TRIAL COURT IMPROPERLY FAILED TO ALLOW PRIOR SERVICER'S RECORDS INTO EVIDENCE

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The District Court of Appeal of the State of Florida, Fifth District, recently reversed the entry of a judgment in favor of two borrowers in a foreclosure action, and confirmed that a current servicer does not need to present testimony from an employee of a prior servicer in order to admit the business records of the prior servicer into evidence at trial.

A copy of the opinion is available at: **Link to Opinion.**

The borrowers obtained their mortgage loan in 2006. They defaulted, and the prior servicer brought a foreclosure action in 2009. At that time, the borrowers sent a letter to the prior servicer acknowledging they were in default and asking for a loan modification. While the foreclosure action was pending, a new servicer began handling the loan.

At the trial for the case, the new servicer wanted to admit into evidence: (1) a computer printout from its system showing the loan was in default, (2) the payoff quote, and (3) the breach letter sent by the prior servicer.

To admit these records, the new servicer offered the testimony of a default case specialist it employed, who had also worked for the prior servicer. The default specialist testified that the new servicer makes and maintains the records in the ordinary course of its business, that the data entries are made at or near the time the event took place, that the entries are made from a person with knowledge, and the records are kept pursuant to procedures to be relied upon at a later date.

Next, the employee testified about how the new servicer received information from the prior servicer and incorporated the information into the new servicer's system. She testified that the new servicer verified the accuracy of the prior servicer's payment history before integrating it into the new servicer's system.

She also testified at length about the "boarding process" the new servicer used whenever it purchased a loan from another company. During that process, the new servicer reviews the loan information to ensure it is correct and matches the information on the original loan documents. She testified

that they do not board a loan if it has inaccuracies or if there is a gap in the payment history.

Regardless, the trial court refused to admit the documents into evidence. The basis for this appeared to be that the witness had not personally boarded the loan, and because several of the documents were prepared by the prior servicer.

Business Records Exception Applied

The Appellate Court reversed the trial court. It started by describing the basic four-part predicate for the business records exception codified by Florida Statute § 90.803(6): i.e., the record (1) was made at or near the time of the event, (2) was made by or from information transmitted by a person with knowledge, (3) was kept in the ordinary course of regularly scheduled business activity, and (4) was made as part of the regular practice of the servicer. Then, the Court turned to the application of the business records exception to situations involving the mortgage industry.

First, the Fifth District noted that the authenticating witness need not be the person who actually prepared the business record. Rather, the authenticating witness need only establish the proper foundation. To do so, the witness must demonstrate that he or she is familiar with the record-keeping system and how data is uploaded into the system.

The Appellate Court noted that "in a perfect world," the plaintiff in a foreclosure action would present testimony from an employee of the prior servicer. However, the Court also noted that this is "neither practical or necessary in every situation." And the Court cited to a recent ruling where it held that a current note holder need not present testimony from the previous note holder to admit the previous holder's records. See Le v. U.S. Bank, 40 Fla. L. Weekly D1214c (Fla. 5th DCA May 22, 2015) (finding it was not an error to allow a witness employed by the bank's current loan servicer to testify about payment history information contained in records obtained from a prior servicer, where the witness's testimony met all the necessary foundational requirements for admission under section 90.803(6)).

The Appellate Court also quoted, at length, a recent Fourth District opinion holding that: "Where a business takes custody of another's business records and integrates them within its own records, the acquired records are treated as having been 'made' by the successor business, such that both records

constitute the successor business's singular 'business record.' " In that situation, the successor business (here, the new servicer) need only show that the other requirements of the business records exception are met, and the records are trustworthy.

Guidance on How to Meet 'Trustworthiness' Requirement

The Fifth District also provided guidance on how a company can meet this "trustworthiness" requirement.

First, the successor business cannot simply rely on the original business's records. Instead, the successor business needs to show how its relationship or contractual obligations with the original business "ensures a substantial incentive for accuracy." Or, the successor business can meet this requirement by showing it has independently confirmed the accuracy of the records.

Applying this reasoning to the mortgage context, the Appellate Court held that "a mortgage servicer enforcing a note it has acquired from another entity can lay the proper predicate under section 90.803(6) for admitting the records of the previous entity, so long as all the requirements of the business records exception are satisfied, the witness can testify that the successor business relies upon those records, and the circumstances indicate the records are trustworthy."

Accordingly, due to the testimony offered in the lower court, the Appellate Court held that the trial judge should have admitted the records. Even though the witness did not personally participate in the "boarding" process, the Fifth District held, she showed she was familiar enough with the process to testify about it.