

*Presenting a live 90-minute webinar with interactive Q&A*

## Defending Contested Mortgage Foreclosure Litigation

Overcoming Challenges to Lender Documentation, MERS and  
Other Standing Issues, and Borrower Defenses and Counterclaims

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WEDNESDAY, JUNE 6, 2012

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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Today's faculty features:

Andrew K. Stutzman, Partner, **Stradley Ronon Stevens & Young**, Philadelphia

Gregory P. Dresser, Partner, **Morrison & Foerster**, San Francisco

Reid S. Manley, Partner, **Burr & Forman**, Birmingham, Ala.

Joseph J. Patry, Counsel, **MERSCORP Holdings**, Reston, Va.

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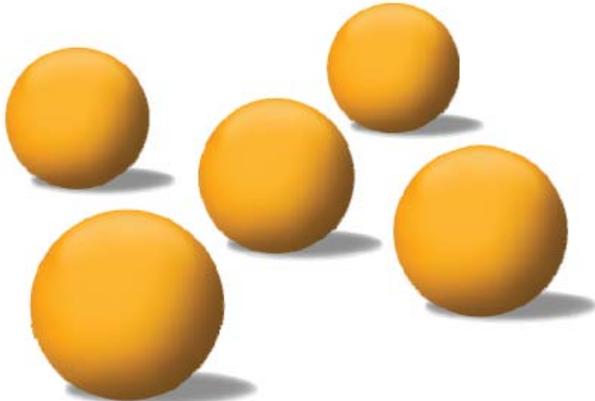
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***Defending Contested Residential Mortgage  
Foreclosure Litigation – Standing and Other  
Defenses***

**Reid S. Manley  
Burr & Forman, LLP  
205-458-5439**



# Issues in Non-Judicial Foreclosure States

- Typically, non-judicial foreclosure states have fewer issues.
- Borrowers still file lawsuits:
  - Prior to foreclosure: Motions for temporary restraining order and requests for injunctive relief are common. Suits regarding modification denials are also increasing.
  - Post-foreclosure: Claim asserted as counterclaims to eviction actions. Also, claims for damages from wrongful foreclosure proceedings.
    - If eviction action has been completed, consider *res judicata* and *Rooker-Feldman* defenses.

# Non-Judicial: Show-Me-The-Note Theory

- The “Show-Me-The-Note” theory has been roundly rejected in recent years.
  - *Farkas v. SunTrust Mortg., Inc.*, 447 Fed. Appx. 972 (11<sup>th</sup> Cir. 2011) (mortgagee need only follow state foreclosure statute, no need to establish “proof of claim” or abide by U.C.C.)
  - *Wells v. BAC Home Loans Svc.*, 2011 WL 2163987 (W.D. Tex. 2011) (proof of possession of note not necessary prior to foreclosure)
  - *Zambrano v. HSBC*, 2010 WL 2105164 (E.D. Va. 2010) (no requirement for mortgagee to go to court and prove possession)
  - *Gallant v. Deutsche Bank*, 766 F. Supp. 2d 174 (W.D. Va. 2010) (inability to produce original wet-ink note does not render foreclosure invalid)

## Non-Judicial: Assignment Considerations

- *Sturdivant v. BAC*, 2011 WL 6275697 (Ala. Civ. App. 2011) (foreclosure deed invalid because mortgagee did not have assignment of mortgage or endorsement of note at the time that foreclosure proceedings were initiated; lacked standing to bring ejectment action)
- *Perry v. FNMA (Perry I)*, 2011 WL 2100235 (Ala. Civ. App. 2011) (foreclosing mortgagee must be assigned note, but not necessarily mortgage, before initiating foreclosure proceedings)
  - “Initiating foreclosure proceedings” – Accelerates maturity date and publishes notice of foreclosure
  - Must attach records to affidavit to show when note was assigned
- *Byrd v. MorEquity*, 2012 WL 8877483 (Ala. Civ. App. 2012) (when assignment and affidavit of mortgagee conflicted, inadequate evidence to prove standing in ejectment action)

# Non-Judicial: Complying with Third-Party Guidelines

- *Perry v. FNMA (Perry II)*, 2012 WL 762995 (Ala. Civ. App. 2012) (failure of mortgagee to comply with HUD guidelines does not render foreclosure invalid)
- *Campbell v. BOA*, 2012 WL 1071636 (Ala. Civ. App. 2012) (borrower must bring challenge to foreclosure based on failure to comply with federal statute, regulation, or mortgage as affirmative claim prior to foreclosure but may not use as defense to ejectment action)
- *Coleman v. BAC*, 2012 WL 335905 (Ala. Civ. App. 2012) (may be defense in non-judicial context, but not to ejectment action)

# Non-Judicial: Separation of Note and Mortgage

- Borrowers allege that because note and mortgage are separated (i.e. assigned to different entities at different times), obligation is unenforceable and foreclosure void
- *Coleman v. BAC*, 2012 WL 335905 (Ala. Civ. App. 2012)
  - Note and mortgage can be separated, but mortgage is useless in the hands of one who does not also hold the obligation.
  - “The note is the cow and the mortgage the tail. The cow can survive without the tail, but the tail cannot survive without the cow.”

