

# CONSUMER NEWS

## THE 2009 ILLINOIS HOMEOWNER PROTECTION ACT: SIMPLY A MEANS TO DELAY THE INEVITABLE?

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### Introduction

On April 5, 2009, Illinois Governor Pat Quinn signed into law the 2009 Homeowner Protection Act.<sup>1</sup> The law became effective on April 6 and remains in effect for two years, until its sunset on April 5, 2011.<sup>2</sup> It gives Illinois homeowners who have fallen more than thirty days behind on their mortgage payments an additional thirty days to work with their lender or servicer to develop a plan that will allow them to remain in their homes.<sup>3</sup> More specifically, lenders and loan servicers must notify the borrowers when a loan is thirty days past due, and provide them with an opportunity to seek housing counseling.<sup>4</sup> If homeowners seek help at a U.S. Department of Housing and Urban Development (HUD) agency, they benefit from an additional thirty days to work out a new payment plan.<sup>5</sup> To summarize, the law acts as a foreclosure moratorium of up to ninety days, allowing the homeowner to find an alternate payment plan to avoid foreclosure.

Before the Act, Illinois required lenders to send a notice of foreclosure to homeowners who were thirty days delinquent.<sup>6</sup> The

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<sup>1</sup> Homeowner Protection Act, 735 ILCS § 5/15-1502.5 (2009).

<sup>2</sup> 735 ILCS § 5/15-1502.5(k) (2009) (“This Section is repealed 2 years after the effective date of this amendatory Act of the 95th General Assembly.”)

<sup>3</sup> 735 ILCS § 5/15-1502.5.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Illinois Foreclosure Law Summary, [http://www.foreclosurelaw.org/Illinois\\_Foreclosure\\_Law.htm](http://www.foreclosurelaw.org/Illinois_Foreclosure_Law.htm) (last visited October 16, 2009).

homeowner was given thirty days to make a payment, or the foreclosure proceedings would begin.<sup>7</sup>

At first sight, the new law seems like a great short-term solution for homeowners. Ninety days should certainly help those who need time to determine a new payment plan to actually find a solution that allows them to stay in their homes. However, one question comes to mind: do most homeowners find a way back into their homes, or do they ultimately end up facing foreclosure after a three-month reprieve?

### *I. Background*

In the past couple of years, the nation's foreclosure crisis has worsened in many ways. The number of foreclosures and delinquencies has grown among prime mortgages, new residential construction has declined, home sales have dropped, and housing prices have decreased.<sup>8</sup> On the other hand, the number of bank-owned properties has skyrocketed.<sup>9</sup> These indicators demonstrate how widespread the foreclosure crisis is, and stress the importance of developing steady and effective policy responses to stem the rate of foreclosures.<sup>10</sup>

In response to the mortgage crisis, states have begun reviewing their foreclosure processes to make sure that borrowers have sufficient time to work with their loan servicers to avoid losing their homes.<sup>11</sup> Most specifically, states have taken steps to ensure that homeowners receive adequate notice of impending foreclosure that includes information on what homeowners can do to avoid losing their homes.<sup>12</sup>

In addition to Illinois, several other states have recently passed similar "grace period" laws.<sup>13</sup>

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<sup>7</sup> *Id.*

<sup>8</sup> Stephanie Casey Pierce, *Emerging Trends: State Actions to Tackle the Foreclosure Crisis*, <http://www.nga.org/Files/pdf/0902foreclosurereport.pdf> (last visited October 20, 2009).

<sup>9</sup> *Id.* at 11.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 30.

<sup>13</sup> National Governors Association Center Report, *Foreclosure Resources*, available at <http://www.nga.org/portal/site/nga/menuitem.9123e83a1f6786440ddcbeeb501010a0/?vgnnextoid=4e67191ee609f110VgnVCM1000005e00100aRCRD> (last visited October 20, 2009).

1. Massachusetts established in April 2008 a new foreclosure system requiring lenders to send a delinquency notice to borrowers ninety days before enacting a foreclosure proceeding. The ninety days prevented any new foreclosure actions during the “right-to-cure” period.

2. Maryland enacted a new law in April 2008 that requires lenders to notify borrowers of intent to foreclose at least forty-five days before filing a foreclosure action in court. The law also stipulates that the foreclosure action may not be filed unless the borrower is at least ninety days delinquent on the mortgage payment. Additionally, when the action is filed, the lender must personally serve the borrower with court papers, and the lender may not sell the property in question until forty-five days after the papers have been served. Borrowers may cure their delinquency up to one day before the foreclosure sale.

