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F. DANA WINSLOW

NYS SUPREME COURT JUSTICE

Before the House of Representatives

DECEMBER 2, 2010

ON

CAUSES AND EFFECTS OF THE FORECLOSURE CRISIS

HOUSE OF REPRESENTATIVES COMMITTEE ON THE JUDICIARY

FORECLOSED JUSTICE:
CAUSES AND EFFECTS OF THE FORECLOSURE CRISIS

Hon. F. Dana Winslow
December 2, 2010

1 BACKGROUND

1.1 Justice in NY State Supreme Court for past 14 years. (Highest trial court within NYS system.)

1.2 Former president of the NYS Supreme Court Justices' Association and present member of the Executive Committee.

1.3 Previous – practicing attorney: federal securities area; commercial, municipal, criminal, and civil litigation in State and Federal Courts.

1.4 On the bench: Presided over more than 1000 mortgage foreclosure cases and the mass re-assessment case in 2003-2005 which provided insight into home values on Long Island.

2 OVERVIEW – FROM COURT'S PERSPECTIVE

2.1 Volume of Foreclosures. Based upon anecdotal evidence, approximately 11% of all homes in Nassau County are either in foreclosure or have been in default for 90 days or more. Court statistics show that 3.12% of all of the homes in Nassau County (approximately 360,000) are in foreclosure. Nassau County Supreme Court (2010) statistics:

2.1.1 Year to date filings: 4,625

2.1.2 Total pending: 11,144

2.2 Problems seen on a recurrent basis. Deficiencies or defects in: (i) the Plaintiff Mortgagee's proof of its right to foreclose and (ii) the Defendant Homeowners' notice of a foreclosure and their opportunity to attempt a loan modification or "workout," or otherwise protect their interests.

2.3 Guiding Principle: Equitable Predictability. Plaintiff Mortgagee, Defendant Homeowner, and the Real Estate industry as a whole, must know with greater certainty what the probable outcome will be following the commencement of a foreclosure action; a predictability that is fair and sustainable.

3 MORTGAGEE ISSUES

3.1 Uncertainty in process and outcome.

3.1.1 **Uncertain requirements**. In the past, the judiciary may have inadvertently contributed to the creation of the foreclosure crisis, by accepting, without question, the submissions of lending institutions seeking foreclosure. Courts have come to recognize the need to scrutinize the evidentiary submission of the Plaintiff Mortgagee before proceeding with foreclosure, and to define the nature of the proof required; that is, the documents that must be submitted to commence the action and apply for an Order of Reference (the Court Order in NY State providing for the computation of the Defendant Homeowner's debt by a court-appointed referee).

3.1.2 **Unsatisfactory Options.** Plaintiff Mortgagees are ambivalent about foreclosure. They want to stop the financial drain of retaining homes in their default inventory (on which they must continue to pay taxes and insurance premiums), yet they know that selling the property in foreclosure results in a greater inventory of homes and a depression of community property values. Forced sale does not relieve them of their property-related expenses, since in the overwhelming percentage of cases, the mortgaged property is sold to a subsidiary or a company controlled by the Plaintiff Mortgagee.

3.1.3 **Uninsurable properties**. Title companies have been expressing increasing reluctance to insure foreclosed properties, due to uncertainty regarding the legitimacy of the transfer of the property to a third party.

3.2 Proof of Standing – Ownership of the Note and Mortgage.

Standing has become such a pervasive issue that I frequently use the term "presumptive mortgagee in foreclosure" to describe the Plaintiff Mortgagee.

3.2.1 **Possession of the actual Mortgage and the actual Note**.

3.2.1.1 Failure to produce Note or production of wrong Note.

3.2.1.2 Affidavits of non-possession or loss of Notes – offered in lieu of the Note. Who has the burden of proof? Are there presumptions available to either party?

3.2.2 **Gaps in the chain of title**. Missing assignments -- effects on prior unnamed mortgagees and their rights. I have obtained from the County Clerk printouts of mortgagee title that have differed substantially from the information provided by Plaintiff Mortgagees in foreclosure applications.

