Written Testimony of

James A. Kowalski, Jr., Esquire
Law Offices of James A. Kowalski, Jr., PL
Jacksonville, FL

Before the
Committee On The Judiciary
United States House of Representatives

"Foreclosed Justice: Causes and Effects of the Foreclosure Crisis"

December 2, 2010
10:00 a.m.

12627 SAN JOSE BOULEVARD, SUITE 203, JACKSONVILLE, FL 32223
TEL: 904.268.1146 FAX: 904.268.1342 EMAIL: KOWALSKI.LAW@MAC.COM

Witness Background Statement

James A. Kowalski, Jr. is an AV-rated civil trial attorney based in Jacksonville, Florida, specializing in consumer protection litigation, including wrongful foreclosure and consumer fraud, complex personal injury, wrongful death, and premises liability litigation. Mr. Kowalski is licensed to practice law in Florida and California and focuses on litigation in the northeast Florida area. He has lived and worked in the Jacksonville area since moving to Florida from Northern California in 1989, after graduating from the University of California, Berkeley, and the University of San Francisco School of Law. Mr. Kowalski served as an Assistant State Attorney from 1989-1996, acting as Division Chief (County Court; Public Corruption Unit) and Senior Trial Attorney in the Special Assault/Sex Crimes and ROC (Repeat Offender Court) Divisions; he was also a member of the on-call homicide team.

After leaving the State Attorney's Office in 1996, Mr. Kowalski has specialized in litigation and handled matters involving consumer protection, including wrongful foreclosure and consumer fraud, complex personal injury, wrongful death, and premises liability litigation. He opened his own practice in late 2006.

Mr. Kowalski has taught and written in the area of crime victimization, including the use of victim impact testimony in death penalty cases, and in the area of consumer fraud, including presentations on mortgage foreclosure litigation. He is a member of the Bar in Florida and California, a member of NACA (the National Association of Consumer Advocates) and the Florida Justice Association. Mr. Kowalski is a current member of the Child Protection Team (CPT) Advisory Council, has served on the board of Compassionate Families, Inc., a Jacksonville non-profit dedicated to assisting the families of homicide victims, and is the past vice-chair of the Mayor's Victim's Assistance Advisory Council (VAAC). He is a recipient of the Jacksonville Legal Aid Pro Bono award for 2006 and 2008, the St. Johns County Legal Aid Pro Bono award for 2009, and the Florida Bar President's Pro Bono Service Award in 2009, for service rendered in the Fourth Judicial Circuit.

Mr. Kowalski has not received any Federal grants nor has he received any compensation in connection with his testimony.

Testimony

Thank you for the opportunity to present testimony on the causes and effects of the foreclosure crisis. As an attorney handling consumer litigation cases in Florida, I have had a front-row seat for much of the past decade, as Florida has been particularly affected by the overall economic crisis, with specific harm coming to the state's citizens in the form of overwhelmingly high mortgage foreclosure rates.

These remarks are drawn in part from testimony I provided in July 2009 to the Florida Supreme Court Task Force on Residential Mortgage Foreclosure Cases, and from prior seminars I have taught in this field. My testimony has not changed because the actions of the mortgage servicing industry have not changed – for years. The manufacture of documents in court, the use of robo-signers, the complete lack of proper documentation required by the Pooling and Servicing Agreements, the UCC and New York trust law – all of this has been standard industry practice *for most of the past decade.*

First, let me make clear that I am not here to demonize the servicing industry and their mill law firms. I do not see the securitized trusts and their mill law firms as demons – I see them as an entirely new legal vehicle for separating homeowners from their homes, with little or no resemblance to the normal attorney-client relationship we are familiar with, and little or no systemized review of individual cases. These are not our grandfather's banks, and the legal product that has been introduced into our state court systems are not like anything we have seen before.

The system that has been in place for years, with the mill firms being merely an extension of contractors to the servicing industry for securitized loans, represents a facial violation of many of the ethical rules which govern attorneys, including Rule 4-2.1, Rules Regulating the Florida Bar, which requires an attorney to exercise "independent professional judgment." Pleadings are routinely drafted by the client (the servicer, not the plaintiff) with no little or no meaningful review by the attorney.

