Date of Hearing: April 16, 2011

ASSEMBLY COMMITTEE ON BANKING AND FINANCE
Mike Eng, Chair
AB 2425 (Mitchell) – As Amended: April 9, 2012

SUBJECT: Mortgages and deeds of trust: foreclosure

SUMMARY: Requires a mortgage servicer to provide a delinquent borrower with a single point of contact (SPOC) for the purpose of expediting loss mitigation evaluation and activities. Additionally, prohibits use of robosigned documents in the foreclosure process. Specifically, this bill:

1) Provides for a borrower that is 60 days or more delinquent, the mortgage servicer shall inform the borrower that if they wish to pursue loss mitigation, the servicer shall establish a SPOC for the borrower.

2) Requires that, upon written or telephonic request by the borrower requesting loss mitigation assistance and who is 60 days or more delinquent, the servicer shall provide the borrower with the contact information of the SPOC within 10 business days.

3) States that if a SPOC changes the borrower shall be informed of the new contact information no later than five business days after the change.

4) Provides that the SPOC is responsible for the following activities:

    a) Communicating the options available to the borrower, the actions the borrower must take to be considered for those options, and the status of the mortgage servicer's evaluation of the borrower for those options;

    b) Coordinating receipt of all documents;

    c) Maintaining and providing accurate information about the borrower's situation and current status in the loss mitigation process;

    d) Ensuring that a borrower, who is not eligible for the federal Making Home Affordable (MHA) program, is considered for proprietary or other investor loss mitigation options; and

    e) Having access to individuals with the ability to stop foreclosure proceedings.

5) Requires the SPOC to remain assigned to the borrower's account until the mortgage servicer determines that all loss mitigation options have been exhausted, the borrower's account becomes current, or, in the case of a borrower in bankruptcy, the borrower has exhausted all loss mitigation options for which the borrower is potentially eligible and has applied;

6) Provides that the mortgage servicer shall ensure that a SPOC refers and transfers a borrower to an appropriate supervisor upon request of the borrower;

7) Prohibits an entity from recording a notice of default (NOD) or otherwise initiating the foreclosure process unless it is the beneficial interest under the deed of trust. Additionally, provides that an agent shall not record an NOD with specific direction of the actual holder of the beneficial interest under the deed of trust.

8) Provides an operative date of July 1, 2013 for the SPOC provisions.

9) Defines a "robosigned document" as any document that contains factual assertions that are not accurate, are incomplete, or are unsupported by competent, reliable evidence. A "robosigned document" also means any document that has not been reviewed by its signer to substantiate the factual assertions contained in the document. For purposes of this definition, multiple people may verify the document or statement so long as the document or statement specifies the portions verified by each signer.

10) Specifies that any entity that records a robosigned document or files a robosigned document in any court relative to a foreclosure proceeding shall be liable for a civil penalty of $10,000 per robosigned document.

11) Provides that the Department of Real Estate, Department of Corporations and Department of Financial Institutions may enforce civil penalties against their respective licensees for a violation.

12) Allows a borrower to seek an injunction to halt a pending trustee sale if the notice of sale (NOS) has been recorded and the borrower reasonably believes that the mortgagee, trustee, beneficiary, or authorized agent failed to comply with the requirement to appoint a SPOC, or following the statutory requirements of the foreclosure process. The injunction would remain in place until the aforementioned provisions are complied with.

13) Provides that if a trustee sale has been completed and the borrower reasonably believes the mortgagee, trust, beneficiary, or authorized agent failed to comply, the borrower may seek the greater of actual damages or $10,000 plus attorney's fees and costs. For violation that are intentional, reckless, or resulted from willful misconduct, damages are treble actual damages or $50,000 plus attorney's fees and costs.

14) Defines "Mortgage servicer" as a person or entity responsible for the day-to-day management of a mortgage loan account, including collecting and crediting periodic loan payments, managing any escrow account or enforcing mortgage loan terms either as the holder of the loan note or on behalf of the holder of the loan note.

EXISTING LAW

1) Regulates the non-judicial foreclosure process pursuant to the power of sale contained within a mortgage contract, and provides that in order to commence the process, a trustee, mortgagee, or beneficiary must record a NOD and allow three months to lapse before setting a NOS for the property. [Civil Code Section 2924, all further references are to the Civil Code].

2) Provides that the mortgagee, trustee or other person authorized to make the sale must give NOS, and requires the NOS to be made, as specified, at least 20 days prior to the date of sale. [Section 2924f].

