

Department of Legislative Services
Maryland General Assembly
2010 Session

FISCAL AND POLICY NOTE
Revised

Senate Bill 276

(The President, *et al.*) (By Request - Administration)

Judicial Proceedings

**Real Property - Residential Property Foreclosure Procedures - Foreclosure
Mediation**

This emergency Administration bill requires a loan modification review to be performed before the filing of an order to docket or complaint to foreclose a mortgage or deed of trust on residential property. The bill requires a secured party, loan servicer, or other agent to file an affidavit stating that a loan modification review (1) has been completed and the reason(s) for denying a loan modification; or (2) cannot be completed because the borrower repeatedly failed to engage in the process. Under the bill, a mortgagor or grantor (borrower) may request a foreclosure mediation session if the borrower contests any reason for being denied a loan modification or other loss mitigation. The bill imposes a \$100 filing fee that may not be passed on to the borrower to help defray the costs of providing foreclosure mediation and housing counseling services.

Fiscal Summary

State Effect: Potential significant general fund revenue and expenditure increase for the Judiciary. General and special fund expenditures may also increase for the Department of Labor, Licensing, and Regulation (DLLR); the Department of Housing and Community Development (DHCD); and the Office of the Attorney General (OAG) as discussed below.

Local Effect: Potential significant revenue increase and significant expenditure increase for circuit courts as discussed below.

Small Business Effect: The Administration has determined that this bill has minimal or no impact on small business (attached). Legislative Services concurs with this assessment, as explained below.

Analysis

Bill Summary:

Additional Requirements for Notice of Intent to Foreclose

The bill requires a notice of intent to foreclose to include a provision that encourages the borrower to seek housing counseling services. The notice of intent to foreclose must also contain specified contact information about the Maryland Homeowners Preserving Equity (HOPE) program and an explanation and timeline for the residential foreclosure process in Maryland.

A notice of intent to foreclose must be accompanied by a loss mitigation application for a federal program in which the secured party participates, such as the U.S. Treasury's Home Affordable Modification Program (HAMP). However, if the secured party does not participate in HAMP, or if a federal loss mitigation program is inapplicable or unavailable, an application for any program offered by the secured party must accompany the notice of intent to foreclose. If the Commissioner of Financial Regulation requires a State-approved uniform loss mitigation application to be used by all secured parties, servicers, and other agents, that uniform application must accompany the notice of intent to foreclose.

The borrower and the record owner of the property must be sent the following documents along with the notice of intent to foreclose and the applicable loss mitigation application:

- instructions for completing the loss mitigation application and a telephone number to confirm receipt;
- an explanation of the eligibility requirements for any federal loss mitigation program in which the secured party, loan servicer, or other agent of the secured party participates, or any other applicable program;
- an explanation of any additional loss mitigation options, including (i) a grace period that postpones payment; (ii) a short sale; (iii) a deed in lieu of foreclosure; (iv) moving to a less costly home in the lender's inventory; (v) cash for keys; or (vi) any other option that helps avoid foreclosure or lessens its impact on the borrower; and
- a postage paid, pre-addressed envelope with the address of the appropriate loss mitigation department authorized by the secured party to modify the terms of the mortgage loan.

Loss Mitigation Affidavit to Accompany an Order to Docket

Under the bill, an order to docket or complaint to foreclose must, among other things, include a loss mitigation affidavit in substantially the form set forth in the bill and that contains any other information required by the Commissioner of Financial Regulation. The authorized person executing the affidavit must identify whether the borrower's loan is owned, securitized, insured, or guaranteed by the Federal National Mortgage Corporation (Fannie Mae), the Federal Home Loan Mortgage Corporation (Freddie Mac), or the Federal Housing Administration (FHA). The party must attest to whether the secured party, servicer, or other agent is participating in a loan modification program and whether the borrower has been offered an opportunity to participate in that program.

Documented Reasons for Denial of a Loan Modification

The affidavit requires the executing party to state whether a loan modification review (1) cannot be completed because repeated, documented attempts to contact the borrower have been unsuccessful; or (2) has been completed and that the borrower has been denied a loan modification or is ineligible for the applicable loan modification program.

