

## Sanctions Against Servicers and Attorneys: Foreclosure Documentation

National Consumer Law Center  
Summer Mortgage Conference  
Washington, D.C. July 17, 2012  
Geoff Walsh



## Making Servicers Pay for Unauthorized Foreclosure Actions

- Authority for sanctions, penalties, fees shifting
- Rule 11, Bankruptcy Rule 9011
- Court's inherent power to sanction
- 28 U.S.C. § 1927
- Fed. R. Civ. P. 56(h)
- Fed R. Civ. P. 37
- State Unfair and Deceptive Practices Act statutes
- Fair Debt Collection Practices Act
- What about sanctions against me?



## Sanctions: Examples

- Appearance of new and improved documents after borrower raises a legal challenge to authority to foreclose
- U.S. Bank v. Kimball, 27 A.3d 1087 (Vt. 2011)
- *In re Arizmendi*, 2011 WL 2182364 (Bankr. S.D. Cal. May 26, 2011)

## Rule 11: Applicability

- F. R. Civ. P 11, Bankruptcy Rule 9011, analogous state court rules
- Applies to individuals filing “documents” in a court
- “Documents” are pleadings, motions, “any paper.”

## Rule 11: In Foreclosures

- Applies to misrepresentations of authority to foreclose in:
  - Judicial foreclosure pleadings and motions, supporting documents
  - Non-judicial foreclosure responsive pleadings, motions, supporting documents
  - In particular, documents filed in support of or in opposition to summary judgment.

## Rule 11(b): What is being certified about a document?

1. Not presented for improper purpose
2. Legal claims warranted, not frivolous
3. Factual contentions have evidentiary support
4. Denials of factual contentions warranted on evidence

## Rule 11(b) Certification

- Certifications made to the best of the person's knowledge, information, and belief, formed *after an inquiry reasonable under the circumstances*
- Allowance for reasonable opportunity for further investigation or discovery as to claims
- Can specifically base denials on reasonable belief, lack of information

## Rule 11: To Whom Does it Apply?

- Attorney and/or party
- If party represented:
  - All sanctions as to factual claims
  - All non-monetary sanctions
- Signing attorney must personally review document. Duty is nondelegable.
  - *In re Obasi*, 2011 WL 6336153 \* 4 (Bankr. S.D.N.Y. Dec. 19, 2011)

## Rule 11: To Whom Does it Apply?

- “Absent exceptional circumstances, a law firm must be held jointly responsible for violations committed by its partners, associates, and employees. Fed. Rule Civ. P. 11(c).”
- Others in chain of preparation of documents, default servicers?
  - *In re Rivera*, 342 B.R. 435 (Bankr. D. N.J. 2006), later decision 369 B.R. 193 (Bankr. D. N.J. 2007)

## Who Can Enforce Rule 11?

- The Court:
  - On own initiative
  - Must issue show cause order describing conduct at issue
- A party . . . but:
  - Must be by separate motion
  - May only file after service on respondent and expiration of 21-day safe harbor period
  - Can't file motion if document withdrawn

## Rule 11: Court's Options for Sanctions

- Order party or attorney to remedy a practice
- Order party or attorney to pay penalty to court
- Order party or attorney to pay movant's attorney's fees in opposing the document.
- Dismiss action
- Enter default against offending party
- *But . . .* Court cannot order *represented party* to pay monetary sanction based upon frivolous legal claim

## Rule 11 and Foreclosures

- Document presented for “improper purpose” Rule 11(b)(1)
- Document offered as valid certification, but
  - No first-hand knowledge by affiant
  - No review by affiant or attorney
  - No authority to certify
  - False signature/notarization

## Rule 11 and Foreclosures

- Factual claims not based on reasonable investigation ( Rule 11(b)(3))
  - Reliance on old screen shots
  - No review of physical transfers of notes
  - Inconsistent indorsements, allonges, assignments
  - Someone else owns the debt
  - Someone else has authority to foreclose

## Rule 11: Standard for Sanctions

- Same whether by court *sua sponte* or on motion of party
- Objectively unreasonable conduct
- Need not find servicer made false representation in bad faith
- *But* filing document known to be false *does* show bad faith

