



FINANCIAL RESTRUCTURING & BANKRUPTCY DEPARTMENT

ALERT

MORTGAGE FORECLOSURE CHALLENGES CAN BE AVOIDED WITH DILIGENCE

By Michael J. Viscount, Jr.

The recent rash of news reports regarding defective foreclosure proceedings by mortgage servicers is merely a politically hyped characterization of a situation familiar to legal professionals and concerns a process that diligence and good lawyering can easily prevent.

Foreclosure of a mortgage and the resulting removal of a person from his or her home or other real property has a historical legal basis stretching back to medieval times. Lenders hold interests in property as collateral for repayment of debts, with the cost of default resulting in forfeiture of the property rights of ownership and possession. As societies became enlightened, legal systems evolved to address the extraordinary need to remedy forfeitures, and as a result, for many years courts have permitted forfeiture only where the foreclosing mortgage holder was able to satisfy several conditions. Paramount among those conditions is first-hand proof the debt exists, with specifics regarding the amount due and how it is calculated; proof of the default; and proof of the existence of security documents properly executed by the property owner, containing all of the required security grants to the foreclosing party and in the possession of the foreclosing party or its agent. When all of these conditions are satisfied, the mortgage holder has no problem foreclosing to recover its collateral.

What has gained the greatest notoriety in the current “scandal” is that foreclosures are processed on behalf of

lenders by mortgage loan servicers involved with the administration of millions of loans packaged and sold off as mortgage-backed securities. When the servicer is ready to request judgment for payment of money or foreclosure on a mortgage, someone with personal knowledge of the underlying documents and the business records of the account concerning the particular loan must testify – under oath, either in person or by certification and under penalty or perjury – on all of the relevant facts. It has been alleged certain servicers had certifications under oath signed by people who sign thousands of such documents each week and who in fact knew nothing at all about the underlying documents, account records and facts, and signed without a notary present. These problems should not be encountered by a lender that funds and services its own loans and retains competent counsel to assist with the pre-foreclosure due diligence that prudent practice dictates.

To avoid foreclosure problems, the lender or other mortgage holder should insist on the following before filing a complaint or initiating other action to commence the legal process:

1. Review all documentation to confirm possession of originals or copies certified to be true of all required debt repayment and security instruments.
2. Confirm all documents are properly signed by the borrower and property owner, if different.

3. Confirm the existence and proper recording of all necessary assignment and transfer documents if the mortgage loan was made by another lender.
4. Confirm the existence of proper billing and payment records for the loan.
5. Refer the matter to a lawyer in the region where the property is located and who is familiar with local law and procedure for completion of real estate foreclosures.

At Fox Rothschild, we have lawyers and paraprofessionals who regularly and without controversy handle real estate mortgage foreclosures in each of the eight states where we maintain offices: Pennsylvania, New Jersey, Delaware, New York, Connecticut, Florida, Nevada and California.

For more information on the handling of your foreclosure needs, please contact Michael Viscount, Jr. at 609.572.2227 or mviscount@foxrothschild.com or any member of our Financial Restructuring & Bankruptcy Department.

Fox Rothschild's Financial Restructuring & Bankruptcy Practice area includes highly experienced attorneys dedicated to practicing in all areas of debtor and creditor law, bankruptcy and related work-outs and litigation. The practice is anchored by a group of seasoned attorneys that has a wealth of knowledge and experience in this practice area and that leverage that experience to develop and implement practical solutions. Fox has an especially strong presence, and noteworthy familiarity with, the state and federal courts in Delaware, New York, New Jersey, Pennsylvania, Nevada, California, Florida and Connecticut, and our lawyers have represented the firm's clients in many courts throughout the United States. Our attorneys can offer a full service representation to lenders and borrowers, and address the most complex issues arising in connection with debt recovery and defense matters in and out of bankruptcy, because we draw upon the support and knowledge of the other attorneys in the multitude of disciplines within the firm.

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