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Excellence Coast to Coast with Representation in 25 States

DEFAULT LAW UPDATE

September 2010

An update on current issues in default law around the country, plus other news from DAG firms.

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Weltman, Weinberg & Reis Co., LPA



Default Attorney Group



CAL-WESTERN
RECONVEYANCE
CORPORATION



LAW OFFICES OF
DANIEL G. CONSUEGRA



HughesWattersAskanase



Florida**Summary Guide to Florida Mediation**

The Florida Supreme Court approved a model mediation order, but individual circuits have adopted the order with some variation and on different schedules. Effective Aug. 2, 2010, all circuits do have Administrative Orders in place for mediation. To stay abreast of these changes, the Law Offices of Daniel C. Consuegra has compiled this comprehensive Guide to Florida Mediation by Circuit. This Guide is continually updated and available to you as a reference tool.

Contact Dan Consuegra at 813-833-7057 or dan.consuegra@consuegralaw.com for your copy.

New Condo Fee Legislation Effective July 1 Increases Liability for Fees from 6 to 12 Months

Effective with new condominium legislation enacted July 1, 2010, the liability of a first mortgage holder that acquires title to property has increased. First Mortgage Holders are now liable for delinquent assessments of either 12 months of accrued fees, or 1% of the original mortgage debt, whichever is less. Servicers need to be mindful of this increased liability particularly with loss mitigation decisions and when the property is in REO. For more details on Senate Bill 1196 and how it impacts your cases, contact our office.

Contact Dan Consuegra at 813-833-7057 or dan.consuegra@consuegralaw.com.

Florida Bankruptcy: Orlando Division Employs New Mortgage Modification Mediation Initiative

In the Middle District of Florida/ Orlando Division, the judges are ordering mortgage modification mediation upon Motion by Debtor. Servicers and Lenders will find that mediation at this stage is more Creditor friendly. First, Servicers and their attorneys are permitted to appear by telephone. Second, because Debtor must supply the bankruptcy court with current financials, those documents and figures are easily obtainable by the Servicer making modification reviews smoother and mediation more fruitful. Third, Debtor is responsible for the cost of mediation, which has an ancillary benefit of limiting mediations to those Debtors truly interested in modifying. For more information on this new program, contact our office.

Contact Dan Consuegra at 813-833-7057 or dan.consuegra@consuegralaw.com.

Florida Bankruptcy: Southern District Chapter 13 Trustees Utilize New HAMP Confirmation Order

Judges in the Southern District of Florida are confirming plans where the Debtor asserts that they have applied for a mortgage modification. The Court then holds status conferences to review the progress of the modification. Servicers need to be aware that the automatic stay remains in effect during this time. For more information on this new practice, contact our office.

Contact Dan Consuegra at 813-833-7057 or dan.consuegra@consuegralaw.com.

Florida Bankruptcy: Southern District - Secured Claim Valuation is Binding without Objection

At least one trustee is beginning to use a modified form of the standard form confirmation order. This modified order provides that if a bankruptcy plan values a secured claim and no objections are filed to the plan, then the valuation is binding, without requiring a separate Motion. Servicers must make certain to object to any plan which improperly values their secured claim in order to protect their interest.

Contact Dan Consuegra at 813-833-7057 or dan.consuegra@consuegralaw.com.

Ohio

Receiver's Sales As An Alternative To Foreclosure Sales In Ohio

By Larry R. Rothenberg, Partner

September 1, 2010

Ohio has a statutory scheme for foreclosures, which generally mandates a judicial action resulting in a public sale by the county sheriff or other officer of the court, or by a licensed auctioneer. The objective of having the property sold by public auction is to derive the maximum sale price, for the benefit of the creditors, who are seeking the maximum recovery, and also for the owner, who is entitled to the excess proceeds, if any, and who may be liable for a deficiency judgment.

In appropriate cases, the court may appoint a receiver to protect and manage the property, and to collect rents from any tenants while the foreclosure is pending. Occasionally, while the case is pending, the receiver might identify a party interested in purchasing the property for a favorable price. Although the law states that a receiver may "generally do such acts respecting the property as the court authorizes," it does not expressly give the court the authority to circumvent the statutory scheme for foreclosures by authorizing the receiver to sell the property privately, free and clear of the interests of all parties. Would such a conveyance by a receiver, even with the express authority of an order of the court, nevertheless be vulnerable to attack?

