AMERICAN BANKER

Don't Punish Consumers for Servicers' Foreclosure Backlogs

American Banker
November 20, 2012
By Mark Kaufman

The Federal Housing Finance Agency recently announced a plan to impose a surcharge on mortgages in states with long foreclosure timelines. While the concern for backlog and associated cost is reasonable, the FHFA should look more closely at the performance of Fannie Mae and Freddie Mac and the servicers they employ before exerting federal influence over state-level foreclosure policy and passing the hat to the borrowers that the agency presumably exists to serve.

The proposal reportedly employs statistical analysis to deem five states out of "the norm" in terms of their timelines. In response, FHFA proposes to impose a fee of $3 to $10 per month for each new mortgage in each state. That can add up to an extra $1,000 to $3,600 over the life of a mortgage. The proposal openly invites states to avoid this charge by changing their law to accelerate foreclosures.

On one level, this approach ignores the merits of state requirements and the fact that many of these requirements have existed for decades. The recent robo-signing scandal highlighted systemic failures to comply not so much with new laws, but with laws already on the books – taking the time to validate title, for example. In other instances, issues such as the dual tracking of foreclosures and modifications and the loss of documents created confusion for borrowers and plagued efforts to avoid foreclosure.

Barred from overseeing large servicers by preemption, states responded in other ways. Courts in states with judicial foreclosure enhanced oversight to ensure that due process was followed before homes were taken. State Attorneys General, joined by the Department of Justice, the Department of Housing and Urban Development, and state bank regulators, entered into the $25 billion National Servicing Settlement. Beyond monetary terms, the settlement finally enabled states to prescribe detailed servicing standards to elevate industry practices.

Given this backdrop, it would seem that the FHFA should ensure compliance by Fannie and Freddie servicers before pressuring states to come into "the norm."

Even where states have enacted new protection, timelines and backlog are not solely a function of state law. Significant responsibility for, and control over, timing remains with servicers and their agents or attorneys. In the wake of the crisis, servicers have acknowledged that their capabilities have been underdeveloped and underfunded, creating confusion and inefficiency that not only impede avoiding foreclosure, but complicate the process.

The critical role of the servicer is illustrated by data provided pursuant to the National Servicing Settlement. The five servicers involved handle roughly 60% of the U.S. market, including 400,000 first-lien mortgages that were 180 days past due as of Sept. 30, 2012. These severe delinquencies presumably comprise a major part of the backlog concerning the FHFA. Based on the data, Bank of America, which accounts for 28% of the loans serviced in the group, is servicing 65% of the severely delinquent loans. By contrast, Bank of America is servicing only 32% of the loans in foreclosure. The data lacks further detail, but it appears that Bank of America, by choice or otherwise, is moving loans to foreclosure far more slowly than others.

This inference is supported by our experience in Maryland, where I am the commissioner of Financial Regulation. Our state has a relatively long foreclosure timeline, though not long enough to be subject to the surcharge. The first step in the process is the issuance of a warning letter, called a Notice of Intent to Foreclose. This letter may be sent to borrowers as soon as 45 days after delinquency and a copy is sent to my office.

Just after the FHFA announcement, Bank of America submitted more than 10,000 notices, after submitting virtually none for several months. Many of the borrowers were receiving a reissuance of a prior notice, presumably to ensure legal compliance. For thousands, this was the third such notice as the same pattern had occurred in the spring.

During the 12 months ending Sept. 30, Bank of America accounted for 48% of the notices filed. The borrowers were, on average, more than 500 days delinquent. By contrast, notices filed by the next three largest servicers averaged 180 days delinquent – creating a gap of *almost a full year*. Leaving aside that state law allows the notice to be sent as soon as 45 days after delinquency, this data suggests that a major statistical driver of time is not the law, but who services your mortgage.

There is no doubt that foreclosure timelines have extended, particularly in judicial states. At the same time, seeking to accelerate a process that results in taking a person's home should not be done lightly.

The FHFA should more closely examine the issue and the servicing industry it helps to oversee before passing the hat to consumers and pressuring states to respond by simply lowering the bar.

Mark Kaufman is the commissioner of the Maryland Office of Financial Regulation.