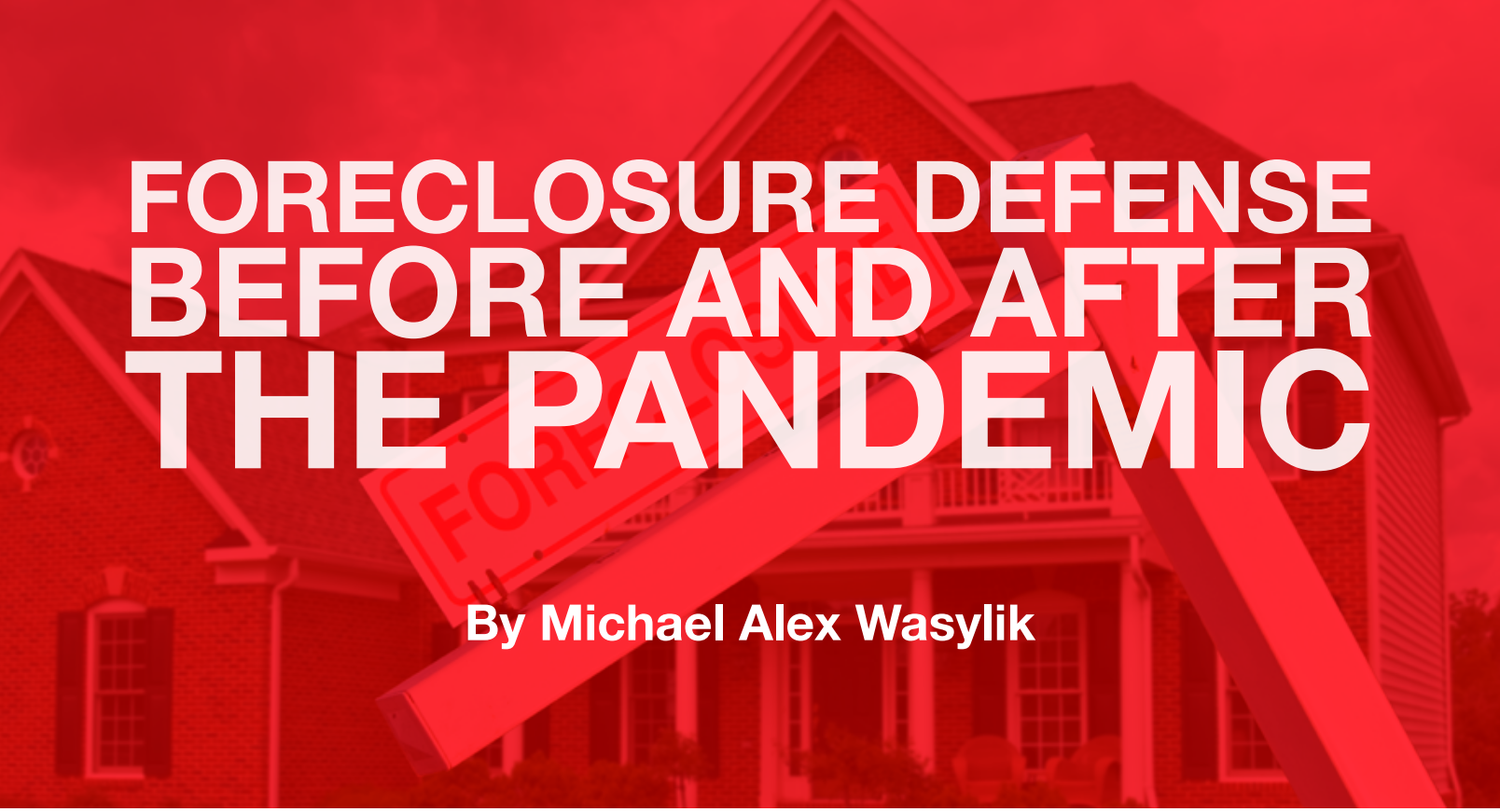

FORECLOSURE DEFENSE BEFORE AND AFTER THE PANDEMIC

By Michael Alex Wasylik

There's no such thing as "foreclosure defense." In 2006, you might understandably have believed that statement to be true. Even for the next couple of years, some lawyers believed that foreclosures were indefensible. They were automatic and inevitable. No options existed besides bankruptcy and stall tactics.

