Robo-signing: Continuing Practice by Settlement Banks in Massachusetts Foreclosures

Based upon investigative study by *GoLocal Worcester*

By

Grace C Ross on behalf of the
Mass Alliance Against Predatory Lending

January 14th, 2013

The Mass Alliance Against Predatory Lending (MAAPL) is a coalition of over 65 member and supporting organizations – community organizations, housing counseling agencies, legal services groups, labor and others – founded to arrest the impacts of the foreclosure crisis in Massachusetts through grassroots organizing, homeowner/tenant education, legal strategies and policy initiatives.

MAAPL member/supporting organizations

Action for Boston Community Development, Inc., Action for Regional Equity, Alliance of Providers of Legal Services to Individuals Facing Foreclosure, ARISE for Social Justice, Arlington Community Trabajando, Boston Tenants Coalition, Brazilian Women's Group, Brockton Interfaith Community, Carpenters Local 40, Carpenters Local 107, Charles Hamilton Houston Institute For Race & Justice, Chelsea Collaborative, Chinese Progressive Association, City Life/Vida Urbana, Coalition for Social Justice, Community Economic Development Ctr of S.E. MA, Community Labor United, Democratic Socialists of America, Dorchester People for Peace, Era Key Realty Services, ESAC, Fair Housing Center of Greater Boston, Greater Boston Legal Services, Greater Four Corners Action Coalition, Green-Rainbow Party of MA, Harvard Legal Aid Bureau, Homeowner Options for MA Elders, Jewish Alliance for Law and Social Action, Lawrence Community Works, Lawyers' Committee for Civil Rights Under Law, Lynn United for Change, Legal Assistance Corporation of Central Mass, Mass Advocates for Children, Mass AFL-CIO, Mass Coalition for the Homeless, Mass Community Action Network, Massachusetts Fair Housing Center, Mass Jobs With Justice, Mass Law Reform Institute, Mass Welfare Rights Union, Merrimack Valley Labor Council, NAACP N.E. Area Council, National Community Reinvestment Coalition, National Consumer Law Center, National Lawyers Guild, Neighbor-to-Neighbor, Neighborhood Legal Services, New England United for Justice, No One Leaves – Springfield, North Shore Labor Council, ¿Oiste?, Organization for a New Equality, Painters District Council 35, Pleasant St. Neighborhood Network Center, Southbridge Community Connections, Springfield No One Leaves Coalition, Survivors Inc., Tri-City Community Action Program, UE Northeast Region, Union of Minority Neighborhoods, United Auto Workers Mass CAP, United Food & Commercial Workers 1445, United For a Fair Economy, United Steel Workers Local 5696, Volunteer Lawyers Project, Worcester Anti-Foreclosure Team.

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Forward

Here we provide a report on the findings of a review of one of the two types of affidavits required in all foreclosures in Massachusetts at this time. Please excuse the rough nature of the writing of this report. Given the urgency of hundreds of Massachusetts families in the foreclosure process every month and the promulgation of yet another national foreclosure-reltaed settlement with the largest foreclosing lenders, the gravity of these results of *GoLocal Worcester's* and our results could not wait.

This research was done as a direct result of our anecdotal experience that the largest foreclosing lenders. Their procedures regarding, for instance, signing affidavits based on personal knowledge or compliance with key Massachusetts laws has seems to be endemically non-compliant. These behaviors have not seemed to change regardless of commitments in various settlements.

Therefore, when we received the Mortgage Settlement Monitors' report of August 29th, 2012, stating that the settlement banks claimed 100% compliance with legal requirements that all affidavits be signed on personal knowledge and those of our state's laws, we felt compelled to see if there had in fact been a sea change. Or was it appropriate to consider claiming that the reports to the Settlement Monitor were fraudulent – at least in our Commonwealth of Massachusetts.

The Monitor's report specifically defined the personal knowledge requirement as: "Servicer shall ensure that affidavits, sworn statements, and Declarations are based on personal knowledge, which may be based on the affiant's review of Servicer's books and records, in accordance with the evidentiary requirements of applicable state or federal law."

We set out to find a media research partner to research these claims in a robust way that could point the way to a realistic assessment of the behavior or these key five megabanks. We were blessed to find a media outlet with a real research staff committed to exposure of issues affecting the lives of regular people.

Here, then are the results of our expertise and *GoLocal Worcester*'s invetsigation.

Grace C Ross, Coordinator
Mass Allaince Against Predatory Lending

Introduction

On August 29th, 2012, the Settlement Monitor for the five largest foreclosing lenders and the Attorneys General and five Federal Agencies released his first report: *First Take: Progress Report from the Monitor of the National Mortgage Settlement*.

