



# FORECLOSURE DEFENSE

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# Defenses to Foreclosure - Standing as to the Mortgage

To have standing to commence a claim for foreclosure, the Plaintiff must be the current mortgagee. And standing must be established as of the filing of the case. *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St. 3d 13 at para. 24 (“Because standing to sue is required to invoke the jurisdiction of the common pleas court, “standing is to be determined as of the commencement of the suit.””)



# Defenses to Foreclosure - Standing as to the Mortgage Cont'd

Only the mortgagee or its successor and assign has standing to foreclose on the mortgage. *Deutsche Bank National Trust Company, Trustee v. Holden*, 147 Ohio St.3d 85 at para. 35



# Defenses to Foreclosure - Standing as to the Note

In order to have standing to sue on a Note, a Plaintiff must establish it is entitled to enforce the instrument pursuant to ORC 1303.31. *Holden* at para. 2.



# Defenses to Foreclosure - Standing as to the Note

## 1303.31 Person entitled to enforce instrument - UCC 3-301.

(A) "Person entitled to enforce" an instrument means any of the following persons:

(1) The holder of the instrument;

(2) A nonholder in possession of the instrument who has the rights of a holder;

(3) A person not in possession of the instrument who is entitled to enforce the instrument pursuant to section [1303.38](#) or division (D) of section [1303.58](#) of the Revised Code.

(B) A person may be a "person entitled to enforce" the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.



# Defenses to Foreclosure - Standing as to the Note

## 1303.31 Person entitled to enforce instrument - UCC 3-301.

(B) A person may be a "person entitled to enforce" the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.



# Defenses to Foreclosure - Standing Cont'd

*Wells Fargo Bank, N.A. v. Horn*, 142 Ohio St.3d 416 (2015):

Proof of Standing may be submitted subsequent to the filing of the Complaint



# Defenses to Foreclosure - Affirmative Defenses

- Failure to Send Notice of Default or Notice of Acceleration:



# Defenses to Foreclosure - Affirmative Defenses

- Failure to properly apply all payments



# Defenses to Foreclosure - Affirmative Defenses

- Statute of Limitations of Enforceability on the Note:

ORC 1303.16(A):

(A) Except as provided in division (E) of this section, an action to enforce the obligation of a party to pay a note payable at a definite time shall be brought within six years after the due date or dates stated in the note or, if a due date is accelerated, within six years after the accelerated due date.



# Defenses to Foreclosure - Affirmative Defenses

- Statute of Limitations of Enforceability on the Note:

Therefore, some affirmative action on the part of the lender is required to demonstrate an acceleration. The filing of a foreclosure action is such an affirmative action because acceleration is required as a condition precedent to a foreclosure filing. *Bank of New York Mellon v. Walker*, 2017-Ohio 535 (8th Dist. 2017); see also *United States Bank N.A. v. Aguilar-Crow*, 7th Dist. Mahoning No. 15 MA 0113, 2016-Ohio-5391, ¶ 40, citing *Huntington Bank v. Popovec*, 7th Dist. Mahoning No. 12 MA 119, 2013-Ohio-4363, ¶ 15; *LaSalle Bank, N.A. v. Kelly*, 9th Dist. Medina No. 09CA0067-M, 2010-Ohio-2668, ¶ 13; *First Fin. Bank v. Doellman*, 12th Dist. Butler No. CA2006-02-029, 2007-Ohio-222, ¶ 20. A previous foreclosure filing can indicate an acceleration occurred. *DePizzo*, at ¶ 22-25.



# Defenses to Foreclosure - Affirmative Defenses

- Conditions Precedent:



# Defenses to Foreclosure - Lost Note Cases

## 1303.38 Enforcement of lost, destroyed or stolen instrument - UCC 3-309.

(A) A person not in possession of an instrument is entitled to enforce the instrument if all of the following apply:

(1) The person seeking to enforce the instrument was entitled to enforce the instrument when loss of possession occurred or has directly or indirectly acquired ownership of the instrument from a person who was entitled to enforce the instrument when loss of possession occurred.

(2) The loss of possession was not the result of a transfer by the person or a lawful seizure.

(3) The person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.



# Defenses to Foreclosure - Lost Note Cases

## **1303.38 Enforcement of lost, destroyed or stolen instrument - UCC 3-309.**

(B) A person seeking enforcement of an instrument under division (A) of this section must prove the terms of the instrument and the person's right to enforce the instrument. If that proof is made, divisions (A) and (B) of section [1303.36](#) of the Revised Code applies to the case as if the person seeking enforcement had produced the instrument. The court may not enter judgment in favor of the person seeking enforcement unless it finds that the person required to pay the instrument is adequately protected against loss that might occur by reason of a claim by another person to enforce the instrument. Adequate protection for the person required to pay the instrument may be provided by any reasonable means.



## Defenses to Foreclosure - Lost Note Cases

The plain language makes clear that the party seeking to enforce a lost note must have been in possession of the instrument at the time it was lost. *Fannie Mae v. Hicks*, 8th Dist., 2015-Ohio-1955 ¶ 26 (“in Ohio a party is not entitled to enforce a lost note unless it was entitled to enforce the instrument when the loss occurred”); *see also Dennis Joslin Co. v. Robinson Broad. Corp.*, 977 F. Supp. 491 (D.D.C. 1997) (holding that subsequent assignee of lost note who was not in possession at the time the loss occurred is not entitled to enforce the note under identical statutory provision).



