Violations - Failure to disclose APR and payment information 3 days prior to consummation as well as the implications of the use of your home as security, inclusion of prohibited terms in transaction (i.e. higher interest rate upon default), pattern of making loans without regard to ability to repay
Remedies - Rescission, unless transaction was for purchase or construction of home, actual damages, statutory damages up to $4,000, prevailing plaintiff fees
Limitations - 1 year to bring a damages claim or rescind; 3 year limitation if used defensively. Applies to loans that meet one of two triggers:

- APR is more than 8 percent above the yield in treasury securities having comparable maturities at the time the loan was made (T-bill rates on the 15th of the month immediately preceding the month of application)
- Points and fees are 8 percent in excess of the "total loan amount" with total at least $583

Sample Case Law

Bryant v. Mortgage Capital Resource Corp., 197 F. Supp.2d 1357 (N.D. Ga. 2002) (discussing the assignment of liability to a subsequent purchaser when dealing with a loan under HOEPA, also discusses equitable tolling in relation to RESPA
Cooper v. First Government Mortg. and Investors Corp., 238 F.Supp.2d 50 (D.D.C. 2002) (assignee liability for HOEPA loans)
In re Robertson, 333 B.R. 894 (M.D. Fla. 2005) (transaction between borrower and lender qualified as a mortgage covered by the HOEPA where borrower secured the loan with her home for a purpose other than to finance the acquisition or initial construction of a dwelling and the annual percentage rate of the loan exceeded the Treasury securities standard by more than 10 points).

Real Estate Settlement Procedures Act (RESPA)

This act provides a private cause of action for violation of its prohibitions against misuse of escrowed funds, kickbacks from companies providing settlement services and steering borrowers to title insurance companies. Either treble or statutory damages plus attorney's fees are available for violations. RESPA also requires advance disclosures (Good Faith Estimate), and disclosure at settlement of settlement costs in real estate transactions. While the statute does not create a private cause of action for disclosure violations, analyzing the disclosures often reveals Truth in Lending and HOEPA violations.

12 U.S.C. §2601, et seq., 24 C.F.R. Part 3500 (Regulation X), 64 Fed. Reg. 10079 (HUD Policy Statement on lender paid broker fees)
Liable Parties - Lender, broker, if not exclusive agent or lender, servicer, title company
Violations (Not all of which provide a private right of action) - failure to give Good Faith Estimate, failure to disclose other credit-related information and give HUD-1statement, failure to give Settlement Statement and servicing statements, payment or acceptance of kickbacks or referral fees, charging fees when no identifiable services are provided, improper servicing of loan (treatment of escrow)
Remedies - Three times amount of illegal charges and attorney fees
Limitations - 1 year to bring an affirmative claim

Sample case law

Hirsch v. Bank of America, 328 F. 3d 1306 (11th Cir. 2003) (provides a two-part test in analyzing RESPA kickback violations involving a mortgage broker; first the court must "determine whether the broker has provided goods or services of the kind typically associated with a mortgage transaction"; then, the court must "determine whether the total compensation paid to the broker is reasonably related to the total value of the goods or services actually provided"
Friedman v. Market Street Mortg. Corp., 520 F.3d 1289 (11th Cir. 2008) (RESPA does not provide a cause of action where a fee for services was rendered but does provide a cause of action when a plaintiff alleges that "no services were rendered in exchange for a settlement fee").

Busby v. JRHBW Realty, Inc. d/b/a RealtySouth, 642 F.Supp.2d 1283 (N.D. Ala. 2009) (realty company could not assert an array of services defense to consumers' claim that company's administrative brokerage commission (ABC) fee violated Real Estate Settlement Procedures Act (RESPA) as a fee for which no services were performed, because the services described by company as justification for the fee, even if those services were actually provided, were not settlement-related and/or they provided little or no benefit to consumers as borrowers)

RESPA Qualified Written Request

Mortgage servicer must respond promptly to written inquiries, known as qualified written requests. If a client believes he or she has been charged a penalty or late fee that is not owed, or has other problems with the servicing of the loan, contact the servicer in writing.
12 U.S.C. § 2605
Liable Parties - Servicer
Violations - Failure to provide notice in writing of any assignment, sale or transfer of servicing of the loan to any other person including the effective date of transfer, contact information of the transferee, and the effect on terms and insurance. Notice must be given not less than 15 days before effective date of transfer. Some exceptions exist.
Remedies - Servicer must acknowledge within 20 working days receipt of the request and must investigate, correct, explain or produce proof of figures/position within 60 days
Statutory damages up to $1,000 for repeated failure to respond.

Sample Case Law
McLean v. GMAC Mortg. Corp., 595 F.Supp.2d 1360 (S.D. Fla. 2009) (requirements for damages for failure to respond to qualified written request)
McLean v. GMAC Mortgage Corp., Inc., __ F.Supp.2d __, 2008 WL 5246149 (S.D. Fla. 2008) (discussing transmission and response requirements for qualified written requests)

Racketeer Influenced and Corrupt Organizations Act ("RICO") Florida Civil Remedies for Criminal Practices Act

Racketeer Influenced and Corrupt Organizations Act ("RICO") and Florida Civil Remedies for Criminal Practices Act were initially created to provide extensive criminal penalties for those engaged in traditional organized crime. However, these statutes have been increasingly used as a means to regulate and prosecute many predatory lending practices. The most apparent advantage of using the RICO Act is that it affords triple actual damages and attorney's fees.

18 U.S.C. §1961, et seq., §§772.103, 772.104, Fla. Stat.
Liable Parties - Persons (broadly defined) conducting RICO enterprise
Violations - Pattern of "racketeering activity" as defined in 18 U.S.C. §1961 (a long list of violations, but this is a very complex statute in application)
Remedies - Three times actual damages and attorney's fees
Limitations - Four years to bring damages claim under federal law, five years under state law

Sample Case Law
Jones v. Childers, 18 F.3d 899 (11th Cir. 1994) (Florida CRCPA claims)
Oglesbee v. IndyMac Financial Services, Inc., __F.Supp.2d__, 2010 WL 475130 (S.D. Fla. 2010) (allegations of criminal activity arising out of the same loan transaction did not qualify as a "pattern" under Florida's RICO statute)

Federal Fair Debt Collection Practices Act (FDCPA)

The purpose of the Federal Fair Debt Collection Practices Act ("FDCPA") is to eliminate abusive practices in the collection of consumer debts, promote fair debt collection and to provide consumers with an avenue for disputing and obtaining validation of debt information in order to

ensure the information's accuracy. The Act creates guidelines under which debt collectors may conduct business, defines rights of consumers involved with debt collectors and prescribes penalties and remedies for violations of the Act.

15 U.S.C. § 1692, et seq.
Liable Parties - Debt collectors (even present owner if took ownership interest after default)
Violations - Specified abusive, deceptive and unfair debt collection practices and failure to provide response to debtor's request for information
Remedies - Actual damages and statutory damages up to $1,000, costs and attorney's fees
Limitations - 1 year from date on which the violation occurred
Strict Liability - Liberally construed in favor of the least sophisticated consumer

Sample Case Law

Laughlin v. Household Bank, Ltd, 969 So.2d 509 (Fla. 1st DCA 2007) (when there are discrepancies between the Florida Consumer Collection Practices Act (FCCPA) and the FDCPA, whichever contains the provision more protective of the debtor prevails)
Jeter v. Credit Bureau, Inc., 760 F.2d 1168 (11th Cir. 1985) (FDCPA protects the unsophisticated consumer).
Fox v. Citicorp Credit Services, Inc., 15 F. 3d 1507 (9th Cir. 1994) (collection attorney liable under FDCPA)

Equal Credit Opportunity Act

Prohibits credit discrimination on the basis of race, color, religion, national origin, sex, marital status, age, or because you get public assistance. Creditors may request most of this information, but may not use it when deciding whether to give a client credit or when setting the terms of credit. ECOA applies to organizations or people who regularly extend credit, including banks, small loan and finance companies, retail and department stores, credit card companies, and credit unions. Everyone who participates in the decision to grant credit or in setting the terms of that credit, including real estate brokers who arrange financing, must comply with the ECOA.

15 U.S.C. § 1691, et seq.
Liable - Creditors
Violations - Credit discrimination based on race, color, religion, national origin, sex, marital status, or age, exceptions exist for good faith safe harbor
Remedies - Actual damages, punitive damages in an amount not greater than $10,000, equitable and declaratory relief, attorney's fees and costs

Sample Case Law

Bagley v. Lumbermens Mut. Cas. Co., 100 F.Supp.2d 879 (N.D. Ill. 2000) (Equal Credit Opportunity Act (ECOA) applied to commercial loans as well as personal loans).
National Ass'n for Advancement of Colored People v. Ameriquest Mortg. Co., 635 F.Supp.2d 1096 (C.D. Cal. 2009) (civil rights organization's allegation that mortgage lenders engaged in predatory lending practices aimed at African-American borrowers was sufficient to state disparate impact claims under FHA and ECOA, where organization identified several specific policies that had discriminatory effect, including marketing of subprime loans, deployment of financial incentives, and lack of meaningful review of loan applications).

Loss Mitigation

Before HAMP, HARP and HAFA, consumers have had special protections available to them if they fall behind in their monthly mortgage payments for reasons beyond their control through if they have FHA, VA, Fannie Mae, and Freddie Mac insured loans. Generally, these borrowers

must be given an opportunity to resolve the delinquency in their mortgage payments through special accommodations. The consumer must be allowed to participate in this process in a meaningful way as a precondition to filing of a mortgage foreclosure lawsuit.

Federal Housing Act ("FHA") Loans

▪ It is the intent of the Department that no mortgagee shall commence foreclosure until the requirements of this subpart have been followed. 24 C.F.R. §203.500 (Mortgage Servicing Generally).

▪ HUD may prescribe conditions and requirements for the appropriate use of these loss mitigation actions, concerning such matters as owner-occupancy, extent of previous defaults, prior use of loss mitigation, and evaluation of the mortgagor's income, credit and property. 24 C.F.R. §203.501 (Loss mitigation).

▪ The mortgagee shall give notice to each mortgagor in default no later than the end of the second month of any delinquency in payments under the mortgage. Mortgagee is not required to send a second delinquency notice to the same mortgagor more often than once each six months. The mortgagee may issue additional or more frequent notices of delinquency at its option. 24 C.F.R. §203.602 (Delinquency notice to mortgagor).

▪ Mortgagees must pursue effective foreclosure prevention strategies and evaluate the particular circumstances surrounding the default; determine the borrower's capacity to pay the monthly payment amount or a modified payment amount; ascertain the reason for the default, and the extent of the borrower's interest in keeping the subject property. Mortgagee must make a reasonable effort to arrange a face-to-face meeting with the borrower before three full monthly installments are unpaid. 24 C.F.R. §203.604.

▪ Mortgagee must manage the mortgage as required by FHA's special foreclosure prevention workout programs which can include and allow for the restructuring of the loan to allow the borrower to pay out delinquent installments, for advances to bring the mortgage current or the temporary reduction or suspension of monthly payment to allow recovery from the specified hardship. Mortgagee is required under federal law to adapt its collection and loan servicing practices to the borrower's individual circumstances and to re-evaluate these techniques each month after default. 24 C.F.R. §203.605.

▪ Before initiating foreclosure, the mortgagee must ensure that all servicing requirements of this subpart have been met. The mortgagee may not commence foreclosure for a monetary default unless at least three full monthly installments due under the mortgage are unpaid after application of any partial payments that may have been accepted but not yet applied to the mortgage account. In addition, prior to initiating any action required by law to foreclose the mortgage, the mortgagee shall notify the mortgagor in a format prescribed by the Secretary that the mortgagor is in default and the mortgagee intends to foreclose unless the mortgagor cures the default. 24 C.F.R. §203.606 (Pre-foreclosure review).

▪ Further, mortgagees are required to take appropriate actions which can reasonably be expected to generate the smallest financial loss to the Department, including, but not limited to:

a. Deeds in lieu of foreclosure under 24 C.F.R. §203.357.
b. Pre-foreclosure sales under 24 C.F.R. §203.370.
c. Partial claims under 24 C.F.R. §203.414.
d. Assumptions under 24 C.F.R. §203.512.
e. Special forbearance under 24 C.F.R. §§203.471 and 203.614.
f. Recasting of mortgages under 24 C.F.R. §203.616.

VA Loans

▪ Mortgage must extend to borrower all reasonable means of forbearance, including an opportunity to apply for a mortgage foreclosure avoidance workout and a consideration of a temporary suspension of borrower's payments or extension of the loan to 38 U.S.C. §3703(a)(1)(A), 38 U.S.C. §3703(a)(2)(B) and 38 U.S.C. §3703(c)(1).

▪ The purpose of the VA Housing Loan Program is to enable veterans to obtain home loans and to minimize the risk of foreclosure and the loss of home ownership. U.S. v. Shimer, 367 U.S. 374, 383 (1961). 38 U.S.C. 36.4346(a) and the VA Handbook H26-94-1 requires Mortgagees to establish a delinquent loan servicing program which, among other things, provides a process to:

1. Have a collection staff trained in techniques of loan servicing and counseling delinquent borrowers, including the pursuit of alternatives to foreclosure available to counsel borrowers in their status as delinquent;
2. Have guidelines for individual analysis of delinquent borrowers;
3. Establish timely, helpful and responsive telephone contact with the delinquent borrowers to determine why payments were not made on the mortgage; alternatively, arrange a face-to-face interview with the delinquent borrower to solicit information to evaluate the prospects for curing the mortgage default including determining whether the granting of forbearance or other such relief would be appropriate to assist the borrower in avoiding foreclosure and avoiding the loss of home ownership by a veteran and that veteran's family;
4. Make a reasonable effort to determine the reason for the borrower's default and whether such reason is temporary or permanent, the income of the borrower and their monthly household and debt expenses and obligations leading to a realistic and mutually satisfactory arrangement for curing the default;
5. Employ collection techniques flexible to adapt to delinquent borrower's circumstances.

Fannie Mae, Freddie Mac

▪ Prior to foreclosure, the mortgagee must provide access to debt management and relief to borrowers facing temporary financial problems. Such relief must include, among other things, temporary indulgence, a liquidating plan, and special forbearance designed to avoid residential foreclosure of single family loans secured by and/or underwritten by Fannie Mae/Freddie Mac.

▪ Mortgagee must pursue effective foreclosure prevention strategies by evaluating the particular circumstances surrounding the borrower's default; the borrower's capacity to pay the monthly payment amount or a modified payment amount; ascertain the reason for the borrower's default, and the extent of the borrower's interest in keeping the property.

▪ Mortgagee must contact the borrower before the 30th day of the delinquency to evaluate foreclosure prevention strategies and must inform the borrower in writing about the applicable foreclosure alternatives in a timely fashion.

▪ Fannie Mae's special foreclosure prevention workout programs can include and allows for a restructuring of the loan allowing the borrower to pay out delinquent installments or advances to bring the mortgage current or to reduce or suspend the monthly mortgage payments for a specific period to allow the borrower time to recover from a financial hardship.

▪ Telephone Numbers - Fannie Mae - (404) 398-6000 - Freddie Mac - 1-800-FREDDIE

Conventional loans

The National Housing Act, 12 U.S.C. 1701x(c)(5) requires Mortgagees to advise borrowers of any home ownership counseling the Mortgagee offers together with information about counseling offered by the U.S. Department of Housing and Urban Development.

STATE CAUSES OF ACTION

The Florida Fair Lending Act (FFL)

This is Florida's version of the Federal Homeownership and Equity Protection Act. The Florida version also requires a right to cure and a limitation on attorneys fees in certain high-cost/high interest, non-purchase money mortgage loans. For loans whose fees exceed the "trigger" amount, FFL, like HOEPA, prohibits certain abusive terms relating to prepayment penalties, default interest rates, negative amortization and requires special "advance look" disclosures of the monthly payment and annual percentage rate, and prohibits the lender from engaging in a pattern or practice of lending without regard to the borrower's ability to repay.

§§494.0078 - 494.00797, Fla. Stat.
Liable Parties - Creditor (generally the original lender), assignee (consistent with 15 U.S.C. §1641)
Violations - Failure to disclose pre-consummation information and give conspicuous warning, inclusion of prohibited terms in transaction, pattern of making loans without regard to ability to repay, failure to provide the right to cure
No private right of action - Remedies provided under the FDUTPA for non-exempt entities
Limitations - Four years

Sample Case Law
Perter v. Ojeda, 902 So.2d 219 (Fla. 3rd DCA 2005) (FFL applies to personal, family and household loans, business loans are exempt from the FFL).

Florida Deceptive and Unfair Trade Practices Act (FDUTPA)

Florida's unfair and deceptive acts and practices statute broadly prohibits any unfair, deceptive, or unconscionable practice. Remedies provided include actual damages, injunctive and declaratory relief. Generally, insurance companies and banks and savings and loans associations are exempt. Violations of other listed consumer protection statutes may also be claimed as violations of the FDUTPA, §501.203(c)(3), Fla. Stat. Enhanced penalties can be assessed by the Attorney General's Office if the victim is elderly or handicapped. §501.2077, Fla. Stat.

§§501.201, et seq., Fla. Stat.
Violations - Unfair, deceptive and/or unconscionable acts or practices
Remedies - Injunctive relief, actual damages, declaratory judgment, attorney fees
Limitations - Four years
Sample of exclusions from coverage - Any person or activity regulated under laws administered by the Office of Insurance Regulation of the Financial Services Commission; banks and savings and loan associations regulated by the Office of Financial Regulation of the Financial Services Commission or by federal agencies.

Sample Case Law
Dept. of Legal Affairs v. Father and Son Moving & Storage, Inc., 643 So.2d 22 (Fla. 4th DCA 1994) (one's actions do not need to violate a specific rule or regulation in order to be considered deceptive under the FDUTPA).

Samuels v. American Legal Clinic, Inc., 176 B.R. 616 (M.B. Fla 1994) (violation of a consumer protection statute is a per se violation of the FDUTPA).

Florida Home Improvement Sales and Finance Act

This Chapter provides very specific protections to consumers, contains a number of disclosure requirements, provides a three-day right of rescission, and provides finance charge limitations. Unfortunately, this section does not provide a private right of action, but can be used to claim a violation of the FDUTPA.

§§520.60, et seq., Fla. Stat.
Liable Parties - Home Improvement Contract Seller - any person other than an employee of the owner who directly or indirectly enters into two or more home improvement contracts for more than $500.00 in one year. §520.61(13), Fla. Stat., See also §520.61(11), Fla. Stat. "home improvement" and §520.61(12), Fla. Stat., "home improvement contract."
Violations - Failure to maintain license, failure to give buyer a copy of the contract, failure to provide notice of the three day right of rescission, failure disclose specifically-designated materials terms of the contract and mortgage, failure to provide a completion certificate, to cancel the contract upon full payment and failure to credit owner for prepayment constitute violations.
No private right of action - Remedies provided under the FDUTPA for non-exempt entities

Sample Case Law

Gissendaner v. Rich, 365 So.2d 454 (Fla. 1st DCA 1978) (home improvement contractor could not prevail in mortgage foreclosure suit where he failed to obtain a signed completion certificate for repairs as required by FHISFA).

Florida Consumer Collection Practices Act ("FCCPA")

Similar to the Federal Fair Debt Collection Practices Act, the FCCPA is designed to address abusive collection practices, require registration of debt collectors and notice of assignment. The Florida law governs creditors and debt collectors.

§§559.55, et seq., Fla.Stat.
Liable Parties - Creditors and debt collectors
Violations - Specified abusive, deceptive, and unfair debt collection practices
Remedies - Actual damages and statutory damages up to $1,000, costs and attorney's fees
Limitations - 2 years from date on which the violation occurred

Sample Case Law

Sandlin v. Shapiro & Fishman, 919 F.Supp. 1564 (M.D. Fla. 1996) (allegations that law firm attempted to collect unauthorized pay off fee stated a cause of action)
Trent v. Mortgage Electronic Registration Systems, Inc., 618 F.Supp.2d 1356 (M.D. Fla.2007) (MERS did not violate FCCPA by referring to itself as a "creditor" in communications to borrowers prior to filing foreclosure suits, even if such references were technically not accurate)

Home Solicitation Sales Act

The Home Solicitation Sales Act requires home-improvement sellers to be licensed. It also provides a three-day right to cancel and prohibits certain illegal practices in connection with a home solicitation sale. There is no private right of action; however, a violation of the Act may be a violation of the FDUTPA. The Act exempts insurance sellers, sales made at fairs and motor vehicle "tent" sales.

§§501.021 - 501.055, Fla. Stat.

Liable Parties - "Home Solicitation Sale" - a broadly defined transaction valued at more than $25.00 when a personal solicitation takes place other than the seller's fixed-location, business establishment and the transactions is consummated away from this fixed location. §501.021(1), Fla. Stat.
Violations - Failure to be properly licensed and obtain a permit, failure to give buyer a copy of the written agreement, failure to provide notice of the three-day right of rescission and failure to rescind. Other specified practices are prohibited in connection with a home solicitation sale.
No private right of action - remedies provided under the FDUTPA for non-exempt entities, criminal penalties
Limitations - Four years for claims pursuant to the FDUTPA

Mortgage Brokers Act (MBA)

This Act requires the licensing of mortgage brokers, limits fees, prohibits specified practices, requires arbitration only if the borrower consents and requires mortgage brokers to disclose any conflicting interests. There are criminal penalties and borrowers have a private right of action for actual damages.

§§494.001, et seq. and 494.003, et seq., Fla. Stat.
Liable Parties - Brokers who offer, accept applications for, solicit, negotiate mortgage loans for another in anticipation of compensation. §494.001(3), Fla. Stat. Banks, FNMA, FHLMC and attorneys are exempt. §494.003, Fla. Stat.
Violations - Failure to become licensed and maintain records or to give proper disclosures, making "false promises" or misrepresentations and other specified prohibited, charging excessive fees
No private right of action - Remedies provided under the FDUTPA for non-exempt entities, criminal penalties (Four year statute of limitations)

Sample Case Law
Truitt v. Metropolitan Mortg. Co., 609 So.2d 142 (Fla. 4th DCA 1992) (statute of limitations did not bar mortgagor's action for violation of mortgagee's alleged fiduciary duty to disclose information adverse to mortgagor's interests where, if proved, allegations would amount to fraudulent concealment which would toll statute of limitations).

Mortgage Lenders Act (MLA)

This Act requires the licensing of mortgage lenders, addresses fees, requires certain actions when providing lock-ins and commitments, and requires audits by the Department of Financial Services. There are criminal penalties and borrowers have a private right of action for actual damages.

§§494.001, et seq. and 494.006 - 494.0077, Fla. Stat.
Liable Parties - Providers or servicers of mortgage loans for others for compensation. §494.001(4), (15), (25), (26), Fla. Stat. Banks, FNMA, FHLMC, VA, GNMA, purchase money lenders, and licensees under Chapter 516, Fla. Stat. are exempt. §494.006, Fla. Stat.
Violations - Failure to become licensed and maintain records, failure to give proper disclosures before accepting fees, failure to follow prescribed "lock in" policies, charging excessive fees
Remedies - Actual Damages (provides a "good faith" exception), criminal penalties
Limitations - None specified, probably four years

OTHER CLAIMS AND DEFENSES TO CONSIDER

Fair Housing Act, 42 U.S.C. §3601, et seq. This is often a reverse redlining claim. The homeowner must be:
1. A member of a protected class.
2. They must have attempted to engage in a real estate related transaction and qualified to do so.
3. And the lender must have refused to transact with them on fair terms.
4. And the lender must have continued to make loans to others with similar qualifications as the homeowner. However, if the lender initiates contact with the homeowner, the final requirement might not be necessary.

- Instruments Deemed Mortgages and the Nature of a Mortgage, § 697.12, Fla. Stat.
- Interest and Usury; Lending Practices, §687.12 Fla. Stat.
- Negligent/intentional misrepresentation
- Breach of Implied Warranty of Merchantability for Goods (in home improvement sale)
- Breach of Fiduciary Duty
- Fraud
- Unconscionability
- Unjust Enrichment
- Waiver
- Fraud in the Inducement

Non-GSE HAMP

Supplemental Directories 09-01 through 10-02,

Current through April 9, 2010

Making Home Affordable Program; aka; HAMP

Purpose:

The stated goal of HAMP is to stabilize the residential property market by minimizing foreclosures.

Method:

HAMP provides financial incentives to borrowers; servicers and investors to reduce monthly payment to 31% of borrower's total gross income, thereby reducing the likelihood of default by increasing the likelihood the borrower will be able to make each and every payment, as agreed, on time. Incentives of up to $5,000 for borrower, $4,500 for the servicer, and investor incentives largely dependants on the reduction in monthly mortgage payment ratio are available if the required conditions are met. Programs are available to both GSE (Government Sponsored Enterprise) and non-GSE loans. Though similar to the GSE modification process, the processes detailed here are applicable to non-GSE mortgages only.

For the various government-serviced or owned loans the following websites provide the applicable HAMP processes:

For the VA: www.homeloans.va.gov/valeri.htm.
For Fannie Mae: https://www.efanniemae.com/sf/guides/ssg/2009annlenltr.jsp?referrer=frpromo.
For Freddie Mac: http://www.freddiemac.com/singlefamily/makinghomeaffordable.html.
For FHA: http://www.hud.gov/offices/adm/hudclips/letters/mortgagee/2009ml.cfm.
For Rural development: http://www.rurdev.usda.gov/regs/an_list.html.

Within the umbrella of the program commonly called HAMP, there are several components:

- The basic HAMP, which is a modification of the first mortgage within specific parameters;
- 2MP, which is for the modification or extinguishment of second liens, and;
- HAFA which provides for a short sale or Deed in Lieu process for those borrowers ineligible for the modification of HAMP due to financial ineligibility.

With all of these programs, the program documents provide for instructions regarding the effect on and preparation of the IRS form 1099 and the borrower's credit report.

HAMP process:

1. Download and submit the Request for Modification and Affidavit (RMA) and Request for individual tax return transcript (4506-EZ). Available at: http://makinghomeaffordable.gov/requestmod.shtml.
2. Eligibility: mortgage payment, including; principal, interest, taxes, insurance and HOA fees, but not mortgage insurance, must be more than 31% of borrower's income pre-modification. Information and calculator tool available at: http://makinghomeaffordable.gov/payment_reduction_estimator.html.
3. Goal of modification: reduce monthly mortgage payment to no more than 31% of borrower income. Non-taxed income, including social security income, must be multiplied by 1.25 to estimate the monthly gross income. Supp Dir 09-07, page 3.
4. HAMP CPP funds are available to compensate the servicer for the portion of the rate reduction that results in a monthly payment reduction from 38% to 31%. The servicer/lender is NOT compensated for the reduction down to 38% or below 31%. HAMP Supplemental Directive 09-01, Introduction of the Home Affordable Modification Program (hereinafter referred to as Supp Dir 09-01) page 24, available at: https://www.hmpadmin.com/portal/programs/hamp/servicer.html. (Fannie Mae issues updates to the process and numbers those documents using the convention two digit year-sequential for year, so that 09-01 is the first in 2009, 09-10 the last, 10-01 the first in 2010, etc. This document references these supplements using the convention Supp Dir YY-## throughout. All can be accessed at the same website, https://www.hmpadmin.com/portal/programs/hamp/servicer.html.)

Other eligibility considerations:

1. Loan originated on or before January 1, 2009. Supp Dir 09-01, page 2.
2. No previous HAMP modification. Supp Dir 09-01, page 2.
3. Account is delinquent or default is reasonably foreseeable. Supp Dir 09-01, page 2.
4. Bankruptcy, and foreclosure filed allowed. Supp Dir 09-01, page 2.
5. Loan is for the borrower's principle residence, a one to four unit property. Supp Dir 09-01, page 2. Current principle balance must not exceed; 1 unit, $729,750; 2 units, $934,200; 3 units, $1,129,250; 4 units, $1,403,400. Supp Dir 09-01, page 3.
6. Before the final modification, the servicer must verify income and expenses. The servicer should use the borrower's tax return, credit report, pay stub, bank statements, and similar documents to verify. Supp Dir 09-01, page 5-8; Supp Dir 09-07, pages 4-5. Non-wage income of up to 20% may be declared and used for the modification calculation if it is less than 20% of the total income. Supp Dir 09-07, page 5. Effective June 1, 2010 income, occupancy and tax returns and/or IRS form 4506 must be submitted prior to consideration for a trial period plan. Supp Dir 10-01, page 1.
7. The borrower's credit bureau file must be updated by the servicer in compliance with HAMP requirements in Supplemental Directory 09-01, page 22 and all updates.

