LEGAL LEAGUE 100
QUARTERLY
SPRING 2019
COMMITTED TO THE INDUSTRY, INTEGRITY, AND BEST PRACTICES

*National*

# EXTINGUISHMENT OF CONDOMINIUM LIENS IN FORECLOSURE: A SUMMARY OF GOVERNING AUTHORITY, BALANCE OF INTERESTS, AND PRACTICAL IMPLICATIONS

*By Michael Sadic, Potestivo & Associates, P.C.*

Recently, there's been an unusual rise in litigation between condominium associations and mortgage lenders about extinguishment of condominium liens created due to failure of property owners-in-foreclosure to pay their share of monthly common expenses. At first glance, the procedure by which mortgage lenders may extinguish a condominium lien seems straightforward. In a foreclosure action[1], the lender must name the condominium association and obtain a judgment of foreclosure. Then, once the property is offered at a public judicial sale, the lender has an obligation to start paying the monthly common expenses as assessed against the property on the first of the month following the sale.[3] Litigation typically ensues when lenders do not start paying their monthly common expenses after purchasing a property at a judicial sale.

The position of the condominium associations is that the failure of the lenders to make a prompt payment for common expenses due after the sale fails to extinguish their lien against the unit created by the prior owner's non-payment of monthly common expenses before

*"Condominium" continued on Page 4*

*National*

# THE SERVICE RELEASE DILEMMA

*By Lisa Gordon, Frenkel Lambert Weiss Weisman & Gordon, LLP*

Service releases are commonplace and a critical component of the mortgage lending and servicing industry, allowing for more capital in the marketplace and an increased ability of lenders to make more loans to potential home buyers. However, when a loan is service released, while the subject of an active foreclosure proceeding or after condition precedent notices are mailed by the prior servicer, the impact on the legal action can be severe and, in some cases, fatal. Successful prosecution of foreclosure actions can be made difficult by the common, innocent act of service releasing a loan. Plaintiffs are required to prove a prima facia case. What constitutes a prima facia case varies by jurisdiction, but many states have statutory conditions precedent to the commencement of a foreclosure. These conditions must be proven by submission of evidence in admissible form. When loans are service released, plaintiff's counsel is often confronted with the situation where one servicer fulfilled the statutory conditions precedent, but a different servicer is now prosecuting the foreclosure case. Thus, foreclosure attorneys are tasked with having to prove a condition precedent was satisfied by a servicer no longer in the business of servicing the loan. What is plaintiff's counsel to do?

Attempting to obtain an affidavit from the prior servicer, which mailed the notice, is the best and most practical method to utilize, but

*"Dilemma" continued on Page 3*

*National*

# SIX STEPS TO SMART INTEGRATION

*By Jan Duke, a360 Firm Solutions*

In an environment of shrinking referral volume and increased operational costs, firms are always looking for ways to reduce expenses. With promised ease and increased efficiencies, integrations and automations are the immediate 'go-to' solutions. If smartly implemented, both initiatives reveal amazing results and make good on their promise; however, poor execution quickly results in costly obligations. When integrations and automations are critical to the success of any firm, it pays to take your time and do it right. Use the following steps to guide your decisions and yield the best results.

## Use Data

Not every task is appropriate for integration. Choose the tasks that have high volume and/or high cost associated with the manual process. When choosing the tasks, don't use your gut and don't use assumptions. Review verified data that encompasses enough time period to ensure you aren't deciding based on a peak or a valley.

## Consider ALL Costs

Integration doesn't come without ancillary cost. You can't flip the switch and make it happen. When determining the true return on your investment, you must factor in the complete cost of the integration. Those costs could include:

- Building the Connection—Depending on your case management system and your infrastructure design, this could be very costly. Include time invested by your IT department; outside tech vendors; connectivity costs; software/hardware.
- Subscription Fees/Platform Connectivity Fees—Most of the platforms utilized by the mortgage servicers have initial connectivity fees.

*"Six Steps" continued on Page 6*

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# FROM THE CHAIR

There seems to be consensus among industry experts that the current trends of relative calm and stability in housing sales, loan origination, and refinance will carry well into the rest of the year. This has opened the door to technology designed to facilitate home-loan originations and create additional opportunities to expand lending across the country. These technological trends in lending will have an impact on mortgage servicing and our role in providing representation to the industry. Understanding upcoming trends and innovation, such as e-notes, e-mortgages, and other technological developments, will provide League members the ability to bring added value to their servicing and default clients.

We have had quality dialogue on topics and issues to present at the Legal League 100 Spring Servicer Summit on May 6-7. The Summit will be another terrific opportunity for the industry to come together and participate in an exchange of information and ideas that will be beneficial to servicers, attorneys, and all who support the servicing industry and are looking ahead. The Summit will be current and relevant to the entire industry and the League is pleased to have the opportunity to bring this valuable information to the industry and League members.

I am also pleased we will have the opportunity to participate in the National Mortgage Servicing Association (NMSA) Annual Member Meeting on behalf of the Legal League 100 Advisory Board. The NMSA is working in concert with the FHA to bring relevant issues of policy concern up for discussion. Legal League 100 will be represented in this important conversation.

There is a lot to look forward to. As we move ahead, the League will continue to strive to be a valuable resource to the mortgage servicing industry and to all Legal League 100 members.

