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Foreclosure Prevention

September 16, 2009
McCall, Idaho

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National Consumer Law Center

NATIONAL
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THE NATIONAL CONSUMER LAW CENTER

The National Consumer Law Center is a legal resource and advocacy organization which seeks justice for low-income people who struggle with consumer and energy problems. The National Consumer Law Center's mission is carried out through a combination of direct advocacy/consumer representation in legislative, judicial, and administrative forums, and by providing local advocates with expert technical assistance and training, research, analysis and issue identification to empower them and their clients to gain economic justice. Since 1992, NCLC has run the Foreclosure Prevention Project. With funding from the U.S. Administration on Aging, we have also been training and supporting local programs that serve older Americans.

The National Consumer Law Center has a long track record of working closely with community organizations on a wide variety of housing, energy, water, electronic benefits, and lending issues and we have the expertise of more than twenty-five years as a national legal support center. In addition, the Center is recognized nationally for the depth of its substantive expertise in relevant federal and state statutory and common law defenses to foreclosure. The National Consumer Law Center authored federal legislation to improve both protections against predatory loans and the fairness of the foreclosure process. The National Consumer Law Center also publishes an inexpensive book for debtors entitled *Surviving Debt: A Guide to Consumers*. That book is a manual for consumer debtors which outlines their best options for managing financial problems. The National Consumer Law Center also publishes a thirteen-volume set of manuals on consumer credit law for attorneys, a handbook on predatory lending called *Stop Predatory Lending: A Legal Guide for Advocates*, *Foreclosures*, and *Foreclosure Prevention Counseling*, for advocates.

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FACULTY

Alys Cohen is a staff attorney at the National Consumer Law Center's Washington office, where she advocates before Congress and federal regulatory agencies on predatory lending and sustainable homeownership issues. Ms. Cohen leads NCLC's mortgage policy work as well as the Center's disaster response project, and also trains and consults with attorneys and other advocates nationwide on mortgage lending matters. She is editor of the Center's *Credit Discrimination* manual, a co-author of *Stop Predatory Lending,* and a contributing author to *Cost of Credit* and *Truth in Lending.* Prior to joining the NCLC staff, Ms. Cohen served as an attorney in the Federal Trade Commission's Bureau of Consumer Protection, Division of Financial Practices, where she focused on predatory lending and discrimination matters. Ms. Cohen is a graduate of the University of Pennsylvania Law School.

Mal Maynard is a graduate of the University of North Carolina Law School and was admitted to the North Carolina bar in 1983. He is the Director of the Financial Protection Law Center which represents borrowers across North Carolina in connection with claims and defenses against predatory mortgage lenders, manufactured/mobile home construction defects, payday lenders, and other consumer protection litigation. He has presented trainings in consumer law and foreclosure defense at seminars throughout the nation. Mr. Maynard has testified before legislative committees and the Federal Reserve Board in support of consumer protection legislation. Mr. Maynard is counsel for nonprofit housing corporations that provide subsidized housing to low-income seniors. He is the recipient of the Defender of Justice award from the North Carolina Justice Center for "outstanding impact litigation to improve the lives of low-income North Carolinians" and the National Consumer Law Center's Vern Countryman Consumer Law Award for strengthening and affirming the rights of low-income Americans.

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Thanks to Mal Maynard for volunteering as a guest presenter and to Jessica Hiemenz, Debbie Parziale & Shirlron Williams at NCLC for finalizing the materials and getting them printed and shipped.

FORECLOSURE PREVENTION

MCCALL, IDAHO
SEPTEMBER 16, 2009

AGENDA

8:30 - 9:00 a.m	Introductions & Overview
	Background on Idaho foreclosure data and national data
	Origins of the mortgage crisis
9:00 - 10:00 a.m.	Industry Overview and Introduction to ARMs
	Servicing structure Securitization overview Basic ARM rules/documents
10:00 - 10:15 a.m.	Break
10:15 – 12:00 a.m.	Federal and state claims
12:00 - 1:00 p.m.	Lunch
1:15 - 2:15 p.m.	Servicing abuses, claims and defenses
2:15 - 3:45 p.m.	Navigating the Home Affordable Modification Program
3:45 to 4:00 p.m.	Break
4:00 – 5:00 p.m.	Loan modification case study

FORECLOSURE PREVENTION

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Sample Adjustable Rate Mortgage Loan

TRUTH-IN-LENDING DISCLOSURE STATEMENT
(THIS IS NEITHER A CONTRACT NOR A COMMITMENT TO LEND)

[ ] Preliminary [X] Final

LENDER: Ameriquest Mortgage Company
23250 Chagrin Blvd., # 375
Beachwood, OH 44122
(216)591-9970

Broker License:

Borrowers: [redacted]

Type of Loan: ADJUSTABLE RATE
Date: May 24, 2004

Address: [redacted]
City/State/Zip: [redacted]

Loan Number: [redacted]

Property: [redacted]

ANNUAL PERCENTAGE RATE	FINANCE CHARGE	Amount Financed	Total of Payments
The cost of your credit as a yearly rate.	The dollar amount the credit will cost you.	The amount of credit provided to you or on your behalf.	The amount you will have paid after you have made all payments as scheduled.
7.697 %	$ 270,817.82	$ 170,016.15	$ 440,833.97

YOUR PAYMENT SCHEDULE WILL BE:

NUMBER OF PAYMENTS	AMOUNT OF PAYMENTS	PAYMENTS ARE DUE MONTHLY BEGINNING	NUMBER OF PAYMENTS	AMOUNT OF PAYMENTS	PAYMENTS ARE DUE MONTHLY BEGINNING
24	$1,097.44	07/01/2004			
335	$1,233.62	07/01/2006			
1	$1,232.71	06/01/2034			

VARIABLE RATE FEATURE:
[X] Your loan has a variable rate feature. Disclosures about the variable rate feature have been provided to you earlier.

SECURITY: You are giving a security interest in the property located at: [redacted]

ASSUMPTION: Someone buying this property
[X] cannot assume the remaining balance due under original terms.
[ ] may assume, subject to lender's conditions, the remaining balance due under original terms.

PROPERTY INSURANCE: You may obtain property insurance from anyone you want that is acceptable to Ameriquest Mortgage Company

LATE CHARGES: If a payment is late, you will be charged 5.000% of the overdue payment.

PREPAYMENT: If you pay off your loan early, you
[X] may [ ] will not have to pay a penalty.

See your contract documents for any additional information regarding non-payment, default, required repayment in full before the scheduled date, and prepayment refunds and penalties.

I/We hereby acknowledge reading and receiving a complete copy of this disclosure.

[redacted] Date

[redacted] Date

Borrower Date

Borrower Date

TIL1 (Rev 7/01) [redacted]

BORROWER COPY

Loan Number: [redacted]

ADJUSTABLE RATE NOTE
(LIBOR Index - Rate Caps)

THIS NOTE CONTAINS PROVISIONS ALLOWING FOR CHANGES IN MY INTEREST RATE AND MY MONTHLY PAYMENT. THIS NOTE LIMITS THE AMOUNT MY INTEREST RATE CAN CHANGE AT ANY ONE TIME AND THE MAXIMUM RATE I MUST PAY. THIS LOAN HAS A PREPAYMENT PENALTY PROVISION.

May 24, 2004 [Date] | Orange [City] | CA [State]

[redacted] [Property Address]

1. BORROWER'S PROMISE TO PAY

In return for a loan that I have received, I promise to pay U.S. $ 177,300.00 (this amount is called "principal"), plus interest, to the order of the Lender. The Lender is Ameriquest Mortgage Company .

I understand that the Lender may transfer this Note. The Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the "Note Holder."

2. INTEREST

Interest will be charged on unpaid principal until the full amount of principal has been paid. I will pay interest at a yearly rate of 6.300 %. This interest rate I will pay may change in accordance with Section 4 of this Note. The interest rate required by this Section 2 and Section 4 of this Note is the rate I will pay both before and after any default described in Section 7(B) of this Note.

3. PAYMENTS

(A) Time and Place of Payments

I will pay principal and interest by making payments every month.

I will make my monthly payments on the first day of each month beginning on July 1, 2004 I will make these payments every month until I have paid all of the principal and interest and any other charges described below that I may owe under this Note. My monthly payments will be applied to interest before principal. If, on June 1, 2034 , I still owe amounts under this Note, I will pay those amounts in full on that date, which is called the maturity date.

I will make my payments at: 505 City Parkway West, Suite 100, Orange, CA 92868

or at a different place if required by the Note Holder.

(B) Amount of My Initial Monthly Payments

Each of my initial monthly payments will be in the amount of U.S. $ 1,097.44 . This amount may change.

(C) Monthly Payment Changes

Changes in my monthly payment will reflect changes in the unpaid principal of my loan and in the interest rate that I must pay. The Note Holder will determine my new interest rate and the changed amount of my monthly payment in accordance with Section 4 of this Note.

ex. 4/16/06 in this loan but 4/16 was wk/end so most recent available is 4/13

4. INTEREST RATE AND MONTHLY PAYMENT CHANGES

(A) Change Dates

The interest rate I will pay may change on the first day of June, 2006 , and on that day every sixth month thereafter. Each date on which my interest rate could change is called a "Change Date."

(B) The Index

Beginning with the first Change Date, my interest rate will be based on an Index. The "Index" is the average of interbank offered rates for six-month U.S. dollar-denominated deposits in the London market ("LIBOR"), as published in The Wall Street Journal. The most recent Index figure available as of the date 45 days before the Change Date is called the "Current Index."

If at any point in time the Index is no longer available, the Note Holder will choose a new index that is based upon comparable information. The Note Holder will give me notice of this choice.

(C) Calculation of Changes

Before each Change Date, the Note Holder will calculate my new interest rate by adding six percentage point(s) (6.000 %) to the Current Index. The Note Holder will then round the result of this addition to the nearest one-eight of one percent (0.125%). Subject to the limits stated in Section 4(D) below, this rounded amount will be my new interest rate until the next Change Date. The Note Holder will then determine the amount of the monthly payment that would be sufficient to repay the unpaid principal that I am expected to owe at the Change Date in full on the Maturity Date at my new interest rate in substantially equal payments. The result of this calculation will be the new amount of my monthly payment.

[redacted]

Initials: _____ _____ _____ _____

(D) Limits on Interest Rate Changes

The interest rate I am required to pay at the first Change Date will not be greater than 8.300 % or less than 6.300%. Thereafter, my interest rate will never be increased or decreased on any single Change Date by more than One percentage point(s) 1.000%) from the rate of interest I have been paying for the preceding six months. My interest rate will never be greater than 12.300 % or less than 6.300 %.

(E) Effective Date of Changes

My new interest rate will become effective on each Change Date. I will pay the amount of my new monthly payment beginning on the first monthly payment date after the Change Date until the amount of my monthly payment changes again.

(F) Notice of Changes

The Note Holder will deliver or mail to me a notice of any changes in my interest rate and the amount of my monthly payment before the effective date of any change. The notice will include information required by law to be given me and also the title and telephone number of a person who will answer any question I may have regarding the notice.

5. PREPAYMENT PRIVILEGE

I may repay all or any part of the principal balance of this Note in accordance with the terms of this Section. A "prepayment" is any amount that I pay in excess of my regularly scheduled payments of principal and interest that the Lender will apply to reduce the outstanding principal balance on this Note in accordance with this Section.

(A) Prepayment Made Three (3.00) year(s) After the Date of this Note

If I make a prepayment commencing on or after the Three (3.00) year anniversary of the date of this Note, I may make that prepayment in full or in part, without the imposition of a prepayment charge by the Lender.

(B) Prepayment Made Within Three (3.00) year(s) of the Date of this Note

I agree to pay Lender a prepayment charge if I make a prepayment before the Three (3.00) year(s) anniversary of the date of this Note is executed. The prepayment charge I will pay will be equal to one percent (1%) of the original principal balance of this loan, if within any 12-month period, I prepay any amount which exceeds twenty percent (20%) of the original principal amount of the loan.

(C) Application of Funds

I agree that when I indicate in writing that I am making a prepayment, the Lender shall apply funds it receives first to pay any prepayment charge and next in accordance with the order of application of payments set forth in Section 2 of the Security Instrument.

(D) Monthly Payments

If I make a prepayment of an amount less than the amount needed to completely repay all amounts due under this Note and Security Instrument, my regularly scheduled payments of principal and interest will not change as a result.

6. LOAN CHARGES

If a law, which applies to this loan and which sets maximum loan charges, is finally interpreted so that the interest or other loan charges collected or to be collected in connection with this loan exceed the permitted limits, then: (i) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (ii) any sums already collected from me which exceeded permitted limits will be refunded to me. The Note Holder may choose to make this refund by reducing the principal I owe under this Note or by making a direct payment to me. If a refund reduces the principal, the reduction will be treated as a partial prepayment.

7. BORROWER'S FAILURE TO PAY AS REQUIRED

(A) Late Charges for Overdue Payment

If the Note Holder has not received the full amount of any monthly payment by the end of fifteen calendar days after the date it is due, I will pay a late charge to the Note Holder. The amount of the charge will be 5.000% of my overdue payment of principal and interest. I will pay this late charge promptly but only once on each late payment.

(B) Default

If I do not pay the full amount of each monthly payment on the date it is due, I will be in default.

(C) Notice of Default

If I am in default, the Note Holder may send me a written notice telling me that if I do not pay the overdue amount by a certain date, the Note Holder may require me to pay immediately the full amount of principal which has not been paid and all the interest that I owe on that amount. The date must be at least 30 days after the date on which the notice is delivered or mailed to me.

(D) No Waiver by Note Holder

Even if, at a time when I am in default, the Note Holder does not require me to pay immediately in full as described above, the Note Holder will still have the right to do so if I am in default at a later time.

(E) Payment of Note Holder's Costs and Expenses

If the Note Holder has required me to pay immediately in full as described above, the Note Holder will have the right to be paid back by me for all of its costs and expenses in enforcing this Note to the extent not prohibited by applicable law. Those expenses include, for example, reasonable attorneys' fees.

8. GIVING OF NOTICES

Unless applicable law requires a different method, any notice that must be given to me under this Note will be given by delivering it or by mailing it by first class mail to me at the Property Address above or at a different address if I give the Note Holder a notice of my different address.

Any notice that must be given to the Note Holder under this Note will be given by mailing it by first class mail to the Note Holder at the address stated in Section 3(A) above or at a different address if I am given notice of that different address.

[redacted]

Initials: _____ _____ _____ _____

9. OBLIGATIONS OF PERSONS UNDER THIS NOTE

If more than one person signs this Note, each person is fully and personally obligated to keep all of the promises made in this Note, including the promise to pay the full amount owed. Any person who is a guarantor, surety or endorser of this Note is also obligated to do these things. Any person who takes over these obligations, including the obligations of a guarantor, surety or endorser of this Note, is also obligated to keep all of the promises made in this Note. The Note Holder may enforce its rights under this Note against each person individually or against all of us together. This means that any one of us may be required to pay all of the amounts owed under this Note.

10. WAIVERS

I and any other person who has obligations under this Note waive the rights of presentment and notice of dishonor. "Presentment" means the right to require the Note Holder to demand payment of amounts due. "Notice of Dishonor" means the right to require the Note Holder to give notice to other persons that amounts due have not been paid.

11. UNIFORM SECURED NOTE

This Note is a uniform instrument with limited variations in some jurisdictions. In addition, to the protections given to the Note Holder under this Note, A Mortgage, Deed of Trust or Security Deed (the "Security Instrument"), dated the same as this Note, protects the Note Holder from possible losses which might result if I do not keep the promises that I make in this Note. That the Security Instrument describes how and under what conditions I may be required to make immediate payment in full of all amounts I owe under this Note. Some of those conditions are described as follows:

Transfer of the Property or a Beneficial Interest in Borrower. If all or any part of the Property or any interest in it is sold or transferred (or if a beneficial interest in Borrower is sold or transferred and Borrower is not a natural person) without the Lender's prior written consent, Lender may, at its option, require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if exercise is prohibited by federal law as of the date of this Security Instrument. Lender also shall not exercise this option if: (a) Borrower causes to be submitted to lender information required by Lender to evaluate the intended transferee as if a new loan were being made to the transferee; and (b) Lender reasonable determines that Lender's security will not be impaired by the loan assumption and that the risk of a breach of any covenant or agreement in this Security Instrument is acceptable to Lender.

To the extent permitted by applicable law, Lender may charge a reasonable fee as a condition of Lender's consent to the loan assumption. Lender may also require the transferee to sign an assumption agreement that is acceptable to lender and that obligates the transferee to keep all the promises and agreements made in the Note and in this Security Instrument. Borrower will continue to be obligated under the Note and this Security Instrument unless Lender releases Borrower in writing.

If Lender exercises the option to require immediate payment in full, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is delivered or mailed within which the Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

Oral agreements, promises or commitments to lend money, extend credit, or forbear from enforcing repayment of a debt, including promises to extend, modify, renew or waive such debt, are not enforceable. This written agreement contains all the terms the Borrower(s) and the Lender have agreed to. Any subsequent agreement between us regarding this Note or the instrument which secures this Note, must be in a signed writing to be legally enforceable.

WITNESS THE HAND(S) AND SEAL(S) OF THE UNDERSIGNED.

_____(Seal)
Borrower [redacted]

_____(Seal)
Borrower [redacted]

_____(Seal)
Borrower

_____(Seal)
Borrower

[redacted]

ADJUSTABLE RATE RIDER

(LIBOR Six-Month-Index (As Published In the Wall Street Journal)- Rate Caps)

THIS ADJUSTABLE RATE RIDER is made this 24th day of May , 2004 and is incorporated into and shall be deemed to amend and supplement the Mortgage, Deed of Trust or Security Deed (the "Security Instrument") of the same date given by the undersigned (the "Borrower") to secure Borrower's Adjustable Rate Note (the "Note") to Ameriquest Mortgage Company (the "Lender") of the same date and covering the property described in the Security Instrument and located at:

[redacted]
[Property Address]

THE NOTE CONTAINS PROVISIONS ALLOWING FOR CHANGES IN THE INTEREST RATE AND THE MONTHLY PAYMENT. THE NOTE LIMITS THE AMOUNT THE BORROWER'S INTEREST RATE CAN CHANGE AT ANY ONE TIME AND THE MAXIMUM RATE THE BORROWER MUST PAY.

ADDITIONAL COVENANTS. In addition to the covenants and agreements made in the Security Instrument, Borrower and Lender further covenant and agree as follows:

A. INTEREST RATE AND MONTHLY PAYMENT CHANGES
The Note provides for an initial interest rate of 6.300 %. The Note provides for changes in the interest rate and the monthly payments, as follows:

4. INTEREST RATE AND MONTHLY PAYMENT CHANGES

(A) Change Dates
The interest rate I will pay may change on the first day of June, 2006 , and on that day every sixth month thereafter. Each date on which my interest rate could change is called a "Change Date."

(B) The Index
Beginning with the first Change Date, my interest rate will be based on an index. The "Index" is the average of interbank offered rates for six-month U.S. dollar-denominated deposits in the London market ("LIBOR"), as published in the Wall Street Journal. The most recent Index figure available as of the date 45 days before each Change Date is called the "Current Index."

If the Index is no longer available, the Note Holder will choose a new index which is based upon comparable information. The Note Holder will give me notice of this choice.

Initials_____

Loan Number: [redacted]

[redacted]

(C) Calculation of Changes

Before each Change Date, the Note Holder will calculate my new interest rate by adding six percentage points (6.000 %) to the Current Index. The Note Holder will then round the result of this addition to the nearest one-eighth of one percentage point (0.125%). Subject to the limits stated in Section 4(D) below, this rounded amount will be my new interest rate until the next Change Date.

The Note Holder will then determine the amount of the monthly payment that would be sufficient to repay the unpaid principal that I am expected to owe at the Change Date in full on the maturity date at my new interest rate in substantially equal payments. The result of this calculation will be the new amount of my monthly payment.

(D) Limits on Interest Rate Changes

The interest rate I am required to pay at the first Change Date will not be greater than 8.300% or less than 6.300%. Thereafter, my interest rate will never be increased or decreased on any single Change Date by more than One(1.000 %) from the rate of interest I have been paying for the preceding six months. My interest rate will never be greater than 12.300)% or less than 6.300)%.

(E) Effective Date of Changes

My new interest rate will become effective on each Change Date. I will pay the amount of my new monthly payment beginning on the first monthly payment date after the Change Date until the amount of my monthly payment changes again.

(F) Notice of Changes

The Note Holder will deliver or mail to me a notice of any changes in my interest rate and the amount of my monthly payment before the effective date of any change. The notice will include information required by law to be given me and also the title and telephone number of a person who will answer any question I may have regarding the notice.

B. TRANSFER OF THE PROPERTY OR A BENEFICIAL INTEREST IN BORROWER

Section 18 of the Security Instrument is amended to read as follows:

Transfer of the Property or a Beneficial Interest in Borrower. As used in this Section 18, "Interest in the Property" means any legal or beneficial interest in the Property, including, but not limited to, those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.

Initials_____

Loan Number: [redacted]

[redacted]

If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by federal law. Lender also shall not exercise this option if: (a) Borrower causes to be submitted to Lender information required by Lender to evaluate the intended transferee as if a new loan were being made to the transferee; and (b) Lender reasonably determines that Lender's security will not be impaired by the loan assumption and that the risk of a breach of any covenant or agreement in this Security Instrument is acceptable to Lender.

To the extent permitted by Applicable Law, Lender may charge a reasonable fee as a condition to Lender's consent to the loan assumption. Lender may also require the transferee to sign an assumption agreement that is acceptable to Lender and that obligates the transferee to keep all the promises and agreements made in the Note and in this Security Instrument. Borrower will continue to be obligated under the Note and this Security Instrument unless Lender releases Borrower in writing. If Lender exercises the option to require immediate payment in full, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Adjustable Rate Rider.

_____ (Seal)
Borrower [redacted]

_____ (Seal)
Borrower [redacted]

_____ (Seal)
Borrower

_____ (Seal)
Borrower

Loan Number: [redacted]

[redacted]

Off'l Staff Commentary to Reg. Z § 226.17-17(c)(1)-(10)(i)

pal balance on the pre-existing loan. This approach to Truth in Lending calculations has no effect on calculations required by other statutes, such as state usury laws.

7. *Wrap-around financing with balloon payments.* For wrap-around transactions involving a large final payment of the new funds before the maturity of the pre-existing loan, the amount financed is the sum of the new funds and the remaining principal on the pre-existing loan. The disclosures should be based on the shorter term of the wrap loan, with a large final payment of both the new funds and the total remaining principal on the pre-existing loan (although only the wrap loan will actually be paid off at that time).

8. *Basis of disclosures in variable-rate transactions.* The disclosures for a variable-rate transaction must be given for the full term of the transaction and must be based on the terms in effect at the time of consummation. Creditors should base the disclosures only on the initial rate and should not assume that this rate will increase. For example, in a loan with an initial rate of 10 percent and a 5 percentage points rate cap, creditors should base the disclosures on the initial rate and should not assume that this rate will increase 5 percentage points. However, in a variable-rate transaction with a seller buydown that is reflected in the credit contract, a consumer buydown, or a discounted or premium rate, disclosures should not be based solely on the initial terms. In those transactions, the disclosed annual percentage rate should be a composite rate based on the rate in effect during the initial period and the rate that is the basis of the variable-rate feature for the remainder of the term. (See the commentary to section 226.17(c) for a discussion of buydown, discounted, and premium transactions and the commentary to section 226.19(a)(2) for a discussion of the redisclosure in certain residential mortgage transactions with a variable-rate feature).

9. *Use of estimates in variable-rate transactions.* The variable-rate feature does not, by itself, make the disclosures estimates.

10. *Discounted and premium variable-rate transactions.* In some variable-rate transactions, creditors may set an initial interest rate that is not determined by the index or formula used to make later interest rate adjustments. Typically, this initial rate charged to consumers is lower than the rate would be if it were calculated using the index or formula. However, in some cases the initial rate may be higher. In a discounted transaction, for example, a creditor may calculate interest rates according to a formula using the six-month Treasury bill rate plus a 2 percent margin. If the Treasury bill rate at consummation is 10 percent, the creditor may forgo the 2 percent spread and charge only 10 percent for a limited time, instead of setting an initial rate of 12 percent.

i. When creditors use an initial interest rate that is not calculated using the index or formula for later rate adjustments, the disclosures should reflect a composite annual percentage rate based on the initial rate for as long as it is charged and, for the remainder of the term, the rate that would have been applied using the index or formula at the time of consummation. The rate at consummation need not be used if a contract provides for a delay in the implementation of changes in an index value. For example, if the contract specifies that rate changes are based on the index value in effect 45 days before the change date, creditors may use any index value in effect during the 45 day period before consummation in calculating a composite annual percentage rate.

ii. The effect of the multiple rates must also be reflected in the calculation and disclosure of the finance charge, total of payments, and payment schedule.

iii. If a loan contains a rate or payment cap that would prevent the initial rate or payment, at the time of the first adjustment, from changing to the rate determined by the index or formula at consummation, the effect of that rate or payment cap should be reflected in the disclosures.

iv. Because these transactions involve irregular payment amounts, an annual percentage rate tolerance of 1/4 of 1 percent applies, in accordance with section 226.22(a)(3).

v. Examples of discounted variable-rate transactions include:

A. A 30-year loan for $100,000 with no prepaid finance charges and rates determined by the Treasury bill rate plus 2 percent. Rate and payment adjustments are made annually. Although the Treasury bill rate at the time of consummation is 10 percent, the creditor sets the interest rate for one year at 9 percent, instead of 12 percent according to the formula. The disclosures should reflect a composite annual percentage rate of 11.63 percent based on 9 percent for one year and 12 percent for 29 years. Reflecting those two rate levels, the payment schedule should show 12 payments of $804.62 and 348 payments of $1,025.31. The finance charge should be $266,463.32 and the total of payments $366,463.32.

B. Same loan as above, except with a 2 percent rate cap on periodic adjustments. The disclosures should reflect a composite annual percentage rate of 11.53 percent based on 9 percent for the first year, 11 percent for the second year, and 12 percent for the remaining 28 years. Reflecting those three rate levels, the payment schedule should show 12 payments of $804.62, 12 payments of $950.09, and 336 payments of $1,024.34. The finance charge should be $265,234.76 and the total of payments $365,234.76.

C. Same loan as above, except with a 7 1/2 percent cap on payment adjustments. The disclosures should reflect a composite annual percentage rate of 11.64 percent based on 9 percent for one year and 12 percent for 29 years. Because of the payment cap, five levels of payments should be reflected. The payment schedule should show 12 payments of $804.62, 12 payments of $864.97, 12 payments of $929.84, 12 payments of $999.58, and 312 payments of $1,070.04. The finance charge should be $277,040.60, and the total of payments $377,040.60.

vi. A loan in which the initial interest rate is set according to the index or formula used for later adjustments but is not set at the value of the index or formula at consummation is not a discounted variable-rate loan. For example, if a creditor commits to an initial rate based on the formula on a date prior to consummation, but the index has moved during the period between that time and consummation, a creditor should base its disclosures on the initial rate.

11. *Examples of variable-rate transactions.* Variable-rate transactions include:

- Renewable balloon-payment instruments where the creditor is both unconditionally obligated to renew the balloon-payment loan at the consumer's option (or is obligated to renew subject to conditions within the consumer's control) and has the option of increasing the interest rate at the time of renewal. Disclosures must be based on the payment amortization (unless the specified term of the obligation with renewals is shorter) and on the rate in effect at the time of consummation of the transaction. (Examples of conditions within a consumer's control include requirements that a consumer be current in payments or continue to reside in the mortgaged property. In contrast, setting a limit on the rate at which the creditor would be obligated to renew or reserving the right to change the credit standards at the time of renewal are examples of conditions outside a consumer's control.) If, however, a creditor is not obligated to renew as described above, disclosures must be based on the term of the balloon-payment loan. Disclosures also must be based on the term of the balloon-payment loan in balloon-payment instruments in which the legal obligation provides that the loan will be renewed by a "refinancing" of the obligation, as that term is defined by section 226.20(a). If it cannot be determined from the legal obligation that the loan will be renewed by a "refinancing," disclosures must be based either on the term of the balloon-payment loan or on the payment amortization, depending on whether the creditor is unconditionally obligated to renew the loan as described above. (This discussion does not apply to construction loans subject to section 226.17(c)(6).)
- "Shared-equity" or "shared-appreciation" mortgages that have a fixed rate of interest

and an appreciation share based on the consumer's equity in the mortgaged property. The appreciation share is payable in a lump sum at a specified time. Disclosures must be based on the fixed interest rate. (As discussed in the commentary to section 226.2, other types of shared-equity arrangements are not considered "credit" and are not subject to Regulation Z.)
- Preferred-rate loans where the terms of the legal obligation provide that the initial underlying rate is fixed but will increase upon the occurrence of some event, such as an employee leaving the employ of the creditor, and the note reflects the preferred rate. The disclosures are to be based on the preferred rate.
- "Price-level adjusted mortgages" or other indexed mortgages that have a fixed rate of interest but provide for periodic adjustments to payments and the loan balance to reflect changes in an index measuring prices or inflation. Disclosures are to be based on the fixed interest rate.

Graduated-payment mortgages and step-rate transactions without a variable-rate feature are not considered variable-rate transactions.

12. *Graduated payment adjustable rate mortgages.* These mortgages involve both a variable interest rate and scheduled variations in payment amounts during the loan term. For example, under these plans, a series of graduated payments may be scheduled before rate adjustments affect payment amounts, or the initial scheduled payment may remain constant for a set period before rate adjustments affect the payment amount. In any case, the initial payment amount may be insufficient to cover the scheduled interest, causing negative amortization from the outset of the transaction. In these transactions, the disclosures should treat these features as follows:

- The finance charge includes the amount of negative amortization based on the assumption that the rate in effect at consummation remains unchanged.
- The amount financed does not include the amount of negative amortization.
- As in any variable-rate transaction, the annual percentage rate is based on the terms in effect at consummation.
- The schedule of payments discloses the amount of any scheduled initial payments followed by an adjusted level of payments based on the initial interest rate. Since some mortgage plans contain limits on the amount of the payment adjustment, the payment schedule may require several different levels of payments, even with the assumption that the original interest rate does not increase.

13. *Growth-equity mortgages.* Also referred to as payment-escalated mortgages, these mortgage plans involve scheduled payment increases to prematurely amortize the loan. The initial payment amount is determined as for a long-term loan with a fixed interest rate. Payment increases are scheduled periodically, based on changes in an index. The larger payments result in accelerated amortization of the loan. In disclosing these mortgage plans, creditors may either:

- Estimate the amount of payment increases, based on the best information reasonably available; or
- Disclose by analogy to the variable-rate disclosures in 226.18(f)(1).

(This discussion does not apply to growth-equity mortgages in which the amount of payment increases can be accurately determined at the time of disclosure. For these mortgages, as for graduated-payment mortgages, disclosures should reflect the scheduled increases in payments.)

14. *Reverse mortgages.* Reverse mortgages, also known as reverse annuity or home equity conversion mortgages, typically involve the disbursement of monthly advances to the consumer for a fixed period or until the occurrence of an event such as the consumer's death. Repayment of the loan (generally a single payment of principal and accrued interest) may be required to be made at the end of the disbursements or, for example, upon the death of the consumer. In disclosing these transactions, creditors must apply the following rules, as applicable:

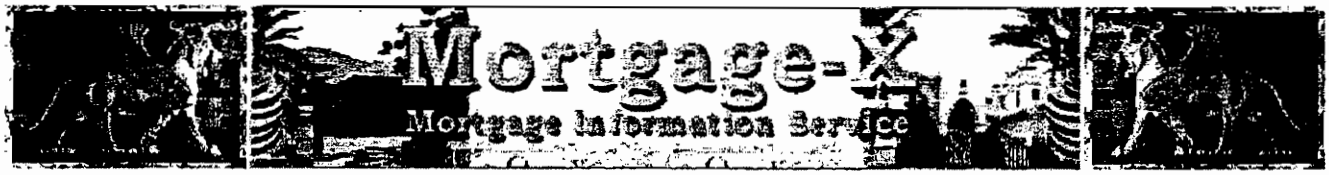
- If the reverse mortgage has a specified period for disbursements but repayment is due only upon the occurrence of a future event such as the death of the consumer, the creditor must assume that disbursements will be made until they are scheduled to end. The creditor must assume repayment will occur when disbursements end (or within a period following the final disbursement which is not longer than the regular interval between disbursements). This assumption should be used even though repayment may occur before or after the disbursements are scheduled to end. In such cases, the creditor may include a statement such as "The disclosures assume that you will repay the loan at the time our payments to you end. As provided in your agreement, your repayment may be required at a different time."
- If the reverse mortgage has neither a specified period for disbursements nor a specified repayment date and these terms will be determined solely by reference to future events including the consumer's death, the creditor may assume that the disbursements will end upon the consumer's death (estimated by using actuarial tables, for example) and that repayment will be required at the same time (or within a period following the date of the final disbursement which is not longer than the regular interval for disbursements). Alternatively, the creditor may base the disclosures upon another future event it estimates will be most likely to occur first. (If terms will be determined by reference to future events which do not include the consumer's death, the creditor must base the disclosures upon the occurrence of the event estimated to be most likely to occur first.)
- In making the disclosures, the creditor must assume that all disbursements and accrued interest will be paid by the consumer. For example, if the note has a nonrecourse provision providing that the consumer is not obligated for an amount greater than the value of the house, the creditor must nonetheless assume that the full amount to be disbursed will be repaid. In this case, however, the creditor may include a statement such as "The disclosures assume full repayment of the amount advanced plus accrued interest, although the amount you may be required to pay is limited by your agreement."
- Some reverse mortgages provide that some or all of the appreciation in the value of the property will be shared between the consumer and the creditor. Such loans are considered variable-rate mortgages, as described in comment 17(c)(1)-11, and the appreciation feature must be disclosed in accordance with section 226.18(f)(1). If the reverse mortgage has a variable interest rate, is written for a term greater than one year, and is secured by the consumer's principal dwelling, the shared appreciation feature must be described under section 226.19(b)(2)(vii).

15. *Morris Plan transactions.* When a deposit account is created for the sole purpose of accumulating payments and then is applied to satisfy entirely the consumer's obligation in the transaction, each deposit made into the account is considered the same as a payment on a loan for purposes of making disclosures.

16. *Number of transactions.* Creditors have flexibility in handling credit extensions that may be viewed as multiple transactions. For example:

- When a creditor finances the credit sale of a radio and a television on the same day, the creditor may disclose the sales as either 1 or 2 credit sale transactions.
- When a creditor finances a loan along with a credit sale of health insurance, the creditor may disclose in one of several ways: a single credit sale transaction, a single loan transaction, or a loan and a credit sale transaction.
- The separate financing of a downpayment in a credit sale transaction may, but need not, be disclosed as 2 transactions (a credit sale and a separate transaction for the financing of the downpayment).

Mortgage-X History for 6m LIBOR



Mortgage (ARM) Indexes

CMT + CMT FAQ + T-Bill + T-Bill FAQ + MTA + MTA FAQ + CODI + COFI + COFI FAQ + COSI + W-COSI + LIBOR + LIBOR FAQ + CD + Prime Rate + RNY + FHFB Contract Rate

Current Values + Release Dates + Comparison Chart + Which Index Is Better? + Mortgage Rate Trend Survey

Historical Data + COFI History + COSI History + CODI History + MTA History + Prime Rate History + Daily WSJ LIBOR Histories + Mortgage-X LIBOR History

Monthly CMT History + Daily CMT Histories + FHFB Contract Rate History + Federal COFI History + National Monthly Median COFI History + FNMA LIBOR History

1-, 3-, 9-Yr Avg + 2-, 6-, 12-Yr Avg + 5-, 10-, 15-Year Averages + Prime Rate Forecast + MTA Rate Forecast + COFI Forecast + COSI Forecast + CODI Forecast

Variability Table + Changes of Direction + W-COSI or CODI? + 6-Month Trends + Lagging Indexes + Find the Best Mortgage!

WSJ LIBOR: Historical Data: 2004

The average of the London Interbank Offered Rates (LIBOR) for 1-month, 3-month, 6-month and 1-year U.S. dollar denominated deposits, as published in The Wall Street Journal (WSJ).

1986 1987 1988 1989 1990 1991 1992 1993 1994 1995 1996 1997 1998 1999 2000 2001 2002 2003 2004 2005 2006 2007 2008 2009

Date	1 Month	3 Month	6 Month	12 Month	Date	1 Month	3 Month	6 Month	12 Month	Date	1 Month	3 Month	6 Month	12 Month
1/2/2004	1.12000	1.15188	1.22000	1.45688	5/5/2004	1.10000	1.18000	1.38000	1.82000	9/2/2004	1.67000	1.80000	1.98000	2.26000
1/5/2004	1.12000	1.15000	1.22000	1.47750	5/6/2004	1.10000	1.18000	1.37813	1.81375	9/3/2004	1.68625	1.81000	1.98125	2.26375
1/6/2004	1.12000	1.15000	1.22750	1.51000	5/7/2004	1.10000	1.18000	1.39000	1.84000	9/6/2004	1.69625	1.82000	2.01000	2.30375
1/7/2004	1.12000	1.15000	1.22938	1.50563	5/10/2004	1.10000	1.19000	1.42000	1.88125	9/7/2004	1.72250	1.85000	2.08000	2.43000
1/8/2004	1.11000	1.14000	1.21188	1.47000	5/11/2004	1.10000	1.24000	1.53000	2.07000	9/8/2004	1.73750	1.86000	2.08000	2.42375
1/9/2004	1.11000	1.14000	1.21000	1.47000	5/12/2004	1.10000	1.24000	1.53000	2.06000	9/9/2004	1.74000	1.86250	2.08500	2.43000
1/12/2004	1.11000	1.14000	1.21000	1.46688	5/13/2004	1.10000	1.24000	1.52000	2.04000	9/10/2004	1.75000	1.87000	2.07000	2.36375
1/13/2004	1.10000	1.12000	1.17000	1.34250	5/14/2004	1.10000	1.25000	1.54000	2.06750	9/13/2004	1.75750	1.87438	2.07000	2.36000
1/14/2004	1.10000	1.12000	1.17000	1.35000	5/17/2004	1.10000	1.26000	1.56000	2.10688	9/14/2004	1.76000	1.88000	2.06000	2.35500
1/15/2004	1.10000	1.12000	1.16500	1.33750	5/18/2004	1.10000	1.25813	1.53000	2.02750	9/15/2004	1.77875	1.88000	2.06000	2.33000
1/16/2004	1.10000	1.12000	1.17000	1.34875	5/19/2004	1.10000	1.26000	1.53375	2.03000	9/16/2004	1.78750	1.88813	2.05625	2.32000
1/19/2004	1.10000	1.12000	1.17000	1.36500	5/20/2004	1.10000	1.27000	1.55000	2.07000	9/17/2004	1.81125	1.91000	2.08000	2.34375
1/20/2004	1.10000	1.12000	1.17000	1.37000	5/21/2004	1.10000	1.28000	1.56875	2.09000	9/20/2004	1.82000	1.91000	2.06000	2.28375
1/21/2004	1.10000	1.12000	1.17500	1.37625	5/24/2004	1.10000	1.28000	1.56000	2.07000	9/21/2004	1.82750	1.91875	2.08000	2.34000
1/22/2004	1.10000	1.12000	1.17000	1.37000	5/25/2004	1.10000	1.29000	1.59000	2.13000	9/22/2004	1.83250	1.93000	2.09000	2.32250
1/23/2004	1.10000	1.12000	1.17000	1.37000	5/26/2004	1.10000	1.29000	1.58250	2.10000	9/23/2004	1.84000	1.94125	2.11000	2.36000
1/26/2004	1.10000	1.12000	1.17000	1.35000	5/27/2004	1.10000	1.30000	1.58813	2.10250	9/24/2004	1.84000	1.95000	2.12000	2.36000
1/27/2004	1.10000	1.12000	1.17000	1.37000	5/28/2004	1.11000	1.31000	1.57875	2.07625	9/27/2004	1.84000	1.96000	2.14000	2.41000
1/28/2004	1.10000	1.12000	1.17563	1.39000	6/1/2004	1.11375	1.31500	1.57750	2.05750	9/28/2004	1.84000	1.97000	2.17000	2.45000
1/29/2004	1.10000	1.12000	1.17000	1.37000	6/2/2004	1.12500	1.32688	1.60500	2.11125	10/1/2004	1.84000	1.97500	2.17000	2.44000
1/30/2004	1.10000	1.12000	1.17000	1.37000	6/3/2004	1.13125	1.34000	1.62750	2.15000	10/4/2004	1.84000	2.02750	2.20000	2.48875
2/2/2004	1.10000	1.13000	1.21375	1.47625	6/4/2004	1.15000	1.36000	1.66000	2.18625	10/5/2004	1.84000	2.03125	2.21000	2.50375
2/3/2004	1.10000	1.13000	1.21000	1.47000	6/7/2004	1.16000	1.37375	1.67375	2.20000	10/6/2004	1.84000	2.04000	2.21188	2.50875

2/4/2004	1.10000	1.13000	1.20125	1.44875
2/5/2004	1.09875	1.13000	1.20000	1.43000
2/6/2004	1.09875	1.13000	1.20000	1.43750
2/9/2004	1.10000	1.13000	1.22000	1.48375
2/10/2004	1.10000	1.13000	1.20000	1.42000
2/11/2004	1.09875	1.13000	1.20000	1.42000
2/12/2004	1.09875	1.13000	1.20938	1.45250
2/13/2004	1.09438	1.12188	1.18000	1.39000
2/16/2004	1.09375	1.12000	1.17500	1.37250
2/17/2004	1.09375	1.12000	1.17000	1.36000
2/18/2004	1.09125	1.12000	1.17000	1.37125
2/19/2004	1.09125	1.12000	1.17000	1.36000
2/20/2004	1.09125	1.12000	1.17750	1.37750
2/23/2004	1.09000	1.12000	1.17188	1.37063
2/24/2004	1.09000	1.12000	1.18000	1.41000
2/25/2004	1.09000	1.12000	1.17000	1.37500
2/26/2004	1.09000	1.12000	1.17000	1.36250
2/27/2004	1.09625	1.12000	1.17000	1.36375
3/1/2004	1.09750	1.12000	1.17000	1.36750
3/2/2004	1.10000	1.12000	1.17000	1.36750
3/3/2004	1.10000	1.12000	1.17250	1.37625
3/4/2004	1.10000	1.12000	1.19000	1.42000
3/5/2004	1.10000	1.12000	1.19000	1.41875
3/8/2004	1.10000	1.12000	1.19000	1.42000
3/9/2004	1.09250	1.11000	1.15000	1.30000
3/10/2004	1.09000	1.11000	1.15000	1.29500
3/11/2004	1.09000	1.11000	1.15000	1.30000
3/12/2004	1.09000	1.11000	1.15000	1.30625
3/15/2004	1.09000	1.11000	1.14500	1.28625
3/16/2004	1.09000	1.11000	1.15000	1.29875
3/17/2004	1.09000	1.11000	1.15875	1.31000
3/18/2004	1.09000	1.11000	1.15000	1.28250
3/19/2004	1.09000	1.11000	1.15000	1.29000
3/22/2004	1.09000	1.11000	1.15000	1.30375
3/23/2004	1.09000	1.11000	1.15000	1.30000
3/24/2004	1.09000	1.11000	1.15000	1.29938
3/25/2004	1.09000	1.11000	1.15000	1.29188
3/26/2004	1.09000	1.11000	1.15000	1.29000
3/29/2004	1.09000	1.11000	1.15000	1.29938
3/30/2004	1.09000	1.11000	1.16000	1.33000
4/1/2004	1.09000	1.11000	1.16000	1.34125
4/2/2004	1.09000	1.11000	1.16000	1.34000
4/5/2004	1.09000	1.11000	1.17000	1.37000
4/6/2004	1.10000	1.14000	1.23000	1.52000
4/7/2004	1.10000	1.14000	1.23000	1.51000
4/8/2004	1.10000	1.14000	1.22250	1.49250
4/13/2004	1.10000	1.14000	1.22500	1.50000
4/14/2004	1.10000	1.14000	1.23500	1.52500
4/15/2004	1.10000	1.14188	1.25500	1.57000
4/16/2004	1.10000	1.15000	1.29000	1.63000
4/19/2004	1.10000	1.15000	1.28000	1.61000
4/20/2004	1.10000	1.14938	1.27000	1.58125
4/21/2004	1.10000	1.15000	1.27500	1.61500
4/22/2004	1.10000	1.16875	1.33000	1.71750
4/23/2004	1.10000	1.17000	1.32500	1.70875
6/8/2004	1.17000	1.40000	1.71000	2.26000
6/9/2004	1.17875	1.41000	1.71000	2.23250
6/10/2004	1.19000	1.42750	1.73813	2.28000
6/11/2004	1.21125	1.46875	1.79500	2.36500
6/14/2004	1.23875	1.52000	1.86000	2.43313
6/15/2004	1.25250	1.54125	1.89500	2.48000
6/16/2004	1.27875	1.56000	1.91875	2.50000
6/17/2004	1.26375	1.53375	1.84500	2.37250
6/18/2004	1.28000	1.55000	1.87063	2.43125
6/21/2004	1.28000	1.55000	1.85063	2.38188
6/22/2004	1.28500	1.55938	1.86375	2.40188
6/23/2004	1.29125	1.55938	1.85500	2.38000
6/24/2004	1.30000	1.57000	1.87000	2.40750
6/25/2004	1.32000	1.58625	1.88250	2.40625
6/28/2004	1.33000	1.58000	1.86625	2.38000
6/29/2004	1.34000	1.58625	1.87000	2.38000
6/30/2004	1.36000	1.60000	1.94000	2.46625
7/1/2004	1.36875	1.61000	1.94000	2.46250
7/2/2004	1.36125	1.60000	1.89750	2.38500
7/5/2004	1.36000	1.60000	1.88125	2.34000
7/6/2004	1.35125	1.57750	1.83375	2.25000
7/7/2004	1.35063	1.58000	1.84000	2.24875
7/8/2004	1.35000	1.58125	1.84125	2.26000
7/9/2004	1.36313	1.59000	1.84125	2.26000
7/12/2004	1.36688	1.59000	1.84000	2.25000
7/13/2004	1.38000	1.60000	1.84125	2.25000
7/14/2004	1.38000	1.60000	1.86000	2.27125
7/15/2004	1.39000	1.61000	1.87000	2.28375
7/16/2004	1.41000	1.62000	1.88000	2.31000
7/19/2004	1.42000	1.63000	1.89125	2.33000
7/20/2004	1.42000	1.63000	1.86000	2.26250
7/21/2004	1.42625	1.63250	1.87000	2.27125
7/22/2004	1.43313	1.65000	1.92000	2.37000
7/23/2004	1.45000	1.66000	1.93000	2.39000
7/26/2004	1.45000	1.66000	1.93000	2.39000
7/27/2004	1.46188	1.66188	1.93000	2.39000
7/28/2004	1.47000	1.67000	1.96000	2.43000
7/29/2004	1.48000	1.68000	1.98000	2.47000
7/30/2004	1.49188	1.69375	1.98625	2.46250
8/2/2004	1.50375	1.70000	1.98000	2.43375
8/3/2004	1.51375	1.69000	1.93750	2.35000
8/4/2004	1.52500	1.70000	1.95500	2.37313
8/5/2004	1.54000	1.70000	1.94000	2.35000
8/6/2004	1.56250	1.71000	1.95000	2.36000
8/9/2004	1.57375	1.71000	1.94125	2.34125
8/10/2004	1.56875	1.67000	1.86000	2.19375
8/11/2004	1.57875	1.68000	1.88000	2.21375
8/12/2004	1.60000	1.71000	1.92000	2.27750
8/13/2004	1.60000	1.71125	1.92000	2.26750
8/16/2004	1.60000	1.72000	1.92125	2.25750
8/17/2004	1.60000	1.72000	1.92000	2.24000
8/18/2004	1.60000	1.73000	1.94000	2.27125
8/19/2004	1.60000	1.73000	1.92125	2.23000
8/20/2004	1.61000	1.74000	1.93750	2.25000
8/23/2004	1.61000	1.74000	1.93000	2.23000
10/7/2004	1.84000	2.04500	2.21625	2.51000
10/8/2004	1.85625	2.06000	2.24000	2.542
10/11/2004	1.85813	2.06000	2.24000	2.536
10/12/2004	1.86250	2.05250	2.20625	2.45375
10/13/2004	1.86750	2.05813	2.20375	2.44375
10/14/2004	1.87000	2.07000	2.21000	2.45000
10/15/2004	1.88875	2.07000	2.20000	2.41750
10/18/2004	1.89000	2.07000	2.19750	2.40500
10/19/2004	1.91000	2.07875	2.20125	2.42313
10/20/2004	1.91000	2.08000	2.21125	2.43625
10/21/2004	1.91000	2.09000	2.22000	2.44000
10/22/2004	1.93250	2.10000	2.22000	2.42000
10/25/2004	1.94000	2.11000	2.24313	2.47000
10/26/2004	1.95125	2.11000	2.22500	2.42000
10/27/2004	1.95875	2.11938	2.24000	2.44125
10/28/2004	1.96000	2.13000	2.25500	2.46375
10/29/2004	1.99000	2.16000	2.30000	2.53000
11/1/2004	2.00000	2.17000	2.31250	2.54625
11/2/2004	2.01625	2.18000	2.32000	2.54375
11/3/2004	2.03938	2.19000	2.34000	2.57875
11/4/2004	2.05000	2.20000	2.35750	2.61000
11/5/2004	2.06125	2.21000	2.35000	2.58000
11/8/2004	2.07000	2.22000	2.37000	2.61000
11/9/2004	2.08688	2.26000	2.45000	2.75750
11/10/2004	2.09125	2.27375	2.46375	2.76625
11/11/2004	2.09000	2.27625	2.47250	2.77625
11/12/2004	2.10000	2.29000	2.49000	2.7987
11/15/2004	2.10125	2.29000	2.49000	2.80
11/16/2004	2.11000	2.30000	2.49188	2.80000
11/17/2004	2.12750	2.31000	2.51000	2.84000
11/18/2004	2.13000	2.33000	2.54000	2.88000
11/19/2004	2.14000	2.33875	2.54000	2.84000
11/22/2004	2.15000	2.34500	2.55000	2.86000
11/23/2004	2.16000	2.36000	2.58000	2.91375
11/24/2004	2.18000	2.38000	2.59125	2.93375
11/25/2004	2.18063	2.38063	2.59688	2.93125
11/26/2004	2.19375	2.39000	2.61000	2.95000
11/29/2004	2.20750	2.40000	2.63000	2.97500
11/30/2004	2.28000	2.40000	2.62375	2.96000
12/1/2004	2.29000	2.41000	2.63500	2.98000
12/2/2004	2.30625	2.41875	2.63250	2.96000
12/3/2004	2.33125	2.43750	2.65000	2.98250
12/6/2004	2.34000	2.44000	2.66125	3.00000
12/7/2004	2.35000	2.44000	2.63125	2.93000
12/8/2004	2.36000	2.45000	2.64000	2.92563
12/9/2004	2.37000	2.46000	2.65250	2.94875
12/10/2004	2.39000	2.47000	2.66000	2.93125
12/13/2004	2.39750	2.48000	2.67000	2.94000
12/14/2004	2.40250	2.49000	2.69000	2.96000
12/15/2004	2.40688	2.50000	2.71000	2.99500
12/16/2004	2.41000	2.50125	2.71000	2.99750
12/17/2004	2.41000	2.51000	2.72000	3.00000
12/20/2004	2.41250	2.52000	2.73875	3.037
12/21/2004	2.41313	2.52125	2.75000	3.06000
12/22/2004	2.41500	2.53000	2.76000	3.08000

4/26/2004	1.10000	1.17000	1.32000	1.69000	8/24/2004	1.61500	1.75000	1.95000	2.26625	12/23/2004	2.41688	2.53000	2.76000	3.09000
4/27/2004	1.10000	1.17000	1.35000	1.77375	8/25/2004	1.62500	1.76000	1.98000	2.31125	12/24/2004	2.41750	2.54875	2.77000	3.08000
4/28/2004	1.10000	1.17000	1.34813	1.76125	8/26/2004	1.63000	1.77000	1.98000	2.30000	12/29/2004	2.42000	2.55000	2.76625	3.08000
4/29/2004	1.10000	1.17000	1.34000	1.75000	8/27/2004	1.64000	1.78125	1.99000	2.32000	12/30/2004	2.42000	2.56000	2.77500	3.10000
4/30/2004	1.10000	1.17875	1.37000	1.81000	8/31/2004	1.65000	1.79000	1.99000	2.30000	12/31/2004	2.39000	2.56000	2.79000	3.12000
5/4/2004	1.10000	1.18000	1.38000	1.83000	9/1/2004	1.67000	1.80000	1.99000	2.30000					

LIBOR: Frequently Asked Questions

Mortgage-X compiles historical values for the indexes which are widely used on adjustable rate mortgages (ARMs): **Historical Data**

Mortgage Professionals Offering LIBOR-indexed Loans: If you are looking for a LIBOR-indexed ARM and need more information or advice, we invite you to take advantage of our database of the most competitive lenders available. Just complete a short loan request form and the best lenders in your local area will contact you with their rates and fees.