If a particular loan is ineligible for or has otherwise been denied a loan modification, the affidavit must state the reasons for denial or ineligibility and provide documentation. A mortgage loan may be ineligible or denied a modification if the loan (1) is not a first lien loan; (2) was originated after January 1, 2009, or a date specified by the loan modification program; (3) has an outstanding balance that exceeds \$729,750, or an amount specified by the loan modification program; (4) is owned by an investor or pool of investors that has not given the servicing agent contractual authority to enter into a loan modification; (5) has a monthly mortgage payment that is less than a certain income threshold at the time of denial, and the threshold is a certain percentage of the borrower's gross monthly income; or (6) has failed a HAMP net present value (NPV) calculation (*i.e.*, the economic value of modifying the loan does not sufficiently exceed the economic value of continuing with the foreclosure process).

In addition, a mortgage loan may be ineligible or denied a loan modification if the applicable property is not an owner-occupied primary residence or a one-to-four unit property, including a condominium, cooperative, or manufactured home; or if the property is vacant or condemned. If the borrower has previously failed a trial loan modification, or if repeated and documented attempts to contact the borrower to obtain certain information have been unsuccessful, the borrower may also be denied a loan modification.

The executing party must also state that the loan has been reviewed for other “soft-landing” loss mitigation relief options and explain why such relief was not offered or was declined by the borrower.

Borrower’s Request for Foreclosure Mediation to Accompany an Order to Docket

An order to docket or complaint to foreclose on residential property must also be accompanied by a request for foreclosure mediation, affidavit, and worksheet in substantially the form set forth in the bill and that contains any other information the Commissioner of Financial Regulation requires.

If a borrower is denied a loan modification or other loss mitigation, the borrower may contest the reasons for denial contained in the loss mitigation affidavit and request a foreclosure mediation session. The borrower must submit the request for foreclosure mediation, affidavit, and financial worksheet to the court within 15 days after being served with a copy of the order to docket and mail a copy of all documents to the foreclosing attorney.

The written notice sent to the borrower that accompanies a copy of the order to docket must inform the borrower of the ability to request foreclosure mediation and that, if the borrower files a request for mediation, the borrower’s property cannot proceed to foreclosure sale until at least 15 days after the mediation session has been held.

Foreclosure Mediation Fees and Procedures

Upon filing an order to docket or complaint to foreclose, an additional \$100 filing fee must be paid. Under the bill, this fee may not be passed on to the borrower and must be used for housing counseling services and to help defray the cost of providing foreclosure mediation services.

If the borrower files a timely request for foreclosure mediation with the completed affidavit, the clerk of the court must schedule the mediation session as soon as practicable. At a foreclosure mediation session, individuals with authority to settle the matter must be present or readily available for consultation and should discuss all foreclosure avoidance options with the participants. The borrower may also designate a housing counselor to be present at the mediation session.

In the event the parties cannot reach an agreement after participating in a foreclosure mediation session, the borrower may file a motion to stay the foreclosure sale within 15 days of completing the foreclosure mediation session. The request for foreclosure mediation constitutes good cause for failing to file a motion to stay within the time period prescribed under the Maryland Rules.

A foreclosure sale of residential property may not occur until:

- at least 45 days after the borrower is properly served with a copy of the order to docket or complaint to foreclose; and
- if the borrower files a timely request for foreclosure mediation accompanied by the borrower's affidavit, at least 15 days after the foreclosure mediation session; or
- if the borrower files a motion to stay the foreclosure sale within 15 days after the mediation session is held, at least 15 days after the court denies the motion or otherwise resolves the case.

Current Law: Under the bill, “foreclosure mediation” means a “settlement conference” as defined in the Maryland Rules. A “settlement conference” is a conference at which the parties, their attorneys, or both appear before an impartial person to attempt to resolve a dispute by agreement or by means other than trial. A settlement conference may include neutral case evaluation and neutral fact-finding, and the impartial person may recommend the terms of an agreement. The participants may accept or reject the recommended settlement. (*See* Md. Rule 17-102(h).)

Foreclosure Process – Filing

“Residential property” is defined as real property improved by four or fewer single-family dwelling units designed principally and intended for human habitation. Except under specified circumstances, an action to foreclose a mortgage or deed of trust on residential property cannot be filed until the later of 90 days after a default in a condition on which the mortgage or deed of trust states that a sale may be made or 45 days after a notice of intent to foreclose is sent. (*See* Real Property Article § 7-105.1(a)-(b).)

