The Lender's Source

MOORE CLARKE DUVALL & RODGERS
ATTORNEYS AT LAW

Regulators Propose Broader Exclusion from Title XI Appraisal Requirements

On December 8th, the FDIC, OCC, and Federal Reserve Board of Governors published a notice of proposed rulemaking that, if finally adopted by these agencies, would substantially raise the value threshold below which appraisals would not be required for residential real estate transactions.

Title XI of FIRREA authorizes regulating agencies to establish transaction thresholds below which a Title XI appraisal (meaning a written appraisal performed in accordance with USPAP standards) will not be required. Under the rules currently in effect, the agencies have exercised this authority to determine that Title XI appraisals are not required for residential real estate transactions with a value of $250,000 or less. For transactions below this threshold, the lending institution need only perform a collateral evaluation consistent with safe and sound banking practices, rather than obtaining a full Title XI appraisal. This lenience is intended to reduce the cost burden imposed on lenders and borrowers in transactions that are likely to pose only minimal risks to soundness of the lenders.

The new proposed rule would increase the value threshold for residential real estate transactions from $250,000 to $400,000. This would mean a substantial increase in Georgia homes falling below the Title XI appraisal threshold. As under the current rule, collateral evaluation would be required for all transactions falling below the threshold.

The proposed rule would also make a few other changes. It would clarify that lenders must conduct collateral evaluations for rural-area residential transactions that are otherwise exempt from Title XI appraisal requirements by operation of the Economic Growth, Regulatory Relief and Consumer Protection Act. It would also impose, within the context of the appraisal rules, a requirement that lenders must appropriately review appraisals for federally-related transactions for compliance with USPAP standards. This requirement is currently mandated by statute (Section 1473(e) of the Dodd-Frank Act), but not yet incorporated into existing appraisal rules of the agencies.

The agencies are accepting public comments on the proposed rule until February 5, 2019. They are also consulting with the BCFP, which must consent to any increase in the appraisal threshold.

Chapter 13 Bankruptcy: Appeals Court Confirms Post-Discharge Liability on Mortgage to be Paid "Outside" of Plan

Confronting an issue of first impression, the U.S. Court of Appeals for the 11th Circuit recently held that a debtor remained liable on her home mortgage debt despite completion of all Chapter 13 plan payments, as the plan terms did not provide for repayment of the mortgage debt.

The facts confronting the court in the opinion (designated as *In re: Dukes*) involved a debtor whose home was encumbered by two mortgages in favor of the same credit union. The debtor filed for Chapter 13 bankruptcy in 2009 while current on both mortgages. Without objection from the credit union, the debtor obtained court confirmation of a plan providing that any payments on the mortgages would be paid directly to the credit union, rather than through the trustee. The plan did not include a repayment schedule for either mortgage.

The debtor timely made all payments specifically required by the plan. However, the debtor ceased payment of the mortgages entirely. In 2012, after completion of the plan payments, the court issued an order discharging the debtor from all debts "provided for" by the plan. The credit union thereafter foreclosed on the debtor's home under the second mortgage, and filed a proceeding in the bankruptcy court to confirm the debtor remained liable for payment of the first mortgage. Both the bankruptcy court and district court found the debtor had not been discharged from her mortgage debts. The debtor appealed.

To determine the issue, the Court of Appeals looked to whether the mortgage debts had been "provided for" by the plan. Under bankruptcy law,

and under the bankruptcy court's own order, the discharge only applied to debts that had been provided for in the plan. The Court of Appeals noted that it had never before addressed the issue of whether a plan *provides for* a debt where it merely declares that any payments on the debt will be made directly to the named creditor.

The debtor argued that because the plan made specific reference to the credit union and mortgage debts, and stated a method for payment (payment outside the plan), the plan sufficiently *provided for* the debts so as to warrant discharge. The Court disagreed. It noted that nothing in the plan set forth specific repayment terms or a repayment schedule for either mortgage. The effect of the plan was to leave the parties' rights governed by the mortgage documents rather than the plan—in other words, to exclude the mortgages from the plan. Having chosen to exclude the mortgages from the constraints of the plan, the debtor could not thereafter change tack and assert that the plan governed repayment and thus required discharge. Per the Court, "Debtor's argument amounts to wanting something for nothing, after Debtor expressly stated that she wanted nothing." As the plan itself did not supply terms for repayment it did not *provide for* the mortgages so as to require discharge.