# SUMMARY JUDGMENT

In order to obtain a judgment in foreclosure, a Plaintiff must prove (a) it is entitled to enforce the Promissory Note; (b) it is entitled to enforce the mortgage either as the original mortgagee or through the chain of recorded assignments and transfers; (c) all conditions precedent have been met as contained in the Note and Mortgage; (d) the Mortgage is in default; and (e) the amount of principal and interest due. *Wachovia Bank v. Jackson*, 2011 Ohio 3203 (5<sup>th</sup> Dist. 2011); see also *Wells Fargo v. Braunskill*, 2015 Ohio 273 (1<sup>st</sup> Dist. 2015); see also *US Bank, N.A. as Trustee v. George*, 2015 Ohio 4957 (10<sup>th</sup> Dist. 2015); and see also *Deutsche Bank Nat'l Trust Co. v. Najjar*, 2013 Ohio 1657



# SUMMARY JUDGMENT - Evidentiary Defenses

Civ. R. 56(E) requires affidavits supporting Motions for Summary Judgment be made on personal knowledge. *State ex rel. Cassels v. Dayton City School Dist. Bd. of Edn.* (1994), 69 Ohio St.3d 217,223, 631 N.E.2d 150



# SUMMARY JUDGMENT - Evidentiary Defenses

## What is Personal Knowledge?:

The Ohio Supreme Court has held that "[p]ersonal knowledge" is "[k]nowledge gained through firsthand observation or experience, as distinguished from a belief based on what someone else has said." *Bonacorsi v. Wheeling & Lake Erie Ry. Co.*, 767 N.E.2d 707, 95 Ohio St.3d 314, 2002-Ohio-2220 (Ohio 2002) (quoting Black's Law Dictionary (7th Ed.Rev.1999) 875)



# SUMMARY JUDGMENT - Evidentiary Defenses

## Plaintiff's Affiant Cannot Provide Legal Opinion:

"Affidavits which merely set forth legal conclusions or opinions without stating supporting facts are insufficient to meet the requirements of Civ.R. 56(E)." *Stamper v. Middletown Hosp\_ Assn.*, 65 Ohio App.3d 65, 69,582 N.E.2d 1040, 1043 (12th Dist. 1989) *citing State v. Licsak* (1974) 41 Ohio App.2d 165, 169; *Naugle v. Campbell Soup Co\_* (.Tune 20, 1986), Henry App. No. 7-84-24, *unreported*, 1986 WL 7312. *See also, Tolson v. Triangle Real Estate*, 10th Dist. Franklin No. 03AP-715, 2004-Ohio-2640,1 12 ("[T]he trial court was correct in striking the remaining portion of ... appellant's affidavit, as those paragraphs merely set forth legal conclusions."). "[A]n entity's status as a holder is a legal conclusion[.]" *Deutsche Bank Natl. Trust Co. v. Thomas*, 2015-Ohio-4037, 42 N.E.3d 1254,, 19 (10th Dist.).



*Up Next:*

RESPA

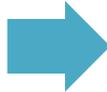
# HISTORY OF RESPA

2010: Dodd Frank signed into law, shifting regulation of Truth in Lending Act (TILA) and Real Estate Settlement Protection Act (RESPA) to newly create CFPB



2012: National Mortgage Settlement entered:

- Significant reform
- No right of enforcement



2014: CFPB issues Regulations X and Z, which codify many terms of the National Mortgage Settlement and create a private right of action

# Truth in Lending Act (TILA) Basics

Statute of Limitations: 1 year

Statutory damages: \$400 to \$4000

Claims generally must be against the investor/owner not servicer

Must meet *Spokeo* standards for actual damages

Fraud, like Civil Rule 9, pleading standards

# Real Estate Settlement Procedures Act (RESPA) Basics

Statute of Limitations : 3 years

Statutory penalties: up to \$2,000

Must prove pattern & practice (rule of thumb, 5 violations in same cases)

Actual damages a statutory requirement

Fraud, like Civil Rule 9, pleading statute

Most claims require opportunity to cure through Notice of Error (NOE)

