



MBA's Legal Issues and Regulatory Compliance Conference 2010

Litigation Panel 1: Defending Your Company against Individual Cases

Litigation In Loss Mitigation

Litigation Trends in Bankruptcy

***Litigation with "Others"**

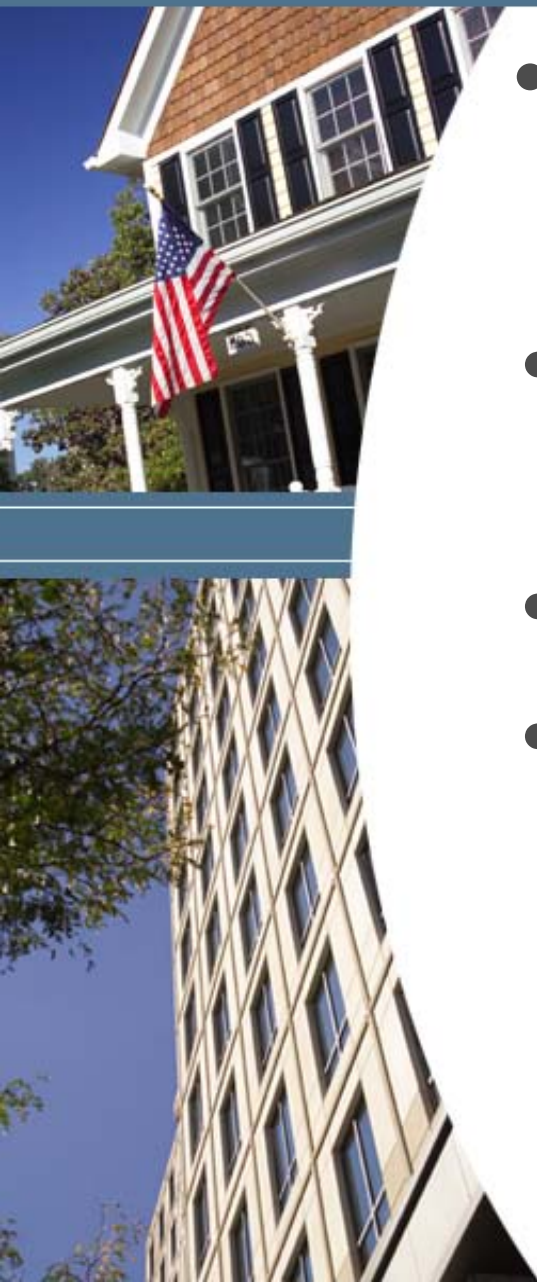
**Robert Maddox
Bradley Arant Boult Cummings**

**May 2 - 5, 2010
Coronado, CA**

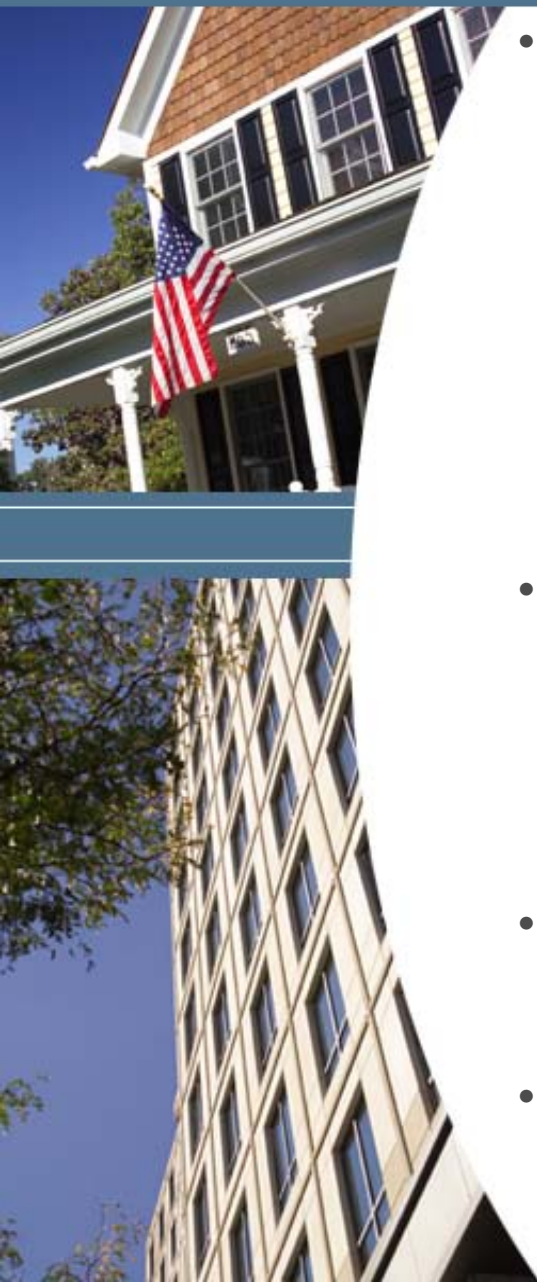


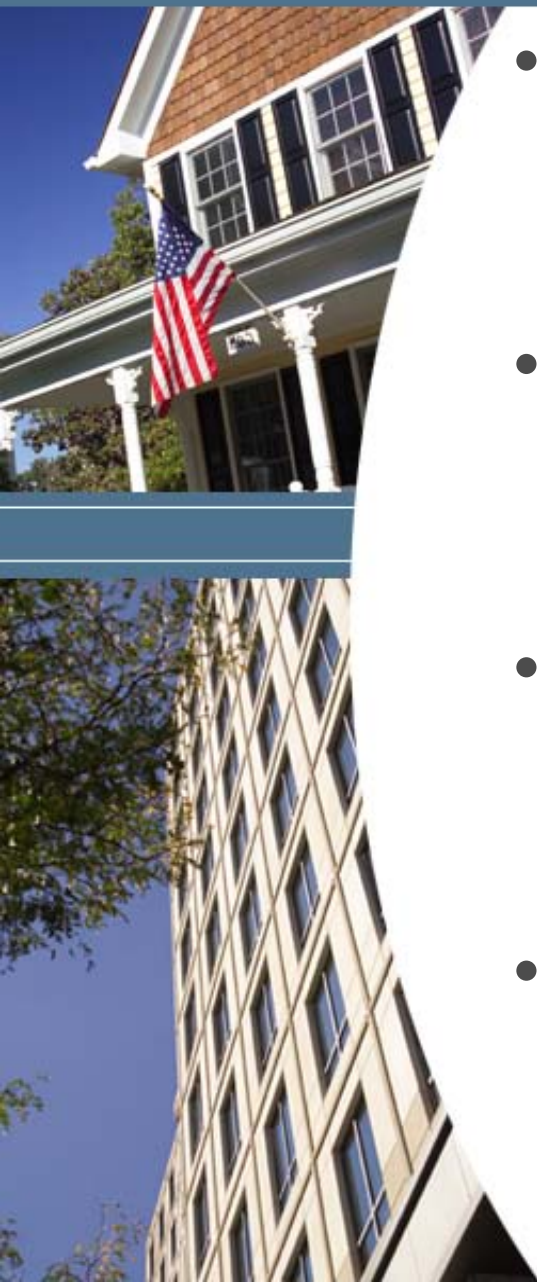
- **Agenda:**

- 1) Litigation and Fraud in Loss Mitigation
- 2) Litigation Trends in Bankruptcy
- 3) Litigation with “Others”



MBA Legal Issues - Litigation Panel: Defending Your Company Against Individual Cases: Overview

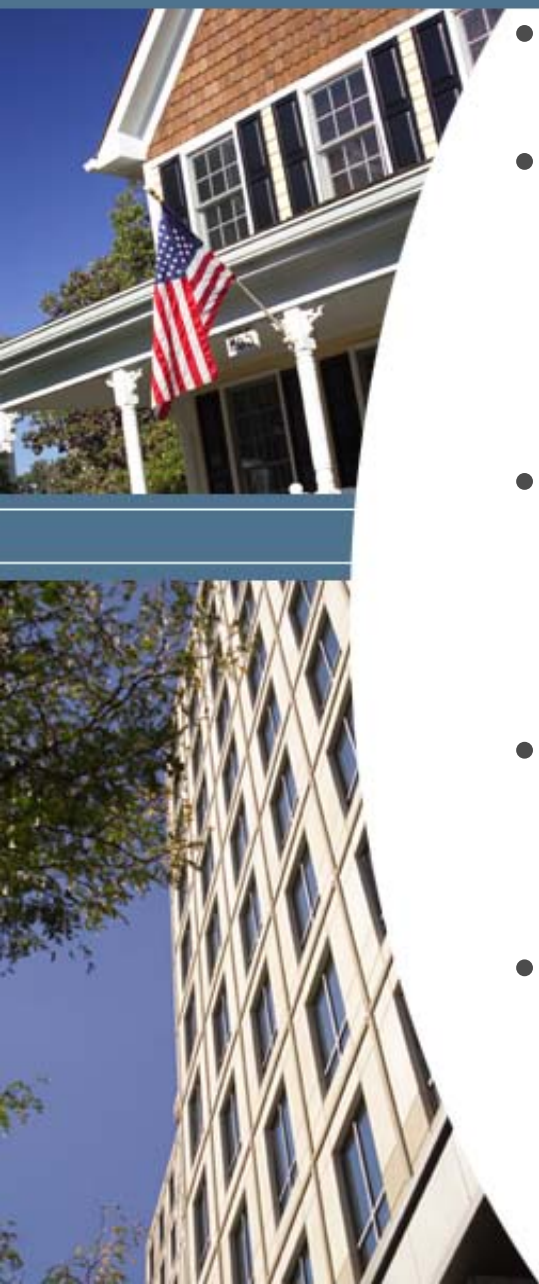
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- 1) Litigation and Fraud in Loss Mitigation
 - » I. Loss Mitigation - Generally
 - Forbearance
 - Repayment Plan
 - Capitalize the delinquency
 - Loan Modification
 - Assumption
 - Deed In Lieu
 - » II. Short Sales
 - » III. Loan Modification & Foreclosure Scams
 - 2) Litigation Trends in Bankruptcy
 - » I. POC Violations
 - » II. Violations of Automatic Stay
 - » III. Violations of Confirmation Order
 - » IV. Violations of Discharge Injunction
 - » V. Unauthorized Fees, Costs or Charges
 - 3) Litigation with “Others”
 - » I. Costs
 - » II. Aggregating and Handling the Claims at the Highest Level
 - 4) Summary and Questions



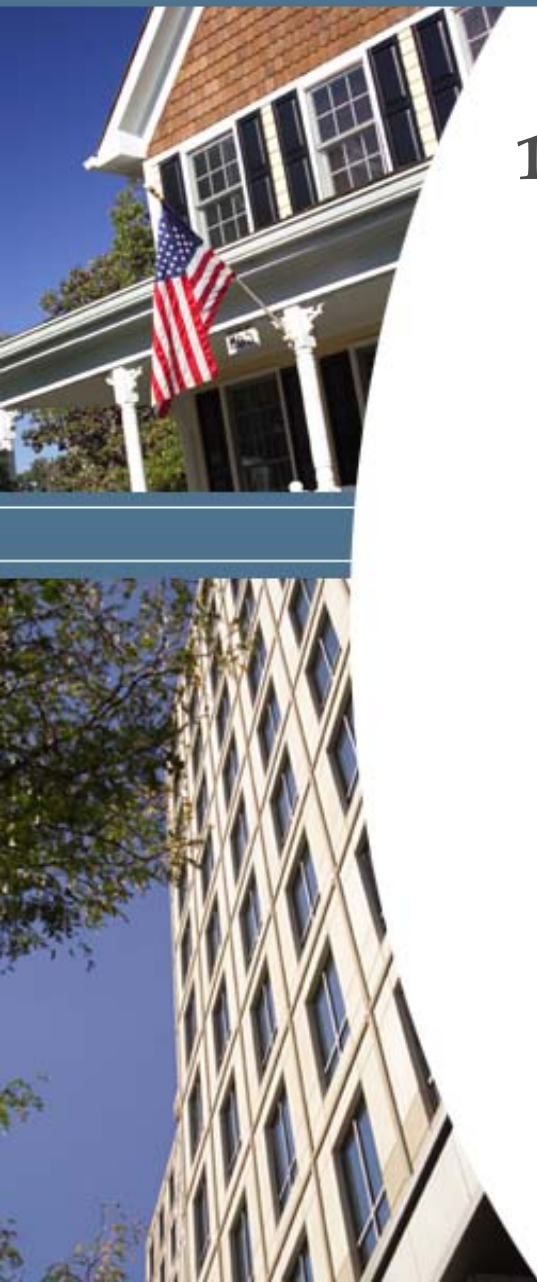
- Numerous times we have consumer and commercial mortgage lawsuits that started with simple miscommunication
- The Banking/Mortgage industry has its own terminology which is not part of the public vernacular***
- The mortgagor becomes frustrated, files a complaint with state agency, BBB, or seek help from a consumer lawyer
- Most lawyers, unless they specialize, do not understand the Banking/Mortgage industry – so we add on a layer of miscommunication in a default situation –

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Defending Your Company Against Individual Cases: Overview



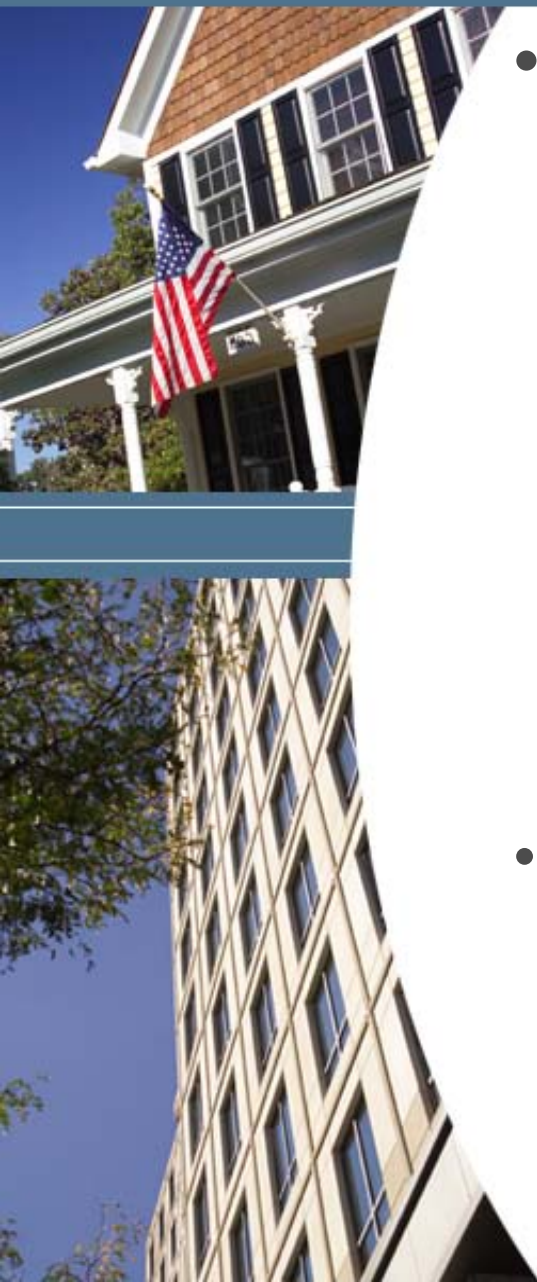
- An example of communication with lawyers:
- An old man was on his death bed. He wanted badly to take some of his money with him. He called his priest, his doctor and his lawyer to his bedside. "Here's \$30,000 cash to be held by each of you. I trust you to put this in my coffin when I die so I can take all my money with me."
- At the funeral, each man put an envelope in the coffin. Riding away in a limousine, the priest suddenly broke into tears and confessed, "I had only put \$20,000 into the envelope because I needed \$10,000 for a new baptistery."
- "Well, since we're confiding in each other," said the doctor, "I only put \$10,000 in the envelope because we needed a new machine at the hospital which cost \$20,000."
- The lawyer was aghast. "I'm ashamed of both of you," he exclaimed. "I want it known that when I put my envelope in that coffin, it held my personal check for the full \$30,000."