## Non-Judicial: Acceleration Letter

- “Notice of Intent to Accelerate” does not equate to an acceleration letter, which is required in the Fannie Mae/Freddie Mac Uniform Instrument mortgage.
- *Jackson v. Wells Fargo Bank*, 2012 WL 517482 (Ala. 2012)
  - Mortgagee may subject itself to breach of contract claim by not providing a true acceleration letter and only providing evidence of an intent to accelerate.
  - Mistake in acceleration letter does not create wrongful foreclosure claim absent evidence that power of sale was used “for a purpose other than to secure the debt owed by the mortgagor.”

# Judicial: Verification of Foreclosure Complaint

- Florida Rule of Civ. P. 1.110(b) – requires plaintiff seeking to foreclose on residential mortgage to verify the complaint.
- Section 92.525(4)(c), Fl. Stat. – requirement that document be verified means doc must be signed and executed by person who must state under oath that facts are true.
- *US Bank v. Stokes*, No. 16-2011-CA-2233 (Fla. Cir. Ct. Feb. 8, 2012) – Verification must be signed by employee who states how she is connected to or related to the plaintiff
- *Becker v. Deutsche Bank*, No. 4D11-1149 (Fla. 4<sup>th</sup> DCA 2012) – Verification need not be immediately after complaint and may be on separate page of complaint

## Judicial: Who must verify?

- Issue has arisen as to who must verify a foreclosure complaint.
- Local Rule Brevard County:
  - Requires verification to be signed by an “officer of Plaintiff”
    - Specifies: “Not an assistant officer, foreclosure specialist or other person whose duties are unclear as to how they would know that that the information in the complaint is accurate.”
  - Verifications signed by lawyer are not acceptable.
  - Dismissal if verification is insufficient.

# Judicial: Lost Note Claim

- *Guerrero v. Chase Home Finance, LLC*, No. 3D11-1404 (Fla. 3d DCA 2012) – Mortgagee determine whether original promissory note exists prior to filing complaint. If note is missing, complaint needs to include lost note count.
  - Failure to include lost note count does not result in dismissal, but creates problems down the road.
  - Make sure that affiant testifying regarding lost note understands facts related to the loss.
- *Deutsche Bank v. Clarke*, No. 08-16974 (Fla. 4<sup>th</sup> DCA 2012) – Mortgagee may submit original note to court during the pre-trial stages of the litigation. Purpose of submitting original promissory note is to ensure it is not negotiated after judgment.
- *Feltus v. U.S. Bank*, 80 So.3d 375 (Fla. 2<sup>nd</sup> DCA 2012) – Lost note count must be included in original complaint or must have adequate explanation from affiant regarding how mortgagee came to own or hold the note. Original note produced in reply brief or with motion for summary judgment is insufficient.

## Judicial: Standing to Foreclose

- Mortgagee must have standing to foreclose **at the time the lawsuit is filed.**
  - This includes a mortgage assignment executed prior to the date of the complaint and an affidavit or endorsement showing that the note was negotiated prior to date of complaint
  - *McLean v. JP Morgan*, No. 09-26853 (Fla. 4<sup>th</sup> DCA 2012) -- Even though lost note submitted with summary judgment, no evidence it was negotiated prior to complaint and assignment of mortgage was executed *three days* after complaint. Foreclosure case dismissed.
  - *Rigby v. Wells Fargo*, No. 08-22772 (Fla. 4<sup>th</sup> DCA 2012) – Foreclosure claim dismissed when assignment dated day after complaint and note was endorsed in blank with no date and no accompanying evidence of date of transfer.
  - *Taylor v. Bayview*, No. 2D10-1493 (Fla. 2<sup>nd</sup> DCA 2012) – allonge attached to note evidencing date of transfer sufficient.

# Sanctions

- *Pino v. The Bank of New York*, No. SC11-697 (Fla. 2011)
  - Court exercises discretion to deny parties leave to dismiss proceedings to review decision in which district court certified question regarding whether plaintiff in mortgage foreclosure may be subject to sanctions for allegedly filing a fraudulent assignment of mortgage.



# Defending Contested Mortgage Foreclosure Litigation

Common Law Duties, Suitability and Predatory Lending Claims,  
Dodd-Frank Changes, TILA Rescission and FDCPA

ANDREW K. STUTZMAN

215.564.8008

[astutzman@stradley.com](mailto:astutzman@stradley.com)

Strafford Publications

June 6, 2012

# Fiduciary Duty or Duty of Good Faith

The “**relationship of a mortgagor and a mortgagee** does not give rise to a duty of good faith and fair dealing, no less a fiduciary duty.”

