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RECENT DEVELOPMENTS IN MORTGAGE FORECLOSURE PROCESS PROVIDES RELIEF TO CONSUMERS

Agostino S. Filippone

I. INTRODUCTION

In the years following America's late 2007 housing bubble burst, details of the abusive practices used by many large banks and mortgage service providers were revealed. Practices including robo-signing, unchecked adjustable rates, collateralized debt obligations, as well as faulty and incomplete paperwork were fodder for news and comedy programs alike. But the unfolding events of the next several years were no joking matter. U.S. foreclosures rapidly increased to an apex in April 2009 with roughly 200,000 homes falling into default, double the number of just two years prior.¹ The Center for Responsible Lending measured the severity of the bubble burst and resulting foreclosure crisis by estimating the number of foreclosures initiated since 2007 at 6.6 million: 1 in 9 homeowners were seriously delinquent on their mortgage and nearly 1 in 4 homes were underwater (owing more on their mortgage than their home was worth).²

While recent legislation and other oversight measures taken at both the federal and state level, as well as large dollar settlements, have offered progress toward disincentivizing future improper conduct by banks and mortgage servicer providers, more work is required for justice to be served.

¹ *Foreclosures Starts at 71-Month Low, Bank Repossessions Increase*, REALTYTRAC (Dec. 11, 2012), <http://www.realtytrac.com/content/foreclosure-market-report/november-2012-foreclosure-activity-report-7514>.

² *Snapshot of a Foreclosure Crisis*, CTR. FOR RESPONSIBLE LENDING (Mar. 17, 2010), <http://www.responsiblelending.org/mortgage-lending/research-analysis/snapshot-of-a-foreclosure-crisis.html>.

II. NEW RULES AT FEDERAL AND STATE LEVELS AIM TO PROTECT CURRENT AND FUTURE HOMEOWNERS IN THE MORTGAGE FORECLOSURE PROCESS

A. New Illinois Supreme Court Rules to Govern the Foreclosure Process

On average, the number of days between notice of default and repossession in Illinois is 647.³ Nationally, that average falls to 378 days.⁴ Critics claim the longer timeline means home values in hard-hit areas stay depressed due to an excess of delinquent home inventory and overburdening of the court system.⁵

In February 2013, the Illinois Supreme Court announced new rules governing foreclosure proceedings that will require lenders to prove that all viable efforts have been exhausted to help the borrower before a judgment can be sought.⁶ The rules were meant to ease the burden of the home foreclosure process by minimizing abuses as well as helping those in threat of losing their home by imposing requirements on mediation programs and lenders.⁷ The rules were the result of 21 months of work and

³ David Lee Matthews, *Time Grows Between Foreclosure, Repossession in Illinois*, CHI. REAL ESTATE DAILY (July 19, 2012), <http://www.chicagorealestatedaily.com/article/20120719/CRED0701/120719722/time-grows-between-foreclosure-repossession-in-illinois> (noting that the length of the foreclosure process in Illinois is the fifth longest in the country. New York is first at 1001 days, New Jersey second at 940 days, Florida third at 861 days, and Connecticut fourth at 656 days).

⁴ *Id.*

⁵ *Id.* (“The foreclosure wave ‘adds more cases to an already stressed court system, and at the same time it means there’s going to be a lot more volume of distressed properties coming on the market,’ says Tom Feltner, vice-president of the Woodstock Institute, a Chicago-based research and advocacy organization.”).

⁶ Mary Ellen Podmolik, *New Rules to Govern Illinois Foreclosures*, CHI. TRIB., Feb. 22, 2013, available at http://articles.chicagotribune.com/2013-02-22/business/ct-biz-0222-mortgage-rules—20130222_1_illinois-foreclosures-mortgage-servicers-foreclosure-process.

