Common Defenses to Residential Foreclosure (ME)

A Practical Guidance® Practice Note by
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This practice note discusses common defenses to residential foreclosure in Maine with a detailed focus on evolving case law. Specifically, the note addresses defenses related to standing, the business exceptions rule, res judicata, and the failure to join necessary parties. Although this practice note analyzes these defenses from the foreclosing lender's perspective, the analysis can also be instructive to borrower's counsel.

For a full discussion of the residential foreclosure process in Maine, see Residential Foreclosure (ME). For guidance on the commercial foreclosure process in Maine, see Commercial Foreclosure (ME).

Overview and Legal Background

In 2009, the Maine Legislature significantly revamped the state's residential foreclosure laws in response to financial crisis of the late 2000s. See Me. Rev. Stat. tit. 14, §§ 6101–6325. Since then, the Maine Supreme Judicial Court, sitting as the Law Court (Law Court), has developed a substantial body of case law addressing all aspects of residential foreclosure litigation in Maine. These decisions have created significant, though not insurmountable, hurdles to obtaining foreclosure judgments, even when a borrower has admittedly defaulted on the loan. Because of the Law Court's frequent admonition that the statutory procedures governing foreclosure must be strictly adhered to by foreclosing lenders, borrowers have significant latitude in attacking foreclosure proceedings.

Generally, the same defenses that may be asserted in an action on the debt may be made in a suit to foreclose a mortgage. The following sections provide an overview of most frequent defenses raised by mortgagors in preventing foreclosure, but they are by no means exhaustive. Other defenses could include an attack on the validity of the note and mortgage, lack of consideration, a mortgagee's prior breach of its obligations, waiver by accepting payment after service of the notice of default, or that an assignment of the mortgage is invalid or void, among others.

Standing

Separation of the Mortgage and the Note – Bank of Am., N.A. v. Greenleaf, 96 A.3d 700, 711 (Me. 2014)

In Mortgage Elec. Registration Sys. v. Saunders, 2 A.3d 289, 295 (Me. 2010), the Law Court confirmed that the only party with standing to foreclose is the party with the right to enforce the note. As a negotiable instrument under Maine's Uniform Commercial Code, Me. Rev. Stat.

tit. 11, § 3-1301, the person holding or possessing the original note is a "mortgagee" under Section 6321 of Maine's foreclosure statute—"a party that is entitled to enforce the debt obligation that is secured by a mortgage." Saunders, 2 A.3d at 295. Thus, the Law Court held that Mortgage Electronic Registration Systems (MERS) did not have standing to foreclose on the property because it did not hold or otherwise own the promissory note—"the only rights conveyed to MERS in either the . . . mortgage or the corresponding promissory note are bare legal title to the property for the sole purpose of recording the mortgage and the corresponding right to record the mortgage in the Registry of Deeds." Id. The Law Court in *Saunders* mentioned in a footnote that it was not addressing the situation where "the mortgage and the note are truly held by different parties," citing case law from the 19th and 20th centuries concluding that the beneficial interest in a mortgage follows possession of the note it secures. Saunders, 2 A.3d at 295–96 n.3 (citing Averill v. Cone, 149 A. 297, 298–99 (Me. 1930); Wyman v. Porter, 79 A. 371, 375 (Me. 1911); Jordan v. Cheney, 74 Me. 359, 361–62 (1883)). Moreover, nowhere in *Saunders* did the Law Court suggest that an assignment from MERS was for any reason ineffective in transferring the interest in the mortgage.

Four years later, in Bank of Am., N.A. v. Greenleaf, 96 A.3d 700, 711 (Me. 2014) (*Greenleaf I*), the Law Court ruled that for a foreclosing party to have standing, it must demonstrate its possession of the note and ownership of the mortgage. Greenleaf I, 96 A.3d at 706. The Law Court further held that the plaintiff bank lacked standing to seek foreclosure on a mortgage and accompanying promissory note because it had acquired its interest in the mortgage from MERS—a nominee that possessed no interest in the mortgage other than the right to record it under the language of the mortgage at issue in Greenleaf I. Greenleaf I, 96 A.3d at 707. Thus, the subsequent assignments by MERS, ultimately to the foreclosing party Bank of America, assigned only that limited right to record, and nothing more. Id. Although Bank of America held the original promissory note, and therefore had the legal authority to collect the amount due under that note, it could not demonstrate its standing to foreclosure on the property because it lacked evidence that it "owned" Greenleaf's mortgage. Greenleaf I, 96 A.3d at 707–08; see Homeward Residential, Inc. v. Gregor, 122 A.3d 947, 954 (Me. 2015) (applying the *Greenleaf I* analysis and finding that the bank did not have standing because it could not prove that it owned the mortgage, which had been assigned several times). In *Greenleaf I*, the Law Court departed from more than century-old Maine precedent that the mortgage "follows" the note. See Wyman, 79 A. at 375; Jordan, 74 Me. at 361–63 ("Nor is an assignment of the mortgage necessary.").