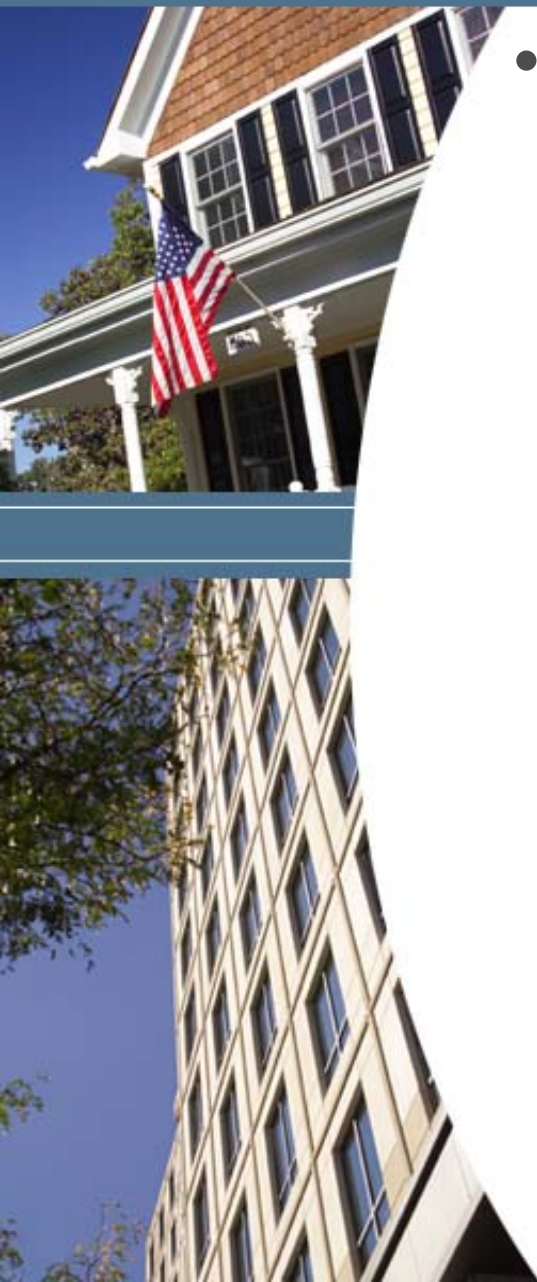


- 1) Litigation and Fraud in Loss Mitigation
 - » I. Loss Mitigation - Generally
 - Forbearance
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 - » II. Short Sales
 - » III. Loan Modification & Foreclosure Scams

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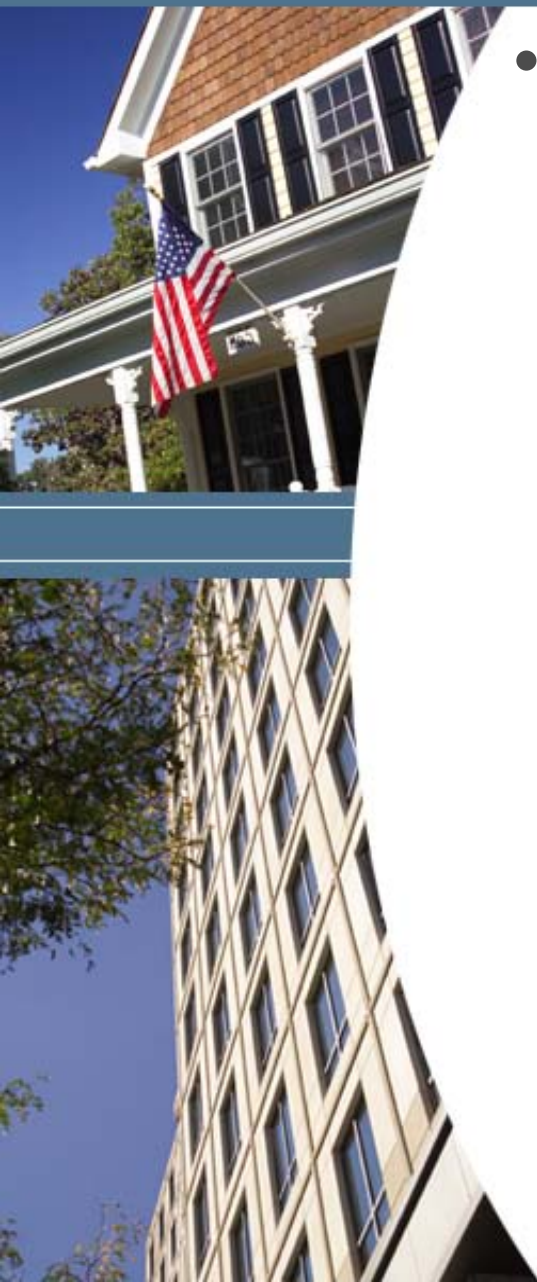
Litigation in Loss Mit: 2 questions the servicer needs to answer

- 
- 1) Identify the problem the mortgagor is currently trying to handle
 - » Economic Change: Job Loss, Divorce, Family Tragedy, etc
 - » Mortgage Product: ARM reset, increased escrow – taxes, insurance
 - » Origination Problem: Investment property, fraud in origination
 - » Other: Natural disaster, etc
 - Making this determination will allow you to determine the genesis of the complaint, apply pressure to that point to bring early resolution – either through litigation and or renewed loss mitigation options

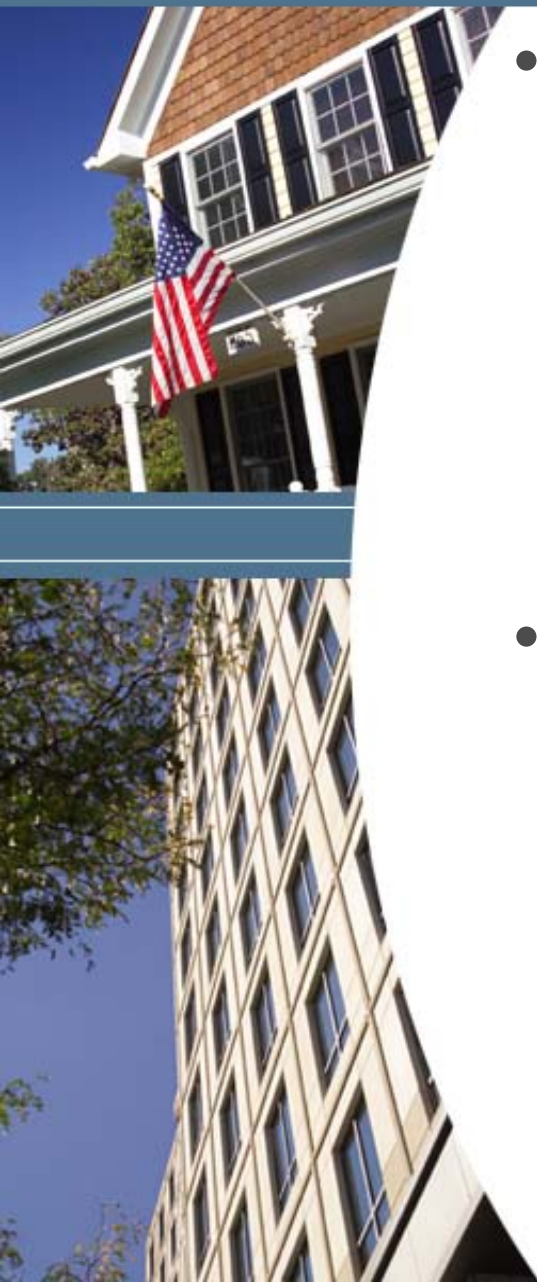


- 2) Questions the Mortgage Servicer has to Review and Determine:
 - » Investor guidelines – what will the investor allow them to do?
 - » Mortgage Insurance – is this going to be an impact on MI
 - » What is the lien position of the mortgage – 1st or 2nd?
 - » Are there other interested parties in the property?
 - » Does this mortgagor qualify for a loan modification?

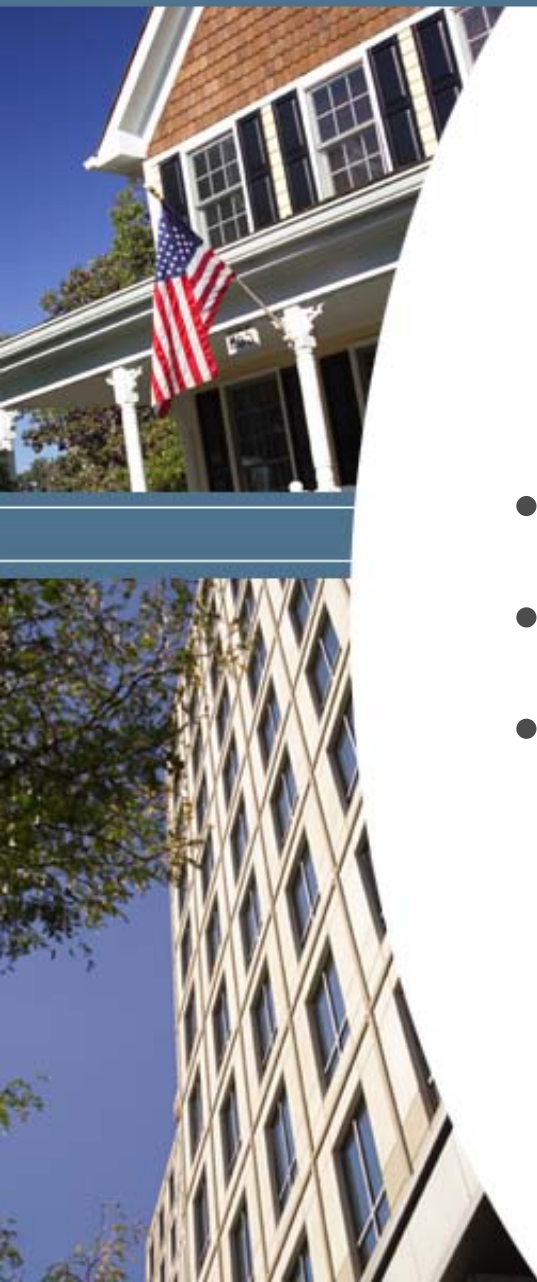
MBA Legal Issues - Litigation Panel:: Litigation in Loss Mit:



- This all leads the servicer to answer and/or calculate the answer to 2 fundamental questions:
 - » 1) Does the Borrower want to keep the house?
 - » 2) The servicer must undertake an “Evaluation of the Borrowers’ Current Financial Condition”



- If they want to keep the house (more leverage)
 - » Forbearance
 - » Repayment Plan
 - » Capitalize the delinquency
 - » Loan Modification
- If they do not want to keep the house (less leverage)
 - » Assumption
 - » Deed In Lieu
 - » Short Sales

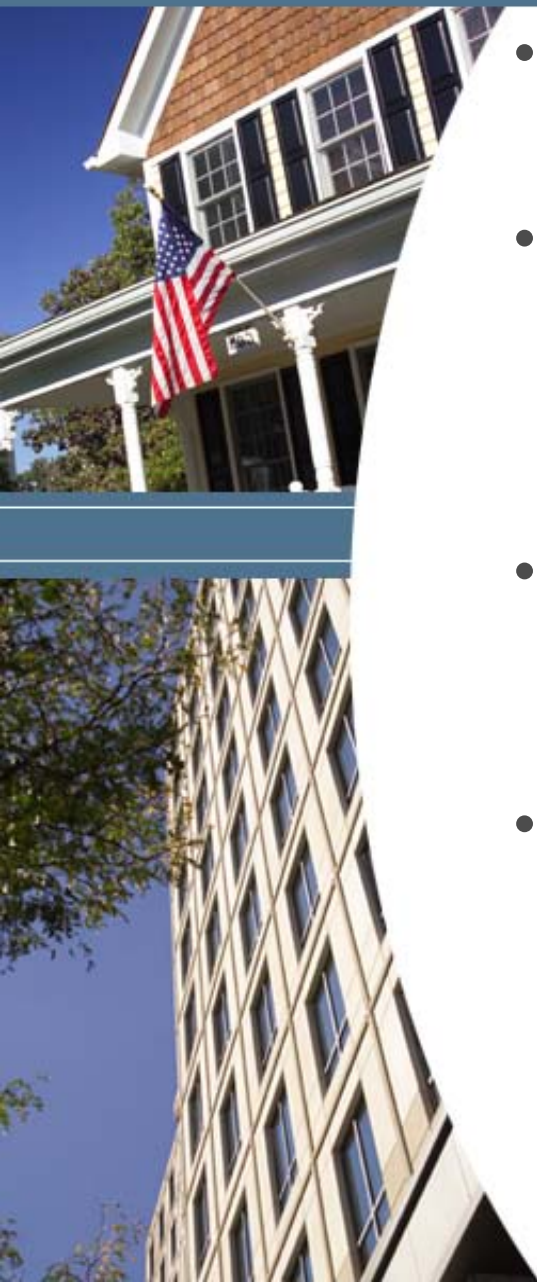


Likely areas where litigation will occur the 3
Loss Mitigation options below: **Identity**

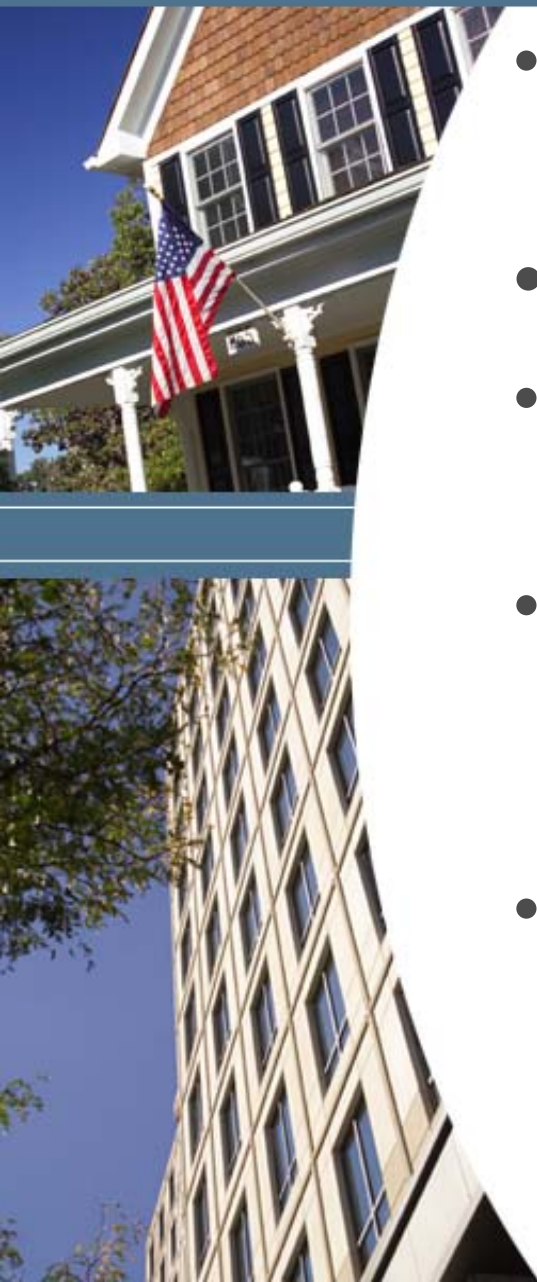
- » Forbearance
- » Repayment Plan
- » Capitalize the delinquency
- Look for false Power of Attorneys
- Look for double dealing with one Spouse
- Look for actions being handled by an
“authorized third party” - if all communications
are being handled by A3P, this is a red flag
you may not be dealing with the true
intentions of the borrower

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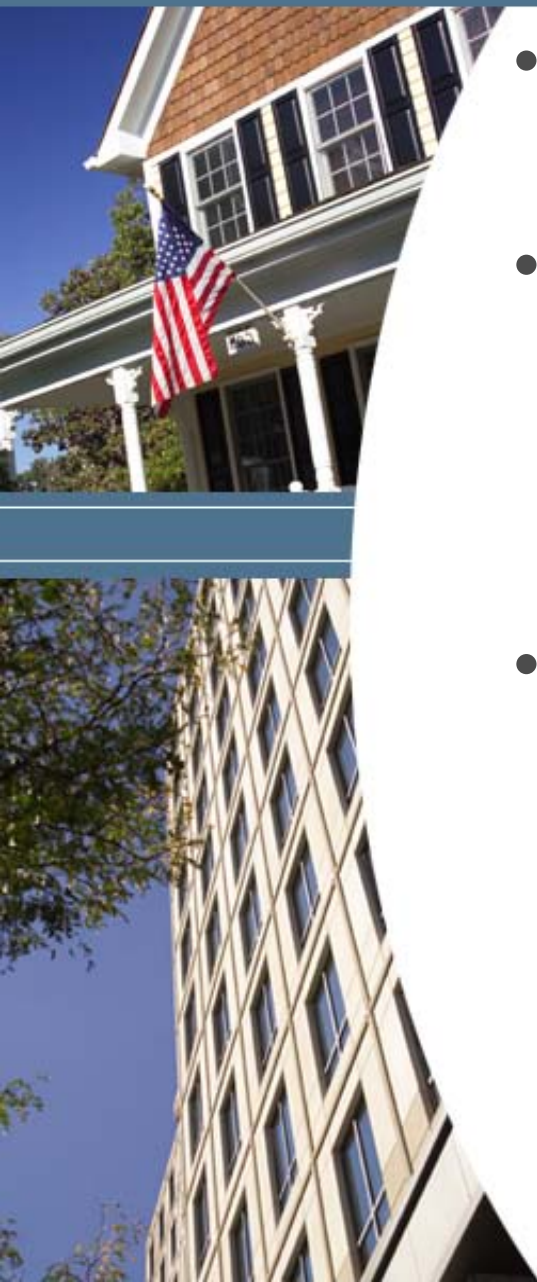
Defending Your Company Against Individual Cases: Overview



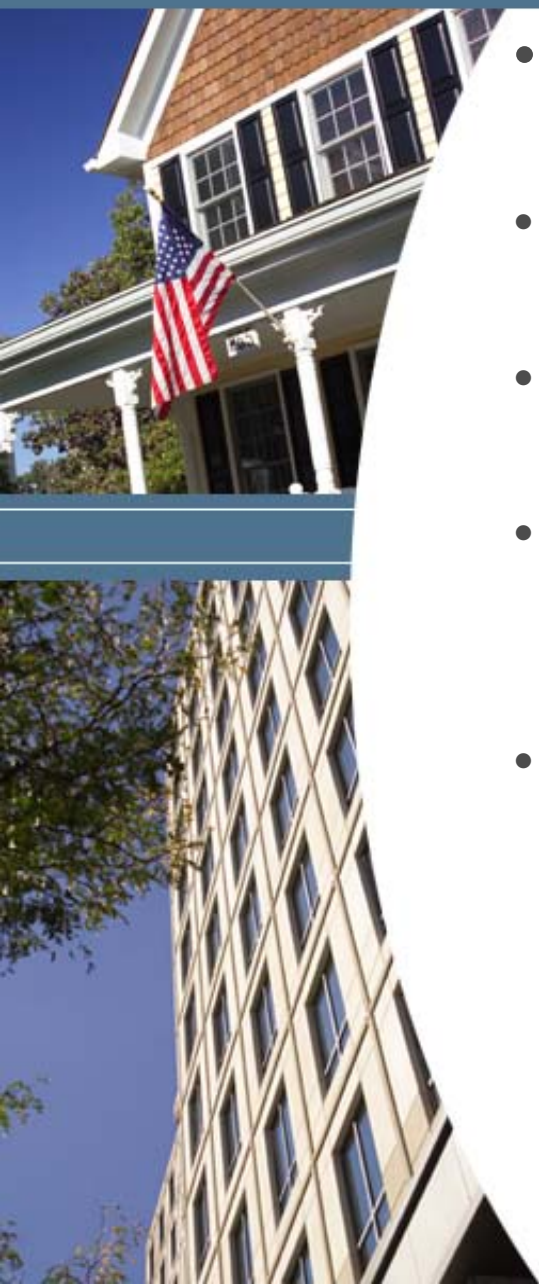
- Prevention and Potential Recovery:
- Forbearance, Repayment and Capitalization of Delinquency are more “traditional” LM options, where the servicer should have more control but the most likely area for fraud.
- Here we are trying to avoid lost time when the borrower ultimately should be placed in a loan mod or other LM options.
- Evaluation of the borrower’s current financial condition is critical (even if they are providing false documents) so this does not wind up a delinquency in 90 days or provide a basis for a consumer complaint.



