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Foreclosure-Related Litigation Update

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STATE AND FEDERAL COURT LITIGATION OF FORECLOSURE-RELATED CLAIMS

I. INTRODUCTION

There are still considerable mortgage-related lawsuits filed in Texas to delay and preclude foreclosure sales. This article considers federal and state court foreclosure-related litigation, jurisdictional issues, and common claims and defenses. The article sets forth some of the advantages to removal to federal court, the tactics borrowers employ to remain in state court, the state and federal causes of action commonly asserted against mortgage defendants (i.e. banks, investors, lenders, servicers, and attorneys), the defenses asserted to the causes of action, and the recovery of attorney fees in defending such lawsuits.[1] The information provided herein is solely for educational and informational purposes and is not intended to constitute legal advice.

II. FEDERAL COURT IS STILL THE PREFERABLE FORUM IN WHICH TO LITIGATE FORECLOSURE-RELATED CLAIMS

The forum in which foreclosure-related cases is litigated is critical. Borrowers generally favor state court and defendants usually prefer federal court. This section explores the advantages to litigating in federal court from the perspective of a defendant, provides a brief overview of the bases for removal, and describes the various tactics borrowers use to avoid federal court.

A. Benefits of Litigating in Federal Court

There are multiple reasons defendants prefer federal court, but the author's top four are: (1) better developed mortgage-related case law; (2) federal courts are more likely to dismiss a case under Rule 12 of the Federal Rules of Civil Procedure and the state counterpart is nowhere near as effective; (3) less of a home-court advantage for local plaintiffs; and (4) more consistent and predictable treatment. Moreover, the Fifth Circuit has stated that: "Texas courts routinely rely on *federal* interpretations of Texas law." *Martins v. BAC Home Loans Servicing, L.P.*, 722 F.3d 249, 253 (5th Cir. 2013) (emphasis in original). The Austin Court of Appeals, quoting the Fort Worth Court of Appeals, stated: "Although not binding on this court, federal authority is particularly persuasive here, 'as much home mortgage litigation in Texas is being tried in the federal courts.'" *Schuetz v. Source One Mortgage Servs. Corp.*, No. 03-15-00522-CV, 2016 WL 4628048, at *3 n.3 (Tex. App.— Austin Sept. 1, 2016, no pet. h.) (mem. op.) (quoting *Robeson v. Mortgage Elec. Registration Sys., Inc.*, No. 02-10-00227-CV, 2012 WL 42965, at *4 n.4 (Tex. App.—Fort Worth, Jan. 5, 2012, pet. denied) (mem. op.)).

B. Removal

Removal from state court to federal court is appropriate if there is federal question or diversity jurisdiction. The relevant removal statutes include: 28 U.S.C. § 1331 (federal question jurisdiction); 28 U.S.C. § 1332 (diversity jurisdiction).

1. Federal Question Jurisdiction

When a claim arises under federal law, such as the Truth in Lending Act, Real Estate Settlement Procedures Act, Fair Debt Collection Practices Act, or Fair Credit Reporting Act, federal question jurisdiction exists and the case can be removed to federal court. *See* 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.").[2]

2. Diversity Jurisdiction

Diversity jurisdiction exists where there is complete diversity of citizenship among the parties and the amount in controversy exceeds $75,000, exclusive of interest and costs. *See* 28 U.S.C. § 1332.

3. Removal Deadlines

When a defendant files a notice of removal, it immediately removes the case from the jurisdiction of the state court. The deadline to remove to federal court is 30 days after being served with the summons and complaint. *See* 28 U.S.C. § 1446(b)(1); *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 347-48 (1999) (holding that a "defendant's time to remove is triggered by simultaneous service of the summons and complaint, or receipt of the complaint, through service or otherwise, after and apart from service of the summons, but not by mere receipt of the complaint unattended by any formal service") (internal quotation

[1] *See* Chapter 10, contribution of Jason L. Sanders, in Locke, William H., Ralph M. Novak, and G.T. Bastian. "Borrower Challenges to Foreclosure and Lender Responses," Texas Foreclosure Manual, 3rd ed. Supplement. Austin, Texas: State Bar of Texas, 2018 for a more robust discussion of the issues presented herein.

[2] When a case presents federal claims and non-federal claims, the federal court has "supplemental jurisdiction" to hear the non-federal claims under certain circumstances. *See* 28 U.S.C. § 1367.