⁷ Press Release, Supreme Court of Illinois, Illinois Supreme Court Adopts New Rules to Ease Burden of Home Foreclosure Process (Feb. 22, 2013), available at <http://www.state.il.us/court/Media/PressRel/2013/022213.pdf> (outlining new requirements for lenders who seek foreclosure, including “. . . identification of resources for government-certified counseling, for free legal representation to eligible homeowners, interpretive services and sworn

public hearings by the fourteen-person Special Supreme Court Committee on Mortgage Foreclosures.⁸ The changes were originally slated to be effective on March 1, 2013 but were later amended to take effect May 1, 2013.⁹ As a result of the changes, before a lender can secure a foreclosure judgment against a borrower, who has appeared before the court, the lender will need to file an affidavit advising the court of the loan modification programs available to that particular borrower, including documented steps taken to help the borrower and the status of those efforts.¹⁰

On the legislative front, Governor Pat Quinn signed a measure in February 2013 that was meant to help speed up the foreclosure process in Illinois.¹¹ The law resulted from debates in Springfield regarding responsibility for maintenance of homes

assurances that all loan modification efforts have been made by the lender.”).

⁸ *Id.* (noting that the committee was made up of an array of persons representing various interests related to housing and the foreclosure crisis, including, as specifically cited in the court’s announcement, “. . . judges; bankers and their lawyers; a public interest attorney; a law professor and the head of the Consumer Protection Division of the Illinois Attorney General’s office”).

⁹ *Id.*; see also Press Release, Supreme Court of Illinois, Illinois Supreme Court Announces Applicable Dates of New Foreclosure Rules (Apr. 8, 2013), available at http://www.state.il.us/court/Media/PressRel/2013/040813_1.pdf; Committee Comments, ILL. SUP. CT. R. 114 (amended Apr. 8, 2013) (effective May 1, 2013), available at http://www.state.il.us/court/supremecourt/rules/Art_II/ArtII.htm#114

(“Because the affidavit [required under Rule 114] must be filed prior to the entry of a foreclosure judgment, the effective date requires application to any case where a judgment of foreclosure has not yet been entered. Thus, although a case may already have been filed prior to the effective date of Rule 114 [May 1, 2013], the Rule would apply if a judgment of foreclosure has not yet been entered.”) Further, Supreme Court Rule 113 was amended to clarify application only to foreclosure actions filed on or after the May 1, 2013 effective date. See Press Release, Supreme Court of Illinois, Illinois Supreme Court Announces Applicable Dates of New Foreclosure Rules (Apr. 8, 2013), available at http://www.state.il.us/court/Media/PressRel/2013/040813_1.pdf.

¹⁰ Mary Ellen Podmolik, *New Ill. Foreclosure Rules to be Broadly Applied Starting May 1*, CHI. TRIB., Apr. 8, 2013, available at http://articles.chicagotribune.com/2013-04-08/business/chi-new-ill-foreclosure-rules-to-be-broadly-applied-starting-may-1-20130408_1_foreclosure-cases-new-cases-loan-modification.

¹¹ Micah Maldenberg, *Foreclosure Fast-Forward: New Law Could Speed Sales*, CRAIN’S CHI. BUS., Mar. 11, 2013, available at <http://www.chicagobusiness.com/article/20130309/ISSUE01/303099982/foreclosure-fast-forward-new-law-could-speed-sales>.

that were under the foreclosure process.¹² Stephen Olson, General Counsel and Chief Operation Officer at Illinois Credit Union League, reported the change was also a way for banks to counter a proposed Chicago ordinance that would have required them to maintain the homes.¹³ The “fast-track” process that lenders can voluntarily invoke allows the option of obtaining a foreclosure judgment and sale of an abandoned home in just fifteen days from first request of the court.¹⁴ The lender must prove to the court that the home is indeed abandoned, because if a homeowner emerges, the “fast-track” process automatically is stopped.¹⁵ However, several lender-side attorneys are skeptical of the “fast-track” claims, since, practically, the law does nothing to guarantee the judge will hold a hearing within fifteen days, and just getting the foreclosure judgment is but one loop to jump through before a lender can actually repossess the property.¹⁶

B. Consumer Financial Protection Bureau Releases Nationwide Mortgage Servicing Rules to Go Into Effect in 2014

As a response to improper practices and misuse of the judicial system by lenders, the Consumer Financial Protection Bureau (“CFPB”) released mortgage servicing rules in January 2013 that are set to take effect in January 2014.¹⁷ CFPB Director

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* (“‘It does not get you a sale any quicker. It does not get you before a judge to approve a sale any quicker,’ says an attorney who represents lenders but isn’t authorized to speak on the record because of her firm’s media policy.”)

