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GMAC: Spectral Hand of "Robosigning"

COMMENTARY by [JONATHAN FOXX](#)



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This past Friday, January 14, 2011, GMAC decided to cancel certain foreclosure actions in Maryland.

At a time in which [foreclosure actions are expected to accelerate 20% in 2011](#), and 2.87 million properties were the subject of default notices, auctions, or repossession in 2010 (a 2% gain from 2009), and [banks seized more than 1 million homes in 2010](#) (up 14% from 2009), the impact of the spectral hand of so-called "robosigning" has now apparently reached a new threshold.

GMAC and Maryland Foreclosures

In a move that should place renewed emphasis on loss mitigation and further curtail the headlong rush to foreclosure processing, GMAC has decided to cancel foreclosure proceedings on 250 properties in Maryland. There have been reports of perhaps 1,000 foreclosures affected and possibly many more.

The ostensible cause of this retreat is due to defective affidavits, executed by one Jeffrey Stephan, a "robo-signer" who has attested to, among other things, the authenticity of foreclosure documents without having had any knowledge about them.

By this point, we all should know the sorry story of robo-signing that has facilitated the massive foreclosure proceedings by banks. GMAC's decision was brought on by a class action handled through the University of Maryland Consumer Protection Clinic and Civil Justice, Inc., a nonprofit. Though there were other aspects tried in the case, the central position of the case argued that any foreclosure action which used [Jeffrey Stephan](#) as the "signer" was essentially illegitimate, and therefore must be dismissed.

I should point out that GMAC is not the only recipient of this argument: although not yet a settled matter, the University of Maryland Consumer Protection Clinic and Civil Justice also want dismissed any foreclosure actions with affidavits from [Xee Moua](#), Wells Fargo employee and admitted "robosignor," who stated in a sworn deposition in a Florida case that she had signed foreclosure-related papers on behalf of the bank and that the only information she verified was whether her name and title appeared correctly on the relevant documents.

Stephan estimated that he signed 10,000 documents a month; Moua claimed to sign at the rate of as much as 500 documents each day.

Mediation

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In Maryland, a judicial foreclosure state, GMAC will refile these cases, but will be required to do so under [new laws that went into effect on July 1, 2010](#). Certain features of these laws probably should be adopted in those states where state law itself provides a means to implement them.

Pursuant to these new Maryland laws, for instance, banks seeking to foreclose must demonstrate in filings that they reviewed and considered foreclosure alternatives, and provided specific notices to the borrowers. Importantly, these laws permit borrowers to be eligible to pursue court supervised mediation. Obviously, this law will change the timing, method and cost for conducting residential foreclosures in Maryland.

So the foreclosure process, as I've mentioned in previous Commentaries, is not going to cease permanently; for the most part, it will slow down for awhile, regroup, gather up its standing, reinforce its procedural integrity, and then restart.

[Here's a good article](#) on the Maryland controversy by a fine reporter who has been tracking this story with clarity for some time.

Servicing and Foreclosure

All this brings me to remarks that will be made today in an "[Opening Address by FDIC Chairman Sheila C. Bair](#)" at the [Summit on Residential Mortgage Servicing for the 21st Century](#), an event sponsored in DC by the Mortgage Bankers Association.

In her prepared remarks, Mrs. Bair states that "chaos in mortgage servicing and foreclosure is introducing a dangerous new uncertainty into this fragile market," and that the "persistent adversary has been inertia in the servicing and foreclosure practices applied to problem loans." Her speech centers on the "mortgage servicing problem."

I think this observation of hers pretty much sums up the situation:

"The mortgage crisis also has revealed a **fatal flaw** in this unbundling of the mortgage-lending process: the misalignment of incentives between the various parties and specialists involved. We have dramatically underappreciated the potential for what economists call "principal-agent" problems arising from misaligned incentives. Mortgage brokers and lenders had little or no incentive to worry about whether borrowers could repay their mortgages. Neither did the investment banks putting together securitizations and CDOs." (My Emphasis.)

Some Suggestions

Essentially, Mrs. Bair suggests a clearly delineated loss mitigation approach that enhances mediation. Perhaps this realization is dawning belatedly on her and the servicers part, but at least it is being discussed in some way.

The suggestions she outlines are well worth considering:

- 1) In order to remedy failures endemic to the largest mortgage servicers ... [there should be] "enforceable requirements that will significantly improve opportunities for homeowners to avoid foreclosure."
- 2) Servicers must commit to adequate staffing and training for effective loss mitigation ... [and] "establish industry benchmarks - based on a maximum number of delinquent loans per representative - and insist on a minimum standard of training to ensure that staff are up-to-date on the latest loss-mitigation programs."
- 3) [Servicers should] "expedite the loan modification process and help clear the market, [looking] for opportunities to greatly simplify loan-modification offers in exchange for waivers of claims."
- 4) Regarding second lien holders interests competing with first lien holder interests, "as part of any resolution of claims regarding large servicers, a fixed formula should be established to govern the treatment of first and second mortgages when the servicer or its affiliate owns the second lien" [a formula which should, at minimum] "require that the subordinate lien be reduced pro-rata to any change in the first mortgage."
- 5) There should be an "independent review of loss-mitigation denials" and "borrowers should have the right to appeal any adverse denial of a loan modification request to an independent party who has the proper information to conduct an immediate review and the power to correct erroneous determinations."

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6) "Weak practices" in handling title documentation must also "cease" by assuring that banks and other servicers will be required to "foreclose in their own names instead of allowing MERS to foreclose [and] provide complete chain of title and note transfer history in the notice of default."

7) Settlements should eliminate "incentive payments to law firms for speedy foreclosures, as well as the use of lost-note affidavits, except where the servicer has made good faith efforts to obtain the note" [and such settlements] should "prohibit foreclosure sales when a loan is in loss mitigation, except in specific situations where delay would disadvantage the investor, violate existing contracts, or reward a borrower acting in bad faith."

Foreclosure Claims Commission

Mrs. Bair asserts a rather bold suggestion - one I have heard much about over the last few years, but now note that it has made its way into quotidian discourse: the creation of a **foreclosure claims commission**.

According to Mrs. Bair, this commission would be "modeled on the BP or 9/11 claims commissions, [and] could be set up and funded by servicers to address complaints of homeowners who have wrongly suffered foreclosure through servicer errors."

I think this will likely be resisted politically, legally, and financially for a number of reasons, but I'll let Mrs. Bair speak:

"Many in the servicing industry will resist a settlement such as this because it would impose much of the immediate financial cost on the major servicers themselves. But this would be short-sighted. The fact is, every time servicers have delayed needed changes to minimize their short-term costs, they have seen a deepening of the crisis that has cost them - and the rest of us - even more."

Resolutions

Somewhere in the interstitial fields of loss mitigation and foreclosure actions a resolution must be found.

And must be found soon!

What do you think?

I would welcome your comments.
Please feel free to email me at any time.



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