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Consumer Law Essentials - Rising from the Dead: Tackling Zombie Second Mortgages

March 11, 2024

2:00 p.m. - 4:00 p.m.

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Zombie Second Mortgages

LEGAL SERVICES NYC | Demand Justice.

GREATER BOSTON LEGAL SERVICES

NCLC National Consumer Law Center

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Todd Kaplan, Greater Boston Legal Services

Please put in chat

1. Name

1. Organization

1. What state your work in

https://www.youtube.com/watch?v=vuvkdUJjxXU

What you will learn

1. What is a zombie second mortgage?

1. What is the current problem?

1. Tools to help clients facing zombie seconds

What is the Problem?

- Recent increase in threat of foreclosure mortgages
- Comes out of the blue
- Asking for a lot of money!
- May threaten homeownership for families who are otherwise current on their first mortgage

Background: origination

- 80/20 loans or HELOCs in the early to mid-2000s
- Exorbitant interest rates, adjustable, early payment penalties, large balloon payments and other unfavorable terms
- Many borrowers quickly fell behind

Background: the Great Recession

- Homes underwater
- Seconds held off foreclosing as home often underwater on first mortgage
- Stopped sending statements, charged off the accounts, stopped communicating.

Background: the Great Recession

- Borrowers thought 2nd was taken care of:
  - loan modification on the first mortgage, bankruptcy, or some government relief and may have received a “1099-C” form indicating the debt was cancelled.

Common characteristics

- Underwater for years
- Charged-off
- Ceased communicating with the borrowers
- Some loans sold to debt buyers for pennies on the dollar– examples

Why Now?

Why Now?

- Equity - rising property values!
- Debt buyers – aggressive action to get a big return.
- Foreclose and receive a large payment or collect through threat of foreclosure
- Includes interest, fees for many years

What now?

- No notices or periodic statements for years
- After struggling to keep home in last housing crisis, now hit with threat of losing home and equity

Who is impacted?

Received foreclosure or collection notice when current on their first mortgage, and thought second mortgage

- charged-off
- discharged in bankruptcy, or
- thought to have been part of a loan modification years ago

- receive a demand for payment or notice of foreclosure for a zombie second mortgage.

Who else?

- Could not get in touch with their second mortgage holder when their home values were underwater,
- Received aggressive collection tactics:
  - Were told they face imminent foreclosure if they do not pay past interest and junk fees, or
  - Were pressured to accept unreasonable loan modification options.
- Threats of negative credit reporting or being subject to inaccurate credit reporting.

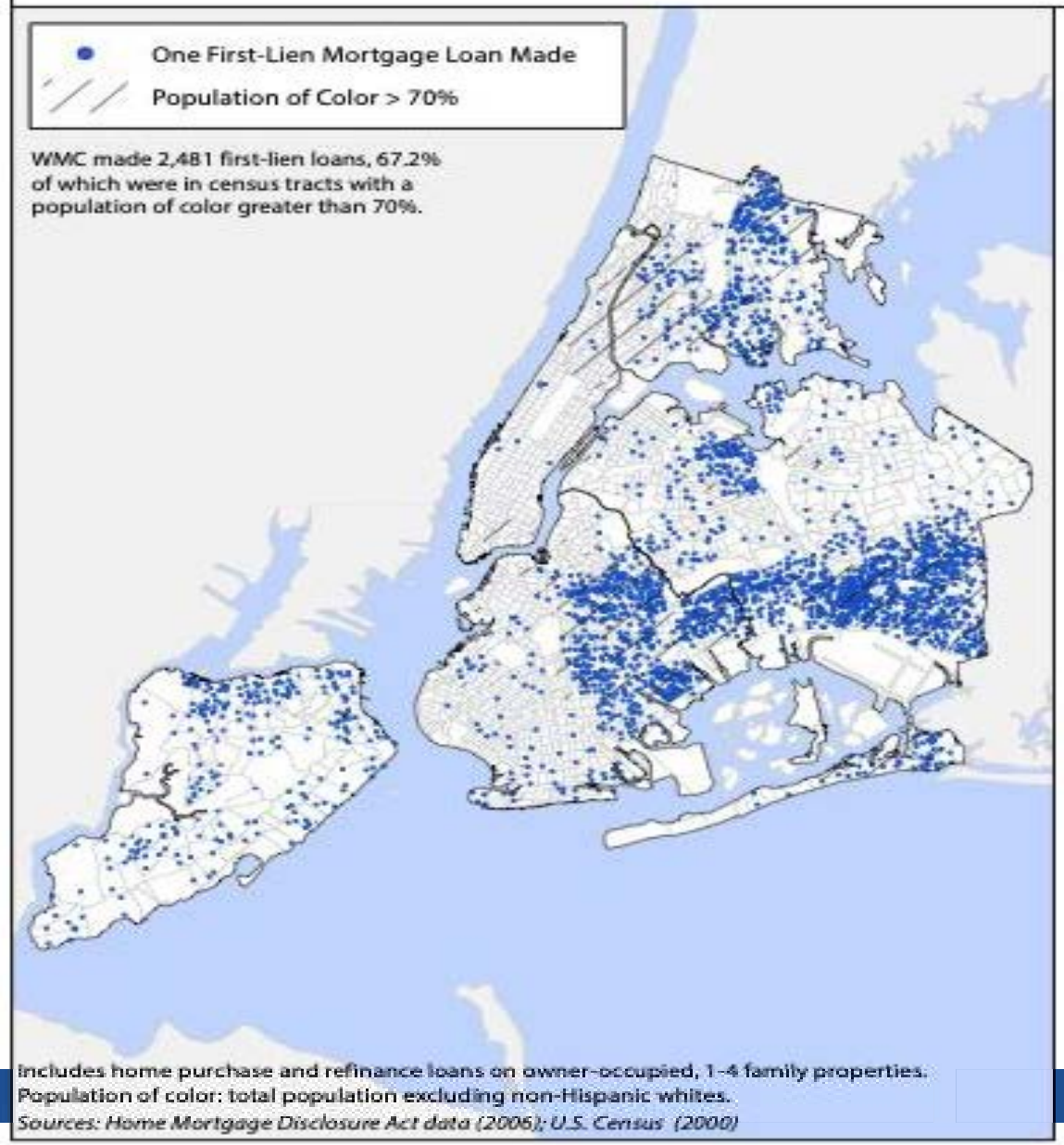
Communities Most Affected

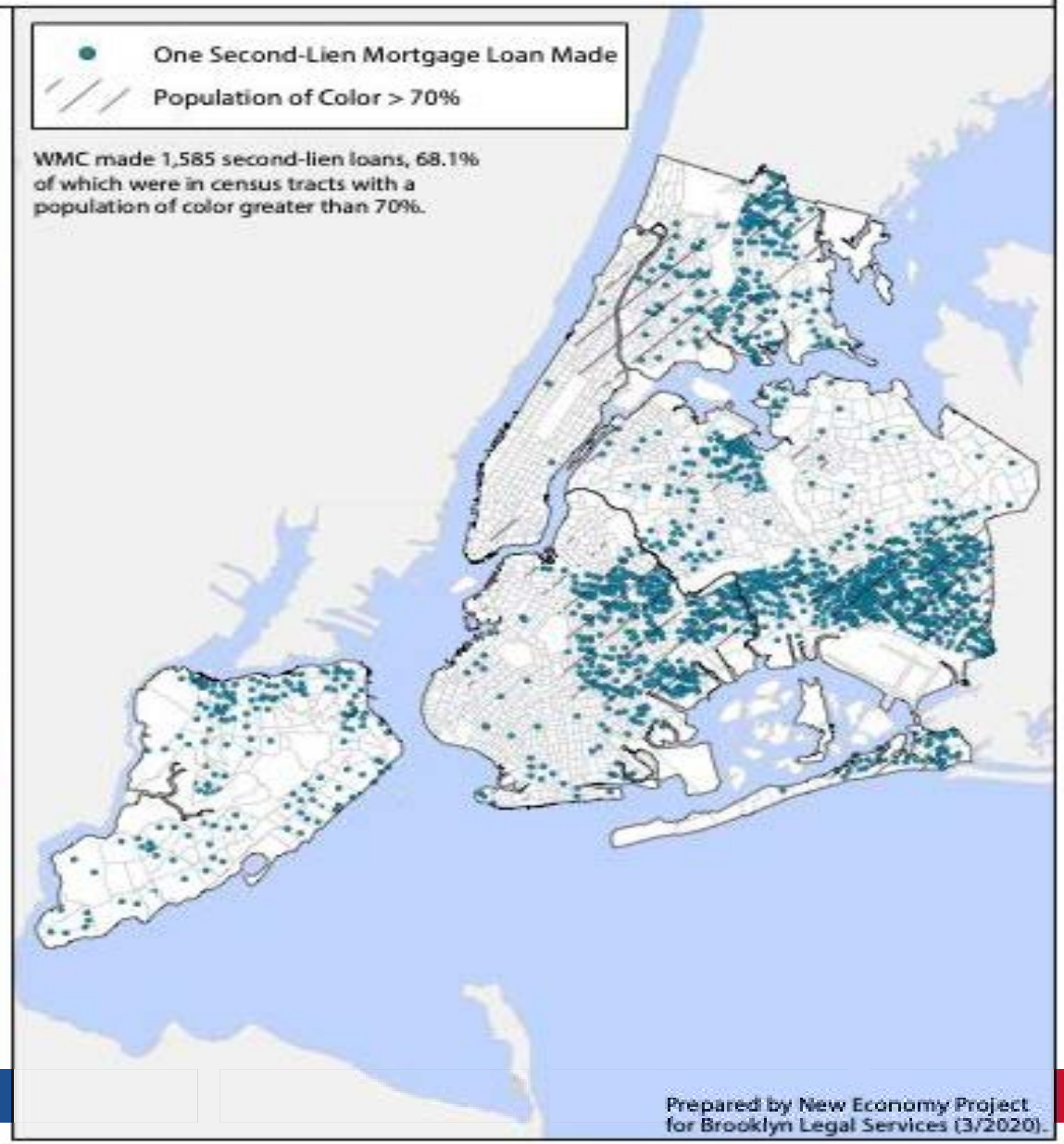
- Black and brown communities disparately impacted
  - Targeted during the early 2000s with these predatory loans
  - Now coming back to haunt them

- Older Adults
  - It’s been years since taking out the 2d mortgage
  - Have been current on their first mortgage
  - Lots of equity in home = desperate
  - On a fixed income = high risk

NY as an example

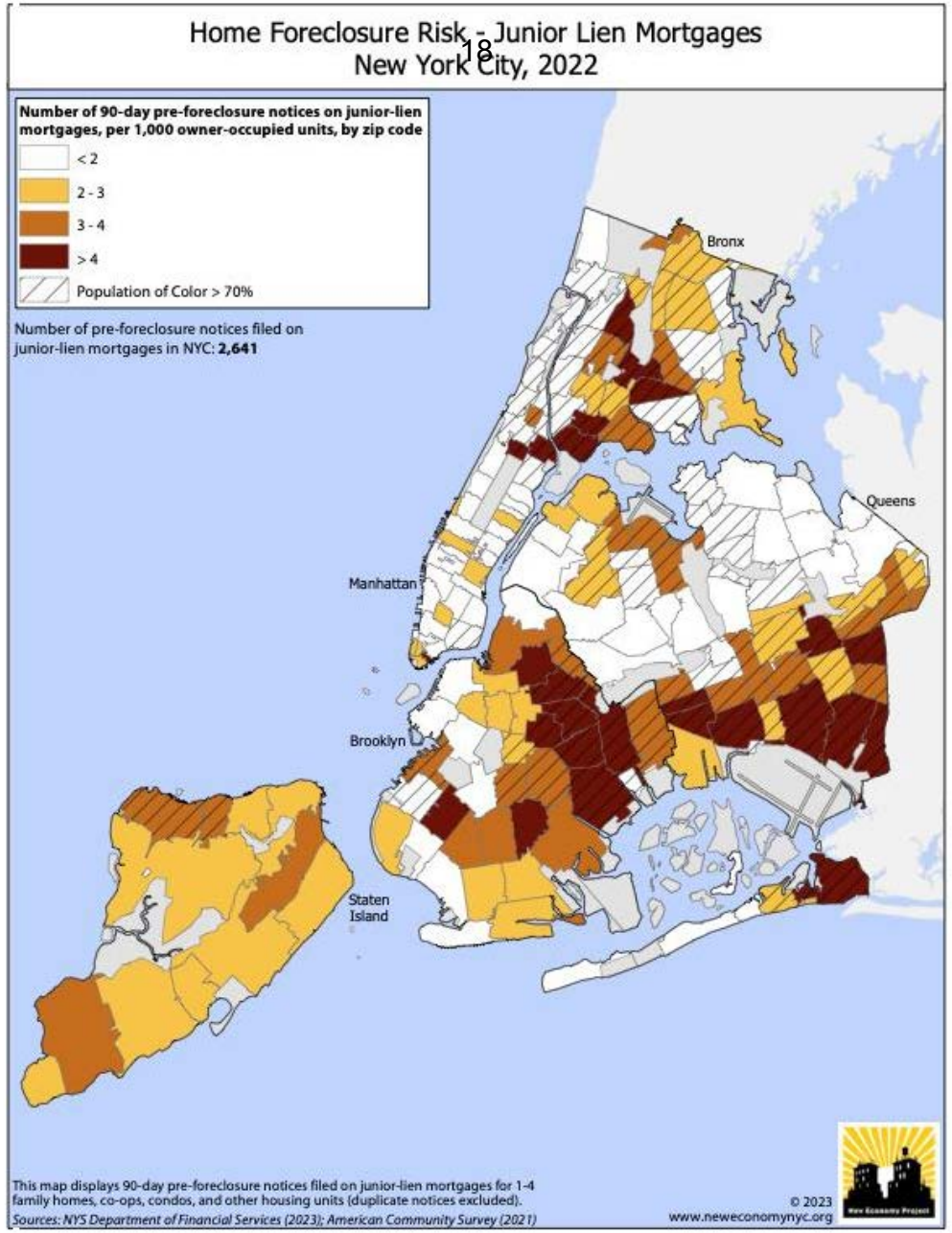
WMC Mortgage Company
New York City, 2006





Includes home purchase and refinance loans on owner-occupied, 1-4 family properties.
Population of color: total population excluding non-Hispanic whites.
Sources: Home Mortgage Disclosure Act data (2006); U.S. Census (2000)

Prepared by New Economy Project for Brooklyn Legal Services (3/2020).


Home Foreclosure Risk - Junior Lien Mortgages
New York City, 2022
Number of 90-day pre-foreclosure notices on junior-lien mortgages, per 1,000 owner-occupied units, by zip code
< 2
2 - 3
3 - 4
> 4
Population of Color > 70%
Number of pre-foreclosure notices filed on junior-lien mortgages in NYC: 2,641
Bronx
Queens
Manhattan
Brooklyn
Staten Island
This map displays 90-day pre-foreclosure notices filed on junior-lien mortgages for 1-4 family homes, co-ops, condos, and other housing units (duplicate notices excluded).
Sources: NYS Department of Financial Services (2023); American Community Survey (2021)
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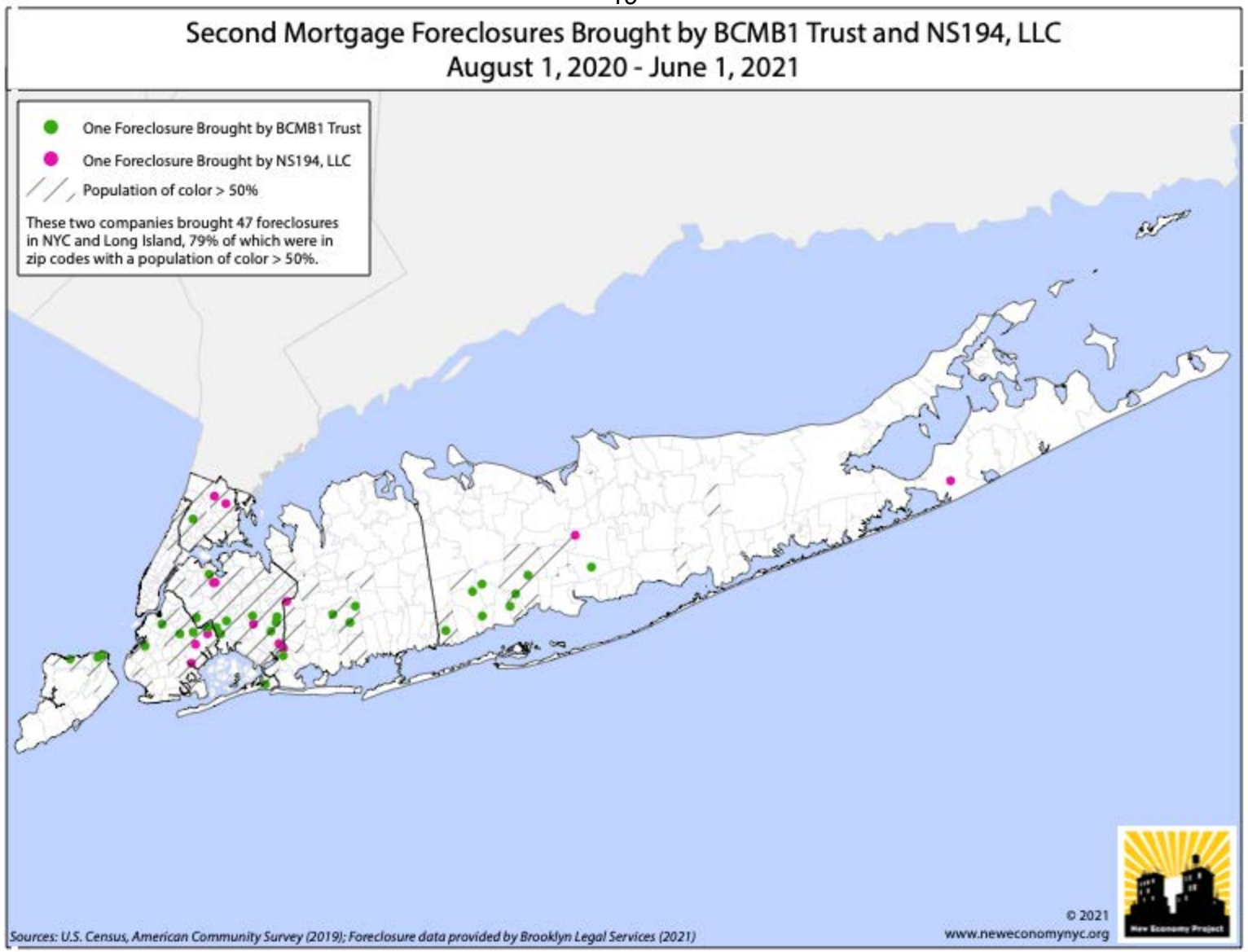
www.neweconomynyc.org


Second Mortgage Foreclosures Brought by BCMB1 Trust and NS194, LLC
August 1, 2020 - June 1, 2021
One Foreclosure Brought by BCMB1 Trust
One Foreclosure Brought by NS194, LLC
Population of color > 50%
These two companies brought 47 foreclosures in NYC and Long Island, 79% of which were in zip codes with a population of color > 50%.
Sources: U.S. Census, American Community Survey (2019); Foreclosure data provided by Brooklyn Legal Services (2021)
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New Economy Project

Quiz Time!
Poll #1

What are common characteristics of zombie second mortgages

Strategies for fighting zombies

General Strategies: Defending a Foreclosure

- Judicial Foreclosure State:
  - standing (particularly for non-negotiable instruments like HELOCs), statute of limitations, notice defenses, unclean hands
  - failure to prove the foreclosure cause of action, for example by establishing default and the amounts due
  - failure to provide pre-foreclosure notices or requirements - content and timing

General Strategies: Defending a Foreclosure

- Non-Judicial foreclosure states' foreclosure claims/defenses:
  - Claims against Zombie Second Lien holder such as violation of state or federal law can be raised as defense in eviction if REO (lender bought at auction) and is Plaintiff.
  - **93A(UDAP) equitable defenses and damages/attorneys fees can be raised to unwind foreclosure if conduct egregious.**
  - **Can assert claims in affirmative action or bankruptcy prior to stop foreclosure including injunctive relief under 93A(UDAP)** (note a "demand letter" should be sent but even if not sent this may not be bar to claim.)