These actions are forced, in part, by the timing pressures imposed by the servicing industry. In 2004, Fidelity National Information Services, a Jacksonville-based company which provides much of the software interface technology used by mill firms and servicers, implemented an "Attorney Performance Report" (APR). The APR is designed to reward high-scoring attorneys, who are ranked on the basis of a number of timing factors. The faster the case is shoved through the foreclosure process, the higher the score. Firms are then color coded as "green light", "yellow light" and "red light," with the slower "red light" firms receiving less and less business.

The focus on speed is part of the business model for the servicers. As those of us who have litigated these cases for years now, and as all of us now know as a result of the robo-signing scandals, most of the servicers use "Signing Officers" – rows of individuals who sit before reams of documents prepared by others, with not even a modest wink at the business records exception to the hearsay rule, and who sign the documents only to have the document transported across the business campus to rows of notaries, who attest to the signatures without ever complying with the basics of their state's notary laws.

Some of the mill firms now employ their own "Signing Officers" – individuals who will sign Assignments of Mortgage on behalf of the owners of the pool, supposedly authorized by the servicer pursuant to the Pooling and Servicing Agreement which applies to the particular securitized trust. The documents are prepared entirely by the servicer.

On occasion, the law firm employees also sign the Affidavits in support of motions for summary judgment filed by the law firms – here, the lawyer's office staff *becomes the material witness for the lawyer's client.*

Right or wrong, you can see from this system there is no real separation between the servicers and the mill firms. The law firm employee is signing documents prepared by the client / servicer (who also has not independently reviewed the substance contained therein). I have provided numerous examples of this in the attached Exhibits.

The most significant problem which arises as a result of this standard business model is the "dual track" system, where homeowners dealing with one unit of a servicer on a loan modification will quickly end up in a foreclosure handled by another unit of the same servicer – units which not only do not coordinate their efforts, but which impose firewalls between themselves, where an employee of one unit cannot even access the computer database used by another unit – even where the information is critical and could either (1) prevent a foreclosure or (2) demonstrate that the foreclosure was wrongly filed in the first place.

The use of robo-signers and the dual track mechanism means simply this: at a very basic level, the servicer *cannot* be relied upon to confirm the veracity of the default. Put another way, if there is a problem with the paperwork, there is a problem with the foreclosure.

None of this is new – judges around the country have been imposing sanctions for this conduct *for years*, and the media has been reporting on these issues *for years*.

I raise these issues to make this point – the core problem with the development of the securitized trusts, the invention of the servicing industry, and the creation of the mill firm system, is that all problems, concerns or issues raised by the borrower / homeowner / defendants are not only ignored, but that the system provides incentives for this practice. This is the single biggest cause of the foreclosure crisis, and we have seen firsthand the effects, in Florida and throughout the country, on families (particularly children), on small businesses, on the economy in general.

A study released last year by the Federal Reserve Bank of Boston makes this clear: Mortgage lenders don't try to rework most home loans held by borrowers facing foreclosure because it would probably mean losing money. We knew ahead of time, based on these findings and prior studies, that the Obama administration's major effort to solve the foreclosure crisis by giving the lending industry $75 billion to rewrite delinquent loans to more affordable levels was not likely to work. One of the study's coauthors, Boston Fed senior economist Paul S. Willen, said the government would be better off giving the money directly to struggling borrowers to help them with their payments, rather than to lenders that are averse to working out the troubled loans.

The Fed's study found that only *3 percent* of seriously delinquent borrowers - those more than 60 days behind - had their loans modified to lower monthly payments; about 5.5 percent received loan modifications that did not result in lower payments. The study focused on 665,410 loans that were originated between 2005 and 2007 and subsequently became seriously delinquent. It also followed about 150,000 borrowers for six months after they received help, through the end of 2008.

"A lot of people you give assistance to would default either way or won't default either way,'' Willen said. "[The servicers] are trying to maximize profits, and at this point maximizing profits does not mean modifying loans.''

We also see this at the state level, with many servicers and lenders who have signed on to receive TARP funds, and are therefore contractually obligated to stay foreclosure lawsuits and comply with the Treasury's HAMP and HARP programs, denying to borrowers that they even participate in the programs or have received federal money. We now know that servicing fees have been pursued to the detriment of both the investors and the homeowners.

