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More on Mortgage Transfer Mysteries

Roger Bernhardt

Introduction

Predatory mortgage lending issues appear to have died down momentarily, at least as far as reported state and federal appellate litigation indicates, but questions about the transfers of those mortgages in the secondary market seem to be growing markedly. Three issues ago, I wrote on *Aceves v U.S. Bank* (2011) 192 CA4th 218, 120 CR3d 507, where one of the issues was whether the new trustee had been properly substituted in by the new lender. See *Mixed Messages on Mortgage Foreclosures*, 34 CEB RPLR 54 (Mar. 2011). Then, two issues ago, I covered *Gomes v Countrywide Home Loans, Inc.* (2011) 192 CA4th 1149, 121 CR3d 819, which held that our statutory provisions permitting trustee sales to be conducted by “any authorized agent” of the beneficiary eliminate most debtor challenges as to how the loan documents got to the foreclosing party. See *Challenges to California Foreclosures Based on MERS Transfers*, 34 CEB RPLR 87 (May 2011). Then, last issue, I commented on *Ferguson v Avelo Mortgage, LLC* (2011) 195 CA4th 1618, 126 CR3d 586, which—indirectly—upheld the effectiveness of a transfer through MERS although it involved only the deed of trust and not the note. See *The Editor’s Take*, 34 CEB RPLR 143 (July 2011). Now, in this issue, there are three more cases involving those issues. What keeps the topic from being monotonous is that the rulings are always new and different—and often scary.

Herrera v Deutsche Bank: Proving a Chain of Loan Titles

In the first of the decisions rendered in this period—*Herrera v Deutsche Bank Nat’l Trust Co.* (2011) 196 CA4th 1366, 127 CR3d 362, reported on p 169—the Third District sets a high bar that a lender must clear when it is not the original holder of the loan it is foreclosing. The original beneficiary of a 2003 deed of trust in that case was Long Beach Mortgage, followed by its successor, Washington Mutual Bank, then its successor, JPMorgan Chase Bank, and then, finally, Deutsche Bank. Because there seemed to be no real argument that the underlying debt was not in default and that formally correct trustee sale proceedings had been conducted, the chain of title to the loan was the only issue holding up a summary judgment in favor of the defendant lender in the trustors’ action to set aside the sale. The holding was that the lender’s production of a 2009 recorded assignment of the deed of trust by JPMorgan to Deutsche and a same-day recorded substitution of trustee by Deutsche was not enough to establish proper authority to conduct a trustee sale, even when bolstered by a declaration of an officer of the new trustee that money was still owing on the loan.

I am no evidence expert, but it seems obvious even to me that when there have been transfers from X to Y and then to Z, neither a copy of the Y to Z document nor a

declaration by an employee of Z would constitute satisfactory proof about the X to Y part of the transaction. If that is all that the case holds, then its impact is probably limited and surmountable. Foreclosing lenders need merely produce a complete chain of title, rather than a few links of it, when being challenged by their borrowers. That is, while the record of the Y to Z assignment might not be acceptable as proof of a transfer from X to Y, it would sufficiently evidence the Y to Z transfer, so that supplementing it with a recorded X to Y assignment would complete the necessary chain (assuming that the problem of an internal MERS transfer is also finessed).

On the other hand, if this decision means—as some bankruptcy courts have suggested—that duly qualified officers from each institution in the process will have to appear in court to swear under oath that they actually and validly did assign their mortgage documents to the next party in line, then the secondary market is in for a long and uncertain time, considering how many of those lending institutions no longer exist. The forgiving standards employed by the First and Second Districts in *Gomes* and *Aceves* may not fare as well in the harsher climate of the Third District, if that is really what the court was saying.

In re Veal: Proving That This Lender Really Is the End of the Line

The second decision, *Veal v American Home Mortgage Servicing, Inc. (In re Veal)* (BAP 9th Cir 2011) 450 BR 897, reported on p 169, moves one step later in the loan transfer process: Even if a complete chain of title was established, is this beneficiary or trustee really the one at the end of the line, *i.e.*, the one entitled to collect or foreclose on the loan? The original beneficiary in *Veal* was GSF, who assigned the mortgage to Option One, who assigned it to Wells Fargo Bank (Wells), as trustee for a securitized trust. When *Veal* filed a Chapter 13 petition, Wells sought stay relief to foreclose, while its mortgage trustee, American Home Mortgage Servicing, Inc. (AMHSI), filed a proof of claim, both of which steps *Veal* resisted. Unlike *Herrera*, the previous steps in the chain of loan titles were not in issue, but rather whether the final transfer step really did give Wells standing to foreclose the mortgage.

