SANDS OF TIME

Time is of the essence and bowing down to it when handling a foreclosure legal proceeding may cause you to lose sight of the ultimate goal.

FEATURE STORY // FORECLOSURE

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Speed Counts

Here to Stay, Legal Timeframes Have Their Pros and Cons

Do timeframes matter? I'll admit right up front this is a trick question. My children hate it when I give them simple answers to their complex questions, because usually my answer is technically correct but fails to provide the slightest illumination on the subject they inquired about. "Dad, are we staying home today or going to a movie?" My answer, without regard to what my plans are, is going to be a teasing "yes" because they asked for an answer to a faulty question. Similarly, the answer to the question "do timeframes matter?" is "yes" because I think timeframes are a good starting point of reference but also "no" because, in large part, the question suggests an imperfect line of inquiry.

The better question might be: "Are timeframes the only thing that matters?"

Timeframes for foreclosure legal proceedings are a relatively recent invention, an artificial target for attorneys to follow in order to comply with the expectations of the various agencies and investors for whom their mortgage clients service loans. The original premise behind timeframes was to establish a reasonable period for the servicer—and its attorney—to recover title to nonperforming assets. Beyond this time period, the investor could summarily charge back any continuing interest losses or, in some cases, make the servicer pay off the loan amount and deal with the recovered real estate on its own. The concept is well-intentioned and, in most cases, pretty easy to accomplish—if everything goes right. The dates were predicated on the historical averages for recovery of properties in foreclosure. Myriad advances in technology—remember the days before the Internet and e-mail became available—have dramatically improved the capability to do routine work in such a way that almost every moderately experienced attorney could argue that they met timeframes in their proverbial sleep.

The 4-Minute Mile

They say that what is old is new again, and that is certainly true in looking at timeline performance. Think about when Roger Bannister broke the 4-minute mile. No one said it could be done, but once he set the standard, others kept improving on it. I am sure that as you read this article, someone somewhere has set a new world record by doing one simple task one more repetition than the previous person or by running .01 seconds faster than the predecessor over a measured distance. Adults are used to setting standards: "I'm going to walk for 20 minutes at 4.0 mph on the treadmill this morning." But in many ways, the business of foreclosure timeframe management is reverting back to the rules of our childhood. Kids don't measure their playtime regimens or record their progress on charts but instead follow a simple rule that if you aren't faster than the child chasing you, then you'll be "it" and lose. The same principle should apply to evaluating your foreclosure lawyer—and other vendors for that matter—but with some introspection along the way.

Freddie Mac was the first investor to improve on the so-called standard timeframes by tightening the noose and imposing what seemed at the time like draconian and arbitrary standards for completion of legal actions for foreclosure and bankruptcy. To reinforce its point, the Federal Home Loan Mortgage Corporation adopted a designated counsel program under which the attorneys chosen to participate were expected to meet and be graded against these more stringent dates. Many counsel at the time complained to their clients that these rules were impossible and that no respectable attorney could provide an acceptable level of professional representation given the demands to file complaints or commence publication in less than the standard 20 to 30 days that had previously been accepted by the legal industry. Over time, however, the better counsel adapted by developing better work routines, in some cases cutting into their profit margins to add staff so they could perform multiple tasks simultaneously. In the end, these attorneys met the heightened expectations of their lender clients. Perhaps a few failed, and even more found that their systems and techniques were so outdated that they could no longer remain competitive and still produce a profit. However, as with all forms of nature, the strong not only survived but got stronger.

High Tech = High Speed

The maturity of the Internet brought along with it a newfound ability to transmit data much faster than was previously possible. E-mail replaced faxes and overnight mail as a medium for communication, reducing the overall time to complete a foreclosure or bankruptcy case but introducing with it complications for those law firms that were too slow to adapt in terms of privacy and data security. Does anyone still think they should use any vendor with a Hotmail or AOL account instead of private domain e-mail? Are you as chagrined as I am to search for a vendor or business partner and discover they don't have a Web site? The best law firms or, in some cases, merely the largest of them with access to capital invested heavily in human capital and information technology to stay competitive. As a result, the barriers to entry into this particular area of legal practice are at an all-time high.

Notwithstanding the demands placed on law firms to stay competitive and financially viable, timeframes continued to decrease. Fast-forward to today, and statistics demonstrate that the average time to file a complaint in Florida has dropped in the past five years from more than 20 days to less than five—even after ordering and reviewing title searches before doing so. How would those attorneys who complained so vociferously about the modest time squeeze imposed on them by the GSE explain that the average time to respond to a request for reinstatement figures has dropped in just the past year from three days to less than an hour?

