Sorenson Van Leuven LAW FIRM

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In This Edition...

How to Reach Us...

2015 Delta Boulevard
Tallahassee, Florida
32303

Post Office Box 3637
Tallahassee, FL 32315

850-388-0500 - Local
866-295-8585 - Toll Free
850-391-6800 - Facsimile
www.svllaw.com

CFPB Amendments to Mortgage Servicing Rules
By: Jim Sorenson

CFPB issued its original Mortgage Service Rules in January 2013 (78 Fed. Reg. 10695 (Feb. 14, 2013). The Servicing Rules addressed such things as crediting of mortgage payments, periodic statements, force-placed insurance, loss mitigation requirements and the 120-day rule. The Servicing Rules became effective on January 10, 2014.

The Service Rules contained an exemption for small servicers which are defined as a servicer that service (together with any affiliates), "5,000 or fewer mortgage loans, for all of which the servicers (or an affiliate) is the creditor or assignee." Small servicers are only subject to the 120-day rule and a prohibition on proceeding with foreclosure if the borrower is performing pursuant to the terms of a loss mitigation agreement.

The CFPB in November 2014 issued proposed rulemaking for Amendments to the Service Rules. On August 4, 2016, the CFPB issued a Final Rule with Amendments to Servicing Rules. Many provisions in the Amendment are effective on October 19, 2017, but certain provisions become effective on April 19, 2018.

The Amendments to Servicing Rules have five key amendments that will impact Credit Union servicers: Treatment of confirmed successors in interest, loss mitigation requirements, live contact and early intervention notice requirements, periodic statements and notices regarding forced-place insurance. These amendments have limited impact on a small servicer but will significantly impact how all other servicers handle mortgages going forward. The purpose of this article is to highlight key changes in the regulation. (Continued on page 2)

(Continued from page 1) This article is not meant as an all-encompassing discussion of all amendments nor is this article legal advice on how to comply with the Amendments to the Mortgage Servicing Rules.

Successors in Interest

This part of the Amendments become effective April 19, 2018. Under this rule change, successors in interest (successors) are "borrowers" and "consumers" entitled to the protections of the Servicing Rules. This means that servicers must generally treat a confirmed successor the same as the borrower, and successors will have the same private rights of action as borrowers. "Successors in interest" are defined broadly to include persons who receive the property because of a divorce or legal separation, through a family trust, from a living spouse or a parent, or when a borrower dies.

The amendments require servicers to have policies and procedures in place to promptly confirm the identity and ownership interest of the successors. Upon learning of the existence of a potential successor, the servicer must tell the potential successor the documents the servicer needs to confirm the person's identity and ownership in the property. Upon receiving the requested documents, the servicer must make a determination and promptly notify the person that their status is confirmed, more documents are needed, or that the person is not a successor.

Loss Mitigation Requirements

The 2016 Amendments to the Mortgage Servicing Rules changes how servicers should process borrowers' loss mitigation applications and prevent wrongful foreclosures. The changes take effect on October 19, 2017. First, servicers are required to meet the loss mitigation requirements more than once during the life of a loan for borrowers that become current on payments after a prior application and before a subsequent loss mitigation application. Second, servicers must provide a written notification to the borrower within five (5) days (excluding Saturdays, Sundays or legal holidays) of receiving a complete loss mitigation application and this notice must set forth the required information in the amended rule. For any incomplete loss mitigation applications, servicers may choose to offer certain short-term repayment plans. Third, servicers must affirmatively prevent foreclosure judgments and/or sales while complete loss mitigation applications are pending.

Under these amendments, servicers are required to take reasonable affirmative steps to delay a foreclosure sale when a loss mitigation application is pending. The foreclosure must be dismissed if servicer fails to take reasonable steps to delay the foreclosure sale. Further, servicers are required to exercise reasonable diligence to obtain certain information from third parties that are not in the borrower's control. Subject to certain exceptions, servicers are prohibited from denying borrowers for loss mitigation solely due to the lack of such information (information from third parties).

The Amendment to the Mortgage Servicing Rules does impact small servicers with regards to a change to the 120-day rule. The rule is amended to provide that a servicer of a subordinate (junior) mortgage may join an existing foreclosure action of a superior lienholder even if the subordinate lien is not 120 days or more delinquent.

