LEGAL LEAGUE QUARTERLY
SUMMER 2011 COMMITTED TO THE INDUSTRY, INTEGRITY, AND BEST PRACTICES

National

CONSENT ORDERS: *Helping or Hurting?*

By Carl A. Eldh, Doonan, Graves & Longoria, LLC

The Office of Thrift Supervision (OTS) and various other federal agencies have recently entered into consent orders with a variety of entities in the mortgage servicing arena with far-reaching effects throughout the industry. The basis for these orders has been discussed extensively in other publications and is rooted in the belief that there have been insufficient resources dedicated to defaults and potential solutions to defaults such as loss mitigation and loan modification.

The OTS specifically found that numerous affidavits were executed relating to information that went to the core of the foreclosure proceedings and alleged they were made on personal knowledge or based upon "a review by the affiant of the relevant books and records, when, in many cases, they were not based on such personal knowledge or review of the relevant books and records."

Affidavits were also not signed or affirmed in the presence of a notary. Foreclosures and bankruptcy proceedings were undertaken "without always ensuring that the promissory note and mortgage were properly endorsed or assigned, and, if necessary, in the possession of the appropriate party at the appropriate time." The OTS also found that there was insufficient both internal and external oversight, including the oversight of outside counsel. The signatories neither admitted nor denied these findings.

A Closer Look at Consent Orders

An area that deserves more regard and analysis is the effect of these orders upon MERSCORP and how that will affect servicers throughout the United States. The orders address MERSCORP a number of times and require compliance with the membership rules of MERSCORP. The entities involved are also required to formulate a specific plan to comply with the membership rules and terms

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National

WHAT HAVE YOU DONE WITH MY CLIENT?

By Jon Engman & Rose Marie Brook, Fabrizio & Brook, P.C.

Remember when thinking outside the box was encouraged? When attorneys were able to discuss unique perspectives and solutions with clients? The latest trend of servicers hiring national firms to oversee local counsel is causing our voices to become quieter and quieter.

With increased audits and government scrutiny throughout the default servicing industry, some servicers have begun outsourcing management of local counsel to large national firms. Rather than streamlining the default legal practice, this trend has led to a muddling effect with state firms answering to national firms unfamiliar with state-specific laws and procedures. A national firm will sometimes take over direct management of active litigation files, requiring the local law firm to communicate with an attorney out of touch with specific state procedures and often the default practice

"What have you done" continued on page 12

National

KEEPING GOOD DEEDS UNPUNISHED IN LOSS MITIGATION

By Martha Croog, Martha Croog, LLC

With the proliferation of mediation programs nationwide, available statistics show that many borrowers re-default following a loan modification. It has been suggested that re-default rates may be higher where loans are modified in mediation.[1] Significant re-default rates indicate that awareness of judicial expectations of "good faith" loss mitigation will continue to be a concern for foreclosing lenders.[2]

For example, despite the fact that a modification was approved in a judicially controlled mediation environment, some mortgagors, after re-defaulting, claim wrongful foreclosure in attacking the modification, even though the modification resolved a prior foreclosure. Situations in which challenges to good faith loss mitigation may occur include separate litigation filed in federal court; in special defenses or counterclaims to pending foreclosure litigation; in motion practice related to the continuation or termination of mediation; and during mandatory settlement negotiations.

A record of good faith measures that were utilized during attempted or completed loss mitigation should be developed and maintained by mortgagees and their servicers for use in foreclosure litigation following default under the original or a modified loan.

Good Faith Standard

As a condition to filing a foreclosure, most states require delivery of notices that identify local and federal loss mitigation resources available to the borrower, including mediation. Some courts also require the filing of affidavits that certify to loss mitigation efforts, as a condition to the entry of a foreclosure judgment. Until mandatory mediation programs fade into the sunset, trial courts will expect that loss mitigation resolutions of foreclosure

"Good Deeds" continued on page 13

LEGAL LEAGUE
QUARTERLY

SUMMER 2011

When it comes to serving our clients and our industry, we're 100 percent.

Colleagues,

National unemployment for May was at 9.1 percent. Inasmuch as the housing crisis and foreclosure volumes keep grabbing headlines, the Consumer Financial Protection Bureau continues to take shape, and a national mortgage servicing settlement remains in draft, we seem to conveniently dismiss a condition that is at the epicenter of a wounded economy ... unemployment is at 9.1 percent.

I did some research and found a period in the early '80s where there was a similar pattern of high unemployment that was greater than 8 percent. That patch lasted for a comparable stretch of time, around 28 months. What's the difference? At the tail end of that cycle, the numbers were showing a steady sign of improvement. Today's circumstance: Unemployment is flat lining or getting worse in some markets. Do you know what unemployment was two years ago? In May 2009, it was at 9.1 percent. No matter, we need to punish the bankers and foreclosure shops … *that* will make us feel better.

Let me tell you had bad it's become. A study conducted in 2010 by the International Monetary Fund concludes, "Foreclosures contribute to 1.25 points of unemployment." Really? That would suggest that if you own a home, you could get a job. Wait, that's backward, isn't it? You need a job to own a home. So maybe (and I'm going out on a limb here) *unemployment* is actually *creating foreclosures!* Could it be? I'll stop; the IMF has enough problems these days.

Bottom line is that housing and mortgage banking has become the emotional pincushion for all that's wrong with the economy and, quite frankly, mankind. A recent survey by *Time Magazine* polled the Top 10 "evil animals" on the planet, and humans came in at No. 2 (sandwiched between rats at No. 3 and bedbugs at No. 1). When citing the "evil" perpetrated by mankind, the piece referred to "concentration camps, war crimes, genocide, the crusades, Al-Qaeda, the specter of nuclear Armageddon, torture and rape, avarice, jealousy, and ***subprime mortgages***."

Enough. We really need to stop diversionary flares of accusation and focus on what matters most. J-O-B-S. Striking a piñata after the candy has been knocked out of it gets boring after awhile. Let D.C. start to explain why nothing is working on the job front. Now that would be interesting. Oh, did I mention that unemployment is at 9.1 percent?

Sincerely,

Ed Delgado
CEO, Five Star Institute

Edward R. Delgado is the CEO of the Five Star Institute, an education provider that offers professional guidance and a specialization in working with defaulted real estate. In this role, this mortgage veteran and visionary is driving education and industry outreach initiatives. Previously, Delgado was SVP for Wells Fargo Home Mortgage, where he was responsible for proposing and reviewing product line or service changes or expansions; conducting cost utilization or efficiency studies; monitoring economic, business, and political trends to determine potential business impact; coordinating the collection of research and departmental plans; and integrating them into recommendations. He also served as an information resource to the business-line management and represented Wells Fargo on several industry boards and committees.

THE FIVE STAR INSTITUTE

2011 Calendar ~ of Events ~

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THE FIVE STAR GOVERNMENT FORUM
The Newseum, Washington, D.C.

March 9
LENDER LEADERSHIP LEAGUE
The Hay-Adams, Washington, D.C.
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April 7-8
LEGAL LEAGUE 100 SPRING SUMMIT
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April 12
DISTRESSED ASSET ROUNDTABLE & EXCHANGE (DARE)
The Plaza, New York City, NY

May 18
THE FIVE STAR DATA & INFORMATION SUMMIT
Mandarin Oriental, Las Vegas, NV

September 10-14
THE FIVE STAR DEFAULT SERVICING CONFERENCE & EXPO
Hilton Anatole, Dallas, TX

MPact Mortgage Origination Show
More information coming soon.

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National

Mortgage Fraud Lawsuits on the Rise: *Are Appraisers Liable?*

By David P. Renovitch, Martin, Leigh, Laws & Fritzlen, P.C.

A hot topic in the servicing industry, mortgage fraud lawsuits are mounting from coast to coast. Just recently, for example, Deutsche Bank was sued by the United States for mortgage fraud.

Often, one of the allegations is that the property was over-valued to allow otherwise unqualified borrowers to take on debt they cannot afford. If there is evidence of over-valuation, who is responsible and who should bear liability?

Carol's Case

A case handed down by the Missouri Court of Appeals on April 19 found that appraisers may bear some responsibility and, thus, liability in these situations. The case involved Carol Edmonds, a single mother who, in 2005, earned $10,900 as a provider of in-home child-care services.

In March 2006, Edmonds received an unsolicited telephone call from Stacy Ware of Unique Realty, a company she owned with her husband, Mark. Stacy showed Edmonds a number of homes listed by Unique Realty and on March 14, 2006, she entered into a contract to purchase a house owned by Mark for $115,000. Stacy served as the loan officer. The house was in bad condition, and Mark promised to complete a total rehab prior to closing. He also said the kitchen appliances would remain in the house.