Recently in Ohio, the Court of Appeals agreed with the trial court, and upheld the validity of such sale, noting that a receiver is "an officer of the court and at all times subject to its order and discretion," and may "generally do such acts respecting the property as the court authorizes." The Court of Appeals cited the Ohio Supreme Court's interpretation of the receivership statute "as enabling the trial court to exercise its sound discretion to limit or expand a receiver's powers as it deems appropriate."

Hence, because the receivership statute does not contain any restrictions on what the court may authorize when it issues orders regarding receivership property, the Court of Appeals held that this includes the power to authorize a receiver, under certain circumstances, to sell property at a private sale free and clear of all liens and encumbrances. Because the Court of Appeals found that trial court did not abuse its discretion in its order, the Court of Appeals decided not to disturb the trial court's judgment. Although this case is not binding authority on any of the other districts in Ohio, and it relied in part on the particularly significant facts, it can be cited in support of a similar motion to authorize a receiver in other cases to sell the property free and clear of the interests of all parties.

If you have any questions or would like to discuss this issue in more detail, please contact Larry Rothenberg at (216) 685-1135 or via email at lrothenberg@weltman.com

Missouri

On August 28, 2010, a new law went into effect in Missouri amending the Mechanic's Lien statutes. It applies to "any residential real property conveyance closing on or after November 1, 2010". While deemed a "minor" change by the Missouri legislature, it is viewed by mechanic's lien claimant attorneys as "major" and making it more difficult for material suppliers and contractors to obtain mechanic's liens against residential properties.

The bill adds Section 429.016 to Missouri's Mechanic's Lien law found in Chapter 429 of the statutes and will become the longest section in Chapter 429. Section 429.016 changes the "notice" requirements for any lien claimant seeking a mechanic's lien against such property. Section 429.016 will also impact the "just and true account" requirement for obtaining a mechanic's lien as well as unqualified lien waivers.

Notice of Sale

Sec. 429.016 requires record title owners of residential real property who have contracted with a claimant for work, labor or materials for construction on such property to record a Notice of Sale at least forty-five (45) days prior to closing. The notice shall include the calendar date for intended closing but does not need to be re-recorded if said date is postponed to a later date. The Notice of Sale shall also be posted at the subject property.

Notice of Rights

Once the Notice of Sale is recorded and posted at the job site, a claimant must record its Notice of Rights no later than five (5) days before the contemplated closing date. The requirements of the Notice of Rights are specific and shall include the date of the document, identity of property owner, identity of claimant, legal description for the property and the person contracting with claimant for work. A lien claimant is still required to file a Mechanic's Lien Statement in circuit court within six (6) months of its last date of work but is no longer required to provide "ten (10) day subcontractor notice to owner" under Section 429.100.

Just and True Account

Under the new law, a lien claimant satisfies the requirement of filing a "just and true account" if the following information and documentation is included: a photocopy of the file-stamped notice of rights; name and address of person or entity the claimant contracted with; copies of any contracts, purchase orders, proposals or other agreements and any change orders or modifications to same; in the absence of any written agreements, a general description of the scope of work agreed to be

performed and the basis for payment as agreed to by claimant and contracting party; all invoices submitted by claimant; an accurate statement of account that shows all payments and credits and the calculation or basis for amounts still claimed owing; and last date of work;

Lien Waivers

The new law provides that a claimant may waive its right to assert a lien by executing a partial or full lien waiver regardless of whether it is conditional (i.e., conditioned upon receipt of payment) or unconditional. However, a lien waiver will be deemed as waiving lien rights for less than the amount claimed owed only if it is an unconditional, final waiver in a form as set forth in Section 429.016.

Analysis

Section 429.016 is viewed as favorable to owners, lenders and title insurers. There is concern among lien claimant attorneys that the new Notice requirement will require all material suppliers and subcontractors to continually monitor the recorder's offices for all Notices of Sales because, if filed, the time for filing a required Notice of Rights may be as short as forty (40) days thereafter.

The definition of "residential real property" is also expanded to include virtually every type of residential property.

The requirement for filing a "just and true" account were previously vague and generally did not serve as a defense unless the lien statement contained virtually no information as to the nature of work performed or the reasonableness of charges. Now, for all residential construction that closes after November 1, 2010, the requirement of a "just and true" account identifies specific information and documentation that must be contained. Failure to include the specifically enunciated information may provide a basis to defeat the lien claim.

The changes to lien waivers are also beneficial to owners, lenders and title insurers in that there is now very little grey area: if a claimant executes an unconditional lien waiver in the form set forth in Section 429.016.27, its lien rights are waived absolutely.

Time will tell how Section 429.016 will effect Missouri Mechanic's Lien law. We expect there may be a fair number of appellate decisions in the next few years challenging or clarifying certain provisions.

