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WHEN A RIGHT TO ARBITRATE CAN BE REVIVED: GRAYROBINSON BREAKS NEW GROUND

By: David S. Hendrix, Esq. & Alissa McKee Ellison, Esq.

In a case of first impression, GrayRobinson attorneys successfully represented SunTrust Bank in an appeal before the Eleventh Circuit Court of Appeals. The case resulted in the unprecedented decision that a defendant's previous waiver of a right to compel arbitration can be rescinded and avoided when a plaintiff files an amended pleading that alters the scope of the litigation.

In *Krinsk v. SunTrust Banks, Inc., et al.*, the Plaintiff filed a putative class action against three Defendants, including SunTrust Bank. The Plaintiff asserted causes of action based on allegations that SunTrust improperly suspended its customers' access to credit under their home equity lines of credit ("HELOCs"). The original Complaint sought to certify a class of customers over the age of sixty-five who had their HELOCs suspended by SunTrust for failing to provide updated financial information to the bank over a three month period. *Krinsk v. SunTrust Banks, Inc., et al.*, 654 F.3d 1194, 1198 (11th Cir. 2011).

Although the Plaintiff's HELOC agreement contained an arbitration provision that included both a class action waiver and a requirement that the Plaintiff arbitrate her claims on a bilateral basis, SunTrust elected not to arbitrate Plaintiff's claims as presented in the original Complaint. This decision was, in part, due to the limited number of class plaintiffs falling into the original class definition. Accordingly, SunTrust moved to dismiss the original Complaint and levied what was referred to as "a vigorous defense against and opposition to class certification and class discovery." *Id.*

The district court ultimately granted SunTrust's Motion to Dismiss, in part, and allowed the Plaintiff twenty days to file an amended complaint. *Id.* at 1199. As a result, the Plaintiff subsequently filed an amended complaint which asserted substantially similar causes of action against SunTrust. *Id.* However, the Amended Complaint altered the class definition to eliminate the age restriction, enlarged the class period from three months to three years, and expanded the potential class from those whose accounts had been suspended or reduced for failing to provide updated financial information to those whose accounts had been suspended or reduced for any reason whatsoever. *Id.* The change in the proposed class definition effectively resulted in the putative class increasing from hundreds of potential members to tens of thousands. *Id.*

In response to the Amended Complaint, SunTrust filed a Motion to Compel Arbitration and an Answer and Affirmative Defenses asserting SunTrust's right to have the Plaintiff's claims arbitrated on a bilateral basis in accordance with the arbitration clause included in the HELOC agreement between the parties. *Id.* The district court denied SunTrust's Motion to Compel Arbitration, finding that SunTrust had waived its right to arbitrate by virtue of its participation in the litigation. *Id.* at 1200. Specifically, the district court found that SunTrust had acted inconsistently with regard to its arbitration right, and that the Plaintiff was prejudiced by SunTrust's actions. *Id.* The district court also found the fact that an Amended Complaint was filed "immaterial," as both the original Complaint and Amended Complaint were based on the same operative facts. *Id.* at 1201.

SunTrust appealed the district court's decision to the Eleventh Circuit, arguing that the Amended Complaint revived its right to have Plaintiff's claims arbitrated. *Id.* at 1202. SunTrust

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SUSPICIOUS ACTIVITY REPORTS

By: David S. Hendrix, Esq. & Veronica A. Meza, Esq.

In 1992, Congress passed the Annunzio-Wylie Anti-Money Laundering Act (the "Act"), which requires banks to report suspicious activities to the appropriate federal authorities. *Cotton v. Privatebank and Trust Co.*, 235 F. Supp. 2d 809, 812 (N.D. Ill. 2002). The laudable goal of the Act was to encourage banks to make reports related to criminal activities. *Id.*