Steps servicer must take, in order:

1. Receive RMA, with hardship affidavit and 4506-EZ from borrower. Supp Dir 09-01, page 3. RMA documents income, all debt and hardship. Income is verified with recent tax documents, pay stubs with year to date information, other reliable third-party documentation. Supp Dir 09-01, page 5. The forms and processes were modified and standardized from multiple documents into fewer documents with Supp Dir 09-07. Borrower response times are also standardized with Supp Dir 09-07.
2. Verify monthly expenses. Obtain credit report for borrower or joint report for married co-borrowers. Supp Dir 09-01, page 10.
a. Monthly gross expenses equals the sum of: mortgage payment, taxes, property insurance, HOA fees, property assessments, mortgage insurance premium, subordinate mortgages, installment debts with more than 10 months payments remaining, student loans, any open end account, HELOC payment, alimony and child support, if more than 10 months remaining, car lease payment, negative rental property income, mortgage payment for second home. Supp Dir 09-01, page 11.
b. If the total monthly expenses (back-end ratio) is more than 55%, the servicer is required to send the Home Affordable Modification Program Counseling Letter. The letter notifies the borrower that they are required to work with a HUD-approved housing counselor to reduce total indebtedness to below 55%, and directs the borrower to HUD's website for additional information. Supp Dir 09-01, page 11.
3. All loans that meet the eligibility requirements and are in default or imminent default ***must*** be evaluated using a standardized NPV (Net Present Value) test that compares the cost to the lender if no modification is done, to the cost if a modification is done. The formula includes the potential amount of interest to be earned and the likelihood the property will be foreclosed, pre and post modification. Fannie Mae has a software application for servicers to use. Supp Dir 09-01, page 4.
Simplified, the formula compares the amount of money the bank could earn if the borrower paid off the current loan to the amount the bank could earn if the borrower pays the loan under HAMP modification terms and provides for a statistical discount for the likelihood the borrower will go into default.
4. If the NPV test indicates that the test is "positive", meaning the lender will make more money if the modification is done, after the reduced likelihood of foreclosure is factored in, the lender MUST offer a modification to the borrower. Supp Dir 09-01, page 4.
5. If the NPV test is "negative", meaning the lender will make more money if the modification is NOT done, even after the reduced likelihood of foreclosure is factored in, the lender may, but need not, offer the lender a modification. Supp Dir 09-01, page 4.
6. If the loan is adjustable, the monthly payment used for the NPV calculation is the current payment if the loan will not reset for at least 120 days. If the loan is scheduled to reset within 120 days, the higher amount of either the current rate or the fully amortizing monthly mortgage payment based on the note reset rate using the index value as of the date of evaluation. Supp Dir 09-01, page 6; Supp Dir 09-07, page 3. .

7. The servicer must maintain the NPV test documentation whether or not a modification is pursued. Supp Dir 09-01, pages 4, 13-4; Supp Dir 09-06, page 2.

8. Servicer must verify income and that borrower is the occupant of the subject residence. Supp Dir 09-01, page 8. The credit report is sufficient to verify that the property is the borrower's principal residence, unless it reveals inconsistencies. Supp Dir 09-07, page 4.

9. Servicer may NOT require an up front cash contribution other than the trial period payment to be considered for HAMP. Supp Dir 09-01, page 6; Supp dir 09-07, page 3.

10. All loans will have a fixed interest rate, fully amortizing loan. (no balloon payment, with an exception, noted below) Supp Dir 09-01, page 9.

11. The servicer should request Government Monitoring Data, information on race, ethnicity and sex, from all borrowers participating in HAMP. The information is so that HUD may track modifications and monitor compliance with Federal laws prohibiting discrimination and also consumer protection laws. The borrower may opt out. Supp Dir 09-02, page 1.

12. In order to facilitate compliance with the Fannie Mae requirement that all loans participating in a Trial Period Plan are setup within its system no later than the fourth of the month in which the plan is to take effect, effective dates for Trial Period Plans sent after the 15th of the month will have an effective date of the 1st of the month after next. So that modifications sent on June 10 will have an effective date of July 1, but modifications sent on June 16 will have an effective date of August 1. Supp Dir 09-03, page 1.

To Modify, in order, AKA "The waterfall":

1. Capitalize accrued interest and required escrow advances and payments made to third parties if allowed by law and not retained by the servicer. Supp Dir 09-01, page 9. (This makes it part of the new principle balance. Attorney fee, and/or foreclosure filing fee would be third party fees)
2. Late fees may NOT be capitalized and MUST be waived if the borrower satisfies the conditions of the trial period plan. Supp Dir 09-01, pages 9, 22.
3. Interest rate should be lowered in increments of .125 until the monthly payment is as close as possible, without going under 31%. The interest rate floor is 2%. Supp Dir 09-01, page 9.
4. Extend the term of the loan up to 480 months from the modification date. If the PSA (Pooling and Servicing Agreement) does not allow for terms of 480 months, calculate the payment using an amortization schedule of up to 480 months with a balloon payment due at maturity. Supp Dir 09-01, page 9.
5. If the payment is still above 31%, the servicer must provide principal forbearance. The principal forbearance amount is non-interest bearing and non-amortizing. It will be due at the earlier of: borrower transfers the property, interest bearing principle is paid off, loan matures. Supp Dir 09-01, pages 9-10.
6. There is NO requirement to *forgive* principle under HAMP. Servicers may elect to forgive principal. Principal forgiveness does not alter the steps in the waterfall procedure. Supp Dir 09-01, page 10.
7. If the mortgage was assumable, the borrower agrees the HAMP modification cancels the assumability feature.
8. All HAMP modified mortgages must include an escrow account unless prohibited by state law. The servicer is responsible for managing the escrow account for payment of property insurance, taxes, HOA fess, etc., as applicable. Supp Dir 09-01, pages 2, 11.

Compliance requirements

1. Servicer must comply with local, state and federal laws and case law. Supp Dir 09-01, page 12. Including;
    a. Prohibition against unfair or deceptive trade practices, section 5 Federal Trade Commission Act.
    b. Compliance with Equal Credit Opportunity Act, and Fair Housing Acts. Prohibit discrimination based on race, gender, religion, marital status, handicap, or receipt of public assistance. Also prohibit redlining.
    c. Compliance with RESPA and FDCPA.

Other relevant information

1. Servicer should follow existing modification process, *unless borrower specifically asks* about a HAMP modification. Supp Dir 09-01, page 13.
2. If the borrower specifically requests HAMP modification, the servicer must apply the NPV test. Supp Dir 09-06 page 1.
3. Servicer should provide clear, written explanation of proposed changes, including notification that HAMP modification will cancel any assumption feature or variable or step-rate interest features. Supp Dir 09-01, page 13.
4. Servicer is required to retain all documentation received and the internally generated information about the HAMP modification for seven years. This includes information and documents concerning eligibility via "the waterfall", any trial period or other payments and calculations of potential incentives, whether a final HAMP modification is approved or denied. Supp Dir 09-01, pages 13-4.
5. Servicers should NOT proceed with a foreclosure sale during the HAMP application and eligibility process, or during the Trial Period Plan. Foreclosure sales are suspended during the Trial Period Plan, unless specific criteria are met- Trial Period Plan payments not made. Supp Dir 09-01, Page 14.
6. A servicer should not offer a HAMP modification if there is reasonable evidence the borrower submitted false information or otherwise engaged in fraud related to the modification. Supp Dir 09-01, page 8; Supp Dir 09-07, page 6.
7. Fannie Mae will establish a fraud detection procedure using reported trial period data. If potential misrepresentations or discrepancies are found, the servicer will be notified and required to resolve the discrepancy before the final modification is executed. Supp Dir 09-07, page 6,
8. Unless the parties are divorced, or deceased, all parties who signed the original loan documents must execute the HAMP documents. A new co-borrower may be added. Supp Dir 09-01, page 16.
9. Servicers may use verbal information to prepare the Trial Period Plan offer until May 31, 2009. Supp Dir 09-01, pages 5, 17; Supp Dir 09-07, page 2, Supp Dir 10-01, page 1. Effective June 1, 2010 servicers must receive the "Initial Package" of RMA, IRS 4506 and income verification prior to offering a trial period plan. Supp Dir 10-01, page 1.
10. Servicers may require documentation to verify income prior to extending a HAMP modification offer, and will be required to do so after June 1, 2010. Supp Dir 10-01, page 1. In all cases, income documentation must not be more that 90 days old when the offer is evaluated. Supp Dir 09-07 page 2.
11. **Effective JUNE 1, 2010** servicers may only offer a trial period plan after the receipt of the "Initial Package", which includes the hardship affidavit, IRS 4506-T, or 4506T-EZ tax release and other documents to verify the borrower's income, occupancy and debt. The verbal process is ending May 31, 2010. Supp Dir 10-01, page 1.
12. Within 10 days of the receipt of borrower financial information the servicer must either; offer a Trial Period Plan using the stated income, provide the forms for written documentation if the servicer is using verified income only, or provide documentation explaining why the borrower is not eligible for HAMP and providing information on other foreclosure prevention options. Supp Dir 09-07 page 7.
13. Within 10 days of receiving the initial package from the borrower, the servicer must acknowledge receipt of the package in writing. If the package was submitted via email, acknowledgement may also be via email. Supp Dir 10-01, page 2.
14. Within 30 days of the receipt of receiving the RMA and all supporting documents to verify income, debt and occupancy status, (the Initial Package") servicer must send either a verified Trial Period Plan, or provide notification that the HAMP modification has been approved pending receipt of all TPP payments, or provide notification that a HAMP modification is not available and offer other available foreclosure prevention alternatives. Supp Dir 09-07, page 7, Supp Dir 10-01, pages 2-3.
15. Within 30 days of the receipt of the initial package the servicer must review for completeness. If the package is incomplete a specific "Incomplete information notice" must be sent. The notice must include a list of required but missing documents, and a date by which the information must be received, which must allow at least 30 days for response. If the information is not received by

the date specified, the servicer must send a follow up notice allowing at least 15 days additional time to provide the documentation. If the borrower still fails to comply, the servicer may declare the loan ineligible for HAMP. The determination that the loan is ineligible must also be communicated to the borrower. Supp Dir 10-01, page 2.

16. To qualify for a final modification, the borrower must have made all Trial Period Plan payments within 30 days of the final due date. The Trial Period Plan is to be 3 months, unless the existing mortgage or servicer contract requires a longer trial. Supp Dir 09-01, page 17.
17. Servicers are encouraged to require automated payments of Trial Period Plan payments. If the servicer requires automated payments, it must be used by all HAMP borrowers. The borrower may opt out. Supp Dir 09-01, page 17.
18. If the borrower reported income is more than 25% lower than the actual verified income, the servicer must recalculate HAMP eligibility but need NOT restart the trial period. Supp Dir 09-01, pages 17-8.
19. If the borrower reported income is 25% more than the actual verified income, the servicer must recalculate HAMP eligibility and must restart the trial period. Supp Dir 09-01, pages 17-18.
20. If the borrower is no longer HAMP modification eligible as a result of the above recalculations, the servicer should consider eligibility for other foreclosure prevention alternatives. Supp Dir 09-01, page 18.
21. If the servicer finds reasonable evidence that the income information was false or fraudulently provided, it should not offer a HAMP modification. Supp Dir 09-07, Page 6.
22. The servicer should follow investor guidelines to ensure the modified mortgage retains its first lien status. Supp Dir 09-01, page 19.
23. If the loan modification includes a principal forbearance, the servicer is encouraged, but not required to include that amount on the borrower's statement. Supp Dir 09-01, page 19.
24. The servicer should also provide monthly updates regarding the accrual of principal balance reduction payments earned as a result of timely payments in compliance with HAMP guidelines. Supp Dir 09-01, page 19. This is money from TARP funds that reduces the borrower's principal balance up to $1000 per year for five years ($5,000 max) as a reward for making all payments on time. Supp Dir 09-01, page 24.
25. If a borrower misses three payments, (three payments are due and unpaid on the last day of the third month) the loan is no longer in "good standing". Good standing cannot be restored, even if the default is cured and payments are made. If good standing is lost, the loan is no longer eligible for borrower, servicer or investor incentives. The mortgage is NOT eligible for another HAMP modification. Supp Dir 09-01, page 19.
26. Servicers must have registered with Fannie Mae on or before December 31, 2009 to participate in HAMP. Supp Dir 09-02 page 1. Fannie Mae requires the servicer provide accurate loan data periodically. Data is to be reported to Fannie Mae at the beginning of the modification period, during the trial period, when the final modification is approved and each month ongoing. Supp Dir 09-01, pages 19-20.
27. The servicer should begin the Trial Period and begin reporting to Fannie Mae once the first trial period payment is received, even if the Trial Period Plan has not been executed and the borrower as not yet submitted income verification. Supp Dir 09-03, page 2. **This provision will be modified beginning in June 2010. Additional details forthcoming from Supp Dir 10-01.
28. If the loan is not eligible for HAMP modification solely because of a negative NPV, inadequate income or other financial reason, the loan may be reconsidered for HAMP modification if the borrower's circumstances change. Supp Dir 10-01, page 4.

ADDITIONAL RESPONSE AND VERIFICATION PROCEDURES

1. Additional data collection and reporting requirements will become effective for loans evaluated, modified or declared ineligible after December 1, 2009. The Supplement includes clarification and examples of data required to be collected and how to report it to Fannie Mae, via Schedule IV. Supp Dir 09-06, pages 1-3.
2. **A HAMP modification evaluation must be performed if**; a borrower submits a written request for consideration of a HAMP modification, or, the borrower submits sufficient financial information for the servicer to complete the NPV analysis, or, the borrower is offered a Trial Period Plan.

Supp Dir 09-08, page 2. The verbal option will end in June 2010, and all TPP's will be based on verified income. Supp Dir 10-01.

3. **If a borrower is evaluated for HAMP but not offered a TPP or official modification**, the servicer must comply with Supp Dir 09-06 and submit documentation to the new schedule IV within the Fannie Mae program and send an appropriate notice to the borrower. Supp Dir 09-08, page 2.
4. If a borrower evaluated for HAMP is not offered a TPP, not offered an official HAMP modification, (after or during the TPP), or is at risk of losing eligibility for HAMP for having failed to provide the necessary documentation, the servicer MUST SEND a notice to the borrower. Supp Dir 09-08, page 1.
5. **Borrower notices must be mailed with 10 days** of the servicer determination that a TPP or official modification will not be offered. Notices must be clear and non-technical with any acronyms or industry terms fully explained. The notice should relate to the reason code from the schedule IV. The Supp Dir offers optional model phrases. The notice must provide the reason or reasons the TPP or official HAMP modification was not offered. If the offer is not made because the loan is NPV test negative, the notice must explain NPV and identify the fields that were determinative. The notice must state that the borrower, or authorized representative, has 30 days to request the specific data input for those fields. The servicer then has 10 days to provide the information. Supp Dir 09-08 pages 2-3.
6. If a foreclosure sale is scheduled, it may not proceed until 30 days after the data is delivered to the borrower. This provides time for the borrower to dispute any errors. If the borrower provides written evidence that one or more fields of NPV data were incorrect, the servicer must verify, and if true, re-run the NPV calculation if it could change the NPV outcome. If the borrower demonstrates inaccuracies in the NPV data, any foreclosure sale must be suspended pending reconciliation. Supp Dir 09-08, page 3.
7. Beginning December 23, 2009 servicers were to review all accounts currently in modification and by January 31, 2010 confirm the status as current or not current. Servicers were to obtain any missing documentation and transition all current participants who were otherwise qualified to permanent modifications by January 31 or within 30 days, whichever was later. Supp Dir 09-10.

HAMP Incentives available

1. Incentives exist for borrower, servicer and investor to modify the mortgage to an affordable level, and keep the modified payments current. Supp Dir 09-01, page 22.
2. For any party to qualify for incentive payments, pre-modification monthly mortgage payment must have exceeded 31% ***and*** post-modification monthly mortgage payments must be at least 6% lower than pre-modification. Supp Dir 09-01, pages 22-3.
3. Total funds available are subject to a cap pursuant to the servicer's agreement with Treasury under the Servicer Participation Agreement. Supp Dir 09-01, page 23.
4. If the borrower's loan ceases to be in "good standing" (three monthly payments are due and unpaid on the last day of the third month) the servicer, borrower and investor are **no longer eligible for incentive payments**. Supp Dir 09-01, pages 19, 22.
5. **Borrower's incentive:** if the monthly mortgage payment is reduced by at least 6%, and the borrower makes all monthly payments on time, the borrower will earn a reduction in the unpaid principal balance. The reduction amount is the lesser of $1,000 or half the reduction in monthly payment, annualized. The reduction can be earned for up to five years, for a total maximum unpaid principal balance reduction of $5,000 over 5 years. Supp Dir 09-01, page 24.
6. **Servicer's incentive:** the servicer will receive $1,000 compensation for each completed HAMP modification. If the borrower was current on the pre-modification loan, the servicer will receive an additional $500. This incentive is payable when the trial period is complete and a final modification is entered and the servicer has completed the Fannie Mae Servicer Participation Agreement. Supp Dir 09-01, page 23.
7. In addition to the one-time payments available, there are "pay for success" payments available to servicers. If the monthly mortgage payment is reduced by 6% or more, the servicer will receive the lesser of $1,000 or half the reduction in monthly payment annualized. The fee is payable annually for three years after the anniversary of the Trial Period Plan execution. Supp Dir 09-01, page 23.

8. **Investor's incentive:** if the target monthly payment ration is achieved (31% of monthly gross income), investors in non-GSE mortgages are entitled to compensation. The amount of compensation is one-half the difference between the monthly payment post-modification and the lesser of either the pre-modification mortgage payment or the what the payment would be at a 38 % monthly payment ratio. The compensation shall accrue monthly for the earlier of; five years, or until the loan is paid off. Supp Dir 09-01, page 24.
9. In addition to accrued compensation payments, the investor will receive a one-time incentive of $1,500 for each modification executed with a borrower who was current prior to the start of the Trial Period Plan, if the reduction is equal to at least 6% of the borrower's monthly mortgage payment ratio, if the Trial Period Plan is successfully completed. Supp Dir 09-01, page 24.
10. An additional program to provide incentives to **investors** to reduce monthly payments to affordable levels was introduced in September of 2009. Called the ***Home Price Decline Protection*** (HPDP), incentive, it is particularly targeted at those homes in areas where property values have fallen and are expected to continue to fall. This program, like the original HAMP, requires that the servicer have executed a servicer participation agreement and that the borrower have successfully completed the trial period, and be in good standing. To be eligible, the loan payments must have been reduced by at least 6% through a HAMP modification. Supp Dir 09-04, page 1-2.
11. Calculation for the amount of eligible incentive through HPDP is automatic and is a part of the NPV, net present value test, which is required at the beginning of the modification process. Three factors are used: 1. the estimated loss in value over the next year, based on value changes in the last two quarters, 2. the unpaid principal balance when the modification occurred, and 3. the MTM-LTV ratio of the loan. This is a measure of what percentage of the current market value is owed, and may reveal that a homeowner is "underwater' and owes more in principal than the home is currently worth on the open market. Whether and how much home prices have declined is determined by the Federal Housing Finance Agency using regional data. Supp Dir 09-04, pages 2-3. The Federal Housing Finance Agency at: http://www.fhfa.gov/Default.aspx?Page=14 has a house price decline calculator available that calculates current value based on price paid, date purchased and purchase amount.
12. The amount of HPDP incentive available is paid annually, over two years, if the mortgage continues to be eligible. Each month earns $1/24^{th}$ of the total available. As with most other incentives, if the loan is paid off or the borrower falls behind and is no longer in good standing, as Fannie Mae defines it, the incentives will stop. Supp Dir 09-04, page 3. The amount of incentive, if any, will vary depending on how much principal is owed, whether and how much home prices have declined in the MSA (Metropolitan Service Area), and the percentage of value to unpaid principal. Amounts will range from zero to several thousand dollars. The specific calculation will be performed by Fannie Mae's NPV application that should have been used at the outset of the HAMP modification process.

Second Lien Modification Program, (2MP)

1. As a supplement to HAMP, the Treasury announced the 2MP in August of 2009. Under this program, borrowers who have a second lien on the primary residence may be eligible for relief of those payments if the first lien has been modified under HAMP. Supp Dir 09-05, page 1.
2. Treasury is establishing a database, called Lender Processing Services (LPS) designed to connect the servicers of HAMP modified first mortgages with the participating servicers of eligible second liens. If both liens are serviced by the same servicer, the servicer should not wait for notification from LPS, but immediately put the 2MP process into place for the second lien. Supp Dir 09-05, pages 3, 8.
3. The borrower will have to consent to the servicer of the first mortgage sharing financial and mortgage data from the HAMP for the servicer of the second lien to apply the 2MP process. The RMA is being modified so that separate consent will not be necessary. Supp Dir 09-05, page 4.
4. The modification process of the second lien is similar to that used in the HAMP. First, the principal, unpaid interest and third party fees are capitalized. Any late fees and penalties must be waived. Then the interest rate is lowered to 1% if the principal is fully amortized or 2% if 50% or

more of the principal balance is interest only. After 5 years, the interest rate will adjust up to the level of the first lien under HAMP. Principal forbearance should be at the same ratio as occurred on the first lien. Principal forgiveness is allowed, but not required. All loans will become closed end. All open lines of credit, such as HELOC will be closed. If the pooling and servicing agreement prohibits modification, the investor must seek approval for an exception and if state law allows, may modify without investor approval. Supp Dir 09-05, pages 4-7.

5. The 2MP is based on the HAMP figures and so cannot begin until after the HAMP Trial Period modification has begun. The 90 day trial period for 2MP can be waived if the payments are current at the time the 2MP modification begins and the new monthly payment is the same as or less than the old contractual payment before 2MP. The 2MP modification can not be effective until after the Trial Period Plan for the HAMP is completed in good standing. Supp Dir 09-05, pages 7-8.
6. If the borrower does not execute and return the 2MP trial period plan with 30 days the servicer may retract the offer and is not required to offer another modification. Supp Dir 09-05, page 9.
7. Like HAMP, servicers are required to be registered with Fannie Mae and report account information monthly after the end of the trial period. Servicers are also required to retain all documentation in support of either extending, or declining to extend a 2MP offer to all serviced borrowers. Compliance and review is administered by Fannie Mae using the same requirements and methods as the HAMP. Supp Dir 09-05, pages 12, 14.

The borrower's credit bureau file must be updated by the servicer in compliance with HAMP requirements

8. The borrower's credit bureau file must be updated by the servicer in compliance with the 2MP requirements as detailed in Supplemental Directory 09-05, pages 13-4.

Incentives Available Under 2MP

1. Incentives are available for borrower, servicer and the investor/lender. Accrual for incentives will begin after the end of any trial period, when the modification is in place. Supp Dir 09-05, pages 12-3.
2. Incentives will no longer accrue if either the 1st HAMP lien, or the 2nd 2MP lien ceases to be in good standing or the loan is paid in full. Like HAMP, good standing is lost if three consecutive payments are missed. If the borrower loses good standing, the eligibility for incentive payments is lost, cannot be regained, and the loan is not eligible for another 2MP modification. Supp Dir 09-05, pages 14-5.
3. **Servicer incentives:** The servicer will receive $500 for each modification under 2MP. The servicer may also receive "pay for success" payments of $250 per year for three years if the borrower remains in good standing and the loan has not been paid in full. Supp Dir 09-05, page 15.
4. **Borrower incentives:** The borrower will receive "pay for performance" reductions to the unpaid principal balance of the first mortgage loan (not the 2nd mortgage loan) in the amount of $250 per year for 5 years after the modification effective date so long as the HAMP *and* the 2MP loans remain in good standing and are not paid in full. This is in addition to the "pay for performance" payments that may be available for the original HAMP loan. Supp Dir 09-05, page 15.
5. **Investor incentives:** The investor will receive compensation according to a formula with 2 options. The payments will accrue beginning the effective date of the 2MP, and will be paid monthly for five years so long as the HAMP and 2MP modified payment accounts remain in good standing and has not been paid in full. Supp Dir 09-05, pages 15-6.

Extinguishment option

1. Extinguishment is an alternative to modification of the second lien. It allows the unpaid principal of the second lien to be sold to the Fannie Mae HAMP program at a significant discount. Once the loan is extinguished, the servicer and lender must cease any an all collection actions, notify the borrower the loan is charged off and update the borrower's credit report[s] with the notation "Cancelled; account charged off". To qualify, the first line must have undergone HAMP modification, and the servicer must participate in the 2MP program. All figures use the values and calculations of the original HAMP modification.

2. In recognition of the statistical likelihood that the second lien on a house that has declined in value and has undergone first lien modification may never be paid, and that the likelihood of traditional payoff method declines with both higher loan to value ratios, higher back-end ratios (total indebtedness) and with every missed monthly payment, the available payoff is calculated on a sliding scale. The payoff ranges from $.03 on the dollar for those accounts more than 6 months in arrears, to a maximum of $.12 on the dollar for those loans deemed to be less risky by virtue of lower debt ratios, fewer missed payments and lower loan to value ratios.
3. If mortgage insurance exists, the insurer must give approval for extinguishment. Compliance and documentation requirements are essentially the same as those under HAMP. Supp Dir 09-05, pages 17-20.

HOME AFFORDABLE FORECLOSURE ALTERNATIVES, HAFA

Supplemental Directive 09-09, effective 04-05-2010

1. Both suggested and required forms for this program are attached to the directive as exhibits and attachments, after the primary document, beginning after page 15.
2. HAFA is part of HAMP and provides incentives for servicers and borrowers to pursue a short sale or Deed-in-Lieu (DIL) instead of a foreclosure judgment. Page 1.
3. As with all of the HAMP programs, non-GSE servicers must have chosen to participate in HAMP and have executed the servicer participation agreement to qualify for the financial incentive payments. Pages 1-2.
4. Borrower must be evaluated for HAMP before being considered for Short Sale, DIL, etc. Page 3.
5. The financial evaluation for HAMP is sufficient for the HAFA evaluation. Page 3.
6. HAFA is designed to create alternatives for borrowers who are HAMP eligible. The basic eligibility for HAFA is the same as that for HAMP; primary residence, first lien, delinquency provisions, income to monthly mortgage ratio and monetary amounts for the lien are all the same. Page 3.
7. If a servicer is participating in HAFA the servicer MUST: (Page 3)
    a. Release the borrower from any future liability for the debt secured by the mortgage.
    b. NOT require a reduction in the estate commission agreed upon at listing.
    c. Create a written policy describing the conditions under which borrowers will be considered for HAFA.
        i. These guidelines, the policy and formula to be applied, including the minimum net proceeds the lender will accept, must be uniform for all loans the servicer services. Page 5.
    d. Evaluate for HAMP before giving the borrower HAFA options.
    e. Offer HAFA within 30 days of: (Page 4)
        i. Determining that the borrower does not qualify for the HAMP modification.
        ii. Borrower fails to complete a Trial Period Plan.
        iii. Borrower becomes 60 days delinquent on a Trial Period Plan
        iv. Borrower requests information on DIL or short sale.
8. The servicer should obtain an appraisal and review title to confirm the borrower will be able to convey clear marketable title. Fees for these services may not be collected in advance but may be added to the outstanding debt of the borrower. Page 5.
9. If the servicer determines that short sale or DIL is not available, that information must be communicated to the borrower in writing with an explanation of why DIL or short sale can not be offered and a toll free number for the borrower to call to discuss the decision. Page 5. These notices must comply with supplemental directive 09-08 that requires, among other things, that notices provide clear, non-technical reasons for decisions. Page 5.
10. The borrower's credit bureau file must be updated as stipulated on pages 13-4 of Supplemental Directory 09-09.

The process for Short Sale Agreement (SSA)

1. The servicer must send the borrower the SSA which lays out the rules and processes, and describes the information the servicer will need to consider the short sale. The SSA will include a

blank copy of the Request for Approval for Short Sale (RASS). When the borrower has an offer on the house, they or the real estate agent will complete the RASS and send it, with a copy of the sales contract to the servicer for approval. Page 6.

