AMERICANS AGAINST FORECLOSURES

CAN FANNIE MAE BE SUED?

Part 1: Mortgage Servicer Obligations for Fannie Mae or Freddie Mac Loans
When a mortgage servicer claims to be collecting or foreclosing on a Deed of Trust and Note owned or guaranteed by Fannie Mae or Freddie Mac, they must comply with strict guidelines set by these government-sponsored enterprises (GSEs), as well as federal regulations and applicable state laws. Fannie Mae and Freddie Mac do not originate or service loans directly but purchase or guarantee loans that meet their standards (conforming loans), delegating servicing responsibilities to approved servicers. Below are the key policies, rules, and case law governing these obligations.

Fannie Mae and Freddie Mac Servicing Guidelines

- **Fannie Mae Servicing Guide**
    - The *Fannie Mae Servicing Guide* outlines servicer responsibilities for loans owned or securitized by Fannie Mae. Key requirements include:
        - **Collection Efforts**: Servicers must follow specific protocols for contacting borrowers facing default, including achieving "Quality Right Party Contact" to discuss workout options (D2-2-01).
        - **Foreclosure Prevention**: Servicers must offer workout options like loan modifications, payment deferrals, or mortgage releases (deed-in-lieu of foreclosure) before proceeding to foreclosure (D2-3.1-05, D2-3.4-02).
        - **Foreclosure Process**: Servicers must adhere to timelines for foreclosure referrals, which vary by lien type and property status (e.g., E-1.2-03 for second lien loans). They must also comply with state foreclosure laws and ensure proper notification to Fannie Mae (E-4.5-01).
        - **Compliance with Federal Laws**: Servicers must follow federal regulations, such as the Real Estate Settlement Procedures Act (RESPA) and the Truth in Lending Act (TILA), when handling escrow accounts, payment processing, or loss mitigation.
    - **Source**: Fannie Mae Servicing Guide, available at servicing-guide.fanniemae.com.
- **Freddie Mac Single-Family Seller/Servicer Guide**
    - The *Freddie Mac Seller/Servicer Guide* governs servicing for Freddie Mac loans, with similar requirements:
        - **Borrower Contact**: Servicers must proactively contact borrowers to discuss delinquency and loss mitigation options (Guide Chapter 9101).

    - **Loss Mitigation**: Options include forbearance, repayment plans, loan modifications, and short sales. Servicers must evaluate borrowers for these options before foreclosure (Guide Chapter 9201).
    - **Foreclosure Procedures**: Servicers must follow Freddie Mac's foreclosure timelines and state-specific requirements, ensuring compliance with the Uniform Instruments (Deeds of Trust/Notes) used for Freddie Mac loans.
  - **Source**: Freddie Mac Single-Family Seller/Servicer Guide, available at guide.freddiemac.com.
- **Uniform Instruments**
  - Fannie Mae and Freddie Mac use standardized legal documents (Notes, Deeds of Trust, Mortgages) known as Uniform Instruments. These documents outline the borrower's obligations and the servicer's rights, including foreclosure procedures. Modifications to these instruments must comply with Fannie Mae/Freddie Mac guidelines, or the loan becomes nonstandard, triggering additional warranties (A2-2-03).
  - **Key Provisions**:
    - The Deed of Trust grants the servicer/lender the right to foreclose upon default, subject to state law and GSE guidelines.
    - The Note specifies repayment terms and default conditions.
  - **Source**: Fannie Mae Legal Documents (singlefamily.fanniemae.com) and Freddie Mac Uniform Instruments (sf.freddiemac.com).
- **Federal Housing Finance Agency (FHFA) Oversight**
  - The FHFA regulates Fannie Mae and Freddie Mac, ensuring compliance with their charters and federal housing policies. The FHFA delegates day-to-day operations, including complaint resolution, to the GSEs but monitors their servicing practices.
  - Servicers must comply with FHFA directives, such as COVID-19-related forbearance and foreclosure moratoriums under the CARES Act (expired July 31, 2021).

Federal Regulations Governing Servicers

- **Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. § 2601 et seq.**
  - RESPA, implemented by Regulation X (12 C.F.R. § 1024), requires servicers to:
    - Respond to borrower inquiries (Qualified Written Requests) within specified timelines.

