

Summary of the National Servicer Settlement Foreclosure Related Provisions

Alan M. White, Reporter

May 11, 2012

Introduction: Background of the Settlement

The recent national mortgage servicer settlement was the product of extensive negotiations among federal and state regulators and the major banks, and thus merits consideration by the Committee in its work on a uniform statute. The following summary is based on the Consent Judgment filed in *United States v. Bank of America*.¹ Similar judgments were agreed with Wells Fargo, Chase Bank, Citibank, and Ally Financial. The five servicers together service roughly 60% of all residential mortgages. The Settlement by its terms expires after 3½ years. The prospective terms govern many aspects of foreclosure practices, including issues under study by the Committee.

Part I of the Settlement – Servicing Standards - covers documentary practices in judicial and nonjudicial foreclosures and bankruptcy court filings by mortgage servicers. These prospective standards appear to cover all mortgages serviced regardless of the investor. In contrast, the monetary relief terms do not extend to mortgages serviced for Fannie Mae or Freddie Mac. Numerous provisions are directly relevant to three issues on the Committee's Issues List: 1) what notice must be provided prior to foreclosure, 2) who can commence foreclosure, with what evidence of rights to enforce the mortgage, and 3) what loss mitigation efforts are required before foreclosure.

I. Pre-Foreclosure Notice

The Settlement requires a uniform 14-day pre-foreclosure notice in all states, judicial and nonjudicial, as follows:

In all states, Servicer shall send borrowers a statement setting forth facts supporting Servicer's or holder's right to foreclose and containing the information required in paragraphs I.B.6 (items available upon borrower request), I.B.10 (account statement), I.C.2 and I.C.3 (ownership statement), and IV.B.13 (loss mitigation statement) herein. Servicer shall send this statement to the borrower in one or more communications no later than 14 days prior to referral to foreclosure attorney or foreclosure trustee. Servicer shall provide the Monitoring Committee with copies of proposed form statements for review before implementation. Paragraph (A)(18) of Part I.

¹ The Complaint and complete settlement documents, including a summary of the servicing standards ("servicing standard highlights") are available at <http://www.nationalmortgagesettlement.com/>.

The 14-day statement or notice must also notify the borrower that they may request and receive a copy of the Note, all mortgage assignments and the name of the current investor. (B)(6). Part IV also requires that the borrower be notified of all available loss mitigation options, and this can presumably be done in the same 14-day notice.

Issues in overlaying this notice with current state law

Existing state laws vary, and may be inconsistent with the Settlement, as to both the content and timing of pre-foreclosure notices. Many states, for example, require a 30-day advance notice.² Of course, the Settlement standard requiring 14-day notice could be met with a longer notice period. The standard Fannie/Freddie Uniform note and security instruments require 30-day notice of default and acceleration, which may or may not be amenable to being combined with statutory notices. As for content, state law foreclosure notices may include the information called for by the Settlement (nature of the default, right to request account information, and availability of loss mitigation alternatives) but can also include information about the right to cure the default, and available state-specific foreclosure assistance programs. Some recent mediation statutes mandate the form of the entire notice, or specific language.³

II. Who can Commence Foreclosure, and what Evidentiary Proof is Required

This topic is addressed at some length in part I(C) of the term sheet, entitled “Documentation of Note, Holder Status and Chain of Assignment.” The servicer must ensure that the foreclosing party has “a documented enforceable interest in the promissory note and mortgage (or deed of trust) under applicable state law, or is otherwise a proper party.” It must set forth the basis for the right to foreclose in court pleadings (for judicial foreclosure states) and in the 14-day notice to the homeowner (for all states). The servicer must make good faith efforts to find lost notes and prevent destruction of original notes, and ensure that a party with appropriate legal authority executes assignments. The intent of this part, presumably, is to avoid lengthy foreclosure delays by having the servicer assemble its standing documents before commencing foreclosure.

On the other hand, the Settlement, by using the “documented enforceable interest . . . under applicable state law, or is otherwise a proper party,” sidesteps the question of exactly who can commence foreclosure. The emphasis on retaining Notes and making good faith efforts to locate lost Notes does evince a preference towards establishing the right to foreclose under the Article 3 methods, but the Settlement does not preclude the use of other legal theories and evidence of proper party status. The Settlement does seem to suggest that a valid transfer of both the Note and Mortgage must be documented; i.e. that neither possession of an endorsed Note, nor of a valid mortgage assignment, is by

² *E.g.* 41 Pa. Stat. Ann. § 403.

³ *E.g.* District of Columbia notice form available at http://www.disb.dc.gov/disr/frames.asp?doc=/disr/lib/disr/fmp/Notice_of_Intention_to_foreclosure.pdf.

itself sufficient. The “otherwise a proper party” language, however, could be read as an alternative to showing transfer of both the Note and Mortgage.

III. Loss Mitigation

The Settlement creates a positive duty for servicers to offer loss mitigation alternatives to foreclosure, including loan modifications, short sales and other options. Loss mitigation efforts are a condition precedent to commencing foreclosure. Servicers must offer a loan modification when the modification results in positive net present value to the investor (compared to proceeding with foreclosure) and other investor requirements are met. Servicers must notify borrowers of all loss mitigation alternatives for which they may be eligible. Term Sheet, Part IV(A)(1). A borrower’s timely request for loss mitigation must be evaluated before there is any referral for foreclosure. There are additional specific provisions addressing borrowers who have applied for modifications under the federal government’s HAMP program, which is due to expire in 2013.

Detailed provisions restrict the practice of “dual tracking”, i.e. moving forward with foreclosure while a loss mitigation request is pending. Term Sheet IV(B). A borrower who completes an application by day 120 of delinquency, or within 30 days after a referral to foreclosure letter, is protected from any foreclosure referral or action until the application is decided. Even a borrower who applies late in the foreclosure process is entitled to action on an application prior to the foreclosure sale, if the request is less than 37 days before the scheduled sale. Servicers may not proceed with foreclosure sale when a borrower is in compliance with a temporary modification or forbearance plan, or a short sale has been approved and funded.

The Settlement aims to improve communication practices that have contributed to foreclosure delays and missed mitigation opportunities through the electronic portal and single point of contact mandates. The servicer is required to develop an on-line document portal that allows borrowers to 1) submit documents and obtain a receipt proving submission and 2) check the status of their loss mitigation application. Servicers must also offer borrowers seeking loss mitigation alternatives a “single point of contact,” i.e. a single employee who will communicate with the borrower throughout the loss mitigation process.

Detailed time lines are set forth in IV(F) for the servicer’s acknowledgment of, and action on, loss mitigation requests. Decisions on complete applications are due in 30 days (the same deadline applies to short sale requests). Servicers are prohibited from paying incentive compensation that encourages foreclosure rather than loss mitigation.

Separate sections address servicer fees, treatment of military personnel under the Servicemembers’ Civil Relief Act, force placed insurance, duties to prevent REO from contributing to blight, and the rights of tenants.