3. North Carolina enacted the State Home Foreclosure Prevention Project, which took effect on November 1, 2008. The law requires lenders to notify both the borrowers and the North Carolina Office of the Commissioner of Banks of the lender’s intent to foreclose at least forty-five days before initiating a foreclosure proceeding. The Office of the Commissioner of Banks has committed to review every loan with a notice to foreclose during the forty-five day period. If the Office determines the homeowner could stay in the home with a reasonable loan modification, it reserves the right to extend the allowable foreclosure filing date an additional thirty days.

4. California passed the California Foreclosure Prevention Act, which went into effect on March 16, 2009. The new law imposes a 90-day moratorium on foreclosures.

## *II. The 2009 Illinois Homeowner Protection Act*

The 2009 Homeowner Protection Act does not provide a guarantee of a particular outcome, but aims at providing time and resources for a borrower to fairly negotiate a plan to stay in his home.<sup>14</sup> To that end, the legislature did not impose any income limit, asset or credit requirements on eligibility,<sup>15</sup> all

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<sup>14</sup> Illinois Legal Aid Online, *What Protections Do I Have as a Homeowner?*, available at [http://www.illinoislegalaid.org/index.cfm?fuseaction=home.dsp\\_content&contentID=6775](http://www.illinoislegalaid.org/index.cfm?fuseaction=home.dsp_content&contentID=6775) (last updated August 2009).

<sup>15</sup> Community Bankers Association of Illinois, Question and Answer: New Illinois Mortgage Foreclosure Grace Periods, available at

homeowners can benefit from this new law, without having to apply for it.

The Act applies to all homeowners not yet involved in judicial foreclosure proceedings as of the date the law became effective.<sup>16</sup> The only restriction is that the counseling can only be used once per loan,<sup>17</sup> as an assurance to the lender that the mortgagor will not engage in “a series of continual delinquencies, counseling requests, and grace periods, to stall foreclosure.”<sup>18</sup>

The procedure under the new law requires several steps. First, lenders and loan servicers must give written notice to borrowers who are delinquent by more than thirty days<sup>19</sup> and inform them that they have an additional thirty days to seek counseling and work out a new payment plan.<sup>20</sup> The notice is to be “informative,” as opposed to “threatening.” The notice must also include information about how to contact loan counseling agencies, including addresses and phone numbers.<sup>21</sup> Additionally, notice must contain “the [HUD]’s current consumer hotline, the Department’s website, and the telephone number, fax number, and mailing address of the mortgagee. No language, other than language substantially similar to the language prescribed in this subsection...shall be included in the notice.”<sup>22</sup>

Following receipt of the notice, the homeowner may seek counseling. If the mortgagor elects to do so, the counselor has an obligation to notify the mortgagee of this fact in writing within thirty days. The counseling must be conducted in person unless the mortgagor is confined to his home due to medical conditions

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<http://www.cbai.com/downloads/QA%20mortgage%20foreclosure%20requirements.pdf> (last visited October 20, 2009).

<sup>16</sup> Illinois Foreclosure Law Summary, *supra* note 6.

<sup>17</sup> Homeowner Protection Act, *supra* note 1 (stating that “the procedures and forbearances described in this Section apply only once per subject mortgage”).

<sup>18</sup> Illinois Foreclosure Law Summary, *supra* note 6.

<sup>19</sup> Homeowner Protection Act, *supra* note 1 (stating that “[u]ntil 30 days after mailing the notice provided for under subsection (c) of this Section, no legal action shall be instituted under Part 15 of Article XV of the Code of Civil Procedure”).

<sup>20</sup> *Id.* (“Notwithstanding anything to the contrary in this Section, nothing shall preclude the mortgagor and mortgagee from communicating with each other during the initial 30 days of delinquency or reaching agreement on a sustainable loan workout plan, or both”).

<sup>21</sup> U.S. Dep’t of Hous. and Urban Dev. List of HUD-approved housing counseling agencies in Illinois, available at <http://www.hud.gov/local/il/homeownership/hsgcounseling.cfm>.

<sup>22</sup> Homeowner Protection Act, *supra* note 1.

or “lives at least fifty miles away from the nearest approved counseling agency.”<sup>23</sup> Under this program, loan counselors are not allowed to charge a fee for their services.<sup>24</sup>

The mortgagee is free to accept or reject the loan workout terms proposed by the mortgagor and counselor. The terms of any loan workout plan agreed upon must be expressed in writing and must be signed by both the mortgagor and mortgagee. If the mortgagee accepts the proposal, or agrees to a modified proposal, then the mortgagee will not pursue foreclosure, as long as the mortgagor continues to comply with the terms of the loan workout plan.<sup>25</sup>

