

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

AB 3100 (Low)
Version: June 6, 2024
Hearing Date: June 25, 2024
Fiscal: Yes
Urgency: No
ID

SUBJECT

Assumption of mortgage loans: dissolution of marriage

DIGEST

This bill requires conventional mortgage loans secured by occupant-owned residential property of four or fewer units to include, for all loans originated after January 1, 2027, provisions to allow a borrower to assume the loan pursuant to a dissolution or separation.

EXECUTIVE SUMMARY

Most home mortgage loans include “due at sale” clauses that allow the lender to immediately request payment of the loan upon the sale or transfer of the property. However, when a couple divorce or separate, it may be ideal for the borrower wishing to keep the home to “assume” the mortgage loan from their former spouse. This is because the loan may have favorable terms, including a favorable interest rate. The benefit of assuming a loan has increased in recent years, as interest rates and inflation have gone up. Thus, homeowners who have owned their home for a while and thus enjoy a lower interest rate on their mortgage would save money by assuming the mortgage, rather than having to obtain a new mortgage at current, historically high interest rates. Federal law places some limits on “due at sale” provisions, and requires federally-related mortgage loans to allow for assumption of the loan in the case of dissolution, legal separation, or incidental property settlement. This bill proposes to require that all conventional mortgage loans include provisions allowing for the purchase of the property by an existing borrower by assuming the mortgage loan, when the assumption is related to a marriage dissolution, legal separation, or an incidental property settlement, for all loans originated after January 1, 2027. AB 3100 is author-sponsored, is supported by the California Association of Realtors. The Committee has received no timely opposition. AB passed out of the Senate Banking and Financial Institutions Committee by a vote of 6 to 1.

PROPOSED CHANGES TO THE LAW

Existing federal law:

- 1) Provides that with respect to a real property loan secured by a lien on residential real property containing less than five dwellings, a lender may not exercise its option pursuant to a due-on-sale clause upon a transfer resulting from a decree of a dissolution of marriage, legal separation agreement, or from an incidental property settlement agreement, by which the spouse of the borrower becomes an owner of the property. (12 U.S.C. § 1701j-3 (d)(7).)

Existing state law:

- 1) Requires a mortgage servicer to allow a successor in interest to either:
 - a) apply to assume the deceased borrower's loan, for which the mortgage servicer may evaluate the creditworthiness of the successor in interest, subject to applicable investor requirements and guidelines; or
 - b) if a successor in interest of an assumable loan also seeks a foreclosure prevention alternative, allow the successor in interest to simultaneously apply to assume the loan and for the foreclosure prevention alternative, for which the mortgage servicer may evaluate the creditworthiness of the successor in interest, subject to applicable investor requirements and guidelines. (Civil Code § 2920.7 (d).)

This bill:

- 1) Requires that a conventional home mortgage loan on owner-occupied residential real property containing less than five dwellings with multiple borrowers, include provisions to allow for any of the existing borrowers to purchase the property interest of another borrower on the loan by assuming the seller's portion of the mortgage, in connection with a decree of dissolution of marriage, a legal separation agreement, or an incidental property settlement, if the assuming borrower qualifies for the underlying loan, as determined by the lender.
 - a. Provides that these requirements apply to conventional home mortgage loans originated on or after January 1, 2027.
- 2) Defines, for the purposes of (1), above the following:
 - a. "conventional home mortgage loan" as a mortgage loan that is not insured or guaranteed by the federal government.
 - b. "owner-occupied" as a property that is the principal residence of the borrowers and is security for a loan made for personal, family, or household purposes.

COMMENTS

1. Author's statement

According to the author:

AB 3100 addresses the problem of rising interest rates causing high monthly payments for homeowners, especially during life transitions like divorce. The bill mandates changes to home mortgage loans, allowing existing borrowers to assume other borrowers' property interest if they qualify, avoiding refinancing and higher interest rates. This simplifies the loan assumption process and promotes homeownership stability. AB 3100 ensures practical solutions that empower Californians to navigate housing transitions without unnecessary financial burdens, ensuring a secure and equitable housing market.

2. Marriage and mortgage assumptions

When two people get married in California, they often share and equally own their property and assets as community property during the marriage. This can include the ownership of their home. However, when married couples get divorced, dividing and disposing of community property may be a complicated process. For a home, they may need to sell it in order for both individuals to end the marriage with their appropriate shares of the community property. Another option sometimes is that one person assumes the mortgage of the remaining share of the home from the other. When a person assumes the mortgage, they keep the interest rate and loan terms of the existing mortgage, and the person providing the assumption is removed from the deed to the home. This can be particularly appealing in today's housing market, as interest rates and inflation have made current mortgages more expensive and home prices higher.¹

3. Mortgages and the federal law around assuming mortgages

There are a variety of loans that prospective homeowners can obtain to finance their home. Most mortgages are what are called conventional mortgage loans, which are private loans not guaranteed by federal agencies like the Federal Housing Administration or the Department of Veterans Affairs. Government-backed loans typically protect the lender against defaults by the borrower, so that lenders offer mortgages to a larger group of borrowers than lenders of loans not guaranteed by the government otherwise might. Conventional loans, on the other hand, are more difficult to obtain because the lender must protect themselves more from default by the borrower. While conventional loans are not backed by the government, most are guaranteed by Fannie Mae and Freddie Mac, two Government-sponsored Enterprises (GSE's) that then set guidelines for the conventional loans that the guarantee must

