FLORIDA'S COURTS OF APPEAL TIGHTEN STANDING REQUIREMENTS FOR FORECLOSURES

The UCC was supposed to make enforcing negotiable instruments a simpler, more streamlined process. It has proven anything but in Florida. Continuing a trend that now stretches back years, mortgage lenders have had an increasingly tough time proving standing to the satisfaction of Florida's District Courts of Appeal in the last few months.

Florida's Fourth District Court of Appeal has long been the most vocal on the standing issue. *See e.g. McLean v. JP Morgan Chase Bank Nat. Ass'n,* 79 So. 3d 170 (Fla. 4th DCA 2012). The last few months have been no different. One opinion of particular note is *Snyder v. JP Morgan Chase Bank, Nat*. Ass'n, No. 4D13-4036, 2015 WL 4549529 (Fla. 4th DCA July 29, 2015). In *Snyder*, JP Morgan Chase Bank attempted to demonstrate its standing by virtue of the purchase and assumption agreement it had with the FDIC for the purchase of Washington Mutual Bank's assets after Washington Mutual was put into receivership by the FDIC. The Fourth DCA was not satisfied by this evidence. Instead, it held that to demonstrate standing under Florida's UCC as either a holder, or a non-holder in possession with the rights of a holder, the plaintiff must show physical possession of the original note, properly endorsed, at the time the Complaint was filed. Since the purchase and assumption agreement was silent as to possession of the original note, the Fourth DCA reversed the final judgment entered by the Trial Court.

Snyder seems completely at odds with the Second District Court of Appeal's opinion in *Stone v. BankUnited*, 115 So.3d 411 (Fla. 2d DCA 2013) which found that a virtually identical FDIC purchase and assumption agreement was satisfactory to demonstrate BankUnited's standing. Rather than certify conflict, the Fourth DCA distinguished *Stone* through an incredibly liberal reading of the facts in *Stone* which the Fourth DCA certainly would not have afforded*BankUnited* had the Fourth DCA heard *Stone* in the first instance.

Turning next to Florida's Fifth District Court of Appeal, the opinion in *Schmidt v. Deutsche Bank*, 40 Fla. L. Weekly D1807a, 5D14-1616 (Fla. 5th DCA July 31, 2015) takes a similarly strict tone. In *Schmidt*, the note in question contained a dated endorsement in blank which pre-dated the filing of the complaint. Based upon this, the witness at trial testified that the Plaintiff held the original note, endorsed in blank, before the case was filed. Two things militated against this testimony. First, the Complaint originally contained a lost note count which was dismissed. Second, on cross examination the witness identified only the dated

endorsement as support for the finding that the Plaintiff was the holder. On appeal Deutshe Bank pointed to provisions in the pooling and servicing agreement and a loan purchase agreement accepted into evidence as further support for the witness' testimony concerning holder status. Again emphasizing physical possession, the Fifth DCA reversed the trial court. The Fifth DCA was unsatisfied that the dated endorsement was probative in any way as to Plaintiff's physical possession and someone bizarrely held that neither the pooling and servicing agreement nor the loan purchase agreement suggested any intent by the assignor to transfer an interest in the note to the Plaintiff.

These opinions make it clear that possession of the note is king, and that regardless of the extent of the collateral agreements which suggest an intent to transfer an interest in the note and mortgage to the plaintiff, increasingly the only safe way to prove standing is by showing possession of the original note, properly endorsed, before the Complaint was filed.

Both of these cases also show Florida's District Court of Appeals reviewing the facts on appeal with a jaundiced eye. The UCC was supposed to make submitting loan purchase agreements unnecessary as the note and its endorsements spoke for itself as to who was the proper party to give a foreclosure judgment. Instead Florida's courts are increasingly asking for a quantum of proof many lenders and loan servicers have struggled to find in record keeping systems created with the UCC's supposedly streamlined approach in mind. Those prosecuting foreclosures need to catch up with this new mindset. While some industry members had systems in place to track collateral files on a day to day basis, others did not. Where old record keeping systems are failing to keep up with the burden of proof now imposed by Florida's courts, there is a need to get creative to squeeze out of these older systems whatever evidence of note possession they contain. Thus, bailee agreements, servicing notes, electronic meta-data on images (showing the date someone put the original into a scanner), mailing logs and receipts, and other such documents have taken on new importance for foreclosure practitioners attempting to fill gaps left by less than optimal record keeping practices of yesteryear. While newly imposed requirements for filing foreclosures in Florida (see Fla. R. Civ. P. 1.115, requiring a certification of original note possession for all new foreclosures) will decrease the need for such creativity going forward, for older cases, the importance of diligently locating evidence of possession of the original note cannot be overlooked.