3) Provides that a mortgage, trustee, beneficiary, or authorized agent may not file a NOD until 30 days after contact has been made with the borrower who is in default. [Section 2923.5a1].

4) Requires the mortgagee, trustee, beneficiary or authorized agent to contact a borrower in default in person or by telephone and inform them of their right to a subsequent meeting, and telephone number of U.S. Department of Housing and Urban Development (HUD) to find a HUD- certified housing counselor. [Section 2923.5a2].

5) Allows a borrower to assign a HUD-certified counselor, attorney or other advisor to discuss with the entities options for the borrower to avoid foreclosure. [Section 2923f].

6) Provides that a NOD may be filed when the mortgagee, trustee, beneficiary or authorized agent has not contacted the borrower provided that the failure to contact the borrower occurred despite reasonable due diligence on the part of the entity and that "due diligence" means and requires the following:

   a) The mortgagee, trustee, beneficiary or authorized agent sends a first class letter that includes the toll-free number available for the borrower to find a HUD-certified housing counseling agency; and,

   b) Subsequent to the sending of the letter the mortgagee, trustee, beneficiary or authorized agent attempts to contact the borrower by telephone at least three times at different hours and on different days. [Section 2923g].

7) Requires the mortgagee, trustee, beneficiary or authorized agent to maintain a toll-free number for borrowers that will provide access to a live representative during business hours and requires the mortgagee, trustee, beneficiary or authorized agent to maintain a link on the main page of its Internet Web site containing the following information:

   a) Options that may be available to borrowers who are unable to afford their mortgage payments and who wish to avoid foreclose, and instructions to borrowers advising them on steps to take to explore these options; and,

   b) A list of documents borrowers should collect and be prepared to submit when discussing options to avoid foreclosure. [Section 2923g (5)].

8) Specifies that the notice and contact requirements do not apply in the following circumstances:

   a) The borrower has surrendered the property as evidenced via a letter or delivery of keys to the property to the mortgagee, trustee, beneficiary or authorized agent ;

   b) The borrower has contacted a person or organization whose primary business is advising people who have decided to leave their homes on how to extend the foreclosure process and avoid the contractual obligations; or,

c) The borrower has filed for bankruptcy. [Section 2923h].

9) Makes legislative findings and declarations that a loan servicer acts in the best interest of all parties if it agrees to, or implements a loan modification or workout plan in one of the following circumstances:

   a) The loan is in payment default, or payment default is reasonably foreseeable; or,

   b) Anticipated recovery under the loan modification or workout plan exceeds the anticipated recovery through foreclosure on a net present value basis. [Section 2923.6].

10) Requires that upon posting of a NOS, the mortgagee, trustee, beneficiary or authorized agent shall mail to the borrower a notice in English and Spanish, Chinese, Tagalog, Vietnamese, or Korean that states:

> "Foreclosure process has begun on this property, which may affect your right to continue to live in this property. Twenty days or more after the date of this notice, this property may be sold at foreclosure. If you are renting this property, the new property owner may either give you a new lease or rental agreement or provide you with a 60-day eviction notice. However, other laws may prohibit an eviction in this circumstance or provide you with a longer notice before eviction. You may wish to contact a lawyer or your local legal aid or housing counseling agency to discuss any rights you may have." [Section 2924.8].

11) Provides that a NOS postponement may occur at any time prior to the completion of a sale for any period of time not to exceed a total of 365 days from the date set in the NOS. [Section 2924g]

12) Specifies that if sale proceedings are postponed for a period totaling more than 365 days, the scheduling of any further proceedings shall be preceded by giving a new NOS. [Section 2924g]

FISCAL EFFECT: Unknown

COMMENTS:

AB 2425, sponsored by Attorney General Kamala Harris, contains two distinct provisions relating the foreclosure process. First, this bill requires servicers to establish a SPOC to assist borrowers with the loan modification process. Second, this bill provides prohibitions on robosigning.

On April 6th, a federal judge signed-off on the $25-billion foreclosure settlement, first announced in February of 2012, between banks (Citi, Wells Fargo, Bank of America, Chase and Ally), federal agencies, and the state attorneys general from 49 states and the District of Columbia. The investigation began in October of 2010 as media stories highlighted widespread allegations regarding the use of "robo-signed" documents used in foreclosure proceedings around the country. The attorneys general formed working groups to investigate the widespread allegations,

however, further investigation led to a larger discussion with the five largest mortgage loan servicers regarding various facets of the foreclosure and loan modification process. While conducting their investigation the attorneys general identified deceptive practices regarding loan modifications, foreclosures occurring due to the servicer's failure to properly process paperwork, and the use of incomplete paperwork to process foreclosures in both judicial and non-judicial foreclosure cases.

