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Barry Hester

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# OPPORTUNITY COSTS: NONJUDICIAL FORECLOSURE AND THE SUBPRIME MORTGAGE CRISIS IN GEORGIA

**Barry Hester\***

## INTRODUCTION

By the fifteenth of the month, Mortgage Servicing Company has not received a payment from Borrower, one of many Georgia borrowers whose subprime residential mortgage loan it services.<sup>1</sup> This is the third missed payment in as many months, and the two previous late payments are still delinquent.<sup>2</sup> Mortgage Servicing purchased the rights to service this and many other loans from Mortgage Trust, a subsidiary of an investment banking firm which bought Borrower's loan from its originator and pooled it along with hundreds more to form Mortgage Trust.<sup>3</sup>

A Mortgage Servicing associate consults with Mortgage Trust and draws up foreclosure materials after reviewing Borrower's loan information on the MERS system.<sup>4</sup> MERS is a national database maintained by the Mortgage Electronic Registration System, Inc., on which "more than half of all home mortgage loans originated in the [U.S.]" were registered by 2004.<sup>5</sup> Because Borrower's loan fits the definition of a "high-cost home loan" under Georgia Code Section 7-6A-2(7),<sup>6</sup> Mortgage Servicing sends Borrower a notice of default and the right to cure within thirty days in order to avoid foreclosure

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\* J.D. 2009, Georgia State University College of Law.

1. See Kathleen C. Engel & Patricia A. McCoy, *Turning a Blind Eye: Wall Street Finance of Predatory Lending*, 75 FORDHAM L. REV. 2039, 2044-45 (2007); Christopher L. Peterson, *Predatory Structured Finance*, 28 CARDOZO L. REV. 2185, 2210 (2007) (explaining that in corresponding with customers, loan servicers "receive monthly payments, monitor collateral, and when necessary foreclose on homes").

2. See Ohio Real Estate News, <http://ohiorealestatenews.wordpress.com/category/foreclosure/> (last visited Aug. 24, 2007) (suggesting that few lenders will foreclose until a borrower is more than two months behind).

3. See Peterson, *supra* note 1, at 2209.

4. See *id.* at 2211.

5. *Id.*

6. O.C.G.A. § 7-6A-2(7) (2007). See *infra* Part II.C.

proceedings.<sup>7</sup> Two weeks later, having heard nothing from Borrower, Mortgage Servicing forwards notice of its intent to foreclose<sup>8</sup> and drafts a notice of the foreclosure sale of Borrower's property to be published in the local legal organ.<sup>9</sup> After two more weeks, Borrower receives a copy of this notice,<sup>10</sup> which Mortgage Servicing then submits for publication in the *Fulton County Daily Report* for the first of four required weeks.<sup>11</sup>

Borrower contacts Mortgage Servicing at this time asking for leniency. He does not contest the three delinquent payments but requests additional time to come up with the money. The servicer explains that she is not authorized to make major changes to loan terms and instructs the borrower to call Mortgage Trust.<sup>12</sup> Borrower tries in vain to speak to someone at Mortgage Trust about amending his loan.<sup>13</sup>

A month later, Mortgage Servicing conducts the foreclosure sale on the steps of the Fulton County Courthouse<sup>14</sup> as an agent of MERS, the mortgagee of record.<sup>15</sup> The servicer not surprisingly enters the lone bid on the property.<sup>16</sup> Three months later, Mortgage Trust notifies Mortgage Servicing that the servicing contract for a new mortgage on the property is available. Thus, roughly two months after Borrower received notice of his third and final default, his home was sold on the courthouse steps, and a new borrower is making mortgage payments on and living in the residence within six months of that default.

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7. See O.C.G.A. § 7-6A-(5)(13)(C)(ii) (2007).

8. See *id.* § 7-6A-(5)11.

9. See O.C.G.A. § 44-14-162 (2007).

10. See O.C.G.A. § 44-14-162.2 (2007), *amended by* S.B. 531, 148th Gen. Assem. (Ga. 2008).

11. See O.C.G.A. § 9-13-141 (2007).

12. See Jeanne Sahadi, *Subprime: Big Talk, Little Help*, CNN MONEY.COM, Sept. 26, 2007, [http://money.cnn.com/2007/09/26/real\\_estate/few\\_loan\\_modifications/index.htm](http://money.cnn.com/2007/09/26/real_estate/few_loan_modifications/index.htm) (asserting that loan servicers may be restricted in the number of loans they can modify without getting the permission of loan pool investors).

13. See *id.* (suggesting that lenders are not staffed to handle modification requests by borrowers).

14. O.C.G.A. § 9-13-160, 161 (2007).

15. See Peterson, *supra* note 1, at 2212.

16. See Basil H. Mattingly, *The Shift from Power to Process: A Functional Approach to Foreclosure Law*, 80 MARQ. L. REV. 77, 78 n.7 (1996).

This hypothetical illustrates the central tension in the law of nonjudicial foreclosure: the viability of the current secured lending model versus the protection of borrowers.<sup>17</sup> In many states, this tension has taken on new policy dimensions in light of “predatory lending” practices<sup>18</sup> and foreclosure on subprime mortgages, those loans offered to borrowers with the poorest credit scores.<sup>19</sup> This Note considers whether Georgia’s existing nonjudicial foreclosure law sufficiently balances the individual and institutional interests at issue in the subprime residential mortgage context.<sup>20</sup> Part I outlines Georgia’s experience in the current increase in subprime mortgage foreclosure, its general nonjudicial foreclosure process, and the traditional policy justifications for nonjudicial foreclosure.<sup>21</sup> Part II examines recent changes to or prohibitions on nonjudicial foreclosure in Georgia and elsewhere and extracts the policy motivations behind those changes.<sup>22</sup> Part III explains that, while the factors giving rise to the proliferation of subprime lending have probably weakened the traditional policy defense of nonjudicial foreclosure and strengthened its criticisms, other factors will likely dramatically reduce Georgia borrowing opportunities in the near future.<sup>23</sup> In this light, nonjudicial foreclosure reform or prohibition is probably not warranted because it

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17. Patrick B. Bauer, *Judicial Foreclosure and Statutory Redemption: The Soundness of Iowa’s Traditional Preference for Protection over Credit*, 71 IOWA L. REV. 1, 7 (1985).

18. Celeste M. Hammond, *Predatory Lending—A Legal Definition and Update*, 34 REAL EST. L.J. 176, 178–81 (2005) (asserting that there is no uniform definition of predatory loans but all describe costs and terms that raise the costs of borrowing without adding any benefits, and discussing the many practices associated with predatory lending, such as aggressive marketing, high and changing interest rates, and prepayment penalties for paying the loan off early).

19. *Id.* at 176 (explaining that subprime borrowers typically have a FICO (Fair Isaac Co.) credit score of less than 570); Dennis Hevesi, *ABC’s (and XYZ’s) of Home Buying*, N.Y. TIMES, Feb. 23, 2003, at 11 (suggesting that subprime loans are those available to borrowers with credit scores less than 620).

