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Foreclosure Discovery and Trial Practice

*Friday, August 14, 2020
1:00-2:15 PM Central Time*

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Contact information for today's presenters

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MODERATOR



Joseph A. Camillo, Jr., Esq.

Managing Partner

Brock & Scott, PLLC

Joseph.Camillo@brockandscott.com

SPEAKER



Sasha Cohen, Esq.

First VP & Corporate Counsel

Bayview Loan Servicing

sashacohen@bayviewloanservicing.com

SPEAKER



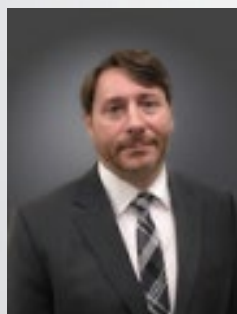
Marissa Yaker, Esq.

Managing Attorney of Foreclosure

Padgett Law Group

Marissa.Yaker@Padgettlawgroup.com

SPEAKER



Jeff Myers, Esq.

Managing Attorney

ZBS Law

jmyers@zbslaw.com

SPEAKER



Sally Garrison, Esq.

Managing Member

The Mortgage Law Firm

Sally.Garrison@mtglawfirm.com

SPEAKER



James M. Garnet, Esq.

Associate Attorney

Brock & Scott, PLLC

James.Garnet@brockandscott.com

Joseph Camillo – Managing Partner Brock and Scott, PLLC

Moderator

Joseph Camillo is Managing Partner of Brock and Scott's New England Foreclosure/Default Servicing/Litigation Practice Groups. He has over 26 years of experience in the areas of Banking, Creditors' Rights, Bankruptcy, Foreclosure, Real Estate, Litigation, Regulatory Compliance and Condominium Law. Brock & Scott currently has offices in 16 states throughout the East and Mid-Atlantic regions and has been a trusted leader in the financial services and real estate industry for over 20 years.



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REPRESENTING, DEFENDING AND EDUCATING
AMERICA'S MORTGAGE SERVICING INDUSTRY.

NAVIGATING COVID-19

Jeff Myers
Managing Attorney
ZBS Law, LLP



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REPRESENTING, DEFENDING AND EDUCATING
AMERICA'S MORTGAGE SERVICING INDUSTRY.

Navigating COVID-19

The COVID-19 Pandemic has precipitated a flurry of regulation and prohibitions aimed at mortgage lenders and servicers to prevent foreclosures and evictions. Broadly speaking, COVID-19 regulations generally fall within one of the following categories:

- 1. Federal Legislation (CARES Act)**
- 2. Federal Executive Actions (Presidential Executive Orders)**
- 3. State Legislation**
- 4. State Executive and Local Actions**



Navigating COVID-19

Federal Legislation – CARES Act

The CARES Act was enacted in March of 2020 to provide a federalized response to the COVID-19 Pandemic. Sections 4022 and 4023 of the Act deal with forbearance / deferment of federally insured loans as well as a moratorium on the foreclosure of federally insured mortgages during the “COVID-19 emergency” declared on March 13, 2020 under the National Emergencies Act (50 U.S.C. § 1601 et seq.). Section 4024 provides a temporary moratorium on eviction filings on federally insured loans and on housing programs covered by the Violence Against Women Act or the rural housing voucher program.



Navigating COVID-19

Federal Legislation – CARES Act

The threshold question in relation to the CARES Act is whether the Act applies to a given mortgage.

Pursuant to § 4022(b)(1), “During the covered period, a borrower *with a Federally backed mortgage loan* experiencing a financial hardship due, directly or indirectly, to the COVID-19 emergency *may request forbearance on the Federally backed mortgage loan*, regardless of delinquency status, by (A) submitting a request to the borrower’s servicer; and (B) affirming that the borrower is experiencing a financial hardship during the COVID-19 emergency.” (Emphasis added).

Pursuant to § 4022(c)(2), “Except with respect to a vacant or abandoned property, *a servicer of a Federally backed mortgage loan may not initiate any judicial or non-judicial foreclosure process, move for a foreclosure judgment or order of sale, or execute a foreclosure related eviction or foreclosure sale* for not less than the 60-day period beginning on March 18, 2020.



Federal Legislation – CARES Act

§ 4022(a)(2) defines a Federally Backed Mortgage Loan as “any loan which is secured by a first or subordinate lien on residential real property (including individual units of condominiums and cooperatives) designed principally for the occupancy of from 1 to 4 families that is –

- A. Insured by the Federal Housing Administration under title II of the National Housing Act (12 U.S.C. 1707 et seq.);**
- B. Insured under section 255 of the National Housing Act (12 U.S.C. 1715z-20);**
- C. Guaranteed under section 184 or 184A of the Housing and Community Development Act of 1992 (12 U.S.C 1715z-13a, 1715z-13b);**
- D. Guaranteed or insured by the Department of Veterans Affairs;**
- E. Guaranteed or insured by the Department of Agriculture;**
- F. Made by the Department of Agriculture; or**
- G. Purchased or securitized by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association.**



