to the nearest cross street, the dimensions of the premises, and the street number, if any. An immaterial error in the diagram or statement will not constitute grounds for relieving the purchaser and ordering a new sale.¹⁴

All advertisements for the sale must state the approximate amount of the judgment and the street numbers of the real estate to be sold when practical.¹⁵

The sheriff can require payment in cash or certified check even if that condition is not contained in the advertised notice of sale.¹⁶

The New Jersey Supreme Court has held¹⁷ that a purchaser at a sheriff's sale may be statutorily¹⁸ relieved of its bid before delivery of the deed if the published notice of sale fails to list any real property tax liens on the property. *A mortgagee can give notice of any existing realty tax lien by including the amount of delinquent realty taxes due as of a specific date in the notice of sale.* The mortgagee is not obligated to update the tax information in the event the sale is adjourned.¹⁹

⁹ R. 4:65-6(b).

¹⁰ *Holmes v. Steele*, 28 N.J. Eq. 173, 174 (Ch. 1877).

¹¹ N.J.S.A. 2A:50-64.

¹² N.J.S.A. 2A:50-64.

¹³ R. 4:65-3. N.J.S.A. 2A:61-1.

¹⁴ R. 4:65-3.

¹⁵ N.J.S.A. 2A:17-34.

¹⁶ *Fidelity Union Bank v. Trim*, 210 N.J. Super. 476, 510 A.2d 98 (App. Div. 1986).

¹⁷ *Summit Bank v. Thiel*, 162 N.J. 51, 740 A.2d 139 (1999).

¹⁸ N.J.S.A. 2A:61-16.

¹⁹ *Summit Bank v. Thiel*, 162 N.J. 51-52, 740 A.2d 139-40 (1999).

R. 4:65-2 requires that the notice of sale include notice that there may be surplus money and the procedure for claiming it. The party obtaining the order or writ may also file the notice of sale with the county recording officer in the county in which the real estate is situate, pursuant to N.J.S.A. 46:26A-11 , and such filing shall have the effect of the notice of settlement as therein provided.²⁰

§ 6.02 Notice of Sale-Posting

A notice of the sale of the mortgaged realty must be posted (a) in the office of the sheriff of the county or counties where the property is situated and (b) at the premises to be sold.²¹ If the premises are residential, the notice of sale shall have annexed thereto, in bold type of at least 14-point, the notice of tenants' rights during foreclosure in the form prescribed by Appendix XII-K of the rules of court.²² The notice must be posted at least 3 weeks before the sale date.²³ Failure to post notice may invalidate the sale.²⁴

§ 6.04 Notice of Sale-Advertising

The sheriff (or other selling officer) must cause the notice of sale to be published at least once a week during 4 consecutive weeks in 2 newspapers designated by the selling officer. There are four publication options in the statute²⁵ as to which newspapers may be used depending upon the county in which the sale is to be held. The first publication must be at least 21 days and the last not more than 8 days prior to the sale date.²⁶

Where the property is located in 2 counties, publication must be made in both counties.²⁷

All advertisements for the sale of real estate by virtue of executions issued out of any court of this state shall state the approximate amount of the judgment or order sought to be satisfied by the sale. When practicable, the advertisements shall state the street numbers of the real estate to be sold.²⁸

²⁰R. 4:65-2

²¹ R. 4:65-3. N.J.S.A. 2A:61.1.

²²R. 4:65-2

²³ N.J.S.A. 2A:61.1.

²⁴ *Washington Heights Fed. Sav. & Loan Ass'n v. Owens*, 5 Misc.2d 131, 164 N.Y.S.2d 577 (Sup. Ct. 1957). See *G.E. Capital Mortg. Services, Inc. v. Marilao*, 352 N.J. Super. 274, 800 A.2d 150 (App. Div. 2002)(did not post at homeowner's request).

²⁵ N.J.S.A. 2A:61.1.

²⁶ N.J.S.A. 2A:61-1.

²⁷ *Craig v. Smith*, 84 N.J. Eq. 593, 597, 95 A. 194, 196 (Ch. 1915).

²⁸N.J.S.A. 2A:17-34

§ 6.05 Service of Notice of Sale

This is an extremely important requirement. *R. 4:65-2* requires that the Plaintiff serve the notice of sale, at least 10 days prior to the date set for sale, by registered or certified mail, return receipt requested, upon (1) every party who has appeared in the action giving rise to the order or writ and (2) the owner of record of the property as of the date of commencement of the action whether or not appearing in the action.²⁹

Failure to mail a notice of sale will constitute grounds for setting aside the sale if the mortgagor or other party entitled to notice has no knowledge of the pending sale.³⁰ Noncompliance with the ten day notice rule constitutes grounds for setting aside the sale only if the party seeking relief seeks that relief promptly, lacked knowledge of the pendency of the sale and no intervening equities in favor of innocent third parties have been created.³¹

R. 1:5-2 previously allowed ordinary mailing to the clerk. However, *R. 1:5-2* now states:

If no address is known, despite diligent effort, the filing of papers with the clerk shall be deemed to satisfy that service requirement and there need be no separate service upon the clerk.

An affidavit of inquiry is required to show that “diligent effort” has been made for defendant’s address. If there is an affidavit of inquiry on file within the preceding 6 months, plaintiff’s proof of service must state that “the party making service has no knowledge of any facts different from those recited in the prior proof of diligent inquiry.” Foreclosing plaintiffs must be wary of this potential pitfall before mailing to the clerk.

However, based on the *R.4:65-2* requirement that the notice of sale be served by registered or certified mail, return receipt requested, in cases of absent defendants, the plaintiff would be wise, after inquiry, to mail the notice to any possible address it may have for the defendant.

§ 6.06 Adjournments of Sale; Stays

The statute and Rules provide that a sheriff or other officer authorized to make a sale under execution may, subject to limitations provided by law, adjourn the sale from time to time.³² He may also adjourn the sale to another place than that mentioned in the

²⁹ *R. 4:65-2*. It would appear that the failure to mail notices as provided in the rule would be a ground to set aside the sale—*Orange Land Co. v. Bender*, 96 *N.J. Super.* 158, 232 A.2d 679 (App. Div. 1967).

³⁰ *Orange Land Co. v. Bender*, 96 *N.J. Super.* 158, 232 A.2d 679 (App. Div. 1967).

³¹ *In re Eagleson Estate*, 172 *N.J. Super.* 98, 104, 410 A.2d 1187, 1190 (App. Div. 1980), *cert. den.* 84 *N.J.* 431 (1980).

³² *N.J.S.A.* 2A:61-5, *R. 4:65-4*.

advertisement.³³

As of July 28, 2019, *N.J.S.A.* 2A:50-64a(2) provides——“That adjournment of the sale of the foreclosed property shall be in accordance with *N.J.S.A.* 2A:17-36 and *N.J.S.A.* 2A:17-36 provides:

Adjournments of sale of real estate. Notwithstanding any other law or court rule to the contrary, a sheriff or other officer selling real estate by virtue of an execution may make five adjournments of the sale, two at the request of the lender, two at the request of the debtor, and one if both the lender and debtor agree to an adjournment, and no more, to any time, not exceeding 30 calendar days for each adjournment. However, a court of competent jurisdiction may, for cause, order further adjournments. [L.1995, c. 244, § 14, eff. Dec. 4, 1995; L.2019, c. 71, § 2, eff. July 28, 2019.]

The statute restricts the sheriff to five adjournments: two at the request of the lender, two at the request of the debtor, and one if both the lender and debtor agree to an adjournment. Adjournments are not to exceed 30 calendar days each. A court for cause may order further adjournments.³⁴

In *Bankers Trust Company of California, N.A. v. Delgado*,³⁵ the Appellate Division held that the foregoing statute only limits adjournments by the judgment debtor not so-called “plaintiff’s adjournments.” Pursuant to *Bankers Trust*, the sheriff may make additional adjournments (more than two) at plaintiff’s request. Thus, the prior practice of permitting unlimited plaintiff’s adjournments is now continued under *N.J.S.A.* 2A:50-64a(2).³⁶

Where a sale of real estate is adjourned for more than 1 week, notice must be published once within 1 week after the date of the adjournment in the newspapers in which the original notice of the sale was published unless the original advertisement of the sale specifically reserved the right to adjourn the sale, in which case no further notice need be published. The adjournment notice need only consist of a statement of the parties to the cause and the time and place to which the sale is adjourned. In publishing any adjournment it shall not be necessary to continue the publication of the original advertisement of the sale.³⁷ Whenever the sale is adjourned for not over one week, an adjournment from week to week is sufficient and no further advertisement is necessary.³⁸

³³ *Penn. v. Craig*, 2 N.J. Eq. 495, 499 (Ch. 1841); *Hunt v. Swayze*, 55 N.J.L. 33, 39, 25 A. 850 (Sup. Ct. 1892). But see R. 4:65–4 (1969) (unless court orders otherwise all sales to be had where sheriff usually makes sales or at the premises to be sold).

³⁴ *N.J.S.A.* 2A:50-64a(2) .

³⁵ 346 *N.J. Super.* 103, 787 A.2d 195 (App. Div. 2001).

³⁶ *Adams v. Lambertville Heat, Light & Power Co.*, 84 N.J. Eq. 96, 100, 92 A. 602, 604 (Ch. 1914), *aff’d* o. b. 84 N.J. Eq. 499, 95 A. 609 (E. & A. 1915).

³⁷ *N.J.S.A.* 2A:61–6.

³⁸ *Hackettstown Nat. Bank v. Smith*, 125 N.J. Eq. 483, 6 A.2d 485 (Ch. 1938) *aff’d* o. b. 125 N.J. Eq. 482, 6 A.2d 486 (E. & A. 1937).

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The Appellate Division has ruled³⁹ that interested parties are entitled to “actual” notice of the adjourned sale date, although such notice need not meet the formal requirements imposed by *R. 4:65-2*, as actual knowledge of the date of the adjourned sale is controlling. The court rules do not address notice requirements with respect to adjourned sales.

The court has inherent power to stay a foreclosure sale under appropriate circumstances.⁴⁰

§ 6.07 Sheriff's Duty to Schedule Sale – 150 days; Special Master

N.J.S.A. 2A:50-64a(3)(a) requires that the sheriff shall conduct a sale date within 150 days of the sheriff's receipt of any writ of execution issued by the court in any foreclosure proceeding.⁴¹

If it becomes apparent that the sheriff cannot the foreclosing plaintiff may apply to the office for an order appointing a Special Master to hold the foreclosure sale.⁴² Upon the foreclosing plaintiff making such application to the office, the office shall issue the appropriate order appointing a Special Master to hold the foreclosure sale. The office may issue the order to appoint a Special Master to hold foreclosure sales for one or more properties within a vicinage.⁴³

It should be noted that the statute now requires that the sheriff conduct a sale within 150 days. Under *R.1:34-6*, the Office of Foreclosure is not authorized to appoint a Special Master and attorneys in applicable situations must apply to the vicinage chancery judge.⁴⁴

§ 6.08 Conduct of Sale –In General

The Fair Foreclosure Act⁴⁵ mandates certain uniform sheriff's sale procedures (but only where the sheriff conducts the foreclosure sale) which include:

- bidding in the name of the assignee of the foreclosing plaintiff;

³⁹ *First Mutual Corp. v. Samojeden*, 214 N.J. Super. 122, 518 A.2d 525 (App. Div. 1986).

⁴⁰ *Kotler v. John Hancock etc., Ins. Co.*, 113 N.J. Eq. 544, 168 A. 36 (Ch. 1933).

⁴¹ *N.J.S.A. 2A:50-64a(3)(a)*.

⁴² *N.J.S.A. 2A:50-64a(3)(b)*.

⁴³ *N.J.S.A. 2A:50-64a(3)(c)*.

⁴⁴ The following interim policy was approved by the Supreme Court at its January 2, 1996 Administrative Conference: Appointment of Special Master: All requests made to the Office of Foreclosure for appointment of a Special Master are to be referred to the appropriate Chancery Judge.

⁴⁵ *N.J.S.A. 2A:50-64(a)(1) to (a)(6)*.

- That the successful bidder at the sheriff's sale shall pay a 20 percent deposit in either cash or by a certified or cashier's check, made payable to the sheriff of the county in which the sale is conducted, immediately upon the conclusion of the foreclosure sale. If the successful bidder cannot satisfy this requirement, the bidder shall be in default and the sheriff shall immediately void the sale and proceed further with the resale of the premises without the necessity of adjourning the sale, without renotification of any party to the foreclosure and without the republication of any sales notice. Upon such resale, the defaulting bidder shall be liable to the foreclosing plaintiff for any additional costs incurred by such default including, but not limited to, any difference between the amount bid by the defaulting bidder and the amount generated for the foreclosing plaintiff at the resale. In the event the plaintiff is the successful bidder at the resale, the plaintiff shall provide a credit for the fair market value of the property foreclosed.; and
- that it shall not be necessary for an attorney or representative of the person who initiated the foreclosure to be present physically at the sheriff's sale to make a bid. A letter containing bidding instructions may be sent to the sheriff in lieu of an appearance.

All foreclosure sales, like other judicial sales, should be under the supervision of the selling officer. Such sale should be conducted in accordance with the judgment and execution.⁴⁶

Failure of the sheriff to conduct a foreclosure sale between the hours of 12:00 noon and 5:00 p.m., as statutorily required,⁴⁷ renders an otherwise properly noticed and conducted sale "voidable" and not "void,"⁴⁸ if an objection to sale is raised within the prescribed period under the rule.⁴⁹

§ 6.09 Place of Sale

The sale is held at the place where the sheriff usually makes such sales or at the premises to be sold unless the court otherwise orders.⁵⁰

Where property is located in two counties, a court order may be obtained permitting sale of all the property at one place.⁵¹

⁴⁶ *Meyer v. Bishop*, 27 N.J. Eq. 141, 145 (Ch. 1876), *aff'd sub nom. Meyer v. Patterson*, 28 N.J. Eq. 239 (E. & A. 1877).

⁴⁷ *N.J.S.A.* 2A:61-4

⁴⁸ *Independence One Mortgage Corp. v. Gillespie*, 289 N.J. Super. 91, 672 A.2d 1279 (App. Div. 1996) disagreeing with *Empire of Am. Realty v. Mancine*, 280 N.J. Super. 280 N.J. Super. 617, 656 A.2d 66 (Ch. Div. 1994).

⁴⁹ *R.* 4:65-5.

⁵⁰ *R.* 4:65-4 (1969). *N.J.S.A.* 2A:61.1.

⁵¹ *R.* 4:65-4.

§ 6.10 Conditions of Sale

The sheriff or other selling officer may establish terms and conditions of sale amply sufficient to secure compliance by the purchaser with his bid. However, such conditions cannot impose on the purchaser liability greater than imposed by law.⁵²

Such terms and conditions usually provide: (1) The highest bidder shall be the purchaser. (2) The purchaser will be required to pay 20% of the purchase price and sign an acknowledgment of the purchase in accordance with the conditions. (3) The deed is to be delivered not less than 10 days after the date of the sale when the balance of the purchase money will be required, with interest payable on the purchase money from the date of the sale and the purchaser to pay for acknowledgment of the deed. (4) If any person or persons purchase at the sale, and do not comply with the foregoing articles and conditions, the property so struck off and sold to him or them will be offered for sale a second time, and the first purchaser or purchasers shall not benefit therefrom but shall be held answerable for all loss and expense occasioned thereby. (5) The sale is subject to adjournment.⁵³

§ 6.11 Reading Description

At the time of making the sale of a particular property, the selling officer at the request of any person interested must read the description by metes and bounds of the real estate to be sold, or in the absence of such a request, the street number of the real estate to be sold or the block and lot number by which it is designated on the tax map of the municipality, or if it is not so identified, then such description as he may deem sufficient.⁵⁴ The selling officer shall then proceed to sell the property at public vendue to the highest bidder.

§ 6.12 Announcements

The attorney for the plaintiff or the person procuring the execution should announce prior to the commencement of the sale the existence of any substantial defect or cloud upon the title of the real estate to be sold and the existence of liens or encumbrances thereon, with the approximate amount due thereon.⁵⁵ No statement should be made which may

⁵² *Hackensack Water Co. v. De Kay*, 36 N.J. Eq. 548, 555 (E. & A. 1883).

⁵³ These are the terms of sale utilized by the Sheriff of Essex County.

⁵⁴ See *N.J.S.A. 2A:61-4*; *Froehlich v. Walden*, 66 N.J. Super. 390, 169 A.2d 204 (Ch. Div. 1961) (cannot be relieved of bid because of purchaser's error as to description where he could have had description read by sheriff).

⁵⁵ This will prevent the bidder from being relieved of his bid pursuant to *N.J.S.A. 2A:61-16*.

If the United States is a party defendant there should be an announcement of the right of the United States to

create a false apprehension in the minds of the bidders.⁵⁶ The selling officer may permit a third person to state facts relating to possible defects of title in property about to be sold.

§ 6.13 Public Auction; Bidding Credit

A foreclosure sale in New Jersey is a public auction; there is no reserve. The property is struck off to the highest bidder. In the majority of sales, the mortgaged premises is struck off to the foreclosing mortgagee for a nominal bid.⁵⁷ In conducting the sale, the sheriff is empowered to act as a public auctioneer. The purpose of the sale is to obtain the highest price for the benefit of the foreclosing mortgagee, other junior lienholders and the owner mortgagor.⁵⁸

The plaintiff receives a bidding credit for its judgment amount, interest and costs and normally does not have to put up any money at the sale unless it exceeds this amount.⁵⁹ Mortgagees in New Jersey establish an “upset price” prior to sale, which ordinarily includes the full judgment amount with interest and costs (but it may be less), and will bid up to that amount.⁶⁰ On request a mortgagee may tell prospective bidders what its upset price is. However, some sheriffs in New Jersey, prohibit mortgagees from announcing the upset price at the sale on the theory that it will inhibit bidding and reduce sheriff’s commissions. This, in the author’s opinion, is irresponsible behavior on the sheriff’s part.

The purchase by the mortgagee at the sale for a nominal sum (which is customary) indicates that no third person was willing to bid more than the mortgagee’s upset price to buy the property. Implicitly, then, such a purchase represents the application of plaintiff’s debt to the mortgaged security as if plaintiff had actually bid up to its debt, interest and costs. The law in New Jersey, however, only requires that plaintiff reduce its debt by the bid price, leaving the mortgagor and others personally liable for almost the full amount due and owing under the note or bond, even though the mortgagee now owns the mortgaged premises.⁶¹

Subsequent encumbrancers included for payment in the execution receive a bidding credit for their respective amounts once the bid exceeds plaintiff’s full debt and

redeem for one year after sale. 28 U.S.C.A. § 2410.

⁵⁶See *Close v. Brown*, 20 A. 674 (N.J. E. & A. 1890) (dictum). Announcements should be clear and not misleading. *Burger v. Dumas*, 25 N.J. Super. 473, 96 A.2d 718 (Law Div. 1953).

⁵⁷ This is usually because bidders do not find it economically feasible to bid up to plaintiff’s upset price (normally plaintiff’s full debt, interest, costs and sheriff’s fees for which it receives a bidding credit). See Weinstein, “Foreclosure and Deficiency Actions in New Jersey, 118 N.J.L.J. Index Page 809 (December 11, 1986).

⁵⁸ *Investors & Lenders, Ltd. v. Finnegan*, 249 N.J. Super. 586, 592 A.2d 1244 (Ch. Div. 1991).

⁵⁹ R. 4:64-3.

⁶⁰ *Investors & Lenders, Ltd. v. Finnegan*, 249 N.J. Super. 586, 592 A.2d 1244 (Ch. Div. 1991).

⁶¹ *Lydecker v. Bogert*, 38 N.J. Eq. 136 (Ch. 1884); *Silver v. Williams*, 72 N.J. Super. 564, 178 A.2d 649 (A.D.1962). See Weinstein, “Foreclosure and Deficiency Actions in New Jersey, 118 N.J.L.J. Index Page 809 (December 11, 1986).

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the bidding reaches their particular amounts in the execution. A secondary encumbrancer not included in plaintiff's judgment and bidding at the sale must initially put up its own funds and then apply for surplus moneys to get its share of the surplus, if any, back.⁶²

§ 6.14 Who Can Purchase?

As a general rule, anyone who is competent to bid may become a purchaser at the sale.⁶³ The mortgagor may, of course, buy in at the foreclosure sale.

A selling officer cannot directly or indirectly become a purchaser.⁶⁴

A person occupying such a position of trust or confidence toward the mortgagor as would make it inequitable for him to acquire title for his individual account may not purchase the property.⁶⁵ An attorney cannot without his client's consent purchase property upon a foreclosure of his client's mortgage. If the relationship of an attorney and client has ceased, there is no objection to the attorney's purchase of a former client's property at foreclosure.⁶⁶

The foreclosing mortgagee can purchase the mortgaged property.⁶⁷ In most instances, the mortgagee probably buys in the property.⁶⁸

§ 6.15 Purchase or Reacquisition of Title by the Mortgagor

As noted, the mortgagor may buy in at the foreclosure sale.⁶⁹ When the foreclosure sale wipes out subordinate mortgages, however, the mortgagor who buys in may find that the subordinate mortgages are revived on equitable grounds or by virtue of an estoppel if

⁶² R.4:64-3.

⁶³ *Semenowich v. Melnyk*, 93 N.J. Eq. 67, 68, 115 A. 4 (Ch. 1921) rev'd on dif. point 93 N.J. Eq. 615, 117 A. 832 (E. & A. 1921).

⁶⁴ 2 Patton, Titles § 486 n. 19.

⁶⁵ *Wakeman v. Dodd*, 27 N.J. Eq. 564 (E. & A. 1876).

⁶⁶ See *536 Broad St. Corp. v. Valco Mtg. Co.*, 135 N.J. Eq. 361, 38 A.2d 903 (Ch. 1944), aff'd o. b. 138 N.J. Eq. 431, 48 A.2d 191 (E. & A. 1946), cert. den. 330 U.S. 821, 67 S.Ct. 772, 91 L.Ed. 1272 (1947).

⁶⁷ *Parker v. Child*, 25 N.J. Eq. 41 (Ch. 1874); *Avon-by-the-Sea Land & Imp. Co. v. Finn*, 56 N.J. Eq. 805, 41 A. 366 (E. & A. 1898). This is the rule in most states, *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 580, 55 S.Ct. 854, 859, 79 L.Ed. 1593, 1599, 97 A.L.R. 1106, 1111 (1935), motion den. 55 S.Ct. 918, reh. den. 296 U.S. 661, 56 S.Ct. 82, 80 L.Ed. 471 (1935). A foreign corporation may acquire title to property as a result of a foreclosure of a mortgage held by it. *N.J.S.A.* 14A:13-1.

⁶⁸ See also, Weinstein, Foreclosure and Deficiency Actions in New Jersey, 118 N.J.L.J. Index Page 809 (December 11, 1986), cited by the New Jersey Supreme Court in *Carteret Savings and Loan Ass'n v. Davis*, 105 N.J. 344, 521 A.2d 831 (1987)—89% of the foreclosure sales in a ten year study resulted in nominal bid purchases by the mortgagee.

⁶⁹ *Mooney v. Provident Savings Bank*, 308 N.J. Super. 195, 705 A.2d 816, affirmed 318 N.J. Super. 257, 723 A.2d 634 (App. Div. 1999).

the subordinate mortgages contain the usual covenants for title.⁷⁰ Even, in the absence of fraud, the mortgagor's reacquisition of the foreclosed property may revive a subordinate mortgage.⁷¹

In *Old Republic Insurance Co. v. Currie*,⁷² it was held that a mortgagee's lien which was extinguished by a foreclosure sale was revived upon the mortgagor's reacquisition of the foreclosed property, however, laches barred mortgagee's recovery of interest for 11-year period after notice of reacquisition. Under *Currie*, even if the mortgagor's personal liability for the secured debt was extinguished by bankruptcy, on reacquisition of title by the mortgagor the warranty obligation was not nullified and the second mortgage was revived.⁷³

However, in *Mooney v. Provident Savings Bank*⁷⁴ it was held that a discharge in bankruptcy of the mortgagors' personal liability for the mortgage debt (as would the running of the statute of limitations) precluded application of the "covenant" approach, a rationale based on a contractual undertaking, where there was no enforceable money claim. Moreover, this coupled with the fact that the junior mortgagees failed to bid at the sale of the first to protect their interests and that there was no covenant or undertaking in the junior mortgages to pay the superior mortgages, precluded revival of the mortgagees' subordinate mortgage liens on equitable grounds.⁷⁵ *Mooney* was affirmed by the Appellate Division. In the author's opinion, revival of judgments after foreclosure and purchase by the mortgagor is not favored by New Jersey courts.

§ 6.16 Irregularities in Advertisement

The deed of the sheriff or other selling officer, made pursuant to the execution, duly acknowledged or proved, constitutes *prima facie* evidence of the truth of the recitals in the deed with respect to advertisement.⁷⁶ And sales may be confirmed by the court, notwithstanding any defect or irregularity in the publication of notice, if the officer making

⁷⁰ See *Old Republic Insurance Co. v. Currie*, 284 N.J. Super. 571, 665 A.2d 1153 (Ch. Div. 1995)(mortgagee's lien which was extinguished by a foreclosure sale was revived upon mortgagor's reacquisition of foreclosed property); *Mooney v. Provident Savings Bank*, 308 N.J. Super. 195, 705 A.2d 816, affirmed 318 N.J. Super. 257, 723 A.2d 634 (App. Div. 1999)(no equitable basis found for reviving defendants' lien on the property, which was extinguished in plaintiffs' bankruptcy discharge and the property was subsequently acquired by plaintiffs).

⁷¹ See *Old Republic Insurance Co. v. Currie*, 284 N.J. Super. 571, 665 A.2d 1153 (Ch. Div. 1995)(mortgagee's lien which was extinguished by a foreclosure sale was revived upon mortgagor's reacquisition of foreclosed property, however, laches barred mortgagee's recovery of interest for 11-year period after notice of reacquisition).

⁷² 284 N.J. Super. 571, 576, 665 A.2d 1153, 1155 (Ch. Div. 1995)(citing *Baird v. Chamberlain*, 60 N.D. 784, 236 N.W. 724 (1931)).

⁷³ *Id.*

⁷⁴ 308 N.J. Super. 195, 705 A.2d 816, affirmed 318 N.J. Super. 257, 723 A.2d 634 (App. Div. 1999).

⁷⁵ 308 N.J. Super. 195, 705 A.2d 816, affirmed 318 N.J. Super. 257, 723 A.2d 634 (App. Div. 1999).

⁷⁶ N.J.S.A. 2A:61-12.

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the sale certifies, under oath, that the sale was otherwise regular and that in his judgment the real estate was sold for a fair price, and if the court is satisfied by affidavit that the defect or irregularity in the publication was not injurious to the parties in interest.⁷⁷

A *bona fide* purchaser of real estate sold by a sheriff or other officer is protected after seven years, even though the sale was not duly advertised or the judgment was paid prior to the sale.⁷⁸

Any recorded deed delivered by a sheriff or other officer standing unchallenged for one year is deemed a valid deed for the property described therein, notwithstanding any informality or imperfection, where the sale has been confirmed by the court.⁷⁹

§ 6.17 Selling Officer's Fees

The Rules provide that a sheriff, receiver or other person ordered to sell real estate shall be allowed the same fees which by statute are allowed to a sheriff on a sale by execution.⁸⁰ The statute relating to such fees⁸¹ provides that when a sale is made by virtue of an execution the sheriff shall be entitled to charge the following fees: On all sums not exceeding \$5,000.00, 6%; on all sums exceeding \$5,000.00 on such excess, 4%; the minimum fee to be charged for a sale by virtue of an execution, \$50.00.⁸²

When the execution is settled without actual sale and such "settlement" is made manifest to the officer, the officer shall receive one-half (1/2) of the amount of percentage allowed herein in case of sale.⁸³ The sheriff was entitled to his one-half commission, when a mortgage foreclosure judgment was satisfied, without a foreclosure sale, from the proceeds of a sale of the mortgaged property by the trustee (of the debtor-mortgagor's Chapter 7 estate) after delivery of the writ of execution to the sheriff. Further, the foreclosing mortgagee was responsible for payment of the commission.⁸⁴

Where the high bidder defaults after a foreclosure sale, sheriff's commissions are based upon the forfeited deposit rather than the bid amount, because in this instance no sale is consummated and sheriff's commissions must be related to the amount recovered on behalf of the creditor.⁸⁵

⁷⁷ *N.J.S.A.* 2A:61-8.

⁷⁸ *N.J.S.A.* 2A:61-17; *Armstrong v. Brown*, 19 *N.J. Super.* 528, 88 A.2d 660 (Ch. Div. 1952).

⁷⁹ *N.J.S.A.* 2A:61-18. Quare: What if no confirmation is required, pursuant to *R.* 4:65-5?

There are many validating acts curing defects in such sales.

⁸⁰ *R.* 4:65-1 (1969).

⁸¹ *N.J.S.A.* 22A:4-8.

⁸² *N.J.S.A.* 22A:4-8.

⁸³ *N.J.S.A.* 22A:4-8. *Sturges v. Lackawanna & W.R. Co.*, 27 N.J.L. 424 (1859).

⁸⁴ *In re Loehwing* 320 B.R. 281 (Bkrtcy.D. N.J. 2005).

⁸⁵ *Jacoby v. Eseo*, 329 *N.J. Super.* 119, 123, 746 A.2d 1069, 1071 (App. Div. 2000), citing *Sinnickson v. Gale*, 16 N.J.L. 21 (Sup. Ct. 1837).

The sheriff is not entitled to collect sheriff sale fees from the successful bidder in addition to the price paid by the bidder at sale, unless the published notice of sale expressly provides for this.⁸⁶

In addition, the officer is entitled to various other fees specified by statute.⁸⁷

§ 6.18 Statement (Taxed Bill) of Costs

The statute also provides that "the sheriff shall file his taxed bill of costs with the clerk of the court out of which such execution issued, within such time as the court shall direct by general rule or special order, or, in default thereof, he shall not be entitled to any costs"; and "if any sheriff shall charge in such bill of costs for services not done, or allowed by law, or shall take any greater fee or reward for any services by him done than is or shall be allowed by law, he shall be liable for the damages sustained by the party aggrieved including a penalty of \$30.00, to be recovered in a summary manner, in the action . . . wherein the execution was issued or otherwise."⁸⁸

The selling officer must, within 30 days after the sale, make and file with his or her bill of costs or execution fees, in the office of the clerk of the court a true statement and calculation, in order of time, of the execution or executions by virtue of which the sale was made, the amount or amounts due thereon, respectively, at the time of the sale, the time or times of sale and the amount of the sales. The statement shall be certified under the hand of the officer making and filing it, and shall be conclusive against the officer only. If there be more sales than 1, the statement shall be made and filed within 30 days after the final sale.⁸⁹

Ordinarily, the sheriff will execute and sign a "Report, Statement and Return of Execution" or an "Execution Sales Statement," containing the above particulars of the sale, if a sale has been made, together with fees and costs, and annex one or the other to the writ of execution which is returned to the court either executed or not executed and filed.

§ 6.19 Bids; Resale

It is the duty of the selling officer to obtain the highest and best price in cash obtainable for the mortgaged property at a fair sale.⁹⁰ The selling officer should not countenance fictitious bidding or puffing.⁹¹ The official in charge of the sale may refuse

⁸⁶ *Howard Savings Bank v. Sutton*, 246 N.J. Super. 482, 587 A.2d 1335 (Ch. Div. 1990).

⁸⁷ N.J.S.A. 22A:4-8.

⁸⁸ N.J.S.A. 22A:4-8.

⁸⁹ N.J.S.A. 2A:17-38.

⁹⁰ See *Froelich v. Walden*, 66 N.J. Super. 390, 395, 169 A.2d 204, 206 (Ch. Div. 1961).

⁹¹ *National Bank of Metropolis v. Sprague*, 20 N.J. Eq. 159 (Ch. 1869).

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bids from irresponsible or incompetent persons.⁹² A large measure of discretion is vested in the selling officer in the conduct of the sale and receipt of bids.⁹³

The selling officer may prescribe that successive bids be a stipulated amount over the previous bid.

The sale should be kept open as long as bids are offered, until the highest price is obtained and no further bids will be offered.⁹⁴ There must be full opportunity for competition among the bidders and the court will not tolerate bidding by a private signal pursuant to an arrangement with the selling officer which gives that bidder an advantage over competitors.⁹⁵ In this state the court ordinarily will not fix a minimum or upset price in advance of the sale.⁹⁶ On the other hand, it would seem to be proper for the mortgage holder to bid the amount of the foreclosure judgment, especially if the United States is a defendant in order to discourage statutory redemption by the United States.⁹⁷ As the California court has stated: "So long as the bid is legitimately made, there is no theory which requires the creditor to bid only a small amount, raising it by degrees only to that required to meet competition."⁹⁸

Until the bid is accepted, it may be withdrawn by the bidder.⁹⁹ When the highest bid is obtained, the sheriff or other officer conducting the sale will announce that the sale is complete by the fall of the hammer, or in some other customary manner, and the property will be struck off to the successful bidder. Once accepted the bid cannot be withdrawn,¹⁰⁰ except that application can be made to the court to be relieved of the bid because of accident, fraud, misrepresentation or mistake.¹⁰¹

There are inherent risks in purchasing at a foreclosure sale; for there is no guarantee that the purchaser will obtain a marketable title.¹⁰² It is likely that the low turnout of third

⁹² *Merwin v. Smith*, 2 N.J. Eq. 182 (Ch. 1839).

⁹³ *Holmes v. Steele*, 28 N.J. Eq. 173, 174 (Ch. 1877). Such discretion is always subject to the control of the court. *Seaman v. Riggins*, 2 N.J. Eq. 214, 216, 34 Am.Dec. 200, 202 (Ch. 1839).

⁹⁴ *Parker v. Pratt*, 8 N.J. Eq. 104 (Ch. 1849); *Montclair Building & Loan Ass'n v. Farmer*, 67 A. 852, 853 (N.J. Ch. 1907).

⁹⁵ *Conover v. Walling*, 15 N.J. Eq. 173, 178 (Prerog.Ct.1852).

⁹⁶ *United Building & Loan Ass'n v. Neuman*, 113 N.J. Eq. 244, 166 A. 537 (Ch. 1933).

⁹⁷ See "Post-Sale Redemption" post.

⁹⁸ *Bank of America Nat. Trust & Sav. Ass'n v. Reidy*, 15 Cal.2d 243, 248, 101 P.2d 77, 80 (1940). A mortgagee may be and often is the sole bidder. Prather, A Realistic Approach to Foreclosure, 14 Bus. Lawyer 132, 137 (1958).

⁹⁹ *National Bank v. Sprague*, 21 N.J. Eq. 458 (E. & A. 1869) at 165. Cf. Restatement, Contracts (1932) § 27.

¹⁰⁰ Thus the sheriff cannot return the deposit after the property has been struck off to the bidder, *Shann v. Jones*, 19 N.J. Eq. 251 (Ch. 1868); or resell the mortgaged premises even with the plaintiff's consent. *New Jersey Title Guaranty & Trust Co. v. Croydon Holding Corp.*, 138 N.J. Eq. 459, 461, 46 A.2d 564, 565 (Ch. 1946).

¹⁰¹ *Karel v. Davis*, 122 N.J. Eq. 526, 194 A. 545 (E. & A. 1937).

¹⁰² For an enumeration of possible risks inherent in purchasing at a sale, see Weinstein, Foreclosure and Deficiency Actions in New Jersey, 118 N.J.L.J. Index Page 809 (December 11, 1986), cited by the New Jersey Supreme Court in *Carteret Savings and Loan Ass'n v. Davis*, 105 N.J. 344, 521 A.2d 831 (1987).

parties who actually buy property at foreclosure sales reflects a general conclusion that the risks of acquiring an imperfect title are often too high.¹⁰³

A purchaser may be statutorily relieved if the title is defective and the purchaser was unaware of such defect at the time of the sale.¹⁰⁴ This has been permitted where the published notice of sale fails to list any real property tax liens on the property.¹⁰⁵

The successful bidder must sign the conditions of sale,¹⁰⁶ and unless he is the plaintiff or his agent he is required to pay a twenty percent deposit in cash, certified check or cashier's check made payable to the sheriff of the county in which the sale was conducted.¹⁰⁷

By virtue of the Fair Foreclosure Act, if the successful bidder cannot satisfy this requirement, the bidder shall be in default and the sheriff shall immediately void the sale and proceed further with the resale without the necessity of adjourning the sale, without renotification of any party to the foreclosure and without the republication of any sales notice. Upon such resale, the defaulting bidder shall be liable to the foreclosing plaintiff for any additional costs incurred by such default including, but not limited to, any difference between the amount bid by the defaulting bidder and the amount generated for the foreclosing plaintiff at the resale. In the event the plaintiff is the successful bidder at the resale, the plaintiff shall provide a credit for the fair market value of the property foreclosed.¹⁰⁸

However, under prior practice, if the bidder failed to make the necessary deposit, the sale could be reopened before the bidders dispersed or the sale could be adjourned;¹⁰⁹ thus, there was no need to void the sale and have a resale. It is not clear whether the sheriff still has discretion to adjourn the sale or whether a resale must immediately be held under all situations.

The sheriff is liable to the plaintiff if the sheriff accepts a check in payment of the bid which is not paid by the bank.¹¹⁰

The successful bidder must sign the conditions of sale, and unless the plaintiff or plaintiff's agent, is required to pay the necessary deposit in cash, certified check or cashier's check.¹¹¹

The successful bidder, before the delivery of the deed, can assigned the bid.

¹⁰³ *Carteret Savings and Loan Ass'n v. Davis*, 105 N.J. 344, 352, 521 A.2d 831, 835 (1987).

¹⁰⁴ N.J.S.A. 2A:61-16.

¹⁰⁵ *Summit Bank v. Thiel*, 162 N.J. 51, 740 A.2d 139 (1999).

¹⁰⁶ See *Cropper v. Brown*, 76 N.J. Eq. 406, 407, 74 A. 987, 988, 139 Am.St.Rep. 770, 771 (Ch. 1909).

¹⁰⁷ N.J.S.A. 2A:50-64a(4).

¹⁰⁸ N.J.S.A. 2A:50-64a(4).

¹⁰⁹ *Smith v. Young*, 12 N.J.L. 300 (Sup. Ct. 1831); *Weatherby v. Slape*, 58 N.J. Eq. 550, 43 A. 898, 78 Am.St.Rep. 627 (E. & A. 1899).

¹¹⁰ *Irving Trust Co. v. Conway*, 11 N.J. Misc. 515, 167 A. 680 (Sup. Ct. 1933).

¹¹¹ N.J.S.A. 2A:50-64a(4).

The successful bidder may assign the bid before the delivery of the deed.¹¹²

§ 6.20 Position of Successful Bidder—Payment of Bid

The bidder who is successful at a foreclosure sale is required to purchase the property, but the purchaser's rights are for most purposes inchoate until (a) ten days after the sale¹¹³ or delivery of the deed,¹¹⁴ whichever is later, or (b) if objections to sale are served, or if confirmation is otherwise required, until the sale is confirmed.¹¹⁵

If the purchaser files for bankruptcy within the ten day period after sale, it would seem that the successful bidder may elect to take back its deposit, as the sheriff cannot convey title to the purchaser in this instance. State law determines the existence and extent of the right of redemption after sale, or at any other point in the foreclosure action. However, federal court, rather than state court, has jurisdiction to determine whether the "stay" and "cure" provisions of the bankruptcy code toll or suspend what remains of the right of redemption as determined by state law.¹¹⁶

The purchaser's interest in the property sold is equitable, and any loss caused by destruction of the building by fire or otherwise falls upon purchaser.¹¹⁷ As a successful bidder, the purchaser has a preferred status and normally cannot be deprived of his right to acquire the premises sold except upon some recognized legal or equitable ground.¹¹⁸

The purchaser is entitled to a conveyance if the court does not set aside the sale.¹¹⁹

The selling officer must convey to the successful bidder after confirmation of the sale, or after 10 days when no confirmation is required, upon payment of purchase price.¹²⁰ Where the selling officer is the sheriff, the statute now requires that the deed must be delivered within two weeks of the date of sale.¹²¹

¹¹² *Ekins v. Murray*, 29 N.J. Eq. 388 (Ch. 1878); *Becker v. Kelsey*, 9 N.J. Misc. 1265, 157 A. 177 (Sup. Ct. 1931).

¹¹³ *R. 4:65-5* (1969). The sheriff cannot compel the successful bidder to accept a deed until the sale is confirmed or the 10-day period to object expires and no objections are served.

¹¹⁴ *R. 4:65-5. Hardyston Nat. Bank v. Tartamella*, 56 N.J. 508, 513, 267 A.2d 495, 498 (1970).

¹¹⁵ *Wimpfheimer v. Prudential Ins. Co.*, 56 N.J. Eq. 585, 591, 39 A. 916, 918 (Ch. 1898); *Ryan v. Wilson*, 64 N.J. Eq. 797, 52 A. 993 (Ch. 1902), *aff'd* 64 N.J. Eq. 805, 53 A. 1039 (E. & A. 1903).

¹¹⁶ *Union County Sav. Bank v. Johnson*, 210 N.J. Super. 589, 510 A.2d 288 (Ch. Div. 1986).

¹¹⁷ *Cropper v. Brown*, 76 N.J. Eq. 406, 74 A. 987, 139 Am.St.Rep. 770 (Ch. 1909). (purchaser cannot be relieved of bid because of such destruction). See Note, 17 A.L.R. 970 (1922), *supp.* 25 A.L.R. 71 (1923).

¹¹⁸ *Chamberlain v. Larned*, 32 N.J. Eq. 295, 296 (E. & A. 1880); *Morrisse v. Inglis*, 46 N.J. Eq. 306, 309, 19 A. 16, 17 (E. & A. 1890). *Shann v. Jones*, 19 N.J. Eq. 251 (Ch. 1868).

¹¹⁹ *Union Building & Loan Ass'n v. Childrey*, 97 N.J. Eq. 20, 24, 127 A. 253, 254, 2 N.J. Misc. 567 (Ch. 1924).

¹²⁰ *N.J.S.A. 2A:50-19*; *R. 4:65-6(c)*, *R. 4:65-5* (1969).

¹²¹ *N.J.S.A. 2A:50-64c*.

The successful bidder who becomes the purchaser at the foreclosure sale must make payment in accordance with the conditions of sale.¹²² Where the mortgagee is the purchaser, he may receive credit for the amount owing to him under judgment and need pay only the amount of the sales expense in cash.¹²³

The statute provides that payment must be made in cash, certified check or cashier's check.¹²⁴ Normally, the purchaser will be advised that the deed is available and that the balance of the purchase price is due.¹²⁵ Although the conditions of sale generally provide that the purchaser shall pay interest from the date of sale, it has been held that interest may not be charged until the deed is ready for delivery; and if such delivery is delayed through no fault of the purchaser, the purchaser is not liable for interest.¹²⁶ In no event, does interest run during the 10 day period after sale within which the deed cannot be delivered.¹²⁷

However the statute¹²⁸ now provides that the sheriff on payment of the balance due must deliver a fully executed deed to the successful bidder within two weeks of the date of the sale. If "a bid is satisfied after the expiration and additional interest is collected from the successful bidder," the sheriff must remit the interest and net amount due to the plaintiff. The language of the statute "after the expiration" apparently refers to the two week period. Thus, it would seem that the statute only authorizes collection of interest from the successful bidder after two weeks not ten days.

The sheriff must make a return to the writ within 30 days of the sale and pay the surplus moneys into court.¹²⁹ The sheriff pays to the plaintiff and to the defendants the amounts directed to be paid to them by the execution, to the extent funds are available from the proceeds of sale, less his fees and commissions, and pays the surplus into court unless an order of the court directs payment of the surplus.

§ 6.21 Enforcement of Bidder's Obligation

On the refusal of the purchaser to comply with his bid, and on motion of any interested party in the foreclosure action heard in a summary manner, the purchaser may be compelled to complete his purchase and pay the balance of the purchase price due to the

¹²² *Marine Trust Co. v. David*, 10 N.J. Misc. 1073, 162 A. 188 (Ch. 1932); *Investors & Lenders, Ltd. v. Finnegan*, 249 N.J. Super. 586, 592 A.2d 1244 (Ch. Div. 1991).

¹²³ See *Needle v. Perfection Const. Co.*, 108 N.J. Eq. 312, 314, 154 A. 878, 879 (E. & A. 1931).

¹²⁴ N.J.S.A. 2A:50-64c.

¹²⁵ *Woodhull v. Neafie*, 2 N.J. Eq. 409 (Ch. 1841).

¹²⁶ *Marine Trust Co. v. David*, 10 N.J. Misc. 1073, 162 A. 188 (Ch. 1932); *Little Falls Savings & Loan Association v. Chas. O. Holmberg & Sons*, 165 N.J. Super. 93, 397 A.2d 717 (Ch. Div. 1978).

¹²⁷ R. 4:65-5. *Little Falls Savings & Loan Association v. Chas. O. Holmberg & Sons*, 165 N.J. Super. 93, 397 A.2d 717 (Ch. Div. 1978).

¹²⁸ N.J.S.A. 2A:50-64c.

¹²⁹ R. 4:59-1(a).

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selling officer, or deposit the balance in court.¹³⁰

The usual practice, when the conditions of sale so provide, is for the court, on motion and notice to the defaulting purchaser, to order a resale, in which case the purchaser, if so provided in the conditions, will be charged with liability for the difference between the price obtained at the first sale and the price obtained at the second sale after all costs of the resale are deducted, and the defaulting purchaser's deposit will be applied against this difference.

Should the high bidder at a Sheriff's sale default in paying the balance due, the Sheriff must readvertise the sale.¹³¹ It is advisable to obtain a court order on notice to the first purchaser before reselling.

§ 6.22 Relief of the Bidder

By statute¹³² any purchaser at any public sale conducted by a sheriff or other selling officer, except a sale under a general execution writ or a sale for taxes or other municipal liens, may now be relieved of its bid if, before the delivery of the deed, he can satisfy the court that there is *any lien or encumbrance on the title or any substantial defect in or cloud upon the title that will render the title unmarketable*.

If, however, the notice of sale describes the defects in title, or the existence of encumbrances or liens thereon and the approximate amount of such encumbrances and liens, or if the court directs the payment of encumbrances or liens not described out of the proceeds of the sale, the bidder will not be relieved of his bid by reason of such encumbrances or liens.¹³³

The inclusion of title defects in the advertisement of sale prevents the bidder from obtaining relief on account of such defects.¹³⁴

A successful bidder cannot be relieved of his bid because of a defect in title or any encumbrance or lien on premises sold if the purchaser had full knowledge thereof at the time the purchaser made the bid.¹³⁵ Knowledge of taxes due is a bar to relief on the ground

¹³⁰ *Silver v. Campbell*, 25 N.J. Eq. 465, 466 (Ch. 1875); *Boorum v. Tucker*, 51 N.J. Eq. 135, 26 A. 456 (Ch. 1893), *aff'd o. b. sub nom. Hartshorne v. Boorum*, 52 N.J. Eq. 587, 33 A. 50 (E. & A. 1894); *McCarter v. Finch*, 55 N.J. Eq. 245, 36 A. 937 (Ch. 1897); *Umbach v. Umbach*, 82 N.J. Eq. 427, 89 A. 514 (Ch. 1914) (on counter motion to be relieved of bid); *Murphy v. Skelly*, 100 N.J. Eq. 193, 135 A. 351 (Ch. 1926), *aff'd* 101 N.J. Eq. 793, 138 A. 882 (E. & A. 1927)(same); *Froehlich v. Walden*, 66 N.J. Super. 390, 169 A.2d 204 (Ch. Div. 1961).

¹³¹ *Investors & Lenders, Ltd. v. Finnegan*, 249 N.J. Super. 586, 592, 592 A.2d 1244, 1248 (Ch. Div. 1991).

¹³² N.J.S.A. 2A:61-16.

¹³³ *Craig v. Smith*, 84 N.J. Eq. 593, 596, 95 A. 194, 196 (Ch. 1915); *Collins v. Kiederling*, 87 N.J. Eq. 12, 15, 97 A. 948, 950 (Ch. 1916).

¹³⁴ *Armstrong v. Fisher*, 73 N.J. Eq. 228, 66 A. 1071 (Ch. 1907).

¹³⁵ *Oakley v. Shaw*, 69 A. 462 (N.J. Ch. 1908); *Fuchs v. Syndicate Realty Co.*, 107 N.J. Eq. 506, 153 A. 584 (E. & A. 1931) (knowledge of taxes due is a bar to relief on the ground that the premises are subject to taxes). *Murphy v. Skelly*, 101 N.J. Eq. 793, 138 A. 882 (E. & A. 1927); *Gerlach v. Ball*, 102 N.J. Eq. 85, 140 A. 235

that the premises are subject to taxes.¹³⁶

A purchaser at the foreclosure sale cannot obtain an apportionment of the current year's taxes vendor and purchaser statute, *N.J.S.A.* 54:4–56.¹³⁷

Where the sale is announced “subject to such facts as an accurate survey will disclose” purchaser must take title even though the mortgaged premises encroach on an adjoining property.¹³⁸

The New Jersey Supreme Court has ruled¹³⁹ that a real property tax lien constitutes a “lien or encumbrance” within the meaning of the statute for which a purchaser may be relieved of its bid.¹⁴⁰

A tenant is not a cloud on title under *N.J.S.A.* 2A:61-16. “The presence of a tenant ... does not affect ... ownership or title to the property.”¹⁴¹

As to title “defects and clouds,” if the purchaser had no knowledge of the defects and the defects were not advertised, the purchaser must satisfy the court that there is a *substantial defect* in title in order to be relieved of its bid.

Once the deed is delivered to the purchaser he cannot thereafter obtain any relief under the statute against the mortgagee.¹⁴²

The court has the power in a proper case to release a purchaser from his bid and order a resale for reasons other than defects in title.¹⁴³

§ 6.23 Report of Sale

In all foreclosure actions the sheriff or other officer directed to sell mortgaged premises must report the sale thereof to the court.¹⁴⁴

No time limit is now fixed but the sheriff should file the report as soon as

(E. & A. 1928) (notice that property was condemned).

¹³⁶ *Fuchs v. Syndicate Realty Co.*, 107 N.J. Eq. 506, 153 A. 584 (E. & A. 1931).

¹³⁷ *Title Guarantee & Trust Co. v. Goeller*, 93 N.J. Eq. 612, 117 A. 831 (E. & A. 1922).

¹³⁸ *Lane v. Chantilly Corp.*, 251 N.Y. 435, 167 N.E. 578, 68 A.L.R. 653 (1929).

¹³⁹ *Summit Bank v. Thiel*, 162 N.J. 51, 740 A.2d 139 (1999).

¹⁴⁰ *N.J.S.A.* 2A:61-16.

¹⁴¹ 30A NJPRAC § 35.11, citing *PHH Mortg. Corp. v. Alleyne*, 2016 WL 3502420, *2 (N.J. Super. Ct. App. Div. 2016)

¹⁴² *Ruskin v. Monticello Building & Loan Ass'n*, 106 N.J.L. 286, 150 A. 214 (Sup. Ct. 1930); *North Jersey Holding Co. v. Snow*, 129 N.J. Eq. 555, 560, 19 A.2d 878, 881 (E. & A. 1941); *Smith v. Boyd*, 272 N.J. Super. 186, 639 A.2d 413 (Law Div., Essex Cty. 1993)

¹⁴³ *Hayes v. Stiger*, 29 N.J. Eq. 196 (Ch. 1878). See also Note, 63 A.L.R. 974 (1929); C.J.S. Judicial Sales § 48 a; C.J.S. Mortgages § 738 d.

¹⁴⁴ *R.* 4:65–6(a). *N.J.S.A.* 2A:50–19.

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practicable. The report verified by affidavit should state the name of the purchaser and the price and terms of sale.¹⁴⁵

In case of a private sale, the report shall have annexed to it the affidavits of at least 2 persons, stating the fair market value of the property sold.¹⁴⁶

§ 6.24 Objections to Sale; Confirmation

Court confirmation of a foreclosure sale is not required today unless the selling officer is a person other than the sheriff¹⁴⁷ or an objection to sale has been raised.¹⁴⁸

R. 4:65-5 provides that a sheriff who is authorized or ordered to sell real estate shall deliver a good and sufficient conveyance in pursuance of the sale unless a motion for the hearing of an objection to the sale is served within 10 days after the sale or at any time thereafter before the delivery of the conveyance. Notice of the motion shall be given to all persons in interest, and the motion shall be made returnable not later than 20 days after the sale, unless the court otherwise orders. On the motion, the court may summarily dispose of the objection; and if it approves the sale and is satisfied that the real estate was sold at its highest and best price at the time of the sale, it may confirm the sale as valid and effectual and direct the sheriff to deliver a conveyance as aforesaid.¹⁴⁹

The rule does not require that the notice of motion for the hearing of an objection be “filed” within the 10 day period but that it be “served.” Service is made in accordance with R. 1:5-2.

Under present practice, the sale is confirmed *automatically* by the passage of 10 days without an objection filed, or, if an objection is filed, when the court confirms the sale by order.¹⁵⁰

It is clear that the mortgagor may raise an objection to the foreclosure sale.¹⁵¹

In *Union County Savings Bank v. Johnson*,¹⁵² however, the Chancery Division held that the filing of Chapter 13 bankruptcy petition two weeks after the foreclosure sale, but prior to delivery of the deed to the foreclosure sale purchaser, did not constitute an “objection” to the foreclosure sale, and thus the resulting deed was valid.

Apart from raising an objection to sale, the original debtor- mortgagor has an

¹⁴⁵ *Ibid.* No further details of the sale are required. *Tulane v. Dean*, 4 N.J.L.J. 23 (Ch. 1880).

¹⁴⁶ R. 4:65-6(c). See *N.J.S.A.* 2A:50-31.

¹⁴⁷ R. 4:64-6(b).

¹⁴⁸ R. 4:65-5.

¹⁴⁹ R. 4:65-5. *N.J.S.A.* 2A:50-19.

¹⁵⁰ *Id.*

¹⁵¹ *McCloskey v. M.P.J. Co.*, 85 N.J. Super. 573, 575, 205 A.2d 469, 470 (Law Div. 1964).

¹⁵² 210 N.J. Super. 589, 510 A.2d 288 (Ch. Div. 1986).

absolute right to redeem within the 10 day period after sale,¹⁵³ which right may be freely assigned.¹⁵⁴ Of course, on redemption, the successful bidder's rights under the sale will end.

Confirmation Required—Selling Officer Other than Sheriff; R. 4:65-6

Any person making the sale, other than a sheriff, shall apply for the court's confirmation of the sale on (a) *10 days' notice*, given personally or by ordinary mail to all persons in interest *who reside in the State* and (b) *20 days' notice* similarly given to all persons in interest *who reside outside this State*; but the court may by order dispense with notice or make any other provision with respect thereto.¹⁵⁵

If a private sale is submitted to the court for confirmation, the court may approve a better offer received after the tentative contract of sale.¹⁵⁶

Proofs Required for Confirmation

The normal proofs for confirmation of the sale are (a) a report of sale by the selling officer;¹⁵⁷ (b) proof of publication and posting;¹⁵⁸ (c) proof of service of the notice of motion for confirmation, unless notice has dispensed with by the court;¹⁵⁹ and (d) form of order confirming sale and directing delivery of the deed.¹⁶⁰

§ 6.25 Deed to Purchaser

The sheriff (or other officer) directed to sell the mortgaged premises must execute a deed in accordance with law.¹⁶¹ By law, the sheriff (or other selling officer) cannot deliver a deed in a mortgage foreclosure action until at least 10 days (calendar days) have elapsed since the date of sale.¹⁶²

Upon receipt of the deed, the purchaser should record it promptly.¹⁶³

¹⁵³ *Hardyston Nat. Bank v. Tartamella*, 56 N.J. 508, 267 A.2d 495 (1970).

¹⁵⁴ *Lobsenz v. Micucci Holdings, Inc.*, 127 N.J. Super. 50, 316 A.2d 59 (App. Div. 1974).

¹⁵⁵ 4:64-6(b).

¹⁵⁶ R. 4:65-6(c).

¹⁵⁷ R. 4:65-6(a).

¹⁵⁸ R. 2A:50-61.1. The notice of sale must be posted (a) in the sheriff's office and (b) at the property to be sold.

¹⁵⁹ R. 4:64-6(b).

¹⁶⁰ R. 4:64-6(c).

¹⁶¹ N.J.S.A. 2A:50-19, 2A:50-37.

¹⁶² *Hardyston Nat. Bank v. Tartamella*, 56 N.J. 508, 267 A.2d 495 (1970).

¹⁶³ See *Kappes v. Rutherford Park Ass'n*, 60 N.J. Eq. 129, 46 A. 218 (Ch. 1900) (failure of foreclosure purchaser to record deed or make claim for a long period of time barred his claim against a subsequent bona fide purchaser without notice.)

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Should the deed fail to describe the premises correctly because of a clerical error in the advertisement, though they were described correctly in the mortgage and execution, the court can order the deed corrected.¹⁶⁴ If the deed is lost before recording, the court can order execution and delivery by the selling officer of a confirmatory deed.¹⁶⁵

The deed must recite the execution by virtue of which the lands were sold.¹⁶⁶ Endorsed on the deed or added to it there is an affidavit executed by the selling officer and sworn to before an attorney at law of New Jersey or a judge of the Superior Court, who must add a statement that he examined the deed and approves it and orders it recorded as a good and sufficient deed for the lands described therein.¹⁶⁷ The recitals in the deed of the selling officer are evidence of the truth thereof.¹⁶⁸ When executed, the deed relates back to the time of the sale.¹⁶⁹

Form of the Deed

The Fair Foreclosure Act¹⁷⁰ now controls the form of the deed where the mortgage foreclosure sale is held by the sheriff.

Realty Transfer Fee; Statement of Prior Liens

The sheriff must attach the applicant's statement of prior liens¹⁷¹ to the deed. The realty transfer fee shall be computed upon the amount bid for the property plus the remaining amount of any superior mortgages, liens or encumbrances constituting "consideration" under *N.J.S.A.* 46:15-5(c). "The amount of liens for real property taxes, water or sewerage charges for the current or any subsequent year" are expressly excluded from the definition of "consideration" under the statute.

Although by law the "grantor" is responsible for payment of the New Jersey Realty Transfer Fee,¹⁷² a sheriff is not a grantor within the meaning of the statute and the foreclosure sale purchaser must pay the fee.¹⁷³

¹⁶⁴ *Manning v. Home Bldg. & Supply Co.*, 98 N.J. Eq. 722, 2 N.J. Misc. 623, 130 A. 724 (Ch. 1925), mod. and aff'd 98 N.J. Eq. 726, 130 A. 726 (E. & A. 1925).

¹⁶⁵ *N.J.S.A.* 2A:61-14,15.

¹⁶⁶ *N.J.S.A.* 2A:17-40.

¹⁶⁷ *N.J.S.A.* 2A:61-9.

¹⁶⁸ *New York & G. L. R. Co. v. State*, 50 N.J.L. 303, 13 A. 1 (Sup. Ct. 1888), aff'd o. b. 53 N.J.L. 244, 23 A. 168 (E. & A. 1890); *Ayers v. Casey*, 72 N.J.L. 223, 61 A. 452 (E. & A. 1905).

¹⁶⁹ *Wimpfheimer v. Prudential Ins. Co.*, 56 N.J. Eq. 585, 39 A. 916 (Ch. 1898); *Cropper v. Brown*, 76 N.J. Eq. 406, 74 A. 987, 139 Am.St.Rep. 770 (Ch. 1909); *Penn Federal Sav. & Loan Ass'n v. Joyce*, 75 N.J. Super. 275, 183 A.2d 114 (App. Div. 1962).

¹⁷⁰ *N.J.S.A.* 2A:50-64(a)(6).

¹⁷¹ *N.J.S.A.* 46:15-6.1.

¹⁷² *N.J.S.A.* 46:15-7.

¹⁷³ *Porreca v. LaFerriere*, 225 N.J. Super. 590, 543 A.2d 102, (A.D.1988).

Preparation of the Deed—by Attorney

N.J.S.A. 2A:50-64(a)(6), amended July 28, 2019, now requires that the plaintiff's attorney shall prepare the deed.

Time for Delivery; Method of Payment

By statute, the sheriff's office must, within two weeks of the date of the sale, deliver a fully executed deed to the successful bidder at the sale provided that the bidder pays the balance of the monies due to the Sheriff by either cash or certified or cashier's check.¹⁷⁴

As noted above, the sheriff (or other selling officer) cannot deliver a deed in a mortgage foreclosure action until at least 10 days (calendar days) have elapsed since the date of sale.

Additional Interest; Net Proceeds to Plaintiff

In the event a bid is satisfied after the expiration and additional interest is collected from the successful bidder, the sheriff shall remit to the plaintiff the total amount, less any fees, costs and commissions due the sheriff, along with the additional interest.¹⁷⁵ The language of the statute—"less any fees, costs and commissions due the sheriff"—appears to prohibit the practice engaged in by some sheriffs of making sales "subject to" sheriff's fees; that is, collecting sheriff's fees from the successful bidder in addition to the bid price. The statute also makes it clear that additional interest collected by the sheriff (presumably after expiration of the two week period) must be remitted to plaintiff and not kept by the sheriff.

Of course, the sheriff can only remit to the plaintiff sums owed the plaintiff. Any surplus must be sent to the Superior Court in accordance with the terms of the writ of execution and statute.¹⁷⁶

§ 6.26 Vacating or Setting the Sale Aside

As previously noted,¹⁷⁷ a motion for the hearing of an objection to sale, pursuant to *R. 4:65-5*, may be served on all interested persons within 10 days after the sale or before delivery of the sheriff's deed, and is returnable not later than 20 days after the sale unless the court otherwise orders. A complete discussion of this subject is beyond the scope of this seminar book.¹⁷⁸

In a proper case the court may set aside a foreclosure sale after a deed has been

¹⁷⁴ *N.J.S.A. 2A:50-64c*.

¹⁷⁵ *N.J.S.A. 2A:50-64c*.

¹⁷⁶ *N.J.S.A. 2A:50-37*.

¹⁷⁷ See supra—"Objection to Sale".

¹⁷⁸ See generally, 30A N.J. Prac. (Weinstein, Law of Mortgages) Sec. 35.17 (2d ed. 2000).

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delivered where no confirmation is required,¹⁷⁹ or before confirmation,¹⁸⁰ or even after confirmation of sale.¹⁸¹ Where the sale is set aside, the title of the purchaser is destroyed along with the title of his grantees.¹⁸²

After the sheriff has delivered the deed or after confirmation of sale, a motion may be made to vacate any confirmation and the sale.¹⁸³ The court on motion of the owner or other party interested may order the parties in interest to show cause why the sale should not be set aside.¹⁸⁴ The burden of proof is upon the objector to show why the sale should be set aside,¹⁸⁵ and the court will hear the matter summarily on the affidavits submitted.¹⁸⁶ It has been held that an order setting aside a sale is a final judgment for the purposes of an appeal.¹⁸⁷

A person seeking to set aside a sale must apply promptly, for if he is guilty of laches no relief will be granted to him.¹⁸⁸ Relief may also be denied where the applicant was guilty of culpable negligence.¹⁸⁹ And a party may be estopped to object to the sale.¹⁹⁰

Although not yet decided in New Jersey, if the Fair Foreclosure Act applies, a foreclosure sale may be set aside for failure by the mortgagee to either send or prove that it sent a notice of intention to foreclose to the debtor prior to the filing of the complaint.¹⁹¹

¹⁷⁹ *Campbell v. Gardner*, 11 N.J. Eq. 423, 69 Am.Dec. 598 (Ch. 1857); *Cawley v. Leonard*, 28 N.J. Eq. 467 (E. & A. 1877); *Woodward v. Bullock*, 27 N.J. Eq. 507 (E. & A. 1875); *Mutual Life Ins. Co. of N. Y. v. Goddard*, 33 N.J. Eq. 482 (Ch. 1881); *Crane v. Bielski*, 15 N.J. 342, 346, 104 A.2d 651, 653 (1954).

¹⁸⁰ *New Jersey Nat. Bank & Trust Co. v. Savemore Realty Co.*, 107 N.J. Eq. 478, 153 A. 480 (E. & A. 1931); *Karel v. Davis*, 122 N.J. Eq. 526, 194 A. 545 (E. & A. 1937). See R. 4:65-5, R. 4:65-6(c) (1969).

¹⁸¹ *Pyle v. Danczewski*, 3 N.J. Misc. 1235, 130 A. 452 (Ch. 1925); *Fruzynski v. Jablonski*, 117 N.J. Eq. 117, 122, 175 A. 112, 114 (E. & A. 1934).

¹⁸² 2 Wiltsie, Foreclosure § 771.

¹⁸³ *Campbell v. Gardner*, 11 N.J. Eq. 423, 69 Am.Dec. 598 (Ch. 1857); *Cawley v. Leonard*, 28 N.J. Eq. 467 (E. & A. 1877); *Woodward v. Bullock*, 27 N.J. Eq. 507 (E. & A. 1875); *Mutual Life Ins. Co. of N. Y. v. Goddard*, 33 N.J. Eq. 482 (Ch. 1881); *Crane v. Bielski*, 15 N.J. 342, 346, 104 A.2d 651, 653 (1954).

¹⁸⁴ *Mutual Life Ins. Co. of N. Y. v. Goddard*, 33 N.J. Eq. 482 (Ch. 1881) (petition to set aside the sale may be used); *First Nat. Bank of Millburn v. Cahill*, 10 N.J. Misc. 693, 160 A. 649 (Ch. 1932).

¹⁸⁵ See *Knickerbocker Trust Co. v. Carteret Steel Co.*, 81 N.J. Eq. 130, 86 A. 55 (Ch. 1912), aff'd sub. nom. *Kline v. Knickerbocker Trust Co.*, 81 N.J. Eq. 518, 87 A. 1118 (E. & A. 1913).

¹⁸⁶ *Crane v. Bielski*, 15 N.J. 342, 104 A.2d 651, (1954).

¹⁸⁷ *Chamberlain v. Larned*, 32 N.J. Eq. 295, 300 (E. & A. 1880); *Crane v. Bielski*, 15 N.J. 342, 104 A.2d 651 (1954).

¹⁸⁸ *Vanduyne v. Vanduyne*, 16 N.J. Eq. 93 (Ch. 1863). See also *Kaplan v. Sleep E Hollow Motel Co.*, 112 N.J. Super. 296, 271 A.2d 12 (App. Div. 1970).

¹⁸⁹ *Parkhurst v. Cory*, 11 N.J. Eq. 233 (Ch. 1856); *Hayes v. Stiger*, 29 N.J. Eq. 196, 197 (Ch. 1878); *Murray v. D'Orsi*, 98 N.J. Eq. 548, 131 A. 122 (Ch. 1925).

¹⁹⁰ *Johns v. Norris*, 27 N.J. Eq. 485 (E. & A. 1875); *State Mut. Building & Loan Ass'n v. O'Callaghan*, 67 N.J. Eq. 103, 57 A. 496 (Ch. 1904) (owner who attended sale failed to give notice of his claim).

¹⁹¹ In *Marra v. Stocker*, 532 Pa. 187, 615 A.2d 326 (1992), the Pennsylvania Supreme Court set aside a foreclosure sale because a notice of intention to foreclose under Act 6 was not given to the owners prior to the filing of the foreclosure complaint. And in *Sharp v. Fidelity Bond and Mortgage Co. (In re Sharp)*, 24

Fraud, surprise, accident, irregularities in the sale and the like are generally grounds for annulling the foreclosure sale.¹⁹²

Plaintiff's failure to serve notice of the sale on a defendant who has appeared or served a pleading is a ground for invalidating the sale.¹⁹³ A foreclosure sale may be annulled where the owner did not understand the nature of the foreclosure proceedings and was unaware that the premises were to be sold.¹⁹⁴

Ordinarily, inadequacy of the bid price is not alone a sufficient cause to move the court to annul a foreclosure sale.¹⁹⁵ However, if the inadequacy of price is so gross as to "shock the conscience" of the court or justifies an inference of fraud the court may vacate the sale.¹⁹⁶ Gross inadequacy of the sale price, coupled with other circumstances appealing to a court of equity such as fraud, accident, surprise, mistake, or any irregularity in the sale, may, however, justify setting aside the foreclosure sale.¹⁹⁷

§ 6.27 Resale after Sale is Vacated or Set Aside

Whenever the court refuses the confirmation of a foreclosure sale, or vacates the confirmation, or sets aside the foreclosure sale, it will generally order a resale.¹⁹⁸ The resale should be readvertised,¹⁹⁹ notice should be posted,²⁰⁰ and notice given to any defendant who has appeared or served a pleading and to the owner of record at the start of the action, as in the case of the former sale.²⁰¹

A mortgage foreclosure resale may, of course, be set aside.²⁰²

B.R. 817 (Bankr.E.D. Pa. 1982), the Bankruptcy Court set aside a Pennsylvania sheriff's sale for failure by the mortgagee to prove that it complied with Act 6's notice requirements.

¹⁹² *Karel v. Davis*, 122 N.J. Eq. 526, 194 A. 545 (E. & A. 1937); *Crane v. Bielski*, 15 N.J. 342, 346, 104 A.2d 651, 653 (1954); *Orange Land Co. v. Bender*, 96 N.J. Super. 158, 232 A.2d 679 (App. Div. 1967).

See generally, 30A N.J. Prac. (Weinstein, Law of Mortgages) Sec. 35.17 (2d ed. 2000).

¹⁹³ See *Orange Land Co. v. Bender*, 96 N.J. Super. 158, 232 A.2d 679 (App. Div. 1967).

¹⁹⁴ *Schilling v. Lintner*, 43 N.J. Eq. 444, 11 A. 153 (Ch. 1887) (applicant aged and not familiar with the English language, and able to pay off mortgage).

¹⁹⁵ See generally, 30A N.J. Prac. (Weinstein, Law of Mortgages) Sec. 35.17 (2d ed. 2000).

¹⁹⁶ See generally, 30A N.J. Prac. (Weinstein, Law of Mortgages) Sec. 35.17 (2d ed. 2000).

¹⁹⁷ See generally, 30A N.J. Prac. (Weinstein, Law of Mortgages) Sec. 35.17 (2d ed. 2000).

¹⁹⁸ See *Karel v. Davis*, 122 N.J. Eq. 526, 194 A. 545 (E. & A. 1937). See also C.J.S. Judicial Sales § 70; C.J.S. Mortgages § 753.

If the sale is vacated to permit redemption, no resale will be necessary. *Crane v. Bielski*, 15 N.J. 342, 104 A.2d 651 (1954).

¹⁹⁹ *Chamberlain v. Larned*, 32 N.J. Eq. 295, 302 (E. & A. 1880).

²⁰⁰ R. 4:65-2 (1969).

²⁰¹ R. 4:65-2 (1969).

²⁰² *New Jersey Title Guaranty & Trust Co. v. Croydon Holding Corp.*, 138 N.J. Eq. 459, 46 A.2d 564 (Ch.

FORECLOSURE SALE; SHERIFF'S PRACTICE

It is common practice today for plaintiff's attorney to hold a resale without a court order, especially where the first sale was void because in violation of a bankruptcy stay. This, however, is incorrect practice and should be avoided both by plaintiff's attorney and the sheriff.

Where a vacation of the sale is sought after a deed has been delivered to the purchaser, the court will require as a condition precedent that the objector restore the purchaser to the *status quo* existing prior to the sale.²⁰³ The objector will have to reimburse the purchaser for any improvements placed on the land after the foreclosure sale, for taxes paid and interest on such amounts, and for the costs of the first sale and the application for a resale.²⁰⁴

If a sale is sought to be set aside so as to allow the redemption of the premises, the court will order the owner of the equity of redemption to pay the plaintiff's foreclosure judgment, interest and costs of the action,²⁰⁵ and the expenses and counsel fee for the examination of title.²⁰⁶ If the objector fails to comply with the order requiring security or payment within the time fixed by the court, the court will confirm the sale or deny the motion to vacate the sale.²⁰⁷

The terms and conditions of the resale should be the same as for the original sale.²⁰⁸

The usual rules as to report of sale²⁰⁹ and confirmation, if necessary, are applicable to a resale.²¹⁰

As previously noted, where the bidder defaults at the sale itself, e.g., where the bidder fails to pay the required deposit, the sheriff by statute must immediately hold a resale.²¹¹

1946).

²⁰³ *Fruzyński v. Jablonski*, 117 N.J. Eq. 117, 175 A. 112 (E. & A. 1934).

²⁰⁴ *Dawson v. Drake*, 29 N.J. Eq. 383 (Ch. 1878), *aff'd* o. b. 30 N.J. Eq. 733 (E. & A. 1879); *Cf. Bluestone Building & Loan Ass'n v. Glasser*, 117 N.J. Eq. 392, 176 A. 314 (Ch. 1934).

²⁰⁵ *Campbell v. Gardner*, 11 N.J. Eq. 423, 69 Am.Dec. 598 (Ch. 1857). If a third person has purchased, purchaser is entitled to interest on deposit. *Hardyston Nat. Bank v. Tartamella*, 56 N.J. 508, footnote at 513, 267 A.2d 495 (1970).

²⁰⁶ *Crane v. Bielski*, 15 N.J. 342, 104 A.2d 651 (1954).

²⁰⁷ *Dunlop v. Chenoweth*, 90 N.J. Eq. 85, 105 A. 592 (Ch. 1918), *aff'd* o. b. 90 N.J. Eq. 601, 106 A. 890 (E. & A. 1919).

²⁰⁸ *Shinn v. Roberts*, 20 N.J.L. 435, 441, 43 Am.Dec. 636, 638 (Sup. Ct. 1845).

²⁰⁹ R. 4:65–6(a) (1969).

²¹⁰ R. 4:65–6(b), (c) (1969).

²¹¹ N.J.S.A. 2A:50-64a(4).

CHAPTER 7

POST-SALE REDEMPTION

§ 7.01 Redemption Within The 10-Day Period After Sale ¹

The mortgagor has an absolute right to redeem within the 10 day period after sale fixed by *R. 4:65–5* for the serving of a motion for the hearing of an objection to the sale. This is not a statutory right. It is a court created right pursuant to the New Jersey Supreme Court decision in *Hardyston Nat. Bank of Hamburg v. Tartamella*.²

Only the “original debtor-mortgagor”³ may exercise the post-sale right to redeem,” or “voluntary post sale transferee of the mortgagor” permitted by *Lobsenz v. Micucci Holdings, Inc.*⁴

Of course, if the optional procedure without sale is used, redemption terminates on entry of the judgment; hence, there is no sale and no right to redeem after sale.

The 10 day period is a calendar day period counted in accordance with *R. 1:3-1*—the “first day out, last day in” rule. The day of the sale is excluded from the count. Pursuant to *R. 1:3-1*, Saturdays, Sundays and legal holidays are included in the count, unless the last day falls on a Saturday, Sunday or legal holiday in which case the 10 day period runs to the next day which is not a Saturday, Sunday or legal holiday.

Rule 4:65-5 permits the serving of the motion up until “delivery of the conveyance.” However, the Court in *Hardyston* said: “we believe the just course is to permit the mortgagor to redeem within the ten-day period fixed by *R. 4:65-5* for objections to the sale and until an order confirming the sale if objections are filed under the rule.” The cases, are all over the board, however, on when the post-sale redemption period expires. These cases are summarized in the section below, with the latest Chancery decision⁵ proclaiming that the post-sale redemption right continues up until “delivery” of the sheriff’s deed.

Redemption should not be made to the sheriff after the sale. However, if the full judgment amount, interest, taxed costs and sheriff’s fees are tendered to the sheriff after sale and accepted by the sheriff, redemption in this instance would not be erroneous.

However, the latest Chancery Division ruling on the subject provides that depositing sufficient funds with the clerk of the court is not the exclusive method for the mortgagor to redeem the property following a mortgage foreclosure sale, although it is the preferred method; and the mortgagor could redeem the property by unqualifiedly

¹ Information in this section taken substantially from 30 N.J. Prac. (Weinstein, Law of Mortgages) § 20.9 (2d ed. 2000).

² 56 N.J. 508, 267 A.2d 495 (1970).

³ *Carteret Sav. and Loan Ass'n, F.A. v. Davis*, 105 N.J. 344, 349, 521 A.2d 831 (1987).

⁴ 127 N.J. Super. 50, 316 A.2d 59 (App. Div. 1974).

⁵ *Mercury Capital Corp. v. Freehold Office Park, Ltd.*, 363 N.J. Super. 235, 832 A.2d 369 (Ch. Div. 2003).

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presenting sufficient funds to the sheriff.⁶

The recommended procedure, then, to be used for a redemption within the 10 day period after sale is to deposit⁷ the full judgment amount, with interest, taxed costs and sheriff's fees with the clerk of the court, and proceed before the vicinage chancery judge,⁸ either by order to show cause with temporary restraints⁹ or motion, on notice to all parties in interest including the mortgagors,¹⁰ for an order permitting redemption after sale, setting aside the sale and declaring it to be null and void, enjoining the sheriff from delivering a deed, authorizing the clerk to pay the redemption sum deposited (if funds have been deposited with the clerk) to plaintiff, less any fees due the clerk and sheriff, and ordering plaintiff to deliver a proper warrant of satisfaction of judgment upon receipt of the funds from the clerk.

In New Jersey, unlike many other states which have a statutory redemption period after sale, the redemptioner redeems from the "mortgage" not the sale, and the price bid at the sale is wholly immaterial in fixing the amount required for redemption. The mortgagors, if payment is made prior to the expiration of the ten day period after sale, are entitled to redeem the mortgaged premises by payment of the amount of the final judgment with interest, costs and sheriff's fees.¹¹

In the last New Jersey Supreme Court pronouncement on the subject, *Carteret Sav. and Loan Ass'n, F.A. v. Davis*,¹² the Court in discussing *Hardyston* stated:

That Court concluded that the debtor should have the further opportunity to redeem the property within the ten days between the sale *and its becoming final*. (Emphasis supplied.)

The sale becomes "final" in New Jersey (a) 10 days after the sale *automatically* or (b) on *confirmation* if, objections to sale are raised, or if confirmation is otherwise required (e.g., sale by person other than the sheriff).

The latest Appellate Division decision¹³ holds that redemption is limited to the 10-day period after sale, unless an objection is filed within the 10 day period, but recognizes that an objection under the rule may also be filed after that time, where valid equitable grounds exists.

