PADGETT LAW GROUP

A people-driven place with a passion for performance and precision.


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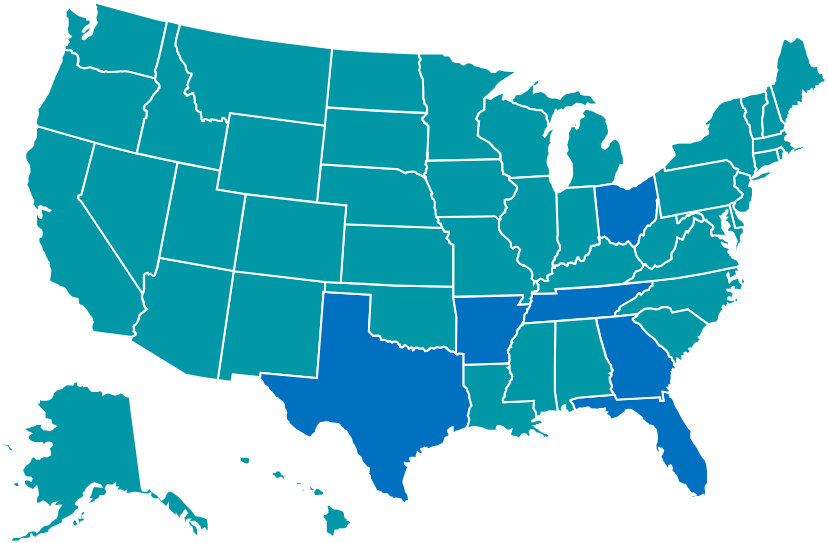
Steven Hurley | Jennifer McCall | Joshua Epling

Padgett Law Group Footprint



FLORIDA +
GEORGIA +
ARKANSAS +
TENNESSEE +
TEXAS+
OHIO

National Bankruptcy and Replevin Work

Full Service Practice

State Snapshot – Georgia

Georgia Foreclosure 101

Non-Judicial State

- Three Types of Security Instruments:
  - Mortgage
  - Deed of Trust
  - Security Deed

Georgia Non-Judicial Foreclosure Requirements

- Lender must hold a security interest
  - O.C.G.A. §44-14-162(b)
- Power of Sale Clause
- Defect-free Security Deed
- SCRA and Bankruptcy checks

Georgia Foreclosure Process

- **First Step**: Default
  - Default occurs under the terms of the Note or Security Deed
- **Second Step:** Notice of intent to foreclose
  - O.C.G.A. §44-14-162.2(a)
  - Notice must be sent no later than 30 days prior to sale
  - Must include the name, address, and telephone number of the entity that has authority to negotiate, amend, and modify all terms of the mortgage with the Debtor
  - Sent via registered or certified mail, return receipt requested
- **Third Step**: Publication of Notice of Sale
  - O.C.G.A. §44-14-162(a)
  - Statutory requirement to provide a full and complete description of the property
  - Notice must be published in the county in which the real property is located and run for 4 consecutive weeks prior to sale
  - Advertisement must specify the time and place of the scheduled sale

Georgia Foreclosure Process cont.

- **Fourth Step:** Foreclosure auction held
  - O.C.G.A. §9-13-140
  - Held first Tuesday of each month between the hours of 10am and 4pm
  - Takes place at the county courthouse
  - Property sold to the highest bidder
    - Lender
    - Third Party Purchaser
- **Fifth Step:** Recording of post-foreclosure deeds
  - O.C.G.A. §44-14-160
  - Deed Under Power
  - DUP must be recorded within 90 days of sale

Most Common Title Issues in Georgia

- Legal Description Error
- Missing Interest
- Attestation

Acknowledgment v. Attestation

- **All Georgia deeds must be:**
  - Signed by the maker,
  - Attested by an officer as provided in Code Section 44-2-15 (usually, a notary), and
  - Attested by one other witness.
- **Attested v. Acknowledged**
  - Acknowledgment: signor states the deed was signed
  - Attestation: notary actually witnesses the signor execute the deed (“signed, sealed and delivered in front of me”; “signed in my presence”; “signed before me”)
- **Possible bankruptcy ramifications of notary acknowledgment**
  - Wells Fargo Bank, N.A. v. Gordon

