

RI Federal Court Issues Order Staying Certain Foreclosure Challenge Cases

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U.S. District Court Judge John J. McConnell, Jr. issued an Order on August 16, 2011 (the “Order”) staying “all mortgage foreclosure cases currently pending in the United States District Court for the District of Rhode Island . . . assigned to” him. The federal court recently assigned the vast majority of mortgage foreclosure challenges to Judge McConnell and Magistrate Judge Lincoln D. Almond after Magistrate Judge David Martin’s Reports and Recommendations in the Cosajay and Fryzel cases resulted in several foreclosure challenge matters being removed to the U.S. District Court from Rhode Island Superior Court. The Court has established a Master Docket for the management of these certain foreclosure challenges entitled “ In re: Mortgage Foreclosure Cases, 11-mc-88-M-LDA.”

It is important to note that contrary to what is being reported in the media, the foreclosure cases that are subject to the Order (the “Mortgage Foreclosure Cases”) are NOT all Rhode Island foreclosure cases, nor are all Rhode Island foreclosure cases which are in litigation in the Rhode Island federal court subject to the Order. It is likely, however, that foreclosure cases with standing issues that are currently pending in federal court in Rhode Island and that are filed in the future in the Rhode Island federal court, will be subject to the stay if the stay of the Order is still in place. Furthermore, while it has been reported that the purpose of the Order is to stay all Rhode Island foreclosures to allow for loss mitigation and mediation, we do not believe that to be the sole intent of Judge McConnell or the Order. Although the Order does require all parties to engage in

direct and serious settlement discussions, the overall thrust of the Order is to provide an organized procedure by which the Court can resolve the standing issues and authority to foreclose issues that have been raised in all of the Mortgage Foreclosure Cases. The standing issues are similar to issues being raised in foreclosure challenges across the U.S., and in many of the Mortgage Foreclosure Cases, the Mortgage Electronic Registration System (“MERS”) is a party defendant.

A large portion of the Mortgage Foreclosure Cases stem from plaintiff borrowers’ allegations that assignments of mortgage are invalid thereby causing the foreclosures at issue, either currently proceeding or having occurred, to be void. Most causes of action relate to MERS’ grant and authority to assign mortgages under both contract and statutory law – causes of action contrary to the natural expansion of well-known Rhode Island standing cases, *Bucci v. Lehman Bros. Bank, FSB* and *Porter v. First NLC Financial Services, LLC*. In the *Bucci* and *Porter* cases, the Rhode Island Superior Court held that MERS had the express contractual grant and statutory authority to foreclose the mortgages at issue. There are also claims in some of the Mortgage Foreclosure Cases that certain mortgage assignments were not properly executed thereby voiding any act of the assignee.

Defendant mortgagees, originators, and lenders in the Mortgage Foreclosure Cases have defended the foreclosures and assignments of mortgage at the outset by challenging the plaintiff borrowers’ standing to challenge the assignment of mortgage – a contract to which he/she is not a party or third party beneficiary. The Reports and Recommendations in *Cosajay* and *Fryzel* reinforce defendant mortgagees’ positions finding that, based on Rhode Island law, a plaintiff borrower does not have requisite standing to challenge an assignment of mortgage between mortgagees.

In addition to staying the Mortgage Foreclosure Cases until the Court makes a final determination in Cosajay and Fryzel, the Order requires the selection of two liaison counsels for defendants and two liaison counsels for plaintiffs. Liaison counsel, pursuant to the Manual for Complex Litigation (Fourth) § 10.22 (2004), are charged “with essentially administrative matters, such as communications between the court and other counsel, convening meetings between counsel, advising parties of developments and otherwise assisting in the coordination of activities and positions” for the group. The selected liaison counsel must be presented to the Court by September 2, 2011. Counsel for the all defendants must reach agreement on the selection of the two liaison counsel.

For all parties that are involved in the Mortgage Foreclosure Cases, but are not party to the Cosajay and Fryzel matters, specifically, the Order also allows for the submission of amici briefs, if any, by September 2, 2011. These amici briefs should contain the defendant’s standing arguments. Argument on plaintiffs’ objections to the Reports and Recommendations in the Cosajay and Fryzel matters will be heard on September 13, 2011.

[Click here for a copy of the Order](#)

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