

An Unlikely Condition Precedent to Foreclosure in Florida

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Mortgage servicers beware. Mortgagors in Florida are defending residential mortgage foreclosures based on the allegation that the servicer failed to give them notice of assignment of the right to bill and collect on the debt underlying the mortgage before commencing the foreclosure action.

The argument is based on Florida Statute Section 559.715, the Florida Consumer Collection Practices Act (FCCPA), and seizes on an October 1, 2010 amendment that requires the notice be given “as soon as practical after the assignment is made, but at least 30 days before any action to collect the debt.”

The argument is misguided, however, as Florida law holds that an *in rem* mortgage foreclosure is an action to enforce a security instrument and not to collect a debt. Numerous cases from the Eleventh Circuit, including *Trent v. Mortgage Electronic Registration Systems, Inc.* and *Warren v. Countrywide Home Loans, Inc.* distinguish the collection of funds due on a debt and the foreclosure of a security interest in real property, holding the latter is not debt collection activity under the FCCPA or its federal counterpart, the Fair Debt Collection Practices Act (FDCPA).

In *Freire v. Aldridge Connors, LLP*, a Florida district court held that a mortgage foreclosure action will constitute debt collection activity only when the complaint also seeks to collect on the note, that is, independently demands payment on the underlying debt. Most recently, in *Reese v. Ellis, Painter, Ratterree & Adams, LLP*, the Eleventh Circuit reiterated the difference between a promissory note (which evidences a debt and specifies terms under which one party will pay money to another) and a security interest (not a promise to pay a debt, but an interest in collateral that a lender can take if a debtor does not fulfill a payment obligation). Thus, the FCCPA does not apply to strictly *in rem* mortgage foreclosure actions, and nothing in Section 559.715 indicates that the notice required is a condition precedent to foreclosing on a security interest.

As a practical matter, welcome letters are typically sent to mortgagors when their servicer changes and such letters will satisfy the alleged condition and avoid the argument. Where a welcome letter has not been sent or is unavailable, the best offense to a Section 559.715 defense is not to demand payment of the underlying debt in the mortgage foreclosure complaint.