Foreclosure Defense and Mediation

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Fighting Together for Economic Justice

Authority to Foreclose

- U.S. Bank, N.A. v. Kimball, 27 A.3d, 1087 (2011)
  - Foreclosing party must have assignment of mortgage, but “the mortgage is an incident to the note”
  - Foreclosing party has burden to demonstrate it is “person entitled to enforce “ the note, defined with reference to 9A V.S.A. § 3-301
  - “Because the note is a negotiable instrument, it is subject to the requirements of the UCC.”

9A V.S.A. § 3-301

- "Person entitled to enforce" an instrument means
- (*i*) the holder of the instrument,
- (*ii*) a nonholder in possession of the instrument who has the rights of a holder,
- or (*iii*) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to section 3-309 [lost note] or 3-418(4) [mistake in payment].

“Holder” of a Negotiable Instrument

- Holder of negotiable instrument has presumptive right to enforce it.

  U.C.C. § 3-308(b)

- “Holder” is a “person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession.
  - U.C.C. § 1-201(21)

“Negotiation” of a Promissory Note

- Possession is essential element of being “holder.”
- Whether bearer paper or order paper, there must be **transfer of possession** of negotiable instrument to the new holder.

A Lost Note

- 9A V.S.A. § 3-309
  - Party seeking to enforce lost note must prove, *inter alia*:
    - It was was in possession of the instrument and entitled to enforce it when loss of possession occurred;
    - The terms of instrument and its right to enforce it
  - Court may require bond, other protection to debtor

U.S. Bank v. Kimball

- U.S. Bank, N.A. v. Kimball, 27 A.3d, 1087 (2011)
- Issue of *timing* of indorsement to note
- Two versions, undated indorsements, either 2005 or 2009
  - One makes plaintiff a holder, the other doesn't
- "U.S. Bank was required to show that at the time the complaint was filed it possessed the original note either made payable to bearer with a blank endorsement or made payable to order with an indorsement specifically to U.S. Bank."
- Bank didn't meet burden of proof for S.J.

U.S. Bank v. Kimball

- Not addressed: impact of timely motion under Rule 17(a)
  - Can bank cure retroactively cure defect in standing?
- Evidentiary issues
  - Admissibility of evidence of timing of indorsement
- Effect of dismissal for lack of standing
  - May be dismissal without prejudice
  - this may be an “ephemeral victory” for the homeowner

Borrower's standing to challenge loan document transfers

- Dernier v. Mortgage Network, Inc., 97 A.3d 465 (2013)
- Borrower seeks declaratory judgment bank has no right to enforce mortgage or note
- Argues note is void because transferred late to trust and indorsement forged (by robosignor)
- Issue: do borrowers have standing to challenge these transfers?
  - Yes, if challenge as void (enforceable by nobody)
  - No, if goes to voidability (by parties to transfer)
  - Transfers in violation of PSA are only voidable

Pre-Foreclosure Notice

- No Vermont statutory requirement for a pre-acceleration or pre-foreclosure notice to borrower
- BUT
- Most form mortgages require a pre-foreclosure notice
- The standard GSE form mortgage ¶ 22 requires pre-foreclosure notice of:
  - Pre-acceleration right to cure within 30 days
  - Post acceleration right to cure until foreclosure sale
  - Borrower's right to contest a foreclosure

Notice Defense to Foreclosure

- Compliance with *contractual* notice requirement is condition precedent to lender's right to foreclose
- Complaint should include specific allegation of compliance
- Plaintiff's burden to produce evidence of compliance with mortgage's notice requirement to obtain summary judgment

Notice Defenses

- Affirmative defense if notice defective:
  - Lack of receipt, defective service
  - Notice not timely
  - Cure rights not properly described
  - Erroneous cure amount
  - Failure to identify the foreclosing party accurately

Notice Defects

- Compliance with ¶ 22 as condition precedent to foreclosure:
  - CitiBank, NA v. Castillo, 32 NYS 3d 441 (N.Y. App. Div. 2016)
  - Aurora Loan Services, LLC v. Condron, 186 A.3d 708 (Conn. Ct. App. 2018)
- Strict compliance with ¶ 22 vs. substantial compliance:
  - Fed Nat'l Mortg. Assoc. v. Marroquin, 74 N.E. 3d 592 (Mass. 2017) (no foreclosure because right to cure described as conditional)
  - Pinti v. Emigrant Mortg. 33 N.E.3d 1213 (Mass. 2013) (notice misrepresented procedure to challenge foreclosure)

Breach of Contract Claims and Defenses

- DON’T argue borrower has cause of action to enforce
  - the servicing agreement
  - a servicing guide
  - a pooling and servicing agreement
  - borrowers are not parties to these agreements
- DO argue in appropriate case that decision to foreclose breaches the mortgage contract between the borrower and the lender.

Breach of Contract Defenses and Counterclaims

- GSE form mortgage authorizes lender to invoke foreclosure remedies as "permitted by applicable law" ¶ 22
- The GSE form mortgage says:
  - **" 'Applicable Law'** means all controlling applicable federal, state and local statutes, regulations, ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions." Definitions (H)

Showing Breach of Contract

- Foreclosure contrary to “applicable law”
  - RESPA
    - Dual tracking violations
    - Failure to correct Notice of Error
  - Servicing guides and contracts set industry standard for reasonableness and fairness of lender conduct
    - Consumer Fraud Act
    - Covenant of good faith and fair dealing
    - Good faith in foreclosure mediation

VT Consumer Fraud Act

- Prohibits “unfair” or “deceptive” acts and practices in commerce. 9 V.S.A. § 2453
- Applies to mortgage lending and servicing
  - In re Weaver, 2015 WL 4722615 (Bankr. D. Vt. Aug. 7, 2015)
- Private right of action for equitable relief and monetary damages (compensatory and exemplary). 9 V.S.A. § 2461
- Mandatory attorney’s fees to prevailing plaintiff
  - Gramatan Home Investors Corp. v. Starling, 470 A.2d 1157 (Vt. 1983)

What is “deceptive?”

- Must be a representation, omission, or practice likely to mislead the typical consumer;
- The consumer must be interpreting the information reasonably under the circumstances;
- The misleading effects must be material, that is, likely to affect the consumer's conduct or decision regarding the service/product.
- An objective standard focuses on “capacity” or “tendency” of act to deceive (not specific intent)
  - Carter v. Gugliuzzi, 716 A.2d 17 (Vt. 1998)

Deceptive servicing practices

- Failure to disclose loss mitigation options accurately
- Misrepresentations as to eligibility or standards applicable to loss mitigation options
- Proceeding with foreclosure when loss mitigation review not complete
- Claims for amounts not due or not authorized by contract

What is “unfair?”

- An act or practice that:
- Offends public policy as it has been established by statutes, the common law, even though not formally declared unlawful
- Is within at least the penumbra of some common-law, statutory, or other established concept of unfairness;
- Is immoral, unethical, oppressive or unscrupulous;
- Causes substantial injury to consumers
  - Christie v. Dalmig, Inc., 396 A.2d 1385 (Vt. 1979)

“Unfair” servicing practices

- Harmful acts in derogation of industry standards as embodied in servicing guidelines
  - Reference servicing guides (Fannie, Freddie guides)
  - FHA, VA, RHS regulations
  - RESPA
  - Servicing contract and PSA
- Servicing errors that reflect systemic problem with servicer’s handling of accounts
- Abuse of superior bargaining power

Loss Mitigation and UDAP Claims

- Wigod v. Wells Fargo Bank, 673 F.3d 547 (7th Cir. 2012) (servicer misrepresented that borrower's eligibility for permanent modification)
- Tanasi v. CitiMortgage, Inc., 257 F. Supp. 3d 232 (D. Conn. 2017) (servicer repeatedly requested duplicative or unnecessary information)
- Henderson v. Wells Fargo Bank, N.A., 2016 WL 324939 (D. Conn. Jan. 27, 2016) (lender induced homeowner to abandon mediation, enter into a trial payment agreement, and make payments, but then failed to offer a modification and moved to foreclose)

Breach of Covenant of Good Faith and Fair Dealing

- Covenant extends to “assertion, settlement, and litigation of contract claims”
- Breached by inaction, lack of due diligence in performing contract obligations
- Can apply where servicer’s actions caused or furthered the default
- Prohibits party to contract from taking advantage of “necessitous circumstances” of the other party
  - Monahan v. GMAC Mortgage Corp., 893 A.2d 298 (Vt. 2005) (servicer mishandled escrow account, failed to timely correct error, and tried to foreclose)

Negligence

- Must establish servicer has duty of care to borrower
- General rule is financial institution has no such duty to borrower
- But affirmative acts by servicer to undertake loss mitigation review can trigger duty to act with reasonable care
  - Tanasi v. Citi Mortgage, Inc., 257 F. Supp. 3d 232 (D. Conn. 2017) (referencing servicer duties under RESPA)
  - Daniels v. Select Portfolio Servicing, Inc., 201 Cal. Rptr. 3d 390 (Cal. Ct. App. 2016) (servicer under duty of care in handling loss mitigation)

Foreclosure Mediation

- One stated purpose of statute is to assure the “application of government loss mitigation program requirements in actions of foreclosure of mortgages” 12 V.S.A. § 4631(a)
- These “programs” include: guidelines for GSEs, FHA, VA, and RHS guaranteed loans 12 V.S.A. § 4631(e)(2)

Foreclosure Mediation

- Covered “government loss mitigation program” also includes loans subject to a “federal law or regulation regarding the notification, consideration, or offer of any loss mitigation options” 12 V.S.A. § 4631(e)(2)(D)
  - Should include broad range of private loans subject to RESPA loss mitigation rules 12 C.F.R. § 1024.41
  - RESPA sets out detailed notice and time frames for servicers’ reviews of loss mitigation applications
  - Also th CARES Act

Pre-Mediation Conference

- Within 45 days of mediator appointment
- Review status of information exchange
- Identify documents still needed
- Set deadlines to provide documents
- Set time frame for review of loss mitigation application
- Parties to cooperate “in good faith” in exchanging documents
- Duty to provide documents in “timely manner”
  - 12 V.S.A. § 4633

Exchanging and reviewing documents and information

- What is “timely?”
- What are standards for “good faith?”
- RESPA rules, major servicing guides (GSEs, FHA, VA, RHS) set time frames for the completion of loss mitigation reviews
- The servicing guides typically define “the criteria for the program and the inputs and calculations used in determining the homeowner's eligibility” *See* 12 V.S.A. § 4633(a)(3)(B)
- These are industry standards for good faith in the conduct of loss mitigation reviews, and timeliness

Court's role in mediation

- Court receives and reviews mediator report
- Court assesses compliance with
  - Mediation statute AND
  - "at a minimum, with any applicable government loss mitigation program requirements." 12 V.S.A. § 4635(a)
- Court can independently assess good faith in applying applicable servicing guidelines

Good Faith Considerations

- Delays, obstructions of mediation process
  - Claiming non-receipt and demanding redundant documents
  - Use of stale or erroneous inputs
  - Delay in review and in giving decisions *See* 12 C.F.R. § 1024.41(c)
  - Inconsistent decisions
  - Not seeking waiver of investor guidelines
  - Servicing transfer delays. *See* 12 C.F.R. §§ 1038(b)(4), 1024.41(k)
  - Not implementing option, such as a conversion

Good Faith Considerations

- Misrepresentations
  - Misstating content of applicable servicing guidelines
  - Misrepresenting amounts due, other inputs
  - Unauthorized terms in modification or other option offered
  - Erroneous determination of ineligibility
  - Falsely claiming investor restriction
  - Unilateral imposition of arbitrary deadlines

Good Faith Considerations

- Violations of statutory requirements
  - Not appearing for mediation (absent statutory exception or court approval)
  - Sending representation without authority
  - Sending representative who is unprepared, without knowledge
  - Failing to provide inputs, calculations, guidelines used for review
  - No clear explanation of decisions
  - Failure to document claimed barriers to approval

Sanctions for Non-Compliance

- Court may impose sanctions for non-compliance with mediation statute, including:
  - tolling of interest, fees, and costs;
  - reasonable attorney's fees and costs to defendant;
  - monetary sanctions;
  - dismissal without prejudice; and
  - prohibiting the mortgagee from selling or taking possession of the property that is the subject of the action with or without opportunity to cure as the court deems appropriate.
    - 12 V.S.A. § 4635(b)

Sanctions Decisions

- Compare
- U.S. Bank, N.A. v. Sawyer, 95 A.3d 608 (Maine 2014) (foreclosure complaint dismissed with prejudice after repeated delays by servicer, failure to give decisions; no showing of bad faith required)
- Indymac Bank, F.S.B. v. Yano-Horoski, 912 N.Y.S. 2d 239 (N.Y. App. Div. 2010) (sanction of cancellation of note and mortgage not authorized by statute and contrary to lender's due process rights)

Sanctions Decisions

- Tolling of interest, fees, costs appropriate from time bad faith conduct began until corrected (both retroactive and prospective)
- Borrower's counsel should keep track of time incurred due to servicer delay
- Sanctions more likely to be upheld where servicer's due process rights respected:
  - Clear notice of performance expected
  - Clear deadlines
  - Warning of sanctions

Mediation Sanctions Orders

- 12 V.S.A. § 4635(b)
- U.S. Bank v. Lisman, 2016 WL 8078137 (Vt. Super. Ct. May 1, 2016) (excluding interest accrued during protracted mediation and $13,193 in “servicing expenses,” directing servicer to implement certain proposed mod terms; $8,847 attorney’s fees to borrower)
- Bank of America v. Conrad, No. 246-5-12 Wmcv (Oct. 15, 2013) (setting deadline to complete mediation, limiting document requests, no assessment of fees and interest over past 10 mos.; attorney’s fees to borrower)

Mediation Sanction Orders

- Ocwen Loan Serv., LLC v. McCoy, Maine Dist. Ct. No. RE-16-392 (Mar. 30, 2012) (tolling interest, fees, collection costs and barring from these from modified UPB, attorneys fees and costs to borrower, fine to court)

  Deutsche Bank Nat. Tr. Co. v. Husband, 13 N.Y.S. 3d 849 (N.Y. Sup. Ct. 2015) (directing implementation of mod terms (2% interest rate) to date five years earlier when mod should have been approved)

Federal Claims and Defenses

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Hypothetical

Part 1: For 4/15/2020 Webinar

- After the death of her spouse, Amy Debet fell behind on her mortgage. Both she and her spouse were on the mortgage and note. She used the Fannie Mae loan look up online and found out her loan was guaranteed by Fannie Mae. She requested and received a BRP Form 710 from her loan servicer, Large Loan Servicing (LLS) and provided all the documents they requested in a timely manner including the completed BRP, financial documents, and death certificate. Before they could give her an answer, LLS transferred the loan to Huge Loan Servicing (HLS). Amy reached out to LLS and HLS about her loan modification application but heard nothing. HLS then sent her a solicitation letter asking her to provide a whole new loan modification application. Amy complied and sent in the documents requested including the BRP and financial documentation. Three months later, HLS sent her a notice acknowledging her application and asking for a BRP for "all financial contributors." Amy lives alone. There are no other "financial contributors" and she explained this to HLS. HLS then sent a notice denying the modification stating she failed to provide the requested documents.

