**How States Can Protect Homeowners Facing Zombie Second Mortgages: Suggested Language for a Second Mortgage Foreclosure Bill**

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The Problem of Zombie Second Mortgages and the Need for Action

During the early 2000s predatory lenders often combined first and second mortgages in a single loan transaction. Referred to as “80-20 mortgages,” the transactions typically financed 80% of the principal balance through a first mortgage and the other 20% through a second mortgage. This kept the first mortgage within a loan-to-value ratio for easy securitization. Many borrowers did not know they had two loans. Careless underwriting and abusive terms led to early defaults on many of these mortgages.

During the Great Recession, many borrowers who had entered into predatory second mortgages found themselves unable to make the payments. However, because housing values had dropped drastically, these lenders typically did not foreclose. Many lenders eventually sold the loans to debt buyers who paid pennies on the dollar in the hopes that property values would increase. Most of these debt buyers ignored the homeowners for years. They did not provide any ongoing information about who owned or serviced the loan and how the homeowner could contact them They did not send monthly statements providing an itemization of amounts owed.

Now that housing values have skyrocketed, these debt buyers are emerging, shocking homeowners with astronomical amounts of interest and fees allegedly due and attempting to foreclose in the hopes of making money on their investments.

Many of the debt buyers who are foreclosing on these mortgages do not have full loan histories. They cannot document prior assignments or the amounts they claim to be owed. Because of the long histories of inaction on the part of the loan owners, many homeowners lost opportunities to explore options for modifications and other loss mitigation options that could have substantially reduced the amounts claimed to be due. Instead, homeowners continued to pay regularly on their first mortgages. They now face the loss of all of their home through foreclosure of a second mortgage they were not aware existed.

There has been limited action at the federal level to address unfair and deceptive zombie second mortgages. It is up to the states to act to protect homeowners trapped by a debt they believed was long behind them. This issue brief provides suggestions for statutory language that states can use to amend existing consumer protection statutes or create a new protective statute. We also provide laws from Virginia and Ohio that address zombie second mortgages.

Suggested Statutory Language to Address Zombie Second
Mortgage Problems

The language proposed below provides safeguards to ensure that holders of second mortgages are providing proper notice and documentation before being allowed to foreclose. These protections will prevent unfair foreclosure of long-dormant second mortgages as well as second mortgages taken as home equity lines of credit. These provisions can be enacted either as a series of amendments to a state’s existing foreclosure statutes or as a new standalone chapter or section.

The suggested language is divided into three parts. Part (A) creates statutory definitions of “subordinate mortgage” and “creditor” to clarify the type of loan and entity that is subject to this law. Part (B) categorizes unlawful conduct and creates limitations on foreclosures with alternatives for non-judicial and judicial foreclosure states. Finally, Part (C) establishes forms of affirmative relief that borrowers may seek outside of the foreclosure context to remedy harms created by unlawful practices of the creditor regarding the subordinate mortgage debt.

## An Act to amend foreclosure procedures for subordinate mortgages

**(A) Definitions**

1. “Subordinate mortgage” means a security instrument in residential real property voluntarily granted in connection with an extension of closed or open-ended credit that (i) was, at the time it was recorded, subordinate to another security interest encumbering the same real property and (ii) and has not been elevated to a first priority lien by satisfaction of one or more former higher priority liens
2. “Creditor” means a person or entity that holds or controls, partially, wholly, indirectly, directly or in a nominee capacity, a subordinate mortgage loan securing a residential property, including, but not limited to, an originator, holder, investor, assignee, successor, trust, trustee, nominee holder, Mortgage Electronic Registration System or mortgage servicer, including the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation; provided, that ''creditor'' shall also include any servant, employee or agent of a creditor.

**Section 1)** The following constitute unlawful practices in connection with the servicing and foreclosure of a subordinate mortgage:

* 1. the failure to provide the borrower with any written communications regarding the loan for a period of twelve or more cumulative months;
	2. the failure to provide periodic statements for each billing cycle when required by federal or state law or investor or guarantor requirements;
	3. the failure to provide a transfer of loan servicing notice to the borrower when required to do so by the Real Estate Settlement Procedures Act, 12 USC §2605 and12 CFR §1024.33, state law or investor or guarantor requirements;
	4. the failure to provide an early intervention notice or other pre-foreclosure notice as required by the Real Estate Settlement Procedures Act or state law or investor or guarantor requirements;
	5. the failure to provide a transfer of loan ownership notice to the borrower when required to do so by federal or state law or investor or guarantor requirements;
	6. the demand for payment, attempt to foreclose, or foreclosure when the statute of limitations for enforcement of the entirety or a portion of the mortgage debt has expired;
	7. the demand for payment, attempt to foreclose, or foreclosure based on a claim for an amount that is not lawfully due on a subordinate mortgage; or
	8. any other circumstances that a court determines indicate an intent to abandon the debt.