Federal Legislation – CARES Act

The threshold applicability of the CARES Act essentially boils down to a two prong inquiry:

- 1. Is the mortgage at issue a federally insured mortgage? If not, CARES Act does not apply with respect to forbearance or deferment and the federal foreclosure moratorium does not apply.**
- 2. Is the property vacant or abandoned? Federally insured mortgages that would otherwise be subject to the foreclosure moratorium are NOT subject to the foreclosure moratorium if the property is vacant or abandoned. This does not mean, however, that vacant or abandoned properties secured by federally insured mortgages are not subject to the forbearance or deferment requirements in § 4022(b).**



Federal Legislation – CARES Act

The CARES Act raises two new evidentiary issues for trial which have not previously been issues in foreclosure or eviction proceedings – specifically because the CARES Act creates disparate treatment for mortgages depending upon how the mortgage is insured, Lenders can expect that going forward, Lenders may be called upon to provide an evidentiary showing as to:

- 1. The type of loan (CONV, FHA, HUD, VA, FHLMC, FNMA, USDA, etc.)**
- 2. Whether the subject property is occupied.**



Federal Legislation – CARES Act

Lenders can anticipate that many borrowers will claim that their mortgage is a federally insured mortgage (even if it is not) based on the fact that many of the commonly used Trust Deeds indicate in their footers that the Trust Deed is a Fannie or Freddie Trust Deed. Borrowers may make this claim in an attempt to argue that a sale was invalid or to argue that the accounting of the mortgage is incorrect due to forbearance / deferment provisions of the CARES Act. Lenders should be prepared to rebut this argument and one of the best tools for doing so is the Loan Dashboard. While most servicers have their own proprietary dashboard tools for managing loans, nearly all have a prominent field that indicates the Loan Type: (CONV, FHA, FNMA, FHLMC, etc.). Screenshots of the Loan Dashboard which include the “Loan Type” field should fall clearly within the Business Records Exception and trial witnesses should be able to readily establish a foundation for inclusion and should be able to describe the process by which the insurer shifts from a federally insured mortgage to a Conventional Loan upon sale.



Federal Legislation – CARES Act

Lenders can also anticipate that some Borrowers will argue that the subject Property was not abandoned or vacant and that the CARES Act and attendant moratoria apply. This will be especially critical for loans that went to sale during the COVID-19 emergency period. Property preservation vendors should be prepared to not only provide a narrative as to why the Property is vacant/abandoned in their view, but should also take pictures supporting that position. Lenders should be prepared to obtain either Affidavits or Declarations of Occupancy Status on Summary Judgment or to call Property Preservation vendors to testify as the Occupancy Status at trial.

Occupancy Status and Insurer Status will also likely be required in possessory actions (see CARES Act § 4024) which prohibits post-foreclosure evictions on properties secured by federally insured mortgages and Lenders in such actions should be prepared to produce evidence on both Occupancy and Insurer Status.



Navigating COVID-19

Federal Executive Actions

On August 8, 2020, the President issued a series of Executive Orders / Memoranda. Of the four Executive Orders / Memoranda, the “Executive Order on Fighting the Spread of COVID-19 by Providing Assistance to Renters and Homeowners” is the most directly applicable to foreclosure and eviction proceedings.

Notably, the Executive Order providing assistance to renters and homeowners does NOT actually extend or replicate the eviction and foreclosure moratoria provided in the CARES Act. Rather, the Executive Order merely provides in Sec. 3(a): “The Secretary of Health and Human Services and the Director of CDC shall consider whether any measures temporarily halting residential evictions of any tenants for failure to pay rent are reasonably necessary to prevent the further spread of COVID-19 from one State or possession into any other State or possession. (b) The Secretary of the Treasury and the Secretary of Housing and Urban Development shall identify any and all available Federal funds to provide temporary financial assistance to renters and homeowners who, as a result of the financial hardships caused by COVID-19, are struggling to meet their monthly rental or mortgage obligations. (c) The Secretary of [HUD] shall take action, as appropriate and consistent with applicable law, to promote the ability of renters and homeowners to avoid eviction or foreclosure resulting from financial hardships caused by COVID-19. Such action may include encouraging and providing assistance to public housing authorities, affordable housing owners, landlords, and recipients of Federal grant funds in minimizing evictions and foreclosures.”



Federal Executive Actions

The August 8, 2020 Executive Actions do not appear to have any substantial impact on evidentiary requirements beyond those already outlined and do not, absent further action as described in the Executive Order, appear to actually impose or extend the moratorium on foreclosure and evictions on properties secured by federally insured mortgages.

It is likely, however, that in the coming few days, in response to the Executive Order, Fannie, Freddie, FHA, HUD will issue directives extending their Holds on files consistent with the Executive Order. Further action, however, will be required by those entities as the current Executive Order merely directs the relevant federal agencies to look into preventing further evictions / foreclosures instead of directly prohibiting evictions and foreclosures or re-imposing the CARES Act moratoria.