2. The SSA is essentially a contract that describes the terms and conditions under which the servicer will accept a short sale. It describes the minimum amount of proceeds the servicer will accept by itemizing the kinds and amounts of costs to be charged to the borrower, which include closing costs, balance due on subordinate liens, real estate commission, etc., that will deducted from the gross proceeds. It also includes notices about the financial, tax and credit score consequences of a short sale and must include the terms under which the offer can be terminated by the servicer. Page 6-7.
3. The SSA must be effective for at least 120 days and may be extended by the servicer for up to 12 months. Page 6.
4. The property must be listed with a local real estate agent who must include in the listing and sales agreements a clause notifying the prospective purchaser that the sale is contingent on approval by the servicer. Page 6.
5. Acceptance of a short by the servicer will release the borrower from any unpaid liability related to the mortgage at closing. Page 6.
6. During the listing period the monthly mortgage payment must be no more than 31% of the borrower's gross monthly income and the servicer must not complete a foreclosure sale if the borrower is complying with the terms of the SSA. Pages 6-7.
7. **The servicer may terminate the SSA if**; the borrower or the listing agent fails to act in good faith in listing, marketing or closing the sale, the borrower's finances improve so that they qualify for a HAMP modification or bring the account current, the borrower files for bankruptcy and the bankruptcy court does approve the SSA, litigation occurs or is threatened that could affect the title or conveyance, or the borrower fails to make an agreed upon monthly mortgage payment, so long as the amount is not in excess of 31% of the borrowers gross monthly income. Pages 7-8, 10.
8. Within three days of an executed offer, the borrower or real estate agent must submit to the servicer the RASS with the sales contract. Page 8.
9. Within 10 days of receiving the RASS and required supporting documents the servicer must approve or disapprove of the sale, sign the RASS and mail it back to the borrower. Page 8.
10. If the terms of the sales contract meets the servicers terms in the SSA, the servicer MUST APPROVE the RASS. Page 8.
11. If a borrower requests a short sale prior to the servicer executing the SSA the borrower must use the alternative RASS. Basic HAMP eligibility requirements still apply and the borrower must be evaluated for a HAMP modification (using the same income, verification procedure, hardship affidavit, etc., as used with HAMP) if that had not been done previously. If the borrower qualifies for HAMP the servicer must notify the borrower and allow 14 days for the borrower to decide whether or not to accept a modification offer. Page 8.
12. If the borrower elects to continue with the short sale process, the servicer must apply the same written policy it developed for all short sales within HAFA to determine eligibility and approval. Page 8.
13. A borrower may NOT participate in a HAMP modification and HAFA simultaneously. Pages 8-9.
14. During the HAFA process the servicer may choose to begin the foreclosure process, but MAY NOT complete a sale; while determining eligibility, while processing a RASS, during the period of the SSA (a minimum of 120 days), during the period between sale and closing if a short sale has been negotiated and approved or pending transfer of property ownership by DIL or approved short sale. Page 10.
15. The servicer must release the lien within 10 days after receiving the proceeds of an approved short sale or the deed if a DIL. Servicer must NOT require the borrower to sign a promissory note for any deficiency. Page 10.
16. The servicer may not charge the borrower any administrative fees for participating in HAFA, though some are eligible to be added to the debt owed if a DIL or short sale is completed. Servicers may require borrowers to waive return of unused escrow and assign the property insurance. Pages 10-11.

17. Servicers must use the forms and documents provided in the supplemental directive and keep the documents and information for 7 years, in compliance with the larger HAMP program. This information must be transmitted to Fannie Mae as required and is subject to audit. Page 12.

DEED IN LIEU (DIL)

1. If the servicer chooses to accept a DIL they must agree to a full release of the debt and waive all claims against the borrower. Page 9.
2. The borrower must agree to leave on an agreed upon date, leave the house broom clean and convey clear, marketable title. Page 9.
3. Servicers may choose, but are not required, to require the borrower have made a good faith effort to sell the house, using the SSA process, before accepting a DIL. Page 9.

INCENTIVES

1. Incentives are available to the borrower and servicer, so long as there are no proceeds from the short sale. Page 11.
2. Upon successful completion of a short sale or DIL, the servicer will advance to the borrower $1,500 in relocation assistance. The payment must be made at closing if the borrower has already vacated, or within 5 days after the borrower vacates the property. The amount must appear on the HUD-1 prepared by the servicer for the borrower. Page 11.
3. The servicer will be reimbursed for the $1,500 advance. The servicer will also receive a $1,000 incentive to cover administrative costs associated with the short sale or DIL. Page 12.
4. If the investor allows the distribution of proceeds to subordinate lien holders the investor will be reimbursed at the rate of 1:3 so that a payment of $1,000 to a subordinate lien holder to secure a release would result in a reimbursement of $300 and a payment of $3,000 would result in a $1,000 reimbursement. The maximum amount of subordinate lien holder release reimbursement available is $1,000. Page 12.

New HAMP Supplemental Directive 10-02

1. Effective June 1, 2010, HAMP Supp. Dir. 10-02 addresses the problem of foreclosure referrals and proceedings continuing during HAMP review, borrower solicitation for HAMP, reasonable efforts by the servicer to contact investors and requirements of HAMP consideration for borrowers in bankruptcy.

Foreclosures

2. Servicers may not refer a loan to foreclosure until the borrower's eligibility is determined or reasonable efforts at solicitation have failed. "Reasonable efforts at solicitation" is defined as at a minimum of over 4 phone calls at different times of the day and two letters, one sent with confirmation of receipt and one sent regular mail over a 30 day period.

3. If a homeowner is turned down for a modification and is sent the mandatory "non-approval notice," there should be an additional 30 days, in most cases, after the non approval notice is sent before the loan can be sold at a foreclosure sale. The exceptions include an ineligible mortgage, borrower withdrawal or failure of the borrower to make payments under their trial or permanent HAMP modification plan.

4. Borrowers in a current trial modification plan based on verified income and the loan had already been referred to foreclosure all foreclosure activity in the case must stop. Prior to June 1, 2010, these loans could proceed to the point of foreclosure.

5. Servicers are allowed to require borrowers to provide modification documents seven business days before a scheduled foreclosure sale in order to stop the sale. Servicers can also impose special requirements (such as express mail) for requests received 30 days before a scheduled foreclosure sale.

6. The servicer must provide the Plaintiff's attorney a certification of HAMP compliance at least seven business days before the foreclosure sale.

Bankruptcy

1. Servicers are required not merely allowed "at their discretion" to consider a HAMP modification.

2. Borrowers in an active Chapter 7 or Chapter 13 bankruptcy case must be considered for HAMP if the borrower, borrower's counsel or bankruptcy trustee submits a request to the servicer.

3. Borrowers in a trial period plan who file a bankruptcy case may not be denied a permanent HAMP modification on the basis of the bankruptcy filing.

4. The servicer and its counsel must work with the borrower or borrower's counsel to obtain any court or trustee approvals of the modification as required by local court rules and procedures. If additional time is needed to obtain the necessary approvals, the servicer should extend the trial period plan for up to an additional two months (resulting in a total five-month trial period).

5. A servicer must not object to confirmation of a borrower's plan, move for automatic stay or move for dismissal of the Chapter 13 case based upon the borrower's payment of only the trial period plan payments rather than the scheduled mortgage payments.

6. Borrowers who have received a Chapter 7 discharge and did not reaffirm the mortgage debt are still eligible for HAMP. The following language must be added to the modification agreement: "I was discharged in a Chapter 7 bankruptcy proceeding subsequent to the execution of the Loan Documents. Based on this representation, Lender agrees that I will not have personal liability on the debt pursuant to this Agreement."

7. Borrowers in bankruptcy may submit copies of the bankruptcy schedules and tax returns filed in the case in lieu of the RMA and Form 4506T-EZ for determination of eligibility as long as they are not more than 90 days old.

8. HAMP eligible Chapter 13 borrowers who are eligible for HAMP may be converted to a permanent modification without completing a trial period plan if: they make all of the post-petition payments on the mortgage to be modified and at least three of those payments are equal to or greater than the proposed modified payment; the modification is approved by the bankruptcy court, if required; and the trial period plan waiver is permitted by the applicable
investor guidelines.

-- Prepared by Deanna Blair and Lynn Drysdale

Understanding the Mortgage Crisis and the Players

By Margery E. Golant, Esq.

Properly litigating a foreclosure case, whether you represent the Plaintiff or Defendant, entails understanding the underpinnings, the players and the issues. In order to properly respond, in order to propound appropriate discovery and in order to defend at trial, it is essential to be comfortable with how the mortgage industry functions. The most important, and unfortunately often the worst-understood issues, relate to the securitization process and the roles of the various participants.

WHAT IS SECURITIZATION ?

- A securitization is a pool of assets having an income flow, all of which belong to a special purpose entity created for the sole purpose of owning the assets
- Investors buy shares in the pool, which entitles them to shares owning various rights relative to the income and the loans themselves. There are usually many different configurations and risk profiles of the shares. The differing categories are called "tranches".
- Securitizations are designed to be "bankruptcy remote" from any failures or claims against the original owners of the assets or the parties having roles connected with the securitization.
- Securitizations purchase their assets from prior owners through a series of conveyances. The funding of the securitization is generally accomplished by means of the sale of securities (the differing bonds and tranches).
- Most residential mortgages are securitized, either in private securitizations or in pools created by Fannie Mae or Freddie Mac.
- Mortgage backed securitizations are normally trusts. They are established and operated via a series of contracts between the Depositor/Issuer, the Trustee, the Servicer and the investors. There are usually other parties to the contracts, including insurors, sub-servicers, and risk managers.
- In private label securitizations, the primary document is usually called a Pooling and Servicing Agreement. When the trust was created by Fannie Mae or Freddie Mac, the primary document is called a Master Trust Agreement. I have included the title page of one of these as an Exhibit to these materials
- Each such trust has a Trustee. However, the Trustee does not deal with the loans that comprise the assets of the trust – this is delegated to one or more Servicers.
- Securitizations operate as REMICS (Real Estate Mortgage Investment Conduits).
- Maintenance of REMIC status allows the securitization to avoid federal taxation – they are pass-through entities.
- Often securitizations are "wrapped" by insurance, in order to improve the credit quality of bonds. The object is for the A level bonds to have AAA ratings.
- The bonds are rated by the rating agencies (Standard & Poor's, Moody's and Fitch)

- Virtually all assets with income streams are securitized, such as auto loans, student loans, even lottery winnings.

- During this decade, virtually all residential and most commercial mortgages were securitized and elected REMIC status.

- The government-sponsored entities, Federal National Mortgage Association (FNMA) and the Federal Home Loan Mortgage Corporation (Freddie Mac) sponsored and insured many securitizations.

- Others are "private label securitizations" created and insured solely by private interests.

- It is arguable whether, in the current scenario, securitizations can legitimately claim to be holders in due course.

Examples of the roles involved in the securitization process

- **ORIGINATORS** - There were two channels of origination, wholesale and retail. Most loan origination companies had both a wholesale and retail division, originated loans themselves at retail and through mortgage brokers at wholesale, which brokers marked up and then sold to consumers. Some of the best known were Countrywide, Washington Mutual, New Century, Wachovia

- **MORTGAGE BROKERS** – Independent contractors who solicited borrowers to enter into loans, then "shopped" the loans across a selection of wholesale lenders, looking for the easiest and most profitable loan.

- **AGGREGATORS / ISSUERS** – These were often the large money-center banks and other major financial services firms such as Lehman Brothers and Morgan Stanley.

- **TRUSTEES** – In most cases, the deals engaged banks to act as trustees of the special purpose entities. Frequent players are Bank of New York, US Bank, DeutscheBank.

- **SERVICERS** – Most people think these are their mortgage companies. They are the "property managers" of the process, taking monthly payments, taking borrower calls, sending bills, checking on taxes, insurance, dunning late payers, making the referral to foreclosure, supervising the foreclosure and handling the sale of the property after foreclosure. In many cases, they are subsidiaries of the aggregators / investors. Examples are Aurora Loan Servicing (Lehman), Saxon (Morgan Stanley), Litton Loan Servicing (originally a subsidiary of Credit-Based Asset Servicing and Securitization LLC, later bought by Goldman, Sachs), Ocwen Loan Servicing (independent), GMAC, Wells Fargo, Chase, CitiMortgage. Servicers are normally compensated per month per loan and do not own any bonds or interests in the underlying mortgages.

- **INVESTORS / BONDHOLDERS** – Usually large institutional investors, such as hedge funds, insurance companies, mutual funds, pension funds, foreign governments.

- The documents by which loans are conveyed along the path from origination to securitized trust include numerous representations and warranties. Some of these relate to the parties themselves, their authority and financial soundness, some of these relate to the relationships among the parties, and some relate to the loans themselves. I have included below examples from an actual pooling and servicing agreement of loan-related representations and warranties

which are reasonably typical. If you look over the representations and warranties included here, you will quickly realize that many/most of the properties which are the subject of foreclosure are not compliant with all of them. The obvious intention was to create pools of loans which were legally sound and legally and regulatorily compliant, to which the Seller had undisputed title, on properties which had clear title, had appropriate insurance, appropriate loan to value ratios, sound mortgage underwriting and in all other ways were valid, enforceable and appropriate collateral for the mortgage debts they secured. However, for the reasons included above, there is extensive failure of these representations and warranties.

"Representations and Warranties – Mortgage Loans

- DLJMC, in its capacity as Seller, hereby makes the representations and warranties set forth in this Schedule III to the Depositor and the Trustee, as of the Closing Date, or the date specified herein, with respect to the Mortgage Loans identified on Schedule I hereto.

(i) The Seller or its affiliate is the sole owner of record and holder of the Mortgage Loan and the indebtedness evidenced by the Mortgage Note.

Immediately prior to the transfer and assignment to the Depositor on the Closing Date or the Subsequent Transfer Date, as applicable, the Mortgage Loan, including the Mortgage Note and the Mortgage, were not subject to an assignment or pledge, and the Seller had good and marketable title to and was the sole owner thereof and had full right to transfer and sell the Mortgage Loan to the Depositor free and clear of any encumbrance, equity, lien, pledge, charge, claim or security interest and has the full right and authority subject to no interest or participation of, or agreement with, any other party, to sell and assign the Mortgage Loan and following the sale of the Mortgage Loan, the Depositor will own such Mortgage Loan free and clear of any encumbrance, equity, participation interest, lien, pledge, charge, claim or security interest.

(ii) Any and all requirements of any federal, state or local law including, without limitation, usury, truth-in-lending, real estate settlement procedures, consumer credit protection, equal credit opportunity or disclosure laws applicable to the Mortgage Loan have been complied with in all material respects.

(iii) The terms of the Mortgage Note and the Mortgage have not been impaired, waived, altered or modified in any respect, except by written instruments which have been recorded to the extent any such recordation is required by law, or, necessary to protect the interest of the Depositor. No instrument of waiver, alteration or modification has been executed, and no Mortgagor has been released, in whole or in part, from the terms thereof except in connection with an assumption agreement and which assumption agreement is part of the Mortgage File and the terms of which are reflected in the Mortgage Loan Schedule; the substance of any such waiver, alteration or modification has been approved by the issuer of any related Primary Insurance Policy and title insurance policy, to the extent required by the related policies.

(iv) The Mortgage Loan complies with all the terms, conditions and requirements of the originator's underwriting standards in effect at the time of origination of such Mortgage Loan.

(v) The information set forth in the Mortgage Loan Schedule, attached to the Agreement as Schedule I, is complete, true and correct in all material respects as of the Cut-off Date.

(vi) With respect to any first lien Mortgage Loan, the related Mortgage is a valid, subsisting, enforceable and perfected first lien on the Mortgaged Property and, with respect to any second

lien Mortgage Loan, the related Mortgage is a valid, subsisting, enforceable and perfected second lien on the Mortgaged Property, and all buildings on the Mortgaged Property and all installations and mechanical, electrical, plumbing, heating and air conditioning systems affixed to such buildings, and all additions, alterations and replacements made at any time with respect to the foregoing securing the Mortgage Note's original principal balance. The Mortgage and the Mortgage Note do not contain any evidence of any security interest or other interest or right thereto. Such lien is free and clear of all adverse claims, liens and encumbrances having priority over the first or second lien, as applicable, of the Mortgage subject only to (1) with respect to any second lien Mortgage Loan, the related First Lien, (2) the lien of non-delinquent current real property taxes and assessments not yet due and payable, (3) covenants, conditions and restrictions, rights of way, easements and other matters of the public record as of the date of recording which are acceptable to mortgage lending institutions generally and either (A) which are referred to or otherwise considered in the appraisal made for the originator of the Mortgage Loan, or (B) which do not adversely affect the appraised value of the Mortgaged Property as set forth in such appraisal, and (4) other matters to which like properties are commonly subject which do not materially interfere with the benefits of the security intended to be provided by the Mortgage or the use, enjoyment, value or marketability of the related Mortgaged Property. Any security agreement, chattel mortgage or equivalent document related to and delivered in connection with the Mortgage Loan establishes and creates (1) with respect to any first lien Mortgage Loan, a valid, subsisting, enforceable and perfected first lien and first priority security interest and (2) with respect to any second lien Mortgage Loan, a valid, subsisting, enforceable and perfected second lien and second priority security interest, in each case, in an estate in fee simple in real property securing the related Mortgage Note, and the Seller has the full right to sell and assign the same to the Depositor;

(vii) There are no mechanics' or similar liens or claims which have been filed for work, labor or material (and no rights are outstanding that under law could give rise to such liens) affecting the related Mortgaged Property which are or may be liens prior to or equal to the lien of the related Mortgage.

(viii) All taxes, governmental assessments, insurance premiums, water, sewer and municipal charges, leasehold payments or ground rents which previously became due and owing have been paid, or escrow funds have been established in an amount sufficient to pay for every such escrowed item which remains unpaid and which has been assessed but is not yet due and payable.

(ix) The Mortgage Note and the Mortgage are not subject to any right of rescission, set-off, counterclaim or defense, including, without limitation, the defense of usury, nor will the operation of any of the terms of the Mortgage Note or the Mortgage, or the exercise of any right thereunder, render the Mortgage Note or Mortgage unenforceable, in whole or in part, or subject to any right of rescission, set-off, counterclaim or defense, including the defense of usury, and no such right of rescission, set-off, counterclaim or defense has been asserted with respect thereto.

(x) The Mortgaged Property is not subject to any material damage by waste, fire, earthquake, windstorm, flood or other casualty. At origination of the Mortgage Loan there was, and there currently is, no proceeding pending for the total or partial condemnation of the Mortgaged Property.

(xi) All improvements subject to the Mortgage which were considered in determining the appraised value of the Mortgaged Property lie wholly within the boundaries and building

restriction lines of the Mortgaged Property (and wholly within the project with respect to a condominium unit) and no improvements on adjoining properties encroach upon the Mortgaged Property except those which are insured against by a title insurance policy and all improvements on the property comply with all applicable zoning and subdivision laws and ordinances.

(xii) Seller has delivered or caused to be delivered to the Trustee or the Custodians on behalf of the Trustee the original Mortgage bearing evidence that such instruments have been recorded in the appropriate jurisdiction where the Mortgaged Property is located as determined by the Seller (or, in lieu of the original of the Mortgage or the assignment thereof, a duplicate or conformed copy of the Mortgage or the instrument of assignment, if any, together with a certificate of receipt from the Seller or the settlement agent who handled the closing of the Mortgage Loan, certifying that such copy or copies represent true and correct copy(ies) of the originals) and that such original(s) have been or are currently submitted to be recorded in the appropriate governmental recording office of the jurisdiction where the Mortgaged Property is located) or a certification or receipt of the recording authority evidencing the same.

(xiii) The Mortgage File contains each of the documents specified in Section 2.01(b) of the Agreement.

(xiv) As of the Closing Date, each Mortgage Loan shall be serviced in all material respects in accordance with the terms of the Agreement.

(xv) All buildings or other customarily insured improvements upon the Mortgaged Property are insured by an insurer acceptable under the FNMA Guides, against loss by fire, hazards of extended coverage and such other hazards as are provided for in the FNMA Guides or by FHLMC, as well as all additional requirements set forth in this Agreement. All such standard hazard policies are in full force and effect and on the date of origination contained a standard mortgagee clause naming the Seller and its successors in interest and assigns as loss payee and such clause is still in effect and all premiums due thereon have been paid. If at the time of origination, the Mortgage Loan was required to have flood insurance coverage in accordance with the Flood Disaster Protection Act of 1973, as amended, such Mortgage Loan is covered by a flood insurance policy meeting the requirements of the current guidelines of the Federal Insurance Administration which policy conforms to FNMA and FHLMC requirements, as well as all additional requirements set forth in this Agreement. Such policy was issued by an insurer acceptable under FNMA or FHLMC guidelines. The Mortgage obligates the Mortgagor thereunder to maintain all such insurance at the Mortgagor's cost and expense, and upon the Mortgagor's failure to do so, authorizes the holder of the Mortgage to maintain such insurance at the Mortgagor's cost and expense and to seek reimbursement therefor from the Mortgagor.

(xvi) With respect to each Mortgage Loan that has a Prepayment Premium feature, each such Prepayment Premium is enforceable and each Prepayment Premium is permitted pursuant to applicable federal, state and local law, subject to federal preemption where applicable.

(xvii) As of the Cut-off Date, approximately 1.0% of the Mortgage Loans are at least 30 days delinquent but not more than 59 days delinquent and approximately 0.2% of the Mortgage Loans are at least 60 days delinquent but not more than 89 days delinquent (based on the Aggregate Loan Balance as of November 1, 2005 and the amount deposited to the Prefunding Account on the Closing Date). None of the Mortgage Loans are greater than 89 days delinquent.

(xix) The Mortgage Note and the related Mortgage are original and genuine and each is the legal, valid and binding obligation of the maker thereof, enforceable in all respects in accordance with its terms subject to bankruptcy, insolvency, moratorium, reorganization and other laws of general application affecting the rights of creditors and by general equitable principles.

(xx) To the knowledge of the Seller, (i) no Mortgage Loan contemplated under the terms of this Agreement is covered by the Home Ownership and Equity Protection Act of 1994 or any comparable state law, (ii) no proceeds from any Group I Mortgage Loan contemplated under the terms of this Agreement were used to finance single-premium credit insurance policies, (iii) no subprime Group I Mortgage Loan originated on or after October 1, 2002 will impose a Prepayment Premium for a term in excess of three years, no Group I Mortgage Loan originated prior to such date, and no non-subprime Group I Mortgage Loan, will impose a Prepayment Premium in excess of five years,

(iv) the related Servicer for each Group I Mortgage Loan has fully furnished, in accordance with the Fair Credit Reporting Act and its implementing regulations, accurate and complete information on its borrower credit files to Equifax, Experian and Trans Union Credit Information Company on a monthly basis, (v) no Group I Mortgage Loan secured by a Mortgaged Property located in the State of Georgia was originated on or after October 1, 2002 and before March 7, 2003, no Group II Mortgage Loan secured by a Mortgaged Property located in the State of Georgia, originated on or after October 1, 2002 and before March 7, 2003 is subject to the Georgia Fair Lending Act (HB 1361), and no Mortgage Loan secured by a Mortgaged Property located in the State of Georgia, originated on or after March 7, 2003 is a "high cost home loan" as defined in the Georgia Fair Lending Act (HB 1361), as amended and (vi) each Group I Mortgage Loan has an original principal balance that conforms to Fannie Mae and Freddie Mac guidelines.

(xxi) Each Mortgage Loan at the time it was made complied in all material respects with applicable local, state, and federal laws, including, but not limited to, all applicable predatory and abusive lending laws.

(xxii) No Mortgage Loan secured by a Mortgaged Property located in the State of New York, for which a loan application was submitted on or after April 1, 2003, is a "high-cost home loan" as defined in the New York Assembly Bill 11856.

(xxiii) No Mortgage Loan is classified as (a) a "high cost mortgage" loan under the Home Ownership and Equity Protection Act of 1994 or (b) a "high cost home," "covered," "high cost," "high risk home" or "predatory" loan under any other applicable state, federal or local law.

(xxiv) With respect to any Mortgage Loan originated on or after August 1, 2004, either (a) the related Mortgage and the related Mortgage Note does not contain a mandatory arbitration clause (that is, a clause that requires the related Mortgagor to submit to arbitration to resolve any dispute arising out of or relating in any way to the Mortgage Loan) or (b) the related Mortgage and the related Mortgage Note contained a mandatory arbitration clause as of the related origination date and such clause has or will be waived by the originator or an entity designated by the Seller in writing no later than sixty (60) days after the related Closing Date which notice included or will include the following language: "WE ARE HEREBY NOTIFYING YOU THAT THE MANDATORY ARBITRATION CLAUSE OF YOUR LOAN, REQUIRING THAT YOU SUBMIT TO ARBITRATION TO RESOLVE ANY DISPUTE ARISING OUT OF OR RELATING IN ANY WAY TO YOUR MORTGAGE LOAN, IS IMMEDIATELY NULL AND VOID. YOU ARE FREE TO CHOOSE TO EXERCISE ANY OF YOUR RIGHTS OR ENFORCE ANY REMEDIES UNDER YOUR

MORTGAGE LOAN THROUGH THE COURT SYSTEM." A copy of the written notice referred to in the immediately preceding sentence, if applicable, shall be retained in the related Mortgage File.

(xxv) The Seller has complied with all applicable anti-money laundering laws and regulations, including without limitation the USA Patriot Act of 2001.

(xxvi) No Mortgage Loan originated on or after November 27, 2003 will be subject to the New Jersey Home Ownership Security Act of 2003.

(xxvii) No Mortgage Loan is a "High Cost Loan" or "Covered Loan", as applicable, as such terms are defined in the then current Standard & Poor's LEVELS® Glossary, which is now Version 5.6(c) Revised, Appendix E, in effect as of the Closing Date or as of the related Subsequent Transfer Date, as applicable."

Federal Funds Rates
1955-2009
From the Federal Reserve

Instrument, Federal funds
Maturity, Overnight
Frequency, Annual
Description, federal funds effective rate
Note: The daily effective federal funds rate is a weighted average of rates on brokered trades.
Note, weekly figures are averages of seven calendar days ending on Wednesday of the current week; monthly figures include each calendar day in the month.
Note: Annualized using a 360-day year or bank interest.

DATE FFO	DATE FFO	DATE FFO
1955, 1.79	1973, 8.74	1991, 5.69
1956, 2.73	1974, 10.51	1992, 3.52
1957, 3.11	1975, 5.82	1993, 3.02
1958, 1.57	1976, 5.05	1994, 4.21
1959, 3.31	1977, 5.54	1995, 5.83
1960, 3.21	1978, 7.94	1996, 5.30
1961, 1.95	1979, 11.20	1997, 5.46
1962, 2.71	1980, 13.35	1998, 5.35
1963, 3.18	1981, 16.39	1999, 4.97
1964, 3.50	1982, 12.24	2000, 6.24
1965, 4.07	1983, 9.09	2001, 3.88
1966, 5.11	1984, 10.23	2002, 1.67
1967, 4.22	1985, 8.10	2003, 1.13
1968, 5.66	1986, 6.80	2004, 1.35
1969, 8.21	1987, 6.66	2005, 3.22
1970, 7.17	1988, 7.57	2006, 4.97
1971, 4.67	1989, 9.21	2007, 5.02
1972, 4.44	1990, 8.10	2008, 1.92
		2009, 0.16

WHAT WENT WRONG / WHERE DID THE MORTGAGE CRISIS COME FROM ?

IN A NUTSHELL, *EVERYTHING*. THERE WERE BREAKDOWNS IN EVERY STEP AND PIECE OF THE PROCESS, WHICH WORSENED AS DEMAND FOR LOANS TO SECURITIZE INTENSIFIED AND ORIGINATION VOLUME INCREASED. AS A RESULT, THE SECURITIZATIONS BECAME A WITCHES' BREW OF TOXIC ELEMENTS:

- The Glass-Steagall Act, (the Banking Act of 1933), which had required the separation of banking operations between business types (commercial and investment banking) was repealed in 1999 by the Gramm-Leach-Blyley Act. Glass-Steagall had been enacted to manage risk after the breakdowns associated with the Great Depression. Glass-Steagall also created the Federal Deposit Insurance Corporation, which insured bank deposits and restored confidence in the soundness of the banking system.

- Repeal of Glass-Steagall resulted in significant changes in the banking industry, particularly commercial banks. Their new willingness to incur new risk was not understood by consumers, who continued to perceive banks as conservative and risk averse, and therefore reliable. Accordingly, many consumers incurred debt in reliance on the fact that banks' willingness to make the loans was indicative of soundness and reasonableness of the loan terms, not realizing that the scene had changed drastically and that the lenders would not be holding the loans themselves so had no interest in their soundness.

- The Federal Reserve lowered interest rates dramatically, apparently to keep the economy growing after the setbacks of the dot.com collapse and the 9-11 terrorist attacks. As a result, liquidity was abnormally large in 2002-2004. In 2004, the Fed began raising rates, triggering rate changes in adjustable rate mortgages which were tied to Fed. Funds rates. See Slide #13 for a year by year listing of the Fed funds rate.

- Excessive and inappropriate use of subprime products became widespread, aggravated by borrower misunderstanding of the risks involved, and compounded by sloppy lending practices. Subprime loans had been conceived for borrowers with lower quality credit. They had evolved as a mechanism for more Americans to own homes. Subprime loans were much easier for brokers and originators to get approved, bypassed normal underwriting standards, and entailed more profit than conventional loans due to higher interest rates and prepayment penalties. However, originators and brokers sold these loans to many borrowers who could have obtained conventional financing (source: Federal Reserve Bank of New York Staff Reports – "Understanding the Securitization of Subprime Mortgage Credit, p. 77) and oversold them inflated principal amounts, lending more money than borrowers could pay back".

- New "exotic" loans became available, such as interest only financing, adjustable rate mortgages, "piggyback" 80/20 loans, 120% loans. Inappropriate and inadequate underwriting at origination became the norm. In essence, they "threw away the rulebook". "Stated income" and "low doc" loans became commonplace, anyone could get a mortgage in virtually any amount. Virtually all of these loans were securitized.