Counterclaims or Affirmative Claims

Federal statutory protections

General Affirmative Claims: Fair Debt Collection Practices Act (FDCPA)

- CFPB Advisory Opinion on Zombie Mortgage
  - Entities that threaten to or bring foreclosures, are FDCPA debt collectors.
  - Time-lapse = time barred under State law.
  - The FDCPA and Reg F prohibit a debt collector from suing or threatening to sue to collect a time-barred debt *even if the debt collector does not know that the debt is time barred.*
- The challenge of TransUnion v. Ramirez, 594 U.S. 413 (2021)

Federal Notice Requirements

- Transfer of Ownership: Truth in lending act (TILA)
- Transfer of Servicing: Real Estate Settlement Procedures Act (RESPA)
- Periodic Statements: TILA

Notice of Transfer of Ownership (TILA)

- Purchasers or assignee of mortgage must deliver notice to borrower within 30 days of sale, transfer or assignment, which must include:
  - Date of transfer
  - Where the transfer is recorded
  - Who to contact on behalf of the creditor
  - Any other relevant information
- TILA: 15 U.S.C. 1641; 12 C.F.R. § 1026.39

Notice of Servicing Transfer (RESPA)

- RESPA: Notice of Servicing Transfer
- Goodbye letter: 15 days before the effective date of the transfer
- Hello letter: 15 days after the servicing transfer
- RESPA: 12 C.F.R. § 1024.33

Relief Available for TILA & RESPA Notice Violations

Can get for client:

- Actual damages
- Statutory damages:
  - TILA: up to $4,000;
  - RESPA: up to $2,000 if pattern or practice of non-compliance
- Attorney's fees and costs

TILA/RESPA Notice Requirements: Limitations

- TILA:
  - **One year SOL**
  - Liability for “any creditor” and assignee if apparent on face of disclosure
- RESPA:
  - **Three year SOL**
  - Liability for Servicer

Periodic Statements (TILA) - Closed End Mortgages

- For closed-end mortgages, must send periodic statements including:
  - Breakdown of amount due
  - Breakdown of past payments since last statement

- 15 U.S.C. § 1638(f), 12 C.F.R. § 1026.41(first effective 1/10/2014)

Periodic Statements: Exception for Charged-Off Loans

- BUT “Charged-off loans” don’t have to send statements **IF** the servicer:
  - doesn’t charge any additional fees or interest on the account.
  - sends notice to borrower within 30 days of charge-off or most recent periodic statement
  - this exception is often inapplicable as debt buyer almost always seeks to collect accrued interest.

Charged-off loans and periodic statements

- If interest or fees are charged to the account, must start sending statements again
- Can't retroactively charge interest or fees to account when charge-off exemption applied
- 12 C.F.R. § 1026.41 (effective 10/19/2017)

Periodic Statements - Home Equity Line of Credit (HELOC)

- Under TILA- Creditor has to send a statement for each billing cycle:
  - 15 U.S.C. § 1637(b)
  - 12 C.F.R. §§ 1026.5(b)(2), 1026.7(a)

Limitations

- Periodic statement requirement for closed end loans only became effective Jan. 2014
- Charge-off rule only became effective Oct. 2017

Relief

Limited relief:

- actual damages:

  charges and interest that could have been avoided, claims for emotional distress

- attorney's fees and costs
- one year SOL

*May not be required for loans in bankruptcy. *See* 12 C.F.R.1026.41(e)(5)

UDAP Options

Advocates in states with strong UDAP protections may incorporate technical violations into UDAP claims/counterclaims to get:

- equitable relief including rescinding foreclosure
- equitable relief including modification of repayment terms and reducing amount owed
- Attorneys' fees and costs (that can spur settlement)

Case Examples From the Field

- Homeowner settled with debt buyer for less than 40% of amount originally borrowed.

- Homeowners in class action settled with removal of all fees and interest from balance claimed.
- Mass. Attorney General's office settled with Zombie mortgage debt buyer with release of hundreds of mortgages, monetary relief and change in practices. (Click here for press release)

Getting Information About the Loan

Qualified Written Requests (Real Estate Settlement Procedures Act- RESPA)

- Qualified Written Requests under RESPA/Reg. X are powerful tools:
  - Get information about loan and account history
  - Request that an error be corrected
  - Provides additional legal claim (and attorney's fees) when servicer messes up
- 12 U.S.C. § 2605(e)

Reg. X under RESPA: What Constitutes a QWR?

- Two types:
  - Request for Information (12 CFR § 1024.36)
  - Notice of Error (12 CFR § 1024.35)
- Must be sent to servicer's designated address: Listed on servicer's website and monthly statement

QWRs/NOEs/RFIs

- Must include certain information
  - Borrower's name
  - Information to identify mortgage account
  - The information being request or the error that occurred
  - If being sent by attorney or housing counselor, include a 3rd party authorization

QWR – Servicer Response Deadlines

- Must acknowledge receipt in 5 business days
- Conduct a reasonable investigation & respond in 30 business days

QWR: Request for Information

- RFI may request information "relating to the servicing of the mortgage loan."
- Servicer must provide information OR explain why they are not providing it along with contact information
- 12 C.F.R. § 1024.36

QWRs for Zombie 2nds: What to Request

- Owner and servicer of the loan
- When did they become the owner/ servicer
- An itemized amount of what is owed/ payoff statement
- Loan documents, including prior loan modifications
- Account transaction history
- All transfer of ownership and transfer of servicing notices
- Monthly statements
- Any available loss mitigation options

How many do you do?

Make sure the request involves a “servicing activity”

QWR: Notice of Error

- Can notify servicer of error related to the loan:
  - wrong amounts charged- excessive, not allowed, inaccurate -retroactive interest
  - 12 C.F.R. § 1024.35

QWR: Notice of Error cont.

- Servicer has to correct the error and provide written notice of the correction; OR
- Conduct a reasonable investigation and provide written notice about what they found along with contact info

What can the borrower get if the servicer does not comply with RESPA

- Actual damages (interest/fees/charges that could have been avoided/emotional distress)
- Statutory damages of up to $2,000 if **pattern or practice of noncompliance**
- Attorney's fees and costs
- SOL: three years

Another Quiz!!

What information can you get with an RFI?

What else can you do?

- Explore Chapter 13 Bankruptcy with a bankruptcy attorney
  - Pay back amounts owed
  - Challenge amounts owed
  - Surrender the house and discharge debt
  - Negotiate a settlement

Filing Complaints

- Consumer Financial Protection Bureau - https://www.consumerfinance.gov/complaint/ *(hopefully)*
- State Attorneys General; note: recent MA AG consent judgment
- State/City Human Rights Commissions (for racial targeting, disparate treatment, or disparate impact)
- State Division of Banks/ Bureau Consumer Protection

Resources

[Hundreds of zombies killed by Massachusetts AG — zombie loans, that is] (NPR Nov. 15, 2024)

[Zombie 2nd mortgages are coming to life, threatening thousands of Americans' homes]

Legislation

Virginia H184 Approved April 17, 2024:

- Creditor must send to homeowner an affidavit affirming whether monthly statements were sent for each period that interest, fees, or other charges were assessed and that homeowner can file a challenge in court.
- Can not assess interest, etc. when statements not sent unless exempted.
- Court can determine if assessed in error and award attorneys' fees

Legislation

Massachusetts SD2427/ HD1450:

- Credit must serve sworn statement that they have:
  - Provided written communications for 12+ months; provided periodic statements; provided transfer and early intervention notices; & the payments are not beyond the SOL before publication of foreclosure sale
- Court can stay sale, waive interest, cease foreclosure and collection, etc.
- Private right of action
- Requires notices in multiple languages

Maryland HB769: Can only foreclose if send statements for 24 months or send special form; not just seconds mortgages; can raise defense of laches; Court can order relief

NCLC Zombie Second Mortgage Toolkit

https://library.nclc.org/zombie-second-mortgages

Support

- NCLC quarterly zombie second call: last held Jan. 30. Contact Andrea: astark@nclc.org for more information
- NYS “Zombie Support Group” Second Thursday of the Month at 2 pm by Zoom; Contact Email Rachel: rgeballe@lsnyc.org
- Consumer Virtual Roundtable: run by NACA every Thursday from 1-2 ET, contact Matt at Matt@consumeradvocates.org

Hypothetical Group Discussions

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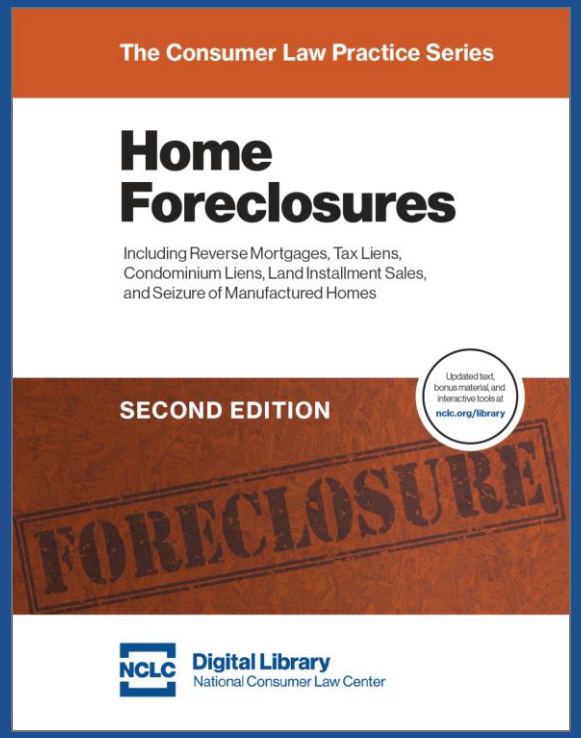

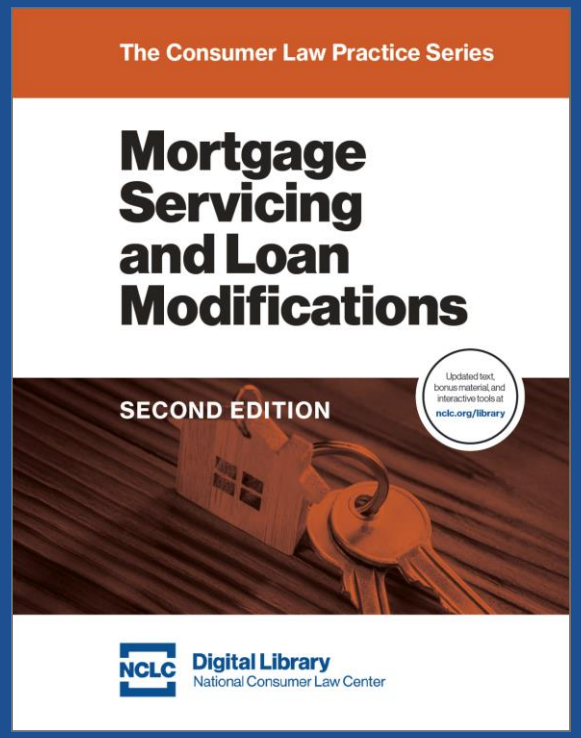

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12.1.1 Introduction

Most of the basic principles that apply when a lender forecloses upon a first mortgage also control when the foreclosure involves a second mortgage. However, second mortgage foreclosures present distinct issues that advocates must be prepared to address. The following two sections of this chapter review general rules that apply in two distinct scenarios. The first considers the impact of foreclosure of a senior mortgage when the same property secures one or more junior mortgages. The next section examines the effect of foreclosure of a junior mortgage when the property is subject to a senior mortgage. The focus of this chapter is on foreclosures that occur when multiple mortgages or deeds of trust encumber the same real property. Advocates should keep in mind that distinct issues can arise with tax liens, judgment liens, condominium association assessments, reverse mortgages, and other types of encumbrances that are covered in specific chapters in this manual.

In a troubling development, a wave of "zombie" second mortgage foreclosures has surfaced in many parts of the United States. In part, this is occurring as a consequence of practices during the years leading up to the 2007 foreclosure crisis. In that era, many mortgage originators combined a second mortgage with a first mortgage as part of the same home purchase or refinancing transaction. Commonly referred to as an "80-20 mortgage," the transaction financed the bulk of the sum advanced, around eighty percent of the principal balance owed, through a first mortgage and a smaller portion, around twenty percent of the principal balance, through a second mortgage from the same lender. Sometimes the second mortgage was considered the "down payment" for the first loan and eliminated the need for the borrower to put any money down on the loan.[1] The structure allowed the originator to charge fees for two distinct loans. Each loan often came loaded with its own array of abusive lending terms.[2]

The structure of "80-20 mortgages" confused many borrowers. Often, they did not realize that two distinct mortgages encumbered their homes. Further complicating the matter, many borrowers obtained modifications of the first mortgages, but not the seconds. If borrowers were aware of the second mortgages, the terms were often so egregious, including steep interest rate adjustments, that after a short time many could not afford the payments

CHAPTERS | APPENDICES | INDEX | COMPANION MATERIALS

EXPAND ALL

Introduction to Summary of State Foreclosure Laws

This appendix is a state-by-state summary of foreclosure laws. Practitioners should use this for easy reference to the foreclosure laws of their state, and to compare their state's laws with those of other states. However, this summary should not be used in place of the actual statutory materials. Note also that this appendix analyzes only the statutory language itself, and does not include judicial interpretation of that language. The practitioner will have to research state court decisions (some of which are referenced in the chapters of this manual) for judicial interpretation of statutory provisions. Practitioners should also be aware that local custom, which generally is not reflected in the statute, may affect the way in which foreclosures are conducted in a jurisdiction. For this reason, local resources and materials must be consulted.

A note on the categories within each summary: the "preforeclosure notice" category refers generally to the notice of sale and notice of default, if required. It does not refer to notice of the commencement of a court action, though such notice would always be required under court rules governing service of process. The "number of notices" category refers to whether the state requires a separate notice of default in addition to a notice of sale.

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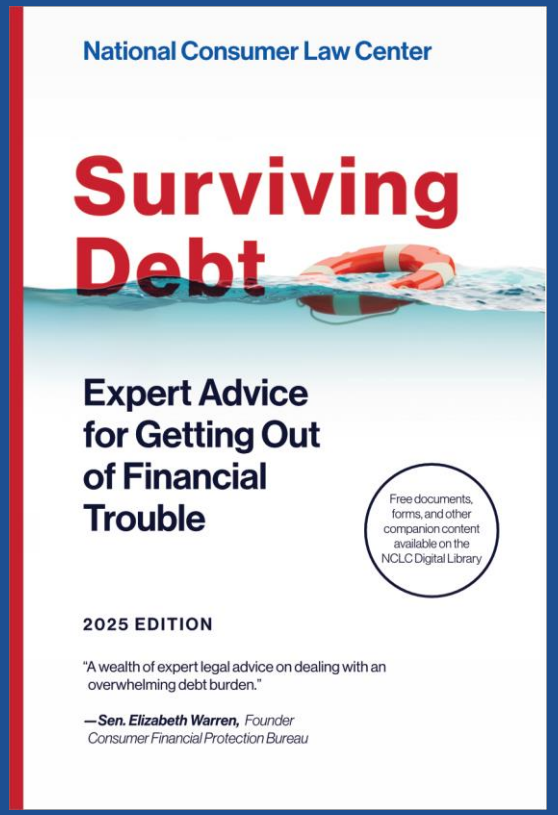
Free Digital Library Resources

Access to *Surviving Debt: Expert Advice for Getting Out of Financial Trouble*

Aggregated lists of free resources on key housing topics

+ More for nonprofit practitioners



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Questions?

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Hypothetical Scenario: The Case of Arthur's Undead Second Mortgage

In 2002, Arthur purchased a home in Anytown, USA, using an 80/20 loan structure. He obtained a first mortgage for 80% of the purchase price and a second mortgage for the remaining 20%. In 2008, during the financial crisis, Arthur experienced financial hardship and fell behind on his mortgage payments. He successfully negotiated a loan modification with what he believed was the combined lender or servicer of both mortgages. Arthur was led to believe, through verbal assurances and the modification documents, that the modification covered both his first and second mortgages, bringing him current. He diligently made the modified payments for years.

Unbeknownst to Arthur, the second mortgage was not included in the modification. It was sold and transferred multiple times over the years to various entities. During this period, Arthur never received any communication regarding the second mortgage, including monthly statements, notices of default, or any other correspondence. He assumed the second mortgage had been resolved as part of the 2008 modification. He also received a “1099-C” notice from his mortgage company that said it was a “Cancellation of Debt” leading Arthur to believe that the debt was cancelled. This notice was also sent to the IRS.

In 2024, Arthur received a letter from "Zombie Mortgage Acquisitions, LLC" (ZMA), a debt collection and mortgage servicing company, demanding immediate payment of a substantial sum, including all past due interest, late fees, and other charges accumulated since 2008 on the second mortgage. The letter threatened foreclosure if the full amount was not paid within 30 days. Arthur is current on his first mortgage and has built substantial equity in his home. He is terrified of losing his property.

Questions:

What additional information do you need to assess Arthur’s claims and how would you gather this information?

What Potential Claims Does Arthur Have Against ZMA (and potentially prior servicers/lenders)

National Consumer Law Center
Fighting Together for Economic Justice

NCLC Checklist for Identifying a Zombie Second Mortgage

January 2025

Typical Characteristics of Zombie Seconds:

- Second mortgage was taken out at the same time as the first mortgage to purchase the property- an "80/20" loan- or taken out shortly after the purchase of the home
- No communications from the lender or servicer for many years until a recent attempt to collect on the loan with the threat of foreclosure
- The amounts alleged owed on the second mortgage are significantly higher than the original principal amount
- There is equity in the property, and if the first mortgage is still outstanding, it is current
- The client believed the loan had been discharged in a previous bankruptcy, modified when their first mortgage was modified, or otherwise waived due to the lack of communication from the lender or servicer

See all our **Zombie Second Mortgage Resources** on the NCLC Digital Library (Subscription required for some content.)