¹⁷ Mary Ellen Podmolik, *Federal Regulators Prepare New Mortgage Rules While Cleaning Up Faulty Foreclosure Issues*, CHI. TRIB., Jan. 8, 2013, available at http://articles.chicagotribune.com/2013-01-08/business/ct-biz-0108-mortgage-fixes-20130108_1_new-mortgage-rules-loan-modifications-gene-amromin (noting that the Consumer Financial Protection Bureau has the power to draft and implement reforms to the mortgage servicing industry under the Dodd-Frank Wall Street Reform and Consumer Protection Act which was passed in 2010); see also U.S. SENATE COMMITTEE ON BANKING, HOUSING, & URBAN AFFAIRS, BRIEF SUMMARY OF THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT (2010), available at http://www.banking.senate.gov/public/_files/070110_Dodd_Frank_Wall_Street_Reform_comprehensive_summary_Final.pdf; see generally Dodd-Frank Wall Street Reform & Consumer Protection Act, Pub. L. No. 111–203, 124 Stat. 1376–2223 (2010), available at

Richard Cordray reported, “For many borrowers, dealing with mortgage servicers has meant unwelcome surprises and constantly getting the runaround. In too many cases, it has led to unnecessary foreclosures. Our rules ensure fair treatment for all borrowers and establish strong protections for those struggling to save their homes.”¹⁸ Because of strong lender control over the mortgage process, including the often-used practice of assigning mortgage servicers and the selling of mortgages to other companies throughout the life of the loan, the process was already bagged with inconsistency and unclear standards.¹⁹ Under the new rules, the CFPB sought to secure strong protections for struggling borrowers, remove surprises in mortgage servicing, and limit runarounds that had become well-publicized practices among some mortgage servicers.²⁰ In order to aid both servicers and borrowers in the transition period, the CFPB has been releasing helpful guides and other plain-language materials to promote a clear understanding of the rights and obligations of each side.²¹

The CFPB’s move marks the first attempt to create a national standard as to how mortgage servicers are required to treat borrowers in default.²² The CFPB changes were seen as

<http://www.sec.gov/about/laws/wallstreetreform-cpa.pdf>.

¹⁸ Press Release, Consumer Financial Protection Bureau, Consumer Financial Protection Bureau Rules Establish Strong Protections for Homeowners Facing Foreclosure (Jan. 17, 2013), *available at* <http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-rules-establish-strong-protections-for-homeowners-facing-foreclosure/>.

¹⁹ *Id.*

²⁰ *Id.* Some examples of the CFPB’s new consumer protective measures include: (1) restricting “Dual-Tracking,” whereby the servicer moved forward with the foreclosure process while simultaneously working with the distressed borrower to avoid foreclosure; (2) mandating early disclosure before the first time that an interest rate for an adjustable-rate mortgage changes; and (3) having servicers implement systems that can provide prompt response to service requests, including crediting a borrower’s account on the same day payment is received, and providing a response within seven business days of a borrower’s written request for payoff balances. *Id.*

²¹ See CONSUMER FINANCIAL PROTECTION BUREAU, SUMMARY OF THE FINAL MORTGAGE SERVICING RULES (2013), http://files.consumerfinance.gov/f/201301_cfpb_servicing-rules_summary.pdf; CONSUMER FINANCIAL PROTECTION BUREAU, CFPB RULES ESTABLISH STRONG PROTECTIONS FOR HOMEOWNERS FACING FORECLOSURE (2013), http://files.consumerfinance.gov/f/201301_cfpb_servicing-fact-sheet.pdf.

