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*AFN's Monthly Litigation Webinar*

# HOT TOPIC LEGAL UPDATES



*Presented by the AFN's Legal Services Committee*

# SPEAKERS



**William M. LeRoy - Moderator**  
*CEO*  
American Legal & Financial Network “AFN”



**Cynthia A. Nierer, Esq. - Panelist**  
*Partner*  
Rosicki, Rosicki & Associates, P.C.



**Dominique M. Varner, Esq. - Panelist**  
*Partner*  
Hughes, Watters & Askanase, L.L.P.



**Matthew C. Abad, Esq. - Panelist**  
*Partner*  
Burke, Costanza & Cuppy L.L.P.



**Michelle Garcia Gilbert, Esq. - Panelist**  
*Attorney*  
Kass, Shuler, Solomon, Spector, Foyle & Singer, P.A.

# Avoiding Debtor Lawsuits After Purchasing Servicing Rights

**How to successfully transition a default  
portfolio after purchase**

# Pre-Purchase Due Diligence

## PPPPPP - Proper Power Planning Prevents Poor Performance

### A. Documentation

#### 1. Origination file

##### a. Disclosures ( GFE, RESPA, TILA)

- Andrews v. Chevy Chase Bank FSB, 20 FRD 612, ED WI
- McKeena v. First Horizon, 475 F3d 418

##### b. Underwriting

- i. Sound Credit (Regulatory/Self-Audits)
- ii. Fair Lending (Regulatory/Self-Audits)
- iii. Non-traditional (Interagency Guidance)
- iv. Sub-prime (Interagency Guidance)

##### c. Title Policies

# Pre-Purchase Due Diligence

## PPPPPP - Proper Power Planning Prevents Poor Performance (cont.)

### 2. Notes and Mortgages

- a. Fixed rate
- b. Adjustable rate
- c. Other terms
  - i. Late charges-Amt, timing
  - ii. Default and acceleration
  - iii. Recovery of attorneys' fees and costs

### 3. Assignments

- a. Properly drafted
- b. Recorded

- MERS v. Azize 965 So2d 151; Countrywide v. Taylor 843 NYS2d 495

- Even though assignment not formally executed until after action filed; equitable transfer from servicing agent occurred prior to complaint being filed. Glynn v. First Union National Bank, 912 So. 2d 357, (Fla.4<sup>th</sup> DCA 2005)

# Pre-Purchase Due Diligence

## PPPPPP - Proper Power Planning Prevents Poor Performance (cont.)

### B. Accounting and Payment Histories

1. Accurate
2. Complete
3. Proper and Timely allocation
  - In re Collins 2007 WL 2116416; In re Osborne 375 BR 216

### C. Defaulted Files

1. Pre-Foreclosure
2. Foreclosure
  - a. Executed Documents
  - b. Pending Judgments and Figures
  - c. Sales - BPO's and Bidding Instructions

U.S. Bank v. Tenn. Farmer Mut. Ins. Co. 2007 WL 4463959 (Tenn. Ct. App.—  
Jackson December 21, 2007)

- Insurance claim denied after property burned down
- Initiation of foreclosure proceedings constitutes an “increase in hazard” which requires notice to insurer under standard terms of the insurance contract
- Increased hazard stems from insured’s temptation to destroy the property to obtain insurance proceeds and pay off the mortgage

# Pre-Purchase Due Diligence

## PPPPPP - Proper Power Planning Prevents Poor Performance (cont.)

3. Bankruptcy
  - a. Executed Documents
  - b. Pending Motions and Hearings
  - c. POC's and Plan Objections
    - In re Campbell 361 BR 831
  
4. Contested and Litigated Files
  - a. Status
  - b. Attorney retained
  - c. Next step
  - d. Direction from or to attorney
  
5. What will happen to files during the transition?

# Post-Purchase Steps

## FFF – Follow-up, Follow-up, Follow-up

- A. Transition Period - Will there be a Black-out period?
- B. Has Direction been given on pending matters?
  - 1. Bankruptcies
    - a. Amount of arrearage
    - b. Post-petition delinquency
    - c. Plan Objections
  - 2. Pending Sales
    - a. Were BPO's Obtained
    - b. Were bidding instructions provided



