

For the past several years, mortgage lenders and servicers have faced an unrelenting tsunami of litigation throughout the country, mostly in response to increased foreclosures. How lenders and servicers have fared in these cases remains largely jurisdiction-dependent. Some states, because of their different jurisprudence and laws, pose unique challenges for lenders and servicers defending consumer lawsuits. I'm here to talk about one of those challenging jurisdictions, New Mexico.

With respect to litigating in New Mexico, there are several things mortgage lenders and servicers need to know. New Mexico is a judicial foreclosure state, meaning that most claims filed against the mortgage lenders and servicers are filed as counterclaims, or third-party claims, in response to foreclosures, and accordingly, they cannot be removed to federal court, even if federal claims are alleged. New Mexico's jurisprudence in relevant legal issues, like claims arising under the Making Home Affordable Act, are underdeveloped as compared to other states, meaning there is a dearth of binding legal authority lenders and servicers can rely on. That results in fewer cases being resolved by dispositive motion.

What jurisprudence has developed in New Mexico has tended to make things more difficult for lenders and services attempting to enforce rights under mortgages. For example, New Mexico courts have issued several decisions over the past few years limiting how services can establish standing to file foreclosures. Borrowers are now using those cases as the basis to file counterclaims of fraudulent misrepresentation, quiet title, and malicious abuse of process. Most New Mexico State courts mandate mediation in all foreclosure actions and decline ruling on dispositive motions until mediations are complete. Mediations often require a representative to personally appear in New Mexico to mediate, and with sufficient settlement authority to avoid the perception of mediating in bad faith, which can lead to sanctions.

There's a wide discrepancy in the time state courts take to rule on dispositive motions, with some state courts ruling within months, and others declining to rule for more than a year and beyond. Most state courts will not rule on any motion without a hearing, regardless of how nominal the issue, which further delays the resolution process. New Mexico statute provides a far-reaching cause of action to claimants like borrowers facing foreclosure called the Unfair Practices Act, which mandates trouble damages and an award of attorney's fees to the prevailing claimant. This statute, and the case law interpreting it, provides a powerful incentive for plaintiff lawyers to over-litigate cases that might have some factual merit but limited nominal damages.

Navigating pitfalls like these in challenging jurisdictions like New Mexico requires the engagement of counsel who know the law, understands the venue, the courts, and the opposing lawyers. The New Mexico legal community is small, and adherence to local custom and practice is essential to an effective defense.

My name is Greg Marshall, and I co-chair Snell & Wilmer's financial services litigation group. If you are in-house counsel for a mortgage lender or servicer that has been sued in New Mexico, consider contacting us to discuss your options.

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