

Mortgage Foreclosure Litigation

Pinellas County Paralegals

January 13, 2009
St. Petersburg, Florida

Defaults, Workouts and Defense of Foreclosures



Charles R. Gallagher III, Esquire
Erika T. Mariz, Esquire
Pye N. Young, Esquire
Gallagher & Associates Law Firm, P.A.
5720 Central Avenue
St. Petersburg, FL 33707
Phone: 727-344-5297
Toll Free: 866-909-5297
Telefax: 727-344-6653
E-Mail: info@attorneyoffices.org
Web: www.attorneyoffices.org

The Mortgage Foreclosure Crisis

I. The Genesis for the Mortgage Crisis

- A. Sub-Prime Lenders
- B. “Fast Food” Mortgage Underwriting
- C. Loans Placed During Real Estate Boom
- D. Specific Classes/Areas Affected
- E. Incentives: Lenders/Brokers

II. Mortgage Pooling

- A. Your Mortgage Sold/Transferred
- B. Large Investment Banks/Trusts Buy Mortgage Debt
- C. Serviced by Secondary Mortgage Servicers-Who Don’t Own Debt
- D. RESPA: Real Estate Settlement Procedures Act
- E. MERS: Mortgage Electronic Registration Systems
- F. “Hello” & “Good-Bye” Letters=RESPA Statutory Notice
- G. Mortgage Pools: Thousands of Loans-One Transaction
- H. Result: Many Lost Instruments
- I. Sub-Prime Market

III. Plaintiff Standing

- A. Is Lender Plaintiff?
- B. Is Servicer/Trustee Plaintiff?
- C. Who Owns the Property
- D. Legal Title/Equitable Title
- E. Assignment from All Prior Holders
- F. Original Instruments Must Be Provided: Note and Mortgage
- G. Must Meet Pre-Conditions:
 - 1. Default
 - 2. Acceleration
 - 3. Notice to Cure
 - 4. Written Notice
 - 5. Foreclosure Counseling
 - 6. Posting of Bond: If Trust or No Note for Lis Pendens

IV. Pre-Foreclosure Alternatives

- A. Best Time to Be in Default
- B. Lenders Inventory of Foreclosed Properties
- C. Deed-in-Lieu of Foreclosure
 - 1. Negotiate No Deficiency
- D. Modification of Note/Mortgage
- E. Reinstatement
- F. Short Sale
 - 1. No Capital Gain: If Primary Residence
- G. Loss Mitigation Packets
- H. Financial Statements
- I. Redemption

1. Statutory Right of Redemption
2. Defense if Subordinate Creditor
 - a. Second Mortgage
 - b. Credit Line
 - c. Construction Lien

V. The Foreclosure Action

- A. Complaint
 1. Cause of Action for Foreclosure
 2. Cause of Action for Breach of Contract
 3. Cause of Action for Promissory Estoppel
 4. Cause of Action for Quantum Meruit
 5. Cause of Action for Unjust Enrichment
 6. Cause of Action for Re-Establishment of Lost Instruments
- B. Notice of Lis Pendens
 1. Notice to the World of Mortgagee's Interest
 2. All later encumbrances are inferior
- C. Note
- D. Mortgage
- E. Assignments
- F. Affidavit of Indebtedness
- G. Demand Letter/Acceleration Notice
 1. Frequently Omitted

VI. Defenses to Foreclosure Actions

- A. Servicemembers Relief Act: f/k/a Soldiers and Sailors Relief Act
- B. Attack Plaintiffs Standing: Named Mortgagee or Assignee
- C. All Assignments Which Confer Standing
- D. Failure to Comply with Conditions Precedent
- E. Lost Instruments: Must Be On Their Own Watch, FS § 673.3091

To reestablish a lost, destroyed, or stolen instrument the party seeking enforcement:

(1) must show that at the time when the loss occurred, the party was entitled to recover or had directly or indirectly acquired ownership from a person who was entitled to enforce at the time of loss;

(2) the loss cannot be the result of a transfer or lawful seizure; and

(3) the party must be unable to reasonably obtain possession of the instrument.

Fla. Stat. § 673.3091(1) (2008).

- F. Burden is on Party Seeking to Enforce the Instrument.
- G. Fla. Stat. § 673.3091(2) (2008); See also Fla. Stat. § 673.3081 (2008) (when the validity is challenged in the pleadings).
- H. Court will not enforce an instrument unless the defendant will be adequately protected against future claims on the lost note. *Perry v. Fairbanks*, 888 So.2d 725, 727, (Fla. 5d DCA 2004).

- I. Due to the negotiable nature of a promissory note, it must be removed from the stream of commerce.
- J. Court is given discretion for this determination. Fla. Stat. § 69.061 (2008).

VII. Basis for Lender Counterclaim

- A. Common/Federal/ State Law Causes of Action
- B. Civil Conspiracy/RICO
- C. Fraud
- D. Indebtedness, Loss of Use
- E. Breach of Contract
- F. Declaratory and Injunctive Relief
- G. Unfair and Deceptive Practices
- H. Illegal Consumer Debt Collection
- I. Unjust Enrichment
- J. Breach of Fiduciary Duties
- K. Conversion
- L. Civil Theft
- M. Negligence
- N. Theories of Assignee Liability/Close Connectedness
- O. Truth in Lending Act /HOEPA
- P. Equal Credit Opportunity Act
- Q. Real Estate Settlement and Procedures Act
- R. Fair Housing Act
- S. Fair Debt Collection Practices Act/Florida Consumer Collection Practices Act

VIII. Fraudulent Practices by Sub-Prime Lenders

- A. Charging late fees when payments were received on time
- B. Claiming "lost" payments
- C. Demanding payments that have already been made
- D. Improper use of escrow funds, or even 'losing' escrow funds
- E. Placing accounts in collections when they are current
- F. 'Forced -placed Insurance' when homeowners already have proper coverage
- G. Placing payments into a suspense account instead of crediting as monthly payment
- H. Taking unauthorized payments from consumers' checking accounts
- I. Demanding payment for 'Corporate Advance fees' without written explanation
- J. Foreclosure proceedings on accounts which are current

IX. FTC/Class Actions

- A. Fairbanks Capital Corp.
- B. Deutsche Bank
- C. Select Portfolio Servicing
- D. Ameriquest
- E. Various Trusts

X. Questions