The Latest on the Mortgage Mess

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ABI WESTERN CONSUMER BANKRUPTCY CONFERENCE

January 21, 2013
Golden Nugget Hotel & Casino
Las Vegas, Nevada

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The Latest on the Mortgage Mess

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1. **What is the National Mortgage Settlement?**
2. **National Mortgage Settlement: An Overview of Bankruptcy-Related Provisions**
3. **Current Developments in Nevada Residential Foreclosures**
4. **Wrongful Foreclosure in the New Millennium: Beware of the FDIC Assignee**

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WHAT IS THE NATIONAL MORTGAGE SETTLEMENT?

-The National Mortgage Settlement ("Settlement") is a $25 billion agreement between federal government agencies (including the USTP), 49 state attorneys general, and the nation's five largest loan servicers: Ally/GMAC, Bank of America, Chase, Citi, and Wells Fargo. Under the Settlement, these servicers will provide consumer relief totaling $17 billion and implement 304 servicing standards.

WHAT CONSUMER RELIEF IS AVAILABLE TO BANKRUPTCY DEBTORS?

-The servicers "may not deny any loss mitigation option to eligible borrowers on the basis that the borrower is a debtor in bankruptcy so long as borrower and any trustee cooperates in obtaining any appropriate approvals or consents." *See* Consent Judgment, p. A-31.

-A debtor may be eligible for a loan modification, including first-lien and second-lien principal reductions, forbearance of principal from a prior modification, short sales, or other relief such as transitional assistance.

-First-Lien Modifications

-A debtor meeting certain eligibility criteria may benefit from a first-lien modification under the Settlement. Some of the eligibility criteria include:

- -The debtor must be at least 30 days delinquent or be at imminent risk of default due to his financial situation.
  - -If the debtor's loan is serviced by Bank of America, the debtor must have been at least 60 days delinquent as of January 31, 2012.
- -The debtor's pre-modification loan-to-value ratio is greater than 100%.
- -The debtor's loan:
  - -Must not be owned by Fannie Mae or Freddie Mac
  - -Must be servicer-owned if serviced by Wells Fargo, Citi, or GMAC.

-Second-Lien Modifications/Extinguishments

-A debtor may also benefit from a second-lien modification or extinguishment under the Settlement. There are two scenarios in which the Settlement requires a settling servicer to modify or extinguish second liens. Each scenario requires that the first-lien mortgage be reduced by

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one of the settling servicers through a proprietary (non-HAMP) modification process. The second lien must also be modified where:

-The servicer that modified the first is also the owner of the second.

-The second lien is serviced by one of the settling servicers. The second lien must be extinguished if payment is over 180 days delinquent.

-Debtors who are currently in bankruptcy or who have been in bankruptcy during the last 24 months are not eligible for a refinance under the Settlement. The refinance program is designed to help homeowners who are current on their loans and who would benefit from an interest rate reduction.

-Attorneys who represent debtors who may be eligible for relief under the Settlement should contact their client's servicer and watch for solicitations sent to counsel in lieu of solicitations sent to homeowners.

-Debtors who have already lost their homes to foreclosure may be entitled to a restitution payment.

ARE THE SETTLING SERVICERS REQUIRED TO SOLICIT ELIGIBLE DEBTORS?

-The settling servicers "have no obligation to solicit borrowers in bankruptcy." *See* Consent Judgment, p. A-16.

-However, the settling servicers may contact borrowers in bankruptcy.

-Bank of America solicits eligible borrowers, whose cases might be at any stage of the bankruptcy process, through their counsel if they are represented.

-The other servicers have yet to disclose their policies on soliciting borrowers in bankruptcy.

HOW DO THE SERVICING STANDARDS AFFECT THE BANKRUPTCY PROCESS?

-The servicing standards provide a robust framework designed to improve the five servicers' current practices.

-Single Point of Contact ("SPOC")

-"Servicer shall ensure that debtors in bankruptcy are assigned to a SPOC specially trained in bankruptcy issues." *See* Consent Judgment, p. A-21.

-The SPOC shall:

-communicate with the borrower about loss mitigation options and the steps the borrower must take to apply for these options

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-be knowledgeable about the borrower's situation and current loan status

-Filed Documents Must be Accurate

-A number of the new servicing standards expand upon Bankruptcy Rule 9011: All pleadings, proofs of claim, affidavits, sworn statements, declarations, and notices of default must be: "***accurate and complete and . . . supported by competent and reliable evidence.***" *See* Consent Judgment, p. A-1.

-If a settling servicer files a proof of claim or a lift stay motion that contains materially inaccurate information, it must:

-File an amended proof of claim or an amended motion, at its own expense, within 30 days of acquiring knowledge of the inaccuracy

-Not collect any attorney fees or other charges for preparation or submission of a proof of claim or a motion for relief that is later withdrawn or denied as a result of "substantial misstatement" as to the amount due

-Affidavits, Sworn Statements, and Declarations

-Must be based on personal knowledge or reliance on business records as permitted under the Federal Rules of Evidence

-Must not contain false or unsubstantiated information, though statements based on information and belief are allowed if so stated

-Must accurately identify affiant/declarant by name, employer, and title

-Must be signed BY HAND and dated (signature stamps and other mechanical signatures prohibited except for electronic filing)

-Proofs of Claim

-Some of the new servicing standards also supplement Bankruptcy Rules 3001 and 3002. Servicers must attach "loan documents" to a proof of claim. These include:

-The original or a duplicate of the promissory note, including all indorsements, or a lost note affidavit if the instrument has been lost or destroyed

-A copy of any mortgage or deed of trust (including, if applicable, evidence of recordation in applicable land records)

-Copies of any assignments of the mortgage or the deed of trust that demonstrate the claimant is entitled to foreclose under applicable state law

-A statement setting forth the basis for asserting that the claimant has the right to foreclose under applicable state law

-Must have procedures to ensure servicer or foreclosing entity has "documented enforceable interest" in the note

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and mortgage under state law, or is otherwise a proper part to the foreclosure action

-Official Form 10 (Attachment A) as required by Bankruptcy Rule 3001(c)(2)(C)

-Must comply with all other requirements in Rule 3001

-Lift Stay Motions in Chapter 13 Cases

-Must include loan documents or state that they are attached to a filed proof of claim

-Must state the basis for the movant's right to foreclose

-Must disclose whether debtor is being evaluated for a loss mitigation option

-Must disclose whether any trial period or permanent loan modification is pending at the time of the motion

-Must include up-to-date statement of all amounts claimed and the amount necessary to cure any default

-Payment Application in Chapter 13 Cases

-Servicers must ensure prompt and proper application of payments made on prepetition arrearage and post-petition payment amounts

-Debtor is to be treated as being current so long as making payments in accordance with confirmed plan and any later effective payment change notices

-Throughout the case, servicer is required to update its records to reflect payments made during case and waiver of any fee as required under Settlement

HOW IS THE SETTLEMENT ENFORCED?

-The Settlement is not directly enforceable by individual borrowers. However, debtor's counsel may argue that a servicer's failure to comply with the Settlement supports a debtor's request for:

-sanctions in addition to those available under Bankruptcy Rules 3001(c)(2)(D) and 3002.1(i)

-denial of stay relief for failure to show cause under section 363(d)(1)

-disallowance of a claim under section 502(b)(1)

-Debtor's counsel may argue that violations support claims that non-complying servicers are violating clear industry standard, giving rise to claims based on

-state UDAP laws

-duty of good faith and fair dealing

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-Courts could also choose to apply equitable principles to deny relief requested by servicers who have violated the Settlement

-The National Monitor calculates credits and audits the servicers' compliance with servicing standards.

- -Metrics translate servicing standards into defined activities that can be measured or tested
  - -There are 29 metrics under the Settlement and the National Monitor can add three additional metrics.
  - -Each metric has an acceptable error rate (typically 5%)
- -Credits measure consumer relief activity under the Settlement. Creditable activities include:
  - -Principal reductions
  - -Refinances
  - -Short sales
  - -Anti-blight measures

WHAT ARE THE CONSEQUENCES FOR SERVICER NONCOMPLIANCE?

-Consequences for Servicer Noncompliance

- -Settlement imposes sanction stronger than that available under Bankruptcy Rule 3002.1(i)
  - -If servicer fails to provide payment change notice as required by Rule 3002.1(b), servicer shall waive and not collect any late charge or other fees imposed solely as a result of the borrower's failure to timely make the changed payment
  - -If servicer fails to timely provide notice of fees, as required by 3002.1 and Rule 3002.1(g), the fees are deemed waived and may not be collected from the borrower
    - -Exception for independent charges, i.e., fees paid by servicer that are authorized by borrower or advanced by servicer for taxes, HOA fees, liens, or insurance

- **-Enforcement by Parties to Settlement and Monitoring Committee**
  - -Civil penalties are available in enforcement actions brought by parties to the Settlement and the Monitoring Committee:
    - -$1 million for an uncured violation of a metric
    - -$5 million for widespread non-compliance with a metric

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How Can We Report Servicer Noncompliance or Other Issues?

