

**NO WRONGFUL FORECLOSURE UNDER GEORGIA LAW
WHERE FORECLOSURE WAS RESULT OF BORROWERS'
DEFAULT**

In *Haynes v. McCalla Raymer, LLC*, No. 14–14036, __ F. 3d __, 2015 WL 4188459 (11th Cir. July 13, 2015), the Eleventh Circuit Court of Appeals affirmed the Northern District of Georgia’s grant of summary judgment in favor of Bank of America, N.A. (“BANA”) on the mortgagors’ wrongful foreclosure claim. **The court held that the mortgagors lacked standing to challenge any alleged deficiencies in the assignment of the security deed from MERS to BANA and that the borrowers’ own default, rather than any alleged defect in the foreclosure notice, led to the foreclosure.**

With respect to the assignment of the security deed, the mortgagors claimed that “the security deed was facially defective and not fit for recording” because there was not an official witness to the assignment. They also claimed that signatures on the security deed were forged, thereby rendering the assigned deed a nullity. **The Eleventh Circuit rejected these arguments outright on the basis that the borrowers lacked standing to challenge the assignment under Georgia law because they were not parties to the assignment and were not intended beneficiaries thereof. The court further noted that, while security deeds must be notarized in order to be recorded, deeds with even patent defects in attestation are still binding between the parties. The court explained that “the inability to record the deed impacts only subsequent purchasers of the property” who may acquire the property in good faith and without notice of other interests in the property. The court also pointed out that Georgia’s foreclosure statute only provided a “limited” protection to consumers, and does not even require that the security deed be recorded prior to foreclosure, only that it be “filed.”** See O.C.G.A. § 44-14-162(b). The court therefore saw “no reason that the patent defect in attestation at issue here would provide [the mortgagors] with standing to challenge an otherwise effective, if not properly recordable, assignment of their security deed.”

Next, the court rejected the borrowers’ claim that the foreclosure notice failed to comply with O.C.G.A. § 44-14-162.2 because it identified BANA as the entity with full authority to modify the loan despite the fact that Fannie Mae was ultimately responsible for modification decisions. The court noted that Georgia courts require only “substantial compliance” with

the statute governing foreclosure notices, and that courts have found substantial compliance to exist where the entity identified in the notice is authorized to convey communications to the party responsible for the modification decision, or where the notice provided the “appropriate contact information” in order to pursue a modification. Because the borrowers admitted that BANA directed them to Fannie Mae to pursue a modification, and that Fannie Mae had full authority to issue a modification, the court found that BANA substantially complied with the notice requirement.

The Eleventh Circuit further held that, even if the notice did not fully comply with Georgia law, the borrowers’ claim for wrongful foreclosure would still fail because they could not show a causal connection between the alleged defective notice and the injury, *i.e.*, the foreclosure. The court noted that it was undisputed that the borrowers had defaulted on their loan and had failed to comply with a proposed trial modification that could have staved off foreclosure. Therefore, the court concluded that “any injury the [borrowers] suffered is the direct result of their own default on the loan and failure to successfully negotiate and abide by more favorable terms. It is not the result of any allegedly inadequate information included in the notice of foreclosure sale.” Accordingly, the court held that the district court did not err in rejecting the borrowers’ wrongful foreclosure claim premised on an allegedly defective foreclosure notice.

The holding in *Haynes* provides a strong rebuke to homeowners seeking to avoid foreclosure based on a lender’s alleged technical noncompliance with a foreclosure statute, particularly in cases where the borrower’s failure to make mortgage payments is undisputed.