

PUBLICATION

Affidavits: Heightened Attention on Modern Business Practices and the Law

October 22, 2010

As everyone in the mortgage industry is keenly aware, servicers and related entities have come under severe scrutiny for the methods by which they prepare affidavits in support of foreclosure efforts. Critics of the foreclosure process allege that various personnel were signing affidavits without reviewing relevant loan records and that some affidavits were notarized improperly. To whatever extent these alleged errors were made, the allegations alone had a significant effect on real estate financing and the foreclosure process. Several mortgage companies halted foreclosures in multiple states. Moreover, mortgage litigation has exploded and is distracting mortgage companies and servicers from the routine default processes. The seemingly ministerial act of executing an affidavit is wreaking havoc in the industry and threatening to further delay the resolution of the national foreclosure glut.

In both affirmative lawsuits where lenders seek to foreclose on security interests or enforce notes and defensive lawsuits where lenders are sued by their borrowers, affidavits are a key requirement for satisfying evidentiary requirements. For instance, Rule 56 of the Federal Rules of Civil Procedures provides that an affidavit used in conjunction with a motion for summary judgment must be "made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated." The rules of civil procedure in most states, including Georgia, Alabama, Mississippi and Florida, contain similar requirements.

While the requirement of personal knowledge appears simple, the realities of business sometimes raise complexities. In modern real estate finance, loans are administered by computers, and companies service loans by the thousands. Accordingly, individual employees often do not have original personal knowledge of the facts underlying each loan. As a result, a lender's employee must base statements in an affidavit on a review of the business records of the entity, rather than eyewitness knowledge. In order for an affidavit based on business records to be valid, of course, the affiant must have reviewed those records. In light of the significant volume of foreclosures currently being conducted nationwide, it is difficult to conduct a review of business records underlying every loan. In spite of this difficulty, however, it is critical to do so. Any employee signing an affidavit based on business records must always take the time to personally review those records.

Another issue regarding affidavits may lie on the horizon. Rule 56 of the Federal Rules of Civil Procedure requires that testimony be legally admissible in order to be considered in support of a motion for summary judgment. This means that an affidavit must satisfy the relevant requirements of the rules of evidence of the court where an action is being prosecuted. In many jurisdictions, the rules allow an affiant to testify based on a review of business records, but this rule varies by state.

Certain states like Georgia and Alabama hold that affidavits executed by employees pursuant to their review of business records rather than direct personal knowledge are inadmissible under the hearsay or best evidence rules unless the business records are incorporated into the affidavit as an attachment. *Beacham v. Calvary Portfolio Servs., LLC*, 304 Ga. App. 37, 38 (Ga. Ct. App. 2010); *Stephens v. First Commercial Bank*, 2010 WL 876823, *2 (Ala. Mar 12, 2010); *Ex parte Walker*, 623 So.2d 281 (Ala. 1992). This is typically a technical issue that is not enforced unless a party objects. However, the present environment requires that companies require their attorneys to consider these issues and adjust their practices accordingly. If uncorrected, the reliance on

affidavit testimony without incorporating the necessary supporting documents could exacerbate the difficulties facing the industry today.

As a result of today's developments, affidavits of all types require heightened attention. Affidavits are critical evidentiary documents, and they must be drafted, signed and notarized with precision and care.