



AFN's Monthly Litigation Webinar

HOT TOPIC LEGAL UPDATES



Presented by the AFN's Legal Services Committee

Speakers



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Attorney

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Foreclosure

ASSIGNMENTS:

Deutsche Bank v. Castellanos, 2008 WL 123798 (Table)
(N.Y.Sup) January 14, 2008

- Motion for Judgment of Foreclosure had been initially denied due to no assignment into named Plaintiff. Plaintiff renewed the application for Judgment which was further denied:
 - while the assignment was now presented to the court, the current owner of the note was not substituted in as Plaintiff.
 - the individual signing the assignment also signed a plaintiff's affidavit BUT on behalf of different entities to which the Judge questioned his employment and/or authorization to sign and the existence of a conflict of interest.
 - the Judge raised the possibility of fraud due to the differing addresses for both entities but the same signator and notary AND raised the possibility of corporate collusion.

Foreclosure

ASSIGNMENTS:

- ▣ *Countrywide Home Loans, Inc. v. Taylor* (NY Supreme Court, Suffolk County, 843 N.Y.S.2d 495)
 - Assignment included an “effective date”. The Judge held that the language was insufficient to establish the plaintiff’s ownership interest at the time the action was commenced. As such, the assignment needed to be fully executed prior to the commencement of the foreclosure action.

- ▣ *Aurora Loan Services, LLC v. Sattar* (NY Supreme Court, Kings County, 17 Misc.3d 1109(A))
 - On an unopposed motion, the judge conducted his own investigation and determined that the assignment into the plaintiff was not of record. The court warned of future sanctions against the attorneys and the named plaintiff for wasting judicial resources by commencing an action in the wrong plaintiff.

Foreclosure/Class Actions

ASSIGNMENTS:

Whittiker et al v. Deutsche Bank National Trust Company, et al.
(US District Court, Northern District of Ohio, Eastern Division;
Docket#: 1:08-cv-00300-DDD)

- ▣ Class Action Lawsuit
 - alleges the defendants filed foreclosure actions without benefit of valid assignments of mortgage.
 - alleges violation of the Federal Fair Debt Collection Practices Act, 15 U.S.C. Section 1692e) by making misleading representations concerning defendants' ability to sue and the interest in the debt.
 - alleges violation of the Ohio RICO (R.C. Section 2923.32) in that by knowingly filing complaints where they did not own the note and mortgage, defendants conduct equates to a pattern of corrupt activity.

Non-Judicial Foreclosure/Class Action Lawsuit

Assignments:

Jackson, et al. v. Mortgage Electronic Registration Systems, Inc. et al.
(U.S.District Court Minnesota, Docket# 0:08-cv-00305-JNE-JJG)

- Plaintiffs allege that MERS violates state law by failing to record all assignments of mortgage prior to commencing a non-judicial foreclosure as per Minn. Stat. Section 580.02 (2006).
- All Plaintiffs claim to have been served with a Notice of Foreclosure Sale naming MERS as the mortgagee and that same have failed to list all assignments of mortgage (Minn. Stat. Section 580.04).
- The District Court has certified the following question to be resolved by the Supreme Court: “When MERS serves as mortgagee of record as nominee for a lender and that lender’s successors and assigns, and the original lender subsequently sells, assigns, or transfers its rights under the mortgage, has there been an assignment of the mortgage that must be recorded pursuant to Minn. Stat. Section 580.02 (2006) before MERS can commence a foreclosure by advertisement?”

Bankruptcy

In Re Brooks

2008 WL 416268 (Bankr. E.D.Pa. Feb. 3, 2008)

Facts:

- ❑ Chapter 13 debtor, prior to bankruptcy, executed 3 different loans and used same real property as collateral on each loan
- ❑ Third loan was assigned from Gelt Financial Corp to Altegra Credit Company. Although Debtor appealed, Altegra won a final foreclosure judgment for \$196,611.68 plus interest against debtor in state court regarding the real property.
- ❑ Sheriff's sale scheduled for 2/6/07; however Debtor filed Chapter 13 Bankruptcy on 2/2/07
- ❑ Litton Loan Servicing, LP filed a proof of claim and a motion for relief on behalf of Residential Funding Company and attached the loan documents regarding the Gelt loan, which was assigned to Altegra.
- ❑ Court requested proof of assignment; however, Litton filed an amended claim and an amended motion for relief as servicer for Mortgagee of Record.