Financial institutions and their current and former directors, officers, employees, agents and contractors are prohibited from disclosing Suspicious Activity Reports ("SARs") or any information that would reveal the existence of a SAR. *See* 31 CFR §§ 1020.320(e), 1021.320(e), 1022.320(d), 1023.320(3), 1024.320(d), 1025.320(e), and 1026.320(e). In fact, the unauthorized disclosure of a SAR is a violation of federal law, and financial institutions, as well as their current and former directors, officers, employees, agents and contractors could be subject to civil and criminal penalties for the unauthorized disclosure of a SAR. *See* 31 U.S.C. §§ 5318(g)(2), 5321, and 5322; *see also* 31 CFR § 1010.820. Violations may be enforced through civil penalties of up to $100,000 per violation, criminal penalties of up to $250,000 and/or imprisonment not to exceed five years. *See* 31 U.S.C. § 5322; *see also* 31 CFR §§ 1010.840 and 103.59(c) (Criminal penalties may increase if the violation is committed while violating another law of the United States or as part of a pattern of illegal activity).

Moreover, it is established that "the prohibition against disclosing a SAR protects from discovery not just the SAR and its contents, ***but also information that would disclose preparation of a SAR***." *Regions Bank v. Allen*, 33 So.3d 72 (Fla. 5th DCA 2010) (*citing Whitney Nat'l Bank v. Karam*, 306 F. Supp. 2d 678, 682 (S.D. Tex. 2004)) (emphasis added). The Act "creates an unqualified discovery and evidentiary privilege." *Id.* However, it has been held that "supporting documentation" underlying a SAR that is "***generated or received in the ordinary course of a bank's business is discoverable***." *Id.* (emphasis added).

In applying this analysis, it has been held that the Act essentially creates two separate categories or "buckets" of supporting documents, described as follows:

The first category represents the factual documents which give rise to suspicious conduct. These are to be produced in the ordinary course of discovery because they are business records made in the ordinary course of business. The second category is documents representing drafts of SARs or other work product or privileged communications that relate to the SAR itself. These are not to be produced

> because they would disclose whether a SAR has been prepared or filed. Thus, transactional and account documents such as wire transfers, statements, checks, and deposit slips are the types of documents generated in the ordinary course of business that are subject to discovery. Such documents would be prepared regardless of whether a financial institution has an obligation to report suspicious activity to the federal government.
>
> By contrast, a draft SAR or internal memorandum prepared as part of a financial institution's process for complying with federal reporting requirements is generated for the specific purpose of fulfilling the institution's reporting obligation. These types of documents fall within the scope of the SAR privilege because they may reveal the contents of a SAR and disclose whether "a SAR has been prepared or filed." (12 C.F.R. § 21.11(k) (2005)). Unlike transactional documents, which are evidence of suspicious conduct, draft SAR's and other internal memoranda or forms that are part of the process of filing SAR's are created to report suspicious conduct.

Regions Bank at 76-77 (internal citations omitted); see also *United States v. LaCost*, 2011 WL 1542072 (C.D. Ill. April 22, 2011) (emphasis added). In other words, any documentation or information that may reveal the content of a SAR or whether a SAR has been prepared or filed is prohibited from disclosure.

The prohibitions found in the Act are so significant that recently the Department of the Treasury Financial Crimes Enforcement Network ("FinCEN") issued an advisory to financial institutions, reminding them, "and in particular, the lawyers that advise them," of the confidentiality surrounding SARs. *See* SAR Confidentiality Reminder for Internal and External Counsel of Financial Institutions ("FinCEN SAR Advisory"), FIN-2012-A002 (March 2, 2012), available at http://www.fincen.gov/statutes_regs/guidance/pdf/FIN-2012-A002.pdf.

FinCEN expressly reinforced the fact that "**any information that would reveal the existence of a SAR**" should not be disclosed, and further stated that it "is concerned that an increasing number of private parties, who are not authorized to know the existence of filed SARs, are seeking SARs from financial institutions for use in civil litigation and other matters." *Id.* FinCEN emphasized that the unauthorized "disclosure of SARs compromises the essential role SARs play in protecting our financial system and in preventing and detecting crimes and terrorist financing . . . The success of the SAR reporting system depends upon the financial sector's confidence that these reports will be appropriately protected." *Id.* The FinCEN SAR Advisory also reiterates the stiff civil and criminal penalties associated with disclosure, and directed financial institutions that receive a subpoena or request for SAR information to contact FinCEN's Office of Chief Counsel "immediately."