Following the Law Court's remand in *Greenleaf I*, the trial court issued an order dismissing the plaintiff bank's complaint without prejudice. Bank of Am., N.A. v. Greenleaf, 124 A.3d 1122, 1123–24 (Me. 2015) (*Greenleaf II*). The defendant mortgagor appealed the dismissal, arguing that because the bank's case had been tried to completion, the trial court should have entered a final judgment in its favor and not merely dismissed the complaint without prejudice. Greenleaf II, 124 A.3d at 1124. On appeal, the Law Court affirmed the dismissal without prejudice, holding that "[a] plaintiff's lack of standing renders that plaintiff's complaint nonjusticiable—i.e., incapable of judicial resolution." Greenleaf II, 124 A.3d at 1125. Therefore, "the court could not have entered a judgment on remand addressing the merits of the Bank's foreclosure claim because the Bank failed to show the minimum interest that is a predicate to bringing that claim in the first place." Greenleaf II, 124 A.3d at 1125.

Only in cursory comments, or, more often, in footnotes indicating that a financial institution's standing to foreclose under *Greenleaf I* is not implicated, has the Law Court commented on how to circumvent standing issues that arise due to an assignment through MERS. This includes:

- When a financial institution held the paper from the beginning of the mortgage transaction, and therefore neither the note nor the mortgage was ever assigned or otherwise transferred (see Ocean Cmtys. Fed. Credit Union v. Roberge, 144 A.3d 1178, 1184 n.3 (Me. 2016))
- When a financial institution obtained a quitclaim assignment from the original mortgagee before bringing the action to foreclose (see JPMorgan Chase Bank, N.A. v. Lowell, 156 A.3d 727, 728–29 n.2 (Me. 2017); accord Nationstar Mortg., LLC v. Halfacre, 143 A.3d 136, 138 (Me. 2016))
- When a financial institution obtains an assignment of the mortgage from the original mortgagee even with an intermediary MERS assignment (see Pushard v. Bank of Am., N.A., 175 A.3d 103, 107 n.1 (Me. 2017))
- When the original mortgagee transferred all of its rights under the mortgage to MERS—not just the right to record—in the original assignment (see CitiMortgage, Inc. v. Chartier, 111 A.3d 39, 40 n.2 (Me. 2015)) –or–
- When the lender introduces evidence that the original lender ratified the assignment of the mortgage from MERS, acting as "nominee" of the original lender (see U.S. Bank N.A. v. Gordon, 227 A.3d 577, 579–80 (Me. 2020))

None of these decisions, however, provided guidance on how to obtain an effective assignment from an original lender that is defunct, obsolete, or otherwise unwilling to assign its original rights to the foreclosing party.

The "Dated" Equitable Trust Doctrine – Beal Bank USA v. New Century Mortg. Corp., 217 A.3d 731 (Me. 2019)

Recently, in Beal Bank USA v. New Century Mortg. Corp., 217 A.3d 731 (Me. 2019), a plaintiff bank holding an assignment from MERS, which encountered the problem of an insolvent originating lender, brought a complaint in equity to compel the assignment of the mortgage to it as the foreclosing party in order to confer standing to foreclose the mortgage under *Greenleaf I*. The bank argued that because it held the note secured by the wayward mortgage, the court should "apply the equitable trust doctrine to conclude that [the insolvent originating lender] holds the mortgage in trust for [the foreclosing bank]" and that the bank was therefore entitled to an assignment of the mortgage. Beal Bank USA, 217 A.3d at 732. This argument was consistent with Maine Superior Court decisions that concluded that "in a situation when the original lender is defunct, . . . declaratory judgment, quiet title, and equitable relief may be appropriate avenues to resolve ownership of a mortgage in favor of the holder of the note." MTGLQ Inv'rs, L.P. v. Mortg. Lenders Elec. Network USA, Inc., 2017 Me. Super. LEXIS 247 (Me. Super. Sept. 19, 2017) (Horton, J.); see also Fannie Mae v. SOV Apex, LLC, 2017 Me. Super. LEXIS 161 (Me. Super. Ct. Jan. 27, 2017) (O'Neil, J) (granting bank's motion to amend to add an equitable cause of action to compel an assignment of the mortgage to the present holder of the note).

