

OUTLINE – EDWARD HYNE

LITIGATION UPDATE PANEL

CONTESTED FORECLOSURE ISSUES

A bi-product of the ever-increasing number of foreclosures is the increase in contested foreclosures. I am here to speak about these issues and the impact it has on a servicer's ability to complete the foreclosure process.

I will break down these issues between servicing defenses and loan origination defenses.

SERVICING RELATED DEFENSES

1. Loss Mitigation. As loss mitigation is the current buzzword, borrowers, especially those who do not have the ability to maintain home ownership, are using this as a defense alleging we are *required* to approve foreclosure alternatives.
 - a. The “requirement” defense to approve loss mitigation assistance.
 - b. Forbearance agreements stop foreclosure.
 - c. No signed forbearance agreement, no formal plan thus I did not know what to pay.
 - d. Responses to loss mitigation set forth an agreement to stop foreclosure.
 - e. Demanding face-to-face interviews.
2. No notice defense. As a delay tactic, more borrowers are claiming they did not receive proper notice of acceleration or notice of sale.

3. Payment disputes. Borrowers and their attorneys are using this defense more often and are becoming more sophisticated in their analysis of payment applications and rejections.
 - a. Courts want more documentation on payment histories, easily readable ledgers, and copies of checks.
 - b. Borrowers attorneys disputing application of payments under plans, and the rejection of partial payments.
 - c. Not following re-pay guidelines – Accepting late or partial payments under plans obligates the servicer to accept future later or partial payments.

4. RESPA Defenses. Borrowers and their attorneys are becoming more familiar with RESPSA requirements and holding servicers accountable for acknowledging and responding to the Qualified Written Request (QWR).
 - a. The three “D’s of Documentation, Documentation, Documentation.

ORIGINATION RELATED DEFENSES

1. Ability to repay defense - Despite paying on loans two to three years or more, borrowers are now claiming they do not have the ability to repay the loan payments. This relates to ARM loans and their changes.

2. Rescission Claims - Borrowers are reviewing lenders disclosures more carefully and challenging the ability to rescind the loan even outside the three date right period.

3. State and local agency defenses - State governments, attorney generals offices and local agencies coming to the aid of borrowers disputing lender’s ability to foreclose.