How did this phenomenon occur, and where were we when it did? Has the profession of law abandoned its principles and circumvented the most rudimentary of ethical considerations in running so fast to meet these timeframes? The answer to that question is most certainly that they have not. But more to the point, how were these new timeframes established? The answer is very simple and relates to the illustration of children at play. Fidelity National, a national default outsourcing and information provider, was one of the first in our industry to make timeframes a goal instead of a guideline. Over a year ago, it instituted a policy recognizing and rewarding those attorneys who did work for its clients in a consistently shorter time than their competition. Simply put, Fidelity established a theory that faster was better and reinforced that opinion by publicizing and comparing the time to completion of various legal tasks among the hundreds of law firms doing work for its client base. It forced attorneys to examine their business practices in the same fashion that other industries have had to reinvent themselves to stay competitive in a global economy. In many cases, the decrease in time resulted simply from paying attention every minute of every day to the concept of "what to do next" and then finding a way to attach significance and effort to doing that one thing without pause.

Cut Time or Cut Corners?

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their vendors, ostensibly for the benefit of the servicing client but often because it furthers their own business aims. First American uses its default flagship product Vendorscape to measure the performance of counsel so it doesn't have to become involved in "choosing" attorney vendors. LandAmerica elects to indemnify clients to a greater extent if it has the ability to choose downstream vendors. While this puts its reputation on the line, obviously, there is no benefit in standing behind counsel who are unable in the long run to produce consistent quality results for LandAmerica's clients. LOGS Network developed a proprietary statistical program called ASAP (Attorney Scorecard and Performance) to help manage the more than 250 law firms its outsourcing division was charged by its largest client with using on its portfolio.

As such systems come online, they force attorneys to become self-critical about the efficiency inherent—or lacking—in their business processes. In a very real sense, the legal profession has merely let the extra air out of the process of foreclosure and bankruptcy and has similarly imposed constraints on its own downstream vendors to perform at higher levels than those previously deemed acceptable.

Of course, when the only acceptable test for quality becomes a simple test of speed, it is inevitable that some of the participants will feel compelled to cut corners to stay in the game. Rosie Ruiz "won" the 1980 Boston marathon, but judges determined she clearly cheated by entering the race in its final half-mile, sprinting across the finish line barely out of breath, and without a trace of sweat. Had she been a little less obvious in her ruse, she might still be holding that title. What if she had simply cut off a few corners of the race circuit instead of so blatantly failing to participate at all?

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In the case of a sanctioned marathon race, there are specific rules about where and how far to run. But if foreclosures are only measured from start to finish, how does one decide the legitimacy of the course taken to get between these two points? In some instances, attorneys file court pleadings without the necessary documentation required by local court rules so they can claim they initiated first legal action faster than their counterparts; some start legal action without waiting for a review of title and risk spending additional time or money amending or restarting the process in the event they later find parties in title who were not properly notified. Maybe this is cheating in a literal sense, but the only rules today are those that reward for speed. As long as the attorneys engaging in such behavior take these risks on their own account and in the end provide good marketable title to the foreclosed properties, then perhaps they should be lauded instead of ridiculed.

The crux of the problem is not the attorneys who cut corners but those who violate the spirit and letter of the law by ignoring it all together. I'm not saying it happens often, but the opportunity exists for attorneys bent on earning a living from handling foreclosures and bankruptcy matters to provide defective notice to the borrowers or tenants—how many homeless people can afford to hire an attorney anyway?—or proceed with judgment despite valid requests for an extension of time to explore payoff options. Some law firms simply quote figures to inquiring mortgagors and then move blithely to foreclosure sale, while others proactively attempt to identify legitimate loss mitigation opportunities. The sad truth is that when only speed matters, firms may feel they can't afford to take the time for such considerations.

Not the Only Thing that Matters

The ongoing challenge for companies in the mortgage servicing industry is to recognize that there are risks to them and to their customers who have fallen into default in deciding which vendors to use solely on the basis of unabashed speed. At the risk of being branded a heretic and perhaps in a slight bow of respect for those more seasoned attorneys who still think that the law is a noble profession, I suggest that there is some value in proceeding slowly enough to identify potential title issues that could cloud title in a subsequent REO sale or in giving mortgagors an extra day or two to attempt to explore loss mitigation strategies while waiting on reinstatement or payoff quotes.

So as to the original question: "Do timeframes matter?" They most certainly do, because without any guidance at all, a servicer would be left with no means to determine the relative differences between two or more lawyers who perform essentially the same mundane legal tasks. But does it really matter if the timeframes themselves are not only arbitrary but, taken to the extreme, may result in more losses than gains and run against the very notion of preserving homeownership in as many cases as possible?

Only time will tell. DS