- Amy sent a Request for Information (RFI) and Notice of Error (NOE) to HLS explaining that she had a complete application with LLS, asked HLS to connect with LLS to get the application, and also asked for an explanation on the denial of the recent application and that HLS provide her with a response on the documents she submitted to LLS and HLS. HLS responded that she had not provided the documents requested but did not provide any further response. With the help of an attorney costing $100, she sent a second QWR/RFI/NOE to HLS via certified mail costing $6.00 in which she itemized the documents she sent to LLS and to HLS and asked HLS to use those documents to evaluate her for a loan modification. She also explained again that HLS did not need a BRP from a contributor because there was no contributor. She said that HLS was in error in denying her application for lack of documents as HLS had or could have gotten all the documents it needed. HLS replied that it would evaluate her again if she reapplied because at this point, all the documents were stale. HLS then began calling Amy several times a day to find out when she would pay the full amount owed. When she could not pay, HLS sent notice and then filed a foreclosure action against her.

Hypothetical

Part II: For 4/25/2020 Webinar

- Amy became anxious, upset, and distraught about being able to keep her house. She could not sleep and stopped going out with friends or playing golf because she felt so desperate. She agreed to mediation of the foreclosure action. She attended the first mediation but the HLS representative said they had no record of her ever applying for a modification and that she would have to send in all the paperwork again. Amy sent in the paperwork and, at the next mediation, HLS was supposed to give her an answer on the application. Instead, they told her she needed to send in the death certificate, which she pointed out she had already provided them at least twice. Nonetheless, because she wanted to save her home, she sent in the certificate. At the third mediation, HLS said they had not fully reviewed the application but they were looking at adding the past due amounts to the principal balance and extending out the term. By the time they finally offered Amy a modification with such terms, thousands of dollars of interest had accrued while HLS hobbled through the review process. That interest will now be added to her loan and she will have to pay interest on that.

RESPA Remedies

FOR INDIVIDUALS

- actual damages to the borrower **as a result** of the failure; and
- any additional damages, as the court may allow, in the case of a **pattern or practice of noncompliance** with the requirements of this section, in an amount not to exceed $2,000.

RESPA: Actual Damages

- Costs of preparing NOE/RFI (postage, copies, travel, lost time)
- Foreclosure costs, late fees
- Improper accrual of unpaid interest
- Loss of home through avoidable foreclosure
- Credit damage

Must Have Causal Link

Moore v. Wells Fargo Bank, N.A., 908 F.3d 1050 (7th Cir. 2018) Borrower failed to demonstrate causal connection between QWR violation and alleged actual damages.

- Attorney's fees paid to have lawyer review servicer's deficient QWR response at heart of claim are not recoverable because not caused by the violation, just as fees for prosecuting the RESPA claim are not damages.
- Evidence showed Borrower's emotional distress arose solely from drawn-out foreclosure saga and impending sale, and not from QWR response

Must Have Causal Link

Bukowski v. Wells Fargo Bank, N.A., 757 F. App'x 124 (3d Cir. 2018)

- Facts: Borrowers completed HAMP TPP but offered permanent mod with large balloon against HAMP guidelines. Borrowers sent RFI and NoE regarding servicer's contention that it was permitted to offer HAMP Mods with balloons. Servicer never adequately responded to the RFI and NoE. Borrowers sued for QWR violations and Complaint was dismissed for failure to plead actual damages.
- Held: cursory allegations in complaint of actual damages, without "articulating any facts linking Wells Fargo's alleged RESPA violations to damages suffered 'as a result' of those failures" fail to state a claim.

Must Have Causal Link

Ranger v. Wells Fargo Bank N.A., 757 F. App'x 896 (11th Cir. 2018)

- Facts: Borrowers sent QWR to servicer regarding billing error that falsely showed loan in default. Servicer did not correct error and Borrowers sued servicer for failure to conduct reasonable investigation and correct errors. Complaint alleged violations caused actual damages of: emotional distress, attorney's fees, improper finance and interest charges, and damaged credit.
- Held: 1) Emotion distress is an "actual damage" recoverable under RESPA, and allegations of distress from servicer pressing forward with foreclosure even after QWR, and that distress would have been avoided if servicer had adequately investigated and corrected error, sufficiently pleaded damages and causal link. (2) Allegations that failure to investigate and correct resulted in additional fees and interest that otherwise would not have been incurred sufficiently pleaded damages. (3) Allegations of damage to credit score and resulting loss of access to credit due to servicer's failure to correct error sufficiently pleaded damages; (4) attorney's fees were not damages because not connected the alleged RESPA violation.

Is Emotional Distress an Actual Damage?

Yes

- Ranger v. Wells Fargo Bank N.A., 757 F. App'x 896 (11th Cir. 2018)
- Moore v. Wells Fargo Bank, N.A., 908 F.3d 1050 (7th Cir. 2018)
- Catalan v. GMAC Mortg. Corp., 629 F.3d 676 (7th Cir. 2011)
- Houston v. U.S. Bank Home Mortg. Wisconsin Servicing, 505 F. App'x 543 (6th Cir. 2012)
- Vilkofsky v. Specialized Loan Servicing, LLC, 2017 WL 2573874 (W.D. Pa. June 14, 2017) (collecting district court cases from 3rd Cir. et al.)

Benner v. Wells Fargo Bank, N.A., 2018 WL 1548683 (D. Me. Mar. 29, 2018) (collecting district court cases in 1st Cir.)

When I knew that SLS kept wanting more documents, some I had already sent in, and wasn't giving me answers about the mod, I had a hard time concentrating and sleeping because I kept worrying about what SLS would do. I had vivid nightmares. I ate more and gained weight. I knew the foreclosure was still active and I didn't want to lose my house to foreclosure. I cried easily and was more uptight with my family. I was on edge always wondering if I could keep my home and if not, what I would possibly do with a disabled son and dying grandmother.

What About Attorney's Fees As an Actual Damage?

Moore v. Wells Fargo Bank, N.A., 908 F.3d 1050 (7th Cir. 2018): Attorney's fees can be actual damages if caused by the violation, but not when, as here, fees were incurred to investigate and pursue the RESPA claim.

McGahey v. Fed. Nat'l Mortg. Ass'n, 266 F. Supp. 3d 421 (D. Me. 2017): $100 in atty fees to pay for 2nd QWR after inadequate response to 1st QWR was actual damage, and citing cases holding atty fees are recoverable as actual damages under RESPA if they are not incurred in connection with bringing a suit under the statute.

What about Amy?

- Actual damages
  - Money spent on 1st NOE?
  - Money spend on 2d NOE?
  - Attorneys' fees for 2d NOE?
  - Any Attorneys' fees for foreclosure defense?
  - Costs related to mediation?
  - Emotional distress?

RESPA Statutory Damages

- 12 U.S.C. § 2605(f)(2)
- Must be “pattern and practice”
  - Can be multiple RESPA violations as part of same transaction
    - Amy: NOEs, Reg. X violations…
  - A servicer can violate 12 U.S.C. 2605(e)(QWR) by, e.g., failing to comply with response timelines, failing to investigate the alleged error, failing to correct the alleged error, and/or failing to explain why there is no error.
  - Think of these as discrete violations, each supporting a claim in litigation.

- Discovery or research may provide evidence of practice
- Up to $2000

Bringing RESPA Claims

- RESPA servicing claim suits can be brought in state or federal courts.
- Look for parallel state statute, claims
- Will most likely be removed
- Generally three-year statute of limitations (12 U.S.C. § 2614).

Litigation Approaches

- Always keep actual damages in mind; you will need to allege them to survive a motion to dismiss.
- Keep a log of expenses your client incurs in the error resolution procedure, including mileage, postage, etc.
- Don’t forget emotional distress.

- *See NCLC* RESPA/ TILA Mortgage Servicing Chart

FDCPA Options

- Same conduct that violates RESPA or TILA may be an FDCPA violation if the servicer is a Debt Collector:
  - uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or
  - who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. AND
  - **does not concern a debt which was not in default at the time it was obtained by such person

Conduct May Constitute:

- **Prohibited Communications**

With consumer when knows represented

- **Harassment or abuse**

Repeat calls with intent to annoy

- **False or misleading representations**

False rep. of character, amount or debt

- **Unfair practices**

General unfair or unconscionable conduct

Amy's claims

- HLS calling several times per day
- After knew she was represented
- Attempting to collect money she should not owe had they followed Reg. X
  - BUT: may have to show would have qualified for and received modification
- Unfair practices in an attempt to collect a debt: loss mit eval process

State FDCPA

- A.G. Rule CP 104.01 et seq.- follows FDCPA
  - constitutes an unfair trade act and practice in commerce under 9 V.S.A. 2453(a).
- Vermont Consumer Protection Statute
  - 9 V.S.A. §2451 et seq.
  - Prohibits unfair methods of competition and unfair or deceptive acts or practices in commerce
  - Equitable Relief; actual damages; attorney's fees; treble damages

Suing the Proper Party

- Numerous potential parties
- Mortgage owners, master servicers, subservicers, servicers' employees
- Typically three types of servicers: the master servicer, the subservicer, and the special servicer.

Proper Party

- Owners may also be liable for the conduct of servicers or subservicers through agency relationship
- *R.G. Fin. Corp. v. Vergara–Nuñez*, 446 F.3d 178, 187 (1st Cir. 2006) (“Typically, a mortgage servicer acts as the agent of the mortgagee to effect collection of payments on the mortgage loan”)

- BUT: Merrill doctrine, which may limit the liability of a government agency (Fannie, Freddie) for the acts of its agents

Discovery from Servicer

- Pre-filing: NOE, RFIs
- Payoff Amount: failure to provide an accurate payoff statement based on a TILA request is subject to and NOE - must respond to a notice of error within seven business days.
- Payment History: A complete life-of-the-loan payment history and legend
- Call log/ contact history detailing communications with the homeowner and other third parties.

Servicer records

- Monthly Statements
- Loss mitigation documents
- Policies and procedures for processing loss mitigation applications
- Pooling and servicing agreement
- All correspondence and notices to the borrower
- Recordings of calls

Lender's Motion for Summary Judgment

- Personal knowledge requirement for affidavits
- Most witnesses unable to meet requirement
- Hearsay—regurgitate information that they have been taught in their training to be court witnesses.

Vermont Rule of Evidence 803(6)

(6) *Records of regularly conducted business activity.*

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions or diagnoses, **made at or near the time by, or from information transmitted by, a person with knowledge**, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12) or a statute or rule permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Beneficial Maine v. Carter, 2011 ME 77

- a business's record of acts or events is admissible as an exception to the hearsay rule if the necessary foundation is established by the testimony of the custodian or other qualified witness.
- intimately involved in the daily operation of the business and whose testimony showed the firsthand nature of [his or her] knowledge
- Must establish all of the foundational elements required to qualify the employee to make the statements contained in the affidavit

Beneficial Maine v. Carter

- Subsequent servicer must meet the requirements of Rule 803(6) regarding the transfer and integration of business records.
- an affiant "whose statements are offered to establish the admissibility of a business record on summary judgment need not be an employee of the record's creator…if the foundational evidence from the receiving entity's employee is adequate to demonstrate that the employee had sufficient knowledge of both businesses' regular practices to demonstrate the reliability and trustworthiness of the information."

Chase v. Goldberg: Maine Superior Court, March 2014

- Affiant not qualified to testify re: default or amount due
- Unclear when servicing began
- Payment missed prior to servicing – documents created by other entities
- No foundation re: business records of Chase *or* prior servicer

Chase v. Goldberg

- the records "are maintained by Chase during the course of Chase's regularly conducted business activities,"
- does not reflect firsthand knowledge or intimately involvement in the plaintiff's daily operations.

Chase v. Goldberg

- the plaintiff's business records "may include records pertaining to the loans it services which were created by others, including records of prior servicers" and that it is the plaintiff's policy "to confirm such records at the time of acquisition .... “
- Does not ID prior servicer nor their records
- Does not address transfer policies

Chase v. Goldberg

- “Information and belief” – NO
- No legal conclusions ie: holder of mortgage
- May not be able to authenticate prior servicing records

What about HLS in Amy’s case

U.S. Bank Trust, N.A. as Trustee for LSF9 Master Participation Trust v. Jones, 925 F.3d 534 (1st Cir. May 30, 2019)

- If try to introduce information compiled by prior servicers;
  - Must use “qualified witness:” can explain and be cross-examined concerning the manner in which the records are made and kept
  - must show how incorporated the previous servicer's records into its own database;
  - Detailed steps it took to review the previous servicer's records in a way that verified the accuracy of the record;
  - How such records were maintained
- Turns on the particular facts of each case

Getting Paid

- RESPA: 12 USC 2605(f)(3)
- FDCPA: 15 USC 1692k(a)(3)
- TILA: 15 USC 1640(a)(3)
- Mediation Sanctions Orders
- VT Consumer Protection statute

All have fee shifting provisions

Chapter 13 Basics

- Must file a Chapter 13 plan: describe treatment of secured, unsecured, “priority” debts
- Length of Plan: 3 to 5 years
- Role of chapter 13 trustee
- Court must review and “confirm” the plan
- “Feasibility” determination made by judge

When is it too late to file?

