

## **Foreclosure Standing – Another Evidentiary Trap for the Unwary Lender**

It looks like standing is the flavor of the month in foreclosure defense and the issue that lenders need to make sure that they are addressing at trial. Two recent Florida appellate court decisions highlight this issue.

In [\*Michael Sorrell v. U.S. Bank National Association\*](#), Fla. 2d DCA Case No. 2D14-3883 (Apr. 6, 2016), Florida's Second District Court of Appeal reversed a final judgment of foreclosure based upon a finding that the lender's "evidence was legally insufficient to prove that it had standing when it filed the Complaint." The note that was attached to the complaint (which was payable to the original lender, was not endorsed, and did not include an allonge) and the mortgage that was attached to the complaint were both in favor of the original lender. The plaintiff filed an amended complaint with an assignment of the mortgage attached, but no additional documents related to the note, and the borrower asserted a defense of lack of standing. The plaintiff then filed the original note and mortgage and a copy of the assignment of mortgage, along with an undated allonge, which was a separate document from and not affixed to the note. No testimony or documentary evidence was offered at trial to establish the date that the plaintiff acquired the note and mortgage; specifically, that the plaintiff owned and held the note and mortgage on the date that the case was filed. Similarly, no evidence was presented to prove when the allonge was created, signed or attached (if it ever was) to the note. The trial court entered final judgment of foreclosure, but the appellate court reversed because the plaintiff had not established that it had standing to foreclose on the date that the complaint was filed. The lack of documentary and testimonial evidence doomed the plaintiff's case and the 2d DCA remanded with instructions for the trial court to dismiss the case.

Similarly, Florida's Fourth District Court of Appeal reversed and remanded with instructions to enter judgment in favor of the borrowers in [\*Susan Elman and Bruce Elman v. U.S. Bank, N.A.\*](#), 4<sup>th</sup> DCA Case No. 4D14-2520 (Apr. 6, 2016). In *Elman*, the plaintiff sought to enforce, as the "holder", a note with an undated special endorsement allonge. However, the note and the allonge referenced different loan numbers. At trial, the plaintiff was not able to establish the date that the allonge was affixed to the original note and other evidence made it, at best, unclear as to who possessed the note when the complaint was filed. The 4<sup>th</sup> DCA relied on the proposition that a plaintiff that is seeking to enforce a note, but is not the original payee, must "prove not only a blank or special endorsement in its favor, but also that the endorsement was placed on the note before it filed the original complaint." In *Elman*, the appellate court found that endorsement and allonge

were undated and the evidence at trial did not establish that the plaintiff possessed the original note with the allonge affixed thereto as of the date that the complaint was filed. Accordingly, the 4<sup>th</sup> DCA found that the plaintiff failed to prove that it had standing to foreclose.

These cases and others like them stand as a stark reminder to lenders of the importance of presenting sufficient evidence at trial to prove that they had standing at the time that they filed their foreclosure actions. When a lender seeks to enforce a note and mortgage to which it is not the original payee pursuant to an undated endorsement or allonge, it is crucial that it present evidence establishing that it had the right to enforce that note at the time that it filed its complaint.