# Requests For Information

RFIs replace qualified written requests

No need for a dispute

Much more information available

Tight response times: 7, 10 or 30 business days

Send NOE if response not timely, or if information provided is incorrect

Tight response times on NOEs

ALL SUBJECT TO SUIT, STATUTORY PENALTIES, DAMAGES AND SHIFTING OF ATTORNEYS FEES

# RFI responses enhance discovery



Service providers are organized in silos



Information from RFIs can conflict with information from pleadings and discovery

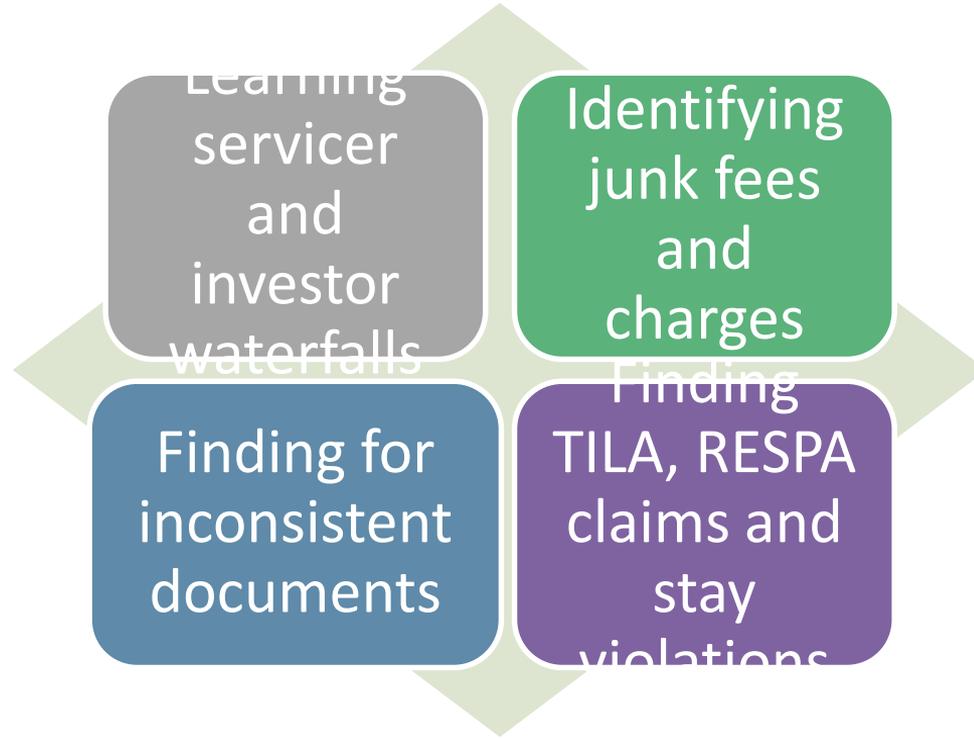


Knowing the investor helps to understand lender strategy, tactics and negotiating posture

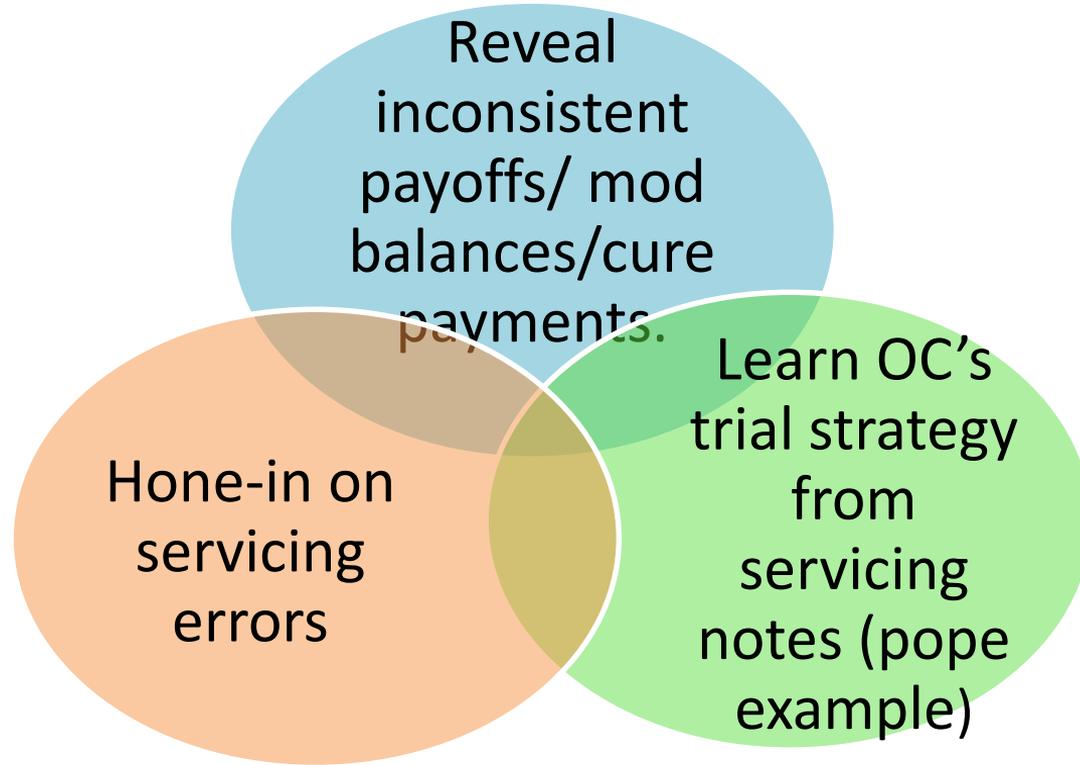


There is no such thing as a “litigation privilege” that forbids you from sending RFI’s for information being sought in discovery requests. – *See Lieber v. Wells Fargo, NDOH 16-cv-02868*

# RESPA as a Tool



# RESPA and TILA as a tool



# RESPA as a Shield

Suing the servicer even on technical violations:

- Brings in the Tall Building lawyers
- Can leverage a mod or a better one
- Can be the basis for state court counterclaims, adversary proceedings or individual federal lawsuits
- Watch out for claim preclusion, Res Judicata, Rooker-Feldman and whole controversy issues