- Provide loss mitigation options before foreclosure (12 C.F.R. § 1024.41).
- Avoid "dual tracking" (pursuing foreclosure while evaluating loss mitigation).
- **Case Law**:
  - *Jesus v. Countrywide Home Loans, Inc.*, 2011 WL 13123029 (D. Nev. 2011): RESPA violations can arise if servicers fail to properly respond to borrower requests or mishandle loss mitigation.
  - *Berneike v. CitiMortgage, Inc.*, 708 F.3d 1141 (10th Cir. 2013): Servicers must comply with RESPA's loss mitigation requirements, and failure to do so stops foreclosure.
- **Truth in Lending Act (TILA), 15 U.S.C. § 1601 et seq.**
  - TILA, implemented by Regulation Z (12 C.F.R. § 1026), requires servicers to provide accurate disclosures and periodic statements. Violations can lead to claims against foreclosure actions.
  - **Case Law**:
    - *Jesinoski v. Countrywide Home Loans, Inc.*, 574 U.S. 259 (2015): Borrowers can rescind certain loans under TILA if disclosures are improper, impacting foreclosure validity.
- **Consumer Financial Protection Bureau (CFPB) Regulations**
  - The CFPB oversees mortgage servicing under the Dodd-Frank Act, enforcing RESPA and TILA. Key rules include:
    - Early intervention for delinquent borrowers (12 C.F.R. § 1024.39).
    - Continuity of contact with a dedicated servicer representative (12 C.F.R. § 1024.40).
    - Loss mitigation procedures to prevent foreclosure (12 C.F.R. § 1024.41).
  - **Case Law**:
    - *Lage v. Ocwen Loan Servicing, LLC*, 839 F.3d 1003 (11th Cir. 2016): Servicer's failure to comply with CFPB loss mitigation rules can lead to liability and foreclosure delays.
- **CARES Act, Pub. L. No. 116-136 (2020)**
  - For federally backed loans (including Fannie Mae/Freddie Mac), the CARES Act provided forbearance options and foreclosure moratoriums during the COVID-19 pandemic. Although these expired, servicers must still comply with post-forbearance workout options.
  - **Case Law**:

    - *Pittman v. Experian Info. Sols., Inc.*, 2021 WL 3418097 (E.D. Mich. 2021): Courts have upheld borrower rights to forbearance under the CARES Act for GSE-backed loans.

Case Law on Servicer Obligations for GSE Loans

- *Berezovsky v. Moniz, 869 F.3d 923 (9th Cir. 2017)**
    - Issue: Borrower challenged a foreclosure by a servicer claiming Fannie Mae ownership.
    - Holding: The court upheld the foreclosure, finding that Fannie Mae's ownership was properly documented, and the servicer followed GSE guidelines and state law.
    - Relevance: Servicers must provide evidence of GSE ownership and compliance with servicing guidelines to validate foreclosure actions.
- **Willis v. Greenpoint Mortgage Funding, Inc.*, 2010 WL 4367329 (D. Ariz. 2010)**
    - Issue: Borrower alleged improper foreclosure by a servicer for a Fannie Mae loan.
    - Holding: The court dismissed claims where the servicer demonstrated compliance with Fannie Mae's loss mitigation and foreclosure protocols.
    - Relevance: Servicers are protected from liability if they adhere to GSE servicing requirements.
- *In re: Fannie Mae/Freddie Mac Senior Preferred Stock Purchase Agreement Class Action Litigations, No. 1:2013mc01288 (D.D.C. 2022)**
    - Issue: Shareholders challenged FHFA actions affecting Fannie Mae/Freddie Mac loan portfolios.
    - Holding: The court addressed FHFA's authority over GSE operations, indirectly affirming that servicers must follow FHFA-directed guidelines.
    - Relevance: Servicer actions are subject to FHFA oversight, reinforcing compliance with GSE rules.

State Law Considerations

- Foreclosure processes vary by state (judicial vs. non-judicial). Servicers must comply with state-specific notice, timing, and procedural requirements, in addition to GSE guidelines.
- **Example Case**:
    - *Bank of America, N.A. v. Kuchta*, 141 Ohio St.3d 75 (2014): In Ohio, a judicial foreclosure state, the servicer had to prove standing and compliance with both state law and GSE guidelines for a Fannie Mae loan.

Part 2: Legal Implications When a Loan Is Not Owned or Guaranteed by Fannie Mae or Freddie Mac

If a mortgage servicer falsely claims that a loan is owned or guaranteed by Fannie Mae or Freddie Mac, this misrepresentation can have significant legal consequences, potentially invalidating foreclosure actions, the Deed of Trust, or the underlying contract. Below, I outline the relevant statutes, case law, and legal principles, focusing on how such a misrepresentation affects the enforceability of the mortgage contract.

