

Session 3
Servicing Decathlon

Wednesday, July 14, 2021
12:10pm – 1:10pm CT

Join a seasoned panel of mortgage servicers and attorneys as they cycle through the latest mortgage servicing strategies and trends in navigating the pandemic and other emerging legal issues around the country. The panelists will dive deep into such topics as navigating foreclosures through and out of moratoria; taking on the hurdles of forbearance and loss mitigation; hitting on occupancy status, including affidavits, vacancy evidence and title insurability; teaming up on successors in interest and statutes of limitations; and emerging trends in consumer complaints and engagement. The session will conclude with a lively discussion of surprising legal servicing discoveries and breakthroughs arising from the pandemic marathon.

I. The New Servicing Environment

A. Historic and unprecedented challenges

1. Pandemic wreaked economic havoc on unprecedented scale
 - a. more than 111 million have experienced income loss; 37 million qualified for unemployment insurance
 - b. Small businesses, hourly worker jobs, industries disappeared
 - c. [CFPB reports over 11 million at risk of losing housing](#)
 - d. Disparate racial, ethnic and gender impacts
 - e. Industrial production down- routinely employs 13 million
 - f. Longest recorded economic expansion ends; largest drop in GDP in history (9.1%)
2. Mortgage servicing impacts
 - a. Remote workers become norm
 - b. Estimated 3 million delinquent loans (2 million in long term forbearance)
 - c. Imposition of country wide foreclosure/eviction moratoria – only common exemption is vacant or abandoned properties
 - i. State Executive Orders/legislative action create eviction/foreclosure moratoria – terms, applicability, expirations and extensions vary widely, must be tracked and incorporated into process
Examples:
Delaware: <https://governor.delaware.gov/health-soe/fourteenth-state-of-emergency/>
Oregon: <https://olis.oregonlegislature.gov/liz/2020S3/Measures/Overview/HB4401>
 - ii. Federal foreclosure/eviction moratoria (FHFA, HUD, USDA/VA) create additional and at times conflicting requirements with multiple extensions (through 6/30/21)
<https://www.fhfa.gov/Media/PublicAffairs/Pages/FHFA-Extends-COVID-19-Forbearance-Period-and-Foreclosure-and-REO-Eviction-Moratoriums.aspx>
[https://www.hud.gov/press/press_releases_media_advisories/HUD No 21 023](https://www.hud.gov/press/press_releases_media_advisories/HUD_No_21_023)

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3. Regulatory Scrutiny of servicing efforts expands
 - a. CFPB focus on servicers and pandemic impacted borrowers intensifies - New administration/Director invigorates Bureau
 - i. [Creates interagency housing portal for homeowners and renters](#)
 - ii. On April 5, 2021, [CFPB issues notice of proposed rulemaking with changes to the mortgage servicing rules to response to COVID 19](#). Comment period ends May 11, 2021. Includes proposed extension of the foreclosure moratorium to December 31, 2021.
 - b. State AG's/Banking departments monitor/encourage consumer outreach and accommodations while continuing to scrutinize mortgage servicing.
 - i. 33 State Attorneys General file action against major servicer over imposition of servicing convenience fees

II. Compliance Risk and the Remote Worker

- A. Privacy, productivity and the remote worker - best practices
 1. IT security protocols mirror those traditionally applicable to site workers
 - a. Establish strong privacy IT guidelines and monitor adherence
 - i. Use company issued laptops with latest antivirus updates
 - ii. Use only secure connections while working
 - iii. Use privacy screens for monitors
 - iv. Continue to prohibit USB enabled devices
 - v. clean desk policy - no post it notes, passwords displayed, etc.
 - vi. log off/lock computer when step away
 - b. Use secure technology platforms such as VPN
 - i. Data encryption at all levels
 - c. Insist on strong passwords/continue schedule of password changes
 2. Privacy
 - a. Establish and maintain strong privacy expectations
 - b. Telephone calls with borrower
 - i. Scripted – what can and can't discuss
 - ii. No calls in public places or where can be overheard
 - iii. Background noise muted/no disclosure of location
 - iv. FDCPA statements where applicable
 - c. Video conferencing controls/requirements
 - i. Avoid borrower video calls
 - ii. Use video encryption
 - iii. Camera/audio off when not in conference
 - iv. Be aware of surroundings – no calls in public places or where can be seen or overheard
 - d. Understand routing call protocols
 - e. Secure applications for work related messaging
 - f. Access to PII only on need to have basis
 - g. Secure disposal protocols in place
 3. Data breach protocols
 - a. Strong process for reporting any possible breach

