

Ramping Up

1. Staffing
 - a. Retaining Staff through Covid and beyond
 - b. Recruiting in the current labor market
 - a. Salary
 - b. Benefits
 - c. Training and Retraining after the CARES Act Moratorium (Reg F)
2. Property Preservation
 - a. Inspections
 - i. Avoiding FDCPA issues
 - ii. Inspections after Schlaf v. Safeguard Property, LLC
899 F.3d 459 (7th Cir. 2018)
 - iii. Completing inspections after the CARES Act Moratorium
3. Firm Pain Points
 - a. Commencing large scale operations after a nearly two-year hiatus
 - i. Retraining staff
 - ii. Hiring new staff
 - iii. Adopting Reg F as needed for clients we demand on behalf of
 - iv. Spend more time speaking with Court personnel as many are short staffed due to labor shortages.
 - v. Replace vendors that did not survive the Moratorium

Post Pandemic Government Programs and Issues

1. Loss Mitigation
 - a. The Homeowner Assistance Fund (HAF) – The American Rescue Plan Act provides up to \$9.961 billion for states, the District of Columbia, U.S. territories, Tribes or Tribal entities, and the Department of Hawaiian Home Lands to provide relief for the country's most vulnerable homeowners.
 - i. The purpose of the HAF is to prevent mortgage delinquencies and defaults, foreclosures, loss of utilities or home energy services, and displacement of homeowners experiencing financial hardship after January 21, 2020.
 - ii. HAF fund may be used for assistance with mortgage payments, homeowner's insurance, utility payments, and other specified purposes.
 - iii. HAF provides a minimum of \$50 million for each state, the District of Columbia and Puerto Rico.
 - b. Arrearages – the maximum allowable period for COVID-19 Forbearance varies depending on the start date of initial forbearance but in no case will it extend beyond June 20, 2022. As a result, many borrowers are coming out of forbearance and need a plan to address arrearages. There are several options.

- i. COVID-19 Advance Loan Modification (ALM) – permanent change in one or more terms of the mortgage that achieves a 25% reduction in P&I payments.
 1. Borrower must be 90+ days delinquent to qualify
 2. Interest rate is the PMMS Rate rounded to 1/8 of 1%
 3. Term for the modified mortgage is 360 months
 4. COVID-19 ALM only capitalizes arrearages
 5. All late charges, fees and penalties are waived, except that a servicer is not required to waive any late charges, fees or penalties that accrued prior to March 1, 2020.
- ii. COVID-19 Recovery Standalone Partial Claim reinstates the mortgage through a Partial Claim for COVID-19 impacted borrowers
 1. Must be owner-occupant
 2. Must have ability to resume making on-time payments
 3. COVID-19 Recovery Standalone Partial Claim includes only arrearages
 4. All late charges, fees and penalties are waived, except that a servicer is not required to waive any late charges, fees or penalties that accrued prior to March 1, 2020.
 5. Must not exceed 25% of the unpaid principal balance as of the date of default at the time of payment of initial partial claim, less any previous partial claims paid
- iii. COVID-19 Recovery Modification is a 360-month loan modification which must include a Partial Claim, if funds are available
 1. Target payment achieves a 25% reduction in P&I portion of borrower's monthly payment
 2. Borrowers who do not qualify for COVID-19 Recovery Standalone Partial Claim must be reviewed for COVID-19 Recovery Modification
 3. Must be owner-occupant
 4. Must have ability to make a modified mortgage payment
- iv. COVID-19 Recovery Non-occupant Modification is a rate and term loan modification
 1. Must have the ability to make modified mortgage payments
 2. For rental properties, vacation properties, and second homes
 3. All late charges, fees and penalties are waived, except that a servicer is not required to waive any late charges, fees or penalties that accrued prior to March 1, 2020.
 4. Mortgagee may only capitalize arrearages for unpaid accrued interest, advances for escrowed items, escrow shortage that falls below the target balance, and related

legal fees and foreclosure/bankruptcy costs not higher than those HUD identifies as customary and reasonable