“Nor is there any duty to **act reasonably toward other people.**”

Motten v. Chase, 2011 WL 2566092, \*11 (S.D.Tex)

“even if Plaintiffs are attempting to assert **bad faith** in the performance of a contractual right to foreclose,

‘a court should not conclude that a foreclosure **conducted in accordance with the terms** of a deed of trust

constitutes a breach of the implied covenant of good faith and fair dealing.”

Kelly v. Bank of America, 2011 WL 2493048 (D. Hawaii)

# “Predatory Lending” - Origin

“there is **no common-law claim** for ‘**predatory lending**’

To the extent such ‘predatory’ practices provide a claim for relief,

they appear to be **grounded in another statutory or common-law cause of action** such as fraud

— the term ‘predatory lending’ **is otherwise too broad.**”

*Teaupa v. U.S. Nat’l. Bank*, 2011 WL 6749813 (D. Hawai’i)

# “Predatory Lending” - Notice

the term is **expansive** and **fails to provide proper notice**,

where Defendants “are **left to guess**

whether this cause of action is based on an alleged violation of federal law,

state law,

common law,

or some combination”

*Vissuet v. Indymac Mortg. Servs.*, 2010 WL 1031013  
(S.D. Cal.)

# Suitability

**“The Complaint seems to boil down to the idea that lenders should not allow borrowers to borrow more than they can afford.”**

**“Plaintiffs have not alleged any reason why defendant owes them a duty to prevent them from taking out a loan they could not afford.”**

*Ryan v. BAC Home Loan Servicing, LP*, 2010 WL 4723732, \*2-3 (E.D.Cal.)

# Ability to Repay - Duty

Lenders “generally owe no duty to a borrower  
‘not to place borrowers in a loan

**even where there was a foreseeable risk** borrowers  
would be unable to repay.”

“The lender’s efforts to determine the creditworthiness  
and ability to repay by a borrower

**are for the lender’s protection,**

not the borrower’s.”

*Marzan v. Bank of America*, 2011 WL 915574, \*9 (D.  
Hawai’i)

## Ability to Repay – False Statement of Fact

“The **mere fact that his loans were approved**, however, does not constitute a **false statement of fact**”

that the borrower “qualified” for the loans and met underwriting standards.

“Even if [the lender’s] employees had told [the borrower] that they **believed he could repay the loan**,

such a statement is merely an **opinion**, which cannot support a cause of action for fraud.”

*Azar v. National City Bank*, 382 Fed. Appx. 880 (11<sup>th</sup> Cir. 2010)

“Plaintiffs’ subjective perception that the bank believed they could repay the loan,

does not convert the bank’s loan approval into a **misrepresentation of fact** made by [the bank].”

*Azar v. American Home Mort. Serv.*, 2010 WL 5648880 (M.D. Fla.)

# Paternalistic Friends

“Plaintiffs **ask the Court to save them from themselves.**”

“They ask the Court to impose a duty on banks to **act not as self-interested adversarial business partners,**  
but to act as **paternalistic friends,**  
who will tell the borrowers when they risk peril.”

“This is not ... the law.”

“A commercial lender is entitled to **pursue its own economic interests** in a loan transaction.”

*Jatras v. Bank of America Corp.*, 2010 WL 1644407, \*5 (D.N.J)

*But see Dixon-Ford v. US Bank*, 2011 WL 6749083 (Bkrtcy.D.N.J.) (A “mortgage lender whom, despite soliciting and obtaining accurate information, presents to a borrower an application grossly misstating income and employment information may mislead a borrower into accepting a mortgage he could not afford.”)

# New TILA §1639c (Ability to Repay)

*In accordance with regulations,*

“no **creditor** may make a **residential mortgage** loan unless ... makes a **reasonable and good faith** determination based on verified and documented information that, at the time the loan is consummated, the consumer **has a reasonable ability to repay** the loan, according to its terms, and all applicable taxes, insurance (including mortgage guarantee insurance), and assessments.”

(And including the **combined** payments of all loans.)

76 FR 27390 (May 11, 2011)  
(Safe Harbor or Rebuttable Presumption)

*To comply with **Ability to Repay**:*

Consider and Verify **eight Underwriting Factors**; or

Originate a “**Qualified Mortgage**” (**alternative proposals**),

a. with assets and income verified, for **deemed** compliance, or

b. with additional underwriting, for a **rebuttable presumption** of compliance; or

Refinance “non-standard mortgage” into “standard mortgage”;  
or

In rural or underserved areas originate a balloon-payment qualified mortgage.

# New TILA §1639b (Anti-Steering)

*Regulations to prohibit:*

- (A) **steering** any consumer to a residential mortgage loan that lacks a **reasonable ability to repay** or has **predatory characteristics or effects** (such as equity stripping, excessive fees, or abusive terms);
- (B) steering from **qualified mortgage to non-qualified mortgage**;
- (C) abusive or unfair lending practices that **promote disparities** of different race, ethnicity, gender, or age;
- (D) **mischaracterizing credit history, available loans, appraisals** or **discouraging from another lender**, if unable to offer a loan not more expensive than a loan for which qualified.