omitted). In cases with multiple defendants, "[e]ach defendant shall have 30 days after receipt by or service on that defendant of the initial pleading or summons . . . to file the notice of removal." 28 U.S.C. § 1446(b)(2)(B). Further, all defendants properly joined and served must consent to the notice of removal. 28 U.S.C. § 1446(b)(2)(A). A defendant that has not been served, or has been fraudulently joined, need not consent to the notice of removal. *Id.* ("all defendants who have been properly joined and served must join in or consent to the removal of the action"). If the case is not immediately removable, but later becomes removable, the defendant has 30 days to remove from the receipt of the amended pleading or other paper that makes the case removable. *See* 28 U.S.C. § 1446(b)(3). If the basis for removal is diversity jurisdiction, the case may not be removed more than one year after the commencement of the action, unless the district court finds that the plaintiff has acted in bad faith to prevent a defendant from removing the action. *See* 28 U.S.C. § 1446(c)(1). However, when a defendant is never formally served, courts have held that the removal deadline starts on the date the defendant voluntarily waived service by filing an answer. *George–Baunchand v. Wells Fargo Home Mortgage, Inc.*, No. CIV.A. H-10-3828, 2010 WL 5173004, at *3-4 (S.D. Tex. Dec. 14, 2010); *Cerda v. 2004–EQRI, LLC, No. SA-07-CV-632-XR*, 2007 WL 2892000, at *3 (W.D. Tex. Oct. 1, 2007), aff'd sub nom., *Cerda v. 2004–EQR1 L.L.C.*, 612 F.3d 781 (5th Cir. 2010) (same); *Prescott v. Mem'l Med. Ctr.–Livingston*, No. 9:00CV–00025, 2000 WL 532035, at *2-3 (E.D. Tex. Mar. 25, 2000) (same).

C. Common Tactics Plaintiffs Use to Prevent Removal

1. Nominal and/or Fraudulently Joined Defendants

Plaintiffs join non-diverse defendants that do not have any real interest in the outcome of the litigation to avoid diversity jurisdiction. "Fraudulent joinder exists where a plaintiff has failed to plead under state law any specific actionable conduct against the non-diverse defendant." *Jones v. Am. Home Prods. Corp.*, 344 F. Supp. 2d 500, 502 (E.D. Tex. 2004). The citizenship of "nominal" or "fraudulently joined" defendants is not considered to determine whether complete diversity exists. *See, e.g., Cuevas v. BAC Home Loans Servicing, LP,* 648 F.3d 242, 249 (5th Cir. 2011); *Larroquette v. Cardinal Health 200, Inc.*, 466 F.3d 373, 376 (5th Cir. 2006).

Trustees and substitute trustees under a deed of trust are often joined as defendants to destroy diversity jurisdiction. A trustee named solely in his or her capacity as a trustee, however, is a nominal party whose presence does not defeat diversity jurisdiction. *See Eisenberg v. Deutsche Bank Tr. Co. Ams.*, No. SA-11-CV-384-XR, 2011 WL 2636135, at *4 (W.D. Tex. July 5, 2011) ("Texas law recognizes that a trustee named solely in his or her capacity as trustee under a deed of trust or security instrument is not a necessary party in a suit to prevent a foreclosure."); *see also Corfield v. Dallas Glen Hills LP*, 355 F.3d 853, 857 (5th Cir. 2003) ("[A] federal court must disregard nominal or formal parties and rest jurisdiction only upon the citizenship of real parties to the controversy."); Tex. Prop. Code Ann. § 51.007 (West 2017) (providing procedure for dismissal of causes of action asserted against trustees solely in their capacity as trustees under a deed of trust, contract lien, or security instrument).

Borrowers will also allege claims against the law firm and attorneys handling the foreclosure, but that tactic generally does not defeat federal diversity jurisdiction. *Adams v. Chase Bank*, No. 3:11-CV-3085-M, 2012 WL 2122175, at *3 (N.D. Tex. May 11, 2012), rec. adopted, 2012 WL 2130907 (N.D. Tex. June 12, 2012) (plaintiff could not recover against improperly joined foreclosure law firm on breach of contract claim); *Marsh v. Wells Fargo Bank, N.A.*, 760 F. Supp. 2d 701, 710 (N.D. Tex. 2011) (plaintiffs could not state declaratory judgment claim against improperly joined foreclosure counsel and substitute trustees); *Mortberg v. Litton Loan Servicing, L.P.*, No. 4:10-CV-668, 2011 WL 4431946, at *4 (E.D. Tex. Aug. 30, 2011), rec. adopted, 2011 WL 4440170 (E.D. Tex. Sept. 22, 2011) (remand to state court not appropriate where foreclosure counsel was improperly joined); *Cook v. Wells Fargo Bank, N.A.*, No. 3:10-CV-0592-D, 2010 WL 2772445, at *3 (N.D. Tex. July 12, 2010) (plaintiff could not recover for breach of contract against improperly joined foreclosure counsel and substitute trustee).

2. Are Trusts, Trustees, or Certificateholders Real Parties in Interest Related to Securitized Loans

Since the United States Supreme Court's opinion in *Americold Realty Tr. v. Conagra Foods, Inc.*, 136 S. Ct. 1012 (2016), federal district "courts in Texas have taken different paths to determine whether a trustee, or the trust itself, is a real party to the controversy." *Lewis v. Deutsche Bank National Tr. Co.*, 3:16-CV-133, 2017 WL 1354098, at *3 (S.D. Tex. Apr. 13, 2017). However, the Fifth Circuit recently clarified the proper path to make this determination. *See Bynane v. Bank of N.Y. Mellon for CWMBS, Inc. Asset-Backed Certificates Series 2006-24*, 866 F.3d 351, 356-59 (5th Cir. 2017); *see also Justice v. Wells Fargo Bank Nat'l Ass'on*, 674 Fed. App'x 330, 332 (5th Cir. 2016).

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