The following outline provides suggestions for gathering information and documents to help determine if this is a zombie second mortgage and if there may be claims against the lender or servicer that would enable a client to challenge the foreclosure, negotiate an affordable loan modification, and obtain other relief to allow them to stay in the home.

I. Gathering Information

1. Loan Origin and Documentation

- ☐ Ask for the loan documents and confirm the loan type. If the client does not have the loan documents, you could look for the mortgage in the online registry of deeds, or you could ask the title company who did the closing.
  - ☐ Is it a traditional second mortgage or
  - ☐ Home equity line of credit? It might say "open-end" credit.
- ☐ Who is the lender?
- ☐ Who is the servicer?
- ☐ When was the loan originated?
- ☐ Was it originated at the same time as a first mortgage for the purchase of the property? (An 80/20 loan)

- ☐ Or was it a stand-alone second mortgage taken out after the property was purchased?
- ☐ What were the circumstances surrounding the origination of the loan i.e.: why did the client take out the loan and what did they believe the terms of the loan were?
- ☐ If the loan is a HELOC, what were the amounts and dates of funds disbursed?
- ☐ Identify the similar parties and documents related to the first mortgage.

2. Loan Status

- ☐ Is the mortgage in default or has been delinquent for an extended period.
    - ☐ If so, how long has the loan been in default?
    - ☐ Does the client's date of default match that of the servicer?
    - ☐ Does the client have documentation of payments made on the loan?
- ☐ Confirm whether the loan has been charged off or deemed non-collectible by the lender.
    - ☐ Does the client have any documentation, letters or notices indicating this?
    - ☐ If not, you could help the client draft a Request for Information (see below)
    - ☐ You can also check the client's credit report to see if there is anything on it regarding the loan
- ☐ Has the first mortgage been paid off or is it in good standing?
- ☐ Was the first mortgage modified at any time?
    - ☐ If so, when was it modified?
    - ☐ Was it modified through the HAMP program?
    - ☐ Who was the investor of the first mortgage?
- ☐ Does the client believe or have documentation that the second mortgage was modified?
- ☐ Was the client surprised by how much was alleged owed? Ask the servicer to provide an account history or all payments received and applied during the life of the loan through a Request for Information to ensure the amounts alleged owed are correct.
- ☐ Has the client ever filed for bankruptcy? If so, what is the case number, chapter type, and dates for any bankruptcies filed since the origination of the second mortgage?

3. *Property Status*

- ☐ Verify if the property has been foreclosed or is in the foreclosure process.
  - ☐ If the foreclosure process has been initiated, what stage is it in?
  - ☐ What notices have been sent to the client from the servicer regarding the foreclosure of the property?

4. *Servicer's Actions*

- ☐ Has the servicer been sending mortgage statements to the client each month?
  - ☐ If not, how long has it been since the client received a statement?
  - ☐ Who sent the last statement to the client- was it the current servicer?
- ☐ Has the client ever received communications regarding the transfer of ownership or servicing of the loan?
- ☐ Before the current attempt to collect on or foreclose on the loan, how long had it been since the client received any communication from the servicer?

5. *Client's Knowledge*

- ☐ When did the borrower first discover they had a second mortgage and how did they discover it?
- ☐ If different, when did the borrower realize the second mortgage is still active now?
- ☐ Assess if the client was aware of the second mortgage's status or existence before receiving the recent communications from the servicer (e.g., does the client believe the loan is no longer active? If so, why?).

6. *Property value*

- ☐ What is the estimated value of the property? (You can check Zillow)
- ☐ What is the total amount owed on the first mortgage?
  - ☐ If the value of the property is less than what is owed on the first mortgage, the borrower might be eligible to remove the second in a bankruptcy - consult a bankruptcy attorney.

7. *Options*

- ☐ If the client wants to stay in the home, you may be able to negotiate a loan modification for the second loan, but you should try to negotiate a waiver of the past due interest and fees that have accumulated during the time when the servicer was not sending monthly statements or other communications to the borrower.

- ☐ The modification also should only include principal actually owed on the loan. The servicer of a zombie second mortgage will generally not be able to prove amounts owed. They do not have records dating back to the origination of the mortgage and all the payments made and credited. Many times, they will do an amortization based on the original note and mortgage and claim that amount is due. You want to be very careful to avoid amounts your client does not owe in a loan modification.

- ☐ Some servicers require large down payments or unaffordable repayment plans that will set the client up for failure and potentially jeopardize their ability to stay current on the first mortgage. If the servicer is unwilling to negotiate an option that is affordable and sustainable for the client, an attorney may be able to allege certain claims that could result in an acceptable modification.

- ☐ The client can also consult with a bankruptcy attorney. It may be possible to get rid of the second mortgage if the value of the property is less than what is owed on the first mortgage. A bankruptcy attorney can challenge the amounts owed and might be able to reduce that amount the client has to pay to get rid of the loan. Or, a bankruptcy might allow the client to repay the principal amount through the bankruptcy. A bankruptcy attorney can do a thorough financial review to determine options for the client.

- ☐ If you are able to get the majority of the information listed here, it will help an attorney assess what legal options are available for the client including possibly challenging the amounts owed, the standing of the lender or servicer to bring the foreclosure, and the validity of the mortgage contract. Another strong claim an attorney might make is that it is an unfair and deceptive practice to allow a loan to become dormant while not communicating with the borrower for years, then suddenly appear when there is equity in the home to foreclose on the loan.

Materials on zombie second mortgages and defending against a foreclosure of a zombie second can be found on the NCLC Digital Library; library.nclc.org/zombie-second-mortgages.

Request for Information:

A request for information (RFI) can be used to verify the existence and details of a potential zombie second mortgage by asking a mortgage servicer to provide specific information about the loan, including the original loan amount, outstanding balance, payment history, and any supporting documentation. This information helps to determine if the debt is legitimate and what actions are appropriate to dispute the debt or negotiate. You can find a sample RFI on NCLC's website. You can help the client write and have them send the RFI certified mail (preferred) or write it yourself and include an authorization form from the client. Some information you could ask for includes:

Owner and Servicer of the Loan

- ☐ Name of current owner and all previous owners, including when loan ownership was transferred

- ☐ Name of current servicer and all previous servicers, including dates of when servicing transferred

- ☐ All notices sent to the borrower regarding any and all transfers of ownership and servicing of the loan including the dates sent and proof of delivery
- ☐ Provide all assignments of the security instrument (deed of trust or mortgage) and proof of transfers, indorsements, and possession of the promissory note, including all notices of these assignments sent to the borrower with the date sent and proof of delivery
- ☐ All documents from the closing of the loan

Charge Off

- ☐ Was the loan charged-off? If so, what was the date of charge off? What was the amount alleged owed when charged off? Provide any communications provided to the borrower of the charge-off. Provide any internal documentation including an account history or loan activity log notating that the loan was charged off.
- ☐ Did you use the write-off to qualify for any favorable tax treatment?
- ☐ If you revoked the charge-off, provide all communications you gave the borrower(s) in connection with the revocation, all internal documents related to the revocation, including the timing
- ☐ Did you charge interest on the loan after it was charged off? If so, what is the total amount to date that you charged?

Periodic Statements and Communications

- ☐ Did you send periodic statements to the borrower after the loan was charged-off? If so, how often were they sent and how many were sent since the charge-off?
- ☐ Provide all periodic statements sent to the borrower during the life of the loan along with proof that they were delivered to the borrower.
- ☐ Provide all communications sent to the borrower from the date you took on ownership/ servicing the loan to the present and include the date sent and proof of delivery.
- ☐ Provide a log of all calls, emails, or texts you exchanged with the borrower including the dates of each communication.

Amounts Alleged Owed on the Loan

- ☐ What is the total amount of a) principal b) interest c) fees & d) other costs currently alleged owed on the loan?
- ☐ Provide a life of the loan account history.
- ☐ Provide the account log of communications (written and verbal) between servicers of the loan and the borrower.

Notice of Error

A notice of error (NOE) can be used to challenge a zombie second mortgage by formally notifying the lender that you believe there is an error in their claim, such as the loan being

considered active when it should be considered discharged or that the servicer is alleging inaccurate and inflated amounts due. You can help the client write and have them send the NOE certified mail (preferred) or write it yourself and include an authorization form from the client. The NOE can be combined with the RFI. You can find a sample RFI/NOE here that you can edit to your particular facts. Identifying the Error

In your notice of error, clearly state that you believe the second mortgage is no longer an enforceable debt obligation in whole or in part, and explain why, including details such as missing payment history, lack of recent communication from the lender, or evidence of a previous debt settlement or discharge. Then ask the lender to correct the error as outlined in the sample NOEs.

**Important Facts about RFIs and NOEs

- If the servicer has designated an address specifically for RFIs or NOEs, you MUST send your letter to that address or it will not receive the protections and benefits accorded to them under Regulation X. The monthly mortgage statement or the servicer's website will have the address and it may say it is for RFIs and NOEs or Qualified Written Requests QWRs (another name for NOEs and RFIs).
- If the servicer fails to respond completely, or at all, to an RFI or NOE, you should send another. If the servicer continues to improperly respond, the client may have a claim under Regulation X against the servicer.
- Regulation X does not apply to HELOCs, but you can still send an RFI or NOE in the hopes the servicer will respond. Under the Truth in Lending Act, you could also send a written notice to the lender's billing inquiry address addressing a billing error e.g.: the amounts alleged due are inaccurate. The notice should include:
    - ☐ The client's name and account number
    - ☐ A description of the error
    - ☐ The date, type, and amount of the error
- You can help the client write the RFI or NOE, but the client should sign and send the letter certified mail, return receipt requested. Keep a copy or photo of the letter and of the envelope with postage to verify when it was sent.
- For more information on NOEs and RFIs see the NCLC's Mortgage Servicing and Loan Modifications manual, Chapter 3. (Subscription required.)

For a background on zombie second mortgages, see 15 Ways to Fight Foreclosure of Zombie Second Mortgages and our digital library page for zombie second mortgages (subscription required for some of the content).

DATE

Via Certified Mail, Return Receipt No. _____
Email (_____), Fax (_____)

SERVICER
DESIGNATED QWR ADDRESS

Re: CLIENT NAME
PROPERTY ADDRESS
LOAN NO.

To Whom It May Concern:

I am writing about the pending foreclosure on the above referenced loan, and the disputed balance [SERVICER NAME] and the investor, [OWNER NAME], is claiming to be due on the loan account.

This is a "qualified written request" under the Real Estate Settlement Procedures Act, 12 U.S.C. 2605(e), a Request for Information ("RFI") under the Real Estate Settlement Procedures Act, 12 C.F.R. § 1024.35 and a Notice of Errors ("NOEs") under the Real Estate Settlement Procedures Act, 12 C.F.R. § 1024.36.5.

Requests for Information

I, [CLIENT NAME] hereby requests the following information related to the servicing of her mortgage loan, and in verification of the amount of the debt SERVICER claims to be due:

1) The origination documents, including the note, the security instrument, and HUD-1 Settlement Statement;

2) A complete transaction history from the date of origination to the present from all prior and current servicers and owners of the loan, reflecting all payments made on the account, and any interest, fees or other charges assessed to the account;

3) The identities of all owners of the loan since origination and the dates of transfer/acquisition;

4) A copy of the complete Asset Sales and Purchase Agreement and a copy of the complete loan schedule attached to the Agreement as Exhibit A with all 34 fields of data for my loan.

5) A copy of the original note with the allonge.

6) The name and address of the current "custodian" for the collateral loan file.

7) Copies of all documents reflecting prior transfers of the note and security instrument, from the original lender to the current owner/assignee of the note and mortgage (include endorsements and allonges for note transfers and assignments for transfers of the security instrument;

8) Copies of any and all loan modifications and other loss mitigation options for my loan;

9) Copies of any and all notices sent to me, [CLIENT NAME] concerning any assignment or transfer of ownership of the loan, including copies of correspondence to me, [CLIENT NAME] constituting proper notice under TILA 1026.39;

10) Identify the entities that have serviced the loan from origination to the present and describe the dates of all transfers of servicing rights;

11) Copies of all documents reflecting any transfer of servicing rights of the loan;

12) Copies of any and all notices sent to me, [CLIENT NAME] concerning transfer of servicing of the loan;

9) Copies of any and all monthly or periodic account statements sent to me, [CLIENT NAME] concerning the account;

10) Copies of all communications transmitted to me, [CLIENT NAME] by [SERVICER] including demands for payment and information about loss mitigation;

11) Identify the loss mitigation options for which my loan has been considered;

12) Provide an itemized explanation of the amount being claimed due on the account at this time, including the amount claimed for principal, interest, and fees;

13) Provide all information that you received about the loan account from the entity from whom you acquired the loan;

14) Identify any periods of time during which the loan was treated as charged off for any purpose, including as an accounting adjustment, for tax treatment, or for credit reporting;

15) If the loan account was ever accelerated, indicate all dates when an acceleration occurred;

16) Provide copies of all notices or documents that established or memorialized an acceleration of the loan account;

17) If the loan is a HELOC any documents reflecting any disbursements made from the equity line at the time of origination;

18) If the loan is a HELOC, records of any disbursements made from the account, including the amount, date, payee, and copy of any checks or other records associated with such disbursement.

Notices of Error

1) From [DATE] to [DATE] the loan was charged off and the owner and servicer failed to provide either a notice of suspension of payments or ongoing periodic account statements. The account must be adjusted to exclude any accrual of interest, fees, or other charges for this period of time

2) More than six years passed since the loan was accelerated on [DATE] without commencement of foreclosure proceedings. Foreclosure is no longer available as a remedy for collection of the debt. Therefore, you must cease and cancel all foreclosure activities. [depending on jurisdiction, entire debt and security interest may be voidable upon expiration of statute of limitations].

3) The statute of limitations for each installment due under the loan agreement expires six years after the installment came due. You are demanding payment for a substantial number of installments that came due before [DATE SIX YEARS AGO]. The account must be adjusted to delete any claims for installments that came due more than six years ago and purportedly remain unpaid.

4) From [DATE] to [DATE] no owner of the loan and no servicer communicated with [NAME OF CLIENT] about the status of the loan. No one provided information about where to send payments or amounts due. No one provided periodic statements, notices of transfers of servicing rights, or notices of transfers of ownership of the loan with relevant contact information. This conduct made it impossible for [NAME OF CLIENT] to make payments. The account must be adjusted to delete any amounts purportedly owed for installments, fees, and charges that came due during this period.

5) You are proceeding with a foreclosure sale based on notices to [NAME OF CLIENT] that, for the reasons described above, substantially misrepresented the amount owed, including the amount needed to cure. You must cease and cancel all pending foreclosure activities based on these defective notices and make the account adjustments described above.

You must provide written acknowledgement of your receipt of this qualified written request within five (5) business days, pursuant to 12 U.S.C. Section 2605(e)(1)(A) as amended effective July 16, 2010 by the Dodd-Frank Financial Reform Act and Reg. X Section 3500.21(e)(1).

Pursuant to Section 1024.36(d)(ii)(2)(A), not later than ten (10) days (excluding public holidays, Saturdays and Sundays) after you receive this request for information you must provide us with the identify of, and address or other relevant contact information for the owner of the mortgage loan identified herein. For all of the other information requested herein, and pursuant to Section

1024.36(d)(ii)(2)(B), you must respond not later than thirty (30) days (excluding legal public holidays, Saturdays and Sundays) after you receive this request for information.

Sincerely,

CLIENT NAME

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

MARIE BAPTISTE-ELMINE, JAVIER CRUZ, FREDDY ELMINE, YVONNE JONES, ALICIA LOMBARDO, OCHIEZE OKORONKWO, PRECILIA OKORONKWO, REBECCA PEREZ, ROSE PROPHETE, DICKSON REGALADO, TYRONE STEWART, BARTHLOMY and EUNICE OGBENNAYA, Plaintiffs, v. RICHLAND & FALKOWSKI, PLLC and SN SERVICING CORPORATION, Defendants.	Civil Action No.: 21-cv-4994 **THIRD AMENDED COMPLAINT** **JURY TRIAL DEMANDED**

INTRODUCTION

1. Plaintiffs Marie Baptiste-Elmine and Freddy Elmine ("Ms. Baptiste-Elmine and Mr. Elmine"), Javier Cruz and Rebecca Perez ("Mr. Cruz and Ms. Perez"), Yvonne Jones ("Ms. Jones"), Alicia Lombardo ("Ms. Lombardo"), Ochieze and Precilia Okoronkwo ("Mr. and Mrs. Okoronkwo"), Rose Prophete ("Ms. Prophete"), Dickson Regalado ("Mr. Regalado"), Tyrone Stewart ("Mr. Stewart"), and Barthlomy and Eunice Ogbennaya ("Mr. and Mrs. Ogbennaya," collectively, "Plaintiffs") bring this action to redress a series of illegal actions Defendants Richland & Falkowski, PLLC ("Richland & Falkowski") and SN Servicing Corporation ("SN Servicing,") (collectively, "Defendants") have taken, including attempting to collect time-barred debt, in violation of federal and state law.

2. Plaintiffs are New York homeowners who were shocked to find themselves in foreclosure on second mortgage loans that had long disappeared, the servicers having long since

ceased to send mortgage statements, sometimes for a decade or more—even though federal regulations required such statements to be sent monthly.

3. Under the advice of counselors, mortgage brokers, and sometimes the servicers themselves, the Plaintiffs were led to believe that these second mortgages—all predatory "piggy-back" second mortgage loans made to Plaintiffs when they were first-time or new homeowners in 2005, 2006, or 2007—were long gone, forgiven, or incorporated into loan modifications of their first mortgage loans.

4. Now, all these years later and during the coronavirus pandemic, after Plaintiffs have worked tirelessly to try to stabilize their finances through loan modifications of their first mortgage loans, Defendants acted in concert to aggressively pursue collection on payments they concede are 8, 10, or even 15 years old, payments that are clearly time-barred by New York's six-year statute of limitations.

5. Under New York State law, a debt-collector may not collect on mortgage payments that are more than six-years past due. A mortgage payment that is six years and one day past due may not legally be collected.

6. When Plaintiffs learned that Defendants were demanding time-barred debt that could not legally be collected, they experienced anger, confusion, anxiety, depression, and insomnia, elevated blood pressure and other emotional and physical harms. Defendants demanded amounts without disclosing which sums were time-barred. Plaintiffs could not know what amounts were time-barred without the help of legal counsel. Plaintiffs lost wages, in the height of the COVID-19 pandemic, to seek advice from housing counselors and attorneys. Plaintiffs also had to pay for transportation and parking to make their appointments.

