



## Legislation & Litigation Hot Topics

*Friday, December 11, 2020  
12:00 PM - 1:15 PM Central Time*

*Presented By*



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# Legislation and Litigation

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**This session will focus on recent and upcoming legislation and litigation.**

- We will provide several CFPB updates including the Seila Law case, the recent settlements with the CFPB and the DOJ and the new final rule regarding the FDCPA.
- We also will discuss several litigation updates in Florida, the new Ohio Supreme Court recommendations and several litigation risks related to foreclosure moratoriums.

**Relevant to our industry, the most recent and anticipated legislation is focused on relief to struggling homeowners and businesses impacted by the pandemic.**

- Many states are considering relief packages as well as eviction and foreclosure moratoriums or limitations.



## *Seila Law.*

- As we all know, when Congress created the CFPB, Congress gave the CFPB extensive rulemaking, enforcement, and adjudicatory powers, including the authority to conduct investigations, issue subpoenas and civil investigative demands, initiate administrative adjudications, prosecute civil actions in federal court, and issue binding decisions in administrative proceedings.
- The CFPB may seek restitution, disgorgement, injunctive relief, and significant civil penalties for violations of the 19 federal statutes under its purview.

## *Seila Law.*

- Unlike other independent agencies headed by multimember boards or commissions, the CFPB is led by a single Director who is appointed by the President with the advice and consent of the Senate, for a five-year term, during which the President may remove the Director only for “inefficiency, neglect of duty, or malfeasance in office.”
- The CFPB receives its funding outside the annual appropriations process from the Federal Reserve.

## *Seila Law.*

- In 2017, the CFPB issued a civil investigative demand to Seila Law LLC, a California-based law firm that provides debt-related legal services.
- The civil investigative demand sought information and documents related to the firm's business practices.
- Seila Law asked the CFPB to set aside the demand on the ground that the agency's leadership by a single Director removable only for cause violated the separation of powers.

## *Seila Law.*

- The CFPB declined to set aside its demand and Seila Law refused to comply with the demand.
- The CFPB filed a petition to enforce the demand in District Court.
- Seila Law renewed its claim that the CFPB's structure violated the separation of powers, but the District Court disagreed and ordered Seila Law to comply with the demand.
- The Ninth Circuit affirmed.

## *Seila Law.*

- The case was argued before the Supreme Court on March 3, 2020 and was decided June 29, 2020.
- The Supreme Court vacated and remanded, holding that the CFPB's leadership by a single individual removable only for inefficiency, neglect, or malfeasance violates the separation of powers.
- The Supreme Court stated that the CFPB may "continue to operate, but its Director, in light of our decision, must be removable by the President at will."

## The Nationstar / Mr. Cooper Settlement.

- On December 7, 2020, the CFPB Multi-State Mortgage Committee (MMC) of state mortgage banking regulators, and every state attorney general settled with Nationstar for alleged violations pertaining to both mortgage origination and servicing practices that took place largely between January 2012 and December 31, 2015.
- The settlement will result in approximately \$85 million in remediation to consumers, the majority of which has been paid, and \$6 million in fees and penalties.

## The Nationstar / Mr. Cooper Settlement.

- The crux of the settlements with the CFPB, state attorneys general, and MMC centers around six practices that allegedly resulted in violations of federal and state law:

## The Nationstar / Mr. Cooper Settlement.

1. Failing to identify at the time of a servicing transfer loans with in-flight modifications, which resulted in processing delays;
2. Foreclosing on borrowers who had received communications indicating that their foreclosure was on hold while they were considered for loss mitigation relief;
3. Representing to borrowers on trial modifications that their payments would not significantly increase upon entering into a permanent modification;
4. Failing to timely disburse tax payments from borrower escrow accounts;
5. Failing to conduct timely escrow analyses for borrowers in Chapter 13 bankruptcy;
6. Failing to timely remove private mortgage insurance (PMI) from borrower accounts.



## The Nationstar / Mr. Cooper Settlement.

- The CFPB did not cite Nationstar for any violations related to the mortgage servicing rules that took effect January 2014.
- To address the CFPB's concerns, Nationstar agreed to, among other things, enhance practices related to the alleged violations, engage in annual lookbacks for four years, and report over a 10-year period any developments that may affect compliance obligations under the settlement agreement.

