

ROBO-SIGNERS:

WILL THEIR ACTIONS HAVE SERIOUS LEGAL CONSEQUENCES, AND, IF SO, FOR WHOM?

By Brett L. Goldblatt



The latest scandal to captivate the nation and further cripple the severely depressed housing market has been dubbed “foreclosuregate.”¹ Since the downturn in the nation’s economy, millions of Americans have been forced out of their homes by banks, as they have been unable to keep up with their monthly mortgage payments. Now a practice has been uncovered whereby financial institutions were using “robo-signers” to rush through thousands of home foreclosures. A robo-signer is a person who quickly signs hundreds or thousands of foreclosure documents in a month swearing that he or she has personally reviewed the mortgage documents, but has not actually done so.² Banks were allegedly hiring hair stylists and Walmart floor workers, individuals who had no formal training, to sign foreclosure affidavits without ever reviewing the documents.³ The foreclosure documents and affidavits, which were executed by robo-signers, were then used

to establish a bank’s ownership of a mortgage. By signing the documents, robo-signers were representing that they had personal knowledge of information which they knew absolutely nothing about.⁴ Consequently, lenders have begun withdrawing affidavits signed by robo-signers, effectively terminating foreclosure proceedings around the country.⁵

Recent reports reveal that robo-signing was not unique to the foreclosure process. The latest permutation of robo-signing apparently occurred in the processing of mortgage assignments.⁶ Mortgage assignments are documents showing a loan’s transfer of ownership; transfers that happened repeatedly when Wall Street firms began buying, bundling and securitizing mortgages to sell to investors on the secondary markets.⁷ In November 2010, employees at Nationwide Title Clearing, a company specializing in loan transfer and assignment services, testified to signing thousands of documents a day, often posing as executives of other companies.⁸ Bank officials allegedly authorized employees at companies such as Nationwide Title Clearing to execute assignments on their behalf using fictitious executive titles.⁹ While some argue that the robo-signer scandal is nothing more than an “overblown case of paperwork bungling”, the underlying legal issues are far more consequential.¹⁰ Aside from the obvious fact that executing documents under fictitious titles

is fraudulent, robo-signing raises complicated issues such as who is the rightful owner of a loan and who has the right to foreclose on the loan.¹¹

In *OneWest Bank, F.S.B. v. Drayton, et al.*, plaintiff OneWest Bank, F.S.B (“OneWest”) initiated a foreclosure action after the defendants defaulted on their residential mortgage.¹² Prior to defendant’s default, Erika Johnson-Seck, a Vice-President at OneWest, executed an assignment of the subject mortgage to Indymac Federal Bank.¹³ Ms. Johnson-Seck executed the assignment under the title of Vice President of Mortgage Electronic Registration Systems, Inc. (“MERS”). MERS is an organization, similar to Nationwide Title Clearing, specializing in loan transfer and assignment services. Interestingly, Ms. Johnson-Seck later admitted that she was never employed by MERS.¹⁴ After the subject mortgage was assigned to Indymac, Ms. Johnson-Seck re-assigned the mortgage to OneWest. This time, she executed the assignment as the Vice President of Indymac.¹⁵ While Ms. Johnson-Seck was once employed by Indymac, she had no connection to Indymac at the time she executed the aforementioned re-assignment. Recently, Ms. Johnson-Seck was deposed in a Florida foreclosure action (*Indymac Federal Bank, FSB v. Machado*), where she admitted to being a robo-signer. She admitted to executing approximately 750 mortgage documents a week, including sworn

documents outside the presence of a notary public.¹⁶ Moreover, she admitted that she did not even read the documents before signing them.¹⁷

In light of Ms. Johnson-Seck's testimony in *Indymac Federal Bank, FSB v. Machado*, the Court dismissed OneWest's foreclosure action without prejudice. The Court indicated that it would entertain the foreclosure action again if certain pre-filing requirements were met. First, the Court indicated that OneWest must explain why Ms. Johnson-Seck was executing documents while wearing so many different corporate hats. Further, the court requested Ms. Johnson-Seck's employment history for the past three years in order to determine what her exact role was as Vice President of OneWest.¹⁸ Third, the Court stated that OneWest must review all the documents submitted to the Court in support of its foreclosure action and sign an affidavit verifying the accuracy of these documents.¹⁹ In essence, the Court's ruling indicated that it would not proceed with OneWest's foreclosure action until it made sense of all the mortgage assignments. Specifically, the Court wanted to determine if OneWest legitimately owned the subject mortgage. If OneWest did not legitimately own the subject mortgage, then it would have no right to foreclose on it.

At first, robo-signing appeared to be a practice utilized by banks to speed up foreclosures. As evident from *OneWest Bank, F.S.B. v. Drayton, et al.*, assignments were being executed by robo-signers, and consequently, the validity of these assignments are now being questioned. The execution of invalid

assignments could affect who has rightful ownership of a mortgage. In light of this, courts are beginning to institute pre-filing foreclosure requirements, mandating that banks establish the validity of their documents and prove that proper protocol was followed prior to instituting a foreclosure action. In turn, this will likely result in the delay of foreclosures as banks attempt to get to the bottom of this robo-signing practice.

The practice of robo-signing could conceivably have ripple effects in the secondary markets. Specifically, it could prove more difficult to bundle and sell mortgages as mortgage-backed securities if the identify of the actual owners of the underlying loans is unclear. Further, financial institutions, such as Nationwide Title Clearing and MERS, could be subjecting themselves to liability based on the practices of robo-signers.

Moreover, lawyers who decide to bring foreclosure actions on behalf of financial institutions that do not have standing (because they do not actually own the mortgage) could be opening themselves up to sanctions from courts. Therefore, attorneys should personally review all relevant foreclosure documents before initiating suit on their client's behalf, in order to ensure that their client is the actual owner of the mortgage.

While robo-signing was first believed to be limited to a few isolated incidents, it has quickly become apparent that this practice was running rampant in the mortgage industry. Although the impact and legal consequences resulting from the actions of robo-signers are

still not entirely clear, at the very least, there is indication that courts are not taking this practice lightly.

(Endnotes)

- 1 Bryce Covert, Robo-signer, New Deal 2.0 (October 20, 2010), available at <http://www.newdeal20.org/2010/10/20/robo-signer-23851/>.
- 2 *OneWest Bank, F.S.B v. Drayton, et al.*, 2010 WL 4187065 at *1 (N.Y. Sup. 2010).
- 3 David Streitfeld, *JP Morgan Suspending Foreclosures*, NYTimes.com (Sept. 29, 2010), available at <http://www.nytimes.com>.
- 4 Robbie Whelan, *GMAC Spotlight on 'Robo-Signer'*, WSJ.com (Sept. 22, 2010), available at <http://wsj.com>.
- 5 *Id.*
- 6 Marian Wang, *Ahead of Congressional Hearings, Robo-Signer Scrutiny Spreads*, ProPublica (Nov. 16, 2010), available at <http://www.propublica.org>.
- 7 *Id.*
- 8 *Id.*
- 9 *Id.*
- 10 Michelle Conlin, *Robo-Signers: Mortgage experience not necessary*, Yahoo News (Oct. 12, 2010), available at <http://news.yahoo.com>.
- 11 *Id.*
- 12 *OneWest Bank, F.S.B v. Drayton, et al.*, *supra* note 1.
- 13 *Id.*
- 14 *Id.* at 2,3.
- 15 *Id.*
- 16 *Id.* at 3.
- 17 *Id.*
- 18 *Id.*
- 19 *Id.*