⁶ *Mercury Capital Corp. v. Freehold Office Park, Ltd.*, 363 N.J. Super. 235, 832 A.2d 369 (Ch. Div. 2003).

⁷ R. 4:57-1(1969).

⁸ *Heritage Bank v. Magnefax Corp.*, 194 N.J. Super. 376, 476 A.2d 1271 (Ch. Div. 1984).

⁹ R. 4:52-1 and 2(1969).

¹⁰ *Heritage Bank v. Magnefax Corp.*, 194 N.J. Super. 376, 476 A.2d 1271 (Ch. Div. 1984).

¹¹ *Ghee v. Davenport*, 2 N.J. Super. 532, 64 A.2d 902 (Ch. 1949), affirmed in part, 4 N.J. Super. 518, 68 A.2d 284 (App. Div. 1949). See also *Lobsenz v. Micucci Holdings, Inc.*, 127 N.J. Super. 50, 316 A.2d 59 (App. Div. 1974), and *Heritage Bank v. Magnefax Corp.*, 194 N.J. Super. 376, 476 A.2d 1271 (Ch. Div. 1984), citing *Hardyston Nat. Bank of Hamburg v. Tartamella*, 56 N.J. 508, 267 A.2d 495 (1970).

¹² 105 N.J. 344, 349, 521 A.2d 831 (1987).

¹³ *Brookshire Equities v. Montaquiza*, 346 N.J. Super. 310, 315, 787 A.2d 942, 945 (App. Div.), *certif. denied*, 172 N.J. 179, 796 A.2d 895 (2002).

But the latest Chancery Division opinion on the subject holds that the mortgagor's post-sale right of redemption "coincides with the rule-based right to object to a sheriff's sale." Thus, the mortgagor's post-sale right of redemption continues up until delivery of the sheriff's deed, whether or not an objection to sale has been filed.¹⁴

It is recommended that a person filing an objection to sale and seeking to redeem, should (a) deposit¹⁵ the redemption sum with the clerk of the court when the motion for the hearing of an objection is filed and served, or, at the very least, (b) make an unqualified tender of the redemption sum within the 10 day period.

If the selling officer is a person other than the sheriff so that court confirmation¹⁶ is required, it is absolutely clear that redemption is permitted up until entry of an order of confirmation.

If the foreclosure action is brought by the United States as holder of the mortgage (e.g., after assignment of an FHA-insured mortgage to the FHA Commissioner), the case is governed by "federal" law under the *Clearfield Trust* doctrine.¹⁷

Although state redemption rights do not apply to judicial foreclosures in federal courts of mortgages held by federal agencies the court can impose an equitable period of time to redeem from the date of sale.¹⁸

Summary of Post-Sale Redemption Decisions—Vagaries Abound; Proposed Resolution

The various court interpretations of *Hardyston*, spell out virtually every possibility.

The cases interpreting *Hardyston* could not be more disparate. For example, one decision holds that the mortgagors' failure to redeem within the 10-day period precluded them from redeeming thereafter, even though the mortgagors filed an objection within the 10 day period and attempted to redeem prior to confirmation.¹⁹

In another decision, affirmed by the Appellate Division, the court would have permitted the mortgagor to redeem after the 10-day period, where an objection was filed after the period expired, if the mortgagor made an unqualified tender at or prior to the return date of the motion for the hearing of the objection.²⁰

Yet, still other decisions refer to "delivery" of the deed as the cut off date for

¹⁴ *Mercury Capital Corp. v. Freehold Office Park, Ltd.*, 363 N.J. Super. 235, 832 A.2d 369 (Ch. Div. 2003).

¹⁵ R. 4:57-1 (1969).

¹⁶ R. 4:65-6(b)(1969).

¹⁷ See *Clearfield Trust Co. v. United States*, 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 838 (1943); *United States v. Allegheny County*, 322 U.S. 174, 64 S.Ct. 908, 88 L.Ed. 1209 (1944); *United States v. Stadium Apartments, Inc.*, 425 F.2d 358 (9th Cir. 1970), cert. denied 400 U.S. 926, 91 S.Ct. 187, 27 L.Ed.2d 185 (1970). But cf. *United States v. Yazell*, 382 U.S. 341, 86 S.Ct. 500, 15 L.Ed.2d 404 (1966); *United States v. MacKenzie*, 510 F.2d 39 (9th Cir. 1975) (en banc).

¹⁸ *U. S. v. Montgomery*, 268 F.Supp. 787 (D.C. Kan. 1967).

¹⁹ *East Jersey Sav. & Loan Ass'n v. Shatto*, 226 N.J. Super. 473, 544 A.2d 899 (Ch. Div. 1987).

²⁰ *Kaplan v. Sleep E Hollow Motel Co.*, 112 N.J. Super. 296, 271 A.2d 12 (App. Div. 1970).

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redemption.²¹

Another Appellate Division decision parrots *Hardyston* and says that, where an objection to sale is served, redemption may be made until confirmation, but is silent on whether an objection filed after the 10-day period and prior to delivery of the deed will extend redemption.²²

The latest Appellate Division decision²³ on the subject holds that redemption is limited to the 10-day period after sale, unless an objection is filed within the 10 day period, but recognizes that an objection under the rule may also be filed after that time, where valid equitable grounds exists, but is silent as to whether redemption may be extended in such instances.

And the most recent Chancery decision and the most far-reaching, simply holds that redemption may be made *until delivery of the deed* and that the mortgagor need not be “put to the task of objecting to the sale's results.”²⁴

What is more, post-sale redemption is greatly exacerbated by the fact that sheriffs’ deeds today are routinely delayed, sometimes for months, due to intervening bankruptcies and because of the great volume of deeds which sheriffs must issue and prepare.

It is submitted that R. 4:65-5 is long overdue for amendment. As Judge Fisher aptly stated in *Mercury Capital Corp. v. Freehold Office Park, Ltd.*,²⁵ where he steadfastly held that redemption is permitted until delivery of the deed irrespective of whether an objection to sale is filed—“Until the rule is changed, no different conclusion is warranted.”

An amendment to R. 4:65-5 will settle this issue once and for all. R. 4:65-5 should be amended to delete the language--“or at any time thereafter before the delivery of the conveyance”---thereby setting forth a single time period.

It should be realized that the proposed amendment above will not prevent mortgagors from filing post-sale motions objecting to sale after expiration of the 10-day period or even after delivery of the sheriff’s deed.²⁶ It is well established that equity always has inherent authority, independent of rule or statute, to set aside a foreclosure sale and permit redemption where there are independent grounds for equitable relief, such as, fraud,

²¹ *Leisuretowne Ass’n v. McCarthy*, 193 N.J. Super. 494, 502, 475 A.2d 62, 66 (App. Div. 1984); *Union County Sav. Bank v. Johnson*, 210 N.J. Super. 589, 596, 510 A.2d 288, 292 (Ch. Div. 1986); *East Jersey Sav. & Loan Ass’n v. Shatto*, 226 N.J. Super. 473, 480-1, 544 A.2d 899, 902-3 (Ch. Div. 1987). *Sovereign Bank, FSB v. Kuelzow*, 297 N.J. Super. 187, 196, 687 A.2d 1039, 1043 (App. Div. 1997); and *Mercury Capital Corp. v. Freehold Office Park, Ltd.*, 363 N.J. Super. 235, 248, 832 A.2d 369, 377 (Ch. Div. 2003).

²² *CKC Condominium Ass’n, Inc. v. Summit*, 335 N.J. Super. 385, 762 A.2d 674 (App. Div. 2000).

²³ *Brookshire Equities v. Montaquiza*, 346 N.J. Super. 310, 315, 787 A.2d 942, 945 (App. Div.), *certif. denied*, 172 N.J. 179, 796 A.2d 895 (2002).

²⁴ *Mercury Capital Corp. v. Freehold Office Park, Ltd.*, 363 N.J. Super. 235, 248, 832 A.2d 369, 377 (Ch. Div. 2003).

²⁵ *Id.* at 243, 832 A.2d 373.

²⁶ *Orange Land Company v. Bender*, 96 N.J. Super. 158, 164, 232 A.2d 679, 682 (App. Div. 1967).

surprise, accident, irregularity in the sale, or inadequacy of price.²⁷

In short, the mortgagor always has a remedy independent of *R. 4:65-5* and its time constraints; laches will not bar such an application. See *Union County Sav. Bank v. Johnson*.²⁸

The proposed amendment merely prevents a mortgagor who has not redeemed or filed an objection within the 10-day period after sale from redeeming, thereafter, by asserting that redemption is being made within the “time period” permitted by *R. 4:65-5*.

The above proposed rule amendment also accords with the latest Appellate Division interpretation of *Hardyston*, in which the court, where the mortgagor had not filed an objection within the 10-day period, refused to permit the mortgagor to redeem thereafter, but nevertheless recognized that a mortgagor could file an objection after the 10-day period where valid grounds exist, such as fraud, surprise, accident and so forth.²⁹

§ 7.02 Right of the Mortgagor’s Assignee to Redeem After Sale ³⁰

As to person’s other than the mortgagor who are entitled to exercise the post-sale right of redemption in New Jersey, the leading case is *Lobsenz v. Micucci Holdings, Inc.*³¹ In *Lobsenz*, a third person, subsequent to the foreclosure sale, obtained information as to rents and expenses of the premises, and obtained an assignment of the mortgagor's right to redeem contingent upon court approval. The Appellate Division, reversed the Chancery Division and held that the assignee should be allowed to redeem, observing that “[I]t is very much to be doubted that bidding at foreclosure sales would be any more discouraged by allowing a transferee to exercise the right to redeem the property than it is by permitting redemption by the owner-mortgagor—if, in fact, the right of the latter has any effect whatever. We perceive none, and our attention has been directed to none.”

The Appellate Division also observed that the right to redeem within the period fixed by *R. 4:65–5* is “closely comparable to the equity-owner's equity of redemption and much like an extension of it.”

In *Heritage Bank v. Magnefax Corp.*,³² though, the court, on equitable grounds, refused to allow redemption by a post-sale assignee of the mortgagors' right of redemption. The assignee was the high bidder at the foreclosure sale, who had bid \$11,000 more than the amount required to

²⁷ *Crane v. Bielski*, 15 N.J. 342, 104 A.2d 651 (1954).

²⁸ 210 N.J. Super. 589, 598, 510 A.2d 288, 293 (Ch. Div. 1986).

²⁹ *Brookshire Equities v. Montaquiza*, 346 N.J. Super. 310, 315, 787 A.2d 942, 945 (App. Div.), certif. denied, 172 N.J. 179, 796 A.2d 895 (2002).

³⁰ Information in this section taken substantially from 30 N.J. Prac. (Weinstein, Law of Mortgages) § 20.9 (2d ed. 2000).

³¹ 127 N.J. Super. 50, 316 A.2d 59 (App. Div. 1974).

³² 194 N.J. Super. 376, 476 A.2d 1271 (Ch. Div. 1984).

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satisfy the mortgage. It was not proved that the mortgagors knew that they were entitled to the surplus of \$11,000 (there being no junior encumbrancers) and the only consideration for the assignment was "a fruit basket and some future free masonry work."

In *Carteret Sav. and Loan Ass'n, F.A. v. Davis*.³³ In *Davis*, the New Jersey Supreme Court reversed the Appellate Division and held that the holder of a second mortgage who was the high bidder at its own foreclosure sale could not redeem post-sale from the purchaser at a later foreclosure sale held on behalf of the first mortgagee. The court's holding, that only the "original" debtor-mortgagor or voluntary post-sale transferee from the original mortgagor as permitted by *Lobsenz*, can redeem within the 10 day period following sale, was based on policy grounds. The court concluded that extending the post-sale right to redeem beyond mortgagors and those to whom the mortgagor has transferred his redemption right during the post-sale redemption period established by *Hardyston* would probably undermine the stability of foreclosure sales "without any attendant benefit."

In *New Jersey Housing and Mtg. Finance Agency v. Bedminster Hills Housing Corp.*,³⁴ a nonprofit corporate entity ("Bedminster") designated by the court to administer a low-income affordable housing plan, was outbid at the foreclosure sale. Nevertheless Bedminster was permitted to redeem after sale, for the upset price, by utilizing a power of attorney executed by the mortgagors at time of purchase, to assign to Bedminster, the mortgagors' right of redemption.

The Appellate Division in *Bedminster Hills* found that the property was "affected with a public interest," that the equities did not favor a nonincome-qualified sheriff's sale purchaser, that public policy mandated finding in favor of corporation, and that the assignment of the right of redemption was supported by adequate consideration.

Bedminster Hills was decided without reference to the "clogging" doctrine. This doctrine specifies that the equitable right of redemption cannot be waived or released by a stipulation to that effect in the mortgage itself,³⁵ or even by a separate contemporaneous agreement to that effect.³⁶ The Appellate Division itself has said:

For centuries it has been the rule that a mortgagor's equity of redemption cannot be clogged and that he cannot, as a part of the original transaction, cut off or surrender his right to redeem. Any agreement which does so is void and unenforceable as against public policy.³⁷

³³ 105 N.J. 344, 521 A.2d 831 (1987).

³⁴ 285 N.J. Super. 255, 666 A.2d 1018 (App. Div. 1995).

³⁵See, e. g., *Youle v. Richards*, 1 N.J. Eq. 534, 23 Am.Dec. 722 (Ch. 1832) (cannot limit redemption to specific time); *Vanderhaize v. Hugues*, 13 N.J. Eq. 244, 410 (Ch. 1861); *Vliet v. Young*, 34 N.J. Eq. 15 (Ch. 1881); *Dorman v. Fisher*, 31 N.J. 13, 15, 155 A.2d 11, 12 (1959) (dictum).

³⁶See *Griffen v. Cooper*, 73 N.J. Eq. 465, 74 N.J. Eq. 16, 68 A. 1095 (Ch. 1908); *McKlosky v. Kobylarz*, 99 N.J. Eq. 202, 132 A. 497 (Ch. 1926); *Mansfield v. Hammond*, 117 N.J. Eq. 509, 176 A. 354 (E. & A. 1935); *Humble Oil & Refining Co. v. Doerr*, 123 N.J. Super. 503, 303 A.2d at 908 (Ch. Div. 1973). See generally Nelson & Whitman, Real Estate Finance Law § 3.1 (3d ed. 1993).

³⁷ *Humble Oil & Refining Co. v. Doerr*, 123 N.J. Super. 530, 303 A.2d 898, 905 (App. Div. 1973).

Under Section 108(b) of the Bankruptcy Code, if a debtor files for bankruptcy during the 10-day post-sale redemption period, the debtor's right to redeem under state law is extended for 60 days.³⁸ The bankruptcy does not extend or suspend the running of the 10-day redemption period. It merely extends the debtor's state law redemption right for 60 days.

§ 7.03 United States—Redemption After Sale; Danger Lurking³⁹

Pursuant to federal statute,⁴⁰ where a sale of real estate is made to satisfy a lien prior to that of the United States, the United States has one year from the date of the foreclosure sale to redeem, except that with respect to a lien arising under the internal revenue laws (*i.e.*, a federal tax lien), the period is 120 days (or the allowable redemption period under State law whichever is longer)—even where State law does not provide for a statutory redemption period after sale.⁴¹

This statutory right of redemption does not arise where the United States holds a lien acquired by assignment from a mortgagee under an F.H.A. or G.I. mortgage insurance or guaranty program.⁴²

The Federal Deposit Insurance Corporation ("FDIC") in its various capacities has waived⁴³ its rights under 28 *U.S.C.* § 2410(c) in mortgage foreclosure actions and therefore under its present statement of policy will not assert any rights it may have to redeem after the foreclosure sale.

Title to the premises sold in foreclosure will be unmarketable⁴⁴ if the United States has the right to redeem, unless, a certificate of release or discharge is obtained pursuant to the federal statutes.⁴⁵

The New Jersey Supreme Court in *First Nat. Bank & Trust Co. v. MacGarvie*⁴⁶ ruled that this federal right of redemption must be exercised "equitably" by the United States by paying the full amount due on the mortgage debt rather than the amount realized at the foreclosure sale.

However, by virtue of the amendment to the federal statute under the Federal Tax

³⁸ 11 *U.S.C.A.* § 108(b).

³⁹ Information in this section taken from 30 N.J. Prac. (Weinstein, Law of Mortgages) § 20.11 (2d ed. 2000).

⁴⁰ 28 *U.S.C.A.* § 2410(c).

⁴¹ See *U. S. v. John Hancock Mut. Life Ins. Co.*, 364 *U.S.* 301, 81 S.Ct. 1, 5 L.Ed.2d 1, 867 (1960).

⁴² 12 *U.S.C.A.* § 1701k.

⁴³ "Statement of Policy on Foreclosure Consent and Redemption Rights," 57 FR 29491 (July 2, 1992).

⁴⁴ *Equitable Life Assur. Soc. Of U.S. v. Hochstein*, 256 N.Y.S.2d 993, 45 Misc.2d 450 (Co. Ct. 1964).

⁴⁵ 28 *U.S.C.A.* § 2410(e) and 26 *U.S.C.A.* § 6325.

⁴⁶ 22 *N.J.* 539, 542, 126 A.2d 880, 885 (1956).

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Lien Act of 1966 and the adoption of subsection (d) of § 2410, the *MacGarvie* holding can no longer be relied upon.⁴⁷

Subsection 2410(d) provides:

(d) In any case in which the United States redeems real property under this section . . . , the amount to be paid for such property shall be the sum of—

(1) the actual amount paid by the purchaser at such sale (which, in the case of a purchaser who is the holder of the lien being foreclosed, shall include the amount of the obligation secured by such lien to the extent satisfied by reason of such sale),

(2) interest on the amount paid (as determined under paragraph (1) at 6 percent per annum from the date of such sale, and

(3) the amount (if any) equal to the excess of (A) the expenses necessarily incurred in connection with such property, over (B) the income from such property plus (to the extent such property is used by the purchaser) a reasonable rental value of such property. (Emphasis supplied.)

In New Jersey, the secured obligation is satisfied only to the extent of the price paid at the foreclosure sale.⁴⁸

The purpose of the federal statute is to encourage the lienholder to bid at least a fair price on the property being foreclosed. Any profit made by the United States on resale reduces the taxpayers liability and is therefore, in part, a tax collection measure.⁴⁹

Subsection 2410(d) has consistently been interpreted by federal courts⁵⁰ to mean what it says. The generally accepted interpretation of section 2410(d) is set forth in *Equity Mortgage Corp. v. Loftus*,⁵¹ in which the Fourth Circuit stated:

Where the purchaser at the sale is the person whose lien is being foreclosed, the amount paid by him includes the amount of the debt underlying his lien to the extent that the lien is satisfied by the sale. Where the lien is fully satisfied, the purchaser is not to receive less than the amount due him at the time of the sale. Where the lien attaches to other property, however, or where, after the sale, the purchaser still has the right to sue for

⁴⁷ See *Equity Mortgage Corp. v. Loftus*, 504 F.2d 1071 (4th Cir. 1974); *Accord Mikulec v. United States*, 705 F.2d 599, 601 (2d Cir. 1983); *Delta Savings & Loan Ass'n v. Internal Revenue Service*, 847 F.2d 248 (5th Cir. 1988) (amount mortgagee paid at foreclosure sale, rather than entire amount of underlying debt, was the amount IRS was required to pay to redeem property); *Vardanega v. Internal Revenue Service*, 170 F.3d 1184, 1186 (9th Cir. 1999), *cert. denied Vardanega v. U.S.*, 528 U.S. 872, 120 S.Ct. 174, 145 L.Ed.2d 147, (1999) (redemption complete by tender of a check to the purchaser for the purchase price).

⁴⁸ 79-83 *Thirteenth Ave., Limited v. DeMarco*, 44 N.J. 525, 532-33, 210 A.2d 401, 405 (N.J. 1965).

⁴⁹ *Delta Savings & Loan Ass'n v. Internal Revenue Service*, 847 F.2d 248, 251 (5th Cir. 1988).

⁵⁰ 504 F.2d 1071, 1074 (4th Cir. 1974). See also *Accord Mikulec v. United States*, 705 F.2d 599, 601 (2d Cir. 1983); *Delta Savings & Loan Ass'n v. Internal Revenue Service*, 847 F.2d 248, 250 (5th Cir. 1988); *Vardanega v. Internal Revenue Service*, 170 F.3d 1184, 1186 (9th Cir. 1999).

⁵¹ 504 F.2d 1071, 1074 (4th Cir. 1974).

the unpaid balance of the amount due him, the amount paid does not include this unpaid balance.” (quoting S.Rep. No. 1708, 89th Cong., 2d Sess. 34, reprinted in 1966 U.S. Code Cong. & Admin. News 3722, 3756).

26 C.F.R. § 301.7425-4(b)(2)(ii) provides:

Where after sale, the holder of the lien being foreclosed has the right to the unpaid balance of the amount due him, the amount legally satisfied by reason of the sale does not include the amount of such lien to the extent *a deficiency judgment may be obtained therefore*. (Emphasis supplied.)

In *Black v. U.S.*,⁵² the court said:

The amount to be paid by the United States when it redeems such property is governed by 28 U.S.C. § 2410(d). In detailing the requirements of § 2410(d), 26 C.F.R. 400.5-1(c)(2)(1987) makes it clear that this amount will vary from state to state depending on state law regarding, *inter alia*, the availability of deficiency judgments following foreclosure. The examples provided in § 400.5-1(c)(2) indicate that in a state where a mortgage obligation is fully satisfied as a result of a foreclosure sale and the mortgagee cannot obtain a deficiency judgment, the United States must pay the full amount of the mortgage obligation to redeem, regardless of the amount paid at the foreclosure sale. (Example 1). On the other hand, Example (2) indicates that in a state where, upon foreclosure, a mortgage obligation is legally satisfied to the extent of the fair market value of the property foreclosed, the United States must pay the fair market value of the property regardless of the foreclosure sale price or the total amount of the mortgage obligation. Finally, Example (3) indicates that in a state where a mortgagee has the right to sue for a full deficiency judgment for any amounts owed above the foreclosure sale price, the United States need only pay the foreclosure sale price in order to redeem.

In *Delta Savings & Loan Ass’n v. Internal Revenue Service*,⁵³ the court rejected Delta’s claim that it could not pursue a deficiency action against the mortgagors because the automatic bankruptcy stay prevented institution of a personal action against them. The court noted that relief from the stay could be obtained and even if such relief had been denied or section 362(d) did not permit the stay to be lifted, Delta’s foreclosure did not relieve the mortgagors of their remaining obligation on the debt owed to Delta, and Delta could still ultimately have received some further payment on its obligation if there were sufficient assets in the bankrupt mortgagors’ estate.⁵⁴

In the most recent federal case on the subject, the Ninth Circuit Court of Appeals

⁵² 683 F.Supp. 770, 773 (N.D. Ala. 1987).

⁵³ *Delta Savings & Loan Ass’n v. Internal Revenue Service*, 847 F.2d 248, 250 (5th Cir. 1988).

⁵⁴ *Delta Savings & Loan Ass’n v. Internal Revenue Service*, 847 F.2d 248, 250 (5th Cir. 1988).

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ruled⁵⁵ that the Internal Revenue Service could redeem the entire property sold at a foreclosure sale, and not just the one-half interest against which it had a tax lien, and that the amount paid by the purchaser at the foreclosure sale plus interest and other costs was the redemption sum.

The United States, since *McGarvie*, has not sought to redeem from a foreclosing mortgagee in New Jersey, for the nominal amount paid by the mortgagee at the foreclosure sale. However, it is the author's considered opinion that in light of § 2410(d) the only absolutely safe course for a foreclosing mortgagee to follow when bidding at a sale, in which the sale divests a subordinate lien held by the United States pursuant to which its post-sale right of redemption arises, is to bid up to the full amount of its debt with interest and costs in order to insure that it will recoup that amount if the United States redeems after sale.

Otherwise, the United States, on redemption, may only be obligated to pay the sale amount plus interest and net expenses in connection with the property. On a nominal bid purchase by the mortgagee of one hundred dollars, which is the usual case, the United States may only be required to pay one hundred dollars plus six percent interest to redeem. If a foreclosing mortgagee does not bid up to its full debt, interest and costs at the sale, and the United States seeks to redeem, the mortgagee may risk litigation with the United States over the redemption sum, with the highly probable result under the statute and regulations that the United States will prevail.

If the United States is not joined in a foreclosure action, its lien, of course, is not cut off by the foreclosure and its right of redemption will not arise under the statute. However, if the United States is not a defendant in the action because its subordinate lien post-dates the filing of the *lis pendens*, it will be bound by the judgment and its lien will be cut-off by the sale;⁵⁶ In this instance, its post-sale right of redemption will arise under the statute even though it is not a party to the foreclosure action.

§ 7.04 Redemption After Deficiency Judgment ⁵⁷

There is a "statutory"⁵⁸ right of redemption for a period of 6 months after the entry of a deficiency judgment in favor of the deficiency judgment debtors. In fact, this is the only instance of a statutory right of redemption of a mortgage under New Jersey law. The statute applies even though the judgment on the secured obligation is entered in another state.⁵⁹

⁵⁵ *Vardanega v. Internal Revenue Service*, 170 F.3d 1184, 1186 (9th Cir. 1999), *cert. denied* 528 U.S. 872, 120 S.Ct. 174, 145 L.Ed.2d 147, (1999).

⁵⁶ *Puritan Dairy Products Co. v. Christoffers*, 54 N.J. Super. 102, 148 A.2d 223 (Ch. Div. 1959).

⁵⁷ Information in this section taken substantially from 30 N.J. Prac. (Weinstein, Law of Mortgages) § 20.12 (2d ed. 2000).

⁵⁸ N.J.S.A. 2A:50-4.

⁵⁹ See *McGlathery v. Dorman*, 97 N.J. Eq. 17, 127 A. 40 (Ch. 1924).

Although this type of redemption is exceedingly rare, the mere potential for such a redemption after completion of the foreclosure action (and loss of title by the foreclosure sale purchaser) brings fear and anxiety to most title insurance companies doing business in New Jersey. This right of redemption can be technical and, for the most part, is not widely understood which adds to the general confusion surrounding it.

Specifically, when does this right of redemption arise. A deficiency judgment on the mortgage note or bond after the foreclosure sale will revive the "equitable right" of redemption of the persons against whom the deficiency judgment was entered, for a period of 6 months after the deficiency judgment, if the deficiency action statutes apply.⁶⁰ Of course, if the deficiency action statutes apply, persons to be held personally liable in a deficiency or money judgment action must be joined in the foreclosure action.⁶¹

There are two notable exceptions to the revival of this right of redemption after sale. First, if the obligor files an answer disputing the deficiency amount,⁶² the amount of the deficiency is determined "by deducting from the debt secured the amount determined as the fair value of the premises," and the deficiency judgment will not open the foreclosure and revive the right of redemption.⁶³ And second, if the deficiency debtor's mortgage was extinguished by foreclosure of a prior mortgage and sale, entry of a deficiency judgment against the debtor will not reopen the foreclosure and result in any right of redemption.⁶⁴

Upon redemption under the statute, the foreclosure sale purchaser will lose all title to the premises.⁶⁵

The right of redemption after entry of a deficiency judgment cannot be waived by the borrower.⁶⁶

If the deficiency action statutes do not apply, the mortgage note or bond holder is free to sue the maker or obligor in an independent action at law, without compliance with the deficiency action statutes, *N.J.S.A. 2A:50-2 et seq.* In such an instance, a right of redemption does not arise on entry of a judgment on the secured obligation.

If the foreclosure action is brought by the United States as holder of the mortgage (e.g., after assignment of an FHA-insured mortgage to the FHA Commissioner), the case is governed by "federal" law under the *Clearfield Trust* doctrine.⁶⁷

⁶⁰ *N.J.S.A. 2A:50-2 et seq.* See *N.J.S.A. 2A:50-2.3* for exceptions.

⁶¹ *N.J.S.A. 2A:50-4, 22.*

⁶² *N.J.S.A. 2A:50-3.*

⁶³ *N.J.S.A. 2A:50-5.*

⁶⁴ *N.J.S.A. 2A:50-9.*

⁶⁵ See *P.L.J., Inc. v. Hinners*, 121 N.J. Eq. 40, 41, 188 A. 496, 497 (Ch. 1936).

⁶⁶ *N.J.S.A. 2A:50-2.2.*

⁶⁷ See *Clearfield Trust Co. v. United States*, 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 838 (1943); *United States v. Allegheny County*, 322 U.S. 174, 64 S.Ct. 908, 88 L.Ed. 1209 (1944); *United States v. Stadium Apartments, Inc.*, 425 F.2d 358 (9th Cir. 1970), *cert. denied* 400 U.S. 926, 91 S.Ct. 187, 27 L.Ed.2d 185 (1970). But cf. *United States v. Yazell*, 382 U.S. 341, 86 S.Ct. 500, 15 L.Ed.2d 404 (1966); *United States v. MacKenzie*, 510 F.2d 39 (9th Cir. 1975) (en banc).

CHAPTER 8

OPTIONAL PROCEDURE WITHOUT SALE

§ 8.01 Optional Procedure without Sale - *N.J.S.A. 2A:50-63*

Section 11 of the Act (*N.J.S.A. 2A:50-63*) establishes an *optional foreclosure procedure* without sale. This is a major innovation, not only for New Jersey but for any jurisdiction. The author believes it is the only statute of its kind anywhere in the country.

You've heard the old adage: "Build a better mousetrap and the world will beat a path to your door." Well, the optional procedure is a better mousetrap. And it is surprising that in the more than ten years since the statute has been passed, practitioners have not seen fit to make more use of it.

Foreclosure by means of sale is, for the most part, a wasteful necessity. The sheriff's sale which concludes the foreclosure action is a mere form with little basis in reality. It is not a real economic sale and by the author's estimation¹ results in plaintiff acquiring title at the sale by virtue of a nominal bid (or a bid not substantially in excess of the plaintiff's debt, interest and costs) in ninety five percent of the cases. So long as the equity of redemption of all parties is constitutionally safeguarded, it should make little difference in terms of ultimate consequences whether the plaintiff receives title as a result of a fictional sale or as a result of a final judgment of foreclosure without sale - which is what the optional procedure does.

Since this is a new remedy in New Jersey, the optional procedure gives the attorney a chance to do something which could not be done before - a chance to score points with a lender by creatively utilizing a brand new remedy to save the lender time and money.

While common law strict foreclosure of mortgages is possible in New Jersey today, the remedy cannot be used to debar and foreclose an *ownership*² interest in the mortgaged premises. The innovation of the optional procedure is that it can be used as an initial remedy to debar and foreclose all interests in the mortgaged premises, including an ownership interest. This makes the optional procedure as viable a remedy as conventional foreclosure with sale and much less costly.

There is a good possibility that after the complaint is filed, a plaintiff can conclude an optional procedure foreclosure in 6-months. Service of process can readily be completed within three months; add another two months for the redemption period, and another month for entry of judgment - that totals six months, and it can easily be accomplished. Moreover, the lender will save the costs of the sheriff's sale, will save the time and uncertainty associated with the sale, and will avoid the post-sale redemption period and attendant rights. Many sheriffs are now asking for a deposit of *one thousand dollars* on delivery of the writ of execution by plaintiff. If a lender uses the optional procedure one hundred times, it will save one hundred thousand dollars. In fact, the savings the lender receives will pay your attorney's fees.

¹ See Weinstein, "Foreclosure and Deficiency Actions in New Jersey," 118 *N.J.L.J.* Index Page 809 (December 11, 1986).

² *Surety Building & Loan Association v. Risack*, 118 *N.J. Eq.* 425, 179 A. 680 (Ch. 1935).

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The judgment terminates the rights of the debtor and other parties, and the lender and lender's attorney need not be concerned with the difficulties and red tape associated with the sale and delivery of the sheriff's deed. This is the original form of the remedy established by the English court of chancery hundreds of years ago and it remains, in the author's opinion, the most equitable form of the remedy. In the abandoned, vacant property situation, the optional procedure is a natural, if the lender's attorney will only have the courage to use it.

It is surprising to the author that more foreclosure practitioners have not seen fit to use the optional procedure without sale. The optional procedure does away with many of the objectionable features of the conventional foreclosure process with sale - e.g., the sheriff's sale, advertising, posting, and mailing of the notice of sale; sheriff's fees and commissions; sheriff's adjournments; and the possibility of redemption and bankruptcy after sale delaying completion of the remedy. The author submits that use of the optional procedure in pertinent cases will save lenders time and money.

§ 8.02 "Optional Procedure"; Outline

The common law strict foreclosure procedure outlined in Chapter 13 has been statutorily modified in section 11 of the *Fair Foreclosure Act* to provide for the *notice of intention to foreclose* and the debtor's *right to cure* under the act up until entry of the redemption order. The optional procedure, therefore, includes five additional requirements: (1) a *notice of intention to commence foreclosure*; (2) a *14-day notice of entry of the redemption order*; (3) an *affidavit of election to utilize the optional remedy*; (4) a *supporting affidavit of abandonment, deed in lieu of foreclosure or no-equity*, and (5) *proof of mailing of the 14-day notice (and no response if papers submitted before the 46th day)*:

1. *Notice of intention to foreclose, N.J.S.A. 2A:50-56a*
2. *Complaint, R. 1:4-1, et seq.; N.J.S.A. 2A:50-56(f)*
3. *Lis pendens, N.J.S.A. 2A:15-6, et seq.*
4. *Service, R. 4:4-3, -4, -5 and -6*
5. *Default, R. 4:43-1; R. 1:6-3*
6. *Ordinary mailing of a copy of the filed default to all defaulted defendants served personally and by mail, R. 4:43-1.*
7. *Resolution of any contested answers, R. 4:64-1(a); N.J.S.A. 2A:50-58(b)*
8. *Appointment of guardian ad litem for minor and/or incompetent; and appointment of attorney for defendant in military service, R. 4:26-2(b)(3); R. 4:64-1(f)*
9. *14-day notice of election to utilize the optional procedure, N.J.S.A. 2A:50-58b*
10. *Affidavit of election, N.J.S.A. 2A:50-63f*
11. *Supporting affidavit-abandonment, deed in lieu and non-rescission, no-equity, N.J.S.A. 2A:50-63f*
12. *Certification of mailing 14-day notice to debtors*

13. *Certification of no response by the debtor (if papers submitted before 46th day; and certification must state that neither plaintiff nor plaintiff's attorney received a response to notice within 10-days after mailing), N.J.S.A. 2A:50-58b*
13. *Proof of amount due, R. 4:64-1(d)*
14. *Certification of search fees and costs, R. 4:42-10*
15. *Non-Military Affidavit, R. 1:5-7*
16. *Certified instruments, R. 4:64-2*
17. *Order fixing the amount, time and place for redemption, R. 4:64-1(d); N.J.S.A. 2A:50-63g*
18. *Service of redemption order on all defendants (at last known address) by ordinary and certified mail, return receipt requested and, if different, also to mortgaged premises; if address is unknown, service by publication required, R. 4:64-1(d); N.J.S.A. 2A:50-63h*
19. *Notice of motion for judgment to appearing parties (including guardian ad litem and attorney for military persons), R. 4:64-1(d)*
20. *Affidavit of non-redemption by plaintiff, N.J.S.A. 2A:50-63l*
21. *Final judgment, N.J.S.A. 2A:50-63*
22. *Service of final judgment on appearing and defaulting parties within seven days, R. 1:5-1(a); R. 4:43-2(c)*
23. *Recording of final judgment as a deed with county recording officer where land located, N.J.S.A. 46:16-1.1*

§ 8..03 Does Section 11 Only Apply to “Residential” Mortgage Foreclosures?

Section 10 of the act (N.J.S.A. 2A:50-62) provides: “The provisions of sections 1 through 9 of this act shall not apply to the foreclosure of a non-residential mortgage ...” This language certainly implies that sections of the act subsequent to section 9, section 11, for example, the optional procedure without sale, would apply to the foreclosure of a non-residential mortgage.

A careful review of section 11, however, indicates that the term “residential mortgage” appears in all of the jurisdictional paragraphs of subsection 11b (N.J.S.A. 2A:50-63b), paragraphs (1), (2) and (3), which set forth the grounds for use of the optional remedy under the act - e.g., abandonment, deed in lieu of foreclosure and no equity. Thus, it is exceedingly clear that the optional procedure can be used only with respect to the foreclosure of a residential mortgage, notwithstanding the pronouncement of section 10.

§ 8.04 Limitation of the Optional Procedure; No Right of Action Against the United States

An inherent limitation of the optional or strict foreclosure procedure is that the United States cannot be joined as a defendant in the action. Federal liens, by law, cannot be cut off in

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a strict mortgage foreclosure action, such as the optional procedure. This is because the federal waiver of sovereign immunity statute, 28 *U.S.C.* § 2410(c), which prescribes the conditions under which the United States has consented to be sued in a foreclosure action, where it holds a subordinate lien on property, provides, “an action to foreclose a mortgage or other lien naming the United States as a party under this section, *must seek judicial sale.*” (Emphasis supplied.) Since the optional or strict mortgage foreclosure process does not entail a sale, judicial or otherwise, the United States cannot be joined as a defendant.

The author believes that since a judgment of strict foreclosure is not effective against the United States, the *lis pendens* will not be binding on an interest of the United States arising after the filing of the *lis pendens* under the optional or strict mortgage foreclosure action. Therefore, any federal liens filed against the title holder up until the recording of the optional or strict mortgage foreclosure judgment will not be cut off.

§ 8.05 Check Your Mortgage Documents

The practitioner preparing to utilize the optional procedure without sale must be careful to check the mortgage documents to confirm that the use of the remedy is not inconsistent with these documents.

For example, the Uniform Mortgage Instrument³ provides: “that failure to cure the default... may result in acceleration of the sums secured by this Security Instrument, *foreclosure by judicial proceeding and sale.*” Subparagraph (d) then goes on to say: “If the default is not cured... lender at its option may require immediate payment in full of all sums secured by this Security Instrument... and may *foreclose this Security Instrument by judicial proceeding.* (Emphasis supplied.)

Thus, it is not absolutely clear whether the “uniform instruments” permit foreclosure without sale in New Jersey, as the terminology is not totally consistent on this point. It is the author’s considered opinion, however, that the provisions of the “uniform instruments” do not absolutely require foreclosure by means of sale, so long as foreclosure is effectuated by means of “judicial proceeding.” The terminology of the uniform instruments, therefore, in the author’s opinion, provides enough authority for a lender in New Jersey to utilize the optional procedure.

The All-State Plain Language, Individual or Corporate Note Mortgage (Form No. 204)⁴ provides in part: Default.

The Lender’s Rights Upon Default. If the Lender declares that the Note and this Mortgage are in default, the Lender *will have all rights by law or set forth in this mortgage.* This includes the right to do any one or more of the following:

...

³ Uniform Mortgage Instrument. NEW JERSEY - Single Family - Fannie Mae/Freddie Mac Uniform Instrument (Form 3031, 1/01). Paragraph 22 - Acceleration; Remedies.

⁴ Copyright 1982 by All-State Legal Supply Co..

(c) start a court action, known as foreclosure, which will *result in a sale of the Property* to reduce my obligations under the Note and this Mortgage; (Emphasis supplied.)

The Blumberg Mortgage, Individual or Corporation - Plain Language Form M902⁵ provides:

Some of Lender's Rights on Acceleration.

8. If the Lender declares acceleration, the Borrower shall immediately pay to the Lender the entire unpaid principal and interest. If the Borrower does not, the lender has *all rights given to Mortgage Lenders by law*, for example:

...

(c) To start a court action for foreclosure. Foreclosure is a court ordered sale of the property. . . (Emphasis supplied.)

In the author's opinion, the lender's remedies on default as specified in New Jersey's plain language mortgage forms are clearly not intended to be exclusive and expressly recognize that on default or acceleration the lender may pursue all rights given to the lender by law. This, of course, would permit use of the optional remedy.

It is suggested that the foreclosing attorney query his or her title insurance company before utilizing the optional procedure to make sure a marketable and insurable title will be obtained by the lender on completion of the optional procedure.

§ 8.06 Right of Action Against RTC and FDIC

In two policy statements entitled "Interim Statement of Policy on Foreclosure Consent and Redemption Rights"⁶ by the Resolution Trust Corporation ("RTC") and "Statement of Policy on Foreclosure Consent and Redemption Rights"⁷ by the Federal Deposit Insurance Corporation ("FDIC"), both the RTC and FDIC, in their *receivership and corporate capacities*, waived their rights under 12 U.S.C. § 1825(b)(2)⁸ and 28 U.S.C. 2410(c)⁹ and gave their consent to foreclosure by the holder of a voluntary lien (*e.g.*, a bona fide mortgagee). Pursuant to these policies, the corporations, when acting in their *conservatorship* capacities,

⁵ Copyright 1984 by Arthur S. Horn, a New Jersey attorney. Julius Blumberg, Inc. Publisher. NYC 10013.

⁶ 57 FR 19651

⁷ 57 FR 29491

⁸ 12 U.S.C. § 1825(b)(2) provides that when acting as receiver "No property of the Corporation shall be subject to levy, attachment, garnishment, foreclosure, or sale without the consent of the Corporation, nor shall any involuntary lien attach to the property of the Corporation."

⁹ 28 U.S.C. 2410(c) provides in part: (1) that the United States shall have a one year right of redemption where a sale of real estate is made to satisfy a prior lien, except with respect to internal revenue liens where a 120-day period is applicable; (2) that a sale to satisfy a lien inferior to that of the United States shall be made subject to and without disturbing the lien of the United States unless it consents; (3) that a foreclosure action joining the United States as a party must seek judicial sale; and (4) a judgment in actions authorized by this section (*e.g.*, quiet title, foreclosure, partition, condemnation or interpleader) shall have the same effect with respect to the discharge of a lien held by the United States as may be provided with respect to such matters by local law.

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will also not assert any right to consent under 12 *U.S.C.* § 1825(b)(2) nor will they assert any rights they possess under 28 *U.S.C.* 2410 (c).¹⁰

The Federal Deposit Insurance Corporation, in its receivership and corporate capacities granted its consent¹¹ to foreclosure under 12 *U.S.C.* § 1825(b)(2) by the holder of a voluntary lien senior to the FDIC's interest where the FDIC holds a recorded "title" or "lien" interest of record. This differs from the RTC Policy which required that a "notice of intent to foreclose" be sent to the RTC where it held a recorded "title" as opposed to a "lien" interest in property, unless an exception was provided in the Policy.

As of January 1, 1996, the Federal Deposit Insurance Corporation became the successor in interest to the Resolution Trust Corporation which is no longer in existence. Presumably, by virtue of the Federal Deposit Insurance Corporation's takeover of the Resolution Trust Corporation, there no longer is any distinction between a mortgage foreclosure action against a "title" or "lien" interest of the Federal Deposit Insurance Corporation.

In the author's opinion, by virtue of these statements of Policy, there should be no impediment to the use of the optional procedure "without sale" against the Federal Deposit Insurance Corporation, as the FDIC has waived the provisions of 28 *U.S.C.* 2410(c) in mortgage foreclosure actions which, in part, include the "judicial sale" requirement.

It is the author's suggestion, however, that the foreclosing attorney check with his or her title insurance company for its marketability of title requirements, before utilizing the optional procedure with respect to the FDIC.

§ 8.07 Establishment of Optional Procedure – *N.J.S.A.* 2A:50-63a

N.J.S.A. 2A:50-63a reads:

- a. An optional procedure without sale for the disposition of a foreclosed premises is hereby established pursuant to subsection b. of this section, wherein a lender may elect to proceed according to the provisions of this act and *R.* 4:64-1(d) of the Rules Governing the Courts of the State of New Jersey.

Analysis

Section 11a makes it clear that the optional procedure incorporates the provisions of *R.* 4:64-1(d), now *R.* 4:64-1(f) - the court rule governing strict foreclosure actions in New Jersey.

§ 8.08 Grounds for Using the Optional Procedure - *N.J.S.A.* 2A:50-63b

N.J.S.A. 2A:50-63b says:

- b. Use of the optional procedure without sale, as provided in this section, shall be permitted only when:

¹⁰ See Weinstein, "Understanding Foreclosures and the RTC," *NJL* (January 18, 1993).

¹¹ 57 *FR* 29491.

- (1) the debtor has abandoned the property which is the subject of the residential mortgage;
- (2) the debtor has voluntarily surrendered the property which is the subject of the residential mortgage by signing a deed in lieu of foreclosure in favor of the lender; or
- (3) there is no equity in the property which is the subject of the residential mortgage, as defined in subsection e. of this section.

Analysis

Section 11b establishes the *exclusive* jurisdictional grounds for use of the optional remedy: abandonment, deed in lieu of foreclosure, and no equity. It should be noted that in each of the three paragraphs above the statute refers to “residential” mortgage. This makes it clear that the optional remedy can only be used for the foreclosure of a residential mortgage as that term is defined in the Act.

§ 8.09 Abandonment By Debtor - *N.J.S.A. 2A:50-63c*

N.J.S.A. 2A:50-63c states:

c. Pursuant to paragraph (1) of subsection b. of this section, and for purposes of this section only, abandonment of the property subject to the residential mortgage shall be established by an affidavit or certification from an individual having personal knowledge of the contents thereof, setting forth the specific facts upon which that conclusion is based. The affidavit or certification shall be submitted to the office or the court at the same time that the lender applies to the office or the court for the order fixing the amount, time and place for redemption.

Analysis

By virtue of the requirement of “personal knowledge,” it is clear that the “affidavit of abandonment” required by this subsection must be executed by a person having “eye-witness” knowledge of the residential mortgaged premises. In the ordinary course, this will be an agent or employee of the lender.

Abandonment includes (a) the intention to abandon (*e.g.*, the voluntary relinquishment of possession) and (b) the external act of abandonment.¹² Where a mortgagee uses its self-help remedy after default, by taking possession of the mortgaged premises, that possession by the mortgagee would not necessarily denote abandonment by the debtor. In that instance, the mortgagor-debtor may not have “voluntarily” relinquished possession to the mortgaged premises but may have been locked-out by the affirmative action of the mortgagee. The essential element of “intention” to abandon would therefore be missing.

In *In re Panas*,¹³ the bankruptcy court stated that it would “insist upon an ‘unequivocal act’ of a mortgagor to forfeit his rights to possession where no court judgment

¹² *Black’s Law Dictionary* 2 (6th Ed. 1990)

¹³ 100 B.R. 734, 741 (Bkrcty. E.D. Pa. 1989).

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terminating those rights has been entered.” The court, construing § 403(d) of Pennsylvania’s Act 6, found a whole series of “unequivocal acts” of abandonment on the part of the debtor, after the debtor abandoned the property for five years without objection. In *Panas*, the mortgagee did not foreclose but took possession of the premises peaceably after default becoming a mortgagee in possession.

Taken literally, Section 11b (*N.J.S.A.* 2A:50-63b) only requires the “debtor” to abandon the residential property and not the owner. Thus, it is theoretically possible for property to be occupied by persons other than the debtor and still to be abandoned by the debtor.

It is unlikely that the Legislature intended that the ground of “abandonment” be applied to property that was in any way lawfully occupied. Certainly, where residential property is tenant occupied the Anti-Eviction Act would prevent eviction of such a tenant, absent compliance with *N.J.S.A.* 2A:18-61.1 *et seq.*¹⁴

In the author’s opinion, abandonment should only be used as a basis for the optional procedure where the residential property is (a) totally unoccupied and (b) where the requisite elements of abandonment have been met, *i.e.*, the intention to abandon and an external act of abandonment.

Abandoned property is an eyesore; it adversely affects the neighborhood, increases potential criminal activity on the property and greatly lessens neighboring property values. It should not be countenanced and, in urban areas, contributes to urban decay. The optional procedure will permit lenders to pursue foreclosure against such properties in a more efficient manner and will save the expense and delay associated with the sheriff’s sale.

With the vacant and abandoned procedure, less attorneys are utilizing the optional procedure when the property is abandoned. The vacant and abandoned procedure results in an expedited sale, allowing the plaintiff to name the United States of America as a defendant. Attorneys, when deciding to use the optional procedure for an abandoned property, should confirm with their title company that it will still insure the action. Some title companies require that abandoned properties be foreclosed under the vacant and abandoned procedure.

§ 8.10 Deed in Lieu of Foreclosure - *N.J.S.A.* 2A:50-63d

N.J.S.A. 2A:50-63d says:

d. Pursuant to paragraph (2) of subsection b. of this section and for purposes of this section only, if the lender receives a deed in lieu of foreclosure, the conveyance shall be effective only if the deed clearly and conspicuously provides: that the debtor may, without penalty, rescind the conveyance within seven days, excluding Saturdays, Sundays and legal holidays; and that such rescission is effective upon delivery of a written notice to the lender or its agent or upon mailing of such notice to the lender or its agent by certified or registered mail, return receipt requested.

¹⁴ *The Chase Manhattan Bank v. Josephson*, 135 N.J. 209, 638 A.2d 1301 (1994).

Analysis

From a straightforward reading of Section 11d, the deed itself (not a collateral document) must clearly and conspicuously contain the above rescission language. Failure of the deed to do this would apparently void the deed. Because this subsection affords the debtor a seven day right of rescission, it would be erroneous for a lender to record such a deed until the seven day period has expired; otherwise, if the deed is rescinded by the debtor it is not clear how the record could be corrected, other than by a reconveyance by the lender. As the subsection makes such a notice of rescission effective on “delivery” or “mailing,” it would be prudent for the lender to wait until at least 10-days have elapsed (*e.g.*, seven days plus three days for mailing) from the date of the deed before recording the deed.

Where the lender utilizes a deed in lieu of foreclosure as grounds for the optional procedure, it is surprising that this subsection does not require a “certification of non-rescission”¹⁵ by the lender as a precondition to the entry of a redemption order by the office or court. Nevertheless, the office or court in all likelihood will certainly require such an affidavit or certification prior to entry of the redemption order.

The act by use of the language “for purposes of this section only” makes it absolutely clear that the right of rescission arises only under section 11 - *e.g.*, where a lender takes a deed in lieu of foreclosure for purposes of subsequently utilizing the optional procedure without sale. This is a remarkable provision in the author’s opinion. Apparently, a lender can take a deed in lieu of foreclosure without a right of rescission, so long as the lender does not subsequently utilize the optional procedure. Thus, a lender may take a deed in lieu of foreclosure and institute a conventional foreclosure with sale, or fail to institute foreclosure at all, without any right of rescission arising in favor of the debtor under the act. Presumably, this is not what the drafters intended, but nevertheless that is how the statute reads.

Once a lender takes a deed in lieu of foreclosure containing the right of rescission, it is assumed that the lender cannot nullify that right by stating that the lender does not intend to proceed under section 11.

There is nothing in the act which would prevent a lender from taking a subsequent deed in lieu of foreclosure, with or without a right of rescission, where the debtor had previously exercised its right to rescind with respect to an earlier deed.

Where a lender has jurisdiction to proceed under more than one paragraph of subsection 11b, compliance with this subsection is nevertheless required where any one of the grounds for the optional remedy is a deed in lieu of foreclosure, unless such basis be dismissed from the action.

Where only one of two debtor-owners gives a deed in lieu of foreclosure to the mortgagee, presumably this basis for use of the optional procedure would not exist.

Similarly, the act establishes this basis for use of the optional procedure only where the *debtor* gives a deed in lieu of foreclosure to the lender. Where the grantor is not the debtor, the deed in lieu basis for the optional procedure apparently would not exist.

¹⁵ See Appendix C, Form No. 22.

The question arises as to whether a lender may take a deed in lieu of foreclosure and, if adequate common law grounds exist, institute a common law strict mortgage foreclosure action against an omitted encumbrancer or encumbrancers.¹⁶ In the author's opinion, there is nothing in the *Fair Foreclosure Act* which would prevent this. Because the debtor-owner is not a party to such an action, compliance by the lender with the *Fair Foreclosure Act* should not be required. In any event, a notice of intention is not required where a lender takes a deed in lieu of foreclosure from the debtor.¹⁷

Presumably, the need to use the deed in lieu of foreclosure grounds for the *optional* or strict mortgage foreclosure remedy may not be necessary in ordinary cases as the lender may utilize the *common law* remedy. The common law remedy can be used only to debar and foreclose the equity of redemption of an omitted encumbrancer, as common law strict foreclosure of a mortgage cannot be used to debar and foreclose the equity of redemption of an owner.¹⁸ However, if there is any question that common law grounds for strict foreclosure do not exist, the optional procedure can safely be used as long as the deed in lieu of foreclosure was given in compliance with subsection 11d.

It is the author's opinion, that the common law strict mortgage foreclosure remedy may be used against an omitted encumbrancer where the lender has taken a deed in lieu of foreclosure in noncompliance with Section 11d. The rescission requirements of the subsection are clearly limited to the optional procedure undertaken in accordance with section 11.

A lender may, of course, take a deed in lieu of foreclosure (containing a non-merger provision)¹⁹ and foreclose conventionally by means of sale against an omitted encumbrancer. Again, compliance by the lender with the act should not be required if the debtor-owner is not joined as a party.

A lender may also take a deed in lieu of foreclosure and foreclose conventionally against the debtor and other person in interest and comply with the dictates of the act. However, in this instance there would appear to be little point for the lender to take a deed in lieu of foreclosure.

Under any circumstance, the debtor-owner cannot be joined in a common law strict mortgage foreclosure action

§ 8.11 No Equity - *N.J.S.A. 2A:50-63e*

e. (1) For purposes of paragraph (3) of subsection b. of this section, a property subject to a residential mortgage shall be deemed to have no equity if the total unpaid balance of all liens and encumbrances against the property, including mortgages, tax liens and judgments actually against the property (not including

¹⁶ *Lockard v. Hendrickson*, 25 A. 512 (Ch. 1892); *Sears, Roebuck v. Camp*, 124 N.J. Eq. 403, 1 A.2d 425 (E. & A. 1938) (mortgagee was unaware of subsequent judgments); *Shepard v. Barrett*, 84 N.J. Eq. 408, 93 A. 852 (Ch. 1915).

¹⁷ *N.J.S.A. 2A:50-56d*.

¹⁸ *Surety Building & Loan Association v. Risack*, 118 N.J. Eq. 425, 179 A. 680 (Ch. 1935).

¹⁹ *Stohl v. Stohl*, 138 N.J. Eq. 220, 47 A.2d 559 (Ch. 1946).

similar name judgments), and any other lien, is equal to or greater than 92 percent of the fair market value of the property. An affidavit setting forth with specificity the fair market value of the property, the unpaid balance of the obligation, including all mortgages and liens and the method by which the lender determined that the property has no equity, shall be submitted to the office or the court at the time the lender applies for the order fixing the amount, time and place for redemption.

(2) If a lender proceeds with the optional procedure under this subsection, and if the debtor has not objected and requested a public sale pursuant to this section, when the foreclosed property is resold by the lender following judgment and provided the resale price received by the lender is in excess of the amount necessary to repay the debt, interest and reasonable costs of the lender, and all carrying charges, including, but not limited to, the reasonable costs of maintenance and resale, the lender shall deposit any such excess in accordance with *R. 4:57 et seq.* of the Rules Governing the Courts of the State of New Jersey.

(3) Upon deposit of any such excess with the Superior Court, the lender shall notify the debtor and any lien holder who held a lien junior to the lender and whose lien was lost in whole or in part as a result of the foreclosure. Such notification shall be by certified mail, return receipt requested, to the last known address of the debtor and such lien holders. The debtor and the lien holders shall then have six months to make an application to the Superior Court, in the form of an application for surplus funds, upon appropriate notice to all other parties in interest, to seek an order for turnover of the excess funds. Failure of a lender to comply with the provisions of paragraphs (2) and (3) of this subsection e. shall not affect title to the foreclosed property.

Analysis

Section 11e requires the lender to determine the total “unpaid balances” of all liens against the property. Normally, the lender is only in a position to know the unpaid balance of its own mortgage or mortgages. The lender obviously cannot determine the unpaid balance that may be due and owing to another creditor without the cooperation of that creditor. Where the creditor does not cooperate, it would appear that the lender will not be able to furnish the required affidavit.

The terminology - “the *method* by which the lender determined the property has no equity” - appears incorrect. (Emphasis supplied.) In the author’s opinion, it should read, “the method by which the lender determined the fair market value of the property.”

The basic assumption of “no-equity” in the context of the strict foreclosure remedy is that since there is no equity in the property, foreclosure by means of sale is futile, thereby justifying foreclosure without a sale. This assumption, however, fails to take into account what the author calls “foreclosure equity.” There may be no equity in property under traditional notions of equity - that is, the amount of outstanding liens and encumbrances may exceed the value of the property. But on foreclosure and sale of the property, subordinate liens are cut off so that the property in the hands of the purchaser at the sale may contain substantial equity.

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Of course, the debtor has the automatic right to request a sale and can thereby put an end to plaintiff's use of the optional procedure. For this reason, the author does not view the no-equity basis for use of the optional procedure as a viable remedy.

It should be noted that the lender's obligation of depositing into court any "excess" (or profit) received on resale of the mortgaged premises only applies to the no-equity basis for the optional procedure and does not apply to the optional procedure where abandonment or deed in lieu of foreclosure are used.

The best practice would be or applying to the vicinage judge for an order determining the fair market value of the property. This should be done prior to applying of order setting time and place of redemption.

§ 8.12 Waiver of Rights by Debtor; Can Lender Maintain Optional Procedure?

Suppose a debtor waives its rights under the act pursuant to a workout agreement and a separately signed document of waiver after default. Can the lender validly utilize the optional procedure, claiming that the debtor has no right to cure and reinstate under the act and no right to request a sale. While the act does not specifically address this situation, there appears to be a serious lack of mutuality in this situation. The debtor is bound by the act and the lender is not.

It is one thing for the debtor to generally waive its rights under the act and for the lender to proceed in the normal course pursuant to its ordinary foreclosure remedy. It is quite another thing for the lender to utilize the special statutory features of the act and not permit the debtor to utilize the protections afforded by the act. A debtor waiving its rights under the act would normally assume that the lender, on failure by the debtor to perform in accordance with the workout agreement, would proceed by foreclosure and sale outside of the act.

In the author's opinion, utilization of the optional procedure by the lender after a "blanket waiver" of rights by the debtor is unfair and inequitable. Where the waiver by the debtor specifically addresses the use of the optional remedy by the lender, the situation, in the author's opinion, is far more equitable. In this context, the debtor may agree to the use of the optional procedure by the lender, and may waive his or her right to request a sale, contest fair market value or the like.

§ 8.13 Jurisdiction, Venue, Pleadings and Process

The reader should generally consult Chapter 7 for jurisdiction, venue, pleadings and process in mortgage foreclosure actions.

§ 8.14 Fair Debt Collection Practices Act (Notice of Intention)

If the attorney mails the notice of intention to the debtor, the attorney (unless the attorney is the original creditor initiating the loan) must be careful to comply with the Fair Debt Collection Practices Act ("FDCPA"). If the notice of intention is the initial communication, the "debt validation notice" and "initial disclosure notice" (the *Miranda* warning) should be included in the notice. This is addressed in Chapter 5.

THE AMOUNT OF THE DEBT IS \$ _____. THE NAME OF THE CREDITOR TO WHOM THE DEBT IS OWED IS _____. UNLESS YOU NOTIFY US IN WRITING WITHIN THIRTY (30) DAYS AFTER RECEIPT OF THIS NOTICE THAT THE DEBT, OR ANY PART OF IT, IS DISPUTED, WE WILL ASSUME THAT THE DEBT IS VALID. IF YOU DO NOTIFY US OF A DISPUTE, WE WILL OBTAIN VERIFICATION OF THE DEBT AND MAIL IT TO YOU. ALSO UPON YOUR WRITTEN REQUEST WITHIN THIRTY (30) DAYS, WE WILL PROVIDE YOU WITH THE NAME AND ADDRESS OF THE ORIGINAL CREDITOR IF DIFFERENT FROM THE CURRENT CREDITOR. THIS COMMUNICATION IS AN ATTEMPT TO COLLECT A DEBT AND ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE.

If the debt secured by the mortgage being foreclosed is not a *consumer debt*²⁰ (i.e., a debt incurred for personal, family or household purposes) the FDCPA does not apply and no disclosure notices are necessary.

§ 8.15 Notice Of Intention - N.J.S.A. 2A:50-56

Pursuant to N.J.S.A. 2A:50-56, the lender must mail a notice of intention to foreclose, by registered or certified mail, return receipt requested, to the residential mortgage debtor, at the debtor's last known address and if different (from the address of the mortgaged premises) also to the address of the mortgaged premises, at least 30-days but not more than 180-days prior to the filing of the foreclosure complaint. This is addressed in Chapter 3.

The requirements for the notice of intention are the same under both the conventional and optional procedures.²¹

§ 8.16 Fair Debt Collection Practices Act (Complaint; Subsequent Papers)

Since the "complaint" is a formal pleading in a legal or civil action, it is statutorily exempt from the both the "debt validation notice"²² and the initial and follow-up FDCPA disclosure notices.²³

The complaint, summons and other formal pleadings are therefore not deemed to be an initial or follow-up communication for purposes of the FDCPA.²⁴

The attorney must be careful to comply with the FDCPA with regard to all foreclosure papers served on the debtor which are not formal pleadings - i.e., cover letters, notices, defaults, judgment, and the like. This is addressed in detail in Chapter 5.

²⁰ 15 U.S.C. § 1692(a)(5).

²¹ N.J.S.A. 2A:50-56

²² 15 U.S.C. §§ 1692g(d).

²³ 15 U.S.C. § 1692e(11).

²⁴ *Hodges v. Sasil Corp.*, 189 N.J. 210, 915 A.2d 1 (2007).

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As noted in a preceding section, any non-pleading foreclosure paper served on the debtor which is the initial communication should contain the “debt validation notice” and “initial disclosure notice.” Subsequent communications need only contain the follow-up or mini-Miranda warning.

THIS COMMUNICATION IS FROM A DEBT COLLECTOR.

§ 8.17 The Complaint

(See Sample Form Appendix C)

It is recommended that plaintiff use a four count complaint. The first two counts should be typical mortgage foreclosure counts (*e.g.*, foreclosure with sale and possession) and the second two counts should be the optional procedure (*e.g.*, foreclosure without sale and possession).

Even if plaintiff intends to use the optional procedure, plaintiff must be sure to also set up a count or counts for conventional foreclosure with sale. Otherwise, if plaintiff’s election to utilize the optional procedure is defeated by a defendant requesting sale, or disallowed by the court or Office for another reason, plaintiff will be required to go back, amend the complaint, add a count for foreclosure with sale, and re-serve all defendants.

The foreclosure count for the optional procedure (*e.g.*, the third count) can repeat and reallege the allegations of the first count and should contain a strict foreclosure (or foreclosure without sale) prayer for relief.

The fourth count, the possession count, can be similar to count two (*i.e.*, the possession count in the conventional action), since the mortgagee is entitled to possession on *default* whether or not it chooses to use the optional remedy. Only plaintiff, however, will be entitled to possession by virtue of the judgment under the optional remedy, not the purchaser at the foreclosure sale.

Section 4f (*N.J.S.A.* 2A:50-56f) requires that if the residential property “has been *abandoned* or *voluntarily surrendered*, the plaintiff shall plead the specific facts upon which this allegation is based” in the complaint. (Emphasis supplied). Thus, if plaintiff at the time of filing of the complaint intends to use “abandonment” or “deed in lieu of foreclosure” as grounds for the optional procedure, one or more of these grounds must be specifically pled in count three of the complaint; otherwise an amendment or amended complaint will be required.

The “no-equity” ground for use of the optional remedy does not have to be “specifically” pled in the complaint. However, if plaintiff intends to rely upon “no equity” as the basis for its election to proceed with the optional procedure, it is the author’s opinion that “no equity” should be set up as an allegation in the third count of the complaint (or other count seeking optional procedure relief), otherwise it would appear that plaintiff has failed to state a claim upon which relief can be granted. Moreover, amended *R.* 4:64-1(b) requires specificity in the complaint.

§ 8.18 Certification of Title Search

Pursuant to R. 4:64-1(a), prior to filing an action to foreclose a mortgage, a condominium lien, or a tax lien to which R. 4:64-7 does not apply, the plaintiff shall receive and review a title search of the public record for the purpose of identifying any lienholder or other persons and entities with an interest in the property that is subject to foreclosure and shall annex to the complaint a certification of compliance with the title search requirements of this rule.

§ 8.19 Joinder of Parties and Claims

Reference should be made to Chapter 7 for joinder of parties and claims.

With respect to the *deed in lieu of foreclosure* basis for the optional procedure, one matter of needs to be discussed: Does the debtor who gave the deed need to be joined as a party defendant? After all, the debtor-mortgagor no longer has an interest in the mortgaged premises.

In fact, Section 4d of the act (N.J.S.A. 2A:50-56d) provides that a notice of intention to foreclose is not required if the debtor has *voluntarily surrendered* the property.

While the act does not specifically address this point, it is assumed that all modes of foreclosure authorized by the act - *i.e.*, foreclosure with sale or the optional procedure without sale - are meant to be *original* or *initial* forms of the remedy, not subsequent, curative or reforeclosure modes. Thus, it is the author's opinion, that the act assumes that the debtor and all other interested persons in the property will be joined as parties in an optional procedure foreclosure, although little, if any, purpose is served by joining the debtor in such cases.²⁵

§ 8.20 The Notice of *Lis Pendens*

A notice of *lis pendens* should be filed with the county recording officer (*i.e.*, clerk or register) under the optional procedure just as in a conventional foreclosure action, otherwise the action will not be *lis pendens* as to persons obtaining an interest in the mortgaged premises by, through, or under the defendants in the action prior to entry of judgment. This is addressed in Chapter 7.

§ 8.21 Service, Default, Answer and Appearance

Service of process, default, the contested and uncontested answer practice, and the like are the same as in the conventional mortgage foreclosure action. *Rules* 4:4-3, -4, -5, -6 and -7; R. 4:43-1 and -2 and R. 4:64-1 and -2 control. This is addressed in detail in Chapter 7.

§ 8.22 Mailing a Copy of the Filed Default to Defaulted Defendants Served Personally or by Mail

(See Sample Form Appendix C)

²⁵ Joining the debtor in the action, where the debtor raised no objection, would presumably operate as an estoppel should the debtor subsequently contend that the deed in lieu of foreclosure was invalid.

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According to *R. 4:43-1*, plaintiff's attorney must mail a copy of the filed default - *i.e.*, the request and certification of default or order entering default, as the case may be - to each defaulting defendant served *personally* or by *mail* at the address where the defendant was last served with process.

A certification of mailing of filed default should be furnished and filed with plaintiff's redemption order package.

§ 8.23 The Optional Procedure is Always “Optional”

After service of process, default, and the like, plaintiff is not obligated in any way to pursue the optional procedure. That's why plaintiff prayed for “conventional” as well as “optional” relief in the foreclosure complaint. Plaintiff must “elect” to proceed under the optional procedure in accordance with the requirements of the act. If for any reason the optional procedure presents difficulties or is impractical, the foreclosing attorney should not hesitate to submit a conventional final judgment package to the Office of Foreclosure and proceed to final judgment and sale in the ordinary course. Even after entry of the order fixing the amount, time and place for redemption, it is not too late for plaintiff to proceed conventionally to judgment and sale.²⁶

§ 8.24 Uncontested Action Date

In order for plaintiff to have jurisdiction to mail the “14-day notice” - the notice to cure - to the debtor under the next section, which is a prerequisite to entry of the order fixing the amount, time and place for redemption, the foreclosure action must be deemed *uncontested* within the meaning of *R. 4:64-1(c)*. That means that (a) default has been entered as to all non-answering defendants; (b) all con-tested answers have been stricken or rendered non-contesting; and (c) all remaining filed pleadings responsive to the complaint are uncontested. Plaintiff must wait for the later of the three events (the uncontested action date) before mailing the 14-day notice to the debtor.

§ 8.25 The 14 Day Notice - *N.J.S.A. 2A:50-58b*

(See *Sample Form, Appendix C*)

Paragraph (1) of subsection 6b (*N.J.S.A. 2A:50-58b(1)*) provides:

b. (1) If a plaintiff's action to foreclose a residential mortgage is uncontested, pursuant to *R. 4:64-1(a)* of the Rules Governing the Courts of the State of New Jersey and the lender chooses to use the optional procedure for the disposition of the foreclosed premises pursuant to section 11 of this act, the lender shall provide the debtor with a notice, mailed at least 14-calendar days prior to filing an affidavit or certification with the office or court pursuant to subsection f. of section 11 of this act. The notice shall provide the debtor with the name and

²⁶ In this instance, the author recommends vacation of the redemption order and entry of a conventional foreclosure judgment with sale.

address of the lender and the telephone number of a representative of the lender whom the debtor may contact to obtain the amount required to cure the default, and advise the debtor that, absent a response from the debtor pursuant to paragraph (2) of this subsection b., the lender shall file an affidavit or certification with the office or court requesting the office or court to enter an order of redemption and that upon the entry of the order of redemption the debtor shall lose the right provided pursuant to section 5 of this act, to cure the default. The lender shall attach a copy of the required 14-day notice to the affidavit or certification for filing with the office or court requesting the office or court to enter an order of redemption. The manner and address for mailing and the effective date of the notice shall be the same as set forth in subsection b. of section 4 of this act.

1995, c. 244 sec. 6. Amended by L.2006, c. 13, sec. 1, eff. July 16, 2006.

Analysis

The requirements of the 14-day notice under this subsection are essentially the same as the requirements under paragraph (1) of subsection 6a, *N.J.S.A.* 2A:50-58a(1), with respect to the conventional foreclosure action with sale,²⁷ except that (a) the notice must be mailed at least 14-calendar days prior to the filing of plaintiff's affidavit or certification of *election* to utilize the optional procedure (normally this affidavit or certification will be filed with plaintiff's "redemption order package") and (b) the debtor's right to cure under the act terminates with the *redemption order*, not the judgment.

As in the conventional action, the 14-day notice cannot be mailed until the foreclosure action is deemed uncontested within the meaning of the *R.* 4:64-1(c).

Paragraph (1) of Section 6b by use of the language "the lender shall provide the debtor with notice," requires the "lender" to mail the 14-day notice to the debtor. Plaintiff's attorney, however, as the legal representative and authorized agent of the lender also has the authority to mail.²⁸

§ 8.26 Contents of the 14 Day Notice - *N.J.S.A.* 2A:50-58b(1)

N.J.S.A. 2A:50-58b(1) says:

The notice shall provide the debtor with the name and address of the lender and the telephone number of a representative of the lender whom the debtor may contact to obtain the amount required to cure the default, and advise the debtor that, absent a response from the debtor pursuant to paragraph (2) of this subsection b., the lender shall file an affidavit or certification with the office or court requesting the office or court to enter an order of redemption and that upon the entry of the order of redemption the debtor shall lose the right provided pursuant to section 5 of this act, to cure the default. The lender shall attach a copy of the required 14-day notice to the affidavit or certification for

²⁷ See *supra* Chapter 8.

²⁸ *Federal National Mortgage Association v. Bracero*, 297 N.J. Super. 105, 687 A.2d 802 (Ch. Div. 1996).

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filing with the office or court requesting the office or court to enter an order of redemption.

Analysis

The 14-day notice serves to put the debtor on notice that the debtor's right to cure the default and reinstate the loan will *terminate* on entry of the *redemption order*. This differs from a conventional foreclosure subject to the act where the right to cure and reinstate continues up until final judgment.

The uniform instruments²⁹ provide that the borrower has the right to cure and reinstate the mortgage until entry of final judgment in all cases where the lender utilizes foreclosure by means other than a power of sale contained in the mortgage. Presumably, the provisions of the *Fair Foreclosure Act* will control in this instance.

On or after July 16, 2006, the notice must provide the debtor with *the name and address of the lender*; the *telephone number of a representative of the lender* whom the debtor may contact to obtain the amount required to cure the default; and a copy of the 14-day notice mailed to each debtor must be attached to plaintiff's affidavit or certification requesting the redemption order. The statute does not require that the name of the lender's representative be set forth in the notice.

While the subsection does not expressly require it, the provisions of Section 6b should be summarized in the notice; otherwise, the language of the notice - that absent a response from the debtor in accordance with paragraph 2 of subsection 6b - will have no meaning to the debtor. The debtor will also not be apprised of the content and service requirements of the statement which he or she may send to the lender unless these requirements are summarized or attached to the 14-day notice.

§ 8.27 Mailing 14-day Notice; Address; Effective Date - *N.J.S.A. 2A:50-58b(1)*

The manner and address for mailing and the effective date of the notice shall be the same as set forth in subsection b. of section 4 of this act.

Analysis

The requirements for mailing of the 14-day notice and its effective date are the same as the notice of intention under subsection 4b of the act (*N.J.S.A. 2A:50-56b*) - *i.e.*, mailed to the debtor by registered or certified mail, return receipt requested, to the debtor's last known address and if different (from the address of the mortgaged premises), also to the mortgaged premises. Subsection 4b (*N.J.S.A. 2A:50-56b*) provides that the notice is effective on "personal delivery" or "mailing," however, the subsection provides that the notice must always be mailed.

Pursuant to *Federal National Mortgage Association v. Bracero*,³⁰ the 14-day notice should be mailed by the lender's attorney and should specify that the debtor's response should be mailed to the address of the lender's attorney. See Chapter 8 in this regard.

²⁹ Paragraph 19 of the Uniform Covenants - Borrower's Right to Reinstate. New Jersey - Single Family - Fannie Mae/Freddie Mac Uniform Instrument (Form 3031 1/01).

³⁰ 297 *N.J. Super.* 105 (Ch. Div. 1966).

§ 8.28 Debtor's Right of Response (Statement) to the 14-day Notice - *N.J.S.A. 2A:50-58b(2)*

(Sample Form No Appendix C)

(2) A debtor may, no later than 10-days after receipt of the notice required pursuant to paragraph (1) of this subsection b., mail to the lender a statement in which the debtor in good faith certifies as true that there is a reasonable likelihood that the debtor will be able to provide payment necessary to cure the default within 45-days of the date the notice required pursuant to paragraph (1) of this subsection b. became effective.

Analysis

The terminology “in which the debtor certifies as true” means that the debtor’s response or statement must be by certification (or affidavit). An unsworn statement or certification will not do.

The terminology “the debtor *in good faith* certifies as true” appears redundant, as a certification by definition under the court³¹ rules cannot be willfully false.

The reader should refer to Chapter 8 for a thorough discussion of the debtor’s right of response to the 14-day notice.

§ 8.29 Debtor's Statement; Address; Person to Whom Mailed - *N.J.S.A. 2A:50-58b(2)*

This statement shall be sent: registered or certified mail, return receipt requested, to the address of the lender who gave notice as required pursuant to paragraph (1) of this subsection b.

Analysis

Pursuant to *Federal National Mortgage Association v. Bracero*,³² the debtor’s response to the 14-day notice must be mailed to the lender’s attorney. See Chapter 8 in this regard.

§ 8.30 Statement By Debtor; Consequences - *N.J.S.A. 2A:50-58b(3)*

(3) a lender who receives a statement sent by the debtor pursuant to paragraph (2) of this subsection b., shall not file an affidavit or certification with the office or court earlier than 46 days after the date the notice required pursuant to paragraph (1) of this subsection b. became effective.

Analysis

Where the debtor mails a statement to the lender’s attorney within 10-days from the debtor’s receipt of the notice, the effect of this subsection is to provide the debtor with a

³¹ R. 1:4-4(b).

³² 297 *N.J. Super.* 105 (Ch. Div. 1966).

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minimum period of 45-days to cure, calculated from the date of mailing of the 14-day notice. This is similar to the period provided to the debtor prior to entry of final judgment in a conventional foreclosure and sale action under the act. See Chapter 8.

It is suggested that unless the attorney is absolutely sure that the debtor will not respond to the 14-day notice - and this normally will be the case only where the debtor is an absent defendant served by publication - the attorney not submit his or her affidavit of election and redemption order package to the Office or court until at least 46-days have elapsed from the date of mailing of the 14-day notice.

Neither the act nor R. 4:64-1(f) require that an appearing party be given a notice of motion for entry of the redemption order so that, unlike a conventional action, there are no motions and return dates to worry about with this notice.

§ 8.31 Debtor's Right to an Extension of Time (Entry of Redemption Order)

There is no provision in the act giving a debtor the right to seek an extension of time with respect to the 45-day period after which the redemption order may be entered and the debtor's right to cure will be lost. In the author's opinion, the omission of such a right in the act is no mere oversight. Section 11g (*N.J.S.A.* 2A:50-63g) expressly provides for "an extension of time for good cause shown" with respect to the "date fixed" for redemption in the order for redemption. The act, however, provides no comparable right to seek an extension of time with respect to "entry" of the redemption order.

§ 8.32 "Rule" Requirements for Entry of the Redemption Order; R. 4:64-1(f)

The R. 4:64-1(f) requirements for entry of an order fixing the amount, time and place for redemption in a strict foreclosure action are as follows:

1. *That the action be deemed uncontested in accordance with R. 4:64-1(b) - i.e., all non-answering parties be defaulted and all contested answers be stricken or rendered non-contesting.*
2. *That plaintiff submit its proof of amount due.*
3. *That plaintiff submit its original or certified instruments in accordance with R. 4:64-2 - i.e., note or bond, mortgage and assignments.*
4. *That minors, infants, and persons in military service be represented in accordance with R. 4:64-1(h) - i.e., by appointment of a guardian ad litem or attorney as the case may be, R. 4:26-2(b)(3).*

Analysis

The provisions of R. 4:64-1(f) mimic what is essentially the common law strict mortgage foreclosure practice in New Jersey and are incorporated by reference in subsection 11g of the act (*N.J.S.A.* 2A:50-63g). The content of this paragraph was adopted in 1989 for the express purpose of conforming the rule to the actual practice. The rule also applies to the foreclosure of a tax sale certificate in personam which is a strict foreclosure practice as well.

In order to process an action under the optional procedure through the Office of Foreclosure, plaintiff must comply with the requirements of R. 4:64-1(f), as well as the statute. For the most part, they are similar.

§ 8.33 Certification of Search Fees and Costs - R. 4:43-10

If you want credit for search fees and costs in the taxed costs awarded by the Office of Foreclosure in connection with entry of the redemption order, you should submit a certification of search fees and costs.

As to search fees, you should include all fees actually and necessarily paid or incurred for searches subsequent to the mortgage being foreclosed. The amount of such fees are limited to 1% of the amount due under the mortgage, with a \$500 maximum and a \$75 minimum, if \$75 were paid or incurred for searches.

Other costs should also be itemized in the certification. Such costs include sheriff's fees for service of original process, *lis pendens* filing fees, publication fees paid to a newspaper for service on absent defendants, and certified mailing fees for service of original process.

