

Andrew D. Cotlar

*Your Tool Box for Mortgage
Foreclosure Defense V 2.0*



Andrew D. Cotlar, Esq.
Cotlar & Cotlar
23 West. Court St.
Doylestown, PA 18901

Tel: 215-345-7310

Email: Acotlar@hotmail.com
www.cotlarlaw.com

A Massive Re-Allocation of Wealth

But a many a starving farmer
The same old story told
How the outlaw paid their mortgage
And saved their little homes.

...

Yes, as through this world I've wandered
I've seen lots of funny men;
Some will rob you with a six-gun,
And some with a fountain pen.

And as through your life you travel,
Yes, as through your life you roam,
You won't never see an outlaw
Drive a family from their home.

- -Woody Guthrie, Pretty Boy Floyd



Today's Goals

- Provide tools to handle a foreclosure defense
- Honorably and fairly
- Without losing money
- Based on my experience as general practitioner in Pennsylvania

Our Game Plan Today

- Basic Vocabulary
- Background/ overview of process
- Legal background
- How to get paid
- Initial Interview; getting started
- Answer and Counterclaims
- What if there's a default?
- Discovery
- Bankruptcy
- Settled solutions
- HAMP Overview and Enforcing Loan Modifications

Disclaimer

- Limited to PA law and my experience here.
- No claim to provide legal analysis of your local jurisdiction if not Pennsylvania.
- But, if it's a judicial foreclosure state, your laws may be similar to ours.
- Know your own jurisdiction's laws and procedures.

Basic Vocabulary

- Notes
- Mortgages
- Deeds
- Assignments
- Loan Modification Agreement
- Reinstatement Letter
- Payoff quote
- Foreclosure Complaint (in rem action)

The Economic Situation

- Woody Guthrie would be appalled
- Mortgages bought and sold on market
- “Tranches”
- Foreclosures driven by hidden investors with minimal risk
- Investments as a whole are insured
- What triggered 2008 recession

The Economic Situation

- Many lenders use servicers as intermediaries
- Manage payments, escrow, and send delinquency notices
- Foreclosure direction sent to specialist firms
- Little direct contact with their client
- Lenders Processing Service and similar computer interaction
- Source of frustration, delay and lack of communication on unusual issues
- Foreclosure firms get paid minimal amount per task

Why are homeowners delinquent?

- Lost jobs
- Medical emergency and no insurance
- Divorce
- Profligacy
- Unexpected sudden debts
- Predatory lending (more later)

Foreclosure crisis: local filings and national focus

- Federally-sponsored attempts to encourage loan modifications have largely failed
- Troubled Asset Relief Program
- HAMP
- Positive and negative reports from different sides
- Thousands of local filings each year in Bucks County alone
- Competing values: families v. investments
- No “pot of gold” for attorneys
- Many defendants are pro se

The Foreclosure Process in PA If You Defend

- 2 months of arrearages
- Act 91 Notice
- 30 day extension if you consult with credit counselors and apply for emergency loans
- Foreclosure Complaint filed
- Mediation program in various counties
- Answer filed (or default judgment if no answer)
- Foreclosing attorney lists for trial if answer filed
- Obtain judgment at trial
- Schedule Sheriff's sale
- May be several adjournments of Sheriff's sale
- Sheriff's sale held; deposits made
- Sheriff's deed issued and transfer of property at Settlement
- Separate action in ejectment if necessary

The Legal Background

- Truth in Lending Act, 15 USC 1601 et seq.
 - Private right of action for actual damages and 2x finance charges, rights of rescissions, costs and attorney's fees.
 - 1 year statute of limitation from closing, but you can assert it as a defense to foreclosure at any time.
 - Details are specified at Federal Reserve Board Regulation Z
 - Basic concept: All fees must be disclosed and cannot be excessive.
 - 3-day right of rescission must be given

