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The Changing Landscape of the Business Records Exception under Florida Law and its Impact on Florida Foreclosures

Fourth District Court of Appeals Holds that Loan Servicer's Affidavit in Support of Summary Judgment Which Relies on Data from a Computer System is Inadmissible Hearsay

I. The Opinion

On September 7, 2011, the Fourth District Court of Appeals issued an opinion in *Glarum v. LaSalle Bank National Association, as Trustee et al.*, 2011 WL 3903161 (Fla. 4th DCA September 7, 2011), narrowly construing the business records exception in a residential foreclosure case. The *Glarum* Court held that an affidavit of indebtedness of an employee of a loan servicer that relied on data from a computer system was inadmissible hearsay. This decision could have broad sweeping application in the lending and loan servicing industries and affect thousands of foreclosure cases, among other types of cases, currently pending in Florida courts.

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In *Glarum*, one of the primary issues on appeal was whether the affidavit of indebtedness in support of a motion for final summary judgment of foreclosure satisfied the requirements of the business records exception to the hearsay rule under Florida law. The business records exception is codified under section 90.803(6)(a), Florida Statutes, and provides that evidence may be admitted as a business record if it meets the following elements:

(1) the record was made at or near the time of the event;
(2) was made by or from information transmitted by a person with knowledge;
(3) was kept in the ordinary course of a regularly conducted business activity; and
(4) that it was a regular practice of that business to make such a record.

The affiant in question, Ralph Orsini, was employed as a "specialist" with Home Loan Services, Inc., a loan servicer on behalf of LaSalle Bank, National Association, as Trustee for Merrill Lynch Mortgage Investors Trust, Mortgage Loan Backed Securities, Series 2006-FFI. The affidavit provided that the borrower was in default on the note and that certain amounts were due and owing.

The Fourth District determined that the affidavit in question failed to fall within the ambit of the business records exception. In so doing, the Fourth District held:

> Orsini did not know who, how, or when the data entries were made in Home Loan Services' computer system. He could not state if the records were made in the regular course of business. He relied on data supplied by Litton Loan Servicing, with whose procedures he was even less familiar. Orsini could state that the data in the affidavit was accurate insofar as it replicated the numbers derived from the company's computer system. Despite Orsini's intimate knowledge of how his company's computer system works, he had no knowledge of how that data was produced, and he was not competent to authenticate that data. Accordingly, Orsini's statements could not be admitted under section 90.803(6)(a), and the affidavit of indebtedness constituted inadmissible hearsay.

Id. at *1.

Although at least one other Florida case has rejected an affidavit of indebtedness for failure to comply with the business records exception,[1] *Glarum* is the first Florida case to specifically hold that an affidavit of a loan servicer relying on computer records is inadmissible hearsay because the affidavit was unable to identify (i) who made the data entries, (ii) how the data entries were made, or (iii) when the data entries were made. To date, cases interpreting the business records exception have determined that it is not necessary to call the person who actually prepared the document in question.[2] If it is interpreted in its broadest terms, *Glarum*, however, could be viewed as requiring the affiant to be the actual person who entered the data into the loan servicer's computer system, or at least require the affidavit to identify the person(s) inputting the data, as well as the procedures for inputting payment and other loan information into a servicers' system. Even if the opinion is narrowly construed to the specific facts, as discussed herein, lawyers defending foreclosures may use this opinion as a basis for deposing the affiant, thereby resulting in additional delays to and costs in the foreclosure process.

II. Future Considerations

We note that as of the drafting of this *GT Alert*, the time for filing a motion for rehearing has not yet expired, and the loan servicer in *Glarum* could seek review of the opinion in the Florida Supreme Court. Accordingly, there is a possibility that the Fourth District could issue an opinion on rehearing or that the Florida Supreme Court could render an opinion on this issue. Moreover, the vague language set forth in *Glarum* makes it difficult to assess how the opinion will be interpreted by Florida trial courts should the decision be upheld.

Given the current scrutiny applied by Florida trial courts construing motions for summary judgment in foreclosure cases, we believe that *Glarum* may be used by borrower's counsel to delay or prolong the matter. It is likely that borrower's counsel will use *Glarum* to take depositions of plaintiffs' corporate representatives in foreclosure matters as to their record keeping procedures and, depending on the facts of the case, will argue that the affidavits of indebtedness are inadmissible hearsay. Therefore, it is important for our clients to understand the potential impact *Glarum* could have not only in foreclosure matters, but in any litigated matter where an affiant may be relying on data entries included within a computer system. In the context of foreclosure matters, *Glarum* is especially concerning given the fact that the lending community uniformly relies upon computer data, including data from prior servicers, when drafting affidavits of indebtedness in support of

summary judgment motions. Indeed, these affidavits may need to include specific factual information related to the affiant's knowledge of how the records were made, in addition to reciting the basic elements of the business records exception.

