

Memorandum
Foreclosure Delays in Judicial Foreclosure States
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Reporter

During the November 2012 meeting, committee member Justice Walters raised as a question for further discussion why uncontested foreclosures in judicial states are taking so long to complete. There is as yet no single report or scholarly article addressing this question;¹ this memorandum is an effort to offer some research and background on the issue.

Certain states with judicial foreclosure procedures have been identified as having very long foreclosure delays, especially in the past three years. The causes of delays are multiple and complex. The reasons for these unusually long timelines include the volume of cases, the aftermath of the robo-signing crisis,² the continuing inability of servicers and foreclosure attorneys to verify basic elements in foreclosure pleadings such as the amounts due and the identity of the parties, and large numbers of contested cases. The delays do not appear to be primarily a function of permanent state foreclosure laws or court rules, but have been affected by temporary court measures. The period from the fall of 2010, when the robo-signing scandal gained nationwide attention, and the end of 2012 when various state and federal reviews of foreclosure processes began winding down, was characterized by atypically long delays in foreclosures in many states.

¹ One study finds evidence that the use of M.E.R.S. to record mortgage assignments increases foreclosure delays significantly in a database of Florida foreclosures. The study did not seek to identify all the possible causes of delays, but found operational risk (servicing problems) a better explanation than the bottleneck hypothesis (too many cases for the system) or the capital constraint hypothesis (banks are slowing down foreclosures to avoid realizing losses). Linda Allen et. al., *Bank Delays in the Resolution of Delinquent Mortgages: The Problem of Limbo Loans* (March 2012) avail. at <http://ssrn.com/abstract=2018948>.

² "Robo-signing" refers to assembly-line signing of foreclosure affidavits with false or unverified statements or without personal knowledge, improper notarizations, or unauthorized signature of note and mortgage assignments. See U.S. Gov't Accountability Office, GAO-11-433, *Mortgage Foreclosures Documentation Problems Reveal Need For Ongoing Regulatory Oversight* (May 2011), available at <http://www.gao.gov/assets/320/317923.pdf>; Cong. Oversight Panel, *Examining the Consequences of Mortgage Irregularities for Financial Stability and Foreclosure Mitigation* (Nov. 16, 2010), available at <http://www.gpo.gov/fdsys/pkg/cprt-111jprt61835/pdf/cprt-111jprt61835.pdf>; Fed. Reserve Sys., Office of Comptroller of the Currency, Office of Thrift Supervision, *Interagency Review of Foreclosure Policies and Practices* (2011) [Hereinafter "INTERAGENCY REVIEW"], available at http://www.federalreserve.gov/boarddocs/rptcongress/interagency_review_foreclasures_20110413.pdf.

Factors that seem to vary among states include state court efforts to correct robo-signing errors and fraud, servicer decisions not to add REO inventory in certain areas, and the time needed to submit and act on borrower requests for modifications and other foreclosure alternatives.³ What follows is a detailed discussion of the court response to robo-signing in one state (New Jersey) and the impact it has had on delays.

New Jersey is reported by FHFA as having a foreclosure timeline of 750 days.⁴ The actual average time required for a judicial foreclosure case filed in calendar year 2012, on the other hand, was about 270 days, according to Kevin Wolfe, Assistant Director, Civil Practice Division, New Jersey Administrative Office of the Courts.⁵

The 750-day figure is largely a result of fallout from the robo-signing crisis in 2010 and 2011. In December 2010 the New Jersey Supreme Court amended its court rules to require foreclosure plaintiffs to file a "Certificate of Diligent Inquiry."⁶ Similar to the New York attorney affirmation,⁷ the CODI called for servicers' attorneys to confirm the accuracy of the allegations in, and the documents attached to, their foreclosure complaints. Foreclosure attorneys in both states have been unwilling, for the past two years or more, to certify the accuracy of their client's foreclosure pleadings, leaving many pending foreclosure cases in limbo. As a result, tens of thousands of uncontested foreclosures are not moving to sale. This backlog of 2010 and 2011 cases seriously distorts the average foreclosure timelines for New Jersey.

³ David Streitfeld, Backlog of Cases Gives a Reprieve on Foreclosures, N.Y. Times (June 19, 2011).

⁴ Federal Housing Finance Agency, State-Level Guarantee Fee Pricing, 77 Fed. Reg. 58991, 58993 (Sept. 25, 2012).