Sincerely,
*Roy Diaz*
SHD Legal Group, P.A.
Chairman, Legal League 100 Advisory Council

## ROY DIAZ, SHD LEGAL GROUP P.A.

*Roy Diaz has been a member of the Florida Bar since 1988. He has concentrated his practice in the areas of real estate, litigation, and bankruptcy. He has represented lenders, servicers of both conventional and GSE loans, private investors, and real estate developers throughout his career with an emphasis on the mortgage servicing industry for over 22 years. Diaz is admitted to Federal Court practice in the United States District Court for the Southern, Middle, and Northern Districts of Florida.*

*"Dilemma" continued from Page 1*

unfortunately, is rarely successful. The only affidavit a foreclosure attorney knows it can obtain is one from the current servicer upon whose behalf the foreclosure is now being prosecuted. Therefore, we turn to the rules of evidence and the business records exception to the hearsay rule, a version of which has been codified in nearly all jurisdictions. In New York, the rule is codified in Civil Practice Law and Rules (CPLR) §4518(a). A proper foundation for the admission of a business record must be provided by someone with personal knowledge of the maker's business practices and procedures. This rule has become the subject of numerous cases in New York given the increased frequency with which loans are being service released.

The courts are consistent in their rulings as to what is required to meet the business records exception, but there have been varying opinions, in many jurisdictions, as to whether the affidavits being offered as evidence, are admissible. New York generally requires two mailings prior to the commencement of a foreclosure action, to wit: a breach letter, in accordance with the mortgage contract, if required by same, and a 90-day notice pursuant to a statutory requirement.[1] Accordingly, plaintiff must prove, via affidavit of its current client, that a prior servicer complied with these mailing requirements. The business records exception requires that the affiant attest to having personal knowledge of the record keeping practices and procedures of the entity by whom the mailing was done as well as the mailing practices and procedures of the entity by whom the mailing was done. See *U.S. Bank National Association v. Henry,* 157 A.D.3d 839 (2d Dept 2018); Citimortgage, Inc. v. Pappas, 147 A.D.3d 900 (2d Dept 2017). Alternatively, some jurisdictions will permit the business records exception to stand if an affiant can attest that the prior servicer's business records were incorporated into the current servicer's own records or routinely relied upon by the current servicer in its business. See *Deutsche Bank National Trust Co. v. Monica*, 131 A.D. 3d 737 (Third Dept. 2015). Servicers must be able to attest to one of these two statements in a properly drafted affidavit. Too often, the language utilized by servicers in affidavits is not specific enough or falls short of the outlined requirements. See *Deutsche Bank National Trust Co. v. Carlin* 2017 NY Slip Op 0542[1] (2d Dept. 2017). This leads to unnecessary denials and in some cases dismissals if sufficient proof cannot be obtained or established by the current servicer.

Servicers are encouraged to consult with counsel as to the requirements of the business records exception in their jurisdictions so that affidavits can accurately reflect compliance with the conditions needed to be fulfilled. Alternatively, obtaining an affidavit from the outgoing servicer, together with business records demonstrating the property mailings, upon receipt of notice of an imminent service release, could save all parties time and trouble.

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[1] NY Real Property Actions and Proceedings Law §1304

*"Condominium" continued from Page 1*

the sale occurred. On the other side, the lenders reject the argument that they should be held liable for a lien created due to their borrower's failure to pay common expenses because the law does not impose a timing requirement when a post-sale payment must be made. The Illinois Supreme Court, in *1010 Lake Shore Ass'n v. Deutsche Bank National Trust Co.*,[4] partially resolved this question but also left much to interpretation.

## Governing Authority

In *1010 Lake Shore*, the court clearly stated that the lender's duty to pay for monthly common expenses assessed against its property starts on the first of the month following the sale. What the court left to interpretation, thus causing condominium associations and lenders to engage in litigation, is the language in the second sentence under section 9(g)(3) of the Condominium Property Act[5], which states, "such payment confirms the extinguishment of any lien created—provides an incentive for prompt payment of those post-foreclosure sale assessments.[6]" The meaning of this language differs if you're a condominium association versus a foreclosure lender.

Following *1010 Lake Shore*, a divergence of opinion as to the meaning of the above words has been created. To condominium associations, the language implies a promptness requirement that must be satisfied by a foreclosure lender in order to confirm the extinguishment of a condominium lien following a foreclosure sale.[7] The lenders take the opposite view and contend that there is no timing requirement as to when the first payment must be made to confirm the extinguishment of the pre-sale lien.[8] Hence, condominium associations argue, if a lender fails to promptly make a payment following the sale, although there's no hard rule as to what promptly means,[9] a lien in favor of the condominium association does not become extinguished through foreclosure. The lender's reject the holding in the Country Club Estates case based on reading of the second sentence in *1010 Lake Shore* that the courts should be engaging in any sort of promptness analysis when determining if a pre-sale condominium lien is extinguished.

The lenders received support for their position in *Quadrangle House Condominium Ass'n v. U.S. Bank*.[10] There, the Sixth Division of the First Appellate District Court of Illinois emphatically held that a payment of post-purchase assessments, whenever made, is the step necessary to confirm the extinguishment of any lien created under section 9(g)(1) in favor of a condominium association.[11] The Sixth Division panel, in no uncertain terms, rejected the analysis under the Country Club Estates case by the Second Division of the First Appellate District Court of Illinois.[12] However, the support for the lenders' position and hope that this opinion would provide better guidance going forward was short lived.

In *V & T Investment Corp. v. West Columbia Place Condominium Ass'n*[13], the Sixth Division cited the Country Club Estates case as guidance on determining when a post-foreclosure sale payment is prompt.[14] The panel effectively reversed its position from the holding in *Quadrangle House Condominium* case. The question whether courts should engage in a promptness analysis was made even more confusing when a different panel of the First Appellate District Court threw support behind the condominium association's position. The Second Division in *U.S. Bank v. Quadrangle House Condominium Ass'n*,[15] relied on its ruling in the Country Club Estates by engaging in an analysis of whether the lender made a prompt payment. Thus, we now have a split of opinions within the First Appellate District as to whether courts should consider whether a post-foreclosure sale payment was promptly made in ruling on the extinguishment of a condominium lien.

