

PRESENTATION

Remedial Action in Seven Southeastern States - Louisiana

Edward H. Arnold, III

504.566-5204

harnold@bakerdonelson.com

Katie L. Dysart

504-566-8611

kdysart@bakerdonelson.com

BAKER DONELSON

EXPAND YOUR EXPECTATIONS[®]

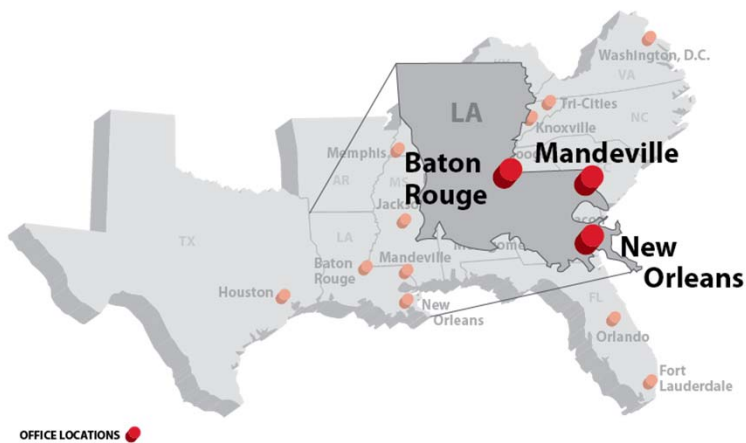
Our Office Locations



www.bakerdonelson.com
© 2014 Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

2

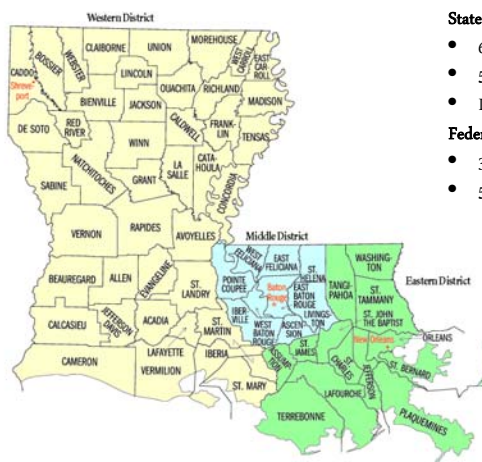
Louisiana Locations



www.bakerdonelson.com
 © 2014 Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

3

Louisiana State and Federal Courts



State

- 64 Parishes
- 5 State Appellate Courts
- La Sup. Ct

Federal /Bankruptcy

- 3 Federal Districts
- 5th Circuit Appeal

www.bakerdonelson.com
 © 2014 Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

4

Pre-Foreclosure Review

- Review loan documents
 - Original or Certified Copy of promissory note
 - See also HB 1259 (substitute for HB 661) which would allow use of a reproduction of a promissory note instead of having to produce the original when foreclosing on a mortgage loan through executory process. The financial institution would be required to certify that the reproduced note is a true and correct reproduction of the original in accordance with the requirements of R.S. 13:3733.1.
 - Mortgage
 - Chain of assignments
 - Thorough Priority Verification – Public Record Review
- Verify Key Facts:
 - the secured note is in default
 - the existence, amount due and owing under the note
 - changes in the interest rate during the term of the note

Pre-Foreclosure Review Continued

- For residential foreclosures, due diligence of "bona fide" tenants (Protecting Tenants at Foreclosure Act)
- Determine whether a deficiency judgment is desirable
 - If a deficiency judgment is desirable, then the sale of the property must be made with appraisal.
- Consider whether a keeper (receiver) is desirable and review loan documents for authority or restrictions on same
- Consider whether Soldiers & Sailors Relief Act for Individuals Applies
- Review Choice of Law Provisions in Note
- Review Property Tax Status
- Confirm Property Insurance or Force Placed Insurance
- Compliance with La. Civ. Code art. 3298 for Multiple Indebtedness Mortgages

Pre-Foreclosure Review Continued

- Compliance with New CFPB Regulations Effective January 10, 2014 (12 CFR 1024.41(f)(1)) (120 Day Delay Period)
 - 41(f)(1) Pre-foreclosure review period.
 - First notice or filing required by applicable law. The first notice or filing required by applicable law refers to any document required to be filed with a court, entered into a land record, or provided to a borrower as a requirement for proceeding with a judicial or non-judicial foreclosure process. Such notices or filings include, for example, a foreclosure complaint, a notice of default, a notice of election and demand, or any other notice that is required by applicable law in order to pursue acceleration of a mortgage loan obligation or sale of a property securing a mortgage loan obligation.