3.2.3 **Retroactive Assignments**. Occurs when, at the time of the commencement of a foreclosure action, the foreclosing Plaintiff Mortgagee did not own the Note and Mortgage. The Note or Mortgage are subsequently assigned to the Plaintiff Mortgagee but made effective "as of" a date prior to commencement of the action. Some NY Courts are now holding that such retroactive assignments do not confer standing upon an assignee mortgagee. I did so in January 2010, in *The Bank of New York as Trustee v. Nagi Elserafy et al.,* Nassau County Index No. 010723/07.

3.2.4 **Robo-signing**. Questionable validity of signatures on assignments and affidavits attesting to ownership of the Note and Mortgage. Examples:

3.2.4.1 Signed by: "Duly Authorized Officer," "Authorized Signer," "Attorney-in-Fact" or "Authorized Agent." What do these titles mean? What is the function of the person signing the documents, and what is the basis of their personal knowledge?

3.2.4.2 Same person signs several documents, in several different capacities: e.g., "Vice President of [Assignor Mortgagee]" is also the "Assistant Secretary of the Servicer" for the Plaintiff Mortgagee, and an employee of the law firm bringing the foreclosure action.

3.2.5 **Validity of notary stamps** on assignments.

3.2.5.1 Assignment documents notarized several months after the assignment was purportedly effected.

3.2.5.2 Notarized in blank – name of the person whose signature was purportedly witnessed is omitted.

3.3 Separation of Equitable and Legal Interest in the Mortgage.

3.3.1 **Servicers**. There is no precise definition. More aptly, there are interchangeable definitions. In one instance, the servicer collects the mortgage payments from the homeowner. In another, the servicer appears to be the equitable owner of the mortgage, and in a third, the servicer commences a foreclosure action on behalf of the equitable owner. In one instance, I asked the attorney for the plaintiff to tell me whether he represented the Plaintiff Mortgagee or the servicer and he said that he did not know.

3.3.2 **Mortgage Electronic Registration Systems ("MERS").**

3.3.2.1 History: My office has been in communication with MERS since 2004. According to MERS counsel, MERS, owned by MERSCORP, was formed in 1996 and, as of 1997, has acted only as a "nominee," to facilitate the transfer of mortgages.

3.3.2.2 Issues:

3.3.2.2.1 Difficulty arises in multiple unrecorded transfers of the legal ownership of the Mortgage (with or without the transfer of the Note) and with tracing and proving the chain of title. I refer the Committee to the attached diagram [Attachment "A"], obtained on the internet, which I believe to be both a nonsensical and accurate depiction of the problems concerning mortgagee chain of title.

3.3.2.2.2 Unclear whether MERS is (by virtue of the rights granted by the Homeowner in the initial Mortgage instrument) the nominee for the initial Mortgagee only, or for all subsequent Mortgagees, including the unnamed, unrecorded Mortgagees in the chain of title, and the Mortgagee who holds the beneficial interest at the time of foreclosure.

3.3.2.2.3 MERS is named as Nominee for purposes of recording the Mortgage. MERS relies upon that status in bringing foreclosure actions in its own name, as Plaintiff. It is unclear that the designation as Nominee for *recording* purposes gives MERS the right to *foreclose*.

3.3.2.2.4 MERS appears on both sides of the foreclosure action. I have seen actions in which MERS has brought the action as plaintiff, and named itself as a defendant.

3.3.3 Can deficiencies be addressed by an Allonge, with or without the approval or signature of the Homeowner? This question has not been answered by the judiciary or the legislature.

3.4 "Packaging" of Mortgages. The creation of pools of mortgages, typically with tranches; i.e., Collateralized Debt Obligations ("CDOs").

3.4.1 **Problem**: whether or not the "pool," "trust" or "fund" has the ultimate right to select specific mortgages from its assets and thereafter foreclose. Does the Court have to make independent determinations through a hearing process?

3.4.2 **Example**: I refer the Committee to the attached caption, which is typical of foreclosure actions arising from CDOs [Attachment "B"].