The Legal Background

- Real Estate Settlement and Procedures Act, 12 U.S.C. 2601 et. seq.
 - Implemented by Federal Reserve Board Regulation X
 - Private right of action for damages, attorneys fees and costs
 - 3 year statute of limitations
 - Prohibits kickbacks, unearned fees, etc
 - Requires HUD sheet to be accurate

The Legal Background

- Pennsylvania Act 91, 35 P.S. 1690.401c et seq.
 - Requires advance written notice of arrears with name of lender, amount to cure, and list of credit counseling agencies in your county.
 - No private right of action
 - Violations of notice provisions are a defense to foreclosure actions
 - Court will dismiss without prejudice to refile
 - Temporary delay

The Legal Background

- Pennsylvania Act 6, Loan Interest and Protection Law of 1974, 41 PS 101 et seq.
 - Limited to home loans \$50k and below
 - Anti-usury law requiring notices prior to foreclosure
 - Independent private right of action
 - Plaintiff can recover excessive interest x3, costs and attorney fees
 - Statute of limitations is 4 years
 - Lots of exceptions; big one is for national banks, which follow more favorable federal law

The Legal Background

- Pennsylvania Mortgage Bankers and Brokers and Consumer Equity Protection Act, 63 PS 456.101 et. seq.
 - Lots of restrictions on balloon rates, negative amortization, etc.
 - Applies to principal less than \$100k
 - No private right of action
 - Doesn't apply to assigns of the loans

The Legal Background

- Fair Debt Collections Practices Act, 15 U.S.C. 1692 et seq.
 - Prohibits abusive debt collection by debt collectors
- PA Fair Credit Extension Uniformity Act
 - Nearly identical protections and covers debt collectors AND creditors in PA. 73 P.S. § 2270.2 et seq.
- PA Unfair Trade Practices and Consumer Protection Law
 - Staple in litigation; 3x damages, costs and attorney fees
 - Applies to mortgage loans
 - Must prove elements of fraud or deception

The Legal Background

- Common law torts, e.g. fraud, misrepresentation, etc.
- Contract defenses (e.g. duty of good faith and fair dealing)

The Legal Background: special note

- Federal Courts can't issue injunctions (Anti-injunction Act), so don't bother to sue in Federal Court and expect the court to enjoin the foreclosure.

So a client is in your office...How to Get Paid

- Up-front payment is possible: flat rate or hourly drawn upon non-refundable retainer
- Or combination of the two with credit for amounts paid
- NB: FTC rules, 16 CFR 322.7:
- Option 1: Collect an advance fee, place it in your escrow account and draw upon it on an hourly basis.
- Option 2: Charge an advance flat fee and make it clear the fee is earned upon receipt.
- No flat fees collected for not actually providing legal work.
- Therefore, BEWARE of companies that want to affiliate with you to avoid the scope of state or federal regulations.

How to Get Paid: What Not to Do

- Don't take an adverse interest in your client's property (ethics)
- Example: forcing your client to take out a second mortgage to guaranty payment (Florida attorney)
- Example: client sells property to straw buyer with whom you have any relationship (Bennett and Dougherty PA criminal conviction)
- Don't make promises you can't keep
- Give client a reality check

A Client Walks into Your Office... What you need to collect

- All correspondence
- All notes re any conversations with lender representatives:
- All settlement documents
- Copy of complaint and attachments
- Mortgage & note
- Other recorded mortgages and
- Any assignments referenced in complaint
- Other loans not in foreclosure
- Other possible liens
- Paystubs and taxes

Review the Complaint

- Does Plaintiff have standing?
 - E.g. Bank of NY, Deutsche Bank, Trustees for investment trusts
 - Assignment dates, names, places, etc.
 - Websites with lists of robo-signers
 - Statement that assignments are in process of being formalized is allowed. U.S. Bank v. Mallory, 2009 PA Super 182; 982 A.2d 986 (Pa. Super. 2009)

Review the Complaint

- Who verified the complaint?
- Party?
- Attorney?
- Helps you focus on who to depose if need be

