ADMISSIBILITY OF PRIOR SERVICER RECORDS

On Nov. 5, 2014, the Fourth District Court of Appeal issued its opinion in Holt v. Calchas, LLC – So. 3d – (Fla. 4th DCA Nov. 5, 2014), a foreclosure action involving a note and mortgage that was not originated by the plaintiff. The decision represents the second time within a month that an appellate court in Florida confronted the issue of the admissibility of account records of prior note holders under the business records hearsay exception. The Holt decision represents a third approach taken by the appellate courts to address the issue of prior loan records and highlights differences amongst the courts regarding the admissibility of such records.

The Fourth District's Decision in Holt

In Holt, after foreclosure was filed by the original lender, the loan was transferred and there were two substitutions of party plaintiff. After judgment in favor of the plaintiff, the borrower appealed, arguing, among other things, that the trial court had erred by admitting the loan payment history records of the prior holders. At trial, the asset manager of the current holder testified that he knew about the prior holders' record keeping practices only because they appeared to follow "generally accepted servicing practice," according to their record-keeping system. He did not identify any particular record-keeping system used by the prior holders and had no personal knowledge regarding their systems.

The Fourth District agreed with the borrower and held that a witness's general testimony that a prior holder follows standard record-keeping practices, without any specific details to establish compliance with the business records exception, is insufficient to establish the proper foundation for admissibility. Because the plaintiff's witness lacked specific knowledge of the record-keeping practices of the prior holders, the court agreed that the prior loan histories should not have been admitted under the business records exception provided in Section 90.803(6), Florida Statutes.

To address the issue of prior records, the Fourth District explained that the payment records of prior holders would be admissible as business records if they were self-authenticated under Section 90.902(11), Florida Statutes, which provides:

(11) An original or a duplicate of evidence that would be admissible under s. 90.803(6), which is maintained in a foreign country or domestic location and is accompanied by a certification or declaration from the custodian of the records or another qualified person certifying or declaring that the record:

(a) Was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person having knowledge of those matters;

(b) Was kept in the course of the regularly conducted activity; and

(c) Was made as a regular practice in the course of the regularly conducted activity,

provided that falsely making such a certification or declaration would subject the maker to criminal penalty under the laws of the foreign or domestic location in which the certification or declaration was signed.

Because the prior history records were not certified by the prior servicer (i.e., they were not self-authenticated) and the testimony did not establish a sufficient foundation for the records to be admitted under the business records exception, the Fourth District reversed and remanded for further proceedings.

The Alternative Approaches Taken By the Second District and the First District

The First and Second District also have addressed the issue of the admissibility of the payment histories of prior holders.

Less than three weeks before the Fourth District issued its opinion in Holt, the First District issued its opinion in Burdeshaw v. The Bank of New York Mellon, et al., 148 So. 3d 819 (Fla. 1st DCA 2014)(see Greenberg Traurig Financial Services Litigation Alert, November 2014). In that case, the loan at issue had been transferred twice before foreclosure proceedings were brought by the current holder. At trial, the current holder had called as a witness the "default proceedings officer" of its immediate predecessor-in-interest, who relied on a printout from the prior holder's computer system. She did not know how fees and expenses were posted to the account and had no personal knowledge regarding the loan origination or payments made to

the original holder. Reversing judgment in favor of the current holder, the First District held that the plaintiff had failed to establish the outstanding loan balance and that evidence regarding the prior loan history was inadmissible hearsay. The court did not address whether the records were, or could be self-authenticated. The First District remanded for entry of judgment in favor of the defendant borrower, refusing to allow the holder an additional opportunity to retry the case.

The Second District also has addressed this issue in WAMCO XXVIII, Ltd. v. Integrated Electronic Environments, Inc., 903 So. 2d 230 (Fla. 2d DCA 2005). In that case, the loan in question was originated by a bank, which thereafter had gone through several mergers, and then sold to the holder that filed suit. The sole witness at trial was an employee of the current note holder and its servicer, who testified that plaintiff relied on the documentation and balance information that it received from its predecessor at the time it acquired the loans. He admitted that while he did not know the specific person who would have put information into the prior holders system, he knew how bank loan accounting systems worked and that the procedures were "bank-acceptable accounting systems." He added that he reviewed the records received from the prior holder, and he described the process that plaintiff uses to verify the accuracy of information received in connection with loan purchases. The trial court thereafter entered judgment in favor of the borrower on grounds that there was a lack of admissible evidence to prove the debt. The Second District reversed. Without discussing authentication, the court held that the records may be excluded from evidence if "the sources of information or other circumstances show a lack of trustworthiness," and that in the absence of such a showing, the prior records should have been admissible and supported judgment in favor of the holder.

Reconciling the Appellate Cases

These three cases represent the spectrum of approaches to the admissibility of prior loan histories. At one end, the First District's holding in Burdeshaw appears to take the most rigid view, requiring that the loan records of each prior holder be authenticated by a witness with personal knowledge regarding the record-keeping system of that holder. At the other end, the Second District's WAMCO holding appears to permit the records of a prior holder to be admitted if the records are kept in "bank-acceptable accounting

systems," the note purchaser engages in a verification procedure, and there is no showing as to a lack of trustworthiness of the records.

The Fourth District's position appears to be a middle ground. While unwilling to allow general, unspecific testimony to establish the elements of the business records exception, it did not require that representatives of each prior holder testify to authenticate the records. Instead, the court provided a "road map" for current holders to follow in cases in that district:

When the current note holder produces at trial a certification in accordance with section 90.902(11) as to the payment history maintained by each previous note holder, and then provides a witness to authenticate the records attributable to the current note holder, the records of payment history should be admissible. Such a procedure would assure compliance with all of the requirements for admission of a business record which relies in part on records from a prior note holder. The procedure would also satisfy the personal knowledge requirement for records kept by the previous note holder.

While note holders should remain mindful of the differences between the districts, the holding in Holt may offer guidance to current note holders, as well as prospective loan purchasers. Self-authentication may help avoid unnecessary, if not impossible to obtain, testimony of multiple live witnesses and, in the case of loan acquisitions, the certification of loan histories could be included as documentation to be delivered at closing.