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Federal Judge Sustains 8 Count Complaint Against US Bank, OneWest, Ocwen

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See 62-Order Denying MTD Buffington Behrens

One of the interesting things about the history of these mortgages and foreclosures is that back when the tidal wave of foreclosures began the banks were denying there was any trust involved in the transactions. Now they claim that their right to appear in court as representative of the owner of the debt or the holder in due course is derived from the Trust instrument (Pooling and Servicing Agreement) of a Trust! But back in 2007-2009, they were busy denying that a Trust existed.

- As I have been stating for months now, the courts are turning the corner. They don't like what they see on the "lender" side.
- First they questioned why the modifications were so random. Judges know that most foreclosures are worked out in a settlement because the bank wants nothing to do with the property if they have a viable borrower who needs a little help.
- Then they questioned why the original documents were nowhere to be found. Where were they? Without the original documents in court, there was obviously SOMEBODY holding them and using them to either make a claim or sell them to another party. Then they questioned why the servicer was constantly changing — causing a proof problem because the new servicer was put in AFTER the default (sometimes by years) and obviously knew nothing except what records they IMPORTED (hearsay) from another servicer.
- Then they questioned substitutions of Plaintiffs in judicial actions without amendment to the complaint. No allegation or exhibit was offered to explain the substitution.
- Then they questioned the relevance of the Pooling and servicing agreement until the banks conceded that whatever right they had to enforce the note or mortgage had to come from a REMIC Trust via the Pooling and Servicing Agreement.
- Then they questioned whether the Trust actually bought the loan, which DOES make the PSA irrelevant, but also means that none of the parties on the "bank" side had any right to be substituting Trustees on deeds of trust nor issuing notices of default, notices of sale or filing foreclosures.
- And now they are coming to grips with the notion that the entire mortgage premise is a scam and so are the foreclosures, to wit: by **not alleging they are holders in due course**, the foreclosing entities are **admitting either unclean hands (which bars success in a court of equity enforcing the mortgage) or they are admitting their was no purchase of the loan for value.**

Some Borrowers seek to become proactive and filed suit to clear up the questions of title,. and the identity of their creditor (something that should have been disclosed in what was table funded loan that is predatory per se — REG Z). Many of these law suits were dismissed under the theory that there was no pending controversy — but that finding was based on the court bias that the loan documents were real, not faked.

Now comes the first case to address the issue of fake documents, fake notes, fake mortgages and fake foreclosures on the Federal level. In a carefully worded opinion a Federal Trial judge has analyzed the entire context of the loans, the documents and the money trail and concluded that the borrower has stated a cause of action for money damages and equitable relief against some of the top players, already in trouble on other fronts, for gaming the system without having any financial interest in the debts, notes, mortgages, deeds of trust or anything else — all under cover of the investors' reasonable belief that they were prohibited from getting notice or even asking about the status of any loan or the loan portfolio in its entirety.

Among the facts salient to the Judges decision were the following:

1. Borrowers never received a signed modification agreement from the "lender" which was required for the modification to take effect. They were then relentlessly dual tracked where the objective was a foreclosure sale and to collect money under a modification agreement that was not in effect according to the foreclosing party. [This practice of luring vulnerable borrowers into questionable modification agreements and taking payments that are never allocated to the loan is widespread. Many judges have entered orders enforcing the modification agreement despite the lack of execution by the alleged servicer or the alleged representative of the holder in due course or owner of the debt.]
2. The representative of the servicer told the borrower not to worry about the notices of default and notices of sale because they were just automatically generated from a computer system that did not reflect the trial. Plan under which they were making payments and under which the payments were accepted.
3. The borrowers were coerced into a second modification agreement that contained terms that was significantly worse than the prior agreement reached between the parties.
4. One West was erroneously identified as the beneficiary under the deed of trust despite the fact that it had gained no interest in the deed of trust from the original beneficiary "because there was none to give." In this case the deed of trust contain the wrong property description.
5. The plaintiff in this case is alleging that one West had no right to file a substitution of trustee under the deed of trust because one West was not a beneficiary or mortgagee. [By attacking the substitution of trustee, the plaintiff was thereby attacking everything else that followed as "fruit of the poison tree."]
6. Plaintiff alleged that a 4D of trust was recorded to correct the legal description. Plaintiffs claim that a new legal description was attached to the original deed of trust and it was really recorded without their knowledge or consent. Plaintiffs claim that their signatures from the original deed of trust were left on the rate recorded trust without their permission to make it appear as though the reason recorded trust was properly signed. [This is a trick that is being used in virtually every foreclosure action across the country. By attaching apparently facially valid documents to other invalid documents parties

attempting to enforce foreclosure are intentionally misleading the courts, the borrowers, bank regulators, government sponsored entities that have issued guarantees of the loan, government entities that have entered into loss sharing agreements with a party claiming losses on loans they don't own, and law enforcement.]

7. The defendant's conceded at the preliminary injunction hearing or judge both that they were unaware of any Arizona statutory or case law that permits unilateral modification and re-recording of a deed of trust or mortgage for the purpose of correcting a legal description or anything else, as was done in this case. [This is exactly what is happening with most promissory notes and mortgages throughout the country. They attach what they call an "allonge" without the knowledge, consent to the signature of the borrower. These instruments purport to contain endorsements or assignments. But in order to be truly effective they would either be required to be on the face of the note or prove that there was no room on the face of the note and therefore the need to attach an additional page. But these "Allonges" are intended to be considered part of the note and therefore subject to the signature of the borrower. But at the time the borrower executed the note, the so-called "allonge" did not exist.

Most of the statutes cited in this decision have their counterparts in most of the states. Thus while this decision is not authoritative, the analysis is extremely persuasive and should be used by those defending foreclosures or taking a proactive stance to remove fake documents that were procured by fraud or behavior that is described as predatory per se.

I invite everyone to read the entire case. The salient points of this decision are as follows:

1. Count 1 of the plaintiffs complaint alleging **negligence per se** against the defendants was sustained.
2. Count 2 For **negligent performance of undertaking** under the "good Samaritan doctrine" was sustained.
3. Count 3 Alleging **false documents** was sustained. This count also contained allegations of forgery
4. Count 4 alleging **payment, discharge and satisfaction** was sustained. The court quoted from the Steinberger decision [also in Arizona] and said it "if it is true that the FDIC has already reimbursed OneWest," then OneWest was not entitled to recover the same money again, although there could be an action against the borrower by a third party who has made such payments. But that action would not be based upon a liquidated amount nor would it be secured by a mortgage or deed of trust.
5. Count 5 Alleging **breach of contract** was sustained as an alternative basis for liability of the defendants.
6. Count 6 also alleging breach of contract relating to the first **loan modification agreement** was sustained.
7. Count 7 Alleging fraud against all of the defendants was dismissed. [But this can be brought back again later upon a showing to the judge of facts that have produced in discovery or investigation during the progress of the case.]
8. Count 8 alleging **trespass to real property** was sustained. None of the defendants have the right to enter upon the property while plaintiff was still the owner of the property.

9. Count 9 Alleging **violation of the fair debt collection practices act (FDCPA)** was sustained. And the court specifically ruled against the proposition that mortgage servicers are not debt collectors under the FDCPA.

All these claims were brought in Arizona and other states previously but they were summarily swept aside before the judges started to suspect that the entire context of the mortgages, notes, debts and foreclosure were lacking credibility.