# New TILA §1640(k) (Defenses)

*In foreclosure,*

*or any other action to collect the debt,*

a consumer may assert a violation of 1639b(c)(1) or (2) (**steering incentives**),

or 1639c(a) (**ability to repay**);

as a matter of defense by **recoupment or setoff**

**without regard for the time limit** on a private action for damages.

## Amended TILA §1640(e) (Time Limits)

“Any action under this section with respect to any violation of section **1639 [disclosures]**, **1639b [anti-steering]**, or **1639c [ability to repay]** of this title may be brought ... before the end of the **3-year period** beginning on the date of the occurrence of the violation.”

# Dodd-Frank §1036 (Prohibited Acts)

*“It shall be unlawful ...*

(B) to engage in any

**unfair,**

**deceptive, or**

**abusive**

act or practice”

# Dodd-Frank §1031(c) (Unfairness)

“(A) the act or practice **causes or is likely to cause substantial injury** to consumers which is **not reasonably avoidable** by consumers; and (B) such substantial injury is **not outweighed by countervailing benefits** to consumers or to competition”

*See also FTC Policy Statement on Unfairness, December 17, 1980*

# Dodd-Frank §1031(d) (Abusive)

- “(1) **materially interferes** with the ability of a consumer **to understand** a term or condition of a consumer financial product or service; **or**
- (2) **takes unreasonable advantage of—**
- (A) a **lack of understanding** on the part of the consumer of the material risks, costs, or conditions of the product or service;
- (B) the **inability of the consumer** to protect the interests of the consumer in selecting or using a consumer financial product or service; **or**
- (C) the **reasonable reliance by the consumer** on a covered person to act in the interests of the consumer”

H.R. 4173 § 4301(c)(2) (Deceptive Acts or Practices)  
(REMOVED)

**CFPB Supervision and Examination Manual -  
Deception**

“Examiners should be informed by the FTC’s Statement for Deception.”

**Deceptive** when:

- (1) “**misleads or is likely to mislead** the consumer”;
- (2) “the **consumer’s interpretation ... is reasonable** under the circumstances”;
- (3) “the misleading representation, omission, act or practice is **material.**”

# UDAAP Private Right of Action

H.R. 4173 § 4508 (No Private Right Of Action)  
**(REMOVED)**

*Alexander v. Sandoval*, 532 U.S. 275 (2001):

“private rights of action to enforce federal law must be **created by Congress**”

“Having sworn off the habit of venturing beyond **Congress’s intent**, we will not accept respondents’ invitation to have one last drink.”

“Language in a **regulation** may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not.”

## UDAAP Private Right of Action - Redux

***deference to federal interpretations of unfair or deceptive:***

“consideration”,

“due consideration and great weight”,

“guidance”,

“consistency”

# TILA Revamped - CFPB *amicus*

creation of an affirmative *amicus curiae* program to shape appellate decisions

*Rosenfield v. HSBC Bank USA, N.A., et al* (*amicus* brief on March 26, 2012):

“The Bureau is now ‘the **primary source for interpretation** and application of truth-in-lending law.’”

“Under the plain terms of §1635 – and **the Bureau’s controlling interpretation** of that provision – consumers exercise their rescission right by providing notice to their lender within three years of obtaining the loan.”

# Rescission Complaint within 3 years

“the rescission notice only expresses a claimed entitlement to right of rescission; it does not actually exercise the right.”

“filing a notice within the three-year period is not enough because §1635(f) is a statute of *repose*, not a statute of *limitations*.”

*Sall v. Bounassissi*, 2011 WL 2791254 (D.Md.) See also *McOmie-Gray v. Bank of America Home Loans*, 667 F.3d 1325 (9<sup>th</sup> Cir. 2012); *Williams v. Wells Fargo*, 410 Fed. Appx. 495 (3d Cir. 2011); *Bradford v. HSBC Mort. Corp.*, 2012 WL 706379 (E.D.Va.)

“The language of the TILA, the holding in *Beach*, and the “strong public policy favoring **certainty of title** all support ‘the majority view that Congress intended that any lawsuit to enforce the right of rescission be brought within the three-year repose period.”

*Sobeniak v. BAC Home Loans Servicing*, 2011 WL 6122318 (D. Minn.)

# Rescission Notice within 3 years

Statute of **repose applies to right of rescission** and not lawsuit.

**“Neither the Act nor the regulation requires** that the borrower also file suit within the applicable periods when the creditor has failed to respond to the notice.”

*Calvin v. Am. Fidelity Mort. Serv.*, 2011 WL 1672064 (N.D.Ill.) **See also *Gilbert v. Residential Funding LLC, et al***, 2012 WL 1548580 (4<sup>th</sup> Cir.); *Sultan v. BAC Home Loans*, 2011 WL 1557933 (W.D.Mo.); *Stewart v. BAC Home Loans*, 2011 WL 862938 (N.D.Ill.)

