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Foreclosure Law in the Wake of Recent Decisions on Residential Mortgage Loans: The Situation in Georgia

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The authors examine several key decisions affecting foreclosure law in Georgia.

Thousands of wrongful foreclosure lawsuits are filed each year in Georgia against banks, lenders, servicers, foreclosure firms, and other entities involved in the non-judicial foreclosure process for residential mortgage loans. There has been recent upheaval in Georgia foreclosure law resulting from several key cases decided in 2012. This article analyzes the decisions' impact on Georgia's non-judicial foreclosure process, pending the Georgia supreme court's response.

REESE v. PROVIDENT FUNDING ASSOCIATES, LLP, 730 S.E.2D 551, 317 GA. APP. 353 (GA. CT. APP. JULY 12, 2012)

In a sharply-divided decision, the majority held, as a matter of first impression, that Georgia's foreclosure notice statute, O.C.G.A. § 44-14-162.2(a), requires the person or entity conducting a non-judicial foreclosure of a residential mortgage loan to provide the borrower/debtor with a written notice of the foreclosure sale that discloses not only "the name, address, and

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telephone number of the individual or entity who shall have full authority to negotiate, amend, and modify all terms of the mortgage with the debtor" (the language that appears in the statute), but also the identity of the "secured creditor" (not required by the statutory language, but which the majority inferred based on legislative intent). The majority further found that the failure to identify the "secured creditor" in the foreclosure notice renders the notice, and any subsequent foreclosure sale, invalid as a matter of law. The dissenting judges in *Reese* found that the majority's holding "amount[ed] to a judicial rewriting of [O.C.G.A. § 44-14-162.2(a)]" to mean that the notice must disclose not only the identity of the person identified in the text of the statute, but the identity of the secured creditor as well.

Lenders, mortgage servicers, investors and title insurers have expressed grave concerns over the majority's holding because it is unclear whether it will be applied retroactively (assuming it is upheld by the Georgia supreme court) and thus potentially call into question the validity of thousands of non-judicial foreclosure sales that occurred between May 2008, when the statute was amended, and July 2012, when the case was decided. Such a result will greatly increase and expand wrongful foreclosure litigation in Georgia.

STOWERS v. BRANCH BANKING & TRUST CO., 731 S.E.2D 367 (GA. CT. APP. AUG. 23, 2012)

Less than 45 days after *Reese* was decided, the Georgia Court of Appeals revisited the statutory notice requirements of O.C.G.A. § 44-14-162.2. This opinion is important in two respects:

- It outlines the retroactivity analysis applicable to judicial opinions like *Reese*; and
- It implies that, notwithstanding *Reese*, "substantial compliance" with the foreclosure notice statute may be sufficient in certain circumstances, as established in *TKW Partners v. Archer Capital Fund*, 302 Ga. App. 443 (2010).

This discrepancy raises questions as to whether a foreclosure notice that does not comply with the additional requirements in *Reese* may still "substan-

tially comply" with the requirements of O.C.G.A. § 44-14-162.2.

Like *Reese*, *Stowers* leaves many questions unanswered. The court of appeals found that *TKW* would not apply retroactively under the facts at issue in that case, but did not rule out the possibility that a retroactive application of *TKW* may be appropriate under different factual circumstances. Also, although the court acknowledged *Reese* several times in its opinion, it did not expressly address whether or how its finding of "substantial compliance" in *TKW* was impacted by the *Reese* majority's interpretation of O.C.G.A. § 44-14-162.2(a). Because *Reese* is silent on substantial compliance, it is unclear whether, if the decision is applied retroactively, foreclosing entities can rely on *TKW* and argue that their foreclosure notices substantially complied with O.C.G.A. § 44-14-162.2. However, the retroactivity analysis in *Stowers* seems to support the argument that *Reese*, which, like *TKW*, "decided an issue of first impression and established a new principle of law," should not be applied retroactively to invalidate foreclosure notices and/or sales that occurred before *Reese* was decided.

YOU v. JPMORGAN CHASE BANK, N.A., NO. 1:12-CV-202-JEC-AJB, 2012 U.S. DIST. LEXIS 127461 (N.D. GA. SEPT. 7, 2012)

On Sept. 7, 2012, Chief Judge Julie Carnes of the U.S. District Court for the Northern District of Georgia issued an Order Certifying Questions to the Georgia supreme court. The questions certified by the judge seek to resolve the confusion created in Georgia foreclosure law by the *Reese* majority's interpretation of O.C.G.A. § 44-14-162.2(a), the uncertainty over whether "substantial compliance" with the statue is sufficient in light of *Reese*, *TKW* and *Stowers*, and the split of authority in the Northern District of Georgia regarding which entities have standing to conduct non-judicial foreclosure proceedings.

The certified questions are:

- Can the holder of a security deed be considered to be a secured creditor, such that the deed holder can initiate foreclosure proceedings on residential property even if it does not also hold the note or otherwise have any beneficial interest in the debt obligation underlying the deed?

- Does O.C.G.A. § 44-14-162.2(a) require that the secured creditor be identified in the notice described by that statute?
- If the answer to the preceding question is "yes," (a) will substantial compliance with this requirement suffice and (b) did the defendant substantially comply in the notice it provided in this case?

Judge Carnes outlined several unanswered questions in Georgia foreclosure law and certified same to the Georgia supreme court for much-needed clarification. However, although this case addresses many important questions, it does not consider all of the questions raised by the conflicting holdings and findings discussed herein. For example, although the district court certified the question of whether the holder/assignee of a security deed may be a "secured creditor" under Georgia law, it did not discuss the distinction between the "holder of a note" and the "owner of the loan," and whether or when either of those entities may be deemed a "secured creditor" for purposes of the statutory notice requirements.

Hopefully, the Georgia supreme court will take the opportunities presented to it in *You* and *Reese* to provide much needed answers to these critical questions in Georgia foreclosure law.