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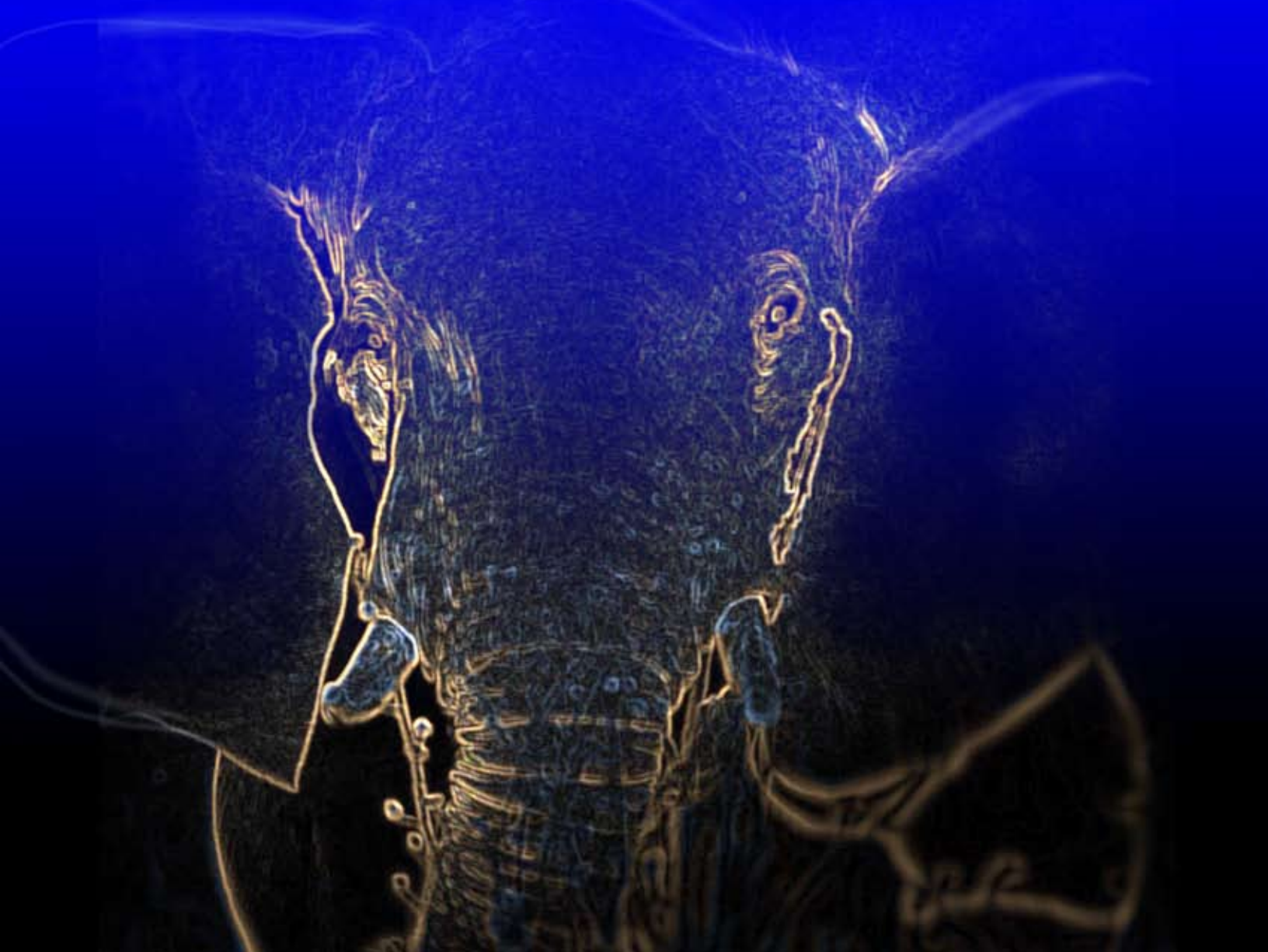
**Real Estate Foreclosure Litigation**

