

## Foreclosure Fallout

GMAC's disclosure probably won't help troubled homeowners

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By: Paola Iuspa-Abbott

**W**hen one of the nation's largest loan servicers revealed it had violated court rules involving affidavits in home foreclosure cases, foreclosure defense lawyer Margery Golant didn't become as excited as one might expect.

The attorney with Golant & Golant in Boca Raton and Fort Lauderdale isn't sure the courts will hold GMAC and other loan servicers accountable for filing deficient affidavits that may have led to hundreds of thousands of improper foreclosures in Florida and elsewhere. Golant said she has raised that defense before and judges have usually ignored it.

Circuit judges from around South Florida assert they do not possess the power to investigate the validity of affidavits and thereby help prevent other loans servicers from committing the same missteps as those committed at GMAC.

As a loan servicer, Minneapolis-based Ally Financial's GMAC unit processes foreclosures on behalf of investors like the government-subsidized agencies Fannie Mae and Freddie Mac. They own the notes and mortgages of many of the homes being foreclosed upon in South Florida.

Judges don't yet know how many GMAC foreclosure cases are working their way through the judicial system or how they would be impacted by GMAC's announcement. The loan servicer is not always named in foreclosure lawsuits, so a plaintiff search would not reflect the number of suits involving GMAC, judges said.

"It is a little early to tell what impact it will have systemwide because it is hard to tell the number of cases that might be in this situation," said Palm Beach Circuit Chief Judge Peter D. Blanc.

GMAC already is calling back some cases. It has asked some judges to cancel foreclosure sales and in some cases, to set aside judgments based upon problems with their affidavits, Blanc said.

"And the courts are granting those requests," he added.

Miami-Dade Circuit Judge Jennifer Bailey said there is no mechanism within the state court system to uncover of large numbers of insufficient affidavits because "each case is considered on its own merits."

Last week, GMAC disclosed that it had allowed employees to sign affidavits without having a personal knowledge of the foreclosure cases, violating the Florida Rules of Civil Procedure [Rule 1.510.] It also let employees sign affidavits without the physical presence of a notary public, which is also required by the Florida rules. GMAC said it is fixing the problem and has postponed foreclosure auctions and evictions of people living in GMAC's repossessed homes in Florida and 22 other states.

GMAC has not stopped filing new foreclosures.

In a foreclosure suit, the plaintiff's affidavit outlines how much the homeowner owes, asserts that there are no unresolved disputes between the lender and borrower, and that the home is legally ready to be sold.

Judges rely on the affidavits as critical evidence when they hand down a summary judgment in favor of the owner of the note. That, in turn, paves the way for the sale of a property at a foreclosure auction. A summary judgment kills a defendant's chance to face the note holder in court.

"This is not just a pro-forma submission," said law professor Michael Flynn, who teaches civil procedure at Nova Southeastern University in Davie. "This is serious stuff when you are trying to get the court to grant a judgment without giving people a day in court,"

Since most foreclosure cases are unopposed, the plaintiff's compliance with the rules is rarely questioned. And judges assert they don't have the power to investigate whether people signing affidavits have the knowledge of the case they claim.

"The courts must remain neutral," Blanc said. "So it puts us in an awkward position. We can't go conduct our own investigation. That's not what the courts are supposed to do."

The court can only rule on the validity of an affidavit if an issue is raised by either the plaintiff or the defendant, he said.

"The judge is responsible to see that there is a note, that there is an assignment if it has been assigned, and that there is an affidavit," said Broward Circuit Chief Judge Victor Tobin. "And that's the way it has always been. Judges don't have the legal power to go behind these affidavits. We do whatever the appellate court tells us to do."



Tobin said his staff has identified about 1,000 foreclosure cases in which GMAC is named as a plaintiff — out of more than 50,000 active cases in Broward County.

Golant said GMAC's disclosure gives her ammunition to try to get foreclosure judgments vacated and give the client a chance to fight the plaintiff in a trial.

But she is not getting her hopes up.

"I am sure that attorneys will be asking that summary judgment orders be vacated based on fraud on the court and that there will be renewed objections in still-pending cases," Golant said. "What the court system will do about it is anyone's guess, given the deficient job it has done up to now. The courts are so swamped ... that they've become complacent accepting these [faulty affidavits] on face value, inappropriately."

### **AG Probe**

GMAC broke its silence almost two months after the Florida attorney general's office began investigating foreclosure law firms that work closely with GMAC and other loan servicers over whether court documents were fabricated and signatures forged to obtain summary judgments.

Under investigation are the Law Offices of David J. Stern in Plantation; the Law Offices of Marshall C. Watson in Fort Lauderdale; Shapiro & Fishman, with offices in Boca Raton and Tampa; and the Florida Default Law Group in Tampa. All have denied wrongdoing.

"It appears to us this type of corrective action on behalf of GMAC could be a result of our efforts and the attention our office has paid to this issue," Ryan Wiggins, a spokeswoman for the attorney general's office, said in a written statement.

The attorney general is not investigating GMAC at this point. This week, attorneys general in Connecticut and California launched probes into GMAC's faulty court documents and are demanding a freeze on GMAC foreclosures.

On two other fronts, the Florida Supreme Court rejected a request by U.S. Rep Alan Grayson, D-Fla., to halt all foreclosures involving the law firms under investigation.

In a letter sent to Grayson on Tuesday, the court said it has "no authority under the Florida Constitution or court rules to intercede in pending cases on the basis of allegations of attorney misconduct and [it] has no authority to investigate allegations of fraud or misconduct in foreclosure cases."

Grayson, together with U.S. Rep Barney Frank, D-Mass., and U.S. Rep. Corrine Brown, D-Fla., on Friday wrote to the head of Fannie Mae, Michael Williams, requesting that the agency stop using the Florida law firms under investigation.

### **New Awareness**

West Palm Beach foreclosure defense lawyer Tom Ice hopes GMAC's announcement will encourage judges to become more vigilant.

"We can only hope that this new public awareness will cause the courts to rethink the tendency to treat foreclosure cases as fait accompli, as somehow unworthy of judicial attention and supervision," said Ice, who deposed a GMAC employee in December 2009.

GMAC employee Jeffrey Stephan said during the deposition he signed an estimated 10,000 affidavits a month prepared by his 13-member team but had no personal knowledge of the cases.

Ice, with Ice Legal, said his law firm questioned employees of other loan servicers and heard similar stories.

"Mass numbers of faulty affidavits have already been discovered," he said. "GMAC, Chase and IndyMac officers already confessed to this when we deposed them."

Tobin said it is hard to know what 'personal knowledge' means anymore, particularly when large corporations like GMAC store their information in computers and have thousands of people processing data.

"I don't anticipate the manager of that corporation going through every single file, which presently are all in computers," the Broward chief judge said. "Clearly, a person could not, nor would I expect a person to go through 30,000 loans. I think we can take it for granted that somebody is not doing that and that they have employees doing that."

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