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Reverse Mortgage Documentation: Learning the Lessons from Forward Mortgage Foreclosures

CHRISTOPHER J. WILLIS AND MERCEDES KELLEY TUNSTALL

For years now, we have seen headline after headline about documentation inconsistencies in mortgages causing problems for lenders and servicers who proceed to foreclosure. Concerns have been raised by courts, regulators and state attorneys general about whether required affidavits have the correct form, whether notaries have signed properly, and whether the chain of title is valid. For forward mortgages, the foreclosure process is the lender's last resort, and is supposed to be an unusual end result for the lender. But for reverse mortgages, foreclosure is a frequent result of the mortgage, and this is all the more reason why it is important for reverse mortgage lenders to review their processes carefully to ensure that their documentation is free of the concerns that are so frequently discussed in the forward mortgage process.

Before getting into a discussion of the specific concerns raised in forward mortgage documentation and the lessons these concerns can teach reverse mortgage lenders, it will be helpful to identify how reverse mortgages are documented differently from forward mortgages. For example, many states require a borrower counseling form to be part of the mortgage documentation. Ensuring that all of the required signatures are on the form, and that the signatures are true and correct and can be properly proved, will be an extra step. When the mortgage is a Home Equity Conversion Mortgage (HECM), the required correspondence with HUD should be in the file. Also for HECMs, if there are two sets of deeds of trust and notes, one showing the name of the lender and one showing HUD, then a quality assurance review should take place to ensure that the borrower's signatures and any required affidavits or notarizations are consistent with each other and are fully executed.

Below we set forth some of the common areas of criticism that have arisen in forward mortgage foreclosures, as a way to preview for reverse lenders the types of issues that may arise in reverse mortgage foreclosures.

1 | CHAIN OF TITLE One of the most common assertions made in connection with forward mortgage foreclosures is that the foreclosing entity cannot demonstrate that it properly holds the note and/or the mortgage. For any loan that is acquired after origination, it is critical for the purchaser to have reliable documentation showing the transfer of the note and an assignment of the mortgage, and a way of authenticating that documentation.

2 | DOCUMENT EXECUTION Many foreclosure-related documents have to be notarized, a process governed by somewhat archaic rules. In order to avoid challenges, it is important that notaries actually witness the signature as it is made, even if the notary is familiar with the signer and his or her signature. Moreover, notaries should be aware of, and follow, state law regarding notary logs and other similar requirements.

3 | VERIFICATION OF AMOUNTS DUE
In any foreclosure – whether judicial or non-judicial – the account must be reviewed for the proper amount due, including any applicable late fees, accrued interest and payments for taxes and insurance made by the lender. Before an employee signs a document attesting to the amount owed, be sure that the employee has access to the necessary records to validate that amount, and be mindful of any vulnerabilities in the record-keeping system that might cause inaccuracies.

4 | FORECLOSURE-RELATED FEES
When foreclosure-related fees are added to a loan balance, make sure that they are permitted by the loan agreement and are reasonable in terms of amount and timing. A great deal of criticism of foreclosures in forward mortgages has revolved around these sorts of fees and charges, making it a prime target for scrutiny in the reverse mortgage context.

The focus on foreclosure documentation in forward mortgages has set the stage for similar scrutiny of reverse mortgages, and the extra documentation required in a reverse mortgage adds to this challenge. We believe that reverse mortgage servicers can avoid many of the difficulties that have befallen forward mortgages by simply examining their foreclosure processes and taking into account the lessons learned in the forward mortgage world. Time and effort spent on prevention now will likely be a very worthwhile investment in preventing litigation and governmental action later. x