

CHAPTER 7

**FORECLOSURE DEFENSE
IN LOUISIANA**

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About The Author

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1. INTRODUCTION

This chapter covers strategies, defenses and remedies for homeowners who face a foreclosure sale of their homes. Foreclosures may be instituted by a lender, a judgment creditor or a government entity. This chapter will focus mostly on foreclosures by a mortgage lender for failure to pay the monthly mortgage note. More extensive legal practice information on foreclosures can be found in the National Consumer Law Center's foreclosure manuals: *Foreclosures* (4th ed. 2012), *Mortgage Lending* (1st ed. 2012), *Foreclosure Prevention Counseling* (2nd ed. 2009).

2. WHY HOME FORECLOSURE DEFENSE IS IMPORTANT

A home is a low-income family's most important asset and the key to family and financial welfare. The mortgage foreclosure crisis and the economic recession of 2008 elevated the practice of foreclosure defense in more ways than one. While it took longer for the foreclosure crisis to take hold in Louisiana, we continue to see more foreclosure filings across the state.¹ Many homeowners facing foreclosure have also been affected by the BP Oil Spill and unemployment. There is a great, unfilled need for legal advice and representation in home foreclosures. This chapter will provide attorneys with basic knowledge and references for more information to help homeowners in foreclosure.

3. WHAT CAN BE DONE FOR A HOMEOWNER WHO FACES FORECLOSURE?

Possible options or remedies to prevent or mitigate foreclosure are:

- loan modification
- forbearance
- refinancing of the loan
- deed in lieu of foreclosure or short sale (owner voluntarily sells to lender for satisfaction of mortgage, and possibly relocation payments)
- if a co-owner is 62 or older, a reverse mortgage to pay off or refinance mortgage
- rescission of certain mortgages for violation of federal consumer protection laws
- injunction to arrest seizure and sale for executory process defects
- injunction if a judicial sale price won't cover homestead exemption and superior mortgages²
- Chapter 13 bankruptcy

Some homeowners may have credit disability or life insurance that will help pay the mortgage. If the homeowner is in default because of a recent disability or the death of a spouse, check to see if they had such insurance. Other possible sources of income are Earned Income Credit tax refunds, Social Security disability or sales of other real estate.³ You should review the client's potential income and resources and minimize his other expenses, if possible.

¹ See Realtytrac.com for foreclosure statistics in your area.

² La. Code Civ. Proc. art. 2337.

³ Earned Income Credit tax refunds may be available for 3 tax years if the taxpayer has failed to claim these refunds.

For most homeowners, loan servicing relief under HAMP or a Chapter 13 bankruptcy will be the primary remedies that may be feasible. The various options to homeowners are discussed below, along with a list of documents you need to evaluate the available options to your client.

4. WHEN CAN FORECLOSURE PREVENTION COUNSELING HELP A HOMEOWNER?

If no foreclosure suit has been filed and the homeowner has not received a letter from the lender's attorney, you may refer them to a HUD-certified housing counselor. Otherwise, you should immediately pursue home foreclosure prevention options for your client. A list of housing counseling agencies in Louisiana is available at: <http://www.hud.gov/offices/hsg/sfh/hcc/hcs.cfm?&webListAction=search&searchstate=LA>.

Generally, a budget analysis and counseling should be performed for foreclosure clients by either a housing counselor or an attorney. This helps insure that the client will be able to avoid foreclosure in both the short-term and the long-term, and provides a basis for assessing the client's options.

The housing counselor can provide the homeowner with budget counseling, help the homeowner compile the documents necessary to apply for loss mitigation and advocate on behalf of the homeowner with the mortgage servicer. Some of the most common loss mitigation options available to borrowers from housing counseling include:

- loan modification (reduction in interest rate, extension of the maturity date for the loan, and principal forgiveness);
- forbearance (fixed period of time when either no payments or due or partial payments are due with a balloon payment due to catch up on all past due payments at the end of the forbearance period);
- refinance;
- deed in lieu of foreclosure; and
- short sales.

5. HOW DO I STOP AN IMMINENT FORECLOSURE?

You should always check immediately to ascertain the existence and date of any foreclosure case. A scheduled foreclosure sale may be stopped or delayed by:

- filing a bankruptcy petition, usually a Chapter 13 bankruptcy
- an application for relief under the Making Home Affordable Program (HAMP)

6. WHAT IF THE FORECLOSURE SALE HAS ALREADY OCCURRED?

After the sheriff has filed his process verbal or filed the sale for recordation in the parish conveyance records, the homeowner is precluded from asserting objections to the form or procedure of the sale or the lack of authentic evidence to support the seizure and sale.⁴

⁴ La. R.S. 13: 4112; cf. *Avery v. Citimortgage, Inc.*, 15 So.3d 240 (La. App. 1 Cir. 2009)(res judicata bars suit for nullity when debtor did not enjoin or appeal executory process).