### (C)Section 2: Limitations on foreclosure

**Alternative #1 (for states that allow non-judicial foreclosure):**

A) As a condition to exercising a power of sale or otherwise conducting a non-judicial foreclosure, the creditor shall serve the borrower with a notice signed under the pains and penalties of perjury 90 days before the foreclosure sale that includes the following:

i) a list of the conduct that constitutes unlawful practices in connection with the servicing and foreclosure of a subordinate mortgage as enumerated in section (1), above; and

ii) a verification that the creditor has reviewed the loan account history and determined:

1. that neither the creditor nor its predecessors committed any of the practices enumerated in section (1), or
2. if the creditor or its predecessors engaged in such practices, a description of those practices and the dates they occurred; and
3. notification to the borrower that if the borrower believes the creditor or its predecessors engaged in any of the practices enumerated in section (1), the borrower may, prior to a foreclosure sale, petition the court for relief.

B) Upon the petition of the borrower, the court shall stay any pending exercise of a power of sale or proceeding for recovery of possession of the property until a final determination on the petition has been made.

C)A creditor, shall not cause publication of notice of a foreclose sale upon a subordinate mortgage loan unless at least 30 days prior to such notice, it has recorded an affidavit signed under the pains and penalties of perjury in the appropriate local land records certifying that the creditor served the borrower with the notice described in section (2)(A), attaching a copy of the notice together with a verification and certifying that the content of the notice is true and accurate.

D) If a foreclosure sale has already occurred on a subordinate mortgage, the court may set aside the foreclosure sale upon a finding that the creditor engaged in unlawful practices as enumerated in section (1), failed to comply with provisions of this section, or claimed an amount not lawfully due in connection with the enforcement of a subordinate mortgage debt.

**Alternative #2 (for states that require judicial foreclosure):**

A) As a condition to initiating a judicial foreclosure, the creditor shall serve the borrower with a notice signed under the pains and penalties of perjury 90 days before the initiation of the foreclosure action that includes the following:

i) a list of the conduct that constitutes unlawful practices in connection with the servicing and foreclosure of a subordinate mortgage as enumerated in section (1), above; and

ii) a verification that the creditor has reviewed the loan account history and determined:

1. that neither the creditor nor its predecessors committed any of the practices enumerated in section (1), or
2. if the creditor or its predecessors engaged in such practices, a description of those practices and the dates they occurred; and
3. notification to the borrower that if the borrower believes the creditor or its predecessors engaged in any of the practices enumerated in section (1), the borrower may, prior to a foreclosure sale, petition the court for relief.

B) Upon the petition of the borrower, the court shall stay any pending foreclosure action, the exercise of a power of sale or proceeding for recovery of possession of the property until a final determination on the petition has been made.

C) A creditor, shall not seek or cause entry of judgment in a proceeding to foreclosure upon a subordinate mortgage loan unless at least 30 days prior to such action, it has recorded an affidavit signed under the pains and penalties of perjury in the appropriate local land records certifying that the creditor served the borrower with the notice described in section (2), attaching a copy of the notice together with a verification and certifying that the content of the notice is true and accurate.

D) If entry of judgment or a foreclosure sale has already occurred on a subordinate mortgage, the court may set aside the judgment or sale upon a finding that the creditor engaged in unlawful practices as enumerated in section (1), failed to comply with provisions of this section, or claimed amounts not lawfully due in a certification of compliance recorded pursuant to this section.

E) It shall be an affirmative defense to the foreclosure action if the court finds that the creditor or its predecessors committed any of the practices enumerated in section (1).

