

Connecticut LawTribune

OCTOBER 18, 2010
VOL. 36, NO. 42 • \$10.00

An ALM Publication



CTLAWTRIBUNE.COM

NO FREEZE ON FORECLOSURES IN STATE COURTS

Some banks voluntarily halt procedures

By THOMAS B. SCHEFFEY

After two weeks of pondering, the state's chief court administrator has told Attorney General Richard Blumenthal she would not place a 60-day moratorium on processing foreclosure cases, despite mounting nationwide evidence the major lenders have been improperly preparing court documents.

In an Oct. 14 letter, Chief Court Administrator Barbara Quinn said it is up to individual judges to watch out for problems with foreclosure cases. She said the judges are "keenly aware" of their obligation "to protect the integrity of the judicial process."

Specifically, they're on alert to carefully consider any motion that questions the reliability of "affidavits of debt," which establish a bank's standing to foreclose in the first place. Judges will also pay attention to motions challenging a lender's claims to "personal knowledge of the underlying documents establishing the chain of title of the debt."

Quinn's carefully chosen words made it clear it's up to those facing foreclosure — and their attorneys — to raise motions and challenge potentially fraudulent foreclosure papers. Blumenthal expressed disappointment that no freeze was imposed. But on their own, mortgage banks and their lawyers have started asking to re-do their flawed foreclosure work in Connecticut.

Foreclosures represent a major part of the Connecticut court docket. There were more than 26,000 in fiscal year 2010. In the previous year, when the state saw nearly 25,000 foreclosure actions, the Judicial Branch launched a foreclosure mediation program that has resulted in thousands

of homeowners being able to stay in their homes.

Voluntary freezes by banks may reduce the pressure on the mediation system. "That would be fine with us," said Deborah Fuller, the Judicial Branch's legislative liaison, who said the system is working to capacity right now.

Over the past few weeks, major banks nationwide have been admitting incidents of bank agents authorizing hundreds and even thousands of foreclosures a week, all the while asserting personal knowledge of the claimed debt. Following these revelations of so-called "robo-signing," JP Morgan/Chase, Bank of America and GMAC/Ally have halted their foreclosure machinery, pending internal review. Congress, the media, and economists are taking a hard new look at the securitized mortgage morass.

Connecticut's attorney general — who is also running for U.S. Senate — has joined that fray. During the past two decades, Blumenthal has repeatedly held a national leadership role when his fellow attorneys general have joined together in consumer, antitrust and "Big Tobacco" litigation. Last week, Blumenthal was one of the leaders of a coalition of attorneys general from all 50 states, probing the "robo-signing" scandal.

The AGs say the goal of their inquiry is to scrutinize the process of "robo-signing" and "evaluate potential remedies" where the mortgage documentation is fraudulent or unsubstantiated.

'Document Execution Issues'

In addition to national banks imposing freezes on new foreclosures, Connecticut lawyers have begun halting foreclosure actions which have already gone to judgment.



CHRISTOPHER BROWN

Law Tribune File Photo

On Oct. 11, foreclosure lawyer Andrew Barsom, of Hartford's top foreclosure firm Hunt Liebert Jacobson, filed a motion to vacate judgment in a case against a small residential borrower. Judgment of foreclosure had entered Sept. 20, but Hunt Liebert asked the court to open and vacate the judgment "to address potential document execution issues."

Finance lawyer Richard A. Rochlin, of Hartford's Sigman & Rochlin, says that the case illustrates how lenders' haste to file foreclosure actions has led to sloppy legal work.

Rochlin said he has been working on a pro bono basis with a borrower, Blackman Properties, which has a loan being serviced by LaSalle Bank National Association. Rochlin's clients were told they missed a payment in

October 2008, but, he says, they presented a canceled check for that date. The bank then said the missed payment must have been from October 2007; Blackman then presented that cancelled check as well.

Rochlin says the bank began the foreclosure process too soon, with too little evidence, and should be punished for abusing the court system. He said as much in an Oct. 15 motion in New Britain Superior Court. "Eventually, Plaintiff stopped investigating and, in bad faith and reckless disregard of proper judicial process, commenced the instant [foreclosure] action," the motion states.

Even though the bank has ultimately admitted its foreclosure filing may have been premature, Rochlin isn't pleased: "Son of a gun. Here we are struggling, the borrower spending countless hours spinning its wheels, and now the bank is telling us 'Oops, we want to take a step back and make sure we did thing right.' We are going to hold the bank's feet to the fire and not just ask that the foreclosure be stayed, but that the bank be sanctioned and be forced to pay for fees and other remedies, as serious as having the judge find that any back principal and interest is waived."

Repeated calls to Hunt Liebert partner Richard Liebert had not been returned by press time.

Longstanding Problems

In Westport, foreclosure lawyer Christopher Brown had some of the earliest success in challenging the byzantine paperwork of

securitized mortgages on behalf of borrowers. He said he's not surprised by the "robo-signing" problems.

In the wake of the 50-state attorney generals' investigation, Brown, a partner in the Westport firm of Begos, Horgan & Brown, said: "The things they're looking into are things I have been raising for years."

The three-way-relationship between mortgage lenders, borrowers and banks and financial institutions that ultimately service the loans has been fraught with problems and bad design, he said. "If you have somebody signing 150 affidavits a day, because there were tons of foreclosures and only a handful of people responsible for the signing, it's not possible to properly review everything, check all the numbers and documents," Brown said.

The servicing banks found that "it was much more cost-effective to put a stack of [affidavits of debt] in front of the person signing, and then have that person go ahead and sign them all, then pass them off to a notary someplace else. A lot of this is arrogance on the banks' part."

Brown said the basic issue at the heart of "robo-signing" – document preparation -- may provide a technical delay in the foreclosure process, but would not, in itself, cancel anyone's debt. He said it was fair to compare an affidavit flaw to a criminal mistrial, which does not result in an acquittal.

Of Blumenthal's attempt at a moratorium, Brown said: "I don't necessarily think much of it. It's a nice gesture, but the courts

don't have any authority to give it to him. I don't think the banks have any obligation to voluntarily halt these things on their own.

"Even if they [institute a moratorium], it's like hitting the pause button. They're not going to blanketly dismiss cases. It may be that OK, you get 60 days to complete your investigation, but then what?"

Robinson & Cole mortgage banking lawyer Norman Roos agreed it would not be helpful to shut down foreclosure as a remedy, even temporarily. If there were a broad freeze on foreclosures, said Roos, one unintended consequence would be to "certainly chill lending activity."

If mortgage lending availability contracted, it would have a negative impact on property values, which could hurt the housing market and economy, he said.

Roos said one matter that might be part of the national investigation is the current practice of financial institutions bundling together mortgages and selling them as securities. Some attorneys have said that leads to situations where there is confusion over who actually holds title to the mortgage. That issue has already been the focus of some foreclosure cases in Connecticut.

"They'll look at what due diligence was performed in the packaging of securities," said Roos. "Are there substantive issues here? Who has nominal, legal or beneficial title to the mortgage, are more technical points. Did a step get missed?" ■