Live Contact and Early Intervention Notice

Under the current Servicing Rules, servicers must attempt to make live contact with the delinquent borrowers regarding available loss mitigation options no later than 36 days after the delinquency begins. Further, the servicers must provide written notice of available loss mitigation options no later than the 45th day of the borrower's delinquency.

(Continued on Page 3)

(Continued from page 2)

The Amendments to the Servicing Rules for live contact and early intervention notices takes effect on October 19, 2017. The Amendments make clear that a servicer's early intervention live contact obligation reoccurs in each billing cycle after each payment due date for the duration of the borrower's delinquency. The rule exempts from live contact, certain borrowers in bankruptcy and those who have invoked the right to cease communications under the Fair Debt Collections Practices Act. The amendments also make clear that the written notice of available loss mitigation options is not required to be provided more than once during any 180-day period, but at the end of the 180-day period if the borrower is 45 days or more delinquent, the servicer must again provide the written notice no later than 180 days after the prior written notice.

The Amendments clarify that a servicer is exempt from written notice to borrowers in bankruptcy if no loss mitigation option is available. However, if an option is available to a borrower in bankruptcy, under the Amended Rule, written notice must be sent to a borrower in bankruptcy but the notice must not contain a request for payment. When sending the written notice to a borrower in bankruptcy, a servicer is only required to send notice once during a single bankruptcy case.

Periodic Statements/Coupon Books

The Amendments to the Mortgage Servicing Rules regarding changes to periodic statements and coupon books takes effect on April 19, 2018. This might be the most substantial change for servicers and certainly the hardest to comply with for most servicers. The main point of the amendment is to require that servicers provide periodic statements or coupon books to borrowers in bankruptcy or to borrowers who have discharged the loan in bankruptcy. What information is required in the statement will vary depending upon the bankruptcy chapter involved.

Under the Amendments, if a triggering event occurs (filing, dismissal, reaffirmation, court orders) a servicer must provide the correct statement within one single billing cycle when the payment due date for that billing cycle is no more than 14 days after the triggering event. The rule includes sample periodic statement forms and those can be found using the following links: https://www.federalregister.gov/d/2016-18901/page-72393

Note that the new statement requirements for Chapter 12 and Chapter 13 bankruptcies will require that a servicer track and report both pre-petition arrears and post-petition arrears separately. Further, you must show correct payments being applied towards both pre-petition arrears and post-petition arrears. Based on my experience, many current servicers have trouble handling mortgage loans in a Chapter 13 and this new rule will only complicate the process.

Finally, the amendments have additional rules for temporary and permanent loss mitigation programs. For consumers in a permanent loss mitigation program, the periodic statements or coupon books should show payments according to the permanent loss mitigation program. For consumers in temporary loss mitigation programs, the periodic statements or coupon books must show payments according to the loan contract.

Force-Placed Insurance

The current Servicing Rules require servicers to furnish proper notifications to borrowers before assessing a charge for hazard insurance purchased on behalf of a borrower when the borrower's insurance has lapsed or expired. The 2016 Amendments go into effect on October 19, 2017. (Continued on Page 4)

(Continued from page 3) The Amendments broaden the requirement to provide notice to borrowers when the insurance coverage obtained by the borrower is insufficient coverage under the terms of the mortgage.

As mentioned above, if your Credit Union is not a small servicer, these Amendments to the Mortgage Servicing Rules contain significant changes that will require a change in procedures and processes for servicing mortgage loans. This article is not legal advice and should not be relied upon as a substitute for legal advice. Should you have questions or need help in making changes to your mortgage servicing processes, please contact a lawyer at SVL for legal advice and guidance on these issues.

Attorney Spotlight
Jim Sorenson

Jim was born in St. Petersburg and lived in Seminole, Florida until moving to Virginia to attend college at Liberty University where he obtained his Bachelor's degree in Economics. Pursing law school at Florida State University is what brought him to his permanent home of Tallahassee. Jim graduated with his law degree in 1996 and has been practicing law for twenty one years. It has always been a dream of Jim's to open his own firm and he is ecstatic to now call it a reality!