This report from the Mortgage Settlement Monitor was not required by the settlement; the first required reports will be submitted to the Federal District Court for the District of Columbia in the second quarter of 2013. But this was the Montior's introduction to the public, a summary of the

initial reports to him from the five megabanks covered by the settlement and announcement of how the public and advocates could post their reports to the Monitor.

The Settlement Monitor including the following in his report:
"Office of Mortgage Settlement Oversight Introduction
On April 5, 2012, the Settlement1 went into effect when the United States District Court for the District of Columbia entered five separate consent judgments2 that settled claims of alleged improper mortgage servicing practices against five major mortgage servicing organizations:

- Bank of America, N.A. ("Bank of America")
- CitiMortgage, Inc. ("Citi")
- Ally Financial, Inc., Residential Capital LLC, and GMAC Mortgage, LLC ("Ally")
- J.P. Morgan Chase Bank, N.A. ("Chase")
- Wells Fargo & Company and Wells Fargo Bank, N.A. ("Wells")

"The governments and government agencies participating in the Settlement (the "government parties") were:

- The U.S. Department of Housing and Urban Development
- The U.S. Department of Justice
- Attorneys general from 49 states and the District of Columbia
- Various state mortgage regulatory agencies
- Other releasing parties, including the Consumer Financial Protection Bureau and the U.S. Department of Treasury

"The Settlement contains 304 actionable Servicing Standards. Each Servicer has agreed to a timeline by which it will phase in the implementation of these Servicing Standards. That timeline sets milestones at 60 days, 90 days, and 180 days from the entry of the Consent Judgments: June 4, 2012, July 5, 2012, and October 2, 2012.

"By July 5, each of the Servicers had implemented between 35 and 72 percent of the Servicing Standards. Four of the five Servicers had implemented more than half of the standards. According to information the Servicers have provided to me [the monitor has not reviewed or certified these reports], the following Servicing Standards are among those in place as of the date of this report: Servicers state the following about documents (affidavits, sworn statements, and Declarations) filed in bankruptcy and foreclosure proceedings. Such documents:

- are based on the affiant's personal knowledge;
- fully comply with all applicable state law requirements;
- are complete with required information at time of execution;
- are signed by hand of affiant (except for permitted electronic filings) and dated; and
- shall not contain false or unsubstantiated information."

These sections immediately grab the curiosity of the leadership of the Mass Alliance Against Predatory Lending – with 7 grassroots organizations seeing hundreds of households struggling against foreclosure and eviction every month and dozens of lawyers active in the courts, we had seen no noticeable change in behavior.

Methodology

Given that the August settlement monitors' *First Take* report said that he had received reports from the settlement banks by July 5th saying that all affidavits were now being done by personal knowledge, which could include the review of records, we chose to look at affidavits that are filed in the course of every foreclosure.

There are two such affidavits that have existed in the MA foreclosure process for the last few years. One affidavit is filed attached to a foreclosure deed. These 'foreclosure affidavits' are recorded in the Registries of Deeds across the state. The other affidavit is completed earlier and filed along with the Land Court proceeding, attesting to the compliance with the MA Right to Cure Statute that became effective on May 1, 2008.

We chose to focus on the foreclosure affidavits. Rather than do a random sampling and meeting such research randomization requirements, *GoLocal Worcester* committed to a comprehensive assessment of all foreclosure affidavits that had been executed by July 5th of 2012 or thereafter. We focused on the Worcester Registry of Deeds and the South Essex Registry of Deeds, and pulled all foreclosure deeds with their accompanying foreclosure affidavits through November 19, 2012.

GoLocal's research staff than sorted all of the affidavits to create a pool of affidavits that were signed only by the five settlement banks, which yielded 111 affidavits from the Worcester Registry of Deeds and 56 affidavits from the South Essex Registry of Deeds. These affidavits were then reviewed and a spreadsheet established identifying the affiants (the signers of all the affidavits), and the institution for which they worked.

For each of the properties associated with each of these foreclosure affidavits, *GoLocal Worcester* also compiled from the appropriate Registry of Deeds, the 'possession' filings as they are called in recordation in our state; the actual document is known as a Certificate of Entry. From each of these documents was taken the name of the purportedly authorized bank representative, who was present at the auction and witnessed what occurred at the auction.

All of these affidavits were then assessed both under the standard personal knowledge requirement for affidavits and the alternative standard – the business exemption – as 'keeper of the records' for their institution. This reflects the legal understanding of two acceptable bases for having knowledge regarding recurrences that can be sworn to in an affidavit.