## Post-Purchase Steps

### FFF – Follow-up, Follow-up, Follow-up (cont.)

3. Almost Completed Foreclosures
  - a. Delinquent assessments and Taxes
  - b. Unrecorded Sheriff's Deeds – Should they be recorded as is under the old servicer's name?
  - c. Warranty Deeds – Should they be recorded as is under the old servicer's name?
4. Completed Foreclosures – Full title policy or an update to the title commitment
5. Name of plaintiff – Will it change, will name be new entity as successor in interest; or will file continue under the old name?
  - Mortgagee's filing of originals, affidavits of mortgagee, assignments, evidence of mortgagee's name changes substantiated mortgagee's ownership of note and mortgage in foreclosure proceedings. Stanley v. Wells Fargo Bank, 937 So. 2d 708, (Fla. 5<sup>th</sup> DCA 2006)

## Post-Purchase Steps

### FFF – Follow-up, Follow-up, Follow-up (cont.)

6. Document execution – Will new servicer execute documents as POA for old entity or as successor in interest?
  - a. Were Documents sent by Attorneys to previous servicer?
  - b. Where are they?
  - c. Were they executed? Can they be executed? (Depends)
    - MERS nominee has standing to bring foreclosure actions. MERS V. Azize, 965 So. 2d 151 (Fla. 2d DCA 2007).
    - Court found no evidence of agreement with servicing agent to forbear filing of foreclosure action. Walker v. Midland Mortgage Co., 935 So. 2d 519 (Fla. 3d DCA 2006)
    - Collection/litigation agent had standing in foreclosure even though it only held, not owned, note. MERS v.Revoredo, 955 So. 2d 33 (Fla. 3d DCA 2007)

#### C. System Issues

1. Servicing System properly track interest rates, late charges?
2. Allow for uploading of pleadings or other documents not requiring execution?

#### D. Payment Histories – Are they accessible?

#### E. Notices – RESPA (Hello and Goodbye)

# Examples of Post-Purchase Problems

## A. Black out period – Sheriff's Sales

1. Missing Bidding Instructions
2. Canceled or Postpone Sale
  - a. Increased delay
  - b. Increased cost

## B. Unpaid Taxes or Assessments

1. Not able to record Sheriff's Deed/Warranty Deed

## C. Title Vesting issues

1. No direction on how to vest title –
  - a. Increased delay – waiting for direction on whether to record deed as is
  - b. Increased delay – BK filing in some jurisdictions could halt process

# Examples of Post-Purchase Problems (cont.)

## D. Execution of Affidavits

1. If Servicer has a set form for use in Judgments, provide format to attorney
  - a. Eliminate requests for revisions causing delays
  
2. Have one person with supervisory authority dictate the format
  - a. Eliminates potential for multiple revisions at the direction of different reps depending upon who reviews that 3 or 3 reps revising affidavits one paragraph at a time, suggest a supervisor review the form affidavit and make suggests changes all at one time.

## Examples of Post-Purchase Problems (cont.)

### **E. Loans assigned to new servicer – new servicer unable to locate in system**

1. Loans not docked properly
2. Unable to find in communication modules

### **F. Billing delays**

1. Not able to review invoices through billing modules

### **G. Unable to upload pleadings as requested by client**

1. New Servicer did not instruct Outsourcer to allow attorneys for old servicer to upload pleadings or other required documents

# Industry Overview

- ▣ Mortgage industry: increased scrutiny by media, legislature, judiciary.
- ▣ Heightened judicial scrutiny across nation, even with uncontested cases, especially sensitive to lender/servicer mistakes, sanctions being assessed.

In re Ezell, No 07-34780 (Bankr. S.D. Tex January 14, 2008, Isgur, J.)

- Following the Padilla decision Court has duty to evaluate application for award of post petition fees. *In re Padilla* --- B.R. ----, 2007 WL 2264714 (Bkrty.S.D.Tex.)
- Post-petition application for fees must comply with Rule 2016(a)
- Application for \$200 was denied for various reasons, including fact that the attorneys fees were not sought for “enforcement of the note” as provided by Deed of Trust”

# Foreclosure Updates

## JUDICIAL SCRUTINY

- ▣ Forbearance agreements filed in court

*Deutsche Bank National Trust v. Williams* (NY Supreme Court, Kings County)

