



# Foreclosure, Loan Modification, Tenants and Homeowners – An Overview

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Maeve Elise Brown, Esq.

Executive Director

Housing and Economic Rights Advocates

(510) 271-8443 ext. 307

HERA

housing and  
economic  
rights advocates



# Non-Judicial Foreclosure Timeline

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- **Governed by Civil Code Sections 2920-2944.5**
- **Letters from servicers to borrower requesting payment (generally at least three over a course of 90 days)**
- **Special Notice and Meet and Confer Requirements for certain residential loans – Civil Code Section 2923.5**
- **Notice of Default (“NOD”) – Civil Code Section 2924**
- **Three month waiting period (essentially for non-HAMP servicers)**
- **Notice of Trustee’s Sale – good for 365 days**
- **Sale can occur 20 days later**

# Stopping Foreclosure - Options

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- Right to Reinstate
  - Pay amount currently in default – NOD period
- Right to Cure
  - Pay off the entire balance of the loan plus lender's reasonable costs and expenses – up to 5 days before sale
- Forbearance Agreement
  - *Limited. Generally, no promises. Not always useful. compare to “trial” modification*

# Stopping Foreclosure - Options

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- Repayment Plan
- Modification
  - Changes the terms of the original note
- Refinance
- Short sale? *Careful!!*
- Deed in Lieu of Foreclosure
- Bankruptcy can halt a sale
  - But it won't always help you keep the house

# Overview of Mortgage Servicing

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- Borrower – made contract with lender/ “investor”
- Investor owns loan – can have rules for the servicer, including restrictions on modification
- Servicer = the entity borrower interacts with

# Modifications: Home Affordable Modification Program Overview

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- **Initial Eligibility** - including servicer participation and investor restrictions
- **Target Payment – PITIA = 31% of gross monthly income**
- **HAMP “Waterfall”** – adjust terms in a particular sequence to see if can arrive at a hypothetical modification that will make the PITIA equal to the target payment
- **NPV Test**
- **Three-month Trial Period**
- **Permanent Modification**

# HAMP Permanent Modifications

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- 5 years at 31% of gross, then stepping up
- Principal forbearance possible
- Amortization issues – balloon payments possible
- Principal forgiveness possible, but has been VERY UNLIKELY.
- Problems with processing modifications? YES.

# Alternatives

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- Traditional modifications: “black box”
- Often less favorable
- New “trial” modification periods for in-house modifications
- Short sale after denied for HAMP: HAFA
- MHA Unemployment Program, Hardest Hit Fund (Cal HFA)
- AG Settlement- but cannot apply, supposed to automatically be considered

# Legal Claims

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- *Origination* claims generally timed out right now
- Three year period for rescission of loan under TILA/HOEPA; four year statute of limitations for fraud on written contract.
- Role of legal claims in modification

