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Judges, attorneys work to stanch foreclosures

Julie Kay / Staff reporter

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Alarmed by the dramatic rise in housing foreclosures across the nation, judges have taken a variety of actions to slow the pace, ranging from outright dismissals for incomplete work to mandated mediation to threatening attorneys with sanctions.

While attorneys hold "boot camps" to train colleagues on how to handle foreclosures, judges have been closing down shortcuts, such as telephone hearings.

Judges and bar associations in several states have also issued a call to all lawyers asking them to represent pro bono thousands of distressed homeowners.

A number of suits have accused banks of allegedly taking shortcuts to rush foreclosures through, often using so-called "foreclosure mills" — law firms that handle a high volume of foreclosure actions — to handle the cases, according to foreclosure defense lawyers, bankruptcy lawyers and consumer rights groups.

They claim that banks — so-called "securitization lenders" that bought scores of mortgages as investments — are filing foreclosure actions without the original paperwork and sometimes, without ensuring that homeowners are properly notified.

Judges around the country are getting the message.

"I deny more foreclosures than I approve," said Justice Arthur Schack of

Kings County, N.Y., Supreme Court, in Brooklyn. "I want to see the servicing agent's power of attorney, I want to see all the paperwork before I approve it. If the paperwork is garbage, I deny it. If you're going to take away someone's home, it should be done properly."

'Political environment'

Tom Deutsch, deputy executive director of the Washington-based American Securitization Forum, a group that represents banks, major law firms and financial companies, acknowledged that judges are becoming "sticklers" for proper paperwork in foreclosure actions. But he asserts that judges are taking issue with technical matters and may not fully understand how the complex industry works.

When judges deny foreclosures because the names of trustees, such as banks, are on the foreclosure documents instead of the names of the servicing agents, who oversee the mortgages, they are taking a procedural action that doesn't change the fact that the homeowner was in default, Deutsch said.

"Judges are being very strict in enforcing the letter of the law," said Deutsch. "This is a heightened political environment and there's been a lot of media interest. But these are merely procedure errors . . . they are pulling out. It's much ado about nothing."

Judges, foreclosure defense attorneys and consumer rights group don't agree.

TOP STATES FOR FORECLOSURES				
Rank	State	Filings in June	Foreclosures to homes ratio	Change from June '07
1.	Nevada	8,713	1 in 122	84.52%
2.	California	68,666	1 in 192	76.97%
3.	Arizona	12,950	1 in 201	126.76%
4.	Florida	40,351	1 in 211	91.83%
5.	Michigan	12,025	1 in 375	19.15%
6.	Ohio	13,194	1 in 382	11.07%
7.	Colorado	4,878	1 in 429	14.50%
8.	Georgia	8,714	1 in 444	21.18%
Nationwide		252,363	1 in 501	53.28%

Source: RealtyTrac of Irvine, Calif.

In Ohio, which has been particularly hard hit by foreclosures, a consortium of plaintiffs' attorneys last month filed a class action against Deutsche Bank A.G. on behalf of Ohio homeowners facing foreclosure. The suit alleges that the bank lacks standing to bring foreclosures throughout Ohio and is missing

key mortgage documents. *Whittiker v. Deutsche Bank National Trust Co.*, No. 1:08cv00300 (E.D. Ohio).

In its filed response, Deutsche Bank, through its attorney Hugh McKay of the Cleveland office of Columbus, Ohio-based Porter Wright Morris & Arthur, flatly denies the allegations and makes the same point that Tom Deutsch made — that the "master servicers" of the mortgages, which are unidentified at this point, are to blame, not them.

In the complex world of mortgage foreclosures in the 21st century, "master servicers" oversee scores of pooled mortgages bought up by banks, making sure mortgages are paid on time and collecting the money. They are hired by trustees like Deutsche Bank, which have in turn been hired by trusts held by financial companies like The Goldman Sachs Group Inc., which buy up mortgages en masse as investments.

But Jim Rosenthal, co-plaintiffs' attorney in the case, calls Deutsche's argument "ridiculous." Because the bank filed the foreclosure in court, it is responsible for its actions and can't pass the buck, he said.

McKay did not return calls for comment.

Pennsylvania courts have also clamped down on foreclosures. In April, the Philadelphia Court of Common Pleas issued a regulation calling for an early intervention pilot project that mandates mediation and possible work-out programs before the property can be seized. *Joint General Court Regulation*, No. 2008-01.

In Nassau County, Fla., Chief Judge Donald Moran of Florida's Fourth Judicial Circuit ruled recently that, due to the "dramatically increasing volume of foreclosure cases coming before the court," the court will no longer allow telephone hearings on foreclosure cases. *Administrative Order*, No. 2008-08.

In January, Ohio Chief Justice Thomas Moyer sent a letter to all 40,000 attorneys in the state asking them to serve as pro bono lawyers or mediators for financially strapped homeowners facing foreclosure. More than 1,300 lawyers agreed and are receiving training from the Ohio State Bar Association.

"This is something we really believe in in our community," said Joshua Cohen, a plaintiffs' attorney at Cohen Rosenthal & Kramer of Cleveland.

A similar initiative recently began in central Florida, where Community Legal Services of Mid-Florida and volunteer private attorneys teamed up to fight foreclosures through what they are calling the Foreclosure Defense Project. The group is enhancing the solicitation by pointing out that the cases can ultimately result in attorney fees — particularly when fraud is found.

April Charney, a consumer specialist at the Jacksonville, Fla., Legal Aid office, is training lawyers around the state of Florida in how to represent homeowners in foreclosure cases.

She teaches lawyers how to turn individual cases into class actions, and has 30 cases involving Deutsche Bank — one of the key banks being targeted by the courts and in class actions.

