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EXPERT ANALYSIS

Lender Alert: Getting Electronic Records Admitted in Florida and New Jersey Foreclosures

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With the rise of securitized mortgage trusts and the subsequent collapse of several lending institutions, it is now commonplace for the party pursuing a foreclosure action to be different from the lender or loan servicer in place at the origination of the loan. Servicing responsibilities are also routinely transferred — perhaps multiple times over the life of a loan — with the loan file being integrated into a new servicing company's records each time. Lenders and loan servicers seeking to admit prior companies' integrated electronic business records as an exception to the hearsay rule during a foreclosure case should be aware that courts are closely scrutinizing a lender's ability to authenticate those records.

Indeed, borrowers often argue that electronic evidence is inadmissible due to improper authentication by the lender's testifying employee. In Florida and New Jersey — the states with the highest foreclosure rates in the country — courts are responding to this business record admissibility challenge by outlining different tests.

Florida and New Jersey have adopted the same elements for the business records exception to the hearsay rule. Both states require an affiant to authenticate that:

- The written record was made at or near the time of the event.
- The record was made by or from information transmitted by a person with relevant knowledge.
- The record was kept in the ordinary course of a regularly conducted business activity.
- It was a regular practice of that business to make such a record.
- The sources of information or circumstances of preparation indicate that it is trustworthy.[1]

In Florida, a business entity's records obtained from prior servicers can be established as trustworthy by a showing that they were subject to the business's internal practices and procedures to ensure the accuracy of the records at the time of the integration.[2] Florida courts have adopted the two-part analysis, set out by *Bank of New York v. Calloway*, 157 So. 3d 1064 (Fla. 4th Dist. Ct. App. 2015), to determine the admissibility of merged business records. First, a witness must lay a proper foundation by demonstrating familiarity with the record-keeping system of the company that prepared the document, as well as knowledge of how the data was uploaded or integrated into the current system.[3]

Second, the court must determine whether the witness's foundation for how the merged business records were created passes a "trustworthiness threshold."[4] Lenders and loan servicers have struggled with this part of the analysis.[5] Recent cases have provided some direction, indicating

that the "trustworthiness" test can be satisfied in at least two ways: by testimony that the successor servicer independently confirmed the accuracy of the predecessor's records, or by offering evidence that the records were reviewed for accuracy before they were integrated into the successor servicer's records system.[6]

Most recently, in *Bank of New York Mellon v. Johnson*, 185 So. 3d 594 (Fla. 5th Dist. Ct. App. 2016), Florida's 5th District Court of Appeal affirmed that a loan servicing employee can demonstrate sufficient familiarity with the servicer's integration of the business records even if the employee did not personally participate in the process.

Reversing a trial court's dismissal of the foreclosure action, the court was satisfied that the merged records had been properly authenticated, and thus were admissible, because the loan servicing employee "testified at length regarding the procedures [the servicer] used to verify the accuracy of the records it obtained from [the prior servicer]" and further testified that the current servicer's records complied with the elements of the business records exception to hearsay.[7]

This decision appears to indicate that lenders and servicers should educate employees who serve as witnesses on how the prior or current record holder verified the accuracy of the loan records before or after integrating them. By doing so, the company can best prepare a witness to sufficiently authenticate merged electronic records.

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New Jersey courts are more liberal in their review of authentication, requiring only that the testifying employee have personal knowledge of his own employer's business records. Personal knowledge of the record integration is not required. The New Jersey Rules of Court specify that in foreclosure cases:

> The affidavit shall be made either by an employee of the plaintiff, if the plaintiff services the mortgage, on the affiant's knowledge of the plaintiff's business records kept in the regular course of business, or by an employee of the plaintiff's mortgage loan servicer, on the affiant's knowledge of the mortgage loan servicer's business records kept in the regular course of business.[8]

Because the rules of court expressly permit a loan-servicing employee to testify based on the servicer's records rather than on those of the prior lender or servicer, lenders face fewer challenges authenticating records in New Jersey.

In *U.S. Bank v. Morris Bayonne Associates*, 2015 N.J. Super. Unpub. LEXIS 2154 (N.J. Super. Ct. App. Div. Sept. 9, 2015), the New Jersey Superior Court Appellate Division affirmed the trial court's admission of the servicer's electronic business records even though the servicer's employee had testified that he only had personal knowledge of how the servicer's records — and not the lender's — were created and maintained. The servicer's employee verified that he had personal knowledge that the servicer was "the current custodian of the original loan documents" and that his knowledge was based on his firsthand review of those documents.[9]

Noting that the "purpose of the business records exception is to broaden the area of admissibility of relevant evidence where there is necessity and sufficient guarantee of trustworthiness," this ruling highlights that the witness must demonstrate personal knowledge of the electronic record system currently being used in order to authenticate that the records are what they are claimed to be.[10] Accordingly, lenders and servicers should ensure that their witnesses can testify to how the electronic record system works and explain the basis for this personal knowledge.

As both Florida and New Jersey courts continue to closely review how a witness authenticates electronic business records in foreclosure cases, lenders and loan servicers should be aware of the developing analysis in these jurisdictions to best select, and thoroughly prepare, their employee witnesses in order to avoid problems with the admission of critical evidence.

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NOTES

[1] Fla. Stat. § 90.803(6)(a); N.J.R.E. 803(c)(6).

[2] *Bank of N.Y. v. Calloway,* 157 So. 3d 1064, 1069 (Fla. 4th Dist. Ct. App. 2015), *reh'g denied* (Mar. 3, 2015).

[3] *Burdeshaw v. Bank of N.Y. Mellon,* 148 So. 3d 819, 823 (Fla. 1st Dist. Ct. App. 2014).

[4] *Calloway*, 157 So. 3d at 1071.

[5] *Compare, e.g., Weisenberg v. Deutsche Bank Nat'l Trust Co.,* 89 So. 3d 1111, 1112 (Fla. 4th Dist. Ct. App. 2012) (finding bank agent testimony laid foundation where she knew how the data was produced and had knowledge of how the data was uploaded into the bank's record-keeping system), with *Glarum v. LaSalle Bank,* 83 So. 3d 780 (Fla. 4th Dist. Ct. App. 2011) (determining loan specialist did not establish foundation where he admitted he had no knowledge of how his own company made data entries into its system).

[6] *Channell v. Deutsche Bank Nat'l Trust Co.,* 173 So. 3d 1017, 1020 (Fla. 2d Dist. Ct. App. 2015).

[7] *Bank of N.Y. Mellon v. Johnson,* 185 So. 3d 594 (Fla. 5th Dist. Ct. App. 2016).

[8] N.J. Ct. R. 4:64-2(c).

[9] *U.S. Bank v. Morris Bayonne Assocs.,* 2015 N.J. Super. Unpub. LEXIS 2154, at *17-18 (N.J. Super. Ct. App. Div. Sept. 9, 2015).

[10] *Id.* at *19-20.

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