NCLC Checklist for Identifying a Zombie Second Mortgage

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Fighting Together for Economic Justice

See all our **Zombie Second Mortgage Resources** on the NCLC Digital Library (Subscription required for some content.)

Typical Characteristics of Zombie Seconds:

- Second mortgage was taken out at the same time as the first mortgage to purchase the property- an "80/20" loan- or taken out shortly after the purchase of the home
- No communications from the lender or servicer for many years until a recent attempt to collect on the loan with the threat of foreclosure
- The amounts alleged owed on the second mortgage are significantly higher than the original principal amount
- There is equity in the property, and if the first mortgage is still outstanding, it is current
- The client believed the loan had been discharged in a previous bankruptcy, modified when their first mortgage was modified, or otherwise waived due to the lack of communication from the lender or servicer

The following outline provides suggestions for gathering information and documents to help determine if this is a zombie second mortgage and if there may be claims against the lender or servicer that would enable a client to challenge the foreclosure, negotiate an affordable loan modification, and obtain other relief to allow them to stay in the home.

I. Gathering Information

1. Loan Origin and Documentation

- ☐ Ask for the loan documents and confirm the loan type. If the client does not have the loan documents, you could look for the mortgage in the online registry of deeds, or you could ask the title company who did the closing.
  - ☐ Is it a traditional second mortgage or
  - ☐ Home equity line of credit? It might say "open-end" credit.
- ☐ Who is the lender?
- ☐ Who is the servicer?
- ☐ When was the loan originated?
- ☐ Was it originated at the same time as a first mortgage for the purchase of the property? (An 80/20 loan)

- ☐ Or was it a stand-alone second mortgage taken out after the property was purchased?
- ☐ What were the circumstances surrounding the origination of the loan i.e.: why did the client take out the loan and what did they believe the terms of the loan were?
- ☐ If the loan is a HELOC, what were the amounts and dates of funds disbursed?
- ☐ Identify the similar parties and documents related to the first mortgage.

2. Loan Status

- ☐ Is the mortgage in default or has been delinquent for an extended period.
    - ☐ If so, how long has the loan been in default?
    - ☐ Does the client's date of default match that of the servicer?
    - ☐ Does the client have documentation of payments made on the loan?
- ☐ Confirm whether the loan has been charged off or deemed non-collectible by the lender.
    - ☐ Does the client have any documentation, letters or notices indicating this?
    - ☐ If not, you could help the client draft a Request for Information (see below)
    - ☐ You can also check the client's credit report to see if there is anything on it regarding the loan
- ☐ Has the first mortgage been paid off or is it in good standing?
- ☐ Was the first mortgage modified at any time?
    - ☐ If so, when was it modified?
    - ☐ Was it modified through the HAMP program?
    - ☐ Who was the investor of the first mortgage?
- ☐ Does the client believe or have documentation that the second mortgage was modified?
- ☐ Was the client surprised by how much was alleged owed? Ask the servicer to provide an account history or all payments received and applied during the life of the loan through a Request for Information to ensure the amounts alleged owed are correct.
- ☐ Has the client ever filed for bankruptcy? If so, what is the case number, chapter type, and dates for any bankruptcies filed since the origination of the second mortgage?

3. Property Status

- ☐ Verify if the property has been foreclosed or is in the foreclosure process.
  - ☐ If the foreclosure process has been initiated, what stage is it in?
  - ☐ What notices have been sent to the client from the servicer regarding the foreclosure of the property?

4. Servicer's Actions

- ☐ Has the servicer been sending mortgage statements to the client each month?
  - ☐ If not, how long has it been since the client received a statement?
  - ☐ Who sent the last statement to the client- was it the current servicer?
- ☐ Has the client ever received communications regarding the transfer of ownership or servicing of the loan?
- ☐ Before the current attempt to collect on or foreclose on the loan, how long had it been since the client received any communication from the servicer?

5. Client's Knowledge

- ☐ When did the borrower first discover they had a second mortgage and how did they discover it?
- ☐ If different, when did the borrower realize the second mortgage is still active now?
- ☐ Assess if the client was aware of the second mortgage's status or existence before receiving the recent communications from the servicer (e.g., does the client believe the loan is no longer active? If so, why?).

6. Property value

- ☐ What is the estimated value of the property? (You can check Zillow)
- ☐ What is the total amount owed on the first mortgage?
  - ☐ If the value of the property is less than what is owed on the first mortgage, the borrower might be eligible to remove the second in a bankruptcy - consult a bankruptcy attorney.

7. Options

- ☐ If the client wants to stay in the home, you may be able to negotiate a loan modification for the second loan, but you should try to negotiate a waiver of the past due interest and fees that have accumulated during the time when the servicer was not sending monthly statements or other communications to the borrower.

- ☐ The modification also should only include principal actually owed on the loan. The servicer of a zombie second mortgage will generally not be able to prove amounts owed. They do not have records dating back to the origination of the mortgage and all the payments made and credited. Many times, they will do an amortization based on the original note and mortgage and claim that amount is due. You want to be very careful to avoid amounts your client does not owe in a loan modification.

- ☐ Some servicers require large down payments or unaffordable repayment plans that will set the client up for failure and potentially jeopardize their ability to stay current on the first mortgage. If the servicer is unwilling to negotiate an option that is affordable and sustainable for the client, an attorney may be able to allege certain claims that could result in an acceptable modification.