### III. The Role of HUD Agencies

The new law would not make much sense without the existence and efficiency of approved HUD agencies across the state. Once homeowners receive a notice letter from their lenders, these HUD agencies become one of a few options to avoid foreclosure. However, one barrier in the implementation of the new law has been the number and location of approved HUD agencies. Some studies show that the state is lacking the appropriate number of agencies. Housing Action Illinois,<sup>26</sup> in partnership with the Woodstock Institute,<sup>27</sup> published a report in June 2009 illustrating that housing counselors are struggling to keep up with the demand for foreclosure counseling sessions and

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Illinois Foreclosure Law Summary, *supra* note 6. *See also* Homeowner Protection Act, *supra* note 1 (“During the 30-day period. . . the mortgagor or counselor or both may prepare and proffer to the mortgagee a proposed sustainable loan workout plan. The mortgagee will then determine whether to accept the proposed sustainable loan workout plan. If the mortgagee and the mortgagor agree to a sustainable loan workout plan, then no legal action under Part 15 of Article XV of the Code of Civil Procedure shall be instituted for as long as the sustainable loan workout plan is complied with by the mortgagor. . . The agreed sustainable loan workout plan and any modifications thereto must be in writing and signed by the mortgagee and the mortgagor”).

<sup>26</sup> Housing Action Illinois “works to increase and preserve the supply of decent, affordable, accessible housing in Illinois for low – and moderate – income households in our state, particularly for households with the lowest incomes.” *See* <http://www.housingactionil.org>.

<sup>27</sup> Woodstock Institute is “a nationally and locally recognized economic justice leader for its research, policy, advocacy, and coalition building in support of fair lending and wealth creation for lower-wealth persons and communities.” *See* <http://www.woodstockinstitute.com>.

that some communities are completely lacking counseling resources all together.”<sup>28</sup>

The study consisted of surveys of ninety-four Illinois agencies.<sup>29</sup> Some of the information that was collected included locations of agencies, numbers of counselors, counselors’ experience, counseling positions available, types of counseling services offered, number of foreclosure counseling sessions, and whether clients were on a waitlist for counseling services.<sup>30</sup>

One of the pertinent findings was that in the Chicago region, there exists “clear geographic gaps in access to foreclosure counseling services.”<sup>31</sup> As the report concludes, “these gaps suggest the need for increased resources for counseling services and possible expansion of borrower outreach events to these areas.”<sup>32</sup> Another one of the findings included the fact that 17% of the agencies surveyed did not operate at full capacity, yet some 20% of agencies reported having waitlists for foreclosure counseling.<sup>33</sup>

In April 2009, Illinois had the “eighth highest rate of foreclosures in the nation with a foreclosure action on one in every 384 Illinois households.”<sup>34</sup> This represented a “total of 13,647 Illinois properties, or the fifth highest state total.”<sup>35</sup> After the passing of the Homeowner Protection Act, Illinois more than ever needs active and efficient HUD agencies to help homeowners who seek counseling in order to save their homes. HUD agencies, and their counselors, often represent the difference between keeping a home and losing it to foreclosure. Without the requisite counseling, the number might continue to worsen.

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<sup>28</sup> Katie Gottschall-Donohue (Housing Action Illinois) and Geoff Smith (Woodstock Institute), *On the Foreclosure Front Lines: Surveying the Capacity of HUD-certified Housing Counseling Agencies in Illinois* (July 7, 2009), available at <http://www.woodstockinst.org/publications/download/on-the-foreclosure-front-lines%3a-surveying-the-capacity-of-hud%11certified-housing-counseling-agencies-in-illinois> (last visited October 20, 2009).

<sup>29</sup> *Id.* at 2

<sup>30</sup> *Id.* at 10.

<sup>31</sup> *Id.* at 4.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 1.

<sup>35</sup> *Id.*

#### IV. The Home Affordable Modification Plan (HAMP)

In an effort to bolster a shaky economy, the Obama administration has also sought to help struggling homeowners with its Home Affordable Modification Plan (“the Plan”), as part of its Homeowner Affordability and Stability Plan (“HASP”).<sup>36</sup> The Plan is funding a seventy-five billion dollar Homeowner Stability Initiative to reach three to four million at-risk homeowners.<sup>37</sup> Its main goal is to reduce the amount homeowners owe each month to sustainable levels.<sup>38</sup>

Unlike the Illinois Act, not every homeowner is eligible under the Plan. Homeowners must meet several requirements to qualify for the Plan.<sup>39</sup> First, homeowners must have a monthly mortgage payment that exceeds 31% of their gross income and the homeowner must be, or have a high likelihood of becoming, delinquent. The Plan applies only to owner-occupied homes (i.e. no speculators, or house flippers) and homes can range from 1 to 4-unit homes. Homeowners whose unpaid principal on their homes is less than \$729,500 qualify (\$934,200 for 2 units; \$1,129,250 for 3 units and \$1,403,400 for 4 units). Finally, loans have to have originated before January 1, 2009.