And then 2008 came and changed all that. A surge of defaulted home loans and new foreclosure filings across the country led to a mass demand for help. As the economy dropped out from underneath them, lawyers from all types of practices rushed in to provide one of the few legal services that their clients could still demand: finding a legal solution to foreclosure.

By 2009, the United States saw a 120 percent increase in new foreclosures over 2007, according to real estate data firm RealtyTrac (https://tinyurl.com/y6v7gmet). The hardest-hit states—Nevada, Arizona, and Florida—saw 10 percent, 6.3 percent, and 5.9 percent of homes enter foreclosure, respectively, according to the same source. In 2010, the numbers were similarly bad.

Lawyers, now in high demand, brought their experiences in drafting and litigating contracts to the world of mortgage lending. Some struck gold in boilerplate contracts and old statutory provisions that others had overlooked. Some resorted to seeking relief primarily in bankruptcy court. Others dug into the fundamentals, applying knowledge of civil procedure and the evidence code to tip the scales in their clients' favor. Many of their clients found relief. And the idea of "foreclosure defense"—whether on behalf of an actual defendant in a judicial foreclosure or a plaintiff to stop a non-judicial foreclosure—became a new feature of our legal landscape.

In recent years, foreclosures have returned to pre-crisis foreclosure volumes, and many lawyers have switched their focus back to other areas of transactional or litigation practice. But the COVID-19 pandemic led to nationwide shutdowns, which in turn has led to skyrocketing unemployment and inability to make monthly mortgage payments. On April 7, 2020, CNBC reported that borrowers requesting a forbearance—permission to postpone one or more mortgage payments—had gone up 1,270 percent between the week of March 2 and the week of March 16, and another 1,896 percent before the month was over (https://tinyurl.com/ul6fhzj). How many of those homeowners, currently in doubt about making their mortgage payments today, will ever get back on track cannot yet be predicted. But we should expect to see a new surge in foreclosure volume by year's end. And the world of foreclosure defense will mutate once again.

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JURISDICTIONAL VARIATIONS OF FORECLOSURE DEFENSE

What does foreclosure defense look like today? Each state has its own unique answer. The laws of each individual state govern the security interests for mortgage loans, and the process for enforcing these security interests also varies widely from state to state.

A majority of states have non-judicial foreclosure procedures, meaning that the lender does not need to obtain court approval before obtaining a sale of the collateral on a defaulted loan. These states usually operate under a "title theory" of mortgages, meaning the buyer of property conveys a "deed of trust" to the lender, which allows the holder of that deed of trust to foreclose through a non-judicial process, spelled out in the contract or by state law. This process usually requires some form of notice period, followed by record notice of a foreclosure auction at which the property is sold. To stop these quick-moving sales, borrowers often must become plaintiffs in a court action for injunctive relief and hope to resolve disputes during this newly found time. Two of the largest states with non-judicial foreclosures are California and Texas.

Other states require lenders to file a lawsuit or petition in equity and obtain a court order directing the foreclosure sale to occur. The judicial foreclosure states rely primarily on a "lien theory" of mortgage, in which the borrower retains full ownership of the home but the lender keeps a contractual lien allowing for the foreclosure remedy in cases of default. The lawsuit itself can be a summary proceeding or perfunctory in some states, while in others the litigation allows for vigorous advocacy and even outright borrower victories, additionally taking longer—sometimes much longer—to complete. Connecticut and Florida are examples of states with judicial foreclosure proceedings.

Non-judicial foreclosure states operate under a "title theory" of mortgages.