STATE LEGISLATIVE ACTION

This is where things get interesting. Many states, not content to leave things in the hands of Congress, have enacted their own foreclosure and eviction moratoria and in many cases, the State legislation is far more expansive in its reach and duration than anything contemplated in the CARES Act. Other states have not enacted any supplemental protections, leading to a national patchwork of overlapping rules and regulations.

By way of example, take HB 4204 (foreclosure moratorium) and HB 4213 (eviction moratorium) passed during an emergency special session by the Oregon legislature and executed by the Governor on June 30, 2020.

The Oregon foreclosure and eviction moratoria are, notably, *retroactive*, establishing an emergency period that runs from March 8, 2020 to September 30, 2020 and subject to extension by the Governor.

The Oregon foreclosure moratorium is also MUCH broader than the CARES Act as it applies to all commercial and residential mortgages related to property within the State. It provides no exceptions for vacant or abandoned properties, but DOES provide exceptions for mortgages which had already been reduced to a Judgment or Writ of Execution or in which a Trustee's Notice of Sale was issued before the emergency period.



STATE LEGISLATIVE ACTION

Curiously, the Oregon eviction moratorium (HB 4213) does NOT cover post-foreclosure evictions which provides a good example of the interplay between State legislative actions and the CARES Act.

Scenario 1: CONV Loan with a Writ of Execution issued 2-5-2020 and sold 6-15-2020. Grantors Occupy Property. Is sale valid? Can eviction against Grantors proceed?

CARES Act does not apply because CONV loan. HB 4204 does not apply because Writ of Execution issued before emergency period, so sale remain valid under subsection 10. Because HB 4213 does NOT apply to post-foreclosure evictions, Lender can seek possession via eviction proceeding.

Scenario 2: FHA Loan with a Writ of Execution issued 11-18-2020 and sold 3-5-2020. Grantors occupy Property and eviction proceedings initiated 3-19-2020.

Sale would still be valid under CARES and HB 4204 as sale occurred prior to CARES and HB 4204 emergency periods. HB 4213 would NOT apply because post-foreclosure evictions are not subject to HB 4213, BUT CARES Act would apply because it is a HUD loan so eviction would be precluded until the end of the COVID-19 period under CARES Act § 4022(c)(2) because the moratorium prohibits servicer from executing “a foreclosure-related eviction.”



Navigating COVID-19

STATE LEGISLATIVE ACTION

Scenario 3: HUD Loan. Trustee's Notice of Sale issued 12-13-2019. Sale set for 4-30-2020. Is sale date valid? Could Grantors be evicted?

HB 4204 would not apply to this loan because the Notice of Sale was issued before 3-8-2020 and so sale could proceed under State Law, however, CARES Act would apply because HUD loan, meaning that 4-30-2020 sale date would be invalid and any sale that occurred would be similarly invalid and subsequent eviction would also be invalid.

Scenario 4: HUD Loan. Vacant Property. Trustee's Notice of Sale issued 3-12-2020. Sale set for 7-30-2020. Sale date valid? Could action for possession be initiated?

CARES Act would not apply despite the fact that it is a HUD Loan because property is vacant so sale would be valid under CARES, however, because Trustee's Notice of Sale issued 3-12-2020 is AFTER the emergency period that is retroactive to 3-8-2020, the 7-30-2020 sale date would NOT be valid and would need to be postponed pursuant to the tolling provision in section 5 of HB 4204. No action for possession could be initiated.

Alternatively, had Trustee's Notice of Sale been issued a week earlier on 3-5-2020 under the exact same loan, a 7-30-2020 sale would be valid and possessory action would have been possible.



STATE EXECUTIVE AND LOCAL ACTIONS

In addition to the CARES Act and relevant State legislation, many States are subject to executive actions on foreclosure and evictions as well as various municipal ordinances temporarily halting court proceedings due to social distancing concerns, Sheriffs offices unable to hold auctions due to social distancing concerns or executive orders, Orders of presiding judges prohibiting foreclosure or forcible entry and detainer actions during specific time periods and the like.

The scope, duration and applicability of these actions vary not just on a State by State level, but on a county by county level, adding an additional layer of complexity to foreclosure and eviction actions during the COVID-19 pandemic.

Setting aside CARES Act and applicable State legislation, Lenders' counsel will also want to review not only whether there are specific executive actions by the Governor of a State in which you want to foreclose or obtain possession, but whether there are any standing orders from the presiding Judge of the County prohibiting foreclosure or eviction proceedings and whether there are any local ordinances that effectuate the same purpose.

Given the patchwork of federal, state and local regulations, it is critical that Lenders counsel take note that there are numerous potential regulations at multiple levels that may prohibit foreclosure or eviction.



