Closing the Gaps: What States Should Do to Protect Homeowners From Foreclosure

Policy Brief
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INTRODUCTION

States have yet to recover from the foreclosure crisis that has stripped trillions of dollars from homeowners and devastated local communities across the nation. While the crisis was caused in large part by unscrupulous lending practices that went unregulated, servicing abuses – including the failure to engage in good faith loss mitigation before beginning the foreclosure process – have exacerbated the problem. The failure to implement and enforce reasonable regulations against servicers has fostered dangerous practices over the last several decades. Despite recent advancements including the National Mortgage Settlement (NMS), the California Homeowner Bill of Rights (HBOR), and new mortgage servicing rules from the Consumer Financial Protection Bureau (CFPB) that go into effect in January 2014, millions of families remain poised to lose their homes. However, there is room for states to build on the reforms of the NMS, HBOR and CFPB rules, and help avoid unnecessary foreclosures. Most importantly, states should add private enforcement that gives homeowners a means to pause the foreclosure process while the servicer corrects violations of the law and encourages servicers to consider loss mitigation alternatives. Although the CFPB rules will be applicable in all states, homeowners will not have the right to prevent unlawful foreclosure sales while servicers correct legal violations, unless states adopt stronger private enforcement provisions.

In this report, we examine recent developments in the legal and regulatory landscape, discuss the relevant provisions of the CFPB rules, California HBOR and other states' laws, and make recommendations for states to adopt additional reforms to fill in the consumer protection gaps that remain. In summary, we recommend that state policymakers implement the following rules through legislation and/or regulation:

(1) Require servicers to adopt and engage in loss mitigation practices;
(2) Restrict servicers from dual tracking (the practice of simultaneously pursuing foreclosure while simultaneously considering a homeowner's application for loss mitigation) at both the pre-foreclosure and post-foreclosure referral stages, while providing homeowners with reasonable deadlines and rights to appeal;
(3) Give homeowners the power to vindicate their rights by providing a private right of action that allows them to pause a foreclosure sale when the servicer has violated the law until the servicer has complied with the law (e.g., to consider the borrower's timely application for a modification); and

(4) Require lenders/servicers to establish procedures for homeowner outreach, denial notices that provide full information and affidavit requirements.

RECENT DEVELOPMENTS

In the past year, there have been several significant developments in curtailing the devastation of the ongoing foreclosure crisis: the National Mortgage Settlement, the passage of the California Homeowner Bill of Rights and various state laws, and the issuance of new mortgage servicing rules by the CFPB. Each of these positive developments is summarized below:

THE NATIONAL MORTGAGE SETTLEMENT

In February 2012, 49 state attorneys general and federal enforcement officials entered into a $25 billion comprehensive servicing settlement with the five major banks: Ally (formerly GMAC), Bank of America, Citibank, J.P. Morgan Chase and Wells Fargo.[1] Among other things, the settlement imposed reforms in the mortgage servicing industry to end sloppy and fraudulent business practices and to give more homeowners a chance to restructure or refinance out of unaffordable loans that are underwater. The settlement restricted the practice of dual tracking and provided new standards for loss mitigation activities and communicating with homeowners.

Two and a half billion dollars from the NMS were allocated to the states to be used for foreclosure prevention activities such as housing counseling and legal services, although the precise usage would be determined by each state. Despite the intention that these funds be used to support foreclosure prevention, much of this money has unfortunately been diverted to other uses. Of the total $2.5 billion, $1 billion has been allocated to aid homeowners, while almost the same amount - $990 million - has been allocated to states' general funds. Another $379 million has yet to be allocated.[2]

The diversion of NMS funds away from housing counseling and legal services intended to avert unnecessary foreclosures means it is all the more important for states to implement strong servicing standards to protect its citizens.

CALIFORNIA'S HOMEOWNER BILL OF RIGHTS

The California Foreclosure Reduction Act – SB 900[3] (Leno, Corbett, DeSaulnier, Evans, Pavley, Steinberg) & AB 278[4] (Eng, Feuer, Mitchell) – commonly referred to as the Homeowner Bill of Rights (HBOR), was passed in 2012 and took effect on January 1, 2013.

HBOR was conceived to address perceived shortcomings in the National Mortgage Settlement, including the limited applicability and duration of the Settlement's provisions (the Settlement is limited to only the five major banks, and is set to expire in 2015). Sponsored by California's Attorney General, this landmark legislation protects Californians by codifying into state law some of the protections of the National Mortgage Settlement, adding new protections, and extending these protections to apply to all servicers (with limitations for some small servicers).[5] Specifically, California's Homeowner Bill of Rights protects homeowners through these key protections:[6]

Restrictions on Dual-Tracking. California law provides that a servicer cannot start or continue a foreclosure while a homeowner's application for loss mitigation is being considered. The prohibition against dual tracking includes:

- *Pre-Foreclosure Referral.* Homeowners who submit a complete loan modification application to their servicer *before* the servicer begins the foreclosure process, *i.e.*, by recording a Notice of Default (NoD), will get a "yes or no" decision with a detailed explanation before the servicer refers the loan to foreclosure. Similarly, if the servicer has approved a foreclosure prevention alternative (e.g., short sale or repayment plan) in writing, the servicer may not record a NoD.
- *Post-Foreclosure Referral.* If a homeowner submits a complete loan modification application *after* an NoD has been recorded, the servicer may not record a notice of trustee sale (NTS) or conduct a sale of the house until after a decision on that application is provided to the homeowner. Similarly, if the servicer has approved a foreclosure prevention alternative (e.g., short sale or repayment plan) in writing after recording an NoD, the servicer shall not then record an NTS, or conduct a trustee sale.
- *Denial Letter.* If a servicer denies a loan modification, it must send a written explanation to the homeowner including specific reasons for any investor disallowance, and if the denial is the result of a net present value calculation, then the servicer must provide the monthly gross income and property value used to calculate the net present value as well as a statement that the homeowner may obtain all of the inputs used in the calculation upon written request.
- *Right to Appeal.* A homeowner may appeal a denial within 30 days, with no limitation based on when the application was received.

Required Single Point of Contact: The servicer must make available to the homeowner a knowledgeable person or team who has knowledge of the homeowner's status and loss prevention alternatives, the responsibility to coordinate the flow of documentation, access to decision makers, and the ability to stop the foreclosure process when necessary.[7]

Prohibition Against Robo-signing: California law requires that all foreclosure documents either recorded with the county recorder (e.g., NoD), or filed in a foreclosure-related court proceeding, must be accurate, complete and supported by evidence. Moreover, servicers are required to review reliable evidence to substantiate the homeowners' default and their right to foreclose. Repeated violations are subject to public enforcement actions (sunsets Jan. 1, 2018).

Strong but Fair Accountability and Homeowner Remedies: California law provides that upon a material violation of HBOR, a homeowner can file a lawsuit to seek an injunction that would require the servicer to pause the foreclosure sale until the servicer corrects and remedies the violation (e.g., the servicer must fully consider a loss mitigation application prior to foreclosure). Eligible homeowners can bring a private right of action against the servicer at the pre-or-post foreclosure sale stage. For actions brought after a foreclosure sale has occurred, judges may award actual damages, plus attorney fees upon a material violation of the law.[8] For reasons discussed in more detail below, states should replicate the protections for homeowners found in California's Homeowner Bill of Rights.

CFPB SERVICING RULES

On January 17, 2013, the Consumer Financial Protection Bureau (CFPB) issued two sets of national servicing rules that borrow in significant part from both the National Mortgage Settlement and HBOR.[9] One set is under the Real Estate Settlement Procedures Act (RESPA), and addresses loss mitigation and dual tracking as well as error resolution and force-placed insurance.[10] The other is under the Truth in Lending Act, and addresses more general servicing practices like periodic statements, notices of interest rate changes and payment processing.[11]

Here we focus on the CFPB's RESPA rules concerning loss mitigation and dual tracking. Key provisions of the CFPB RESPA rules include the following:

Loss Mitigation Outreach Requirements: Servicers must make good faith efforts to establish live contact with a delinquent homeowner by the 36th day of the homeowner's delinquency to inform the homeowner about available loss mitigation options. Additionally, servicers must send a written notice by the 45th day of the homeowner's delinquency, which encourages the homeowner to contact the servicer, and provides information on loss mitigation options and how to contact counseling organizations.

Continuity of Contact Requirements: Servicers must establish policies to ensure that by day 45 of a homeowner's delinquency, it assigns personnel to the homeowner to respond to the homeowner's inquiries and assist the homeowner with available loss mitigation options. These personnel must remain available until the homeowner has made two consecutive payments on a loss mitigation agreement without incurring a late fee.[12]

Pre-Foreclosure Process Dual Track Restrictions: A mortgage servicer may not start the foreclosure process until a homeowner is more than 120 days delinquent. Additionally, if a homeowner submits a complete loss mitigation application before the servicer starts the foreclosure process (even if after the 120-day period), then the servicer may not begin the process while the application is pending.