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It's Not the Reset

It's Not the Reset

Although much attention has been paid to ARM rate resets, an examination of loan defaults shows many ARM borrowers default before the rate resets. Foreclosure were at high rates even before ARMs began to reset. Instead, it's the underwriting and origination process:

- Approving loans for people who couldn't afford them
  - falisifying income (no doc loans and forgeries)
  - granting exceptions to underwriting guidelines
- Inflated appraisal
- Quoting payments without including escrow

GAO found increased likelihood of default with:

- less than full documentation
- slow home value appreciation
- higher LTV
- other factors

Sources:

Home Mortgages: Provisions in a 2007 Mortgage Reform Bill (H.R. 3915) Would Strengthen Borrower Protections, but Views on Their Long-term Impact Differ, Govt. Accountability Office, #GAO-09-741 (7/09), available at www.gao.gov/cgi-bin/getrpt?GAO-09-741 (discussing factors related to increased risk of default).

State Foreclosure Prevention Working Group, Analysis of Subprime Mortgage Servicing Performance, Data Report No. 1, Feb. 2008, 10-11.

Morgan J. Rose, Predatory Lending Practices and Subprime Foreclosures – Distinguishing Impacts by Loan Category 25, 32 (Dec. 2006), available at http://www.chicagofed.org/cedric/2007_res_con_papers/car_62_morgan_j_rose_foreclosures_draft.pdf (average purchase money ARM that entered foreclosure taking only 12.4 months to enter foreclosure from origination)

Anthony Pennington-Cross & Giang Ho, The Termination of Subprime Hybrid and Fixed Rate Mortgages 15-17 (Federal Reserve Bank of St. Louis, Working Paper No. 2006-042A, 2006), available at http://research.stlouisfed.org/wp/2006/2006-042.pdf (hybrid 2/28 ARMs have a higher probability of default at any age and the rate of default increases during the first two years, even before any payment shock)

Susan E. Barnes, Patrice Jordan, Victoria Wagner & David Wyss, Standard & Poor's, Standard & Poor's Weighs in on the U.S. Subprime Mortgage Market 12 (Apr. 5, 2007), available at http://www2.standardandpoors.com/spf/pdf/media/TranscriptSubprime_040507.pdf (increase in early payment defaults within four months of origination)

Litigating Predatory Lending Claims

Litigating Predatory Lending Claims

- Federal
- State
- Litigation Considerations

Predatory Lending Practices

- Bait and switch
- Flipping
- Balloon payments
- Prepayment penalties
- Padded appraisals
- Falsified or fraudulent applications
- Fraud in Inducement
- High rates & fees
- Unsuitable/Unaffordable
- Negative amortization
- Daily interest rate loans
- Steering to high-rate lenders
- Mandatory arbitration clauses

Disparate Impact on Minorities

- Blacks get high-rate loans much more often than whites with similar and smaller incomes.
- African-Americans were 3.7 times more likely to receive a higher-cost loan than whites.
- Hispanic borrowers are 2.3 times more likely than white borrowers to receive such a loan.

(source: Minority Families Pay More, HMDA Stats Show Disturbing Disparities, Center for Responsible Lending Issue Brief # 28, September 14, 2005)

Opportunities for Scams

- Home Improvement Scams
- Aggressive loan originators
- Mortgage Brokers
- Property flipping scams
- Mobile Home Dealers
- Investment Scams
- Foreclosure "rescue" scams
- Closing Agents

State Claims and Defenses

- Usury
- Unfair and Deceptive Acts or Practices (UDAP)
- Fraud and Misrepresentation
- Unclean hands defense
- Unconscionability
- Duty of Good Faith and Fair Dealing
- Fiduciary Duty
- Licensing
- Contract Claims
- State mini-HOEPAs
- (Lis Pendens)

FEDERAL CLAIMS AND DEFENSES

1. **Home Ownership and Equity Protection Act (HOEPA)**
   Cancellation
   Damages
   Remedies if sold in the secondary market
2. **Truth-lending rescission rights (cancellation and damages**
3. **RESPA / Kickbacks (Treble Damages) QWR & Servicer obligations – see RESPA claim chart page 137 of booklet**
4. **ECOA**
5. **Fair Housing Act**

1

Homeownership and Equity Protection Act (HOEPA)

- Coverage – 15 U.S.C. § 1602aa
- Residential Mortgage
  - Interest rate >8% above comparable T-Bill Rate >10% above comp T-Bill for junior lien loans or
  - Points and fees > 8% loan amount
- Substantive provisions – 15 U.S.C. § 1639
  - Early disclosures
  - Prohibited terms
  - Enhanced remedies
  - Enhanced remedies against assignees

Homeownership and Equity Protection Act (HOEPA) (continued)

- Balloon payments in loans less than 5 years
- Negative amortization
- Most prepayment penalties
- Default interest rates
- Most prepaid payments
- Making loan lender should know borrower can't afford
- Paying contractor without homeowner's consent

State Claims and Defenses

- Usury
- Unfair and Deceptive Acts or Practices (UDAP)
- Fraud and Misrepresentation
- Unclean hands defense
- Unconscionability
- Duty of Good Faith and Fair Dealing
- Fiduciary Duty
- Licensing
- Contract Claims
- State mini-HOEPAs

Usury

- 1st mortgage loans – for *interest* only in states which opted out of DIDMCA
- More states have reasserted rights to limit up-front points and fees
- Everywhere for non-bank lenders for junior mortgages
- Generally provable from face of document
- Can be generally used affirmatively for short period of time, should be much longer as a defense.
- Penalty – generally – 2 xs interest paid, plus no interest charged on loan.

Fraud & Misrepresentation

- Intent to defraud
- Actual deception
- Reliance on misrepresentation
- Damages
- Clear and Convincing evidence

Examples of Successful Fraud Cases

- Lender financing work of contractor whom it knew converted proceeds to pay off old jobs
- Lender financing home contractor whom it knew did not finish promised work
- Lender who promised a loan on certain terms than changed the terms in the written contract without disclosing change to homeowner
- Lender or broker who failed to disclose actual amount of the loan or the amount of the yield spread premium.

Unclean Hands Defense

- Borrowers *not* complicit for signing loan App with false income or appraisal
- Who prepares documents?
- Who is more sophisticated?
- Did borrower have opportunity to review documents at closing?
- What was borrower told?

Unconscionability

- Common law
- UCC – 2-302
- Statutory in some states

Unconscionability -2

- Procedural – involves bargaining process during which contract made
  - Oppression (disparity on bargaining power)
  - Surprise (hidden terms)
    - Loan notes are adhesion contracts
    - Terms are in fine print, complex
- Substantive – focuses on content of contract
  - contract unfairly reallocates risks of bargain in unreasonable or unexpected manner
  - Special vulnerabilities – financial distress, limited education of borrower – are relevant

Unconscionability -3

- Examples from UCC
  - Gross price disparity
  - Entering transaction knowing consumer will not receive substantial benefit
  - Entering transaction knowing there is no reasonable probability of repayment in full by consumer (*improvident extension of credit)*

Unconscionability -4

- In many states – limited to a defense to enforcement of contract
- May be a category of state UDAP
- May be an affirmative claim – statutory and/or case law may support

Unfair and Deceptive Acts and Practices – "UDAP"

- Substantive unfairness
  - Just a really bad deal
  - Unaffordable
  - Made without regard to ability to repay
  - Collecting fees in excess of allowed under state law
- Procedural unfairness
  - Failure to disclose
    - Fees
    - Disadvantageous nature of loan
    - Arrangement with lender
    - Kickbacks
- Damages
  - Actual
  - Statutory
  - Treble)
  - Punitive
  - attorneys fees

UDAP continued

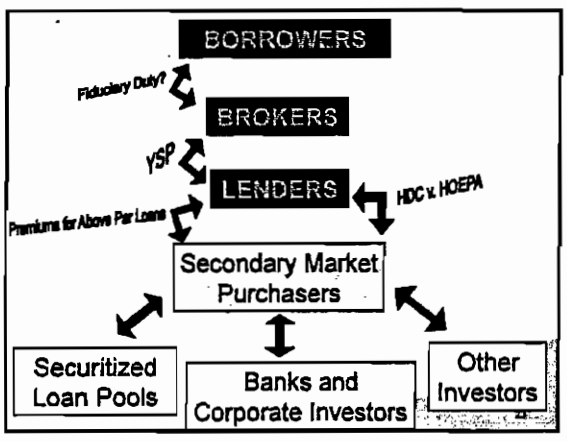
- Failure to disclose
  - Fees
  - Disadvantageous nature of loan
  - Arrangement with lender
  - Kickbacks

Duty of Good Faith and Fair Dealing

- Based in common law and UCC
- Imposed on parties to an existing contract
- To prohibit "improper behavior in the performance and enforcement of contract"
- Standard claim against servicers for problem servicing of mortgages
- Won't apply to initial contract between consumer and lender -- but may apply to contract with broker.
- Breach -- breach of contract, also can be tort

Duty of Good Faith and Fair Dealing – 2 -- Examples

- Under-billing monthly payments, then adding unearned interest to principal without notice to consumer
- Charging fax fees and pay-off fees without authority
- Placing monthly payments in "suspense" triggering late fees and higher interest charges on loan
- Failing to timely pay insurance from escrow and then force-placing insurance at higher rates
- Conducting unnecessary property inspections when H/O not in default imposing additional fees.
- Improperly calculating interest in variable loans



Fiduciary Duties

- Existence of duty leads to duty of fair and honest disclosure and actions
- Broker often has a duty of agent to principal
- Duty to advise of disadvantageous terms
- Accepting kickback from lender at expense of borrower may violate
- Steering borrower to more expensive loan should violate
- Duty from lender may be found in representation of lender's agent to borrower
- Quasi-fiduciary relationship of trust and confidence should give rise at least to disclosure duty
- Failure – tort of nondisclosure or silence as misrepresentation

Licensing Violations

- Non-depository lenders (other than banks) regulated by state licensing statutes
- Require creditors to be licensed in order to do business
- Significant penalties for failing to obtain licenses or ignoring consumer protections
- State law specifies remedy/penalty, may be –
  - Voiding loan
  - UDAP violation

Licensing Violations -2

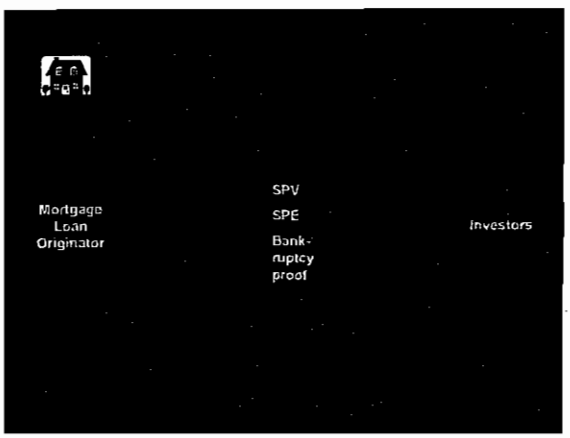
- Even without statute specifying voiding – CL may require
- Principle at CL – contracts null & void when made in violation of regulatory statutes for protection of public
- Licensive requirements can also apply to-
  - Home improvement contractors
  - Brokers
  - Appraisers
  - Lenders or brokers as credit repair organizations

Contract Claims

- What was promised? What was delivered?
- Parole evidence rule may defeat challenge as to main differences – unless you can show fraud, or procedural unfairness, or misrepresentation
- Looking at 4 corners of the documents provided to consumer –
  - Application, GFE, early TILA,
  - final TILA, HUD 1
  - Note
  - What does it appear consumer *believed* she was getting

Contract Claims -2

- Do contract provisions contradict each other
  - How does TILA compare to Note provisions (Andrews v. Chevy Chase, 240 F.R.D. 612 (E.D. Wis. 2007)
  - How many contract provisions support your client's view of contract?
  - How many support the lenders?
  - Adhesion contract – interpret confusing contract provisions against the drafter



Holding Assignees Liable Primary Liability

- Assignee involved in fraud/udap
- Lender was agent of assignee
- Corporate/familial relationship between lender and assignee
- Joint venture –
  - Lender, servicer, assignee (securitized trust) all engaged in money-making endeavor with terms at issue contemplated

Holding Assignees Liable Primary Liability - 2

- Civil conspiracy between or among parties
- Aiding or abetting (fraud, UDAP)
- Knowledge of the fraud and acceptance of the "fruits"
- Knowledge of insolvency of the seller of the loan
- RESPA violation if referral paid or split in provision of settlement services
- RICO
- ECOA or Fair Housing act

Holding Assignees Liable – Derivative Liability

- FTC preservation of claims & defenses up to amount of sales contract (state laws generally include similar protections)
- HOEPA loans – assignees liable for all state law claims unless assignee could not determine from TILA and HUD 1 that loan was a HOEPA loan.
- Close relationship between lender and assignee may create an agency relationship (active involvement in approval of loan origination)

Holding Assignees Liable – Derivative Liability - 2

- Loan must a *negotiable instrument* for holders to attain Holder in Due Course Status
  - Adjustable rate loans may not be
- For HDC status to apply – loan must have been purchased –
  - In good faith (honesty in fact and observance of reasonable commercial standards)
  - *For value*
  - *Without notice of defects, defenses, dishonor or other problems*

Affordability

Focusing on *Affordability*

- Determining affordability of loan
- Duty of originator/lender in relation to it
- Proving lack of affordability
- Fitting it into claims

Affordability Analysis

- The five federal agencies that regulate lenders in this country commented on the role of unacceptable underwriting in the origination of ARMs in the current lending crisis:
- The Agencies continue to believe that institutions should maintain qualification standards that include a credible analysis of a borrower's capacity to repay the loan according to its terms. This analysis should consider both principal and interest obligations at the fully indexed rate with a fully amortizing repayment schedule, plus a reasonable estimate for real estate taxes and insurance, whether or not escrowed. Qualifying consumers based on a low introductory payment does not provide a realistic assessment of a borrower's ability to repay the loan according to its terms.
- Department of the Treasury, OCC, Federal Reserve System, FDIC, Department of the Treasury OTS, and the National Credit Union Administration, Statement on Subprime Mortgage Lending, 72 Fed. Reg. 37569, 37571 – 37572-73 (July 10, 2007).

Affordability Analysis

- Red Flags of inflated income
  - Eyeball job --- is this reasonable income for it?
  - Compare income stated on application to real income –
    - Same job?
    - More jobs?
    - Different sources of income?
    - Consistent (e.g. SSI and law mowing?)

Affordability Analysis -2

- Has Social Security income been grossed up? (Increased by a percentage to factor in the non-taxable nature of the income?) If so, was the percentage a reasonable figure in relation to the real tax that would have been paid on this amount of income?
  - Tax rate on $10,000 of income is approximately 11% (see http://www.unclefed.com/IRS-Forms/taxtables/2007_1040tt.pdf.)
  - Add state taxes
  - If an unreasonable tax rate was applied (e.g. 35% on $10,000 on income) go back and do the analysis based on a more realistic rate.

Affordability Analysis -3

- Limited documentation?
  - What was requested?
    - Bank statements – what do they show – NOT the income claimed
    - Verification of employment – or income (ALWAYS REQUIRED) – what does it say?
    - Reconcile these items with income stated on application
- Stated Income? Why? Is this an appropriate loan for that?

Affordability Analysis -3

- Did client ask for/ understand limited or stated income loan? Did client actually provide documentation, which may then have been ignored?
- What documentation is required?
  - *ask your client – what would this documentation have shown?*
  - what documentation does your client remember providing?
  - How can these bits of information be reconciled?

Affordability Analysis -4

- Take what you have – TILA and Application (using Lender's numbers) and analyze:
- Adding principal and interest payments to imputed monthly contributions for taxes and insurance – what proportion of gross income is used up *for initial payments?*
- What other debts are there?
- How much *residual* income is there?
- How many people in household have to live off this remaining income?

Affordability Analysis -5 Example

- Monthly income of $2489 supporting mother and three children.
- Initial principal and interest payments –$1244.84
- Allocation to taxes and insurance – 121.02
- Monthly *initial* housing expense – $1365.84
- $1365 is *over* 50% of $2489.

Industry Underwriting Standards Agency Guidelines

A mortgage loan which requires homeowners to make mortgage payments which are this much of their gross income clearly violates industry standards, as well as recognized underwriting requirements expected of the industry – and is therefore in violation of state laws against unconscionable contracts, unfair practices, etc.

Look for good mortgage underwriters, mortgage bankers, real estate professionals, real estate finance academics as potential volunteer expert witnesses.

Injunctive Relief

- (Federal) Rule 60 issues:
  - Irreparable Harm
  - Likelihood of Success on the Merits
  - Restraint requested is less onerous to the party restrained than the consequence of the unrestrained behavior would be to your client
  - Bond – maintaining the status quo – little risk of loss to restrained party
  - TRO's, P.I.'s, affidavits, briefs...
  - **diana@financialprotectionlawcenter.org**

State Court vs Federal Court

- State Court efficiencies for local practitioners
- Federal Claims vs. State UDAP or Common Law Claims – sometimes it is just a matter of pleading the same grievance in different words
- Complete Diversity vs. "fraudulent joinder" often "local" defendants are appropriate and necessary and they destroy complete diversity
- $75,000.00 threshold – future stream of payments is reduced by present value

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Developments and Ideas For the Practice of Consumer Law

In This Issue

BAPCPA Circuit Court Review

Now almost four years after the enactment of the 2005 Act, a number of contested issues generated by the new law are being resolved by the Circuit Court of Appeals. This issue will review the outcomes in these decisions, which in general have been a mixed bag for consumer debtors.

Debtors Score Important Victory on Car Ownership Allowance in Fifth and Seventh Circuits

The Seventh Circuit, in *Ross Tousey*,[1] held that a debtor is entitled to claim a car ownership allowance in the § 707(b) means test regardless of whether the debtor is currently making car loan payments.[2] In the first circuit court opinion on the issue, *Ross-Tousey* ruled that its result was dictated by the plain language of the statute, legislative history, and the means test's underlying policies to use objective standards rather than actual expenses where the Code does not specifically state that actual expenses should be used. The Fifth Circuit in *In re* Tate[3] recently adopted the Seventh's "plain meaning" approach in *Ross-Tousey* and rejected the "IRM manual" approach which relies upon the Internal Revenue Service manual as a guideline for applying the means test expense deductions.

§ 1328(f) Lookback Runs from Filing Date to Filing Date

In *In re Sanders*,[4] the Sixth Circuit addressed the discharge limitation in 11 U.S.C. § 1328(f)(1), which prohibits a debtor from receiving a discharge in a chapter 13 case if the debtor has received a discharge in a case filed under chapter 7 during the previous four years. The court held that the four-year period begins to run at the time of filing of the chapter 7 case rather than from the date of the issuance of the discharge. Acknowledging that its reading of the statute created certain complications with respect to § 1328(f)(2), which limits the filing of consecutive chapter 13 cases, the court declined to attempt to unravel Congress' intent, and instead relied on the plain grammatical meaning of the language of the statute.

The Sixth Circuit joins the Fourth Circuit and First Circuit Bankruptcy Appellate Panel in concluding that the discharge limitations in § 1328(f) run from filing date to filing date.[5]

Circuit Split on Constitutionality of BAPCPA's Gag Rule Results in Supreme Court Review

The Eighth and Fifth Circuits have split on whether Code § 526(a)(4) is constitutional. That section enacted as part of the 2005 amendments prohibits "debt relief agencies," which arguably includes attorneys, from advising debtors or prospective debtors from incurring more debt in contemplation of filing bankruptcy. The Eighth Circuit, in *Milavetz, Gallop & Milavetz v. United States*,[6] held that § 526(a)(4) was an unconstitutional restriction on free speech because, even assuming the government had compelling interests, the restriction was not narrowly tailored to those interests. The Eighth Circuit concluded that the law, as written, "is substantially overbroad and unconstitutional as applied to attorneys."[7]

By contrast, the Fifth Circuit in *Hersh v. U.S. ex rel. Mukasey*,[8] held that § 526(a)(4) is constitutional. The court used the doctrine of constitutional avoidance to declare that the reach of § 526(a)(4) applies only to advice given to a debtor to incur debt in contemplation of bankruptcy when "doing so would be an abuse of the bankruptcy system." As construed the court found that the section was neither overbroad or facially violative of the First Amendment.

The Circuit split has led the Supreme Court, on June 8, 2009, to grant a certiorari petition in the *Milavetz* case.[9] The case will be argued later this year.

Projected Disposable Income: Mechanical Approach v. Presumptive Approach v. Forward Looking Approach (*Split Possibly Leading to Supreme Court Review*)

Circuit Courts of Appeals have also split on how projected disposable income should be determined for above-median debtors in chapter 13 cases. The Ninth Circuit adopted the "mechanical approach" in the first circuit opinion on the subject, *Maney v. Kagenveama*.[10] The court turned to the plain language of the statute noting that while "projected disposable income" is used in § 1325(b)(1)(B), the term is not specifically defined in that section. The term "disposable income," however is given a very specific definition in § 1325(b)(2). The Ninth Circuit reasoned that there would have been no purpose in including a definition of "disposable income" in § 1325(b)(2) if it did not offer guidance to the interpretation of "projected disposable income" in the preceding paragraph. The court went on to conclude that, as the definition of "disposable income" in § 1325(b)(2)

[1] Ross-Tousey v. Neary, 549 F.3d 1148 (7th Cir. 2008).
[2] There has been a split among the lower courts on this issue. *See In re* Ransom, 380 B.R. 799 (B.A.P. 9th Cir. 2007) (describing the split in authority).
[3] 2009 WL 1608890 (5th Cir. Jun 10, 2009).
[4] 551 F.3d 397 (6th Cir. 2008).
[5] *See In re* Bateman, 515 F.3d 272 (4th Cir. 2008) (§ 1328(f)(2)'s two-year lookback period runs from file date to file date); *In re* Gagne, 394 B.R. 219 (B.A.P. 1st Cir. 2008) (same).
[6] 541 F.3d 785 (8th Cir. 2008).
[7] *Id.* at 794.
[8] 553 F.3d 743 (5th Cir. 2008).
[9] Milavetz, Gallop & Milavetz, P.A. v. U.S., 2009 WL 602029 (U.S. June 8, 2009) and U.S. v. Milavetz, Gallop & Milavetz, P.A., 2009 WL 908452 (U.S. June 8, 2009).
[10] 541 F.3d 868 (9th Cir. 2008).

does not contemplate future or anticipated income, such considerations cannot be included in the interpretation of the term "projected disposable income."

The Ninth Circuit in *Kagenveama* also addressed the phrase "applicable commitment period," to determine whether the lower court erred in allowing the plan to extend for only three years. Section 1325(b)(4) provides that the "applicable commitment period" for an above-median debtor is five years. The court agreed with the trustee that the "applicable commitment period" was a temporal requirement over which the plan must extend, rather than, as Kagenveama argued, a monetary multiplier used to calculate the total amount to be repaid without regard to the time period over which it is paid. It went on, however, to conclude that, because the debtor had no projected disposable income, the term "applicable commitment period," was rendered irrelevant finding that the term only comes into play when there is disposable income to be distributed.

Since the decision in *Kagenveama*, the Eighth and Tenth Circuit Courts have also weighed in on the issue. In *In re Frederickson*,[11] the interpretation of the phrase "projected disposable income" arose in the context of a challenge to the length of the debtor's plan. The Eighth Circuit acknowledged that, pre-BAPCPA, it would "simply multiply the debtor's 'disposable income' by the number of months" in the plan to determine the amount of "projected disposable income" available to pay creditors.[12] The Eighth Circuit nevertheless concluded that it could now disregard the *amended* definition of "disposable income" for purposes of determining "projected disposable income" because that definition is "based upon a debtor's historical income and IRS tables that provide regional averages for common expenses" and thus "does not take into consideration a debtor's current financial situation."[13] In other words, the Eighth Circuit rejected projecting into the plan period the BAPCPA calculation of disposable income because it would not necessarily provide an "accurate" picture of the debtor's ability to pay. Instead, the Eighth Circuit applied the pre-BAPCPA method for determining "disposable income."

The Tenth Circuit's decision, *Hamilton v. Lanning*,[14] also adopted a forward-looking approach but ostensibly limits that approach by imposing a presumption that the calculation of "disposable income" according to the Code accurately reflects the debtor's future financial condition. This same "presumptive" approach is often advocated by the UST. Unfortunately, the approach adopted by the *Lanning* Court and advocated by the UST is no less divorced from the text of the Code than *Frederickson*. Nothing in § 1325(b) suggests that courts may ignore the definition of "disposable income," whether on a showing of "changed circumstances" or not. [15]

While a petition for certiorari has been denied in *Frederickson*,[16] the Supreme Court has requested that the Solicitor General advise it on whether to grant the petition for certiorari filed in *Lanning*. This is a strong indicator that the petition may ultimately be granted.

[11] 545 F.3d 652 (8th Cir. 2008).
[12] *Id.* at 658.
[13] *Id.*
[14] 545 F.3d 1269 (10th Cir. 2008).
[15] *Id.* at 1282.
[16] Frederickson v. Coop, 129 S.Ct. 1630 (U.S. Mar. 23, 2009).

Update on Upside Down Cars

Both the Fourth Circuit and the Eleventh Circuit have held that under applicable state law creditors have purchase money security interests in the portion of a debt used to pay off of negative equity on a trade-in vehicle.[17] The Fourth Circuit reasoned that a natural reading of the statute mandated such finding "because that financing enabled the Prices to acquire rights in their new car," thus the trade-in of the vehicle in which the debtors had negative equity was closely connected to the acquisition of the new vehicle. In so holding, the Fourth Circuit was persuaded in part by the Eleventh Circuit's discussion in *Graupner* of an identical provision. Additionally, the Fourth Circuit found that its decision was supported by Congress' intent in enacting the hanging paragraph of the Bankruptcy Code, "to protect secured car lenders from having their claims bifurcated in Chapter 13." Both courts, however, fail to address the fact that purchase money obligations traditionally have not included the payment of antecedent debt.

Full Surrender Lacks Traction in Circuit Courts

While the majority of bankruptcy courts have determined that an "allowed secured claim" is fully satisfied by the surrender of the collateral securing the debt based on the application of the hanging paragraph, the Circuit Courts of Appeals have held otherwise.[18] The Circuit Courts and a handful of bankruptcy courts holding that full satisfaction of an allowed secured claim is not permitted base their decisions on three lines of reasoning that: 1) § 506 is irrelevant in the context of surrender under § 1325(a)(5)(C); 2) state law determines the right to an unsecured claim; and, 3) surrender eradicates the estate's interest in the collateral. Despite the trend among circuit courts, two recent bankruptcy court decisions have held that debtors may satisfy collateral in full satisfaction of a creditor's "allowed secured claim."[19]

Stripping Down Liens on Mobile Homes

BAPCPA added a new definition of "debtor's principal residence" in Code § 101(13A), but Congress made no change to the anti-modification provision in § 1322(b)(2) which applies only to "real property" that is the debtor's principal residence. Green Tree Servicing and several other creditors have argued that the new definition prevents debtors from stripping down liens on mobile or manufactured homes even if the home is considered personal property under state law. In the first circuit court opinion on the issue, the Sixth Circuit in *In re Reinhardt*[20] held that the anti-modification provision did not prevent stripdown of a secured loan on a mobile home treated as personal property even though the creditor also held a security interest in real estate upon which the home was situated. The court found that the anti-modification provision applies only if a mobile home is both real property, as defined by state law, and the debtor's principal residence. The Sixth Circuit refused to

[17] *See In re* Price, 562 F.3d 618 (4th Cir. 2009); *In re* Graupner, 537 F.3d 1295 (11th Cir. 2008).
[18] *See, e.g., See* Tidewater Fin. Co. v. Kenney, 531 F.3d 312 (4th Cir. 2008); *In re* Long, 519 F.3d 288 (6th Cir. 2007); *In re* Wright, 492 F.3d 829 (7th Cir. 2007); Capital One Auto Fin. v. Osborn, 515 F.3d 817 (8th Cir. 2008); *In re* Ballard, 526 F.3d 634 (10th Cir. 2008); *In re* Barrett, 543 F.3d 1239 (11th Cir. 2008).
[19] *See In re* Adams, 403 B.R. 387 (Bankr. E.D. La. 2009); *In re* Pruitt, 401 B.R. 546 (Bankr. D. Conn. 2009).
[20] 563 F.3d 558 (6th Cir. 2009).

consider BAPCPA's legislative history to determine Congress' intent in adding the definition, which the creditor argued reflects an intent to prohibit such modifications, "[b]ecause § 1322(b)(2) clearly contains a separate requirement that the 'debtor's principal residence' must be real property."[21] The *Reinhardt* decision is consistent with the overwhelming majority of lower court decisions on the issue.[22]

Six Ways to Find Out Who Owns and Services the Mortgage

A mortgage loan is typically assigned several times during its term, and may be held by one entity but serviced by another. Different disclosure requirements apply depending upon whether information is sought about the ownership of the mortgage loan or its servicing. Knowing exactly who owns and services the mortgage is a critical first step to negotiating a binding workout or loan modification. The information is needed to send a notice of rescission under the Truth in Lending Act and to identify potential defendants in litigation. This information may also provide a defense to foreclosure or stay relief in bankruptcy if these proceedings are not initiated by a proper party.[23]

1. Send a TILA § 1641(f)(2) Request to the Servicer

The Truth in Lending Act contains a provision that requires the loan servicer to tell the borrower who the actual holder of the mortgage really is.[24] Upon written request from the borrower, the servicer must state the name, address, and telephone number of the owner of the obligation or the master servicer of the obligation.[25]

One problem with this provision's enforcement had been the lack of a clear remedy for the servicer's non-compliance. However, the Helping Families Save Their Homes Act of 2009[26] amends TILA to explicitly provide that violations may be remedied by TILA's private right of action found in § 1640(a), which includes recovery of actual damages, statutory damages, costs and attorney fees.[27] The amendment adds the owner disclosure provision found in § 1641(f)(2) to the list of TILA requirements that give rise to a cause of action against the creditor if there is a failure to comply. Although § 1640(a) refers to "any creditor who fails to comply," by specifically adding as an actionable requirement a disclosure provision which Congress knew is directed to servicers and therefore involves compliance by creditors through their servicers, Congress chose to make creditors liable to borrowers for noncompliance by servicers.

The TILA provision does not specify how long the servicer has to respond to the request. Perhaps because no parties were directly liable under § 1640(a) for violations of the disclosure requirement before the 2009 amendment, no case law had developed on what is a reasonable response time. In the future, courts may be guided by recent regulations issued by the Federal Reserve Board requiring servicers to provide payoff statements within a reasonable time after request by the borrower.[28] In most circumstances, a reasonable response time is within five business days of receipt.[29] Applying this benchmark to § 1641(f)(2) requests would seem appropriate since surely no more time is involved in responding to a request for ownership information than preparing a payoff statement. Alternatively, a 30-day response period should be the outer limit for timeliness since that is the time period Congress used in § 1641(g).

2. Review Transfer of Ownership Notices

The Helping Families Save Their Homes Act of 2009 also added a new provision in TILA which requires that whenever ownership of a mortgage loan securing a consumer's principal dwelling is transferred, the creditor that is the new owner or assignee must notify the borrower in writing, within 30 days after the loan is sold or assigned, of the following information:

- the new creditor's identity, address, and telephone number;
- the date of transfer;
- location where the transfer is recorded;
- how the borrower may reach an agent or party with authority to act on behalf of the new creditor; and
- any other relevant information regarding the new owner.[30]

The new law applies to any transfers made after the Act's effective date, which was May 20, 2009. The Mortgage Electronic Registration System (MERS) recently announced a program to implement the new law.[31]

Advocates should request that clients provide copies of any ownership notices they have received based on this new law. Assuming that there has been compliance with the statute, the advocate may be able to piece together a chain of title as to ownership of the mortgage loan (for transfers after May 20, 2009) and verify whether any representations made in court pleadings or foreclosure documents are accurate. Failure to comply with the disclosure requirement gives rise to a private right of action against the creditor/new owner that failed to notify the borrower.[32]

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[21] *Id.* at 563-63.

[22] Green Tree Servicing, LLC v. Harrison, 2009 WL 82565 (W.D.La. Jan 12, 2009); *In re* Coleman, 392 B.R. 767 (B.A.P. 8th Cir. 2008); *In re* Davis, 386 B.R. 182 (B.A.P. 6th Cir. 2008); *In re* Shepherd, 381 B.R. 675 (E.D. Tenn. 2008); Moss v. GreenTree-Al, LLC, 378 B.R. 655 (S.D. Ala. 2007); *In re* Jordan, 403 B.R. 339 (Bankr. W.D. Pa. 2009); *In re* Gearheart, 2007 WL 4463342 (Bankr. E.D. Ky. Dec 14, 2007); *In re* Fuller, 2007 WL 3244113 (Bankr. M.D.N.C. Nov 02, 2007); *In re* Oliviera, 378 B.R. 789 (Bankr. E.D. Tex. 2007); *In re* Bartolome, 2007 WL 2774467 (Bankr. M.D. Ala. Sept. 21, 2007); *In re* Manning, 2007 WL 2220454 (Bankr. N.D. Ala. Aug. 2, 2007); *In re* McLain, 376 B.R. 492 (Bankr. D.S.C. 2007); *In re* Coleman, 373 B.R. 907 (Bankr. W.D. Mo.2007); *In re* Cox, 2007 WL 1888186 (Bankr. S.D. Tex. June 29, 2007). *But see In re* Lunger, 370 B.R. 649 (Bankr. M.D. Pa. 2007).

[23] *See* NCLC Foreclosures, § 4.3.4.

[24] 15 U.S.C. § 1641(f). The provision also should require disclosure to the borrower's advocate with a properly signed release form. *See* NCLC Foreclosures, Appx. A, Form 3, *infra.*

[25] If the service provides information about the master servicer, a follow-up request should be made to the master servicer to provide the name, address, and telephone number of the owner of the obligation.

[26] Pub. L. No. 111-22, § 404 (May 20, 2009).

[27] *See* 15 U.S.C. § 1640(a).

[28] Reg Z § 226.36(c)(1(iii); NCLC Truth in Lending, § 9.9.3 (6th ed. 2007 and 2008 Supp.).

[29] Official Staff Commentary § 226.36(c)(1)(iii)-1.

[30] *See* 15 U.S.C. § 1641(g)(1)(A)–(E).

[31] Under "MERS InvestorID," notices will be automatically generated whenever a "Transfer of Beneficial Rights" occurs on the MERS system. A sample Transfer Notice and "Training Bulletin" are available for download at www.mersinc.org/news. MERS is taking the position, based on the wording of the statute (which refers to "place where ownership of the debt is recorded"), that it can comply by disclosing only the location where the original security instrument is recorded because the note is not a "recordable document." If MERS members do not agree with this interpretation, they can opt out of MERS InvestorID and presumably send their own notice.

[32] *See* 15 U.S.C. § 1640(a).

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3. Send a "Qualified Written Request" under RESPA

Any written request for identification of the mortgage owner sent to the servicer will not only trigger rights under 15 USC § 1641(f) discussed earlier, but will also be a "qualified written request" under the Real Estate Settlement Procedures Act.[33] Under RESPA, a borrower may submit a "qualified written request" to request information concerning the servicing of the loan or to dispute account errors. Because the servicer acts as an agent for the mortgage owner in its relationship with the borrower, a request for information about the owner should satisfy the requirement that the request be related to loan servicing. Details about how to send the request are covered in § 8.2.2 of NCLC *Foreclosures*. The servicer has 20 business days after receipt to acknowledge the request, and must comply within 60 business days of receipt.[34] Damages, costs and attorneys fees are available for violations, as well as statutory damages up to $1,000 in the case of a pattern and practice of noncompliance.[35]

4. Review the RESPA Transfer of Servicing Notices

Finding the loan servicer is generally easier because the client is likely getting regular correspondence from that entity. Still, the law requires that formal servicing transfer notices are to be provided to borrowers, and reviewing these can provide helpful information. RESPA provides that the originating lender must disclose at the time of loan application whether servicing of the loan may be assigned during the term of the mortgage.[36] In addition, the borrower must be notified when loan servicing is transferred after the loan is made.[37] Failure of the servicer to comply with the servicing transfer requirements subjects the servicer to liability for actual damages, statutory damages, costs and attorney fees.[38] Unlike the TILA requirement discussed earlier, RESPA is limited to the transfer of servicing; it does not require notice of any transfers of ownership of the note and mortgage.[39]

5. Go to Fannie and Freddie's Web Portals

To facilitate several voluntary loan modification programs implemented by the U.S. Treasury,[40] both Fannie Mae and Freddie Mac allow borrowers to contact them to determine if they own a loan. Borrowers and advocates can either call a toll-free number[41] or enter the property's street address, unit, city, state, and ZIP code on a website.[42] The website information, however, sometimes refers to Fannie Mae or Freddie Mac as "owners" when in fact their participation may have been as the party that had initially purchased the loans on the secondary market and later arranged for their securitization and transfer to a trust entity which ultimately holds the loan.

6. Check the Local Registry of Deeds

Checking the local registry where deeds and assignments are recorded is another way to identify the actual owner. But do not rely solely on the registry of deeds to identify the obligation's current holder of the obligation, as many assignments are not recorded. In fact, if MERS is named as the mortgagee, typically as "nominee" for the lender and its assigns, then mortgage assignments will not be recorded in the registry of deeds.[43] A call to MERS is not helpful as MERS currently will only disclose the name of the servicer and not the owner.[44] In addition, some assignments may be solely for the administrative convenience of the servicer, in which case the servicer may appear as the owner of the mortgage loan.

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[33] 12 U.S.C. § 2605(e). *See also* NCLC Foreclosures, § 8.2.2.
[34] 12 U.S.C. § 2605(e)(2).
[35] 12 U.S.C. § 2605(f).
[36] 12 U.S.C. § 2650(a). *See* NCLC Foreclosures, § 8.2.3..
[37] 12 U.S.C. § 2650(b). *See* NCLC Foreclosures,§ 8.2.3..
[38] 12 U.S.C. § 2650(f). *See* NCLC Foreclosures,§ 8.2.6.

[39] *See, e.g.*, Daw v. Peoples Bank & Trust Co., 5 Fed.Appx. 504 (7th Cir. 2001).
[40] *See* 27 NCLC REPORTS, *Bankruptcy and Foreclosures Ed.*, Mar/Apr 2009.
[41] For Fannie Mae call 1-800-7FANNIE (8 a.m. to 8 p.m. EST); Freddie Mac call 1-800-FREDDIE (8 a.m. to 8 p.m. EST).
[42] Fannie Mae Loan Lookup, at www.fanniemae.com/homeaffordable; Freddie Mac Self-Service Lookup, at www.freddiemac.com/corporate.
[43] *See* NCLC, Foreclosures, § 4.3.4A.
[44] The telephone number for the automated system is 888-679-6377. When calling MERS to obtain information on a loan, you must supply MERS with the MIN number or a Social Security number. The MIN number should appear on the face of the mortgage. You may also search by property address or by other mortgage identification numbers by using MERS's online search tool at www.mers-servicerid.org.

In re Stewart, 391 B.R. 327
(Bankr. E.D. La. 4-10-08)

H

United States Bankruptcy Court,
E.D. Louisiana.
In re Dorothy Chase **STEWART**, Debtor.
No. 07-11113.

April 10, 2008.

Background: Chapter 13 debtor-mortgagor objected to proof of claim filed by **mortgage** servicing agent.

Holdings: The Bankruptcy Court, Elizabeth W. Magner, J., held that:
(1) **mortgage** servicing agent's failure to notify debtor-borrower of fees, costs and charges that it had assessed against her account, prior to applying **mortgage** payments made by debtor to satisfaction of these unnoticed fees, costs and charges, was contrary to requirements of **mortgage** and **mortgage** note, and prevented allowance of proof of claim that it had filed in bankruptcy case in amount stated;
(2) drive-by inspection fees included in proof of claim were not reasonable;
(3) court could not allow, over objection by Chapter 13 debtor-mortgagor, charges included in **mortgage** servicing agent's proof of claim for nine separate broker's price opinions;
(4) servicing agent's misapplication of payments made by debtor-borrower, contrary to terms of **mortgage** documents, to satisfy late charges and inspection fees prior to principal and outstanding interest rendered the escrow calculations that it provided in support of its proof of claim wholly incorrect;
(5) servicing agent's interpretation of provision of **mortgage** documents permitting it to impose late charge only once on each late payment, as permitting imposition of multiple late charges in connection with a single missed payment because monthly payments that debtor-mortgagor subsequently made after the month in which payment was missed were applied to that owing for the previous month, thereby resulting in continuing series of delinquencies, was not reasonable interpretation;
(6) legal fees included in **mortgage** servicing agent's proof of claim had to be disallowed in part; and
(7) servicing agent's abusive imposition of unwarranted fees and charges, illegal imposition of fees disguised as costs, negligent imposition of fees and costs not due, improper calculation of escrow payments, misapplication of payments contrary to the terms of **mortgage** and **mortgage** note, failure to notify debtor-mortgagor of fees and charges on her account, and improper payment of unnoticed fees and charges during pendency of debtor's and her husband's bankruptcy cases warranted assessment of damages.

So ordered.

West Headnotes

[1] Bankruptcy 51 ⚿2926

51 Bankruptcy
51VII Claims
51VII(E) Determination

51k2925 Evidence
51k2926 k. Presumptions and Burden of Proof. Most Cited Cases

Bankruptcy 51 ⇐2928

51 Bankruptcy
51VII Claims
51VII(E) Determination
51k2925 Evidence
51k2928 k. Effect of Proof of Claim. Most Cited Cases
Properly filed proof of claim constitutes prima facie evidence of claim's validity and amount, and burden is on objecting party to present sufficient evidence to overcome the prima facie effect of claim; if objecting party succeeds, then creditor will have to prove validity of claim. Fed.Rules Bankr.Proc.Rule 3001(f), 11 U.S.C.A.

[2] Bankruptcy 51 ⇐2926

51 Bankruptcy
51VII Claims
51VII(E) Determination
51k2925 Evidence
51k2926 k. Presumptions and Burden of Proof. Most Cited Cases
Inconsistencies between proof of claim that was filed by **mortgage** servicing agent and the accounting that servicing agent submitted in support of claim, as well as servicing agent's admission that there were errors in claim, was sufficient to overcome the prima facie effect of claim and to shift to servicing agent the burden of proving validity of claim. Fed.Rules Bankr.Proc.Rule 3001(f), 11 U.S.C.A.

[3] Bankruptcy 51 ⇐2825

51 Bankruptcy
51VII Claims
51VII(A) In General
51k2825 k. Claims Allowable; What Constitutes "Claim.". Most Cited Cases
Mortgage servicing agent's failure to notify debtor-borrower of fees, costs and charges that it had assessed against her account, prior to applying **mortgage** payments made by debtor to satisfaction of these unnoticed fees, costs and charges, was contrary to requirements of **mortgage** and **mortgage** note, under which such fees, costs and charges were payable only on notice to borrower, and prevented allowance of proof of claim that it had filed in bankruptcy case in amount stated.

[4] Bankruptcy 51 ⇐2901.1

51 Bankruptcy
51VII Claims
51VII(D) Proof; Filing
51k2901 Sufficiency of Filing
51k2901.1 k. In General. Most Cited Cases

Drive-by inspection fees included in proof of claim filed by **mortgage** servicing agent, pursuant to servicing agent's alleged policy of ordering such inspections if **mortgage** payment was more than 20 days past due, were not reasonable where, as result of borrower's missing a single payment and of servicing agent's application of subsequent payments to payment that was past due, this single missed payment had resulted in separate drive-by inspections in each succeeding month until bankruptcy petition was filed, despite fact that initial inspection, and each subsequent inspection, disclosed that property was occupied and well-maintained, and despite fact that, during time that these inspections occurred, debtor was making regular **mortgage** payments, albeit payments which were being applied to that owing for the preceding month; allowance of all of these inspection fees as component of servicing agent's proof of claim was especially inappropriate, where many of these inspections were performed on property other than debtor's, and where servicing agent failed to read reports.

[5] Bankruptcy 51 ⚿2825

51 Bankruptcy
51VII Claims
51VII(A) In General
51k2825 k. Claims Allowable; What Constitutes "Claim.". Most Cited Cases

Bankruptcy court could not allow, over objection by Chapter 13 debtor-mortgagor, charges included in **mortgage** servicing agent's proof of claim for nine separate broker's price opinions, where it appeared that certain charges were duplicative, where others were for opinions that were completed while debtor had a bankruptcy case pending and while adequate protection order was in place, and where the last was prepared following foreclosure sale, when debtor no longer owned property.

[6] Bankruptcy 51 ⚿2825

51 Bankruptcy
51VII Claims
51VII(A) In General
51k2825 k. Claims Allowable; What Constitutes "Claim.". Most Cited Cases

Charges included in **mortgage** servicing agent's proof of claim for broker's price opinions were in nature of undisclosed fee, that was improperly disguised as third party vendor cost, where third party that prepared these opinions was actually a division of servicing agent, and servicing agent's representative acknowledged that its actual cost for preparation of these opinions was significantly less than amount billed to Chapter 13 debtor-borrower's account.

[7] Bankruptcy 51 ⚿2825

51 Bankruptcy
51VII Claims
51VII(A) In General
51k2825 k. Claims Allowable; What Constitutes "Claim.". Most Cited Cases

Mortgage servicing agent's misapplication of payments made by Chapter 13 debtor-borrower, contrary to terms of **mortgage** documents, to satisfy late charges and inspection fees prior to principal and outstanding interest rendered the escrow calculations that it provided in support of its proof of claim wholly incorrect, and insufficient to permit allowance of servicing agent's proof of claim in amount filed.

