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Finding Out Who Really Holds The Note

Lawyers have reason, tools to look at securitized mortgages

By GEORGE T. HOLLER

In Frank Capra's "It's a Wonderful Life," when Ed lost his job and missed a few payments, he didn't lose his house. He went to see George Bailey, executive secretary of his mortgage lender, the Bailey Brothers Building and Loan, and they worked things out. Try that with Dusseldorf Bank Trust Company Americas, as Indenture Trustee of the Alibaba Series Class A Trust (2006-A1). While it *was* a wonderful life, today it's just a mess. Trying to figure out who holds a mortgage note which has been securitized can be difficult, if not impossible. There are, however, certain viable techniques that lawyers can use.

First and foremost, why do we care who holds the note? Recently, the Supreme Judicial Court of Massachusetts ruled that where a mortgage lender does not hold title to the mortgage at the time of foreclosure, then that foreclosure is void. See *U.S. Bank v. Ibanez*. In Connecticut however, Connecticut General Statutes Section 49-17 provides a mechanism for a lender to foreclose even if the lender does not have legal title to the mortgage. In other words, what really matters here is who holds the note.

How To Search

Under the Section 1641(f)(2) of the Truth In Lending Act, a mortgage servicer must respond to a written request from the borrower or his representative to identify the full name, address and telephone number of the current holder of the original mortgage note. Failure to respond gives rise to statutory damages.

On the Internet, Fannie Mae and Freddie Mac have web sites which allow you to search based on the property address. Alternatively, if the loan was securitized into a "private label" or "non-agency" trust and certificates of that trust were sold by public offering, then the trust must have been registered with the Securities and Exchange Commission. Beginning in 2006, SEC Regulation AB required the entity creating the trust to file a schedule of included loans. Go to the SEC search portal and search by the name of the trust. See www.sec.gov/edgar/searchedgar/companysearch.html

Of course, this works best if you have the name of the trust. If you don't, remember that loans were typically pooled quarterly and securitized the following quarter in the name of the originating entity.

For example, let's assume your client borrowed $180,040 from Chase in January 2006. You have to know that Chase securitized most of its loans under the name JP Morgan Acceptance Corporation, or JPMAC. Try searching under "JPMAC 2006" using the "contains" function on the search page. This will bring up a list of Chase securitizations. Names often appear in the form similar to: JPMAC 2006-CH1 or JPMAC 2006-CH2. Since our hypothetical loan was closed in January, it would most likely be included in the CH1 trust.

Click on the CIK number (0001378812) on the left side of the search results. Begin searching for the loan schedule by clicking on the oldest Form 8-K. This document should contain the schedule of loans as a separate exhibit or as part of the pooling and servicing agreement. If not, view the Form 424(B)(5) or the Free Writing Prospectus (FWP). It may take some substantial digging to find your loan.

In our example, the loan schedule is contained in the FWP second from the bottom of the search results. Click on the "document" tab on the left, then on the actual document on the next page (m1062fwp.htm). Once in the document, use the Control F function in your web browser and search for your original loan amount: "180400". This particular loan schedule contains information like interest rate, loan number and the original term, which should enable you to confirm a match.

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Unlisted Loans

If the loan was securitized into a private placement, which is different than a "private label," then the trust information would not be filed with the SEC. A private placement securitization was done when the certificates would be sold to a small number of investors such that the Securities Act did not apply. These private placement trusts truly are a black hole. The only way to get information on the note holder is through discovery.

Alternatively, loans securitized prior to 2006 did not include loan schedules, and many filings after the promulgation of Regulation AB did not comply with the sched-

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uling requirement.

There are ways to find these loans. The Bloomberg terminal provides a service that compiles monthly remittance reports from servicers which can be searched to locate your loan. Another service, ABSNet Loan, allows users to drill down to loan level detail using zip codes, original loan amounts, and maturity dates. Both of these services are subscription based and are extremely expensive, especially ABSNet. The best option here is to contact an expert with access to these systems.

Marie McDonnell, of McDonnell Property Analytics, is the expert the Massachusetts court relied upon in the *Ibanez* case. See www.mcdonnellanalytics.com.

Is It Enforceable?

Since the right to receive the mortgage indebtedness is the key element enabling a lender to foreclose, an attorney must examine whether the lender has that right based on Connecticut law. Connecticut's Uniform Commercial Code governs the rights of parties in negotiable instruments. C.G.S. Section 42a-3-301 provides the default rule as to who may enforce a note: "'Person entitled to enforce instrument' means: (i) the holder of the instrument, (ii) a nonholder in possession who has the rights of a holder, . . ." This rule is, however, only a default rule, and per C.G.S. Section 42a-1-302, parties are free to vary the effects of the UCC by agreement.

Arguably, the Pooling and Servicing Agreement (PSA) securitizing your client's loan constitutes such a "variation" overriding the UCC default rules governing the transfer of your promissory note. Most PSA's require two "true sales" prior to transfer to the trust in order to make the promissory notes "bankruptcy remote" from the originating lender (in other words to protect the trust from the avoidance powers of a bankruptcy trustee in case the originating lender goes bankrupt).

To accomplish these "true sales," most PSA's require special endorsement from the originator (A) to a "seller" (B), the same from the seller to a "depositor" (C), and an endorsement in blank from the depositor to the trust (D). In other words, the chain of endorsements on the note should read: "Pay to the order of B," signed A, then "Pay to the order of C," signed B, then "Pay to the Order of _____," signed C.

Typically the lender will bring a note endorsed in blank to the foreclosure, which obviously does not comply with the PSA creating the trust. Most PSA's create trusts governed by New York law, and New York law is clear that any action taken in contravention of the trust agreement is void. Therefore, arguably the lender's attorney standing in foreclosure court waiving a note endorsed in blank has better standing to enforce the note than the client he or she represents.

What would George Bailey think about that? ■