- General federal rule: “ a default with respect to…a lien on the debtor’s principal residence may be cured . . . until such residence is sold at a foreclosure sale that is conducted in accordance with applicable nonbankruptcy law.” 11 U.S.C. § 1322(c)(1).

Options for Dealing with a Secured Claim in Chapter 13

- Cure a pre-bankruptcy payment default and maintain post-petition payments
- Remove or reduce a lien (completely unsecured junior lien)
- Pay a lien in full over time, modify terms
- Do nothing about the lien

Proofs of Claim

- Servicer typically files for lender
- Lists amounts claimed for:

  (a) pre-petition arrearage (cure amount) and
  (b) total principal balance
- Debtor can object to creditor's claim
- Objection treated as lawsuit (Adversary Proceeding)
- Most federal rules of civil procedure apply, including discovery

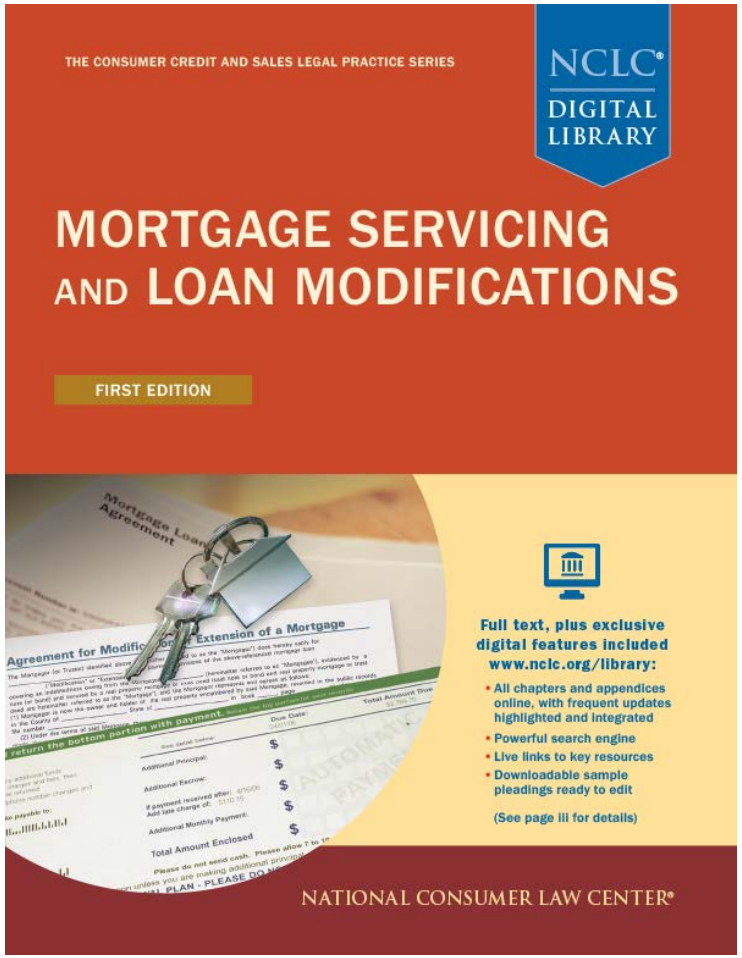
Loss Mitigation in Bankruptcy

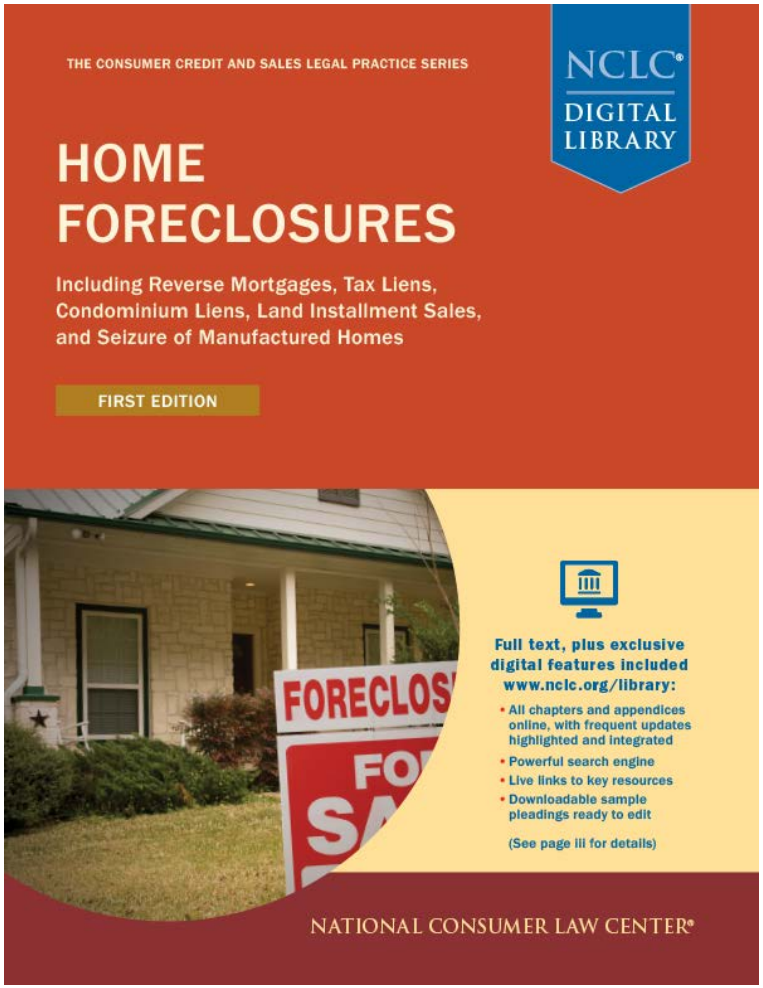
- Most options (Flex Mod, FHA-HAMP) available despite bankruptcy
- Loan modification can be tool in curing default under chapter 13 plan
- See *In re* Nardini, 2015 WL 9438292 (Bankr. D. Vt. Dec. 23, 2015) (permitting temporary reduction of scheduled payments pending outcome of mediation)
- RESPA rules apply during bankruptcy
- Ability to bring legal claims (adversary proceeding) against creditor

Bankruptcy Documentation

- F.R. Bankr. P. 3001(c)(2)
  - Specific disclosure of pre-petition fees and amounts due in proof of claim
- F.R. Bankr. P. 3002.1
  - Disclosure of post-petition fees, payment changes, and completion of cure
- *In re* Gravel, 601 B.R. 873 (Bankr. D. Vt. 2019) (appeal pending)
  - Enforcing requirements of Rule 3002.1

NCLC Manuals





Since 1969, the nonprofit **National Consumer Law Center® (NCLC®)** has worked for consumer justice and economic security for low-income and other disadvantaged people, including older adults, in the U.S. through its expertise in policy analysis and advocacy, publications, litigation, expert witness services, and training. **www.nclc.org**

MORTGAGE SERVICING CLAIMS CHART

REAL ESTATE SETTLEMENT PROCEDURES ACT (RESPA) and TRUTH IN LENDING ACT (TILA)

CLAIM	CITATIONS	RIGHT OF ACTION	REMEDY[1]	APPLICATION	STATUTE OF LIMITATION	EXEMPTIONS
	RESPA					
Duty to Make Timely Payments Out of Escrow	12 U.S.C. § 2605(g) Reg. X, Subparts B and C 12 C.F.R. §§ 1024.17(k) and 1024.34(a)	12 U.S.C. § 2605(f) and § 2614	actual damages, costs and attorney's fees; plus $2,000 per violation if pattern and practice of non-compliance	open-end (as to § 1024.17) and closed-end loans on principal and non-principal residence	3 years 12 U.S.C. § 2614	borrower more than 30 days overdue (except must pay borrower's hazard insurance rather than force place) - 12 C.F.R. § 1024.17(k)(1), (2), (5)(i)
Duty to Provide Annual Escrow Statements	12 U.S.C. § 2609(c)(2) Reg. X, Subpart B 12 C.F.R. § 1024.17(i)			open-end and closed-end loans on principal and non-principal residence		borrower more than 30 days overdue, or in foreclosure or bankruptcy - 12 C.F.R. § 1024.17(i)(2)
Duty to Perform Escrow Analysis and Calculate Proper Escrow Payment	12 U.S.C. § 2609(a) Reg. X, Subpart B 12 C.F.R. § 1024.17(c)			open-end and closed-end loans on principal and non-principal residence		

[1] If a remedy or right of action is not listed, the failure to comply with a servicing provision may possibly be pursued as a breach of contract or state UDAP statute violation. *See* National Consumer Law Center, Mortgage Servicing and Loan Modifications, chapter 5 (2019), *updated at* www.nclc.org/library. The extent of a private remedy against servicers for TILA violations is uncertain because the liability provision of TILA, 15 U.S.C. § 1640(a), imposes liability on "creditors." *See* NCLC Mortgage Servicing § 4.2.12.

Requirements for Escrow Surpluses	Reg. X, Subpart B 12 C.F.R. § 1024.17(f)			open-end and closed-end loans on principal and non-principal residence		borrower more than 30 days overdue - 12 C.F.R. § 1024.17(f)(2)(ii)
Requirements for Escrow Shortages	Reg. X, Subpart B 12 C.F.R. § 1024.17(f)			open-end and closed-end loans on principal and non-principal residence		
Requirements for Escrow Deficiencies	Reg. X, Subpart B 12 C.F.R. § 1024.17(f)			open-end and closed-end loans on principal and non-principal residence		borrower more than 30 days overdue - 12 C.F.R. § 1024.17(f)(4)(iii)
Duty to Provide Notice of Escrow Shortage or Deficiency	12 U.S.C. § 2609(b) Reg. X, Subpart B 12 C.F.R. § 1024.17(f)(5)			open-end and closed-end loans on principal and non-principal residence		
Duty to Provide Transfer of Servicing Statement and 60-day Payment Safe Harbor	12 U.S.C. § 2605(b)-(d) Reg. X, Subpart C 12 C.F.R. § 1024.33(b) and (c)	12 U.S.C. § 2605(f) and § 2614	actual damages, costs and attorney's fees; plus $2,000 per violation if pattern and practice of non-compliance	closed-end loans on principal and non-principal residence	3 years 12 U.S.C. § 2614	
Duty to Respond to Notice of Error and Request for Information	12 U.S.C. § 2605(e) Reg. X, Subpart C 12 C.F.R. §§ 1024.35 and 1024.36	12 U.S.C. § 2605(f) and § 2614	actual damages, costs and attorney's fees; plus $2,000 per violation if pattern and practice of non-compliance	closed-end loans on principal and non-principal residence	3 years 12 U.S.C. § 2614	

Duty to Respond to Request for Identity of Mortgage Owner	12 U.S.C. § 2605(k)(1)(D) Reg. X, Subpart C 12 C.F.R. § 1024.36(d)	12 U.S.C. § 2605(f) and § 2614	actual damages, costs and attorney's fees; plus $2,000 per violation if pattern and practice of non-compliance	closed-end loans on principal and non-principal residence	3 years 12 U.S.C. § 2614	
General Servicing Requirements	Reg. X, Subpart C 12 C.F.R. § 1024.38			closed-end loans on principal and non-principal residence		small servicer; reverse mortgage; qualified lender[2] - 12 C.F.R. § 1024.30(b)
Early Intervention Requirements	Reg. X, Subpart C 12 C.F.R. § 1024.39	12 U.S.C. § 2605(f) and § 2614	actual damages, costs and attorney's fees; plus $2,000 per violation if pattern and practice of non-compliance	closed-end loans on principal residence	3 years 12 U.S.C. § 2614	borrower in bankruptcy (partial exemption); small servicer; reverse mortgage; qualified lender - 12 C.F.R. § 1024.30(b) and § 1024.39(d)
Continuity of Contact Requirements	Reg. X, Subpart C 12 C.F.R. § 1024.40			closed-end loans on principal residence		small servicer; reverse mortgage; qualified lender - 12 C.F.R. § 1024.30(b)
Duty to Comply with Loss Mitigation Procedures	Reg. X, Subpart C 12 C.F.R. § 1024.41	12 U.S.C. § 2605(f) and § 2614	actual damages, costs and attorney's fees; plus $2,000 per violation if pattern and practice of non-compliance	closed-end loans on principal residence	3 years 12 U.S.C. § 2614	small servicer (except per § 1024.41(j) must not initiate foreclosure if borrower performing on loss mitig. option and if not more than 120 days delinquent); reverse mortgage; qualified lender - 12 C.F.R. § 1024.30(b)

[2] A "qualified lender" is defined in 12 C.F.R. § 617.7000 (referring to mortgage loans made under the Farm Credit System).

	TILA					
Duty to Send Interest Rate and Payment Change Notices	15 U.S.C. § 1638a Reg. Z, 12 C.F.R. § 1026.20(c) and (d)	15 U.S.C. § 1640(a)	actual damages, plus twice finance charge (up to $4,000 for closed-end mortgage), costs and attorney's fees	adjustable rate, closed-end loans on principal residence	1 year 15 U.S.C. § 1640(e)	ARMs with term of 1 year or less
Duty to Promptly Credit Payments	15 U.S.C. § 1639f Reg. Z, 12 C.F.R. § 1026.36(c)(1)	15 U.S.C. § 1640(a)	actual damages, plus twice finance charge (up to $4,000 for closed-end mortgage), costs and attorney's fees	closed-end loans on principal residence	1 year 15 U.S.C. § 1640(e)	
Ban on Pyramiding of Late Fees	Reg. Z, 12 C.F.R. § 1026.36(c)(2)	15 U.S.C. § 1640(a)	actual damages, plus twice finance charge (up to $4,000 for closed-end mortgage), [3] costs and attorney's fees	closed-end loans on principal residence	1 year 15 U.S.C. § 1640(e)	
Duty to Provide Timely Payoff Statement	15 U.S.C. § 1639g Reg. Z, 12 C.F.R. § 1026.36(c)(3)	15 U.S.C. § 1640(a)	actual damages, plus twice finance charge (up to $4,000 for closed-end mortgage), costs and attorney's fees	open-end and closed-end loans on principal and non-principal residence	1 year 15 U.S.C. § 1640(e)	

[3] Because this requirement is found only in Reg. Z, some courts may find that no statutory damages are available.