-Nationwide

-The US Trustee Program

-A party to the Settlement

-Members of the Monitoring Committee

-Joseph Smith, the National Monitor

-The National Monitor's website, https://www.mortgageoversight.com/ contains a form for reporting issues on behalf of a client.

-California

-Email the California Monitor Program: CAMonitor@doj.ca.gov

-We review and respond to inquiries from California homeowners.

-We communicate with the servicers about situations faced by individual homeowners. We prioritize homeowners who do not have the assistance of counsel.

-You can also visit our website, www.californiamonitor.org, for more information.

Homeowner Bill of Rights

-Separate California legislation that will apply to most banks doing business in California.
-Effective date: January 1, 2013.
-Expands many Settlement servicing standards to apply broadly to mortgage servicers.
-Restricts dual tracking.
-Requires banks to assign borrowers a single point of contact.
-Directly enforceable by borrowers.
-Remedies include injunctive relief and damages.
-Civil penalty of up to $7,500 per loan for recording and filing multiple of unverified documents.
-More information available at http://oag.ca.gov/hbor.

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National Mortgage Settlement: An Overview of Bankruptcy-Related Provisions*

The economic tumult of the recent past led to increasing scrutiny of mortgage loan servicing practices and which spawned an investigation by the Department of Justice and 49[1] state Attorneys General into the practices of the six largest loan servicers: Bank of America, GMAC, Ally Bank, Citibank, JPMorgan Chase and Wells Fargo (the "Banks"). That investigation was resolved when those six banks entered into a comprehensive settlement of the claims brought by the DOJ and AGs (the "Settlement"). *See* Consent Judgment, *United States v. Bank of America Corp.*, No. 12-0361, (D.D.C. Apr. 4, 2012), ECF No. 11 (consent judgment regarding Bank of America). The settlement imposes obligations to modify or document certain loan servicing practices – including numerous provisions that relate, either directly or indirectly, to loan servicers' bankruptcy practices. This paper presents an overview of those portions of the settlement that impact servicer bankruptcy practices.

In October 2010, the DOJ and state AG offices launched an investigation concerned primarily with the "robo-signing" of affidavits used to support foreclosure actions. However, the investigation (and settlement) encompassed other foreclosure-related practices, such as the presentation and handling of loss mitigation or home modification plans. The settlement was reached after a year of investigation and negotiation between the Banks and the DOJ/AGs. The settlement requires monetary relief to be paid by the Banks and requires certain changes in servicer practices.[2] Generally, those changes include:

Documentation and disclosure: The Settlement imposes affirmative obligations to accurately document a borrower's loan and to disclose any fees assessed to it. Specifically, affidavits must be based on personal review of a loan file and proofs of claim must be accurate. Inaccurate proofs of claim must be fixed. Moreover, the Banks must account for loans in a manner that that clearly identifies principal, interest, escrow and fees and must credit payments in a specified manner. All loan documentation will be subjected to periodic audits. Any third-parties providing foreclosure or bankruptcy services to the Banks are subject to certain oversight restrictions and must comply with the restrictions of the Settlement.

Loss mitigation/loan modification: The Settlement requires Banks to follow certain protocols in offering and handling loss mitigation/loan modification. The Banks must notify borrowers of loss mitigation options prior to referral to foreclosure. Applications for loan modifications must be granted or denied within thirty days and, if denied, the Bank must inform the borrower why denial was warranted. Loan modification denials will be reviewed internally and also be subject to appeal. The Banks cannot "dual track" (*i.e.* consider a loan modification application while simultaneously foreclosing) modifications. The Banks will establish a single

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* By: Hon. Laura Stuart Taylor, U.S. Bankruptcy Court, Southern District of California, San Diego, CA; Rudy J. Cerone and Cullen J. Brown, McGlinchey Stafford, PLLC, New Orleans, LA.

[1] Oklahoma did not participate.

[2] For more detailed information on the Settlement, see, generally, www.nationalmortgagesettlement.com

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point of contact for information on loan modification for each borrower and develop information "portals" concerning loan modification/loss mitigation. Crucially, a Bank cannot deny loss mitigation or loan modification to a borrower simply because the borrower is in bankruptcy.

Fee restrictions: The Settlement proscribes the fees that may be charged and the disclosures necessary before fees can be collected. All default, foreclosure or bankruptcy-related fees must be disclosed and must be "reasonable." Moreover, such fees must be represented on a fee schedule. Late fees are prohibited in certain instances where a borrower pays less than the entire amount of past due payments. Third-party fees (including BPO fees, preservation fees, inspection fees and other similar fees) are subject to numerous restrictions.

Enforcement: The Settlement provides for a bifurcated enforcement process, composed of (1) a non-adversarial monitoring program and (2) potential litigious enforcement by any party to the suit or an overarching "independent" committee. The monitoring program is headed up by an independent Monitoring Committee who, in turn, appoints an individual Monitor. The Banks report to the Monitor, and the Monitor may investigate possible violations. The Monitor reports to the Monitoring Committee and also can impose additional (though consistent) requirements on the Banks in the event of noncompliance. The Monitoring Committee has the authority to file enforcement actions. Other parties to the Settlement (the Department of Justice, the Office of the U.S. Trustee, state Attorneys General, etc.) also may file enforcement actions; however, they must first present the proposed enforcement action to the Monitoring Committee, which has the option of pursuing the action itself or deferring to the agency that brought the matter to its attention. Joseph A. Smith, Jr., a former North Carolina Commissioner of Banks, has been appointed as Monitor, and runs the Office of Mortgage Settlement Oversight.[3]

While the Settlement applies only to the six banks that were investigated, many of its provisions surely will be viewed (going forward) as a standard for servicing best practices. Moreover, the Settlement requires the Banks to ensure any third-party provider complies with the dictates of the Settlement, such that any service provider that counts one of these Banks as a client must be aware of the restrictions of the Settlement. Accordingly, all consumer bankruptcy practitioners should be familiar with its terms.

What follows are excerpts from the Settlement Term Sheet, which is Exhibit A to the Consent Judgment, that may impact consumer bankruptcy practice:

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[3] For more information about the Monitor and the Office of Mortgage Settlement Oversight, see, generally, www.mortgageoversight.com

SETTLEMENT TERM SHEET

I. FORECLOSURE AND BANKRUPTCY INFORMATION AND DOCUMENTATION – A-1

- **A-3, 10.** Servicer must not pay volume-based or other incentives to employees or third-party providers or trustees that encourage undue haste or a lack of due diligence.
- **A-3, 11.** Affiants shall be individuals, not entities.
- **A-3, 15**. Servicer shall not file a proof of claim ("POC") in a bankruptcy case with materially inaccurate info. Servicer must substitute inaccurate POCs with amended POCs at own expense after having acquired actual knowledge of material inaccuracy, notifying Borrower and/or Borrower's counsel.
- **A-3, 16.** Servicer shall not rely on an affidavit, sworn statement or declaration which was required to be based on review and personal knowledge but was not, or which was not notarized when required, or which contained materially inaccurate information.
- **A-4, B2**. For any loans with daily interest, Servicer must credit any payments *as of the date received*, and post them no more than two business days after receipt.
- **A-4, B3.** For any loan that does not have daily interest, Servicer shall "promptly" accept and apply payments.
- **A-5, B4.** Servicer shall not be required to accept partial payments after Servicer has noticed Borrower that the loan is in default and has been accelerated.
- **A-7, 11b.** In Chapter 13 cases, Servicer shall treat Borrower as current so long as Borrower is in conformance with confirmed plan and any later payment change notices.
- **A-7, 11c.** As of the date of a dismissal, or an order granting stay relief, or an order granting a discharge, Servicer will, for free, reconcile payments received with respect to the B's obligations during the case and appropriately update the Servicer's systems.
- **A-9, D1**. Servicer shall ensure that POCs filed on behalf of Servicer are documented in accordance with the United States Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, and any applicable local rule or order ("bankruptcy law").
- **A-10, D2**. To each Motion for Relief from Stay, Servicer must attach POC if not previously submitted, which must include the basis for asserting the right to foreclose.
- **A-11, E.** Servicer must conduct at least quarterly reviews of a statistically significant number of affidavits, sworn statements, Declarations, notices of default, notices of sale, and similar foreclosure notices, as well as internal controls and procedures regarding same, to ensure documents are accurate and comply with prevailing law and the consent judgment. Reviews must verify the accuracy of the statements in the documents. *Employees who conduct reviews must be separate and independent of employees who prepare the foreclosure and bankruptcy documents.*

