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# RESIDENTIAL LOAN SERVICING: *SEVEN MAJOR MISTAKES TO AVOID*

**John L. Hosack, Esq., Jason E. Goldstein, Esq., Mr. Joffrey Long**

**12:00 Noon PST**
**August 9, 2016**
**Webinar**
**Buchalter Nemer**
**1000 Wilshire Boulevard, Suite 1500**
**Los Angeles, California 90017**

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# I. INTRODUCTION

## A. Servicing Agreements

**"'Accepted Servicing Practices' means . . . Reasonable and customary servicing practices . . . in accordance with . . . accepted mortgage servicing practices for prudent servicers . . . the terms of the related Mortgage Loan Documents . . . Applicable Law and Regulations, and . . . servicing standards promulgated by the CFPB."**

## B. The Real Estate Settlement Procedures Act Servicing Rules ("RESPA")

## C. The California Homeowners' Bill Of Rights ("CHBOR")

## D. How RESPA and the CHBOR are generally the same *and* different.

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## II. MISTAKE #1 – AVOIDING BORROWER CLAIMS THAT THE SERVICER TOLD THEM THAT THEY HAD TO BE IN DEFAULT TO GET A LOAN MODIFICATION

### A. Training personnel to say the "right thing!"

1. **Borrowers may misinterpret statements from servicers as requiring them to be in default – *or to not make payments* – to obtain a loan modification.**
2. **Borrowers must be told that even if they are behind in payments, they may not qualify for a loan modification –**
3. **Borrowers must be told if they don't make their payments they may lose their property.**

### B. Pre-recorded message played to every borrower who calls to discuss a loan modification:

**"Pursuant to your loan contract, you must make your payments as agreed. You will not be told by us to not make your payments. You should not construe anything said today as asking you to not make your payments."**

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## II. MISTAKE #1 – AVOIDING BORROWER CLAIMS THAT THE SERVICER TOLD THEM THAT THEY HAD TO BE IN DEFAULT TO GET A LOAN MODIFICATION

C. Do you want a protocol agreement?

D. Can you get a protocol agreement?

E. Is the protocol agreement going to be unilateral or bilateral?

F. What's in it?

**"I fell behind on payment based on _____. I was not told by my servicer or lender to stop making payments."**

**"I acknowledge receipt of a letter from servicer which informed me that . . .**

**"In the event we do reach terms for a modification, the lender may require a release of disputes in consideration for providing the modification."**

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## III. MISTAKE #2 – AVOIDING CLAIMS THAT THE LOAN MODIFICATION PROCESS WAS HANDLED IMPROPERLY

**A. Document the file so the "designated representative" or "PMK" in a lawsuit can easily explain what happened.**

**Case example: servicing codes**

**B. Explain clearly in writing (email or letter) what options may be available to the borrower**

**C. "Life after HAMP" and proprietary options add another layer requiring clarity.**

**12 C.F.R. § 1024.38 ("[provide accurate information regarding loss mitigation options available to a borrower . . . ")**

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## III. MISTAKE #2 – AVOIDING CLAIMS THAT THE LOAN MODIFICATION PROCESS WAS HANDLED IMPROPERLY

### D. Explain clearly in correspondence what is needed to make the loan modification documentation "complete."

**12 C.F.R. §1024.38(b)(2) ("identify documents and information that a borrower is required to submit to complete a loss mitigation application . . .")**

1. **What type of income information is being asked for? Paystubs? Tax Returns? Do you want 4506-T? Financial Statements?**
2. **Consider a written application which contains the exact documentation and information required to be considered – whether you take the information down yourself or require it to be filled out by the borrower.**

**Case example: defeat the borrower's claim on a motion to dismiss – save money on legal fees.**

3. **Confirming receipt of the documents you have received.**

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## III. MISTAKE #2 – AVOIDING CLAIMS THAT THE LOAN MODIFICATION PROCESS WAS HANDLED IMPROPERLY

**D. Do not delay in asking for documents or information which are needed.**

**See, 12 C.F.R. § 1024.41(b) ("[a] servicer shall exercise reasonable diligence in obtaining documents and information to complete a loss mitigation application")**

**E. Loan modifications must have a release of all claims.**

**F. Loan modification is the time to add any terms you would like to have in your loan documents, but did not have before.**

**G. Loan modification endorsements to your Loan Policy of Title Insurance.**

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## III. MISTAKE #2 – AVOIDING CLAIMS THAT THE LOAN MODIFICATION PROCESS WAS HANDLED IMPROPERLY

### H. The Letter Regarding The Present Unavailability Of Foreclosure Alternatives

1. **Reasons for denial must be clear and a narrative explanation is recommended.**

**See, 12 C.F.R. § 1024.38(b)(2)(v) ("[p]roperly evaluate a borrower who submits an application for all loss mitigation options for which the borrower may be eligible pursuant to any requirements established by the owner or assignee of the borrower's mortgage loan . . ."**

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# Save The Date!

# ESCROW INSTRUCTIONS AND TITLE INSURANCE: FIVE CRITICAL ISSUES + THREE TRAPS TO AVOID

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## IV. MISTAKE #3 – AVOIDING TRIAL PAYMENT PLAN ISSUES

### A. Documentation is everything! No oral Trial Payment Plans ("TPP").

### B. The written TPP must contain the following language:

1. **The TPP does not change the loan terms**
2. **The TPP is solely for the lender's/servicer's use to determine if the borrower "may" be qualified for a loan modification or foreclosure prevention alternative.**
3. **There is no express or implied agreement to modify the loan terms simply by granting a TPP and the borrower understands and agrees to this.**

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## IV. MISTAKE #3 – AVOIDING TRIAL PAYMENT PLAN ISSUES

C. Personnel must be trained to treat borrowers with respect, but it is not necessary to make them happy or say what the borrowers want to here (when what the borrowers want to hear is not true).