Duty to Send Periodic Mortgage Statements	15 U.S.C. § 1638(f) Reg. Z, 12 C.F.R. § 1026.41	15 U.S.C. § 1640(a)	actual damages, costs and attorney's fees	closed-end loans on principal and non-principal residence	1 year 15 U.S.C. § 1640(e)	limited exemption for borrowers in bankruptcy; small servicer; reverse mortgage; timeshares; fixed-rate mortgages with qualifying coupon books
Duty to Send Escrow Cancelation Notices	15 U.S.C. § 1639d(j)(1)(B); Reg. Z, 12 C.F.R. § 1026.20(e)	15 U.S.C. § 1640(a)	actual damages, twice finance charge (up to $4000 for closed-end mortgage), costs, and attorney fees	closed-end loans on principal and non-principal residence	1 year 15 U.S.C. § 1640(e)	reverse mortgage; subordinate-lien mortgages
Duty to Send Transfer of Ownership Notices	15 U.S.C. § 1641(g)(1)(A) – (E); Reg. Z 12 C.F.R. § 1026.39	15 U.S.C. § 1640(a)	actual damages, twice finance charge (up to $4000 for closed-end mortgage), costs, and attorney fees	closed-end loans secured by a dwelling or real property; open-end loans on principal residence	1 year 15 U.S.C. § 1640(e)	

KeyCite Yellow Flag - Negative Treatment
Distinguished by Bank of Maine v. Hatch, Me., March 13, 2012

25 A.3d 96
Supreme Judicial Court of Maine.

BENEFICIAL MAINE INC.
v.
Timothy G. CARTER et al.

Docket No. Yor–10–568.
|
Submitted on Briefs: April 27, 2011.
|
Decided: July 7, 2011.

Synopsis
Background: Mortgagee brought foreclosure action against mortgagors. The District Court, Biddeford, Foster, J., granted summary judgment in favor of mortgagee. Mortgagors appealed.

[Holding:] The Supreme Judicial Court, Saufley, C.J., held that affidavit of employee of mortgagee's mortgage servicer was inadequate to establish admissibility of mortgage records pursuant to business records exception.

Judgment vacated and matter remanded.

West Headnotes (13)

[1] **Appeal and Error** De novo review

The Supreme Judicial Court reviews a court's entry of summary judgment de novo, viewing the facts in the light most favorable to the party against whom summary judgment was entered.

1 Cases that cite this headnote

[2] **Judgment** Mortgages and secured transactions, cases involving

To obtain a summary judgment of foreclosure, a mortgage holder must establish that there are no disputes of facts that are material to the elements required for foreclosure and that the mortgage holder is entitled to judgment as a matter of law. Rules Civ.Proc., Rule 56(c).

[3] **Judgment** Admissibility

The evidence relied on at summary judgment must be of a quality that would be admissible at trial. Rules Civ.Proc., Rule 56(c).

[4] **Mortgages and Deeds of Trust** Weight and sufficiency

The following, at a minimum, must be established for a mortgage holder to foreclose: (1) the existence of the mortgage, including the book and page number of the mortgage, and an adequate description of the mortgaged premises, including the street address, if any; (2) properly presented proof of ownership of the mortgage note and the mortgage, including all assignments and endorsements of the note and the mortgage; (3) a breach of condition in the mortgage; (4) the amount due on the mortgage note, including any reasonable attorney fees and court costs; (5) the order of priority and any amounts that may be due to other parties in interest, including any public utility easements; (6) evidence of properly served notice of default and mortgagor's right to cure in compliance with statutory requirements; (7) after January 1, 2010, proof of completed mediation (or waiver or default of mediation), when required, pursuant to the statewide foreclosure mediation program rules; and (8) if the homeowner has not appeared in the proceeding, a statement, with a supporting affidavit, of whether or not the defendant is in military service in accordance with the Servicemembers Civil Relief Act.

Servicemembers Civil Relief Act, § 1(a) et seq., 50 U.S.C.A.App. § 501 et seq.

[5] **Appeal and Error**Documentary evidence

When the Supreme Judicial Court reviews a trial ruling regarding the admissibility of a business record, the Court reviews foundational findings for clear error and the ultimate determination of the record's admissibility for abuse of discretion. Rules of Evid., Rule 803(6).

1 Cases that cite this headnote

[6] **Appeal and Error**Admission or exclusion of evidence in general
Appeal and Error Discretion of lower court; abuse of discretion
Appeal and Error Summary Judgment

When reviewing whether business records were properly admissible pursuant to exception to hearsay rule, so as to be considered on summary judgment, the Supreme Judicial Court determines whether competent undisputed evidence, properly referenced in the statements of material facts, supports the foundational facts required for admissibility of the asserted business records, and, if those facts are supported, whether the court abused its discretion in considering the evidence. Rules of Evid., Rule 803(6).

4 Cases that cite this headnote

[7] **Evidence**Unofficial or business records in general

The purpose of the business records exception to the hearsay rule is to allow the consideration of a business record, without requiring firsthand testimony regarding the recorded facts, by supplying a witness whose knowledge of business practices for production and retention of the record is sufficient to ensure the reliability and trustworthiness of the record. Rules of Evid., Rule 803(6).

4 Cases that cite this headnote

[8] **Evidence**Form and Sufficiency in General
JudgmentDocumentary evidence or official record
JudgmentPersonal knowledge or belief of affiant

The affiant whose statements are offered to establish the admissibility of a business record pursuant to exception to the hearsay rule on summary judgment need not be an employee of the record's creator. Rules of Evid., Rule 803(6).

2 Cases that cite this headnote

[9] **Evidence**Form and Sufficiency in General

If the foundational evidence from the receiving entity's employee is adequate to demonstrate that the employee had sufficient knowledge of both businesses' regular practices to demonstrate the reliability and trustworthiness of the information, a business records will be admissible pursuant to exception to hearsay rule based on affidavit of non-employee of record's creator. Rules of Evid., Rule 803(6).

4 Cases that cite this headnote

[10] **Evidence**Unofficial or business records in general

In order to establish admissibility of a business record pursuant to exception to hearsay rule based on affidavit of non-employee of record's creator, such an affiant must demonstrate knowledge that: (1) the producer of the record at issue employed regular business practices for

creating and maintaining the records that were sufficiently accepted by the receiving business to allow reliance on the records by the receiving business; (2) the producer of the record at issue employed regular business practices for transmitting them to the receiving business; (3) by manual or electronic processes, the receiving business integrated the records into its own records and maintained them through regular business processes; (4) the record at issue was, in fact, among the receiving business's own records; and (5) the receiving business relied on these records in its day-to-day operations. Rules of Evid., Rule 803(6).

6 Cases that cite this headnote

[11] **Evidence**Form and Sufficiency in General

In order to establish admissibility of a business record pursuant to exception to hearsay rule based on affidavit of non-employee of record's creator, the affiant must have firsthand knowledge, based on the affiant's supervision of or participation in day-to-day business operations of the receiving business, that the records were among those created, maintained, and transmitted through regular business practices. Rules of Evid., Rule 803(6).

4 Cases that cite this headnote

[12] **Evidence**Unofficial or business records in general

In order to establish admissibility of a business record pursuant to exception to hearsay rule based on affidavit of non-employee of record's creator, an affiant so qualified must aver the following standard foundational elements, some of which may already have been established through proof of the witness's qualifications: (1) the record was made at or near the time of the events reflected in the record by, or from information transmitted by, a person with personal knowledge of the events recorded therein; (2) the record was kept in the course of a regularly conducted business; (3) it was the regular practice of the business to make records of the type involved; and (4) no lack of trustworthiness is indicated from the source of information from which the record was made or the method or circumstances under which the record was prepared. Rules of Evid., Rule 803(6).

6 Cases that cite this headnote

[13] **Evidence**Form and Sufficiency in General
JudgmentDocumentary evidence or official record
JudgmentPersonal knowledge or belief of affiant

Affidavit of employee of mortgagee's mortgage servicer was inadequate to establish admissibility of purported mortgage records pursuant to business records exception to hearsay rule, and therefore trial court improperly relied upon records in granting summary judgment in favor of mortgagee in foreclosure action; affidavit did not provide any basis for employee's personal knowledge of mortgagee's record-keeping practices, and employee did not purport to be the custodian or the records. Rules of Evid., Rule 803(6).

2 Cases that cite this headnote

Attorneys and Law Firms

***98** S. James Levis, Jr., Esq., Levis & Ingraham, PA, Saco, ME, for Timothy G. and Kathleen A. Carter.

William B. Jordan, Esq., Shapiro & Morley, LLC, South Portland, ME, for Beneficial Maine, Inc.

Panel: SAUFLEY, C.J., and ALEXANDER, LEVY, SILVER, MEAD, GORMAN, and JABAR, JJ.

Opinion

SAUFLEY, C.J.

[¶ 1] Timothy G. and Kathleen A. Carter appeal from a summary judgment entered in the District Court (Biddeford, *Foster, J.*) in favor of Beneficial Maine Inc. on its foreclosure complaint. The Carters challenge the foundation presented by Beneficial to support the admissibility of its mortgage records pursuant to the business records exception to the hearsay rule. *See* M.R. Evid. 803(6). Beneficial relied on the affidavit of an employee of a separate business to support its motion for summary judgment. Because that affidavit was inadequate to establish the admissibility of the purported business records, we vacate the summary judgment and remand the matter for further proceedings.

I. BACKGROUND

[¶ 2] On November 4, 2009, Beneficial filed a complaint for foreclosure against the Carters in the District Court. *See* 14 M.R.S. § 6321 (2010). Beneficial alleged that the Carters had defaulted in payment on their promissory note to Beneficial, which was secured by a mortgage on certain real property in Kennebunk owned by the Carters.[1]

[¶ 3] After the parties were unable to resolve the case through mediation,[2] Beneficial moved for summary judgment and submitted a statement of material facts. *See* M.R. Civ. P. 56(h)(1). In support of its statement of material facts, Beneficial referred to two affidavits—one from Beneficial's attorney, which clarified the priority of the Carters' creditors, and one from Shana Richmond, Vice President of Administrative Services for HSBC Consumer Lending Mortgage Servicing, described in the affidavit as Beneficial's "servicer." Beneficial cited to Richmond's affidavit, with its attached exhibits, as the sole evidentiary support for its allegations of its ownership of the note and mortgage, the Carters' obligation on the note, the Carters' default, and the amount that the Carters owed. Richmond's affidavit states the ***99** following as the foundation for her factual assertions:

> The Bank [Beneficial] is the holder of the note and mortgage.... I have access to the records relating to the mortgage transactions with respect to said note and mortgage. My knowledge as to the facts set forth in this affidavit is derived from my personal knowledge of this account and of the records of this account, which are kept in the ordinary course of business by the Bank and which were made at or near the time of the transactions by, or from information transmitted by, a person with knowledge of the facts set forth in said records. These records are kept in the ordinary course of business, pursuant to the company's regular practice of making such records. The exhibits attached hereto are true copies of the original documents.

[¶ 4] The Carters objected to the admissibility of the Richmond affidavit and the attached exhibits on the grounds that they constituted hearsay and that Beneficial had not established a foundation for application of the business records exception. The court entered summary judgment in the bank's favor on its foreclosure complaint. The Carters appealed. *See* 14 M.R.S. § 1901(1) (2010); M.R.App. P. 2.

II. DISCUSSION

[¶ 5] We recently addressed the foundational elements that must be established for a court to consider a business record on summary judgment in a foreclosure proceeding. *See HSBC Mortg. Servs., Inc. v. Murphy*, 2011 ME 59, 19 A.3d 815. Here, we consider whether those foundational elements were properly presented on summary judgment by an employee of the mortgage holder's "servicer."

A. Summary Judgment in Foreclosure Proceedings

[1] [2] [3] [4] [¶ 6] We review a court's entry of summary judgment de novo, viewing the facts in the light most favorable to the party against whom summary judgment was entered. *See Murphy*, 2011 ME 59, ¶ 8, 19 A.3d at 819. To obtain a summary judgment of foreclosure, a mortgage holder must establish that there are no disputes of facts that are material to the elements required for foreclosure[3] and that the mortgage holder is entitled to judgment as a matter of law. *See* M.R. Civ. P. 56(c). The facts offered in support of summary judgment must be properly ***100** presented for a court to enter summary judgment for the mortgage holder: "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." M.R. Civ. P. 56(e). The record references must refer "to evidence that is of a quality that would be admissible at trial." *Murphy*, 2011 ME 59, ¶ 9, 19 A.3d at 819.

[¶ 7] Beneficial attempted to support its statement of material facts with the affidavit of Shana Richmond, an individual who was not Beneficial's employee. The cursory reference in Richmond's affidavit to her knowledge of the critical issues—how Beneficial created, maintained, and produced the records—prompts us to clarify the foundation of knowledge that a nonemployee must possess to be a "qualified witness" to lay the foundation for a business record, M.R. Evid. 803(6), in an affidavit to support summary judgment in a foreclosure action, M.R. Civ. P. 56(j).

[¶ 8] In reviewing the adequacy of the affidavit presented in this case, we (A) discuss our standard of review for the challenged ruling, (B) summarize the foundational elements and knowledge required for an affiant to establish the admissibility of a business record, and (C) review the adequacy of the affidavit presented by Beneficial to determine whether summary judgment was appropriate in this case.

B. Standard of Review on Summary Judgment

[5] [¶ 9] In the past, we have reviewed courts' consideration of business records on summary judgment for an abuse of discretion. *See Estate of Davis*, 2001 ME 106, ¶ 10, 775 A.2d 1127, 1130–31; *United Air Lines, Inc. v. Hewins Travel Consultants, Inc.*, 622 A.2d 1163, 1167–69 (Me.1993). Since these cases were decided, however, we have clarified that, when we review a *trial* ruling regarding the admissibility of a business record, we review foundational findings for clear error and the ultimate determination of the record's admissibility for abuse of discretion. *See Bank of Am., N.A. v. Barr*, 2010 ME 124, ¶ 17, 9 A.3d 816, 820.