Post-Foreclosure Referral Dual Track Restrictions: If a servicer has already started the foreclosure process, it cannot move for a judgment or order of sale or conduct a sale of the house if the homeowner submits a complete loss mitigation application more than 37 days before the foreclosure sale.

Denial Notice: If a homeowner's loss mitigation application is denied, a servicer shall send a notice stating the "specific reasons" for the denial of each loan modification option, and informing the homeowner of any appeal rights. This includes the following: (1) if the denial is due to investor requirements, the servicer must identify the investor as well as the requirement that is the basis of the denial; and (2) if the denial is due to a net present value calculation, the servicer must provide all inputs used in the calculation.[13]

Appeal Rights: When a loss mitigation application has been denied, the homeowner may appeal that determination if the complete application was received 90 or more days before a foreclosure sale (or within the first 120 days of delinquency). The homeowner shall be given at least 14 days to appeal. The appeal shall be to different personnel than those responsible for the denial, and the servicer shall provide a decision within 30 days.

Right to Seek Damages for Violations: The CFPB loss mitigation rules are subject to the general liability provision under RESPA, which allows a homeowner to seek actual damages, potential additional pattern and practices damages of up to $1,000, and attorneys' fees and costs (in a successful case), for a servicer's failure to comply. RESPA does not allow a homeowner to seek an injunction to stop a foreclosure sale.

COMPARING CALIFORNIA'S HBOR AND THE CFPB SERVICING RULES

There are several areas where California HBOR provides more protections to homeowners than the CFPB rules. First, if a servicer has already started the foreclosure process, California law has no deadline for a homeowner to submit a complete application in order to stop the servicer from moving toward foreclosure sale, while the CFPB rules require submission of the application no more than 37 days before the foreclosure sale date. Second, California law allows a homeowner to appeal a denial regardless of when the application was received, while the CFPB limits the right to homeowners who submit an application 90 days or more before a possible foreclosure sale date. Third, and most significantly, California law allows homeowners to go to court to put a pause on a foreclosure sale when servicers violate the law's requirements until the servicer remedies the violation (or provides a foreclosure alternative such as a loan modification), an option which the CFPB rules do not provide.

STATE ACTION TO ESTABLISH SERVICER DUTY OF LOSS MITIGATION

Before the National Mortgage Settlement, several states, including New York, North Carolina, and Maryland, took proactive measures to regulate mortgage servicing, including imposing a duty of loss mitigation on servicers. Other states like Massachusetts have more recently adopted rules requiring servicers to engage in some form of loss mitigation before beginning or completing the foreclosure process.

New York: In 2008, New York passed legislation requiring the New York State Banking Department to promulgate regulations to regulate mortgage servicing and the foreclosure process.[14] Two years later, the Banking Department responded by creating Part 419 of Superintendent's Regulations. Section 419.11 requires that a servicer make "reasonable and good faith efforts consistent with usual and customary industry standards to engage in appropriate loss mitigation options, including loan modifications, to avoid foreclosure."[15] The rule also provides detailed requirements around loss mitigation procedures and requirements.[16]

North Carolina: In 2009, North Carolina passed legislation requiring a mortgage servicer to reach out to a delinquent homeowner, and if the homeowner replies, to negotiate with the homeowner to attempt to reach a resolution.[17]

Maryland: In 2010, Maryland passed legislation requiring a mortgage servicer to engage in a loss mitigation analysis and to submit an affidavit about its efforts both when initiating the foreclosure process and when proceeding to sale.[18] Under Maryland law, the homeowner may also request foreclosure mediation.

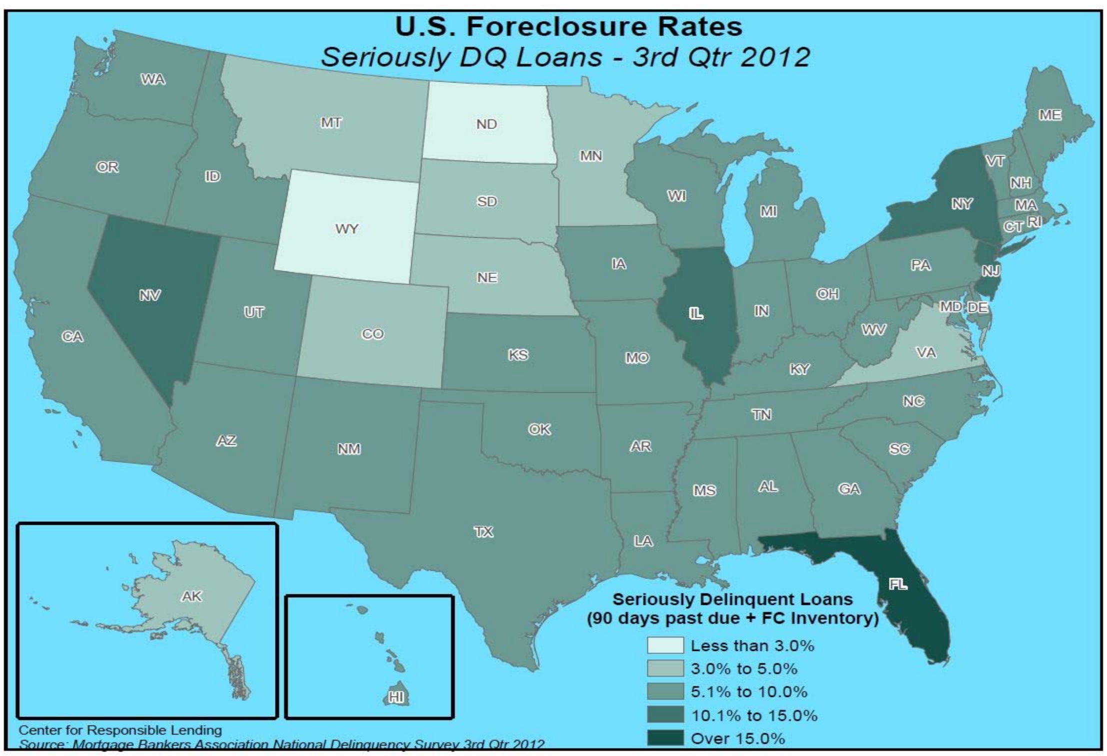
Massachusetts: Just last year, Massachusetts passed legislation that extends the foreclosure process by 60 days unless a servicer can demonstrate that it "engaged in a good faith effort to negotiate a commercially reasonable alternative to foreclosure."[19]

<u>DESPITE THESE ADVANCES, MORE ACTION IS NEEDED BY THE STATES</u>

FORECLOSURES IN HIGH NUMBERS ARE EXPECTED TO CONTINUE

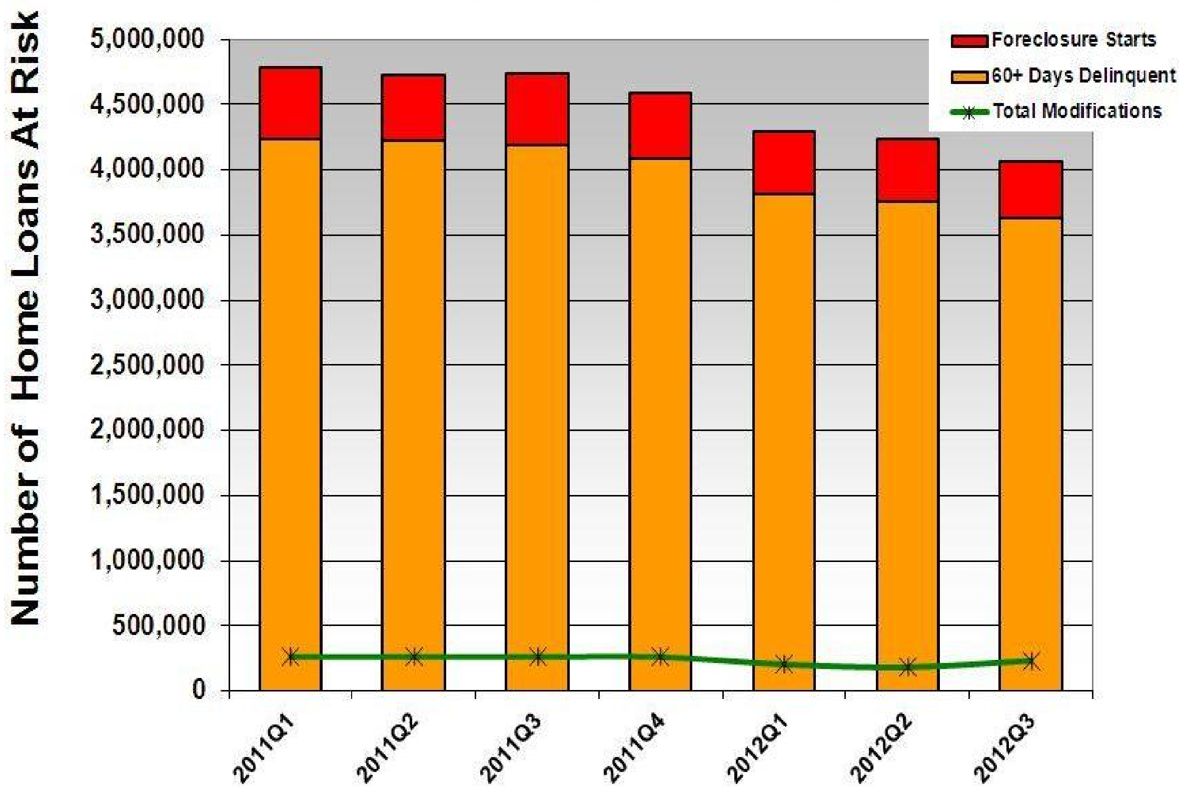
Based on the most recent delinquency and foreclosure data released by the Mortgage Bankers Association, the percentage of mortgage loans that are seriously delinquent remains substantially elevated. In the great majority of states, somewhere between 1 in 10 and 1 in 20 mortgage loans are seriously delinquent; in Nevada, Illinois, New York and New Jersey, between 1 in 7 and 1 in 10 borrowers are seriously delinquent; and more than 1 in 7 borrowers in Florida is seriously delinquent (see Figure 1 below). As of October 2012, an estimated 6 million homes remained at risk of defaulting nationwide.[20] The foreclosure pipeline remains significant and continues to threaten a substantial number of homeowners with the loss of their homes.[21]