II. THIRD-PARTY PROVIDER OVERSIGHT – A-12

- **A-12, A.** Servicer shall adopt policies and processes to oversee foreclosure firms, law firms, foreclosure trustees, subservicers, other agents, independent contractors, entities, and third parties, including subsidiaries and affiliates, (collectively, "3Ps") retained by or on behalf of Servicer that provide foreclosure, bankruptcy, loss mitigation, or mortgage servicing activities
- **A-12, A1.** Servicer shall perform appropriate due diligence of 3Ps' qualifications, expertise, capacity, reputation, complaints, info security, document custody practices, business continuity, and financial viability
- **A-12, A2.** Servicer shall amend agreements, engagement letters, or oversight policies with 3Ps to require them to comply with Servicer's policies and procedures, as well as state and federal laws.
- **A-12, A4.** Servicer shall ensure that foreclosure and bankruptcy counsel and foreclosure trustees have appropriate access to information from Servicer's books and records necessary to perform their duties in preparing pleadings and other documents submitted in foreclosure and bankruptcy proceedings.
- **A-12, A6.** *Using separate and independent employees*, Servicer shall conduct periodic reviews of 3Ps, including a review of a sample of their foreclosure and bankruptcy documents, and a review of fees, processes, and loan document security.
- **A-12, A6e.** Servicer must require 3Ps to disclose any imposed sanctions or professional disciplinary actions taken against 3Ps for misconduct.
- **A-12, A6f.** Servicer must assess whether bankruptcy attorneys comply with the best practice of determining whether Borrower has made a payment curing a stay relief delinquency within two business days of the scheduled hearing date.
- **A-13, A7-9.** Servicer shall take appropriate remedial steps upon identifying problems, including terminating its relationship with 3P, adopting processes for reviewing and addressing customer complaints about 3P, and regularly reviewing and assessing the adequacy of its internal controls with respect to its obligations under this Section.
- **A-14, B.** Additional Oversight of Activities by Third-Party Providers: Servicer shall require a certification process for law firms to ensure that attorneys have the requisite experience and competence. Servicer shall ensure that attorneys are licensed and have an appropriate contact within Servicer to facilitate loss mitigation and legal proceedings. Servicer must require 3Ps to maintain records identifying all notarizations of Servicer's documents executed by each of 3P's notaries.

III. BANKRUPTCY – A-14

- **A-14, B1**. Servicer must notice Debtor's counsel, and trustee within 180 days of Debtor's incurring any fee, expense, or charge, itemizing same if it is recoverable against Debtor or Debtor's principal residence, so long as Holder intends to collect. **(ci).** With the exception of independent charges that are authorized by Borrower or which consist of

amounts the Servicer advances for taxes, homeowners' association fees, liens, or insurance, failure to notice Debtor of such fee forfeits same.(**cii).** The Court may, after notice and a hearing, preclude Holder from presenting the omitted information, and may award expenses and attorney's fees caused by holder's failure.

- **A-15, B1e.** Servicer shall file and serve on Debtor, counsel, and trustee any change in payment amounts, including those resulting from interest rate or escrow adjustments, at least 21 days before a payment in the new amount is due. Servicer shall waive any late charge or other fees resulting solely from Borrower's failure to make a timely payment due to Servicer's failure to notice timely.

IV. LOSS MITIGATION – PAGE A-16

- A1. Servicer must inform Borrower of possible loss mitigation options before foreclosure (**BUT NOT if borrower is in bankruptcy**), and must consider a loan modification application before foreclosing.
- A2. Servicer shall offer and facilitate loan modifications for Borrower rather than foreclose when loan modification would be NPV positive.
- A3. Servicer must allow Borrower enrolled in a trial period plan under HAMP, who made all required payments but were denied a permanent modification, the opportunity to reapply for a HAMP or prop loan modification with current financial info.
- A4. Borrowers who kept current under HAMP trial period shall be converted to permanent modifications.

V. DUAL TRACK RESTRICTED

- **A-17, B1.** Servicer can't foreclose while loan modification application is pending if Servicer received:
  - (a) A complete application no later than 120 days of delinquency, OR
  - **(b)** A substantially complete loan modification application no later than 120 days of delinquency, with final completion no later than day 130. Servicer can't foreclose until it determines Borrower not eligible for a loan modification or if Borrower declines loan modification.
- B2. Servicer can't foreclose once loan modification entered until Borrower fails to pay or Borrower breaches.
- B3. If Borrower's loan modification is denied, and if Borrower is entitled to an appeal, Servicer will not foreclose until the later of the 30-day appeal period or 15 days after Servicer denies Borrower's appeal.
- **A-18, B4.** After foreclosure referral, Borrower can still apply for loan modification within 30 days after Post Referral to Foreclosure Solicitation Letter.(B5 provides same appeal period as B3).
- **A-19, B6.** If Servicer receives loan modification application more than 37 days before foreclosure sale is scheduled, Servicer can't proceed with sale.

- **B7.** If Borrower's loan modification denied, and more than 90 days remain until scheduled foreclosure sale, then provision B3's appeal period applies.
- **B8.** If Servicer receives loan modification application within 37 to 15 days before scheduled foreclosure sale, Servicer must conduct an expedited review.
- **A-20, B9.** If Servicer receives loan modification application less than 15 days before foreclosure sale, Servicer must notify borrower as to its ability or inability to complete application review.
- **B10.** Servicer not responsible for failing to obtain a delay in a ruling on a judgment or foreclosure sale if Servicer made a request for such a delay but it was not approved.
- **B11.** Servicer shall not foreclose if Borrower in compliance with a trial loan mod, forbearance, or repayment plan, or a short sale or deed-in-lieu of foreclosure has been approved by all parties, and proof of funds or financing has been provided to Servicer.

VI. SINGLE POINT OF CONTACT

- **A-21, C1.** Servicer shall establish a single point of contact ("SPOC") for each Borrower for the loss mitigation, loan mod, and foreclosure process.
- **A-23, C8.** Servicer shall designate one or more management-level employees to be the primary contact for state attorney generals, state regulators, each regional office of the U.S. Trustee and federal regulators for handling Borrower complaints.
- **A-23, C9.** Servicer shall establish a toll-free number staffed by bankruptcy-trained employees to respond to inquiries from Chapter 13 trustees.

VII. GENERAL LOSS MITIGATION REQUIREMENTS

- **A-28, H5.** Servicer shall not adopt compensation arrangements for its employees that encourage foreclosure over loss mitigation alternatives.
- **A-29, H8.** Servicer shall not advise Borrower to go into default to qualify for loss mitigation.
- **A-29, H11.** Servicer cannot charge an application fee for a loan modification and must provide a pre-paid overnight envelope or pre-paid address label for return of an application.
- **A-29, H12.** Servicer shall not be obligated to evaluate requests for loss mitigation options from Bs who (1) have already been evaluated or had the chance to be evaluated under HAMP or proprietary modification programs OR (2) Borrowers who were already evaluated under this Agreement, *unless there has been a material change in Borrower's financial circumstances*

VIII. LOSS MITIGATION DURING BANKRUPTCY

- **A-31, L1.** Borrower's in bankruptcy still get any loss mitigation option so long as they and their trustees cooperate in obtaining approvals and consents.

- **A-31, L2**. Servicer shall, to the extent "reasonable," extend trial period loan modification plans as necessary to accommodate delays in obtaining bankruptcy court approvals or Debtor's trial period payments from Chapter 13 trustees. Borrower must maintain trial payments through trial periods.
- **A-31, L3**. When Debtors are in compliance with a trial period or permanent loan modification plan, Servicer will not:
  1) Object to Chapter 13 plan
  2) File a Motion to Dismiss the bankruptcy case
  3) File a Motion to Relief from Stay solely on the basis that the Debtor paid only the trial period or permanent loan modification amounts.

X. RESTRICTIONS ON SERVICING FEES, A-35 Fees must be reasonable and customary and expressly authorized by the loan instruments.

- **A-36, B4.**

  a. Servicer shall not collect any late fee or delinquency charge when the only delinquency is attributable to late fees or delinquency charges assessed on an earlier payment, and the payment is otherwise a full payment for the applicable period and is paid on or before its due date or within any applicable grace period.

  b. Servicer shall not collect late fees based on an amount greater than the past due amount, collected from the escrow account or from escrow surplus without Borrower's approval, or deducted from any regular payment.

  c. Servicer shall not collect any late fees for periods during which a complete loan modification application is under consideration, or while the borrower is making timely trial modification payments, or while Servicer is evaluating a short sale offer.
- **A-37, D.**

  a. Servicer must not collect any attorney's fees or other charges with respect to a POC or Motion for Relief from Stay-related document that is withdrawn or denied, or with respect to amendments of same due to Servicer's misstatements of the amount due.

  b. Servicer must not collect late fees due to delays in receiving Debtor's payments, including trial or permanent modification payments as well as post-petition conduit payments under Section 1322(b)(5) that Debtor timely made to a Chapter 13 trustee.