The Court further held that discharge of the mortgage debt, without the credit union's consent, would violate Chapter 13 bankruptcy law. Section 1322(b) restricts a plan from modifying the rights of a creditor whose claim is secured only by an interest in the debtor's residence. The credit union was just such a creditor, and it had not agreed to modify any of the terms of the mortgages. Under the terms of the mortgage documents, the debtor was to remain personally liable for payment of the mortgage debts. To allow discharge of the debt upon completion of the plan payments (which, again, did not include mortgage payments) would be an impermissible modification of the credit union's rights.

The Court of Appeals' logic in *In re: Dukes* is largely consistent with other federal courts that previously have addressed the same issue. However, the opinion is important as it sets binding precedent within the Eleventh Circuit (which includes bankruptcy courts and federal district courts within the States of Georgia, Alabama, and Florida). The opinion's reach is not unlimited—again, it centered on a plan that featured no mortgage repayment or modification terms—but it should provide some comfort to residential mortgage creditors dealing with such a situation.

Court of Appeals Preserves Borrower's Fraud Claim Against Mortgage Servicer

The recent opinion by the U.S. Court of Appeals for the 11th Circuit in *Harbin v. Roundpoint Mortgage Company* provides a valuable example of the trouble a lender or servicer may encounter as a result of misrepresentations made to a borrower in post-default negotiations. The facts underlying the opinion featured a borrower who had defaulted on her home mortgage. The mortgage servicer accelerated the loan, and scheduled foreclosure to occur in April of 2015. Later, as part of a temporary forbearance agreement with the borrower, the foreclosure was rescheduled for June 3, 2015.

Slightly more than one week before the rescheduled foreclosure, the borrower submitted a loan modification application to the servicer. Four days later, on May 29, the borrower called the servicer to inquire about the status of her application. In what was apparently a lengthy phone call, the servicer employee informed the borrower that her application was incomplete but the servicer would "try to do what we can to get the [foreclosure] postponed." The borrower explained that she needed more time to attempt to save her home from foreclosure, and that she was considering bankruptcy to obtain additional time if the servicer did not agree to postponement. During the course of the call, the employee consulted two co-employees and finally advised the borrower that "it does look like it [the foreclosure] has been suspended temporarily."

During subsequent emails on the same day, the servicer employee advised the borrower of the specific documents needed to complete the loan application. The borrower asked for confirmation that the June 3rd foreclosure was to be postponed. The employee responded via email that "the foreclosure has been suspended temporarily." Nonetheless, the servicer foreclosed on June 3rd.

After learning of the foreclosure, the borrower sued the servicer for various claims including fraud. The district court dismissed the fraud claim without a trial, finding that the borrower could not have reasonably relied on the employee's representations regarding "suspension" of the planned foreclosure sale date.

On appeal, the Court of Appeals disagreed and reinstated the fraud claim. It noted that a reasonable jury could find that the borrower reasonably understood and relied upon the employee's representations to mean that the foreclosure would be postponed to a date after June 3. Further, the employee's representations had been false at the time they were made as the servicer did not then intend to delay the foreclosure. Per the Court of Appeals, a reasonable jury could also find that, by not filing for bankruptcy protection to forestall the foreclosure, the borrower had acted to her detriment on the employee's misrepresentations and had suffered compensable damages from the loss of her home.

On these bases, the Court vacated the district court's dismissal of the fraud claim. As a result, the claim will now be returned to the district court for a jury to determine whether, and what amount, the borrower may recover on her fraud claim.

Understanding the UCC-1: Filing and Notice Requirements for PMSI Super-Priority

By carefully following UCC filing and notice requirements, an institution that extends credit to enable a debtor to purchase collateral may obtain priority over earlier-filed floating or "blanket" security interests against the debtor. This special priority is often referred to as *super-priority*.