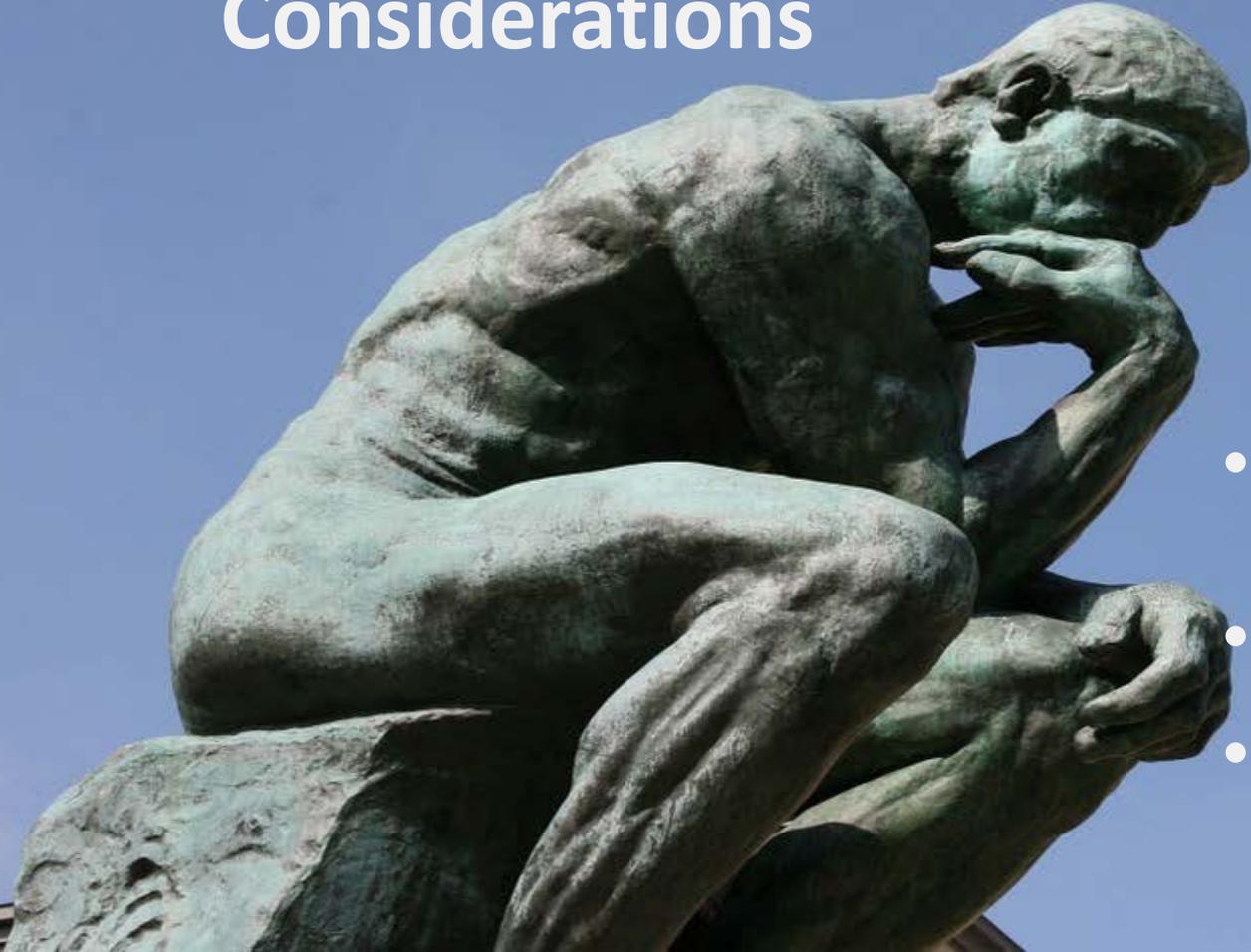


# RESPA as a Sword

- Actual damages
- Statutory damages available
- UDAP, Breach of Contract, FDCPA and FCRA claims
- Shifting attorneys fees and costs



# Additional Considerations



- Outside of special circumstances such as loss mitigation errors it is often not the error itself that is actionable, it is the servicer's failure to properly respond to the NOE or qualified written request.
- Actual damages, Actual damages, Actual damages!
- Pattern and Practice within your case
- Storytelling is key

# PATTERN AND PRACTICE FOR RESPA

*Meija v. Ocwen Loan Servicing LLC*, 703 F. App'x 860, 864 (11th Cir. 2017) ("Moreover, courts have interpreted the term "pattern or practice" in accordance with the usual meaning of the words, suggesting "a standard or routine way of operating." [McLean, 595 F. Supp. 2d at 1365](#) (quoting [In re Maxwell, 281 B.R. 101, 123 \(Bankr. D. Mass. 2002\)](#)). Failure to respond to one, or even two qualified written requests does not amount to a "pattern or practice." *See id.*

# STACKING OF DAMAGES FOR RESPA

12 C.F.R. 2605(f) explicitly states:

Whoever fails to comply with any provision of this section shall be liable to the borrower for **each such** (emphasis added) failure in the following amounts:

(1) Individuals In the case of any action by an individual, an amount equal to the sum of—

(A) any actual damages to the borrower as a result of the failure; and  
(B) any additional damages, as the court may allow, in the case of a pattern or practice of noncompliance with the requirements of this section, in an amount not to exceed \$2,000

# STACKING CONT'D

Section 2605(f) explicitly indicates that a failure to comply with damages gives rise to damages for each such failure and the failure to comply with separate provisions of the statute can render Rushmore liable for separate damages. *Moore v. Caliber Home Loans, Inc.*, Case No. 14-cv-00852-MRB, *Memorandum Opinion on Motion to Dismiss*, Page ID#223, (SDOH 2015, J. Barrett); see also *Weber v. Seterus*, Case No. 16-cv-06620, *Memorandum Opinion on Motion for Summary Judgment*, Page ID#109 (NDIL 03/28/2018: Judge Durkin)

# Cases that can be brought right away

- RESPA Dual Tracking: Servicer moves judicial foreclosure or non judicial sale forward in any way while loss mitigation (loan mod, short sale, deed in lieu) is pending.
- TILA false statement on a mortgage loan statement.
- RESPA failure to board a loan modification (usually during a servicing transfer, but not always)
- RESPA trial plan to loan modification transitions.