The Office of Foreclosure will tax the costs and include the fees and charges itemized in your certification in the Clerk's taxed cost sheet. The tax cost sheet also includes a \$200 fee for the filing of the complaint, an attorney's statutory allowance of \$50,³³ and counsel fees awarded pursuant to R. 4:42-9(a)(4). See Chapter 8 in this regard.

§ 8.34 Certification of Amount Due and Non-Military Service - R. 4:64-2, 1:5-7.

This certification tells the court the amount due and owing under the mortgage being foreclosed, so that the court may include this amount in the foreclosure judgment. Counsel fees should not be included in this amount as they are separately awarded as part of taxed costs.

The reader is referred to Chapter 8 (§ 8.07) for a more thorough discussion. A separate Affidavit of Non-Military is now required in accordance with amended R. 1:5-1.³⁴

The certification should have an attached schedule giving a breakdown of the amount due. Thus, there should be a breakdown for - principal due at time of default, interest (specifying "from" and "to" dates used for its calculation and rate used), late charges (setting forth the number of late charges and amount of each charge), advances (separately itemizing

³³ N.J.S.A. 22A:22-10

³⁴ R. 1:5-1 Before entry of judgment by default, an affidavit, which may be filed as part of the affidavit of proof, shall be filed as required by law setting forth facts showing that the defendant is not in military service. Unless based on facts admissible in evidence, the affidavit shall have attached to it a statement from the Department of Defense or from each branch of the armed forces that the defendant is not in the military service. If the plaintiff is unable to determine whether the defendant is in military service, the affidavit shall so state, and the court, before entering judgment, may require the plaintiff to post a bond in an amount approved by the court to indemnify the defendant, if later found to have been in military service, against any loss or damage resulting from the judgment should it be set aside. The bond shall remain in effect until expiration of the time for appeal and setting aside of the judgment.

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taxes, insurance and the like), and escrow advances (separately itemizing what the advances were used for).

Late charges cannot be included beyond the filing of the foreclosure complaint.

If the mortgage utilizes a variable rate interest schedule, the rate charged for each particular period must be set forth in the proof.

The principal sum due cannot exceed the face amount of the mortgage unless the loan documents provide for negative amortization.

While it is customary for plaintiff to combine the certification of amount due with the non-military certification,³⁵ the Office of Foreclosure now requires a separate affidavit of non-military service.

§ 8.35 Redemption Order Package

If:

- (a) all defendants have been served,
- (b) the action is deemed uncontested in accordance with R. 4:64-1(a),
- (c) the 14-day notice of entry of the redemption order has been served on the debtor, and
- (d) the debtor has failed to respond to the notice within 10-days after receipt, or
- (e) 45-days have elapsed since mailing of the notice,

then it is time to submit your “redemption order package” to the Office of Foreclosure and have the “order fixing the amount, time and place for redemption” entered under the optional procedure. Necessary papers and proofs for the redemption order package are outlined as follows:

- *Certification of mailing 14-day notice and certification of no response (where papers submitted prior to 46th day).*
- *A copy of the 14-day notice mailed to each debtor must be attached to plaintiff's certification of mailing or application.*
- *Affidavit of election to utilize optional remedy.*
- *Affidavit of abandonment (if abandonment used as basis of remedy).*
- *Affidavit of no-equity and fair market value (if no-equity used as basis of remedy).*
- *Affidavit of non-rescission (if deed in lieu used as basis of remedy).*
- *Copies of returns of service and filed copies of defaults previously entered.*
- *Affidavit of publication, mailing, and inquiry (as to absent defendants served by publication).*
- *Affidavit of mailing - (as to defendants served with original process by mail).*

³⁵ R. 1:5-7.

- *Affidavit of ordinary mailing of a copy of the filed default to all defaulted defendants served personally or by mail.*
- *Proof of amount due.*
- *Non-military affidavit.*
- *Original note or bond, recorded mortgage and assignments, if any, or copies certified to be true by New Jersey attorney.*
- *Form of order fixing the amount, time and place for redemption.*

§ 8.36 Election to Proceed Under the Optional Procedure - *N.J.S.A. 2A:50-63f*

f. (1) In accordance with the provisions of *R. 4:64-1(d)* of the Rules Governing the Courts of the State of New Jersey, and subject to compliance with the provisions of this act, a lender may elect to proceed with the optional procedure by filing an affidavit or certification with the office or the court.

(2) The affidavit or certification shall set forth the facts which the lender alleges show that it is entitled to proceed under one or more paragraphs of subsection b. of this section and shall be supported by the proofs required by this section and such other proofs as may be required by the office or the court.

Analysis

Section 11f makes it clear that plaintiff must affirmatively “elect” to use the optional procedure by filing the required affidavit or certification. It would appear from the language - “supported by the proofs required by this section [section 11]” - that the affidavit or certification to elect must be forwarded to the Office of Foreclosure with plaintiff’s redemption order package. Unquestionably, the “proofs” referred to by Section 11f, at least in part, are the proofs required for the entry of the redemption order. There would appear to be no purpose in filing the affidavit of election prior to the filing of papers and proofs for the redemption order.

The prior *R. 4:64-1(d)* is now *R. 4:64-1(f)*.

As to optional residential foreclosure actions instituted on or after July 16, 2006, the effective date of the statutory amendment, a copy of the 14-day notice must be attached to the affidavit or certification of election. A copy of the notice sent to each debtor should be attached.

§ 8.37 Affidavit of Abandonment - *N.J.S.A. 2A:50-63c*

(Sample Form Appendix C)

Pursuant to Section 11c (*N.J.S.A. 2A:50-63c*), the act requires plaintiff, where plaintiff utilizes abandonment as a basis for the optional remedy, to submit an “affidavit or certification of abandonment” at the same time plaintiff makes application to the office or court for the redemption order.

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§ 8.38 Affidavit of No Equity - *N.J.S.A. 2A:50-63e*

(Sample Form Appendix C)

Pursuant to Section 11e (*N.J.S.A. 2A:50-63e*), the act requires plaintiff, where plaintiff utilizes no-equity as a basis for the optional remedy, to submit an affidavit in accordance with the provisions of the subsection at the time plaintiff makes application to the office or court for the redemption order.

§ 8.39 Deed in Lieu of Foreclosure - Proofs

(Sample Form Appendix C)

While not required by the act, it is the author's suggestion that plaintiff, where a deed in lieu of foreclosure is utilized as the basis for the optional procedure, submit an "affidavit or certification of non-rescission" at the time plaintiff makes application to the office or court for the redemption order. The office or court may require such a proof.

§ 8.40 The Redemption Order - *N.J.S.A. 2A:50-63g*

(Sample Form Appendix C)

g. In accordance with the provisions of *R. 4:64-1(d)* of the Rules Governing the Courts of the State of New Jersey, and subject to compliance with the provisions of this act, the office or the court may enter an order fixing the amount, time, and place for redemption, which shall be not less than 45-days nor more than 60-days after the date of the order. The office or the court may grant an extension of time for good cause shown. The order shall provide that:

- (1) the redeeming defendant pay to the plaintiff's attorney the amount fixed by the office or the court for redemption, together with interest to the date of redemption, plus all court costs;
- (2) redemption shall be by cash, cashier's check or certified check and made at the office of the plaintiff's attorney, if such office is located in the county where the property is situated, or at such other place as designated by the office or the court, between the hours of 9:00 a.m. and 4:00 p.m. of the date set by the office or the court in the order; and
- (3) in the absence of redemption, the defendants shall stand absolutely debarred and foreclosed from all equity of redemption.

Analysis

The requirements of *R. 4:64-1(d)*, *R. 4:64-1(f)*, are set forth in a preceding section. The language of the subsection "subject to compliance with the act" undoubtedly refers to the "affidavit of election" and "specialized proofs" required before the redemption order may be entered.

The subsection requires a 45-day to 60-day redemption date; this means that the office or court must project a date at least 45-days and not more than 60-days from the date of entry of the redemption order within which the defendants may redeem. Currently, the Office of Foreclosure gives a 60-day redemption date in the redemption orders it enters. Pursuant to Section 11*l* (*N.J.S.A.* 2A:50-63*l*) and current case law,³⁶ redemption may be made at any time up until entry of judgment including the whole of the last day upon which judgment is entered.

In accordance with Section 11*g*, the office or court, with respect to the “date” fixed for redemption, may grant an extension of time for “good cause” shown. It is assumed that grounds for such an extension would include “hardship,” a “signed contract” for sale of the mortgaged premises, or other reason justifying equitable relief by the court. Equity has always had inherent authority to give interested persons extensions of time to redeem and, historically, has exercised this right with great liberality. Of course, it is clear that notwithstanding the provisions of the subsection, all applications for extensions of time must be made to the vicinage judge, as the Office of Foreclosure cannot enter an order which requires the exercise of judicial discretion.

§ 8.41 Contents of the Redemption Order - *N.J.S.A.* 2A:50-63*g, h*

(Sample Form Appendix C)

g. The order shall provide that:

- (1) The redeeming defendant pay to the plaintiff’s attorney the amount fixed by the office or court for redemption, together with interest to the date of redemption, plus all court costs;
- (2) redemption shall be by cash, cashier’s check or certified check and made at the office of the plaintiff’s attorney, if such office is located in the county where the property is situated, or at such other place designated by the office or the court, between the hours of 9:00 a.m. and 4:00 p.m. of the date set by the office or the court in the order; and
- (3) in the absence of redemption, the defendants shall stand absolutely debarred and foreclosed from all equity of redemption.

h. (2) The notice shall:

- (a) inform the defendants that the plaintiff is proceeding under an optional procedure authorized by section 11 of this act and set out the steps of the optional procedure;
- (b) inform all defendants of the terms and conditions under which a defendant may request a public sale of the mortgaged premises pursuant to subsection i of this section; and;

³⁶ *Landa v. Adams*, 162 *N.J. Super.* 318, 392 A.2d 1215 (App. Div. 1978).

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(c) clearly state that no request for a public sale made after 30-days from the date of service will be granted, except for good cause shown.

Analysis

There appears to be a mistake in paragraph (2) of Section 11h, *N.J.S.A.* 2A:50-63h(2). Reference in paragraph (2) to the “notice,” should read the “order or notice.”

It is instructive to note that reference in paragraph (2) to “plaintiff’s attorney” is the first time any mention has been made in the act of plaintiff’s attorney as having any specific role or function in the action.

Of course, the redemption order refers to “redemption” by parties in interest - *i.e.*, payment of the total accelerated mortgage indebtedness plus interest and costs - not the right of the debtor to “cure” by payment of arrearages. Pursuant to section 5 of the act, the debtor has lost the latter right by virtue of the entry of the redemption order. Plaintiff is entitled to the sum fixed by the redemption order plus *interest* (*i.e.*, contract rate interest) to the date of redemption. The order should not provide for “lawful” interest on the redemption sum, as lawful interest (*i.e.*, the post judgment rate)³⁷ is applicable only after entry of final judgment.

In point of actual practice, the Office of Foreclosure enters the redemption order in the name of a chancery judge designated by the Chief Justice³⁸ (presently the Honorable Neil H. Shuster, Chancery Judge of Mercer County). The redemption order fixes: (a) the redemption “amount,” (b) the redemption date, the “time” by which redemption must be made by the defendants, and (c) the “place” where redemption is to be made.

The redemption date itself is just a formality, as another provision of the act, Section 11l, makes it clear that redemption is permitted up until the entry of judgment including *the whole of the last day upon which judgment is entered*. This conforms with present equity practice. The redemption order also sets forth the service requirements of the order.

Where the mortgaged premises are not located in the county where plaintiff’s attorneys are located, plaintiff, may utilize a law office located in the county where the mortgaged premises are situate and have redemption ordered made to that office.

Historically, the redemption order was the final step in the strict foreclosure process. Failure of the defendants to redeem in accordance with the redemption order, debarred and foreclosed the equity of redemption of the defendants without further action or documentation. Later, the redemption order was followed up with a “decree,” which merely memorialized of record the failure of the defendants to redeem.

§ 8.42 Service of the Redemption Order - *N.J.S.A.* 2A:50-63h(1)

h. (1) The order for redemption or notice thereof shall be mailed to each defendant's last known address and, if different, also to the address of the property being foreclosed. The order for redemption or notice thereof shall be

³⁷ *R.* 4:42-11(a). The rule also refers to orders for the payment of money. A redemption order is not an order for the payment of money within the meaning of the rule.

³⁸ *R.* 1:34-6.

sent by ordinary mail and certified mail, return receipt requested, within 20-days after the date the order is entered, except that, as to defendants whose addresses are unknown and who were served by publication, no further publication of the order for redemption or notice thereof need be made.

Analysis

Paragraph (1) requires that the redemption order be served by ordinary and certified mail, return receipt requested. This is the only instance under the act where simultaneous mailed modes are required.

The service requirement for the redemption order, which require an *additional* mailing to the mortgaged premises in all cases where the address of a defendant is not the same as the mortgaged premises, make little sense and probably is the result of a mistake. The redemption order should be served on defendants whose addresses are known by mailing to the address or addresses where they were last served. Many defendants in the action will be “non-debtors.” It makes little sense to require an additional mailing to the mortgaged premises if the address of a non-debtor defendant is not the same as mortgaged premises. Presumably, addresses for subsequent encumbrancers will never be the same as the mortgaged premises.

It is the author’s opinion that an additional mailing to the mortgaged premises should only be effectuated where mailing is made to a “debtor.” Mailing to the mortgaged premises for a non-debtor defendant is ridiculous. If Bell Telephone is a defendant in the action, why should an additional mailing be required to Bell Telephone at the mortgaged premises.

R. 4:64-1(d), now R. 4:64-1(f), requires that the redemption order or notice be served on defendants whose addresses are known by “ordinary” mail, whereas this paragraph requires an ordinary and certified mailing, return receipt requested. And second, as to defendants whose addresses are unknown, publication of the order or notice is required under the rule.

Paragraph (1) of Section 11h (*N.J.S.A.* 2A:50-63h) dispenses with the second publication as to absent defendants whose addresses are unknown and were served with original service by publication. This accords with *N.J.S.A.* 54:5-98, as the second publication is deemed unnecessary and futile.

The following interim policy was approved by the Supreme Court at its January 2, 1996 Administrative Conference:

Notice of Order Entering Amount, Time and Place for Redemption: The Office of Foreclosure is to continue requiring publication as mandated by the rule, at least ten days prior to the redemption date.

Obviously, the Supreme Court deems the second publication to be a due process requirement which cannot be dispensed with. By virtue of this policy, the Office of Foreclosure will require that defendants whose addresses are unknown be served with the redemption order (or notice) by publication in accordance with R. 4:64-1(d), now R. 4:64-1(f). There is no requirement under the paragraph that the redemption order or notice also be mailed to the mortgaged premises where a defendant is served by publication. This would have been a good idea for a debtor-defendant served by publication.

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Where service is made by mail, separate envelopes should be used for each defendant, even if they are husband and wife living at the same address.³⁹

The rule incorporates the equity practice by providing that either the redemption order or a “notice”⁴⁰ thereof be served on the defendants. The “notice” (*i.e.*, “notice to redeem”) is an abbreviated form of the order, which contains all the essential information of the order, and will save plaintiff advertising costs where the order or notice must be published in the newspaper.

§ 8.43 Ineffective Redemption Order

Where the redemption order is ineffective, either because it has not been properly served in accordance with the terms of the order or because the content of the order is erroneous in whole or part, a new redemption order must be entered by the Office and served in accordance with law. In such cases, presumably the right to cure by the debtor would not be terminated until entry of the second or subsequent order. Pursuant to the statute,⁴¹ another 14-day notice (giving the debtor the right to cure) must be mailed to the debtor before the Office can enter a new redemption order.

§ 8.44 Procedure for Requesting a Sale - *N.J.S.A. 2A:50-63i*

(*Sample Form Appendix C*)

i. In any matter in which the office or the court has issued an order for redemption and the lender is permitted to proceed by the optional procedure, a defendant who wishes to object to the optional procedure and request a public sale with respect to the mortgaged premises being foreclosed, shall submit to the office or the court a written request for a public sale within 30-days of the date the order or notice thereof is served. If a defendant requests a public sale within the required time period, and subject to compliance with the provisions of this act, the office or court shall enter a judgment of foreclosure which provides for a public sale of the premises in accordance with applicable law.

Analysis

The provisions of this subsection underscore why it is imperative for a lender to seek conventional as well as optional relief under the Act. Otherwise, if the optional procedure is converted to a conventional foreclosure with sale pursuant to a request for a public sale by a defendant, a plaintiff who has not requested conventional relief in its complaint will be without a remedy.

The subsection makes it clear that only a “defendant” may request a public sale. Thus, a debtor who gives a deed in lieu of foreclosure and is not a party to the action cannot request a sale because that person is not a defendant. This same principle would presumably apply to a person not made a defendant to the action because that person’s lien or interest post-dated the filing of the notice of *lis pendens*.

³⁹ *Henry C. McCandless, Inc. v. Schaffer*, 103 N.J. Eq. 170, 142 A. 566.

⁴⁰ See Appendix C.

⁴¹ *N.J.S.A. 2A:50-58b*.

It is assumed that the mortgagor will always request a public sale in order to delay the foreclosure. However, the only instance in which this appears to be a real possibility is where “no-equity” is used as a basis for the optional procedure.

The deed in lieu of foreclosure debtor will not request a sale because: (a) the debtor, having divested himself or herself of title, may not be a defendant in the action; (b) the debtor having voluntarily relinquished title and possession will have no reason to seek a sale or delay; and (c) as noted above, such a debtor being neither a defendant nor an owner has no right to request a sale under the act.

Where abandonment is used as the basis for the optional remedy, there ordinarily will be no debtor in being who can be located, so the possibility of such a debtor requesting a sale is entirely remote.

Where a defendant has properly “requested” a sale pursuant to subsection 11i, it would appear that the correct procedure to follow is (a) vacation of the order fixing the amount, time and place for redemption and (b) entry of a conventional foreclosure judgment providing for a public sale. Presumably, language vacating the redemption order in such cases can be included in the conventional judgment of foreclosure.

§ 8.45 When a Cash Deposit or Bond is Not Required - *N.J.S.A. 2A:50-63i*

Pursuant to Section 11i:

Any such defendant who requests a public sale, other than a natural person who is the owner or a voluntary transferee from that owner, shall be required to post a cash deposit or bond prior to the date fixed for redemption.

Analysis

By virtue of the language of the subsection - “a voluntary transferee from that owner” [*sic* natural person] - it would appear that an individual acquiring title to the mortgaged premises from a corporate owner and requesting a sale would be required to post a cash deposit or bond. However, where the owner (*e.g.*, a natural person) voluntarily transfers title to a corporation or partnership that transferee is apparently not required to post a cash deposit or bond in order to request a sale, because in this instance the subsection does not expressly require that the transferee also be a natural person.

By use of the language “voluntary transferee,” the subsection makes it clear that a purchaser at an involuntary sale (*i.e.*, a foreclosure sale, judgment execution sale or the like) would be required to post a cash deposit or bond in order to request a public sale.

§ 8.46 When a Bond is Required; Procedure - *N.J.S.A. 2A:50-63i*

Section 11i provides:

Any such defendant who requests a public sale, other than a natural person who is the owner or a voluntary transferee from that owner, shall be required to post a cash deposit or bond prior to the date fixed for redemption. This cash deposit or bond shall be in an amount which is 10% of the amount found due

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in the order fixing the amount, time and place for redemption and shall be held to secure the plaintiff against any additional interest and costs, as well as any deficiency, as a result of the public sale. The office or the court may dispense with this requirement for good cause shown. The defendant who requests a public sale, other than a natural person who is the owner or a voluntary transferee from that owner, shall pay all expenses and costs associated with the public sale, including, but not limited to, all sheriff's fees and commissions.

Analysis

It has been pointed out that the act does not specify with whom the bond must be posted. By virtue of the language "The office or court may dispense with a bond," it is clear that the Legislature intended that the bond be posted with the Office of Foreclosure or the court. Because the current court rules do not permit a bond to be approved and accepted by the Office, the bond must of necessity be approved and accepted by the chancery judge of the vicinage, *R* 1:13-3.

The following interim policy was approved by the Supreme Court at its January 2, 1996 Administrative Conference:

Authority to Dispense with Requirement of Posting Cash Deposit or Bond when Requesting Public Sale Under Optional Procedure: Application to waive cash deposit or bond received by the Office of Foreclosure are to be referred to the appropriate Chancery Division judge for adjudication and be entered by the Office of Foreclosure only with court approval.

A person required to post a bond should be prepared to bid up to plaintiff's full debt, interest and costs at the sale; otherwise that person will be liable to plaintiff for: (a) any additional interest and costs as a result of the sale and (b) any deficiency - *i.e.*, the difference between the bid price and plaintiff's debt, interest and costs. A subsequent encumbrancer in such an instance would be better off redeeming from the plaintiff and taking an assignment of the mortgage.

Because of the requirement of a bond, it is unlikely that a non-debtor defendant will request a sale, unless that person actually intends to purchase at the sale and liquidate the lender's debt, interest and costs. Such a sale, therefore, would not be requested for purposes of delay.

§ 8.47 Redemption - *N.J.S.A. 2A:50-63k*

(Sample Form Appendix C)

k. Upon redemption, the plaintiff shall furnish the redemptioner with an appropriate certificate of redemption and the redemptioner shall acquire all rights provided by law and equity but shall not be entitled to a deed or title to the mortgaged premises solely by virtue of the redemption. A redemptioner in proper cases may proceed to foreclose the redemptioner's interest.

Analysis

The provision in the subsection that the redeeming person - “shall not be entitled to a deed” - was meant to overrule the present equity, strict mortgage foreclosure practice in New Jersey which unjustly entitles a redemptioner to a deed to the mortgaged premises.⁴²

The language of the subsection makes it clear that the redemptioner may be entitled, according to equity practice and procedure, to step into plaintiff’s shoes and foreclose as assignee or equitable assignee of the plaintiff-mortgagee.

The effect of redemption depends upon the person redeeming. Redemption by the owner will serve to terminate the foreclosure action and preserve the *status quo*.

The requirement of the subsection that on redemption plaintiff shall furnish the redemptioner with an appropriate certificate of redemption appears to be of little purpose. Perhaps, this is a misguided requirement taken from the Tax Sale Law⁴³ to evidence extinguishment or cancellation of the tax sale certificate. In any event, such a certificate is not needed in mortgage foreclosure practice. A mortgage may only be canceled of record in accordance with specific statutory procedures.⁴⁴

§ 8.48 Redemption; Dispute Among Defendants - N.J.S.A. 2A:50-63j

j. In the event of any dispute among defendants over the right to redeem, the court shall enter such order as is necessary to secure the plaintiff pending the resolution of the dispute, including, but not limited to, payment of plaintiff’s additional interest and costs which accrue as a result of the dispute.

Analysis

According to equity practice and procedure, where there is a dispute among co-defendants as to which defendant is entitled to redeem, redemption is ordinarily permitted in accordance with the order of priorities of those defendants.

§ 8.49 Procedure for Judgment - N.J.S.A. 2A:50-63l

(Sample Forms Appendix C)

l. In the absence of redemption, and on proof of mailing of the order for redemption or notice thereof pursuant to subsection h. of this section and an affidavit of non-redemption, the plaintiff shall be entitled to a judgment debarring and foreclosing the equity of redemption of the defendants and each of them and any person claiming by, through or under them, and adjudging the plaintiff be vested with a valid and indefeasible estate in the mortgaged premises. Anything to the contrary notwithstanding, redemption shall be permitted at any time up until the entry of judgment including the whole of the last day upon which judgment is entered. A certified copy of the judgment

⁴² See *supra* Chapter 14.

⁴³ N.J.S.A. 54:5-53.2.

⁴⁴ N.J.S.A. 46:18-5, -6, -7, -8 and N.J.S.A. 2A:51-1 *et seq.*

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shall be accepted for recording by the county recording officer pursuant to P.L.1939, c. 170 (C. 46:16-1.1).

Analysis

Section 111 (*N.J.S.A.* 2A:50-63l) does not expressly require that: (a) the redemption order (or notice thereof) be published⁴⁵ as to defendants whose addresses are unknown and; (b) “appearing” parties be given a notice of motion for judgment.⁴⁶ The subsection also does not refer to the entry of judgment in accordance *R. 4:64-1(d)* now *R. 4:64-1(f)*.⁴⁷

Compliance with the rule is nevertheless a condition of the statute,⁴⁸ and the Office of Foreclosure will not enter judgment absent compliance with it. Thus, where applicable, appearing parties must be given a notice of motion for judgment (*i.e.*, 16-days plus three *business* days for mailing) and, in accordance with the previously noted policy⁴⁹ of the Supreme Court, parties whose addresses are unknown must be served with the redemption order (or notice) by publication.

The final judgment debars and forecloses the defendants (and their privies) of all equity of redemption and vests title in the plaintiff.

This is similar to the effect of a judgment in a tax sale certificate foreclosure judgment.⁵⁰ Although the statute does not specifically so provide, the estate vested in the plaintiff is a “fee simple” estate unless a leasehold or other lesser estate is being foreclosed.

The statute incorporates the principle of *Landa v. Adams*⁵¹ established in tax sale certificate foreclosure actions, that redemption is permitted up until final judgment including the whole of the last day upon which judgment is entered.

Even though the final draft of Assembly Bill No. 1064 deleted the language “awarding possession” after “a judgment” in subsection 11j, it is clear that plaintiff may

⁴⁵ See Appendix C.

⁴⁶ See Appendix C.

⁴⁷ **(f) Tax Sale Foreclosure; Strict Mortgage Foreclosures.** If an action to foreclose or reforeclose a tax sale certificate in personam or to strictly foreclose a mortgage where provided by law is uncontested as defined by paragraph (c), the court, subject to paragraph (h) of this rule, shall enter an order fixing the amount, time and place for redemption upon proof establishing the amount due. . . . The order for redemption or notice of the terms thereof shall be served by ordinary mail on each defendant whose address is known at least 10-days prior to the date fixed for redemption. Notice of the entry of the order of redemption, directed to each defendant whose address is unknown, shall be published in accordance with *R. 4:4-5(c)* at least 10-days prior to the redemption date The court, on notice to all appearing parties including parties whose answers have been stricken, may enter final judgment upon proof of service of the order of redemption as herein required and the filing by plaintiff of an affidavit of non-redemption. The Office of Foreclosure may, pursuant to *R. 1:34-6*, recommend the entry of both the order for redemption and final judgment.

⁴⁸ *N.J.S.A.* 2A:50-63a.

⁴⁹ The following interim policy was approved by the Supreme Court at its January 2, 1996 Administrative Conference: Notice of Order Entering Amount, Time and Place for Redemption: The Office of Foreclosure is to continue requiring publication as mandated by the rule, at least ten days prior to the redemption date.

⁵⁰ *N.J.S.A.* 54:5-87.

⁵¹ 162 *N.J. Super.* 318, 392 A.2d 1215 (App. Div. 1978) (Landowner’s right of redemption was not barred by final judgment entered at some unknown time during final day for redemption, *N.J.S.A.* 54:5-85, -86).

obtain an award of possession in the judgment where plaintiff has included a second or additional count for possession in the complaint. Under common law in New Jersey, a mortgagee is entitled to possession on or after default⁵² by the mortgagor, irrespective of whether a foreclosure or possession proceeding has been instituted. This principle would remain unchanged whether the optional or conventional procedure is subsequently utilized for foreclosure.

Even if a mortgagee were not entitled to possession on or after default, the mortgagee by virtue of the entry of judgment under the optional procedure becomes the “owner” of the mortgaged premises and entitled, thereby, to possession *qua* owner. Pursuant to R. 4:27-2, a fourth count awarding possession on entry of judgment under the optional procedure may be joined with the third (or foreclosure) count. Thus, under either view, the foreclosure judgment may award possession under the optional procedure where a count for possession has been included in the foreclosure complaint.⁵³

It is not clear to the author why the terminology “awarding possession” was deleted from subsection 63l. However, such deletion in the author’s opinion has no practical effect on the right of the mortgagee in New Jersey to obtain possession as against the mortgagor.

Where the foreclosure judgment does not award possession, plaintiff may obtain possession pursuant to an order for possession procedure.⁵⁴

§ 8.50 Final Judgment Package

The final judgment “package,” or papers necessary to obtain final judgment under the optional procedure, are outlined as follows:

- *Proof of certified and ordinary mailing of the redemption order (or notice thereof) to defendant’s last known address and, if different, also to the address of mortgaged premises. N.J.S.A. 2A:50-63h(1).*⁵⁵
- *Proof of publication of the redemption order (or notice to redeem), if defendants’ addresses are unknown. R. 4:64-1(f).*⁵⁶
- *Notice of motion for judgment (16-days plus 3-business days for mailing) to all appearing parties. R. 4:64-1(d).*⁵⁷
- *Affidavit of non-redemption. N.J.S.A. 2A:50-63l.*⁵⁸

⁵² *Dorman v. Fisher*, 31 N.J. 13, 14, 155 A.2d 11, 12 (1959).

⁵³ See Appendix C.

⁵⁴ R. 4:59-2(b). This requires a 10-day demand for possession to parties in possession and a notice of motion for an order for possession (16-days plus three business days for mailing) returnable before the vicinage chancery judge. To save time, the demand and notice of motion may be served on parties in possession simultaneously.

⁵⁵ See Appendix C.

⁵⁶ See Appendix C.

⁵⁷ See Appendix C.

⁵⁸ See Appendix C.

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- *Form of final judgment. N.J.S.A. 2A:50-63l.*⁵⁹
- *Form of writ of possession, if applicable. R. 4:59-2(b).*⁶⁰

The procedure for judgment under the optional procedure is substantially similar to the procedure for judgment in a tax sale certificate foreclosure action. The only real difference being that under the optional procedure the redemption order must be mailed by ordinary *and* certified mail, return receipt requested to defendants whose addresses are known, whereas under a tax sale foreclosure only ordinary mailing of the redemption order is required.

§ 8.51 Checklist (General)**Stage #1**

1. Obtain foreclosure searches;
2. Mail notice of intention to foreclose - 30-days;
3. Prepare and file complaint;
4. Prepare and file lis pendens;
5. Obtain continuation searches through filing date of lis pendens;
6. Amend complaint if additional liens or interests are shown on continuation search;
7. Service
 - (a) complaint/amendments with summons on defendants whose addresses are known;
 - (b) notice in lieu of summons and complaint/amendments to State of New Jersey
 - (c) publish notice to absent defendants in newspaper/mailling within seven days - obtain proof of publication

Deal with any contesting answers filed by:

1. motion for summary judgment/motion to strike
2. agreement (*e.g.*, change to non-contesting/withdrawal)

Stage #2

Apply for entry of default with the following submissions to the Clerk's Office/Office of Foreclosure:

1. Request and Certification of Default; and/or
2. Notice of Motion for Entry After Six Months (if default not timely entered) with supporting Certification, Proof of Mailing, and Order;

Stage #3

⁵⁹ See Appendix C.

⁶⁰ See Appendix C. (Anti-Eviction Act Affidavit).

Appointment of: guardian ad litem for minor or incompetent defendant and attorney for defendant in military service. Filing of answer or appearance by guardian or attorney.

Action becomes “uncontested” on latest of three dates below:

1. Date last default entered;
2. Date last contested answer stricken or rendered non-contesting;
3. Date last uncontested answer filed.

Stage #4

After action becomes “uncontested”:

1. Mail 14-calendar day notice to debtors of filing of an affidavit of election to utilize optional procedure and for entry of redemption order.

Stage #5

Redemption Order may be entered prior to 46th day, if (a) within 10-days after receipt by debtors of notice (b) lender’s attorney has not received a certified statement from debtor.

Redemption Order cannot be entered prior to 46th day - all other cases.

Apply for entry of the order fixing the amount, time and place for redemption (“redemption order”) by filing the following with the Office of Foreclosure:

1. If the redemption order is to be entered prior to 46th day - certification of: (a) mailing of 14-day notice (with copies of mailed notices annexed), and; (b) no response from debtor within 10-days after receipt by debtors of notice; or
2. If redemption order is to be entered on or after 46th day - certification of mailing of 14-day notice (with copies of mailed notices annexed);
3. Certification of ordinary mailing of filed default (to defaulting defendants served personally or by mail);
4. Affidavit or Certification of Election (to utilize optional procedure) with supporting: (a) Certification of Abandonment; and/or (b) Certification of Deed In Lieu of Foreclosure and Non-Rescission; and/or (c) Certification of No-Equity.
5. Copies of all services, including answers or appearances filed and disposition order of contesting answers;
6. Any corrective orders;
7. Proof of relief from any bankruptcy stay;
8. Certification of Service (as to defendants served with original process by mail);
9. Certification of Publication, Inquiry and Mailing (absent defendants);
10. Certification of Amount Due;
11. Certification of Non-Military Service (with Department of Defense Statement annexed)

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12. Certification of Fees and Costs;
13. Copy of note or bond and recorded mortgage and assignments, if any, certified to be true copies;
14. Form of Redemption Order.

Stage #6

Apply for Final Judgment by filing the following with the Office of Foreclosure:

1. Proof of Mailing of the Redemption Order (or Notice), by ordinary and certified mail, return receipt requested, to all defendants whose addresses are known - within 20-days after entry of Order; or
2. Proof of Publication of Redemption Order (or Notice) to defendants whose addresses are unknown and who were served by publication - within 20-days after entry of Order;
3. Notice of Motion for Judgment (and proof of service) to attorneys for answering or appearing parties and parties appearing pro se;
4. Affidavit or Certification of Non-Redemption;
5. Form of Final Judgment.

Stage #7Post Judgment

1. Recording of final judgment as a deed with county recording officer where land located, *N.J.S.A.* 46:16-1.1;
2. Mail copy of judgment to appearing parties and attorneys of record/within seven days after judgment signed;
3. Mail copy of judgment (ordinary mail) to defaulting defendants/within seven days after receipt of judgment by plaintiff.
4. If “no equity” used as basis for the optional remedy, on resale of property by lender: (a) deposit excess funds, if any, in court and; (b) notify debtor and all lien holders who then have 6-months to make application for turnover of excess funds.

§ 8.52 Checklist (Detailed)

1. Notice of Intention (to be mailed to the debtor at least 31-days prior to filing of complaint). *N.J.S.A.* 2A:50-56a.
2. Prepare and file complaint. *R.* 1:4-1, *et seq.*
3. Prepare and file *lis pendens*. *N.J.S.A.* 2A:15-6 *et seq.*
4. Obtain continuation searches through date of filing *lis pendens*.
5. Service:

- (a) summons and complaint (and amendments, if any). *R. 4:4-4, -5, -6, -7.*
 - (b) notice in lieu of summons and complaint to State of New Jersey. *R. 4:4-4(a)(7).*
 - (c) publication of notice to absent defendants in newspaper and mailing - obtain proof of publication. *R. 4:4-5(c).*
6. Enter default against all non-answering defendants. *R. 4:43-1.*
7. Ordinary mail a copy of the filed default to all defaulting defendants served personally or by mail. *R. 4:43-1.*
8. Deal with any contested answers filed by:
- (a) Motion to strike/summary judgment
 - (b) Requesting attorney to withdraw or change to uncontested answer
9. Have a guardian ad litem appointed for any minor and incompetent defendants and an attorney appointed for a defendant in military service. *R. 4:4-64-1(f).*
10. When action is deemed “uncontested” - *e.g.*, date of entry of last default or date last contested answer stricken or rendered non-contesting, whichever is later - mail 14-day notice to debtors of filing of an affidavit of election to utilize optional procedure and for entry of redemption order. *R. 4:64-1(a). N.J.S.A. 2A:50-58(b)(1).*
11. **Alternative number one:** Wait 45-days from the date the 14-day notice was mailed to the debtor and submit redemption order package to Office of Foreclosure on or after the 46th day. (Author’s suggested practice).
12. **Alternative number two:** The Office of Foreclosure will not enter the redemption order prior to the 46th day (after mailing of the 14-day notice) unless: (a) a certification of mailing of the 14-day notice is furnished; (b) at least 10-days have elapsed from receipt by debtors of notice; and (c) a certification of no response by the debtor is furnished.

First Package Submission

13. Redemption order package:
- [Copies of defaults and services previously filed; original acknowledgments of service not filed.]
 - [Proof of service for defendants, if any, served with process by publication - affidavit of publication, mailing, and inquiry.]
 - [Proof of service for defendants, if any, served with process by mail - affidavit of mailing and inquiry]
 - Affidavit of ordinary mailing of a copy of the filed default to defaulting defendants served personally and by mail. *R. 4:43-1.*
 - Certification of mailing of the 14-day notice with copies of mailed notices attached (and if application is made for the redemption order prior to the 46th day, certification must state that at least 10-days have

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elapsed since receipt by the debtors of notice and a certification of no response from the debtor is required).

- Affidavit of election to utilize optional remedy. *N.J.S.A.* 2A:50-63(f).
- Affidavit of non-rescission - if deed in lieu used as basis of remedy. *N.J.S.A.* 2A:50-63(b)(2).
- Affidavit of abandonment - if abandonment used as basis of remedy. *N.J.S.A.* 2A:50-63(b)(1).
- Affidavit of no-equity and fair market value - if no-equity used as basis of remedy. *N.J.S.A.* 2A:50-63(b)(3).
- Affidavit of amount due. *R.* 4:64-1(d).
- Affidavit of search fees. *R.* 4:42-10.
- Affidavit of non-military service. *R.* 1:5-7.
- Original note or bond, mortgage and assignments, if any, or copies certified to be true by New Jersey attorney. *R.* 4:64-2.
- Form of order fixing the amount, time and place for redemption. *N.J.S.A.* 2A:50-63g,h.

14. Entry of order fixing the amount, time and place for redemption. *N.J.S.A.* 2A:50-63g,h; *R.* 4:64-1(d).

Second Package Submission

15. Final judgment package.

- As to defendants whose addresses are known, proof of mailing of redemption order (or notice to redeem), by ordinary *and* certified mail, return receipt requested, within 20-days of date of order. *N.J.S.A.* 2A:50-63h(1).
- As to defendants whose addresses are unknown, proof of publication of redemption order (or notice to redeem) within 20-days of date of order. *R.* 4:64-1(f).
- Notice of motion for judgment (16-days plus three business days for mailing) to attorneys for answering or appearing parties and parties appearing pro se, if any, and proof of service of the notice. *R.* 4:64-1(d).
- Affidavit of non-redemption by plaintiff. *N.J.S.A.* 2A:50-63l; *R.* 4:64-1(f).
- Form of final judgment

16. Entry of final judgment. *N.J.S.A.* 2A:50-63l.

Post Judgment

17. Recordation of certified (blue or gold sealed) copy of final judgment as a deed with county recording officer where mortgaged premises situate. *N.J.S.A.* 46:16-1.1.

18. Ordinary mailing of a copy of the judgment to defaulting defendants within 7-days after receipt of executed judgment. *R.* 4:43-2(c).

19. Service of a copy of the judgment on attorneys of record and appearing parties within 7-days after judgment signed. *R.* 1:5-1(a).

20. On entry of judgment, the debt secured by the foreclosed mortgage is deemed satisfied and plaintiff cannot institute any further or contemporaneous action for the collection of the debt. *N.J.S.A.* 2A:50-63m.

21. If “no equity” used as basis for the optional remedy, on resale of property by lender, deposit excess, if any, in court and notify debtor and all lien holders whose liens were lost in whole or part, who then have 6 months to make a surplus moneys application for turnover of excess funds. *N.J.S.A.* 2A:50-63e(2) and (3).

§ 8.53 Entry of Final Judgment

After entry of judgment, the foreclosing attorney will receive back a *certified copy* of the judgment from the Office of Foreclosure with a blue or gold seal affixed. This certified copy of the judgment⁶¹ must be immediately recorded as a *deed* with the county recording officer where the land is situated. If the property is located in more than one county, the judgment must be recorded in the several counties where the property is situate, not just the county of venue.

The judgment in a strict foreclosure action operates as a deed from the defendants to the plaintiff, and the county recording officer will index the names of all defendants in the Grantor Book for Deeds. It is important, therefore, that the names of all defendants to the action be listed in the judgment.

The foreclosing attorney must make sure that the description in the judgment is accurate in all respects, otherwise the marketability of title may be impugned. If the description in the judgment contains minor errors, plaintiff can obtain an order correcting clerical error in the judgment which, if sealed, can also be recorded with the county recording officer. An amended judgment can also be used for this purpose. For major discrepancies in the judgment or proceeding, the Office of Foreclosure will ordinarily refer the foreclosing attorney to the vicinage judge for the relief requested.

If the judgment is vacated in whole or in part, a *sealed* copy of the order vacating must be obtained which should be recorded⁶² with the county recording officer.

§ 8.54 Bankruptcy

Final judgment under the optional procedure cuts off (*i.e.*, terminates) the interests of all defendants in and to the mortgaged premises. The owners have no right of redemption after judgment, similar to the right they would have in a conventional foreclosure action.

⁶¹ *N.J.S.A.* 46:16-1.1.

⁶² *Sonderman v. Remington Construction Co., Inc.*, 127 N.J. 96, 603 A.2d 1 (1992).

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11 U.S.C. § 1322(c)(1) now provides, “a default with respect to, or that gave rise to a lien on the debtor’s principal residence may be cured... until such residence is *sold at a foreclosure sale* that is conducted in accordance with applicable nonbankruptcy law...” (Emphasis supplied.)

Since there is no sale under the optional procedure, the judgment under the optional procedure constitutes the sale, as it were, and the above language must necessarily be interpreted in this fashion. Hence, there is no right by the homeowner to cure in a Chapter 13 proceeding after entry of final judgment under the optional procedure.

§ 8.55 Service of Judgment on Parties

(Sample Forms Appendix C)

Pursuant to R. 1:5-1, a copy of the judgment must be served on all *attorneys of record* and *parties appearing pro se* within seven days after it is signed.

Pursuant to R. 4:43-2(c), as to all judgments entered on or after September 1, 1996, a copy of the judgment must be served within 7-days after receipt by plaintiff on all *defaulting defendants* by ordinary mail as required by R. 1:5-2. Presumably, this means that if the defaulting defendant’s address is unknown (*e.g.*, where the defendant has been served by publication), plaintiff must mail a copy of the judgment to the “defendant care of the Clerk of the Superior Court,” Chancery Division (CN 971, Trenton NJ 08625).⁶³

Proof of mailing of the judgment should be filed in the foreclosure action.⁶⁴

§ 8.56 Debt Deemed Satisfied on Entry of Judgment; No Personal Action - N.J.S.A. 2A:50-63m

m. Upon entry of judgment vesting title in the plaintiff pursuant to subsection l. of this section, the debt which was secured by the foreclosed mortgage shall be deemed satisfied, and the plaintiff shall not be permitted to institute any further or contemporaneous action for the collection of the debt.

Analysis

A consequence of utilizing the optional remedy is that the mortgage debt is deemed satisfied on entry of judgment under the optional procedure. The subsection’s prohibition is broad and intended to apply to the “institution” of a personal action on the debt as well as to the “collection” of a judgment for the mortgage debt. The terminology “*plaintiff* shall not be permitted to institute” is clearly erroneous, as the prohibition of the subsection would logically apply to *any holder* of the personal obligation secured by the foreclosed mortgage, once the debt is deemed satisfied. (Emphasis supplied.)

Where “abandonment” or “voluntary surrender” are used as the basis for the optional procedure, relinquishment of the personal action presumably will not present a practical

⁶³ The language of the rule is somewhat confusing. R. 1:5-2 does not require service on defaulting defendants. For the language of the rule to have any meaning therefore, it must mean that defaulting defendants’ must be served at their last known addresses and if none to the Clerk.

⁶⁴ R. 1:5-3.

problem for the lender. Ordinarily, an absent defendant is not amenable to a personal action, which, in all likelihood would be futile anyway; and a debtor giving a deed in lieu of foreclosure would not, in accordance with the expectation of the parties, be sued in a personal action for the mortgage debt.

The subsection specifically provides, “the debt secured by the *foreclosed* mortgage shall be deemed satisfied.” (Emphasis supplied.) Where plaintiff holds a subsequent mortgage which has been cut off in the action but not technically foreclosed, presumably the debt secured by the subsequent mortgage would not be deemed satisfied. Where plaintiff forecloses a first and second mortgage, the debt with respect to both mortgages would be deemed satisfied.

Where a judgment of foreclosure is entered under the optional procedure, if plaintiff or another holds a judgment for the mortgage debt, execution cannot be had on the judgment, as the debt and consequently the judgment would be deemed satisfied under this subsection.

Where a contemporaneous action on the mortgage debt is brought during foreclosure, the cause of action would terminate pursuant to this subsection, once a judgment foreclosing the mortgage is entered under the optional procedure.

Where plaintiff holds a judgment for the mortgage debt upon which plaintiff intends to execute against other assets of the debtor, plaintiff should not pursue foreclosure under the optional procedure for this mortgage, as the judgment will become wholly unenforceable once a judgment of foreclosure is entered under the optional procedure.⁶⁵

§ 8.57 Disposition of Profit on Resale by Lender; No Equity Basis - N.J.S.A. 2A:50-63e(2),(3)

(Sample forms)⁶⁶

e (2) If a lender proceeds with the optional procedure under this subsection, and if the debtor has not objected and requested a public sale pursuant to this section, when the foreclosed property is resold by the lender following judgment and provided the resale price received by the lender is in excess of the amount necessary to repay the debt, interest and reasonable costs of the lender, and all carrying charges, including, but not limited to, the reasonable costs of maintenance and resale, the lender shall deposit any such excess in accordance with R. 4:57 *et seq.* of the Rules Governing the Courts of the State of New Jersey.

(3) Upon deposit of any such excess with the Superior Court, the lender shall notify the debtor and any lien holder who held a lien junior to the lender and whose lien was lost in whole or in part as a result of the foreclosure. Such notification shall be by certified mail, return receipt requested, to the last

⁶⁵ Suppose plaintiff has executed under a judgment for the mortgage debt against other assets of the debtor prior to entry of judgment under the optional procedure. What result would the judgment in the optional proceeding have on the previous executions? Presumably, they would be valid as the debt was in full force and effect when the executions were made and the debt was reduced accordingly.

⁶⁶ See Appendix C.

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known address of the debtor and such lien holders. The debtor and the lien holders shall then have six months to make an application to the Superior Court, in the form of an application for surplus funds, upon appropriate notice to all other parties in interest, to seek an order for turnover of the excess funds. Failure of a lender to comply with the provisions of paragraphs (2) and (3) of this subsection e. shall not affect title to the foreclosed property.

Analysis

The terminology of paragraph (2) of Section 11e - “If a lender proceeds with the optional procedure *under this subsection*,” - makes it absolutely clear that only where the optional procedure is based upon the “no-equity” ground under subsection 11e must a lender deposit any excess after resale into court. (Emphasis supplied.)

Subsection 11e deals exclusively with the no-equity ground as the basis for the optional remedy and reference to the subsection in the statute clearly limits the procedure outlined under paragraph (2) - *i.e.*, the deposit of excess funds into court after resale - to the optional foreclosure procedure under the “no equity” subsection, *N.J.S.A.* 2A:50-63e.

To the author’s knowledge, this is the only instance under New Jersey law where a foreclosing mortgagee must deposit its excess (or net profit as defined by the subsection) into court after the resale of foreclosed property. The Legislature was no doubt concerned that the no-equity basis for utilization of the optional procedure - even with the safeguards built into the act - would permit a lender to obtain foreclosed property with equity which the lender could convert to profit on resale.

This legislative concern, in the author’s opinion, is well-founded depending upon the structure of liens on the foreclosed property. Take, for example, a property worth \$100,000, subject to: (a) a \$25,000 first mortgage being foreclosed with a total amount due of \$32,000 and (b) \$75,000 worth of subordinate liens. It is clear that under the formula of the subsection, there is no equity in the property. This is essentially a “private sale” standard of equity. At a private sale by the mortgagor there would be no equity in this situation.

However, with respect to the purchase of the property at a foreclosure sale, the standard for equity changes. At a foreclosure sale, subordinate liens will be cut off, so that there is a real possibility that the successful purchaser, the lender or third party purchaser, will realize a profit on resale depending upon the bid price. The lender will ordinarily bid up to its upset price - normally its debt, interest, costs and sheriff’s fees - and professional bidders will ordinarily bid up to no more than 60-percent of their own fair market value appraisal of the property.

If, in the scenario above, the lender’s mortgage was a second mortgage and there were no subordinate liens on the property but there were \$75,000 worth of prior liens, then in all likelihood the foreclosing lender would be the successful purchaser at the foreclosure sale and on resale would make no profit and would in fact lose money.

Thus, the formula set forth in paragraph 1 of Section 11e, *N.J.S.A.* 2A:50-63e(1), is virtually worthless in terms of identifying whether a property will have equity at a foreclosure sale.

In most cases, in the author's view, lenders lose money on the resale of foreclosure properties.

Paragraph (2) of the subsection appears to have some definitional inconsistencies. It requires notification only to the "debtor" and subordinate "lien holders." The paragraph should have referred to all subordinate persons in interest prejudiced by the sale. The "owner" of the property may not be the "debtor," and there may be subordinate interests on the property which are not, strictly speaking, "liens" - *e.g.*, a leasehold interest, security interest, life estate or the like. Thus, under a literal reading of the paragraph, it is possible that a non-debtor title holder may be unable to share in any resale surplus.

Because paragraph (2) requires that notification be given to "any lien holder who held a lien junior to the lender and whose lien was lost in whole or in part as a result of the foreclosure," and because this paragraph does not require that such lien holder also be a "defendant," the lender, under the paragraph requirements, must search the record up until recordation of the foreclosure judgment for lien holders whose interests were cut off by the judgment. These lien holders must be noticed, even if their liens were filed after the notice of *lis pendens*, and such lien holders, thereby, were not named as party defendants in the foreclosure action.

At the author's suggestion, the drafters of the act included the provision that failure of a lender to comply with paragraphs (2) and (3) - *i.e.*, the deposit of excess funds with the court and notification requirements to lien holders - shall not affect title. Title companies, therefore, do not have to be concerned with the application of funds received by a lender on resale of the property following a judgment based upon no-equity under the optional procedure.

The author questions the terminology "reasonable costs" in paragraph (2) of the subsection - *i.e.*, "the amount necessary to repay the debt, interest and *reasonable costs* of the lender." (Emphasis supplied.) Presumably, reasonable costs refer to "court" costs. In New Jersey, the only costs recoverable by a lender in a foreclosure action are costs awarded by the Office or court pursuant to court rule. Thus, all costs would be *prima facie* reasonable.

§ 8.58 Reforeclosure

Where foreclosure under the optional foreclosure is incomplete because of the omission of a lienholder or encumbrancer, so long as the "debtor" or other person entitled to cure is not a party to the reforeclosure, the provisions of the act would appear inapplicable. In such an instance, there is no reason why reforeclosure against the omitted encumbrancer could not proceed by way of common law strict foreclosure or by means of foreclosure by sale.

Where, however, a debtor has been omitted from the prior foreclosure, the act would apply and the notice of intention and other provisions of the act would be applicable on reforeclosure. Where the residential debtor-owner is a party to the reforeclosure, presumably common law strict foreclosure could not be utilized.

§ 8.59 Checklist No. 2 (Optional Procedure)

Step #1

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1. Obtain foreclosure searches;
2. Mail notice of intention to foreclose – 30-days (but not where deed in lieu of foreclosure given);
3. Prepare and file complaint;
4. Prepare and file *lis pendens*;
5. Obtain continuation searches through filing date of *lis pendens*;
6. Amend complaint if additional liens or interests are shown on continuation search;
7. Service
 - (a) complaint with summons on defendants whose addresses are known; and amendments
 - (b) notice in lieu of summons and complaint/amendments to State of New Jersey
 - (c) publish notice to absent defendants in newspaper/ mailing within 7 days - obtain proof of publication
8. Deal with any contesting answers filed by:
 - a) motion for summary judgment/motion to strike
 - b) agreement (*e.g.*, change to non-contesting/withdrawal)

Step #2

Apply for entry of default with the following submissions to the Clerk's Office/Office of Foreclosure:

- a) Request and Certification of Default; and/or
- b) Notice of Motion for Entry After Six Months (if default not timely entered) with supporting Certification, Proof of Mailing, and Order;

Step #3

1. Appointment of: guardian *ad litem* for minor or incompetent defendant and attorney for defendant in military service. Filing of answer or appearance by guardian or attorney.
2. Action becomes “uncontested” on latest of three dates below:
3. Date last default entered;
4. Date last contested answer stricken or rendered non-contesting;
5. Date last uncontested answer filed.

Step #4

After action becomes “uncontested”:

Mail 14-calendar day notice to debtors of filing of an affidavit of election to utilize optional procedure and for entry of redemption order.

Step #5

Redemption Order may be entered prior to 46th day, if plaintiff files: (a) a certification of

mailing of the 14-day notice to all debtors and (b) a certification of no response - *i.e.*, that within 10-days after receipt by the debtors of the 14-day notice, lender's attorney has not received a certified statement from the debtors.

Redemption Order cannot be entered prior to 46th day - all other cases.

Apply for entry of the order fixing the amount, time and place for redemption ("redemption order") by filing the following with the Office of Foreclosure:

1. If the redemption order is to be entered prior to 46th day - a certification of (a) mailing of 14-day notice certifying that within 10-days after receipt by the debtors of the 14-day notice, lender's attorney has not received a certified statement from the debtors, and (b) no response from debtor; or
2. If redemption order is to be entered on or after 46th day - a certification of mailing of 14-day notice;
3. Certification of ordinary mailing of filed default (to defaulting defendants served personally or by mail);
4. Affidavit or Certification of Election (to utilize optional procedure) with supporting: (a) Certification of Abandonment; and/or (b) Certification of Deed In Lieu of Foreclosure and Non-Rescission; and/or (c) Certification of No-Equity;
5. Copies of all services, including answers or appearances filed and disposition order of contesting answers;
6. Any corrective orders;
7. Proof of relief from any bankruptcy stay;
8. Certification of Service (as to defendants served with original process by mail);
9. Certification of Publication, Inquiry and Mailing (absent defendants);
10. Certification of Amount Due and Non-Military Service;
11. Non-Military Affidavit;
12. Certification of Fees and Costs;
13. Copy of note or bond and recorded mortgage and assignments, if any, certified to be true copies;
14. Form of Redemption Order.

Step #6

Apply for Final Judgment by filing the following with the Office of Foreclosure:

1. Proof of Mailing of the Redemption Order (or Notice), by ordinary and certified mail, return receipt requested, to all defendants whose addresses are known - within 20-days after entry of Order; or
2. Proof of Publication of Redemption Order (or Notice) to defendants whose addresses are unknown and who were served by publication - within 20-days after entry of Order;

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3. Notice of Motion for Judgment (and proof of service) to attorneys for answering or appearing parties and parties appearing pro se;
4. Affidavit or Certification of Non-Redemption;
5. Form of Final Judgment.

Step #7**Post Judgment**

1. Recording of final judgment as a deed with county recording officer where land located, *N.J.S.A.* 46:16-1.1;
2. Mail copy of judgment to appearing parties and attorneys of record/within 7-days after judgment signed;
3. Mail copy of judgment (ordinary mail) to defaulting defendants/within 7-days after receipt of judgment by plaintiff.

Note: If “no equity” used as basis for the optional remedy, on resale of property by lender: (a) deposit excess funds, if any, in court and; (b) notify debtor and all lien holders who then have 6-months to make application for turnover of excess funds.

CHAPTER 9

VACANT AND ABANDONED RESIDENTIAL PROPERTY FORECLOSURES

§ 9.1 Introduction

FORECLOSURE OF ABANDONED RESIDENTIAL PROPERTIES – RULE RELAXATION, MODEL PLEADINGS

Recently adopted legislation provides for a summary procedure for foreclosure of vacant or abandoned residential properties. L. 2012, c. 70, codified at *N.J.S.A.* 2A:50-73. The Supreme Court has relaxed the provisions of *Rule* 4:64-1 (“Foreclosure Complaint, Uncontested Judgment Other than in In Rem Tax Foreclosures”) to allow such summary foreclosures to proceed pending development and adoption of the necessary implementing rule amendments.

Attached is the Court’s April 29, 2013 detailed rule relaxation order. The Court has asked the Civil Practice Committee to develop and recommend conforming rule amendments. Additionally, the Civil Practice Division of the Administrative Office of the Courts has developed a set of model pleadings to initiate a summary mortgage foreclosure action for vacant and abandoned residential property or to convert a pending foreclosure action to a summary proceeding. The model pleadings are can be downloaded from the Judiciary website at http://www.judiciary.state.nj.us/civil/forms/11720_abandoned_residentialpleadings_v3.pdf. While use of these model pleadings is not mandatory, counsel should review them carefully and adapt them to their particular case as appropriate, since each contains the necessary detail to proceed with a summary vacant/abandoned residential property foreclosure action.

Any questions regarding this Notice, the Court’s rule relaxation order, or the sample pleadings may be directed to Kristi Jasberg Robinson, Esq., Chief, Civil Practice Division, Administrative Office of the Courts, Hughes Justice Complex, P.O. Box 981, Trenton, NJ 08625-0981; (609) 292-8470; Kristi.Robinson@judiciary.state.nj.us.

/s/ Glenn A. Grant

Glenn A. Grant, J.A.D.
Acting Administrative Director of the Court

Dated: May 23, 2013

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SUPREME COURT OF NEW JERSEY

It is ORDERED, pursuant to N.J. Const. Art. VI, sec. 2 par. 3, that the provisions of Rule 4:64-1 (“Foreclosure Complaint, Uncontested Judgment Other Than In Rem Tax Foreclosures”) are supplemented and relaxed so as allow for the summary foreclosure proceedings for “vacant and abandoned” residential properties pursuant to L. 2012, c. 70, codified at N.J.S.A. 2A:50-73, as detailed in this order.

In addition to the content required by Rule 4:64-1(a) and (b), a complaint for foreclosure of vacant and abandoned residential property as established by N.J.S.A. 2A:50-73 shall set out facts that the plaintiff alleges demonstrate that the property is vacant and abandoned. The complaint shall incorporate the Rule 4:64-2(b) affidavit or certification of amount due that the plaintiff will rely upon to establish the judgment amount.

Notwithstanding the procedure for judgment set forth in Rule 4:64-1(d)(1)(A), where residential property is vacant and abandoned as established by N.J.S.A. 2A:50-73, a notice of motion for entry of judgment and the notice of tenants’ rights during foreclosure in the form prescribed by Appendix XII-J of the Rules of Court are not required to be served. A copy of the Rule 4:64-2(b) affidavit or certification of amount due shall be served with the Rule 4:67-1 order to show cause or the Rule 4:67-2 notice of motion to proceed summarily.

Notwithstanding the application for judgment procedure set forth in Rule 4:64-1(d)(2), if the court determines that residential property is vacant and abandoned as established by N.J.S.A. 2A:50-73, the court on the return date of the order to show cause or the order to proceed summarily may enter final judgment provided an application is accompanied by proofs as required by Rule 4:64-2. In lieu of the filing otherwise required by Rule 1:6-4, the application shall be filed with the Office of Foreclosure in the Administrative Office of the Courts. The Office of Foreclosure may recommend entry of final judgment pursuant to Rule 1:34-6.

The provisions of the rule relaxation order shall be effective immediately and until further order.

For the Court,
/s/ Stuart Rabner
Chief Justice

Dated: April 29, 2013

§ 9.02 N.J.S.A. 2A:50-73

N.J.S.A. 2A:50-73

2A:50-73. “Vacant and abandoned” residential property; required conditions; exemptions; lender authority to bring a summary foreclosure action; notice; standard of proof; entry of judgment; governing law

Effective: May 29, 2019

a. For the purposes of this section, “vacant and abandoned” residential property means residential real estate with respect to which the mortgagee proves, by clear and convincing evidence, that the mortgaged real estate is vacant and has been abandoned or where a notice of

violation has been issued pursuant to subsection b. of section 1 of P.L.2014, c. 35 (C.40:48-2.12s). Where a notice of violation has not been issued pursuant to subsection b. of section 1 of P.L.2014, c. 35 (C.40:48-2.12s), real property shall be deemed “vacant and abandoned” if the court finds that the mortgaged property is not occupied by a mortgagor or tenant as evidenced by a lease agreement entered into prior to the service of a notice of intention to commence foreclosure according to section 4 of the “Fair Foreclosure Act,” P.L.1995, c. 244 (C.2A:50-56), and at least two of the following conditions exist:

- (1) overgrown or neglected vegetation;
- (2) the accumulation of newspapers, circulars, flyers or mail on the property;
- (3) disconnected gas, electric, or water utility services to the property;
- (4) the accumulation of hazardous, noxious, or unhealthy substances or materials on the property;
- (5) the accumulation of junk, litter, trash or debris on the property;
- (6) the absence of window treatments such as blinds, curtains or shutters;
- (7) the absence of furnishings and personal items;
- (8) statements of neighbors, delivery persons, representatives of a common interest community association, or government employees indicating that the residence is vacant and abandoned;
- (9) windows or entrances to the property that are boarded up or closed off or multiple window panes that are damaged, broken and unrepaired;
- (10) doors to the property that are smashed through, broken off, unhinged, or continuously unlocked;
- (11) a risk to the health, safety or welfare of the public, or any adjoining or adjacent property owners, exists due to acts of vandalism, loitering, criminal conduct, or the physical destruction or deterioration of the property;
- (12) an uncorrected violation of a municipal building, housing, or similar code during the preceding year, or an order by municipal authorities declaring the property to be unfit for occupancy and to remain vacant and unoccupied;
- (13) the mortgagee or other authorized party has secured or winterized the property due to the property being deemed vacant and unprotected or in danger of freezing;
- (14) a written statement issued by any mortgagor expressing the clear intent of all mortgagors to abandon the property;
- (15) any other reasonable indicia of abandonment.

b. For the purposes of this section, a residential property shall not be considered “vacant and abandoned” if, on the property:

- (1) there is an unoccupied building which is undergoing construction, renovation, or rehabilitation that is proceeding diligently to completion, and the building is in compliance with all applicable ordinances, codes, regulations, and statutes;
- (2) there is a building occupied on a seasonal basis, but otherwise secure; or

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(3) there is a building that is secure, but is the subject of a probate action, action to quiet title, or other ownership dispute.

c. In addition to the residential mortgage foreclosure procedures set out in the “Fair Foreclosure Act,” P.L.1995, c. 244 (C.2A:50-53 et seq.), a summary action to foreclose a mortgage debt secured by residential property that is vacant and abandoned may be brought by a lender in the Superior Court. In addition, a lender may, at any time after filing a foreclosure action, file with the court, in accordance with the Rules Governing the Courts of the State of New Jersey, an application to proceed in a summary manner because the residential property that is the subject of the foreclosure action is believed to be “vacant and abandoned”; provided, however, that this section shall not apply to a foreclosure of a timeshare interest secured by a mortgage.

d. (1) In addition to the service of process required by the Rules of Court, a lender shall establish, for the entry of a residential foreclosure judgment under this section, that a process server has made two unsuccessful attempts to serve the mortgagor or occupant at the residential property, which attempts must be at least 72 hours apart, and during different times of the day, either before noon, between noon and 6 P.M., or between 6 P.M. and 10 P.M.

(2) In addition to any notices required to be served by law or the Rules of Court, a lender shall, with any order to show cause served as original service of process or a motion to proceed summarily, serve a notice that the lender is seeking, on the return date of the order to show cause, or on the date fixed by the court, to proceed summarily for entry of a residential foreclosure judgment because the property is vacant and abandoned.

(3) When a property is deemed vacant and abandoned as herein defined, a lender shall not be required to serve the debtor with the notice to cure required by section 6 of the “Fair Foreclosure Act,” P.L.1995, c. 244 (C.2A:50-58).

e. (1) The court may enter a final residential mortgage foreclosure judgment under this section upon a finding, (a) by clear and convincing evidence, that the residential property is vacant and abandoned as defined under subsection a. of this section, and (b) that a review of the pleadings and documents filed with the court, as required by the Rules of Court, supports the entry of a final residential mortgage foreclosure judgment.

(2) A final residential mortgage foreclosure judgment under this section shall not be entered if the court finds that:

(a) the property is not vacant or abandoned; or

(b) the mortgagor or any other defendant has filed an answer, appearance, or other written objection that is not withdrawn and the defenses or objection asserted provide cause to preclude the entry of a final residential mortgage foreclosure judgment.

f. If a final residential mortgage foreclosure judgment under this section is not entered on the original or adjourned return date of an order to show cause or the date fixed by the court to proceed summarily, the court may direct that the foreclosure action continue on the normal track for residential mortgage foreclosure actions for properties that are not vacant and abandoned and the notice to cure served with the order to show cause or the order fixing that date for the matter to proceed summarily shall be of no effect.

g. All actions brought to foreclose on real property pursuant to this section shall proceed in accordance with the Rules of Court.

h. Nothing in this section is intended to supersede or limit other procedures adopted by the Court to resolve residential mortgage foreclosure actions, including, but not limited to, foreclosure mediation.

i. Nothing in this section shall be construed to affect the rights of a tenant to possession of a leasehold interest under the Anti-Eviction Act, P.L.1974, c. 49 (C.2A:18-61.1 et seq.), the “New Jersey Foreclosure Fairness Act,” P.L.2009, c. 296 (C.2A:50-69 et seq.), or any other applicable law.

j. (1) Notwithstanding paragraph (3) of subsection a. of section 12 of P.L.1995, c. 244 (C.2A:50-64) to the contrary, the sheriff shall sell the property within 90 days of the sheriff’s receipt of any writ of execution issued by the court if:

(a) the court makes a finding in the foreclosure judgment that the property is vacant and abandoned; or

(b) the court issues an order directing the sheriff to sell the property within 90 days, pursuant to the provisions of subsection k. of this section.

(2) If it becomes apparent that the sheriff cannot comply with the provisions of paragraph (1) of this subsection, the foreclosing plaintiff shall apply to the court for an order appointing a Special Master or judicial agent to hold the foreclosure sale, within 90 days of the date of application.

k. (1) Following issuance of a foreclosure judgment, in which the court did not make a finding that the property is vacant and abandoned, a foreclosing plaintiff may make application to the court for the property to be sold by the sheriff within 90 days of the date of application. The application shall include a certification that the mortgaged real estate is vacant and abandoned.

(2) Upon application that meets the criteria set forth in paragraph (1) of this subsection, the court shall issue an order directing the sheriff to sell the property in accordance with the provisions of subsection j. of this section. A hearing shall not be required unless the application is contested.

§ 9.03 R.4:64-1A

(a) Verified Complaint and Order to Show Cause. In addition to the content required by R. 4:64-1(a) and (b), a complaint for foreclosure of vacant and abandoned residential property as established by *N.J.S.A.* 2A:50-73 shall set out facts that the plaintiff alleges demonstrate that the property is vacant and abandoned. The complaint shall have attached the R. 4:64-2(b) affidavit or certification of amount due that the plaintiff will rely upon to establish the judgment amount and the R. 4:64-2(d) affidavit of diligent inquiry. Copies of such affidavits or certifications shall be served with the R. 4:67-1 order to show cause.

(b) Notice of Motion to Proceed Summarily. An application to proceed summarily for foreclosure of vacant and abandoned residential property as established by *N.J.S.A.* 2A:50-73 shall have attached the R. 4:64-2(b) affidavit or certification of amount due that the plaintiff will rely upon to establish the judgment amount and the R. 4:64-2(d) affidavit of diligent inquiry. Copies of such affidavits or certifications shall be served with the R. 4:67-2 notice of motion to proceed summarily.

(c) Procedure to Enter Judgment.

(1) *Application for Judgment.* The application for judgment shall be accompanied by proofs as

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required by R. 4:64-2 not already of record. In lieu of the filing otherwise required by R. 1:6-4, the application shall be filed with the Office of Foreclosure in the Administrative Office of the Courts.

(2) *Notices.* Notwithstanding the procedure for judgment set forth in R. 4:64-1(d)(2), where residential property is vacant and abandoned as established by *N.J.S.A.* 2A:50-73, a notice of motion for entry of judgment and the notice of tenants' rights during foreclosure in the form prescribed by Appendix XII-K of the Rules of Court are not required to be served.

(3) *Entry of Judgment.* Notwithstanding the procedure for judgment set forth in Rule 4:64-1(d)(4), if the court determines that residential property is vacant and abandoned as established by *N.J.S.A.* 2A:50-73, the court on the order to show cause return date or the order to proceed summarily return date may enter final judgment. The Office of Foreclosure may recommend entry of final judgment pursuant to R. 1:34-6.

§ 9.04 Sample Forms (available for download at

<https://www.njcourts.gov/selfhelp/catalog.html?keywords=Foreclosure%20set&customer=Attorneys>)

Plaintiff or Filing Attorney Information:

Name [Attorney's Name]

NJ Attorney ID [Insert NJ Attorney ID No.]
Number

Address [Attorney's Address]
[Attorney's Address]

Telephone Number [Attorney's Phone Number]

_____, Plaintiff, v. _____, Defendant.	Superior Court of New Jersey Chancery Division _____ County General Equity Part Docket No: F _____ Civil Action Verified Complaint Vacant & Abandoned Residential Property Mortgage Foreclosure First Count

1. Plaintiff, _____, is a corporation having its principal place of business at [insert the plaintiff's business address] and is authorized to transact business in the State of New Jersey.

2. This action is being brought to foreclose a mortgage because you have failed to comply with the terms and conditions of the Note and Mortgage. As a result, the entire debt is due, including the unpaid principal amount due on the Note, and Mortgage, and all unpaid interest and advances, attorney fees and costs.

3. On [insert the date of note], obligor(s) (a/k/a debtor(s)) executed a Note (obligation) with the following terms:

Obligor(s): [insert the names of the obligor(s) who executed the note]

Original Note amount of: (\$)

Initial Note contract interest rate of percent;

Note's initial monthly payments for interest and principal of \$; and

Late charges of percent after days of an installment's due date.

4. To secure the payment of the Note, a Mortgage was executed and delivered to secure certain property identified in paragraph 5 below, and thereby conferred on the mortgagee a lien on the property that secures the debt. The terms of the Note are:

Mortgage given to: [insert the name of the original Mortgagee]

Mortgage dated: [insert the date of the original Mortgage]

Date recorded: [insert the date the original Mortgage was recorded]

Mortgage Recorded in Book , Page in C ounty Clerk's office.

5. The property being foreclosed upon herein is commonly known as [insert street number and street name] in the [city, township, borough] of [insert name of municipality], County of , and State of New Jersey, being also known as Lot , Block on the [city, township, borough] of [insert name of municipality] tax records. A more detailed metes and bounds description is attached to this Foreclosure Complaint as Schedule "A."

6. This mortgage a purchase money mortgage.

7. The mortgage a ssigned [if no assignment, just end the sentence here].

Mortgage assigned by: [insert the name of the original Mortgagee]

Mortgage assigned to: [insert the name of the Assignee]

Assignment dated: [insert the date of the Assignments]

Assignment recorded on: [insert the date of the Assignment recording]

Assignment Recorded in Assignment of Mortgage Book , at Page in County Clerk's office.

8. The terms and conditions of the Note and Mortgage state that if any payments for interest and principal, taxes, and/or insurance are not made for more than thirty (30) days from the date of mailing of a Notice of Default to the obligors, and the payments remain unpaid, then the entire principal sum, with all interest and advances may be due, at the option of the mortgagee.

9. Defendants have defaulted under the terms and conditions of the Note and Mortgage and are still in default.

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10. The terms and conditions of the Note and Mortgage being foreclosed on state that additional interest will continue to accrue for any and all payments made for additional advances, which may include taxes and insurance, or any other liens which affect the property, or other advances made to preserve and protect the Plaintiffs interest in the property, and attorneys fees for services rendered, and will continue to accumulate through to the date of foreclosure sale. Plaintiff reserves the right to submit its proof of all amounts due at the time that judgment in foreclosure is entered.

11. The following parties are being joined to foreclose their rights in, to or against the property being foreclosed on because their interest is subordinate and subject to the lien of the foreclosing plaintiff. These following defendants are not being sued to be held liable or accountable to the plaintiff in any manner through the instant action, but rather, are being joined in this action for the sole purpose of foreclosing any and all interests, including the right of redemption of the mortgage being foreclosed on that the following defendants may have in the property:

11a. [Insert the specifics for each subordinate lien -- holder's name, recording date and recording information et cetera.]

11b. [Insert the name of any subsequent owner; insert the specifics for the conveyance – grantor(s) and grantee(s) name(s), recording date and recording information et cetera.]

11c.

11d.

12. The plaintiff has complied with the Fair Foreclosure Act by mailing the Notice of Intent to Foreclose at least 30 days before the filing of this Foreclosure Complaint.

WHEREFORE, Plaintiff demands judgment:

(a) Fixing the amount due the Plaintiff on the Note and Mortgage;

(b) Directing that the Plaintiff be paid the amount due on the note and mortgage, together with interest, advances and costs;

(c) Barring and foreclosing the defendants, and each of them, of all equity of redemption in and to the property being foreclosed upon;

(d) Adjudging that the property be sold according to law to satisfy the amount due the Plaintiff;

(e) For such other relief as the court may deem just and equitable.

Second Count

13. Plaintiff repeats and realleges the allegations of the paragraphs set forth in the First Count and makes the same a part hereof, as if repeated at length.

14. Defendants, [insert the names of the defendant(s)], are in possession of the property described in the First Count of this Complaint and because of the default in the terms of the Note and Mortgage described in the First Count of this Complaint, have deprived the Plaintiff it's right to possession of the property described in the First Count of this Complaint.

WHEREFORE, the Plaintiff demands judgment

- (a) for possession of the property in favor of the plaintiff or plaintiff's assignee or any purchaser at sheriff's sale;
- (b) for damages for mesne profits;
- (c) for costs of this proceeding, and
- (d) for such other and further relief as the court may deem just and equitable.

Third Count

15. Plaintiff repeats and realleges the allegations of the paragraphs set forth in the First and Second Counts and makes the same a part hereof, as if repeated at length.

16. The property is vacant and abandoned and is not occupied by a mortgagor or tenant [optional if known: as evidenced by a lease agreement entered into prior to the service of a notice of intention to commence foreclosure].

17. An inspection of the property, which is the subject of the within foreclosure action, by an agent of the plaintiff substantiates that the property is vacant and abandoned and that the following conditions exist (only insert existing conditions established by personal knowledge):

- ☐ overgrown or neglected vegetation;
- ☐ the accumulation of newspapers, circulars, flyers or mail on the property;
- ☐ disconnected gas, electric, or water utility services to the property;
- ☐ the accumulation of hazardous, noxious, or unhealthy substances or materials on the property;
- ☐ the accumulation of junk, litter, trash or debris on the property;
- ☐ the absence of window treatments such as blinds, curtains or shutters;
- ☐ the absence of furnishings and personal items;
- ☐ statements of neighbors, delivery persons, or government employees indicating that the residence is vacant and abandoned (attach a summary of the statements);

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- ☐ windows or entrances to the property that are boarded up or closed off or multiple window panes that are damaged, broken and unrepaired;
- ☐ doors to the property that are smashed through, broken off, unhinged, or continuously unlocked;
- ☐ a risk to the health, safety or welfare of the public, or any adjoining or adjacent property owners, exists due to acts of vandalism, loitering, criminal conduct, or the physical destruction or deterioration of the property (**describe in detail**);
- ☐ an uncorrected violation of a municipal building, housing, or similar code during the preceding year, or an order by municipal authorities declaring the property to be unfit for occupancy and to remain vacant and unoccupied (**attach a copy of any violations, violation correction demands or orders**);
- ☐ the mortgagee or other authorized party has secured or winterized the property due to the property being deemed vacant and unprotected or in danger of freezing;
- ☐ a written statement issued by any mortgagor expressing the clear intent of all mortgagors to abandon the property (**attach a copy of the written statement**);
- ☐ any other reasonable indicia of abandonment (**describe**).

WHEREFORE, Plaintiff, in accordance with *N.J.S.A. 2A:50-73* demands judgment that:

- (a) the residential property that is the subject of this foreclosure action is vacant and abandoned as defined by *N.J.S.A. 2A:50-73(a)*;
- (b) the court enter a final residential mortgage foreclosure judgment on the return date of an order to show cause;
- (c) such other and further relief as the court may deem just and equitable.

Fourth Count

Insert into a separate count any other cause of action for which relief is sought, for example, any open prior lien that is alleged satisfied, any reformation of the note, mortgage or property description, recognition of an equitable mortgages or *other cause*. **NOTE. This count may bar the action from proceeding in a summary manner.**

18. Plaintiff repeats and realleges the allegations of the paragraphs set forth in the First, Second AND Third Counts and makes the same a part hereof, as if repeated at length.

19. Insert facts and allegations supporting any additional germane relief sought.

[Insert Name of Law Firm]

Attorneys for Plaintiff

By: _____

Attorney sign above and type or print name below

Dated: _____

Count I Verification

I, [insert employee's name], do hereby certify that:

1. I am an employee of [insert plaintiff or the mortgage servicing company's name] at its [insert the city/state location where affiant works] office as a [insert the affiant's title/position]. [Said company is a mortgage servicing company authorized to service and handle mortgage transactions on behalf of the plaintiff involving the mortgage debtors named in the plaintiff's complaint. The plaintiff has not revoked said mortgage servicing company's authority and, as such, I have the authority to verify, on behalf of the plaintiff, the allegations of the complaint and the computation of amount due set forth in the attached schedule.]

2. I have thoroughly reviewed the plaintiff's [alternate language mortgage servicing company's] books and records concerning the note and mortgage loan described in the plaintiff's complaint and am fully familiar with the facts set forth herein.

3. The allegations in paragraphs 3 through 12 in Count I of the within complaint setting out the loan and mortgage records associated with the residential property located at [insert street address, municipality and county], New Jersey are true and correct to my personal knowledge.

4. I have reviewed all entries and calculations and amounts indicated in the schedule attached to the complaint are correctly stated and if such statement indicates any advances made or to be made by the plaintiff or owner of the mortgage indebtedness, that such advances were, in fact, made.

5. Per diem interest of \$, as set forth in the annexed schedule, will accrue on the principal from , 20 .

6. The plaintiff may be compelled to advance various sums in order to protect and preserve the mortgaged real property. It may be necessary for the plaintiff to pay taxes and assessments which have been or may be levied upon the real property, liability, fire and other hazard insurance premiums on the real property and by virtue of the mortgage the same constitute additional indebtedness secured by the mortgage.

