

Department of Legislative Services  
Maryland General Assembly  
2011 Session

FISCAL AND POLICY NOTE  
Revised

House Bill 509

(Delegate Niemann)

Environmental Matters

Judicial Proceedings

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**Real Property - Mortgages - Enforcement**

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This emergency bill clarifies the authority of the Commissioner of Financial Regulation to enforce and investigate the Protection of Homeowners in Foreclosure Act (PHIFA) and the Maryland Mortgage Fraud Protection Act (MMFPA). The bill authorizes the commissioner to enforce these Acts by requiring a violator to take affirmative action to correct a violation, including the restitution of money or property to any person aggrieved by the violation. The commissioner is authorized to cooperate with any unit of law enforcement in the investigation and prosecution of a violation of the Acts and aid any unit of the State government with regulatory jurisdiction over the business activities of the violator. In any action brought by the commissioner, the commissioner is entitled to recover the costs of the action for the use of the State. The bill clarifies that a homeowner may bring an action for damages caused by a violation of PHIFA, without having to exhaust administrative remedies available under PHIFA and regardless of the status of an administrative action or criminal prosecution under PHIFA. Likewise a person may bring an action for damages caused by a violation of MMFPA without having to exhaust administrative remedies available under MMFPA and regardless of the status of an administrative action or criminal prosecution, if any, under MMFPA.

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**Fiscal Summary**

**State Effect:** The bill enhances the commissioner's enforcement authority and may result in operational efficiencies.

**Local Effect:** Any impact on the workload of circuit courts is expected to be minimal.

**Small Business Effect:** None.

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## Analysis

### Current Law:

#### *Protection of Homeowners in Foreclosure Act and Maryland Mortgage Fraud Protection Act*

PHIFA was enacted to address the growing problem of foreclosure “rescue” scams. It requires that “foreclosure consultants” enter into consulting contracts with homeowners that lay out the terms of their agreements, give disclosures, and afford basic consumer protections such as a three-day rescission period. MMFPA prohibits specified actions made with the intent to defraud, including knowingly making, using, or facilitating the use of any deliberate misstatement, misrepresentation, or omission during the mortgage lending process with the intent that it will be relied upon by a mortgage lender, borrower, or any other party to the lending process.

The Attorney General or commissioner may seek an injunction to prohibit a person who has engaged or is engaged in a violation of the Acts. The court may enter any order or judgment necessary to (1) prevent the use by a person of any prohibited practice; (2) restore to a person any money or real or personal property acquired from the person by means of any prohibited practice; or (3) appoint a receiver in case of a willful violation of the Acts.

In any action brought by the Attorney General or the commissioner under the Acts, the Attorney General or the commissioner is entitled to recover the costs of the action for the use of the State. A violation of the PHIFA is an unfair or deceptive trade practice within the meaning of the Maryland Consumer Protection Act and is subject to its enforcement and penalty provisions.

A homeowner may also bring an action for damages incurred as the result of a violation of PHIFA. A homeowner who brings an action and is awarded damages because of a PHIFA violation may also be awarded reasonable attorney’s fees. If the court finds that the defendant willfully or knowingly violated PHIFA, the court may award damages equal to three times the amount of actual damages.

A person may bring an action for damages incurred as the result of a violation of MMFPA. A person who brings an action and is awarded damages because of an MMFPA violation may also be awarded reasonable attorney’s fees. If the court finds that the defendant willfully or knowingly violated MMFPA, the court may award damages equal to three times the amount of actual damages.

The commissioner has also general investigative and enforcement powers to enforce a violation of any law, rule, regulation, or order over which the commissioner has jurisdiction.

### *General Investigative and Enforcement Authority*

The commissioner may make public or private investigations in order to (1) determine whether a violation has occurred; and (2) aid in the enforcement of a law or in the prescribing of regulations, rules, and orders over which the commissioner has jurisdiction. The commissioner may perform specified actions, such as administer oaths or subpoena witnesses, for the purposes of an investigation or proceeding. The commissioner may also require or permit a person to make an oral or written statement regarding a matter under investigation and, subject to State law, publish information concerning a violation of a law, regulation, rule, or order over which the commissioner has jurisdiction.

If a person refuses to obey a subpoena, the commissioner may apply to the appropriate circuit court to issue an order requiring the person to appear before the commissioner, or an officer designated by the commissioner, and produce evidence, if so ordered. A failure to obey this order is punishable as contempt of court.

When the commissioner determines that a person has violated a law, regulation, rule, or order over which the commissioner has jurisdiction, the commissioner may issue, without a prior hearing, a summary order directing the person to cease and desist from engaging in the activity if immediate action is in the public interest. The commissioner must notify the person of the opportunity for a hearing before the commissioner and the consequences of failing to request a hearing. The hearing must be held in accordance with the Administrative Procedure Act.

If, after notice and a hearing, the commissioner determines a violation has occurred, the commissioner may, in addition to taking any other action authorized by law, issue a final cease and desist order, suspend or revoke the license of the person, issue a penalty order for up to \$1,000 for the first violation and up to \$5,000 for each subsequent violation, or take any combination of these actions. In determining the amount of the civil penalty, the commissioner must consider numerous specified factors.

In the event of a violation, the commissioner may also bring an action in the appropriate circuit court to obtain one or more of the following remedies:

- a temporary restraining order;
- a temporary or permanent injunction;
- a civil penalty of up to \$1,000 for a first violation and up to \$5,000 for each subsequent violation;
- a declaratory judgment;
- an order preventing access to the violator's assets;
- rescission;

- restitution; and
- any other relief as the court deems just.