Review the Complaint

- Mortgage Electronic Registration Systems (MERS).
What is it?
 - See Michael Powell and Gretchen Morgenson, “MERS? It May Have Swallowed Your Loan,” New York Times (March 5, 2011).
 - Nothing inherently wrong with MERS being assignor. See Mortg. Elec. Registration Sys. v. Ralich, 982 A.2d 77, 81 (Pa. Super. 2009).
 - But through discovery you may want to explore whether MERS vice presidents really exist as a matter of fact (robo signers)
 - Lenders, servicers and foreclosure firms pay for staff to be Vice President with MERS on temporary basis

Review the Complaint

- Pooling and Servicing Agreements
 - Form 8-k, SEC.
 - This will detail all the steps that have to be fulfilled, including multiple written assignments.
 - Often these are missing.
 - Raising this defense can trigger a loan modification.
 - Plaintiff may cure the problem by getting the assignments but sometimes the intermediaries are long gone.
 - Also check to see that your property is on the list of properties in the pool. This is schedule I and may only be obtained through discovery.

Review the Complaint

- Proper Act 91 Notices? List of credit counseling agencies in the county.
- Needs to be attached to complaint in PA
- This was a jurisdictional requirement!
 - Beneficial v. Vukmam, 2012 PA Super 18; 37 A.3d 596 (Pa. Super. 2012) (superseded by statute)
 - But see Act 70, 2012, S.B. 1433: not jurisdictional but still a good defense and case can be dismissed w/o prejudice until notice is provided
- Good for delay only

Review the Complaint

- Review the numbers for inaccuracies
 - Amount of arrears
 - Excessive attorney fees
 - Mysterious other fees/costs
 - Dates of arrears
 - Interest rate, interest rate caps
 - Compare to mortgage and note

Answering the Complaint: Duty of good faith and fair dealing

- Gather information on client-lender interactions
- See, e.g. NV and AZ AG complaints against Bank of America. Great detailed examples of bad faith:
 - Assurances of no foreclosure pending loan modification discussions when proceeding with foreclosure anyway;
 - Falsely telling customers they must be in default to obtain a modification;
 - Promising to make loan modifications permanent only to renege on the deal;
 - Conjuring bogus reasons for denying modifications. (Andrew Martin and Michael Powell, “Two States Sue Bank of America Over Mortgages,” New York Times, Dec. 17, 2010)

Answering the Complaint: Duty of good faith and fair dealing

- Inherent in every PA contract:
- “Section 205 of the Restatement (Second) of Contracts suggests that “[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.” Creeger Brick and Building Supply, Inc. v. Mid-State Bank, 385 Pa. Super. 30; 560 A.2d 151, 153 (Pa. Super. 1989).
- Fleet Real Estate Funding Corp. v. Smith, 530 A.2d 919 (Pa. Super. 1987) (lender’s refusal to cooperate with homeowner’s request to negotiate payments constitutes breach of duty of good faith and fair dealing when HUD guidelines for FHA insured mortgage not followed);
- Commonwealth School Employee’s Retirement Fund v. Terrell, 582 A.2d 367 (Pa. super, 1990) (lender’s failure to properly service loan was breach of duty of good faith and fair dealing); Union National Bank of Little Rock v. Cobbs, 567 A.2d 719 (Pa. Super, 1989) (same).

Answering the Complaint: Duty of good faith and fair dealing

- HAMP participating lenders have additional duties
- See their service agreement and HAMP guidelines (U.S. Treasury)
- For latest version of Making Home Affordable Handbook, see <https://www.hmpadmin.com/portal/programs/guidance.jsp>. (now v 5.0)
- Frequently updated.
- Prohibits moving forward with foreclosure while evaluating loss mitigation measures like loan modifications
- Rules on how to evaluate a loan modification
- No private right of action to enforce, but this may be good basis for establishing an implied duty contractually

Answering the Complaint

- **REMEMBER:** just filing an answer will buy your client lots of time.
- The file goes to the bottom of the very busy foreclosure attorney's pile.
- If you don't file an answer, you risk default and malpractice.

