LIST OF DEFENSES, AFFIRMATIVE DEFENSES, AND COUNTERCLAIMS

Truth in Lending Act (TILA)

Citation: 15 U.S.C. §1601, et seq.
12 C.F.R. Part 226 (Regulation Z)

Liable Parties
Creditors (generally the original lender)
Assignee, if violation “apparent on face” of documents

Actionable Wrongs:
Failure to disclose credit information or cancellation rights
Material Violations (grounds for rescission)
  Amount financed
  Finance charge
  Annual percentage rate
  Total of payments
  Payment schedule
  Failure to give proper notice of right to cancel
  Certain HOEPA violations

Material Violations (grounds for statutory damages)
  Amount financed
  Finance charge
  Annual percentage rate
  Total of payments
  Payment schedule
  Security interest disclosures
  Failure to provide proper notice of right to cancel

Remedies:
Rescission, unless transaction was for purchase or construction of home
Actual damages
Statutory damages up to $4,000
Attorney fees

Limitations:
3 years to rescind under TILA, though limit does not apply to recoupment under state law
1 year to bring damages claim
No limit if used defensively by way of recoupment

Home Ownership and Equity Protection Act (HOEPA)

Citation: 15 U.S.C. §1639
12 C.F.R. Part 226 (Regulation Z)

Liable Parties
Creditors (generally the original lender)
Assignee
Actionable Wrongs:  Failure to disclose credit information and give conspicuous warning  
Inclusion of prohibited terms in transaction  
  Balloon payments in loans less than five years  
  Negative amortization  
  Most repayment penalties  
  Default interest rates  
  Most prepaid payments  
  Making loan lender should know borrower can’t afford  
  Paying contractor without homeowner’s consent  

Remedies:  Rescission, unless transaction was for purchase or construction of home  
Actual damages  
Statutory damages up to $4,000(Note: In addition to regular TILA monetary damage remedies, HOEPA violations give rise to "enhanced" monetary damages under 15 U.S.C. § 1640(a)(4), namely, all payments made by the borrower)  
Attorney fees  

Limitations:  3 years to rescind under TILA, though limit does not apply to recoupment under state law  
1 year to bring damages claim  
No limit if used defensively by way of recoupment  

Real Estate Settlement Procedures Act (RESPA)  

Citation:  12 U.S.C. §2601, *et seq.*  
24 C.F.R. Part 3500 (Regulation X)  
64 Fed. Reg. 10079 (HUD Policy Statement on lender-paid broker fees)  

Liable Parties:  Lender  
Broker, if not exclusive agent of lender  
Servicer  
Title company  

Actionable Wrongs:  Failure to give Good Faith Estimate, disclose other credit-related information, and give HUD-1 Settlement Statement and servicing statements  
Payment or acceptance of kickbacks or referral fees  
Making charges for which no identifiable services are provided  
Improper servicing of loan
Remedies: Three times amount of illegal charges
Attorney fees

Limitations: 1 year to bring affirmative claim
No limit if raised by way of recoupment

**Consumer Sales Practices Act (CSPA)**

Citation: R.C. Chapter. 1345.01 *et. seq.*
O.A.C. Chapter. 109:4-3

Liable Parties: “Supplier” (generally not lenders until January 2007, but would include brokers, home repair contractors and some assignees)

Actionable Wrongs: Unfair acts or practices
Deceptive acts or practices
Unconscionable acts or practices
Violations of O.A.C. Chapter. 109:4-3

Remedies: Rescission
Actual damages
Three times actual damages
Declaratory judgment
Statutory injunction
Attorney fees

Limitations: Two years for affirmative claims
No limitation if raised as counterclaim

**Home Solicitation Sales Act (HSSA)**

Citation: R.C. §§1345.21 - 1345.28

Liable Parties: “Supplier” (generally not lenders, but would include brokers, home repair contractors and some assignees)

Actionable Wrongs: Failure to give proper disclosures, written agreement, notice of cancellation rights; Inclusion of prohibited terms
Failure to cancel when properly requested

Remedies: Cancellation of transaction
Remedies provided under the Consumer Sales Practices Act
Limitations: Unlimited right to cancel contract if proper cancellation rights not provided by supplier
Two years for affirmative claims
No limitations if raised as counterclaim

**Mortgage Brokers Act (MBA)**

**Citation:**
R.C. Chapter. 1322
O.A.C. Chapter. 1301: 8-7

**Liable Parties:** Mortgage brokers (the person or entity registered with the Superintendent of Financial Institutions)

**Actionable Wrongs:**
Failure to maintain records
Making “false promises” or engaging in course of misrepresentations
Engaging in “improper, fraudulent, or dishonest” dealings