Following are excerpts from the Enforcement Terms, Exhibit E to the Consent Judgment:

ENFORCEMENT TERMS

EXHIBIT E: Enforcement Terms

- **E-1, B.** A committee comprising representatives of the state Attorneys General, State Financial Regulators, the U.S. Department of Justice and the U.S. Department of Housing and Urban Development shall monitor Servicer's compliance with the Consent Judgment (the "Monitoring Committee").
- **E-1, C.1.** Joseph A. Smith, Jr. is appointed to the position of Monitor. If the Monitor is unable to complete his or her duties, Servicer and the Monitoring Committee shall mutually agree upon a replacement.
- **E–1-2, C.2.** The Monitor has the right to employ an accounting firm or firms and one or more attorneys or other professional persons to represent or assist the Monitor in carrying out the Monitor's duties (each such individual, along with each individual deployed to the engagement by the Primary Professional Firm, shall be defined as a "Professional").
- **E-3, C.5.** The Monitor shall determine whether Servicer is in compliance with the Servicing Standards and the Mandatory Relief Requirements (as defined in Section C.12) and whether Servicer has satisfied the Consumer Relief Requirements and to report his or her findings as provided in Section D.3.
- **E-3, C.6.** A work plan shall be agreed upon by Servicer and the Monitor, and not objected to by the Monitoring Committee (the "Work Plan").
- **E–3-4, C.7.** Servicer will designate an internal quality control group that is independent from the line of business whose performance is being measured (the "Internal Review Group") to perform compliance reviews each calendar quarter ("Quarter") in accordance with the terms and conditions of the Work Plan (the "Compliance Reviews") and satisfaction of the Consumer Relief Requirements after the (A) end of each calendar year (and, in the discretion of the Servicer, any Quarter) and (B) earlier of the Servicer assertion that it has satisfied its obligations thereunder and the third anniversary of the Start Date (the "Satisfaction Review").
- **E-7, C.19.** The Monitor shall engage Servicer in a review of a pattern of noncompliance with a material term of the Servicing Standards to determine if the facts are accurate or the information is correct.
- **E–7-8, C.20.** The Monitor may request information from Servicer in addition to that provided under Sections C.16-19.
- **E-8, C.21.** The Monitor may interview Servicer's employees and agents.
- **E–8-9, C.23.** If the Monitor reasonably concludes that a pattern of noncompliance exists and is reasonably likely to cause material harm to borrowers or tenants residing in foreclosed properties, the Monitor may propose an additional provision of the Work Plan relating to Servicer's compliance with the associated term or requirement.

- **E-9, D.1.** Following the end of each Quarter, Servicer will report the results of its Compliance Reviews for that Quarter (the "Quarterly Report").
- **E–9-10, D.2.** Following the end of each Quarter, Servicer will transmit to each state a report (the "State Report") including general statistical data on Servicer's servicing performance.
- **E-10, D.3.** The Monitor shall report on Servicer's compliance with this Consent Judgment in periodic reports setting forth his or her findings (the "Monitor Reports").
- **E-11, E.1.** A "Potential Violation" of this Consent Judgment occurs if the Servicer has exceeded the Threshold Error Rate set for a Metric in a given Quarter. In the event of a Potential Violation, Servicer shall meet and confer with the Monitoring Committee within 15 days of the Quarterly Report or Monitor Report indicating such Potential Violation.
- **E-11, E.2.** Servicer shall have a right to cure any Potential Violation.
- **E-12, E.6.** In the event a Potential Violation is cured as provided in Sections E.3, above, then no Party shall have any remedy under the Consent Judgment(other than the remedies in Section E.5) with respect to such Potential Violation.
- **E-14, G.** Servicer, the Monitor, and the Monitoring Committee will engage in good faith efforts to reach agreement on the proper resolution of any dispute concerning any issue arising under the Consent Judgment. Subject to Section J, below, in the event that a dispute cannot be resolved, Servicer, the Monitor, or the Monitoring Committee may petition the Court for resolution of the dispute.
- **E-14, H.** Nothing in this Consent Judgment shall be deemed to interfere with existing consumer complaint resolution processes, and the Parties are free to bring consumer complaints to the attention of Servicer for resolution outside the monitoring process. In addition, Servicer will continue to respond in good faith to individual consumer complaints provided to it by State Attorneys General or State Financial Regulators in accordance with the routine and practice existing prior to the entry of this Consent Judgment, whether or not such complaints relate to Covered Conduct released herein.
- **E-14, I.** Nothing in the Consent Judgment shall affect requirements imposed on the Servicer pursuant to Consent Orders issued by the appropriate Federal Banking Agency (FBA), as defined in 12 U.S.C. § 1813(q), against the Servicer.
- **E-14, J.1.** This Consent Judgment shall be enforceable in the U.S. District Court for the District of Columbia (the "Court").
- **E–14-15, J.2.** Servicer's obligations under the Consent Judgment shall be enforceable solely in the Court. An enforcement action under the Consent Judgment may be brought by any Party to the Consent Judgment or the Monitoring Committee.
- **E–15-16, J.3.** The sole relief available in such an Enforcement Action will be Equitable Relief and Civil Penalties, but nothing in this Section shall limit the availability of remedial compensation to harmed borrowers as provided in Section E.5.

- **E-16, K.** The Consent Judgment and all Exhibits shall retain full force and effect for three and one-half years from the date it is entered (the "Term"), unless otherwise specified in the Exhibit. Servicer shall submit a final Quarterly Report for the last quarter or portion thereof falling within the Term, and shall cooperate with the Monitor's review of said report, which shall be concluded no later than six months following the end of the Term, after which time Servicer shall have no further obligations under this Consent Judgment.

JANUARY 2007 – OCTOBER 2012

Clark County, Nevada Residential Foreclosure
Notice of Default

Aug 2011	3100
Sep	4150
Oct	75
Nov	92
Dec	144
Jan 2012	252
Feb	224
Mar	482
Apr	404
May	521
Jun	629
Jul	914
Aug	1311
Sept*	706
Oct	1360

*only 19 business days in the month

Foreclosure Mediation Factsheet

The State of Nevada Foreclosure Mediation Program (FMP) was created by the 2009 Legislature to directly address the foreclosure crisis in Nevada. Created by Assembly Bill 140, the program provides homeowners and lenders with an opportunity to discuss alternatives to foreclosure. AB 140 amended NRS 107.080 and 107.086.

Why Mediate?

Foreclosure mediation is fast, inexpensive and cost effective. Through give-and-take, homeowners and lenders, with the assistance of a trained mediator, seek a mutually acceptable resolution to a mutual dilemma. By working together to explore various options, agreements are often reached that benefit both sides and avoid foreclosure.

Advantages

Foreclosure mediation allows homeowners to sit down with a lender and talk about alternatives to foreclosure. Under the Nevada Foreclosure Mediation Program (FMP), lender representatives who attend mediations must have the authority to negotiate and modify the terms of a loan. This improves chances that a homeowner and a lender can reach an agreement that avoids foreclosure. Mediations often result in loan modification, a short sale agreement or other resolution.

In the first year of the program, 46-percent of mediation agreements resulted in homeowners remaining in their homes.

Rules

Rules passed by the Nevada Supreme Court provide for orderly, timely, and cost-effective mediations. Under the program rules, mediations must take place within 135 days of the homeowner's request for mediation, the submission of fees by both parties, and the production of required documentation by the lender and homeowner.

When mediation is scheduled, the lender must have someone present (either in person or by telephone) who has the authority to modify the terms of the loan. The mediator must approve participation via telephone prior to the date of the mediation. Homeowners must also appear and may have a representative who is an attorney licensed to practice in Nevada, a foreclosure or loan modification professional licensed under NRS 645F.310, or a U.S. Department of Housing and Urban Development (HUD) approved housing counselor employed by HUD-Approved Housing Counseling Agencies. Both the homeowner and lender must mediate in good faith.

Eligibility

The FMP applies to residential properties located in Nevada that are owner-occupied and the primary residence of the owners. Additional eligibility requirements include a Notice of Default (NOD) and Election to Sell that was filed with the County Recorder on or after July 1, 2009. Homeowners that received a NOD prior to July 1, 2009 and meet the other requirements listed above may opt into the program upon written agreement with their lender.

