BERGMAN ON MORTGAGE FORECLOSURES . . .

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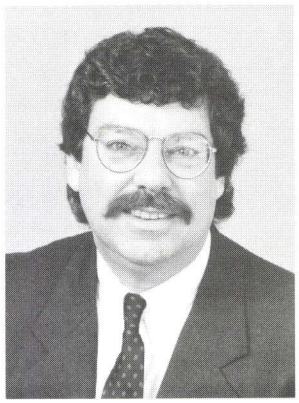

They Never Served Me — Again?

Of **course** jurisdiction is critical. Lawyers hardly need be told that there would not be a viable legal system if service of process was not scrupulously scrutinized by the courts. Having observed the obvious, just as apparent is the particular distaste many plaintiffs' attorneys have for the typically facile "I wasn't served" defense, which seems to be so much a part of mortgage foreclosure zeitgeist.

That revulsion is too often felt (at least on the part of lenders' counsel) is probably inherent in the nature of the foreclosure case. And there are two reasons for that. First, the mortgage foreclosure action is ritualistically based upon plateaus to be achieved. Where other litigation follows process service with motions or discovery, or sometimes speeds to judgment, the claimed issue of jurisdiction tends to surface sooner rather than later. But in the foreclosure case it can lurk silently in the background, allowing the (supposedly) unserved party to pounce on the eve of sale, righteously appalled at the miscarriage of litigation proceeding without his assuredly dispositive defenses.

A second reason why the jurisdiction defense is so oft-encountered in foreclosures is the sheer desperation engendered by the looming result of the matter. Loss of title to property — particularly one's home — is genuinely traumatic. Such irreparable gloom is understandably capable of emboldening many a party.

Since the nature of the legal profession is that attorneys at different times can and do represent competing interests, counsel can prosecute a foreclosure one day and defend a different foreclosure another. Such perspective teaches, naturally, that sometimes process **is** served incorrectly — and that is entitled to a remedy. But if the reader senses some disdain here for the lack of service defense, the perception is correct.

Where there is a genuine issue as to service, it is both understandable and appropriate for the court to either find no jurisdiction or schedule a traverse hearing. A real question can arise, for example, if a defendant avers that the description in the affidavit of service is greatly at variance with his actual description. Proof that the party served by in hand delivery was out of the state when process was delivered to him at his residence would likewise give pause.

If, however, the claim is feigned, a firm response, even from an otherwise sympathetic bench, is in order. Case law supports such an unflinching posture, which should make it easier for judges to be resolute on this point. That sometimes the courts are not so steadfast is one of the disconcerting aspects of the dilemma.

One particularly irksome rejoinder of the aggrieved defendant is the posture that additional process which was supposed to be mailed was never received. In the face of a sworn affidavit of mailing, however, such a denial isn't enough.[1] As a matter of law, service by mail is complete, regardless of delivery, where the mailing itself is proper.[2] Couched in other terms, a mere denial of receipt by mail absent further probative facts is insufficient to overcome the presumption of delivery attendant to a properly mailed letter.[3] In short, service by mail is complete regardless of delivery.[4]

Another common defensive posture in this arena is just a bald sworn statement about lack of service. That too is condemned by case law.[5] One shortcoming is neglect to swear to **specific** facts in support of denial of proper service.[6] As one court so well expressed the thought, for there to be a traverse, a question of fact must be presented rather than a mere denial of service. "To hold otherwise would be to open a potential floodgate of mandated hearings whenever a party may choose to controvert receipt of process. . ."[7]

Well, we may not yet have been burdened with the feared floodgate, but experience suggests too much court time is consumed by wrestling with desperate process service claims. It ought not to be.

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