DS news

COUNSEL'S CORNER

LEARNING LESSONS FROM DIVERSE COURT CASES

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Kerry Franich is a certified specialist in appellate law who works in Severson & Werson's Orange County office where he prosecutes and defends State and Federal Appeals covering subjects including financial services, real estate, arbitration, unfair competition, discrimination, judicial disqualification, and civil procedure. DS News spoke with Franich about the greatest challenges financial services' attorneys are facing today and how his years' of experience help him navigate today's climate.

What current challenges are appellate attorneys who work in default litigation facing? Procedurally, court congestion has worsened in many jurisdictions, which causes a lot of appeals to progress at a seemingly glacial pace. That's frustrating for both us and our clients, particularly when a sale is being delayed because of an appeal.

Similarly, cases filed in trial courts these days often survive longer than cases filed several years ago because today's cases are usually less vulnerable to pleadings challenges. More frequently, eliminating them requires a motion for summary judgment or trial.

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So, one challenge is ensuring that our clients don't get trapped in a holding pattern just because of a pending appeal or lawsuit. We find that stagnant cases often lead to other problems: property preservation issues, needless escrow advances, and ballooning loan balances, all of which reduce the probability of the borrower curing the default or qualifying for a modification.

There are substantive challenges too. Regulatory compliance is rightly a top concern for most of our clients right now, but there are also basic macro-level changes occurring in the law right now that are equally important.

For example, in some jurisdictions, our basic understanding of loan servicers' roles and obligations is changing. Do they owe borrowers a duty of care when reviewing loan modification applications? Courts are dividing over that question, so the answer may depend on the jurisdiction in which you're litigating.

Likewise, litigation involving the various state homeowner bills of rights that were enacted years ago are now reaching appellate courts. So, we're starting to receive guidance from those courts about what certain sections of those bills mean and require.

In short, the challenge is keeping up with rapid changes in law, anticipating the direction the law is headed, and writing briefs that help shape the law's direction.

What strategies can servicers employ to avoid costs and delays? It obviously depends on the case, but generally speaking, there are a few strategies that servicers can consider. The common theme running throughout them all, however, is to be proactive rather than reactive: foreclose, sell, and evict.

Absent confirmed wrongdoing or a genuine threat of exposure to liability, foreclosing, selling properties out of REO, and evicting as quickly as possible tends to mitigate costs and reduce the probability of sequel lawsuits. In some cases, proceeding with a foreclosure, sale, or eviction can also prompt new settlement negotiations or voluntary dismissals. However, depending on your jurisdiction and the facts in your case, this strategy may be unavailable (for example, there's a stay forbidding a sale).

In addition, servicers should stop successive modification reviews if possible.

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Successive reviews can also be dangerous. For example, when a borrower files a meritless lawsuit after repeatedly getting denied a loan modification, but the servicer thereafter commits an egregious mistake while re-reviewing him or her (such as inadvertently foreclosing during the review). Servicers need to be careful to avoid creating liability where

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there was originally none.

Depending on the jurisdiction and the circumstances of the case, a servicer may be required to re-evaluate the homeowner for a loan modification. However, if no obligation exists, servicers that value efficiency will choose to decline starting another review when it has no chance of success and creates no advantage in defending the litigation.

In what ways do you help the servicers you work with streamline the appeals process? We search for ways to terminate the appeal short of a decision on the merits. In cases pending in backlogged appellate courts, search for opportunities to ditch the appeal earlier by motion. Appellate courts tend to issue decisions on motions a lot faster than full-blown decisions on the appeals' merits. Sometimes, this is as easy as identifying a jurisdictional defect, like an untimely appeal. But there are other more subtle attack strategies too. Has a pivotal issue in the appeal become moot? Is there a way to have a party designated as a vexatious litigant? Is there an order you obtained in the trial court you can enforce while the case is on appeal? If so, that might be a source of unexpected leverage—most appellate courts have the inherent power to dismiss an appeal where a party fails to comply with a trial court order (the disentitlement doctrine). In short, don't assume you'll need to wait two years for an appellate court to file a decision on the merits. There may be a way to kill the case earlier.

How can attorneys partner with servicers to predict and plan for litigation expenses? Forming an estimated budget at the suit's inception is typically helpful for both us and our clients. And if something in the case occurs that dramatically impacts the budget's estimate, then obviously updating the budget is important. Flat fee billing structures are helpful for those clients that want greater accuracy in forecasting legal expenses.

Another area that is sometimes overlooked is scrutinizing whether any offensive litigation can be filed that might offset the cost of defense. Default servicing litigation has traditionally been strictly defensive in nature. But an unsettling number of lawsuits against servicers sometimes reveal fraud and other misconduct committed by borrowers or other third parties. Yes, pursuing a cross-complaint may be futile if the target has no assets. But not always.