However, under state law, there may be grounds to attack the sale as a nullity if the foreclosing creditor is the adjudicatee at the sale or still owns the property. For example, a sale may be annulled for:

- the sale was for less than two-thirds of the appraised value if appraised;⁵
- the sale occurred without a prior seizure of the property;⁶
- a judicial sale occurred without due process notice to a co-owner;⁷
- fraud or ill practices.⁸

Also, the foreclosure sale may be voidable if it was conducted in violation of a bankruptcy stay order.

In rare cases, there is money left over after all creditors have been paid. Here, the homeowner may seek return of those funds from the sheriff. Also, another party may have a co-ownership interest in the property (or even a homestead exemption claim), which may not be subject to the mortgage. In these cases, the co-owner should take immediate action to protect his interest in the funds from a foreclosure sale.⁹

Some homeowners may have damage claims for wrongful seizure or other torts.¹⁰

7. WHAT DOCUMENTS DO I NEED TO EVALUATE THE CLIENT'S POSSIBLE FORECLOSURE DEFENSES?

To assist a homeowner who faces foreclosure, gather these documents and information to assess their situation:

1. **Original loan closing paperwork:** Promissory note, Mortgage, HUD-1, Truth-in-Lending Disclosures, Act of Sale etc. Check to see whether the loan originated within the last 3 years. If so, complete a full Truth in Lending Rescission analysis. Check to see whether the loan is an Adjustable Rate Mortgage, Fixed Rate Mortgage, FHA Mortgage, Reverse Mortgage, etc. The original note and mortgage must be read thoroughly. Look for contract provisions on the order of application of payments to late fees, interest, principal, etc., and balloon payments, default and notice of acceleration to the borrower.
2. **Mortgage servicing paperwork:** Monthly statements, letters from mortgage servicer, escrow analysis statements. Check to see if the taxes and insurance are escrowed. Many homeowners do not know why their monthly mortgage payments have increased. More often than not, it is due to an escrow account. Though most mortgages provide homeowners with the right to buy and pay for their own insurance separately, many homeowners have let their insurance lapse and the lender has force-placed insurance that can be up to five times the annual premium they could obtain from a private insurer. Also check to see whether the homeowner has filed their homestead exemption or assessment freeze paperwork with the local tax assessor.

⁵ La. Code Civ. Proc. art. 2336.

⁶ Turner v. Glass, 188 So. 147 (La. 1939).

⁷ Magee v. Amiss, 502 So.2d 568 (La. 1987).

⁸ La. Code Civ. Proc. art. 2001-04; Ellerd v. Williams, 404 So.2d 1271, 1273 (La. App. 2 Cir. 1981); Slidell Bldg. Supply, Inc., v I.D.S. Mortgage Corp., 273 So.2d 343 (La. App. 1 Cir. 1972), writ denied 274 So.2d 708.

⁹ See e.g., American Thrift & Finance Plan, Inc. v. Valteau, 576 So.2d 598 (La. App. 4 Cir. 1991).

¹⁰ See § 10, *infra*.

3. **Notices of Default, Notices of Acceleration and letters from attorneys threatening foreclosure.** Be sure to dispute the debt within 30 days using a Qualified Written Request, as provided for under the Real Estate Procedures and Settlement Act (RESPA, 12 U.S.C. § 2605(e)).
4. **Notice of Seizure, Petition for Executory Process (or Suit on a Note, if in ordinary process), Promissory Note and copy of Mortgage, and a copy of all other paperwork filed in the foreclosure suit.** If a homeowner is two or more months past due on her monthly mortgage payments, check with the local courthouse to make sure a suit has not been filed. If an executory process suit has been filed, check to see whether the proper authentic evidence has been attached to the petition, including the original note (would be stored in a vault at the courthouse, not in the case file), a copy of the mortgage and a notice of default sent to the borrower. Check whether a sale date has been set by calling the parish sheriff's office. The Notice of Seizure often contains a tentative sale date and should not be relied upon for accuracy.
5. **Miscellaneous paperwork:** Applications for Loan Modifications, previous Loan Modification Agreements signed by the borrower, Quitclaim Deeds by one borrower to another, Judgments of Possession or other succession paperwork for the property at issue, divorce judgments of borrowers.

8. THE MAJOR FORECLOSURE DEFENSE OPTIONS

8.1 BANKRUPTCY

A Chapter 13 bankruptcy reorganization may be necessary to stop a foreclosure sale. This option may be available if the homeowner has sufficient income to cure the loan arrearages, stay current on the mortgage and pay secured creditors over a 36 to 60 month period.