[8] Bankruptcy 51 ⚿2825

51 Bankruptcy
51VII Claims
51VII(A) In General
51k2825 k. Claims Allowable; What Constitutes "Claim.". Most Cited Cases
Mortgage servicing agent's interpretation of provision of **mortgage** documents permitting it to impose late charge only once on each late payment, as permitting imposition of multiple late charges in connection with a single missed payment because monthly payments that Chapter 13 debtor-mortgagor subsequently made after the month in which payment was missed were applied to that owing for the previous month, thereby resulting in continuing series of delinquencies, despite debtor's regular monthly payments, until missed payment was cured, was not reasonable interpretation and prevented bankruptcy court from allowing servicing agent's proof of claim in amount filed.

[9] Contracts 95 ⚿155

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k151 Language of Instrument
95k155 k. Construction Against Party Using Words. Most Cited Cases
Under Louisiana law, ambiguity in contract is construed against the drafter.

[10] Bankruptcy 51 ⚿2825

51 Bankruptcy
51VII Claims
51VII(A) In General
51k2825 k. Claims Allowable; What Constitutes "Claim.". Most Cited Cases
Attempt on part of **mortgage** servicing agent's attorney to recover on servicing agent's behalf, by means of adequate protection order entered in debtor-mortgagor's Chapter 13 case, 26 prepetition property inspection fees dating back to years before petition was filed, without ever disclosing nature of these charges, was clear violation of counsel's duty of candor to court.

[11] Bankruptcy 51 ⚿2827

51 Bankruptcy
51VII Claims
51VII(A) In General
51k2827 k. Claims by Insiders and by Attorneys in Excess of Value. Most Cited Cases
Legal fees included in **mortgage** servicing agent's proof of claim, for which servicing agent failed to supply an accounting, or which represented undisclosed fees imposed without court approval for legal services rendered in debtor's or her husband's prior bankruptcy cases, had to be disallowed.

[12] Bankruptcy 51 ⚿2825

51 Bankruptcy
51VII Claims
51VII(A) In General
51k2825 k. Claims Allowable; What Constitutes "Claim.". Most Cited Cases
Charge included in **mortgage** servicing agent's proof of claim for cost of title policy had to be disallowed where cost was incurred following mortgagee's acquisition of property at foreclosure sale and represented a cost associated with ownership, not collection.

[13] Torts 379 ⇐435

379 Torts
379V Other Miscellaneous Torts
379k435 k. Abuse of Rights. Most Cited Cases
While invoked sparingly, Louisiana law recognizes doctrine of abuse of rights.

[14] Torts 379 ⇐435

379 Torts
379V Other Miscellaneous Torts
379k435 k. Abuse of Rights. Most Cited Cases
Under Louisiana law, abuse of rights doctrine is applied to prevent holder of rights or powers from exercising those rights or powers when his predominant motive is to cause harm to another.

[15] Torts 379 ⇐435

379 Torts
379V Other Miscellaneous Torts
379k435 k. Abuse of Rights. Most Cited Cases
Doctrine of abuse of rights has been applied to prevent party from exercising a right to the harm of another, even in absence of showing of an intent by party to cause harm, if it was shown that party has no serious and legitimate interest in exercise of right that is worthy of judicial protection.

[16] Torts 379 ⇐435

379 Torts
379V Other Miscellaneous Torts
379k435 k. Abuse of Rights. Most Cited Cases
Under doctrine of abuse of rights, holder of individual right cannot exercise that right to detriment of other parties just for the sheer sake of exercising it; at least a serious and legitimate interest will have to be shown in order to justify exercise of right.

[17] Bankruptcy 51 ⇐2187

51 Bankruptcy
51II Courts; Proceedings in General

51II(C) Costs and Fees
51k2182 Grounds and Circumstances
51k2187 k. Frivolity or Bad Faith; Sanctions. Most Cited Cases

Mortgage servicing agent's abusive imposition of unwarranted fees and charges, illegal imposition of fees disguised as costs, negligent imposition of fees and costs not due, improper calculation of escrow payments, misapplication of payments contrary to the terms of **mortgage** and **mortgage** note, failure to notify debtor-mortgagor of fees and charges on her account, and improper payment of unnoticed fees and charges during pendency of debtor's and her husband's bankruptcy cases warranted assessment of damages in debtor's favor in amount of $10,000, plus $12,350 in legal fees.

[18] Bankruptcy 51 ⇐2187

51 Bankruptcy
51II Courts; Proceedings in General
51II(C) Costs and Fees
51k2182 Grounds and Circumstances
51k2187 k. Frivolity or Bad Faith; Sanctions. Most Cited Cases

Mortgage servicing agent would be sanctioned in amount of $2,500 for its actions in presenting consent adequate protection order to bankruptcy court which did not reflect agreement between servicing agent and Chapter 13 debtor-mortgagor as represented to court, plus an additional $2,500 for filing significantly erroneous proofs of claim and for misrepresenting, as cost allegedly paid to third party vendor for preparation of broker's price opinions on mortgaged property, a fee charged by one of its own divisions.

***330** Elisabeth D. Harrington, Kirk L. Myers, Harrington & Myers, Metairie, LA, for Debtor.

MEMORANDUM OPINION

ELIZABETH W. MAGNER, Bankruptcy Judge.

On August 23, 2007, Debtor, Dorothy Chase Stewart ("Debtor"), filed an Objection to Wells Fargo Home **Mortgage**, Inc., as agent to Lehman Brothers' ("Wells Fargo") second amended claim. The proof of claim was signed by Hilary Bonial ("Bonial") of Brice, Vander Linden & Wernick, P.C. ("Brice"), national counsel to Wells Fargo. Debtor objected to the amounts claimed, demanded a payment history and support for items included in the claim described as "Other Amounts for Inspection Fees, Appraisal Fees, NSF Check Charges, and Other Charges" as well as "Pre-Petition Attorney [sic] Fees and Costs" and "Escrow Advance."

Wells Fargo filed a timely Response to the Objection ("Response") further itemizing the amounts included in the line item categories to its proof of claim. Wells Fargo listed the individual taxes and insurance payments made from Debtor's escrow account by amount and date of payment. It also attached copies of the invoices which it alleged substantiated its claim for prepetition attorneys' fees and costs. It identified property inspections, appraisal fees, title research fees, and property preservation fees as the other charges owed. These charges were itemized by type, but Wells Fargo did not supply any additional ***331** information as to the amount, date, or payee for each charge, nor did it supply copies of invoices or proof of payment for the other charges claimed.

Wells Fargo's Response also admitted that the negative escrow balance contained in its proof of claim was still under re-

view. Specifically, Wells Fargo was not able to ascertain if the amounts claimed for escrow included a credit for the portions of the past due monthly installments attributable to escrow. Without this information, or a full history of the escrow account, Wells Fargo admitted that Debtor would not be able to verify the amounts it claimed on its proof of claim, and conversely, Wells Fargo would not be able to prove the amounts owed.

The Response was signed by Hershel C. Adcock, Jr., as local counsel to Wells Fargo. Approximately one week later, the Response was supplemented to provide a credit against the escrow account for a property tax deduction that was not owed.[FN1] The Response also detailed the individual past due monthly installments by date, principal, interest, and escrow portions. A schedule reflecting amounts paid into and deducted from escrow over the life of the loan was also supplied.

FN1. Debtor's home is exempt from property taxes.

The initial hearing on this matter was held on September 25, 2007. Paul Rummage of the Law Offices of Paul Rummage and Herman Wessels of Dean Morris, LLP, appeared on behalf of Wells Fargo. Counsel were the third and fourth law firms to represent Wells Fargo since the inception of the case. Neither Ms. Bonial nor Mr. Adcock appeared. As of the initial hearing date, Wells Fargo still had not supplied a full loan history nor had it produced any documentation to substantiate the amounts it claimed for fees and costs, save the invoices of foreclosure counsel. At the start of the hearing, it was evident that counsel were uninformed as to the nature or amounts due on the claims filed, with one limited exception.

Herman Wessels of Dean Morris represented that after reviewing the invoices his firm had submitted to Wells Fargo in connection with the foreclosure and eviction proceedings against Debtor, errors in billing became evident. Specifically, the invoices contained a charge for a deposit forwarded to the sheriff in connection with an eviction action. When the eviction suit was dismissed, the deposit was returned to Dean Morris, and $1,800.00 should have been refunded to Wells Fargo and credited toward Debtor's account. Upon further questioning, it was also admitted by Dean Morris that a deposit might also exist in connection with the foreclosure action, but further research was necessary.

The Court continued the hearing to November 1, 2007, ordered the appearance of Ms. Bonial and Mr. Adcock at the continued hearing date, and ordered production no later than October 25, 2007, of a loan history and copies of all invoices, cancelled checks, and other evidence to support the costs, fees, and charges claimed.

On October 24, 2007, Wells Fargo filed a request for an extension of the deadline to produce the documentation and accounting. The request for extension was considered at the hearing on November 1, 2007, during which the Debtor painstakingly identified the additional information needed, or explanations required, to review the accounting Wells Fargo supplied. Wells Fargo was instructed to bring to the next hearing a representative with personal knowledge of this loan as well as Wells Fargo's administrative policies. It was also ordered to provide documentation from the sheriff regarding the amounts *332 charged in connection with the foreclosure. Wells Fargo committed to verify the amounts claimed in connection with the escrow account and to reconcile the amounts claimed on proofs of claim filed in previous cases against its loan history. The Court also ordered the production of any notices delivered to Debtor regarding 1) changes in her adjustable interest rate or escrow account; or 2) the imposition of fees, costs, or charges against her account.

At the second continued hearing on December 4, 2007, Hilary Bonial and Paul Rumage appeared on behalf of Wells Fargo with Kimberly Miller, Vice President in charge of Bankruptcy, Foreclosure, and the Litigation Management De-

partment ("Bankruptcy Dept.").

Jurisdiction

This Court has jurisdiction pursuant to 11 U.S.C. §§ 501 and 502 and Fed. R. Bankr.P 3001, 3002, and 3007; this is a core proceeding under 28 U.S.C. § 157(b)(2)(B).

Facts

Debtor, along with her now deceased husband William Chase, Jr., obtained a loan from Norwest **Mortgage**, Inc., in 1999. The loan is secured by a **mortgage** on her home and the debt is currently being serviced by Wells Fargo, as agent for Lehman Brothers, the assignee of Norwest **Mortgage**, Inc.

The current bankruptcy was filed on June 12, 2007; it is the third bankruptcy filed by the Debtor or her deceased husband. The first bankruptcy was filed by William Chase, Jr.,[FN2] on January 11, 2002, and dismissed on January 29, 2004, for failure to make payments to the trustee. The second bankruptcy was filed *pro se* on April 20, 2004, and dismissed on July 26, 2005, for failure to make payments to the trustee. In this case, Debtor is represented by counsel.

> FN2. Although William Chase, Jr., filed the first bankruptcy individually, in an attempt to reduce confusion, the Court will often refer to the Debtor when discussing the details of that bankruptcy.

Wells Fargo has filed three proofs of claim in this case. The first, filed on July 12, 2007, listed $33,641.80 in past due sums accruing prepetition. On August 20, 2007, Wells Fargo amended its original claim to add two additional past due monthly installments for July and August 2007. Technically, these installments accrued postpetition and should not have been added to the prepetition amounts itemized by Wells Fargo.

Wells Fargo itemized its past due balance:

Total Arrearage as of August 31, 2007

- Regular Monthly Installments July 1, 2004, through August 31, 2007 — $26,582.67
- Late Charges — 776.44
- Pre-petition Attorney Fees and Costs — 6,663.96
- Other pre-petition fees, expenses and charges as reflected in 1A above — 1,013.75
- Interest accruing at the contract rate of 10.38% on pre-petition arrearage if al- — (0.00)

lowed by 11 U.S.C. § 1322(e)	
	$35,03 6.82

The proofs of claim were all signed by Bonial as Wells Fargo's authorized agent. They all bear the following assertion:

> Please be advised that reasonable fees and costs for the review of the bankruptcy pleadings, review of client information, preparation and filing of the Proof of Claim will be charged to the lender/servicer for post-petition services rendered subsequent to the filing of this bankruptcy matter. Further, note that future fees and costs for bankruptcy related services are expected to accrue throughout the life of this bankruptcy case, and will be charged to the lender/servicer. If such fees and costs or charges are not paid through the bankruptcy,***333** the lender reserves the right, at the lender's discretion, to seek future reimbursement for the fees, costs and charges related to services rendered and expenses incurred pursuant to the terms provided for in the underlying security instrument, the bankruptcy code and other applicable law.[FN3]

FN3. This language was further amended on September 9, 2007.

Loan Documents

Debtor's note requires monthly payments of principal and interest sufficient to amortize her original principal balance of $61,200.00 over 30 years ("Note").[FN4] During the first three (3) years of the Note, the interest rate was 10.375% per annum. On the third anniversary of the Note's execution, and every year thereafter, the interest rate is subject to adjustment by adding 7% to the average weekly yield on United States Treasury Securities adjusted to a constant security of one year. Monthly payments are due on the first day of the month and considered late after the fifteenth day.

FN4. Exh. C. Note.

If full payment of principal and interest is not received on time, the Note provides that the holder may assess a late charge equal to 5% of the past due principal or interest outstanding. The Note states that only one late charge may be assessed on each late payment.[FN5]

FN5. Exh. C, Note ¶ 7(A).

The Note is secured by the **mortgage** encumbering Debtor's home (" **Mortgage**"). Both the Note and **Mortgage** allow, as a reimbursable expense, up to 25% of the sums due as attorney's fees.[FN6]

FN6. Exh. C, Note ¶ 7(E); **Mortgage,** ¶ 21.

The lender did not initially establish an escrow account for the payment of insurance premiums and property taxes incurred in connection with the property securing this loan. Debtor is elderly and the assessed value of her home is exempt from property taxes due to the homestead exemption and her age. Insurance was initially acquired and paid for by Debtor outside of the loan. The **Mortgage** provides that if the lender advances money for the payment of insurance premiums or property taxes on behalf of the borrower, then those amounts are immediately reimbursable, or at the lender's sole discre-

tion, may be repaid in twelve monthly installments.[FN7]

FN7. Exh. C, **Mortgage** ¶ 2.

The **Mortgage** also authorizes lender's collection, on a monthly basis, of the amounts it reasonably estimates will be necessary to satisfy future property tax or insurance premium demands. It allows the lender to assess and hold the maximum sum provided by 12 U.S.C. § 2603, *et seq.* ("RESPA").[FN8]

FN8. Exh. C, **Mortgage** ¶ 2. The provisions set forth in 12 U.S.C. § 2603, *et. seq.*, are also known as the Real Estate Settlement Procedures Act, or RESPA.

The **Mortgage** allows Wells Fargo to make reasonable entries upon and inspections of the property. However, the **Mortgage** also provides that Wells Fargo "*shall* give Borrower notice at the time of or prior to an inspection specifying *reasonable* cause for the inspection."[FN9] Finally, the **Mortgage** requires that "[a]ny notice to Borrower provided for in this Security Instrument shall be given by delivering it or by mailing it by first class mail unless applicable law requires use of another ***334** method."[FN10]

FN9. Exh. C, **Mortgage** ¶ 9, emphasis added.

FN10. Exh. C, **Mortgage** ¶ 14.

The **Mortgage** also provides that if Debtor fails to perform under the terms of the loan documents, Wells Fargo may:

> ... do and pay for whatever is necessary to protect the value of the Property and Lender's rights in the Property. Lender's actions may include ... paying reasonable attorney's fees ... Any amounts disbursed by Lender under this paragraph 7 shall become additional debt of Borrower secured by this Security Instrument. Unless Borrower and Lender agree to other terms of payment, these amounts shall bear interest from the date of disbursement at the Note rate and shall be payable, with interest, *upon notice* from Lender to Borrower requesting payment.[FN11]

FN11. Exh. C, **Mortgage** ¶ 7, emphasis added.

The order of application of payments collected under the Note is set forth in the **Mortgage**. The **Mortgage** provides that payments will be applied to: 1) prepayment charges; 2) funds necessary to satisfy property taxes or insurance premiums; 3) accrued interest; 4) accrued principal; and finally, 5) late charges.[FN12] The Note does not address how attorneys fees, costs, or fees other than late fees, property taxes, or insurance charges are to be satisfied.

FN12. Exh. C, **Mortgage** ¶ 3.

Specific provisions control over the general terms of an agreement.[FN13] Because the **Mortgage** specifically requires that any payment received must first be applied to satisfy outstanding escrow charges, accrued interest, accrued principal and late charges, in that order, the Court finds that these obligations must be satisfied prior to the satisfaction of any additional sums incurred in connection with protecting the property or enforcing the terms of the Note.

FN13. *See, e.g., Godchaux v. Conveying Techniques, Inc.*, 846 F.2d 306, 314 n. 17 (5th Cir.1988); *Carpenters Amended and Restated Health Ben. Fund v. Holleman Const. Co. Inc.*, 751 F.2d 763, 766 (5th Cir.1985);

Weingarten Realty Investors v. Albertson's Inc., 66 F.Supp.2d 825, 839 (S.D.Tex.1999).

The Note and **Mortgage** are governed by Louisiana law, which provides that attorney's fees and charges may be contractually authorized, but even if contractually allowed their assessment must be reasonable.[FN14]

FN14. *See, Central Progressive Bank v. Bradley*, 502 So.2d 1017 (La.1987); *Wuertz v. Tobias*, 512 So.2d 1209 (La.App. 5th Cir.1987); and *City of Baton Rouge v. Stauffer Chemical Company*, 500 So.2d 397 (La.1987).

Based on the law and analysis set forth below, the Court has applied the payments received on this debt and in accordance with the terms of the Note and **Mortgage**. It has also allowed or disallowed various charges, costs, or fees based on the terms of the Note and **Mortgage**; the accounting, testimony, and documentation supplied by Wells Fargo; Louisiana Law; and RESPA. The new loan history is reflected as Table I, attached to this Memorandum Opinion. The payments, costs, fees, and charges reflected on Table I are incorporated into this Memorandum Opinion as findings of fact.

Law and Analysis

[1][2] In this case, Debtor claims Wells Fargo abused its discretion when it imposed the fees, costs, and charges against her account. It, therefore, becomes necessary to examine what, when, how and why any particular charge, fee, or cost is assessed. In order to evaluate Debtor's claims, some background regarding the administrative***335** practices of Wells Fargo is necessary.[FN15]

FN15. A properly filed proof of claim constitutes *prima facie* evidence of the claim's validity and amount. An objecting party must present sufficient evidence to overcome the *prima facie* effect of the claim. If the objecting party succeeds, the creditor must prove the validity of the claim. *See, Matter of O'Connor*, 153 F.3d 258, 260 (5th Cir.1998) and Bankruptcy Rule 3001. Wells Fargo admitted at the September 25, 2007, hearing that there were errors in its proof of claim. In addition, the Court finds that inconsistencies between the proof of claim filed by Wells Fargo and its accounting substantiate this admission. The Court finds that this admission is sufficient to rebut the *prima facie* presumption and shift the burden to Wells Fargo.

Loan Administration

Ms. Miller explained that Wells Fargo administers 7.7 million home **mortgage** loans.[FN16] The management or administration of these loans is accomplished through several computer software packages, some owned by Wells Fargo, some licensed from third party vendors. Entries on the loan account are tracked with a licensed computer software platform commonly known as Fidelity **Mortgage** Servicing Package or Fidelity MSP. Fidelity MSP provides extremely sophisticated computer software for the management of home **mortgage** loans and is one of the largest providers of this service nationally. When a payment is received on a **mortgage** loan, it is entered into the Fidelity MSP system and then deposited. Fidelity MSP applies the payment to a borrower's account; in this case, satisfying outstanding fees and costs first.

FN16. *See,* December 4, 2007, Tr. T. 18:14-147:13 for Ms. Miller's description of Wells Fargo's procedures.

In this Court's experience, virtually every home **mortgage** executed in the United States contains provisions that determine when payments are due, when they are considered late, what fees or charges may accrue if late, when a default can be declared, the remedies available on default, and which collection fees or charges are recoverable after default. In addition, most notes and **mortgages** provide fairly clear directives regarding the application of payments between principal,

accrued interest, fees, costs, and amounts due to satisfy insurance and property taxes. Mercifully, most home **mortgage** loans have relatively standard, predictable language. However, the right to assess certain charges or fees on late payment or default is often at the discretion of the holder of the note. How this discretion is exercised is subject to guidelines not contained in the note or **mortgage**.

In this Court's opinion, the exercise of that discretion may be impacted by the relationship between the holder of the note and the party that administers its collection. In the present financial market, almost every home **mortgage** loan is packaged with thousands of other loans and sold to investors assembled on Wall Street. The securitization of **mortgage** loans allows the original lender to immediately recover the amounts lent, providing it with liquidity and reducing its risk of default. The investors that acquire these bundled loans or portfolios are most often not banks or credit unions, the traditional members of the lending community. Instead, they are investment or brokerage houses; insurance companies; hedge, pension, or mutual funds; and other investment groups. They then hire a loan service provider to administer the loan portfolio.

The securitization of home **mortgage** loans has divorced the lending community from borrowers. Not only are the new holders of the **mortgage** notes nontraditional lenders, but a **mortgage** service provider*336 is a buffer in the relationship between lender and borrower. The holders of notes do not see themselves as lenders, but investors in an asset. They have little interest in the relationship between lender and borrower except as it might affect their return on investment.

Mortgage service providers administer notes for a fee. The terms of their agreements with investors, as well as the guidelines the investors set for administration of the loan, have ramifications for the borrower. Most servicing agreements allow the service provider to charge a flat fee, usually stated as a percentage of the portfolio under administration. All principal and interest payments collected are paid to the note holder. Usually, fees are additional income to the service provider while costs are simply a pass through, or reimbursable items. In addition, servicers invest the "float," or funds held on deposit, and retain earnings on that investment. Therefore, amounts held in escrow or in debtor suspense are an addition source of revenue for the servicer. While a **mortgage** service provider and note holder's interests are closely aligned, they are not perfectly aligned. It is in a **mortgage** service provider's interest to collect fees and hold funds, both of which generate additional income for its account. Conversely, a note holder or investor is interested in the collection and application of payments to principal and interest.

Since many fees and charges are imposed at the discretion of the lender and must be "reasonable" under the law, servicing agreements may establish guidelines for the exercise of that discretion.[FN17] In this case, Wells Fargo did not produce its servicing agreement. Therefore, the exact terms of its relationship with Lehman Brothers and the financial incentives available to Wells Fargo are not in evidence.

> FN17. In many cases the service agreements will simply refer to a published set of guidelines used by federal agencies.

In any event, Ms. Miller testified that once the guidelines for management of a loan are determined by the loan's investor, Fidelity MSP imports the guidelines into its internal logic.[FN18] For example, if investor guidelines suggest the assessment of a late charge every time a payment is fifteen (15) days past due, the Fidelity MSP system will automatically assess a late charge if payment is not posted to the account within fifteen (15) days of its due date.

> FN18. *See, supra,* note 16.

Other charges or fees are assessed against the account by virtue of "wrap around" software packages maintained by Wells Fargo. These software packages interface with Fidelity MSP and implement decisions based on their own internal logic. For example, if a borrower is delinquent in making a payment, Wells Fargo's computer system may automatically send a demand letter to the borrower. Guidelines might also recommend a property inspection if a loan is past due. If such an event occurs, the computer system will automatically generate a work order for an inspection, allow the vendor to upload the completed report, generate a check to the vendor for the inspection, and charge the customer's account-all without human intervention.

When a loan is involved in foreclosure, bankruptcy, or other litigation, Wells Fargo manages that loan through its Bankruptcy Department located in Fort Mill, South Carolina. Ms. Miller is the Vice President who oversees this department of 375 people.

The transfer of loans involved in a bankruptcy to Ms. Miller's department begins with America InfoSource ("AIS"), a third ***337** party vendor hired by Wells Fargo to provide daily information regarding new bankruptcy filings that may potentially involve Wells Fargo loans. At the inception of this relationship, Wells Fargo supplied AIS with a listing of every credit relationship it held or serviced, as well as certain fields of information (debtor's name, address, social security number, etc.) on each borrower. The information is updated daily as Wells Fargo acquires new relationships and old ones are closed.

AIS scans the electronic databases of all the bankruptcy courts in the country and attempts to match debtors to any of the information supplied by Wells Fargo. If a match is made for one field of information, Wells Fargo is immediately notified. The notification provides Wells Fargo with the debtor's name, address, social security number, the bankruptcy court, case number, chapter type, and judge assigned. Once notified, Wells Fargo verifies that the debtor is a borrower. To verify the "match," Wells Fargo scans the information supplied by AIS against its own records. Ideally, three fields or pieces of information will be verified and matched.[FN19] If a three field match is not secured by Wells Fargo's internal computer system, the system will reject the borrower and a manual match will be attempted. This is one of the few times any human being touches or reviews a loan's electronic record.

> FN19. Wells Fargo's computer system for this function is called Hogan. Hogan will typically attempt to match the customer's name, address and social security number. If this does not result in a complete three field match, other file information may be used.

Once Wells Fargo's computers have verified the AIS borrower match, the program automatically activates a system within the Fidelity MSP software platform called a Bankruptcy Work Station ("BWS"). This sub-part of Fidelity MSP is allegedly infused with computer logic designed to manage a loan during a pending bankruptcy. The supervision of that loan then falls to Ms. Miller.

Once a borrower's status as a bankruptcy debtor has been confirmed, the Fidelity MSP/BWS automatically advises counsel for Wells Fargo when a loan is referred for legal action. Who is selected to represent Well Fargo is dependent on who owns the loan. If a loan is owned by Wells Fargo, it is automatically referred to one of its national counsel; either Brice or McCalla Raymer. If held by one of the federal agencies, Wells Fargo will refer the loan to a firm on an approved list supplied by the agency. If held by a private investment group, that group can specify counsel or can delegate the responsibility to Wells Fargo as the service provider. If the loan is managed by national counsel, local counsel are retained to physically file pleadings and make court appearances when necessary. Local counsel are not given access to either the electronic files or accounting history but receive all of their information from national counsel. They typically do not

have direct client access and may even be prohibited from contacting the service provider or note holder by their retainer agreements.[FN20]

FN20. *See, In re Parsley,* 384 B.R. 138 (Bankr.S.D.Tex.2008). Although the *Parsley* opinion involved Countrywide, it contains an excellent explanation of the typical relationship between national counsel and local firms with regard to their representation of parties in this industry. In this Court's experience, the relationships and practices are similar from service provider to service provider, note holder to note holder. Wells Fargo's testimony substantiates this belief.

> This Court has already remarked on the obvious problems with this system. Local counsel are rarely prepared to answer specific questions about the information contained in a proof of claim or a motion for relief from the automatic stay. They do not have access to either a loan history or the documents necessary to substantiate any charge or discrepancy. Typically they assume the role of dutiful scribes, taking notes on the Court or Debtor's questions and promising to deliver documents or answers at the next hearing. This practice is both wasteful and inefficient. It also does not comport with the Canons of Ethics or the Local Rules of the District Court. *See, generally,* Bankruptcy Rule 9011, E.D. La. Loc. R. 11, Louisiana State Bar Assc. Rules of Professional Conduct, Art. 16, Rules 1.3, 5.1, 5.4, and 5.5; *see also, In re Porcheddu,* 338 B.R. 729 (Bankr.S.D.Tex.2006); *In re Ulmer,* 363 B.R. 777 (Bankr.D.S.C.2007); *In re Osborne,* 375 B.R. 216 (Bankr.M.D.La.2007); and *In re Parsley, supra.*
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> Four different firms have appeared for Wells Fargo in this case alone. Only Brice, Wells Fargo's national counsel, appears to have the information or access necessary to address the issues presented in this case. It is worth noting that despite Debtor's Objection to the proof of claim prepared and signed by Brice, they did not make an appearance in this matter until ordered to do so by this Court.
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> Since this Court's decision in *Jones v. Wells Fargo,* 366 B.R. 584 (Bankr.E.D.La.2007), Wells Fargo has represented that it will no longer utilize national counsel for bankruptcy or foreclosure files. Having realized the significant difficulties that were created by its former employment practices, Wells Fargo has elected to employ one firm in each state that will handle all matters involving borrowers located in that state. Local counsel will have the same access to Wells Fargo's computer systems heretofore only enjoyed by national counsel. However, this case was handled under the prior system. Wells Fargo selected its national counsel to represent it in connection with this case. They in turn employed local attorneys: one firm to handle the foreclosure, another firm the bankruptcy, and still another the litigation over the Objection to the proof of claim.

***338** Once the BWS notifies Brice that it has been retained, Brice is given immediate access to Wells Fargo's mainframe computer platform. In addition, the computer automatically searches different parts of Wells Fargo's multiple software packages and compiles a storage file where counsel can obtain all the information necessary to perform his or her duties. For example, when a loan is owned or serviced by Wells Fargo, the documents evidencing the initial loan transaction are kept in pdf format under a software platform called FileNet. FileNet is scanned for copies of the note, **mortgage**, recordation certificate, and other relevant closing documents. Those electronic files are then assembled in a storage file for counsel's use. The Fidelity MSP system, containing the loan's account history, is open to review by counsel. iClear, another computer program, contains copies of the invoices that represent costs billed to the loan.[FN21]

FN21. December 4, 2007 Tr.T. 53:24-55:25. It does not appear that copies of the inspection reports are available to counsel as they are kept with property management, nor are other reports such as brokers price opinions or

appraisals made available.

The first task of counsel, once a bankruptcy is filed, is to prepare a proof of claim. Because counsel has direct access to Wells Fargo's complete loan accounting, as well as the documents that support its debt and security interest, national counsel prepares the proof of claim without ever speaking to a Wells Fargo representative. In fact, Wells Fargo testified that it does not review any proof of claim prior to its filing. Wells Fargo's testimony was that *only after filing* was the proof of claim reviewed for accuracy.[FN22] Other legal assignments are executed in a similar fashion.

FN22. December 4, 2007 Tr.T. 57:2-15.

For example, when a loan goes into postpetition default, the BWS automatically notifies legal counsel of this fact. Legal counsel then prepares a motion for relief utilizing information obtained from the Fidelity MSP system and BWS, including attaching any necessary documents to support***339** the motion and the financial allegations of the default. The motion is typically filed without Wells Fargo's input or review. Wells Fargo testified that it does not maintain records of the legal documents filed on its behalf but relies exclusively on counsel for this service.

The logic utilized by the BWS in its decision making process is both detailed, court, and *even judge* specific. For example, if under local rules, or even local custom of a particular district or judge, a motion for relief may not be filed until the loan is at least ninety (90) days past due, the computer can be adjusted to notify counsel of the need to file a motion for relief when the debtor's account is past due ninety (90) days rather than the typical sixty (60). Other adjustments to the system can be made to eliminate fees or charges prohibited by a particular jurisdiction or judge within a jurisdiction. In summary, Fidelity MSP and BWS allow Wells Fargo to input the individual demands of a particular investor or note holder as well as a court district or even judge.

Debtor has raised several objections to the administration of her loan by Wells Fargo. The objections involve the imposition of inspection fees; appraisal and broker's price opinion fees; sheriff's costs and commissions; legal fees both incurred both prior to and after bankruptcy; the calculation of Debtor's escrow balance; and language included in Wells Fargo's proof of claim which Debtor maintains is illegal and inappropriate. Debtor complains that the fees, costs, and charges claimed were erroneously imposed, unreasonable, inaccurate and/or not legally due.

In addition, Debtor complains that Wells Fargo failed to properly notify her of changes in the amounts estimated to cover demands against her escrow account and interest rate. Debtor also complains of Wells Fargo's failure to notify her both prior to filing and subsequently thereafter of any costs, charges, or fees imposed on her account. Finally, Debtor complains that Wells Fargo's application of her payments is contrary to the terms of the Note, **Mortgage**, and applicable law.

Failure to Notice

[3] In the current case, after the Objection was filed, Wells Fargo amended its proof of claim yet again. The Second Amended Proof of Claim, filed on September 9, 2007, alters the First Amended Proof of Claim by changing the language in "Section 3. Other Information." The new language provides, in part:

A. Claimant is entitled, and reserves the right to receive all amounts which are payable after the petition date under the loan documents described above ... including the following payments upon and additions to the total debt:

1. Regular monthly installments as are provided by the loan documents, subject to future adjustments for escrow deposit

or interest rate changes.

2. As of August 20, 2007, regular monthly payments are due for the months of September 1, 2007 in the amount of $697.51, late charges have been accrued in the amount of ($0.00), and reasonable and necessary attorney's fees have been incurred for creditor's representation in this proceeding.

3. Late charges, reasonable attorneys' fees, and other amounts of the type described in Section 1A above, as provided for in the loan documents.

This Court's procedures, set forth in Administrative Order 2008-1, dictate the proper method for requesting payment of post-petition fees or costs. The Court finds that this disclaimer is impermissible and notes that Wells Fargo will be subject to sanctions if it attempts to collect any ***340** costs or fees in contravention of the Administrative Order or places this language in any proofs of claim on file in the District.

With regard to the noticing of prepetition charges and costs, this Court previously addressed Wells Fargo's questionable loan administration practices in *In re Jones*, 366 B.R. 584 (Bankr.E.D.La.2007)("*Jones I*") and *In re Jones*, 2007 WL 2480494 (Bankr.E.D.La.2007)("*Jones II*"); both opinions were entered in the same adversary. The Debtor in *Jones* owned a home that was encumbered by a **mortgage** held by Wells Fargo. The debtor sold his home in an attempt to use the equity to payoff the amounts due under his plan. The payoff provided by Wells Fargo was considerably larger than the debtor expected, however. As a result, the debtor filed an adversary after Wells Fargo refused to provide a detailed explanation of the charges and fees contained within the payoff. In *Jones I*, this Court thoroughly reviewed Wells Fargo's accounting and determined that $24,450.65 more than was actually due was collected by Wells Fargo at closing. The discrepancy between Wells Fargo's payoff and the amount actually due was the result of a number of errors. First, with regard to the prepetition debt calculation, Wells Fargo improperly reported prepetition foreclosure costs. Second, Wells Fargo assessed additional prepetition charges without amending its claim, notifying the debtor, Court, or Chapter 13 Trustee. Third, Wells Fargo improperly calculated the postpetition debt by failing to show the debtor's account as current on the petition date, an error which caused Debtor to pay thousands of dollars in additional interest. Fourth, Wells Fargo did not report or request Court approval for postpetition fees assessed against the debtor's account and unknowingly paid by debtor from either Trustee or regular installment payments.[FN23]

FN23. The Court conducted a hearing on the propriety of sanctions, at which time Wells Fargo offered, *in lieu* of sanctions, to impose certain procedures to notify debtors, counsel, and the Chapter 13 Trustee of fees and costs incurred postpetition. This Court accepted Wells Fargo's offer, and in *Jones II*, set forth the procedures by which Wells Fargo is to handle its loans in cases pending before this Court. *In re Jones*, 2007 WL 2480494, at *5-6 (Bankr.E.D.La.2007). This procedure was implemented by Administrative Order 2008-1. Wells Fargo is in the process of complying with this judgment and a filed a Statement of the Accrual of Post Petition Charges into the record of this case on February 28 and 29. See Docket nos. 56-57. The Statement reflects that no fees, costs, or charges have been incurred on this account since the Petition date.

The testimony in *Jones* indicated that this conduct was not unique to Jones' account but systematic. One of the primary problems discovered in *Jones* was Wells Fargo's failure to notify borrowers of the assessment of fees, costs, or charges at the time they are incurred. This practice exists during all stages of the loan's administration and is not peculiar to loans involved in a bankruptcy. As a result of its previous experience, the Court specifically directed Wells Fargo to submit into evidence copies of any and all notices to Debtor of fees, costs, or charges incurred.

Wells Fargo supplied a listing of computer generated tasks allegedly applicable to this account.[FN24] The list provides a date, letter or task number, and description of the event. Copies of the letters allegedly sent were not produced nor were any form letters made available to the Court.[FN25]

FN24. Exh. A.

FN25. An exception to this general statement involves escrow and change of interest rate notices which were produced.

***341** According to the list, no correspondence was forwarded to Debtor during the first year of her loan's administration. On December 15, 2000, Debtor was fifteen days late on her monthly installment payment. According to Wells Fargo's accounting records, it assessed a late fee of $27.71 on December 18, 2000, without notice to Debtor. On January 3, 2001, an acceleration letter was allegedly forwarded. What demands or information it included are unknown. On the same day a "30 day solicitation" was performed. Again, what this involved is unclear. Debtor made a payment on January 12, 2001, in the amount of $654.11. Wells Fargo applied the payment to the December installment, then assessed and paid itself a late fee on that installment. The remainder, $72.29, was placed in a suspense account.

On January 17, 2001, the list reflects a "15 day delinquency." It was followed by a "22 day delinquency" on January 23, 2001. Also provided on that date was a "Short Pmt in Suspense" task. Again, no evidence was presented as to the nature or content of these tasks. A review of the entire list indicates that many of the entries that appear are not correspondence, but tasks undertaken by Wells Fargo employees or counsel. Therefore, the Court cannot conclude that the above described delinquencies are notices of past due account delivered to Debtor.[FN26] The opposite conclusion is more likely, given that several other entries designate "letter" when correspondence is sent.[FN27]

FN26. See for example, entry on 10/30/01, "Active Foreclosure" obviously indicating that the file had be transferred for foreclosure action; or entry on 12/27/01 "Foreclosure Payoff." Was this prepared at the Debtor's request or more likely, for Wells Fargo's counsel who needed the payoff for bidding purposes at the pending foreclosure sale in December of 2001?

FN27. See for example, entry on 1/3/01, "Acceleration letter;" or the 5/16/02 entry, "Search letters sent to Tax Auth." On 9/21/01 Wells Fargo's listing reflects an "ARM change notice."

On January 18, 2001, Debtor's account was charged an additional $27.71 late fee because her payment on January 12th had been applied to the December 1, 2000, installment leaving her January 2001 installment past due. On February 1, 2001, a "30 day solicitation" was allegedly performed. The nature of that solicitation is unknown. On February 9, 2001, another "Short Pmt in Suspense" task is specified on the listing, presumably, a reference to the $72.29 still held in suspense from the January payment. This is the last time Wells Fargo's task records reflect any entry with regard to the Debtor's suspense account despite almost continual use throughout the remaining period of the loan's administration.

On February 12, 2001, Debtor forwarded another payment of $654.11. Wells Fargo applied the payment to the January installment and the late fee assessed on that payment. The remainder of the funds were placed in suspense. On February 17, 2001, a "15 day delinquency" is noted of unknown content, followed by a "22 day delinquency" on February 23, 2001.

For the remaining year, Wells Fargo appears to have entered 15, 22, and 30 day delinquencies as well as acceleration let-

ters. Nothing produced indicates that Debtor was advised that late fees or other charges were being imposed on her account or that funds were being held in suspense rather than being applied to reduce her past due installment. Ms. Miller testified that Debtor was not notified of ***342** past due payments, the imposition of late charges, or inspection fees.[FN28]

FN28. December 4, 2007, Tr.T 221:17-224:5.

Between December 2000 and the filing of the first bankruptcy, approximately one year, thirteen (13) late fees were charged, without notice, for a total of $360.23. Each of these fees were deducted from Debtor's monthly payments, again without notice, deepening her default and ultimately triggering seven (7) property inspections for which Debtor was charged an additional $15.00 each. Again, these charges were assessed against Debtor's account and paid from the monthly installments she was forwarding without notice. The total cost to Debtor for one missed $554.11 installment in December of 2000 was $465.36 in late fees and property inspection charges. Debtor paid an additional $400.00 towards her past due balance in the four months following her default, all of which was promptly applied to satisfy late fees and property inspections charges rather than the past due interest and principal installment as required by the **Mortgage**. Although Debtor paid her monthly principal and interest payments throughout 2001, plus $400.00, Wells Fargo showed her $619.47 in arrears by October, 2001.

Debtor's October installment payment appears to have been returned by Wells Fargo.[FN29] Instead of applying her payment, Wells Fargo placed the loan in foreclosure and actively returned at least one other tender in November, 2001.[FN30] Putting aside late fees and inspection charges, Debtor was only $154.11 in arrears on her monthly installment at the time her loan was referred for foreclosure.

FN29. Exh. A, entry 10/12/01 "Return Funds."

FN30. Exh. A, entry 11/19/01 "Return Funds."

By the time Debtor's husband filed his case on January 11, 2002 ("2002 Bankruptcy"), Wells Fargo claimed attorney's fees and costs of foreclosure amounting to $2,218.33 in addition to missed installment payments, inspection fees, and late charges. The proof of claim filed in that case itemizes a past due balance of $6,098.10.

Following the dismissal of the 2002 Bankruptcy[FN31] and during the entire administration of the loan thereafter, Wells Fargo appears to have had little or no contact with Debtor. Save for the delivery of incoherent escrow adjustments and letters regarding a change in interest rate, none of the thousands of dollars in fees, charges, or costs were noticed to Debtor.[FN32] The Court concludes, just as in *Jones,* that Wells Fargo has a corporate practice that fails to notify borrowers that fees, costs, or charges are being assessed against their accounts. This failure is fatal to Wells Fargo's decision to pay itself from payments sent by Debtor for other purposes and is contrary to the requirements of the Note and **Mortgage**.

FN31. Case No. 02-10228 was dismissed on January 29, 2004.

FN32. Wells Fargo did notify Debtor, in accordance with the terms of the Note, of any adjustment to her interest rate. It also frequently reviewed and adjusted Debtor's escrow account. Unfortunately, the escrow notices were both confusing and in error.

The Triumph of Computer Logic Over Human Logic

Property or "Drive By" Inspections

[4] As previously indicated, the Fidelity MSP and BWS will apply computer logic to certain events, triggering automatic action on a loan file. Wells Fargo testified that in this case the decision paradigm allowed for property inspections if the loan ***343** was twenty (20) days past due. According to Wells Fargo, this principle controlled the loan's management both prior to and after bankruptcy filing. Wells Fargo has produced 43 of the 44 inspection reports prepared on Debtor's property.[FN33] *Since Debtor's first missed payment in December of 2000, Wells Fargo has inspected this property on average every 54 days.*

> FN33. The report for the inspection allegedly performed on 7/14/06 has not been produced and Wells Fargo admits it cannot be substantiated.

Wells Fargo argues that the decision to conduct drive-by inspections every time a loan is twenty (20) days past due is reasonable. It maintains that once a debtor is past due, industry experience supports the belief that the collateral is often at risk. As such, inspections are ordered to guard against a potential loss. Wells Fargo further argues that the charges are minor and constitute a reasonable exercise of discretion to manage the risk.[FN34]

> FN34. While a $15.00 inspection charge might be minor in an individual case, if the 7.7 million home **mortgage** loans Wells Fargo services are inspected just once per year, the revenue generated will exceed $115,000,000.00.

Wells Fargo requests blanket authority to charge every debtor or borrower a fee for a drive-by inspection no matter what the circumstances, provided, in Wells Fargo's view, the loan is twenty (20) days past due. While this might seem both logical and practical at first blush, in practice it is much less so.

In this case, Debtor fell one month behind in December of 2000. Despite Wells Fargo's assertion that property inspections are always ordered when a loan is twenty (20) days past due, this does not appear to be the case. Although Debtor was one month past due in December 2000, and according to Wells Fargo remained so for the rest of 2001, property inspections were not ordered until July 2001.[FN35] What risk suddenly existed in July 2001 was not explained, but it is clear that Wells Fargo does not have a policy of automatically inspecting properties once a loan is twenty (20) days past due. The six month delay in ordering an inspection calls into question Wells Fargo's assertion that loans twenty (20) days past due constitute a risk to the note-holder justifying immediate inspection.[FN36]

> FN35. Wells Fargo represented that it did not fully automate property inspection requests until July, 2001. December 4, Tr.T. 154:22-155:17.

> FN36. For example, in 2003, Debtor fell one month behind but property inspections were not ordered until seven (7) months later. Ten (10) inspections were then ordered over a six (6) month period despite Debtor's continuing payments on a monthly basis. Exh. H.

Once the Fidelity MSP system went into action, a drive by inspection was ordered, performed, and its cost charged to Debtor's account. The first report revealed that the property was occupied, well maintained, and in good condition.[FN37] The next month, Debtor paid her monthly installment. However, upon its receipt, the computer posted the payment to the previous month's installment. The computer then read a delinquency for August, now twenty (20) days past due. The Fidelity MSP system dutifully recognized the triggering event and ordered yet another drive-by inspection which was performed and charged to Debtor. This chain of delayed payment continued for eight (8) months until the 2002 Bankruptcy

was filed. Each month, a drive-by inspection was ordered, performed, and charged to Debtor's account.

FN37. Exh. E.

*344 All eight (8) inspections indicated that the property was occupied and well maintained.[FN38] Because the vendor uploads the finished report directly into Wells Fargo's computer mainframe, the system, rather than a person, checks for the condition of the property and alerts Wells Fargo if a property appears to be at risk.[FN39] The actual electronic file of the report is stored in the Property Management Department of Wells Fargo but never appears to be read by anyone.

FN38. Exh. E.

FN39. December 4, 2007, Tr. T. 86:3-87:18.

All forty-three (43) reports describe the property as being in good condition. Further, since most were obtained while the Debtor was making regular monthly payments, the paradigm that signaled a risk to the property was imperfect if not inapplicable. In addition, the inspections were of little use to Wells Fargo because *a review of the inspections reveals that many were performed on property other than Debtor's.*

For example, the inspection completed on July 5, 2001, indicates that Debtor's house is of brick construction, while the inspections completed from August to February of 2002 describe a house of frame construction. Obviously, two different properties were inspected. However, since Wells Fargo blindly relied on a computer to both order inspections and evaluate their conclusions, it did not know that the erroneous inspections it received were of no benefit.[FN40] The failure of Wells Fargo to notice such significant inconsistencies evident on the face of the reports further confirms that they were not reviewed by any human being. If Wells Fargo did not believe the reports were important enough to read, this calls into question the importance of obtaining the reports in the first place.

FN40. Exh. E. This discrepancy is found throughout the reports. Twenty-four (24) reports describe Debtor's home as brick while sixteen (16) describe it as frame construction.

Assuming the inspections were properly performed, the other troubling point raised is the frequency of their performance. Forty-four (44) inspections were ordered on one property over a period of seventy-nine (79) months. Every report indicates that the property inspected was in good condition. Why was there a need to continuously reinspect? No answers were supplied. In short, the Court concludes that Wells Fargo's computer system automatically generates these inspections for no discernable purpose or benefit to the lender.

The Court can only conclude that the necessity of performing drive-by inspections is not critical to the administration of a loan. If the first report reveals a property in fair to good condition, nothing justifies, without further evidence of a problem, monthly inspections thereafter. The fact that Wells Fargo does not appear to read the inspections it orders further substantiates this finding.

Paragraph 9 of the **Mortgage** provides that "[l]ender or its agent may make reasonable entries upon and inspections of the Property. Lender *shall* give Borrower notice at the time of or prior to an inspection specifying *reasonable cause* for the inspection."[FN41] Ms. Miller testified that Wells Fargo does not send borrowers notice when it performs a property inspection.[FN42] The Court has already found that Wells Fargo does not notify the borrower that she has incurred a charge for this service.

FN41. Emphasis added.

FN42. December 4, 2007, Tr.T. 92:1-13.

***345** Wells Fargo is entitled to recover necessary costs incurred in connection with the protection of its rights in the property. The **Mortgage** specifies that the disbursements shall be payable *upon notice from Lender to Borrower.*[FN43] Even after notice, the assessment of disbursements attributable to protect the property must be reasonable. In this case, Wells Fargo's imposition of inspection fees was neither noticed nor reasonable.

FN43. Exh. C, **Mortgage** ¶ 7.

Broker's Price Opinions/Appraisal Charges

[5] Wells Fargo ordered nine (9) broker's price opinions ("BPOs"), originally characterized as appraisals in Wells Fargo's proof of claim, on this property in the same seventy-nine (79) month period. Only two BPOs were produced, although invoices delivered by Premiere Asset Services ("Premiere") to Wells Fargo for every BPO were entered into evidence. None of these charges were noticed to Debtor at the time they were incurred.

Wells Fargo testified that when a property is placed in foreclosure, a BPO is ordered.[FN44] Wells Fargo testified that this property was in a continuous foreclosure proceeding from 2002 until 2007. Multiple BPOs were required because Debtor (or her spouse) filed for bankruptcy relief multiple times. Each time a bankruptcy case was filed, the foreclosure sale was stopped. However after each case's dismissal, the foreclosure sale was rescheduled and a new BPO was necessary.

FN44. In Louisiana, because all foreclosures are by judicial process, if a lender wishes to preserve a deficiency claim, the sheriff must begin the bidding at the initial public auction at 66 2/3% of appraised value. Prior to sale, both borrower and lender are entitled to submit evidence of appraised value. If the values differ, the sheriff will appoint a third party appraiser to reconcile the difference.

Debtor did not contest the logic of this explanation, but a review of the account indicates that Wells Fargo ordered many more BPOs than were necessary. Over the life of the loan Wells Fargo charged Debtor:

$125.00	1/09/02
125.00	3/02/04
125.00	9/30/04
125.00	9/30/04
125.00	9/12/05
125.00	9/12/05

95.00 3/30/06
95.00 3/30/06
390.0 3/06/07
0

The BPOs performed in January 2002 and March 2004 appear to have been completed while Wells Fargo was actively foreclosing on the property.[FN45] The two BPOs in September of 2004 were completed while Debtor had a bankruptcy pending and an adequate protection order in place.[FN46] No explanation as to the necessity of these charges was offered and the reports were not produced. In addition, the charges appear to be duplicative.

FN45. These are the only two BPOs produced. Exh. G.