- Since loans were now originated for sale, no longer for retention in originators' portfolios, originators knew that the risk of default was passed on to the ultimate purchasers. While theoretically the sellers incur repurchase risk, this was rarely invoked. In addition, the ultimate

bankruptcies and FDIC takeovers of many of the originators eliminated repurchase as an avenue of recourse in many cases. The soundness of the loans became irrelevant.

- Fraud and lack of standardization or regulation of the origination process. Borrowers had no meaningful way to compare loan products or to understand what they were being offered. This was exacerbated by bait and switch and what came to be known in the industry as "ambush closing" where borrowers were surprised at the last minute with drastically different loan terms, and in non-escrowed loans to cover obligations for property taxes and insurance. Origination fraud and appraisal fraud became commonplace, rife with kickbacks, flips, excessive appraisals, forged documents, resulting in loans which were significantly undersecured at best. While appraisers and originators were theoretically subject to regulatory control, little or none was exercised. The topic of mortgage fraud will be addressed in a separate presentation here today.

- Careless and non-compliant origination and closing, including lien priority failures, Truth in Lending violations, bait and switch and a general "free for all" environment. These defective and noncompliant loans made their way into securitizations, due to a general lack of due diligence and scrutiny of any kind. Once securitized, they could not help but fail.

- Many borrowers received loans with no regard for their ability to repay them. There was no external regulation or supervision of the honesty or propriety of the origination process.

- Legal and regulatory breakdown in the licensure of originators and mortgage brokers. For example, in Florida mortgage brokers license were issued to numerous individuals with records of felony convictions. Virtually all loans originated by mortgage brokers were destined for securitizations.

- Lack of accountability. Originators sold loans that were invalid, not supported by the represented property values; not supported by the represented incomes / ability to pay, and in various other ways not validly originated. Representations and warranties comparable to those in Slides 11-12 were part of every transaction, yet many loans were not compliant. Aggregators /depositors failed to "scrub" the loans for compliance, relying exclusively on unverified and marginally enforceable representations and warranties, and then in turn making representations and warranties concerning the loans which were likewise unverified and at times wholly untrue.

- Overvaluation of the collateral in the up trending market. Many of the properties were significantly overvalued even at origination. Easy loan terms, low interest rates and fraud fed a frothy market, resulting in an escalating price bubble, even further removed from real values.

- Rating agency failures. The agencies were hired and paid by each deal's issuer to rate the deal, and were expected to deliver an AAA rating, or risked the loss of future lucrative engagements, so had an obvious lack of objectivity and inherent conflict of interest. The ratings were based on the apparent underpinnings of the deal (i.e. property values and creditworthiness of the payors), which were not tested.

- Lack of equity cushion compounded by significant market decline built a trap for investors and borrowers from which neither could escape, making default and loss inevitable.

- Inability and unwillingness of servicers to manage large numbers of defaulted loans. When the deals were made, default percentages were low. Servicers calculated their profitability based on assumptions of low default rates, computerized management of loans in most instances, and were not eager to drastically increase their staffs to handle the burgeoning numbers of defaults.

- A lack of understanding by borrowers, servicers, attorneys, judges and regulators of the securitized model and the roles of the various participants led to confusion and difficulty applying the law of negotiable instruments , ineffective efforts to address the resulting issues and problems.

- Conflicts of interest among different tranches of investors; between servicers and clients; between trusts and originators. Since servicers do not own the loans, they do not receive any economic incentive from minimization of ultimate loss. They are paid per month per loan, so the more loans they have in their servicing portfolios, the more their compensation. They are also paid more per loan for loans in default than for performing loans, on the theory that loans in default entail more work. However, they then attempt to maximize profitability by "production line" servicing , entailing call centers, often offshore, long hold times, minimal interaction with borrowers, and only cursory interaction with the foreclosure law firms. Servicers are also usually entitled to retain the late fees and junk fees (i.e. property inspection, appraisal, payoff statement fees, etc.), and generally benefit from "force-placed" insurance premiums, which motivates them to keep loans in default.

- Robotic foreclosure processing, by law firms paid small flat fees per case.

- Insufficient market for foreclosed properties. As the numbers of defaulted and foreclosed loans increases, they drag down further all home prices, putting an increasing number of borrowers underwater, making it increasingly impossible for homeowners to sell homes they think they will be unable to afford, or must leave for some reason.

In order to litigate cases related to these loans, it is necessary to understand where the particular loan fits in the scheme of things. Is it claimed by Fannie or Freddie or a private securitization, or much more infrequently, is it a whole loan (a loan completely owned by one party, not involved in one of these mortgage pools) ? Who is the real party in interest ? Was the loan properly conveyed to the claimant ? Who is the loan servicer ? What errors have been made, if any, in the origination process, the conveyance process, the servicing process, the foreclosure process ? Does the situation qualify for any potential resolution scenarios ?

SUGGESTED FURTHER READING FOR THOSE INTERESTED

- **Basics of Fannie Mae MBS** http://www.fanniemae.com/mbs/mbsbasics/remic/index.jhtml?p=Mortgage-Backed+Securities&s=Basics+of+Fannie+Ma

- **Ashcraft and Schuermann, Understanding the Securitization of Subprime Mortgage Credit,** http://www.newyorkfed.org/research/staff_reports/sr318.pdf

- **Reiss, Subprime Standardization: How Rating Agencies Allow Predatory Lending To Flourish In The Secondary Mortgage Market**, Florida State University Law Review [Vol. 33:985]

- **Peterson, Predatory Structured Finance,** 2186 Cardozo Law Review [Vol. 28:5:2007] Electronic copy available at http://ssrn.com/abstract=929118

- **Demyanyk and Van Hemert, Understanding the Subprime Mortgage Crisis,** Electronic copy available at: http://ssrn.com/abstract=1020396

FEDERAL NATIONAL MORTGAGE ASSOCIATION
("FANNIE MAE")

as

Issuer, Master Servicer, Guarantor and Trustee

SINGLE-FAMILY MASTER TRUST AGREEMENT

for

GUARANTEED MORTGAGE
PASS-THROUGH CERTIFICATES

evidencing undivided beneficial interests in

POOLS OF RESIDENTIAL MORTGAGE LOANS

June 1, 2007

CREDIT SUISSE FIRST BOSTON MORTGAGE SECURITIES CORP

CREDIT SUISSE FIRST BOSTON MORTGAGE ACCEPTANCE CORP.,

Depositor

DLJ MORTGAGE CAPITAL, INC.,

Seller

OCWEN LOAN SERVICING, LLC,

Servicer

WELLS FARGO BANK, N.A.,

Servicer

SELECT PORTFOLIO SERVICING, INC.,

Servicer and Special Servicer

CLAYTON FIXED INCOME SERVICES INC.,

Credit Risk Manager

and

U.S. BANK NATIONAL ASSOCIATION,

Trustee

POOLING AND SERVICING AGREEMENT

Dated as of November 1, 2005

Home Equity Asset Trust 2005-9

HOME EQUITY PASS-THROUGH CERTIFICATES, SERIES 2005-9

Table of Contents

The Florida Bar Continuing Legal Education Committee and the
Consumer Protection Law Committee

Residential Foreclosure Cases: Litigation Issues, Strategies and Skills - Practical Lessons for both Lenders and Homeowners Counsel

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

Thursday, June 24, 2010

Course No. 8968 9

CLE SEMINAR EVALUATION FORM

Name (Optional): _____ Date: June 24, 2010

Name of Course: Residential Foreclosure Cases: Litigation Issues, Strategies and Skills (89689)

City: Boca Raton Facility: _____

Please evaluate the speaker presentation for this Florida Bar CLE program based on the following scale: **5=excellent; 4=good; 3=fair/average; 2=poor; 1=unacceptable.** If you rate a presentation 2 or 1, please explain why, in the comment section, so that we may further improve our programs.

Speaker	Speaker Rating	Course Book	Comments
Hon. Jennifer D. Bailey			
Roy A. Diaz			
Lynn Drysdale			
Margery Ellen Golant			
Scott E. Simowitz			

General Speaker Comments: _____

General Seminar Comments: _____

Coursebook Comments: _____

☐ Did you attend this course via **WEB CAST**? If so, please send this completed form to FAX 850-561-5825.

Please evaluate the facility based on the following scale: **5=excellent; 4=good; 3=fair/average; 2=poor; 1=unacceptable.** If you use a rate of 2 or 1, please explain why, in the comment section, so that we may further improve our programs.

_____ convenience
_____ aesthetics (comfort, cleanliness, etc.)
_____ amenities (restaurants, restrooms, parking, etc.)

Facility Comments: _____

Where did you learn of this seminar?

☐ Bar *News* Ad ☐ Brochure ☐ FLABAR Website ☐ Section Website ☐ Other

Please identify any topic that you wish to see as the subject of future or expanded Florida Bar seminars:

_____

11. Are there any exemptions from CLER?

Rule 6-10.3(c) lists all valid exemptions. They are:

1) Active military service
2) Undue hardship (upon approval by the BLSE)
3) Nonresident membership (see rule for details)
4) Full-time federal judiciary
5) Justices of the Supreme Court of Florida and judges of district, circuit and county courts
6) Inactive members of The Florida Bar

12. Other than attending approved CLE courses, how may I earn credit hours?

Credit may be earned by:

1) Lecturing at an approved CLE program
2) Serving as a workshop leader or panel member
3) Writing and publishing in a professional publication or journal
4) Teaching (graduate law or law school courses)
5) University attendance (graduate law or law school courses)

13. How do I submit various activities for credit evaluation?

Applications for credit may be found either on our website, www.floridabar.org, or in the directory issue of The Florida Bar Journal following the listing of Board Certified Lawyers.

14. How are attendance hours posted on my CLER record?

If you registered for a seminar through The Florida Bar Registrations Department, the credit will be posted to your record automatically. If the course is sponsored by a Florida Bar Section or another organization, you can post your credits online.

15. How long does it take for hours to be posted to my CLER record?

When you post your CLE credit online, your record will be automatically updated and you will be able to see your current CLE hours and reporting period.

16. How may I find information on programs sponsored by The Florida Bar?

You may wish to visit our website, www.floridabar.org, or refer to The Florida Bar News. You may also call CLE Registrations at 850/561-5831.

17. If I accumulate more than 30 hours, may I use the excess for my next reporting cycle?

Excess hours may not be carried forward. The standing policies of the BLSE, as approved by the Supreme Court of Florida specifically state in 6.03(b):

... CLER credit may not be counted for more than one reporting period and may not be carried forward to subsequent reporting periods.

18. Will out-of-state CLE hours count toward CLER?

Courses approved by other state bars are generally acceptable for use toward satisfying CLER.

19. If I have questions, whom do I call?

You may call the Legal Specialization and Education Department of The Florida Bar at 850/561-5842.

While online checking your CLER, don't forget to check your Basic Skills Course Requirement status.

The Florida Bar Continuing Legal Education Committee and the
Consumer Protection Law Committee

Residential Foreclosure Cases: Litigation Issues, Strategies and Skills - Practical Lessons for both Lenders and Homeowners Counsel

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

Thursday, June 24, 2010

Course No. 8968 9

THE FLORIDA BAR

PREFACE

The course materials in this booklet were prepared for use by the registrants attending our Continuing Legal Education course during the lectures and later in their offices.

The Florida Bar is indebted to the members of the Steering Committee, the lecturers and authors for their donations of time and talent, but does not have an official view of their work products.

CLER CREDIT
(Maximum 4.0 hours)

General 4.0 hours Ethics 0.0 hours

CERTIFICATION CREDIT
(Maximum 4.0 hours)

Real Estate 4.0 hours

Seminar credit may be applied to satisfy both CLER and Board Certification requirements in the amounts specified above, not to exceed the maximum credit. Refer to Chapter 6, Rules Regulating The Florida Bar, see the CLE link at www.floridabar.org for more information about the CLER and Certification Requirements.

Prior to your CLER reporting date (located on the mailing label of your Florida Bar *News*) you will be sent a Reporting Affidavit (must be returned by your CLER reporting date) or a Notice of Compliance which confirms your completion of the requirement according to Bar records (does not need to be returned). You are encouraged to maintain records of your CLE hours.

CLE CREDIT IS NOT AWARDED FOR THE PURCHASE OF THE COURSE BOOK ONLY.

CLE COMMITTEE MISSION STATEMENT

The mission of the Continuing Legal Education Committee is to assist the members of The Florida Bar in their continuing legal education and to facilitate the production and delivery of quality CLE programs and publications for the benefit of Bar members in coordination with the Sections, Committees and Staff of The Florida Bar and others who participate in the CLE process.

COURSE CLASSIFICATION

The Steering Committee for this course has determined its content to be INTERMEDIATE.

CONSUMER PROTECTION LAW COMMITTEE

Julia Harris — Chair
Victoria Butler — Chair-elect
Laura Boeckman and Douglas Kilby — CLE Co-chairs

CLE COMMITTEE

Paul H. Chipok, Orlando — Chair
Terry L. Hill — Director, Programs Division

For a complete list of Membership Services, see the September 2009 Directory Issue of The Florida Bar Journal, starting on page 20 or visit our web site at www.floridabar.org.

LECTURE PROGRAM

1 – 1:30 p.m.	**Overview of the foreclosure crisis in Florida**; making the initial assessment of your case; who are the players in the foreclosure process and how do they work; the major issues that plaintiffs and defendants have to address in foreclosures.
1:30 - 2:10 p.m.	**Answers, Affirmative Defenses and Preliminary motions:** Motions to Dismiss, Motion to Stay (to comply with HAMP/HARP), verified pleadings, lost note/mortgage and other preliminary motions and matters.
2:10 – 2:20 p.m.	**Questions** (submitted in writing and selected by the panel).
2:20 – 2:30 p.m.	**Break**
2:30 – 3 p.m.	**Effective Discovery** – finding out what you need to know through initial written discovery, motions to compel and depositions.
3 – 3:30 p.m.	**Effective advocacy in summary judgment motions** – when to file and what you need in support and in opposition.
3:30 – 3:40 p.m.	**Break**
3:40 – 4:50 p.m.	**Maximizing chances for success in mediation** and exploring alternatives to foreclosure including during early foreclosure mediation process, navigating loss mitigation process and navigating HAMP and HARP.
4:50 – 5 p.m.	**Q & A and closing comments**

Speakers for Presidential Showcase Seminar: Residential Foreclosure Cases: Litigation Issues, Strategies and Skills -- Practical Lessons for both Lenders and Homeowners Counsel

June 24, 2010, Boca Raton Resort & Club, 1 to 5 p.m.

Honorable Jennifer Bailey, Circuit Judge for the 11th Judicial Circuit
Miami
Judge Bailey is the administrative judge of the 11th Circuit's General Jurisdiction (Civil). She chaired the Florida Supreme Court's Task Force on Residential Mortgage Foreclosure Cases. As chair, Judge Bailey extensively studied the foreclosure problem in Florida and is intimately familiar with the foreclosure litigation process.

Roy A. Diaz, shareholder of Smith, Hiatt & Diaz P.A.
Fort Lauderdale
A native of Florida, Diaz attended undergraduate school at Florida International University (B.A., 1984) and law school at Nova Southeastern School of Law (Juris Doctor, 1987). His practice is concentrated in the areas of real estate, litigation and bankruptcy. He has represented lenders, servicers, private investors and real estate developers since 1994. Diaz was admitted to The Florida Bar in 1988.

Lynn Drysdale, Jacksonville Area Legal Aid Inc.
Jacksonville
Drysdale is a senior staff attorney with Jacksonville Area Legal Aid where she has represented consumers in foreclosure defense for more than 20 years. She regularly testifies before state and federal legislators on consumer issues and is a nationally recognized consumer attorney. Drysdale is an experienced foreclosure defense practitioner and regularly speaks on foreclosure and other consumer protection issues.

Margery E. Golant, Golant & Golant, P.A.
Boca Raton
Golant is a real estate attorney and litigator with more than 20 years of experience. She represents consumers in financial services litigation in defense of foreclosure and focuses on issues of securitization and structured finance issues. Golant previously worked at one of the largest subprime mortgage servicers in the United States and was a district court judge in Pennsylvania.

Scott E. Simowitz, Moskowitz, Mandell, Salim & Simowitz, P.A.,
Fort Lauderdale
Simowitz practices in the areas of foreclosure, banking and commercial litigation. He regularly represents lenders and financial institutions in foreclosures. He is a graduate of the University of Miami law school and is active in state and local bar associations.

TABLE OF CONTENTS

Glossary
30 Terms to Know and Understand

1. Aggregator - A party involved within the secondary mortgage market that purchases mortgages from financial institutions and then securitizes them into mortgage-backed securities (MBS). Aggregators earn profit by purchasing individual mortgages at lower prices and then selling the pooled MBS at a higher premium. Purchasing an MBS tends to be far less risky compared to purchasing an individual mortgage as the pools of mortgages diversifies the source of the individual mortgage's income stream. Some mortgage originators also become aggregators as securitizing a pool of mortgages can be seen as a natural extension of their business. Plus, doing so would limit losses incurred to the originator in the event that mortgage rates rise, as typically seen when originators would sell the mortgages into the secondary market.

2. Appraiser- A person qualified by education, training, and experience to provide appraisals. Appraisals- A professional opinion, usually written, of the market value of a property, such as a home, business, or other asset whose market price is not easily determined. Usually required when a property is sold, taxed, insured, or financed.

3. Condominium Association - An association of unit owners in a condominium building. The association elects a board of directors, which handles maintenance and repair of common areas, disputes among unit owners and enforcement of rules and regulations, and condominium fees.

4. Debt-to-Income Ratio - A figure that calculates how much of a person's income is spent paying his or her debts. The higher one's debt-to-income ratio, the more of their monthly income that is solely devoted to paying back debts. DTI is important to manage, because it is something often considered by institutions when they evaluate loan creditworthiness; institutions conclude that if a person's DTI is too high, they might not be able to pay back their debts very easily, and the institution will be less inclined to make the loan. Formula: monthly debts owed divided by monthly income.

5. Deed in Lieu of Foreclosure - An instance where borrowers voluntarily convey their rights in a property to the lender rather than going all the way through the foreclosure process.

6. Deficiency Judgment – A personal judgment against the borrower for the remaining balance on the loan after a foreclosure sale.

7. Forbearance agreement - Provides short-term relief for borrowers who have temporary financial problems. Forbearance agreements can allow for payment "holidays" and otherwise structure the repayment of delinquent payments. See Modification Agreement below.

8. Homeowner Association - A membership organization formed by a real estate developer to own and maintain common green areas, streets and sidewalks and to enforce covenants to preserve the appearance of the development may be exempt as a social welfare organization if it is operated for the benefit of all the residents of the community.

9. Investor - An individual who commits money to investment products with the expectation of financial return. Generally, the primary concern of an investor is to minimize risk while maximizing return, as opposed to a speculator, who is willing to accept a higher level of risk in the hopes of collecting higher-than-average profits. Trustees of mortgage backed securities are tasked to make payments to investors.

10. Issuer - A legal entity that develops, registers and sells securities for the purpose of financing its operations. Issuers may be domestic or foreign governments, corporations or investment trusts. Issuers are legally responsible for the obligations of the issue and for reporting financial conditions, material developments and any other operational activities as required by the regulations of their jurisdictions. The most common types of securities issued are common and preferred stocks, bonds, notes, debentures, bills and derivatives. Say ABC Corp. sells common shares to the general public on the market in order to

generate capital to finance its business operations. This means ABC Corp. is an issuer, and it is therefore required to file with regulators, such as the Securities and Exchange Commission, disclosing relevant financial information about the company. ABC must also meet any legal obligations or regulations in the jurisdiction where it issued the security. Writers of options are occasionally referred to as issuers of options because they also sell securities on a market.

Issuer- 1. A person or entity (such as a corporation or bank) that issues securities, negotiable instruments, or letters of credit.

a. Non-reporting issuer. An issuer not subject to the reporting requirements of the Securities Exchange Commission because it (1) it is a private trust not registered with the SEC which is not subject to its reporting requirements, (2) has not had not filed any documents with the Securities Act within the fiscal year, and (3) did not, at the end of its last fiscal year, meet the shareholder or asset tests under the Exchange Act registration requirements.

b. A company or municipality offering securities for sale to investors.

11. Lender - A private, public or institutional entity which makes funds available to others to borrow.

12. Lien Holder – One who holds a lien on real property:

a. Lien- is an encumbrance on one person's property to secure a debt the property owner owes to another person. The statement that someone's property is "tied up" describes the effect of liens on both real and Personal Property.

13. Loan Reinstatement - A reinstatement is when you pay the full amount you owe (total of past due monthly payments plus all fees) in a lump sum by a specific date.

14. Loan Servicer - A public or private entity that collects, monitors and reports loan payments, handles property tax, insurance escrows and late payments. Some mortgage foreclosure lawsuits are filed by the servicer. Servicers are also required to remit payments to the mortgage holders (sometimes investors). With securitized loans there are categories of servicers:

Primary Servicer (or Sub-Servicer) - In some cases the Borrower may deal with a Primary Servicer that may also be the loan originator or Mortgage Banker who funded the loan. The Primary Servicer maintains the direct Borrower contact, and the Master Servicer may sub-contract certain loan administration duties to the Primary or Sub-Servicer.

Master Servicer - The Master Servicer's responsibility is to service the loans in the securitized loan pool through maturity unless the Borrower defaults. The Master Servicer manages the flow of payments and information and is responsible for the ongoing interaction with the performing Borrower.

Special Servicer - Upon the occurrence of certain specified events, primarily a default, the administration of the loan is transferred to the Special Servicer. Besides handling defaulted loans, the Special Servicer also has approval authority over material servicing actions, such as loan assumptions.

15. Mortgage - A loan to finance the purchase of real estate, usually with specified payment periods and interest rates. The borrower (mortgagor) gives the lender (mortgagee) a lien on the property as collateral for the loan.

16. Mortgagee - The creditor or lender in a mortgage agreement.

17. Mortgagor - The borrower in a mortgage agreement.

18. Mortgage Backed Securities (MBS) - Is an asset-backed security or debt obligation that represents a claim on the cash flows from mortgage loans, most commonly on residential property. First, mortgage loans are purchased from banks, mortgage companies and other originators. Then, these loans are

assembled into pools. This is done by government agencies, government-sponsored enterprises (GSEs) and private entities, which may offer features to mitigate the risk of default associated with these mortgages. Mortgage-backed securities represent claims on the principal and payments on the loans in the pool, through a process known as securitization. These securities are usually sold as bonds, but financial innovation has created a variety of securities that derive their ultimate value from mortgage pools.

Most MBSs are issued by the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corp. (Freddie Mac), U.S. government-sponsored enterprises. Ginnie Mae, backed by the full faith and credit of the U.S. government, guarantees that investors receive timely payments. Fannie Mae and Freddie Mac also provide certain guarantees and, while not backed by the full faith and credit of the U.S. government, have special authority to borrow from the U.S. Treasury. Some private institutions, such as brokerage firms, banks and homebuilders, also securitize mortgages, known as "private-label" mortgage securities. Different types of MBS:

Residential mortgage-backed security (RMBS) - a pass-through MBS backed by mortgages on residential property.

Commercial mortgage-backed security (CMBS) - a pass-through MBS backed by mortgages on commercial property

Collateralized mortgage obligation (CMO) - a more complex MBS in which the mortgages are ordered into tranches by some quality (such as repayment time), with each tranche sold as a separate security.

19. Mortgage Broker - An individual or company who brings borrowers and lenders together for the purpose of loan origination, but which does not originate or service the mortgages. The broker might also negotiate with the lender to try and find the best possible financing deal possible for the borrower.

20. Mortgage Electronic Registration System (MERS) - Mortgage Electronic Registration Systems (MERS) is a privately held company that operates an electronic registry designed to track servicing rights and ownership of mortgage loans in the United States. MERS attempts to serve as the mortgagee of record for lenders on mortgage documents by naming itself as "nominee," a status that has been rejected by some courts. MERS is not listed as "lender" on the note. It does not own, hold or service mortgages. MERS claims its process eliminates the need to file assignments in the county land records, which lowers costs for lenders and decreases revenue for county clerks.

21. Modification of Mortgage Terms - A modification of an existing loan made by a lender in response to a borrower's long-term inability to repay the loan. Loan modifications typically involve a reduction in the loan interest rate and/or principal balance and/or a change in the length of the term of the loan or any combination of the three. A lender might be open to modifying a loan because the cost of doing so is less than the cost of default and based upon the differing home foreclosure avoidance plans such as HAMP and HARP. A loan modification agreement is different from a forbearance agreement. A forbearance agreement provides short-term relief for borrowers who have temporary financial problems, while a loan modification agreement is a long-term solution for borrowers who will never be able to repay an existing loan.

22. Mortgage Pool – A group of related financial instruments, such as mortgages, combined for resale to investors on a secondary market. This is also known as a pool.

23. Net Present Value Model of the Making Home Affordable Plan - The present value of an investment's future net cash flows minus the initial investment. If positive, the investment should be made (unless an even better investment exists), otherwise it should not.

a. **The Home Affordable Modification Plan and Home Affordable Refinance Plan** are the parts of MHA that use refinancing and loan modifications to reduce monthly mortgage payments to a level that borrowers can afford today and into the future.

24. Originator - A mortgage lender who creates a mortgage secured by some amount of the mortgagor's real property. The entity that initiates a funds transfer subject to UCC article 4A. UCC § 4A-104(c).

a. Section 494.001(2), Fla. Stat. "Act as a loan originator" means being employed by a mortgage lender or correspondent mortgage lender, for compensation or gain or in the expectation of compensation or gain, to negotiate, offer to negotiate, or assist any licensed or exempt entity in negotiating the making of a mortgage loan, including, but not limited to, working with a licensed or exempt entity to structure a loan or discussing terms and conditions necessary for the delivery of a loan product. A natural person whose activities are ministerial and clerical, which may include quoting available interest rates, is not acting as a loan originator.

b. Loan Originator pursuant to the Secure and Fair Enforcement for Mortgage Broker's Act defines "loan originator" as "an individual who (I) takes a residential mortgage loan application and (II) offers or negotiates terms of a residential mortgage loan for compensation or gain."

25. Partial Loan Modification - Loan modification is a process whereby a homeowner's mortgage is modified and both lender and homeowner are bound by the new terms.

26. Pooling and Servicing Agreement - The Pooling and Servicing Agreement (PSA) is an agreement between the investment pool Trustee and the Master Servicer and will define the conditions under which the servicing of a loan or pool of loans will be transferred, the terms of the trust and otherwise directs the actions of the trustee and servicers.

27. Rating Agency - There will be as few as one and as many as four Rating Agencies involved in rating a securitized trust. Rating agencies establish bond ratings for each bond class at the time the securitization is closed. They also monitor the pool's performance and update ratings for investors based on performance, delinquency and potential loss events affecting the loans within the trust.

28. Real Estate Mortgage Investment Conduit (REMIC) is a type of multi-class mortgage-back security in which interest and principal payments from mortgages are structured into separately traded securities. REMICs direct the cash flow from the underlying mortgage- backed collateral into separately traded securities called classes. These classes are distinguished by their sensitivity to the prepayment risk of the underlying mortgage-backed collateral. Different classes are more or less sensitive to prepayment risk, bear different interest rates and have various average lives and final maturities. A properly structured REMIC receives preferred tax status.

29. Trustee - With securitized loans the Trustee's primary role is to hold all the loan documents and distribute payments received from the Master Servicer to the bondholders. Although the Trustee is typically given broad authority with respect to certain aspects of the loan under the PSA [Pooling and Servicing Agreement], the Trustee typically delegates its authority to either the Special Servicer or the Master Servicer. (see Loan Servicer above)

30. Short Sale - Is a sale of real estate for less than the balance owed on the property's loan. This will work if the lender decides that selling the property at a moderate loss is better than foreclosing and re-taking the property. This agreement, however, does not necessarily release the borrower from the obligation to pay the remaining balance of the loan, known as the deficiency.

Sample State and Federal Laws

Federal Causes of Action

The Truth in Lending Act (TILA)

Requires disclosure of credit terms and applies to most extensions of consumer credit. **The Truth in Lending Act** provides actual damages, statutory damages for some violations, and attorney's fees. For non-purchase money mortgages, home equity loans, and some other transactions secured by a consumer's home, rescission may be available.

