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Protecting Absent Stakeholders in Foreclosure Litigation: Securities Investors, Mortgage Modification, and State Court Responses to the Foreclosure Crisis

The role of the judiciary has been noticeably absent from discussions about solutions to the foreclosure crisis. This Article argues that state courts have an opportunity to meaningfully intervene in the foreclosure process by addressing the competing financial interests of mortgage servicers and the absent securities investors whom servicers represent. By some estimates, foreclosures under current market conditions lead to more than 50% average loss in loan value, compared to 5% average loss in loan value with modification. This Article proposes that state courts utilize pre-foreclosure mediation programs to ensure that foreclosure is in the best interests of absent investors before permitting foreclosure to proceed. Unlike foreclosure defense, widespread mortgage modification has the potential to immediately reduce the foreclosure rate, a prerequisite to stabilizing mortgage markets and the broader economy.

Jeffrey Payne

Class Retreat from Mass Deceit: Assessing Class Action Compatibility with Truth in Lending Act Rescission

The Truth in Lending Act (TILA) provides for two primary civil remedies for aggrieved borrowers who received misleading loan disclosures: damages and rescission. While the damages remedy caps class-action damages recoveries, TILA's rescission remedy is completely silent on class action treatment. Despite a district court split on the amenability of the class action device for TILA rescission, the only two federal Circuit Courts of Appeal to consider the issue have foreclosed the right of borrowers to seek class-wide rescissory relief. This Article compares the judicial analysis in these two cases and finds that both courts erroneously construed TILA rescission in favor of lender rights and overstepped their constitutionally delegated power by completely foreclosing a right absent clear congressional intent.

Andrew Lichtenstein

United We Stand, Disparate We Fall: Putting Individual Victims of Reverse Redlining in Touch with Their Class

Reverse redlining is a form of illegal lending discrimination in which lenders target minority communities for unfair, overpriced loans. Most often, plaintiffs bring reverse redlining claims under a disparate impact theory, which does not require the plaintiff to show discriminatory intent and instead relies on a showing of statistical disparities to state a prima facie case. However, because this theory is predicated on abstract statistical information instead of facts from the plaintiffs' actual experiences, plaintiffs and their attorneys fail to recognize reverse redlining claims. Also, plaintiffs who do recognize their claims lack the resources to successfully do the detailed and extensive statistical analysis required to state a prima facie case. Therefore, legislative action is needed to shift the primary burden of preventing reverse redlining from private plaintiffs to government agencies better equipped to investigate and pursue reverse redlining.

James Pulliam

Good Cop, Bad Cop: Market Competitors, UDAP State Consumer Protection Laws, and the U.S. Mortgage Crisis

State unfair or deceptive acts or practices statutes (UDAPs) offer consumers broad protections against abusive business activity. However, although UDAPs could have been used to combat predatory lending during the housing bubble, the laws generally failed to detour the predatory lending that fueled the mortgage crisis. One reason that UDAPs did not play a bigger role in litigating against predatory lending is that states limit or deny UDAP standing for business competitors. Because businesses often lack a transactional nexus with other competitor businesses in their marketplace, this Article argues that UDAPs should provide businesses with representative standing free of an injury-in-fact requirement. This reform would allow businesses who suffer a diminished capacity to compete when their competitors act in unfair ways to engage in industry self-policing by using UDAPs to litigate against abusive business practices in their marketplace.

J. Kevin Murray

Ineffective Appraisal Regulation: A Crack in the Foundation of the Home Mortgage Industry

Although inflated appraisals played a key role in each of the last two major national financial crises, regulators have been unable to ensure appraisal accuracy. As a result, self-interested loan transaction parties are able to coerce appraisers to inflate appraisal values for nothing more than the promise of future business. What's more, the complex and convoluted appraisal regulatory system is powerless to detect and prevent such inappropriate conduct. As Congress once again examines the financial industry and explores meaningful reform, it is imperative that self-interested parties be removed from the appraiser selection process and appraisal regulatory responsibilities be consolidated at the federal level.

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