Answer the Complaint: what not to do

- Do NOT use the following language regarding the arrears paragraph, taken from Pa. R.C.P. 1029(c), if you can help it:
 - After reasonable investigation, Defendant is without knowledge or information sufficient to form a belief as to the truth or accuracy of the allegation/averment and therefore said allegation/averment is denied. Strict proof is required at trial.
- First Wis. Trust Co v. Strausser, 653 A.2d 688, 692 (Pa. Super 1995).
General denials of factual matters in foreclosure will be considered admissions if the Defendant should have this information.
- See note to Pa.R.C.P. 1029(c).
- Note: Reliance on subdivision (c) does not excuse a failure to admit or deny a factual allegation when it is clear that the pleader must know whether a particular allegation is true or false. See Cercone v. Cercone, 254 Pa.Super. 381, 386 A.2d 1 (1978).
- Time and time again people lose on appeal because of this because they should know how much they owe.

Answer the Complaint: proper denials

- Pick apart the breakdown of arrears and look for inconsistencies or inaccuracies that allow you to deny the allegations, e.g. date interest started on arrears
- Highlight any discrepancies between complaint and Act 91 notice description
- Use the following language to demonstrate why Defendant should not have the kind of information needed to affirm or deny:
 - After reasonable investigation, Defendant is without knowledge or information sufficient to form a belief as to the truth or accuracy of the allegation/avermnt and therefore said allegation/avermnt is denied. Strict proof is required at trial. Further, pursuant to Pa. R.C.P. 1029(c), Defendant avers that the information forming the substance of this allegation is not information to which she has access, because [her departed husband dealt exclusively with servicer Bank of America and the matter of arrears and that information was not shared with her.] [the proper calculation of interest, escrow advances, penalties and property inspection fees are matters within the exclusive knowledge of the servicer, not Defendant]

Answer the Complaint: new matter and defenses

- File with the answer New Matter and defenses
 - Tell the story of arrears in new matter
 - Violation of specific statute
 - Breach of contract
 - Breach of implied contractual duty of good faith and fair dealing
 - Fraud, misrepresentation, etc.

Counterclaims

- Not generally available for foreclosures
- Because its in rem
- Rearick v. Elderton State Bank, 2014 PA Super 157, 97 A.3d 374, 383 (Pa. Super 2014).
- Counterclaims are allowed if they arise from the execution of the underlying note or mortgage (e.g. fraud in the execution)

Counterclaims: TILA and RESPA

- Look at settlement docs for inaccuracies or inconsistencies
- Examine HUD sheet
- Proper notices given? (e.g. right to rescind)

Counterclaims: predatory lending

- NOT usually successful
- **What to look for**
 - Lender provides loan to applicant when it knew or should have known repayment was not possible
 - Compare loan app and credit history
 - Look at appraisals
 - Discovery: request entire file and look at underwriting comments, especially for any “overrides”

Counterclaims: predatory lending

- **Note on abusive lending practices. [PA Banking Dept.]**
 - Making a loan without regard to the borrower's ability to repay;
 - Loan flipping;
 - Excessive fees and packing;
 - Aggressive and deceptive marketing;
 - Home improvement scams;
 - Prepayment penalties
 - Balloon payments
 - Negative Amortization (paying less than interest and principal/month)

Counterclaims: predatory lending

- **Hallmarks of Predatory Lending:**
 - “One of the clearest indicators of a predatory and unfair loan is one which exceeds the borrower’s needs and repayment capacity.” Girard Finance v. Pa Hum. rel. Comm, 2012 Pa. Commw. LEXIS 223, 13 (Pa. Comw. 2012) (reverse redlining case)
 - “high interest rates, high upfront fees, high late fees, hidden fees, hidden costs, and a lack of disclosure to the borrower.” 14

Counterclaim: RESPA

Set it up early with opening letter

- “We believe that the calculation of principal and interest owed may be incorrect. Pursuant to the 12 U.S.C. §2605(e) and implementing Regulation X, we demand a written response to this inquiry detailing the calculation of principal and interest for the above accounts within 20 days of the date of this letter. The reason why we are seeking this information is that _____ is ready and willing to negotiate a loan modification but wishes to ensure that the amount due is accurate.”

