PUBLICATION

Sanity in Florida? New Ruling Sheds Some Light on the Business Records Exception

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On May 6, 2015, Florida's Third District Court of Appeal finally weighed in on an important tactic relied on by servicers in residential foreclosure actions. In *Bank of America, N.A. v. Delgado*, No. 3D13-910 (Fla. 3d DCA May 6, 2015), the court held that qualified witnesses testifying under the business records exception were not required to have actually worked at the company at the time all the business records entries were made, as long as the witnesses can show that they have personal knowledge of, and understand, the record keeping system.

Background

In residential mortgage foreclosure litigation, qualifying a witness under the business record exception has historically been an important evidentiary obstacle to overcome. While most employees can answer the basic foundational questions to qualify as witnesses, foreclosing plaintiffs typically run into problems in two situations: when the witness is required to testify regarding records of a prior servicer; and when the witness is a relatively new employee of the servicer and the records predate the witness's employment.

There have been a number of recent appellate court opinions regarding prior servicer's records. These cases generally rely on the 2005 Second District case of *WAMCO XXVIII, Ltd. v. Integrated Elec. Environments, Inc.*, 903 So. 2d 230 (Fla. 2d DCA 2005), which held that if a servicer integrates records of a prior servicer into its own business records, and relies on the records in the regular course of business, the prior servicer's records become a part of the new servicer's records. The Fourth District recently approved the *WAMCO* decision on the issue of prior servicer records. Although, under the facts of the case before it, it found that the witness did not have sufficient knowledge to qualify, the *Holt* court stated "A subsequent note holder can also provide testimony consistent with that which was approved by the Second District in *WAMCO*, where the current note holder had procedures in place to check the accuracy of the information it received from the previous note holder." *Holt v. Calchas, LLC*, 155 So. 3d 499, 506 (Fla. 4th DCA 2015).

Thus, the law on prior servicer records is pretty well settled, and the big takeaway for servicers is to ensure that they have adequate training programs for any employees who will be witnesses. Every lender or loan servicer in the business of buying and selling loans or servicing rights should have a boarding process in place to verify the accuracy of records received from a prior servicer and integrate the prior servicer records into its own records. Adequate training on this boarding process will ensure that the witnesses can always qualify to testify based on prior servicer records.

Although the issue of prior servicer records seems to be well-settled in Florida's appellate courts, *Delgado* resolved a related evidentiary issue that has been recurring in the trial courts: when a borrower's counsel objects to a witness being able to testify as to business records, parts of which were made before the witness was employed by the corporation who is party to the suit. Business records may be admitted under section 90.803(6) of the Florida Statutes if the proponent of the evidence demonstrates the following through a records custodian or other qualified person:

(1) the record was made at or near the time of the event; (2) was made by or from information transmitted by a person with knowledge; (3) was kept in the ordinary course of a regularly conducted business activity; and (4) that it was a regular practice of that business to make such a record.

Weisenberg v. Deutsche Bank Nat. Trust Co., 89 So. 3d 1111, 1112 (Fla. 4th DCA 2012); § 90.803(6)(a), Fla. Stat.

In cases where the business records predate the witness's tenure as an employee with the foreclosing plaintiff or servicer, borrower's counsel are examining servicer witnesses on whether the policies and procedures have changed since the inception of the loan. Because the witnesses were not employees during all relevant times, many respond that they are not sure. Many trial court judges then find that the witness is not qualified to testify as to records that predate that employee's tenure. This is often fatal to the case because some courts then find that if the initial numbers are not reliable, then they cannot ensure that the remaining records are accurate. If this approach were affirmed by the appellate courts and widely adopted, corporate litigants would be required to keep an army of long-term employees on staff as witnesses, a proposition, which does not make much sense. Despite the proliferation of this issue in Florida's trial courts, the appellate courts had not taken this issue up.

The sparse case law on the issue supported the argument that a qualified witness need not have been in the employ of the corporate party when the business records were made, so long as the witness was familiar with the recordkeeping procedures. *O'Leary v. InfraSource Transmission Services Co.*, 758 F. Supp. 2d 9, 12 (D. Me. 2010) ("If Mr. O'Leary were correct, no business could ever admit a business record under Rule 803(6) that had been created before the hiring date of its most senior employee, a proposition that is nonsensical."); *accord* 34 Am. Jur. Proof of Facts 2d 509 ("[T]he witness need not even have been in the employ of the business to which it relates at the time of its making, so long as he understands the system." (citing 4 Weinstein's Evidence ¶803(6)[02])). However, without any Florida Appellate courts weighing in on the subject, trial courts were free to rule as they saw fit.

The *Delgado* Decision

The *Delgado* decision held that qualified witnesses testifying under the business records exception weren't required to have actually worked at the company at the time all the business records entries were made, as long as the witnesses can show that they have personal knowledge of, and understand, the record keeping system. This commonsense approach to the business records exception will allow witnesses to testify as long as they meet the standard prerequisites and can confirm that their employer currently relies on the records in the ordinary course of its business, even if some of the entries in the records predate the witness's employment.

What This Means for You

The takeaway from the *Delgado* decision for lenders, loan servicers and all corporations involved in litigation is that there is no substitute for adequate training programs on record keeping procedures for all employees who may be called to testify pursuant to the business records exception. If a witness can testify that the records are made and maintained by persons with knowledge, at or near the time of the event; that they are kept in the ordinary course of business; and that it is the regular practice of the company to make and rely upon such records, the witness should be qualified to testify in nearly every situation irrespective of when that witness began working for the corporation and when the records were made. Additional training on boarding process for records of prior servicers should ensure that the prior servicer's records will qualify as records of the current servicer, avoiding the need to haul an employee from every prior servicer into court. *Delgado* is a giant leap toward streamlining this process.

If you have questions about this or any other residential mortgage-related matter, please contact the Baker Donelson attorney with whom you regularly work or any of the Firm's residential mortgage litigation attorneys.