Jim and his wife, Michelle, will be celebrating 25 years of marriage this August! They have four children, Mandy, 21, who is finishing up her junior year at Florida State University and works part-time in the bankruptcy department at our firm; Jimmy, 19, who is serving as an MP (Military Police) for the United States Army and currently stationed in Savannah, Georgia; Paul, 16, sophomore at North Florida Christian and just started driving (watch out on the roads!) and Peter, 11, who is in the 5th grade and we call Jim's "mini-me."

In Jim's time away from the office, he loves to fish, relax at the beach and work in the yard. All of these activities allow Jim to get that much needed R&R that he deserves from his busy work weeks!

Jim was asked what his biggest reward thus far has been with the opening of Sorenson Van Leuven:
"Seeing the staff pulling together as a team to get the new firm up and running! The moral of the employees has been extraordinary. I love seeing how they have rallied and continue to be each other's cheerleaders with this transition. This has been something that I am extremely grateful for." Jim is looking forward to the months ahead and all that is to come for Sorenson Van Leuven.

See Us At…

◊ **May 17-20– Georgia Credit Union Affiliates Annual Convention,** Savannah, Georgia.
◊ **June 14-16, 2017-Southeast Credit Union Conference & Expo,** Orlando, Florida.
◊ **August 2-4, 2017-Sorenson Van Leuven Collections & Bankruptcy Seminar,** Orlando, Florida.
For more information, contact Whitney Whitaker at whitneyw@svllaw.com.

Rights of Third-Parties to Intervene in a Foreclosure
By: Stephen Orsillo

Occasionally, the issue arises after a mortgage is in default and foreclosure proceedings have begun, where a third-party, whether it is a business or individual, suddenly becomes the owner of the property. In most situations, these new owners come about because of the borrower filing bankruptcy or the homeowner or condominium association starting its own foreclosure.

In a bankruptcy, a new owner can appear following a bankruptcy trustee's sale of the real property to a third-party. The borrower may indicate in their bankruptcy filing that they want to surrender the property, meaning that they do not want to retain ownership of the real property. When this is done, the trustee may take possession of the real property and then proceed to liquidate the property by selling it to a third-party through what is called a trustee's sale. The proceeds from the trustee's sale are then used to satisfy the borrower's unsecured creditors. It's important to note that a trustee's sale is subject to a lender's mortgage, meaning that the new owner's rights in the property are subject to the lender's mortgage.

When this issue arises with a homeowner's association or condominium association, it is a result of the association filing its own foreclosure because the borrower failed to keep current with the association's assessments. As you may already know, most, if not all, homeowner and condominium associations charge an assessment (a fee) to each property owner, which is then used to maintain the common grounds within the association. Failure of a property owner to pay the assessments can result in the association placing a lien upon the property and then foreclosure of that lien in a manner similar to a residential mortgage foreclosure, with the property being sold to a third party at a foreclosure auction. Much like in the bankruptcy context, the sale of real property in an association foreclosure is subject to a lender's first mortgage.

The problem with both above situations is that a new property owner, and possibly tenants, must be dealt with. Most new owners are short term investors who want to move a tenant into the property and collect rent while the foreclosure is proceeding, or they are innocent third parties who unknowingly purchased the property subject to a lender's mortgage. In either case, the new owners want to seek to intervene in the foreclosure to either delay the impending final judgment of foreclosure to increase their profits on their investment or because they feel slighted in some way and feel that they can work out some type of agreement with the mortgage lender. Thankfully, a recent ruling by the Fourth District Court of Appeal (4th DCA) helped to provide some clarity to this issue.

On February 22, 2017, the 4th DCA issued a ruling in *Fed. Nat'l Mortgage Ass'n v. Gallant*, 211 So. 3d 1055 (Fla. 4th DCA 2017), wherein the Court held that an owner who acquires an ownership interest after a lis pendens is recorded, does not have the right to intervene in the foreclosure and become a defendant. In *FNMA*, the lender filed a foreclosure and, as part of the foreclosure, recorded a lis pendens. After the recording of the lis pendens, the homeowner's association filed its own foreclosure. The homeowner's association obtained a final judgment of foreclosure and the property was sold at a foreclosure sale to a third-party purchaser, Gallant, well before the lender ever obtained a final judgment. Upon becoming the owner of the property, Gallant renovated the property and then listed it for sale, eventually having a contract for sale of $350,000.00. Upon discovering the lender's foreclosure, Gallant sought to quiet title based on the lender's inadvertent satisfaction of mortgage and to intervene in the foreclosure. The lower court granted Gallant's request to intervene in the foreclosure and issued a stay in the foreclosure pending the outcome of the quiet title action. Upon Appeal, the 4th DCA held that because a lis pendens was recorded, Gallant was provided with constructive notice of the lender's foreclosure and therefore knew, or should have known, that the foreclosure was proceeding and that their ownership interest would be subject to the lender's foreclosure. Further, the 4th DCA held that a party that purchases the property after the lis pendens is recorded is generally not entitled to intervene in the pending foreclosure action.