The appraisers, Barry Hough and Mary Atkins, d/b/a Home Appraisers of Greater St. Louis, provided an appraisal dated April 20, 2006, stating a fair market value of $115,000. The appraisal noted the property had recently completed renovations and there were no physical deficiencies affecting livability or structural soundness. Mark paid $67,294 for the house when he purchased in on March 2, 2006. Market data for the neighborhood showed an average house value of $48,930 and a high of $72,057. A HUD warning was issued to the lender because the appraisal was suspiciously high.

Edmonds visited the property several times in early April 2006 and did not see that any of the promised improvements had been completed. She tried backing out of the contract, and Mark agreed to lower the purchase price to $110,000. Mark also promised to pay the first three mortgage payments and assured her that all repairs and improvements would be completed by closing.

Stacy initially told Edmonds the monthly mortgage payments would be $850, which she was unable to afford. Stacy was able to reduce the total monthly mortgage payments on two loans to $693. Closing occurred April 26, 2006. Edmonds began moving in the day after closing, but none of the promised repairs and improvements had been completed, and the kitchen appliances were gone. Mark stopped payment on the check for Edmonds' first three mortgage payments, and Stacy and Mark did not return her numerous phone calls.

Edmonds retained an attorney and notified the servicer that she would not make payments based on fraud. She filed for bankruptcy in 2007 and obtained a temporary restraining order in 2008 to stop the foreclosure but could not post the $5,000 bond. In September 2009, she was evicted.

Edmonds filed a lawsuit in the Circuit Court of the City of St. Louis alleging against the appraiser, among numerous other parties and claims, violations of Missouri's Merchandising Practices Act (MPA), negligence and civil conspiracy. The trial court granted summary judgment in favor of the appraiser citing, among other things, the buyer did not rely on the appraisal.

Missouri's Merchandising Practices Act (MPA) provides that it shall be unlawful for any party to engage in deception, fraud, false pretense, false promise, misrepresentation, unfair practice or concealment, suppression, or omission of any material fact

"Mortgage Fraud" continued on page 13

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States: Arkansas

Arkansas Legislature Enacts Significant Changes to Statutory Foreclosure Process

By Shellie Wallace, Wilson & Associates, PLLC

The 88th General Assembly of the Arkansas Legislature was as prolific as past sessions, with more than 2,000 combined House and Senate bills filed prior to the March 7 deadline. Three bills of significant interest to the mortgage banking industry are Act 903, Act 885, and Act 901. Read on for more details on each and how they will affect the statutory foreclosure process.

Act 903 – To Amend the Definitions Regarding the Regulation of Unsanitary Conditions and to Declare an Emergency

Act 903 was filed as HB 2141 with the purpose of adding "abandoned home or residential property" as an unsafe or vacant structure. This allows municipalities to cut weeds and remove garbage, stagnant water pools, and other unsightly and unsanitary articles from the abandoned property.

The municipality can impose a priority lien for the costs of removal and remediation, and as many foreclosed homes are "abandoned," municipal liens imposed pursuant to the act will need to be paid, as they cannot be foreclosed.

The act contains an emergency clause and became effective March 31.

Act 885 – To Require Additional Information and to Encourage Loss Mitigation and Loan Modifications Before Initiating a Statutory Foreclosure

Act 885 was filed as HB 1811. It initially encompassed many of the reforms sought by the attorneys general in their ongoing settlement discussions with major servicers. As amended, the act requires the beneficiary to mail the borrower, at least 10 days prior to initiating a foreclosure, a letter that contains the following: a copy of the note, with endorsements; a copy of the security instrument with any assignments in its possession; the name of the holder of the note and its physical location; loan modification or forbearance assistance information; and a payment history showing the date of default.

The act also requires the beneficiary to certify that the borrower is not eligible or does not meet the criteria for loan modification or forbearance assistance. Notice must be mailed by certified and first-class mail to the borrower, at least 10 business days before the sale. The requirement to send either the pre-foreclosure or pre-sale letter cannot be delegated to the attorney or trustee administering the foreclosure.

Act 901 – To Amend Provisions of the Arkansas Code Related to Statutory Foreclosures

Act 901 was filed as HB 2085. It was amended to remove any confusion in existing statutory language regarding the parties that may proceed under the Statutory Foreclosure Act and conduct sales. The bill clarifies that the following parties are authorized to foreclose a mortgage or deed of trust under the nonjudicial statute:

Attorneys or trustees with physical offices within the state accessible to the public for the purpose of accepting funds from the borrower.

Certain lenders and approved mortgage loan servicers, provided they have a physical location in the state open normal banking hours, are the note holders or servicers for the note holders and do not charge any fees or costs.

State agencies where not otherwise prohibited by law.

The bills also confirms that nonjudicial sales must be conducted by a third party who is a licensed real estate agent and licensed auctioneer. Though other existing code sections already require the licensure of persons auctioning and selling property, this language is now cross referenced in the Statutory Foreclosure Act.

Both Act 885 and Act 901 will be effective 60 days after sine die.

Shellie Wallace is partner and supervising attorney of the foreclosure legal and foreclosure title departments at Wilson & Associates, PLLC. She has significant experience in consumer protection litigation, with emphasis on construction fraud.

States: Connecticut

Case Study: Falls Mill of Vernon Condominium Assn, Inc., v. John R. Sudsbury, et al.

By William R. Dziedzic, Bendett & McHugh, P.C.

In a recent Connecticut appellate case, Falls Mill of Vernon Condominium Assn, Inc., v. John R. Sudsbury, et al., a defendant mortgagee, appealed the trial court's denial of its motion to open judgment of foreclosure. The plaintiff brought an action to foreclose its statutory lien for unpaid common charges on a condominium unit in which the defendant mortgagee had an interest.

At issue on appeal was whether or not the failure of the plaintiff in a foreclosure action to give a defaulted defendant notice of judgment under Practice Book § 17-22 has any bearing on the triggering of the 20-day appeal period or on the effectuation of judgment. The appellate court affirmed the judgment and reasoned that the plain language of the relevant statute implicates only notices required to be sent by the court clerk and not notices required to be sent by the prevailing party.

Plaintiff effectuated service on the defendant mortgagee by serving its registered agent for service. Defendant was later defaulted for failure to appear, and the plaintiff filed its motion for judgment of foreclosure. The trial court entered a judgment, and notice of the judgment was sent to the defendant's agent for service. No defendant redeemed on their law day, and title vested in the plaintiff. More than a year later, defendant filed a motion to open the judgment alleging, inter alia, that it did not receive proper notice of the plaintiff's notice of the judgment of foreclosure.

Court rules require under Practice Book § 17-22, which provides in relevant part "[that] a notice of judgment after default for failure to enter an appearance … shall be mailed within 10 days of the entry of judgment by counsel of the prevailing party to the party against whom it is directed." The defendant argued that since notice of the judgment was sent to the agent for service and not the party itself, then the applicable period to appeal did not run.

The trial court denied defendant's motion to open judgment, claiming it lacked authority to hear the motion and cited Connecticut General Statutes § 49-15, which provides in relevant part that "[a]ny judgment foreclosing the title to real estate by judgment of strict foreclosure may, at the direction of the court rendering the judgment, be opened … provided no such judgment shall be opened after the title has become absolute in any encumbrancer …" (Emphasis added.)

As always, it is important for servicers to promptly forward to foreclosure counsel any homeowners association complaints in a super lien state or risk being foreclosed out. Additionally, servicers need not be concerned with a judgment of foreclosure being opened after title vested because of a failure by counsel to properly mail a notice of judgment.

William R. Dziedzic is an attorney with Bendett & McHugh, P.C. The firm has nearly 25 years of experience representing clients in mortgage default litigation and real estate.

States: Washington D.C.

D.C. Saving Homes Law Creates Unique Challenges

By Jeffrey Fisher, The Fisher Law Group, PLLC

Since last November, residential foreclosures in the District of Columbia have been on an unofficial moratorium. Following emergency legislation covering the same subject on an interim basis, the Saving D.C. Homes from Foreclosure Act of 2010 became effective March 12.

Under this law, District residents can ask for face-to-face mediation. If an owner occupant requests mediation, the lender is required to participate. This moratorium will last until the D.C. Department of Insurance, Securities, and Banking (DISB) promulgates final regulations, which are expected imminently.

Lender/Borrower Mediation

In the various drafts, DISB has proposed a highly detailed mediation process involving multiple notices, both to and from borrowers and to and from lenders. Under this process, the lender is required to provide a statutory "Notice of Default on Residential Mortgage" to the borrower, with a copy to the mediation administrator along with a $300 fee. Attachments would include a loss mitigation application, as well as a description of the eligibility requirements of the potentially available loss mitigation options applicable to the loan. Additionally, there are detailed requirements regarding the timing and method of mailing and proof of mailing.