3.5 Other Prima Facie Proof.

3.5.1 **General problem**. Foreclosures processed by law firms in "bulk": my office has compared foreclosure applications that vary little or not at all from each other and occasionally contain language inapplicable to the foreclosure being considered.

3.5.2 **Proof of debt**.

3.5.2.1 Case example. Wife signed Mortgage but not the Note. I held that the Plaintiff Mortgagee must provide, at minimum, an explanation. Without such explanation, there would be dismissal. Demonstrates a dual problem: First, there is no conformity with the recording act (the Mortgage does not match the underlying debt obligation); and second, it allows the lenders to issue mortgages with the knowledge that one of the homeowners is not creditworthy, and to show overstated income or payment requirements on the closing statements for the loan.

3.5.3 **Amount due**.

3.5.3.1 Robosigning - the individual signing the affidavit has no knowledge of the required facts.

3.5.3.2 Plaintiff Mortgagee must demonstrate proper accounting and crediting of payments, particularly where there have been multiple mortgagees and/or servicers.

4 HOMEOWNER ISSUES

4.1 General. The ultimate goal is a process which is equitable and predictable, affording the Defendant Homeowners sufficient and accurate information, and an opportunity to protect their interests.

4.2 Knowledge of the Lawsuit: Service of Process.

4.2.1 **Actual knowledge**. The laws governing service of process are designed to provide defendants with actual notice of the lawsuit whenever possible. Problems arise in determining whether or not the Defendant Homeowner has received actual notice. Affidavits of process servers are often incomplete, uninformative or defective on their face.

4.2.2 **Substituted service**.

4.2.2.1 NY's Civil Practice Law and Rules ("CPLR") allows service by methods other than in-hand delivery to Defendant Homeowner.

4.2.2.1.1 CPLR 308(2) Delivery to person of "Suitable Age and Discretion" at the residence.

4.2.2.1.2 CPLR 308(4) "Nail and Mail" – affixation to the door of the residence.

4.2.2.2 Problems determining whether the summons and complaint were ultimately received by the Defendant Homeowner.

4.2.2.2.1 Person who accepts papers is not named, identified or described. The recipients are often "John" or "Jane" Doe, identified only as the Defendant Homeowner's "co-tenant" or "co-occupant."

4.2.2.2.2 Papers are delivered or affixed at an address other than the property being foreclosed. No explanation is offered.

4.2.2.2.3 If papers are delivered to the property being foreclosed, it is not always clear that the Defendant Homeowner still resides there. Law does not permit substituted service at the "last known address."

4.2.2.2.4 Due diligence: Before resorting to CPLR 304(4) "nail and mail" service, process server fails to first use due diligence to serve the Defendant Homeowner by CPLR 308(1) service (actually handing the papers to him/her) or by CPLR 308(2) substituted service. The due diligence requirement is not satisfied when these prior attempts occur on weekdays when the Defendant Homeowner would be expected to be at work or in transit to or from work.

4.2.2.3 Problems determining Non-military status.

4.2.2.3.1 I have seen cases in which the sole proof of non-military status was the process server's observation that the person (other than the Defendant Homeowner), who accepted the papers or verified the Defendant Homeowner's address, was not in military clothing.

4.2.2.3.2 Department of Defense confirmation of non-military status is often not provided, and even when submitted, we rarely know what information the Plaintiff Mortgagee provided to the Department of Defense when requesting military status. I have received affidavits stating that individuals with common names such as "Andrew Jones," were not in the military service.

4.3 Access to legal representation. Less than 3% of the Defendant Homeowners appear with counsel. Most of the Defendant Homeowners proceed alone, at a difficult time in their lives. *But see* CPLR 3408(b) (a *pro se* defendant may be permitted to proceed as a "poor person" and have counsel appointed to represent him or her). Nassau and Suffolk Counties in NY have established a *pro bono* legal representation program.

4.4 Modification Applications/negotiations.

4.4.1 **Knowledge and access**. The Defendant Homeowners rarely know whom to contact, and rarely have reasonable access to the appropriate person in the Plaintiff Mortgagee's office or the law firm representing the Plaintiff Mortgagee.