Rejecting analogous case law out of Massachusetts, the Law Court concluded that the holding in *Greenleaf I* "stands as an implicit rejection of [the bank's] argument here that the equitable trust doctrine effectively establishes ownership of a mortgage in the holder of its accompanying note." Beal Bank USA, 217 A.3d at 735. The Law Court went on to state that "[a]lthough some courts continue to apply the *dated* equitable trust doctrine in the context of modern mortgage foreclosure actions, those courts do so under the foreclosure laws of their jurisdictions." Id. (emphasis added). For this proposition, the Law Court cited a 2013 First Circuit opinion (applying Massachusetts foreclosure laws) and a 2011 Supreme Judicial Court of Massachusetts opinion.

The Law Court in *Beal Bank* then stated, "[t]aken to its logical conclusion, the acceptance of [the bank's] argument would require us to hold that, once a party becomes the 'holder' of a note secured by a mortgage, that status would operate to automatically transfer ownership of the mortgage . . . ." Id. The Law Court expressly rejected the conclusion that a noteholder can cure a standing problem under *Greenleaf I* by bringing an action in equity pre-foreclosure when a noteholder conclusively demonstrates that the originating lender is insolvent or otherwise defunct, and therefore the noteholder's only remedy is to compel an assignment in equity, despite the fact that nothing in the language of *Greenleaf I* implicitly or explicitly rejects a noteholder's alternative pre-foreclosure remedies to protect the security for the debt.

A New Justice's Concurring Opinion – U.S. Bank N.A. v. Gordon, 227 A.3d 577 (Me. 2020)

More recently, in U.S. Bank N.A. v. Gordon, 227 A.3d 577 (Me. 2020), the Law Court held that effective ratification of an ineffective assignment was legally sufficient to effectuate that assignment and thereby confer standing on the foreclosing party under Greenleaf I. Gordon, 227 A.3d at 579–80. The majority opinion is short and succinct.

More notable is the concurring opinion, authored by recently appointed Law Court Justice Andrew Horton. After reviewing long-standing 19th century precedent that "ownership of a real estate mortgage automatically follow[s] the note that was secured by the mortgage," Gordon, 227 A.3d at 580 (citing Holmes v. French, 70 Me. 341, 344–45 (1879) ("The purchaser and owner of the mortgage debt is the equitable owner and assignee of the mortgage. The mortgage is incident and collateral to the debt secured by it, and an assignment of the debt carries with it, in equity, the mortgage. This rule is too well settled to require the citation of authorities in its support."); Wyman v. Porter, 79 A. 371, 375 (Me. 1911); Farnsworth v. Kimball, 91 A. 954, 956 (Me. 1914); Pratt v. Bank of Am., N.A., 2013 U.S. Dist. LEXIS 150644 (D. Me. Oct. 21, 2013)), Justice Horton concluded that "[t]he modern majority rule on the transfer of mortgages dispenses with the distinction between equitable and legal title and provides simply that a transfer of ownership of the note transfers ownership of the mortgage unless otherwise agreed." Gordon, 227 A.3d at 580 (citing *Restatement (Third) of Property: Mortgages § 5.4(a)* (Am. Law Inst. 1997) ("A transfer of an obligation secured by a mortgage also transfers the mortgage unless the parties to the transfer agree otherwise.")). "The Restatement makes clear that no separate assignment of the mortgage is necessary in order for an assignment of the note to transfer ownership of the mortgage." Id. (citing *Restatement (Third) of Property: Mortgages § 5.4(a)*); see John J. Aromando, Standing to Foreclose in Maine: Bank of America, N.A. v. Greenleaf, 29 Me. Bar J. 186, 188 (2014) ("Maine law has been clear on this for many years: the mortgage follows the note.").

Justice Horton then went on to criticize the court's *Greenleaf I* and *Beal Bank* decisions for "substantially departing from the foregoing precedent and the corresponding modern Restatement rule," including the "principle that the ownership of the mortgage follows

ownership of the mortgage note." Gordon, 227 A.3d at 582. Justice Horton specifically criticized *Greenleaf I* as "sever[ing] ownership of the mortgage from ownership of the mortgage note regardless of the intentions of the parties to the assignment, id., and questioned (what many foreclosing parties are desperate to know) how, under the Court's decision in *Beal Bank*, the owner of the mortgage note can obtain legal title to the mortgage if the holder of legal title either refuses or is unable to transfer title." Gordon, 227 A.3d at 582 n.4. Justice Horton explicitly stated he would "revisit" the Law Court's recent foreclosure jurisprudence "in the interest of stare decisis." Gordon, 227 A.3d at 582–83. He also concluded that the MERS "assignment of its interest in the mortgage—which included legal title to the mortgage—was sufficient" to determine that U.S. Bank had standing to foreclose as the mortgagee under Me. Rev. Stat. tit. 14, § 6321. Gordon, 227 A.3d at 583 (internal citation omitted).