To request mediation, borrowers must return a completed "Mediation Request Form" and pay a $50 fee. During the mediation, the borrower and lender would meet and, with the help of a neutral third party, reach an agreement that will avoid the lender foreclosing on the borrower's home. This agreement can include renegotiation of the terms of the loan, loan modifications, refinancing, short sale, deed in lieu of foreclosure, and other options that may be available to prevent a foreclosure.

New Challenges to the Industry

The DISB predicts that each mediation session would last three hours, and if necessary, the parties would engage in two sessions. The legislation mandates that these mediation sessions be completed within 90 days after delivery of the Notice of Default unless extended for 30 days by mutual consent.

The document production and participation requirements regarding the mediation sessions will be onerous to the industry, requiring production of notes and assignment trials, and pooling and servicing agreements. Apparently, there will be a result-oriented regulatory definition of "good faith" in mediation, and a failure to mediate in good faith may result in $500 daily fines, continuance of mediation sessions until full compliance, and cancellation of the Notice of Default.

Borrowers and lenders may appoint representatives to attend the mediation on their behalf. Because sensitive personal financial information will be exchanged and discussed during the mediation, the meeting is generally not open to the public.

What's Next?

Thus far, the regulators have not provided that the issuance of a certification of mediation, which is a precondition of scheduling a foreclosure sale, will be conclusive that all statutory and regulatory requirements have been met. Since the District's basic process remains non-judicial, title insurers will find it difficult, if not impossible, to underwrite title insurance on completed foreclosure sales.

It is possible that servicers, in consultation with their attorneys, may choose to proceed with judicial foreclosures rather than to submit to these new regulatory procedures.

Jeffrey Fisher is founder and a member of the Fisher Law Group, PLLC, comprised of five attorneys and more than 40 staff members. Fisher Law represents a growing base of national and local lenders.

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GEORGIA SUPREME COURT: *Facially Invalid Security Deeds Don't Provide Constructive Notice*

By John D. Andrle, Esq., McCurdy & Candler, LLC

WE NOW KNOW what we long hoped we did not want to know—namely, that Georgia security deeds with missing witness signatures or a missing notary seal are avoidable by bankruptcy trustees because these security deeds do not provide sufficient constructive notice under state law.

On March 25, the Georgia Supreme Court decided a certified question of state law presented to it from the U.S. District Court for the Northern District of Georgia in an appeal of a bankruptcy court's decision in In re Haglar, 429 B.R. 42 (2009). The Supreme Court considered the question of whether, in the absence of fraud, a security deed that is filed, recorded, and accurately indexed provides sufficient constructive notice to bona fide purchasers (BFPs) when it contains a patently defective attestation.

A Chapter 7 trustee has the ability under § 544(a)(3) of the Bankruptcy Code to avoid a security deed when under state law, a hypothetical BFP of real property would not have constructive notice of such transfer or obligation. Lenders argued that even a facially defective security deed that was filed and recorded clearly still had the ability to trigger a duty to inquire.

The Supreme Court found in the final analysis that these defective deeds would not be considered "duly" filed, recorded, and indexed and thus could not provide sufficient notice. The Supreme Court stated that giving license to lenders to rely on facially invalid security deeds:

"'Would relieve lenders of any obligation to present properly attested security deeds and would tell clerks that the directive to admit only attested deeds is merely a suggestion, not a duty, and this would risk an increase in fraud because deeds no longer would require attestation by a public officer who is sworn to verify certain information on the deeds before they are recorded and deemed to put all subsequent purchasers on notice."

What does the landscape look like then, in a post-Haglar world when one is attempting to defend against a trustee's avoidance action? Fortunately, there are still tactical defenses that can be employed.

Under a 1995 amendment to O.C.G.A. § 44-14-33, it is recognized that a facially proper but latently defective attestation does provide sufficient constructive notice. Leeds Bldg. Products, Inc. v. Sears Mortgage Corp., 267 Ga. 300 (1996). Also, security deeds that are missing the official witness signature or notary seal can be preserved from trustee avoidance under certain circumstances when a closing attorney affidavit is filed with the security deed testifying to the execution and attestation of the security deed by the borrower. Kim v. Terrace Mortgage Company, 571 F.3d 1342 (11th Cir. 2009).

John D. Andrle, Esq., is an attorney with McCurdy & Candler, LLC. McCurdy is a full-service firm that conducts general business and civil litigation practice with an emphasis on serving the needs of the financial and mortgage banking communities.

STANDING IN THE ILLINOIS FORECLOSURE CONTEXT: *Who Can Foreclose?*

By Nickolas A. Schad, Potestivo & Associates, P.C.

"THE FREQUENCY WITH which securities … are traded in the financial market can make it difficult to identify the entity that is actually in possession of the note or the mortgage. Thus, when challenged in courts throughout the country, lenders recently have seen lawsuits dismissed for failing to ascertain a basic element of litigation."[1]

There has been a recent trend among Illinois judges adjudicating foreclosure cases to request additional proof of the plaintiff's standing,[2] regardless of whether any standing[3] challenges are raised by a defendant. "In Illinois, standing is defined as some injury[4] in fact to a legally recognized interest."[5]

In a foreclosure action, the ability to foreclose upon a mortgage is evidenced when a party has possession of the note upon which the mortgage[6] is pledged as a security.[7] When the note is transferred, the transfer "vests in the transferee any right of the transferor to enforce the instrument."[8] Thus, the date the note is transferred,[9] the ability to enforce the note and bring a mortgage foreclosure action travels with it.[10]

In Illinois, a mortgagee or its authorized agent has standing to bring a foreclosure action. Mortgagee is defined under the Illinois Mortgage Foreclosure Law as "(i) the holder of an indebtedness or obligee of a nonmonetary obligation secured by a mortgage or any person designated or authorized to act on behalf of such holder and (ii) any person claiming through a mortgagee as successor."[11] If the plaintiff is not the original lender, the plaintiff can establish standing by attaching a copy of the allonge or assignment of mortgage to the complaint. If those documents are unavailable, the plaintiff can also file an affidavit, either with the complaint or prior to judgment, showing that the loan had been transferred from the original lender to the plaintiff.[12]

Mortgage Electronic Registration Systems, Inc., v. Barnes[13] highlights the recent standing issues raised in Illinois courts. In Barnes, Mortgage Electronic Registration Systems, Inc., ("MERS") filed a complaint to foreclose upon a mortgage where MERS was listed as the nominee of the lender and the lender's successors and assigns.[14] Barnes, because another entity appeared on the mortgage as lender, claimed "that MERS was not the true owner or holder of the note and mortgage" and therefore suffered no injury to have standing to bring the foreclosure action.[15] The court, in disagreeing with Barnes' argument, stated that MERS did have standing to bring the foreclosure action as, in Illinois, "[a] plaintiff can maintain a [foreclosure action] although the beneficial ownership of the note is in another person."[16] Moreover, as MERS was listed as the nominee for the lender on the mortgage, this was clear proof of MERS' authorization to act for the holder of the indebtedness.[17]

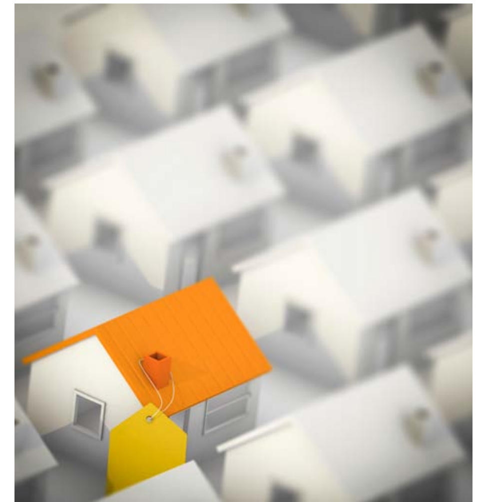
Nickolas A. Schad joined Potestivo & Associates, P.C., in October 2010. He currently holds the position of associate attorney in the litigation department in the Chicago office.