Georgia Foreclosure Conclusion

- Confirm clear title
- Adhere to non-judicial foreclosure statutes
- Timely record post-foreclosure deeds

State Snapshot – Ohio

Servicer Transfers In The Age Of Schwartzwald

Industry Trends in Servicing Transfers

The sale and transfer of mortgage servicing is common within the industry and continues to increase. A mortgage transfer to a different servicer may be facilitated by:

- An effort to improve mortgage servicing performance;
- By a mortgage servicer's failure to meet contractual requirements;
- Regulatory changes;
- Changes in servicing profitability that may prompt lenders to reduce or increase their holdings;
- Changes in investors who have contractual agreements with other servicers.

Federal Home Loan Mort. Corp. v. Schwartzwald

In 2012, the Ohio Supreme Court changed the scope of the foreclosure industry as we know it when it rendered its decision in *Federal Home Loan Mort. Corp. v. Schwartzwald.* Schwartzwald requires a Plaintiff to have standing by holding the note and/or mortgage at the time a complaint in foreclosure is filed. The practical application of the holding required plaintiffs to include endorsed notes and assignments of mortgage as exhibits to its foreclosure complaint.

However, Schwartzwald does not require or prohibit substitution of the plaintiff when a transfer of interest in the note or mortgage occurs subsequent to commencement of the suit.

Federal Home Loan Mort. Corp. v. Schwartzwald, 2012-Ohio-5017, 1344 Ohio St.3d 13, 979 N.E.2d 1214, 1220

Ohio Rules of Civil Procedure 17(A) vs. 25(C)

“Every action shall be prosecuted in the name of the real party in interest.” Civ.R. 17(A).

“In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party.” Civ.R. 25(C).

An Action may be prosecuted by the original party even after a transfer of interest

Ohio Appellate Courts have applied the plain meaning of Civ.R. 25 by holding that actions may be prosecuted by the original party even after a transfer of interest:

“Because Civ.R. 25(C) provides that the proceedings may be continued by or against the original party, “[t]he rule does not require that a substitution of parties be made.”

Waterfall Victoria Master Fund 2008 1 v. Rittenhouse, 2018-Ohio-1791, 2018 Ohio App. LEXIS 1917, 2018 WL 2095709, citing *Midwest Business Capital v. RFS Pyramid Mgt.*, 11th Dist. Trumbull No. 2011-T-0030, 2011-Ohio-6214, ¶ 23.

The Ohio Supreme Court Weighs In

"Civil Rule 25(C) provides that an action may be continued by or against the original party where a transfer of interest has occurred. The rule does not require that a substitution of parties be made. To the contrary, the rule provides that the action may be continued against the original party. While the rule provides that a substitution of parties may be directed by the court, upon proper motion, it does not condition subject matter jurisdiction upon substitution of the successor party in interest."

Krischbaum v. Dillon, 58 Ohio St. 3d 58, 567 N.E.2d 1291 (1991).

Benefits of Proceeding in the Name of the Original Plaintiff

- Proceeding in the name of the original party/plaintiff allows the case to proceed without unnecessary delay.
- No motions for substitution of party/plaintiff will need to be prepared and filed.
- No delay or cost associated with having to attend a hearing on a motion to substitute party/plaintiff.

State Snapshot – Florida

Florida Foreclosure 101

- Judicial State
- Borrowers sign two separate instruments: the promissory note and mortgage. The party that signs the note is personally liable for the debt.
- Florida is an original document state, which means in order to file suit, Plaintiff must certify as to possession of the Original Note and that its location must be determined and specified in said certification. See Fla. Stat. 702.015(4).
- If the note is lost, a Lost Note Affidavit should be executed pursuant to Fla. Stat. 673.3091 and 702.015(5).
- Demand Letter must substantially comply with the terms of the loan documents.
- Standing must be proven twice: 1) when the complaint is filed, and 2) at the judgment hearing.