The complaint filed by the attorneys general, provided a detailed list of allegations concerning several key areas related to foreclosure and servicing practices. The specific allegations include:

- Unfair, deceptive, and unlawful servicing process;
- Unfair, deceptive, and unlawful loan modification and loss mitigation processes;
- Wrongful conduct related to foreclosures;
- Unfair and deceptive origination practices; and
- Violation of the Servicemembers Civil Relief Act.

In resolving the aforementioned claims, the settlement provides for relief for borrowers in the form of modifications, mortgage loan servicing reforms, increased compliance monitoring and enforcement.

The settlement requires a total of $17 billion to be allocated to facilitate loan modifications to borrowers with the intent and ability to stay in their homes. Of the $17 billion, 60% must be allocated to principal reduction modifications. Additionally, banks must offer refinance programs through the use of $3 billion to assist borrowers with negative equity whom otherwise would be unable to refinance. Additional settlement monies are dedicated to borrowers who were wrongfully foreclosed on after January 1, 2008 (Approx. $1.5 billion in relief), and another $2.5 billion to the states for foreclosure relief and housing programs.

The settlement also requires major changes concerning servicing of the five banks party to the settlement. These changes include:

- Information in foreclosure affidavits must be personally reviewed and based on competent evidence.
- Holders of loans and their legal standing to foreclose must be documented and disclosed to borrowers.
- Borrowers must be sent a pre-foreclosure notice that will include a summary of loss mitigation options offered, an account summary, description of facts supporting lender’s right to foreclose, and a notice that the borrower may request a copy of the loan note and the identity of the investor holding the loan.

- Borrowers must be thoroughly evaluated for all available loss mitigation options before foreclosure referral, and banks must act on loss mitigation applications before referring loans to foreclosure; i.e. “dual tracking” will be restricted.
- Denials of loss mitigation relief must be automatically reviewed, with a right to appeal for borrowers.
- Banks must implement procedures to ensure accuracy of accounts and default fees, including regular audits, detailed monthly billing statements and enhanced billing dispute rights for borrowers.
- Banks are required to adopt procedures to oversee foreclosure firms, trustees and other agents.
- Banks will have specific loss mitigation obligations, including customer outreach and communications, time lines to respond to loss mitigation applications, and e-portals for borrowers to keep informed of loan modification status.
- Banks are required to designate an employee as a continuing SPOC to assist borrowers seeking loss mitigation assistance.
- Military personnel who are covered by the Servicemembers Civil Relief Act (SCRA) will have enhanced protections.
- Banks must maintain adequate trained staff to handle the demand for loss mitigation relief.
- Application and qualification information for proprietary loan modifications must be publicly available.
- Servicers are required to expedite and facilitate short sales of distressed properties.
- Restrictions are imposed on default fees, late fees, third-party fees, and force-placed insurance.

For a detailed look at the complaint and resulting settlement, a full list of documents can be found at http://www.nationalmortgagesettlement.com/.

SPOC.

The mortgage settlement requires that the servicers party to the settlement establish a SPOC for "each potentially eligible first lien mortgage borrower so that the borrower has access to an employee of the servicer to obtain information throughout the loss mitigation, loan modification and foreclosure processes (Exhibit A, page 21 of the settlement documents)."

The issues preceding the need for inclusion of a SPOC in the loan modification process have been well documented. Borrowers have reported via media outlets and in other forums regarding frustration in seeking loss mitigation has resulted in numerous phone calls with different people, each one not aware of the efforts of the other. Additionally, borrowers have reported submitting paperwork to one contact at a servicer to only get passed on to another contact who then requests the same information for submission. In the worst cases, paperwork is lost, or the foreclosure

process continues while the borrower believes they are being genuinely evaluated for a loan modification.

In April of 2011, Federal regulators (Office of Comptroller of Currency, Office of Thrift Supervision, and Federal Reserve System) issued enforcement orders against Ally Bank/GMAC, Aurora Bank, Bank of America, Citibank, EverBank, HSBC, JPMChase, MetLife, OneWest, PNC, Sovereign Bank, SunTrust, US Bank, and Wells Fargo. These orders were based on a review conducted by the regulators of the foreclosure policies and practices of these servicers. The orders, among other things, mandated that the servicers establish a SPOC for borrowers throughout the modification process. The federal regulatory enforcement orders require, in specific reference to SPOC, that

1) A SPOC is established for each borrower to remain with them throughout the lost mitigation process;

2) Written communications with the borrower identify such SPOC along with one or more direct means of communication with the contact;

3) SPOC has access to current information and personnel (in-house or third-party) sufficient to timely, accurately, and adequately inform the borrower of the current status of the Loss Mitigation, loan modification, and foreclosure activities;

4) Measures to ensure that staff are trained specifically in handling mortgage delinquencies, Loss Mitigation, and loan modifications;

5) Procedures and controls to ensure that a final decision regarding a borrower's loan modification request (whether on a trial or permanent basis) is made and communicated to the borrower in writing, including the reason(s) why the borrower did not qualify for the modification.

