

Perspective



Henderson|Franklin
ATTORNEYS AT LAW

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This newsletter is designed to address legal issues that impact lending in Florida. Whether making loans or collecting bad loans, *The Lender's Perspective* will provide timely and valuable insight to the creditor.

Condominium Association Liens For Past Due Assessments

A Case Impacting Mortgage Lenders

The Lender's Perspective has previously dealt with condominium association liens for past due assessments.

Regular readers may recall issues that addressed the safe harbor limitation on mortgage lender's liability under Florida Statute 718.116. Now, however, condominium associations are using a case from 2005 to cause some lender's to lose that protection. *Read on!*

The Statutory Safe Harbor

Florida Statutes Section 718.116(b) provides the safe harbor for a foreclosing mortgagee. The statute provides that the maximum liability of a "...first mortgagee or its successor or assignees..." who acquires title by foreclosure or deed in lieu of foreclosure will not exceed the lesser of 12 months of assessments or 1% of the original mortgage face amount. The *Bay Holdings* case brings to the forefront the need to understand exactly who is a "successor or assignee" of a first mortgagee.

Bay Holdings, Inc. v. 2000 Island Boulevard Condo. Assoc. – The facts

In this case, Bank United FSB, a first mortgagee, filed a mortgage foreclosure action against their borrower's condominium unit in Miami-Dade County, Florida. The final foreclosure judgment in the case was entered in favor of the bank. After the final judgment was entered but prior to the foreclosure sale, Bank United FSB assigned the final judgment and the associated bid rights to Bay Holdings, Inc., a wholly-owned subsidiary of Bank United FSB. As many of you know, lenders frequently transfer mortgage loans or judgments in foreclosure to separate entities so that those entities will take title to the property being foreclosed. The general idea is that the lender will better insulate itself from liability associated with owning foreclosed real estate.

The Result

The bank asserted the statutory safe harbor in an effort to limit its exposure to past due assessments on the condo unit.

The condominium association challenged whether the statute applied, arguing that the assignee of the judgment, Bay Holdings, was not a "successor or assignee" of the first mortgagee under the terms of the statute. The Third District Court of Appeal agreed. In its opinion, the Court cited Florida Statute 718.116(1)(g) which states that the term "successor or assignee" includes only a subsequent holder of the note and mortgage. Bay Holdings never held the note and mortgage, only the final judgment by way of an assignment. The result was that Bay Holdings would most likely be liable for all the past due assessments on the unit.

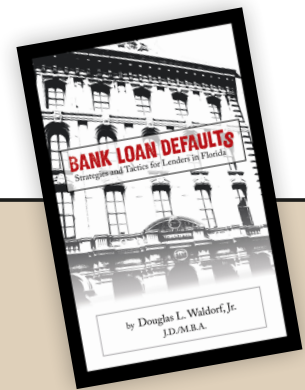
Planning for the Future

Since lenders will undoubtedly still want to take title to foreclosure property in special purpose entities, we need to plan for that in light of this case. The amount of past due assessments for which a lender is liable should, along with other prior liens, such as unpaid taxes, be considered in deciding whether to foreclose at all. Being able to take advantage of the statutory safe harbor may be a significant issue where the

amount of past due assessments is large. The message of *Bay Holdings* is clear: you must assign the actual note and mortgage to the special purpose entity, not just the final judgment and bid rights. From a timing perspective, it is easier to do this by recording an appropriate assignment of note and mortgage prior to bringing the foreclosure action. This should be coupled

with an allonge endorsing the note to the assignee. If the foreclosure is already pending, you can still do this but will then need to substitute parties in the litigation such that the new note and mortgage holder will be the plaintiff. In this way you can avoid the *Bay Holdings* trap and still take title in the special purpose entity.

Mr. Waldorf is a Board Certified Real Estate Lawyer whose practice focuses on banking industry clients. He represents lenders in commercial and residential loan transactions, mortgage foreclosures, deeds in lieu of foreclosure, forbearance agreements, and defaulted loan workouts. He can be reached at 239.344.1213 or douglas.waldorf@henlaw.com



Douglas Waldorf's first book, *Bank Loan Defaults: Strategies and Tactics for Lenders in Florida*, is now available. *Bank Loan Defaults* is a practical guide creditors need to consider when evaluating defaulted loans. From analyzing events of default, understanding how to foreclose a mortgage, obtaining a deficiency judgment and collecting a judgment, this book provides timely, real-world insight. Contact Attorney Waldorf to obtain your copy.

As always, thanks for reading and watch for the next issue of The Lender's Perspective. This newsletter is written quarterly and back issues are available at henlaw.com.

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