D. The "form" TPP should be reviewed by a qualified professional.

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## V. MISTAKE #4 – AVOIDING SINGLE POINT OF CONTACT ISSUES

A. Ensuring that the "team" assigned to a borrower has access to current information.

See 12 C.F.R. § 1024.40(a)(1)("[a]ssign personnel to a delinquent borrower . . ."

See, *Cal. Civ. Code* § 2923.7(e)("'single point of contact' means an individual or team of personnel . . .")

B. Consider assigning teams at the onset of an initial call, litigation, bankruptcy, generalist. If litigation or a bankruptcy is filed – ask for attorney information, if any, and copies of pleadings or case numbers.

C. Personnel with specialized knowledge of bankruptcy may be assigned to delinquent borrowers who file for bankruptcy (*but interaction should be limited*).

See, Commentary to 12 C.F.R. § 1024.40(a)

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## V. MISTAKE #4 – AVOIDING SINGLE POINT OF CONTACT ISSUES

**D. Setting up your "team" must be carefully considered, especially "who" speaks to the borrower and under what circumstances.**

***Consider compartmentalizing, if economically feasible.***

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# VI. MISTAKE #5 – AVOIDING FORECLOSURE ISSUES

## A. Dual Tracking

**1. Consider informing a borrower requesting a loan modification, in writing, with a clear "form letter" stating that the process toward foreclosure does not stop until the servicer receives a completed loan modification application and supporting documentation and we send you a letter confirming a completed application has been received.**

## B. When boarding the loan, or no later then before recording a Notice of Default, a servicer should consider a *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919 "review" or a quality review of the file.

# VI. MISTAKE #5 – AVOIDING FORECLOSURE ISSUES

**C. Loan modification requests after a Notice of Default and Election to Sell Under Deed of Trust is recorded.**

1. **At what point do you raise a borrower's request to a foreclosure specialist, management or to counsel?**
2. **Lender's ability to help a borrower may be at its greatest before a foreclosure sale.**

**D. Servicer should consider not allowing its personnel to give foreclosure sale information to borrowers.**

1. **Borrowers may be referred to the foreclosure trustee for the date of the sale and possibly reinstatement figures.**
2. **The specific person who may be assigned to bankrupt borrowers should be similarly instructed.**

**E. Generally, accepting payments during the publication period involved with a Notice of Sale is more trouble than it's worth.**

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## VII. MISTAKE #6 – AVOIDING CLAIMS BASED ON INCORRECT OR DISPUTED COMMUNICATIONS ISSUES

### A. Are "form letters" what you really want:

1. While a loan modification is being considered.
2. After foreclosure proceedings are initiated.

Case example: Letter sent after foreclosure sale asking to discuss "foreclosure prevention alternatives."

### B. Every letter should be written so that a servicer would be proud if it was Plaintiff's Exhibit #1.

### C. Avoiding "he said, she said" situations with proper documentation, including confirming oral communications in writing.

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## VII. MISTAKE #6 – AVOIDING CLAIMS BASED ON INCORRECT OR DISPUTED COMMUNICATIONS ISSUES

### D. When borrowers send letters claiming violations of RESPA and/or the CHBOR – or raising issues with the origination of the loan (TILA, FHA, ADA, etc.):

1. **The servicer should consider promptly engaging qualified counsel to draft a response to be sent in the name of the servicer, at least in the first instance.**
2. **An ounce of prevention is less costly than a pound of cure.**
3. **Borrowers go from letters to the servicer/lender, to government agencies (CFPB) and then to lawsuits.**

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# VIII. MISTAKE # 7 – AVOIDING CLAIMS WITH QUALIFIED WRITTEN REQUESTS/NOTICES OF ERROR

**A. Acknowledgment letters should be sent, but not concede it is a QWR.**

**B. What is a Qualified Written Request ("QWR")?**

1. **A QWR, in general, is a written correspondence identifying the borrower and account which includes a statement of reasons explaining in sufficient detail the claim is in error.**

**C. What is not a QWR?**

1. **A QWR is not a request for everything in the world. See, *Medrano v. Flagstar Bank* (9th Cir. 2012) 704 F.3d 661, 666 ("the letter must request information about servicing . . . [this] ensures that the statutory duty to respond does not arise with respect to all inquiries or complaints from borrowers to servicers").**

2. **Providing unneeded responses may allow for borrowers to make unsupported claims regarding assignments. See, *Yvanova v. New Century Mortgage* (2016) 62 Cal.4th 919**

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## VIII. MISTAKE # 7 – AVOIDING CLAIMS WITH QUALIFIED WRITTEN REQUESTS/NOTICES OF ERROR

**D. Responses to QWR's must be detailed and explain exactly why the account was/was not in error – no form letters.**

**Case example: *Renfroe v. Nationstar Mortg., LLC* (11th Cir. May 12, 2016) 822 F.3d 1241**

**E. When QWR's - or letters purporting to be QWR's - should be elevated to senior personnel or qualified counsel must be carefully considered.**

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# Conclusion

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