## Balance of Interest

Depending on which side of the fence one is, there are good reasons for and against imposing a prompt payment requirement under section 9(g)(3) of the Condominium Property Act. If the Supreme Court clarified the meaning of "prompt payment" to mean that there is a promptness requirement under the law, this would likely result in many condominium liens not being extinguished through foreclosure. Condominium associations would be able to salvage all the unpaid common expenses not paid by the prior owner that had to be unfairly borne by the rest of the paying owners. Lenders would be adversely impacted because, on top of filing a foreclosure case and taking a loss on their investments, they would be forced to pay for the failure attributable to a prior owner, especially considering that an institutional lender would not have enjoyed the benefits of common areas. Even if the court rejected the argument that a post-foreclosure sale payment must be promptly made, condominium associations would not be left without a remedy.[16] Under the current law, condominium associations can always rely on salvaging at least six months of unpaid pre-foreclosure sale common expenses.

## Practical Implications

Of course, it is important to note that these cases illustrate the exceptions, not the rule. On a given day, thousands of properties are bought and sold in Illinois at judicial auctions, which may have a lien under section 9(g)(1) attached to them. Both the condominium associations and lenders can take specific steps to prevent any risk of potential litigation. After a judicial sale, lenders and condominium associations should be proactive to make it known to the other side that a specific unit in the building was sold, informing the other side of an address where an invoice or payment can be sent, the name of contact person, etc. If such steps are taken, then, presumably, litigation between parties could altogether be avoided.

## Conclusion

For the sides who fail to exercise proactiveness, we can only expect more litigation on this issue going forward, until, at last, the Supreme Court decides to take up a case to clarify the meaning of its words"provides an incentive for prompt payment of those post-foreclosure sale assessments."

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*1. 735 ILCS 5/15-1101, et seq.*
*2. 765 ILCS 605/9(g)(1)*
*3. 765 ILCS 605/9(g)(3)*
*4. 2015 IL 118371*
*5. Id. at 9(g)(3)*
*6. Id. at 118371,*
*7. See Country Club Estates Condominium Ass'n v. Bayview Loan Servicing LLC, 2017 IL App (1st) 162459*
*8. See 5510 Sheridan Road Condominium Ass'n v. U.S. Bank, 2017 IL App (1st) 160279*
*9. In, 5510 Sheridan, it took the foreclosing bank 12 month to make the full payment for post-foreclosure common expenses. 5510 Sheridan Road, at ¶¶ 7-9.*
*10 .2018 IL App (1st) 171713*
*11. Id. at ¶ 14.*
*12. Id. at ¶ 13.*
*13. 2018 IL App. (1st) 170436*
*14. Id. at ¶ 30.*
*15. 2018 IL App. (1st) 171711*
*16. See 765 ILCS 605/9(g)(4)*

*"Six Steps" continued from Page 1*

» Transaction Fees
» IT Labor Investment—Your IT team/contractor will not only have time invested in the connection but there is time associated with monitoring the system as well as maintaining the connection, including updates and changes.
» Operational Labor Investment—Any successful integration project requires involvement of the operational staff that best understand the task.

## Understand the Benefit

To calculate an accurate return on your investment, you will need to measure the benefit as compared to the costs mentioned above.

» Labor Costs—Capture the cost of each task associated with the transaction you are integrating, keeping in mind that the tasks may cross department lines. As an example: if you are implementing a two-way integration with your title services vendor, you would want to understand the costs associated with each task you are eliminating (i.e. placing the order; following up on order; receiving results; entering results in CMS; receiving invoice; data entry of invoice into CMS/accounting system). Those tasks may cross over department lines, so having a detailed time and motion study of the entire process will provide you with actual value of the benefit.
» Improved Timeline—If integration is set up accurately, it eliminates the manual labor which therefore reduces the time it takes to complete the task. If the outcome of the integration doesn't improve the process, that may signal something is wrong.
» Other Savings—Integration with certain vendors can result in savings in other areas. Examples include bankruptcy monitoring vendors that reduce PACER expenses; mail services vendors that reduce equipment and supplies expense associated with copiers/printers/postage; and automated e-filing providers that reduce labor associated with the e-filing.

## Know the Risks

Any time process change is introduced into an organization, there is risk involved. When dealing with integration, you are exchanging data. In most cases, that data includes NPI, so having proper risk mitigation controls in place is key.

» Compliance—Review your client requirements related to data sharing and vendor disclosure.
» Data/tech failures—One of the biggest risks in introducing integration/automation is the possibility of a system error or failure. Don't just confirm there are mechanisms in place for alerts when errors occur but be sure that someone is reviewing those reports and alerts!

## Manage the Change

Utilizing integration and automation to improve efficiency is only effective if your staff understands the impact and makes corresponding process changes. If not, you will find yourself in a situation where you are paying for integration, but everything is still being done manually. It happens … a lot!

» Staff training—Do not let your IT staff handle the implementation of the integration in a vacuum. Involve your operations leaders and require that each impacted staff member is trained and thoroughly understands the WHY, WHEN, and HOW.
» Exception reporting—Confirm that exception reports are in place and know who "owns" reviewing the reports to confirm integration is working as planned.
» Controls—Follow proper Change Control Protocol when procedures change so that your integration stays current.

***Any time process change is introduced into an organization, there is risk involved. When dealing with integration, you are exchanging data. In most cases, that data includes NPI, so having proper risk mitigation controls in place is key.***

## Measure Results

Most importantly, hold your team accountable for the results. If you have required a detailed cost-benefit analysis and that analysis reveals a savings of $XX, the final step should be documentation of that result at 30 days post implementation, six months post implementation, and one year post implementation. Failure to circle back and truly measure the results will render the magic pill of integration in nothing more than a costly addiction.

