

**Womble Carlyle Sandridge & Rice, PLLC
Presents:**

Mortgage Servicing 2008:

**Trials, Trends and Tips for
Residential Mortgage Lenders
and Servicers**



Presenters



Donald C. Lampe



Mark P. Henriques



Kenneth B. Oettinger



Meredith J. McKee



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Mortgage Servicing Today

- Increase in defaults + foreclosures = more scrutiny by plaintiffs lawyers, regulators and legislators
- Greater attention to business practices than ever before
- Compliance/controls more important than ever



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What We Will Cover. . .

- Selected federal law developments
- State legal developments – emerging standards
- North Carolina’s comprehensive new mortgage servicing law
- And, your questions. . .



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Common Themes?

- Higher duties, standards of care, for loan servicers
- Results may be “equitable” rather than legal
- New laws and legal developments impose operational challenges – controls, systems, training, monitoring



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Mortgage Servicing: Selected Federal Law Developments

Presenter: Ken Oettinger



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Rescission Under Truth in Lending Act

- Applies to most refinance mortgage transactions – a “stick” to promote disclosure of credit terms to consumers
- Based on common law concepts
 - Restore parties to their pre-transaction positions
 - Traditionally available in cases of mistake, fraud or a “substantial” breach of contract



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Case Law Trends

- Cases increasing as consumers struggle to pay mortgages and consult attorneys who scrutinize closing-table disclosures
- Plaintiffs’ bar pursuing class action cases that could extend the rescission window beyond three years
- Cases brought for very “technical” disclosure violations – e.g., Andrews v. Chevy Chase



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American Mortgage Network, Inc. v. Shelton
486 F.3d 815 (4th Cir. 2007)

- One month after closing, lender discovered finance charges under-disclosed by \$100
- TILA did not require re-disclosure, but lender gave notice of under-disclosure and reopened right to rescind/rescission period
- Consumers gave timely notice of rescission
- Lender prepared to unwind transaction upon confirmation that consumers were prepared to return net loan proceeds



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American Mortgage Network, Inc. v. Shelton
486 F.3d 815 (4th Cir. 2007) – Cont'd

- Consumers lacked ability to return net loan proceeds, but demanded lender release its lien on their home immediately
- Lender filed declaratory judgment action to establish reasonable rescission procedures



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American Mortgage Network, Inc. v. Shelton
486 F.3d 815 (4th Cir. 2007) – Cont’d

- During discovery, lender learned borrower overstated income, had an employee prepare the appraisal and lied on Occupancy Agreement
- Trial court declared consumers could not rescind the loan in light of their misconduct – upheld an appeal
- Court dismissed remaining consumer claims and said lender satisfied its duties and obligations under TILA



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Practical Impact of *Shelton*

- No possibility lender will be deemed to have forfeited the net loan proceeds (at least in the Fourth Circuit)
- Rescission conditioned on the lender “receiving its legal due” - concept infused with equitable principles



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Practical Impact of *Shelton* – Cont’d

- Consumers have duty to undertake reasonable and timely steps to unwind a mortgage transaction after giving notice of intent to cancel the transaction
 - “Clearly it was not the intent of Congress to reduce the mortgage company to an unsecured creditor or to simply permit the debtor to indefinitely extend the loan without interest.” 486 F.3d 815, 820-21.
- Voluntary re-disclosures do not have to meet the technical requirements of Regulation Z



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Rescission Lessons?

- Lenders should not concede equitable “high-ground” when confronting rescission claims
- Courts have broad discretion on manner of rescission – the “mechanics” of rescission
- Lenders in TILA rescission cases should explore whether consumer:
 - Lacks ability to return the net loan proceeds
 - Engaged in inequitable conduct
 - Benefited from transaction subject to attack



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Federal Laws and Regulations

- Mortgage Reform and Anti-Predatory Lending Act of 2007, HR 3915
- Federal Reserve Board Proposed Amendments to Regulation Z, 2008 Federal Register 1672



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House Bill 3915

- Servicers must provide annual notice to consumers, including updated contact information for creditor or any assignee
- Servicers must provide comprehensive monthly statements that include prepayment fee, current interest rate, date of any rate reset, any late payment fees, and any other information as may be required by regulation



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Proposed Changes to TILA Regulation Z

- The Fed proposes that no servicer shall:
 - Fail to credit payments on date received
 - “Pyramid” late fees
 - Fail to provide consumer with a schedule of servicing charges within a reasonable time upon request
 - Fail to provide an accurate payoff statement within a reasonable time upon request



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Mortgage Servicing: State Law Updates

Presenter: Mark Henriques



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What is Happening?

- Loan servicers facing attacks from many angles....
 - Individual borrowers and class actions
 - State investigations
 - City lawsuits



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Current Events...City Lawsuits

- *City of Cleveland v. Deutsche Bank Trust Company et al*, No. CV-08-646970 (OH CP. Ct., Jan 14, 2008).
 - City of Cleveland moves against most of prominent securitizers in mortgage industry alleging that growth of subprime mortgages “and the corresponding foreclosures” constituted a “public nuisance” under common law
 - City seeks direct and proximate damages for (i) monitoring, maintenance, and demolition costs incurred in connection with foreclosed properties and (ii) reduced city property tax revenue due to property devaluation from foreclosures



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Current Events...City Lawsuits

- Will more localities follow on, and if so, what impact on servicing?
- Will the focus be on originations, servicing, defaults/foreclosures or some or all?
- Note: more cities talking about “moratoriums”