<u>Figure 1: Seriously Delinquent Loan Rates – 3rd Quarter 2012</u>



As reflected in Figure 2, while the number of homes in the foreclosure pipeline appears to be decreasing, and the pace of new homes entering foreclosure has slowed down, there remains an alarmingly high number of homes at risk of foreclosure, with relatively few loan modifications in comparison. Due to shadow inventory as a result of robo-signing at the end of the third quarter 2012, there were more than 4 million homes either 60 or more days delinquent or starting the foreclosure process, compared with 232,733 in third quarter 2012, and 879,216 for the year including fourth quarter 2011 through third quarter 2012.loan modifications, as reported by Hope Now.

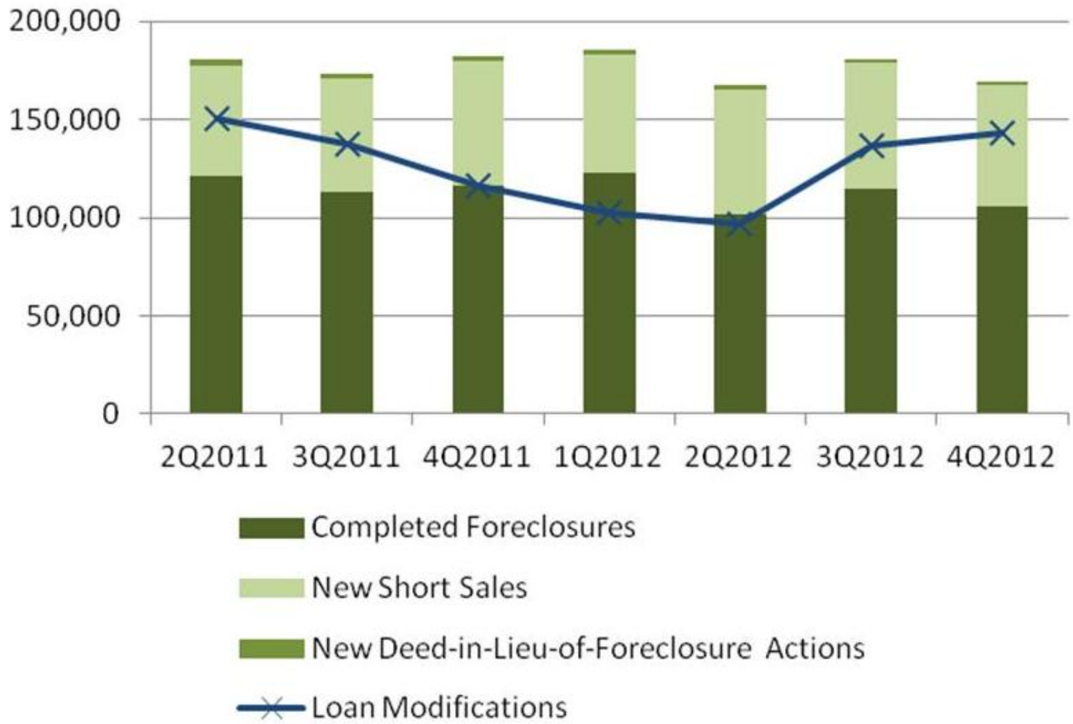
Figure 2: Homes at Risk vs. Loan Modifications



Sources: *MBA National Delinquency Survey, Hope Now,*

Because the foreclosure pipeline has accumulated over a long period of time, with some of those loans possibly in the loan modification process, Figure 2 may not be an accurate way to examine more current loss mitigation activity. A different way to look at this may be to compare the number of new completed loan modifications with the numbers of new home forfeiture activities, as reported quarterly by the Office of the Comptroller of the Currency (OCC).

Figure 3: Completed Loan Modifications vs. New Home Forfeiture Actions[22]



Using this metric, it is evident that servicers have made progress in their efforts to save homes from foreclosures or other loss. Although numerous factors go into the numbers of forfeitures and loan modifications each quarter, Figure 3 shows that there has been an uptick in new loan modifications following the National Mortgage Settlement which was finalized in the first quarter of 2012.

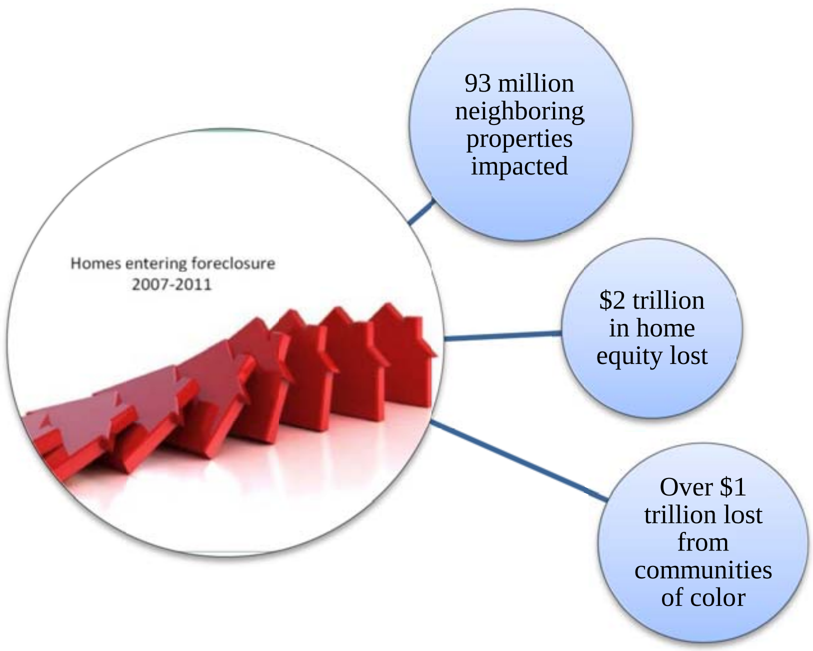
As discussed in more detail below, however, servicer errors and shortcomings remain, which continue to prevent eligible homeowners from obtaining relief from foreclosure.[23] Homeowners need a way to save their homes when servicers do not follow the law. The recommendations set forth herein will improve the chances that a homeowner who *can* save her home through a loan modification *will* save her home.

STATE ACTION CAN HELP CONTAIN THE ECONOMIC SPILLOVER EFFECT OF FORECLOSURES ON NEIGHBORING PROPERTIES AND COMMUNITIES

It is now well-known that foreclosures not only harm the families who lose their homes, but also neighboring homeowners, their neighborhoods, surrounding communities and the wider economy. As such, policies that help prevent avoidable foreclosures help everyone.

Between 2007 and 2011, 10.9 million homes were lost to foreclosure.[24] In CRL's 2012 report, *Collateral Damage: The Spillover Costs of Foreclosures*, we examined the economic impact of foreclosures on neighboring homeowners. We estimate that, based on loans that entered foreclosure between 2007 and 2011, neighboring homeowners lost or will lose nearly $2 trillion in property value as a result of being in close proximity to those foreclosures.[25] These losses affect 93 million properties, and include both the spillover impact of homes that have completed the foreclosure process and future losses that will result from homes that have started but not yet completed the foreclosure process.[26] On average, families affected by nearby foreclosures have already lost or will lose $21,077 in household wealth, representing 7.2 percent of their home value, solely by virtue of being in close proximity to foreclosures.[27] Additionally, we note that some communities are disproportionately impacted by spillover loss relative to their homeownership rates. Over one-half of the spillover loss is associated with communities of color. As a result, minority neighborhoods have lost or will lose $1 trillion in home equity as a result of spillover from homes that have started the foreclosure process, reflecting the high concentrations of foreclosures in neighborhoods of color.