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- b. Retention of data and accountability protocols
- 4. Working conditions
 - a. Secure and private place
 - b. On call times/work hours established
 - c. No expectation of privacy while using company equipment

III. Mortgage Servicing Challenges

- A. The COVID impacted Borrower and FC relief
 - 1. Forbearance is new again – navigating state and federal requirements
 - a. Complexity of state versions elevate compliance risk
 - i. Example – MA introduces forbearance allowing missed payments to be added to end of term; <https://malegislature.gov/Laws/SessionLaws/Acts/2020/Chapter65>
 - b. Timing of duration and terms vary
 - i. Servicers must map effective dates, changing requirements and duration
 - c. Impact of imposing forbearance for government loans versus making it an option:
 - i. Opinions vary as to whether it has blunted the number of delinquencies or merely masked them.
 - ii. Some in forbearance continue to make their payments - use it as a credit line
 - iii. Delinquency numbers in 2008 crisis increased from 2-8% versus 2020 have dropped to 1.8% from 3%
 - iv. Strong real estate market has helped avoid 2008 scenario
 - 2. Supporting the newly delinquent borrower in forbearance – servicer actions and borrower response
 - a. Borrower: Maybe unfamiliar with loan resolution process/looking for assurances, maybe uncertain of employment status/despondent
 - b. Servicer must avoid promises, giving legal or other advice, discussing ability to pay as condition of forbearance, timing post forbearance outreach/transition to facilitate loan modification
 - i. Critical to provide written and clear explanation of both forbearance and loss mitigation process, offer and procedure to accept
 - c. Address borrower using an empathetic tone
 - d. Respond to high volume of borrower inbound requests with technology to facilitate communication – website, portals to manage communication
 - e. Key areas of dispute
 - i. Failure to clearly explain the forbearance process, its duration and post forbearance repayment options.
 - ii. Failure to or inadequately explain implications of forbearance plan
 - iii. Credit reporting issues – Servicer erroneously and in contravention of many state regulations and/or Executive Orders/Federal directives reports forbearance as defaulted loan
 - iv. Insufficient or tardy follow up with borrower relative to moving into loss mitigation.
 - v. Deficiencies in tracking and implementing changing state and federal moratoria resulting in servicing errors
 - f. See *Pennell v. Global Trust Management, LLC*

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3. Exiting forbearance and the new face of loan modification
 - a. March, 2021 5.5 % of all mortgages in forbearance
 - b. Challenges in moving from temporary nature of forbearance into permanent loan modification
 - i. The unemployed/underemployed borrower and loss mitigation
 - ii. Are traditional loss mitigation packages still relevant?
 - iii. Are standards for appeals outdated?
 - iv. The effect of the equity buffer in real estate
 - v. Tracking a moving target – ex. GSE's allowing forbearance extension of up to 3 months for those on forbearance plan at time of latest extension in order to facilitate loan modification. Can add forbearance payments to end of loan term
 - c. Trial versus permanent loss mitigation – how long?
- B. The deceased borrower
 1. Successor in interest communication
 2. Navigating forbearance and loss mitigation options
- C. Communication challenges
 1. The uninitiated and distressed borrower
 - a. strategies for working with first time defaulters
 2. FDCPA
 3. [CFPB communication directive issued](#)
 - a. Interviewed multiple servicers
 - b. Encourages servicer to use all available tools – written notices and technology
 - c. Create self service platforms to manage volume and selections
 - i. Consider feasibility of tailoring communication of options to the particular loan investor
 4. Servicer and firm communication best practices
 - a. Mapping and recording consumer's contact preferences/controls
 - i. websites/portals with robust tools for self help – only 69% of servicer have mortgage relief options on website per Fannie Mae
 - ii. texting protocols
 - iii. email protocols
 - iv. Call center retraining relative to new options
 - b. Balancing strategies to encourage borrower to open mail vs. privacy/FDCPA/state debt collection laws
 5. Overcoming language barriers – priority of state and federal regulators
 - a. Requires some knowledge of demographic data
 - b. QC and QI measures must be in place
 - c. Robust translation and interpretation processes – written and verbal
 - d. Employ back translation
 - e. [CFPB issues Limited English Proficiency Guidelines](#)