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Key Legal Issues in State Courts

- Patterns in recent cases – emerging plaintiff theories and defenses
- Court using “equity” to ignore the documents
- Standards of care as the “new standard” – what next?
- State law judges are increasingly applying principles of equity—not statutory default principles—in foreclosures



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***Matrix Financial Services, Inc. v. Dean*, -- S.E.2d --,
2007 WL 4215071 (Ga. App. Nov. 30, 2007)**

- Trial court barred bank from proceeding in dispossessory action against borrower
- Borrower argued that Bank lacked perfected security interest in the loan documents
- Court of Appeals found that factual questions exist on whether the Bank acted in good faith in foreclosing



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***Eastern Savings Bank v. Sanders*, 373 S.C. 349, 644
S.E.2d 802 (S.C. Ct. Ap. Apr. 16, 2007)**

- Bank sought to have foreclosure sale set aside due to low sale price
- Sale price was less than the value of the property because of mistake by Bank's counsel, not as a result of conduct related to the sale
- Bank had to live with low sale price \$550,000 value versus \$246,000 sale price



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Standards of Care

- *In re Bigelow*, -- N.C. App. --, 649 S.E.2d 10 (Aug. 7, 2007)
 - Trial court denied request for foreclosure
 - Borrower not in default because attempted to send in payments and contact the bank
 - Court applied the contract principle that a party cannot take advantage of nonperformance if its own actions prevented the performance



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Bayview Loan Servicing, LLC v. Simmons, -- Va. --, 654 S.E.2d 898 (Jan. 11, 2008)

- Borrower sued loan servicing agent which had foreclosed
- Borrower claims that no pre-acceleration notice was provided as required by Deed of Trust
- Court held that Bayview failed to prove “actual knowledge” of pre-acceleration notice.
- Court rejected argument that notice of foreclosure was “deemed an effective exercise of acceleration rights.”



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Mortgage Servicing: North Carolina's New Law

Presenter: Meredith McKee



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Developments in North Carolina

- Comprehensive new North Carolina servicing law
- Issues in complying with both RESPA and state servicing laws
- Need for lenders to revisit systems and controls – acceptance and crediting of payments, imposition of fees, responses to QWR's



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New North Carolina Servicing Law

- Mortgage Debt Collection and Servicing Act
 - Session Law 2007-351/ House Bill 1374
 - Effective date: April 1, 2008
- Why is it important?
 - First time that mortgage servicing subject to NC regulations
 - Unique language requires NC-specific procedures
 - New pitfalls, short fuses and potential for liability
- Will other states use NC as “model”?



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Mortgage Debt Collection and Servicing Act

- Who’s covered?
 - “Servicers” as defined in § 2605(i) of RESPA
 - Includes third party servicers and loan holders
- What loans are included?
 - “A loan secured by real property ... used, or intended to be used, by an individual borrower ... as a dwelling.”
 - Type of loan is irrelevant: PMM’s, refi’s, HELOC’s, etc.
 - No consumer purpose or “primary residence” requirements



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Mortgage Debt Collection and Servicing Act – Cont’d

- Restricts servicing fees
 - Fees charged by servicer must be permitted under applicable law and the parties’ contract
 - Fees incurred must be assessed within 45 days
 - “Clear and conspicuous” explanation must be sent to borrower 30 days after assessment



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Mortgage Debt Collection and Servicing Act – Cont’d

- Restricts crediting of payments
 - Must credit payments on account within one business day, with some exceptions
 - Language not necessarily consistent with other laws/regs or systems in place



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Mortgage Debt Collection and Servicing Act – Cont'd

- Requires heightened care in handling escrows
 - Collect and make payments “so as to ensure that no late penalties are assessed or other negative consequences result”
 - Applies in default/delinquency unless:
 - Default > 90 days
 - Servicer reasonably believes funds will not be recovered



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Mortgage Debt Collection and Servicing Act – Cont'd

- Short fuse for responding to borrower inquiries
 - Two types
 - Not easy to tell difference – must study the request itself
- Within 10 days of written request, must provide statement of:
 - Account status and balance, escrow balance, etc.
 - Identity of current holder of note
 - Contact information for servicing representatives with authority to resolve disputes



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Mortgage Debt Collection and Servicing Act – Cont’d

- Within 25 days of written request, must provide:
 - Copy of original note or affidavit of lost note
 - Full itemized payment history for a minimum of two years
- Difficult to tell what to do if electronic communication
- Third-party servicers – closer contacts with holders



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Mortgage Debt Collection and Servicing Act – Cont’d

- Litigation risk:
 - Room for technical errors in servicing procedures
 - Differences between RESPA and NC law
 - Confusion over what a “written request” looks like
 - Hazards in handling escrow accounts
- Right to cure ends when litigation instituted



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Template for Other Legislation?

- North Carolina has history of leading in the mortgage arena
- Congress sees Act as a template – e.g., HR3915
- Other states are following . . .



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Revisit Systems and Controls

- Servicers must:
 - Watch “short fuse” timing – payments, notices, requests
 - Be able to discern between types of requests
 - Train servicing department and compliance team on new requirements
 - Ensure computer systems account for changes in law



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Presenter Contact Information

Donald C. Lampe

DLampe@wcsr.com

(704) 350 -6398

Mark P. Henriques

MHenriques@wcsr.com

(704) 331-4912

Kenneth B. Oettinger

KOettinger@wcsr.com

(704) 331-4976

Meredith J. McKee

MMckee@wcsr.com

(704) 331-4997



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