2. Meeting HUD Deadlines

- a. In all states, the increased demands of Regulation F compliance can lead to delays shortly after the referral if the information and documentation necessary to prepare the Debt Validation Notice is not included in the referral package. It is important that servicers provide the most recent periodic statement in that package to avoid that delay.
- b. In all states, it is important to ensure that all necessary documents are included in the referral and that the referral is sent in a timely manner to allow time for title to be received and assignments or other required documents to be completed in time to meet FLAD.
- c. In non-judicial states with shorter timelines, there is often a conflict between the First Legal Action Deadline and the requirement to issue the Notice of Pending Acquisition letter (NOPA) not less than 60 days but no more than 90 days prior to the sale date.
 - i. Generally, if a request for FLAD extension is submitted timely based on this conflict, HUD will grant an extension.
 - ii. If a request is not submitted, proceeding judicially in order to satisfy both requirements may be an option.
- d. In judicial states, while it may be possible to expedite a petition filing on short notice, if this is done before title is received, the result can be the need to file a motion to amend which may place both the plaintiff and the firm in a bad light in front of the court if the amendment and delay would not have been necessary had title been examined prior to meeting first legal.

3. Conflicts between national emergency extensions and investor requirements

- a. Pursuant to Mortgagee Letter 2022-02, HUD has extended First Legal Action Deadlines by 180 days from the later of the end of a Borrower's COVID-19 Forbearance or the expiration of the foreclosure moratorium.
- b. With HUD's moratorium ending on September 30, 2022, loans where no COVID-19 Forbearance is in place had a deadline of March 31, 2022 unless further extension was granted.
- c. As COVID-19 Forbearances begin to end on other accounts, it is imperative that servicers balance efforts to get borrowers into other loss mitigation plans with timely referral to attorneys so that it is possible to meet FLAD.
- d. Although the Regulation X moratorium, in place from August 31, 2021 through December 31, 2021, was less restrictive than prior COVID-19 related moratoriums, it still prevented commencement of foreclosure for many loans where the borrower was less than 120 days delinquent as of March 1, 2020.
 - i. In some states, this restriction might have made it difficult to meet a FLAD of March 31, 2022 if there was a delay in referral after December 31, 2021, in particular in non-judicial states

where NOPA timing guidelines must also be taken into consideration.

Regulation F

1. Regulation F (12 CFR Part 1006)
 - a. Regulation F imposes new requirements under the Fair Debt Collection Practices Act (FDCPA)
 - b. The new regulation took effect on November 30, 2021
 - c. Among other things, the regulation requires new information in a notice for validation of debt, which must be sent to borrowers prior to initiating foreclosure
 - d. The CFPB has provided a model notice which, if used, acts as a safe harbor against challenges as to the form of the notice
2. The New Notice Requirements
 - a. The notice of validation must include the following:
 - i. The debt collector communication disclosure
 1. For example, "This is an attempt to collect a debt and any information obtained will be used for that purpose."
 - ii. Information about the debt
 1. The debt collector's name and address
 2. The borrower's name and address
 3. The name of the creditor to whom the debt was owed on the itemization date
 4. The account number as of the itemization date
 5. The itemization date (must choose one of the following):
 - a. Last statement date
 - b. Charge-off date
 - c. Last payment date
 - d. Transaction date
 - e. Judgment date
 6. The amount of the debt on the itemization date
 7. An itemization of the current amount of the debt, reflecting interest, fees, payments, and credits since the itemization date
 8. The current amount of the debt
 - iii. Information about consumer protections
 1. The date that the validation period ends (30 days)
 2. A statement that the debt collector will cease collections if the borrower requests verification of the debt or the name and address of the original creditor during the validation period
 3. The CFPB consumer protections website
 - iv. Consumer-response information
 1. Dispute prompts
 - a. "I want to dispute the debt because I think..."

- b. "This is not my debt"
 - c. "The amount is wrong"
 - d. "Other"
 - 2. Original-creditor information prompt
 - 3. Mailing addresses for the borrower and the debt collector
 - b. Special Rule for Residential Mortgage Debt
 - i. Under §1006.34(c)(5), if a periodic statement is required under Regulation Z (12 CFR 1026.41), then the debt collector may use the most recent periodic statement instead of the itemized validation information
 - 1. No uniformity is periodic statement form
 - ii. Note that periodic statements are not required for:
 - 1. HELOCs
 - 2. Reverse mortgages
 - 3. Loans in bankruptcy or that have been discharged in bankruptcy
- 3. Validation Notices in Practice
 - a. Notice under the Special Rule (loans required to send periodic statements under Reg Z)
 - i. If a current periodic statement is provided at referral, then firms can send the required validation notice without needing further information
 - ii. If a current periodic statement is not provided, then servicers should provide clear instructions on how to request the most recent periodic statement
 - b. Notices Where Itemization is Required (HELOCs/Reverse/Bankruptcy)
 - i. Loans may need to be reviewed on a case by case basis to determine the best method for itemization, as it depends on the age of the loan, the age of the default, and the available information.
 - ii. Note that there are inherent risks to each of the choices below, but one of these dates **MUST** be used for itemization
 - iii. Itemization from Last Statement Date
 - 1. How to Calculate: A current periodic statement can be used for itemization if it includes a breakdown of the entire amount due as of the date of the statement.
 - 2. Things to Consider
 - a. If the statement does not include a total amount due with a breakdown, then it cannot be used for itemization
 - b. The regulation does not allow a debt collector to rely on the last periodic statement if it was issued by an entity that is considered a debt collector under the FDCPA
 - iv. Itemization from Last Payment Date

