

FLORIDA STATUTE § 559.715 IS INAPPLICABLE TO NOTE HOLDERS

The Second District Court of Appeal has become the first appellate court in Florida to hold that Florida Statute § 559.715, part of the Florida Consumer Collection Practices Act, Chapter 559, et seq. (“FCCPA”), does not apply to the note holder in a mortgage foreclosure proceeding. *Deutsche Bank Nat. Trust Co. v. Hagstrom*, 2D14-5254, 2016 WL 3926852, at *1 (Fla. 2d DCA 2016). In many instances, the *Hagstrom* holding will eviscerate a § 559.715 affirmative defense, which historically has been a popular and often effective defense to foreclosure, due in large part to the lack of case law interpreting this section of the FCCPA. However, recent holdings, such as *Hagstrom*, provide much-needed clarification of this statute.

Section 559.715 states as follows:

[The FCCPA] does not prohibit the assignment, by a creditor, of the right to bill and collect a consumer debt. However, the *assignee* must give the debtor written notice of such assignment as soon as practical after the assignment is made, but at least 30 days before any action to collect the debt. The assignee is a real party in interest and may bring an action to collect a debt that has been assigned to the assignee and is in default.

- 559.715, Fla. Stat.

In *Hagstrom*, at summary judgment, defendants relied on § 559.715 to argue that Plaintiff, who was not the original lender, failed to provide written notice of the assignment of debt and therefore failed to comply with a condition precedent to foreclosure. *Hagstrom*, 2016 WL 3926852, at *1. The trial court agreed and granted summary judgment in the defendants’ favor.

On appeal, the Second District Court of Appeal began its analysis by examining the text of the statute itself, and the plaintiff’s relationship to the debt at issue. *Id.* at *3. The Court explained that pursuant to the plain language of the statute, the statute applies to assignees of the *right* to bill and collect a consumer debt, but *not to an assignee of the debt in and of itself*. *Id.* In other words, “Section 559.715 requires no action by the creditor or the note holder.” *Id.* Section 559.715 does not create any requirements or conditions in order for the note holder to enforce the debt by filing a lawsuit, because the Court reasoned, the note holder has the right to enforce the note regardless of any assignment to bill and collect the debt. *Id.* The Court continued by explaining that in mortgage foreclosure lawsuits, there can be more than real party interest, i.e. the note holder and the assignee of the right to bill

and collect a consumer debt, and “[a]ssignment of the right to bill and collect the debt and notice thereof is irrelevant to whether a note holder can enforce the note.” *Id.* at *4.

Thus, the Court concluded that because Plaintiff had sufficiently proven that it was the holder of the note at the time the lawsuit was filed, § 559.715 was not applicable to it. *Id.* at *5. In no uncertain terms, the Court emphasized that § 559.715 “simply does not apply to holders of notes secured by mortgages on real property. Neither is it an affirmative defense to foreclosure actions; it does not establish a condition precedent and in no other way avoids the claims to foreclose a mortgage and enforce a note.” *Id.*

While defense counsel are likely to continue to raise § 559.715 as an affirmative defense to foreclosure, the *Hagstrom* decision coupled with the recent *Brindise v. U.S. Bank Nat. Ass’n*, 183 So. 3d 1215, 1216 (Fla. 2d DCA 2016) decision, in which the Court held that compliance with § 559.715 is not a condition precedent to foreclosure, provide powerful tools for Plaintiff’s counsel to defeat § 559.715 defenses.

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