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# The Florida Supreme Court Finds Basis For Attorney Fee Award In Favor Of Mortgagor Despite Bank's Ostensible Lack Of Standing

*By Roy Diaz, SHD Legal Group, P.A.*

The Florida Supreme Court issued a written opinion on January 4, 2019, which addressed a mortgagor's entitlement to prevailing party attorney's fees in the context of an unsuccessful foreclosure action. *Glass v. Nationstar Mort. LLC*, etc., et. al., Case No. SC17-1387 (Fla. January 4, 2019). Nationstar held a reverse mortgage and initiated foreclosure proceedings "due to non-payment of taxes and/or insurance on the property." After two amendments to the complaint the mortgagor (Glass) successfully moved to dismiss Nationstar's foreclosure complaint with prejudice. Notably, Glass' motion to dismiss contained four grounds for dismissal but the trial court did not indicate the specific basis for dismissal in its order.

After the dismissal, Glass moved for attorney's fees as the prevailing party in the mortgage foreclosure suit. Nationstar appealed the order of dismissal to the Fourth DCA, but then voluntarily dismissed the appeal "after briefing" but before the Fourth DCA rendered a decision. Glass then moved for appellate attorney's fees, which the Fourth DCA denied. In its order denying fees the Fourth DCA stated that Glass could not "take advantage of a fee provision" contained in a mortgage contract which the plaintiff lacked the right to enforce. Glass appealed this holding to the Florida Supreme Court.

The Florida Supreme Court accepted jurisdiction and noted the issue in the case was the mortgagor's "entitlement to appellate attorney's fees…after a bank files a notice of voluntary dismissal in the district court of appeal." The court concluded Glass was entitled to fees as the prevailing party on appeal since Nationstar voluntarily dismissed the appeal but also "because Nationstar maintained its right to enforce the reverse mortgage contract in its appeal until the dismissal." The court quashed the Fourth DCA's decision explaining it mischaracterized the procedural history of the case and misstated the lower court's ruling.

The court explained the Fourth DCA improperly focused on the dismissal of the complaint for lack of standing by the trial court instead of the "entitlement to appellate attorney's fees based on the voluntary dismissal [of the appeal]" by Nationstar. The Court elaborated:

> "This reasoning both misstates the basis of the trial court's ruling on Glass's motion for dismissal and fails to address Glass's motion for appellate attorney's fees based on the voluntary dismissal."

***"This reasoning both misstates the basis of the trial court's ruling on Glass's motion for dismissal and fails to address Glass's motion for appellate attorney's fees based on the voluntary dismissal."***

The court then discussed the four grounds Glass raised in her motion to dismiss and pointed out the trial court did not provide a basis for its decision, so it was "inaccurate to state that Glass was successful only for demonstrating that Nationstar lacked standing." The court went further: "Even if the trial court's dismissal was based on lack of standing, it was not based on a finding that Nationstar did not hold the note …" Instead, it was based on a finding that "Nationstar's complaint was legally insufficient for failure to properly demonstrate the chain of title" to the note and mortgage. Importantly, the court distinguished, but did not overrule *Bank of New York Mellon Trust Co. v. Fitzgerald* 215 So. 3d 116 (Fla. 3d DCA 2017), reh'g denied (Apr. 11, 2017), review dismissed, SC17-993, 2017 WL 2348649 (Fla. May 30, 2017) on this ground.

In *Fitzgerald*, the Third DCA refused to grant attorney's fees to the mortgagor despite the fact she obtained judgment based on the bank's lack of standing. However, in *Fitzgerald* the Third DCA specifically found that "no contract existed between the Bank and Fitzgerald that would allow Fitzgerald to invoke the reciprocity provisions of section 57.105(7)" which provision can create entitlement to attorney fees. The Court in Glass pointed out that the Fourth DCA made no such findings.

The Glass court then went into a detailed discussion regarding attorneys' fees noting the rule is that "attorney fees may be awarded by a court only when authorized by statute or by agreement of the parties." The court then clarified, however, that:

> ***"attorney's fees may be recovered under a prevailing-party attorney's fee provision … even though the contract is rescinded or held to be unenforceable."***

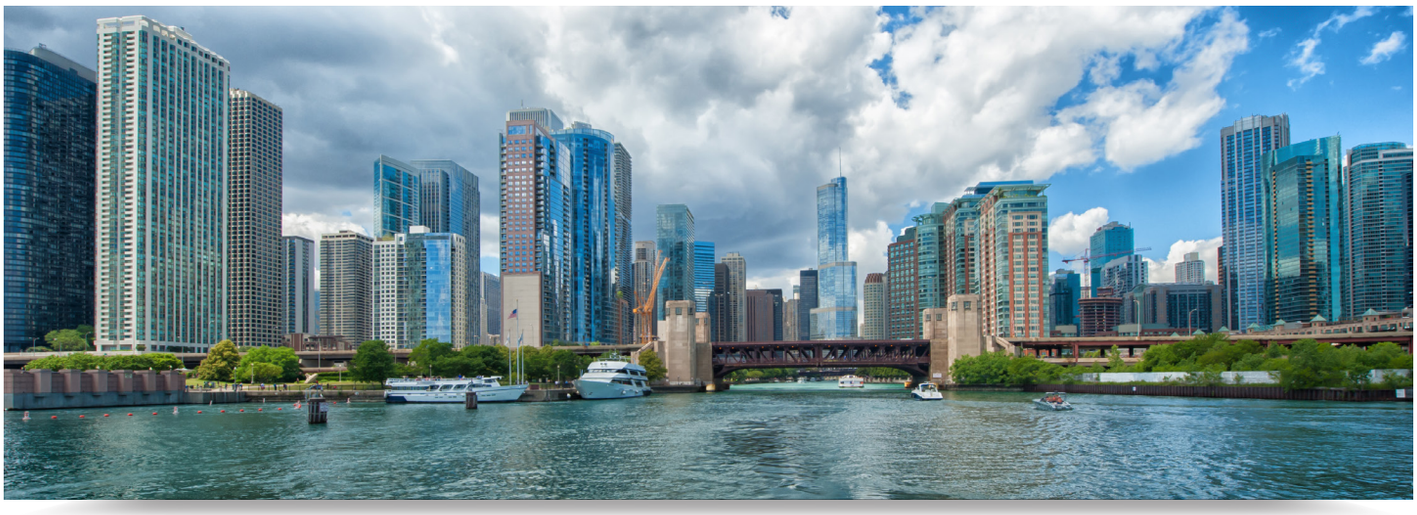
The court finally concluded that a reverse mortgage contract "clearly existed between Glass and Countrywide Mortgage Company …" and "… was merely unenforceable by Nationstar because it failed to demonstrate that it was the rightful successor in interest."