The problem arose because the assignment from Option One to Wells recited that it transferred “the mortgage securing payment of the note” without saying that it also transferred the note itself. Given that language, could Wells truly assert that if *Veal* paid it, *Veal*’s obligation on the note would be discharged as against any other creditor? Wells had to be a “person entitled to enforce” the instrument, as UCC Article 3 requires (UCC §3–301), but the documents did not show that Wells possessed the note or that the note was bearer paper, nor even that Wells was a possessing nonholder with the rights of a holder (such as one who takes by assignment rather than negotiation). Nor did it show that Wells was an owner of the note, with enforceable rights to payment of it under Article 9 (UCC §9–203). Transfer of a mortgage without the underlying note accomplishes nothing except to give the transferee a worthless piece of paper. As for AMHSI, its evidence failed to show that it was a proper agent of Wells, who held the note, or what endorsements were on it.

Unlike *Herrera*, these are issues of commercial law rather than evidence. The lender or servicer has to have the note to enforce the mortgage debt; merely showing that it has the mortgage (without the note) is no substitute. Maybe Wells can find the note (it should have gotten possession of it under the pooling and servicing agreement that securitized the Option One pile of loans), or perhaps it can use appropriate lost note procedures to make up for its disappearance. The bankruptcy courts—as my prior columns have noted—are making considerably more rigorous demands than many of our state courts request. *Veal* is much closer to *Herrera* than to *Aceves* and *Gomes* in wanting all of the I's dotted and T's crossed.

This case arose in Arizona and seemed to turn on Illinois law, but I think its logic might equally apply here—unless our state court holdings or statutes can trump federal bankruptcy rules.

Edwards v Wells Fargo Bank: A Happy Ending?

These three cases were conveniently published in an order that corresponds to the sequencing of foreclosure challenge issues, and this third decision takes us to the very end of the foreclosure process. In *Edwards v Wells Fargo Bank (In re Edwards)* (BAP 9th Cir, July 12, 2011, BAP No. CC-10-1362-MkPaD) 2011 Bankr Lexis 2810, reported on p 167, a trustee sale was held on May 17. The lender (who purchased at that sale) filed an unlawful detainer action on June 3 and obtained judgment on July 14 and a writ of possession on July 26. Only after that, on August 5 (apparently in the hope of stopping execution of the writ), did the debtor file under [Chapter 7](#).

The bankruptcy filing was clearly too late, given that under [CC §2924h](#), the debtor had much earlier lost all of her legal and equitable interests in the property. The completed trustee sale to itself meant that Wells was now full owner of the property. Therefore, according to the Bankruptcy Appellate Panel, (1) Wells had standing to request stay relief to continue seeking possession of the property and (2) the debtor no longer had any interest in the property to include in her bankruptcy estate. Earlier compliance with *Veal*'s demanding standards was no longer relevant, even in bankruptcy court.

So there can come a time when everything finally does come to an end. But do not forget all that had to have happened to bring about that result. First, in her bankruptcy, this debtor wanted only to include the property in her estate—not, apparently, to challenge the mortgage loan, nor its transfer, nor its ultimate foreclosure. Second, in state court, she had defaulted in the unlawful detainer action brought against her. Even then, as the court notes in a footnote, res judicata does not necessarily mean complete issue preclusion against her, because of the brevity of summary unlawful detainer proceedings. So stay tuned for news on some later action yet to be brought by Edwards to undo everything.

I was tempted to include a fourth, even later, post-foreclosure development from the federal district court, *Herrera v LCS Fin. Serv. Corp.* (ND Cal, June 1, 2011, No. C09-02843 TEH) 2011 US Dist Lexis 58288 (not the same Herrera as in state court), which permitted class certification of the nearly 5000 homeowners who had received dunning

notices from a loan servicer about their second mortgages, after having been foreclosed out of their first mortgages, probably in violation of the [CCP §580b](#) antideficiency rule, and arguably therefore in violation of the state and federal fair debt collection practices acts. So the saga does truly continue.