

## Foreclosure: “Homeowners Bill of Rights”

August 2012

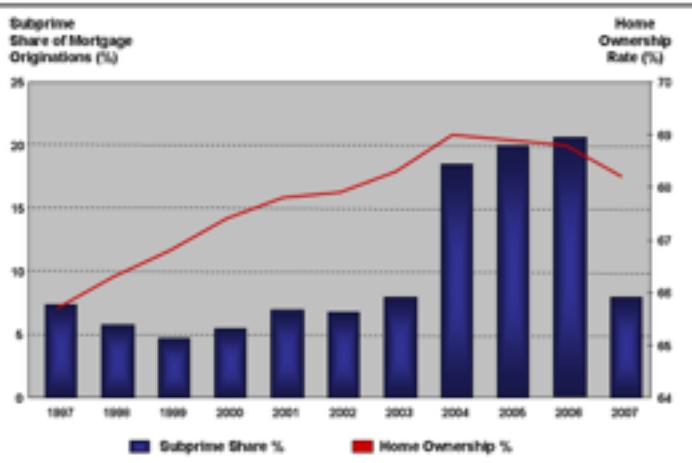
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*In August of 2012, the Legislature passed and the Governor signed a revised Mortgage Foreclosure Conference Committee Report (This report was contained in two identical measures: AB 278 and SB 900 of 2012, which took effect January 1, 2013).*

### Origins of the Housing Crisis.

The financial crisis that has been wreaking havoc in markets in the U.S. and across the world since August 2007 had its origins in a mortgage market that combined an asset price bubble with new kinds of financial innovations, encouraged by federal policy, that masked risk. In addition to encouraging high risk lending federal financial regulators and supervisors failed to understand the risks that were being encouraged and the warning signs that manifested earlier in the decade.<sup>1</sup>

U.S. Subprime Lending Expanded Significantly 2004-2006



SOURCE: U.S. Census Bureau; Harvard University, State of the Nation's Housing Report 2008

During the Clinton Administration the mission of the Government Sponsored Entities (GSEs), which include Fannie Mae and Freddie Mac, changed to become more activist. These 1995 changes to the Community Reinvestment Act authorized GSE's to buy subprime mortgages, which they began to do in 1997. While the GSEs' roles changed, nothing was done to change the regulatory structure with regard to the new mission. In September 2003, President Bush sent Congress a sweeping GSE regulation proposal; creating a new agency within the Treasury Department to assume supervision of Fannie Mae and Freddie Mac. That agency would have authority, which now rests with Congress, to set capital-reserve requirements for the GSEs. During Congressional testimony Treasury

Secretary John Snow stated: "There is a general recognition that the supervisory system for housing-related government-sponsored enterprises neither has the tools, nor the stature, to deal effectively with the current size, complexity and importance of these enterprises."<sup>2</sup>

### National Mortgage Settlement Agreement.

The settlement follows ten months of intensive negotiations between the five banks and a coalition of state attorneys general and federal agencies, including the Departments of Justice, Treasury, and Housing and Urban Development. The investigation began in October 2010 following revelations of widespread use of "robo-signed" affidavits in foreclosure proceedings across the country. State attorneys general formed a working group to investigate the problem and to confront the banks about the allegations. The major mortgage servicing banks soon acknowledged that individuals had been signing thousands of foreclosure affidavits without reviewing the validity or accuracy of the sworn statements. Several national banks then agreed to stop their foreclosure filings and sales until corrective action could be taken.

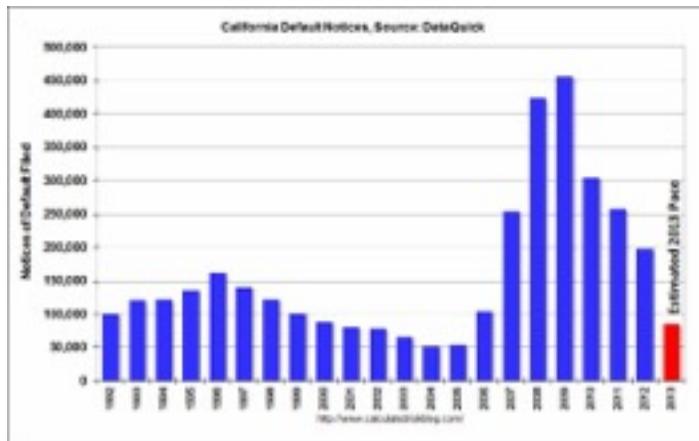
The \$25 billion settlement, which was announced in February of 2012, represented the largest financial recovery obtained by the states' attorneys general since the 1998 Master Tobacco Settlement, was reached with Bank of America, J.P. Morgan Chase, Wells Fargo, Citigroup and Ally Financial. It will allow hundreds of thousands of distressed homeowners to stay in their homes through enhanced loan modifications and principal reduction, and it will also provide payments to victims of unfair foreclosure practices.<sup>3</sup>

