

Resources on Mortgage Servicing

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- I. Relevant Causes of Action, Laws, or Rules (other than Bankruptcy Code)
 - a. Federal Rules of Bankruptcy Procedures 2016, 3001, and 9011
 - b. Real Estate Settlement Procedures Act, 12 U.S.C. § 2605(b)-(e); 2609
 - c. Unfair or Deceptive Practices Act
 - d. State Debt Collection statute (maybe Federal Debt Collection Practices Act)
 - e. Breach of Contract
 - f. Duty/Covenant of Good Faith or Fair Dealing
 - g. Fraud or Misrepresentation
 - h. Negligent or Intentional Infliction of Emotional Distress

- II. New or Pending Legislation or Rules on Mortgage Servicing
 - a. Pub. L. No. 111-22, § 404 (May 20, 2009), *codified at* 15 U.S.C. § 1641(g). In May 2009, a new subsection was added to 15 U.S.C. § 1641 that requires creditors to provide notice to the borrowers when the ownership of their mortgage loans is transferred or assigned to another party.
 - b. Proposed Rules 3001 and 3002. The Bankruptcy Rules Committee has proposed amendments to the Federal Rules of Bankruptcy Procedure that address mortgage claims. The rules are open for public comment beginning in August 2009, with two public hearings scheduled for late 2009 and early 2010. The amendments would change Rule 3001(c) to require additional documentation to support claims, including mortgage claims of individual debtors, and would impose consequences for failing to support claims with documentation. New Rule 3002.1 would apply in claims secured by a chapter 13 debtor's principal residence, requiring the creditor to provide notices of payment changes, postpetition fees and charges, and notice of a final payment curing arrearages.

- III. Bankruptcy Court Cases
 - a. *In re Wells*, No. 08-17639, 2009 WL 1872401, (Bankr. N.D. Ohio June 19, 2009) (disallowing claim because purported creditor did not show the note was negotiated to claimant bank, either by endorsement of the note or by endorsement by an allonge, a paper affixed to the note).
 - b. *In re Collins*, No. 07-38246, 2009 WL 1607737, (Bankr. S.D. Tex. June 8, 2009) (denying all attorneys fees in cases in which lender filed intentionally inaccurate proofs of claim and denying recovery of lenders' attorneys fees in those cases in which the note was not accelerated on grounds that contract language did not permit recovery in such circumstances).
 - c. *Walton v. Countrywide (In re Sanchez)*, Case No. 1:08-cv-23337, Bankr. Case No. 01-042230, Adv. Case No. 08-1176 (D. Fla. June 6, 2009) (reversing bankruptcy court's decision that U.S. Trustee did not have standing to pursue sanctions for alleged bad faith conduct by mortgagee in filing motions for relief from stay).

- d. *In re Parker*, 403 B.R. 775 (Bankr. E.D. Ark. 2009) (breach of contract sufficiently pled when borrower alleged that servicer diverted payments to unauthorized escrow account and failed to send notice of rate adjustment).
- e. *In re Rangel*, No. 08-33200, 2009 WL 1531961, (Bankr. S.D. Tex. May 29, 2009) (denying some lenders' and servicers' fee applications because mortgage notes and deeds of trust did not contain language permitting recovery of requested expenses).
- f. *In re Clark*, No. 1:03-bk-25033, 2009 WL 1850322, (Bankr.E.D.Ark. May 21, 2009) (setting aside prior ex parte order of stay relief based on debtor's failure to comply with mortgage payment schedule and reimposing stay to stop eviction because mortgage creditor received and accepted full payment on claim from Chapter 13 trustee on claim).
- g. *In re Nosek*
 - i. *In re Nosek*, 4:08-cv-40095-WGY (D. Mass. May 26, 2009) (upholding bankruptcy court's sanctions against Ameriquest and its bankruptcy counsel but ruling that sanctions against Wells Fargo and Ameriquest's national counsel could not be imposed under Rule 9011 because latter parties did not have sufficient role in bankruptcy court filings).
 - ii. *In re Nosek*, 544 F.3d 34 (1st Cir. 2008) (remanding case to bankruptcy court for reconsideration, holding that substantive basis of sanctions and damages were inappropriate grounds for resolving dispute based on lender's misapplication of payments).
 - iii. *Nosek v. Ameriquest Mortgage Company, et al.*, (*In re Nosek*), 386 B.R. 374 (Bankr. D. Mass. 2008) (imposing monetary sanctions on Ameriquest, Wells Fargo, and several attorneys for misrepresenting the holder of the note).
- h. *McDermott v. Countrywide (In re O'Neal)*, Case No. 07-51027, Adv No. 08-5031, (Bankr. N.D. Ohio, May 1, 2009) (ruling that Countrywide had no reasonable basis for filing proof of claim or objection to confirmation when debtor sold property prepetition in short sale and setting hearing to determine amount of sanctions).
- i. *In re McKain*, Order Requiring Accounting Procedures, Case 08-10411 (Bankr. E.D. La. May 1, 2009) (imposing accounting procedures for postpetition charges related to debtors' mortgages on Ocwen in chapter 13 cases).
- j. *In re Taylor*, Case 07-15385-sr (Bankr. E.D. Pa. April 15, 2009) (providing extensive description of computerized preparation of proofs of claims in bankruptcy and role of LPS in such, and imposing non-monetary sanctions under Rule 9011 on attorneys who filed inaccurate proof of claim).
- k. *In re Mitchell*, No. 07-16226-LBR, 2009 WL 1044368 (Bankr. D. Nev. March 31, 2009) (holding that MERS lacked standing to pursue stay relief when it could not show that it was either holder of the mortgage note or a transferee in possession of the note, as required by Nevada law to pursue a foreclosure).
- l. *In re Jacobsen*, 2009 WL 567188 (Bankr. W.D. Wash. 2009) (denying motion for stay relief because movant had not established either identity of holder of note or movant's authority to act on behalf of that party)