# Tender for TILA Rescission

“Under TILA, a borrower who rescinds is required to tender the net loan proceeds to the lender, as the remedy seeks to **restore the parties ... to the status quo ante.**”

*Brown v. HSBC*, 2011 WL 3101780 (E.D.Va.)

“while the plaintiff can get out of the loan, she does not get to keep the principal amount of the loan”

*Parham v. HSBC*, 2011 WL 2414404 (E.D.Va.)

“Without ... meaningful tender, [Plaintiff] seeks **empty remedies**, not capable of being granted.”

*Trujillo v. MERS*, 2011 WL 121629 (E.D.Cal.)

“equity will not interpose its remedial power in the accomplishment of what seemingly would be nothing but **an idly and expensively futile act**”

*Park v. Wachovia*, 2011 WL 98408 (S.D.Cal.)

“little sense to ... proceed absent some indication that the claim will not simply be **dismissed at the summary judgment stage**”

*Sorrels v. J.P. Morgan*, 2011 WL 662980 (S.D.Cal.)

# Tender during Foreclosure

A pending foreclosure may “raise the inference that Plaintiffs are either presently in the foreclosure process because they are behind on loan payments or no longer own the home.

Such circumstances suggest Plaintiffs lack the necessary means to tender loan proceeds, or their rescission right has expired.”

Ward v. Security Atlantic Mort. Electronic Reg. Sys., 2012 WL 871119 (E.D.N.C.)

“Indeed, given the [borrowers’] inability to make a single mortgage payment after March 2008, the record provides no support for the contention that [they] were in a position to tender the balance due.”

US Bank v. Guillaume, 38 A.3d 570 (N.J. 2012)

# Pleading Tender

“possess **sufficient liquid assets at their disposal** to tender the loan proceeds”?

MTD **granted** - too “vague” and “unclear what ‘at their disposal’ means”

Cook v. Wells Fargo, 2010 WL 2724270 (S.D.Cal.)

“**has the ability to tender** pursuant to TILA”?

MTD **granted** – conclusory allegation without facts about resources is speculative

Briosos v. Wells Fargo, 2010 WL 3341043 (N.D.Cal.)

“would be able to tender” the borrowed funds, either **by refinance or sale of home**?

MTD **denied** – not so speculative to be implausible

Carrington v. HSBC, 2010 WL 5590761 (E.D.Va.)

“**might be able**” to tender after credit for payments and damages, and can sell home if necessary?

MTD **granted** – only “conceivable” and not “plausible” that will be able to tender

Cheche v. Wittstat Title, 723 F.Supp.2d 851 (E.D.Va. 2010)

“**at the time of the notice** of rescission,... fully able and capable of tendering”?

MTD **granted** – need “clearly stated present ability to tender”

Tancio v. Saxon Mortg., 2011 WL 672641 (N.D.Cal.)

“**will need time** to seek refinancing or a buyer”?

MTD **granted** – “ability to tender is at best speculative”

Hudson v. Bank of America, 2010 WL 2365588 (E.D.Va.), *aff’d.*, 2011 WL 1897551 (C.A.4 (Va.))

# Tender the House

“willing and able to **turn over the real property** secured by the loan”?

MSJ **Granted** – “must tender the balance of the loan proceeds”

Brunat v. IndyMac, 2011 WL 1304589 (D.Ariz.)

"**offering their real property**, as opposed to the loan proceeds”?

MTD **Granted** – property received was loan proceeds, not the collateral

Adams v. American Mortg. Network, Inc., 2011 WL 1298012 (S.D.Cal.)

“ability and willingness to **convey the property** to [creditor] because the property itself constitutes the ‘loan proceeds’”?

MJP **Granted** - “The Sanders received money, not a house.”

Sanders v. Ethington, 2010 WL 5252843 (D.Utah)

Proposed “**short sale**” to repay?

MTD **Granted** – need a definite offer to repay

Moseley v. Countrywide, 2010 WL 4481782 (E.D.N.C.)

# Pleading Tender Not Required

"Requiring a plaintiff to allege the ability to tender back **imposes a pleading requirement not found in the Act** itself burdens the plaintiff and favors the defendant, contrary to the Act's broad remedial purpose."

Woodworth v. Bank of America, 2011 WL 1540358 (D.Or.)

"practical effect ... would be to bar almost all TILA claims for rescission, for **it would be a rare TILA plaintiff who could truthfully allege** an ability to tender at the time ... complaint is filed."

Tacheny v. M&I Marshall & Ilsley Bank, 2011 WL 1657877 (D.Minn.)