### California

The foreclosure crisis, impacting the rest of the country, severely hit California, both in terms of the number of foreclosures as well as the number of communities affected by the negative effects of foreclosure. At the start of 2006, California had among the lowest foreclosure rates in the country; by the beginning of 2008, the state has consistently ranked among the highest in the nation for both foreclosure totals and foreclosure rates. Through 2010, California continued to top the nation with the total number of foreclosures.<sup>4</sup>

The sheer number of constituents impacted by the falling economy and property values, failure of regulatory oversight, as well as the apparent inability

of lenders to work with homeowners, led to a plethora of state legislative activity, resulting in the "Homeowners Bill of Rights".



### Provisions of the Conference Committee Report.

Generally, the Conference Committee Report amended the state's existing mortgage foreclosure law with the purpose of eliminating the dual-tracking of foreclosure and loan modification proceedings. It expands notification to the borrower of foreclosure proceedings. Establishes a private right of action to enforce these provisions, including treble actual damages. Sunsets some provisions on January 1, 2018. Establishes a limited exclusion for licensed financial entities with fewer than 175 foreclosures per year. Applies to owner-occupied primary residential property (one-to-four units).

### Private Right of Action.

- Provides for the borrower to file for injunctive relief, and enjoin any further process including trustee sale, until the mortgage servicer can prove to the court that they did not act improperly. It would then take a filing by the mortgage servicer to lift the injunction if the issue had been cured.
- Specifies that if the borrower waits until after trustee sale, the award for intentional and reckless, or willful misconduct is treble actual or \$50,000 in statutory damages.
- Provides the court *may* award reimbursement of borrowers reasonable attorney's fees and costs but makes no consideration for the mortgage servicer in that regard.
- States that there is no sunset on Private Right of Action, after January 1, 2018 it applies to operating provisions and is extended to signatories of the National Mortgage Settlement Agreement and smaller servicers, previously exempted.

### "Robosigning" (though no longer using that name).

- Requires that a notice of default, notice of sale, assignment, or trustee substitution recorded in connection with a foreclosure filed in any court must be accurate and complete. Requires that the servicer must ensure it has reviewed evidence to

substantiate the borrower's default and right to foreclose, including loan status and information.

- Provides that a mortgage servicer engaging in multiple and repeated uncorrected violations in recording documents is liable to a civil penalty of up to \$7,500 per mortgage in action brought by the AG, DA, City Attorney (if over 75K in pop), or an administrative hearing by licensing Depts. (Corporations, Financial Institutions, and Real Estate). This provision shall sunset on January 1, 2018.

### Single Point of Contact (SPOC).

- Requires servicers to, upon request of the borrower, provide the borrower with a single point of contact.
- Specifies duties of the SPOC to include: a) communicating process and timelines for foreclosure alternatives, b) coordinating receipt of documents and notifying borrowers of missing documents, c) be able to inform borrowers of the status of their application, d) ensuring borrower is considered for all available alternatives offered through servicer, e) access to individuals with the ability and authority to stop foreclosure proceedings.
- Specifies that a SPOC shall remain assigned to the borrower until servicer determines all options have been exhausted, or account current.
- Specifies that a SPOC means an individual or team each of whom has ability and authority to perform the above duties.
- Exempts from this provision state and federal financial institutions, and Dept. of Real Estate licensees with fewer than 175 foreclosures in the prior year.

### Pre-Notice of Default (NOD) Outreach.

- Requires servicers to contact the borrower 30-days prior to the filing of a Notice of Default (NOD). Requires a borrower to be evaluated for foreclosure alternatives. Specifies a borrower may enlist a US Dept. of Housing and Urban Development certified counseling agency, or attorney, to assist them.
- Specifies the type and order of outreach attempts, that must be employed to contact the borrower prior to filing of an NOD, including first-class mail, 2-weeks of telephone calls, certified mail with return receipt, and a toll-free number to be made available. (aka: Due diligence requirement)

### Pre-NOD Communication.

- Amends the existing pre-NOD communication requirements to also require a statement that the borrower may request a copy of: a) the evidence of indebtedness, b) borrower's deed of trust, c) assignment of mortgage to demonstrate right to foreclose, and d) borrower's payment history since they were last less than 60-days due. This provision does not apply to entities with fewer than 175 foreclosures in the prior year. This provision sunsets January 1, 2018.
- Amends NODs to also require a statement that the servicer has contacted the borrower, or tried with due diligence to contact them.

**Delays in Filings.**

16. Prohibits the filing of a Notice of Default, Notice of Sale, or conducting a trustee's sale while a borrower's application for a first-lien loan modification is pending.
17. Provides these actions may resume if: a) the servicer determines the borrower to be ineligible for a modification, and any appeal period has been exhausted, b) borrower fails to accept an offered modification within 14-days, or c) borrower defaults or breaches the agreed upon modification.
18. These provisions sunset on January 1, 2018.