4.4.1.1 Attorneys practicing across the state with multiple offices have often utilized a single address, telephone and fax number which has effectively created barriers for Defendant Homeowners who are trying, willing, and maybe able, to offer payment of arrears or acceptable loan modifications. The barrier is increased by the multiplicity of choices confronted by a caller reaching an automated phone system.

4.4.1.2 Access must include the name of a knowledgeable representative of the Plaintiff Mortgagee, including counsel or someone who has or can obtain the necessary authority to proceed with a meaningful resolution, if possible, at the earliest stage of the proceedings.

4.4.2 **Plaintiff Mortgagee "Bad faith."** CPLR 3408(f) – Plaintiff Mortgagees must participate in mandatory settlement conferences, and negotiate in good faith for a mutually agreeable resolution, including loan modification, if possible.

4.4.2.1 Timely response – A Plaintiff Mortgagee must timely acknowledge the information provided by the Defendant Homeowner and respond to justified offers of modification. There are many instances of a Plaintiff Mortgagee refusing to consider a loan modification because the Defendant Homeowner's financial information was not up-to-date, even though the delay was due to the Plaintiff Mortgagee's own failure to timely respond to the Defendant Homeowner.

4.4.2.2 Short Sale – The short sale contemplates that the Defendant Homeowner will provide an acceptable contract of sale to the Plaintiff Mortgagee reducing the outstanding balance due. More often than not, the ultimate contract submitted to the Plaintiff Mortgagee is determined to be unacceptable (too far below market value), even though the determination of market value by the Plaintiff Mortgagee does not comport with comparable sales, particularly in a falling market.

4.4.2.3 Protocol – There must be some definition of, and consistency in, the manner and circumstances in which a modification will be granted.

4.4.2.3.1 6/31 rule: Informal protocol adopted by several lenders (including Emigrant Mortgage Company).

4.4.2.3.1.1 Reduction of interest rate to 6%
4.4.2.3.1.2 Monthly payments equal to or less than 31% of gross income

4.4.2.3.2 I have seen at least two occasions in which a third party (e.g., relative) has been potentially available as an asset or income guarantor, but has not come forward because the criteria for loan modification were unknown. When ultimately apprised of the protocol, they were willing to guarantee the debt and offer funds to reduce the arrears.

4.4.3 **Communication breakdown**. Foreclosure proceeds while modification/settlement is pending. In several of my cases, the modification and foreclosure were being handled by separate departments within the same lending institution, and the modification department did not communicate with the foreclosure department. The foreclosure sale took place while the Defendant Homeowner was waiting for a response on the modification.

4.4.4 **Conflict of interest**. Some attorneys represent the Plaintiff Mortgagee as well as a second mortgagee bank named as a defendant. Differing interests present potential impediment to modification or settlement.

4.4.5 **Judicial Response**. Bad faith in settlement negotiations has been used by Courts as a basis to vacate the underlying debt or interest, or impose substantial sanctions. One case was recently overturned by the Appellate Division as an inappropriate *sua sponte* exercise of equitable power without legal authority or notice to the parties. *IndyMac Bank, F.S.B. v. Yano-Horoski,* 26 Misc.3d 717, *rev'd* 2010 WL 4676301 (November 16, 2010). Another case has yet to see appellate resolution. *Emigrant Mortgage Co. v. Corcione,* 28 Misc.3d 161 (April 16, 2010) ($100,000 sanction and voiding accrual of interest). In my view, the state of the law is less certain or predictable as a result of these decisions.

4.5 Foreclosure Rescue Scams (e.g., "Straw Man transaction"). In order to avoid foreclosure, Defendant Homeowner "sells" property to a "straw man" who borrows money from a new bank to "purchase it." Straw man rents the property back to the Defendant Homeowner. Plaintiff Mortgagee is paid off, but Defendant Homeowner is unable to make the "rent" payments to the "straw man," and winds up in eviction proceedings. Defendant Homeowner loses any equity of redemption or right to surplus moneys that he or she might have had prior to the transaction.