The FinCEN SAR Advisory not only reinforces a financial institution's responsibility to keep all SAR information confidential, but also bolsters the undisputable necessity of maintaining this confidentiality to prevent financial crimes and terrorist activity. Therefore, financial institutions and their attorneys should proceed with caution when producing investigatory materials and implement all necessary measures to make sure that SARs, or any information related to or revealing the existence of SARs, are not inadvertently produced.

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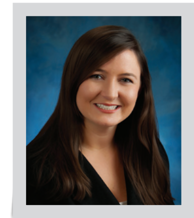

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THE CURRENT STATE OF FORECLOSURES IN FLORIDA: DEFEATING STANDING ATTACKS AND THE MERS ASSIGNMENT ARGUMENT

By: Mark Schellhase, Esq.

When a lender files a foreclosure lawsuit alleging the right to enforce the note and mortgage, yet the lender is not reflected as the mortgagee of record in the loan documents and there is no recorded assignment of mortgage, the defendant will likely raise lack of standing as a defense to the foreclosure action. To overcome this defense, the plaintiff must take care to allege the chain of title adequately, and ensure that the loan documents attached to the complaint do not contradict the plaintiff's representation that it has the right to enforce the note and mortgage as the owner and holder of the loan documents. Additionally, Florida Rule of Civil Procedure 1.110(b), as amended, requires that complaints involving residential real property be verified and signed by a representative of the lender, under penalty of perjury, attesting that all facts within the lawsuit are true to the best of his or her knowledge and belief. From the lender's perspective, another frequent consideration in defeating the standing attack concerns the lender's relationship with Mortgage Electronic Registration Systems, Inc. ("MERS"). MERS is a private organization that tracks mortgages on its electronic registry, and is often designated as the nominee for the lender on the loan documents.

Under current Florida law, executing an assignment of mortgage from MERS to the plaintiff after the foreclosure action is instituted is not a fatal problem for lenders. In the Florida Supreme Court's seminal decision *Johns v. Gillian*, the Court considered facts in which a written assignment with a defective seal was executed after a foreclosure suit was filed. 184 So. 140, 141 (Fla. 1938). The Court noted that while a corporate seal is a statutory requirement, it will not preclude a mortgagee from being foreclosed upon by the assignee of the loan documents, where the facts reflect that the note and mortgage were transferred by the owner and holder to the assignee. *Id.* at 143-44. The Court held that the lender's mere transfer of the note and mortgage was sufficient to reflect the transfer, and that the mortgage passes in equity as an incident of debt even without a formal assignment. *Id.* Although the executed assignment of the mortgage from the original lender to the plaintiff was defective for lack of proper corporate seal in that case, the assignment was taken as evidence that the company had, before the commencement of the suit, sold and transferred its entire interest in the loan to the plaintiff. *Id.*

Similarly, in an April 2011 decision, the Fourth District Court of Appeal considered whether Deutsche Bank had standing to bring the foreclosure action and whether summary judgment was properly entered in its favor where an assignment from MERS to Deutsche Bank was executed after the foreclosure action was filed. *Harvey v. Deutsche Bank Nat. Trust Co.*, 69 So.3d 300, 304 (Fla. 4th DCA 2011). The defendant in that case argued that Deutsche Bank had no standing and that the assignment was fraudulent because it was entered and recorded after the foreclosure was filed. *Id.* The court explained that because Deutsche Bank possessed the original note and filed it with the trial court, its status was established as the note holder, regardless of any recorded assignments. *Id.* The Fifth District Court of Appeal applied similar reasoning to the January 2012 case *Deutsche Bank Nat. Trust Co. v. Lippi*, which held that an assignee had standing to bring a foreclosure action as holder of the note even though the assignment was executed post-foreclosure. 2012 WL 162023 (Fla. 5th DCA 2012).

