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Dealing with the Pro Se Litigant

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Recent Increase in Pro Se Litigants

- Current industry climate has led to an increase in pro se litigants
 - Negative press surrounding mortgage lenders and servicers has emboldened borrowers to pursue legal action without seeking legal advice/representation
 - Borrowers often turn to the Internet as their first resource in dealing with these issues, no shortage of self-help “resources”
 - Many borrowers do not want to pay for representation

Classifying Pro Se Litigants: Frustrated Borrowers

- Generally two types of pro se litigants:
 - Frustrated borrowers
 - Predatory borrowers
- Frustrated borrowers: genuinely frustrated borrowers who want to pay their mortgage, but are unable to and are looking for a loan modification or some other type of relief and have encountered difficulty navigating the loss mitigation process
 - Common claims:
 - TILA
 - RESPA
 - HAMP-related claims
 - Breach of contract/breach of trial mod (HAMP TPP)
 - Debt collection claims (state and federal)
 - Wrongful foreclosure
 - Consumer protection statutes (DTPA)

Classifying Pro Se Litigants: Predatory Borrowers

- Predatory borrowers: unrealistic and unreasonable borrowers who are trying to capitalize on the current industry turmoil and are willing to employ any tactic to obtain a free home
 - Common claims:
 - Show-me-the-note defense to foreclosure
 - Rescission of note
 - Conspiracy
 - Fraud
 - Lack of standing
 - Other Internet-based machinations focused on voiding the note and deed of trust while maintaining possession of the property

Primary Objective in Dealing with Pro Se Litigants: Early Resolution

- Need to resolve pro se cases as quickly as possible
 - Pro se litigants are emotionally tied to their cases; the more a case progresses, the less reasonable the plaintiff becomes
 - Pro se cases are expensive to defend because the plaintiff's lack of familiarity with the legal process often creates more work for the defendant

Means of Achieving Early Resolution: Loan Modification

- Two parallel tracks to be pursued simultaneously
 - Loan modification or other form of mortgage assistance
 - Removal to Federal Court and Motion to Dismiss
- Loan modification or other form of mortgage assistance to settle the litigation
 - Ask the plaintiff at the outset to enter an agreement to deposit funds into the court's registry or trust account to be applied toward modification
 - Allows you to distinguish between those who are genuinely interested in and can afford a modification and those who are not interested in a modification and/or cannot afford one ("Predatory borrowers" are generally resistant to this approach and other efforts to resolve the litigation at the outset)

Means of Achieving Early Resolution: Removal and MTD

- Removal to Federal Court and Motion to Dismiss
 - Federal Judges are typically less lenient with pro se litigants than state court judges
 - Procedurally it is less difficult to dismiss a case in federal court than in state court
 - Removal and a motion to dismiss puts the plaintiff on the defensive and may leave the plaintiff looking for a way out of the litigation
 - Do not answer in state court before removing
 - Note, however, that where it is necessary to file an answer in state court before removing, a Rule 12(c) Motion for Judgment on the Pleadings may be filed after removing. A Rule 12(c) Motion can be filed once the pleadings are closed. Fed. R. Civ. P. 12(c). The pleadings are considered closed when a defendant files an answer in state court, provided there are no court-ordered replies, “counterclaims, cross-claims, or third-party claims” *Davis v. Nissan Motor Acceptance Corp.*, Civil Action No. 3:09-CV-869-L, 2009 WL 3363800, at *2 (N.D. Tex. Oct. 16, 2009). The standards are the same for deciding motions under Rule 12(c) and Rule 12(b)(6). *Guidry v. Am. Pub. Life Ins. Co.*, 512 F.3d 177, 180 (5th Cir. 2007).

