

PART II
THE MAJOR (WINNING!) DEFENSES TO FORECLOSURE:
LACK OF INTEREST IN PROPERTY/LACK OF STANDING BY MERS
AND OTHER MORTGAGE "SERVICING AGENTS/NOMINEES"¹

I. OVERVIEW

In December, 2009 I issued my first memo on this issue, mainly out of intellectual curiosity, and to assist a client in Nevada. I have not been this excited about a legal issue since 1987, when I figured out how to discharge taxes through bankruptcy.² The bottom line: information is available on line for attorneys, accountants, and those who are facing foreclosure or have friends or family members facing foreclosure, now or in the foreseeable future. Since my first memo there have been more winning cases; there have also been some losing cases with respect to quiet title, as discussed below.

The purpose of this memo is to share information, attempt to get as many attorneys and others as excited about the issue as I am, and to agree to share information now and in the future. I now have an additional motive: my son, who is licensed to practice in California, may be starting a practice there as early as December, and as an attorney in search of a practice, will likely include foreclosure defense (FD).

Simply put, securitization: (1) lender sells mortgage to big bank (BB); (2) BB forms trust and bundles hundreds or thousands of mortgages; (c) BB sells trust as security; (d) when borrowers default, trust does not get paid and investors get burned; e.g., German banks which invested in U.S. sub-prime market. As part of process, "Servicer" collects borrower payments and, after fee, pays to trust. Watch for, e.g.,: who is servicer, trustee, party bringing foreclosure. MERS found it too expensive to record. Is note bearer note? If not assigned, was it recorded?

II. SECURITIZATION OF MORTGAGES AND AN EASY READ

First, if you do not have my first memo, please request same

¹ This memo, and Part I, are not to be considered legal advice to anyone. Consult an attorney in your jurisdiction.

² I wrote a book, Secret Exposed: Elimination of Tax Debts Through Bankruptcy, and my firm discharged for clients millions - Chapter 13 and Chapter 7. I sponsored a national seminar and spoke at others.

so you can be brought up to speed. Secondly, the easiest read to bring you to an understanding of what has been going on is a "Counterpunch" article by Pam Mertens. Google Pam's name and look for her article; it mentions judges nix foreclosures. If you do not find it there, then go to Counterpunch.com. Pam was on Wall Street for 21 years and is a well-known author. She does a great job with respect to outlining the basics of this, at first blush, complicated issue. I asked Pam whether she plans to write more articles on this subject and she indicated negative, at least not at this time, due to other pressing issues.

The winning cases, aside from those in my first memo, include a state court in New York and a bankruptcy judge in Cleveland. In New York, Deutsch Bank (DB) sued to foreclose and the case was dismissed without prejudice and they have not refiled. The judge pointed out that DB sold to Goldman Sachs (GS), the largest bank in the world. Interesting, though not covered by the national media: DB sued B of A in November of last year for over a billion dollars, claiming breach of contract and indemnification for having purchased from B of A loans which B of A said were securitized, but which were not. One hypothesis: given the "pecking order," Goldman turned to DB, which in turn turned to B of A to be made whole; B of A refused, and DB had no choice but to sue. Follow this by way of Pacer; access to the docket sheet - federal court, S.D.N.Y. Last I read, the motion to dismiss by B of A was to be heard on 3/31. Query: Why so little media coverage?

In the New York case, the state court judge dismissed foreclosure without prejudice, but DB has not again re-filed and probably will not; likely they cannot find the original note. In the Cleveland case, according to the news article, folks kept their home by the bankruptcy judge forcing DB to negotiate, which they did, resulting in a monthly mortgage of \$4,000 reduced to \$1,500. I will not be citing the cases in this memo in the interest of getting this out quickly. Case cites will be forthcoming from those assisting me and hopefully from the readers of this memo. Eventually we probably need to establish a blog so that we can quickly exchange information.