- m. *In re Booth*, 2009 WL 81327 (Bankr. E.D. Ark. 2009) (sustaining in part creditor objection to plan language related to application of payments, post-petition fees, and notice of payment changes, and compliance with 524(i)).
- n. *McCarther-Morgan v. Asset Acceptance (In re McCarther-Morgan)*, Case: 08-1093 (B.A.P. 9th Cir. Jan. 15, 2009) (appealed to Ninth Circuit) (holding that mere filing of proof of claim (in this case for unsecured debt) cannot as matter of law give rise to claim under Fair Debt Collections Practices Act or its California state-law equivalent).
- o. *In re Hwang*, 396 B.R. 757 (Bankr. C.D. Cal. 2008) (servicer not real party in interest for purposes of pursuing motion for relief from stay).
- p. *In re Zunner*, 396 B.R. 265 (Bankr. W.D.N.Y. 2008) (holding that broker price opinion in preparation of foreclosure was not allowable charge to protect mortgagees' interest in property).
- q. *In re Hayes*, 393 B.R. 259 (Bankr. D. Mass. 2008) (denying motion for relief from stay when mortgagee failed to show proper chain of title from loan originator).
- r. *In re Haque*, 395 B.R. 799 (Bankr. S.D. Fla., Oct. 28, 2008) (imposing \$95,000 in sanctions under 11 U.S.C. §105 on law firm and creditor for filing false affidavits to support motions for relief from stay).
- s. *Campbell v. Countrywide Home Loans, Inc.*, 545 F.3d 348 (5th Cir. Aug. 26, 2008) (holding that unpaid monthly escrow payments must be included in proof of claim; missed escrow payments may not be recouped by performing a new post-petition escrow analysis).
- t. *In re Hight*, 393 B.R. 484 (Bankr. S.D. Tex. Aug. 13, 2008) (disallowing creditor's pre-petition attorney's fees for preparation of foreclosure sale when creditor failed to provide evidence pertaining to what work was done, who did the work, hourly rate and time spent).
- u. *Payne v. MERS*, 387 B.R. 614 (Bankr. D. Kan., May 6, 2008) (finding that creditor violated RESPA, which court held applies in bankruptcy and finding that creditors' misapplication of plan payments violated automatic stay).
- v. *In re Prevo*, 394 B.R. 847 (Bankr. S.D. Tex. 2008) (filing claim without supporting documents required by Rule 3001 resulted in loss of prima facie validity; disallowing all fees and costs and issuing show cause order to determine whether creditor must pay debtor's attorney's fee for objecting to claim).
- w. *In re Stewart*, 391 B.R. 327 (Bankr. E.D. La. 2008) (awarding damages and legal fees and sanctioning Wells Fargo for the abusive and negligent imposition of fees, and moreover, ordering Wells Fargo to conduct an audit of every proof of claim filed on its behalf in cases pending on or after April 13, 2007).
- x. *In re Schuessler*, 386 B.R. 458 (Bankr. S.D.N.Y. 2008) (ordering Chase Home Finance to pay attorneys fees and debtors' costs and barring recoupment of any costs to Chase of filing of unwarranted motion for relief from stay).
- y. *In re Parsley*, 384 B.R. 138 (Bankr. S.D. Tex. 2008) (ruling on order to show cause why sanctions were not warranted for motion for relief from stay allegedly filed without grounds that while Countrywide and its counsel engaged in poor practices that conduct did not rise to level of clear and convincing bad faith action).