1 Douglas S. Malan, Shaking Standing: Foreclosure cases identify shoddy record-keeping in mortgage industry, Connecticut Law Tribune, June 2, 2008, available at www.ctlawtribune.com/getarticle.aspx?id=30505. **2** The U.S. Supreme Court has found three major elements of standing: injury, causation, and redressability. Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992). **3** Standing is generally defined as the ability of a party to demonstrate to the court sufficient connection to and harm from the law or action challenged to support that party's participation in the case. Mortgage Electronic Registration Systems, Inc., v. Barnes, 406 Ill.App.3d 1, 6 (1st Dist. 2010). ***4*** This claimed injury "must be distinct and palpable, fairly traceable to the defendant's actions, and substantially likely to be prevented or redressed by the grant of the requested relief." Martini v. Netsch, 272 Ill. App.3d 693, 695 (1st Dist. 1995). **5**Id. **6** The mortgage is not the evidence of the right to payment but is an agreement that "secures payment or performance of [the] obligation" represented in the note. 810 ILCS 5/9-102(a)(55). **7**See generally Niehaus v. Niehaus, 2 Ill. App.2d 434 (4th Dist. 1954). **8** 810 ILCS 5/3-203(b). **9** Generally, the transfer of the note is evidenced by an allonge. The allonge demonstrates the path the note took from the original lender to the current holder. Assignments of mortgage are also generally executed between transferring parties, which evidences the transfer of the mortgagee's interest in the security agreement, the mortgage. The allonge and assignment of mortgage help to create a "chain" demonstrating the ownership of the indebtedness. ***10*** 810 ILCS 5/9-313(a). ***11*** 735 ILCS 5/15-1208. ***12*** U.S. Bank National Association v. Sauer, 392 Ill. App.3d 942, 946 (2nd Dist. 2009). ***13*** Mortgage Electronic Registration Systems, Inc. v. Barnes, 406 Ill. App.3d 1, 6 (1st Dist. 2010). ***14*** Id. at 122. ***15*** Id. at 121. ***16*** Id. at 124 citing Kazunas v. Wright, 286 Ill.App.

States: Michigan

Property Transfer Affidavits: *When and Why Should You File?*

By Tobias Lipski, Schneiderman & Sherman, P.C.



When should a mortgagee who takes title by sheriff's sale file the property transfer affidavit (PTA)? In order to avoid post-sale complications and minimize potential losses and delays, it is in a mortgagee's best interest to file the PTA, subsequent to expiration of the redemption period.

Penalties from Failure to File

Pursuant to MCL 211.27a(7)(d), as well as the Michigan Department of Treasury Assessment and Certification Division, the PTA does not need to be filed until one year after the expiration of the redemption period or until the mortgagee sells the property, whichever occurs first. In other words, all of the local assessors who evaluate a penalty for failure to file the PTA within 45 days after expiration of redemption are not doing so lawfully and should be reported to the tax commissioner if unwilling to rescind the penalty.

That said, many assessors do in fact assess this penalty, and fighting with them could cause potentially avoidable delay in REO. Also, for larger inventories, it would appear to be more complicated to monitor a file for the "one year from redemption expiration, unless property has been sold" deadline than to go ahead and file the affidavit at the expiration of the redemption period.

Post-REO Sale Retroactive Reassessment

On occasion, subsequent to foreclosure sale, an assessor will fail to recognize that the property has been acquired by an entity, rather than by individuals occupying the property as a personal residence. Consequently, the assessor will fail to assess the property as non-homestead until sometime after the property has been sold to a new residential purchaser. As a result, the assessor will retroactively assess additional taxes to the property dating back to the date of foreclosure sale.

First, the assessor will go after the new property owner, who will, in turn, likely go after the REO title company. The REO title company then has to direct the assessor to Michigan law, which protects a bona fide purchaser from such taxes. The assessor will then pursue the mortgagee/seller. Based on a conversation with the Michigan Department of Treasury Principal Residence Exemption unit, filing of the PTA will serve as sufficient notice to the assessor that the principal residence exemption should be removed and taxes timely adjusted.

Cost-Benefit Analysis

A cost-benefit analysis should suggest that the benefit of avoiding delays and costs that could result from not filing the PTA would outweigh any fees and aggravation associated with routinely filing the affidavit upon expiration of the redemption period.

Attorney Tobias J. Lipski serves as general counsel and title curative supervisor for Schneiderman & Sherman, P.C. Lipski ensures each division's compliance with Michigan and federal law and cures title issues on behalf of creditors, title agents, title insurance underwriters, and individuals.

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Foreclosing Securitized Mortgages? Prove It!

By Garry McCubbin and Gerald Walters, Kozeny & McCubbin, L.C.

"Foreclosure defense" is an emerging, albeit informal, legal specialty. Frequently, foreclosure defense involves little more than making the lender prove "standing," that is, proving that the foreclosing lender actually holds the loan and is thereby the proper party to foreclose. In this regard, some recent court rulings have not been kind to the securitization model, and MERS's role in particular. These seemingly adverse court rulings often "go viral" and are quickly cited by foreclosure defense attorneys in later foreclosures. An adverse court ruling can thus create a ripple effect that complicates or delays later foreclosures.

A careful reading of some of these rulings reveals that they were probably avoidable. They seem to be the result of either a failure to prove some necessary aspect of standing or failure to adequately explain the role of MERS to the court. It is clear that as an industry, we need to all work harder to avoid high-profile adverse court rulings by ensuring that courts have the evidence and legal arguments needed to rule on the merits of the cases.

U.S. Bank National Association v. Ibanez

A case garnering a great deal of attention is U.S. Bank National Association v. Ibanez, 458 Mass. 637, 941 N.E.2d 40 (2011 Mass.), a case decided by the Massachusetts Supreme Court in January. In this case, the plaintiffs were two lenders that had bought properties at their own nonjudicial foreclosure sales (two similar cases had been consolidated or joined together because they contained similar legal issues). Both loans had been securitized, and neither plaintiff was the original lender. After the foreclosure sales, they both filed suit to quiet title and declare that they owned the foreclosed properties.

Massachusetts state law provides that the foreclosing entity must hold the mortgage at the time of the notice of foreclosure sale. Despite the court providing a fair opportunity for the plaintiffs to produce documents establishing that they held the mortgages at the time the foreclosure sales were initiated, the plaintiffs were unable to do so. Unsigned and incomplete documents had been submitted, which the court determined was not proper proof of the plaintiffs' ownership of the mortgages. Consequently, the court ruled that the plaintiffs had failed to demonstrate that the foreclosure sales were valid or that the plaintiffs acquired title to the properties as a result of the sales.

The court made no finding that either MERS or the securitization of mortgages was inherently improper. It simply ruled that the plaintiffs had to own the mortgages in order to conduct valid foreclosures under Massachusetts law and that, in these instances, they had failed prove that they did.

Landmark Bank v. Kesler

In another unfortunate case, Landmark Bank v. Kesler, 216 P. 3d 158, 166 (Kan. 2009), the Kansas Supreme Court belittled MERS as a mere "straw man." In Landmark, a junior mortgage held by a MERS member was extinguished by foreclosure of a senior mortgage. MERS had never been served with notice in the case and attempted to vacate the default foreclosure judgment. The court noted that there was no evidence in the case to show that MERS had any protectable rights in the loan. The court also speculated that if one entity held the note while another (MERS) held the mortgage, the mortgage might be unenforceable unless MERS was an agent of the holder of the note. With an apparent absence of any evidence offered to show that MERS was in fact an agent for the holder of the note, the opinion called into question whether a mortgage with MERS is even enforceable in Kansas.

Fortunately, the Bankruptcy Court for the District of Kansas later mitigated the negative effect of the Landmark decision in In Re Martinez, Case No. 10-07027. (Opinion filed April 20.) In Martinez, a promissory note was executed in favor of Countrywide Home Loans, Inc., and the corresponding mortgage named MERS as the holder of the mortgage and specifically described Countrywide as the lender. In the bankruptcy proceeding, both sides filed motions for summary judgment as to whether MERS and/or Countrywide could enforce the mortgage. The debtor argued that because Countrywide held the note and MERS held the mortgage, the note and mortgage had been separated, rendering the mortgage unenforceable. The debtor's theory was that the holder of the mortgage alone is not entitled to any payments, so the mortgage cannot be in default. The corollary to this argument is that because the lender does not hold the mortgage, the lender cannot enforce it.

An interesting aspect of the Martinez case is that the Kansas Court of Appeals had previously reversed a lower court judgment allowing a judicial foreclosure of the Martinez mortgage by MERS, relying heavily on the Landmark case. (See Mortgage Electronic Registration Systems v. Graham, 44 Kan. App. 547 [Kan. App. 2010]. Martinez had been Graham in the state court foreclosure). The appellate court held that the note and mortgage had been split, and therefore the mortgage could not be enforced by MERS and that there was no evidence that MERS had received permission to act as the agent of Countrywide.

In the bankruptcy court, Martinez, the debtor, argued that the state case was res judicata as to the issue of the nonenforceability of the mortgage, meaning that the nonenforceability could not be re-litigated in the bankruptcy court. The bankruptcy judge rejected the res judicata argument, pointing out that the state court decision was based upon a lack of jurisdiction and not on the merits of the case and that the issue of agency had not been raised or addressed by any of the parties in the state court foreclosure action. Ultimately,

the bankruptcy judge ruled that there was an agency relationship between the lender and the holder of the mortgage, so the note and mortgage were not separated, the mortgage could be enforced, and the court granted relief from the stay to allow foreclosure.

