

Evidence

It is often difficult for mortgage servicers, particular if they are not the original lender, to prove the true status of an account. Affidavits are often submitted to prove default that are conclusory and insufficient. *Manufacturers & Traders Trust Co. v. Medina*, 01 C 768, 2001 WL 1558278 (N.D.Ill., Dec. 5, 2001); *Cole Taylor Bank v. Corrigan*, 230 Ill.App.3d 122, 595 N.E.2d 177, 181 (2d Dist. 1992). Computer-generated bank records or testimony based thereon are often offered without proper foundation, or are summarized without being introduced. *Manufacturers & Traders Trust Co. v. Medina*, supra, 01 C 768, 2001 WL 1558278 (N.D.Ill., Dec. 5, 2001); *FDIC v. Carabetta*, 55 Conn.App. 369, 739 A.2d 301 (1999).

Testimony, whether live or in the form of an affidavit, to the effect that the witness has reviewed a loan file and that the loan file shows that the debtor is in default is hearsay and incompetent; rather, the records must be introduced after a proper foundation is provided. *New England Savings Bank v. Bedford Realty Corp.*, 238 Conn. 745, 680 A.2d 301, 308-09 (1996), later opinion, 246 Conn. 594, 717 A.2d 713 (1998); *Cole Taylor Bank v. Corrigan*, supra, 230 Ill.App.3d 122, 595 N.E.2d 177, 181 (2d Dist. 1992). It is the business records that constitute the evidence, not the testimony of the witness referring to them. *In re A.B.*, 308 Ill.App. 3d 227, 719 N.E.2d 348 (2d Dist. 1999).

Nor is such an affidavit made sufficient by omitting the fact that it is based on a review of loan records, if it appears that the affiant did not personally receive or observe the reception of all of the borrower's payments. *Hawaii Community Federal Credit Union v. Keka*, 94 Haw. 213, 11 P.3d 1, 10 (2000). If the underlying records are voluminous, a person who has extracted the necessary information may testify to that fact, but the underlying records must be made available to the court and opposing party. *In re deLarco*, 313 Ill.App.3d 107, 728 N.E.2d 1278 (2d Dist. 2000).

Counsel should challenge any such testimony or affidavits. Counsel should not simply assume that the mortgage company must be right in claiming a default; there are reported decisions in which it turned out that the lender's right hand did not know what the left hand was doing and that there was really no basis for a claimed default. *In re Hart*, 246 B.R. 709 (Bankr. D.Mass. 2000); *In re McCormack*, 96-81-SD, 1996 WL 753938 (D.N.H. 1996). See also, *FNMA v. Bryant*, 62 Ill.App.3d 25, 378 N.E.2d 333 (5th Dist. 1978), where the court found that the lender had foreclosed too quickly and that the default had been cured. Frequently, mortgage servicers attempt to service loans without consulting the loan documents, with the result that they depart from the their terms. In other cases, mortgage companies have been unable to prove that they actually own the loan and gave notice of acceleration as required by the loan documents. *In re Kitts*, 2002 WL 416912 (Bankr. E.D.Tenn. Feb. 28, 2002).

There is a common assumption that mortgage companies desire performing loans, not to foreclose and acquire real estate. This assumption is no longer well founded. There are an increasing number of "scavengers" that buy bad debts, including mortgages, for a fraction of face value and attempt to enforce them. Such entities profit by foreclosure.

"Mortgage sources confide that some unscrupulous lenders are purposely allowing certain borrowers to fall deeper into a financial hole from which they can't escape. Why? Because it pushes these consumers into foreclosure, whereupon the lender grabs the house and sells it at a profit." Robert I. Heady, *The People's Money*, "Foreclosure, You Must Avoid It," *South Florida Sun-Sentinel*, Feb. 25, 2002, 2002 WL 2949282. In addition, particularly if the loan is guaranteed (by private mortgage insurance or the government), a mortgage company may find it more profitable to foreclose and make a claim on the guarantee rather than work with a "difficult" borrower.

Furthermore, production of original records often reveals unauthorized charges and other improprieties that may give rise to a claim against the mortgage company.