

Challenges to Foreclosure Docs Reach a Fever Pitch

American Banker | Wednesday, June 16, 2010

By [Kate Berry](#)

Correction: *An earlier version of this story misidentified the court where Judge J. Michael Traynor presides. It is a Florida state court, not a federal one. An editing error was to blame.*

The backlash is intensifying against banks and mortgage servicers that try to foreclose on homes without all their ducks in a row.

Because the notes were often sold and resold during the boom years, many financial companies lost track of the documents. Now, legal officials are accusing companies of forging the documents needed to reclaim the properties.

On Monday, the Florida Attorney General's Office said it was investigating the use of "bogus assignment" documents by [Lender Processing Services Inc.](#) and its former parent, [Fidelity National Financial Inc.](#) And last week a state judge in Florida ordered a hearing to determine whether M&T Bank Corp. should be charged with fraud after it changed the assignment of a mortgage note for one borrower three separate times.

"Mortgage assignments are being created out of whole cloth just for the purposes of showing a transfer from one entity to another," said [James Kowalski Jr.](#), an attorney in Jacksonville, Fla., who represents the borrower in the M&T case.

"Banks got away from very basic banking rules because they securitized millions of loans and moved them so quickly," [Kowalski](#) said.

In many cases, Kowalski said, it has become impossible to establish when a mortgage was sold, and to whom, so the servicers are trying to recreate the paperwork, right down to the stamps that financial companies use to verify when a note has changed hands.

Some mortgage processors are "simply ordering stamps from stamp makers," he said, and are "using those as proof of mortgage assignments after the fact."

Such alleged practices are now generating fire from the bench.

In the foreclosure case filed by M&T in February 2009, the bank initially claimed it lost the underlying mortgage note, and then later claimed the mortgage was owned by [First National Bank of Nevada](#), which the [Federal Deposit Insurance Corp.](#) shut down in 2008, before the foreclosure had been started.

M&T then claimed Wells Fargo & Co. owned the note, "contradicting all of its previous claims," according to Circuit Court Judge [J. Michael Traynor](#), who ordered the evidentiary hearing last week into whether M&T perpetrated a fraud on the court.

"The court has been misled by the plaintiff from the beginning," Judge [Traynor](#) said in his order, which also dismissed M&T's foreclosure action with prejudice.

The Marshall Watson law firm in Fort Lauderdale, Fla., which represents M&T in the case, declined to comment and the bank said it could not comment.

In a notice on its website, the Florida attorney general said it is examining whether Docx, an Alpharetta, Ga., unit of [Lender Processing Services](#), forged documents so foreclosures could be processed more quickly.

"These documents are used in court cases as 'real' documents of assignment and presented to the court as so, when it actually appears that they are fabricated in order to meet the demands of the institution that does not, in fact, have the necessary documentation to foreclose according to law," the notice said.

Docx is the largest lien release processor in the United States working on behalf of banks and mortgage lenders.

[Peter T. Sadowski](#), an executive vice president and general counsel at [Fidelity National](#) in Fort Lauderdale, said that more than a year ago his company began requiring that its clients provide all paperwork before the company would process title claims.

[Michelle Kersch](#), a spokeswoman for Lender Processing Services, said the reference on the Florida attorney general's website to "bogus assignments" referred to documents in which Docx used phrases like "bogus assignee" as placeholders when attorneys did not provide specific pieces of information.

"Unfortunately, on occasion, incomplete documents were inadvertently recorded before the missing information was obtained," [Kersch](#) said. "[LPS](#) regrets these errors and the use of this particular placeholder phrasing."

The company, which was spun off from [Fidelity](#) National two years ago, is cooperating with the attorney general and conducting its own internal investigation.

Lender Processing Services disclosed in its annual report in February that federal prosecutors were reviewing the business processes of Docx. The company said it was cooperating with that investigation.

"This is systemic," said [April Charney](#), a senior staff attorney at Jacksonville Area Legal Aid and a member of the Florida [Supreme Court](#)'s foreclosure task force.

"Banks can't show ownership for many of these securitized loans," [Charney](#) continued. "I call them empty-sack trusts, because in the rush to securitize, the originating lender failed to check the paper trail and now they can't collect."

In Florida, Georgia, Maryland and other states where the foreclosure process must be handled through the courts, hundreds of borrowers have challenged lenders' rights to take their homes. Some judges have invalidated mortgages, giving properties back to borrowers while lenders appeal.

In February, the Florida state Supreme Court set a new standard stipulating that before foreclosing, a lender had to verify it had all the proper documents. Lenders that cannot produce such papers can be fined for perjury, the court said.

Kowalski said the bigger problem is that mortgage servicers are working "in a vacuum," handing out foreclosure assignments to third-party firms such as LPS and Fidelity.

"There's no meeting to get everybody together and make sure they have their ducks in a row to comply with these very basic rules that banks set up many years ago," Kowalski said. "The disconnect occurs not just between units within the banks, but among the servicers, their bank clients and the lawyers."

He said the banking industry is "being misserved," because mortgage servicers and the lawyers they hire to represent them in foreclosure proceedings are not prepared.

"We're tarring banks that might obviously do a decent job, and the banks are complicit because they hired the servicers," Kowalski said.