Bellestri v. Ocwen

Yet another unfortunate case is Bellestri v. Ocwen, 284 S.W.3d 619 (Mo. App. 2009). In this case, the purchaser of the property at a tax sale filed suit to quiet title. Ocwen Loan Servicing, LLC, was later joined because it held the deed of trust. The court ruled that Ocwen did not have standing to challenge the tax sale or deed. The court stated that Ocwen had not demonstrated that it was the holder of the note, and therefore under Missouri law could not be deemed the holder of the deed of trust. The court held that since BNC was the holder of the note, and it was therefore the only entity that could enforce the deed of trust, Ocwen had no standing to challenge the sale. The court noted that there was no evidence in the record that indicated that MERS either held the note or that BNC gave MERS the authority to transfer the note.

MERS later filed suit in federal court for the Eastern District of Missouri, alleging that its due process rights had been violated because it did not receive notice of the tax sale and that Bellestri failed to comply with Missouri law by not providing it with notice of the tax sale, even though MERS was the denominated as the beneficiary and nominee for the lender or the lender's successors. The U.S. District Court ruled that in that capacity, MERS indeed had a claim or interest in the property and was entitled to notice and held that the tax sale was void due to lack of notice to MERS. (Mortgage Electronic Registration Systems, Inc. v. Bellistri, 2010 U.S. Dist LEXIS 67753 [E.D. Mo. 2010].)

A Missouri bankruptcy has also ruled that MERS's involvement does not render the deed of trust unenforceable. In In Re Patricia Louise Tucker, 441 B.R. 638 (Bankr. E.D. Mo. 2010), the trustee argued, in response to a motion for relief from the automatic stay filed by the then note-holder, that because the holder of the note did not also hold the deed of trust, it could not enforce it. The court rejected that argument, finding that the documents involved allowed MERS to hold the deed of trust as the agent or nominee of the original holder of the note, as well as subsequent holders of the note, and therefore the note was secured and the creditor currently holding the note was entitled to enforce the deed of trust.

Two More Cases to Consider

In a pair of cases recently decided by the U.S. District Court, Eastern District Missouri, the court dismissed complaints that alleged the involvement of MERS invalidated the foreclosure process. Those cases are Billy White v. BAC Home Loan Servicing, L.P., et al., Case No. 4:10-CV2137 CAS (opinion filed April 19) and Quincy White v. BAC Home Loan Servicing, L.P., et al. Case No. 4:10-CV-2094 (opinion filed April 19). These cases were originally filed in state court but were both removed to federal court because they contained allegations that the Fair Debt Collection Practices Act had been violated, thus providing the basis for federal jurisdiction. The cases also alleged wrongful foreclosure, negligence, and fraud and asked to quiet title.

The primary allegation in the complaints was that MERS did not have the authority (or standing) to transfer any interests or to represent the interests of either the original lenders or any of it successors. Therefore, according to the plaintiffs, when MERS executed an "Assignment of Deed of Trust" on behalf of Countrywide Home Loans, Inc., to BAC Home Loans Servicing. L.P., no interest was validly transferred, and BAC's subsequent foreclosure was improper. Defendants argued that pursuant to applicable law, MERS had the authority to assign both the note and deed of trust to BAC.

The court, quoting the language in the deed of trust, held that MERS was an agent for all the defendants and that the language in the deed of trust granted it the authority to assign both the deed of trust and the note and that BAC, through its agent MERS, held both the note and deed of trust, and thus had the right to foreclose. Once the court found that the deed of trust gave MERS the authority to transfer or assign the note, all the counts of the complaint were dismissed because the defendants had not done anything improper nor had they made any false statements that would support the remaining allegations. The federal claim of alleged violations of the FDCPA was dismissed because none of the representations of the defendants was untrue, misleading, or deceptive.

After the court ruled upon the federal question, it decided to exercise its supplemental jurisdiction as to the state law claims. As a part of its initial analysis, the court ruled that the allegations the plaintiffs had made with regard to the lack of authority of MERS to act as the agent of Countrywide were not entitled to be believed because the recorded documents executed by the defendants created an agency relationship that allowed MERS to make the assignments it did. Therefore, the actions taken by the defendants were lawful, and their communications to the plaintiffs were truthful.

Adverse Rulings = Adverse Impact

Adverse rulings have far greater implications than the particular cases at hand. They have a ripple effect that makes future foreclosures more challenging and more costly. It is important to note that none of these cases determined that MERS could not be the lawful agent for either the original lenders or its successors and assigns or that MERS's activities or claim of authority were invalid. What the courts have made clear, however, is that that lenders, servicers, and their attorneys must make sure they taking and properly documenting the actions authorized by their deeds of trusts, notes, and assignments and then following state law requirements with regard to foreclosures, including possessing the required and properly executed documents. Of course, when cases are litigated, the proper documents need to be admitted into evidence so that the agency relationship of MERS to any other parties is clearly established—clearly proven.

The adverse rulings noted herein may have been avoidable. They appear to have in common a failure to offer evidence as to some crucial fact that was indeed provable, i.e., a fact for which evidence was presumably available that could have been presented to the court: Ibanez (a signed rather than unsigned copy of the PSA to prove plaintiffs did hold the mortgages at the time of the foreclosures); Landmark (the MERS membership agreement to prove MERS was an agent of the holder of the note); Bellisteri (the MERS membership agreement to prove MERS was an agent of the holder of the note).

These observations are not intended to be critical of any of the parties or counsel involved. But as an industry, we can do a better job in presenting our cases and avoiding the broader consequences of high-profile, adverse court rulings. Let's prove it!

Garry McCubbin is a partner at Kozeny & McCubbin, L.C. He has been in private practice since 1990, concentrating on creditors' right and real estate law. Gerald Walters is an associate at Kozeny & McCubbin, L.C. He has been licensed since 1974 and brings extensive trial experience to the firm in both bench and jury trials.

Movers & Shakers

PIERCE & ASSOCIATES APPOINTS DIRECTOR OF FORECLOSURE OPERATIONS

Pierce & Associates P.C. named Ralph Gerardi director of foreclosure operations. Gerardi previously worked at Chase Home Finance, LLC, from 2006 through 2011 as VP. He also served as the VP of First American National Default Outsourcing from 2000 through 2006. Gerardi graduated from the School of Mortgage Banking in 1996.

FABRIZIO & BROOK PARTNER NOMINATED TO BAR ASSOCIATION BOARD

Jonathan L. Engman, partner at Fabrizio & Brook, P.C., in Troy, Michigan, was nominated to run for the board of directors for the Oakland County Bar Association. Engman has been a member of the Oakland County Bar Association since 1998 and active in the association throughout his career. Currently he is chair of the Real Property Committee.

WILFORD & GESKE NAMES NEW SHAREHOLDER

Eric D. Cook was named a shareholder at Wilford & Geske. The law firm's name is now Wilford, Geske & Cook, P.A. Having joined Wilford & Geske when the law firm was established in 2003, Cook's areas of concentration include commercial and business litigation, banking, bankruptcy, creditors' remedies, foreclosure, and construction and real estate law.

POTESTIVO & ASSOCIATES PROMOTES WOODS AVP AND MANAGING ATTORNEY

Potestivo & Associates, P.C., announced the promotion of supervising attorney Michael J. Woods to AVP and managing attorney of the firm's Rochester Hills, Michigan, office. Woods joined the firm in 2006. He supervises its foreclosure and loss mitigation processes and is actively involved in a number of local professional associations.

SOUTH & ASSOCIATES HIRES THREE NEW ATTORNEYS

South & Associates, P.C., hired three new associate attorneys. Noah McGraw joined the firm's corporate office in Overland Park, Kansas, as an attorney in the foreclosure department. He will focus primarily on Missouri foreclosures. McGraw received his bachelor's degree from the University of Kansas and his J.D. from the University of Missouri–Kansas City. He is licensed to practice in Missouri and the U.S. District Court for the Western District of Missouri.

Jason Howell also works from the firm's corporate office in Overland Park and is an attorney in the commercial and special asset department. Howell received his bachelor's degree from DePaul University and his J.D. from the University of Missouri–Kansas City. He is licensed to practice in both Missouri and Kansas.

SOUTH & ASSOCIATES HIRES NEW ASSOCIATE ATTORNEY

The creditors' rights firm South & Associates, P.C., hired a new associate attorney, Holly A. Smith. Smith joins the firm's corporate office in Overland Park, Kansas, as the supervising attorney of the loss mitigation department. Smith received her J.D. from the University of Kansas and is licensed to practice in Missouri and Kansas.

ROBERT J. HOPP & ASSOCIATES APPOINTS TWO SUPERVISING ATTORNEYS

Robert J. Hopp & Associates recently announced the appointments of two supervising attorneys: Cynthia A. Nierer, Esq., in the firm's New York office and Karen Weaver in the Albuquerque office.

Nierer has more than 16 years' experience in the real estate and mortgage default industry. Previously, she was the directing partner of the real estate closing and eviction departments at Rosicki, Rosicki & Associates P.C., where she practiced since 1995. She earned her JD from St. Johns University, School of Law.