20. See *infra* Part III. Not all subprime loans are predatory, but the overlap between the two is considerable. See Deanne Loonin & Elizabeth Renuart, *The Life and Debt Cycle: The Growing Debt Burdens of Older Consumers and Related Policy Recommendations*, 44 HARV. J. ON LEGIS. 167, 178 (2007). As a result, Although this Note focuses on the sufficiency of nonjudicial foreclosure in the context of subprime loans, predatory lending concerns are highly relevant.

21. See *infra* Part I.

22. See *infra* Part II.

23. See *infra* Part III.

continues to preserve borrowing opportunities in an uncertain lending future.<sup>24</sup>

## I. BACKGROUND

### A. Subprime Lending, Securitization, and Foreclosure Rates in Georgia

American residential foreclosure rates began a historic spike as early as 2005.<sup>25</sup> The national rate of foreclosure in the first quarter of 2007 was the highest it has been in fifty years.<sup>26</sup> In August, 2007, an estimated 243,947 U.S. homes, or nearly one in 500, were subject to foreclosure, public auction, or repossession.<sup>27</sup> Estimates of Georgia's foreclosure rates place it among the highest in the country.<sup>28</sup> Subprime mortgage foreclosure rates are particularly startling.<sup>29</sup> The Center for Responsible Lending conducted a study of more than six million subprime mortgages that were entered into between 1998 and the third quarter of 2006; the results indicated that one in five of the subprime mortgages made in 2005 and 2006 is likely to end in foreclosure.<sup>30</sup> Significantly, subprime mortgages are estimated to constitute one-quarter of today's mortgage market.<sup>31</sup> Because of scheduled "resets" in adjustable rate subprime mortgages originated

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24. See *infra* Part III.B.

25. David Gonzalez, *Risky Loans Help Build Ghost Town of New Homes*, N.Y. TIMES, Sept. 24, 2007, at B1.

26. Dina ElBoghdady & Nancy Trejos, *Foreclosure Rate Hits Historic High*, WASH. POST, June 15, 2007, at D1.

27. Vikas Bajaj, *Foreclosures Surged 36% in August, Report Says*, N.Y. TIMES, Sept. 18, 2007, at C3.

28. Carrie Teegardin, *The Crisis of Foreclosure: A Sign of the Times*, ATLANTA J.-CONST., Sept. 9, 2007, at A1 (citing Mortgage Bankers Association report). But see Carrie Teegardin, *Foreclosures: State 'Crisis' Figures Way Off*, ATLANTA J.-CONST., Oct. 14, 2007, at A1 (questioning a private company's extreme projections of Georgia foreclosures).

29. ELLEN SCHLOEMER ET AL., CENTER FOR RESPONSIBLE LENDING, LOSING GROUND: FORECLOSURES IN THE SUBPRIME MARKET AND THEIR COST TO HOMEOWNERS 3 (2006), <http://www.responsiblelending.org/pdfs/CRL-foreclosure-rprt-1-8.pdf>.

30. *Id.* at 2-3.

31. Ron Nixon, *Study Predicts Foreclosure for 1 in 5 Subprime Loans*, N.Y. TIMES, Dec. 20, 2006, at C4.

through 2007, the population of troubled subprime mortgages could potentially rise throughout 2011.<sup>32</sup>

The increase in foreclosure rates on this type of loan reflects a historic change in lending practices.<sup>33</sup> Historically, lenders originated and held the loan using their own money in what has been described as the “two-party” period.<sup>34</sup> After the Great Depression, the federal government ushered in a “three-party” mortgage system by creating a secondary mortgage market designed to protect borrowers by underwriting loans.<sup>35</sup>

In the last two decades, the “private-label securitization” model has emerged as the predominant loan finance structure.<sup>36</sup> Within this framework, loans are bundled and sold to mortgage investment vehicles, typically trusts, which increases the credit pool and spreads lending risk from individual lenders to investors at-large.<sup>37</sup> This change has increased the number of “credit-worthy” borrowers, helping give rise to the modern subprime mortgage industry.<sup>38</sup> The system’s underwriting, origination, and servicing mechanism can engage ten or more parties.<sup>39</sup>

### *B. Nonjudicial Foreclosure in Georgia Under O.C.G.A. § 44-14-162*

The speed of Georgia’s nonjudicial foreclosure process has been an easy target for blame throughout the recent increase in foreclosure

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32. Valerie Cotsalas, *Fear of Foreclosure*, N.Y. TIMES, Apr. 22, 2007, at 11 (explaining that an adjustable rate mortgage “resets” to a higher interest rate after a few years at an attractive introductory rate); Real Estate News, Mortgage Reset Graph, Aug. 27, 2008, <http://realestatenewsblog.blogspot.com/2008/08/mortgage-reset-graph-2008-2009-2010.html> (last visited Oct. 13, 2009).

33. Peterson, *supra* note 1, at 2191.

34. *Id.* at 2194.

35. *Id.* at 2194–96.

36. *Id.* at 2200.

37. Engel & McCoy, *supra* note 1, at 2041; Robert S. Friedman & Eric R. Wilson, *The Legal Fallout from the Subprime Crisis*, 124 BANKING L.J. 420, 421 (2007); Peterson, *supra* note 1, at 2265.

38. See Kenneth C. Johnston et al., *The Subprime Morass: Past, Present, and Future*, 12 N.C. BANKING INST. 125, 125–28 (2008).

39. Peterson, *supra* note 1, at 2265.

rates.<sup>40</sup> One Atlanta newspaper columnist explained that Georgia is a state in which “the bank can grab your home without a court hearing and before you have time to even realize what’s happening” and asserted that the practice must stop.<sup>41</sup> In a recent case, even the Georgia Court of Appeals weighed in:

In closing, we note that this litigation could well have been prevented if Georgia law provided any kind of procedural oversight—either judicial or administrative—for foreclosure proceedings. The validity or invalidity of [the mortgagor’s] security interest in the Property should have been resolved as part of the foreclosure proceedings, prior to the negotiation of any settlement agreement. Unfortunately, our legislature has declined to provide such procedural safeguards to homeowners or to place any meaningful restrictions on mortgage lenders. In light of the current mortgage crisis and high foreclosure rate resulting from the practices of the subprime lending market, we urge the General Assembly to address this important issue.<sup>42</sup>

Undoubtedly, the general Georgia nonjudicial process is one of the most rapid means of foreclosure permitted in the nation, with completion possible in less than two months after default.<sup>43</sup> This mechanism contrasts the year-long process in states like Florida, where foreclosure is possible only through the court system.<sup>44</sup> With some exceptions, Georgia’s process fairly exemplifies the typical nonjudicial foreclosure remedy.<sup>45</sup> The system is one policy response

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40. E.g., John F. Sugg, *Let’s Foreclose on the Gold Dome*, CREATIVE LOAFING, Aug. 29, 2007, at 21.

41. *Id.*

42. Matrix Fin. Servs, Inc. v. Dean, 655 S.E.2d 290, 295 (Ga. Ct. App. 2007).

43. Jim Saccacio, *The Best and Worst States for Buying Foreclosures*, REALTY TRENDS, Mar. 2006, <http://www.realtytrac.com/news/customer/2006.3/index.asp>.