15 U.S.C. §1601-1667g, 12 C.F.R. Part 226 (Regulation Z), Official Staff Commentary to Regulation Z
15 U.S.C. § 1641(g) was recently added to require notice to the consumer of the new creditor including name, telephone number, contact information of person with authority, date of transfer, information of where transfer information recorded.
Liable Parties - Creditor - (Generally the original lender), Assignee, if violation "apparent on face" of documents
Rescission, unless transaction was for purchase or construction of home (15 U.S.C. §1635, 12 C.F.R. § 226.23, also see official staff commentary)
Statutory damages - 15 U.S.C. § 1640, et seq., minimum $100 and maximum $4,000
Attorney fees to "prevailing plaintiff"
Limitations - 1 year to rescind and bring damage claims, 3 years if used defensively

Sample Case Law

Beach v Ocwen Fed Bank, 523 U.S. 410 (1998) (generally, there is no right under federal law to raise rescission as a defense to foreclosure, even by way of recoupment beyond three years)
Williams v. Homestake Mortgage Co., 968 F.2d 1137 (11th Cir. 1992) (court may equitably modify rescission tender requirement);
Matthews v. New Century Mortgage Corp., 185 F. Supp. 2d 874 (S.D. OH 2002) claims typically found in predatory lending case involving elderly homeowners and also involves claims describing TILA, HOEPA, Equitable Tolling, FHA, ECOA, Conspiracy, Fraud, Unconscionability, and Ohio's Rico Statute violations)
Jones v. Rees-Max, LLC, 514 F. Supp 2d 1139 (D. Minn. 2007) (an equitable mortgage governed by TILA may arise from a sale-lease-back arrangement)
Dailey v. Leshin, 792 So.2d 527 (Fla. 2nd DCA 2001) (TILA rescission claims based on failure to disclose the right to rescind expired when plaintiff's contracted to sell the property because allowing seller to rescind after could lead to possible title and transaction disputes; however, TILA damages claims may survive sale).

The Home Ownership and Equity Protection Act of 1994 (HOEPA)

Applies special restrictions to certain high-rate loans secured by the home – primarily non-purchase money mortgages, home equity loans, and home improvement loan. For loans which fees exceed the "trigger" amount, HOEPA prohibits certain abusive terms and practices, requires special "advance look" disclosures, and prohibits the lender from engaging in a pattern or practice of lending without regard to the borrower's ability to repay. All of the Truth in Lending remedies are available, plus special enhanced damages.

15 U.S.C. § 1639, 12 C.F.R. §§ 226.31, 226.32, and 226.34, Regulation Z
Liable Parties - Creditor (generally the original lender) and assignee

Violations - Failure to disclose APR and payment information 3 days prior to consummation as well as the implications of the use of your home as security, inclusion of prohibited terms in transaction (i.e. higher interest rate upon default), pattern of making loans without regard to ability to repay
Remedies - Rescission, unless transaction was for purchase or construction of home, actual damages, statutory damages up to $4,000, prevailing plaintiff fees
Limitations - 1 year to bring a damages claim or rescind; 3 year limitation if used defensively. Applies to loans that meet one of two triggers:

- APR is more than 8 percent above the yield in treasury securities having comparable maturities at the time the loan was made (T-bill rates on the 15th of the month immediately preceding the month of application)
- Points and fees are 8 percent in excess of the "total loan amount" with total at least $583

Sample Case Law

Bryant v. Mortgage Capital Resource Corp., 197 F. Supp.2d 1357 (N.D. Ga. 2002) (discussing the assignment of liability to a subsequent purchaser when dealing with a loan under HOEPA, also discusses equitable tolling in relation to RESPA
Cooper v. First Government Mortg. and Investors Corp., 238 F.Supp.2d 50 (D.D.C. 2002) (assignee liability for HOEPA loans)
In re Robertson, 333 B.R. 894 (M.D. Fla. 2005) (transaction between borrower and lender qualified as a mortgage covered by the HOEPA where borrower secured the loan with her home for a purpose other than to finance the acquisition or initial construction of a dwelling and the annual percentage rate of the loan exceeded the Treasury securities standard by more than 10 points).

Real Estate Settlement Procedures Act (RESPA)

This act provides a private cause of action for violation of its prohibitions against misuse of escrowed funds, kickbacks from companies providing settlement services and steering borrowers to title insurance companies. Either treble or statutory damages plus attorney's fees are available for violations. RESPA also requires advance disclosures (Good Faith Estimate), and disclosure at settlement of settlement costs in real estate transactions. While the statute does not create a private cause of action for disclosure violations, analyzing the disclosures often reveals Truth in Lending and HOEPA violations.

12 U.S.C. §2601, et seq., 24 C.F.R. Part 3500 (Regulation X), 64 Fed. Reg. 10079 (HUD Policy Statement on lender paid broker fees)
Liable Parties - Lender, broker, if not exclusive agent or lender, servicer, title company
Violations (Not all of which provide a private right of action) - failure to give Good Faith Estimate, failure to disclose other credit-related information and give HUD-1statement, failure to give Settlement Statement and servicing statements, payment or acceptance of kickbacks or referral fees, charging fees when no identifiable services are provided, improper servicing of loan (treatment of escrow)
Remedies - Three times amount of illegal charges and attorney fees
Limitations - 1 year to bring an affirmative claim

Sample case law

Hirsch v. Bank of America, 328 F. 3d 1306 (11th Cir. 2003) (provides a two-part test in analyzing RESPA kickback violations involving a mortgage broker; first the court must "determine whether the broker has provided goods or services of the kind typically associated with a mortgage transaction"; then, the court must "determine whether the total compensation paid to the broker is reasonably related to the total value of the goods or services actually provided"
Friedman v. Market Street Mortg. Corp., 520 F.3d 1289 (11th Cir. 2008) (RESPA does not provide a cause of action where a fee for services was rendered but does provide a cause of action when a plaintiff alleges that "no services were rendered in exchange for a settlement fee").

Busby v. JRHBW Realty, Inc. d/b/a RealtySouth, 642 F.Supp.2d 1283 (N.D. Ala. 2009) (realty company could not assert an array of services defense to consumers' claim that company's administrative brokerage commission (ABC) fee violated Real Estate Settlement Procedures Act (RESPA) as a fee for which no services were performed, because the services described by company as justification for the fee, even if those services were actually provided, were not settlement-related and/or they provided little or no benefit to consumers as borrowers)

RESPA Qualified Written Request

Mortgage servicer must respond promptly to written inquiries, known as qualified written requests. If a client believes he or she has been charged a penalty or late fee that is not owed, or has other problems with the servicing of the loan, contact the servicer in writing.
12 U.S.C. § 2605
Liable Parties - Servicer
Violations - Failure to provide notice in writing of any assignment, sale or transfer of servicing of the loan to any other person including the effective date of transfer, contact information of the transferee, and the effect on terms and insurance. Notice must be given not less than 15 days before effective date of transfer. Some exceptions exist.
Remedies - Servicer must acknowledge within 20 working days receipt of the request and must investigate, correct, explain or produce proof of figures/position within 60 days
Statutory damages up to $1,000 for repeated failure to respond.

Sample Case Law
McLean v. GMAC Mortg. Corp., 595 F.Supp.2d 1360 (S.D. Fla. 2009) (requirements for damages for failure to respond to qualified written request)
McLean v. GMAC Mortgage Corp., Inc., __ F.Supp.2d __, 2008 WL 5246149 (S.D. Fla. 2008) (discussing transmission and response requirements for qualified written requests)

Racketeer Influenced and Corrupt Organizations Act ("RICO") Florida Civil Remedies for Criminal Practices Act

Racketeer Influenced and Corrupt Organizations Act ("RICO") and Florida Civil Remedies for Criminal Practices Act were initially created to provide extensive criminal penalties for those engaged in traditional organized crime. However, these statutes have been increasingly used as a means to regulate and prosecute many predatory lending practices. The most apparent advantage of using the RICO Act is that it affords triple actual damages and attorney's fees.

18 U.S.C. §1961, et seq., §§772.103, 772.104, Fla. Stat.
Liable Parties - Persons (broadly defined) conducting RICO enterprise
Violations - Pattern of "racketeering activity" as defined in 18 U.S.C. §1961 (a long list of violations, but this is a very complex statute in application)
Remedies - Three times actual damages and attorney's fees
Limitations - Four years to bring damages claim under federal law, five years under state law

Sample Case Law
Jones v. Childers, 18 F.3d 899 (11th Cir. 1994) (Florida CRCPA claims)
Oglesbee v. IndyMac Financial Services, Inc., __F.Supp.2d__, 2010 WL 475130 (S.D. Fla. 2010) (allegations of criminal activity arising out of the same loan transaction did not qualify as a "pattern" under Florida's RICO statute)

Federal Fair Debt Collection Practices Act (FDCPA)

The purpose of the Federal Fair Debt Collection Practices Act ("FDCPA") is to eliminate abusive practices in the collection of consumer debts, promote fair debt collection and to provide consumers with an avenue for disputing and obtaining validation of debt information in order to

ensure the information's accuracy. The Act creates guidelines under which debt collectors may conduct business, defines rights of consumers involved with debt collectors and prescribes penalties and remedies for violations of the Act.

15 U.S.C. § 1692, et seq.
Liable Parties - Debt collectors (even present owner if took ownership interest after default)
Violations - Specified abusive, deceptive and unfair debt collection practices and failure to provide response to debtor's request for information
Remedies - Actual damages and statutory damages up to $1,000, costs and attorney's fees
Limitations - 1 year from date on which the violation occurred
Strict Liability - Liberally construed in favor of the least sophisticated consumer

Sample Case Law

Laughlin v. Household Bank, Ltd, 969 So.2d 509 (Fla. 1st DCA 2007) (when there are discrepancies between the Florida Consumer Collection Practices Act (FCCPA) and the FDCPA, whichever contains the provision more protective of the debtor prevails)
Jeter v. Credit Bureau, Inc., 760 F.2d 1168 (11th Cir. 1985) (FDCPA protects the unsophisticated consumer).
Fox v. Citicorp Credit Services, Inc., 15 F. 3d 1507 (9th Cir. 1994) (collection attorney liable under FDCPA)

Equal Credit Opportunity Act

Prohibits credit discrimination on the basis of race, color, religion, national origin, sex, marital status, age, or because you get public assistance. Creditors may request most of this information, but may not use it when deciding whether to give a client credit or when setting the terms of credit. ECOA applies to organizations or people who regularly extend credit, including banks, small loan and finance companies, retail and department stores, credit card companies, and credit unions. Everyone who participates in the decision to grant credit or in setting the terms of that credit, including real estate brokers who arrange financing, must comply with the ECOA.

15 U.S.C. § 1691, et seq.
Liable - Creditors
Violations - Credit discrimination based on race, color, religion, national origin, sex, marital status, or age, exceptions exist for good faith safe harbor
Remedies - Actual damages, punitive damages in an amount not greater than $10,000, equitable and declaratory relief, attorney's fees and costs

Sample Case Law

Bagley v. Lumbermens Mut. Cas. Co., 100 F.Supp.2d 879 (N.D. Ill. 2000) (Equal Credit Opportunity Act (ECOA) applied to commercial loans as well as personal loans).
National Ass'n for Advancement of Colored People v. Ameriquest Mortg. Co., 635 F.Supp.2d 1096 (C.D. Cal. 2009) (civil rights organization's allegation that mortgage lenders engaged in predatory lending practices aimed at African-American borrowers was sufficient to state disparate impact claims under FHA and ECOA, where organization identified several specific policies that had discriminatory effect, including marketing of subprime loans, deployment of financial incentives, and lack of meaningful review of loan applications).

Loss Mitigation

Before HAMP, HARP and HAFA, consumers have had special protections available to them if they fall behind in their monthly mortgage payments for reasons beyond their control through if they have FHA, VA, Fannie Mae, and Freddie Mac insured loans. Generally, these borrowers

must be given an opportunity to resolve the delinquency in their mortgage payments through special accommodations. The consumer must be allowed to participate in this process in a meaningful way as a precondition to filing of a mortgage foreclosure lawsuit.

Federal Housing Act ("FHA") Loans

▪ It is the intent of the Department that no mortgagee shall commence foreclosure until the requirements of this subpart have been followed. 24 C.F.R. §203.500 (Mortgage Servicing Generally).

▪ HUD may prescribe conditions and requirements for the appropriate use of these loss mitigation actions, concerning such matters as owner-occupancy, extent of previous defaults, prior use of loss mitigation, and evaluation of the mortgagor's income, credit and property. 24 C.F.R. §203.501 (Loss mitigation).

▪ The mortgagee shall give notice to each mortgagor in default no later than the end of the second month of any delinquency in payments under the mortgage. Mortgagee is not required to send a second delinquency notice to the same mortgagor more often than once each six months. The mortgagee may issue additional or more frequent notices of delinquency at its option. 24 C.F.R. §203.602 (Delinquency notice to mortgagor).

▪ Mortgagees must pursue effective foreclosure prevention strategies and evaluate the particular circumstances surrounding the default; determine the borrower's capacity to pay the monthly payment amount or a modified payment amount; ascertain the reason for the default, and the extent of the borrower's interest in keeping the subject property. Mortgagee must make a reasonable effort to arrange a face-to-face meeting with the borrower before three full monthly installments are unpaid. 24 C.F.R. §203.604.

▪ Mortgagee must manage the mortgage as required by FHA's special foreclosure prevention workout programs which can include and allow for the restructuring of the loan to allow the borrower to pay out delinquent installments, for advances to bring the mortgage current or the temporary reduction or suspension of monthly payment to allow recovery from the specified hardship. Mortgagee is required under federal law to adapt its collection and loan servicing practices to the borrower's individual circumstances and to re-evaluate these techniques each month after default. 24 C.F.R. §203.605.

▪ Before initiating foreclosure, the mortgagee must ensure that all servicing requirements of this subpart have been met. The mortgagee may not commence foreclosure for a monetary default unless at least three full monthly installments due under the mortgage are unpaid after application of any partial payments that may have been accepted but not yet applied to the mortgage account. In addition, prior to initiating any action required by law to foreclose the mortgage, the mortgagee shall notify the mortgagor in a format prescribed by the Secretary that the mortgagor is in default and the mortgagee intends to foreclose unless the mortgagor cures the default. 24 C.F.R. §203.606 (Pre-foreclosure review).

▪ Further, mortgagees are required to take appropriate actions which can reasonably be expected to generate the smallest financial loss to the Department, including, but not limited to:

a. Deeds in lieu of foreclosure under 24 C.F.R. §203.357.
b. Pre-foreclosure sales under 24 C.F.R. §203.370.
c. Partial claims under 24 C.F.R. §203.414.
d. Assumptions under 24 C.F.R. §203.512.
e. Special forbearance under 24 C.F.R. §§203.471 and 203.614.
f. Recasting of mortgages under 24 C.F.R. §203.616.

VA Loans

▪ Mortgage must extend to borrower all reasonable means of forbearance, including an opportunity to apply for a mortgage foreclosure avoidance workout and a consideration of a temporary suspension of borrower's payments or extension of the loan to 38 U.S.C. §3703(a)(1)(A), 38 U.S.C. §3703(a)(2)(B) and 38 U.S.C. §3703(c)(1).

▪ The purpose of the VA Housing Loan Program is to enable veterans to obtain home loans and to minimize the risk of foreclosure and the loss of home ownership. U.S. v. Shimer, 367 U.S. 374, 383 (1961). 38 U.S.C. 36.4346(a) and the VA Handbook H26-94-1 requires Mortgagees to establish a delinquent loan servicing program which, among other things, provides a process to:

1. Have a collection staff trained in techniques of loan servicing and counseling delinquent borrowers, including the pursuit of alternatives to foreclosure available to counsel borrowers in their status as delinquent;
2. Have guidelines for individual analysis of delinquent borrowers;
3. Establish timely, helpful and responsive telephone contact with the delinquent borrowers to determine why payments were not made on the mortgage; alternatively, arrange a face-to-face interview with the delinquent borrower to solicit information to evaluate the prospects for curing the mortgage default including determining whether the granting of forbearance or other such relief would be appropriate to assist the borrower in avoiding foreclosure and avoiding the loss of home ownership by a veteran and that veteran's family;
4. Make a reasonable effort to determine the reason for the borrower's default and whether such reason is temporary or permanent, the income of the borrower and their monthly household and debt expenses and obligations leading to a realistic and mutually satisfactory arrangement for curing the default;
5. Employ collection techniques flexible to adapt to delinquent borrower's circumstances.

Fannie Mae, Freddie Mac

▪ Prior to foreclosure, the mortgagee must provide access to debt management and relief to borrowers facing temporary financial problems. Such relief must include, among other things, temporary indulgence, a liquidating plan, and special forbearance designed to avoid residential foreclosure of single family loans secured by and/or underwritten by Fannie Mae/Freddie Mac.

▪ Mortgagee must pursue effective foreclosure prevention strategies by evaluating the particular circumstances surrounding the borrower's default; the borrower's capacity to pay the monthly payment amount or a modified payment amount; ascertain the reason for the borrower's default, and the extent of the borrower's interest in keeping the property.

▪ Mortgagee must contact the borrower before the 30th day of the delinquency to evaluate foreclosure prevention strategies and must inform the borrower in writing about the applicable foreclosure alternatives in a timely fashion.

▪ Fannie Mae's special foreclosure prevention workout programs can include and allows for a restructuring of the loan allowing the borrower to pay out delinquent installments or advances to bring the mortgage current or to reduce or suspend the monthly mortgage payments for a specific period to allow the borrower time to recover from a financial hardship.

▪ Telephone Numbers - Fannie Mae - (404) 398-6000 - Freddie Mac - 1-800-FREDDIE

Conventional loans

The National Housing Act, 12 U.S.C. 1701x(c)(5) requires Mortgagees to advise borrowers of any home ownership counseling the Mortgagee offers together with information about counseling offered by the U.S. Department of Housing and Urban Development.

STATE CAUSES OF ACTION

The Florida Fair Lending Act (FFL)

This is Florida's version of the Federal Homeownership and Equity Protection Act. The Florida version also requires a right to cure and a limitation on attorneys fees in certain high-cost/high interest, non-purchase money mortgage loans. For loans whose fees exceed the "trigger" amount, FFL, like HOEPA, prohibits certain abusive terms relating to prepayment penalties, default interest rates, negative amortization and requires special "advance look" disclosures of the monthly payment and annual percentage rate, and prohibits the lender from engaging in a pattern or practice of lending without regard to the borrower's ability to repay.

§§494.0078 - 494.00797, Fla. Stat.
Liable Parties - Creditor (generally the original lender), assignee (consistent with 15 U.S.C. §1641)
Violations - Failure to disclose pre-consummation information and give conspicuous warning, inclusion of prohibited terms in transaction, pattern of making loans without regard to ability to repay, failure to provide the right to cure
No private right of action - Remedies provided under the FDUTPA for non-exempt entities
Limitations - Four years

Sample Case Law
Perter v. Ojeda, 902 So.2d 219 (Fla. 3rd DCA 2005) (FFL applies to personal, family and household loans, business loans are exempt from the FFL).

Florida Deceptive and Unfair Trade Practices Act (FDUTPA)

Florida's unfair and deceptive acts and practices statute broadly prohibits any unfair, deceptive, or unconscionable practice. Remedies provided include actual damages, injunctive and declaratory relief. Generally, insurance companies and banks and savings and loans associations are exempt. Violations of other listed consumer protection statutes may also be claimed as violations of the FDUTPA, §501.203(c)(3), Fla. Stat. Enhanced penalties can be assessed by the Attorney General's Office if the victim is elderly or handicapped. §501.2077, Fla. Stat.

§§501.201, et seq., Fla. Stat.
Violations - Unfair, deceptive and/or unconscionable acts or practices
Remedies - Injunctive relief, actual damages, declaratory judgment, attorney fees
Limitations - Four years
Sample of exclusions from coverage - Any person or activity regulated under laws administered by the Office of Insurance Regulation of the Financial Services Commission; banks and savings and loan associations regulated by the Office of Financial Regulation of the Financial Services Commission or by federal agencies.

Sample Case Law
Dept. of Legal Affairs v. Father and Son Moving & Storage, Inc., 643 So.2d 22 (Fla. 4th DCA 1994) (one's actions do not need to violate a specific rule or regulation in order to be considered deceptive under the FDUTPA).

Samuels v. American Legal Clinic, Inc., 176 B.R. 616 (M.B. Fla 1994) (violation of a consumer protection statute is a per se violation of the FDUTPA).

Florida Home Improvement Sales and Finance Act

This Chapter provides very specific protections to consumers, contains a number of disclosure requirements, provides a three-day right of rescission, and provides finance charge limitations. Unfortunately, this section does not provide a private right of action, but can be used to claim a violation of the FDUTPA.

§§520.60, et seq., Fla. Stat.
Liable Parties - Home Improvement Contract Seller - any person other than an employee of the owner who directly or indirectly enters into two or more home improvement contracts for more than $500.00 in one year. §520.61(13), Fla. Stat., See also §520.61(11), Fla. Stat. "home improvement" and §520.61(12), Fla. Stat., "home improvement contract."
Violations - Failure to maintain license, failure to give buyer a copy of the contract, failure to provide notice of the three day right of rescission, failure disclose specifically-designated materials terms of the contract and mortgage, failure to provide a completion certificate, to cancel the contract upon full payment and failure to credit owner for prepayment constitute violations.
No private right of action - Remedies provided under the FDUTPA for non-exempt entities

Sample Case Law

Gissendaner v. Rich, 365 So.2d 454 (Fla. 1st DCA 1978) (home improvement contractor could not prevail in mortgage foreclosure suit where he failed to obtain a signed completion certificate for repairs as required by FHISFA).

Florida Consumer Collection Practices Act ("FCCPA")

Similar to the Federal Fair Debt Collection Practices Act, the FCCPA is designed to address abusive collection practices, require registration of debt collectors and notice of assignment. The Florida law governs creditors and debt collectors.

§§559.55, et seq., Fla.Stat.
Liable Parties - Creditors and debt collectors
Violations - Specified abusive, deceptive, and unfair debt collection practices
Remedies - Actual damages and statutory damages up to $1,000, costs and attorney's fees
Limitations - 2 years from date on which the violation occurred

Sample Case Law

Sandlin v. Shapiro & Fishman, 919 F.Supp. 1564 (M.D. Fla. 1996) (allegations that law firm attempted to collect unauthorized pay off fee stated a cause of action)
Trent v. Mortgage Electronic Registration Systems, Inc., 618 F.Supp.2d 1356 (M.D. Fla.2007) (MERS did not violate FCCPA by referring to itself as a "creditor" in communications to borrowers prior to filing foreclosure suits, even if such references were technically not accurate)

Home Solicitation Sales Act

The Home Solicitation Sales Act requires home-improvement sellers to be licensed. It also provides a three-day right to cancel and prohibits certain illegal practices in connection with a home solicitation sale. There is no private right of action; however, a violation of the Act may be a violation of the FDUTPA. The Act exempts insurance sellers, sales made at fairs and motor vehicle "tent" sales.

§§501.021 - 501.055, Fla. Stat.

Liable Parties - "Home Solicitation Sale" - a broadly defined transaction valued at more than $25.00 when a personal solicitation takes place other than the seller's fixed-location, business establishment and the transactions is consummated away from this fixed location. §501.021(1), Fla. Stat.
Violations - Failure to be properly licensed and obtain a permit, failure to give buyer a copy of the written agreement, failure to provide notice of the three-day right of rescission and failure to rescind. Other specified practices are prohibited in connection with a home solicitation sale.
No private right of action - remedies provided under the FDUTPA for non-exempt entities, criminal penalties
Limitations - Four years for claims pursuant to the FDUTPA

Mortgage Brokers Act (MBA)

This Act requires the licensing of mortgage brokers, limits fees, prohibits specified practices, requires arbitration only if the borrower consents and requires mortgage brokers to disclose any conflicting interests. There are criminal penalties and borrowers have a private right of action for actual damages.

§§494.001, et seq. and 494.003, et seq., Fla. Stat.
Liable Parties - Brokers who offer, accept applications for, solicit, negotiate mortgage loans for another in anticipation of compensation. §494.001(3), Fla. Stat. Banks, FNMA, FHLMC and attorneys are exempt. §494.003, Fla. Stat.
Violations - Failure to become licensed and maintain records or to give proper disclosures, making "false promises" or misrepresentations and other specified prohibited, charging excessive fees
No private right of action - Remedies provided under the FDUTPA for non-exempt entities, criminal penalties (Four year statute of limitations)

Sample Case Law
Truitt v. Metropolitan Mortg. Co., 609 So.2d 142 (Fla. 4th DCA 1992) (statute of limitations did not bar mortgagor's action for violation of mortgagee's alleged fiduciary duty to disclose information adverse to mortgagor's interests where, if proved, allegations would amount to fraudulent concealment which would toll statute of limitations).

Mortgage Lenders Act (MLA)

This Act requires the licensing of mortgage lenders, addresses fees, requires certain actions when providing lock-ins and commitments, and requires audits by the Department of Financial Services. There are criminal penalties and borrowers have a private right of action for actual damages.

§§494.001, et seq. and 494.006 - 494.0077, Fla. Stat.
Liable Parties - Providers or servicers of mortgage loans for others for compensation. §494.001(4), (15), (25), (26), Fla. Stat. Banks, FNMA, FHLMC, VA, GNMA, purchase money lenders, and licensees under Chapter 516, Fla. Stat. are exempt. §494.006, Fla. Stat.
Violations - Failure to become licensed and maintain records, failure to give proper disclosures before accepting fees, failure to follow prescribed "lock in" policies, charging excessive fees
Remedies - Actual Damages (provides a "good faith" exception), criminal penalties
Limitations - None specified, probably four years

OTHER CLAIMS AND DEFENSES TO CONSIDER

Fair Housing Act, 42 U.S.C. §3601, et seq. This is often a reverse redlining claim. The homeowner must be:
1. A member of a protected class.
2. They must have attempted to engage in a real estate related transaction and qualified to do so.
3. And the lender must have refused to transact with them on fair terms.
4. And the lender must have continued to make loans to others with similar qualifications as the homeowner. However, if the lender initiates contact with the homeowner, the final requirement might not be necessary.

- Instruments Deemed Mortgages and the Nature of a Mortgage, § 697.12, Fla. Stat.
- Interest and Usury; Lending Practices, §687.12 Fla. Stat.
- Negligent/intentional misrepresentation
- Breach of Implied Warranty of Merchantability for Goods (in home improvement sale)
- Breach of Fiduciary Duty
- Fraud
- Unconscionability
- Unjust Enrichment
- Waiver
- Fraud in the Inducement

Non-GSE HAMP

Supplemental Directories 09-01 through 10-02,

Current through April 9, 2010

Making Home Affordable Program; aka; HAMP

Purpose:

The stated goal of HAMP is to stabilize the residential property market by minimizing foreclosures.

Method:

HAMP provides financial incentives to borrowers; servicers and investors to reduce monthly payment to 31% of borrower's total gross income, thereby reducing the likelihood of default by increasing the likelihood the borrower will be able to make each and every payment, as agreed, on time. Incentives of up to $5,000 for borrower, $4,500 for the servicer, and investor incentives largely dependants on the reduction in monthly mortgage payment ratio are available if the required conditions are met. Programs are available to both GSE (Government Sponsored Enterprise) and non-GSE loans. Though similar to the GSE modification process, the processes detailed here are applicable to non-GSE mortgages only.

For the various government-serviced or owned loans the following websites provide the applicable HAMP processes:

For the VA: www.homeloans.va.gov/valeri.htm.
For Fannie Mae: https://www.efanniemae.com/sf/guides/ssg/2009annlenltr.jsp?referrer=frpromo.
For Freddie Mac: http://www.freddiemac.com/singlefamily/makinghomeaffordable.html.
For FHA: http://www.hud.gov/offices/adm/hudclips/letters/mortgagee/2009ml.cfm.
For Rural development: http://www.rurdev.usda.gov/regs/an_list.html.

Within the umbrella of the program commonly called HAMP, there are several components:

- The basic HAMP, which is a modification of the first mortgage within specific parameters;
- 2MP, which is for the modification or extinguishment of second liens, and;
- HAFA which provides for a short sale or Deed in Lieu process for those borrowers ineligible for the modification of HAMP due to financial ineligibility.

With all of these programs, the program documents provide for instructions regarding the effect on and preparation of the IRS form 1099 and the borrower's credit report.

HAMP process:

1. Download and submit the Request for Modification and Affidavit (RMA) and Request for individual tax return transcript (4506-EZ). Available at: http://makinghomeaffordable.gov/requestmod.shtml.
2. Eligibility: mortgage payment, including; principal, interest, taxes, insurance and HOA fees, but not mortgage insurance, must be more than 31% of borrower's income pre-modification. Information and calculator tool available at: http://makinghomeaffordable.gov/payment_reduction_estimator.html.
3. Goal of modification: reduce monthly mortgage payment to no more than 31% of borrower income. Non-taxed income, including social security income, must be multiplied by 1.25 to estimate the monthly gross income. Supp Dir 09-07, page 3.
4. HAMP CPP funds are available to compensate the servicer for the portion of the rate reduction that results in a monthly payment reduction from 38% to 31%. The servicer/lender is NOT compensated for the reduction down to 38% or below 31%. HAMP Supplemental Directive 09-01, Introduction of the Home Affordable Modification Program (hereinafter referred to as Supp Dir 09-01) page 24, available at: https://www.hmpadmin.com/portal/programs/hamp/servicer.html. (Fannie Mae issues updates to the process and numbers those documents using the convention two digit year-sequential for year, so that 09-01 is the first in 2009, 09-10 the last, 10-01 the first in 2010, etc. This document references these supplements using the convention Supp Dir YY-## throughout. All can be accessed at the same website, https://www.hmpadmin.com/portal/programs/hamp/servicer.html.)

