

PUBLICATION

Legal Developments

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Louisiana

Legislative Changes to Louisiana Mortgage Cancellation Procedure

In an effort to end confusion and establish uniformity, the Louisiana Legislature has enacted revised mortgage cancellation procedures. House Bill 739, Act 337, effective August 15, 2007, amends and reenacts La. R.S. 9:3567 and La. R.S. 44:106(A), 109(A), and 110 and enacts La. R.S. 44:109.1 in connection with the cancellation of mortgages and vendor's privileges. Essentially a single uniform cancellation form is now available to "licensed financial institutions" in order to cancel a mortgage in any parish in the State of Louisiana. The form must identify the mortgagor and mortgagee, date of instrument, parish of recordation, recording data, legal description of the property secured, and language stating that the filer is a "licensed financial institution" and requires language limiting the clerk's liability. Execution by a bank officer and notary public is also required.

An affidavit of the closing notary is now also permitted to cancel a mortgage or vendor's privilege, when the debt has been paid but where the notary has lost the paraphed (marked for identification) note or other evidence of cancellation.

Lastly, in the instance where a title policy covering the immovable property is issued when the paraphed note or other evidence of cancellation is lost, an officer of a title insurer may now file an affidavit to cancel a mortgage or vendor's privilege.

Arbitration Clause Voids Louisiana's Expedited Foreclosure Remedy Known as Executory Process

In *Ellis Construction, Inc. v. Vieux Carre Resort Properties*, 934 So. 2d 206 (La. App. 4th Cir. 6/07/06), the Fourth Circuit Court of Appeal addressed the effect of an arbitration clause contained in a construction contract on a collateral (future advance) mortgage securing the amounts due under the construction contract. Although the collateral mortgage satisfied all of the requirements in order to obtain Louisiana's expedited foreclosure remedy known as executory process, the Court held that the debtor was entitled to an injunction, because a suspensive condition to the seizure and sale had not yet been satisfied: arbitration of the amount owed by the debtor as required by the construction contract. The Court recognized that executory process is intended to grant accelerated relief to creditors in a summary proceeding without a trial, but that parties are free to contract on their own terms as long as the terms are not illegal or prohibited by statute. This decision was also based on the strong presumption in favor of upholding arbitration agreements and the fact that the debt in dispute was covered by the arbitration clause contained in the construction contract. Thus, the contractor, as a creditor, unknowingly contracted around the use of executory process which is permitted by Louisiana law. The use of arbitration provisions in loan documents must be carefully considered in light of the possible loss of executory process.

Subprime Mortgage Woes Continue

The subprime mortgage meltdown continues to have far reaching adverse effects on the U.S. economy. As the situation continues to worsen, it is clear that all those involved in the subprime mortgage process including

originators, servicers, mortgage-backed securities participants, investors and their D&O or E&O insurers all face potential increases in litigation and claims. The tightening of credit has substantial implications beyond the housing and financial services industries. These challenges call for knowledgeable counsel with the bench strength and experience to respond appropriately. Baker Donelson was one of the first firms to focus on the crisis by creating a Subprime Mortgage Task Force, a multi-disciplinary practice group of attorneys from across Baker Donelson's five-state southern U.S. and Washington, D.C. geographic footprint. Baker Donelson represents more than 100 mortgage lenders and servicers, mortgage investors, banks, savings and loans, finance companies, credit unions, holding companies, and other financial institutions in connection with litigation, transactional, structural, regulatory, legislative and corporate matters unique to such businesses. For more information on the Baker Donelson Subprime Mortgage Task Force please visit www.bakerdonelson.com/subprime.

Other Areas

Prepayment Premium on Commercial Real Estate Loan Upheld The Seventh Circuit case of *River East Plaza V. Variable Annuity Life Insurance Co.*, No. 06- 3856, 2007 WL 2377383 (7th Cir. Aug 23, 2007) has upheld the enforcement of a prepayment premium in a fixed rate commercial real estate loan. The court reversed the decision of the district court which had held that such provision was an unenforceable penalty. The court of appeals reasoned that the borrower was given an alternative means of performing the contract. The court also noted that there were no Illinois decisions holding that the prepayment clause was an impermissible liquidated damages provision.