Motion to Dismiss: Pleading Deficiencies

- Pro se litigants are subject to the same pleading requirements as represented litigants. *Mitchell v. Walters*, No. 10-1061 (SRC), 2010 WL 3614210, at *2 (D.N.J. Sept. 8, 2010) (citing *Erickson v. Pardus*, 551 U.S. 89, 93-94 (2007)).
- Plaintiffs' failure to meet federal pleading standard
 - It is not enough that the plaintiff allege the mere possibility of misconduct, it is incumbent upon the plaintiff to “show that the [plaintiff] is entitled to relief.” Fed. R. Civ. P. 8(a)(2); See also *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-50 (2009).
 - Courts should neither “strain to find inferences favorable to plaintiffs” nor accept “conclusory allegations, unwarranted deductions, or legal conclusions.” *R2 Invs. LDC v. Phillips*, 401 F.3d 638, 642 (5th Cir. 2005) (quotation omitted).
 - “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” See *Iqbal*, 129 S.Ct. at 1949-50 (noting that courts are not bound to accept as true a legal conclusion couched as a factual allegation).

Motion to Dismiss: Pleading Deficiencies (cont'd.)

- Plaintiffs' failure to meet heightened federal pleading standard for fraud
 - “To satisfy Rule 9(b), the plaintiff must allege with specificity ‘the statements (or omissions) considered to be fraudulent, the speaker, when and why the statements were made, and an explanation why they are fraudulent.’” *Lechner v. Citimortgage, Inc.*, No. 4:09-CV-302-Y, 2009 WL 2356142, at *4 (N.D. Tex. July 29, 2009) (quoting *Plotkin v. IP Axxcess, Inc.*, 407 F.3d 690, 691 (5th Cir. 2005)).

Motion to Dismiss: Substantive Deficiencies - FDCPA

- FDCPA
 - Servicer/lender not a debt collector, unless loan was in default at the time the loan was obtained. See *Perry v. Stewart Title Co.*, 756 F.2d 1197, 1208 (5th Cir. 1985), *modified on other grounds*, 761 F.2d 237 (5th Cir. 1985). (“The legislative history of section 1692a(6) indicates conclusively that a debt collector does not include the consumer's creditors, a mortgage servicing company, or an assignee of a debt, as long as the debt was not in default at the time it was assigned.”)

Motion to Dismiss: Substantive Deficiencies - TILA

- TILA
 - Downstream servicer/assignee not a creditor for TILA purposes. *Roach v. Option One Mortgage Corp.*, 598 F. Supp. 2d 741, 749-50 (E.D. Va. 2009) (citing 15 U.S.C. § 1602(f)). TILA does allow for assignee liability in limited circumstances. *Id.* (citing 15 U.S.C. § 1641 (e)(1)).
 - One-year statute of limitations on damage claims for failure to disclose violations. *Moor v. Travelers Ins. Co.*, 784 F.2d 632, 633 (5th Cir. 1986) (“Nondisclosure is not a continuing violation for purposes of the statute of limitations.”) (quotation omitted).

Motion to Dismiss: Substantive Deficiencies - RESPA

- RESPA

- QWR

- Alleged QWR does not meet statutory requirements. 12 U.S.C. § 2605(e); *Castrillo v. Am. Home Mortgage Servicing, Inc.*, Civil Action No. 09-4369, 2010 WL 1424398, at *7 (E.D. La. Apr. 5, 2010);
 - QWR claim is not ripe—period to respond has not yet expired. 12 U.S.C. § 2605(e)(1)(A) (requiring a servicer to “provide a written response acknowledging receipt of the correspondence within 20 days (excluding legal public holidays, Saturdays, and Sundays)”); 12 U.S.C. § 2605(e)(2) (requiring servicer to respond to a borrower’s QWR “[n]ot later than 60 days (excluding legal public holidays, Saturdays, and Sundays) after the receipt” of the QWR); 24 C.F.R. § 3500.21(e)(1), (e)(3) (clarifying that 12 U.S.C. § 2605(e)(1)(A) and 12 U.S.C. § 2605(e)(2) refer to “business days,” rather than “calendar days”); and
 - Only servicers are subject to QWR provisions. 12 U.S.C. § 2605(e); *Castrillo*, 2010 WL 1424398, at *7.

Motion to Dismiss:

Substantive Deficiencies—RESPA (cont'd.)