- z. *In re Ezzell*, 07-34780 (Bankr. S.D. Tx. Jan. 14, 2008) (disallowing creditor's attorney's fees for failure to comply with Rule 2016)
- aa. *In re Maisel*, 378 B.R. 19 (Bankr. D. Mass. 2007) (standing/ownership of creditor)
- bb. *In re Waring*, No. 06-40614, Transcript of Hearing (Bankr. D. Mass. July 27, 2007) (requiring servicer to produce evidence that property inspections were conducted)
- cc. *In re Dominique*, 368 B.R. 913 (Bankr. S.D. Fla. 2007) (holding that lender that failed to give debtor annual escrow analysis required under RESPA waived its right to collect such amounts).
- dd. *In re Schwartz*, 366 B.R. 265 (Bankr. D. Mass. 2007) (creditor could not show it had right to undertake prepetition foreclosure)
- ee. *Jones v. Wells Fargo*, 366 B.R. 584 (Bankr. E.D. La. 2007) (challenge to creditor's accounting and application of plan payments)
- ff. *In re Allen*, 2007 WL 115182, No. 06-60121, (Bankr. S.D. Tex., Jan. 9, 2007) Mem. Op. re Sanction of Creditor's Attorneys (Jan. 9, 2007) (sanctions for erroneous objection to plan confirmation)
- gg. *In re Berghoff*, 2006 WL 1716299 (Bankr. N.D. Ohio 2006) (violation of Rule 9011 to include impermissible fees in claim)
- hh. *Litton Loan Servicing v. Garvida*, 347 B.R. 697 (9th Cir. BAP 2006) (servicer failed to comply with court order to provide accounting of loan balance)
- ii. *In re Nosek*, 363 B.R. 643 (Bankr. D. Mass. 2006) (misapplication of plan payments), *rev'd* 544 F.3d 34 (1st Cir. 2008).
- jj. *In re Rivera*, 342 B.R. 435 (Bankr. D.N.J. 2006) (pre-signature of pleadings by servicer without review)
- kk. *In re Thompson*, 350 B.R. 842 (Bankr. E.D. Wisc. 2006) (RESPA action for failure to respond to debtor's request for clarification of account balance)
- ll. *In re Gorshtein*, 285 B.R. 118 (Bankr. S.D.N.Y. 2002) (motions for relief from stay without adequate factual investigation or legal basis)
- mm. *Maxwell v. Fairbanks Capital Corp.*, 281 B.R. 101 (Bankr. D. Mass. 2002) (miscalculation of amount owing)
- nn. *In re Slick*, No. 98-14378, Adv. No. 99-1135 (Bankr. S.D. Ala. Nov. 22, 2002) (class action for failure to file applications with court for attorneys fees)
- oo. *Tate v. NationsBanc Mortgage Corp.*, 253 B.R. 653 (Bankr. W.D.N.C. 2000) (Rule 2016 applies to attorneys fees of mortgage creditor)
- pp. *In re Wines*, 239 B.R. 703 (Bankr. D.N.J. 1999) (inability to explain calculation of amount allegedly due)

IV. Other Relevant Cases

- a. *Calloway v. Green Tree Servicing, LLC*, 607 F. Supp. 2d. 669 (D. Del. 2009) (denying motion to dismiss Fair Credit Reporting Act claim premised on servicer incorrectly reporting two outstanding mortgages when borrowers had only one mortgage).
- b. *Wells Fargo v. Aponte*, Case No. 16-2005-CA-008625 (Fla. Cir. Ct. June 15, 2009) (denying motion for summary judgment in foreclosure on basis that material issues existed, including that plaintiffs' affidavits in support of foreclosure

contained factual mistakes about entities that employed affiants and plaintiff's insufficient showing of standing to pursue foreclosure).

- c. *Wells Fargo v. Jordan*, Case No. 91675 (Ohio App. March 12, 2009) (reversing grant of summary judgment and remanding to trial court to dismiss foreclosure suit because plaintiff Wells Fargo was not the real party in interest on date of foreclosure complaint and thus lacked standing).
- d. *Wells Fargo v. Byrd*, 897 N.E.2d 722 (Ohio Ct. App. 2008) (upholding dismissal of foreclosure action because Wells Fargo was not owner of mortgage but ruling that dismissal should have been without prejudice).
- e. *In re Foreclosure Cases*, 521 F. Supp. 2d 650 (S.D. Ohio 2007) (J. Rose) (lack of standing/proof of ownership of mortgage)
- f. *In re Foreclosure Cases*, No. 07CV2282, 2007 WL 3232430, (N.D. Ohio. Oct. 31, 2007) (J. Boyko) (lack of standing/proof of ownership of mortgage)
- g. *Islam v. Option One Mortgage Corp.*, 432 F.Supp.2d 181 (D. Mass. 2006) (action against former servicer when acts to collect continued after refinancing)
- h. *Rawlings v. Dovenmuehle Mortgage, Inc.*, 64 F. Supp. 2d 1156 (M.D. Ala. 1999) (action against servicer for applying borrower's payments to wrong account)