FN46. One of these charges appears to be a duplicate of the other. Wells Fargo may have discovered this sometime later when it reviewed the file for foreclosure. A reversal of costs was entered six months later, in March of 2005, for $125.00. Exh. H.

In September of 2005, two identical BPO charges appear on the account. While one charge appears to be duplicative of the other, it is also unlikely that inspections could have been performed at this time given that Jefferson Parish was under an evacuation order due to Hurricane Katrina and closed to all but emergency personnel. Again, copies of the reports were not produced.

In March of 2006, two identical BPO charges again appear. Both, along with ***346** the BPO charges in September of 2005 and the property inspections ordered post Hurricane Katrina seem to have been reversed on October 13, 2006, due to the "hurricane."[FN47] The last BPO, in March of 2007, was after the foreclosure on Debtor's home and when the property was owned by Wells Fargo. This charge would not be attributable to Debtor. The Court finds that the only two BPOs properly ordered under Wells Fargo's stated policies were the BPOs ordered in January 2002 and March 2004.

FN47. Exh. H. Entries on 9/12/05, 3/30/06, and $15.00 of inspection charges on 1/12/06, 2/21/06, 3/14/06, 4/11/06, 5/19/06, 6/12/06, 7/05/06, 7/14/06, 8/3/06, 9/8/06, as well as a trip expense charge for property preservation on 10/10/06 were written off on 10/13/06 for $625.00. Costs of photographs totaling $12.00 remained on the account.

[6] An additional objection to the BPOs was asserted by Debtor regarding the amounts charged by Wells Fargo. Wells Fargo's testimony at the trial was that BPOs were secured from Premiere, an independent entity, although affiliated with Wells Fargo. Copies of the invoices representing the amounts "paid" to Premiere were produced. Wells Fargo admitted that the invoices included profit for Premiere although it did not know how much. Wells Fargo insisted that all costs are "passed through" to a borrower's account at the amount actually billed by the third party.

Following this trial, Wells Fargo stipulated in another matter that Premiere is *a division,* not an affiliate, of Wells Fargo, and "invoices" produced as evidence of the costs associated with the acquisition of BPOs are internal memos between departments allocating costs of administration. While it remains true that the BPOs are performed by third party vendors, the amount paid is not what is reflected on the "invoices." Wells Fargo's national counsel has represented to this Court that only $50.00 of each invoice represents the actual cost incurred by Wells Fargo for a BPO.[FN48] The remaining amounts, approximately $880.00 in total, were added to the actual costs by Wells Fargo. The Court concludes that these

additional charges are an undisclosed fee, disguised as a third party vendor cost, and illegally imposed by Wells Fargo.

FN48. *See, In re Fitch, Case. No 04-14039.* February 13, 2008 Tr.T. 5:10-6:21.

Escrow for Insurance and Property Taxes

[7] At closing, borrowers on home **mortgage** loans must typically prove that adequate insurance exists against the property's loss. Property taxes must also be current. Most **mortgage** lenders demand at closing assurances that future insurance premiums and property taxes will be paid. Typically, this is accomplished through the use of escrow accounts. Debtor's Note and **Mortgage** are no exception. The **Mortgage** allows Wells Fargo to set up an escrow account if Debtor does not maintain adequate insurance. Debtor's loan was not originally set up to include a monthly escrow payment.

In year two, Debtor failed to maintain property insurance. Wells Fargo sent several notices reminding Debtor to provide proof of insurance and warning that Wells Fargo would "force-place" insurance on Debtor's behalf if proof of insurance were not supplied.[FN49] Despite these warnings, Debtor failed to secure insurance on her home. On March 11, 2001, Wells Fargo paid for a force-placed property insurance policy at a cost of $651.00. Because there was no escrow fund from which to ***347** make this payment, Debtor was immediately responsible for reimbursing Wells Fargo for this expense.

FN49. Exh. A; December 4, 2007 Tr.T. 162:3-163:15.

On April 13, 2001, Wells Fargo sent Debtor a letter notifying her that $144.66 would be added to her monthly installment to reimburse Wells Fargo for this advance.[FN50] Because force-placed insurance was necessary, Wells Fargo also exercised its right to escrow for estimated future premiums accruing at the policy's annual renewal date.[FN51]

FN50. The **Mortgage** provides that should Wells Fargo advance funds for insurance or property taxes, it may at its discretion amortize the amounts due from the borrower over twelve months. Through this notice, Wells Fargo elected this option of repayment.

FN51. Although the policy was not placed until March 2001, the policy period ran from November 2000 (the date Debtor's original policy terminated for non-renewal) until November 2001.

The monthly escrow amount was allegedly calculated by adding the estimated premium for the next year's renewal to the amounts already paid. In order to ensure that the escrow account would always have a "cushion" over and above that needed to pay for next year's insurance premium, two additional months worth of escrow were collected.[FN52] To arrive at a borrower's monthly escrow payment, the total of these sums is divided by 12.

FN52. Pursuant to RESPA, a lender may increase the annual amounts held on deposit in escrow by 1/6 of the estimated amount due. Section 10, RESPA. This arguably would keep Debtor's escrow account in positive balance even if the premium for the following year increased. However, since the change in Debtor's monthly payment did not take effect until June of 2001, even at its inception, the calculations used by Well Fargo would render Debtor's escrow account short in November 2001 when the next premium payment was due.

Beginning with the June 2001 payment, Wells Fargo increased Debtor's monthly installment by $144.66.[FN53] This increase does not comply with the terms of the Note, **Mortgage**, RESPA, or the facts of this case. The Court calculates the

amounts required were instead $84.22 per month.[FN54]

FN53. Exh. B.

FN54. Mathematically the amounts owed included $651.00 for the 2001-2002 premium and $651.00 estimated as necessary to satisfy the 2002-2003 premium. To this sum is added $108.50 (calculated as (($651.00 divided by 12) x 2)). Then the total is divided by 12. The result is a monthly escrow payment of $117.54. However, since Wells Fargo should have held $399.89 in Debtor's suspense account at the time, the total due should have been reduced by the balance in Debtor's suspense account. The over-payments reduced Debtor's monthly escrow payment to $84.22.

Debtor did not make the additional $144.66 per month payments. Instead, she continued to make regular monthly principal and interest payments of $554.11.[FN55] Wells Fargo instituted foreclosure proceedings in October of 2001 and Debtor's husband filed the 2002 Bankruptcy in January 2002 after their payments for the October and November installments were refused.

FN55. Debtor paid at least $554.11 every month from January 2001-November 2001. In September of 2001 her entire payment was placed in suspense and remained unapplied as late as January 2002 when the bankruptcy was filed. Her October and November 2001 payments were returned.

Shortly after the institution of the 2002 Bankruptcy, Wells Fargo again reviewed Debtor's escrow account. The renewal premium of $651.00 for the 2001-2002 policy year had been paid the previous December. Wells Fargo's records reflected a *negative* $1,111.08 balance in Debtor's account ***348** as of January 2002.[FN56] However, Wells Fargo's proof of claim filed in that proceeding reflected no past due escrow balance.[FN57]

FN56. Exh. H.

FN57. See Wells Fargo's Proofs of Claim filed in bankruptcy case no. 02-10228.

Under questioning by Debtor, Ms. Miller explained that when a proof of claim is generated, the computer will assume that any past due installment payments included in the proof of claim are current. This updates the escrow balance because the computer "assumes" that the portion of the past due installments attributable to escrow have been added to the balance on the petition date. The computer then compares the adjusted balance to the balance actually needed in the account and only schedules the difference as either a positive or negative on the proof of claim.[FN58]

FN58. December 4, 2007 Tr.T. 204:10-205:22.

Assuming this testimony is correct, the computer would have added $144.66 for the six (6) past due monthly installments included in the proof of claim. This would have adjusted the negative balance to $243.12, which together with $108.50, should have been reflected on the proof of claim. According to Ms. Miller, this sum should have been included on the proof of claim.[FN59] Obviously this was not done, calling into question Ms. Miller's understanding of how the Fidelity MSP/BWS system calculates escrow balances.

FN59. Under Ms. Miller's explanation, the negative balance was really $351.62 because an additional $108.50 (1/6 of the estimated yearly insurance premium) should have also been included.

But there are greater problems with Wells Fargo's calculations. As previously stated, the **Mortgage** requires Wells Fargo to apply any funds received first to the payment of outstanding escrow charges, then to accrued interest, then to outstanding principal. Only after all these amounts are paid can late fees or inspection charges be satisfied. Throughout 2001, and while a single monthly installment of principal and interest remained outstanding, Wells Fargo satisfied late charges and inspection fees instead of the principal and interest outstanding. Then, in March of 2001, when the first insurance premium payment was made, Wells Fargo again preferred the payment of late fees and inspection charges to that of insurance. The result is that Debtor's escrow account is wholly incorrect.[FN60]

FN60. Exh. H.

Table II reflects the Court's calculations for the escrow account after reapplying the payments as required by the **Mortgage** and using correct escrow calculations. The balance in January 2002 was negative $396.79, with escrow payments current through December 31, 2001. Assuming this discrepancy was added to the proof of claim, Debtor's new escrow payment would be $63.29 for 2002.[FN61]

FN61. *See* Table II.

In April of 2003, the escrow account was reviewed again. This time the premium paid in December of 2002 was $744.00. Wells Fargo calculated the necessary escrow payment at $158.48 per month. Wells Fargo advised Debtor that her new payment, beginning June 2003, would increase to $712.59.[FN62] The Court finds this is erroneous and holds that the proper amount was $625.15. The Court calculates that the escrow payment was actually $71.04.[FN63]

FN62. Exh. B.

FN63. *See* Table II.

*349 Wells Fargo apparently realized that it had over-calculated Debtor's escrow deficiency for 2003, because its next analysis, performed on May 4, 2004, calculated an estimated surplus of $784.68 rather than the allowable low point of $108.50. This dropped the monthly payments back down to $608.33 or $54.22 per month for escrow.[FN64]

FN64. Exh. B.

In April 2005, the escrow review changed Debtor's payment to $613.10.[FN65] In September 2005, her Note interest rate changed increasing her payment to $628.67.[FN66] The following August, the escrow review changed the payment to $623.91,[FN67] and in December 2006, the interest rate changed yet again modifying the payment to $675.79.[FN68] Finally, in June 2007, Wells Fargo changed Debtor's installment payment to $697.51.[FN69] Throughout this period, Debtor continued to pay $712.59 per month, at least until Hurricane Katrina occurred.[FN70] After August 2005, all payments ceased.

FN65. Exh. B.

FN66. Exh. D.

FN67. Exh. B.

FN68. Exh. D.

FN69. Exh. B.

FN70. Exh. H.

The correct escrow calculations based on the Note, **Mortgage**, and RESPA are set forth on Table II attached to these Reasons. These figures are used by the Court to amortize the loan rather than the incorrect calculations presented by Wells Fargo.

Late Charges

[8] Debtor missed her first installment payment in December, 2000, however, she resumed making timely payments on January 12, 2001. Wells Fargo assessed a late charge for the missed December, 2000, payment and it assessed a $27.71 late charge for each month that followed because Debtor remained contractually one month behind.[FN71]

FN71. Exh. H.

Paragraph 27 of the **Mortgage** allows the lender to assess late charges, and provides: "[b]orrower shall pay to Lender a late charge of 5 percent of any monthly installment of principal and interest as provided in the Note not received by Lender within 15 days after such installment is due." Additionally, Paragraph 7(A) of the Note provides that the Debtor will pay the "late charge promptly, but only once on each late payment." Louisiana law permits lenders to assess late charges if agreed to by the parties.[FN72]

FN72. *See*La.R.S. §§ 6:1097 and 9:3505.

As stated above, the **Mortgage** allows Wells Fargo to collect a late charge if a payment is more than fifteen (15) days delinquent. The **Mortgage** does not, however, allow Wells Fargo to assess a late charge for each subsequent month until the default is cured. If a borrower misses a payment in December 2000, but makes timely payments in January, February, and March of 2001, the borrower has missed one payment, not four. Wells Fargo, however, reads the relevant provision to allow an assessment for each month until the borrower cures the initial default. This interpretation is unreasonable.[FN73]

FN73. *See*12 C.F.R. § 227.15, which provides that "it is an unfair act or practice for a bank to levy or collect any delinquency charge on a payment, when the only delinquency is attributable to late fees or delinquency charges assessed on earlier installments, and the payment is otherwise a full payment for the applicable period and is paid on its due date or within an applicable grace period." While this section regulates consumer credit transactions, the Court cannot see how such an act is any less unfair when it concerns a real estate transaction.

***350** The result of Wells Fargo's position in this case is the imposition of a fine or penalty of $360.23 in late fees over a thirteen (13) month period for one $554.11 missed payment.[FN74] During this same period the past due principal balance on the missed payment continued to bear interest. Therefore, the imposition of the late fee was a penalty for the failure to pay accrued interest. The penalty amounted to an additional charge of 100% per annum.[FN75] The Court does not find this a reasonable interpretation of the contract's terms.

FN74. Added to this outrage are an additional $105.00 in inspection fees charged over seven (7) months. If Wells Fargo had followed its policies to the letter, this sum could have been as high as $195.00.

FN75. The imposition of a 100% penalty is particularly unreasonable given that Wells Fargo never notified Debtor that it had imposed a late fee and never demanded payment.

[9] Ambiguity in a contract is construed against the drafter; Wells Fargo.[FN76] The Note provides that only one penalty may be assessed for a missed payment. Given that the Debtor made regular installment payments throughout the life of her loan, the Court interprets the **Mortgage** to allow the assessment of one late charge on any payment not received within fifteen (15) days of the date due, but not for each and every month following until the initial default is cured.

FN76. *Matter of U.S. Abatement Corp.*, 79 F.3d 393, 400 (5th Cir.1996).

The Adequate Protection Order

[10] On April 20, 2004, Debtor filed her own bankruptcy ("2004 Bankruptcy").[FN77] Thereafter, Debtor failed to make postpetition payments to Wells Fargo for May 2004 through August 2004. A motion for relief was filed and a consent order entered allowing Debtor to add the "June 2004 through and including August 2004 post petition payments, late charges and attorneys fees and costs of $500.00 ..." to her plan. Wells Fargo represented that this totaled $2,859.99.[FN78] In reviewing this case, the Court noticed that Wells Fargo's amended proof of claim filed on November 4, 2004, itemized the new additions as follows:

FN77. Case No. 04-12889.

FN78. *In re Stewart*, Case No. 04-12889, P-43.

3 payments @ 608.33	$1,824.99
Bankruptcy fees	125.00
Property preservation fee	380.00
NSF fees	30.00
Attorney's fees	500.00
	$2,859.99

[79]

FN79. *In re Stewart*, Case No. 04-12889, claim No. 3.

The Court Order did not approve a bankruptcy fee of $125.00, nor did it approve property preservation fees of $380.00. Further, NSF fees were not disclosed or approved. Judging from its accounting, it appears Wells Fargo attempted to claim approximately twenty-six (26) prepetition property inspections dating back to October 2001 in this Adequate Protection Order without disclosing this to the Court or trustee.[FN80] This action was a clear violation of counsel's duty to be candid with the Court, but even more disturbing is Wells Fargo's willingness to take advantage of an elderly, *pro se*, widow. Needless to say, the additional charges are disallowed if not already stricken under the other findings contained in these Reasons.[FN81]

FN80. Exh. H.

FN81. The amounts due are reflected on Table IV.

***351** *Attorney Fees and Costs*

[11] Between Debtor and her deceased husband, her home has been the subject of a continuous foreclosure proceeding as well as three bankruptcies. As might be expected, Wells Fargo has incurred a considerable amount of attorneys' fees and costs since Debtor missed her first payment in December, 2000. Both the **Mortgage**, Note, and Louisiana law allow a lender to collect the reasonable fees and costs incurred by legal counsel in connection with enforcement of the lender's rights.

Wells Fargo has submitted invoices totaling $8,632.46 in fees and costs associated with foreclosure actions. The accounting also reflects a $614.91 refund by the sheriff that is not included in its counsel's invoices.[FN82] The costs of a separate eviction proceeding were also charged to Debtor. They amounted to $3,082.00, but on further research, Wells Fargo determined that a credit of $1,800.00 was due on these fees, reducing them to $1,282.00.[FN83]

FN82. Exh. H, entry November 14, 2005.

FN83. September 25, 2007 Tr.T. 10:15-18.

Wells Fargo also included two charges of $150.00 for bankruptcy fees and $500.00 for costs and fees associated with the filing of its Motion for Relief from the Automatic Stay.

The foreclosure fees and costs reflected in Wells Fargo's accounting and invoices, as of January 2002, match exactly the amounts set forth in its initial proof of claim filed in the 2002 Bankruptcy, with one exception. Legal fees were not charged at the rate of $900.00, but $775.00, according to counsel's invoice. The foreclosure fees, as of 2002, are therefore reduced to $1,968.33.

A charge of $150.00 was assessed for preparation of the proof of claim in the 2002 Bankruptcy. That fee was neither approved by the Court nor disclosed to anyone. It is therefore disallowed.

After the dismissal of the 2002 Bankruptcy, Wells Fargo rescheduled the property for sheriff sale. Additional fees and costs of $1,528.61 were incurred. Therefore, as of April 2004, the total fees and costs incurred were $3,496.94.

After the 2004 Bankruptcy was filed, another $150.00 proof of claim fee was assessed. This fee was not approved by the Court in the 2004 Bankruptcy and it is disallowed. Also, during the 2004 Bankruptcy, Wells Fargo filed a Motion for Relief from the Automatic Stay. A consent order for adequate protection was entered by the Court.[FN84] That Order awarded Wells Fargo fees and costs incurred in connection with the motion of $500.00. The Court recognizes that award as additional fees due Wells Fargo.

FN84. *In re Stewart,* Case No. 04-1288, P-43.

Following the dismissal of the 2004 Bankruptcy, the foreclosure process began anew. This time a sheriff's deposit of $1,500.00 was posted. Costs of $185.00 were billed against this deposit, then Hurricane Katrina interrupted the foreclos-

ure. On November 14, 2005, the sheriff refunded $614.91 to Wells Fargo of the $1,315.00 remaining on deposit. Since Wells Fargo did not supply an accounting of the $700.09 in additional costs incurred, they are disallowed. Allowed fees now total $4,181.94.[FN85]

FN85. Exh. F.

In late 2006, Wells Fargo rescheduled its foreclosure sale. Following the sale, counsel billed Wells Fargo an additional $3,772.61. The amounts reflected on counsel's statement cannot be reconciled with the previous invoices supplied. The statement*352 gives a credit for previous billings by the sheriff of $2,612.44 but the previous invoices indicate that $3,607.03 had been paid. Without detail on the credit, these invoices must be reduced to $2,779.02.[FN86]

FN86. Exh. F.

[12] In December 2006, Wells Fargo instituted an eviction proceeding against Debtor. Fees and costs billed to Debtor's account totaled $2,120.00. However, $1,800.00 was refunded and is due to Debtor. Wells Fargo also charged Debtor's account $450.00 for the cost of a title policy. This is not appropriate as the policy was acquired after Wells Fargo foreclosed on the property and this cost is associated with ownership, not collection. Wells Fargo also charged for clerk and sheriff's costs of $122.00 already included in the original $2,120.00 billed.[FN87] Total fees and costs allowed for the eviction are therefore $320.00.

FN87. Exh. F.

Total fees and costs as of March 2007 are:

Fees and costs 2002	$1,968.33
Fees and costs 2004	1,528.61
Bankruptcy Fees	500.00
Fees and costs 2005	185.00
Fees and costs 2006	2,779.02
Eviction	320.00
Total Fees and costs	$7,280.96

Suspense Accounts and the Application of Payments

Debtor's first payment was due January 1, 2000, in the amount of $544.11. She paid $556.00 on January 10, 2000, and Wells Fargo applied $554.11 toward principal and interest. The excess payment of $1.89 was applied toward principal. Debtor made timely payments in the amount of $554.11 for the months of February through November of 2000.[FN88]

FN88. Exh. H.

Debtor missed her December 2000 payment. Wells Fargo did not provide evidence that a past due notice was delivered to Debtor. Debtor's next payment was made January 12, 2001 in the amount of $654.11. Wells Fargo applied $554.11 toward the December 2000 installment, paid a $27.71 late fee, and placed the remaining $72.29 into a "suspense account." FN89

> FN89. Suspense accounts are utilized by Wells Fargo when the payment received does not match the monthly installment. For example, on May 11, 2001, Debtor forwarded a payment of $554.11 to Wells Fargo which was immediately placed in suspense rather than immediately applied because it did not include the unnoticed late fee of $27.71. In January of 2001, Debtor's payment was sufficient to pay her December installment but was not enough to also fully satisfy her January 2001 installment. Rather than apply a partial payment, Wells Fargo simply deposited the money into a suspense account. *See also, In re Nosek,* 2006 WL 1867096, at *3 (Bankr.D.Mass.2006).

Ms. Miller did not know if Debtor was advised of her suspense balance, nor could she prove that Debtor had been notified that a late fee had been charged against her account. For all Debtor knew, her payment of $654.11 had satisfied her January 2001 installment and $100.00 of the past due December payment. Instead, Wells Fargo applied the payment to one installment and charged her an unnoticed late fee. Not only does this Court have a serious problem with the application of a payment to an undisclosed fee, but it also finds that Wells Fargo's application of funds is contrary to the terms of its Note and **Mortgage**.

Under the Note and **Mortgage**, payments are to be applied first to outstanding escrow installments, then accrued interest, then accrued principal, *and last to late fees.* Therefore, the $654.11 payment ***353** should have been applied to her past due December installment.

This would have left January's installment of $554.11 outstanding, as well as the late fee of $27.71. Debtor's balance in suspense would have been $100.00 because, until the January installment was satisfied, late charges could not be paid. This misapplication of payments continued throughout 2001.

The problem worsened after July 2001, when Wells Fargo began ordering property inspections because the loan was technically twenty (20) days past due. The costs of inspection, $15.00 per month, were assessed and paid without notice, prior to the satisfaction of outstanding principal, accrued interest, and insurance premiums.

This created not only a burgeoning default but also another review of Debtor's escrow account. The review resulted in the third adjustment to her monthly installment in a six month period. Yet again, Wells Fargo miscalculated the amount required.

Debtor attempted to keep pace with this rising tide, but in November of 2001, after having two payments refused and a foreclosure instituted, Debtor appears to have given up. Debtor's spouse filed bankruptcy *pro se* in January of 2002.

The proof of claim filed by Wells Fargo in that case reflected the following charges:

6 payments @ 698.77	$4,19
(8/1/01-1/1/02)	2.62
Accrued late charges (3)	83.13
Foreclosure fees and	

costs

1193.33

900.00 2,093.33

Inspection fees 30.00
Property preservation 15.00
Suspense Balance (440.98)
Misc foreclosure fees (BPO) 125.00
Total: $6,098.10

FN90. *In re Stewart,* Case No. 02-10228, Claim No. 2.

Based on Wells Fargo's accounting, this proof of claim was substantially in error. The correct amount of her monthly installment should have been $638.33 not $698.77. Had Wells Fargo properly applied Debtor's extra payments to escrow, Debtor would have been current in her escrow account through December 31, 2001. Based on the Court's revised accounting, Debtor owed six (6) principal and interest payments of $554.11 when the 2002 Bankruptcy was filed. Debtor's suspense account had a positive $48.79 balance and her escrow account a negative $396.79. To this must be added the escrow payment of $63.29 due for January 2002. The BPO charge listed on the proof of claim has been addressed and reduced from $125.00 to $50.00 and all late fees but one have been disallowed. An inspection fee of $15.00 is allowed because Debtor was twenty (20) days late on the December 2000 payment. Because no proof of the property preservation fee was presented at trial, that charge is disallowed. Attorney's fees and costs have been previously reduced due to the credit for $125.00 on counsel's invoice. The net effect is a past due balance of $5,796.99. FN91

FN91. See Table III.

Debtor paid her monthly installments on a timely basis from February 2002 through October 2002. She missed her November 2002 payment but managed to become current through later payments. At the dismissal of the case in January of 2004, Debtor was postpetition current. Debtor's husband's plan payments netted Wells Fargo an additional $1,090.46 on its past due claim. She also had $40.64 in her suspense account. The Court has applied the plan payments and prepetition Debtor suspense account to satisfy the proof of claim escrow balance of $411.29. The remaining plan payments and postpetition ***354** suspense account balance have been applied to Debtor's past due installment payments. FN92

FN92. *See,* Table III.

Three months later, in April of 2004 when Debtor filed the 2004 Bankruptcy, Wells Fargo's proof of claim stated:

5 Payments @ 712.59 $3,562.

	95
5 Payments @ 712.58	3,562.90
Accrued late charges (22)	609.46
Foreclosure fees and costs	
	$1,302.42
	561.89
	750.00
	2,614.31

Bankruptcy fees	150.00
Inspection fees (20)	300.00
BPO fees (2)	250.00
Property preservation	240.00
Tax research fee	20.00
Total	$11,309.62[93]

FN93. To this, Wells Fargo added $2,859.99, under the Adequate Protection Order, for a total claim of $11,555.35. *In re Stewart,* Case No. 04-12889, Claim No. 3.

This proof of claim is also significantly in error. As previously stated, at the time the 2002 Bankruptcy was dismissed, Debtor had made all postpetition installment payments to Wells Fargo. Therefore, only the past due installments from the previous case were outstanding, and even they had been partially satisfied by the Trustee in the 2002 Bankruptcy. Debtor had missed three additional payments between the bankruptcy cases (February 1, 2004-April 1, 2004). Added to this were additional foreclosure costs and fees. Since Debtor had made every postpetition payment timely save one, there should not have been any additional late charges or inspection fees on the account except perhaps one of each in November of 2002. Late fees were assessed between January 2004 and April 2004. As a result, only four (4) additional late fees are recognized. Wells Fargo's assessment of twenty-two (22) late charges is directly attributable to the incorrect assessment of escrow charges and, therefore, the calculation of the monthly installment. Because the assessment was due to Wells Fargo's error, they are disallowed, along with the inspection fees which were never noticed. The bankruptcy attorney's fees have been previously discussed and disallowed. Property preservation fees have not been substantiated, and, therefore, are disallowed as is the tax research fee which does not appear in the accounting at all. The allowed BPO fees (one prior to the 2002 Bankruptcy and one prior to the 2004 Bankruptcy) are reduced to a total of $100.00.

The arrearage in the second case was $8,153.30.[FN94] To this amount, adequate protection sums ordered in September

2004 must be added:

FN94. See Table IV.

3 payments (6/04-8/04) @ $554.11	$1,662.33
3 escrow payments @ 38.65	135.63
5 late charges	138.55
Attorney's fees and costs	500.00
Total	$2,436.51

Against this arrearage Debtor paid $3,120.00, of which $271.26 should have been applied to Debtor's escrow account and the rest to accrued interest and principal. In addition, Debtor's suspense account contained $483.73. As of July 2005, Debtor had a past due balance of $6,986.08.[FN95]

FN95. See Table V.

Hurricane Katrina hit the New Orleans area approximately one month after Debtor's 2004 bankruptcy was dismissed. She did not make any payments after the date of her dismissal. By directive from Fannie Mae and Freddie Mac, payments on all home **mortgage** loans in the New Orleans area were suspended.[FN96] In 2006, Wells Fargo resumed its foreclosure proceedings,*355 selling the property at public auction. Thereafter, it began eviction proceedings.

FN96. December 4, 2007 Tr.T 304:20-25.

Following the foreclosure, Debtor was contacted by another division of Wells Fargo regarding the possibility of a reverse **mortgage**. Convinced by Wells Fargo that she could qualify for a reverse **mortgage**, Debtor in turn convinced Wells Fargo's **mortgage** loan department to unwind the foreclosure sale. Debtor was refused the reverse **mortgage** loan and the entire foreclosure process was put back in motion. During the period between August 2005 and June 2007, Wells Fargo ordered eleven (11) more property inspections and four (4) BPOs. All these charges were reversed in March of 2007. Sheriff's fees of $185.00 incurred in July 2005 have been allowed. Legal fees and costs associated with the eviction proceeding have been previously adjusted to $320.00.

The Court has made the above corrections to Debtors's loan history. The corrected accounting appears on Table I. The past due amount owed to Wells Fargo as of the petition date is $24,924.10, not the $35,036.00 claimed by Wells Fargo in its latest proof of claim.[FN97]

FN97. See Table VI.

Damages and Sanctions

Accounting and Administrative Abuses

The reconciliation of Debtor's account took Wells Fargo four months to research and three hearings before this Court to explain. An account history was not produced until two months after the filing of the Objection. An additional two months were spent obtaining the necessary information to explain or establish the substantial charges, costs, and fees reflected on the account.

In the end, Wells Fargo charged nine (9) BPOs to Debtor's account but could only produce two corresponding reports. At least three sets of BPOs were duplicative of each other; two BPOs were probably never performed due to the closure of Jefferson parish following Hurricane Katrina; and all contained hidden fees for Wells Fargo disguised as costs. Only two BPOs were ultimately accepted as validly performed.

Wells Fargo charged Debtor with forty-four (44) inspections; the Court allowed one (1). Wells Fargo also charged Debtor forty-nine (49) late charges; only ten (10) of which were approved. Almost every disallowed inspection and late fee was imposed while Debtor was making regular monthly payments, was assessed under circumstances contrary to Wells Fargo's stated policies or the Note's terms, and was unreasonable under the circumstances. Substantial legal fees were also claimed without over $1,800.00 in credits being posted.

The calculation of Debtor's monthly escrow was almost incomprehensible and virtually incorrect in every instance. This caused Wells Fargo to demand substantially erroneous and increased payments from Debtor. But one of the most troubling problems with the accounting delivered by Wells Fargo was the preference for the payment of fees and charges over escrow, principal, and interest payments in contravention of the Note and **Mortgage's** clear terms.

In *Brantley v. Tremont & Gulf Railway Co.*,[FN98] the Louisiana Supreme Court established that a plaintiff that sustained damages as a result of the fault of the defendant, will not be denied a recovery merely because he cannot establish exactly the amount suffered. La. Civil Code Art. 1999 provides, "[w]hen damages are insusceptible***356** of precise measurement, much discretion shall be left to the court for the reasonable assessment of these damages."[FN99]

FN98. 226 La. 176, 75 So.2d 236, 239 (1954).

FN99. La. Civ.Code Ann. art. 1999 (1985).

In cases where there are no intentional breaches of contract and no actual damages are proven, Louisiana courts have allowed for the recovery of nominal damages for technical breach of a contract.[FN100] Damages in excess of nominal amounts have also been awarded.[FN101]

FN100. *Levy v. Southern Bell Telephone and Telegraph Co.*, 172 So.2d 371 (La.App. 4th Cir.1965); *Fiesta Foods, Inc. v. Ogden*, 159 So.2d 577 (La.App. 1st Cir.1963); *Mayeux, Bennett, Hingle Ins. Agency, Inc. v. Southern Bell Telegraph & Telephone*, 148 So.2d 771 (La.App. 4th Cir.1963), *cert. denied*, 244 La. 131, 150 So.2d 589, and *Meyer v. Succession of McClellan*, 30 So.2d 788 (La.App.Orleans 1947).

FN101. *See, Scheinuk The Florist, Inc. v. Southern Bell Telephone & Telegraph Co.*, 128 So.2d 683 (La.App. 4th Cir.1961) and *Mayeux, supra.*

[13][14][15][16] In addition, Louisiana law recognizes the doctrine of abuse of rights. Although invoked sparingly, it was affirmed in *Illinois Central Gulf Railroad Co. v. International Harvester Co.*[FN102]

FN102. 368 So.2d 1009 (La.1979).

In its origin, the abuse of rights doctrine was applied to prevent the holder of rights or powers from exercising those rights exclusively for the purpose of harming another, but today most courts in civil law jurisdictions will find an act abusive if the predominant motive for it was to cause harm.... The doctrine has been applied where an intent to harm was not proven, if it was shown that there was no serious and legitimate interest in the exercise of the right worthy of judicial protection ... Although there are still pending important questions concerning its scope as well as criteria for the definition of abusive use of rights, this we may safely say now: it will be difficult for a holder of an individual right, in most of the civil jurisdictions today, to exercise such right to the detriment of other parties, just for the sheer sake of exercising it. At least a 'serious and legitimate interest' will have to be shown in order to justify the exercise of its right.[FN103]

FN103. *Id.* at 1014, citations omitted.

Because this Court awards Debtor the sums set forth below as sanctions, it will not award nominal damages for the technical breaches of the Note and **Mortgage's** terms including, the illegal imposition of fees disguised as costs (BPO charges); the negligent imposition of fees and costs not due (legal charges and deposits reimbursed); the improper calculation of escrow payments; the misapplication of payments contrary to the terms of the Note and **Mortgage**; the failure to notify Debtor of fees and charges imposed on her account; or Wells Fargo's abusive behavior with regard to its rights under the Note and **Mortgage**, in particular, the abusive imposition of unwarranted fees and charges (late fees and inspection costs).

Improper Conduct in Connection With Bankruptcy Filings

Although Wells Fargo was specifically asked to reconcile the amounts reflected on its prior proofs of claim with the amounts claimed on its account history, it did not. A review by the Court revealed why: the proofs of claim filed in the 2004 and 2007 Bankruptcies were so significantly erroneous that a reconciliation was not possible. Charges for NSF fees, tax searches, property preservation fees, and unapproved bankruptcy fees appeared on *357 the proofs of claim filed in this and previous cases without explanation or substantiation. Further, these charges never appeared as entries on the account history.

Another problem with the proof of claim was the incorrect reporting of Debtor's escrow account balance. First, the escrow account was wholly inaccurate because Wells Fargo miscalculated the amounts due. This caused Wells Fargo to demand substantially more each month than was allowed under RESPA. Wells Fargo also misapplied payments on the Note, further compounding the problem.

The miscalculation of monthly escrow payments also overstated Debtor's monthly installment and corresponding arrears. The combination of all these errors led to substantial overstatements in the past due amounts owed by Debtor in the approximate amount of $3,100.00 in 2004 and over $10,000.00 in 2007.

The Court is also offended by the insertion of additional bankruptcy fees and charges in the consent adequate protection order entered in the 2004 Bankruptcy. Wells Fargo represented to the Court that the $2,859.99 contained in the order represented "June 2004 through and including August 2004 post petition payments, late charges and attorneys fees and costs of $500.00 ..." Instead, Wells Fargo included additional "bankruptcy fees" of $125.00, property preservation fees of

$380.00, and NSF fees of $30.00. The property preservation fee was actually composed of twenty-six (26) *prepetition,* previously undisclosed, property inspection charges left off the proof of claim. The Court finds the actions of Wells Fargo to have been duplicitous and misleading.

[17][18] The Court finds that Wells Fargo was negligent in its practices and took insufficient remedial action following this Court's rulings in *Jones v. Wells Fargo* to remedy problems with its accounting. The Court will assess damages in the amount of $10,000.00, plus $12,350.00 in legal fees, for the abusive imposition of unwarranted fees and charges (late fees and inspection costs); the illegal imposition of fees disguised as costs (BPO charges); the negligent imposition of fees and costs not due (legal charges and deposits reimbursed); the improper calculation of escrow payments; the misapplication of payments contrary to the terms of the Note and **Mortgage**; the failure to notify Debtor of fees and charges on her account; and the improper payment of unnoticed fees and charges during pending bankruptcies. The Court will also sanction Wells Fargo in the amount of $2,500.00 for its actions in connection with presenting a consent adequate protection order to the Court, which did not reflect the agreement between the parties as represented to the Court. Finally, the Court will sanction Wells Fargo $2,500.00 for filing significantly erroneous proofs of claim in 2004 and 2007 and misrepresenting the costs associated with Premiere.

In order to rectify this problem in the future, the Court orders Wells Fargo to audit every proof of claim it has filed in this District in any case pending on or filed after April 13, 2007, and to provide a complete loan history on every account. For every debtor with a case still pending in the District, the loan histories shall be filed into the claims register and Wells Fargo is ordered to amend, where necessary, the proofs of claim already on file to comply with the principles established in this case and *Jones.* For closed cases, Wells Fargo is ordered to deliver to Debtor, Debtor's counsel and Trustee a copy of the accounting.

The Court will enter an administrative order for the review of these accountings and proofs of claim. The Court reserves ***358** the right, if warranted after an initial review of the accountings, proofs of claim and any amended claims filed of record, to appoint experts, at Wells Fargo's expense, to review each accounting and submit recommendations to the Court for further adjustments based on the principles set forth in this Memorandum Opinion and *Jones.*

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Table I

Date Rcvd	Description	Installment Date	Amt Rcvd	Trustee Arrears	Principal	Interest	Escrow	Late Fees	Other	Principal Balance	Debtor Suspense	Comments
01/01/00	Origination; interest 10.375%	01/01/00								$61,175.01		
01/10/00	Installment Payment	01/01/00	$554.00		$27.09	$528.91				$61,147.92		Surplus $1.89 paid toward principal
02/08/00	Installment Payment	02/01/00	$554.11		$25.44	$528.67				$61,122.48		
03/13/00	Installment Payment	03/01/00	$554.11		$25.66	$528.45				$61,096.82		
04/10/00	Installment Payment	04/01/00	$554.11		$25.88	$528.23				$61,070.94		
05/08/00	Installment Payment	05/01/00	$554.11		$26.10	$528.01				$61,044.84		
06/12/00	Installment Payment	06/01/00	$554.11		$26.33	$527.78				$61,018.51		
07/13/00	Installment Payment	07/01/00	$554.11		$26.55	$527.56				$60,991.96		
08/14/00	Installment Payment	08/01/00	$554.11		$26.78	$527.33				$60,965.18		
09/11/00	Installment Payment	09/01/00	$554.11		$27.02	$527.09				$60,938.16		
10/16/00	Installment Payment	10/01/00	$554.11		$27.25	$526.86				$60,910.91		
11/10/00	Installment Payment	11/01/00	$554.11		$27.48	$526.63				$60,883.43		
12/18/00	Late Charge							$27.71	$15.00			
01/12/01	Installment Payment	12/01/00	$654.11		$27.72	$526.39				$60,855.71	$100.00	
02/12/01	Installment Payment	01/01/01	$654.11		$27.96	$526.15				$60,827.75	$100.00	
03/01/01	Hazard Premium						($651.00)					
03/12/01	Installment Payment	02/01/01	$654.11		$28.20	$525.91				$60,799.55	$100.00	
04/11/01	Installment Payment	03/01/01	$654.00		$28.45	$525.66				$60,771.10	$99.89	
05/11/01	Installment Payment	04/01/01	$654.11		$28.69	$525.42				$60,742.41		
06/01/01	Applied Debtor Suspense		$399.89				$399.89				($399.89)	
06/08/01	Installment Payment		$554.11				$84.22				$469.89	Table II for monthly escrow calculation
07/10/01	Installment Payment	05/01/01	$554.11		$28.94	$525.17	$84.22			$60,713.47	($84.22)	
08/13/01	Installment Payment	06/01/01	$554.11		$29.19	$524.92	$84.22			$60,684.28	($84.22)	
09/12/01	Installment Payment	07/01/01	$554.11		$29.42	$524.69	$84.22			$60,654.86	($84.22)	
10/01/01							$84.22				($84.22)	
11/01/01							$84.22				($84.22)	
12/12/01	Hazard Premium						($651.00)					
01/11/02	02-10128 Bankruptcy filed	Totals					($396.78)	$27.71	$15.00		$48.79	Table III
01/11/02	Debtor Suspense Applied						$48.79				($48.79)	
01/11/02	Adjustment to Escrow for POC						$448.00					
01/11/02	Adjustment to Escrow for POC						$63.29					1/01/02 escrow payment
02/11/02	Installment Payment	02/01/02	$608.00				$63.29			$60,625.16	$544.71	Table II for monthly escrow calculation
03/15/02	Installment Payment	02/01/02	$789.18		$29.70	$524.41				$60,595.20	$295.07	
	Applied Debtor Suspense	03/01/01	$617.40		$29.86	$524.15	$63.29				($617.40)	
04/08/02	Installment Payment	04/01/02	$608.36		$30.11	$523.90	$63.29			$60,564.99	($9.04)	
05/09/02	Installment Payment	05/01/02	$608.36		$30.48	$523.63	$63.29			$60,534.51	($9.04)	
06/07/02	Installment Payment	06/01/02	$608.36		$30.74	$523.37	$63.29			$60,503.77	($9.04)	
07/08/02	Installment Payment	07/01/02	$608.00		$31.00	$523.11	$63.29			$60,472.77	($9.40)	
08/12/02	Installment Payment	08/01/02	$608.36		$31.27	$522.84	$63.29			$60,441.50	($9.04)	

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Table I

Date Rcvd	Description	Installment Date	Amt Rcvd	Trustee Arrears	Principal	Interest	Escrow	Late Fees	Other	Principal Balance	Debtor Suspense	Comments
09/09/02	Installment Payment	09/01/02	$608.36		$31.54	$522.57	$63.29			$60,406.96	($9.04)	
09/13/02	Trustee Payment			$28.07								
10/14/02		10/01/02	$608.36		$31.82	$522.29	$63.29			$60,375.14	($9.04)	
11/08/02		11/01/02	$350.00				$63.29	$37.27			$86.71	
12/09/02	Installment Payment	11/01/02	$608.34		$32.37	$521.74				$60,342.77	($9.04)	
		12/01/02					$63.29					
12/11/02	Hazard Premium						($744.00)					
12/12/02	Trustee Payment			$291.86								
01/10/03	Installment Payment	12/01/02	$608.34		$32.37	$521.74				$60,310.40	($9.04)	
		01/01/03					$71.04				($516.81)	Table II for monthly escrow calculation
01/17/03	Trustee Payment			$71.43								
02/07/03	Installment Payment	01/01/03	$608.34		$32.37	$521.74				$60,278.03		
		02/01/03					$71.04				($516.81)	
02/17/03	Trustee Payment			$91.80								
03/10/03	Installment Payment	02/01/03	$608.34		$32.93	$521.18				$60,245.10		
		03/01/03					$71.04				($516.81)	
03/25/03	Trustee Payment			$121.46								
04/07/03	Installment Payment	03/01/03	$608.34		$33.22	$520.89				$60,211.88		
		04/01/03					$71.04				($516.81)	
04/18/03	Trustee Payment			$121.46								
05/09/03	Installment Payment	04/01/03	$608.34		$33.50	$520.61				$60,178.38		
		05/01/03					$71.04				($516.81)	
05/27/03	Trustee Payment			$121.46								
06/09/03	Installment Payment	05/01/03	$608.34		$33.79	$520.32				$60,144.59		
		06/01/03					$71.04				($516.81)	
06/24/03	Trustee Payment			$121.46								
07/11/03	Installment Payment	06/01/03	$608.34		$34.06	$520.08				$60,110.53		
		07/01/03					$71.04				($516.81)	
07/23/03	Trustee Payment			$121.46								
08/07/03	Installment Payment	07/01/03	$712.59		$34.36	$519.78				$60,076.17		
		08/01/03					$71.04				$87.44	
09/08/03	Installment Payment	08/01/03	$712.59		$34.66	$519.43				$60,041.51		
		09/01/03					$71.04				$87.44	
10/13/03	Installment Payment	09/01/03	$712.59		$34.96	$519.13				$60,006.55		
		10/01/03					$71.04				$87.44	
11/07/03	Installment Payment	10/01/03	$712.59		$35.26	$518.83				$59,971.29		
		11/01/03					$71.04				$87.44	
12/08/03	Installment Payment	11/01/03	$717.58		$35.56	$518.53				$59,935.73		
		12/01/03					$71.04				$87.43	

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Table I

Date Rcvd	Description	Installment Date	Amt Rcvd	Trustee Arrears	Principal	Interest	Escrow	Late Fees	Other	Principal Balance	Debtor Suspense	Comments
01/09/04	Installment Payment	12/01/03	$712.58		$35.87	$578.22				$58,899.86		
		01/01/04					$45.21				$113.27	
	Debtor Suspense Applied	01/01/04			$36.18	$517.93				$59,863.68	($554.11)	
01/29/04	03-10228 Dismissed	Totals		$1,090.46			$262.17	$27.71	$15.00	$59,863.68	$40.64	
	Trustee Payments Applied	08/01/03		($1,090.46)	$36.49	$517.60				$59,827.19		$411.29 applied to poc escrow balance
												$125.06 unapplied
02/16/04	Late Charge							$27.71				
03/16/04	Late Charge							$27.71				
04/16/04	Late Charge							$27.71				
04/20/04	04-12889 Bankruptcy Filed	Totals					$262.17	$110.84	$15.00	$59,827.19	$40.64	Table IV
05/01/04	Debtor Suspense Applied		$40.65								($40.64)	Suspense applied to POC
	Unapplied Trustee payment											$125.06 applied to POC
	POC adjustment	1/04-3/04	$135.63				$135.63					added to POC
05/16/04	Late Charge							$27.71				
06/16/04	Late Charge							$27.71				
07/16/04	Late Charge							$27.71				
08/16/04	Late Charge							$27.71				
09/16/04	Late Charge							$27.71				
09/22/04	Adj. to Escrow for Adequate Prot	6/04 - 8/04	$135.63				$135.63					added to POC
10/13/04	Installment Payment	05/01/04	$712.08		$36.18	$517.93	$45.21			$59,793.01	$112.76	
10/05/04	Installment Payment	09/01/04	$608.00		$36.81	$517.28	$45.21			$59,754.20	$8.01	
	Applied Debtor Suspense	10/01/04	$45.21				$45.21				($45.21)	
11/09/04	Installment Payment	10/01/04	$712.08		$37.53	$516.96				$59,717.07		
		11/01/04					$45.21				$112.76	
11/12/04	Trustee Payment			$786.54								
12/08/04	Hazard Premium						($651.00)					
12/13/04	Trustee Payment			$944.00								
12/27/04	Installment Payment	11/01/04	$712.08		$37.45	$516.64				$59,679.62		
		12/01/04					$45.21				$112.76	
02/07/05	Installment Payment	12/01/04	$712.08		$37.76	$516.32				$59,641.86		
		01/01/05					$54.25				$109.72	
02/08/05	Installment Payment	01/01/05	$712.08		$38.09	$515.98				$59,603.77		
		02/01/05					$54.25				$103.72	
03/09/05	Installment Payment	02/01/05	$712.08		$38.42	$515.66				$59,565.35		
		03/01/05					$54.25				$103.72	
03/09/05	Applied Debtor Suspense	03/01/05	$544.11		$38.75	$515.33				$59,526.60	($554.11)	
04/08/05	Installment Payment	04/01/05	$712.58		$39.08	$515.00	$54.25			$59,487.52	$104.22	
05/06/05	Installment Payment	05/01/05	$712.58		$39.42	$514.66	$54.25			$59,448.10	$104.22	
07/08/05	Installment Payment	07/01/05	$712.59		$40.12	$513.99	$54.25			$59,368.22	$104.23	

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Table I

Date Rcvd	Description	Installment Date	Amt Rcvd	Trustee Arrears	Principal	Interest	Escrow	Late Fees	Other	Principal Balance	Debtor Suspense	Comments
07/26/05	04-12889 Dismissed	Totals		$3,120.00			$488.73	$277.10	$15.00	$59,368.22	$488.73	Table V
	Application of Trustee Payments	9/01/01-01/01/02	$3,120.00	($3,120.00)	$205.83	$2,564.72						$271.26 applied to escrow poc balance
												$78.19 + $125.06 = $203.25 unapplied
	Applied Debtor Suspense	02/02/04	$554.11		$42.34	$511.87					($488.73)	$488.73 + 40.64 from debtor suspense; and
	Application of POC credits											$29.74 from Trustee unapplied;
08/29/05	Hurricane Katrina Landfall										$178.51	Remaining balance of Trustee
												unapplied 178.51
12/01/05	Interest Rate Change	Interest = 10.75%; P&I = $568.66										
12/07/05	Hazard Premium						($651.00)					
	Unapplied Trustee payments						$178.51					
12/01/06	Interest Rate Change	Interest = 12.00%; P&I = $621.54										
03/20/07	Hazard Premium						($687.23)					
06/12/07	07-11113 Bankruptcy Filed	Totals					($676.49)	$277.10	$15.00			Table VI

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Table II

Description	Balance		Comments
7/03 Payment	$71.04		
8/03 Payment	$71.04		
9/03 Payment	$71.04		
10/03 Payment	$71.04		
11/03 Payment	$71.04		
12/03 Payment	$71.04		
12/10/03 Hazard Premium	($651.00)		
Balance 12/31/03		$216.96	2004 Mo. Escrow Calculation: 216.96-(651 + 108.50) = 542.54 / 12 = 45.21
1/04 Payment	$45.21		
04-12889 Bankrupcy filed		$262.17	
2/04 - 4/04	$135.63		3 (2/04 - 4/04)@ $45.21 = 135.63 Per 2004 Proof of Claim
5/04 Payment	$45.21		
6/04 - 8/04	$135.63		3 (6/04 - 8/04)@ $45.21 = 135.63 Per 2004 Adequate Protection Order
9/04 Payment	$45.21		
10/04 Payment	$45.21		
11/04 Payment	$45.21		
12/04 Payment	$45.21		
12/08/04 Hazard Premium	($651.00)		
Balance 12/31/04		$108.48	2005 Mo. Escrow Calculation: 108.48- (651 + 108.50) = 651.02 / 12 = 54.25
1/05 Payment	$54.25		
2/05 Payment	$54.25		
3/05 Payment	$54.25		
4/05 Payment	$54.25		
5/05 Payment	$54.25		
7/05 Payment	$54.25		
Balance 7/31/05		$488.23	
12/05 Hazard Premium	($651.00)		
Application of Debtor Suspense	$173.52		
3/07 Hazard Premium	($687.23)		
Balance 3/31/07		($676.48)	
07-11113 Bankruptcy filed			POC calculation: 2007 Mo Escrow Calculation--687.23 + 114.54 = 801.18 / 12 = 66.81
			676.48 + (1/07-6/07 @ 66.81) = 1077.34
POC Adjustment 1/07-6/07	$400.86		
POC Adjustment	$676.48	$400.86	

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Table II

Description	Balance		Comments
1/00 - 3/01	$0.00		
3/12/01 Hazard Premium	($651.00)		
5/01 Debtor Suspense Payment	$399.89		
6/01 Payment	$84.22		Initial Escrow Calculation (($651 + $651 + $108.50)-$399.89) / 12 = $84.22
7/01 Payment	$84.22		
8/01 Payment	$84.22		
9/01 Payment	$84.22		
10/01 Payment	$84.22		
11/01 Payment	$84.22		
12/12/01 Hazard Premium	($651.00)		
Balance 12/31/01		($396.79)	
02-10228 Bankruptcy filed			
Application of Debtor Suspense	$48.79		
POC Balance Adjustment	$348.00	$0.00	POC Escrow Calculation $396.79 + $63.29 = $460.08
POC 1/02 payment adjustment	$63.29	$63.29	2002 Mo Escrow Calculation: 651 + 108.50 = 759.50 / 12 = 63.29
2/02 Payment	$63.29		
3/02 Payment	$63.29		
4/02 Payment	$63.29		
5/02 Payment	$63.29		
6/02 Payment	$63.29		
7/02 Payment	$63.29		
8/02 Payment	$63.29		
9/02 Payment	$63.29		
9/02 Payment	$63.29		
10/02 Payment	$63.29		
11/02 Payment	$63.29		
12/02 Payment	$63.29		
12/11/02 Hazard Premium	($744.00)		
Balance 12/31/02		$15.48	2003 Mo. Escrow Calculation $15.48 - ($744 + 124) = $852.52/12 = $71.04
1/03 Payment	$71.04		
2/03 Payment	$71.04		
3/03 Payment	$71.04		
4/03 Payment	$71.04		
5/03 Payment	$71.04		
6/03 Payment	$71.04		

Table III

2002 Proof of Claim Reconciliation

6 Payments @ $554.11	$3,324.66
Accrued Late Charges	27.71
Foreclosure Fees and Costs	1,968.33
Inspection Fee	15.00
Suspense Balance	(48.79)
Escrow Balance	396.79

Escrow Payment 1/1/02	63.29	
BPO	50.00	
Total	$5,796.99	

* * *

Past Due Balance Due at Dismissal of 2002 Bankruptcy

Past Due Payments		
8/1/01 1/1/02 @ $554.11	$3,324.66	
Less Trustee Payment (8/1/01 installment)	(554.11)	
5 Past Due 9/1/01-1/1/02		$2,770.55
Past Due Escrow		
Negative Balance on Filing	396.79	
Add Escrow Charge 1/1/02	63.29	
Less Debtor Suspense Account on Filing	(48.79)	
	411.29	
Less Trustee Payment	(411.29)	
		0.00
Accrued Late Charges (2)	55.42	
Inspection Fee	15.00	
Attorneys' Fees and Costs	1,968.33	
BPO	50.00	
Total Costs and Fees		2,061.04
Subtotal		$4,831.59
Less Unapplied Trustee Payment		(125.06)
		$4,734.24

Table IV

2004 Proof of Claim Reconciliation

Balance Due at Dismissal of 2002 Case	$4,734.24	
Additional Past Due Payments		
3 (2/1/04-4/1/04) @ $554.11	1,662.33	
Additional Past Due Escrow Payments		
3 (2/1/04-4/1/04) @ $45.21	135.63	
Additional Late Charges		
3 (2/1/04-4/1/04) @ $27.71	83.13	
Additional BPO	50.00	
Additional Attorneys' Fees and Costs	1,528.61	
Less Debtor Suspense Balance (4/1/04)	(40.64)	
		$ 8,153.30
Plus Consent Order:		
Attorneys' Fees and Costs	500.00	
Postpetition Past Due Payments		
3 (6/04-8/04) @ $554.11	1,662.33	
Late Charges		
5 (5/04-9/04) @ $27.71	138.55	
Postpetition Past Due Escrow Payments		
3 (6/04-8/04) @ $45.21	135.63	
		$

	2,436.51
Total	$10,589.81

Table V

Past Due Balance July 2005

Previous Past Due Installments

5 (9/1/01-1/1/02) @ $554.11	$2,770.55	
Less 2004 Trustee Payments	(2,770.55)	
3 (2/1/04-4/1/04) @ $554.11	1,662.33	
3 (6/1/04-8/1/04) @ $554.11	1,662.33	
		$3,324.66

Additional Credits

Debtor Suspense Balance 4/04	40.64	
Debtor Suspense Balance 7/05	483.73	
Unapplied Trustee Payments [1]	203.25	

FN1. Unapplied funds from 2002 Bankruptcy of $125.06 plus unapplied funds from 2004 bankruptcy (($3,120.00 - $2,770.55 - $274.26) = $78.19).