- Likely areas where litigation will occur in Assumptions: **False Financials**
- Assumptions
- Assumptions are back! They tend to show up in down economic environments
- Usually are done by relative, friend or colleague of borrower who is desperate to remove liability of mortgage
- False Financials submitted by borrower or person to assume mortgage



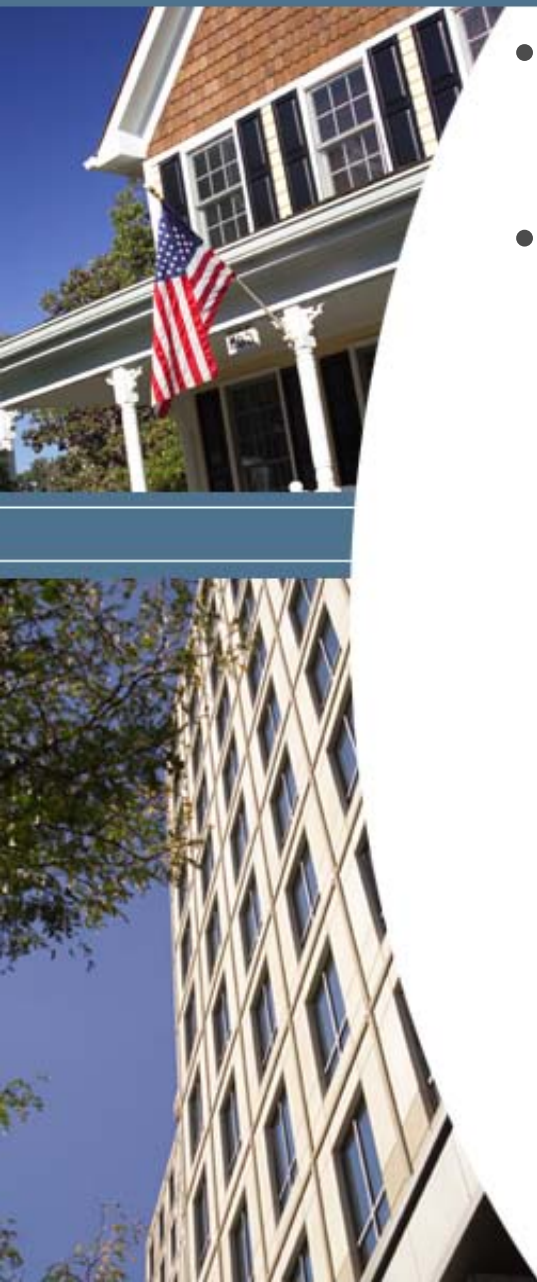
- Prevention and Potential Recovery:
- Should be underwritten as if new mortgage, with original borrower as guarantor and still liable in event of default by person assuming mortgage
- Verification of financials, employment and basic affordability thresholds should prevent fraud

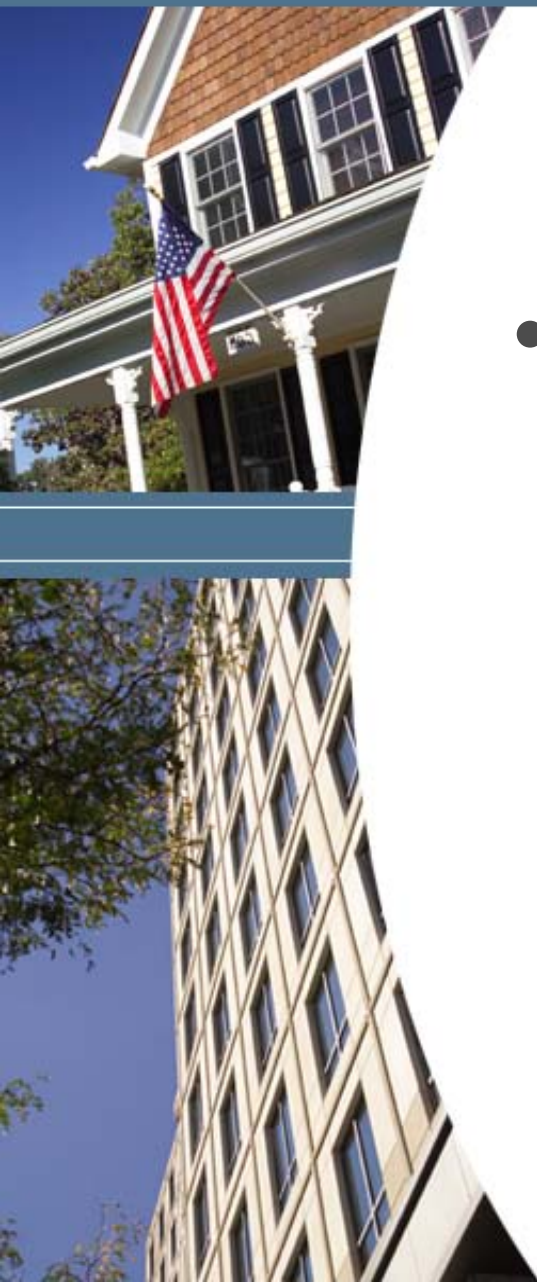


- Likely areas where litigation will occur in Deed in Lieu: **False Satisfactions/Releases**
- Throughout the country we are seeing false lien releases and satisfactions by companies and individuals (nothing new)
- However, they are now being done in the DIL context to remove 2nd liens/HELOCS in order for a DIL to take place.
- Most often the release/satisfaction is falsified by a loan mod/title agent, who has accepted \$\$ from a distressed borrower for a DIL.
- Outcome is a DIL done, 1st takes prop assuming free and clear but the 2nd soon coming to collect from 1st – more litigation and borrower is usually judgment proof.

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Defending Your Company Against Individual Cases: Overview

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- Prevention and Potential Recovery:
 - Make sure these are done prior to DIL:
 - » Needs to be a first lien priority position
 - » Check status of taxes
 - » Have a title search done to make sure no unknown encumbrances
 - » Make sure you have indemnity for any unknown liens, taxes, assessments, etc
 - *** Have a notarized affidavit by both the borrower and their A3P/loan mod company – indemnifying you. They all know at the absolute minimum that the 2nd existed and it was not paid off. You can argue the fraud later. Then rescind the DIL.***
 - » Make sure delinquent mortgagor pays recording fees



- II. Breakdown Short Sale Litigation – Parties involved, damage to company, outline possible steps for prevention and potential recovery.

A. Phony Short Sale Scam

I. Background

a. Borrower is delinquent and property is on market for sale. Usually some communication between borrower and servicer has already taken place to determine:

1. Original Value
2. Current UPB
3. Applicable local market conditions
4. Range for Short Sale Price

II. Usually two (2) types of fraud

- a. Fraud directed against Borrower
- b. Fraud directed against Servicer

A. Phony Short Sale Scam - Fraud Directed Against Borrower

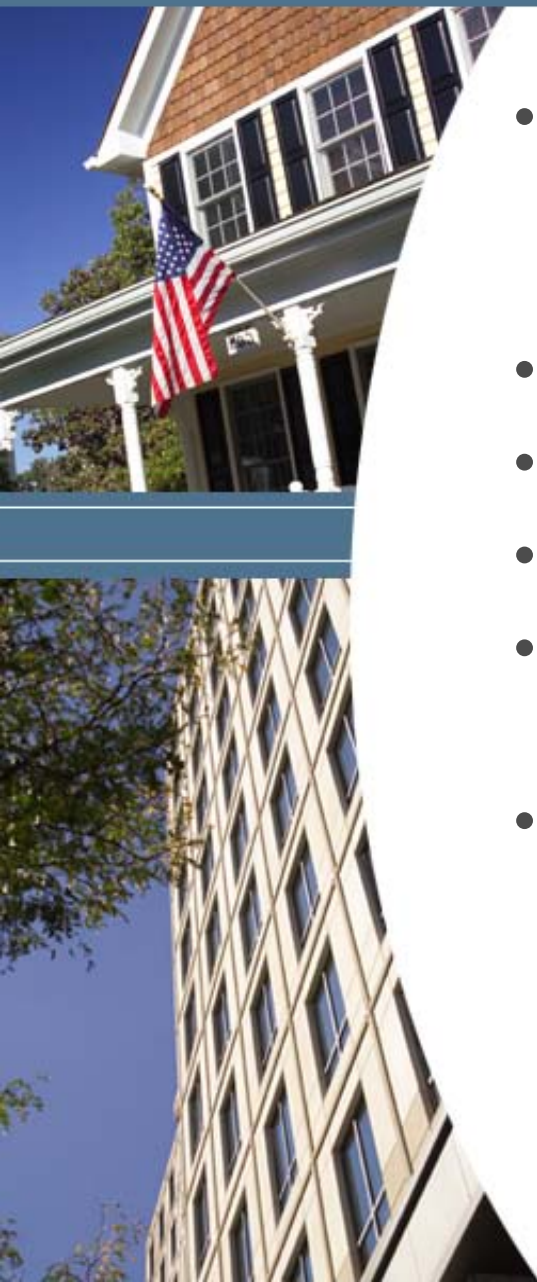
- I. Distressed Borrower, pays an up front fee and grants Power of Attorney to “Short Sale Specialist” to negotiate with lender and/or prospective purchaser for short sale price.
- II. If no Sale – Specialist just keeps up front fee if no sale, servicer loses valuable time due to specialist and borrower further upside down.
- III. If Sale – Specialist makes money off of sale, buyer has good price, servicer/investor loses money, distressed borrower has no home and possible tax consequences from the short sale

A. Phony Short Sale Scam - Fraud Directed Against Servicer

- I. Borrower enters into contract with colleague, relative, business partner, etc. for a contract well below UPB
- II. Property “dressed down” to give illusion of “artificially distressed” for inspection purposes (waste issue)
- III. Lender accepts artificially depressed short sale price
- IV. Original Borrower moves back into property, arranges to “buy back” property and eventually has same house with new lower loan
- V. Servicer and Investor lose through fraud

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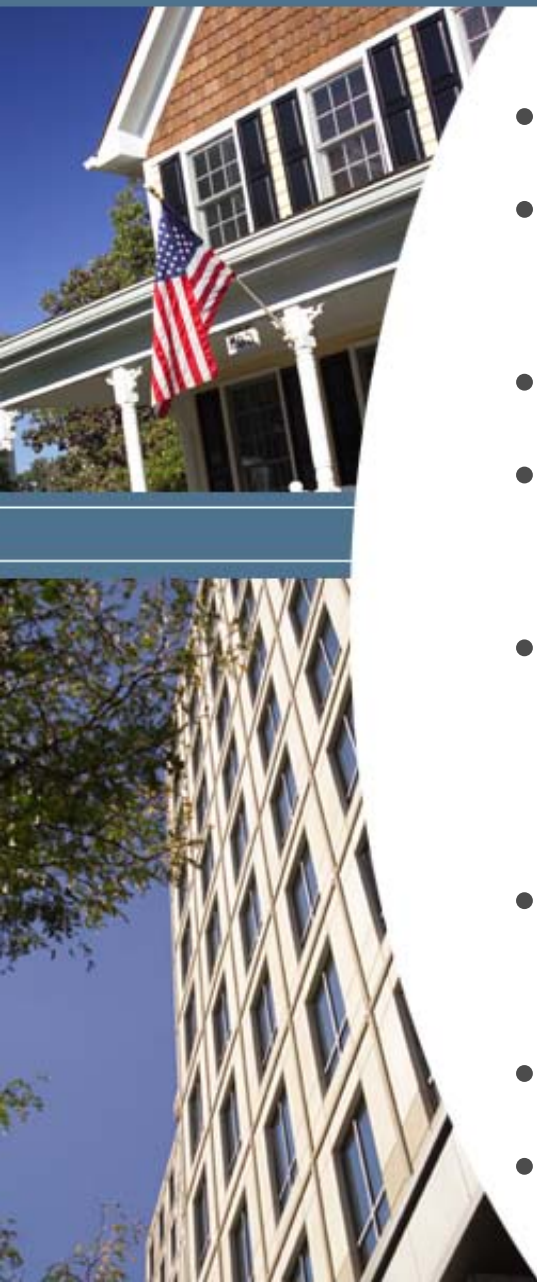
Defending Your Company Against Individual Cases: Short Sales



- Likely areas where litigation will occur in Short Sales: **False Appraisals, Back to back closings, Dirty Realtor and Borrower may be involved**
- Property dressed down for BPO
- Depressed offer for short sale
- Short sale goes through and realtor collects
- Sometime back to back closings – realtor already has second contract to close for higher price
- Closing attorney/title agent, realtor and appraiser just collected 2 fees for the same property

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Defending Your Company Against Individual Cases: Short Sales



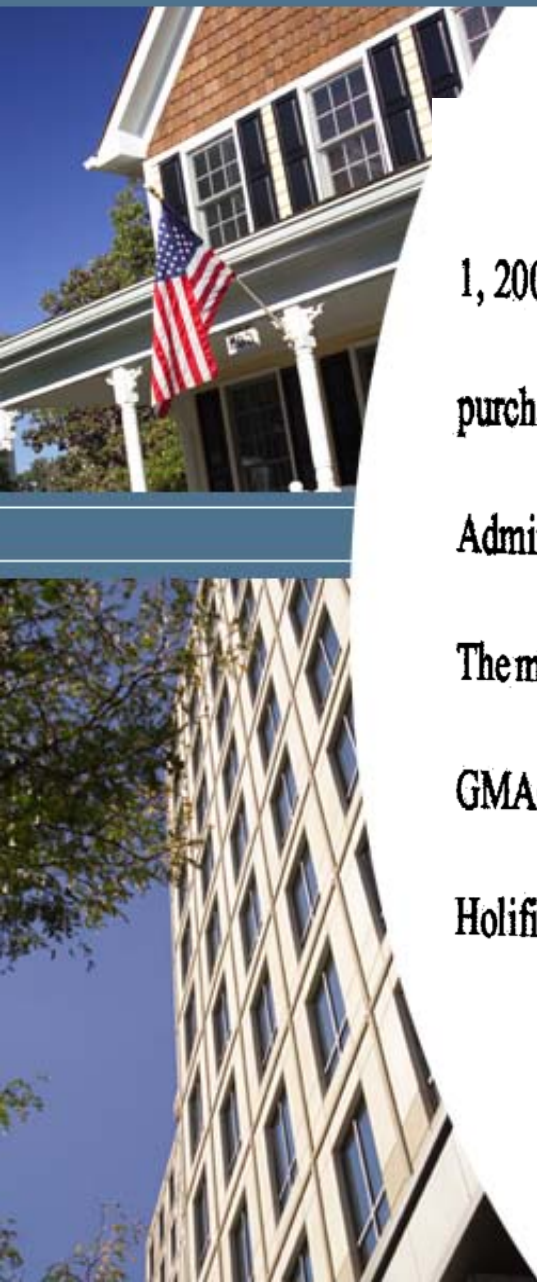
- Prevention and Potential Recovery:
- Reg Comp *** - make sure short sale approval letter has anti-flipping language ***
- Give all parties notice – and rescind the sale
- Send the short sale purchaser back their by money by whatever means you received
- Cost benefit – after rescinding sale, notify all parties involved that you are going “to turn them” to the appropriate licensing agency
- Negotiate for all your “carrying costs” to be paid by the parties involved to short sale fraud
- If they resist, sue for fraud and report them
- So far, 100% negotiation/settlement in short sale fraud – no loss to company

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Defending Your Company Against Individual Cases: Short Sales



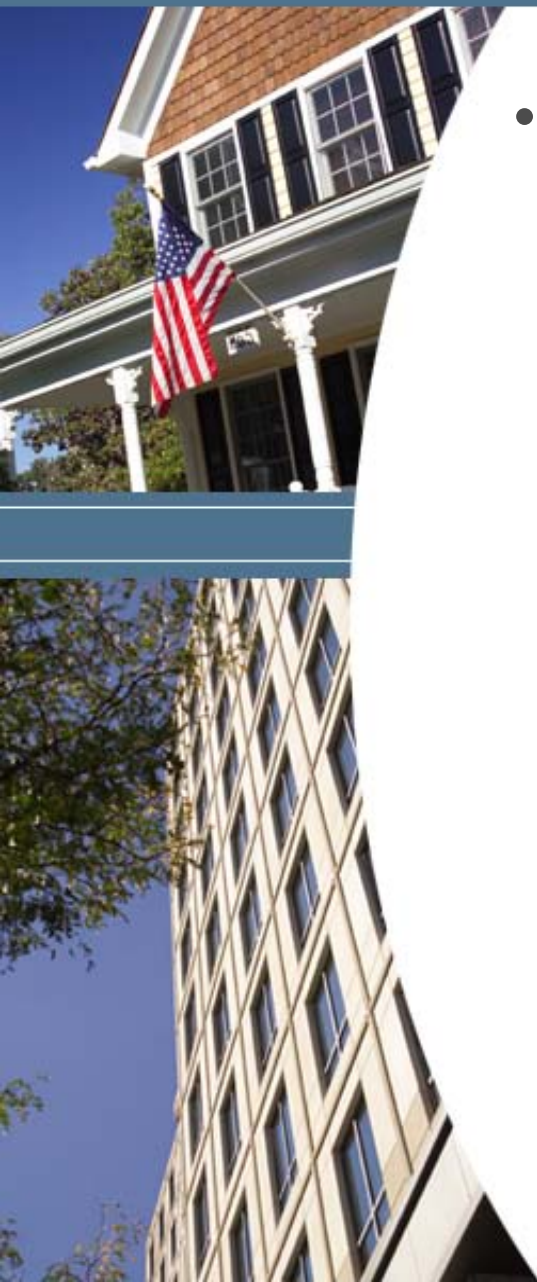
4. That on September 13, 2008, Otis Williams died.
5. On October 23, 2008, his estate was opened and his sister, Pauline Crenshaw, was appointed the Administratrix.
6. Otis Williams owned property located at 1311 Airport Lane, SW, Bessemer, Alabama 35022, at the time of his death.
7. Ms. Crenshaw and Mr. Holifield began negotiating with GMAC Mortgage LLC for the sale by her to Holifield of the subject property as a short sale.