Although a troubling decision for the mortgage industry, there are limits to the Glass holding. Firstly, possession of the original negotiated note at the time of filing the complaint eliminates any basis for dismissal or an adverse judgment based on lack of standing. Secondly, if the bank's foreclosure is unsuccessful based on lack of standing the bank can still argue (perhaps counter-intuitively) that no contract existed between the plaintiff and the mortgagor. Admittedly, this latter issue will likely be the subject of future litigation.

***Roy Diaz*** *is the shareholder of SHD Legal Group P.A. in Fort Lauderdale Florida. He has been a member of the Florida Bar since 1988. He has concentrated his practice in the areas of real estate, litigation, and bankruptcy. He has represented lenders, servicers of both conventional and GSE loans, private investors, and real estate developers throughout his career with an emphasis on the mortgage servicing industry for over 25 years. Diaz is admitted to Federal Court practice in the United States District Court for the Southern District of Florida, Middle District of Florida, and Northern District of Florida. He is also admitted in the United States Court of Appeals for the Eleventh Circuit. Diaz is the current Chair of the Legal League 100.*

1 *The Florida Supreme Court identified the four grounds in Glass' motion to dismiss as follows: (1) The complaint allegations were "legally insufficient for failure to properly demonstrate [Nationstar's] chain of title," (2) Nationstar failed to allege a breach because the lender was required to pay taxes and insurance under the terms of the reverse mortgage, (3) Nationstar failed to demonstrate it received HUD approval to accelerate the loan, and (4) "the exhibits to the complaint contravened the finding that non-payment of taxes" constituted default because "there was sufficient equity remaining on the line of credit to fund taxes and insurance." Glass, at 7.*

2 *The court accepted jurisdiction based on a perceived conflict between decisions from the First and Fourth district courts of appeal that addressed prevailing party attorney's fees. Bank of New York v. Williams, 979 So. 2d 347 (Fla. 1st DCA 2008); Nationstar Mortgage LLC v. Glass, 219 So. 3d 896 (Fla. 4th DCA 2017). In Glass, Justice Ricky Polston dissented with a written opinion wherein he stated the Court lacked "constitutional authority to review [the] case because the Fourth District Court of Appeal's decision in… Glass…does not expressly and directly conflict with the First District Court of Appeal's decision in…Williams…on the same question of law." Justice Polston explained that the issue addressed by the Fourth DCA in Glass was centered on whether the bank was a "party to the contact" whereas the First DCA in Williams focused on whether the mortgagor was a "prevailing party." Glass, at 12-14.*



*States: Illinois*

# Publication Requires Particularity

*By Lauren Riddick, Codilis & Associates, P.C.*

In litigation, "personal jurisdiction" is required against all named defendants. The crux of this power flows from the party filing an action (the plaintiff) properly making an individual (the defendant) aware of the litigation filed. Stated another way, if a plaintiff fails to properly make a defendant aware of an action, then personal jurisdiction is lacking, and any orders the court makes are subject to being cancelled at any time-even long after litigation is thought to have been concluded. In mortgage foreclosure actions, this can cause additional delays and costs to an often lengthy and expensive process.

Publication service, which involves notifying a defendant via a local newspaper, requires an affidavit evidencing that a diligent inquiry has occurred to ascertain the defendant's location. Additionally, in Cook County mortgage foreclosure actions, affidavits must be sworn by the individual who made the "due inquiry," setting forth "with particularity" an "honest and well directed effort" to ascertain the location of the defendant.

In early 2018, the Fourth Division of the 1st District Appellate Court held that only one attempt at personal service was sufficient, given the circumstances of the case. In *Neighborhood Lending Services, Inc. v. Griffin*, 2018 IL App (1st) 162855, the defendant's wife stated that the defendant didn't live at the residence and refused to provide any further information.

***It seems safe to say that the more precise and particular the details of a process server's affidavit is, the stronger a plaintiff's publication service may be.***

The defendant, appearing nearly a year later, alleged that Neighborhood Lending failed to exercise due inquiry or due diligence. The court disagreed.

> ***"This is a case in which the defendant's spouse—a resident of the single-family home at issue—directly informed the process server that defendant did not reside at that address and no alternate address could be found …There is no reason to believe that subsequent visits would have yielded any different resultsm …" Id. ¶ 21-22.***