8.2 MORTGAGE RESCISSION RIGHTS

If the mortgage was executed less than three years ago, the consumer may have the right to cancel the mortgage under either the Home Ownership and Equity Protection Act (HOEPA) or the Truth in Lending Act.¹¹ The homeowner's notice of rescission automatically voids the lender's security interest. A rescission can significantly reduce a consumer's liability and lead to restructuring of the loan. Significantly, rescission of the mortgage defeats foreclosure since the security interest is cancelled. This forces the lender to sue by ordinary process. In defense to suit by ordinary process, the consumer may assert counterclaims or reconventional demands.

8.3 LOAN SERVICING PROGRAMS OR PROCEDURES

8.3.1 The Making Home Affordable Program (HAMP)

The Making Home Affordable Program (HAMP) directs the United States Department of Treasury to compensate mortgage servicers for modifying and refinancing loans where the borrower is or has undergone a hardship making it difficult for them to pay their mortgage.¹² The hardship can include unemployment,

¹¹ See 15 U.S.C. § 1635; National Consumer Law Center, *Truth in Lending*, Ch. 10 (8th ed. 2012).

¹² The Making Home Affordable Program consists of separate initiatives for mortgage modification (Home Affordable Modification Program or "HAMP"), refinance (Home Affordable Refinance Program or "HARP") and forbearance (Home Affordable Unemployment Program or "UP"). For more information on HAMP, see www.makinghomeaffordable.gov. See also, National Consumer Law Center, *Foreclosures*, §§ 2.8.4-2.8.6 (4th ed. 2012).

death of a borrower, illness etc. A list of HAMP mortgage servicers is available at: <http://www.makinghomeaffordable.gov/get-assistance/contact-mortgage/Pages/default.aspx>. The guidelines for servicing are found in Making Home Affordable Supplemental Directives and Handbook.¹³

Under HAMP, loan servicers are also directed to complete a Net Present Value ("NPV") Test, using a model developed by the Department of Treasury, which helps servicers determine whether a loan modification or foreclosure is more profitable for any given loan account and corresponding property.

A HAMP loan modification aims to bring the monthly mortgage payment down to 31% of the borrower's monthly household income for 5 years by reducing the interest rate down to 2% or lengthening the life of the loan. See Net Present Value Test, Fannie Mae's website, available at: <https://www.efanniemae.com/sf/mha/mhamod/npvtest/>.

HAMP is an important foreclosure prevention tool because it requires all participating mortgage servicers to review borrowers' accounts for eligibility before filing a foreclosure action.

A homeowner who has not already done so and whose mortgage servicer participates in HAMP, can submit an application for HAMP, which requires that the sheriff's sale be stopped to allow for review of the application and an approval or denial letter be sent to the borrower before proceeding with foreclosure.

This right of review for HAMP before foreclosure may be an affirmative defense to foreclosure.¹⁴ This is especially if the loan is owned by Fannie Mae. See Fannie Mae Servicing Guidelines, Fannie Mae's website, available at: <https://www.efanniemae.com/sf/mha/mhamod/>.

If the mortgage servicer reviews the borrower's account for HAMP, they will usually send the borrower a Trial Period Plan (TPP) and require the borrower to agree to make three consecutive on time payments under the TPP. Once those TPP payments are made, HAMP directs the mortgage servicer to permanently modify the loan. In certain circumstances, courts have held that a borrower who has complied with a Trial Period Plan has an affirmative defense to foreclosure under contract and other state law.¹⁵

¹³ See <https://www.hmpadmin.com/portal/programs/guidance.html>.

¹⁴ See *Champagne v. Bank of America, NA*, 2012 WL 777322 (E.D. La., 2012) (denying Bank of America's motion to dismiss under Rooker-Feldman doctrine and remands to state court); *Singh v. JP Morgan Chase Bank, NA*, 2012 WL 669952 (E.D. Tex. 2012) (denying Chase's motion to dismiss); *Dixon v. Wells Fargo Bank, N.A.*, 798 F.Supp.2d 336 (D. Mass. 2011) (denying Wells Fargo's Motion to Dismiss in part); *Speleos v. BAC Home Loans, No. 1:10-cv-11503-NMG*, 755 F.Supp.2d 304 (D. Mass. Dec. 14, 2010) (holding plaintiffs failed to state a breach of third party contract claim but stated a negligence claim); *Senicion v. Saxon Mortg. Servs.*, No. CV 10-03108, 2010 WL 5174510 (N.D. Cal. Apr. 11, 2011) (TRO granted), (N.D. Cal. May 17, 2011) (preliminary injunction granted); *In re Bank of America Home Affordable Modification Program (HAMP) Contract Litigation*, No. 10-md-02193-RWZ, 2011 U.S. Dist. LEXIS 72079, 2011 WL 2637222 (D. Mass. July 6, 2011) (denying motion to dismiss in part). *c.f.* *Provost v. Saxon Mortg. Services, Inc.*, 2012 WL 1065481 (D. Mass. Mar 27, 2012) (granting motion to dismiss); *Brockbank v. JP Morgan Chase Bank, N.A.*, 2012 WL 1142933 (D. Utah 2012) (granting motion to dismiss); *Sherman v. Litton Loan Servicing, L.P.*, 796 F.Supp.2d 753 (E.D. Va., 2011) (dismissing for lack of private right of action under HAMP); *Puzz v. Chase Home Finance, LLC*, 763 F.Supp.2d 1116 (D. Ariz., 2011) (dismissing for lack of private right of action); *Sankey v. Aurora Loan Services, LLC*, 757 F.Supp.2d 57 (D. Mass., 2010) (denying preliminary injunction).