As a result of my years of first-hand experience, I have reached 5 major conclusions, outlined below, with supporting documentation as to each:

1. The servicing industry as a business model is irretrievably broken, and the application of the servicing industry procedures to loan modifications sought under HAMP and other programs has been counterproductive. The clearest evidence of this is in the "dual track" process.

Under the "dual track" system, a borrower who might not be behind at all, and who calls the servicer to inquire about a loan modification, is often told they need to miss three payments in order to be considered for a loan modification. After the first payment is missed, two things immediately happen: (a) an initial default letter is computer-generated; and (b) the missed payment is reported to the credit bureaus. When the borrower calls after receiving the letter, they are told that this is expected, and they should proceed to miss the next two payments. The same thing happens for payments 2 and 3; at 91 days the borrower is in default and the file is sent to the default loan department, and the referral to the mill law firm starts. At that point, for the first time, the borrower or a HUD counselor is permitted to submit financial records to the loan modification department to seek a modification, but the borrower's financial position has already worsened because of the credit reporting. From this point forward, the borrower is on "dual tracks" and the foreclosure proceeds with one department at the same time the loan modification is considered by another department. The two departments do not, and are often not permitted to, communicate. See, Exhibits 2 and 7.

Under this system, when the Affidavit of Indebtedness is created, the so-called "robo-signer" looks at a summary of the payment history only (no other documents whatsoever) and is never permitted to review the actual contact history containing the instructions to the borrower. Exhibit 2.

2. Affidavits and Assignments of Mortgage filed in mortgage foreclosure cases are, for the most part, worthless. The overwhelming evidence from Florida and around the country consists of proof that Affidavits are completed by individuals who not only do not read the file; they do not even have access to the critical portions of the loan file. Those who review a summary of the payment screen, for example, are not even permitted to review the customer contact screen, which should include reference to conversations with the borrowers. See, Exhibits 2-6 and 8.

It is now evident that Assignments are also created after the fact in an attempt to demonstrate a chain of ownership, and that many critical facts in the Assignments, such as the date of the Assignment or the assertion of an equitable transfer, are not based on any evidence at all. (For example, the date often used for the Assignment is the date the file is transferred to the law firm, *not* the date the Trust purportedly took ownership of the loan.)

I listened to a Federal District Judge last month describe Affidavits as "all surface and no anchor." I have never taken a deposition of an Affiant, or read or reviewed a deposition taken by another lawyer, in more than 7 years of this practice, where the Affidavit itself was wholly truthful. In the GMAC deposition that has made national news, for example, possibly the only fully truthful statement in the entire document was the name of the Affiant herself. See, Exhibit 8.

3. Many of the mill law firms are overwhelmed by their internal structures and by demands placed on them by the industry and, as a practical effect, have complied with whatever they have been asked to do. This applies particularly to the Law Offices of David J. Stern, as clearly demonstrated by the recent depositions taken by the Florida Attorney General's Office, and includes law firm employees acting as affiants and signatories on Affidavits where the law firm employee had no personal knowledge and was acting outside the scope of whatever authority they might have had. See, Exhibit 6.

4. Legal Aid groups and HUD counselors are an integral part of the solution, and must be better funded to provide support at all levels. For example, the Jacksonville Area Legal Aid (JALA) lawyers carefully review the files, and, for the most part, when a JALA lawyer is coming to court, it is an indication that there is a solution at the end of the case (for example, the borrower should qualify for a loan modification but that portion of the file is in the "dual-track" morass.) HUD counselors can also provide invaluable information on HAMP-related solutions, and both legal services and HUD counselors must be properly funded to provide assistance in litigation. Exhibit 1 is an example of a borrower who was fortunate to come into contact with her local Legal Aid, which is providing assistance in a case in which two foreclosures filed by two different securitized trusts are pending at the same time.

