

FORECLOSURE NOT BARRED BY "NOTICE OF ASSIGNMENT"

The District Court of Appeal of Florida, Second District ("Second DCA"), recently held that **a notice of assignment of a mortgage loan pursuant to the Florida Consumer Collection Practices Act ("FCCPA"), § 559.715, Florida Statutes, is not a condition precedent to filing a mortgage foreclosure action**, but certified the question to the Florida Supreme Court for resolution as one of great public importance.

A copy of the opinion is available at: [Link to Opinion](#)

Husband and wife borrowers obtained a mortgage loan in 2005, which was later transferred to a new holder via "blank endorsement," which under section 673.205(2) of Florida's Uniform Commercial Code means that the note becomes "payable to bearer and may be negotiated by transfer of possession alone until specially endorsed."

The borrowers defaulted in 2010 and the mortgagee sued to foreclose and for a money judgment in 2012.

In defense, the borrowers argued that the mortgagee had to provide notice that it had become the holder of the mortgage at least 30 days prior to filing suit pursuant to § 559.715, Florida Statutes, part of the FCCPA. The trial court rejected this argument and denied the borrowers' motion for involuntary dismissal.

The case went to trial and the judge entered final judgment of foreclosure in the mortgagee's favor. The borrowers appealed.

On appeal, the Second DCA began by analyzing the text of § 559.715, which the Court noted "does not prohibit the assignment, by a creditor, of the right to bill and collect a consumer debt," but instead requires that "the assignee must give the debtor written notice of such assignment as soon as practical" and "at least 30 days before any action to collect the debt." The statute also provides that the "assignee is a real party in interest and may bring action to collect a debt that has been assigned to the assignee and is in default."

The Court explained that "[t]he legislature intended the statute to streamline the collection of consumer debts" in order to "reduce the number of lawsuits that collection agencies must pursue", and this "assignment and

consolidation process allows a stranger to the initial financing transaction, typically a collection agency, to proceed more efficiently to obtain payment of delinquent obligations from a single debtor for the benefit of multiple creditors."

The Court went on to explain, however, that the statute does not "appl[y] neatly in the mortgage foreclosure context where, more often than not, a single note holder seeks to foreclose on a single mortgage and note upon the mortgagor's default. The assignee of the note is not a collection agent for others."

The parties' central dispute was "whether a foreclosure suit is an effort to collect a consumer debt" to which §559.715 applies.

Noting that the federal cases cited by the parties offered no consistent guidance on the question presented, the Second DCA refused "to become ensnared unnecessarily in a briar patch" and concluded that "the trial court did not err."

The Court reasoned that § 559.75 "has no language making written notice of assignment a condition precedent to suit" and, because the legislature knew how to "condition the filing of a lawsuit on some prior occurrence", citing the examples of the presuit notice required in libel and slander actions, the presuit investigation and discovery process required before suing for medical malpractice, and arbitration as a condition precedent to suing in certain condominium disputes, the Court refused to "expand the statute to include language the Legislature did not enact."

The Court also reasoned that the use of "a" instead of "the" in the language of the statute when referring to the real party in interest meant that "the assignee is not the only real party in interest" and that "the assignor retains rights against the debtor." The Court noted that, "[i]n such a situation, requiring written notice from the assignee makes perfect sense; notice alerts the debtor that multiple parties may seek to collect a delinquent debt."

The Second DCA rejected the borrowers' argument that they would be left with no remedy for failure to give the notice of assignment required by § 559.75 unless the notice is a condition precedent to a foreclosure action, explaining that "the prohibitions in section 559.72 [of the FCCPA] do not include the alleged failure to give notice."

In addition, while the FCCPA "prohibits egregious debt collection practices and provides legal remedies to protect consumers from harassing collection efforts", the borrowers failed to show "that the mere filing of a foreclosure suit, even one seeking money damages, implicates those concerns." The Court also noted that, because the FCCPA contains, in addition to a private right of action, "a sweeping scheme of administrative enforcement," the Court concluded that "where administrative enforcement mechanisms exist, making section 559.715 a condition precedent is not necessary to the primary purpose of the FCCPA."

The Court stressed that the borrowers "ignore the fact that the lender could transfer the note without prior notice to them" under paragraph 20 of the mortgage and, thus, found that "[a]s a matter of contract, section 559.715 is inapplicable."

It also considered it "significant that the [borrowers] contractually agreed with their lender on the procedure by which they would receive notice of any default and the manner in which the lender could accelerate all payments due." Because the borrowers were not arguing that they failed to receive the default notice or that the notice of default was deficient, the Court found that under paragraph 20 of the mortgage, the borrowers were "not entitled the notice they claim is due under section 559.715" and, moreover, "in the event of default, they agreed to a notice method independent of section 559.715."

Concluding that **"failure to provide written notice under section 559.715 did not bar [a mortgagee's] foreclosure suit, nor did it create a condition precedent to the institution of the foreclosure suit"** the Court affirmed the trial court's final judgment of foreclosure.

However, given the large number of foreclosure cases pending in Florida's courts "where defendants have raised section 559.715 as a bar to foreclosure," the Court certified the following question to the Florida Supreme Court as one of great public importance: "Is the provision of written notice of assignment under section 559.715 a condition precedent to the institution of a foreclosure lawsuit by the holder of the note?"