1. Ways to Calculate: To complete this type of itemization, the firm will need a complete pay history
2. Things to Consider
 - a. The regulation describes the “last payment date” as the date that the last payment was applied, so if a payment was placed in suspense or only partially applied, then it may not be possible to itemize using this method
- v. Itemization from Origination
 1. How to Calculate: Itemization can be done using origination documents, along with a complete pay history.
 2. Things to Consider
 - a. Itemization from origination cannot be done with an incomplete pay history.
 - b. Itemization also cannot be done without the original loan number and original creditor information.
 - c. Calculating itemization from origination may be time and labor intensive, as the itemization must include all charges accrued and all payments made since the date of itemization.
- vi. Itemization from Charge-Off Date
 1. This will only apply to loans which have previously been charged off and will likely be very uncommon
 2. If this type of itemization is appropriate, the firm would need a breakdown of the loan as of the charge-off date in order to complete the itemization.
- vii. Itemization from Judgment Date
 1. This will only apply where there has been a previous judgment and will likely not be applicable to most loans
 2. If this type of itemization is appropriate, the firm will need a breakdown of the loan as of the judgment date.

Litigation

1. State specific issues
 - a. Kessler case
 - i. What exactly is Kessler? Bank of America, NA v. Andrew Kessler, AD3D (D67785) (2nd Dept. 2021)
 1. Strict compliance with RPAPL 1304 is required – “the inclusion of any material in the separate envelope sent to the borrower under RPAPL 1304 that is not expressly delineated in [the statute] constitutes a violation of the separate envelope requirement of RPAPL 1304(2)”
 2. Irrelevant whether additional material was on the same page as the notice or separately paginated
 - ii. How to proceed?

1. Pre-commencement:
 - a. 1304 notices which are determined to have extraneous language/documentation included can be resent to ensure proper compliance with Kessler
 - b. Once the 90 days lapse, can proceed with commencement
2. Commenced actions:
 - a. Pending actions pre-entered judgment of foreclosure and sale should be reviewed to determine if the 1304 notice is Kessler compliant
 - b. Should a notice not be compliant, servicer will have to make a business decision to determine if want to discontinue the foreclosure, re-notice and recommence
 - i. Factors to consider:
 1. Has 1304 compliance been raised by the borrower?
 2. Is the matter otherwise litigated?
 3. What stage of foreclosure is the matter at?
 4. Prior history
 - a. Has an action been previously commenced? Statute of Limitations implications
 - iii. Miscellaneous notes:
 1. 1304 compliance can be raised at any juncture of the foreclosure until an entered judgment of foreclosure and sale is obtained
 2. 1304 notice is not required for a borrower's estate; therefore, if a borrower is deceased, a notice is not required
 3. Kessler is only controlling in the jurisdiction of the 2nd Department (biggest volume of cases and most influential in the state)
 - a. Therefore, loans for property addresses located outside of this jurisdiction are not subject to Kessler however servicer will have to make business decision if whether want to reissue the 1304 notice
2. How to combat litigation issues
 - a. Register for state-specific alerts regarding proposed legislation
 - i. Will receive notifications of proposed/pending legislation that Servicer can monitor
 - b. Utilize the expertise of retained counsel
 - i. Provide specific legal issue for counsel to address/advise via email

- ii. Servicer can engage counsel to review portfolio to determine what cases may be affected by a recent decision/new law and seek advice
 - iii. Request counsel conduct training sessions or Q&A sessions to address specific topics of concern
- c. Loss mitigation
- d. Pre-first legal review for potential pitfalls