The competency required for standard personal knowledge is actually being present to witness – that is: see, hear, smell, feel what happened at a particular occurrence – or the business exemption standard of competence which is that you are the keeper of the records for an institution that has consistent standard operating procedures, and as the person in charge of those procedures, you can attest to the validity of the records created by such procedures.

As explained in the accompanying legal memo*, MA foreclosure affidavits can be split into three areas of information: the first section being proof that the homeowner was in default, which

requires knowledge of the payment requirements and actual accounting of payments from the borrower; the second section which is standardly carried out by the legal representative for the foreclosing institution, which includes notifications to the homeowner, legally required publication in a newspaper in general circulation in the town where the property is located; and finally a third section which attests to what happened at the auction of the property itself. Given the requirements for competency to attest to each of these sections of activities covered by the foreclosure affidavit, the affiant would have to be the 'keeper of the records' for the bank would have to attest to the first section of the affidavit, the 'keeper of records' for the law office or the actual employee who carried out the steps of notification and related activities by the law firm, and finally someone who was present at the actual auction itself.

Having identified that the affidavits were all signed either by a representative from the foreclosing lender or representative from a law firm, even allowing that the signer from the bank or from the law firm was indeed the keeper of the records for that institution, it becomes clear that they were not the keeper of the records for the other institution; therefore, every affiant failed in competency either because they didn't represent the bank or they didn't represent the law firm representing the bank.

The third area which required actual personal presence at the auction was assessed based by whether the purportedly authorized bank representative on the 'possession' or Certificate of Entry document was the person who signed the affidavit or not. In no circumstances was the person who was supposedly representing the bank at the auction, also the person who signed the foreclosure affidavit.

Results

Of the affidavits reviewed, thirty-six were signed on behalf of Bank of America; twenty-two were signed on behalf of Citi affiliates; fourteen were signed on behalf of the Ally consortium of banks; forty-four were signed for JP Morgan Chase or their trusts; fifty were signed on behalf of Wells Fargo. Of the total, thirty (30) were signed by a bank representative, and one hundred and thirty-six (136) were signed by a representative of the law firm. As we stated above, 100% failed on not having been signed by someone was at the auction – although ten foreclosure affidavits had no Possession document found to have been filed on them. 100% failed because they were not signed by someone who could be both the keeper of the records at the bank and at the representative law firm.

All of the affidavits failed on that third count that the affiant was not at the auction, and all affidavits failed on one of the previous two sections because they were not signed by somebody who worked at both the bank and the law office.

Conclusions

In conclusion, using the standard for personal knowledge laid out in the settlement agreement, which conforms also with MA law, the foreclosure affidavits in two of the MA registries executed since the date by which the settlement banks reported to the monitor they were 100% in compliance with the legal requirements for signing under personal knowledge, shows that their

procedures remained 100% non-compliant with MA law and with the requirements for personal knowledge.

Given the 100% non-compliance in two of MA twenty-one registries and given that that non-compliance is based on the standard operating procedures of the five settlement banks, we believe it is completely safe to generalize our results. To assume non-compliance at least in the vast majority of all foreclosure affidavits recorded in MA since the July 5th date for claimed total compliance by the five settlement banks is a valid conclusion to draw from our research.

We very much hope that our Attorney General who has been so committed to this consumer issue and addressing the wide reaching impacts of the foreclosure crisis and the settlement monitor himself will take very serious note of the fact that our research unquestionably shows that at least in one state, the five settlement banks have inaccurately represented their compliance both with the personal knowledge requirement for legal documents in the foreclosure process and compliance with state law, the two first claims of meeting the legal metrics required by the national settlement agreement.

We call on both offices to take immediate, swift, and unequivocal action.

MEMORANDUM

TO: Grace Ross
FROM: Tom Vawter
RE: Evidentiary Issues re: Affidavits
DATE: December 10, 2012

In the foreclosure context, the Massachusetts legislature has established a short-hand method that when unchallenged has been deemed sufficient to establish that a residential property has transferred hands by foreclosure into the purchaser at foreclosure. The execution and recordation of a foreclosure deed, pursuant to M.G.L. c. 244 §§14-15, and the execution and recordation of an "Affidavit", pursuant to M.G.L. c. 244 §15 and sufficiently in accordance with M.G.L. c. 183, Form 8, has been legislated to be "prima facie" evidence that a residential property has been duly transferred.

A borrower may challenge the accuracy and/or validity of either or both of these documents. Such a challenge must generally be raised through the courts and court cases. There really has been no other avenue available to a borrower.