Figure 3: Collateral Damage: The Spillover Costs of Foreclosure



States Can Act to Curtail Harmful and Illegal Mortgage Servicer Practices that Stem in Part From Market Failures.[28]

Even before the current crisis and revelations of servicer shortcomings and misconduct, government enforcement actions and private litigation against major servicers identified widespread errors and abuses in mortgage servicing.[29] The absence of standards, rules or true oversight allowed servicing abuses to go unchecked for decades. These servicing abuses and shortcomings served to exacerbate the foreclosure crisis and to escalate the level of foreclosures.

Unfortunately, market incentives reward abusive conduct in servicing. Perverse financial incentives in pooling and servicing contracts explain why servicers press forward with foreclosures when other solutions are more advantageous to both homeowner and investor.[30] As such, the compensation structure skews servicers' decision-making towards foreclosure at the expense of homeowners and communities.[31] Mortgage servicers earn significant revenue from wrongful fees and other poor or abusive conduct, and therefore have strong financial incentives to engage in harmful business practices.[32] For example, servicers typically earn a significant portion of their income from assessing late fees and other fees;[33] increase revenues by reducing costs, such as through staffing thinly (increasing the risk of servicing errors);[34] and bring in revenues from proceeding to foreclosure while loss mitigation efforts cost them.[35]

Simply put, the existing servicing model does not promote good service to borrowers. Mortgage servicers contract with the owners of a mortgage loan and not with borrowers. Because servicers lack a contractual (or duty-bound) relationship with borrowers and because borrowers are "locked in" to the relationship, servicers have little incentive to provide adequate customer service.[36] Borrowers also have no authority to "fire" their servicer for bad service.

Although there have been improvements in mortgage servicing over the last few years due to increased public attention on the abuses and government actions that have been taken, errors and failings that impact borrowers and communities do continue to occur, warranting additional action by states.

While servicing abuses extend to all facets of mortgage servicing, here we summarize only the abuses and misconduct that states can address in the loss mitigation and the foreclosure process.

Failure to Engage in Meaningful Loss Mitigation. Historically, despite requirements under government rules or servicers' pooling and servicing agreements, servicers have not done a good job of engaging in meaningful loss mitigation to avoid foreclosure over the last several years. [37] During this time, some of the most significant problems have been in this area, including the failure to review homeowners for a loan modification,[38] improper denials (especially under the national Making Home Affordable Program "HAMP" program), failure to honor loan modifications[39] or other agreements[40] and failure to offer loss mitigation options that actually help consumers stay in their homes. As a result of servicer failures, many homeowners have not had a fair opportunity to seek loan modifications that could have kept them in their homes.[41]

Dual Tracking. Servicers have been widely faulted for dual tracking, *i.e.*, actively pursuing foreclosure even when they are already working with homeowners on a modification (or when a homeowner is paying on a trial loan modification).[42] Sometimes this happens because of internal servicer communication failures,[43] or because servicers follow foreclosure timelines that are separately administered from their loss mitigation programs. This practice is widespread[44] and damaging.

In a February 2012 survey of consumer attorneys from 45 states, more than 90% of respondents reported representing homeowners placed in foreclosure while awaiting a loan modification, and 80% had a servicer attempt a foreclosure sale.[45] A 2013 survey of California housing counselors and legal service advocates reveals that dual tracking practices – while somewhat improved – are still continuing in high numbers, notwithstanding that both the NMS and California HBOR placed restrictions on them.[46] Sixty percent of respondents reported that dual tracking still occurs, with 36% reporting that it continues to occur "always" or "often".[47] Counselors did credit the private right of action included within California's HBOR with "imposing added measures of servicer accountability" in California.[48]

Dual tracking not only harms homeowners by creating unnecessary stress and uncertainty, but also strains housing counselors and legal service providers, whose limited resources are expended halting foreclosure sales rather than assisting homeowners seeking modifications.[49] Ultimately, dual tracking can lead to foreclosure even when foreclosure does not make financial sense to either the homeowner or the owner of the mortgage.[50]

Inadequate and Ineffective Communication.[51] Throughout the foreclosure crisis, homeowners have complained of troubles communicating with their servicers, ranging from excessive hold times to representatives who give conflicting or incorrect information, or who are unable to help.[52] This has been and continues to be particularly problematic for non-English speakers.[53] Homeowners seeking loss mitigation have found that they repeatedly must explain their circumstances to servicer employees unfamiliar with their circumstances, or they find that their documents have been lost or that document requests are inconsistent.[54] According to the CFPB, communication breakdowns, due to the "inadequate manner by which servicer personnel at major servicers have provided assistance" have been "one of the most significant impediments to the success of foreclosure mitigation programs."[55] Homeowners who are unable to get the help they need may lose their homes unnecessarily.[56]

Robo-signing and Other Fraud. As revealed by legal proceedings over the last few years, mortgage servicers were proceeding with foreclosure while failing to review key documents or falsifying court documents used to foreclose often because the companies failed to kept accurate records of ownership, payments and escrow accounts that would enable legal foreclosures.[57] These practices violate the law, and often deny homeowners due process.[58]

IMPLEMENTING STRONG STATE SERVICING STANDARDS CAN EASE THE IMPACT OF THE FORECLOSURE CRISIS

In the face of continuing foreclosure risks, states can take action to stabilize local housing markets and protect homeowners from mortgage servicing abuses through practical, yet important, legislation that borrows from but adds in significant ways to the standards set by the CFPB mortgage servicing rules, California's HBOR, and other states' laws.

POLICY RECOMMENDATIONS

State policymakers are in a strong position to enact meaningful reforms to ensure that servicers explore all applicable alternatives prior to foreclosure, limit dual tracking, provide reasonable, yet clear guidelines on timing, denial notifications, and appeal rights, and provide homeowners with the right to put a pause on a foreclosure sale while a servicer corrects legal violations (and engages in whatever foreclosure-prevention processes the law requires).[59] Any comprehensive set of state reforms should, therefore, do the following:

- **Require servicers to adopt and engage in loss mitigation practices.**

  Policymakers should require an explicit duty to engage in loss mitigation analysis before the foreclosure process is commenced. Although the CFPB rules set forth procedures for loss mitigation outreach, they do not contain an explicit duty to engage in loss mitigation.

By contrast, several states, as discussed above, have set forth more explicit duties, requiring servicers to review homeowners for foreclosure alternatives prior to foreclosure. Loss mitigation serves the interests of both the homeowner and the mortgage holder by seeking solutions that would allow homeowners to remain in their homes or otherwise limit their losses, while also providing mortgage holders with a means to mitigate their own losses. Because HAMP is due to expire at the end of 2013 (unless Treasury extends the program), it is even more imperative that servicers be required to engage in a loss mitigation assessment.[60] Adding an explicit duty to engage in a loss mitigation analysis before the foreclosure sale begins will increase the likelihood that avoidable foreclosures are prevented.

- **Restrict lenders/servicers from dual tracking (the practice of simultaneously pursuing foreclosure while a homeowner's application for loss mitigation is pending) at both the pre-foreclosure and post-foreclosure referral stages, while providing homeowners with reasonable deadlines and a right to appeal.**

Pre-Foreclosure Referral. Policymakers should adopt the CFPB rule that provides that a mortgage servicer may not start the foreclosure process until a homeowner is more than 120 days delinquent, or while an application is pending if a homeowner submits a complete loss mitigation application after 120 days, but before the servicer starts the foreclosure process.[61] The 120-day window (measured from the first day of delinquency) will provide time for servicer outreach to homeowners and give homeowners a reasonable amount of time to complete the loss mitigation application process before being referred to foreclosure. Pre-foreclosure referral protections provide clear timelines and encourage all parties to carry out the loss mitigation process quickly.

Post-Foreclosure Referral. If a homeowner submits a complete loss mitigation application by a specified deadline after a homeowner is referred to foreclosure, policymakers should prohibit servicers from taking the next official step in the foreclosure process while that application is pending and throughout the appeals process. Under the CFPB rules, if a servicer has already started the foreclosure, it is prevented from taking steps toward foreclosure sale only if the homeowner submits a complete loss mitigation application more than 37 days before the sale date.[62] Conversely, California law has no deadline; it prohibits a servicer from taking the next step in the foreclosure process, and requires the servicer to give the homeowner a yes or no answer on a loan modification application, if it is received at any time prior to the completion of the foreclosure sale.[63] Policymakers should establish reforms that provide homeowners with ample time to apply, providing deadlines that are consistent and workable with their state's foreclosure timetables.

