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Will we see clarity in the Maine courts regarding foreclosures and mortgage electronic reg. system? - by John Doonan

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Will we see clarity in the state courts of Maine regarding foreclosures and the mortgage electronic registration system?

In 2014, the law court in Maine determined that when a mortgage was originally granted to the Mortgage Electronic Registration System (MERS) as nominee for the lender, the only rights that MERS possessed was the right to record the mortgage. Effectively, this voided all mortgage assignments executed by MERS and had a chaotic effect on the default industry. As one can imagine, this affected a number of market participants ranging from the GSE's to title insurance companies and servicers throughout the country. The so-called Greenleaf decision had a number of unforeseen consequences. Although it was possible to obtain "quitclaim assignments" from some of the original lenders, many had ceased to exist either through bankruptcy or other methodologies. Hundreds of lawsuits were brought (with mixed results) as Declaratory Judgment Actions in attempts to obtain court orders or injunctive relief to transfer the subject mortgage. In addition, M.R.S.A. 33 § 508 was passed by the legislature, and signed into law, to address some of the concerns the real estate bar. A general opinion seems to have arisen, in light of the mortgage title nature of Maine caselaw, that M.R.S.A. 33 § 508 has not solved the issues that arise in the foreclosure context.

We may be close to some guidance from the law court on the preferred process to address these issues. The Law Court has recognized the importance of the issues raised by Greenleaf and recently request amicus briefs from interested parties. There is currently before the law court the matter of Beal Bank v. New Century Mortgage Corp. (Pen-18-158). There have been numerous briefs filed in this matter from the full spectrum of perspectives in the default arena including those advocating for consumers (e.g. Maine Attorneys Saving Homes) and Doonan, Graves and Longoria, LLC submitted a brief on behalf of a national servicer. New Century no longer exists and the various interested parties have addressed a number of issues in their briefing. It is hoped that the law court will address the appropriate methodology for resolving Greenleaf issues through the Maine state courts. The alternative to that process, may very well involve reopening bankruptcies that have been

closed for more than a decade, or attempting to have the courts of the states where these now defunct entities were incorporated appoint receivers to execute the required documentation. These alternatives are especially problematic due to the cost, the passing of time, the destruction of documentation and the fact the original lenders probably did not consider these loans to be either an asset, or a liability, of the bankruptcy estate, since they had attempted to transfer the note and mortgage prior to Greenleaf being decided. There is certainly no guarantee that the various alternative remedies that are theoretically possible will work in the real world. For instance, the bankruptcy courts may refuse to reopen these cases, the cost, just for service of such a motion will certainly be prohibitive and if current investors are forced to seek resolution in states such as Delaware there will be a significant cost to bringing the various actions, and educating those courts as to the current posture of Maine caselaw and the rationale behind a state court addressing property concerns outside of their jurisdiction.

The current situation has resulted in dozens, if not hundreds, of zombie properties throughout the state where the properties have been abandoned by their owners and the mortgage holder has been unable to resolve the mortgage title issues so that they can resell the properties. There has been oral argument on the Beal matter before the law court and it is hoped that a decision which addresses the various aspects of the unforeseen consequences of the Greenleaf decision will be forth coming shortly.

Doonan, Graves and Longoria, LLC is a leading default industry advocate throughout New England and has been active in the market since 1986.

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