SUMMARY

- 1. Given the new regulatory environment, Lenders counsel should be prepared to present evidence as to the type of loan that is being foreclosed. CONV, FHA, HUD, FHLMC, FNMA, VA, USDA, etc.**
- 2. Lenders should be prepared to present evidence as to whether the Property is occupied or abandoned.**
- 3. Lenders should be prepared to respond to allegations from borrowers that the accounting is not correct because it fails to account for deferment / forbearance under either CARES Act and/or State Law.**



Servicer View

- Willing to sign additional affidavits or obtain additional proof of loan ownership
- Willing to order additional property inspection reports
- Current process is to review multiple inspection reports to confirm vacancy
- Vacancy unknown, err on the side of caution



Discovery and Evidence Hot Topics



Sally E. Garrison, Esq., Managing Member
The Mortgage Law Firm,
which provides default services in
CA, HI, AZ, OR, WA, and OK.
Sally is currently licensed in OK, TX, AZ,
and is awaiting her admission to HI.



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Hearsay Rule and the Business Record Exception

Hearsay Rule: a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Each state has its own civil rules; so, some minor variations can be expected.

Examples:

- *Indirect Information: Quoting or describing what someone told you happened. For example, A assaults B. C witnesses the assault. D testifies that C told D about the assault.*
- *Presenting the unsworn, out-of-court recorded statements of a 3rd party to prove your case. For example, D saw that C posted on Facebook that A assaulted B.*

Exceptions Include:

- *Present sense impression*
- *Excited utterance*
- *Then existing mental, emotional, or physical condition*
- *Statements made for medical diagnosis*
- *Recorded recollection*
- *Public records*
- *Vital statistics*
- ***Records of regularly conductive activity (Business Records Exception)***
(And the absence of such records)



Business Record Exception

Business Record Exception: Writings, records of acts, events, conditions, opinions, made at or near the time by a person with knowledge. Must show that the records was made and kept in the regular course of business. If you cannot provide this, then the exception is not available.

Central Question: Do the records from a prior servicer, once boarded, become your business records?

Attorney Answer: Depends on which court you are in and what you have to prove, but the trends is that they do not and courts are requiring additional proof. Each state will handle it differently, but there are strategies to minimize the impact and avoid making bad law.

Examples:

- ***Serve discovery aimed at obtaining an admission of accuracy***
- ***Limit the time in controversy***
- ***Use of affidavits***
- ***Use of witness testimony***
- ***Is it possible that you have an employee that can discuss the prior servicer's practices?***
- ***Subpoena – has the potential to be very unpopular***



Motions in Limine

What is that? “Limine” is Latin for “at the start” or “on the threshold.” In litigation, a Motion in Limine is used outside the presence of the jury to exclude certain testimony or lines of argument, often these motions are made and heard prior to the start of trial.

Central Question: *Why are they useful?*

Attorney Answer: *They can narrow the scope of the trial, avoid arguments that only serve to confuse the jury or the issues, and avoid prejudicial testimony or claims.*

How and when to present these will be governed by your applicable rules of civil procedure.

Examples of topics that could be limited:

- *Default is admitted, but borrower wants to put on testimony about the job market and his efforts to obtain alternate employment.*
- *Trial is limited to a foreclosure claim and a defense of payment applications, but defendant wants to testify about his military service.*
- *Defendant may wish to exclude any testimony about prior defaults.*
- *Daubert Motion (a special variety of Motion in Limine) to challenge the admissibility of a purported expert witness.*



Discovery Strategies

Discovery Strategies: *Discovery can correct or provide additional support to your case. If done early enough, it can prove up the motion for summary judgment and avoid trial.*

Central Question: *What should I be asking for? What discovery options are there?*

Attorney Answer: *Depends on the case. First identify where your case has weaknesses, then identify the claims made by defendant that must be proven. The standard discovery tools are requests for admission, requests for production, interrogatories, depositions, and subpoenas. Depending on your jurisdiction limitations, you can issue written discovery early on, which can give you an advantage both in the time you have to move for judgment and in developing your case. Depositions can anchor a witness to a specific narrative, limiting the scope of the litigation.*

Examples of discovery strategies:

- *You could ask for admissions about the accuracy of prior servicer records, and if they deny, you can use an interrogatory to have them specifically identify any error. If they fail to respond, it is treated as an admission.*
- *You can request all the payment documentation from the borrower to prove up payment, this would include any records from their agents, like banks and money order services.*
- *If there are counterclaims or affirmative defenses, you can ask for identification of each and every fact that comprise those claims. This will help you define what you need to overcome.*



E-Note / E-Mortgage Litigation Proofs

Why are these different? *E-Notes and E-Mortgages have no physically tangible original. Every version you can see, is a copy. FNMA defines them to be “created and stored electronically rather than by using traditional paper documentation....”*

Central Question: *Assuming electronic origination is acceptable, if I can't produce the original note, how do I show standing?*

Attorney Answer: *Just like with hardcopy notes, each jurisdiction will be different. To help get oriented, here is the terminology:*

Standard Note	E-Note
Negotiable Instrument	Transferable Record
Original Note	Authoritative Copy
Possession	Control
Holder	Controller
Custodian	Location
Vault	E-Vault
Indorsement	Transfer of Control
Chain of Indorsements	Transferable Record Audit Trail of Controllers



E-Note Proofs

E-Mortgages and AOM: These will still be recorded or otherwise part of the public record. As such, they are generally not as challenging to establish as good evidence. These documents will be less likely to see major change. The impact of Covid-19 and the accompanying shelter orders may see a large increase in the number of remote and electronic originations. So, it is something to keep an eye on.

