

FORECLOSURE DEFENSE BASICS

With the continued economic crisis, it is important for [lawyers](#) to know how to represent a homeowner in foreclosure. While much discussion has been devoted to deeds in lieu of foreclosure, short sales, and other ways to help a homeowner exit their home, not much discussion has been devoted to how to challenge a wrongful foreclosure. This article covers the basics. First, a brief overview of the economic crisis.

Brief History of the Economic Crisis

Up to mid-2006, the housing market was booming. Lenders, eager to take advantage of the perceived opportunity, incorporated various incentives into their loans, in order to encourage consumers to borrow more money. Unfortunately, the banks, in their frenzy, issued many loans to consumers who clearly could not afford the loans. The lenders pushed the subprime loans by assuring the consumers they could quickly refinance to lower rates.

Then, in mid-2006, the bubble burst. Interest rates rose and property values plummeted, making it difficult to refinance. Many of the loans went into foreclosure as the consumers, predictably, defaulted.

This economic crisis resulted in a number of banks collapsing. The government showed compassion to the big banks that survived by passing the Emergency Economic Stabilization Act, 12 U.S.C. §§ 5201 *et seq.*, which provided a \$700 billion bailout to the banks. The Act, in part, delegated authority to the U.S. Treasury to provide taxpayer money to banks, in return for the banks' agreement to participate in programs designed to assist struggling homeowners. 12 U.S.C. § 5219. One such program was the Obama Administration's Home Affordable

Modification Program (HAMP). 12 U.S.C. §§ 5219, 5219a, 1715z-23.

Contrary to popular belief, HAMP actually *requires* a loan modification under certain conditions, leaving no discretion to the mortgage servicer. Although HAMP is a voluntary program, 12 U.S.C. § 1715z-23(e)(4)(C), if a servicer chooses to participate, it is bound by the requirements.

HAMP Requirements

The first step toward a HAMP modification is a Trial Period Plan (TPP). A TPP reduces the monthly mortgage payments to 31% of the homeowner's gross monthly income. The HAMP Guidelines (www.hmpadmin.com/portal/programs/docs/hamp_servicer/mhahandbook_30.pdf), at pp. 41-42, 73, mandate that a participating mortgage servicer provide a TPP when:

- (a) The mortgage is a first lien originated on or before Jan. 1, 2009;
- (b) No previous HAMP modification;
- (c) The mortgage is delinquent or default is reasonably foreseeable;
- (d) The home is the principal residence;
- (e) The home is not vacant;
- (f) The borrower has documented financial hardship;
- (g) The mortgage payments are greater than 31% of the borrower's monthly gross income;
- (h) If there is no escrow account, the borrower agrees to create one;
- (i) The unpaid principal balance is not greater than \$729,750; and
- (j) The Net Present Value test (NPV) is positive [NPV is explained at https://www.hmpadmin.com/portal/earningcenter/docs/job_aids/sumbittinngloantest.pdf].

The fact that a mortgage servicer has no discretion, and must provide a TPP, is shown by the HAMP Guidelines at p. 73:

All loans that meet HAMP eligibility criteria ... must be evaluated using a standardized NPV test [I]f the NPV result for the modification scenario is greater than the NPV result for no modification, the result is deemed “positive” and the servicer must offer the modification.

The procedure for issuing a HAMP modification is straightforward. First, the consumer applies. Second, the mortgage servicer reviews the application. Third, only if the consumer is eligible, the mortgage servicer must issue a TPP. Finally, if the homeowner makes three timely TPP payments, the TPP becomes permanent.

How To Use HAMP To Defend The Homeowner In Foreclosure

In Maryland, a mortgage servicer must submit an affidavit stating that it has engaged in good-faith loss mitigation efforts, or explaining what is required for the homeowner to qualify. Md. Code, Real Prop. § 7-105.1(d)(2)(viii). In either case, the homeowner may request mediation and, if the homeowner is entitled to loss mitigation, the courts may require the mortgage servicer to comply with its obligations, resulting in dismissal.

Additionally, violating HAMP often gives rise to causes of action against the mortgage servicer. HAMP, in and of itself, does not give rise to a private cause of action. However, a HAMP violation may satisfy one or more legal elements of a recognized statutory or common law claim.

This is important. If the homeowner files a counterclaim against the servicer, and demands a jury, the court will often have to stay foreclosure proceedings until after the

jury trial. A foreclosure may act as *res judicata* to an issue raised in the counterclaim. In such event, the court must stay the foreclosure, until resolution of the counterclaim, in order to protect the homeowner’s constitutional jury rights. *Fairfax Savings, F.S.B. v. Kris Jen Ltd.*, 338 Md. 1, 31 (1995); *Chaires v. Chevy Chase Bank*, 131 Md. App. 64 (2000); *Higgins v. Barnes*, 310 Md. 532 (1987).