# Mortgage Servicing Issues

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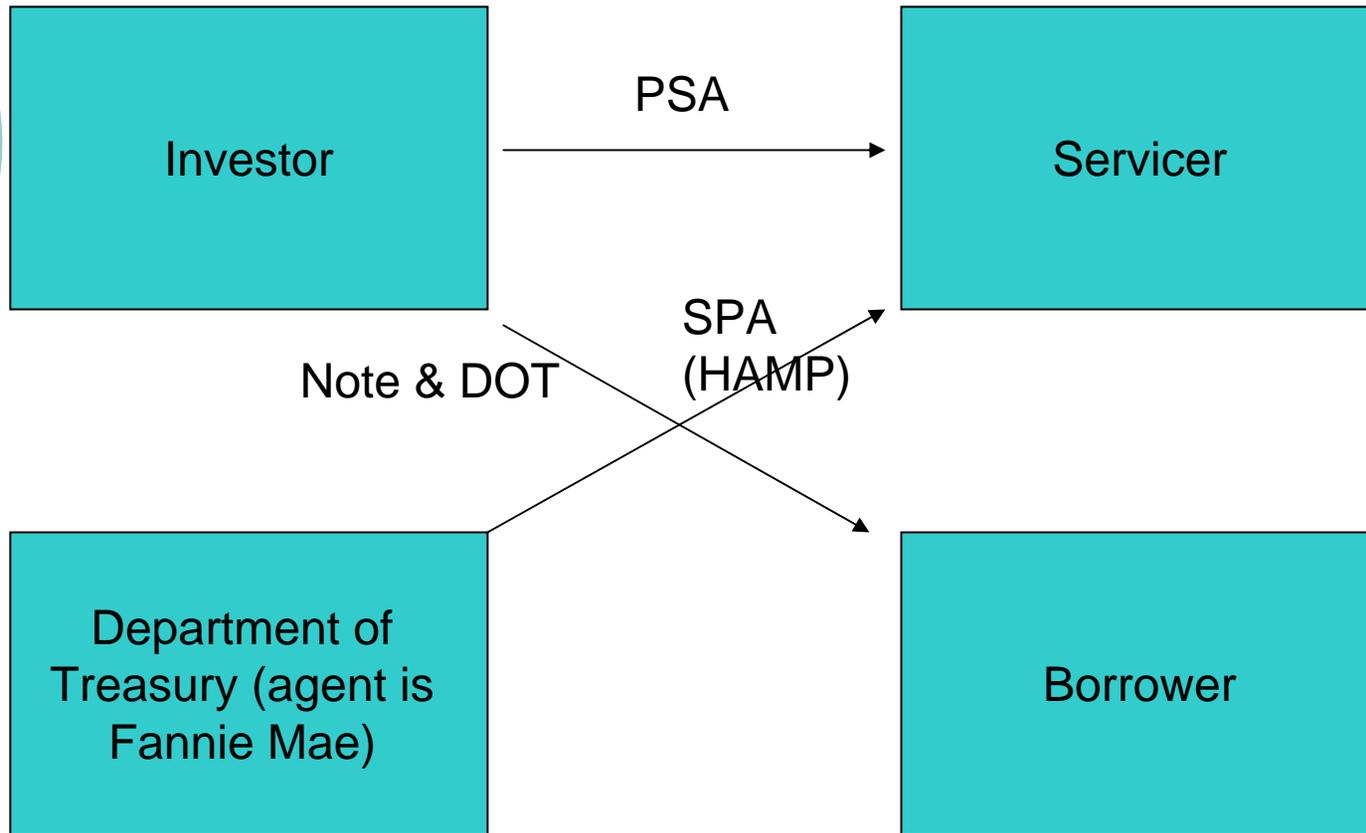
- Failure to honor or process modification or workout.
- Accounting failures, excessive fees, property tax and insurance escrow issues – RESPA and Qualified Written Request
- Failure to properly evaluate loan for HAMP or other workout

# Wrongful Foreclosure

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- **“Accidental” foreclosure**
- **Oral promise not to foreclose? Have to show specific, detrimental reliance**
- **Non-judicial foreclosure system means borrower has to bring a suit**
- **Modification / honoring a workout agreement – litigation is not always necessary**

# Basic Contractual Relationships in Mortgage Servicing



# Other Issues

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- Two Loans? Be aware of the possibility of a *deficiency judgment*
- Unfair debt collection tactics by first mortgage lender, second mortgage lender, debt collectors on charged off loans
- HOAs and foreclosure
- Incorrect credit reporting
- Foreclosure rescue scams / predators before AND AFTER foreclosure

# RESPA

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- Qualified Written Request under 12 U.S.C. 2605(e).
- Borrower can dispute account errors or request information.
- Servicer must respond within 20 business days and correct or explain within 60. Timelines amended to 5 and 30 by Dodd-Frank.
- Remedies: Actual and statutory damages, costs and attorney's fees.

# Types of Scams and Borderline Practices

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- Upfront Fee for Modification Assistance.
  - Solicitation deception
- Bankruptcy Related Scams
  - Sham Bankruptcies
  - Damaging Bankruptcy Assistance
- Lawyer or “Legal” related scams
  - “Mass Joinder” suits
  - “Forensic Audits”
- Clouding title (make them prove the note)
- Lease purchase options
- Rental fraud
- Short Sale concerns?

# Prohibition on Advance Fees

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- SB 94: Bars any person who “negotiates, arranges, or otherwise offer to perform a mortgage loan modification or other mortgage loan forbearance” from collecting advance fees for its services.
- Effective October 11, 2009 - Applies to attorneys as well as others engaged in assisting borrowers with loan modifications and/or foreclosure avoidance
- Civ. Code 2944.7(a) Notwithstanding any other provision of law, it shall be unlawful for any person who negotiates, attempts to negotiate, arranges, attempts to arrange, or otherwise offers to perform a mortgage loan modification or other form of mortgage loan forbearance for a fee or other compensation paid by the borrower, to do any of the following:
  - Claim, demand, charge, collect, or receive any compensation until after the person has fully performed each and every service the person contracted to perform or represented that he or she would perform. ...

