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Defense Questions Court's Silence on Standing in Foreclosure Cases

Samantha Joseph, Daily Business Review

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The Third District Court of Appeal's one-liners aren't sitting well with some foreclosure defense attorneys who say it abuses per curiam affirmances, or PCAs, to avoid justifying rulings on lender standing.

The appellate court, which hears appeals from Miami-Dade and Monroe counties, issued PCAs in about 81 percent of the foreclosure cases heard in 2015.

The "Third DCA has never issued a written decision reversing a final judgment of foreclosure because the foreclosing lender failed to prove standing at the inception of the case. Not once," Tampa foreclosure defense attorney Mark Stopa wrote in a footnote in a motion for rehearing in the case of clients Thomas and Deborah Corrigan. "That bears a moment of reflection."

PCAs affirm trial court orders when the legal issues are so well-settled that a fresh discussion would be fruitless. They resemble administrative dismissals, listing three judges on an appellate panel and the words, "Per curiam. Affirmed."

But some attorneys say the court misuses the tool to strategically sidestep writing opinions that could provide grounds for rehearing. Instead, they say it uses the decisions to wipe out options for further review and avoid conflicts with other district courts.

Stopa's motion before the Second DCA mentions "concerns about judges allowing subjective perceptions of equity" to invade their decisions, but he wrote he "refrains from commenting about the propriety" of their results.

From 2013 to the first week of March when the first large wave of appeals stemming from the housing collapse hit their dockets, the Third DCA wrote four opinions addressing lender standing, compared with 76 opinions on the same subject from the Fourth DCA, according to a count by Davie attorney Michael Wrubel.

During that period, the Fourth DCA wrote 63 appellate opinions that found the lender failed to prove standing. Of them, 44 reviewed trials and 19 involved summary judgments. In 12

cases, the court sided with plaintiffs, finding lenders proved they had the right to foreclose. Ten of the cases involved trials, and two covered summary judgments.

"What this tells me about the Fourth is it's more than willing to allow the concept of standing to live and breathe. In the Third, there's not one single instance where they've done that, which is very hard to explain," Wrubel said. "If the Third DCA wants to consistently rule that the banks always have standing, contradicting what the Fourth DCA has ruled, I think they need to write an opinion about it."

Law On Standing

In the four cases where the Third DCA issued opinions on standing, one involved a defendant who waived standing as an affirmative defense. In another, the appellate court affirmed because it didn't have a trial transcript. In the two other decisions, it upheld the lower court ruling without discussing the facts surrounding standing.

Lender standing became a central defense for thousands of homeowners in the wake of a robo-signing scandal. Regulators uncovered thousands of fraudulent mortgages as loan documents flew from originating brokers to lenders who repackaged and resold the debts, often misplacing notes along the way.

A $50 billion settlement by state attorneys general with Bank of America, Citigroup Inc., Wells Fargo N.A., Ally Financial Inc. and JPMorgan Chase & Co. required the banks to improve their loan servicing practices and provide billions of dollars in relief to consumers after the housing crash.

Defense attorneys have successfully argued lenders' failure to attach notes to their complaints proved they lacked legal standing to sue.

"In the modern foreclosure era, the law on standing in the Third DCA is almost non-existent as opposed to being settled," Wrubel said. "The four cases written are of no precedential value ... thus, no guidance."

The appellate court did not respond to inquiries for comment, but it had an unlikely defender: outspoken foreclosure defense attorney Thomas Ice of Ice legal, who has widely criticized the use of PCAs as a means of streamlining the Florida Supreme Court caseload.

"The whole point of the law and courts and the judicial system is to resolve disputes without people taking matters into their own hands," the Royal Palm Beach attorney said. "Part of doing that is to be able to explain to people why you're ruling this way as a judge."

He suggested a perception of bias toward lenders in the Third DCA might be just that — an unfounded impression not supported by a review of the court's rulings.

By his count, the Fourth DCA issued PCAs in about three-quarters of its foreclosure cases regardless of whether standing was the central issue. That puts its PCA rate near the Third's, but its heavier caseload translates to a higher volume of opinions, leading observers to falsely conclude the Fourth is more borrower-friendly, Ice said.

"If you compare them based on the number of cases, it's about the same," he said.

Thomas Hall, former Clerk of Court of the Florida Supreme Court, also defended the Third DCA's use of PCAs but suggested a preconception among jurists that borrowers are likely to come out on the losing end for defaulting on mortgages.

"I would never think they were intentionally misusing it," said Hall of the Mills Firm in Tallahassee. "I think sometimes they think it's easier to PCA the case and end it because they somehow have a belief, 'You're going to lose, so why drag it out anyway?' "

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