Meanwhile, a book release announced 3/14/10 on "60 Minutes": The Big Short by Michael Lewis. It covers the securitization topic and the fact that the big boys covered both ends of the deal by credit default swaps.³ "60 Minutes" promised that Katie Couric and

³ The big boys (a) securitized the loans; (b) sold them to investors; and (c) ensured the failure, thus making money when they (a) sold or (b) collected the insurance upon failure. One

the evening news would have a series concerning GS, yet the first night, 3/15, Katie did not as much as mention GS, and no mention even of the general issue since the "60 Minutes" program. "60 Minutes" totally blasted GS; maybe GS, the largest bank in the world, got to the big media boys? In any event, as I said six months ago, "the cat is out of the bag." The question now is, what will be done with this knowledge? My suggestion: FD by way of; e.g., quiet title or bankruptcy.

III. INFORMATION ON THE WEB

The best website I have reviewed to date is livinglies.com. Neal Garfield, web sponsor and an attorney, has been putting on seminars on this subject, and what is great about the website is that folks write in and say they need an attorney who "gets it." Hopefully, after reading my first memo and this one, and at least skimming some of the case law, you, as an attorney or otherwise, will "get it." Many of the individuals leave their emails to be contacted by attorneys. I thank attorney David Mills (see discussion, *infra*) for these leads, which goes to show that collectively we can share information and move ahead to the end that folks are protected and better represented and no one will have to spend time to "reinvent the wheel."⁴

IV. NON-JUDICIAL V. JUDICIAL FORECLOSURES

David states that approximately two-thirds of the states are non-judicial foreclosure states, meaning foreclosure could be brought administratively by way of the trustee of the deed of trust who claims to hold the note. Knee-jerk reaction here, of course, is to file a lawsuit, but then that leads to the quiet title issues discussed below. Also, compounding the legal issue is that the law varies by state. Thus, considerable homework may have to be undertaken, unless the case is taken to Bankruptcy Court, which seems the most favorable forum.

V. QUIET TITLE

The serious potential problem with quiet title is that the court will require a bond, as has occurred in at least one case in

American made \$750 million with credit default swaps, betting the securitized loans would fail.

⁴ Very little is found by a Google search of the obvious word choices (e.g., foreclosure defense); livinglies.com is not found by this method. Yes, I am a novice surfer.

Tennessee. Again, check state law on this subject.

VI. STRATEGY: COOPERATE AND GRADUATE

It is my hope that through memos such as this we can all assist one another by sharing information. I have assistance from attorneys, paralegals, and others for gathering information from the internet, but not just collecting the blogs, articles, etc., but by putting together a resource listing by category; e.g., cases, articles, websites, attorneys. Hopefully we can assist one another by sharing information; the learning curve is now at an exponential rate.

VII. FD PROVIDES LEVERAGE IN A LOAN MODIFICATION ATTEMPT

As indicated in my first memo and as proven now by, e.g., the Cleveland case, FD can be utilized as leverage in loan modifications.

VIII. CLIENT OBJECTIVES

Assume the client's objectives are: keep the house and have no mortgage, or alternatively, have a mortgage they can live with, or at worst, lose the house and get the lion's share of the net net proceeds, absent the mortgage. This ties in with the bankruptcy strategy as opposed to quiet title. Under quiet title, obviously the house is kept and is now debt free, but again, the downside is the risk of a court-ordered bond. In the Tennessee case the judge required \$20,000. Thus, the attorney now looks to the bankruptcy alternative.

IX. BANKRUPTCY (BK)

I know enough about bankruptcy to be dangerous; well, maybe a lot more than that given that I had a substantial bankruptcy practice years ago, after I figured out how to discharge taxes through bankruptcy, but I could not get the bankruptcy bar to undertake the issue. Thus, I was a tax attorney who became a bankruptcy attorney. "Necessity is the mother of all inventions." Some basics are in order. The limits for Chapter 13 are about \$1 million secured debt and \$350,000 unsecured. The complications of bankruptcy are more compounded by the Reform Act effective October of 05; thus, I rely on BK counsel to develop the expertise in this area with respect to FD. Having discussed the issues with some BK attorneys recently, I give my bottom line thoughts.

