

Florida Foreclosure Litigation

Part 1: Proving the Case

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Elements of a Foreclosure

Foreclosure Actions Based on Breach of Contract

- Existence of a contract (obligation between the parties)
- Breach of the contract
- Damages (must be caused by breach)

Existence of a Contract

There must be an obligation between the parties to a foreclosure action (*Standing to foreclose*)

The original payee may enforce when there is no evidence of a transfer

If the party attempting to enforce the obligation is not the original payee, the transfer and/or negotiability of the note becomes important

- The note is transferred when delivered for purposes of giving the right to enforce
- Transfer gives the right to enforce

Existence of a Contract (continued)

Permitted Plaintiffs according to the UCC:

- Holder
- Nonholder in possession with rights of holder
- Person not in possession who is entitled to enforce

*It is not required that the person enforcing the instrument is the *owner*. A person may even be entitled to enforce if they are in wrongful possession.

Existence of a Contract (continued)

Standing is acquired on the date which the Plaintiff obtained its status. A specific date is not required, as long as evidence proves the transfer occurred before the filing of the Complaint.



Use any of the following to determine the time of standing:

- Pooling and Servicing Agreement
- "Screen shots" from servicing system
- Assignments of mortgage
- Bailee Letters (document transfer records)

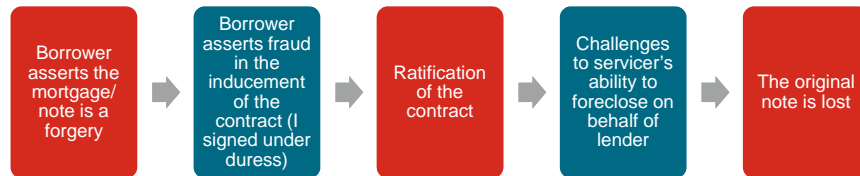
Existence of a Contract (continued)

The note as a negotiable instrument

- Special Indorsement: Made payable to the bearer or to a specifically named person or entity.
- Blank Indorsement: Indorsement doesn't specify any recipient, so by default becomes payable to bearer
- UCC §3-205

Note: If the note is transferred for value but not indorsed, the transferee has a right to the unqualified indorsement, but negotiation doesn't occur until the note is indorsed. (UCC §3-203)

Contract Problems



Enforcing a Lost Note

- **Lost Note Count in a Complaint must be accompanied by an affidavit as to the following (per Fla. Stat. 702.015):**
 - Clear chain of indorsements, transfers or assignments
 - Set forth facts showing entitlement to enforce
 - Include copies of the note and allonges and evidence of acquisition
- **Re-establishing a lost note requires testimony:**
 - The party seeking to enforce was entitled to enforce at the time of loss
 - Loss was not the result of a transfer or seizure
 - Party cannot reasonably obtain the instrument because it is lost or destroyed
- **To enforce a lost note, you must prove the terms**

Breach of the Contract

The breach = failure to pay

Is notice of lender's intent to accelerate required? *Not always!*

When the mortgage requires that a borrower be provided notice of intent to accelerate, proper notice is not given until the requisite information is communicated:

Breach of the Contract (continued)

Standard Fannie/Freddie mortgage requirements for notice are included in paragraph 22:

- Advise of the default
- Identify action required to cure default
- Identify date (not less than 30 days) by which default must be cured
- Notify that failure to timely cure may result in acceleration, foreclosure and judicial sale
- Inform of right to reinstate after acceleration
- Inform of right to assert defenses in foreclosure action

And now...a word about acceleration

- Having a copy of the notice letter is not sufficient! You must be able to demonstrate that it was sent
- Acceleration occurs upon the filing of the foreclosure Complaint
- Florida's statute of limitations requires that acceleration occur within five years of the date of default
- Currently, the law in Florida permits a lender to accelerate on any date of default within 5 years, even if prior attempts to accelerate were unsuccessful (U.S. Bank v. Bartram)

Damages

