

## **Foreclosure Workshop #62: Understanding Hawaii's 25 New Foreclosure Standing Requirements — Coming Soon To Your Jurisdiction?**

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Probably the most significant positive development in foreclosure defense in the past two centuries has been occurring in Hawaii Courts just recently that promises to be shortly replicated nationwide.

For too long traditional rules of evidence have been virtually ignored in foreclosure cases, specifically and most importantly the evidentiary requirement that a foreclosing plaintiff must first prove that it is the owner of the loan having the right to foreclose.

In recent months Hawai'i appellate courts, reversing direction, have been rapidly overturning foreclosure summary judgments for lack of standing.

John and I examine these new cases and these new Hawaii standing requirements on today's show.

Our law firm, for instance, has won 71 appeals overall in the past 25 years in state and federal courts (averaging about 3 a year), including the United States Supreme Court, of which 22 have been foreclosure reversals in just the last 14 months (now averaging about 2 a month) based mostly on Hawaii's new standing requirements, and we expect more than 50 more standing reversals in the next 12 months.

Every homeowner facing foreclosure and their attorneys need to understand these Hawai'i appellate cases, the full opinions in which will shortly this week be posted on this website in our appellate section, hyperlinked.

Some of these new overlapping standing requirements, as applied to foreclosure cases, discussed on our show, time permitting, are:

1. Standing is the new fourth requirement for foreclosing, in addition to proving the loan terms, payment default, and notice of default.
2. A subsequent purchaser of property may challenge a foreclosing plaintiff's standing.
3. A foreclosing plaintiff has the burden of proof regarding standing.
4. A foreclosing plaintiff to prove standing must prove an injury in fact.
5. A foreclosing plaintiff must prove the ability to return the original note to the

borrower as part of the standing requirement.

6. A borrower in foreclosure has the right to conduct discovery on standing issues prior to summary adjudication.

7. A foreclosing plaintiff must prove it was entitled to foreclose at the time its Complaint was filed and the foreclosure case first commenced.

8. To be a qualified witness, one representing a foreclosing plaintiff must prove such personal knowledge as to the specific record keeping of every prior loan servicer and holder of the note.

9. Allonges must similarly be authenticated to prove the standing of a foreclosing plaintiff at the time suit was commenced.

10. Those signing loan documents and affidavits claiming to be attorneys in fact must prove such authority at the time of signing.

11. Proof of the standing of foreclosing plaintiffs is a jurisdictional requirement for invoking a court's jurisdiction.

12. A verified complaint is not sufficient to prove the standing of a foreclosing plaintiff.

13. Affidavit submitted by an attorney for a foreclosing plaintiff that he or she held the note at the time a foreclosure complaint was filed held not sufficient to prove standing.

14. Being a qualified witness does not answer the next evidentiary inquiry: qualified to testify as to what?

15. An undated endorsement does not prove a foreclosing plaintiff was entitled to foreclose at the time suit was commenced.

16. An undated allonge does not prove a foreclosing plaintiff was entitled to foreclosure at the time suit was commenced.

17. The evidence of standing at a summary judgment hearing in a foreclosure case must be viewed in a light most favorable to the objecting borrower.

18. An Attorney Affirmation as to standing has no evidentiary value in a foreclosure case.

19. An affidavit that someone representing a foreclosing plaintiff viewed the original note prior to the filing of a foreclosure suit does not prove standing at the time the suit was commenced.

**20. Standing at the time suit was commenced is in doubt when a copy of the note is not attached to the complaint.**

**21. Standing at the time suit was commenced is in doubt when a different copy of the note is attached to the complaint than is offered at a summary judgment hearing.**

**22. A statement in a complaint upon filing that the foreclosing plaintiff has possession of the note is not sufficient to prove standing.**

**23. Statements that affiant is familiar with the record keeping of another entity, without showing how, is not enough to prove standing.**

**24. Fact that note and mortgage were assigned to the foreclosing plaintiff prior to filing a foreclosure complaint not enough to prove standing at the time suit commenced.**

**25. Standing is a jurisdictional issue that can be raised in defense of a foreclosure action at every stage of the proceedings, including on appeal even for the first time or sua sponte by an appellate court.**

**John and I also suggest our own two additional standing requirements for proving standing in foreclosure cases:**

**26. Requiring proof of standing not only at time suit is commenced, but, following the money and the money transfer documentation, requiring evidence of the ownership chain of payment for the mortgage loan, fully discoverable otherwise invoking discovery sanctions, including involuntary dismissal with prejudice.**

**27. Requiring proof of standing not only at time suit is commenced, but both as to the note and the mortgage, and following the money as to both, because in securitized trust funding the note and the mortgage are not only contemplated to be separated, but are separated, resulting in the mortgage not necessarily following the note, and instead resulting in a potentially large number of stakeholders both in the note and in the mortgage as security for other promissory notes, which are necessary and indispensable parties in any securitized trust foreclosure action.**

**John and I also explain why we consider the new Hawaii standing requirements embodied in Hawaii's new Reyes-Toledo, Mattos, and Behrendt Rules as having the same purpose and positive effects in foreclosure cases as has the Miranda Rule in criminal cases.**

**Gary Dubin 7/1/18**