Counterclaim: RESPA

- “You are further warned that pursuant to 12 U.S.C. §2605(e)(3), you may not provide any information regarding any overdue payment owed by _____ to any consumer reporting agency as the term is defined by 15 U.S.C. §1681a, for a 60-day period commencing with the date of this letter. Failure to comply with this request within the applicable deadline will subject you to potential liability under the Real Estate Settlement Procedures Act of 1974 as amended.”

Set up Debt Collection claim

- Request reinstatement quote
 - Could trigger information for suit under FDCPA if it is inaccurate.
 - See Allen v. LaSalle Bank, NA, 2011 U.S. App. LEXIS 587 (3d Cir. 2011) (holding that reinstatement letter from foreclosing attorney to defense attorney claiming fees and costs in excess of those authorized by New Jersey law violated Fair Debt Collections Practices Act 1692(f)(1) because such amounts were not authorized by agreement or permitted by law).
 - But see Wright v. Phelan, Hallinan & Schmieg, 2010 U.S. Dist. LEXIS 21977 (3d Cir. 2010) (holding that FDCPA does not apply to attorney-to-attorney communications)

Aggressive preemptive action ?

Don't bother

- Rooker Feldman doctrine and Anti-Injunction Act prohibits Federal injunctions issued against state courts
- Don't double your workload

Is it too Late?

Petition to Open Judgment vs. Petition to Strike

- U.S. Bank v. Mallory, 2009 Pa. Super, 182, 982 A.2d 986 (Pa. Super. 2009) (held for lender)
- Petition to Strike: granted only for a “fatal defect or irregularity appearing on the face of the record.”
- Petition to Open (used for factual matters not apparent on face of record):
 - 10 day automatic open, Pa. R.C.P. No. 237.3.
 - Otherwise...
 - Prompt filing of petition (82 day delay is too much time; within a month preferred)
 - Reasonable excuse or explanation (lack of sophistication not an excuse)
 - A meritorious defense (see above)

Discovery

- Ask for entire account file
 - Were payments applied to principal & interest or first to penalties. Compare with note & mortgage
- Look at underwriting criteria and comments
- Look at activity log (computerized)
- Look at conversation log (computerized)
- Pay special attention to amounts and dates
- Look for assignments

Discovery: Examine the Note

- Possession of note vs assignment of mortgage
- If Plaintiff is claiming right to foreclose based on possession of original note.
- Go to foreclosure firm law offices
- Bring a witness who can sign an affidavit that they examined the document
- Look for evidence of originality

Discovery: Depositions of Plaintiff Witness

- There mere threat often triggers a request for a loan modification
- Examine means of possession of note and assignments
- Examine amounts and how calculated
- Examine their knowledge of the file

Bankruptcy

- Not a long term solution, as lenders get exempted by petition
- Lender can go after the security (the land) as foreclosure is against the land
- Bankruptcy reflects on credit rating, which makes loan modification more difficult
- But it does take care of the consumer debt load that often gets people into trouble

Settlement

- Forbearance (temporary) (beware of waivers) (interest on arrears still accrues)
- Home Affordable Modification Program (“Obama Plan”).
 - ALWAYS APPLY: foreclosure can’t go forward with a pending application.
 - Tier 2 allows multiple tries if previously rejected.
- Countrywide & Citibank agreement with PA attorney general with principal reduction (beware of tax consequences for principal forgiveness)
- Short sale; must be by consent of all interested parties
- Deed in lieu of foreclosure, possibility of \$3-4K payment (“Deeds for Keys”)
- Transfer deed with lease back (e.g. Fannie Mae program)
- Reverse mortgage for older adults with equity in property.