(2002 of $125.06 plus 2004 ($3,120.00 - $2,770.55 - $78.19))	727.62	
Pay 2/1/04 Installment		($554.11)
Less Unapplied Funds		($173.51)
		$2,597.04

Past Due Escrow

3(2/1/04-4/1/04) @ $45.21	135.63	
3(6/1/04-8/1/04) @ $45.21	135.63	
Less 2004 Trustee Payments	(271.26)	
		$0.00
Late Charges (10)		
12/00, 11/02, 2/04-9/04	277.10	
Inspection Fees	15.00	
BPOs (2)	100.00	
Attorney's Fees and Costs	3,996.94	
		$4,389.04
Total		$6,986.08

Table VI

Past Due Balance June 12, 2007

Past Due installments	
5 (3/04-4/04; 6/04-8/04) @ $554.11	$2,770.55
4 (8/05-11/05) @ $554.11	2,216.44
12 (12/05-11/06) @ $569.66	6,835.92
7 (12/06-6/07) @ $621.54	4,350.78
Negative Escrow (balance 12/31/06)	(676.49)
Escrow 6 (1/1/07-6/1/07) @ $66.81	400.86
Attorneys' Fees and Costs	7,280.96
Late Charges (10)	277.10
Inspection Fee	15.00
BPO (2)	100.00

Total	$24,924.10

Bkrtcy.E.D.La.,2008.
In re Stewart
391 B.R. 327

END OF DOCUMENT

Table I

ate Rcvd	Description	Installment Date	Amt Rcvd	Trustee Arrears	Principal	Interest	Escrow	Late Fees	Other	Principal Balance	Debtor Suspense	Comments
01/01/00	Origination; interest 10.375%	01/01/00								$61,175.01		
01/10/00	Installment Payment	01/01/00	$556.00		$27.09	$528.91				$61,147.92		Surplus $1.89 paid toward principal
02/08/00	Installment Payment	02/01/00	$554.11		$25.44	$528.67				$61,122.48		
03/13/00	Installment Payment	03/01/00	$554.11		$25.66	$528.45				$61,096.82		
04/10/00	Installment Payment	04/01/00	$554.11		$25.88	$528.23				$61,070.94		
05/08/00	Installment Payment	05/01/00	$554.11		$26.10	$528.01				$61,044.84		
06/12/00	Installment Payment	06/01/00	$554.11		$26.33	$527.78				$61,018.51		
07/13/00	Installment Payment	07/01/00	$554.11		$26.55	$527.56				$60,991.96		
08/14/00	Installment Payment	08/01/00	$554.11		$26.78	$527.33				$60,965.18		
09/11/00	Installment Payment	09/01/00	$554.11		$27.02	$527.09				$60,938.16		
10/16/00	Installment Payment	10/01/00	$554.11		$27.25	$526.86				$60,910.91		
11/10/00	Installment Payment	11/01/00	$554.11		$27.48	$526.63				$60,883.43		
12/18/00	Late Charge							$27.71	$15.00			
01/12/01	Installment Payment	12/01/00	$654.11		$27.72	$526.39				$60,855.71	$100.00	
02/12/01	Installment Payment	01/01/01	$654.11		$27.96	$526.15				$60,827.75	$100.00	
03/01/01	Hazard Premium						($651.00)					
03/12/01	Installment Payment	02/01/01	$654.11		$28.20	$525.91				$60,799.55	$100.00	
04/11/01	Installment Payment	03/01/01	$654.00		$28.45	$525.66				$60,771.10	$99.89	
05/11/01	Installment Payment	04/01/01	$554.11		$28.69	$525.42				$60,742.41		
06/01/01	Applied Debtor Suspense		$399.89				$399.89				($399.89)	
06/08/01	Installment Payment		$554.11				$84.22				$469.89	Table II for monthly escrow calculation
07/10/01	Installment Payment	05/01/01	$554.11		$28.94	$525.17	$84.22			$60,713.47	($84.22)	
08/13/01	Installment Payment	06/01/01	$554.11		$29.19	$524.92	$84.22			$60,684.28	($84.22)	
09/12/01	Installment Payment	07/01/01	$554.11		$29.42	$524.69	$84.22			$60,654.86	($84.22)	
10/01/01							$84.22				($84.22)	
11/01/01							$84.22				($84.22)	
12/12/01	Hazard Premium						($651.00)					
01/11/02	02-10228 Bankruptcy filed	Totals					($396.79)	$27.71	$15.00		$48.79	Table III
01/11/02	Debtor Suspense Applied						$48.79				($48.79)	
01/11/02	Adjustment to Escrow for POC						$348.00					
01/11/02	Adjustment to Escrow for POC						$63.29					1/01/02 escrow payment
02/11/02	Installment Payment	02/01/02	$608.00				$63.29			$60,625.16	$544.71	Table II for monthly escrow calculation
03/15/02	Installment Payment	02/01/02	$789.18		$29.70	$524.41				$60,595.20	$235.07	
	Applied Debtor Suspense	03/01/02	$617.40		$29.96	$524.15	$63.29				($617.40)	
04/08/02	Installment Payment	04/01/02	$608.36		$30.21	$523.90	$63.29			$60,564.99	($9.04)	
05/09/02	Installment Payment	05/01/02	$608.36		$30.48	$523.63	$63.29			$60,534.51	($9.04)	
06/07/02	Installment Payment	06/01/02	$608.36		$30.74	$523.37	$63.29			$60,503.77	($9.04)	
07/08/02	Installment Payment	07/01/02	$608.00		$31.00	$523.11	$63.29			$60,472.77	($9.40)	
08/12/02	Installment Payment	08/01/02	$608.36		$31.27	$522.84	$63.29			$60,441.50	($9.04)	

Table I

te Rcvd	Description	Installment Date	Amt Rcvd	Trustee Arrears	Principal	Interest	Escrow	Late Fees	Other	Principal Balance	Debtor Suspense	Comments
09/09/02	Installment Payment	09/01/02	$608.36		$31.54	$522.57	$63.29			$60,406.96	($9.04)	
09/13/02	Trustee Payment			$28.07								
10/14/02		10/01/02	$608.36		$31.82	$522.29	$63.29			$60,375.14	($9.04)	
11/08/02		11/01/02	$150.00				$63.29	$27.27			$86.71	
12/09/02	Installment Payment	11/01/02	$608.34		$32.37	$521.74				$60,342.77	($9.04)	
		12/01/02					$63.29					
12/11/02	Hazard Premium						($744.00)					
12/12/02	Trustee Payment			$291.86								
01/10/03	Installment Payment	12/01/02	$608.34		$32.37	$521.74				$60,310.40	($9.04)	
		01/01/03					$71.04				($16.81)	Table II for monthly escrow calculation
01/17/03	Trustee Payment			$71.43								
02/07/03	Installment Payment	01/01/03	$608.34		$32.37	$521.74				$60,278.03		
		02/01/03					$71.04				($16.81)	
02/17/03	Trustee Payment			$91.80								
03/10/03	Installment Payment	02/01/03	$608.34		$32.93	$521.18				$60,245.10		
		03/01/03					$71.04				($16.81)	
03/25/03	Trustee Payment			$121.46								
04/07/03	Installment Payment	03/01/03	$608.34		$33.22	$520.89				$60,211.88		
		04/01/03					$71.04				($16.81)	
04/18/03	Trustee Payment			$121.46								
05/09/03	Installment Payment	04/01/03	$608.34		$33.50	$520.61				$60,178.38		
		05/01/03					$71.04				($16.81)	
05/27/03	Trustee Payment			$121.46								
06/09/03	Installment Payment	05/01/03	$608.34		$33.79	$520.32				$60,144.59		
		06/01/03					$71.04				($16.81)	
06/24/03	Trustee Payment			$121.46								
07/15/03	Installment Payment	06/01/03	$608.34		$34.06	$520.03				$60,110.53		
		07/01/03					$71.04				($16.81)	
07/23/03	Trustee Payment			$121.46								
08/07/03	Installment Payment	07/01/03	$712.59		$34.36	$519.73				$60,076.17		
		08/01/03					$71.04				$87.44	
09/08/03	Installment Payment	08/01/03	$712.59		$34.66	$519.43				$60,041.51		
		09/01/03					$71.04				$87.44	
10/13/03	Installment Payment	09/01/03	$712.59		$34.96	$519.13				$60,006.55		
		10/01/03					$71.04				$87.44	
11/07/03	Installment Payment	10/01/03	$712.59		$35.26	$518.83				$59,971.29		
		11/01/03					$71.04				$87.44	
12/08/03	Installment Payment	11/01/03	$712.58		$35.56	$518.53				$59,935.73		
		12/01/03					$71.04				$87.43	

Table I

ite Rcvd	Description	Installment Date	Amt Rcvd	Trustee Arrears	Principal	Interest	Escrow	Late Fees	Other	Principal Balance	Debtor Suspense	Comments
01/09/04	Installment Payment	12/01/03	$712.59		$35.87	$578.22				$59,899.86		
		01/01/04					$45.21				$113.27	
	Debtor Suspense Applied	01/01/04			$36.18	$517.93				$59,863.68	($554.11)	
01/29/04	02-10228 Dismissed	Totals		$1,090.46			$262.17	$27.71	$15.00	$59,863.68	$40.64	
	Trustee Payments Applied	08/01/01		($1,090.46)	$36.49	$517.60				$59,827.19		$411.29 applied to poc escrow balance
												$125.06 unapplied
02/16/04	Late Charge							$27.71				
03/16/04	Late Charge							$27.71				
04/16/04	Late Charge							$27.71				
04/20/04	04-12889 Bankruptcy Filed	Totals					$262.17	$110.84	$15.00	$59,827.19	$40.64	Table IV
05/01/04	Debtor Suspense Applied		$40.65								($40.64)	Suspense applied to POC
	Unapplied Trustee payment											$125.06 applied to POC
	POC adjustment	1/04-3/04	$135.63				$135.63					added to POC
05/16/04	Late Charge							$27.71				
06/16/04	Late Charge							$27.71				
07/16/04	Late Charge							$27.71				
08/16/04	Late Charge							$27.71				
09/16/04	Late Charge							$27.71				
09/22/04	Adj. to Escrow for Adequate Prot	6/04 - 8/04	$135.63				$135.63					added to POC
10/13/04	Installment Payment	05/01/04	$712.08		$36.18	$517.91	$45.21			$59,791.01	$112.76	
10/05/04	Installment Payment	09/01/04	$608.00		$36.81	$517.28	$45.21			$59,754.20	$9.01	
	Applied Debtor Suspense	10/01/04	$45.21				$45.21				($45.21)	
11/09/04	Installment Payment	10/01/04	$712.08		$37.13	$516.96				$59,717.07		
		11/01/04					$45.21				$112.76	
11/12/04	Trustee Payment			$786.54								
12/08/04	Hazard Premium						($651.00)					
12/13/04	Trustee Payment			$944.00								
12/27/04	Installment Payment	11/01/04	$712.08		$37.45	$516.64				$59,679.62		
		12/01/04					$45.21				$112.76	
01/07/05	Installment Payment	12/01/04	$712.08		$37.76	$516.32				$59,641.86		
		01/01/05					$54.25				$103.72	
02/08/05	Installment Payment	01/01/05	$712.08		$38.09	$515.99				$59,603.77		
		02/01/05					$54.25				$103.72	
03/09/05	Installment Payment	02/01/05	$712.08		$38.42	$515.66				$59,565.35		
		03/01/05					$54.25				$103.72	
03/09/05	Applied Debtor Suspense	03/01/05	$544.11		$38.75	$515.33				$59,526.60	($554.11)	
04/08/05	Installment Payment	04/01/05	$712.58		$39.08	$515.00	$54.25			$59,487.52	$104.22	
05/06/05	Installment Payment	05/01/05	$712.58		$39.42	$514.66	$54.25			$59,448.10	$104.22	
07/08/05	Installment Payment	07/01/05	$712.59		$40.12	$513.99	$54.25			$59,368.22	$104.23	

Table I

e Rcvd	Description	Installment Date	Amt Rcvd	Trustee Arrears	Principal	Interest	Escrow	Late Fees	Other	Principal Balance	Debtor Suspense	Comments
)7/26/05	04-12889 Dismissed	Totals		$3,120.00			$488.23	$277.10	$15.00	$59,368.22	$483.73	Table V
	Application of Trustee Payments	9/01/01-01/01/02	$3,120.00	($3,120.00)	$205.83	$2,564.72						$271.26 applied to escrow poc balance
												$78.19 + $125.06 = $203.25 unapplied
	Applied Debtor Suspense	02/01/04	$554.11		$42.24	$511.87					($483.73)	$483.73 + 40.64 from debtor suspense; and
	Appliecation of POC credits											$29.74 from Trustee unapplied;
)8/29/05	Hurricane Katrina Landfall										$173.51	Remaining balance of Trustee
												unapplied 173.51
12/01/05	Interest Rate Change	Interest = 10.75%; P&I = $569.66										
12/07/05	Hazard Premium						($651.00)					
	Unapplied Trustee payments						$173.51					
12/01/06	Interest Rate Change	Interest = 12.00%; P&I = $621.54										
)3/20/07	Hazard Premium						($687.23)					
)6/12/07	07-11113 Bankruptcy Filed	Totals					($676.49)	$277.10	$15.00			Table VI

90

Description	Balance		Comments
1/00 - 3/01	$0.00		
3/12/01 Hazard Premium	($651.00)		
5/01 Debtor Suspense Payment	$399.89		
6/01 Payment	$84.22		Initial Escrow Calculation (($651 + $651 + $108.50)-$399.89) / 12 = $84.22
7/01 Payment	$84.22		
8/01 Payment	$84.22		
9/01 Payment	$84.22		
10/01 Payment	$84.22		
11/01 Payment	$84.22		
12/12/01 Hazard Premium	($651.00)		
Balance 12/31/01		($396.79)	
02-10228 Bankruptcy filed			
Application of Debtor Suspense	$48.79		
POC Balance Adjustment	$348.00	$0.00	POC Escrow Calculation $396.79 + $63.29 = $460.08
POC 1/02 payment adjustment	$63.29	$63.29	2002 Mo Escrow Calculation: 651 + 108.50 = 759.50 / 12 = 63.29
2/02 Payment	$63.29		
3/02 Payment	$63.29		
4/02 Payment	$63.29		
5/02 Payment	$63.29		
6/02 Payment	$63.29		
7/02 Payment	$63.29		
8/02 Payment	$63.29		
9/02 Payment	$63.29		
9/02 Payment	$63.29		
10/02 Payment	$63.29		
11/02 Payment	$63.29		
12/02 Payment	$63.29		
12/11/02 Hazard Premium	($744.00)		
Balance 12/31/02		$15.48	2003 Mo. Escrow Calculation $15.48 - ($744 + 124) = $852.52/12 = $71.04
1/03 Payment	$71.04		
2/03 Payment	$71.04		
3/03 Payment	$71.04		
4/03 Payment	$71.04		
5/03 Payment	$71.04		
6/03 Payment	$71.04		

Table II

Description	Balance		Comments
7/03 Payment	$71.04		
8/03 Payment	$71.04		
9/03 Payment	$71.04		
10/03 Payment	$71.04		
11/03 Payment	$71.04		
12/03 Payment	$71.04		
12/10/03 Hazard Premium	($651.00)		
Balance 12/31/03		$216.96	2004 Mo. Escrow Calculation: 216.96-(651 + 108.50) = 542.54 / 12 = 45.21
1/04 Payment	$45.21		
04-12889 Bankrupcy filed		$262.17	
2/04 - 4/04	$135.63		3 (2/04 - 4/04)@ $45.21 = 135.63 Per 2004 Proof of Claim
5/04 Payment	$45.21		
6/04 - 8/04	$135.63		3 (6/04 - 8/04)@ $45.21 = 135.63 Per 2004 Adequate Protection Order
9/04 Payment	$45.21		
10/04 Payment	$45.21		
11/04 Payment	$45.21		
12/04 Payment	$45.21		
12/08/04 Hazard Premium	($651.00)		
Balance 12/31/04		$108.48	2005 Mo. Escrow Calculation: 108.48- (651 + 108.50) = 651.02 / 12 = 54.25
1/05 Payment	$54.25		
2/05 Payment	$54.25		
3/05 Payment	$54.25		
4/05 Payment	$54.25		
5/05 Payment	$54.25		
7/05 Payment	$54.25		
Balance 7/31/05		$488.23	
12/05 Hazard Premium	($651.00)		
Application of Debtor Suspense	$173.52		
3/07 Hazard Premium	($687.23)		
Balance 3/31/07		($676.48)	
07-11113 Bankruptcy filed			POC calculation: 2007 Mo Escrow Calculation--687.23 + 114.54 = 801.18 / 12 = 66.81
			676.48 + (1/07-6/07 @ 66.81) = 1077.34
POC Adjustment 1/07-6/07	$400.86		
POC Adjustment	$676.48	$400.86	

Table III
2002 Proof of Claim Reconciliation

6 Payments @ $554.11	$3,324.66
Accrued Late Charges	27.71
Foreclosure Fees and Costs	1,968.33
Inspection Fee	15.00
Suspense Balance	(48.79)
Escrow Balance	396.79
Escrow Payment 1/1/02	63.29
BPO	50.00
Total	$5,796.99

* * *

Past Due Balance Due at Dismissal of 2002 Bankruptcy

Past Due Payments		
8/1/01 - 1/1/02 @ $554.11	$3,324.66	
Less Trustee Payment (8/1/01 installment	(554.11)	
5 Past Due 9/1/01 - 1/1/02		$2,770.55
Past Due Escrow		
Negative Balance on Filing	396.79	
Add Escrow Charge 1/1/02	63.29	
Less Debtor Suspense Account on Filing	(48.79)	
	411.29	
Less Trustee Payment	(411.29)	
		0.00
Accrued Late Charges (2)	55.42	
Inspection Fee	15.00	
Attorneys' Fees and Costs	1,968.33	
BPO	50.00	
Total Costs and Fees		2,061.04
Subtotal		$4,831.59
Less Unapplied Trustee Payment		(125.06)
		$4,734.24

Table IV
2004 Proof of Claim Reconciliation

Balance Due at Dismissal of 2002 Case	$4,734.24	
Additional Past Due Payments		
3 (2/1/04-4/1/04) @ $554.11	1,662.33	
Additional Past Due Escrow Payments		
3 (2/1/04-4/1/04) @ $45.21	135.63	
Additional Late Charges		
3 (2/1/04-4/1/04) @ $27.71	83.13	
Additional BPO	50.00	
Additional Attorneys' Fees and Costs	1,528.61	
Less Debtor Suspense Balance (4/1/04)	(40.64)	
		$8,153.30
Plus Consent Order:		
Attorneys' Fees and Costs	500.00	
Postpetition Past Due Payments		
3 (6/04-8/04) @ $554.11	1,662.33	
Late Charges		
5 (5/04-9/04) @ $27.71	138.55	
Postpetition Past Due Escrow Payments		
3 (6/04-8/04) @ $45.21	135.63	
		$2,436.51
Total		$10,589.81

Table V
Past Due Balance July 2005

Previous Past Due Installments			
5 (9/1/01-1/1/02) @ $554.11		$2,770.55	
Less 2004 Trustee Payments		(2,770.55)	
3 (2/1/04-4/1/04) @ $554.11		1,662.33	
3 (6/1/04-8/1/04) @ $554.11		1,662.33	
			$3,324.66
Additional Credits			
Debtor Suspense Balance 4/04	40.64		
Debtor Suspense Balance 7/05	483.73		
Unapplied Trustee Payments[1]	203.25		
(2002 of $125.06 plus	727.62		
2004 ($3,120.00 - $2,770.55- $78.19))			
Pay 2/1/04 Installment			($554.11)
Less Unapplied Funds			($173.51)
			$2,597.04
Past Due Escrow			
3(2/1/04 - 4/1/04) @ $45.21		135.63	
3(6/1/04 - 8/1/04) @ $45.21		135.63	
Less 2004 Trustee Payments		(271.26)	
			$0.00
Late Charges (910			
12/00, 11/02, 2/04-9/04		277.10	
Inspection Fees		15.00	
BPOs (2)		100.00	
Attorney's Fees and Costs		3,996.94	
			$4,389.04
Total			$6,986.08

[1] Unapplied funds from 2002 Bankruptcy of $125.06 plus unapplied funds from 2004 bankruptcy (($3,120.00 - $2,770.55- $274.26)= $78.19)

Table VI
Past Due Balance June 12, 2007

Past Due installments		
5 (3/04 - 4/04; 6/04 - 8/04) @$554.11	$2,770.55	
4 (8/05 - 11/05) @ $554.11	2,216.44	
12 (12/05 - 11/06) @ $569.66	6,835.92	
7 (12/06 - 6/07) @ $621.54	4,350.78	
Negative Escrow (balance 12/31/06)	(676.49)	
Escrow 6 (1/1/07 - 6/1/07) @ $66.81	400.86	
Attorneys' Fees and Costs	7,280.96	
Late Charges (10)	277.10	
Inspection Fee	15.00	
BPO (2)	100.00	
Total		$24,924.10

RESPA Claims Chart

REAL ESTATE SETTLEMENT PROCEDURES ACT (RESPA) CLAIMS CHART

CLAIM	CITATIONS	RIGHT OF ACTION	REMEDY[1]	STATUTE OF LIMITA-TIONS	DEFAULT OR BANKRUPTCY EXEMPTION
Pre-Settlement					
Duty to Provide Good Faith Estimate, Information Booklet	Section 5 12 U.S.C. §2604 Reg. X §3500.7; Reg. X §3500.6				
Duty to Provide Servicing Statement	Section 6 12 U.S.C. §2605(a) Reg. X §3500.21(b)	Yes §2605(f) §2614	actual damages, costs and attorney's fees; plus $1,000 per violation if pattern and practice of non-compliance	3 years §2614	
Duty to Provide "Controlled Business Arrangement" Notice	Section 8 12 U.S.C. §2607 Reg. X §3500.15	Yes §2607(d) §2614	3 times amount paid for settlement service, attorney's fees, and costs	1 year §2614	
Settlement					
Duty to Provide HUD-1 Settlement Statement	Section 4 12 U.S.C. §2603 Reg. X §3500.8				

[1] Where a remedy or right of action is not listed, the failure to comply with a RESPA provision may possibly be pursued as a breach of contract or state UDAP statute violation. *See* NCLC *Foreclosures*, Chapter 4.

Duty to Provide Initial Escrow Account Statement	Section 10 12 U.S.C. §2609(c)(1) Reg. X §3500.17(g)				
Prohibition against Kickbacks, Fee Splitting and Unearned Fees	Section 8 12 U.S.C. §2607 Reg. X §3500.14(b)	Yes §2607(d) §2614	3 times amount paid for settlement service, attorney's fees, and costs	1 year §2614	
Prohibition against Requiring Purchase of Title Insur. from Particular Title Co.	Section 9 12 U.S.C. §2608 Reg. X §3500.16	Yes §2608(b) §2614	3 times all charges for title insurance	1 year §2614	
Prohibition against Charging Fee for Preparing Escrow and HUD-1 Statements, and TIL Disclosures	Section 12 12 U.S.C. §2610 Reg. X §3500.12				
Post-Settlement					
Duty to Make Timely Payments Out of Escrow	Section 6 12 U.S.C. §2605(g) Reg. X §3500.21(g) and §3500.17(k)	Yes §2605(f) §2614	actual damages, costs and attorney's fees; plus $1,000 per violation if pattern and practice of non-compliance	3 years §2614	If borrower more than 30 days overdue; Reg. X, §3500.17(k)(1), (2)
Duty to Provide Annual Escrow Statements	Section 10 12 U.S.C. §2609(c)(2) Reg. X §3500.17(i)				If borrower more than 30 days overdue, or in foreclosure or bankruptcy; Reg. X, §3500.17(i)(2)

Duty to Perform Escrow Analysis and Calculate Proper Escrow Payment	Section 10 12 U.S.C. §2609(a) Reg. X §3500.17(c)				No
Requirements for Escrow Surpluses	Reg. X §3500.17(f)				If borrower more than 30 days overdue; Reg. X, §3500.17(f)(2)(ii)
Requirements for Escrow Shortages	Reg. X §3500.17(f)				No
Requirements for Escrow Deficiencies	Reg. X §3500.17(f)				If borrower more than 30 days overdue; Reg. X, §3500.17(f)(4)(iii)
Duty to Provide Notice of Escrow Shortage or Deficiency	Section 10 12 U.S.C. §2609(b) Reg. X, 24 C.F.R. §3500.17(f)(5)				No
Duty to Respond to Qualified Written Request	Section 6 12 U.S.C. §2605(e) Reg. X §3500.21(e)	Yes §2605(f) §2614	actual damages, costs and attorney's fees; plus $1,000 per violation if pattern and practice of non-compliance	3 years §2614	No
Duty to Provide Transfer of Servicing Statement and 60-day Payment Safe Harbor	Section 6 12 U.S.C. §2605(b)-(d) Reg. X §3500.21(d)	Yes §2605(f) §2614	actual damages, costs and attorney's fees; plus $1,000 per violation if pattern and practice of non-compliance	3 years §2614	No

Home Affordable Modification Program

OVERVIEW

- What is HAMP?
  - What loans are eligible?
  - How do you figure that out?
- How does HAMP work?
  - Waterfall for payment reduction
  - NPV test
- Special features:
  - Waiver
  - Stopping a foreclosure

FIRST POLL

- Have you done or seen
  - No HAMP modifications?
  - One to two HAMP modifications?
  - More than two but less than five?
  - Five or more HAMP modifications?

THE OBAMA PLAN aka HAMP, MHA

- Voluntary incentive based plan
  - Servicers choose whether to participate or not
  - All GSE loans covered by GSE-specific, HAMP similar plans
- Participating servicers supposed to screen everybody
- Uniform modification characteristics
  - Payments reduced to 31%
  - Modification results in a Net Present Value for investors
  - Trial mod followed by permanent mod

WHERE IS THERE GUIDANCE?

- No regs
- No statute
- Guidance
  - Supplemental Directives
  - FAQs
  - Model Forms
- hmpadmin.com

WILL SERVICERS MODIFY LOANS?

- Mandates that banks receiving TARP money on a "going forward basis" offer loan modifications
- Servicers that sign contracts bound to modify all loans, provided no limitations in the PSA
- GSE loans must be modified
- Servicers and investors receive incentive payments to modify loans

SERVICER INCENTIVES

- $1000 for each completed loan mod
- $1000 a year for 3 years for sustained loan modification, if payment reduced by 6%
- Incentives for deed in lieu or short sale
- $500 for pre-default loan modification

INVESTOR INCENTIVES

- $1500 pre-default loan modification
- Partial loan guarantees for modified loans (declining principal coverage)
- Interest or principal reduction subsidies for half the difference between a payment at 38% DTI and 31% DTI

IT'S A FLOOR, NOT A CEILING

- Servicers can do modifications that go deeper than HAMP and still receive incentive payments
  - FAQs #3, 19
- Servicers can offer non-HAMP modifications, although everyone should be screened for and offered a HAMP mod

HOW DO YOU FIND OUT IF THE LOAN IS COVERED?

- List of participating servicers
  - Take one, take all
  - Either at financialstability.gov or makinghomeaffordable.gov
- 30 participating servicers as of 7/21/09
- All Fannie/ Freddie loans subject
- VA, FHA, and RHS should have similar programs by fall

FANNIE AND FREDDIE SUBSTANTIALLY SIMILAR

- Similar programs for Freddie & Fannie
  - Fannie: Announcement 09-05R
  - Freddie: Chapter C65 of Seller/Servicer Guide
- Servicers get same incentives

HOW DO YOU TELL IF IT IS A FANNIE/ FREDDIE LOAN?

- Servicer should tell you
- Freddie:
  - Complete form at Freddie Mac's web site, www.freddiemac.com/mymortgage
  - Call 1-800-FREDDIE
- Fannie:
  - Call Fannie at 1-800-7FANNIE
  - www.fanniemae.com/loanlookup

POLL QUESTIONS ON PSAs

A PSA is

a) A hormone checked in older men
b) The agreement between investors and servicers
c) A profoundly silly alphanumeric code
d) I have no idea

PSAS AND LOAN MODS

- Doesn't override PSAs, but . . .
- This program follows the "usual and customary industry standards"
- Servicers expected to use "all reasonable efforts" to get waivers
- 15 U.S.C. §1639a creates safe harbor from investor litigation for servicers who modify under HAMP
- Servicers free to offer other loan mods under PSAs

WHAT IF THEY SAY THEIR INVESTOR DOESN'T ALLOW MODS?

- Servicers do not have to perform HAMP mods if prohibited by the PSA
- Ask for
  - The name of the investor
  - The PSA
  - What steps they've taken to get a release
- Supplemental Directive 09-01 requires them to use "reasonable efforts" to get approval for mods

TWO-STEP SCREENING PROCESS

- Is the borrower eligible?
  - Default or imminent risk of default
  - Primary residence
  - Value limits
- Does the borrower qualify?
  - Hardship affidavit
  - Verified income
  - NPV test (will the investor profit more by a mod than without a mod?)

DEFAULT?

- Default
- Or default is "imminent"
  - Is the rate about to reset?
  - Lost income in the home?
    - Employment income
    - Divorce/ separation
  - Fraud in origination
  - Low cash reserves

ELIGIBILITY

- Primary residence
- One to four units
- Unpaid principal balance cap
  - over $700K for 1 unit
  - over $1.4 mil for 4 units
- Should review for hardship when have any contact with borrower

THRESHOLD TESTS TO GET A LOAN MOD

- Payment must be lowered
  - Affordability
  - Current income must be verified
- Does the investor save money?
  - Loan mods cost money
  - Failed loan mods cost more money
  - Net Present Value Test (NPV)

FIRST COMES THE TRIAL MOD

- Trial mod for three to four months
  - Can be based on oral representations of income
  - Credit reporting either in default or making payments under a plan
  - Payments held in suspense and only credited when equal to full monthly payment under note, arrearages accrue
- Permanent mod offered upon successful completion of trial mod and verification of income

LOWERING THE PAYMENT

- Current payments must be >31% in order to be eligible for HAMP
  - Special incentive for lowering monthly payments by at least 6%
  - Lesser of
    - $83.33 a month or
    - ½ of the reduction in the borrower's monthly payment Affordable payments
- Payments reduced to 38%, Treasury subsidizes rate reductions down to 31%

HOW DO THEY DO IT? LOWERING THE PAYMENT

- Interest rate
- Amortization term (but not payments) extended to 40 years
- Principal forbearance
- Servicers may, but need not substitute principal forgiveness for any of these steps

INTEREST RATE

- Reduced to as low as 2% for 5 years (to get to 31%)
- Can go lower, but incentives only paid down to 2%
- Increase at 1% after 5 years to lower of
  - Freddie Mac rate
  - Interest rate cap in note

PRINCIPAL REDUCTIONS & FORBEARANCE

- Forbearance part of the waterfall
- Servicers may do reductions
  - If a reduction is done instead of rate reduction, investors/ servicers can receive same payments as with rate reduction
- $1,000/year for 5 years to reduce principal balance

NO FEES FOR A MODIFICATION

- *Unpaid* late fees waived
- No charge for modification
  - But foreclosure costs
  - Property inspection
  - Credit report

THE NEW DEBT MAY INCREASE ANYHOW

- Arrearages capitalized
  - Past due interest
  - Escrow
  - Foreclosure costs
  - Includes short fall between trial mod payments and note payments

POLL QUESTIONS

Have you or your clients been told that

a) they had too much income for a HAMP modification?

b) they had too little income for a HAMP modification?

c) their expenses were too high for a HAMP modification?

d) they weren't eligible, without any explanation?

31% OF WHAT? THE EXPENSES/INCOME RATIO

- Income
  - Gross income
  - Net income gets multiplied by 125%
- Expenses
  - PITI on first mortgage only
  - Mortgage insurance not included
- Note: Neither income nor expenses are an absolute bar, but a borrower's income may be too low or too high for a HAMP mod
  - Too low and the borrower will fail the NPV test
  - Too high and the borrower may already be at 31% DTI

THE BACK END RATIO

- Servicers supposed to calculate ratio of *all* expenses to income, after the first lien mortgage payment is reduced to 31% of income
- If the back end ratio is more than 55%, borrowers are required to get HUD-certified housing counseling
  - Expenses should not be grounds for denying a modification
  - Borrowers need not complete the counseling before the mod

NET PRESENT VALUE TEST

- If what is realized at a foreclosure is less than the present value of a modified loan, then there may be a loan mod
- Result focused on net benefit to investors, as a whole
  - Not borrower
  - Not servicer
  - Not community

HOW MUCH IS THE UNMODIFIED LOAN WORTH?

- Present value of the interest payments over the life of the loan
- Focuses on total payments
- Assumes all payments made, on time and in full
- Assumes usually current interest rates

WHAT IS THE RISK OF FORECLOSURE?

- HAMP NPV test has a default model based on four variables:
  - FICO score
  - MTM-LTV
  - Current delinquency status
  - DTI
- Value of current loan reduced by probability of default
- Value of loan mod reduced by probability of redefault

WHAT WILL BE REALIZED AFTER A FORECLOSURE SALE?

- How much will costs be?
  - Property taxes and insurance
  - Attorneys' fees and sales costs
  - Foregone interest
- How much will the house sell for?
  - How high is the current value?
  - What is the REO discount?
  - Are house prices going up or down?
- How long will a foreclosure take?
- What is the chance that a homeowner will cure?

WHAT IS THE PRESENT VALUE OF INTEREST PAYMENTS ON A MODIFIED LOAN?

- What interest rate(s) are used?
- Is principal deferred or forgiven?
- How long will it take for the loan to be repaid?
- How likely are loans to redefault?
- How long do loans take to redefault?

MORTGAGE INSURANCE

- Mortgage insurance payments included in NPV
  - Makes foreclosure more attractive
- Agreements with MI companies to pay partial claims to avoid foreclosure
  - Servicers instructed to clear modifications with MI
  - MI companies plug value of partial claim into NPV
- MI payments must continue to be made
  - Not included in measuring payment reduction or affordability
  - Paid on entire unpaid principal balance, even if there is forbearance
- Heightens importance of identifying MI

FAILING THE NPV TEST: WHY?

- Current income stream on loan is high
  - Small likelihood of default (high FICO, low LTV, current, low DTI)
- Foreclosure looks attractive
  - High home value
  - Chance of cure is high
- Mod looks risky
  - Declining home prices
  - High chance of redefault
- Mod doesn't generate enough income
  - Borrower's income is so low that at 31%, the mod doesn't generate enough income

FINDING THE SWEET SPOT

- Loan mod driven by income and payment amount
  - Borrowers can sometimes include income of other members of the household: only do this if you need that income to pass the NPV test
- Don't worry about value, time to sale, anything other than income unless the borrower fails the NPV test

HAMP NPV MODEL IS NOT PUBLIC

- Servicers submit their information in batches through a secure part of hmpadmin.com
- Treasury may be willing to require disclosure of some of the inputs and outputs into NPV
- Should always demand in discovery the entire NPV

SERVICERS CAN CREATE THEIR OWN NPV

- Large servicers can develop their own code
  - Approximately 8 servicers have indicated that they will do so, including B of A
  - Freddie Mac is testing to make sure same results
- Large servicers can use their own numbers for
  - default
  - redefault and
  - The discount rate (+250 basis points)

FDIC NPV TOOL: AN APPROXIMATION OF HAMP

- HAMP has some more sophisticated assumptions, but based on FDIC and FDIC closest public match
- Use FDIC NPV tool with care
  - Autocompletes some information
    - Current payment (based on original interest)
    - Taxes, insurance, foreclosure costs and timeline, based on state
  - Current value
    - Too high and a foreclosure makes more money for investors
- FDIC.gov

FDIC NPV TOOL: CONSERVATIVE ASSUMPTIONS

- House appreciation forecast
- REO stigma
- Time to market
- Redefault rate for loan mods

QUESTIONS ON THE NPV TEST

JUNIOR LIENS

- Junior liens included in back-end ratio
- Some money to negotiate junior liens
  - $1000
  - Some incentives to servicers to remove junior liens

JUNIOR LIEN MODIFCATIONS

- ☐Coordinated (?) with first lien mods
  - Servicers don't have to sign on to both programs
- ☐Liens can be modified
  - Reduced to 1% interest for 5 years (unless IO, then 2%)
  - Reamortized to match first lien
  - Forbear principal in same proportion as on first
- ☐Liens can be extinguished

JUNIOR LIEN MODIFCATIONS INCENTIVES

- ☐Incentive payments to servicers
  - $500 upfront, $250/yr for 3 years
- ☐Incentive payments to borrowers
  - $250/yr for 5 yrs to reduce first mortgage principal balance

HAMP COMPLIANCE POLL QUESTIONS-1

- ☐ Poll questions:
  - Have you seen waiver of claims and defenses?
  - Have you seen waiver of right to a HAMP review?
  - Have you seen HAMP modifications in litigation?
  - Have you seen HAMP modifications in bankruptcy?
  - Have you seen foreclosures initiated while a HAMP review was underway?
  - Have you seen foreclosure sales conducted while a HAMP review was underway?

HAMP COMPLIANCE POLL QUESTIONS-2

- ☐ Poll questions:
  - Have you seen foreclosures initiated while a HAMP review was underway?
  - Have you seen foreclosure sales conducted while a HAMP review was underway?

WAIVER

- ☐Should be no waiver
  - Supplemental Directive 09-01, p. 2
- ☐Language in modification agreement, paragraph 4E appears to waive some defenses
- ☐Can get a HAMP mod even if in active litigation
- ☐Servicers have discretion regarding HAMP mods and bankruptcy

IS THERE TIME TO DO A LOAN MOD?

- ☐Foreclosure SALES stayed while loan mod review conducted
- ☐Loan should not be put into foreclosure during trial mod period
- ☐Loan should not be put into foreclosure during a HAMP review

WHAT HAPPENS IF THE MOD FAILS?

- Servicer and borrower keep incentive payments made to date
- No further loan mod: one bite at the apple
- BE CAREFUL: DO NOT INCLUDE INCOME NOT NEEDED TO PASS THE NPV TEST

DO THEY HAVE TO TELL YOUR CLIENT WHY NO LOAN MOD?

- No notice requirements in HAMP, but
  - FCRA
    - No private right of action
  - ECOA
    - Potential private right of action

WHAT IF THEY DON'T GIVE YOUR CLIENT A MOD?

- Complain
- Litigate

WHO YOU GONNA CALL?

- Fannie?
  - 1-800-7FANNIE
  - But Fannie's primary responsibility is fiscal
- OIG for TARP
  - 1-(877) SIG-2009
  - Not really on their radar screen
- Freddie Mac
  - (866) 939 – 4469 (HAMP Support line)
  - In charge of compliance

LITIGATION THEORIES

- Third party beneficiary
- Equity
- UDAP
- Qui Tam/ Federal False Claims Act
- Questions: have people tried these? With what results? Other theories?

Loan Modification Case Study

Client Interview Notes

To: Brown File
From: Intrepid Attorney
Date: 9/20/07

The Browns came to see me today. They have just gotten a notice that their home is in foreclosure.

The Browns have lived in their home for 33 years. Neither is in good health. Mr. Brown is 82, has had a stroke, cancer, and lost both of his feet (diabetes?). Mrs. Brown is 79. Their only income is Social Security and a small pension. The Browns are African-American. They write and read with difficulty.

They got a mortgage in 2005 for $213,750. The monthly payments were $739, but at some point they were told that the payments would go up $50 every month. They decided they should get a reverse mortgage because they were having trouble making monthly payments.

In November 2006, Lucien Jamet of MLS Mortgage Co. gave them calculations of the amount they could get from a reverse mortgage. It showed we could pay off the old mortgage and still get about $10,000 out. But in order to do that, Mr. Jamet told them, they would need to make some repairs, which he could do for them. The Browns say they told Mr. Jamet to do the repairs and gave him a note for $24,500 for the repairs. The note comes due in five years, they say.

At some point while they were dealing with Jamet, a Reverend Wright came to see them. They had known Reverend Wright since he was a child. He brought with him a woman named Melissa Villegas. Reverend Wright said Ms. Villegas could help them get a good deal on a mortgage. The Browns told Ms. Villegas that they wanted a reverse mortgage; she told them Landmark Realty could help them get a reverse mortgage.

A few days later, one evening in mid-November, the Browns say Ms. Villegas sent out a notary to their homes. The notary told them to sign all the papers then. They didn't understand what they were signing and the notary didn't explain the papers to them.

About two months later, the Browns got a bill in the mail saying their new monthly payment was $2107. They made a few of those payments, but are worried about keeping up those payments, since it is almost all their income and they were having trouble making their lower payments.

The Browns had no documents with them. They said they didn't get copies of any documents. I called the title company and they sent me what they said was their complete file.

The title company documents appear to confirm that the Browns got at most only one copy of the rescission notice and their payment schedule has an error in it. The loan application has several thousand dollars of employment income from a "Friendship Church" on it, plus over $20,000 in liquid assets. The Browns tell me they aren't working and have less than $2,000 in their checking account. The HUD-1 shows that the broker involved was Landmark Realty—they got a $3614 yield spread premium from the lender.

The title company file also shows that there was a second mortgage for $35,000. It looks like this mortgage pays off the "note" Jamet had them sign; there's a payment of $24,500 to "Jamet & Sons, LLC." MLS Mortgage also got about $8,000 in the disbursements from this second mortgage.

According to their Truth-in-Lending from the title company file, their monthly payments start out at $2106.61 for two years, with a balloon payment of $253,526.38 after 30 years.

Possible claims

Truth-in-Lending rescission
RESPA (kickback to broker)
Fraud
Conspiracy
UDAP
Fraud in factum?

Damages
Increase in payments from $739
Disgorgement of all fees
Emotional distress relating to foreclosure, increased payments
TIL statutory and rescission damages
3x the yield spread premium of $3614

To: Brown File
From: Intrepid Attorney
Date: 2/1/09
Re: Possible Loan Modification

The bank that held the Brown's loan has failed and been taken over by the FDIC. It is not clear what claims will survive. We will file a claim form with the FDIC.

I have reviewed their eligibility for the FDIC loan mod in a box. I downloaded the FDIC's Net Present Value Calculator from the FDIC's website at http://www.fdic.gov/consumers/loans/loanmod/loanmodguide.html.

Their loan was originally a 50 year amortization—or 600 month amortization period. The remaining amortization period is 575 (600-25).

Their current interest rate is 9.99%, under the interest rate cap in their note. Without the cap it would be 10.375% (the six month LIBOR was 4.17875% on October 16, 45 days before the December 1, 2008 change date, plus the margin of 6.25%, rounded to the nearest 0.125%).

The Browns managed, with some help from some local agencies and their church, to make 18 payments. They made their last payment in June 2008. They are 8 payments behind.

Their unpaid principal balance, when they made that last payment, was $277,540.77. The appraiser we had look at their property thinks it is only worth $250,000.

Their current gross monthly income is $2896.

The FDIC loan mod in a box approves a loan mod, but requires principal forbearance. It will lower their monthly payment to $904.02 for 5 years, at 3% interest. They will have a balloon payment at the end, as they do now, but it will be about $40,000 less than now.

Questions:

1) Did the Browns sign the earlier agreement they got from Home Eq? Will that change whether or not they can get this loan mod?

2) What will happen to the second mortgage on the Brown's house?

3) What are the tax consequences for the forgiven interest and principal forbearance?

4) Should the Browns take this loan mod offer?
- Can they afford it over the life of the loan?
- Is there something better they can get?
- If their income changes or their taxes change, will they still be eligible for thisb loan mod? Will it still be affordable?

To: Brown File
From Intrepid Attorney
Date: 6/16/08
Re: Negotiation with Servicer

The Browns came in today. They had gotten nervous about what was happening with their case and called the servicer. The servicer sent them the attached agreement to sign before they enter into any discussions about settlement.

I reminded the Browns that I was representing them in court proceedings and that they should not talk to the servicer without me. They say they didn't sign anything.