I hereby certify that the foregoing statements made by me are true. I am aware that, if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

Dated: _____

Plaintiff's/ Plaintiff's Service Employee Signature Above

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and Type or Print Name Below

Count III Verification

I, [insert agent's name] do hereby certify that:

1. I am an agent of [insert plaintiff's name], plaintiff in this foreclosure action.
2. I personally inspected the real property located at [insert the street address, municipality and county], New Jersey which is the subject of the within foreclosure action on [insert date or dates of inspections].
3. I have reviewed the conditions that establish that the property is vacant and abandoned, which are described in Count III of the complaint, and the same are true and correct to my personal knowledge.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

Dated: _____

Agent's Signature Above and Type or Print Name Below

Rule 4:5-1 Certification

In accordance with Rule 4:5-1, I hereby certify that the matter in controversy is not the subject of any action pending in any Court or pending arbitration proceeding. There is no other action or arbitration proceeding contemplated.

[Insert Name of Law Firm]
Attorneys for Plaintiff

By: _____
Attorney sign above and type or print name below

Dated: _____

Rule 4:5-1(b)(2) Certification

In accordance with Rule 4:5-1(b)(2), I hereby certify that pursuant to Rule 4:64-1(a), prior to the filing of the complaint, I have caused a title search of the public record to be made for the purpose of identifying any lien holders or other persons or entities with an interest in the property that is the subject of this foreclosure.

[Insert Name of Law Firm]
Attorneys for Plaintiff

By: _____
Attorney sign above and type or print name below

Dated: _____

Rule 1:5-6(c)(1)(e) and Rule 4:64-1(a) (2) and (3) Certification of Diligent Inquiry

, Esq., of full age, hereby certifies and say:

1. On [insert date], I communicated by [insert mode of communication] with the following named employee(s) of [insert the plaintiff's name or insert the plaintiff's mortgage loan servicer's name], who stated that he/she personally reviewed the complaint to be filed with the court and that he/she confirmed compliance with *Rule* 4:64-1(b)(1) through (b)(10) and (b)(12) through (b)(13).

2. The name, title and responsibilities of the plaintiff's employee(s) or plaintiff's mortgage loan servicer's employee(s) with whom I communicated are: [insert the employee's name][insert the employee's title][insert the employee's responsibilities].

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3. [If an employee of the plaintiff's mortgage loan servicer] The above-named employee(s) stated that the relationship between his/her employer and the plaintiff is: [insert description of the relationship], and confirmed that his/her employer is authorized to act on behalf of the plaintiff in this action.

3/4. Based on my communication with the above-named employee(s) of plaintiff or plaintiff's mortgage loan servicer, as well as my own inspection of the loan information supplied by the plaintiff or the plaintiff's mortgage loan servicer and other diligent inquiry, I execute this certification to comply with the requirements of *Rules* 1:4-8(a), 1:5-6(c)(1)(E), and 4:64-1(a)(2) and (3).

4/5. I am aware that I have a continuing obligation under Rule 1:4-8 to amend this certification if a reasonable opportunity for further investigation or discovery indicates insufficient evidentiary support for any factual assertions proffered by plaintiff in any court filings or documents in this case.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

[Insert Name of Law Firm]

Attorneys for Plaintiff

By: _____
Attorney sign above and type or print name below

Dated: _____

Rule 1:38-7 Certification of Redaction

I certify that confidential personal identifiers have been redacted from documents now submitted to the court, and will be redacted from all documents submitted in the future in accordance with Rule 1:38-7(b).

[Insert Name of Law Firm]

Attorneys for Plaintiff

By: _____
Attorney sign above and type or print name below

Dated: _____

Property Legal Description/Metes and Bounds Description

Attachment: Schedule “A” Mortgage Property Legal Description

Attach Amount Due Schedule Court Rule Appendix XII-J

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Amount Due ScheduleNOTE AND MORTGAGE
DATED _____

Recorded on _____, in _____ County, in Book _____ at Page _____

Property _____

Address: _____

Mortgage Holder: _____

Statement Of Amount Due

Unpaid Principal Balance as of _____ \$ _____

Interest from _____ to _____ \$ _____

(Interest rate = _____ % per year; \$ _____ per day x _____ days)

Late Charges from _____ to _____

(\$ _____ /mo. x _____ mos.) \$ _____

Advances through _____ for:

Real Estate Taxes \$ _____

Home Owners Insurance Premiums \$ _____

Mortgage Insurance Premium \$ _____

Inspections \$ _____

Winterizing/Securing \$ _____

Sub-Total of Advances \$ _____

Less Escrow Monies (\$ _____)

Net Advances \$ _____ \$ _____

Interest on advances _____ to _____ \$ _____
from _____

Other charges (specify) \$ _____

TOTAL DUE AS OF _____ \$ _____

Surplus Money: If after the sale and satisfaction of the mortgage debt, including costs and expenses, there remains any surplus money, the money will be deposited into the Superior Court Trust Fund and any person claiming the surplus, or any part thereof, may file a motion pursuant to Court Rules 4:64-3 and 4:57-2 stating the nature and extent of that person's claim and asking for an order directing payment of the surplus money. The Sheriff or other person conducting the sale will have information regarding the surplus, if any.

Date: [insert date] /s/

Following are two stand-alone verifications for Count I and III that, if used in place of the verifications in the complaint, must be attached to the complaint when it is filed.

Verified Complaint – Separate Count I Verification (In Place of Verification Inserted Directly into the Complaint). Verification Must Be Attached to the Complaint When Filed.

Plaintiff or Filing Attorney Information:

Name [Attorney's Name]

NJ Attorney ID Number [Insert NJ Attorney ID No.]

Address [Attorney's Address]

[Attorney's Address]

Telephone Number [Attorney's Phone Number]

_____,
Plaintiff,

v.

_____,
Defendant.

Superior Court of New Jersey
Chancery Division _____ County

General Equity Part

Docket No:

F _____

Civil Action

Verification Count I and Proof of Amount Due
Schedule

I, [insert employee's name], do hereby certify that:

1. I am an employee of [insert plaintiff or the mortgage servicing company's name] at its [insert the city/state location where affiant works] office as a [insert the affiant's title/position]. [Said company is a mortgage servicing company authorized to service and handle mortgage transactions on behalf of the plaintiff involving the mortgage debtors named in the plaintiff's complaint. The plaintiff has not revoked said mortgage servicing company's authority and, as such, I have the authority to verify, on behalf of the plaintiff, the allegations of the complaint and the computation of amount due set forth in the attached schedule.]

2. I have thoroughly reviewed the plaintiff's [alternate language mortgage servicing company's] books and records concerning the note and mortgage loan described in the plaintiff's complaint and am fully familiar with the facts set forth herein.

3. The allegations in paragraphs 3 through 12 in Count I of the within complaint setting out the loan and mortgage records associated with the residential property located at [insert

VACANT AND ABANDONED

street address, municipality and county], New Jersey are true and correct to my personal knowledge.

4. I have reviewed all entries and calculations and amounts indicated in the schedule attached hereto are correctly stated and if such statement indicates any advances made or to be made by the plaintiff or owner of the mortgage indebtedness, that such advances were, in fact, made.

5. Per diem interest of \$, as set forth in the annexed schedule, will accrue on the principal from , 20 .

6. The plaintiff may be compelled to advance various sums in order to protect and preserve the mortgaged real property. It may be necessary for the plaintiff to pay taxes and assessments which have been or may be levied upon the real property, liability, fire and other hazard insurance premiums on the real property and by virtue of the mortgage the same constitute additional indebtedness secured by the mortgage.

7. I make this certification knowing that the court will rely on the same to decide whether the within foreclosure action may proceed in a summary manner.

I hereby certify that the foregoing statements made by me are true. I am aware that, if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

Dated: _____

*Plaintiff's/ Plaintiff's Service Employee Signature Above
 and Type or Print Name Below*

Amount Due Schedule

NOTE AND MORTGAGE
DATED _____

Recorded on _____, in _____ County, in Book _____ at Page _____

Property
Address: _____

Mortgage Holder: _____

Statement Of Amount Due

Unpaid Principal Balance as of _____ \$ _____

Interest from _____ to _____ \$ _____

(Interest rate = _____ % per year; \$ _____ per day x _____ days)

Late Charges from _____ to _____

(\$ _____ /mo. x _____ mos.) \$ _____

Advances through _____ for:

Real Estate Taxes \$ _____

Home Owners Insurance Premiums \$ _____

Mortgage Insurance Premium \$ _____

Inspections \$ _____

Winterizing/Securing \$ _____

Sub-Total of Advances \$ _____

Less Escrow Monies (\$ _____)

Net Advances \$ _____ \$ _____

Interest on advances _____ to _____ \$ _____
from _____

Other charges (specify) \$ _____

TOTAL DUE AS OF _____ \$ _____

Surplus Money: If after the sale and satisfaction of the mortgage debt, including costs and expenses, there remains any surplus money, the money will be deposited into the Superior Court Trust Fund and any person claiming the surplus, or any part thereof, may file a motion pursuant to Court Rules 4:64-3 and 4:57-2 stating the nature

VACANT AND ABANDONED

and extent of that person's claim and asking for an order directing payment of the surplus money. The Sheriff or other person conducting the sale will have information regarding the surplus, if any.

Date: [insert date] /s/ _____
Type or Print Lender's or Servicing Agent's Employee's Name

Verified Complaint – Separate Count III Verification (In Place of Verification Inserted Directly into the Complaint). Verification Must Be Attached to the Complaint When Filed.

Plaintiff or Filing Attorney Information:

Name [Attorney's Name]

NJ Attorney ID Number [Insert NJ Attorney ID No.]

Address [Attorney's Address]

[Attorney's Address]

Telephone Number [Attorney's Phone Number]

_____,
Plaintiff,
v.
_____,
Defendant.

Superior Court of New Jersey
Chancery Division _____ County
General Equity Part
Docket No: **F** _____
Civil Action
Verification Count III

I, [insert agent's name] do hereby certify that:

1. I am an agent of [insert plaintiff's name], plaintiff in this foreclosure action.
2. I personally inspected the real property located at [insert the street address, municipality and county], New Jersey which is the subject of the within foreclosure action on [insert date or dates of inspections].
3. I have reviewed the conditions that establish that the property is vacant and abandoned, which are described in Count III of the complaint, and the same are true and correct to my personal knowledge.
4. I make this certification knowing that the court will rely on the same to decide whether the within foreclosure action may proceed in a summary manner.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

Dated: _____

NEW JERSEY MORTGAGE FORECLOSURE

Agent's Signature Above and Type or Print Name Below

OSC as Original Process

Summary Action Vacant & Abandoned Residential Property Foreclosure

Plaintiff or Filing Attorney Information:Name [Attorney's Name]NJ Attorney ID Number [Insert NJ Attorney ID No.]Address [Attorney's Address][Attorney's Address]Telephone Number [Attorney's Phone Number]

_____,
 Plaintiff,
 v.
 _____,
 Defendant.

Superior Court of New Jersey
 Chancery Division _____ County
 General Equity Part

Docket No: F _____

Civil Action
 Order to Show Cause
 Summary Vacant & Abandoned Residential
 Mortgage Foreclosure Action

THIS MATTER being brought before the Court by , attorney for plaintiff, [insert the plaintiff's name], seeking relief by way of a summary action pursuant to *R. 4:67-1(a)*, based upon the facts set forth in the verified complaint filed herewith; and the Court having determined that this matter may be commenced by order to show cause as a summary proceeding pursuant to *N.J.S.A. 2A:50-73*; and for good cause shown.

IT IS on this _____ day of , 20 _____, *ORDERED* that the defendants, namely, [insert the names of all defendants whose interest in the property will be extinguished by the foreclosure], appear and show cause on the _____ day of , 20 _____ before the Superior Court at the County _____ Courthouse in _____, New Jersey at _____ o'clock in the _____ noon, or as soon thereafter as counsel can be heard, why judgment should not be entered for:

A. Finding that the residential property that is the subject of this foreclosure action is vacant and abandoned as defined by *N.J.S.A. 2A:50-73(a)*;

B. Fixing the amount due the Plaintiff on the Note and Mortgage;

VACANT AND ABANDONED

C. Directing that the Plaintiff be paid the amount due on the note and mortgage, together with interest, advances, and costs;

D. Barring and foreclosing the defendants, and each of them, of all equity of redemption in and to the property being foreclosed upon;

E. Adjudging that the property be sold according to law to satisfy the amount due the Plaintiff;

F. For possession of the property in favor of the plaintiff or plaintiff's assignee or any purchaser at sheriff's sale;

G. For damages for mesne profits;

H. For costs of this action;

I. Other relief demanded in the complaint;

I/ J Granting such other relief as the court deems just and equitable.

And it is further *ORDERED* that:

1. A copy of this order to show cause, verified complaint and all supporting affidavits or certifications, including the proof of amount due schedule attached to the complaint, submitted in support of this application and the Notice required by *N.J.S.A. 2A:50-73* be personally served on the defendant(s) or, if personal service cannot be effectuated as evidenced by an affidavit or certification of inquiry, by appropriate substituted service within _____ days of the date hereof, in accordance with *R. 4:4-3* and *R. 4:4-4*, this being original process..

2. If the plaintiff pursues a summary action foreclosure judgment on the return date, the attempted personal service on the defendant(s)-mortgagor(s) or any occupant(s) at the property must be at least 72 hours apart, and during different times of the day, either before noon, between noon and 6 P.M., or between 6 P.M. and 10 P.M. The process server's return must explicitly document the dates and times of attempted service on the defendant(s)-mortgagor(s) or any occupant(s).

3. The notice required by *N.J.S.A. 2A:50-73* shall be in a minimum of 14-Point font and shall state:

“To: [name of defendant-mortgagor or tenant]

Address: [address of defendant-mortgagor or tenant]

The lender is seeking on the return date set in this order to show cause, or on any adjourned date fixed by the court, to proceed summarily for entry of a residential foreclosure judgment because the property is vacant and abandoned. If you fail to file and serve a written answer, an answering affidavit, or a motion, the application will be decided on the papers on the return date and relief may be granted by default.”

4. The plaintiff must file with the court through the Superior Court Clerk's office in Trenton his/her/its proof of service of the pleadings on the defendants and his/her/its remaining judgment proofs no later than fifteen (15) days before the return date of this order to show cause.

5. Defendant(s) shall file and serve a written answer, an answering affidavit or a motion returnable on the return date to this order to show cause and the relief requested in the verified complaint and proof of service of the same by , 20 . The answer, answering affidavit or a motion, as the case may be, must be filed with the Clerk of the Superior Court at the Hughes Justice Complex, P.O. Box 971, 25 Market Street, Trenton, New Jersey 08625 and a copy of the papers must be sent directly to the chambers of the below named judge.

6. The plaintiff must file and serve any written reply to the defendant's order to show cause opposition by , 20 . The reply papers must be filed with the Clerk of the Superior Court at the Hughes Justice Complex, P.O. Box 971, 25 Market Street, Trenton, New Jersey 08625 and a copy of the reply papers must be sent directly to the chambers of the below named judge.

7. If the defendant(s) do/does not file and serve opposition to this order to show cause, the application will be decided on the papers on the return date and relief may be granted by default, provided that the plaintiff files the remaining judgment proofs along with proof(s) of service and a proposed form of judgment at least fifteen (15) days prior to the return date.

8. Defendant(s) take notice that the plaintiff has filed a foreclosure lawsuit against you in the Superior Court of New Jersey. The verified complaint attached to this order to show cause states the basis of the lawsuit. If you dispute this complaint, you, or your attorney, must file a written answer, an answering affidavit, or a motion returnable on the return date to the order to show cause and proof of service before the return date of the order to show cause. These documents must be filed with the Clerk of the Superior Court, Hughes Justice Complex, P.O. Box 971, 25 Market Street, Trenton, New Jersey 08625. Include a \$135 filing fee payable to the "Treasurer State of New Jersey." You must also send a copy of your answer, answering affidavit, or motion to the plaintiff's attorney whose name and address appear above, or to the plaintiff, if no attorney is named above. A telephone call will not protect your rights; you must file and serve your answer, answering affidavit or motion with the fee or judgment may be entered against you by default.

9. If you cannot afford an attorney, you may call the Legal Services office in the county in which you live or the Legal Services of New Jersey Statewide Hotline at 1-888-LSNJ-LAW (1-888-576-5529). If you do not have an attorney and are not eligible for free legal assistance you may obtain a referral to an attorney by calling one of the Lawyer Referral Services. A directory with contact information for local Legal Services Offices and Lawyer Referral Services is available online at njcourts.gov/forms/10153_deptyclerklawref.pdf.

10. The Court will entertain argument, but not testimony, on the return date of the order to show cause, unless the court and parties are advised to the contrary no later than days before the return date.

VACANT AND ABANDONED

P.J. Ch

Following are model pleadings to convert a plenary foreclosure action to a summary proceeding pursuant to *Rule 4:67-2(b)*.

Motion to Proceed Summarily
Vacant & Abandoned Residential Property Foreclosure

Plaintiff or Filing Attorney Information:Name [Attorney's Name]NJ Attorney ID Number [Insert NJ Attorney ID No.]Address [Attorney's Address][Attorney's Address]Telephone Number [Attorney's Phone Number]

_____,
Plaintiff,

v.

_____,
Defendant.

Superior Court of New Jersey
Chancery Division _____ County
General Equity Part
Docket No:
F _____

Civil Action
Motion to Proceed Summarily
Vacant & Abandoned Residential Mortgage
Foreclosure Action

PLEASE TAKE NOTICE that, on the [Insert day of month], of [insert month], 20____, at nine (9) o'clock in the forenoon, or as soon thereafter as counsel may be heard, the undersigned, attorneys for the plaintiff, shall apply to the Superior Court of New Jersey, Chancery Division, General Equity Part at the Court House in [insert city], New Jersey, pursuant to *Rule 4:67-2(b)* for an Order allowing the within foreclosure action to proceed in a summary manner.

PLEASE TAKE FURTHER NOTICE that this Notice of Motion is being filed in accordance with *Rule 1:6-2*, and plaintiff hereby waives oral argument unless requested by another party.

Plaintiff shall rely upon the attached affidavit/ certification in support of this Motion.

[Insert Name of Law Firm]
Attorneys for Plaintiff

By: _____
Attorney sign above and type or print name below

Dated: _____

Proof of Mailing/Filing – Superior Court Clerk

The original of the within Notice of Motion has been filed with the Clerk of the Superior Court at the Hughes Justice Complex, P.O. Box 971, 25 Market Street, Trenton, New Jersey 08625.

Dated: _____

By: _____

Proof of Mailing – Defendants

On [Date], I, the undersigned, mailed to:

[Insert Name], Esq., Attorney for Defendant, at [insert address],

[Insert Name], Mortgagor-Defendant's name (if unrepresented) at [insert address],

[Insert Name], Defendant at [insert address],

by regular mail, a copy of the within Notice of Motion and supporting affidavit(s) and/or certification(s) and proof of amount due schedule.

Dated: _____

By: _____

5. Attached hereto is a certification by [insert name] who has made a physical inspection of the real property.

6. The aforesaid inspection makes clear that the property is not occupied by the defendant- mortgagor or tenant [optional if known: as evidenced by a lease agreement entered into prior to the service of a notice of intention to commence foreclosure] and is vacant and abandoned as defined by *N.J.S.A. 2A:50-73*.

7. Attached hereto is a certification by [insert name] an employee of [insert the plaintiff or plaintiff's servicer's name] who has reviewed the plaintiff's business records.

8. Plaintiff requests entry of an order allowing the within foreclosure action to proceed in a summary manner.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

[Insert Name of Law Firm]

Attorneys for Plaintiff

By: _____
Attorney sign above and type or print name below

Dated: _____

VACANT AND ABANDONED

Certification in Support of Motion to Proceed Summarily
Abandoned Residential Property Foreclosure
Submitted with Motion to Proceed Summarily

Plaintiff or Filing Attorney Information:

Name [Attorney's Name]

NJ Attorney ID Number [Insert NJ Attorney ID No.]

Address [Attorney's Address]

[Attorney's Address]

Telephone Number [Attorney's Phone Number]

Superior Court of New Jersey
Chancery Division _____ County

General Equity Part

Docket No: **F** _____

Civil Action

Certificate in Support of
Motion to Proceed Summarily
Vacant & Abandoned Residential Mortgage
Foreclosure

_____,
Plaintiff,
v.
_____,
Defendant.

[Insert name], hereby certifies and says the following:

1. I am an agent of [insert the plaintiff's name], the plaintiff in the within action and I am fully familiar with the facts contained herein.

2. I personally inspected the real property located at [insert street address, municipality and county], New Jersey which is the subject of the within foreclosure action on [insert date or dates of inspections].

3. My inspection of the real property that is the subject of the within foreclosure action reveals that the property is vacant and abandoned and the following conditions exist (only insert existing conditions established by personal knowledge):

- ☐ overgrown or neglected vegetation;
- ☐ the accumulation of newspapers, circulars, flyers or mail on the property;
- ☐ disconnected gas, electric, or water utility services to the property;
- ☐ the accumulation of hazardous, noxious, or unhealthy substances or materials on the property;

- ☐ the accumulation of junk, litter, trash or debris on the property;
- ☐ the absence of window treatments such as blinds, curtains or shutters;
- ☐ the absence of furnishings and personal items;
- ☐ statements of neighbors, delivery persons, or government employees indicating that the residence is vacant and abandoned (**attach a summary of the statements**);
- ☐ windows or entrances to the property that are boarded up or closed off or multiple window panes that are damaged, broken and unrepaired;
- ☐ doors to the property that are smashed through, broken off, unhinged, or continuously unlocked;
- ☐ a risk to the health, safety or welfare of the public, or any adjoining or adjacent property owners, exists due to acts of vandalism, loitering, criminal conduct, or the physical destruction or deterioration of the property (**describe in detail**);
- ☐ an uncorrected violation of a municipal building, housing, or similar code during the preceding year, or an order by municipal authorities declaring the property to be unfit for occupancy and to remain vacant and unoccupied (**attach a copy of any violations, violation correction demands or orders**);
- ☐ the mortgagee or other authorized party has secured or winterized the property due to the property being deemed vacant and unprotected or in danger of freezing;
- ☐ a written statement issued by any mortgagor expressing the clear intent of all mortgagors to abandon the property (**attach a copy of the written statement**);
- ☐ any other reasonable indicia of abandonment (**describe**).

4. I make this certification knowing that the court will rely on the same to decide whether the within foreclosure action may proceed in a summary manner.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

Dated: _____

Agent's Signature Above and Type or Print Name Below

VACANT AND ABANDONED

Certification in Support of Motion to Proceed Summarily
 Abandoned Residential Property Foreclosure
 Submitted with Motion to Proceed Summarily

Plaintiff or Filing Attorney Information:

Name [Attorney's Name]

NJ Attorney ID Number [Insert NJ Attorney ID No.]

Address [Attorney's Address]

[Attorney's Address]

Telephone Number [Attorney's Phone Number]

_____,
 Plaintiff,
 v.
 _____,
 Defendant.

Superior Court of New Jersey
 Chancery Division _____ County
 General Equity Part
 Docket No:
 F _____
Civil Action
 Certificate in Support of
 Motion to Proceed Summarily -
 Vacant & Abandoned Residential Mortgage
 Foreclosure
 Verification Count I and
 Proof of Amount Due Schedule

I, [insert employee's name], do hereby certify that:

1. I am an employee of [insert plaintiff or the mortgage servicing company's name] at its [insert the city/state location where affiant works] office as a [insert the affiant's title/position]. [Said company is a mortgage servicing company authorized to service and handle mortgage transactions on behalf of the plaintiff involving the mortgage debtors named in the plaintiff's complaint. The plaintiff has not revoked said mortgage servicing company's authority and, as such, I have the authority to verify, on behalf of the plaintiff, the allegations of the complaint and the computation of amount due set forth in the attached schedule.]

2. I have thoroughly reviewed the plaintiff's [alternate language mortgage servicing company's] books and records concerning the note and mortgage loan described in the plaintiff's complaint and am fully familiar with the facts set forth herein.

3. The allegations in paragraphs 3 through 12 in Count I of the within complaint setting out the loan and mortgage records associated with the residential property located at [insert

street address, municipality and county], New Jersey are true and correct to my personal knowledge.

4. I have reviewed all entries and calculations and amounts indicated in the schedule attached hereto are correctly stated and if such statement indicates any advances made or to be made by the plaintiff or owner of the mortgage indebtedness, that such advances were, in fact, made.

5. Per diem interest of \$, as set forth in the annexed schedule, will accrue on the principal from , 20 .

6. The plaintiff may be compelled to advance various sums in order to protect and preserve the mortgaged real property. It may be necessary for the plaintiff to pay taxes and assessments which have been or may be levied upon the real property, liability, fire and other hazard insurance premiums on the real property and by virtue of the mortgage the same constitute additional indebtedness secured by the mortgage.

7. I make this certification knowing that the court will rely on the same to decide whether the within foreclosure action may proceed in a summary manner.

I hereby certify that the foregoing statements made by me are true. I am aware that, if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

Dated: _____

*Plaintiff's/ Plaintiff's Service Employee Signature Above
 and Type or Print Name Below*

VACANT AND ABANDONED

Amount Due Schedule

NOTE AND MORTGAGE
DATED _____

Recorded on _____, in _____ County, in Book _____ at Page _____

Property
Address: _____

Mortgage Holder: _____

Statement Of Amount Due

Unpaid Principal Balance as of _____ \$ _____

Interest from _____ to _____ \$ _____

(Interest rate = _____ % per year; \$ _____ per day x _____ days)

Late Charges from _____ to _____

(\$ _____ /mo. x _____ mos.) \$ _____

Advances through _____ for:

Real Estate Taxes \$ _____

Home Owners Insurance Premiums \$ _____

Mortgage Insurance Premium \$ _____

Inspections \$ _____

Winterizing/Securing \$ _____

Sub-Total of Advances \$ _____

Less Escrow Monies (\$ _____)

Net Advances \$ _____ \$ _____

Interest on advances _____ to _____ \$ _____
from _____

Other charges (specify) \$ _____

TOTAL DUE AS OF _____ \$ _____

Surplus Money: If after the sale and satisfaction of the mortgage debt, including costs and expenses, there remains any surplus money, the money will be deposited into the Superior Court Trust Fund and any person claiming the surplus, or any part thereof, may file a motion pursuant to Court Rules 4:64-3 and 4:57-2 stating the nature and extent of that person's claim and asking for an order directing payment of the surplus money. The Sheriff or other person conducting the sale will have information regarding the surplus, if any.

NEW JERSEY MORTGAGE FORECLOSURE

Date: [insert date]/s/

Type or Print Lender's or Servicing Agent's Employee's Name

Order to Proceed Summarily
 Abandoned Residential Property Foreclosure
 Submitted with Motion to Proceed Summarily

Plaintiff or Filing Attorney Information:Name [Attorney's Name]NJ Attorney ID Number [Insert NJ Attorney ID No.]Address [Attorney's Address][Attorney's Address]Telephone Number [Attorney's Phone Number]

Superior Court of New Jersey
 Chancery Division _____ County
 General Equity Part
 Docket No: _____
F _____

_____,
 Plaintiff,
 v.
 _____,
 Defendant.

Civil Action
 Order to Proceed Summarily
 Vacant & Abandoned Residential Mortgage
 Foreclosure

THIS MATTER being brought before the Court by [insert name of law firm], attorney for plaintiff, [insert the plaintiff's name], seeking relief by way of an order to proceed summarily pursuant to *R. 4:67-2(b)*, and it appearing from the affidavits/ certifications filed in support of the motion that the property is vacant and abandoned; and it appearing that the matter may be completely disposed of on the record or on minimal testimony in open court, the Court having determined that this matter may proceed in a summary manner ; and for good cause shown.

IT IS on this _____ day of , 20____, **ORDERED** that this matter shall proceed with a short trial date of the _____ day of , 20____ before the Superior Court, Chancery Division, General Equity Part at the County Courthouse in [insert the name of the county seat], New Jersey at _____ o'clock in the _____ noon, or as soon thereafter as counsel can be heard.

On the date fixed to proceed summarily the court may determine:

A. That the residential property that is the subject of this foreclosure action is vacant and abandoned as defined by *N.J.S.A. 2A:50-73*;

B. Fix the amount due the Plaintiff on the Note and Mortgage;

VACANT AND ABANDONED

C. Direct that the Plaintiff be paid the amount due on the note and mortgage, together with interest, advances, and costs;

D. Bar and foreclose the defendants, and each of them, of all equity of redemption in and to the property being foreclosed upon;

E. Adjudge that the property be sold according to law to satisfy the amount due the Plaintiff;

F. Possession of the property in favor of the plaintiff or plaintiff's assignee or any purchaser at sheriff's sale;

G. Damages for mesne profits;

H. For costs of this action;

I. ;

I/ J Granting such other relief as the court deems just and equitable.

And it is further *ORDERED* that:

1. The plaintiff serve a copy of this ORDER and the Notice required by *N.J.S.A. 2A:50-73* on the defendant(s) within seven (7) days of the date of this order.

2. If the plaintiff pursues a summary action foreclosure judgment on the return date, a renewed attempt of personal service on the defendant(s)-mortgagor(s) or any occupant(s) at the property must be at least 72 hours apart, and during different times of the day, either before noon, between noon and 6 P.M., or between 6 P.M. and 10 P.M. The process server's return must explicitly document the dates and times of attempted service on the defendant(s)-mortgagor(s) or any occupant(s). **[THIS PROVISION IS NECESSARY UNLESS THE PLENARY SERVICE WAS DONE IN COMPLIANCE WITH THE STATUTE.]**

3. The notice, required by *N.J.S.A. 2A:50-73*, shall be in a minimum of 14-Point font and shall state:

"To: [name of defendant-mortgagor or tenant]

Address: [address of defendant-mortgagor or tenant]

The lender is seeking on the return date set in this order, or on any adjourned date fixed by the court, to proceed summarily for entry of a residential foreclosure judgment because the property is vacant and abandoned. If you fail to respond the application will be decided on the papers on the return date and relief may be granted by default."

4. The plaintiff must file with the court through the Clerk of the Superior Court at the Hughes Justice Complex, P.O. Box 971, 25 Market Street, Trenton, New Jersey 08625 his/her/its proof of service of this order and the Notice required by *N.J.S.A. 2A:50-73* and his/her/its remaining judgment proofs no later than fifteen (15) days before the return date set in this order.

5. The Court will entertain argument, but not testimony, on the return date set in this order, unless the court and parties are advised to the contrary no later than days before the return date.

P.J. Ch

VACANT AND ABANDONED

BY THE COURT

_____,
 Plaintiff,
 v.
 _____,
 Defendant.

Superior Court of New Jersey
 Chancery Division _____ County
 General Equity Part
 Docket No: F _____

Civil Action
 Order Denying Summary Foreclosure

It appearing that on [date of OSC or Order to Proceed Summarily] an [Order to Show Cause][Order to Proceed Summarily] was entered by the court and [an answer, appearance, written objection that precludes the entry of a final residential mortgage foreclosure judgment has been filed] OR [the plaintiff has not established by clear and convincing evidence that the residential property is vacant and abandoned], and for good cause shown.

It is on this _____ day of _____, 20____ ORDERED that:

1. The Order to Show Cause be and hereby is discharged.
2. The plaintiff's application to proceed with the foreclosure in a summary manner is DENIED.
3. The within foreclosure action may continue on the normal track for residential mortgage foreclosure actions for properties that are not vacant and abandoned and the Notice to Cure required by *N.J.S.A. 2A:50-58* shall be served with the Notice of Motion for Judgment as required by *Rule 4:64-1(d)*.
4. A copy of the within order shall be served upon defendant-mortgagor and all parties or the attorneys for the parties who have appeared in the action within seven (7) days of the date hereof.

 P.J. Ch

VACANT AND ABANDONED

Model Mortgage Foreclosure Judgment – Vacant & Abandoned Residential Property

Plaintiff or Filing Attorney Information:Name [Attorney's Name]NJ Attorney ID Number [Insert NJ Attorney ID No.]Address [Attorney's Address][Attorney's Address]Telephone Number [Attorney's Phone Number]

_____,
 Plaintiff,
 v.
 _____,
 Defendant.

Superior Court of New Jersey
 Chancery Division _____ County
 General Equity Part
 Docket No: _____
F _____

Civil Action
 Mortgage Foreclosure Judgment
 Vacant & Abandoned Residential Property

This matter having been opened to the Court by [insert plaintiff's law firm name], Attorneys for the Plaintiff; and the Court having determined that this matter may be [commenced by Order to Show Cause] OR [prosecuted as a summary proceeding] pursuant to *N.J.S.A. 2A:50-73*, and it appearing that on [date of OSC or Order to Proceed Summarily] an [Order to Show Cause][Order to Proceed Summarily] seeking, among other relief, the summary disposition of the within foreclosure action, was entered by the court, and [insert appearing attorney's name], Esq., attorney for the plaintiff, appearing, and the mortgagor-defendant [tenant-defendant] having not appeared or answered at the time and place designated in the [Order to Show Cause][Order Allowing Action to Proceed Summarily]; and proof of service of the [verified complaint, order to show cause and the affidavits or certification in support][Order Allowing the Action to Proceed Summarily] and the Notice of the Summary Proceeding for Entry of a Residential Foreclosure Judgment required by *N.J.S.A. 2A:50-73* having been timely filed herein and it appearing that the mortgagor-defendant [tenant-defendant] has/have been served by substituted service; and the other defendants were served in accordance with the Rules of Court; and the plaintiff having submitted a true copy of the note, mortgage and assignment or assignments of mortgage, if any, and having filed a certification of amount due including a schedule setting forth the computation of the amount due on the plaintiff's note; and the Court having reviewed the papers submitted in support of the relief sought and the Court having received a recommendation from the Office of Foreclosure and having placed its opinion on the record in open Court and good cause appearing.

It is on this _____ day of _____, 20____ *ORDERED AND ADJUDGED* that:

1. The residential property is vacant and abandoned and no answer, appearance, or written objection that precludes the entry of a final residential mortgage foreclosure judgment has been filed.

2. The amount due the plaintiff is \$[insert amount due] together with interest at the contract rate of [insert note interest]% on \$[insert total of principal and advances], being the principal sum in default and advances, if any, from [insert the date the proof of amount due calculates the contract interest through] to the date of this judgment and lawful interest thereafter together with costs of this suit to be taxed, which includes, as a part thereof, a counsel fee of \$[insert counsel fee computation], computed as allowed by R. 4:42-9(a)(4) and which is hereby approved and allowed.

3. The mortgaged real property, known as [insert street address]; being Block [insert block] Lot(s) [insert lot(s)] on the [insert municipality name] municipal tax records, being further described by the legal description/ metes and bounds description in the mortgage, shall be sold to raise and satisfy the amount due, in the first place to the plaintiff, together with the plaintiff's costs and lawful interest thereon to be computed as aforesaid, and that an execution for that purpose be duly issued out of this Court directed to the Sheriff of County, commending said Sheriff to make a public sale, according to law, of the real property, free of all claims, rights and interest of the defendants, or any person or entity claiming under or through the defendants, except as herein provided.

4. The defendants in this cause, and each of them, stand absolutely debarred and foreclosed of and from all equity of redemption of, in, and to said real property described in the complaint and when sold as aforesaid by virtue of this judgment.

5. The plaintiff or its assignee or the successful purchaser at the Sheriff's sale shall duly recover against the defendants, and all parties holding under said defendants, possession of the real property with the appurtenances thereto.

6. Out of the monies arising from said sale the Sheriff shall pay to the plaintiff, in the first place, the amount due the plaintiff, with interest thereon as aforesaid and the plaintiff's taxed costs with interest thereon, as aforesaid.

7. The Sheriff aforesaid shall make a report of the sale, without delay, as required by the Rules Governing the Courts of the State of New Jersey.

8. In case more money shall be realized by the sale than is required to satisfy such amount due the plaintiff, then such surplus be brought into this Court to abide the further Order of this Court.

9. Notwithstanding anything herein to the contrary, this judgment shall not affect the rights of any person protected by the New Jersey Tenant Anti-Eviction Act, *N.J.S.A. 2A:18-61.1, et seq.*, the right of redemption given the United States under 28 *U.S.C. '2410*, the limited priority rights for the aggregate customary condominium assessment for the six-month period prior to the recording of any association lien as allowed by *N.J.S.A. 46:8B-21* or the Soldiers' and Sailors' Civil Relief Act of 1940, 50 *U.S.C. App. 501 et seq.*

/s/ Signature General Equity Judge

[Type or Print Name]P.J. Ch

VACANT AND ABANDONED

Model Writ of Execution – Vacant & Abandoned Residential Property (*Rule 4:59-1(a)*)

_____ , Plaintiff, v. _____ , Defendant.	Superior Court of New Jersey Chancery Division _____ County General Equity Part Docket No: F _____ Civil Action Write of Execution Vacant & Abandoned Residential Property

The State of New Jersey to
Sheriff of Coun ty
Greetings

WHEREAS, on [insert judgment date] by a certain Judgment in the Superior Court of New Jersey in the above captioned pending cause of action it was determined that the property is vacant and abandoned; and it was ORDERED and ADJUDGED in favor of the Plaintiff, [insert the plaintiff's name], against the following named defendants:

[insert defendants' names who were defaulted or answer struck]

–

–

–;

that certain real property with appurtenances and all the defendants', or those claiming through any of said defendants, rights in and to the same, described in the complaint in this action and particularly set forth and described herein, that is to say, real property commonly known as:

[insert the street address]; being Block [insert the block] Lot(s) [insert lot(s)]
on the [insert the municipality's name] municipal tax map and further described
the rider annex hereto,

be sold by the Sheriff of Coun ty and for that purpose a writ of execution should
issue directed to the aforesaid Sheriff.

AND WHEREAS, the aforesaid judgment establishes that the amount due the plaintiff is \$ _____ being the principal and interest secured by a certain mortgage dated [insert the mortgage date] and given by [insert the mortgagors' names] together with interest at the contract rate of [insert note's contract rate]% on \$[insert principal and advances, but not accrued interest] being the principal sum in default and advances, if any, from [insert the date that the amount due computed through] to [insert the judgment date], and lawful interest thereafter on the total amount due the plaintiff until the same be paid and satisfied together with the plaintiff's costs duly taxed at [\$ insert the taxed cost amount] with lawful interest thereon from the above judgment date.

NOW, THEREFORE, YOU ARE HEREBY COMMANDED to cause a public notice and sale to be made of the real property aforesaid and to sell so much of the same as may be needed and necessary to raise and pay the amount due the plaintiff.

YOU ARE FURTHER COMMANDED to pay to the plaintiff the amount of said judgment together with lawful interest and costs thereon. You are to retain out of the proceeds of sale your fees and the costs and expenses of sale as authorized by law.

YOU ARE FURTHER COMMANDED that if the property shall sell for more than a sufficient amount to satisfy the aforesaid judgment and your costs and expenses of sale and you have surplus money, then you are directed to bring the surplus money before the Superior Court of New Jersey at Trenton, New Jersey, within thirty (30) days after sale to abide the further order of the this Court and if no sale is held, then this writ is returnable within twenty-four (24) months, pursuant to R. 4:59-1(a), by certificate under your hand together with this writ.

WITNESS, the Honorable[insert the judge's name], Judge of the New Jersey Superior Court at [Insert City], New Jersey, on [insert date the writ is issued].

/s/ Michelle M. Smith

Clerk of the New Jersey Superior Court

[RIDER WITH LEGAL DESCRIPTION OF PROPERTY ATTACHED.]

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NOTICE TO THE BAR AND PUBLIC

FORECLOSURE -- AVAILABILITY OF HOMEOWNER ASSISTANCE FUND (HAF) RELIEF FOR ELIGIBLE NEW JERSEY RESIDENTS; COURT FORMS TO APPLY TO STAY A SHERIFF'S SALE AND TO OBJECT TO AN IN PERSONAM TAX FORECLOSURE JUDGMENT

As announced in a December 8, 2021 notice, the Supreme Court has authorized homeowners to request a stay of the sheriff's foreclosure sale or a stay of a tax sale foreclosure based on eligibility for relief through the Homeowner Assistance Fund (HAF). This notice provides information on that application process, including (1) an approved form of motion to request a stay of the sheriff's foreclosure sale; and (2) an approved motion packet to request a stay of a tax sale foreclosure.

American Rescue Plan & Homeowner Assistance Fund

The federal American Rescue Plan of 2021 established the HAF to prevent displacement of homeowners who fell behind in mortgage payments because of the COVID-19 pandemic. The U.S. Department of the Treasury has allocated \$325.6 million in HAF funds to New Jersey. Those funds are intended to be available to owner-occupants of one- to four-unit residences who have incomes less than 150% of the Area Median Income. To qualify for HAF funds, homeowners must attest that they experienced COVID-related financial hardship after January 21, 2020.

Pending Availability of HAF Funds in New Jersey

The New Jersey Housing and Mortgage Finance Agency ("NJHMFA") is an approved provider for federal HAF assistance. HAF funds can be used (1) to pay arrears and reinstate the current mortgage; (2) to assist homeowners in making their next four mortgage payments; (3) to pay nonmortgage incidental costs such as taxes, homeowner's insurance, assessments and municipality liens; or (4) to pay a combination of arrears, mortgage payments, or incidental costs not to exceed \$35,000. Information about the HAF program can be found at <https://nj.gov/dca/hmfa/dca/hmfa>

Motion to Stay Sheriff's Sale

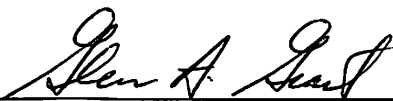
To prevent displacement of homeowners intended to be protected by the American Rescue Plan while upholding the due process rights of those homeowners, the Court has authorized homeowners who meet HAF eligibility requirements to file a motion to stay a sheriff's foreclosure sale. That motion is only available after a defendant has received both statutory adjournments of the foreclosure sale. Eligible homeowners are required to file a motion to stay the sheriff's sale using the forms attached to this notice. Any such motion must be served on the mortgage holder who will have an opportunity to object to the stay. Homeowners must attest that they meet all of the HAF eligibility requirements. There is no fee for filing a motion to stay a sheriff's sale based on HAF eligibility. All applications will be decided by a vicinage judge.

Tax Foreclosures

HAF assistance is also available to homeowners in tax foreclosure matters. Where a homeowner meets the HAF eligibility requirements, the homeowner must file a motion seeking to stay the tax sale foreclosure. That motion must be served on the holder of the tax sale certificate who would have an opportunity to object to the further stay. There will be no filing fee for the motion on the basis of HAF eligibility. All applications will be decided by a vicinage judge.

Attached are the motion packet to stay a sheriff's sale based on HAF eligibility and the motion packet to stay a tax sale foreclosure based on HAF eligibility. The flyer for the HAF program administered by NJHMFA is also attached.

Questions on this notice may be directed to the Superior Court Clerk's Office at (609) 421-6100.



Glenn A. Grant
Administrative Director

Dated: May 10, 2022



How to File a Motion Before a Judge to Stay Sheriff's Sale in Order to Apply for Relief Through the Homeowner Assistance Fund (HAF)

(Superior Court of New Jersey - Chancery Division - General Equity) Who Should Use This Packet?

These instructions are for use before a sheriff's sale is scheduled and after you have exhausted the two statutory stays that you may request from the sheriff. *N.J.S.A. 2A:17-36*. **These instructions are for use ONLY by homeowners who are eligible for relief through the Homeowner Assistance Fund (HAF), a provision of the American Rescue Plan of 2021, and are seeking a stay of sheriff's sale to allow them to apply for HAF relief.**

You must file a WRITTEN request with the Chancery Division, General Equity in the vicinage (county) in which your property is located in order for the court to consider a stay of a sheriff's sale. Contact the Civil Division in your county to find out where to do this. Civil Division contact information is posted on the Judiciary's website www.njcourts.gov. It is important that you file a motion requesting a stay as soon as possible after the sheriff's sale stays are exhausted.

With limited exceptions, any paper filed with the court can be looked at by the public. You may only file a motion on behalf of yourself. You may not file a motion for anyone else. A Power of Attorney does not allow you to file on behalf of anyone else. Motions filed on behalf of anyone else will be returned.

Note: These materials have been prepared by the New Jersey Administrative Office of the Courts for use by self-represented litigants. The instructions and forms will be periodically updated as necessary to reflect current New Jersey statutes and court rules. The most recent version of the forms will be available on the Judiciary's Internet site njcourts.gov. However, you are ultimately responsible for the content of your court papers.

Completed forms should be submitted electronically via the Judiciary Electronic Document Submission (JEDS) system. Learn more at www.njcourts.gov.

**In instances where electronic filing is not possible, forms may be submitted via postal mail to:
Superior Court Clerk's Office
Attention: Foreclosure Processing Services**

**P.O. Box 971
Trenton, New Jersey 08625**

Things to Think About Before You Represent Yourself in Court

Try to Get a Lawyer

CAUTION: Some Foreclosure cases are very complex and you should consider getting a lawyer. The court system can be confusing and it is a good idea to get a lawyer if you can. The law, the proofs necessary to present your case, and the procedural rules governing cases in the Chancery Division, General Equity Part are complex. Most likely your adversary will be represented by a lawyer. It is recommended that you make every effort to obtain the assistance of a lawyer. If you cannot afford a lawyer, you may contact the legal services program in your county to see if you qualify for free legal services. Their telephone number can be found in your local yellow pages under "Legal Aid" or "Legal Services."

If you do not qualify for free legal services and need help in locating an attorney, you can contact the bar association in your county. That number can also be found in your local yellow pages. Most county bar associations have a Lawyer Referral Service. The County Bar Lawyer Referral Service can supply you with the names of attorneys in your area willing to handle your particular type of case and will sometimes consult with you at a reduced fee. There are also a variety of organizations of minority lawyers throughout New Jersey, as well as organizations of lawyers who handle specialized types of cases. Ask your county court staff for a list of lawyer referral services that include these organizations.

If you decide to proceed without an attorney, these materials explain the procedures that **must** be followed to have your papers properly filed and considered by the court. Failure to follow procedures can result in a delay with processing your documents.

These materials do not provide information on the law governing your claims or defenses; information on how to conduct pretrial discovery; information on alternative dispute resolution procedures, such as mediation, that may be available or required in your case; information on the kinds of evidence you need to prove your claims or defenses at trial; or

information on other procedural and evidentiary rules governing foreclosure actions.

While you have the right to represent yourself in court, you should not expect special treatment, help, or attention from the court. The following is a list of some things the court staff can and cannot do for you. Please read it carefully before asking the court staff for help.

- We *can* explain and answer questions about how the court works.
- We *can* tell you what the requirements are to have your case considered by the court.
- We *can* give you some information from your case file.
- We *can* provide you with samples of court forms that are available.
- We *can* provide you with guidance on how to fill out forms.
- We *can* usually answer questions about court deadlines.
- We *cannot* give you legal advice. Only your lawyer can give you legal advice.
- We *cannot* tell you whether or not you should bring your case to court.
- We *cannot* give you an opinion about what will happen if you bring your case to court.
- We *cannot* recommend a lawyer, but we can provide you with the telephone number of a local lawyer referral service.
- We *cannot* talk to the judge for you about what will happen in your case.
- We *cannot* let you talk to the judge outside of court.
- We *cannot* change an order issued by a judge.

Keep Copies of All Papers

Make and keep copies of all completed forms and documents related to your case.

Definitions of Words Used in This Packet

Adversary – Your *adversary* in a lawsuit is the person or persons whose position is opposite to you. In a case in which there is only a plaintiff and a defendant and you are the plaintiff, your adversary is the defendant. Likewise, if you are the defendant, your adversary is the plaintiff. In this packet, service on your adversary means service on the attorney(s) representing your adversary or adversaries and/or on any party(ies) not represented by counsel.

Brief – A *brief* is a written argument submitted to the court in which you present the facts and the history of your case and the legal argument supporting the request you have made to the court in your motion.

Caption - A *caption* is the name of the case; it lists the name of both the plaintiff(s) and the defendant(s). For example: ABC Mortgage Company, Plaintiff v. Mary Smith, Defendant.

Certification - A *certification* is statement that certain facts are true to the best of the knowledge of the person making the statement. It is like an affidavit, but is not sworn before a notary or other authorized person.

Contesting Answer - A *contesting answer* is one that challenges the right of the lender to foreclose on the defendant's property. A contesting answer will be sent to a judge for a determination on the lender's right to foreclose.

Defendant - The *defendant* is the person being sued.

Discovery Motion - A *discovery motion* asks the court for a ruling on some phase of the discovery process such as a motion for more specific answers to interrogatories, a motion to compel depositions. Before filing a discovery motion, the moving party must try to resolve the matter with the other party(ies) in the case.

Docket Number - A *docket number* is the number the court assigns to a case so that it may be identified and located easily. You **must** include the docket number on all your communications regarding your case. **Note: Documents without a docket number cannot be filed.**

File - To *file* means to give the court the appropriate documents, forms and fees.

Motion – A *motion* is an application to the court for a specific order or ruling to be made in favor of the person making the motion (the movant).

Motion Day – Courts hear motions on specified days (usually Fridays) on the court calendar called *motion days*. You should obtain the motion schedule on line from the judiciary website at: njcourts.gov. It is the litigant's responsibility to contact the courthouse in the county where the case is filed to inquire about the motion day and to confirm if a case is scheduled for a hearing.

Movant or moving party – The *movant or moving party* is the person who is bringing the motion.

Non-contesting Answer - A *non-contesting answer* is one that does not challenge with specificity the lender's right to foreclose on the defendant's property. A case with a non-contesting answer will not be sent to a judge for resolution, but will be handled by the Office of Foreclosure in Trenton.

Notice of Motion – A *Notice of Motion* is the form used to inform the court and all opposing parties that the moving party is seeking a specific ruling or order from the court. A Notice of Motion must identify the courthouse where the motion will be heard (the courthouse in the county where the case is filed).

Definitions of Words Used in This Packet (continued)

Oral Argument – *Oral argument* refers to the appearance in court by the parties to present their positions to the judge in person. Either side may request oral argument, but the decision on whether there will be oral argument is up to the judge. If oral argument is not requested by either of the parties or the judge, the motion will be decided “on the papers.”

Plaintiff - The *plaintiff* is the person who files a complaint in a lawsuit.

Pro se - *Pro se* is a Latin term that means “on one’s own behalf.” A plaintiff or defendant in a law suit who does not have an attorney is said to be appearing *pro se*.

Proof of Mailing - *Proof of mailing* is the form in which you provide the dates and method you used to give the other parties copies of the papers that you filed in court.

Proposed Form of Order – A *proposed order* is a form that the judge can use to either grant or deny the relief sought in the motion. Every motion must be accompanied by a proposed form of order.

Redaction - the censoring or obscuring of part of a text for legal or security purposes is called *redaction*.

Note: Any documents received by the Clerk’s office will be processed and placed in the case jacket which, with limited exceptions, is available for public view.

Relief - *Relief* is the assistance or remedy sought by a complainant from a judge.

Return date – The *return date* is the date on which the court will consider the motion. If you request oral argument you must appear before the judge. If no oral argument is requested, the matter will be decided “on the papers.” That is, the judge will decide the motion on what has been submitted in the moving papers and in the opposition papers, without having anyone appear in court.

Service - *Service* refers to the delivery of the complaint or any other paper in a suit to the other parties in the case. Formal legal service requires that the service be made by an authorized person or by mail or, in limited situations, by publication in a newspaper.

Summary judgment - A motion for *summary judgment* asks the court to resolve the case in the moving party’s favor without a trial because there is no dispute over the facts of the case and the law supports the moving party’s position.

Venue - the *venue* is the particular county in which a court with jurisdiction may hear and determine a case.

The numbered steps listed below tell you what forms you will need to fill out and what to do with them. Each form should be typed or printed clearly on 8 ½" x 11" white paper only. Forms may not be filed on a different size or color paper.

Stay of Sheriff's Sale Notice of Motion Instructions

Following are instructions to complete the attached sample Notice of Motion, Certification in Support and Form of Order:

STEP 1: Complete the Notice of Motion

In the Notice of Motion, you inform the court and all parties that you have asked for a specific ruling or order and you specify the ruling you want – stay of the sheriff's sale – as well as any other relief being sought.

Motions are heard in court on specified days. You can obtain the motion schedule from the clerk's office (see link above). If the sheriff's sale is not imminent, you should pick a motion day at least 3 weeks from the date you mail your motion papers in order to give your adversary, 16 days before the return date as required by the court rules.

If the sheriff's sale is imminent, contact the judge's chambers to ask when he or she can hear your motion and how he or she wants you to communicate to the lender's attorney that you are making the motion on short notice.

STEP 2: Complete the Certification in Support of the Motion and the Certification of Service

The Certification in Support of the Motion tells the court the reasons why you want the ruling you have requested and the reasons why the court should grant your request. You must also complete the certification of service that tells the court the date on which you mailed (or delivered) the copies of the documents to the lender's attorney.

STEP 3: Complete the Proposed Form of Order

Fill in the information up to the line for the date of the order. Leave the date and the rest of the form blank. The judge will complete the terms of the Order when the motion is decided.

STEP 4: Mail (or Deliver) the Notice of Motion, Certifications and Proposed Form of Order to the Lender's Attorney

You must serve the lender's attorney no later than 16 days before the specified return date on your notice of motion. While the court rules do not require you to use certified mail, it is suggested that you send your motion and supporting papers by regular and certified mail, return receipt requested. You will then have the green card when it is returned to you as proof of service.

If the sheriff's sale is imminent and you must be heard before 16 days, deliver the motion, certification and order by hand, courier or overnight letter directly to the General Equity judge's chambers.

STEP 5: Mail or Deliver the Forms to the Court or File via the Judiciary Electronic Document Submission (JEDS) System

. It is recommended that you submit your documents electronically through the Judiciary's Electronic Document Submission (JED) application. That application can be found at [JEDS \(njcourts.gov\)](http://JEDS.njcourts.gov). First time users are required to register and to create a user name and password.

If you wish to deliver the forms to court, your local court address is available online at njcourts.gov. If you wish to mail the papers, we recommend that you use certified mail, return receipt requested. Mail or deliver the original Notice of Motion, Certification and proposed Form of Order to the Superior Court Clerk's Office using the address provided on Page 1.

If you wish the court to send you back a copy of these papers stamped "filed," you must include an additional copy and a self-addressed, stamped envelope. Keep copies of all papers you provide to the court or any other party. Make and keep for yourself copies of all completed forms and any canceled checks, money orders, receipts, bills, contract estimates, letters, leases, photographs and other important papers that relate to your case.

Step 7 - Appear in Court

The Court will notify you when the matter will be heard by the judge. You will also be told whether to appear in person or virtually. Since the applications are time sensitive, most appearances are conducted virtually.

Instructions for Completing the Notice of Motion (Form A)

1. At the top left of the form, enter your name, address, daytime phone number, and email address. If you are not an attorney, leave the *Attorney ID* field blank. **Note: the email address is required.**
2. On the line labeled *Plaintiff(s)*, type or print the plaintiff's name.
3. On the line labeled *Defendant(s)*, enter the name(s) of the defendants listed on the complaint.
4. On the line labeled *County*, enter the county where the case is filed.
5. On the line labeled *Docket Number*, enter the foreclosure docket number. This information can be found in the complaint that was served on you.
6. To the right of *To*, enter the names and addresses of all person who will be served with a copy of this motion. Attach additional sheets if necessary.
7. On the line labeled *Court located at*, enter the address of the court where you want your Motion to be heard.
8. After the word *on*, enter the return date of motion. A motion schedule is available online at njcourts.gov.
9. In the space after *for an Order to*, describe any additional relief you are requesting from the court.
10. Date and sign the form and print your name under the signature.

Form A

NOTICE: This is a public document, which means the document as submitted will be available to the public upon request. Therefore, do not enter personal identifiers on it, such as Social Security number, driver's license number, vehicle plate number, insurance policy number, active financial account number, active credit card number, or military status information.

Name _____
 Address _____
 Daytime Telephone _____
 Email Address _____
 Attorney ID _____
 (if
 applicable) _____

Superior Court of New Jersey
 Chancery Division - General Equity
 _____ County

Docket Number: F - _____

 Plaintiff(s)

v.

 Defendant(s)

Civil Action

**Notice of Motion
 To Stay Sheriff's Sale
 In Order To Apply for Relief
 Through The Homeowner Assistance Fund**

To:

TAKE NOTICE that the undersigned will apply to the above named Court located at _____, on _____, at 9:00 a.m.

for an **Order** (a) staying the sheriff's sale, and (b) to (describe additional relief requested):

I will rely on the attached certification, which contains the grounds for the relief sought.

Pursuant to R. 1:6-2(d), Oral argument is requested.

Date _____

 Signature

 Print Name

Instructions for Completing the Certification in Support of Motion (Form B)

1. At the top left of the form enter your name, address, daytime phone number, and email address. If you are not an attorney, leave the *Attorney ID* field blank. **Note: the email address is required.**
2. On the line labeled *Plaintiff(s)*, type or print the plaintiff's name.
3. On the line labeled *Defendant(s)*, enter the name(s) of the defendants listed on the complaint.
4. On the line labeled *County*, enter the county where the case is filed.
5. On the line labeled *Docket Number*, enter the foreclosure docket number. This information can be found in the complaint that was served on you.
6. Enter your name on the line that says *I /We, _____, am / are the defendant(s) in the above-captioned matter.*
7. Enter your property address on the line that says *I / We am / are the owner(s) of property known as _____.*
8. Certify that you have already used two available statutory adjournments and must now seek to stay the sheriff's sale by Motion.
9. Enter the date your property is scheduled for sale on the line that says *A Sheriff's sale of my property is scheduled for _____.*
10. Certify that you intend to apply for relief through the Homeowner Assistance Fund (HAF). If you do not intend to apply for HAF assistance, you should not use this form. For more information, contact the New Jersey Housing and Mortgage Finance Agency (NJHMFA) at 609-278-7400.
11. Certify that the assistance available through HAF, a maximum of \$35,000, on its own or in combination with other funds that are available to you now, would be enough to bring your mortgage current and end the foreclosure process.
12. Certify that you experienced COVID-related financial hardship occurring after January 21, 2020. This is a requirement to apply for relief through HAF. If you are not eligible for HAF assistance, you should not use this form. For more information, contact NJHMFA at 609-278-7400.
13. Certify that your household income does not exceed 150% of the Area Median Income (AMI). To determine if you qualify, review this chart provided by NJHMFA:
https://www.njhousing.gov/dca/hmfa/covid19/docs/HAF_Incom_%20Limit_SHEET_A.pdf. This is a requirement to apply for relief through HAF. If you are not eligible for HAF assistance, you should not use this form. For more information, contact NJHMFA at 609-278-7400.
14. In the space under where it says *This motion should be granted because*, state the facts supporting why your motion should be granted. Attach additional sheets if necessary.
15. Date and sign the form, and print your name under the signature. **Note:** when you sign this form, you are certifying that the statements made on the form are true. If you willfully make false statements, you may be subject to punishment.

Instructions for Completing the Certification of Service (Form B)

1. Enter the date you mailed copies of the documents to your adversaries.

How to File a Motion to Stay Sheriff's Sale in Order to Apply for Relief Through the Homeowner Assistance Fund (HAF)

2. Select the mailing method you used (regular or certified mail). If you sent it by both regular and certified mail, return receipt requested, check both.
3. List the name and address for each party to the lawsuit. If the party is represented by an attorney, enter the attorney's name and address and enter which party the attorney represents.
4. Date and sign the form, and print your name under the signature.

Form B (continued)

Name _____
 Address _____
 Daytime Telephone _____
 Email Address _____
 Attorney ID _____

Superior Court of New Jersey
 Chancery Division - General Equity
 _____ County

Docket Number: F - _____

 Plaintiff(s)

v.

 Defendant(s)

Civil Action

**Certification in Support of
 Stay of Sheriff's Sale**

1. I / We, _____, am / are the defendant(s) in the above-captioned matter.
2. I / We am / are the owner(s) of property known as _____, New Jersey.
 (insert property address)
3. I / We have used our two available adjournments.
4. A Sheriff's sale of my property is scheduled for _____.
 (insert date)
5. I / We am / are the borrower(s) and mortgagor(s) on a loan secured by a mortgage on the above-described property, which is the subject of the above-captioned foreclosure action.
6. The above-described property is a one- to four-unit residential dwelling.
7. I / We request that the Sheriff's Sale of the above premises, be postponed, so that I / we can apply for relief through the Homeowner Assistance Fund (HAF), a provision of the American Rescue Plan of 2021.
8. I / We certify that \$35,000 of relief would be enough on its own or in combination with other funds presently available to me/us to bring this mortgage current and prevent foreclosure.
9. I / We certify to a COVID-related financial hardship occurring after January 21, 2020.
10. The annual income of my / our household is _____. This amount that does not exceed 150% of the Area Median Income, as described by the New Jersey Housing and Mortgage Finance Agency (NJHMFA). In making this statement, I/we have reviewed the income levels published by NJHMFA (https://www.njhousing.gov/dca/hmfa/covid19/docs/HAF_Incom_%20Limit_SHEET_A.pdf).
11. This motion should be granted because:

I certify that the above statements made by me are true and that if any of the statements are willfully false, I am subject to punishment.

Form B (continued)

Date _____

Signature_____
Print Name**Certification of Service**

I, certify that on _____, I sent a copy of the Notice of Motion, Certification, and Proposed Form of Order to the following parties by: (Check which mailing method you chose. If you sent it by both regular and certified mail, return receipt requested, check both.)

☐ regular mail☐ certified mail, return receipt requested

List each party to the lawsuit; use the attorney's name and address if the party is represented by counsel.

Name _____ Name _____

Address _____ Address _____

Attorney for _____ Attorney for _____

Date _____

Signature_____
Print Name

Instructions for Completing the Proposed Form of Order (Form C)

1. At the top left of the form enter your name, address, daytime phone number, and email address. If you are not an attorney, leave the *Attorney ID* field blank. **Note: the email address is required.**
2. On the line labeled *Plaintiff(s)*, type or print the plaintiff's name.
3. On the line labeled *Defendant(s)*, enter the name(s) of the defendants listed on the complaint.
4. On the line labeled *County*, enter the county where the case is filed.
5. On the line labeled *Docket Number*, enter the foreclosure docket number. This information can be found in the complaint that was served on you.
6. In the space under the section that starts *This matter having been brought before the Court...* describe any additional relief you are requesting from the court.
7. **DO NOT** fill out anything that appears under the text "**For Court Use Only.**" The judge will complete the remaining information.

Form C

Name _____
 Address _____
 Daytime Telephone _____
 Email Address _____
 Attorney ID _____

Superior Court of New Jersey
 Chancery Division - General Equity
 _____ County
 Docket Number: F - _____

 Plaintiff(s)

v.

 Defendant(s)

Civil Action**Order To Stay Sheriff's Sale**

This matter having been brought before the Court on Motion of defendant for an **Order** (a) staying the sheriff's sale, and (b) to (describe additional relief requested):

and the Court having considered the matter and for good cause appearing,

(Do not write below this line, For Court Use Only)

It is on this ____ day of _____, 20____, **ORDERED** that:

1. The Sheriff's Sale scheduled for the ____ day of _____, 20____, is stayed for 90 days until the ____ day of _____, 20____ to allow the defendant/defendants to apply for relief through the Homeowner Assistance Fund under the American Rescue Plan of 2021. The court will further review this matter on _____.

2. It is FURTHER ORDERED that the Superior Court Clerk is directed to provide a copy of this Order to the New Jersey Housing and Mortgage Finance Agency. NJHFMA will contact the homeowner within 14 days of this Order to determine HAF eligibility.

3. Additional Relief:

It is **FURTHER ORDERED** that a copy of this Order be served by the moving party upon all other parties or their attorneys, if any, within ____ days of the date listed above.

This motion was:

☐ **Opposed**

☐ **Unopposed**

 , P.J. Ch

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How to File a Motion Before a Judge to Stay Tax Foreclosure in Order to Apply for Relief Through the Homeowner Assistance Fund (HAF)

(Superior Court of New Jersey - Chancery Division - General Equity) Who Should Use This Packet?

These instructions are for use before Final Judgment has been entered in a Tax Foreclosure, if you wish to stay the proceedings in order to apply for HAF assistance. **These instructions are for use ONLY by homeowners who are eligible for relief through the Homeowner Assistance Fund (HAF), a provision of the American Rescue Plan of 2021, and are seeking a stay of tax foreclosure to allow them to apply for HAF relief.**

You must file a WRITTEN request with the Chancery Division, General Equity in the vicinage (county) in which your property is located in order for the court to consider a stay of a tax foreclosure. Contact the Civil Division in your county to find out where to do this. Civil Division contact information is posted on the Judiciary's website www.njcourts.gov. It is important that you file a motion requesting a stay before Final Judgment is entered.

With limited exceptions, any paper filed with the court can be looked at by the public. You may only file a motion on behalf of yourself. You may not file a motion for anyone else. A Power of Attorney does not allow you to file on behalf of anyone else. Motions filed on behalf of anyone else will be returned.

Note: These materials have been prepared by the New Jersey Administrative Office of the Courts for use by self-represented litigants. The instructions and forms will be periodically updated as necessary to reflect current New Jersey statutes and court rules. The most recent version of the forms will be available on the Judiciary's Internet site njcourts.gov. However, you are ultimately responsible for the content of your court papers.

Completed forms should be submitted electronically via the Judiciary Electronic Document Submission (JEDS) system. Learn more at www.njcourts.gov.

In instances where electronic filing is not possible, forms may be submitted via postal mail to:

**Superior Court Clerk's Office
Attention: Foreclosure Processing Services
P.O. Box 971
Trenton, New Jersey 08625**

Things to Think About Before You Represent Yourself in Court

Try to Get a Lawyer

CAUTION: Some Foreclosure cases are very complex and you should consider getting a lawyer. The court system can be confusing and it is a good idea to get a lawyer if you can. The law, the proofs necessary to present your case, and the procedural rules governing cases in the Chancery Division, General Equity Part are complex. Most likely your adversary will be represented by a lawyer. It is recommended that you make every effort to obtain the assistance of a lawyer. If you cannot afford a lawyer, you may contact the legal services program in your county to see if you qualify for free legal services. Their telephone number can be found in your local yellow pages under “Legal Aid” or “Legal Services.”

If you do not qualify for free legal services and need help in locating an attorney, you can contact the bar association in your county. That number can also be found in your local yellow pages. Most county bar associations have a Lawyer Referral Service. The County Bar Lawyer Referral Service can supply you with the names of attorneys in your area willing to handle your particular type of case and will sometimes consult with you at a reduced fee. There are also a variety of organizations of minority lawyers throughout New Jersey, as well as organizations of lawyers who handle specialized types of cases. Ask your county court staff for a list of lawyer referral services that include these organizations.

If you decide to proceed without an attorney, these materials explain the procedures that **must** be followed to have your papers properly filed and considered by the court. Failure to follow procedures can result in a delay with processing your documents.

These materials do not provide information on the law governing your claims or defenses; information on how to conduct pretrial discovery; information on alternative dispute resolution procedures, such as mediation, that may be available or required in your case; information on the kinds of evidence you need to prove your claims or defenses at trial; or information on other procedural and evidentiary rules governing foreclosure actions.

What You Should Expect If You Represent Yourself

While you have the right to represent yourself in court, you should not expect special treatment, help, or attention from the court. The following is a list of some things the court staff can and cannot do for you. Please read it carefully before asking the court staff for help.

- We *can* explain and answer questions about how the court works.
- We *can* tell you what the requirements are to have your case considered by the court.
- We *can* give you some information from your case file.
- We *can* provide you with samples of court forms that are available.
- We *can* provide you with guidance on how to fill out forms.
- We *can* usually answer questions about court deadlines.
- We *cannot* give you legal advice. Only your lawyer can give you legal advice.
- We *cannot* tell you whether or not you should bring your case to court.
- We *cannot* give you an opinion about what will happen if you bring your case to court.
- We *cannot* recommend a lawyer, but we can provide you with the telephone number of a local lawyer referral service.
- We *cannot* talk to the judge for you about what will happen in your case.
- We *cannot* let you talk to the judge outside of court.
- We *cannot* change an order issued by a judge.

Keep Copies of All Papers

Make and keep copies of all completed forms and documents related to your case.

Definitions of Words Used in This Packet

Adversary – Your *adversary* in a lawsuit is the person or persons whose position is opposite to you. In a case in which there is only a plaintiff and a defendant and you are the plaintiff, your adversary is the defendant. Likewise, if you are the defendant, your adversary is the plaintiff. In this packet, service on your adversary means service on the attorney(s) representing your adversary or adversaries and/or on any party(ies) not represented by counsel.

Brief – A *brief* is a written argument submitted to the court in which you present the facts and the history of your case and the legal argument supporting the request you have made to the court in your motion.

Caption - A *caption* is the name of the case; it lists the name of both the plaintiff(s) and the defendant(s). For example: ABC Mortgage Company, Plaintiff v. Mary Smith, Defendant.

Certification - A *certification* is statement that certain facts are true to the best of the knowledge of the person making the statement. It is like an affidavit, but is not sworn before a notary or other authorized person.

Contesting Answer - A *contesting answer* is one that challenges the right of the lender to foreclose on the defendant's property. A contesting answer will be sent to a judge for a determination on the lender's right to foreclose.

Defendant - The *defendant* is the person being sued.

Discovery Motion - A *discovery motion* asks the court for a ruling on some phase of the discovery process such as a motion for more specific answers to interrogatories, a motion to compel depositions. Before filing a discovery motion, the moving party must try to resolve the matter with the other party(ies) in the case.

Docket Number - A *docket number* is the number the court assigns to a case so that it may be identified and located easily. You **must** include the docket number on all your communications regarding your case. **Note: Documents without a docket number cannot be filed.**

File - To *file* means to give the court the appropriate documents, forms and fees.

Motion – A *motion* is an application to the court for a specific order or ruling to be made in favor of the person making the motion (the movant).

Motion Day – Courts hear motions on specified days (usually Fridays) on the court calendar called *motion days*. You should obtain the motion schedule on line from the judiciary website at: njcourts.gov. It is the litigant's responsibility to contact the courthouse in the county where the case is filed to inquire about the motion day and to confirm if a case is scheduled for a hearing.

Movant or moving party – The *movant or moving party* is the person who is bringing the motion.

Non-contesting Answer - A *non-contesting answer* is one that does not challenge with specificity the lender's right to foreclose on the defendant's property. A case with a non-contesting answer will not be sent to a judge for resolution, but will be handled by the Office of Foreclosure in Trenton.

Notice of Motion – A *Notice of Motion* is the form used to inform the court and all opposing parties that the moving party is seeking a specific ruling or order from the court. A Notice of Motion must identify the courthouse where the motion will be heard (the courthouse in the county where the case is filed).

Definitions of Words Used in This Packet (continued)

Oral Argument – *Oral argument* refers to the appearance in court by the parties to present their positions to the judge in person. Either side may request oral argument, but the decision on whether there will be oral argument is up to the judge. If oral argument is not requested by either of the parties or the judge, the motion will be decided “on the papers.”

Plaintiff - The *plaintiff* is the person who files a complaint in a lawsuit.

Pro se - *Pro se* is a Latin term that means “on one’s own behalf.” A plaintiff or defendant in a law suit who does not have an attorney is said to be appearing *pro se*.

Proof of Mailing - *Proof of mailing* is the form in which you provide the dates and method you used to give the other parties copies of the papers that you filed in court.

Proposed Form of Order – A *proposed order* is a form that the judge can use to either grant or deny the relief sought in the motion. Every motion must be accompanied by a proposed form of order.

Redaction - the censoring or obscuring of part of a text for legal or security purposes is called *redaction*.

Note: Any documents received by the Clerk’s office will be processed and placed in the case jacket which, with limited exceptions, is available for public view.

Relief - *Relief* is the assistance or remedy sought by a complainant from a judge.

Return date – The *return date* is the date on which the court will consider the motion. If you request oral argument you must appear before the judge. If no oral argument is requested, the matter will be decided “on the papers.” That is, the judge will decide the motion on what has been submitted in the moving papers and in the opposition papers, without having anyone appear in court.

Service - *Service* refers to the delivery of the complaint or any other paper in a suit to the other parties in the case. Formal legal service requires that the service be made by an authorized person or by mail or, in limited situations, by publication in a newspaper.

Summary judgment - A motion for *summary judgment* asks the court to resolve the case in the moving party’s favor without a trial because there is no dispute over the facts of the case and the law supports the moving party’s position.

Venue - the *venue* is the particular county in which a court with jurisdiction may hear and determine a case.

The numbered steps listed below tell you what forms you will need to fill out and what to do with them. Each form should be typed or printed clearly on 8 ½” x 11” white paper only. Forms may not be filed on a different size or color paper.

Stay of Tax Foreclosure Notice of Motion Instructions

Following are instructions to complete the attached sample Notice of Motion, Certification in Support and Form of Order:

STEP 1: Complete the Notice of Motion

In the Notice of Motion, you inform the court and all parties that you have asked for a specific ruling or order and you specify the ruling you want – stay of the tax foreclosure – as well as any other relief being sought.

Motions are heard in court on specified days. You can obtain the motion schedule from the clerk's office (see link above). You should pick a motion day at least 3 weeks from the date you mail your motion papers in order to give your adversary, 16 days before the return date as required by the court rules.

If the Motion for Final Judgment is currently pending, contact the judge's chambers to ask when he or she can hear your motion and how he or she wants you to communicate to the lender's attorney that you are making the motion on short notice.

STEP 2: Complete the Certification in Support of the Motion and the Certification of Service

The Certification in Support of the Motion tells the court the reasons why you want the ruling you have requested and the reasons why the court should grant your request. You must also complete the certification of service that tells the court the date on which you mailed (or delivered) the copies of the documents to the lender's attorney.

STEP 3: Complete the Proposed Form of Order

Fill in the information up to the line for the date of the order. Leave the date and the rest of the form blank. The judge will complete the terms of the Order when the motion is decided.

STEP 4: Mail (or Deliver) the Notice of Motion, Certifications and Proposed Form of Order to the Lender's Attorney

You must serve the lender's attorney no later than 16 days before the specified return date on your notice of motion. While the court rules do not require you to use certified mail, it is suggested that you send your motion and supporting papers by regular and certified mail, return receipt requested. You will then have the green card when it is returned to you as proof of service.

If the entry of Final Judgment is imminent and you must be heard before 16 days, deliver the motion, certification and order by hand, courier or overnight letter directly to the General Equity judge's chambers.

STEP 5: Mail or Deliver the Forms to the Court or File via the Judiciary Electronic Document Submission (JEDS) System

. It is recommended that you submit your documents electronically through the Judiciary's Electronic Document Submission (JED) application. That application can be found at [JEDS \(njcourts.gov\)](http://JEDS.njcourts.gov). First time users are required to register and to create a user name and password.

If you wish to deliver the forms to court, your local court address is available online at njcourts.gov. If you wish to mail the papers, we recommend that you use certified mail, return receipt requested. Mail or deliver the original Notice of Motion, Certification and proposed Form of Order to the Superior Court Clerk's Office using the address provided on Page 1.

If you wish the court to send you back a copy of these papers stamped "filed," you must include an additional copy and a self-addressed, stamped envelope. Keep copies of all papers you provide to the court or any other party. Make and keep for yourself copies of all completed forms and any canceled checks, money orders, receipts, bills, contract estimates, letters, leases, photographs and other important papers that relate to your case.

STEP 6: Appear in Court

The Court will notify you when the matter will be heard by the judge. You will also be told whether to appear in person or virtually. Since the applications are time sensitive, most appearances are conducted virtually.

Instructions for Completing the Notice of Motion (Form A)

1. At the top left of the form, enter your name, address, daytime phone number, and email address. If you are not an attorney, leave the *Attorney ID* field blank. **Note: the email address is required.**
2. On the line labeled *Plaintiff(s)*, type or print the plaintiff's name.
3. On the line labeled *Defendant(s)*, enter the name(s) of the defendants listed on the complaint.
4. On the line labeled *County*, enter the county where the case is filed.
5. On the line labeled *Docket Number*, enter the foreclosure docket number. This information can be found in the complaint that was served on you.
6. To the right of *To*, enter the names and addresses of all person who will be served with a copy of this motion. Attach additional sheets if necessary.
7. On the line labeled *Court located at*, enter the address of the court where you want your Motion to be heard.
8. After the word *on*, enter the return date of motion. A motion schedule is available online at njcourts.gov.
9. In the space after *for an Order to*, describe any additional relief you are requesting from the court.
10. Date and sign the form and print your name under the signature

Form A

NOTICE: This is a public document, which means the document as submitted will be available to the public upon request. Therefore, do not enter personal identifiers on it, such as Social Security number, driver's license number, vehicle plate number, insurance policy number, active financial account number, active credit card number, or military status information.

Name _____
 Address _____
 Daytime Telephone _____
 Email Address _____
 Attorney ID _____
 (if
 applicable) _____

Superior Court of New Jersey
 Chancery Division - General Equity
 _____ County

Docket Number: F - _____

 Plaintiff(s)

v.

 Defendant(s)

Civil Action

**Notice of Motion
 To Stay Tax Foreclosure
 In Order To Apply for Relief
 Through The Homeowner Assistance Fund**

To:

TAKE NOTICE that the undersigned will apply to the above named Court located at _____, on _____, at 9:00 a.m.

for an **Order** (a) staying the Tax Foreclosure, and (b) to (describe additional relief requested):

I will rely on the attached certification, which contains the grounds for the relief sought.

Pursuant to *R. 1:6-2(d)*, Oral argument is requested.