Enforcing Loan Modifications- HAMP

- HAMP regulations
 - U.S. Treasury polices and HAMP servicer handbook that compiles all policy updates, V. 5.0:
 - <https://www.hmpadmin.com/portal/programs/guidance.jsp>

Enforcing Loan Modifications

- Frequent problem
- HAMP loan modification
- Proposal is to reduce payments to affordable rate per month by reducing interest rate, deferring arrears or principal to balloon payment, so that monthly amount is less than 31% of gross income
- Client must qualify and fill out long Request for Modification form
- Details in HAMP handbook
- Temporary Trial Plan to requires client to make 3 payments over 3 months
- Once client complies, permanent loan modification document is presented for signature.
- Financials must remain same
- What if lender does not honor the agreement?

Enforcing Loan Modifications- HAMP

- TPP not converting to permanent status: VERY frequently litigated. Typical excuses:
 - applicant “not qualified” despite going through pre-qualification procedures
 - applicant did not pay 3 payments
 - applicant did not submit documents
 - Frequently lost, sometimes allegedly on purpose
 - Applicant’s financials have changed
- Agreed among all courts, no private right of action to enforce HAMP U.S. Treasury Rules
- BUT, is the TPP contract enforceable on its own terms pursuant to state contract law? YES.
 - Wigod v. Wells Fargo Bank, 7th Cir. 2011.
- No controlling appellate Pennsylvania law yet

Recent Cases Worth Reading

- J.P. Morgan Chase Bank, N.A. v. Murray, 2013 Pa Super. 55, [63 A.3d 1258](#) (2013)
- CitiMortgage v. Barbezat, 2016 Pa. Super. 7, 131 A.3d 65 (2016)
- Bank of America v. Gibson, 102 A.3d 462 (Pa. Super. 2014)
- PHH Mortgage Corp. v. Powell, 100 A.3d 611 (Pa. Super. 2014)
- HSBC Bank v. Donaghy, 2014 Pa. Super, 215 (2014)
- Walkup v. Santander, 2015 U.S. Dist. LEXIS 162060 (E.D. Pa. 2015)
- U.S. Bank, N.A. v. Pautensis, 118 A.3d 386 (Pa. Super. 2015)
- Montgomery Cty v. MERSCORP, Inc., 16 Fed. Supp. 3d. 542 (E.D. Pa, 2014) rev'd at [795 F.3d 372](#) (3rd Cir. 2015)
- U.S. Bank v. Mallory, 2009 PA Super 182; 982 A.2d 986 (Pa. Super. 2009)
- Wells Fargo Bank v. Lupori, 2010 Pa. Super. 205 (2010)
- Commonwealth Financial Systems, Inc. v. Smith, 2011 Pa. Super, 30 (2011)

U.S. Consumer Financial Protection Bureau January 2014 Rules

- Foreclosure initiated only after 120 days of delinquency.
- No dual-tracking, i.e. proceeding with foreclosure while homeowner has submitted a loan modification application.
- Must notify homeowners about foreclosure alternatives.
- Direct and ongoing access to servicing personnel (i.e. single point of contact)
- Homeowners must be considered for all available loss mitigation, not just in-house loan mods
- No sheriff's sales if loan mod arrives at least 37 days before sale date.
- Clear monthly mortgage statements
- Prior warning before interest rate adjustments
- Prior warning before purchasing forced-place insurance
- Restrictions on placing partial payments in "suspense accounts"
- Respond to payoff requests in 7 days
- Respond to notices of error in calculation from homeowner in 30 days
- Store loan information in an accessible way.
- NO private right of action.
- www.consumerfinance.gov

Final Thoughts

- Use these tools to take these cases
- You can make money
- Make it clear you cannot guaranty that you'll save someone's home; but you can give them lots of time and possibly resolve the matter
- You will have a grateful client for life
- Any questions? E-mail me or call me.

Thank You and Good Luck

Andrew D. Cotlar, Esq.

Law Office of Cotlar & Cotlar
23 West Court St.
Doylestown, PA 18901

Tel: 215-345-7310

acotlar@hotmail.com

www.cotlarlaw.com