Other eligibility considerations:

1. Loan originated on or before January 1, 2009. Supp Dir 09-01, page 2.
2. No previous HAMP modification. Supp Dir 09-01, page 2.
3. Account is delinquent or default is reasonably foreseeable. Supp Dir 09-01, page 2.
4. Bankruptcy, and foreclosure filed allowed. Supp Dir 09-01, page 2.
5. Loan is for the borrower's principle residence, a one to four unit property. Supp Dir 09-01, page 2. Current principle balance must not exceed; 1 unit, $729,750; 2 units, $934,200; 3 units, $1,129,250; 4 units, $1,403,400. Supp Dir 09-01, page 3.
6. Before the final modification, the servicer must verify income and expenses. The servicer should use the borrower's tax return, credit report, pay stub, bank statements, and similar documents to verify. Supp Dir 09-01, page 5-8; Supp Dir 09-07, pages 4-5. Non-wage income of up to 20% may be declared and used for the modification calculation if it is less than 20% of the total income. Supp Dir 09-07, page 5. Effective June 1, 2010 income, occupancy and tax returns and/or IRS form 4506 must be submitted prior to consideration for a trial period plan. Supp Dir 10-01, page 1.
7. The borrower's credit bureau file must be updated by the servicer in compliance with HAMP requirements in Supplemental Directory 09-01, page 22 and all updates.

Steps servicer must take, in order:

1. Receive RMA, with hardship affidavit and 4506-EZ from borrower. Supp Dir 09-01, page 3. RMA documents income, all debt and hardship. Income is verified with recent tax documents, pay stubs with year to date information, other reliable third-party documentation. Supp Dir 09-01, page 5. The forms and processes were modified and standardized from multiple documents into fewer documents with Supp Dir 09-07. Borrower response times are also standardized with Supp Dir 09-07.
2. Verify monthly expenses. Obtain credit report for borrower or joint report for married co-borrowers. Supp Dir 09-01, page 10.
a. Monthly gross expenses equals the sum of: mortgage payment, taxes, property insurance, HOA fees, property assessments, mortgage insurance premium, subordinate mortgages, installment debts with more than 10 months payments remaining, student loans, any open end account, HELOC payment, alimony and child support, if more than 10 months remaining, car lease payment, negative rental property income, mortgage payment for second home. Supp Dir 09-01, page 11.
b. If the total monthly expenses (back-end ratio) is more than 55%, the servicer is required to send the Home Affordable Modification Program Counseling Letter. The letter notifies the borrower that they are required to work with a HUD-approved housing counselor to reduce total indebtedness to below 55%, and directs the borrower to HUD's website for additional information. Supp Dir 09-01, page 11.
3. All loans that meet the eligibility requirements and are in default or imminent default ***must*** be evaluated using a standardized NPV (Net Present Value) test that compares the cost to the lender if no modification is done, to the cost if a modification is done. The formula includes the potential amount of interest to be earned and the likelihood the property will be foreclosed, pre and post modification. Fannie Mae has a software application for servicers to use. Supp Dir 09-01, page 4.
Simplified, the formula compares the amount of money the bank could earn if the borrower paid off the current loan to the amount the bank could earn if the borrower pays the loan under HAMP modification terms and provides for a statistical discount for the likelihood the borrower will go into default.
4. If the NPV test indicates that the test is "positive", meaning the lender will make more money if the modification is done, after the reduced likelihood of foreclosure is factored in, the lender MUST offer a modification to the borrower. Supp Dir 09-01, page 4.
5. If the NPV test is "negative", meaning the lender will make more money if the modification is NOT done, even after the reduced likelihood of foreclosure is factored in, the lender may, but need not, offer the lender a modification. Supp Dir 09-01, page 4.
6. If the loan is adjustable, the monthly payment used for the NPV calculation is the current payment if the loan will not reset for at least 120 days. If the loan is scheduled to reset within 120 days, the higher amount of either the current rate or the fully amortizing monthly mortgage payment based on the note reset rate using the index value as of the date of evaluation. Supp Dir 09-01, page 6; Supp Dir 09-07, page 3. .

7. The servicer must maintain the NPV test documentation whether or not a modification is pursued. Supp Dir 09-01, pages 4, 13-4; Supp Dir 09-06, page 2.

8. Servicer must verify income and that borrower is the occupant of the subject residence. Supp Dir 09-01, page 8. The credit report is sufficient to verify that the property is the borrower's principal residence, unless it reveals inconsistencies. Supp Dir 09-07, page 4.

9. Servicer may NOT require an up front cash contribution other than the trial period payment to be considered for HAMP. Supp Dir 09-01, page 6; Supp dir 09-07, page 3.

10. All loans will have a fixed interest rate, fully amortizing loan. (no balloon payment, with an exception, noted below) Supp Dir 09-01, page 9.

11. The servicer should request Government Monitoring Data, information on race, ethnicity and sex, from all borrowers participating in HAMP. The information is so that HUD may track modifications and monitor compliance with Federal laws prohibiting discrimination and also consumer protection laws. The borrower may opt out. Supp Dir 09-02, page 1.

12. In order to facilitate compliance with the Fannie Mae requirement that all loans participating in a Trial Period Plan are setup within its system no later than the fourth of the month in which the plan is to take effect, effective dates for Trial Period Plans sent after the 15th of the month will have an effective date of the 1st of the month after next. So that modifications sent on June 10 will have an effective date of July 1, but modifications sent on June 16 will have an effective date of August 1. Supp Dir 09-03, page 1.

To Modify, in order, AKA "The waterfall":

1. Capitalize accrued interest and required escrow advances and payments made to third parties if allowed by law and not retained by the servicer. Supp Dir 09-01, page 9. (This makes it part of the new principle balance. Attorney fee, and/or foreclosure filing fee would be third party fees)
2. Late fees may NOT be capitalized and MUST be waived if the borrower satisfies the conditions of the trial period plan. Supp Dir 09-01, pages 9, 22.
3. Interest rate should be lowered in increments of .125 until the monthly payment is as close as possible, without going under 31%. The interest rate floor is 2%. Supp Dir 09-01, page 9.
4. Extend the term of the loan up to 480 months from the modification date. If the PSA (Pooling and Servicing Agreement) does not allow for terms of 480 months, calculate the payment using an amortization schedule of up to 480 months with a balloon payment due at maturity. Supp Dir 09-01, page 9.
5. If the payment is still above 31%, the servicer must provide principal forbearance. The principal forbearance amount is non-interest bearing and non-amortizing. It will be due at the earlier of: borrower transfers the property, interest bearing principle is paid off, loan matures. Supp Dir 09-01, pages 9-10.
6. There is NO requirement to *forgive* principle under HAMP. Servicers may elect to forgive principal. Principal forgiveness does not alter the steps in the waterfall procedure. Supp Dir 09-01, page 10.
7. If the mortgage was assumable, the borrower agrees the HAMP modification cancels the assumability feature.
8. All HAMP modified mortgages must include an escrow account unless prohibited by state law. The servicer is responsible for managing the escrow account for payment of property insurance, taxes, HOA fess, etc., as applicable. Supp Dir 09-01, pages 2, 11.

Compliance requirements

1. Servicer must comply with local, state and federal laws and case law. Supp Dir 09-01, page 12. Including;
    a. Prohibition against unfair or deceptive trade practices, section 5 Federal Trade Commission Act.
    b. Compliance with Equal Credit Opportunity Act, and Fair Housing Acts. Prohibit discrimination based on race, gender, religion, marital status, handicap, or receipt of public assistance. Also prohibit redlining.
    c. Compliance with RESPA and FDCPA.

Other relevant information

1. Servicer should follow existing modification process, *unless borrower specifically asks* about a HAMP modification. Supp Dir 09-01, page 13.
2. If the borrower specifically requests HAMP modification, the servicer must apply the NPV test. Supp Dir 09-06 page 1.
3. Servicer should provide clear, written explanation of proposed changes, including notification that HAMP modification will cancel any assumption feature or variable or step-rate interest features. Supp Dir 09-01, page 13.
4. Servicer is required to retain all documentation received and the internally generated information about the HAMP modification for seven years. This includes information and documents concerning eligibility via "the waterfall", any trial period or other payments and calculations of potential incentives, whether a final HAMP modification is approved or denied. Supp Dir 09-01, pages 13-4.
5. Servicers should NOT proceed with a foreclosure sale during the HAMP application and eligibility process, or during the Trial Period Plan. Foreclosure sales are suspended during the Trial Period Plan, unless specific criteria are met- Trial Period Plan payments not made. Supp Dir 09-01, Page 14.
6. A servicer should not offer a HAMP modification if there is reasonable evidence the borrower submitted false information or otherwise engaged in fraud related to the modification. Supp Dir 09-01, page 8; Supp Dir 09-07, page 6.
7. Fannie Mae will establish a fraud detection procedure using reported trial period data. If potential misrepresentations or discrepancies are found, the servicer will be notified and required to resolve the discrepancy before the final modification is executed. Supp Dir 09-07, page 6,
8. Unless the parties are divorced, or deceased, all parties who signed the original loan documents must execute the HAMP documents. A new co-borrower may be added. Supp Dir 09-01, page 16.
9. Servicers may use verbal information to prepare the Trial Period Plan offer until May 31, 2009. Supp Dir 09-01, pages 5, 17; Supp Dir 09-07, page 2, Supp Dir 10-01, page 1. Effective June 1, 2010 servicers must receive the "Initial Package" of RMA, IRS 4506 and income verification prior to offering a trial period plan. Supp Dir 10-01, page 1.
10. Servicers may require documentation to verify income prior to extending a HAMP modification offer, and will be required to do so after June 1, 2010. Supp Dir 10-01, page 1. In all cases, income documentation must not be more that 90 days old when the offer is evaluated. Supp Dir 09-07 page 2.
11. **Effective JUNE 1, 2010** servicers may only offer a trial period plan after the receipt of the "Initial Package", which includes the hardship affidavit, IRS 4506-T, or 4506T-EZ tax release and other documents to verify the borrower's income, occupancy and debt. The verbal process is ending May 31, 2010. Supp Dir 10-01, page 1.
12. Within 10 days of the receipt of borrower financial information the servicer must either; offer a Trial Period Plan using the stated income, provide the forms for written documentation if the servicer is using verified income only, or provide documentation explaining why the borrower is not eligible for HAMP and providing information on other foreclosure prevention options. Supp Dir 09-07 page 7.
13. Within 10 days of receiving the initial package from the borrower, the servicer must acknowledge receipt of the package in writing. If the package was submitted via email, acknowledgement may also be via email. Supp Dir 10-01, page 2.
14. Within 30 days of the receipt of receiving the RMA and all supporting documents to verify income, debt and occupancy status, (the Initial Package") servicer must send either a verified Trial Period Plan, or provide notification that the HAMP modification has been approved pending receipt of all TPP payments, or provide notification that a HAMP modification is not available and offer other available foreclosure prevention alternatives. Supp Dir 09-07, page 7, Supp Dir 10-01, pages 2-3.
15. Within 30 days of the receipt of the initial package the servicer must review for completeness. If the package is incomplete a specific "Incomplete information notice" must be sent. The notice must include a list of required but missing documents, and a date by which the information must be received, which must allow at least 30 days for response. If the information is not received by

the date specified, the servicer must send a follow up notice allowing at least 15 days additional time to provide the documentation. If the borrower still fails to comply, the servicer may declare the loan ineligible for HAMP. The determination that the loan is ineligible must also be communicated to the borrower. Supp Dir 10-01, page 2.

16. To qualify for a final modification, the borrower must have made all Trial Period Plan payments within 30 days of the final due date. The Trial Period Plan is to be 3 months, unless the existing mortgage or servicer contract requires a longer trial. Supp Dir 09-01, page 17.
17. Servicers are encouraged to require automated payments of Trial Period Plan payments. If the servicer requires automated payments, it must be used by all HAMP borrowers. The borrower may opt out. Supp Dir 09-01, page 17.
18. If the borrower reported income is more than 25% lower than the actual verified income, the servicer must recalculate HAMP eligibility but need NOT restart the trial period. Supp Dir 09-01, pages 17-8.
19. If the borrower reported income is 25% more than the actual verified income, the servicer must recalculate HAMP eligibility and must restart the trial period. Supp Dir 09-01, pages 17-18.
20. If the borrower is no longer HAMP modification eligible as a result of the above recalculations, the servicer should consider eligibility for other foreclosure prevention alternatives. Supp Dir 09-01, page 18.
21. If the servicer finds reasonable evidence that the income information was false or fraudulently provided, it should not offer a HAMP modification. Supp Dir 09-07, Page 6.
22. The servicer should follow investor guidelines to ensure the modified mortgage retains its first lien status. Supp Dir 09-01, page 19.
23. If the loan modification includes a principal forbearance, the servicer is encouraged, but not required to include that amount on the borrower's statement. Supp Dir 09-01, page 19.
24. The servicer should also provide monthly updates regarding the accrual of principal balance reduction payments earned as a result of timely payments in compliance with HAMP guidelines. Supp Dir 09-01, page 19. This is money from TARP funds that reduces the borrower's principal balance up to $1000 per year for five years ($5,000 max) as a reward for making all payments on time. Supp Dir 09-01, page 24.
25. If a borrower misses three payments, (three payments are due and unpaid on the last day of the third month) the loan is no longer in "good standing". Good standing cannot be restored, even if the default is cured and payments are made. If good standing is lost, the loan is no longer eligible for borrower, servicer or investor incentives. The mortgage is NOT eligible for another HAMP modification. Supp Dir 09-01, page 19.
26. Servicers must have registered with Fannie Mae on or before December 31, 2009 to participate in HAMP. Supp Dir 09-02 page 1. Fannie Mae requires the servicer provide accurate loan data periodically. Data is to be reported to Fannie Mae at the beginning of the modification period, during the trial period, when the final modification is approved and each month ongoing. Supp Dir 09-01, pages 19-20.
27. The servicer should begin the Trial Period and begin reporting to Fannie Mae once the first trial period payment is received, even if the Trial Period Plan has not been executed and the borrower as not yet submitted income verification. Supp Dir 09-03, page 2. **This provision will be modified beginning in June 2010. Additional details forthcoming from Supp Dir 10-01.
28. If the loan is not eligible for HAMP modification solely because of a negative NPV, inadequate income or other financial reason, the loan may be reconsidered for HAMP modification if the borrower's circumstances change. Supp Dir 10-01, page 4.

ADDITIONAL RESPONSE AND VERIFICATION PROCEDURES

1. Additional data collection and reporting requirements will become effective for loans evaluated, modified or declared ineligible after December 1, 2009. The Supplement includes clarification and examples of data required to be collected and how to report it to Fannie Mae, via Schedule IV. Supp Dir 09-06, pages 1-3.
2. **A HAMP modification evaluation must be performed if**; a borrower submits a written request for consideration of a HAMP modification, or, the borrower submits sufficient financial information for the servicer to complete the NPV analysis, or, the borrower is offered a Trial Period Plan.

Supp Dir 09-08, page 2. The verbal option will end in June 2010, and all TPP's will be based on verified income. Supp Dir 10-01.

3. **If a borrower is evaluated for HAMP but not offered a TPP or official modification**, the servicer must comply with Supp Dir 09-06 and submit documentation to the new schedule IV within the Fannie Mae program and send an appropriate notice to the borrower. Supp Dir 09-08, page 2.
4. If a borrower evaluated for HAMP is not offered a TPP, not offered an official HAMP modification, (after or during the TPP), or is at risk of losing eligibility for HAMP for having failed to provide the necessary documentation, the servicer MUST SEND a notice to the borrower. Supp Dir 09-08, page 1.
5. **Borrower notices must be mailed with 10 days** of the servicer determination that a TPP or official modification will not be offered. Notices must be clear and non-technical with any acronyms or industry terms fully explained. The notice should relate to the reason code from the schedule IV. The Supp Dir offers optional model phrases. The notice must provide the reason or reasons the TPP or official HAMP modification was not offered. If the offer is not made because the loan is NPV test negative, the notice must explain NPV and identify the fields that were determinative. The notice must state that the borrower, or authorized representative, has 30 days to request the specific data input for those fields. The servicer then has 10 days to provide the information. Supp Dir 09-08 pages 2-3.
6. If a foreclosure sale is scheduled, it may not proceed until 30 days after the data is delivered to the borrower. This provides time for the borrower to dispute any errors. If the borrower provides written evidence that one or more fields of NPV data were incorrect, the servicer must verify, and if true, re-run the NPV calculation if it could change the NPV outcome. If the borrower demonstrates inaccuracies in the NPV data, any foreclosure sale must be suspended pending reconciliation. Supp Dir 09-08, page 3.
7. Beginning December 23, 2009 servicers were to review all accounts currently in modification and by January 31, 2010 confirm the status as current or not current. Servicers were to obtain any missing documentation and transition all current participants who were otherwise qualified to permanent modifications by January 31 or within 30 days, whichever was later. Supp Dir 09-10.

HAMP Incentives available

1. Incentives exist for borrower, servicer and investor to modify the mortgage to an affordable level, and keep the modified payments current. Supp Dir 09-01, page 22.
2. For any party to qualify for incentive payments, pre-modification monthly mortgage payment must have exceeded 31% ***and*** post-modification monthly mortgage payments must be at least 6% lower than pre-modification. Supp Dir 09-01, pages 22-3.
3. Total funds available are subject to a cap pursuant to the servicer's agreement with Treasury under the Servicer Participation Agreement. Supp Dir 09-01, page 23.
4. If the borrower's loan ceases to be in "good standing" (three monthly payments are due and unpaid on the last day of the third month) the servicer, borrower and investor are **no longer eligible for incentive payments**. Supp Dir 09-01, pages 19, 22.
5. **Borrower's incentive:** if the monthly mortgage payment is reduced by at least 6%, and the borrower makes all monthly payments on time, the borrower will earn a reduction in the unpaid principal balance. The reduction amount is the lesser of $1,000 or half the reduction in monthly payment, annualized. The reduction can be earned for up to five years, for a total maximum unpaid principal balance reduction of $5,000 over 5 years. Supp Dir 09-01, page 24.
6. **Servicer's incentive:** the servicer will receive $1,000 compensation for each completed HAMP modification. If the borrower was current on the pre-modification loan, the servicer will receive an additional $500. This incentive is payable when the trial period is complete and a final modification is entered and the servicer has completed the Fannie Mae Servicer Participation Agreement. Supp Dir 09-01, page 23.
7. In addition to the one-time payments available, there are "pay for success" payments available to servicers. If the monthly mortgage payment is reduced by 6% or more, the servicer will receive the lesser of $1,000 or half the reduction in monthly payment annualized. The fee is payable annually for three years after the anniversary of the Trial Period Plan execution. Supp Dir 09-01, page 23.

8. **Investor's incentive:** if the target monthly payment ration is achieved (31% of monthly gross income), investors in non-GSE mortgages are entitled to compensation. The amount of compensation is one-half the difference between the monthly payment post-modification and the lesser of either the pre-modification mortgage payment or the what the payment would be at a 38 % monthly payment ratio. The compensation shall accrue monthly for the earlier of; five years, or until the loan is paid off. Supp Dir 09-01, page 24.
9. In addition to accrued compensation payments, the investor will receive a one-time incentive of $1,500 for each modification executed with a borrower who was current prior to the start of the Trial Period Plan, if the reduction is equal to at least 6% of the borrower's monthly mortgage payment ratio, if the Trial Period Plan is successfully completed. Supp Dir 09-01, page 24.
10. An additional program to provide incentives to **investors** to reduce monthly payments to affordable levels was introduced in September of 2009. Called the ***Home Price Decline Protection*** (HPDP), incentive, it is particularly targeted at those homes in areas where property values have fallen and are expected to continue to fall. This program, like the original HAMP, requires that the servicer have executed a servicer participation agreement and that the borrower have successfully completed the trial period, and be in good standing. To be eligible, the loan payments must have been reduced by at least 6% through a HAMP modification. Supp Dir 09-04, page 1-2.
11. Calculation for the amount of eligible incentive through HPDP is automatic and is a part of the NPV, net present value test, which is required at the beginning of the modification process. Three factors are used: 1. the estimated loss in value over the next year, based on value changes in the last two quarters, 2. the unpaid principal balance when the modification occurred, and 3. the MTM-LTV ratio of the loan. This is a measure of what percentage of the current market value is owed, and may reveal that a homeowner is "underwater' and owes more in principal than the home is currently worth on the open market. Whether and how much home prices have declined is determined by the Federal Housing Finance Agency using regional data. Supp Dir 09-04, pages 2-3. The Federal Housing Finance Agency at: http://www.fhfa.gov/Default.aspx?Page=14 has a house price decline calculator available that calculates current value based on price paid, date purchased and purchase amount.
12. The amount of HPDP incentive available is paid annually, over two years, if the mortgage continues to be eligible. Each month earns $1/24^{th}$ of the total available. As with most other incentives, if the loan is paid off or the borrower falls behind and is no longer in good standing, as Fannie Mae defines it, the incentives will stop. Supp Dir 09-04, page 3. The amount of incentive, if any, will vary depending on how much principal is owed, whether and how much home prices have declined in the MSA (Metropolitan Service Area), and the percentage of value to unpaid principal. Amounts will range from zero to several thousand dollars. The specific calculation will be performed by Fannie Mae's NPV application that should have been used at the outset of the HAMP modification process.

Second Lien Modification Program, (2MP)

1. As a supplement to HAMP, the Treasury announced the 2MP in August of 2009. Under this program, borrowers who have a second lien on the primary residence may be eligible for relief of those payments if the first lien has been modified under HAMP. Supp Dir 09-05, page 1.
2. Treasury is establishing a database, called Lender Processing Services (LPS) designed to connect the servicers of HAMP modified first mortgages with the participating servicers of eligible second liens. If both liens are serviced by the same servicer, the servicer should not wait for notification from LPS, but immediately put the 2MP process into place for the second lien. Supp Dir 09-05, pages 3, 8.
3. The borrower will have to consent to the servicer of the first mortgage sharing financial and mortgage data from the HAMP for the servicer of the second lien to apply the 2MP process. The RMA is being modified so that separate consent will not be necessary. Supp Dir 09-05, page 4.
4. The modification process of the second lien is similar to that used in the HAMP. First, the principal, unpaid interest and third party fees are capitalized. Any late fees and penalties must be waived. Then the interest rate is lowered to 1% if the principal is fully amortized or 2% if 50% or

more of the principal balance is interest only. After 5 years, the interest rate will adjust up to the level of the first lien under HAMP. Principal forbearance should be at the same ratio as occurred on the first lien. Principal forgiveness is allowed, but not required. All loans will become closed end. All open lines of credit, such as HELOC will be closed. If the pooling and servicing agreement prohibits modification, the investor must seek approval for an exception and if state law allows, may modify without investor approval. Supp Dir 09-05, pages 4-7.

5. The 2MP is based on the HAMP figures and so cannot begin until after the HAMP Trial Period modification has begun. The 90 day trial period for 2MP can be waived if the payments are current at the time the 2MP modification begins and the new monthly payment is the same as or less than the old contractual payment before 2MP. The 2MP modification can not be effective until after the Trial Period Plan for the HAMP is completed in good standing. Supp Dir 09-05, pages 7-8.
6. If the borrower does not execute and return the 2MP trial period plan with 30 days the servicer may retract the offer and is not required to offer another modification. Supp Dir 09-05, page 9.
7. Like HAMP, servicers are required to be registered with Fannie Mae and report account information monthly after the end of the trial period. Servicers are also required to retain all documentation in support of either extending, or declining to extend a 2MP offer to all serviced borrowers. Compliance and review is administered by Fannie Mae using the same requirements and methods as the HAMP. Supp Dir 09-05, pages 12, 14.

The borrower's credit bureau file must be updated by the servicer in compliance with HAMP requirements

8. The borrower's credit bureau file must be updated by the servicer in compliance with the 2MP requirements as detailed in Supplemental Directory 09-05, pages 13-4.

Incentives Available Under 2MP

1. Incentives are available for borrower, servicer and the investor/lender. Accrual for incentives will begin after the end of any trial period, when the modification is in place. Supp Dir 09-05, pages 12-3.
2. Incentives will no longer accrue if either the 1st HAMP lien, or the 2nd 2MP lien ceases to be in good standing or the loan is paid in full. Like HAMP, good standing is lost if three consecutive payments are missed. If the borrower loses good standing, the eligibility for incentive payments is lost, cannot be regained, and the loan is not eligible for another 2MP modification. Supp Dir 09-05, pages 14-5.
3. **Servicer incentives:** The servicer will receive $500 for each modification under 2MP. The servicer may also receive "pay for success" payments of $250 per year for three years if the borrower remains in good standing and the loan has not been paid in full. Supp Dir 09-05, page 15.
4. **Borrower incentives:** The borrower will receive "pay for performance" reductions to the unpaid principal balance of the first mortgage loan (not the 2nd mortgage loan) in the amount of $250 per year for 5 years after the modification effective date so long as the HAMP *and* the 2MP loans remain in good standing and are not paid in full. This is in addition to the "pay for performance" payments that may be available for the original HAMP loan. Supp Dir 09-05, page 15.
5. **Investor incentives:** The investor will receive compensation according to a formula with 2 options. The payments will accrue beginning the effective date of the 2MP, and will be paid monthly for five years so long as the HAMP and 2MP modified payment accounts remain in good standing and has not been paid in full. Supp Dir 09-05, pages 15-6.

Extinguishment option

1. Extinguishment is an alternative to modification of the second lien. It allows the unpaid principal of the second lien to be sold to the Fannie Mae HAMP program at a significant discount. Once the loan is extinguished, the servicer and lender must cease any an all collection actions, notify the borrower the loan is charged off and update the borrower's credit report[s] with the notation "Cancelled; account charged off". To qualify, the first line must have undergone HAMP modification, and the servicer must participate in the 2MP program. All figures use the values and calculations of the original HAMP modification.

2. In recognition of the statistical likelihood that the second lien on a house that has declined in value and has undergone first lien modification may never be paid, and that the likelihood of traditional payoff method declines with both higher loan to value ratios, higher back-end ratios (total indebtedness) and with every missed monthly payment, the available payoff is calculated on a sliding scale. The payoff ranges from $.03 on the dollar for those accounts more than 6 months in arrears, to a maximum of $.12 on the dollar for those loans deemed to be less risky by virtue of lower debt ratios, fewer missed payments and lower loan to value ratios.
3. If mortgage insurance exists, the insurer must give approval for extinguishment. Compliance and documentation requirements are essentially the same as those under HAMP. Supp Dir 09-05, pages 17-20.

HOME AFFORDABLE FORECLOSURE ALTERNATIVES, HAFA

Supplemental Directive 09-09, effective 04-05-2010

1. Both suggested and required forms for this program are attached to the directive as exhibits and attachments, after the primary document, beginning after page 15.
2. HAFA is part of HAMP and provides incentives for servicers and borrowers to pursue a short sale or Deed-in-Lieu (DIL) instead of a foreclosure judgment. Page 1.
3. As with all of the HAMP programs, non-GSE servicers must have chosen to participate in HAMP and have executed the servicer participation agreement to qualify for the financial incentive payments. Pages 1-2.
4. Borrower must be evaluated for HAMP before being considered for Short Sale, DIL, etc. Page 3.
5. The financial evaluation for HAMP is sufficient for the HAFA evaluation. Page 3.
6. HAFA is designed to create alternatives for borrowers who are HAMP eligible. The basic eligibility for HAFA is the same as that for HAMP; primary residence, first lien, delinquency provisions, income to monthly mortgage ratio and monetary amounts for the lien are all the same. Page 3.
7. If a servicer is participating in HAFA the servicer MUST: (Page 3)
    a. Release the borrower from any future liability for the debt secured by the mortgage.
    b. NOT require a reduction in the estate commission agreed upon at listing.
    c. Create a written policy describing the conditions under which borrowers will be considered for HAFA.
        i. These guidelines, the policy and formula to be applied, including the minimum net proceeds the lender will accept, must be uniform for all loans the servicer services. Page 5.
    d. Evaluate for HAMP before giving the borrower HAFA options.
    e. Offer HAFA within 30 days of: (Page 4)
        i. Determining that the borrower does not qualify for the HAMP modification.
        ii. Borrower fails to complete a Trial Period Plan.
        iii. Borrower becomes 60 days delinquent on a Trial Period Plan
        iv. Borrower requests information on DIL or short sale.
8. The servicer should obtain an appraisal and review title to confirm the borrower will be able to convey clear marketable title. Fees for these services may not be collected in advance but may be added to the outstanding debt of the borrower. Page 5.
9. If the servicer determines that short sale or DIL is not available, that information must be communicated to the borrower in writing with an explanation of why DIL or short sale can not be offered and a toll free number for the borrower to call to discuss the decision. Page 5. These notices must comply with supplemental directive 09-08 that requires, among other things, that notices provide clear, non-technical reasons for decisions. Page 5.
10. The borrower's credit bureau file must be updated as stipulated on pages 13-4 of Supplemental Directory 09-09.