**(C) Remedies**

**Section 3:** If the court determines that the creditor or its predecessors engaged in any of the unlawful practices enumerated in section (1), the court may order the creditor to:

a) waive interest, fees, and charges added to the loan;

b) cease all foreclosure activity and begin the foreclosure process anew with a Notice of Right to Cure itemizing the amounts owed after waiver of interest, fees, and charges;

c) cease all collection activity on the loan;

d) terminate all transfers or sales of the loan;

e) record a release of all liens securing the loan;

f) request that the tradelines for the loan be deleted from the borrower’s credit reporting file with any credit reporting agency to which the loan owner, its agents, or their predecessors previously reported the debt;

g) any other order the court deems just and proper.

**Section 4:** If the court determines that a creditor or its predecessors engaged in any of the unlawful practices enumerated in section (1), such creditor is liable to such person in an amount equal to the sum of:

a) any actual damage sustained by such person as a result of such conduct;

b) punitive damages as the court may allow in the case of a willful failure to comply with any requirement imposed under this section; and

c) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court.

**Section 5**: A violation of any provision of this section is a per se violation of the state’s Unfair Deceptive Trade Practices Act and creates a rebuttable presumption that damages have been incurred, and provides grounds for license revocation.

**Section 6**: The [designate an appropriate state agency] shall promulgate regulations necessary to carry out this section

**Section 7**: All notices required under the section shall be provided in English and Spanish and, in clear and conspicuous language at the top of the notice there shall be a statement that the contents are important and should be translated immediately in the top 7 languages of the Commonwealth.

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# State Legislation Addressing Zombie Second Mortgages

## Virginia’s 2024 subordinate mortgage legislation: an example of a new zombie second mortgage statute

In April 2024, the Governor of Virginia signed into law [Va. H.B. 184](https://lis.virginia.gov/cgi-bin/legp604.exe?241+sum+HB184), *An Act to amend and reenact § 55.1-321 of the Code of Virginia, relating to foreclosure procedures; subordinate mortgage; affidavit required found at* [§ 55.1-321 (A1 & A2) of the Code of Virginia](https://law.lis.virginia.gov/vacode/title55.1/chapter3/section55.1-321/)*.*

While the law does include some of the language we recommend, it is more limited to the failure to send monthly statements.

Virginia is a non-judicial foreclosure state. The new law requires, as a precondition to a foreclosure sale of a subordinate mortgage, that the lienholder must provide to the trustee an affidavit affirming whether monthly statements were sent to the borrower and, absent an exemption, for each billing cycle that they were not sent, the lienholder cannot collect interest, fees, or other charges. A borrower who believes certain amounts have been added that should not have been can petition the court for a waiver of such amounts. If successful, the borrower will be awarded attorneys’ fees and costs.

The new law does not apply to subordinate lienholders who are either (a) the original creditor, (b) a mortgage servicer acting on behalf of the original creditor, (c) a national or state-chartered bank, or (d) a federal or state-chartered credit union.

The law provides protections similar to those suggested by NCLC for borrowers who fail to receive periodic statements for an extended period of time on the subordinate loan.  The NCLC suggested language provides greater consequences with certain limitations on the ability to foreclose instead of just limiting the amount the lienholder can collect. The NCLC suggestions also are applicable to the loan owner, its agents, or their predecessors, so would include the entities exempted in the Virginia law.

**Statute Text:** [§ 55.1-321 (A1 & A2) of the Code of Virginia](https://law.lis.virginia.gov/vacode/title55.1/chapter3/section55.1-321/), relating to foreclosure procedures; subordinate mortgage; affidavit required.

A1. If the proposed sale is initiated due to a default in payment under a security instrument that (i) was, at the time it was recorded, subordinate to another security interest encumbering the same real property and (ii) has not subsequently been elevated to a first priority lien by a recorded voluntary subordination agreement, such subordinate mortgage lienholder shall submit to the trustee an affidavit affirming whether monthly statements were sent to the property owner for each period that any interest, fees, or other charges were assessed. No such interest, fees, or other charges shall be assessed or charged for any period during which periodic statements were not sent unless the subordinate mortgage lienholder identifies a specific exemption pursuant to applicable law for which such subordinate mortgage lienholder was not required to send such specific statements for any period of time enumerated in the affidavit. Such affidavit shall also include an itemized list of the current amount owed, including any periods in which interest, fees, and other charges were waived because no monthly statements were sent during such period. The subordinate mortgage lienholder shall provide a copy of such affidavit to the person required to pay the instrument with written notice that a request for sale shall be made of the trustee upon the expiration of 60 days from the day of mailing such notice. Such notice shall be sent by certified mail, return receipt requested, to the last known mailing address of such person required to pay the instrument. Such notice shall advise the person required to pay the instrument that if such person believes that such interest, fees, or other charges have been assessed in error, such person may, prior to the sale, petition the circuit court of the city or county where such property or some part thereof lies for an accounting and order declaring the proper balance secured by the subordinate mortgage. If the court determines that charges were assessed in error, such person shall be entitled to recover attorney fees and costs against the subordinate mortgage lienholder. The provisions of this subsection shall not apply to subordinate lienholders who are either (a) the original creditor, (b) a mortgage servicer acting on behalf of the original creditor, (c) a national or state-chartered bank, or (d) a federal or state-chartered credit union.