Please do not hesitate to contact David Renovitch at Martin, Leigh, Laws & Fritzlen, P.C, 7733 Forsyth, Ste. 1975 , St. Louis , MO 63105 , if you have any questions or wish to discuss any issues associated with this change to Missouri Mechanic's Lien law. He can be reached at (314) 862-5200 or by email at dpr@mllfpc.com.

New York

New York Mandatory Settlement Conferences:

New York Courts, especially in New York City, are increasingly holding lenders to tight timelines and exacting requirements for loan modification reviews (especially HAMP). Under the mandatory settlement conference statute and Court rules, the Court can dismiss the foreclosure action and impose sanctions if the Court finds that the lender was not acting in good faith (which includes timely review of loan modification application). Servicers should make sure that loan modification applications are

reviewed promptly and a loan modification offered or, if denied for failure to qualify, a denial letter be sent immediately to borrower and servicer's Counsel.

To discuss this matter further, please contact David P. Case, Esq., Fein, Such & Crane, L.L.P., (585) 232-7400 x. 218 or cased@rgcattys.com

North Carolina

Western District of North Carolina Chapter 13 Claims- Local Form Use Mandatory.

Although the Western District's Administrative Order mandating the use of local forms for claims and payment change notices has been in effect for more than a year, the trustees are seeing a large increase of instances where servicers are failing to use the local form for payment/escrow changes. Failure to use the proper form results in the Trustee disregarding the change notice. We're seeing a corresponding increase in Show Cause Motions issuing from the trustees to rectify the problem.

Please contact Sean at sean.corcoran@brockandscott.com (704-369-0676) with any concerns or to request a copy of the local forms.

Eastern District of North Carolina- Chapter 13 Motions to Deem Current (In re Adams, EDNC 04-03875).

A servicer's post-discharge attempts to collect pre-discharge fees after entry of an order deeming the account current led to sanctions for (1) contempt of the order deeming current and (2) violation of the discharge injunction. The Court's seemingly arbitrary imposition of a \$65,000 sanction was influenced by the 22 month period during which the loan was in violation of the order deeming current.

Contact Sean at sean.corcoran@brockandscott.com (704-369-0676) for a copy of the opinion.

Western States Update: Arizona

Several new bills were passed by the Arizona legislature this past session relating to lending and foreclosure. Below is a summary of each for your review:

HB 2626 – Pre-foreclosure Avoidance Contact Requirement: Adds Section 33-807.01 to Arizona Revised Statutes, effective as of July 29, 2010. This bill requires lenders to "attempt to contact" borrowers in writing to discuss options to avoid foreclosure at least thirty (30) days prior to the foreclosure trustee recording the Notice

of Sale. Such attempt shall be in the form of a written notice, and documentation of the notice shall be maintained in the lender's credit file. There is no requirement for certified or registered mail stated in the statute, so first class mail appears to satisfy the statute. This requirement applies to **first deeds of trust recorded on or after January 1, 2003 through December 31, 2008**, and the subject property must be **owner-occupied as the borrower's principal residence**.

This bill **does not apply** to (1) state or local public housing agency or authority loans; (2) loans that are collateral for securities published by an agency or authority; (3) small private lenders who make fewer than 5 loans a year; and (4) lenders compliant with HAMP.

NOTE: Unless the lender is exempt (e.g. a HAMP servicer), to record a Notice of Sale on July 29, 2010 (the bill's effective date), the 30 day written notice under HB2626 must be given on or before June 29, 2010. It is our understanding that most, if not all, of Cal-Western's clients are already sending pre-foreclosure loss mitigation solicitation letters to borrowers on all loans. Thus, to comply with HB 2626, lenders will simply need to confirm that the solicitation letters are sent at least thirty days prior to the foreclosure referral and that copies of the letters are saved in each loan file. There is no requirement for the lender or the trustee to include any declaration of compliance with HB2626 in the Notice of Sale. Thus, Cal-Western will not require any written statement from the lender on each file to confirm the required notice has been sent. However, please confirm that your shop is either compliant in sending the required notices on all covered loans or exempt generally regarding HB2626 by affirmative response to this e-mail.

HB 2766 – Rental Agreement Provision if Property in Foreclosure: Adds Section 33-1331 to Arizona Revised Statutes, effective as of July 29, 2010. This bill is only applicable to an owner whose property is subject to a foreclosure proceeding at the time of the rental agreement to a tenant. Such owner is required to put written notice regarding the foreclosure, in the form set forth in the statute, in the rental agreement. This bill does not generally require any action on the part of lenders, servicers or foreclosure trustees.