44. Lisa Easterwood, *Is Bankruptcy Reform Legislation Working*, 17 PARTNERS IN COMMUNITY & ECON. DEV. 2 (2007), available at [http://www.frbatlanta.org/invoke.cfm?objectId=19422D38-5056-9F12-12E89D9C91AE28DB&method=display\\_body](http://www.frbatlanta.org/invoke.cfm?objectId=19422D38-5056-9F12-12E89D9C91AE28DB&method=display_body).

45. FRANK S. ALEXANDER, GEORGIA REAL ESTATE FINANCE AND FORECLOSURE LAW § 8-2 (4th ed. 2007).

to the lender-borrower power struggle that is as old as secured lending itself.<sup>46</sup>

Georgia law makes nonjudicial foreclosure available to lenders when a particular loan contract provides for it.<sup>47</sup> For that reason, it is also known as “power of sale” foreclosure, and the Georgia Supreme Court has long enforced it as a contractual remedy subject to certain statutory requirements.<sup>48</sup> Georgia Code Section 44-14-162 sets forth the nonjudicial foreclosure mechanism for home loans not considered “high-cost home loans.”<sup>49</sup> Upon default, the mortgagee intending to foreclose is required to publish notice of the impending foreclosure sale for four consecutive weeks in the local legal organ after sending a copy of that notice to the debtor at least thirty days prior to the proposed foreclosure sale.<sup>50</sup> At any time before the foreclosure sale, the borrower can redeem her interest in the property by curing the default.<sup>51</sup> The sale is conducted on the relevant county courthouse steps on the first Tuesday of each month.<sup>52</sup> In Georgia, the sale price—although almost invariably below fair market value<sup>53</sup>—is not subject to judicial confirmation unless the lender wishes to seek a deficiency judgment.<sup>54</sup> Lenders can seek a deficiency judgment whenever the sale price is insufficient to cover the cost of the borrower’s debt.<sup>55</sup> They rarely do so, however, because of the difficulty in collecting from borrowers already unable to make

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46. See Mattingly, *supra* note 16, at 89.

47. 3A GA. JUR. *Property* § 32:30 (2008).

48. Gurr v. Gurr, 32 S.E.2d 507, 507 (Ga. 1944); Salter v. Bank of Commerce, 6 S.E.2d 290, 293 (Ga. 1939). See generally 3A GA. JUR. *Property* § 32:30 (2008).

49. O.C.G.A. § 44-14-162 (2007). For “high cost home loans,” see discussion *infra* Part II.C. The mechanism set forth in § 44-14-162 and those like it shall be referred to throughout this Note as “general” methods of nonjudicial foreclosure as contrasted by those applicable only to certain loans.

50. O.C.G.A. § 44-14-162 (2007); O.C.G.A. § 44-14-162.2 (2007), amended by S.B. 531, 148th Gen. Assem. (Ga. 2008).

51. See Grant S. Nelson & Dale A. Whitman, *Reforming Foreclosure: The Uniform Nonjudicial Foreclosure Act*, 53 DUKE L.J. 1399, 1438–39 (2004).

52. O.C.G.A. § 9-13-161 (2007).

53. Mattingly, *supra* note 16, at 96.

54. O.C.G.A. § 44-14-161(a) (2007); see also ALEXANDER, *supra* note 47, § 9-1.

55. ALEXANDER, *supra* note 45, § 9-1.



mortgage payments.<sup>56</sup> Importantly, Georgia's general foreclosure process does not provide the borrower with a statutory right of redemption.<sup>57</sup> This right, given to borrowers in several states, entitles the borrower to redeem her interest in the property during a statutorily-defined period after the foreclosure sale.<sup>58</sup>

### *C. Traditional Policy Considerations Surrounding Nonjudicial Foreclosure*

Nonjudicial foreclosure is available to mortgagees in roughly sixty percent of the states.<sup>59</sup> All jurisdictions authorize judicial foreclosure in some form.<sup>60</sup> The primary reason advanced for permitting this nonjudicial foreclosure is that it is a cheaper and more efficient remedy.<sup>61</sup> In addition to the savings afforded by not requiring court proceedings,<sup>62</sup> proponents argue that the lender's rapid foreclosure decreases the risk of incidental costs from "vandalism, fire loss, depreciation, damage, and waste" associated with a property in default.<sup>63</sup> Nonjudicial foreclosure is an unquestionably quicker process than its counterpart within the court system; in some states, nonjudicial foreclosure can conclude in as few as twenty days.<sup>64</sup>

Under several theories, nonjudicial foreclosure also supports the borrower's interests. One economic perspective is that a rapid and inexpensive means of foreclosure best serves the most fundamental

56. See John R. Dowd, Jr., Comment, *Allowing Current Debtors to Retain Collateral Without Reaffirming or Redeeming: A Healthy Balance Between Creditor and Debtor Rights*, 17 MISS. C. L. REV. 131, 147 (1996).

57. Nelson & Whitman, *supra* note 51, at 1465 n.252.

58. *Id.* at 1404.

59. See *id.* at 1403.

60. Mattingly, *supra* note 16, at 93.

61. Debra P. Stark, *Foreclosing on the American Dream: An Evaluation of State and Federal Foreclosure Laws*, 51 OKLA. L. REV. 229, 232 (1999).

62. Nelson & Whitman, *supra* note 51, at 1403.

63. Ira Waldman, Committee Member, National Conference of Commissioners on Uniform State Laws, Prefatory Note on the Uniform Nonjudicial Foreclosure Act (Aug. 2, 2002), [http://www.abanet.org/rppt/cmtes/rp/i4/waldman-Uniform\\_Nonjudicial\\_Foreclosure\\_Act.pdf](http://www.abanet.org/rppt/cmtes/rp/i4/waldman-Uniform_Nonjudicial_Foreclosure_Act.pdf).

64. Molly F. Jacobson-Greany, *Setting Aside Nonjudicial Foreclosure Sales: Extending the Rule to Cover Both Intrinsic and Extrinsic Fraud or Unfairness*, 23 EMORY BANKR. DEV. J. 139, 150-51 (2006); Stark, *supra* note 61, at 232 n.10.

element of secured lending: the use of collateral to minimize lender risk.<sup>65</sup> By lowering lender transaction costs associated with defaulting borrowers, nonjudicial foreclosure arguably lowers mortgage costs and increases opportunities to all borrowers.<sup>66</sup> Others simply contend that in many cases mortgage default is clear, and borrowers benefit from the speedy release of their debt obligation.<sup>67</sup>

From the borrower's perspective, judicial foreclosure may be preferable because a mortgagee is given more time to redeem her interest in the property or raise legal defenses to the foreclosure.<sup>68</sup> Nonjudicial foreclosures, on the other hand, have been described as "harsh remedies because debtors lose their property in a proceeding devoid of judicial oversight."<sup>69</sup> A consumer advocacy group has even asserted that nonjudicial foreclosure should be declared an "unfair and deceptive practice" in connection with loans governed by the federal Home Ownership and Equity Protection Act.<sup>70</sup> In cases where federal or state government involvement is sufficient to implicate Fifth or Fourteenth Amendment protections, courts have held that executions of nonjudicial foreclosure without personal notice or an opportunity to present a defense violate borrowers' procedural due process rights.<sup>71</sup> Finally, critics suggest that the court supervision inherent in a judicial foreclosure minimizes the likelihood of a grossly inadequate sale price and resulting deficiency.<sup>72</sup>

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65. See DAVID A. SCHMUDDE, A PRACTICAL GUIDE TO MORTGAGES AND LIENS 126 (2004).