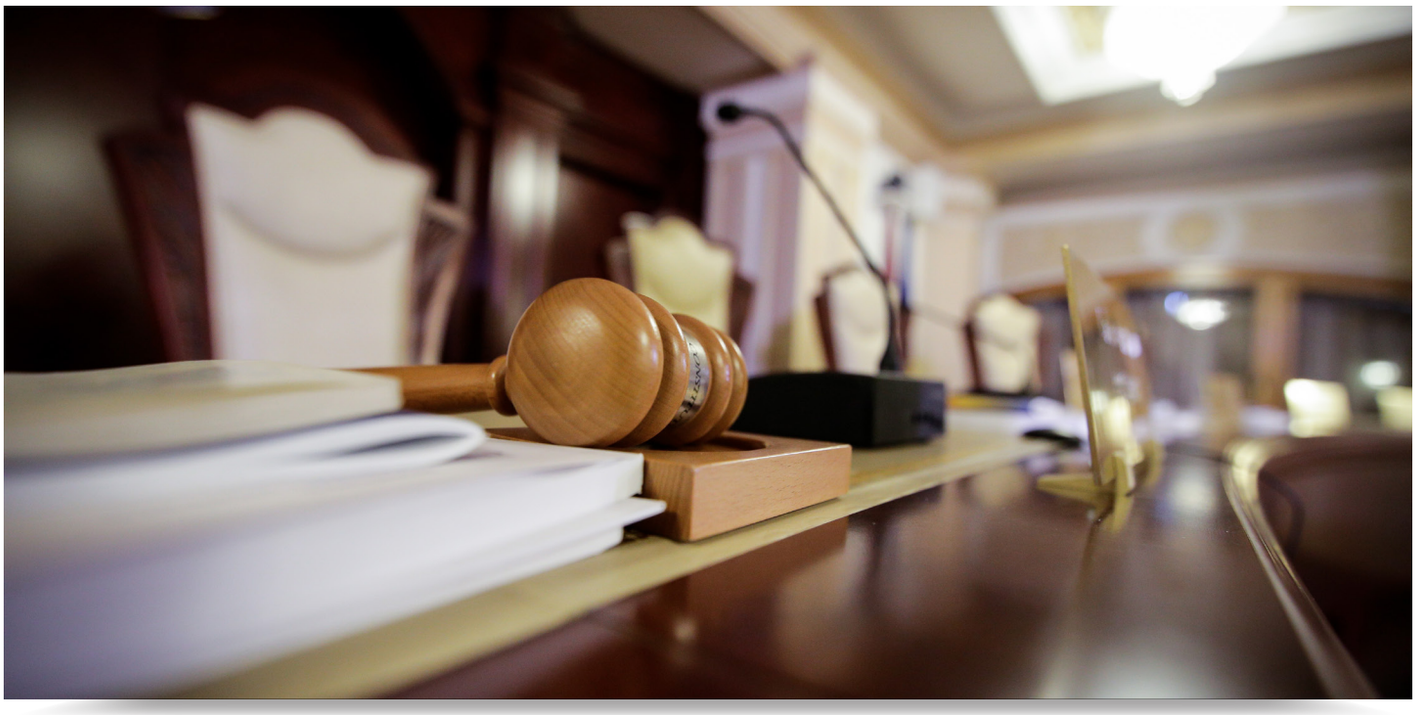
Towards the end of 2018, the First Division of the 1st District Appellate Court encountered a somewhat similar fact pattern, but with a very different result. In *Deutsche Bank Nat'l Trust Co. v. Burrell*, 2018 Ill. App. Unpub. LEXIS 1563, the plaintiff filed an affidavit stating that a process server attempted to serve the defendant a total of 29 times at the subject property address, all without success. However, the affidavit also evidenced searches conducted which resulted in the discovery of additional potential addresses for the defendant, one of which was in Merrillville, Indiana. In Merrillville, the process server spoke to an unknown woman getting into her car. When asked if the defendant was at home, the woman replied that she didn't know him.

Defendant filed a motion to quash service several months after the foreclosure sale, stating that he'd lived at the Merrillville, Indiana location for approximately 14 years and arguing that Deutsche Bank failed to properly serve him. The court agreed.

The court ruled that the plaintiff failed to evidence an "honest and well directed effort" to ascertain the defendant's whereabouts, emphasizing the fact that the plaintiff only made one attempt at the Merrillville location, which "consisted only of a conversation with some unnamed person in front of the house who said that she did not know [the defendant.] This was not 'due inquiry'."

It seems safe to say that the more precise and particular the details of a process server's affidavit is, the stronger a plaintiff's publication service may be. At a minimum, the name and relationship to a party should always be obtained if a witness's statement is meant to be relied upon.

***Lauren Riddick*** *handles contested foreclosure matters as a member of the Codilis & Associates, P.C. Contested Litigation Unit and also assists with title matters. She joined the firm in August 2013. Prior to joining the firm, she was an Adjunct Professor of Law with several colleges and a Securities Attorney for a large broker-dealer in Florida. Riddick is a member of the Illinois and Florida Bar Associations.*



*States: Ohio*

# Adoptive Business Records in Ohio's Courtrooms

*By Rick D. DeBlasis and Charles E. Rust, Lerner, Sampson & Rothfuss, LPA*

The "business records exception" of Ohio Evidence Rule 803(6) is an indispensable ally of the lender's trial lawyer. The rule against hearsay prohibits the use of records to prove a lender's case, unless the record is offered by the testimony of the custodian or other qualified witness who has personal knowledge of the record-keeping system in which the record is maintained. This requirement has made its way to the forefront of foreclosure litigation recently, due to the prevalence of servicing changes during the life a loan. Now, the majority of Ohio's appellate courts has addressed the nuances of authenticating adoptive business records, i.e., those created and maintained by a prior servicer.

In Ohio, the idea that the records of a prior servicer may be authenticated by a subsequent servicer originates from a 2006 credit card case in Ohio's First District Court of Appeals.[1] The court held that "exhibits can be admitted as business records of an entity, even when that entity was not the maker of those records, provided that the other requirements of [Evid.R.] 803(6) are met and the circumstances indicate that the records are trustworthy."[2] The majority of Ohio's Appellate Districts have directly adopted or discussed this general notion, or it has been applied by the respective common pleas courts.[3] However this begs the question: what circumstances indicate that the records of a prior servicer are indeed trustworthy?