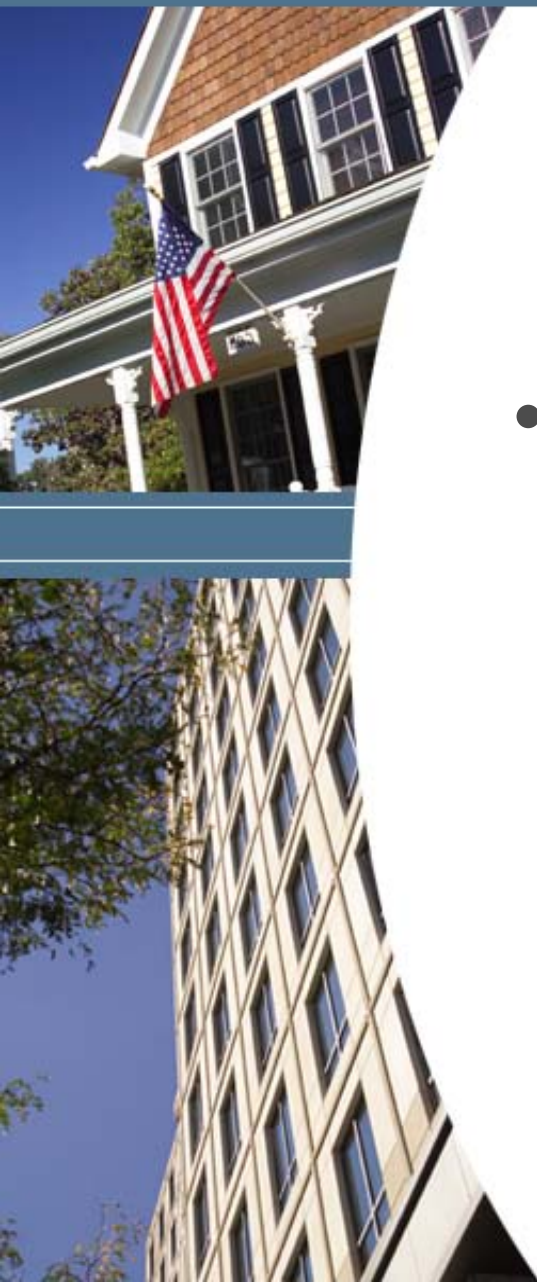
The background of the slide features a collage of two images. The top image shows a two-story house with a brown roof, white columns on the porch, and an American flag flying. The bottom image shows a tall, modern skyscraper with a grid of windows.

8. The negotiations continued and culminated in an agreement on or about September 1, 2009, wherein shortly thereafter GMAC Mortgage LLC received the sum of \$20,850.00 as the purchase price for the property, the same having been agreed to by all the heirs of Otis Williams, the Administratrix of the Estate, Pauline Crenshaw, Mr. Charles Holifield and GMAC Mortgage LLC. The monies continued to remain in the account of GMAC Mortgage LLC for several months wherein GMAC Mortgage LLC finally repudiated the contract for purchase and sale and forwarded Plaintiff Holifield's money back to him.

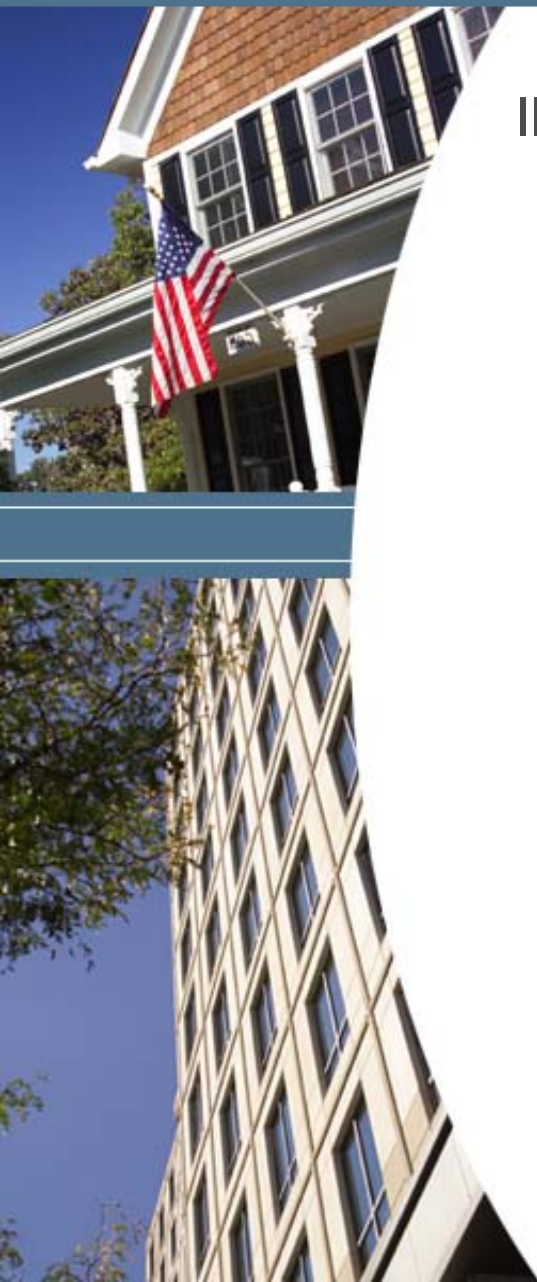
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Defending Your Company Against Individual Cases: Short Sales

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- What really happened????
 - » A fraud group was trolling obituaries
 - » Called Ms. Crenshaw, said they were with the mortgage company
 - » Worked on a fraudulent short sale
 - » Actually took the money out of the Plaintiff/prospective Third-party purchaser's ("3PP") checking account
 - » 3PP complained to mortgage company about not transferring property. No evidence of sale
 - » 3PP filed lawsuit last month against mortgage company – mortgage company has no evidence it ever spoke to 3PP.
 - » Fraud group posed as “asset manager” for servicer – 3PP never actually spoke to servicer

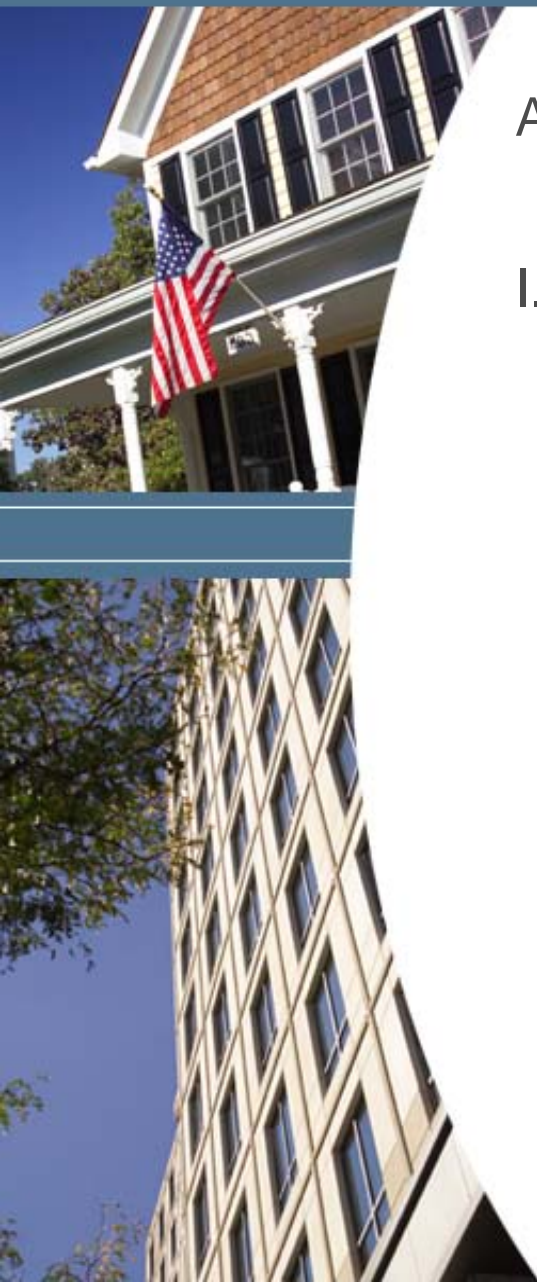


- III. Breakdown Foreclosure Fraud & Loan Modification Schemes
 - Parties, damages, prevention and potential recovery.



- III. Fraud Involving Foreclosure Rescue Schemes
 - I. Examination of Foreclosure Fraud – Why it Occurs
 - II. Examination of Loan Modification Schemes – Why they Occur
 - III. Anatomy of a Typical Foreclosure/Loan Modification Rescue Scheme - “the middle man and the scam”
 - IV. Variations on a Theme: Transfer and Rent
 - V. Prevention and Recovery

MBA Legal Issues - Litigation Panel: Describe Foreclosure Rescue Schemes



- A. Examination of Foreclosure Fraud – Why it Occurs
 - I. The foreclosure process is an easy target for fraud because we have a basic premise that the foreclosure sale should be:
 - a. Public
 - b. Transparent from the lender's perspective
 - c. To achieve the highest price for the property in question

MBA Legal Issues - Litigation Panel:: Describe Foreclosure Rescue Schemes

A. Examination of Foreclosure Fraud – Why it Occurs

I. Public Notice

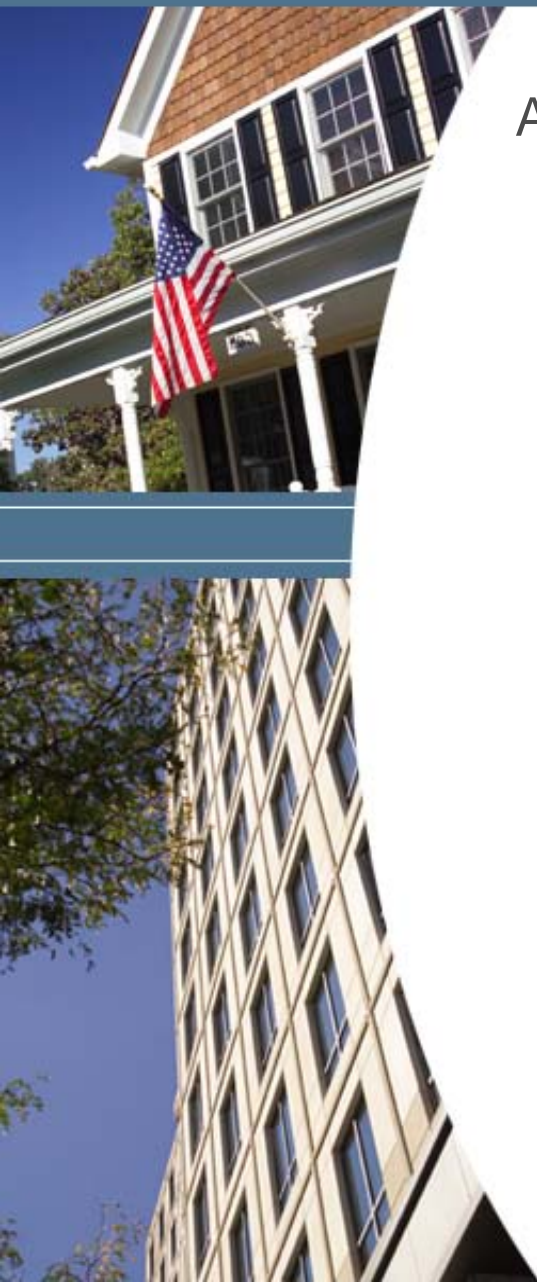
a. Regardless of the type of state foreclosure system:

1. Power of Sale (Non-Judicial), or
2. Judicial foreclosure,

b. We provide public notice:

1. Power of Sale – the foreclosing entity has to provide notice to the public, usually in a legal periodical for a certain number of days/weeks
2. Judicial Foreclosure – the lawsuit is a public record

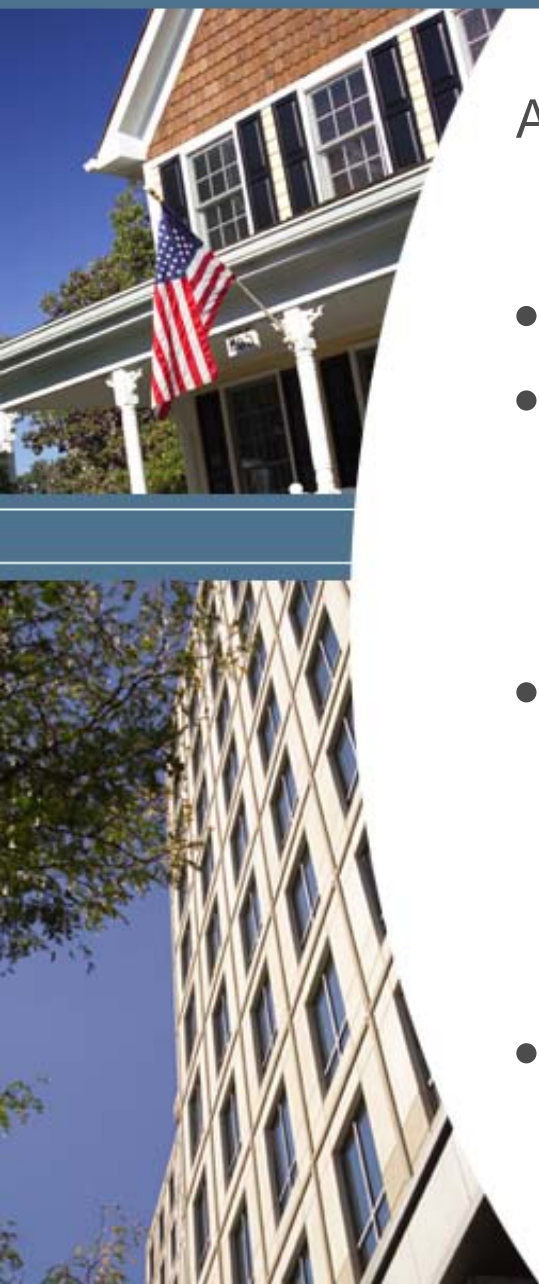
MBA Legal Issues - Litigation Panel:: Describe Foreclosure Rescue Schemes



- A. Examination of Foreclosure Fraud – Why it Occurs
 - I. Public Notice – Public Information
 - a. Both types of foreclosure notices provide to the fraudster:
 1. The borrower's name
 2. The lender's/foreclosure entity's name
 3. The amount of indebtedness (in some jurisdictions)
 4. The property address

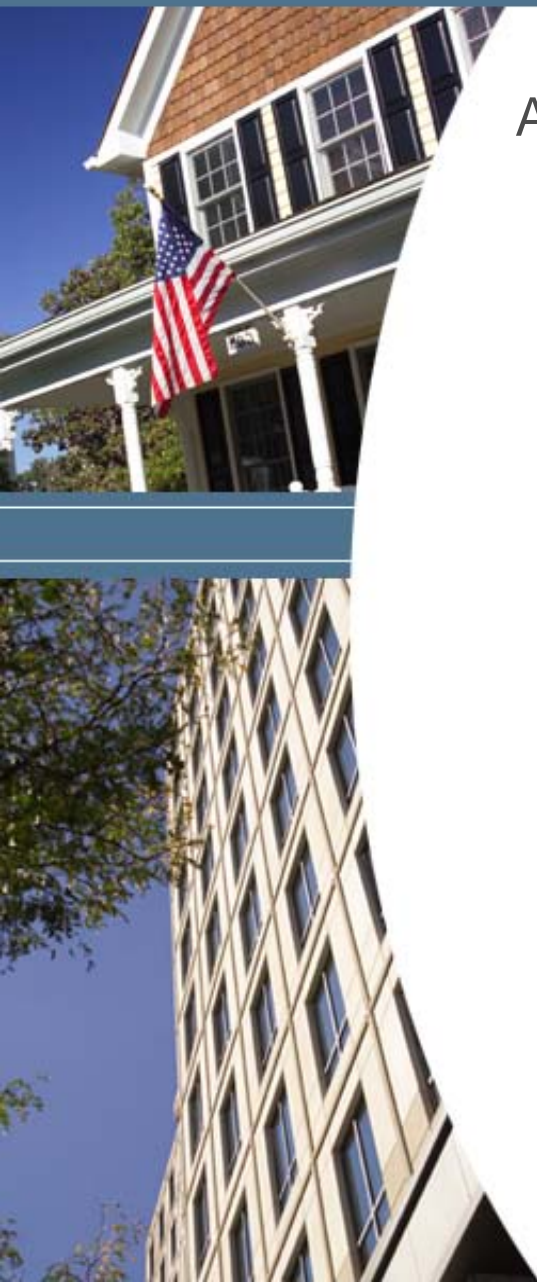
MBA Legal Issues - Litigation Panel::