66. See *id.*; see also Waldman, *supra* note 63.

67. *Id.*

68. Stark, *supra* note 61, at 232.

69. Jacobson-Greany, *supra* note 64, at 151.

70. Elizabeth Renuart, Staff Attorney, National Consumer Law Center, Testimony Before the Board of Governors of the Federal Reserve Regarding Home Equity Lending and HOEPA (Aug. 4, 2000), available at [http://www.nclc.org/initiatives/predatory\\_mortgage/hoepa\\_fl.shtml](http://www.nclc.org/initiatives/predatory_mortgage/hoepa_fl.shtml).

71. *Roberts v. Cameron-Brown Co.*, 410 F. Supp. 988, 989 (S.D. Ga. 1975) (holding that the federal government's role in a mortgage financed by the Federal National Mortgage Association and subsidized through the National Housing Act was sufficient to constitute state action under the Fifth Amendment's due process clause); *Turner v. Blackburn*, 389 F. Supp. 1250, 1256 (W.D. N.C. 1975) (finding state action sufficient to justify Fourteenth Amendment due process protection in a clerk of court's filing of a report validating a nonjudicial foreclosure sale).

72. John Mixon & Ira B. Shepard, *Antideficiency Relief for Foreclosed Homeowners: ULSIA Section 511(b)*, 27 WAKE FOREST L. REV. 455, 480 (1992).

## II. RECENT MODIFICATIONS TO OR PROHIBITIONS ON NONJUDICIAL FORECLOSURE IN GEORGIA AND OTHER JURISDICTIONS

### *A. Recent Changes to and Prohibitions on Nonjudicial Foreclosure in Other States Generally*

In the last two decades, several state legislatures have added, abolished, or significantly altered their general nonjudicial foreclosure procedures.<sup>73</sup> These changes illustrate the continued vitality of traditional policy debates surrounding this form of foreclosure apart from new considerations implicated by subprime lending.<sup>74</sup> Illinois banned power of sale foreclosure altogether in 1987.<sup>75</sup> This remedy had been an available contract term since common law.<sup>76</sup> On the balance, the change was described as an effort by the legislature “to reduce the costs of foreclosure and to increase the prices at which foreclosure sales occurred.”<sup>77</sup>

In 1998, the Hawaii legislature added a new form of nonjudicial foreclosure combining elements of its existing judicial and nonjudicial foreclosures.<sup>78</sup> The existing power of sale foreclosure method had been in place since 1847 and was disfavored because of its ambiguity while judicial foreclosures were criticized as taking a year or more—a time during which rent and homeowner’s association maintenance fees did not have to be paid.<sup>79</sup> Supporters argued that improved nonjudicial foreclosure was warranted because more than ninety-five percent of foreclosures went unchallenged.<sup>80</sup> In

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73. See, e.g., CAL. CIV. CODE § 1367.4(c) (West, Supp. 2005); HAW. REV. STAT. ANN. § 657-5 (LexisNexis 2007); 735 ILL. COMP. STAT. ANN. 5/15-1405 (West 2007).

74. See *infra* Part III.A.

75. 735 ILL. COMP. STAT. ANN. 5/15-1405; Stark, *supra* note 61, at 233.

76. BRADLEY V. RITTER, MORTGAGE FORECLOSURES IN ILLINOIS 481 (2006).

77. Catherine A. Gnatek, Note, *The New Mortgage Foreclosure Law: Redemption and Reinstatement*, 1989 U. ILL. L. REV. 471, 471 (1989); see also Mattingly, *supra* note 16, at 120 n.179.

78. HAW. REV. STAT. ANN. § 657-5 (LexisNexis 2007); see also Sandi M. Skousen, *New Foreclosure Option Combines Best of Existing Processes*, PAC. BUS. NEWS, June 12, 1998, <http://pacific.bizjournals.com/pacific/stories/1998/06/15/story8.html>; David C. Farmer, *Hawaii Enacts Expedited Nonjudicial Foreclosure*, HAW. BUS. J., Nov. 1998, at 42.

79. Farmer, *supra* note 78, at 42.

80. Skousen, *supra* note 78.

apparent response to these concerns, Hawaii Revised Statute Section 667 set forth clearer notice requirements relative to the existing power of sale foreclosure mechanism, which was retained, and the new “alternate” procedure was made available at the election of the mortgagee.<sup>81</sup> Its added clarity addressed the reluctance of title insurance companies to insure the properties given the uncertain finality of the sale.<sup>82</sup> Significantly, pursuant to Hawaii Revised Statute Section 667-35, the borrower, the foreclosing mortgagee, or any other lienholder can compel a judicial foreclosure via court order at any time before the foreclosure sale.<sup>83</sup>

Also in 1998, the New York legislature departed from sanctioning only judicial means of foreclosure.<sup>84</sup> An amendment to New York Real Property Actions and Proceedings Law Section 231 made nonjudicial foreclosure available for a narrow but significant purpose: foreclosure upon commercial property.<sup>85</sup> This law did nothing to modify the requirement that New York residential property be foreclosed upon through the judicial system.<sup>86</sup> Moreover, in permitting the commercial use of nonjudicial foreclosure, the New York legislature prohibited its use in situations in which residential tenants would be affected.<sup>87</sup> It continues to ban them in connection with residential property and enables commercial mortgagors to compel judicial foreclosure upon proving “undue hardship.”<sup>88</sup>

California narrowed the availability of nonjudicial foreclosure in 2005 by significantly limiting its use by homeowners associations

81. Farmer, *supra* note 78, at 42.

82. *Id.*

83. *Id.* at 43.

84. Richard S. Fries, *Amendment to RPAPL Article 14 Allows Nonjudicial Foreclosure of Commercial Mortgages*, N.Y. ST. BUS. J., Dec. 1998, at 50.

85. N.Y. REAL PROP. ACTS. LAW § 1401 (McKinney 2007); Fries, *supra* note 84, at 50; *Foreclosure: New York Enacts Power of Sale Law*, REAL EST. L. REP. (West Group), Nov. 1998, at 8 [hereinafter *N.Y. Foreclosure*].

86. *N.Y. Foreclosure*, *supra* note 85, at 8.

