



Foreclosure, Loan Modification, Tenants and Homeowners – An Overview

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Non-Judicial Foreclosure Timeline

- **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

- 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

- 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

- 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

- **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

- 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

- 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

- *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

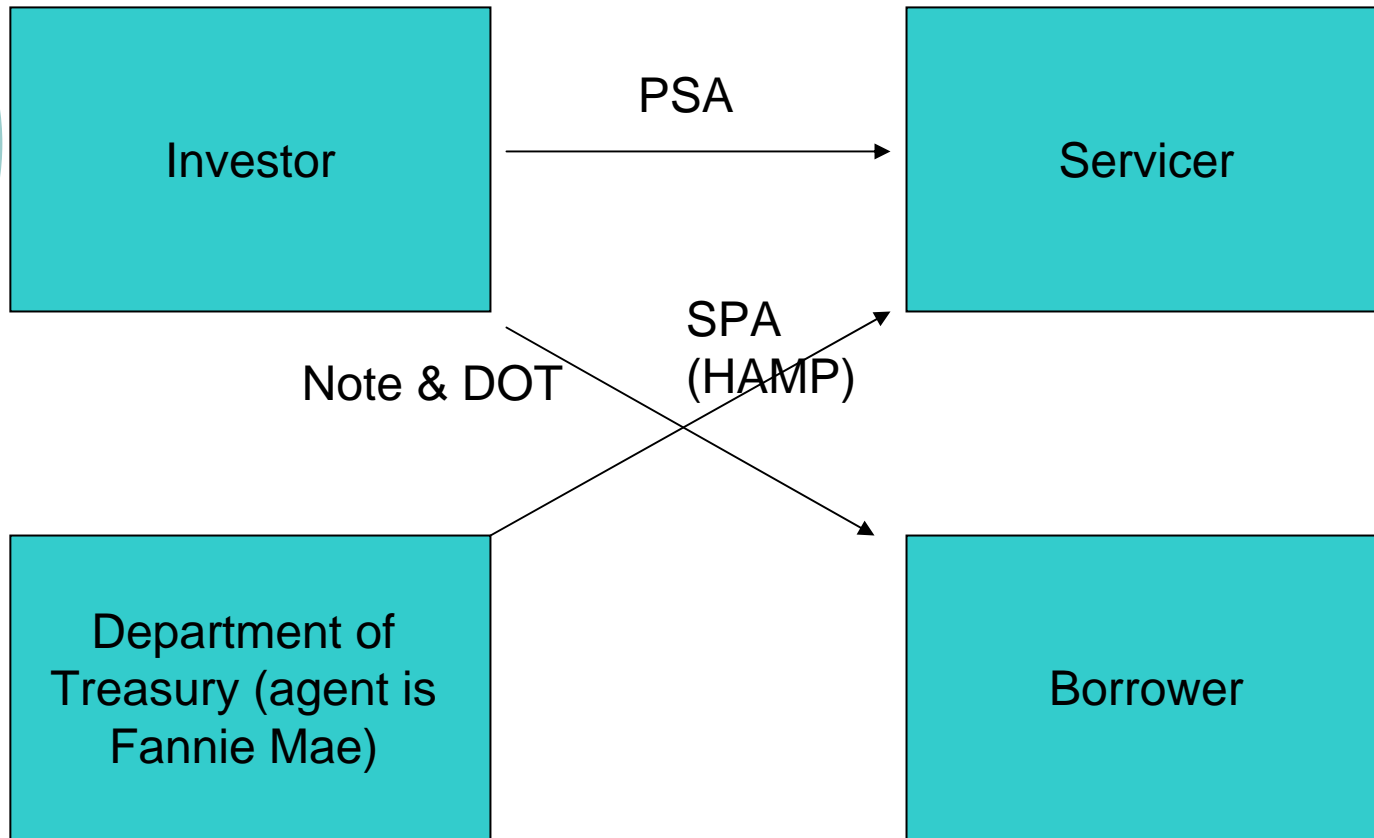
Mortgage Servicing Issues

- 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

- **“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

- 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

- 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

- 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

- 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

- 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

- 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

- 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

- 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)

- 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

- 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

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

Section 8 Tenants

- 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

- 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

- 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

- 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.