PUBLICATION

A Changing World: An Overview of New Trends in Default Litigation

July 14, 2011

2010-2011 has seen unprecedented litigation involving the default servicing process. Across the country the number of lawsuits is skyrocketing. The theories of these lawsuits are limited only by a borrower's or plaintiff's counsel's imagination and ability to search the Internet to find the latest trend.

Litigation Involving Robo-Signing — It's a Brave *Neu* World

By now, we all know the term "Robo-Signing," which was ushered in with a south Florida case, *GMAC Mortgage, LLC vs. Ann M. Neu*. During deposition, the GMAC witness testified that she did not have personal knowledge of the information contained in an affidavit used in the foreclosure process.

There was little or no rehabilitation of the witness during the deposition and ultimately, the court's ruling against the lender was harsh. Numerous articles have been written using the term robo-signing but the bottom line is servicing departments and their foreclosure counsel must know how to properly execute affidavits which stand up to scrutiny.

First and foremost the affiant (party executing the affidavit) should have an understanding about the document he/she is signing. Simply put, the purpose of an affidavit is to make a written statement under oath, just as if that person were testifying in court. A checklist for the affiant is:

- The affiant should have **personal knowledge** of the facts - AFFIDAVITS ARE EVIDENCE. To be admissible, testimony must be offered by a competent witness with personal knowledge of the facts.
- **Documents and computer records are hearsay.** The affiant and his/her counsel must know how to get such evidence into court properly. An exception to the hearsay objection is the use of documents such as business records. To get a business record into evidence through an affidavit, your attorney should treat the affidavit just as she would in taking oral testimony. That is, the affidavit should state that the documents reviewed by the affiant are records kept in the regular course of business (such as payment and transactions histories); that the affiant is familiar with these records; and that the affiant has reviewed the specific records. Only after laying this legal foundation does the affiant state what the records show. Setting out the affidavit in this posture provides the court with competent evidence of what the records are, how they are kept and that the witness is familiar with the records and has reviewed the records, with the conclusion being a statement of what the records show.
- The affiant should have confidence that legal counsel has current **knowledge of the law** governing the content of affidavits including the Federal Rules of Evidence, state court statutes, Rules & Common Law; Local Rules, General Orders and Standing Orders. Question your counsel to ensure that the counsel keeps abreast of changes in the law and is not just passing standard forms to the court.
- The affiant should pay attention to the details. **Watch the dates used in affidavits**. Beware of the use of "effective date" versus the actual date the affidavit is executed and notarized.
- The affiant should **never sign a document with blanks**.

Litigation Involving Execution of Assignments

Another litigation trend is attacking any assignment in the property title chain and particularly to attack assignments from MERS to the party holding the note at the time a foreclosure commences. Proper execution of real estate documents is state-specific but you should always take the following steps:

- **Confirm authority to execute.** The person executing the assignment must have authority to sign.
- **Read** what is being executed.
- **Check the dates.**
- **Execute in front of a notary.**

Review, review, review form assignments! In particular, note the effective date of the instrument and all of the language in the instrument.

Suits Du Jour

It is impossible to identify every legal theory currently used by plaintiffs in bringing default litigation claims. The term "wrongful foreclosure" is too generic to be useful other than to generally identify a theory that a plaintiff is entitled to judgment because the note holder could not or should not execute the power of sale provisions in the security instrument. However, below are other specific claims which reappear frequently:

- **Failure to Modify: The No-Mod, Mo-Mod and Re-Mod Cases**

  - In a No-Mod case, the plaintiff alleges the servicer or lender either had a duty or an agreement to modify the existing loan terms. There is a trend among borrowers who bring suit without counsel to allege that they have a government created right to a HAMP loan. Effective defenses to this allegation include use of the statute of frauds (a legal theory which requires a "writing"). More problematic are allegations that the parties (lender/servicer and borrower) had agreed to terms of a loan modification but nevertheless foreclosure ensued. Therefore, it is important that any written communication with a borrower is very clear as to what conditions apply before foreclosure will be halted.

Practice Tip: If you haven't reviewed form letters or other communication which go to borrowers concerning loan modification agreements, you should do so without delay. Make sure that the letters clearly communicate the lender/servicers' intent regarding halting any default activity.

  - The **Mo-Mod** theory is based on the plaintiff's allegations that the modification terms offered were not good enough and that the lender or servicer is withholding a better deal. This theory is often combined with an argument that HAMP terms were withheld from the borrower.
  - The **Re-Mod** theory alleges that borrower's circumstances changed but the lender/servicer refused to review the prior modification offer or to offer something new.
- **Standing Challenges**: Challenges to the right of the foreclosing party to commence or perform the foreclosure are not new theories, although the press would have the public believe otherwise. Standing challenges are another wrinkle in the "you don't have the right to foreclose the loan theory" (*i.e.* wrongful foreclosure). The issue has been renewed by a Massachusetts opinion, *U.S. Bank National Association v. Ibanes*[1] where the court found a foreclosure sale void where the securitization trustee could not provide valid assignment information to verify the rights of the foreclosing party. Actually, it is logical that the note holder would have this burden, but the issue is complicated by MERS issues, defective assignments, lost notes, assignment, pooling and servicing agreements and other securitization issues. This issue is easily defended **if** the assignments are of record and **if** the original documents evidencing the right of the foreclosing party can be located. Some courts have found other ways that the lender/note holder can prove its interest. An Alabama court in *US Bank v. Congress*[2] found that the trustee of a securitized trust had standing to bring foreclosure if it holds the

note and that the party did not have to own the note to have standing. Further, that court held that the pooling and servicing agreement could be evidence of right to foreclose if that document identified the loan in its schedules.

- **Negligence and Breach of Fiduciary Duties**: Although a state-by-state consideration, an allegation by a borrower that the lender, servicer or investor has breached a fiduciary duty owed to the borrower should raise a red flag, particularly because mortgage transactions are, in most states, considered to be long arm contractual transactions in which a fiduciary duty is not owed to the borrower by the lender or its assignees of title. The legal theory of negligence also concerns breach of a duty owed by one party to another. If no duty is legally owed, then there can be no claim for negligence.
- **Federal Regulatory Claims**: Of late, there has been a surge in cases alleging violation of federal regulatory claims such as violations of the Truth in Lending Act (TILA), Real Estate Settlement Procedures Act (RESPA), Home Owner's Equity Protection Act (HOEPA) and the Fair Debt Collections Practices Act (FDCPA). Boilerplate lawsuits can be found on the Internet ready to cut and paste into a complaint. Most often the plaintiff and, in a surprising number of cases, the attorney, have failed to read the statute and may ignore important provisions of what the statute covers and when suits regarding violations of the statue must be brought. There are often simple defenses to such claims such as a bar on prosecution on account of the expiration of statutes of limitation (for instance, TILA has a bar for damages after one year and bars rescission of the loan after three years; RESPA has a one- or three-year claims bar dependent upon which provision of the statute the claim is based upon); inapplicability to loans **not** secured by the principal dwelling or those which are **not** purchase money, reverse mortgages or open ended agreements.

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[1] Mass. Jan 7, 2011

[2] Cir. Ct. Ala, Feb. 23, 2011