Legal Theories for Invalidating the Contract or Deed of Trust

- **Fraud or Misrepresentation**
  - If a servicer falsely claims GSE ownership to justify collection or foreclosure, this may constitute fraud or misrepresentation, potentially voiding the foreclosure or contract.
  - **Elements of Fraud** (Restatement (Second) of Contracts § 162):
    - A false representation of a material fact.
    - Knowledge of falsity or reckless disregard for truth.
    - Intent to induce reliance.
    - Justifiable reliance by the borrower.
    - Resulting damages.
  - **Case Law**:
    - *Glaski v. Bank of America, N.A.*, 218 Cal.App.4th 1079 (2013): A California court held that a borrower could challenge a foreclosure if the servicer lacked authority to act due to improper assignment or misrepresentation of ownership. While not specific to GSEs, the principle applies to false claims of Fannie Mae/Freddie Mac ownership.
    - *Yvanova v. New Century Mortgage Corp.*, 62 Cal.4th 919 (2016): California Supreme Court allowed borrowers to challenge void assignments in foreclosure, supporting claims against servicers misrepresenting loan ownership.
- **Lack of Standing to Foreclose**
  - A servicer must prove it has the legal right to foreclose, typically by showing it holds the Note or acts as an agent for the Note holder (often Fannie Mae/Freddie Mac for GSE loans). If the loan is not GSE-owned, the servicer lacks standing if it cannot prove proper assignment or ownership.
  - **Statutes**:
    - **Uniform Commercial Code (UCC) Article 3**: Governs negotiable instruments like mortgage Notes. A servicer must be

        a "holder" or authorized agent to enforce the Note (UCC § 3-301).
    - **State Property Laws**: Most states require the foreclosing party to hold both the Note and Deed of Trust or prove agency (e.g., Cal. Civ. Code § 2924 for non-judicial foreclosures).
  - **Case Law**:
    - *Deutsche Bank Nat'l Trust Co. v. Brumbaugh*, 2012 OK 3 (Okla. 2012): The court dismissed a foreclosure where the servicer failed to prove it held the Note or had authority from the true owner.
    - *In re Veal*, 450 B.R. 897 (B.A.P. 9th Cir. 2011): A servicer lacked standing to foreclose when it could not demonstrate proper assignment or ownership of the loan.
- **Breach of Contract**
  - The Deed of Trust and Note form a contract between the borrower and lender. If the servicer misrepresents the loan's ownership to enforce terms specific to GSE loans (e.g., stricter foreclosure timelines), this may constitute a breach, potentially voiding the foreclosure action.
  - **Case Law**:
    - *Culhane v. Aurora Loan Services of Nebraska*, 708 F.3d 282 (1st Cir. 2013): A borrower successfully challenged a foreclosure where the servicer lacked proper authority under the contract terms.
- **Violation of Federal and State Consumer Protection Laws**
  - False claims about GSE ownership violates federal and state consumer protection statutes, such as:
    - **Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692**: Prohibits false or misleading representations in debt collection, including misrepresenting the creditor's identity.
    - **State Unfair and Deceptive Acts and Practices (UDAP) Laws**: Most states have UDAP statutes (e.g., Cal. Bus. & Prof. Code § 17200) that prohibit deceptive practices in foreclosure or servicing.
  - **Case Law**:
    - *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016): While addressing standing, this case supports claims under FDCPA for concrete injuries from false representations.
    - *Midland Funding, LLC v. Johnson*, 581 U.S. 224 (2017): FDCPA applies to mortgage servicers acting as debt collectors, supporting claims for misrepresentation.

- **Invalidation of Deed of Trust or Contract**
  - A Deed of Trust is deemed void and unenforceable if based on fraud or lack of authority. However, invalidating the entire mortgage contract is rare unless the misrepresentation goes to the contract's formation (e.g., fraud in the inducement).
  - **Restatement (Second) of Contracts § 164**: A contract is voidable if induced by fraudulent misrepresentation.
  - **Case Law**:
    - *Saxon Mortgage Services, Inc. v. Harrison*, 2010 Md. App. LEXIS 121 (Md. Ct. Spec. App. 2010): A foreclosure was invalidated where the servicer misrepresented its authority, rendering the action void.

