MORTGAGE LOAN HISTORIES ARE NOT HEARSAY

Bayview Loan Servicing LLC v. Wicker, Case No. 3 WAP 2018, --- A.3d ----, 2019 WL 1388516 (Pa. Mar. 28, 2019), clarifies that in Pennsylvania state court, **a servicer pursuing foreclosure may succeed in getting loan records from prior servicers admitted into evidence without testimony from every prior servicer**.

In a ruling favorable to mortgage servicers, the court refused to adopt a "bright line rule forbidding the authentication of documents recorded by a third party." Instead, the court ruled that trial courts have broad discretion to allow admission of such third-party records under Pennsylvania Rule of Evidence 803(6).

Business records, including mortgage loan histories, are hearsay. But when a business can provide a witness to testify that someone with personal knowledge prepares its records, at or near the time of the event they record, and that it regularly keeps such records in the ordinary course of business, those records become admissible under Rule 803(6) unless they are untrustworthy.

A problem commonly arises in foreclosure cases when a mortgage loan has changed servicers over the years. The servicer pursuing foreclosure typically has incorporated records from a prior servicer into its own, and relied on those records. But the current servicer may not be able to offer a witness to explain how *prior* servicers kept their records.

Courts have handled this problem in different ways. Federal courts, applying Federal Rule of Evidence 803(6), generally have permitted the current business to bring in third party-created evidence, calling it "integrated" business records. See *Air Land Forwarders v. United States*, 172 F.3d 1338, 1342 (Fed. Cir. 1999). ("Other courts of appeal ... have generally held that a document prepared by a third party is properly admitted as part of a business entity's records if the business integrated the document into its records and relied upon it.") State courts have not always agreed. In Maine, for instance, a servicer must bring a witness who can specifically address the practices of every past servicer to gain admission of the full loan history. See *Beneficial Maine Inc. v. Carter*, 25 A.3d 96 (Maine 2011).

In its March 28 ruling in *Wicker*, the Pennsylvania Supreme Court took neither extreme. The court stated that the issue was "whether records containing information originally recorded by the first company may be authenticated by an employee of the current holder of the loan or whether the litigant must provide an employee of each of the prior holders of the loan…." The court then ruled that the

trial court acted within its discretion in accepting the evidence solely through a witness employed by the current servicer.

The *Wicker* court reasoned that the current servicer had relied on the older records. It also observed that the records did not contain obvious factual inaccuracies or lapses in time that would bring into question their trustworthiness. The court added that the witness had described an extensive "boarding" process aimed at ensuring an accurate transfer of the records. Finally, the witness had testified that because both the old and new servicers used the same loan-history software, the practices across the two servicers were similar. The court used broad language to affirm that accepting evidence in situations like this would be a matter for the trial court's discretion.

After *Wicker*, mortgage servicers in Pennsylvania state court *can* use one qualified witness to bring into evidence loan histories that include former servicers' records. But in doing so, they must ensure that the file is in order, has no troubling inaccuracies, and that the witness is familiar with the "boarding" process. It also would be prudent to use witnesses with some broader knowledge of the servicing industry and how loan events are recorded. Significant factual failings in any case could lead to the loan history being excluded from evidence, and thus, a lost foreclosure trial.