E-Notes: A copy of the E-Note should be used to show the terms, the signatories, and the lender. However, this should be accompanied by an E-Note Certification of Authentication from the location (custodian) and Summary Information, that tracks the controller (holder) of the E-Note.

Challenges: District courts may be new to this type of document and it may will required educating the bench as to the documents and nature of E-Notes. It is critical that your firms know they are handling an E-Note and they provide the appropriate proofs to avoid making bad law.



Servicer View

- It is important to know as early as possible if counsel discovers any issues.
- Work cooperatively with prior servicers to obtain required witnesses.
- Additional loss mitigation opportunities or foreclosure alternatives should be explored.



Polling Question #1

What has been the biggest issue with regard to servicing loans during Covid-19?

A - Conflicting/uncertain State and Federal/GSE moratoriums;

B - Courts issuing their own moratoriums on foreclosure cases;

C - Insurability issues for actions taken during the pandemic

D - All of the above



TRENDING LITIGATION TOPICS: STANDING, NOTE POSSESSION and CONTROL

SASHA M. COHEN, ESQ
FIRST VICE PRESIDENT AND
CORPORATE COUNSEL,
DEFAULT ADMINISTRATION
BAYVIEW LOAN SERVICING, LLC

Sasha M. Cohen, Esq. is the First Vice President and Corporate Counsel of the Default Administration Department at Bayview Loan Servicing, LLC. She manages the pre-foreclosure, foreclosure and bankruptcy departments along with an operations team that includes the corporate witness and mediation team and the attorney and trustee network.



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STANDING-FLORIDA

- Standing
 - The plaintiff must prove that it has standing or the ability to enforce its right to foreclose the mortgage before the complaint is filed
- Relevant Case Law

Endorsement chain critical to allegation in support of standing.

Most common ways you see entitlement to enforce terms of loan documents alleged in a complaint:

- Holder of the note;
- Non-holder in possession who has the rights of a holder; or
- Not in possession, but otherwise entitled to enforce terms pursuant to Florida's lost note statutes.



STANDING-FLORIDA

- **Standing: Note Holder**

Endorsement(s) to either blank or to Plaintiff

- Where holder status is based on endorsement to blank, a Plaintiff must prove that the endorsement was effectuated before a foreclosure lawsuit was filed.
- This is accomplished by attaching a copy of the note bearing all endorsements to the initial complaint (first legal filing).
- In Florida, you have a rebuttable presumption of standing if you attach a copy of the note bearing either an endorsement to blank, or a specific endorsement to the named Plaintiff, to the initial complaint, and then file the note in the same form.



STANDING-FLORIDA

- **Standing: Non-Note Holder**

Theories of standing when you do not have endorsement chain to blank, or specific endorsement to Plaintiff.

- Owner of the Note

- Can present evidence of ownership through (1) an assignment of note and mortgage prior to filing of the complaint, (2) affidavit of ownership, or (3) competent witness testimony regarding date of ownership.

- Section 673.3091, Florida Statutes – enforcement of a lost promissory note. A Plaintiff may enforce a lost note if:

- (a) Plaintiff was entitled to enforce when loss occurred or has directly or indirectly acquired ownership of the instrument from a person who was entitled to enforce the instrument when loss of possession occurred;
 - (b) The loss was not the result of a transfer or a lawful seizure; and
 - (c) Inability to reasonably determine whereabouts, destruction, or qualified wrongful possession

*Plaintiff must also demonstrate adequate protection against loss.



STANDING-FLORIDA

- **Standing: Standing at Judgment**

A Plaintiff is required to show standing both (1) at the inception of the action and (2) at the time of judgment.

Standing at the time of judgment

- Testimony of witness that Plaintiff possesses the original note
- Admission of original note into evidence at trial

Common Challenges

- if Plaintiff is substituted during pendency of action



STANDING-FLORIDA

- **Case law**

Ortiz v. PNC Bank, NA, 188 So.3d 923 (Fla. 4th DCA 2016):

If the lender files with the court the original note in the same condition as the copy attached to the complaint, then...such evidence is sufficient to show that the lender actually possessed the note when it filed the complaint, and thus, had standing to bring the foreclosure action.

Bank of NY v. Calloway; 2020 Fla. App. Lexis 10184 (Fla. 4th DCA 2020):

A plaintiff may establish standing to foreclose in more than one way.