(Continued on Page 6)

(Continued from page 5)

While the facts in *FNMA* addressed an owner, who takes title through a homeowner's foreclosure, this same issue arises whether it is in a bankruptcy or a homeowner's foreclosure, it is important to note that the new owner, and any possible tenants, take title subject to the recorded lis pendens and they do not have to be included in the foreclosure as a defendant. Further, that new owner has limited rights to intervene and raise defenses as to the foreclosure. Instead, their ownership interest will be eliminated upon the issuance of the Certificate of Title. The ruling in *FNMA* helps avoid the need to amend the complaint to include the new owner and limits the owner from raising possible defenses to the foreclosure.

Should you have questions about foreclosures, rights of subsequent owners, condominium and HOA associations or Trustees selling mortgaged property, please do not hesitate to contact one of the lawyers at SVL for legal advice.

From the Light Side of the Law: Can I Replevin my Dog from my Ex?
By: Jim Sorenson

As many of you are aware, a secured lender occasionally will pursue a Writ of Replevin to recover collateral when a Debtor is hiding that collateral or preventing the collateral from being repossessed. I recently came across a unique replevin case. An ex-boyfriend filed a replevin action to try and recover a dog from his ex-girlfriend. The ex-girlfriend argued that the dog was a gift to her from her ex and that the dog belonged to her. The boyfriend argued he paid for the dog and it was not a gift, but belonged to him. The court did not find the evidence convincing and ruled that the dog was joint property, belonging to each party. As such, a replevin was an improper action. Instead, the proper remedy was partition and the court could order the dog sold and the proceeds divided. One would conclude the Judge was not a fan of either party, nor did the Judge ever assume he would be presiding of a custody dispute involving a dog. It is unclear if the parties found an acceptable, non-judicial settlement (such as a joint visitation schedule) or if the parties went forward with partition and sale of the dog.

A "Bowl" Lotta Fun at Tallahassee Chapter's Annual Tournament

Sorenson Van Leuven participated in the Tallahassee Chapter of Credit Unions Annual Bowling Tournament held on March 27, 2017, and sponsored a four-person bowling team. It was a great turnout for the Chapter and its fundraising efforts.

Our firm's team, "Law and Order SVL," won Most Creative Team Name. A huge congratulations to our participating team members, attorneys Tyler Van Leuven, Blair Boyd, Stephen Orsillo and staff member Cathi Barineau, who are pictured here. Way to go!

Staff Spotlight
Crystal Parsons

Crystal was born and raised on the Gulf Coast in good ol' Wakulla, Florida. Growing up near the water explains Crystal's love for fishing. Her and her husband Kevin, who have been married for thirteen years, enjoy going out on the boat especially during scallop season. Crystal will send Kevin in the water to dive for the scallops and she will sit up top shucking and drinking her beverage of choice. Her favorite days are the days spent on the water!

Crystal has been working in the legal field for fourteen years as a legal assistant. She is a cherished employee at Sorenson Van Leuven who handles many of our tedious foreclosure files.

Away from the office, Crystal also loves to go cycling with her husband on the St. Marks Trail. The trail runs 20.5 miles from Tallahassee to the coastal community of St. Marks. Each trip is different in its own as the scenery is always changing but each time is so much fun and a great time for them to spend together.

Crystal has nine grandchildren and one great grandchild, Chloe, who was just born on December 15th to her grandson, Kieryn. Kieryn is currently stationed in Afghanistan and is airborne for the United States Army. Crystal is extremely proud of Kieryn and all of his accomplishments serving for our country. She anxiously awaits the day he will be back home with family!

Thank you Crystal for your continued devotion and commitment to our firm. We appreciate your hard work throughout the years, your fun personality and how you always keep us laughing!