

**NOTICE OF ASSIGNMENT OF DEBT NOT APPLICABLE TO
MORTGAGE LENDERS OR FORECLOSURES**

The District Court of Appeal of Florida, Second District, recently reversed a final summary judgment in borrowers' favor, holding that section 559.715 of the Florida Consumer Collection Practices Act (FCCPA) does not apply to the holder of the note and is not an affirmative defense to foreclosure actions because it does not create a condition precedent to an action to foreclose the mortgage and enforce the note.

A copy of the opinion is available at: [Link to Opinion](#).

A mortgagee filed a foreclosure action, attaching to the complaint a note and an allonge bearing an indorsement from the original lender in blank, the same day the note and mortgage were signed. The mortgage named MERS as the mortgagee acting as nominee for the original lender.

The mortgagee moved for summary judgment, filing the original note and allonge with blank indorsement along with an assignment of mortgage from MERS to the plaintiff dated a few months prior to the filing of the foreclosure action.

The borrowers filed a cross motion for summary judgment, arguing that the plaintiff mortgagee was not the original lender, and failed to give any notice of assignment supposedly required by section 559.715 of the FCCPA. The borrowers argued that the failure to comply with this condition precedent required summary judgment in their favor.

The trial court granted the borrowers' motion for summary judgment, from which the plaintiff mortgagee appealed.

On appeal, the mortgagee argued that "the trial court erred in concluding that the alleged failure to comply with section 559.715 is a legally sufficient affirmative defense to the filing of its foreclosure action [and that] section 559.715 is inapplicable to its foreclosure action because [it] is not a debt collector for purposes of the [FCCPA] ... [and] because the act of filing a foreclosure lawsuit is not debt collection activity for purposes of the FCCPA."

The Appellate Court began its analysis by considering "the express language of the FCCPA and the applicable sections of Florida's Uniform Commercial Code and Title XL of the Florida Statutes."

The Appellate Court noted that section 559.715 states that the FCCPA:

does not prohibit the assignment, by a creditor, of the right to bill and collect a consumer debt. However, the assignee must give the debtor written notice of such assignment as soon as practical after the assignment is made, but at least 30 days before any action to collect the debt. The assignee is the real party in interest and may bring an action to collect a debt that has been assigned to the assignee and is in default.

Florida Statutes, § 559.715.

The Court went on to explain that in a different context it had “implicitly determined that a promissory note secured by a mortgage is a consumer debt for purposes of the FCCPA.” In the case at bar, it was addressing “the applicability of the section 559.715 to [the mortgagee] based on [its] relationship to the debt, i.e., the note.”

The Appellate Court reasoned that the note was a negotiable instrument under Chapter 673 of Florida’s UCC and the mortgagee was “entitled to enforce the note not because it is an assignee of the right to bill and collect but because it meets the statutory definition of the holder of the note.”

Section 671.201, Florida Statutes (2011), defines “holder” as “[t]he person in possession of a [note] that is payable either to bearer or to an identified person that is the person in possession.” Accordingly, the Court reasoned, the mortgagee’s “possession of the note indorsed in blank is critical to its status as a holder.”

The Court then pointed out that “section 550.715 applies only to assignees of the right to bill and collect a consumer debt not to assignees of the debt itself” before concluding that “[s]ection 559.715 requires no action by the creditor or the note holder. It in no way impacts or limits the right of the note holder to file a foreclosure lawsuit. The right of the note holder to enforce the note exists regardless of an assignment to bill and collect the debt. ... Concluding that the assignee of the right to bill and collect the debt is the only real party in interest would run afoul of Florida law that the note holder has standing to enforce the note.”

The Court relied on its own recent holding that “section 559.715 does not create a condition precedent to the filing of a foreclosure lawsuit, even where enforcement of the note is sought.” *Brindise v. U.S. Bank Nat’l Ass’n*, 183 So. 3d 1215, 1219

(Fla. 2d DCA), review denied, No. SC16-300, 2016 WL 1122325 (Fla. Mar. 22, 2016).

The Court held that because the mortgagee “was not the assignee of the right to bill and collect the debt ... [but was] the holder of the note at the time the lawsuit was filed,” section 559.715 is inapplicable to the mortgagee.

Moreover, the Appellate Court held, this section is not an affirmative defense to a foreclosure action and does not create a condition precedent or in any other way avoids the claims to foreclose a mortgage and enforce a note.

Accordingly, the trial court’s summary judgment ruling in favor of the borrowers was reversed, and the case remanded for further proceedings.