# Cases that must be built using RFIs & NOEs:

- RESPA escrow mistakes
- RESPA errors in boarding loans on transfer of servicing
- TILA failure to apply payment to principal, interest and escrow
- RESPA holding money in suspense
- RESPA failure to implement final cure from completed Chapter 13 bankruptcy
- RESPA failure to provide documents pursuant to RFI
- RESPA failure to respond to NOE in a timely manner
- RESPA lack of diligence in loan modification process
- RESPA inaccurate fees or corporate advances ( late fees, inspection fees, appraisals, legal fees)
- RESPA screw-ups related to securing allegedly abandoned homes
- RESPA failure to allow for an appeal of loss mitigation denial
- RESPA failure to properly review for loss mitigation.
- RESPA wrongful imposition of escrow.

# DRAFTING an RFI– PAYOFF

Servicer

Address for Receipt of Request for Information

City, State, ZIP

\*Sent via Certified Mail return receipt requested []

In the Matter of:

Borrower's Name:

Borrower's Address:

Loan Number:

\*\*If responding to this correspondence by e-mail, please send to [notices@dannlaw.com](mailto:notices@dannlaw.com)

# DRAFTING an RFI – PAYOFF

Re: Request for Payoff Statement Pursuant to 12 C.F.R. § 1026.36(c)(3)

Dear Sir or Madam:

This is a written request for a payoff statement related to the above-referenced mortgage loan account for which you are the servicer.

All references herein are to Regulation Z of the Mortgage Servicing Act as amended by the Consumer Financial Protection Bureau pursuant to the Dodd Frank Act.

The written authority from the above-referenced borrower to our law firm for this correspondence is enclosed herewith and incorporated herein by reference.

Pursuant to 12 C.F.R. § 1026.36(c)(3), you “must provide an accurate statement of the total outstanding balance that would be required to pay the consumer's obligation in full as of a specified date” within a reasonable time after receipt of this request. Under no circumstances are you to fail to provide the requested payoff statement within seven business days of receipt of this request.

# Drafting an RFI - LIFE OF LOAN

**Re: Request for Information Pursuant to 12 C.F.R. § 1024.36**

Dear Sir or Madam:

This is a Request for Information related to your servicing of the above-referenced mortgage loan. All references herein are to Regulation X of the Mortgage Servicing Act as amended by the Consumer Financial Protection Bureau pursuant to the Dodd Frank Act.

The written authority of the above-referenced borrower for this request to our law firm is enclosed herewith and incorporated herein by this reference.

Pursuant to 12 C.F.R. § 1024.36(c), you must provide our office with a written response acknowledging receipt of this notice **within five (5) days** of such, excluding legal public holidays, Saturdays, and Sundays.

Moreover, pursuant to 12 C.F.R. § 1024.36(d)(ii)(2)(B), you must provide the information requested, *infra*, **within thirty (30) days** after your receipt of this request, excluding legal public holidays, Saturdays, and Sundays.

# Drafting an RFI - LIFE OF LOAN

Please provide the following information within the time periods noted herein:

An exact reproduction of the life of loan mortgage transactional history for this loan from the contract system of record from your electronic software program for this loan. For purposes of identification, the life of loan transactional history means any software program or system by which the servicer records the current mortgage balance, the receipt of all payments, the assessment of any late fees or charges, and the recording of any corporate advances for any fees or charges including but not limited to property inspection fees, broker price opinion fees, legal fees, escrow fees, processing fees, technology fees, or any other collateral charge. Also, to the extent this life of loan transactional history includes in numeric or alpha-numeric codes, please attach a complete list of all such codes and state in plain English a short description for each such code.

Copies of any and all servicing notes related to your servicing of the above-referenced mortgage loan from January 10, 2014.

Copies of any and all broker's price opinions you performed or otherwise obtained for the above-referenced property in relation to the above-referenced mortgage loan.

# Drafting an RFI - Other Information You Can Request

## **Location of Note/Custodial File:**

The physical location of the original note related to the above-referenced mortgage loan.

A true and accurate copy of the original note related to the above-referenced mortgage loan.

The identity, address, and other relevant contact information for the custodian of the collateral file containing the original collateral documents for the above-referenced mortgage loan, including, but not limited to the original note.

# Drafting an RFI - Other Information You Can Request

## **Loss mitigation/Loan Modification Documents:**

Please state each and every date during the time period from January 10, 2014, to the present on which you received a complete loss mitigation application from the above-referenced borrower. Please note that, pursuant to 12 C.F.R. § 1024.41(b)(1), a “complete loss mitigation application” is defined as “an application in connection with which a servicer has received all the information that the servicer requires from a borrower in evaluating applications for the loss mitigation options available to the borrower.”

# Drafting an RFI – TILA Request

**Re: Request for Information Pursuant to 12 C.F.R. § 1024.36 and 15 U.S.C. § 1641(f)(2)**

Dear Sir or Madam:

This is a Request for Information related to your servicing of the mortgage loan of the above-named borrower. All references herein are to Regulation X of the Mortgage Servicing Act as amended by the Consumer Financial Protection Bureau pursuant to the Dodd Frank Act.

The written authority of the above-referenced borrower for this Request to our law firm is enclosed herewith and incorporated herein by reference.

Pursuant to 12 C.F.R. § 1024.36(d), you must respond to this Request no later than **ten (10) days** after your receipt of such, excluding legal public holidays, Saturdays, and Sundays.

Please provide the following information within the time periods noted herein:

# Drafting an RFI – TILA Request

The name, address, and appropriate contact information for the current owner or assignee of the above-referenced mortgage loan.

a. If the above-referenced mortgage loan is held in a trust for which an appointed trustee receives payments on behalf of such trust and Federal National Mortgage Association (Fannie Mae) or Federal Home Loan Mortgage Corporation (Freddie Mac) is the owner of such loan or the trustee of the securitization trust in which the loan is held, please also provide the name or number of the trust or pool in which such loan is held.