Right to Appeal. Policymakers should give homeowners a right to appeal a loan modification denial when the loan modification application is received within the dual track deadlines established by the state. The CFPB rules provide homeowner with a right to appeal a denial only if a complete application is received by the servicer 90 days before a possible foreclosure sale date. On the other hand, California law provides a broader protection and allows a homeowner to appeal a denial regardless of when the application was received. Given the evidence of widespread servicer errors related to denials, policymakers should provide appeal rights to homeowners who meet the state's application deadlines.

- **<u>Give homeowners a remedy by giving them the right to stop a foreclosure sale when the lender/servicer has violated the law.</u>**

  Dual track restrictions are intended to prevent unnecessary foreclosures. This goal cannot be effectuated fully by the CFPB rules alone, because the law under which the rule was implemented, RESPA, does not allow homeowners to prevent a foreclosure sale when servicers violate the rules' requirements.[64] For that reason, policymakers should implement a strong enforceability measure that gives homeowners the right to suspend a foreclosure sale when a servicer has not complied with the loss mitigation rules, and until it does so.

  Giving homeowners the right to pause a foreclosure when servicers do not comply with the rules, and until they do follow the law, is critical to curtailing the number of preventable foreclosures. Without it, homeowners will not have the means to prevent avoidable foreclosures. Unfortunately, public enforcement by state Attorneys General or state regulators will not provide this kind of individual intervention in the foreclosure process. Foreclosures move quickly; these public officials do not have the nimbleness, the resources (and sometimes lack the authority) to pursue time-sensitive individual foreclosure cases on behalf of homeowners.

  Therefore, policymakers should adopt the substantive recommendations discussed herein in tandem with a right to seek an injunction (for non-judicial foreclosure actions) or to raise a defense to foreclosure (for judicial foreclosure actions) to suspend the foreclosure process when servicers fail to comply. This will allow homeowners to halt the foreclosure process while the servicer considers the homeowner for foreclosure prevention alternatives and otherwise complies with the law's requirements. If the servicer complies with the law's requirements and determines after a full and proper examination that the homeowner *does not* qualify for a loan modification or other alternative, then the servicer may proceed with a foreclosure sale. If the servicer determines that the homeowner *does* qualify for a loan modification or other loss mitigation alternative, then the home would be saved: the foreclosure proceedings would be dismissed, and an unnecessary foreclosure will have been averted.

- **<u>Require servicers to establish procedures for homeowner outreach, detailed denial notices, and an affidavit requirement.</u>**

  Policymakers should also enact robust procedures for homeowner outreach, straightforward timelines, detailed denial notices, and an affidavit requirement to facilitate the loss mitigation process and promote transparency and the accurate provision of information to homeowners.

  Outreach. Outreach to homeowners early in delinquency is both good for homeowners and should be a customary business practice for servicers.[65] In fact, research shows that homeowners have a lower re-default rate the earlier they are reached in delinquency.[66]

States should adopt outreach requirements in line with the CFPB rules, which require servicers (1) to make good faith efforts to establish live contact with homeowners by the 36th day of their delinquency and inform them that loss mitigation options may be available;[67] and (2) to provide a written notice including information about loss mitigation options by the 45th day of the homeowner's delinquency.[68]

Denial Notice. States should also require servicers to provide (1) a detailed denial notice when an application is denied, providing the specific reasons for the servicer's determination for each loss mitigation option and (2) detailed instructions on how to appeal the denial. The CFPB rules require that the notice include "specific reasons" for the denial. The CFPB's Official Interpretation further provides that the denial notice must include specific reasons for an investor disallowance if that is the reason for the denial, and all of the inputs used in any net present value (NPV) calculation if failing the NPV test is the reason for the denial.[69] States should adopt these detailed requirements outlined in the CFPB Interpretation. Providing greater detail in the denial notice allows homeowners to consider whether a denial was in error and whether an appeal is appropriate.

Affidavit. To ensure accuracy, transparency and accountability, servicers also should be required to submit an affidavit stating that it has complied in good faith with the state's loss mitigation procedures.[70]

CONCLUSION

When servicers fail to employ viable loss mitigation tools, the foreclosure crisis is exacerbated. By ensuring that servicers examine all possible foreclosure alternatives and by promoting clarity, transparency and accountability in the loss mitigation process, states will help more homeowners avoid unnecessary foreclosure and keep more people in their homes. This, in turn, will benefit everyone by reducing the spillover impact of foreclosures and by helping to stabilize the state's economy and housing market.

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[1] The settlement also provided $20 billion in financial benefits to homeowners through various activities such as principal reduction loan modifications to avoid foreclosure, mortgage refinancings, and waiver of moneys owed after short sales. For more information, including settlement documents, *see* State Attorneys General, National Mortgage Settlement, http://nationalmortgagesettlement.com/ (last updated Feb. 19, 2013). For a summary of the settlement, *see* CTR. FOR RESPONSIBLE LENDING, SUMMARY OF NATIONAL MORTGAGE SETTLEMENT (2012), *available at* http://www.responsiblelending.org/mortgage-lending/policy-legislation/states/Summary-of-AG-Settlement-3-12-12.pdf. For information on settlement implementation through December 31, 2012, *see* CTR. FOR RESPONSIBLE LENDING, ANALYSIS OF *ONGOING IMPLEMENTATION*, THE REPORT OF THE MONITOR OF THE NATIONAL MORTGAGE SETTLEMENT, *available at* http://www.responsiblelending.org/mortgage-lending/policy-legislation/regulators/2013-crl-policy-brief-mortgage-settlement-monitor-report-analysis-march-19.pdf.

[2] Paul Kiel et al., *Where are the Foreclosure Deal Millions Going in Your State?*, PROPUBLICA.ORG, Oct. 23, 2012, http://www.propublica.org/special/where-are-the-foreclosure-deal-millions-going.

[3] S.B. 900, 2011-2012 Leg., Reg. Sess. (Cal. 2012).

[4] A.B. 278, 2011-2012 Leg., Reg. Sess. (Cal. 2012).

[5] While some provisions of the California HBOR sunset on January 1, 2018, key provisions, including the general rule against dual tracking and the right to seek an injunction for a violation, remain in place indefinitely. Additionally, compared to the Settlement, California's Homeowner Bill of Rights provides stronger dual track

provisions, a different approach to the single point of contact requirements, and strong individualized enforcement mechanisms.

[6] For more information about California HOBR, *see* CTR. FOR RESPONSIBLE LENDING, CALIFORNIA HOMEOWNERS' BILL OF RIGHTS (HOBR) (2012), *available at* http://www.responsiblelending.org/california/ca-mortgage/policy-legislation/HOBR-Short-Summary-10-31.pdf.

[7] Mortgage servicers who foreclosed on 175 or fewer properties in California are exempt from the requirement to provide a single point of contact. CAL. CIV. CODE § 2923.7(g) (West 2012).

[8] California law also provides that a court may award the greater of triple actual damages or $50,000 if it finds that the servicer's violation was intentional, reckless or resulted from willful misconduct. CAL. CIV. CODE §§ 2924.12(b), 2924.19(b) (West 2012). The bill also gives servicers a right to cure. A mortgage servicer can avoid liability by correcting and remedying a violation at any time before a "trustee's deed upon sale" has been recorded (the document recorded following a foreclosure sale of the property). CAL. CIV. CODE §§ 2924.12(c), 2924.19(c) (West 2012).

[9] *See* Mortgage Servicing Rules under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. 10695 (Feb.14, 2013) (to be codified at 12 C.F.R. §1024), *available at* http://www.gpo.gov/fdsys/pkg/FR-2013-02-14/pdf/2013-01248.pdf.

[10] *See generally id.*

[11] Mortgage Servicing Rules under the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 10901 (Feb. 14, 2013) (to be codified at 12 C.F.R. § 1026), *available at* http://www.gpo.gov/fdsys/pkg/FR-2013-02-14/pdf/2013-01241.pdf.

[12] We believe that this CFPB rule is sufficient, and accordingly, do not recommend that the states adopt a similar rule (sometimes referred to as a "single point of contact" or "SPOC" rule).

[13] Mortgage Servicing Rules under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. 10695, 10897 (Feb.14, 2013), *available at* http://files.consumerfinance.gov/f/201301_cfpb_final-rule_servicing-respa-interpretations.pdf.

[14] S. 8143A, 2007-2008 Leg., Reg. Sess. (N.Y. 2008) (enacted as 2008 N.Y. Laws ch. 472).

[15] NY. COMP. CODES R. & REGS. tit. 3, § 419.11 (2012) (effective Oct. 1, 2010).

[16] *Id.*

[17] N.C. GEN. STAT. § 53-244.110(7) (2012). Specifically, the law provides as follows "In the event of a delinquency or other act of default on the part of the borrower, the mortgage servicer shall act in good faith to inform the borrower of the facts concerning the loan and the nature and extent of the delinquency or default and, if the borrower replies, to negotiate with the borrower, subject to the mortgage servicer's duties and obligations under the mortgage servicing contract, if any, to attempt a resolution or workout to the delinquency." *Id.*

This provision is subject to the mortgage servicer's duties and obligations under the mortgage servicing contract.