However, in rare circumstances, if title to property reverts to a lender at a foreclosure of its deed of trust, the lender agrees to accept rent and/or enter into a rental agreement with the existing tenant, and another (senior) lien is in foreclosure, the lender would be required to include this new statutory language. However, it does not appear that this situation is very likely to occur.

HB 2479 – Lender Contact Information on Deeds: Amends Section 33-401 of Arizona Revised Statutes, effective as of July 29, 2010. This bill gives instruction regarding deeds and conveyances in which the grantee is either a bank, financial institution, corporation, association, LLC or partnership subject to regulation by the State of Arizona and requires address and entity formation information for grantees to be included in trustee's deeds or warranty deeds. The purpose of the Bill is to ensure state and local governments or other interested parties can more easily contact the owner of property regarding its condition, maintenance and status.

. This bill would apply to a Trustee's Deed Upon Sale given to applicable grantees by Cal-Western Reconveyance Corporation.

Summary: For deeds and conveyances of real property in which the grantee is either a bank, financial institution, corporation, association, LLC or partnership regulated by the State of Arizona (i.e. an Arizona entity or an entity doing business in Arizona), such deeds or conveyances shall include the grantee's name, address and the state in which they are incorporated, organized, licensed, chartered or registered, together with the name of the country under which the grantee is chartered or formed. The United Trustees Association recommends adding a separate attachment to the deed for the beneficiary information disclosure page to include the actual address of the mortgage servicer or owner's REO department because the bill was enacted to help towns and cities contact lenders when REO properties fall into neglect or disrepair and violate zoning laws, and requires address and entity formation information for grantees to be included in trustee's deeds or warranty deeds. The purpose of the Bill is to ensure state and local governments or other interested parties can more easily contact the owner of property regarding its condition, maintenance and status.

SB 1202 – Foreclosure Surplus Funds Mailing Requirements: Amends Arizona Revised Statutes Section 33-812, effective as of July 29, 2010. This Bill gives additional instruction to trustees regarding the disposition of surplus trustee's sale proceeds.

Summary of Changes:

A. Proceeds Deposited By Trustee: After application of funds from the foreclosure sale to the foreclosing lender's outstanding indebtedness and junior lienholders in order of their priority, the trustee is to mail notice of any excess proceeds to **"all known addresses"** of the trustor. Previously, ARS 33-812B required mailing to the trustor, but did not require mailing to **"all known addresses."**

B. Civil Action for Balance of Proceeds Deposited With County Treasurer: ARS 33-812D is amended to require that when the trustee decides to deposit the funds with the court in lieu of disbursement, a conformed copy of the complaint is to be mailed to **"all known addresses for those persons entitled to notice"** under 33-812 (D). The complaint shall include, by incorporation or attachment, a list of the persons and each of the known addresses to which the complaint will be mailed. ARS 33-812F is amended to provide that the trustee is discharged as plaintiff without prejudice upon filing the complaint AND **"the subsequent certificate of mailing for the complaint with the certified mailing receipts of the addressees."** Previously, ARS 33-812D and F did not require mailing to **"all known addresses"** of the persons entitled to notice and did not specifically condition the discharge of the trustee on the filing of the certificate of mailing with the certified mailing receipts.

C. Application For Release in Civil Action: ARS 33-812G copy of the application for release of surplus funds by any applicant is to be sent to **all addresses of the persons entitled to notice that are known to or ascertained by the applicant or their agent. The mailing to the interested parties**

shall occur within 3 business days after application filing. If an applicant receives a returned envelope with a forwarding address then, within 10 business days of receipt, the **applicant is to (1) send by certified mail a copy of the application to the new address;** (2) file a second affidavit of mailing; (3) mail a copy of the second affidavit to all parties; and (4) **continue service of the application until an envelope is returned without a forwarding address.** When mailing to the addresses of a business or financial institution, the trustee or applicant is only required to mail to the primary address recorded with the Corporation Commission. Anyone who receives the application and has a right to proceeds can file a response within **45 days** of the **latest** mailing of the application. Previously, ARS 33-812G did not require an applicant to mail the application to all know addresses of entitled persons, and did not require repeated mailing of the application to all forwarding addresses. Previously, the deadline for a response to an application was 30 days after mailing of the application.