Standing – Looking Ahead

Justice Horton's concurrence gives lenders faint hope that perhaps the Law Court will right its course on the severance of the mortgage and note under *Greenleaf I* and return to its long-established precedent from Jordan v. Cheney, 74 Me. 359, 361–62 (1883) to Mortg. Elec. Registration Sys., Inc. v. Saunders, 2 A.3d 289, 297 (Me. 2010).

Ironically, however, given the Law Court's other case law requiring, in effect, a discharge of a borrower's mortgage when a mortgagee fails to prove its foreclosure case on the merits, see Pushard, 175 A.3d at 114–16, a decision that a mortgagee does not have standing to foreclose is the best outcome for an unsuccessful foreclosing lender—it means that the dismissal does not have a preclusive effect, and the mortgagee can pursue a new foreclosure action once it cures the standing deficiency (assuming the original lender is not now defunct or otherwise unwilling to assign the mortgage). Note, however, that in some cases borrowers will move for judgment as a matter of law pursuant to Me. R. Civ. P. 50(d), or, alternatively, for a dismissal with prejudice, which trial courts may grant. See, e.g., U.S. Bank Trust, N.A. v. Keefe, 237 A.3d 904 (Me. 2020) (declining to review entry of judgment in favor of the borrower when the bank lacked standing when the bank failed to timely file a notice of appeal with applicable fee nor a motion with the trial court to extend the time to file).

In sum, to avoid standing defenses, foreclosing parties must proceed cautiously when MERS appears in the chain of title and obtain the necessary assignments from the originating lender or the lender appearing directly before the transfer to MERS.

Hearsay and the Business Records Exception

The General Rule

To strictly comply with all of the statutory steps required to properly foreclose, including submitting the eight elements of proof outlined in *Higgins*, foreclosing parties often have to rely on business records to prove the amount due on the mortgage note, including reasonable attorney's fees and court costs. Chase Home Fin. LLC v. Higgins, 985 A.2d 508, 510–11 (Me. 2009). Pursuant to Me. R. Evid. 803(6), a "custodian or other qualified witness" must testify that:

- The record was made at or near the time of the events reflected in the record by—or from information transmitted by—someone with knowledge
- The record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit
- Making the record was a regular practice of that activity – and–
- The opponent of the record does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness

Problems with meeting these requirements are unlikely to arise if the foreclosing party held the note and mortgage since inception. In that situation, supplying a custodian or other qualified witness to establish the Rule 803(6) requirements should be straightforward because all of the necessary records never changed hands.

Historic Application of the Rule

Complying with Rule 803(6) proves challenging, however, when servicing of the loan changes hands, as it often does. New loan servicers rely on integrated servicing records from previous servicers as evidence of historical loan activity, to confirm the investor's property interest, and to enforce obligations of the mortgage and note. In these circumstances, until recently, although the qualified witness "need not be an employee of the record's creator," Beneficial Maine Inc. v. Carter, 25 A.3d 96 (Me. 2011), records would only be admissible pursuant to Rule 803(6) "if the foundational evidence from the receiving entity's employee [was] adequate to demonstrate that the employee had sufficient knowledge of *both businesses'* regular practices to demonstrate the reliability and trustworthiness of the information." Carter, 25 A.3d at 101–02 (emphasis added). Under a quick reading of *Carter*, therefore, the custodian had to have knowledge

of both the previous servicer's and current servicer's recordkeeping practices.

The Law Court's decision in *Carter*, however, relied on its previous decision in Northeast Bank & Trust Co. v. Soley, 481 A.2d 1123, 1127 (Me. 1984). In *Soley*, the Law Court addressed whether to admit under Rule 803(6) the plaintiff bank's business record, in that case a prime rate schedule, when "the original source of the information contained in the rate schedule" was a separate entity, the First National Bank of Boston, "who was telephoned for the prime rate information each day . . . [and who] was not within the business enterprise that maintained the record." Soley, 481 A.2d at 1127. In affirming the rate schedule's admission, the *Soley* court noted that the bank's prime rate schedule was a record the bank kept in a systematic way, the bank presented a witness who testified that it was "common practice for Maine banks to base loans on the prime rate charged by the First National Bank of Boston," and the "Boston bank would have an obvious business incentive in assuring that this employee would have personal knowledge of changes in the prime rate and would report those changes accurately." Soley, 481 A.2d at 1127. Therefore, the Law Court concluded that "it would be fair to infer that the employee of the First National Bank of Boston who reported the prime rate did so in the regular course of the Boston bank's business as a part of his or her job duties," id., and admitted the record as an integrated business record under Rule 803(6). Soley, 481 A.2d at 1126–27. Contrary to the *Carter* court's characterization of *Soley*, the qualified witness's personal knowledge of both banks' regular business practices was not required. Id.