Title Insurance Issues

- Regulation of Title Insurance in Louisiana
 - Published rates and published endorsements
 - Louisiana Department of Insurance (ldi.louisiana.gov)
 - REO Risk Assessment
 - Adverse Possession
 - Service of Process
 - Notice to Inferior Creditors
 - Non-Military Affidavit
 - Publication
 - Seller / Purchaser Affiliation
 - Purchase Price Issues
- Review Existing Title Policy
- Continuation of Coverage – Loan vs. Owner Policy (*cf.* insuring foreclosure sales)

Louisiana: Non-Judicial by Power of Sale

- Real Property Not Permitted:
- Personal Property: La. R.S. 6:965, *et seq.* which, upon meeting certain requirements, allows “self-help” repossession of automobiles under very limited circumstances

Louisiana: Judicial Foreclosure – Deficiency Judgments

- In an executory proceeding, right to a deficiency judgment turns on whether the judicial sale was conducted with or without appraisal. If the property is sold without appraisal, the highest bid need only be sufficient to cover costs and the amount of any encumbrances prior to that of the seizing creditor, and the debtor is not liable for a deficiency.
- If the creditor requests sale with the benefit of appraisal, the property cannot be sold for less than two-thirds of the appraised value at the first auction. If no satisfactory bids are obtained, the creditor may request that it be reoffered for sale. At the second auction the property is sold for cash for whatever it will bring, provided that the bid is sufficient to cover costs and encumbrances superior to that of the seizing creditor.
- When sold with benefit of appraisal, the debtor can be liable for a deficiency.

Louisiana: Judicial Foreclosure – Executory Process

- Executory Process is an *in rem* action derived from the Civil Code.
- Preferred method as it results in obtaining a faster sheriff's sale date due to plaintiff not having to go through "normal" lawsuit process and then wait for the running of suspensive appeal periods.
- Requires act of mortgage or vendor's privilege to be in authentic form and contain a confession of judgment.
- Strict requirements concerning nature and form of documents submitted in support of foreclosure by executory process.

Louisiana: Judicial Foreclosure – Executory Process

- The Petition
 - Verification
 - Affidavit of officer of the lender that verifies
 - the secured note is in default
 - the existence, amount due and owing under the note
 - changes in the interest rate during the term of the note
 - etc.
 - Original Promissory Note (Art. 2635)
 - Certified Copy or Duplicate Original of Mortgage (Art. 2635)
 - Certified Copy of Evidence of Activity for Corporations, LLC's and Partnerships (Art. 2636)
 - Documents demonstrating the assignment of the Note and Mortgage to Bank.

Louisiana: Judicial Foreclosure – Executory Process

- Other documents needed under the circumstances
 - Motion and Order to substitute copy for original Promissory Note
 - Mennonite Notices (need to run mortgage records to see if any liens exist)
 - Motion and order to appoint a keeper (receiver) to maintain the property
- Order for Issuance of Writ of Seizure and Sale
 - Order issuing writ of seizure and sale commanding sheriff to seize and sell the property affected by the mortgage. (Art. 2638)

Executory Process: Procedure/Logistics for Seizure and Sale

- If Petition is in order, Court will issue Order without prior notice to borrower.
- Pursuant to the Order, the Clerk of Court will issue a Writ Of Seizure And Sale (Art. 2638), directing sheriff to seize and sell the mortgaged property.
- Clerk of Court will also issue a Notice of Demand that will allow the debtor three days to pay the amount demanded. The Sheriff must serve the Notice of Demand BEFORE execution on the writ of seizure and sale. However, if the Notice of Demand for payment is waived, the sheriff may immediately execute on the writ of seizure and sale.
 - May be waived, in which case sheriff will immediately execute

