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CONSIDERATIONS FOR WAREHOUSE MORTGAGE LENDERS

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Warehouse mortgage lenders who make loans to mortgage originators secured by the underlying notes and mortgages customarily take possession of the notes, endorsed by the mortgage originator in blank. Possession of the negotiated, endorsed promissory note not only permits the warehouse mortgage lender to perfect its security interest in the note and related mortgage in the best manner possible (superior to perfection by filing a UCC financing statement), but also permits the warehouse mortgage lender to become a holder in due course. This holder in due course status permits the warehouse mortgage lender to take the note free from claims and most defenses.

Warehouse mortgage lenders who take possession of collaterally assigned notes become the holders of such notes under Article 3 of the Uniform Commercial Code. In Florida, actions to foreclose mortgages may be brought only by the real party in interest or by another party on behalf of the real party in interest. The warehouse mortgage lender, as the collateral assignee and holder of the underlying note, has standing to enforce the note and mortgage in a foreclosure action. In addition, an agent for the warehouse mortgage lender (e.g., the warehouse mortgage lender's servicer) may enforce the note and mortgage on the warehouse mortgage lender's behalf, as long as the warehouse mortgage lender joins in or ratifies the legal action taken. Pursuant to the provisions of the loan or other agreement between the warehouse mortgage lender and its borrower (e.g., the mortgage originator), the warehouse mortgage lender may authorize the mortgage originator to prosecute proceedings to foreclose the underlying note and mortgage. Without such authorization, the mortgage originator (the warehouse mortgage lender's borrower) may not have standing to bring a foreclosure action against the maker of the note and mortgage.

Whether or not a warehouse mortgage lender authorizes its borrower to prosecute foreclosure proceedings against the underlying mortgagor, warehouse mortgage lenders who take possession of the underlying note endorsed (in blank or otherwise) should consider becoming an additional party plaintiff to actions by their borrower to foreclose the mortgages secured by such note. This will not only preclude a defendant from arguing that the missing warehouse mortgage lender is the only real party in interest, but will also permit a warehouse mortgage lender to monitor the progress of the foreclosure action, to receive notice of sale of the mortgaged property, and to know when to require its borrower (if the borrower purchases the property at the foreclosure sale) to deliver to it a fee mortgage encumbering the mortgaged property as substitute collateral to secure the warehouse mortgage facility. A warehouse mortgage lender may consider engaging the same legal counsel as its borrower (at the borrower's cost) to represent it in such foreclosure actions, and entering into a bailee agreement with such counsel with respect to delivery to counsel of the original note and mortgage, if they are required to be delivered to the court in connection with the foreclosure actions (as is typical in Florida). Absent a bailee arrangement, the warehouse mortgage lender who has perfected its interest in the note solely by possession may lose its perfected security interest upon delivery of the note to counsel or the court.

For more information on this topic, please contact the author, Phyllis Bean, on the firm's Business, Finance & Tax Team.

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