Carter espoused an unduly strict application of Rule 803(6) in the foreclosure context, and as a result, borrowers frequently successfully challenged records of a prior servicer as inadmissible hearsay. Without those records, it was difficult if not impossible for a foreclosing plaintiff to satisfy the elements of its claim—particularly with respect to proving the precise amount due on the loan. See, e.g., M & T Bank v. Plaisted, 192 A.3d 601, 607–10 (Me. 2018) (vacating judgment of foreclosure when plaintiff's witness could not explain number discrepancies in records that integrated information from multiple previous servicers, and the witness had no knowledge of "both businesses" records); Deutsche Bank Nat'l Trust Co. v. Eddins, 182 A.3d 1241, 1245 (Me. 2018) (holding that the bank's use of a senior loan analyst could not provide the foundation for the required statutory notice as a business record because the notice was prepared by the law firm of the servicer, rather than the servicer itself); Gregor, 122 A.3d at 952 n.11 (holding that an analyst for the loan servicer could not properly testify regarding loan records under the business records exception because she did not have firsthand knowledge of the creation of the document or the bank's processes in creating loan records); Greenleaf I, 96 A.3d at 710–11 (holding that a bank official could not be used to admit loan records because she did not describe her involvement with the bank's recordkeeping process or the level of firsthand knowledge regarding the bank's records). But see Lowell, 156 A.3d at 731 (holding that the bank officer properly testified regarding the bank's procedures for producing and retaining loan payment documents, even if he didn't have personal knowledge of the specific documents at issue in the case).

The Federal Counterpart – U.S. Bank Trust, N.A. v. Jones, 925 F.3d 534 (1st Cir. 2019)

Recently, the First Circuit addressed the admissibility of integrated business records pursuant to Fed. R. Evid. 803(6), the then substantively identical (and now completely identical—see Me. R. Evid. 803(6) advisory committee's note to August 2018 amendment (amending the Maine Rule "to follow a corresponding 2014 amendment" to the Federal Rule)) federal counterpart to Me. R. Evid. 803(6). The First Circuit confirmed that the federal counterpart, and the federal courts' application of that counterpart, is more permissive than Maine's current treatment of integrated business records.

At issue in *Jones* was a spreadsheet that integrated loan history and transaction details from two previous servicers that were "boarded" or "transferred" from those previous servicers' databases to the foreclosing party's system. United States Bank Trust, N.A. v. Jones, 330 F. Supp. 3d 530, 541 (Me. 2018). The bank invoked Fed. R. Civ. P. 803(6), arguing that when a bank "relies on other servicers' records in its day-to-day business once it believes they are correct" and "treats the records as part of its own business records," then the record should be admitted as an exception to the hearsay rule. The U.S. District Court for the District of Maine agreed and admitted the spreadsheet, declining to follow Maine's "strict approach," and opting instead to follow "the majority of circuit courts." Jones, 330 F. Supp. 3d at 543. In taking this approach, the District Court noted:

> Financial institutions and servicers have an obvious incentive to accurately document transactions and maintain reliable records to account for the status of their loans and to preserve their ability to collect debts in the event of default. While each servicer might not independently investigate the entire transaction history, [the witness] testified that [the servicer's] acquisition department took steps to review the previous servicer's records in a way that assured itself of the accuracy of

> the records during the boarding process before placing its own financial interest at stake by relying on those records.

Jones, 330 F. Supp. 3d at 541.

On appeal, the First Circuit affirmed, stating that it had "affirmed the admission of business records containing third-party entries without third-party testimony where the entries were 'intimately integrated' into the business records, or where the party that produced the business records 'relied on the [third-party] document and documents such as those [ ] in his business.'" Jones, 925 F.3d at 537 (quoting United States v. Doe, 960 F.2d 221, 223 (1st Cir. 1992) (internal citation omitted)). Associate Justice Souter, writing for the First Circuit, stressed that the "key question is whether the records in question are reliable enough to be admissible." Id. (internal quotation marks omitted). Moreover, the First Circuit stated that a Maine case would "take the same basic approach as our cases do," permitting the admission of integrated business records if the evidence "demonstrate[s] the reliability and trustworthiness of the information." Jones, 925 F.3d at 537 (quoting Beneficial Maine Inc. v. Carter, 25 A.3d 96, 102 (Me. 2011)). Notably, the First Circuit removed the first part of the sentence from *Carter*, which states that the witness needed to prove sufficient knowledge of "*both businesses'* regular practices to demonstrate the reliability and trustworthiness of the information." Carter, 25 A.3d at 102 (emphasis added) (citing Soley, 481 A.2d at 1126–27). Instead, the district court's and First Circuit's analysis more closely tracks the Law Court's earlier decision in *Solely*.