Executory Process: Procedure/Logistics for Seizure and Sale

- Upon seizure, the sheriff must serve a notice of seizure on the borrower. (Art. 2721(B)). Also, third parties with interests in the property must be notified of the judicial sale of the property (Mennonite Notice).
- Seizure may be physical or constructive; a keeper may be appointed to manage the seized property.
- Advertisement: Newspaper in parish where property is located, may appear any time following three days' delay following service of the notice of seizure on borrower. Include full description of property, day, time, place at which property will be sold at judicial sale. Must be published twice for immovable property: (a) first, at least thirty days before judicial sale; (b) second, several days before the sale. (Art. 2331)
- Judicial Sale: (Art. 2336)
 - o In order to maintain the ability to obtain a deficiency judgment, the sale must be with appraisal:

Executory Process: Procedure/Logistics for Seizure and Sale

- o Many parishes will require a recent appraisal. The requirements of the date of the appraisal differ parish-by-parish. Many sheriffs are willing to work with foreclosing creditors on large commercial foreclosures and waive any local (and often, unwritten) requirement that the appraisal be updated within a particular period of time, but it is advisable to obtain the most recent appraisal possible and work with an appraiser to update it as necessary.
- Reinscription of Mortgage
- Mortgage and Conveyance Certificate
- Confirm correct legal description
- Review and entertain inquiries from potential purchasers
- Coordinating and filing of sheriff's deed and payment of sheriff's invoice
- Final payments to keeper and discharge of keeper

Louisiana: Judicial Foreclosure – Executory Process

- As part of the Executory Process, the seizing creditor may request a Keeper for the property (which is akin to a receiver in other jurisdictions). Some State Court Judges want to appoint someone local, but we typically propose the Keeper who is an expert on managing the property type.
- Sheriff's Commission:
 - **State Court:** There is a statutory 3% commission on sheriff's sales, including credit bids. That number can be negotiated down by agreement with the sheriff prior to commencing the executory process, however, it varies by Parish.
 - **Federal:** 1.5% commission capped at 50K (28 USC 1921 & 28 CFR 0.114(h))
 - See e.g., *Asset One La. v. Vulcan Minerals & Energy, Inc.*, 2002 WL 1303118 (E.D. La. June 11, 2002, J. Zainey) (denying request for injunction to arrest executory process in federal court); cf. *LBUS 2005-C2 Meraux Shopping Center, LLC v. River Park Real Estate, LLC*, Civ Act. 06-3951 (E.D. La. July 28, 2006, J. Berrigan) (dismissing petition for executory process filed in federal court given that federal rules require citation, summons and judgment, whereas executory proceedings under La. law effect seizure and sale of property "without previous citation and judgment per La. Code Civ. Pro. art. 2631).

Louisiana: Judicial Foreclosure – Ordinary Process

- Foreclosure of a mortgage by ordinary process results in an ordinary proceeding against the mortgagor for a money judgment and for recognition of the mortgage or privilege.
- Defendant entitled to the normal delays for answering, as well as the suspensive appeal period (60 days).
- After suspensive appeal period, mortgage is enforced via a writ of fieri facias. Defendant is served with a notice of seizure and the sheriff will advertise the judicial sale twice within a 30-day period prior to the sale.
- Provisional Remedies – Writ of Sequestration

Additional Considerations

- Jurisdiction/venue of the Court pursuant to which the sheriff's deed was issued
- Check that all defendants were served with notice of seizure, or attorneys at law were properly appointed for any nonresident or absentee defendants
- If mortgagor is not the owner of the real estate at the time of foreclosure, ascertain that the current owner was notified of the seizure
- Review description of property in mortgage, judicial advertisements and sheriff's deed and check for any discrepancies
- With respect to the amount of the bid, if there were encumbrances superior to that of the seizing creditor, ascertain that the amount of the bid was sufficient to satisfy the superior encumbrances
- If there were inferior lienholders, ascertain that they were given "Mennonite" notices of the pending sheriff's sale
- With respect to real estate taxes, ascertain that the real estate taxes due at the time of foreclosure were paid by the sheriff or that the purchaser acquired the property subject to outstanding taxes