TEXAS AND CALIFORNIA: EXAMPLES OF NON-JUDICIAL FORECLOSURE

Even within those two broad categories, the process can be much different in states with a stronger tradition of consumer protection than those without. Texas consumer lawyer Bill Clanton, who handles a variety of debt-defense cases from his San Antonio office, finds that homeowners have few strong protections when it comes to saving their home from foreclosure. It has to be a "very obvious case" of wrongdoing before the courts will allow a borrower to halt a foreclosure for very long, Clanton said. Texas borrowers typically need to seek a temporary restraining order to stop the sale, and then withstand a motion to dismiss the action. And although Clanton sees success in other forms of debt defense and consumer debt reporting cases, he's found that homeowners, unless they act quickly, don't have much cause for optimism trying to stop a foreclosure in Texas courts. Depending on the timing of the notices required under Texas law, a homeowner can see their property sold in as little as 41 days from the first notice given—although typically the shortest foreclosures take about 60 days.

California, by contrast, offers more state law protections for homeowners. Even though borrower-filed litigation can still be a challenge, there remain some ways borrowers can obtain relief. And California's relatively high home prices mean that even a borrower who can't fully make a mortgage payment may have both the resources and the financial incentive to seek legal help.

Bay Area lawyer Jason Estavillo has organized his firm, Law Offices of Jason W. Estavillo, P.C., to enable a rapid response to new foreclosure proceedings. The biggest obstacle, he finds, is when homeowners wait until the last minute to seek help, making their case an "emergency" and creating additional costs for the homeowner. As in Texas, a California borrower can seek a temporary injunction to stop a sale. Although Estavillo prefers to get involved as soon as the homeowner knows there's a problem, he can still get into court for a temporary injunction with as little as five days' notice before a scheduled sale.

And because California has a "Bill of Rights" for

homeowners—a 2013 version expired due to a sunset provision in 2018, and while there is a current version, it has fewer protections—Estavillo finds that filing a lawsuit gives him the opportunity to negotiate for borrowers because the lenders' litigation counsel are more responsive than the call-center employees who handle customer support for lenders. Simply applying for a loan modification or other relief can be grounds for obtaining the temporary injunction under California law, and once lenders' counsel enters the case, they can ensure that a legitimate application gets the consideration it deserves before the lender resets the auction. For those who simply want to exit gracefully, the borrower and lender can agree for incentive-based surrender options, time to sell the house and recapture equity (often possible due to California's real estate prices), or simply an agreed-upon time to vacate.

Florida is famous both for the length of its process and its culture of active litigation.

CONNECTICUT AND FLORIDA: EXAMPLES OF JUDICIAL FORECLOSURE

Judicial foreclosure processes, and methods of obtaining relief, also vary widely from state to state. Connecticut, a judicial foreclosure state, has an unusual process with two tracks. State law provides a "strict foreclosure" track in which the title passes immediately to the lender with no sale, after a period in which borrowers may redeem their rights to the property by paying the past-due amounts. This process can take as little as 60 days if unopposed.

Hartford consumer lawyer Sarah Poriss has found that many of her clients have the ability and the desire to renegotiate the terms of their loans. Like Estavillo, she's taken a deliberate approach to organizing her practice to help her clients get the time to engage with the other side and reach a fair resolution. Connecticut's process, while quick-moving if unopposed, allows borrowers to request mediation, abating the foreclosure process until the parties have had a chance to fully explore loan modification and other loss mitigation offers. Instead of seeing them homeless in 60 days, Poriss seeks a settlement for her clients over seven to 12 months, often allowing them to keep the home at the end. She sees few cases that would benefit from protracted litigation, and she finds the judicial process useful mostly for the access it provides to mediation.

Of all the states, Florida may be most famous both for the length of its process and the culture of active litigation that marks foreclosures in the state. This culture was inspired at least in part by former legal aid attorney April Charney, who in 2008 began traveling the state teaching lawyers how to challenge foreclosure cases, with the goal of raising what she called an "army" of foreclosure defense lawyers to challenge flaws in lenders' cases.

Foreclosures, unlike most other civil cases in Florida, often take more than a year to complete unless completely uncontested. Many take longer, especially older filings. In just one county, Hillsborough, the courts recently ended a "backlog" docket of foreclosure cases filed in or before 2012. At the end of 2019, there were still approximately 200 still-active older cases reassigned to the regular civil dockets. At least a few of those cases were filed in 2008 or even earlier, including one case of mine. (And even these aren't the most extreme cases in Florida: Patsy Campbell of Okeechobee County famously fought her foreclosure from 1985 until finally losing the home to auction in 2011, as reported in the *Wall Street Journal*, https://tinyurl.com/y7ugh9gu.)

