

USFN[®] Report

Updates on Mortgage Industry Trends

Winter 2011

The Mortgage Servicing Industry Under Siege

by **Charles A. Lovell**

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AS INCOMING CHAIR of the USFN Legal Issues Committee, this is the opportunity for me to prognosticate on the state of the industry and the challenges we face. First, though, I want to give kudos to the outgoing Chair, Terry Hutchens, who has done a masterful job over his two-year term with all of its challenges. While Terry could

see *The Mortgage Servicing Industry on page 21*



C. Lovell

Contested Foreclosures Some Practical Suggestions for Servicers

by **Jennifer M. West**

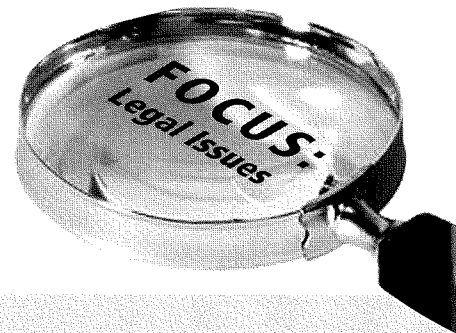
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ONE DIRECT RESULT of the foreclosure crisis has been an increase in the number of contested foreclosures across the country. Depending on the jurisdiction, borrowers will either file a counterclaim in an existing judicial foreclosure action or a separate lawsuit requesting actual and even punitive damages against servicers and the foreclosing law firm for wrongful foreclosure. Lawsuits filed by

see *Contested Foreclosures on page 18*



J. West



Features

Contested Foreclosures	1
Legislative Updates	6
Robo-Signing in the News	9

Departments

State-by-State	11
Bankruptcy Update	15
HOA Talk	16
Legal Issues Update	17

Connections

From the President	2
Members Moves + News	3
Servicer's Bulletin Board	5
Calendar	22
Member Directories	22

pepper his articles and presentations with references to John Locke and Edmund Burke, mine tend to be a bit pedestrian, more in the nature of *Saturday Night Live*. Terry is a true gentleman and a scholar, and I will never be able to look as dapper as he does.

Before writing this introduction column, I looked at Terry's introduction from last year. At that point, the dramatic changes in mortgage servicing concerned the Protecting Tenants at Foreclosure Act, RESPA reform, Home Affordable Modification Program, and states' attempts to appear as busy as the Feds. Judicial activism was on its continued rise, foreclosure volumes were increasing, and timelines were dragging in response to all of the attempts at loan modification.

This year, we face the same challenges, as well as a plethora of new ones. At the top of the list is the "robo-signing" issue, with direct challenges by plaintiffs, attorneys general, and legislatures

to the very business models of the industry. Make no mistake, "robo-signing" is wrong. If we take away the roof over a family's head, it is imperative that it is done with all of the protections of due process. Some may throw up their hands and say, "But my notary was eleven feet away from me when I executed these five hundred documents!" However, if the state law requires that the affiant be within the distance at which the notary and affiant can physically exchange identification, then, indeed, it is incumbent that it be done properly.

The requirements of laws regarding foreclosure and bankruptcy are not mere formalities, nor should they be seen as impediments to timeline compliance in a volume environment. Law firms don't do their clients any favors when they get all "greens" on timeline report cards if it is done at the sacrifice of being an excellent lawyer, taking the time to make sure that the process is done legally and correctly. (Query: do I now get an attorney for all of my "reds"?)

When we attorneys go into court and make a representation on behalf of our mortgage lender or servicer client, we must get it right the first time and be sure that our representations are completely accurate. The mortgage industry seems to have squandered much of the good will it enjoyed in past years. At the beginning of my legal career, judges believed that the information

presented by institutional clients was accurate; my sense is that courts now believe the complete opposite.

What to do about all of this? There are already rumblings of federal requirements of standardization in mortgage foreclosure processes. These will not preempt or subsume each of the fifty states' laws in their laboratories of democracy (that was Justice Brandeis, Terry); there will be an additional regulatory layer added atop the existing processes. We can expect the process to be an almost unmanageable patchwork of federal, state, municipal, and GSE requirements. If the past is an indicator of the future, default attorneys will be expected to comply with all of these requirements and to do it under fee limitations that were last changed a decade ago.

On top of this layer of legal issues is the conflict between industry-giant outsourcing and technology firms and the requirements of the GSEs. On the one hand, outsourcing/technology

firms work themselves ever closer into more of the independent law firms' business processes (and profits) and, on the other hand, the GSEs limit the ability to use those systems or to be reimbursed for them. At the same time, the GSEs insist that their costs be driven to the absolute minimum, thereby, for example, taking efficient and accurate foreclosure publication services off the table. In the midst of all this, the attorneys and the servicers hunker down,

being buffeted by wind from all directions.

Do I have the answers to all of this? No. But I do have opinions, and lots of them. Throughout the year, the USFN Legal Issues Committee will track all of these competing interests in the marketplace. We may even opine on one or two of them. In this edition of the USFN Report, you will read a feature on "robo-signing" by Peter Mehler and one on contested foreclosures by Jennifer West. Also, there are Legislative Updates for Alaska, Massachusetts, and New York, authored by Richard Ullstrom, Kathryn Ryan, and Andrew Morganstern, respectively. Plus, an article on "SCRA and the Military Dependent" by William Fischbach and one on recent SCRA amendments by Mark Adelman.

We hope that you enjoy these articles, or at least learn from them. The opinions? Well, if you don't like them, then, in my best Emily Litella voice, "Never Mind!" ■