²² Alan Zibel, *Mortgage Rules Aid Homeowners*, WALL ST. J., Jan. 17, 2013, *available at*

positive by investors that complained banks were not doing enough in lead-up years to give assistance to struggling homeowners, leading to increased loss through the foreclosure process.²³ Consumer groups, however, were not thrilled with the new rules, saying the protections were not enough and that time restrictions imposed on borrowers were improper.²⁴

III. MORTGAGE FORECLOSURE SETTLEMENTS SEEK TO COMPENSATE BORROWERS

A. 2012 Joint State-Federal Settlement With the Five Largest Mortgage Servicers (\$26 Billion)

In February 2012, a federal court judge approved the settlement reached between the federal government and forty-nine state attorneys general and the five largest mortgage providers: Ally Financial, Bank of America, Citibank, JP Morgan Chase, and Wells Fargo.²⁵ Of the \$26 billion, at least \$17 billion is

<http://online.wsj.com/article/SB10001424127887323783704578246213248784302.html>.

²³ *Id.*

²⁴ Mandi Woodruff, *Looks Like We Were the Only Ones Happy With the New Mortgage Rules*, BUS. INSIDER, Jan. 17, 2013, available at <http://www.businessinsider.com/consumer-activists-bash-cfpb-rules-dual-tracking-2013-1>. Americans for Financial Reform said, “While the CFPB’s final rule is better than its proposed rule on this score, it still only partly addresses the issue, leaving borrowers vulnerable to unnecessary foreclosures. The rule is also too restrictive about the time period during which servicers have to even consider loan modification requests.” *Id.* Bruce Marks, Founder and CEO of Neighborhood Assistance Corporation of America, voiced, “CFPB is providing mortgage servicers advance notice to do their dirty work before the new regulations go into effect . . . [w]hen the new servicing rules go into effect in 2014 the landscape will be very different with many more communities devastated due to CFPB’s failure as the consumer watchdog. When it comes to holding the banks accountable and providing assistance to consumers, CFPB has sat on the sidelines as a no show.” *Id.* See also Press Release, Americans for Financial Reform, AFR Statement on CFPB Mortgage Servicer Rule (Jan. 17, 2013), available at <http://ourfinancialsecurity.org/2013/01/afr-statement-on-cfpb-mortgage-servicer-rule/>.

²⁵ *Federal Government & Attorneys General Reach Landmark Settlement with Major Banks*, NAT’L MORTG. SETTLEMENT, <http://www.nationalmortgagesettlement.com/> (last updated Feb. 19, 2013); Les Christie, *Court Approves \$26 Billion Foreclosure Settlement*, CNN MONEY, Apr. 10, 2012, http://money.cnn.com/2012/04/06/real_estate/mortgage-settlement/index.htm?iid=HP_LN.

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marked toward helping with mortgage modifications for borrowers behind on their payments, \$3 billion to help borrowers who are current, an additional \$5 billion in fines to the states and federal government, and roughly \$1 billion to be paid to former owners who lost their homes to foreclosure.²⁶

As a result of the settlement, 20,044 Illinois consumers were provided with more than \$1.4 billion in help.²⁷ The help came to residents chiefly in the form of reductions to principal payments (or extinguishing debts altogether) and refinanced underwater loans.²⁸ Among those receiving “first line” principal reductions, the average reduction was approximately \$115,000.²⁹ The settlement also included funds used to cover housing counseling, legal aid costs, and borrower outreach.³⁰

B. 2013 Settlement Between Federal Government and Thirteen Banks (\$3.6 Billion)

As part of an enforcement action agreed to between several large banks and the Office of the Comptroller of the Currency in April 2011, banks agreed to conduct a review of internal mortgage handling processes.³¹ The agreement came on the heels of the “robo-signing” scandal and tentatively allowed for potential homeowner compensation if it was shown that “financial injury” occurred due to errors in the way the foreclosure process was handled by those banks and their agents.³² However, the review process stalled, in part because a case-by-case review by independent consultants proved too slow and too expensive and also because only a fraction of the affected borrowers came forward to formally apply for a review.³³ As a

²⁶ *Id.*

²⁷ Francine Knowles, *20,000 Illinois Homeowners Aided By Foreclosure Settlement: Compliance Report*, CHI. SUN TIMES, (Feb. 21, 2013), <http://www.suntimes.com/business/18380024-420/20000-illinois-homeowners-aided-by-foreclosure-settlement-compliance-report.html>.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ Les Christie, *Millions of Homeowners Eligible for Foreclosure Review*, CNN MONEY, (Nov. 1, 2011), http://money.cnn.com/2011/11/01/real_estate/foreclosure_abuse/index.htm?iid=EL.