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7. The time-barred amounts claimed by Defendants prevented Plaintiffs from resolving their arrears. Defendants illegally inflated Plaintiffs' arrears by amounts ranging from $10,000 to nearly $70,000 for each mortgage loan. The additional arrears prevented Plaintiffs from considering available loan and grant programs that they could have otherwise used to resolve the debts and get out of foreclosure.

8. Through illegal threats to sue on incorrect and therefore vastly overinflated time-barred amounts and foreclosure lawsuits seeking improper sums, Defendants, both subject to the federal Fair Debt Collection Practices Act, have caused Plaintiffs financial harm and intensive emotional distress. Defendant SN Servicing's collection actions also violated the New York State Deceptive Practices Act, to the acute detriment of the affected Plaintiffs.

JURISDICTION

9. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 for claims under the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq*. This Court has jurisdiction pursuant to 28 U.S.C. § 1367 for Plaintiffs' claims under state law.

VENUE

10. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(b) because a substantial portion of the events and omissions giving rise to this Complaint occurred within the Eastern District of New York.

PARTIES

11. Plaintiff Marie Baptiste-Elmine, a 45-year-old woman, and Plaintiff Freddy Elmine, a 53-year-old man, wife and husband, live with their children, ages 16, 20, and 24, in

their home at 119-12 220th Street, Cambria Heights, NY 11411. Ms. Baptiste-Elmine works as a respiratory therapist at a hospital; Mr. Elmine is employed as a school bus driver.

12. Plaintiff Javier Cruz, a 51-year-old man, and Plaintiff Rebecca Perez, a 44-year old woman, husband and wife, live with their children, ages 14 and 23, in their home at 132 Logan Street, Brooklyn, NY 11208. Mr. Cruz worked as a porter in Brooklyn and is currently recovering from a kidney transplant; Ms. Perez works as a paraprofessional in a school.

13. Plaintiff Yvonne Jones, a 69-year-old woman, lives in her home at 346 Lott Avenue, Brooklyn, NY 11212, her home of 18 years, with her husband Wallace M. Jones. Until she retired in 2020, Ms. Jones worked in the division of customer service for the New York City Department of Education.

14. Plaintiff Alicia Lombardo, a 52-year-old woman, lives with her husband David Lombardo in their home at 204 Sherbrooke Avenue, Buffalo, NY 14221. Ms. Lombardo works as a carpenter.

15. Plaintiff Ochieze Okoronkwo, a 65-year-old man, and Plaintiff Precilia Okoronkwo, a 50-year-old woman, husband and wife, live with their children, ages 11, 19, and 22, in their home at 32-30 Mickle Avenue, Bronx, NY 10469. Mr. Okoronkwo is now retired; he made his career as a youth counselor in the Bronx. Mrs. Okorowko works as a medical technologist.

16. Plaintiff Rose Prophete, a 53-year-old woman, lives with her husband and her children, ages 20 and 25, at 15 Paerdegat 6th Street, Brooklyn, New York 11236, her home of 19 years. Ms. Prophete works as a hospital technician; her husband is employed as a security guard.

17. Plaintiff Dickson Regalado, a 48-year-old man, lives with his children, ages 15, 20, and 24, in his home at 132-11 85th Street, Ozone Park, NY 11417. Mr. Regalado works as a computer network administrator.

18. Plaintiff Tyrone Stewart, a 55-year-old man, lives in his home at 947 East 213th Street, Bronx, NY 10469. Mr. Stewart works as a carpenter.

19. Plaintiff Barthlomy Ogbennaya, a 68-year old man, and Plaintiff Eunice Ogbennaya, a 59-year-old woman, husband and wife, live with their children, ages 21, 21, 22, 26, and 27, at 818 East 232nd Street, Bronx, NY. Mr. Ogbennaya works for New York City as an Associate Job Opportunity Specialist I; Mrs. Ogbennaya is a registered nurse.

20. Defendant Richland & Falkowski, PLLC is law firm located at 28-07 Jackson Avenue, 5th Floor in Long Island City, Queens, New York. Richland & Falkowski is a high-volume debt collection law firm whose principal business is the enforcement of security interests through a robust practice of prosecuting foreclosures in the New York State courts.

21. Defendant SN Servicing is a wholly owned subsidiary of Security National Master Holding Company, LLC and a corporation organized under the laws of Alaska. SN Servicing maintains its principal place of business at 13702 Coursey Blvd Bldg. 1, Baton Rouge, Louisiana 70817. SN Servicing is a conforming and "special servicer" of residential mortgage loans, specializing in collecting on defaulted or delinquent loans. SN Servicing has serviced the mortgage debt of Yvonne Jones, Plaintiffs Ochieze and Precilia Okoronkwo, Plaintiff Rose Prophete, Plaintiff Dickson Regalado, Freddy Elmine, and Marie Baptiste-Elmine and acts or acted as the agent of mortgage purchase trusts BCMB1 Trust and NS194, LLC. As part of its business, SN Servicing services defaulted and delinquent loans in the state of New York.

STATEMENT OF FACTS

Plaintiffs Javier Cruz and Rebecca Perez

22. Mr. Cruz and Ms. Perez live in their one-family home located at 132 Logan Street, Brooklyn, NY 11208, in the Cypress Hills neighborhood of Brooklyn, NY.

23. Mr. Cruz and Ms. Perez live in their home with their children, ages 14 and 23.

24. Mr. Cruz and Ms. Perez purchased their home in March of 2006.

25. To finance the purchase, Mr. Cruz and Ms. Perez received a mortgage loan from American Home Mortgage for $335,000.

26. After purchasing the home, their mortgage servicing was transferred to Countrywide, and they began receiving solicitations from Countrywide to refinance their mortgage.

27. Since their property needed repairs, Mr. Cruz and Ms. Perez were persuaded to refinance their mortgage loan with Countrywide.

28. Although Mr. Cruz and Ms. Perez speak Spanish as their primary language, and have only limited English proficiency, Countrywide spoke with them exclusively in English.

29. Countrywide insisted on conducting the entire application and approval process remotely, and Mr. Cruz and Ms. Perez were never able to meet Countrywide's representative in person.

30. Countrywide sent Mr. Cruz and Ms. Perez the refinance paperwork, which was in English.

31. A representative of Countrywide did not conduct a closing for the 2006 refinance. Instead, Countrywide instructed Mr. Cruz and Ms. Perez to submit signed documents.

32. Mr. Cruz and Ms. Perez believed that the refinance consisted of a single loan.

33. Unbeknownst to Mr. Cruz and Ms. Perez, the refinance resulted in two loans: the first mortgage increased to $344,000, and they also received a second mortgage loan for $25,000.

34. The second loan bore an exorbitant interest rate of 9.5%.

35. After the refinancing, Mr. Cruz and Ms. Perez did not receive statements for the second mortgage loan. Instead, they only received statements for the first mortgage loan.

36. Mr. Cruz and Ms. Perez did not receive statements for their second loan even after the Consumer Financial Protection Bureau (CFPB) amended Regulation X in 2014 to require that a statement be sent on all residential mortgage loans, including those in delinquency status.

37. In the spring of 2021, Mr. Cruz and Ms. Perez were shocked to receive a summons and complaint, dated December 19, 2020, bearing the index number 504189/2021, entitled *BCMB1 Trust v. Javier Cruz* et al., commencing a foreclosure action on a second mortgage.

38. The complaint asserted that a principal amount of $21,779.47 and interest "and other charges" were "due and owing" from May 1, 2009, a date nearly 12 years before the date of the foreclosure filing. The filing sought at least $10,000 in interest payments and approximately $1,300 in principal that could not legally be collected.

39. Defendant Richland & Falkowski did not disclose that some of the amounts demanded were outside of the statute of limitations, so Mr. Cruz and Ms. Perez did not know that some of the amount demanded were not legally collectible.

40. Until they received the foreclosure papers, Mr. Cruz and Ms. Perez were unaware that they had a second mortgage.

41. Mr. Cruz and Ms. Perez were shocked, confused, and distraught to receive the foreclosure papers. Mr. Cruz and Ms. Perez were terrified to lose their home of over fifteen

years, fearful that they might be evicted at any time from the home that their eldest daughter had grown up in, and the only one their youngest daughter had ever known. Mr. Cruz and Ms. Perez were crushed by the fear that they would lose their home, because they did not believe that they could pay off the total for all of the years of payments sought in the Complaint. Mr. Cruz experienced insomnia. The stress exacerbated his kidney disease. He was told he needed dialysis and Ms. Perez had to donate a kidney to him.

42. Mr. Cruz and Ms. Perez incurred costs to meet with legal counsel, which was necessary to determine that only some amounts could legally be collected and to answer the foreclosure complaint to assert a defense based on the state statute of limitations. They had to pay subway fare of over $10 to go to multiple appointments with an attorney, trips on public transportation that caused them great stress during the COVID pandemic.

43. If only the sums that could legally be collected had been sought, Mr. Cruz and Ms. Perez would have been more easily able to resolve the debt before the costs and fees of the foreclosure litigation—including thousands of dollars of fees charged by defendant Richland & Falkowski—had ballooned and made swift resolution impossible. Without the time-barred debt, paths to resolution could otherwise have been found through grant and loan programs available to homeowners in New York City and New York State.

44. Mr. Cruz and Ms. Perez had never heard of the foreclosing plaintiff in the lawsuit, BCMB1 Trust, which purported to be their creditor. The summons and complaint were filed by Defendant Richland & Falkowski, attorneys representing BCMB1 Trust.

45. Defendant Richland & Falkowski's illegal actions in demanding time-barred debt have left Mr. Cruz and Ms. Perez shaken, distraught, and in poorer mental, emotional, and physical health. They have lost time and money to learn that the demanded amount included

time-barred debt and to assert the defense necessary to avoid liability for debt that could not legally be collected. They have also lost endless nights of sleep over whether they might lose their family home as a result of the efforts to collect on time-barred debt.

Plaintiffs Marie Baptiste-Elmine and Freddy Elmine

46. Ms. Baptiste-Elmine and Mr. Elmine live in their home, a one-family property located at 119-12 220th Street, in the Cambria Heights neighborhood of Queens, NY.

47. Ms. Baptiste-Elmine and Mr. Elmine live in their home with their children, ages 16, 20, and 24.

48. Ms. Baptiste-Elmine and Mr. Elmine purchased their home in March of 2005.

49. Before their purchase of their home in March of 2005, Ms. Baptiste-Elmine and Mr. Elmine had never purchased a home. They were unfamiliar with the process and did not know what to expect. They purchased the home with two mortgages, a large loan and a smaller "piggyback" loan, both from WMC Mortgage Corporation.

50. After only a short time, Ms. Baptiste-Elmine and Mr. Elmine started to receive solicitation phone calls from a company called Countrywide. The sales representative from Countrywide told Ms. Baptiste-Elmine and Mr. Elmine that their purchase mortgages would soon become more expensive, and they had to refinance right away to reduce their payment.

51. Ms. Baptiste-Elmine and Mr. Elmine were current on their payments, but they were worried that the Countrywide representative might be right, and their payments might increase. They were, accordingly, persuaded to refinance their loans into a single refinance loan.

52. The Countrywide representative also solicited Ms. Baptiste-Elmine and Mr. Elmine for a new second mortgage, convincing them that a second loan would provide funds for Ms. Baptiste-Elmine and Mr. Elmine to make needed repairs to their home.

53. Although Ms. Baptiste-Elmine and Mr. Elmine were not looking for additional funds, the Countrywide representative's pitch convinced them that they should take out these funds and make some repairs to increase the value of their home.

54. Although Ms. Baptiste-Elmine and Mr. Elmine only had one closing for both loans, public records indicate that Countrywide purported to date the first mortgage, a consolidated loan for $433,000, as of September 26, 2006, and the second loan for $37,450, as of January 17, 2007.

55. The second loan bore an exorbitant interest rate of 8.25%.

56. Ms. Baptiste-Elmine and Mr. Elmine were able to make payments on both loans for some time, but they fell behind in 2008 when their employment income was reduced.

57. Ms. Baptiste-Elmine and Mr. Elmine sought and obtained a loan modification of the first mortgage loan from their mortgage servicer.

58. Ms. Baptiste-Elmine and Mr. Elmine stopped receiving mortgage statements for the second mortgage loan. They did not receive a statement for the second mortgage loan for many years.

59. Ms. Baptiste-Elmine and Mr. Elmine thought that their second loan was consolidated into the first loan modification, which was corroborated by the fact that they stopped receiving statements for that loan.

60. Ms. Baptiste-Elmine and Mr. Elmine did not receive statements for their second loan even after the CFPB amended Regulation X in 2014 to require that a statement be sent on all residential mortgage loans, including those in delinquency status.

61. In 2019, Ms. Baptiste-Elmine and Mr. Elmine began to receive collection statements that purported to pursue payment of the second mortgage loan. Because they were sure that their second mortgage had been modified with their first, Ms. Baptiste-Elmine and Mr. Elmine thought these notices were scams.

62. Ms. Baptiste-Elmine and Mr. Elmine soon began to receive notices from defendant SN Servicing. SN Servicing failed to send accurate notices, instead deceptively seeking to collect amounts that were outside of the statute of limitations and therefore could not legally be collected.

63. In the fall of 2020, Ms. Baptiste-Elmine and Mr. Elmine were shocked to receive a summons and complaint, dated September 28, 2020, bearing the index number 717009/2020, entitled *BCMB1 Trust v. Freddy Elmine* et al., commencing a foreclosure action on the long-absent second mortgage, which they believed had been consolidated and modified years before.

64. The complaint asserted that a principal amount of $35,623.89 and interest "and other charges" were "due and owing" from January 1, 2009, a date over 11.5 years before the date of the foreclosure filing. The filing sought at least $14,500 in interest payments and approximately $1,500 in principal that could not legally be collected.

65. Defendant Richland & Falkowski did not disclose that some of the amounts demanded were outside of the statute of limitations, so Ms. Baptiste-Elmine and Ms. Elmine did not know that some of the amounts demanded were not legally collectible.

66. Ms. Baptiste-Elmine and Mr. Elmine were confused and panicked to receive foreclosure documents requesting payments from over a decade before. They were terrified they would lose their home, because they did not believe that they could pay off the total for all of the years of payments sought in the foreclosure complaint. They suffered a loss of trust between them and separated as a result. The stress impacted their children and their youngest daughter began to act out.

67. Ms. Baptiste-Elmine and Mr. Elmine incurred costs to meet with legal counsel, at great difficulty and risk during the COVID pandemic, which was necessary to determine that only some amounts could be collected and to answer the foreclosure complaint to assert a defense based on the state statute of limitations. They had to pay over $50 for gas to visit a housing counselor and to visit an attorney, in order to determine that some of the amounts sought in the complaint could not be collected, and to drive with a friend to serve the foreclosure answer with the statute of limitations defense. They had to pay over $5 for parking to visit the attorney and approximately $20 to make copies of documents for the attorney.

68. If only the sums that could legally be collected had been sought, Ms. Baptiste-Elmine and Mr. Elmine would have been more easily able to resolve the debt before the costs and fees of the foreclosure litigation—including thousands of dollars of fees charged by defendant Richland & Falkowski—had ballooned and made swift resolution impossible. Without the time-barred debt, paths to resolution could otherwise have been found through grant and loan programs available to homeowners in New York City and New York State.

69. Ms. Baptiste-Elmine and Mr. Elmine had never heard of the foreclosing plaintiff in the lawsuit, BCMB1 Trust, which purported to be Ms. Baptiste-Elmine and Mr. Elmine's

creditor. The summons and complaint were filed by Defendant Richland & Falkowski, attorneys representing BCMB1 Trust.

70. Defendants' illegal actions in demanding time-barred debt have left Ms. Baptiste-Elmine and Mr. Elmine stressed, depressed, and in poorer mental, emotional, and physical health. They have lost time and money to learn that the demanded amount included time-barred debt and to assert the defense necessary to avoid liability for debt that could not legally be collected. They have lost sleep over whether they can repay the tens of thousands of dollars sought, and whether they might lose their family home as a result of the effort to collect on time-barred debt.

Plaintiff Yvonne Jones

71. Ms. Jones lives in her home, a one-family property located at 346 Lott Avenue, Brooklyn, NY 11212, in the Brownsville neighborhood. Ms. Jones, now retired, spent her career working, first as a clerk at a private business, and later at the New York City Department of Education.

72. Ms. Jones lives in her home with her husband, Wallace M. Jones.

73. Ms. Jones purchased her home in February 2006.

74. At the time of purchase, Ms. Jones was renting an apartment and had never bought a home before.

75. In order to buy her home, Ms. Jones had to seek a mortgage loan.

76. Although she used a mortgage broker, she did not know the terms of the mortgage before she sat down at the closing table to sign the papers. The mortgage broker provided her with an attorney for the transaction, but that attorney did not provide her with advice, nor explain the papers to her.

77. Only after she completed the closing, when she started to receive statements, did Ms. Jones come to understand that—even though she had put her life savings down to purchase the property—she had taken out two loans and that her home would be encumbered by two mortgages.

78. Both loans, a first loan for $263,120 and a second loan for $65,780 were originated by Fremont Investment & Loan—a now discredited predatory and discriminatory lender.

79. The second loan bore an exorbitant 11.5% rate of interest.

80. After her closing, Ms. Jones made payments on both mortgages, but she soon fell into default as the combined payments were unaffordable to her.

81. Ms. Jones was able to modify her first mortgage loan, and she stopped receiving statements on her second mortgage loan. Ms. Jones did not receive statements from the servicer of her second mortgage loan for many years.

82. Ms. Jones did not receive mortgage statements for her second loan even after the CFPB amended Regulation X in 2014 to require that a statement be sent on all residential mortgage loans, including those in delinquency status.

83. In winter of 2021, Ms. Jones received correspondence from SN Servicing, a company she had never heard of. This company purported to be the servicer of her second loan, and sought payment of large amounts, including sums that could not legally be collected because they were outside of New York's statute of limitations.

84. Shortly thereafter, also in the winter of 2021, Ms. Jones was confused to receive a summons and complaint, dated January 28, 2021, bearing the index number 502303/2021,

entitled *NS194, LLC v. Yvonne Prescott*, et al., commencing a foreclosure action on the long-absent second mortgage.

85. The complaint asserted that a principal amount of $65,694.67 and interest "and other charges" were "due and owing" from July 1, 2006, a date nearly 15 years before the date of the foreclosure filing. The filing sought at least $59,000 in interest payments and approximately $2,800 in principal that could not legally be collected.

86. Defendant Richland & Falkowski did not disclose that some of the amounts demanded were outside of the statute of limitations, so Ms. Jones did not know that some of the amounts demanded were not legally collectible.

87. Ms. Jones incurred costs to meet with legal counsel, during the height of the COVID pandemic, which was necessary to determine that only some amounts could be collected and to answer the foreclosure complaint to assert a defense based on the state statute of limitations. She had to pay over $20 in parking fees to visit a housing counselor and attorney. She incurred over $50 making copies of documents for the attorneys, so that they could determine what sums could legally be collected.