[18] MD. CODE ANN., REAL PROP. §§ 7-105.1(e)(2)(viii), 7-105.1(g) (LexisNexis 2012). "'Loss mitigation analysis' means an evaluation of the facts and circumstances of a loan secured by owner-occupied residential property to determine: (i) Whether a mortgagor or grantor qualifies for a loan modification; and (ii) If there will be no loan modification, whether any other loss mitigation program may be made available to the mortgagor or grantor." § 7-105.1(a)(5).

[19] MASS. GEN. LAWS ch. 244, § 35A(h)(2) (2012).

[20] Presentation slide provided by Laurie Goodman, Amherst Securities, to Eric Stein, Ctr. for Responsible Lending (Oct. 2012) (on file with authors).

[21] According to the Associated Press, "The number of U.S. homes repossessed by lenders last month fell 11 percent from January and declined 29 percent from February last year, tumbling to the lowest level since September 2007, [based on the] foreclosure listing firm RealtyTrac, Inc…. [However,] some states continued to see sharp increases in homes lost to foreclosure…, including Washington, Wisconsin and Iowa." *Sharp Drop in US Homes Lost to Foreclosure in February*, ASSOCIATED PRESS, Mar. 15, 2013, *available at* http://www.npr.org/templates/story/story.php?storyId=174257171. Consequently, many experts have attributed the decline in national foreclosure filings to the drop in California, where the Homeowner Bill of Rights went into effect, noting that California experienced a 39.5 percent decrease in foreclosure filings between December and January. *See RealtyTrac: California leads sharp drop in US homes that entered foreclosure in January*, ASSOCIATED PRESS, Feb. 14, 2013, *available at* http://www.foxnews.com/us/2013/02/14/realtytrac-california-leads-sharp-drop-in-us-homes-that-entered-foreclosure-in/#ixzz2NzqC3SDn; *see also* RealtyTrac, California Real Estate Trends & Market Info, http://www.realtytrac.com/statsandtrends/ca. Reuters notes: "Excluding the decline in California, foreclosure starts edged up less than 1 percent compared to December, said Daren Blomquist, Vice President at RealtyTrac." *U.S. foreclosure activity fell in January*, REUTERS, Feb. 14, 2013, *available at*

http://www.reuters.com/article/2013/02/14/usa-housing-realtytrac-idUSL1N0BDHUY20130214. This further supports our contention that state-based loss mitigation reforms are a vital first step in stabilizing the nation's housing market.

[22] *See* OFFICE OF THE COMPTROLLER OF THE CURRENCY, OCC MORTGAGE METRICS REPORT: FOURTH QUARTER 2012 22 t.13, 45 t.41 (2013) (compiled using 2012:Q4 data), *available at* http://www.occ.gov/news-issuances/news-releases/2013/nr-occ-2013-56a.pdf.

[23] *See infra* notes 43-44, 46-47 and accompanying text.

[24] DEBBIE G. BOCIAN ET AL., CTR. FOR RESPONSIBLE LENDING, COLLATERAL DAMAGE: THE SPILLOVER COSTS OF FORECLOSURES 2 (2012), *available at* http://www.responsiblelending.org/mortgage-lending/research-analysis/collateral-damage.pdf (CRL calculation based on MBA National Delinquency Survey, scaled to reflect market coverage. Per MBA's claims, we assume 85% market coverage for 2007q1-2010q2 and 88% coverage for 2010q3 and after). For spillover data by state, *see* Ctr. for Responsible Lending, The "Spillover" Costs of Foreclosures by State, http://www.responsiblelending.org/state-of-lending/mortgages/spillover-map.html; DEBBIE G. BOCIAN ET AL., CTR. FOR RESPONSIBLE LENDING, THE STATE OF LENDING IN AMERICA & ITS IMPACT ON U.S. HOUSEHOLDS 54-55 (2012), *available at* http://www.responsiblelending.org/state-of-lending/state-of-lending.html.

[25] Over one-half of the spillover loss is associated with communities of color: minority neighborhoods have lost or will lose $1 trillion in home equity as a result of spillover from homes that have started the foreclosure process, reflecting the high concentrations of foreclosures in neighborhoods of color. BOCIAN ET AL., COLLATERAL DAMAGE, *supra* note 24, at 2.

[26] *Id.* at 2, 2 n.2.

[27] *Id.* Families impacted in minority neighborhoods have lost or will lose, on average, $37,084 or 13.1 percent of their home value.

[28] *See* Kurt Eggert, *Limiting Abuse and Opportunism by Mortgage Servicers*, 15 HOUSING POLICY DEBATE 753, 756 (2004), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=992095; *see also generally* NAT'L CONSUMER LAW CTR, FORECLOSURES §§ 6.1-6.6.6 (3d ed. 2010) (detailing mortgage servicing abuses).

[29] Long before the financial crisis, the government took action against major mortgage servicers Ocwen, *see* Supervisory Agreement Between Ocwen Federal Bank FSB & Office of Thrift Supervision, OTS Docket No. 04592 (2004), *available at* http://www.ots.treas.gov/docs/9/93606.pdf, and Fairbanks, *see* U.S. v. Fairbanks Capital Corp. et al., No. 03-12219 (D. Mass. filed Nov. 12, 2003), *available at* http://www.ftc.gov/opa/2003/11/fairbanks.shtm. Additionally, private litigants alleged widespread abuses against the following servicers. *See, e.g.,* Hanson v. Ocwen Federal Bank et al., No. 3:02CV 960 (D. Conn. filed July 15, 2002), *available at* http://www.cbsnews.com/htdocs/pdf/ocwensuit.pdf; Lucas v. Fairbanks Capital Corp., No. 03-C-2 (W. Va. Circuit Ct. filed Jan. 7, 2003), *available at* http://www.nclc.org/images/pdf/unreported/lucas-v-fairbanks.PDF; Schaffer v. Litton Loan Servicing, LP, No. 05-07673 (C.D. Cal., order granting class certification May 18, 2007), *available at* http://www.lieffcabraser.com/cases.php?CaseID=52) (certifying a nationwide class action, including a separate class of California borrowers, alleging that Litton engaged in a scheme in which "it failed accurately to service its borrowers' loans and then falsely claimed that borrowers were in default."). *See also* Paul Jackson, "Homecomings' Servicing Practices Subject of Class-Action Lawsuit," HOUSINGWIRE, Feb. 11, 2008, *available at* http://www.housingwire.com/news/2008/02/11/homecomings-servicing-practices-subject-class-action-lawsuit (describing class action lawsuit filed against Homecomings Financial, LLC for "predatory servicing").

[30] For example, servicers are entitled to charge and collect a variety of fees after the homeowner goes into default and can recover the full amount of those fees off the top of the foreclosure proceeds. For a thorough discussion of the servicing incentive structure, *see Problems in Mortgage Servicing from Modification to Foreclosure: Hearing Before the S. Comm. On Banking, Housing and Urban Affairs*, 110th Cong. (2010) (Testimony of Diane Thompson, Nat'l Consumer Law Ctr.) *available at* http://banking.senate.gov/public/index.cfm?FuseAction=Hearings.Testimony&Hearing_ID=df8cb685-c1bf-4eea-941d-cf9d5173873a&Witness_ID=d9df823a-05d7-400f-b45a-104a412e2202; *see also* DIANE THOMPSON, NAT'L CONSUMER LAW CTR., WHY SERVICERS FORECLOSE WHEN THEY SHOULD MODIFY AND OTHER PUZZLES OF SERVICER BEHAVIOR 16-29 (2009), *available at* http://www.nclc.org/images/pdf/foreclosure_mortgage/mortgage_servicing/servicer-report1009.pdf.

[31] *See* Adam J. Levitin & Tara Twomey, *Mortgage Servicing*, 28 YALE J. ON REG. 1 (2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1324023 (arguing that a principal-agent problem in servicing has played a critical role in the foreclosure crisis).