¹⁵ *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547 (7th Cir. 2012) (holding breach of contract claims were not preempted by HAMP); *Ortega v. Wells Fargo Bank, N.A.*, 2012 WL 275055 (N.D. Ohio, 2012) (motion to dismiss denied in part); *Bosque v. Wells Fargo Bank, N.A.*, 762 F. Supp. 2d 342 (D. Mass. 2011) (holding plaintiffs had standing to assert breach of contract and finding breach of TPP contract); *Fletcher v. OneWest Bank, FSB*, 798 F. Supp. 2d 925 (N.D. Ill. 2011) (finding breach of contract). *But see* *Geske v. Wells Fargo Bank, Nat. Ass'n*, 2012 WL 1231835 (N.D. Tex., 2012) (granting Wells Fargo's motion to dismiss); *Soin v. Federal Nat. Mortg. Ass'n*, 2012 WL 1232324 (E.D. Cal., 2012) (denying plaintiff's preliminary injunction); *Bohnhoff v. Wells Fargo Bank, NA*, 2012 WL 1110585 (D. Minn., Apr. 2012) (granting Wells Fargo's motion to dismiss).

For more information on HAMP, see National Consumer Law Center, *Foreclosures*, § 2.8 (4th ed. 2012).

8.3.2 FHA-Insured Home Loans

The HUD Federal Housing Administration's purpose is to expand homeownership opportunities for people who are not adequately served by the private market. Lenders provide the funding for the mortgage, the FHA insures the lender so that it is 100% protected against the risk of default.

Because of the negative incentives for foreclosure with FHA-Insured loans, mortgage servicers of FHA loans have to comply with FHA loan servicing guidelines. 24 C.F.R. § 203.500-203.660. These guidelines illustrate six different options for homeowners who are in threat of foreclosure: forbearance; refinancing; loan modification; partial claim; pre-foreclosure sale; and deed in lieu of foreclosure. Mortgage servicers must review the loan for these loss mitigation options before proceeding with foreclosure proceedings. For more information, see National Consumer Law Center, *Foreclosures*, § 3.2, § 2.11 (4th ed. 2012).

Moreover, courts across the country have held that a mortgage company's failure to comply the FHA Loan Servicing Guidelines is a complete defense to a mortgage foreclosure action.¹⁶

8.3.3 VA Loans

The Department of Veterans Affairs (VA) guarantees loans made by lenders to veterans. Mortgage servicers of VA loans must comply with special servicing guidelines. 38 C.F.R. § 36.4275-83. A mortgage company's failure to comply with the VA Loan Servicing Guidelines should also be a complete defense to a mortgage foreclosure action. However, there has not been much litigation on this issue since the VA Loan Servicing Guidelines were promulgated as federal regulations. For more information, see National Consumer Law Center, *Foreclosures*, § 3.3, § 2.11 (4th ed. 2012).

8.3.4 USDA Loans or Rural Housing Service

The United States Department of Agriculture Rural Development (USDA), Rural Housing Service, provides single family Direct and Guaranteed Loans under its directive to improve the economy and quality of life in rural America.

8.3.4.1 USDA Direct Loans

USDA is the lender and servicer for Direct Loans. Special servicing for Direct Loans, including workout agreements, protective advances (USDA pays taxes and insurance on behalf of borrower), and payment assistance is required under 7 C.F.R. § 3550.201-211 and the USDA Handbook, available online at: <http://www.rurdev.usda.gov/Handbooks.html>. However, these special servicing options are not available post-acceleration of the loan and definitely not during foreclosure proceedings.