Thus, to stave off standing attacks, the above case law indicates that plaintiffs in foreclosure actions should ensure that the complaint alleges the complete chain of title of the loan, how the loan was acquired, and that the note was transferred to the plaintiff before the action was filed. However, the record evidence should clearly establish that the plaintiff acquired the note and mortgage at issue *before* instituting the foreclosure action. The lender's argument for sufficient standing to bring the action is supported where the plaintiff is in possession of the original loan documents, since the delivery of the loan documents with intention to pass the title on a proper consideration will vest the equitable interest. Additionally, any form of assignment of mortgage which transfers the real and beneficial interests in the securities unconditionally to the assignee will entitle the lender to maintain a foreclosure action. *Johns*, 184 So. at 143; *Harvey*, 69 So.3d at 304; *see also*, *WM Specialty Mortg., LLC v. Salomon*, 874 So.2d 680, 682-83 (Fla. 4th DCA 2004); *McLean v. JP Morgan Chase Bank Nat. Ass'n*, 2011 WL 6183587 (Fla. 4th DCA 2011).

Ultimately, the execution of an assignment of mortgage after the filing of a foreclosure action is not fatal to the foreclosure case from the lender's perspective. As the above case law reflects, motions for summary judgment have been granted where such an assignment was executed and recorded after the foreclosure action was filed. However, it should be noted that in those cases, the record evidence conclusively established that the plaintiff acquired the note before the foreclosure action was filed, and that the plaintiff was in possession of the original loan documents. Defeating a standing attack may not be as successful in cases in which the note is lost and the plaintiff cannot establish that it was in possession of the note prior to it being lost. Therefore, in the current foreclosure arena, as defendants' standing attacks are becoming increasingly creative, a careful evaluation of the facts and the plaintiff's chain of title is warranted to ensure that the plaintiff minimizes arguments which could delay the case or even preclude entry of summary judgment in the plaintiff's favor.

> ***Under current Florida law, executing an assignment of mortgage from MERS to the plaintiff after the foreclosure action is instituted is not a fatal problem for lenders.***

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maintained that the drastic expansion of the class definition in the Amended Complaint "rejuvenated" its right to compel arbitration. *Id.* This argument presented an issue of first impression for the court. *Id.*

In a landmark decision, the Eleventh Circuit held that, while "invocation of the judicial process ordinarily establishes a waiver of the defendant's right to compel arbitration," when "a plaintiff files an amended pleading that unexpectedly changes the shape of the case, the case may be so alter[ed] . . . that the [defendant] should be relieved from its waiver." *Id.* (*citing Cabinetree of Wis., Inc. v Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 391 (7th Cir. 1995)). The court decided that such circumstances existed in *Krinsk* because the new class definition "greatly broadened the potential scope of this litigation by opening the door to thousands – if not tens of thousands – of new class plaintiffs not contemplated in the original class definition by discarding the old definition's limits on the class plaintiffs' age and on the bases for their HELOC suspensions." *Id.* at 1203. The opinion concluded that the "vast augmentation of the putative class so altered the shape of the litigation that . . . SunTrust should have been allowed to rescind its waiver of its right to arbitration." *Id.* at 1204.

The effective result of this ruling is that plaintiffs can no longer trap defendants into litigation by initially proposing a small class definition, only later to amend the class definition drastically and simultaneously argue that the defendant waived its right to invoke an arbitration clause by engaging in the litigation process. Rather, if a plaintiff changes litigation strategy, defendants will have an opportunity to adjust their defensive strategy accordingly by moving to arbitrate. Thus, for businesses regularly entering into contracts containing arbitration clauses, the *Krinsk* ruling represents a significant victory.

CONSENT ORDERS AND THIRD-PARTY MANAGEMENT

By: Alexandra de Alejo, Esq.

