

Litigation and Enforcement Update

Wrongful Foreclosure, Servicing & Mortgage Fraud Issues

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TILA rescission claims

- This is the typical claim that the borrower never received two fully completed Notices of Right to Rescind as required by TILA and Reg Z.
- Borrower often demands principal reduction and/or loan modification.

Fraud in the Inception / Fraud in the Inducement

- These are claims brought by borrowers who claim that a third party—often a “trusted” mortgage broker “friend”—convinced them to obtain a loan by misrepresenting the loan terms. Now, the “friend” is nowhere to be found and the borrower claims that the security instrument is void.

Resurgence of YSP claims

- While YSP class actions have essentially disappeared, there has been a resurgence of YSP claims in individual suits. Borrowers attack the YSP as either illegal kickbacks under RESPA Section 8, or as inadequately disclosed broker compensations in violation of the HUD Policy Statements.

Oral Forbearance Agreement

- Lenders have seen an increase in cases where the borrower—or more often, an agent of the borrower—claims to have obtained an “oral promise” from the lender to postpone a foreclosure sale. Such suits are frequently filed after the lender has already completed the foreclosure and holds the property as REO.

Foreign language disclosures

- Several states, including California, have laws that require certain disclosures to be given where the loan is negotiated primarily in a specified foreign language. (See, e.g., California Civil Code § 1632.)
- If the statutes are applicable to a particular transaction, they usually require the originating lender or broker to provide a copy of the contract in the foreign language used to negotiate the loan. Failure to do so may allow the borrower to rescind the loan (and possibly recover attorneys’ fees).

Failure to Provide Additional Notices

- New state laws require additional notices to borrower prior to initiating foreclosure. Laws also provide additional protections for tenants.

Take Aways

- Be familiar with state, county and city specific requirements
- Active monitoring of process
- Promptly investigate wrongful foreclosure claims (including review of loan file and insurance coverage)
- Immediate response to borrower / counsel
- Assess borrower's objective
- Efficient defense

“Common” Predatory Servicing Claims

- Imposing unwarranted and improper fees—often late fees when the loan was not late.
- Failing to credit payments received in a timely fashion—allegedly so that late fees can be charged and borrowers placed in foreclosure.
- Misapplying payments—allegedly for the benefit of the servicer.
- Prematurely referring the account to foreclosure and collections—despite legal and accounting errors allegedly made by the servicer.
- Failing to timely respond and communicate with customers.
- While the first wave of cases focused on servicing wrongs above, in the more recent cases servicers are alleged to have specifically targeted subprime borrowers, who are disproportionately individuals with low incomes or members of minority groups.

Take Aways

- Refer unsatisfied borrowers to customer service specialists, particularly if your borrower is an attorney
- Utilize outside counsel for immediate response
- Monitor public complaint websites

Thank you