

April 1, 2014

NM Court Challenges Bank Foreclosure Practice

In February, the New Mexico Supreme Court rejected the practices widely used to pursue mortgage foreclosure in New Mexico. In two opinions, *Bank of New York v. Romero* and *Bank of America v. Quintana*, the Court threw out attempts to establish the right to bring suit (standing) through post-Complaint evidence. This is not a small issue of procedure, but rather a direct refutation of the practices by which banks had pursued foreclosure based upon negotiated instruments. Accordingly, the decisions bring into question the validity of a huge number of currently pending foreclosure complaints and should force banks to rethink current practices for pursuing foreclosure. Perhaps unintentionally, the decisions also raise problems for any entity attempting to prove facts through reliance on business records. Accordingly, focused consideration of how to establish standing is now necessary in New Mexico.

Both *Romero* and *Quintana* appear to be fairly standard foreclosure cases. In both, a borrower obtained a home loan and defaulted on the payments on that loan. Also in both cases, the initial lender attempted to assign the note to one or more successors, doing so through specific endorsement and also through a blank endorsement on the note, making the note bearer paper. No endorsement was dated. In both cases, when the plaintiff brought suit, it attached to its complaint a copy of the note since that document existed when the borrower took out the loan, before the inclusion of any endorsements. Because the notes attached to the complaints did not have endorsements and because the plaintiff-banks were not the entities that issued the loans, the question of standing was readily apparent.

When the borrowers challenged their standing to bring suit, both banks attempted to prove standing by arguing that the notes were bearer paper and also by use of testimony that a witness had reviewed the company's business records and was able to swear to the existence of standing based on that review. The trial courts and appellate courts found in favor of the banks in both cases.

The New Mexico Supreme Court overturned the lower courts. Both decisions begin with the premise that a plaintiff must prove standing to bring suit as of the time the Complaint was filed. The notes attached to the Complaint, however, did not establish standing because they both named predecessors to the plaintiffs. While the plaintiffs each had original endorsed notes, showing endorsements in blank, the Court found a contradiction between the undated endorsements. Because none of the endorsements were dated, the Court found that it could not conclude that the notes were bearer paper.

Alternatively, both plaintiffs attempted to show standing through testimony in which a witness testified to the review of business records that showed that plaintiff was entitled to enforce. The Supreme Court found this testimony insufficient, as a matter of law. Because the witnesses did not establish that they had personal knowledge of what they were testifying to and because they relied on business records that had not been produced and that were not of record, there was no admissible evidence by which the plaintiffs could show standing. Accordingly, the Court overturned the decisions.

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Takeaways:

- **Foreclosure is going to become more difficult in New Mexico.** New Mexico generally requires judicial foreclosure. As a result, foreclosure was already a more involved process than it is in many other states. With *Romero* and *Quintana* in place, foreclosing banks should expect challenges to standing in every contested matter.
- **Prove standing before you file.** Standing is an issue that often receives little consideration by clients or lawyers—obviously, the complainant is the correct person or he or she wouldn't be discussing the suit to begin with. In light of *Romero* and *Quintana*, however, this point must receive initial consideration in every case and the plaintiff should clearly establish standing as part of its initial pleading. Though this is not necessarily standard practice in light of liberal rules of notice pleading (and has not been the practice of many foreclosing banks in New Mexico to date), anyone bringing suit as a successor entity must now give consideration to how he or she can prove standing and then make that showing as part of the complaint.
- **Take care to bring admissible evidence.** In both *Romero* and *Quintana*, the plaintiffs attempted to prove standing through reliance on business records showing they had standing, but did not attempt to admit those records into evidence. That may have been because the records were unclear or for some other tactical consideration. Whatever the reason, even live testimony, when only based on amorphous, not produced records, lacked a foundation and could not be considered as proof of standing. This now appears to be the law for all New Mexico cases, not merely those involving foreclosure. Accordingly, the best practice is to disclose the business records, regardless of how convoluted they may be, and to admit them into evidence, with full showings of authenticity, as part of the summary judgment or trial showing.

This document is intended to provide you with general information regarding New Mexico bank foreclosure practices. The contents of this document are not intended to provide specific legal advice. If you have any questions about the contents of this document or if you need legal advice as to an issue, please contact the attorney listed or your regular Brownstein Hyatt Farber Schreck, LLP attorney. This communication may be considered advertising in some jurisdictions.

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