- Every forbearance agreement must be filed with the Court and if there is a default by the mortgagor an application must be made to appoint a new referee to recalculate the amount due.
- ▣ Mediation in uncontested cases
- ▣ Advocating from the bench

# Foreclosure Updates

## JUDICIAL SCRUTINY, cont.

### ASSIGNMENTS

- ▣ Assignments recorded before filing
- ▣ Assignments with “effective date” sometimes held insufficient to establish ownership interest at the time the action was commenced; best practice: execute prior to the commencement of the foreclosure action.  
*Countrywide Home Loans, Inc. v. Taylor* (NY Supreme Court, Suffolk County, 843 N.Y.S.2d 495)
  - Assignment included an “effective date”. The Judge held that the language was insufficient to establish the plaintiff’s ownership interest at the time the action was commenced. As such, the assignment needed to be fully executed prior to the commencement of the foreclosure action.
- ▣ Some judges review uncontested cases, determine assignment not of record.  
*Aurora Loan Services, LLC v. Sattar* (NY Supreme Court, Kings County, 17 Misc.3d 1109(A))
  - On an unopposed motion, the judge conducted his own investigation and determined that the assignment into the plaintiff was not of record. The court warned of future sanctions against the attorneys and the named plaintiff for wasting judicial resources by commencing an action in the wrong plaintiff
- ▣ Some judges “sanction” parties by dismissing actions, requiring refiling fees, threatening future penalties.
- ▣ MERS issues resolved in several jurisdictions to allow bringing of action on behalf of another, but judges now using assignment “issues” to delay actions.



# Foreclosure Updates

## JUDICIAL SCRUTINY, cont.

### PLAINTIFF'S AFFIDAVITS

- ▣ Require an officer of plaintiff to sign.
- ▣ Though attorney in fact or an agent legally can sign, judges requiring separate affidavit signed by the plaintiff confirming agent authority.
- ▣ No stand alone signatures on last page.
- ▣ Signing assignment for Bank A, then signing affidavit for Bank B, questioned and sometimes disallowed. Judges are objecting when this occurs in the same case and recently judges have denied motions where the signor signed on behalf of different banks in different cases.

# Foreclosure Updates

## JUDICIAL SCRUTINY, cont.

### JUDICIAL REVIEW OF ORIGINATION FILE

- ▣ Judges reviewing loan origination files.
- ▣ Judges quoting case law, newspapers and magazines - critical of the mortgage industry.
- ▣ Courts verifying if the bank involved in fraud.

# Foreclosure Updates

## JUDICIAL SCRUTINY, cont.

### FORECLOSURE SALES, MISCELLANEOUS MATTERS

- ▣ Courts hold foreclosure sales not held > 1 year after judgment date w/o updated judgment.  
*Bardi v. Morgan* (NY Supreme Court, Kings County)
  - 10 years passed between the entry of the judgment of foreclosure and sale and the foreclosure sale due to litigation, bankruptcy and third party purchaser defaults on prior sales. The court held that a foreclosure sale may not take place more than one year after the date the judgment was entered unless an application is made for an updated judgment.
- ▣ Courts recommend law allowing insurance funds for prepayment of mortgage debt, not repair property.
- ▣ Judge held Deed In Lieu Subject to Lease Known to Mortgagee.
- ▣ Mortgagor nontitled spouse necessary party to extinguish right of redemption
- ▣ Lender/Service friendly decisions:
  - No reinstatement after default per mortgage terms.
  - Unclean hands defense connected to default
  - Failure to provide a payoff not defense to nonpayment

# Foreclosure Updates

## OTHER AREAS OF CONCERN

### CONDOMINIUM AND HOMEOWNER ASSOCIATION ASSESSMENTS AND LIENS

- ▣ Encumbrances on property and owner, superior to second mortgages.
- ▣ “Super lien” states.
- ▣ First purchase money superior in some states.
- ▣ Laws allow collection from buyer at sale.
- ▣ Best practice: include associations in actions to eliminate interest; answer when served in association action since second can be extinguished

# Conclusion

## Question & Answer Period

If you have any further questions that were not addressed in this presentation, or want to contact one of our speakers, please email Matt Bartel, Executive Director of AFN, at [mbartel@e-afn.org](mailto:mbartel@e-afn.org).

Thank you for your participation in this webinar. Please complete the brief survey which you will be directed to at the conclusion of this presentation.

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