

Perspective



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ATTORNEYS AT LAW

MAY 2009

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.

Protecting Your Collateral

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

The phone rings in the bank lawyer's office. In this economic environment, it's no surprise when the dialogue proceeds as follows:

Bank Lawyer: "Hello."

Banker: "This is Bill over at State Bank. Got another defaulted real estate loan to talk about."

Bank Lawyer: "Well, let's send a demand letter then start foreclosure."

Banker: "Sounds good. Oh, by the way, we changed the locks today. The president thinks the place might get vandalized. Lots of stuff laying around in there as well."

Bank Lawyer: "Wait a minute. I have to start the clock."

The rights and liability of banks facing this all-too-common scenario and similar situations are the subject of this edition of *The Lender's Perspective*.

"I have a mortgage so, of course, I can occupy the property!"

Not so fast. When considering the lender's options to preserve and protect real property collateral, you need to first

take note of Florida Statute 697.02 which states that a mortgage is only a *lien* on the property. It does not convey legal title to the real estate nor does it convey any right to possess the property. Rather, the mortgage holder's remedy is to foreclose the mortgage which, of course, involves a judicial action.

If the property is abandoned, the best course of action may be to expedite the filing of the foreclosure and have bank counsel file an emergency motion for permission to enter upon and secure the premises. Keep in mind, the court has jurisdiction over the property and can grant this type of relief. Often, these motions will be heard on an emergency basis. The relief requested can include permission to change locks and otherwise safeguard the property. The lender occupying the property under an order of this type is well advised to video tape and/or photograph the premises and inventory all of the contents found inside in order to minimize any liability to the owner.

If the property is not abandoned, assuming a foreclosure suit is filed, the court will not likely grant access to the lender. Instead, the bank should file a motion for injunction, asking the court to order the owner/occupant to maintain the property until such time as the foreclosure

is complete. Failure of the owner to comply can be enforced by contempt proceedings.

If no suit is filed, the bank can, with agreement of the owner, assume the role of "mortgagee in possession." There is ample case law in Florida supporting this concept. Generally, the mortgagee is deemed to occupy and hold the property in trust until it obtains title through foreclosure or deed in lieu of foreclosure. In this situation, the lender is well advised to obtain a signed agreement with the owner of the property delineating its right to occupy the property and setting out the responsibilities of each party during occupancy (e.g. taxes, insurance, maintenance, etc.).

I have a car loan, what about repossession?

Loans secured by non-real estate can offer the lender the opportunity, subject to certain constraints, to seize possession of its collateral prior to obtaining a judgment. This is often referred to as a "self help" remedy and can be a powerful tool for the collector of a defaulted loan. Assuming there is a default under the loan documents, the secured lender can generally acquire possession of the collateral using this self help approach provided that the possession is acquired

“peacefully.” So, when does a breach of the peace occur so as to make the repossession wrongful under the law? Unfortunately, there is no clear answer. However, it can be said that even the verbal protest by the debtor will be enough to negate the opportunity for peaceful repossession. Likewise, entering onto the debtor’s property may also create an issue. The uncertainty over what is and is not “peaceful repossession” seems to limit this remedy and its most common application is in the context of car loans.

Final thoughts:

Here are a few final points to consider when evaluating how to protect your collateral:

- For larger, income-producing properties, consider a receiver. The receiver is a court-appointed professional whose job is to take control of and manage the property and the income it generates. The receiver must provide a financial

accounting to the court. The downside is that receivers are often costly and the bank will most likely bear this cost.

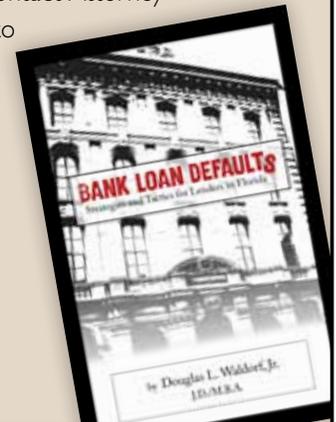
- Consider the risks of self-help remedies. They can include claims of trespass and conversion of personal property.
- Don’t forget about rental income from real property. If your documents allow it, take action quickly to control the rents. These funds can be used to help offset the costs of maintaining the collateral.

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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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.



As always, thanks for reading and watch for the next issue of The Lender’s Perspective.

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