Additional Considerations Continued

- Review the mortgage certificates run in connection with the sheriff's sale and ascertain that the sheriff cancelled all inferior encumbrances
- If the sheriff's sale was the result of an executory proceeding pursuant to a writ of seizure and sale, and if the Internal Revenue Service filed a federal tax lien more than 30 days before the sale, obtain a copy of a letter addressed to the Internal Revenue Service which complies with the requirements of 26 U.S.C.A. § 7425(c) with evidence that the Internal Revenue Service received the letter at least twenty-five days before the sale, or obtain a copy of a letter from the Internal Revenue Service acknowledging receipt of adequate notice
- If a sheriff's sale was the result of an ordinary proceeding pursuant to a writ of fieri facias, and if the Internal Revenue Service filed a federal tax lien before commencement of the proceeding, ascertain that the Internal Revenue Service was made a party to the proceeding.
- If the real estate that was the subject of the sheriff's sale was owned by FDIC or was subject to a nonconsensual security interest in favor of FDIC, obtain evidence that FDIC consented to the sale.

Louisiana: Right of Redemption

- Louisiana law does not provide for a right of redemption
- Three (3) year Tax Sale Redemption for Non Payment of Ad Valorem Taxes
 - *Orleans Dist. Redevelopment v. Ocwen, [cite]* (finding tax sale an absolute nullity insusceptible of prescription in the event of failure to provide Mennonite notice to the mortgagee).

Foreclosure Alternatives

- Short Sale
- Deed in Lieu/ Dation en Paiement
- Workout/Forbearance/Restructure
- Ordinary Process/Writ of Sequestration
 - Must show:
 - Ownership interest or a right to possess the property
 - Property is within the power of the debtor to conceal, dispose of or waste
 - Must be made by specific factual allegations
 - Requires creditor to post a bond set by court unless dispensed with by law

Post-Foreclosure Actions

- Title Insurance
- Tenant Notices/Evictions
- Utilities
- Tax Assessment
- Revisit Property Insurance (once creditor becomes owner)
- Payment of Sheriff's Commission and Costs
- Refund of Deposit from Clerk
- Payment and Discharge of Keeper (if applicable)
- Recordation of Sheriff's Deed

Recent Cases

- *LEGGO v. Brennan's Claims*
- *Colonial Finance LLC v. Colonial Golf & Country Club, Inc.* Case No. 11-CA-5 (La. App. 5th Cir. 2011)
- In re: Hari Aum, 714 F.3d 274 (5th Cir. 2013)

Table of Authorities

Questions?

PRESENTATION

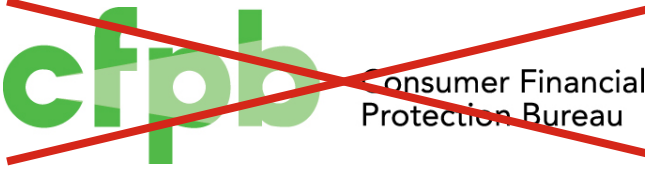
Foreclosures in Georgia

Dylan W. Howard, Esq.
Baker Donelson
Monarch Plaza
3414 Peachtree Road, N.E. • Suite 1600
Atlanta, GA 30326
404.589.3406
dhoward@bakerdonelson.com

BAKER DONELSON

EXPAND YOUR EXPECTATIONS[®]

Disclaimer

~~ Consumer Financial Protection Bureau~~

www.bakerdonelson.com
© 2014 Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

2

A Crisis in Decline?

- **According to the Corelogic March, 2014 Foreclosure Report:**
 - Georgia had the fifth highest number of completed foreclosures in year ending March, 2014: 33,232
 - A 31% decrease from the prior year
 - Serious delinquency rate for the Atlanta metro area: 4.8%
 - Down from 5.48% in July, 2013



www.bakerdonelson.com
© 2014 Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

3

Mortgage Law in Georgia

Title state

Security Deeds rather than deeds of trust

www.bakerdonelson.com
© 2014 Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

4

Standing to Foreclose

You v. J.P. Morgan Chase Bank, N.A.