Maine's Recent Articulation of Me. R. Evid. 803(6) – The Bank of New York Mellon v. Shone, 239 A.3d 671 (Me. 2020)

In The Bank of New York Mellon v. Shone, 239 A.3d 671 (Me. 2020), the Law Court effectively overruled *Carter* and followed the First Circuit's lead in *Jones*. In *Shone*, the foreclosing plaintiff commenced a foreclosure action against the Shones and at trial sought to introduce its notice of default through the testimony of its witness, an employee of the servicer. The notice was sent by the servicer's law firm, and the trial court excluded the notice based on the witness's lack of personal knowledge about the law firm's creation of the record and recordkeeping practices. On appeal, the Law Court vacated the trial court's judgment and unequivocally adopted the integrated business records exception to the hearsay rule under Me. R. Evid. 803(6), holding that a business record from a receiving entity is admissible so long as the receiving business can establish that (1) the receiving business integrated the record into its own records, (2) the receiving business verified "or otherwise established the accuracy of the contents of the record," and (3) the receiving business relied on the record "in the conduct of its operations." Shone, 239 A.3d at 674. *Shone's* integration, verification, and reliance test aligns with the nearly identical Fed. R. Evid. 803(6), thereby promoting uniformity of application of the exception and discouraging forum shopping.

It is important to note that even if a custodian or qualified witness testifies to the necessary integration, verification, and reliance elements under *Shone*, the mortgagor may still challenge the trustworthiness of the business records pursuant to Me. R. Evid. 803(6)(E). It is the mortgagor's burden to demonstrate untrustworthiness, but if it carries that burden, the court may exclude the evidence on that basis. See Wilmington Tr., Nat'l Ass'n v. Berry, 237 A.3d 167, 172 (Me. 2020).

Thus, where multiple servicers are involved, the receiving entity must prove integration, verification, and reliance of the business record before being admissible under Me. R. Evid. 803(6). Where business records are most often used to prove up the amount due on the mortgage note under *Higgins* and Me. Rev. Stat. tit. 14, § 6111(1-A), the loan history offered by the foreclosing plaintiff should include the following information:

- The original amount of the loan
- The date the debt was incurred
- The schedule and due dates for payments; the dates and the amounts of each payment, including any payments made after default; the dates and amounts of each charge assessed (interest, escrow payments, costs, fees, and other charges)
- The balance due on the note after each payment and charge assessed; the date of the last payment before default
- The total amount paid by the mortgagor –and–
- If the loan was serviced by more than one loan servicer, the time during which each servicer was responsible for collecting and recording loan payments and charges

Plaisted, 192 A.3d at 608 n.6. Maine courts prefer this information in chronological order in a form that is "both accessible and admissible." Plaisted, 192 A.3d at 610.

Res Judicata – Preclusive Effect of a Dismissal with Prejudice or Judgment on the Merits

If an initial foreclosure action is dismissed with prejudice or judgment is entered in favor of the borrower, the mortgagee is precluded from bringing a later foreclosure action under the doctrine of res judicata. If a case is dismissed without prejudice, a mortgagee may be able to bring a later action. See Wilmington Sav. Fund Soc'y FSB v. Mooney, 2017 U.S. Dist. LEXIS 79628 (D. Me. May 24, 2017) (holding that preclusion does not apply when the first action was dismissed without prejudice and the mortgagor did not appeal that ruling). There are two key Law Court cases addressing res judicata and the preclusive effect of previous foreclosure actions.

Fannie Mae v. Deschaine, 170 A.3d 230 (Me. 2017)

In *Deschaine*, Fannie Mae filed an initial foreclosure complaint in 2012, which was dismissed with prejudice for failing to comply with the court's pretrial scheduling order pursuant to Me. R. Civ. P. 16A(d). Deschaine, 170 A.3d at 232–33. In 2013, Fannie Mae sent a new notice of default to the Deschaines and thereafter filed a second foreclosure complaint requesting a judgment of foreclosure based on the default that occurred after the previous notice of default. The Deschaines counterclaimed arguing that they held title to the property unencumbered by the mortgage because of the previous action being dismissed with prejudice. Id.

