

## FORECLOSURES CONTINUE FULL STEAM AHEAD

Defenses exist for troubled borrowers who challenge lenders' standing

By **CHRISTOPHER G. BROWN**

Expect 2010 to be another tough year for those having trouble keeping up with their mortgage payments. As an attorney who spends my days fighting against mortgage lenders, that's what I'm expecting in the coming year. That said, I do expect some good news for cash-strapped home owners next year because I see strong indicators that tell me that the courts will take a hard look at the legality of some mortgage foreclosure proceedings. On the other hand, I don't foresee much of a decline in the number of mortgage foreclosures in 2010.

Looking into my crystal ball, here's what 2010 looks like to me:

**The pace of foreclosures will not slow.** There will be no significant decline in the number of mortgage foreclosures within the next 12 months. The first wave of foreclosures was for those who took out sub-

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prime loans. These posed the highest risk of default and so it was natural that these loans would start the foreclosure wave. Unfortunately, I expect that wave to intensify as more and more loans from the next riskiest loan category – Alt-A – fall into default. When you add that to a struggling economy, high unemployment and a terrible real estate market, you have a recipe for an increase in foreclosures for at least the next 12 months.



**More foreclosures will be fought successfully.** I expect problems in the loan registration system to slow or even halt some foreclosure proceedings. More courts will take a dim view of Mortgage Electronic Registration Systems, Inc. (MERS) which is the system that's supposed to keep track of mortgage filings. I first challenged this system in court in 2008 and was able to halt a client's foreclosure completely because of its flaws. Then the Supreme Court of Kansas and other courts observed that the MERS system could create insurmountable problems for a party seeking to foreclose. I predict that more court decisions like these will follow in 2010 as the spotlight becomes more focused on the problems with MERS.

The system was originally created to keep

track of any changes in the ownership of a mortgage. Today, it has some significant problems when it comes to proving what institution actually has the ability to launch a foreclosure proceeding. Watch for more and more courts to take notice of that in 2010.

Only the owner of a loan has the right to foreclose on a mortgage in most jurisdictions. There is, however, a distinction in the law between owning the loan and having a right to enforce the note and that distinction can make the difference between whether a foreclosure action is proper or not. In the past, courts allowed parties to file foreclosure actions based on the assertion that those parties had the right to enforce the note. I've fought these actions by arguing to the court that the foreclosing party needs to prove ownership, which is more than just a right to enforce the note.

I anticipate that more courts in 2010 will recognize the distinction between the right to enforce the note and the right to foreclose the mortgage, and more foreclosure actions will be dismissed as a result.

**Mortgage modifications will become rarer.** I believe that it will be harder to avoid foreclosure in 2010. If a borrower is seeking a mortgage modification, she probably will be talking to one department in the bank. If she is seeking a short sale, she

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probably will be talking to a different department. Foreclosures are handled by yet another department in the bank.

The problem is that the different departments don't talk to each other and what one department is doing does not affect the other.

This means that, for example, borrowers could be working on a modification with the loss mitigation department only to find that the foreclosure department has had them served with a foreclosure summons. A pending modification application does not prevent the bor-

rowers from losing their house in foreclosure.

In general, I'm looking toward 2010 as a year in which foreclosures will continue at the current pace, but borrowers will have more success in keeping the foreclosure wolves at bay. ■