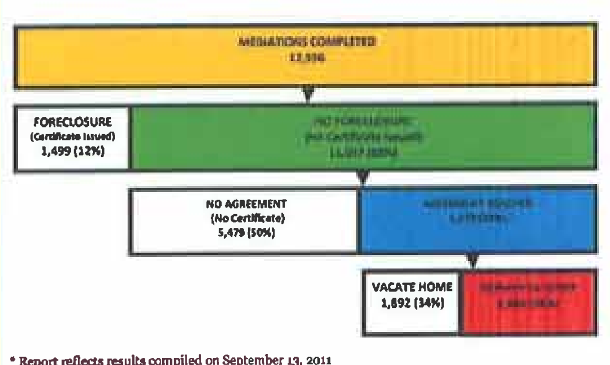
Homeowner Requirements

The eligible homeowner has thirty (30) days after receiving the notice of default to request mediation by completing the Election/Waiver Form and submitting the non-refundable mediation fee of $200 together with the required Financial Statement and Housing Affordability Worksheet to the FMP as a packet. The Election/Waiver Form and instructions, as well as the Financial Statement and Housing Affordability Worksheet should be included in a packet when the lender serves the NOD upon the homeowner. Homeowners must mail a copy of the Election/Waiver Form to the Lender's Trustee by certified or registered mail, return receipt requested. All other forms and documentation such as the Financial Statement and Housing Affordability Worksheet, as well as required information listed on the Financial Statement (i.e. tax return, bank statements, pay stubs, and profit and loss statements) must be submitted to the mediator at least ten (10) days prior to the date of the mediation. The Homeowner must also submit a confidential non-binding proposal to the mediator to resolve the foreclosure.

Lender Requirements

Upon receipt of the completed Election/Waiver Form the homeowner, the lender has ten (10) days to submit the required Trustee Information Form; recorded copy of the NOD and the required $200 fee. Upon notice that a homeowner has elected to participate in the FMP, lenders must participate in good faith in the mediation. Lenders must provide the following documentation to the mediator and homeowner at least 10 days prior to the mediation: original or certified copy of the deed of trust; mortgage note; and each assignment of the deed of trust and mortgage note. Additional required documentation include: an appraisal and/or a Broker's Price Opinion (with prior approval by the mediator) dated not more than sixty (60) days from the date of the mediation; a confidential proposal to resolve the foreclosure; and the evaluative method used to determine eligibility/non-eligibility for a loan modification. The non-binding proposal and evaluative methodology should be provided to the mediator under confidential cover. Any delay by the lender will extend the time it takes for the mediation to be held.

Results of Mediations (September 2009—June 2011)*



* Report reflects results compiled on September 13, 2011

Mediation Costs

Other than a filing fee paid by the lender upon the filing of a Notice of Default (NOD), the cost of mediation is $400, shared equally by the homeowner and the lender. Parties must pay their $200 mediation fee prior to the scheduling of a mediation. Homeowners must initiate the mediation process within 30 days of receiving a NOD by certified or registered mail.

Mediation Scheduling

Once a homeowner elects to participate in mediation, the mediation will be calendared to take place within 135 days from the date of receipt of funds from the Lender. The Mediator will contact the Homeowner and Lender to schedule the mediation. Within ten (10) days after the conclusion of the mediation, the Mediator will file his/her Mediator Statement with the FMP. Copies of the Mediator Statement will be forwarded to the Lender, Homeowner and their respective representatives.

Petition for Judicial Review

If not satisfied with the outcome of the mediation, the Lender or the Homeowner may file a Petition for Judicial Review. The Petition for Judicial Review must be filed within thirty (30) days of receipt of the mediator's statement. Petitions must be filed with the District Court in the county where the notice of default originated.

Forms

The required homeowner and lender documents can be found on the Nevada Foreclosure Mediation Program website at www.foreclosuremediationnv.org. Homeowner financial documents and Lender-certified loan documents must be provided to the mediator in advance of a mediation. The mediator may request additional forms and documents prior to the start of a mediation.

Agreements

The parties may agree to modify a loan on a permanent or temporary basis, or the homeowner may agree to relinquish the home. All agreements must be in writing and signed by the parties. Temporary agreements must indicate an expiration or vacate date.

If the Homeowner or the Lender fails to fulfill the obligations of the agreement, either party may file a Petition for Judicial Review with thirty (30) days following the expiration or vacate date of the agreement.

Program Results

The program has successfully brought homeowners together with lenders to directly address the foreclosure crisis and to enable families to remain in their homes. In the program's first year, between July 1, 2009 and June 30, 2010, a total of 4,212 homeowners participated in mediations. Out of the total number of mediations, 89-percent did not result in foreclosure and 46-percent resulted in a loan modification or other agreement for the homeowner to remain in the home.

Additional Information

Additional information about the State of Nevada Foreclosure Mediation Program may be obtained at www.foreclosuremediationnv.org. Individuals may also call the program at (702) 486-9380 in Southern Nevada, (775) 687-9816 in Carson City, or (888) 421- 3004 toll free outside the 702 area code.

Mediating a foreclosure action is fast, inexpensive, and offers a flexibility that more formal processes do not offer.

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December 15, 2011

ASSEMBLY BILL 284 FACT SHEET

Purpose

To protect Nevada property owners from fraudulent foreclosure.

What is AB 284?

AB 284 changed Nevada Foreclosure Law by adding stricter requirements for the foreclosure process. As of October 1, 2011, anyone filing a notice to initiate foreclosure under Nevada Revised Statutes (NRS) 107 must include a notarized affidavit documenting certain information regarding the ownership of the property that is the subject of the foreclosure, the authority of the trustee, and the amount in default and related fees and costs. In addition, AB 284 states that mortgages and assignments of real property may not be enforced unless they are recorded in the office of the recorder of the county in which the property is located.

AB 284 helps to protect Nevadans' right to accurate information during foreclosure by allowing homeowners to seek damages and an injunction against anyone who acts contrary to NRS 107.080 during the foreclosure process. There are also stricter criminal penalties for anyone who purposely tries to defraud a homeowner by making a false representation or recording a false document. AB 284 strengthens the Attorney General's enforcement authority over foreclosure fraud.

How do I, as an individual property owner, protect my rights under AB 284?

To enforce AB 284, first you must be a property owner of record. Second, if you find an error in your foreclosure you should notify your trustee or beneficiary of

The information in this document is not meant to provide legal advice to any individual or organization, or to substitute for advice from an attorney.

the error(s) and allow them 20 days to make a good faith effort to correct the mistake.

If the mistake is not corrected, then the property owner can seek to enforce their rights under AB 284 in the District Court of the County in which the property is located.

AB 284 Sponsors/Cosponsors

- Marcus Conklin, William Horne, Marilyn Kirkpatrick

Important Dates

- Mar 15, 2011—Read first time. Referred to Committee on Judiciary. To printer.
- May 20, 2011—Approved by the Governor. Chapter 81.
- October 1, 2011—Effective
- Read the entire bill history

News You Can Use

- Read the News Release
- Read Assembly Bill No. 284
- Read the Model Affidavit at http://bit.ly/ModelAffidavit

More Information

Have additional questions about interpretation, implementation, and enforcement of AB284? Fill out our form to submit a potential question which may be added to our fact sheet. Check back periodically to see the most up to date copy.

The information in this document is not meant to provide legal advice to any individual or organization, or to substitute for advice from an attorney.

ASSEMBLY BILL 284 FREQUENTLY ASKED QUESTIONS

The information contained in these FAQs represents the Nevada Attorney General's office's current understanding of AB 284. It is not intended to provide legal advice to any individual or organization or to interfere in any way with interpretations of AB 284 by the courts of the State of Nevada.

Section 9 of AB 284 requires a notice of breach and of the election to sell (also known as a notice of default), to include a notarized affidavit. What should these affidavits include?

The language of AB 284 sets forth clearly the items to be included in the affidavit. The Attorney General's office has worked with other entities engaged in the foreclosure process to develop a model affidavit which we believe complies with the statute. A copy of this model affidavit is available at http://bit.ly/ModelAffidavit for the convenience of practitioners. However, use of this model affidavit is not mandatory. Practitioners may develop and utilize their own versions of the affidavit. The compliance of each affidavit with AB 284 may be subject to evaluation by the courts.

What is the effective date of AB 284?

The effective date of AB 284 is October 1, 2011, as a result of the enactment of AB 273, which postponed the effective date of AB 284 from July 1, to October 1.

Is it necessary to re-start foreclosures that are not complete as of October 1, 2011, to include the affidavit required by AB 284?

It is the view of the Attorney General's office, that it is not necessary to re-start foreclosures that are not complete as of October 1, 2011, to include the affidavit required by AB 284. Again, we expect that this provision may be interpreted by the courts.

Are banks required to use the affidavit required by AB 284?

Yes. AB 284 states that it applies to all foreclosure filings under Nevada Revised Statutes 107.080, regardless of the type of entity making the filing.

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AMERICAN BANKRUPTCY INSTITUTE
20TH ANNUAL SOUTHWEST BANKRUPTCY CONFERENCE

Wrongful Foreclosure in the New Millennium:

Beware of the FDIC Assignee

September [13-15], 2012
Las Vegas, NV

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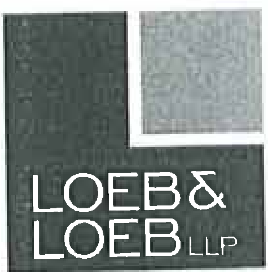

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Wrongful Foreclosure in the New Millennium: Beware of the FDIC Assignee

I. INTRODUCTION

A staggering number of banks have failed within the last ten years, including several of the largest bank failures in history. With this slew of failed banks closing their doors, an increasing number of private entities are purchasing the assets (including mortgage loans) of these failed banks from the FDIC in its capacity as receiver over these failed institutions. Further, the significant increase in foreclosures across the country has resulted in a consequential increase in wrongful foreclosure actions. As many of these wrongful foreclosure actions are brought by mortgagors with regard to actions taken by failed banks under FDIC receivership, the applicability of the *D'Oench* Doctrine and its statutory counterpart, 12 U.S.C. § 1823(e), to FDIC assignees has become particularly relevant.

