

Massachusetts Joins 49 State Mortgage Settlement

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After nearly a year and half of negotiations with Bank of America, Wells Fargo, JPMorgan Chase, Citi, and GMAC, 49 state attorneys general yesterday announced a settlement regarding mortgage servicing and foreclosure issues. Joining the settlement was Massachusetts, which had filed a lawsuit against the five banks on December 1, 2011. There are at least two significant aspects to the settlement for Massachusetts.

First, borrowers and the Commonwealth will see significant relief under the settlement. Massachusetts' estimated share of the settlement is \$317,915,272. Much of this funding will go to borrowers through loan modifications. However, certain borrowers will qualify for cash payments, and other borrowers will be eligible to refinance their underwater loans. In addition, the Commonwealth will receive a direct payment of \$46,559,061 that will be used to assist homeowners. Presumably, some of these funds will go to the Attorney General's Office in order to ensure that the settlement is implemented in a way that provides the best relief for Massachusetts borrowers. Likely, another portion of the funds will go to non-profits to manage programs to help homeowners struggling with their mortgages. Notably, this settlement does not implicate mortgages held by Fannie Mae and Freddie Mac, only those held by the banks.

Second, the Attorney General's Office was able to achieve a state-specific carve out to the agreement, which will allow the Office to continue portions of its lawsuit against the banks. It appears that only a few states achieved carve outs from the settlement. Because of the carve out, Massachusetts will continue to pursue its claims regarding the alleged corruption of the Commonwealth's land recording system through the use of the Mortgage Electronic Registration System (MERS). MERS has been used in the Commonwealth since at least the 1990s, and questions regarding MERS will remain until the Superior Court addresses the issue in the lawsuit or a settlement is reached. In addition, the Office can continue to pursue claims against the banks for initiating foreclosures without holding the actual mortgage. These claims arise out of the Supreme Judicial Court's decision in *U.S. Bank v. Ibanez*, which held that banks must hold a valid mortgage assignment before foreclosing. Although it remains unclear how many foreclosures have occurred without valid assignments, the Attorney General's Office has kept the pressure on the banks to resolve this issue globally as opposed to through individual circumstances.

The settlement may have provided indirect support to a bill introduced by the Attorney General's Office, *An Act to Prevent Unnecessary and Unreasonable Foreclosures*, H.1219, which would require loan modifications when an analysis shows that it is more profitable to modify the loan than foreclose. Because the settlement requires loan modifications, the Attorney General's Office will argue that the legislation is needed in order to provide a framework for how these loan modifications should work. This bill remains under consideration by the Joint Committee on Financial Services, but I expect that the pressure will increase to release this bill soon. Lenders should keep an eye on this legislation and consider how their operations may need to change if they are required to refinance certain mortgages.

The state attorneys general will continue negotiations with a group of other national banks, and I would expect a settlement with them soon.

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