A new provision is inserted as ARS 33-812H to confirm that when mailing to a business or financial institution, the foreclosure trustee or applicant is only required to mail to **“the primary address of the business or financial institution as recorded with the Corporation Commission.”**

The majority of these amendments only apply to foreclosure trustees or their counsel processing disbursements or deposits of surplus funds. Cal-Western is in the process of revising its processes to ensure compliance with these new provisions as of July 29, 2010. However, the provisions of ARS 33-812G and H would also apply to a lender/servicer or its counsel when submitting an application for release of surplus funds as a junior lien holder in the Civil Action for Deposit regarding a senior lien sale. Depending on how much business a lender/servicer conducts in Arizona, to ensure receipt of notices relating to surplus funds from foreclosure sales in Arizona, a lender/servicer may want to consider registration with the Corporations Commission.

For more information on the Arizona bills, contact Michelle Mierzwa, Esq. at Cal-Western Reconveyance, a Prommis Solutions Company at Michelle.mierzwa@prommis.com.

DAG Firms Awarded for Performance

Hughes Watters Askanase Named One of Two Law Firms to Receive Lender Processing Services Summit Award for Fourth Consecutive Year

For an unprecedented fourth consecutive year, Houston law firm Hughes Watters Askanase L.L.P. (www.hwa.com) received the Lender Processing Services (LPS) Summit Award for attaining the highest ratings in both bankruptcy and foreclosure among firms in the LPS attorney network.

The LPS Summit Award recognizes law firms that achieve consistently superior performance in bankruptcy and foreclosure practice. This year, HWA is one of only two firms in the national LPS attorney network to achieve this exceptional new distinction.

“We have a wealth of resources that allow our attorneys to leverage their experience with other practice groups in the firm,” noted Carolyn Taylor, a partner with HWA and leader of the firm’s default services practice

area. "As a result, we provide our clients with a well-rounded, unique perspective on the myriad of complex issues and challenges currently plaguing the residential and commercial housing and mortgage industries."

Read the full announcement. at www.defaultattorneygroup.org – DAG in the News

Florida Firm Foreclosure Timeline 166 Days Shorter than State Average

The Law Offices of Daniel C. Consuegra recently received the top ranking score for the state of Florida on a client scorecard. The firm beat the state average from Service to Judgment by almost 150 days. The state average for that process is 329 days and the firm averaged just 180 in the period measured.

"We achieved this high score due to the efficient processes we have in place to meet the demands of the challenging Florida foreclosure environment," commented Daniel C. Consuegra, managing partner and founder of the firm. "By streamlining procedures to get affidavits completed and working proactively to schedule judgment hearings as quickly as possible, we can effectively manage timelines."

During the measured time period, the firm's overall foreclosure timeline was 166 days shorter than state averages, at 263 days vs. 429 days for the state.

Read the full announcement. at www.defaultattorneygroup.org – DAG in the News

DAG Speaks: Carolyn Taylor to Speak at Five Star

Partner Carolyn Taylor of member firm HughesWattersAskanase (TX), will moderate a panel entitled, "Foreclosure Fundamentals: Learn the Basic Building Blocks Necessary for a Solid Business Foundation in Foreclosures," at The Five Star Default Servicing Conference and Expo on Sept. 20 in Dallas, Texas (www.fivestarconference.com). Taylor's presentation will focus on providing attorneys, agents and brokers with a working understanding of the vocabulary, paperwork, regulations and business dealings of foreclosure proceedings.

DAG Authors: Recent Published Articles

When Does Communication Turn Into Collection?

By Carolyn Taylor, Partner, HughesWattersAskanase (TX)

Loss mitigation is the mantra of the mortgage industry. With no foreseeable end to the mortgage crisis, the environment has shifted from a paradigm where foreclosure made business sense in many cases to one in which loan resolution is necessary, suggested and often required to avoid negative consequences affecting our country's troubled economy. However, loss mitigation works only in those situations where the borrower and the lender effectively communicate with each other and reach a mutually beneficial solution. The process

presupposes a verbal or written dialogue between the borrower and the lender or servicer, and thus, falls squarely within the types of activities covered under the Fair Debt Collection Practices Act (FDCPA) and comparable state statutes. The federal and state debt collection practices statutes provide fertile ground for litigation. By July of this year, 2,542 such lawsuits have been filed. In today's environment, creditors engaging in loss mitigation may be braving untested waters. Until loss mitigation is afforded a safe harbor, the tension between prohibited third-party disclosure and adequately informing the consumer that the communication is from a debt collector, among other issues, will continue to present significant challenges for the consumer mortgage industry.

Read the full article <http://www.hwa.com/content/documents/July2010ServicingMgmt.pdf> and contact author Carolyn Taylor of member firm HughesWattersAskana (TX) for more information at cat@hwa.com.

For Questions about DAG, or to get information about a DAG Symposium for your office or in your city, contact

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