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Richard F. Kessler is a nationally recognized authority on foreclosure who has produced significant original work on documentary defects and legal problems created by conveying a mortgage for securitization. During the past two years, I have published numerous articles concerning documentation and securitization.

I have been a member of the D.C. Bar since 1968 and have had exposure to experience in virtually every aspect of real estate including real estate law, construction and financing. Mr. Kessler consults with attorneys, financial analysts and others affected by foreclosure particularly as it affects mortgages purchased by mortgage backed securities trusts (MBSTs).

More than 80% of all mortgages have been sold to MBSTs. A significant number of these mortgaged properties have been foreclosed, are being foreclosed or will be foreclosed. RealtyTrac estimates that more than 3 million homes will be foreclosed in 2010.

Who is affected?

- Any party who has funded, organized or administered a mortgage backed securitization trust (MBST).
- Any investor who has lost money on certificates issued by a MBST.
- Any property owner in foreclosure or who has been wrongfully foreclosed.
- Title companies who insure properties foreclosed on behalf of a MBST.
- Lawyers who bring foreclosure actions on behalf of an MBST or defend against foreclosure on behalf of an MBST.
- Investment companies interested in funding class action lawsuits to recover monetary compensation for wrongful foreclosure and mortgage fraud.

Today, the crisis *de jour* is the discovery of widespread misuse of affidavits executed by an affiant who falsely claims to have personal knowledge of the financial record of the debt and that the amount claimed as due and owing is true and correct when the signatory has no knowledge whatsoever of the financial records. This is only the tip of an iceberg. Securitization of mortgages has created many other types of documentary defects just waiting to capture media attention. These defects may render mortgages unenforceable and create massive liabilities for the parties involved.

Problem Documents Categorized by Type

1. Authentication fraud. Fraudulent affidavit used.
2. Assignment fraud. Chain of title. Property taken and foreclosure enforced on behalf of a party which is not the note holder. Fraudulent affidavit used.
3. Verification fraud by attorneys. Fraudulent affidavit used.
4. MERS. Assignment in blank does not convey a secured interest in the mortgaged property. Chain of title. MERS wrongfully foreclosed or assigned its interest to a successor who wrongly foreclosed without standing. No valid document transferring title to the note to plaintiff.
5. Incomplete order of judgment which fails to extinguish third party interests in the property. Unmarketable title. Failure to use and produce report of title.
6. Failure to comply with court rules and administrative orders to obtain judgment. Mandatory mediation in Florida is an example of such an order issued by a court, in this case, the Supreme Court of Florida. Fraudulent document used to show compliance.
7. Failure to provide proper legal notice to debtor. Fraudulent document used to show compliance.
8. Failure to provide proper legal notice to debtor in military service. Fraudulent document used to show compliance.
9. False lost note affidavit. Fraudulent affidavit used.
10. Failure to disclose advances of defaulted mortgage payments to MBST trustee. Fraud and deceit upon the court resulting from failure to disclose the payments in the complaint and use of a fraudulent authentication.
11. Contradiction between pleadings and other documents filed with the court or in the land records and the Master Pooling and Servicing Agreement. Creating contradicting documents which bar foreclosure unless and until contradiction is explained and resolved.
12. Failure to confirm that the MBS trust was shown as the holder of the mortgage on schedules filed with the SEC. False verification affidavit and false allegation in complaint that plaintiff is the note holder.
13. Misuse of tax exemption for Real Estate Mortgage Investment Conduit (REMIC) resulting in tax evasion. Lack of documents to show compliance with IRS REMIC rules as a result of failure to transfer mortgages to MBST within the required time period.
14. Documentary evidence of predatory financing and non-compliance with federal and state statutory authorities for making a loan, settling a loan or collecting payment of a debt.

15. Documentary evidence of mortgage fraud, i.e. deliberately making bad loans to borrowers which the lender knows or has reason to know that the borrower cannot afford to repay.

Non-Documentary, Major Legal Issues

- ❖ Securitization renders the mortgage unenforceable because it unilaterally modifies the mortgage without the written consent of the borrower. Breach of contract or tortious interference in a contract.
- ❖ Securitization renders the mortgage unenforceable because it cannot provide an identifiable party which is secured by the mortgage as a successor in interest to the mortgagee.

I am available to consult on how a client needs to address these documentary defects. Such consultation may include, for example and without limitation, such matters as:

- Understanding how foreclosure of securitized mortgages has created liability.
- Identifying the risks of liability which can result in causes of action to recover damages as a result.
- Understanding the revenue producing opportunities created by these sources of liability.
- Strategic planning to constrain and contain potential liability and avoid paying damages.
- Forward planning to avoid liability in the future