Florida Litigation Hot Topics

Mailing Demand Letters

- Servicer witness must be trained on the mailing procedures.
- Third Party Vendors can mail demand letters for servicers. However, the witness should receive training from the vendor so they are familiar with the mailing practices of the third party.
- Introduction of the demand letter itself, without proof of mailing and witness testimony, is insufficient to establish the letter was mailed and could result in a dismissal.
- Additional evidence is needed to establish demand letters were properly mailed to the borrower (i.e. mailing receipt or letter log).
- See ***Roesch v. U.S. Bank, National Association***, Case No. 2d-18-1686, Fla. 2d DCA (April 15, 2020). "The fact that a document is drafted is insufficient in itself to establish that it was mailed… [M]ailing must be proven by producing additional evidence…" (citations & quotations omitted).

Florida Litigation Hot Topics

Prior Servicer Records and the Boarding Process

- Upon a servicer transfer, incorporating and boarding the prior servicer records into your system is absolutely necessary in order to testify at trial.
- The Business Records exception to the hearsay rule allows the current servicer witness to testify to records from the prior servicer. However, the proper foundation must be laid. When boarding the loan, the prior servicer(s) data must be reviewed and approved as accurate before the loan can be officially boarded.
- The witness does not have to work in the boarding or loan transfer department. Instead, the witness will need training to establish they are familiar with the boarding policies and procedures.
- The boarding process is dissected by nearly every opposing counsel and judge if there has been a servicer transferred at least one time during the life of the loan.

Attorneys' Fees Based on Standing

- The different jurisdictions throughout Florida are split on how to assess whether the borrower is entitled to attorneys' fees if they prevail due to standing.
- Florida follows the "American Rule" that attorney's fees may be awarded only when authorized by contract or statute. Typically defense counsel seek fees pursuant to the mortgage fee provision and the reciprocity provision of section 57.105(7), Florida Statutes.
- Second and Fifth District Court of Appeals (DCA)
    - Regardless of the borrower prevailing on a "lack of standing" defense, the borrower is entitled to fees **if there was proof of a contract between the parties at the time of trial.** *Harris v. Bank of New York Mellon,* (Fla. 2d DCA 2018); and *Madl v. Wells Fargo Bank, N.A.*, (Fla. 5th DCA 2017); see also *Jones v. U.S. Bank Trust, N.A.*, (2d DCA 2020), where the borrower was not entitled to fees because there was no proof of contract ever established (emphasis added).
- Third DCA
    - A party that prevails on its argument that dismissal is required because the plaintiff lacked standing to sue upon the contract cannot recover fees based upon a provision in that same contract. *Bank of N.Y. Mellon Tr. Co., N.A. v. Fitzgerald*, 215 So. 3d 116, 121 (Fla. 3d DCA 2017)
- Fourth DCA
    - **NO STANDING = NO ATTORNEYS' FEES**. *Nationstar v. Faramarz,* 275 So. 3d 668 (Fla. 4th DCA 2019).

Florida Governor's Executive Order 20-180

"Limited Extension of Mortgage Foreclosure and Eviction Relief"

- On April 2, 2020, Governor Desantis executed Executive Order 20-94 which prevented mortgagees from filing foreclosure and eviction actions.
- However, on July 29, 2020, Desantis executed Executive Order 20-180, which amended 20-94.
- Executive Order 20-180 extended the foreclosure moratorium until Sept. 1, 2020, but also made some significant carve-outs which will allow for foreclosure files to be initiated and progress through the court system. The moratorium now only prohibits the "final action" in a mortgage foreclosure actions, and only applies to single-family mortgages where non-payment is due to the COVID pandemic.
- It is **Padgett Law Group's** reading of the amended moratorium that it would not apply to loans where the default occurred prior to the issuance of the state of emergency in Florida. Additionally, we expect different counties/judges to interpret "final action" to be either sale, certificate of title, or eviction.
- In summary, absent an investor restriction, a mortgage foreclosure may be initiated and moved all the way to "final action" under the amended moratorium, and in some circumstances through the sale and eviction stage.

Q&A

JOSHUA EPLING
Supervising Attorney - Ohio
Joshua.Epling@Padgettlawgroup.com

JENNIFER MCCALL
Supervising Attorney - Georgia
Jennifer.McCall@Padgettlawgroup.com

STEVEN HURLEY
Supervising Attorney - Florida
Steven.Hurley@Padgettlawgroup.com

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