"practical inability to refinance may be relevant to the **factual inquiry** as to his actual ability to tender, such an assessment is not appropriate at the 12(b)(6) stage"

Little v. Bank of America, 2011 WL 144911 (E.D.Va.) See also Kelly v. Bank of America, 2011 WL 2493048 (D. Hawaii)

# FDCPA – Assignments

“For an entity that did not originate the debt in question but acquired it and attempts to collect on it, that entity is either a creditor or a debt collector depending on the **default status** of the debt at the **time it was acquired.**”

“The same is true of a loan servicer”

*Bridge v. Ocwen*, 2012 WL 1470146 (6<sup>th</sup> Cir.)

“The FDCPA itself does not contain a definition of the term ‘default.’ The standard mortgage note states that the debt is in default if the payment is even **one day late.**”

CFPB Supervision and Examination Manual, Mortgage Servicing – Examination Procedures, Collections

Debt validation/1692g notice identified the assignee who acquired the loan after it was in default as the “creditor”

FDCPA claim stated where assignee was identified as the “creditor” in validation/1692g notice as it had allegedly received the debt while in default

*Bourff v. Rubin Lublin, LLC*, 674 F.3d 1238 (11<sup>th</sup> Cir. 2012)

Andrew K. Stutzman  
[www.stradley.com](http://www.stradley.com)



*"This human experiment has gone on long enough. Give the hippos control."*

# Challenges to Foreclosures in Non- Judicial Foreclosure States

**June 6, 2012**

Presented By

Gregory P. Dresser

Partner

Morrison & Foerster LLP

# Challenges to Non-Judicial Foreclosures

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- Focus on California law.
- “Authority” to proceed with foreclosure; “show me the note”; MERS challenges.
  - Servicer does not need to tender original note to proceed with foreclosure.
  - Agent can proceed with foreclosure on behalf of owner/holder.
  - Specifically:
    - “California’s non-judicial foreclosure law does not provide for the filing of a lawsuit to determine whether [the beneficiary] has been authorized by the holder of the Note to initiate a foreclosure.”
      - *Gomes v. Countrywide Home Loans, Inc.*, 192 Cal. App. 4th 1152, 1156, cert. denied 181 L. Ed. 2d 287 (2011).

# Challenges to Non-Judicial Foreclosures

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- Borrower cannot maintain action to determine “authority” of beneficiary to proceed with foreclosure where beneficiary can show proper assignments.
- Designation of “nominal” beneficiary in deed of trust is not actionable.
- Authority rejects MERS (and similar) challenges.
  - *Fontenot v. Wells Fargo Bank, N.A.*, 198 Cal. App. 4th 256 (2011).
  - *Herrera v. FNMA*, No. E052943 (4th App. Dist. May 17, 2012) (certified for publication).
- Authority also rejects arguments that assert that beneficiary of deed of trust has to produce original note.
  - *Hafiz v. Greenpoint Mortg. Funding Inc.*, 652 F. Supp. 2d 1039, 1043 (N.D. Cal. 2009).
  - *Nool v. HomeQ Servicing*, 653 F. Supp. 2d 1047, 1053 (E.D. Cal. 2009).

# Wrongful Foreclosure; Rescission

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- Wrongful foreclosure and rescission claims will fail for lack of tender.
- Wrongful foreclosure claim:
  - More than 5 days before trustee's sale, borrower is required to tender amount of default.
  - Within 5 days of foreclosure sale (including after sale), borrower is required to tender amount of debt.
    - *Periguerra v. Meridas Capital, Inc.*, No. C 09-4748, 2010 U. S. Dist. LEXIS 8082, at 9-10 (N. D. Cal. Jan. 29, 2010).
    - *U. S. Cold Storage v. Great W. Sav. & Loan Ass'n.*, 165 Cal. App. 3d 1214, 1222 (1985).
  - Rescission requires that borrower tender what it received in the bargain. I.e., the borrower has to return the money it was loaned to him or her.
    - *Fleming v. Kagan*, 189 Cal. App. 2d 791, 796 (1981).

# Debt Collection Claims

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- Fair Debt Collection Practices Act. 25 U.S.C. § 1692, *et seq.*
- Lenders (banks, mortgage companies) are generally not subject to the FDCPA.
  - *Pollice v. Nat'l Tax Funding, L.P.*, 225 F.3d 379, 403 (3d Cir. 2000).
- Creditor can become subject to FDCPA as a “debt collector” when it “receives an assignment or transfer of a debt in default *solely for the purpose of facilitating collection of such debt for another.*” 15 U.S.C. § 1692a(4) (emphasis added).
- Foreclosure is not debt collection under the FDCPA. *Izenberg v. ETS Serv., LLC*, 589 F. Supp. 2d 1193, 1199 (C.D. Cal. 2008).