¹⁶ See 24 C.F.R. § 203.500-203.660; *Lacy-McKinney v. Taylor, Bean & Whitaker Mortgage Corp.*, 937 N.E.2d 853, 2010 WL 4683464 (Ind. App. 2010); *Wells Fargo Home Mortg., Inc. v. Neal*, 398 Md. 705, 922 A.2d 538 (Md. 2007); *Washington Mutual Bank v. Mahaffey*, 154 Ohio App.3d 44 (Ohio App. 2003) (judgment of trial court reversed where bank failed to comply with FHA Guidelines constituted an equitable defense to foreclosure); *Mellon Mortgage Co. v. Larios*, 1998 WL 292387 (N.D. Ill. May 20, 1998), *citing* *Bankers Life Co. v. Denton*, 120 Ill.App.3d 576, 579 (1983); *Fleet Real Estate Funding Corp. v. Smith*, 366 Pa. Super 116, 124 (Pa. Super. 1987) (holding mortgagor on FHA-insured mortgage could raise as equitable defense to foreclosure mortgagee's deviation from compliance with forbearance provisions in the regulations and the handbook); *Federal Nat. Mortg. Ass'n v. Moore*, 609 F.Supp 194, 198 (N.D.Ill. 1985); *Cross v. Federal Nat. Mortg. Ass'n*, 359 So.2d 464, 465 (Fla. App. 1978); *Federal Nat. Mortg. Ass'n v. Ricks*, 372 N.Y.S.2d 485, 496-97 (N.Y. Sup. Ct. 1975). See also *Bankers Life Co. v. Denton* 120 Ill.App.3d 576 (Ill. App. 1983) (specifically disagreeing with *Roberts v. Cameron-Brown Co.*, 556 F.2d 356 (5th Cir. 1977), which had held the borrower was an incidental beneficiary who had no cause of action, and holding failure to comply as affirmative defense).

Borrowers with USDA Direct Loans have a right to appeal adverse decisions, including a denial of special servicing. Borrowers must request an appeal in writing within 30 days of receipt of adverse notice. Borrowers send the request for an appeal to the address listed on the adverse notice. The appeals are heard by the National Appeals Division. For more information, see National Consumer Law Center, *Foreclosures*, § 3.4.2, § 2.11 (4th ed. 2012).

8.3.4.2 USDA Guaranteed Loans

USDA Guaranteed Loans are guaranteed by the USDA against default by the borrower. USDA Guaranteed Loans will not be serviced by the USDA and will not necessarily be identifiable from the loan documents. Special loss mitigation options are available to borrowers with USDA Guaranteed Loans. The servicing guidelines are outlined at: <http://www.rurdev.usda.gov/regs/an/an4433.pdf>. These guidelines have not yet been published into the Code of Federal Regulations. For more information, see National Consumer Law Center, *Foreclosures*, § 3.4.3, § 2.11 (4th ed. 2012).

8.3.5 National Mortgage Settlement

Consent judgments were entered against five leading mortgage servicers, Bank of America, JP Morgan Chase, Wells Fargo, Citibank and Ally/GMAC in *United States of America v. Bank of America Corp. et al.*, USDC No. 12-0361 (D.D.C. 4/4/12).¹⁷ The consent judgments, available relief and servicing standards for these servicers can be found at www.nationalmortgagesettlement.com. The consent judgments provide relief to Louisiana homeowners and should be reviewed if one of these banks is your client's servicer. Also, see National Consumer Law Center, *Foreclosures*, § 2.9 (4th ed. 2012).

8.4 REVERSE MORTGAGES

A Home Equity Conversion Mortgage (HECM), also known as a reverse mortgage, is a federally insured loan that enables homeowners who are 62 years of age or older to withdraw some of the equity in their home or use the loan proceeds to refinance or buy a new primary residence. Unlike a traditional mortgage, no repayment is required until the borrowers no longer use the home as their principal residence or fail to meet the mortgage obligations. Borrowers are responsible for property taxes, general upkeep of the property and must keep all required insurance premiums current for the property. The regulations that govern the origination and servicing of an HECM are available at 24 C.F.R. § 206. Importantly, 24 C.F.R. § 206.27(c)(1) provides that the mortgage balance will be due and payable in full if a mortgagor dies and the property is not the principal residence of at least one surviving mortgagor, or a mortgagor conveys all or his or her title in the property and no other mortgagor retains title to the property. It is also important to note that there are "reverse mortgages" that are not federally insured, but those are usually scams.

¹⁷See NCLC Reports, *Bankruptcy and Foreclosures*, vol. 30 (May/June 2012).

9. FORECLOSURE DEFENSE PROCEDURES

9.1 EXECUTORY PROCESS

In Louisiana, most foreclosure cases are filed as a Petition for Executory Process under La. Code Civ. Proc. art. 2631-41. The day the Petition for Executory Process is filed a judgment is granted, ordering that a Notice of Seizure issue for the sheriff to seize and sell the property.¹⁸ Citation is unnecessary in executory proceedings, but the sheriff must attempt serve the defendant with a written notice of seizure.¹⁹ However, often the debtor is never served with any notice because service is made on a court-appointed curator. The curator does not file any pleadings in the executory process case. His duty is limited to attempting to notify the debtor.