Alter Highlighted Terms for Interactive NPV Analysis

Program Parameters

Current Freddie rate	6.5%
Program interest rate floor	3.0%

Loan origination information and current status

Investor type (HFI MBS)	MBS	
Orig Loan Amount		$276,000
Original Amortization Term		600
Original Interest Rate		8.990%
Interest only loan (Y/N)	N	
Current UPB		$277,541
Current Rate		8.990%
Remaining Term		575
Months past due		8
Property state	IN	
Current Monthly Mortgage Payment		$2,328.78
Current Interest Payment		$2,310.53
Current Principal Payment		$18.25
Past Due Interest		$20,795
Advances/Escrow		$1,572
Current Debt		$299,907

Borrower status

Monthly Income*	$2,896
Monthly Taxes and Insurance	$196

Foreclosure Scenario

UPB Adjusted for Accrued Interest and Escrow	$299,907
Current Value	$250,000
Home Price Appreciation Forecast	-20%
REO Stigma Discount	20%
Cure Rate	15%
Months to Liquidation	11
Future Interest and Advanced Escrow	$27,577
Foreclosure Costs	$3,581
REO Value	$128,842
Estimated Loss	($171,065)
Zero Cure PV Loss	($156,155)
Probability Wtd Loss	($145,405)
PV Loss	($132,732)

Present Value of Modification

Affordable DTI level	38%	
Modified Payment	$904.02	
Interest Rate at 30 Year Term	2.5%	**Interest rate less than program floor, extend amortization term**
Interest Rate with 40 Year Term	2.5%	**Principal forbearance required**

Prinicpal Forbearance

UPB adjusted for Accrued Interest and Escrow	$299,907
Modified Rate	3.000%
Modified Full Am Payment	$983.88
Difference from Affordable Payment	$79.86
Princ Forebearance	$26,310.19
PV Lost Interest/Forgiven Debt	($81,900.13)

Redefault Rate		40%
Months to Redefault		3
WA Discounted Payments		($110,545.46)
Benefit from Modification		$22,186.12
NPV Test (Pass/Fail)	Pass	

Modification terms

Adjusted UPB	$299,907
Initial Modified Interest Rate	3.000%
Modified Amortization Terms	695
Initial Modified Payment	$904.02
% Difference from Original Payment	-61.2%

PRE-WORKOUT AGREEMENT

This Pre-Workout Agreement is entered into this _____ (the "Agreement"), by and between HomEq ("Lender") and [redacted], collectively known as "Borrower(s)".

Whereas, Borrower(s) is/are indebted to Lender pursuant to the provisions of a note and deed-of-trust/mortgage (The "Loan");

Whereas, Borrower(s) is/are currently delinquent on the mortgage payments;

Whereas, HomEq is willing to discuss a workout arrangement with Borrower(s);

Whereas, Borrower(s) is/are desirous of negotiating a workout and is/are asking HomEq for assistance and agrees that this is not an attempt to interfere with Borrower(s)' business or to control the Borrower(s);

Whereas, Borrower(s) understand(s) that, **until such time as Lender approves a workout arrangement and a written agreement has been executed, a final agreement has not been reached, and the foreclosure action is continuing.**

Now therefore, in consideration of Lender discussing and working towards a workout arrangement with Borrower(s), Borrower(s) agrees that:

a. The Loan is currently in default and the next payment due is <due date>;
b. Such default is valid and material according to the Loan documents;
c. The unpaid principal balance of the Loan is currently $< **UPB** > plus interest accruing from the date of default, late charges and attorney's fees *(this is not a payoff figure)*.
d. Borrower(s) hereby waives any and all defenses he/she/they may have against Lender; and Borrower(s) hereby release any and all claims he/she/they may have against Lender.

Borrower(s) further agrees and understands that HomEq, by entering into this Agreement, do not waive any rights under the Loan Documents and Lender may proceed with foreclosure during the period that Lender and Borrower(s) discuss a workout arrangement.

HomEq Servicing Corporation

_____

[redacted] <date>

_____

Loss Mitigation Officer <date>

_____

<date>

TRUTH-IN-LENDING DISCLOSURE STATEMENT

(THIS IS NEITHER A CONTRACT NOR A COMMITMENT TO LEND)

LENDER OR LENDER'S AGENT:
RESMAE MORTGAGE CORPORATION
6 POINTE DRIVE BREA, CALIFORNIA 92821

CFL # 603-5947 ☐ Preliminary ☒ Final
DATE: 11/08/2006
LOAN NO.: [redacted]
Type of Loan: CONVENTIONAL
248BZ

BORROWERS: [redacted]

8.990%

ADDRESS: [redacted]
CITY/STATE/ZIP: [redacted] CALIFORNIA [redacted]
PROPERTY: [redacted] CALIFORN[redacted]

ANNUAL PERCENTAGE RATE The cost of your credit as a yearly rate.	FINANCE CHARGE The dollar amount the credit will cost you.	Amount Financed The amount of credit provided to you or on your behalf.	Total of Payments The amount you will have paid after you have made all payments as scheduled.
11.3795 %	$ 938,032.59	$ 266,408.20	$ 1,204,440.79

PAYMENT SCHEDULE:

NUMBER OF PAYMENTS	AMOUNT OF PAYMENTS	PAYMENTS ARE DUE BEGINNING	NUMBER OF PAYMENTS	AMOUNT OF PAYMENTS	PAYMENTS ARE DUE BEGINNING
24	2,106.61	Jan 1st, 2007			
6	2,328.79	Jul 1st, 2009			
6	2,553.32	Jul 1st, 2009			
323	2,667.79	Jan 1st, 2010			
1	253,526.38	Dec 1st, 2036			

DEMAND FEATURE: ☒ This loan does not have a Demand Feature. ☐ This loan has a Demand Feature as follows:

VARIABLE RATE FEATURE:
☒ This Loan has a Variable Rate Feature. Variable Rate Disclosures have been provided to you earlier.

SECURITY: You are giving a security interest in the property located at: [redacted] CALIFORNIA [redacted]

ASSUMPTION: Someone buying this property ☒ cannot assume the remaining balance due under original mortgage terms
☐ may assume, subject to lender's conditions, the remaining balance due under original mortgage terms.

FILING / RECORDING FEES: $ 100.00

PROPERTY INSURANCE: ☒ Property hazard insurance with a mortgagee clause to the lender is a required condition of this loan. Borrower may purchase this insurance from any insurance company acceptable to the lender.
Hazard insurance ☐ is ☒ is not available through the lender at an estimated cost of $ $0.00 for a 0.00 year term.

LATE CHARGES: If your payment is more than 15 days late, you will be charged a late charge of 5.000 % of the overdue payment

PREPAYMENT: If you pay off your loan early, you
☒ may ☐ will not have to pay a penalty.
☐ may ☒ will not be entitled to a refund of part of the finance charge.

See your contract documents for any additional information regarding non-payment, default, required repayment in full before scheduled date, and prepayment refunds and penalties.
e means estimate

I/We hereby acknowledge reading and receiving a complete copy of this disclosure.

[redacted] 11-15-06
BORROWER / DATE

[redacted] 11-15-06
BORROWER / DATE

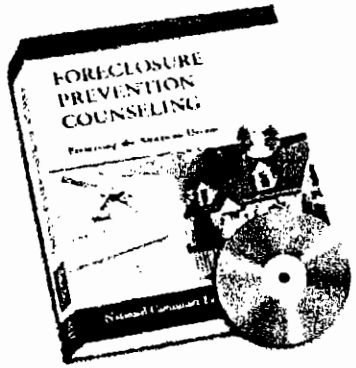
BORROWER / DATE

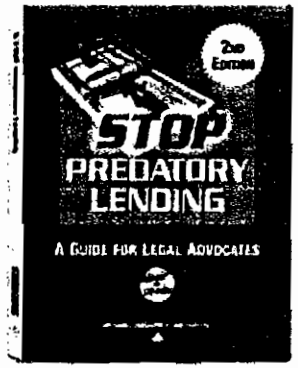
BORROWER / DATE

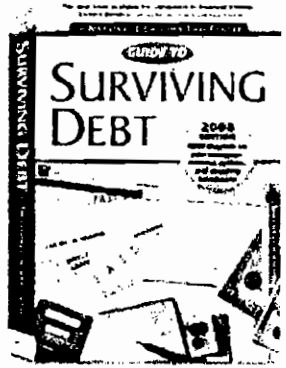
VMP-79E (9908) VMP MORTGAGE FORMS - (800)521-7291 Page 1 of 2 5/96

NCLC Resources

NCLC Resources







SPECIAL CONFERENCE DISCOUNTS

These NCLC Publications from the Nation's Consumer Law Experts

Truth in Lending

with Companion Website
(1136 pp) 2007 6th Ed. and 2008 Supplement

The definitive treatise on Truth in Lending, Consumer Leasing, and the Home Ownership and Equity Protection Acts governing high-cost mortgages with key consumer protection statutes, providing actual damages, statutory damages attorney fees, and loan rescission. The website includes computer software for easy calculation of APRs even for irregular or variable rate loans, numerous sample pleadings, important federal statutes, and full text of all Federal Register notices re Reg. Z and its Commentary.

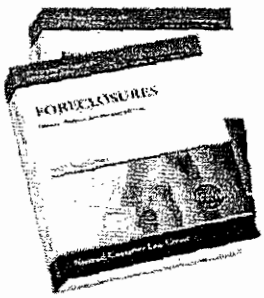
☐ ~~$150~~ **Conference Price: $90**

The Cost of Credit

Regulation, Preemption, and Industry Abuses
with Companion Website
(1244 pp) 2009 4td Ed.

A roadmap for consumer litigation against abusive creditors. Find how to raise loan broker or originator abuses against the mortgage holder. Comprehensive analysis on examining OCC, OTS and FDIC preemption interpretations, and the preemptive effect on state credit law of various federal statutes. The website includes credit math software, key federal statutes, regulations and hard to find agency opinion letters and over 100 sample pleadings.

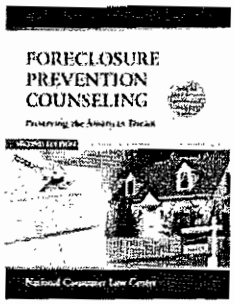
☐ ~~$130~~ **Conference Price: $78**



Foreclosures:

Defenses, Workouts and Mortgage Servicing
with Companion Website
(774 pp) 2007 First Ed. with 2009 Supplement

Details legal rights, and tactics to saving homes from seizure including challenging mortgage servicer abuses, foreclosure litigation, raising loan origination claims against the mortgage holder, tax fore-closures and homeowner rights even *after* the foreclosure sale. ☐ ~~$120~~ **Conference Price: $72**



Foreclosure Prevention Counseling with Companion Website (414 pp, 2nd Ed.)

Practical advice on stopping a threatened foreclosure. How to obtain a workout tailored for 6 different types of mortgages: Fannie Mae, Freddie Mac, Subprime, FHA –insured, VA and Rural Housing Service. **Includes the latest on the new loan modification initiatives.** Details 14 steps to foreclosure prevention and strategies to deal with overcharges and servicing errors.

☐ ~~$60~~ **Conference Price: $36**

Stop Predatory Lending:

A Guide for Legal Advocates
with CD-Rom (286 pp, 2nd Ed.)

A detailed overview of abusive lending with legal protections simplified and practical legal strategies to remedy abusive mortgage, payday, rent-to-own, auto title, and tax refund anticipation loans. ☐ ~~$60~~ **Conference Price $36**

NCLC Guide to Surviving Debt

(480 pages, 2008 edition)

Great introduction for lawyers new to consumer law and everything non-lawyers should know about the rights of consumer borrowers including which debts to pay first, dealing with debt collectors, credit reporting, student loans and bankruptcy.

☐ ~~$20~~ **Conference Price: $12**

TO ORDER: Complete this form and send payment to National Consumer Law Center, 7 Winthrop Square, 4th Floor Boston MA 02110 or **CALL (617) 542-9595 and mention discount training code 909AP or FAX this form to (617) 542-8028.**

Order securely online at **www.consumerlaw.org and enter discount code of 909AP at checkout.**

Hurry, conference prices expire 9/30/2009.

Please send me the marked NCLC titles above with free UPS Ground shipping.

☐ Check Enclosed. ☐ VISA MasterCard AMEX DISCOVER

:d Nmber_____

Exp. Date ____ / _____ Signature _____

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ORGANIZATION _____

STREET ADDRESS _____

CITY _____ ST _____ ZIP _____

TELEPHONE ( ) _____

EMAIL: _____

WEST'S IDAHO CODE ANNOTATED

CHAPTER 15

TRUST DEEDS

§ 45-1501 THROUGH § 45-1515

CHAPTER 15

TRUST DEEDS

Section

§ 45–1501. Repealed

§ 45–1502. Definitions—Trustee's charge

As used in this act:

(1) "Beneficiary" means the person named or otherwise designated in a trust deed as the person for whose benefit a trust deed is given, or his successor in interest, and who shall not be the trustee.

(2) "Grantor" means the person conveying real property by a trust deed as security for the performance of an obligation.

(3) "Trust deed" means a deed executed in conformity with this act and conveying real property to a trustee in trust to secure the performance of an obligation of the grantor or other person named in the deed to a beneficiary.

(4) "Trustee" means a person to whom the legal title to real property is conveyed by trust deed, or his successor in interest.

(5) "Real property" means any right, title, interest and claim in and to real property owned by the grantor at the date of execution of the deed of trust or acquired thereafter by said grantor or his successors in interest. Provided, nevertheless, real property as so defined which may be transferred in trust under this act shall be limited to either (a) any real property located within an incorporated city or village at the time of the transfer, or (b) any real property not exceeding forty (40) acres, regardless of its location, and in either event where the trust deed states that the real property involved is within either of the above provisions, such statement shall be binding upon all parties and conclu-

sive as to compliance with the provisions of this act relative to the power to make such transfer and trust and power of sale conferred in this act.

(6) The trustee shall be entitled to a reasonable charge for duties or services performed pursuant to the trust deed and this chapter, including compensation for reconveyance services notwithstanding any provision of a deed of trust prohibiting payment of a reconveyance fee by the grantor or beneficiary, or any provision of a deed of trust which limits or otherwise restricts the amount of a reconveyance fee to be charged and collected by the trustee. A trustee shall be entitled to refuse to reconvey a deed of trust until the trustee's reconveyance fees and recording costs for recording the reconveyance instruments are paid in full. The trustee shall not be entitled to a foreclosure fee in the event of judicial foreclosure or work done prior to the recording of a notice of default. If the default is cured prior to the time of the last newspaper publication of the notice of sale, the trustee shall be paid a reasonable fee.

S.L. 1957, ch. 181, § 2; S.L. 1967, ch. 118, § 2; S.L. 1970, ch. 42, § 1; S.L. 1983, ch. 190, § 1; S.L. 1995, ch. 326, § 2; S.L. 1996, ch. 248, § 1; S.L. 1997, ch. 387, § 1.

Library References

Mortgages ⇐209.
Westlaw Key Number Search: 266k209.
C.J.S. Mortgages § 280.

Research References

Treatises and Practice Aids

Law of Distressed Real Estate § 68:1, Type of Security Device Used.

Law of Distressed Real Estate § 68:11, Nonjudicial Foreclosure for Deeds of Trust.

Residential Mortgage Lending: State Regulation Manual - West Idaho § 2:15, Document Preparation.

Residential Mortgage Lending: State Regulation Manual - West Idaho § 2:19, Foreclosure.

Residential Mortgage Lending: State Regulation Manual - West Idaho § 2:34, Security Instrument.

Residential Mortgage Lending: State Regulation Manual - West Idaho § 2:38, Trustees.

Notes of Decisions

1. In general

Under Idaho law, trust deed which was defective because it reflected that size of aggregated parcels exceeded statutory maximum would be treated as a mortgage, with beneficiary losing only right to nonjudicial foreclosure and the shorter 120–day period of cure as opposed to one year postforeclosure period of redemption; thus, its recordation would be constructive notice of beneficiaries' lien, which would protect his rights as against subsequent purchasers or encumbrancers. I.C. §§ 45–1502 et seq., 45–1502(5). In re Bear Lake West, Inc., 1984, 36 B.R. 413. Mortgages ⇐ 8; Mortgages ⇐ 154(4); Vendor And Purchaser ⇐ 231(17)

Legal title to property is conveyed by deed of trust to trustee. I.C. § 45–1502(4). Defendant A v. Idaho State Bar, 1999, 132 Idaho 662, 978 P.2d 222. Mortgages ⇐ 138

Failure of title insurer, which was designated as trustee under vendor's deed of trust, to disclose second deed of trust in verbal update could not form basis for negligence liability; vendor's deed of trust and the Trust Deeds Act did not establish duty on part of insurer to provide verbal updates, and verbal update was not given pursuant to insurer's role as trustee. I.C. § 45–1502 et seq. Brown's Tie & Lumber Co. v. Chicago Title Co. of Idaho, 1988, 115 Idaho 56, 764 P.2d 423. Insurance ⇐ 2620

Prior execution of deed of trust on real estate conveyed to trustee nothing more than power of sale, capable of exercise upon occurrence of certain contingencies such as default in payment, and left in trustor legal estate comprised of all incidents of ownership, which passed to

Note 1

bankruptcy estate upon trustor's filing of bankruptcy. Bankr.Code, 11 U.S.C.A. § 541; I.C. § 45–1502 et seq. Long v. Williams, 1983, 105 Idaho 585, 671 P.2d 1048. Bankruptcy ⇐ 2545

2. Delivery

Deed of trust must be delivered to give it effect. I.C. § 45–1502(4). Defendant A v. Idaho State Bar, 1999, 132 Idaho 662, 978 P.2d 222. Mortgages ⇐ 66

3. Actions for money judgment

Holders of note secured by deed of trust on real property were entitled to sue on note without first resorting to foreclosure proceedings on property covered by deed. I.C. §§ 45–1502 to 45–1515. Tanner v. Shearmire, 1989, 115 Idaho 1060, 772 P.2d 267. Mortgages ⇐ 218.1

Holder of promissory note secured by deed of trust encumbering real property was entitled to bring action for money judgment on note without first exhausting security by judicial foreclosure or by exercise of power of sale. I.C. §§ 45–1502 et seq., 45–1505(4). Frazier v. Neilsen & Co., 1989, 115 Idaho 739, 769 P.2d 1111. Mortgages ⇐ 218.1

If a holder of a promissory note secured by a deed of trust encumbering real property files suit to recover on the debt without first foreclosing on the security, the security is waived at the time the action on the debt is filed. I.C. § 45–1502 et seq. Frazier v. Neilsen & Co., 1989, 115 Idaho 739, 769 P.2d 1111. Mortgages ⇐ 218.4

§ 45–1503. Transfers in trust to secure obligation—Foreclosure

(1) Transfers in trust of any estate in real property as defined in section 45-1502(5), Idaho Code, may hereafter be made to secure the performance of an obligation of the grantor or any other person named in the deed to a beneficiary. Where any transfer in trust of any estate in real property is hereafter made to secure the performance of such an obligation, a power of sale is hereby conferred upon the trustee to be exercised after a breach of the obligation for which such transfer is security, and a deed of trust executed in conformity with this act may be foreclosed by advertisement and sale in the manner hereinafter provided, or, at the option of beneficiary, by foreclosure as provided by law for the foreclosure of mortgages on real property. If any obligation secured by a trust deed is breached, the beneficiary may not institute a judicial action against the grantor or his successor in interest to enforce an obligation owed by the grantor or his successor in interest unless:

(a) The trust deed has been foreclosed by advertisement and sale in the manner provided in this chapter and the judicial action is brought pursuant to section 45-1512, Idaho Code; or

(b) The action is one for foreclosure as provided by law for the foreclosure of mortgages on real property; or

(c) The beneficiary's interest in the property covered by the trust deed is substantially valueless as defined in subsection (2) of this section, in which case the beneficiary may bring an action against the grantor or his successor in interest to enforce the obligation owed by grantor or his successor in interest without first resorting to the security; or

(d) The action is one excluded from the meaning of "action" under the provisions of section 6-101(3), Idaho Code.

(2) As used in this section, "substantially valueless" means that the beneficiary's interest in the property covered by the trust deed has become valueless through no fault of the beneficiary, or that the beneficiary's interest in such property has little or no practical value to the beneficiary after taking into

account factors such as the nature and extent of the estate in real property which was transferred in trust; the existence of senior liens against the property; the cost to the beneficiary of satisfying or making current payments on senior liens; the time and expense of marketing the property covered by the deed of trust; the existence of liabilities in connection with the property for clean up of hazardous substances, pollutants or contaminants; and such other factors as the court may deem relevant in determining the practical value to the beneficiary of the beneficiary's interest in the real property covered by the trust deed.

(3) The beneficiary may bring an action to enforce an obligation owed by grantor or his successor in interest alleging that the beneficiary's interest in the property covered by the trust deed is substantially valueless without affecting the priority of the lien of the trust deed and without waiving his right to require the trust deed to be foreclosed by advertisement and sale and the beneficiary may, but shall not be required to, plead an alternative claim for foreclosure of the trust deed as a mortgage in the same action. If the court finds that the property is not substantially valueless, the beneficiary may seek judicial foreclosure of the trust deed, or he may dismiss the action and foreclose the trust deed by advertisement and sale in the manner provided in this chapter. If the court finds that the beneficiary's interest in the property covered by the trust deed is substantially valueless and enters a judgment upon the obligation, when that judgment becomes final the beneficiary shall execute a written request to the trustee to reconvey to the grantor or his successor in interest the estate in real property described in the trust deed. If the beneficiary obtains judgment on an obligation secured by a trust deed pursuant to subsection (1)(c) of this section, the lien of the judgment shall not relate back to the date of the lien of the trust deed.

S.L. 1957, ch. 181, § 3; S.L. 1967, ch. 118, § 3; S.L. 1989, ch. 340, § 1; S.L. 1993, ch. 281, § 2.

Cross References

Recording mortgages, see § 6-101 et seq.

Library References

Mortgages ⇐329 to 379.
Westlaw Key Number Searches: 266k329 to 266k379.

C.J.S. Mortgages §§ 473, 490 to 496, 499 to 500, 506 to 512, 551 to 552, 575 to 626, 630 to 689.

Research References

Treatises and Practice Aids

Law of Distressed Real Estate § 68:3, After Default and Before Foreclosure -- Alternative Remedies.

Notes of Decisions

1. Validity

Statute providing for foreclosure of a trust deed by advertisement or notice and sale, contains requirements, as to notice and opportunity to be heard, sufficient to meet constitutional requirements of due process. Laws 1957, c. 181, § 1 et seq.; Const. art. 1, §§ 1, 13; U.S.C.A.Const. Amend. 14. Roos v. Belcher, 1958, 79 Idaho 473, 321 P.2d 210. Constitutional Law ⇐ 309(1); Mortgages ⇐ 330

Statute providing for foreclosure of a trust deed by advertisement or notice and sale was not unconstitutional on ground that it was unreasonably discriminatory in that it permitted use of trust deeds as security only in cases where conveyance was of an area not exceeding three acres, in view of fact that classification was reasonably based on distinction between initial payments where small acreages are involved, providing little or no equity in the borrower, as distinguished from substantial equity of borrowers where larger acreages are involved. Laws 1957, c. 181, § 1 et seq. Roos v. Belcher, 1958, 79 Idaho 473, 321 P.2d 210. Constitutional Law ⇐ 208(1); Mortgages ⇐ 330

2. In general

Statute prohibiting beneficiary of trust deed from instituting action against grantor unless trust deed has been foreclosed did not apply retroactively to action instituted before statute's effective date. I.C. § 45–1503. Frazier v. Neilsen & Co., 1990, 118 Idaho 104, 794 P.2d 1160. Mortgages ⇐ 330

Prior execution of deed of trust on real estate conveyed to trustee nothing more than power of sale, capable of exercise upon occurrence of certain contingencies such as default in payment, and left in trustor legal estate comprised of all incidents of ownership, which passed to bankruptcy estate upon trustor's filing of bankruptcy. Bankr.Code, 11 U.S.C.A. § 541; I.C. § 45–1502 et seq. Long v. Williams, 1983, 105 Idaho 585, 671 P.2d 1048. Bankruptcy ⇐ 2545

Statute providing for foreclosure of a trust deed by advertisement or notice and sale, would not be deemed unenforceable because of certain obvious clerical errors or misprints, but references in sections eight and ten of such statute would be read as references to section six, rather than section five. Laws 1957, c. 181, §§ 1 et seq., 6(2, 7), 8, 10. Roos v. Belcher, 1958, 79 Idaho 473, 321 P.2d 210. Mortgages ⇐ 330

3. Actions for money judgement

Under either previous statute or amended version, bank was entitled to proceed directly against debtors on note because its interest in property was rendered substantially useless as defined by statute; bank's action to enforce obligation owed by debtors was begun only after foreclosure of deed of trust which was senior to bank's deed of trust and thus foreclosure sale served to terminate all interest in property covered by trust deed, bank's lien against property was extinguished and its interest in property was therefore unavailable for future foreclosure. I.C. § 45–1503. First Interstate Bank of Idaho, N.A. v. Eisenbarth, 1993, 123 Idaho 895, 853 P.2d 640. Mortgages ⇐ 218.1

Creditor was entitled to bring action on note without first resorting to security; amendment to statute requiring creditor to resort to security first did not apply to note which was in existence prior to effective date of amendment. I.C. §§ 45–1503, 45–1503(1)(c). Curtis v. Firth, 1993, 123 Idaho 598, 850 P.2d 749. Secured Transactions ⇐ 226

Holder of promissory note secured by deed of trust encumbering real property was entitled to bring action for money judgment on note without first exhausting security by judicial foreclosure or by exercise of power of sale. I.C. §§ 45–1502 et seq., 45–1505(4). Frazier v. Neilsen & Co., 1989, 115 Idaho 739, 769 P.2d 1111. Mortgages ⇐ 218.1

4. Waiver of security

If a holder of a promissory note secured by a deed of trust encumbering real property files suit to recover on the debt without first foreclosing on the security, the security is waived at the time the action on the debt is filed. I.C. § 45–1502 et seq. Frazier v. Neilsen & Co., 1989, 115 Idaho 739, 769 P.2d 1111. Mortgages ⇐ 218.4

If, during an action on the debt brought by the holder of a promissory note secured by a deed of trust encumbering real property, the property covered by the trust deed is conveyed or encumbered by the debtor, any revival of the security of the trust deed upon dismissal of the suit on the debt shall be subject to any such conveyance or encumbrance. I.C. § 45–1505(4). Frazier v. Neilsen & Co., 1989, 115 Idaho 739, 769 P.2d 1111. Mortgages ⇐ 218.4

5. Foreclosure by sale

In foreclosure proceeding, deed of trust, trial court properly utilized judicial foreclosure in determination of deficiency judgment, rather

than statutory section limiting the amount of a deficiency judgment resulting from foreclosure of a trust deed. I.C. §§ 6–101, 6–108, 45–1503, 45–1512. Thompson v. Kirsch, 1984, 106 Idaho 177, 677 P.2d 490. Mortgages ⇐ 375

§ 45–1504. Trustee of trust deed—Who may serve—Successors

(1) The trustee of a trust deed under this act shall be:

(a) Any member of the Idaho state bar;

(b) Any bank or savings and loan association authorized to do business under the laws of Idaho or the United States;

(c) An authorized trust institution having a charter under chapter 32, title 26, Idaho Code, or any corporation authorized to conduct a trust business under the laws of the United States; or

(d) A licensed title insurance agent or title insurance company authorized to transact business under the laws of the state of Idaho.

(2) The trustee may resign at its own election or be replaced by the beneficiary. The trustee shall give prompt written notice of its resignation to the beneficiary. The resignation of the trustee shall become effective upon the recording of the notice of resignation in each county in which the deed of trust is recorded. If a trustee is not appointed in the deed of trust, or upon the resignation, incapacity, disability, absence, or death of the trustee, or the election of the beneficiary to replace the trustee, the beneficiary shall appoint a trustee or a successor trustee. Upon recording the appointment of a successor trustee in each county in which the deed of trust is recorded, the successor trustee shall be vested with all powers of an original trustee.

S.L. 1957, ch. 181, § 4; S.L. 1969, ch. 155, § 1; S.L. 1983, ch. 190, § 2; S.L. 2005, ch. 236, § 3.

Historical and Statutory Notes

S.L. 2005, ch. 236, rewrote subsecs. (1)(c) and (2) that formerly provided:

"[(1)](c) Any corporation authorized to conduct a trust business under the laws of Idaho or the United States; or

"(2) In the event of death, dissolution, incapacity, disability or resignation of the trustee, the beneficiary may nominate in writing another qualified trustee. Provided, however, that the beneficiary may, for any reason obtain the resignation of the trustee by serving upon the trustee and the grantor in the deed of trust, at their last known address, a notice of intention to appoint a successor trustee. Said notice shall be given by registered or certified mail, and twenty (20) days after the date of mailing the notice of intention to appoint a successor trustee the beneficiary may nominate a successor trustee. Upon recording in the mortgage records of the county or counties in which the trust deed is recorded of the appointment of a successor trustee, the successor trustee shall be vested with all of the powers of the original trustee. Provided that a trustee may not be changed at the beneficiary's nomination after foreclosure has commenced by the filing of the notice of default and is proceeding timely."

Library References

Mortgages ⇐209.

Westlaw Key Number Search: 266k209.

C.J.S. Mortgages § 280.

Research References

Treatises and Practice Aids

Residential Mortgage Lending: State Regulation Manual - West Idaho § 2:38, Trustees.

Notes of Decisions

In general 1

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1. In general

Nonjudicial deed of trust foreclosure statute, providing for notice of intention to appoint successor trustee where trustee under deed of trust refuses to resign, did not apply to case where trustee voluntarily resigned. I.C. § 45–1504(2). Frontier Federal Sav. and Loan Ass'n v. Douglass, 1993, 123 Idaho 808, 853 P.2d 553, rehearing denied, certiorari denied 114 S.Ct. 309, 510 U.S. 917, 126 L.Ed.2d 257. Mortgages ⇐ 209

Nonjudicial deed of trust foreclosure statute did not require that resignation of trustee be recorded. I.C. § 45–1504(2). Frontier Federal Sav. and Loan Ass'n v. Douglass, 1993, 123 Idaho 808, 853 P.2d 553, rehearing denied, certiorari denied 114 S.Ct. 309, 510 U.S. 917, 126 L.Ed.2d 257. Mortgages ⇐ 209

§ 45–1505. Foreclosure of trust deed, when

The trustee may foreclose a trust deed by advertisement and sale under this act if:

(1) The trust deed, any assignments of the trust deed by the trustee or the beneficiary and any appointment of a successor trustee are recorded in mortgage records in the counties in which the property described in the deed is situated; and

(2) There is a default by the grantor or other person owing an obligation the performance of which is secured by the trust deed or by their successors in interest with respect to any provision in the deed which authorizes sale in the event of default of such provision; and

(3) The trustee or beneficiary shall have (a) filed for record in the office of the recorder in each county wherein the trust property, or some part or parcel, is situated, a notice of default identifying the deed of trust by stating the name or names of the trustor or trustors and giving the book and page where the same is recorded, or a description of the trust property, and containing a statement that a breach of the obligation for which the transfer in trust is security has occurred, and setting forth the nature of such breach and his election to sell or cause to be sold such property to satisfy such obligation; and (b) mailed a copy of such notice by registered or certified mail, return receipt requested, to any person requesting such notice of record as provided in section 45-1511, Idaho Code. Service by mail in accordance with this subsection (3) shall be deemed effective at the time of mailing.

(4) No action, suit or proceeding has been instituted to recover the debt then remaining secured by the trust deed, or any part thereof, or if such action or proceeding has been instituted, the action or proceeding has been dismissed.

S.L. 1957, ch. 181, § 5; S.L. 1990, ch. 401, § 1.

Cross References

Mortgage foreclosures, see § 6–101 et seq.

Library References

Mortgages ⇐335.
Westlaw Key Number Search: 266k335.

C.J.S. Mortgages §§ 506 to 512, 579, 602, 604.

Research References

Treatises and Practice Aids

Law of Distressed Real Estate § 17:21, Stability of Titles and Proof of Compliance With Statutes.

Law of Distressed Real Estate § 19:27, Other Statutory Controls -- Election of Remedies Statutes.

Law of Distressed Real Estate § 68:12, Nonjudicial Foreclosure for Deeds of Trust -- Prerequisites to Nonjudicial Foreclosure.

Restatement (3d) of Property (Mortgages) § 8.2, Mortgagee's Remedies on the Obligation and the Mortgage.

Notes of Decisions

1. Validity

Statute providing for foreclosure of a trust deed by advertisement or notice and sale was not unconstitutional on ground that it was unreasonably discriminatory in that it permitted use of trust deeds as security only in cases where conveyance was of an area not exceeding three acres, in view of fact that classification was reasonably based on distinction between initial payments where small acreages are involved, providing little or no equity in the borrower, as distinguished from substantial equity of borrowers where larger acreages are involved. Laws 1957, c. 181, § 1 et seq. Roos v. Belcher, 1958, 79 Idaho 473, 321 P.2d 210. Constitutional Law ⇐ 208(1); Mortgages ⇐ 330

Statute providing for foreclosure of a trust deed by advertisement or notice and sale, contains requirements, as to notice and opportunity to be heard, sufficient to meet constitutional requirements of due process. Laws 1957, c. 181, § 1 et seq.; Const. art. 1, §§ 1, 13; U.S.C.A.Const. Amend. 14. Roos v. Belcher, 1958, 79 Idaho 473, 321 P.2d 210. Constitutional Law ⇐ 309(1); Mortgages ⇐ 330

2. In general

Statute governing foreclosure of trust deed and statute governing action seeking balance due on obligation are in pari materia and must be construed together. I.C. §§ 45–1505, 45–1512. Frontier Federal Sav. and Loan Ass'n v. Douglass, 1993, 123 Idaho 808, 853 P.2d 553, rehearing denied, certiorari denied 114 S.Ct. 309, 510 U.S. 917, 126 L.Ed.2d 257. Statutes ⇐ 223.2(1.1)

Statute providing in effect that a mortgage can be foreclosed only by judicial action, and statute to the effect that a mortgagee cannot recover possession without a foreclosure sale, are not applicable to proceedings for the foreclosure of a trust deed by advertisement or notice and sale as authorized by statute. Laws 1957, c. 181, §§ 1 et seq., 3, 5, 6, 16; I.C. §§ 6–101, 6–104, 45–901, 45–904. Roos v. Belcher, 1958, 79 Idaho 473, 321 P.2d 210. Mortgages ⇐ 330

Statute providing for foreclosure of a trust deed by advertisement or notice and sale, would not be deemed unenforceable because of certain obvious clerical errors or misprints, but references in sections eight and ten of such statute would be read as references to section six, rather than section five. Laws 1957, c. 181, §§ 1 et seq., 6(2, 7), 8, 10. Roos v. Belcher, 1958, 79 Idaho 473, 321 P.2d 210. Mortgages ⇐ 330

3. Duties of trustee

Action of title insurer, which was designated as trustee in vendor's deed of trust, in delaying scheduled foreclosure sale after discovering second deed of trust was necessary to clear second trust deed from title at judicial sale, and thus, was proper exercise of its powers as trustee and could not form basis for insurer's bad-faith claim. I.C. § 45–1505. Brown's Tie & Lumber Co. v. Chicago Title Co. of Idaho, 1988, 115 Idaho 56, 764 P.2d 423. Mortgages ⇐ 209

4. Actions for money judgment

Holder of promissory note secured by deed of trust encumbering real property was entitled to bring action for money judgment on note without first exhausting security by judicial foreclosure or by exercise of power of sale. I.C. §§ 45–1502 et seq., 45–1505(4). Frazier v. Neilsen & Co., 1989, 115 Idaho 739, 769 P.2d 1111. Mortgages ⇐ 218.1

If, during an action on the debt brought by the holder of a promissory note secured by a deed of trust encumbering real property, the property covered by the trust deed is conveyed or encumbered by the debtor, any revival of the security of the trust deed upon dismissal of the

suit on the debt shall be subject to any such conveyance or encumbrance. I.C. § 45–1505(4). Frazier v. Neilsen & Co., 1989, 115 Idaho 739, 769 P.2d 1111. Mortgages ⇐ 218.4

5. Foreclosure by sale

Parties to promissory note secured by deed of trust cured default by modifying note, such that there were no longer any sums past due, and thus, foreclosure sale of property securing the note was void, even though grantors of deed of trust did not pay entire amount then due at time of modification and acknowledged that notice of default would remain filed until beneficiary withdrew it, where parties agreed to a new schedule of payments, and beneficiary agreed to forbear from proceeding with foreclosure sale unless there was a new default. I.C. § 45–1505(2). Taylor v. Just, 2002, 138 Idaho 137, 59 P.3d 308. Mortgages ⇐ 335; Mortgages ⇐ 369(2)

Statute providing that a failure to comply with the manner for foreclosing on a deed of trust would not affect validity of a sale to a good faith purchaser for value did not apply to foreclosure sale that was void for lack of a default. I.C. §§ 45–1505(2), 45–1506, 45–1508. Taylor v. Just, 2002, 138 Idaho 137, 59 P.3d 308. Mortgages ⇐ 369(2); Mortgages ⇐ 372(3)

Fact that notice of trustee's sale stated that beneficiary "elects to sell or cause the trust property to be sold to satisfy said obligation" did not preclude mortgagee, under either estoppel or waiver theories, from recovering statutory deficiency judgment where relevant language was required by statute governing foreclosure of trust deed. I.C. §§ 45–1505(3), 45–1512. Frontier Federal Sav. and Loan Ass'n v. Douglass, 1993, 123 Idaho 808, 853 P.2d 553, rehearing denied, certiorari denied 114 S.Ct. 309, 510 U.S. 917, 126 L.Ed.2d 257. Mortgages ⇐ 375

§ 45–1506. Manner of foreclosure—Notice—Sale

(1) A trust deed may be foreclosed in the manner provided in this section.

(2) Subsequent to recording notice of default as hereinbefore provided, and at least one hundred twenty (120) days before the day fixed by the trustee for the trustee's sale, notice of such sale shall be given by registered or certified mail, return receipt requested, to the last known address of the following persons or their legal representatives, if any:

(a) The grantor in the trust deed and any person requesting notice of record as provided in section 45-1511, Idaho Code.

(b) Any successor in interest of the grantor (including, but not limited to, a grantee, transferee or lessee) whose interest appears of record prior to the recording of the notice of default, or where the trustee or the beneficiary has actual notice of such interest.

(c) Any person having a lien or interest subsequent to the interest of the trustee in the trust deed where such lien or interest appears of record prior to the recording of the notice of default, or where the trustee or the beneficiary has actual notice of such lien or interest.

(3) The disability, insanity or death of any person to whom notice of sale is to be given under subsection (2) of this section shall not delay or impair in any way the trustee's right under a trust deed to proceed with a sale under such deed, provided the notice of sale required under subsection (2) of this section has been mailed as provided by law for service of summons upon incompetents or to the administrator or executor of the estate of such person.

(4) The notice of sale shall set forth:

(a) The names of the grantor, trustee and beneficiary in the trust deed.

(b) A description of the property covered by the trust deed.

(c) The book and page of the mortgage records or the recorder's instrument number where the trust deed is recorded.

(d) The default for which the foreclosure is made.

(e) The sum owing on the obligation secured by the trust deed.

(f) The date, time and place of the sale which shall be held at a designated time after 9:00 a.m. and before 4:00 p.m., Standard Time, and at a designated place in the county or one of the counties where the property is located.

(5) At least three (3) good faith attempts shall be made on different days over a period of not less than seven (7) days each of which attempts must be made at least thirty (30) days prior to the day of the sale to serve a copy of the notice of sale upon an adult occupant of the real property in the manner in which a summons is served. At the time of each such attempt, a copy of the notice of sale shall be posted in a conspicuous place on the real property unless the copy of the notice of sale previously posted remains conspicuously posted. Provided, however, that if during such an attempt personal service is made upon an adult occupant and a copy of the notice is posted, then no further attempt at personal service and no further posting shall be required. Provided, further, that if the adult occupant personally served is a person to whom the notice of sale was required to be mailed (and was mailed) pursuant to the foregoing subsections of this section, then no posting of the notice of sale shall be required.

(6) A copy of the notice of sale shall be published in a newspaper of general circulation in each of the counties in which the property is situated once a week for four (4) successive weeks, making four (4) publishings in all, with the last publication to be at least thirty (30) days prior to the day of sale.

(7) An affidavit of mailing notice of sale and an affidavit of posting (when required) and publication of notice of sale as required by subsection (6) of this section shall be recorded in the mortgage records in the counties in which the property described in the deed is situated at least twenty (20) days prior to the date of sale.

(8) The sale shall be held on the date and at the time and place designated in the notice of sale or notice of rescheduled sale as provided in section 45-1506A, Idaho Code, unless the sale is postponed as provided in this subsection or as provided in section 45-1506B, Idaho Code, respecting the effect of an intervening stay or injunctive relief order. The trustee shall sell the property in one parcel or in separate parcels at auction to the highest bidder. Any person, including the beneficiary under the trust deed, may bid at the trustee's sale. The attorney for such trustee may conduct the sale and act in such sale as the auctioneer of trustee. The trustee may postpone the sale of the property upon request of the beneficiary by publicly announcing at the time and place originally fixed for the sale, the postponement to a stated subsequent date and hour. No sale may be postponed to a date more than thirty (30) days subsequent to the date from which the sale is postponed. A postponed sale may itself be postponed in the same manner and within the same time limitations as provided in this subsection.

(9) The purchaser at the sale shall forthwith pay the price bid and upon receipt of payment the trustee shall execute and deliver the trustee's deed to such purchaser, provided that in the event of any refusal to pay purchase money, the officer making such sale shall have the right to resell or reject any subsequent bid as provided by law in the case of sales under execution.

(10) The trustee's deed shall convey to the purchaser the interest in the property which the grantor had, or had the power to convey, at the time of the execution by him of the trust deed together with any interest the grantor or his successors in interest acquired after the execution of such trust deed.

(11) The purchaser at the trustee's sale shall be entitled to possession of the property on the tenth day following the sale, and any persons remaining in possession thereafter under any interest except one prior to the deed of trust shall be deemed to be tenants at sufferance.

(12) Whenever all or a portion of any obligation secured by a deed of trust which has become due by reason of a default of any part of that obligation, including taxes, assessments, premiums for insurance or advances made by a beneficiary in accordance with the terms of the deed of trust, the grantor or his successor in interest in the trust property or any part thereof, or any beneficiary under a subordinate deed of trust or any person having a subordinate lien or encumbrance of record thereon, at any time within one hundred fifteen (115) days of the recording of the notice of default under such deed of trust, if the power of sale therein is to be exercised, or otherwise at any time prior to the entry of a decree of foreclosure, may pay to the beneficiary or their successors in interest, respectively, the entire amount then due under the terms of the deed of trust and the obligation secured thereby (including costs and expenses actually incurred in enforcing the terms of such obligation and a reasonable trustee's fee subject to the limitations imposed by subsection (6) of section 45-1502, Idaho Code, and attorney's fees as may be provided in the promissory note) other than such portion of the principal as would not then be due had no default occurred, and thereby cure the default theretofore existing, and thereupon, all proceedings theretofore had or instituted shall be dismissed or discontinued and the obligation and deed of trust shall be reinstated and shall be and remain in force and effect, the same as if no acceleration had occurred.

(13) Any mailing to persons outside the United States and its territories required by this chapter may be made by ordinary first class mail if certified or registered mail service is unavailable.

(14) Service by mail in accordance with the provisions of this section shall be deemed effective at the time of mailing.

S.L. 1957, ch. 181, § 6; S.L. 1967, ch. 74, § 1; S.L. 1983, ch. 190, § 3; S.L. 1990, ch. 401, § 2.

Library References

Mortgages ⇐335, 345, 349 to 379.
Westlaw Key Number Searches: 266k335; 266k345; 266k349 to 266k379.

C.J.S. Mortgages §§ 499 to 500, 506 to 512, 551 to 552, 579, 602 to 604, 608 to 620, 622 to 626, 630 to 689.

Research References

Treatises and Practice Aids

Law of Distressed Real Estate § 19:28, Other Statutory Controls -- Statutory Extension of Equitable Redemption.

Law of Distressed Real Estate § 68:14, Nonjudicial Foreclosure for Deeds of Trust -- Mailing, Posting, and Publication of Notice of Sale.

Law of Distressed Real Estate § 68:15, Nonjudicial Foreclosure for Deeds of Trust -- Cure of Default.

Law of Distressed Real Estate § 68:16, Nonjudicial Foreclosure for Deeds of Trust -- Foreclosure Sale.

Law of Distressed Real Estate § 68:17, Nonjudicial Foreclosure for Deeds of Trust -- Possession by Purchaser.

Law of Distressed Real Estate App 11L, Jurisdictional Laws and Practices Regarding Rights to Possession, Receivers, and Rents.

Residential Mortgage Lending: State Regulation Manual - West Idaho § 2:19, Foreclosure.

Notes of Decisions

1. Validity

Statute providing for foreclosure of a trust deed by advertisement or notice and sale was not unconstitutional on ground that it was unreasonably discriminatory in that it permitted use of trust deeds as security only in cases where conveyance was of an area not exceeding three acres, in view of fact that classification was reasonably based on distinction between initial payments where small acreages are involved, providing little or no equity in the borrower, as distinguished from substantial equity of borrowers where larger acreages are involved. Laws 1957, c. 181, § 1 et seq. Roos v. Belcher, 1958, 79 Idaho 473, 321 P.2d 210. Constitutional Law ⇐ 208(1); Mortgages ⇐ 330

Statute providing for foreclosure of a trust deed by advertisement or notice and sale, contains requirements, as to notice and opportunity to be heard, sufficient to meet constitutional requirements of due process. Laws 1957, c. 181, § 1 et seq.; Const. art. 1, §§ 1, 13; U.S.C.A.Const. Amend. 14. Roos v. Belcher, 1958, 79 Idaho 473, 321 P.2d 210. Constitutional Law ⇐ 309(1); Mortgages ⇐ 330

2. In general

Statutory provision giving the grantor of a deed of trust the right to cure a default by paying the sums due, including a reasonable trustee's fee and attorney fees, within 115 days after the recording of the notice of default simply grants a right to cure within 115 days after the recording of the notice of default and specifies how a grantor can exercise that right; it does not purport to limit the right of the grantor and beneficiary to come to their own agreement to cure a default. I.C. § 45-1506(12). Taylor v. Just, 2002, 138 Idaho 137, 59 P.3d 308. Mortgages ⇐ 335

Where although if mortgagor had produced money and mortgagees had refused to accept it an injunction against foreclosure would have been in order, the mortgagor's offer was not coupled with present ability, injunctive relief was not in order. I.C. §§ 45-1506, 45-1506(2). Allied Investments, Inc. v. Dunn, 1983, 104 Idaho 764, 663 P.2d 300. Mortgages ⇐ 413

3. Construction and application

Statute providing in effect that a mortgage can be foreclosed only by judicial action, and statute to the effect that a mortgagee cannot recover possession without a foreclosure sale, are not applicable to proceedings for the foreclosure of a trust deed by advertisement or notice and sale as authorized by statute. Laws 1957, c. 181, §§ 1 et seq., 3, 5, 6, 16; I.C. §§ 6-101, 6-104, 45-901, 45-904. Roos v. Belcher, 1958, 79 Idaho 473, 321 P.2d 210. Mortgages ⇐ 330

Statute providing for foreclosure of a trust deed by advertisement or notice and sale, would not be deemed unenforceable because of certain obvious clerical errors or misprints, but references in sections eight and ten of such statute would be read as references to section six, rather than section five. Laws 1957, c. 181, §§ 1 et seq., 6(2, 7), 8, 10. Roos v. Belcher, 1958, 79 Idaho 473, 321 P.2d 210. Mortgages ⇐ 330

4. Tender and payment

Mortgagees' statement that entire balance was due was not sufficient to constitute refusal, thus excusing mortgagor from making valid tender to avoid foreclosure. I.C. §§ 45-1506, 45-1506(2). Allied Investments, Inc. v. Dunn, 1983, 104 Idaho 764, 663 P.2d 300. Mortgages ⇐ 401(5)

Where agent, at most, made spoken offer to pay, such did not constitute a valid tender suffi-

cient to cure default. I.C. § 45–1506(12). Owens v. Idaho First Nat. Bank, 1982, 103 Idaho 465, 649 P.2d 1221, review denied 116 Idaho 466, 776 P.2d 828. Tender ⇐ 11

Fact that bank manager stated that he would check to see if payment could be accepted did not establish that tender would have been futile. I.C. § 45–1506(12). Owens v. Idaho First Nat. Bank, 1982, 103 Idaho 465, 649 P.2d 1221, review denied 116 Idaho 466, 776 P.2d 828. Tender ⇐ 16(2)

5. Notice of sale

Posted notice of sale on foreclosure of trust deed was not proper, where property was occupied by mortgagor as his residence. I.C. § 45–1506. Security Pacific Finance Corp. v. Bishop, 1985, 109 Idaho 25, 704 P.2d 357. Mortgages ⇐ 354

Absent showing that mortgagor received notice of the date, time, and place of scheduled sale on foreclosure of trust deed, and notice of the sum owing on the debt, statutory [I.C. § 45–1506(4)] requirements for notice of sale on foreclosure of trust deed were not complied with, and thus, foreclosure at trustee's sale was invalid, even though mortgagor had actual notice that mortgagee intended to hold foreclosure sale of mortgagor's home. Security Pacific Finance Corp. v. Bishop, 1985, 109 Idaho 25, 704 P.2d 357. Mortgages ⇐ 355

6. Bids

Trustee under deed of trust was required to accept bid of only bidder at sale, even if bidder was mortgagee, and deliver trustee's deed to bidder upon receipt of payment. I.C. § 45–1506(8, 9). Frontier Federal Sav. and Loan Ass'n v. Douglass, 1993, 123 Idaho 808, 853 P.2d 553, rehearing denied, certiorari denied 114 S.Ct. 309, 510 U.S. 917, 126 L.Ed.2d 257. Mortgages ⇐ 363; Mortgages ⇐ 374

7. Setting aside sale

Statute providing that a failure to comply with the manner for foreclosing on a deed of trust would not affect validity of a sale to a good faith purchaser for value did not apply to foreclosure sale that was void for lack of a default. I.C. §§ 45–1505(2), 45–1506, 45–1508. Taylor v. Just, 2002, 138 Idaho 137, 59 P.3d 308. Mortgages ⇐ 369(2); Mortgages ⇐ 372(3)

8. Deficiency and personal liability

Electric cooperative's lien upon member's property for unpaid electric bill was extinguished by savings and loan association's foreclosure of its deed of trust on the same property, where deed of trust was recorded eight years before cooperative recorded its notice of lien, and association, at trustee's sale, bid only the amount owed on its loan, thereby leaving no balance against which cooperative could assert its claim. I.C. §§ 30–301 et seq., 45–1506(2)(d). First Federal Sav. and Loan Ass'n of Twin Falls v. East End Mut. Elec. Co., Ltd., 1987, 112 Idaho 762, 735 P.2d 1073. Mortgages ⇐ 535(1)

Joint foreclosure by senior mortgagee and junior mortgagee was permissible and would result in each party being reimbursed by priority to extent of proceeds, losing redemption rights, and receiving deficiency to extent of unsatisfied debt, with appropriate credit given for reasonable value of security. I.C. §§ 6–101, 6–108, 11–401 to 11–403, 45–1506, 45–1512. First Sec. Bank of Idaho, N.A. v. Stauffer, 1986, 112 Idaho 133, 730 P.2d 1053. Mortgages ⇐ 559(3); Mortgages ⇐ 559(7); Mortgages ⇐ 563

Under statute allowing for money judgment to be entered against grantor of deed of trust after foreclosure by trustee sale "for the balance due upon the obligation for which such deed of trust was given as security," but providing that court may not render judgment for more than amount by which entire amount of indebtedness exceeded fair-market value, "fair market value" included expenses of trustee's sale, reasonable attorney's fee incurred up to time of sale, costs of action for deficiency, and costs of suit. I.C. §§ 45–1506(12), 45–1507, 45–1512; Rules Civ. Proc., Rule 54(d), (d)(5, 7). Farber v. Howell, 1986, 111 Idaho 132, 721 P.2d 731. Mortgages ⇐ 375

§ 45–1506A. Rescheduled sale—Original sale barred by stay—Notice of rescheduled sale

(1) In the event a sale cannot be held at the time scheduled by reason of automatic stay provisions of the U.S. bankruptcy code (11 U.S.C. 362), or a stay order issued by any court of competent jurisdiction, then the sale may be rescheduled and conducted following expiration or termination of the effect of the stay in the manner provided in this section.

