

FORECLOSURE DEFENSE CHECKLIST

Please Note: Nothing contained here is intended to be, or should be construed as, legal advice or any other advice which requires state or federal professional licensing of any kind. This checklist has been prepared and derived from the information gathered in connection with extensive research, review of documents, meetings with clients, and attendance at court hearings with respect to hundreds of foreclosure and eviction cases over the past several years (in the wake of the national foreclosure crisis). Please also note that this information is subject to interpretation in accordance with the applicable rules and laws in the various state jurisdictions; as well as the applicable federal rules and laws governing a foreclosure in your jurisdiction.

The checklist below presents several items that you may want to check and review in order to determine whether the given item identifies a material issue that may contribute to your overall strategy to contest, stop, postpone, defeat, and/or invalidate a wrongful or illegal foreclosure.

Notice Deficiencies

Foreclosures may be conducted only in accordance with strict rules and guidelines as established by state and federal laws. One of the first of such requirements is the strict conformance with the procedural notices required by law. Therefore, it is important to make sure the party foreclosing has met all of the notice requirements as specified in the applicable foreclosure laws in your state. Any material notice deficiency (in content, timing, or other material aspect) can invalidate a foreclosure proceeding.

Lack of Debt Validation

The foreclosing party has an obligation to substantiate and account for the alleged amount that is owed and in default. Often borrowers do not challenge the amount owed because they know they are "in debt." However, being in debt, in and of itself, isn't a sufficient reason for being foreclosed on. You have a right to an exact accounting. The foreclosing party, especially in this age of sophisticated accounting software, should immediately be able to generate a complete accounting of all the receipts, credits, debits, charges, disbursements, and running balances with respect to the given mortgage loan account since its inception. Additionally, a borrower has the right to examine the original document which evidences the debt (with all the applicable and requisite assignments and/or endorsements which appear on, or are affixed to the mortgage note as an allonge) which substantiate that the party foreclosing is, in fact, the holder of the note and has legal standing.

Lack of Legal Standing

This is, perhaps, the most difficult area for a typical homeowner to "wrap his or her mind around." Very often, foreclosure notices are received from attorneys representing entities the homeowner has never even heard of (or conducted any business with). This is because a mortgage and mortgage note can be assigned (or transferred to a new "holder in due course") one or more times as it travels through the secondary market. Even more confusing is the fact that mortgages were pooled and "securitized" so they could be sold to investors as securities all over the world. The significance is that this pooling and securitization of mortgages as collateralized debt obligations, often accomplished by assignments made by Mortgage Electronic Registration Systems, Inc. (MERS) as a nominee for the holders of these mortgages and notes, has created a debacle. Courts all over the country are trying to agree about whether the mass-assignment of mortgage interests by MERS (often separate from the mortgage note) has compromised the legal ability to foreclose the mortgages. The bottom line is that the party foreclosing a mortgage has to prove that it is the valid holder in due course of both the mortgage and underlying mortgage note it seeks to foreclose. That is often easier said than done.

Forbearance Frauds

During the early stages of a foreclosure proceeding, borrowers are often encouraged to contact their "lender" in order to prevent a pending foreclosure. In many instances, these homeowners are led to believe that they can obtain a lower payment and/or reduction in principal as a permanent modification of their mortgage loan. In MOST cases, however, these disingenuous offers are designed by mortgage servicers to (a) extract money out of the borrower under false pretenses, while (b) getting updated financial information from the borrower, and (c) deceptively getting the borrower's confirmation that certain amounts are owed and the lender has legal standing to foreclose. In essence, more often than not, forbearance arrangements are merely temporary payment plans which are misrepresented as alternatives to foreclosure when, in fact, there is no reasonable likelihood or intent on the part of the servicer or lender to stop a pending foreclosure.