293 Ga. 67, 74 (2013)

“the holder of a deed to secure debt is authorized to exercise the power of sale in accordance with the terms of the deed even if it does not also hold the note or otherwise have any beneficial interest in the debt obligation underlying the deed.”



Foreclosure Procedures

Non-judicial

The procedures for a non-judicial foreclosure are straightforward

Foreclosure Procedures (continued)

Rules No 1, 2 and 3

- Read the security deed.

Must contain language transferring title, must explicitly provide for a power of sale, make sure it gives the lender the right to bid at the foreclosure sale.

Notice Requirements

- O.C.G.A. 44-14-162 et seq.
- Notice more than 30 days prior to foreclosure sale.
- Previously, written notice not required for homes not intended to be the borrower's primary residence, but that was amended in 2012.



Notice Requirements (continued)

- Notice must include the name, address and telephone number for the person or entity with authority to negotiate the terms of the loan.
- Court precedent: sufficient to identify loan servicer rather than the investor or owner. Sufficient to identify attorney for lender.

TKW Partners, LLC v. Archer Capital Fund, LP, 302 Ga. App. 443 (2010); *Ford v. CitiMortgage, Inc.*, No. 13-14683, --- F. App'x ---, 2014 WL 1257953, at *1 (11th Cir. Mar. 28, 2014); *Carr v. U.S. Bank, N.A.*, 534 F. App'x 878 (11th Cir. 2013); *Harris v. Chase Home Fin., LLC*, 524 F. App'x 590 (11th Cir. 2013).

Notice Requirements (continued)

- Sent by registered or certified mail, return receipt requested.
- Don't have to prove receipt, just proper mailing.
- Sent to property address, or any other address specified by the borrower in writing.



Notice Requirements (continued)

For a high cost home loan, have to send notice more than 14 days prior to publication of the legal advertisement.
O.C.G.A. 7-6A-5(11).

HCHL?

- exceeds HOEPA rate; or
- total points and fees exceed 5% of the loan amount if loan is \$20k or more.

Notice Requirements (continued)

- **Published advertisements:**
 - paper of record
 - once a week for the four consecutive weeks prior to the foreclosure sale.
 - full and complete description, including legal description.
 - if contains street address, must be in **bold** type.

Sale Day

Sale must be cried on the courthouse steps

Between 10 a.m. and 4 p.m.

First Tuesday of the month

By lender, or agent or attorney for lender

Funds generally must be tendered immediately

Cash or cashier's check acceptable

Excess proceeds

Generally owed to debtor

May be applied by foreclosing lender to other debts held by the lender

May be paid to other junior lienholders as well

If there are junior lienholders, safe bet is to file an interpleader

Foreclosure Miscellany

No statutory right of redemption.

Transfer Tax: \$1 for the first \$1,000 or fractional part of \$1,000 and at the rate of 10 cents for each additional \$100 or fractional part of \$100

If fail to pay Transfer Tax, deed is unrecordable. However, since 1984 recorded deeds provide constructive notice whether the tax was paid or not.

Confirmation/Deficiency Judgments

- **Deficiency judgments are permitted in Georgia, but:**
 - Must report the sale to a superior court judge within 30 days of sale.
 - Court then sets a hearing.
 - Provide notice to debtor more than 5 days prior to hearing.
 - Must prove that the property sold for at least its fair market value and that the sale was conducted in accordance with the procedural requirements.

Confirmation/Deficiency Judgments **(continued)**

- **Deficiency judgments are permitted in Georgia, but:**
 - Decide whether you are going to confirm prior to conducting the sale.
 - Hire an appraiser who has testified and been accepted as an expert before by other courts.
 - Have the appraisal dated to the date of the foreclosure sale.
 - Get a detailed appraisal.
 - Do not rely on a drive by appraisal.

www.bakerdonelson.com
© 2014 Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

17

Judicial Foreclosure

- **Used when:**
 - the Security Deed does not provide a power of sale.
 - Occasionally used when there are title or boundary line issues.
 - If Lender wants to combine a suit on note with a foreclosure to avoid confirmation requirement.



