SIX MONTHS IN REVIEW: FLORIDA CASE LAW

1. ***Conditions Precedent to Foreclosure****:* The standard Fannie Mae/Freddie Mac mortgage used in a generous majority of Florida loan closings includes a provision requiring that borrowers be provided with notice prior to a lender's acceleration of the defaulted loan. Paragraph 22 of the mortgage states in pertinent part:

> **Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to assert in the foreclosure pro¬ceeding the non-existence of a default or any other defense of Borrower to acceleration and foreclosure.**

In back-to-back opinions out of the 2nd and 5th District Courts of Appeal this past March, the respective courts both tackled Paragraph 22 in determining whether the requisite notice (the "default letter") that was provided to the borrowers was legally sufficient. In *U.S. Bank v. Busquets*, 135 So. 3d 488 (Fla 2d DCA 2014), the Second District examined the default letter to determine whether it placed the borrower on notice of the possibility of a judicial foreclosure proceeding, and whether it adequately advised the borrower of a possible right to reinstate following the default. The Second District found that the default letter was legally sufficient with regard to both issues. The language in the default letter may not have been as artful as possible, but when it placed the borrower on sufficient notice (particularly when read in the context of the entire mortgage), it was enough.

The following week, the Fifth District in *Samaroo v. Wells Fargo Bank*, 137 So. 3d 1127 (Fla 2014) found that a default letter which completely omitted one of the requirements of Paragraph 22 of the mortgage was legally

insufficient. Specifically, where the default letter did not advise the borrower of a right to reinstate following the default, sufficient notice was not found and the judgment was reversed.

There is not yet enough discussion from the various appellate courts in Florida to reconcile these opinions, but these cases considered alone indicate that if each of the elements is discussed in the default letter *in some way*, courts may consider whether the default letter is substantially compliant with Paragraph 22. On the other hand, if one of the elements is missing completely, courts may find that notice simply wasn't adequate.

2. *Business Records*: Hearsay challenges to the records offered by a lender's fact witness (at trial) or affiant (at summary judgment) are not new to the foreclosure arena, but this niche area of law is heating up in what appears to be a case-by-case battle over whether the elements of Florida Statute §90l.803(6) (the business record exception to the hearsay rule) have been met. Two cases in particular have revealed a thoughtful examination by the First and Fourth Districts so far this year on the subject.

First came *Hunter v. Aurora Loan Services*, LLC, 137 So. 3d 570 (Fla 1st DCA), in which the First District acknowledged that a witness who testifies about business records (such as a consolidated notes log or loan payment history) **does not necessarily have to be the person who created the records**. However, the First District then examined the testimony to determine whether the witness had particular knowledge of the record keeping procedures used to generate the document. In *Hunter*, knowledge of industry-wide standard practices was not enough.

Then, in *Cayea v. Citimortgage, Inc*., 138 So. 3d 1214 (Fla 4th DCA), the Fourth District examined the specific testimony provided at trial and concluded that because **the witness demonstrated familiarity with the record keeping system used, as well as familiarity with the process followed in logging mortgage payments, the business record exception was correctly applied by the trial judge in admitting the evidence at trial.**

Interestingly, both the *Hunter* and *Cayea* decisions reference two additional Fourth District rulings with opposite results: *Glarum v. LaSalle Bank National Association*, 83 So. 3d 780 (Fla. 4th DCA 2011) and *Weisenberg v. Deutsche Bank National Trust Co.,* 89 So. 3d 1111 (Fla. 4th DCA 2012).

These cases were specifically distinguished from one another by both courts as examples of application of the business record exception. **The obvious conclusion seems to be that this question must be answered on a case-by-case basis, depending on the specific testimony provided in a case and the particular objections raised to that testimony.** Undoubtedly, this is not the last we've seen of the business record discussion.

3. *Statute of Limitations:* Likely the most talked-about development in mortgage foreclosure litigation this year, two districts have ruled that the statute of limitations for the foreclosure of a mortgage is five years from *each*date of default (date of missed payment).

Both *U.S. Bank, N.A. v. Bartram*, ____ So. 3d ____, 2014 WL 1632138 (Fla. 5th DCA, April 25, 2014) and *Evergrene Partners, Inc. v. Citibank, N.A.,*____So. 3d ____, 2014 WL 2862392 (Fla. 4th DCA, June 25, 2014) found that the five-year statute of limitations for a mortgage foreclosure in Florida does not preclude acceleration and filing of a new foreclosure action even if the *original* date of default falls outside of five years.

In these consistent rulings, the Fifth and Fourth Districts both cite to the Florida Supreme Court's decision in *Singleton v. Greymar Associates*, 882 So.2d 1004 (Fla. 2004). The Court in *Singleton* found that a new and independent right to accelerate existed with each default in a *res judicata*context. That analysis, extended to a statute of limitation context, provides that a new default presents a new cause of action to foreclose.

Understanding the implications of this ruling, the Fifth District has certified to the Supreme Court the following question (identifying this issue as a matter of great public importance):

> Does acceleration of payments due under a note and mortgage in a foreclosure action that was dismissed pursuant to rule 1.420(b), Florida Rules of Civil Procedure, trigger application of the statute of limitations to prevent a subsequent foreclosure action by the mortgagee based on all payment defaults occurring subsequent to dismissal of the first foreclosure suit?