The advantage of a Ch.13 is that client has control over maintaining the case or dismissal of the case. I point out that

I give this opinion not having yet studied the details of the BK winning cases, for reason that most of the cases are won on the basis that the claimed note holder moves to lift the automatic stay and does not succeed for reason of lack of proof of the original note, thus lack of protectable interest, therefore lack of standing to even come into court and move to lift the stay. I use a couple of examples in my attempt to illustrate strategy and results. But again, these are not proven strategies except to the extent covered by reported (or otherwise known) case decisions.

Assume the client owes a \$500,000 mortgage, the house is worth \$300,000, and client has credit card debt of \$30,000, and no other debt. He files a Ch.13, the bank or other claimant (MERS, for example) (C) files a proof of claim to which client objects and files an adversary action to resolve the issue. C fails to timely produce the original note. The court orders that C has no valid claim and enters an order. Client dismisses the case and demands C release the lien based on the court order, or otherwise the client will have to file a quiet title action in which he will seek attorney fees as permitted on contract actions in states such as Arizona. If C refuses, then the quiet title action must be filed, and hopefully a bond is not required because client proceeds with a motion for summary judgment, utilizing the doctrine of res judicata/collateral estoppel; i.e., the BK order is used against the bank, and is etched in stone. Bottom line result: client now has house free and clear.

Under Ch.7, the issue is more problematic for reason that the client cannot willy-nilly dismiss the case. Assume the same facts as above, but now the BK trustee is chomping at the bit to earn fees by way of sale of the property and payment to the general unsecured creditors/credit card debt of \$30,000. Client perhaps can obtain another loan or otherwise negotiate with the trustee, but a worst-case scenario is that trustee sells the property for, let's assume \$400,000, pays the creditors \$30,000, and himself and his attorney another \$20,000. The client then receives the net net, which is \$350,000 cash in pocket, which ain't bad for a day's work. $400 - (30 + 20) = 350$.

Another possibility is that the client seeks to dismiss the Ch.7, and either the trustee does not object, or does object but client prevails against trustee through hearing and decision by the BK judge. Toss into this the issue of homestead exemption, whether or not it applies, what amount, state law, etc. - in Arizona \$150,000 whether married or single, and in some states, such as Florida and Texas, unlimited. Another issue arises: is the homestead issue viewed as of the date of filing the bankruptcy, or does the trustee succeed in disregarding the homestead protection?

As you can see, we need experienced BK counsel to weigh in, which leads to a paradox: I am suggesting this is a new and profitable practice area for ready development. We need BK counsel involved, but who is the busiest right now, given the substantial increase of BK's; i.e., up a third last year. Speaking of numbers, national media reports state 2.9 million foreclosures last year, and at least another 3 million this year, and articles report that MERS is involved in one-half of the foreclosures. That means MERS is involved in 3 million foreclosures, just covering those two years. There should be plenty of clients to go around.

X. MY CURRENT INVOLVEMENT - ADVISOR IN SEVERAL ONGOING CASES

First is my Nevada client who was about to ask for a short sale, so I suggested that she ask the bank if they had the original note and if so, provide a copy. Bank later began to proceed with non-judicial foreclosure. Client hired a local attorney and has engaged in loan modification negotiations, holding in the back pocket if needed the FD defense through BK, quiet title, or otherwise. Also, the notarized (required by state law) documents are bogus; client did not appear before the notary. The second case is a friend of a former client in Arizona who has not paid the mortgage in about a year and a half. I referred her to consult with Arizona BK counsel.

The third case is an Arizona BK, not my client, but attorney tells me that C has not yet produced the original note. Judge Curley lifted the stay and gave debtor right to file a motion for injunction if C could not produce the note within 90 days. I suggested a stiff demand letter to C for evidence of the original note. This will be a good test case for the Arizona BK court.