A written notice of intent to foreclose must be sent to the borrower and the record owner at least 45 days before the filing of an action to foreclose a mortgage or deed of trust on residential property. This notice must be sent by certified mail, postage prepaid, return receipt requested, and by first-class mail. A copy of the notice must also be sent to the Commissioner of Financial Regulation in DLLR. The notice must be in the form that the commissioner prescribes by regulation and contain specified information. (*See* Real Property Article § 7-105.1(c).)

An order to docket or a complaint to foreclose a mortgage or deed of trust on residential property must contain specified information and be accompanied by specified documents.

Service of Process

A copy of the order to docket or complaint and all other papers filed with it must be served by either personal delivery to the borrower, or by leaving the papers with a resident of suitable age and discretion at the borrower's dwelling house or usual place of abode. (*See* Real Property Article § 7-105.1(d).)

If at least two good faith efforts to complete service of process on different days have not succeeded, the plaintiff may effect service by (1) filing an affidavit with the court describing the good faith efforts to complete service; (2) mailing a copy of the order to docket or complaint and all accompanying papers by certified mail, return receipt requested, and first-class mail to the borrower's last known address; and (3) posting a copy of the order to docket or complaint and all accompanying papers in a conspicuous place on the property subject to the mortgage or deed of trust. The individual making service of process must file proof of service with the court in accordance with the Maryland Rules. A foreclosure sale of residential property may not occur until at least 45 days after service of process is made. (*See* Real Property Article § 7-105.1(e).)

Notice of a Proposed Foreclosure Sale to the Record Owner, Occupants, and Subordinate Interest Holders

At the same time the borrower is served with all required documents, the person authorized to sell the residential property must send written notice to all occupants of the property. The notice must inform the occupants that a foreclosure sale of the property may occur at any time after 45 days from the date of the notice. The notice must also state that the person could be evicted, even if the person is a tenant and has paid all rent due and otherwise complied with the terms of the lease.

Within 10 to 30 days before a foreclosure sale of residential property, the person authorized to sell the property must notify the record owner of the property and any holder of a subordinate mortgage, deed of trust, or other subordinate interest, including a judgment, of the time and place of the sale. Written notice must also be sent to all occupants no earlier than 30 days and no later than 10 days prior to the date of the foreclosure sale, and a final notice must be sent after the entry of a judgment awarding possession of the property and before any attempt to execute the writ of possession. The person giving each notice must file an affidavit of compliance in the foreclosure proceeding after each notice is sent. If the foreclosure sale is postponed, no additional notice is required to be sent to the occupants of the property. (*See* Real Property Article §§ 7-105.2, 7-105.3, 7-105.9.)

Notice of the time, place, and terms of a foreclosure sale of residential property must be published in a newspaper of general circulation at least once a week for three successive

weeks, with the first publication at least 15 days before the sale and the last not more than one week before the sale. (*See* Md. Rule 14-210(a).)

Cure of Loan Default

The borrower of a mortgage or deed of trust on residential property has the right to cure a default and reinstate the loan at any time up to one business day before a foreclosure sale by paying all past-due payments, penalties, and fees. Upon request, and within a reasonable time, the secured party or the secured party's authorized agent must notify the borrower or the individual's attorney of the amount necessary to cure the default and reinstate the loan, as well as instructions for delivering the payment. (*See* Real Property Article § 7-105.1(h).)

Background:

State Response to the Mortgage Crisis

The State's multi-faceted approach to the foreclosure crisis has involved legislative reforms of mortgage lending laws, extensive consumer outreach efforts, and enhanced mortgage industry regulation and enforcement. Legislation passed during the 2008 and 2009 sessions:

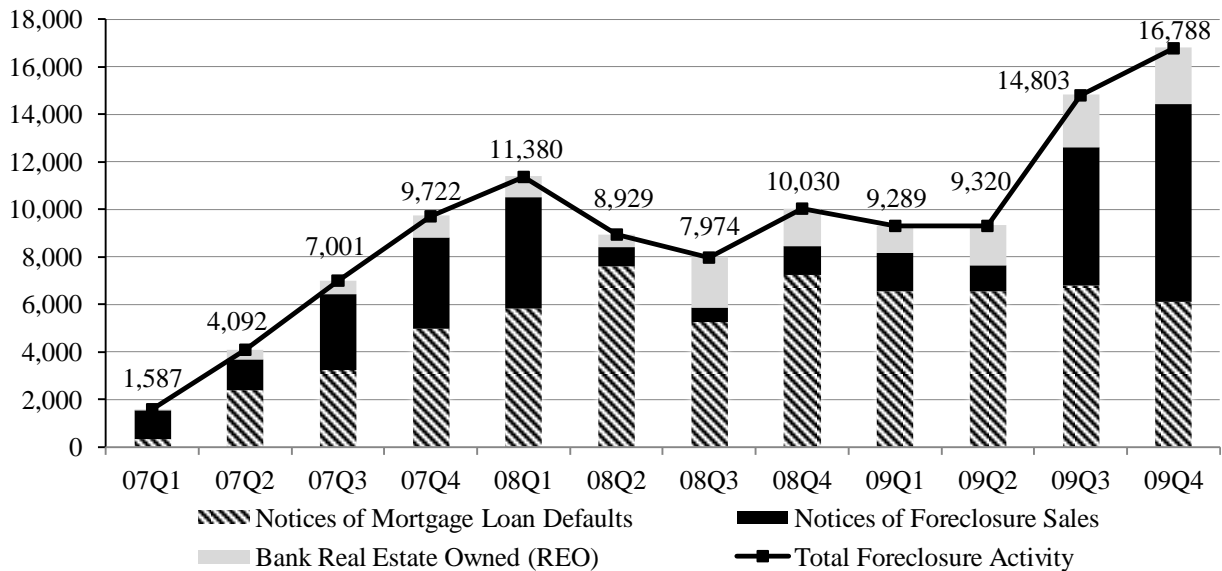
- created the Mortgage Fraud Protection Act, Maryland's first comprehensive mortgage fraud statute;
- tightened mortgage lending standards and required a lender to give due regard to a borrower's ability to repay a loan;
- prohibited foreclosure rescue transactions and granted the Commissioner of Financial Regulation additional enforcement powers;
- reformed the foreclosure process to provide homeowners with greater time and additional notices before their properties are sold; and
- required additional notices to be given to residential tenants renting properties pending foreclosure.

Consumer outreach efforts include statewide public workshops to assist distressed homeowners in coordination with the Maryland Foreclosure Prevention Pro Bono Project. Since July 2008, over 1,000 volunteer attorneys trained through the project have provided free legal advice at foreclosure solutions workshops and represented borrowers referred from nonprofit housing counseling agencies. The project is coordinated by the Pro Bono Resource Center of Maryland in collaboration with other State agencies, the Maryland State Bar Association, and other nonprofit housing counseling service

providers. In addition to the project, the State has sponsored more than 200 public foreclosure solution workshops attended by approximately 25,000 homeowners.

Despite the impact of extensive State legislative and consumer outreach efforts, **Exhibit 1** shows that total foreclosure activity in Maryland continues to increase as State residents feel the effects of rising unemployment and declining home values. The figures in Exhibit 1 incorporate data from DHCD’s quarterly foreclosure reports that track documents filed in all three phases of the foreclosure process, including notices of mortgage loan default, notices of foreclosure sales, and properties that have been foreclosed on and repurchased by lenders. As shown in Exhibit 1, total foreclosure activity in the State has risen 67% year-over-year from the fourth quarter of 2008 to the fourth quarter of 2009, and over 13% from the third quarter of 2009 to the fourth quarter of 2009.

Exhibit 1
Total Foreclosure Activity in the State
First Quarter 2007 – Fourth Quarter 2009



Source: Department of Legislative Services using DHCD quarterly report data attributed to RealtyTrac

Although research from the Federal Reserve Bank of Richmond indicates that Maryland’s mortgage delinquency and foreclosure rates are lower than the national average, **Exhibit 2** shows that both subprime and prime delinquencies and foreclosures continue to rise.

Exhibit 2
Maryland Owner-occupied Loan Statistics
September 2008-2009

	September <u>2008</u>	March <u>2009</u>	September <u>2009</u>
Owner-occupied Subprime Loans			
90+ Days Past Due	13.4%	19.6%	23.4%
Foreclosure	8.0%	9.9%	11.4%
Owner-occupied Prime Loans			
90+ Days Past Due	1.5%	2.4%	3.6%
Foreclosure	0.9%	1.6%	1.9%

Source: Federal Reserve Bank of Richmond using data from Lender Processing Services Applied Analytics (September 2009)

From September 2008 to September 2009, the percentage of prime loans in Maryland more than 90 days delinquent rose from 1.5% to 3.6%. Over the same period, the foreclosure rate of prime loans more than doubled from 0.9% to 1.9%. According to the Federal Reserve Bank of Richmond, more than 23% of owner-occupied subprime loans in the State were more than 90 days overdue.