[32] *See id.*

[33] *See* Levitin & Twomey, *supra* note 31, at 41-45; NAT'L CONSUMER LAW CTR., *supra* note 28, § 6.1.2; Eggert, *supra* note 27, at 759.
[34] *See, e.g.*, Schaffer v. Litton Loan Servicing, LP, No. 05-07673 (addressing Litton's understaffing and lack of training, and referring to testimony that Litton employees were instructed to throw away complaints because they could not address them all). *See also* Complaint at ¶ 8, *Homecomings* (alleging understaffing). *See also* Levitin & Twomey, *supra* note 31, at 37 (noting that "a servicer's ability to influence its net servicing income depends on its ability to … control servicing costs."). When federal regulators examined 14 federally regulated mortgage servicers during the fourth quarter of 2010, they found that most "had inadequate staffing levels or had recently added staff with limited servicing experience. … Examiners also noted weak controls, undue emphasis on quantitative production and timelines, and inadequate workload monitoring." *See* FED. RESERVE SYS., OFFICE OF THE COMPTROLLER OF THE CURRENCY & OFFICE OF THRIFT SUPERVISION, INTERAGENCY REVIEW OF FORECLOSURE POLICES AND PRACTICES 8 (2011), *available at* http://www.occ.gov/news-issuances/news-releases/2011/nr-occ-2011-47a.pdf.
[35] *See* Levitin & Twomey, *supra* note 31, at 71-72 (discussing servicers' financial disincentive to promote loan modifications). As reported in *Inside B&C Lending*, "Servicers are generally dis-incented [*sic*] to do loan modifications because they don't get paid for them but they do get paid for foreclosures." Further, "it costs servicers between $750 and $1,000 to complete a loan modification. *See Subprime Debt Outstanding Falls, Servicers Pushed on Loan Mods,* INSIDE B & C LENDING, Nov. 16, 2007. In the same article, Kathleen Tillwitz, a senior vice president at Dominion Bond Rating Service indicated that "'Some servicers are not doing any loan mods at all [because] [t]hey don't want to absorb the costs.'" *Id.* Moreover, due to the perverse incentives, some servicers manufacture defaults and push borrowers towards foreclosure. *See* Eggert, *supra* note 26, at 757 (citing *In re* Asbill, 1999 WL 33486100 (Bankr. D. S.C. 1999)); NAT'L CONSUMER LAW CTR., *supra* note 28, § 6.1.2 & n. 12-13 (discussing revenues generated from fee income).
[36] *See* Eggert, *supra* note 28, at 767-72 (addressing the issue of opportunism by servicers and discussing that the normal market forces that limit it are not present in the case of mortgage servicing); *Broken Dreams in the Poconos: The Response of the Secondary Markets and Implications for Federal Legislation: Hearing Before the Subcomm. on Capital Markets, Insurance and Government Sponsored Enterprises of the H. Comm on Financial Services*, 108th Cong. 2 (2004) (Testimony of Maureen McGrath, National Advocacy Against Mortgage Servicing Fraud), *available at* http://financialservices.house.gov/media/pdf/061404mm.pdf ("The financial incentives to provide good service to customers, which work in other sectors of our economy, don't work for loan servicing. The firm servicing mortgages will not get more customers by improving service quality, only higher costs. And the firm providing minimal service or less will not lose customers, because their customers are locked in.").
[37] *See* NAT'L CONSUMER LAW CTR., *supra* note 28 § 6.4.5.
[38] Complaint at 24, U.S. et al v. Bank of America et al., No. 1:12-cv-00361 (D.D.C. 2012), *available at* http://www.justice.gov/opa/documents/complaint.pdf.
[39] Sometimes homes are sold even after individuals have been approved for and are participating in loss mitigation programs. For example, Dirma Rodriguez had been paying on a trial loan modification for 13 months when the home in which she and her disabled daughter reside was foreclosed and sold to an investor. Gale Holland, *An Ugly Foreclosure Story, Starring Bank Of America*, L.A. TIMES, Apr. 13, 2012, *available at* http://articles.latimes.com/2012/apr/13/local/la-me-holland-20120413.
[40] *See* NAT'L CONSUMER LAW CTR., *supra* note 28, § 6.4.5; *see also Problems in Mortgage Servicing from Modification to Foreclosure: Hearing Before the S. Comm. On Banking, Housing and Urban Affairs,* 110th Cong. 9 (2010) (Testimony of Diane Thompson, Nat'l Consumer Law Ctr.), *available at* http://banking.senate.gov/public/index.cfm?FuseAction=Hearings.Testimony&Hearing_ID=df8cb685-c1bf-4eea-941d-cf9d5173873a&Witness_ID=d9df823a-05d7-400f-b45a-104a412e2202 (detailing that "Delay and deny is many servicers' standard response to loan modification requests.").
[41] *See, e.g.*, Olga Pierce & Paul Kiel, *By the Numbers: A Revealing Look at the Mortgage Mod Meltdown*, PROPUBLICA.ORG, Mar. 8, 2011, *available at* http://www.propublica.org/article/by-the-numbers-a-revealing-look-at-the-mortgage-mod-meltdown.
[42] *See, e.g.*, NAT'L ASSOC. OF CONSUMER ADVOCATES ET AL., SERVICERS CONTINUE TO WRONGFULLY INITIATE FORECLOSURES: ALL TYPES OF LOANS AFFECTED 1-2 (2012) (hereinafter NACA ET AL.), *available at* http://www.nclc.org/images/pdf/foreclosure_mortgage/mortgage_servicing/wrongful-foreclosure-survey-results.pdf; CAL. REINVESTMENT COAL., CHASM BETWEEN WORDS AND DEEDS IX: BANK VIOLATIONS HURT HARDEST HIT COMMUNITIES (2013), *available at* http://calreinvest.org/system/resources/W1siZiIsIjIwMTMvMDQvMDIvMjJfMTVfMzNfNjI3X0NoYXNtX0J3X1d

vcmRzX2FuZF9EZWVkc19JWF9GaW5hbF9SZXBvcnQucGRmIl1d/Chasm%20Bw%20Words%20and%20Deeds%20IX%20Final%20Report.pdf. The CRC survey compiled responses from 84 counselors and legal service advocates across California. CAL. REINVESTMENT COAL., CHASM BETWEEN WORDS AND DEEDS IX at 4. More than 60% of counselors reported that the big 5 settling servicers (Bank of America, Citibank, JP Morgan Chase, Wells Fargo and GMAC/Ally) dual track "sometimes," "often," or "always". *Id.* at 6. Before the NMS and California HBOR took effect, one hundred percent of California counselors reported that servicers "often" or "sometimes" started the foreclosure process while a modification application was under review, and 86% reported that homeowners "often" or "sometimes" had their homes sold in foreclosure while a modification application was under review. CAL. REINVESTMENT COAL., CHASM BETWEEN WORDS AND DEEDS VIII: LACK OF ACCOUNTABILITY PLAGUES CALIFORNIANS 2 (2012), *available at* http://calreinvest.org/system/resources/BAhbBlsHOgZmSSI1MjAxMi8wNC8xMi8wMl8yMl8yMl8yMTBfQ291bnNlbG9yU3VydmV5RklOQUwucGRmBjoGRVQ/CounselorSurveyFINAL.pdf. *See also* NAT'L ASSOC. OF CONSUMER ADVOCATES & NAT'L CONSUMER LAW CTR., SERVICERS CONTINUE TO INITIATE WRONGFUL FORECLOSURES 1-2 (2010), *available at* http://www.nclc.org/images/pdf/foreclosure_mortgage/mortgage_servicing/wrongful-foreclosure-survey.pdf (detailing that almost 99% of attorneys surveyed from 34 states reported serving a homeowner who was placed in foreclosure while awaiting a loan modification).

[43] For examples of homeowners harmed by this practice, *see* Yuki Noguchi, *Homeowners Facing Foreclosure Get New Protections*, NAT'L PUBLIC RADIO, Oct. 3, 2012, *available at* http://www.npr.org/2012/10/03/162203078/dual-tracking-to-stop-for-homeowners; Debra Gruszecki, *Homeowner Protesting 'Dual-Tracking' Gets Loan Modification Authorization*, THE PRESS ENTERPRISE, June 30, 2012, *available at* http://www.pe.com/business/business-to-business-headlines/20120629-real-estate-homeowner-protesting-dual-tracking-gets-loan-modification-authorization.ece.

[44] KATHERINE PORTER, CALIFORNIA MONITOR, OFFICE OF THE CAL. ATTY. GEN., WAITING FOR CHANGE: DUAL TRACKING AND HOME FORECLOSURE, THE FIRST REPORT OF THE CALIFORNIA MONITOR 8 (2012), *available at* http://californiamonitor.org/wp-content/uploads/2012/10/Report-Final-4p.pdf.

[45] *See* NACA ET AL., *supra* note 42, at 1.

[46] CAL. REINVESTMENT COAL., CHASM BETWEEN WORDS AND DEEDS IX, *supra* note 42, at 1 . The CRC survey compiled responses from 84 counselors and legal service advocates across California. *Id.* at 1. More than 60% of counselors reported that the big 5 settling servicers (Bank of America, Citibank, JP Morgan Chase, Wells Fargo and GMAC/Ally) dual track "sometimes," "often," or "always". *Id.* at 6.

[47] *Id.*

[48] *Id.* at 2.

[49] CAL REINVESTMENT COAL., CHASM BETWEEN WORDS AND DEEDS VIII, *supra* note 42, at 4.

[50] *See* Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. 10695, 10701 (noting that "servicers may be acting to maximize their self-interests in the handling of delinquent borrowers, rather than the interests of owners or assignees of mortgage loans.").