Lenders must always keep a couple of key concepts in mind. First, super-priority does not automatically result from extending purchase money credit. If special filing and notice requirements are not satisfied, the normal "first to file" rule of priority will apply. Second, failure to meet all requirements for super-priority is not necessarily fatal to the lender's position. If a UCC-1 is properly filed—even if after the narrow super-priority time windows—the lender may still have a perfected security interest that will prevail over later-filing creditors.

For collateral other than inventory and livestock, the requirements for super-priority are simple. So long as the lender properly files a UCC-1 covering the purchase money collateral within 20 days after the debtor takes possession of the collateral, the lender will have priority over earlier-filed or later-filing non-PMSI secured creditors. If instead the lender files more than 20 days after the debtor takes possession, the lender will have inferior priority to earlier-filed secured creditors but superior priority to later-filing non-PMSI secured creditors.

If the collateral is inventory or livestock, the requirements for super-priority are stricter. First, there is no 20-day "grace period" for filing a UCC-1. The purchase money lender will only obtain super-priority if it files *before* the debtor obtains possession of the collateral. Second, the lender must also provide timely written notice directly to the competing earlier-filed creditor as to which priority is desired.

Regardless of whether the collateral is inventory or livestock, the written notice must be signed by the lender, describe the type of collateral at issue, state that the lender intends to acquire a purchase money security interest in that collateral, and be received by the competing creditor before the debtor takes possession of the collateral. For livestock collateral, the competing creditor must receive the notice within six months before the debtor takes possession. For inventory, the competing creditor must receive the notice within five years before the debtor takes possession (a much more generous timeframe). If a competing earlier-filed creditor does not timely receive a proper written notice from the purchase money lender, the competing creditor may have superior priority. Likewise, if the purchase money lender has not filed its UCC-1 before the debtor takes possession, earlier-filed creditors will be entitled to priority.

The UCC is drafted to encourage purchase money lending, and offers super-priority as a valuable advantage. Lenders should act carefully to secure this advantage. But again, the value of the advantage is largely restricted to debtors subject to earlier-filed perfected blanket security interests. Absent such a perfected interest, the purchase money lender can rely on proper filing as protection for the priority of its security interest.

MOORE CLARKE DUVALL & RODGERS
ATTORNEYS AT LAW

Have Questions? Contact Us.

Albany
2829 Old Dawson Road
Albany, Georgia 31707
Tel. 229-888-3338

Valdosta
2611 N. Patterson Street
Valdosta, Georgia 31604
Tel. 229-245-7823

Atlanta
900 Circle 75 Parkway
Suite 1175
Atlanta, Georgia 30339
Tel. 770-563-9339

Savannah
33 Bull Street
Suite 203
Savannah, Georgia 31401
Tel. 912-234-0995

E-mail
businesslaw@mcdr-law.com

Visit us on the internet at:
www.mcdr-law.com

New Email Address?
Not on Our Contact List?

If you wish to continue to receive future issues of this newsletter, please let us know if your email address should change. Additionally, if you do not currently receive the newsletter directly via email but would like to do so in the future, we will be happy to add you to our contact list. At your convenience, please send an email message to businesslaw@mcdr-law.com with your email contact information.

Visit Our Website.

You can find this issue and previous issues of our newsletter, as well as useful information and commentary on a variety of other legal topics, on our firm's website located at www.mcdr-law.com. Future editions of this newsletter will be added to the website as they are prepared.

This newsletter is a publication and product of the law firm of Moore, Clarke, DuVall & Rodgers, P.C. The information contained in this newsletter is not intended to be, nor does it constitute, legal advice. Further, nothing in this newsletter creates or imposes an attorney-client relationship between the firm and any recipient or reader.

Selection of a law firm for your institution is an important decision that should be based upon a thorough assessment of the firm members' levels of skill, competence, and experience. Before you decide, ask us to send you free written information regarding our firm's qualifications.