

EDITORIAL

A Successful Program Surges

THE DEPARTMENT OF HOUSING AND URBAN Development's Section 184 Native American mortgage program has just had its most successful year, at nearly a half-billion dollars of home finance to American Indians and Alaska Natives.

In a year where overall mortgage lending has been stagnant, the HUD 184 has kicked it up a gear and increased by 25% over fiscal 2009. And the program has tripled its annual findings since 2006 during an era of retrenchment and disaster for the mortgage industry.

Since inception during the 1990s, total fundings are \$1.8 billion for 12,062 mortgages, for an average of about \$150,000 per financing.

One big reason for the jump in volume has been an increase in the number of loans

made to Native Americans off-reservation. Some 10,000 loans have been made to Natives living on "fee simple" land (private property) vs. a little more than 2,000 to those living on tribal trust land or "allotted" trust land. (The U.S. government holds tribal lands "in trust" for tribes or individual Indians, a status that makes mortgages much more difficult to perfect.) That's about 16% going to Natives who live on tribal trust or allotted land. But in fiscal 2010, of 3,028 loans made to Indians and Alaska Natives, just 183 went to mortgages on reservations, or about 6%, indicating an acceleration of a trend away from reservation loans, where alternatives are scarce, to private property loans, where alternatives are plentiful.

In fiscal 2004, for example, fully 40% of Section 184 money went to tribal trust or allotted

land. A lot of the private property loans, however, are located in Alaska and Oklahoma, two states where reservations per se do not exist, but many people live in Native areas there. And in fact, Oklahoma (\$593 million in volume) and Alaska (\$290 million in volume) are the two states with the biggest Section 184 volume, with nearly half the financings.

Considering that total mortgages to Native people are off by more than 60% since the market high, Section 184 has been doing a terrific job of increasing its numbers year to year.

But attention must be paid to the credit-starved reservations where so many are so poorly housed, and where Section 184 has seen a numerical falloff, not an increase. An effort should be made to boost totals there as well. ♦

OPEN FORUM

Borrower Defaults Eclipsed By Robo-Signing Flap

By Melissa Barrett & Andrea Lee Negroni

THE LIST OF STATES SEEKING TO HALT FORECLOSURES is growing longer. On Oct. 6, Ohio attorney general Richard Cordray announced a civil lawsuit challenging foreclosures in which legal documents were apparently executed by so-called robo-signers. Maryland and North Carolina also joined other states requesting major mortgage companies cease foreclosures pending review of their preforeclosure documentation procedures. Fannie Mae and Freddie Mac have also advised servicers to immediately review their foreclosure procedures.

The wrench in the foreclosure works follows irregularities discovered in the procedures of some servicers whose employees "robo-signed" affidavits, in some cases without verifying their contents, or who executed affidavits without a notary public present. Robo-signers are typically employed by loan servicers or contractors for the foreclosing plaintiffs, and some of them have testified that they signed affidavits in as many as 10,000 cases a month. Others have said they looked only at dates, or only at borrower names, before signing affidavits permitting foreclosures to proceed. Defense attorneys quickly latched onto the high volume of cases handled by loan administration departments and their contractors, claiming that employees cannot possibly review loan files as fast as the signing rates suggest.

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Although the robo-signed affidavits were initially problematic only in judicial foreclosure states, nonjudicial foreclosure states are also beginning to investigate foreclosure procedures. California State Assemblyman Ted Lieu, for example, has asked the Departments of Financial Institutions and Corporations to adopt a temporary moratorium on foreclosures. North Carolina attorney general Roy Cooper announced an investigation into the foreclosure practices of more than a dozen mortgage lenders, concerned about whether

Most challenges to robo-signing do not allege that the foreclosure defendants are not in default.

they are making a "good-faith effort to work out a loan modification before they proceed with a foreclosure." Even in states where AGs cannot pinpoint a particular legal violation attributable to robo-signing, there have been threats to use fraud and unfair and deceptive acts and practices laws against companies whose foreclosure or eviction procedures employ methods such as robo-signing. Some lawyers have predicted a "sandstorm" of litigation.

Even Congress has taken notice. On Oct. 5, House Speaker Nancy Pelosi and other Democratic representatives from California asked the federal government to investigate robo-signing, which, prior to any actual in-

vestigation, she has already dubbed "fraud." Sen. Richard Shelby echoed Speaker Pelosi's call for an investigation.