(2) Notice of the rescheduled sale shall be given at least thirty (30) days before the day of the rescheduled sale by registered or certified mail to the last

known address of all persons who were entitled to notice by mail of the original sale and to any person who shall have recorded a request for notice of sale at least forty-five (45) days prior to the rescheduled sale date in the form and manner required by section 45-1511, Idaho Code, provided that recording the request prior to notice of default is, for the purposes of this section only, waived.

(3) Notice of the rescheduled sale shall be published in the newspaper of original publication once a week for three (3) successive weeks, making three (3) publishings in all, with the last publication to be at least ten (10) days prior to the day of sale.

(4) The trustee shall make an affidavit stating that he or she has complied with subsections (2) and (3) of this section. The trustee shall make the above affidavit available for inspection at the time of the rescheduled sale together with any affidavit of mailing and posting, when required, which was not of record as required by subsection (7) of section 45-1506, Idaho Code, when the stay became effective. The affidavit or affidavits shall be attached to or incorporated in the trustee's deed.

S.L. 1983, ch. 190, § 4; S.L. 1987, ch. 166, § 1.

Library References

Mortgages ⇐357.
Westlaw Key Number Search: 266k357.
C.J.S. Mortgages § 622.

Notes of Decisions

Bankruptcy proceedings 1

1. Bankruptcy proceedings

Postpetition recordation of trustee's deed on property foreclosed on prepetition was probably a nullity, where bankruptcy court did not authorize recordation and foreclosing creditor could not claim good-faith purchaser status. Bankr.Code, 11 U.S.C..A § 549(a). In re Young, 1993, 156 B.R. 282. Bankruptcy ⇐ 2588

Actions taken in violation of automatic stay are void. Bankr.Code, 11 U.S.C.A. § 362(a). In re Young, 1993, 156 B.R. 282. Bankruptcy ⇐ 2462

Generally, Chapter 13 debtors may not exercise avoiding powers without prior authorization of bankruptcy court obtained after notice and hearing and upon showing that Chapter 13 trustee has neglected or refused to prosecute proceeding. In re Young, 1993, 156 B.R. 282. Bankruptcy ⇐ 2702.1

Transfer of interest in real property will not be subject to avoidance based on "strong arm" powers to the extent that purchaser of property on date of bankruptcy would be charged with constructive or inquiry notice of transfer. Bankr.Code, 11 U.S.C.A. § 544(a)(3). In re Young, 1993, 156 B.R. 282. Bankruptcy ⇐ 2705

Chapter 13 debtor could not exercise strong-arm powers to avoid prepetition foreclosure sale on residence, where state statute provided that purchaser at trust deed sale was entity against whom subsequent bona fide purchaser could not perfect interest, notwithstanding provisions of recording statute. Bankr.Code, 11 U.S.C.A. § 544(a)(3); I.C. § 45–1508. In re Young, 1993, 156 B.R. 282. Bankruptcy ⇐ 2705

Chapter 13 debtor was precluded from exercising "strong arm" powers to avoid prepetition foreclosure on his residence by information in public record that would have put reasonably diligent person on inquiry notice of foreclosure sale purchaser's interest in the property, where county property records included notices that deed of trust was in default, that property was to be sold at trustee's sale, and that sale had been rescheduled after debtor's resort to bankruptcy, and notices stated name of trustee and phone number from which additional information could be obtained. Bankr.Code, 11 U.S.C.A. § 544(a)(3). In re Young, 1993, 156 B.R. 282. Bankruptcy ⇐ 2705

Note 1

Debtor has standing to avoid certain involuntary transfers of exempt property. Bankr.Code, 11 U.S.C.A. § 522(h). In re Young, 1993, 156 B.R. 282. Bankruptcy ⇐ 2794.1

§ 45–1506B. Postponement of sale—Intervention of stay

(1) If a stay as set out in subsection (1) of section 45-1506A, Idaho Code, which would otherwise have stopped a foreclosure sale is terminated or lifted prior to the date of sale, then any person having a right to reinstate the deed of trust pursuant to subsection (12) of section 45-1506, Idaho Code, may request the trustee to postpone the sale for a period of time which shall allow at least one hundred fifteen (115) days to elapse from the recording of the notice of default to the rescheduled date of sale exclusive of the period of time during which such stay was in effect.

(2) Written request for postponement must be served upon the trustee prior to the time set for the original sale.

(3) If the foreclosure has proceeded in compliance with all requirements of subsections (2) through and including (6), of section 45-1506, Idaho Code, prior to the intervention of the stay, then at the time appointed for the original sale, the trustee shall announce the date and time of the rescheduled sale to be conducted at the place originally scheduled and no further or additional notice of any kind shall be required.

(4) If the foreclosure has proceeded in compliance with subsections (2) through and including (5), of section 45-1506, Idaho Code, prior to the intervention of the stay, then the foreclosure process may be resumed if timely compliance can be had with publication of the original notice of sale under subsection (6) of section 45-1506, Idaho Code. If timely compliance under subsection (6) of section 45-1506, Idaho Code, is not possible, the partially completed foreclosure process shall be discontinued and any further sale proceeding shall require new compliance with all notice of sale procedures as provided in section 45-1506, Idaho Code.

(5) Nothing in this section shall be construed to create a right to cure the default and reinstate the deed of trust under subsection (12) of section 45-1506, Idaho Code, for a period of time longer than one hundred fifteen (115) days from the recording of the notice of default exclusive of the time during which a stay is in effect and if no request is made to postpone the sale under the circumstances provided in this section, the computation of time under this chapter shall be deemed unaffected by any intervening stay.

S.L. 1983, ch. 190, § 5.

Library References

Mortgages ⇐357.
Westlaw Key Number Search: 266k357.
C.J.S. Mortgages § 622.

Notes of Decisions

Bankruptcy proceedings 1

1. Bankruptcy proceedings

Generally, Chapter 13 debtors may not exercise avoiding powers without prior authorization of bankruptcy court obtained after notice and hearing and upon showing that Chapter 13 trustee has neglected or refused to prosecute proceeding. In re Young, 1993, 156 B.R. 282. Bankruptcy ⇐ 2702.1

Actions taken in violation of automatic stay are void. Bankr.Code, 11 U.S.C.A. § 362(a). In re Young, 1993, 156 B.R. 282. Bankruptcy ⇐ 2462

Transfer of interest in real property will not be subject to avoidance based on "strong arm" powers to the extent that purchaser of property on date of bankruptcy would be charged with constructive or inquiry notice of transfer. Bankr.Code, 11 U.S.C.A. § 544(a)(3). In re Young, 1993, 156 B.R. 282. Bankruptcy ⇐ 2705

Chapter 13 debtor was precluded from exercising "strong arm" powers to avoid prepetition foreclosure on his residence by information in public record that would have put reasonably diligent person on inquiry notice of foreclosure sale purchaser's interest in the property, where county property records included notices that deed of trust was in default, that property was to be sold at trustee's sale, and that sale had been rescheduled after debtor's resort to bankruptcy, and notices stated name of trustee and phone number from which additional information could be obtained. Bankr.Code, 11 U.S.C.A. § 544(a)(3). In re Young, 1993, 156 B.R. 282. Bankruptcy ⇐ 2705

Debtor has standing to avoid certain involuntary transfers of exempt property. Bankr.Code, 11 U.S.C.A. § 522(h). In re Young, 1993, 156 B.R. 282. Bankruptcy ⇐ 2794.1

Chapter 13 debtor could not exercise strong-arm powers to avoid prepetition foreclosure sale on residence, where state statute provided that purchaser at trust deed sale was entity against whom subsequent bona fide purchaser could not perfect interest, notwithstanding provisions of recording statute. Bankr.Code, 11 U.S.C.A. § 544(a)(3); I.C. § 45-1508. In re Young, 1993, 156 B.R. 282. Bankruptcy ⇐ 2705

Postpetition recordation of trustee's deed on property foreclosed on prepetition was probably a nullity, where bankruptcy court did not authorize recordation and foreclosing creditor could not claim good-faith purchaser status. Bankr.Code, 11 U.S.C.A § 549(a). In re Young, 1993, 156 B.R. 282. Bankruptcy ⇐ 2588

§ 45-1507. Proceeds of sale—Disposition

The trustee shall apply the proceeds of the trustee's sale as follows:

(1) To the expenses of the sale, including a reasonable charge by the trustee and a reasonable attorney's fee.

(2) To the obligation secured by the trust deed.

(3) To any persons having recorded liens subsequent to the interest of the trustee in the trust deed as their interests may appear.

(4) The surplus, if any, to the grantor of the trust deed or to his successor in interest entitled to such surplus.

S.L. 1957, ch. 181, § 7.

Library References

Mortgages ⇐376.
Westlaw Key Number Search: 266k376.
C.J.S. Mortgages §§ 664 to 672.

Notes of Decisions

In general 1

1. In general

Reasonable attorney fees incurred for trustee's sale should have been included as part of secured debt for purposes of determining amount of any deficiency, where there were no contractual provisions to the contrary. I.C. § 45–1507. Wilhelm v. Johnston, 2001, 136 Idaho 145, 30 P.3d 300. Mortgages ⇐ 375

Determination of what amount constitutes a reasonable attorney fee incurred for trustee's sale to be included as part of secured debt for purposes of determining amount of any deficiency is committed to the trial court and is necessarily subject to some discretion, but it is not within the trial court's discretion to deny any attorney fees where there is sufficient evidence showing that some fees have been reasonably incurred for purposes of the trustee's sale. I.C. § 45–1507. Wilhelm v. Johnston, 2001, 136 Idaho 145, 30 P.3d 300. Mortgages ⇐ 375

Evidence was adequate to determine reasonable attorney fee incurred for trustee's sale to be included as part of secured debt for purposes of determining amount of any deficiency; compilation of billing records of attorney presented considerable detail regarding services provided and amounts charged, bookkeeper for attorney testified to explain what billing records encompassed and how they were prepared, bills showed legal services provided from commencement of nonjudicial foreclosure through date of trustee's sale, and there was no evidence to controvert charges or to show that charges were unreasonable. I.C. § 45–1507. Wilhelm v. Johnston, 2001, 136 Idaho 145, 30 P.3d 300. Mortgages ⇐ 375

Although a debtor is entitled to any surplus of actual proceeds from a trustee's sale after the expenses of the sale, the obligations secured by the deed of trust, and any subordinate liens have been satisfied, there is no corresponding provision for an award to the debtor measured by the excess of fair market value over the secured debt. I.C. § 45–1507. Wilhelm v. Johnston, 2001, 136 Idaho 145, 30 P.3d 300. Mortgages ⇐ 376

Under statute allowing for money judgment to be entered against grantor of deed of trust after foreclosure by trustee sale "for the balance due upon the obligation for which such deed of trust was given as security," but providing that court may not render judgment for more than amount by which entire amount of indebtedness exceeded fair-market value, "fair market value" included expenses of trustee's sale, reasonable attorney's fee incurred up to time of sale, costs of action for deficiency, and costs of suit. I.C. §§ 45–1506(12), 45–1507, 45–1512; Rules Civ. Proc., Rule 54(d), (d)(5, 7). Farber v. Howell, 1986, 111 Idaho 132, 721 P.2d 731. Mortgages ⇐ 375

§ 45–1508. Finality of sale

A sale made by a trustee under this act shall foreclose and terminate all interest in the property covered by the trust deed of all persons to whom notice is given under section 45-1506, Idaho Code, and of any other person claiming by, through or under such persons and such persons shall have no right to redeem the property from the purchaser at the trustee's sale. The failure to give notice to any of such persons by mailing, personal service, posting or publication in accordance with section 45-1506, Idaho Code, shall not affect the validity of the sale as to persons so notified nor as to any such persons having actual knowledge of the sale. Furthermore, any failure to comply with the provisions of section 45-1506, Idaho Code, shall not affect the validity of a sale in favor of a purchaser in good faith for value at or after such sale, or any successor in interest thereof.

S.L. 1957, ch. 181, § 8; S.L. 1990, ch. 401, § 3.

Library References

Mortgages ⇐378.

Westlaw Key Number Search: 266k378.

C.J.S. Mortgages §§ 551 to 552, 658.

Research References

Treatises and Practice Aids

Bankruptcy Exemption Manual App D § D13, Idaho.

Law of Distressed Real Estate § 68:17, Nonjudicial Foreclosure for Deeds of Trust -- Possession by Purchaser.

Residential Mortgage Lending: State Regulation Manual - West Idaho § 2:19, Foreclosure.

Notes of Decisions

1. In general

Highest bidder at foreclosure sale did not acquire title to the real property, and thus was not a "good faith purchaser for value," where the trustee refused to execute and deliver a deed. I.C. § 45-1508. Taylor v. Just, 2002, 138 Idaho 137, 59 P.3d 308. Mortgages ⇦ 363

Statute providing in effect that a mortgage can be foreclosed only by judicial action, and statute to the effect that a mortgagee cannot recover possession without a foreclosure sale, are not applicable to proceedings for the foreclosure of a trust deed by advertisement or notice and sale as authorized by statute. Laws 1957, c. 181, §§ 1 et seq., 3, 5, 6, 16; I.C. §§ 6-101, 6-104, 45-901, 45-904. Roos v. Belcher, 1958, 79 Idaho 473, 321 P.2d 210. Mortgages ⇦ 330

Where a trust deed incorporated therein by reference certain provisions contained in another trust deed executed by other grantors conveying different property, but the reference was definite and certain, and was to an instrument recorded in a public office, accessible to all interested parties, such incorporation was binding on grantors. Laws 1957, c. 181, § 1 et seq. Roos v. Belcher, 1958, 79 Idaho 473, 321 P.2d 210. Mortgages ⇦ 105

Legislative withdrawal of right of redemption by grantor in a trust deed is not a denial of due process where withdrawal is effected only in cases where property owner by his contract so agrees, and therefore, statute authorizing foreclosure of a trust deed by notice and sale without judicial foreclosure or right of grantor to redeem property is not unconstitutional and a sale made pursuant thereto was not invalid. Const. art. 1, §§ 1, 13; U.S.C.A.Const. Amend. 14; I.C. §§ 6-101, 11-310, 11-401, 11-402; Laws 1957, c. 181, §§ 1 et seq., 8. Roos v. Belcher, 1958, 79 Idaho 473, 321 P.2d 210. Constitutional Law ⇦ 278(1.3); Mortgages ⇦ 592

2. Action on indebtedness secured

Mortgagee was not precluded from bringing direct action against mortgagor to collect entire debt secured by mortgage after trustee of senior deeds of trust respecting property sold property to third party for less than its fair market value, despite assertions that single-action statute and statute limiting deficiency judgments in mortgage foreclosures barred action; mortgagee's mortgage lien on property became valueless at time of trustee's sale, as mortgagee had no right under terms of mortgages to foreclose its mortgages before trustee sold property and mortgagee had no right to redeem property from purchaser at trustee's sales. I.C. §§ 6-101, 6-108, 45-1508. Idaho Power Co. v. Benj. Houseman Co., 1993, 123 Idaho 674, 851 P.2d 970. Mortgages ⇦ 218.1

3. Setting aside sale

Statute providing that a failure to comply with the manner for foreclosing on a deed of trust would not affect validity of a sale to a good faith purchaser for value did not apply to foreclosure sale that was void for lack of a default. I.C. §§ 45-1505(2), 45-1506, 45-1508. Taylor v. Just, 2002, 138 Idaho 137, 59 P.3d 308. Mortgages ⇦ 369(2); Mortgages ⇦ 372(3)

4. Constructive or quasi contracts

I.C. § 45-1508, which denies to purchaser in default on deed of trust any right to redeem property after it is sold at trustee's sale did not prevent equity from ordering compensation to vendor for her conveyance of property, even though it did prevent defaulting purchaser from redeeming property sold to corporation which had made construction loan and acquired deed to property at trustee's sale on foreclosure of its lien. Pichon v. L.J. Broekemeier, Inc., 1985, 108 Idaho 846, 702 P.2d 884, review denied 116 Idaho 466, 776 P.2d 828. Implied And Constructive Contracts ⇦ 3

5. Bankruptcy proceedings

Chapter 13 debtor could not exercise strong-arm powers to avoid prepetition foreclosure sale on residence, where state statute provided that purchaser at trust deed sale was entity against whom subsequent bona fide purchaser could not perfect interest, notwithstanding provisions of recording statute. Bankr.Code, 11

Note 5

U.S.C.A. § 544(a)(3); I.C. § 45–1508. In re Young, 1993, 156 B.R. 282. Bankruptcy ⇐ 2705

§ 45–1509. Trustee's deed—Form and contents

(1) The trustee's deed to the purchaser at the trustee's sale under this act shall conform to the requirements of subsection (2) of this section.

(2) The trustee's deed shall contain, in addition to a description of the property conveyed, a recital of the facts concerning the default, the mailing and the publication of the notice of sale, the conduct of the sale and the receipt of the purchase money from the purchaser.

S.L. 1957, ch. 181, § 9.

Library References

Mortgages ⇐374.
Westlaw Key Number Search: 266k374.
C.J.S. Mortgages §§ 645 to 649, 658.

§ 45–1510. Trustee's deed—Recording—Effect

When the trustee's deed is recorded in the deed records of the county where the property described in the deed is located, the recitals contained in the deed and in the affidavits required under section 45-1506, subsection (7), Idaho Code, shall be prima facie evidence in any court of the truth of the recitals and the affidavits. However, the recitals and affidavits are conclusive in favor of a purchaser in good faith for value or any successor in interest thereof.

S.L. 1957, ch. 181, § 10; S.L. 1990, ch. 401, § 4.

Library References

Mortgages ⇐374.
Westlaw Key Number Search: 266k374.
C.J.S. Mortgages §§ 645 to 649, 658.

Notes of Decisions

In general 1

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1. In general

Statute providing in effect that a mortgage can be foreclosed only by judicial action, and statute to the effect that a mortgagee cannot recover possession without a foreclosure sale, are not applicable to proceedings for the foreclosure of a trust deed by advertisement or notice and sale as authorized by statute. Laws 1957, c. 181, §§ 1 et seq., 3, 5, 6, 16; I.C. §§ 6–101, 6–104, 45–901, 45–904. Roos v. Belcher, 1958, 79 Idaho 473, 321 P.2d 210. Mortgages ⇐ 330

Statute providing for foreclosure of a trust deed by advertisement or notice and sale, would not be deemed unenforceable because of certain obvious clerical errors or misprints, but references in sections eight and ten of such statute would be read as references to section six, rather than section five. Laws 1957, c. 181, §§ 1 et seq., 6(2, 7), 8, 10. Roos v. Belcher, 1958, 79 Idaho 473, 321 P.2d 210. Mortgages ⇐ 330

Where a trust deed incorporated therein by reference certain provisions contained in another trust deed executed by other grantors conveying different property, but the reference was definite and certain, and was to an instrument recorded in a public office, accessible to all interested parties, such incorporation was binding on grantors. Laws 1957, c. 181, § 1 et seq. Roos v. Belcher, 1958, 79 Idaho 473, 321 P.2d 210. Mortgages ⇐ 105

§ 45-1511. Request for copy of notice of default or notice of sale—Marginal recordation thereof

Any person desiring a copy of any notice of default or any notice of sale under a deed of trust, as hereinbefore provided, at any time subsequent to the recordation of such deed of trust and prior to the recording of notice of default thereunder, may cause to be filed for record in the office of the recorder of the county or counties in which any part or parcel of the real property is situated a duly acknowledged request for a copy of any such notice of sale or default showing service upon such trustee. The request shall set forth the name and address of the person requesting copies of such notice or notices and shall identify the deed of trust by stating the names of the parties thereto, the date of recordation and the book and page where the same is recorded and the recorder's instrument number. The recorder shall immediately enter on the margin of the record of the deed of trust therein referred to that such request is recorded at a certain book and page in the records of his office; no request or any statement therein contained or the record thereof shall affect the title to said property or be deemed notice to any person that any person so recording such request has any right, title or interest in or lien or charge upon the property in the deed of trust referred to therein.

S.L. 1957, ch. 181, § 11.

Library References

Mortgages ⇐335, 352.1.
Westlaw Key Number Searches: 266k335; 266k352.1.

C.J.S. Mortgages §§ 506 to 512, 579, 602, 604, 608, 616 to 620.

Notes of Decisions

In general 1

1. In general

Holders of note secured by trust deed on real property were not required to notify county recorder of their interest in foreclosure proceedings relating to such property, as they had no duty to keep informed on the pending foreclosure, and in any event failure to keep informed of foreclosure did not affect their independent right to sue on the note. I.C. § 45-1511. Tanner v. Shearmire, 1989, 115 Idaho 1060, 772 P.2d 267. Mortgages ⇐ 218.1

§ 45-1512. Money judgment—Action seeking balance due on obligation

At any time within 3 months after any sale under a deed of trust, as hereinbefore provided, a money judgment may be sought for the balance due upon the obligation for which such deed of trust was given as security, and in such action the plaintiff shall set forth in his complaint the entire amount of indebtedness which was secured by such deed of trust and the amount for which the same was sold and the fair market value at the date of sale, together with interest from such date of sale, costs of sale and attorney's fees. Before rendering judgment the court shall find the fair market value of the real property sold at the time of sale. The court may not render judgment for more than the amount by which the entire amount of indebtedness due at the time of sale exceeds the fair market value at that time, with interest from date of sale, but in no event may the judgment exceed the difference between the amount for

which such property was sold and the entire amount of the indebtedness secured by the deed of trust.

S.L. 1957, ch. 181, § 12.

Library References

Mortgages ⇐375.
Westlaw Key Number Search: 266k375.
C.J.S. Mortgages §§ 674 to 676.

Research References

Treatises and Practice Aids

Law of Distressed Real Estate § 68:3, After Default and Before Foreclosure -- Alternative Remedies.

Law of Distressed Real Estate § 19:16, Fair Market Value Statutes -- in General.

Law of Distressed Real Estate § 19:25, Other Statutory Controls -- One-Action Statutes.

Law of Distressed Real Estate § 68:19, Nonjudicial Foreclosure for Deeds of Trust -- Deficiency Judgment.

Residential Mortgage Lending: State Regulation Manual - West Idaho § 2:12, Deficiency Judgments.

Residential Mortgage Lending: State Regulation Manual - West Idaho § 2:19, Foreclosure.

Notes of Decisions

1. In general

Statute governing foreclosure of trust deed and statute governing action seeking balance due on obligation are in pari materia and must be construed together. I.C. §§ 45–1505, 45–1512. Frontier Federal Sav. and Loan Ass'n v. Douglass, 1993, 123 Idaho 808, 853 P.2d 553, rehearing denied, certiorari denied 114 S.Ct. 309, 510 U.S. 917, 126 L.Ed.2d 257. Statutes ⇐ 223.2(1.1)

Protection afforded by antideficiency statute to deed of trust beneficiaries when grantor purchases property at foreclosure sale for full credit bid could not be extended to assignor of deed of trust interest, to preclude assignee from attempting to hold assignor liable, following its full credit bid, for damage to trust property. I.C. § 45–1512. Willis v. Realty Country, Inc., 1991, 121 Idaho 312, 824 P.2d 887, review denied. Mortgages ⇐ 375

Joint foreclosure by senior mortgagee and junior mortgagee was permissible and would result in each party being reimbursed by priority to extent of proceeds, losing redemption rights, and receiving deficiency to extent of unsatisfied debt, with appropriate credit given for reasonable value of security. I.C. §§ 6–101, 6–108, 11–401 to 11–403, 45–1506, 45–1512. First Sec. Bank of Idaho, N.A. v. Stauffer, 1986, 112 Idaho 133, 730 P.2d 1053. Mortgages ⇐ 559(3); Mortgages ⇐ 559(7); Mortgages ⇐ 563

Allowing secured creditor to foreclose upon deed of trust after a deficiency judgment had been entered against debtors was not violative of requirement in trust deed statute that foreclosure precede judgment on debt secured by deed of trust; judgment simply served to determine debt remaining after personal collateral had first been liquidated, thus establishing true balance secured by trust deed. I.C. § 45–1512. Snake River Equipment Co. v. Christensen, 1984, 107 Idaho 541, 691 P.2d 787. Mortgages ⇐ 337

Where beneficiary of subordinate deeds of trust elected to foreclose them and purchase property subject thereto by bidding full amount of mortgagors' obligations to beneficiary, beneficiary thereby extinguished obligations and its right to recover any deficiency judgments. I.C. § 45–1512. Alpine Villa Development Co., Inc. v. Young, 1979, 99 Idaho 851, 590 P.2d 578. Mortgages ⇐ 559(3)

2. Actions for deficiency

Fact that notice of trustee's sale stated that beneficiary "elects to sell or cause the trust property to be sold to satisfy said obligation" did not preclude mortgagee, under either estoppel or waiver theories, from recovering statutory deficiency judgment where relevant language was required by statute governing foreclosure of trust deed. I.C. §§ 45–1505(3), 45–1512. Frontier Federal Sav. and Loan Ass'n v. Douglass, 1993, 123 Idaho 808, 853 P.2d 553, rehearing denied, certiorari denied 114 S.Ct. 309, 510 U.S. 917, 126 L.Ed.2d 257. Mortgages ⇐ 375

Holders of note secured by deed of trust were not barred by three-month statute of limitations on suit based on deficiency action under Trust Deeds Act, as time limit applied to deficiency action resulting from foreclosure sale and holders were suing independently on note. I.C. §§ 5–216, 45–1512. Tanner v. Shearmire, 1989, 115 Idaho 1060, 772 P.2d 267. Mortgages ⇦ 218.11

Holders of note secured by trust deed on real property were not precluded from obtaining judgment on note because total indebtedness owed by maker at time of default did not exceed fair-market value of property at time of foreclosure sale, as restriction was tied to foreclosure sales under deed of trust and holders of note had independent action to recover indebtedness owed thereon. I.C. § 45–1512. Tanner v. Shearmire, 1989, 115 Idaho 1060, 772 P.2d 267. Mortgages ⇦ 218.1

In suit for deficiency judgment following nonjudicial foreclosure of sale of property subject to deed of trust, mere fact that parties' experts were unable to agree on particular figure for deficiency was not sufficient basis for rejecting all experts' testimony or for holding that plaintiffs failed to prove deficiency. I.C. § 45–1512. Logan v. Grand Junction Associates, 1986, 111 Idaho 670, 726 P.2d 782. Mortgages ⇦ 375

Property owners have right to render their opinion as to value of their property for purposes of determining fair market value of property under statute which limits recovery of deficiency, after foreclosure, to difference between indebtedness and fair market value of property. I.C. § 45–1512. Evans v. Sawtooth Partners, 1986, 111 Idaho 381, 723 P.2d 925. Mortgages ⇦ 561.6

Unobjected-to testimony, which concerned owner's informally accepted counteroffer to sell property for $25,000 more than offer, was admissible for purposes of determining fair market value of property under statute which limited recovery of deficiency, after foreclosure, to difference between indebtedness and fair market value of property; moreover, this testimony could be interpreted to support a value of amount of counteroffer. I.C. § 45–1512. Evans v. Sawtooth Partners, 1986, 111 Idaho 381, 723 P.2d 925. Mortgages ⇦ 561.6

3. Computation of deficiency

If fair market value of property exceeded price for which it was sold by trustee following nonjudicial foreclosure, deficiency is measured against fair market value, not against amount realized from sale, and thus, to determine whether there is a deficiency, a trial court must first determine fair market value of property at time of foreclosure sale, and court must also determine entire amount of indebtedness secured by deed of trust. I.C. § 45–1512. Wilhelm v. Johnston, 2001, 136 Idaho 145, 30 P.3d 300. Mortgages ⇦ 375

Evidence of unaccepted $300,000 offer which elicited informally accepted counteroffer of $325,000, appraisal report of $265,000 and appraisal report of $340,000, was sufficient to support valuation of property "at least $317,000" for purposes of statute which limited recovery of deficiency, after foreclosure, to difference between indebtedness and fair market value of property, even though after trustee's sale under deed of trust sellers were unable to find buyer for property at $295,000 and reduced their sale price to $275,000. I.C. § 45–1512. Evans v. Sawtooth Partners, 1986, 111 Idaho 381, 723 P.2d 925. Mortgages ⇦ 375

Under statute allowing for money judgment to be entered against grantor of deed of trust after foreclosure by trustee sale "for the balance due upon the obligation for which such deed of trust was given as security," but providing that court may not render judgment for more than amount by which entire amount of indebtedness exceeded fair-market value, "fair market value" included expenses of trustee's sale, reasonable attorney's fee incurred up to time of sale, costs of action for deficiency, and costs of suit. I.C. §§ 45–1506(12), 45–1507, 45–1512; Rules Civ. Proc., Rule 54(d), (d)(5, 7). Farber v. Howell, 1986, 111 Idaho 132, 721 P.2d 731. Mortgages ⇦ 375

In foreclosure proceeding, deed of trust, trial court properly utilized judicial foreclosure in determination of deficiency judgment, rather than statutory section limiting the amount of a deficiency judgment resulting from foreclosure of a trust deed. I.C. §§ 6–101, 6–108, 45–1503, 45–1512. Thompson v. Kirsch, 1984, 106 Idaho 177, 677 P.2d 490. Mortgages ⇦ 375

4. Waiver or estoppel of guarantor

Even if antideficiency statute inured to benefit of guarantor, guarantor contractually waived any antideficiency protection by express language contained in guaranty. I.C. § 45–1512. First Sec. Bank of Idaho, N.A. v. Gaige, 1988, 115 Idaho 172, 765 P.2d 683. Guaranty ⇦ 72

Guarantor may legally contract to waive a defense provided by antideficiency judgment statute. I.C. § 45–1512. Valley Bank v. Larson, 1983, 104 Idaho 772, 663 P.2d 653. Guaranty ⇦ 72

Language in guaranty agreement whereby guarantor expressly waived any right to require creditor to proceed against principal debtor or to pursue any other available remedy was broad enough to include waiver of a defense that creditor failed to seek recovery for deficiency from debtor within three months described by statute and, even if statute inured to benefit of guarantor, operated as a waiver of any right he may have possessed to require creditor to proceed in

any specific manner on principal debtor's default. I.C. § 45–1512. Valley Bank v. Larson, 1983, 104 Idaho 772, 663 P.2d 653. Guaranty ⇐ 72

5. Rights of guarantors, generally

Antideficiency statute does not apply to guarantors. I.C. § 45–1512. First Sec. Bank of Idaho, N.A. v. Gaige, 1988, 115 Idaho 172, 765 P.2d 683. Mortgages ⇐ 559(3)

Antideficiency statute did not protect holder of unrecorded second deed of trust on debtor's building when holder was sued on guaranty agreement. I.C. § 45–1512. First Sec. Bank of Idaho, N.A. v. Gaige, 1988, 115 Idaho 172, 765 P.2d 683. Mortgages ⇐ 559(3)

Bank was not required to seek deficiency judgment against partnership, after deficiency from the sale of real property collateral of partnership, before proceeding against guarantors who were partners under statute since interest that guarantors had in the realty sold was not the sort intended to be protected by the statute where they were merely limited partners in the partnership which held the property. I.C. §§ 45–1512, 53–218. First Interstate Bank of Idaho v. Gill, 1985, 108 Idaho 576, 701 P.2d 196. Guaranty ⇐ 77(2)

Statute requiring creditor to seek a money judgment for balance due on note obligation within three months of sale under deed of trust operated to protect debtor, but did not give guarantor, whose obligation was independent of debtor, right to claim protection thereunder when creditor failed to file an action against debtor within prescribed three-month period. I.C. § 45–1512. Valley Bank v. Larson, 1983, 104 Idaho 772, 663 P.2d 653. Guaranty ⇐ 77(2)

6. Fees and costs

Secured creditor was entitled to attorney fees upon foreclosure of deed of trust after entry of deficiency judgment against debtors where deed of trust provided for payment of attorney fees incurred in enforcing it. I.C. § 45–1512. Snake River Equipment Co. v. Christensen, 1984, 107 Idaho 541, 691 P.2d 787. Mortgages ⇐ 377

§ 45–1513. Transfers and trusts are conveyances

A deed of trust or transfer of any interest in real property in trust to secure the performance of any obligation shall be a conveyance of real property.

S.L. 1957, ch. 181, § 13.

Library References

Mortgages ⇐1, 8.
Westlaw Key Number Searches: 266k1; 266k8.
C.J.S. Mortgages §§ 2 to 7.

Notes of Decisions

1. In general

Failing to promptly notify trustee or beneficiary that original deed of trust was being held rather than delivered to either of them, and conditioning release of original deed of trust to beneficiary upon her payment of another client's legal bill was conduct warranting private reprimand and restitution of amount paid for third-party attorney fees. Rules of Prof.Conduct, Rule 1.15(b). Defendant A v. Idaho State Bar, 1999, 132 Idaho 662, 978 P.2d 222. Attorney And Client ⇐ 58

Legal title to property is conveyed by deed of trust to trustee. I.C. § 45–1502(4). Defendant A v. Idaho State Bar, 1999, 132 Idaho 662, 978 P.2d 222. Mortgages ⇐ 138

2. Delivery

To be valid, a conveyance of property requires delivery of the instrument. Defendant A v. Idaho State Bar, 1999, 132 Idaho 662, 978 P.2d 222. Deeds ⇐ 54

Delivery is sufficient when grantor parts with control of deed and does not retain right to keep it. Defendant A v. Idaho State Bar, 1999, 132 Idaho 662, 978 P.2d 222. Deeds ⇐ 56(3)

Deed of trust must be delivered to give it effect. I.C. § 45–1502(4). Defendant A v. Idaho State Bar, 1999, 132 Idaho 662, 978 P.2d 222. Mortgages ⇐ 66

§ 45–1514. Reconveyance upon satisfaction of obligation

Upon performance of the obligation secured by the deed of trust, the trustee upon written request of the beneficiary shall reconvey the estate of real

property described in the deed of trust to the grantor; providing that in the event of such performance and the refusal of any beneficiary to so request or the trustee to so reconvey, as above provided, such beneficiary or trustee shall be liable as provided by law in the case of refusal to execute a discharge or satisfaction of a mortgage on real property.

S.L. 1957, ch. 181, § 14.

Library References

Mortgages ⇐309(1) to 315(3).
Westlaw Key Number Searches: 266k309(1) to 266k315(3).

C.J.S. Mortgages §§ 451, 465, 477 to 485, 488.

Research References

Treatises and Practice Aids

Residential Mortgage Lending: State Regulation Manual - West Idaho § 2:33, Release and Payoff.

Notes of Decisions

1. In general

Debtor's right to deed of reconveyance is not contingent upon payment of trustee's fee which is not part of debt secured by deed of trust. I.C. § 45–1514. Brinton v. Haight, 1994, 125 Idaho 324, 870 P.2d 677. Mortgages ⇐ 298(3)

2. Accrual of interest

Maker of promissory note was entitled to condition tender of full payment upon contemporaneous delivery of deed of reconveyance without negating tender's effectiveness to terminate accrual of interest. I.C. §§ 28–3–604(1), 45–1514. Brinton v. Haight, 1994, 125 Idaho 324, 870 P.2d 677. Interest ⇐ 50

Grantor of deed of trust may condition tender of full payment upon contemporaneous delivery of deed of reconveyance, and such condition does not vitiate tender's effectiveness to terminate accrual of interest. I.C. §§ 28–3–604(1), 45–1514. Brinton v. Haight, 1994, 125 Idaho 324, 870 P.2d 677. Interest ⇐ 50

Makers of promissory note were not required to tender trustee's administrative fees in addition to secured debt in order to be entitled to deed of reconveyance or to stop running of interest, despite trustee's claim that additional reconveyance fee was ordered. I.C. § 45–1514. Brinton v. Haight, 1994, 125 Idaho 324, 870 P.2d 677. Interest ⇐ 50

Letter by maker of promissory note offering to make payment in full, excluding payment of reconveyance fee imposed by trustee under deed of trust, was sufficient to halt additional accumulation of interest. I.C. §§ 28–3–604(1), 45–1514. Brinton v. Haight, 1994, 125 Idaho 324, 870 P.2d 677. Interest ⇐ 50

§ 45–1515. Time limits for foreclosure

The foreclosure of a trust deed by advertisement and sale shall be made and the foreclosure of a trust deed by judicial procedure shall be commenced within the time limited by the same period and according to the same provisions including extensions as provided by law for the foreclosure of a mortgage on real property.

S.L. 1957, ch. 181, § 15.

Cross References

Mortgage foreclosure, see § 6–101 et seq.

Library References

Mortgages ⇐345.
Westlaw Key Number Search: 266k345.
C.J.S. Mortgages § 603.

Notes of Decisions

In general 1

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1. In general

Holders of note secured by deed of trust on real property were entitled to sue on note without first resorting to foreclosure proceedings on property covered by deed. I.C. §§ 45-1502 to 45-1515. Tanner v. Shearmire, 1989, 115 Idaho 1060, 772 P.2d 267. Mortgages ⇐ 218.1

CHAPTER 16

SEED LIENS [REPEALED]

§§ 45-1601 to 45-1607. Repealed

WEST'S IDAHO CODE ANNOTATED

CHAPTER 15

TRUST DEEDS

§ 45-1501 THROUGH § 45-1515

UPDATED POCKET PARTS

CHAPTER 10

MORTGAGE OF REAL PROPERTY

§ 45–1001. What may be mortgaged

Research References

Treatises and Practice Aids
The Law of Debtors and Creditors § 8:6, Creation and Form of the Real Estate Mortgage.

CHAPTER 13

GENERAL PROVISIONS RELATING TO ENFORCEMENT OF LIENS AND MORTGAGES

Section
45–1302. Determination of all rights upon foreclosure proceedings.

§ 45–1302. Determination of all rights upon foreclosure proceedings

In any suit brought to foreclose a mortgage or lien upon real property or a lien on or security interest in personal property, the plaintiff, cross-complainant or plaintiff in intervention may make as party defendant in the same cause of action, any person having, claiming or appearing to have or to claim any title, estate, or interest in or to any part of the real or personal property involved therein, and the court shall, in addition to granting relief in the foreclosure action, determine the title, estate or interest of all parties thereto in the same manner and to the same extent and effect as in the action to quiet title.

S.L. 1929, ch. 113, § 1; S.L. 1937, ch. 21, § 1; S.L. 1967, ch. 272, § 21. Amended by S.L. 2010, ch. 79, § 16, eff. July 1, 2010.

Codifications: I.C.A. § 44–1104.

CHAPTER 15

TRUST DEEDS

Section
45–1502. Definitions—Trustee's charge.
45–1505. Foreclosure of trust deed, when.
45–1510. Trustee's deed—Recording—Effect.

§ 45–1502. Definitions—Trustee's charge

As used in this act:

(1) "Beneficiary" means the person named or otherwise designated in a trust deed as the person for whose benefit a trust deed is given, or his successor in interest, and who shall not be the trustee.

(2) "Grantor" means the person conveying real property by a trust deed as security for the performance of an obligation.

(3) "Trust deed" means a deed executed in conformity with this act and conveying real property to a trustee in trust to secure the performance of an obligation of the grantor or other person named in the deed to a beneficiary.

(4) "Trustee" means a person to whom the legal title to real property is conveyed by trust deed, or his successor in interest.

(5) "Real property" means any right, title, interest and claim in and to real property owned by the grantor at the date of execution of the deed of trust or acquired thereafter by said grantor or his successors in interest. Provided, nevertheless, real property as so defined which may be transferred in trust under this act shall be limited to: (a) any real property located within an incorporated city or village at the time of the transfer; (b) any real property not exceeding eighty (80) acres, regardless of its location, provided that such real property is not principally used for the agricultural production of crops, livestock, dairy or aquatic goods; or (c) any real property not exceeding forty (40) acres regardless of its use or location.

(6) The trustee shall be entitled to a reasonable charge for duties or services performed pursuant to the trust deed and this chapter, including compensation for reconveyance services notwithstanding any provision of a deed of trust prohibiting payment of a reconveyance fee by the grantor or beneficiary, or any provision of a deed of trust which limits or otherwise restricts the amount of a reconveyance fee to be charged and collected by the trustee. A trustee shall be entitled to refuse to reconvey a deed of trust until the trustee's reconveyance fees and recording costs for recording the reconveyance instruments are paid in full. The trustee shall not be entitled to a foreclosure fee in the event of judicial foreclosure or work done prior to the recording of a notice of default. If the default is cured prior to the time of the last newspaper publication of the notice of sale, the trustee shall be paid a reasonable fee.

S.L. 1957, ch. 181, § 2; S.L. 1967, ch. 118, § 2; S.L. 1970, ch. 42, § 1; S.L. 1983, ch. 190, § 1; S.L. 1995, ch. 326, § 2; S.L. 1996, ch. 248, § 1; S.L. 1997, ch. 387, § 1; S.L. 2008, ch. 365, § 1, eff. July 1, 2008.

Historical and Statutory Notes

2008 Legislation

S.L. 2008, ch. 365, § 1, rewrote subsec. (5), which prior thereto read:

"(5) 'Real property' means any right, title, interest and claim in and to real property owned by the grantor at the date of execution of the deed of trust or acquired thereafter by said grantor or his successors in interest. Provided, nevertheless, real property as so defined which may be transferred in trust under this act shall be limited to either (a) any real property located within an incorporated city or village at the time of the transfer, or (b) any real property not exceeding forty (40) acres, regardless of its location, and in either event where the trust deed states that the real property involved is within either of the above provisions, such statement shall be binding upon all parties and conclusive as to compliance with the provisions of this act relative to the power to make such transfer and trust and power of sale conferred in this act."

Law Review and Journal Commentaries

Buyer (and Debtor) Beware. Kelly Arthur Anthon, (February 2007). 50-FEB Advocate (Idaho) 28.

Research References

Forms

American Jurisprudence Legal Forms 2d § 179:87, Idaho--Deed of Trust.

American Jurisprudence Legal Forms 2d § 179:88, Idaho--Deed of Trust--Traditional Form.

Treatises and Practice Aids

Law of Distressed Real Estate § 68:1, Type of Security Device Used.

Law of Distressed Real Estate § 68:11, Nonjudicial Foreclosure for Deeds of Trust.

Residential Mortgage Lending: State Regulation Manual - West Idaho § 2:15, Document Preparation.

Residential Mortgage Lending: State Regulation Manual - West Idaho § 2:19, Foreclosure.

Residential Mortgage Lending: State Regulation Manual - West Idaho § 2:34, Security Instrument.

Residential Mortgage Lending: State Regulation Manual - West Idaho § 2:38, Trustees.

Notes of Decisions

4. Encumbrance by deed of trust

If, from the face of the trust deed, it is clear that the parties intend to invoke the formulaic language of the Idaho statute permitting parties to contractually render property eligible for foreclosure by trustee's sale, as opposed to foreclosure sale, then

that effort should be recognized and enforced. In re Wiebe, 2006, 353 B.R. 906. Mortgages ⇐ 10

Under Idaho law, parties may render property eligible for encumbrance by a deed of trust suitable for foreclosure by trustee's sale, and not by judicial action as a mortgage, by merely including in the deed of trust a statement that the property is either less than 40 acres in size or located within an incorporated city or village, even though the property actually is larger than 40 acres in size and is not located within the boundaries of any city or village. In re Wiebe, 2006, 353 B.R. 906. Mortgages ⇐ 10; Mortgages ⇐ 48(1)

5. Fixtures

Mobile home owned by borrower was affixed to the land, thus was converted to real property, and was subject to foreclosure when trust conducted non-judicial foreclosure sales on deeds of trust secured by the real property, where mobile home was connected to well, septic tank and powerlines, borrower completed driveway to mobile home to county standards, and borrower constructed mobile home foundation and decks. Spencer v. Jameson, 2009, 211 P.3d 106, 147 Idaho 497. Fixtures ⇐ 18.4

§ 45–1503. Transfers in trust to secure obligation—Foreclosure

Research References

Treatises and Practice Aids

Law of Distressed Real Estate § 68:3, After Default and Before Foreclosure--Alternative Remedies.

Notes of Decisions

Fixtures 6

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6. Fixtures

Mobile home owned by borrower was affixed to the land, thus was converted to real property, and was subject to foreclosure when trust conducted non-judicial foreclosure sales on deeds of trust secured by the real property, where mobile home was connected to well, septic tank and powerlines, borrower completed driveway to mobile home to county standards, and borrower constructed mobile home foundation and decks. Spencer v. Jameson, 2009, 211 P.3d 106, 147 Idaho 497. Fixtures ⇐ 18.4

§ 45–1504. Trustee of trust deed—Who may serve—Successors

Research References

Treatises and Practice Aids

Residential Mortgage Lending: State Regulation Manual - West Idaho § 2:38, Trustees.

§ 45–1505. Foreclosure of trust deed, when

The trustee may foreclose a trust deed by advertisement and sale under this act if:

(1) The trust deed, any assignments of the trust deed by the trustee or the beneficiary and any appointment of a successor trustee are recorded in mortgage records in the counties in which the property described in the deed is situated; and

(2) There is a default by the grantor or other person owing an obligation the performance of which is secured by the trust deed or by their successors in interest with respect to any provision in the deed which authorizes sale in the event of default of such provision; and

(3) The trustee or beneficiary shall have (a) filed for record in the office of the recorder in each county wherein the trust property, or some part or parcel, is situated, a notice of default identifying the deed of trust by stating the name or names of the trustor or trustors and giving the book and page where the same is recorded, or a description of the trust property, and containing a statement that a breach of the obligation for which the transfer in trust is security has occurred, and setting forth the nature of such breach and his election to sell or cause to be sold such property to satisfy such obligation; and (b) mailed a copy of such notice by registered or certified mail, return receipt requested, to any person requesting such notice of record as provided in section 45–1511, Idaho Code. Service by mail in accordance with this subsection (3) shall be deemed effective at the time of mailing. In addition, the trustee shall mail the notice required in this section to any individual who owns an interest in property

which is the subject of this section. Such notice shall be accompanied by and affixed to the following notice in twelve (12) point boldface type, on a separate sheet of paper, no smaller than eight and one-half (8 ½) inches by eleven (11) inches:

"NOTICE REQUIRED BY IDAHO LAW

Mortgage foreclosure is a legal proceeding where a lender terminates a borrower's interest in property to satisfy unpaid debt secured by the property. This can mean that when a homeowner gets behind on his or her mortgage payments, the lender forces a sale of the home on which the mortgage loan is based. Some individuals or businesses may say they can "save" your home from foreclosure. You should be cautious about such claims. It is important that you understand all the terms of a plan to "rescue" you from mortgage foreclosure and how it will affect you. It may result in your losing valuable equity that you may have in your home. If possible, you should consult with an attorney or financial professional to find out what other options you may have. Do not delay seeking advice, because the longer you wait, the fewer options you may have.

Under Idaho law, you have five (5) days to rescind or undo certain contracts or agreements that relate to transferring interests in property or money in a foreclosure situation. An attorney or financial professional can tell you more about this option.".

If the trust deed, or any assignments of the trust deed, are in the Spanish language, the written notice set forth in this section shall be in the Spanish language on a form to be prepared and made available by the office of the attorney general.