Date _____

 Signature

Instructions for Completing the Certification in Support of Motion (Form B)

1. At the top left of the form enter your name, address, daytime phone number, and email address. If you are not an attorney, leave the *Attorney ID* field blank. **Note: the email address is required.**
2. On the line labeled *Plaintiff(s)*, type or print the plaintiff's name.
3. On the line labeled *Defendant(s)*, enter the name(s) of the defendants listed on the complaint.
4. On the line labeled *County*, enter the county where the case is filed.
5. On the line labeled *Docket Number*, enter the foreclosure docket number. This information can be found in the complaint that was served on you.
6. Enter your name on the line that says *I /We, _____, am / are the defendant(s) in the above-captioned matter.*
7. Enter your property address on the line that says *I / We am / are the owner(s) of property known as _____.*
8. Enter the date you were served with a Tax Foreclosure Complaint on the line that says *This property is currently in tax foreclosure, and I was served with the Complaint on _____.*
9. Certify that the above-described property is a one- to four-unit residential dwelling
10. Certify that you intend to apply for relief through the Homeowner Assistance Fund (HAF). If you do not intend to apply for HAF assistance, you should not use this form. For more information, contact the New Jersey Housing and Mortgage Finance Agency (NJHMFA) at 609-278-7400.
11. Certify that the assistance available through HAF, a maximum of \$35,000, on its own or in combination with other funds that are available to you now, would be enough to bring your mortgage current and end the foreclosure process.
12. Certify that you experienced COVID-related financial hardship occurring after January 21, 2020. This is a requirement to apply for relief through HAF. If you are not eligible for HAF assistance, you should not use this form. For more information, contact NJHMFA at 609-278-7400.
13. Certify that your household income does not exceed 150% of the Area Median Income (AMI). To determine if you qualify, review this chart provided by NJHMFA:
https://www.njhousing.gov/dca/hmfa/covid19/docs/HAF_Incom_%20Limit_SHEET_A.pdf. This is a requirement to apply for relief through HAF. If you are not eligible for HAF assistance, you should not use this form. For more information, contact NJHMFA at 609-278-7400.
14. In the space under where it says *This motion should be granted because*, state the facts supporting why your motion should be granted. Attach additional sheets if necessary.
15. Date and sign the form, and print your name under the signature. **Note:** when you sign this form, you are certifying that the statements made on the form are true. If you willfully make false statements, you may be subject to punishment.

Instructions for Completing the Certification of Service (Form B)

1. Enter the date you mailed copies of the documents to your adversaries.
2. Select the mailing method you used (regular or certified mail). If you sent it by both regular and certified mail, return receipt requested, check both.
3. List the name and address for each party to the lawsuit. If the party is represented by an attorney, enter the attorney's name and address and enter which party the attorney represents.
4. Date and sign the form, and print your name under the signature.

Form B

Name _____
 Address _____
 Daytime Telephone _____
 Email Address _____
 Attorney ID _____

Superior Court of New Jersey
 Chancery Division - General Equity
 _____ County

Docket Number: F - _____

 Plaintiff(s)

v.

 Defendant(s)

Civil Action

**Certification in Support of
 Stay of Tax Foreclosure**

1. I / We, _____, am / are the defendant(s) in the above-captioned matter.
2. I / We am / are the owner(s) of property known as _____, New Jersey.
 (insert property address)
3. This property is currently in tax foreclosure, and I was served with the Complaint on _____.
 (insert date)
4. I / We am / are the borrower(s) and mortgagor(s) on a loan secured by a mortgage on the above-described property, which is the subject of the above-captioned foreclosure action.
5. The above-described property is a one- to four-unit residential dwelling.
6. I / We request that the Tax Foreclosure in this matter be stayed, so that I / we can apply for relief through the Homeowner Assistance Fund (HAF), a provision of the American Rescue Plan of 2021.
7. I / We certify that \$35,000 of relief would be enough on its own or in combination with other funds presently available to me/us to bring this mortgage current and prevent foreclosure.
8. I / We certify to a COVID-related financial hardship occurring after January 21, 2020.
9. The annual income of my / our household is _____. This amount that does not exceed 150% of the Area Median Income, as described by the New Jersey Housing and Mortgage Finance Agency (NJHMFA). In making this statement, I/we have reviewed the income levels published by NJHMFA (https://www.njhousing.gov/dca/hmfa/covid19/docs/HAF_Incom_%20Limit_SHEET_A.pdf).
10. This motion should be granted because:

Date _____

 Signature

 Print Name

Form B (continued)**Certification of Service**

I, certify that on _____, I sent a copy of the Notice of Motion, Certification, and Proposed Form of Order to the following parties by: (Check which mailing method you chose. If you sent it by both regular and certified mail, return receipt requested, check both.)

☐ regular mail ☐ certified mail, return receipt requested

List each party to the lawsuit; use the attorney's name and address if the party is represented by counsel.

Name _____ Name _____

Address _____ Address _____

Attorney for _____ Attorney for _____

Date _____

Signature

Print Name

Instructions for Completing the Proposed Form of Order (Form C)

1. At the top left of the form enter your name, address, daytime phone number, and email address. If you are not an attorney, leave the *Attorney ID* field blank. **Note: the email address is required.**
2. On the line labeled *Plaintiff(s)*, type or print the plaintiff's name.
3. On the line labeled *Defendant(s)*, enter the name(s) of the defendants listed on the complaint.
4. On the line labeled *County*, enter the county where the case is filed.
5. On the line labeled *Docket Number*, enter the foreclosure docket number. This information can be found in the complaint that was served on you.
6. In the space under the section that starts *This matter having been brought before the Court...* describe any additional relief you are requesting from the court.
7. **DO NOT** fill out anything that appears under the text “**For Court Use Only.**” The judge will complete the remaining information.

Form C

Name _____
 Address _____
 Daytime Telephone _____
 Email Address _____
 Attorney ID _____

Superior Court of New Jersey
 Chancery Division - General Equity
 _____ County
 Docket Number: F - _____

 Plaintiff(s)

v.

 Defendant(s)

Civil Action**Order To Stay Tax Foreclosure**

This matter having been brought before the Court on Motion of defendant for an **Order** (a) staying the Tax Foreclosure, and (b) to (describe additional relief requested):

and the Court having considered the matter and for good cause appearing,

(Do not write below this line, For Court Use Only)

It is on this ____ day of _____, 20____, **ORDERED** that:

1. The above-captioned Tax Foreclosure matter is stayed for 90 days until the ____ day of _____, 20____ to allow the defendant/defendants to apply for relief through the Homeowner Assistance Fund under the American Rescue Plan of 2021. The court will further review this matter on ____.

2. It is FURTHER ORDERED that the Superior Court Clerk is directed to provide a copy of this Order to the New Jersey Housing and Mortgage Finance Agency. NJHFMA will contact the homeowner within 14 days of this Order to determine HAF eligibility.

3. Additional Relief:

It is **FURTHER ORDERED** that a copy of this Order be served by the moving party upon all other parties or their attorneys, if any, within ____ days of the date listed above.

This motion was:

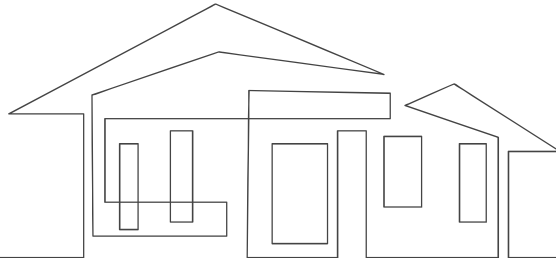
☐ **Opposed**

☐ **Unopposed**

_____, P.J. Ch

MORTGAGE ASSISTANCE IS AVAILABLE

436



The Emergency Rescue Mortgage Assistance (ERMA) program provides financial assistance to eligible homeowners who have experienced a significant decrease in income or increase in expenses due to the COVID-19 pandemic.

PROGRAM OVERVIEW:

- **Up to \$35,000 per household for expenses which may include:**
 - Mortgage reinstatement
 - Escrow shortages
 - Delinquent property taxes
 - Municipal or property tax liens
 - Mortgage payments, including principal, interest, taxes, and homeowner's insurance

ELIGIBILITY:

- **To qualify for assistance, a homeowner must:**
 - Own and occupy an eligible one- to four unit primary residence
 - Have experienced a COVID-19 related financial hardship, and have been unable to remain current on mortgage payments
 - Meet household income limits
 - Have been current on mortgage and property taxes as of January 2020

HOW TO APPLY:

- **For assistance with a tax foreclosure or a foreclosure involving a sheriff's sale, call 1-855-647-7700**
- Application portal available at www.njerma.com



ERMA is a federally-funded program administered by the New Jersey Housing and Mortgage Finance Agency.

NOTICE TO THE BAR AND PUBLIC

FORECLOSURE – AUTHORIZATION FOR HOMEOWNERS TO APPLY FOR AN ADDITIONAL STAY OF A SHERIFF’S SALE BASED ON HOMEOWNER ASSISTANCE FUND (HAF) ELIGIBILITY

The Supreme Court has authorized homeowners to request an additional stay of the sheriff’s sale in residential foreclosures (after exhaustion of the statutory maximum of five 30-day stays) if they are eligible for relief through the Homeowner Assistance Fund (HAF). Following up on the November 19, 2021 notice on the resumption of issuance of writs of possession, this notice announces that new process to protect homeowners facing delinquency, default, or foreclosure due to missed mortgage payments resulting from hardship caused by the COVID-19 pandemic.

American Rescue Plan & Homeowner Assistance Fund

The federal American Rescue Plan of 2021 established the HAF to prevent displacement of homeowners who fell behind in mortgage payments because of the COVID-19 pandemic. The U.S. Department of the Treasury has allocated \$325.6 million in HAF funds to New Jersey. Those funds are intended to be available to owner-occupants of one- to four-unit residences who have incomes less than 150% of the Area Median Income. To qualify for HAF funds, homeowners must attest that they experienced COVID-related financial hardship after January 21, 2020.

Pending Availability of HAF Funds in New Jersey

The New Jersey Housing and Mortgage Finance Agency (“NJHMFA”) has submitted a proposal for distribution of those federal HAF funds, which are projected to be able to assist up to 7,000 New Jersey homeowners. HAF funds can be used (1) to pay arrears and reinstate the current mortgage; (2) to assist homeowners in making their next four mortgage payments; (3) to pay non-mortgage incidental costs such as taxes, homeowner’s insurance, assessments and municipality liens; or (4) to pay a combination of arrears, mortgage payments, or incidental costs not to exceed \$35,000.

The in-development NJHFMA program has not yet been approved. (See <https://www.njhousing.gov/dca/hmfa/covid19/haf/>) Thus, there is as yet no

public application process to apply for HAF funds, although NJHFMA expects that applications will open in the near future.

Forthcoming Motion Packet; Questions

To prevent displacement of homeowners intended to be protected by the American Rescue Plan while upholding the due process rights of mortgagors, the Court has authorized homeowners who meet HAF eligibility requirements to file a motion to stay a pending sheriff's sale until they can avail themselves of HAF assistance. Any such motion would need to be served on the mortgage holder who would have an opportunity to object to the further stay. There will be no filing fee for the motion to stay sheriff's sale due to HAF eligibility. All applications will be decided by a vicinage judge.

The Judiciary is finalizing a motion packet for use by homeowners, which will be promulgated by future notice.

Questions on this notice may be directed to the Superior Court Clerk's Office at (609) 421-6100.



Hon. Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts

Dated: December 8, 2021

**New Jersey Housing and Mortgage Finance Agency
Emergency Rescue Mortgage Assistance (ERMA)
Programmatic Element: Mortgage Reinstatement
Guidelines**

1. Program Overview	New Jersey Housing and Mortgage Finance Agency's Emergency Rescue Mortgage Assistance (ERMA) Program will assist New Jersey homeowners unable to pay their mortgages or other eligible housing expenses due to a COVID-19 related financial hardship. ERMA exists to promote neighborhood stability through homeowner retention by reducing delinquencies, mortgage defaults and foreclosures among New Jersey homeowners receiving assistance.
2. Brief Description	The Mortgage Reinstatement component of ERMA will provide funds to eliminate or reduce past due payments and other delinquent amounts, including payments under a forbearance plan. Homeowner Assistance Fund (HAF) funds may be used to bring account fully current, with no remaining delinquent amounts post loss mitigation efforts, and to repay amounts advanced by the lender or servicer on the borrower's behalf for property charges, including property taxes, hazard insurance premiums, flood or wind insurance premiums, condominium fees, homeowners' association fees or other reasonable fees that the servicer advanced to protect lien position. HAF funds may be used to supplement other loss mitigation measures offered by the servicer or where HAF funds are necessary for the homeowner to qualify for other such loss mitigation measures. To the extent applicants are able to use other loss mitigation resources in a timeline consistent with the timeline of the application for HAF assistance, utilizing other loss mitigation resources first is encouraged.
3. Maximum Amount of Assistance per Household	Homeowners will be eligible for up to \$35,000 through this program to be used only for the homeowner's primary residence. Eligible homeowners may benefit from multiple components of the ERMA program provided the total benefit from all components does not exceed \$35,000.
4. Homeowner Eligibility Criteria / Documentation Requirements	Homeowner Eligibility Criteria: • Must have experienced a COVID-19 related financial hardship after January 21, 2020. ○ Reduction of income or increase in household expenses by at least 10%

	• Must have incomes equal to or less than 150% of the area median income, consistent with Treasury guidance. Homeowners may not have liquid assets (excluding retirement assets and education savings plans) equal to or greater than the amount of their approved Program assistance. Documentation Requirements: • Valid Identification. • Hardship Affidavit. • Third Party Authorization. • Mortgage Statement (if available). • Income Determination Documents.
5. Property/Loan Eligibility Criteria Specific to the Program	Property criteria includes: • Must be owner-occupied primary residence. • Must be a one- to four-unit property. • Must be an attached or detached house, a condominium unit or a manufactured home on a foundation permanently affixed to real property. Loan criteria includes: • Mortgage or other associated housing costs covered by the program must not have been 30 days or more delinquent on 1/21/2020. • At application, borrower must be behind on mortgage or have a forbearance balance, escrow shortage, or other eligible housing-related expenses. • Current unpaid principal mortgage balance must not exceed conforming limit for applicable property type/unit count • Mortgage servicer must be willing/able to accept and apply Program funds.
6. Structure of Assistance	• Program assistance will be provided to the homeowner in the form of a 0% interest rate, non-amortizing (no monthly payments), forgivable, subordinate 3-year loan. The loan will be non-recourse, secured and recorded, and take a junior lien position on the home. • All or a portion of the unforgiven loan funds will be due and payable from net equity proceeds upon sale or transfer or refinance of the property (except for refinances for a lower rate and/or shorter term) or if the borrower ceases to occupy the property as their primary residence prior to the end of the third year. If the property is sold and does not generate sufficient proceeds to repay all or a portion of the loan, the

	portion of the loan remaining unpaid after the proceeds are applied will be forgiven.
7. Payment Requirements	• Payments will be made directly to the lender or servicer.

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**New Jersey Housing and Mortgage Finance Agency
Emergency Rescue Mortgage Assistance (ERMA)
Programmatic Element: Mortgage Payment Assistance
Guidelines**

1. Program Overview	New Jersey Housing and Mortgage Finance Agency's Emergency Rescue Mortgage Assistance (ERMA) Program will assist New Jersey homeowners unable to pay their mortgages or other eligible housing expenses due to a COVID-19 related financial hardship. ERMA exists to promote neighborhood stability through homeowner retention by reducing delinquencies, mortgage defaults and foreclosures among New Jersey homeowners receiving assistance.
2. Brief Description	The Mortgage Payment Assistance component of ERMA will provide funds to pay forward monthly mortgage payments on behalf of homeowners unable to make their mortgage payments due to a continuing financial hardship associated with the COVID-19 pandemic. Homeowner Assistance Fund (HAF) funds may be used to pay a homeowner's monthly mortgage/loan payments for a period up to 4 months or until the maximum amount of assistance is reached (whichever comes first). HAF funds may be used to supplement other loss mitigation measures offered by the servicer or where HAF funds are necessary for the homeowner to qualify for other such loss mitigation measures. To the extent applicants are able to use other loss mitigation resources in a timeline consistent with the timeline of the application for HAF assistance, utilizing other loss mitigation resources first is encouraged.
3. Maximum Amount of Assistance per Household	Homeowners will be eligible for up to \$35,000 through this program to be used only for the homeowner's primary residence. Eligible homeowners may benefit from multiple components of the ERMA program provided the total benefit from all components does not exceed \$35,000.
4. Homeowner Eligibility Criteria / Documentation Requirements	Homeowner Eligibility Criteria: • Must have experienced a COVID-19 related financial hardship after January 21, 2020. ○ Reduction of income or increase in household expenses by at least 10%.

	• Must have incomes equal to or less than 150% of the area median income, consistent with Treasury guidance. Homeowners may not have liquid assets (excluding retirement assets and education savings plans) equal to or greater than the amount of their approved Program assistance. Documentation Requirements: • Valid Identification. • Hardship Affidavit. • Third Party Authorization. • Mortgage Statement (if available). • Income Determination Documents.
5. Property/Loan Eligibility Criteria Specific to the Program	Property criteria includes: • Must be owner-occupied primary residence. • Must be a one- to four-unit property. • Must be an attached or detached house, a condominium unit or a manufactured home on a foundation permanently affixed to real property. Loan criteria includes: • Mortgage or other associated housing costs covered by the program must not have been 30 days or more delinquent on 1/21/2020. • Any current unpaid principal mortgage balance must not exceed conforming limit for applicable property type/unit count. • Mortgage servicer must be willing/able to accept and apply Program funds.
6. Structure of Assistance	• Program assistance will be provided to the homeowner in the form of a 0% interest rate, non-amortizing (no monthly payments), forgivable, subordinate 3-year loan. The loan will be non-recourse, secured and recorded, and take a junior lien position on the home. • All or a portion of the unforgiven loan funds will be due and payable from net equity proceeds upon sale or transfer or refinance of the property (except for refinances for a lower rate and/or shorter term) or if the borrower ceases to occupy the property as their primary residence prior to the end of the third year. If the property is sold and does not generate sufficient proceeds to repay all or a portion of the loan, the portion of the loan remaining unpaid after the proceeds are applied will be forgiven. • Homeowner must work directly with a HUD-Certified Housing Counseling Agency during the duration of the

	assistance period in order to receive Monthly Payment Assistance.
7. Payment Requirements	• Payments will be made directly to the lender or servicer.

ERMA Income Limits

150% AMI								
County	1-Person Family	2-Person Family	3-Person Family	4-Person Family	5-Person Family	6-Person Family	7-Person Family	8-Person Family
Cumberland	\$80,850	\$92,400	\$103,950	\$115,500	\$124,750	\$134,000	\$143,250	\$152,500
Atlantic	\$87,300	\$99,750	\$112,200	\$124,650	\$134,650	\$144,600	\$154,600	\$164,550
Cape May	\$89,150	\$101,900	\$114,650	\$127,350	\$137,550	\$147,750	\$157,950	\$168,150
Burlington, Camden, Gloucester and Salem	\$99,250	\$113,400	\$127,600	\$141,750	\$153,100	\$164,450	\$175,800	\$187,150
Warren	\$108,400	\$123,850	\$139,350	\$154,800	\$167,200	\$179,600	\$192,000	\$204,350
Hudson	\$108,700	\$124,200	\$139,750	\$155,250	\$167,700	\$180,100	\$192,550	\$204,950
Mercer	\$112,150	\$128,200	\$144,200	\$160,200	\$173,050	\$185,850	\$198,650	\$211,500
Essex, Morris, Sussex and Union	\$112,800	\$128,900	\$145,000	\$161,100	\$174,000	\$186,900	\$199,800	\$212,700
Monmouth and Ocean	\$114,350	\$130,700	\$147,050	\$163,350	\$176,450	\$189,500	\$202,600	\$215,650
Bergen and Passaic	\$114,900	\$131,300	\$147,700	\$164,100	\$177,250	\$190,400	\$203,500	\$216,650
Hunterdon, Middlesex and Somerset	\$129,400	\$147,850	\$166,350	\$184,800	\$199,650	\$214,400	\$229,200	\$243,950

100% AMI								
County	1-Person Family	2-Person Family	3-Person Family	4-Person Family	5-Person Family	6-Person Family	7-Person Family	8-Person Family
Cumberland	\$79,900	\$79,900	\$79,900	\$79,900	\$83,200	\$89,350	\$95,500	\$101,650
Atlantic	\$79,900	\$79,900	\$79,900	\$83,100	\$89,750	\$96,400	\$103,050	\$109,700
Cape May	\$79,900	\$79,900	\$79,900	\$84,900	\$91,700	\$98,500	\$105,300	\$112,100
Burlington, Camden, Gloucester and Salem	\$79,900	\$79,900	\$85,050	\$94,500	\$102,100	\$109,650	\$117,200	\$124,750
Warren	\$79,900	\$82,600	\$92,900	\$103,200	\$111,500	\$119,750	\$128,000	\$136,250
Hudson	\$79,900	\$82,800	\$93,150	\$103,500	\$111,800	\$120,100	\$128,350	\$136,650
Mercer	\$79,900	\$85,450	\$96,150	\$106,800	\$115,350	\$123,900	\$132,450	\$141,000
Essex, Morris, Sussex and Union	\$79,900	\$85,950	\$96,700	\$107,400	\$116,000	\$124,600	\$133,200	\$141,800
Monmouth and Ocean	\$79,900	\$87,150	\$98,050	\$108,900	\$117,650	\$126,350	\$135,050	\$143,750
Bergen and Passaic	\$79,900	\$87,550	\$98,500	\$109,400	\$118,200	\$126,950	\$135,700	\$144,450
Hunterdon, Middlesex and Somerset	\$86,250	\$98,600	\$110,900	\$123,200	\$133,100	\$142,950	\$152,800	\$162,650

In accordance with US Treasury HAF guidelines from August 2, 2021, income maximums are derived from area median income (AMI) calculations published by HUD under their 42 U.S.C. 1437a(b)(2) obligations. Income maximums may change if the AMI calculations change from HUD change. *In accordance with the American Rescue Plan Act of 2021 requirements, income maximums in Chart 1 are determined by 150% AMI or 100% of US Median Income, whichever is higher. However, 60% of funds must be distributed to assist those who are at or below 100% AMI. These incomes are listed in Chart 2.*

**New Jersey Housing and Mortgage Finance Agency
HAF Housing Counseling Program
Guidelines**

1. Program Overview	The New Jersey Housing and Mortgage Finance Agency (“NJHMFA”) has created the Homeowner Assistance Fund (“HAF”) Housing Counseling Program to improve HAF program coordination, offer outreach to eligible homeowners, and assist applicants with the application process for the Emergency Rescue Mortgage Assistance (“ERMA”) program. ERMA was created to promote neighborhood stability through homeowner retention by reducing delinquencies, mortgage defaults and foreclosures among New Jersey homeowners receiving assistance.
2. Brief Description	The HAF Housing Counseling Program exists to ensure the dissemination of information regarding the availability of assistance programs, help families determine eligibility for Federal, State and Local programs, and help applicants navigate the ERMA program application process.
3. Maximum Amount of Assistance per Household	Up to \$700 paid to a Department of Housing and Urban Development (“HUD”) Certified Housing Counseling Agency (“HCA”).
4. Homeowner Eligibility Criteria / Documentation Requirements	Homeowner Eligibility Criteria: • Must have experienced a COVID-19 related financial hardship after January 21, 2020. • Must have incomes equal to or less than 150% of the area median income, consistent with Treasury guidance. Documentation Requirements: • Valid Identification. • Hardship Affidavit. • Third Party Authorization. • Mortgage Statement (if available). • Income Determination Documents.
5. Property/Loan Eligibility Criteria Specific to the Program	Property criteria includes: • Must be owner-occupied primary residence. • Must be a one- to four-unit property. • Must be an attached or detached house, a condominium unit or a manufactured home on a foundation permanently affixed to real property.

6. Structure of Assistance	• Homeowners will be given the option to work with an HCA contracted with NJHMFA to perform counseling services. • HCAs will be responsible for performing general intake, collecting income, property, mortgage, and asset information, and offering support options for the homeowner. HCAs will assist in the completion and submission of ERMA applications for homeowners who meet the minimum ERMA eligibility criteria.
7. Payment Requirements	• Payments will be made directly to the HCA.

**New Jersey Housing and Mortgage Finance Agency
Emergency Rescue Mortgage Assistance (ERMA)
Programmatic Element: Property Charge Default Resolution
Guidelines**

1. Program Overview	New Jersey Housing and Mortgage Finance Agency's Emergency Rescue Mortgage Assistance (ERMA) Program will assist New Jersey homeowners unable to pay their mortgages or other eligible housing expenses due to a COVID-19 related financial hardship. ERMA exists to promote neighborhood stability through homeowner retention by reducing delinquencies, mortgage defaults and foreclosures among New Jersey homeowners receiving assistance.
2. Brief Description	The Property Charge Default Resolution component of ERMA will provide funds to resolve certain property charge defaults that threaten a homeowner's ability to sustain ownership of a non-mortgaged property. Homeowner Assistance Fund (HAF) funds may be used to pay past due property taxes, municipal liens or utility liens that threaten sustained ownership of the property. Past due amounts must be brought current by program assistance or resolved concurrently with other assistance programs.
3. Maximum Amount of Assistance per Household	Homeowners will be eligible for up to \$35,000 through this program to be used only for the homeowner's primary residence. Eligible homeowners may benefit from multiple components of the ERMA program provided the total benefit from all components does not exceed \$35,000.
4. Homeowner Eligibility Criteria / Documentation Requirements	Homeowner Eligibility Criteria: • Must have experienced a COVID-19 related financial hardship after January 21, 2020. ○ Reduction of income or increase in household expenses by at least 10%. • Must have incomes equal to or less than 150% of the area median income, consistent with Treasury guidance. Homeowners may not have liquid assets (excluding retirement assets and education savings plans) equal to or greater than the amount of their approved Program assistance. Documentation Requirements: • Valid Identification.

	• Hardship Affidavit. • Third Party Authorization. • Mortgage Statement (if available). • Income Determination Documents.
5. Property/Loan Eligibility Criteria Specific to the Program	Property criteria includes: • Must be owner-occupied primary residence. • Must be a one- to four-unit property. • Must be an attached or detached house, a condominium unit or a manufactured home on a foundation permanently affixed to real property. Loan criteria includes: • Property/housing costs covered by the program must not have been 30 days or more delinquent on 1/21/2020. • At application, borrower must be behind on eligible housing-related expenses. • Eligible expenses are limited to past due property taxes, municipal liens and utility liens.
6. Structure of Assistance	• Program assistance will be provided to the homeowner in the form of a 0% interest rate, non-amortizing (no monthly payments), forgivable, subordinate 3-year loan. The loan will be non-recourse, secured and recorded, and take a junior lien position on the home. • All or a portion of the unforgiven loan funds will be due and payable from net equity proceeds upon sale or transfer or refinance of the property (except for refinances for a lower rate and/or shorter term) or if the borrower ceases to occupy the property as their primary residence prior to the end of the third year. If the property is sold and does not generate sufficient proceeds to repay all or a portion of the loan, the portion of the loan remaining unpaid after the proceeds are applied will be forgiven.
7. Payment Requirements	• Payments may be made directly to the appropriate entity, not the borrower or any third party.

FORMS

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FORM NO. 1**WAIVER OF RIGHTS UNDER THE ACT**

Please be advised that I, the undersigned, being in default under a certain mortgage made by me on *(Day/Month/Year)* to *(Name Of Lender)* in the principal sum of \$ *(Dollar Amount)*, voluntarily and without coercion hereby waive in accordance with law any and all rights that I may have under the Fair Foreclosure Act, N.J.S.A. 2A:50-53 et seq., and all amendments and supplements thereto, with respect to the aforesaid mortgage and residential property covered by said mortgage.

I hereby state that I am signing this waiver pursuant to a workout agreement dated *(Day/Month/Year)*, between myself and the above lender with respect to the aforesaid residential mortgage and property.

Dated:

(Name and Signature Of Debtor)

Editor's Note: This waiver must be given after default pursuant to a workout agreement in a separate written document signed by the debtor, N.J.S.A. 2A:50-61.

FORM NO. 2

****THIS FORM IS ONLY A SAMPLE AND NOT
INTENDED FOR USE****

NOTICE OF INTENTION TO FORECLOSE

(LENDER'S LETTERHEAD)

(Date)

Via Certified Mail RRR # _____

Name of Individual Debtor

Street Address

Municipality, State, Zip Code

RE: Lender's Name

Lender's Account Number

Address of Mortgaged Property

NOTICE OF INTENTION TO FORECLOSE

(N.J.S.A. 2A:50-56)

Dear _____:

The *(Note/Bond/Other Obligation)* you executed on *(Date of Obligation)*, which is secured by a mortgage on the above referenced property dated *(Date/Month/Year)* in the principal amount of \$_____ is in default, because we have not received the installments due for the months of *(itemize month/year of overdue payments)*.

RIGHT TO CURE DEFAULT

You may cure your default by paying or tendering \$_____ to us, on or before *(not less than 30 days after mailing of notice)*. This amount includes any other scheduled installment and late charge, which will become due to us during this period, even though such installment may not presently be due. Your payment must be mailed to *(Name/Address/Phone Number Of The Person To Whom Payment Must Be Made)*.

FAILURE TO CURE

If you do not cure the default by _____, we may initiate foreclosure proceedings

against you and take steps to terminate your ownership in the property by commencing a foreclosure suit in a court of competent jurisdiction.

RIGHT TO CURE AFTER FORECLOSURE COMMENCED

In the event that we commence a foreclosure action against you, you will still have a right to cure the default prior to entry of the foreclosure judgment pursuant to Section 5 of the "Fair Foreclosure Act;" however, you will be responsible for our court costs and attorneys' fees in an amount not to exceed that amount permitted pursuant to the Rules Governing the Courts of the State of New Jersey.

RIGHT TO TRANSFER OWNERSHIP

In the event that you transfer the real estate to another person, the transfer is still subject to our rights in the mortgage covering the property. The new owner of the property may have the right to cure the default as provided in the "Fair Foreclosure Act," subject to the mortgage documents

RIGHT TO SEEK LEGAL COUNSEL

You are advised to seek counsel from an attorney of your own choosing concerning your mortgage default situation. If you are unable to obtain an attorney, you may communicate with the New Jersey Bar Association or Lawyer Referral service in the county in which the mortgaged premises is located. If you are unable to afford an attorney, you may communicate with the Legal Services Office in the county in which the mortgaged premises is located. These numbers are listed on the attached Schedule.

POSSIBLE FINANCIAL ASSISTANCE

You are advised that there may be the possible availability of financial assistance for curing a default from programs operated by the State or federal government or non-profit organizations, if any, as identified by the Commissioner of Banking. Section 5 of the "Fair Foreclosure Act" provides that this requirement may be satisfied by attaching a list of such programs promulgated by the commissioner. Such a list is attached. You may also wish to contact one of the following agencies to inquire about the availability of financial assistance:

HUD Housing Counseling Services:	800-569-4287
Veteran's Administration:	800-827-1000
New Jersey Department of Banking and Insurance:	609-292-7272

IF YOU DISAGREE WITH US

If you disagree with our assertion that (1) a default has occurred or (2) the correctness of our calculation of the amount required to cure the default, you may contact *(Name And Address Of The Lender/ Telephone Number Of A Representative Of The Lender)*.

The Lender on your loan:****LENDER'S NAME:** _____****LENDER'S ADDRESS:** _____****REPRESENTATIVES PHONE#:** _____**The Servicer for your loan is:******SERVICER'S NAME:** _____****SERVICER'S ADDRESS:** _____****REPRESENTATIVES PHONE#:** _____

In accordance with the "New Jersey Residential Mortgage Lending Act," sections 1 through 39 of P.L.2009, c.53 (C.17:11C-51 through C.17:11C-89), Lender is (*either exempt from licensure or*) required to be licensed under the act in accordance with applicable law.

FORECLOSURE MEDIATION

You may be apply to participate in the Residential Foreclosure Mediation Program.
Contact information for the New Jersey Foreclosure Mediation Program is:

Mail: Superior Court Clerk's Office
Attn: Foreclosure Mediation
P.O. Box 971
25 Market Street
Trenton, New Jersey 08625

For further information please contact the Superior Court Clerk's Office by calling (609) 421-6100 between the hours of 8:30 am – 4:30 pm or sending an email to SCCO.Mailbox@njcourts.gov, or visit the Court's website at:
<https://www.njcourts.gov/courts/superior/foreclosuremediation.html>.

A packet called "How to Apply for Foreclosure Mediation," which includes the Court's Mediation Request Statement form, can be obtained in English at:
https://www.njcourts.gov/forms/11270_hud_njhmfa_borrower_instruct.pdf?c=2ZF.

This packet is available in Spanish at:
https://www.njcourts.gov/forms/11270_hud_njhmfa_borrower_instruct_spn.pdf?c=cLO.

The Mediation Request Statement must be completed and returned to the Superior Court Clerk's Office, at the above address, no later than 60 days from the date you are served with the foreclosure Summons and Complaint.

Derecho a la Mediación

En el caso de que iniciemos un procedimiento de ejecución hipotecaria en su contra, usted tiene la opción de participar en el Programa de Mediación de Ejecución Hipotecaria después de presentar una queja de ejecución hipotecaria iniciando la mediación de conformidad con el párrafo (2) de la subsección a. de la sección 4 de P.L.2019, c.64 (C.2A: 50-77). La información de contacto para el Programa de Mediación de Ejecuciones Hipotecarias de Nueva Jersey es:

Correo: Superior Court Clerk's Office
Attn: Foreclosure Mediation
P.O. Box 971
25 Market Street
Trenton, New Jersey 08625

Para obtener más información, comuníquese con la Oficina del Secretario del Tribunal Superior llamando al (609) 421-6100 entre las 8:30 am y las 4:30 pm o enviando un correo electrónico a SCCO.Mailbox@njcourts.gov, o visite el sitio web de la Corte en: <https://www.njcourts.gov/courts/superior/foreclosuremediation.html>

Puede obtener en inglés un paquete llamado "How to Apply for Foreclosure Mediation", que incluye el formulario de declaración de solicitud de mediación del Tribunal, en: https://www.njcourts.gov/forms/11270_hud_njhmfa_borrower_instruct.pdf?c=2ZF

Se puede obtener en español un paquete llamado "Cómo solicitar la mediación en una ejecución hipotecaria", que incluye el formulario de declaración de mediación del Tribunal, en: https://www.njcourts.gov/forms/11270_hud_njhmfa_borrower_instruct_spn.pdf?c=cLO

La Declaración de Solicitud de Mediación debe completarse y devolverse a la Oficina del Secretario del Tribunal Superior, en la dirección antes mencionada, a más tardar 60 días después de la fecha en que se le entregue la citación y la demanda de ejecución hipotecaria.

You are entitled to housing counseling, at no cost to you, through the Foreclosure Mediation Program established by the New Jersey Judiciary. Contact information for the New Jersey Foreclosure Mediation Program is:

Mail: Superior Court Clerk's Office
Attn: Foreclosure Mediation
P.O. Box 971
25 Market Street
Trenton, New Jersey 08625

For further information please contact the Superior Court Clerk's Office by calling (609) 421-6100 between the hours of 8:30 am – 4:30 pm or sending an email to SCCO.Mailbox@njcourts.gov, or visit the Court's website at:

<https://www.njcourts.gov/courts/superior/foreclosuremediation.html>

MULTIFAMILY HOUSING PRESERVATION AND RECEIVERSHIP

If the property has more than one dwelling unit, but less than five, and is not properly maintained and meets the necessary conditions for receivership eligibility, established pursuant to section 4 of the “Multifamily Housing Preservation and Receivership Act,” P.L.2003, c.295 (C.2A:42-117), the residential mortgage lender shall file an order to show cause to appoint a receiver.

THE FOLLOWING IS A LIST OF GOVERNMENTAL AND NON-PROFIT ENTITIES WHICH MAY PROVIDE FINANCIAL ASSISTANCE OR COUNSELING TO THE BORROWERS IN FORECLOSURE. IT IS RECOMMENDED THAT YOU CONSULT WITH YOUR ATTORNEY.

American Credit Alliance, Inc.
26 South Warren Street
Trenton, NJ 08608
(609) 393-5400

Atlantic Human Resources, Inc.
1 South New York Avenue
Atlantic City, NJ 08401
(609) 348-4131

Consumer Credit Counseling Service of Central New Jersey
1931 Nottingham Way,
Hamilton, NJ 08619
(609) 586-2574

Consumer Credit Counseling Service of New Jersey
185 Ridgedale Avenue
Cedar Knolls, NJ 07927-1812
(973) 267-4324

Fair Housing Council of Northern New Jersey
131 Main Street
Hackensack, NJ 07601
(201) 489-3552

Garden State Consumer Credit Counseling, Inc.
225 Willowbrook Road
Freehold, NJ 07728
1-800-992-4557

Housing Coalition of Central Jersey
78 New Street
New Brunswick, NJ 08901
(732) 249-9700

Jersey Counseling & Housing Development, Inc.
29 South Blackhorse Pike
Blackwood, NJ 08012
(856) 227-3683

Jersey Counseling & Housing Development, Inc.
1840 South Broadway
Camden, NJ 08104
(856) 541-1000

Mercer County Hispanic Association
200 E. State Street--2nd Floor
Trenton, NJ 08607
(609) 392-2446

Middlesex County Economic Opportunities Corporation
1215 Livingston Avenue
North Brunswick, NJ 08902
(732) 790-3344

Monmouth County Human Services
Housing Services Unit
PO Box 3000
Freehold, NJ 07728
(732) 431-7998

Morris County Fair Housing Council
65 Spring Street
Morristown, NJ 07963
(973) 538-2975

NJ Citizen Action
744 Broad St., Ste 2080
Newark, NJ 07102
973-646-8800
1-800-NJ-OWNER
1-888-TAXES-11

NJ Citizen Action
85 Raritan Ave., Ste 100
Highland Park, NJ 08904
732-246-4772

Ocean Community Economic Action Now, Inc.
22 Hyers St.
Toms River, NJ 08753-0773
(732) 244-2351, ext. 2

Paterson Coalition for Housing, Inc.
262 Main Street, 5th Floor
Paterson, NJ 07505
(973) 684-5998

Paterson Task Force for Community Action, Inc.
155 Ellison Street
Paterson, NJ 07505
(973) 279-2333

Puerto Rican Action Board
90 Jersey Ave # B
New Brunswick NJ 08901
(732) 249-9700

Tri-County Community Action Agency, Inc.
110 Cohansey Street
Bridgeton, NJ 08302
(856) 451-6330

Urban League for Bergen County
106 West Palisade Avenue
Englewood, NJ 07631
(201) 568-4988

Urban League for Essex County
508 Central Avenue
Newark, NJ 07101
(973) 624-9535

Urban League of Union County
288 North Broad Street
Elizabeth, NJ 07208
(908) 351-7200

Homelessness Prevention Program
 New Jersey Department of Community Affairs
 (866) 889-6270*

***Basic eligibility is limited to: (a) single family owner/occupied dwellings with all those on the deed and mortgage occupying the house; (b) no more than one mortgage or lien encumbrance on the property; (c) no initiated or ongoing bankruptcy. Assistance will be in the form of a loan, and a lien will be placed on the property. The family must document the financial reason for nonpayment. At the time of the eligibility decision, the household must have and document sufficient income to support the household and repay the loan. There is a fee for the credit check and property search.

County	Lawyer Referral	Legal Services
Atlantic	(609) 345-3444	(609) 348-4200
Bergen	(201) 488-0044	(201) 487-2166
Burlington	(609) 261-4862	(609) 261-1088
Camden	(856) 482-0618	(856) 964-2010
Capy May	(609) 463-0313	(609) 465-3001
Cumberland	(856) 696-5550	(856) 691-0494
Essex	(973) 622-6204	(973) 624-4500
Gloucester	(856) 848-4589	(856) 848-5360
Hudson	(201) 798-2727	(201) 792-6363
Hunterdon	(908) 236-6109	(908) 782-7979
Mercer	(609) 585-6200	(609) 695-6249
Middlesex	(732) 828-0053	(732) 249-7600
Monmouth	(732) 431-5544	(732) 866-0020
Morris	(973) 267-5882	(973) 285-6911
Ocean	(732) 240-3666	(732) 341-2727
Passaic	(973) 278-9223	(973) 523-2900
Salem	(856) 935-5629	(856) 691-0494
Somerset	(908) 685-2323	(908) 231-0840
Sussex	(973) 267-5882	(973) 383-7400
Union	(908) 353-4715	(908) 354-4340
Warren	(908) 859-4300	(908) 475-2010



FREE
Court Foreclosure
Mediation is Available



It May Be Possible to Save Your Home

Your mortgage is currently in default. If the default is not corrected, you may be served with a foreclosure complaint in the future that could cause you to lose your home. The New Jersey Judiciary has set up a Foreclosure Mediation Program to assist certain homeowners after the complaint has been filed. This program is available to all qualifying homeowners whether or not they file an answer to the foreclosure complaint.

A court-sponsored Foreclosure Mediation Program is available to assist certain homeowners.

To qualify for this program:

- You must be served with a Foreclosure Complaint and Summons.
- You must be an owner-occupant of a one-to four-family residential property.
- The property must be your primary residence and you must not be in bankruptcy.
- You must meet the eligibility requirements listed on mediation request form.
- You must obtain the assistance of a trained foreclosure prevention and default mitigation counselor.

Regarding the new housing counselor requirements as of Nov. 1, 2019, contact the NJ Housing and Mortgage Finance Agency at 609-278-7508.

To Participate in Foreclosure Mediation:

- Complete and return the original copy of the Mediation Request Statement (found in CN 11270- How to Apply for Foreclosure Mediation) to the Superior Court Clerk's Office, Foreclosure Mediation Unit no later than 60 days after receipt of the Summons and Complaint.

To Get Housing Counselor Help:

- Call 609-278-7508 and ask for the number of a housing counselor in your area certified by the Department of Housing and Urban Development (HUD) or visit the NJ Housing and Mortgage Finance Agency (NJHMFA) website at <http://www.njhousing.gov>.
- Make an appointment to meet with the HUD certified housing counselor who will discuss your financial situation and offer potential options to help you retain your home.

For more information and to download forms for the program, go to www.njcourts.gov and search for Office of Foreclosure or contact the Superior Court Clerk's Office, Customer Assistance Center, at 609-421-6100.

Superior Court Clerk's Office, Office of Foreclosure, 25 Market St., P.O. Box 971, Trenton, NJ 08625-0971

Caution

Applying for foreclosure mediation will not stop your lender from moving forward with its foreclosure action. If you dispute your lender's claims, you should consult a New Jersey licensed attorney and/or file an answer that conforms to the New Jersey Court Rules. How to File an Answer to a Foreclosure Complaint and the Foreclosure Case Information Statement are provided on the Self Help Center of the Judiciary's website, njcourts.gov.

Do Not Delay

You must apply for foreclosure mediation within 60 days of receipt of the Summons and Complaint. After 60 days, you may not participate in foreclosure mediation unless you file a motion asking the court to allow you into mediation. If your home is scheduled for a sheriff's sale, you will need to file a motion asking the court to stay the sheriff's sale. A sample motion to stay the sheriff's sale is on the Judiciary's Web site at:
www.njcourts.gov/forms/11277_fm_nom_sheriffstay_salepacket.pdf

La mediación
GRATIS
para ejecuciones
hipotecarias judiciales
está a su disposición



Puede ser posible salvar su residencia

Su hipoteca está actualmente en mora. Si no se subsana este incumplimiento de pago, es posible que a usted se le notifique una demanda de ejecución hipotecaria en el futuro, que podría causar que pierda su residencia. El Poder Judicial de Nueva Jersey ha establecido un Programa de Mediación en Ejecuciones Hipotecarias para ayudar a ciertos propietarios después de que se haya presentado la demanda. Este programa está a la disposición de todos los propietarios que reúnen las condiciones necesarias, sin importar si presentan, o no, una contestación a la demanda de ejecución hipotecaria.

Hay un programa de Mediación en ejecuciones hipotecarias patrocinado por el tribunal para ayudar a ciertos propietarios.

Para reunir las condiciones necesarias para este programa:

- Se le tiene que haber notificado la Demanda de Ejecución Hipotecaria con el Emplazamiento.
- Usted debe ser un propietario-ocupante de una propiedad residencial de una a cuatro familias.
- La propiedad debe ser su residencia principal y el prestatario no debe estar en bancarrota.
- Usted debe ser el prestatario, y su préstamo hipotecario debe estar en proceso de ejecución.
- Usted debe cumplir los requisitos de idoneidad de la lista en el formulario de solicitud de mediación.
- Debe obtener la ayuda de un abogado capacitado en la prevención y atenuación predeterminada de una ejecución hipotecaria.

Para obtener más información y para bajar los formularios para el programa, visite nuestro sitio web: njcourts.gov - Oficina de ejecuciones hipotecarias O comuníquese con El Centro de Ayuda a los Clientes de la Secretaría del Tribunal Superior llamando al 609-421-6100.

Secretaría de Tribunal Superior, Oficina de Ejecución Hipotecaria, 25 Market St., P.O. Box 971, Trenton, NJ 08625-0971

Con relación a los nuevos requisitos para los consejeros de vivienda a partir del 1º de noviembre de 2019 tenga la bondad de comunicarse con la agencia de viviendas y finanzas hipotecarias - New Jersey Housing & Mortgage Finance Agency - llamando al 609-278-7508.

Para participar en la mediación de una ejecución hipotecaria:

- Llene y devuelva a la Secretaría del Tribunal Superior, Mediación en Ejecuciones Hipotecarias Superior Court Clerk's Office, Foreclosure Mediation, la copia original de la Mediation Request Statement (Declaración de Solicitud de Mediación) (que se encuentra en CN 11270 - Cómo Solicitar la Mediación en una Ejecución Hipotecaria (How to Apply for Foreclosure Mediation)) nunca más tarde de los 60 días siguientes a la fecha en que recibió la Notificación de la Demanda y la Demanda.

Para conseguir ayuda de un consejero de viviendas:

- Llame al 609-278-7508 y pida el número de teléfono de un asesor de viviendas en su zona, certificado por el Departamento de Viviendas y Desarrollo Urbano (HUD) o visite la página web de la Agencia de Viviendas y Finanzas de Hipotecas de Nueva Jersey (NJHMF) en: <http://www.njhousing.gov>.
- Haga una cita para reunirse con el consejero de viviendas certificado por HUD quien analizará con usted su situación económica, y le ofrecerá posibles opciones para ayudarle a retener su residencia.

Advertencia

La solicitud para una mediación en su ejecución de la hipoteca no impedirá que su prestamista siga adelante con la acción de ejecución hipotecaria. Si usted disputa las afirmaciones de su prestamista, debe consultar con un abogado autorizado para ejercer en Nueva Jersey o presentar una respuesta que se ajuste a las Reglas Judiciales de Nueva Jersey o hacer las dos cosas. Encontrará los formularios Cómo Presentar una Contestación a una Demanda de Ejecución Hipotecaria y Declaración Informativa sobre un Caso de Ejecución Hipotecaria en el Centro de Ayuda Propia en la página web del Poder Judicial, njcourts.gov.

CN 11284 - SPANISH - SEPTIEMBRE 2021

No se demore

Usted debe solicitar la mediación en la ejecución hipotecaria dentro de los 60 días de haber recibido la Notificación de Demanda y la Demanda. Después de los 60 días, no puede participar en la mediación hipotecaria a menos que presente un pedimento que demuestre que existen circunstancias excepcionales y el tribunal le permita entrar en la mediación. Si ya se ha programado la venta judicial de su residencia por el alguacil, necesitará presentar un pedimento en que solicite del tribunal el aplazamiento de la venta por el alguacil. Hay una muestra del pedimento para el aplazamiento de la venta por el alguacil en el sitio web del Poder Judicial en: njcourts.gov/forms/11277_fm_nom_sheriffstay_salepacket_spn.pdf

Editor's note: Under the current changes, the borrowers must be notified of the availability of mediation. The borrowers must be notified in Spanish and English. Copies of the Notice of Foreclosure Mediation Availability are included.

Editor's Note: The notice of intention must be addressed to each debtor separately, and mailed to each debtor in "separate" envelopes even if husband and wife.

Editor's Note: The above notice does not require the debtor to make payment of the amount required to cure by "cash, cashier's check or certified check."

Editor's Note: The above list promulgated by the Commissioner of Banking and Insurance on September 18, 2006. By law, the list must be attached to the notice of intention. Attorneys are cautioned to check with the Commissioner from time to time for an updated list.

Editor's Note: If the original creditor does not give the notice to the debtor or the notice is sent by the lender's attorney or the lender's servicing agent after default, and the notice constitutes the debt collector's first communication with the consumer-debtor, then the Fair Debt Collection Practices Act (15 U.S.C.A. Sec. 1601 as amended) "debt validation notice" and "initial disclosure" should be set forth in the notice of intention as follows:

THE AMOUNT OF THE DEBT IS \$ _____. THE NAME OF THE CREDITOR TO WHOM THE DEBT IS OWED IS _____. UNLESS YOU NOTIFY US IN WRITING WITHIN THIRTY (30) DAYS AFTER RECEIPT OF THIS NOTICE THAT THE DEBT, OR ANY PART OF IT, IS DISPUTED, WE WILL ASSUME THAT THE DEBT IS VALID. IF YOU DO NOTIFY US OF A DISPUTE, WE WILL OBTAIN VERIFICATION OF THE DEBT AND MAIL IT TO YOU. ALSO UPON YOUR WRITTEN REQUEST WITHIN THIRTY (30) DAYS, WE WILL PROVIDE YOU WITH THE NAME AND ADDRESS OF THE ORIGINAL CREDITOR IF DIFFERENT FROM THE CURRENT CREDITOR. THIS COMMUNICATION IS AN ATTEMPT TO COLLECT A DEBT AND ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE.

FORM NO. 3**COMPLAINT**

Name of Attorneys
 Address of Attorneys
 Telephone Number
 Attorneys for Plaintiff

[Name of Plaintiff]

Plaintiff

vs

[Names of all Defendants]

Defendants

SUPERIOR COURT
 OF NEW JERSEY
 CHANCERY DIVISION
[COUNTY OF VENUE]

Docket No. F-

Civil Action

**RESIDENTIAL MORTGAGE
 FORECLOSURE COMPLAINT**

FIRST COUNT

1. Plaintiff, *(Name of Mortgage Holder)*, is a corporation having its principal place of business at *(insert the plaintiff's business address)* and is authorized to transact business in the State of New Jersey.

2. This action is being brought to foreclose a mortgage because you failed to comply with the terms and conditions of the Note and Mortgage. As a result the entire debt is due, including the unpaid principally amount due on the Note, and Mortgage, and all unpaid interests and advances, attorney fees and costs.

3. On *(insert the date of the Bond/Note)*, obligor(s) (a/k/a debtor(s)) executed a Note (obligation) commencing on the first day of *(Day/Month/Year)* and on the first day of each month thereafter until the principal and interest are fully paid, except that the final payment of principal and interest, if not paid sooner, shall be due and payable on the first day of *(Day/Month/Year)*. with the following terms:

Obligor(s): _____
 Obligee(s): _____
 Original Note amount of: _____ (\$ _____)
 Initial interest rate of: _____
 Monthly payments (for interest and principal) of: _____
 Late charges of ____% after _____ days of an installment's due date.

4. To secure payment of said *(Bond/Note)*, a Mortgage was executed and delivered to secure certain property, and thereby conveyed in fee, on express condition that the conveyance would be void if

the payments were made timely in accordance with the terms of the Note:

Mortgage given to: _____
 Mortgage amount: _____
 Mortgage dated: _____
 Date recorded: _____
 Mortgage recorded in Book _____, page _____ in (insert name of the county) County Clerk's office

5. The mortgaged premises are described as follows:

Address : (insert full address of mortgaged premises)
 Being also know as Lot _____, Block _____ on the municipal tax map of (insert name of municipality).

A more detailed legal description is set forth in Schedule A. The metes and bounds description was taken from the recorded mortgage;

[Note: By law, (a) the street address, (b) municipal tax map block and lot and (c) metes and bounds description must be set forth in the complaint, R. 4:64-1 (b) (12).]

[Note: If a metes and bounds description is set forth, the complaint must state "whether the recorded mortgage instrument includes that description," R. 4:64-1(b)(12).]

[Note: If a metes and bounds description is not included, a statement substantially similar to the following must be included: The mortgage property is delineated by municipal tax map block and lot reference in the aforementioned mortgage and not by a metes and bounds description.]

6. This mortgage (is or is not) a purchase money mortgage.

7. The mortgage was (was not) assigned as follows:

Mortgage assigned by: _____
 Mortgage assigned to: _____
 Assignment dated: _____
 Assignment recorded on: _____
 Assignment recorded in Book _____, page _____ in (insert name of the county) County Clerk's office

8. The terms and conditions of the Note and Mortgage state , should any default be made in the payment of any monthly installment on account of principal and interest, or any part thereof, if any of the other payments to be made by the obligors under the provisions of the mortgage securing the Note on the date payable as provided in the Note or in the mortgage are not made for more than thirty (30) days from the date of mailing of a Notice of Default to the obligors, and the payments remain unpaid, then the entire principal sum, with all interest and advances may be due on *(the date of acceleration of the debt)*, at the option of the mortgagee.

9. The Note and Mortgage included the following provisions. *(Description of the pertinent terms or conditions of the debt instrument or mortgage.*

[Note: R. 4:64-1(b) (6) requires description of the pertinent terms or conditions of the debt instrument or mortgage. For example: If the loan included a default interest rate, these terms should be included in the

complaint. The Office of Foreclosure will not allow the amounts to be included in the judgment unless the terms are set forth in the complaint.]

[Note: By law, any prepayment penalty must be set forth in the complaint, R. 4:64-1(b)(9).]

10. On (Day/Month/Year) an installment of principal, interest and taxes became due and payable on plaintiff's mortgage and this installment and subsequent installments have not been paid. Plaintiff has elected that the whole of the unpaid principal and interest plus late fees due on plaintiff's (note or bond) and mortgage, plus any sums advanced for the payment of municipal liens, property preservation or insurance, shall now be due

[Note: By law, "the facts establishing the default" and acceleration of the debt's maturity date" (if applicable) must be set forth, R. 4:64-1(b)(6).]

12. The date or dates of default are: *[set forth date or dates]*

[Note: By law, the "date of default" must expressly be set forth in the complaint, R. 4:64-1(b)(7). It is not enough just to say that the mortgagor missed a payment on such and such a date.]

13. The terms and conditions of the Note and Mortgage contained a provision that if any of the installments of taxes, assessments, water charges or any municipal lien levied against the premises should remain in default, the mortgagee may pay same and such amount shall be a lien on said lands, added to the amount of the mortgage debt and secured by this mortgage. Additional interest may will continue to accrue for any and all payments made for additional advances made to protect the Plaintiff's interest in the property, and will continue to accumulate through the date of the sale. Plaintiff reserves the right to submit proof of all amounts due at the time the judgment in foreclosure is entered.

14. The following parties are being joined to foreclose their rights in, to or against the property being foreclosed because their interest is subordinate and subject to the lien of the foreclosing plaintiff. These following defendants are not being sued to held liable or accountable to the plaintiff in any manner through the instant action, but rather, are being joined in the action for the sole purpose of foreclosing any and all interests, included the right of redemption of the mortgage being foreclosed that the following defendants may have in the property:

14(a). *(Insert the specifics for each subordinate lien holder's name, recording date and recording information, etc.*

14(b). *(Insert the name of any subsequent owner; insert the specifics for the conveyance – grantor(s) and grantee(s) name(s), recording information.*

[sample allegation where debtor has waived the provisions of act]

14(c). On (Day/Month/Year), the said (Name of Spouse) died wherein title became vested in (Name of Surviving Spouse) as surviving tenant by the entirety. The said (Name of Spouse) died (Testate/Intestate) on (Day/Month/Year) a resident of (Name of County) leaving a (Will/Administration) (Probated/Filed) in (Name of County). Under the aforesaid (Will/Administration) the mortgaged premises were (Devised/Left) to (Names of Devisees/Names of Heirs at Law).

[List in paragraph form--14(a), 14(b), etc--the names of the persons and entities holding subordinate interests, with a description of the interests with particularity and recording information if any]

[Note: By law, subordinate parties in interest must be set forth with “particularity” and must contain the “recording date” of the lien, interest, or encumbrance they hold, R. 4:64-1(b)(11).]

[Note: When a married person who has not signed the mortgage is joined, the particular facts relied on to bar that person’s rights and interest must be set forth in the complaint, including whether such person’s rights and interest were acquired before or after the date of the mortgage, R. 4:64-1(b)(13). A purchase money mortgage is entitled to priority over a spouse’s marital right of joint possession, N.J.S.A. 3B:28-3.1.]

15. Plaintiff has in compliance with the Fair Foreclosure Act, *N.J.S.A. 2A:50-53 et seq.*, mailed a notice of intention to foreclose to the debtors at least thirty one (31) days prior to the filing of this complaint and by serving any other notices required by law, and buy otherwise complying with the requirements of *N.J.S.A. 2A:50-56 (f)*.

[Note: Plaintiff must allege compliance with “other notices required by law,” R. 4:64-1(b)(13). In non-Fair Foreclosure Act cases, compliance with any other pre-filing notice requirements must be alleged.]
[sample allegation where debtor has waived the provisions of act]

16. On *(Date/Month/Year)*, the debtor, after default, and pursuant to a workout agreement signed a separate written document waiving any and all rights under the act in accordance with section 9 of the Fair Foreclosure Act, *N.J.S.A. 2A:50-53 et seq.*; and plaintiff by virtue of that waiver is not required to mail a notice of intention to foreclose to the debtor.

[sample allegation where deed in lieu of foreclosure given]

16. On *(Day/Month/Year)* the debtor voluntarily surrendered the property that is the subject of the residential mortgage by signing a deed in lieu of foreclosure in favor of *(Name of Lender)* in compliance with the Fair Foreclosure Act, *N.J.S.A. 2A:50-53 et seq.*, which was recorded on *(Day/Month/Year)* in the *(Name)* County *(Clerk’s or Register’s)* Office in Deed Book *(Number)* at Page *(Number)*. Pursuant to *N.J.S.A. 2A:50-56d* of the Fair Foreclosure Act, plaintiff is not required to mail a notice of intention to foreclose to the debtor.

WHEREFORE, plaintiff demands judgment:

- (a) Fixing the amount due on its mortgage.
- (b) Barring and foreclosing the defendants and each of them of all equity of redemption in and to said lands.
- (c) Directing that the plaintiff be paid the amount due on its mortgage with interest and costs.
- (d) Adjudging that the said lands be sold according to law to satisfy the amount due plaintiff.
- (e) Appointing a receiver of rents, issues and profits of said lands.

SECOND COUNT

1. Plaintiff repeats any and all allegations of the First Count and makes same a part hereof as if repeated at length.

2. By reason of the default under the mortgage referred to in the First Count of the Complaint, and by

reason of the terms of the mortgage, plaintiff is entitled to possession of the premises described in Paragraph 3 of the First Count.

3. Defendants, (Names) are now in possession of the premises described in Paragraph 3 and have at all times deprived plaintiff of possession of said premises.

WHEREFORE, plaintiff demands judgment:

(a) That plaintiff or the purchaser at the foreclosure sale recover possession of the mortgaged premises against said defendants or anyone holding under them;

(b) Damages for mesne profits;

(c) Costs.

Dated:

(Plaintiff's Attorney)

The contact information for the representative of the creditor who is responsible for receiving complaints of property maintenance and code violations for this matter is:

The agent who is responsible for the care maintenance, security and upkeep of the property if it becomes vacant and abandoned is:

RULE 4:5-1 CERTIFICATION

In accordance with R. 4:5-1, I hereby certify that the matter in controversy is not the subject of any action pending in any Court or of a pending arbitration proceeding. There is no other action or arbitration proceeding contemplated, nor is there any other party who should be joined in this action.

Dated:

(Plaintiff's Attorney)

RULE 4:5-1(b)(2) CERTIFICATION

In accordance with R. 4:5-1(b)(2), I hereby certify that pursuant to R. 4:64-1(a), that prior to the filing of this mortgage foreclosure complaint, I have received and reviewed a title search of the public record for the purpose of identifying any lien holders or other persons and entities with an interest in the property that is subject to the within foreclosure.

Dated:

(Plaintiff's Attorney)

RULE 1:38-7(b) CERTIFICATION

In accordance with R. 1:38-7(b), I hereby certify that confidential personal identifiers have been redacted from all documents now submitted to the court, and will be redacted from all documents submitted in the future.

Dated:

(Plaintiff's Attorney)

RULE 1:5-6(c)(1)(E) AND RULE 4:64-1(a)(2) and (3) CERTIFICATION OF DILIGENT INQUIRY

_____, Esq., of full age, hereby certifies and says:

1. On *(insert date)*, I communicated by *(insert mode of communication)* with the following named employee(s) of the *(insert the plaintiff's name or insert the plaintiff's mortgage loan servicer's name)*, who state that he/she personally reviewed the complaint to be filed with the court and that he/she confirmed compliance with Rule 4:64-1(b)(1) through (b)(10) and (b)(12) through (b)(13).

2. The name, title and responsibilities of the plaintiff's employee(s) or plaintiff's mortgage loan servicer's employee(s) with whom I communicated are: *(insert the employee's name)* *(insert the employee's title)* *(insert the employee's responsibilities)*.

3. *(If an employee of the plaintiff's mortgage loan servicer)* The above-named employee(s) stated that the relationship between his/her employer and the plaintiff is: *(insert description of the relationship)*, and confirmed that his/her employer is authorized to act on behalf of the plaintiff in this action.

3/4. Based on my communication with the above-named employee(s) of plaintiff or plaintiff's mortgage loan servicer, as well as my own inspection of the loan information supplied by the plaintiff or the plaintiff's mortgage loan servicer and other diligent inquiry, I execute this certification to complaint with the requirements of Rules 1:4-8(a), 1:5-6(c)(1)(E), and 4:64-1(a)(2) and (3).

4/5. I am aware that I have a continuing obligation under Rule 1:4-8 to amend this certification if a reasonable opportunity for further investigation or discovery indicates insufficient evidentiary support for factual assertions proffered by plaintiff in any court filings or documents in this case.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated:

(Plaintiff's Attorney)

SCHEDULE "A"

All that certain tract or parcel of land and premises situate, lying and being in the *(insert municipality)*, County of *(insert county)* and State of New Jersey.

Also known as tax lot _____ in block _____ on the tax assessment map of *(insert municipality)*.

More commonly known as *(insert full address)*.

(INSERT LEGAL DESCRIPTION HERE).

FORM NO. 4

FORECLOSURE CASE INFORMATION STATEMENT

 FORECLOSURE CASE INFORMATION STATEMENT (FCIS) Use for initial Chancery Division — General Equity foreclosure pleadings (not motions) under Rule 4:5-1. Pleading will be rejected for filing, under Rule 1:5-6(c), if information is not furnished or if attorney's signature is not affixed.		FOR USE BY CLERK'S OFFICE ONLY	
		PAYMENT TYPE: ☐ CK ☐ CG ☐ CA ☐ MO	
		RECEIPT NO:	
		AMOUNT:	
		OVERPAYMENT:	
		BATCH NUMBER:	
		BATCH DATE:	
SECTION A: TO BE COMPLETED BY ALL PARTIES			
CAPTION		COUNTY OF VENUE	
		DOCKET NUMBER (When available)	
NAME(S) OF FILING PARTY(IES)(e.g., John Doe, Plaintiff)		DOCUMENT TYPE ☐ COMPLAINT ☐ ANSWER ☐ OTHER	
ATTORNEY NAME (IF APPLICABLE)		FIRM NAME (If applicable)	
MAILING ADDRESS		DAYTIME TELEPHONE NUMBER	
SECTION B: TO BE COMPLETED BY PLAINTIFF TO INITIAL COMPLAINT			
FORECLOSURE CASE TYPE NUMBER		IS THIS A HIGH RISK MORTGAGE PURSUANT TO P.L.2009,c.84 AND P.L.2008,c.127 ☐ YES ☐ NO	
☐ 088 IN PERSONAM TAX FORECLOSURE ☐ 089 IN REM TAX FORECLOSURE ☐ 0RF RESIDENTIAL MORTGAGE FORECLOSURE ☐ 0CF COMMERCIAL MORTGAGE FORECLOSURE ☐ 0CD CONDOMINIUM OR HOMEOWNER'S ASSOCIATION LIEN FORECLOSURE ☐ 091 STRICT FORECLOSURE ☐ OFP OPTIONAL FORECLOSURE PROCEDURE (NO SALE)		PURCHASE MONEY MORTGAGE ☐ YES ☐ NO RELATED PENDING CASE ☐ YES ☐ NO IF YES, LIST DOCKET NUMBERS:	
FULL PHYSICAL STREET ADDRESS OF PROPERTY:		MUNICIPALITY CODE(*)	
ZIP CODE: COUNTY:		MUNICIPAL BLOCK: (LOTS):	
ALL FILING PARTIES MUST SIGN AND PRINT NAMES(S) AND DATE THE FORM BELOW			
I certify that confidential personal identifiers have been redacted from documents now submitted to the court, and will be redacted from all documents submitted in the future in accordance with Rule 1:38-7(b).			
ATTORNEY/SELF REPRESENTED SIGNATURE		PRINT ATTORNEY/SELF REPRESENTED NAME DATE	

*The Municipality Codes are available at http://www.judiciary.state.nj.us/forms/CN11343_municodes_11-9-2009.pdf

*[Note: A list the municipality codes is available at:
http://www.judiciary.state.nj.us/forms/11343_municodes.pdf]*

*[Note: An editable form of the FCIS is available at:
http://www.judiciary.state.nj.us/civil/forms/10169_foreclosure_cis.pdf]*

FORM NO. 5**COUNT IN COMPLAINT TO FORECLOSE SECURITY INTEREST**

[Number] Count

1. Plaintiff repeats the allegations set forth in the First Count making them paragraph 1 of this count.

2. Plaintiff repeats the allegations set forth in the Second Count making them paragraph 2 of this Count.

3. As additional security for the payment of said note, the said _____ executed to _____, a financing statement. Said financing statement was filed in the Office of _____, as file # _____, and the Office of _____, as file # _____. A copy of said financing statement is attached hereto and made a part hereof.

WHEREFORE, Plaintiff demands judgment:

(a) Fixing the amount due on the financing statement.

(b) Barring and foreclosing the defendants and each of them of all equity of redemption in and to the said goods and chattels on and in said premises in question more specifically set forth in the financing statement.

(c) Adjudging that the said goods and chattels located on and in the said premises in question more specifically set forth in the financing statement be sold according to law by the sheriff, together with the sale of the mortgaged premises, to satisfy the amount due plaintiff.

Editor's Note: Pursuant to R. 4:64-1(g) a separate count must be used to foreclose a security interest together with the foreclosure of the mortgage.

Editor's Note: Plaintiff must be sure to include specific language in the judgment and execution for foreclosure of the personal property in accordance with the count in the complaint.

FORM NO. 6**COUNT IN COMPLAINT FOR REFORMATION***[Number]* Count

1. Plaintiff repeats the allegations set forth in the First and Second Counts making them paragraph 1 of this count.

2. On _____, 20____, _____, the mortgagors, executed a mortgage to _____, which mortgage was recorded in the _____ County _____ Office in Book _____ of Mortgages, Page _____. Said mortgage was given to secure the sums of \$_____.

3. By mutual mistake, said mortgage was erroneous in that: *[SET FORTH ERROR IN MORTGAGE]*.

[ALT—REFORMATION AS TO PARTIES]

3. *[Through inadvertence and mistake, the mortgagor's wife and co-title holder, (Naming person), did not sign the mortgage, although she received the benefit of the mortgage proceeds and resides at the mortgaged premises]*

4. Plaintiff therefore requests that the said mortgage be reformed to reflect *[SET FORTH CORRECTION NEEDED]*.

WHEREFORE, Plaintiff demands judgment:

(a) Reforming, modifying and amending the mortgage set forth in paragraph 3 of this count to reflect *[SET FORTH CORRECTION.] OR [_____ AS A MORTGAGOR AND SIGNATORY TO THE MORTGAGE]*.

Editor's Note: Plaintiff must proceed before the vicinage chancery judge for this relief.

FORM NO. 7**CERTIFICATION OF VERIFICATION**

_____, pursuant to R. 1:4-4(b), hereby certifies as follows:

1. I, the undersigned, am the *[Set forth title or position]* of the plaintiff herein.
2. I have read the allegations of the foregoing Complaint and same are true and correct to the best of my knowledge and belief.

I hereby certify that the foregoing statements made by me are true; I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

Name of Person

Dated:

Editor's Note: A foreclosure complaint is not required to be verified. Many practitioners who seek a rent receiver in the foreclosure action, or at the time the foreclosure complaint is filed, use a verified complaint although this is not absolutely required..

FORM NO. 8**SUBSTITUTION OF ATTORNEY**

[Use Abbreviated Caption]

It is stipulated that _____, Esq. is substituted in my place and stead as attorney for the plaintiff.

Attorney for Plaintiff

FORM NO. 9**NOTICE OF LIS PENDENS**

Name of Attorney
 Attorney for Plaintiff
 Address of Attorney
 Phone Number of Attorney

[Name of Plaintiff]

SUPERIOR COURT OF NEW JERSEY
 CHANCERY DIVISION
 _____ COUNTY

vs.

DOCKET NO. F-

[Names of all Defendants]

NOTICE OF LIS PENDENS

TO WHOM IT MAY CONCERN:

Notice is hereby given of the commencement and pendency of the above entitled Civil Action, the general objects of which are:

1. To foreclose the following mortgage covering the premises hereinafter described, to wit:
 mortgage made by _____ to _____ dated _____, recorded in the Office of the (Clerk) (Register) of _____ County, in Book _____ of Mortgages for said County, at pages _____, which mortgage was assigned to _____ plaintiff, who is now the holder thereof, by Assignment of Mortgage dated _____, recorded in Book _____ of Assignments of Mortgages for said County, at pages _____.

2. To recover possession of the lands and premises hereinafter described.

The lands and premises to be affected by said action are described as follows:

[Full Description]

3. The Complaint in the above entitled action was filed in the Office of the Clerk of the Superior Court of New Jersey, Chancery Division, on _____, 20____.

Attorney for Plaintiff

By: _____

Editor's Note: A lis pendens must be filed in each county where all or a portion of the mortgaged premises is located.

Editor's Note: A full caption must be used naming all defendants in the action.

FORM NO. 9A**DISCHARGE OF
NOTICE OF LIS PENDENS**

[Use Full Caption]

TO THE _____ OF THE COUNTY OF _____

THIS IS TO CERTIFY that, WHEREAS, a certain Lis Pendens was filed on _____, _____ in the office of the _____ of _____ County in the above entitled action and recorded in your office in Book _____, at pages _____ et seq.; and

WHEREAS, the matters in dispute have been amicably resolved between the parties, and, therefore, the said Lis Pendens should be discharged of record;

NOW, THEREFORE, the _____ of _____ County is hereby authorized, empowered and directed to discharge the said Lis Pendens, and this shall be his sufficient Warrant to do so.

WITNESS my hand and seal this _____ day of _____, 20____.

Signed, Sealed and Delivered

in the presence of:

Attorneys for Plaintiff

By: _____

State of New Jersey)

ss.

County of _____

BE IT REMEMBERED, that on this _____ day of _____, 20____, personally appeared _____, an Attorney at law of New Jersey, who, I am satisfied, is the person mentioned in the within instrument, and thereupon _____ acknowledged that *[he/she]* signed, sealed and delivered the same as *[his/her]* act and deed, for the uses and purposes therein expressed.

A Notary Public of New Jersey

or

An Attorney at Law of New Jersey

FORM NO. 10**CONSENT TO AMEND TO COMPLAINT**

[The following language should be set forth below plaintiff's signature line on the amendment to the complaint when the consent of an answering or appearing party is required]

I hereby consent to the form and filing of the within amended complaint.

Attorney for Defendant

Dated:

FORM NO. 11

**ACKNOWLEDGMENT OF SERVICE BY INDIVIDUAL
DEFENDANT
TO BE ANNEXED TO SUMMONS**

Service of a true copy of within summons, together with the complaint, is hereby acknowledged this _____ day of _____, 20____.

Attorney for Defendant

[If the acknowledgment of service is signed by the defendant himself or herself, the following acknowledgment must be attached]:

[State of New Jersey]
ss.

County of _____

Be It Remembered That on this _____ day of _____, 20__, before me, the undersigned, personally appeared _____, who I am satisfied is the person named in the foregoing acknowledgment of service and he did acknowledge that he signed and delivered the same as his act and deed for the uses and purposes therein expressed.

Title

Editor's Note: Only a New Jersey attorney may acknowledge service on behalf of a defendant.

FORM NO. 12**CONSENT TO AMEND COMPLAINT AND ACKNOWLEDGMENT OF SERVICE**

[Use Abbreviated Caption]

The undersigned hereby acknowledges service and consents to the filing by plaintiff of an amendment to the foreclosure complaint in the within matter.

Attorney for Defendant

Dated:

Editor's Note: R. 4:9-1 requires that the answering (or adverse) party consent to the filing of an amendment. This consent form satisfies that requirement and dispenses with the need for plaintiff to serve the amendment on the consenting defendant.

FORM NO. 12A**ORDER ALLOWING FILING AMENDED COMPLAINT**

[Use Abbreviated Caption]

This matter have been opened to the Court by *(insert name of law firm)*, attorney for plaintiff, and it appearing that _____, and proof having been submitted as to _____ good cause appearing.

It is on the *(insert day of month)* day of *(insert month)*, *(insert year)* ORDERED that:

1. Plaintiff be and hereby is permitted to file an Amended Complaint in the annexed to its Notice of Motion within _____ days of the date thereof.

2. The plaintiff shall serve such amended complaint on the defendant(s) within ten (10) days from the date thereof.

3. The defendant(s) shall serve his/her/its answer to the amended complaint within (20) days after service upon him/her/it of the amended complaint and that failure to do so a default may be entered against him/her/it.

4. A copy of this order shall be served on all parties with Seven (7) days of the date of this order.

J.S.C.

Respectfully Recommend
Rule 1:34-6 Office of Foreclosure

FORM NO. 13**NOTICE OF DISMISSAL OF DEFENDANT**

[Abbreviated Caption]

The above entitled matter is hereby dismissed against the Defendants listed below only without prejudice:

[List Names of Defendants Dismissed]

NAME OF LAW FIRM

Attorneys for Plaintiff

By: _____

FORM NO. 14**STIPULATION OF DISMISSAL**

[Use Abbreviated Caption]

The matters in controversy in the within action having been amicably adjusted the action is hereby dismissed without costs to either party.

Attorney for the Plaintiff

Attorney for the Defendants

Dated:

Editor's Note: A stipulation (as opposed to a notice) of dismissal must be used where the defendant to be dismissed has answered.

FORM NO. 15**SUMMONS****APPENDIX XII-A. SUMMONS**

Attorney(s):
 Office Address & Tel. No.:
 Attorney(s) for Plaintiff(s)

 Plaintiff(s)	SUPERIOR COURT OF NEW JERSEY COUNTY DIVISION Docket No.
vs.	CIVIL ACTION
Defendant(s)	SUMMONS

From The State of New Jersey To The Defendant(s) Named Above:

The plaintiff, named above, has filed a lawsuit against you in the Superior Court of New Jersey. The complaint attached to this summons states the basis for this lawsuit. If you dispute this complaint, you or your attorney must file a written answer or motion and proof of service with the deputy clerk of the Superior Court in the county listed above within 35 days from the date you received this summons, not counting the date you received it. (A directory of the addresses of each deputy clerk of the Superior Court is available in the Civil Division Management Office in the county listed above and online at http://judiciary.state.nj.us/prose/10153_deputyclerklawref.pdf.) If the complaint is one in foreclosure, then you must file your written answer or motion and proof of service with the Clerk of the Superior Court, Hughes Justice Complex, P.O. Box 971, Trenton, NJ 08625-0971. A filing fee payable to the Treasurer, State of New Jersey and a completed Case Information Statement (available from the deputy clerk of the Superior Court) must accompany your answer or motion when it is filed. You must also send a copy of your answer or motion to plaintiff's attorney whose name and address appear above, or to plaintiff, if no attorney is named above. A telephone call will not protect your rights; you must file and serve a written answer or motion (with fee of \$135.00 and completed Case Information Statement) if you want the court to hear your defense.

If you do not file and serve a written answer or motion within 35 days, the court may enter a judgment against you for the relief plaintiff demands, plus interest and costs of suit. If judgment is entered against you, the Sheriff may seize your money, wages or property to pay all or part of the judgment.

If you cannot afford an attorney, you may call the Legal Services office in the county where you live or the Legal Services of New Jersey Statewide Hotline at 1-888-LSNJ-Law (1-888-576-5529). If you do not have an attorney and are not eligible for free legal assistance, you may obtain a referral to an attorney by calling one of the Lawyer Referral Services. A directory with contract information for local Legal Services Offices and Lawyer Referral Services is available in the Civil Division Management Office in the county listed above and online at http://judiciary.state.nj.us/prose/10153_deputyclerklawref.pdf.

Clerk of the Superior Court

DATED:

Name of Defendant to Be Served:

Address of Defendant to Be Served:

[As amended on September 4, 2012.]

FORM NO. 15A

60 DAY SUMMONS (FOR USA and FDIC)

APPENDIX XII-A. SUMMONS

Attorney(s):
Office Address & Tel. No.:
Attorney(s) for Plaintiff(s)

Plaintiff(s)

vs.

Defendant(s)

SUPERIOR COURT OF NEW JERSEY

COUNTY

DIVISION

Docket No. _____

CIVIL ACTION

SUMMONS

From The State of New Jersey To The Defendant(s) Named Above:

The plaintiff, named above, has filed a lawsuit against you in the Superior Court of New Jersey. The complaint attached to this summons states the basis for this lawsuit. If you dispute this complaint, you or your attorney must file a written answer or motion and proof of service with the deputy clerk of the Superior Court in the county listed above within 35 days from the date you received this summons, not counting the date you received it. (A directory of the addresses of each deputy clerk of the Superior Court is available in the Civil Division Management Office in the county listed above and online at http://judiciary.state.nj.us/prose/10153_deputyclerklawref.pdf.) If the complaint is one in foreclosure, then you must file your written answer or motion and proof of service with the Clerk of the Superior Court, Hughes Justice Complex, P.O. Box 971, Trenton, NJ 08625-0971. A filing fee payable to the Treasurer, State of New Jersey and a completed Case Information Statement (available from the deputy clerk of the Superior Court) must accompany your answer or motion when it is filed. You must also send a copy of your answer or motion to plaintiff's attorney whose name and address appear above, or to plaintiff, if no attorney is named above. A telephone call will not protect your rights; you must file and serve a written answer or motion (with fee of \$135.00 and completed Case Information Statement) if you want the court to hear your defense.

If you do not file and serve a written answer or motion within 35 days, the court may enter a judgment against you for the relief plaintiff demands, plus interest and costs of suit. If judgment is entered against you, the Sheriff may seize your money, wages or property to pay all or part of the judgment.