Verbal Misrepresentation Tactics

Mortgage servicers are notorious for making statements and promises that are NEVER reduced to writing. In fact, the correspondence that a homeowner receives in the mail often refutes what the homeowner has been told on the phone

(especially when trying to get the homeowner to send money, send documents, and/or provide more information). The classic example is the homeowner that sends modification documents and information (i.e. a hardship letter, financial documents, etc.) only to be told "it wasn't received" or "it wasn't complete" and/or it "hasn't been processed." Meanwhile, the foreclosure gun remains pointed at the homeowner's head and precious time is ticking away as the homeowner makes more payments to avoid foreclosure. While the servicer tells the homeowner to contact the lender's attorney to stop the foreclosure, the lender's attorney tells the borrower to contact the lender or servicer. This "runaround routine" is standard operating practice in the foreclosure arena. However, it is also an unfair and deceptive trade practice (though hard to prove).

❑ **Forgeries & Fake Documents**

Forging documents is a process of changing, altering, creating, or imitating documents with the intent to deceive the party or parties relying on the authenticity of those documents (usually to create a false sense of authority and many times produce a monetary gain). Unfortunately, forged and faked documents can play a major role in an illegal foreclosure if the forgery isn't challenged or discovered. One notable area where forgeries take place is in the "after-the-fact" production of documents that are necessary to prove the chain of title of the holders in due course pursuant to substantiating the legal standing to foreclose. Therefore, you should take a close look at any documents that were seemingly not available or recorded on or about the time they were allegedly executed and are, at a much later date (sometimes years later) being brought to the table to substantiate legal standing to foreclose (such as mortgage assignments and allonges to mortgage notes).

❑ **Securitization Issues & "Blank Endorsements"**

This aspect of the foreclosure process is especially complex, but is finally becoming the subject of many legal inquiries. In a nutshell, the financial gurus on Wall Street have converted large pools of mortgages (thousands and thousands of them) into "securities" in order to enable investors from around the globe to invest in fractional interests of these mortgage pools; often held in large trusts. In that process, these mortgage loans were often "sliced and diced" in a fashion and method which often resulted in unaccountability, or even loss, of the original mortgage documents; perhaps because so much of the process was conducted through electronic means. The bottom line is that the advocates of the Wall Street derivative financing schemes (with the intent to make, literally, billions off these collateralized debt obligations) want to conveniently "excuse" the fact that, for example, your original mortgage note can't be located, was not properly assigned, was not properly transferred, and/or was not properly endorsed; despite that these circumstances could render a foreclosure based on these deficiencies to be invalid. These types of defects are often rationalized by foreclosing attorneys as being unimportant; and these attorneys concentrate on putting the borrower on defense by pushing a foreclosure forward. Borrowers should demand, therefore, that the original mortgage note (or an exact copy), together with all its applicable assignments and/or endorsements as of the time of commencement of any foreclosure proceeding, be produced for the purposes of debt validation and the proof of legal standing. Many law firms that are hired to foreclose these "toxic assets" are specialists in covering up the legal deficiencies created in the "wind-fall-profits-driven" securitization process on Wall Street.

❑ **Conflicts of Interest**

Illegal foreclosures are taking place in epidemic proportions all over the country through the operation of "foreclosure mills." For the purposes here, a foreclosure mill is defined as an organized effort by a mortgagee and/or its legal representatives to circumvent applicable foreclosure laws through the orchestration of a sophisticated maze of unfair, deceptive, and illegal acts and conduct being perpetrated on innocent mortgagors to generate wind-fall profits.

The key ingredient and characteristic in the successful operation of a foreclosure mill is the presence of the unconscionable conflicts of interest which serve to violate any sense of public trust and responsibility that attorneys are supposed to exemplify as "officers of the Court." To the contrary, attorneys from the same firm that is operating as a foreclosure mill often do ALL of the following in a foreclosure proceeding: (a) represent the servicer and/or lender, (b) represent the party that assigned the subject mortgage loan to the servicer and/or lender, (c) represent the party named as the mortgagee or "seller" at the foreclosure sale, and (d) represent the "buyer" at the foreclosure sale; often a government-sponsored enterprise such as Fannie Mae, Freddie Mac, or HUD.

The result of this obvious collusion and conflict of interest is that it creates an unmercifully "stacked deck" which is all but impossible for a homeowner to defend against without really deep pockets. However, these conflicts of interest are in violation of any reasonable interpretation of the state and federal laws prohibiting unfair and deceptive business practices - if not constituting outright racketeering!

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