

AMERICAN BANKER

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Burden of Proof Grows in Foreclosure Hub Florida

American Banker | Wednesday, March 3, 2010

By Sara Lepro

A pair of Florida court rulings will make foreclosures in this hard-hit housing market even more painful for lenders.

The state Supreme Court said last month that before foreclosing, a lender must verify that it has all the proper documents, including proof it owns the mortgage in question. This isn't as easy as it may sound, since during the securitization boom of the last decade, mortgages were typically sold several times over.

If, when pressed by the borrower, a lender cannot produce such papers, the institution could be fined for perjury, the court said.

Foreclosures in other states have been dismissed for lack of such proof, but those rulings were handed down on a case-by-case basis. Florida stands out for trying to uniformly make lenders do more due diligence up front.

"Florida is the first state that I'm aware of that ... is requiring some pretty strict rules of evidence and documentation of who is the actual holder of the note," said O. Max Gardner 3rd, a consumer bankruptcy attorney at Gardner & Gardner PLLC in Shelby, N.C.

In December, the same court said all Florida foreclosure cases must go through mediation, a process that has been gaining popularity in other states and that bankers say makes foreclosures expensive for them.

Both rulings are designed to help ease the backlog of foreclosure cases that have been clogging Florida courts. The verification requirement, for example, precludes long, drawn-out arguments over whether the lender has the right to bring an action against the borrower in the first place.

"The effect here is in part to help the individual homeowner, but it's also an effort to try to ensure that the creditors' sloppiness in preparing these foreclosures isn't imparting a huge burden on the court," said Katie Porter, an associate professor at the University of Iowa College of Law. It's a clear message to lenders "to clean it up," she said.

Florida's approach isn't expected to be widely duplicated elsewhere. Only 20 states even require lenders to go through courts to conduct foreclosures. (In most other states, lenders can simply move to sell the house, though the borrower can sue to stop the foreclosure. A handful of states have a hybrid system where a lender can choose to process a foreclosure in or out of court.)

Even so, anything affecting foreclosures across Florida has an industrywide impact. Florida has one of the highest foreclosure rates in the country, with one in every 187 homes receiving a foreclosure filing in January, according to the latest data from RealtyTrac Inc.

MISSING NOTES

The problem of proper documentation is one that has only surfaced in the last couple of years, but that has taken some courts awhile to figure out.

"This has been an issue going on in bankruptcy court for four or five years at least," Gardner said. "There was a long learning curve for the lawyers that were representing the consumers and an educational process for the court system to understand ... the complexities of securitization."

One of the more prominent instances of a borrower's lack-of-documentation defense holding up occurred in October 2007, when a federal judge in Cleveland dismissed 14 foreclosure claims brought by a subsidiary of Deutsche Bank AG on the grounds that it could not adequately show it owned the mortgages in question.