In light of *Glarum*, the following reflects certain issues that may need to be considered in the future depending upon how the decision is interpreted by trial courts:

- The affiant should be familiar with and have a specific understanding as to how the records are kept by the company and about the company's recordkeeping practices in general. The affidavit may need to provide that the information contained therein is derived from records that are typically made and relied upon within the company. Given that the exclusion of evidence based on hearsay is premised on the grounds that such information is not reliable or trustworthy, to the extent possible, the affidavit may need to contain language addressing the procedures that the company takes to ensure that the information input into its computer system is accurate. Likewise, the affiant may need to describe in general how the information contained in the records was obtained including identifying where the information was derived, which departments input the information into the computer system and the timeframe in which the information was input into the computer system. It seems unlikely that the *Glarum* court intended to require that the affidavit identify each individual who made a specific entry in the record in order for the evidence to be admitted. However, the breadth of the language used in the opinion leaves the issue open to interpretation by a trial court. With that said, the information included in the affidavit will need to be sufficient to show that the records were made by or from information transmitted by a person with knowledge;

- Particular care should be given to who the company selects as the affiant as the *Glarum* decision significantly increases the possibility that the affiant's deposition will be requested by some borrower's counsel;

- The affidavit may need to include factual information establishing that the records relied upon were kept in the ordinary course of the company's regularly conducted business activity, with specific reference to each record that is relied upon. *Glarum* suggests that an affidavit that fails to provide any information regarding data relied upon from a prior loan servicer may be inadmissible hearsay. Accordingly, to the extent that the company is relying on information from a prior lender or loan servicer, the affidavit may need to show how the prior records are received, and kept in the ordinary course of the company's regularly conducted business activity. The courts may even require the affidavit to provide information regarding the procedures used by the prior loan servicer to ensure that the information is kept within the normal course of its business; and

- Although plaintiffs in foreclosure cases do not typically serve discovery requests on the borrower prior to moving for summary judgment of foreclosure, in light of *Glarum*, and depending upon the affirmative defenses that are raised, plaintiffs may consider sending such requests to elicit admissions and responses from the borrower concerning key issues such as the date of default, and identification of payments made to date. These discovery responses, when coupled with a verified complaint, and possession of the original note with a special or blank endorsement, may bolster support for the entry of summary judgment.

III. Conclusion

In sum, *Glarum* has already garnered significant attention both at the state and national levels, because it has such broad implications with respect to the form and content of affidavits of indebtedness in pending and future cases. The Fourth District Court of Appeals has sent a strong statement that more generic affidavits currently utilized in some cases will no longer be sufficient where they do not include specific and detailed factual information regarding the compilation of the loan and payment data into a computer system. In doing so, the appellate court may have achieved the unintended result of dramatically changing the foreclosure landscape in Florida.

Nonetheless, one could argue that the *Glarum* decision is limited to the specific facts in that action. Moreover, for cases filed after January 1, 2010, the verified complaint should already set forth the lender's standing to bring the action, and allege the borrower's payment default. If a borrower fails to provide evidence to contradict the affidavit of indebtedness, and fails to come forward with information contesting the accuracy of the payment information, trial courts may still grant summary judgment even in the face of the *Glarum* holding. In fact, the trial and appellate courts in Florida face a delicate balancing act of requiring detailed affidavits on the one hand, but mandating foreclosure "rocket dockets" on the other to advance the foreclosure cases and reduce the overwhelming administrative and financial burden on Florida courts. However, unless *Glarum* is revised, or overturned by rehearing or further appellate review, we recommend that our financial institution clients pay careful attention to the holding in *Glarum* and be prepared to revise and modify affidavits of indebtedness as may be necessary to comply with the decision. Greenberg Traurig will continue to monitor how this case is interpreted on a going forward basis, including any further appellate review.

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[1] *See Mazine v. M& I Bank*, 2011 WL 2937307, *2 (Fla. 1st DCA July 22, 2011) (holding that "[w]hile it is not necessary to call the individual who prepared the document, the witness through whom a document is being offered must be able to show the requirements for establishing a proper foundation."). In *Mazine*, the First District rejected an affidavit of indebtedness where none of the requirements for admission as a business records were met. The affidavit failed to include information regarding how the information contained in the affidavit was prepared and maintained, whether the information was kept in the regular course of business, or the source of the information contained within the records.

[2] *See United Auto Ins. Co. v. Affiliated Healthcare Centers, Inc.*, 43 So. 2d 127, 130 (Fla. 3d DCA 2010) (holding that "in order to lay a foundation for the business records exception to the hearsay rule, 'it is not necessary to call the person who actually prepared the document,'" (citations omitted), however, "an affidavit in support of summary judgment which merely states that documents appear in files and records of the business is not sufficient to meet the requirements of the business records exception to the hearsay rule.").

This *GT Alert* was prepared by **Michele Stocker, Chair, Financial Services Litigation Practice Group** and **Cory Eichhorn**. Questions about this information can be directed to:

- Michele Stocker — 954.768.8271 | stockerm@gtlaw.com
- Cory Eichhorn — 954.768.8263 | eichhornc@gtlaw.com
- Or your Greenberg Traurig attorney

Albany
518.689.1400

Amsterdam
+ 31 20 301 7300

Atlanta
678.553.2100

Austin
512.320.7200

Boston
617.310.6000

Chicago
312.456.8400

Dallas
214.665.3600

Delaware
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Denver
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Fort Lauderdale
954.765.0500

Houston
713.374.3500

Las Vegas
702.792.3773

London*
+44 (0)203 349 8700

Los Angeles
310.586.7700

Miami
305.579.0500

New Jersey
973.360.7900

New York
212.801.9200

Orange County
949.732.6500

Orlando
407.420.1000

Palm Beach County North
561.650.7900

Palm Beach County South
561.955.7600

Philadelphia
215.988.7800

Phoenix
602.445.8000

Sacramento
916.442.1111

San Francisco
415.655.1300

Shanghai
+86 21 6391 6633

Silicon Valley
650.328.8500

Tallahassee
850.222.6891

Tampa
813.318.5700

Tysons Corner
703.749.1300

Washington, D.C.
202.331.3100

White Plains
914.286.2900

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