www.bakerdonelson.com
© 2014 Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

18

Judicial Foreclosure (continued)

- **3 types:**
 1. Foreclosure in equity
 2. Foreclosure at law
 3. Judicial Foreclosure of a deed to secure debt



Georgia Title Issues

- **Form of Deeds**
 - Must contain:
 - language conveying title
 - an accurate description of the property
 - Must be signed by the Maker
 - Corporate deeds should be signed in the name of the corporation by a duly authorized officer or agent
 - Deed must be attested by 2 witnesses, one of whom should be a notary (notarial seal should be attached)
 - Should indicate that witnesses actually saw the maker sign



PRESENTATION

Receiverships Under Georgia Law

Katy Furr
Baker Donelson
Monarch Plaza
3414 Peachtree Road, N.E. • Suite 1600
Atlanta, GA 30326
404.221.6533
kfurr@bakerdonelson.com

BAKER DONELSON

EXPAND YOUR EXPECTATIONS[®]

Receiverships Under Georgia Law

- The Grounds for Receivership
- Exploring the Standard
- Notice
- The Receiver's Authority
- Discharge of the Receiver & Dismissal of the Receivership Complaint
- Anything Else I Should Know?

www.bakerdonelson.com
© 2014 Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

22

Receivership: Grounds Generally

A receiver is a court appointed individual or company that takes possession of and manages property when the subject property or fund is the subject of pending litigation and the rights of either or both parties cannot otherwise be fully protected.

[O.C.G.A. § 9-8-1]

Receivership: Grounds Generally (continued)

A receiver may be appointed when there is no one to manage a subject fund or property.

[O.C.G.A. § 9-8-1]

Receivership: Trusts or Joint Property

A receiver may be appointed to take possession of and protect trust or joint property and funds whenever the danger of destruction and loss shall require such interference.

[O.C.G.A. § 9-8-2]

Receivership: Assets Liable for a Debt

A receiver may be appointed to take possession of and hold, subject to the direction of the court, and assets charged with the payment of debts where there is manifest danger of loss, destruction or material injury to those interested.

[O.C.G.A. § 9-8-3]

The Standard

A receivership may be appointed when:

1. Prudently and cautiously exercised
2. Clear and urgent cases
3. Trial court discretion

[O.C.G.A. § 9-8-4]

Receivers Have Been Appointed In These Situations

Possible destruction of collateral

Damage to collateral

Loss of income from the collateral

Receivers Will Not Be Appointed When

Mere nonpayment by a mortgagor

Mere nonpayment of taxes

Mere nonpayment of insurance

Notice: Who Has To Know & When?

General Rule – Provide a copy of the stamp filed complaint and rule nisi to borrower & borrower's counsel (if applicable)

Extraordinary circumstances – Receivership may be appointed without notice of the borrower. [O.C.G.A. § 9-8-3].

The Receiver's Authority

Officer of the court

Scope of authority is defined by the court making the appointment

Tailor each receivership order to the specifics of a given case

Discharge of the Receiver & Dismissal of the Receivership Complaint

At completion of the receivership, the receiver will file a Motion for Approval of Final Accounting, Ratification of Receiver's Actions and Discharge of Receiver.

Upon entry of the Order, a Motion to Dismiss must be filed.

Receivership cases cannot be dismissed unless there is an order of the court. [O.C.G.A. § 9-11-66].

Anything Else I Should Know?

Attorney-Client Privilege: Receiver controls the attorney-client privilege belonging to the enterprise.

In Pari Delicto Defenses: If a receiver replaces dishonest managers and then asserts claims against third-parties, who may have participated or been involved in the activities of the enterprise in receivership. The 3rd parties may raise an in pari delicto defense, claiming that they should not be liable to the receiver because of the dishonest and illegal acts of the former managers.