5 RECOMMENDATIONS/CONSIDERATIONS

5.1 Service of Process – In my view, NY law requires the following proof from Plaintiff Mortgagees who serve the summons and complaint by a method other than in-hand delivery [e.g., CPLR 308(2) and 308(4)].

5.1.1 Demonstrate diligent efforts to serve by personal delivery.

5.1.2 Identify the full name of the person accepting papers, and his or her relationship to the Defendant Homeowner.

5.1.3 Ascertain, verify and provide documentary proof of the Defendant Homeowner's current and valid address.

5.1.4 Provide credible and substantiated proof of the Defendant Homeowner's non-military status.

5.2 Attorney Certification. Administrative Order of the Chief Administrative Judge of the Courts, dated October 10, 2010 – Plaintiff Mortgagee's counsel in a foreclosure action is now required to file an affirmation certifying that counsel has made inquiry to the banks and lenders, and carefully reviewed the papers, to verify the accuracy of documents filed in support of residential foreclosures.

5.2.1 As of the effective date of this requirement, attorneys in over 50% of the Nassau foreclosure matters have attempted to withdraw the proceeding, or some portion of the proceeding, without notification to the Defendant Homeowner. This figure is based upon my own anecdotal experience in cases over which I preside, as well as information provided by Court officials and Plaintiffs' attorneys.

5.2.2 In all new foreclosure actions, commenced after the effective date of the Administrative Order, the attorney certification must be filed with the initial request for judicial intervention. (If the action was already pending at the effective date, the certification may be made at other stages in the proceeding, as specified in the Administrative Order.) Does a single certification at one stage of the proceedings (e.g. commencement) satisfy the requirement with respect to all subsequent submissions? To what extent, and under what circumstances, is an attorney required to update or reaffirm the certification? Further administrative and judicial action is anticipated.

5.3 Real Property Actions and Proceedings Law ("RPAPL") 1303. Notice required to be served with the summons and complaint on colored paper providing the Defendant Homeowner with advice on how homeowners can seek help and warning the Defendant Homeowner of foreclosure rescue scams.

5.4 CPLR 3408. Mandatory settlement conferences in residential foreclosure actions.

5.5 Prima Facie Proof.

5.5.1 Total "package" should be submitted by the Plaintiff Mortgagee before the Defendant Homeowner is required to respond.

5.5.2 The "Stamp." I created a stamp in 2007 [Attachment "C"], to be inserted in all Orders of Reference, which sets forth the minimum requirements of proof to be submitted to the referee. Substantially the same requirements have been codified in CPLR 3408(e).

5.6 Sanctions for Bad Faith. Voiding accrual of interest during period of "bad faith."

6 ON THE HORIZON

6.1 Reverse mortgages. A popular commodity receiving heightened publicity in the past ten years, particularly for lower income homeowners who have substantial equity in their homes. The procedures and practices for foreclosure in this area have not been established. If permitted under the loan, the minimum requirements for foreclosure upon a reverse mortgage would seem to be the same as with every other mortgage but, in addition, should include an affidavit of fair market value as of the commencement of the action.

6.2 UCC Article 3. Some Plaintiff Mortgagees have argued that their status as a holder of a negotiable instrument (the Note) under UCC Article 3 allows them to proceed in foreclosure without proof of the chain of title (i.e., endorsements, intermediate assignments of the Note and Mortgage). Problems: first, a Mortgage is not a negotiable instrument under UCC Article 3; second, the endorsement in blank procedure, frequently used by a Plaintiff Mortgagee, does not necessarily create the elusive negotiable instrument; and third, in many cases, the Plaintiff Mortgagee cannot produce the Note.