87. *Id.*

88. 2 MICHAEL T. MADISON, JEFFRY R. DWYER, & STEVEN W. BENDER, *THE LAW OF REAL ESTATE FINANCING* § 19:3 (2007).

seeking to collect unpaid dues by their members.<sup>89</sup> Under enacted Chapter 452, homeowners associations cannot use nonjudicial foreclosure to foreclose on homes unless an individual homeowner owes more than \$1800 in assessments or owes assessments for more than twelve months.<sup>90</sup> In passing this law, legislators in committee referred to a family that lost their home over outstanding association dues of \$1.50.<sup>91</sup> The statute also increased the notice required in permissible applications of nonjudicial foreclosure by homeowners associations.<sup>92</sup> Amendments in 2005 to Wyoming's foreclosure law also increased the notice requirements of that state's nonjudicial foreclosure procedure.<sup>93</sup>

## *B. Recent Changes to Nonjudicial Foreclosure Law in the Context of Predatory Lending*

### *1. A Model Act*

Several states have recently included explicit prohibitions on the use of nonjudicial foreclosure in predatory lending legislation, but its use was not previously sanctioned in those states for any type of loan.<sup>94</sup> These seemingly redundant prohibitions are based on provisions in the Home Loan Protection Act.<sup>95</sup> This model act, promulgated by the AARP in conjunction with the National Consumer Law Center in 2001, has the stated purpose of "protecting the homes and the equity of individual borrowers," and aspires to address the persistence of abusive terms in home secured-loans.<sup>96</sup> The Act sets forth general restrictions and prohibitions as well as special

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89. Niki Zupanic, *Keeping Homes off the Auction Block: California Limits Foreclosures by Homeowners Associations*, 37 MCGEORGE L. REV. 199, 199–200 (2006).

90. CAL. CIV. CODE § 1367.4(c) (West. Supp. 2005).

91. Zupanic, *supra* note 89, at 199–200 n.14.

92. *Id.* at 202.

93. Dale W. Cottam & Jack D. Edwards, *Wyoming Foreclosure Law: Conforming to the Broad Changes Made by House Bill 112*, 6 WYO. L. REV. 1, 3–4 (2006).

94. See, e.g., N.J. STAT. ANN. § 46:10B-26(k) (West 2007).

95. HOME LOAN PROTECTION ACT (Am. Ass'n of Retired Pers. 2001) [hereinafter HLPAA].

96. *Id.* § 1.

restrictions on “high-cost home loans,” defined as loans whose total points and fees, interest rates, or prepayment penalties exceed certain specified thresholds.<sup>97</sup>

Among these special restrictions applicable to high-cost home loans, Section 4(l) of the Act provides that creditors making a high-cost home loan must use judicial foreclosure if it is available in the state in which the secured property is located.<sup>98</sup> For states that lack a “full judicial foreclosure process,” the Act proposes that such creditors must “obtain a declaratory judgment in a court of competent jurisdiction” that they have a legal right to foreclose before they can exercise any available nonjudicial remedy.<sup>99</sup> In the comments to this proposed section, the drafters indicate that its provisions are “intended to ensure that borrowers of high-cost loans will always have an opportunity to raise any legal defenses they may have before their homes are lost to foreclosure.”<sup>100</sup>

## 2. Adoption of Legislation Based on the AARP Model Act

Various states have enacted anti-predatory lending laws since the 2001 promulgation of the AARP model act.<sup>101</sup> Many of these lending laws incorporate the model Act’s definition of “high-cost home loans” and place the same restrictions on mortgage terms and practices.<sup>102</sup> Nonetheless, states that previously authorized nonjudicial foreclosure and have enacted an anti-predatory lending law using the structure of the AARP model act generally have not included its prohibition on nonjudicial foreclosure for high-cost home

97. *Id.* § 2(e).

98. *Id.* § 4(l).

99. *Id.*

100. *Id.*

101. Julie R. Caggiano et al., *Predatory Lending Law Developments and Assignee Liability Under HOEPA and State Law*, 62 BUS. LAW. 617, 618–19 (2007).

102. See, e.g., IND. CODE §§ 24-9-2-8, 24-9-5-3(a) (2006) (defining high cost home loans and placing restrictions on them); N.J. STAT. ANN. § 46:10B-26 (2003) (restricting high cost home loans); N.J. STAT. ANN. § 46:10B-24 (West 2004) (defining high cost home loans); N.M. STAT. § 58-21A-6(E) (2007) (restricting foreclosure on high cost home loans to judicial foreclosure proceedings); see also Baher Azmy & David Reiss, *Modeling a Response to Predatory Lending: The New Jersey Home Ownership Security Act of 2002*, 35 RUTGERS L.J. 645, 650 (2004).

loans.<sup>103</sup> A version of the Model Act's Section 4(I), for example, is noticeably absent from an Arkansas version of the Act.<sup>104</sup> This is a significant affirmation of a lender-friendly remedy in a lender-hostile legislative climate.<sup>105</sup> Recent New Jersey, New Mexico, and Indiana laws, on the other hand, expressly prohibit the use of nonjudicial foreclosure using language materially identical to that in the AARP model act even though such a foreclosure mechanism was not otherwise available in those jurisdictions.<sup>106</sup>

### *C. Nonjudicial Foreclosure Reconsidered in Georgia: GAFLA and "High-Cost Home Loans"*

The Georgia legislature was quick to pass its own version of the AARP model act, and, as with versions of the Act enacted in other nonjudicial foreclosure states, its adaptation stopped short of prohibiting nonjudicial foreclosure for covered loans although it did enhance the required notice.<sup>107</sup> Georgia's version, the Georgia Fair Lending Act (GAFLA), was initially identified as among the toughest lending laws in the nation, although subsequent amendments and federal preemption may have limited its reach.<sup>108</sup> GAFLA

103. See, e.g., ARK. CODE ANN. § 23-53-104 (West 2007).

104. Compare ARK. CODE ANN. § 23-53-104 (West 2007) with HPLA, *supra* note 97, § 4.

105. See generally, Baher Azmy, *Squaring the Predatory Lending Circle: A Case for States as Laboratories of Experimentation*, 57 FLA. L. REV. 295 (2005).

106. Compare IND. CODE § 24-9-5-3(a) (2006), N.J. STAT. ANN. § 46:10B-26(k) (West, 2003), and N.M. STAT. § 58-21A-6(E) (2007) with HPLA, *supra* note 95, § 4.

107. Georgia Fair Lending Act, 2002 Georgia Laws Act 488 (H.B. 1361) (codified as amended at Ga. Stat. § 7-6A-1 et seq.), amended by 2003 Georgia Laws Act 1 (S.B. 53); Leetra Harris & Brian Nichols, Banking and Finance, *Credit or Loan Discrimination; Define and Prohibit Abusive Home Loan Practices; Provide for Prohibited Practices and Limitations for Covered Home Loans and High-Cost Home Loans; Create Consumer Protections for Covered Home Loans and High-Cost Home Loans; Provide for Penalties and Enforcement; Provide Exceptions for Unintended Violations; Provide for Severability*, 19 GA. ST. U. L. REV. 14, 15 (2002).

