

FORECLOSURE AND EMINENT DOMAIN

Eminent domain laws allow the state to take private property for public use. Some municipalities, in partnership with a commercial enterprise called Mortgage Resolution Partners, have developed programs that use eminent domain to restructure mortgage obligations. The intent behind this is to use eminent domain as a form of principal forgiveness for borrowers who are struggling to make their monthly payments.

The legal risks to municipalities of this entirely new way of using eminent domain law are still not entirely understood, but some have already withdrawn their plans for such programs, as they have awakened to the challenges they would create. Critics note that no precedent of the U.S. Supreme Court allows a government to seize private property and redistribute it to others for the general purpose of improving conditions. Compensation for properties seized is typically set at less than fair market value, leaving municipalities at risk from legal challenges when investors challenge the valuations.

This legal risk has been noted at the federal level. The Federal Housing Finance Administration (FHFA) has indicated that it could order Fannie Mae and Freddie Mac to cease doing business in areas “employing eminent domain to restructure mortgage loan contracts.” In December 2014, President Obama signed H.R. 83,¹ an omnibus appropriations bill that included a provision prohibiting the Department of Housing and Urban Development (HUD), FHA and Ginnie Mae from insuring, securitizing or establishing a Federal guarantee for mortgage loans seized through the power of eminent domain through September 30, 2015. With the FHA, Fannie Mae and Freddie Mac representing up to 90 percent of all new loans, this has significantly limited the refinancing options for municipalities’ eminent domain proposals.

Lenders have called foul on the issue, citing the fact that many of the loans marked for seizure are not delinquent and so these programs are unlikely to have a significant effect on foreclosure and blight. These programs create significant extra risk for lenders, which face the prospect of having paying mortgages seized and rewritten without their consent and after the fact. It is thought that this might incentivize lenders to abandon markets and increase prices.

The National Black Caucus of State Legislators (NBCSL) has recognized the potential negative effect eminent domain proposals could have on loan availability for aspiring homeowners, housing prices in neighborhoods, and persons of color who have disproportionately had to rely on FHA

¹ Consolidated and Further Continuing Appropriations Act of 2015, Pub. L. No. 112-235, <https://www.congress.gov/113/bills/hr83/BILLS-113hr83enr.pdf>.

loans for homeownership. In 2014, NBCSL enacted a resolution encouraging policymakers to recognize the potential dangers to minority communities in using eminent domain laws to seize mortgages.²

AFSA'S POSITION

The American Financial Services Association (AFSA) strongly opposes the use of eminent domain to restructure mortgage obligations on legal and practical grounds, for the significant negative effects such programs have on its members, borrowers and the municipalities that adopt them.

AFSA believes that eminent domain programs should be dropped in favor of existing programs of foreclosure prevention. Since 2008 mortgage lenders, which typically lose money in foreclosure, have put significant extra resources into foreclosure prevention, supporting federal government initiatives, hiring new staff and developing new methods for reaching out to borrowers. We believe that this has resulted in a robust system to support delinquent borrowers that deserves municipal support.

² National Black Caucus of State Legislators, *Resolution HSE-15-16 Promoting Safe and Legal Foreclosure Prevention*, available at <http://nbcsl.org/public-policy/resolutions/item/1365-housing-resolution-hse-15-16.html> (December 2014).