USE OF INTEGRATED RECORDS FROM PRIOR SERVICER

The U.S. Court of Appeals for the First Circuit recently affirmed a mortgage foreclosure judgment, holding that the district court properly admitted into evidence a computer printout from the loan servicer containing incorporated information from prior loan servicers.

A copy of the opinion in *U.S. Bank Trust, N.A. v. Jones* is available at: Link to Opinion.

The plaintiff borrower defaulted on her mortgage loan and the bank filed a diversity action in the U.S. District Court for the District of Maine. "At trial, [the bank] sought to establish the total amount owed on the loan account by introducing a computer printout … that contained an account summary and a list of transactions related to the loan. The District Court admitted [it] into evidence and relied on it in granting judgment to [the bank]…"

On appeal, the borrower argued "that admitting [the printout] violated the Federal Rules of Evidence." Reviewing "the district court's interpretation of the Federal Rules of Evidence *de novo*, but its application of those Rules for abuse of discretion[,]" the First Circuit affirmed.

The First Circuit reasoned that "Rule 803(6), known as the business records exception, authorizes the admission of certain documents under an exception to the usual prohibition against the admission of hearsay statements, that is, statements by an out-of-court declarant offered into evidence to prove the truth of the matter asserted."

The borrower argued that admitting the printout was improper because it summarized some transactions that were created by two prior loan servicers, whose records were "integrated" into the current servicer's "database when [it] succeeded them as servicer." Thus, the printout was inadmissible "unless supported by testimony of a custodian or qualified witness with personal knowledge of the record keeping of the respective prior servicers."

The Court rejected this argument because "**there is no categorical rule barring the admission of integrated business records under Rule 803(6) based only on the testimony of a representative of a successor business. … Rather the admissibility of the evidence turns on the facts of each case."**

The First Circuit explained that "we have affirmed the admission of business records containing third-party entries without third-party testimony **where the entries were 'intimately integrated' into the business records, … or where the party that produced the records 'relied on the [third-party] document and documents such as those in his business…."**

On the other hand, "we have rejected the admission of business records containing or relying on the accuracy of third-party information integrated into the later record where, for example, the later business did not 'use a procedure for verifying' such information, lacked a 'self-interest' in assuring the accuracy of the outside information,' or sought admission of third-party statements made 'by a stranger to it,' … The key question is whether the records in question are 'reliable enough to be admissible.'"

The First Circuit concluded that the district court did not abuse its discretion in finding the computer printout "with its integrated elements reliable enough to admit under Rule 803(6)." It reasoned that an employee of the servicer testified that "the servicer relied on the accuracy of the mortgage history and took measures to verify the same." In addition, the borrower did not dispute the accuracy of the printout based on "overbilling or unrecorded payments, as she surely could have done if the records were inaccurate."

The Court rejected the borrower's argument that the servicer's employee was not a qualified witness under Rule 803(6)(D) because she "was not personally involved in the creation of [her employer's] records and lacked knowledge about how prior loan servicers maintained their records" because "a 'qualified witness' 'need not be the person who actually prepared the record.' … Rather, a 'qualified witness' is 'simply one who can explain and be cross-examined concerning the manner in which the records are made or kept.'" Because the witness "provided detailed testimony regarding how [the servicer] maintained its records, … and how it verified the accuracy of the records it got from other servicers,…" she "was 'qualified' within the meaning of Rule 803(6)."

In addition to finding the servicer's witness was competent to testify under Rule 803(6), the First Circuit rejected as "simply unrealistic" the borrower's argument that the servicer's reliance on the accuracy of the prior servicer's incorporated records had no evidentiary weight because the servicer was not the holder of the note, who would be the one to suffer if the records were proven inaccurate. The Court reasoned that if the servicer "is shown to be claiming unsupportable facts about an account's history, to the financial detriment of … the assigned payee of a

mortgagor's note, [the servicer's] business with [the payee] will suffer accordingly, as will its appeal in the eyes of other note holders who contract or might contract with [the servicer]."

The First Circuit made short shrift of the borrower's remaining arguments that the district court's admission of the loan history printout violated Federal Rules of Evidence 901, 1001, and 1002, concluding there was no abuse of discretion in admitting the printout because the witness was "knowledgeable, trained, and experienced" in analyzing the servicer's records and she testified that the loan history "is an accurate printout from [the servicer's] database."

Finally, the First Circuit rejected the borrower's argument that the district court improperly awarded the bank "approximately $23,000 for escrow, title fees, and inspections that were not recoverable under the terms of her promissory note" because the note permitted recovery of "costs and expenses in enforcing this Note to the extent not prohibited by applicable law" and "they likely would not have been incurred absent [the borrower's] breach."