88. If only the sums that could legally be collected had been sought, Ms. Jones would have been more easily able to resolve the debt before the costs and fees of the foreclosure litigation—including thousands of dollars of fees charged by defendant Richland & Falkowski—had ballooned and made swift resolution impossible. Without the time-barred debt, paths to resolution could otherwise have been found through grant and loan programs available to homeowners in New York City and New York State.

89. Ms. Jones had never heard of the foreclosing plaintiff in the lawsuit, which purported to be her creditor. The summons and complaint were filed by Defendant Richland & Falkowski, attorneys representing NS194, LLC.

90. Ms. Jones suffered great mental strain from the foreclosure on her second mortgage. She was confused and scared that she would lose her home. Ms. Jones feared that she would lose her home, because she did not believe that she could pay off the total for all the years of payments sought in the Complaint. Ms. Jones began to suffer headaches. She felt stressed and panicked.

91. Defendant Richland & Falkowski's illegal actions in demanding time-barred debt have left Ms. Jones afraid and in poorer mental, emotional, and physical health. She has lost time and money to learn that the demanded amount included time-barred debt and to assert the defense necessary to avoid liability for debt that could not legally be collected.

Plaintiff Alicia Lombardo

92. Ms. Lombardo lives in her home, a one-family property located at 204 Sherbrooke Avenue, Buffalo, NY.

93. Ms. Lombardo lives in her home with her husband, David Lombardo.

94. Ms. Lombardo, then known as Alicia Quinn, purchased her home in April of 2005.

95. Ms. Lombardo financed the purchase of her home with a mortgage from First Franklin Financial Corporation.

96. In 2007, thinking that her loan payments would soon increase, Ms. Lombardo sought to refinance her mortgage. She submitted a loan application and was approved by a company called Countrywide.

97. Countrywide insisted on conducting the entire application and approval process remotely, and Ms. Lombardo was never able to meet Countrywide's representative in person.

98. The Countrywide representative told Ms. Lombardo that it would be to her financial benefit to structure her mortgage as an "80/20" loan, with a second "piggyback," rather than as a single loan and mortgage.

99. A representative of Countrywide conducted the closing of the 2007 refinance in Ms. Lombardo's home.

100. Both loans, a first loan for $118,400 and a second for $22,200, were originated by Countrywide, a now discredited predatory and discriminatory lender.

101. The second loan bore an exorbitant interest rate of 9.25%.

102. Ms. Lombardo was able to make payments on both loans for some time, but she fell behind in or around 2008 when her employment income was reduced.

103. Ms. Lombardo contacted Bank of America, which had purchased Countrywide and was now the servicer of her loans. Bank of America's representative told her to concentrate on paying the first mortgage.

104. Based on the instruction from Bank of America, and because Bank of America was servicing and responsible for both loans, Ms. Lombardo believed she did not need to address her payment problems with the second mortgage.

105. Ms. Lombardo sought and obtained two modifications of her first mortgage loan.

106. Around the time of the first modification of her first mortgage loan, Ms. Lombardo stopped receiving statements on her second mortgage loan. She did not receive statements for the second mortgage loan for many years.

107. Ms. Lombardo did not receive statements for her second loan even after the CFPB amended Regulation X in 2014 to require that a statement be sent on all residential mortgage loans, including those in delinquency status.

108. In the winter of 2020-2021, Ms. Lombardo began to receive collection statements from a company she'd never heard of purporting to pursue payment of the second mortgage loan. Because she had never received any notice of a servicing transfer nor an introduction to a new servicer, Ms. Lombardo thought these notices were not correct.

109. In the spring of 2021, Ms. Lombardo was confused to receive a summons and complaint, dated February 9, 2021, bearing the index number 804209/2021, entitled *BCMB1 Trust v. Alicia D. Quinn, a/k/a Alicia Lombardo* et al., commencing a foreclosure action on the long-absent second mortgage.

110. The complaint asserted that a principal amount of $19,647.03 and interest "and other charges" were "due and owing" from May 1, 2010, a date nearly 11 years before the date of the foreclosure filing. The filing sought at least $7,500 in interest payments and approximately $3,300 in principal that could not legally be collected.

111. Defendant Richland & Falkowski did not disclose that some of the amounts demanded were outside of the statute of limitations, so Ms. Lombardo did not know that some of the amounts demanded were not legally collectible.

112. Ms. Lombardo was stressed to receive foreclosure documents requesting payments from over a decade before. She was confused because she felt she had always been upfront with her servicer, and that she had followed Bank of America's instructions about how to treat the first and second loans. Ms. Lombardo feared that she would lose her home, because she

did not believe that she could pay off the total for all of years of payments sought in the Complaint.

113. Ms. Lombardo incurred costs to meet with legal counsel, which was necessary to determine that only some amounts could be collected and to answer the foreclosure complaint to assert a defense based on the state statute of limitations. She had to pay for gas to drive more than ten miles to the legal aid office during the height of the COVID pandemic to meet with an attorney and sign and verify the answer to the foreclosure action asserting a statute of limitations defense.

114. If only the sums that could legally be collected had been sought, Ms. Lombardo would have been more easily able to resolve the debt before the costs and fees of the foreclosure litigation—including thousands of dollars of fees charged by defendant Richland & Falkowski—had ballooned.

115. Ms. Lombardo had never heard of the foreclosing plaintiff in the lawsuit, BCMB1 Trust, which purported to be her creditor. The summons and complaint were filed by Defendant Richland & Falkowski, attorneys representing BCMB1 Trust.

116. Ultimately, Ms. Lombardo obtained payoff assistance from the New York Homeowner Assistance Fund (HAF) to resolve the foreclosure. Based on defendant Richland & Falkowski's demands in the foreclosure complaint and during litigation the mortgage payoff included approximately $3,300 in time-barred principal. There is a lien on her home for amounts including this time-barred sum.

117. Defendant Richland & Falkowski's illegal actions in demanding time-barred debt left Ms. Lombardo feeling stressed, depressed, and overwhelmed, and in poorer mental, emotional, and physical health. She lost time and money to learn that the demanded amount

included time-barred debt and to assert the legal defense necessary to avoid liability for debt that could not legally be collected. She felt blindsided and embarrassed. She lost sleep and began to suffer from headaches because of the efforts to collect on time-barred debt.

Plaintiffs Ochieze Okoronkwo and Precilia Okoronkwo

118. Mr. and Mrs. Okoronkwo live in their home, a one-family property located at 32-30 Mickle Avenue, Bronx, NY 10469, in the Eastchester neighborhood.

119. Mr. and Mrs. Okoronkwo live in their home with their children, ages 11, 19, and 22.

120. Mr. and Mrs. Okoronkwo purchased their home in January of 2006.

121. Before that time, neither Mr. Okoronkwo nor Mrs. Okoronkwo had ever purchased a home. They were unfamiliar with the process and did not know what to expect. They found a local real estate broker, who helped them find a one-family property.

122. In order to buy their home, Mr. and Mrs. Okoronkwo had to seek a mortgage loan. The real estate broker told them he could help them find a mortgage loan. When the process dragged on, Mr. Okoronkwo went into a local real estate office and asked about a mortgage loan. The broker in the real estate office said that he could find the Okoronkwos a loan quickly.

123. Unbeknownst to Mr. and Mrs. Okoronkwo, and without their direction, the mortgage broker arranged for them to receive two mortgage loans, rather than one.

124. Mr. and Mrs. Okoronkwo also paid $20,000 towards the purchase of their home.

125. At the closing, Mr. and Mrs. Okoronkwo were overwhelmed with papers. The people present kept telling them to hurry to finish signing and did not give them time to read the

papers. Because the real estate agent had provided them with an attorney, Mr. and Mrs. Okoronkwo thought that their interests were protected. Even after the closing was completed, Mr. and Mrs. Okoronkwo did not know that they had two mortgage loans, rather than one.

126. Both loans were from WMC Mortgage, a now discredited predatory and discriminatory lender, a first loan for $340,000 and a second loan for $85,000.

127. The second loan bore an exorbitant 10.5% rate of interest.

128. Only after the closing, when they received their first mortgage statements, did Mr. and Mrs. Okoronkwo realize they had two loans.

129. Mr. Okoronkwo confronted the mortgage broker, who said that if the Okoronkwos paid for three months, their payments would be combined into one loan.

130. The Okoronkwos made their payments and appealed to bank representatives, but neither WMC, nor their servicer, Wilshire, would assist the Okoronkwos to combine the loans and payments as promised.

131. Although the payments on the two loans were very expensive, Mr. and Mrs. Okoronkwo paid both loans for as long as they could. They sought and obtained two loan modifications of the first mortgage loan, and were able to negotiate an affordable first mortgage loan payment.

132. Soon after they modified the first loan for the first time in 2011, Mr. and Mrs. Okoronkwo stopped receiving statements for the second mortgage loan. They did not receive a statement for the second mortgage loan for nearly a decade.

133. Mr. and Mrs. Okoronkwo received advice from a housing counselor that they did not need to worry about their second mortgage after modifying their first. Because of this advice

and because they stopped receiving statements for the second loan, they did not believe they still needed to make payments on a second mortgage loan.

134. Mr. and Mrs. Okoronkwo did not receive statements for their second loan even after the CFPB amended Regulation X in 2014 to require that a statement be sent on all residential mortgage loans, including those in delinquency status.

135. In November of 2020, Mr. and Mrs. Okoronkwo were shocked to receive a notice from Defendant SN Servicing, a company they had never heard of. This notice threatened foreclosure, and stated that Mr. and Mrs. Okoronkwo's home loan was 4,030 days past due and that they owed over $103,000 in past due debt.

136. This notice threatened to sue Mr. and Mrs. Okoronkwo for amounts—at least 1600 days of interest and principal payments, or approximately $40,000—that were outside New York's statute of limitations, and which therefore could not be collected in a foreclosure action.

137. Mr. and Mrs. Okoronkwo were stressed and shocked to receive this notice, seeking to collect so many days and years of payments totaling over $100,000. They worried, thinking about all their attempts over the years to find stability and create one affordable payment on their home.

138. In the spring of 2021, Mr. and Mrs. Okoronkwo were further shocked to receive a summons and complaint, dated March 24, 2021, bearing the index number 804084/2021E, entitled *NS194, LLC v. Precilia Okoronkwo* et al., commencing a foreclosure action on the long-absent second mortgage.

139. The complaint asserted that a principal amount of $85,082.68 and interest "and other charges" were "due and owing" from October 1, 2009, a date nearly 11.5 years before the

date of the foreclosure filing. The filing sought over $42,000 in interest payments and appoximately $2,700 in principal that could not legally be collected.

140. Defendant Richland & Falkowski did not disclose that some of the amounts demanded were outside of the statute of limitations, so Mr. and Mrs. Okoronkwo did not know that some of the amounts demanded were not legally collectible.

141. Mr. and Mrs. Okoronkwo incurred costs to meet with legal counsel, at the height of the COVID pandemic, which was necessary to determine that only some amounts could be collected. They had to pay $7 to pay for parking near the law office and more than $15 to make copies so that the attorney could assess their legal defenses and prepare an answer to the foreclosure complaint to assert a defense based on the state statute of limitations.

142. If only the sums that could legally be collected had been sought, Mr. and Mrs. Okoronkwo would have been more easily able to resolve the debt before the costs and fees of the foreclosure litigation—including thousands of dollars of fees charged by defendant Richland & Falkowski—had ballooned and made swift resolution impossible. Without the time-barred debt, paths to resolution could otherwise have been found through grant and loan programs available to homeowners in New York City and New York State.

143. Mr. and Mrs. Okoronkwo were devastated to receive the foreclosure papers, terrified they might lose the home they loved and that they had worked so hard to maintain for their family. Mr. and Mrs. Okoronkwo were fearful that they would lose their home, because they did not believe that they could pay off the total for all of the years of payments sought in the Complaint. They suffered stress and lost sleep. The debt overcharge in the complaint made them fearful; they lost trust in institutions that they thought were in place to protect them. Mrs.

Okoronkwo suffered from headaches whenever she thought about the risk that they might be evicted from their home. The stress aggravated Mr. Okoronkwo's high blood pressure.

144. Mr. and Mrs. Okoronkwo had never heard of the foreclosing plaintiff in the lawsuit, NS 194, LLC, which purported to be their creditor. The summons and complaint were filed by Defendant Richland & Falkowski, attorneys representing NS194, LLC.

145. Defendant Richland & Falkowski's illegal actions in demanding time-barred debt have left Mr. and Mrs. Okoronkwo fearful and in poorer mental, emotional, and physical health. They have lost time and money to learn that the demanded amount included time-barred debt and to assert the defense necessary to avoid liability for debt that could not legally be collected. They have lost countless nights of sleep over whether they might lose their family home as a result of the efforts to collect on time-barred debt.

Plaintiff Rose Prophete

146. Ms. Prophete lives with her family in her home, a two-family property located at 15 Paerdegat 6th Street, Brooklyn, NY 11236, in the Canarsie neighborhood. She lives with her husband and two children, ages 18 and 23.

147. Ms. Prophete purchased her home in May 2005.

148. In order to buy their home, Ms. Prophete and her partner at the time had to seek a mortgage loan.

149. Only a little more than a year after they completed the purchase, the broker who arranged their original financing encouraged Ms. Prophete and her partner to refinance to lower their monthly payments.

150. Ms. Prophete was paying the mortgage and handling all of the costs and upkeep for her home. Believing that a refinance would help lower her costs, Ms. Prophete agreed to a refinance into a new first and second mortgage loan. The mortgage broker told Ms. Prophete that this financing structure would be the most financially advantageous to her.

151. Both loans were from Fairmont Funding Ltd., a now discredited predatory and discriminatory lender. The first loan was for $504,000 and the second loan was for $63,000.

152. The second loan bore an exorbitant 9% rate of interest.

153. Although the payments on the two loans were very expensive, Ms. Prophete made full monthly payments on both loans through 2008.

154. Ultimately, Ms. Prophete received a letter from Bank of America stating that she and her co-borrower no longer needed to make payments on the second loan.[1] After receiving this letter, Ms. Prophete did not receive any statements for the second mortgage loan for nearly a decade.

155. Ms. Prophete obtained a modification of her first mortgage loan in October 2011, and soon was making regular payments. Because Bank of America had notified her that she no longer had a second mortgage, Ms. Prophete was not concerned that she did not receive statements for the second mortgage loan, nor did she worry about falling behind on that loan.

156. Ms. Prophete did not receive mortgage statements for her second loan even after the CFPB amended Regulation X in 2014 to require that a statement be sent on all residential mortgage loans, including those in delinquency status.

[1] In the early 2010s, large servicers, including Bank of America, maintained programs to forgive second mortgage debt in order to satisfy settlements with state and federal regulators. *See, e.g.,*, "The Second Mortgage Shell Game," NYTimes, Feb. 17, 2013, available at nytimes.com/2013/02/18/opinion/the-second-mortgage-shell-game.html.

157. In March of 2021, Ms. Prophete was shocked to receive a summons and complaint, dated January 28, 2021, bearing the index number 502277/2021, entitled *NS194, LLC v. Rose Prophete* et al., commencing a foreclosure action on the long-absent second mortgage.

158. The complaint asserted that a principal amount of $61,932.31 and interest "and other charges" were "due and owing" from January 1, 2009, a date 12 years before the date of the foreclosure filing. The filing sought over $29,000 in interest payments and approximately $3,400 in principal that could not legally be collected due to the statute of limitations.

159. Defendant Richland & Falkowski did not disclose that some of the amounts demanded were outside of the statute of limitations, so Ms. Prophete did not know that some of the amounts demanded were not legally collectible.

160. Ms. Prophete incurred costs to meet with legal counsel, which was necessary to determine that only some amounts could be collected and to answer the foreclosure complaint to assert a defense based on the state statute of limitations. She had to take time off of work without pay to go to an appointment with an attorney; she paid at least $1 faxing papers about her second mortgage to the law office.

161. If only the sums that could legally be collected had been sought, Ms. Prophete would have been more easily able to resolve the debt before the costs and fees of the foreclosure litigation had ballooned and made swift resolution impossible. Without the time-barred debt, paths to resolution could otherwise have been found through grant and loan programs available to homeowners in New York City and New York State.

162. Ms. Prophete had never heard of the foreclosing plaintiff in the lawsuit, which purported to be her creditor. The summons and complaint were filed by Defendant Richland & Falkowski, attorneys representing NS194, LLC.

163. Ms. Prophete was devastated to receive the foreclosure complaint. She felt terrified that all the effort she had put into maintaining her home for her family could be taken away from her at any time. Ms. Prophete feared that she would lose her home, because she did not believe that she could pay off the total for all of the years of payments sought in the foreclosure complaint. She was devastated the foreclosure sought time-barred debt. She was scared and shocked that the lawsuit demanded payments from such a long time ago, after years of hearing nothing. She suffered stress, panic attacks, and impacts to her mood and her relationships with her family and her colleagues at work.

164. After Defendant Richland & Falkowski filed the foreclosure action, Ms. Prophete received a statement from Defendant SN Servicing, a company she had never heard of before.

165. This statement was the first statement that Ms. Prophete had received for the second mortgage loan in nearly a decade, since she was advised by Bank of America that the loan was cancelled.

166. Through its statements, Defendant SN Servicing *also* purported to seek collection of amounts that were due more than six years prior, outside of New York's statute of limitations.

167. Defendants' illegal actions in demanding time-barred debt have caused Mr. Prophete grave distress, worry, and fear, and left her in poorer mental, emotional, and physical health. She has lost time and money to learn that the demanded amount included time-barred debt and to assert the defense necessary to avoid liability for debt that could not legally be collected. She also lost countless nights of sleep over whether she might lose her family's home as a result of the efforts to collect on time-barred debt.

Plaintiff Dickson Regalado

168. Mr. Regalado lives in his home, a one-family property located at 132-11 85th Street, in the Ozone Park neighborhood of Queens, NY.

169. Mr. Regalado lives in his home with his children, ages 13, 17, and 21.

170. Mr. Regalado purchased his home in October of 2006.

171. Before that time, Mr. Regalado had never purchased a home. He was unfamiliar with the process and did not know what to expect. He and his wife at the time looked around the neighborhood where they were living with her parents and found a one-family property that would fit their growing family.

172. Mr. Regalado had saved funds towards the purchase of a home, but the broker told him it was not necessary to use the money to make a down payment. Instead, he advised Mr. Regalado to take out two loans.

173. Both loans were from affiliates of Countrywide Home Loans, a now discredited predatory and discriminatory lender, a first loan for $318,848 from America's Wholesale Lender and a second loan for $79,712 from Countrywide Bank.

174. The second loan bore an exorbitant 8.5% rate of interest and had predatory features, such as a prepayment penalty and payment "balloon" at maturity.

175. The payments on the two loans were expensive, and Mr. Regalado was able to sustain payments on both loans for less than a year, before suffering loss of income.

176. Ultimately, Mr. Regalado obtained a modification of his first mortgage loan. Around that time, the servicer stopped sending statements for the second loan.