Describe Foreclosure Rescue Schemes



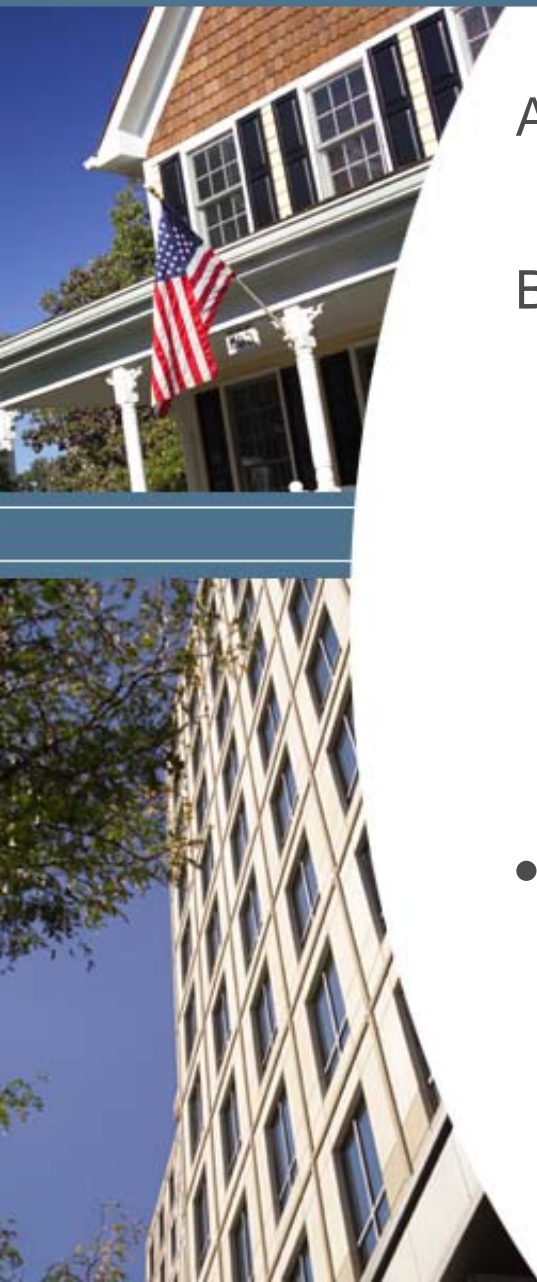
- A. Examination of Foreclosure Fraud – Why it Occurs
 - I. Public Notice – Public Information
 - **Knowledge is Power**
 - This type of personal information about the pending foreclosure coming from a “credit counselor”, “real estate agent”, “foreclosure specialist” is powerful.
 - From the borrower’s perspective – usually they are not communicating with their servicer or are frustrated with their servicer and you have an “uninterested” 3rd party offering help with that type of knowledge
 - Easy Target – Easy Money – Borrower, Servicer and Investor will lose.

MBA Legal Issues - Litigation Panel:: Describe Loan Modification Rescue Schemes



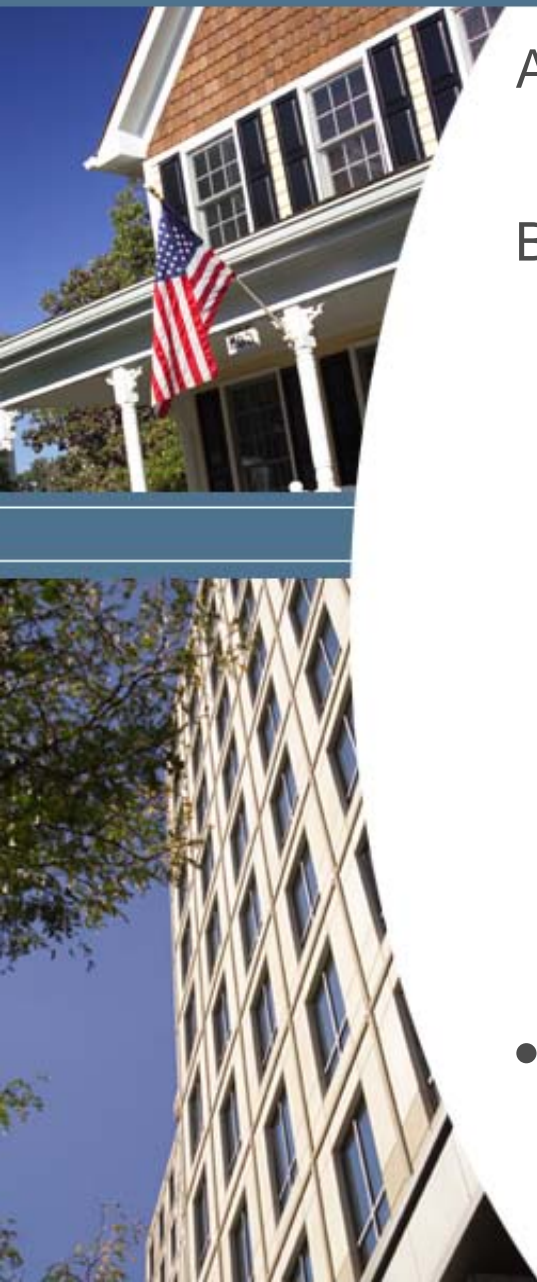
- A. Examination of Loan Modification Schemes – Why they occur
 - I. Public/Political demand are driving forces
 - II. Investor & Servicer have financial incentives – in some cases
 - III. Based on the above – Borrower submits a “financial package” for analysis and review by servicer
 - IV. The borrower is notified for the reasons that they did not qualify.

MBA Legal Issues - Litigation Panel: Describe Loan Modification Rescue Schemes



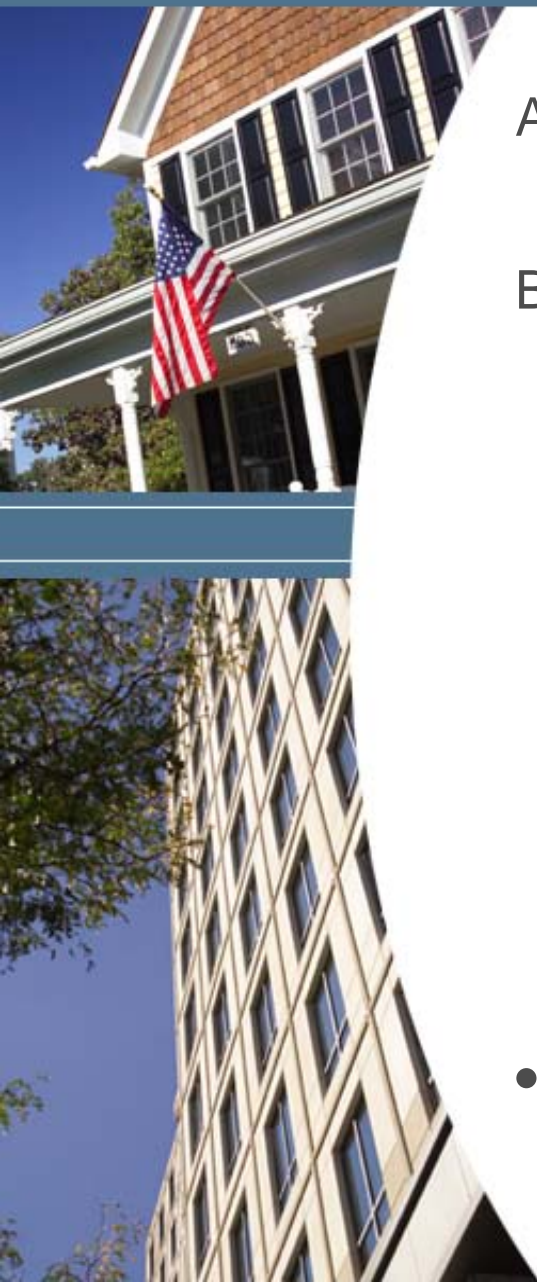
- A. Examination of Loan Modification Schemes – Why they occur
- B. Borrower Fraud
 - V. The borrower is then usually given an opportunity to resubmit “updated” financials, to see again if they can qualify for a loan modification.
Roadmap to fraud.
 - Easy Money – Servicer and Investor will lose.

MBA Legal Issues - Litigation Panel:: Describe Loan Modification Rescue Schemes



- A. Examination of Loan Modification Schemes – Why they occur
 - B. Borrower Fraud – Variations on a theme
- VI. The borrower adds the following to their “updated” financials:
- Unemployment Income (limited in duration)
 - Rental Income from “renting room” in house with false rental agreement
 - Extra unverified income – babysitting, elder sitting (opens up servicer for complaint down the line for failure to consider)
- Easy Money – Servicer and Investor will lose.

MBA Legal Issues - Litigation Panel: Describe Loan Modification Rescue Schemes

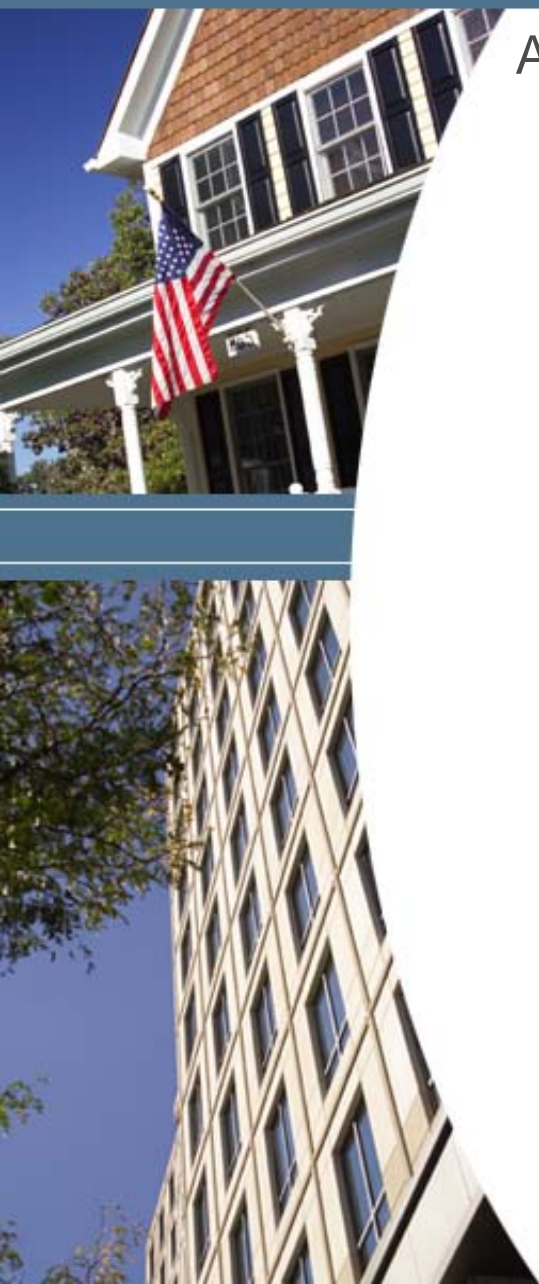


- A. Examination of Loan Modification Schemes – Why they occur
 - B. Borrower Fraud – Variations on a theme
- VII. Different scenario – Borrower with investment property. Submits “financial package” but fails to disclose all financial liabilities. Servicer has no idea as they have different servicer with principal residence.
- Easy Money – Servicer and Investor will lose.

A. Anatomy of a Typical F/C - LM Rescue Scheme

I. The Scheme – Direct Contact

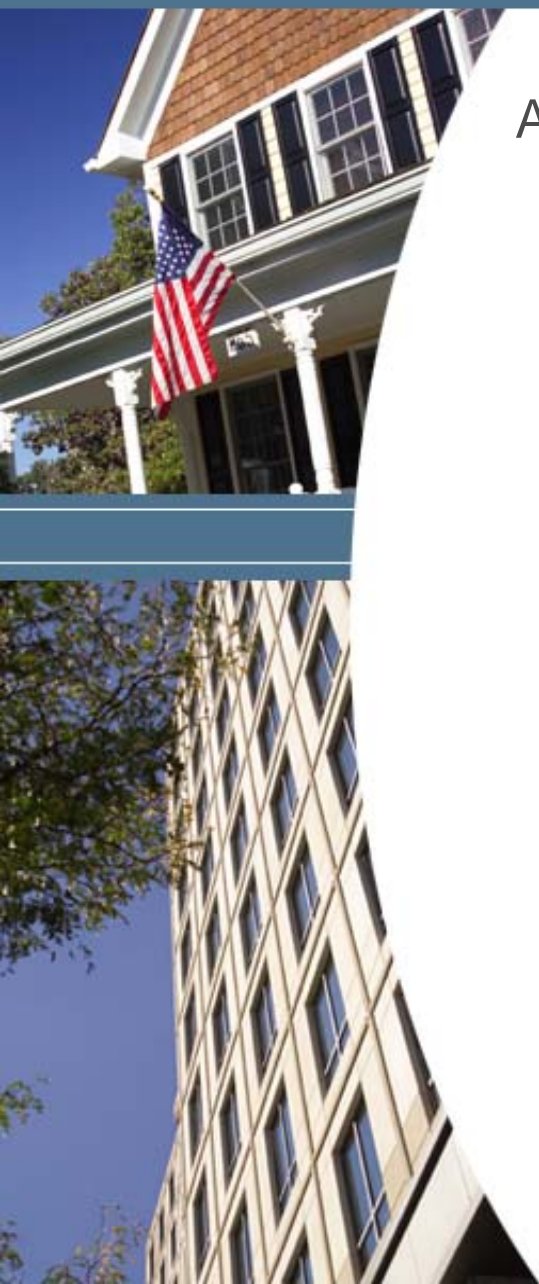
- a. After obtaining Borrower's trust with Public Notice Information, they convince the Borrower they have a relationship with the servicer which can save their home from foreclosure or with loan mod.
- b. They convince the Borrower to pay a large "upfront" fee to cover costs with communicating with the servicer – telephone calls, letters, payment history analysis, etc.
- c. Then they advise and encourage the Borrower to cease all communication with servicer – they will handle it all – you need to speak in a single, uniform voice without conflicting information in order to achieve the best result – saving your home.