# **THE ELEPHANT IN THE LIVING ROOM**

**Three Simple Rules To Avoid The Crush**

Prepared by:

Richard Charnley  
Stephen Lightfoot II  
Jesshill Love  
Todd Wenzel



# Real Estate Foreclosure Litigation

## THE ELEPHANT IN THE LIVING ROOM

### Three Simple Rules To Avoid The Crush

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<http://www.jdsupra.com/post/foreclosure-litigation-the-elephant-in-the-living-room> (file=24768a-bf62-4286-9842-0791d04219e8)

For the last year talk of the spike in mortgage foreclosures has infiltrated our lives. Banks are failing. Legislatures are screaming for "foreclosure relief." Hoping to avoid disaster, real estate companies are inducing potential buyers to take "all expenses paid" tours of distressed properties. Hundreds of billions of dollars are at risk, as are the homes of tens of thousands of American citizens.

But, while lawmakers structure "bailouts" and developers sell excess inventory at deep discounts, the foreclosure numbers continue to escalate, and as more and more families lose their homes, history has taught us that the risk of litigation will expand geometrically and has become an *elephant in the living room*.

In the mid-1980s foreclosure activity bloomed, and for a while, mortgage foreclosure was a hotbed of litigation; however, since that time, the area has grown cold and many of the lessons learned have been forgotten. However, by looking back and unearthing the litigation patterns of the 1980s, one can develop and implement three simple rules that will help deflect criticism, perhaps insulate real estate professionals from the rising tide of lawsuits and, in the final analysis, keep the *elephant* from entering the building in the first place.

#### **RULE 1. COLLECT YOUR DEFENSIVE DOCUMENTATION NOW.**

With investment banks folding and small brokerage companies disappearing into thin air, it is evermore important to have all your important documents at your fingertips. Indeed, when you find yourself in the cross

hairs of litigation – a named defendant in a lawsuit – you may well need to prove a negative to avoid liability. Showing that you were not to blame for causing a seven figure short fall will be impossible without source materials. As such, the best way to marshal evidence is through the documentation you have on the transaction in question.

Unfortunately, it is a corollary of *Murphy's Law* that as soon as you need that important document, it will have disappeared, you will not be able to find it, and everyone will blame you for losing it. The simple way to prevent this from happening is to collect all of your recent mortgage documentation NOW and keep files for each transaction safely stored in a specific file and in a specific place. Although this instruction seems elementary, it is amazing how many times documents concerning a single, particular transaction are filed in several different places. Keeping documents in different files/different locations increases the likelihood that you will not be able to find a particular document; it also potentially expands the scope of discovery in litigation.

Lawsuit discovery requests for the production of documents typically include a request for all "writings" as that term is defined by California Evidence Code Section 250. The definition is extremely broad and includes handwriting, typewriting, printing, photographs, e-mail and "any form of communication." This would include electronic forms of communications that are covered under the Federal Rules of Civil Procedure, amended in December 2006, to cover electronic discovery. If you keep documents in more than one file, you may be requested to produce all the "writings" from each of the

files. This makes responding to the discovery difficult and, if the documents are commingled with documents from other transactions, you may be faced with a discovery fight as to whether the other documents should be produced. Needless to say, your record keeping practices will also be scrutinized, which may not bode well for your side of the case.

If you are faced with a lawsuit, the time to gather all the relevant documents is yesterday. Even though there might not be a pending request to produce documents, it is crucial to get all of your documents together immediately so your lawyers can review them. Having the documents in hand early will help your lawyers analyze potential strengths and weaknesses of the case as well as prepare and develop case strategy.

#### **RULE 2. EVALUATE PERFORMANCE OF FORMER ASSOCIATES**

The mortgage process involves multiple players, including the brokers themselves, appraisers, lenders, the borrowers, real estate finance companies, and so forth. Often, brokers package multiple questionable deals using the same "team." Greed is infectious, and cross referrals of shady deals can be commonplace.

