



## Perspective

## Expert Analysis

# Foreclosure Crisis: Intramural Battles May Be the Toughest Part

BY MARK G. PETERS

A decade ago, when I was a senior lawyer at the New York Attorney General's office focusing on economic regulatory enforcement, I brought a case against a then large sub-prime lender who had made predatory loans to a number of New Yorkers. The case had everything a young prosecutor (and his attorney general boss) could hope for: sympathetic victims—in this case, literally, widows about to be thrown out of their homes—a large, not entirely scrupulous, financial company and a complex regulatory scheme which, with creative lawyering, could create new precedent and consumer protections.

At the time, the regulators at the state's Banking Department didn't quite see it the same way. In their view, this was a regulatory matter and no place for an attorney general to be mucking about. When they "asked" us to stand down, there resulted, as the diplomats like to say, "a frank exchange of views." At one point, a harassed defense lawyer who was representing the sub-prime lender, and who had been whipsawed between us, called to say that he could not attend a scheduled meeting with me the next day because the Banking Department had threatened to pull his client's license if he met with us.

The point of this story is not to tell a tale of government dysfunction. In fact, the lender in question had genuinely engaged in some shoddy practices that were only stopped by joint action. It took the AG's office to shine a light on these practices, but it also took the Banking Department's expertise to help establish the subtle balance between protecting consumers and stifling business.

Rather, the story illustrates a challenge for both government and the financial industry in getting through this new, and much larger, crisis of foreclosure proceedings and internal controls: Not only will the numerous government actors in this drama be looking at the lenders, but, until boundaries are established, they will be looking, perhaps even more warily, at one another.

The basic facts of the present foreclosure problem have been widely reported and require little repetition here. A number of financial institutions, facing vastly increased foreclosures because of

the economy, are accused of failing to adhere to all of the legal safeguards established to ensure people are not improperly pushed from their homes. While several well publicized cases have come to light, only future investigation will determine the actual scope of the problem.

As this entire issue unfolds, the various government agencies' intra-mural relationships is a challenge for all concerned that needs to be resolved quickly for everyone's benefit. When government agencies are worried about turf—and in a high publicity drama such as this, they cannot help but be—they can make bad or overly hasty decisions. The ability to reflect on a situation, to analyze the best way of fixing the problem without killing the patient, is not an ability provided to those who must also worry that someone else will preempt them onto the field. Smart, well motivated regulators (and most of my former colleagues in government fit both descriptions) can get pushed off track.

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The intra-mural fights come in several parts, each of which requires separate thought and resolution. First, there is the fight between regulators and prosecutors. This is akin to the fight described in the opening story above. Already, a 50-state attorney general coalition has started looking at the practices of the big banks, while the New York Banking Department, separately, has sent inquires to many different institutions that it regulates. These two camps will need to coordinate efforts, to make sure they are not making inconsistent demands for future practices.

Second, there is the fight between state and federal agencies. Right now, the states, via the 50-state coalition, appear to be in the lead. How-

ever, as this issue unfolds, it seems remote that the federal authorities will be content to stand on the sidelines and watch. Already, they have given indications of future action. While both sovereigns have their own laws and regulations, it is important to again create consistent demands.

The failure to resolve these intra-mural fights is bad for all involved. For the regulators, and the citizens they protect, such fights distract from the primary goal: consistent enforcement of the laws to ensure fair treatment of all concerned. For banks and other financial institutions, competing regulators give rise to grave uncertainty and the need to focus considerable resources not on the business of banking, and not on ensuring compliance and fair dealings with the public, but on walking the tightrope of pleasing multiple masters at one time. It is the equivalent of being the youngest child in a dysfunctional family.

Fortunately, there seem to be early signs that all concerned may approach this in a thoughtful way. The major banks have clearly taken this seriously and begun their own reviews which will allow them to more readily respond to the multiple investigations that are surely coming. Regulators, through the 50-state attorney general investigation, for example, have shown a willingness to work together. Much work remains, but hopefully it can be focused on resolving the substantive issue rather than intra-mural fights.

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