## “But some of it is true!”

- Truth of underlying content not defense (“they owe us something, so we can foreclose”)
  - *In re Taylor*, 655 F. 3d 274 (3d Cir. 2011)
  - *In re Obasi*, 2011 WL 6336153 (Bankr. S.D. N.Y. Dec. 19, 2011)
  - *In re Parsley*, 384 B.R. 138 (Bankr. S.D. Tex. 2008)

## Factual Accuracy/Technical Defects

- All the statements are true, we just messed up on the technicalities
  - *In re Ulmer*, 363 B.R. 777 (Bankr. D.S.C. 2008)
  - *In re Rivera*, 342 B.R. 435 (Bankr. D. N.J. 2006, later decision 369 B.R. 193 (Bankr. D.N.J. 2007)

## Amount of sanctions

- *In re Nosek*, 406 B.R. 434 (D. Mass. 2009), *modified* 609 F. 3d 6 (1<sup>st</sup> Cir. 2010) (Rule 9011 sanctions \$250,000 or \$5,000)
- *In re Rivera*, 342 B.R. 435 (Bankr. D.N.J. 2006), *aff'd* 2007 WL 1946656 (D.N.J. June 27, 2007) (\$150,000)

## Rule 11: Assessing Severity of Violation

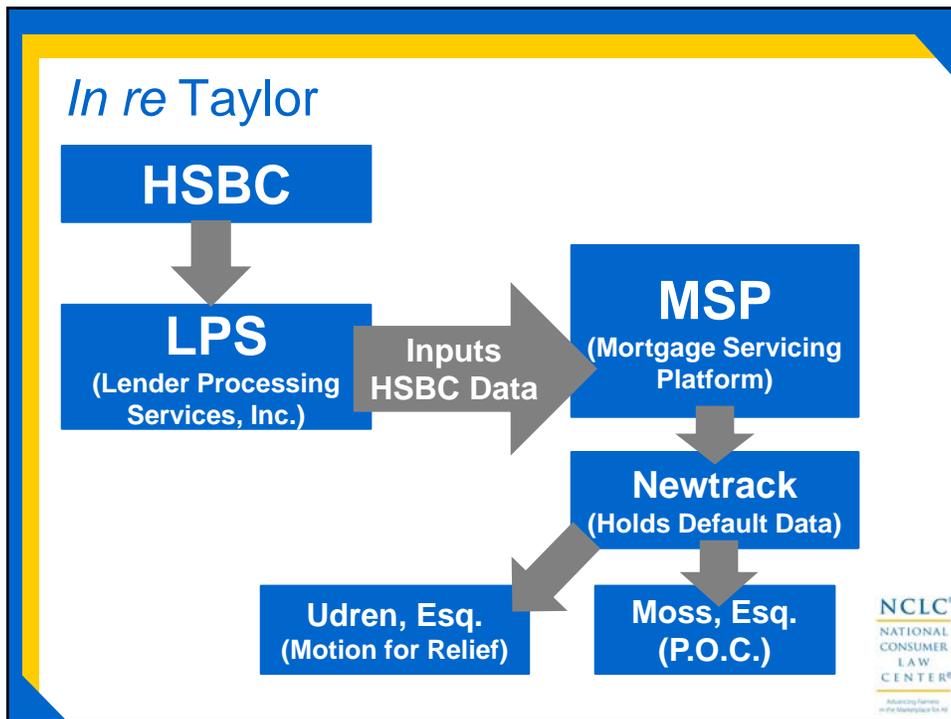
- Factors in sanctions assessment:
- Pattern vs. isolated incident
- Willful vs. negligent
- Knowledge, experience of attorneys
- Adequate time to review
- Financial resources of party
- Amount needed to deter course of conduct
  - By the party
  - By similar parties (see Rule 11(c)(4)).