In Tennessee, attorney David Mills filed quiet title in state court, which action was (unbelievably) dismissed for failure to state a claim. That case is now on appeal and I, along with other attorneys, will be filing amicus. The judge felt the case was "not ripe" because David is paying the mortgage. Obviously, if there is a cloud on title by lien, then the case is "ripe" for litigation. Finally, in another Tennessee case, the judge ordered a \$20,000 bond, which the client cannot afford; and, he was just laid off. It sounds like it is probably ripe for a Ch.13, and Tennessee counsel is shopping for BK counsel to get more than general advice.

XI. FRAUD REGARDING THE NOTE OR OTHER DOCUMENTATION

I am told that there is considerable fraud by the banks with respect to client's original note, and my client in Nevada has already seen substantial fraud. Thus, you may need a handwriting

expert. Also, there are some attorneys or others offering various courses ranging from obtaining an expert's declaration to becoming a certified forensic examiner with respect to loan documentation. Prior to the "MERS-type defenses," many were defending on other grounds; e.g., violation of Truth in Lending law. Failure of C to have original note is but a starting point. Proper notarization? Documents recorded as required by state law? UCC?

XII. SECURITIZATION - A SHORT COURSE

See reference #4 at end of memo for a short course re the securitization process, which is really pretty easy to follow, especially with a flow diagram, thanks to our Secretary of FDIC and her report to Congress. Recall that when the Dow went to about 6,000 and the big bail out occurred, Congress wanted to understand what was going on with mortgage securitization. Thus, our government officials were explaining. Obviously, there is a lot more explaining to do, but, no doubt, no one will ever be held accountable.

XIII. LEGAL ISSUES - SHORT COURSE

Failure to produce the original note may be just the starting point in considering issues of UCC holder in due course, etc. As to the claim of unjust enrichment, this can (hopefully) be countered: the homeowner may be enriched by a mortgage debt gone bye-bye, but the homeowner cannot be legally required to pay a person to whom the debt is not obligated. That person, of course, is the holder in due course of the original note, or a proper assignee. Interesting that one BK judge in California has made clear by his new court rule that C is not to even step into court unless it has in hand the original note for review by the judge. In another court, BK or district court, the judge has made clear that he will no longer accept "affidavits of lost notes," a common ploy by C.

This brings me to discuss BK case decisions and the hearsay rule/business records exception. Business records can be offered and admitted only if a person with knowledge testifies. Here we have a straw man of a straw man; MERS is a straw man of C and in turn through the MERS agreement with its members has bank employees appointed by MERS as MERS officers. This is with a declaration or otherwise appearing in court. It is no wonder that one California BK judge threatened C's attorney with sanctions for having submitted a declaration under penalties of perjury in which the declarant had personal knowledge of only two of about twenty facts recited. The witness reviewed the MERS computer and swore that the numbers in his declaration were correct, yet he had no personal

knowledge of correctness.

More stories abound on the internet, and my only word of caution: you may well get hooked and spend countless hours. For lawyers, at least, the real test is what are the reported decisions, or even if not reported, those which we can obtain from the court by way of Pacer or otherwise so as to build a powerful legal memo for FD.

XIV. CLASS ACTION LAWSUIT

See Trevino v. Merscorp, Case #07-568, USDC, Delaware.

XV. SUMMARY AND CONCLUSION

The ball is now in your court. My suggestion: if you have the temerity, take it and run. A single legal aid attorney has fended off 300 foreclosures. See Bloomberg article, infra.

Suggested followup:

1. Bloomberg article, 2/22/10;
2. Pam Mertens article in Counterpunch re judges nix foreclosures;
3. Livinglies.com;
4. real-debt-elimination.com/mortgage_elimination/federal_judge_demands_clear_documentation_in_foreclosures (Cleveland BK case/Deutsch Bank and Secretary of FDIC and explanation/flow diagram of securitization. NOTE: a "bankruptcy-remote special purpose entity (SPE)" is utilized.)

/mac/Foreclosure Defense Part II - 3/17/10