## The Nationstar / Mr. Cooper Settlement.

- The MMC also alleged concerns associated with the timely refund of escrow surpluses, failure to provide notices of loan transfer, failure to obtain regulatory approval to work at certain locations, and inadequate response times to consumer complaints.
- To address the concerns raised by the MMC, Nationstar agreed to implement several enterprise risk management programs, a monitoring and testing program, and also agreed to a set of mortgage servicing standards that largely mirror those from the National Mortgage Settlement.

## The Nationstar / Mr. Cooper Settlement.

- The majority of the issues identified in the MMC settlement were related to servicing concerns.
- However, there were some alleged violations of mortgage origination requirements between March 2012 and March 2014.

## The DOJ Settlements.

- The Department of Justice, through its U.S. Trustee Program, also reached settlements with Nationstar, as well as U.S. Bank and PNC Bank, pertaining to alleged violations of the bankruptcy code.
- Those three bankruptcy settlements will result in approximately \$117 million of refunds and credits to impacted borrowers.

The DOJ / Trustee settlements alleged failures to:

- Perform annual escrow analyses for borrowers in bankruptcy;
- File timely and accurate payment change notices (PCNs);
- File timely and accurate notices of fees assessed;
- Provide accurate final accountings of the payments made by borrowers during bankruptcy.

## The DOJ /Trustee MOUs.

- To resolve the DOJ claims, all three entities entered memorandums of understanding that require significant consumer remediation via credits, refunds, and waived fees.
- The MOUs also require the three entities to take affirmative steps to address the alleged compliance failures.



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## The FDCPA Final Rule.

- Background of the Rule
  - Notice of Proposed Rulemaking & Comment Period
  - Issuance of Final Rule & Effective Date
  - Possible stumbling blocks prior to implementation
- Coverage
  - Does not extend to first party debt collectors
- Definitions
  - “Consumer” includes a “deceased natural person”
  - Distinguishes between a “communication” and an “attempt to communicate”



- Communication Provisions
  - Time & Place Restrictions (Section 1006.6(b))
    - Assumption of Convenient Time
    - Reasonableness Standard
  - Consumers Who Are Represented by Counsel (Section 1006.6(b)(2))
  - Communication Media Restrictions (Section 1006.14(h)(1))
  - Telephone Call Frequency Limits (Section 1006.14)
    - “Seven in Seven” rule
    - Exclusions

- Communication Provisions Cont'd
  - Electronic Communications (Section 1006.6)
    - Emails, text messages
    - Time & place restrictions apply
    - Frequency limits do not apply as long as not harassing
    - Option to unsubscribe required
    - Prohibition on use of workplace email
    - Safe harbor for unintended disclosure to third party
  - Social Media Platforms (Section 1006.22(f)(4))
    - Can be used if not viewable by public or the person's social media contacts
  - Limited Content Messages & Voicemail (Section 1006.2(j))

- Other Key Conduct Rules
  - Prohibition on the Sale, Transfer or Placement of Certain Debts (1006.30(b))
    - Prohibits debt collectors from selling, transferring or placing a debt for collection if the debt has been paid, settled or discharged in bankruptcy
    - Notable exception: debts secured by an enforceable lien, as long as the transferee is notified that the consumer's personal liability has been discharged
  - Duplicate Dispute Notice (1006.38(d)(2)(ii))
    - Clarifies what a duplicative request is, and what action must be taken in response

What was not included, and what's next?

- Attorney Involvement Safe Harbor
  - The Bureau had proposed a “safe harbor” provision that would have provided for certain “meaningful involvement” standards, but declined to include it in the Final Rule
- The Bureau intends to issue a disclosure focused rule this month that will address:
  - Validation Notice Clarifications
  - Model Validation Notice
  - Time Barred Debt Disclosures

If foreclosure moratoriums were lifted today, would your organization be ready?

- A. Yes
- B. No
- C. Not sure

If foreclosure moratoriums are lifted January 31, 2021, will your organization be ready?

- A. Yes
- B. No
- C. Not sure



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## Attorney's Fees and Standing in Florida.

- Prevailing Party Fees Provision – Fla. Stat. 57.105(7)
- FL appellate courts are currently split on whether a borrower is entitled to attorneys fees under the prevailing party fees provision if the bank fails to establish standing to foreclose.
- In FL, the bank must establish standing two times: 1) at the time the complaint was filed, and 2) at trial or final hearing.
- Some courts have distinguished whether the plaintiff established standing for one of the prongs, but not the other. In other words, there was a lack of standing when the complaint was filed, but standing was subsequently established at trial.

