

PUBLICATION

Georgia Court of Appeals Revises Georgia Foreclosure Statute

July 31, 2012

Continuing the trend of state appellate courts towards "judicial legislation," the Georgia Court of Appeals, on July 12, 2012, issued an opinion effectively revising the statutory requirement regarding notice of foreclosure. That decision, *Reese v. Provident Funding Associates, LLP*, finds that the Georgia foreclosure statute [O.C.G.A. § 44-14-162.2] requires that a material element of the foreclosure notice is disclosure of the identity of the secured creditor.

While the principal ruling in *Reese* may be an attempt by the court to provide clarity to borrowers, the decision creates significant confusion for both borrowers and lenders. The decision effectively makes the identity of a secured creditor a material element of the foreclosure notice, but fails to provide a definition of the term and ignores other Georgia statute and case law defining the term.

In the decision, the court notes that Mortgage Electronic Registrations Systems, Inc. (MERS) was the grantee under the Security Deed on the date that the notice of foreclosure was sent. This would seem to suggest that MERS could be considered the secured creditor at the time notice was given. But the court did not reconcile this position with O.C.G.A. § 44-14-162(b), which requires that the assignment vesting the secured creditor with title to the security instrument be filed before the time of the foreclosure sale. Although the court found that Provident was a loan servicer and not the secured creditor, the court did not address the fact that MERS (the grantee of the security deed) assigned the Security Deed and the underlying debt to Provident prior to foreclosure.

Simply put, this opinion creates a great deal of uncertainty about who may be identified as a secured creditor for purposes of compliance with the decision. Without further clarification, through reconsideration or from the Supreme Court of Georgia, this opinion will create new liability for lenders and servicers, and make numerous foreclosures that were proper when they occurred, improper.

At the time of this writing, Provident Funding had applied to the court for rehearing and was denied. The next step is further appeal to the Supreme Court of Georgia.