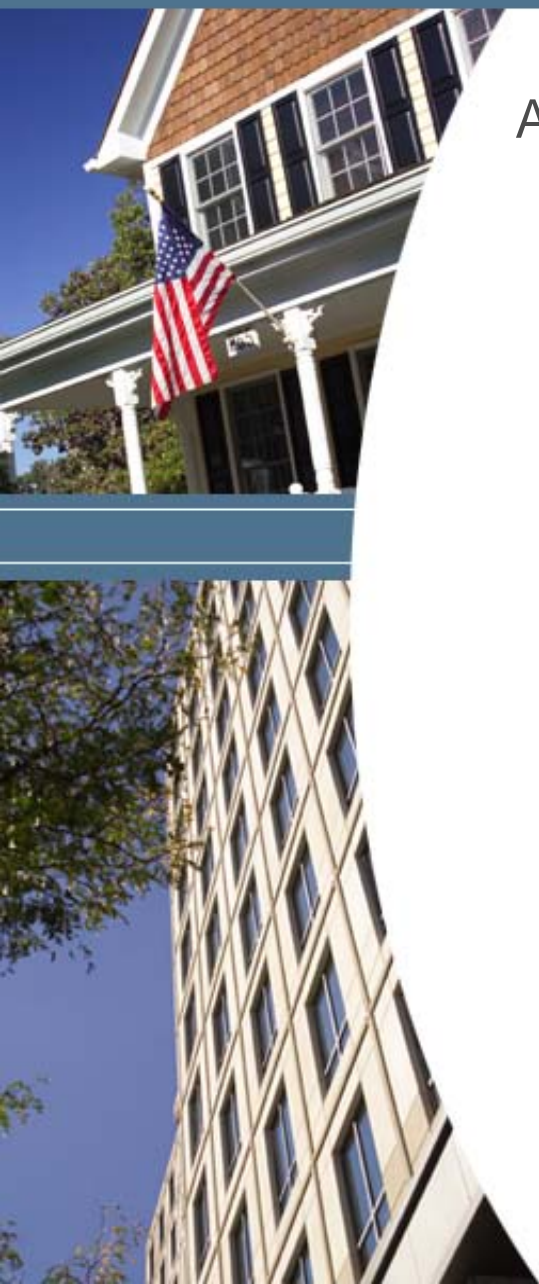
A. Anatomy of a Typical F/C - LM Rescue Scheme

I. The Result – Direct Contact

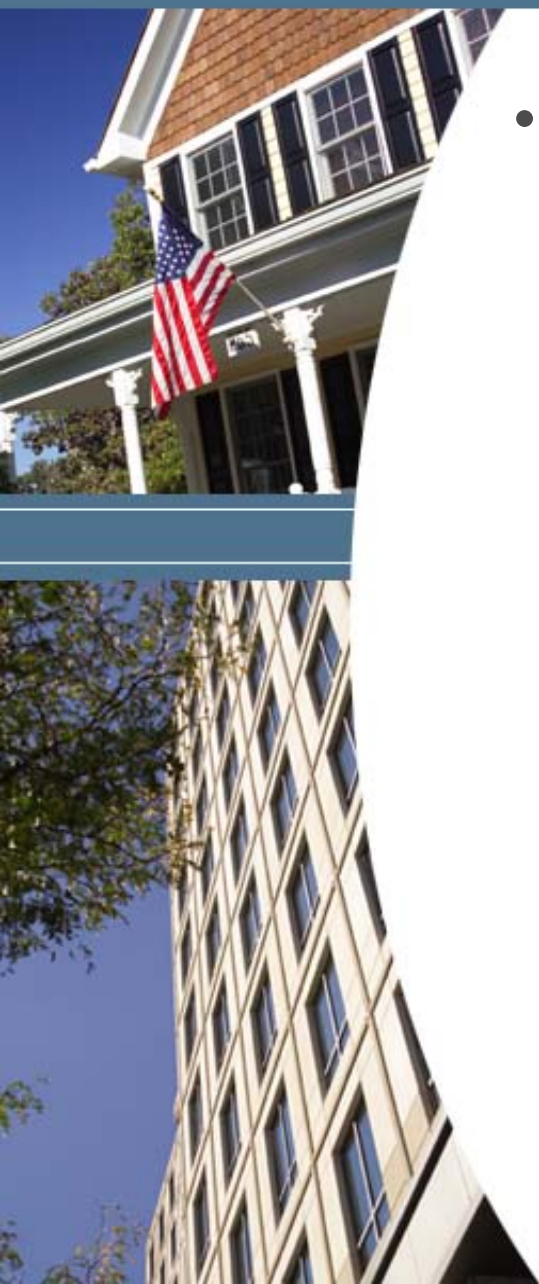
- a. Some “f/c - LM specialists” never even attempt to make contact – they take the “upfront fee” and leave the Borrower only with the advice not to communicate with the servicer – while the Borrower’s inaction and lack of communication puts them even further behind.
- b. Other “specialists” do attempt to contact the servicers but they are providing an additional and expensive layer of communication the Borrower could receive for free. In addition, the “upfront fee” further depletes the Borrower’s financial resources with an unnecessary fee, which in most instances could be used to pay down the indebtedness or as part of the contribution on a loan modification.
- c. *****NOTE***** - same scenario can play out for both f/c and LM



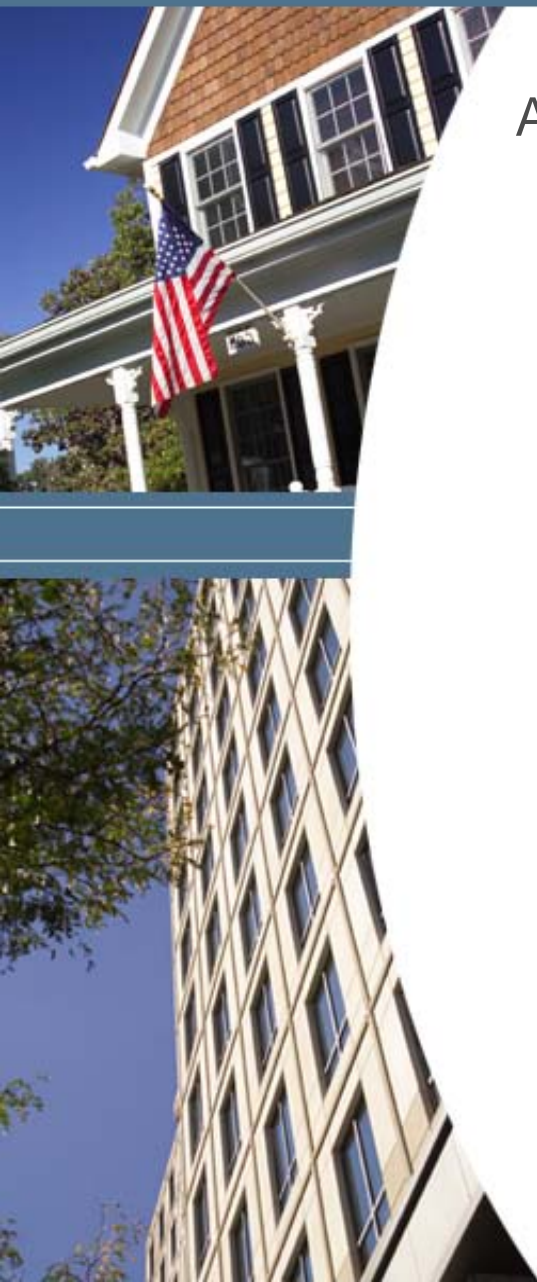
- A. Anatomy of a Typical F/C - LM Rescue Scheme
 - I. The Scheme – Property Transfer
 - a. Public Notice Information to gain Borrower’s trust
 - b. Request “upfront” fee
 - c. Advise not to communicate with servicer
 - d. Usually through multiple written agreements, the “specialist” convinces the Borrower to transfer the Property in a “Limited Conveyance” – to an entity, person, or trust
 - e. “If you “technically” don’t own the home anymore, they can’t foreclose because you don’t own the property – but you will stay in the house and we will transfer it back into your name when you can make the mortgage payments again.”
 - f. The grantee in the “Limited Conveyance” either quit claims the property to a straw for another mortgage or the property is sold.



- A. Anatomy of a Typical F/C - LM Rescue Scheme
 - I. The Result – Property Transfer
 - a. The Borrower temporarily remains in the house unaware and ignorant of the subsequent transfers.
 - b. The “specialist” is gone with:
 - 1. The Up Front Fee
 - 2. Any money made off of the subsequent transfers
 - 3. The Borrower’s future
 - c. The subsequent grantee and/or mortgagee have been duped and are out the money
 - d. The Borrower lost the “up front” fee, the home to foreclosure and probably their faith in humanity.



- Anatomy of a Typical F/C - LM Rescue Scheme
 - I. The Scheme: Variation on a Theme:
Short Sale to Rent
 - a. Public Notice Information to gain Borrower's trust.
 - b. Advise not to communicate with servicer.
 - c. "Specialist/Broker" mislead Borrower they can avoid foreclosure with a "quick short sale" and just pay "rent" to stay in the house.
 - d. "Specialist/Broker" sets up a straw buyer (usually paid 5k-15k for use of good credit)
 - e. Fraudulent short sale orchestrated to straw, false second mortgage and/or smaller liens "appear" on title report, which add additional money on top of the short sale to pay the "Specialist/Broker", the straw buyer and the closing agent.



A. Anatomy of a Typical F/C - LM Rescue Scheme

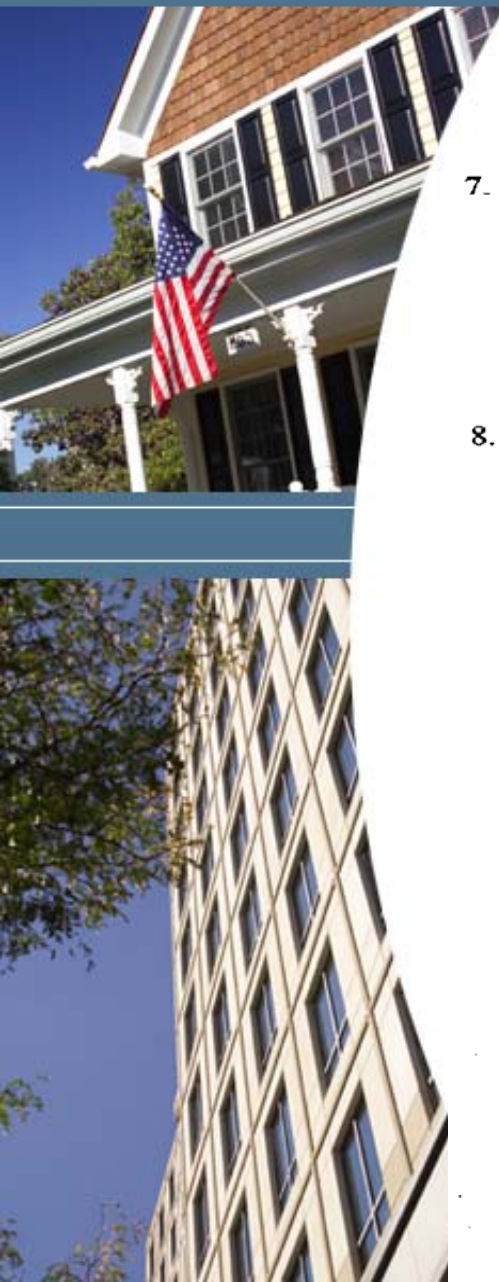
I. The Result: Variation on a Theme:

Short Sale to Rent

- a. The Straw Buyer defaults on the new mortgage, red flag of EPD. Credit ruined.
- b. The closing agent committed fraud and likely to lose any license.
- c. “Specialist/Broker” had nothing in their name and made money off of sale to the straw.
- d. Borrower pays rent and likely stays in house another 90 to 120 days before new mortgagee forecloses

Loss Mitigation & Foreclosure Fraud

Describe Foreclosure/Modification Rescue Schemes



A. Anatomy of a Typical F/C - LM Rescue Scheme

7. Plaintiff Andrea Martin was made a victim of a fraudulent real estate scheme which has been prevalent nationally and in the Dallas real estate market. While this scheme has been highlighted in the media consumers continue to be victimized.
8. In this a scheme, an investment group, usually led by a mortgage broker and comprised of real estate agents, title company agents and appraisers, solicit innocent inexperienced individuals and persuade them to volunteer the use of their good credit for the purchase of real estate in their name. They are promised that everything will be taken care for them and that the property will be managed with no responsibility or liability for any losses. They are usually told that the property will be initially rented out for a period of a year so it may appreciate and will then be sold. In reality, these conspirators never intending to perform as promised, usually strike a deal with desperate sellers of otherwise expensive properties to agree to raise the listed sales price, sometimes several hundred thousand dollars, they obtain inflated appraisals and secure loans for the unwary borrower based on manipulations of the loan process as brokers or lender insiders. Sellers usually kick back the inflated funds from sale to the group. The conspirators pocket these funds, rent out the property and collect additional money, but sooner thereafter fail to pay the mortgage as promised and abandon the property to be foreclosed. The borrower / victim cannot sell the property as the loan far

A. Anatomy of a Typical F/C - LM Rescue Scheme

I. Prevention and Recovery

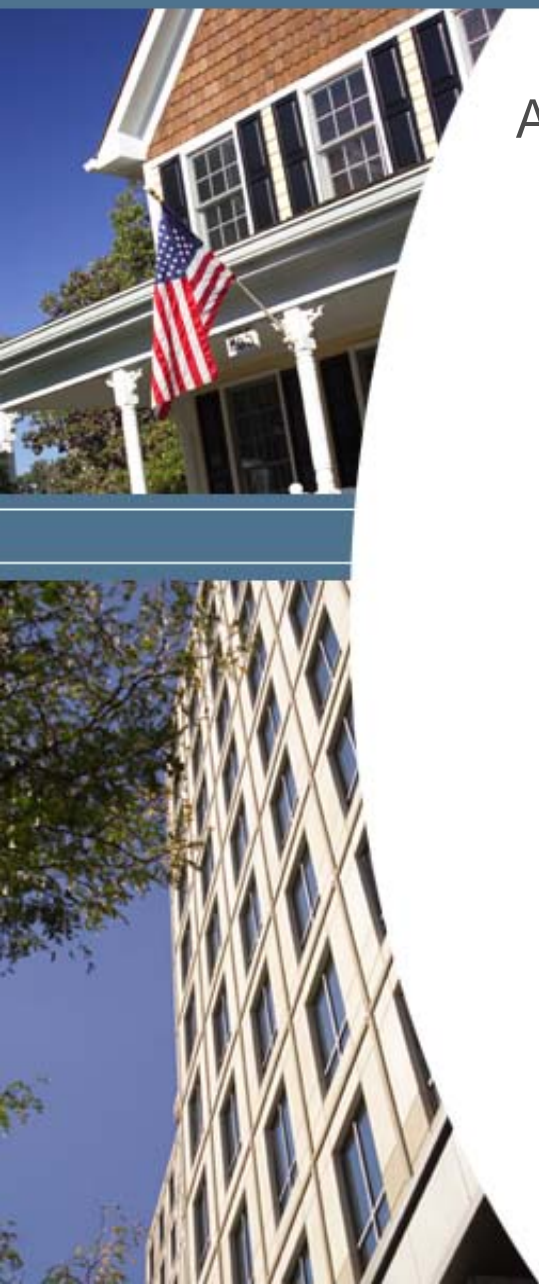
a. Prevention by the Servicer

1. Denial, Shame or Embarrassment

The Borrower may not want to confront their economic reality or are ashamed and embarrassed of their inability to make their mortgage payment.

2. Communication between the Borrower and Servicer is critical to deterring the “middle man and the scam” in taking advantage of the Borrower, which directly impacts the servicer.

3. Referrals to HUD approved counselors (www.hud.gov) and government entities for a neutral, third party perspective.

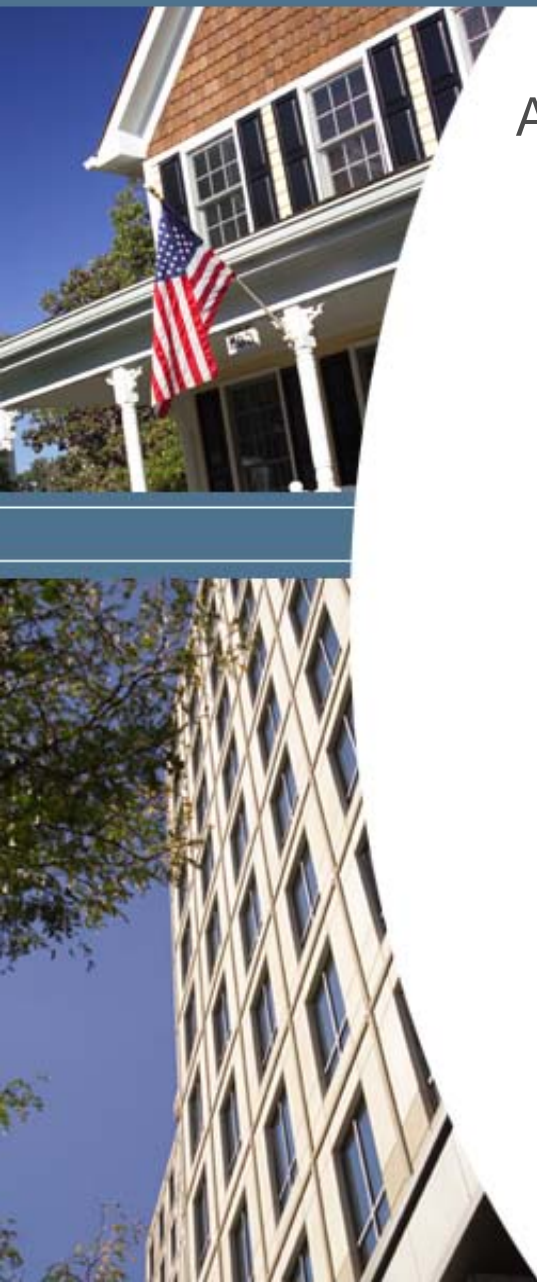


A. Anatomy of a Typical F/C - LM Rescue Scheme

I. Prevention and Recovery

a. Prevention by Our Government

- » June 08, New Jersey AG announces multiple lawsuits involving “foreclosure rescue” scams
- » July 08, Missouri AG - Operation Stealing Home
- » September 08, Ohio AG filed suit against multiple “mortgage rescue scams”
- » October 08, North Carolina AG announced filing suit against 3 companies that, “misled homeowners in fear of losing their homes to foreclosure”
- » October 08, Florida AG announced suit under Foreclosure Rescue Fraud Prevention Act of 2008 against South FL Company Outreach Housing
- » December 08 TX AG announces new legislative initiative “Foreclosure Rescue Fraud Prevention Act”
- » January 09 CT AG – Investigating “HOPE Alliance”
- » February 09 FBI/HUD increased funding in ‘10 Budget
- » March 09, AZ AG announced suit against 4 related companies for taking advantage of distressed homeowners in foreclosure
- » March 09 TX AG has press release warning “Foreclosure Rescue Scams Threat to Consumers”

- 
- A. Anatomy of a Typical F/C - LM Rescue Scheme
 - I. Prevention and Recovery
 - a. Prevention by Our Government - continued
 - » January 10, Florida Attorney General Actively Pursues Loan Modification/Foreclosure Fraud Companies
 - » January 10 – Nevada AG hands down 3 indictments in Las Vegas loan Modification Scam
 - » February 10 - CA Attorney General Brown Warns Homeowners to Avoid Forensic Loan Audits
 - » March 10, New York AG announces lawsuit involving “loan modification” group National Modification Service & Infinity Fund Group
 - » March 10, Minnesota AG sues two mortgage loan modification firms
 - » Florida Senate Bill 2226 (overly broad)

A. Anatomy of a Typical F/C - LM Rescue Scheme

I. Prevention and Recovery

a. Recovery - Financial Concerns

1. Reality: Most servicers are very wary on attacking and litigating fraud files strictly due to cost and no guarantee of recovery.
2. Early analysis of fraud is key.
 - ✓ Identify parties, people involved
 - ✓ Perform Asset search
 - ✓ Perform docket/civil litigation search
 - ✓ Limited Interviews
 - ✓ Draft timeline referencing key documents
 - ✓ Diagram/Visio connections between parties
3. Once you complete early analysis package, then determine your recovery potential.
4. Perform cost/benefit analysis
(Recovery Potential v. Litigation Budget)

MBA Legal Issues - Litigation Panel::

Describe Foreclosure/Loan Modification Rescue Schemes

A. Anatomy of a Typical F/C - LM Rescue Scheme

I. Prevention and Recovery

a. Recovery - Government Partnership

1. Regardless of determination of Civil cost/benefit analysis, move forward with notifying proper government entities.
2. Partner and assist with appropriate FBI/USA office around the country.
3. Provide them the “early analysis package” because the more information you provide, the quicker they will make a determination as to whether to pursue the matter.
4. Triple win: Assist in justice served, remove criminals from within and around the industry, possible criminal restitution to more than cover your financial investment.