Federal Efforts to Promote Loan Modifications

Created in March 2009 and implemented two months later, the federal Home Affordable Modification Program was designed to facilitate loan modifications for qualifying homeowner occupants who are at risk of default or already in default, experiencing financial hardship, and meet other specified criteria. Participation in HAMP is mandatory for lenders that benefited from federal assistance through the U.S. Treasury's Financial Stability Plan. Many of the nation's largest loan servicers are required to participate in HAMP, as more than 85% of the outstanding mortgages in the country are covered under the program.

Exhibit 3 shows the number of active trial loan modifications and permanent modifications offered to Maryland homeowners from May through December 2009.

Exhibit 3
HAMP Activity by State
May-December 2009

<u>State</u>	<u>Active Trial</u> <u>Loan Modifications</u>	<u>Permanent</u> <u>Loan Modifications</u>	<u>Total</u>
Maryland	25,847	2,270	28,117
Virginia	19,791	1,898	21,689
Pennsylvania	18,459	1,388	19,847
District of Columbia	1,428	108	1,533

Source: *FinancialStability.gov*, Monthly Making Home Affordable Report (December 2009)

Homeowners seeking a loan modification under HAMP must have unpaid principal balances below the Fannie Mae and Freddie Mac conforming loan limit of \$729,750 (for a single-family home). To participate, an eligible home may not be investor-owned and may not be vacant or condemned. Loans subject to modification must have been originated on or before January 1, 2009, and may only be modified once under HAMP.

In determining HAMP eligibility, the lender must analyze a borrower's net present value for modification versus foreclosure. The NPV calculation includes the borrower's payment history and credit score to predict (1) how likely the borrower will cure the loan default; and (2) the lender's potential losses incurred on the loan in the event of foreclosure based on geographic real estate trends. All borrowers must fully document income, including a signed copy of the most recent tax return, two most recent pay stubs, and a signed affidavit of financial hardship. The program requires participating loan servicers to follow a specific "waterfall" process in modifying loans to achieve a target monthly payment of 31% of the borrower's gross monthly income that includes first lowering the interest rate of the loan and then extending the term.

Maryland Foreclose Mediation Workgroup and Other States' Loan Modification Efforts

Over the course of six to eight weeks in fall 2009, the Governor convened a workgroup of various stakeholders at DHCD to explore the various options for instituting a foreclosure mediation program in the State. The workgroup examined the existing foreclosure process in the State and analyzed the advantages and disadvantages of other states' existing mediation programs. The ultimate goal was to draw upon other states' models to design a Maryland-specific program that would complement and help facilitate the success of the federal HAMP program.

Nevada's foreclosure mediation program was one of several analyzed by the Maryland foreclosure mediation workgroup. Under the Nevada program, homeowners who receive a foreclosure notice have 30 days from the date of the notice to opt-in to the state mediation program. The program is overseen by the Nevada judiciary and requires good faith participation from borrowers, lenders, and loan servicers. The Nevada Supreme Court promulgates mediation rules and requires lenders and servicers to disclose their loan modification analyses to the mediator during a mediation session.

Nevada's foreclosure mediation program is entirely self-funded through a \$400 fee split evenly between the borrower and lender. An additional \$50 fee increase is imposed on parties filing a foreclosure notice. From July 1, 2009, through December 1, 2009, more than 3,400 Nevada homeowners who received notices of default requested mediation. As of December 11, 2009, the Nevada Supreme Court has appointed and trained 170 mediators participating in Nevada's Foreclosure Mediation Program. From July 1 through November 15, the Nevada judiciary reports the following statistics concerning its program:

Notices of default filed:	29,242
Requests for mediation:	3,446 (11.7%)
Mediations conducted:	372
Mediations scheduled:	876
Cases to be scheduled:	1,402

In the first four and a half months of Nevada's program, 29,242 notices of default had been filed. However, that figure includes commercial and nonowner occupied properties that are ineligible for Nevada's Foreclosure Mediation Program.