STANDING

STANDING

I'm still standing yeah yeah yeah

I'm still standing yeah yeah yeah



STANDING-NEW YORK

STANDING

- A mortgagee-plaintiff establishes its standing to foreclose by proving that it holds or is otherwise the assignee of the original endorsed note prior to commencement of the foreclosure action
- NY Court of Appeals in *Aurora Loan Services v. Taylor*, 25 N.Y.3d 363 (2015)
- A servicer must be able to demonstrate by affidavit and documentary evidence, the exact date upon which the foreclosing mortgagee-plaintiff held the original note
- *U.S. Bank v. Saharwal*, 175 A.D.3d 1154 (2d Dep't 2019) affirmed trial court's grant of summary judgment where the plaintiff attached a copy of the consolidated note to the complaint at commencement



STANDING-NEW YORK

STANDING

- Since 2015 over 1,000 cases have cited Taylor
- NY appellate courts have applied Taylor in many different ways
- But all have become increasingly strict on the kind of proof required for a mortgagee-plaintiff to meet the evidentiary burden of proving standing to foreclose by physical possession of the of the original note prior to the commencement of the foreclosure
- One of the major challenges in NY is when a chain of assignments includes an assignment into MERS
- Has long since been held that MERS never held the original note and had no authority to commence a foreclosure action, *Bank of New York v. Silverberg*, 86 A.D.3d 274 (2d Dep't 2011).



Evolution of Standing

- Proving standing can become very difficult as appellate courts continue to reverse trial court grants of summary judgment on technical evidentiary issues but particularly the business records exception to the hearsay rules
- It is now necessary to require servicer witnesses to testify as to their personal knowledge of servicing records and recordkeeping practices from a prior servicer.
- *First Department in Residential Credit Solutions, Inc. v. Gould*, 171 A.D.3d 638 (1st Dep't 2019) reversed the trial court because the Court found the affidavit from Seterus in support of summary judgment was insufficient because it recited conclusory language regarding possession of the note. *Id* at 639.



Evolution of Standing

- Although the majority of the Court found that Seterus' affiant did testify as to the incorporation of Residential Credit Solution's business records, the failure to include those records rendered the affidavit conclusory and of no probative value. *Id*; see also *U.S. Bank N.A. v. Haber*, 170 A.D.3d 775 (2d Dep't 2019) (reversing summary judgment based on servicer's failure to lay a foundation demonstrating physical delivery of the note prior to commencement of foreclosure action)
- The takeaway here is that in NY servicers must be prepared to overcome evidentiary hurdles necessary for the mortgagee-plaintiff to demonstrate its standing to foreclose. To overcome hearsay objections, in some cases the servicing affiant's personal knowledge about integration of prior servicer records is necessary to prove the exact date the mortgagee-plaintiff obtained possession of note prior to commencing a foreclosure. cords and recordkeeping practices from a prior servicer.



STANDING

STANDING

STAND IN THE PLACE WHERE YOU LIVE.....



NOW LETS GO SOUTH AND A LITTLE WEST TO....



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STANDING-TEXAS

STANDING

- A mortgagee-plaintiff does not have to possess, produce, or hold the note to foreclose
- Foreclosing party must be beneficiary under the deed of trust
- Note and deed of trust are separate obligations and can be held separately
- Borrowers lack standing to challenge assignments or securitizations, can only challenge assignments that are void not voidable



STANDING-TEXAS

STANDING

- Mortgage Servicers: A mortgage servicer may administer a non-judicial foreclosure of property on behalf of a mortgagee if:
- The mortgage servicer and the mortgagee have entered into an agreement granting the current mortgage servicer authority to service the mortgage;
- The notices of sale required under Texas law disclose that the mortgage servicer is representing the mortgagee under a servicing agreement and the name of the mortgagee, and: (A) the address of the mortgagee; or (B) the address of the mortgage servicer, if there is an agreement granting a mortgage servicer the authority to service the mortgage. Tex. Prop. Code § 51.0025



Discovery & Trial Practice - Maine

James M. Garnet, Esq. is an associate attorney with Brock & Scott, PLLC. Attorney Garnet manages the New England Judicial Foreclosure practice group overseeing Connecticut, Maine and Vermont. Brock & Scott currently has offices in 16 states and has been a trusted leader in the financial services and real estate industry for over 20 years with a commitment to helping our clients succeed.



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Hearsay and the Business Records Exception

Business records are hearsay and therefore inadmissible pursuant to M.R. Evid. 802 unless they meet the requirements of the business records exception in M.R. Evid. 803(6).

Rule 803(6) provides that a business record is admissible if

- (A) The record was made at or near the time by - or from information transmitted by - someone with knowledge;
- (B) The record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
- (C) Making the record was a regular practice of that activity;
- (D) All these conditions are shown by the testimony of the custodian or another qualified witness; and
- (E) Neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.



Common Hearsay Objections

Promissory Note:

- Maine courts require the original promissory note to be presented at trial.
- Maine has not adopted the latest revisions to the UCC. As a result, lost note affidavits can only be enforced by the party who lost the note. See 11 M.R.S.A. §3-1309.

Mortgage/Assignments/Loan Modifications:

- In order to overcome hearsay objections, you must present originals or certified copies of recorded documents.

Demand Letter:

- For demand letters sent by prior servicers, vendors or law firms, witness preparation is key. Witness must have sufficient knowledge as to the business and record keeping practices of the entity who prepared and mailed the letter.