A debtor must assert defenses to a petition for executory process by injunction or suspensive appeal.²⁰ A suspensive appeal is not practical for a low-income homeowner since a bond equal to 150% of the debt must be posted.²¹ A preliminary injunction, but not a temporary restraining order, may issue to arrest the seizure and sale of immovable property.²² Therefore, a homeowner must move quickly to file for preliminary and permanent injunctions to enjoin the sale. The preliminary injunction should be heard not less than 2 days nor more than 10 days after service of the rule to show cause why the preliminary injunction should not issue.²³

The grounds and procedures for asserting foreclosure defenses by injunction are:

- the debt is extinguished or legally unenforceable; or
- the procedures required for executory process have not been followed.²⁴

The grounds for an injunction itemized in Code of Civil Procedure art. 2751 are not exclusive. An applicant for a preliminary injunction must prove irreparable injury and a prima facie for relief.²⁵ Real property is unique, and the loss of one's home meets the irreparable injury standard.²⁶ The applicant must furnish security for the issuance of a preliminary injunction, except in the cases listed in Code of Civil Procedure art. 2753. If a preliminary injunction is denied, a suspensive appeal of the injunction denial does not suspend foreclosure by executory process.²⁷

The sale may be enjoined "if the procedure required by law for an executory proceeding has not been followed."²⁸ Thus, defects in authentic evidence may bar executory process, including attaching a copy of the mortgage but not an original promissory note.²⁹ Under Louisiana law the mortgage follows the note.³⁰ In addi-

¹⁸La. Code Civ. Proc. art. 2635.

¹⁹La. Code Civ. Proc. arts. 2640, 2721.

²⁰La. Code Civ. Proc. art. 2642; *Provident Bank v. Leslie*, 28 So.3d 1196 (La. App. 4 Cir. 2010); *First Guaranty Bank, Hammond, Louisiana v. Baton Rouge Petroleum Center*, 529 So.2d 834 (La.1987).

²¹La. Code Civ. Proc. art. 2642.

²²La. Code Civ. Proc. art. 2752.

²³La. Code Civ. Proc. art. 3602.

²⁴La. Code Civ. Proc. art. 2751.

²⁵*Jo Ellen Smith Psychiatric Hospital v. Harrell*, 546 So. 2d 886, 891 (La. App. 1 Cir.1989).

²⁶*Robbins v. State through State Land Office*, 704 So.2d 961 (La. App. 3 Cir. 1997); *Bean v. Independent American Savings Association*, 838 F.2d 739, 743 (5th Cir. 1988).

²⁷*Wood v. Fontenot*, 896 So.2d 323 (La. App. 3 Cir. 2005); *United Companies v. Hall*, 722 So.2d 48 (La. App. 1 Cir. 1998).

²⁸La. Code Civ. Proc. art. 2751.

²⁹*First Guaranty Bank v. Ratcliff*, 424 So.2d 289 (La. App. 1 Cir. 1982).

³⁰La. Civ. Code art. 3312; *Louisiana National Bank of Baton Rouge v. Heroman*, 280 So.2d 362 (La. App. 3 Cir. 1973).

tion, the plaintiff must establish the chain of title of the note and mortgage at issue through authentic evidence. An unendorsed promissory note is not prima facie evidence of ownership.³¹

9.2 ORDINARY PROCESS AND THE LOST NOTE STATUTE

If the note is lost, the creditor lacks authentic evidence or the mortgage is rescinded, the foreclosure will have to proceed as an ordinary proceeding. Also, the creditor has the right to convert an executory proceeding to an ordinary proceeding.³² In an ordinary proceeding, a debtor may assert defenses, offsets and reconventional demands.

In a foreclosure by ordinary process, the original promissory note does not have to be introduced into evidence if the requirements of the Lost Note Statute, La. R.S. 13:3741, are met.³³ La. R.S. 13:3741 requires that the loss of the note be advertised in a public newspaper and proper means taken to recover the possession of the instrument.

9.3 COLLATERAL MORTGAGES

A "collateral mortgage" consists of: (1) an act of mortgage, (2) a collateral mortgage, or ne varietur, note paraphed for identification with the act of mortgage, and (3) a pledge of the collateral mortgage note to the creditor in order to secure the debt, usually represented by a hand note.³⁴ The collateral mortgage is different from a conventional mortgage because money is not advanced directly on what is titled the "collateral mortgage note" but on a separate promissory note.³⁵ This is an unusual and complicated type of mortgage. It is often misunderstood and improperly issued by small finance companies.