5. Local counsel has no connection to these issues whatsoever. They do not participate in the creation of the Affidavits or Assignments, know nothing about the file other than what they are told by the staff of the mill law firm, and usually do not have the opportunity to review the file until immediately before the hearing. They do not have the opportunity to conduct any independent investigation whatsoever, do not sign pleadings, and are therefore outside the purview of Rule 2.515(a), Florida Rules of Judicial Procedure: "The signature of an attorney shall constitute a certificate by the attorney that the attorney has read the pleading or other paper; that, to the best of the attorney's knowledge, information and belief there is good ground to support it..."

Conclusion

So – what to do, given the business practices of the industry, the servicing abuses outlined above, and the fact that the mill firm system provides no meaningful checks and balances to the foreclosure process sought by the servicer?

First, I would respectfully suggest that the major servicers should not be believed when they suggest that all borrowers are deadbeats, and speeding up the process, and rubber-stamping the abomination that is MERS, should be the course we follow. At some point, we simply have to stop accepting the ever-changing excuses offered by the servicing industry for what appears to be a completely failed business model.

Why should we continue to place trust in an industry that has clearly resorted to the wholesale manufacture of critical documents as a business practice?

If we are to restore trust in our institutions, including in the judicial process itself, we have to start, at some point, to reform the servicing industry. The "dual track" concept needs to end immediately. Fannie and Freddie need to be incentivized to be part of the reform process, not part of the problem. MERS needs to end, as the servicers do not need a "truth bailout" to go along with the massive financial gift we have given them as a reward for truly abysmal business practices. A careful inquiry, point-by-point and document-by-document, needs to be started so that investors can have faith in the fact that they actually own what they think they own.

At each step, the interests of American homeowners need to be considered first.

Thank you for allowing me the opportunity to share these comments.

TABLE OF CONTENTS

EXHIBIT 1: Example of two trustees (US Bank and Wells Fargo Bank) suing at the same time on the same note to foreclose on the same house. As you can see from the attached Complaints, both US Bank Trust National Association, as Trustee of the Sequoia Funding Trust, and Wells Fargo Bank, NA, as Certificate Trustee for VNT Trust Series 2010-1, claim to own the note in a case currently pending in Duval County Circuit Court. *See also*, *Ruscalleda v. HSBC Bank USA*, 43 So.3d 947 (Fla. 3d DCA 2010) (HSBC and American Home Mortgage simultaneously attempted to foreclose the same mortgage).

EXHIBIT 2: Extensive Punitives Order describing the disconnect between the Affiant and the actual facts of the case, in which the borrowers were not only not in default, the servicer had actually lowered their payments to compensate for wrongly forced-placed coverage. The affiant, whose deposition was taken in 2003, confirmed she would not have executed her affidavit if she had been permitted to review the complete loan history.

EXHIBIT 3: Example of affidavit purporting to show an equitable transfer – the Affiant testified that the Affidavit itself was drafted by attorneys and did not include facts with which he was familiar. Summary Judgment entered for Defendants, who unwittingly had purchased a condemned house as part of a fraud scheme.

EXHIBIT 4: Example of mill firm and servicer submitting inconsistent facts and exhibits to the Complaints to, as the Court put it, change "...as needed to benefit the Plaintiff." This case also highlights the difference between what the mill firm is told by the servicer and what the servicer submits to the Court – the mill lawyer told the Court that the original documents were not received from the servicer until months after the Complaint was filed (and until after the first Motion to Dismiss), (see page 11 of the transcript) while the servicer testified via Affidavit, after the case was dismissed with prejudice, that the file documents were forwarded shortly after the case was sent to the mill firm (Affidavit, pages 2-3.)

EXHIBIT 5: Example of numerous inconsistent Assignments, and of the Bank taking inconsistent positions before a trial Court and an appellate Court. Order allowing punitive damages sets forth fact pattern in detail.

EXHIBIT 6: Assignment of Mortgage signed by office manager for David Stern's office, as "Assistant Secretary" of MERS, together with the *actual* Power of Attorney, which specifically provides the Assistant Secretary is limited to signing *Affidavits* (not Assignments).

EXHIBIT 7: Excerpt of BOA deposition, in which the BOA employee who was charged with testifying, with knowledge, about a BOA credit disability plan, confirmed he could not find out anything regarding the BOA credit disability plan.

EXHIBIT 8: The GMAC mess.