

Perspective



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This newsletter is designed to address legal issues that impact lending in Florida. Whether making loans or collecting bad loans, *The Lender's Perspective* will provide timely and valuable insight to the creditor.

Judgment Collection In Florida

By Douglas L. Waldorf, Jr., J.D., M.B.A.

The last issue of *The Lender's Perspective* focused on the procedure to obtain a deficiency judgment. So now what? The bad news is that once you win the judgment, you need to turn it into money...and that can be tough. Let's look, then, at how this is done in Florida.

Searching for Hidden Treasure

The judgment creditor's first objective is to locate the debtor's assets. A bank has one advantage in that it may have accounts titled in the debtor's name. If so, Florida law permits the creditor to "set off" the account to pay the judgment. That is, the bank can take funds from the account and distribute them to itself as payment of the judgment. Be aware, though, that the account owner and the judgment debtor must be identical. For example, an account titled "John Smith in trust for Jane Smith" cannot be set off to pay for a judgment against only John Smith individually. The identity of the parties is not the same. Each case needs to be carefully analyzed and

discussed with counsel. An improper set off could expose the bank to liability for conversion of funds.

In reality, debtors frequently will have moved accounts to other banks long before the judgment is obtained so set off may not be readily available. However, the bank can garnish accounts of the debtor that are placed with other financial institutions. To determine where those accounts might be, the bank may elect to use an asset locator service and there are many private companies that will conduct an asset search for a fee. The bank can also obtain a fair amount of information on its own. The first step should be to review the credit files for copies of loan applications, financial statements and tax returns provided by the debtor as part of the original loan process. Don't forget to look for copies of any loan payment checks that you may have as these can provide information as to other banks the debtor uses. Finally, you can review the real property records in the applicable county to see what real estate the debtor owns.

"Do you solemnly swear to tell the truth...?"

To better understand the debtor's current financial condition, most creditors will want to take the deposition of the debtor.

Referred to as a "deposition in aid of execution," this involves questioning under oath as to the debtor's financial circumstances. The debtor is generally subpoenaed to appear and give the deposition and may also be required to produce financial records. These records, at a minimum, would include bank statements, real estate deeds, tax returns, investment account statements and car titles. Following this inquiry, if any assets are identified, the bank can take additional legal action in order to force the sale of the assets to pay the judgment. This, however, can be an uphill battle from the creditor's perspective. Florida is a relatively debtor-friendly state and there are many situations in which assets may be exempt from attachment by the creditor. For example, if the judgment is against one person only and that person is married, assets titled in both the husband and wife's name may be beyond the reach of the creditors. Likewise, assets held in trust may not be subject to the claims of creditors seeking to collect a judgment that is not against the trust. Other exemptions for debtors in Florida include annuity contracts, cash surrender value or proceeds of life insurance policies, disability income benefits, partnership property and individual retirement accounts.

Sophisticated debtors may have engaged in valid estate planning, or they may have sold assets they once owned, basically rendering them “judgment proof.” While it is generally true that the law prohibits a debtor from engaging in the transfer of assets for the purpose of hindering or defrauding creditors, enforcing this requires yet another legal action in which the lender bears a fairly stringent burden of proving that the transfer of assets was intended to defraud creditors.

Throwing Good Money After Bad ?

Ultimately, the lender’s business decision is whether to risk spending still more money on legal fees and costs in hope of collecting the judgment. Prior to making this determination, the bank may consider the following: (1) obtain a lien search on the borrower and guarantors; (2) review the original loan applications and periodic

financial reporting contained in its files, including the tax returns provided by the borrower and guarantor; (3) search the real estate records in the appropriate county; and, (4) consider using an asset search service to assist in locating assets that may be taken to satisfy the judgment.

In closing, here are a few facts about judgments in Florida to keep in mind:

- Judgments become liens on real property of the debtor only in the county in which they are properly recorded. So, a judgment properly recorded in Lee County will not become a lien on property the debtor owns in, say, Miami-Dade county.
- Once properly recorded, a judgment remains a lien on real property for ten years, subject to being renewed for a total possible life of 20 years from the date the judgment was entered.

- Judgments become liens on *personal* property of the debtor when a judgment lien certificate is filed with the State of Florida Department of State. This lien is valid for an initial period of five years from the filing of the certificate and may be extended for another five years upon the timely filing of a second lien certificate.
- Judgments accrue interest from the date they are entered by the court. The interest rate is determined annually and is presently 11%.

Mr. Waldorf is a Board Certified Real Estate Lawyer whose practice focuses on banking industry clients. He represents lenders in commercial and residential loan transactions, mortgage foreclosures, deeds in lieu of foreclosure, forbearance agreements, and defaulted loan workouts.

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In the next issue of The Lender’s Perspective we will leave the “bad loan arena” and talk about the advantages and disadvantages of buying another bank’s loan documents. Lastly, I want to acknowledge John Agnew, Esq. and Tyra Read, Esq., two Henderson Franklin attorneys who contributed greatly to this issue.

This update is for general information only and should not be construed as legal advice or legal opinion on any specific matter. The hiring of a lawyer is an important decision that should not be based solely on advertising. Before you decide, ask us to send you free written information about our qualifications and experience.



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