[6] [¶ 10] Because we review the summary judgment record de novo in the light most favorable to the nonprevailing party, and because the evidence relied on at summary judgment must be of a quality that would be admissible at trial, we follow our bifurcated standard of review from *Barr* to determine (1) whether competent undisputed evidence, properly referenced in the statements of material facts, supports the foundational facts required for admissibility of the asserted business records; and (2) if those facts are supported, whether the court abused its discretion in considering the evidence. *See id.; see also* M.R. Civ. P. 56(e); M.R. Evid. 803(6). If necessary foundational elements for admission of a business record are not supported by competent undisputed evidence in the summary judgment record, that business record may not be considered on summary judgment. *See* M.R. Civ. P. 56(e); *see also Smith v. Burlington N. & Santa Fe Ry. Co.*, 344 Mont. 278, 187 P.3d 639, 649–50 (2008) (rejecting the application of a pure abuse-of-discretion standard of review when reviewing a ruling on the foundation for admissibility on summary judgment).

[¶ 11] If we conclude that specific documents presented in support of summary judgment lacked the necessary foundation to be admissible as business records or that the court abused its discretion in considering them, we review de novo whether, in the absence of those records, there are sufficient undisputed facts to entitle the ***101** moving party to judgment as a matter of law. *See Murphy*, 2011 ME 59, ¶ 8, 19 A.3d at 819; M.R. Civ. P. 56(c). Beneficial's records, offered through the affidavit of HSBC's employee, constitute the only evidence in the summary judgment record concerning the contract and the breach. If those records cannot be considered, Beneficial will have failed to meet its burden on summary judgment to provide undisputed facts upon which it is entitled to judgment as a matter of law. *See* M.R. Civ. P. 56(c). Accordingly, the outcome of this appeal turns on the admissibility of the business records.

C. Business Records Exception to the Hearsay Rule

[7] [¶ 12] Hearsay, defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted," M.R. Evid. 801(c), is inadmissible except as provided by law[4] or by the Maine Rules of Evidence, *see* M.R. Evid. 802. Pursuant to the Maine Rules of Evidence, a business's record of acts or events is admissible as an exception to the hearsay rule if the necessary foundation is established "by the testimony of the custodian or other qualified witness." M.R. Evid. 803(6);[5] *see Murphy*, 2011 ME 59, ¶ 10, 19 A.3d at 820. This requirement is tied to the purpose underlying the business records exception to the hearsay rule: to allow the consideration of a business record, without requiring firsthand testimony regarding the recorded facts, by supplying a witness whose knowledge of business practices for production and retention of the record is sufficient to ensure the reliability and trustworthiness of the record. *See Murphy*, 2011 ME 59, ¶¶ 10–17, 19 A.3d at 822; *State v. Radley*, 2002 ME 150, ¶¶ 13–16, 804 A.2d 1127, 1131–32; *State v. Tomah*, 1999 ME 109, ¶ 9, 736 A.2d 1047, 1050–51.

[8] [9] [¶ 13] The affiant whose statements are offered to

establish the admissibility of a business record on summary judgment need not be an employee of the record's creator. *See, e.g.*, *Ne. Bank & Trust Co. v. Soley*, 481 A.2d 1123, 1127 (Me.1984). For instance, if the records were received and integrated into another business's records and were relied upon in that business's day-to-day operations, an employee of the receiving business may be ***102** a qualified witness. *See id.; see also* Field & Murray, *Maine Evidence* § 803.6 at 486 (6th ed.2007). In such instances, records will be admissible pursuant to the business records exception to the hearsay rule, M.R. Evid. 803(6), if the foundational evidence from the receiving entity's employee is adequate to demonstrate that the employee had sufficient knowledge of both businesses' regular practices to demonstrate the reliability and trustworthiness of the information. *Soley*, 481 A.2d at 1126–27; *see also United States v. Pfeiffer*, 539 F.2d 668, 670–71 (8th Cir.1976) (upholding the admission of delivery receipts from a common carrier when the sender's employee testified about the process by which such receipts were generated and obtained in the regular course of business and relied upon by the sender).

[10] [11] [12] [¶ 14] Such an affiant must demonstrate knowledge that

- the producer of the record at issue employed regular business practices for creating and maintaining the records that were sufficiently accepted by the receiving business to allow reliance on the records by the receiving business;
- the producer of the record at issue employed regular business practices for transmitting them to the receiving business;
- by manual or electronic processes, the receiving business integrated the records into its own records and maintained them through regular business processes;
- the record at issue was, in fact, among the receiving business's own records; and
- the receiving business relied on these records in its day-to-day operations.

See Soley, 481 A.2d at 1126–27. The affiant must have firsthand knowledge, based on the affiant's supervision of or participation in day-to-day business operations of the receiving business, that the records were among those created, maintained, and transmitted through regular business practices. *Murphy*, 2011 ME 59, ¶ 10, 19 A.3d at 820; *Barr*, 2010 ME 124, ¶ 19, 9 A.3d at 821. An affiant so qualified must aver the following standard foundational elements, some of which may already have been established through proof of the witness's qualifications:

> (1) the record was made at or near the time of the events reflected in the record by, or from information transmitted by, a person with personal knowledge of the events recorded therein;
>
> (2) the record was kept in the course of a regularly conducted business;
>
> (3) it was the regular practice of the business to make records of the type involved; and
>
> (4) no lack of trustworthiness is indicated from the source of information from which the record was made or the method or circumstances under which the record was prepared.

Murphy, 2011 ME 59, ¶ 10, 19 A.3d at 820 (quoting *Barr*, 2010 ME 124, ¶ 18, 9 A.3d at 821); *see* M.R. Evid. 803(6).

D. Admissibility of Beneficial's Records and Summary Judgment Review

[13] [¶ 15] In the matter before us, Richmond was not an employee of Beneficial itself but of Beneficial's "servicer," HSBC. Although Richmond's affidavit states that the records were kept by Beneficial in the ordinary course of business from information supplied at or near the time of the recorded events by a person with knowledge of those events, it does not provide any basis for Richmond's personal knowledge of Beneficial's practices. Richmond does not purport to be the custodian of the records, nor does she explain the source of her understanding of Beneficial's ***103** "daily operation" or show the "firsthand nature of [her] knowledge." *Murphy*, 2011 ME 59, ¶ 10, 19 A.3d at 820 (quotation marks omitted). Her affidavit indicates only that she has personal knowledge of "this account and of the records of this account" and that she has "access to the records." The affidavit provides no elaboration on the nature of HSBC's role as Beneficial's "servicer," or of HSBC's responsibilities and activities with regard to Beneficial's accounts.

[¶ 16] Although it is possible that an employee of HSBC—perhaps even Richmond herself—may have personal knowledge of both entities' practices for creating, maintaining, and transmitting the records, the affidavit does not report the basis for Richmond's

knowledge of (1) Beneficial's practices for creating, maintaining, and transmitting the records at issue; (2) HSBC's practices in obtaining and maintaining the bank's records for HSBC's own use; or (3) HSBC's integration of the bank's records into HSBC's own records. *See Murphy*, 2011 ME 59, ¶ 10, 19 A.3d at 820; *Barr*, 2010 ME 124, ¶¶ 18–19, 9 A.3d at 820–21; *Soley*, 481 A.2d at 1127; M.R. Civ. P. 56(e). Richmond did not, therefore, establish that she was a "custodian or other qualified witness" who could provide trustworthy and reliable information about the regularity of the creation, transmission, and retention of the records offered. M.R. Evid. 803(6). Because Richmond's affidavit could not establish the foundation for the records' admissibility, the court could not properly consider those records on summary judgment. *See* M.R. Civ. P. 56(e).

[¶ 17] Beneficial presented no other evidence regarding the mortgage, the default, or the other elements set forth in *Chase Home Finance LLC v. Higgins*, 2009 ME 136, ¶ 11, 985 A.2d 508, 510–11, to support its motion for summary judgment. Because of the deficiencies in the affidavit, Beneficial has failed to demonstrate on summary judgment that the Carters were obligated by, and defaulted on, the mortgage note, and that Beneficial is entitled to judgment as a matter of law. *See* M.R. Civ. P. 56(c), (e); *Murphy*, 2011 ME 59, ¶ 17, 19 A.3d at 822. Accordingly, we vacate the summary judgment entered in favor of Beneficial. Having reached this conclusion, we do not address the Carters' additional argument regarding the adequacy of the notice of default and the right to cure.

The entry is:

Summary judgment vacated. Remanded for further proceedings.

All Citations

25 A.3d 96, 2011 ME 77

Footnotes

1 Beneficial asserted that the unpaid principal, interest, charges, and fees amounted to a total obligation of $378,803.43.

2 Pursuant to M.R. Civ. P. 93, the parties participated in the Judicial Branch Foreclosure Diversion Program.

3 The following, at a minimum, must be established for a mortgage holder to foreclose:

- the existence of the mortgage, including the book and page number of the mortgage, and an adequate description of the mortgaged premises, including the street address, if any;
- properly presented proof of ownership of the mortgage note and the mortgage, including all assignments and endorsements of the note and the mortgage;
- a breach of condition in the mortgage;
- the amount due on the mortgage note, including any reasonable attorney fees and court costs;
- the order of priority and any amounts that may be due to other parties in interest, including any public utility easements;
- evidence of properly served notice of default and mortgagor's right to cure in compliance with statutory requirements;
- after January 1, 2010, proof of completed mediation (or waiver or default of mediation), when required, pursuant to the statewide foreclosure mediation program rules; and
- if the homeowner has not appeared in the proceeding, a statement, with a supporting affidavit, of whether or not the defendant is in military service in accordance with the Servicemembers Civil Relief Act.

Chase Home Fin. LLC v. Higgins, 2009 ME 136, ¶ 11, 985 A.2d 508, 510–11 (citations omitted).

4 The Legislature has, for instance, crafted certain limited exceptions to the inadmissibility of hearsay. *See, e.g.*, 22 M.R.S. § 4007(3–A) (2010) (providing that, absent a timely objection, the written report of a licensed mental health professional is admissible in a child protection proceeding, without the professional's testimony, if that professional treated or evaluated the child who is the subject of the proceeding).

5 The business records exception is stated as follows in the Maine Rules of Evidence:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
> ....
> **(6) Records of regularly conducted business.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business, and if it was the regular practice of

> that business to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 903(12) or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.
>
> M.R. Evid. 803.

End of Document

STATE OF VERMONT

SUPERIOR COURT
Windham Unit

CIVIL DIVISION
Docket No. 246-5-12 Wmcv

Bank of America, N.A. vs. Conrad et al

ENTRY REGARDING MOTION

Count 1, Foreclosure (246-5-12 Wmcv)
Count 2, Foreclosure (246-5-12 Wmcv)

Title: Motion for Sanctions (Motion 7)
Filer: Adrian N. Conrad
Attorney: Eric L. Velto
Filed Date: August 19, 2013

Response filed on 09/16/2013 by Attorney Kathryn Donovan for Plaintiff Bank of America, N.A.
Response filed on 10/08/2013 by Attorney Eric L. Velto for Defendant Erica R. Washburn

The motion is GRANTED.

On Aug. 7, 2013, Mediator Jennifer Emmens-Butler filed her Foreclosure Mediation Report in which she concluded that Plaintiff had failed to mediate in good faith. As grounds, the Mediator stated: "Despite multiple sessions, bank never communicated timely if anything was missing and then asked for things already submitted. It took 45 minutes to find a rep only to find out that review was not done. Review and offer promised after 5/15 session after requiring only one more P&L, only to find that Bank again asked for P&L at 7/10 session (and not prior to) and then requested entire new package on 7/11. Review has never been done despite borrower providing what has been asked for."

Plaintiff/Bank filed an objection to the Mediator's report on Aug. 9, 2013 asserting that the "facts described in said report do not constitute bad faith as defined in the foreclosure statute." Defendant/Borrower filed the pending motion for sanctions on August 19, 2013. Following the hearing on Oct. 8, 2013, and based on the arguments presented in addition to the pleadings, the Court concludes that Borrower has established that Bank failed to participate in mediation in good faith. The Court further concludes that the sanctions sought by Borrower are fully warranted by the egregious circumstances.

Bank's argument that the behavior described by the Mediator does not amount to bad faith is unconvincing. In its opposition to Borrower's request for sanctions, Bank does not dispute either the accuracy of the factual matters identified by the Mediator, or the even more particular chronology set forth in Borrower's motion. Rather, Bank minimizes its role in the unproductive mediation sessions, suggesting that the delays identified are typical while maintaining that it remains "willing and able to continue with the mediation process and seek a solution." Yet, when asked at the hearing for any specific disagreement it might raise with

respect to Borrower's characterizations, Bank maintained that the delay was partially attributable to a discrepancy of only 3 months in the time covered by a profit & loss statement, with no other examples to explain its failure to review and respond to Borrower's request for modification. Accepting the Borrower's account of the history of the attempts at mediation as otherwise unrebutted, the Court is hard-pressed to come to any conclusion other than Bank has been deliberately obstructionist in its dealings with Borrower, or so negligent in the discharge of its duties to prepare and participate in the mediation process that the result becomes indistinguishable from deliberate obstructionism.