108. Peterson, *supra* note 1, at 2243. The GAFLA was the subject of high-profile controversy in two ways soon after its passage. First, the Office of Thrift Supervision of the Department of Treasury announced that federal regulations preempted the GAFLA's restrictions on federally chartered banks and their operating subsidiaries. Julia Patterson Forrester, *Still Mortgaging the American Dream: Predatory Lending, Preemption, and Federally Supported Lenders*, 74 U. CIN. L. REV. 1303, 1339 (2006). Second, in response to the original GAFLA's broad provisions for assignee liability, rating agencies such as Standard & Poor's indicated that they would no longer rate securities backed by residential loans that originated in Georgia after the effective date of the statute. *Id.* at 1321. The rating

incorporated the AARP Act's requirements and limitations on "high-cost home loans" and defined those loans in the same way.<sup>109</sup> The GAFLA was an early showcase of the AARP Act's sweeping regulation of abusive lending practices.<sup>110</sup> It instituted limits on interest rates and marketing strategies and complete bans on mortgage prepayment and modification penalties.<sup>111</sup> The law also mandates pre-loan counseling and declares "unconscionable and void" loan terms that specify a litigation forum unfavorable to the borrower.<sup>112</sup> Notably, the law prohibits borrowers from bringing class action lawsuits against lenders.<sup>113</sup>

Despite its extensive regulation of substantive loan terms and practices, the GAFLA made only two changes to the applicable nonjudicial foreclosure process: it imposed new requirements that the borrower receive notice of a right to cure the default at least thirty days prior to the sale date as well as notice of the intent to foreclose at least fourteen days prior to sale advertisement.<sup>114</sup> The model Act's prohibition on nonjudicial foreclosure in connection with covered loans was proposed but did not survive floor debate.<sup>115</sup> A representative voicing opposition to the ban argued that requiring "every foreclosure to go through the 'full court system'" would be one of the GAFLA's "unintended consequences."<sup>116</sup> Supporters, meanwhile, later counted the ban's removal among the bill's compromises.<sup>117</sup>

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agencies abandoned that position when the Georgia legislature quickly amended the statute to limit assignee liability and create a due diligence "safe harbor." *Id.* at 1321–22.

109. O.C.G.A. § 7-6A-2 (2007); David Reiss, *Subprime Standardization: How Rating Agencies Allow Predatory Lending to Flourish in the Secondary Mortgage Market*, 33 FLA. ST. U. L. REV. 985, 1032–33 (2006).

110. Peterson, *supra* note 1, at 2243.

111. O.C.G.A. § 7-6A-5 (2007).

112. *Id.* § 7-6A-5(6)–(7).

113. *Id.* § 7-6A-6.

114. *Id.* § 7-6A-5.

115. Harris & Nichols, *supra* note 107, at 37–38.

116. *Id.* at 37.

117. *Id.* at 45.



### III. SUFFICIENCY OF NONJUDICIAL FORECLOSURE LAW IN GEORGIA IN THE CONTEXT OF SUBPRIME LENDING

#### *A. The Appropriate Lens for Examining the Sufficiency of Georgia's Nonjudicial Foreclosure Law in the Subprime Context*

Examining the sufficiency of Georgia's nonjudicial foreclosure remedy for subprime residential mortgages entails both traditional and new policy considerations.<sup>118</sup> As previously stated, the central tension in foreclosure law is the potential conflict between the viability of the secured lending business venture and fairness to the borrower.<sup>119</sup> Protecting the former ensures that lending institutions remain profitable.<sup>120</sup> With respect to the latter, shelter and personal well-being are potentially at stake.<sup>121</sup>

Traditional foreclosure policy considerations continue to frame contemporary foreclosure debate and reform.<sup>122</sup> Recent changes to general nonjudicial foreclosure processes in Hawaii, New York, California, and Wyoming ostensibly protect borrowers through heightened notice.<sup>123</sup> In the same vein, New York's 1998 amendments authorize the use of nonjudicial foreclosure but not in cases where the borrower can prove it causes "undue hardship."<sup>124</sup> The New York amendments also limit the use of the new remedy to commercial settings and, even then, essentially forbid its use in New York City if more than sixty-five percent of the subject property is used to house residential tenants.<sup>125</sup> Alternatively, the changes to the general nonjudicial foreclosure process in Illinois and Hawaii, along with its narrow amendment in California and Wyoming and its

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118. See *supra* Part I.A.

119. See *supra* Introduction; see also Bauer, *supra* note 17, at 7.

120. See SCHMUDDE, *supra* note 65, at 126.

121. Anne Balcer Norton, *Reaching the Glass Usury Ceiling: Why State Ceilings and Federal Preemption Force Low-Income Borrowers into Subprime Mortgage Loans*, 35 U. BALT. L. REV. 215, 227 (2005).

122. See *supra* Parts I.C., II.A.

123. See *supra* Part II.A.

124. MADISON, DWYER, & BENDER, *supra* note 88, § 19:3.

125. See *supra* Part II.A.

addition to the commercial lender's repertoire in New York, reflect a continued policy focus on the lender's efficient remedy.<sup>126</sup>

While these traditional policy concerns persist, potential changes to Georgia's nonjudicial foreclosure remedy in the subprime lending context should also be informed by a new set of considerations.<sup>127</sup> These include the highly securitized nature of subprime loans and the special status of the subprime borrower.<sup>128</sup> Moreover, the GAFLA's limitations on covered loan terms and practices are also relevant to the question of whether nonjudicial foreclosure reform is an answer to Georgia's mortgage foreclosure crisis.<sup>129</sup> Finally, any potential state-level changes to the subprime mortgage foreclosure remedy must be evaluated in light of national responses to the subprime mortgage crisis, including class action lawsuits, federal intervention, and loan market backlash.<sup>130</sup>

## *B. Examining Georgia's Nonjudicial Foreclosure Remedy for Subprime Loans*

### *1. The Effect of the Secured Lending Model on the Efficiency Defense of Nonjudicial Foreclosure*

The lender's interest in an efficient remedy continues to weigh heavily on possible foreclosure reform but may be diminished in light of securitization.<sup>131</sup> Georgia's existing nonjudicial foreclosure process provides even lenders of high-cost home loans with an undoubtedly potent remedy.<sup>132</sup> It preserves the lender's right to sell the property within thirty days of sale advertisement as well as its right to seek deficiency judgments.<sup>133</sup> On the surface, the ten or more parties constituting the cast of characters that back various parts of

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126. *Id.*

127. *See infra* Part III.B.

128. *See supra* Part I.A.

129. *See infra* Part III.B.

130. *See infra* Part III.B.

131. *See supra* Part I.A.