IV. Navigating to Sale

- A. State moratoriums, forbearance extensions and other challenges
 1. Whether a servicer and counsel may send state and contractual notices on loans subject to moratorium varies my state and investor

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- a. Pre-FC versus FC initiation notices
2. Barriers to timely sale
 - a. lack of cooperation by essential third parties
 - i. Sheriff's in some counties refusing to set sale – MI example
 - ii. Auction- social gathering restrictions
 - iii. Judges refusing to issue judgments/imposing additional requirements
 - iv. Court delays
 - b. Servicer document execution delays
 - i. Delays in obtaining POA's and other documents from investors
 - ii. COVID has accelerated passage of temporary and permanent remote notarization legislation but remote working conditions creating delays
- B. Federal Agencies
 1. GSE's, FHA, USDA and VA extend FC and EV moratorium to June 30,2021 along with forbearance enrollment window. Agencies add 6 months to forbearance period for those enrolled prior to June 30,2020.
 2. CDC EV moratorium instituted September 4, 2020 and extended until 6/30/2021
 - a. <https://www.cdc.gov/media/releases/2021/0329-Eviction-Moratorium.htmls>
 - b. landlord may not evict based on missed payments if tenant executes CDC form stating suffered COVID related economic distress.
 - c. Cascading successful legal challenges against CDC brought by landlords
 - i. First Federal opinion– See *Tiger Lily LLC v. U.S. Dept of Housing and Urban Development* decided March 29,2021. 7th Circuit held eviction moratorium unconstitutional as beyond the CDC powers which consist of ability to enforce quarantines in this instance.
 - ii. Compare to moratoria voluntarily or legislatively adopted at state level pursuant to police powers more likely to survive legal challenge
- C. Navigation of vacant and abandoned property exemptions
 1. Importance of awareness of applicable terms of moratorium and social gathering limits at the time of the foreclosure sale
 2. Proof of and duration of vacancy challenged by attorneys, title companies and courts
 - a. Methods of vacancy determination highly scrutinized
 - b. Vacancy must span date of demand through sale
 - c. Formulaic/check the box type affidavits routinely deemed insufficient
 - d. Title underwriters particularly reluctant to insure without a detailed affidavit with documentary evidence such as:
 - i. Property inspection reports – when and what
 - ii. Confirmation of utilities turned off/winterization (which can create risk of being deemed a mortgagee in possession)
 - iii. Written notification by borrower that has vacated
 - iv. Certification by process server attempting in-hand service
 - v. Verification by on site broker or property management company
 - e. Demands for Affidavits of Compliance with Social Gathering Limitations by title insurance underwriters becoming more commonplace
 3. Some courts requiring detailed affidavits
 - a. Attorney pleadings, affidavits and offers of proof

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- b. Attorneys considering incorporation of relocation agreements as part of post foreclosure litigation settlement to obtain possession and avoid violation of eviction moratoria
- D. Insurability of foreclosures of occupied properties
 - 1. Some title insurance underwriters refusing to insure if borrower occupied
 - 2. Some reviewing sale on case by case basis.

V. Addressing and Resolving Consumer Complaints

- A. Increase in filings
 - 1. AG/CFPB/Banking Division portals encourage filing
 - 2. Fertile ground for consumer bar
- B. Current and anticipated basis
 - 1. Navigation of forbearance/loss mitigation confusing for all
 - 2. Appeal of loan modification denial
 - 3. Thwarted desire of borrower to save accumulated equity/gain time to sell
 - 4. Vacancy challenges
 - 5. Servicing transfers
 - i. different investor/state forbearance decisioning - treatment of payments
 - ii. loss mitigation in flight – document collection, definition/notice of complete application
 - 6. Treatment of escrows in forbearance
 - 7. SII- COVID casualties
 - 8. Maintaining SPOC in the remote working world
- C. Strategies to control complaints
 - 1. Requires proactive/empathetic approach
 - 2. Servicer/counsel coordination and communication is vital
 - 3. Effective routing of complaints – role of attorney
 - 4. Centralized complaint resolution group –changes to process post COVID
 - 5. Effective handling of AG/CFPB/Congressional inquiries

VI. Files on Hold and Enforceability of Debt

- A. Statute of Limitations
- B. Expiration of note and mortgage instruments