In a court setting, the central challenge would be whether either the foreclosure deed and/or the affidavit would be admissible in an evidentiary hearing or trial. Generally speaking, a written document is considered to be hearsay and is not admissible unless there is some exception to the hearsay rule that would permit its admission. In Massachusetts, there is a statutory provision that provides that copies of public records, including those recorded in one of the state's Registry of Deeds, so long as it is a certified copy, "shall . . . be admitted in evidence equally with the originals." M.G.L. c. 233 §79A. This statutory provision is to obviate the need of a party to authenticate a copy of a document that has been recorded.

Despite the best efforts of the banking industry, this statute does not establish, where objected to, the truth of what the document states. As the Massachusetts Supreme Judicial Court recently reaffirmed in *Bevilacqua v. Rodriguez*, 460 Mass. 762, 770-771 (2011), ". . . there is nothing magical in the act of recording an instrument with the registry that invests an otherwise meaningless document with legal effect." In other words, a party that disputes the validity of a deed, a mortgage, and/or an affidavit, has the right to do so and in any litigation that concerns this instrument, the objections may effect its admissibility.

The primary contention of a homeowner who is challenging an Affidavit of Sale is that it is certainly an insufficient, if not meaningless, document that should not be given legal effect.

The challenges can range from the fact that the Affidavit is often not executed under the penalties of perjury nor otherwise sworn to, the affiant has no personal knowledge of the facts recited or the affiant does not have requisite corporate standing, i.e., Keeper of Records, in order to establish a basis for the knowledge regarding the facts recited, the facts recited are wrong, the facts are insufficient to establish that the "person selling" the property at foreclosure had complied with "the requirements of the power of sale and of the statute . . . in all respects", (see, M.G.L. c. 244 §15); and as otherwise may be raised.

With respect to challenges to an Affidavit of Sale, a good place to start is by raising issues regarding the signer's testimonial competency – that is what basis of the affiant's knowledge regarding to the facts he/she has set out in the affidavit?

Is it based upon personal observation or knowledge? Is there any claim, however conclusionary, in the affidavit that it is based upon personal knowledge? The mere recitation that an affidavit is made upon personal knowledge is not sufficient. See *Vassalle vs. Midland Funding LLC,* Ohio case. There needs to be facts alleged that would support such a conclusion. Are there any facts set out in the Affidavit to establish and support the fact that the affiant's statements are made upon personal knowledge? If not, the opposing party would have a good basis to argue that the Affidavit should not be admitted, and certainly not, without the affiant called to the stand to testify and to be cross-examined.

It should be noted that where a witness is available to testify, the witness cannot submit his/her prior written statement and/or affidavit in lieu of his/her testimony. There are exceptions to this general rule. Where a witnesses memory has been exhausted, one of the exceptions would allow the witness an opportunity to review his prior statement/affidavit to refresh his/her present memory.

If the affiant does not have personal knowledge, is there corporate knowledge (which is generally preserved in some type of documentation). If so, what would be needed in order for a witness to be able to testify to contents of any such documentation? Generally speaking, the corporate entity would need to call the Keeper of the Records, the person in charge of maintaining and preserving documentation generated and/or received by the corporation. In order for a keeper of the records to testify to the facts set out in the affidavit, it would need to establish that the documents upon which it relies would meet the statutory parameters of reliability, which is a preliminary matter for the judge to determine. Without the documents meeting the basic business exception rule, no one can rely upon them, even if they work for the company and have reviewed the records.

For purposes of an affidavit, it would seem that it would need to be the keeper of the record who would need to be the affiant and set out the facts which it gleaned from the corporate records.

There is a very good discussion of all this in the recent Appellate Division of the District Court case entitled *HSBC vs. Galebach.*

The standard Massachusetts foreclosure affidavit can be broken into essentially three sections based on the present industry standard operating procedures. The first section attests to the homeowner purportedly being in default – this is based on the financial accounting supposedly done by mortgagee. The second section enumerates the actions leading up to the auction such as the publishing of the notice in the paper carried out by the law firm on behalf of the bank. The third section reports on the actions and verbal bidding at the auction itself, all of which would be the personal knowledge of the people attending the auction including the bank representative at the action.

As can be gathered, the issue that a foreclosing entity has is that it is highly unlikely that there is just one person who has personal knowledge and/or corporate knowledge of all three areas that are covered. The person attending the foreclosure sale very well may have little or no knowledge as to the facts leading up to the foreclosure sale.