132. Saccacio, *supra* note 43.

133. O.C.G.A. § 7-6A-5 (2007).

the contemporary subprime loan seemingly reinforce the lender's need for such an economizing process.<sup>134</sup> The compartmentalized role of the various players, however, has streamlined the lender's overall scheme.<sup>135</sup> Loan servicers, for example, only handle direct interactions with borrowers and are insulated and supported by the capital marshaled by third-party investment.<sup>136</sup> Technological advances such as the MERS database have directly reduced the transaction costs of foreclosure.<sup>137</sup> It has even been argued that undercapitalized originators front the secured lending industry as a "disposable filter," absorbing liabilities and expunging them through bankruptcy or questionable settlement.<sup>138</sup> The proliferation of the secured lending model is evidence of the viability of this arrangement and its substantial deviation from the early mortgage models that justified nonjudicial foreclosure.<sup>139</sup>

On the other hand, the borrower's interest in an efficient foreclosure mechanism is largely undiminished by securitization.<sup>140</sup> Again, decreased foreclosure costs theoretically lower borrowing costs and increase borrowing opportunities.<sup>141</sup> To the extent that subprime loans are more likely to end in default, all borrowers benefit from a subprime lender's remedy that quickly puts foreclosed properties back on the market.<sup>142</sup>

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134. See Peterson, *supra* note 1, at 2265.

135. See *id.*

136. Engel & McCoy, *supra* note 1, at 2041.

137. See Peterson, *supra* note 1, at 2265.

138. *Id.* at 2273.

139. See Engel & McCoy, *supra* note 1, at 2041; Peterson, *supra* note 1, at 2273.

140. See Engel & McCoy, *supra* note 1, at 2041.

141. SCHMUDDE, *supra* note 65, at 126.

142. See *id.*

## 2. *The Effect of the Special Status of the Subprime Borrower on the Fairness Critique of Nonjudicial Foreclosure*

### a. *Considerations in the Nature of Due Process*

Subprime borrowers probably have a heightened need for a fair foreclosure proceeding.<sup>143</sup> Even when mortgage default is clear, foreclosure law has historically acknowledged a borrower's interest in a fair proceeding, judicial or otherwise.<sup>144</sup> Subprime borrowers are vulnerable to the potentially cascading effects of foreclosure given their weaker credit scores and fewer credit alternatives.<sup>145</sup> While this may tip the balance in favor of enhanced protection for subprime borrowers, some have argued that such borrowers are less responsible about their loans and more brazen than other borrowers.<sup>146</sup> Others point out that many subprime mortgages were issued to real estate speculators investing in residential property.<sup>147</sup> The preemption issue aside, it is also possible that subprime borrower protection, if warranted, is granted by the restrictions on unfair loan terms contained in the GAFLA.<sup>148</sup> Finally, subprime borrowers might not deserve special protections for loans that would not otherwise be available to them but for the lender's unconventionally risky lending.<sup>149</sup>

Fairness to the borrower can be measured by both legal and practical standards. Although the GAFLA permits a relatively rapid foreclosure process, it entitles borrowers to additional notice of the right to cure and the intent to foreclose, it maintains general nonjudicial foreclosure provisions for the right to notice of

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143. See *supra* Part I.A.

144. See generally Mattingly, *supra* note 16.

145. Kurt Eggert, *Held Up in Due Course: Predatory Lending, Securitization, and the Holder in Due Course Doctrine*, 35 CREIGHTON L. REV. 503, 571-72 (2002).

146. Kathleen C. Engel & Patricia A. McCoy, *A Tale of Three Markets: The Law and Economics of Predatory Lending*, 80 TEX. L. REV. 1255, 1358 (2002) (positing that such buyers are more likely to use the mortgage money for luxury items rather than for emergencies or repairs).

147. Vikas Bajaj, *Builders and Homeowners Under Strain*, N.Y. TIMES, Mar. 7, 2008, at C1.

148. The restrictions on unfair practices for high interest home loans arguably already provide protections for subprime borrowers. See generally Harris & Nichols, *supra* note 107.

149. See *supra* Part I.A.

foreclosure thirty days before the sale, the right to redeem the property until the sale, and limitations on deficiency judgments.<sup>150</sup> The notice formula required by GAFLA for covered loans is sufficient as a matter of law; the Georgia Supreme Court has held that power of sale foreclosure does not involve “state action,” the trigger for due process protection under the Fifth Amendment.<sup>151</sup> In cases where constitutional due process has been required, personal service of foreclosure notice has been necessary.<sup>152</sup>

As a practical matter, the borrower’s interest in a fair foreclosure proceeding probably extends beyond mere notice.<sup>153</sup> The foreclosure process is a clear and compelling alteration of private property interests.<sup>154</sup> In the residential property context, this alteration of property interests affects a fundamental, non-economic human concern: shelter.<sup>155</sup> Notably, the constitutional formulation of due process includes both notice and the opportunity to be heard, and the best indicia of the latter is the borrower’s right to seek to enjoin foreclosure.<sup>156</sup>

### *b. The Borrower’s Legal Recourse for Wrongful Nonjudicial Foreclosure*

The only legal recourse for borrowers in Georgia who believe they are being subjected to wrongful nonjudicial foreclosure is a suit for injunctive relief.<sup>157</sup> A plaintiff has a cause of action in wrongful foreclosure when there is a violation of the statutory duty to exercise a power of sale fairly and in good faith.<sup>158</sup> In the secured lending context, a plaintiff’s need to resort to a wrongful foreclosure lawsuit is partially a consequence of loan servicers’ inability to modify

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150. O.C.G.A. § 44-14-162.1–2 (2007), *amended* by S.B. 531 (2008).

151. *Parks v. Bank of N. Y.*, 614 S.E.2d 63, 64 (2005).

152. *See* ALEXANDER, *supra* note 45, § 8-2.

153. *See generally* Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306 (1950).

154. *Id.* at 313.

155. Norton, *supra* note 121, at 227.

156. Mullane, 339 U.S. at 314.

157. *See* Waldman, *supra* note 63.

158. 3A. GA. JUR. *Property* § 32:36 (2008).

terms.<sup>159</sup> Furthermore, Georgia borrowers are not entitled to a statutory right of redemption even for loans covered by the GAFLA.<sup>160</sup> This means they do not have the option of curing a loan deficiency just one day after the foreclosure sale even if they then had the money to do so.<sup>161</sup>

In a suit to enjoin foreclosure, the increased number of parties with a hand in a particular mortgage increases the plaintiff borrower's costs because he must identify and serve a greater number of defendants.<sup>162</sup> This assumes borrowers subject to foreclosure have the time and resources to individually secure counsel—a questionable assumption because borrowers would probably not be in default in the first place if they could afford to sue for injunctive relief.<sup>163</sup> These borrowers are especially harmed by the increased costs of litigating a securitized loan.<sup>164</sup>

Moreover, the GAFLA specifically prohibits class action litigation by borrowers whose complaint concerns a high-cost home loan.<sup>165</sup> The class action suit is generally intended to make a remedy available to a large group of individuals with similar claims whose individual losses are not practicable to litigate.<sup>166</sup> Although at least one commentator has argued that foreclosure suits are not generally well-suited to class action because the facts and claims tend to be highly individualized,<sup>167</sup> borrower groups have already filed a number of such lawsuits around the country.<sup>168</sup> Thus, the GAFLA class action ban may materially detract from subprime borrower protection. Many subprime loan contracts make litigation considerations moot by

159. See Sahadi, *supra* note 12 (suggesting that lenders are not staffed to handle modification requests by borrowers).

160. See *supra* Parts I.A, II.C.

161. See Nelson & Whitman, *supra* note 51, at 1465 n.252.

162. Peterson, *supra* note 1, at 2265.

163. *Id.* at 2267–68.

