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STATE of AFFAIRS

TOP NEWS

Four states have bounced back to pre-recession employment levels, and more are on the way, according to a report from Information Handling Services (IHS). Alaska, North Dakota, Texas, and Louisiana—the four states benefitting most from the energy boom—have all reached or passed their pre-recession employment levels. Most other states are within 5 percent, but on the other end of the spectrum, 16 states still have fewer than 95 percent of their pre-recession job levels. Alabama, Florida, Arizona, Michigan, Rhode Island, and Nevada each have at least 7 percent to make up before hitting their previous peaks. Half of the United States is expected to be back to peak job levels in 2012–13, while the other half will not completely recover until 2014 at the earliest. The majority of these states are expected to get back to their peaks in 2014–15, though Nevada, Michigan, and Rhode Island are not expected to fully recover until 2017 or beyond.

Florida

RANK: 1

90+ Day Delinquency Rate	Foreclosure Rate	Unemployment Rate
MARCH 2012		
3.93%	14.02%	9.0%
YEAR AGO		
4.85%	13.87%	10.7%
PERCENT POINT CHANGE		
-19.1%	1.1%	-15.9%

Top County

MIAMI-DADE COUNTY

90+ Day Delinquency Rate	Foreclosure Rate
MARCH 2012	
4.85%	20.39%
YEAR AGO	
6.01%	21.14%
PERCENT POINT CHANGE	
-19.3%	-3.6%

Top Core-Based Statistical Area

MIAMI-FORT LAUDERDALE-MIAMI BEACH, FL

90+ Day Delinquency Rate	Foreclosure Rate
MARCH 2012	
4.21%	17.17%
YEAR AGO	
5.52%	17.64%
PERCENT POINT CHANGE	
-23.8%	-2.7%

NOTE: The 90+ Day delinquency rate is the percentage of outstanding mortgage loans that are 90-plus days delinquent. The foreclosure rate is the percentage of outstanding mortgage loans currently in foreclosure. State rank is based on the March 2012 foreclosure rate. All figures are rounded to the nearest decimal. The unemployment rate reflects preliminary March 2012 figures released by the **Bureau of Labor Statistics**. All other data courtesy of **Lender Processing Services**.

FROM THE BENCH

The Application of the Florida Business Records Hearsay Exception to Foreclosure Litigation

According to the Mortgage Bankers Association's recently released National Delinquency Survey, more than 24 percent of home loans in Florida were in some stage of delinquency or foreclosure in the last quarter of 2010. About 14 percent of Florida homes were actively in foreclosure, meaning that a foreclosure action had been initiated by the lender, but the mortgage had not been sold via foreclosure sale, been brought current by the homeowner, or a workout (loan modification, short sale) had not taken place.

This issue has created a booming business for attorneys that specialize in defending homeowners in foreclosure litigation. While some attorneys simply take their clients' money, buy them some time, and have no real expertise in this evolving area of law, other lawyers have organized, shared information and best practices, and they are quite savvy in the defense of these actions.

One example of such savviness, combined with, quite frankly, a loan servicer's sloppiness, is seen in the Florida Fourth District Court of Appeal's case of *Glarum v. LaSalle Bank National Association*, So. 3d, 2011 WL 5573941 (Nov. 17, 2011). LaSalle filed a foreclosure action against a homeowner. The homeowner's counsel filed an answer admitting that payments had not been made according to the terms of the note, but denied LaSalle's allegations regarding the amount of the default. To establish the amount of the indebtedness, LaSalle filed the affidavit of a "specialist" from the loan servicer in support of its motion for summary judgment. This specialist attested that the homeowner was in default pursuant to the note and owed in excess of $340,000. The trial court granted summary judgment in LaSalle's favor. The homeowner appealed the decision.

Pursuant to Florida law, the affidavit constituted "hearsay" evidence. "Hearsay" is a statement, other than one made by an individual while testifying at a trial or hearing, offered in evidence to prove the truth of the matter asserted. Hearsay evidence is inadmissible in a Florida court unless a statutory exception applies. In this case, the business records hearsay exception would be applicable.

Pursuant to Section 90.803(6)(a), Florida Statutes, documentary evidence may be admitted into evidence as a business record if the proponent of the evidence demonstrates the following through a records custodian or other qualified person:

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

As was his legal right, counsel for the homeowner took the deposition of the loan servicer's employee. The witness explained that he derived the $340,000 figure from his company's computer system. However, he did not know who entered the data into the computer and could not verify that the entries were correct at the time they were made. In addition, to calculate the homeowner's payment history, the witness relied in part on data retrieved by a prior servicer of the subject loan.

The appellate court applied the business records hearsay exception to the employee's testimony and ruled that the affidavit could not be admitted into evidence under Section 90.803(6)(a) and, as such, was inadmissible hearsay. The court found that the witness did not know who, how, or when the data entries were made into the servicer's computer system, neither could he state if the records were made in the regular course of business. As the witness had no knowledge of how his own company's data was produced, he was not competent to authenticate the data. The court thus reversed the lower court's entry of summary judgment in favor of LaSalle and sent the case back to the trial court.

While the *Glarum* case is very specific in its holding, lenders and servicers can learn some broad lessons. First, don't assume that a homeowner won't obtain counsel, and competent counsel at that. Second, don't assume the counsel will not take the deposition of any individual swearing to an affidavit—or affiant—that supports a motion for summary judgment.

The law does not require an affiant who relies on computerized bank records to be the records custodian who entered or created the data, nor must the affiant identify who entered the data into the computer. Likewise, there is no rule which precludes the admission of computerized business records acquired from a prior loan servicer. What is required is that the affiant knows the basics as set forth in Section 90.803(6)(a).

Finally, if it is suspected that an affiant does not have the ability to testify in compliance with the law, a court may permit affidavits to be supplemented by further affidavits. It is highly recommended that lenders and servicers work closely with their counsel to avoid this costly and embarrassing situation.

This From the Bench *article is provided by Michael J. Barker and Keith M. Hoffman. Barker is a partner in the Jacksonville, Florida, office of Quintairos, Prieto, Wood & Boyer, P.A., and heads up the firm's financial services practice group. Hoffman is a partner in the firm's Tampa office and a member of the Financial Services Practice Group. Both represent clients in the default servicing, banking, mortgage lending, mortgage servicing, and title insurance industries.*