## Foreclosure Mill Practices

- *In re Obasi*, 2011 WL 6336153 (Bankr. S.D.N.Y. Dec. 19, 2011) (attorney certification false when no review by attorney)
- *In re Ulmer*, 363 B.R. 777 (Bankr. D.S.C. 2007) (false certification of attorney review, no attorney involvement, no investigation of facts)
- *In re Rivera*, 342 B.R. 435 (Bankr. D.N.J. 2006) (pre-signed verifications)

## Reliance on National Data Vendors

- *In re Taylor*, 655 F. 3d 274 (3d Cir. 2011, *affirming in part* 407 B.R. 618 (Bankr. E.D. Pa. 2009))
- Role of Lender Processing Services, Inc. (LPS) successor to Fidelity National Information Services
- Represents 39 of 50 largest U.S. Banks.
- Involved in loans with over 50% of value of U.S. residential mortgages.

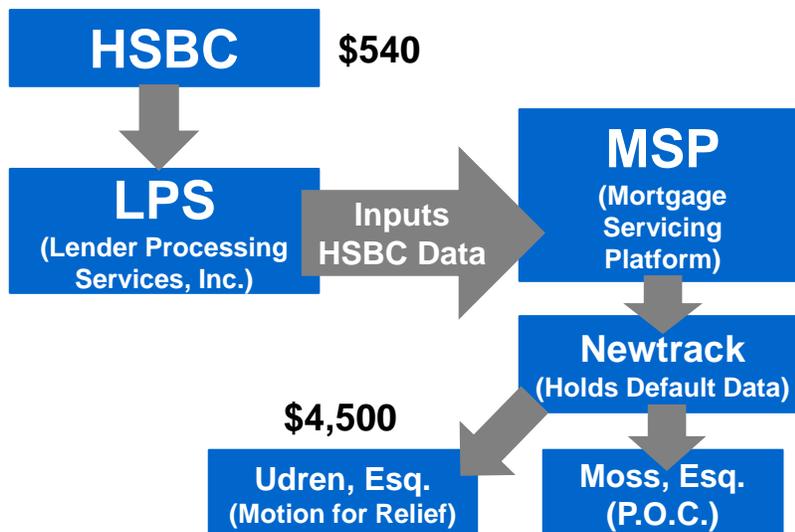


- In re Taylor*
- The Udren Firm
    - Local firm hired to file motions for relief from stay.
    - 10 attorneys, 130 paralegal & admin staff.
    - NewTrack gives time lines for tasks
    - Attorneys have no access to MSP or HSBC
    - Fear of “escalation” outside of NewTrack
- NCLC<sup>®</sup>  
NATIONAL  
CONSUMER  
LAW  
CENTER<sup>®</sup>  
Advancing Fairness  
in the Marketplace for All

## *In re Taylor*: Rule 11 Violations

- Pressing a motion on facts known to be untrue
- Unreasonable to rely on incomplete information from vendor data. Not objectively reasonable inquiry (product did not include insurance data, extent of borrower's equity)
- Misleading not to inform court of dispute over insurance (\$4500 versus \$540 due)
- Nonmonetary sanctions against attorney, law firm, and HSBC.

## *In re Taylor*



## “Institutional Knowledge” and Rule 11

- “Where a lawyer systematically fails to take any responsibility for seeking adequate information from her client, makes representations without any factual bases because they are included in a ‘form pleading’ she has been trained to fill out, and ignores obvious indications that her information may be incorrect, she cannot be said to have made reasonable inquiry.”
  - *In re Taylor*, 655 F. 3d 274, 288 (3d Cir. 2011)

## *In re Rivera* – 2005 litigation

- Attachment of pre-signed verifications to multiple motion filings
- Two Rule 11 violations
- Submitted for improper purpose – falsely stating attorney reviewed, when had not. Rule 11(b)(1)
- False and misleading as to facts – that attorney reviewed and signed. Rule 11(b)(3)
- Accuracy of data not a defense

## Court's Inherent Power to Sanction

- Courts have inherent power to sanction misconduct by attorneys and parties
- *Chambers v NASCO, Inc.*, 501 U.S. 32 (1991)
- Not governed by rule or statute
  - *But* see Bankruptcy Code § 105(a)
- No specific reference to “document” filing
- Can apply to represented *party*.
- Generally requires finding of bad faith

## Court's Inherent Power to Sanction

- Sanctions can include:
  - Dismissal of action
  - Entry of judgment against party
  - Fees shifting, other penalties
- Purpose of sanctions is to vindicate court's authority, not provide remedy to a party.