# LITIGATION UPDATES

## Attorney's Fees and Standing in Florida.

- Second District Court of Appeals
  - *Harris v. Bank of New York Mellon*, (Fla. 2d DCA 2018) – the bank failed to establish standing when the complaint was filed, but subsequently established standing at trial through an assignment. Court ruled borrower WAS entitled to fees.
  - *Jones v. U.S. Bank Trust, N.A.*, (Fla. 2d DCA 2020) – the bank failed to establish standing at any point. Court ruled borrower was NOT entitled to fees.
- Third District Court of Appeals
  - *The Bank of NY Mellon Tr. Co. v. Fitzgerald*, (Fla. 3d DCA 2017) – the court found that plaintiff failed to establish standing at any point. Accordingly, no valid contract existed between the parties, and the borrowers could NOT recover fees.



# LITIGATION UPDATES

## Attorney's Fees and Standing in Florida.

- Fourth District Court of Appeals
  - NO STANDING = NO FEES. The 4th DCA does not distinguish whether the bank established standing at trial, but not when the complaint was filed (or vice versa).
  - *Nationstar Mortgage v. Glass* (Fla. 4th DCA 2017)
- Fifth District Court of Appeals
  - *Madl v. Wells Fargo Bank, N.A.* (Fla. 5th DCA 2017) – the court awarded attorney's fees to the borrower because a contractual relationship was established (no standing when complaint was filed, but standing subsequently established at trial).
- FL Supreme Court weighing in?

# LITIGATION UPDATES

Face to Face Meeting requirements for FHA files. A condition precedent.

- Mortgagee must have a face-to-face interview with the Borrower or make a reasonable effort to arrange a face-to-face interview no later than the 61st Day of delinquency, unless exempt.
- The Mortgagee must send to the Borrower via Certificate of Mailing or Certified Mail providing information on the availability of the interview and how to schedule.
- Pre-COVID the Mortgagee had to attempt to contact the borrower at the subject property. Unless exempt, the face-to-face interview attempt is a *condition precedent* to a foreclosure action in Florida.

Face to Face Meeting requirements for FHA files. A condition precedent.

- *Derouin v. Universal American Mortgage Co.* (Fla. 2d DCA 2018)
  - Unless exempt, the face-to-face interview attempt is a condition precedent to a foreclosure action in Florida. The burden is on the bank to prove satisfaction.
  - The Borrower must raise the bank's failure to comply with the face-to-face requirements as an affirmative defense.
- *Kuhnsman v. Wells Fargo Bank, N.A.* (Fla. 2d DCA 2020)
  - Key Factors: Substantial Compliance and Prejudice to the Borrowers
- What is the impact of COVID on the face-to-face meeting requirements?

## How are Florida Courts handling COVID

- Most courts are now proceeding with foreclosure trials and hearings via Zoom.
- Witnesses should be trained on all Zoom functions and should be prepared for the differences that video trials present.
- Although there are some difficulties with Zoom trials, use the positive functions to your advantage!
- Will Florida bring back foreclosure divisions and senior judges in all large counties like they did in 2008?



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## Ohio Supreme Court Recommendations

- The Supreme Court of Ohio- Foreclosures & Civil Justice Report and Recommendations (issued June 19, 2020)
  - Prepared by Office of Court Services by committee comprised of judges, mediators and legal aid service providers.
  - The Report and Recommendations address the impact of the public health emergency caused by COVID-19 on the Ohio court system, including an anticipated influx of foreclosure case filings and backlog of civil cases generally.

## Ohio Supreme Court Recommendations.

- Regarding the anticipated increase in Ohio foreclosure case filings, certain recommendations were proposed to assist Ohio courts in managing and resolving foreclosure-related cases in a more efficient manner. The primary recommendations relating to foreclosure cases are as follows:
  - The Supreme Court should consider adopting a toolkit that would set forth a uniform framework that local courts could elect to adopt regarding foreclosure mediation.
  - The Supreme Court should encourage Settlement Events (defined as a bench-bar collaboration events using volunteer mediators to resolve pending cases) and distribute materials for local courts to use to prepare and implement a settlement event.

## Ohio Supreme Court Recommendations.

- Recommendations continued:
  - The Supreme Court should adopt temporary rules regarding Foreclosure Mediation Training and Settlement Event Training to focus on foreclosure specific considerations and reduce the number of training hours required for potential mediators.
  - The Supreme Court should encourage use of a compendium of loss mitigation alternatives to foreclosure.



# POLLING QUESTION

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What is your biggest concern about moratoriums being lifted?