Following these enforcement guidelines, the United States Treasury Department issued additional guidance under the Making Home Affordable (MHA) modification program (Supplemental Directive 11-04, issued May 11, 2011 and effective on September 1, 2011). The directive provided, "Each servicer subject to this Supplemental Directive must establish and implement a process through which borrowers who are potentially eligible for HAMP, the Home Affordable Unemployment Program (UP) or Home Affordable Foreclosure Alternatives (HAFA) are assigned a relationship manager to serve as the borrower's single point of contact through the entire delinquency or imminent default resolution process."

Does the assignment of a SPOC work to encourage greater efficiency and outcomes in the foreclosure process? According to Alan Jones, senior Vice President of Wells Fargo Home Mortgage, while speaking on a panel at a Mortgage Bankers Association servicing conference in 2011, "the single-point of contact does work. It has helped to avoid foreclosures when the borrower has one person to call while filling out their documentation" (*Wells Fargo Finalizing Electronic Mortgage Modification Revamp*, Housingwire-February 25th, 2011).

Robosigning.

AB 2425 prohibits the use of robosigned documents in the foreclosure process. Robosigning has gained national attention as reports revealed rampant shortcomings with foreclosing processing. Robosigning was first discovered in 2009 by Palm Beach, Florida Attorney Tom Ice after he deposed a bank employee who admitted to signing hundreds of foreclosure documents in a day without looking at them.

Often these problems appeared to be limited to judicial foreclosure states where a foreclosure requires various court filings. However, media reports demonstrated that the issue was not limited to judicial foreclosure states. A January 20, 2011 article in American Banker (*New Point of Foreclosure Contention: Default Notice*) provided the following:

> At issue is the notice of default, the first letter that a mortgage lender or servicer sends to a homeowner who has fallen behind on payments. The notice typically starts the formal foreclosure process in nonjudicial states such as California, Arizona and Nevada.
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> Every notice of default has a signature on it. But just like the infamously rubber-stamped affidavits in the robo-signing cases, default notices, in at least some instances, have been signed by employees who did not verify the information in them, court papers show. In several lawsuits filed in nonjudicial states, borrower attorneys are arguing that this is grounds to stop a foreclosure.
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> "Whoever signs the NOD needs to have knowledge that there is in fact a default," said Christopher Peterson, an associate dean and law professor at the University of Utah.
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> The suits also argue that the default notices are invalid because the employees who signed them worked for companies that did not have standing to foreclose.
>
> In a lawsuit against Wells Fargo & Co. in Nevada, an employee for a title company who signed default notices admitted in a deposition this month that he did not review any documents or know who had the right to foreclose.
>
> "They are starting foreclosures on behalf of companies with no authority to foreclose," said Robert Hager, an attorney with the Reno, Nev., law firm Hager & Hearne, representing the borrower in the case. "The policy of these companies is to just have a signer execute a notice of default starting foreclosure without any documentation to determine whether they are starting an illegal foreclosure."
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> The Nevada nonjudicial foreclosure statute requires that the company signing a notice of default have the authority to foreclose, Hager said.
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> In a deposition on Jan. 4, Stanley Silva, a title officer at Ticor Title of Nevada Inc., said he "technically signed" default notices for clients, which were often acting as agents of other parties, which in turn worked for others.
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> "The person at the bottom of the chain, by executing the document, has taken an action on behalf of all of them through their various agency agreements," Silva said. In one case, for example, he said he had signed "on behalf of Ticor Title of Nevada, who is agent for LPS Title, who is agent for National Default Servicing."

"Who is agent for Fidelity National?" Hager asked. "Apparently, yes," Silva replied.

"Which is a servicer for Wilshire?"

"Apparently."

Silva said under oath that he never reviewed any documents or knew what company was the holder of the original note at the time he signed the notice of default. He said he signed about 200 default notices over a four-year period.

When asked by Hager if he signed notices of default "without verifying the accuracy of the information," Silva replied: "Correct."