- Failure to appropriately plead damages arising from violation. 12 U.S.C. § 2605(f)(1); *Cortez v. Keystone Bank, Inc.*, No. 98-2457, 2000 WL 536666, at *12 (E.D. Pa. May 2, 2000).
 - Stating a claim for statutory damages requires pleading a “pattern or practice of noncompliance.” 12 U.S.C. § 2605(f)(1).
- One-year statute of limitations. See *Farmer v. Countrywide Fin. Corp.*, No. SACV08-1075 AG (RNBx), 2009 WL 1530973, at *5-6 (C.D. Cal. May 18, 2009).
- Can only recover damages for violations of 12 U.S.C. 2605 (RESPA servicer provisions), cannot enjoin foreclosure. 12 U.S.C. § 2605(f)(1)(A)-(B); See also *Chenault v. Chase Home Finance LLC*, No. 3:08-CV-0076-M, 2008 WL 4635392, at * 2 (N.D. Tex. Oct. 15, 2008) (“Even assuming a violation under § 2605(e), the statute does not provide any defense to foreclosure.”)

Motion to Dismiss: Substantive Deficiencies - HAMP

- HAMP
 - No private right of action. *Simon v. Bank of Am., N.A.*, No. 10-cv-0030-GMN-LRL, 2010 WL 2609436, at *10 (D. Nev. June 23, 2010) (“[D]istrict courts have consistently held that [HAMP] does not provide borrowers with a private cause of action against lenders for failing to consider their application for loan modification”).
 - Borrowers are not intended third-party beneficiaries of the Servicer Participation Agreement. *Simmons v. Countrywide Home Loans, Inc.*, No. 09cv1245 JAH, 2010 WL 2635220, at *5 (S.D. Cal. June 29, 2010) (“Qualified borrowers such as plaintiffs here cannot reasonably rely on a manifested intent to confer rights upon them since [HAMP] does not require that [lender] modify all eligible loans.”)

Motion to Dismiss:

Substantive Deficiencies - HAMP (cont'd.)

- Trial Period Plan does not give rise to an enforceable contract. See *Vida v. Onewest Bank, F.S.B.*, Civ. No. 10-987-AC, 2010 WL 5148473, at *6-7 (D. Or. Dec. 13, 2010) (dismissing breach of contract claim premised on a TPP because a “[TPP] is explicitly not an enforceable offer for loan modification” and payments under a TPP do not amount to consideration); *Prasad v. BAC Home Loans Servicing LP*, Civ. No. 2:10-CV-2343-FCD/KJN, 2010 WL 5090331, at *3-5 (E.D. Cal. Dec. 7, 2010) (dismissing contract related claims under a TPP because a binding contract does not arise under a TPP); *Locke v. Wells Fargo Home Mortgage*, No. 10-60286-Civ., 2010 WL 4941456, at *3-4 (S.D. Fla. Nov. 30, 2010) (finding that the statute of frauds barred the plaintiff’s breach of contract claim); *but see Durmic v. J.P. Morgan Chase Bank, NA*, No. 10-CV-10380-RGS, 2010 WL 4825632, at *3-5 (D. Mass. Nov. 24, 2010) (denying motion to dismiss the plaintiff’s contract related claims arising under a TPP).

Motion to Dismiss:

Substantive Deficiencies - HAMP (cont'd.)

- Trial Period Plan does not give rise to a claim for promissory estoppel. See *Prasad*, 2010 WL 5090331, at *4-5 (denying plaintiff’s promissory estoppel claim because the TPP did not amount to a clear promise and plaintiff did not allege a substantial detriment where the property was not currently in foreclosure); *Locke*, 2010 WL 4941456, at *4 (denying promissory estoppel claim because the TPP did not contain a “definite or substantial” promise and “promissory estoppel cannot be used to circumvent the statute of frauds”) (quotation omitted); *but see Durmic*, 2010 WL 4825632, at *5 (finding that plaintiff properly pled promissory estoppel “as an alternative theory of recovery”).