9.4 OTHER DEFENSES TO EXECUTORY OR ORDINARY PROCESS

Additional defenses to foreclosure are:

9.4.1 Prescription

Actions on promissory notes are subject to a liberative prescription of five years which runs from the date that payment becomes exigible.³⁶ Generally, the maturity date of a note fixes the period at which the five year prescriptive period begins to run.³⁷ If prescription is evident on the face of the petition, the plaintiff has the burden of proving that prescription has not run.³⁸ When more than five years have elapsed after the maturity date of a note, and there is no interruption or renunciation of prescription, recovery on the note is barred by prescription.³⁹

Creditors may seek to overcome a prescription plea by arguing that the debtor renounced prescription or acknowledged the debt by making a payment. Once prescription has run, acknowledgment is no longer applicable. Only "renunciation"

³¹Bankers Trust v. Colley, 884 So. 592 (La.App.); Hollis v. Norton, 586 So.2d 656 (La.App.5 Cir. 1991); N. E. England Associates, Inc. v. Davis, 333 So.2d 696 (La. App. 4 Cir. 1976).

³²La. Code Civ. Proc. art. 2644.

³³U.S. Bank National Ass'n v. Custer, 33 So.3d 303 (La. App. 5 Cir. 2010); Norwest Bank v. Walker, 933 So.2d 222, 225 (La. App. 4 Cir. 2006).

³⁴Max Nathan, Jr. & H. Gayle Marshall, *The Collateral Mortgage*, 33 La. L. Rev. 497, 500 (1973)

³⁵Diamond Servs. Corp. v. Benoit, 780 So. 2d 367, 371 (La. 2001). See also La. R.S. 9:5551-5554 (Supp. 2002); First Guar. Bank v. Alford, 366 So. 2d 1299, 1302 (1978); La CCP 2637.

³⁶La. Civ. Code art. 3498.

³⁷Acorn Community Land Ass'n of La. v. Zeno, 936 So.2d 836, 840 (La. App. 4 Cir. 2006).

³⁸Campo v. Correa, 828 So.2d 502, 508 (La. 2002).

³⁹Acorn Community Land Ass'n of La. v. Zeno, 936 So.2d 836, 840 (La. App. 4 Cir. 2006). Anthon v. Knox, 155 So.2d 53, 54-55 (La. App. 1 Cir. 1963).

may be applicable after prescription has run.⁴⁰ Proof of renunciation, interruption or suspension of prescription must be clear, specific and positive.⁴¹ A renunciation must be clear, direct and absolute and manifested by words or actions of the party in whose favour prescription has run. There must be a new promise to pay for renunciation to exist. One may “acknowledge” a debt and even make a partial payment of the debt without renouncing prescription.⁴² An oral acknowledgment or an unsigned writing may be insufficient to constitute renunciation.⁴³

9.4.2 Mortgage Electronic Registration Systems, Inc. (MERS)

Mortgage Electronic Registration Systems, Inc., commonly referred to as “MERS”, states on its website that it is “an innovative process that simplifies the way mortgage ownership and servicing rights are originated, sold and tracked. Created by the real estate finance industry, MERS eliminates the need to prepare and record assignments when trading residential and commercial mortgage loans.” MERS website, Home Page, available at: www.mersinc.org. MERS is commonly listed in the mortgage at issue as a mortgagee. Though not as common today, there was a time when MERS was named as plaintiff on many foreclosure lawsuits, both in ordinary and executory process in Louisiana.

MERS does not have valid standing to foreclosure unless the promissory note at issue is endorsed in blank or is endorsed to MERS specifically.⁴⁴

9.4.3 Satisfaction

When the obligation secured by a mortgage has been fully satisfied, La. R.S. 9:5385 states that the mortgage holder shall, within thirty days of receiving a written demand, produce the satisfied promissory note or a release in a form sufficient to bring about the cancellation of the inscription of the recorded mortgage. Moreover, La. R.S. 9:5385 (B) provides that if the mortgage servicer fails to produce the satisfied promissory note or an instrument of release within thirty days after receiving a written demand, the mortgage servicer shall be liable for all damages and costs, including attorney fees.

10. TORT CLAIMS AGAINST LENDERS

10.1 WRONGFUL FORECLOSURE

To have a cause of action for wrongful foreclosure, a plaintiff must first show the seizure was illegal or wrongful. Next, under the duty/risk analysis, a plaintiff must show that the wrongful seizure was caused by the fault of one who owed a duty to the plaintiff, and that there was a breach of this duty.⁴⁵ An aggrieved plaintiff is entitled to recover general and special damages caused by wrongful seizure of his property.⁴⁶ Seizure in executory process without authentic evidence gives rise to an action for wrongful seizure.⁴⁷

⁴⁰Lima v. Schmidt, 595 So.2d 624, 631-32 (La. 1992).

⁴¹Babin v. Babin, 10 So.3d 784, 785-86 (La. App. 5 Cir. 2009).

⁴²Neese v. Papa John's Pizza, 44 So.3d 321 (La. App. 5 Cir. 2010).