177. Because Mr. Regalado received advice that he did not need to worry about his second mortgage loan after modifying the first loan, and because he stopped receiving statements

for the second loan, he did not believe he still needed to make payments on a second mortgage loan.

178. Mr. Regalado did not receive mortgage statements for his second loan even after the CFPB amended Regulation X in 2014 to require that a statement be sent on all residential mortgage loans, including those in delinquency status.

179. In 2019, Mr. Regalado began to receive collection statements that purported to pursue payment of the second mortgage loan. He was distressed, as he had thought that the second loan was gone. He became very worried that he would lose the home that he had worked so hard to purchase, pay for, and maintain.

180. In April of 2020, Mr. Regalado was shocked to receive a notice from Defendant SN Servicing. This notice threatened to bring a foreclosure action, and stated that Mr. Regalado's home loan was 3,430 days past due and that he owed over $69,259.96 in past due debt.

181. This notice threatened to sue Mr. Regalado for amounts—over 1,000 days of payments, or nearly $20,000—that were outside New York's statute of limitations, and which therefore could not be collected in a foreclosure action.

182. Mr. Regalado felt shock and intense fear that he might lose his home. He panicked and began to lose sleep over the large sums sought.

183. In fall of 2020, Mr. Regalado was further shocked to receive a summons and complaint, dated September 9, 2020, bearing the index number 715320/2020, entitled *BCMB1 Trust v. Dickson A. Regalado* et al., commencing a foreclosure action on the long-absent second mortgage.

184. The complaint asserted that a principal amount of $76,962.15 and interest "and other charges" were "due and owing" from November 1, 2010, a date nearly 11 years before the date of the foreclosure filing. The filing sought over $20,000 in interest payments and approximately $2,800 in principal that could not legally be collected.

185. Defendant Richland & Falkowski did not disclose that some of the amounts demanded were outside of the statute of limitations, so Mr. Regalado did not know that some of the amounts demanded were not legally collectible.

186. Mr. Regalado incurred spent subway fare to and from the courthouse in downtown Queens, looking for legal assistance, which was necessary to determine that only some amounts could be collected and to answer the foreclosure complaint to assert a defense based on the state statute of limitations. He had to pay more than $2 to make copies of documents for his attorney.

187. If only the sums that could legally be collected had been sought, Mr. Regalado would have been more easily able to resolve the debt before the costs and fees of the foreclosure litigation had ballooned. Without the time-barred debt, paths to resolution could otherwise have been found through grant and loan programs available to homeowners in New York City and New York State.

188. Mr. Regalado had never heard of the foreclosing plaintiff in the lawsuit, which purported to be his creditor. The summons and complaint were filed by Defendant Richland & Falkowski, attorneys representing BCMB1 Trust.

189. Mr. Regalado was terrified over the loss of the home he had poured so much into, investing his time and resources into making the space a home for his family. Mr. Regalado feared that he would lose his home, because he did not believe that he could pay off the total for

all of the years of payments sought in the foreclosure complaint. He panicked and was unable to sleep. He felt depressed and empty. He was anxious about how he could find such a large sum to save his home.

190. Mr. Regalado continued to receive statements from SN Servicing and a subsequent servicer. The August 2021 statement claimed amounts totaling over $76,000 to reinstate loan payments accruing since December 2010—including years of payments that cannot legally be collected—for a total of over $150,000 to pay off the loan, this on a debt that totaled only $79,000 when it was made.

191. Defendants' illegal actions in demanding time-barred debt have caused Mr. Regalado anxiety, depression, and fear, and left him in poorer mental, emotional, and physical health. He has lost time and money to learn that the demanded amount included time-barred debt and to assert the defense necessary to avoid liability for debt that could not legally be collected.

Plaintiff Tyrone Stewart

192. Mr. Stewart lives in his home, a two-family property located at 947 East 213th Street, in the Williamsbridge neighborhood of the Bronx, NY.

193. Mr. Stewart purchased his home in June of 2004.

194. Before the purchase of his home, Mr. Stewart had never purchased a home. He was unfamiliar with the process and did not know what to expect. He purchased the home with a mortgage from Greenpoint Funding Mortgage.

195. After only a short time, Mr. Stewart started to receive solicitations in the mail. Mortgage companies sent what looked like checks that could be used to access the equity in the home.

196. Because Mr. Stewart had expended some funds repairing his home and had outstanding bills for the materials, he decided to take an offer for a second mortgage loan.

197. The mortgage company insisted on conducting the entire application and approval process remotely, and Mr. Stewart was never able to meet the company's representative in person.

198. A representative of the mortgage company did not conduct a closing for the 2006 second mortgage. Instead, the company instructed Mr. Stewart to submit signed documents.

199. The second mortgage loan for $70,000 was originated by Capital One, a now discredited predatory and discriminatory lender.

200. The second loan bore an exorbitant interest rate of 8.6%.

201. Mr. Stewart was able to make payments on both loans for some time, but he fell behind in 2008 when his employment income was reduced.

202. Mr. Stewart sought and obtained a loan modification of the first mortgage loan from his mortgage servicer.

203. Mr. Stewart attempted to modify his second mortgage. Mr. Stewart submitted an application to his servicer, Bank of America, but he never received a decision on his application.

204. Mr. Stewart ultimately stopped receiving mortgage statements or any other communications for the second mortgage loan. He did not receive a statement for the second mortgage loan for many years.

205. Mr. Stewart was confused about the status of his second mortgage loan. He decided to focus on paying his first mortgage.

206. Mr. Stewart did not receive statements for the second loan even after the CFPB amended Regulation X in 2014 to require that a statement be sent on all residential mortgage loans, including those in delinquency status.

207. In the spring of 2021, Mr. Stewart received his first mortgage statement in over a decade.

208. Shortly thereafter, also in the spring of 2021, Mr. Stewart was confused to receive a summons and complaint, dated May 28, 2021, bearing the index number 807467/2021E, entitled *STAR201 LLC v. Tyrone Stewart* et al., commencing a foreclosure action on the long-absent second mortgage.

209. The complaint asserted that a principal amount of $61,942.12 and interest "and other charges" were "due and owing" from July 16 1, 2009, a date nearly 12 years before the date of the foreclosure filing. The filing sought over $27,000 in interest payments and approximately $19,000 in principal that could not legally be collected.

210. Defendant Richland & Falkowski did not disclose that some of the amounts demanded were outside of the statute of limitations, so Mr. Stewart did not know that some of the amounts demanded were not legally collectible.

211. Mr. Stewart was puzzled, and, at first, he thought the papers were a scam. After visiting the courthouse and learning that indeed, a lawsuit had been filed, Mr. Stewart was alarmed. He was stressed, worried, and perplexed that his loan could reappear after so many years of no contact about it. Mr. Stewart feared that he would lose his home, because he did not believe that he could pay off the total for all the years of payments sought in the Complaint.

212. Mr. Stewart was afraid that he would lose his home. He had no way to tell that some of the payments that the foreclosing plaintiff sought could not legally be collected.

213. Mr. Stewart incurred costs to find legal counsel, which was necessary to determine that only some amounts could be collected. He had to miss four hours of work and forgo over $150 in pay to go the courthouse to get counsel from an attorney who could assist him in asserting a statute of limitations defense to his foreclosure.

214. If only the sums that could legally be collected had been sought, Mr. Stewart would have been more easily able to resolve the debt before the costs and fees of the foreclosure litigation had ballooned and made swift resolution impossible. Mr. Stewart explored resolving the second mortgage using resources he had saved, but they were not sufficient. Without the time-barred debt, paths to resolution could otherwise have been found through grant and loan programs available to homeowners in New York City and New York State.

215. Mr. Stewart had never heard of the foreclosing plaintiff in the lawsuit, STAR201 LLC, which purported to be his creditor. The summons and complaint were filed by Defendant Richland & Falkowski, attorneys representing STAR201, LLC.

216. Defendant Richland & Falkowski's illegal actions in demanding time-barred debt have left Mr. Stewart stressed and depressed, and in poorer mental, emotional, and physical health. He has lost time and money to learn that the demanded amount included time-barred debt and to assert the defense necessary to avoid liability for debt that could not legally be collected. He is fearful and uncertain of his future and often unable to sleep.

Plaintiffs Barthlomy and Eunice Ogbennaya

217. Mr. and Mrs. Ogbennaya live in their two-family home located at 818 East 232nd Street, Bronx, NY 10466, in the Wakefield neighborhood.

218. Mr. and Mrs. Ogbennaya live in their home with their children, ages 21, 21, 22, 26, and 27.

219. Mr. and Mrs. Ogbennaya purchased their home in November of 2006.

220. Before that time, Mr. and Mrs. Ogbennaya had never purchased a home. They were unfamiliar with the process and did not know what to expect. They found a local real estate company and looked at properties in the neighborhood near where they were living/renting. They found a home that would fit their growing family.

221. They also found a broker, who helped them look for a mortgage.

222. Based on their conversations with their broker, Mr. and Mrs. Ogbennaya thought they would be taking out a single mortgage loan, but when they got to the closing table, they saw that the broker had actually arranged two loans.

223. Mr. and Mrs. Ogbennaya protested that they could not afford two loans. The broker told them not to worry, and that if they paid on time for a year and submitted a sum of $1,000 to the servicer, they could combine the two loans for an affordable payment.

224. Both loans were from Mortgage Lender's Network, a now discredited predatory and discriminatory lender, a first loan for $464,680 and a second loan for $116,170.

225. The second loan bore an exorbitant 9.8% rate of interest and had predatory features, such as a prepayment penalty and payment "balloon" at maturity.

226. The first mortgage also had predatory features, including a short-term teaser interest rate, an adjustable interest rate, and a balloon.

227. Mr. and Mrs. Ogbennaya trusted the mortgage broker and signed the papers. The lawyer who purported to represent them had been provided by the mortgage broker, met them for the first time at the closing, and did not explain any papers or give them any independent advice.

228. The payments on the two loans were expensive, and Mr. and Mrs. Ogbennaya were able to sustain payments on both loans only for a short time.

229. Mr. and Mrs. Ogbennaya followed the instructions of the broker, paying on time for a year, and submitting an additional $1,000, but the servicer would not combine the loans to an affordable payment as promised.

230. Ultimately, after years of efforts, Mr. and Mrs. Ogbennaya were able to modify their first mortgage loan.

231. However, shortly after receiving notice that servicing would be transferred to Nationstar Mortgage Servicing, Ms. and Mrs. Ogbennaya stopped receiving statements for the second loan.

232. Because Mr. and Mrs. Ogbennaya received advice that, as long as they were paying on their modified first, they did not need to worry about the second mortgage loan, and because they stopped receiving statements for the second loan, they did not believe they still needed to make payments on a second mortgage loan.

233. Mr. and Mrs. Ogbennaya did not receive mortgage statements for their second loan even after the CFPB amended Regulation X in 2014 to require that a statement be sent on all residential mortgage loans, including those in delinquency status.

234. In 2021, Mr. and Mrs. Ogbennaya were shocked to receive a summons and complaint, dated September 15, 2021, bearing the index number 812473/2021E, entitled

STAR202, LLC v. Eunice Ogbennaya et al., commencing a foreclosure action on the long-absent second mortgage.

235. The complaint asserted that a principal amount of $111,850.95 and interest "and other charges" were "due and owing" from April 1, 2009, a date nearly 11.5 years before the date of the foreclosure filing. The filing sought at least $63,000 in interest payments and approximately $6,100 in principal that could not legally be collected.

236. Defendant Richland & Falkowski did not disclose that some of the amounts demanded were outside of the statute of limitations, so Mr. and Mrs. Ogbennaya did not know that some of the amounts demanded were not legally collectible.

237. Mr. and Mrs. Ogbennaya incurred costs to meet with legal counsel, which was necessary to determine that only some amounts could be collected and to answer the foreclosure complaint to assert a defense based on the state statute of limitations. They had to pay more than $1 for gas and parking to visit the courthouse, in order to determine that some amounts sought in the complaint could not be collected and to prepare an answer asserting a statute of limitations defense. When they learned that some of the sums sought could not legally be collected they were frustrated and alarmed. The stress exacerbated Mr. Ogbennaya's high blood pressure and began to psychologically and emotionally impact their children.

238. If only the sums that could legally be collected had been sought, Mr. and Mrs. Ogbennaya would have been more easily able to resolve the debt before the costs and fees of the foreclosure litigation had ballooned and made swift resolution impossible. Without the time-barred debt, paths to resolution could otherwise have been found through grant and loan programs available to homeowners in New York City and New York State.

239. Mr. and Mrs. Ogbennaya were not familiar with the foreclosing plaintiff in the lawsuit, which purported to be his creditor. The summons and complaint were filed by Defendant Richland & Falkowski, attorneys representing STAR202, LLC.

240. Mr. and Mrs. Ogbennaya were frightened to receive the foreclosure papers. Mr. and Mrs. Ogbennaya feared that they would lose their home, because they did not believe that they could pay off the total for all the years of payments sought in the foreclosure complaint. They felt under extreme pressure, terrified that they might lose their family home, which they had worked so hard over a decade to preserve and maintain. As they cast about, looking for resources, their children began to ask what was wrong. Mr. and Mrs. Ogbennaya were embarrassed to have to disclose these difficulties to their children, and devastated that the lawsuit caused their children heartache and worry.

241. Defendants' illegal actions in demanding time-barred debt have caused Mr. and Mrs. Ogbennaya panic, sadness, worry, embarrassment, and fear, and left them in poorer mental, emotional, and physical health. They have lost time and money to learn that the demanded amount included time-barred debt and to assert the defense necessary to avoid liability for debt that could not legally be collected.

Public Records Show Defendants Are Pursuing Hundreds of Thousands of Dollars of Time-Barred Debts in Foreclosures Filed in New York Courts

242. At the time they received the summons and complaints in the foreclosure actions commenced against them, Plaintiffs each knew only of their own shock at the emergence of a long-disappeared second mortgage loan and of the efforts to foreclose on them.

243. Though they did not know it, Plaintiffs were victims in a coordinated scheme to use deceptive notices and the New York Courts to wrest excessive, time-barred payments from unwitting borrowers.

244. Public records reveal that Richland & Falkowski has represented BCMB1 Trust, NS194, LLC, and related trusts in nearly 100 foreclosure actions in the New York State courts in 2020 and 2021.

245. The vast majority these foreclosure lawsuits—all filed during the coronavirus pandemic—seek payments, together totaling nearly three million dollars, that are barred by New York's statute of limitations, each foreclosure representing a violation of the federal Fair Debt Collection Practices Act.

246. Public filings also reveal that Defendant SN Servicing is implicated in many of these efforts to collect on time-barred payments through foreclosure actions, further evidence of Defendants' pattern and practice of colluding to extract time-barred payments from consumers in violation of the New York State Deceptive Practices Act.

247. In illegally and deceptively seeking these payments from Plaintiffs and from other New Yorkers, the Defendants put significant numbers of homeowners—many of whom have struggled to achieve housing stability and are at great pains to remain current on a first mortgage during the pandemic—at risk of losing their homes or defaulting on their first mortgages in order to settle debts that should never have been demanded.

FIRST CAUSE OF ACTION

FAIR DEBT COLLECTION PRACTICES ACT
(All Plaintiffs Against Defendant Richland & Falkowski)

248. Plaintiffs repeat and reallege paragraphs 1 through 247 of the Complaint as if fully set forth herein.

249. Congress enacted the Fair Debt Collection Practices Act (the "FDCPA"), 15 U.S.C. § 1692 *et seq*., in 1977, "to eliminate abusive debt collection practices by debt collectors, [and] to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged . . . ." 15 U.S.C. § 1692(e).

250. Plaintiffs are all "consumers" within the meaning of 15 U.S.C. § 1692a(3), in that the debt that was sought to collect from them is a consumer debt.

251. Richland & Falkowski is a "debt collector" as defined in 15 U.S.C. § 1692a(6) because:

a. It is a person who regularly uses instrumentalities of interstate commerce and the mails in a business the principal purpose of which is the collection of debts, and regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another; and

b. Its business has as its principal purpose the enforcement of security interests in judicial foreclosure proceedings.

252. The CFPB also issued an advisory opinion, effective May 1, 2023, affirming that the FDCPA and Regulation F may be violated when a "debt collector" "brings or threatens to bring a State court foreclosure action to collect a time-barred mortgage debt."

253. Defendant Richland & Falkowski violated the following provisions of the FDCPA:

a. 15 U.S.C. § 1692e, by using false and deceptive representations in connection with the collection of a debt claimed to be owed by Plaintiffs; and

b. 15 U.S.C. § 1692e(2), by misrepresenting the character, amount, or legal status of the asserted debt.

c. 15 U.S.C. § 1692f(1), by using unfair or unconscionable means to collect or attempt to collect a debt.

254. Specifically, Defendant Richland & Falkowski violated the FDCPA by filing foreclosure lawsuits against all Plaintiffs that: (1) misrepresented the amount owed on all of Plaintiffs' mortgage loans, (2) attempted to collect incorrect amounts including payments that are not owed on their mortgage loans because they are outside the governing statute of limitations, and (3) attempted to collect an amount not authorized by agreement or permitted by law.

255. As a result of Richland & Falkowski's conduct, actions, and omissions, Plaintiffs have suffered actual damages including the costs of damage to their credit rating and impairment of their ability to obtain credit.

256. Plaintiffs have also suffered damage to reputation, embarrassment, humiliation, and other emotional and mental distress resulting from Richland & Falkowski's violation of the FDCPA.

257. As a result of Richland & Falkowski's violations of the FDCPA, Plaintiffs seek:

a. Compensatory damages to be determined at trial;

b. Statutory damages;

c. Costs and disbursements; and

d. Attorney's fees. 15 U.S.C. § 1692k(3).

SECOND CAUSE OF ACTION

FAIR DEBT COLLECTION PRACTICES ACT
(Plaintiffs Ochieze Okoronkwo and Precilia Okoronkwo Against Defendant SN Servicing)

258. Plaintiffs repeat and reallege paragraphs 1 through 256 of the Complaint as if fully set forth herein.

259. SN Servicing is a "debt collector" as defined in 15 U.S.C. § 1692a(6) because:

a. It is a person who regularly uses instrumentalities of interstate commerce and the mails in a business the principal purpose of which is the collection of debts, and regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another, and

b. It acquired Plaintiffs Ochieze and Precilia Okoronkwo's account when the account was already claimed to be in default.

260. Defendant SN Servicing violated the following provisions of the FDCPA:

a. 15 U.S.C. § 1692e, by using false and deceptive representations in connection with the collection of a debt claimed to be owed by Plaintiffs;

b. 15 U.S.C. § 1692e(2), by misrepresenting the character, amount, or legal status of the asserted debt; and

c. 15 U.S.C. § 1692e(5), by threatening to take an action that cannot legally be taken or that is not intended to be taken.

