

IN FLORIDA NOTE HOLDERS MUST PROVIDE EVIDENCE TO ENFORCE LOST OR PROMISSORY NOTES

Florida law provides a mechanism to re-establish a promissory note which was lost or destroyed where the existence and ownership of the Note may be established by evidence. However, in *Delia v. GMAC Mortgage Corporation*, 2014 WL 5284995 (Fla. 5th DCA Oct. 17, 2014), the Fifth District Court of Appeal ruled that GMAC, as the holder attempting to reinstate a lost promissory note, failed to prove that it had standing to proceed on its lost note theory because GMAC failed to submit any evidence that the obligor on the Note was adequately protected against multiple claims for repayment, which is required by §702.11, Fla. Stat.

Florida Statutes §673.3091(c)(2), which governs lost or destroyed promissory notes, states that “[t]he court may not enter judgment in favor of the person seeking enforcement unless it finds that the person required to pay the instrument is adequately protected against loss that might occur by reason of a claim by another person to enforce the instrument. Adequate protection may be provided by any reasonable means.” Adequate protection in this context is defined by the recently adopted §702.11, Fla Stat. which requires the following adequate protection for obligors of lost or destroyed notes: (1) A written indemnification agreement by a person reasonably believed sufficiently solvent to honor such an obligation; (2) A surety bond; (3) A letter of credit issued by a financial institution; (4) A deposit of cash collateral with the clerk of the court; or (5) Such other security as the court may deem appropriate under the circumstances. As explained by the *Delia* opinion, because GMAC failed to put on any evidence on the issue of adequate protection, the Court was required to reverse and remand the case for re-establishment of the lost promissory note.

Lenders, servicers, and holders who seek to enforce a lost or destroyed note should be aware of the new statute and case law mandating security for the obligor before seeking judgment. Due to the intended retroactive effect of §702.11, Fla. Stat., this law now applies to “all currently pending actions, even if the suit was brought before the statute went into effect.” Although the question of what “other security the court may deem appropriate” remains open, generally, a holder should be prepared to post a letter of credit, surety bond, written indemnification agreement, or deposit cash collateral with the clerk of court, or to provide another similar form of security when seeking to enforce its rights under a lost or destroyed note.