# Legal Claims Against Foreclosure Rescue Scammers

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- Rules Governing Quality of Attorney Work:
  - Cal. R. Prof. Conduct 3-200 (can't seek employment if member knows objective is to bring action without probable cause... or to present an unwarranted claim or defense in litigation)
  - Bus. & Prof. Code § 6068(c), (d), (g) – duty of lawyer assert only legal and just causes, not to mislead court
- FTC “MARS Rule” – 16 C.F.R. Part 322, Mortgage Assistance Relief Services
  - Prohibits fees until time that borrower gets an offer of modification that he or she accepts
  - Attorneys are exempted if they are providing mortgage assistance relief as part of law practice and comply with applicable state laws

# Legal Claims Against Foreclosure Rescue Scammers

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- Laws about Referral Services/ Working With Nonlawyers:
  - Can't pay a referral fee to f/c consultant or other person for referring distressed homeowners: Cal Rule. Prof. Conduct 1-320(B); Cal. Bus & Prof. Code §§ 6151 and 6152; Cal. Bus & Prof. Code § 6155
  - Can't split fees: Cal. R. Prof. Conduct 1-320(A)
  - Can't aid f/c consultant in unauthorized practice of law, or form joint venture with nonlawyer to provide legal services: Cal. Rule Prof. Conduct 1-300(A), 1-310
  - No unauthorized practice by paralegals: Cal. Bus & Prof. Code § 6450 – no legal advice, no explaining or recommending use of documents, no unlawful practice of law or paralegal services for nonattorney.

# How and Where to Make Complaints

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- California Attorney General
- Federal Trade Commission
- California Bar Association
- HUD
- Local Legal Services Organizations
- County District Attorneys
- DRE
- Small Claims?
- <http://www.loanscamalert.org/>

# California notice periods for tenants

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- 3 days for breach of contract.
- 60 days for periodic tenancies of more than 1 year.
- 30 days for periodic tenancies of less than 1 year.
- 90 days for Section 8 tenancies **and most post-foreclosure tenancies—but see PTFA which may extend through end of lease.**
- “Just Cause” eviction protections, certain jurisdictions

# Protecting Tenants at Foreclosure Act (PTFA)

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- Public Law 111-22, Sections 701-704
- Sunsets on Dec. 31, 2014
- Protects all bona fide tenants in any dwelling or residential real property
- A lease or tenancy is bona fide only if:
  - Tenant is not the mortgagor or the mortgagor's child, spouse, or parent; and
  - Lease was the result of an arms length transaction; and
  - Rent is not substantially less than fair market rent (unless the reduction is due to governmental subsidy)

# Bona Fide Tenants Under PTFA

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- Must be given at least 90 days' notice for owner move-in (note that a bank cannot "move in")
- Entitled to stay until end of the lease, if lease entered into before "notice of foreclosure"
- Notice of foreclosure - the date title is transferred through foreclosure (Dodd-Frank Amendment)

# Security Deposit Return

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- Old and new owner jointly and severally liable for return under California law
- See California Civil Code, Section 1950.5

# Section 8 Tenants

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- Deemed bona fide tenants
- New owner takes title subject to both the Section 8 lease and the HAP contract
- EXCEPTION: Lease may be terminated with a 90 day notice if new owner will occupy unit as primary residence
- Any eviction notices must also be sent to the Housing Authority. 24 CFR 982.310(e)(2)(ii).

# Lockout or Utility Shut-Off Illegal

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- Cal. Civil Code 789.3: Except after lawful eviction and pursuant to Cal law, unlawful for a landlord to:
  - Shut off utilities with intent to terminate lease.
  - Change locks, remove windows or doors, or remove personal property.

# Utility Shutoffs

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- For individually metered units (including SFHs), 10-day notice of shutoff. Pub. Util. Code 777, 10009
- For master metered units, 15-day notice of shutoff. Pub. Util. Code 777.1, 10009.1
- Tenants have the right to put the accounts in their own names without paying for the landlord's arrearages.

# Tenant's Right to Recover Property

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- Cal. Civil Code 1965: Landlord cannot refuse to give back personal property left by tenant if:
  - Tenant requests return of specific property in writing within 18 days.
  - Tenant offers to pay reasonable costs of removal and storage.