Motion to Dismiss: Substantive Deficiencies - Other Claims

- Deceptive Trade Practices Act

- Borrower is not a consumer for Texas DTPA purposes. *See, e.g., Baker v. Countrywide Home Loans, Inc.*, No. 3:08-CV-0916-B, 2009 WL 1810336, at *6 (N.D. Tex. Jun. 24, 2009) (finding that under the Texas DTPA the plaintiffs were not consumers with regard to the defendant mortgage servicer, because the servicer “merely loaned [the plaintiffs] money in the form of a mortgage loan”).
- Georgia Fair Business Practices Act is designed to protect consumers from deceptive acts in the marketplace, not remedy private wrongs. As such, the FBPA does not apply to regulated areas of the consumer marketplace including dealing with residential mortgage transactions, where there is a regulatory framework in place to protect consumers. *See, e.g., Zinn v. GMAC Mortgage*, No. 1:05 CV 01747 MHS, 2006 WL 418437, at *3-4 (N.D. Ga. Feb. 21, 2006) (declining to apply the FBPA to the plaintiff’s mortgage-related transactions, “because the alleged violation did not affect the consuming public generally”); *Krell v. Nat’l Mortgage Corp.*, 448 S.E.2d 248, 248-49 (Ga. Ct. App. 1994) (finding that violation of HUD regulations did not support a claim under the Georgia and Tennessee consumer protection statutes).

Motion to Dismiss:

Substantive Deficiencies - Other Claims (cont'd.)

- Wrongful foreclosure

- Cannot state a claim if borrower has not lost possession of the home. *Smith v. Nat'l City Mortgage*, No. A-09-CV-881 LY, 2010 WL 3338537, at *13-14 (W.D. Tex. Aug. 23, 2010).
- A plaintiff continuing to reside in the property post-foreclosure cannot recover damages under a wrongful foreclosure claim, and is also precluded from seeking rescission as a remedy where he has confirmed that he cannot pay the debt and has not made a tender. See *Burnette v. Wells Fargo Bank, N.A.*, No. 4:09-CV-370, 2010 WL 1026968, at *2-3 (E.D. Tex. Feb. 16, 2010) (finding that plaintiff could not recover damages for wrongful foreclosure because he remained in possession of the property); *Lambert v. First Nat'l Bank of Bowie*, 993 S.W.2d 833, 835 (Tex. App.—Fort Worth 1999, pet. denied) (holding that in order to have a foreclosure sale cancelled, rescinded or otherwise set aside, the mortgagor is required to “tender ‘all amounts due and owing’ under the note and deed of trust”) (quotation omitted).

Motion to Dismiss:

Substantive Deficiencies - Other Claims (cont'd.)

- Show-me-the-note or lack-of-standing defense to foreclosure
 - Courts have rejected this defense to non-judicial foreclosure. See, e.g., *Mansour v. Cal-Western Reconveyance Corp.*, 618 F. Supp. 2d 1178, 1181 (D. Ariz. 2009) (stating that “courts have routinely held” that the show-me-the-note theory is inapplicable to nonjudicial foreclosure proceedings, where a state’s foreclosure statute does not require presentation of the original note); *Sawyer v. Mortgage Elec. Registration Sys., Inc.*, No. 3-09-CV-2303-K, 2010 WL 996768, at *3 (N.D. Tex. Feb. 1, 2010) (applying Texas foreclosure statute to find that MERS could administer a non-judicial foreclosure without producing the original loan documents).
 - State statutes allow interest holders other than the originating lender or assignee to conduct non-judicial foreclosures. See, e.g., Tex. Prop. Code § 51.0025 (authorizing a servicer to conduct non-judicial foreclosure proceedings); *Sawyer*, 2010 WL 996768, at *3 (applying § 51.0025 to find that MERS could administer a non-judicial foreclosure without establishing its status as holder of the Note and Deed of Trust); see also Tex. Prop. Code § 51.0001(4)(C) (defining a “Mortgagee” as the “last person to whom the security interest has been assigned of record”); Tex. Prop. Code § 51.002(a)-(h) (setting forth the requirements for non-judicial foreclosure in Texas, which do not include establishing holder status); *Athey v. Mortgage Elec. Registration Sys., Inc.*, 314 S.W.3d 161, 165-66 (Tex. App.—Eastland 2010, pet. denied) (stating that Texas law does not require a mortgagee to establish its status as holder to conduct a non-judicial foreclosure).