After an unsuccessful mediation, the Deschaines moved for summary judgment on their counterclaims and on all counts of Fannie Mae's complaint. Deschaine, 170 A.3d at 234. The Deschaines argued that Fannie Mae had accelerated the debt in the first foreclosure action, and therefore that Fannie Mae was barred from bringing a second foreclosure claim. Id. The Deschaines relied on the Law Court's previous decision in Johnson v. Samson Const. Corp., 704 A.2d 866, 869 (Me. 1997), where the Law Court held that res judicata bars a lender's second foreclosure action on the debt when the first foreclosure action expressly accelerated the debt under the terms of the promissory note.

Fannie Mae "disputed the assertion that the debt was accelerated" because the language of the mortgage and note at issue in *Deschaine*, unlike *Johnson*, merely gave the lender discretion to accelerate the debt and "Fannie Mae did not indisputably exercise that option." Deschaine, 170 A.3d at 238. Fannie Mae further argued that even an attempt at acceleration "is not effective unless and until the court enters a foreclosure judgment." Id.

The Law Court found the facts of *Deschaine* on all fours with *Johnson*, holding that Fannie Mae exercised its option to accelerate the entire debt by filing the first foreclosure action wherein it "declared in its complaint that the entire amount the Deschaines were obligated to pay pursuant to the loan documents was then due." Deschaine, 170 A.3d at 240. The Law Court further held that "because acceleration is entirely the lender's prerogative and occurs upon the filing of a foreclosure complaint, it does not depend on any judicial imprimatur in the form of a judgment in the lender's favor." Deschaine, 170 A.3d at 241. The Law Court therefore affirmed the trial court's decision in favor of the borrower on the basis of res judicata. Deschaine, 170 A.3d at 232.

Pushard v. Bank of Am., N.A., 175 A.3d 103 (Me. 2017)

Only a few months later, the Law Court took preclusion one step further in Pushard v. Bank of Am., N.A., 175 A.3d 103 (Me. 2017). In *Pushard*, the bank initiated a foreclosure action against the borrowers, and after a trial, the court entered a judgment in favor of the Pushards because the court concluded that the bank failed to meet its burden on the elements of foreclosure—namely, that a breach occurred, the amount due on the mortgage note, and that the notice of default complied with statutory requirements under Me. Rev. Stat. tit. 14, § 6111. Pushard, 175 A.3d at 107. A few months later, the borrowers initiated an action against the bank seeking "(1) a discharge of the mortgage and (2) an order enjoining the Bank from enforcing the note and mortgage and compelling the bank to record a release of the mortgage," among other claims. Pushard, 175 A.3d at 107. On cross-motions for summary judgment in the borrowers' action, the trial judge entered judgment in favor of the bank holding that the previous foreclosure judgment in favor of the Pushards "does not, and could not, preclude a claim by the Bank for amounts coming due on the note after the 2014 foreclosure judgment" because the bank did not accelerate the payments on the note (thus distinguishing the case from Johnson). Pushard v. Bank of Am., N.A., 2016 Me. Bus. & Consumer LEXIS 23 (Me. Bus. & Consumer Docket, Mar. 15, 2016). Analyzing Me. Rev. Stat. tit. 14, § 6111, the trial court concluded that "[t]he defective notice of the right to cure meant the Bank could not accelerate payments on the note or claim the entire balance due on the note." Id. Thus, the trial court denied the Pushards' motion for summary judgment, concluding that the bank "is not required to release its mortgage, either under Me. Rev. Stat. tit. 33, § 551 or on any other basis." Id.

On appeal, the Law Court vacated the trial court's judgment and remanded for the trial court to enter judgment in favor of the Pushards on their claim for declaratory relief "that the note and mortgage are unenforceable and that the Pushards hold title to their property free and clear of the Bank's mortgage encumbrance." Pushard, 175 A.3d at 116. The Law Court rejected the trial court's analysis that the defective notice under Me. Rev. Stat. tit. 14, § 6111 prevented the bank from accelerating the debt on the note. Pushard, 175 A.3d at 113–14. Instead, the Law Court applied its reasoning in *Deschaine* to hold that the bank accelerated the debt by "exercis[ing] its option to put the entire remaining balance in issue in its foreclosure action, instead of simply demanding payment of past due amounts." Pushard, 175 A.3d at 115. Thus, the Law Court concluded that "notwithstanding that the foreclosure court determined that the Bank failed to prove that its notice of default complied with section 6111 . . . the Bank triggered the acceleration clauses of the note and mortgage when it filed the foreclosure action demanding immediate payment of the entire remaining debt." Id. With a declaratory judgment in hand, the Pushards were then free to record the judgment with the registry of deeds to quiet title to the property. Pushard, 175 A.3d at 116.