V. Pending Litigation to Watch

- a. *Hill v. Countrywide (In re Hill)*, No. 01-22574, Show Cause Order (Bankr. W.D. Pa. Dec. 21, 2007) ("recreated" escrow letters produced in post-discharge dispute; settlement requires Countrywide to pay \$100,000 damages (Aug. 11, 2008).
- b. Selected Cases in which the Chapter 13 Trustee, Ronda Winnecour, seeks relief against Countrywide Home Loans, Inc., No. 07-00203 (Bankr. W.D. Pa., Oct. 8, 2008) (allegations by Chapter 13 trustee that servicer failed to credit debtors' accounts with trustee payments); Order Approving Settlement (Bankr. W.D. Pa. Oct. 22, 2008). UST continuing to pursue sanctions
- c. *Trevino v. MERS, et al.*, 1:07-cv-00568, Complaint (D. Del. Nov. 6, 2007) (class action alleging MERS and lenders overcharge borrowers above actual costs); Memorandum Opinion (D. Del. Sept. 30, 2008)(denying MERS and Washington Mutual motion to dismiss; granting motion to dismiss of Freddie Mac, GMAC and shareholder defendants).
- d. *Harris v. Fidelity Nat'l Information Serv.*, No. 03-44826, Adv. No. 08-03014, Complaint (Bankr. S.D. Tx. Jan. 16, 2008) (class action suit alleging that default servicers has impermissible and undisclosed arrangements with attorneys to retain portion of fees). Reference withdrawn, now case no. 4:08cv01243 in U.S. District Court in S.D. of Tex. Stipulated Dismissal entered Dec. 3, 2008.
- e. *In re Ocwen Federal Bank FSB Mortgage Servicing Litigation*, 04-CV-2714, MDL-1604 (N.D. Ill.) (class action challenging "proof of claim" fee in mortgage claims)

VI. Scholarly Articles

- a. Larry Cordell, Karen Dynan, Andreas Lehnert, Nellie Liang & Eileen Mauskopf, *The Incentives of Mortgage Servicers: Myths and Realities* (Fed. Reserve Bd., Fin. and Econ. Discussion Series, Paper No. 2008-46, 2008), available at <http://www.federalreserve.gov/pubs/feds/2008/200846/200846pap.pdf>.

- b. Alan M. White, *Rewriting Contracts, Wholesale: Data on Voluntary Mortgage Modifications from 2007 and 2008 Remittance Reports* (Aug. 26, 2008), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1259538
- c. Kurt Eggert, *Limiting Abuse and Opportunism by Mortgage Servicers*, 15 HOUSING POLICY DEBATE No. 3 (2007), <http://ssrn.com/abstract=992095>
- d. Kurt Eggert, *Comment: What Prevents Loan Modifications*, 18 HOUSING POLICY DEBATE No. 2 (2007), <http://ssrn.com/abstract=1081479>.
- e. Henry Hildebrand III, *The Sad State of Mortgage Service Providers*, 22 AM. BANKR. INST. L. REV. 10 (2003).
- f. Anthony Pennington-Cross & Giang Ho, *Loan Servicer Heterogeneity and the Termination of Subprime Mortgages*, Fed. Res. Board of St. Louis Working Paper No. 2006-024A (2006), <http://ssrn.com/abstract=897277>.
- g. Katherine Porter, *Misbehavior and Mistake in Bankruptcy Mortgage Claims*, 83 TEX. L. REV. 121 (2008), <http://ssrn.com/abstract=1027961>.
- h. Michael Stegman et al., *Preventive Servicing is Good for Business and Affordable Homeownership Policy*, 18 HOUSING POLICY DEBATE No. 2 (2007), <http://www.mi.vt.edu/web/page/950/sectionid/580/pagelevel/3/interior.asp>.

