



Judge Sanctions Mortgage Banking Industry – AND THEIR ATTORNEYS

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Many courts around the nation are looking closely at mortgage banking litigation and holding the lenders, servicers and their attorneys to what some consider to be an elevated standard of ethics. Recently, the U.S. Bankruptcy Court for the District of Massachusetts, Judge Joel Rosenthal, issued an opinion on April 25, 2008, in the case of *In re Jacalyn S. Nosek*, imposing sanctions on a mortgage banking defendant and its attorneys for alleged misrepresentations as to the status of the note and mortgage at issue in the case.

The issue in the *Nosek* case is that throughout most of the case, the Mortgage Servicer (“Servicer”) and its attorneys represented that the Servicer was the “holder” of the note and mortgage. Specifically, the Servicer and its attorneys made some of the following representations to the court indicating that the Servicer was the “holder” of the note and mortgage:

1. Servicer filed a proof of claim, and an amended proof of claim attaching the original note and mortgage without any reference or mention to the assignment.
2. Attorneys for Servicer signed pleadings stating that The Servicer “is the holder of the first mortgage on real property.”
3. The Servicer’s Customer Service Department sent the debtor multiple letters stating that the Servicer

“holds an adjustable rate note secured by a mortgage.”

4. Counsel for Servicer filed a Motion for Relief from Stay in the debtor’s bankruptcy case on behalf of the Servicer and represented that the Servicer was the “holder of a first mortgage.”
5. Counsel for Servicer admitted in a signed answer to an Adversary Proceeding Complaint that the Servicer is the holder of the first position mortgage.
6. Attorney for Servicer defended Servicer in an 8-day trial in an Adversary Proceeding without advising the Court that Servicer was neither the noteholder nor mortgagee.

The parties argued that they should not be sanctioned because first, no one intentionally misled the Court; second, the debtor and her attorneys knew that the Servicer was not the noteholder and therefore, the debtor was not harmed; third, notes and mortgage are bought and sold with such frequency that it is difficult to know at any given moment who holds the note and mortgage; and fourth, the Pooling and Service Agreement permitted the Servicer to undertake actions in its own name.

Servicer’s argument that the Pooling and Service Agreement permitted Servicer to undertake actions in its own name is of particular interest. The *Nosek* Court noted that proofs of

claim filed under a written power of attorney “MUST” have the power of attorney attached. Fed. R. Bankr. P. 3001. The Court noted that mortgage lenders and servicers “private agreements and the frenzied trading market for mortgages do not excuse compliance with the Bankruptcy Rules any more than they would justify ignoring the Bankruptcy Code.” Courts in other jurisdictions, such as here in the 11th Circuit have not required a written power of attorney, and have held that a servicing agent qualifies as a real party in interest with standing to file a proof of claim on behalf of a credit card issuer. See *Greer v. O’Dell*, 305 F.3d 1297 (11th Cir. 2002).

In the *Nosek* Order finding sanctions to be appropriate, the Court noted that “those parties who do not hold the note or mortgage and who do not service the mortgage do not have standing to pursue motions for relief or other actions arising from the mortgage obligation.” The Court found that the misrepresentations in *Nosek* are not unique in the residential mortgage industry, and referred to many other cases involving “lack of knowledge”, “sloppiness”, and “mistakes” on the part of mortgage banking defendants and their attorneys. Therefore, it is clear that the sanctions imposed in the *Nosek* case are not only directed towards the attorneys involved, but should serve as a warning for the mortgage banking industry and their attorneys to ensure that their representations to the court are correct.

Ultimately in *Nosek* despite the fact that all parties argued to the court that there was no intent to mislead the court, Judge Rosenthal sanctioned the Servicer and its attorneys.

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The Servicer was sanctioned \$250,000. The law firm representing the Servicer was sanctioned \$25,000, and a partner for the law firm that conducted the trial was individually sanctioned \$25,000. National counsel for the Servicer was also sanctioned \$100,000. The Trustee argued that all responsibilities were turned over to the Servicer. The court noted that it would not allow the Trustee or any other mortgagee to evade responsibility by pointing fingers at their servicers. As a result, the court imposed sanctions of \$250,000 against the Trustee in its capacity as Trustee of the securitization. The Court stated that “sanctions are designed to deter future actions not only those of the offending party but also ‘comparable conduct by others similarly situated.’” Fed. R. Bankr. P. 9011(c)(2).



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