Recently, some Ohio courts of appeals have held that "trustworthiness of a record is suggested by the profferer's incorporation into its own records and reliance on it."[4] Others have held that "[o]ne circumstance that indicates the trustworthiness of such a document proffered as a business record might be the ongoing relationship between the business creating the document and the incorporating business."[5] At a fundamental level, such logic is consistent with the notion that "[t]he rationale behind Evid.R. 803(6) is that if information is sufficiently trustworthy that a business is willing to rely on it in making business decisions, the courts should be willing to rely on that information as well."[6]

It is likely not enough for an affiant to aver simply that the records of a prior servicer[7] are incorporated into the records of the current servicer. The records of a prior servicer must be incorporated and relied upon in the ordinary course of business to meet the trustworthiness requirements of Evidence Rule 803(6).[8] Thus, the summary judgment affidavit of a transferee servicer should explicitly indicate both incorporation of the records of the prior servicer into its own and reliance upon those records in the ordinary course of business.

Other averments can augment trustworthiness. For example, the transferee servicer may have, or may have had, an ongoing relationship with the transferor servicer, such that the new servicer has become familiar with and relied upon, without issue, the old servicer's record-keeping system for many years.[9] The new servicer may have acquired the old servicer.[10] Failure to include such language in the lender's affidavit could be the difference between the court awarding summary judgment and the court finding a genuine issue of material fact warranting trial.

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*1 Great Seneca Financial v. Felty, 170 Ohio App.3d 737, 2006-Ohio-6618, 869 N.E.2d 30, ¶ 14 (1st Dist.).*
*2 Id.*
*3 See Ocwen Loan Servicing, LLC v. Malish, 2d Dist. Montgomery No. 27532, 2018-Ohio-1056, ¶ 23; Sec'y of Veterans Affairs v. Leonhardt, 3rd Dist. Crawford No. 3-14-04, 2015-Ohio-931, ¶¶ 57-59; Carrington Mtge. Servs., LLC v. Shepherd, 5th Dist. Tuscarawas No. 2016 AP 07 0038, 2017-Ohio-868, ¶ 34-36; U.S. Bank N.A. v. Hill, 6th Dist. Ottawa No. OT-17-029, 2018-Ohio-4532; Bank of New York Mellon v. Kohn, 7th Dist. Mahoning No. 17 MA 0164, 2018-Ohio-3728; RBS Citizens, N.A. v. Zigdon, 8th Dist. Cuyahoga No. 93945, 2010-Ohio-3511; Ohio Receivables, LLC v. Dallariva, 10th Dist. Franklin No. 11AP-951, 2012-Ohio-3165, ¶¶ 19-21; Green Tree Servicing, LLC v. Roberts, 12th Dist. Butler No. CA2013-03-039, 2013-Ohio-5362, ¶¶ 30-31.*
*4 Ocwen Loan Servicing, LLC v. Malish, supra.*
*5 PNC Mtge. v. Krynicki, 7th Dist. Mahoning No. 15 MA 0194, 2017-Ohio-808, ¶ 13; Sec'y of Veterans Affairs v. Leonhardt, supra, ¶ 59.*
*6 U.S. Bank, N.A. v. Lawson, 5th Dist. Delaware No. 13CAE030021, 2014-Ohio-463, ¶ 20.*
*7 Bank of N.Y. Mellon v. Roulston, 8th Dist. Cuyahoga No. 104908, 2017-Ohio-8400.*
*8 See Deutsche Bank Trust Co. v. Jones, 2018-Ohio-587, ¶ 17.*
*9 Ocwen Loan Servicing, LLC v. Malish, supra.*
*10 Id.*


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*States: Texas*

# The Intersection of Probate and Foreclosure in Texas

*By Alexander Wolfe, Padgett Law Group*

Few people take out a mortgage with the thought that they might not outlive the terms of the note and deed of trust they have executed. However, it is an unfortunate reality that the passing of a borrower can result in a home loan going into default when there is no other party with the desire or the means to continue making payments. In Texas, the death of the borrower can present surprising complications in what is typically a relatively straightforward foreclosure process.

In 1956, the Texas Supreme Court ruled in *Pearce v. Stokes* that the power of sale held by a mortgagee under a deed of trust is suspended during the pendency of a dependent administration (a court-supervised administration of a decedent's estate.) Furthermore, the exercise of that power is subject to cancellation by the appointment of a dependent administrator at any point in the four years after the death of the borrower (the period during which a dependent administration can be opened.) For these reasons, a mortgage lender cannot simply proceed to foreclosure sale if they have discovered that a borrower is deceased.

The lender must first do their due diligence to determine if any party is attempting to probate the decedent's estate and, if so, whether it will be necessary to look to the court for approval to foreclose. Because of the uncertainty created regarding the validity of a foreclosure sale held within the four years following the death of the borrower, the lender may find it necessary to petition the court to open a dependent administration in those instances where the heirs are not themselves probating the estate, for the purpose of obtaining an order allowing foreclosure. This process is known colloquially as a "creditor's administration." Heirs may find themselves surprised to be contacted by a lender who is attempting to probate the estate of a loved one, but they will typically find that the probate courts are often deferential towards and protective of their interest in the estate. Furthermore, an estate administrator is often the only party in the position to deal with the affairs of the estate, including arranging a sale of the property, in such a way that ultimately benefits the heirs and lender both.

An alternative to the creditor's administration is to file suit against the heirs, petitioning a court to authorize a foreclosure sale that, in addition to foreclosing the lender's lien, also terminates the in rem interest of the heirs in the subject property. This option can allow the lender to avoid the expense and delay of administering the borrower's estate, as well as place the lender on friendlier ground than the probate courts can sometimes be. Lenders should consult with their foreclosure counsel on which process serves their interests best in particular circumstances.