261. The CFPB also issued an advisory opinion, effective May 1, 2023, affirming that the FDCPA and Regulation F may be violated when a "debt collector" "brings are threatens to bring a State court foreclosure action to collect a time-barred mortgage debt."

262. Specifically, Defendant SN Servicing violated the FDCPA by sending Plaintiffs Ochieze Okoronkwo and Precilia Okoronkwo each a 90-day pre-foreclosure notice that: (1) claimed amounts were owed on Plaintiffs' mortgage that incorrectly included amounts that could not be collected because they were outside of New York State's statute of limitations, (2)

misrepresented the amount owed on the mortgage, and (3) threatened to bring a foreclosure action that would seek a judgment for amounts barred by the applicable statute of limitations.

263. As a result of SN Servicing's conduct, actions, and omissions, Plaintiffs Ochieze and Precilia Okoronkwo have suffered actual damages, including the costs of damage to their credit rating and impairment of their ability to obtain credit.

264. Plaintiffs Ochieze Okoronkwo and Precilia Okoronkwo have also suffered damage to reputation, embarrassment, humiliation, and other emotional and mental distress as a result of SN Servicing's violation of the FDCPA.

265. As a result of SN Servicing's violations of the FDCPA, Plaintiffs Ochieze and Precilia Okoronkwo seek:

a. Compensatory damages to be determined at trial;

b. Statutory damages;

c. Costs and disbursements; and

d. Attorney's fees. 15 U.S.C. § 1692k(3).

THIRD CAUSE OF ACTION

DECEPTIVE PRACTICES ACT
NEW YORK GENERAL BUSINESS LAW § 349
(Plaintiffs Yvonne Jones, Marie Baptiste-Elmine, Freddy Elmine, Ochieze Okoronkwo, Precilia Okoronkwo, Rose Prophete, and Dickson Regalado Against Defendant SN Servicing)

266. Plaintiffs repeat and reallege paragraphs 1 through 263 of the Complaint as if fully set forth herein.

267. SN Servicing conducts business and furnishes a service as those terms are defined by New York General Business Law § 349 (the "Deceptive Practices Act").

268. SN Servicing's business practices are consumer-oriented. SN Servicing services mortgage loans for homeowners throughout New York. SN Servicing's loan servicing practices have a broad impact on consumers with little knowledge of the practices or procedures of the mortgage industry.

269. Moreover, complaints to the federal Consumer Financial Protection Bureau catalogued in a database that is available to the public demonstrate that SN Servicing shows a troubling pattern of attempting to collect on time-barred debts.

270. Upon information and belief, SN Servicing as servicer of the subject mortgage loans, arranged for Richland & Falkowski's representation and directed the foreclosure lawsuits seeking time-barred debt.

271. SN Servicing has violated the Deceptive Practices Act by engaging in acts that were misleading in a material way, deceptive, and contrary to public policy and generally recognized standards of business.

272. SN Servicing violated the Deceptive Practices Act by:

a. Pursuing collection and satisfaction of payments that came due more than six years prior to the commencement of collection efforts, and hence were no longer collectable under the statute of limitations for collection of a mortgage debt under New York state law.

b. Sending pre-foreclosure notices demanding payment of time-barred debt, abusing New York's statutory borrower protections in an attempt to coerce Plaintiffs into paying amounts that they did not owe and that Defendants could not enforce.

273. Defendant willfully and knowingly undertook these illegal acts in violation of the General Business Law.

274. As a result of SN Servicing's deceptive conduct, actions, and omissions, Plaintiffs have suffered actual damages.

275. In addition to pecuniary losses, Plaintiffs suffered actual harm as a result of SN Servicing's violations of GBL §349(a), including but not limited to, the annoyance, time, frustration, anger, and anxiety incurred by Plaintiffs.

276. As a result of the aforesaid violations of the Deceptive Practices Act, SN Servicing is liable to Plaintiffs for:

a. Compensatory damages to be determined at trial;

b. Statutory damages;

c. Treble damages;

d. Exemplary damages;

e. Injunctive relief;

f. Costs and disbursements; and

g. Attorney's fees. N.Y. G.B.L. § 349(h).

WHEREFORE, Plaintiffs respectfully request that this Court:

a. Grant the relief requested in Counts One through Three herein;

b. Award compensatory damages and interest in the amount to be determined at trial, including pain and suffering in the form of embarrassment, humiliation, and other distress in the amount to be determined by the jury;

c. Award statutory damages;

d. Pursuant to the Deceptive Practices Act, enjoin Defendant SN Servicing from engaging in the deceptive practice of pursuing collection activities on any of its customers' time-barred payments;

e. Award further injunctive relief;

f. Award Plaintiffs reasonable attorney's fees and costs for this action; and

g. Award such other further relief as the Court deems just and proper.

DATED: March 8, 2024
Brooklyn, NY

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15 Ways to Fight Foreclosure of Zombie Second Mortgages

Geoff Walsh December 09, 2024

CONTENTS

As the name suggests, zombie mortgages can be terrifying. They rise from the dead, appear without warning, and seize homes. And they are appearing now more than ever. This article explains what they are, why they are now such a problem, and fifteen ways homeowners can stop foreclosures of zombie mortgages. For even more detail, see **Chapter 12 of NCLC's *Home Foreclosures*** (https://library.nclc.org/book/home-foreclosures/1211-introduction).

What Are Zombie Second Mortgages?

The zombie mortgages that are wreaking havoc today are second mortgages. Many were originated by predatory lenders in the years leading up to the 2007 financial crisis. During that era of frenzied lending, brokers often combined first and second mortgages in a single loan transaction. Referred to as "80-20 mortgages," the transactions typically financed 80% of the principal balance through a first mortgage and the other 20% through a second mortgage. This kept the first mortgage within a loan-to-value ratio for easy securitization. Careless underwriting and abusive terms led to early defaults on many of these mortgages.

Why Did These Second Mortgages Become Dormant?

Many homeowners struggled to keep up on their first mortgages through the Great Recession, often with the help of loan modifications. In the early years of the Recession, home values dropped precipitously. With so many properties deep underwater, holders of first mortgages faced reduced recoveries if they foreclosed. Second mortgagees, on the other hand, were almost certain to obtain nothing if they decided to foreclose. Not surprisingly, as many homeowners were unable to make payments on second mortgages, the owners of these loans wrote them off.

These "write-offs" were accounting devices used to reflect that the loans had ceased to be income-producing assets. In some cases, the owner of the loan issued an IRS Form indicating that it was seeking favorable tax treatment for a written-off loan. The role of this IRS Form 1099-C is discussed in **NCLC's *Collection Actions* § 5.2.7.3** (https://library.nclc.org/book/collection-actions/5273-irs-form-1099-c-evidence-debt-cancellation).

These accounting adjustments did not necessarily mean that the borrowers were no longer under legal obligations to repay the debts. In most cases, unless some of the legal principles discussed in this article applied, the loan owners retained the option to change their minds and demand payment again. Borrowers did not understand this. Many thought that when their first mortgages were modified, second mortgages were covered as well. Years passed, sometimes well over a decade, and borrowers heard nothing from anyone about the second mortgages.

Why Are Zombie Second Mortgages Coming Back to Life Now?

Zombie second mortgages are coming back to life for simple economic reasons. Now there is home equity for them to feed on. Over the past several years home values have risen significantly in many parts of the country. Homes that were underwater in 2010 now stand well above water, and homeowners' equity has become an enticing target. Over the years since the Great Recession many homeowners also worked to pay down their first mortgages, further increasing their home equity.

Who Is Foreclosing on These Second Mortgages?

The parties foreclosing on zombie second mortgages are a mix of players, with the original lenders seldom still in the picture. The parties threatening foreclosure today are often debt buyers or their collection agents. Debt buyers purchase pools of defaulted loan accounts, then opportunistically select those to foreclose. They can focus on equity-rich properties and those where they can easily pay off the first mortgage to obtain unencumbered title for themselves.

How Does a Second Mortgage Foreclosure Work?

At the foreclosure sale of a first mortgage, the buyer typically acquires title free of any liens that attached to the property after the date the first mortgage originated. In the case of a second mortgage foreclosure, the buyer at the foreclosure sale *does not* obtain unencumbered title to the property. The buyer acquires only the borrower's right to redeem the property from the first mortgage.

If a buyer at the foreclosure sale of a second mortgage wishes to do so, the buyer can pay off the first mortgage and thereby obtain title to the property. Importantly, the foreclosure of a second mortgage means that after the foreclosure the borrower's right to redeem the property by paying off all the mortgage debts is extinguished. Under most state laws, the purchaser at the foreclosure sale of a second mortgage can proceed to take possession of the property and evict the borrowers. The ability to use the powerful remedy of foreclosure gives a second mortgage debt buyer and its debt collector extremely powerful leverage. **NCLC's *Home Foreclosures* § 12.1** (https://library.nclc.org/book/home-foreclosures/1211-introduction) explores the substantive distinctions between first and second mortgage foreclosures.

15 Ways Homeowners Can Fight Off Zombie Second Mortgage Foreclosures

Resurrecting a long-dormant second mortgage and abruptly threatening to foreclose is a patently abusive practice. When presented with viable defenses and claims, courts should be willing to intervene to protect homeowners. **Chapter 12 of NCLC's *Home Foreclosures*** (https://library.nclc.org/book/home-foreclosures/1211-introduction) describes legal defenses and claims that give courts authority to rein in zombie foreclosures. This article summarizes the most important claims and defenses.

1. The Statute of Limitations

Statutes of limitations can provide a powerful defense to foreclosure of a second mortgage. Under certain state laws, the expiration of the statute of limitations for foreclosure not only bars foreclosure, but also can be a basis for extinguishing the mortgage as an encumbrance on the property.

Examine your state laws to determine the statute of limitations applicable to foreclosures. In a few states the status of the law remains unclear. **Appendix E to NCLC's *Home Foreclosures*** (https://library.nclc.org/book/home-foreclosures/introduction-summary-state-foreclosure-laws) includes summaries of the applicable limitation periods for foreclosures in most states. In many jurisdictions the statute of limitations for foreclosures is equivalent to the limitation period for enforcement of negotiable notes and other written contracts – typically six years.

Other states look to limitation periods for asserting rights in real property. These timeframes based on real property law can be considerably longer, ranging from ten to thirty years. A few states do not recognize any statute of limitations for foreclosure of mortgages or deeds of trust. More detail on individual state statutes of limitations for foreclosures is discussed in **NCLC's *Home Foreclosures* § 5.3.1** (https://library.nclc.org/book/home-foreclosures/531-overview).

The first step is to determine the statute of limitations. The second step is to determine when the statute of limitations begins to run under the state's law. For mortgages and deeds of trust there are three potential trigger events to consider:

- The due date of each unpaid installment may start a limitation period running for collection of that installment. This limitation can preclude claims for many of the older

installments due on a loan that was never accelerated and remained inactive for many years.

- A loan owner's acceleration of the loan makes the entire loan balance due immediately and starts the statute of limitations running for the entire debt if not paid. Factual and legal issues can arise in proving whether and when an acceleration occurred. These issues are discussed in **NCLC's *Home Foreclosures* § 5.3.** (https://library.nclc.org/book/home-foreclosures/532-when-does-statute-limitations-begin-run)**2**.

- The loan's reaching its contractual maturity date for payment of the entire debt makes any remaining unpaid balance due immediately, and like acceleration, triggers the running of the statute of limitations for the entire unpaid sum.

NCLC's *Home Foreclosures* § 12.2 (https://library.nclc.org/book/home-foreclosures/1221-general) discusses statutes of limitations with a specific focus on defending second mortgage foreclosures.

2. Challenging Authority to Foreclose a Second Mortgage

The party foreclosing a second mortgage must have authority to enforce the underlying contractual documents, the note and mortgage. **NCLC's *Home Foreclosures* Chapter 2** (https://library.nclc.org/book/home-foreclosures/21-introduction), **Chapter 3** (https://library.nclc.org/book/home-foreclosures/31-introduction), and **Chapter 4** (https://library.nclc.org/book/home-foreclosures/41-introduction) provide extensive analysis of authority to foreclose. The basic concepts covered there apply to second mortgage foreclosures as well.

Debt buyers who acquire pools of defaulted second mortgages are unlikely to have systems in place that larger mortgage servicers use to document transfers of negotiable notes and account histories. A request for information (RFI) under RESPA regarding loan ownership and possession of the relevant contract documents can build a successful challenge to a party's authority to foreclose a second mortgage. *See* **NCLC's *Home Foreclosures* § 12.3** (https://library.nclc.org/book/home-foreclosures/123-authority-foreclose-second-mortgage). Sample RFI letters inquiries about second mortgages are available **here** (https://library.nclc.org/zombie-second-mortgages).

3. Claims Under TILA and RESPA

Claims under TILA and RESPA can be raised against the owners and servicers of zombie second mortgages. Junior mortgages are not exempt from most of the important TILA and RESPA provisions, although some requirements do not apply to HELOC loans. **NCLC's *Home***

***Foreclosures* § 12.4** (https://library.nclc.org/book/home-foreclosures/1241-general-principles) discusses coverage of second mortgages under TILA and RESPA.

Both TILA and RESPA allow claims for statutory penalties, compensatory damages, and attorney fees. These laws also establish an important industry standard – that owners and servicers of mortgage loans must keep borrowers regularly informed about the status of their loans. Claims under TILA and RESPA can include:

- *TILA transfer of loan ownership notices*. Effective in 2009, provisions of Regulation Z require that new owners or assignees of mortgage loans inform borrowers of a transfer of loan ownership within thirty days after a loan is sold. 12 C.F.R. § 1026.39(b), implementing 15 U.S.C. § 1641(g). These regulations are discussed in detail in **NCLC's *Mortgage Servicing and Loan Modifications* § 4.2.7** (https://library.nclc.org/book/mortgage-servicing-and-loan-modifications/4271-generally). Transfer of ownership notices must provide specific information that borrowers need to understand their current payment obligations. Failure to inform borrowers of sales of their loans contributes to the expectation that there is no need take action regarding an ongoing payment obligation. *See* **NCLC's *Home Foreclosures* § 12.4.2** (https://library.nclc.org/book/home-foreclosures/1242-notices-change-loan-ownership-and-servicing-rights-junior-mortgages).

- *RESPA notice of transfer of mortgage servicing rights*. A transfer of servicing rights for a second mortgage triggers obligations under RESPA for both the transferor servicer and the transferee servicer to provide a timely notice to the borrower. 12 U.S.C. § 2605(b); Reg. X, 12 C.F.R. § 1024.33(b). **NCLC's *Mortgage Servicing and Loan Modifications* § 3.4** (https://library.nclc.org/book/mortgage-servicing-and-loan-modifications/341-introduction) discusses this requirement in detail. In addition to contact information for the new servicer, the notice must state when the new servicer will begin to accept payments. Failure to give timely notice deprives a borrower of another important tool for ascertaining the status of an account. *See* **NCLC's *Home Foreclosures* § 12.4.2** (https://library.nclc.org/book/home-foreclosures/1242-notices-change-loan-ownership-and-servicing-rights-junior-mortgages).

- *The TILA periodic statement requirements*. Amendments to the TILA periodic statement rule were designed to prevent the surprise appearance of a long-dormant second mortgage together with unexpected claims for years of accrued interest and fees. *See* Reg. Z, 12 C.F.R. § 1026.41, *implementing* 15 U.S.C. § 1638(f). Under the rule, servicers must keep borrowers informed about the status of a second mortgage, including whether it has been charged-off or re-activated for collection, as well as who currently owns the loan and how to contact appropriate parties for up-to-date information. The rule requires heightened periodic statement disclosures when the

loan is in arrears. **NCLC's *Mortgage Servicing and Loan Modifications* § 4.2.5** (https://library.nclc.org/book/mortgage-servicing-and-loan-modifications/4251-generally). The initial version of this periodic statement rule went into effect in February 2014. Amendments effective in October 2017 added requirements for disclosing the charged-off status of a loan and for giving notice before collection on a charged-off loan resumed. 12 C.F.R. § 1026.41(e)(6). The amended rule bars collection of interest and fees that a lender alleges accrued after the lender gave notice of charge-off and before it gave notice of resumption of payments. 12 C.F.R. § 1026.41(e)(6)(ii)(B). *See* **NCLC's *Home Foreclosures* § 12.4.3** (https://library.nclc.org/book/home-foreclosures/1243-tilas-periodic-statement-rule-and-bar-collection-interest-and-fees).

- *TILA rescission*. A successful TILA rescission voids a lender's security interest in the borrower's real property, effectively barring a foreclosure. *See* **NCLC's *Truth in Lending* Ch. 10** (https://library.nclc.org/book/truth-lending/101-tila-rescission-overview). Second mortgages may be particularly susceptible to rescission claims when they come with faulty disclosures and did not finance a home purchase. However, zombie mortgages may present statute of limitations problems unless the borrower can rely on certain recoupment principles or has access to more favorable state law rescission rights. *See* **NCLC's *Home Foreclosures* § 12.4.4** (https://library.nclc.org/book/home-foreclosures/1244-tila-rescission-claims-and-second-mortgages).

TILA and RESPA claims may be limited by their respective statutes' limitation periods, although these claims in some states can be raised by way of recoupment in a foreclosure proceeding. TILA and RESPA claims also raise questions as to the proper defendant in the action. But, as described in items #5 and #6, *infra*, the TILA or RESPA violation can form the basis for contract claims under the mortgage loan agreement as well as UDAP and FDCPA claims. TILA and RESPA violations also provide support for state law negligence and fraud claims.

4. The Fair Debt Collection Practices Act

The Fair Debt Collection Practices Act (FDCPA) prohibits unfair or deceptive debt collection activities. Seeking to collect a sum that is not lawfully owed or enforcing a security interest when there is not a present right to do so violates these FDCPA prohibitions. *See* **NCLC's *Fair Debt Collection* §§ 7.4.11** (https://library.nclc.org/book/fair-debt-collection/74111-generally), **8.3** (https://library.nclc.org/book/fair-debt-collection/831-overview), and **8.6** (https://library.nclc.org/book/fair-debt-collection/861-overview). Upon proving an FDCPA violation, borrowers can recover statutory penalties, damages, and attorney fees.

Owners of zombie second mortgages and their attorneys may qualify as "debt collectors" under the FDCPA. **NCLC's *Fair Debt Collection* § 4.7.3.4** (https://library.nclc.org/book/fair-debt-collection/4734-enforcement-security-interests-debt-collection). Servicers of zombie second mortgages may qualify as debt collectors as well if, as is likely, they acquired servicing rights after the loan went into default. **NCLC's *Fair Debt Collection* § 4.7.5.2.3** (https://library.nclc.org/book/fair-debt-collection/47523-mortgage-servicers-foreclosure-trustees-foreclosure-law-firms-and). Some limited exceptions to FDCPA coverage may apply to certain entities when they engage only in essential non-judicial foreclosure activities and do not demand payment. **NCLC's *Fair Debt Collection* § 4.7.5.3** (https://library.nclc.org/book/fair-debt-collection/47531-introduction).

