

NOTE AND MORTGAGE STILL ENFORCEABLE AFTER DISMISSAL OF FORECLOSURE ACTION

Unsuccessful mortgage foreclosure actions have resulted in a new wave of "quiet title" lawsuits brought by borrowers attempting to have their notes and mortgages deemed void and unenforceable. However, the federal district and state appellate courts of Florida considering the issue have uniformly rejected the theory that a failed foreclosure attempt allows mortgagors to obtain their property free and clear of the lien where the mortgage and note have not been paid in full.

In recent cases such as *Matos v. Bank of New York* and *Dorta v. Wilmington Trust Nat. Ass'n*, both the Middle District and Southern District of Florida have held that the involuntary dismissal of a foreclosure action does not affect the enforceability of the note and mortgage, and that subsequent foreclosure and acceleration actions could be brought for any payment default less than five years old – the statute of limitations for breach of contract actions in Florida.

Likewise, in *U.S. Bank Nat. Ass'n v. Bartram*, the Fifth District Court of Appeals explained, "... a default occurring after a failed foreclosure attempt creates a new cause of action for statute of limitations purposes, **even where acceleration had been triggered and the first case was dismissed on its merits** ... provided the subsequent foreclosure action on the subsequent defaults is brought within the limitations period."

While the current decisions seem to favor lenders, the existing state of the law should not be a basis to cease acting diligently as things could change. In *Bartam*, the Fifth District certified to the Florida Supreme Court the question of whether acceleration after involuntary dismissal of a foreclosure action would trigger application of the statute of limitations to prevent a subsequent foreclosure action based on subsequent payment defaults. The Florida Supreme Court has accepted jurisdiction and briefing is in progress.