**Remedies:**
Damages
Punitive damages
Statutory injunction

**Limitations:** None specified, but might be 6 see:

**Racketeer Influenced and Corrupt Organizations Act (RICO)**

**Citation:**

**Liable Parties:** Persons (broadly defined) conducting RICO enterprise

**Actionable Wrongs:** Pattern of “racketeering activity” as defined in 18 U.S.C. §1961 (a long list of actionable wrongs, but this is a very complex statute in application)

**Remedies:** Three times actual damages
Attorney fees

**Limitations:** Four years to bring damages claim

**Breach of Warranty**

**Citation:**
N/A, though UCC applies if sale of goods involved (R.C. § 1302.01, *et seq.*)

**Liable Parties:**
Seller
Lender
Broker
Home repair contractor
Assignee

**Actionable Wrongs:** Failure to carry out contractual obligations

**Remedies:**
- Actual, consequential damages
- Specific performance or rescission

**Limitations:**
Generally fifteen years (written contracts) or six years (oral contract) as provided by R.C. §§2305.06 and .07. Four years relative to sale of goods. R.C. § 1302.98(A).

**Breach of Fiduciary Duty**

**Citation:** Common law/case law: *Swayne v. Beebles Invs., Inc.*, (10th Dist. 2008), 176 Ohio App.3d 293, ¶39; *Myer v. Preferred Credit, Inc.* (Hamilton Cty. 2001), 766 N.E.2d 612, ¶19; *Case v. Business Centers, Inc.*, (10th Dist. 1976), 48 Ohio App.2d 267, 270.

**Liable Parties:** Broker

**Actionable Wrong:**
- Failure to act in best interests of borrower
- Failure to disclose information to borrower and inform of options

**Remedies:**
- Actual and consequential damages
- Punitive damages

**Limitations:**
Probably four years (general statute of limitations)

**Fraud**

**Citation:** Common law

**Liable Parties:**
- Seller
- Lender
- Broker
- Home repair contractor
- Appraiser

**Actionable Wrong:** Trickery, deception, deceit, falsity, concealment, appraisal fraud (Note: appraisal fraud has its own standard, so need to look under appraisal fraud cases)

**Remedies:**
- Actual and consequential damages
- Injunction
- Rescission
Punitive damages
Attorney fees

Limitations: Four years

**Civil Conspiracy**

Citation: Common law

Liable Parties: Seller
Lender
Broker
Home repair contractor
Appraiser
Title company

Actionable Wrongs: Unlawful injury through necessary concerted action with another

Remedies: Whatever is available for the underlying wrongful acts; co-conspirators are liable for the acts of the others

Limitations: Dependent on underlying wrongful acts

**Unconscionability**

*Swayne v. Beebles Invs., Inc.,* (10th Dist. 2008) (goes through elements of substantive and procedural unconscionability)

Citation: Common law

Liable Parties: Seller
Lender
Broker
Home repair contractor
Assignee

Actionable Wrongs: Over-reaching, unfairness, inequity

Remedies: Actual and compensatory damages
Rescission
Injunction
Punitive damages

Limitations: Probably four years
**FAIR DEBT COLLECTION PRACTICES ACT**  
15 U.S.C. 1692

If cannot show have right to collect note debt and to request foreclosure, allege:

At all times material, Plaintiff is a “debt collector” as the term is defined under 15 U.S.C. §1692a(6);  
And at all material times, the Note debt is a “debt” as defined under 15 U.S.C. §1692a(5);  
Plaintiff violated the Fair Debt Collection Practices Act when it filed a Complaint in Foreclosure against the [homeowner] because it is threatening to take a legal action that it cannot legally take and used a false misrepresentation or deception to collect a debt that .  

Plaintiff does not have the legal right to collect on the Note debt and to Foreclose;  
Put facts in, example of facts:  
In order to collect on the Note debt and to bring a foreclosure action, the Plaintiff  
must be entitled to enforce the Note and have an interest in the Mortgage;  
Here, Plaintiff is not entitled to enforce the Note and does not have an interest in the Mortgage;  
Plaintiff is not the Note holder and is not the Mortgagee as it alleges;  
To be a Note holder, the Plaintiff must have possession of the original Note, along  
with an endorsement;  
[HomeOwner] has never executed a Note in favor of Plaintiff and the Note has never  
been endorsed in blank or specifically to Plaintiff;  
Also, Plaintiff is not the Mortgagee;  
[HomeOwner] has never executed a Mortgage in favor of the Plaintiff and Plaintiff  
has never received an interest in the Mortgage;  
The chain of Mortgage Assignments was not signed by an authorized party and  
contains a defective acknowledgment;  
The Statute of Frauds requires that an interest in land be transferred in writing and  
signed by an authorized party;  A Mortgage is an interest in land;  Any attempted  
transfer of land that violates the Statute of Frauds is void;  
Ohio and Florida law require that any granting of a mortgage interest be  
acknowledged by a Notary Public.¹ Here, the Notary Public’s acknowledgement was  
ot valid.  The Notary Public did not actually witness Crystal Moore sign.  
Therefore, Plaintiff violated the Fair Debt Collection Practices Act when it filed a  
Complaint in Foreclosure.  
The [HomeOwner] is entitled to an award of actual damages plus up to $1,000, to an  