## 28 U.S.C. § 1927

- Applies in federal courts, including bankruptcy courts
- *Counsel's* liability for excessive costs
- Sanction for unnecessary filings & litigation
- Not limited to document-related misconduct

## 28 U.S.C. § 1927

- Sanctions knowing or reckless conduct that disregards risk that actions will needlessly multiply proceedings
- Sanctions limited to fees incurred by opposing party
- Against law firms and individual attorneys
- Can't sanction parties

## 28 U.S.C. § 1927

- *In re Brown*, 444 B.R. 691 (Bankr. E.D. Tex. 2009) (reckless disregard in response to standing challenge)
- *In re DePugh*, 409 B.R. 125 (Bankr. S.D. Tex. 2009) Securitized credit card debt
  - Unqualified trial witness
  - Certifications by affiants with no first-hand knowledge
- *In re Pastran*, 462 B.R. 201 (Bankr. N.D. Tex. 2011) (statements false, but not bad faith)

## F. R. Civ. P. 56(h)

- Applies to summary judgment proceedings
- Affidavit or declaration submitted in bad faith
- Two aspects:
  - Fees shifting for expenses incurred in contesting bad faith affidavit
  - Party or attorney may be adjudged guilty of contempt
- See *FNMA v. Bradbury*, 32 A.2d 1014 (Maine 2011)
- *Residential Funding Co., LLC v. Thorne*, 2012 WL 2061625 (Ohio App. June 8, 2012)

## Fraud on the Court

- Focus on “a wrong against the institutions set up to protect and safeguard the public” *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 246 (1944)
- Intentional or reckless disregard of truth
- Directed at the court and actually deceives court
- Standard may require that conduct be carried out through an “officer of the court”
- Not just fraud between the parties

## Fraud on the Court

- *In re Woodruff*, 2010 WL 386209 (Bankr. M.D. Ala. Jan. 27, 2010)
- *In re Canty*, 2010 WL 1880710 (Bankr. N.D. Ala. May 7, 2010)
- *In re Brannan*, 2011 WL 5331601 (Bankr. S.D. Ala. Nov. 7, 2011) (ruling on class cert. motion)
- See *also* *Sunland Homeowners Ass’n v. Orlandini*, 227 Ariz. 288, 257 P.3d 1168 (2011)

## Fraud on the Court - Relief

- Dismissal, entry of default judgment
- Relief from judgment. See F.R. Civ. P. 60(d)(3)
  - Can be independent action seeking relief from judgment
  - Not subject to one year limit under F.R. Civ. P. 60(b)
  - See Residential Funding Co., LLC v. Thorne, 2012 WL 2061625 (Ohio App. June 8, 2012)
- Independent action for monetary damages?  
*Compare Bradbury v. GMAC Mortgage, LLC*, 780 F. Supp. 108 (D. Me. 2011) and *In re Canty*, 2010 WL 188070 (Bankr. N.D. Ala. May 7, 2010)

## State UDAP Statutes

- Coverage: Does your state's UDAP law apply to foreclosure conduct/banks?
- Relief:
  - Compensatory damages: what is injury?
  - Enhanced damages & attorney's fees
  - Equitable relief

## State UDAP Statutes

- *Tamburri v. Suntrust Mortgage, Inc.*, 2011 WL 6294472 (N.D. Cal. Dec. 15, 2011) (wrong party listed as beneficiary for loss mitigation contact on notice of default), later decision 2012 WL 2367881 (N.D. Cal. June 21, 2012)
- *Bain v. OneWest Bank, F.S.B.*, 2011 WL 917385 (W.D. Wash. Mar. 15, 2011), (*certified question pending*: does MERS' role prevent borrower from identifying the real beneficiary?)

