

Perspective



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ATTORNEYS AT LAW

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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.

Post Judgment Rate of Interest

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Lenders are frequently pursuing deficiency judgments or other money judgments against defaulted borrowers. This issue of *The Lender's Perspective* examines the rate of interest accruing on these judgments.

Pre and post-judgment interest

Generally, interest on debt can be separated into interest accruing pre-judgment and interest accruing post-judgment. Pre-judgment interest is a matter of contract between the parties. Notes and other obligations evidencing a debt provide a stated rate of interest accruing on the unpaid principal. Many such obligations also specify a higher rate of interest accruing in the event of default.

Provided these rates are not usurious, they will be enforced by courts and the resulting accrued interest will be added to the principal balance of the borrower's obligation. In Florida, the maximum lawful rate of interest is 18% on obligations not exceeding \$500,000 and 25% on obligations in excess of \$500,000.

Post judgment interest is the interest rate applied to the amount of any money judgment against the borrower.

Statutory post-judgment interest

Section 55.03(1), Florida Statutes (2009), provides that the interest rate applicable to judgments be determined annually by the Chief Financial Officer. The rate is set as of January 1 and is calculated by adding 500 basis points to the average discount rate of the Federal Reserve Bank of New York for the preceding year. For 2010, the statutory post-judgment interest rate is 6.00%.

An alternative post-judgment interest rate

In today's difficult economic environment, lenders are looking for ways to maximize their collection of defaulted loans. After recovering possession of collateral, the lender's is left to attempt collection of a money judgment. One source of leverage is a high post judgment interest rate. Many borrowers are concerned that their debt will continue to increase over time as judgments remain unpaid and, in some cases, this may increase the likelihood of the parties reaching a settlement.

Lenders should be aware of a Florida Supreme Court decision which allowed a post-judgment interest rate higher than that otherwise provided by statute. In *Whitehurst v. Camp*, 699 So.2d 679 (Fla. Sup. Ct. 1997), the Court found that the parties to a contract could agree to a post judgment rate of interest in the event of a default on the obligation. The decision was consistent with the language

of Section 55.03(2) which states that "Nothing contained herein shall affect a rate of interest established by written contract or obligation." The key point is that the contract language pertaining to post-judgment interest must be clear and unambiguous. While many lenders use loan documents which provide for default interest rates, very few are taking advantage of the opportunity for greater leverage offered by higher post-judgment

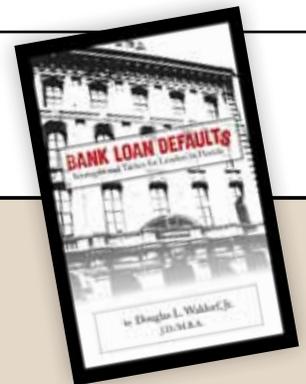
rates. With this case in mind, lenders are well advised to incorporate into their loan documents language which clearly provides that any judgment on the debt will thereafter bear interest at a rate greater than that otherwise provided by statute. The language should clearly state that the post-judgment rate is agreed to by the borrower and that it supersedes any post-judgment rate provided by statute.

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. He can be reached at 239.344.1213 or douglas.waldorf@henlaw.com



As always, thanks for reading and watch for the next issue of The Lender's Perspective. This newsletter is written quarterly and back issues are available at henlaw.com.

Douglas Waldorf's first book, *Bank Loan Defaults: Strategies and Tactics for Lenders in Florida*, is now available. *Bank Loan Defaults* is a practical guide creditors need to consider when evaluating defaulted loans. From analyzing events of default, understanding how to foreclose a mortgage, obtaining a deficiency judgment and collecting a judgment, this book provides timely, real-world insight. Contact Attorney Waldorf to obtain your copy.



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