In 2023, the CFPB published a helpful Guidance on the applicability of the FDCPA to certain debt collection practices involving zombie second mortgage debt. *See* CFPB, Fair Debt Collection Practices Act (Regulation F); Time-Barred Debt, **88 Fed. Reg. 26,475 (May 1, 2023)** (https://www.govinfo.gov/content/pkg/fr-2023-05-01/pdf/2023-09171.pdf). This CFPB guidance is discussed in **NCLC's *Home Foreclosures* § 12.4.4a** (https://library.nclc.org/book/home-foreclosures/1244a-fdcpa-claims-related-second-mortgages).

5. Contract-Based Claims and Defenses

Standard loan documents contain terms that obligate lenders to comply with applicable federal and state laws if they wish to foreclose. *See* **NCLC's *Mortgage Servicing and Loan Modification* § 5.5** (https://library.nclc.org/book/mortgage-servicing-and-loan-modifications/551-general) (discussing requirement to comply with "applicable law" as term of standard GSE security instrument). As "applicable laws," TILA and RESPA impose duties on lenders and their servicers to communicate with borrowers and provide them with specified information. This information includes when to make payments, how much to pay, and where to send payments. *See* #3, *supra*.

Framing these obligations as contractual conditions to a foreclosure avoids potential TILA or RESPA statute of limitations defenses and disputes over who is a proper party defendant that can arise when the borrower relies exclusively on the TILA and RESPA regulations. *See* **NCLC's *Home Foreclosures* § 12.6** (https://library.nclc.org/book/home-foreclosures/126-contract-based-claims-and-defenses).

6. Negligence-Based Claims and Defenses

Tort-related claims arising from mortgage servicing and foreclosures often focus on negligence-based theories. State courts vary in their willingness to hold mortgage servicers to a duty of care to avoid negligent conduct. *See* **NCLC's *Mortgage Servicing and Loan Modifications* § 10.5.6** (https://library.nclc.org/book/mortgage-servicing-and-loan-

modifications/1056-fdcpa-and-state-debt-collection-statutes). In jurisdictions that recognize such a duty, borrowers can point to the many federal statutes and regulations that impose obligations on mortgage servicers to communicate regularly with homeowners. Mortgage servicers agree to comply with these obligations when they undertake to service a loan.

The assumed duties include the ongoing disclosure of accurate information about the account. A servicer's choice to remain silent and allow interest and charges to grow to the point where it becomes impossible for the borrower to plan to repay an arrearage flagrantly disregards these duties. The conduct harms the borrower by making foreclosure inevitable. *See* **NCLC's *Home Foreclosures* § 12.7** (https://library.nclc.org/book/home-foreclosures/127-defenses-and-claims-based-state-udap-statutes).

7. Defenses and Claims Based on State UDAP Statutes

Federal and state laws impose affirmative obligations on owners of second mortgages and their servicers to disclose changes of loan ownership and servicing rights as well as details about an account's current status. Violations of TILA, RESPA, and other federal and state laws that mandate regular disclosures of loan information to borrowers can be the basis for effective claims under state unfair and deceptive acts and practices (UDAP) statutes. *See* **NCLC's *Unfair and Deceptive Acts and Practices* § 6.4.1** (https://library.nclc.org/book/unfair-and-deceptive-acts-and-practices/641-truth-lending-violations).

Borrowers have strong arguments that the practice of lying in wait while systematically failing to communicate before a foreclosure meets both the "unfair" and "deceptive" standard under the state UDAP statutes. *See* **NCLC's *Unfair and Deceptive Acts and Practices* §§ 4.2.15** (https://library.nclc.org/book/unfair-and-deceptive-acts-and-practices/42151-overview), **4.3.3** (https://library.nclc.org/book/unfair-and-deceptive-acts-and-practices/4331-unfairness-broader-deception), **4.4** (https://library.nclc.org/book/unfair-and-deceptive-acts-and-practices/441-importance-unconscionability-standard). Not all state UDAP statutes apply to financial institutions and foreclosures. However, many do and can authorize wide-ranging relief, including equitable remedies. *See* **NCLC's *Home Foreclosures* § 12.7** (https://library.nclc.org/book/home-foreclosures/127-defenses-and-claims-based-state-udap-statutes).

8. Laches and Equitable Defenses to Second Mortgage Foreclosures

Equitable defenses to foreclosure may be available when the owner of a zombie mortgage seeks to foreclose after the account has remained inactive for many years. The foreclosure may be barred under the doctrines of unclean hands or laches. The elements of laches under a typical state law are: (1) the creditor's knowledge of the cause of action, (2) an

unreasonable delay in commencing the action, and (3) harm resulting from the unreasonable delay. Under the laches doctrine, foreclosure can be barred even when the statute of limitations to foreclose has not expired. *See* **NCLC's *Home Foreclosures* § 12.8.2** (https://library.nclc.org/book/home-foreclosures/1282-general-principles-laches).

Borrowers who believed their loans had been written off or modified and could not communicate with anyone about the loan for years may have foregone timely options to address the loan default, such as through loss mitigation. Borrowers can also be harmed when years of delay have led to the disappearance of evidence needed to defend against a foreclosure. *See* **NCLC's *Home Foreclosures* § 12.8.4** (https://library.nclc.org/book/home-foreclosures/1284-prejudice-or-harm-borrower).

9. State Law General Foreclosure Requirements

Each state sets requirements for conduct of a valid foreclosure. A discussion of general state foreclosure laws and their applicability to second mortgages is found at **NCLC's *Home Foreclosures* § 12.9** (https://library.nclc.org/book/home-foreclosures/129-state-law-foreclosure-requirements).

A foreclosing party must typically have the right to enforce a mortgage or deed of trust and the related promissory note. The party must designate a default, give specific notices, and identify the amount owed. **NCLC's *Home Foreclosures* Chapter 5** (https://library.nclc.org/book/home-foreclosures/51-introduction) and **Chapter 8** (https://library.nclc.org/book/home-foreclosures/81-introduction) discuss procedural challenges in the context of first lien mortgage foreclosures that may apply to second mortgages as well. State statutes may impose a good faith obligation on mortgage servicers or require transparency in pre-foreclosure loss mitigation reviews. *See* **NCLC's *Home Foreclosures* § 5.13.2.4.2** (https://library.nclc.org/book/home-foreclosures/513242-meaning-good-faith).

The Massachusetts Attorney General recently won extensive relief against a zombie mortgage investor on behalf of a statewide class of borrowers. The Massachusetts AG's complaint focused on the investor's pattern of non-compliance with a state statute that obligated lenders to review borrowers for mortgage modifications before they foreclosed on certain mortgages. *See* **Massachusetts Attorney General Assurance of Discontinuance in Franklin Credit Management** (https://library.nclc.org/companion-material/mass-ag-assurance-discontinuance-franklin-credit-management-sept-26-2024) (Sept. 26, 2024).
Investigate state foreclosure laws to determine whether all procedural requirements, such as participation in settlement conferences and mediations and review for loss mitigation, apply to second mortgages in the same way they do to first mortgages.

10. State Laws That Specifically Regulate Second Mortgages

Thirteen states have enacted statutes specifically designed to regulate second mortgages. These statutes are discussed generally at **NCLC's *Home Foreclosures* § 12.10.1** (https://library.nclc.org/book/home-foreclosures/12101-overview-state-law-requirements) and a state-by-state analysis is found at **§ 12.10.2** (https://library.nclc.org/book/home-foreclosures/121021-connecticut). Several of these statutes limit default-related charges. Others set guidelines for second mortgage loan origination and require special licensing. Violation of these origination laws may give rise to recoupment claims against debt buyers.

11. Bankruptcy Remedies Applicable to Zombie Second Mortgages

In addition to the reprieve from foreclosure activity through the automatic stay, bankruptcy offers homeowners who file for relief under chapter 13 the opportunity to object to a second mortgagee's claim. The homeowner can challenge amounts owed when a statute of limitations bars all or some of the creditor's claim. Recoupment is also available despite statutes of limitations on a homeowner's affirmative claims against the creditor. When the first lien mortgage and other senior encumbrances exceed the property's value, the homeowner can "strip off" the junior mortgage in a chapter 13 case, making the loan balance a dischargeable unsecured debt. **NCLC's *Home Foreclosures* Chapter 9** (https://library.nclc.org/book/home-foreclosures/91-introduction) discusses other ways to deal with mortgagees in bankruptcy. A discussion of bankruptcy's application specifically to second mortgages is found at **NCLC's *Home Foreclosures* § 12.11** (https://library.nclc.org/book/home-foreclosures/1211-using-bankruptcy-second-mortgages).

12. Loss Mitigation Options for Junior Mortgages

Loss mitigation options created by the major federal guarantors and insurers of mortgage loans can be critically important tools for preserving homeownership. However, certain options, including many modification programs, are available only for first mortgages. Nevertheless, many forbearance options apply to all federally backed mortgages regardless of their lien position. **NCLC's *Home Foreclosures* § 12.5** (https://library.nclc.org/book/home-foreclosures/1251-respa) outlines the major servicing options that cover junior mortgages.

13. Issues Involving Deficiency Claims Specific to Second Mortgages

Second mortgages can present unique problems related to post-foreclosure deficiency claims. For example, borrowers may find that they are liable for a deficiency claim on a junior mortgage after the *senior* mortgage has been foreclosed. Nevertheless, state anti-deficiency statutes may protect borrowers from these claims. **NCLC's *Home Foreclosures* § 10.4** (https://library.nclc.org/book/home-foreclosures/1041-deficiency-judgments-defined) contains a general discussion of issues related to post-foreclosure deficiency claims. **NCLC's *Home Foreclosures* § 12.12** (https://library.nclc.org/book/home-foreclosures/1212-deficiency-claim-issues-special-second-mortgages) provides state-specific examples of the scope of state anti-deficiency protections for second mortgages.

14. Recoupment Strategies Against Zombie Seconds

A homeowner's legal claims arising from zombie second mortgages tend to deal with actions that took place many years ago – even a decade or more ago. At the same time, statutes of limitations for consumer claims tend to be short, often one to three years for important federal statutory claims, such as those under TILA, RESPA, and the FDCPA.

Recoupment is a doctrine that in certain situations allows a consumer to pursue legal claims that would otherwise be time-barred. Through recoupment a debtor can assert time-barred claims defensively against a creditor as an offset to the creditor's claims against the debtor, as long as all the claims stem from the same transaction. *See* **NCLC's *Home Foreclosures* § 12.12a** (https://library.nclc.org/book/home-foreclosures/1212a-importance-recoupment-consumer-claims-involving-zombie-mortgages).

Recoupment is generally available for consumers in two contexts. In bankruptcy, recoupment permits a debtor to assert time-barred legal claims against a party who has a claim in the bankruptcy case. A borrower who is a debtor in bankruptcy can bring claims in recoupment up to the amount of the second mortgagee's claim in the bankruptcy case.

The other option is to use recoupment in response to a judicial proceeding that the second mortgagee initiated against the borrower. This recoupment could be in response to a judicial foreclosure or an action for a deficiency.

15. Defenses and Claims Related Specifically to HELOC Loans

Certain second mortgages are structured as open-end home equity lines of credit, or HELOC loans. Under a HELOC, the borrower takes out advances during a "draw period" until the principal balance reaches a monetary cap. The loan documents typically provide for a fixed repayment period for the full loan balance. This repayment term may be tied to when the borrower reaches the borrowing cap.

HELOCs can present several distinct legal issues. First, because a HELOC does not establish a fixed debt obligation at loan origination, most courts do not consider HELOCs to be negotiable instruments. This can complicate a foreclosing party's burden to establish that it has authority to foreclose. Unlike negotiable notes, non-negotiable promissory notes, such as HELOCS, are not self-authenticating. *See* **NCLC's *Home Foreclosures* § 2.2.4.3** (https://library.nclc.org/book/home-foreclosures/2243-benefits-being-holder-negotiable-note).

A party claiming the right to enforce a non-negotiable note must be able to document the chain of past transfers of the loan documents. The heightened evidentiary burden to show authority to foreclose a non-negotiable note is discussed in **NCLC's *Home Foreclosures* § 2.4** (https://library.nclc.org/book/home-foreclosures/241-who-can-enforce-nonnegotiable-note).

Second, different statutes of limitations may apply to enforcement of negotiable and non-negotiable notes. In some jurisdictions, the limitation period to enforce a non-negotiable note may be shorter than the period for a negotiable note. A HELOC's repayment term can also be shorter than for a typical fixed obligation mortgage.

Third, certain obligations under statutes such as TILA and RESPA do not apply to open-end credit transactions, such as HELOCs. When a HELOC is at issue, check coverage before raising these statutory claims. HELOC coverage under federal consumer protection statutes is discussed in **NCLC's *Home Foreclosures* § 12.4.1** (https://library.nclc.org/book/home-foreclosures/1241-general-principles).

Additional Zombie Debt Resources

*NCLC's **Trending Topics Page for Zombie Second Mortgages*** (https://library.nclc.org/zombie-second-mortgages), open to the public, has articles, court decisions, model legislation, videos, key weblinks, sample letters, complaints, other pleadings, written submissions by speakers at past NCLC conferences (open to legal aid, NACA, and recent NCLC conference attendees), and links for subscribers to further discussion in NCLC treatises.

The NCLC/NACA 2025 Mortgage Conference (https://www.nclc.org/annual-conferences/), to be held in Los Angeles June 8 – 10, is certain to include sessions on the latest concerning zombie second mortgages.

The NACA/NCLC 2025 Spring Training (https://www.nclc.org/annual-conferences/), to be held April 29 – May 3 in Long Beach California, is also likely to cover topics related to zombie second mortgages.

Relevant sections of NCLC treatises are linked above, and subscriptions are available at **nclc.org/bookstore** (https://library.nclc.org/bookstore).

Meet the author

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Geoffry Walsh is a senior attorney at the National Consumer Law Center (NCLC) focusing on foreclosure prevention, consumer bankruptcy, and other consumer credit issues. He has testified and provided written testimony on foreclosure policies at the federal and state levels. His work has focused on federal agency mortgage problems, foreclosure mediation, and bankruptcy topics. Geoff has served as a panelist and instructor at trainings and legal education seminars on foreclosure prevention and bankruptcy.

Geoff is co-editor of *Home Foreclosures* (https://library.nclc.org/book/home-foreclosures) and a contributing author to *Consumer Bankruptcy Law and Practice* (https://library.nclc.org/book/consumer-bankruptcy-law-and-practice), *Student Loan Law* (https://library.nclc.org/book/student-loan-law), *Fair Debt* (https://library.nclc.org/book/fair-debt-collection) *Collection* (https://library.nclc.org/book/fair-debt-collection), *Truth in Lending* (https://library.nclc.org/book/truth-lending), *Mortgage Servicing and Loan Modifications* (https://library.nclc.org/book/mortgage-servicing-and-loan-modifications), *Access to Utility Service* (https://library.nclc.org/book/access-utility-service), and *Credit Discrimination* (https://library.nclc.org/book/credit-discrimination). He also co-authored the NCLC reports How GSE Note Sales Undermine (https://www.nclc.org/resources/report-how-gse-note-sales-undermine-homeownership/) Homeownership (https://www.nclc.org/resources/report-how-gse-note-sales-undermine-homeownership/) and Clearing the Path to a New Beginning, a Guide to (https://www.nclc.org/resources/clearing-the-path-to-a-new-beginning/) Discharging Criminal Justice Debt in Bankruptcy (https://www.nclc.org/resources/clearing-the-path-to-a-new-beginning/).

Before joining NCLC, Geoff worked for over 25 years as a staff attorney with legal services programs in Vermont and Philadelphia. He represented low-income clients in foreclosure, eviction, and bankruptcy proceedings.

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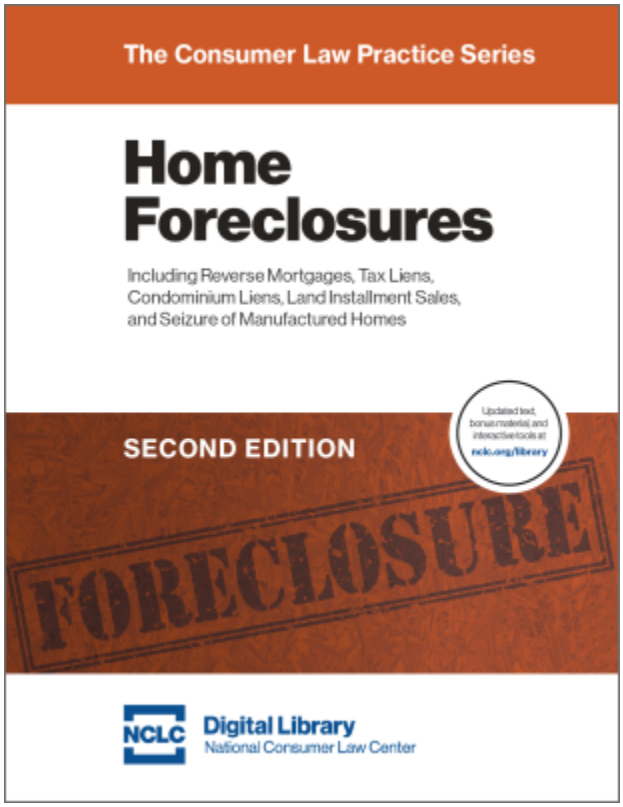

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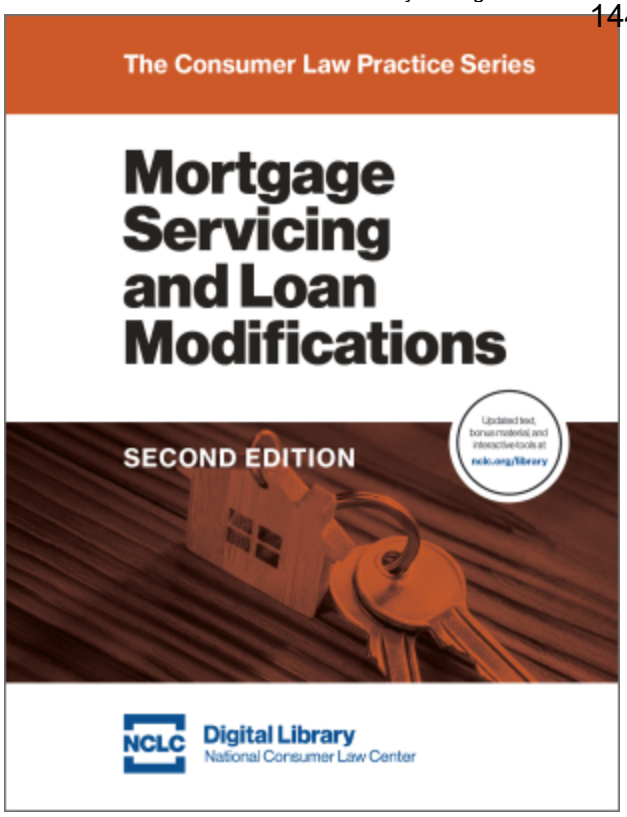

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