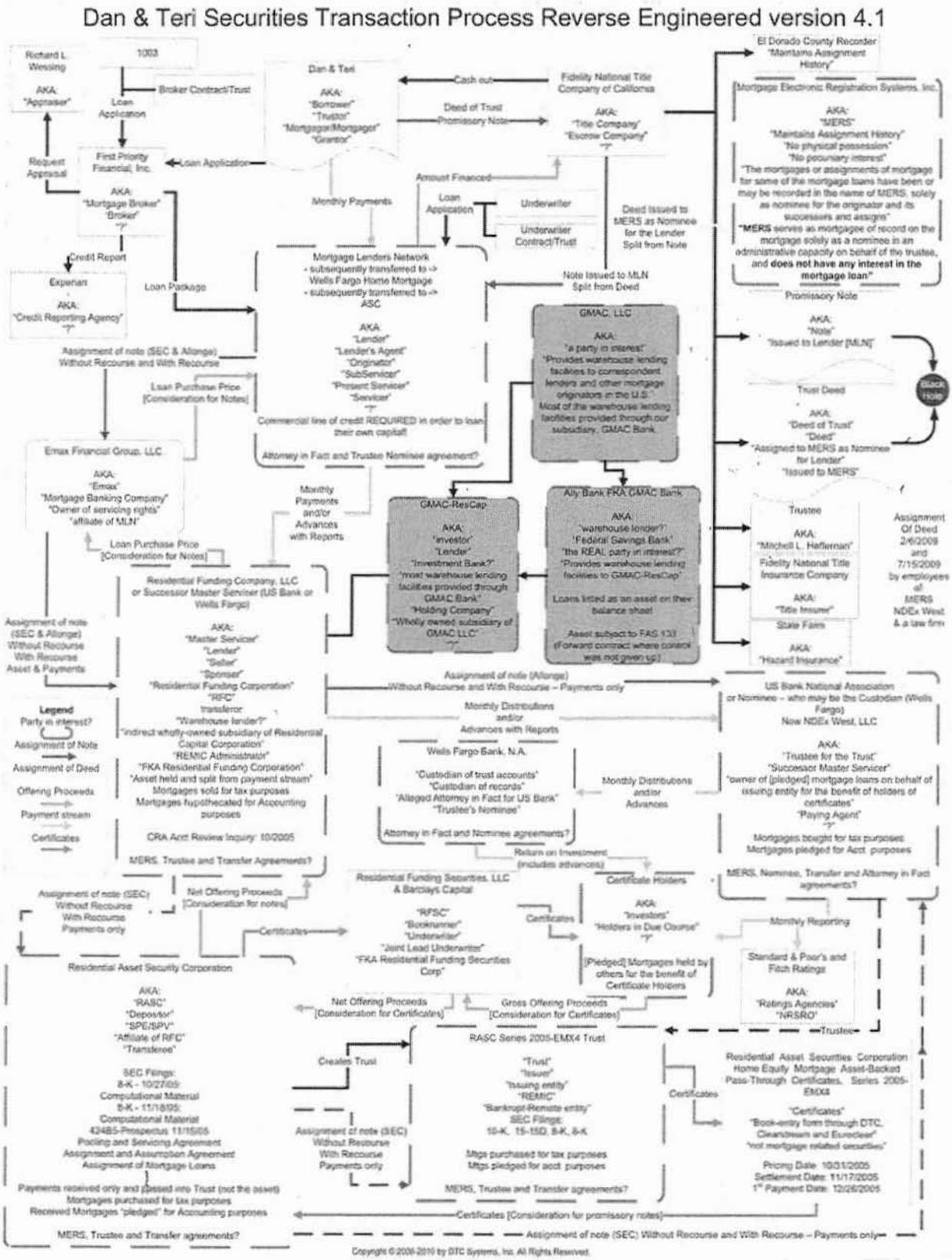
6.3 Notice of Pendency. RPAPL 1331 requires plaintiffs to file a Notice of Pendency in a foreclosure action at least 20 days before a final judgment is rendered. A Notice of Pendency is effective for three years from the date of filing [CPLR 6513]. Successive Notices of Pendency may be filed, even after a Notice of Pendency has expired or has otherwise been rendered ineffective [CPLR 6516]. The problem arises when foreclosure proceedings continue beyond the effective period of the Notice of Pendency, and the Notice of Pendency has not been renewed, or proof of such renewal has not been provided to the Court. Does such failure to timely renew the Notice of Pendency void the proceeding *ab initio,* or is it a correctable deficiency which can be rectified without Court intervention?