A. *The Federal Deposit Insurance Corporation (FDIC) as Receiver*

1. When a federal bank fails, a special administrative regime is triggered, pursuant to the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), which governs the resolution of issues raised by this failure. 12 U.S.C. §§ 1821, et. seq.; Pub. L. No. 101-73, 103 Stat. 183 (1989). Under this regime, the FDIC is appointed as receiver and serves as the successor to the failed institution.

2. The directive of the FDIC, as receiver, is to maximize the failed bank's assets and minimize the loss to the insurance fund. In its receivership role, the FDIC has complete authority to wind down the affairs of the failed financial institution by managing and preserving the failed bank's assets (including mortgage loans), collecting all obligations, and conducting all other business. 12 U.S.C. § 1821(d)(2).

B. *Special Safeguards for the FDIC Receiver against Certain Claims and Defenses Embodied in the "*D'Oench *Doctrine" and its Statutory Counterpart, 12 U.S.C. § 1823(e)*

1. The law grants the FDIC potential safeguards against certain claims and defenses raised by consumers who entered into loans with a bank prior to its failure. These safeguards arise from two separate, but interrelated, sources – the federal common law "*D'Oench* Doctrine," and its statutory counterpart, 12 U.S.C. § 1823(e).

2. Both the *D'Oench* Doctrine and § 1823(e) apply to any agreement tending to diminish or defeat any interest that the FDIC might have in an asset in its capacity as receiver. 12 U.S.C. § 1823(e)(1); *see Caires v. JP Morgan Chase Bank*, 745 F.Supp.2d 40, 52 (D. Conn. 2010). Courts recognize that allowing parties to assert oral agreements, or agreements that otherwise fail to meet the doctrine's requirements

against a purchaser, would diminish the value of assets that the FDIC seeks to sell and undermine the deposit insurance system. *See, e.g., Caires v. JP Morgan Chase Bank*, 745 F.Supp.2d at 52; *Adams v. Madison Realty & Dev.*, 937F.2d 845, 852, 854 (3d Cir. 1991); *Porras v. Petroplex Sav. Ass'n*, 903 F.2d 379, 380–81 (5th Cir.1990).

C. *Origins of the* D'Oench *Doctrine*

1. Modest Origins of the *D'Oench* Doctrine

The *D'Oench* Doctrine "holds a favored status in the arsenal of weapons" used by federal banking authorities to collect obligations facially owed to, or to avoid obligations facially owed by, a failed bank. 4 L. Distressed Real Est. § 45:1 (updated June 2012). Yet, while the *D'Oench* Doctrine has a substantial impact – by barring most claims raised in litigation – the doctrine itself possesses relatively modest origins. *Id.*

2. The Supreme Court Case that Created the Doctrine: *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942).

The *D'Oench* Doctrine was first articulated by its namesake in the United States Supreme Court's 1942 decision in *D'Oench, Duhme & Co. v. FDIC*, which provided that borrowers could not assert defenses based on secret side agreements with the failed institution in subsequent actions brought by the FDIC to collect on a loan. 315 U.S. 447 (1942).

a) **The *D'Oench* Facts.** The borrower, a sophisticated businessperson, executed a demand note, which a bank officer orally agreed not to enforce. This side agreement was evidenced on certain receipts for the notes, but was not evidenced on the notes themselves or the books of the bank. When the bank later failed and the FDIC acquired the note and demanded payment, the borrower asserted the secret, oral side agreement with the bank officer as a defense.

b) **The *D'Oench* Holding.** Precluding the borrower from asserting a defense based on the oral side agreement with the bank officer, the Supreme Court applied a rule of equity that a debtor is equitably estopped from asserting a defense based on collateral or secret agreements with the failed institution that are not evidenced in the institution's written books and records. *Id.* at 459.

3. **The Supreme Court's Reasoning in *D'Oench*.** The Supreme Court reasoned that to permit the enforcement of such side agreements would allow parties to misrepresent to the regulatory agencies the true status of a financial obligation. In rendering its decision, the Supreme Court sought to protect federal banking authorities from claims arising from fraudulent schemes unbeknownst to banking authorities. *Id.* at 457-60.

D. *The D'Oench Doctrine – Overview of the Doctrine*

1. **The *D'Oench* Doctrine Generally.** The D'Oench Doctrine is a federal common law principle of equitable estoppel generally construed in tandem with its statutory counterpart, 12 U.S.C. § 1823(e), that prohibits borrowers from asserting claims or defenses against the FDIC and its successors-in-interest or assignees which are not properly reflected in the official books or records of a failed bank or thrift. *See, e.g., Langley v. Federal Deposit Ins. Corp.*, 484 U.S. 86, 91–92, 108 S.Ct. 396 (1987) (*Langley*); *Goldstein v. F.D.I.C.*, 2012 WL 1819284, at *4 (D. Md. May 16, 2012); *Nat'l Enters., Inc. v. Barnes*, 201 F.3d 331, 333 n.3 (4th Cir. 2000) (citing *Resolution Trust Corp. v. Allen*, 16 F.3d 568, 574 (4th Cir. 1994)).

The *D'Oench* Doctrine precludes reformation of a written instrument to reflect oral representations not reduced to writing whenever the FDIC has assumed receivership of the assets in question. *Magdaleno v. IndyMac Bancorp., Inc.*, 2011 WL 338493, at *9 (E.D. Cal. Jan. 31, 2011).

2. **Purposes of the Doctrine. The Doctrine serves two general purposes:**

a) First, it allows federal and state bank examiners to rely on a bank's records in evaluating the worth of the bank's assets. *See, e.g., Langley*, 484 U.S. at 91–92; *Goldstein v. FDIC*, 2012 WL 1819284 at *4; *Young v. FDIC*, 103 F.3d 1180, 1187 (4th Cir. 1997) (*Young*). Otherwise, "[n]either the FDIC, nor state banking authorities would be able to make reliable evaluations if bank records contained seemingly unqualified notes that are in fact subject to undisclosed conditions." *Langley*, 484 U.S. at 91-92; *see FDIC v. Twin Dev., LLC*, 2012 WL 1831639, at *5 (S.D. Cal. May 18, 2012).

b) Second, it "ensure[s] mature consideration of unusual loan transactions by senior bank officials, and prevent[s] fraudulent insertion of new terms, with the collusion of bank employees, when a bank appears headed for failure." *Young*, 103 F.3d at 1187 (citing Langley, 484 U.S. at 91-92); *see, e.g., Goldstein v. FDIC*, 2012 WL 1819284 at *4; *FDIC v. Twin Dev., LLC*, 2012 WL 1831639 at *5.

3. **Broad Application of the *D'Oench* Doctrine.** The *D'Oench* Doctrine has been expanded by judicial interpretation and legislative codification. *See, e.g., Aurora Loan Services LLC v. Sadek*, 809 F.Supp.2d 235, 240 (S.D.N.Y. 2011); *FDIC v. Twin Dev., LLC*, 2012 WL 1831639 at *5 (noting the broad scope of *D'Oench* Doctrine and § 1823(e)). The original test for determining whether claims were barred under the *D'Oench* Doctrine was whether the agreement, oral or written, was designed to deceive the public authority or would tend to have that effect. *Young*, 103 F.3d at 1187. Courts, however, have broadly interpreted the scope of the doctrine such that it applies in virtually all cases where the FDIC is confronted with an agreement not documented in the institution's records. *See id.*

4. **Exceptions to the *D'Oench* Doctrine.** As described below, the *D'Oench* Doctrine and § 1823(e) do not apply to certain claims and defenses. Thus, certain causes of action could survive an FDIC receivership and an assignee would not be able to assert the *D'Oench* Doctrine to protect against such claims and defenses.

E. *The Intertwining of the Federal Common Law Articulation of the D'Oench Doctrine and 12 U.S.C. § 1823(e)*

1. **The Common Law Articulation of the *D'Oench* Doctrine**

Under federal common law, invalidation under the *D'Oench* Doctrine generally turns on "whether the purported agreement relied upon by the private party was ever memorialized in writing or otherwise made explicit such that ... the [FDIC] would have knowledge of the bank's obligations during an evaluation of the bank's records." *Aurora Loan Services LLC v. Sadek*, 809 F. Supp. 2d at 241.