Common Hearsay Objections

Payment History:

Maine requires full payment history from origination, regardless of date of default. Any gap in payment history will result in a judgment for defendant. In Maine, a judgment in favor of defendant equates to a total loss of the asset. The note is no longer enforceable and the mortgage is no longer an encumbrance. See KeyBank Nat'l Ass'n v. Estate of Quint, 2017 ME 237, 176 A.3d 717 and M&T Bank v. Plaisted, 2018 ME 121.



Servicing Transfers

Current Issues:

Prior servicer witness requirement: Presently, Maine courts require all prior servicers to provide witnesses at foreclosure trials. A plaintiff is not entitled to a judgment of foreclosure unless they can produce a qualified witness who can testify with sufficient knowledge of the day-to-day operations and regular business practices of *any and all* prior servicers of the loan. KeyBank Nat'l Ass'n v. Estate of Quint, 2017 ME 237, 176 A.3d 717.

However, in a case currently on appeal (The Bank of New York Mellon v. Danielle Shone et al.) the Maine Supreme Court is considering adjusting application of the business records exception to the hearsay rule, M.R. Evid. 803(6), to track application of Fed. R. Evid. 803(6) as addressed in U.S. Bank Trust, N.A. v. Jones, 925 F.3d 534 (1st Cir. 2019).



Tools to Overcome Hearsay Objections

Discovery

Requests for Admissions

- Served upon defendants with complaint pursuant to M.R. Civ. P. 36.
- Defendants have 45 days to answer, object or admit.
- If defendant fails to respond, each matter is deemed admitted and conclusively established.

Depositions

- Another tool useful in obtaining critical admissions.
- Can be used at trial to contradict or impeach the testimony of defendant.



Tools to Overcome Hearsay Objections cont.

Motions in Limine

- Surrender of property in bankruptcy supports motion in limine as a tool to obtain early ruling that a surrender of the property in a bankruptcy and subsequent discharge of debt bars a borrower from contesting the state foreclosure case.
- Can be used as a tool for a preliminary determination on the validity and the pre-trial admission of the demand letter.

Prior Admissions

- Most loan modifications contain language where the borrower acknowledges the amount owed as of the effective date of the modification.
- This acknowledgement can be used to avoid bringing in prior servicer witnesses from servicers prior to the modification.
- It can also be used to prove the amount owed if the servicer does not have the complete payment history from prior to effective date of the modification.



COVID-19 Issues

Changes to trial procedure:

- Large backlog of cases awaiting trial dates due to court closures, federal and state moratoriums.
- For courts that require in-person witness appearance, the logistics of witness travel will be burdensome. This is especially true in states that require multiple witnesses.
- Video and telephonic appearances.
 - Ensure technology is working properly prior to trial by conducting a practice run.
 - Take extra time to prepare witnesses as you may not have the ability to speak off the record once the trial commences.



Servicer View - Maine

- It is important to know as early as possible if counsel discovers any issues .
- Work cooperatively with prior servicers to obtain required witnesses.
- Additional loss mitigation opportunities or foreclosure alternatives should be explored.



Polling Question #2

With regard to Hearsay, what is the level of understanding parties have of the business record exception?

A - Great;

B - Good;

C - Fair;

D - Poor



FLORIDA TRENDING LITIGATION TOPICS

MARISSA M. YAKER, ESQ MANAGING ATTORNEY OF FORECLOSURE PADGETT LAW GROUP

Marissa M. Yaker, Esq. is the Managing Attorney of Foreclosure for Padgett Law Group (PLG). A full-service creditors' rights law firm with practices in Florida, Georgia, Tennessee, Arkansas, Texas, and Ohio, Marissa oversees foreclosure processing and operations across eight physical locations within the firm's footprint. PLG additionally has a nationwide bankruptcy practice



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Prima Facie Case of Loan Boarding Payment History

Prima Facie Case:

- To establish a prima facie case, a foreclosure Plaintiff must prove the amount due; in other words, the Plaintiff must introduce some evidence regarding the outstanding debt.
- How much of the payment history is required to be entered into evidence in a mortgage foreclosure action generally will depend on the damages sought.
- If a Bank did not have the entire payment history in its business records, then it never would be able to foreclose. This is not the law, as each subsequent default creates a distinct cause of action subject to a different calculation of damages. See Bartram v. U.S. Bank, N.A., 211 So. 3d 1009, 1019 (Fla. 2016). Thus, how much of the payment history is required to be entered into evidence generally will depend on the damages sought



Hearsay Exception Broken Down-Florida

Controlling Law:

- Florida Statute 90.803(6)

Foundational Elements:

- *The required foundation for invoking the business records hearsay exception may be established in one of three ways:*
 - (1) a records custodian may take the stand and testify under oath to the predicate requirements;
 - (2) the parties may stipulate to the admissibility of a document as a business record; or
 - (3) through a certification or declaration that complies with the hearsay exception and self-authentication rules, requiring notice and inspection of the documents.
 - *Bank of New York v. Calloway*, 157 So. 3d 1064 (Fla. 4th DCA 2015)
- *An affidavit seeking to meet the business records exception to hearsay needs to demonstrate:*
 - (1) that the record was made at or near the time of the event;
 - (2) that it was made by or from information transmitted by a person with knowledge;
 - (3) that it was kept in the ordinary course of a regularly conducted business activity; and
 - (4) that it was a regular practice of that business to make such a record.
 - Sacks v. Bank of New York Mellon, 264 So. 3d 938 (Fla. 4th DCA 2018)