Representatives for Wells Fargo did not return calls seeking comment. The intermediaries that Silva mentioned in his testimony either did not return calls or declined to comment.

Walter Hackett, a lawyer with Inland Counties Legal Services, in San Bernardino, Calif., and a former banker with Bank of America Corp. and Union Bank, has filed several cases contesting notices of default, on the grounds that the employees signing such notices were working for companies that are not the note holders — or even their appointed agents.

"A huge percentage of notices of default and notices of trustee sales are legally questionable and probably void," Hackett said. "Nobody with the authority to trigger the nonjudicial foreclosure process is triggering it — only third parties who claim they have the right to do so are triggering it."

After a notice of default is sent to the borrower and filed at the county recorder's office, a notice of sale is typically published in the local newspaper and the sale of the property often takes place without the borrower even knowing the home has been sold to another party.

O. Max Gardner 3rd, a consumer bankruptcy attorney at Gardner & Gardner PLLC in Shelby, N.C., said the default notice is "the key legal document that is sent to the borrower" before a notice of sale.

Thousands of judicial-state foreclosures were halted last year after several banks including Ally Financial Inc.'s GMAC Mortgage and Bank of America Corp. admitted that employees had signed affidavits without reviewing the documents. In several judicial states, including New York and Florida, sloppy paperwork by servicers has led courts to require that companies verify they have all the proper documents, including proof they own the mortgage before foreclosing.

This month, in a closely watched case, the Supreme Judicial Court of Massachusetts (a nonjudicial state) rejected claims made by U.S. Bancorp and Wells Fargo that the banks, as securitization trustees, did not have to prove their authority to foreclose on two separate homes.

Peterson, the law professor, said one difference between the notice of default cases and the widely publicized robo-signing incidents is that in the latter, affidavits are given to judges whereas the notice of default is not strictly a legal document.

> But consumer lawyers said homeowners face a bigger legal burden in nonjudicial sates because they have to file a lawsuit against the holder of the note to bring any action in court.
>
> "Because there's no court reviewing anything in nonjudicial states," abuses are "probably even more rampant," Gardner said. "This is just another example of robo-signing in a different context."

The United States Department of Housing and Urban Development, Office of Inspector General (OIG) conducted a review of the servicing practices of the five servicers party to the national mortgage settlement. These reviews were conducted due to reported allegations made in the fall of 2010 that servicers were engaged in widespread foreclosure practices that involved the use of robosigning of foreclosure documents. The five servicers were examined based on their status as Federal Housing Administration (FHA) direct endorsement lenders that can originate, sponsor and service FHA-insured loans. Among the findings included in one of the reports (*Bank of America Corporation Foreclosure and Claims Process Review*. HUD, Office of Inspector General, March 12, 2012) were the following

- *"*Bank of American did not establish effective control over its foreclosure process."
- "Bank of America did not establish a control environment that ensured that's its notaries met their responsibilities under State laws that required them to witness affiants' signatures on documents they notarized." The sample of documents reviewed by OIG "included documents with notary stamps from Texas and California." California law requires a notary to verify the signature of signers.
- "Bank of America's claim files for the 118 sample loans did not consistently contain relevant pre- foreclosure information that supported the legal basis for foreclosure"
- "Bank of America conveyed a property located in Modesto, CA, to HUD with incorrect legal description. California is a two-deed State, requiring a trustee deed and grant deed. The grant deed conveying the property title to HUD used a legal description for a property on another street. Because the legal description was incorrect, Bank of America did not give HUD good and marketable title to the property."

Similar HUD OIG reports exist for Wells, Citi, Chase, and Ally Financial.

REGISTERED SUPPORT / OPPOSITION:

Support

Department of Justice, Attorney General (Sponsor)
California Professional Firefighters (CPF)
California School Employees Association
Cambridge Credit counseling
Center for Responsible Lending (CRL)

ClearPoint Financial Services
Coalition for Quality Credit Counseling (CQCC)
Consumer Credit Counseling Service of Orange County
Consumer Credit Counseling Service of San Francisco
Consumer Credit Counseling Service of the North Coast
Consumer Credit Counseling Service of the Twin Cities
GreenPath
Home Strong USA
InCharge
Lutheran Office of Public Policy - California
Money Management International
Novadebt
Springboard Nonprofit Consumer Credit Management
SurePath Financial Solutions

Opposition

California Bankers Association
California Chamber of Commerce
California Credit Union League
California Financial Services Association
California Independent Bankers
California Land Title Association
California Mortgage Association
California Mortgage Bankers Association
Securities Industry and Financial Markets Association
United Trustees Association

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