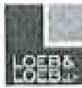
2. **Statutory Counterpart to the *D'Oench* Doctrine – 12 U.S.C. § 1823(e)**

a) Congress extended the *D'Oench* Doctrine's reach by statute through the enactment of § 1823(e) of the Federal Deposit Insurance Act of 1950 (FDIA), as amended by FIRREA. 12 U.S.C. § 1823(e). FIRREA extended the protections of § 1823 given to the FDIC in its corporate capacity to the FDIC in its receivership capacity. Prior to FIRREA's enactment in 1989, § 1823 only explicitly applied to the FDIC in its corporate capacity, even though a large body of case law had developed since the *D'Oench* Doctrine's creation that expanded the statutory coverage to receivership situations. Thus, FIRREA essentially codified the common law which applied § 1823 to the FDIC as receiver.

b) Section 1823(e) provides that in order for any agreement between a failed bank and borrower to be valid and enforceable against the FDIC or its assignee, the agreement must be:

(1) in writing;
(2) executed by both parties;
(3) officially approved by the financial institution's board or loan committee; and
(4) maintained from the date of execution as an official record of the institution. 12 U.S.C. § 1823(e).

c) Section 1823(e) "essentially codifies the common law *D'Oench* doctrine," however, the "two remain separate and independent grounds for decision." *Nat'l Enters., Inc. v. Barnes*, 201 F.3d at 333 n. 4. It expands the common law doctrine with specific criteria that "an agreement that meets



the requirements of the statute survives even if the [FDIC] did not know of it; and an agreement that does not meet them fails even if the [FDIC] knew." *Aurora Loan Services LLC v. Sadek*, 809 F. Supp. 2d at 241.

F. ***Expansive Scope of the D'Oench Doctrine and 11 U.S.C.A. § 1823(e)***

1. Since the doctrine's nascence 70 years ago, courts have expanded the *D'Oench* bar to an increasingly wider range of situations and afforded its protections to individuals further removed from the banking transaction – including to third party purchasers of assets of the insolvent bank from the FDIC – and have barred most otherwise "potent" defenses and affirmative claims. *See IndyMac Venture, LLC v. Silver Creek Crossing, LLC*, 2010 WL 1138391, at *2 (W.D. Wash. Mar. 19, 2010) (noting that courts have expanded the scope of the *D'Oench* Doctrine since its creation); *Rankin v. Toberoff*, 1998 WL 370305, at *4, n.3 (S.D.N.Y. June 30, 1998) (summarizing the developments of the protections afforded to the FDIC by *D'Oench* and concluding that the doctrine essentially provides blanket immunity to the FDIC by gradually having expanded into a "federal holder in due-course doctrine, permitting the FDIC to take assets of fails free of all defenses").

2. A survey of *D'Oench* decisions reveals this expansive application of the doctrine. Consider the following:

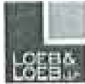
a) The *D'Oench* Doctrine can be asserted not only by the FDIC, the Resolution Trust Corporation (RTC) and a bridge bank, but by private parties purchasing the assets of a failed institution from federal authorities. *See Magdaleno* v. *IndyMac*, 2011 WL 338493 at *9 (listing cases).

b) The *D'Oench* Doctrine precludes both defenses to, and affirmative claims for, relief. *See Silver Creek Crossing, LLC*, 2010 WL 1138391 at *2-4; *Timberland Design, Inc. v. First Serv. Bank for Sav.*, 932 F.2d 46, 50 (1st Cir. 1991). These include many typical oral contract claims relating to the liquidation of collateral, release of guaranties, and failure to fund or to renew loans.

c) The *D'Oench* Doctrine applies even where the entity asserting it had knowledge of the alleged "secret" or "side" agreement. *Point Developers, Inc. v. FDIC*, 961 F. Supp. 449, 457 (E.D.N.Y. 1997) (citing *Langley*, 484 U.S. at 93).

d) The *D'Oench* Doctrine applies even where the bank customer was innocent of misconduct and did not intend to deceive banking authorities. *See Young*, 103 F.3d at 1188; *FDIC v. Krause*, 904 F.2d 463 (8th Cir. 1990).

e) A misrepresentation or omission by a bank still constitutes an "agreement" triggering the categorical requirements of § 1823(e). *See Langley*, 484 U.S. at 87, 91-93; *see also FDIC v. Twin Dev., LLC*, 2012 WL 1831639 at *5.



II. ASSIGNEE'S PROTECTIONS UNDER THE *D'OENCH* DOCTRINE AND ITS STATUTORY COUNTERPART 12 U.S.C. § 1823(E)

A. *Categories of Assignees Asserting the Protections of the* D'Oench *Doctrine and 12 U.S.C. § 1823(e)*

1. **Holders of the note itself**. When the FDIC, as receiver, assigns a note that was previously held by a failed bank subject to receivership, the assignee becomes the holder of the note with the same rights and interests in the note and is entitled to the same protections under *D'Oench* and § 1823(e) as the FDIC itself. In other words, "if the note is enforceable in the hands of the FDIC, it is equably enforceable in the hands of the assignee bank." *See, e.g., Alarcon v. Williams*, 772 F. Supp. 334, 342-43 (E.D. Mich. 1991) (citing cases); *Kilpatrick v. Riddle*, 907 F.2d 1523, 1528 (5th Cir.1990); *FDIC v. Newhart*, 892 F.2d 47, 50 (8th Cir.1989).

2. **Holders of the servicing rights and obligations**. The right to service a loan constitutes a receivership asset that may be assigned by the FDIC. *See Caires v. JP Morgan Chase Bank*, 745 F. Supp. at 50. Therefore, an assignee of servicing rights and obligations held by a failed bank under receivership "steps into the shoes" of the FDIC, receiving the same protections under *D'Oench* and § 1823(e) as the FDIC itself. *See id.*

B. *The Common Law* D'Oench *Doctrine and 12 U.S.C. § 1823(e) Apply to FDIC Assignees*

1. **The Majority View is that Assignees Stand in the Same Protected Shoes as the FDIC and Receive the Benefits of the *D'Oench* Doctrine and 12 U.S.C. § 1823(e).** The majority of courts have found that the *D'Oench* Doctrine also applies to assignees of the FDIC that purchase assets of failed banks or thrifts from the FDIC or like federal agencies. *See, e.g., Magdaleno v. IndyMac Bancorp., Inc.*, 2011 WL338493 at *9 (listing cases and stating that "the [*D'Oench*] Doctrine and its statutory counterpart [§ 1823(e)] apply equally to successors in interest [and assignees] that purchase assets which FDIC as assumed receivership"); *Silver Creek Crossing*, LLC, 2010 WL 1138391 at *2 (same); *Caires v. JP Morgan Chase Bank*, 745 F. Supp.2d at 50 (same); *Porras v. Petroplex Sav. Ass'n*, 903 F.2d at 380-81 (same); FSLIC *v. Murray*, 853 F.2d 1251, 1256 (5th Cir. 1988) (explaining that FDIC assignees also enjoy protection from claims or defenses based on unrecorded agreements); *FDIC v. Newhart*, 892 F.2d at 48-51 ("[A]ssertion of defenses based on oral agreements with the failed bank is transferred to a subsequent purchaser of the note from the FDIC.").

2. **Policy Rationale for Applying *D'Oench* to Assignees.** The policy justifications for expanding *D'Oench's* power to immunize the FDIC and other similar federal agencies from borrowers' claims and defenses carry less weight when applied to assignees of the loan or debtor, since upon transfer of the obligation into

private commerce, the burden or benefit on the federal government decreases. However, the majority of courts have found that the *D'Oench* Doctrine nevertheless should be expanded in order to promote the marketability of the failed bank's obligations by making them most attractive to prospective buyers, and thereby ultimately recouping more of the losses suffered by the federal government in taking over the failed institution.

C. *Do Assignees Benefit from the Federal Six-Year Statute of Limitations Period Provided by FIRREA?*

1. **FIRREA's Six-Year Statute of Limitations Period.** FIRREA grants to the FDIC, in its receivership and corporate capacities, a six-year statute of limitations period to bring suit on debts. 12 U.S.C. § 1821(d)(14) (FDIC may also take advantage of a longer limitations period under a state provision).

2. **FDIC Assignees Generally Receive the Protections of FIRREA's Six-Year Statute of Limitations Period.** Most courts have held that transferring the federal six-year statute of limitations from the FDIC, and the now defunct Federal Savings and Loan Insurance Corporation (FSLIC), to its assignees is consistent with the common law of assignments, furthers congressional policy, and is supported by the cases that extend the *D'Oench* Doctrine to assignees in the private market. *See FDIC v. Bledsoe*, 989 F.2d 805 (5th Cir. 1993) (holding that lender, as an FSLIC assignee, was entitled to the same six-year statute of limitations as the FSLIC).