## Fair Debt Collection Practices Act ("FDCPA")

- Coverage:
- Servicers - if began to service loan after default and did not originate loan. *Bridge v. OCWEN Federal Bank, FSB*, 681 F.3d 355 (6<sup>th</sup> Cir. 2012) (servicer treated debt as in default when acquired it)
- Foreclosure attorneys - law firm that regularly engages in consumer debt collection activities. *Heintz v. Jenkins*, 514 U.S. 291 (1995)

## FDCPA (cont'd)

- Prohibitions:
- Prohibits debt collector's use of "false, deceptive or misleading representations" in connection with the collection of any debt. 15 U.S.C. § 1692e
- Specifically prohibits "[t]he false representation of . . . the character, amount, or legal status of any debt" 15 U.S.C. § 1692e(2)

## FDCPA (cont'd)

- FDCPA and non-Judicial Foreclosures:
- Majority Rule: non-judicial foreclosures subject to all FDCPA provisions: e.g. *Kaltenbach v. Richards*, 464 F.3d 524 (5<sup>th</sup> Cir. 2006)
- Minority Rule: only subject to § 1692f(6)(A): prohibition on "[t]aking or threatening to take any nonjudicial action to effect disposition or disablement of property . . . If there is not present right to possession of the property claimed as collateral"

## FDCPA (cont'd)

- Conduct of foreclosure sale without authority to foreclose
  - Wallace v. Washington Mutual Bank, F.A., -- F.3d --, 2012 WL 2379664 (6<sup>th</sup> Cir. June 26, 2012) (valid claim that law firm violated § 1692e by filing foreclosure complaint before named client was owner of note and assignee of mortgage)
  - Minnifield v. Johnson & Friedman, LLC, 448 Fed. Appx. 914, 2011 WL 5119543 (11<sup>th</sup> Cir. Oct. 28, 2011) (law firm violated § 1692f by initiating non-judicial foreclosure proceedings before client assigned mortgage)

## FDCPA (cont'd)

- Remedies
- “any actual damages sustained” (§1692k(a)(1))
- Includes damages for emotional harm. e.g. Minnifield v. Johnson & Freedman, LLC, 448 Fed. Appx. 914 (11<sup>th</sup> Cir. 2011)
- Statutory penalty up to \$1,000 (§1692k(a)(2)(A)).
- Attorneys fees and costs. (§1692k(a)(3)).

## Discovery Sanctions

- F. R. Civ. P. 37(b),(d)
- Sanctions can include:
  - Admission of borrower's claims
  - Preclusion of servicer claim or defense
  - Striking of pleading
  - Stay of proceedings
  - Dismissal of action
  - Entry of default
  - Contempt for failure to obey discovery order

## Sanctions *Against* Borrowers and Their Counsel

- Challenging authority to conduct non-judicial foreclose
- Example:
- *Gomes v. Countrywide Home Loans, Inc.*, 192 Cal. App. 4<sup>th</sup> 1149, 121 Cal. Rptr. 3d 819, 825 (2011) (complaint must identify “specific factual basis for alleging that the foreclosure was not initiated by the correct party.”)

## Sanctions *Against* Borrowers and Their Counsel

- Pattern of borrower's attorney's litigation:
- Nguyen v. Bank of America, N.A. , 2011 WL 5574917 (N.D. Cal. Nov. 15, 2011) (repeat filings of same note transfer challenge)
- Dagupion v Green Tree Servicing, LLC, 2011 WL 6101024 (D. Haw. Dec. 7, 2011) (attorney's repeated filing of same boilerplate complaint)

## Sanctions *Against* Borrower's Counsel

- Note enforcement claim contrary to controlling law:
- Welk v. GMAC Mortgage, LLC, -- F. Supp. --, 2012 WL 1035433 (D. Minn. Mar. 29, 2012) (multiple actions raising claim purportedly precluded by recent state Supreme Court ruling)
- Hien Pham v. Bank of New York, -- F. Supp. --, 2012 WL 1222572 (E.D. Va. April 10, 2012) (declining sanctions, but noting 4<sup>th</sup> Circuit's rejection of same note enforcement challenge)

## Sanctions *Against* Borrower's Counsel

- “Improvident tone” of Complaint
- Koufos v. U.S. Bank, N.A., 2011 WL 5026394 (Bankr. D. Mass. Oct. 21, 2011)