A 20-year veteran of real estate, creditor bankruptcy, foreclosure, and commercial law litigation, Weaver is a former associate attorney for Susan C. Little & Associates P.A. She has also worked for Albuquerque firms Castle Meinhold & Stawiarski; Little & Drantell P.C.; and Vogel, Campbell & Blueher P.C. She received her JD from the California Western School of Law.

GERNER & KEARNS ADDS TWO NEW ASSOCIATE ATTORNEYS

Gerner & Kearns, Co., LPA recently announced the appointment of D. Anthony Sottile as a senior associate in the firm's default services practice group as its lead bankruptcy attorney and Crystal L. Saresky as an associate, also in the firm's default services practice group.

Sottile received his JD from Pettit College of Law at Ohio Northern University and is admitted to practice in the states of Ohio, Kentucky, and Indiana, as well as the U.S. District Courts in all three states. His primary area of practice is representing creditors' rights in consumer bankruptcy matters, and he will also be involved in foreclosure matters.

Saresky earned her JD from the Salmon P. Chase College of Law. She is admitted to practice law in the state of Kentucky, as well as the U.S. District Court and the U.S. Bankruptcy Court in the eastern and eestern districts of Kentucky. She will focus on clients' foreclosure matters.

WELTMAN, WEINBERG & REIS CO. WELCOMES NEW HIRES IN FLORIDA, OHIO

The creditors' rights law firm Weltman, Weinberg & Reis Co., has added three new associates and a junior partner to its ranks.

The firm welcomed Lisa M. Rogers (pictured) as a junior partner within the foreclosure and evictions group in Fort Lauderdale. Rogers earned her JD from Nova Southeastern University. Associates Amy McGrotty (pictured), who received her JD from the Nova University Center for the Study of Law, and Damian A. Valladares, who earned a JD from the University of Miami School of Law, also joined the Fort Lauderdale office as part of the firm's real estate default group.

In addition, Robert E. Altman III joined the firm's real estate default group in its Cincinnati office as an associate. Altman received his JD cum laude from the Salmon P. Chase College of Law.

GEORGIA FIRM HIRES DIRECTOR FOR NEW QUALITY CONTROL DEPARTMENT

McCurdy & Candler, LLC, hired Joe Bayonne as director over the firm's new quality control and compliance department. Bayonne's financial services audit experience includes business process and workflow improvement as well as operational, compliance, and IT reviews. He was previously senior audit manager for a global information management and electronic commerce firm.

Movers & Shakers

REISENFELD & ASSOCIATES ANNOUNCES PROMOTION AND NEW HIRES

Reisenfeld & Associates LPA, LLC, recently announced that Matthew C. Gladwell was promoted to member of the firm, and Brian E. Chapman and Gregory A. Goldblatt joined the firm as associate counsels in the litigation department.

Gladwell joined Reisenfeld & Associates as an associate attorney in June 2005. Prior to that, he worked in the real estate group of a large law firm in Dayton, Ohio, and as a realty specialist for the U.S. Army, Corps of Engineers. Gladwell received his JD from the University of Notre Dame and is currently the lead Ohio counsel at Reisenfeld & Associates.

Chapman previously served as an associate litigation attorney with Weltman, Weinberg & Reis in Cincinnati, where he concentrated his practice in foreclosure and litigation. He has nearly 24 years' experience in creditors' rights law and graduated with his JD from Salmon P. Chase.

Goldblatt was most recently an associate attorney at Slovin & Associates in Cincinnati, where he focused on collections law and protecting creditors' interests in foreclosure and bankruptcy matters. He received his JD from the University of Cincinnati. Prior to his law career, Goldblatt was a senior equities trader.

ROBERT J. HOPP & ASSOCIATES ADDS TO ARIZONA-NEVADA AND CALIFORNIA TEAMS

Robert J. Hopp & Associates, LLC, recently welcomed Marty G. Baker, Esq., to its Arizona and Nevada legal team as senior associate attorney. Baker has 16 years' experience in the industry. Prior to joining the firm, he was a managing attorney in the mortgage default arena and was involved in the Arizona and Nevada foreclosure process while serving as an attorney and foreclosure trustee. Baker earned his J.D. from the University of Minnesota.

Donna L. La Porte, Esq., joined the firm's California legal team as managing attorney. La Porte is an AV-rated attorney in the commercial and default industries with more than 20 years' experience representing financial institutions, mortgage bankers, and servicers. She was previously managing partner for the bankruptcy, unlawful detainer, and receivership departments with Wright, Finlay & Zak, LLP. She earned her J.D. from the University of Utah, School of Law.

ADAMS & EDENS PARTNER NAMED PRESIDENT-ELECT OF THE MISSISSIPPI BAR

Lemuel G. Adams, III, senior partner in the firm of Adams & Edens, P.A., in Brandon, Mississippi, was elected to serve as president-elect of the Mississippi Bar. Adams' term as president-elect will begin in July during the annual meeting. Adams practices in the areas of lender representation and residential and commercial real estate as well as individual and commercial.

MCCALLA RAYMER ANNOUNCES PARTNER AND MANAGING PARTNER APPOINTMENTS

McCalla Raymer, LLC, named Denise Rowan partner within the firm's commercial real estate and workouts practice group. Rowan is located in the firm's newly opened Panama City, Florida, office. She earned her J.D. from Emory University School of Law. Rowan is also certified by the Florida Supreme Court as a civil circuit mediator and trained to mediate cases under Florida's mandated residential mortgage foreclosure program.

The law firm also named Kent Altom managing partner of its Georgia and Alabama litigation and trial practice group. Altom joined the group in 2005 and is admitted to practice law in both states. He received his law degree from Cumberland School of Law in Birmingham. Prior to joining McCalla Raymer, Altom completed a two-year clerkship with the Honorable Thomas B. Bennett, U.S. Bankruptcy Court Judge for the Northern District of Alabama.

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"Consent Orders" continued from page 1

of MERSCORP and its Resolution Management System. We further see that the servicer's compliance plans must provide for an annual independent test of the MERSCORP compliance system. Certainly, these orders appear to solidify the position of MERSCORP in the evolving default landscape.

These orders require swift movement on the part of the signatories. Committees to oversee compliance with the orders must be appointed within five days and include at least two independent members who may not be employees or officers of the signatories or any of its subsidiaries or affiliates. "Comprehensive Action Plans" (which are subject to the approval of the OTS) must be completed within 60 days, and quarterly progress reports must be submitted to the Compliance Committee.

Once the Action Plan has been approved by the OTS, the signatories "shall not take any action that would constitute a significant deviation from or material change to the requirements of the Action Plan or of [the] Order unless and until [it] has received a prior written determination of no supervisory objection from the [OTS]." There is no mention in the orders as to the process by which these findings of "no objection" are to be obtained, so we must assume that will be a process that will evolve over time if it is ever to be needed. These "Compliance Tracking Reports" must separately list each corrective action required by the order, identify the required or anticipated completion date for the corrective action, and summarize the status of the corrective action and future steps to be taken.

Members of the boards of directors of the signatories must also personally certify their review of the reports and the corrective action taken or to be taken. This certification must take place through a board resolution that is to be provided to the OTS within 15 days of the submission of the Compliance Tracking Report. The orders seek to increase the resources available in this area, strengthen both internal and external oversight, and to that end present some problematic requirements. The orders require that the workloads of people in this area "are appropriate to ensure compliance with the requirements of [the] orders." Additionally, while it would appear that requiring all future actions to be done in a "safe and sound manner" is a noble goal, the ambiguity presented therein will probably provide fodder for years of litigation.

Controversial Requirements

Another controversial issue is the requirement that there be a "single point of contact" for debtors throughout the loss mitigation, loan modification, and foreclosure processes. This single contact must be identified in writing to the debtor and provide continuity, with personnel "knowledgeable about a specific borrower's situation." It does not take a great deal of imagination to see how the details of such a requirement will also lead to increased litigation.

The orders also require "ongoing testing for compliance with applicable legal requirements and supervisory guidance that is completed by qualified persons with requisite knowledge and ability (which may include internal audit) who are independent of the [signatories'] business lines." The sufficiency of this testing and the qualifications of those responsible for the testing are not otherwise defined. The orders even address fees to third parties by requiring "a review of fee structures for third-party providers to ensure that the method of compensation considers the accuracy, completeness, and legal compliance of foreclosure filings and is not solely based on increased foreclosure volume and/or meeting processing timelines."

Perhaps this will lead to local counsel being more oriented toward the practice of law and less to simply pushing paper through the system as quickly as possible. There are a variety of other conditions, and it remains to be seen how intrusive the OTS will be in the day-to-day operations of the signatories and how the courts interpret compliance with these orders. If history is any guide, it is likely that there will be a variety of views expressed from the courts in this area.