For instance, a foreclosure acts as *res judicata* to the existence of a foreclosure-triggering default. In the counterclaim, the homeowner may allege there is no default, because of entitlement to a HAMP modification. See *Wells Fargo Home Mortgage v. Neal*, 398 Md. 705 (2007) (violation of loss mitigation requirements permitted finding of no default).

The issue of no default could well be essential to the counterclaim. For example, it is a violation of the Maryland Consumer Protection Act for a mortgage servicer to attempt or threaten to exercise a right that does not exist. Md. Code, Com. L. §§ 13-101 *et seq.* If a mortgage servicer directs its attorneys to file a foreclosure, when there is actually no default because the homeowner is entitled to a HAMP modification, then the servicer is subject to liability. The court would need to stay the foreclosure in order to protect the homeowner’s constitutional right to a jury finding on the issue.

There are countless other fact patterns that permit a jury finding of no default or that the mortgage servicer waived the default. Counsel should work diligently to spot these issues because, oftentimes, the best foreclosure defense is a good offense.

Traditional Foreclosure Defenses

The traditional defenses fall into two categories – procedural and substantive. Substantive defenses may only be raised before the sale, while procedural defenses

may either be raised before, or in timely exceptions filed after, the sale. *Bates v. Cohn*, 417 Md. 309 (2010).

One procedural defense is inadequate sale price. A sale must be set aside where the sale price shocks the conscience. *Simard v. White*, 383 Md. 257 (2004); *McCartney v. Frost*, 282 Md. 631 (1978). The leading case on inadequacy of sale price is *Pizza v. Walter*, 345 Md. 664 (1997), which held that a sale should have been vacated where the home was purchased for only 52% of its fair market value. The Court noted that a sale should be set aside, even if it does not shock the conscience, where there is an inadequate price coupled with some other evidence of irregularity. 345 Md. at 667.

Defective service may result in dismissal. Service is a procedural right. *Griffin v. Bierman*, 403 Md. 186 (2008). Process servers often post the Order to Docket (the foreclosure lawsuit) on the homeowner's door. However, before posting is permitted, Rule 14-209(a) first requires "good faith" attempts on two different days to serve the homeowner personally. What is a good faith attempt? If, on the first attempt, the process server fails to leave a note with a contact number to arrange personal service, is that good faith? If the mortgage servicer had the homeowner's email, but did not email any notice to the homeowner after a failed first attempt, is that good faith? Especially where the homeowner failed to timely raise a valid objection to the foreclosure, dismissal should be sought for invalid service to restart the foreclosure timeline.

Another defense is the legal fiction of no default. The Court of Appeals has held that, where a mortgage servicer engages in inequitable conduct, even if there is an otherwise valid default, the court may impose the legal fiction of no default. *Wells Fargo Home Mortgage v. Neal*, 398 Md. 705 (2007).

The defense of tender may also save the home. If the homeowner tried to tender payment of the default, but the mortgage servicer rejected the payment and instead demanded payment of the mortgage in full, the court must dismiss the foreclosure. *Greenbriar Condominium, Phase I, Council of Unit Owners, Inc. v. Brooks*, 159 Md.App. 275 (2004). In Maryland, a homeowner may tender payment at any time up until one business day before the sale. Md. Code, Real Prop. § 7-105.1(n)(1). To date, case law has only held that tender is a substantive defense, and must be raised pre-sale. *Greenbriar, supra*. However, tender (like other traditionally substantive defenses), may in some cases be procedural, as the *Bates* court recognized that part of the delineation between "substantive" and "procedural" depends on when the wrongful conduct occurred, and when the homeowner had notice thereof. *Bates*, 417 Md. at 19.

Other defenses include (a) insufficient advertisement of sale, (b) preventing or chilling bidding at sale, and (c) a misstatement of the amount of the debt. See *Greenbriar*, 387 Md. at 740-41.

Conclusion

Banks caused the economic crisis. The taxpayers came to the banks' rescue with a \$700 billion bailout. In return, these banks are required to shoulder part of the burden in helping the average taxpayer get back on financial track, such as by complying with HAMP. Helping the consumer would produce necessary cash flow for the economy. However, many banks choose not comply with their obligations. As a result, many homes are needlessly in jeopardy, and these consumers have valid foreclosure defenses. As attorneys, we should help them.

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