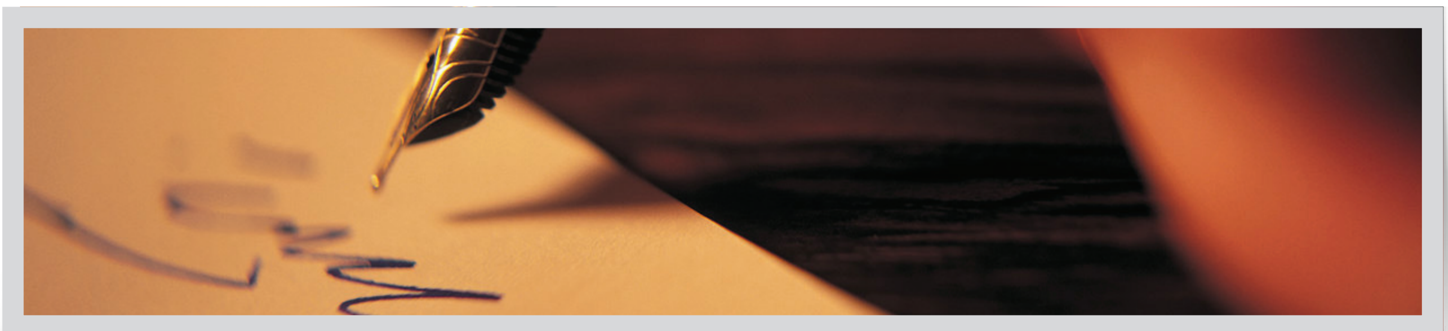
On April 13, 2011, the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the Office of Thrift Supervision announced enforcement actions against mortgage servicers and/or third-party vendors with respect to residential mortgage servicing and foreclosure processing. As part of those consent orders, federal regulators are requiring mortgage servicers to improve oversight of third-party service providers that support mortgage servicing and foreclosure activities, including law firms.

Under the orders, servicers are charged with establishing processes for evaluating the qualifications of third-party service providers and with conducting regular, periodic reviews and assessments of the third-party service providers' performance. Performance is based on qualitative standards for competence, completeness, and legal compliance, as opposed to standards based solely on speed of processing or volume of foreclosures processed.

Such requirements will expose servicers to new liabilities and require changes and additions to the servicers' existing foreclosure procedures. Specific actions taken by servicers may vary. Below is a list of examples of the actions taken by servicers:

- Instituting weekly status reports from third-party servicers, such as law firms, to the mortgage servicers. These status reports can become the base for the regular, periodic reviews. The reviews should be conducted by attorneys experienced in the area of residential foreclosure.
- Conducting "pre-reviews" during on-site reviews, in which the reviewing attorneys first compare the servicers' foreclosure file to the online Clerk of Court's file. When GrayRobinson conducts these reviews, our on-site attorneys carry web-enabled laptops and access the dockets of each file to compare the Clerk of Court's records with those of the foreclosure firm.
- Conducting interviews with the leaders of different departments as well as the lower level staff of foreclosure law firms to see what procedures these firms have in place, and if anyone is actually following or monitoring them. This also identifies whether there are communication errors between attorneys and staff.
- Sending a report back to the law firms at the conclusion of the audits to explain what was done properly or improperly. This allows the law firms to take corrective measures and ensure that the same mistakes are not continuously made.
- Instituting continual follow-ups and annual reports/reviews to ensure that the firms do not fall back into old ways but instead continue to improve their process, even as changes develop in the rules/courts.
- Conducting seminars and training sessions with law firms to highlight problem areas and emphasize the expectations of lenders so as to improve procedures and compliance.
- Drafting procedures and forms, such as affidavits and assignments, for the foreclosure firms to ensure that they follow uniform guidelines and standards, and also to streamline the audit process. Note, however, that these procedures and forms must be state-specific and written by experienced attorneys.

In conclusion, implementing these and similar actions can improve and streamline the oversight process, so as to minimize the liabilities of servicers. In light of the new requirements, implementation of such actions is recommended.



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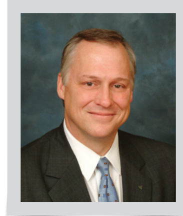

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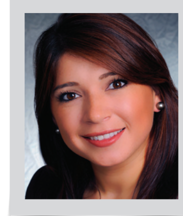

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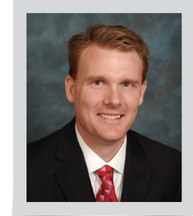

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