

Use of Prior Servicer's Records at Trial Depends on Proper Foundation

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Mortgage servicing duties are routinely transferred, requiring lenders, servicers and financial institutions to rely on the prior servicer's business records to prove their cases against borrowers – specifically, to prove the amount of the debt due at trial, since the assignee's records necessarily include and are based on the predecessor's records. Such records may also be used to demonstrate possession of the original note prior to the filing of the complaint, and other essential elements of a foreclosure case that go to standing.

Several recent Florida appellate court decisions, however, have given borrowers some ammunition to counter reliance on prior servicer's records. For example, in both *Hunter v. Aurora Loan Services, LLC* and *Yang v. Sebastian Lakes Condo. Ass'n, Inc.*, the court found the prior servicer's records should have been excluded because the witness lacked sufficient personal knowledge to rely on a prior servicer's records.

Nonetheless, reliance on a prior servicers' business records is still permissible with the proper foundation. For example, the court in *Bank of New York, as Trustee v. Calloway*, found the lender's witness sufficiently confirmed the trustworthiness of the third-party business records at issue by testifying that the prior servicer's records had been reviewed for accuracy prior to integrating them into the plaintiff's own records. The court further held that the circumstances of the loan transfer itself could have been sufficient to establish trustworthiness given the business relationships and common practices inherent among lending institutions acquiring and selling loans.

The pivotal difference in the cases: the foundation laid by the lender or loan servicer's trial witness. Therefore, preparation of the trial witness to lay the appropriate foundation for reliance on a prior servicer's business records is key. With sufficient training regarding the policies and procedures in place to ensure the accuracy of records transferred from a prior servicer, a trial witness should be able to lay the proper foundation to allow the witness to rely on a prior servicer's records.