The requirement for mandatory mediation incorporated in 12 V.S.A. § 4631 et seq. "establishes a program to assure the availability of mediation and application of the federal Home Affordable Modification Program ('HAMP') requirements in actions for foreclosure of a mortgage on any dwelling house of four units or less that is occupied by the owner as a principal residence". While stopping short of making compliance with the HAMP requirements an affirmative defense to a foreclosure action, the statute provides distinct guidance and broad judicial authority to insure that the affordable modification expectations incorporated in the federal HAMP requirements are actually observed. The record in this case casts extreme doubt over the Bank's protestations that it has been, and continues to be, dedicated to a mediation process that includes a fair opportunity for Borrowers to modify their payment schedule in order to remain in their home while reasonably continuing to discharge their obligation to Bank. Rather, the record here - marked by Bank created delay, unduly burdensome and repetitive document requests, lack of diligent preparation for mediation, and the absence of any evidence of a good faith evaluation of Borrowers' eligibility and capability with respect to a modified loan payment plan – justifies the sanctions requested by Borrower, as to continued stay of any substantive determination of Plaintiff's requested foreclosure remedies, as well as tolling of interest, fees and costs after the original mediation date of Dec. 19, 2012, attorneys fees, and a directive that mediation be rejoined and quickly consummated in good faith. See, *Citibank v. Mumley*, Doc No. S1087-09 CnC (Entry, Sept 1, 2011); *Wells Fargo Bank, N.A. v. Betit et al.,* Doc . No. 408-5-10 Rdcv (Entry Aug. 27, 2012); *PNC Mortgage v. Maruca*, Doc. No. 321-4-10 Rdcv (Entry, Oct. 9, 2012).

WHEREFORE, it is hereby **ORDERED:** Defendant's motion for sanctions is **GRANTED.** Plaintiff and Defendant shall forthwith resume mediation, and complete it within 60 days according to a schedule to be coordinated between counsel for the parties and the Mediator. Defendant shall not be required to produce any documentation already provided unless Plaintiff, through counsel, states in writing a good faith explanation as to why a particular piece of information requires supplementation. All requests for relief in the foreclosure case are stayed pending the Mediator's report after the parties make a renewed effort at good faith modification. For the purposes of determining the amount which Defendants must address through any loan modification, Plaintiff may not assess late fees, and interest after the first mediation date of Dec 19, 2012. Plaintiff shall pay Defendant's reasonable attorneys fees for representation at the failed mediation sessions after Dec. 19, 2012 and in connection with this proceeding for sanctions. Defendant shall submit their request for fees, together with an itemization of counsel's representation, within 15 days.

So ordered.

Electronically signed on October 15, 2013 at 03:10 PM pursuant to V.R.E.F. 7(d).

John P. Wesley

John P. Wesley
Superior Court Judge

Notifications:
Kathryn Donovan (ERN 2345), Attorney for Plaintiff Bank of America, N.A.
Eric L. Velto (ERN 1661), Attorney for Defendant Adrian N. Conrad
Eric L. Velto (ERN 1661), Attorney for Defendant Erica R. Washburn
Neutral Mediator/Arbitrator/Evaluator Jennifer R. Emens-Butler

CARES ACT MORTGAGE RELIEF CHART

Loan Type	CARES Act Apply?	Applicable Guidance	Additional Forbearance Provisions beyond CARES Act	Post-forbearance Options
Fannie Mae	Yes	Fannie Mae Lender Letter 2020-02/Fannie Mae Servicer Script/Fannie Mae Servicing Guide – Forbearance/Fannie Mae Lender Letter 2017-09R (Extend Mod)/Fannie Mae Lender Letter 2020-05 (Payment Deferral)/Fannie Mae Servicing Guide – workout options	• Explicit that no documentation required • More than two forbearance terms explicitly allowed • Mandatory on servicers to extend forbearance up to 12 months if borrowers have not resolved their hardship • Servicer must start outreach efforts to borrower within 30 days of end of forbearance to examine permanent options.	• For borrowers who can afford current payment o Extend Modification (for borrowers who can afford repaying escrow shortage over 60 months) o Cap and Extend Modification o Payment Deferral (for loans 30-60 days behind starting as soon as 7/1/2020) • For borrowers who cannot afford current payment o Flex Modification
Freddie Mac	Yes	Freddie Mac Bulletin 2020-04/Freddie Mac Bulletin 2020-07/Freddie Mac Bulletin 2020-10/Freddie Mac Servicer Script/Freddie Mac Servicer Guide – Forbearance/Freddie Mac Bulletin 2017-25 (Extend Mod)/Freddie Mac Bulletin 2020-06 (Payment Deferral)/	• Explicit that no documentation required • More than two forbearance terms explicitly allowed • If borrower and servicer cannot agree on a term or if servicer cannot communicate with borrower, the servicer must give the borrower the term requested by the borrower • Servicer must start outreach efforts to borrower within 30 days of end of forbearance to	• For borrowers who can afford current payment o Extend Modification o Cap and Extend Modification o Payment Deferral (for loans 30-60 days behind starting as soon as 7/1/2020) • For borrowers who cannot afford current payment o Flex Modification

CARES ACT MORTGAGE RELIEF CHART

			examine permanent options.	
FHA-insured (review mortgage statement, language	Yes	Mortgagee Letter 2020-06/HUD's COVID-19 Questions and Answers/HUD Handbook 4000.1	• No documents required for acceptance • Borrower	• For borrowers who can afford current payment o COVID-19 National Emergency Standalone Partial Claim • For borrowers
VA-guaranteed	Yes	VA Circular 26-20-12	• No statement on whether there can be more than two forbearance periods • No specific method of acceptance is stated, but no documentation is needed. • Explicit statement that borrowers existing forbearance do not need to make a lump sum payment. • Servicer must review files within 30 days of end of plan for permanent options.	• No specific loss mitigation options for COVID-19 related hardships. • Options are stated in VA Handbook M26-4 • Disaster related modifications do apply to COVID-19 defaults.
USDA-guaranteed	Yes	April 8, 2020 Program Update	• No statement on whether there can be more than two forbearance periods • No specific method of acceptance provided. • No discussion of pre-completion conversation.	• Upon completion of forbearance, lender should offer a payment plan or extend the term if the borrower requests it. • Otherwise, lenders should evaluate borrowers under the standard loss mitigation plan.
USDA Direct	Yes	April 8, 2020 Program Update	• No specific forbearance provisions were listed. • The guidance directs borrowers to payment	• No specific post-forbearance provisions were listed. • The guidance directs borrowers to payment assistance and

CARES ACT MORTGAGE RELIEF CHART

			assistance and moratorium provisions.	moratorium provisions.
Private Label Security (PLS)	No	None	No forbearance provisions required.	No modification provisions provided
Portfolio Loan	No	None	No forbearance provisions required.	No modification provisions provided

Hypothetical for RESPA and TILA Servicing Rules

Part 1: For 4/15/2020 Webinar

After the death of her spouse, Amy Debet fell behind on her mortgage. Both she and her spouse were on the mortgage and note. She used the Fannie Mae loan look up online and found out her loan was guaranteed by Fannie Mae. She requested and received a BRP Form 710 from her loan servicer, Large Loan Servicing (LLS) and provided all the documents they requested in a timely manner including the completed BRP, financial documents, and death certificate. Before they could give her an answer, LLS transferred the loan to Huge Loan Servicing (HLS). Amy reached out to LLS and HLS about her loan modification application but heard nothing. HLS then sent her a solicitation letter asking her to provide a whole new loan modification application. Amy complied and sent in the documents requested including the BRP and financial documentation. Three months later, HLS sent her a notice acknowledging her application and asking for a BRP for "all financial contributors." Amy lives alone. There are no other "financial contributors" and she explained this to HLS. HLS then sent a notice denying the modification stating she failed to provide the requested documents.

Amy sent a Request for Information (RFI) and Notice of Error (NOE) to HLS explaining that she had a complete application with LLS, asked HLS to connect with LLS to get the application, and also asked for an explanation on the denial of the recent application and that HLS provide her with a response on the documents she submitted to LLS and HLS. HLS responded that she had not provided the documents requested but did not provide any further response. With the help of an attorney costing $100, she sent a second QWR/RFI/NOE to HLS via certified mail costing $6.00 in which she itemized the documents she sent to LLS and to HLS and asked HLS to use those documents to evaluate her for a loan modification. She also explained again that HLS did not need a BRP from a contributor because there was no contributor. She said that HLS was in error in denying her application for lack of documents as HLS had or could have gotten all the documents it needed. HLS replied that it would evaluate her again if she reapplied because at this point, all the documents were stale. HLS then began calling Amy several times a day to find out when she would pay the full amount owed. When she could not pay, HLS sent notice and then filed a foreclosure action against her.

Part II: For 4/25/2020 Webinar

Amy became anxious, upset, and distraught about being able to keep her house. She could not sleep and stopped going out with friends or playing golf because she felt so desperate. She agreed to mediation of the foreclosure action. She attended the first mediation but the HLS representative said they had no record of her ever applying for a modification and that she would have to send in all the paperwork again. Amy sent in the paperwork and, at the next mediation, HLS was supposed to give her an answer on the application. Instead, they told her she needed to send in the death certificate, which she pointed out she had already provided them at least twice. Nonetheless, because she wanted to save her home, she sent in the certificate. At the third mediation, HLS said they had not fully reviewed the application but they were looking at adding the past due amounts to the principal balance and extending out the term. By the time they finally offered Amy a modification with such terms, thousands of dollars of interest had accrued while HLS hobbled through the review process. That interest will now be added to her loan and she will have to pay interest on that.

STATE OF MAINE
YORK, ss.

DISTRICT COURT
Located at Springvale
Docket No. RE-10-392

OCWEN LOAN SERVICING, LLC,
Plaintiff

v.

MELINDA A. McCOY
Defendant

ORDER ON MEDIATOR'S REPORT OF NONCOMPLIANCE

This matter came before the court on February 7, 2012 in connection with the Foreclosure Mediator's Report of Noncompliance filed on December 16, 2011. Plaintiff filed its Objection to Report of Noncompliance on December 21, 2011. At the February 7th hearing, Leonard F. Morley, Jr., Esq., appeared for and represented Plaintiff OCWEN Loan Servicing, LLC. Defendant Linda A. McCoy appeared and was represented by Thomas A. Cox, Esq., who entered a limited appearance for purposes of this hearing. Defendant requests an award of sanctions based on the mediator's report of noncompliance. The court has reviewed the mediator's report, other interim reports of the mediator, and the pleadings filed, including Plaintiff's objection, and has also considered the arguments of counsel.

According to the complaint in this matter, in May 2009 Defendant executed and delivered a note and mortgage to Taylor, Bean and Whitaker Mortgage Company on certain premises in Limerick, Maine. Beginning in July 2010 Defendant ceased making payments on the note and thereby breached a condition of the mortgage. Plaintiff was assigned the mortgage in December 2010. As of December 27, 2010, the principal balance on the note and mortgage was $173,784.53, which, together with accrued interest and other charges up to that point, totaled $180,221.28.

On January 31, 2011, Defendant filed a response to the complaint and a request for mediation. Subsequently, the parties attended five mediation sessions over a six-month period from June 2011 to December 2011.

In mortgage foreclosure actions, when parties are referred to mediation Maine law requires them to make a good faith effort. 14 M.R.S. § 6321-A(12) (parties and their attorneys must "make a good faith effort to mediate all issues. If any party or attorney fails to attend or to make a good faith effort to mediate, the court may impose appropriate sanctions"); M.R.Civ.P. 93(j) ("If a plaintiff or defendant or attorney fails to attend or to make a good faith effort to mediate, the mediator shall inform the court, and the court may impose appropriate sanctions."). The issue presented in this case is whether the Plaintiff failed "to make a good faith effort to mediate," and if so, what sanctions are appropriate.

Defendant contends that Plaintiff failed to mediate in good faith by prolonging the mediation process far longer than was necessary and causing her to lose time and money. Specifically, she contends that Plaintiff should have known at the outset that Defendant was ineligible for the HAMP[1] loan modification program and therefore substantial time was wasted; that Plaintiff did not evaluate Defendant's application in a timely fashion thereby unnecessarily extending the mediation process; and that at the fifth mediation when Plaintiff finally did disclose that Defendant was ineligible for HAMP, Plaintiff represented that it would only take two to three weeks to explore an alternative modification program but some additional information may need to be provided. Defendant suggests that Plaintiff's course of conduct in this case reflects a general practice by lenders and servicers in foreclosure mediations to deliberately prolong mediations in the hope that borrowers will eventually wear down and give up. The court agrees that, in this case, mediation was unnecessarily prolonged.

The mortgage in question was executed after January 1, 2009, and therefore the loan, on its face, was ineligible for a HAMP modification. Despite the fact that the loan's ineligibility should have been readily apparent to Plaintiff, the first two mediation sessions, conducted on June 8, 2011 and July 25, 2011, respectively, focused exclusively on a potential HAMP modification. During those sessions the parties arranged for Defendant to fill out the HAMP application forms and Plaintiff requested that Defendant submit additional documentation due to changes in her financial circumstances.

During the second (July 25th) mediation session, Plaintiff represented that a HAMP review would take two to three weeks after all necessary documents were received. Defendant agreed to send all requested documents by August 19th. Although Plaintiff received Defendant's documents on August 25th, six days later than the August 19th target date, Plaintiff still had over three weeks to review the documents prior to the third mediation session scheduled for September 19, 2011.

Plaintiff appeared at the September 19th session without having acted upon the information sent by Defendant and therefore unable to move the process forward. *See* Mediator's Interim Report from the September 19th session, stating "Plaintiff had not yet submitted the file for a HAMP review as promised." The mediator's report further noted that at the session Plaintiff "agreed to expedite the HAMP review" and that if the Defendant were to fail to qualify for HAMP, "then she will be considered for a Freddie Mac modification."

The fourth mediation session was held on October 31, 2011. Although six more weeks had elapsed since the prior session, Plaintiff still had not completed the HAMP review it had promised to expedite. Plaintiff could only report that

[1] This acronym stands for "Home Affordable Modification Program", a federal residential loan modification program instituted in response to the subprime mortgage crisis and the ensuing foreclosure epidemic.

the file "was still in underwriting." No mention was made of any consideration given to a potential Freddie Mac modification. The Mediator's Interim Report from the October 31st session states that the mediator warned Plaintiff "that if we return for an additional mediation session and the case has not progressed, the mediator will consider the Plaintiff to be in non-compliance."

The fifth mediation session was held on December 7, 2011. At this point Plaintiff had been in possession of Defendant's financial documentation for 104 days. Plaintiff disclosed, for the first time, that Defendant's loan was not eligible for HAMP, noting that, having originated in May 2009, the loan was outside the January 1, 2009 cut-off for HAMP eligibility. Thus, even though the loan was never eligible for a HAMP modification, it was not until the fifth mediation—nearly six months after the initial mediation session and almost a year after the complaint was filed—before Plaintiff realized, or at least disclosed, that the course it had been pursuing was not available. Apparently it was only at this point that Plaintiff would now consider as an alternative a Freddie Mac modification (despite having flagged this as a potential alternative in September), but Plaintiff now needed additional time to undertake that review.