The identity of and address for the master servicer of the above-referenced mortgage loan.

The identity of and address for the current servicer of the above-referenced mortgage loan.

Please be advised this request is also being made under 12 U.S.C. § 1641(f)(2) of the Truth in Lending Act (TILA). For each violation of TILA, you may be liable to the borrower for actual damages, costs, attorney fees, and statutory damages of up to Four Thousand Dollars (\$4,000.00).

# WHY SEND THE TILA LETTER?

Knowing the owner/investor of the loan is crucial to loss mitigation and potentially strategic in knowing when to litigate

Sometimes the master servicer is different than the current servicer

During litigation, sometimes the answers you get in discovery are different than the answer you get with the RFI!

**DAMAGES!!!!**

# NOTICES OF ERROR – Simple Rules of Thumb

You can send an NOE when the borrower reasonably believes an error has occurred on the loan.

The vast majority of RESPA violations are only triggered with the sending of a Notice of Error and the subsequent failure to respond/failure to investigate.

Get familiar with 12 C.F.R. 1024.35(b)(1)-(11) as they are the different categories of errors. When in doubt, cite the section you think it may be covered and (b)(11).

# NOTICES OF ERROR – Simple Rules of Thumb

Remember: A servicer does not have to agree the error is committed, they however must conduct a “reasonable investigation”:

12 C.F.R. § 1024.35(e)(1) provides that a servicer must respond to a notice of error by either “[c]orrecting the error or errors identified by the borrower and providing the borrower with a written notification of the correction, the effective date of the correction, and contact information, including a telephone number, for further assistance” or “[c]onducting a reasonable investigation and providing the borrower with a written notification that includes a statement that the servicer has determined that no error occurred, a statement of the reason or reasons for this determination, a statement of the borrower's right to request documents relied upon by the servicer in reaching its determination, information regarding how the borrower can request such documents, and contact information, including a telephone number, for further assistance.”

# NOTICES OF ERROR – Simple Rules of Thumb

DO NOT SEND MULTIPLE REQUESTS IN A NOE

BE AS CLEAR AS POSSIBLE IN YOUR ERROR

BE AS CLEAR AS POSSIBLE IN YOUR PROPOSED RESOLUTION  
TO THE ERROR

REMEMBER PATTERN AND PRACTICE!!!!

# 12 C.F.R. 1024.35(b)(1)-(11)

**(b) Scope of error resolution.** For purposes of this section, the term “error” refers to the following categories of covered errors:

- (1)** Failure to accept a payment that conforms to the [servicer](#)'s written requirements for the borrower to follow in making payments.
- (2)** Failure to apply an accepted payment to principal, interest, escrow, or other charges under the terms of the [mortgage loan](#) and applicable law.
- (3)** Failure to credit a payment to a borrower's [mortgage loan](#) account as of the date of receipt in violation of [12 CFR 1026.36\(c\)\(1\)](#).
- (4)** Failure to pay taxes, insurance premiums, or other charges, including charges that the borrower and [servicer](#) have voluntarily agreed that the [servicer](#) should collect and pay, in a timely manner as required by [§ 1024.34\(a\)](#), or to refund an [escrow account](#) balance as required by [§ 1024.34\(b\)](#).

# 12 C.F.R. 1024.35(b)(1)-(11)

- (5)** Imposition of a fee or charge that the [servicer](#) lacks a reasonable basis to impose upon the borrower.
- (6)** Failure to provide an accurate payoff balance amount upon a borrower's request in violation of section [12 CFR 1026.36\(c\)\(3\)](#).
- (7)** Failure to provide accurate information to a borrower regarding [loss mitigation options](#) and foreclosure, as required by [§ 1024.39](#).
- (8)** Failure to transfer accurately and timely information relating to the [servicing](#) of a borrower's [mortgage loan](#) account to a [transferee servicer](#).
- (9)** Making the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process in violation of [§ 1024.41\(f\)](#) or (j).
- (10)** Moving for foreclosure judgment or order of sale, or conducting a foreclosure sale in violation of [§ 1024.41\(g\)](#) or (j).
- (11)** Any other error relating to the [servicing](#) of a borrower's [mortgage loan](#).

# SAMPLE NOTICE OF ERROR

July 2, 2018

Selene Finance LP

ATTN: Customer Service Research

P.O. Box 421517

Houston, TX 77242

*\*Sent via Certified Mail return receipt requested [7014 2120 0003 0667 4133]*

## **In the Matter of:**

Borrower's Name:

Property Address:

Mortgage Acct. No.:

*\*If responding to this correspondence by e-mail, please send to [notices@dannlaw.com](mailto:notices@dannlaw.com)*

**Re: Notice of error pursuant to 12 C.F.R. § 1024.35(b)(2) for failing to apply accepted payments to principal, interest, escrow, or other charges under the terms of the mortgage loan and applicable law**

# SAMPLE NOTICE OF ERROR

Dear Sir or Madam:

Please consider this letter to constitute a Notice of Error under 12 C.F.R. § 1024.35 of Regulation X of the Mortgage Servicing Act under the Real Estate Settlement Procedures Act (RESPA), which became effective on January 10, 2014. These amendments implemented the Dodd-Frank Wall Street Reform and Consumer Protection Act provisions regarding mortgage loan servicing.

Pursuant to 12 C.F.R. § 1024.35(d), **within five (5) days** of your receipt of this notice, excluding legal public holidays, Saturdays and Sundays, you must send a written response acknowledging such receipt.