State/Local Fiscal Effect: Legislative Services estimates that State general fund revenues could increase by \$1,681,200 in fiscal 2011. This estimate assumes the Administrative Office of the Courts receives the entirety of the \$100 filing fee imposed under the bill. However, the bill does not specify whether the fee stays with the circuit court where the conference is held, goes to the Administrative Office of the Courts, or is shared.

Using data from DHCD quarterly foreclosure reports, Maryland homeowners received 16,812 notices of foreclosure sales in calendar 2009. To the extent each order to docket or complaint to foreclose must be accompanied by an additional \$100 filing fee, general fund revenues increase by \$1,681,200. However, if the fee is retained in the circuit court or shared, general fund revenues are lower and local revenues increase. Out-year general fund revenues cannot be reliably estimated due to difficulties in forecasting the State foreclosure rate in fiscal 2012 and beyond and the expiration of HAMP on December 31, 2012.

General fund expenditures could increase significantly in fiscal 2011 for the Judiciary to establish and administer the State foreclosure mediation program. Absent any estimate of the cost to administer settlement conferences from the Administrative Office of the Courts, and *for illustrative purposes only*, expenditures for circuit courts could increase by almost \$807,000 in fiscal 2011. This fiscal estimate assumes 12% of the 16,812 Maryland homeowners who received notices of foreclosure sales are eligible for the State foreclosure mediation program and would subsequently choose to opt-in (similar to Nevada's participation rate). Information from Nevada indicates that the average total cost of a foreclosure mediation session approaches \$400. To the extent the percentage of eligible Maryland homeowners opting in to the foreclosure mediation program approaches 25%, circuit court expenditures can increase by \$1,681,200 in fiscal 2011.

This estimate does not account for the full range of costs likely to be incurred by the Judiciary. Likewise, costs may increase for other agencies such as DLLR, DHCD, and OAG to handle additional inquiries and complaints.

Additional Information: The fiscal estimate provided by Legislative Services is derived, in large part, from analysis of available in-State foreclosure statistics and information on the impacts of the mortgage crisis from other States and national organizations. The limited information that was provided by the Judiciary and DHCD (after repeated requests) was vague, hypothetical, and did not sufficiently illuminate the true revenue and expenditure impacts of this bill. For example, the Administrative Office of the Courts did note that the bill has significant operational and fiscal impacts on the circuit courts, but did not quantify current expenditures or provide figures to support that position. Despite repeated requests, the office has not provided Legislative Services with information regarding the current number of retired judges performing settlement conferences, per diem expenditures, or the existing workload of circuit court nondomestic mediation and volunteer settlement conference programs.

Additional Information

Prior Introductions: None.

Cross File: HB 472 (The Speaker, *et al.*) (By Request - Administration) - Environmental Matters.

Information Source(s): Department of Housing and Community Development (*Property Foreclosure Events in Maryland* quarterly reports); Federal Reserve Bank of Richmond, State of Nevada Judiciary; U.S. Department of the Treasury – *MakingHomeAffordable.gov*; Baltimore Preservation Housing Coalition; RealtyTrac,

Judiciary (Administrative Office of the Courts); Department of Labor, Licensing, and Regulation; Department of Legislative Services

Fiscal Note History: First Reader - February 15, 2010
ncs/kdm Revised - Updated Information - February 18, 2010

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ANALYSIS OF ECONOMIC IMPACT ON SMALL BUSINESSES

TITLE OF BILL: Real Property – Residential Property Foreclosure Procedures – Foreclosure Mediation

BILL NUMBER: SB 276

PREPARED BY: Department of Labor, Licensing and Regulation

PART A. ECONOMIC IMPACT RATING

This agency estimates that the proposed bill:

WILL HAVE MINIMAL OR NO ECONOMIC IMPACT ON MARYLAND SMALL BUSINESS

OR

WILL HAVE MEANINGFUL ECONOMIC IMPACT ON MARYLAND SMALL BUSINESSES

PART B. ECONOMIC IMPACT ANALYSIS

The majority of mortgages in Maryland are held and serviced by large banks and corporations. For the minority serviced by small Maryland servicers and lenders, SB 276 will have a modest impact by assessing a \$100 fee for filing a foreclosure action.