**Loan Modification: Application.**

19. Requires servicers to provide information regarding how to apply for a first-lien loan modification.
20. Specifies that measure is not intended to require a particular result of any consideration of loss mitigation options.

**Loan Modification: Decision.**

21. Upon a decision being reached on a borrower's application for a loan modification, the servicer must notify the borrower in writing within 5-days.
22. Upon Denial:
  - Notice to include: a) application for appeal, b) specific reason for investor disallowance if applicable, c) monthly gross income and property value in Net Present Value calculation, if a factor, d) description of other foreclosure prevention alternatives available, or e) statement that borrower had previously been offered an loan modification and failed to make payments.
  - The borrower has 30-days to appeal and to provide evidence the decision was in error.
  - Prohibits the recording of an NOD until 31-days after notice, or 15-days following denial of appeal, or 14-days following breach of a loan modification.
  - Provides servicer is not obligated to evaluate applications from those who have already been evaluated unless there has been a material change in the borrower's financial circumstances.
23. Upon Approval:
  - States that upon borrower acceptance, the servicer is required to provide a copy of the fully executed agreement evidencing the alternative.
  - Requires a rescission of a NOD, or cancellation of a trustee's sale. In the case of a short sale, rescission or cancellation to occur when sale has been approved by all parties and proof of funds or financing has been provided.
  - Requires that in the event the borrower's loan is transferred or sold to another servicer, the subsequent servicer shall continue to honor any previously approved first lien loan modification or other foreclosure alternative.
  - 24. Prohibits charging of fees for any application or processing thereof.
  - 25. Prohibits collection of late fees while application is under consideration, or denial being appealed.
  - 26. Sunsets on January 1, 2018. Thereafter, states intent that servicers offer borrowers loan

modification consistent with contractual or other authority.

**Post-NOD Communication.**

27. Requires that unless a borrower has already exhausted the first-lien loan modification process offered by their servicer, within 5-days *business* of the filing of a Notice of Default, the servicer is to communicate with the borrower that: a) they still may be eligible for evaluation for a foreclosure alternative, b) whether an application is required, c) the process by which the borrower may obtain an application for seeking a foreclosure alternative. This provision sunsets January 1, 2018.

**Trustee Sales.**

28. Requires that when a trustee sale is postponed for at least 10 *business* days, a mortgagee, beneficiary, or authorized agent is to provide written notice to the borrower regarding the new date and time of sale within five *business* days following postponement. This provision will sunset on January 1, 2018.
29. Prohibits the filing of a NOD or otherwise initiating a foreclosure process unless the entity is the holder of the beneficial interest under the mortgage or deed of trust, or a designated agent of the holder of beneficial interest acting under authority designated by the holder of beneficial interest.

**Definitions.**

30. Defines "mortgage servicer" as a person who directly services a loan, interacting with the borrower, managing the account, or enforcing an instrument. Includes those who are subservicers to a master servicer by contract. Excludes a trustee, trustee's authorized agent acting under a power of sale pursuant to a deed of trust.
31. Exempts from the definition of "borrower" those who surrendered their property, have filed bankruptcy, or have a contract with an organization with the purpose of advising people on how to extend the process to avoid contractual obligations.
32. Defines "first lien" as the most senior mortgage or deed of trust on the property that is the subject of the NOD or NOS.

**Miscellaneous.**

33. States this measure is not intended to supersede obligations of signatories to the consent judgment entered into associated with the National Mortgage Settlement Agreement.
34. Specifies that consistent with their general regulatory authority, the Departments of Corporations, Financial Institutions, and Real Estate may promulgate regulations applicable to any entity or person under their jurisdictions, necessary to carry out these purposes. Violation of regulations will only be enforceable by the regulatory agency.

**Conclusion**

In California, foreclosure starts dropped precipitously in the beginning of January 2013, when the new "Homeowner Bill of Rights" law took effect.<sup>5</sup>

It is unclear whether the federal or state efforts will have the intended effect within the housing market, since the tidal wave of foreclosure had largely ceased by the time both were in place. Its rather like fixing a river levee to new specifications after the flood waters have subsided: there will be no way to know their effect unless the market is once again hit with a dramatic event.

However, in the short term both regulators who should have been watching more closely, and financial institutions which worked on automatic pilot, will be under notice that the old methodologies will be insufficient. Everyone will need to be more watchful. Hopefully, the protections built into these settlements will give struggling homeowners a fighting chance to hold onto their properties.

If you have any questions regarding this document, contact Peter Renevitz at [peter@pradvocacy.com](mailto:peter@pradvocacy.com)

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