

EVIDENTIARY ISSUES IN FORECLOSURE CASES

Securitization: who are the players.

Intro: Clip from "It's a Wonderful Life"

<http://www.youtube.com/watch?v=EOzMdEwYmDU&feature=related>

Original movie: ~ You're thinking of this place all wrong. As if I had the money back in a safe. The money's not here. Your money's in Joe's house...right next to yours. And in the Kennedy house, and Mrs. Macklin's house, and a hundred others. Why, you're lending them the money to build, and then, they're going to pay it back to you as best they can. Now what are you going to do? Foreclose on them?...Now wait...now listen...now listen to me. I beg of you not to do this thing. If Potter gets hold of this Building and Loan there'll never be another decent house built in this town.

Present day:

Customer: George Bailey, I need to talk with you about my mortgage on my house. We just got this letter in the mail from somebody named MERS, saying that my house payment was changed a few months ago from \$600 a month to \$1250 per month and, if I don't catch up all of those back payments, that MERS is going to foreclose on my house. What are you trying to do to me? And who is this MERS?

George Bailey: You're thinking of this all wrong. Your mortgage is not here in our bank. We have taken your mortgage, together with the mortgages we made on Joe's house...and the Kennedy house, and Mrs. Macklin's house, and a hundred others, and sold them to someone who rolled them all together into a securitized trust. We don't own those mortgages any more, so if you have concerns about your mortgage loan, you will have to talk to the holder of the note and deed of trust. The last I heard, this securitized pool of assets was being supervised by Helen Hunt, so you may have to go to Helen Hunt for an answer, but that is subject to change at any time.

Our bank was simply the **Originator** of this Note and Deed of Trust. We loaned the money on your house, but we didn't even use our money to do it. Before we closed on your loan, we had already agreed to sell your paper. We sold your mortgage to an Aggregator, who packaged your loans together with others for securitization. We do this because securitized mortgages help us make loans at a lower interest rate and reduce the risks of default. Maybe you should talk to the Aggregator.

Sponsor/Aggregator: I am the Sponsor or Aggregator in the securitization of mortgages. In this role, I purchase lots of mortgages from the banks so that they can be rolled together in a package with other similar mortgages to be sold next to a Depositor and eventually to investors. Because I am creating value, I earn a fee for my role in this process.

Depositor: As Depositor, I represent a crucial stage of the securitization process: without me, there could be no “true sale” of the loans to a “bankruptcy remote” and “FDIC remote” entity. I purchase the pool of assets, create a Special Purpose Vehicle (SPV) or Special Purpose Entity (SPE) into which these assets are deposited and then sell the assets to the Trustee of the securitization Trust so that they can be resold to investors. For this service, I earn a fee.

Issuer: Once an SPV or SPE has been formed, the Issuer, usually the Trust Fund of the securitization Trust, acquires those pooled assets and issues certificates that can be sold to investors. Before the certificates can be issued, there are all sorts of legal documents that must be drafted by the lawyers, including the Master Trust Agreement, the Mortgage Loan Sale and Purchase Agreement, and True Sale Legal Opinions. By transforming the collection of pooled assets into certificates to be sold to the public, I am producing a valuable financial product, for which I earn a fee, not to mention the legal fees that are required for these documents. By the way, if you know the name of the Trust, you can look up all of these documents on the SEC website.

Underwriter: As an underwriter, my job is to conduct an analysis of financial products to make sure that they are credit worthy and that they provide an attractive investment opportunity. Without underwriters like me, the market would be flooded with worthless paper that is likely to go into default. In today’s market of products that include zero amortization mortgages and negative amortization mortgages, my job is particularly important, so as to insure that only credit worthy products make it into the public offerings. No financial product could be brought to market without my services. I am a highly trained financial analyst, so I earn a substantial fee for my services.

Trustee: Each investor who buys certificates in securitized mortgages is buying a tiny piece of dozens of mortgages as a beneficial owner. But because each of the individual mortgages is still enforceable as a contract, some entity must serve as record owner of the instruments from the original transaction. As Trustee for the securitized trust (not to be confused with the Trustee or Substitute Trustee under the Deed of Trust), I am the owner and holder of the Note and Deed of Trust. Obviously, this is an important job, for which I am paid a fee.

Servicer: Once the securitization process is complete, someone has to look after the business end of the mortgage business. As servicing agent, my job is to keep records of each account and, in the event of default, to pursue collection efforts, including foreclosure. There may be more than one of me for each securitized Trust, including a Master Servicer and Default Servicer. There may also be a Master Document Custodian to take possession of key loan documents. My fees are well earned, because I am working to collect the payments due under the individual notes. Because the notes have been rolled together into a securitized trust, no one would be able to keep up with the records without the help of a servicing agent.

Investor: I am an individual or institutional investor who buys shares of mortgage backed securities. Sometimes I am a trained and sophisticated financial manager, such as the portfolio manager for the Judicial Retirement portfolio, while in other instances I am just a small investor with a few thousand dollars. Either way, my stock broker tells me that these investments are completely safe because every one of them is backed by mortgages on real estate. They also give me an opportunity to get higher returns that formerly were available only to the big banks. It is just like bringing Wall Street to my street.

Customer: George Bailey, what have you gotten me into? I wish I had kept my business with old man Potter. At least that way, I only had to worry about one banker with his hand in my pocket.