If you cannot afford an attorney, you may call the Legal Services office in the county where you live or the Legal Services of New Jersey Statewide Hotline at 1-888-LSNJ-Law (1-888-576-5529). If you do not have an attorney and are not eligible for free legal assistance, you may obtain a referral to an attorney by calling one of the Lawyer Referral Services. A directory with contact information for local Legal Services Offices and Lawyer Referral Services is available in the Civil Division Management Office in the county listed above and online at http://judiciary.state.nj.us/prose/10153_deputyclerklawref.pdf.

Clerk of the Superior Court

DATED:

Name of Defendant to Be Served:

Address of Defendant to Be Served:

[As amended on September 4, 2012.]

FORM NO. 16**NOTICE IN LIEU OF SUMMONS
(TO STATE OF NEW JERSEY)
WITH ACKNOWLEDGMENT**

[Use Abbreviated Caption]

To the State of New Jersey: L.S.

Notice is hereby given that the State of New Jersey is made a party defendant to the complaint in the above entitled action because it is alleged that the State of New Jersey has an interest in the mortgaged premises subsequent to the lien of plaintiff's mortgage by virtue of the fact that:

[Set forth subordinate lien held by the State]

Notice is also given that the State of New Jersey is made a defendant by virtue of a judgment in favor of the State of New Jersey against _____, in the amount of \$ _____ and costs, which judgment was recovered on _____, 20__, in the Superior Court of New Jersey as No. J _____.

[Corporate franchise tax allegation]

Notice is also given that the State of New Jersey has or may claim a lien against the mortgaged premises for unpaid corporate franchise or other taxes due from the _____ Corporation.

[Inheritance tax allegation]

Notice is also given that the State of New Jersey has or may claim a lien against the mortgaged premises because of New Jersey Transfer Inheritance Taxes or other taxes due from the Estate of _____, deceased who died on _____, 20__, a resident of _____ County and _____ is Executor of such estate, whose address is _____, New Jersey; [or, if no personal representative state names and addresses of heirs-at-law]

[or]

After diligent search and inquiry, plaintiff has been unable to ascertain whether _____ is alive or dead, or if he is deceased, plaintiff, after diligent inquiry and search, has been unable to determine who are his heirs at law, and the State of New Jersey may have or claim to have a lien on the estate of _____, and if he be dead on the estates of the heirs, devisees, or personal representatives and his, their, or any of their successors in right, title and interest, all of whose names and addresses are unknown, by reason of inheritance or other taxes due.

You are required to serve upon _____ plaintiff's attorneys, whose address is _____ New Jersey, _____, an answer to the complaint within 60 days after the service. If you fail to do so, judgment by default may be rendered against you for the relief demanded in the complaint. You shall file the answer and proof of service, in duplicate, with the Clerk of the

Superior Court, Hughes Justice Complex, CN-971, Trenton, NJ 08625, in accordance with the rules governing civil practice in the courts.

Dated: _____, 20____.

Clerk of the Superior Court

ACKNOWLEDGMENT OF SERVICE

Service of the within notice, together with a copy of the complaint, is hereby acknowledged this _____ day of _____, 20____.
Attorney General of the State of

Attorney General of New Jersey

By: _____

Editor's Note: Where the State is joined for a subordinate lien, a "notice" not a summons must be used, N.J.S.A. 2A:45-1 et seq. If the State is served because the mortgaged premises may have escheated to the State subsequent to the mortgage, a "summons" must be used, N.J.S.A. 2A:37-9.

Editor's Note: If the State is joined because of a recognizance or a criminal judgment held by the State, the county prosecutor must be served with the notice.

Editor's Note: The notice must set forth the reasons why the State is joined. Reference to a paragraph in the complaint is improper.

Editor's Note: The easiest way to serve the State is through an acknowledgment of service as above.

Editor's Note: Serving the State by mail is useless since the State cannot be defaulted pursuant to mailed service.

FORM NO. 17
AFFIDAVIT OF SERVICE
(PRIVATE PROCESS SERVER)

Plaintiff	Superior Court of New Jersey
vs	Venue
Defendant	Docket No.

Person to be served (Name & Address)

AFFIDAVIT OF SERVICE
(For Use by Private Process)

Attorney:

Cost of service pursuant R. 4:43-2(c)

\$ _____

Papers Served

Service Data:

Served Successfully _____ Not Served _____ Date _____ Time: _____
 Attempts: _____

_____ Delivered a copy to him/her personally Name of Person Served and relationship/title: _____

_____ Left a copy with a competent household
 member over 14 years of age residing _____
 therein (indicate name & relationship at right) _____

_____ Left a copy with person authorized to
 accept service, e.g., managing agent,
 registered agent etc.
 (indicate name & official title at right) _____

Description of Person Accepting Service:

Sex _____ Age _____ Height _____ Weight _____ Skin Color _____ Hair Color _____

Unserved:

- () Defendant is unknown at the address furnished by the attorney
- () All reasonable inquiries suggest defendant moved to an undetermined address
- () No such street in municipality
- () No response on: _____ Date _____ Time _____
 _____ Date _____ Time _____
- () Other _____ Comments or Remarks

Server Data:

I, <Name of Server>, was at the time of service a Competent adult not having a direct interest in the litigation. I declare under penalty of perjury that the foregoing is true and correct.

Signature of Process Server _____ Date _____

Sworn and subscribed to me this
 _____ day of _____

Notary Signature

Name of Notary's Commission expiration

<Insert Private Process Server's name, address and telephone number>

Editor's Note: This is a typed copy of the form promulgated by the Administrative Director of the Courts pursuant to R. 4:4-7. This Affidavit of Service form is mandated to be used by private process servers in New Jersey.

FORM NO. 18

**ACKNOWLEDGMENT OF SERVICE BY INDIVIDUAL
DEFENDANT
TO BE ANNEXED TO SUMMONS**

Service of a true copy of within summons, together with the complaint, is hereby acknowledged this _____ day of _____, 20____.

Attorney for Defendant

[If the acknowledgment of service is signed by the defendant himself or herself, the following acknowledgment must be attached]:

State of New Jersey)
) ss.
County of _____)

Be It Remembered That on this _____ day of _____, 20__, before me, the undersigned, personally appeared _____, who I am satisfied is the person named in the foregoing acknowledgment of service and he did acknowledge that he signed and delivered the same as his act and deed for the uses and purposes therein expressed.

Title

Editor's Note: Only a New Jersey attorney may acknowledge service on behalf of a defendant.

FORM NO. 19

**CERTIFICATION OF INQUIRY
(IN SUPPORT OF IN-STATE
SERVICE BY MAIL)**

[Abbreviated Caption]

[Name of Attorney], hereby certifies:

1. I am an attorney at law of New Jersey actually entrusted with the conduct of this matter.
2. I delivered the summons and complaint to a private process server to serve defendant *[Name of Defendant]*.
3. The private process server was unsuccessful at serving defendant after numerous attempts at defendant's residence address: *[Street/City/State/Zip Code]*.
4. The neighbors confirmed that the defendant does reside at the aforesaid address.
5. A postal search confirmed that defendant receives mail at the aforesaid address.
6. The Tax Collector's records reflect that the mailing address for defendant is the aforesaid address.
7. A skip trace indicated that the last known address for the defendant is the aforesaid address.
8. Inquiry to the New Jersey Motor Vehicle Commission failed to reveal a new address for the defendant.
9. A telephone book inquiry indicates that defendant has a telephone number at the aforesaid address.
10. As set forth in the Certification of Mailing filed herein, service of process was effected by certified mail, return receipt requested, and regular mail, to the defendant at *[Street/City/State/Zip Code]* in accordance with R. 4:4-3(a).

I certify that the above statements are true. I am aware that if any of the above statements are willfully false that I am subject to punishment.

NAME OF LAW FIRM

Attorneys for Plaintiff

By: _____
[Name of Attorney]

Editor's Note: In-State service by mail can only be made to defendant's abode or place of business or employment (addressee only), R. 4:4-3(a). See form of Certification of Mailing below.

FORM NO. 20

AFFIDAVIT OF INQUIRY IN SUPPORT OF OUT-OF-STATE MAILED SERVICE

[Use Abbreviated Caption]

_____, hereby certifies to the following:

1. I am an _____ with the law firm of _____, attorneys for plaintiff in the above entitled action and have full knowledge of the matters and facts hereinafter set forth.
2. Inquiry has been made for present whereabouts of defendant(s) *[Naming defendants]* in order to serve him/her/them in the above foreclosure action.
3. In all my inquiries, inquiry was made of any person who I had reason to believe possessed knowledge or information as to the defendant's residence or address or the matter inquired of. Where inquiry was made by letter, I enclosed sufficient postage for the return of an answer; and stated that an action has been or is about to be commenced against the person inquired for, and that the object of the inquiry is to give notice of the action in order that the person may appear and defend it.
4. I forwarded summons and complaint and amendment(s) if any to the Sheriff of _____ County for service upon said defendant(s) at the mortgaged premises _____. The Sheriff advised that defendant does not reside there.
5. A postal search was made for the defendant(s) at the mortgaged premises. The United States Postal Service advised – “not known at given address.”
6. This office requested a search from New Jersey Division of Motor Vehicles for said defendant(s). The New Jersey Motor Vehicle Commission advised no record found.
7. This office requested a skip trace investigation from _____ in order to obtain a current address for the defendant(s). Said investigation revealed a current address of defendant(s) is _____, Pa. _____.
8. An inquiry was conducted with the United States Postal Services for the defendant at said address, _____, Pa. _____. The United States Postal Service advised that this is a good address.
9. This office made an inquiry with Directory Assistance in order to obtain a telephone

number for the defendant(s). The telephone operator advised that there is a listing for defendant(s) at _____, and that the telephone number is _____.

10. I personally spoke to the defendant(s) by telephone at the above address and verified that defendant(s) reside at the said address: _____, Pa. _____.

11. Based upon the foregoing, I am satisfied that defendant(s) cannot be served with process in New Jersey as he/she/they reside out of state as aforesaid.

12. This certification is made in support of out-of-state mailed service of summons, complaint and amendment(s) if any to the Defendant(s) in accordance with R. 4:4-4(b) and R. 4:4-5(b), as will more fully appear from the Certification of Mailing filed in this action.

I hereby certify that the foregoing statements made by me are true; I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

Person Doing the Inquiry

Dated:

Editor's Note: R. 4:4-5(c) (2) provides: " The inquiry required by this rule shall be made by the plaintiff, plaintiff's attorney actually entrusted with the conduct of the action, or by the agent of the attorney; it shall be made of any person who the inquirer has reason to believe possesses knowledge or information as to the defendant's residence or address or the matter inquired of; the inquiry shall be undertaken in person or by letter enclosing sufficient postage for the return of an answer; and the inquirer shall state that an action has been or is about to be commenced against the person inquired for, and that the object of the inquiry is to give notice of the action in order that the person may appear and defend it. The affidavit of inquiry shall be made by the inquirer fully specifying the inquiry made, of what persons and in what manner, so that by the facts stated therein it may appear that diligent inquiry has been made for the purpose of effecting actual notice."

FORM NO. 21

CERTIFICATION OF INQUIRY IN SUPPORT OF SERVICE BY PUBLICATION

[Use Abbreviated Caption]

_____, hereby certifies to the following:

1. I am an [attorney, employee with the law firm of _____, [an agent of _____,] attorneys for plaintiff in the above entitled action and have full knowledge of the matters and facts hereinafter set forth.

2. Inquiry has been made with respect to the present whereabouts of defendant(s) *[Naming defendants]* in order to serve him/her/them in the above foreclosure action.

3. In all my inquiries, inquiry was made of any person who I had reason to believe possessed knowledge or information as to the defendant's residence or address or the matter inquired of. Where inquiry was made by letter, I enclosed sufficient postage for the return of an answer; and stated that an action has been or is about to be commenced against the person inquired for, and that the object of the inquiry is to give notice of the action in order that the person may appear and defend it.

4. This office forwarded summons and complaint (and amendment(s) if any) to the Sheriff of _____ County for service upon said defendant(s) at the mortgaged premises _____. The Sheriff advised that the property was vacant and no one lived there.

5. _____ Investigators made inquiry of neighbors and tenants, if any, and persons in the vicinity of the mortgaged premises but founds no information regarding the defendant's whereabouts.

6. A postal inquiry was conducted for the defendant(s) at the mortgaged premises. The United States Postal Service advised – “moved left no forwarding address.”

7. An inquiry was conducted with the United States Postal Services for the Defendant(s) at _____, N.J. _____. The United States Postal Service advised -- good as addressed.

8. This office requested a Motor Vehicle Commission search from the defendant(s) inquired for. The New Jersey Motor Vehicle Commission advised that it had an address of record for defendant(s) at _____, N.J. _____.

9. A U.S. postal search was conducted for the defendant(s) at _____, N.J. _____. The United States Postal Service advised -- “good as addressed.”

10. This office forwarded summons and complaint and amendment(s) if any to the Sheriff of _____ County for service upon said Defendant(s) at the _____, N.J. _____. The Sheriff advised that Defendant(s) could not be served at that address and were no longer living there.

11. This office requested a skip trace investigation from _____ in order to obtain a current address for the Defendant(s). Said investigation revealed a current address of Defendant(s) to be the same address as above _____, N.J. _____.

12. Defendant(s) were listed in the County telephone directory at the above address of _____. There were three other people in that telephone directory with the same last name. Inquiry letters were sent to each of them requesting information as to the current address or location of Defendant(s). One letter was returned "attempted-not-known," and no response was received from the other persons to whom inquiry letters were sent.

13. This office requested information from the Office of the Tax Collector of _____ for the address or whereabouts of defendant(s). Said Office had no address for defendant(s) other than the mortgaged premises.

14. _____ Title Co. searched the records of the _____ County Surrogate's Office and found no record of death of defendant(s) and no estates or waivers for defendant(s).

15. I caused the records of the State Registrar of Vital Statistics in Trenton to be searched and found no record of death of defendant.

16. I requisitioned a grantee-grantor search from _____ Title Co. for [Name of County] and [Name of County], New Jersey, for any deeds and mortgages given or held by the defendant(s) in order to ascertain a new or current address for defendant(s) and found no new or current address other than the address or addresses noted above.

17. After diligent inquiry, I am satisfied that defendant(s) are alive and that their whereabouts cannot be located for the purpose of effectuating service on said Defendant(s). I make this certification in support of service by publication and mailing to Defendant(s) last known address, as will more fully appear from the Certification of Publication and Mailing filed in this action.

I hereby certify that the foregoing statements made by me are true; I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

Person Doing Inquiry

Dated:

Editor's Note: The above form is only a guide. Inquiry should be made of every person the inquirer has reason to believe may possess knowledge as to the identity or whereabouts of the Defendant(s) inquired for.

Editor's Note: If a Judgment Creditor is inquired for inquiry should also be made of the attorney or law firm recovering the judgment and the court records in which the judgment was entered for the whereabouts of Defendant. If a Mortgagee is inquired for, inquiry should also be made of the Department of Banking and Insurance, any names and addresses on the mortgage instrument itself for the whereabouts of Defendant, and any available federal databases if a federal institution is involved. If a Corporation is inquired for, inquiry should also be made of: Secretary of State's/Treasurer's records for information regarding the Defendant corporation.

Editor's Note: If the inquirer cannot after diligent inquiry ascertain whether Defendant(s) are dead or alive, and if dead, their heirs, devisees and personal representatives, it is customary to join Defendant(s), their heirs, devisees and personal representatives and his, her, their or any of their successors in right, title and interest, R. 4:26-5. In this case, the affidavit of inquiry must

also set forth specific inquiry for such heirs, devisees etc.

FORM NO. 22

INQUIRY LETTER

[Letterhead of Attorney, Attorney's Agent or Plaintiff]

Dear Sir or Madam:

I am an _____ with the law firm of _____, (or agent for said law firm).

An action has been or is about to be commenced against *[Naming defendant or defendants]* the person *[or persons]* inquired for. The purpose of the action is to foreclose a mortgage on *[Street Address/City/State]*. The object of this letter and inquiry is to give notice of the action to *[Naming defendant or defendants]* in order that (he/she/them) may appear and defend it.

The inquirer has reason to believe that you may possess knowledge or information as to the residence, address or whereabouts of *[Naming defendant or defendants]*.

Enclosed please find a self-addressed stamped envelope from the undersigned, with sufficient postage for the return of an answer. You can also call me at the telephone number above should you have any questions or require additional information.

Your earliest attention will be greatly appreciated.

Name of Attorney or Agent

Date:

Editor's Note: The inquiry letter is a good technique to use for inquiry. The attorney should keep a separate file for each defendant inquired for. A letter should be sent to anyone the attorney or investigator believes has information about the whereabouts of a defendant. Any responses received should be placed in the appropriate defendant's file. When it comes time to prepare the affidavit of inquiry, the attorney should specifically refer to the inquiry letters sent and summarize any responses.

FORM NO. 23**CERTIFICATION OF SERVICE (BY MAILING)**

[Use Abbreviated Caption]

1. I am an employee of _____ attorneys for plaintiff in the above-entitled action.

2. On _____, 20____, I mailed a copy of the attached summons and a copy of the complaint filed in this action, by placing such copies in an envelope, addressed as below, sealing said envelope, placing proper postage thereon by certified mail, return receipt requested and by ordinary mail, mailing such envelope at the Post Office, _____, New Jersey to the persons and addresses listed below:

[LIST NAMES AND ADDRESSES OF PERSONS MAILED TO]

3. The signed return receipt card(s) or unclaimed certified mail envelope(s) are attached.

[If registered or certified mailed service is made pursuant to R. 4:4-3 and is refused or unclaimed, add the following]

4. The ordinary mailing has not been returned and the simultaneous mailing therefore constitutes effective service.

5. I hereby certify that the foregoing statements made by me are true; I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

[Attach copy of (a) summons used for service and (b) original signed return receipt card or original unclaimed registered or certified mail envelope.]

Name of Employee

Dated:

FORM NO. 24**NOTICE TO ABSENT DEFENDANTS (PUBLICATION)**

**SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION**

COUNTY

DOCKET NO. F-_____

NOTICE TO ABSENT DEFENDANTS

STATE OF NEW JERSEY TO: *[Name or Names of Persons]*

You are hereby summoned and required to serve upon _____, plaintiff's attorneys, whose address is _____, New Jersey, an answer to the complaint in a civil action in which _____ is _____ plaintiff and _____ et al. are defendants pending in the Superior Court of New Jersey within 35 days after [insert date of publication] exclusive of said date. If you fail to do so, judgment by default may be rendered against you for the relief demanded in the complaint. You shall file your answer and proof of service in duplicate with the Clerk of the Superior Court, Hughes Justice Complex, CN-971, Trenton, NJ 08625, in accordance with the rules governing the courts.

You are further advised that if you cannot afford an attorney, you may call the Legal Services office in the county where you live. If you do not have an attorney and are not eligible for free legal assistance, you may obtain a referral to an attorney by calling the Lawyer Referral Services. The names and telephone numbers of such agencies in the county of venue are as follows:

Lawyer Referral Services: *[Insert telephone number]*

Legal Services *[Insert telephone number]*

Legal Services of New Jersey Statewide Hotline at 1-888-LSNJ-Law (1-888-576-5529)

This action has been instituted for the purpose of foreclosing a mortgage and recovering possession of the lands and premises described in a mortgage dated _____, 20____, **recorded on _____, in book _____, page _____**, made by _____ to the plaintiff **[if different from plaintiff, list lender on the instruments]** and covers real estate located at *[Street Address, tax lot and block]*, New Jersey.

You are made a defendant because *[State reasons for joinder as alleged in complaint]* and your lien or encumbrance on the mortgaged premises is subject to plaintiff's mortgage.

Dated:

Clerk of the Superior Court

Editor's Note: R. 4:4-5(c) provides for service: " by publication of a notice once in a newspaper published or of general circulation in the county in which the venue is laid; and also by mailing, within 7 days after publication, a copy of the notice as herein provided and the complaint to the defendant, prepaid, to the defendant's residence or the place where the defendant usually receives mail, unless it shall appear by affidavit that such residence or place is unknown, and cannot be ascertained after inquiry as herein provided or unless the defendants are proceeded against as unknown owners or claimants pursuant to R. 4:26-5(c). But if defendants are proceeded against pursuant to R. 4:26-5(c), a copy of the notice shall be posted upon the lands

affected by the action within 7 days after publication;

(1) The notice required by this rule shall be in the form of a summons, without a caption, and shall state briefly (1) the object of the action and the name of the person to whom it is addressed and why such person is made a defendant; and (2) where the action concerns real estate, the municipality in which and the street on which the real estate is situate, and, if the property is improved, the street number of the same, if any, and if a mortgage is to be foreclosed, the parties thereto and the date thereof;"

FORM NO. 25

APPEARANCE BY DEFENDANT

[Use Abbreviated Caption]

Appearance is hereby entered for the defendant.

Attorney for Defendant
[naming defendant]

Dated:

FORM NO. 26

NOTICE OF APPEARANCE, CONSENT TO JUDGMENT, AND WAIVER OF NOTICES

[Use Abbreviated Caption]

The undersigned appears in the within action, admits the contents of the complaint, and waives report of the encumbrance of said defendant in the final judgment and waives all proceedings and notices in said action and consents to the entry of final judgment, but does not waive the notice of sale and notice of and proceedings to obtain surplus moneys.

Attorney for Defendant

Dated:

FORM NO. 27**ANSWER NOT DISPUTING RIGHT OF PLAINTIFF (UNCONTESTED)**

[Use Abbreviated Caption]

The defendant, _____, having its principal office at _____, in the _____ of _____, County of _____, State of New Jersey answering the complaint of the plaintiff says:

1. It has no knowledge or information sufficient to form a belief as to the allegations of the complaint.
2. It joins in the demand of the plaintiff for judgment and also demands that such judgment shall fix the amount due it on the mortgage referred to in paragraph _____ of the complaint, and that it be paid the amount due thereon with interest and costs and that the lands be sold to satisfy the amount due the defendant as well as the amount due the plaintiff.

 Attorney for Defendant

Dated:

CERTIFICATION

In accordance with Rule 4:5-1, I hereby certify that the matter in controversy is not the subject of any action pending in any Court or of a pending arbitration proceeding. There is no other action or arbitration proceeding contemplated, nor is there any other party who should be joined in this action.

Attorneys for Plaintiff

 Attorney for Defendant

Dated:

FORM NO. 28**STIPULATION EXTENDING TIME TO ANSWER**

[Use Abbreviated Caption]

It is stipulated that the defendant's time to answer or to take any steps addressed to the complaint is hereby extended until _____, 20____.

 Attorney for Plaintiff

 Attorney for Defendant
(naming defendant)
FORM NO. 29**ORDER EXTENDING TIME TO ANSWER**

[Use Abbreviated Caption]

This matter have been opened to the Court by *(insert name of law firm)*, attorney for defendant, and it appearing that good cause exists to allow the defendant, *(insert defendant's name)* to answer the complaint.

It is on the *(insert day of month)* day of *(insert month)*, *(insert year)* ORDERED that:

1. Defendant *(insert defendant's name)*, may answer or otherwise move with respect to the complaint herein is extended from *(insert date of service plus 35 days)* to *(date of order plus 20 days)*.

2. A copy of this order shall be served on all parties with Seven (7) days of the date of this order.

 J.S.C.

Respectfully Recommend
Rule 1:34-6 Office of Foreclosure

FORM NO. 30**SUMMARY JUDGMENT AS TO DEFENDANT AND RETURNING THE ACTION TO
THE OFFICE OF FORECLOSURE**

[Use Abbreviated Caption]

This matter being opened in the presence of _____, attorney for the plaintiff and _____ attorney for the defendant, _____, on the motion of the plaintiff to enter summary judgment and the court having considered the pleadings filed in this action, together with the affidavits annexed thereto, and the court having heard the arguments of counsel, and considered the memorandum of the plaintiff, and being of the opinion that the answer filed in this cause failed to set forth a genuine issue as to any material facts, and contains no legal or equitable defenses and that summary judgment should be entered in favor of the plaintiff.

It is on this _____ day of _____, 20____, Ordered and ADJUDGED that:

1. That the motion of the plaintiff for summary judgment be granted.
2. That the Clerk of this court shall enter the default of the defendant as though no answering pleading had been filed.
3. That this matter be referred to the Office of Foreclosure for further proceedings and entry of final judgment under Rule 4:64 pursuant to the rules governing civil practice in the courts.

J.S.C.

Respectfully Recommended:

R. 1:34-6 OFFICE OF FORECLOSURE

FORM NO. 31**ORDER STRIKING ANSWER OF DEFENDANT AND RETURNING THE ACTION TO
THE OFFICE OF FORECLOSURE**

514591[Use Abbreviated Caption]

This matter being opened in the presence of _____, attorney for the plaintiff and _____ attorney for the defendant, _____, on the motion of the plaintiff to strike the answer of such defendant] or [to enter summary judgment] and the court having considered the pleadings filed in this action, together with the affidavits annexed thereto, and the court having heard the arguments of counsel, and considered the memorandum of the plaintiff, and being of the opinion that the answer filed in this cause failed to set forth a genuine issue as to any material facts, and contains no legal or equitable defenses and that summary judgment should be entered in favor of the plaintiff.

It is on this _____ day of _____, 20____, Ordered and ADJUDGED that:

1. That the answer of defendant, (*insert Defendant's name*), be stricken.
2. That the Clerk of this court shall enter the default of the defendant as though no answering pleading had been filed.
3. That this matter be referred to the Office of Foreclosure for further proceedings and entry of final judgment under Rule 4:64 pursuant to the rules governing civil practice in the courts.

J.S.C.

Respectfully Recommended:

R. 1:34-6 OFFICE OF FORECLOSURE

FORM NO. 32**REQUEST TO ENTER DEFAULT AND CERTIFICATION OF DEFAULT**

TO THE CLERK OF THE ABOVE NAMED COURT:

Please enter the default of the Defendants *[Names of Defendants]* for failure to plead or otherwise defend, as provided by the Rules of Court. There is annexed hereto a Certification in support of this request.

NAME OF LAW FIRM

Attorneys for Plaintiff

By: _____
[Name of Attorney]

Dated:

CERTIFICATION OF DEFAULT

[Name of Attorney], hereby certifies:

1. I am an attorney at law of the State of New Jersey and am the person actually entrusted with the management of this matter.
2. Service of the Summons and Complaint and any amendments was made upon the Defendant *[Name]* by a private process server on *[Name/Dater/Year]* as the return of service will disclose.
3. Service of the Summons and Complaint and any amendments was made upon the Defendant *[Name]* by certified and regular mail on *[Name/Dater/Year]* as shown on the enclosed proof of mailing.
4. The time within which Defendants may answer or otherwise move as to the Complaint has expired, and the Defendants have not answered or otherwise moved, and the time for the Defendants to answer or otherwise move has not been extended.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

[Name of Attorney]

Dated:

FORM NO. 33

NOTICE OF MOTION FOR Default

[Use Abbreviated Caption]

Take notice that we shall apply before the Office of Foreclosure, at the Hughes Justice Complex, 6th Floor, North Wing, Market Street, Trenton, NJ 08628 for the entry of Default. Default sought will be entered in the discretion of the court unless the attorney or *pro se* party on whom it has been served notifies in writing the Office of Foreclosure and the attorney for the moving party or the *pro se* party within ten days after the date of service of the motion that the responding party objects to the entry of the order.

"IF YOU WANT TO OBJECT TO THIS MOTION YOU MUST DO SO IN WRITING WITHIN 10 DAYS AFTER THE DAY YOU RECEIVED THIS MOTION. ANY OBJECTION MUST ADDRESS THE SUBJECT OF THE MOTION AND DETAIL WITH SPECIFICITY THE BASIS OF THE OBJECTION TO THE MOTION. YOU MUST FILE YOUR OBJECTION WITH THE OFFICE OF FORECLOSURE, P.O. BOX 971, 25 MARKET STREET, TRENTON, NEW JERSEY 08625, AND SERVE A COPY ON THE MOVING PARTY. THE OFFICE OF FORECLOSURE DOES NOT CONDUCT HEARINGS. YOUR PERSONAL APPEARANCE AT THE OFFICE WILL NOT QUALIFY AS AN OBJECTION. IF YOU FILE A SPECIFIC OBJECTION TO THE MOTION, THE CASE WILL BE SENT TO A JUDGE FOR RESOLUTION. YOU WILL BE INFORMED BY THE JUDGE OF THE TIME AND PLACE OF THE HEARING ON THE MOTION."

Please note that no hearing will take place at the time and place above, as the Office of Foreclosure is not a hearing office. An appearance is not required.

Dated: _____, 20____.

Attorneys for the Plaintiff

By _____

CERTIFICATION OF SERVICE OF NOTICE

_____, does hereby certify

I am employed by _____, attorneys for Plaintiff in the above entitled action.

On _____, 20____, a copy of the within Notice of Motion and was sent to the

following:

[List names and addresses mailed to]

by certified mail, return receipt requested and by regular mail, with required postage thereon, by depositing an envelope containing said Notice of Motion through the United States mail.

I hereby certify that the foregoing statements made by me are true; I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

Name and Title

Dated:

FORM NO. 34

**CERTIFICATION IN SUPPORT OF
NOTICE OF MOTION TO ENTER DEFAULT AFTER 6 MONTHS**

[Use Abbreviated Caption]

1. I am a member of the law firm of _____, attorneys for the plaintiff and the person entrusted with the management and conduct of this action.

2. The following defendants were served on the date set forth after their names with a copy of the summons and complaint [and amendment to the complaint, if any]:
as appears from the Sheriff's return of service.

3. The following defendants were served on the date set forth after their names with a copy of the summons and complaint [and amendment to the complaint, if any]:
by certified mail, return receipt requested, as appears from the affidavit of mailing with the certified signed receipt attached filed herein.

4. The following defendants were served on the date set forth after their names with a copy of the summons and complaint, [and amendment to the complaint, if any]:
by publication and by mailing as appears from the affidavit of publication and mailing filed herein.

5. The State of New Jersey was served with a Notice and complaint on the _____ day of _____, 20____, as appears from the acknowledgment of service.

6. That the time within which said defendants may answer or otherwise move as to the complaint has expired; and that the defendants have not answered or otherwise moved and the

time has not been extended. More than 6 months has expired from the date of actual default by defendants.

I hereby certify that the foregoing statements made by me are true; I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Name of Attorney

Dated: _____, 20____.

FORM NO. 35

**ORDER PERMITTING ENTRY OF DEFAULT
WHERE DEFAULT NOT ENTERED WITHIN 6 MONTHS**

[Use Abbreviated Caption]

This matter being opened to the court by _____ attorneys for the plaintiff and it appearing that default of the defendant hereinafter named was not entered within 6 months of the actual default and due notice of this application having been given to said defendants and good cause appearing.

It is on this _____ day of _____, 20____, Ordered that:

1. The clerk of the Superior Court is directed to enter a default against the following defendants:

1a. *(insert defendant's name)*

1b. *(insert defendant's name)*

for failure to answer or otherwise defend in accordance with the rules governing civil practice in the courts.

2. A copy of this order shall be served on all parties with Seven (7) days of the date of this order.

J.S.C.

Respectfully Recommended:

R. 1:34-6 OFFICE OF FORECLOSURE

FORM NO. 36**CERTIFICATION OF MAILING FILED DEFAULT**

[Abbreviated Caption]

On *(Day/Month/Year)*, I, the undersigned, *(an Attorney At Law of New Jersey/an employee of the attorneys for plaintiff in the above entitled action)* mailed, by regular first class mail, in separate envelopes, with postage prepaid thereon, to the following defaulted defendants (served personally or by mail), addressed to the same addresses where said defendants were last served with process, a filed copy of the default, and order entering default, if any, where default was entered after 6 months:

(LIST NAMES OF PERSONS WITH MAILING ADDRESSES)

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

(Name of Attorney or Employee)

Dated:

FORM NO. 37

GENERIC MOTION BEFORE THE OFFICE FORECLOSURE UNDER RULE 1:34-6

Editor's note:

Revised Rule 4:64-9, now requires certain language to be included in all motions for orders entered by the Office of Foreclosure. Below is a generic motion that complies with the requirements. A motion for entry final judgment included later in this section.

[Use Abbreviated Caption]

Take notice that we shall apply before the Office of Foreclosure, at the Hughes Justice Complex, 6th Floor, North Wing, Market Street, Trenton, NJ 08628 for the entry [*insert name of order to be entered*] sought will be entered in the discretion of the court unless the attorney or *pro se* party on whom it has been served notifies in writing the Office of Foreclosure and the attorney for the moving party or the *pro se* party within ten days after the date of service of the motion that the responding party objects to the entry of the order.

"IF YOU WANT TO OBJECT TO THIS MOTION YOU MUST DO SO IN WRITING WITHIN 10 DAYS AFTER THE DAY YOU RECEIVED THIS MOTION. ANY OBJECTION MUST ADDRESS THE SUBJECT OF THE MOTION AND DETAIL WITH SPECIFICITY THE BASIS OF THE OBJECTION TO THE MOTION. YOU MUST FILE YOUR OBJECTION WITH THE OFFICE OF FORECLOSURE, P.O. BOX 971, 25 MARKET STREET, TRENTON, NEW JERSEY 08625, AND SERVE A COPY ON THE MOVING PARTY. THE OFFICE OF FORECLOSURE DOES NOT CONDUCT HEARINGS. YOUR PERSONAL APPEARANCE AT THE OFFICE WILL NOT QUALIFY AS AN OBJECTION. IF YOU FILE A SPECIFIC OBJECTION TO THE MOTION, THE CASE WILL BE SENT TO A JUDGE FOR RESOLUTION. YOU WILL BE INFORMED BY THE JUDGE OF THE TIME AND PLACE OF THE HEARING ON THE MOTION."

Please note that no hearing will take place at the time and place above, as the Office of Foreclosure is not a hearing office. An appearance is not required.

Dated: _____, 20____.

Attorneys for the Plaintiff

By _____

CERTIFICATION OF SERVICE OF NOTICE

_____, does hereby certify

I am employed by _____, attorneys for Plaintiff in the above entitled action.

On _____, 20____, a copy of the within Notice of Motion and was sent to the following:

[List names and addresses mailed to]

by certified mail, return receipt requested and by regular mail, with required postage thereon, by depositing an envelope containing said Notice of Motion through the United States mail.

I hereby certify that the foregoing statements made by me are true; I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

Name and Title

FORM NO. 38

ORDER VACATING DEFAULT ENTERED BY CLERK

[Use Abbreviated Caption]

This matter being opened to the Court, by _____, Attorney for _____, and it appearing that the default of the defendant has been entered by the Clerk, and _____ is desirous of vacating that the default;

It is, on this _____ day of _____, 20____, ORDERED that:

1. The default entered in this action as to *(insert name of defendant)* be and hereby is vacated.
2. The defendant be and hereby is permitted to serve and file an answer within ten (10) days of the signing of this order.
3. The Superior Court Clerk is directed to correct the county of venue on the Automated Case Management System docket.
4. A copy of this order shall be served on all parties with Seven (7) days of the date of this order.

J.S.C.

Respectfully Recommended:

R. 1:34-6 OFFICE OF FORECLOSURE

FORM NO. 39

ORDER CHANGING VENUE

[Use Abbreviated Caption]

This matter being opened to the Court, by _____, Attorney for _____, and it appearing that the complaint incorrectly designated the county of venue as _____ County instead of _____ County, and plaintiff is desirous of correcting the venue;

It is, on this _____ day of _____, 20____, ORDERED that:

1. The venue of the within action be corrected to read _____ County, and that the complaint and all pleadings in this action be amended to name _____ County as the county of venue.
2. The Superior Court Clerk is directed to correct the county of venue on the Automated Case Management System docket.
3. A copy of this order shall be served on all parties with Seven (7) days of the date of this order.

J.S.C.

Respectfully Recommended:

R. 1:34-6 OFFICE OF FORECLOSURE

[Attach supporting certification]

Editor's Note: This order is usually signed ex parte by the Office of Foreclosure.

FORM NO. 40**ORDER CORRECTING LEGAL DESCRIPTION**

[Use Abbreviated Caption]

THIS MATTER having been brought before the Court on application of _____, attorneys for plaintiff, that a minor deficiency in the metes and bounds description requires correct, and proof having been submitted as to the deficiency and good cause appearing for the entry of said order;

It is on this _____ day of _____, 20____, ORDERED that:

1. The metes and bounds description attached to the complaint is correct to read:

[Insert Corrected Metes and Bounds Description]

2. A copy of this order shall be served on all parties with Seven (7) days of the date of this order.

J.S.C.

Respectfully Recommended:

R. 1:34-6 OFFICE OF FORECLOSURE

FORM NO. 41**ORDER SUBSTITUTING NAME OF PLAINTIFF**

[Use Abbreviated Caption]

This matter being brought on by _____, Attorney for the plaintiff, and appearing that *(insert the name of original plaintiff)* assigned and transferred its interest to *(insert the name of the substituted plaintiff)* and good cause appearing.

It is on this _____ day of _____, 20____, ORDERED:

1. The complaint and all pleadings in this action be and hereby are amended by striking the name of the *(insert the name of original plaintiff)* as the party plaintiff in the complaint and all pleadings.

2. *(Insert the name of the substituted plaintiff)* be and hereby is substituted in the place and stead of *(name of original plaintiff)*.

3. The caption be and hereby is amended to delete the name *(insert the original plaintiff)* and replace in his/her/its stead the name *(insert the new plaintiff's name)*.

4. The Superior Court Clerk is directed to correct the county of venue on the Automated Case Management System docket.

5. A copy of the order shall be served on all parties within Seven (7) days of the date of this order

J.S.C.

Respectfully Recommended:

R. 1:34-6 OFFICE OF FORECLOSURE

Dated:

FORM NO. 42

ORDER CORRECTING NAME OF DEFENDANT

[Use Abbreviated Caption]

This matter being brought on by _____, Attorney for the plaintiff, and it being represented to the Court that the correct name of the defendant _____ is now _____ and that the name of the defendant, _____ was omitted from the caption and good cause being shown;

It is on this _____ day of _____, 20__, Ordered that the complaint be amended to correct the name of the defendant to read as follows: [State correct name]

And it is further Ordered that the caption is amended to include the following defendant, _____ and it is further Ordered that plaintiff need not serve a copy of this order upon

defendants.

J.S.C.

Respectfully Recommended:

R. 1:34-6 OFFICE OF FORECLOSURE

Editor's Note: This order is customarily used where a tenant has been fictitiously designated in the complaint, and the sheriff or process server has served the tenant and ascertained the tenant's correct name. This order is used to correctly identify and name the defendant in the action.

FORM NO. 43

ORDER SUBSTITUTING HEIRS, DEVISEES, AND PERSONAL REPRESENTATIVES

[Use Abbreviated Caption]

This matter being opened to the Court, by _____, Attorney for _____, and it appearing that the defendant, *(insert the deceased defendant's names)* has passed away and good cause appearing,

It is, on this _____ day of _____, 20____, ORDERED that:

1. *(Insert personal representative's name)*, personal representative of the estate of *(insert the deceased defendant's name)* is hereby joined as a party defendant to extinguish his/her power over title, *N.J.S.A. 3B:3-10*.

2. *(Insert the intestate heirs or testamentary devisee's who succeed to title of the property)* are hereby joined as party defendants to extinguish any title interest granted by *N.J.S.A. 3B:1-3*.

3. The Superior Court Clerk is directed to correct the county of venue on the Automated Case Management System docket.

3. A copy of this order shall be served on all parties with Seven (7) days of the date of this order.

J.S.C.

Respectfully Recommended:

R. 1:34-6 OFFICE OF FORECLOSURE

FORM NO. 44

ORDER APPOINTING ATTORNEY FOR DEFENDANT IN MILITARY SERVICE

[Use Abbreviated Caption]

It appearing the defendant _____ is in the military service of the United States and is not represented by an attorney;

It is, on motion of _____, attorney for the plaintiff, on this _____ day of _____, 20____, Ordered that _____, an attorney at law of the State of New Jersey, be and he is appointed as attorney for said defendant, by whom said defendant may appear and defend this action and be represented herein;

It is further ordered that said attorney investigate and inquire into the interest, rights and claims of said defendant, and if said attorney believes that said defendant has a defense, the said attorney shall interpose such defense by way of an appropriate pleading; and

It is further ordered that if upon such investigation and inquiry the said attorney shall conclude that the defendant has no defense to the action, and that no defensive measures should be taken in this action on his behalf, the said attorney shall within the time above limited, report to this court in writing the nature of his investigation, and the facts upon which his conclusion is based, and that such report be filed in this action.

J.S.C.

Respectfully Recommended:

R. 1:34-6 OFFICE OF FORECLOSURE

Editor's Note: Supporting certification should be furnished to Office or court in connection with Order.

FORM NO. 45**REPORT OF ATTORNEY FOR DEFENDANT IN MILITARY SERVICE**

[Use Abbreviated Caption]

_____, Esq., appointed by Order entered _____, 20____, as attorney for _____, a defendant in the military service who has failed to appear reports as follows:

This action is to foreclose a mortgage dated _____, 20____, on premises commonly known as _____, _____, New Jersey _____.

The mortgage amount was \$_____ and there is presently due on said mortgage \$_____.

The property is assessed at \$_____ for tax purposes.

I contacted the defendant _____, who is presently stationed at _____, _____ and had several telephone conversations with him/her. The defendant has advised that he/she has no defense to the foreclosure and no funds to redeem or reinstate the mortgage.

[Alternate]

I contacted the defendant _____, who is presently stationed at _____, _____ and had several telephone conversations with him/her. The defendant advised of his/her desire to reinstate the mortgage. On _____, 20____, I forwarded to the defendant a statement of the amount required to cure but as of this date defendant has not tendered the required amount and has in fact advised that he/she does not have sufficient funds to effectuate a cure at this time or in the foreseeable future. The defendant has also advised that he/she has no defense to the foreclosure.

Based upon my communications with the defendant it would appear that the defendant has no legal defense to the foreclosure, no funds to reinstate or redeem the mortgage and no grounds to dispute the validity or enforceability of the mortgage. Moreover, the defendant did not authorize or request that I file an answer contesting the foreclosure.

Respectfully submitted,

Attorney for Defendant

Dated:

FORM NO. 46

**NOTICE OF MOTION FOR APPOINTMENT OF GUARDIAN AD LITEM
FOR MINOR OR ALLEGED MENTALLY INCAPACITATED PERSON
AND CERTIFICATION OF SERVICE**

[Use Abbreviated Caption]

TO _____:

Take notice that unless you, or some other person on your behalf, makes application for the appointment of a guardian ad litem for _____, that on the _____ day of _____, 20____, [insert a date at least 10 days after time default will be entered] 9:00 A.M. [prevailing time] or soon thereafter as counsel can be heard, I shall apply before the Superior Court, Chancery Division, at _____, _____, New Jersey, _____, for the appointment of a guardian ad litem to represent and defend the action on your behalf.

Dated: _____, 20____.

Attorney for Plaintiff

CERTIFICATION OF SERVICE

_____, does hereby certify

I am employed by _____, attorneys for Plaintiff in the above entitled action.

On _____, 20____, a copy of the within Notice of Motion for Appointment of a Guardian Ad Litem was sent to the following:

[List names and addresses mailed to]

by certified mail, return receipt requested and by regular mail, with required postage thereon, by depositing an envelope containing said Notice of Motion for Appointment of a Guardian Ad Litem through the United States mail.

I hereby certify that the foregoing statements made by me are true; I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

Title

Dated:

Editor's Note: The Office of Foreclosure will not appoint a guardian ad litem for an "owner."

Editor's Note: The notice of motion for appointment of a guardian ad litem must be served on the appropriate persons designated in Rule 4:4-4(a)(1)(2) or (3) who were served for or on behalf of the alleged mentally incapacitated person or minor.

FORM NO. 47

CERTIFICATION FOR APPOINTMENT OF GUARDIAN AD LITEM

[Use Abbreviated Caption]

_____ does hereby certify:

1. I am an attorney-at-law of the State of New Jersey, associated with the attorney for the plaintiff and the person entrusted with the conduct and management of the action.

2. The defendant, _____, is a minor/alleged mentally incapacitated person.

3. Said minor/alleged incapacitated person was served with summons and complaint in accordance with the rules governing civil practice of the courts.

4. A default has been entered against said defendant and no guardian ad litem has been appointed for said defendant and no application has been made by any person on his behalf for the appointment of such a guardian.

5. Due notice of an application for the appointment of a guardian has been given in accordance with the rules.

6. By reason of the minority/alleged incapacity of such defendant he is unable to defend the action.

7. A guardian ad litem should therefore be appointed for said defendant, for the purpose of defending this action on his behalf.

I hereby certify that the foregoing statements made by me are true; I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

Dated: _____, 20____.

Editor's Note: If a guardian ad litem is not to be appointed for an owner, the motion should be returnable before the Office of Foreclosure, Hughes Justice Complex, 6th Floor, North Wing, Trenton, NJ 08628. The Office will not appoint a guardian ad litem for an owner defendant.

FORM NO. 48

ORDER APPOINTING GUARDIAN AD LITEM

[Use Abbreviated Caption]

This matter having been presented to the Court, upon the return date of a motion for the appointment of a guardian ad litem for _____, an infant/alleged incompetent, a defendant in this action, and good cause appearing for this order.

It is on this _____ day of _____, 20____, Ordered that _____ be and he hereby is appointed guardian ad litem to represent and defend this action on behalf of such minor/alleged incompetent; and

It is further ordered that the plaintiff do serve a copy of this order, which need not be certified, upon said guardian ad litem.

J.S.C.

Respectfully Recommended:

RULE 1:34-6 OFFICE OF FORECLOSURE

Editor's Note: As of this writing, the Office of Foreclosure will not enter this order where the minor or incompetent defendant is the owner.

FORM NO. 49**PROOF OF MAILING ORDER OF APPOINTMENT**

[Use Abbreviated Caption]

1. I am an employee of _____ attorneys for plaintiff in the above-entitled action.

2. On _____, 20____, I mailed a copy of the Order Appointing Guardian Ad Litem, by placing such copies in an envelope, addressed as below, sealing said envelope, placing proper postage thereon, by ordinary mail to attorneys and by certified mail, return receipt requested and by ordinary mail to parties, and, mailing such envelop at the Post Office, _____, New Jersey to the persons and addresses listed below:

[LIST NAMES AND ADDRESSES OF PERSONS MAILED TO: PERSONS SERVED ON BEHALF OF MINOR/MENTALLY INCAPACITATED PERSON AND PERSON APPOINTED GUARDIAN AD LITEM]

3. I hereby certify that the foregoing statements made by me are true; I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

Name of Employee

Dated:

Editor's Note: Even though R. 4:26-2(b)(3) does not require service of the Order, nevertheless it should be served on the above persons.

FORM NO. 50

**ANSWER BY GUARDIAN AD LITEM
ON BEHALF OF MINOR OR ALLEGED INCOMPETENT**

[Use Abbreviated Caption]

The answer of _____, a minor [or alleged mentally incapacitated person] defendant, by _____, Guardian Ad Litem, says that:

1. The defendant admits to an interest in the subject matter of the complaint.
2. The defendant is otherwise a stranger to the matters contained therein.
3. The defendant submits to the judgment of this Court and respectfully requests that the interest of the defendant be protected.

Dated: _____, 20____.

Guardian ad Litem

FORM NO. 51
REPORT OF GUARDIAN AD LITEM
FOR MINOR OR ALLEGED INCOMPETENT

[Use Abbreviated Caption]

_____, Esq., appointed by Order entered _____, 20____, as Guardian Ad Litem for defendant _____, a [minor/alleged incompetent] reports as follows:

This action is to foreclose a mortgage dated _____, 20____, on premises commonly known as _____, _____, New Jersey _____.

The mortgage amount was \$_____ and there is presently due on said mortgage \$_____.

The property is assessed at \$_____ for tax purposes.

I contacted the defendant _____ presently living at _____, _____ and had several telephone conversations with him/her. I attempted to ascertain from the defendant whether the defendant had any defense to the foreclosure or sufficient funds to redeem or reinstate the mortgage but was unable to do so.

I also contacted members of defendant's family and attempted to ascertain from them whether the defendant had any defense to the foreclosure or sufficient funds to redeem or reinstate the mortgage but was unable to do so.

It would appear that the defendant has no legal defense to the foreclosure, no funds to reinstate or redeem the mortgage and no grounds to dispute the validity or enforceability of the mortgage. Moreover, neither the defendant nor any one on defendant's behalf authorize me to file an answer contesting the foreclosure.

Respectfully submitted,

Guardian Ad Litem

Dated:

FORM NO. 52

**NOTICE BY DEFENDANT FOR LEAVE TO PROCEED
(ABANDONMENT RULE -- RULE 4:64-4)**

[Use Abbreviated Caption]

To _____, Attorney for the Plaintiff, and to all defendants.

Please take notice, that I shall apply before his Honor _____, Chancery Division Judge, or such other Judge who shall be hearing motions on the _____ day of _____, 20____, at 9:00 in the forenoon, [prevailing time] at the _____, in the _____ of _____, New Jersey on behalf of the defendant, _____, who holds a mortgage subordinate to plaintiff's mortgage, and who filed an answer requesting that the claim of such defendant be reported on, to proceed with the action to judgment and execution, and disallow any costs to plaintiff because the plaintiff neglects or refuses to proceed with the action, although a considerable time has elapsed since the commencement of the action.

Attached and made a part hereof, is an affidavit in support of this application.

Attorney for defendant
[Naming defendant]

CERTIFICATION OF SERVICE

_____, does hereby certify

I am employed by _____, attorneys for Plaintiff in the above entitled action.

On _____, 20____, a copy of the within Notice of Motion for an Order To Proceed was sent to the following:

[List names and addresses mailed to]

by certified mail, return receipt requested and by regular mail, with required postage thereon, by depositing an envelope containing said Notice of Motion for an Order To Proceed through the United States mail.

I hereby certify that the foregoing statements made by me are true; I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

Name and Title

[Attach an affidavit or certification in support of the motion, indicating interest of defendant and plaintiff's delay in proceeding with its foreclosure.]

FORM NO. 53

BANKRUPTCY CERTIFICATION (RELIEF FROM STAY)

[Use Abbreviated Caption]

I am an attorney at law of New Jersey associated with the attorneys for the plaintiff and I am the person actually entrusted with the management and conduct of this action.

On _____, 200__, defendant _____ filed a petition under Chapter _____ of the United States Bankruptcy Code.

On _____, 200__, an Order vacating the automatic stay was filed for this property permitting the within foreclosure to proceed.

I hereby certify that the foregoing statements made by me are true; I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

[Attach Copy of Order]

If Notice of Proposed Abandonment is submitted to the Office of Foreclosure as proof of relief from the Bankruptcy stay, Proof of No Objection filed by the Clerk must also be submitted.

Name of Attorney

Dated:

FORM NO. 54

CERTIFICATION OF MARITAL STATUS

_____, of full age, by way of certification in accordance with R.1:4-4(b), says:

2. I am employed by _____, attorneys for plaintiff in the above entitled cause.

3. I have ascertained by means of information obtained during the foreclosure action that the defendant _____ is married and his/her wife's/husband's name is _____.

[Alternate paragraph]

3. I have ascertained by means of information obtained during the foreclosure action that the defendant _____ is not married.

I hereby certify that the foregoing statements made by me are true; I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Name of Person

Dated:

FORM NO. 55**ORDER PERMITTING ENTRY OF JUDGMENT AGAINST DEFENDANT
DESIGNATED BY INITIALS -- RULE 4:26-6**

[Use Abbreviated Caption]

This matter being opened to the Court in accordance with R. 4:26-6, and it being represented to the Court in the attached certification that notwithstanding diligent inquiry plaintiff has been unable to ascertain a first name for defendant other than M.C. Dean;

It is on this _____ day of _____, 20____;

ORDERED, that leave is hereby granted to the plaintiff in the above foreclosure action to enter the foreclosure judgment against defendant, J.R. Roy, using said initials as the full first name of said defendant.

J.S.C.

Respectfully Recommended:

R. 1:34-6 OFFICE OF FORECLOSURE

[Attach Certification in Support of above Order detailing steps taken to ascertain the first full name of defendant, such as written letters of inquiry to defendant etc. See below.]

FORM NO. 56**CERTIFICATION IN SUPPORT OF ORDER PERMITTING ENTRY OF JUDGMENT
AGAINST DEFENDANT DESIGNATED BY INITIALS**

[Use Abbreviated Caption]

_____, an employee of _____, attorneys for plaintiff in the above action, by way of certification in accordance with Rule 1:4-4(b) says:

1. I have made inquiry as to the full first name of J.R. Roy, the owner of the mortgaged premises.

2. The loan application, mortgage documents, title search and plaintiff's records use the initials "J.R." as defendant's full given name.

3. I sent an inquiry letter to J.R. Roy requesting information regarding defendant's full first name. To date I have received no response to my inquiry.

4. I have examined the sheriff's return of service and find that defendant was served as J.R. Roy and that the sheriff was unable to obtain any other first name for the defendant.

5. I know of no other source from which I can obtain information regarding defendant's full first name.

6. This certification is made in support of an order permitting entry of judgment against defendant using the initials "J.R." as defendant's full given name in accordance with R. 4:26-6.

I hereby certify that the foregoing statements made by me are true; I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

Name of Person

Dated:

FORM NO. 57

**CERTIFICATION OF INABILITY TO ASCERTAIN
DEFENDANT'S FIRST NAME (OR NAME)**

[Use Abbreviated Caption]

_____, an employee of _____, attorneys for plaintiff in the above action, by way of certification in accordance with R. 1:4-4(b) says:

1. In accordance with Rule 4:26-5, defendant has been designated "Mrs. John Brown."

2. I have made inquiry as to the first name of defendant.

3. I sent inquiry letters to Mr. And Mrs. John Brown requesting information regarding defendant's first name. To date I have received no response to my inquiries.

4. I examined the mortgage documents and can find no first name designated in the documents for defendant Mrs. John Brown.

5. I have examined plaintiff's records and can find no first name designated in the documents for defendant Mrs. John Brown

6. I examined the sheriff's return of service for defendant in order to ascertain defendant's first name but the sheriff was unable to obtain a first name and the return of service does not set forth a first name for the defendant.

7. I know of no other source from which I can obtain information regarding defendant's first name

I hereby certify that the foregoing statements made by me are true; I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

Name of Person

Dated:

Editor's Note: This form certification should be used where a defendant is fictitiously designated in accordance with the Rules. If a defendant has been designated "John Doe, husband of Mary Green, said name of John Doe being fictitious," for example, in accordance with R. 4:26-5, the above certification should refer to plaintiff's inability to ascertain defendant's full name.

Editor's Note: Where the Rules expressly permit joinder of a defendant using a fictitious designation—e.g., "Mrs. John Brown, his wife" or "John Doe, husband of _____, said name of John Doe being fictitious,"--except where the defendant's first name is designated by initials, no order is required to enter judgment against the defendant using that fictitious designation.

Attorney for Plaintiff

FORM NO. 58**CERTIFICATION AND NOTICE TO DEFENDANTS BY ENCUMBRANCER SEEKING
TO BE INCLUDED IN FINAL JUDGMENT**

[Use Abbreviated Caption]

_____ does hereby certify:

I am a member of the law firm of _____, attorneys for the plaintiff in the above entitled action, and have full charge thereof.

On _____, 2000, and in accordance with R. 4:64-1(e)(2), notice of the amount claimed due on Defendant's _____ encumbrance was served on all defendants whose addresses are known or readily ascertainable, by ordinary mail to attorneys of record and by certified mail, return receipt requested and ordinary mail to defendants pro se, as follows:

[List Names and Addresses Mailed To]

I certify that none of the defendants listed above has, within 10 days after the date of service of the notice, as aforesaid, served upon me a written objection to the validity, priority or amount of the encumbrance held by Defendant *[Name]*.

I hereby certify that the foregoing statements made by me are true; I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

 Name of Attorney

Dated:

Editor's Note: A defendant-subsequent encumbrancer's Proof of Amount Due must be filed with the Office of Foreclosure together with the above Certification and, if defendant holds a lien or encumbrance other than a judgment, e.g., a mortgage, then defendant's certified or original Instruments must also accompany the above Certification. Defendant's proofs must, of course, be received by the Office of Foreclosure prior to entry of final judgment and must be in compliance with R. 4:64-1(e) to be included for payment in the final judgment.

FORM NO. 59**CERTIFICATION OF NON-MILITARY SERVICE**

[Abbreviated Caption]

_____ does hereby certify:

I am a member or associate of the law firm of _____, attorneys for the plaintiff in the above entitled action, and have full charge thereof.

1. None of the defendants (natural persons) in this action defaulted for failure to appear are in the military service of the United States, or its allies.
2. Attached hereto is a Department of Defense Statement (s) for the debtors, mortgagors or borrowers.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

(Name of Attorney)

Date:

FORM NO. 60

**CERTIFICATION OF NON-MILITARY SERVICE
(NO DEPARTMENT OF DEFENSE STATEMENT OBTAINABLE)**

[Abbreviated Caption]

_____ does hereby certify:

I am a member or associate of the law firm of _____, attorneys for the plaintiff in the above entitled action, and have full charge thereof.

1. I have been unable to obtain Department of Defense Statements for the following non-

debtor, mortgagor or borrower defendants because they are subsequent encumbrancers and I have no social security numbers for them.

[List names of defendants]

2. To the best of my knowledge, none of the above defendants are in the military service of the United States, or its allies.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

(Name of Attorney or Employee)

Date:

FORM NO. 61

CERTIFICATION OF SEARCH FEES

[Abbreviated Caption]

I am an Attorney at Law of New Jersey and actually entrusted with the conduct of this action.

1. I caused a title search to be done in the county where the premises are located for the purpose of determining the state of the title to be foreclosed.
2. Allowance is asked for the following search fees which were incurred subsequent to the mortgage being foreclosed and other allowable fees.

Title search	<i>[Dollar Amount]</i>
Filing lis pendens	<i>[Dollar Amount]</i>
Sheriff's fees for service	<i>[Dollar Amount]</i>
Private process server's fees	<i>[Dollar Amount]</i>
Certified mail (original service)	<i>[Dollar Amount]</i>
Publication fees	<i>[Dollar Amount]</i>
TOTAL COSTS	<i>[Dollar Amount]</i>

I certify that the above statements are true. I am aware that if any of the above statements

are willfully false that I am subject to punishment.

[Name of Attorney]

Dated:

FORM NO. 62

PROOF OF AMOUNT DUE AFFIDAVIT AND SCHEDULE

**AFFIDAVIT OF AMOUNT DUE TO ANNEXED TO NOTICES OF MOTION FOR
JUDGMENT IN RESIDENTIAL MORTGAGE FORECLOSURE ACTIONS PURSUANT
TO RULE 4:64-2 AND THAT MUST BE SUBMITTED IN FORECLOSURE ACTIONS
PENDING AS OF JUNE 9, 2011**

[Abbreviated Caption]

_____, of full age, being duly sworn according to law, depose and say:

1. *(If by an employee of the plaintiff) I (insert the affiant's name), am employed by the plaintiff as its (insert the city/state location where the affiant works) office as a (inset the affiant's title/position). My responsibilities in this position are (insert the affiant's responsibilities). I am authorized to make this affidavit on the behalf of the plaintiff.*

1. *(If by an employee of plaintiff's mortgage loan servicer) I (insert affiant's name) am employed by (insert plaintiff's mortgage servicer's name) at its (insert the city/state location where the affiant works) office as a (inset the affiant's title/position). My responsibilities in this position are (insert the affiant's responsibilities). Said company is a mortgage servicing company authorized to service and handle mortgage transactions on behalf of the plaintiff involving the mortgage debtor(s) named in the plaintiff's complaint. The plaintiff has not revoked said mortgage servicing company's authority and, as such, I have the authority to make, on behalf of the plaintiff, the computation of amount due herein set forth*

2. *I have thoroughly reviewed (insert the plaintiff's or plaintiff's mortgage servicing company's] books and records concerning the note and mortgage loan described in the plaintiff's complaint.*

3. *Said books and business records indicate that the default of the defendants-borrowers, _____, remains uncured and there is due to the plaintiff in this action the sum of \$ _____, as set forth in the Proof of Amount Due Schedule annexed hereto. I have reviewed all entries and calculations, and they are correct. Per diem interest, as*

set forth in the annexed schedule, will accrue on the principal from _____, 20____.

4. The property described in the complaint in action cannot be divided and should be sold as a single tract.

5. There are no just debts, set-offs, credits or allowances due or to become due from the plaintiff to the defendant-borrower(s), other than those set forth herein.

6. The plaintiff is the owner/holder the aforesaid note and mortgage.

7. I understand that the court will rely upon this affidavit in support of the plaintiff's application for a judgment in the within action.

sign above and type/print below

Sworn to and subscribed before me, this
_____ day of _____, 20____

Notary Public of the State of _____
My Commission Expires: _____

[NOTARY SEAL]

AMOUNT DUE SCHEDULE

NOTE AND MORTGAGE DATED: _____

Recorded on _____, in _____, County, in Book _____, Page _____.

Property Address: _____

Mortgage Holder: _____

STATEMENT OF AMOUNT DUE

Unpaid Principal Balance as of _____ \$ _____

Interest from _____ to _____ \$ _____

(Interest rate = _____ % per year; \$ _____ per day x _____ days)

Late Charges from _____ to _____

(\$ _____ /mo. x _____ mos.) \$ _____

Advances through _____ for:

Real Estate Taxes \$ _____

Home Owners Insurance Premiums \$ _____

Mortgage Insurance Premiums \$ _____

Inspections \$ _____

Winterizing/Securing \$ _____

Sub-total of Advances \$ _____

Less Escrow Advances \$ _____

Net Advances \$ _____ \$ _____

Interest on advances from _____ to _____ \$ _____

Other Charges (specify) \$ _____

Total Due as of _____ \$ _____

Surplus Money: If after the sale and satisfaction of the mortgage debt including costs and expenses, there remains any surplus money, the money will be deposited into the Superior Court Trust Fund and any person claiming the surplus, or any part thereof, may file a motion pursuant to Court Rules 4:64-3 and 4:57-2 stating the nature and extent of that person's claim and asking for an order directing payment of the surplus money. The Sheriff or other person conducting the sale will have information regarding the surplus, if any

/s/ _____
Type or Print Lender's or Servicing Agent's Employee's name

Date:

FORM NO. 63**14 DAY NOTICE OF ENTRY OF JUDGMENT
(NOTICE TO CURE)****(LETTERHEAD OF LENDER'S ATTORNEY)**

(Date)

Via Certified Mail RRR#

Name of Individual Debtor

Street Address

Municipality, State, Zip Code

RE: Lender's Name

Lender's Account Number

Address of Mortgaged Premises

NOTICE OF ENTRY OF FINAL JUDGMENTDear *(Name of Debtor)*:

This is to advise you that absent a response from you in accordance with paragraph 2 of subsection 6a of the Fair Foreclosure Act, *N.J.S.A. 2A:50-58a(2)*, we will submit proper proofs for entry of final judgment in the above foreclosure action on or after *(Day/Month/Year—At least 14 days after date of mailing of Notice)* and that upon entry of final judgment you will lose your right provided pursuant to section 5 of the act to cure the default.

Paragraph 2 of subsection 6a of the Fair Foreclosure Act provides that you may, no later than 10 days after receipt of the within notice for entry of final judgment, mail to us a statement in which you in good faith certify as true that there is a reasonable likelihood that you will be able to provide payment necessary to cure the default within 45 days of the date that this notice became effective. The date this notice became effective was the date we mailed it to you on *(Day/Month/Year)*. This statement must be sent by registered or certified mail, return receipt requested, to our address. The name and address you may mail your statement to is: *(Name of Lender/C/O Name of Lender's Attorney/Address/Attention: Name of Person)*. If we receive such a timely statement from you, we cannot submit proper proofs for entry of final judgment in foreclosure earlier than *(Day/Month/Year—At least 46 days after date of mailing of notice)*.

The name and address of the lender and the telephone number of a representative of the lender whom you may contact to obtain the amount required to cure the default is set forth below:

Lender's name: _____

Lender's address: _____

Phone number of a representative of the lender: _____

(PLEASE NOTE: If a servicer is handling the loan, its contact information should be provided)

Servicer's name: _____

Servicer's address: _____

Phone number of a representative of the servicer: _____

(Name of Law Firm)

By: _____

(Name of Attorney)

Editor's Note: For actions instituted on or after July 16, 2006, the 14-day notice of entry of judgment must include the name and address of the lender and the telephone number of the lender's representative whom the debtor may contact to obtain the amount required to cure the default.

Editor's Note: A separate notice should be used for each debtor and mailed to each debtor in separate envelopes (even if husband and wife) by the lender's attorney. The notice should direct the debtor to respond to the lender's attorney. See Federal National Mortgage Association v. Bracero, 297 N.J. Super. 105 (Ch. Div. 1996).

FORM NO. 64

**NOTICE OF MOTION FOR ALL FINAL JUDGMENTS
TO ANSWERING OR APPEARING PARTIES, MORTGAGORS AND TENANTS**

[Use Abbreviated Caption]

Take notice that we shall apply before the Office of Foreclosure, at the Hughes Justice Complex, 6th Floor, North Wing, Market Street, Trenton, NJ 08628 for the entry of judgment in this action in favor of the plaintiff for the relief demanded in the complaint and shall file the proof required by R. 4:64-2. Judgment sought will be entered in the discretion of the court unless the attorney or *pro se* party on whom it has been served notifies in writing the Office of Foreclosure and the attorney for the moving party or the *pro se* party within ten days after the date of service of the motion that the responding party objects to the entry of the order.

"IF YOU WANT TO OBJECT TO THE CALCULATION OF AMOUNT DUE, YOU MUST DO SO IN WRITING WITHIN 10 DAYS AFTER THE DAY YOU RECEIVED THIS MOTION. ANY OBJECTION TO THE CALCULATION OF THE AMOUNT DUE MUST ADDRESS AND DETAIL WITH SPECIFICITY THE BASIS OF THE OBJECTION TO THE AMOUNT DUE. YOU MUST FILE YOUR OBJECTION WITH THE OFFICE OF FORECLOSURE, P.O. BOX 971, 25 MARKET STREET, TRENTON, NEW JERSEY 08625, AND SERVE A COPY ON THE MOVING PARTY. THE OFFICE OF FORECLOSURE DOES NOT CONDUCT HEARINGS. YOUR PERSONAL APPEARANCE AT THE OFFICE WILL NOT QUALIFY AS AN OBJECTION. IF YOU FILE A SPECIFIC OBJECTION TO THE CALCULATION OF THE AMOUNT DUE, ON RECEIPT OF A SPECIFIC OBJECTION TO THE CALCULATION OF THE AMOUNT DUE PURSUANT TO R. 4:64-1(d)(1)(A), THE OFFICE OF FORECLOSURE SHALL REFER THE MATTER TO THE JUDGE IN THE COUNTY OF VENUE, WHO SHALL SCHEDULE SUCH FURTHER PROCEEDINGS AND NOTIFY THE PARTIES OR THEIR ATTORNEYS OF THE TIME AND PLACE THEREOF."

Please note that no hearing will take place at the time and place above, as the Office of Foreclosure is not a hearing office. An appearance is not required.

Dated: _____, 20____.

Attorneys for the Plaintiff

By _____

CERTIFICATION OF SERVICE OF NOTICE

_____, does hereby certify

I am employed by _____, attorneys for Plaintiff in the above entitled action.

On _____, 20____, a copy of the within Notice of Motion and Certification of Amount Due was sent to the following:

[List names and addresses mailed to]

by certified mail, return receipt requested and by regular mail, with required postage thereon, by depositing an envelope containing said Notice of Motion through the United States mail.

I hereby certify that the foregoing statements made by me are true; I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

Name and Title

Dated:

FORM NO. 65

Rule 4:64-2(d) Certification of Diligent Inquiry and Accuracy of Foreclosure Documents and Factual Assertions

_____, Esq., of full age, being duly sworn according to law, depose and say:

1. I am an attorney at law licensed to practice in the State of New Jersey and am affiliated with the law firm of _____, attorneys for the foreclosing Plaintiff with regard to the above entitled action. I am one of the attorneys responsible for this mortgage foreclosure action and am fully familiar with the pleading and documents filed in this action and the facts set forth in this affidavit.

2. On *[insert date]*, I communicated in *[mode of communication]* with the following named employee(s)*[insert the of the plaintiff or the name of the plaintiff's servicer]*, who informed me that he/she personally reviewed the affidavit of the amount due and the original or true copy of the note, mortgage and recorded assignments, if any, about to be submitted to the court and that he/she confirmed the accuracy of those documents:

Name of the Employee:

Title of the Employee:

Responsibilities of the Employee: verifications of pleadings and affidavits.

3. Based on my communication with the above named employee of Plaintiff or Plaintiff's mortgage loan servicer, as well as my own inspection of the documents about to be filed with the court and other diligent inquiry, I execute this certification to comply with the requirements of Rule 1:4-8(a) and 4:64-2(d).

4. I am aware that I have a continuing obligation under Rule 1:4-8 to amend this certification if a reasonable opportunity for further investigation or discovery indicates insufficient evidentiary support for any factual assertions proffered by plaintiff in any court filings or documents in this case.

By; _____

Sworn to and Subscribed before me, this

_____ day of _____, _____

Notary Public of the State of _____

My Commission Expires: _____

FORM NO. 66
CERTIFICATION OF MAILING OF 14 DAY NOTICE

[Abbreviated Caption]

On *(Day/Month/Year)*, I, the undersigned, the Attorney for *(Name of Lender)* mailed to the following persons, in separate envelopes, by certified mail, return receipt requested, with postage prepaid, a 14 day notice of entry of judgment in accordance with *N.J.S.A. 2A:50-58a*, advising the debtors of the debtors' right to cure under the act and the debtors' right to mail a certified statement to the attorney for the lender in accordance with the aforesaid statute:

(LIST NAMES OF PERSONS WITH MAILING ADDRESSES)

A copy of the notice mailed to each debtor is attached to this certification.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

(Name of Law Firm)

By: _____
(Name of Attorney)

Dated:

Editor's Note: For actions instituted on or after July 16, 2006, a copy of the notice mailed to the debtor must be attached to plaintiff's application for judgment.

Editor's Note: This form should be used alone where submission of final judgment papers is made to the Office or court "after" the 45 day period has elapsed from the date of mailing of the 14 day notice. Where final judgment papers are submitted "prior" to the expiration of the 45 day period, this form should be used together with the Certification of No Response from the Debtor.

Editor's Note: The 14 day notice must be mailed in "separate" envelopes to each debtor even if they are husband and wife living at the same address. The notice must be mailed to the debtor's last known address, and if different from the address of the mortgage premises, also to the mortgaged premises, N.J.S.A. 2A:50-56b, 58a. It is the author's suggestion that the notice also be mailed to any other address of the debtor of which the lender is aware.

FORM NO. 67**CERTIFICATION OF NO RESPONSE**

[Abbreviated Caption]

I, the undersigned, Attorney for *(Name of Lender)* certify that, pursuant to section 6 of the Fair Foreclosure Act, *N.J.S.A. 2A:50-58*, neither I, nor to the best of my knowledge, anyone on behalf of the lender received a statement from any of the following persons or anyone on their behalf within 10-days after receipt by said persons of the notice of entry of judgment:

(LIST NAMES OF PERSONS)

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

(Name of Law Firm)

By: _____

(Name of Attorney)

Dated:

Editor's Note: This proof is required only where you are applying to the Office or court for final judgment before 45 days have elapsed from the date of mailing of the 14 day notice. This form should be used together with the previous form—the Certification of Mailing of the 14 Day Notice. After 45 days have elapsed, this form serves no purpose.

FORM NO. 68

**CERTIFICATION OF MAILING OF 14 DAY NOTICE
AND NO RESPONSE (COMBINED)**

[Abbreviated Caption]

On *(Day/Month/Year)*, I, the undersigned, the Attorney for *(Name of Lender)* mailed to the following persons, in separate envelopes, by certified mail, return receipt requested, with postage prepaid, a 14 day notice of entry of judgment in accordance with *N.J.S.A. 2A:50-58a*, advising the debtors of the debtors' right to cure under the act and the debtors' right to mail a certified statement to the attorney for the lender in accordance with the aforesaid statute.

I certify that in accordance with section 6 of the act, neither I, nor to the best of my knowledge, anyone on behalf of the lender received a statement from any of the following persons or anyone on their behalf within 10-days after receipt by said persons of the notice of entry of judgment:

(LIST NAMES OF PERSONS WITH MAILING ADDRESSES)

A copy of the notice mailed to each debtor is attached to this certification.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

(Name of Law Firm)

By: _____

(Name of Attorney)

Editor's Note: This is a combined mailing and no response form which eliminates the need for a separate "no response" certification when submitting final judgment papers to the Office prior to the 46th day.

FORM NO. 69**CERTIFICATION THAT 14 DAY NOTICE IS NOT REQUIRED**

(Abbreviated Caption)

1. I am the attorney for plaintiff in the above-entitled action.

[sample allegations where debtor has waived the provisions of act]

2. On *(Date/Month/Year)*, the debtor, after default, and pursuant to a workout agreement signed a separate written document waiving any and all rights under the act in accordance with section 9 of the Fair Foreclosure Act, *N.J.S.A. 2A:50-61*.

3. By virtue of the aforesaid waiver of rights under the act, the debtor is not entitled to service of a 14 day notice of entry of judgment pursuant to *N.J.S.A. 2A:50-58a*.

[sample allegations where deed in lieu of foreclosure given]

4. On *(Day/Month/Year)* the debtor voluntarily surrendered the property that is the subject of the residential mortgage by signing a deed in lieu of foreclosure in favor of *(Name of Lender)* in compliance with the Fair Foreclosure Act, *N.J.S.A. 2A:50-53 et seq.*, which was recorded on *(Day/Month/Year)* in the *(Name)* County *(Clerk's or Register's)* Office in Deed Book *(Number)* at Page *(Number)*.

5. By virtue of the aforesaid voluntary surrender and deed in lieu of foreclosure by the debtor to the lender in accordance with the act, the debtor is not entitled to service of a 14 day notice of entry of judgment pursuant to *N.J.S.A. 2A:50-56a*.

6. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

Dated:

(Name of Law Firm)

By: _____

(Name of Attorney)

FORM NO. 70**STATEMENT BY DEBTOR**

(Date)

Via Certified Mail RRR#

Name of Attorney For Lender

Address

Municipality, State, Zip Code

RE: Debtor's Name

Lender's Account Number

Address of Mortgaged Premises

Statement of DebtorDear *(Name of Attorney For Lender)*:

Please be advised that I, the undersigned debtor, in good faith certify as true that there is a reasonable likelihood that I will be able to provide payment necessary to cure the default within 45 days of the date the notice required by paragraph (1) of subsection 6a of the Fair Foreclosure Act, *N.J.S.A. 2A:50-58a(1)*, was mailed to me.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

(Name of Debtor)

Editor's Note: Apparently a certified statement from any single debtor will stay the entry of judgment for the 45 day period.

FORM NO. 71**COMBINED CERTIFICATION OF MAILING OF VARIOUS FORECLOSURE
DOCUMENTS AND NON-MILITARY STATUS**

[Abbreviated Caption]

_____, of full age, knowing that the Court relies on the statements herein set forth, hereby certifies and says:

1. I am the attorney for _____, the Plaintiff in the above captioned matter, and am familiar with the facts herein set forth.

2. On the within states dates, staff under my supervision and control caused the procurement of Department of Defense Manpower Data Center Reports and posting with the United States Postal Service of the within described letters, notices, and court documents mailed to the within named persons at the addresses next to their name.

3. On _____, a Notice of Motion for Final Judgment, in the form required by *R. 4:64-9*, and a Certification of Amount Due containing a schedule required by *R. 4:64-2* and found in App. XII-J of the Rules of New Jersey Courts was mailed to the following parties at the addresses listed below on the dates set opposite their name:

☐ Mortgagors and all other named parties obliged on the debt.

☐ All parties who appeared in the action including the defendants whose answers have been stricken or rendered uncontested.

☐ Defaulting parties if application for final judgment is not made within six months of entry of default.

☐ Residential tenants joined as defendants in the action, along with the notice of tenants' rights during foreclosure [App. XII-K Court Rules]

Name

Address

4. On the following date, _____, a Fair Foreclosure Act Notice to Residential Mortgage Debtor(s) pursuant to *N.J.S.A. 2A: 50-58* was mailed to the following parties at the addresses listed below and a copy of said notice is attached hereto as an exhibit:

Name

Address

[] The Fair Foreclosure Act is not applicable for the following reasons: _____

5. On the following date, _____, the Notice of Mediation Availability, Foreclosure Mediation Financial Worksheet and combination HUD-Certified Housing Counselor Instruction Form and Foreclosure Mediation Recommendation Statement were served on the following parties pursuant to R. 4:64-1(d):

Name

Address

[] The availability of the Foreclosure Mediation Program is not part of the within foreclosure action for the following reason: _____.

6. On the following date, _____, a copy of the filed default was mailed to the following parties:

Name

Address

7. On the following date, _____, copies the following signed Order(s), _____, were served on the defendants listed below:

Name

Address

8. As indicated on the attached Department of Defense Manpower Data Center Reports, none of the debtors, mortgagors, or borrowers in the matter are in the military service of the United States or its allies, except the following parties: _____.

[] I have been unable to obtain Department of Defense Statements for the other non-debtor, mortgagor or borrower defendants because they are subsequent encumbrancers and the Plaintiff does not have the social security numbers necessary to obtain the report.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

(insert name of Law Firm)
 ATTORNEYS FOR PLAINTIFF

BY: _____
Attorney sign above and type name below

FORM NO. 72**NOTICE OF CURE**

[Abbreviated Caption]

TO: The Superior Court of New Jersey

Take notice that the within action has been cured in accordance with Section 5 of the Fair Foreclosure Act, *N.J.S.A.* 2A:50-57, and therefore must be dismissed.

Subsection 5e of the act provides: "If default is cured after the filing of a foreclosure action, the lender shall give written notice of the cure to the court. Upon such notice, the court shall dismiss the action without prejudice."

(Name of Law Firm)

By: _____

(Name of Attorney)

Date:

Editor's Note: This Notice should be sent by the lender's attorney to the Chief, Office of Foreclosure, CN-971, Trenton, New Jersey 08625 together with an Order for Dismissal Without Prejudice, Form No. 11. If the action is "contested," this Notice and Order of Dismissal should be sent to the vicinage chancery judge, R. 1:5-6(b)(3).

FORM NO. 73**ORDER OF DISMISSAL WITHOUT PREJUDICE
(WHERE CURE EFFECTED)**

(Abbreviated Caption)

The within action having been cured in accordance with Section 5 of the Fair Foreclosure Act, *N.J.S.A.* 2A:50-57, it is on this (Day/Month/Year) Ordered that the within action be dismissed without prejudice pursuant to Subsection 5e of said act.