Defenses to foreclosure based on claimed defects in lenders' supporting paperwork did not begin with robo-signing, but until now, these did not engage the public, the media and lawmakers as quickly as the robo-signing issue. Since foreclosures started to skyrocket several years ago, borrowers have challenged legal ownership of their loans in an attempt to disqualify the plaintiff that filed the foreclosure suit. In some of these cases, where mortgage assignments appear to be dated after the case was filed, foreclosure judgments have been denied, and in at least a few cases, overturned.

The Massachusetts Land Court recently decided that an unrecorded mortgage assignment in blank did not effectively transfer ownership of the loan to the foreclosing plaintiff, and as a result of this decision, the homeowners were able to reoccupy the house. The Internet is rife with examples of lender documents that consumer advocates claim fatally taints foreclosure cases, including similar-looking signatures in the signature blocks for lender, witness and notary public.

Ironically, most challenges to robo-signing do not allege that the foreclosure defendants are not in default. The documentation defects attributed to robo-signers are primarily technical, not substantive. Unfortunately, the issue has taken on a life of its own, and unless addressed promptly and effectively, it may become the straw that breaks the camel's back, depriving mortgage lenders of the ability to predictably and timely realize upon their security interests with potentially catastrophic effects for mortgage finance.

Some judges are threatening not only to stop hearing foreclosure cases when the lender's documents are robo-signed, but also to "reopen" completed foreclosures involving robo-signed affidavits and other paperwork

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irregularities. The class-action bar is gearing up to use the robo-signing issue to challenge foreclosures and evictions, including those

already completed. If and when this happens (and there is evidence it has already started), the titles conveyed at completed foreclosure sales could be thrown into question all over the country. New owners of previously fore-

closed properties could find their titles challenged by previous owners.

In challenges to ownership, title insurance companies pay the title defense costs. The trade association for title insurers, the

American Land Title Association, has said that the cost of defending titles and reimbursing owners for lost properties rose 14% from mid-2009 to mid-2010. ALTA's director of communications, Jeremy Yohe, says ALTA is "working closely with Fannie Mae, Freddie Mac and federal banking regulators to keep REO sales fluid" and discussing steps lenders can take to ensure that title insurance continues to be issued on REO properties. Among the possibilities under consideration is for title insurers to obtain warranties from lenders against errors in their foreclosures.

At least one national title insurer, Old Republic, is reported to have threatened to stop writing title policies on foreclosed Florida properties, and there is danger that others may follow.

Even if title insurers continue offering coverage, if foreclosures can be unwound based on claims of robo-signing, eventually title insurers will craft a coverage exception, reducing the value of the insurance to the owner of a previously foreclosed property. Alternatively, the cost of title insurance on prior foreclosed properties may increase, raising the buyer's total closing costs. Rising costs associated with financing property and the continued languishing of foreclosed properties on the market will further dampen the already depressed real estate market and stall economic recovery.

Moreover, if robo-signing continues to dominate the media and the public is persuaded that foreclosures tend to involve fraud or forgery, homebuyers may deliberately steer away from buying foreclosed homes. Rejection of foreclosure inventory, estimated by some to be 25% of the property on the market today, could be devastating to a real estate recovery.

Other problems will follow if foreclosure cases are deemed suspect when filed and open to challenge after completion. These include a boom in quiet title actions, and increasing backlogs in already-overburdened courts and land records offices.

The percentage of loans 90 or more days past due in the first quarter of 2010 was 9.5%. This figure suggests there are a lot of foreclosures in the pipeline. Some lenders traditionally postpone evictions during the year-end holiday season. Others will voluntarily or involuntarily delay foreclosures and evictions until the robo-signing issue is explored and resolved. However, when the smoke obscuring the robo-signing issue clears and the holidays are behind us, the number of home loans in default is likely to be higher than ever, with a backlog of foreclosures that is longer than ever.

If workable solutions to the robo-signing issue and "documentation defect defenses" are not found quickly, these problems will be exacerbated by a shrinking public appetite for buying previously foreclosed homes, higher closing costs for title insurance, title searches and closing agents, and clogged dockets in every courtroom where real estate issues are disputed. ♦

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