Avoiding the Deschaine/Pushard Trap

As discussed above, the consequences of a foreclosing plaintiff failing to meet its burden on the elements of its claim are significant—the borrowers are thereafter entitled to quiet title on the property free of the mortgage encumbrance.

The most common errors in a foreclosing plaintiff's case relate to insufficient evidence of the amount due on the note based on the inadmissibility of evidence as hearsay, as discussed above, and a defective notice of default and right to cure pursuant to Me. Rev. Stat. tit. 14, § 6111(1-A). Failure to strictly comply with Section 6111 operates as a "substantive defect" in the mortgagee's case that will give rise to a dismissal with prejudice or the right to summary judgment in favor of the mortgagor, which will have preclusive effect going forward. See the following cases:

- JPMorgan Chase Bank, N.A. v. Lowell, 156 A.3d 727, 733–34 (Me. 2017)(holding that the required notice was deficient because it did not state a certain amount that the mortgagor would have to pay and left open the possibility of additional fees being added later)
- U.S. Bank Trust, N.A. v. Mackenzie, 149 A.3d 267, 270 (Me. 2016)(holding that a mortgagor was entitled to dismissal of the action with prejudice because failure to provide an adequate notice was a substantive defect in the bank's case)
- Wells Fargo Bank, N.A. v. Girouard, 123 A.3d 216, 219 (Me. 2015)(holding that the mortgagor was entitled to summary judgment rather than a dismissal without prejudice based on the bank's defective notice)
- U.S. Bank, N.A. v. Tannenbaum, 126 A.3d 734, 736 (Me. 2015)(judgment in borrower's favor was grounded in inadequate notice, which was therefore a "final judgment on the merits" with preclusive effect)

Thus, strict compliance with Me. Rev. Stat. tit. 14, § 6111 is imperative.

Moreover, if a foreclosing plaintiff's evidence is excluded for any reason, and the excluded evidence necessarily results in the plaintiff failing to prove its foreclosure claim, before entry of an adverse judgment, the foreclosing plaintiff must make an offer of proof or report the case to the Law Court pursuant to Me. R. App. P. 24(c) to preserve its right to appeal the exclusion of that evidence and avoid the preclusive effect of the judgment. For example, in Wilmington Sav. Fund Soc'y, FSB v. Abildgaard, 229 A.3d 789 (Me. 2020), the plaintiff presented evidence of a number of elements of its foreclosure claim, but the trial court excluded evidence of the notice of default and right to cure. At that point, Wilmington rested its case (before proving the remaining elements of its claim) and took an appeal to the Law Court. Id. The Law Court affirmed the trial court's judgment in favor of the borrower and noted that Wilmington failed to preserve the issue of the excluded evidence for review because it neither made an offer of proof on the remaining elements of its foreclosure claim, nor invoked Me. R. App. P. 24, which allows interlocutory appeals of trial court rulings in limited circumstances. Having "failed to pursue either of these options," the final judgment rule prohibited the Law Court from determining whether the evidence should have been excluded because vacating the trial court's decision on that issue would only have the effect of "remand[ing] for the court to resume the trial at the point where Wilmington rested its case." Wilmington Sav. Fund Soc'y, FSB, 229 A.3d at 790.

Finally, it is an open question whether a deceleration clause in the mortgage and note, and proper procedures taken by the foreclosing plaintiff to decelerate the debt pursuant to those instruments, could avoid the "free home" result under *Deschaine* and *Pushard*.

Necessary Parties – Dismissal without Prejudice

Finally, a mortgagor may raise the defense that necessary parties are absent from the foreclosure proceeding. A foreclosure action may be dismissed without prejudice if

a necessary party has not been joined, such as the original executor of the note or a municipality when a tax lien is challenged. See, e.g., MTGLQ Investors, L.P. v. Alley, 166 A.3d 1002, 1005 (Me. 2017) (vacating the foreclosure judgment because the mortgagor who executed the note, or its assignee, was a necessary party and someone with an interest in the land who is not a party to the note does not have standing to challenge alleged nonpayment of the note); Ocwen Fed. Bank v. Gile, 777 A.2d 275, 280–82 (Me. 2001) (holding that a municipality was a necessary party to a foreclosure action when the foreclosing mortgagee challenged the validity of the municipality's tax lien on the property, and remanding to the trial court with directions to join the municipality and reconsider all issues).

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