A problem with 'mills'

Charney's suits against Deutsche Bank echoes several across the country, alleging that "foreclosure mills" are taking shortcuts.

These firms — which get bonuses based on the speed of the foreclosures — have a battery of paralegals churning out the work, and typically hire local counsel unfamiliar with the cases, who frequently lack the original mortgage documents.

That's because the original lender has long since sold the note to a secondary bank or finance company — usually without the knowledge of the homeowner, according to Ira Rheingold, executive director of the Washington-based National Association of Consumer Advocates.

Many of the foreclosures that Charney is defending were brought by the Tampa-based Florida Default Law Group, which represents Deutsche Bank. Officials at the firm did not return calls seeking comment.

The law firm bills itself on its Web site as specializing in creditors' rights,

including "foreclosures on single family, multi-family and commercial real estate, representation of the creditor in debtor bankruptcy matters, evictions, trial work on contested matters, legal opinions and real estate closing proceedings."

Justice Jack Battaglia of Kings County, N.Y., Supreme Court, voiced many of the same concerns over shortcuts in an order that he issued in February, denying a foreclosure brought by U.S. Bancorp's U.S. Bank National Association.

U.S. Bank was several times removed from the original mortgage issuer, describing itself in the action as "trustee for the Home Equity Loan Trust (U.S. Bank National Association, as trustee on behalf of the holders of the asset backed securities Corporation Home Equity Loan Trust)."

Battaglia's order stated that "[t]he affidavit of merit and amount due is executed by a person who is not an officer or employee of either plaintiff or the original mortgagee, and who is not shown to have personal knowledge of the matters asserted, or to be qualified to testify from the books and records of the plaintiff or the original mortgagee," adding that no proof was shown that the homeowner or original lender was properly notified of the default.

Rheingold applauds Battaglia and other judges for refraining from merely "rubber-stamping" foreclosures.

"For too long the courts have just pushed paper through without actually looking at it, which led to people losing their homes," Rheingold said. "The courts are busy and many times no one shows up in court to defend the suitJudges have a gigantic mess on their hands."

A number of law firms that handle high volumes of foreclosures declined comment for this story.

Deutsche Bank, the bank most cited in suits and most often denied foreclosures, declined comment, citing pending litigation. Other banks that have been cited are U.S. Bank and Wells Fargo & Co.

Jennifer Wendt, a spokeswoman for U.S. Bank, which has also been

admonished by judges who have rejected a number of its foreclosures for incomplete paperwork, said her bank was not the one at fault because it bought the mortgage as a "trustee for the securitization" — meaning it oversees a large volume of mortgages on behalf of investors.

"Our name is on those court and county records, but they wouldn't be our mortgages," Wendt said. "It's a pretty complicated thing."

Wells Fargo did not return calls for comment.

The ruling that seems to have opened the floodgates occurred in Ohio federal court in October 2007.

Deutsche Bank, facing a spate of lawsuits in Ohio state court, tried to sidestep state court by moving the cases to federal court. Its strategy backfired.

In his ruling, U.S. District Judge Christopher Boyko in Cleveland dismissed 14 foreclosure cases, stating that Deutsche Bank had no proof to back up its claim that it was the holder and owner of the mortgages. *Amended General Order*, No. 2006-16 (N.D. Ohio).

Following the judge's lead

Judges around the country have been following Boyko's lead. For example, on March 7, Duval County, Fla., Circuit Judge Lance Day dismissed a foreclosure brought by Deutsche Bank, ruling there were "inconsistencies" in the plaintiff's documents. *Deutsche Bank National Trust Co., trustee for Goldman Sachs v. Pope*, No. 16-20 07-CA-008285 (Duval Co., Fla., Cir. Ct.).

Day stated that the only document presented by the plaintiff was a mortgage payable to a separate party. "The document does not reflect the recording information for the mortgage purportedly assigned and does not provide the name of an assignee," stated the ruling.

Mark Kessler, a Jacksonville, Fla., solo attorney representing Deutsche Bank in Day's case, said in an interview that he was simply the local counsel hired by the main counsel and that he didn't even remember the case. "I have so

many of these," Kessler said. "I was just the warm body they called."

Deutsche's primary plaintiffs' attorney in the case, Mark Olivera at the Law Offices of Marshall C. Watson of Fort Lauderdale, Fla., didn't return calls for comment.

Banks' use of local counsel, far removed from the original client and doing a high volume of cases, is part of the problem, according to Max Gardner, a North Carolina solo bankruptcy plaintiffs' attorney.

"Judges are starting to get wise, starting to look at the paper, and say to the attorneys standing before them: 'Who is your client?,' " said Gardner.

But Kessler said lawsuits by lawyers like Charney are only temporary solutions.

"If the paperwork is not right, it's just an exercise," he said. "The bank will ultimately jump through the hoops and get it right, and you're still dealing with the fact that the person is defaulting on his loan and doesn't have the money to pay the mortgage."

That may be true, but judges are taking the matter seriously — so seriously that they've begun to sanction and fine law firms for failing to provide the proper paperwork with their foreclosure actions.

In a blistering opinion in June, Schack, the Brooklyn judge, threatened Mary McLoughlin, an attorney at Rosicki, Rosicki & Associates of Carle Place, N.Y., with sanctions for filing a foreclosure on behalf of Wells Fargo. After doing his own research in the Automated City Register Computer System, a New York homeowner database, Schack discovered that Wells Fargo never owned the mortgage.

Schack denied the foreclosure and further set a hearing for Aug. 1 to afford her a chance to explain why she should not be sanctioned for "frivolous conduct." *Wells Fargo Bank v. Reyes*, No. 5516/08 (Kings Co., N.Y., Sup. Ct.). McLoughlin did not return calls for comment.

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