In the case of the large foreclosure law firms in Massachusetts, they all have "mortgage agents", individuals who the law firm hires to go and attend foreclosure sales on behalf of the firm. These "mortgage agents" can attend many auctions a day. In many, if not most cases, these "mortgage agents" are the individuals who conduct the "entry" onto the property for purposes of establishing possession under M.G.L. c. 244 §§ 1 & 2; they are also the person who is most often granted a power of attorney by the foreclosing entity to act on behalf of the foreclosing entity at the foreclosure. Interestingly enough, these "mortgage agents" are rarely, if ever, used for purposes of becoming the affiant for the Affidavit of Sale. Given their presence at the foreclosure sale and their personal knowledge of what happened, it would seem that these "mortgage agents" would be best suited to become the affiants, at least in one respect.

Instead, the foreclosing entities tend to use an individual who had nothing to do with the foreclosure process at any stage thereof, who has no personal knowledge and insufficient corporate knowledge.

If the affiant actually worked for the bank, not the lawyers of the bank, they may have been Keeper of the Records and had the "competence" and access to the information about whether the homeowner/mortgagor was behind in their payments, delinquent or in default. But, unless they flew up to Massachusetts for the auction, they themselves personally, then they did not have personal knowledge of what happened at the auction, and they did not put the notice in the paper.

If the signer is signing on behalf of the law firm as an attorney for the bank, then we know that they were not the keepers of the records for the financial transactions. So their signatory will fail as personal knowledge because they do not have direct knowledge of the accounting. They may have been the Keeper of the Records for the law firm which means they may be able to attest to the acts of the law firm. If they are not the person in the Possession/ Certificate of Entry who stepped on the property, they do not have direct information about what happened, personal experience of what happened, at the auction. So whatever they report happened at the auction is based on hearsay.

It should be noted that it is very hard for a bank to comply with the requirements of the Affidavit in Massachusetts given the nature and extent of the facts that must be covered by the Affidavit to meet its obligation. As a non-judicial foreclosure state, the Massachusetts Legislature and subsequent case law has determined that the statutory foreclosure provision are consumer protection statutes and that strict compliance is required.

In *Ibanez*, the Judges of the Supreme Judicial Court stated "we adhere to the familiar rule that 'one who sells under a power [of sale] must follow strictly its terms. If he fails to do so there is no valid execution of the power, and the sale is wholly void.' Moore v. Dick, 187 Mass. 207, 211 (1905)."

If the lender acts as both the foreclosing entity and purported purchaser at the auction, their actions must meet the highest standards in Massachusetts law of "utmost diligence and strictest good faith" (*Williams v. Resolution*, 417 Mass. at 383.) If an affidavit is claimed to be signed under personal knowledge, it cannot be "sort of" based on personal knowledge.

Many of the disputes regarding the Affidavits of sale arise in post-foreclosure eviction cases. Many of them come up for the court's consideration pursuant to the purchaser-at-foreclosure's motion for summary judgment, brought under Mass Rules of Civil Procedure Rule 56. The banks et al believe that upon the submission of the foreclosure deed and the affidavit of sale, they should be able to win their right to possession of the borrower's home as a matter of law.

Under M.R.C.P. Rule 56(e), "affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." None of the Affidavits of Sale are made on personal knowledge. The foreclosing entities are claiming that they don't have to because Form 8 of M.G.L. c. 183 has been deemed sufficient and where there is a conflict between a statutory provision and a rule of procedure, the statutory procedure should take precedence.

It is interesting to note that there is a statutory provision under M.G.L. c. 183 §5B which states: "an affidavit made by a person claiming to have personal knowledge of the facts therein stated and containing a certificate by an attorney at law that the facts stated in the affidavit are relevant to the title to certain land and will be of benefit and assistance in clarifying the chain of title may be filed for record."

It is certain that the foreclosing entities would distinguish this statute again by reference to Form 8 itself where there is nothing therein that clearly requires the affiant to have personal knowledge. Further, it would be argued that it has to with clarify and/or correcting the record in the land registries. The applicability of this statutory provision has not been raised or ruled on by any MA court to this writer's knowledge.

Two rulings that may be cited by the lenders as proof that the foreclosing affidavit does not have to be based on personal knowledge do not actually address that question. Both *Gabriel* and *Hendricks*, recent Massachusetts decisions addressed the challenge to a foreclosure based on deviation or lack of particularity of the promulgated foreclosure affidavit form itself was insufficient challenge but neither addressed the issue of the necessity of the affiant's personal knowledge; in *Gabriel* footnote 11 explicitly stated that the issue of affiant's personal knowledge had not been argued.

But as the Settlement Monitor reports the commitment by the five banks on page five of *First Take*: "Servicers state the following about documents (affidavits, sworn statements, and Declarations) filed in bankruptcy and foreclosure proceedings. Such documents:

- are based on the affiant's personal knowledge;33
- fully comply with all applicable state law requirements;34"