J.S.C.

Editor's Note: This order should be used in conjunction with a "Notice of Cure," Form No. 10. Where the action is "uncontested," it should be sent to the Office of Foreclosure, CN-971, Trenton, New Jersey 08625. Where the action is "contested" it should be sent to the vicinage chancery judge, R. 1:5-6(b)(3).

FORM NO. 74

FINAL JUDGMENT

(Abbreviated Caption)

This matter being opened to the Court by *[Law Firm]*. Attorneys for Plaintiff, and it appearing to the Court that the Summons and Complaint (and amendments, if any) have been duly issued and returned served upon the Defendants, and the Clerk having entered default against all defendants for failure to plead or otherwise defend, *[except (Names of Defendants) who filed non-contesting answer(s)/except (Names of Defendants) who filed answer(s) which were stricken]* and the Plaintiff's note *[or bond]* and mortgage and assignments, if any, having been presented to the Court, and proofs having been submitted of the amount due on Plaintiff's mortgage, and sufficient cause appearing;

It is on this _____ day of _____, 200__, ORDERED AND ADJUDGED that the Plaintiff is entitled to have the sum of \$ _____ together with lawful interest thereon computed from _____, together with costs of this action to be taxed, including a counsel fee of \$ _____ raised and paid out of the mortgaged premises; and it is further

[Contract Rate Interest Alternative Paragraph]

It is on this _____ day of _____, 200__, ORDERED AND ADJUDGED that the Plaintiff is entitled to have the sum of \$ *(Total Dollar Amount From Proof)* with *(Contract Rate Interest from Note and Mortgage)* % interest on \$ *(Add Principal Sum in Default Plus Advances)*, being the principal sum in default plus advances, if any, from *(Date to which Interest Figured in Proof of Amount Due)* to *(Date of Judgment)* and lawful interest thereafter on the total sum due, together with costs of this action to be taxed, including a counsel fee of \$ _____ raised and paid out of the mortgaged premises; and it is further

[Inclusion of Encumbrancer Paragraph]

And to secondly pay *[Name of Encumbrancer]* the sum of \$ _____ together with lawful interest thereon computed from _____, together with costs of this action to be taxed, raised and paid out of the mortgaged premises; and it is further

ORDERED that the Plaintiff or purchaser at the Sheriff's sale duly recover against the said *[Name Defendants in Possession]*, and all persons holding under them, the possession of the premises mentioned and described in the said Complaint, with appurtenances; and it is further

ORDERED and adjudged that the mortgaged premises be sold to raise and satisfy the several sums of money due to the Plaintiff *[and defendant]* in the sum(s) aforesaid together with lawful *[and contract rate interest]* as aforesaid, together with costs to be taxed and that an Execution for that purpose duly issue out of this Court directed to the Sheriff of *[Name of*

County], commanding him or her to make sale, according to law, of the mortgaged premises described in the Complaint, and out of the moneys arising from the sale that he pay to the Plaintiff *[and defendant]* its said debt with interest thereon as aforesaid, and costs aforesaid, and in case more money shall be realized by said sale than shall be sufficient to answer such several payments, that such surplus be brought into this Court to abide the further order of this Court, and that the Sheriff of *[Name of County]* shall make his report of sale without delay as required by the Rules of this Court; and it is further

ORDERED and adjudged that the Defendants, and each of them, stand absolutely debarred and foreclosed of and from all equity of redemption of, in and to said mortgaged premises described in the Complaint when sold as aforesaid by virtue of this judgment.

Notwithstanding anything herein to the contrary, this judgment shall not affect the rights of any person protected by the New Jersey Tenant Anti-Eviction Act, N.J.S.A. 2A:18-61.1. et seq., the right of redemption given the United States of America under 28 U.S.C. Sec. 2410, the limited priority rights for aggregate customary condominium assessments for the six month period prior to the recording of any association lien as allowed by N.J.S.A. 46:8B-21 or rights afforded by the Servicemembers Civil Relief Act, 50 U.S.C. App. 501 et seq. or N.J.S.A. 38:23C-4.

Hon. Neil H. Shuster, P.J.Ch.

Respectfully recommended

R. 1:34-6 OFFICE OF FORECLOSURE

Editor's Note: The author strongly disagrees with the language of the last paragraph of the judgment which is apparently mandated by the Office of Foreclosure, especially as the language relates to the limited statutory priority granted to customary condominium assessments. By virtue of this language, it appears that a condominium association can assert its lien in accordance with the statute against the foreclosed property after foreclosure, although the association was joined in the action and failed to dispute plaintiff's priority in that action.

FORM NO. 75

PROOF OF MAILING (COPY OF JUDGMENT)

(Abbreviated Caption)

1. I, the undersigned, am a legal assistant with *[Name of Law Firm]*, attorneys for Plaintiff in the above entitled matter.

2. On (Day/Month/Year), I mailed in the U.S. Post Office at (City/Town and State), a sealed envelope with postage prepaid thereon, by regular and certified mail, return receipt requested to:

[List Names and Addresses of Persons Mailed To]

containing a copy of the Final Judgment.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

[Name]

Dated:

Editor's Note: As to defaulting defendants, R. 4:43-2(c) provides, in part:

Within seven days after receipt of the executed judgment from the court, the proponent of the judgment shall serve a copy thereof on the defaulting defendant as required by R. 1:5-2 except that service may be made by ordinary mail alone.

Editor's Note: As to appearing parties, R. 1:5-1 provides that a copy of the judgment must be served on all attorneys of record and parties appearing pro se within 7 days after it is signed. Service of papers under R. 1:5-1 is ordinarily made by ordinary mail to attorneys and simultaneous ordinary and certified mail to parties pro se, R. 1:5-2.

FORM NO. 76**CONSENT TO JUDGMENT**

[The following wording should appear below and to the left of the judge's signature line on the foreclosure judgment]

I hereby consent to the entry of the within judgment.

[Waiver Allegation]

[Defendant waives all notices and proceedings in relation to this action including the notice of motion for judgment, except the notice of sale and surplus moneys proceedings.]

Attorney for Defendant

Dated:

FORM NO. 77

**ORDER CORRECTING CLERICAL ERROR
IN FINAL JUDGMENT (RULE 1:13-1)**

[Use Abbreviated Caption]

This matter being opened to the Court by the Attorney for the plaintiff, and it appearing that a final judgment was entered in this action and through oversight there was a clerical error in said judgment in that *[Set forth error or omission in judgment]*, and for good cause appearing;

It is, on this _____ day of _____, 20____, Ordered that the final judgment entered in this action be and the same is hereby amended and corrected as follows:

[Set forth changes to be made]

J.S.C.

Respectfully Recommended:

R. 1:34-6 OFFICE OF FORECLOSURE

Editor's Note: If there are extensive changes in the judgment, an amended judgment can be used.

FORM NO. 78**WARRANT OF SATISFACTION (JUDGMENT)**

[Use Abbreviated Caption]

TO THE CLERK OF THE ABOVE NAMED COURT:

WHEREAS, Judgment was entered in the above entitled action in favor of the plaintiff against defendants, as appears in Docket No. *[SET FORTH DOCKET NUMBER FROM CAPTION]*

NOW, THEREFORE, this is your warrant and authority to enter on the aforesaid record, this satisfaction of judgment.

WITNESS my hand and seal this _____ day of _____, 20 _____.
Signed, Sealed and Delivered

in the presence of:

Attorneys for Plaintiff

By: _____

State of New Jersey)

ss.

County of _____

BE IT REMEMBERED, that on this _____ day of _____, 20 _____, personally appeared _____, an Attorney at law of New Jersey, who, I am satisfied, is the person mentioned in the

within instrument, and thereupon _____ acknowledged that [he/she] signed, sealed and delivered the same as [his/her] act and deed, for the uses and purposes therein expressed.

A Notary Public of New Jersey

or

An Attorney at Law of New Jersey

Editor's Note: If a foreclosure judgment is paid or otherwise satisfied, other than by a sale of the premises, a satisfaction of the judgment should be entered by the Clerk by virtue of a duly acknowledged or proven warrant of satisfaction, N.J.S.A. 2A:50-32.

FORM NO. 79

WRIT OF EXECUTION

(Abbreviated Caption)

THE STATE OF NEW JERSEY

To the Sheriff of [Name of County]

GREETING:

WHEREAS on the following date _____, by a certain Judgment in the Superior Court of New Jersey, in a certain cause therein pending, wherein the Plaintiff is [Name of Plaintiff] and the following named parties are the Defendants: [List Names of All Defendants], it was ordered and adjudged that certain mortgaged premises, with appurtenances, in the Complaint (and Amendments, if any) in said cause particularly set forth and described, that is to say:

The mortgaged premises are described as set forth upon the rider annexed hereto and made a part hereof.

Together with all and singular rights, liberties, privileges, hereditaments and appurtenances thereto belonging or in any wise appertaining, and the reversion and remainders, rents, issues and profits thereof, and also all the estate, right, title and interest, use, property, claim and demand of the said Defendants, of, in, to and out of the same, to be sold to pay and satisfy in the first place unto the plaintiff [Name of Plaintiff] the sum of \$ _____ being the principal, interest, and lawful advances, if any, secured by a certain mortgage dated _____ and given by _____ together with

lawful interest thereon from _____, until the same be paid and satisfied and also the costs of the aforesaid Plaintiff.

[Contract Rate Interest Alternative]

Together with all and singular rights, liberties, privileges, hereditaments and appurtenances thereto belonging or in any wise appertaining, and the reversion and remainders, rents, issues and profits thereof, and also all the estate, right, title and interest, use, property, claim and demand of the said Defendants, of, in, to and out of the same, to be sold to pay and satisfy in the first place unto the plaintiff *[Name of Plaintiff]* the sum of \$ *(Total Dollar Amount From Proof)* with *(Contract Rate Interest from Note and Mortgage)* % interest on \$ *(Add Principal Sum in Default Plus Advances)*, being the principal sum in default plus advances, if any, from *(Date to which Interest Figured in Proof of Amount Due)* to *(Date of Judgment)* and lawful interest thereafter on the total sum due, until the same be paid and satisfied and also the costs of the aforesaid Plaintiff.

[Inclusion of Encumbrancer Alternative]

And in the first place unto the defendant *[Name of Defendant]* the sum of \$ _____ being the principal and interest, secured by a certain mortgage dated _____ and given by _____ together with lawful interest thereon from _____, until the same be paid and satisfied and also the costs of the aforesaid Defendant.

And for that purpose a Writ of Execution should issue, directed to the Sheriff of *[Name of County]*, commanding him or her to make sale as aforesaid; and that the surplus money arising from such sale, if any, should be brought into the said court, subject to the further order of the said court, as by the said Judgment remaining as of record in the said Superior Court of New Jersey, at Trenton, doth and may fully appear; and whereas the costs of the said Plaintiff have been duly taxed at the following sum of \$ _____.

Therefore, you are hereby commanded *[*as you have been commanded before/as you have oftentimes been commanded**]* that you cause to be made of the premises aforesaid, by selling so much of the same as may be needful and necessary for the purpose, the aforesaid sum[s], and the same do you pay to the said Plaintiff *[and Defendant]* together with lawful *[and contract rate interest thereon]* interest thereon as aforesaid, the sum[s] aforesaid of costs, and that you have the surplus money if any there be, before the said Superior Court of New Jersey, as aforesaid, at Trenton, within 30 days after sale (if no sale, Writ returnable within 24 months, R. 4:59-1(a)), to abide the further order of the said court, according to the Judgment aforesaid; and you are to make return at the time and place aforesaid, by certificate under your hand, of the manner in which you have executed this our Writ, together with this Writ.

WITNESS, the Honorable Neil H. Shuster, Judge of the Superior Court at Trenton aforesaid, this _____ day of _____ 200 ____.

THEODORE J. FETTER

ACTING CLERK OF SUPERIOR COURT

[Name of Law Firm]
Attorneys for Plaintiff

By: _____
[Name of Attorney]

ATTACHED RIDER

The mortgaged premises are described as follows:

[Set forth description]

BEING COMMONLY KNOWN AS: *[Set forth street address]*

Block _____, Lot _____ Tax Map _____.

Editor's Note: The first writ is called a Writ of Execution. The second is called an Alias Writ of Execution; and all subsequent writs, no matter how many, are simply called Pluries Writs of Execution.

* *This language is to be used in an Alias Writ of Execution.*

** *This language to be used in a Pluries Writ of Execution.*

Editor's Note: The execution should follow the judgment as to amounts, dates and so forth.

Editor's Note: The writ of execution should contain the names of all defendants in the body of the execution, so the sheriff's deed will contain a recitation of all party defendants.

Editor's Note: Plaintiff's attorney need only sign the execution before he or she sends it to the sheriff. It does not have to be signed prior to execution by the Clerk.

FORM NO. 80**ASSIGNMENT OF MORTGAGE FORECLOSURE JUDGMENT (AND NOTE)**

[Use Abbreviated Caption]

The Assignor *[Naming person]* residing or located at *[Street No./City/County/State]*, for other good and valuable consideration does hereby assign to *[Naming person]* residing or located at *[Street No./City/County/State]*, the Assignee, a judgment of foreclosure entered in the Superior Court of New Jersey on _____ under Docket No. F- _____, against _____ et al.

[Assignment of Note if Applicable]

Assignor also assigns to Assignee that certain Note dated _____ between _____, Borrower, and _____ Note Holder in the original amount of \$ _____.

In witness whereof, the Assignor has signed and sealed this Assignment, or has caused this Assignment to be signed by its authorized corporate officers with its corporate seal affixed, on the _____ day of _____, 20____.

(Assignor)

By: _____
(Authorized Officer)

Signed, Sealed and Delivered In the Presence
of or Attested by:

Editor's Note: An assignment of a mortgage foreclosure judgment is filed and recorded with the Clerk of the Superior Court, Chancery Division, CN971, Hughes Justice Complex, Trenton, N.J. 08625. N.J.S.A. 2A:16-15. There is a filing fee of \$5.00. N.J.S.A. 2A:2-20.

Editor's Note: The mortgage need not be assigned with the judgment and note as the mortgage is merged into the judgment and the rights of the parties under the mortgage are now governed by the judgment.

FORM NO. 81**SHERIFF'S DEED**

THIS INDENTURE,
made this *(date)* day of *(month)*, *(year)*. Between *(name)*, Sheriff of the County of *(name)*, in the State of New Jersey, party of the first part and *(name(s))* party of the second part, witnesseth.

WHEREAS, on the *(date)* day of *(month)*, *(year)*, a certain Writ of Execution was issued out of the Superior Court of New Jersey, Chancery Division-*(name)*County, Docket No. directed and delivered to the Sheriff of the said County of *(name)* and which said Writ is in the words or to the effect following that is to say:

THE STATE OF NEW JERSEY to the Sheriff of the County of *(name)*,

Greeting:

WHEREAS, on the *(date)* day of *(month)*, *(year)*, by a certain judgment made in our Superior Court of New Jersey, in a certain cause therein pending, wherein the PLAINTIFF is:

and the following named parties are the DEFENDANTS:

IT WAS ORDERED AND ADJUDGED that certain mortgaged premises, with the appurtenances in the Complaint, and Amendment to Complaint, if any, in the said cause particularly set forth and described, that is to say: The mortgaged premises are described as set forth upon the RIDER ANNEXED HERETO AND MADE A PART HEREOF.

BEING KNOWN AS Tax Lot *(number)* in Block *(number)* COMMONLY KNOWN AS (street address).

TOGETHER, with all and singular the rights, liberties, privileges, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and remainders, rents, issues and profits thereof, and also all the estate, right, title, interest, use, property, claim and demand of the said defendants of, in, to and out of the same, to be sold, to pay and satisfy in the first place unto the plaintiff,

the sum of \$(*amount*) being the principal, interest and advances secured by a certain mortgage dated *(date, month, year)* and given by *(name)* together with lawful interest from

until the same be paid and satisfied and also the costs of the aforesaid plaintiff with interest thereon.

AND for that purpose a Writ of Execution should issue, directed to the Sheriff of the County of

(*name*)commanding him to make sale as aforesaid; and that the surplus money arising from such sale, if any there be, should be brought into our said Court, as by the judgment remaining as of record in our said Superior Court of New Jersey, at Trenton, doth and more fully appear; and whereas, the costs and Attorney's fees of the said plaintiff have been duly taxed at the following sum: \$(*amount*).

THEREFORE, you are hereby commanded that you cause to be made of the premises aforesaid, by selling so much of the same as may be needful and necessary for the purpose, the said sum of \$(*amount*) and the same you do pay to the said plaintiff together with contract and lawful interest thereon as aforesaid, and the sum aforesaid of costs with interest thereon.

And that you have the surplus money, if any there be, before our said Superior Court of New Jersey, aforesaid at Trenton, within 30 days after pursuant to Rule 4:59-1(a), to abide the further Order of the said Court, according to judgment aforesaid, and you are to make return at the time and place aforesaid, by certificate under your hand, of the manner in which you have executed this our Writ, together with this Writ, and if no sale, this Writ shall be returnable within 12 months.

WITNESS, the Honorable (*name*), Judge of the Superior Court at Trenton, aforesaid, the (*date*) day of (*month*), (*year*).

/s/, Clerk
Superior Court of New Jersey

/s/ Attorneys for Plaintiff

As by the record of said Writ of Execution in the Office of the Superior Court of New Jersey, at Trenton, in Book (*number*) of Executions, Page (*number*) etc., may more fully appear.

AND WHEREAS I, the said (*name*), as such Sheriff as aforesaid did in due form of law, before making such sale give notice of the time and place of such sale by public advertisement signed by myself, and set up in my office in the (*name*) Building in (*name*) County, being the County in which said real estate is situate and also set up at the premises to be sold at least three weeks next before the time appointed for such sale.

I also caused such notice to be published four times in two newspapers designated by me and printed and published in the said County, the County wherein the real estate sold is situate, the same being designated for the publication by the Laws of this State, and circulating in the neighborhood of said real estate, at least once a week during four consecutive calendar weeks. One of such newspapers, (*name of newspaper*) is a newspaper with circulation in (*name of town*), the County seat of said (*name*) County. The first publication was at least twenty one days prior and the last publication not more than eight days prior to the time appointed for the sale of such real estate, and by virtue of the said Writ of Execution, I did offer for sale said land and premises

at public venue at the County *(name)* Building in *(name of town)* on the *(date)* day of *(month)* *(year)* at the hour of *(time)* in the *(a.m. or p.m.)*.

WHEREUPON the said party of the second part bidding therefore for the same, the sum of *\$(amount)* and no other person bidding as much I did then and there openly and publicly in due form of law between the hours of *(time)* and *(time)* in the *(a.m. or p.m.)*, strike off and sell tracts or parcels of land and premises for the sum of *\$(amount)* to the said party of the second part being then and there the highest bidder for same. And on the *(date)* of *(month)* in the year last aforesaid I did truly report the said sale to the Superior Court of New Jersey, Chancery Division and no objection to the said sale having been made, and by Assignment of Bid filed with the Sheriff of *(name)* County said bidder assigned its bid to:

NOW, THEREFORE, This Indenture witnesseth, that I, the said *(name)*, as such Sheriff as aforesaid under and by the virtue of the said Writ of Execution and in execution of the power and trust in me reposed and also for and in consideration of the said sum of *\$(amount)* therefrom acquit, exonerate and forever discharge to the said party of the second part, its successors and assigns, all and singular the said tract or parcel of lands and premises, with the appurtenances, privileges, and hereditaments thereunto belonging or in any way appertaining; to have and hold the same, unto the said party of the second part, its successors and assigns to its and their only proper use, benefit, and behoof forever, in as full, ample and beneficial manner as by virtue of said Writ of Execution I may, can or ought to convey the same.

And, I, the said *(name)*, do hereby covenant, promise and agree, to and with the said party of the second part, its successors and assigns, that I have not, as such Sheriff as aforesaid, done or caused, suffered or procured to be done any act, matter or thing whereby the said premises, or any part thereof, with the appurtenances, are or may be charged or encumbered in estate, title or otherwise.

IN WITNESS WHEREOF, I the said *(name)* as such Sheriff as aforesaid, have hereunto set my hand and seal the day and year aforesaid.

Signed, sealed and delivered in the presence
of

Attorney at Law of New Jersey

(Signature of Sheriff), Sheriff

State of New Jersey) SS.
_____)
County

I, *(name)*, Sheriff, of the County of *(name)*, do solemnly swear that the real estate described in

this deed made to

was by me sold by virtue of a good and subsisting execution (*or as the case may be*) as is therein recited, that the money ordered to be made has not been to my knowledge or belief paid or satisfied, that the time and place of the same of said real estate were by me duly advertised as required by law, and that the same was cried off and sold to a bona fide purchaser for the best price that could be obtained and the true consideration for this conveyance as set forth in the deed is \$(*amount*).

(*Name of Sheriff*), Sheriff

Sworn before me, (*name*), on this (*date*) day of (*month*), (*year*), and I having examined the deed above mentioned do approve the same and order it to be recorded as a good and sufficient conveyance of the real estate therein described.

STATE OF NEW JERSEY) ss.

(*Name*) County)

(*Attorney or Notary Public*)

On this (*date*) day of (*month*), (*year*), before me, the subscriber, (*name*) personally appeared (*name*), Sheriff of the County of (*name*) aforesaid, who is, I am satisfied, the grantor in the within Indenture named, and I having first made known to him the contents thereof, he did thereupon acknowledge that he signed, sealed and delivered the same on his voluntary act and deed, for the uses and purposes therein expressed.

(*Attorney or Notary Public*)

FORM NO. 82**WRIT OF POSSESSION (WITH ANTI-EVICTION ACT CERTIFICATION)**

[Use Abbreviated Caption]

L. S.

The State of New Jersey to: the Sheriff of the County of _____ Greetings:

Whereas, on the _____ day of _____, 20____, by a certain judgment of the Superior Court of New Jersey, in an action therein pending, wherein _____ is plaintiff and _____ et als., are defendants, it was ordered and adjudged that the plaintiff recover the possession of the lands and premises with the appurtenances described in its complaint, from the defendants [name them] and each of them, which premises are more particularly described as follows:

[Copy description from complaint and add street number, street and municipality]

the possession of which said lands and premises the said defendants have hitherto unlawfully deprived the said plaintiff, as appears to us of record;

Therefore, you are hereby commanded that, without delay, you cause the said plaintiff to have possession of the said lands and premises with the appurtenances thereunto belonging and appertaining; and make known to the Superior Court of New Jersey aforesaid at Trenton, New Jersey on the _____ day of _____, 20____, next, the manner in which you have executed this writ; and have you then and there with this writ.

Witness, the Honorable _____, Judge of the Superior Court, at Trenton, New Jersey, aforesaid this _____ day of _____, 20____.

Clerk of the Superior Court

Attorney for the plaintiff

CERTIFICATION

I, the undersigned, Attorney for _____ by way of certification in accordance with R. 1:4-4(b) say:

The name or names of each person against whom this writ is to issue are as follows:

[Names of persons].

The persons named above against whom this writ is to issue are not protected by the provisions of N.J. Tenant Anti-Eviction Statute, as enunciated in the N.J. Supreme Court case of Chase vs. Josephson.

The reason why the above-named persons against whom this writ is to issue are not protected by New Jersey's Anti-Eviction Act (N.J.S.A. 2A:18-61.1 et seq.) is because they are the *[owners, former owners etc.]* of the property which is the subject of this action, not tenants or former tenants protected by the Act.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

Name of Attorney

Dated:

FORM NO. 83

ORDER DIRECTING SHERIFF TO PAY ADDITIONAL SUMS TO PLAINTIFF

[Use Abbreviated Caption]

This matter being opened to the Court by _____, Attorney for the plaintiff, requesting an order directing the Sheriff of _____ County to pay the plaintiff amounts in addition to the amount adjudged to be paid to the plaintiff by virtue of the writ of execution in this action and it appearing that the plaintiff has advanced sums of money subsequent to the final judgment for taxes and repairs which were necessary to preserve the security of plaintiff's mortgage, and good cause appearing;

It is Ordered on this _____ day of _____, 20__, that the Sheriff of _____ County pay the plaintiff the following amounts in addition to the amount adjudged to be paid to plaintiff by the writ of execution in this action:

The sum of \$_____ advanced by the plaintiff for taxes, together with interest from

_____, 20____.

The amount of \$_____ advanced by plaintiff for necessary repairs, together with interest from _____, 20____.

ORDERED that this Order shall be effective only if delivered to the sheriff prior to the foreclosure sale.

J.S.C.

Editor's Note: This order is signed pursuant to its specific authorization under R. 1:34-6. See supporting certification below.

FORM NO. 84

CERTIFICATION IN SUPPORT OF ORDER DIRECTING SHERIFF TO PAY ADDITIONAL SUMS TO PLAINTIFF

_____ of full age, by way of certification in accordance with R. 1:4-4(b), say:

I am _____, the plaintiff in the above entitled cause, and I am duly authorized to make this certification on behalf of said plaintiff.

Under date of _____, 20____, a final judgment was entered based upon my certification.

Subsequent to entry of final judgment, the plaintiff made advances to protect its interest for real estate taxes and hazard insurance, which were necessary to preserve the security of plaintiff's mortgage. Those advances are as follows:

REAL ESTATE TAXES	\$_____
HAZARD INSURANCE	\$_____
TOTAL ADVANCES	\$_____

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated:

Name and Title

Editor's Note: This certification must be furnished with the form of order above.

FORM NO. 85

ORDER APPOINTING SPECIAL MASTER TO SELL

[Use Abbreviated Caption]

This matter being opened to the Court by _____, the Attorney for the plaintiff, it is on this _____ day of _____, 20____, and for good cause shown, Ordered that *[Name of Attorney]* be appointed Special Master in the within action, and that *[he/she]* sell the mortgaged premises at public vendue in accordance with law. The sale shall be held in Room _____ in the _____ County Courthouse *[Street address/City/State]* in accordance with law.

Where the said sale is adjourned according to law, said Special Master may appoint an agent to adjourn the sale in his place and stead.

It is Further Ordered that said Special Master, or plaintiff's attorney, may, unless an objection to sale is raised, apply for court confirmation of the sale, without notice, in accordance with R. 4:65-6(b).

J.S.C.

Respectfully Recommended:

R. 1:34-6 OFFICE OF FORECLOSURE

Editor's Note: This order is most commonly used where the mortgaged premises straddles the county line and a Special Master must conduct the sale because no sheriff has jurisdiction to sell the entire premises at one sale. This order can also be used where the sheriff does not timely schedule a sale pursuant to N.J.S.A. 2A:50-64(b). See 30B N.J. Prac. (Weinstein) Appendix G, Forms Nos. 161-168 for a complete list of Special Master forms.

FORM NO. 86**ORDER VACATING JUDGMENT**

[Use Abbreviated Caption]

This matter being opened to the court by _____, attorneys for plaintiff, and it appearing that judgment was entered and execution issued on _____, 20__; and it further appearing that the defendants/mortgagors, _____, filed chapter 7 petition in bankruptcy on _____' and it further appearing that the bankruptcy filing prohibited the entry of judgment and issuance of the execution on _____; and it further appearing that the debtors have been discharged, and the real property described in the execution abandoned; and for good cause shown:

It is on this _____ day of _____, 20____, ordered that the judgment entered and execution issued on _____, be and are hereby vacated; and

It is further ordered that a new judgment be entered and a new execution issue.

 J.S.C.
FORM NO. 87
**ORDER VACATING EXECUTION AND JUDGMENT,
REINSTATING BOND AND MORTGAGE AND DISMISSING PROCEEDINGS**

[Use Abbreviated Caption]

This matter being opened to the court by _____, attorney for the plaintiff, and it appearing that a default judgment in favor of the plaintiff has been entered and a writ of execution issued by the Clerk and the plaintiff consenting to vacate the judgment and return the writ and good cause appearing,

It is on this _____ day of _____, 20____, Ordered that:

1. The default judgment be vacated and set aside and the writ of execution is voided.

2. That the bond or note and mortgage referred to in the complaint shall be reinstated and remain in full force and effect in the same manner as though the above entitled action had not been instituted.

3. A copy of the order shall be served on all parties within Seven (7) days of the date of this order

J.S.C.

Respectfully Recommended
Rule 1:34-6 Office of Foreclosure

Consent is given to entry of the above order.

Attorney for defendants.

FORM NO. 88

**ORDER TO SHOW CAUSE FOR REDEMPTION OF MORTGAGE AFTER SALE,
SETTING ASIDE THE SALE, ORDERING THAT THE FORECLOSURE JUDGMENT
BE SATISFIED
AND RESTRAINING THE SHERIFF FROM DELIVERING DEED**

[Use Abbreviated Caption]

It is on this *[Day/Month/Year]* Ordered that the plaintiff *[Naming plaintiff]* and purchaser *[Naming third party purchaser if any]* at the sale, show cause before this Court at _____, New Jersey on *[Day/Month/Year]* at 9:00 A.M. [prevailing time] or as soon as counsel may be heard, why an Order should not be entered permitting defendant-mortgagor(s) *[Naming defendant(s)]* to redeem the mortgage and set aside the foreclosure sale, and ordering plaintiff to deliver a proper warrant for the satisfaction of the foreclosure judgment upon receipt of the funds from the Clerk of this Court; and it is

Further Ordered that the Sheriff of _____ County, is enjoined and restrained from delivering a sheriff's deed to the successful purchaser at the sale pending resolution of this Order.

Further Ordered that the defendants shall serve their answering affidavits, certification and brief by [Day/Month/Year]; and plaintiff shall serve its reply, if any, by [Day/Month/Year]; and

It is Further Ordered that a copy of this order, certified by the attorney for the defendant to be a true copy, and a copy of any supporting affidavits similarly certified, be served upon the plaintiff, [Naming plaintiff], the third party purchaser at the sale, if any, [Naming purchaser] and the Sheriff of _____ County [and any other persons required to be served], by certified mail return, receipt requested and by ordinary mail, within _____ days from the date hereof by mailing to such persons or their legal representatives as follows:

[List Names and Addresses for Service]

J.S.C.

Editor's Note: Only the original mortgagor can redeem within the 10 calendar day period after sale. While redemption through the chancery judge is not absolutely required, it is recommended by the author. See Mercury Capital Corp. v. Freehold Office Park, Ltd., 363 N.J.Super. 235, 248, 832 A.2d 369, 377 (Ch. Div. 2003).

FORM NO. 89

PROOF OF MAILING (NOTICE OF SALE)

(Abbreviated Caption)

1. I, the undersigned, am a legal assistant with [Name of Law Firm], attorneys for Plaintiff in the above entitled matter.
2. On (Day/Month/Year), I mailed in the U.S. Post Office at (City/Town and State), a sealed envelope with postage prepaid thereon, by regular and certified mail, return receipt requested to:

[List Names and Addresses of Persons Mailed To]

containing a copy of the Notice of Sale.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

[Name]

Editor's Note: At least 10 days prior to the date set for sale, plaintiff must serve the notice of sale by registered or certified mail, return receipt requested, upon (1) every party who has appeared in the action giving rise to the order or writ and (2) the owner of record of the property as of the date of commencement of the action whether or not appearing in the action, R.4:65-2. It is advisable to also mail the notice by regular mail. The signed return receipt cards and unclaimed certified mail envelopes need not be filed in the action. If the sale is adjourned, a notice of adjourned sale should be served on the same parties.

FORM NO. 90

CONCISE STATEMENT OF DESCRIPTION (N.J.S.A. 2A:61-1)

The property to be sold is located in _____, County of _____ and State of New Jersey. The premises is commonly known as _____.

Tax Lot No. _____

Block No. _____

Dimensions of Lot: Approximately _____ x _____ feet.

Number of Feet to Nearest Cross Street: Located on the _____ side of _____ Avenue, distant _____ feet southwardly from its intersection with _____ Street.

The above advertisement does not constitute a full legal description of the real estate. The full legal description may be found at the Office of the Sheriff during regular business hours.

FORM NO. 91

ASSIGNMENT OF BID AT SHERIFF'S SALE

[Use Abbreviated Caption]

For value received, plaintiff does assign, set over and transfer unto: _____ that bid made by it at a sale held on _____, 20____, conducted by the Sheriff of the County of _____

_____, which sale resulted from a foreclosure action instituted by the plaintiff in the above entitled action, and said plaintiff does authorize the Sheriff of _____ County, to issue a deed for said premises in the name of and to the said assignee.

In Witness whereof, the plaintiff has caused these presents to be signed by its proper officers and caused its corporate seal to be hereto affixed this _____ day of _____, 20____.

Attest:

Secretary

By _____
President

[Add corporate proof or acknowledgment as the case may be]

Editor's Note: An assignment of bid is not necessary if the assignee of the foreclosing plaintiff actually bids at the sheriff's sale in its own name, N.J.S.A. 2A:50-64a(1).

FORM NO. 92

MOTION FOR HEARING ON OBJECTIONS TO SALE

[Use Abbreviated Caption]

To _____, Sheriff of _____ County, and to _____ Attorney for the plaintiff and to all other persons in interest:

Take notice that on _____, the _____ day of _____, 20____, at 9:00 A.M. [prevailing time] or soon thereafter as counsel may be heard, the undersigned will move before the Superior Court of New Jersey, Chancery Division at _____, _____ New Jersey, for a hearing on the objections to sale heretofore served and filed, in connection with the sale of premises commonly known as *[Street Number/City]* New Jersey, held on the _____ day of _____, 20____, pursuant to a writ of execution and to set aside such sale.

At such hearing the undersigned will rely on the attached affidavits.

Attorney for the defendant

[Attach affidavits in support of motion]

Editor's Note: See R. 4:65-5.

FORM NO. 93

**ORDER RATIFYING SALE NOTWITHSTANDING
DEFECT, IRREGULARITY, OR OMISSION
IN PROCEEDINGS**

[Use Abbreviated Caption]

This matter being opened to the court by _____, attorneys for plaintiff, and it appearing that the foreclosure sale was held by the Sheriff of _____ County on _____ on _____, 20____; and it further appearing that *[Set forth defect, irregularity, or omission]*; and for good cause shown:

It is on this _____ day of _____, 20____, ordered that the foreclosure sale held in the within matter on _____, 20____, is hereby ratified and deemed to be proper, valid and effectual for all purposes.

J.S.C.

FORM NO. 94

**NOTICE OF MOTION FOR ORDER
TO PAY OUT SURPLUS MONEYS
(AND CERTIFICATION OF SERVICE)**

[Use Abbreviated Caption]

TO: *[Name all defendants and the plaintiff]*

Take notice that on *[Day/Month/Year]* at 9:00 o'clock in the forenoon, [prevailing time] or soon thereafter as counsel may be heard the undersigned attorney for the defendant, will apply before the Honorable _____, Judge of the Superior Court, Chancery Division, at _____ New Jersey, for an order to pay to defendant *[Naming Defendant]*, the sum of *[Dollar Amount]* from the proceeds of surplus money deposited with the Clerk of the Superior Court, as set forth in the attached certification.

Take further notice that if you claim priority over this defendant, or if you claim a portion of such surplus money, you are to submit your proof of claim and the amount due at the time and place mentioned above.

Attorney for the Defendant

Date:

CERTIFICATION OF SERVICE

_____, does hereby certify

I am employed by _____, attorneys for Plaintiff in the above entitled action.

On _____, 20____, a copy of the within Notice of Motion for an Order To Pay Out Surplus Moneys was sent to the following:

[List names and addresses mailed to]

by certified mail, return receipt requested and by regular mail, with required postage thereon, by depositing an envelope containing said Notice of Motion for an Order To Pay Out Surplus Moneys through the United States mail.

I hereby certify that the foregoing statements made by me are true; I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

Name and Title

Editor's Note: R. 4:64-3 requires that the notice of motion be given to all parties (including defaulting parties) not directed to be paid in the execution--normally this will be all parties except plaintiff. Plaintiff should also be noticed.

FORM NO. 95

CERTIFICATION IN SUPPORT OF APPLICATION TO PAY OUT SURPLUS

[Use Abbreviated Caption]

1. I am one of the defendants in the within foreclosure action/ or I am *[Name Title or Status]* of *[Name of Entity]*, a *[corporation, partnership, etc.]* of the State of New Jersey, one of the defendants in the within foreclosure action.

2. On *[Day/Month/Year]* the Sheriff of _____ County sold said lands and premises and deposited with the Clerk of this Court, the sum of *[Dollar Amount]* as surplus moneys arising from the foreclosure sale.

3. The applicant is the holder of *[Set forth lien, incumbrance or interest held by defendant]* on the foreclosed land and premises. Said *[mortgage/lien, etc]* was in the original amount of \$ _____, dated _____, 20____, and was *[recorded/filed]* in the Office of the _____ of _____ County on _____, 20____, in *[Book, etc.]* of *[Mortgages, etc.]* at *[page/instrument number]*.

4. The amount owed applicant as of the date of sale is *[Set forth total dollar amount]* in accordance with the schedule set forth below:

[Set forth schedule of amount owed giving breakdown of principal, interest, etc.]

5. To applicant's knowledge, there are no unsatisfied prior liens or encumbrances on the lands and premises, and the allegations of the complaint indicate that applicant is next in line of priority and therefore entitled to receive from the Clerk of this court, the sum of *[Dollar amount]*

or so much of the surplus money as is now on deposit with the Clerk of the Court, if less than that sum is on deposit.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Name

Date:

FORM NO. 96

ORDER TO PAY OUT SURPLUS MONEYS

[Use Abbreviated Caption]

This matter being opened to the Court by _____ Attorney for the defendant applicant _____, *[and no other party appearing/ or in the presence of (list parties and attorneys)]* and the Court having considered the proofs and the argument of counsel and proof having been filed that all defendants were served with notice of the motion together with the attached affidavit; and it appearing that the Sheriff of _____ County has deposited with the Clerk of the Court the sum of \$_____ as surplus money arising from the sale of the premises described in the complaint and that there is due to the defendant applicant the sum of \$_____, being the amount due on defendant's *[mortgage, lien etc.]* with interest from _____, 20____, to date *[and there secondly due to the defendant _____, the sum of \$_____ on the (mortgage, lien, etc.) held by such defendant, and for good cause shown;*

It is therefore on this _____ day of _____, 20____, Ordered that the Clerk of this Court is hereby authorized and directed to pay the defendant applicant, _____ and his attorney the sum of \$_____ *[and the Clerk of this Court be and is hereby directed to pay the balance of the surplus money, with all accumulations of interest, to the defendant _____,]* less the commissions properly allowed to the Clerk upon the deposit of the surplus money; and

It is further Ordered that a true copy of this order, which need not be certified be mailed to all other defendants or their attorneys at their last known address within _____ days from the date hereof.

J.S.C.

Editor's Note: Surplus funds should be paid to defendants in order of their respective priorities, with the final surplus going to the mortgagor or owner, as the case may be, the former holder of the equity of redemption, representing said owner's equity.

OPTIONAL PROCEDURE FORMS

FORM NO. 97

COMPLAINT—OPTIONAL PROCEDURE

Name of Attorneys
Address of Attorneys
Telephone Number
Attorneys for Plaintiff

[Name of Plaintiff]

Plaintiff

vs

[Names of all Defendants]

Defendants

SUPERIOR COURT OF
NEW JERSEY
CHANCERY DIVISION
[COUNTY OF VENUE]

Docket No. F-
Civil Action

COMPLAINT IN FORECLOSURE

Plaintiff, *(Name of Mortgage Holder)*, having its principal office at *(Address)* says:

FIRST COUNT (CONVENTIONAL)

1. One *(Day/Month/ Year)*, *(Name of Obligors/Makers)* being indebted to *(Name of Mortgagee)* in the sum of *(Dollar Amount)* executed to it a (Bond or Note) of that date to secure that sum with interest thereon from said date at the rate of *(State Percentage)* per annum on the unpaid balance until paid, said principal and interest to be paid in monthly installment of *(Dollar Amount)* commencing on the first day of *(Day/Month/Year)* and on the first day of each month thereafter until the principal and interest are fully paid, except that the final payment of principal and interest, if not paid sooner, shall be due and payable on the first day of *(Day/Month/Year)*.

2. To secure payment of said *(Bond/Note)*, the said *(Name of Mortgagors)* executed to *(Name of Mortgagee)* a mortgage of even date with the *(Bond/Note)* in the sum of *(Dollar Amount)* . Said mortgage was duly recorded on *(Day/Month/Year)* in *(Name)* County in Book *(Number)* of Mortgages at Page *(Number)*.

[sample allegation if the mortgagor-spouses have died]

2A. On *(Day/Month/Year)*, the said *(Name of Spouse)* died wherein title became vested in *(Name of*

Surviving Spouse) as surviving tenant by the entirety. The said *(Name of Spouse)* died *(Testate/Intestate)* on *(Day/Month/Year)* a resident of *(Name of County)* leaving a *(Will/Administration)* *(Probated/Filed)* in *(Name of County)*. Under the aforesaid *(Will/Administration)* the mortgaged premises were *(Devised/Left)* to *(Names of Devisees/Names of Heirs at Law)*.

3. The mortgaged premises are described as follows:

[Set forth description of mortgaged premises]

[Note: By law, (a) the street address, (b) municipal tax map block and lot and (c) metes and bounds description must be set forth in the complaint, R. 4:64-1(12).]

[Note: If a metes and bounds description is set forth, the complaint must state “whether the recorded mortgage instrument includes that description,” R. 4:64-1(b)(12).]

[Note: If a metes and bounds description is not included, a statement substantially similar to the following must be included: The mortgage property is delineated by municipal tax map block and lot reference in the aforementioned mortgage and not by a metes and bounds description.]

4. On *(Day/Month/Year)* by assignment bearing that date *(Name of Assignor)* assigned said *(Bond/Note)* and Mortgage to *(Name of Assignee)* which assignment was recorded in the Clerk's office of *(Name of County)* on *(Day/Month/Year)* in Book *(Number)* of Assignments of Mortgage for said County at page *(Number)*.

5. *[If applicable]* This is a purchase money mortgage.

6. Said Bond/Note and mortgage contained a provision that, should any default be made in the payment of any monthly installment on account of principal and interest, or any part thereof, if any of the other payments to be made by the obligors under the provisions of the mortgage securing the *(Bond/Note)* on the date payable as provided in the *(Bond/Note)* or in the mortgage, then and from that date, the entire principal sum remaining unpaid, with all the arrearages of interest thereon, and all other payments provided in the mortgage, shall at the option of the obligee, its successors and assigns, become due and payable immediately thereafter although the period may not have expired.

7. Said *(Bond/Note)* and Mortgage contained a provision that if any of the installments of taxes, assessments, water charges or any municipal lien levied against the premises should remain in default, the mortgagee may pay same and such amount shall be a lien on said lands, added to the amount of the mortgage debt and secured by this mortgage.

[Note: By law, “a description of the pertinent terms and conditions of the debt instrument or mortgage” must be set forth, R. 4:64-1(b)(6).]

8. The said note or mortgage provides that the mortgagee may collect a late charge not to exceed *(Percent)* for each dollar of each payment more than *(Number)* days in arrears to cover an extra charge in handling delinquent payments.

9. *[If applicable]* The note or mortgage contain a prepayment penalty as follows: *[describe in detail]*

[Note: By law, any prepayment penalty must be set forth in the complaint, R. 4:64-1(b)(9).]

10. During the course of this action, the plaintiff may be obligated to make advances for the payment of

taxes, insurance and necessary expenses to preserve the security, and such sums advanced under the terms of the *(Bond or Note)* or mortgage, together with interest, are to be added to the amount due on the mortgage debt and secured by plaintiff's mortgage hereunder.

11. On *(Day/Month/Year)* an installment of principal, interest and taxes became due and payable on plaintiff's mortgage and this installment and subsequent installments have not been paid. Plaintiff has elected that the whole of the unpaid principal and interest plus late fees due on plaintiff's *(note or bond)* and mortgage, plus any sums advanced for the payment of municipal liens, property preservation or insurance, shall now be due.

[Note: By law, "the facts establishing the default" and acceleration of the debt's maturity date" (if applicable) must be set forth, R. 4:64-1(b)(6).]

12. The date or dates of default are: *[set forth date or dates]*

[Note: By law, the "date of default" must expressly be set forth in the complaint, R. 4:64-1(b)(7). It is not enough just to say that the mortgagor missed a payment on such and such a date.]

[Note: If the debt has matured, it is suggested that the complaint allege that the debt matured on (Day/Month/Year) and all sums secured by the mortgage, together with interest and other lawful charges, is now due.]

13. Defendants set forth below are the holders of liens and interests which are subordinate to the lien of plaintiff's mortgage.

[List in paragraph form--13(a), 13(b), etc--the names of the persons and entities holding subordinate interests, with a description of the interests with particularity and recording information if any]

[Note: By law, subordinate parties in interest must be set forth with "particularity" and must contain the "recording date" of the lien, interest, or encumbrance they hold, R. 4:64-1(b)(11).]

[Note: When a married person who has not signed the mortgage is joined, the particular facts relied on to bar that person's rights and interest must be set forth in the complaint, including whether such person's rights and interest were acquired before or after the date of the mortgage, R. 4:64-1(b)(13). A purchase money mortgage is entitled to priority over a spouse's marital right of joint possession, N.J.S.A. 3B:28-3.1.]

14. *[If applicable]* Plaintiff has in compliance with the Fair Foreclosure Act, N.J.S.A. 2A:50-53 et seq., mailed a notice of intention to foreclose to the debtors at least thirty one (31) days prior to the filing of this complaint.

[Note: Plaintiff must allege compliance with "other notices required by law," R. 4:64-1(b)(13). In non-Fair Foreclosure Act cases, compliance with any other pre-filing notice requirements must be alleged.]

[sample allegation where debtor has waived the provisions of act]

14A. On *(Date/Month/Year)*, the debtor, after default, and pursuant to a workout agreement signed a separate written document waiving any and all rights under the act in accordance with section 9 of the Fair Foreclosure Act, N.J.S.A. 2A:50-53 et seq.; and plaintiff by virtue of that waiver is not required to mail a notice of intention to foreclose to the debtor.

[sample allegation where deed in lieu of foreclosure given]

14B. On *(Day/Month/Year)* the debtor voluntarily surrendered the property that is the subject of the residential mortgage by signing a deed in lieu of foreclosure in favor of *(Name of Lender)* in compliance with the Fair Foreclosure Act, *N.J.S.A. 2A:50-53 et seq.*, which was recorded on *(Day/Month/Year)* in the *(Name)* County *(Clerk's or Register's)* Office in Deed Book *(Number)* at Page *(Number)*. Pursuant to *N.J.S.A. 2A:50-56d* of the Fair Foreclosure Act, plaintiff is not required to mail a notice of intention to foreclose to the debtor.

15. Any interest or lien which any of the defendants herein has or claims to have in or upon the said mortgaged premises or some part thereof is subject to the lien of plaintiff's mortgage.

WHEREFORE, plaintiff demands judgment:

- (a) Fixing the amount due on its mortgage.
- (b) Barring and foreclosing the defendants and each of them of all equity of redemption in and to said lands.
- (c) Directing that the plaintiff be paid the amount due on its mortgage with interest and costs.
- (d) Adjudging that the said lands be sold according to law to satisfy the amount due plaintiff.
- (e) Appointing a receiver of rents, issues and profits of said lands.

SECOND COUNT (POSSESSION)

1. Plaintiff repeats any and all allegations of the First Count and makes same a part hereof as if repeated at length.
2. By reason of the default under the mortgage referred to in the First Count of the Complaint, and by reason of the terms of the mortgage, plaintiff is entitled to possession of the premises described in Paragraph 3 of the First Count.
3. Defendants, *(Names)* are now in possession of the premises described in Paragraph 3 and have at all times deprived plaintiff of possession of said premises.

WHEREFORE, plaintiff demands judgment:

- (a) That plaintiff or the purchaser at the foreclosure sale recover possession of the mortgaged premises against said defendants or anyone holding under them;
- (b) Damages for mesne profits;
- (c) Costs.

Dated:

(Plaintiff's Attorney)

THIRD COUNT (OPTIONAL PROCEDURE)

1. Plaintiff repeats any and all allegations of the first two counts and makes same a part hereof as if repeated at length.

[Sample Allegation Where Property Abandoned]

2A. On or before *(Day/Month/Date)*, the debtor abandoned the property which is the subject of the residential mortgage, by voluntarily leaving the said premises and causing same to remain vacant, unoccupied, unattended and in substantial disrepair; whereby plaintiff on or before *(Day/Month/Date)*, and in accordance with law, expended substantial sums of money making necessary repairs and boarded up the said premises in order to preserve and protect it.

[Sample Allegation Where Property Voluntarily Surrendered]

2B. On *(Day/Month/Year)*, the debtor voluntarily surrendered the property which is the subject of the residential mortgage in accordance with the Fair Foreclosure Act, *N.J.S.A. 2A:50-53 et seq.*, by giving a deed in lieu of foreclosure to plaintiff dated *(Day/Month/Year)*, recorded in the *(Name)* County *(Clerk or Registered)* Office on *(Day/Month/Year)* in Deed Book *(Number)* at Page *(Day/Month/Year)*.

*[Sample Allegation Where Property Has No Equity] **

2C. The residential mortgaged premises has no equity in accordance with *N.J.S.A. 2A:50-63e*.

3. Plaintiff is entitled to utilize the Optional Procedure in accordance with section 11 of the Fair Foreclosure Act, *N.J.S.A. 2A:50-53 et seq.*

WHEREFORE, plaintiff demands judgment:

- (a) Fixing the amount due on its mortgage.
- (b) Barring and foreclosing the defendants and each of them of all equity of redemption in and to said lands which are the subject of the residential mortgage.
- (c) Directing that the plaintiff be paid the amount due on said mortgage together with interest and costs by a date fixed by the Office or court for that purpose in accordance with *N.J.S.A. 2A:50-53 et seq.*, and in default thereof, that the said defendants and all persons claiming by, through or under them may be debarred and foreclosed of and from all equity and right of redemption in and to the premises in said mortgage described in paragraph 3 of Count 1 herein.
- (d) Directing that the plaintiff be vested with an absolute and indefeasible estate of inheritance in fee simple in and to the lands described in paragraph 3 of Count 1 herein

FOURTH COUNT (POSSESSION)

1. Plaintiff repeats any and all allegations of the first three counts and makes same a part hereof as if repeated at length.

2. By reason of the default in the terms of the mortgage referred to in the First Count of the Complaint, and by reason of the terms of the mortgage, plaintiff is entitled to possession of the premises described in

Paragraph 3 of the First Count.

3. Plaintiff is also entitled to possession by virtue of the entry of judgment pursuant to Count Three herein in accordance with R. 4:27-2.

4. Defendants, *(Names)* are now in possession of the premises described in Paragraph 3 and have at all times deprived plaintiff of possession of said premises.

Dated:

(Plaintiff's Attorney)

Editor's Note: Even though the facts upon which the "no-equity" basis for use of the optional procedure are not statutorily required to be specifically alleged in the complaint, it is the author's opinion that failure to allege this basis "generally," where no other basis is alleged, will result in the failure of the complaint to state a claim upon which optional relief may be granted.

The contact information for the representative of the creditor who is responsible for receiving complaints of property maintenance and code violations for this matter is:

The agent who is responsible for the care maintenance, security and upkeep of the property if it becomes vacant and abandoned is:

RULE 4:5-1 CERTIFICATION

In accordance with R. 4:5-1, I hereby certify that the matter in controversy is not the subject of any action pending in any Court or of a pending arbitration proceeding. There is no other action or arbitration proceeding contemplated, nor is there any other party who should be joined in this action.

Dated:

(Plaintiff's Attorney)

RULE 4:5-1(b)(2) CERTIFICATION

In accordance with R. 4:5-1(b)(2), I hereby certify that pursuant to R. 4:64-1(a), that prior to the filing of this mortgage foreclosure complaint, I have received and reviewed a title search of the public record for the purpose of identifying any lien holders or other persons and entities with an interest in the property that is subject to the within foreclosure.

Dated:

(Plaintiff's Attorney)

RULE 1:38-7(b) CERTIFICATION

In accordance with R. 1:38-7(b), I hereby certify that confidential personal identifiers have been redacted from all documents now submitted to the court, and will be redacted from all documents submitted in the future.

Dated:

(Plaintiff's Attorney)

RULE 1:5-6(c)(1)(E) AND RULE 4:64-1(a)(2) and (3) CERTIFICATION OF DILIGENT INQUIRY

_____, Esq., of full age, hereby certifies and says:

1. On *(insert date)*, I communicated by *(insert mode of communication)* with the following named employee(s) of the *(insert the plaintiff's name or insert the plaintiff's mortgage loan servicer's name)*, who state that he/she personally reviewed the complaint to be filed with the court and that he/she confirmed compliance with Rule 4:64-1(b)(1) through (b)(10) and (b)(12) through (b)(13).

2. The name, title and responsibilities of the plaintiff's employee(s) or plaintiff's mortgage loan servicer's employee(s) with whom I communicated are: *(insert the employee's name) (insert the employee's title) (insert the employee's responsibilities)*.

3. *(If an employee of the plaintiff's mortgage loan servicer)* The above-named employee(s) stated that the relationship between his/her employer and the plaintiff is: *(insert description of the relationship)*, and confirmed that his/her employer is authorized to act on behalf of the plaintiff in this action.

3/4. Based on my communication with the above-named employee(s) of plaintiff or plaintiff's mortgage loan servicer, as well as my own inspection of the loan information supplied by the plaintiff or the plaintiff's mortgage loan servicer and other diligent inquiry, I execute this certification to complaint with the requirements of Rules 1:4-8(a), 1:5-6(c)(1)(E), and 4:64-1(a)(2) and (3).

4/5. I am aware that I have a continuing obligation under Rule 1:4-8 to amend this certification if a reasonable opportunity for further investigation or discovery indicates insufficient evidentiary support for factual assertions proffered by plaintiff in any court filings or documents in this case.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated:

(Plaintiff's Attorney)

SCHEDULE "A"

All that certain tract or parcel of land and premises situate, lying and being in the *(insert municipality)*, County of *(insert county)* and State of New Jersey.

Also known as tax lot _____ in block _____ on the tax assessment map of *(insert municipality)*.

More commonly known as *(insert full address)*.

(INSERT LEGAL DESCRIPTION HERE).

FORECLOSURE CASE INFORMATION STATEMENT

Appendix XII-B2

 FORECLOSURE CASE INFORMATION STATEMENT (FCIS) Use for initial Chancery Division — General Equity foreclosure pleadings (not motions) under Rule 4:5-1. Pleading will be rejected for filing, under Rule 1:5-6(c), if information is not furnished or if attorney's signature is not affixed.		FOR USE BY CLERK'S OFFICE ONLY PAYMENT TYPE: ☐ CK ☐ CG ☐ CA ☐ MO RECEIPT NO: _____ AMOUNT: _____ OVERPAYMENT: _____ BATCH NUMBER: _____ BATCH DATE: _____	
SECTION A: TO BE COMPLETED BY ALL PARTIES			
CAPTION		COUNTY OF VENUE	
		DOCKET NUMBER (When available)	
NAME(S) OF FILING PARTY(IES)(e.g., John Doe, Plaintiff)		DOCUMENT TYPE	
		☐ COMPLAINT ☐ ANSWER ☐ OTHER	
ATTORNEY NAME (IF APPLICABLE)		FIRM NAME (If applicable)	
MAILING ADDRESS		DAYTIME TELEPHONE NUMBER	
SECTION B: TO BE COMPLETED BY PLAINTIFF TO INITIAL COMPLAINT			
FORECLOSURE CASE TYPE NUMBER		IS THIS A HIGH RISK MORTGAGE PURSUANT TO P.L.2009,c.84 AND P.L.2008,c.127 ☐ YES ☐ NO	
☐ 088 IN PERSONAM TAX FORECLOSURE ☐ 089 IN REM TAX FORECLOSURE ☐ 0RF RESIDENTIAL MORTGAGE FORECLOSURE ☐ 0CF COMMERCIAL MORTGAGE FORECLOSURE ☐ 0CD CONDOMINIUM OR HOMEOWNER'S ASSOCIATION LIEN FORECLOSURE ☐ 091 STRICT FORECLOSURE ☐ 0FP OPTIONAL FORECLOSURE PROCEDURE (NO SALE)		PURCHASE MONEY MORTGAGE ☐ YES ☐ NO RELATED PENDING CASE ☐ YES ☐ NO IF YES, LIST DOCKET NUMBERS: _____	
FULL PHYSICAL STREET ADDRESS OF PROPERTY:		MUNICIPALITY CODE(*)	
ZIP CODE: COUNTY:		MUNICIPAL BLOCK:	
		(LOTS):	
ALL FILING PARTIES MUST SIGN AND PRINT NAMES(S) AND DATE THE FORM BELOW			
I certify that confidential personal identifiers have been redacted from documents now submitted to the court, and will be redacted from all documents submitted in the future in accordance with Rule 1:38-7(b).			
ATTORNEY/SELF REPRESENTED SIGNATURE		PRINT ATTORNEY/SELF REPRESENTED NAME	
		DATE	

*The Municipality Codes are available at http://www.judiciary.state.nj.us/forms/CN11343_municodes_11-9-2009.pdf

*[Note: A list the municipality codes is available at:
http://www.judiciary.state.nj.us/forms/11343_municodes.pdf]*

*[Note: An editable form of the FCIS is available at:
http://www.judiciary.state.nj.us/civil/forms/10169_foreclosure_cis.pdf]*

Editor's Note: Even though the facts upon which the "no-equity" basis for use of the optional procedure are not statutorily required to be specifically alleged in the complaint, it is the author's opinion that failure to allege this basis "generally," where no other basis is alleged, will result in the failure of the complaint to state a claim upon which optional relief may be granted.

FORM NO. 98**“RESCISSION LANGUAGE”--DEED IN LIEU OF FORECLOSURE**

(Type the following language in bold caps at or near beginning of the deed in lieu of foreclosure)

PURSUANT TO THE PROVISIONS OF SUBSECTION 11D OF THE FAIR FORECLOSURE ACT, N.J.S.A. 2A:50-63D, YOU MAY, WITHOUT PENALTY, RESCIND THIS CONVEYANCE WITHIN SEVEN DAYS EXCLUDING SATURDAYS, SUNDAYS AND LEGAL HOLIDAYS; AND THAT SUCH RECISION IS EFFECTIVE UPON DELIVERY OF A WRITTEN NOTICE TO THE LENDER OR ITS AGENT OR UPON MAILING OF SUCH NOTICE TO THE LENDER OR ITS AGENT BY CERTIFIED OR REGISTERED MAIL, RETURN RECEIPT REQUESTED.

Editor's Note: It is recommended that the above deed not be recorded until after the seven day period of recission has passed and no written notice of recission from the debtor has been received.

FORM NO. 99

**NOTICE OF RESCISSION BY DEBTOR
AFTER DEED IN LIEU OF FORECLOSURE**

Date:

Via Certified Mail RRR #

Lender or Lender's Agent

Address

ATT: (Name of Applicable Person, if any)

Notice of Recission by Debtor of Deed In Lieu of Foreclosure Signed On *(Day/Month/Year)*
(Address of Property)

To: *(Name of Person If Known/To Whom It May Concern):*

Please be advised that this communication constitutes formal written notice pursuant to subsection 11d of the Fair Foreclosure Act, *N.J.S.A. 2A:50-63d*, of my intention to rescind the deed in lieu of foreclosure signed by me on *(Day/Month/Year)* with respect to *(Address of property)*. This written notice has been mailed or delivered to you within seven (7) days after execution of the deed in lieu of foreclosure referred to above and is absolutely effective to effectuate recission in accordance with the terms of the act.

Please confirm by letter that you have received this communication and intend to abide by its terms.

Sincerely,

(Name of Debtor)

FORM NO. 100**14 DAY NOTICE –OPTIONAL PROCEDURE****(LETTERHEAD OF LENDER’S ATTORNEY)**

(Date)

Via Certified Mail RRR#

Name of Individual Debtor

Street Address

Municipality, State, Zip Code

RE: Lender’s Name
 Lender’s Account Number
 Address of Mortgaged Premises

**NOTICE OF FILING AFFIDAVIT OR CERTIFICATION OF ELECTION
 REQUESTING OFFICE OR COURT TO ENTER AN ORDER OF REDEMPTION**

Dear *(Name of Debtor)*:

This is to advise you that absent a response from you in accordance with paragraph 2 of subsection 6b of the Fair Foreclosure Act, *N.J.S.A. 2A:50-58b(2)*, we will file an affidavit or certification of election requesting the office or court to enter an order fixing the amount, time and place for redemption in accordance with *N.J.S.A. 2A:50-58b(1)* in the above foreclosure action on or after *(Day/Month/Year)* *(At least 14 days after date of mailing of Notice)* and that upon entry of the order fixing the amount, time and place for redemption you will lose your right to cure the default in accordance with section 5 of the act.

Paragraph 2 of subsection 6b of the Fair Foreclosure Act provides that you may, no later than 10 days after receipt of the within notice for entry of final judgment, mail to us a statement in which you in good faith certify as true that there is a reasonable likelihood that you will be able to provide payment necessary to cure the default within 45 days of the date that this notice became effective. The date this notice became effective was the date we mailed it to you on *(Day/Month/Year)*. This statement must be sent by registered or certified mail, return receipt requested, to our address. The name and address you may mail your statement to is: *(Name of Lender/C/O Address of Attorney/Attention: Name of Person)*. If we receive such a timely statement from you, we cannot file the aforesaid affidavit or certification of election and cannot submit proper proofs for entry of the order fixing the amount, time and place for redemption earlier than *(Day/Month/Year)* *(At least 46 days after date of mailing of the notice)*.

The name and address of the lender and the telephone number of a representative of the lender whom you may contact to obtain the amount required to cure the default is set forth below:

Lender's name: _____

Lender's address: _____

Phone number of a representative of the lender: _____

(PLEASE NOTE: If a servicer is handling the loan, its contact information should be provided)

Servicer's name: _____

Servicer's address: _____

Phone number of a representative of the servicer: _____

(Name of Law Firm)

By: _____

(Name of Attorney)

THIS NOTICE IS AN ATTEMPT TO COLLECT A DEBT AND ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE.

Editor's Note: For actions instituted on or after July 16, 2006, the 14-day notice of entry of judgment must include the name and address of the lender and the telephone number of the lender's representative whom the debtor may contact to obtain the amount required to cure the default.

Editor's Note: A separate notice should be used for each debtor and mailed to each debtor in separate envelopes (even if husband and wife) by the lender's attorney. The notice should direct the debtor to respond to the lender's attorney. See Federal National Mortgage Association v. Bracero, 297 N.J. Super. 105 (Ch. Div. 1996).

Editor's Note: Since the 14 day notice will be given to the debtor by the lender's attorney, and since the 14 day notice is technically not a "pleading" in the foreclosure action, a Fair Debt Collection Practices Act (15 U.S.C. §1601 as amended) disclosure should be prominently typed into the notice.

Since the 14 day notice will not be the initial communication, the following mini disclosure may be used:

THIS NOTICE IS AN ATTEMPT TO COLLECT A DEBT AND ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE.

FORM NO. 101**CERTIFICATION OF MAILING OF 14 DAY NOTICE—OPTIONAL PROCEDURE**

[Abbreviated Caption]

On *(Day/Month/Year)*, I, the undersigned, Attorney for *(Name of Lender)* mailed to the following persons, in separate envelopes, by certified mail, return receipt requested, with postage prepaid, a 14 day notice of filing a certification of election requesting the office or court to enter a redemption order in accordance with *N.J.S.A. 2A:50-58b(1)*:

(LIST NAMES OF PERSONS WITH MAILING ADDRESSES)

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

(Name of Law Firm)

By: _____
(Name of Attorney)

Dated:

Editor's Note: This form should be used alone where submission of papers for the redemption order is made to the Office or court "after" the 45 day period has elapsed from the date of mailing of the 14 day notice. Where papers for entry of the redemption order are submitted "prior" to the expiration of the 45 day period, this form should be used in conjunction with "Form No.18A," Certification of No Response from the Debtor.

Editor's Note: The 14 day notice must be mailed in "separate" envelopes to each debtor even if they are husband and wife living at the same address. The notice must be mailed to the debtor's last known address, and if different from the address of the mortgage premises, also to the mortgaged premises, N.J.S.A. 2A:50-56b, 58a. It is the author's suggestion that the notice also be mailed to any other address for the debtor of which the lender is aware.

FORM NO. 102**CERTIFICATION OF NO RESPONSE—OPTIONAL PROCEDURE**

[Abbreviated Caption]

I, the undersigned, Attorney for *(Name of Lender)* certify that, pursuant to section 6 of the Fair Foreclosure Act, *N.J.S.A. 2A:50-58*, I mailed to the persons identified below, a 14 day notice of filing a certification of election requesting the office or court to enter a redemption order in accordance with *N.J.S.A. 2A:50-58b(1)*, setting forth the debtors' right to cure in accordance with the act.

I certify that in accordance with section 6 of the act, neither I, nor to the best of my knowledge, anyone on behalf of the lender, received a statement from any of the following persons within 10 days after receipt by said debtor(s) of the 14 day notice:

(LIST NAMES OF PERSONS)

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

(Name of Law Firm)

By: _____

(Name of Attorney)

Dated:

Editor's Note: This proof is required only where you are applying to the Office or court for the redemption order under the optional procedure before the 45 day period has elapsed from the date of mailing of the 14 day notice and should be used together with the previous form under the optional procedure.

FORM NO. 103**CERTIFICATION OF MAILING OF 14 DAY NOTICE
AND NO RESPONSE–OPTIONAL PROCEDURE (COMBINED)**

[Abbreviated Caption]

On *(Day/Month/Year)*, I, the undersigned, Attorney for *(Name of Lender)* mailed to the following persons, in separate envelopes, by certified mail, return receipt requested, with postage prepaid, a 14 day notice of filing a certification of election requesting the office or court to enter a redemption order in accordance with *N.J.S.A. 2A:50-58b(1)*:

(LIST NAMES OF PERSONS WITH MAILING ADDRESSES)

I certify that in accordance with section 6 of the act, neither I, nor to the best of my knowledge, anyone on behalf of the lender, received a statement from any of the debtors within 10 days after receipt by the debtor(s) of the 14 day notice.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

(Name of Law Firm)

By: _____
(Name of Attorney)

Dated:

Editor's Note: This is a form which combines the certification of mailing with the certification of no response and obviates the need for a separate certification for the latter.

FORM NO. 104**STATEMENT BY DEBTOR**

(Date)

Via Certified Mail RRR#
Name of Attorney For Lender
Address
Municipality, State, Zip Code

RE: Debtor's Name
 Lender's Account Number
 Address of Mortgaged Premises

Statement of Debtor

Dear *(Name of Attorney For Lender)*:

Please be advised that pursuant to *N.J.S.A. 2A:50-58b(2)*, I, the undersigned debtor, in good faith certify as true that there is a reasonable likelihood that I will be able to provide payment necessary to cure the default within 45 days of the date the notice required by paragraph (1) of subsection 6b of the Fair Foreclosure Act, *N.J.S.A. 2A:50-58b(1)* was mailed to me.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

(Name of Individual Debtor)

FORM NO. 105

CERTIFICATION OF ELECTION TO UTILIZE OPTIONAL REMEDY

(Abbreviated Caption)

1. I, the undersigned, am an Attorney At Law of New Jersey and attorney for plaintiff in the within foreclosure action.
2. In accordance with subsection 11f of the Fair Foreclosure Act, *N.J.S.A. 2A:50-63f*, plaintiff hereby elects to utilize the optional procedure pursuant to Counts Three and Four of the Complaint.
3. The basis of plaintiff's election to utilize the optional procedure pursuant to subsection 11b of the Fair Foreclosure Act is as follows: *(Set forth one or more of the following grounds) (Abandonment) (Deed In Lieu Of Foreclosure) (No Equity)*.
4. *(If abandonment utilized as basis)/* On or before *(Day/Month/Year)* the debtor abandoned the property which is the subject of the residential mortgage foreclosure action, by leaving said premises vacant, in disrepair, with no furniture, clothing, food, or anything else which would indicate an intention on the part of the debtor to return to the premises and occupy it as a residence. As a result of such abandonment, plaintiff boarded up the property to prevent vandalism and expended substantial sums of money for the maintenance and preservation of said premises.

5. *(If deed in lieu utilized as basis)/* On *(Day/Month/Year)*, the debtor signed a deed in lieu of foreclosure in favor of *(Name of Lender)*, which clearly and conspicuously contained the required rescission language of subsection 11d, and which conveyance was not rescinded by the debtor within seven days or at any time thereafter.

6. *(If no equity utilized as basis)/* The sum total of all liens and encumbrances on the property which is the subject of the residential mortgage foreclosure action is \$ *(Dollar Amount)*. The fair market value of the mortgaged premises as determined by plaintiff in its Certification of No Equity is \$ *(Dollar Amount)*. Thus, the total of all liens and encumbrances against the property is equal to or greater than 92% of such fair market value. Pursuant to subsection 11e of the fair Foreclosure Act, the mortgaged premises has no equity in accordance with the act.

7. A Certification of *(Abandonment/Non-Rescission/No Equity)* is submitted to the court together with this Certification, as well as other required proofs, in support of plaintiff's election to utilize the optional procedure herein.

8. I make this affidavit based upon personal knowledge knowing that the court will rely on the truth and veracity of the statements made herein.

9. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

Dated:

(Name of Law Firm)

By: _____

(Name of Attorney)

Editor's Note: In accordance with Paragraph 7 above, a supporting Certification of Abandonment, a Certification of Non-Rescission, and/or a Certification of No-Equity must be submitted with the within Certification of Election, together with necessary papers and proofs for the Order Fixing the Amount, Time and Place for Redemption.

FORM NO. 106**CERTIFICATION OF ABANDONMENT**

(Abbreviated Caption)

1. I, the undersigned, am a duly authorized representative of *(Name of Lender)*. Set forth qualifications, experience, real estate expertise and so forth.

2. On *(Day/Month/Year)* I personally visited the property which is the subject of this residential mortgage foreclosure action, commonly known as *(Street Address)*, and made a complete investigation of the condition of the property and all other relevant facts bearing on the matters and conclusions recited herein.

3. (Recite in detail the condition of the property; steps taken for maintenance and preservation; whether it appeared to be recently occupied or unoccupied for long time; whether boarded up; condemned; in condemned condition; hazard to public health, safety and welfare; code violations; utilities not working and any other facts which would conclusively show that property was not occupied for some time, was not in livable condition, contained little or no furniture, clothing or anything else that would indicate that owner intended to return.)

4. (Recite steps taken to find owner, if any, in order to determine owner's state of mind and intention to abandon; conversations with owner in which owner indicated intent to abandon; conversations with neighbors. Check to see whether owner's children are still enrolled in local schools; postal inquiry to discover forwarding address out of time; whether mail is delivered to property, etc..)

5. Based upon my investigation of the property in question, it is my opinion that the property was abandoned by *(Name of Owner)*; and that the vacant and deplorable condition of the property, (the lack of working utilities, food, clothing, furniture and the like) indicated that said owner or owners had no intention of returning to the property to reside in it.

6. I make this affidavit based upon personal knowledge knowing that the court will rely on the veracity and truth of the statements made herein.

7. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

Dated:

(Name and Title)

FORM NO. 107**CERTIFICATION OF NON-RESCISSION**

(Abbreviated Caption)

1. I, the undersigned, am a *(State Title, Position And Name Of Lender)*.
2. On *(Day/Month/Year)* the debtor *(Set Forth Names)* voluntarily abandoned the property which is the subject of the residential mortgage foreclosure action by giving a deed in lieu of foreclosure to *(Name of Lender)*, dated *(Day/Month/Year)*, recorded *(Day/Month/Year)* in the *(Name)* County *(Clerk's or Register's)* Office in Deed Book *(Number)* at Page *(Number)*.
3. Prior to execution of the aforesaid deed the debtor, in accordance with section 3 of the Fair Foreclosure Act was given notice of and apprised of its rights pursuant to section 4 of the act.
4. The aforesaid deed in lieu of foreclosure dated *(Day/Month/Year)* clearly and conspicuously provided: that the debtor may without penalty, rescind the conveyance within seven days excluding Saturdays, Sundays and legal holidays; and that such rescission is effective upon delivery of a written notice to the lender or its agent or upon mailing of such notice to the lender or its agent by certified or registered mail, return receipt requested.
5. The aforesaid deed was signed by the debtor on *(Day/Month/Year)*. At no time within seven days after *(Day/Month/Year)*, or at any time thereafter, did the debtor rescind the aforesaid conveyance by delivering or mailing a written notice of rescission to *(Name of Lender)* or an agent of *(Name of Lender)* in accordance with subsection 11d of the Fair Foreclosure Act.
6. I make this affidavit based upon personal knowledge knowing that the court will rely on the veracity and truth of the statements made herein.
7. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

Dated:

(Name and Title)

FORM NO. 108**CERTIFICATION OF NO-EQUITY**

(Abbreviated Caption)

1. I, the undersigned, am (*State Title, Qualifications, Experience, and so forth*).
2. (Set forth with specificity the fair market value of the property in question).
3. (Set forth the unpaid balance of the obligation, plus the total unpaid balances of all liens and encumbrances against the property, including mortgages, tax liens and judgments actually against the property (not similar name judgments), as of the date of the affidavit.
4. (Show that the total set forth in paragraph 3. is equal to or greater than 92 percent of the amount set forth under paragraph 2.)
5. The method by which the lender determined that the property had no equity.
6. By virtue of the matters recited above, the property which is the subject of this residential mortgage foreclosure action has no equity in accordance with subsection 11e of the Fair Foreclosure Act.
7. I make this affidavit based upon personal knowledge knowing that the court will rely on the truth and veracity of the statements made herein.
8. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

Dated:

(*Name and Title*)

FORM NO. 109

ORDER FIXING THE AMOUNT, TIME AND PLACE FOR REDEMPTION

(Abbreviated caption)

This matter being opened to the court by *(Name of Attorneys)*, Attorneys for plaintiff, and it appearing that default has been entered against the defendants *(Insert Names Of Defendants)*; that the defendants *(Insert Names Of Defendants)* have filed non-contesting answers; that plaintiff has produced before this court certified copies of the mortgage, note/bond and assignments, if any, to be foreclosed; and that in accordance with the Fair Foreclosure Act, *N.J.S.A. 2A:50-53 et seq.*, pursuant to which this action is brought, plaintiff has given the debtor a 14 day notice of entry of this order in accordance with law *(or, if applicable, "plaintiff is not required to give the debtor a 14 day notice of entry of this order because the debtor voluntarily surrendered the property/or waived the provisions of the act in accordance with law.")*

IT IS on the *(Day/Month/Year)*, ORDERED AND ADJUDGED that the amount required to redeem the premises referred to in the aforementioned mortgage is the sum of \$ *(Dollar Amount)*, together with lawful interest on said sum from *(Day/Month/Year)* to the date of redemption, and costs of suit duly taxed in the sum of \$ *(Amount)*; and

IT IS FURTHER ORDERED that the *(Day/Month/Year)* *(not less than 45 days nor more than 60 days after the date of the order)* between the hours of 9:00 a.m. and 4:00 p.m. at *(Law Firm/Name of Person/Street Address)*, be and the same is hereby fixed as the time and place for redemption of the said lands as described in the complaint and making up the premises concerning which the complaint is filed; and that thereupon the defendant who redeems shall acquire all rights provided by law and equity in accordance with *N.J.S.A. 2A:50-63k*; and

IT IS FURTHER ORDERED that pursuant to *N.J.S.A. 2A:50-57b(1)*, redemption shall be made in cash, cashier's check or certified check; and

IT IS FURTHER ORDERED that in default of said defendants paying to the person aforesaid, at the place aforesaid, the said sum, interest, and costs aforesaid, the said defendants stand absolutely debarred and foreclosed of and from all right and equity of redemption on, in and to said lands and premises and every part hereof, and the plaintiff shall have an absolute and indefeasible interest of inheritance in fee simple to said lands and premises. Anything to the contrary notwithstanding, redemption shall be permitted at any time up until the entry of judgment including the whole of the last day upon which judgment is entered; and

IT IS FURTHER ORDERED that in accordance with *N.J.S.A. 2A:50-63h*, the order for redemption or notice thereof shall be mailed to each defendant's last known address and, if different from the address of the property being foreclosed, also to the address of the property being foreclosed, by ordinary mail and certified mail, return receipt requested, within 20 days after the date this order is entered; and, as to defendants whose addresses are unknown, this order (or a notice thereof) shall be published in a newspaper published or of general circulation in the county of venue within 20 days after the date this order is entered.

IT IS FURTHER ORDERED that a copy of this order be delivered to the person to whom redemption is ordered to be made, and that said person certify to this court whether the premises were or were not redeemed from plaintiff's mortgage in accordance with the terms of this order.

NOTICE TO DEFENDANTS [*N.J.S.A.* 2A:50-63h(2)]

Please be advised that plaintiff is proceeding under an optional procedure authorized by section 11 of *N.J.S.A.* 2A:50-63, which requires that plaintiff file a complaint in the Superior Court of New Jersey in accordance with *N.J.S.A.* 2A:50-53 et seq. and the Rules Governing The Courts Of The State Of New Jersey; serve you with a summons and a copy of the complaint in accordance with the Rules Governing The Courts Of The State Of New Jersey; then proceed in accordance with the aforesaid statute and rules to enter an order fixing the amount, time and place for redemption ("the redemption order") which tells you the "amount" required for redemption (i.e., the sum necessary to pay-off and satisfy the mortgage) and the "time" and "place" appointed by the court, when and where redemption is to be made. The redemption order (or a notice containing the terms and provisions of the order) must be served on you by ordinary and certified mail if your address is known to plaintiff. If your address is unknown, a copy of the order or notice thereof must be published in a newspaper published or circulating in the county where the action is brought. If you do not redeem or pay-off the mortgage, with interest to date of redemption and costs awarded by the court in the order, at the appointed time and place set forth in the redemption order, plaintiff has the right to proceed to final judgment by filing an affidavit of non-redemption with the court and proof of service of the redemption order (or notice thereof) in accordance with the aforesaid statutes and rules of court. You have the right to redeem and pay off all sums due and owing under the mortgage, with interest and costs, up until entry of final judgment including the whole of the last day upon which judgment is entered. On entry of final judgment pursuant to the statute you will lose your ownership and rights to the property being foreclosed. There is no public sale of the property being foreclosed under the optional procedure.

