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Robo-Signing Redux: Servicers Still Fabricating Foreclosure Documents

The practice continues nearly a year after the companies were caught cutting corners in the robo-signing scandal and about six months after the industry began negotiating a settlement with state attorneys general investigating loan-servicing abuses.

Several dozen documents reviewed by *American Banker* show that as recently as August some of the largest U.S. banks, including Bank of America Corp., Wells Fargo & Co., Ally Financial Inc., and OneWest Financial Inc., were essentially backdating paperwork necessary to support their right to foreclose.

Some of documents reviewed by *American Banker* included signatures by current bank employees claiming to represent lenders that no longer exist.

Many banks are missing the original papers from when they securitized the mortgages, in some cases as long ago as 2005 and 2006, according to plaintiffs' lawyers. They and some industry members say the related mortgage assignments, showing transfers from one lender to another, should have been completed and filed with document custodians at the time of transfer.

"It's one thing to not have the documents you're supposed to have even though you told investors and the SEC you had them," says Lynn E. Szymoniak, a plaintiff's lawyer in West Palm Beach, Fla. "But they're making up new documents."

The banks argue that creating such documents is a routine business practice that simply "memorializes" actions that should have occurred years before. Some courts have endorsed that view, but others, such as the Massachusetts Supreme Judicial Court, have found that this amounts to a lack of sufficient evidence and renders foreclosures invalid.

According to a document submitted in a Florida court by Bank of America Corp., bank assistant vice president Sandra Juarez signed a mortgage assignment on July 29 of this year that purported to transfer ownership of a mortgage from New Century Mortgage Corp. to a trustee,

Deutsche Bank. Two problems with that: New Century, a subprime lender, went bankrupt in 2007; and the Deutsche Bank trust that purported to hold the loan was created for a securitization completed in 2006 — about five years before Juarez signed it over to the trust. (Bank of America, as the servicer of the loan, was seeking to foreclose on behalf of the trust and its bondholders.)

Most of the pooling and servicing agreements governing securitizations require a complete chain of endorsements. This means the promissory note (the piece of paper the borrower signs promising to pay the loan) and all intervening mortgage assignments showing transfers from one lender to another must be delivered to a trust within 60 days of the securitization closing date.

Jumana Bauwens, a spokeswoman for B of A, says such mortgage assignments are simply "procedural steps" to prove to a court that a trust has the right to foreclose on a borrower. In the Juarez case, B of A had power of attorney to sign on New Century's behalf, she says.

But other mortgage industry members argue that the burden of proof is on the banks to show their legal right to enforce a debt, and that servicers are supposed to audit the loan before proceeding with a foreclosure.

"They're supposed to make sure the trust is the correct trust, that the loan was properly assigned to the trust and that the debtor is genuinely in default," says Michael Olenick, the chief executive of Legalprise Inc., a West Palm Beach, Fla., research firm that tracks foreclosure filings and other court records for attorneys.

Several other documents reviewed this month by *American Banker* were signed in July by Tonya Hopkins, who identified herself as an assistant secretary for Sand Canyon Mortgage, also known as Option One Mortgage Corp., the former subprime lending unit of H&R Block Inc.

Sand Canyon quit the mortgage business in 2009 and sold the loans to American Home Mortgage Servicing Inc., where Hopkins now works — but she still signed the documents as an officer of Sand Canyon. An H&R Block spokesman calls Sand Canyon a "discontinued business."

Philippa Brown, a spokeswoman for American Home, says the transfer of the loan took place at the closing of the securitization in 2006 and the assignment that was recorded in 2010 was a "confirmatory assignment, memorializing the transfer that had previously occurred while Sand Canyon was still in business."

She adds, "The practice of executing assignments to confirm for the public record that mortgages were previously assigned to the trust reflects standard industry practice."

In another document, Wells Fargo assistant secretary Nancy D. Sorensen recently acted as a nominee of Fremont Investment and Loan, which went out of business in 2008. On Aug. 11 of this year, she assigned a mortgage from the Mortgage Electronic Registration Systems registry on behalf of Fremont to a Deutsche Bank trust — for a bond issue that was completed in 2006.

Wells Fargo spokesman Tom Goyda says the document is "a routine and fully authorized assignment of the [mortgage] note," on behalf of Fremont "and its successors."

On June 17, Mollie Schiffman, an assistant vice president at OneWest Bank, signed a mortgage assignment for a loan that also was supposed to have been transferred to a Deutsche Bank trust in 2006. OneWest, built on the ashes of the failed IndyMac, did not respond to requests for comment for this article.

On May 18 of this year, GMAC assistant secretary Jacqueline Keeley, acting as a nominee of now-defunct Aegis Wholesale Corp., assigned a mortgage from the MERS registry to a Deutsche Bank trust for a bond deal that closed in 2005. GMAC is now known as Ally Financial.

Ally spokeswoman Gina Proia says it is common for there to be a gap between mortgage assignments transferred from one lender to another. Some states allow for after-the-fact documentation of previous transfers, she says.

But most securitization agreements required the actual note, mortgage, and all intervening assignments to be transferred to a trust before the closing date, which the documents reviewed by American Banker show did not always happen.

Securitization attorneys insist the trust agreements give banks latitude on the delivery of documents such as assignments. And banks have maintained that such legal errors are mere "technicalities." Bungled paperwork, they argue, does not change the main issue in foreclosures: that the borrower is in default.

Plaintiffs' lawyers counter that, in the rush to securitize large pools of mortgages, the mortgage lenders, trustees and custodians did not track or record documents. The lawyers, most of whom are litigating in Florida, say that many banks failed to deliver original "blue ink" signed promissory notes and all the intervening mortgage assignments as required by securitization trusts.

James Kowalski Jr., a lawyer in Jacksonville, Fla., says servicers have been creating mortgage assignments "out of thin air" for years because so many lenders that went out of business failed to complete and transfer the required paperwork for mortgages in securitized trusts.

"The bank servicers are going back and realizing that they have to bridge a missing gap because the originating lender is no longer in existence and they can't move the property," he says. "The banks want to paper over the true transfer question."

North Carolina consumer bankruptcy lawyer O. Max Gardner III says servicers and trustees often submit promissory notes in court without proper endorsements, which show the chain of title from one lender to another. Then, after the fact, there will be "a magically appearing note with a stamped endorsement," Gardner said.

When plaintiff's lawyers then try to depose the person whose name is stamped on the endorsement, "we're being told the person is no longer employed by the servicer or by the party for whom they signed," Gardner says.

Linda Tirelli, a New York bankruptcy lawyer, calls such mortgage documents "Ta-Da!" assignments because they seem to appear out of nowhere.

"Why are they creating their own assignments to begin with?" asks Tirelli, who represents borrowers. "Why is this even an issue?"