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After reviewing definition of supplier and making sure plaintiff fits, allege:

   At all times material, Plaintiff is a “supplier” as is defined under the Ohio Consumer Sales Practices Act;2
   Plaintiff’s transactions with the [HomeOwner] is a “consumer transaction” as defined under the Act;3
   Plaintiff violated the Act when it filed this foreclosure action alleging that the Grosses were in default;
   Plaintiff committed an unfair or deceptive act or practice in violation of the Act when it filed the foreclosure action after regularly accepting the [HomeOwner’s] payments and inducing them to believe that they would receive a permanent loan modification;4
   Plaintiff caused HomeOwner considerable physical and emotional distress and suffering and monetary damage;
   As a result, HomeOwner is entitled to actual damages plus up to $5,000 in noneconomic damages and reasonable attorney fees for each violation.5

Other Claims and Defenses to Consider

Constitutional: “The Court’s facilitation of a process that allows for property to be taken away by an entity that has failed to show that it has a legal right to do so, violates the Grosses’ United States Constitutional due process rights and their Ohio Constitutional Inalienable Rights. U.S. Const. am.14; Section 1.01, Art. I, Ohio Constitution.”
Lack of Standing (not entitled to enforce the Note or Mortgage)
Statute of Frauds bars enforcement of the Mortgage, Ohio Rev. Stat. § 1335.04 (1953). If not originator and no Mortgage Assignment or Mortgage Assignment is not signed by an authorized party.
Failure to mitigate damages
Foreclosure barred by principles of Equity
Rule 41 dismissal with prejudice, U.S. Bank v. Gullotta, 120 Ohio St.3d 399 (Ohio 2008).
Failure to comply with a condition precedent

2 Ohio Rev. Code § 1345.01(C); 1345.091(A).
3 Ohio Rev. Code§1345.01(A).
4 Ohio Rev. Code§1345.02(A).
5 Ohio Rev. Code§1345.09(A),(F).
FHA Face to Face meeting requirement

An example FHA argument is:

Plaintiff failed to perform the pre-foreclosure servicing steps required by the Code of Federal Regulations and Ohio case law. The Federal Housing Administration (“FHA”) insures this loan. The loan’s FHA Case Number is 411-3439335. (See Plaintiff’s Exhibit A “Note”, page 1). Since the federal government backs FHA loans, federal law mandates that the mortgagee take certain pre-foreclosure servicing requirements to avoid foreclosure. Title 12 of the United States Code section 1715u(a) states, in part (emphasis added):

Upon default or imminent default, as defined by the Secretary of any mortgage insured under this subchapter, mortgagees shall engage in loss mitigation actions for the purpose of providing an alternative to foreclosure (including but not limited to actions such as special forbearance, loan modification, preforeclosure sale, support for borrower housing counseling, subordinate lien resolution, borrower incentives, and deeds in lieu of foreclosure. . .

The Note and Mortgage terms only allow acceleration of the debt if it is permitted by the Secretary’s regulations (See Sections 9(a) and 9(d) of the Mortgage, Plaintiff’s Exhibit B, page 3 and Section 6(b) of the Note, Plaintiff’s Exhibit A, page 2). These requirements are found in 24 C.F.R. § 203.500 to § 203.508 and 24 C.F.R. § 203.600 to § 203.616. The requirements include the right to a face-to-face interview with the mortgagor. Chapter 24 of the Code of Federal Regulations section 203.604 states in pertinent part:

The mortgagee must have a face-to-face interview with the mortgagor, or make a reasonable effort to arrange such a meeting, before three full monthly installments due on the mortgage are unpaid. If default occurs in a repayment plan arranged other than during a personal interview, the mortgagee must have a face-to-face meeting with the mortgagor, or make a reasonable attempt to arrange such a meeting within 30 days after such default and at least 30 days before foreclosure is commenced.

At no time has Plaintiff conducted a face-to-face interview with Mr. Daugherty or Ms. Wilson or attempted to arrange such an interview. See Affidavit of Steve Daugherty and Diane Wilson (attached as Exhibit 1).

