Forbearance Options and CARES Act Requirements

John Rao, Steve Sharpe & Tara Twomey

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NCLC's CARES Act Mortgage Webinar Series

COVID-19 and Mortgage Relief for Homeowners: CARES Act Protections
May 7, 2020

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• Intro to TILA/RESPA Servicing Claims
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• Home Equity Theft and Foreclosure Rescue Scams 101
• Home Purchase Scams: Investigation, Funding Structure, Claims and Defenses
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• Multi-Servicer Cases
• Strategic Advocacy on Home Scams: Working with Local Government, Effective Outreach
Forbearance Options and CARES Act Requirements

“Federally-Backed Mortgage Loans”
“Federally-Backed” CARES v. “Federally-Related” RESPA

“Federally-backed” v. “Federally-related”

First or subordinate lien on residential real property (including condo units and cooperatives)
"Federally-related"

Broader than federally-backed and includes:
- Portfolio Loans
- PLS Loans
- Credit Union Loans
- Some Land Contracts

Excludes for some RESPA provisions certain open-ended credit transactions (HELOC & some HECMs). RESPA also excludes business purpose loans.

See 12 C.F.R. §§ 1024.2, 1024.5. NCLC, Mortgage Servicing § 3.2

"Federally-backed" v. "Federally-related"

- FHA, VA, RHS, Fannie Mae, Freddie Mac Loans
- Many Land Contracts
- Chattel Mortgages
- The Orphans
“During the covered period”

“(1) IN GENERAL.—During the covered period, a borrower with a Federally backed mortgage loan experiencing a financial hardship due, directly or indirectly, to the COVID–19 emergency…

CARES Act, § 4022(b)(1)

“Covered period”

Section 4023, which relates to multi-family housing, defines “covered period” as date of enactment to:

1) the end of the national COVID emergency; or
2) December 31, 2020 whichever comes first.
“Covered period”
- Changing guidances
  (see, e.g., Freddie Mac Bulletin 2020-04)
  - How much lead time will we have before the President ends the emergency declaration?
  - Are servicers going to provide relief even after the expiration of the covered period?

“Regardless of delinquency status”

“What if loan:
- Is in foreclosure?
- Has been accelerated?
- Is in bankruptcy or loan discharged?”
“shall be granted” and “servicer shall”

“Shall” is the most important word in the Act.

“shall be granted”

Enforceability

Equitable Defense

Private Right of Action??

RESPA

UDAP
The CARES Act has language that is directly intended to help borrowers.

No similarly protective language in TARP.

The HAMP rules were contained in HAMP Handbook, which did not have the authority of a federal statute.

No case law on this yet, but look at NCLC Home Foreclosures book for discussion of defenses.

Start considering practical things for your own cases – do you want to put the request in writing even if not required?

For legal aid programs, do you start taking cases where making sure borrowers get forbearance they need?

“up to 180 days” plus “additional period of up to 180 days”
“up to 180 days”

Who decides length of forbearance?

“up to 180 days”

What qualifies as “initial” or “extended” forbearance?
How many forbearance periods are allowed?

Important to start from the textual language, but then move on to relevant agency/investor interpretation.

Things change fast

Last week, FHA/VA/USDA issued a fact sheet that addresses who determines the length

Fannie Mae – “the servicer may provide an initial forbearance period, and any extended forbearance period, in separate, shorter increments. If the borrower’s COVID-19 related hardship has not been resolved during an incremental forbearance period, the servicer must extend the borrower’s forbearance period, not to exceed 12 months total.”
“up to 180 days”

Freddie Mac – “Affirming that an eligible Borrower may be given an initial forbearance plan for up to 180 days, and thereafter one or more forbearance plan term extensions, provided the total forbearance terms do not exceed 12 months. . . . In the event the Servicer and Borrower cannot agree on an appropriate forbearance length, or further communication with the Borrower is not possible under the circumstances, the Servicer must provide the term requested by the Borrower, not to exceed 180 days.”

“up to 180 days”

Updated FHA/VA/USDA Fact Sheet – “Servicers must approve the forbearance for the amount and time that the borrower requests. Under the CARES Act, this is done at the borrowers’ request and for as long as they request, up to 360 days in total (initial up to 180 days and then up to another 180 days, if requested).”

“no fees, penalties, or interest...”
“No fees, penalties, or interest…”

- Borrower must not be charged:
  - Late fees
  - Property inspection fees
  - Foreclosure expenses and attorney fees (even after moratorium ends)

“During a period of forbearance…”

- Ban on fees and expenses applies during entire forbearance period
- Ban on dual tracking under 1024.41(c)(2)(iii)
- Both should deter servicers from:
  - Taking any steps in foreclosure process even after moratorium expires
  - Continuing with foreclosure on pre-COVID delinquent loans

Escrow Issues
Escrows During Forbearance

- **Insurance**
  Servicer must timely disburse (advance funds if needed) and cannot force place

- **Taxes and other escrow items**
  Reg. X exemption for loans more than 30 days overdue may apply

- **Annual statements**
  Reg. X exemption may apply (but not notice of shortage/deficiency)

See NCLC, Mortgage Servicing § 3.5

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Escrows During Forbearance

- **Joint Agency Statement** –
  - No supervisory or enforcement action against servicers for delays in sending annual escrow statements
  - But servicers must continue to comply with 12 C.F.R. § 1024.17(k) and make timely disbursements

Other Notices
What about Reg. X notices?

- Forbearance is short-term loss mitigation option and request is incomplete application
- Acknowledgement notice under 41(b) and forbearance notice under 41(c)(2)(iii) must be sent within 5 days
- Joint Agency Statement – no supervisory or enforcement action against servicers for missing deadlines provided notice is sent before the end of forbearance period.

See NCLC, Mortgage Servicing § 3.8.2.10

Periodic Statements

- Should servicer disclose $0 or amount due under loan contract?
  - Amount Due – may disclose either
  - Explanation of Amount Due - must disclose both
  - Possible explanation to help avoid confusion

See NCLC, Mortgage Servicing § 4.2.5

Consumer Resources
Advocate Resources

Share your experiences

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