The foreclosure process can also be impacted by heirs' efforts to probate the estate of a borrower. Lenders should cautious about holding a foreclosure sale when the heirs are actively engaged in efforts to probate the estate, for two reasons; one, that a successful probate of the estate by the heirs resolves the legal uncertainty lenders face in circumstances when the estate is unprobated and two, any effort to proceed prematurely may result in a contest in a probate court that is friendly to the heirs. That is not to say that lenders should not intervene in a pending probate proceeding when efforts by the heirs have languished through inattention or an inability to proceed, but lenders should also be conscientious of the delays heirs may themselves experience in probating the estate.

If the heirs are successful in probating the estate, the appointment of an executor constrains lenders from holding a nonjudicial foreclosure sale earlier than six months from the date of the appointment. This allows the executor time to make arrangements concerning the property. Case law and best practices necessitate that such sale, if necessary, take place with notice to the executor.

It behooves the heirs or their attorney to reach out to the mortgage lender to make them aware of the borrower's death and inform the lender of their intentions towards the estate of the borrower. Doing so helps to ensure that the lender doesn't either prematurely foreclose upon the property in ignorance of the heirs' efforts or, in the alternative, initiate probate proceedings that result in unnecessary attorney's fees and costs. Often, a simple phone call to lender's counsel is enough to allow their heirs time to gather their resources and plan a course of action that ultimately avoids the necessity of foreclosure.

***Alexander Wolfe** is the Texas Foreclosure attorney for the Padgett Law Group. Wolfe handles bank and lender representations, including loan servicing and default-related legal services ranging from loss mitigation to foreclosure, bankruptcy, evictions, replevins, and litigation generally. He is based out of Padgett's new Texas office, and is licensed to practice in the State of Texas and in the United States District Courts for the Northern and Eastern Districts of Texas. Wolfe has practiced in the area of creditors' rights since 2010 and, prior to joining Padgett, worked as an associate and supervising attorney for two of the largest mortgage default firms in Texas.*

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# MOVERS & SHAKERS

## GARDEN TO SERVE ON CMBA BOARD

Maggie M. Garden, Director of Marketing and Client Relations at Bendett & McHugh, P.C., has been elected to serve on the Board of Directors for the Connecticut Mortgage Bankers Association.

Garden's roles at Bendett & McHugh include marketing, client/public relations, event coordinating, strategic planning, and corporate communications. In addition to her work with Bendett & McHugh, P.C., Garden also serves as Chairperson of the Connecticut Mortgage Bankers Association's (CMBA) Marketing/Communications Committee as well as the American Legal and Financial Network's Marketing and Women in Legal Leadership Committees. In 2010, Garden co-founded the Bendett & McHugh Miles for Miracles 5k and Family Fun Walk/Run. She has served as Race Director of this event for the past eight years which has helped raise over $40,000 for Connecticut Children's Medical Center."

## KENT MCPHAIL & ASSOCIATES JOINS LEGAL LEAGUE 100

Alabama-based Kent McPhail & Associates LLC is now a member of the Legal League 100. Established in September 1994, Kent McPhail & Associates has established a growing reputation in the southeastern United States as a firm that produces real results in the representation of creditors, who are its primary clients and its primary area of emphasis. Kent McPhail & Associates is headquartered in downtown Mobile, Alabama.

Kent McPhail & Associates primarily services creditors, and their areas of practice include bankruptcy, collection services, real estate foreclosure, probate, replevins, and subrogation, commercial, and consumer litigation.

## THE MORTGAGE LAW FIRM EXPANDS

The Mortgage Law Firm has announced its expansion into Oregon and Washington, adding to the firm's existing footprint of Arizona, California, Hawaii, and Oklahoma. Jason Cotton, Owner of The Mortgage Law Firm, said, "We opened these offices, first and foremost, to meet the current needs of our clients. But, the expansion is also a natural progression for our attorneys who grew up in the Pacific Northwest. It is important to The Mortgage Law Firm that we have meaningful roots in the states we represent and these states were a perfect fit." With the expansion it was announced that Renee M. Parker will be the Managing Attorney for the firm's Washington Office. She joined The Mortgage Law Firm in 2017, and has over 13 years' of experience handling foreclosure matters, complex bankruptcy and civil matters, title insurance issues and mortgage banking litigation."

## SCHNEIDERMAN & SHERMAN ADDS KIRBY TO TEAM

Michigan-based Schneiderman & Sherman, PC, a regional law firm with over 35 years' experience, announced the hiring of Krystal Kirby in the role of Marketing Director. Kirby will work under Neil Sherman, Managing Attorney.

Prior to accepting the position, Kirby served as Director of Marketing for Michigan's second largest real estate brokerage, Berkshire Hathaway HomeServices Michigan Real Estate. She will spearhead the firm's marketing functions across all practices and business lines.

Competitive landscape analysis, traditional and digital marketing, promotions, public relations, social media, and event management will be some of Kirby's key priorities for the firm. She will also be supporting philanthropic initiatives—a core value to both Schneiderman & Sherman and their new Marketing Director. Kirby is currently serving her first term on the Junior Board of Directors for the Bissell Pet Foundation. Her other affiliations include the American Marketing Association, Events Industry Council (the accrediting body for her CMP certification), and the Grand Valley State University Alumni Association.

## TROTT LAW ANNOUNCES MERGER

Michigan-based Trott Law P.C. has announced its expansion through a merger with Academy Law Group in Minnesota. Academy Law Group will now operate as Trott Law in Minnesota.

Academy Law Group is a full service default law firm, handling both private investor and GSE/FHA/VA files. After successfully representing banks and servicers for many years, they are dedicated to earning and maintaining a strong reputation for meeting the highest level of quality and customer service. The merger signifies a step into the future for both firms as they bolster its service offerings for clients through a new multi-state presence.

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