3. **Policy Rationale for Why Assignees Should Not Be Limited to State Statute of Limitations Periods.** To hold that assignees of the FDIC are relegated to the state statute of limitations periods would serve to shrink the private market for assets of failed banks. *See FDIC v. Bledsoe*, 989 F.2d at 805. Such a result would run contrary to judicial and congressional policy allowing the FDIC to rid the federal system of failed bank assets. *See id.*

4. **The Shift in Judicial Basis for Applying FIRREA's Statute of Limitations Period to FDIC Assignees: The Supreme Court Case of *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994) (*O'Melveny*)**

a) While modern courts generally recognize that FIRREA's six-year statute of limitations period applies to FDIC assignees seeking to enforce loan obligations, the underlying analysis justifying this application has shifted largely as a result of the Supreme Court's 1994 decision in *O'Melveny & Myers v. FDIC*, which disapproved of federal common law and held that claims against the FDIC as receiver are generally governed by state law. 512 U.S. 79 (1994) (*O'Melveny*).

b) **The *O'Melveny* Case.** In *O'Melveny*, the FDIC, as receiver of a California savings bank, sued a law firm that had provided legal services for the bank. The FDIC asserted that the firm was negligent and breached its

fiduciary duty by failing to uncover the wrongdoing of certain officers of the bank. *Id.* The Supreme Court held that FIRREA preempted the creation of federal common law on this issue and that the rule of decision, therefore, should be found either in the federal statute itself or in state law. *Id.*

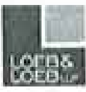
c) **Pre-*O'Melveny* Basis for Applying FIRREA's Statute of Limitations Period to FDIC Assignees.**

Prior to the Supreme Court's decision in *O'Melveny*, courts generally extended FIRREA to assignees simply by reasoning that federal common law provided for assignees to step into the shoes of their assignors. *See, e.g., Bledsoe*, 989 F.2d at 805; *Mountain States Fin. Res. Corp. v. Agrawal*, 777 F. Supp. 1550 (W.D. Okla. 1991); *White v. Moriarty*, 19 Cal. Rptr. 2d 200 (App. 1993); *but see WAMCO, III v. First Piedmont Mortgage Corp.*, 856 F. Supp. 1976 (E.D. Va. 1994) (finding that only the RTC and FDIC could take advantage of the FIRREA limitations period).

d) **Post-*O'Melveny* Basis for Applying FIRREA's Statute of Limitations Period to FDIC Assignees.**

Following the *O'Melveny* decision decrying the application of federal common law, the majority of courts still find that assignees should receive the benefit of the FIRREA six-year statute of limitations period, but reach this conclusion more indirectly.

Post-*O'Melveny* courts tend to analyze the issue by referring to the rights granted by the relevant state to an assignee, rather than by applying FIRREA's federal statute of limitations period to the assignee directly. Thus, under this analysis, if state law allows assignees to step into the shoes of the assignor, then the courts typically will extend that right and permit the assignee to adopt the FIRREA statute of limitations period. *See, e.g., Nat'l Enters. v. Barnes*, 201 F.3d at 333 (finding that assignee gets benefits of FIRREA's six-year limitations period where state law provides that assignees step into the shoes of the assignor); *UMLIC-Nine Corp. v. Lipan Springs Dev. Corp.*, 168 F.3d 1173 (10th Cir. 1999) (finding that the statute of limitations period "reset" when the RTC took over as receiver after the note previously had been held by the FDIC as receiver for a different bank). *But see Beckley Capital L.P. v. DiGeronimo*, 184 F.3d 52, 58 (1st Cir. 1999) (finding that in a suit against a deceased guarantor, where the obligation was in default before the FDIC received it, the FDIC's assignee could not claim the benefit of the six-year limitations period, but instead was restricted to the one-year state limitations period governing suits brought against estates).



III. WHERE THE *D'OENCH* DOCTRINE DOES NOT APPLY: CLAIMS AND DEFENSES THAT CARRY THROUGH FDIC RECEIVERSHIP

A. *While the* D'Oench *Doctrine and 12 U.S.C. § 1823(e) are broad, they are not limitless. Certain claims and defenses are not barred by the D'Oench Doctrine*

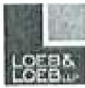
Courts have found that the following non-exhaustive list of claims and defenses generally are not barred by the *D'Oench* Doctrine and § 1823(e):

1. Claims that do not relate to a specific asset (the "no asset exception," as discussed below) or not related to an agreement
2. Claims based on the actions of the FDIC itself
3. Breach of fiduciary duty and other "free standing torts"
4. Breach of the duty of food faith and fair dealing based on obligations in written agreement
5. Fraud in the factum
6. Illegality
7. Economic duress (in certain circumstances)
8. Discharge in bankruptcy
9. Expiration of the applicable statute of limitations
10. Usury that is apparent on the face of the document
11. Release
12. Equitable subordination claims
13. Equitable defenses such as laches
14. State consumer fraud (UDAP) claims
15. Truth in lending rescission

B. *The No Asset Exception of 12 U.S.C. § 1823(e)*

1. While assignees generally stand in the same protected shoes as the FDIC, there are certain exceptions in the mortgage loan context whereby certain claims or defenses can survive FDIC receivership and liability can carry over or be imputed to the FDIC's assignee. One widely recognized exception is the "no asset exception."

a) The "no asset exception" to the *D'Oench* Doctrine and its statutory counterpart § 1823(e) is generally defined as precluding application of *D'Oench* where parties contend that no asset exists or the asset is invalid and that such invalidity is caused by acts independent of understanding or side agreement. *see, e.g., FDIC v. McFarland*, 33 F.3d 532, 537 (5th Cir.1994); *FDIC v. Zook Bros. Constr. Co.*, 973 F.2d 1448, 1452 (9th Cir.1992); *Commerce Federal Savings Bank v. FDIC*, 872 F.2d 1240, 1244 (6th Cir.1989); *Beighley v. FDIC*, 868 F.2d 776 (5th Cir.1989); *FDIC v. P.L.M. Int'l, Inc.*, 834 F.2d 248 (1st Cir.1987); *Howell v. Cont'l Credit Corp.*, 655 F.2d 743 (7th Cir.1981); *cf. Langley v. FDIC*, 484 U.S. 86, 93–94, 108 S.Ct. 396, 402–03, 98 L.Ed.2d 340 (1987)).



b) One example of where the no asset exception applies can be found in the securitization context. In securitization arrangements or vehicles, the mortgage loans would not be assets acquired by the FDIC when it became the receiver of the bank that originated the loan. In turn, an assignee of the FDIC would not receive the protection of the *D'Oench* Doctrine and its counterpart § 1823(e), and the consumer would be free to raise its claims and defenses against the assignee as the current holder.

2. The no-asset exception precludes the application of the doctrine when no asset actually existed at the time the bank was acquired by the FDIC. Accordingly, the *D'Oench* Doctrine would not apply to protect an assignee:

a) **Where the failed bank did not own the mortgage and note at the time it failed and the FDIC became the receiver of the bank that originated the loan.** For claims and defenses arising from a loan origination, one threshold question is whether the bank actually owned the mortgage and note at the time it failed and closed. If a bank has sold most of its loan portfolios in the secondary market, often through securitization, then the bank did not own the underlying mortgage and note upon commencement of the FDIC receivership, then the mortgage and note is an asset obtained by the FDIC receiver. *See, e.g., Booker v. Sarasota, Inc.*, 707 So. 2d 886 (Fla. 1998) (stating that before *D'Oench* can apply, assignee must properly prove its status as legal owner and holder of the note); *Ledo Financial Corp. v. Summers*, 122 F.3d 825, 829 (9th Cir. 1997) (finding that the *D'Oench* Doctrine and 12 U.S.C. § 1823(e) did not apply because the FDIC had not acquired the underlying note).

b) **Where the bank did not service the note at the time it closed.** For claims and defenses arising out of the bank's servicing activities, the critical question is whether the bank serviced the mortgage account at the time it failed. If the bank committed servicing abuses, but sold its servicing rights (an asset) before it failed, the FDIC has no right to that asset upon the bank's closure. In that case, the *D'Oench* Doctrine and § 1823(e) will be inapplicable to claims based on servicing abuses because a claim regarding servicing abuses would not tend to diminish or defeat the FDIC's interest in a specific asset acquired by it. Additionally, many claims regarding servicing abuses typically are based on the servicer's violation of the contract terms, which also would render *D'Oench* and § 1823(e) inapplicable.

Further, if the claim is based on the Real Estate Settlement Procedures ACT (RESPA), then the "free-standing" tort exception would apply. The "free standing" tort exception provides that a tort claim, which is "free standing" and not linked to any unwritten agreement, is not barred by *D'Oench* or 12 U.S.C. § 1823(e).

IV. CONCLUSION

As can be seen above, Congress and the courts have taken broad measures to protect financial institutions and capital markets. With the substantial increase in foreclosures has come an increase in wrongful foreclosure litigation. For those institutions that have followed proper protocol and procedure, there is great protection. For those that have not, courts are willing to avoid applying the robust protections afforded to FDIC Assignees.