Lender Liability Update



Considine v. Murphy

CFPB bulletins focusing on vendor evaluations

Nativi v. Deutsche Bank

Lender Placed Insurance Rules

PRESENTATION

Remedial Action in Southeastern States – Foreclosure in Florida

Zachary J. Bancroft

407.367.5426

zbancroft@bakerdonelson.com

Heidi Weinzetl

954.768.1600

hweinzetl@bakerdonelson.com

BAKER DONELSON

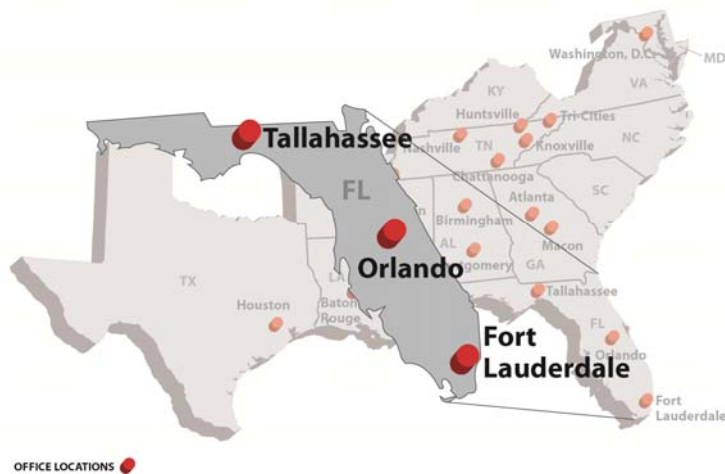
EXPAND YOUR EXPECTATIONS[®]

Our Office Locations



www.bakerdonelson.com
© 2014 Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

Florida Locations



www.bakerdonelson.com
© 2014 Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

3

Judicial Foreclosure



Florida is a lien theory state

Florida law does not provide for non-judicial foreclosure

Foreclosures are civil lawsuits, generally in State Circuit Courts

Lis Pendens is recorded at the beginning of the litigation and gives notice to the public of a pending lawsuit

Named as Defendants:

- All those named in the note/mortgage
- HOA or Condo Association (if applicable)
- All junior lienholders
- Tenants (if desirable to terminate lease)

www.bakerdonelson.com
© 2014 Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

4

Special Rules for Residential Foreclosures



- The Florida Statutes contains a variety of special rules applicable to residential foreclosures:
 - complaint must be verified
 - must verify possession of the original note, or include a “lost note” count
 - if the note is lost, plaintiff must offer “adequate protection” for duplicate enforcement



www.bakerdonelson.com
© 2014 Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

5

Special Rules for Residential Foreclosures (continued)



- Many counties have created special divisions for residential foreclosure cases
- Statute of limitations is 5 years from the date of default
- Statute of limitations is 1 year to seek a deficiency judgment



www.bakerdonelson.com
© 2014 Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

6

HOA and Condo Associations



A foreclosure does not *entirely* eliminate past due HOA or condo assessments

The liability of one who acquires title is the lesser of:

- Unpaid common expenses and assessments that accrued during the 12 months immediately preceding title; or
- One percent of the original mortgage debt.



www.bakerdonelson.com
© 2014 Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

7

HOA and Condo Associations (continued)



Note that this only applies to a first-position mortgage holder or assignee; this means loan documents, not bid, must be assigned

Associations may foreclose their own lien, but they do so subject to the superior first mortgage lien



www.bakerdonelson.com
© 2014 Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

8

The Foreclosure Sale



- Final Judgment sets the date, time and place of the sale
- Notice of Sale must publish for 2 consecutive weeks
- Sale may be live at the county courthouse or on-line, generally at the realforeclose.com website
- Loan documents, foreclosure judgment, or winning bid may be assigned to a special purpose entity for the purposes of taking title



www.bakerdonelson.com
© 2014 Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

9

The Foreclosure Sale



- Right of redemption ends as of the sale date
- Title vests in the winning bidder by Certificate of Title (the operative deed) issued by the Clerk of Court on the 11th day after the sale if no objections are filed within the prior 10 days
- Title insurance may be purchased by winning bidder



www.bakerdonelson.com
© 2014 Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

10

Receivership



Receivership in Florida is largely determined by Florida common law instead of by statute or loan documents

There is a large degree of judicial discretion in Florida receiverships and the focus of the Court is primarily on whether the appointment will prevent the property from being wasted or subject to significant risk of loss