(4) No action, suit or proceeding has been instituted to recover the debt then remaining secured by the trust deed, or any part thereof, or if such action or proceeding has been instituted, the action or proceeding has been dismissed.

S.L. 1957, ch. 181, § 5; S.L. 1990, ch. 401, § 1; S.L. 2008, ch. 192, § 2, eff. July 1, 2008; S.L. 2009, ch. 136, § 1, eff. July 1, 2009.

Historical and Statutory Notes

2008 Legislation

S.L. 2008, ch. 192, § 2, rewrote subsec. (3), which prior thereto read:

"(3) The trustee or beneficiary shall have (a) filed for record in the office of the recorder in each county wherein the trust property, or some part or parcel, is situated, a notice of default identifying the deed of trust by stating the name or names of the trustor or trustors and giving the book and page where the same is recorded, or a description of the trust property, and containing a statement that a breach of the obligation for which the transfer in trust is security has occurred, and setting forth the nature of such breach and his election to sell or cause to be sold such property to satisfy such obligation; and (b) mailed a copy of such notice by registered or certified mail, return receipt requested, to any person requesting such notice of record as provided in section 45-1511, Idaho Code. Service by mail in accordance with this subsection (3) shall be deemed effective at the time of mailing."

2009 Legislation

S.L. 2009, ch. 136, § 1, in subsec. (3), in the fourth sentence, deleted "canary yellow or some similarly colored yellow" preceding "paper".

Cross References

Right of rescission of contract, see § 45–1603.

Research References

Treatises and Practice Aids

Law of Distressed Real Estate § 17:21, Stability of Titles and Proof of Compliance With Statutes.

Law of Distressed Real Estate § 19:27, Other Statutory Controls–Election of Remedies Statutes.

Law of Distressed Real Estate § 68:12, Nonjudicial Foreclosure for Deeds of Trust–Prerequisites to Nonjudicial Foreclosure.

Residential Mortgage Lending: State Regulation Manual - West Idaho § 2:19, Foreclosure.

Restatement (3d) of Property (Mortgages) § 8.2, Mortgagee's Remedies on the Obligation and the Mortgage.

Notes of Decisions

1.5. Due process

Under Idaho law, the terms of the trust deed foreclosure statutes must be strictly complied with in order to satisfy the due process requirements of notice and opportunity to be heard. In re Thorian, 2008, 387 B.R. 50. Constitutional Law ⇐ 4417

3. Duties of trustee

Under Idaho law, receiver appointed to manage mall that served as collateral for loan was entitled to recover rents collected from time lender filed notice of default and notice of trustee's sale, rather than from time of receiver's appointment, despite borrower's contention that deed of trust merely gave lender security interest in rents, where deed of trust allowed lender to collect rents upon default. Canada Life Assur. Co. v. LaPeter, 2009, 557 F.3d 1103, withdrawn from bound volume, amended and superseded on denial of rehearing 563 F.3d 837. Mortgages ⇐ 473

5. Foreclosure by sale

Chapter 11 debtors failed to establish that the prepetition foreclosure sale of their residence was not properly conducted under Idaho law, and so they failed to show that they did not receive "reasonably equivalent value" for the transfer, as required for its avoidance as fraudulent; deed of trust was recorded, debtors were in default, notice of default stating debtors' breach was recorded, debtors were properly served, and notice of sale was published, and, though deed of trust holder allegedly failed to provide notice required by deed trust, such alleged breach was insufficient to support judicial invalidation of the otherwise regularly noticed and conducted sale. In re Thorian, 2008, 387 B.R. 50. Bankruptcy ⇐ 2650(4)

Under Idaho law, a trustee may foreclose by advertisement and sale if: (1) the deed is recorded in the mortgage records in the county where the property is situated, (2) there is a default by the grantor, (3) the trustee or beneficiary has filed a notice of default identifying the deed of trust by stating the names of the trustors and including a statement that a breach of the obligation has occurred, and (4) the trustee or beneficiary has mailed a copy of the notice to any person requesting such notice. In re Thorian, 2008, 387 B.R. 50. Mortgages ⇐ 335

5.5. Rents

Under Idaho law, receiver appointed to manage mall that served as collateral for loan was entitled to recover rents collected from time lender filed notice of default and notice of trustee's sale, rather than from time of receiver's appointment, despite borrower's contention that deed of trust merely gave lender security interest in rents, where deed of trust allowed lender to collect rents upon default. Canada Life Assur. Co. v. LaPeter, 2009, 563 F.3d 837. Mortgages ⇐ 473

6. Summary judgment

Genuine issues of material fact existed as to whether, under Idaho law, special forbearance plan (SFP) entered into by borrowers and deed of trust holder was a "contract" that holder breached in failing to modify borrowers' loan, precluding summary judgment in borrowers' action for, inter alia, breach of contract. In re Thorian, 2008, 387 B.R. 50. Bankruptcy ⇐ 2164.1

Genuine issues of material fact existed as to whether, under Idaho law, deed of trust holder breached the covenant of good faith and fair dealing implied in any "contract" created by the parties' special forbearance plan (SFP), precluding summary judgment in action brought by borrowers. In re Thorian, 2008, 387 B.R. 50. Bankruptcy ⇐ 2164.1

Genuine issues of material fact existed as to whether, under Idaho law, deed of trust holder's representative committed fraud with respect to her statements and actions regarding the status of borrowers' pending foreclosure sale, precluding summary judgment in borrowers' action for fraud. In re Thorian, 2008, 387 B.R. 50. Bankruptcy ⇐ 2164.1

7. Attorney fees

Under Idaho law, lender was entitled to recover attorney fees incurred in appeal concerning appropriateness of appointment of receiver in its action against borrower, where deed of trust provided for award of reasonable attorney fees to prevailing party "[s]hould either party bring suit to enforce this Deed of Trust, including any appeal proceeding," and lender prevailed on appeal. Canada Life Assur. Co. v. LaPeter, 2009, 557 F.3d 1103, withdrawn from bound volume, amended and superseded on denial of rehearing 563 F.3d 837. Mortgages ⇐ 581(2)

§ 45–1506. Manner of foreclosure—Notice—Sale

Cross References

Action for possession,
Complaint and summons, see § 6–310.
Continuance, see § 6–311.
Judgment on trial by court, see § 6–311A.
Consumer foreclosure protection act, contract notice, see § 45–1602.

Research References

Treatises and Practice Aids

Law of Distressed Real Estate § 19:28, Other Statutory Controls--Statutory Extension of Equitable Redemption.
Law of Distressed Real Estate § 68:14, Nonjudicial Foreclosure for Deeds of Trust--Mailing, Posting, and Publication of Notice of Sale.

Law of Distressed Real Estate § 68:15, Nonjudicial Foreclosure for Deeds of Trust--Cure of Default.

Law of Distressed Real Estate § 68:16, Nonjudicial Foreclosure for Deeds of Trust--Foreclosure Sale.

Law of Distressed Real Estate § 68:17, Nonjudicial Foreclosure for Deeds of Trust--Possession by Purchaser.

Law of Distressed Real Estate App 11L, Jurisdictional Laws and Practices Regarding Rights to Possession, Receivers, and Rents.

Residential Mortgage Lending: State Regulation Manual - West Idaho § 2:19, Foreclosure.

Notes of Decisions

Attorney fees 10
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1.5. Due process

Under Idaho law, the terms of the trust deed foreclosure statutes must be strictly complied with in order to satisfy the due process requirements of notice and opportunity to be heard. In re Thorian, 2008, 387 B.R. 50. Constitutional Law ⇐ 4417

5. Notice of sale

Under Idaho law, if a foreclosure sale was stopped, as opposed to merely postponed, deed of trust holder would have to comply with the statute governing notice of sale. In re Thorian, 2008, 387 B.R. 50. Mortgages ⇐ 353

Under Idaho law, if a foreclosure sale was postponed or continued, as opposed to stopped, such a continuance would occur at the time of the scheduled sale and would not require further notice to mortgagors. In re Thorian, 2008, 387 B.R. 50. Mortgages ⇐ 357

Chapter 11 debtors failed to establish that the prepetition foreclosure sale of their residence was not properly conducted under Idaho law, and so they failed to show that they did not receive "reasonably equivalent value" for the transfer, as required for its avoidance as fraudulent; deed of trust was recorded, debtors were in default, notice of default stating debtors' breach was recorded, debtors were properly served, and notice of sale was published, and, though deed of trust holder allegedly failed to provide notice required by deed of trust, such alleged breach was insufficient to support judicial invalidation of the otherwise regularly noticed and conducted sale. In re Thorian, 2008, 387 B.R. 50. Bankruptcy ⇐ 2650(4)

Announcement at trustee's sale that non-judicial foreclosure sale was rescheduled provided adequate notice of postponed sale to property owner and did not violate her due process rights. Black Diamond Alliance, LLC. v. Kimball, 2010, 229 P.3d 1160, 148 Idaho 798. Constitutional Law ⇐ 4417; Mortgages ⇐ 357

Appointment of co-trustor/daughter as personal representative of estate of co-trustor/mother, more than one and one-half years after co-trustor/daughter had received notice of deed of trust foreclosure sale for residential property, did not operate retroactively as notice to the estate, with respect to the foreclosure sale. PHH Mortg. Services Corp. v. Perreira, 2009, 200 P.3d 1180, 146 Idaho 631. Mortgages ⇐ 352.1

Strict compliance with notice provisions is required for foreclosure of trust deeds. Federal Home Loan Mortg. Corp. v. Appel, 2006, 137 P.3d 429, 143 Idaho 42. Mortgages ⇐ 354

Deed of trust trustee was required to provide notice and publication to inform borrowers of foreclosure sale rescheduled for date after lifting of bankruptcy stay; the stay was in effect on the date of the original sale, the borrowers had no reason to show up to hear rescheduling announcement, and to reschedule the sale, the trustee needed to comply with notice and publication requirements, rather than simply announcing the new date and time of the sale on the date of the original sale. Federal Home Loan Mortg. Corp. v. Appel, 2006, 137 P.3d 429, 143 Idaho 42. Mortgages ⇐ 357

6. Bids

Sale of first deed of trust on land securing first loan that trust had made to borrower was final, though trust bid $86,507.45 in excess of the credit available to it at non-judicial foreclosure sale and trust did not pay the price bid before trustee executed the trust deed, as a sale of a trust deed at a non-judicial foreclosure sale was final once a trustee accepted the bid as payment in full unless there were issues regarding the notice of the sale, and borrower was provided with notice of the sale. Spencer v. Jameson, 2009, 211 P.3d 106, 147 Idaho 497. Mortgages ⇐ 364

Trust bid $86,507.45 in excess of the amount of credit available to it, when, after it had purchased second deed of trust securing second loan it had made to borrower, it purchased at non-judicial foreclosure sale the first deed of trust on land securing the first loan it had made to borrower, and thus trust did not pay the price owing before trustee executed the trustee's deed on such purchase, though the $86,507.45 represented the amount it had bid to purchase second deed of trust, as the first deed of trust was the prior loan, and trust did not have to purchase the second deed of trust in order to protect its interest in the first deed of trust. Spencer v. Jameson, 2009, 211 P.3d 106, 147 Idaho 497. Mortgages ⇐ 363; Mortgages ⇐ 364

Sale of second deed of trust on land securing second loan to borrower was final, though trust bid $5,000 in excess of the credit available to it at non-judicial foreclosure sale and trust did not pay the price bid before trustee executed the trust deed, as a sale of a trust deed at a non-judicial foreclosure

sale was final once a trustee accepted the bid as payment in full unless there were issues regarding the notice of the sale, and borrower was provided with notice of the sale. Spencer v. Jameson, 2009, 211 P.3d 106, 147 Idaho 497. Mortgages ⇐ 364

Trust bid $5,000 in excess of the amount of credit available to it, when it purchased second deed of trust on land securing second loan to borrower at non-judicial foreclosure sale, and thus trust did not pay the price owing before trustee executed the trustee's deed on such purchase, where only $60,000 of $65,000 loan had actually been advanced to borrower, $5,000 had not been advanced because borrower failed to complete improvements to mobile home that was attached to the land as agreed under the terms of the loan, and, though such deed of trust allowed the trust to make any advances necessary to protect its security interest and trust completed the improvements after the foreclosure sale, the $5,000 was not advanced until after the sale. Spencer v. Jameson, 2009, 211 P.3d 106, 147 Idaho 497. Mortgages ⇐ 363; Mortgages ⇐ 364

Where the holder of the deed of trust note is the bidder at foreclosure sale, crediting the bid against the note is the equivalent of a cash sale for purposes of statutory obligation to pay purchase money and the price bid. Federal Home Loan Mortg. Corp. v. Appel, 2006, 137 P.3d 429, 143 Idaho 42. Mortgages ⇐ 364

Credit bid by deed of trust beneficiary as holder promissory note satisfied statutory obligation to pay purchase money and the price bid at foreclosure sale; the statute did not require payment in cash. Federal Home Loan Mortg. Corp. v. Appel, 2006, 137 P.3d 429, 143 Idaho 42. Mortgages ⇐ 364

7. Setting aside sale

Genuine issue of material fact as to whether deed of trust beneficiary knew that statutory notice and publication requirements were not complied with in connection with rescheduled foreclosure sale precluded summary judgment on beneficiary's status as good-faith purchaser in action to eject borrowers from the property. Federal Home Loan Mortg. Corp. v. Appel, 2006, 137 P.3d 429, 143 Idaho 42. Judgment ⇐ 181(25)

If deed of trust beneficiary knew that statutory notice and publication requirements were not complied with in connection with rescheduled foreclosure sale, it had actual knowledge that such requirements were not met and could not claim to be a good faith purchaser for value. Federal Home Loan Mortg. Corp. v. Appel, 2006, 137 P.3d 429, 143 Idaho 42. Mortgages ⇐ 357

9. Summary judgment

Genuine issues of material fact existed as to whether, under Idaho law, deed of trust holder's representative committed fraud with respect to her statements and actions regarding the status of borrowers' pending foreclosure sale, precluding summary judgment in borrowers' action for fraud. In re Thorian, 2008, 387 B.R. 50. Bankruptcy ⇐ 2164.1

Genuine issues of material fact existed as to whether, under Idaho law, deed of trust holder breached the covenant of good faith and fair dealing implied in any "contract" created by the parties' special forbearance plan (SFP), precluding summary judgment in action brought by borrowers. In re Thorian, 2008, 387 B.R. 50. Bankruptcy ⇐ 2164.1

Genuine issues of material fact existed as to whether, under Idaho law, special forbearance plan (SFP) entered into by borrowers and deed of trust holder was a "contract" that holder breached in failing to modify borrowers' loan, precluding summary judgment in borrowers' action for, inter alia, breach of contract. In re Thorian, 2008, 387 B.R. 50. Bankruptcy ⇐ 2164.1

10. Attorney fees

Property owner's appeal claiming that she received inadequate notice rescheduled foreclosure sale was frivolously pursued and, therefore, entitled purchaser to attorney fees on appeal. Black Diamond Alliance, LLC. v. Kimball, 2010, 229 P.3d 1160, 148 Idaho 798. Costs ⇐ 260(5)

§ 45–1506A. Rescheduled sale—Original sale barred by stay—Notice of rescheduled sale

Notes of Decisions

2. Notice and publication

Deed of trust trustee was required to provide notice and publication to inform borrowers of foreclosure sale rescheduled for date after lifting of bankruptcy stay; the stay was in effect on the date of the original sale, the borrowers had no reason to show up to hear rescheduling announcement, and to reschedule the sale, the trustee needed to comply with notice and publication requirements, rather than simply announcing the new date and time of the sale on the date of the original sale. Federal Home Loan Mortg. Corp. v. Appel, 2006, 137 P.3d 429, 143 Idaho 42. Mortgages ⇐ 357

§ 45–1506B. Postponement of sale—Intervention of stay

Notes of Decisions

Notice and publication 2

2. Notice and publication

Deed of trust trustee was required to provide notice and publication to inform borrowers of foreclosure sale rescheduled for date after lifting of bankruptcy stay; the stay was in effect on the date of the original sale, the borrowers had no reason to show up to hear rescheduling announcement, and to reschedule the sale, the trustee needed to comply with notice and publication requirements, rather than simply announcing the new date and time of the sale on the date of the original sale. Federal Home Loan Mortg. Corp. v. Appel, 2006, 137 P.3d 429, 143 Idaho 42. Mortgages ⇐ 357

§ 45–1507. Proceeds of sale—Disposition

Research References

Treatises and Practice Aids

Law of Water Rights and Resources § 5:22, Waters Subject to Appropriation--Water Unavailable for Appropriation--Environmental Reservation.

Notes of Decisions

Foreclosure 2
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2. Foreclosure

Borrower was entitled to surplus proceeds from non-judicial foreclosure sales of two trust deeds, when trust, which had made two loans to borrower secured by deeds of trust, initially bid $5,000 in excess of amount borrower owed under loan secured by second trust deed and then bid $86,507.95 in excess of amount borrower owed under loan secured by first trust deed by including amount it paid for second trust deed in amount it paid for first trust deed, as there were proceeds from the sales that went beyond the sales' expenses and the obligations secured by the deeds; though trust alleged that borrower would obtain a windfall, equity was not available to trust, as there was a comprehensive regulatory framework for non-judicial foreclosures. Spencer v. Jameson, 2009, 211 P.3d 106, 147 Idaho 497. Mortgages ⇐ 376

3. Review

Supreme Court would not consider, in borrower's appeal in action seeking to recover a surplus from foreclosure sales, argument by trust and trust beneficiary that they did not owe borrower surplus proceeds from non-judicial foreclosure sales of two trust deeds because another lender, who had subordinated his lien on the subject property to trust's deeds of trust, was entitled to any surplus before a surplus could be distributed to borrower, where trust and trust beneficiary did not make such argument to the trial court. Spencer v. Jameson, 2009, 211 P.3d 106, 147 Idaho 497. Mortgages ⇐ 572

§ 45–1508. Finality of sale

Research References

Treatises and Practice Aids

Bankruptcy Exemption Manual App B13, Idaho.
Law of Distressed Real Estate § 68:17, Nonjudicial Foreclosure for Deeds of Trust—Possession by Purchaser.
Residential Mortgage Lending: State Regulation Manual - West Idaho § 2:19, Foreclosure.

Notes of Decisions

Bids 5.5
Notice 6

5. Bankruptcy proceedings

Under Idaho law, Chapter 12 debtors' interest in real property that was sold at a prepetition trustee's sale was terminated upon sale, and so the property was not part of their bankruptcy estate. In re Wiebe, 2006, 353 B.R. 906. Bankruptcy ⇐ 2535(5); Bankruptcy ⇐ 2545; Mortgages ⇐ 378

5.5. Bids

Sale of first deed of trust on land securing first loan that trust had made to borrower was final, though trust bid $86,507.45 in excess of the credit available to it at non-judicial foreclosure sale and trust did not pay the price bid before trustee executed the trust deed, as a sale of a trust deed at a non-judicial foreclosure sale was final once a trustee accepted the bid as payment in full unless there were issues regarding the notice of the sale

and borrower was provided with notice of the sale. Spencer v. Jameson, 2009, 211 P.3d 106, 147 Idaho 497. Mortgages ⇐ 364

Sale of second deed of trust on land securing second loan to borrower was final, though trust bid $5,000 in excess of the credit available to it at non-judicial foreclosure sale and trust did not pay the price bid before trustee executed the trust deed, as a sale of a trust deed at a non-judicial foreclosure sale was final once a trustee accepted the bid as payment in full unless there were issues regarding the notice of the sale, and borrower was provided with notice of the sale. Spencer v. Jameson, 2009, 211 P.3d 106, 147 Idaho 497. Mortgages ⇐ 364

6. Notice

The alleged ineffectiveness of the notice, to the estate of a deceased co-trustor, of the deed of trust foreclosure sale for residential property did not affect the validity of the foreclosure sale with respect to two non-deceased co-trustors who received proper notice of the foreclosure sale. PHH Mortg. Services Corp. v. Perreira, 2009, 200 P.3d 1180, 146 Idaho 631. Mortgages ⇐ 369(6)

§ 45–1510. Trustee's deed—Recording—Effect

(1) When the trustee's deed is recorded in the deed records of the county where the property described in the deed is located, the recitals contained in the deed and in the affidavits required under section 45–1506, subsection (7), Idaho Code, shall be prima facie evidence in any court of the truth of the recitals and the affidavits. However, the recitals and affidavits are conclusive in favor of a purchaser in good faith for value or any successor in interest thereof. For purposes of this section, the trustee's deed shall be deemed effective as of the date and time on which the sale was held if such deed is recorded within fifteen (15) days after the date of sale or the first business day following the fifteenth day if the county recorder of the county in which the property is located is closed on the fifteenth day.

(2) Where a trustee's sale held pursuant to section 45–1506, Idaho Code, is invalid by reason of automatic stay provisions of the U.S. bankruptcy code, or a stay order issued by any court of competent jurisdiction or otherwise, recordation of a notice of rescission of the trustee's deed shall restore the condition of record title to the real property described in the trustee's deed and the existence and priority of all lienholders to the status quo prior to the recordation of the trustee's deed upon sale. Only the trustee or beneficiary who caused the trustee's deed to be recorded, or his/its successor in interest, may record a notice of rescission. The notice of rescission shall accurately identify the deed of trust, the recording instrument numbers used by the county recorder or the book and pages at which the trustee's deed and deed of trust are recorded, the names of all grantors, trustors and beneficiaries, the location of the property subject to the deed of trust and the reason for rescission. Such notice of rescission shall be in substantially the following form:

NOTICE OF RESCISSION OF TRUSTEE'S DEED UPON SALE

This Notice of Rescission is made this day .... with respect to the following:

1. THAT .... is the duly appointed Trustee under the certain Deed of Trust dated .... and recorded .... as instrument number .... in book ...., page ...., wherein .... and .... are named as Trustors, ... is named as Trustee, ... is named as Beneficiary;

2. THAT .... is the Beneficiary of record under said Deed of Trust;

3. THAT THE DEED OF TRUST encumbers real property located in the County of ...., State of Idaho, described as follows:

Property Description

4. THAT BY VIRTUE OF a default under the terms of the Deed of Trust, the Beneficiary did declare a default, as set forth in a Notice of Default recorded .... as instrument number .... in book ...., page ...., in the office of the Recorder of .... County, State of Idaho;

5. THAT THE TRUSTEE has been informed by the Beneficiary that the Beneficiary desires to rescind the Trustee's Deed recorded upon the foreclosure sale that was conducted in error due to a failure to communicate timely, notice of conditions that would have warranted a cancellation of the foreclosure that did occur on ....;

6. THAT THE EXPRESS PURPOSE of this Notice of Rescission is to return the priority and existence of all title and lienholders to the status quo ante as existed prior to the Trustee's sale.

NOW THEREFORE, THE UNDERSIGNED HEREBY RESCINDS THE TRUSTEE'S SALE AND PURPORTED TRUSTEE'S DEED UPON SALE AND HEREBY ADVISES ALL PERSONS THAT THE TRUSTEE'S DEED UPON SALE DATED .... AND RECORDED .... AS .... INSTRUMENT NUMBER .... IN THE COUNTY OF ...., STATE OF IDAHO, FROM .... (TRUSTEE) TO .... (GRANTEE) IS HEREBY RESCINDED, AND IS AND SHALL BE OF NO FORCE AND EFFECT WHATSOEVER. THE DEED OF TRUST DATED ...., RECORDED .... AS INSTRUMENT NUMBER .... IN BOOK ...., PAGE ...., IS IN FULL FORCE AND EFFECT.

.....
Authorized Signatory
Acknowledgment

S.L. 1957, ch. 181, § 10; S.L. 1990, ch. 401, § 4. Amended by S.L. 2010, ch. 249, § 1, eff. July 1, 2010.

Historical and Statutory Notes

2010 Legislation

S.L. 2010, ch. 249, § 1, rewrote the section, which prior thereto read:

"When the trustee's deed is recorded in the deed records of the county where the property described in the deed is located, the recitals contained in the deed and in the affidavits required under section 45-1506, subsection (7), Idaho Code, shall be prima facie evidence in any court of the truth of the recitals and the affidavits. However, the recitals and affidavits are conclusive in favor of a purchaser in good faith for value or any successor in interest thereof."

§ 45-1512. Money judgment—Action seeking balance due on obligation

Research References

Treatises and Practice Aids

Law of Distressed Real Estate § 68:3, After Default and Before Foreclosure--Alternative Remedies.

Law of Distressed Real Estate § 19:16, Fair Market Value Statutes--In General.

Law of Distressed Real Estate § 19:25, Other Statutory Controls--One-Action Statutes.

Law of Distressed Real Estate § 68:19, Nonjudicial Foreclosure for Deeds of Trust--Deficiency Judgment.

Residential Mortgage Lending: State Regulation Manual - West Idaho § 2:12, Deficiency Judgments.

Residential Mortgage Lending: State Regulation Manual - West Idaho § 2:19, Foreclosure.

Notes of Decisions

Assignees 7

7. Assignees

Assignee of beneficial interest in deed of trust on residential property was not required to provide trustors with an accounting showing how much was owing under the promissory note secured by the deed of trust, where the assignee was not seeking a money judgment on a deficiency. PHH Mortg. Services Corp. v. Perreira, 2009, 200 P.3d 1180, 146 Idaho 631. Mortgages ⇐ 265

§ 45-1514. Reconveyance upon satisfaction of obligation

Research References

Treatises and Practice Aids

Residential Mortgage Lending: State Regulation Manual - West Idaho § 2:33, Release and Payoff.

CHAPTER 16

CONSUMER FORECLOSURE PROTECTION ACT

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Office of Attorney General
700 W. Jefferson Street
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Consumer Protection
954 W. Jefferson, 2nd Floor
Boise, ID 83720
(208) 334-2424
Toll Free in Idaho:
1-800-432-3545
Fax (208) 334-4151

The Protecting Tenants at Foreclosure Act

SUMMARY OF THE ACT

An increasing number of tenants have found themselves displaced after being caught unaware that their rental was being foreclosed. The Protecting Tenants at Foreclosure Act ensures that tenants receive appropriate notice of foreclosure and are not abruptly displaced.

Under the Act, the new property owner cannot evict a month-to-month tenant for 90 days or, when a lease is in effect, until the tenant's lease ends except when the new property owner is going to use the rental property as his or her primary residence. In that case, the new owner only has to give the tenant 90 days notice.

Frequently Asked Questions

REQUIREMENTS UNDER THE ACT

- The new owner must be the "immediate successor in interest," such as a person or the bank that foreclosed on the property.
- The tenancy or lease must be bona fide. The tenant cannot be the mortgagor or a member of the mortgagor's family. The tenancy or lease must be the result of an arms-length transaction, and the tenancy or lease must require the payment of fair market rent or rent that is subsidized through federal, state or local subsidies.

SECTION 8 TENANTS

The law provides Section 8 tenants with all of the same rights as other tenants. The new owner must give the tenants a 90-day notice to leave if the owner intends to occupy the property as a primary residence. The tenant's Section 8 Housing Assistance Payment contract continues, and foreclosure is not a lawful reason for the owner to terminate a lease.

WHO REGULATES THE ACT

The law is self-regulating, which means that no government agency enforces it. Tenants must take action to enforce their rights.

WHAT TO DO IF YOUR RENTAL IS FORECLOSED

A Tenant without a Written Lease

- **Send a Letter to the Owner.** If you receive notice from the new owner asking you to vacate the foreclosed property before the 90-day period ends, send a letter via certified mail, return receipt requested, to the new owner informing them of the law. Click here for a sample letter.
- **Attend All Hearings.** If you receive an eviction notice, you must attend all court hearings. Take a copy of (a) any documents showing your tenancy, such as rental receipts; (b) the letter you sent to the owner; (c) the return receipt; and (d) a copy of the law . Explain to the judge why you are entitled to remain in the rental for 90 days. See the Landlord and Tenant Guidelines for additional information about defending an eviction claim.
- **Continue Paying Rent.**

- **Before the Sale**. Until the property transfers to a new owner, you must continue to pay rent to your landlord. It is very important to keep copies of your payments in case a dispute arises about whether you paid your rent or to whom you paid it.
- **After the Sale**. When the property is sold to the new owner, it is the owner's responsibility to notify you that you have 90 days to vacate the property. You must offer to pay rent to the new owner during the 90-day period. If the owner requires you to pay rent and you fail to do so, the owner can evict you. See the Landlord and Tenant Guidelines for information about the eviction process.

- **Negotiate a New Lease** (optional). If you want to remain in the rental beyond the 90 days, you can negotiate a new lease with the new owner. To protect yourself, you should obtain a written agreement and make sure it allows you sufficient time to relocate if the owner sells the home. See the Landlord and Tenant Guidelines for general information about lease agreements.
- **Request Your Deposit**. If the prior owner fails to return your deposit, you can file a lawsuit against the owner demanding a refund. See the Landlord and Tenant Guidelines for additional information about deposits.

A Tenant with a Written Lease That Has Not Expired

- **Send a Letter to the Owner**. If you receive written or oral notice from the new owner asking you to vacate the foreclosed property before the end of your lease, send a letter via certified mail, return receipt requested, to the new owner informing them of the law. Click here for a sample letter.
- **Attend All Hearings**. If you receive an eviction notice, you must attend all court hearings. Take a copy of (a) your lease agreement; (b) the letter you sent to the owner; (c) the return receipt; and (d) a copy of the law . Explain to the judge why you are entitled to remain in the rental. See the Landlord and Tenant Guidelines for additional information about defending an eviction claim.
- **Continue Paying Rent**. You must continue to pay rent to your landlord under the terms of the lease. It is very important to keep copies of your payments. See the Landlord and Tenant Guidelines for additional information about rental payments.

  - **Before the Sale**. Until the property transfers to a new owner, you must continue to pay rent to your landlord under the terms of your lease. It is very important to keep copies of your payments in case a dispute arises about whether you paid your rent or to whom you paid it.
  - **After the Sale**. When the property is sold to the new owner, it is the owner's responsibility to notify you that you have until the end of your lease to vacate the property. You must offer to pay rent to the new owner during the lease period. If the owner requires you to pay rent and you fail to do so, the owner can evict you. See the Landlord and Tenant Guidelines for information about the eviction process.

- **Negotiate a New Lease** (optional). When your lease ends, if you want to remain in the rental, you can negotiate a new lease with the new owner. To protect yourself, you should obtain a written agreement and make sure it allows you sufficient time to relocate if the owner sells the home. See the Landlord and Tenant Guidelines for general information about lease agreements.
- **Request Your Deposit**. If the prior owner fails to return your deposit, you can file a lawsuit against the owner demanding a refund. See the Landlord and Tenant Guidelines for additional information about deposits.

A Section 8 Tenant

- Call your Section 8 worker and inform him or her about the foreclosure. Click here for a sample letter to send to the new owner.

INFORMATION FOR SUCCESSORS IN INTEREST (NEW PROPERTY OWNERS)

The following is intended to assist realtors, financial institutions, lawyers and others who may encounter a situation that falls under the Protecting Tenants at Foreclosure Act . The Attorney General's Office encourages persons and entities with legal questions about their obligations under the Act to contact their private attorney.

Introduction:

- Immediate successors of a rental property take their interest subject to the remaining term of any bona fide lease. The obligations of the Act are broadly imposed by the Helping Families Save Their Homes Act of 2009 and are not limited to FHA-insured or HUD-assisted housing.
- The responsibility for providing advance notice to tenants falls on the immediate successor in interest. Click here for a sample notice.

Section 702:

- Section 702 of the Act applies to any foreclosure on a "Federally-related mortgage" loan, as well as any foreclosure on the mortgage of any dwelling or residential real property. The term "Federally-related mortgage" is defined in Section 3 of the Real Estate Settlement Procedures Act . The Act covers all residential property foreclosures regardless of the entity involved in the foreclosure and regardless of whether the tenants are recipients of any type of housing assistance.
- The Act does not apply to tenants who are the child, spouse or parent of the mortgagor. The original lease agreement must have been the result of an arms-length transaction and require the payment of a fair market rent.

Section 703:

- Section 703 addresses residential housing in which tenants receiving Section 8 rental voucher assistance reside. The protections in this section are in addition to those of Section 702. Section 703 makes conforming changes to the United States Housing Act of 1937 to ensure the Act covers leases and housing assistance payments contracts applicable to Section 8 tenants.
- Immediate successor owners of foreclosed properties in which Section 8 voucher recipients reside become participants in HUD's Section 8(o) tenant-based voucher programs and must comply with Sections 702 and 703. A demand upon the Section 8 voucher recipient to vacate the property before the sale of the property does not constitute "other good cause" as meant in HUD's regulations on termination of tenancy. However, the owner may terminate the tenancy effective on the date of the property transfer if the owner: (a) will occupy the property as a primary residence; and (b) has provided the tenant with a notice to vacate at least 90 days before the effective date of the notice.

State of Idaho
Office of Attorney General Lawrence Wasden

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Frequently Asked Questions About Foreclosure

When does the Protecting Tenants at Foreclosure Act become effective?

The Act became effective on May 20, 2009, and remains in effect until December 31, 2012.

What government agency enforces the Protecting Tenants at Foreclosure Act?

The Act is "self-executing," so no government agency (such as the Attorney General's Office or HUD) is responsible for enforcing the Act. Housing advocates should help educate tenants, landlords and the community about these new tenant rights.

Can the person who buys the home that I am renting make me leave immediately?

No. The new owner must give you a 90-day notice to leave. If you have a lease, you can remain in the home until the lease ends as long as the new owner does not intend to live in the home as his or her residence. If the new owner wants to live in the home, the owner only has to give you a 90-day notice to leave.

What do I do if the new owner tells me to leave in less than 90 days?

You should send a letter via certified mail to the new owner informing the owner about the Protecting Tenants at Foreclosure Act. Make sure you keep a copy of the letter for your records and save your return receipt.

Do I have to continue paying rent?

Yes. If you fail to pay rent the new owner can begin eviction proceedings.

What if I have a one-year lease that has more than 90 days left?

Generally, you can remain in the home until the lease ends. However, if the new owner wants to occupy the home as his or her primary residence, the new owner only has to give you 90 days to vacate.

I am a month-to-month tenant without a written lease. Does the new owner have to give me 90 days to vacate?

Yes. As long as you pay rent to the new owner, you have 90 days to vacate the property.

My written lease ends in 30 days. Do I still have 90 days to vacate?

Yes. If your lease term ends before 90 days following the foreclosure, then you have the full 90 days to vacate.

My landlord notified me of the foreclosure before it occurred, and I vacated the property before the end of my lease agreement. Am I entitled to damages under the Act because I had to vacate early and did not receive proper notice?

Your landlord may have breached your lease agreement under contract law, but he or she did not violate the Act because your landlord is not a successor in interest.

What do I do if the new owner sues to evict me?

File an answer with the court stating that the new owner failed to give you proper notice under the Protecting Tenants at Foreclosure Act. Attend all court proceedings and take all documents, including your letter to the new owner, with you to court.

What if I live in Section 8 housing?

You have the same rights as other tenants, as well as the right to the continuation of your Section 8 Housing Assistance Payment contract. In addition, foreclosure is not a lawful reason to terminate your lease.

The landlord never refunded my deposit. How do I get my money back?

Idaho law provides a relatively simple procedure for a tenant to follow to obtain a deposit from a landlord who fails to return the tenant's deposit or provide an itemized list of deductions within 21 days after the lease ends.

Step 1: Write a letter to the landlord. Send written notice by certified mail to the landlord demanding return of the deposit. Be sure to keep a copy of the letter.

Step 2: Wait for a reply from the landlord. The landlord has three business days from the date the letter is received to return the deposit.

Step 3: Sue the landlord. If the landlord fails to return the deposit, the tenant can file a complaint in small claims court.

Step 4: Go to trial. The parties will receive notification of the date, time and place for the trial. The judge will ask the parties to explain their positions and present their evidence. The tenant should provide a copy of all communication with the landlord, photographs and/or videotapes, and bring witnesses who accompanied the tenant during the final inspection. If the tenant wins, the judge may award the tenant three times the security deposit, plus court costs and attorney fees

Who do I contact if I have questions about the law?

You can contact a private attorney, your local legal aid office, a housing counselor or, if you are a Section 8 tenant, your Section 8 worker. To speak with an attorney, contact the Idaho State Bar's Lawyer Referral Program at 208-334-4500, or visit their website at isb.idaho.gov.

To locate your nearest legal aid office or find additional information about legal aid's programs, contact the Idaho Legal Aid Services, Inc. at 208-345-0106, or visit their website at www.idaholegalaid.org.

Housing counselors are available to assist you with a variety of housing-related issues. To locate a counselor in your area, visit the U.S. Department of Housing and Urban Development's website at www.hud.gov.

I need an attorney to advise me about my rights and options. Can the Attorney General help me?

No. The Attorney General's Office cannot act as a private attorney for you. Our office acts on behalf of all the people of Idaho.

I see that the Attorney General's Consumer Protection Division offers informal dispute resolution. Can I file a complaint against the new owner who is trying to evict me?

Yes. In addition to his enforcement duties under the law, the Attorney General offers an informal dispute resolution process to Idaho residents who file complaints with the Attorney General. If you file a complaint and request dispute resolution, we will forward your complaint to the new owner for a response. We will copy you on our correspondence and any response we receive. Complaint forms are available here or by calling 208-334-2424 or toll-free in Idaho 888-432-4535.

When deciding whether to file a complaint with us, please keep the following important factors in mind:

- We cannot provide immediate action on your behalf. Our dispute resolution process is voluntary and can take up to 60 days. If you are facing immediate eviction and you need legal assistance, please contact a private attorney.
- We do not enforce the Protecting Tenants at Foreclosure Act. That means we cannot force a new owner to answer your complaint, comply with the Act or allow you to remain in a home.
- We cannot recover any restitution or damages for you. In addition to the fact that we do not enforce the Protecting Tenants at Foreclosure Act, the Act does not include a penalty provision.

Where can I go to get information about other landlord-tenant laws in Idaho?

The Attorney General publishes the Landlord Tenant Guidelines which is available here or by calling 208-334-2424 or toll-free in Idaho 888-432-4535.

HELPING FAMILIES SAVE THEIR HOMES ACT

Public Law No: 111-22 (S. 896E) (Enacted: May 20, 2009)

DIVISION A

TITLE VII--PROTECTING TENANTS AT FORECLOSURE ACT

Amends in part: *United States Housing Act of 1937*, 42 U.S.C. 1437f(o)(7)
Sunset: December 31, 2012

SEC. 701. SHORT TITLE.

This title may be cited as the "Protecting Tenants at Foreclosure Act of 2009".

SEC. 702. EFFECT OF FORECLOSURE ON PREEXISTING TENANCY.

(a) In General- In the case of any foreclosure on a federally-related mortgage loan or on any dwelling or residential real property after the date of enactment of this title, any immediate successor in interest in such property pursuant to the foreclosure shall assume such interest subject to—

(1) the provision, by such successor in interest of a notice to vacate to any bona fide tenant at least 90 days before the effective date of such notice; and

(2) the rights of any bona fide tenant, as of the date of such notice of foreclosure—

(A) under any bona fide lease entered into before the notice of foreclosure to occupy the premises until the end of the remaining term of the lease, except that a successor in interest may terminate a lease effective on the date of sale of the unit to a purchaser who will occupy the unit as a primary residence, subject to the receipt by the tenant of the 90 day notice under paragraph (1); or

(B) without a lease or with a lease terminable at will under State law, subject to the receipt by the tenant of the 90 day notice under subsection (1) except that nothing under this section shall affect the requirements for termination of any Federal- or State-subsidized tenancy or of any State or local law that provides longer time periods or other additional protections for tenants.

(b) Bona Fide Lease or Tenancy- For purposes of this section, a lease or tenancy shall be considered bona fide only if—

(1) the mortgagor or the child, spouse, or parent of the mortgagor under the contract is not the tenant;

(2) the lease or tenancy was the result of an arms-length transaction; and

(3) the lease or tenancy requires the receipt of rent that is not substantially less than fair market rent for the property or the unit's rent is reduced or subsidized due to a Federal, State, or local subsidy.

(c) Definition- For purposes of this section, the term 'federally-related mortgage loan' has the same meaning as in section 3 of the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2602).

SEC. 703. EFFECT OF FORECLOSURE ON SECTION 8 TENANCIES.

Section 8(o)(7) of the United States Housing Act of 1937 (42 U.S.C. 1437f(o)(7)) is amended—

(1) by inserting before the semicolon in subparagraph (C) the following: and in the case of an owner who is an immediate successor in interest pursuant to foreclosure during the term of the lease vacating the property prior to sale shall not constitute other good cause, except that the owner may terminate the tenancy effective on the date of transfer of the unit to the owner if the owner—

(i) will occupy the unit as a primary residence; and

(ii) has provided the tenant a notice to vacate at least 90 days before the effective date of such notice.'; and

(2) by inserting at the end of subparagraph (F) the following: In the case of any foreclosure on any federally-related mortgage loan (as that term is defined in section 3 of the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2602)) or on any residential real property in which a recipient of assistance under this subsection resides, the immediate successor in interest in such property pursuant to the foreclosure shall assume such interest subject to the lease between the prior owner and the tenant and to the housing assistance payments contract between the prior owner and the public housing agency for the occupied unit, except that this provision and the provisions related to foreclosure in subparagraph (C) shall not shall not affect any State or local law that provides longer time periods or other additional protections for tenants.

SEC. 704. SUNSET.

This title, and any amendments made by this title are repealed, and the requirements under this title shall terminate, on December 31, 2012.

UNITED STATES HOUSING ACT OF 1937
42 U.S.C. 1437f(o)(7) (relevant section)

(7) Leases and tenancy
Each housing assistance payment contract entered into by the public housing agency and the owner of a dwelling unit—

(A) shall provide that the lease between the tenant and the owner shall be for a term of not less than 1 year, except that the public housing agency may approve a shorter term for an initial lease between the tenant and the dwelling unit owner if the public housing agency determines that such shorter term would improve housing opportunities for the tenant and if such shorter term is considered to be a prevailing local market practice;

(B) shall provide that the dwelling unit owner shall offer leases to tenants assisted under this subsection that—

(i) are in a standard form used in the locality by the dwelling unit owner; and

(ii) contain terms and conditions that—

(I) are consistent with State and local law; and

(II) apply generally to tenants in the property who are not assisted under this section;

(C) shall provide that during the term of the lease, the owner shall not terminate the tenancy except for serious or repeated violation of the terms and conditions of the lease, for violation of applicable Federal, State, or local law, or for other good cause, and that an incident or incidents of actual or threatened domestic violence, dating violence, or stalking shall not be construed as a serious or repeated violation of the lease by the victim or threatened victim of that violence and shall not be good cause for terminating the tenancy or occupancy rights of the victim of such violence;

(D) shall provide that during the term of the lease, any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants, any criminal activity that threatens the health, safety, or right to peaceful enjoyment of their residences by persons residing in the immediate vicinity of the premises, or any violent or drug-related criminal activity on or near such premises, engaged in by a tenant of any unit, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy; except that

(i) criminal activity directly relating to domestic violence, dating violence, or stalking, engaged in by a member of a tenant's household or any guest or other person under the tenant's control shall not be cause for termination of the tenancy or occupancy rights, if the tenant or immediate member of the tenant's family is a victim of that domestic violence, dating violence, or stalking;

(ii) Limitation.—Notwithstanding clause (i) or any Federal, State, or local law to the contrary, a public housing agency may terminate assistance to, or an owner or manager may bifurcate a lease under this section, or remove a household member from a lease under this section, without regard to whether a household member is a signatory to a lease, in order to evict, remove, terminate occupancy rights, or terminate assistance to any individual who is a tenant or lawful occupant and who engages in criminal acts of physical violence against family members or others, without evicting, removing, terminating assistance to, or otherwise penalizing the victim of such violence who is also a tenant or lawful occupant. Such eviction, removal, termination of occupancy rights, or termination of assistance shall be effected in accordance with the procedures prescribed by Federal, State, and local law for the termination of leases or assistance under the relevant program of HUD-assisted housing.

(iii) nothing in clause (i) may be construed to limit the authority of a public housing agency, owner, or manager, when notified, to honor court orders addressing rights of access or control of the property, including civil protection orders issued to protect the victim and issued to address the distribution or possession of property among the household members in cases where a family breaks up;

(iv) nothing in clause (i) limits any otherwise available authority of an owner or manager to evict or the public housing agency to terminate assistance to a tenant for any violation of a lease not premised on the act or acts of violence in question against the tenant or a member of the tenant's household, provided that the owner, manager, or public housing agency does not subject an individual who is or has been a victim of domestic violence, dating violence, or stalking to a more demanding standard than other tenants in determining whether to evict or terminate;

(v) nothing in clause (i) may be construed to limit the authority of an owner or manager to evict, or the public housing agency to terminate assistance to any tenant if the owner, manager, or public housing agency can demonstrate an actual and imminent threat to other tenants or those employed at or providing service to the property if that tenant is not evicted or terminated from assistance; and

(vi) nothing in this section shall be construed to supersede any provision of any Federal, State, or local law that provides greater protection than this section for victims of domestic violence, dating violence, or stalking.;

(E) shall provide that any termination of tenancy under this subsection shall be preceded by the provision of written notice by the owner to the tenant specifying the grounds for that action, and any relief shall be consistent with applicable State and local law; and

(F) may include any addenda required by the Secretary to set forth the provisions of this subsection.

Sample Notice for Successors in Interest to Provide to Tenants

The Attorney General recommends that new owners consult with a private attorney to ensure the notice they provide to a tenant complies with state and federal law and includes the appropriate information and options that the new owner wants to offer to the tenant.

<Enter Date>

<Enter Tenant's Name>
<Enter Tenant's Address>

IMPORTANT NOTICE:
THE PROPERTY IN WHICH YOU LIVE HAS BEEN FORECLOSED AND HAS A NEW OWNER

The new owner is: **<Enter Name, Address, Telephone & Email Address>**
We represent the new owner: **<Enter Name, Address, Telephone & Email Address>**

Please contact us immediately to advise us as to whether you are a tenant and to provide us with evidence of your tenancy, such as a COPY of your lease or COPIES of your rental payment receipts.

Please continue paying your monthly rent of <$ enter amount> on the <enter day> of every month. You may mail your payments to: <enter contact information>.

If we do not hear from you within 20 days of your receipt of this notice, you will not lose any legal rights, but we will take legal action to remove you from the property. This Notice describes some of your legal rights. Please contact a private attorney if you have questions about your rights or options under state or federal law.

IF YOU ARE A BONA FIDE TENANT, THE *PROTECTING TENANTS AT FORECLOSURE ACT OF 2009*, PUB. L. NO. 111-22, § 702-703 (2009), ALLOWS YOU TO CONTINUE AS A TENANT FOR THE REMAINDER OF YOUR LEASE OR AT LEAST 90-DAYS FROM THE DATE YOU ARE GIVEN NOTICE TO VACATE WHICHEVER IS LONGER. IN EITHER CASE, THE NEW OWNER CAN ONLY TERMINATION YOUR TENANCY AND EVICT YOU IF THE OWNER HAS GIVEN YOU AT LEAST 90 DAYS NOTICE TO VACATE.

You are protected by the Protecting Tenants at Foreclosure Act of 2009 if:

- You were a tenant in the foreclosed property at the time the new owner took title; and
- You are NOT the child, parent or spouse of the former owner; and
- Your rent is equal to or is not substantially below fair market rent, or you pay less because you have rental assistance such as Section 8.

If the new owner sells the property to a person who wants to move into the property as his or her home, the law allows that buyer to gives you at least 90 days advance notice before the date you are being asked to leave.

If you have a SECTION 8 voucher you have additional rights.

- The new owner must abide by your lease and by the Housing Assistance Payments contract that the old owner had with the housing authority.
- The new owner has to accept your share of the rent from you and the housing authority's share from the housing authority.

YOU HAVE OPTIONS:

- The new owner may be willing to pay your moving expenses and any other costs or amounts you and the new owner agree on in exchange for your agreement to leave the premises in less than 90 days or before your lease expires.

- The new owner may be willing to negotiate a lease agreement to allow you to continue renting the home beyond the 90 days.

- Please contact <enter name> at <telephone number> if you wish to discuss these options.

- For additional information about the Protecting Tenants at Foreclosure Act, please visit the Idaho Attorney General's website at www.ag.idaho.gov.

AARP FOUNDATION

Predatory Mortgage Lending

training module

AARP/National Legal Training Project administered through the AARP Foundation

The AARP Foundation is AARP's affiliated charity. Foundation programs provide security, protection and empowerment for older persons in need. Low-income older workers receive the job training and placement they need to re-join the workforce. Free tax preparation is provided for low- and moderate-income individuals, with special attention to those 60 and older. The Foundation's litigation staff protects the legal rights of older Americans in critical health, long-term care, consumer and employment situations. Additional programs provide information, education and services to ensure that people over 50 lead lives of independence, dignity and purpose. Foundation programs are funded by grants, tax-deductible contributions and AARP."

AARP is a nonprofit, nonpartisan membership organization that helps people 50+ have independence, choice and control in ways that are beneficial and affordable to them and society as a whole. We produce *AARP The Magazine*, published bimonthly; *AARP Bulletin*, our monthly newspaper; *AARP Segunda Juventud*, our bimonthly magazine in Spanish and English; *NRTA Live & Learn*, our quarterly newsletter for 50+ educators; and our website, www.aarp.org. AARP Foundation is our affiliated charity that provides security, protection, and empowerment to older persons in need with support from thousands of volunteers, donors, and sponsors. We have staffed offices in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands.

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Predatory Mortgage Lending

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