164. *Id.*

165. O.C.G.A. § 7-6A-6 (2007).

166. Matthew Eisler, Note, *Difficult, Duplicative and Wasteful?: The NASD's Prohibition of Class Action Arbitration in the Post-Bazze Era*, 28 CARDOZO L. REV. 1891, 1905 (2007).

167. See Peterson, *supra* note 1, at 2268.

168. Faten Sabry & Thomas Schopfloch, *The Subprime Meltdown: Not Again!*, AM. BANKR. INST. J. 1, 45 (Sept. 2007).

providing for mandatory arbitration, the fairness of which has been questioned in this context.<sup>169</sup> Additionally, reflecting the difficulty of defensive litigation, defaulting borrowers have increasingly responded to impending foreclosure by filing for bankruptcy.<sup>170</sup>

These considerations raise a more general question: Which party should bear the burden of proof in a foreclosure proceeding?<sup>171</sup> If the borrower is truly in default, it does not seem overly burdensome to place the burden of proof on the foreclosing party.<sup>172</sup> On the other hand, the mortgage debt is the borrower's obligation, and the borrower may have better access to proof that a payment was made or that the loan itself was not validly entered into.<sup>173</sup> The burden of proof question goes to the heart of foreclosure policy.<sup>174</sup> In isolation, however, it is too narrow a consideration to be determinative of nonjudicial foreclosure's sufficiency.<sup>175</sup>

## *2. Predatory Lending the Bathwater and Nonjudicial Foreclosure the Baby: Alternative Remedies for Georgia's Foreclosure Crisis*

The sufficiency of Georgia's nonjudicial foreclosure remedy in the subprime context cannot be considered in a vacuum. Related legislative, political, and economic variables may make hasty changes to subprime foreclosure law short-sighted.<sup>176</sup> The GAFLA's restrictions on lending terms and practices, if enforced, so dramatically alter the balance between subprime lenders and borrowers that it may more than address concerns over fairness, such

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169. Peterson, *supra* note 1, at 2268–69.

170. Easterwood, *supra* note 44.

171. Stark, *supra* note 61, at 232 n.11.

172. See Harold L. Levine, *A Day in the Life of a Residential Mortgage Tenant*, 36 J. MARSHALL L. REV. 687, 694 (2003) (explaining that the burden of proof on a foreclosing party in a judicial foreclosure “rapidly shifts to the defendant borrower”).

173. See Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 CORNELL L. REV. 401, 467 (1993) (noting that the burden of proof is often imposed on the party with “better access to evidence” related to the disputed matter).

174. See generally *id.*

175. See *infra* Part III.B.3.

176. See *supra* Part I.A.

as the borrower's small chance of obtaining injunctive relief from wrongful foreclosure.<sup>177</sup>

Moreover, a backlash of class action litigation nationwide will likely provide redress for current Georgia borrowers while raising borrowing costs for future Georgia borrowers.<sup>178</sup> The effect of the government's "bailout" initiative—the Troubled Asset Relief Program—is still unclear.<sup>179</sup> Furthermore, it is uncertain whether the GAFLA will see greater enforcement in the wake of *Cuomo v. Clearing House Ass'n*, a decision which calls into question federal preemption of such state banking laws.<sup>180</sup> In the short term, market adjustments to the subprime lending industry will likely have a more direct impact on the lender-borrower power struggle.<sup>181</sup> Some predict a return to the high down payment requirements and shorter mortgage terms that traditionally made home mortgages unavailable to subprime borrowers.<sup>182</sup>

The possible impacts of the GAFLA, the federal response, and likely mortgage industry backlash are probably not yet being felt by current borrowers because most of the loans currently triggering foreclosure originated before the current awareness of abuses in predatory lending developed.<sup>183</sup> Thus, while securitization has probably weakened the traditional efficiency justification for and strengthened the traditional borrower fairness criticism of nonjudicial foreclosure, related influences will almost certainly reduce borrowing opportunities in the near future.<sup>184</sup> These influences will probably also provide additional borrower safeguards particular to subprime lending.<sup>185</sup> The 2008 Georgia General Assembly, for example,

177. See *supra* Part III.C.

178. See generally Friedman & Wilson, *supra* note 37.

179. Floyd Norris, *U.S. Bank Bailout to Rely in Part on Private Money*, N.Y. Times, Feb. 9, 2009, at A1.

180. *Cuomo v. Clearing House Ass'n*, 129 S. Ct. 2710 (2009).

181. Mark Trumbull, *Home-loan Trouble Spurs Fears of U.S. 'Credit Crunch'*, CHRISTIAN SCI. MONITOR, Mar. 15, 2007, at 2.

182. *Id.*

183. Cotsalas, *supra* note 32, at 11.

184. See *supra* Part I.A.

185. See *supra* Part II.B–C.



increased the generally applicable requirement for notice of foreclosure proceedings upon a residence under any power of sale arrangement from fifteen to thirty days.<sup>186</sup> In this light, nonjudicial foreclosure might well continue to insulate the lender from the risks of lending without unreasonably harming the subprime borrower.<sup>187</sup>

## CONCLUSION

Securitization has facilitated the proliferation of subprime lending, and, in turn, the dramatic increases in U.S. foreclosure rates during the last three years.<sup>188</sup> At the same time, this new lending infrastructure has probably weakened the traditional efficiency defense of nonjudicial foreclosure while bolstering the borrower fairness argument against it.<sup>189</sup> Nonetheless, nonjudicial foreclosure is a stronghold for borrowing opportunities as legislative, political, and economic forces will likely constrain them in the near future.<sup>190</sup>

The GAFLA, if rigorously enforced, has the potential to reduce the number of borrowers whose interests are poorly served by Georgia's swift nonjudicial foreclosure and the limited legal recourse that process provides.<sup>191</sup> This law is in fact a means of preventing the likeliest long-term cause of the current foreclosure increases: abusive lending.<sup>192</sup> For these reasons, reform or prohibition of nonjudicial foreclosure should probably not be viewed as a remedy for Georgia's current incidence of subprime mortgage foreclosure.<sup>193</sup> This mechanism is more accurately understood as an important structural support for the secured loan that insulates lenders from the risks of

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186. See O.C.G.A. § 44-14-162.2, amended by S.B. 531. S.B. 465, which would have extended that notice period to 90 days for § 7-6A-2(7) "high cost home loans," failed.

187. See SCHMUDDE, *supra* note 65, at 126.

188. See *supra* Part I.A.

189. See *supra* Part III.

190. See *supra* Part III.

191. See *supra* Part II.C.

192. See *supra* Part II.C.

193. See *supra* Part III.B.

subprime lending by spreading some of the risk back onto the borrower.<sup>194</sup>

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194. See SCHMUDDE, *supra* note 65, at 126.