[51] *See* U.S. DEP'T OF TREASURY, MAKING CONTACT: THE PATH TO IMPROVING MORTGAGE INDUSTRY COMMUNICATION WITH HOMEOWNERS 10 (2012), *available at* http://www.treasury.gov/initiatives/financial-stability/reports/Documents/SPOC%20Special%20Report_Final.pdf (noting widespread problems and confusion experienced in attempting contact with servicers).

[52] Even after the single point of contact requirements of the NMS and California HBOR, counselors continue to report that contacts are "not accessible, consistent and knowledgeable," and that servicers continue to lose documents. CAL. REINVESTMENT COAL., CHASM BETWEEN WORDS AND DEEDS IX, *supra* note 42, at 4-5, 9-10.

[53] *Id.* at 12-13.

[54] *Legislative Proposals to End Taxpayer Funding for Ineffective Foreclosure Mitigation Programs: Hearing Before the Subcomm. on Insurance, Housing and Community Opportunity, H. Comm on Financial Services*, 111th Cong. 6 (2011) (Testimony of Neil M. Barofsky, Special Inspector General for The Troubled Asset Relief Program), *available at* http://financialservices.house.gov/media/pdf/030211barofsky.pdf.

[55] 78 Fed. Reg. at 10807.

[56] For example, a quarter of those denied a HAMP modification between 2009 and 2011 were told the denial was because their applications were missing required documentation. Given that servicers were notoriously incapable to tracking document submissions, many homeowners may have been wrongly denied because the servicer lost their documents. *See* Olga Pierce & Paul Kiel, *By the Numbers: A Revealing Look at the Mortgage Mod Meltdown*,

PROPUBLICA.ORG, Mar. 8, 2011, *available at* http://www.propublica.org/article/by-the-numbers-a-revealing-look-at-the-mortgage-mod-meltdown.

[57] The national mortgage settlement arose from claims of robosigning. The settlement agreement "settles state and federal investigations finding that the country's five largest mortgage servicers routinely signed foreclosure related documents outside the presence of a notary public and without really knowing whether the facts they contained were correct. Both of these practices violate the law." *See* About the Settlement, http://nationalmortgagesettlement.com/about (last visited Mar. 26, 2013). The Center for Responsible Lending served as co-counsel in several cases relating to these issues, including a Maine class action filed against GMAC Mortgage. *See* Archibal et al. v. GMAC Mortgage, LLC, No. CV-2010-494 (Me. Super. Ct. filed Oct. 1, 2010), *available at* http://www.molleurlaw.com/themed/molleurlaw/files/uploads/GMAC%20Maine%20Class%20Action%20Complaint.pdf. *See also* AEQUITAS COMPLIANCE SOLUTIONS, FORECLOSURES IN CALIFORNIA: A CRISIS OF COMPLIANCE 1 (2012), *available at* http://www.sfassessor.org/Modules/ShowDocument.aspx?documentid=1018 (prepared for S.F. Office of the Assessor-Recorder) (analyzing a sampling of the paperwork surrounding residential foreclosures conducted in San Francisco between January 2009 and October 2011, and identifying "clear violations of law" in 84% of the loans).

[58] In addition to the violations cited in the National Mortgage Settlement, *see* Complaint at 21-47, U.S. et al v. Bank of America et al., No. 1:12-cv-00361 (D.D.C. 2012), *available at* http://www.justice.gov/opa/documents/complaint.pdf. Additionally, federal regulators examined the foreclosure policies and practices of 14 federally-regulated servicers during the fourth quarter of 2010 and concluded that, "the majority of servicers reviewed had inadequate affidavit and notary-signing processes that did not ensure proper attestation (or verification) of the underlying documents." *See* FED. RESERVE SYS. ET AL., *supra* note 34, at 7. In addition to federal-level actions, several states have reached agreements with servicers for ongoing abuses. In December 2012, New York required Ocwen Financial Corporation to agree to a monitor to ensure that it complies with reforms to its mortgage servicing practices that it had agreed to in 2011. *See* Press Release, New York Department of Financial Services, Cuomo Administration Requires Major Mortgage Servicer to Install Monitor to Ensure Promised Reforms are Implemented (Dec. 5, 2012), *available at* http://www.dfs.ny.gov/about/press/pr1212051.htm. Others are continuing to pursue litigation. For example, while others have settled with Lender Processing Services, Nevada's Attorney General continues to pursue action against LPS. *See* Chris Sieroty, *Nevada Is Last State Standing as Mortgage Processor Reaches Settlement*, LAS VEGAS REVIEW-JOURNAL, Jan. 30, 2013, *available at* http://www.lvrj.com/business/nevada-is-last-state-standing-as-mortgage-processor-reaches-settlement-189210581.html.

[59] The CFPB rules include a partial exemption for small servicers. A small servicer is one which, together with its affiliates, services (either as the originator or as an assignee) 5,000 or fewer single family residential mortgage loans, as of January 1st of any given year. Mortgage Servicing Rules under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. 10695, 10876 (Feb.14, 2013) (to be codified at 12 C.F.R § 1024.30(b)). Housing finance agencies are also considered "small servicers," despite the sizes of their servicing portfolios. *Id.* Small servicers must not begin the foreclosure process until a homeowner is more than 120 days delinquent, and is prohibited from taking the next step in the foreclosure process while a homeowner is performing on a loss mitigation agreement. *Id.* at 10885 (to be codified at 12 C.F.R § 1024.41(j)). The California HBOR also contains a limited exemption for small servicers. In California, the general dual tracking and enforcement provisions still apply to small servicers, but the specific procedural details do not apply so as to ease the burden. CAL. CIV. CODE §§ 2923.55(g), 2923.6(i), 2923.7(g), 2923.10(c), 2924.11(i), 2923.5, 2924.18, 2924.19 (West 2012). California defines small servicers as those that foreclose on fewer than 175 residential properties in the prior year. *See, e.g.*, *id.* § 2924.18(b). States may choose to implement a similar *limited* exemption for certain small servicers, while still applying the general dual tracking proscriptions, as the CFPB rules and HBOR both do.

[60] On March 26, 2013, CRL and other groups called on the Treasury Department to extend the HAMP program. *See* Letter from Ctr. for Responsible Lending et al. to Jacob Lew, Secretary, U.S. Dep't of Treasury (Mar. 26, 2013), *available at* http://www.responsiblelending.org/mortgage-lending/policy-legislation/regulators/2013-hamp-extension-letter-final-march-28.pdf.

[61] Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. 10695, 10819.

[62] *Id.*

[63] CAL. CIV. CODE §§ 2923.6(c), 2924.11(b) (West 2012).

[64] The CFPB rule does provide a private right of action under RESPA, but for damages only. Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. 10695, 10884 (to be codified at 12 C.F.R. pt. 1024.41(a) (citing 12 U.S.C. 2605(f)). Under RESPA, the homeowner is only provided actual damages, typically after a foreclosure sale has been completed. Real Estate Settlement Procedures Act, 12 U.S.C. § 2605(f). A homeowner cannot bring an action to stop a foreclosure sale or raise a defense to foreclosure if the servicer fails to comply with the rules. *Id.* Moreover, given that most homeowners are delinquent in their payments and have homes that are under water, damages, if any, can be difficult to prove.

[65] *See* CTR. FOR RESPONSIBLE LENDING ET AL., COMMENTS TO THE CONSUMER FINANCIAL PROTECTION BUREAU RE: 2012 REAL ESTATE SETTLEMENT PROCEDURES ACT (REGULATION X) MORTGAGE SERVICING PROPOSAL 2 (2012), *available at* http://www.responsiblelending.org/mortgage-lending/policy-legislation/regulators/CRL-CFA-CAP-Mortgage-Servicing-Standards-Comment.pdf.

[66] *See* LAURIE S. GOODMAN ET AL., AMHERST SECURITIES GRP. LP, MODIFICATION EFFECTIVENESS: THE PRIVATE LABEL EXPERIENCE AND THEIR PUBLIC POLICY IMPLICATIONS 7 (2012) (submitted to the Pew Charitable Trusts Conference on Strategies for Revitalizing the Housing Market), *available at* http://www.pewstates.org/uploadedFiles/PCS_Assets/2012/Goodman_et_al_%20Modification_Effectiveness.pdf.

[67] Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. 10695, 10819-20.

[68] *Id.*

[69] Mortgage Servicing Rules under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. 10695, 10897 (Feb. 14, 2013), *available at* http://files.consumerfinance.gov/f/201301_cfpb_final-rule_servicing-respa-interpretations.pdf.

[70] *See, e.g.*, MD. CODE ANN., REAL PROP. § 7-105.1 (LexisNexis 2012) (requiring servicers to submit a loss mitigation affidavit both to start and end the foreclosure process). California law does require the filing of a declaration, but it has become a boilerplate document without any detail, and has not proven effective. *See, e.g.*, CAL. CIV. CODE § 2923.5(b) (West 2012). A more detailed requirement like that in the Maryland law is preferable.