The process for Short Sale Agreement (SSA)

1. The servicer must send the borrower the SSA which lays out the rules and processes, and describes the information the servicer will need to consider the short sale. The SSA will include a

blank copy of the Request for Approval for Short Sale (RASS). When the borrower has an offer on the house, they or the real estate agent will complete the RASS and send it, with a copy of the sales contract to the servicer for approval. Page 6.

2. The SSA is essentially a contract that describes the terms and conditions under which the servicer will accept a short sale. It describes the minimum amount of proceeds the servicer will accept by itemizing the kinds and amounts of costs to be charged to the borrower, which include closing costs, balance due on subordinate liens, real estate commission, etc., that will deducted from the gross proceeds. It also includes notices about the financial, tax and credit score consequences of a short sale and must include the terms under which the offer can be terminated by the servicer. Page 6-7.
3. The SSA must be effective for at least 120 days and may be extended by the servicer for up to 12 months. Page 6.
4. The property must be listed with a local real estate agent who must include in the listing and sales agreements a clause notifying the prospective purchaser that the sale is contingent on approval by the servicer. Page 6.
5. Acceptance of a short by the servicer will release the borrower from any unpaid liability related to the mortgage at closing. Page 6.
6. During the listing period the monthly mortgage payment must be no more than 31% of the borrower's gross monthly income and the servicer must not complete a foreclosure sale if the borrower is complying with the terms of the SSA. Pages 6-7.
7. **The servicer may terminate the SSA if**; the borrower or the listing agent fails to act in good faith in listing, marketing or closing the sale, the borrower's finances improve so that they qualify for a HAMP modification or bring the account current, the borrower files for bankruptcy and the bankruptcy court does approve the SSA, litigation occurs or is threatened that could affect the title or conveyance, or the borrower fails to make an agreed upon monthly mortgage payment, so long as the amount is not in excess of 31% of the borrowers gross monthly income. Pages 7-8, 10.
8. Within three days of an executed offer, the borrower or real estate agent must submit to the servicer the RASS with the sales contract. Page 8.
9. Within 10 days of receiving the RASS and required supporting documents the servicer must approve or disapprove of the sale, sign the RASS and mail it back to the borrower. Page 8.
10. If the terms of the sales contract meets the servicers terms in the SSA, the servicer MUST APPROVE the RASS. Page 8.
11. If a borrower requests a short sale prior to the servicer executing the SSA the borrower must use the alternative RASS. Basic HAMP eligibility requirements still apply and the borrower must be evaluated for a HAMP modification (using the same income, verification procedure, hardship affidavit, etc., as used with HAMP) if that had not been done previously. If the borrower qualifies for HAMP the servicer must notify the borrower and allow 14 days for the borrower to decide whether or not to accept a modification offer. Page 8.
12. If the borrower elects to continue with the short sale process, the servicer must apply the same written policy it developed for all short sales within HAFA to determine eligibility and approval. Page 8.
13. A borrower may NOT participate in a HAMP modification and HAFA simultaneously. Pages 8-9.
14. During the HAFA process the servicer may choose to begin the foreclosure process, but MAY NOT complete a sale; while determining eligibility, while processing a RASS, during the period of the SSA (a minimum of 120 days), during the period between sale and closing if a short sale has been negotiated and approved or pending transfer of property ownership by DIL or approved short sale. Page 10.
15. The servicer must release the lien within 10 days after receiving the proceeds of an approved short sale or the deed if a DIL. Servicer must NOT require the borrower to sign a promissory note for any deficiency. Page 10.
16. The servicer may not charge the borrower any administrative fees for participating in HAFA, though some are eligible to be added to the debt owed if a DIL or short sale is completed. Servicers may require borrowers to waive return of unused escrow and assign the property insurance. Pages 10-11.

17. Servicers must use the forms and documents provided in the supplemental directive and keep the documents and information for 7 years, in compliance with the larger HAMP program. This information must be transmitted to Fannie Mae as required and is subject to audit. Page 12.

DEED IN LIEU (DIL)

1. If the servicer chooses to accept a DIL they must agree to a full release of the debt and waive all claims against the borrower. Page 9.
2. The borrower must agree to leave on an agreed upon date, leave the house broom clean and convey clear, marketable title. Page 9.
3. Servicers may choose, but are not required, to require the borrower have made a good faith effort to sell the house, using the SSA process, before accepting a DIL. Page 9.

INCENTIVES

1. Incentives are available to the borrower and servicer, so long as there are no proceeds from the short sale. Page 11.
2. Upon successful completion of a short sale or DIL, the servicer will advance to the borrower $1,500 in relocation assistance. The payment must be made at closing if the borrower has already vacated, or within 5 days after the borrower vacates the property. The amount must appear on the HUD-1 prepared by the servicer for the borrower. Page 11.
3. The servicer will be reimbursed for the $1,500 advance. The servicer will also receive a $1,000 incentive to cover administrative costs associated with the short sale or DIL. Page 12.
4. If the investor allows the distribution of proceeds to subordinate lien holders the investor will be reimbursed at the rate of 1:3 so that a payment of $1,000 to a subordinate lien holder to secure a release would result in a reimbursement of $300 and a payment of $3,000 would result in a $1,000 reimbursement. The maximum amount of subordinate lien holder release reimbursement available is $1,000. Page 12.

New HAMP Supplemental Directive 10-02

1. Effective June 1, 2010, HAMP Supp. Dir. 10-02 addresses the problem of foreclosure referrals and proceedings continuing during HAMP review, borrower solicitation for HAMP, reasonable efforts by the servicer to contact investors and requirements of HAMP consideration for borrowers in bankruptcy.

Foreclosures

2. Servicers may not refer a loan to foreclosure until the borrower's eligibility is determined or reasonable efforts at solicitation have failed. "Reasonable efforts at solicitation" is defined as at a minimum of over 4 phone calls at different times of the day and two letters, one sent with confirmation of receipt and one sent regular mail over a 30 day period.

3. If a homeowner is turned down for a modification and is sent the mandatory "non-approval notice," there should be an additional 30 days, in most cases, after the non approval notice is sent before the loan can be sold at a foreclosure sale. The exceptions include an ineligible mortgage, borrower withdrawal or failure of the borrower to make payments under their trial or permanent HAMP modification plan.

4. Borrowers in a current trial modification plan based on verified income and the loan had already been referred to foreclosure all foreclosure activity in the case must stop. Prior to June 1, 2010, these loans could proceed to the point of foreclosure.

5. Servicers are allowed to require borrowers to provide modification documents seven business days before a scheduled foreclosure sale in order to stop the sale. Servicers can also impose special requirements (such as express mail) for requests received 30 days before a scheduled foreclosure sale.

6. The servicer must provide the Plaintiff's attorney a certification of HAMP compliance at least seven business days before the foreclosure sale.

Bankruptcy

1. Servicers are required not merely allowed "at their discretion" to consider a HAMP modification.

2. Borrowers in an active Chapter 7 or Chapter 13 bankruptcy case must be considered for HAMP if the borrower, borrower's counsel or bankruptcy trustee submits a request to the servicer.

3. Borrowers in a trial period plan who file a bankruptcy case may not be denied a permanent HAMP modification on the basis of the bankruptcy filing.

4. The servicer and its counsel must work with the borrower or borrower's counsel to obtain any court or trustee approvals of the modification as required by local court rules and procedures. If additional time is needed to obtain the necessary approvals, the servicer should extend the trial period plan for up to an additional two months (resulting in a total five-month trial period).

5. A servicer must not object to confirmation of a borrower's plan, move for automatic stay or move for dismissal of the Chapter 13 case based upon the borrower's payment of only the trial period plan payments rather than the scheduled mortgage payments.

6. Borrowers who have received a Chapter 7 discharge and did not reaffirm the mortgage debt are still eligible for HAMP. The following language must be added to the modification agreement: "I was discharged in a Chapter 7 bankruptcy proceeding subsequent to the execution of the Loan Documents. Based on this representation, Lender agrees that I will not have personal liability on the debt pursuant to this Agreement."

7. Borrowers in bankruptcy may submit copies of the bankruptcy schedules and tax returns filed in the case in lieu of the RMA and Form 4506T-EZ for determination of eligibility as long as they are not more than 90 days old.

8. HAMP eligible Chapter 13 borrowers who are eligible for HAMP may be converted to a permanent modification without completing a trial period plan if: they make all of the post-petition payments on the mortgage to be modified and at least three of those payments are equal to or greater than the proposed modified payment; the modification is approved by the bankruptcy court, if required; and the trial period plan waiver is permitted by the applicable investor guidelines.

-- Prepared by Deanna Blair and Lynn Drysdale

Understanding the Mortgage Crisis and the Players

By Margery E. Golant, Esq.

Properly litigating a foreclosure case, whether you represent the Plaintiff or Defendant, entails understanding the underpinnings, the players and the issues. In order to properly respond, in order to propound appropriate discovery and in order to defend at trial, it is essential to be comfortable with how the mortgage industry functions. The most important, and unfortunately often the worst-understood issues, relate to the securitization process and the roles of the various participants.

WHAT IS SECURITIZATION ?

- A securitization is a pool of assets having an income flow, all of which belong to a special purpose entity created for the sole purpose of owning the assets
- Investors buy shares in the pool, which entitles them to shares owning various rights relative to the income and the loans themselves. There are usually many different configurations and risk profiles of the shares. The differing categories are called "tranches".
- Securitizations are designed to be "bankruptcy remote" from any failures or claims against the original owners of the assets or the parties having roles connected with the securitization.
- Securitizations purchase their assets from prior owners through a series of conveyances. The funding of the securitization is generally accomplished by means of the sale of securities (the differing bonds and tranches).
- Most residential mortgages are securitized, either in private securitizations or in pools created by Fannie Mae or Freddie Mac.
- Mortgage backed securitizations are normally trusts. They are established and operated via a series of contracts between the Depositor/Issuer, the Trustee, the Servicer and the investors. There are usually other parties to the contracts, including insurors, sub-servicers, and risk managers.
- In private label securitizations, the primary document is usually called a Pooling and Servicing Agreement. When the trust was created by Fannie Mae or Freddie Mac, the primary document is called a Master Trust Agreement. I have included the title page of one of these as an Exhibit to these materials
- Each such trust has a Trustee. However, the Trustee does not deal with the loans that comprise the assets of the trust – this is delegated to one or more Servicers.
- Securitizations operate as REMICS (Real Estate Mortgage Investment Conduits).
- Maintenance of REMIC status allows the securitization to avoid federal taxation – they are pass-through entities.
- Often securitizations are "wrapped" by insurance, in order to improve the credit quality of bonds. The object is for the A level bonds to have AAA ratings.
- The bonds are rated by the rating agencies (Standard & Poor's, Moody's and Fitch)

- Virtually all assets with income streams are securitized, such as auto loans, student loans, even lottery winnings.
- During this decade, virtually all residential and most commercial mortgages were securitized and elected REMIC status.
- The government-sponsored entities, Federal National Mortgage Association (FNMA) and the Federal Home Loan Mortgage Corporation (Freddie Mac) sponsored and insured many securitizations.
- Others are "private label securitizations" created and insured solely by private interests.
- It is arguable whether, in the current scenario, securitizations can legitimately claim to be holders in due course.

Examples of the roles involved in the securitization process

- **ORIGINATORS** - There were two channels of origination, wholesale and retail. Most loan origination companies had both a wholesale and retail division, originated loans themselves at retail and through mortgage brokers at wholesale, which brokers marked up and then sold to consumers. Some of the best known were Countrywide, Washington Mutual, New Century, Wachovia
- **MORTGAGE BROKERS** – Independent contractors who solicited borrowers to enter into loans, then "shopped" the loans across a selection of wholesale lenders, looking for the easiest and most profitable loan.
- **AGGREGATORS / ISSUERS** – These were often the large money-center banks and other major financial services firms such as Lehman Brothers and Morgan Stanley.
- **TRUSTEES** – In most cases, the deals engaged banks to act as trustees of the special purpose entities. Frequent players are Bank of New York, US Bank, DeutscheBank.
- **SERVICERS** – Most people think these are their mortgage companies. They are the "property managers" of the process, taking monthly payments, taking borrower calls, sending bills, checking on taxes, insurance, dunning late payers, making the referral to foreclosure, supervising the foreclosure and handling the sale of the property after foreclosure. In many cases, they are subsidiaries of the aggregators / investors. Examples are Aurora Loan Servicing (Lehman), Saxon (Morgan Stanley), Litton Loan Servicing (originally a subsidiary of Credit-Based Asset Servicing and Securitization LLC, later bought by Goldman, Sachs), Ocwen Loan Servicing (independent), GMAC, Wells Fargo, Chase, CitiMortgage. Servicers are normally compensated per month per loan and do not own any bonds or interests in the underlying mortgages.
- **INVESTORS / BONDHOLDERS** – Usually large institutional investors, such as hedge funds, insurance companies, mutual funds, pension funds, foreign governments.
- The documents by which loans are conveyed along the path from origination to securitized trust include numerous representations and warranties. Some of these relate to the parties themselves, their authority and financial soundness, some of these relate to the relationships among the parties, and some relate to the loans themselves. I have included below examples from an actual pooling and servicing agreement of loan-related representations and warranties

which are reasonably typical. If you look over the representations and warranties included here, you will quickly realize that many/most of the properties which are the subject of foreclosure are not compliant with all of them. The obvious intention was to create pools of loans which were legally sound and legally and regulatorily compliant, to which the Seller had undisputed title, on properties which had clear title, had appropriate insurance, appropriate loan to value ratios, sound mortgage underwriting and in all other ways were valid, enforceable and appropriate collateral for the mortgage debts they secured. However, for the reasons included above, there is extensive failure of these representations and warranties.

"Representations and Warranties – Mortgage Loans

- DLJMC, in its capacity as Seller, hereby makes the representations and warranties set forth in this Schedule III to the Depositor and the Trustee, as of the Closing Date, or the date specified herein, with respect to the Mortgage Loans identified on Schedule I hereto.

(i) The Seller or its affiliate is the sole owner of record and holder of the Mortgage Loan and the indebtedness evidenced by the Mortgage Note.

Immediately prior to the transfer and assignment to the Depositor on the Closing Date or the Subsequent Transfer Date, as applicable, the Mortgage Loan, including the Mortgage Note and the Mortgage, were not subject to an assignment or pledge, and the Seller had good and marketable title to and was the sole owner thereof and had full right to transfer and sell the Mortgage Loan to the Depositor free and clear of any encumbrance, equity, lien, pledge, charge, claim or security interest and has the full right and authority subject to no interest or participation of, or agreement with, any other party, to sell and assign the Mortgage Loan and following the sale of the Mortgage Loan, the Depositor will own such Mortgage Loan free and clear of any encumbrance, equity, participation interest, lien, pledge, charge, claim or security interest.

(ii) Any and all requirements of any federal, state or local law including, without limitation, usury, truth-in-lending, real estate settlement procedures, consumer credit protection, equal credit opportunity or disclosure laws applicable to the Mortgage Loan have been complied with in all material respects.

(iii) The terms of the Mortgage Note and the Mortgage have not been impaired, waived, altered or modified in any respect, except by written instruments which have been recorded to the extent any such recordation is required by law, or, necessary to protect the interest of the Depositor. No instrument of waiver, alteration or modification has been executed, and no Mortgagor has been released, in whole or in part, from the terms thereof except in connection with an assumption agreement and which assumption agreement is part of the Mortgage File and the terms of which are reflected in the Mortgage Loan Schedule; the substance of any such waiver, alteration or modification has been approved by the issuer of any related Primary Insurance Policy and title insurance policy, to the extent required by the related policies.

(iv) The Mortgage Loan complies with all the terms, conditions and requirements of the originator's underwriting standards in effect at the time of origination of such Mortgage Loan.

(v) The information set forth in the Mortgage Loan Schedule, attached to the Agreement as Schedule I, is complete, true and correct in all material respects as of the Cut-off Date.

(vi) With respect to any first lien Mortgage Loan, the related Mortgage is a valid, subsisting, enforceable and perfected first lien on the Mortgaged Property and, with respect to any second

lien Mortgage Loan, the related Mortgage is a valid, subsisting, enforceable and perfected second lien on the Mortgaged Property, and all buildings on the Mortgaged Property and all installations and mechanical, electrical, plumbing, heating and air conditioning systems affixed to such buildings, and all additions, alterations and replacements made at any time with respect to the foregoing securing the Mortgage Note's original principal balance. The Mortgage and the Mortgage Note do not contain any evidence of any security interest or other interest or right thereto. Such lien is free and clear of all adverse claims, liens and encumbrances having priority over the first or second lien, as applicable, of the Mortgage subject only to (1) with respect to any second lien Mortgage Loan, the related First Lien, (2) the lien of non-delinquent current real property taxes and assessments not yet due and payable, (3) covenants, conditions and restrictions, rights of way, easements and other matters of the public record as of the date of recording which are acceptable to mortgage lending institutions generally and either (A) which are referred to or otherwise considered in the appraisal made for the originator of the Mortgage Loan, or (B) which do not adversely affect the appraised value of the Mortgaged Property as set forth in such appraisal, and (4) other matters to which like properties are commonly subject which do not materially interfere with the benefits of the security intended to be provided by the Mortgage or the use, enjoyment, value or marketability of the related Mortgaged Property. Any security agreement, chattel mortgage or equivalent document related to and delivered in connection with the Mortgage Loan establishes and creates (1) with respect to any first lien Mortgage Loan, a valid, subsisting, enforceable and perfected first lien and first priority security interest and (2) with respect to any second lien Mortgage Loan, a valid, subsisting, enforceable and perfected second lien and second priority security interest, in each case, in an estate in fee simple in real property securing the related Mortgage Note, and the Seller has the full right to sell and assign the same to the Depositor;

(vii) There are no mechanics' or similar liens or claims which have been filed for work, labor or material (and no rights are outstanding that under law could give rise to such liens) affecting the related Mortgaged Property which are or may be liens prior to or equal to the lien of the related Mortgage.

(viii) All taxes, governmental assessments, insurance premiums, water, sewer and municipal charges, leasehold payments or ground rents which previously became due and owing have been paid, or escrow funds have been established in an amount sufficient to pay for every such escrowed item which remains unpaid and which has been assessed but is not yet due and payable.

(ix) The Mortgage Note and the Mortgage are not subject to any right of rescission, set-off, counterclaim or defense, including, without limitation, the defense of usury, nor will the operation of any of the terms of the Mortgage Note or the Mortgage, or the exercise of any right thereunder, render the Mortgage Note or Mortgage unenforceable, in whole or in part, or subject to any right of rescission, set-off, counterclaim or defense, including the defense of usury, and no such right of rescission, set-off, counterclaim or defense has been asserted with respect thereto.

(x) The Mortgaged Property is not subject to any material damage by waste, fire, earthquake, windstorm, flood or other casualty. At origination of the Mortgage Loan there was, and there currently is, no proceeding pending for the total or partial condemnation of the Mortgaged Property.

(xi) All improvements subject to the Mortgage which were considered in determining the appraised value of the Mortgaged Property lie wholly within the boundaries and building

restriction lines of the Mortgaged Property (and wholly within the project with respect to a condominium unit) and no improvements on adjoining properties encroach upon the Mortgaged Property except those which are insured against by a title insurance policy and all improvements on the property comply with all applicable zoning and subdivision laws and ordinances.

(xii) Seller has delivered or caused to be delivered to the Trustee or the Custodians on behalf of the Trustee the original Mortgage bearing evidence that such instruments have been recorded in the appropriate jurisdiction where the Mortgaged Property is located as determined by the Seller (or, in lieu of the original of the Mortgage or the assignment thereof, a duplicate or conformed copy of the Mortgage or the instrument of assignment, if any, together with a certificate of receipt from the Seller or the settlement agent who handled the closing of the Mortgage Loan, certifying that such copy or copies represent true and correct copy(ies) of the originals) and that such original(s) have been or are currently submitted to be recorded in the appropriate governmental recording office of the jurisdiction where the Mortgaged Property is located) or a certification or receipt of the recording authority evidencing the same.

(xiii) The Mortgage File contains each of the documents specified in Section 2.01(b) of the Agreement.

(xiv) As of the Closing Date, each Mortgage Loan shall be serviced in all material respects in accordance with the terms of the Agreement.

(xv) All buildings or other customarily insured improvements upon the Mortgaged Property are insured by an insurer acceptable under the FNMA Guides, against loss by fire, hazards of extended coverage and such other hazards as are provided for in the FNMA Guides or by FHLMC, as well as all additional requirements set forth in this Agreement. All such standard hazard policies are in full force and effect and on the date of origination contained a standard mortgagee clause naming the Seller and its successors in interest and assigns as loss payee and such clause is still in effect and all premiums due thereon have been paid. If at the time of origination, the Mortgage Loan was required to have flood insurance coverage in accordance with the Flood Disaster Protection Act of 1973, as amended, such Mortgage Loan is covered by a flood insurance policy meeting the requirements of the current guidelines of the Federal Insurance Administration which policy conforms to FNMA and FHLMC requirements, as well as all additional requirements set forth in this Agreement. Such policy was issued by an insurer acceptable under FNMA or FHLMC guidelines. The Mortgage obligates the Mortgagor thereunder to maintain all such insurance at the Mortgagor's cost and expense, and upon the Mortgagor's failure to do so, authorizes the holder of the Mortgage to maintain such insurance at the Mortgagor's cost and expense and to seek reimbursement therefor from the Mortgagor.

(xvi) With respect to each Mortgage Loan that has a Prepayment Premium feature, each such Prepayment Premium is enforceable and each Prepayment Premium is permitted pursuant to applicable federal, state and local law, subject to federal preemption where applicable.

(xvii) As of the Cut-off Date, approximately 1.0% of the Mortgage Loans are at least 30 days delinquent but not more than 59 days delinquent and approximately 0.2% of the Mortgage Loans are at least 60 days delinquent but not more than 89 days delinquent (based on the Aggregate Loan Balance as of November 1, 2005 and the amount deposited to the Prefunding Account on the Closing Date). None of the Mortgage Loans are greater than 89 days delinquent.

(xix) The Mortgage Note and the related Mortgage are original and genuine and each is the legal, valid and binding obligation of the maker thereof, enforceable in all respects in accordance with its terms subject to bankruptcy, insolvency, moratorium, reorganization and other laws of general application affecting the rights of creditors and by general equitable principles.

(xx) To the knowledge of the Seller, (i) no Mortgage Loan contemplated under the terms of this Agreement is covered by the Home Ownership and Equity Protection Act of 1994 or any comparable state law, (ii) no proceeds from any Group I Mortgage Loan contemplated under the terms of this Agreement were used to finance single-premium credit insurance policies, (iii) no subprime Group I Mortgage Loan originated on or after October 1, 2002 will impose a Prepayment Premium for a term in excess of three years, no Group I Mortgage Loan originated prior to such date, and no non-subprime Group I Mortgage Loan, will impose a Prepayment Premium in excess of five years,

(iv) the related Servicer for each Group I Mortgage Loan has fully furnished, in accordance with the Fair Credit Reporting Act and its implementing regulations, accurate and complete information on its borrower credit files to Equifax, Experian and Trans Union Credit Information Company on a monthly basis, (v) no Group I Mortgage Loan secured by a Mortgaged Property located in the State of Georgia was originated on or after October 1, 2002 and before March 7, 2003, no Group II Mortgage Loan secured by a Mortgaged Property located in the State of Georgia, originated on or after October 1, 2002 and before March 7, 2003 is subject to the Georgia Fair Lending Act (HB 1361), and no Mortgage Loan secured by a Mortgaged Property located in the State of Georgia, originated on or after March 7, 2003 is a "high cost home loan" as defined in the Georgia Fair Lending Act (HB 1361), as amended and (vi) each Group I Mortgage Loan has an original principal balance that conforms to Fannie Mae and Freddie Mac guidelines.

(xxi) Each Mortgage Loan at the time it was made complied in all material respects with applicable local, state, and federal laws, including, but not limited to, all applicable predatory and abusive lending laws.

(xxii) No Mortgage Loan secured by a Mortgaged Property located in the State of New York, for which a loan application was submitted on or after April 1, 2003, is a "high-cost home loan" as defined in the New York Assembly Bill 11856.

(xxiii) No Mortgage Loan is classified as (a) a "high cost mortgage" loan under the Home Ownership and Equity Protection Act of 1994 or (b) a "high cost home," "covered," "high cost," "high risk home" or "predatory" loan under any other applicable state, federal or local law.

(xxiv) With respect to any Mortgage Loan originated on or after August 1, 2004, either (a) the related Mortgage and the related Mortgage Note does not contain a mandatory arbitration clause (that is, a clause that requires the related Mortgagor to submit to arbitration to resolve any dispute arising out of or relating in any way to the Mortgage Loan) or (b) the related Mortgage and the related Mortgage Note contained a mandatory arbitration clause as of the related origination date and such clause has or will be waived by the originator or an entity designated by the Seller in writing no later than sixty (60) days after the related Closing Date which notice included or will include the following language: "WE ARE HEREBY NOTIFYING YOU THAT THE MANDATORY ARBITRATION CLAUSE OF YOUR LOAN, REQUIRING THAT YOU SUBMIT TO ARBITRATION TO RESOLVE ANY DISPUTE ARISING OUT OF OR RELATING IN ANY WAY TO YOUR MORTGAGE LOAN, IS IMMEDIATELY NULL AND VOID. YOU ARE FREE TO CHOOSE TO EXERCISE ANY OF YOUR RIGHTS OR ENFORCE ANY REMEDIES UNDER YOUR

MORTGAGE LOAN THROUGH THE COURT SYSTEM." A copy of the written notice referred to in the immediately preceding sentence, if applicable, shall be retained in the related Mortgage File.

(xxv) The Seller has complied with all applicable anti-money laundering laws and regulations, including without limitation the USA Patriot Act of 2001.

(xxvi) No Mortgage Loan originated on or after November 27, 2003 will be subject to the New Jersey Home Ownership Security Act of 2003.

(xxvii) No Mortgage Loan is a "High Cost Loan" or "Covered Loan", as applicable, as such terms are defined in the then current Standard & Poor's LEVELS® Glossary, which is now Version 5.6(c) Revised, Appendix E, in effect as of the Closing Date or as of the related Subsequent Transfer Date, as applicable."

Federal Funds Rates
1955-2009
From the Federal Reserve

Instrument, Federal funds
Maturity, Overnight
Frequency, Annual
Description, federal funds effective rate
Note: The daily effective federal funds rate is a weighted average of rates on brokered trades.
Note, weekly figures are averages of seven calendar days ending on Wednesday of the current week; monthly figures include each calendar day in the month.
Note: Annualized using a 360-day year or bank interest.

DATE FFO	DATE FFO	DATE FFO
1955, 1.79	1973, 8.74	1991, 5.69
1956, 2.73	1974, 10.51	1992, 3.52
1957, 3.11	1975, 5.82	1993, 3.02
1958, 1.57	1976, 5.05	1994, 4.21
1959, 3.31	1977, 5.54	1995, 5.83
1960, 3.21	1978, 7.94	1996, 5.30
1961, 1.95	1979, 11.20	1997, 5.46
1962, 2.71	1980, 13.35	1998, 5.35
1963, 3.18	1981, 16.39	1999, 4.97
1964, 3.50	1982, 12.24	2000, 6.24
1965, 4.07	1983, 9.09	2001, 3.88
1966, 5.11	1984, 10.23	2002, 1.67
1967, 4.22	1985, 8.10	2003, 1.13
1968, 5.66	1986, 6.80	2004, 1.35
1969, 8.21	1987, 6.66	2005, 3.22
1970, 7.17	1988, 7.57	2006, 4.97
1971, 4.67	1989, 9.21	2007, 5.02
1972, 4.44	1990, 8.10	2008, 1.92
		2009, 0.16

WHAT WENT WRONG / WHERE DID THE MORTGAGE CRISIS COME FROM ?

IN A NUTSHELL, *EVERYTHING*. THERE WERE BREAKDOWNS IN EVERY STEP AND PIECE OF THE PROCESS, WHICH WORSENED AS DEMAND FOR LOANS TO SECURITIZE INTENSIFIED AND ORIGINATION VOLUME INCREASED. AS A RESULT, THE SECURITIZATIONS BECAME A WITCHES' BREW OF TOXIC ELEMENTS:

- The Glass-Steagall Act, (the Banking Act of 1933), which had required the separation of banking operations between business types (commercial and investment banking) was repealed in 1999 by the Gramm-Leach-Blyley Act. Glass-Steagall had been enacted to manage risk after the breakdowns associated with the Great Depression. Glass-Steagall also created the Federal Deposit Insurance Corporation, which insured bank deposits and restored confidence in the soundness of the banking system.

