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Court News

### **Chief Justice Issues TRO Regarding Mortgage Foreclosures**

On **motion** of the Federal National Mortgage Association (Fannie Mae), the Chief Justice has issued a temporary restraining **order** regarding foreclosure actions that involve loans that are potentially subject to modification under the Home Affordable Modification Program (HMP).

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2009-05-04-01

# The Supreme Court of South Carolina

Ex Parte Federal National Mortgage  
Association, Petitioner.

In Re Federal National Mortgage Association  
("Fannie Mae") Loans Subject to Foreclosure  
Sale.

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## ORDER

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Petitioner asks this Court to issue an ex parte temporary injunction<sup>1</sup> or restraining order "enjoining all judicial officials in South Carolina conducting foreclosure sales on May 4, 2009 (or the next judicial sales dated) from dismissing all eligible one- to four-unit owner occupied properties securing Fannie Mae portfolio mortgage loans and MBS pool mortgage loans guaranteed by Fannie Mae for which there is a foreclosure judgment." It asserts that this injunction is necessary to avoid undue costs if these foreclosure actions are dismissed rather than stayed or postponed based on the fact that the underlying loans may be subject to modification under the Homeowner Affordability and Stability Plan, the Home Affordable Modification Program (HMP), and the United States Treasury Supplemental Directive 09-01. It also states that, "absent injunction, mortgagors eligible for relief under the HMP program could be denied their right to participate because their property was sold at the foreclosure sale. This qualifies as irreparable injury for which the court should provide redress in the form of a temporary injunction."

While I am very troubled by the ex parte nature of this petition<sup>2</sup>, I grant a temporary restraining order (TRO) preventing the foreclosure sale of any property arising out of a loan owned or guaranteed by petitioner or Freddie Mac or held by a servicer who has signed an agreement to participate in the HMP<sup>3</sup>. If a sale has already taken place today prior to issuance of this order, this TRO shall stay the master-in-equity, circuit court judge or special referee from taking any further action to complete the sale including the issuance of a deed to the purchaser.

By May 15, 2009, the plaintiff in every mortgage foreclosure action stayed by this order shall serve on all other parties to the action (including petitioner and/or Freddie Mac as appropriate) an affidavit setting forth its belief whether the loan is subject to modification under the HMP. If the affidavit indicates that the loan is subject to modification under the HMP, the foreclosure shall be stayed pending a determination if the loan will be modified. If the loan is modified, the foreclosure action shall be dismissed. If the loan is not modified,

the foreclosure may proceed.

If the affidavit indicates that the loan is not subject to modification under the HMP, the TRO will be lifted unless petitioner, Freddie Mac or another party serves and files a counter affidavit asserting that the loan is subject to modification under the HMP by May 22, 2009. If a counter affidavit is timely filed, the TRO will remain in effect until the master-in-equity or circuit court judge determines if the HMP is applicable to the loan. The lower court shall insure that these determinations are made in an expeditious manner.

If the loan is determined not to be subject to modification under the HMP, the TRO shall be lifted and the foreclosure may continue. If the lower court determines that the loan is subject to modification and the loan is modified, the foreclosure action shall be dismissed. If the lower court determines that the loan is subject to modification but the loan is not subsequently modified, the TRO shall be lifted and the foreclosure may continue.

IT IS SO ORDERED.

s/Jean Hoefer Toal  
JEAN H. TOAL  
CHIEF JUSTICE

Columbia, South Carolina  
May 4, 2009  
4:50 p.m.

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<sup>1</sup> Under Rule 65(a), SCRPC, a temporary injunction cannot be issued without notice to the adverse party.

<sup>2</sup> Petitioner has known about the facts supporting its request for injunctive relief for almost a month before filing this petition, and could have provided notice to the opposing parties during that period. If it were not for the interest of mortgagors who may be entitled to a loan modification, I would deny the requested relief based on petitioner's lack of diligence.

<sup>3</sup> While petitioner asks for this relief only as to Fannie Mae owned or guaranteed loans, this TRO applies to all loans that are subject to modification whether owned or guaranteed by Fannie Mae or Freddie Mac, or a servicer who has signed an agreement to participate in the HMP.