VII. Industry Data

- a. U.S. FINANCIAL NETWORK, NATIONAL MORTGAGE SERVICER'S REFERENCE DIRECTORY (22ND ED. 2005)
- b. Freddie Mac Single-Family Servicing Guidelines (click on All Regs, then on Servicing Volume 2), <http://www.freddiemac.com/sell/guide/#>
- c. Fannie Mae Single-Family Servicing Guidelines (click on Access All Regs, then on Servicing Guides and Forms), <https://www.efanniemae.com/sf/guides/ssg/>
- d. Jay Brinkman, Mortgage Bankers Association, *An Examination of Mortgage Foreclosures, Modifications, Repayment Plans, and Other Loss Mitigation Activities in Third Quarter of 2007* (Jan. 2008), http://www.mortgagebankers.org/files/News/InternalResource/59454_LoanModificationsSurvey.pdf.
- e. Marina Walsh, Mortgage Bankers Association, *2007 Costs of Mortgage Servicing Study* (Sept. 2007), <http://www.mortgagebankers.org/files/ServicingOperationsStudyWalsh9-07.pdf>

VIII. Government Reports and Congressional Hearings

- a. Cordell, et al., *The Incentives of Mortgage Servicers: Myths and Realities*, Finance and Economic Discussion Series, Federal Reserve Board, Washington, D.C., <http://www.federalreserve.gov/pubs/feds/2008/200846/200846pap.pdf>
- b. State Foreclosure Prevention Working Group, *Analysis of Subprime Mortgage Servicing Performance*, Data Report Nos. 1 (February 2008) and 2 (April 2008) http://www.mass.gov/Cago/docs/press/2008_02_07_foreclosure_report_attachme nt1.pdf and http://www.mass.gov/Cago/docs/press/2008_04_22_sfpwg_report2.pdf
- c. Hearing on *A Review of Mortgage Servicing Practices and Foreclosure Mitigation*, U.S. House of Representatives Committee on Financial Services,

110th Cong., July 25, 2008,

http://www.house.gov/apps/list/hearing/financialsvcs_dem/hr072508.shtml

- d. Hearing on *Policing Lenders and Protecting Homeowners: Is Misconduct in Bankruptcy Fueling the Foreclosure Crisis?*, U.S. Senate Committee on the Judiciary, 110th Cong. May 6, 2008,
<http://judiciary.senate.gov/hearing.cfm?id=3327>
- e. Hearing on *H.R. 5679, The Foreclosure Prevention and Sound Mortgage Servicing Act of 2008*, U.S. House of Representatives Committee on Financial Services, 110th Cong. April 16, 2008,
http://www.house.gov/apps/list/hearing/financialsvcs_dem/hr041608.shtml

IX. News Stories and Miscellaneous

- a. Emily Flitter, *JPM Units to Settle FTC Counts*, Vol. 173, No. 175 AMERICAN BANKER, 13, Sept. 10, 2008.
- b. Kimberly Blanton, *Suit Blames Loan Servicer for Pending Foreclosure*, BOSTON GLOBE, Aug. 5, 2008.
- c. Amir Efrati, *Wells Fargo Is Sanctioned for Role in Mortgage Woes*, WALL STREET J. C5, Apr. 30, 2008
- d. Carrie Teegardin, *Couple loses home in Countrywide dispute but may yet win*, ATLANTA JOURNAL-CONSTITUTION, Mar. 30, 2008,
http://www.ajc.com/business/content/business/stories/2008/03/28/countrywide_0330.html
- e. Amir Efrati & Kara Scannell, *Countrywide Draws Ire of Judges*, WALL STREET J. A3, Jan. 14, 2008
- f. Gretchen Morgenson, *Dubious Fees Hit Borrowers in Foreclosure*, NEW YORK TIMES, A1, Nov. 6, 2007
- g. Sacha Pfeiffer, *Hidden Legal Fees Push Some Into Foreclosure*, BOSTON GLOBE (Jan. 18, 2007).
- h. Mara Der Hovanesian, *When Mortgage Firms Don't Play Fair*, BUSINESSWEEK.COM, http://realestate.msn.com/buying/article_busweek.aspx?cp-documentid=2133885.
- i. Jack Guttentag, *Why is Mortgage Servicing So Bad?* (Feb. 3, 2003; updated Dec. 13, 2004),
http://www.mtgprofessor.com/A%20%20Servicing/why_is_servicing_so_bad.htm
- j. *Credit Slips* blog, postings on mortgages and home loans,
http://www.creditslips.org/creditslips/mortgage_debt_home_equity/index.html
- k. *Mortgage Servicing News* website, <http://www.mortgageservicingnews.com/>
- l. John Rao, Odette Williamson, Tara Twomey, et. al, FORECLOSURES (Nat'l Consumer Law Center, 2d. ed. 2007) (Chapters 6, 7 & 8 address mortgage servicing abuse and are the best comprehensive resource for practitioners).