In addition, Ohio case law requires that a mortgagee meet these servicing requirements before initiating a foreclosure. The 2nd and 10th District Courts of Appeals have held that the failure of the mortgagee to follow HUD servicing requirements set forth in the Code of Federal Regulations for FHA loans constitutes an affirmative defense to foreclosure.
In *Washington Mutual Bank v. Mahaffey*, the Second District Court of Appeals reversed the trial court’s summary judgment in favor of the bank, stating,

[T]he scheme of the regulation is that a lender may not commence foreclosure until at least three full monthly installments are due but unpaid, and the lender, before initiating foreclosure, must ensure that the servicing requirements have been met, including the face-to-face interview requirement. It would be inconsistent with C.F.R. Section 203.606(a) to allow a lender to commence foreclosure after three full months of default, without having complied with the face-to-face interview requirements of Section 203.604(b).


The Fifth District Court of Appeals recently agreed with the *Mahaffey* court. In *U.S. Bank, N.A. v. Detweiler*, the court held that a foreclosing party “must also establish that is sufficiently complied with 24 C.F.R. § 203.604 as a condition precedent to foreclosure.” *U.S. Bank, N.A. v. Detweiler* (5th Dist. Stark Cty.), 2010-Ohio-6408, ¶57. Further, summary judgment is still improper even when the defendant fails to respond to plaintiff’s motion for summary judgment. *Id.* at ¶58.

Similarly, in *GMAC Mortg. of Pennsylvania v. Gray*, the Tenth District Court of Appeals reversed the trial court’s summary judgment in favor of the bank, stating, “We agree with this reasoning and hold that the failure of a mortgagee to adhere to the HUD servicing requirements set forth in the regulations and handbook constitutes an affirmative defense to foreclosure.” *GMAC Mortg. of Pennsylvania v. Gray* (10th Dist. Franklin Cty.), 1991 WL 268742, *7* (attached as Appendix A).

In addition, the Lucas County Court of Common Pleas recently ruled that a foreclosing party must follow the servicing requirements before filing a foreclosure complaint. In *Flagstar Bank, F.S.B. v. Williams*, the court addressed the issue of whether a party is entitled to foreclose on a FHA loan if it does not conduct or attempt to conduct a face-to-face interview. *Flagstar Bank, F.S.B. v. Williams* (C.P. Lucas Cty., March 4, 2010), Case No. CI-2008-6136 at pgs 1, 4 (attached as Appendix B). In denying Plaintiff’s attempt to obtain a judgment, the Court held:

While Defendant may technically be in default, the legal fiction that no default exists may be maintained by Defendant until such time as Plaintiff complies with the statutory and regulatory requirement to pursue loss mitigation prior to the filing of a foreclosure. Accordingly, Plaintiff may not proceed with a foreclosure against Defendant until all servicing requirements mandated by 24 C.F.R. 203.500 et. seq. and 24 C.F.R. 203.600 et. seq. are met.

*Id.* at 6.
RHS/VA loss mitigation requirements
Failure to follow HAMP guidelines\(^7\)
Failure to abide by National Fair Housing Goals, 42 U.S.C. 1441 (government loans)
Fair Housing Act, 42 U.S.C. §3601, et seq.
Ohio Corrupt Activity Act (mini-RICO), R.C. §2923.31, et seq.
Negligent/intentional misrepresentation
Intentional infliction of emotional distress
Breach of contract
  Duress
  Lack of Capacity
  Unconscionability
  Illegality
Promissory/equitable estoppel
Failure of consideration
Unjust enrichment
Illegality
Mistake

In short, a party may not proceed with a foreclosure until it has fulfilled its pre-foreclosure servicing requirements as mandated by the terms of the loan, the United States Code, and the Code of Federal Regulations. Plaintiff failed to follow the applicable servicing requirements. Plaintiff’s failure to comply with an essential condition precedent to establish standing robs this Court of jurisdiction to proceed with this matter. As such, Mr. Daugherty and Ms. Wilson request that this Court dismiss this case.

\(^7\) Plaintiff’s claims are barred for failure to comply with Making Home Affordable Program (HAMP) guidelines. HAMP guidelines require that before a foreclosure can be filed, a borrower’s loan modification application must be first reviewed and a determination made that the borrower is ineligible. See: Making Home Affordable Program, Handbook for Servicers of Non-GSE Mortgages, version 3.2, section 3.1, pg 58 (June 1, 2011). Defendants applied for a loan modification on May 27, 2011. Their application is still pending as Plaintiff has not made a decision whether the Defendants are eligible or ineligible. Yet, Plaintiff filed this foreclosure action on July 18, 2011. Accordingly, Defendants request that this case be dismissed.