Complying with AB 284

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As we all know, as of October 1, 2011, all Notices of Default must include an affidavit of authority to foreclose which is signed by the trustee, the beneficiary or its authorized agent. The affidavit must be notarized, signed under penalty of perjury and made with personal knowledge of everything in the affidavit. While this is a significant change in the law, it might nevertheless come as a surprise that, since October 1, 2011, very few Notices of Default have been recorded in Nevada. The question arises: Did foreclosure filings come to a screeching halt because loan servicers and trustees can no longer robo-sign foreclosure documents, or, is it because no one knows how to safely comply with AB 284 as it is an unclear and overly burdensome law? The Nevada Attorney General would prefer to believe the former.

One of the most common questions asked in the context of the latter point is: "What affidavit form can we use to as- sure we are in compliance with AB 284?" Unfortunately, there can be no assurance that use of any particular affidavit, even the AG's Model Form, would insulate the signer from liability, let alone a lawsuit. However, once you have settled on which interpretation of the statute's requirements seem most appropriate, below are some tips that may help you assist the servicer in tailoring a preferred version of the form.

The most important criteria of any form affidavit are that it contains all the required content, is signed by one with "personal knowledge," and is signed by someone authorized to sign under the statute. It bears repeating: The affidavit should include every required component in the statute, including:

1. Name/address of trustee, current note holder, current servicer and current beneficiary;

2. Name/address of every prior known beneficiary;

3. Confirmation that the beneficiary possesses or constructively possesses the original Note;

4. Confirm that the Trustee has Authority to foreclose;

5. Amount in default, unpaid principal balance, past default-related fees, estimated future default-related fees, and estimated foreclosure fees and costs; and

6. The description of the instruments that conveyed the interest to each beneficiary.

Once all of the required information is set forth in the affidavit, then an authorized person (most likely the loan servicer) must sign it having "personal knowledge" of the contents. What is personal knowledge? It is not defined in the amendments, nor is a clear definition found in Nevada law. Generally, though, if one has personal knowledge about something, it's because the person perceived it; that is, the person saw it, heard it, felt it, etc., and in most states, read it, (at least as long as it was a business record or a public record). We believe Nevada is likely to

follow this approach; however, the Nevada Attorney General has not confirmed this, and the Attorney General's Model Affidavit does not specifically provide for such sources. Nonetheless, most of us believe that personal knowledge must, as a practical matter, include the ability to rely on business records and public records, otherwise no one in our industry could sign these affidavits. If the affidavits cannot be signed, then all fore- closures would have to be done judicially, which is probably not the intent of the Legislature or the Attorney General, and which would cause a logjam in the courts.

Assuming the required content is in the affidavit, and assuming the signer has the requisite authority and personal knowledge in order to execute the affidavit, the AG's Model form probably works for most purposes. However, if the AG's form is being used, there are some modifications to the form that the signer may want to consider:

1. Unless the signer really intends to be "sworn in" by the notary ("I, John Doe, do solemnly swear under penalties of perjury that this is a true, complete and correct statement, so help me God…"), the signer may want to replace that "sworn under oath" language with the general jurat and penalty of perjury language. Nevada law provides that where a statute requires an affidavit sworn under oath, a sworn declaration will do.

2. The signer may also want to add the qualifying language to the form stating that the signer is relying on personal knowledge, including business records and public records (not just personal knowledge as the AG form states).

3. The breakdown of the default amounts on the AG's form is subject to interpretation, and so the signer may want to consider the below:

g. 5a on the form asks only for the missed principal and interest payments. Yet, the statute states that we are to disclose the "amounts in default." "Missed principal and interest payments" and "amount in default" can be two different things (the amount in default can include late charges, fees, corporate advances, etc.). You can pick one or the other description, but the statute states, "amount in default."

h. 5d requires, "A good faith estimate of all fees imposed and to be imposed because of the default…" For one, fees already imposed do not need to be estimated. And two, what type of fees are fees "imposed and to be imposed due to the default?" Are those for BPOs and late charges, and if so, for what time period do we estimate those for? The signer may want to add qualifying language to state something to effect of, "assuming the foreclosure proceeds in its normal course…" (although, I understand that the average foreclosure in Nevada is now about 300 days instead of the statutory 120 days!)

i. 5e calls for "….total fees and costs to be charged to the debtor in connection with the exercise the power of sale…" I assume this means foreclosure fees and costs, and maybe it would be clearer if these fees/costs were described as such.

4. Paragraph 6 of the AG's form requires the disclosure of the "instruments that conveyed the interest of each beneficiary." The issues that arise from this section (and the section

in the statute requiring beneficial assignments to be recorded) is a hotbed of debate. Does the statute require the disclosure in the affidavit of all beneficiaries, whether or not they are evidenced by a recorded assignment? Must all transfers (including pre-October 1, 2011 transfers) be evidenced by a recorded assignment, thus no "unrecorded transfers" come into play? If you or your servicing client interpret the statute as not being retroactive, and also interpret the statute as to requiring the disclosure of all beneficiaries, even those not evidenced by a recorded assignment, you may want to tweak the AG's form a bit as to number 6.

In sum, the particular form used should not be as important as the content of the affidavit, and that the signer of the affidavit has authority and personal knowledge of that content. While there is an added measure of protection in utilizing the Attorney General's version, in that the courts give some deference to the Attorney General's Office, it is also more restrictive than other versions. The harsh reality is that the use of the Attorney General's form or any other proposed form, for that matter will not prevent suits by borrowers for alleged non-compliance with the statute nor will it serve as a complete defense. In other words, there is still risk regardless of which form you elect to use.

Good luck to us all.

1. On November 16, 2011, the Nevada Attorney General announced the indictment of two LPS employees for an alleged robo signing scheme that resulted in the filing of tens of thousands of fraudulent documents with the Clark County Recorder's Office between 2005 and 2008.