# Rosenthal Act

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- Rosenthal Fair Debt Collection Practices Act (“Rosenthal Act”), California Civil Code § 1788 *et seq.*
- Rosenthal Act requires compliance with FDCPA. Cal Civ. Code § 1788.1.
- Rosenthal Act prevents threats or harassment in connection with collection of a debt. *Id.* § 1788.12. The Act outlines specific prohibited practices. *Id.* §§ 1788.10-16.
- Lenders and beneficiaries under deeds of trust are not “debt collectors” within the meaning of the Rosenthal Act. *Id.* § 1877.2(c).
- Also, foreclosure is not debt collection under the Rosenthal Act. *Izenberg, supra; Ines v. Countrywide Home Loans, Inc.*, No. 08-CV-1267, 2008 WL 4791863, at \*3 (S.D. Cal. Nov 3, 2008).

# Challenges to Foreclosure Based on HAMP or Other Supposedly Promised Home Mortgage Loan Modifications

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- Background

- Home Affordable Modification Program (“HAMP”).
  - Enacted in February 2009
  - Purpose: To assist at-risk homeowners and prevent “avoidable” foreclosures, not all foreclosures. See 12 U.S.C. § 5219(a)(1)
  - Scope: Participation is voluntary for non-GSE-owned loans. Servicers who choose to participate enter into Servicer Participation Agreements (“SPAs”) under which they agree to participate in HAMP. (Treasury Supplemental Directive (“S.D.”) 09-01.)
  - Guidelines: Establish semi-standardized framework under which lenders can compare the NPV of HAMP modified loans to the NPV of unmodified loans (loans that will likely proceed to foreclosure) through:
    - Threshold criteria; and
    - “Standard Modification Waterfall.”

## Challenges to Foreclosure Based on HAMP or Other Supposedly Promised Home Mortgage Loan Modifications

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- Trial Period Plan (“TPP”): If the loan appears to qualify for a modification after application of all of the HAMP criteria, the loan may then be placed into a TPP.
  - Prior to June 1, 2010, servicers could evaluate based solely upon verbal representations. Almost all HAMP challenges arise under this form of the TPP.
  - On January 28, 2010, Treasury issues Supplemental Directive 10-01, which required “full verification of borrower eligibility prior to offering a trial period plan.”

# Issues That Arise in HAMP Litigation

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- Private right of action for failing to modify? **Weight of authority says no.**

- *Cohn v. Bank of Am.*, 2011 U.S. Dist. LEXIS 3076 at \*22-23 (E.D. Cal. Jan 10, 2011).
- *Marks v. Bank of Am.*, 2010 U.S. Dist. LEXIS 61489, at \*16 (D. Ariz. June 21, 2010).

***But see:***

- *Durmic v. J.P. Morgan Chase Bank, N.A.*, 2010 U.S. Dist. LEXIS 124603, at \*8-9 n.9 (D. Mass. Nov. 24, 2010).

# Issues That Arise in HAMP Litigation

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- Can borrowers be third-party beneficiaries under SPAs? **No, well settled.**
  - *Morales v. Chase Home Fin. LLC*, 2011 U.S. Dist. LEXIS 49698, at \*23-24 (N.D. Cal. Apr. 11, 2011)
  - *Turbeville v. JPMorgan Chase Bank*, 2011 U.S. Dist. LEXIS 42290, at \*15-17 (C.D. Cal. Apr. 4, 2011)
  - *Grill v. BAC Home Loans Servicing LP*, 2011 U.S. Dist. LEXIS 3771, at \*17-18 (E.D. Cal. Jan. 13, 2011)
  - *Simmons v. Countrywide Home Loans, Inc.*, 2010 U.S. Dist. LEXIS 65031, at \*15 (S.D. Cal. June 29, 2010)

# Issues That Arise in HAMP Litigation

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## *But two outliers from state courts:*

- *Parker v. Bank of Am., NA*, 2011 WL 6413615, at \*7 (Mass. Super. Ct. Dec. 16, 2011) (“With the utmost respect for those in the majority, I believe nonetheless that the court in Marques [2010 WL 3212131 (S.D. Cal. Aug. 12, 2010)] had it right.”)
- *Phillips v. U.S. Bank, NA*, No. 11 CV 00504, at \*4 (Sup. Ct. Ga. Nov. 2, 2011) (“Multiple courts from a variety of jurisdictions have extended such standing to third parties harmed as a result of HAMP violations. (HAMP is not old enough to have generated a huge volume of cases.)”)

# Issues That Arise in HAMP Litigation

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- Can breach of contract claims be brought under TPPs? **Based on promise of permanent modification: weight of authority says no, but there is now contrary authority from the 7th Circuit.**
- **Based on timely consideration: recent cases suggest this theory may be more tenable.**
  - **Promise of permanent modification:** at least nine courts have now dismissed breach of contract claims based on alleged promise to modify. Three courts, including the Seventh Circuit, have upheld breach of contract claims in this context.
    - *Nungaray v. Litton Loan Servicing, LP*, 200 Cal. App. 4th 1499, 1504 (2011) (“As a matter of law, there was no contract here.”)
    - *Senter v. JPMorgan Chase Bank, N.A.*, 2011 U.S. Dist. LEXIS 105414, at \*19 (S.D. Fla. Aug. 9, 2011) (“The Court agrees with the Defendants that the Plaintiffs have failed to adequately plead consideration for the purposes of establishing a valid contract.”)