Facts (continued)

- To maintain standing, Court advised Litton to submit an assignment.
- Litton's attorney filed a pleading to amend record for filing of chain of assignment in the name RFC Homecomings Financial, assignee of National City Home Loan Services, f/k/a Altegra Credit Co., assignee of Gelt Financial Corp. However, Homecomings did not make any motions or claims in the case. There was no mention of Litton in this pleading.
- Debtor objected to the amended claim because it was untimely and no proof of ownership/assignment
- Debtor filed a response to the Amended Motion for Relief asserting that Litton lacked standing and that the underlying mortgage was satisfied.

Issue and Resolution

- ▣ **Issue:** If there is no record before the Court that Litton Loan Servicing L.P. owns or services the Debtor's mortgage, should the Court deny the Amended Motion for Relief and sustain the Debtor's Objection to the Amended Claim?
- ▣ **Resolution:** Yes. The Amended Motion for Relief was denied without prejudice to refile as to the Mortgagee with proof of ownership/assignment. The Amended Objection to Claim was partially sustained; however, the current owner of the Debtor's mortgage would have 15 days from the date of this order to amend the proof of claim and the claim will relate back to the original timely filed claim by Residential Funding Company on 3/20/07.

Court's Analysis

- ▣ **Regarding Amended Motion for Relief:** Court stated that it did not have a clear picture of who currently owns the Debtor's mortgage and by denying the Amended Motion, the Court eliminates the risk of granting relief where it is not deserved. Also, Court pointed out that due to the variety of pleadings and names on file, there is neither proof of ownership of the Debtor's mortgage, nor is there a motion pending by Homecomings – the only party to have offered an assignment.
- ▣ **Rule of Law:** A party who has neither suffered the injury directly nor has an assignment of a cause of action lacks standing.

Court's Analysis (continued)

- ▣ **Regarding Amended Proof of Claim:** Court stated that due to an impossible paper trail and because the claim is facially flawed, the Debtor's Objection to the Amended Claim is partially sustained because no ownership of the Debtor's mortgage has been established by Litton. However, the Court stated that the sensible and permissible thing to do is allow the secured creditor with proof of ownership 15 days from the date of this order to file an amended claim.
- ▣ **Note:** The Court also admonished the Debtor by stating that the Debtor, who voluntarily incurred and previously acknowledged the debt, remains liable for the foreclosure judgment for \$196,611.68. Court further stated that res judicata precludes Debtor from now trying to attack the foreclosure judgment in this Court.

Suggestion

Be sure to get assignments in order now so that it will not be a problem later.

Loss Mitigation: how assignments count...

- ▣ Servicer and borrower work together to minimize losses,
- ▣ 2 types: keep home, sell/deed home

Loss Mitigation and assignments...

- ✓ Who owns the loan?
- ✓ Who services the loan?
- ✓ Who can make loss mitigation decisions?
- ✓ Types of loss mitigation:
 - Repayment plan
 - Loan modifications
 - Payment deferments
 - Short sales
 - Deed in Lieu of foreclosure

Loss Mitigation and assignments...

- ▣ Innovative ideas in Loss Mitigation:
 - Cash for deeds in lieu.
 - Notice on monthly statements, other notices.
 - Local counsel incentives to handle.
 - Loss mit package served w/ summons, mailed/emailed by attorney when referred.
 - Reverse mortgages.
 - Credit counseling, state agency referral.
 - REO broker contact with owners.

Loss Mitigation and assignments...

- ▣ How do assignments affect loss mitigation?
 - Part of proof needed to enforce lender's rights under loan documents, including right, ability to enter into binding loss mitigation.
 - Transfer of interest must comply with jurisdictional requirements.