Homeowners are only eligible to participate in the program once; if after modification, the borrower fails to stay current, the borrower is no longer eligible to apply for a modification under this program.

In order to reach its goal of helping struggling homeowners, the federal government is working in collaboration with lending institutions. As an incentive to help borrowers, the servicers receive an up-front fee of a thousand dollars for each eligible modification meeting guidelines established under this initiative.<sup>40</sup> They also receive “‘pay for success fees’ – awarded monthly as long as the borrower stays current on the loan – of up to one thousand dollars each year for three years.”<sup>41</sup>

Among all of the provisions of this Plan, perhaps one of the most encouraging ones for homeowners is the Home Price

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<sup>36</sup> U.S. Dept. of the Treasury, Homeowner Affordability and Stability Plan Executive Summary (2009), available at <http://www.treas.gov/press/releases/tg33.htm> (last visited October 20, 2009).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

Decline Reserve Payments provision that enticing lenders not to foreclose on homeowners. Overall, the Plan both rewards and entices lenders to negotiate and work out new payment plans, while simultaneously providing genuine help to homeowners.

#### *V. Results of the HAMP*

While initially slow to catch on, the Plan has seen a dramatic increase in participation since its inception. In August 2009, the Treasury Department released information on the mortgage services companies participating in the Plan, as well as an estimate of how many loan modifications the lenders were actually working on.<sup>42</sup> The program seemed to have had a slow start; only 9% of all eligible mortgages had started a trial modification by the end of July 2009.<sup>43</sup> The Treasury Department had the goal of doubling this number by November,<sup>44</sup> but it seems like it reached it “early.”<sup>45</sup>

However, according to the *Chicago Tribune*, “The Obama administration said [on October 8, 2009] that its much-criticized program to help homeowners avoid foreclosure had met its initial target of 500,000 trial mortgage modifications, about a month ahead of schedule.” Much of this success has been credited to the participation of large lenders. For instance, Bank of America, told the *Chicago Tribune* that it would be able to meet the goal set by the Obama administration of 125,000 modifications by November 1, 2009, since it had begun about 95,000 modifications as of September 30.<sup>46</sup> Wells Fargo subsequently reported that “it had arranged 62,989 trial modifications under the program as of September 30, nearly double the number of modifications it had done through the end of August.”<sup>47</sup>

However, the federal program is not a perfect solution. While the Plan reaches out to more homeowners than its Illinois counterpart, “[a]bout 12 percent of U.S. homeowners are [still] at least one payment behind, and many [of them] aren’t eligible for the program.”<sup>48</sup> Despite the program’s increasing success, critics

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<sup>42</sup> U.S. Bureau of Labor Statistics, <http://www.bls.gov>.

<sup>43</sup> *Id.*

<sup>44</sup> Homeowner Affordability and Stability Plan, *supra* note 36.

<sup>45</sup> Jim Puzzanghera, *Modification Plan for Mortgages Hits Target*, CHICAGO TRIBUNE, Oct. 9, 2009, at C29.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

remain skeptical as to the real impact the Plan will have on the mortgage crisis in the long run.

### *VI. Resolution*

Neither the Illinois Homeowner Protection Act nor the HAMP are flawless, and neither are they a failure. Each plan includes positive ingredients. With the unemployment rate in Illinois at close to 10% in 2009,<sup>49</sup> the highest it has been in over a decade, the major problem for delinquent homeowners is not time but the lack of a job - and the salary that goes with it - to make down payments on their mortgages. Moreover, the only way the new law has a chance of truly making a difference is if its foundation - the agencies - are steady. Without such stability, the rest of the process would simply collapse.

Assuming agencies and counselors are working smoothly with borrowers, the counselors would then be able to design a tailored payment plan, which could help the borrower not to become delinquent. Similarly to what the federal government is doing, Illinois legislators could tweak the current law to reward lenders for every successful payment plan modified, thereby helping both the lender and the homeowner - and on a grander scale - the economy as a whole. After all, as Benjamin Franklin once said, "an ounce of prevention is worth a pound of cure."<sup>50</sup>

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<sup>49</sup> U.S. Bureau of Labor Statistics, *supra* note 42.

<sup>50</sup> Benjamin Franklin, *The Quotable Franklin*, available at <http://www.ushistory.org/franklin/quotable/quote67.htm> (last visited October 20, 2009).