7 CONCLUSION

The ultimate solution may rest in a paradigm change which focuses upon the Defendant Homeowners' ability to pay, rather than the Plaintiff Mortgagee's artificial financial requirements. For example, if the Defendant Homeowners are able to pay $2,000 per month, having a present obligation of $3,500 per month, a loan modification for a period of two years or longer, at $2,000 per month, would avoid the Plaintiff Mortgagee's costs of foreclosure and property maintenance, avoid the potential loss of principal arising out of a forced sale in a depressed market, and allow the Defendant Homeowners to remain in their home. This approach could ultimately reduce the costs to lenders and borrowers, stabilize the real estate market, and promote equitable predictability.

ATTACHMENTS

A. Dan & Teri Securities Transaction Process Reverse Engineered Version 4.1
B. Caption: Wells Fargo v. Mori
C. The "Stamp."



ATTACHMENT "A"

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 9

NASSAU COUNTY

INDEX NO.: 653/07

MOTION DATE: 6/1/07

MOTION SEQ NO.: 001

WELLS FARGO BANK, N.A. FOR THE BENEFIT OF THE CERTIFICATEHOLDERS ASSET BACKED SECURITIES CORPORATION HOME EQUITY LOAN TRUST, SERIES WMC 2005-HE5 ASSET BACKED PASS-THROUGH CERTIFICATES, SERIES, WMC 2005-HE5
C/O Countrywide Home Loans, Inc.
400 Countrywide Way
Simi Valley, CA 93065

Plaintiff,

-against-

JONATHAN MORI, HOME CASH, INC., AMERICAN BUSINESS MORTGAGE SERVICES, INC., CHRYSLER FINANCIAL COMPANY, LLC, COUNTRYWIDE FINANCIAL CORP., DEBRA ANN COLLINS, MICHAEL JENIS, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. AS NOMINEE FOR WMC MORTGAGE CORP., NASSAU COUNTY OFFICE OF HOUSING AND INTERGOVERNMENTAL AGENCY, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, PEOPLE OF THE STATE OF NEW YORK, TOWN OF OYSTER BAY DEPARTMENT OF INTERGOVERNMENTAL AGENCY, UNITED STATES OF AMERICA ACTING THROUGH THE IRS, WANTAGH DENTAL ARTS PC,

JOHN DOE (Said name being fictitious, it being the intention of Plaintiff to designate any and all occupants of premises being foreclosed herein, and any parties, corporations or entities, if any, having or claiming an interest or lien upon the mortgaged premises.),

Defendants.

ATTACHMENT "B"

and it is further

ORDERED, that plaintiff shall include in the documentation provided to the referee pursuant to RPAPL §1321, the following: (1) an accounting of all credits to and charges against the account of the subject mortgage for a period of five years prior to the commencement of this foreclosure action, which may be produced in the form in which it is maintained in the regular course of business, or a copy of any accounting meeting these requirements that has been provided to the mortgagor within the five month period prior to this action; and (2) an affidavit by an officer of the plaintiff attesting to ownership of the subject note and the mortgage securing the note, which shall establish the chain of title from the inception of the loan to date. The report of the referee shall include a representation that the plaintiff has complied with this requirement. Reasons for failure to provide the information required, or deficiencies or discrepancies in the information provided, must be noted in the referee's report, which shall be served immediately upon the Court and all mortgagors, together with the information upon which it is based. No Judgment of Foreclosure and Sale shall be awarded in the absence of the foregoing.

ORDERED, that the named plaintiff mortgagee in the foreclosure proceedings shall additionally provide, to the referee, the documentation evidencing the "Appointment of the FDIC as conservator or receiver" pursuant to 12 USCA §1821 (c) and the documentation demonstrating the transfer, hypothecation, assumption of the assets or obligations, assignment or creation of agency with or for the benefit of the FDIC, as applicable in the instant matter.

_____

J.S.C.

ATTACHMENT "C"