# Issues That Arise in HAMP Litigation

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- *Morales v. Chase Home Fin. LLC*, 2011 U.S. Dist. LEXIS 49698, at \*11-18 (N.D. Cal. Apr. 11, 2011)
- *Bourdelaïs v. J.P. Morgan Chase Bank, N.A.*, 2011 U.S. Dist. LEXIS 35507, at \*14 (E.D. Va. Apr. 1, 2011)
- *Brown v. Bank of NY Mellon*, 2011 U.S. Dist. LEXIS 6006, at \*8 (W.D. Mich. Jan. 21, 2011)
- *Torres v. Litton Loan Servicing L.P.*, 2011 U.S. Dist. LEXIS 4616, at \*6 (E.D. Cal. Jan. 18, 2011)
- *Vida v. OneWest Bank, F.S.B.*, 2010 U.S. Dist. LEXIS 132000, at \*15 (D. Or. Dec. 13, 2010)
- *Shurtliff v. Wells Fargo Bank, N.A.*, 2010 U.S. Dist. LEXIS 117962, at \*13 (D. Utah Nov. 5, 2010)

# Issues That Arise in HAMP Litigation

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***But see:***

- *Turbeville*, 2011 U.S. Dist. LEXIS 42290, at \*10-11.
- *Durmic*, 2010 U.S. Dist. LEXIS 124603, at \*15.

***7th Circuit:***

- Servicer may be regarded as having agreed to provide a permanent modification if it countersigns the TPP and the borrower makes three timely payments under the TPP. *Wigod v. Wells Fargo Bank, N.A.*, \_\_\_ F.3d \_\_\_ (7th Cir. 2012).
- **Timely consideration**
  - *Wilcox v. EMC Mortg. Corp.*, 2011 U.S. Dist. LEXIS 82128, at \*17.
  - *Bosque v. Wells Fargo Bank, N.A.*, 2011 U.S. Dist. LEXIS 8509, at \*22 n.12 (D. Mass. Jan. 26, 2011).

# Issues That Arise in HAMP Litigation

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- How strong are promissory estoppel claims? **Weight of authority says weak, but, again, there is contrary authority from the 7th Circuit.**

- *Bourdelais*, 2011 U.S. Dist. LEXIS 35507, at \*14-15.
- *Morales*, 2011 U.S. Dist. LEXIS 49698, at \*19-23.
- *Grill*, 2011 U.S. Dist. LEXIS 3771, at \*21-22.

***But see:***

- *Wigod v. Wells Fargo Bank, N.A.*, \_\_\_ F.3d \_\_\_ (7th Cir. 2012) (based on promises in the countersigned TPP).
- *Wilcox*, 2011 U.S. Dist. LEXIS 82128, at \*20-21.
- *Turbeville*, 2011 U.S. Dist. LEXIS 42290, at \*17-18.

# HAMP Claims and Defenses Based on AG Settlement or OCC Consent Order

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- AG settlement: The only court to consider the issue has rejected AG settlement (and the conduct described therein) as necessary factual support for unfair, deceptive, and unlawful practices as a basis for a UDAP claim.
  - *Crilley v. Bank of America, N.A.*, No. 12-00081, 2012 U.S. Dist. LEXIS 58469, at \*17 n. 4 (D. Harv. Apr. 26, 2012).
- OCC settlement: Financial Institutions Supervisory Act (“FISA”) has broad language that could strip jurisdiction of court over any institution that is a party to an OCC consent order.
- OCC has authority to address unsafe or unsound practices or violations of law by financial institutions. 12 U.S.C. §§ 1818(b), 1813(q).

# HAMP Claims and Defenses Based on AG Settlement or OCC Consent Order

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- “No court shall have jurisdiction to *affect by injunction or otherwise* the issuance or enforcement of any notice or order under any such section, or to review, modify, suspend, terminate, or set aside any such notice or order.” 12 U.S.C. § (i)(1) (emphasis added).
- Broad language of § 1818(i)(1) strips federal courts of jurisdiction whenever a determination could affect an agency decision.
- Most HAMP claims clearly implicate conduct addressed by OCC consent order.

Gregory P. Dresser  
Morrison & Foerster  
425 Market Street  
San Francisco, CA 94105  
T. (415) 268-7000  
F. (415) 268-7522



# Contested Mortgage Foreclosure: MERS Litigation

Joseph Patry

[joep@mersinc.org](mailto:joep@mersinc.org)

703.761.1270

Joining Blank Rome, Washington DC, June 18

# MERS® Cases and Issues

- Recent significant cases
  - Recent NY and TX appellate cases
  - *Commonwealth* and *Scarborough*
- Common arguments and defenses
  - Borrowers lack of standing to challenge assignment
  - MERS interest as mortgagee
  - MERS authority to assign mortgages
  - Splitting of the note and mortgage