MBA Legal Issues - Litigation Panel::

Describe Foreclosure/Loan Modification Rescue Schemes

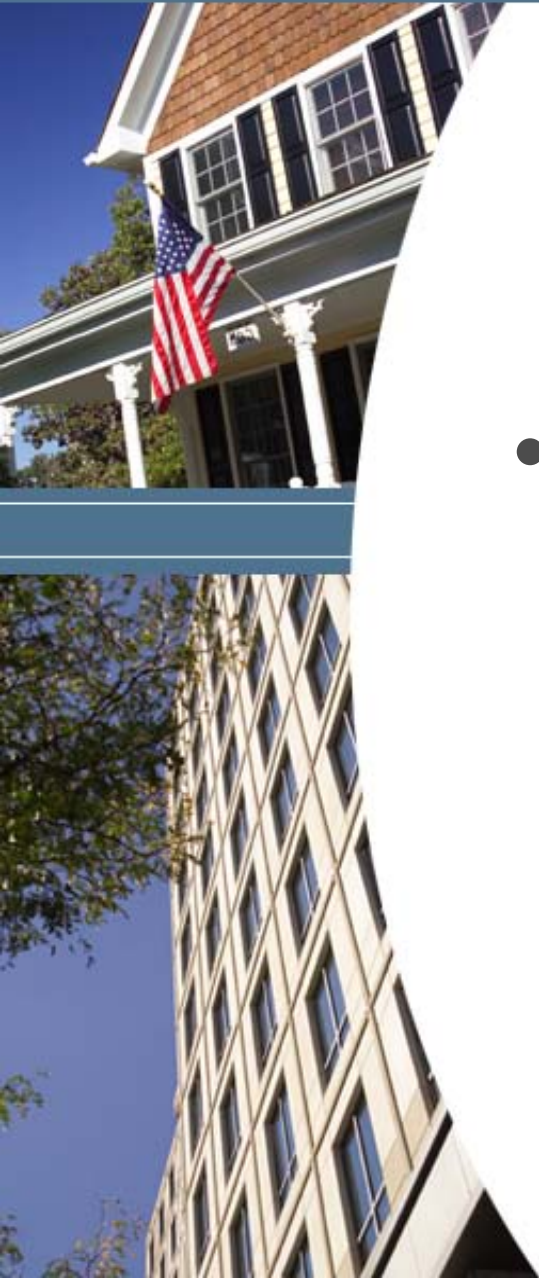
A. Anatomy of a Typical F/C - LM Rescue Scheme

I. Prevention and Recovery

a. Recovery - Pockets of Money

1. Fraudster is an Attorney
 - i. Closing Protection Letter if closing transaction
 - ii. Local/State Bar Assoc. Victim Funds
 - iii. Personal/Firm/Partnership Assets
 - iv. Malpractice carrier with negligence claim
2. Fraudster is a Realtor
 - i. Personal/Firm/Agency Assets
3. Fraudster is Notary
 - i. Simple Claim on Notary Bond
4. Tracking, subpoenaing, freezing and attaching
 - i. File suit with TRO – immediate hearing with Order
 - ii. Track money from fraud transaction to first Bank
 - iii. Subpoena Bank for records (repeat if needed)
 - iv. Identify proceeds, freeze account
 - v. Identify assets purchased with proceeds
 - vi. Equitable lien/trust on assets/Lis Pendens on real property

MBA Legal Issues - Litigation Panel: Defending Your Company Against Individual Cases: Overview



- II. Trends in Bankruptcy

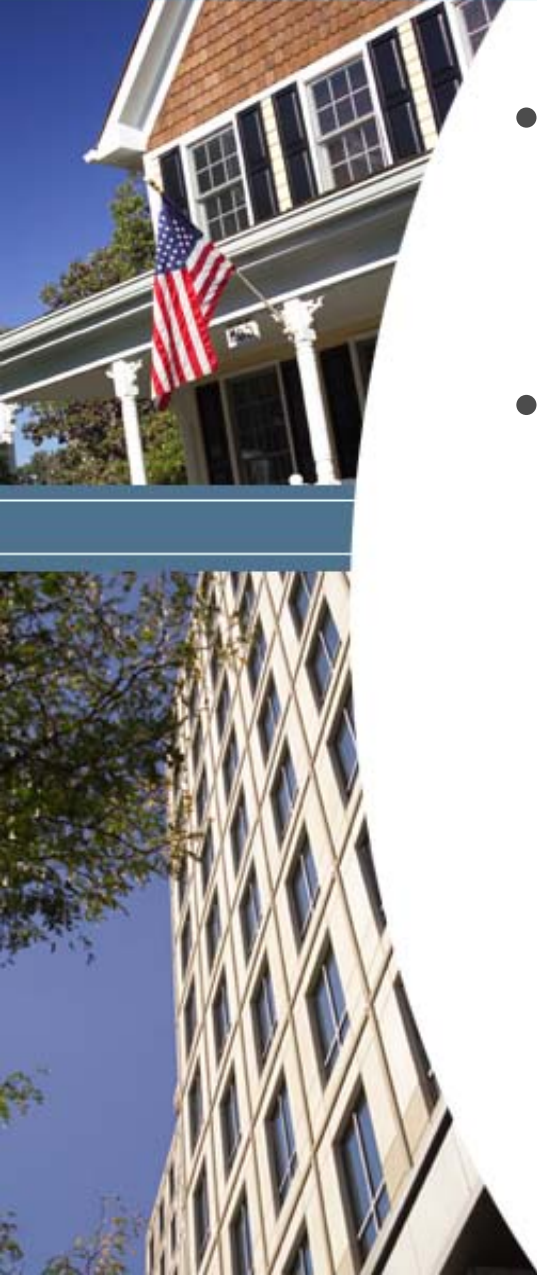
Bankruptcy Litigation



Bankruptcy Specific Litigation

- **Violation of the Automatic Stay**
 - » Has the mortgagee taken property of the estate without court approval?
- **Violation of the Confirmation Order**
 - » Has the mortgagee applied post-petition payments consistent with the terms of the plan?

Bankruptcy Litigation

- 
- **Violation of the Discharge Injunction**
 - » Has the mortgagee properly documented the debtor’s “fresh start”?
 - **Improper/Unauthorized Fees, Costs and Charges**
 - » Is the mortgagee over secured?
 - » If so, were applicable fees approved by the Court?
 - » Must the mortgagee disgorge on unauthorized fees and expenses?

Case Studies



In re Nosek – Bankruptcy Court for the District of Massachusetts

- » Failure to differentiate between cure payments and direct payments under plan
 - Section 1322(b)(5) allows “maintenance and cure” plans
 - Maintenance payments may come from debtor or trustee
- » Lots of Zeroes
 - \$250,000 in emotional distress damages
 - \$500,000 in punitive damages
 - On appeal and appears to be an anomaly in terms of damages
 - But in *In re Slick*, in the S.D. of Alabama, sanctions were \$2.0 million

Case Studies



In re Padilla – Bankruptcy Court for the Southern District of Texas

- » Bankruptcy Rule 2016 applies to expenses and fees of oversecured mortgagees
- » Errors by mortgagee in application of payments does not violate stay
- » Errors by mortgagee in application of payments might violate confirmation order and Rule 2016
- » May require disgorgement of fees and charges collected

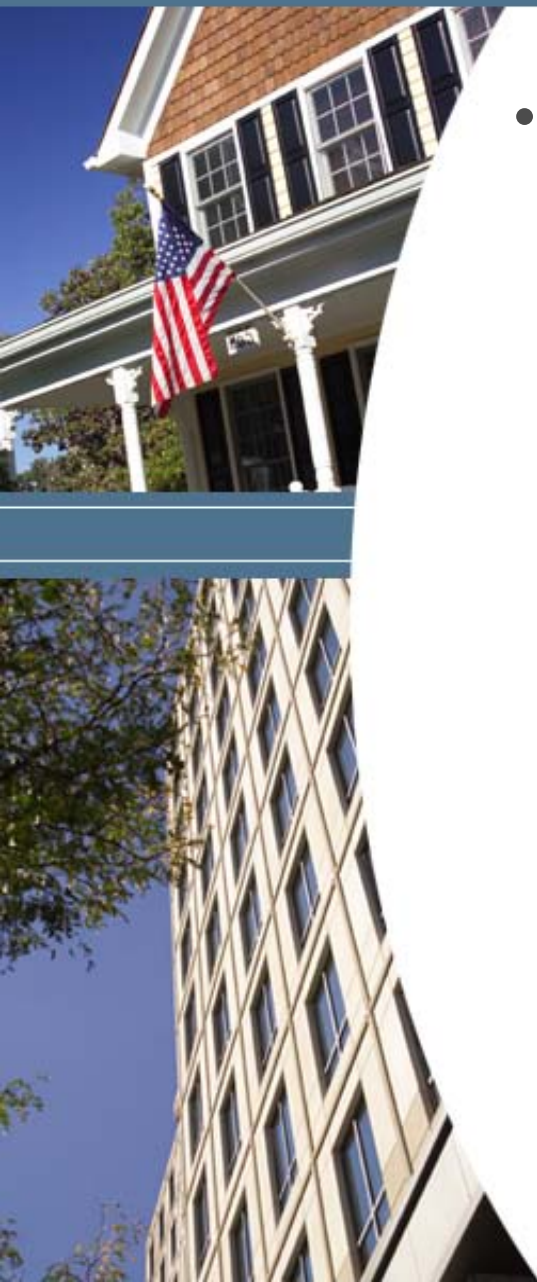
Case Studies



In re Sanchez – Bankruptcy Court for the Southern District of Texas

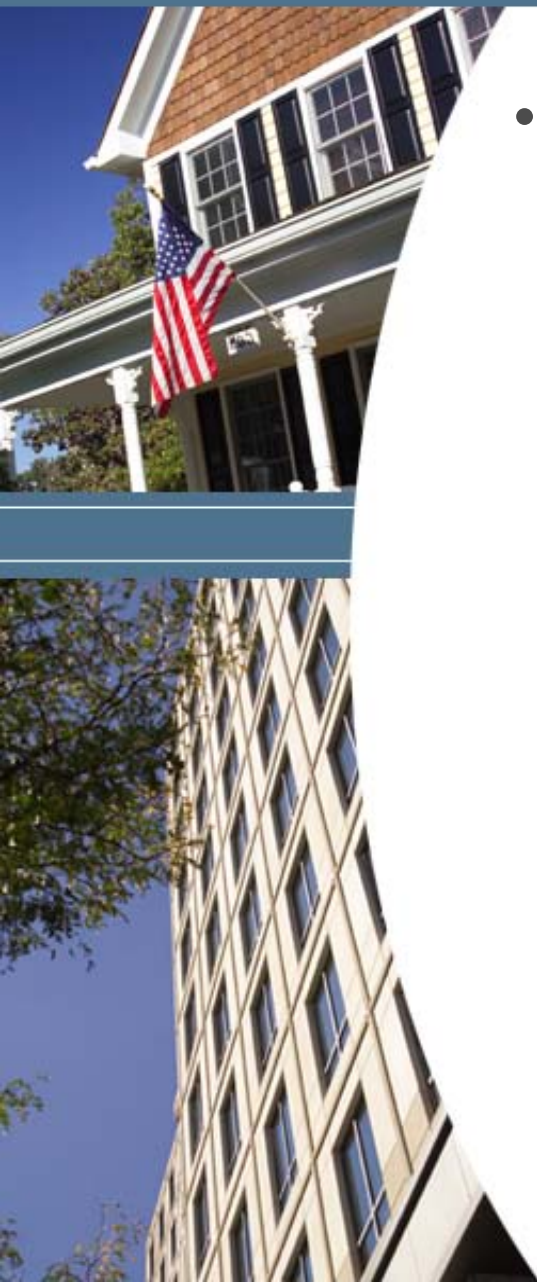
- » Errors by mortgagee in application of payments does violate stay
- » Difference between *Padilla* and *Sanchez* may be of minor practical consequence in terms of liability (if improper application, it either violates stay or violates confirmation order)
- » *Padilla* may be more favorable in terms of damages, because attorneys' fees specifically are allowed for violation of the automatic stay.

Case Studies



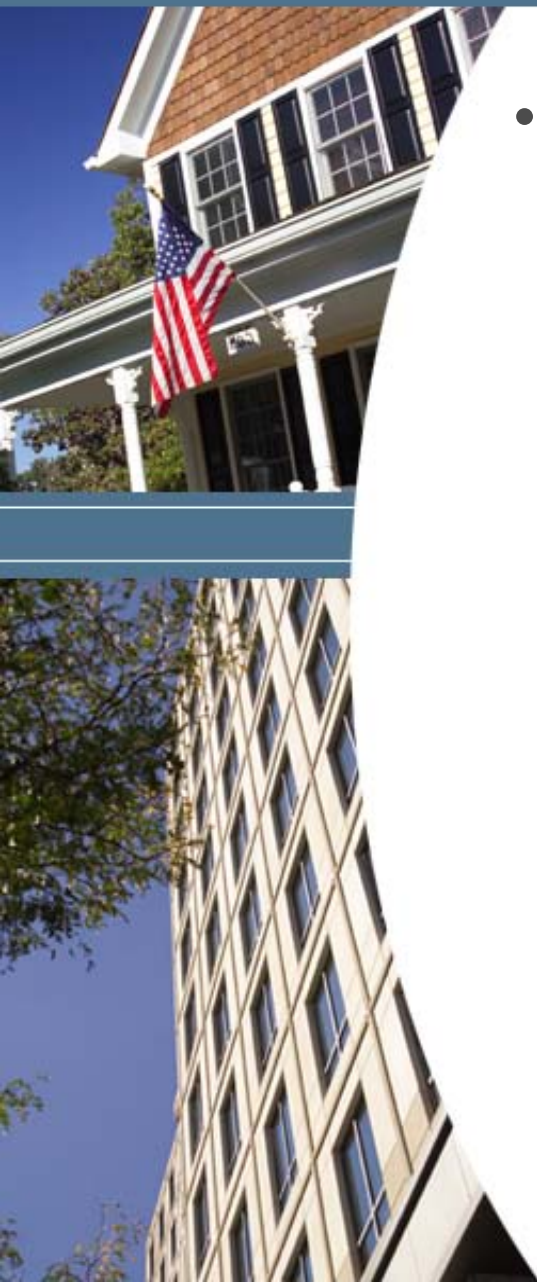
- In re Nibbelink – Bankruptcy Court for the Middle District of Florida, 2009
 - » § 524 is a post-discharge injunction against the collection of debts discharged in bankruptcy.
 - » Monetary awards not expressly authorized, but court may award actual and punitive damages under § 105.
 - » Mortgagee charged improper fees (i.e. no court approval) during life of debtors' chapter 13 case and attempted to collect such fees after debtors received discharge.

Case Studies



- Nibbelink (cont'd)
 - » Mortgagee called debtors several times, sent numerous ominous letters, ignored letters by debtors' counsel attempting to resolve matter; made false entries on debtors' credit report.
 - » Court awarded debtors \$3,383.44 in actual damages, \$15,000 in punitive damages; \$21,177.50 in attorneys' fees, \$842.00 in costs, and correction of debtors' credit report.

Case Studies



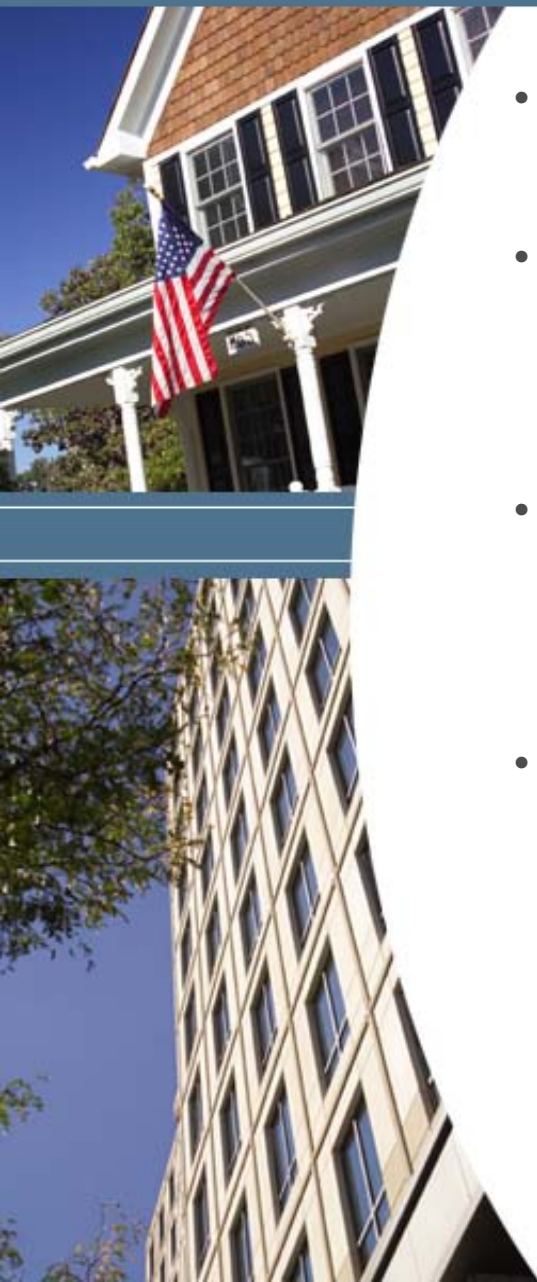
- In re Hildreth – Bankruptcy Court for the Middle District of Alabama, 2006
 - » Mortgagee made 60 phone calls to debtors' home and job and sent three letters to the debtors to collect non-existent mortgage delinquency.
 - » Debtor awarded emotional distress damages of \$9,000, punitive damages of \$18,000, and mortgagee ordered to repay trustee \$2,944.77 it had been paid by trustee on its claim.