⁵ Lisa Prevost, Upshot of the Foreclosure Backlog, New York Times December 6, 2012. Note that the time from court filing through completed foreclosure sale would not include the period between referral for foreclosure and the initial filing, a period that would be included in the FHFA measure.

⁶ The December 20, 2010 amendments to N.J. Rule 1:5-6(c)(1)(E) and Rules 4:64-1(a)(2) and (3) require that plaintiffs' attorneys affix to foreclosure complaints a certification of diligent inquiry as to the accuracy of foreclosure documents and factual assertions, specifically, (1) that the attorney has communicated with employee(s) of the plaintiff who (a) personally reviewed the documents being submitted and (b) confirmed their accuracy, (2) the name(s), title(s) and responsibilities in those titles of the plaintiff's employee(s) with whom the attorney communicated, and (3) that the complaint and all annexed documents comport with the provisions of Rule 1:4-8(a).

⁷ Andrew Keshner, *New Court Rule Says Attorneys Must Verify Foreclosure Papers*, N.Y. Law J. (Oct 21, 2010).

In addition, the New Jersey courts issued orders to show cause why uncontested foreclosures by the six largest mortgage servicers should not be suspended on December 20, 2010.⁸ That matter led to a stipulation in March 2011, the appointment of a special master to review the servicer procedures, and finally a series of special master's reports in August 2011 that permitted uncontested foreclosures to proceed. The servicers voluntarily ceased prosecuting all pending foreclosures during this court proceeding.

Further complicating the situation in New Jersey was the discovery that notices of intent to foreclose sent prior to 2010 regularly violated New Jersey's legal requirements under its Fair Foreclosures Act. The New Jersey law requires the notice of intent to identify both the mortgage owner and the servicer. Servicers had developed a routine practice of identifying only the servicer, and not the loan owner. The New Jersey Supreme Court decided in the *Guillaume* case⁹ that pending foreclosures with defective notices need not be dismissed, but that courts could direct the plaintiff to serve a corrected notice of intent. Servicers have been engaged in the process of re-sending tens of thousands of notices in foreclosure cases that were filed prior to 2012 in order to comply with New Jersey law. Meanwhile, despite the February 2012 ruling in favor of the lender in the *Guillaume* case, no foreclosure sale has yet been set for the property involved in that case.¹⁰

Legal services advocates in New Jersey maintain that servicers were responsible for the delays. They argue that servicers could have responded much more promptly to the December 2010 court actions, and could have resumed foreclosures in early 2011, either by promptly sending corrected notices of intent and filing certifications of diligent inquiry in support of foreclosure documents, or dismissing and refile pending cases. A motion by legal services to reduce the interest charged on mortgages involved in delayed uncontested foreclosures was recently rejected by the Superior Court.¹¹

New York and Illinois judges also took action to stay foreclosures and review robo-signing defects.¹² In nonjudicial states, courts were not directly affected by robo-signing. As a result, there have not been court initiatives in those states to delay foreclosures in order to correct affidavits or insure that foreclosures are

⁸ In the Matter of Residential Mortgage Foreclosure Pleading and Document Irregularities, Order Directing the Named Foreclosure Plaintiffs to Show Cause etc., No. F-059553-10 (N.J. Superior Ct. Chancery Div. Mercer Cty December 20, 2010).

⁹ U.S. Bank v. Guillaume, 209 N.J. 449, 38 A. 3rd 570 (2012).

¹⁰ E-mail from Rebecca Shore, counsel for the Guillumes.

¹¹ In re Application of Wells Fargo Bank NA to Issue Corrected Notices of Intent to Foreclose etc., No. F9564-12 (N. J. Superior Court Jan. 7 2013).

¹² See *supra* note 6; Mary Ellen Podmolik, Altered Documents halt Some Cook County Foreclosures, Chicago Tribune (March 25, 2011).

otherwise properly documented.¹³ The April 2012 national settlement among state attorneys general, the Department of Justice and five major servicers did not require any corrective action for pending foreclosures; the corrective measures were prospective only. As a result, each state is left to decide what, if any, action should be taken to review pending or recently completed foreclosures. Those decisions have clearly contributed to interstate variation in the pace of foreclosure processing in the 2010 to 2012 period.

¹³ *See, e.g.*, Nancy Sarnoff, Foreclosures Go Forward Despite Texas AG's Moratorium Push, *Houston Chronicle*, October 5, 2010.