Pursuant to 12 C.F.R. § 1024.35(e)(3)(i)(C), **within thirty (30) days** of your receipt of this notice, excluding legal public holidays, Saturdays and Sundays, you must send a written response to this notice in compliance with the express requirements of 12 C.F.R. § 1024.35(e)(1)

A written authorization from the above-referenced borrowers (the “Borrowers”) authorizing our firm to send this notice is enclosed and incorporated by this reference.

# SAMPLE NOTICE OF ERROR

Notice of errors pursuant to 12 C.F.R. § 1024.35(b)(2) for failing to apply accepted payments to principal, interest, escrow, or other charges under the terms of the mortgage loan and applicable law:

12 C.F.R. § 1024.35(b)(2) provides that it is an error for a servicer to fail “to apply an accepted payment to principal, interest, escrow, or other charges under the terms of the mortgage loan and applicable law.”

On or about June 19, 2018, the Borrowers received correspondence from Selene Finance that the loan was delinquent for the May 2018 and June 2018 contractual mortgage payment. A copy of this correspondence is enclosed.

The Borrowers are aware of the Notice of Servicing Change from Caliber Home Loans, Inc. to Selene Finance which took place in May 2018. **It is the Borrowers’ understanding that they were to pay the May 2018 contractual mortgage payment to Caliber Home Loans, Inc. and the June 2018 payment was the first payment to be tendered to Selene.**

# SAMPLE NOTICE OF ERROR Continued

Based upon the enclosed proof of payment from JP Morgan Chase Bank, N.A., the Borrowers tendered the May 2018 contractual mortgage payment to Caliber Home Loans, Inc. on May 4, 2018 in the amount of \$1,401.71.

***Based upon the receipt of the June 19, 2018 letter, the Borrowers assert that Selene Finance has failed to properly credit both the May 4, 2018, payment and the June 3, 2018, payment tendered by the Borrowers pursuant to 12 C.F.R.***

***1024.35(b)(2). The Borrowers allege that Selene Finance has misapplied two (2) contractual mortgage payments of \$1,401.71 or \$2,803.42 total which represent the May 2018 and June 2018 contractual mortgage payments. The Borrowers allege these actions constitute two (2) separate and distinct errors in the servicing of their mortgage loan pursuant to 12 C.F.R. 1024.35(b)(2) or alternatively 12 C.F.R. 1024.35(b)(11).***

# SAMPLE NOTICE OF ERROR Continued.

Notice of errors pursuant to 12 C.F.R. § 1024.35(b)(2) for failing to apply accepted payments to principal, interest, escrow, or other charges under the terms of the mortgage loan and applicable law:

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# SAMPLE NOTICE OF ERROR

## Conclusion and requested actions:

Based upon the foregoing, the Borrowers calculate and otherwise allege that **Selene has committed no less than a total of two (2) errors in the servicing of the Loan** as described *supra*.

Please correct these errors and provide us with notification of the correction(s), the date of the correction(s), and contact information for further assistance; or, after conducting a reasonable investigation, provide the Borrowers, **through our office**, with a written notification that includes: a statement that you have determined that no error(s) occurred; a statement of the reason(s) for such determination; a statement of the Borrowers' right to request documents upon which you relied in reaching your determination; information regarding how the Borrowers can request such documents; and, contact information for further assistance. *In addition to the documentation related to the investigation of the Notice of Error, the Borrowers are also requesting: (1) A life of loan transaction history from July 1, 2017, to the present (June 30, 2018); and a (2) A payoff statement.*

Further, please note that pursuant to 12 C.F.R. § 1024.35(i), after you receive this notice, you are prohibited from furnishing adverse information to any consumer credit reporting agency regarding any payment that is the subject of this notice for at least sixty (60) days.



*Up Next:*

Loss Mitigation

## Loss Mitigation – How Many Bites at the Apple?

A servicer is only required to comply with the requirements of this section for a single complete loss mitigation application for a borrower's mortgage loan account.



# Prohibition on Foreclosure Referrals

1024.41(f) states that a servicer shall not make the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process unless:

- (i) A borrower's mortgage loan obligation is more than 120 days delinquent;
- (ii) The foreclosure is based on a borrower's violation of a due-on-sale clause; or
- (iii) The servicer is joining the foreclosure action of a subordinate lienholder.

# What Is a Foreclosure Referral?

The commentary states:

- i. Where foreclosure procedure requires a court action or proceeding, a document is considered the first notice or filing if it is the earliest document required to be filed with a court or other judicial body to commence the action or proceeding (e.g., a complaint, petition, order to docket, or notice of hearing).
- ii. Where foreclosure procedure does not require an action or court proceeding, such as under a power of sale, a document is considered the first notice or filing if it is the earliest document required to be recorded or published to initiate the foreclosure process.

## What Is a Foreclosure Referral? (cont.)

iii. Where foreclosure procedure does not require any court filing or proceeding, and also does not require any document to be recorded or published, a document is considered the first notice or filing if it is the earliest document that establishes, sets, or schedules a date for the foreclosure sale.

iv. A document provided to the borrower but not initially required to be filed, recorded, or published is not considered the first notice or filing on the sole basis that the document must later be included as an attachment accompanying another document that is required to be filed, recorded, or published to carry out a foreclosure.



## Loss Mitigation: Foreclosure Sale

*Prohibition on foreclosure sale.* If a borrower submits a complete loss mitigation application after a servicer has made the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process but more than 37 days before a foreclosure sale, a servicer shall not move for foreclosure judgment or order of sale, or conduct a foreclosure sale, unless:

(1) The servicer has sent the borrower a notice pursuant to paragraph (c)(1)(ii) of this section that the borrower is not eligible for any loss mitigation option and the appeal process in paragraph (h) of this section is not applicable, the borrower has not requested an appeal within the applicable time period for requesting an appeal, or the borrower's appeal has been denied;

## Loss Mitigation: Foreclosure Sale (cont.)

- (2) The borrower rejects all loss mitigation options offered by the servicer; or
- (3) The borrower fails to perform under an agreement on a loss mitigation option.