- ☐ The client can also consult with a bankruptcy attorney. It may be possible to get rid of the second mortgage if the value of the property is less than what is owed on the first mortgage. A bankruptcy attorney can challenge the amounts owed and might be able to reduce that amount the client has to pay to get rid of the loan. Or, a bankruptcy might allow the client to repay the principal amount through the bankruptcy. A bankruptcy attorney can do a thorough financial review to determine options for the client.

- ☐ If you are able to get the majority of the information listed here, it will help an attorney assess what legal options are available for the client including possibly challenging the amounts owed, the standing of the lender or servicer to bring the foreclosure, and the validity of the mortgage contract. Another strong claim an attorney might make is that it is an unfair and deceptive practice to allow a loan to become dormant while not communicating with the borrower for years, then suddenly appear when there is equity in the home to foreclose on the loan.

Materials on zombie second mortgages and defending against a foreclosure of a zombie second can be found on the NCLC Digital Library; library.nclc.org/zombie-second-mortgages.

Request for Information:

A request for information (RFI) can be used to verify the existence and details of a potential zombie second mortgage by asking a mortgage servicer to provide specific information about the loan, including the original loan amount, outstanding balance, payment history, and any supporting documentation. This information helps to determine if the debt is legitimate and what actions are appropriate to dispute the debt or negotiate. You can find a sample RFI on NCLC's website. You can help the client write and have them send the RFI certified mail (preferred) or write it yourself and include an authorization form from the client. Some information you could ask for includes:

Owner and Servicer of the Loan

- ☐ Name of current owner and all previous owners, including when loan ownership was transferred

- ☐ Name of current servicer and all previous servicers, including dates of when servicing transferred

- ☐ All notices sent to the borrower regarding any and all transfers of ownership and servicing of the loan including the dates sent and proof of delivery
- ☐ Provide all assignments of the security instrument (deed of trust or mortgage) and proof of transfers, indorsements, and possession of the promissory note, including all notices of these assignments sent to the borrower with the date sent and proof of delivery
- ☐ All documents from the closing of the loan

Charge Off

- ☐ Was the loan charged-off? If so, what was the date of charge off? What was the amount alleged owed when charged off? Provide any communications provided to the borrower of the charge-off. Provide any internal documentation including an account history or loan activity log notating that the loan was charged off.
- ☐ Did you use the write-off to qualify for any favorable tax treatment?
- ☐ If you revoked the charge-off, provide all communications you gave the borrower(s) in connection with the revocation, all internal documents related to the revocation, including the timing
- ☐ Did you charge interest on the loan after it was charged off? If so, what is the total amount to date that you charged?

Periodic Statements and Communications

- ☐ Did you send periodic statements to the borrower after the loan was charged-off? If so, how often were they sent and how many were sent since the charge-off?
- ☐ Provide all periodic statements sent to the borrower during the life of the loan along with proof that they were delivered to the borrower.
- ☐ Provide all communications sent to the borrower from the date you took on ownership/servicing the loan to the present and include the date sent and proof of delivery.
- ☐ Provide a log of all calls, emails, or texts you exchanged with the borrower including the dates of each communication.

Amounts Alleged Owed on the Loan

- ☐ What is the total amount of a) principal b) interest c) fees & d) other costs currently alleged owed on the loan?
- ☐ Provide a life of the loan account history.
- ☐ Provide the account log of communications (written and verbal) between servicers of the loan and the borrower.

Notice of Error

A notice of error (NOE) can be used to challenge a zombie second mortgage by formally notifying the lender that you believe there is an error in their claim, such as the loan being considered active when it should be considered discharged or that the servicer is alleging inaccurate and inflated amounts due. You can help the client write and have them send the NOE certified mail (preferred) or write it yourself and include an authorization form from the client. The NOE can be combined with the RFI. You can find a sample RFI/NOE here that you can edit to your particular facts. Identifying the Error

In your notice of error, clearly state that you believe the second mortgage is no longer an enforceable debt obligation in whole or in part, and explain why, including details such as missing payment history, lack of recent communication from the lender, or evidence of a previous debt settlement or discharge. Then ask the lender to correct the error as outlined in the sample NOEs.

**Important Facts about RFIs and NOEs

- If the servicer has designated an address specifically for RFIs or NOEs, you MUST send your letter to that address or it will not receive the protections and benefits accorded to them under Regulation X. The monthly mortgage statement or the servicer's website will have the address and it may say it is for RFIs and NOEs or Qualified Written Requests QWRs (another name for NOEs and RFIs).
- If the servicer fails to respond completely, or at all, to an RFI or NOE, you should send another. If the servicer continues to improperly respond, the client may have a claim under Regulation X against the servicer.
- Regulation X does not apply to HELOCs, but you can still send an RFI or NOE in the hopes the servicer will respond. Under the Truth in Lending Act, you could also send a written notice to the lender's billing inquiry address addressing a billing error e.g.: the amounts alleged due are inaccurate. The notice should include:
    - ☐ The client's name and account number
    - ☐ A description of the error
    - ☐ The date, type, and amount of the error
- You can help the client write the RFI or NOE, but the client should sign and send the letter certified mail, return receipt requested. Keep a copy or photo of the letter and of the envelope with postage to verify when it was sent.
- For more information on NOEs and RFIs see the NCLC's Mortgage Servicing and Loan Modifications manual, Chapter 3. (Subscription required.)

For a background on zombie second mortgages, see 15 Ways to Fight Foreclosure of Zombie Second Mortgages and our digital library page for zombie second mortgages (subscription required for some of the content).