Now is the time to start reviewing past associates' mortgage deals that are in default or worse, in actual foreclosure. It is human nature that once we find a path that works, we will repeat that path until it fails. With the brokering of mortgage loans, this was often the case in the last four to five years. If a broker was able to obtain a mortgage loan for a low-income borrower once, that

broker would likely repeat those steps in closing similar deals.

For the employer of such brokers, if one of those deals was made with falsified or skeptical information, it is likely that a significant percentage of that broker's deals are also bad. Who will be left holding the bag? The employer, of course.

Therefore, in as soon as possible, the employer/principal should engage in some reverse engineering and scrutinize not only all deals closed by such broker, but also any deals involving a member of the broker's team. If you suspect that a past employee closed some questionable deals, it is best to learn of those suspect deals sooner rather than later. Nobody likes surprises, and it is a good practice to be aware of the chinks in the armor before being drawn into a battle zone. Now is the time to start reviewing past employees' mortgage deals that involve properties that have ended up in foreclosure, or are headed in that direction

### **RULE 3. PREPARE CLIENT/ ADDRESS LISTS AND MONITOR PUBLICATION DATES.**

Now that you have gathered and centralized all of the important files and documents, it is time to put them to good use. Pertinent information should be summarized so that vital details related to each loan such as client contact information and property addresses can be easily accessed. The property addresses can then be easily monitored for Notice(s) of Default and Notice(s) of Sale.

In certain cases, it may not be necessary to monitor all brokered loans. To the contrary, the previously performed centralization and organization of files may have revealed problematic loan packages, team members,

or offices. In this event, your monitoring of public notices and publication dates should start here. This is where you will see the greatest return for time invested.

There are multiple ways to monitor public records related to foreclosures. The records are public, after all, and can be obtained from the local county government. This office may be known in your county as the recorder, county clerk, circuit court clerk, registrar, prothonotary, or bureau of conveniences. In certain counties, the public records are posted online by the county in which case the notices can be monitored remotely by computer. Other counties employ the services of a foreclosure listing service company. These companies literally take the pain out of the monitoring process. For a fee, the foreclosure listing service will provide you all relevant public notices for the county such as Notices of Default and the subsequent Notice of Sale. The public notices can then easily be monitored for localized areas on a daily basis from a remote computer.

By monitoring the public notices you will be able to identify which files, if any, may require further attention or possibly intervention. There is no need to be concerned over realities that may never materialize. To the contrary, the monitoring process will provide you with the requisite information to identify potential problems before they arise. Early identification of potential problem files will assist both the company and its counsel in structuring relevant defenses to maximize future litigation strategy.

## **CONCLUSION**

We have no doubt that brokers, underwriters, appraisers, securitizers and lenders will become the targets of mortgage foreclosure litigation. The maelstrom will not encourage selectivity, and no matter what your standing, you should presume that you will be sued. Any other assumption invites financial disaster.

The elephant is out there, and he is hungry. The only reliable method of maintaining financial security in the upcoming storm is to build a strong bulwark by following the "three simple rules," so when the *elephant's* trunk starts fumbling for the keys to your house, they are safely in your pocket.

### **Ropers, Majeski, Kohn & Bentley Mortgage Foreclosure Litigation Team**

For Legal Assistance  
With Mortgage Foreclosure Matters,  
Contact:

Richard Charnley	Los Angeles
Steve Erigero	Los Angeles
Jesshill Love	Redwood City
Richard Williams	San Jose
Todd Wenzel	San Francisco
Stephen Lightfoot II	San Francisco

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New York, NY 10004  
ph (212) 668-5927  
fax (212) 668-5929

**Boston**

60 State St., Ste. 700  
Boston, MA 02109  
ph (617) 973-5720  
fax (617) 973-5721

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