You may object to the optional procedure and request a public sale of the property being foreclosed in accordance with subsection i of section 11 of the Fair Foreclosure Act, *N.J.S.A.* 2A:50-63i, by submitting to the Office of Foreclosure (CN 971, Trenton, N.J. 08625), or the court, a written request for a public sale within 30 days of the date this order (or notice thereof) is served on you. If you are the owner of the property, and you are a natural person, or a voluntary transferee from that owner, you have the right to request a public sale without posting a cash deposit or bond. Any other defendant requesting a sale must post a cash deposit or bond with the court, in an amount which is 10% of the amount found due in the redemption order, prior to the date fixed for redemption in the order, and must pay all expenses and costs associated with the public sale, including but not limited to, all sheriff's fees and commissions. The court may dispense with a bond for good cause shown.

Please be advised that no request for a public sale made after 30 days from the date of service of the redemption order will be granted, except for good cause shown.

(J.S.C.)

Editor's Note: The place for redemption under the act is plaintiff's attorneys office, if the office is located in the county of venue, otherwise redemption should be ordered made to the offices of a law firm located in the county of venue, naming a specific person in that office to whom redemption should be made.

Editor's Note: While the statute does not require a second publication as to defendants whose addresses are unknown and who were served with original process by publication, the Office of Foreclosure will not honor this statutory provision and will not process the case unless such defendants are served with the redemption order or notice thereof by publication in accordance with the rules of court.

FORM NO. 110**NOTICE TO REDEEM**

(Abbreviated Caption)

TO: *(Set Forth Names Of Defendants To Whom Notice Directed)*

PLEASE TAKE NOTICE that an order made on *(Day/Month/Year)*, the Superior Court fixed *(Day/Month/Year)* between the hours of 9.00 a.m. and 4.00 p.m. at *(Place of Redemption/Street Address/Person In Charge)*, as the time and place when and where you may pay to the plaintiff the amount so found due on its mortgage as follows:

Mortgage made by *(Mortgagors)* to *(Name of Lender)* covering premises known as *(Street Address Of Mortgaged Premises)*. Total amount required to redeem is \$ *(Dollar Amount)*, together with interest from *(Day/Month/Year)* and costs of \$ *(Dollar Amount)*. Payment must be made in cash, cashier's check or certified check.

And that unless, at the same time and place, you or one of you redeem by paying the aforesaid sum so found due to plaintiff, then you, and each of you shall be debarred and foreclosed of and from all right and equity of redemption of, in and to the lands and premises above set out and described in the complaint and every part thereof, and that the plaintiff be vested with an absolute and indefeasible estate of inheritance in fee simple in said lands and premises.

Anything to the contrary notwithstanding, redemption shall be permitted at any time up until the entry of judgment including the whole of the last day upon which judgment is entered

NOTICE TO DEFENDANTS [N.J.S.A. 2A:50-63h(2)]

Please be advised that plaintiff is proceeding under an optional procedure authorized by section 11 of N.J.S.A. 2A:50-63, which requires that plaintiff file a complaint in the Superior Court of New Jersey in accordance with N.J.S.A. 2A:50-53 et seq. and Rules Governing The Courts Of The State Of New Jersey; serve you with process and a copy of the complaint in accordance with the Rules Governing The Courts Of The State Of New Jersey; then proceed in accordance with the aforesaid statute and rules to enter an order fixing the amount, time and place for redemption ("the redemption order") which tells you the "amount" required for redemption (i.e., the sum necessary to pay-off and satisfy the mortgage) and the "time" and "place" appointed by the court, when and where redemption is to be made. The redemption order (or a notice containing the terms and provisions of the order) must be served on you by ordinary and certified mail if your address is known to plaintiff. If your address is unknown, a copy of the order or notice thereof must be published in a newspaper published or circulating in the county where the action is brought. If you do not redeem or pay-off the mortgage, with interest to date of redemption and costs awarded by the court in the order, at the appointed time and place set forth in the redemption order, plaintiff has the right to proceed to final judgment by filing an affidavit of non-redemption with the court and proof of service of the redemption order (or notice thereof) in accordance with the aforesaid statutes and rules of court. You have the right to

redeem and pay off all sums due and owing under the mortgage, with interest and costs, up until entry of final judgment including the whole of the last day upon which judgment is entered. On entry of final judgment pursuant to the statute you will lose your ownership and rights to the property being foreclosed. There is no public sale of the property being foreclosed under the optional procedure.

You may object to the optional procedure and request a public sale of the property being foreclosed in accordance with subsection i of section 11 of the Fair Foreclosure Act, *N.J.S.A. 2A:50-63i*, by submitting to the Office of Foreclosure (CN 971, Trenton, N.J. 08625), or the court, a written request for a public sale within 30 days of the date this order (or notice thereof) is served on you. If you are the owner of the property, and you are a natural person, or a voluntary transferee from that owner, you have the right to request a public sale without posting a cash deposit or bond. Any other defendant requesting a sale must post a cash deposit or bond with the court, in an amount which is 10% of the amount found due in the redemption order, prior to the date fixed for redemption in the order, and must pay all expenses and costs associated with the public sale, including but not limited to, all sheriff's fees and commissions. The court may dispense with a bond for good cause shown.

Please be advised that no request for a public sale made after 30 days from the date of service of the redemption order will be granted, except for good cause shown.

(Attorney for Plaintiff)

Date:

Editor's Note: The notice to redeem is an abbreviated version of the order fixing the amount, time and place for redemption (the redemption order) containing the essential provisions of the order. It is most commonly used in newspaper publications where publication of the full redemption order would prove too costly.

FORM NO. 111**REQUEST FOR A PUBLIC SALE**

Date:

Via certified Mail RRR #

Office Of Foreclosure

CN 971

Trenton, New Jersey

AT: Jim Colasurdo, Chief, Office of Foreclosure

RE: (Docket No. F-)
 (Name Of Plaintiff) v. (Name Of First Defendant)

Dear Mr. Colasurdo:

Please be advised that I am the owner of property located at (Street Address).

Pursuant to subsection 11i of the Fair Foreclosure Act, *N.J.S.A. 2A:50-63i*, I am hereby objecting to the optional procedure and requesting a public sale of the mortgaged premises.

I was served with a copy of the redemption order on (Day/Month/Year) and therefore my request is timely.

Please see to it that this request for a sale is filed and becomes a permanent part of the court record in the within action.

[Sample paragraph where bond required]

Because I am not the owner, I will proceed before the chancery judge of the vicinage in accordance with subsection 11i of the Fair Foreclosure Act to have a bond approved and filed in accordance with the act.

If you wish to contact me, please do so at the above address and telephone number.

Sincerely,

 (Name)

cc: Attorney for Plaintiff

Editor's Note: If the owner is not a natural person or a transferee from that owner, a cash deposit must be posted or bond approved and filed with the vicinage chancery judge—in an amount which shall be 10% of the amount found due in the redemption order—prior to the date

fixed for redemption. The court may dispense with a bond for good cause shown.

Editor's Note: If the foreclosure action is uncontested, the request for a sale should be sent to the Office of Foreclosure. If the action is contested, the request should be filed with the vicinage chancery judge.

FORM NO. 112

CERTIFICATION OF MAILING OF ORDER FIXING THE AMOUNT, TIME AND PLACE FOR REDEMPTION OR NOTICE THEREOF

[Abbreviated Caption]

On (Day/Month/Year), I, the undersigned (*an Attorney At Law of New Jersey/a secretary employed by the attorneys for plaintiff in the above entitled action*), mailed to the following persons, in separate envelopes, by certified mail, return receipt requested, and by regular first class mail, with postage prepaid thereon, a copy of the Order Fixing the Amount, Time and Place for Redemption (or Notice thereof) in accordance with N.J.S.A. 2A:50-63h:

(LIST NAMES OF PERSONS WITH MAILING ADDRESSES)

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

(Name of Attorney or Secretary)

Dated:

Editor's Note: The statute, N.J.S.A. 2A:50-63h permits plaintiff to mail either a copy of the Order Fixing the Amount, Time and Place for Redemption (or a Notice thereof) within 20 days after the date of the Order. The Notice is an abbreviated form of the Order. For the form of a Notice to Redeem, see Form No. 22 in this Appendix.

FORM NO. 113

**CERTIFICATION OF PUBLICATION OF ORDER FIXING THE AMOUNT TIME
AND PLACE FOR REDEMPTION OR NOTICE THEREOF**

[Abbreviated Caption]

On *(Day/Month/Year)*, I, the undersigned *(an Attorney At Law of New Jersey/a secretary employed by the attorneys for plaintiff in the above entitled action)*, caused to be published a copy of the Order Fixing the Amount, Time and Place for Redemption (or Notice thereof), in accordance with law, in the following newspaper: *(Name of Newspaper)*.

Attached is the original proof of publication by the newspaper. *(Attach original newspaper notice and affidavit of publication from the newspaper)*.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

(Name of Attorney or Secretary)

Dated:

Editor's Note: Rule 4:64-1(F) permits plaintiff to publish either a copy of the Order Fixing the Amount, Time and Place for Redemption (or a Notice thereof). Although N.J.S.A. 2A:50-63h provides that the Order or Notice does not have to be published with respect to defendants whose addresses are unknown, nevertheless, according to the current practice of the court, the Order or Notice must be published, with respect to all defendants whose addresses are unknown, within 20 days after the date of the Order. The Notice is an abbreviated form of the Order. For the form of a Notice to Redeem, see Form No. 22 in this Appendix.

FORM NO. 114**NOTICE OF MOTION FOR ALL FINAL JUDGMENTS
TO ANSWERING OR APPEARING PARTIES, MORTGAGORS AND TENANTS**

[Use Abbreviated Caption]

Take notice that we shall apply before the Office of Foreclosure, at the Hughes Justice Complex, 6th Floor, North Wing, Market Street, Trenton, NJ 08628 for the entry of judgment in this action in favor of the plaintiff for the relief demanded in the complaint and shall file the proof required by R. 4:64-2. Judgment sought will be entered in the discretion of the court unless the attorney or *pro se* party on whom it has been served notifies in writing the Office of Foreclosure and the attorney for the moving party or the *pro se* party within ten days after the date of service of the motion that the responding party objects to the entry of the order.

IF YOU WANT TO OBJECT TO THIS MOTION YOU MUST DO SO IN WRITING WITHIN 10 DAYS AFTER THE DAY YOU RECEIVED THIS MOTION. ANY OBJECTION MUST ADDRESS THE SUBJECT OF THE MOTION AND DETAIL WITH SPECIFICITY THE BASIS OF THE OBJECTION. YOU MUST FILE YOUR OBJECTION WITH THE OFFICE OF FORECLOSURE, P.O. BOX 971, 25 MARKET STREET, TRENTON, NEW JERSEY 08625, AND SERVE A COPY ON THE MOVING PARTY. THE OFFICE OF FORECLOSURE DOES NOT CONDUCT HEARINGS. YOUR PERSONAL APPEARANCE AT THE OFFICE WILL NOT QUALIFY AS AN OBJECTION. IF YOU FILE A SPECIFIC OBJECTION, THE CASE WILL BE SENT TO A JUDGE FOR RESOLUTION. YOU WILL BE INFORMED BY THE JUDGE OF THE TIME AND PLACE OF THE HEARING ON THE MOTION.

Please note that no hearing will take place at the time and place above, as the Office of Foreclosure is not a hearing office. An appearance is not required.

Dated: _____, 20____.

Attorneys for the Plaintiff

By _____

CERTIFICATION OF SERVICE OF NOTICE

_____, does hereby certify

I am employed by _____, attorneys for Plaintiff in the above entitled action.

On _____, 20____, a copy of the within Notice of Motion and Certification of

Amount Due was sent to the following:

[List names and addresses mailed to]

by certified mail, return receipt requested and by regular mail, with required postage thereon, by depositing an envelope containing said Notice of Motion through the United States mail.

I hereby certify that the foregoing statements made by me are true; I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

Name and Title

Dated:

Editor's Note: Although not required by the rules, it is a good idea for plaintiff to submit a copy of plaintiff's Certification of Amount Due with the above Notice of Motion.

Editor's Note: Although the statute, N.J.S.A. 2A:50-63l, does not specifically require a notice of motion for judgment to appearing and answering defendants, it is clear that R. 4:64-1(d) requires that such a motion be given.

FORM NO. 115**CERTIFICATE OF REDEMPTION**

Certificate of Redemption

Optional Foreclosure Procedure

N.J.S.A. 2A:50-63k

KNOW ALL MEN BY THESE PRESENTS, That, Whereas by a certain mortgage between *(Name of Mortgagor)* and *(Name of Mortgagee)* dated *(Day/Month/Year)*, recorded *(Day/Month/Year)* in the *(Name of County)* County *(Clerk's or Register's)* Office in Mortgage Book *(Number)* at Page *(Number)* certain residential property commonly known as *(Street Address)* were encumbered by the aforesaid residential mortgage.

On or about *(Day/Month/Year)* an action was instituted in the Superior Court of New Jersey entitled *(Name of Plaintiff)* v. *(Name of First defendant)*, Docket No. F- *(Number)*.

NOW, THEREFORE, I, the undersigned being *(Plaintiff's Attorney or Authorized Agent)*, do certify that on *(Day/Month/Year)* and before the equity of redemption was cut off, as provided by law, *(Name of Redemptioner)* claiming to have an interest in said lands did redeem said lands by paying to plaintiff \$ *(Dollar Amount)*, the amount required by law for redemption.

IN WITNESS WHEREOF, I have set my hand and seal this *(Day/Month/Year)*.

(Attorney For Plaintiff or Authorized Agent)

(Acknowledgment)

Editor's Note: The effect of a Certificate of Redemption pursuant to N.J.S.A. 2A:50-63k is not absolutely clear. It does not appear that this certificate should be recorded with the county recording officer, as the certificate merely serves to evidence redemption and has no title consequences. Where the redemption satisfies and discharges the mortgage, the mortgage should be endorsed for cancellation or a discharge of mortgage should be obtained in accordance with law. Unlike its function with respect to a tax sale certificate, where the certificate of redemption may be used to discharge a tax sale certificate of record pursuant to N.J.S.A. 54:5-55, it does not appear that the certificate of redemption pursuant to the optional procedure should or can be used to discharge a mortgage of record. Where redemption does not discharge the mortgage but allows the redemptioner to step into the shoes of the foreclosing plaintiff and foreclose the redemptioner's interest, the certificate of redemption is merely a muniment or receipt evidencing redemption with no other function or purpose.

FORM NO. 116**CERTIFICATION OF NON-REDEMPTION**

(Abbreviated Caption)

1. I, the undersigned am an Attorney At Law of New Jersey and a member of *(Name of Law Firm)*, the law firm named in the redemption order to which redemption is to be made.
2. Pursuant to the Order made by the court in the above entitled cause, I duly attended at my *(Street Address)* on *(Day/Month/Year)* between the hours of 9:00 a.m. and 4:00 p.m.
3. I do hereby state that neither the defendants nor any person or persons acting on their behalf appeared before me at the time and place aforesaid and that neither the defendants nor any person or persons acting on their behalf paid or offered to pay to the said plaintiff the sum mentioned at the time and place aforesaid, or at any time thereafter, which time and place was fixed by this court for redemption.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

(Name of Firm)

By: _____

(Name of Attorney)

Dated:

FORM NO. 117

JUDGMENT—OPTIONAL PROCEDURE

(Abbreviated Caption)

THIS CAUSE being opened to the court by *(Name of Plaintiff's Attorneys)*, Attorneys for Plaintiff, and it appearing to the Court that the complaint filed herein was duly filed to foreclose the equity of redemption of the defendants pursuant to the optional procedure in accordance with the Fair Foreclosure Act, *N.J.S.A. 2A:50-53 et seq.*, and to confirm in the plaintiff the fee simple title in and to the premises described in the complaint and hereinafter described;

And it appearing that the plaintiff is the holder of a mortgage affecting the premises described in the complaint made by *(Name of Mortgagors)* to *(Name of Lender)* dated *(Date/Month/Year)*, recorded *(Date/Month/Year)* in the *(Name of County)* County *(Clerk or Register's)* Office in Mortgage Book *(Number)* at Page *(Number)*.

And it further appearing that there was due on said mortgage as of *(Day/Month/Year)* in accordance with the certification of plaintiff filed in the cause, for principal, interest, taxes, and other lawful charges, the sum of \$ *(Dollar Amount)* with lawful interest from *(Day/Month/Year)*, together with costs.

And it further appearing that default has been entered by the Clerk of the Court against the defendants *(Insert Names of Defaulted Defendants)*; and that the defendants *(Insert Names of Answering and Appearing Defendants)* have filed non-contesting answers or appearances; and that plaintiff filed a certification with the court electing, and establishing that it is entitled, to proceed under one or more paragraphs of subsection 11b of the Fair Foreclosure Act, *N.J.S.A. 2A:50-63b*, and supported by the proofs required by the act; and the court by its order made on *(Date/Month/Year)*, fixed the *(Date/Month/Year)*, between the hours of 9.00 a.m. and 4.00 p.m. in the *(Address/Place of Redemption)*, as the time and place for the redemption of the premises upon payment thereof; and that neither the defendants nor any one acting on their behalf requested a public sale of the mortgaged premises in accordance with *N.J.S.A. 2A:50-63i*.

And it further appearing by certification of mailing duly filed herein that the order fixing the amount, time and place for redemption or notice thereof was duly mailed by certified mail, return receipt requested, and by regular mail in accordance with the terms of the order of the court concerning the defendants whose addresses are known; and published in a newspaper published or generally circulated in the county of venue as to defendants whose addresses are unknown;

And it further appearing from the certification of *(Name of Person To Whom Redemption Ordered Made)* that he or she attended at *(Address/Place of Redemption)*, on the *(Day/Month/Year)* between the hours of 9.00 a.m. and 4.00 p.m.; that neither the defendants nor any person acting on their behalf, appeared before her at the time and place aforesaid; that neither the defendants nor any person acting in their behalf paid or offered to pay to the plaintiff the said sum of money mentioned above found to be due to the plaintiff, at the time and place

aforesaid; and that the said sum and said costs still remain due and owing to plaintiff.

IT IS therefore on this (Day/Month/Year), ORDERED AND ADJUDGED that, in accordance with section 11 of the Fair Foreclosure Act, N.J.S.A. 2A:50-63 *et seq.*, the defendants (*Insert Names of All Defendants*), and all persons claiming by, from or under them, stand absolutely debarred and foreclosed of and from any and all right and equity of redemption, in and to the lands and every part thereof, which lands and premises are more particularly described as follows:

(INSERT DESCRIPTION OF MORTGAGED PREMISES)

And it is further ORDERED AND ADJUDGED that the plaintiff (*Name*), is vested with an absolute and indefeasible estate of inheritance in fee simple to the premises above described.

(J.S.C.)

Editor's Note: A certified, sealed copy of this judgment must be recorded as a deed with the county recording officer's office where the land is located.

FORM NO. 118

PROOF OF MAILING (COPY OF JUDGMENT)

(Abbreviated Caption)

1. I, the undersigned, am a legal assistant with [*Name of Law Firm*], attorneys for Plaintiff in the above entitled matter.

2. On (Day/Month/Year), I mailed in the U.S. Post Office at (City/Town and State), a sealed envelope with postage prepaid thereon, by regular and certified mail, return receipt requested to:

[List Names and Addresses of Persons Mailed To]

containing a copy of the Final Judgment.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

[Name]

Dated:

Editor's Note: As to defaulting defendants, R. 4:43-2(c) provides, in part:

Within seven days after receipt of the executed judgment from the court, the proponent of the judgment shall serve a copy thereof on the defaulting defendant as required by R. 1:5-2 except that service may be made by ordinary mail alone.

Editor's Note: As to appearing parties, R. 1:5-1 provides that a copy of the judgment must be served on all attorneys of record and parties appearing pro se within 7 days after it is signed. Service of papers under R. 1:5-1 is ordinarily made by ordinary mail to attorneys and simultaneous ordinary and certified mail to parties pro se, R. 1:5-2.

FORM NO. 119

**NOTICE OF DEPOSIT OF EXCESS FUNDS
WITH THE SUPERIOR COURT OF NEW JERSEY
(NO-EQUITY ONLY)**

[Abbreviated Caption]

To: *(List the names of the debtors and the names of all junior lien holders whose liens were lost in whole or in part as a result of entry of the foreclosure judgment under the optional procedure).*

Take notice that on *(Day/Month/Year)* plaintiff, in accordance with the requirements of N.J.S.A. 2A:50-63e(2) and (3), deposited *(Dollar Amount)* with the Superior Court of New Jersey representing excess funds in the above entitled action. Pursuant to the aforesaid statute, you have six (6) months to make an application to the Superior Court in the form of an application for surplus funds, on notice to all other parties in interest, to seek an order for turnover of the excess funds.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

(Name of Plaintiff's Attorney)

Dated:

Editor's Note: The above Notice must be sent by certified mail, return receipt requested to the last known address of the debtor and to all junior lien holders whose liens were lost in whole or in part as a result of entry of the foreclosure judgment under the optional procedure. A proof of mailing of the Notice should be filed with the court. See the next form of this Appendix for the form of such a proof of mailing. This notice is only required where the no-equity basis for the optional procedure is used.

FORM NO. 120

**CERTIFICATION OF MAILING OF NOTICE OF DEPOSIT OF EXCESS
FUNDS WITH THE SUPERIOR COURT OF NEW JERSEY
(NO-EQUITY ONLY)**

[Abbreviated Caption]

On *(Day/Month/Year)*, I, the undersigned *(an Attorney At Law of New Jersey/a secretary employed by the attorneys for plaintiff in the above entitled action)*, mailed to the following persons and their attorneys, in separate envelopes, at their respective last known addresses as set forth below, by certified mail, return receipt requested, with postage prepaid, a *Notice of Deposit of Excess Funds With The Superior Court of New Jersey* in accordance with *N.J.S.A. 2A:50-63e(3)*,:

(LIST NAMES OF PERSONS WITH MAILING ADDRESSES)

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

(Name of Attorney or Secretary)

Dated:

Editor's Note: The Notice must be sent by certified mail, return receipt requested to the last known address of the debtor and to all junior lien holders whose liens were lost in whole or in part as a result of entry of the foreclosure judgment under the optional procedure. In the author's opinion, the Notice should also be mailed to any attorneys of record in the action representing the debtor and junior lien holders. This notice is only required where the no-equity basis for the optional procedure is used.

FORM NO. 121**VERIFIED COMPLAINT VACANT & ABANDONED RESIDENTIAL PROPERTY
MORTGAGE FORECLOSURE****(WITH SAMPLE CERTIFICATIONS AND AMOUNT DUE)****Plaintiff or Filing Attorney Information:**Name [Attorney's Name]NJ Attorney ID Number [Insert NJ Attorney ID No.]Address [Attorney's Address][Attorney's Address]Telephone Number [Attorney's Phone Number]

Superior Court of New Jersey
 Chancery Division _____ County
 General Equity Part

Docket No: F _____

Civil Action

Verified Complaint Vacant & Abandoned
 Residential Property Mortgage Foreclosure

_____,
 Plaintiff,
 v.
 _____,
 Defendant.

First Count

1. Plaintiff, [insert the plaintiff's name], is a corporation having its principal place of business at [insert the plaintiff's business address] and is authorized to transact business in the State of New Jersey.

2. This action is being brought to foreclose a mortgage because you have failed to comply with the terms and conditions of the Note and Mortgage. As a result, the entire debt is due, including the unpaid principal amount due on the Note, and Mortgage, and all unpaid interest and advances, attorney fees and costs.

3. On [insert the date of note], obligor(s) (a/k/a debtor(s)) executed a Note (obligation) with the following terms:

Obligor(s): [insert the names of the obligor(s) who executed the note]

Original Note amount of: (\$)

Initial Note contract interest rate of percent;

Note's initial monthly payments for interest and principal of \$; and

Late charges of _____percent after days of an installment's due date.

4. To secure the payment of the Note, a Mortgage was executed and delivered to secure certain property identified in paragraph 5 below, and thereby conferred on the mortgagee a lien on the property that secures the debt. The terms of the Note are:

Mortgage given to: [insert the name of the original Mortgagee]

Mortgage dated: [insert the date of the original Mortgage]

Date recorded: [insert the date the original Mortgage was recorded]

Mortgage Recorded in Book _____, Page _____ in [Insert the name of the county] County Clerk's office.

5. The property being foreclosed upon herein is commonly known as [insert street number and street name] in the [city, township, borough] of [insert name of municipality], County of [Insert the name of the county], and State of New Jersey, being also known as Lot _____, Block _____ on the [city, township, borough] of [insert name of municipality] tax records. A more detailed metes and bounds description is attached to this Foreclosure Complaint as Schedule "A."

6. This mortgage [choose one - is/is not] a purchase money mortgage.

7. The mortgage [choose one - was/was not] assigned [if no assignment, just end the sentence here].

Mortgage assigned by: [insert the name of the original Mortgagee]

Mortgage assigned to: [insert the name of the Assignee]

Assignment dated: [insert the date of the Assignments]

Assignment recorded on: [insert the date of the Assignment recording]

Assignment Recorded in Assignment of Mortgage Book _____, at Page _____ in [Insert the name of the county] County Clerk's office.

8. The terms and conditions of the Note and Mortgage state that if any payments for interest and principal, taxes, and/or insurance are not made for more than thirty (30) days from the date of mailing of a Notice of Default to the obligors, and the payments remain unpaid, then the entire principal sum, with all interest and advances may be due, at the option of the mortgagee.

9. Defendants have defaulted under the terms and conditions of the Note and Mortgage and are still in default.

10. The terms and conditions of the Note and Mortgage being foreclosed on state that additional interest will continue to accrue for any and all payments made for additional advances, which may include taxes and insurance, or any other liens which affect the property, or other advances made to preserve and protect the Plaintiffs interest in the property, and attorneys fees for services rendered, and will continue to accumulate through to the date of foreclosure sale. Plaintiff reserves the right to submit its proof of all amounts due at the time that judgment in foreclosure is entered.

11. The following parties are being joined to foreclose their rights in, to or against the property being foreclosed on because their interest is subordinate and subject to the lien of the

foreclosing plaintiff. These following defendants are not being sued to be held liable or accountable to the plaintiff in any manner through the instant action, but rather, are being joined in this action for the sole purpose of foreclosing any and all interests, including the right of redemption of the mortgage being foreclosed on that the following defendants may have in the property:

11a. [Insert the specifics for each subordinate lien -- holder's name, recording date and recording information et cetera.]

11b. [Insert the name of any subsequent owner; insert the specifics for the conveyance – grantor(s) and grantee(s) name(s), recording date and recording information et cetera.]

11c.

11d.

12. The plaintiff has complied with the Fair Foreclosure Act by mailing the Notice of Intent to Foreclose at least 30 days before the filing of this Foreclosure Complaint.

WHEREFORE, Plaintiff demands judgment:

- (a) Fixing the amount due the Plaintiff on the Note and Mortgage;
- (b) Directing that the Plaintiff be paid the amount due on the note and mortgage, together with interest, advances and costs;
- (c) Barring and foreclosing the defendants, and each of them, of all equity of redemption in and to the property being foreclosed upon;
- (d) Adjudging that the property be sold according to law to satisfy the amount due the Plaintiff;
- (e) For such other relief as the court may deem just and equitable.

Second Count

13. Plaintiff repeats and realleges the allegations of the paragraphs set forth in the First Count and makes the same a part hereof, as if repeated at length.

14. Defendants, [insert the names of the defendant(s)], are in possession of the property described in the First Count of this Complaint and because of the default in the terms of the Note and Mortgage described in the First Count of this Complaint, have deprived the Plaintiff it's right to possession of the property described in the First Count of this Complaint.

WHEREFORE, the Plaintiff demands judgment

- (a) for possession of the property in favor of the plaintiff or plaintiff's assignee or any purchaser at sheriff's sale;

- (b) for damages for mesne profits;
- (c) for costs of this proceeding, and
- (d) for such other and further relief as the court may deem just and equitable.

Third Count

15. Plaintiff repeats and realleges the allegations of the paragraphs set forth in the First and Second Counts and makes the same a part hereof, as if repeated at length.

16. The property is vacant and abandoned and is not occupied by a mortgagor or tenant [optional if known: as evidenced by a lease agreement entered into prior to the service of a notice of intention to commence foreclosure].

17. An inspection of the property, which is the subject of the within foreclosure action, by an agent of the plaintiff substantiates that the property is vacant and abandoned and that the following conditions exist(*only insert existing conditions established by personal knowledge*):

- ☐ overgrown or neglected vegetation;
- ☐ the accumulation of newspapers, circulars, flyers or mail on the property;
- ☐ disconnected gas, electric, or water utility services to the property;
- ☐ the accumulation of hazardous, noxious, or unhealthy substances or materials on the property;
- ☐ the accumulation of junk, litter, trash or debris on the property;
- ☐ the absence of window treatments such as blinds, curtains or shutters;
- ☐ the absence of furnishings and personal items;
- ☐ statements of neighbors, delivery persons, or government employees indicating that the residence is vacant and abandoned(attach a summary of the statements);
- ☐ windows or entrances to the property that are boarded up or closed off or multiple window panes that are damaged, broken and unrepaired;
- ☐ doors to the property that are smashed through, broken off, unhinged, or continuously unlocked;
- ☐ a risk to the health, safety or welfare of the public, or any adjoining or adjacent property owners, exists due to acts of vandalism, loitering, criminal conduct, or the physical destruction or deterioration of the property(describe in detail);
- ☐ an uncorrected violation of a municipal building, housing, or similar code during the preceding year, or an order by municipal authorities declaring the property to be unfit for occupancy and to remain vacant and unoccupied(attach a copy of any violations, violation correction demands or orders);
- ☐ the mortgagee or other authorized party has secured or winterized the property

- due to the property being deemed vacant and unprotected or in danger of freezing;
- ☐ a written statement issued by any mortgagor expressing the clear intent of all mortgagors to abandon the property(attach a copy of the written statement);
- ☐ any other reasonable indicia of abandonment(describe).

WHEREFORE, Plaintiff, in accordance with *N.J.S.A. 2A:50-73* demands judgment that:

- (a) the residential property that is the subject of this foreclosure action is vacant and abandoned as defined by *N.J.S.A. 2A:50-73(a)*;
- (b) the court enter a final residential mortgage foreclosure judgment on the return date of an order to show cause;
- (c) such other and further relief as the court may deem just and equitable.

Fourth Count

Insert into a separate count any other cause of action for which relief is sought, for example, any open prior lien that is alleged satisfied, any reformation of the note, mortgage or property description, recognition of an equitable mortgages or other cause. NOTE. This count may bar the action from proceeding in a summary manner.

18. Plaintiff repeats and realleges the allegations of the paragraphs set forth in the First, Second AND Third Counts and makes the same a part hereof, as if repeated at length.

19. *Insert facts and allegations supporting any additional germane relief sought.*

[Insert Name of Law Firm]
Attorneys for Plaintiff

By: _____
Attorney sign above and type or print name below

Dated: _____

Count I Verification

I, [insert employee's name], do hereby certify that:

1. I am an employee of [insert plaintiff or the mortgage servicing company's name] at its [insert the city/state location where affiant works] office as a [insert the affiant's title/position]. *[Said company is a mortgage servicing company authorized to service and handle mortgage transactions on behalf of the plaintiff involving the mortgage debtors named in the plaintiff's complaint. The plaintiff has not revoked said mortgage servicing company's authority and, as such, I have the authority to verify, on behalf of the plaintiff, the allegations of the complaint and the computation of amount due set forth in the attached schedule.]*

2. I have thoroughly reviewed the plaintiff's [alternate language mortgage servicing company's] books and records concerning the note and mortgage loan described in the plaintiff's complaint and am fully familiar with the facts set forth herein.

3. The allegations in paragraphs 3 through 12 in Count I of the within complaint setting out the loan and mortgage records associated with the residential property located at [insert street address, municipality and county], New Jersey are true and correct to my personal knowledge.

4. I have reviewed all entries and calculations and amounts indicated in the schedule attached to the complaint are correctly stated and if such statement indicates any advances made or to be made by the plaintiff or owner of the mortgage indebtedness, that such advances were, in fact, made.

5. Per diem interest of \$, as set forth in the annexed schedule, will accrue on the principal from , 20.

6. The plaintiff may be compelled to advance various sums in order to protect and preserve the mortgaged real property. It may be necessary for the plaintiff to pay taxes and assessments which have been or may be levied upon the real property, liability, fire and other hazard insurance premiums on the real property and by virtue of the mortgage the same constitute additional indebtedness secured by the mortgage.

I hereby certify that the foregoing statements made by me are true. I am aware that, if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

Dated: _____

Plaintiff's/ Plaintiff's Service Employee Signature Above
and Type or Print Name Below

Count III Verification

I, [insert agent's name] do hereby certify that:

1. I am an agent of [insert plaintiff's name], plaintiff in this foreclosure action.
2. I personally inspected the real property located at [insert the street address, municipality and county], New Jersey which is the subject of the within foreclosure action on [insert date or dates of inspections].
3. I have reviewed the conditions that establish that the property is vacant and abandoned, which are described in Count III of the complaint, and the same are true and correct to my personal knowledge.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

Dated: _____

Agent's Signature Above and Type or Print Name Below

Rule 4:5-1 Certification

In accordance with Rule 4:5-1, I hereby certify that the matter in controversy is not the subject of any action pending in any Court or pending arbitration proceeding. There is no other action or arbitration proceeding contemplated.

[Insert Name of Law Firm]
Attorneys for Plaintiff

By: _____
Attorney sign above and type or print name below

Dated: _____

Rule 4:5-1(b)(2) Certification

In accordance with Rule 4:5-1(b)(2), I hereby certify that pursuant to Rule 4:64-1(a), prior to the filing of the complaint, I have caused a title search of the public record to be made for the purpose of identifying any lien holders or other persons or entities with an interest in the property that is the subject of this foreclosure.

[Insert Name of Law Firm]
Attorneys for Plaintiff

By: _____
Attorney sign above and type or print name below

Dated: _____

Rule 1:5-6(c)(1)(e) and Rule 4:64-1(a) (2) and (3)
Certification of Diligent Inquiry

, Esq., of full age, hereby certifies and say:

1. On [insert date], I communicated by [insert mode of communication] with the following named employee(s) of [insert the plaintiff's name or insert the plaintiff's mortgage loan servicer's name], who stated that he/she personally reviewed the complaint to be filed with the court and that he/she confirmed compliance with *Rule* 4:64-1(b)(1) through (b)(10) and (b)(12) through (b)(13).

2. The name, title and responsibilities of the plaintiff's employee(s) or plaintiff's mortgage loan servicer's employee(s) with whom I communicated are:[insert the employee's name][insert the employee's title][insert the employee's responsibilities].

3. *[If an employee of the plaintiff's mortgage loan servicer]* The above-named employee(s) stated that the relationship between his/her employer and the plaintiff is: [insert description of the relationship], and confirmed that his/her employer is authorized to act on behalf of the plaintiff in this action.

3/4. Based on my communication with the above-named employee(s) of plaintiff or plaintiff's mortgage loan servicer, as well as my own inspection of the loan information supplied by the plaintiff or the plaintiff's mortgage loan servicer and other diligent inquiry, I execute this certification to comply with the requirements of *Rules* 1:4-8(a), 1:5-6(c)(1)(E), and 4:64-1(a)(2) and (3).

4/5. I am aware that I have a continuing obligation under Rule 1:4-8 to amend this certification if a reasonable opportunity for further investigation or discovery indicates insufficient evidentiary support for any factual assertions proffered by plaintiff in any court filings or documents in this case.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

[Insert Name of Law Firm]
Attorneys for Plaintiff

By: _____
Attorney sign above and type or print name below

Dated: _____

Rule 1:38-7 Certification of Redaction

I certify that confidential personal identifiers have been redacted from documents now submitted to the court, and will be redacted from all documents submitted in the future in accordance with Rule 1:38-7(b).

[Insert Name of Law Firm]
Attorneys for Plaintiff

By: _____
Attorney sign above and type or print name below

Dated: _____

Attachment: Schedule "A" Mortgage Property Legal Description

Attach Amount Due Schedule Court Rule Appendix XII-J

Property Legal Description / Metes and Bounds Description

Amount Due Schedule

NOTE AND MORTGAGE DATED _____

Recorded on _____, in _____ County, in Book _____ at Page _____

Property Address: _____

Mortgage Holder: _____

Statement Of Amount Due

Unpaid Principal Balance as of _____ \$ _____

Interest from _____ to _____ \$ _____

(Interest rate = _____ % per year; \$ _____ per day x _____ days)

Late Charges from _____ to _____

(\$ _____ /mo. x _____ mos.) \$ _____

Advances through _____ for:

Real Estate Taxes \$ _____

Home Owners Insurance Premiums \$ _____

Mortgage Insurance Premium \$ _____

Inspections \$ _____

Winterizing/Securing \$ _____

Sub-Total of Advances \$ _____

Less Escrow Monies (\$ _____)

Net Advances \$ _____ \$ _____

Interest on advances from _____ to _____ \$ _____

Other charges (specify) \$ _____

TOTAL DUE AS OF _____ \$ _____

Surplus Money: If after the sale and satisfaction of the mortgage debt, including costs and expenses, there remains any surplus money, the money will be deposited into the Superior Court Trust Fund and any person claiming the surplus, or any part thereof, may file a motion pursuant to Court Rules 4:64-3 and 4:57-2 stating the nature and extent of that person's claim and asking for an order directing payment of the surplus money. The Sheriff or other person conducting the sale will have information regarding the surplus, if any.

Date: [insert date] _____

/s/ _____
Type or Print Lender's or Servicing Agent's Employee's Name

Following are two stand-alone verifications for Count I and III that, if used in place of the verifications in the complaint, must be attached to the complaint when it is filed.

FORM NO. 122

**VERIFIED COMPLAINT – SEPARATE COUNT I VERIFICATION (IN PLACE OF
VERIFICATION INSERTED DIRECTLY INTO THE COMPLAINT). VERIFICATION
MUST BE ATTACHED TO THE COMPLAINT WHEN FILED.**

Plaintiff or Filing Attorney Information:Name [Attorney's Name]NJ Attorney ID Number [Insert NJ Attorney ID No.]Address [Attorney's Address][Attorney's Address]Telephone Number [Attorney's Phone Number]_____,
Plaintiff,

v.

_____,
Defendant.

Superior Court of New Jersey
Chancery Division _____ County

General Equity Part

Docket No: F _____

Civil Action

Verification Count I and Proof of Amount Due
Schedule

I, [insert employee's name], do hereby certify that:

1. I am an employee of [insert plaintiff or the mortgage servicing company's name] at its [insert the city/state location where affiant works] office as a [insert the affiant's title/position]. *[Said company is a mortgage servicing company authorized to service and handle mortgage transactions on behalf of the plaintiff involving the mortgage debtors named in the plaintiff's complaint. The plaintiff has not revoked said mortgage servicing company's authority and, as such, I have the authority to verify, on behalf of the plaintiff, the allegations of the complaint and the computation of amount due set forth in the attached schedule.]*

2. I have thoroughly reviewed the plaintiff's [alternate language mortgage servicing company's] books and records concerning the note and mortgage loan described in the plaintiff's complaint and am fully familiar with the facts set forth herein.

3. The allegations in paragraphs 3 through 12 in Count I of the within complaint setting out the loan and mortgage records associated with the residential property located at [insert street address, municipality and county], New Jersey are true and correct to my personal knowledge.

4. I have reviewed all entries and calculations and amounts indicated in the schedule attached hereto are correctly stated and if such statement indicates any advances made or to be made by the plaintiff or owner of the mortgage indebtedness, that such advances were, in fact, made.

5. Per diem interest of \$, as set forth in the annexed schedule, will accrue on the principal from , 20.

6. The plaintiff may be compelled to advance various sums in order to protect and preserve the mortgaged real property. It may be necessary for the plaintiff to pay taxes and assessments which have been or may be levied upon the real property, liability, fire and other hazard insurance premiums on the real property and by virtue of the mortgage the same constitute additional indebtedness secured by the mortgage.

7. I make this certification knowing that the court will rely on the same to decide whether the within foreclosure action may proceed in a summary manner.

I hereby certify that the foregoing statements made by me are true. I am aware that, if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

Dated: _____

*Plaintiff's/ Plaintiff's Service Employee Signature Above
and Type or Print Name Below*

Amount Due Schedule

NOTE AND MORTGAGE DATED _____

Recorded on _____, in _____ County, in Book _____ at Page _____

Property Address: _____

Mortgage Holder: _____

Statement Of Amount Due

Unpaid Principal Balance as of _____ \$ _____

Interest from _____ to _____ \$ _____

(Interest rate = _____ % per year; \$ _____ per day x _____ days)

Late Charges from _____ to _____

(\$ _____ /mo. x _____ mos.) \$ _____

Advances through _____ for:

Real Estate Taxes \$ _____

Home Owners Insurance Premiums \$ _____

Mortgage Insurance Premium \$ _____

Inspections \$ _____

Winterizing/Securing \$ _____

Sub-Total of Advances \$ _____

Less Escrow Monies (\$ _____)

Net Advances \$ _____ \$ _____

Interest on advances from _____ to _____ \$ _____

Other charges (specify) \$ _____

TOTAL DUE AS OF _____ \$ _____

Surplus Money: If after the sale and satisfaction of the mortgage debt, including costs and expenses, there remains any surplus money, the money will be deposited into the Superior Court Trust Fund and any person claiming the surplus, or any part thereof, may file a motion pursuant to Court Rules 4:64-3 and 4:57-2 stating the nature and extent of that person's claim and asking for an order directing payment of the surplus money. The Sheriff or other person conducting the sale will have information regarding the surplus, if any.

Date: [insert date] _____

/s/ _____
Type or Print Lender's or Servicing Agent's Employee's Name

FORM NO. 123

**VERIFIED COMPLAINT – SEPARATE COUNT III VERIFICATION (IN PLACE OF
VERIFICATION INSERTED DIRECTLY INTO THE COMPLAINT). VERIFICATION
MUST BE ATTACHED TO THE COMPLAINT WHEN FILED.**

Plaintiff or Filing Attorney Information:Name [Attorney's Name]NJ Attorney ID Number [Insert NJ Attorney ID No.]Address [Attorney's Address][Attorney's Address]Telephone Number [Attorney's Phone Number]

_____,
Plaintiff,
v.
_____,
Defendant.

Superior Court of New Jersey
Chancery Division _____ County
General Equity Part

Docket No: F _____

Civil Action
Verification Count III

I, [insert agent's name] do hereby certify that:

1. I am an agent of [insert plaintiff's name], plaintiff in this foreclosure action.
2. I personally inspected the real property located at [insert the street address, municipality and county], New Jersey which is the subject of the within foreclosure action on [insert date or dates of inspections].
3. I have reviewed the conditions that establish that the property is vacant and abandoned, which are described in Count III of the complaint, and the same are true and correct to my personal knowledge.
4. I make this certification knowing that the court will rely on the same to decide whether the within foreclosure action may proceed in a summary manner.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

Dated: _____

Agent's Signature Above and Type or Print Name Below

FORM NO. 124

**OSC AS ORIGINAL PROCESS
SUMMARY ACTION VACANT & ABANDONED RESIDENTIAL PROPERTY
FORECLOSURE**

Plaintiff or Filing Attorney Information:Name [Attorney's Name]NJ Attorney ID Number [Insert NJ Attorney ID No.]Address [Attorney's Address][Attorney's Address]Telephone Number [Attorney's Phone Number]

Superior Court of New Jersey
Chancery Division _____ County

General Equity Part

Docket No: F _____

Civil Action

Order to Show Cause

Summary Vacant & Abandoned Residential
Mortgage Foreclosure Action

_____,
Plaintiff,
v.
_____,
Defendant.

THIS MATTER being brought before the Court by , attorney for plaintiff, [insert the plaintiff's name], seeking relief by way of a summary action pursuant to *R. 4:67-1(a)*, based upon the facts set forth in the verified complaint filed herewith; and the Court having determined that this matter may be commenced by order to show cause as a summary proceeding pursuant to *N.J.S.A. 2A:50-73*; and for good cause shown.

IT IS on this ____ day of , 20____, *ORDERED* that the defendants, namely, [insert the names of all defendants whose interest in the property will be extinguished by the foreclosure], appear and show cause on the ____ day of , 20____ before the Superior Court at the _____ County Courthouse in , New Jersey at ____ o'clock in the ____ noon, or as soon thereafter as counsel can be heard, why judgment should not be entered for:

A. Finding that the residential property that is the subject of this foreclosure action is vacant and abandoned as defined by *N.J.S.A. 2A:50-73(a)*;

B. Fixing the amount due the Plaintiff on the Note and Mortgage;

C. Directing that the Plaintiff be paid the amount due on the note and mortgage, together with interest, advances, and costs;

D. Barring and foreclosing the defendants, and each of them, of all equity of redemption in and to the property being foreclosed upon;

E. Adjudging that the property be sold according to law to satisfy the amount due the Plaintiff;

F. For possession of the property in favor of the plaintiff or plaintiff's assignee or any purchaser at sheriff's sale;

G. For damages for mesne profits;

H. For costs of this action;

I. Other relief demanded in the complaint;

I/ J Granting such other relief as the court deems just and equitable.

And it is further *ORDERED* that:

1. A copy of this order to show cause, verified complaint and all supporting affidavits or certifications, including the proof of amount due schedule attached to the complaint, submitted in support of this application and the Notice required by *N.J.S.A. 2A:50-73* be personally served on the defendant(s) or, if personal service cannot be effectuated as evidenced by an affidavit or certification of inquiry, by appropriate substituted service within _____ days of the date hereof, in accordance with *R. 4:4-3* and *R. 4:4-4*, this being original process.

2. If the plaintiff pursues a summary action foreclosure judgment on the return date, the attempted personal service on the defendant(s)-mortgagor(s) or any occupant(s) at the property must be at least 72 hours apart, and during different times of the day, either before noon, between noon and 6 P.M., or between 6 P.M. and 10 P.M. The process server's return must explicitly document the dates and times of attempted service on the defendant(s)-mortgagor(s) or any occupant(s).

3. The notice required by *N.J.S.A. 2A:50-73* shall be in a minimum of 14-Point font and shall state:

"To: [name of defendant-mortgagor or tenant]

Address: [address of defendant-mortgagor or tenant]

The lender is seeking on the return date set in this order to show cause, or on any adjourned date fixed by the court, to proceed summarily for entry of a residential foreclosure judgment because the property is vacant and abandoned. If you fail to file and serve a written answer, an answering affidavit, or a motion, the application will be decided on the papers on the return date and relief may be granted by default."

4. The plaintiff must file with the court through the Superior Court Clerk's office in Trenton his/her/its proof of service of the pleadings on the defendants and his/her/its remaining judgment proofs no later than fifteen (15) days before the return date of this order to show cause.

5. Defendant(s) shall file and serve a written answer, an answering affidavit or a motion returnable on the return date to this order to show cause and the relief requested in the verified complaint and proof of service of the same by , 20____. The answer, answering affidavit or a

motion, as the case may be, must be filed with the Clerk of the Superior Court at the Hughes Justice Complex, P.O. Box 971, 25 Market Street, Trenton, New Jersey 08625 and a copy of the papers must be sent directly to the chambers of the below named judge.

6. The plaintiff must file and serve any written reply to the defendant's order to show cause opposition by , 20 . The reply papers must be filed with the Clerk of the Superior Court at the Hughes Justice Complex, P.O. Box 971, 25 Market Street, Trenton, New Jersey 08625 and a copy of the reply papers must be sent directly to the chambers of the below named judge.

7. If the defendant(s) do/does not file and serve opposition to this order to show cause, the application will be decided on the papers on the return date and relief may be granted by default, provided that the plaintiff files the remaining judgment proofs along with proof(s) of service and a proposed form of judgment at least fifteen (15) days prior to the return date.

8. Defendant(s) take notice that the plaintiff has filed a foreclosure lawsuit against you in the Superior Court of New Jersey. The verified complaint attached to this order to show cause states the basis of the lawsuit. If you dispute this complaint, you, or your attorney, must file a written answer, an answering affidavit, or a motion returnable on the return date to the order to show cause and proof of service before the return date of the order to show cause. These documents must be filed with the Clerk of the Superior Court, Hughes Justice Complex, P.O. Box 971, 25 Market Street, Trenton, New Jersey 08625. Include a \$135 filing fee payable to the "Treasurer State of New Jersey." You must also send a copy of your answer, answering affidavit, or motion to the plaintiff's attorney whose name and address appear above, or to the plaintiff, if no attorney is named above. A telephone call will not protect your rights; you must file and serve your answer, answering affidavit or motion with the fee or judgment may be entered against you by default.

9. If you cannot afford an attorney, you may call the Legal Services office in the county in which you live or the Legal Services of New Jersey Statewide Hotline at 1-888-LSNJ-LAW (1-888-576-5529). If you do not have an attorney and are not eligible for free legal assistance you may obtain a referral to an attorney by calling one of the Lawyer Referral Services. A directory with contact information for local Legal Services Offices and Lawyer Referral Services is available online at njcourts.com/prose/10153_deptyclerklawref.pdf.

10. The Court will entertain argument, but not testimony, on the return date of the order to show cause, unless the court and parties are advised to the contrary no later than _____ days before the return date.

Following are model pleadings to convert a plenary foreclosure action to a summary proceeding pursuant to *Rule* 4:67-2(b).

FORM NO. 125

**MOTION TO PROCEED SUMMARILY
VACANT & ABANDONED RESIDENTIAL PROPERTY FORECLOSURE**

Plaintiff or Filing Attorney Information:Name [Attorney's Name]NJ Attorney ID Number [Insert NJ Attorney ID No.]Address [Attorney's Address][Attorney's Address]Telephone Number [Attorney's Phone Number]

Superior Court of New Jersey
Chancery Division _____ County
General Equity Part

Docket No: **F** _____**Civil Action**

Motion to Proceed Summarily
Vacant & Abandoned Residential Mortgage
Foreclosure Action

_____,
Plaintiff,
v.
_____,
Defendant.

PLEASE TAKE NOTICE that, on the [Insert day of month], of [insert month], 20____, at nine (9) o'clock in the forenoon, or as soon thereafter as counsel may be heard, the undersigned, attorneys for the plaintiff, shall apply to the Superior Court of New Jersey, Chancery Division, General Equity Part at the Court House in [insert city], New Jersey, pursuant to *Rule* 4:67-2(b) for an Order allowing the within foreclosure action to proceed in a summary manner.

PLEASE TAKE FURTHER NOTICE that this Notice of Motion is being filed in accordance with *Rule* 1:6-2, and plaintiff hereby waives oral argument unless requested by another party.

Plaintiff shall rely upon the attached affidavit/ certification in support of this Motion.

[Insert Name of Law Firm]
Attorneys for Plaintiff

By: _____
Attorney sign above and type or print name below

Dated: _____

FORM NO. 126

Proof of Mailing/Filing – Superior Court Clerk

The original of the within Notice of Motion has been filed with the Clerk of the Superior Court at the Hughes Justice Complex, P.O. Box 971, 25 Market Street, Trenton, New Jersey 08625.

Dated: _____

By: _____

FORM NO. 127**Proof of Mailing – Defendants**

On [Date], I, the undersigned, mailed to:

[Insert Name], Esq., Attorney for Defendant, at [insert address],

[Insert Name], Mortgagor-Defendant's name (if unrepresented) at [insert address],

[Insert Name], Defendant at [insert address],

by regular mail, a copy of the within Notice of Motion and supporting affidavit(s) and/or certification(s) and proof of amount due schedule.

Dated: _____

By: _____

FORM NO. 128

**CERTIFICATION IN SUPPORT OF MOTION TO PROCEED SUMMARILY
ABANDONED RESIDENTIAL PROPERTY FORECLOSURE
SUBMITTED WITH MOTION TO PROCEED SUMMARILY**

Plaintiff or Filing Attorney Information:Name [Attorney's Name]NJ Attorney ID Number [Insert NJ Attorney ID No.]Address [Attorney's Address][Attorney's Address]Telephone Number [Attorney's Phone Number]

Superior Court of New Jersey
Chancery Division _____ County

General Equity Part

Docket No: F _____

Civil Action

Certificate in Support of
Motion to Proceed Summarily
Vacant & Abandoned Residential Mortgage
Foreclosure

_____,
Plaintiff,

v.

_____,
Defendant.

[Insert name], Esq., hereby certifies and says the following:

1. I am the attorney for the plaintiff in the within action, and I am fully familiar with the facts contained herein.

2. The defendant, [insert name] is one of the mortgagors of the real property that is the subject of the foreclosure complaint.

3. Personal service on the above named defendant-mortgagor was attempted at the real property which is the subject of the within foreclosure action. [NOTE TO PLAINTIFF'S ATTORNEYS – YOU SHOULD INSTRUCT YOUR PROCESS SERVER TO COMPLY WITH THE 72 HOUR AND TIME OF DAY REQUIREMENT IN N.J.S.A. 2A:50-73 TO AVOID RESERVICE UNDER AN ORDER TO PROCEED SUMMARILY.]

4. As is evidenced by the return of service, the defendant-mortgagor is not occupying the real property and personal service at the property was not effectuated. Service by substituted [mail][publication]service has been completed.

5. Attached hereto is a certification by [insert name] who has made a physical

inspection of the real property.

6. The aforesaid inspection makes clear that the property is not occupied by the defendant- mortgagor or tenant *[optional if known: as evidenced by a lease agreement entered into prior to the service of a notice of intention to commence foreclosure]* and is vacant and abandoned as defined by *N.J.S.A. 2A:50-73*.

7. Attached hereto is a certification by [insert name] an employee of [insert the plaintiff or plaintiff's servicer's name] who has reviewed the plaintiff's business records.

8. Plaintiff requests entry of an order allowing the within foreclosure action to proceed in a summary manner.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

[Insert Name of Law Firm]
Attorneys for Plaintiff

By: _____
Attorney sign above and type or print name below

Dated: _____

FORM NO. 129

**CERTIFICATION IN SUPPORT OF MOTION TO PROCEED SUMMARILY
ABANDONED RESIDENTIAL PROPERTY FORECLOSURE
SUBMITTED WITH MOTION TO PROCEED SUMMARILY**

Plaintiff or Filing Attorney Information:Name [Attorney's Name]NJ Attorney ID Number [Insert NJ Attorney ID No.]Address [Attorney's Address][Attorney's Address]Telephone Number [Attorney's Phone Number]

Superior Court of New Jersey
Chancery Division _____ County

General Equity Part

Docket No: F _____

Civil Action

Certificate in Support of
Motion to Proceed Summarily
Vacant & Abandoned Residential Mortgage
Foreclosure

_____,
Plaintiff,

v.

_____,
Defendant.

[Insert name], hereby certifies and says the following:

1. I am an agent of [insert the plaintiff's name], the plaintiff in the within action and I am fully familiar with the facts contained herein.

2. I personally inspected the real property located at [insert street address, municipality and county], New Jersey which is the subject of the within foreclosure action on [insert date or dates of inspections].

3. My inspection of the real property that is the subject of the within foreclosure action reveals that the property is vacant and abandoned and the following conditions exist(*only insert existing conditions established by personal knowledge*):

- ☐ overgrown or neglected vegetation;
- ☐ the accumulation of newspapers, circulars, flyers or mail on the property;
- ☐ disconnected gas, electric, or water utility services to the property;
- ☐ the accumulation of hazardous, noxious, or unhealthy substances or materials on the property;

- ☐ the accumulation of junk, litter, trash or debris on the property;
- ☐ the absence of window treatments such as blinds, curtains or shutters;
- ☐ the absence of furnishings and personal items;
- ☐ statements of neighbors, delivery persons, or government employees indicating that the residence is vacant and abandoned(attach a summary of the statements);
- ☐ windows or entrances to the property that are boarded up or closed off or multiple window panes that are damaged, broken and unrepaired;
- ☐ doors to the property that are smashed through, broken off, unhinged, or continuously unlocked;
- ☐ a risk to the health, safety or welfare of the public, or any adjoining or adjacent property owners, exists due to acts of vandalism, loitering, criminal conduct, or the physical destruction or deterioration of the property(describe in detail);
- ☐ an uncorrected violation of a municipal building, housing, or similar code during the preceding year, or an order by municipal authorities declaring the property to be unfit for occupancy and to remain vacant and unoccupied(attach a copy of any violations, violation correction demands or orders);
- ☐ the mortgagee or other authorized party has secured or winterized the property due to the property being deemed vacant and unprotected or in danger of freezing;
- ☐ a written statement issued by any mortgagor expressing the clear intent of all mortgagors to abandon the property(attach a copy of the written statement);
- ☐ any other reasonable indicia of abandonment(describe).

4. I make this certification knowing that the court will rely on the same to decide whether the within foreclosure action may proceed in a summary manner.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

Dated: _____

Agent's Signature Above and Type or Print Name Below

FORM NO. 130

**CERTIFICATION IN SUPPORT OF MOTION TO PROCEED SUMMARILY
ABANDONED RESIDENTIAL PROPERTY FORECLOSURE
SUBMITTED WITH MOTION TO PROCEED SUMMARILY**

Plaintiff or Filing Attorney Information:Name [Attorney's Name]NJ Attorney ID Number [Insert NJ Attorney ID No.]Address [Attorney's Address][Attorney's Address]Telephone Number [Attorney's Phone Number]

Superior Court of New Jersey
Chancery Division _____ County

General Equity Part

Docket No: F _____

Civil Action

Certificate in Support of
Motion to Proceed Summarily -
Vacant & Abandoned Residential Mortgage
Foreclosure
Verification Count I and
Proof of Amount Due Schedule

_____,
Plaintiff,

v.

_____,
Defendant.

I, [insert employee's name], do hereby certify that:

1. I am an employee of [insert plaintiff or the mortgage servicing company's name] at its [insert the city/state location where affiant works] office as a [insert the affiant's title/position]. *[Said company is a mortgage servicing company authorized to service and handle mortgage transactions on behalf of the plaintiff involving the mortgage debtors named in the plaintiff's complaint. The plaintiff has not revoked said mortgage servicing company's authority and, as such, I have the authority to verify, on behalf of the plaintiff, the allegations of the complaint and the computation of amount due set forth in the attached schedule.]*

2. I have thoroughly reviewed the plaintiff's [alternate language mortgage servicing company's] books and records concerning the note and mortgage loan described in the plaintiff's complaint and am fully familiar with the facts set forth herein.

3. The allegations in paragraphs 3 through 12 in Count I of the within complaint setting out the loan and mortgage records associated with the residential property located at [insert street address, municipality and county], New Jersey are true and correct to my

personal knowledge.

4. I have reviewed all entries and calculations and amounts indicated in the schedule attached hereto are correctly stated and if such statement indicates any advances made or to be made by the plaintiff or owner of the mortgage indebtedness, that such advances were, in fact, made.

5. Per diem interest of \$, as set forth in the annexed schedule, will accrue on the principal from , 20.

6. The plaintiff may be compelled to advance various sums in order to protect and preserve the mortgaged real property. It may be necessary for the plaintiff to pay taxes and assessments which have been or may be levied upon the real property, liability, fire and other hazard insurance premiums on the real property and by virtue of the mortgage the same constitute additional indebtedness secured by the mortgage.

7. I make this certification knowing that the court will rely on the same to decide whether the within foreclosure action may proceed in a summary manner.

I hereby certify that the foregoing statements made by me are true. I am aware that, if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

Dated: _____

*Plaintiff's/ Plaintiff's Service Employee Signature Above
 and Type or Print Name Below*

Amount Due Schedule

NOTE AND MORTGAGE DATED _____

Recorded on _____, in _____ County, in Book _____ at Page _____

Property Address: _____

Mortgage Holder: _____

Statement Of Amount Due

Unpaid Principal Balance as of _____ \$ _____

Interest from _____ to _____ \$ _____

(Interest rate = _____ % per year; \$ _____ per day x _____ days)

Late Charges from _____ to _____

(\$ _____ /mo. x _____ mos.) \$ _____

Advances through _____ for:

Real Estate Taxes \$ _____

Home Owners Insurance Premiums \$ _____

Mortgage Insurance Premium \$ _____

Inspections \$ _____

Winterizing/Securing \$ _____

Sub-Total of Advances \$ _____

Less Escrow Monies (\$ _____)

Net Advances \$ _____ \$ _____

Interest on advances from _____ to _____ \$ _____

Other charges (specify) \$ _____

TOTAL DUE AS OF _____ \$ _____

Surplus Money: If after the sale and satisfaction of the mortgage debt, including costs and expenses, there remains any surplus money, the money will be deposited into the Superior Court Trust Fund and any person claiming the surplus, or any part thereof, may file a motion pursuant to Court Rules 4:64-3 and 4:57-2 stating the nature and extent of that person's claim and asking for an order directing payment of the surplus money. The Sheriff or other person conducting the sale will have information regarding the surplus, if any.

Date: [insert date]

/s/
Type or Print Lender's or Servicing Agent's Employee's Name

FORM NO. 131

**ORDER TO PROCEED SUMMARILY
ABANDONED RESIDENTIAL PROPERTY FORECLOSURE
SUBMITTED WITH MOTION TO PROCEED SUMMARILY**

Plaintiff or Filing Attorney Information:Name [Attorney's Name]NJ Attorney ID Number [Insert NJ Attorney ID No.]Address [Attorney's Address][Attorney's Address]Telephone Number [Attorney's Phone Number]

Superior Court of New Jersey
Chancery Division _____ County

General Equity Part

Docket No: F _____

Civil Action

Order to Proceed Summarily
Vacant & Abandoned Residential Mortgage
Foreclosure

_____,
Plaintiff,
v.
_____,
Defendant.

THIS MATTER being brought before the Court by [insert name of law firm], attorney for plaintiff, [insert the plaintiff's name], seeking relief by way of an order to proceed summarily pursuant to *R. 4:67-2(b)*, and it appearing from the affidavits/certifications filed in support of the motion that the property is vacant and abandoned; and it appearing that the matter may be completely disposed of on the record or on minimal testimony in open court, the Court having determined that this matter may proceed in a summary manner ; and for good cause shown.

IT IS on this _____ day of , 20____, *ORDERED* that this matter shall proceed with a short trial date of the _____ day of , 20____ before the Superior Court, Chancery Division, General Equity Part at the [Insert the name of the county] County Courthouse in [insert the name of the county seat], New Jersey at _____ o'clock in the _____ noon, or as soon thereafter as counsel can be heard.

On the date fixed to proceed summarily the court may determine:

A. That the residential property that is the subject of this foreclosure action is vacant and abandoned as defined by *N.J.S.A. 2A:50-73*;

B. Fix the amount due the Plaintiff on the Note and Mortgage;

C. Direct that the Plaintiff be paid the amount due on the note and mortgage, together with interest, advances, and costs;

D. Bar and foreclose the defendants, and each of them, of all equity of redemption in and to the property being foreclosed upon;

E. Adjudge that the property be sold according to law to satisfy the amount due the Plaintiff;

F. Possession of the property in favor of the plaintiff or plaintiff's assignee or any purchaser at sheriff's sale;

G. Damages for mesne profits;

H. For costs of this action;

I. *Other relief demanded in the complaint;*

I/ J Granting such other relief as the court deems just and equitable.

And it is further *ORDERED* that:

1. The plaintiff serve a copy of this ORDER and the Notice required by *N.J.S.A. 2A:50-73* on the defendant(s) within seven (7) days of the date of this order.

2. If the plaintiff pursues a summary action foreclosure judgment on the return date, a renewed attempt of personal service on the defendant(s)-mortgagor(s) or any occupant(s) at the property must be at least 72 hours apart, and during different times of the day, either before noon, between noon and 6 P.M., or between 6 P.M. and 10 P.M. The process server's return must explicitly document the dates and times of attempted service on the defendant(s)-mortgagor(s) or any occupant(s). [THIS PROVISION IS NECESSARY UNLESS THE PLENARY SERVICE WAS DONE IN COMPLIANCE WITH THE STATUTE.]

3. The notice, required by *N.J.S.A. 2A:50-73*, shall be in a minimum of 14-Point font and shall state:

"To: [name of defendant-mortgagor or tenant]

Address: [address of defendant-mortgagor or tenant]

The lender is seeking on the return date set in this order, or on any adjourned date fixed by the court, to proceed summarily for entry of a residential foreclosure judgment because the property is vacant and abandoned. If you fail to respond the application will be decided on the papers on the return date and relief may be granted by default."

4. The plaintiff must file with the court through the Clerk of the Superior Court at the Hughes Justice Complex, P.O. Box 971, 25 Market Street, Trenton, New Jersey 08625 his/her/its proof of service of this order and the Notice required by *N.J.S.A. 2A:50-73* and his/her/its remaining judgment proofs no later than fifteen (15) days before the return date set in this order.

5. The Court will entertain argument, but not testimony, on the return date set in this order, unless the court and parties are advised to the contrary no later than _____ days before the return date.

P.J. Ch

FORM NO. 132

ORDER DENYING SUMMARY FORECLOSURE

BY THE COURT

_____,
Plaintiff,
v.
_____,
Defendant.

Superior Court of New Jersey
Chancery Division _____ County
General Equity Part
Docket No: F _____

Civil Action
Order Denying Summary Foreclosure

It appearing that on [date of OSC or Order to Proceed Summarily] an [Order to Show Cause][Order to Proceed Summarily] was entered by the court and [an answer, appearance, written objection that precludes the entry of a final residential mortgage foreclosure judgment has been filed] OR [the plaintiff has not established by clear and convincing evidence that the residential property is vacant and abandoned], and for good cause shown.

It is on this _____ day of , 20 ORDERED that:

1. The Order to Show Cause be and hereby is discharged.
2. The plaintiff's application to proceed with the foreclosure in a summary manner is DENIED.
3. The within foreclosure action may continue on the normal track for residential mortgage foreclosure actions for properties that are not vacant and abandoned and the Notice to Cure required by *N.J.S.A. 2A:50-58* shall be served with the Notice of Motion for Judgment as required by *Rule 4:64-1(d)*.
4. A copy of the within order shall be served upon defendant-mortgagor and all parties or the attorneys for the parties who have appeared in the action within seven (7) days of the date hereof.

P.J. Ch

FORM NO. 133**MODEL MORTGAGE FORECLOSURE JUDGMENT – VACANT &
ABANDONED RESIDENTIAL PROPERTY****Plaintiff or Filing Attorney Information:**Name [Attorney's Name]NJ Attorney ID Number [Insert NJ Attorney ID No.]Address [Attorney's Address][Attorney's Address]Telephone Number [Attorney's Phone Number]Superior Court of New Jersey
Chancery Division _____ County

General Equity Part

Docket No: F _____

Civil ActionMortgage Foreclosure Judgment
Vacant & Abandoned Residential Property

_____,
Plaintiff,
v.
_____,
Defendant.

This matter having been opened to the Court by [insert plaintiff's law firm name], Attorneys for the Plaintiff; and the Court having determined that this matter may be [commenced by Order to Show Cause] OR [prosecuted as a summary proceeding] pursuant to *N.J.S.A. 2A:50-73*, and it appearing that on [date of OSC or Order to Proceed Summarily] an [Order to Show Cause][Order to Proceed Summarily] seeking, among other relief, the summary disposition of the within foreclosure action, was entered by the court, and [insert appearing attorney's name], Esq., attorney for the plaintiff, appearing, and the mortgagor-defendant [tenant-defendant] having not appeared or answered at the time and place designated in the [Order to Show Cause][Order Allowing Action to Proceed Summarily]; and proof of service of the [verified complaint, order to show cause and the affidavits or certification in support][Order Allowing the Action to Proceed Summarily] and the Notice of the Summary Proceeding for Entry of a Residential Foreclosure Judgment required by *N.J.S.A. 2A:50-73* having been timely filed herein and it appearing that the mortgagor-defendant [tenant-defendant] has/have been served by substituted service; and the other defendants were served in accordance with the Rules of Court; and the plaintiff having submitted a true copy of the note, mortgage and assignment or assignments of mortgage, if any, and having filed a certification of amount due including a schedule setting forth the computation of the amount due on the plaintiff's note; and the Court having reviewed the papers submitted in support of the relief sought and the Court having received a recommendation from the Office of Foreclosure and having placed its opinion on the record in open Court and good cause

appearing.

It is on this _____ day of , 20____ *ORDERED AND ADJUDGED* that:

1. The residential property is vacant and abandoned and no answer, appearance, or written objection that precludes the entry of a final residential mortgage foreclosure judgment has been filed.

2. The amount due the plaintiff is \$[insert amount due] together with interest at the contract rate of [insert note interest]% on \$[insert total of principal and advances], being the principal sum in default and advances, if any, from [insert the date the proof of amount due calculates the contract interest through] to the date of this judgment and lawful interest thereafter together with costs of this suit to be taxed, which includes, as a part thereof, a counsel fee of \$[insert counsel fee computation], computed as allowed by R. 4:42-9(a)(4) and which is hereby approved and allowed.

3. The mortgaged real property, known as [insert street address]; being Block [insert block] Lot(s) [insert lot(s)] on the [insert municipality name] municipal tax records, being further described by the legal description/ metes and bounds description in the mortgage, shall be sold to raise and satisfy the amount due, in the first place to the plaintiff, together with the plaintiff's costs and lawful interest thereon to be computed as aforesaid, and that an execution for that purpose be duly issued out of this Court directed to the Sheriff of [insert county name] County, commending said Sheriff to make a public sale, according to law, of the real property, free of all claims, rights and interest of the defendants, or any person or entity claiming under or through the defendants, except as herein provided.

4. The defendants in this cause, and each of them, stand absolutely debarred and foreclosed of and from all equity of redemption of, in, and to said real property described in the complaint and when sold as aforesaid by virtue of this judgment.

5. The plaintiff or its assignee or the successful purchaser at the Sheriff's sale shall duly recover against the defendants, and all parties holding under said defendants, possession of the real property with the appurtenances thereto.

6. Out of the monies arising from said sale the Sheriff shall pay to the plaintiff, in the first place, the amount due the plaintiff, with interest thereon as aforesaid and the plaintiff's taxed costs with interest thereon, as aforesaid.

7. The Sheriff aforesaid shall make a report of the sale, without delay, as required by the Rules Governing the Courts of the State of New Jersey.

8. In case more money shall be realized by the sale than is required to satisfy such amount due the plaintiff, then such surplus be brought into this Court to abide the further Order of this Court.

9. Notwithstanding anything herein to the contrary, this judgment shall not affect the rights of any person protected by the New Jersey Tenant Anti-Eviction Act, *N.J.S.A. 2A:18-61.1, et seq.*, the right of redemption given the United States under 28 *U.S.C.* 2410, the limited priority rights for the aggregate customary condominium assessment for the six-month period prior to the recording of any association lien as allowed by *N.J.S.A. 46:8B-21* or the Soldiers' and Sailors' Civil Relief Act of 1940, 50 *U.S.C. App. 501 et seq.*

/s/ Signature General Equity Judge

*[Type or Print Name]*P.J. Ch

FORM NO. 134**MODEL WRIT OF EXECUTION – VACANT & ABANDONED RESIDENTIAL
PROPERTY (RULE 4:59-1(A))**

_____ , Plaintiff, v. _____ , Defendant.	Superior Court of New Jersey Chancery Division _____ County General Equity Part Docket No: F _____ Civil Action Write of Execution Vacant & Abandoned Residential Property

The State of New Jersey to
 Sheriff of [insert county name] County
Greetings

WHEREAS, on [insert judgment date] by a certain Judgment in the Superior Court of New Jersey in the above captioned pending cause of action it was determined that the property is vacant and abandoned; and it was ORDERED and ADJUDGED in favor of the Plaintiff, [insert the plaintiff's name], against the following named defendants:

[insert defendants' names who were defaulted or answer struck]

—
 —
 —;

that certain real property with appurtenances and all the defendants', or those claiming through any of said defendants, rights in and to the same, described in the complaint in this action and particularly set forth and described herein, that is to say, real property commonly known as:

[insert the street address]; being Block [insert the block] Lot(s) [insert lot(s)] on the [insert the municipality's name] municipal tax map and further described the rider annex hereto,
 be sold by the Sheriff of [insert county name] County and for that purpose a writ of execution should issue directed to the aforesaid Sheriff.

AND WHEREAS, the aforesaid judgment establishes that the amount due the plaintiff is \$[insert amount due] being the principal and interest secured by a certain mortgage dated [insert the mortgage date] and given by [insert the mortgagors' names] together with interest at the contract rate of [insert note's contract rate]% on \$[insert principal and advances, but not accrued interest] being the principal sum in default and

advances, if any, from [insert the date that the amount due computed through] to [insert the judgment date], and lawful interest thereafter on the total amount due the plaintiff until the same be paid and satisfied together with the plaintiff's costs duly taxed at [\$ insert the taxed cost amount] with lawful interest thereon from the above judgment date.

NOW, THEREFORE, YOU ARE HEREBY COMMANDED to cause a public notice and sale to be made of the real property aforesaid and to sell so much of the same as may be needed and necessary to raise and pay the amount due the plaintiff.

YOU ARE FURTHER COMMANDED to pay to the plaintiff the amount of said judgment together with lawful interest and costs thereon. You are to retain out of the proceeds of sale your fees and the costs and expenses of sale as authorized by law.

YOU ARE FURTHER COMMANDED that if the property shall sell for more than a sufficient amount to satisfy the aforesaid judgment and your costs and expenses of sale and you have surplus money, then you are directed to bring the surplus money before the Superior Court of New Jersey at Trenton, New Jersey, within thirty (30) days after sale to abide the further order of the this Court and if no sale is held, then this writ is returnable within twenty-four (24) months, pursuant to R. 4:59-1(a), by certificate under your hand together with this writ.

WITNESS, the Honorable [insert the judge's name], Judge of the New Jersey Superior Court at [Insert City], New Jersey, on [insert date the writ is issued].

/s/ Michelle M. Smith

Clerk of the New Jersey Superior Court

[RIDER WITH LEGAL DESCRIPTION OF PROPERTY ATTACHED.]

About the Panelists...

Maryann Flanigan is Chief Counsel, Foreclosure Defense and Hurricane Sandy Legal Defense Projects, Legal Services of New Jersey, in Edison, New Jersey. She supervises two statewide legal projects consisting of three attorneys and two paralegals in areas involving case selection, case litigation strategy and impact litigation. Ms. Flanigan has provided representation for New Jersey residents in, or at risk of, foreclosure in cases involving issues including servicer misconduct and RESPA claims, loss mitigation misconduct, risk of equity loss, wrongful foreclosure actions and consumer fraud. She has also represented New Jersey residents that were affected by Hurricane Sandy in legal matters including consumer defense, contracts, landlord-tenant disputes, administrative law proceedings and federal agency appeals.

Ms. Flanigan has testified in the New Jersey and U.S. Senates concerning consumer-related matters on three separate occasions. She has been the Legal Services of New Jersey designee member of the New Jersey Supreme Court Committee on Complementary Dispute Resolution and the New Jersey Supreme Court Special Committee on Residential Mortgage Foreclosure.

Ms. Flanigan received her B.A.'s from Howard University and her J.D. from Duke University School of Law.

Brian F. Kerins is an attorney with Garden State Legal Services Corporation in Lawrenceville, New Jersey. Since 1993, Garden State Legal has been providing review services and assistance with both mortgage and tax foreclosures from the complaint through final judgment, and Chancery Abstracts and Certificates of Regularity are also offered by the firm after the fact.

Mr. Kerins is admitted to practice in New Jersey. He is a member of the New Jersey State Bar Association and has lectured on mortgage foreclosure for ICLE.

Mr. Kerins is a graduate of Rutgers Law School-Camden.

Kristina G. Murtha is the Managing Attorney for the New Jersey office of Kivitz McKeever Lee P.C. (known in Pennsylvania as the KML Law Group) in Westmont, New Jersey. She has extensive experience in foreclosure, litigation, evictions, REO and workout/mediations.

Ms. Murtha is admitted to practice in New Jersey and Pennsylvania, and before the United States District Court for the District of New Jersey and the Eastern, Middle and Western Districts of Pennsylvania; and the Third Circuit Court of Appeals. She has more than 20 years of experience in representing lenders in mortgage foreclosure and related bankruptcy actions.

Ms. Murtha received her B.A. from Trinity College and her J.D. from Widener University School of Law, where she was inducted into the *Phi Delta Phi* legal society.

Michelle M. Smith was appointed Clerk of the Superior Court of New Jersey in 2013 and oversees the Superior Court Clerk's Office in the Richard J. Hughes Justice Complex in Trenton, New Jersey. Her primary responsibilities have included statewide judiciary records

management, foreclosure, statewide judgment liens, and policy and planning. She was formerly the Assistant Chief of Court Processing Services for the Superior Court Clerk's Office.

Ms. Smith has served on the Advisory Committee on Public Access and the Advisory Committee on Information Technology, as well as other committees within the judiciary. Prior to joining the judiciary, she was the Associate Executive Director of Community Mediation Services (CMS), a New York-based not for profit, which provided conflict resolution and alternative dispute resolution processes for litigants in the court system. During her tenure at CMS she served in many roles, including case worker for at-risk adolescents; a certified community, special education and family mediator; and Director of the New York City Family Mediation Program.

Ms. Smith was certified as a basic and family mediation trainer by the New York Office of Court Administration. She has been an Adjunct Professor at Columbia University, the New York Institute of Technology and the John Jay College of Criminal Justice, where she has taught conflict resolution and education law to graduate and undergraduate students.

Ms. Smith received her undergraduate degree from St. John's University and her J.D. from the Jacob D. Fuchsberg Law Center.

Dennis P. Uhlmann, Jr. is a Partner in Martone & Uhlmann, P.C. in Clifton, New Jersey. With experience in representing and defending creditors in foreclosure and eviction litigation matters, he focuses in all aspects of foreclosure litigation from initial title search through property sale and evictions, and has also worked to defend foreclosing creditors in municipal court matters. He regularly appears in Municipal and Chancery courts through the State of New Jersey advocating for lender's rights.

Mr. Uhlmann is admitted to practice in New Jersey and New York. Prior to joining the firm, he worked as an associate for a one of the largest real estate firms in New Jersey focusing on Foreclosures and Bankruptcies. He also worked as a certified legal intern for the State Attorney's Office for the 4th Judicial Circuit of Florida and was a member of the Florida Coastal Mock Trial Team.

Mr. Uhlman received his B.A., *summa cum laude*, from Fairleigh Dickinson University and his J.D., with honors, from Florida Coastal School of Law, where he was the recipient of several honors. He clerked for the Honorable Monte E. Richardson, United States Magistrate Judge, Middle District of Florida.