- A. Not having adequate staffing
- B. Compliance with new restrictions
- C. Increased loss mitigation applications
- D. Increased litigation



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Litigation resulting from increase in foreclosures.

- While it is uncertain exactly when and how moratoriums will end, it is anticipated that foreclosure volumes will spike significantly and quickly.
  - Points to consider
    - Staffing levels of servicers and vendor firms
    - Potential added requirements to foreclosure process
    - Increased loss mitigation requests
- Increase in foreclosure volumes will inevitably lead to increase in litigation, including moratorium related issues.

## Litigation and Challenges in Connection with Foreclosure Moratoriums

- Litigation Regarding Vacancy Determinations and Improperly Proceeding Under a Moratorium
  - Vacancy Time Period
  - Method of Confirming Occupancy
  - Evidence of Vacancy
- FDCPA Litigation Regarding Misrepresentations of the Ability to Take Legal Action
  - Language in Demand Letters
- Conflicts Between the CARES Act and State Law / Orders
  - Under CARES Act “Covered Period” Not Defined
- Litigation Regarding the Acceleration of a Loan Balance
  - Does Sending a Demand Letter Violate a Moratorium?
- Litigation for Violating the Prohibition on Referral by Assigning Foreclosure to a Law Firm
  - FNMA Servicing Guide Section E-1.2-02
    - What Constitutes Referring a Matter to Foreclosure?

## Litigation and Challenges in Connection with Foreclosure Moratoriums

- Declarations of Exemption
  - State Specific Requirements
  - *Sua Sponte* Challenges From Court
  - States Requiring Declaration of Exemption Despite No Statutory Requirement
- Reverse Mortgages
  - Can a Forbearance be Offered?
    - No Payments to Excuse
- Electronic Signatures
  - Uniform Electronic Transactions Act
  - State Law Can Provide Additional Restrictions
    - Maryland – Documents Executed Under Oath Must be an Original Handwritten Signature

# LITIGATION UPDATES

## Litigation Resulting from Significant Increase in Foreclosures After Conclusion of Moratoriums.

- Procedural Oversight
  - Additional Notice and Certification Requirements Due to State Executive and Administrative Orders
- Class Action Lawsuits
- Failures to Meet Court Prescribed Deadlines
- Statutes of Limitation
- Strict Compliance with Required Language for Loss Mitigation Solicitation Notices
- Failures to Grant Borrowers Loss Mitigation Alternatives Due to High Volume of Requests
- Increase in Qualified Written Requests

# LITIGATION UPDATES

## Preparing for Litigation and Challenges to Foreclosures in a Post-moratorium World.

- Litigation Regarding Terms of Forbearance Agreements
  - How Will the Amount for Which Payments Were Excused During the Forbearance Period be Repaid?
    - Balloon Payment at the end of the Forbearance Period, Balloon Payment at end of Loan Term, or Extension of Loan Term?
      - Under the CARES Act “Forbearance” is not Defined
        - Contains No Explanation of How Missed Payments Will be paid
    - Allegations of Unconscionability and Unfair Lending Practices Depending on How a Balloon Payment is Assessed.
      - GSE Loans Offering Payment Deferral Options Where Balloon Payment is Due at the End of the Loan
      - Maryland – Executive Order Does Not Specify How Payments May Become Due
      - District of Columbia - Provides for Deferment Program With Options for Repayment

# LITIGATION UPDATES

## Preparing for Litigation and Challenges to Foreclosures in a Post-Moratorium World.

- Litigation Regarding Terms of Forbearance Agreements
  - Misrepresentation of Terms Due to Informal Nature of Forbearance Agreements
  - Increase in FDCPA Disputes
    - Application of Fees, Interest, Late Charges, etc.
      - CARES Act – No Application of Fees, Penalties or Interest Beyond the Amounts Scheduled or Calculated as if the Borrower Made all of the Contractual Payments on Time
      - District of Columbia
        - Deferment Program – Waives Principal and Interest and Any Late Fee, Processing Fee, or any other Fee Accrued During the Public Health Emergency
  - Credit for Prior Offered Forbearances
  - Placing Borrowers in Forbearance Without Borrower Permission
  - Evidence of Hardship



Preparing for Litigation and Challenges to Foreclosures in a Post-moratorium World.

Is a restart necessary?

- Judicial vs. Non-Judicial Foreclosure Jurisdiction
- Dismissal for Lack of Prosecution
- Was the Default Cured?

# Webinar Wrap-Up

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## Questions

If you have a question regarding today's presentation, please contact the ALFN or any of the presenters directly.

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