If the commissioner believes a person is *about to* violate a law, regulation, rule, or order over which the commissioner has jurisdiction, the commissioner may bring an action in the appropriate circuit court to obtain a temporary restraining order, a temporary or permanent injunction, or both.

These general investigative and enforcement powers do not apply to (1) any bank, trust company, savings bank, savings and loan association, or credit union incorporated or chartered under the laws of Maryland or the United States that maintains its principal office in this State; (2) any out-of-state bank, as defined by State law, having a branch that accepts deposits in this State; (3) any institution incorporated under federal law as a savings association or savings bank that does not maintain its principal office in this State but has a branch that accepts deposits in this State; or (4) an affiliate of any of these institutions.

## **Background:**

### *State Response to the Mortgage Crisis*

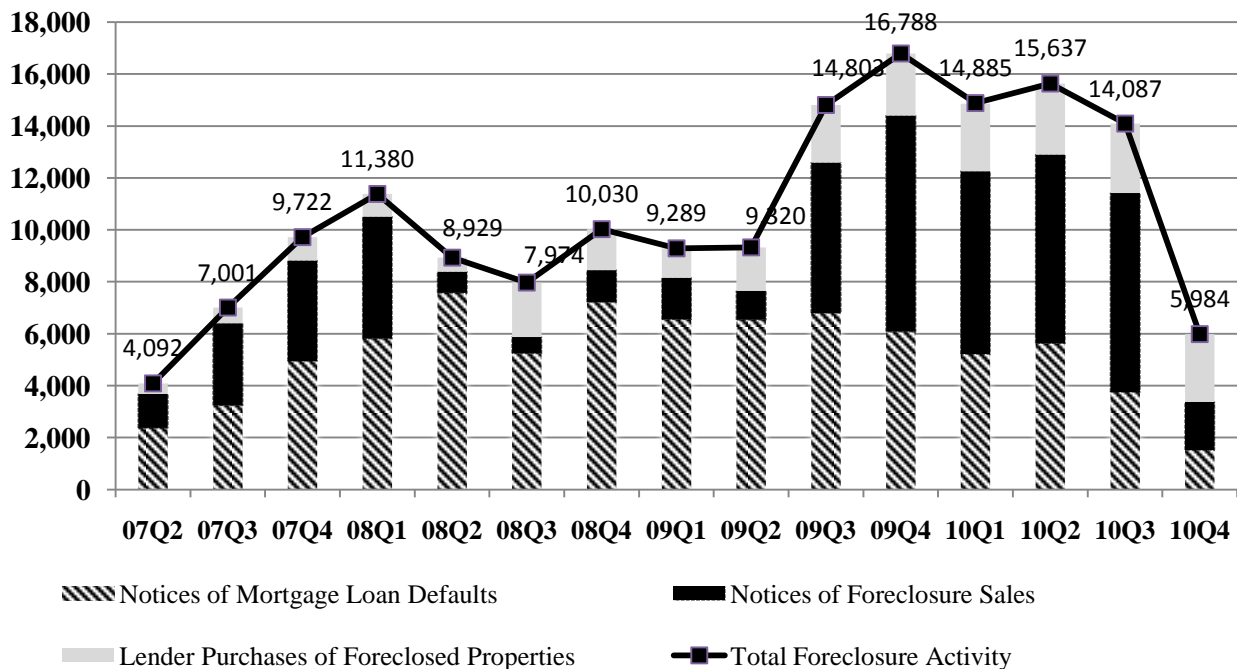
The State's multi-faceted approach to the foreclosure crisis has involved legislative reforms of mortgage lending laws, extensive consumer outreach efforts, and enhanced mortgage industry regulation and enforcement. PHIFA was first enacted in 2005 and amended in 2008 in response to increased foreclosure activity in the State. Legislation passed during the 2008, 2009, and 2010 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;
- required additional notices to be given to residential tenants renting properties pending foreclosure;
- required the secured party to file a specified final loss mitigation affidavit and send to the mortgagor or grantor a copy of the affidavit and a request for foreclosure mediation form; and
- required a lender, under specified circumstances, to provide to a borrower a specified written notice regarding homebuyer education or housing counseling in connection with specified mortgage loans.

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.

Due to a multitude of factors, including the State’s new foreclosure mediation process, consumer outreach efforts, and legal issues surrounding many banks and mortgage companies’ foreclosure practices, total foreclosure activity decreased significantly in the fourth quarter of 2010. **Exhibit 1** shows that total foreclosure activity in Maryland is at its lowest level since the second quarter of 2007. The figures in Exhibit 1 incorporate data from the Department of Housing and Community Development’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.

**Exhibit 1**  
**Total Foreclosure Activity in the State**  
**First Quarter 2007 – Fourth Quarter 2010**



Source: The Department of Housing and Community Development

The office of the commissioner advises that it has rarely filed for an injunction in circuit courts before because of legal expenses. The bill allows the commissioner to enforce any violation through an administrative process.

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### **Additional Information**

**Prior Introductions:** None.

**Cross File:** None.

**Information Source(s):** Office of the Attorney General; Department of Housing and Community Development; Judiciary (Administrative Office of the Courts); Department of Housing and Community Development; Department of Labor, Licensing, and Regulation; State's Attorneys' Association; Department of Legislative Services

**Fiscal Note History:** First Reader - February 23, 2011  
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