Analyzing Loss Mitigation Activities

The orders also seek to look back as far as January 1, 2008, to analyze foreclosures that have been pending at any time during this period. Signatories are required to contract with an "independent consultant acceptable to the [OTS]" to determine whether the ownership of the promissory note and mortgage were properly documented; the foreclosing entity was the proper party to the foreclosure; whether the foreclosure was in compliance with state and federal laws; whether any foreclosures occurred while the debtor was in a trial or permanent loan modification; the reasonableness of the fees; and additionally whether any "Loss Mitigation Activities" complied with HAMP and any signatory's proprietary loan modification program.

In relation to Loss Mitigation Activities, the consultant is to determine whether the debtor has adequate opportunity to apply for a loan modification and whether the application was handled properly and reasonably and a final decision was communicated to the debtor prior to the foreclosure sale. Further, the consultant is to determine if any errors in the foreclosure process resulted in financial damage to the debtor or mortgagee (lender). Within 45 days of the report, the signatories are to submit a plan acceptable to the OTS to compensate the debtors for any loss and/or remediate any unauthorized foreclosure sale. There is no mention of a plan to deal with any losses by the mortgagees.

Clearly, we have once again come to a brave new world in the default arena and only time will tell if these orders help resolve the default crisis in this country or simply further mire it in this seemingly endless problem.

"What have you done" continued from page 1

as a whole.

Often, a local attorney will need to spend hours on the phone educating a national firm on state law requirements. The servicing client disconnects itself with its local law firms, communicating solely with the national firm and leaving the local firm further out of touch with its own client. Although this practice may be perceived as a solution to lenders and servicers overwhelmed with default litigation throughout the country, it instead creates a further barrier to effective legal representation.

Assembly Line Approach

The attorney-client relationship is sacrosanct. An attorney must be able to effectively communicate with its client, and vice versa, or no real relationship exists. When representing corporations, this means an ability to speak directly with an individual with knowledge and decision-making authority over the issues involved. More than a legal advocate, an attorney is also a counselor who must be capable of advising the client of nuances in specific state law and giving tactical advice based on the attorney's interpretation of local ordinances and the judicial bench in a particular district. This expertise is critical to a successful relationship and successful representation.

The use of a large firm to oversee smaller local firms throughout the country may be the natural progression of the industry following its immersion in national processing companies used to manage default files. The national processing companies created the first major obstacle to effective attorney-client communication. Perhaps lawyers must accept that the advantages may outweigh the disadvantages because more and more lenders continue to welcome processing companies to assist with their default portfolios? Nevertheless, the truth of the inherent flaw in separating a lawyer from its client should not be ignored, and the latest move toward national firms will only make it worse.

An unfortunate result of a national firm managing local firms throughout the country is the furtherance of assembly line thinking—in other words, further automating an already over-automated industry. Although local lawyers are in the best position to advise as to state procedures or "best practices," national firms are being employed to audit local procedures and move toward universal procedures for all of the states. The reality is that every case is unique and one strategy does not fit all.

Lost in Translation

A local attorney communicating through a third party takes away its direct relationship with its client. In many cases, an out-of-state law firm essentially becomes the "client" to the local firm and the extent of the "real client's" involvement is unknown. Without a client to communicate with, a meaningful discussion of case strategy becomes difficult, if not impossible, through a third party.

Vital communications get lost in translation, often leading to unanswered questions, poor choices, and frustration for all. This is similar to the child's game of "telephone," where the phrase at the end of the circle is never the same as it was at the beginning. This new barrier to direct client communication will create more difficulty in effective representation and can lead to serious problems such as a lawyer without a client on the eve of trial, or worse, a lawyer standing before a judge without having had an opportunity to even communicate with the client.

So why hire a national firm? Why not seek answers to questions regarding local default procedures or how best to handle a default case from the experienced local law firms hired to do just that? When did direct communication with a client become the exception rather than the norm?

Today, when all eyes are watching, solid relationships and good communication with counsel in every state should be cherished more than ever. Clients, can you hear us?

"Good Deeds" continued from page 3

litigation observe the venerable, but ambiguous, good faith standard. The high-profile scrutiny of foreclosures by regulators, and in the media, has led some states to adopt a statutory good faith duty in resolving foreclosures.[3] Some courts have inserted a good faith standard into mediation standing orders.[4] In their discretion, courts also may rely on a good faith standard in the exercise of their equitable powers during foreclosure.[5] However, regardless of the source of the duty, the specific conduct required to show good faith, or the penalty for its perceived absence, is often not clearly delineated.

Reported foreclosure decisions on sanctions or dismissal orders based are not common, regardless of whether bad faith was raised by the mediator, the borrower, or the court. Further, inasmuch as threatened or actual claims of bad faith are often raised during mediation, before foreclosure litigation resumes, judicial responses are not likely to be reported.

Examples of Bad Faith

A review of recent decisions from New York, which imposes a statutory duty of good faith, reveals at least five examples of conduct or omissions that illustrate bad faith. First, the inclusion of unspecified and/or inadequately documented charges in a proposed loan modification, such as those for escrow advances and preservation expenses, has been found to be bad faith.6 Interestingly, bad faith was found in a case due to the failure to promptly file a foreclosure. In that case, the court criticized the lender for engaging in extended loss mitigation, presumably so as to increase the arrearage.[7] Bad faith has also been found by the inclusion of broad waivers in the modification documents.[8] A fourth example of bad faith conduct is the issuance of inconsistent or unreliable denial letters.[9]

As a final example, a trial court may find bad faith to be present if it deems the loan modification to be unaffordable. For example, one trial court found bad faith as a matter of law where the lender refused either to convert the adjustable interest rate to a fixed rate or to adjust the amortization term in modifying the loan after "directed" to do so. [10] Another court found bad faith because the lender refused to allow a relative to purchase the property at "lien stripped" fair market value or to offer a modification that included more than 25 percent of nonborrower income from relatives who occupied the property.[11]

Foreclosure may be denied for bad faith loss mitigation if a mortgagee does not restructure a loan in a manner that complies with the court's opinion of commercial reasonableness. Courts evaluate the propriety of loss mitigation solutions offered to resolve foreclosure litigation based on their general experience in reviewing loss mitigation outcomes in other foreclosures on their dockets.[12] Some trial courts may find bad faith in a particular loss mitigation solution if it bears characteristics that resemble those described in the legislative history to remedial legislation responding to the subprime loan crisis.[13] A trial court may perceive bad faith in the demeanor of the lender, its servicer, or local counsel simply because the lender resists or is unable to comply with a court's loss mitigation mandate.[14]

Penalties for Bad Faith

Trial courts may issue a variety of sanctions for bad faith or "unclean hands." These include (i) damages for a breach of the covenant of good faith and fair dealing; (ii) sanctions and curtailment of interest, fees, and charges; (iii) a stay of foreclosure litigation or of redemption periods; or (iv) continuation of mediation after the expiration of statutory mediation periods.

One New York court denied recovery of arrearage that had accrued during the period beginning on the date of the modification denial and ending on the date of a decision on a final loan modification, while another excluded it for the period beginning on the date of default and ending on the date of the court's order.[15] Another New York court warned that continued bad faith would result in the loss of local counsel's privilege of appearing in foreclosure conferences in the county.[16] One court ordered a lender to execute the final modification after repeatedly refusing to approve it, without providing the borrower with a clear explanation for the refusal.[17]

Bad faith findings led a New York court to employ its equitable powers to assess exemplary damages of $100,000 against a servicer,[18] while another vacated a foreclosure judgment and actually cancelled the note and mortgage.[19]

Appellate Court Sets Limits on Sanctions for Bad Faith

In IndyMac Bank, F.S.B. v. Yano-Horoski, the Appellate Court set limits on the sanctions imposed by the trial court in discharging the mortgage. The Appellate Court ordered that the mortgage be reinstated. In so ruling, the sua sponte sanction imposed was found to be erroneous, and the trial court was held to have exceeded its equitable powers. The Appellate Court's ruling was based on the premise that cancellation of the mortgage was not a sanction authorized by the statute imposing the duty of good faith loss mitigation. Yano-Horoski also can be interpreted to support a mortgagee request for an evidentiary hearing, or for discovery from the borrower, as a condition of judicial review of a bad faith claim.[20]

Creating a Record of Good Faith

What proactive measures may be taken to develop a record of good faith that may be relied upon when foreclosure litigation resumes after mediation is terminated, or after re-default under the original loan or a modified loan? In addition to maintaining records of loss mitigation notices and affidavits filed in the foreclosure, local counsel should file statements or certifications of service on the borrower of loan modification, or short sale packages, and other loss mitigation notices.