Case Studies

- In re Payne – Bankruptcy Court for the District of Kansas, 2008

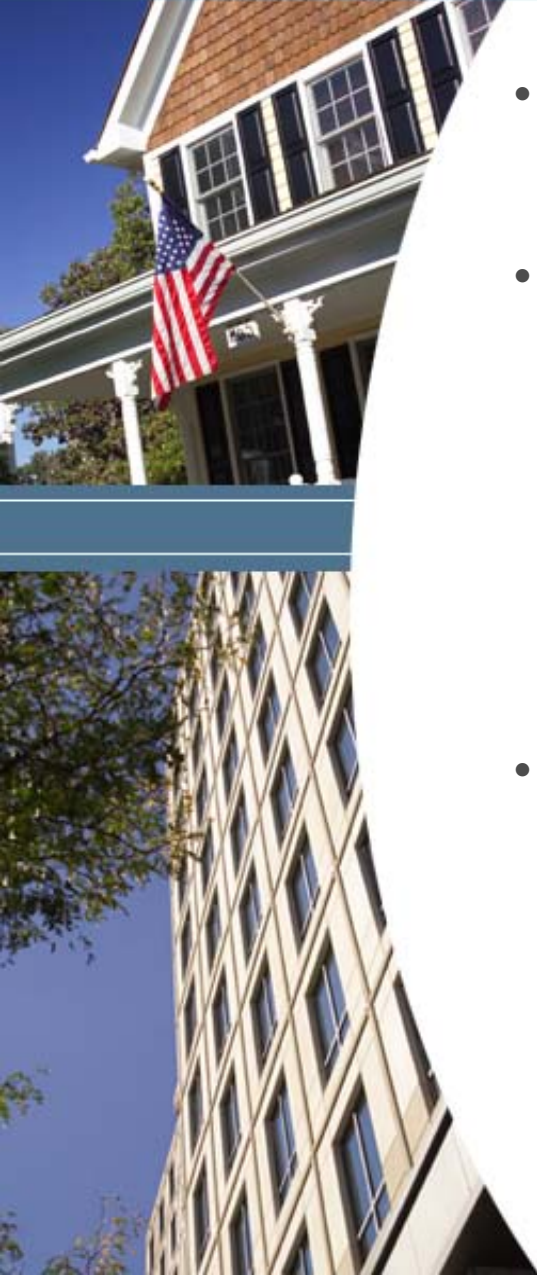
- » Servicer violated the automatic stay by applying trustee's payments to disallowed pre-petition late fees instead of allowed pre-petition claim, refusing to remove the disallowed fees from the account, and assessing and collecting post-petition fees without notice to debtors.
- » Servicer violated the stay by attempting to collect disallowed fees from debtors via payoff letter.
- » Debtors awarded \$16,348.22 in damages, which included \$3,350 for emotional distress, out-of-pocket expenses, and punitive damages and crediting the debtors' account in the amount of disallowed charges.

Violation of Section 1322(b)(5) Order

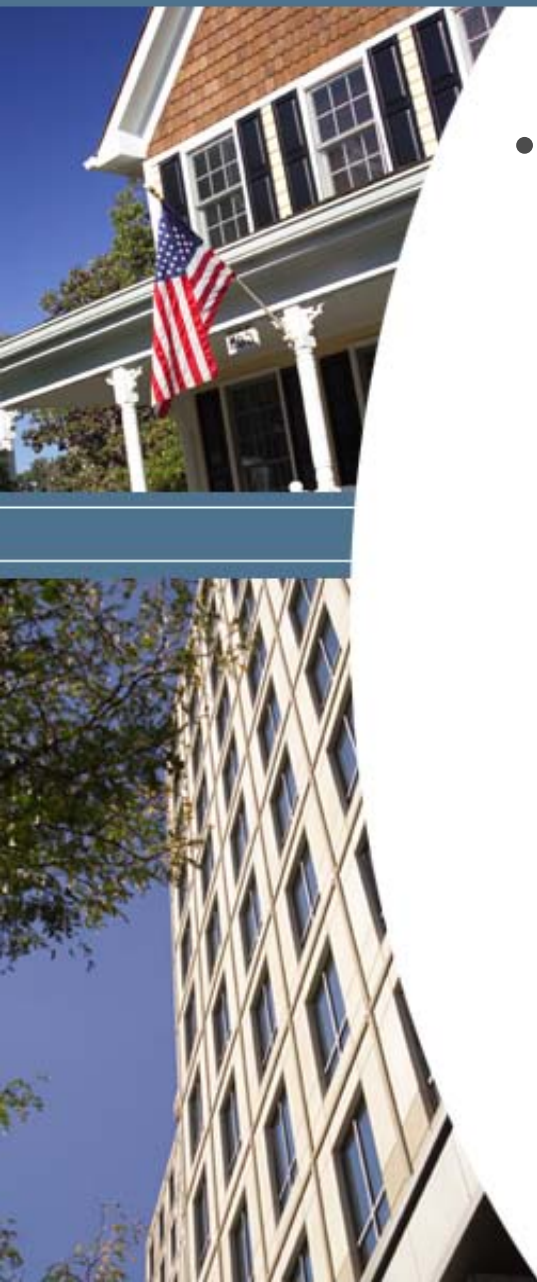


- At the end of cases, the Chapter 13 Trustees file a motion to declare debtors' mortgage payments current as of a date at the end of the cases.
- “The § 1322(b)(5) proceeding has an obvious purpose, that is, to ‘flush out’ all undisclosed charges and assessments that might have arisen during the administration of the Chapter 13 case.” *In re Jones*, 2010 WL 55328, at *1 (Bankr. N.D. Miss. Jan. 6, 2010)
- It is “an additional mechanism to prevent Chapter 13 debtors from being ‘blind sided’ by creditors who demand otherwise unknown fees and charges immediately after debtors emerge from bankruptcy protection.” *In re Eddins*, 2008 WL 4905477, at *1 (Bankr. N.D. Miss. Oct. 20, 2008).
- The Court has repeatedly held that a cause of action exists for violation of this Order.

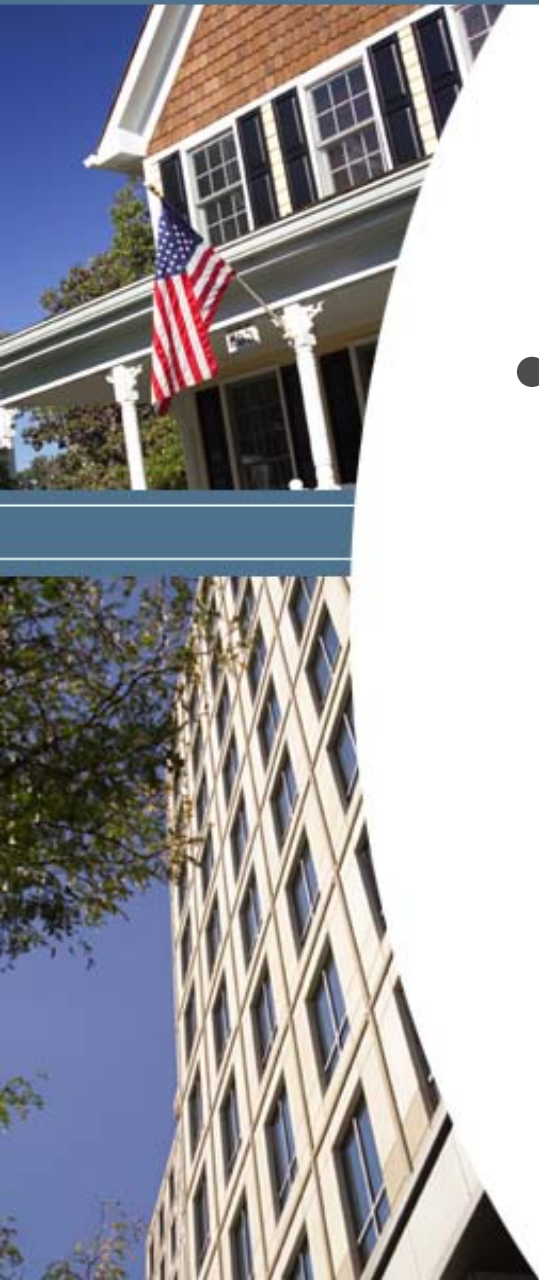
New Section 524(i)



- The 2005 amendments to the Bankruptcy Code added a new subsection.
- Subsection (i) provides: The willful failure of a creditor to credit payments received under a plan confirmed under this title, unless the order confirming the plan is revoked, the plan is in default, or the creditor has not received payments required to be made under the plan in the manner required by the plan (including crediting the amounts required under the plan), shall constitute a violation of an injunction under subsection (a)(2) if the act of the creditor to collect and failure to credit payments in the manner required by the plan caused material injury to the debtor.
- Courts have held that section 524(i) is not an exception to the anti-modification provision of section 1322(b)(5), but rather a post-discharge remedy for the debtor. *E.g.*, *In re Winston*, 416 B.R. 32 (Bankr. N.D.N.Y. 2009; *In re Collins*, 2007 WL 2116416, at *4 (Bankr. E.D. Tenn. July 19, 2007).



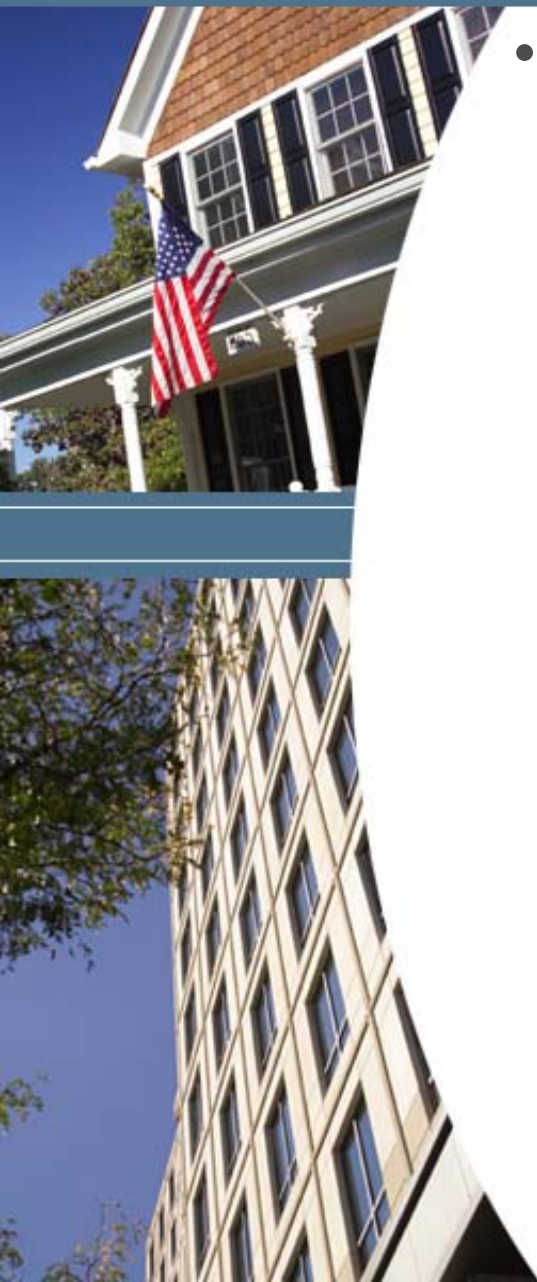
- II. - Trends in Bankruptcy
 - » Take aways:
 - Having a clear policy and procedure in place for default counsel in representation, including expectations and indemnity
 - QA/QC – are needed throughout the bankruptcy process –
 - › A) To Ensure no erroneous POC filed
 - › B) No Violation of Automatic Stay
 - › C) No Violation of Confirmation Order
 - › D) No Violation of Discharge Injunction
 - › E) No Unauthorized Fees, Costs or Charges



- III. Litigation With “Others”

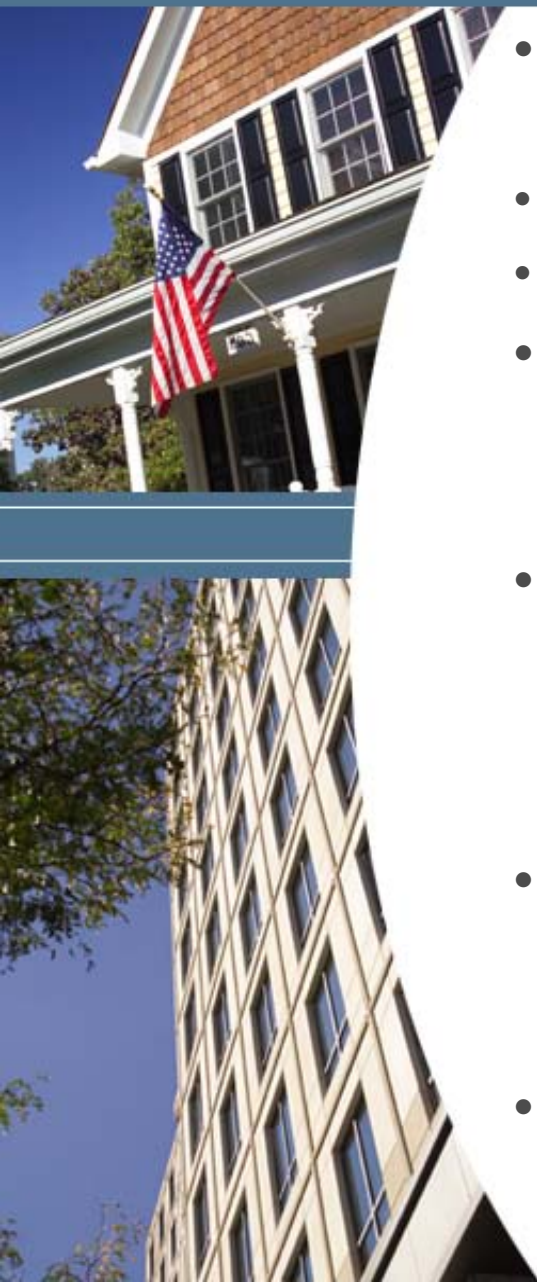
MBA Legal Issues - Litigation Panel::

Defending Your Company Against Individual Cases: Litigation with Others

- 
- Litigation (and claims) with Others, includes:
 - » 1) State Agencies
 - » 2) State Attorney Generals
 - » 3) Municipalities (Portfolio Level)– Leverage on the Trustees
 - » 4) HOAs, Condos, PUDs, etc
 - » 5) Municipalities (Loan Level) – Individual Fines can be outrageous
 - » 6) MI companies**
 - » 7) Title Insurance companies**
 - » 8) Vendor Management
 - » 9) Repurchases

MBA Legal Issues - Litigation Panel::

Defending Your Company Against Individual Cases: Overview



- The key common factors in handling these cases on an individual level:
 - 1) COST
 - 2) CONTROLLING THE DOCUMENTATION AND INFORMATION
 - A) Your company does not want the reputational risk of having a “crusading” state actor decide to take an unhealthy interest your actions
 - B) ** Aggregate your MI and Title Claims and then present them. You are going to do the individual file work anyway – but it is so much more powerful when you present the collective amount rather than the individual cases
 - C) Aggressive Municipalities need to be addressed on a collective basis or the individual properties are going to be a logistical nightmare.
 - D) Handle these at the highest level possible – so the costs do not consume your company

MBA Legal Issues - Litigation Panel: Defending Your Company Against Individual Cases: Overview

• SUMMARY

- 1) Litigation and Fraud in Loss Mitigation
 - » I. Loss Mitigation - Generally
 - Forbearance
 - Repayment Plan
 - Capitalize the delinquency
 - Loan Modification
 - Assumption
 - Deed In Lieu
 - » II. Short Sales
 - » III. Loan Modification & Foreclosure Scams
- 2) Litigation Trends in Bankruptcy
 - » I. POC Violations
 - » II. Violations of Automatic Stay
 - » III. Violations of Confirmation Order
 - » IV. Violations of Discharge Injunction
 - » V. Unauthorized Fees, Costs or Charges
- 3) Litigation with “Others”
 - » I. Costs
 - » II. Aggregating and Handling the Claims at the Highest Level
- 4) Summary and Questions

Questions

- *MBA's Legal Issues and Regulatory Compliance Conference 2010*
- May 2 - 5, 2010
- Coronado, CA

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