- Repeal of Glass-Steagall resulted in significant changes in the banking industry, particularly commercial banks. Their new willingness to incur new risk was not understood by consumers, who continued to perceive banks as conservative and risk averse, and therefore reliable. Accordingly, many consumers incurred debt in reliance on the fact that banks' willingness to make the loans was indicative of soundness and reasonableness of the loan terms, not realizing that the scene had changed drastically and that the lenders would not be holding the loans themselves so had no interest in their soundness.

- The Federal Reserve lowered interest rates dramatically, apparently to keep the economy growing after the setbacks of the dot.com collapse and the 9-11 terrorist attacks. As a result, liquidity was abnormally large in 2002-2004. In 2004, the Fed began raising rates, triggering rate changes in adjustable rate mortgages which were tied to Fed. Funds rates. See Slide #13 for a year by year listing of the Fed funds rate.

- Excessive and inappropriate use of subprime products became widespread, aggravated by borrower misunderstanding of the risks involved, and compounded by sloppy lending practices. Subprime loans had been conceived for borrowers with lower quality credit. They had evolved as a mechanism for more Americans to own homes. Subprime loans were much easier for brokers and originators to get approved, bypassed normal underwriting standards, and entailed more profit than conventional loans due to higher interest rates and prepayment penalties. However, originators and brokers sold these loans to many borrowers who could have obtained conventional financing (source: Federal Reserve Bank of New York Staff Reports – "Understanding the Securitization of Subprime Mortgage Credit, p. 77) and oversold them inflated principal amounts, lending more money than borrowers could pay back".

- New "exotic" loans became available, such as interest only financing, adjustable rate mortgages, "piggyback" 80/20 loans, 120% loans. Inappropriate and inadequate underwriting at origination became the norm. In essence, they "threw away the rulebook". "Stated income" and "low doc" loans became commonplace, anyone could get a mortgage in virtually any amount. Virtually all of these loans were securitized.

- Since loans were now originated for sale, no longer for retention in originators' portfolios, originators knew that the risk of default was passed on to the ultimate purchasers. While theoretically the sellers incur repurchase risk, this was rarely invoked. In addition, the ultimate

bankruptcies and FDIC takeovers of many of the originators eliminated repurchase as an avenue of recourse in many cases. The soundness of the loans became irrelevant.

- Fraud and lack of standardization or regulation of the origination process. Borrowers had no meaningful way to compare loan products or to understand what they were being offered. This was exacerbated by bait and switch and what came to be known in the industry as "ambush closing" where borrowers were surprised at the last minute with drastically different loan terms, and in non-escrowed loans to cover obligations for property taxes and insurance. Origination fraud and appraisal fraud became commonplace, rife with kickbacks, flips, excessive appraisals, forged documents, resulting in loans which were significantly undersecured at best. While appraisers and originators were theoretically subject to regulatory control, little or none was exercised. The topic of mortgage fraud will be addressed in a separate presentation here today.

- Careless and non-compliant origination and closing, including lien priority failures, Truth in Lending violations, bait and switch and a general "free for all" environment. These defective and noncompliant loans made their way into securitizations, due to a general lack of due diligence and scrutiny of any kind. Once securitized, they could not help but fail.

- Many borrowers received loans with no regard for their ability to repay them. There was no external regulation or supervision of the honesty or propriety of the origination process.

- Legal and regulatory breakdown in the licensure of originators and mortgage brokers. For example, in Florida mortgage brokers license were issued to numerous individuals with records of felony convictions. Virtually all loans originated by mortgage brokers were destined for securitizations.

- Lack of accountability. Originators sold loans that were invalid, not supported by the represented property values; not supported by the represented incomes / ability to pay, and in various other ways not validly originated. Representations and warranties comparable to those in Slides 11-12 were part of every transaction, yet many loans were not compliant. Aggregators /depositors failed to "scrub" the loans for compliance, relying exclusively on unverified and marginally enforceable representations and warranties, and then in turn making representations and warranties concerning the loans which were likewise unverified and at times wholly untrue.

- Overvaluation of the collateral in the up trending market. Many of the properties were significantly overvalued even at origination. Easy loan terms, low interest rates and fraud fed a frothy market, resulting in an escalating price bubble, even further removed from real values.

- Rating agency failures. The agencies were hired and paid by each deal's issuer to rate the deal, and were expected to deliver an AAA rating, or risked the loss of future lucrative engagements, so had an obvious lack of objectivity and inherent conflict of interest. The ratings were based on the apparent underpinnings of the deal (i.e. property values and creditworthiness of the payors), which were not tested.

- Lack of equity cushion compounded by significant market decline built a trap for investors and borrowers from which neither could escape, making default and loss inevitable.

- Inability and unwillingness of servicers to manage large numbers of defaulted loans. When the deals were made, default percentages were low. Servicers calculated their profitability based on assumptions of low default rates, computerized management of loans in most instances, and were not eager to drastically increase their staffs to handle the burgeoning numbers of defaults.

- A lack of understanding by borrowers, servicers, attorneys, judges and regulators of the securitized model and the roles of the various participants led to confusion and difficulty applying the law of negotiable instruments , ineffective efforts to address the resulting issues and problems.

- Conflicts of interest among different tranches of investors; between servicers and clients; between trusts and originators. Since servicers do not own the loans, they do not receive any economic incentive from minimization of ultimate loss. They are paid per month per loan, so the more loans they have in their servicing portfolios, the more their compensation. They are also paid more per loan for loans in default than for performing loans, on the theory that loans in default entail more work. However, they then attempt to maximize profitability by "production line" servicing , entailing call centers, often offshore, long hold times, minimal interaction with borrowers, and only cursory interaction with the foreclosure law firms. Servicers are also usually entitled to retain the late fees and junk fees (i.e. property inspection, appraisal, payoff statement fees, etc.), and generally benefit from "force-placed" insurance premiums, which motivates them to keep loans in default.

- Robotic foreclosure processing, by law firms paid small flat fees per case.

- Insufficient market for foreclosed properties. As the numbers of defaulted and foreclosed loans increases, they drag down further all home prices, putting an increasing number of borrowers underwater, making it increasingly impossible for homeowners to sell homes they think they will be unable to afford, or must leave for some reason.

In order to litigate cases related to these loans, it is necessary to understand where the particular loan fits in the scheme of things. Is it claimed by Fannie or Freddie or a private securitization, or much more infrequently, is it a whole loan (a loan completely owned by one party, not involved in one of these mortgage pools) ? Who is the real party in interest ? Was the loan properly conveyed to the claimant ? Who is the loan servicer ? What errors have been made, if any, in the origination process, the conveyance process, the servicing process, the foreclosure process ? Does the situation qualify for any potential resolution scenarios ?

SUGGESTED FURTHER READING FOR THOSE INTERESTED

- **Basics of Fannie Mae MBS** http://www.fanniemae.com/mbs/mbsbasics/remic/index.jhtml?p=Mortgage-Backed+Securities&s=Basics+of+Fannie+Ma

- **Ashcraft and Schuermann, Understanding the Securitization of Subprime Mortgage Credit,** http://www.newyorkfed.org/research/staff_reports/sr318.pdf

- **Reiss, Subprime Standardization: How Rating Agencies Allow Predatory Lending To Flourish In The Secondary Mortgage Market**, Florida State University Law Review [Vol. 33:985]

- **Peterson, Predatory Structured Finance,** 2186 Cardozo Law Review [Vol. 28:5:2007] Electronic copy available at http://ssrn.com/abstract=929118

- **Demyanyk and Van Hemert, Understanding the Subprime Mortgage Crisis,** Electronic copy available at: http://ssrn.com/abstract=1020396

FEDERAL NATIONAL MORTGAGE ASSOCIATION
("FANNIE MAE")

as

Issuer, Master Servicer, Guarantor and Trustee

SINGLE-FAMILY MASTER TRUST AGREEMENT

for

GUARANTEED MORTGAGE
PASS-THROUGH CERTIFICATES

evidencing undivided beneficial interests in

POOLS OF RESIDENTIAL MORTGAGE LOANS

June 1, 2007

CREDIT SUISSE FIRST BOSTON MORTGAGE SECURITIES CORP

CREDIT SUISSE FIRST BOSTON MORTGAGE ACCEPTANCE CORP.,

Depositor

DLJ MORTGAGE CAPITAL, INC.,

Seller

OCWEN LOAN SERVICING, LLC,

Servicer

WELLS FARGO BANK, N.A.,

Servicer

SELECT PORTFOLIO SERVICING, INC.,

Servicer and Special Servicer

CLAYTON FIXED INCOME SERVICES INC.,

Credit Risk Manager

and

U.S. BANK NATIONAL ASSOCIATION,

Trustee

POOLING AND SERVICING AGREEMENT

Dated as of November 1, 2005

Home Equity Asset Trust 2005-9

HOME EQUITY PASS-THROUGH CERTIFICATES, SERIES 2005-9

Table of Contents

Ninth Judicial Circuit Foreclosure Division Benchbook

NINTH JUDICIAL CIRCUIT
FORECLOSURE DIVISION BENCHBOOK

TABLE OF CONTENTS

ANNOUNCEMENT
NON-COMMERCIAL FORECLOSURE CASES - ORANGE COUNTY
NEW PROCEDURES STARTING JULY 6, 2010

Starting July 6, 2010, all non-commercial foreclosure matters in Orange County will be heard by two specific subdivisions labeled Foreclosure Division A and Foreclosure Division B. These subdivisions will be manned by Senior Judges and will be dedicated solely to non-commercial foreclosure matters including residential and timeshare foreclosures. Commercial foreclosure matters will remain with the current civil divisions.

Both divisions will hear non-commercial foreclosure matters on Mondays, Tuesdays, Thursdays and Fridays in two sessions: 9:00 a.m. to noon and 1:30 p.m. to 3:00 p.m. Timeshare foreclosures only will be heard on Wednesdays, from 9:00 a.m. to noon. Wednesday afternoons are reserved for scheduled contested hearings.

Specific division cases will be assigned to either Division A or B and will be heard only on certain days as follows:

Division A Mondays - Division 32A cases
Tuesdays - Division 34 cases
Thursdays - Division 37 cases
Fridays - Division 40 cases

Division B Mondays - Division 33 cases
Tuesdays - Division 35 cases
Thursdays - Division 39 cases
Fridays - Division 43A cases

Each law firm may set twenty (20) cases per session, i.e., 20 cases in the morning and 20 cases in the afternoon each day. Law firms are encouraged to set cases during both the morning and the afternoon sessions. The cases will be heard on a first come, first served basis.

Timeshare foreclosure cases will be heard Wednesdays from 9:00 a.m. to noon. Divisions 32A, 34, 37, and 40 cases will be heard by Foreclosure Division A; divisions 33, 35, 39 and 43A timeshares will be heard by Foreclosure Division B. Wednesday afternoons are reserved for scheduled contested hearings.

Foreclosure Division A proceedings will be held in Hearing Room 1100.01 of the Orange County Courthouse before Presiding Judge Foreclosure A.

Foreclosure Division B proceedings will be held in Hearing Room 1100.02 of the Orange County Courthouse before Presiding Judge Foreclosure B.

If you presently have foreclosure hearings scheduled after July 6, 2010, in the regular civil divisions, please be advised that the hearings will need to be re-set in the Foreclosure Divisions A and B. You will need to re-notice those hearings for a day/division as applicable from the list above.

In order to reschedule cases currently set after July 6, 2010, please contact the Judicial Assistant for the applicable division to reschedule any contested hearings. Hearing times will be available via JACs listed under the titles, Foreclosure Division A and Foreclosure Division B. After June 28th, administrative staff assigned specifically to Foreclosure Divisions A and B will handle scheduling. Contact information for the administrative staff for Foreclosure Divisions A and B will be released as soon as the information is available.

No hearings will be held the week of July 26th.

In the meantime, if you have any questions, please contact the Judicial Assistant for the division to which the case is assigned.

Circuit Foreclosures									
	2002	2003	2004	2005	2006	2007	2008	2009	2010
Jan	513	547	423	355	348	661	1587	2392	2092
Feb	514	472	425	313	427	631	1781	2373	2277
Mar	462	442	419	374	442	692	1971	2941	1693
Apr	417	428	380	306	323	721	2073	2921	1583
May	488	410	280	379	360	729	2114	2831	1428
Jun	467	399	323	321	368	781	2303	2739	
Jul	445	445	375	332	347	972	2186	2862	
Aug	486	420	300	343	445	1058	2420	2389	
Sep	441	410	287	344	506	1031	2686	2552	
Oct	498	443	347	238	494	1355	2823	2455	
Nov	456	329	355	304	510	1349	1838	2135	
Dec	515	429	303	364	497	1371	2349	2718	
TOTAL	5,702	5,174	4,217	3,973	5,067	11,351	26,131	31,308	9,073

Westlaw

West's Florida Statutes Annotated Currentness
Title XL. Real and Personal Property (Chapters 689-724)
➞ Chapter 702. Foreclosure of Mortgages, Agreements for Deeds, and Statutory Liens (Refs & Annos)
➞ **702.01. Equity**

All mortgages shall be foreclosed in equity. In a mortgage foreclosure action, the court shall sever for separate trial all counterclaims against the foreclosing mortgagee. The foreclosure claim shall, if tried, be tried to the court without a jury.

VALIDITY

<The amendment to this section by Laws 1987, c. 87-217, § 2, was found to be a unconstitutional by the Florida Supreme Court in Haven Federal Savings & Loan Association v. Kirian, 579 So.2d 730 (1991). See, Notes of Decisions, Validity.>

702.02. Repealed by Laws 1971, c. 71-5, § 4, eff. Jan. 1, 1972

702.021. Repealed by Laws 1971, c. 71-5, § 4, eff. Jan. 1, 1972

702.03. Certain foreclosures validated

All mortgage foreclosures heretofore made, or now pending, wherein there has been annexed to the bill of complaint in such cause, an uncertified copy of the mortgage, as provided by chapter 12095, Acts of 1927, entitled: "An act to amend section 3845 RGS relating to complaint in foreclosure of mortgages" are hereby validated and confirmed insofar as they relate to the copy of the mortgage attached to such complaint, to the same extent and effect as if section 3117, RGS, had been expressly repealed by chapter 12095, 1927, entitled: "An act to amend section 3845 RGS relating to complaint in foreclosure of mortgages."

702.035. Legal notice concerning foreclosure proceedings

Whenever a legal advertisement, publication, or notice relating to a foreclosure proceeding is required to be placed in a newspaper, it is the responsibility of the petitioner or petitioner's attorney to place such advertisement, publication, or notice. For counties with more than 1 million total population as reflected in the 2000 Official Decennial Census of the United States Census Bureau as shown on the official website of the United States Census Bureau, any notice of publication required by this section shall be deemed to have been published in accordance with the law if the notice is published in a newspaper that has been entered as a periodical matter at a post office in the county in which the newspaper is published, is published a minimum of 5 days a week, exclusive of legal holidays, and has been in existence and published a minimum of 5 days a week, ex-

clusive of legal holidays, for 1 year or is a direct successor to a newspaper that has been in existence for 1 year that has been published a minimum of 5 days a week, exclusive of legal holidays. The advertisement, publication, or notice shall be placed directly by the attorney for the petitioner, by the petitioner if acting pro se, or by the clerk of the court. Only the actual costs charged by the newspaper for the advertisement, publication, or notice may be charged as costs in the action.

702.04. Mortgaged lands in different counties

When a mortgage includes lands, railroad track, right-of-way, or terminal facilities and station grounds, lying in two or more counties, it may be foreclosed in any one of said counties, and all proceedings shall be had in that county as if all the mortgaged land, railroad track, right-of-way, or terminal facilities and station grounds lay therein, except that notice of the sale must be published in every county wherein any of the lands, railroad track, right-of-way, or terminal facilities and station grounds to be sold lie. After final disposition of the suit, the clerk of the circuit court shall prepare and forward a certified copy of the decree of foreclosure and sale and of the decree of confirmation of sale to the clerk of the circuit court of every county wherein any of the mortgaged lands, railroad tracks, right-of-way, or terminal facilities and station grounds lie, to be recorded in the foreign judgment book of each such county, and the costs of such copies and of the record thereof shall be taxed as costs in the cause.

702.05. Mortgaged lands sold for taxes

Any person who has a lien by mortgage or otherwise upon lands sold for taxes may, within the time allowed by law for redemption, redeem such lands, and the receipt of the officer authorized to receive the amount paid for redemption money shall entitle the lienholder to collect the said amount, with interest at the rate of 10 percent per annum, as a part of and in the same manner as the amount secured by her or his original lien.

702.06. Deficiency decree; common-law suit to recover deficiency

In all suits for the foreclosure of mortgages heretofore or hereafter executed the entry of a deficiency decree for any portion of a deficiency, should one exist, shall be within the sound judicial discretion of the court, but the complainant shall also have the right to sue at common law to recover such deficiency, provided no suit at law to recover such deficiency shall be maintained against the original mortgagor in cases where the mortgage is for the purchase price of the property involved and where the original mortgagee becomes the purchaser thereof at foreclosure sale and also is granted a deficiency decree against the original mortgagor.

702.065. Final judgment in uncontested proceedings where deficiency judgment waived; attorney's fees when default judgment entered

(1) In uncontested mortgage foreclosure proceedings in which the mortgagee waives the right to recoup any deficiency judgment, the court shall enter final judgment within 90 days from the date of the close of pleadings. For the purposes of this subsection, a mortgage foreclosure proceeding is uncontested if an answer not

contesting the foreclosure has been filed or a default judgment has been entered by the court.

(2) In a mortgage foreclosure proceeding, when a default judgment has been entered against the mortgagor and the note or mortgage provides for the award of reasonable attorney's fees, it is not necessary for the court to hold a hearing or adjudge the requested attorney's fees to be reasonable if the fees do not exceed 3 percent of the principal amount owed at the time of filing the complaint, even if the note or mortgage does not specify the percentage of the original amount that would be paid as liquidated damages. Such fees constitute liquidated damages in any proceeding to enforce the note or mortgage. This section does not preclude a challenge to the reasonableness of the attorney's fees.

702.07. Power of courts and judges to set aside foreclosure decrees at any time before sale

The circuit courts of this state, and the judges thereof at chambers, shall have jurisdiction, power, and authority to rescind, vacate, and set aside a decree of foreclosure of a mortgage of property at any time before the sale thereof has been actually made pursuant to the terms of such decree, and to dismiss the foreclosure proceeding upon the payment of all court costs.

702.08. Effect of setting aside foreclosure decree

Whenever a decree of foreclosure has been so rescinded, vacated, and set aside and the foreclosure proceedings dismissed as provided in s. 702.07, the mortgage, together with its lien and the debt thereby secured, shall be, both in law and equity, completely relieved of all effects of any kind whatsoever resulting from or on account of the foreclosure proceedings and the decree of foreclosure and fully restored in all respects to the original status of the same as it existed prior to the foreclosure proceedings and the decree of foreclosure, and thereafter the same shall be for all purposes whatsoever legally of force and effect just as if foreclosure proceeding had never been instituted and a decree of foreclosure had never been made.

702.09. Definitions

For the purposes of ss. 702.07 and 702.08 the words "decree of foreclosure" shall include a judgment or order rendered or passed in the foreclosure proceedings in which the decree of foreclosure shall be rescinded, vacated, and set aside; the word "mortgage" shall mean any written instrument securing the payment of money or advances and includes liens to secure payment of assessments arising under chapters 718 and 719 and liens created pursuant to the recorded covenants of a homeowners' association as defined in s. 712.01; the word "debt" shall include promissory notes, bonds, and all other written obligations given for the payment of money; the words "foreclosure proceedings" shall embrace every action in the circuit or county courts of this state wherein it is sought to foreclose a mortgage and sell the property covered by the same; and the word "property" shall mean and include both real and personal property.

702.10. Order to show cause; entry of final judgment of foreclosure; payment during foreclosure

(1) After a complaint in a foreclosure proceeding has been filed, the mortgagee may request an order to show cause for the entry of final judgment and the court shall immediately review the complaint. If, upon examination of the complaint, the court finds that the complaint is verified and alleges a cause of action to foreclose on real property, the court shall promptly issue an order directed to the defendant to show cause why a final judgment of foreclosure should not be entered.

(a) The order shall:

1. Set the date and time for hearing on the order to show cause. However, the date for the hearing may not be set sooner than 20 days after the service of the order. When service is obtained by publication, the date for the hearing may not be set sooner than 30 days after the first publication. The hearing must be held within 60 days after the date of service. Failure to hold the hearing within such time does not affect the validity of the order to show cause or the jurisdiction of the court to issue subsequent orders.

2. Direct the time within which service of the order to show cause and the complaint must be made upon the defendant.

3. State that the filing of defenses by a motion or by a verified or sworn answer at or before the hearing to show cause constitutes cause for the court not to enter the attached final judgment.

4. State that the defendant has the right to file affidavits or other papers at the time of the hearing and may appear personally or by way of an attorney at the hearing.

5. State that, if the defendant files defenses by a motion, the hearing time may be used to hear the defendant's motion.

6. State that, if the defendant fails to appear at the hearing to show cause or fails to file defenses by a motion or by a verified or sworn answer or files an answer not contesting the foreclosure, the defendant may be considered to have waived the right to a hearing and in such case the court may enter a final judgment of foreclosure ordering the clerk of the court to conduct a foreclosure sale.

7. State that if the mortgage provides for reasonable attorney's fees and the requested attorney's fees do not exceed 3 percent of the principal amount owed at the time of filing the complaint, it is unnecessary for the court to hold a hearing or adjudge the requested attorney's fees to be reasonable.

8. Attach the final judgment of foreclosure the court will enter, if the defendant waives the right to be heard at the hearing on the order to show cause.

9. Require the mortgagee to serve a copy of the order to show cause on the mortgagor in the following man- ner:

a. If the mortgagor has been served with the complaint and original process, service of the order may be made in the manner provided in the Florida Rules of Civil Procedure.

b. If the mortgagor has not been served with the complaint and original process, the order to show cause, together with the summons and a copy of the complaint, shall be served on the mortgagor in the same manner as provided by law for original process.

Any final judgment of foreclosure entered under this subsection is for in rem relief only. Nothing in this subsection shall preclude the entry of a deficiency judgment where otherwise allowed by law.

(b) The right to be heard at the hearing to show cause is waived if the defendant, after being served as provided by law with an order to show cause, engages in conduct that clearly shows that the defendant has relinquished the right to be heard on that order. The defendant's failure to file defenses by a motion or by a sworn or verified answer or to appear at the hearing duly scheduled on the order to show cause presumptively constitutes conduct that clearly shows that the defendant has relinquished the right to be heard. If a defendant files defenses by a motion or by a verified or sworn answer at or before the hearing, such action constitutes cause and precludes the entry of a final judgment at the hearing to show cause.

(c) In a mortgage foreclosure proceeding, when a default judgment has been entered against the mortgagor and the note or mortgage provides for the award of reasonable attorney's fees, it is unnecessary for the court to hold a hearing or adjudge the requested attorney's fees to be reasonable if the fees do not exceed 3 percent of the principal amount owed on the note or mortgage at the time of filing, even if the note or mortgage does not specify the percentage of the original amount that would be paid as liquidated damages.

(d) If the court finds that the defendant has waived the right to be heard as provided in paragraph (b), the court shall promptly enter a final judgment of foreclosure. If the court finds that the defendant has not waived the right to be heard on the order to show cause, the court shall then determine whether there is cause not to enter a final judgment of foreclosure. If the court finds that the defendant has not shown cause, the court shall promptly enter a judgment of foreclosure.

(2) In an action for foreclosure, other than residential real estate, the mortgagee may request that the court enter an order directing the mortgagor defendant to show cause why an order to make payments during the pendency of the foreclosure proceedings or an order to vacate the premises should not be entered.

(a) The order shall:

1. Set the date and time for hearing on the order to show cause. However, the date for the hearing shall not be set sooner than 20 days after the service of the order. Where service is obtained by publication, the date for the hearing shall not be set sooner than 30 days after the first publication.

2. Direct the time within which service of the order to show cause and the complaint shall be made upon the defendant.

3. State that the defendant has the right to file affidavits or other papers at the time of the hearing and may appear personally or by way of an attorney at the hearing.

4. State that, if the defendant fails to appear at the hearing to show cause and fails to file defenses by a motion or by a verified or sworn answer, the defendant may be deemed to have waived the right to a hearing and in such case the court may enter an order to make payment or vacate the premises.

5. Require the mortgagee to serve a copy of the order to show cause on the mortgagor in the following man- ner:

a. If the mortgagor has been served with the complaint and original process, service of the order may be made in the manner provided in the Florida Rules of Civil Procedure.

b. If the mortgagor has not been served with the complaint and original process, the order to show cause, together with the summons and a copy of the complaint, shall be served on the mortgagor in the same manner as provided by law for original process.

(b) The right to be heard at the hearing to show cause is waived if the defendant, after being served as provided by law with an order to show cause, engages in conduct that clearly shows that the defendant has relinquished the right to be heard on that order. The defendant's failure to file defenses by a motion or by a sworn or verified answer or to appear at the hearing duly scheduled on the order to show cause presumptively constitutes conduct that clearly shows that the defendant has relinquished the right to be heard.

(c) If the court finds that the defendant has waived the right to be heard as provided in paragraph (b), the court may promptly enter an order requiring payment in the amount provided in paragraph (f) or an order to vacate.

(d) If the court finds that the mortgagor has not waived the right to be heard on the order to show cause, the court shall, at the hearing on the order to show cause, consider the affidavits and other showings made by the parties appearing and make a determination of the probable validity of the underlying claim alleged against the mortgagor and the mortgagor's defenses. If the court determines that the mortgagee is likely to prevail in the foreclosure action, the court shall enter an order requiring the mortgagor to make the payment described in paragraph (e) to the mortgagee and provide for a remedy as described in paragraph (f). However, the order shall be stayed pending final adjudication of the claims of the parties if the mortgagor files with the court a written undertaking executed by a surety approved by the court in an amount equal to the unpaid balance of the mortgage on the property, including all principal, interest, unpaid taxes, and insurance premiums paid by the mortgagee.

(e) In the event the court enters an order requiring the mortgagor to make payments to the mortgagee, payments shall be payable at such intervals and in such amounts provided for in the mortgage instrument before acceleration or maturity. The obligation to make payments pursuant to any order entered under this subsection shall commence from the date of the motion filed hereunder. The order shall be served upon the mortgagor no later than 20 days before the date specified for the first payment. The order may permit, but shall not require the mortgagee to take all appropriate steps to secure the premises during the pendency of the foreclosure ac- tion.

(f) In the event the court enters an order requiring payments the order shall also provide that the mortgagee shall be entitled to possession of the premises upon the failure of the mortgagor to make the payment required in the order unless at the hearing on the order to show cause the court finds good cause to order some other method of enforcement of its order.

(g) All amounts paid pursuant to this section shall be credited against the mortgage obligation in accordance with the terms of the loan documents, provided, however, that any payments made under this section shall not constitute a cure of any default or a waiver or any other defense to the mortgage foreclosure action.

(h) Upon the filing of an affidavit with the clerk that the premises have not been vacated pursuant to the court order, the clerk shall issue to the sheriff a writ for possession which shall be governed by the provisions of s. 83.62.

END OF DOCUMENT

Westlaw

West's Florida Statutes Annotated Currentness
Title VI. Civil Practice and Procedure (Chapters 45-89) (Refs & Annos)
➞ Chapter 45. Civil Procedure: General Provisions (Refs & Annos)
➞ **45.01. Repealed by Laws 1955, c. 29737, § 1**

45.011. Definitions

In all statutes about practice and procedure "plaintiff" means any party seeking affirmative relief whether plaintiff, counterclaimant, cross-claimant; or third-party plaintiff, counterclaimant or cross-claimant; "defendant" means any party against whom such relief is sought; "bond with surety" means a bond with two good and sufficient sureties, each with unencumbered property not subject to any exemption afforded by law equal in value to the penal sum of the bond or a bond with a licensed surety company as surety or a cash deposit conditioned as for a bond.

45.02. Repealed by Laws 1967, c. 67-254, § 49

45.021. Applicability

Chapters 45-51, 55-57, 68 and 69 apply to all actions, whether heretofore at law or in chancery, unless specifically provided otherwise in such chapters or parts thereof.

45.03. Repealed by Laws 1967, c. 67-254, § 49

45.031. Judicial sales procedure

In any sale of real or personal property under an order or judgment, the procedures provided in this section and ss. 45.0315-45.035 may be followed as an alternative to any other sale procedure if so ordered by the court.

(1) Final judgment.--

(a) In the order or final judgment, the court shall direct the clerk to sell the property at public sale on a specified day that shall be not less than 20 days or more than 35 days after the date thereof, on terms and conditions specified in the order or judgment. A sale may be held more than 35 days after the date of final judgment or order if the plaintiff or plaintiff's attorney consents to such time. The final judgment shall contain the following statement in conspicuous type: