WHEN THE BORROWER SUES THE LENDER IN FEDERAL COURT

By: Bruce J. Bergman*

Abetted by the unending media cascade reporting on mortgage crises and the purported unendurable plight of borrowers, the myth has been accepted that borrowers are victims while mortgage lenders and servicers are the black hated villains. Servicers, however, know this is a canard and could readily recite the innumerable instances of borrowers gaming the system to interminably delay the foreclosure process.

Not surprisingly then we are too often constrained to begin these columns with observations about how treacherous the pursuit of foreclosures has become. In these unusual times this is certainly true and borrowers (already aided by new laws and cases which slow foreclosures to their advantage) will sometimes pursue an action in federal court to assault the lender when ultimately the defenses had failed in state court.

Bruce J. Bergman, a member of Berkman, Henoch, Peterson, Peddy & Fenchel, P.C., Garden City, New York. He is the author of a three-volume text, "*Bergman on New York Mortgage Foreclosures"* (LexisNexis Matthew Bender & Co. [rev 2011] and a member of the USFN. He can be reached at b.bergman@bhpp.com

This would appear to be yet another level of peril to servicers. Why generally, though, that borrowers' approach is barred is the message of this review. Of course, that borrowers many times should not be initiating claims against lenders and servicers in federal court does not stop them from doing so – all at the cost of money and time to lender and servicer.

There is a specific nationally applicable precept which addresses this point: the *Rooker – Feldman* doctrine. In lay terms, it provides that when a party loses a case in state court (we are concentrating upon a mortgage borrower in that position) lower federal courts have no jurisdiction to sit in judgment on a case already decided in state court. In other words, the federal court cannot hear the case and change what happened. [There is nuance to this and more to explore; for a further discussion see 1 *Bergman On New York Mortgage Foreclosures* §2.23, LexisNexis Matthew Bender (rev. 2011).]

Practical case examples will make the concept more vivid.

In one Federal case, *Kesten v. Eastern Sav. Bank,* 2009 WL 303327 (E.D.N.Y.), after a foreclosure sale, but before delivery of the deed, the defaulting mortgagor deeded the property to Kesten. In the state trial court, it was ruled that Kesten had no title, no claim. The person who sold the property to him, the mortgagor, had nothing to sell. When the property was struck down at the foreclosure auction, the mortgagor lost his title – case closed -- but Kesten did

not accept that. Undaunted, he sued the foreclosing bank in the United States District Court alleging that the bank wrongfully refused to discharge the mortgage on the property he purchased. He also sought damages of $1,000,000.00.

Wrong, said the court. The suit is barred by *Rooker – Feldman.* Lower federal courts cannot review state court decisions. There is simply no jurisdiction. The borrower's purchaser – Kesten - loses.

Another example is *Mercado v. Playa Realty Corporation*, 2005 WL 1594306 (E.D.N.Y.) where the borrower lost her house in a state court foreclosure. She too remained undeterred and sued the bank in federal court alleging that the bank's supposed predatory lending practices caused the loan default. So, she asserted, the loss of the house was an injury suffered because of the predatory lending. Wrong again ruled the court. This is exactly the type of action which is barred by *Rooker – Feldman*: the state court loser sues the winner in that case claiming injury visited upon her by the state court judgment. It doesn't work.

The tenacity and persistence of defaulting borrowers in assaulting the foreclosure process can often be remarkable. But one tactic which does not succeed is attempting to retry the case in federal court.