

## **BANKS HAVE NO DUTY TO PERFORM REASONABLE UNDERWRITING UNDER FLORIDA LAW**

Occasionally a borrower's counsel or counsel for an institution that has served as a lending partner in some capacity will get crafty in trying to shift the blame for bad business transactions to the originating and lead lending institution by asserting claims against the original lender for not performing like a reasonable and prudent bank can be expected to perform in the administration of a loan. The claims come in many forms, but they are all predicated on the same fundamental premise: if the bank had performed a better/reasonable underwriting or processing of the original loan, then the losses that ultimately occurred would have been prevented. Fortunately for banks, these types of claims are unsustainable in Florida law. There is no tort duty for banks to process loans competently. *See Silver v. Countrywide Home Loans, Inc.*, 760 F. Supp. 2d 1330, 1339 (S.D. Fla. 2011).

Generally, in Florida four elements are necessary to sustain a negligence claim: (1) a duty, or obligation, recognized by the law, requiring defendant to conform to a certain standard of conduct, for the protection of others against unreasonable risks; (2) a failure on the defendant's part to conform to the standard required: a breach of duty; (3) a reasonably close causal connection between the conduct and the resulting injury known as "legal cause," or "proximate cause," and which includes the notion of cause in fact; and (4) actual loss or damage. *See Curd v. Mosaic Fertilizer, LLC*, 39 So. 3d 1216, 1227 (Fla. 2010) (citing *Clay Elec. Coop., Inc. v. Johnson*, 873 So. 2d 1182, 1185 (Fla. 2003)). Specifically, an essential element of a claim of negligence is a legal duty owed to the plaintiff. *Clay Electric*, 873 So. 2d at 1185. Lender liability claims against banks based on negligent underwriting fail for want of duty to perform a reasonable underwriting.

In analyzing the issue of whether banks have a reasonable duty of care in underwriting loan applications (either to their borrower or others who may rely on the existence of the loan), I was unable to find any law that provided extra-contractual tort liability to a bank who did not make representations to a borrower or other third party that induced reliance and created a fiduciary duty. To the contrary, at least four federal courts have concluded there is no such common law duty of competent loan underwriting or processing in Florida. *See [Brake v. Wells Fargo Fin. Sys. Fla., Inc., No. 8:10-cv338, 2011 WL 6719215, at \\*10-11 \(M.D. Fla. Dec. 5, 2011\)](#)* (noting "federal courts applying Florida law have held that there is no legal duty to process loans

competently.”); [\*Silver v. Countrywide Home Loans, Inc.\*, 760 F. Supp. 2d 1330, 1342–43 \(S.D. Fla. 2011\)](#) (same); [\*Azar v. Nat’l City Bank\*, No. 6:09–cv–400, 2009 WL 3668460, at \\*3 \(M.D. Fla. Oct. 26, 2009\)](#) (dismissing negligence claim because the defendant bank had no duty under Florida law to process plaintiff’s loan application properly); [\*Matthys v. Mortg. Elec. Registration Sys., Inc.\*, No. 6:09–cv–1150, 2009 WL 3762632, at \\*2 \(M.D. Fla. Nov. 10, 2009\)](#) (dismissing negligence claims as there is no duty under Florida law to use reasonable care in the evaluation of loan applications).

In the *Brake* action, the borrower plaintiffs alleged a negligence count against the defendant bank. In this regard, the plaintiffs argued that the defendant bank “owed [them] a duty of care to process the loan application in accordance with standard underwriting criteria, service the loan in accordance with industry standards, and otherwise deal in good faith,” and that the defendant bank breached this duty by failing to “collect, examine and evaluate, pertinent information regarding [the plaintiffs’] financial position.” In oral arguments, plaintiffs’ counsel distilled this claim to the contention that the defendant failed to comport its loan underwriting with best practices and, that, if the defendant had done so, it would have known that the plaintiffs could not afford the mortgage. The defendant bank argued that this claim is not actionable because there is no duty to process the loan application in any particular manner. In dismissing the borrower claims, the court remarked that this claim of negligence struck it as illogical, stating “After all, the defendant bank simply granted the plaintiffs a loan pursuant to their own request. From the plaintiffs’ viewpoint, what is unreasonable about that? Under the plaintiffs’ theory, any business transaction that turns bad can be the subject of a claim of negligence.” The court went on to state that in all events, the plaintiffs have not presented any legal authority in which a Florida court has held, or even suggested, that a lender has a legal duty to use reasonable care in the processing of a loan application. To the contrary, federal courts applying Florida law have held that there is no legal duty to process loans competently. *Silver v. Countrywide Home Loans, Inc.*, *supra*, 760 F.Supp.2d at 1339; *Azar v. National City Bank*, 2009 WL 3668460 at \*3 (M.D.Fla.2009); *Matthys v. Mortgage Electronic Registration Systems, Inc.*, 2009 WL 3762632 at \*2 (M.D.Fla.2009). “In short, Florida courts have rejected the contention that banks owe a legal duty to prospective borrowers to process, and consider, loan applications with reasonable care. Moreover, such a duty is contrary to common sense, since in a non-fiduciary relationship each party’s duty is simply to look out for its

own interest. A violation of a duty of self-interest cannot plausibly give rise to a tort claim.” *Id.*

As such, when a claimant tries to take the position that “you shouldn’t have lent that money because you should have known better,” Florida banks can breathe a sigh of relief that those positions/claims are unsustainable under Florida law. Now, whether the regulators will agree is a whole different discussion...