¹ Anoush Garakani, "Assumptions on the rise: are you ready for mortgage assumptions?" JD Supra (Dec. 19, 2022), available at <https://www.jdsupra.com/legalnews/assumptions-on-the-rise-are-you-ready-6432882/>.

follow.² Fannie Mae and Freddie Mac historically were private companies that operated under government regulation as GSE's; however, after the 2008 financial crisis, both came under the control of the government.³

Most conventional loans contain a due-on-sale or due-on-transfer clause, which requires the borrower to pay the mortgage in full whenever the borrower sells or transfers the residence. However, in 1982, Congress passed the Garn-St Germain Depository Institutions Act of 1982 (Pub. L. 97-320) (the Act). The Act prohibits lenders from requiring a loan be paid in full upon sale or transfer in certain circumstances, and provides for the assumption of mortgage loans in certain circumstances as well. Specifically, the Act prevents a lender from calling a loan due or requiring immediate repayment when a surviving joint tenant takes title to the home, or when the title is transferred by inheritance. (12 U.S.C. § 1701j-3(d).) The Act also encourages lenders in the exercise of their option to require payment under a due-on-sale clause to permit assumption at the existing contract rate or one that is below the average between the contract and market rates. (12 U.S.C. § 1701j-3(b)(3).) The Act also provides for specific instances in which a lender of a mortgage loan on residential real property of less than five dwelling units may not exercise its option to require payment under a due-on-sale clause. One of the instances is when there has been a transfer of the property resulting from a decree of dissolution of marriage, a legal separation agreement, or from an incidental property settlement agreement through which the borrower becomes an owner of the property. (12 U.S.C. § 1701j-3(d)(7).) In addition to these provisions of the Garn-St. Germain Act, Fannie Mae and Freddie Mac maintain guidelines for the assumption of loans, if the loan allows for assumptions, in certain circumstances and with review by the GSE in most instances.

4. AB 3100 proposes to allow individuals who get divorced to be able to assume their ex-spouse's portion of the mortgage

AB 3100 proposes to ensure that borrowers in California with a conventional loan have the option of requesting an assumption of a mortgage loan pursuant to a divorce, legal separation, or an incidental property settlement. It specifies that a conventional mortgage loan originated after January 1, 2027 secured by property with four or fewer units must include in the loan agreement provisions allowing for existing borrowers to assume the seller's portion of the mortgage in connection with a degree of dissolution of marriage, legal separation agreement, or an incidental property settlement, if the borrower otherwise qualifies for the underlying loan. This requirement is ultimately a requirement on the loan agreement, providing that the lender must provide borrowers

² See, Consumer Financial Protection Bureau, "Conventional Loans," (accessed Jun. 16, 2024), <https://www.consumerfinance.gov/owning-a-home/conventional-loans/>; Kate Wood, "What is a Conventional Loan?" Nerdwallet (Dec. 20, 2023), <https://www.nerdwallet.com/article/mortgages/conventional-mortgage>.

³ Consumer Financial Protection Bureau, "What are Fannie Mae and Freddie Mac?" (Feb. 2, 2024), <https://www.consumerfinance.gov/ask-cfpb/what-are-fannie-mae-and-freddie-mac-en-1959/>.

the option to assume the loan through the contract. However, AB 3100 does not require the lender to approve or grant any particular assumption request, as it provides the lender the authority to determine whether the borrower qualifies for the underlying loan. Moreover, AB 3100 does not apply to every conventional loan, but rather to those secured by residential property occupied by the owner.

AB 3100's language is substantially similar to that of the Garn-St. Germain Depository Institutions Act of 1982. Because its provisions allowing for assumptions connected to a dissolution or separation are substantially the same as those in the Garn-St. Germain Depository Institutions Act, the two laws do not conflict. This is relevant because federal law supersedes and supplants state law via the Supremacy Clause of the United States Constitution (U.S. Const., Art. VI, § 2), when the two conflict. While the two laws do not conflict, it is nonetheless possible for the federal law to preempt AB 3100's provisions under field preemption. However, the Garn-St. Germain Act addresses state laws in multiple provisions relating to due-at-sale clauses, which may suggest that Congress did not intend to occupy the entire field of due-at-sale clauses, if the law specifically outlawed certain state laws. Moreover, it should be noted that the Garn-St. Germain Depository Institutions Act of 1982 applies to all federally-related mortgage loans, which includes both loans guaranteed by the federal government and loans regulated by a GSE. Because AB 3100 pertains to conventional loans, most of which are already covered by the Garn-St. Germain Act, it will impact those conventional loans that are not backed by a GSE.

SUPPORT

California Association of Realtors

OPPOSITION

None received

RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation:

SB 1150 (Leno, Ch. 838, Stats. 2016) prohibited a mortgage servicer, upon notification that a borrower has died, from recording a notice of default, and required a mortgage servicer to allow a successor in interest to assume the deceased borrower's loan or apply for foreclosure prevention alternatives on an assumable loan.

PRIOR VOTES:

Senate Banking and Financial Institutions Committee (Ayes 6, Noes 1)

Assembly Floor (Ayes 68, Noes 0)

Assembly Judiciary Committee (Ayes 12, Noes 0)