Loss Mitigation and assignments...

- ▣ **Problems:** failure to record, failure to notify mortgagor about transfer, failure of assignee to take physical possession of originals.
- ▣ **Judges hate lost documents.**
- ▣ **Best practices:** Assign mortgage & note at same time in same assignment, plus endorsement of note, for value; record thereafter.

Loss Mitigation and assignments...

- ▣ Bankers Trust Company of California v. Vaneck, 899 A. 2d 41 (Conn. App. 2006).: Mortgage follows note, thus only rightful owner of note has right to enforce.
- ▣ In re Vermont Fiberglass, Inc., 45 B.R. 603 (D. VT. 1984): recording not necessary for valid assignment, but unrecorded assignment inferior to right of purchaser w/o notice.

Loss Mitigation and assignments...

- Walker v. Midland Mortgage Co., 935 So. 2d 519 (Fla. 3d DCA 2006): No evidence of agreement with servicing agent to forbear filing of foreclosure action.
- Davis v. Starling, 799 So. 2d 373 (Fla. 4th DCA 2001): Assignment must be for “value” to be holder in due course, avoid defenses.
- Trent v. MERS, Inc., 2007 WL 2120262 (M.D. Fla.), Mortgagors aware of MERS' role per loan docs: lender remained "creditor", MERS obtained legal title to note, ability to foreclose.

Corporate Governance – LACR(P)

- ▣ LEGAL – advise the institution as to the legal risk (broadly defined)
- ▣ AUDIT – check to see that the other control groups and lines of business are following the policies and procedures
- ▣ COMPLIANCE – checking to see that the lines of business are complying with the appropriate regulations and regulatory guidance

Corporate Governance – LACR(P)

- ▣ RISK – Evaluates the risk
 - Credit Risk
 - Reputational risk – how will this play out
 - ▣ Front page of the paper/headline news
 - ▣ Court of public opinion
- ▣ PRIVACY

LACR(P) - Application to Assignment Issue

- ▣ LEGAL –
 - Review the purchase agreement for issues related to documentation
 - Assignments
 - ▣ Properly executed
 - ▣ Recorded
 - Payment Histories
 - Transaction histories
 - Duty for seller to provide
 - ▣ At close?
 - ▣ At default?

LACR(P)

▣ AUDIT

- After close – Policies and procedures in place
 - ▣ Assignments
 - ▣ Payment Histories
 - ▣ Transaction Histories

▣ COMPLIANCE

- Policies and Procedures to review purchased portfolios for proper documentation
- KYC and CIP
 - ▣ Know Your Customer/Customer Identification
- Disclosures (GFE, RESPA, TILA, Privacy)
- Underwriting
- Sound Credit (Regulatory/Self-Audits)

LACR(P)

▣ COMPLIANCE

- Fair Lending
- Non-traditional
- Sub-prime

- Documentary exams (Assignments/Histories)
 - In Custody
 - Can they be located?
 - Can they be obtained?
 - Is there someone with the authority to execute

LACR(P)

- ▣ COMPLIANCE
 - Default
 - Sending appropriate notices?
 - Loss Mitigation efforts?
 - ▣ Contact made as appropriate

Compliance

▣ RISK

- Systems in place to identify
 - ▣ High risk portfolios
 - Acceptable amount of risk in the portfolio
 - ▣ High risk accounts

- Check with other Control/Governance Groups
 - ▣ Assignments executed/recorded?

PPPPPP

- ▣ Proper
- ▣ Power
- ▣ Planning
- ▣ Prevents
- ▣ Poor Performance -
 - ▣ ALSO DEFINED AS LOSSES FROM LAWSUITS
 - ▣ OR NEGATIVE HEADLINES IN THE NEWS

Conclusion

Question & Answer Period

If you have any further questions that were not addressed in this presentation, or want to contact one of our speakers, please email Matt Bartel, Executive Director of AFN, at mbartel@e-afn.org.

Thank you for your participation in this webinar. Please complete the brief survey which you will be directed to at the conclusion of this presentation.

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