⁴³State ex rel. Sunseri v. Thoman, 135 So.2d 791 (La. App. 1 Cir. 1962).

⁴⁴See Landmark National Bank v. Kesler, 216 P.3d 158 (Kan. 2009); Jackson v. MERS, 770 N.W.2d 487, 491-92 (Minn. 2009); In re MERSCORP v. Romaine, 861 N.E.2d 81 (N.Y. 2006); MERS v. Neb. Dep't of Banking & Fin., 704 N.W. 2d 784, 788 (Neb. 2005); see also U.S. Bank Nat. Ass'n v. Custer, 33 So.3d 303 (La. App. 5 Cir. 2010).

⁴⁵La. Civ. Code art. 2315; Bank of New York v. Parnell, 32 So.3d 877 (La. App. 5 Cir. 2010), *rev'd in part*, 56 So.2d 160 (La. 2010) (reversed on HOEPA issue).

⁴⁶Levine v. First National Bank of Commerce, 948 So.2d 1051 (La. 2006); Nassau Realty Co., Inc. v. Brown, 332 So.2d 206, 211 (La. 1976).

⁴⁷Bank of New York Mellon v. Smith, 71 So.3d 1034 (La. App. 3 Cir. 2011) *writ denied* 75 So.3d 462 (La. 2011).

10.2 ABUSE OF RIGHTS DOCTRINE

Under the abuse of rights doctrine, Louisiana courts exercise judicial control and can prevent exercise of what would normally be a party's rights.⁴⁸ However, a lender's reasonable enforcement of an obligation by foreclosure is unlikely to provide an "abuse of rights" defense or damages claim.⁴⁹

10.3 OTHER TORT CLAIMS

Liability may exist for other torts by a lender, e.g., negligent misrepresentation, sending a letter improperly claiming that a debt was owed to it,⁵⁰ or failure to credit mortgage payments.⁵¹

11. DEFICIENCY JUDGMENTS AFTER SALE BY EXECUTORY PROCESS

If the property was sold in executory process without appraisal, no deficiency judgment can be had.⁵² Even untimely appraisals will deprive the creditor of his right to a deficiency judgment. The statutory prohibition against deficiency judgments when the real estate was sold without appraisal may not be waived by the debtor.⁵³ In general, when property has been sold after appraisal and in accordance with the laws for appraisal, the creditor may obtain a personal judgment against the mortgagor for any deficiency remaining after the application of the sale proceeds to the secured debt.⁵⁴ A creditor must file an ordinary action to seek a deficiency judgment.⁵⁵ Deficiency judgment actions prescribe 5 years from the date of the sheriff's sale.⁵⁶

12. OTHER MORTGAGE ABUSES

The federal Consumer Financial Protection Bureau has promulgated Regulation O, 12 C.F.R. § 1015 to regulate mortgage assistance relief providers. Check to see if a prior provider violated the provisions of Regulation O. For more information on mortgage assistance relief abuses, see NCLC, Foreclosures § 17.4.4 (4th ed. 2012)

13. TAX ISSUES IN FORECLOSURE

A foreclosure sale, short sale or cancellation of debt in a loan modification may have income tax consequences. *See* Chapter 14, *Tax Law for Legal Services and Pro Bono Attorneys, infra*.

⁴⁸Truschinger v. Pak, 513 So.2d 1151, 1154 (La. 1987); Illinois Central Gulf Railroad Co. v. International Harvester Co., 368 So.2d 1009 (La. 1979).

⁴⁹Fidelity Bank & Trust Co. v. Hammons, 540 So.2d 461 (La. App. 1 Cir. 1989) (rejecting abuse of rights claim even though executory process was improper).

⁵⁰Bizcapital Business & Industrial Development Corp. v. Union Planters Co., 884 So.2d 623, 627 (La. App. 4 Cir. 2004) (negligent misrepresentation); State Bank of Commerce v. Demco of Louisiana, Inc., 483 So.2d 1119, 1122 (La. App. 5 Cir. 1986) (improper claim of debt).

⁵¹Avery v. Citimortgage, 15 So.3d 240 (La. App. 1 Cir. 2009).

⁵²La. R.S. 13:4106; Williams v. Perkins-Seigne Partner, 633 So.2d 1247 (La. 1994).

⁵³La. R.S. 13: 4107.

⁵⁴La. Code Civ. Proc. art. 2771; Jackson v. Slidell Nissan, 693 So.2d 1257 (La. App. 1 Cir. 1997).

⁵⁵First Guaranty Bank, Hammond, Louisiana v. Baton Rouge Petroleum Center, 529 So.2d 834 (La. 1987).

⁵⁶Dyck-O'Neal, Inc. v. Sands, 745 So.2d 68 (La. App. 4 Cir. 1999).