Several other counties have similar backlogs of older cases that still hang on. Cases filed more recently, however, tend to have cleaner fact patterns—Florida changed its foreclosure statutes in 2013 to impose higher pre-filing duties on lenders and their counsel to verify the underlying allegations of the foreclosure complaint—and the trend is for even contested foreclosure cases to complete in 12 to 24 months.

Between 2008 and 2015, foreclosure defense lawyers scored wave after wave of victories, getting cases dismissed for lack of

standing, failure to provide contractually required notices, and even the failure to introduce sufficient evidence of the amounts owed. But the effect of statutory changes and shifting appellate law narrowed defenses available to borrowers or eliminated them entirely, while also creating "presumptions" that lowered the bar for certain elements of the lenders' cases.

Florida's defense practice has begun to shift. Although some cases with good fact patterns (obvious lender error or failure to comply with federal regulations on federally backed loans) still lend themselves to litigation, most find the only real permanent solution, besides proving a lack of breach, involves reaching some kind of settlement with the lender. Proper defense can add to a borrower's leverage or slow the process long enough to reach that settlement, but even outright dismissals don't carry the day because appellate courts have radically curtailed the application of res judicata and statute of limitation defenses in foreclosure cases.

WHAT DOES THE CORONA-SHAPED FUTURE HOLD?

So, in a future shaped by the COVID-19 pandemic, what's in store for foreclosure defense practitioners, besides a surge of new homeowners in need of legal help? Poriss and Estavillo see a shift away from the stigma that homeowners suffer in foreclosure cases. Unlike in 2008, Poriss says, borrowers who fall behind because they lost their jobs during the pandemic won't be treated as if it's their fault. Estavillo also notes that "shame and embarrassment" are among the reasons he saw homeowners wait until the last minute to hire counsel. They are less likely to attach these feelings to financial troubles caused by the pandemic.

Besides the changing emotional landscape, the outbreak has also already led to an overlay of federal programs atop the quilted state-by-state landscape that previously characterized foreclosure practice. Federally backed loans with Federal Housing Administration insurance or Department of Veterans Affairs insurance, loans owned by Fannie Mae or Freddie Mac, and certain other federally related mortgages now have relief options crafted specifically for financial victims of the pandemic. Some servicers have obligations to provide relief through a combination of forbearance, deferment, modification, and other loss mitigation. These programs are still evolving as of this writing (April 20, 2020), but they all offer more tools for practitioners to get both short-term and long-term relief for their clients.

In the wake of COVID-19, some servicers have obligations to provide relief.

Part of this relief may come from leverage. Whether a lender fails to properly handle a request for loss mitigation under the Real Estate Settlement Procedures Act or reports a pandemic-related late payment in violation of the recently passed Coronavirus Aid, Relief, and Economic Security Act, mortgage servicers will need to resolve errors (inevitable due to the likely volume of relief requests) by offering some form of accommodation.

And on the positive side, the purpose of these new or expanded programs is not to create mishandling errors but to provide substantive relief in the form of time to recover and the ability to catch up on mortgage payments once financial troubles subside. A combination of forbearance and modification can be a powerful one-two punch to permanently solve a temporary mortgage problem for many homeowners who suffer a temporary loss of income due to the shutdown.

And for those who don't fully recover from their financial troubles, they should see less stigma and greater access to measures meant to ease the transition into a new living situation. Either way, the job of the foreclosure defense practitioner will likely continue to be finding that permanent solution. But the likelihood of success will be greater, with more leverage and more substantive opportunities for relief. ■

Michael Alex Wasylik is a founding attorney of Ricardo & Wasylik PL (http://ricardolaw.com), serving the entire state of Florida. With the firm, Mike helps protect Florida homeowners from foreclosure, unscrupulous debt collectors, and false or inaccurate credit reporting. He grew up in the Tampa Bay area and is a proud graduate of Northwestern University and the Florida State University College of Law.