The question before the court is whether Plaintiff's conduct amounts to a failure to mediate in good faith such that sanctions are awardable pursuant to M.R. Civ. P. 93(j). While that determination is for the court, the statute governing the foreclosure mediation program, 14 M.R.S. § 6321-A, expressly provides that, "[a]s part of the report, the mediator may notify the court if, in the mediator's opinion, either party failed to negotiate in good faith." *Id.* § 6321-A(13). *See also* M.R. Civ. P. 93(j). Here, the mediator did so inform the court, stating in the Report of Noncompliance in pertinent part as follows:

> Plaintiff was not prepared for today's mediation session, the fifth session scheduled in this case. Plaintiff has repeatedly agreed to review Defendant's file for a HAMP or a Freddie Mac loan modification, but has attended one session after another, only to report that the review has still not been completed as agreed. . . . Plaintiff's representative did not report any valid reason for today's lack of preparedness, other than the file being overlooked, and again insisted that Defendant would need to resubmit her package in order for a review to be completed....
>
> Plaintiff's pattern of repeatedly not being prepared and not complying with mediated agreements shows an egregious lack of respect for this process and has cost this program and this Defendant significant time and financial resources. *This mediator recommends that Plaintiff be sanctioned for the repeated waste of judicial resources in an amount that conveys the seriousness of the statutory requirements of this program.*

Report of Noncompliance dated December 7, 2011, the date of the fifth mediation (emphasis added).

Plaintiff's counsel takes issue with the characterization of the proceedings set forth in the Report of Noncompliance. Noting that the Report of Noncompliance was issued by a different mediator than the one who had presided over the previous three mediation sessions, Plaintiff's Objection offers a different perspective. Reviewing each mediation session independently, Plaintiff's counsel contends as to each session that Plaintiff was prepared, cooperative, and acting in good faith. *See* Objection at ¶¶ 3, 4, 6, 8, 11, 13, 14.

The point that counsel misses, however, is that in assessing Plaintiff's conduct in light of a duty to mediate in good faith, the court needs to look at the mediations in their totality. When so viewed, it is difficult to conclude that Plaintiff made a meaningful effort to reach a negotiated resolution of this matter in a timely fashion. It took five mediation sessions and over six months to arrive at a point where Plaintiff determined that Defendant's loan was not even eligible for the HAMP modification program. At the very least, by the time of the September 19th mediation session, when Defendant had provided all updated information requested, Plaintiff should have been in a position to make that determination. Instead, the session was unproductive and was continued. The October 31st session was similarly unproductive. Despite the fact that a potential alternative to a HAMP modification was identified at the September 19th mediation session,[2] no consideration was given to that alternative in October, and it was not until HAMP-ineligibility was determined at the December 7th session that Plaintiff turned again to the prospect of a Freddie Mac modification. Even then, further delay ensued because Plaintiff requested additional information and time for review. While the Plaintiff's attorney may have appeared at mediation sessions prepared and cooperative, the client failed to act on information provided in a timely manner, prolonged this process far longer than was necessary, and wasted both Defendant's and the court's time.

Accordingly, the court finds and concludes that Plaintiff failed to mediate in good faith.[3] In formulating the appropriate sanctions to be imposed in this case pursuant to Rule 93(j), the court has taken into consideration the purpose of Rule 93(j) and the impact of the Plaintiff's conduct.

Accordingly, it is hereby **ORDERED** as follows:

1. Interest charges and fees shall be tolled beginning on the date of the third mediation session, September 19, 2011. If a loan modification is finally approved, then said interest charges and fees shall be tolled from September 19, 2011 to the date said modification is finalized or alternatively to the date of this order, whichever is later. If a loan modification is not approved, then said interest charges and fees shall be tolled from September 19,

[2] *See* Mediator's Report dated September 19th ("If Defendant does not qualify for HAMP, then she will be considered for a Freddie Mac modification").

[3] Such a conclusion is consistent with the overarching goals of the Foreclosure Diversion Program. *See generally* Jesse D. Stewart, Comment, *Maine's Foreclosure Mediation Program: What Should Constitute A Good Faith Effort to Mediate?* 64 Me. L. Rev. 249 (2011).

2011 to the date this order enters. Said interest charges and fees shall not be applied retroactively by the Plaintiff, and the Plaintiff may not recover from, pass on to or charge Defendant in any manner for said interest or fees for the applicable time period just described.

2. Plaintiff shall reimburse Defendant for reasonable expenses, including lost income and transportation costs for the third, fourth, and fifth mediation sessions. Defendant shall submit an affidavit of costs and expenses within 30 days and the court will issue a separate order of reimbursement.

3. Plaintiff shall pay reasonable attorney's fees incurred by Defendant's counsel in connection with the hearing on the mediator's report. Counsel shall submit an affidavit of fees and expenses within 30 days and the court will issue a separate order awarding said fees and expenses.

4. Plaintiff shall not recover from, pass on to or charge Defendant in any manner for any attorney's fees and/or costs related to mediation sessions after the September 19th mediation session and/or related to the hearing on the mediator's report.

5. Plaintiff shall pay a fine of $1,500.00 to the Foreclosure Diversion Program within 60 days of the entry of this order.

The clerk may incorporate this order upon the docket by reference pursuant to Rule 79(a) of the Maine Rules of Civil Procedure.

Dated: March 30, 2012

Hon. Wayne R. Douglas
Judge, Maine District Court

STATE OF MAINE
CUMBERLAND, ss

SUPERIOR COURT
CIVIL ACTION
Docket No. RE-13-0332
NM - CUM - 3/11/2014

JPMORGAN CHASE BANK, N.A.,

Plaintiff

v.

SUSAN GOLDBERG,

Defendant

and

PARKWAY PINES CONDOMINIUM ASSOCIATION,

Party-in-Interest

ORDER ON MOTION FOR SUMMARY JUDGMENT

Before the court is plaintiff's motion for summary judgment in an action for foreclosure brought pursuant to 14 M.R.S. § 6321, et seq. No opposition to the motion has been filed. For the following reasons, the motion is denied.

The plaintiff's motion for summary judgment is subject to Rule 56(j), which imposes detailed requirements for granting summary judgment in foreclosure actions. M.R. Civ. P. 56(j).[1] The court is required independently to determine if those requirements have been met and to determine whether the mortgage holder has set forth in its statement of material facts the facts necessary for summary

[1] Maine Rule of Civil Procedure 56(j) states, in part:

> No summary judgment shall be entered in a foreclosure action filed pursuant to Title 14, Chapter 713 of the Maine Revised Statutes except after review by the court and determination that (i) the service and notice requirements of 14 M.R.S. § 6111 and these rules have been strictly performed; (ii) the plaintiff has properly certified proof of ownership of the mortgage note and produced evidence of the mortgage note, the mortgage, and all assignments and endorsements of the mortgage note and the mortgage; and (iii) mediation, when required, has been completed or has been waived or the defendant, after proper service and notice, has failed to appear or respond and has been defaulted or is subject to default.

judgment in a residential mortgage foreclosure. Chase Home Fin. LLC v. Higgins, 2009 ME 136, ¶ 11, 985 A.2d 508.

After reviewing the file, the court concludes that the requirements for a summary judgment of foreclosure have not been met. The plaintiff has not demonstrated that affiant Donna J. Gilkerson is qualified to testify as to the defendant's default and the amount due on the note. See Beneficial Maine, Inc. v. Carter, 2011 ME 77, ¶¶ 14-16, 25 A.3d 96; M.R. Evid. 803(6); M.R. Civ. P. 56(e); (Gilkerson Aff. ¶¶1-3, 5). The plaintiff alleges the defendant did not make the required monthly payments beginning April 1, 2011. JPMorgan Chase Bank, N.A., was not assigned the mortgage until May 14, 2012. (Pl.'s S.M.F. ¶¶ 4-5; Gilkerson Aff. ¶¶ 8, 10; Ex. D.) It is unclear to the court when the plaintiff began servicing the loan, and the extent to which Ms. Gilkerson relied on documents that were created by other entities.

In her affidavit, Ms. Gilkerson has not satisfied the foundational requirements to permit her to testify regarding the business records of JP Morgan Chase or of other entities involved. See Beneficial Maine, 2011 ME 77, ¶¶ 13-14, 25 A.3d 96. With regard to the records of JP Morgan Chase, Ms. Gilkerson states only that the records "are maintained by Chase during the course of Chase's regularly conducted business activities," and her testimony does not reflect firsthand knowledge or show that she was intimately involved in the plaintiff's daily operations. See Beneficial Maine, 2011 ME 77, ¶ 14, 25 A.3d 96; HSBC Mortgage Servs., Inc. v. Murphy, 2011 ME 59, ¶ 10, 19 A.3d 815; (Gilkerson Aff. ¶ 5.) With regard to the records of other entities involved, Ms. Gilkerson states that the plaintiff's business records "may include records pertaining to the loans it services which were created by others, including records of prior servicers" and that it is the plaintiff's policy "to confirm

such records at the time of acquisition . . . ." (Gilkerson Aff. ¶ 5.) Ms. Gilkerson identifies neither the prior servicers nor the records that originated from those prior servicers. Further, she does not address the policies regarding the transfer of records as required. See Beneficial Maine, 2011 ME 77, ¶¶ 13-14, 25 A.3d 96; (Gilkerson Aff. 1-6).

The Law Court has held that an affiant "whose statements are offered to establish the admissibility of a business record on summary judgment need not be an employee of the record's creator"; however, the affiant must meet the requirements of Rule 803(6) as well as additional requirements regarding the transfer and integration of business records. Id. Plaintiff has not provided adequate evidence of the default or the amount due on the note. See Beneficial Maine, 2011 ME 77, ¶¶ 13-14, 25 A.3d 96; Chase Home Fin., 2009 ME 136, ¶ 11, 985 A.2d 508.

The entry is

The Plaintiff's Motion for Summary Judgment is DENIED.

Dated: 3-11-14

Nancy Mills
Justice, Superior Court

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925 F.3d 534
United States Court of Appeals, First Circuit.

U.S. BANK TRUST, N.A., AS TRUSTEE FOR LSF9 MASTER PARTICIPATION TRUST, Plaintiff, Appellee,
v.
Julia L. JONES, Defendant, Appellant.

No. 18-1719
|
May 30, 2019
|
Rehearing and Rehearing En Banc Denied July 23, 2019

Synopsis

Background: Mortgagee brought action against mortgagor for breach of contract and breach of promissory note. The United States District Court for the District of Maine, John A. Woodcock, Jr., J., 330 F.Supp.3d 530, entered judgment in favor of mortgagee, and mortgagor appealed.

Holdings: The Court of Appeals, Souter, Circuit Judge, held that:

[1] loan servicer's computer printout, containing an account summary and a list of transactions related to mortgage loan, was admissible under the business records exception to the hearsay rule;

[2] loan servicer's employee, who testified about incorporation of prior servicer's records into her employer's database, was a "qualified witness" within meaning of the business records exception;

[3] testimony of loan servicer's employee satisfied requirements of Rules of Evidence that the printout was what its proponent claimed it was and that it accurately reflected the data in servicer's database and was thus an original writing; and

[4] charges for escrow, title fees, and inspections stemming from mortgagee's efforts to maintain property securing mortgagor's promissory note were recoverable under the terms of note.

Affirmed.

West Headnotes (10)

[1] **Federal Courts** Evidence

The Court of Appeals reviews the district court's interpretation of the Federal Rules of Evidence de novo, but its application of those Rules for abuse of discretion.

[2] **Federal Courts** Evidence

The Court of Appeals will not substitute its judgment in a discretionary evidentiary ruling for that of the district court unless left with a definite and firm conviction that the court below committed a clear error of judgment.

[3] **Evidence** Memoranda and statements

Loan servicer's computer printout, containing an account summary and a list of transactions related to mortgage loan, was admissible under the business records exception to the hearsay rule in mortgagee's breach of contract action against mortgagor, although the printout contained some information compiled by prior servicers; servicer incorporated the previous servicer's records into its own database and placed its own financial interest at stake by relying on those records, and its acquisition department took steps to review the previous servicer's records in a way that assured itself of the accuracy of the records. Fed. R. Evid.

803(6).

2 Cases that cite this headnote

[4] **Evidence** Form and Sufficiency in General

A "qualified witness" within meaning of the business records exception to the hearsay rule 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 and kept. Fed. R. Evid. 803(6).

1 Cases that cite this headnote

[5] **Evidence** Form and Sufficiency in General

Loan servicer's employee, who testified about incorporation of prior servicer's records into her employer's database, was a "qualified witness" within meaning of the business records exception to the hearsay rule in mortgagee's breach of contract action against mortgagor; although employee was not personally involved in creation of the records, she provided detailed testimony regarding how her employer maintained its records and how it verified the accuracy of records it got from other servicers. Fed. R. Evid. 803(6).

1 Cases that cite this headnote

[6] **Federal Courts** Evidence

The ordinary practice of federal courts is to apply the Federal Rules of Evidence in diversity cases.

[7] **Federal Courts** Admissibility

Federal rule containing business records exception to the hearsay rule was not materially different from its Maine counterpart, so as to require application of the Maine rule in diversity case. Fed. R. Evid. 803(6); Me. R. Evid. 803(6).

[8] **Evidence** Statements of account

Business records of loan servicers may not always carry the requisite indicia of reliability to be admissible under the business records exception to the hearsay rule; the admission of integrated business records in this context must turn on the particular facts of each case. Fed. R. Evid. 803(6).

2 Cases that cite this headnote

[9] **Evidence** Form and Sufficiency in General

Testimony of loan servicer's employee that computer printout was an account summary and payment history printed from mortgagor's records satisfied requirements of Rules of Evidence that the printout was what its proponent claimed it was and that it accurately reflected the data in servicer's database and was thus an original writing, as required for printout to be admissible in mortgagee's breach of contract action against the mortgagor. Fed. R. Evid. 901(a), 1001(d), 1002.