A servicer not moving for foreclosure judgment includes:

- Not moving for summary judgment

- Not moving for default judgment of the borrower currently be considered for loss mitigation

A servicer must take reasonable steps to avoid a ruling on a pending motion that would result in a foreclosure judgment against a borrower

## Loss Mitigation – Less than 37 days

If a complete loss mitigation application is received less than 37 days before a scheduled foreclosure sale, a servicer is under no obligation to conduct a loss mitigation review. See 1024.41(c)(1).



## Loss Mitigation - Timing

So a lender receives a request for assistance. What deadlines are triggered? Section 1024.41(b)(2)(1)(B) states:

Within 5 days (excluding legal public holidays, Saturdays, and Sundays) after receiving the loss mitigation application that the servicer acknowledges receipt of the loss mitigation application and that the servicer has determined that the loss mitigation application is either complete or incomplete.



# Loss Mitigation – What Triggers Obligations under the Regulation?

A lender is under no obligation to review a borrower without a request for loss mitigation.

If a borrower makes a request for loss mitigation, to what extent can the Regulations be triggered?

Section 1024.31 defines a loss mitigation application as:

“an oral or written request for a loss mitigation option that is accompanied by any information required by a servicer for evaluation for a loss mitigation option.”

*“Loss mitigation option means an alternative to foreclosure offered by the owner or assignee of a mortgage loan that is made available through the servicer to the borrower.”*

## Loss Mitigation Timing on a Complete Application

Pursuant to Section 1024.41(c), If a servicer receives a complete loss mitigation application more than 37 days before a foreclosure sale, it is required to, within 30 days of the date the application was considered complete:

- (i) Evaluate the borrower for all loss mitigation options available to the borrower; and
- (ii) Provide the borrower with a notice in writing stating the servicer's determination of which loss mitigation options, if any, it will offer to the borrower on behalf of the owner or assignee of the mortgage.

# Loss Mitigation – What Triggers Obligations under the Regulation?

Thus, a request for assistance accompanied by the statement “I make \$1,000 a month” could trigger the obligations under this Regulation.



## Loss Mitigation - Timing

If a loss mitigation application is incomplete, the notice shall state the additional documents and information the borrower must submit to make the loss mitigation application complete and the applicable date pursuant to paragraph (b)(2)(ii) of this section. The notice to the borrower ***shall include a statement*** that the borrower should consider contacting servicers of any other mortgage loans secured by the same property to discuss available loss mitigation options.”

The Notice also “must include a reasonable date by which the borrower should submit the documents and information necessary to make the loss mitigation application complete.”

## Loss Mitigation Timing on a Complete Application (cont.)

The servicer shall include in this notice the amount of time the borrower has to accept or reject an offer of a loss mitigation program as provided for in paragraph (e) of this section, if applicable, and a notification, if applicable, that the borrower has the right to appeal the denial of any loan modification option as well as the amount of time the borrower has to file such an appeal and any requirements for making an appeal.”

Servicer must allow 14 days (7 days if the sale is within 45 days) for borrower to decide on the offer of a loss mitigation program



## Loss Mitigation – Timing (what is reasonable)?

When attempting to offer guidance on what constitutes a significant period of time, the CFPB simply stated that it may include consideration of the timing of the foreclosure process. As an example, the CFPB said that “if a borrower is less than 50 days before a foreclosure sale, an application remaining incomplete for 15 days may be a more significant period of time under the circumstances than if the borrower is still less than 120 days delinquent on a mortgage loan obligation” (and thus the foreclosure would not have been filed yet due the pre-foreclosure review period).

# Loss Mitigation – What If the Application Was Facially Complete?

Under Section 1024.41(c)(2)(iv), where an application is considered facially complete upon the first review and the borrower is informed of the same in the “five day letter” required under 1024.41(b)(2)(i)(B), but it is later determined that information is missing, presuming the borrower timely provides a complete package, the lender is required to consider the application “complete” as of the date it was facially complete.



## Loss Mitigation – What If the Application Was Facially Complete?

What does this mean? If a lender receives a loss mitigation package and determines it is facially complete on April 1st, but later determines it is incomplete on April 15th, so long as the borrower provides the missing documentation within a reasonable period, the evaluation must be complete under 1024.41(c)(1).



## Loss Mitigation – Appeals of Denials

Under Section 1024.41(h), a servicer is required to let the borrower to appeal the denial of any trial or permanent loan modification offers if it is issued 90 days or more before a foreclosure sale (or during the 120 period before the matter can be referred to foreclosure).

The servicer is required to give the borrower 14 days to appeal.

Pursuant to 1024.41(h)(3), an appeal must be reviewed by different personnel than those responsible for evaluating the borrower's complete loss mitigation application.

# Loss Mitigation – Appeals of Denials (cont.)

Notice must be given to the borrower.

The stay on foreclosure remains in place during the appeal.

The borrower may also send a NOE.

The servicer is required to provide a response to the appeal within 30 days. See 1024.41(h)(4).

The borrower shall be given 14 days to accept or reject any offers.



## Loss Mitigation – the Risk

(3) Costs: In addition to the amounts under paragraph (1) or (2), in the case of any successful action under this section, the costs of the action, together with any attorney's fees incurred in connection with such action as the court may determine to be reasonable under the circumstances.



# THANK YOU!!!

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