Hearsay Exception Broken Down-Florida

Evidence:

- When having a records custodian testify to the predicate requirements of the business records hearsay exception, it is not necessary to call the individual who prepared the document; however, the witness through whom the document is being offered must be able to show each of the requirements for establishing a proper foundation. See Bank of New York v. Calloway, 157 So. 3d 1064 (Fla. 4th DCA 2015)
 - It is highly recommended that the witness is trained by multiple departments throughout the loan payment process in order to demonstrate the 4 prongs of the business records exception mentioned earlier.

Recent Florida Supreme Court Decision:

- The proper predicate for admission of records into evidence under the business records exception to the hearsay rule can be laid by a qualified witness testifying to the foundational elements of the exception, as held by the Second District. Jackson v. Household Fin. Corp. III, No. SC18-357, 2020 WL 3580036, at *1 (Fla. July 2, 2020).
- Testimony providing factual specificity as to how records were compiled, maintained, or utilized is not required as part of the prima facie case to admit evidence under the business records exception to hearsay. *Id.*



Demand Letters and Mailing Practices

Training:

- Servicer witness must be trained on the mailing procedures.

Third Party Vendors:

- Third Party Vendors can mail demand letters for servicers. However, the witness should receive training from the vendor so they are familiar with the mailing practices of the third party. Using Third Party Vendor to mail to demand letters is not fatal.

Burden of Proof:

- Introduction of the demand letter itself, without proof of mailing and witness testimony, is insufficient to establish the letter was mailed and could result in a dismissal.
- Additional evidence is needed to establish demand letters were properly mailed to the borrower (i.e. mailing receipt or letter log).



Demand Letters and Mailing Practices

Relevant Caselaw:

Burden of Proof:

- Roesch v. U.S. Bank, National Association, Case No. 2d-18-1686, Fla. 2d (April 15, 2020). “The fact that a document is drafted is insufficient in itself to establish that it was mailed... [M]ailing must be proven by producing additional evidence...” (citations & quotations omitted).

Prior Servicer Demands

- Wells Fargo Bank, N.A. v. Balkissoon, 183 So. 3d 1272 (Fla. 4th DCA 2016).
- Soule v. U.S. Bank Nat'l Ass'n for BNC Mortg. Loan Tr. 2007-1 Mortg. Pass-Through Certificates, Series 2007-1, 253 So. 3d 679 (Fla. 2d. 2018), reh'g denied (Sept. 18, 2018).
- JPMorgan Chase Bank Nat'l Ass'n v. Pierre, 215 So. 3d 633 (Fla. 4th DCA 2017)

Third Party Vendor Demands:

- Knight v. GTE Fed. Credit Union, No. 2D16-3241, 2018 WL 844352 (Fla. 2d. Feb. 14, 2018).



Prior Servicer Records and the Boarding Process

Servicer Transfer:

- Upon a servicer transfer, incorporating and boarding the prior servicer records into your system is necessary in order to testify at trial.
- The Business Records exception to the hearsay rule allows the current servicer witness to testify to records from the prior servicer. However, the proper foundation must be laid. When boarding the loan, the prior servicer(s) data must be reviewed and approved as accurate before the loan can be officially boarded.

Important Nuances:

- The witness does not have to work in the boarding or loan transfer department. Instead, the witness will need training to establish they are familiar with the boarding policies and procedures.
- The boarding process is dissected by nearly every opposing counsel and judge if there has been a servicer transferred at least one time during the life of the loan.



Prior Servicer Records and the Boarding Process

Relevant Case law:

Overview:

- Sacks v. Bank of New York Mellon, 264 So. 3d 938 (Fla. 4th DCA 2018)

Trustworthiness:

- Bank of New York v. Calloway, 157 So. 3d 1064 (Fla. 4th DCA 2015)



Servicer View-Florida

- Vendor Breach letter issues
- Have had witness training sessions by the vendor;
- Vendor affidavits



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Joseph A. Camillo, Jr., Esq.
Managing Partner
Brock & Scott, PLLC
Joseph.Camillo@brockandscott.com

Sasha Cohen, Esq.
First VP & Corporate Counsel
Bayview Loan Servicing
sashacohen@bayviewloanservicing.com

Marissa Yaker, Esq.
Managing Attorney of Foreclosure
Padgett Law Group
Marissa.Yaker@Padgettlawgroup.com

Jeff Myers, Esq.
Managing Attorney
ZBS Law
jmyers@zbslaw.com

Sally Garrison, Esq.
Managing Member
The Mortgage Law Firm
Sally.Garrison@mtglawfirm.com

James M. Garnet, Esq.
Associate Attorney
Brock & Scott, PLLC
James.Garnet@brockandscott.com

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