[10] **Mortgages and Deeds of Trust** Lender or Mortgagee, Remedies of and Enforcement by

Charges for escrow, title fees, and inspections stemming from mortgagee's efforts to maintain property securing mortgagor's promissory note were recoverable under the terms of note, where

> the note permitted recovery for "costs and expenses" in enforcing the note to the extent not prohibited by applicable law.

***536** APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE [Hon. John A. Woodcock, Jr., U.S. District Judge]

Attorneys and Law Firms

Thomas A. Cox for appellant.

Matthew A. Fitzgerald, with whom Ashley P. Peterson, Richmond, VA, was on brief, for appellee.

Michael A.F. Johnson and Dirk C. Phillips, Washington, DC, on brief for Federal Housing Finance Agency, amicus curiae.

Stuart Rossman, Boston, MA, Geoff Walsh, J.L. Pottenger, Jr., and Jeffrey Gentes on brief for National Consumer Law Center and Jerome N. Frank Legal Services Organization, amici curiae.

Frank D'Alessandro and Jonathan E. Selkowitz on brief for Pine Tree Legal Assistance, Inc., amicus curiae.

Before Lynch, Circuit Judge, Souter, Associate Justice,* and Stahl, Circuit Judge.

Opinion

SOUTER, Associate Justice.

In this diversity case, appellee U.S. Bank Trust, N.A., sued appellant Julia Jones for breach of contract and breach of promissory note, among other claims, after Jones stopped making payments due to U.S. Bank on her mortgage loan. At trial, U.S. Bank sought to establish the total amount owed on the loan account by introducing a computer printout, marked as Exhibit 8, that contained an account summary and a list of transactions related to the loan. The District Court admitted Exhibit 8 into evidence and relied on it in granting judgment to U.S. Bank in the amount of $226,458.28. We affirm.

I

[1] [2]Jones argues on appeal that admitting Exhibit 8 violated the Federal Rules of Evidence. "We review the district court's interpretation of the Federal Rules of Evidence de novo, but its application of those Rules for abuse of discretion." Bradley v. Sugarbaker, 891 F.3d 29, 33 (1st Cir. 2018). "[T]his court will not substitute its judgment" in a discretionary evidentiary ruling "for that of the district court unless left with a definite and firm conviction that the court below committed a clear error of ***537** judgment." Clukey v. Town of Camden, 894 F.3d 25, 34 (1st Cir. 2018) (quoting Paolino v. JF Realty, LLC, 830 F.3d 8, 13 (1st Cir. 2016) (internal quotation marks omitted)).

A

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. Fed. R. Evid. 801(c), 802. Rule 803(6) provides that "[a] record of an act, event, condition, opinion, or diagnosis" is "not excluded by the rule against hearsay" if:

> "(A) the record was made at or near the time by-or from information transmitted by—someone with knowledge;
>
> (B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
>
> (C) making the record was a regular practice of that activity;
>
> (D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and
>
> (E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness."

[3]Jones says that Exhibit 8 does not meet the requirements of this rule because of the nature of the information the Exhibit contains or is said to rest upon. Exhibit 8 is a

summary of Jones's account as a mortgage borrower, and, in particular, of the transactions the mortgage history comprises, that is maintained by the current independent servicer of Jones's account, Caliber Home Loans, Inc. Critically, however, this record is a product of records of some transactions that took place before Caliber became servicer of Jones's account. The prior entries were created by two other loan servicers, Seterus and Bank of America, and were integrated into Caliber's database when Caliber succeeded them as servicer. According to Jones, these integrated business records from the prior servicers preclude admission of Exhibit 8 under the quoted rule unless supported by testimony of a custodian or qualified witness with personal knowledge of the record keeping of the respective prior servicers.

But there is no categorical rule barring the admission of integrated business records under Rule 803(6) based only on the testimony from a representative of the successor business. "[W]hether a third party's records ... can be integrated into the records of the offering entity ... for purposes of admission under the business records exception is not an issue upon which this circuit has reached a uniform conclusion" covering every instance. United States v. Savarese, 686 F.3d 1, 12 (1st Cir. 2012). Rather, the admissibility of the evidence turns on the facts of each case.

Thus, 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, FTC v. Direct Marketing Concepts, Inc., 624 F.3d 1, 16 n.15 (1st Cir. 2010), or where the party that produced the business records "relied on the [third-party] document and documents such as those[ ] in his business," United States v. Doe, 960 F.2d 221, 223 (1st Cir. 1992) (internal quotation marks omitted). Conversely, in the absence of third-party evidence, we have rejected the ***538** 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," United States v. Vigneau, 187 F.3d 70, 77 & n.6 (1st Cir. 1999) (emphasis omitted), or sought admission of third-party statements made "by a stranger to it," Bradley, 891 F.3d at 35 (quoting Vigneau, 187 F.3d at 75 (alterations omitted)). The key question is whether the records in question are "reliable enough to be admissible." Direct Marketing Concepts, 624 F.3d at 16 n.15.

In answering that question, we are mindful that the "reliability of business records is said variously to be supplied by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation." Fed. R. Evid. 803 advisory committee's note to 1972 proposed rules. The rule seeks "to capture these factors and to extend their impact" by applying them to a "regularly conducted activity." Id.

Based on the facts presented here, we cannot say that the District Court abused its discretion in finding Exhibit 8 with its integrated elements reliable enough to admit under Rule 803(6). Facts in the record, including testimony provided by an employee of Caliber, Letycia Lopez, establish that the servicer relied on the accuracy of the mortgage history and took measures to verify the same. As the District Court explained, Lopez testified that Caliber incorporated the previous servicer's records into its own database and "plac[ed] its own financial interest at stake by relying on those records," and that "Caliber's acquisition department took steps to review the previous servicer's records in a way that assured itself of the accuracy of the records." 330 F. Supp. 3d 530, 543 (D. Me. 2018); see Trial Tr. 28:3-6, 60:17-19. The District Court also soundly noted that Jones did not "dispute the transaction history by claiming overbilling or unrecorded payments," as she surely could have done if the records were inaccurate. 330 F. Supp. 3d at 544; see Fed. R. Evid. 803(6)(E). Nor has Jones contested the District Court's conclusion that the data revealed "no discrepancies" giving rise to doubt that the business records were trustworthy. 330 F. Supp. 3d at 541; see id. at 544.

[4] [5]Jones seeks to eliminate the significance of the testimony from Lopez by arguing that she was not a "qualified witness" within the meaning of subsection (D) of Rule 803(6). According to Jones, Lopez was not personally involved in the creation of Caliber's records and lacked knowledge about how prior loan servicers maintained their records. But a "qualified witness" "need not be the person who actually prepared the record." Wallace Motor Sales, Inc. v. Am. Motors Sales Corp., 780 F.2d 1049, 1061 (1st Cir. 1985). Rather, a "qualified witness" is "simply one who can explain and be cross-examined concerning the manner in which the records are made and kept." Id. Here, Lopez provided detailed testimony regarding how Caliber maintained its records, Trial Tr. 8-13, and how it verified the accuracy of the records it got from other servicers, id. at 26:22-28:16. Lopez therefore was "qualified" within the meaning of Rule 803(6).

Jones not only fails to eliminate Lopez's competence as a

witness, but she also fails to discredit the substance of Lopez's testimony that the incorporated records were reliable owing to the very fact that Caliber put its financial interest at stake by relying ***539** on them. Jones claims that any reliance is of little, if any, evidentiary worth, simply because Caliber is a contractor that services the mortgage account, not the holder of the note. According to Jones, if the incorporated information turns out to be unreliable so as to defeat any action to collect the balance Caliber says is due, the loser will be U.S. Bank, not Caliber. But this is simply unrealistic. If Caliber is shown to be claiming unsupportable facts about an account's history, to the financial detriment of U.S. Bank as assigned payee of a mortgagor's note, Caliber's business with U.S. Bank will suffer accordingly, as will its appeal in the eyes of other note holders who contract or might contract with Caliber for its services. Since Jones gives us no sufficient reason to refuse to apply the evidence of reliance here, we treat it as we did in Doe, 960 F.2d at 223, as evidence of incorporation's reliability.

[6]Nor are we persuaded by Jones's fallback argument that it was error to interpret Federal Rule 803(6) in a manner inconsistent with the corresponding state rule of evidence in Maine, where this diversity suit was brought. The District Court was doing nothing other than following the ordinary practice of federal courts to apply the Federal Rules of Evidence in diversity cases. See Downey v. Bob's Discount Furniture Holdings, Inc., 633 F.3d 1, 8 (1st Cir. 2011).

[7]Of course, we leave open the possibility that there could be instances in which the State rule counts as a "substantive" rule that must be applied under the doctrine of Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). See McInnis v. A.M.F., Inc., 765 F.2d 240, 245 (1st Cir. 1985). But this is no such case, given that Federal Rule 803(6) "endeavor[s] to reach almost identical results" as its Maine counterpart. Id. While Federal Rule 803(6) and Maine Rule 803(6) were not entire facsimiles of one another at the time the District Court decided this case, an authoritative treatise on Maine evidence had noted that the State and Federal versions of the rule were "substantively the same," Richard H. Field & Peter L. Murray, Maine Evidence 417 (4th ed. 1997), and the State has recently revised its Rule 803(6) so that its text is now identical to the Federal Rule, Me. R. Evid. 803(6) advisory committee's note to August 2018 amendment (amending the Maine Rule "to follow a corresponding 2014 amendment" to the Federal Rule). Maine cases also take the same basic approach as our cases do: Maine permits the admission of integrated business records if the evidence "demonstrate[s] the reliability and trustworthiness of the information." Beneficial Me. Inc. v. Carter, 25 A.3d 96, 102 (Me. 2011).[1] Because there is no material conflict between the Maine Rule and the Federal Rule, there is no ground for requiring the Maine Rule to be applied in this case.

[8]In sum, we reject Jones's challenge under Rule 803(6) to the District Court's admission of Exhibit 8. We do so, however, while acknowledging that the business records of loan servicers may not always carry the requisite indicia of reliability. See, e.g., ***540** Brief for National Consumer Law Center and Jerome N. Frank Legal Services Organization as Amici Curiae 12-18. It therefore bears repeating: the admission of integrated business records in this context must turn, as it does here, on the particular facts of each case.

B

[9]Jones also claims that the District Court's admission of Exhibit 8 violated Federal Rules of Evidence 901, 1001, and 1002. Rule 901(a) provides that "the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." The related Rule 1002 requires "[a]n original writing, recording, or photograph ... in order to prove its content unless these rules or a federal statute provides otherwise," while Rule 1001(d) includes the provision that for "electronically stored information," an "original" is "any printout ... if it accurately reflects the information."

The District Court did not abuse its discretion in concluding that Exhibit 8 satisfied these rules. Lopez testified that she "reviewed personally the records in this particular case" and "found them to be accurate," Trial Tr. 28:9-13, and specifically attested that Exhibit 8 was "an account summary and payment history" printed from Caliber's records. Trial Tr. 25:19-26:15. That testimony is sufficient to "support a finding" that Exhibit 8 "is what the proponent claims it is," as Rule 901(a) requires, and it also suffices to support a finding that Exhibit 8 is a "printout" that "accurately reflects" the data in Caliber's database and is thus an "original writing," as Rules 1001(d) and 1002 require.

Jones argues that Lopez's testimony was inadequate because it did not supply "[e]vidence describing a process or system and showing that it produces an accurate result," as is contemplated by Rule 901(b)(9). But Rule 901(b)(9) offers just one illustrative "example[ ] ... of evidence that satisfies the requirement" of Rule 901(a),

and a proponent may satisfy Rule 901(a) by other means. Fed. R. Evid. 901(b). Thus, even in the absence of expert testimony regarding the accuracy of the process, we have held that the testimony of "someone knowledgeable, trained, and experienced in analyzing" the program's results may show that "the item is what the proponent claims it is," as Rule 901(a) requires. United States v. Espinal-Almeida, 699 F.3d 588, 612-613 (1st Cir. 2012). Here, Lopez's testimony amply demonstrates that she was "knowledgeable, trained, and experienced" in analyzing Caliber's records. Id.; see Trial Tr. 32:1-33:11. And her testimony indicated that Exhibit 8 is an accurate printout from Caliber's database. Trial Tr. 25:19-26:15. There was no abuse of the District Court's discretion in admitting Exhibit 8.

II

[10]There is one final matter of housekeeping. Jones claims that the District Court erred by awarding U.S. Bank approximately $23,000 in charges for escrow, title fees, and inspections that were not recoverable under the terms of her promissory note. Because she did not raise that claim in the District Court, our review is for plain error. Blockel v. J.C. Penney Co., 337 F.3d 17, 25 (1st Cir. 2003). Jones's note permits recovery for "costs and expenses in enforcing this Note to the extent not prohibited by applicable law." Note 6(E). Amounts owed for escrow, title fees, and inspections qualify as "costs and expenses" incurred in "enforcing this Note," for they stem from U.S. Bank's efforts to maintain the property securing the note, and they likely would not have been incurred absent Jones's breach. Jones has not identified any contrary evidence demonstrating ***541** that the award of these charges was error, plain or otherwise.

Affirmed.

All Citations

925 F.3d 534, 109 Fed. R. Evid. Serv. 609

Footnotes

* Hon. David H. Souter, Associate Justice (Ret.) of the Supreme Court of the United States, sitting by designation.

1 Jones alleges that two recent decisions of the Supreme Judicial Court of Maine reject an integrated business records exception. See KeyBank Nat'l Ass'n v. Estate of Quint, 176 A.3d 717, 721-722 (Me. 2017); Deutsche Bank Nat'l Tr. Co. v. Eddins, 182 A.3d 1241, 1244-45 (Me. 2018). But both decisions rely on Carter and explicitly acknowledge that integrated business records may be admitted into evidence. KeyBank, 176 A.3d at 721; Deutsche Bank, 182 A.3d at 1244. Even if these Maine cases are not identical to our cases in all of their particulars, they follow the same case-by-case reliability approach to the admissibility of integrated business records. See Carter, 25 A.3d at 101.