Letters and statements of written and oral communications with borrowers and investors, such as those related to financial and documentary requests, or which specify filing deadlines, should be provided to counsel. Consistent denial letters should be issued, and supporting financial calculations and references to applicable stated guidelines or underwriting standards prescribed by the loss mitigation programs under review should be attached.[21] Descriptive characterizations and annotations as to the reasonableness of preservation and escrow charges should be furnished.[22]

Presentation of documented and sensible reasons for the products or resolutions that have been offered to a specific borrower shows good faith. The supporting reasons why a particular loss mitigation resolution was denied, or why inclusion of a sought-after provision was rejected, should be articulated. These reasons include investor restrictions, underwriting standards, proprietary program guidelines, an admission of fraud in a hardship letter, or other adverse conduct in a prior or pending foreclosure, including mediation. In the long term, these efforts may improve judicial awareness of the factors that influence the loss mitigation solutions that mortgagees and their servicers are able to offer.

Lenders should consider reliance on the mutuality of the good faith burden in appropriate cases. For example, it may be advisable, offensively, to seek termination of mediation for failure to attend scheduled sessions or to comply with good faith document requests. Moreover, in the event of a subsequent foreclosure after re-default, mortgagees should call the court's attention to the procedural history with respect to its good faith participation in a judicially sponsored mediation program or settlement conference.

1 "High Re-Default Rates: Obama's Loan Modification Nightmare," Luke Mullins, U.S. News and World Report (April 3, 2009) http://money.usnews.com/money/blogs/the-home-front/2009/04/03/high-redefault-rates-obamas-loan-modification-nightmare (last visited 5/16/11); "Half of U.S. Home Loan Modifications Default Again," John Gittelsohn, Bloomberg LP, (March 25, 2010; last visited May 15, 2011). www.bloomberg.com/apps/news?sid=aVYxPZ56vjys&pid=newsarchive. 2 U.S. News, "High Re-Default Rates," supra. 3 N.Y. CPLR § 3408; 22, N.Y.C.R.R. 202.12-a(c)(4); 14 Maine Rev. Stat. Ann. § 6321-A; Nev. Rev. Stat. § 107.086; 12 Vt. Stat. Ann § 4631, et seq.; D.C. Code § 42-815(e). Wells Fargo Bank v Meyers, 913 NYS2d 500, 504 (Sup. Ct. Suffolk County 2010).4 See, e.g., Connecticut's "Uniform Foreclosure Mediation Standing Orders," www.jud.ct.gov/external/super/ standorders/Civil/FMP_010510.pdf, May 16, 2011.5 Black's Law Dictionary defines good faith as "a state of mind consisting in honesty in the belief or purpose, faithfulness to one's duty or obligation, observance of reasonable commercial standards of fair dealing in a given trader or business, or absence of intent to defraud or seek unconscionable advantage." Black's Law Dictionary (7th ed. 1999). Emigrant Mortgage Co., Inc. v. Corcione, 900 N.Y.S. 2d 608, 614 (Sup. Ct. Suffolk County 2010).6 Emigrant Mortgage Co., supra at 611-612 (Sup. Ct. Suffolk County 2010), Meyers, supra at 503, U.S. Bank v Mathon, 29 Misc. 3d 12284A ***6 (Sup. Ct. Suffolk County 2010).7 In Emigrant Mortgage, the trial court found bad faith where the servicer had delayed foreclosure of an 18% note during a period of 14 months while it engaged in loss mitigation, Emigrant Mortgage, supra at 611; see also Westervelt, supra (lender claiming that the loss mitigation packages were "still under review" where the borrower alleged having resubmitted them; refusal to re-examine the borrower's income and failure to appear for court-ordered loss mitigation conferences (counsel claimed that it failed to receive notice). 8 Emigrant Mortgage Co., supra at 613-14.9 Meyers, supra at 503-504.10 See Wells Fargo Bank, N.A. v. Hughes, 897 N.Y.S. 2d 605, 609 (Sup. Ct. Erie Co. Jan. 13, 2010). 11 IndyMac Bank, F.S.B. v. Yano-Horoski, 890 NYS 2d 313, 315-316 (Sup. Ct. Suffolk County (2009), rev'd, 912 NYS 2d 239 (NY App. Div. 2010).12 IndyMac Bank, supra 315-316, BAC Home Loan Servicing v. Westervelt, 29 Misc.3d 1224A, ***12 (Sup. Ct. Dutchess County 2010); Emigrant Mortgage Co. supra at 610 (Sup. Ct. Suffolk County, 2010).1314 Westervelt, supra at ***8-9, Hughes, supra at 607-609, Meyers, supra at 503. 14 See IndyMac, supra at 319; Hughes, supra at 609; Westervelt, supra at ***12, Emigrant Mortgage Co., supra at 611; Wells Fargo Bank, NA v. Meyers, 913 N.Y.S.2d 500, 504 (Sup. Ct. Suffolk County 2010). 15 Emigrant Mortgage Co., supra at 614.16 Id.17 See Meyers, supra, 913 N.Y.S.2d 500 (Sup. Ct. Suffolk Co. 2010),18 The subsequent docket activity in Emigrant Mortgage Co. indicates that this case was settled in mediation, after a motion to reargue the sanctions motion was filed. 19 See IndyMac, supra at 724, holding that lender exhibited "opprobrious demeanor and condescending attitude." 20 See Id, supra at 240 (NY App. Div. 2010). 21 Mathon, supra at ***7-9, Meyers, supra at 502, Westervelt, supra (bad faith based on inconsistent and inadequate statements in denying a modification under HAMP). 22 See Id. (holding that the trial court also found that unspecified and/or unexplained charges was evidence that the loss mitigation resolution offered by the mortgagee lacked good faith); see also Corcione, supra at 611 (excessive and unexplained fees, including an overstatement of escrow advances). IndyMac supra at 316-317 (the trial court found that the servicer misrepresented the amount owed by about $80,000).

"Mortgage Fraud" continued from page 3

in connection with the sale of merchandise. RSMo § 407.0201. Merchandise includes real estate. RSMo. § 407.010(4). In a suit brought by a private party, the plaintiff must prove (1) purchase of merchandise from defendant; (2) for personal use; (3) an ascertainable loss of money or property and (4) caused by an unlawful act as defined by section 407.020.

The MPA is intended "to preserve fundamental honesty, fair play, and right dealings in public transactions." State ex rel. Nixon v. Beer Nuts, Ltd., 29 S.W.3d 828, 837 (Mo. App.E.D., 2000). The MPA "eliminates the need for the attorney general to prove intent to defraud or reliance in order for the court to find that defendant has engaged in unlawful practices." Id.

Actions Taken by the Court of Appeals

The Court of Appeals determined the trial court erred because Edmonds did not need to prove that she relied on the appraisal and that there was sufficient evidence giving rise to a genuine issue of material fact as to whether the appraisers engaged in unlawful practices under the MPA.

The Court of Appeals also reversed the trial court on the negligence claim, specifically the reasoning that the appraisal was not a cause of Edmonds' damages because she did not rely on it. The Court of Appeals held that appraisals are intended to inform the buyer of fair market value and are required by lenders. The Court of Appeals also reasoned that the lender may not have given the loan absent the inflated appraisal and, therefore, Edmonds would not have been damaged.

The Court of Appeals also held there was sufficient evidence for a reasonable jury to find that there was civil conspiracy between the parties, so the trial court erred in granting summary judgment on that count, too.

This decision is important to mortgage loan servicers in that it provides a potential source of liability in the event of mortgage fraud alleged against them. Lenders and servicers do, in fact, rely upon the accuracy and honesty of appraisals in making loans and it is reasonable for them to rely upon same. Intentionally or negligently inflated appraisals may be a key reason for bad loans that result in foreclosures and potential mortgage fraud lawsuits.

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Legal League 100 ~ *In Pictures*

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(1) Jane Woll of Martin, Leigh, Laws & Fritzlen, P.C.; Meredith McCrory; and Neil Sherman of Schneiderman & Sherman, P.C., catch up during DS News' Ultimate Press Party—an annual networking reception sponsored by the Legal League 100, hosted February 22. **(2)** *DS News*' Ultimate Press Party **(3)** Jared Anderson and Jeremy Lipford of Shapiro & Kirsch, LLP, check in at the spring Legal League 100 Servicer Summit registration desk. **(4)** Five Star Institute CEO Ed Delgado welcomes Legal League 100 Servicer Summit attendees during the afternoon luncheon. The spring Legal League 100 was hosted at the Ritz-Carlton in Dallas April 7–8 to bring together lenders, servicers, GSEs, and Legal League 100 members to caucus on the latest issues and policy impacting the default and mortgage banking industry. **(5)** Jack Konyk, executive director of government affairs at Weiner Brodsky Sidman Kider, P.C., speaks to Legal League 100 Servicer Summit attendees on the newest legislation coming out of Washington and its effect on the financial and housing markets. **(6)** The Legal League 100 Servicer Summit Luncheon

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