A2. Any purchaser at a foreclosure sale shall provide certification that such purchaser shall pay off any priority security instruments no later than 90 days from the date that the trustee's deed conveying the property pursuant to such sale is recorded in the land records. The person originally required to pay the instrument shall have the right to petition the circuit court of the city or county where the property or some part thereof lies to recover from the purchaser any payments toward such priority lien amounts made by such person required to pay the instrument after the date of the foreclosure sale, plus any attorney fees and costs.

*Ohio’s 2022 subordinate mortgage legislation:  an example of a new zombie second mortgage statute*

The Ohio second mortgage statute Ohio Revised Code, [Section 1349.78: Written notice to debtor](https://codes.ohio.gov/ohio-revised-code/section-1349.78) focuses on notice to homeowners before the filing of a foreclosure.

The law requires creditors to send a written notice to a debtor at least 30 days before filing a foreclosure action on a debt secured by residential real property, provided the debt is not a first mortgage and is in default or accelerated. The notice must include key information such as the debt amount, the creditor's contact details, the debtor's right to legal counsel, and potential bankruptcy relief options. If a creditor fails to send the notice due to an unintentional error, they may avoid civil liability if they promptly correct the mistake and make restitution to the debtor. Failure to meet these conditions gives the debtor the right to seek damages, but class actions are not permitted.

**Statute Text:** Effective: July 6, 2022:

(A) Not less than thirty days prior to a person filing a foreclosure action to collect on a debt secured by residential real property, the person shall first send a written notice as described in division (B) of this section via United States mail to the residential address of the debtor, if both of the following apply:

(1) The debt is secured by a mortgage lien on the debtor's residential real property that is not in the first mortgage position.

(2) The debt has either been accelerated or is in default in accordance with the terms set forth in the promissory note.

(B) The written notice may be included on, or accompany, any other communication, and shall be printed in at least twelve-point type and include the following:

(1) The name and contact information of the person collecting the debt;

(2) A statement of the amount of the debt;

(3) A statement that the debtor has a right to engage an attorney;

(4) A statement that the debtor may qualify for debt relief under Chapter 7 or 13 of the United States

Bankruptcy Code, 11 U.S.C. Chapter 7 or 13, as amended;

(5) A statement that a debtor that qualifies under Chapter 13 of the United States Bankruptcy Code may be able to protect their residential real property from foreclosure.

(C) Upon written request of the debtor, the owner of the debt shall provide a copy of the note and the loan history to the debtor.

(D)(1) As used in this division:

(a) "Bona fide error" means an unintentional clerical, calculation, computer malfunction or programming, or printing error.

(b) "Restitution" means either of the following:

(i) A waiver of all fees, costs, or expenses proximately associated with the failure to provide the notice to the debtor; or

(ii) Actual damages.

(2) Any owner of debt subject to divisions (A), (B), and (C) of this section shall not be held civilly liable in any action, if all of the following are met:

(a) The owner of the debt shows by a preponderance of evidence that the compliance failure was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

(b) Within sixty days after discovering the error, and prior to the initiation of any action, the owner of the debt notifies the debtor of the error and the manner in which the owner of the debt intends to make full restitution to the debtor.

(c) The owner of the debt promptly makes reasonable restitution to the debtor.

(3) If, in the event of a compliance failure, the owner of the debt does not meet the conditions set forth in division (D)(2) of this section, a debtor injured by the error has a cause of action to recover damages. Such an action shall not, however, be maintained as a class action

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