³² *Id.*

³³ Les Christie, *Payments Coming for Borrowers in \$3.6B Foreclosure Settlement*, Apr. 10, 2013,

result, a revised January 2013 settlement was struck that agreed on a value of \$3.6 billion and opened the claim process to all borrowers in default in 2009 and 2010.³⁴

In April 2013, a listing sheet developed by the Office of the Comptroller of the Currency and Federal Reserve provided payment specifics of the finalized January 2013 settlement agreement between federal banking regulators and thirteen mortgage servicers.³⁵ Public perception of the settlement was negative, with one news commentator even calling it a “massive nationwide crime scene.”³⁶ The settlement is to be paid to more than four million affected borrowers whose homes took part in foreclosure proceedings during 2009 and 2010.³⁷ Payout amounts ranged from a minimum of \$300 (paid to the majority of borrowers) to a maximum of \$125,000 (paid to a minority of borrowers).³⁸

Payouts to qualified mortgage borrowers from the \$3.6 billion settlement started in April.³⁹ Frustrations with the settlement process continued to plague consumers. Some parties reported having their settlement checks rejected, but the Federal Reserve advised that such early problems have since been

http://money.cnn.com/2013/04/09/real_estate/foreclosure-payments/index.html (noting that only 439,000 of the approximate four million eligible borrowers were actually filing for a review).

³⁴ *Id.* (indicating that as part of the settlement, borrowers accepting a settlement check will not forfeit any of their rights to pursue other legal actions against their mortgage servicer).

³⁵ OFFICE OF THE COMPTROLLER OF THE CURRENCY, INDEPENDENT FORECLOSURE REVIEW PAYMENT AGREEMENT DETAILS (2013), <http://www.occ.gov/news-issuances/news-releases/2013/nr-ia-2013-60a.pdf>.

³⁶ Chris Hayes, *Tuesday's Foreclosure Settlement: A Nationwide Crime Scene*, MSNBC, Apr. 10, 2013, <http://tv.msnbc.com/2013/04/10/tuesdays-foreclosure-settlement-a-nationwide-crime-scene/> (noting that a scheduled payment of \$125,000 to members of the armed forces who had their homes wrongfully foreclosed while on active-duty (which is a criminal felony) was egregiously uncaring and unfair).

³⁷ E. Scott Reckard, *\$3.6 Billion in Foreclosure Settlement Payments to Begin Friday*, L.A. TIMES, Apr. 9, 2013, available at <http://www.latimes.com/business/money/la-fi-mo-foreclosure-settlement-20130409,0,471582.story>.

³⁸ *Id.*

³⁹ Julie Schmit, *Payments Start in \$3.6 Billion Foreclosure Settlement*, USA TODAY, Apr. 9, 2013, available at <http://www.usatoday.com/story/money/business/2013/04/09/foreclosure-settlement-payments-start/2067005/>.

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corrected.⁴⁰ According to the Federal Reserve, more than 50,000 people have already cashed or deposited their settlement checks.⁴¹

IV. CONCLUSION

Amongst large-scale public outcry and against a backdrop of perceived class warfare, federal and state officials have acted to not only limit the immediate fallout stemming from the foreclosure crisis, but also put in place a series of commonsense impediments to the same unchecked practices that promoted the excessive greed and inflation of the housing bubble. Such work has resulted in two high-profile settlements in addition to assorted positive legislative and administrative regulations. The reactive work, while positive, is still too little, too late for many affected citizens who had the doors shut on their American dream.

⁴⁰ Margaret Chadbourn, *Fed-foreclosed Borrowers Had Problems Cashing Settlement Checks*, REUTERS, (Apr. 17, 2013), <http://www.reuters.com/article/2013/04/17/us-usa-banks-foreclosure-settlement-idUSBRE93G0J820130417>.

⁴¹ *Id.*