Statutes Governing Non-GSE Loans

For loans not owned or guaranteed by Fannie Mae or Freddie Mac (non-GSE loans), servicers are not bound by GSE guidelines but must still comply with federal and state laws. Misrepresenting a loan as GSE-owned violates these statutes:

- **FDCPA, 15 U.S.C. § 1692e**
  - Prohibits false representations about the character, amount, or legal status of a debt. Claiming GSE ownership when untrue violates this section.
  - **Penalty**: Actual damages, statutory damages up to $1,000, and attorney's fees.
- **RESPA, 12 U.S.C. § 2605**
  - Requires servicers to provide accurate information about loan ownership in response to borrower inquiries. Misrepresentation triggers liability.
  - **Penalty**: Actual damages and up to $2,000 for a pattern of violations.
- **State Foreclosure Statutes**
  - States regulate foreclosure processes, requiring proof of ownership or authority. Misrepresenting GSE ownership violates:
    - **California**: Cal. Civ. Code § 2924(a)(6) requires the foreclosing party to record a declaration of authority.
    - **New York**: N.Y. Real Prop. Acts. Law § 1302 requires proof of standing in foreclosure actions.
  - **Case Law**:
    - *U.S. Bank N.A. v. Ibanez*, 458 Mass. 637 (2011): Massachusetts court invalidated a foreclosure where the servicer failed to prove proper assignment, applicable to non-GSE loans.
- **State Contract Law**

  - Misrepresentation of loan ownership breaches the implied covenant of good faith and fair dealing, a common-law principle in most states.
  - **Case Law**:
    - *Fannie Mae/Freddie Mac Shareholder Litigation*, No. 1:2013mc01288 (D.D.C. 2022): While addressing shareholder claims, the court recognized breaches of good faith in GSE-related contracts, supporting borrower claims for misrepresentation.

Practical Implications

- **Challenging Foreclosure**: Borrowers can challenge a foreclosure by demanding proof of GSE ownership (e.g., via Fannie Mae's Loan Lookup tool at www.KnowYourOptions.com/loanlookup or Freddie Mac's at www.freddiemac.com/mymortgage).[](https://www.fhfa.gov/homeowners-and-homebuyers/mortgage-assistance/complaints-concerns-questions/issue-with-fannie-mae-or-freddie-mac)
- **Rescission or Damages**: If misrepresentation is proven, borrowers will seek rescission of the foreclosure sale, damages, or injunctive relief.
- **Statute of Limitations**: Claims under FDCPA (1 year), RESPA (3 years), or state laws vary, so prompt action is critical.

Part 3: Case References Summary

Below is a consolidated list of key cases cited, with their relevance to your query:

- *Berezovsky v. Moniz, 869 F.3d 923 (9th Cir. 2017)**: Validates foreclosure for GSE loans when ownership and compliance are proven.
- **Glaski v. Bank of America, N.A.*, 218 Cal.App.4th 1079 (2013)**: Supports borrower challenges to foreclosure based on improper authority or misrepresentation.
- **Yvanova v. New Century Mortgage Corp.*, 62 Cal.4th 919 (2016)**: Allows challenges to void assignments in foreclosure.
- *Deutsche Bank Nat'l Trust Co. v. Brumbaugh, 2012 OK 3 (Okla. 2012)**: Requires proof of Note ownership for foreclosure standing.
- **Jesinoski v. Countrywide Home Loans, Inc.*, 574 U.S. 259 (2015)**: Supports TILA rescission for improper disclosures.
- *Lage v. Ocwen Loan Servicing, LLC, 839 F.3d 1003 (11th Cir. 2016)**: Enforces CFPB loss mitigation rules.
- *U.S. Bank N.A. v. Ibanez, 458 Mass. 637 (2011)**: Invalidates foreclosure without proper assignment.
- *In re: Fannie Mae/Freddie Mac Senior Preferred Stock Purchase Agreement Class Action Litigations, No. 1:2013mc01288 (D.D.C. 2022)**: Affirms FHFA oversight and good faith in GSE contracts.

Part 4: Recommendations and Notes

- **Verify Loan Ownership**: Use Fannie Mae or Freddie Mac's online tools or contact the servicer with a Qualified Written Request under RESPA to confirm ownership.
- **Legal Action**: If misrepresentation is suspected, consult a foreclosure defense attorney to file claims under FDCPA, RESPA, or state law. Time-sensitive statutes of limitations apply.
- **State-Specific Issues**: Foreclosure laws vary (e.g., judicial in New York, non-judicial in California). Local counsel can address state-specific statutes and case law.

Conclusion

Mortgage servicers collecting or foreclosing on Fannie Mae or Freddie Mac loans must comply with GSE Servicing Guides, federal regulations (RESPA, TILA, CFPB rules), and state foreclosure laws. Failure to follow these can lead to liability or foreclosure delays, as seen in cases like *Berezovsky* and *Lage*. If a servicer falsely claims GSE ownership, this constitutes fraud, lack of standing, or a violation of FDCPA/RESPA, potentially invalidating foreclosure actions or triggering damages, as supported by *Glaski* and *Yvanova*. Borrowers should verify loan ownership and seek legal counsel to challenge improper actions, mindful of time-sensitive legal deadlines.