The factors that are usually heavily considered by courts – (1) the right for appointment of a receiver under the loan documents, and (2) the existence of a default – are not as determinative in Florida cases

The selection of the actual Receiver is also subject to the Court's discretion

A receiver's bond is required and amount is set by the Court

Receivership (continued)



Timing of appointment is determined by the Court's schedule – an expedited hearing within 24 to 48 hours can be requested for emergencies

All parties must generally be given notice of the hearing, *ex parte* appointments are possible but rare and only in extreme circumstances

Receivership sales are possible but not the norm – the process would be specified in the Receivership order (there is no statutory provision)

An alternative to a receivership is a rents sequestration order. It requires a default and written demand for rents

Deficiency Judgments



Residential – must be sought within one year of the sale

Commercial – can be sought up to five years after the sale

Foreclosure judgment must reserve jurisdiction to determine right to a deficiency judgment

Amount is based on the fair market value of the property on the date of the sale

The winning bid at the sale is not conclusive; generally an appraisal is needed

A money judgment may be pursued prior to or concurrently with a foreclosure judgment

www.bakerdonelson.com
© 2014 Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

13

Webinar Series Coming in August



Beyond the Basics: Four-Part Residential Mortgage Foreclosure Intensive

12:00 – 1:00 Eastern

- **August 5: Proving a Mortgage Foreclosure Case**– including discussion about standing, default, condition precedent and damages
- **August 7: Litigation tools in a Foreclosure Action** – Motion Practice, Written Discovery and Depositions
- **August 12: Trying a Contested Foreclosure Case** – hearsay, prior servicer records and bank representative testimony at trial
- **August 14: Post Judgment Motion Practice and Foreclosure Appeals** – Preserving the record, when to appeal and appellate court trends in Florida

www.bakerdonelson.com
© 2014 Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

14

Questions?



Defaulted Real Estate Loan Remedies in Mississippi

Alan Smith

asmith@bakerdonelson.com

601.351.8932

Lee Lott

llott@bakerdonelson.com

601.351.2464

BAKER DONELSON

EXPAND YOUR EXPECTATIONS[®]

Baker Donelson Offices



Mississippi – Non-Judicial Foreclosure

Power of sale held by Trustee under Deed of Trust



Land Records to Review

MAIN TWO

- Note
- Deed of Trust

ALSO

- Substitution of Trustee
- Assignment of Lien
- Loan Modification(s) of record
- Other Liens
- Other land records



Loan File

- Loan modification(s) not of record
- Reinstatement quotes
- Payoff quotes
- Forbearance Terms
- Other loan records



Homestead Properties

- DOT must be signed by both spouses
- Mutual and Simultaneous
- Title insurance



Loss Mitigation

- Loan Modification
- Deed-in-Lieu
- Cash for Keys
- Short Sale
- Discounted Payoff
- Agreed Foreclosure with Waiver of Deficiency
- Forbearance



Documents to Prepare

- Substitution of Trustee
- Notice of Default
- Notice of Sale
- Notice of Sale in Newspaper
- Notice of Sale posted at courthouse
- Notice to IRS
- Reinstatement Quote
- Other documents required by Note/DOT
- Other documents required by federal statutes



Conducting the Sale

- Follow notice of sale
- Read notice of sale
- Bidding
- Affidavit
- Trustee's deed
- Proof of publication
- No right to redemption
- Surplus funds
- Deficiency



Common Defenses Raised by Borrowers

LAWSUITS

- Lawsuit for injunctive relief to prevent foreclosure
- Refusal to vacate, requiring eviction action by REO owner
- Lawsuit for wrongful eviction

CLAIMS

- Breach of contract
- Negligence
- Fraud
- Intentional infliction of emotional distress

REMOVAL TO FEDERAL COURT

Settlement

- Loan Modification
- Deed-in-Lieu
- Cash for Keys
- Short Sale
- Discounted Payoff
- Agreed Foreclosure with Waiver of Deficiency
- Forbearance



Pitfalls: Deeds of Trust

- Deed of Trust must be signed by all holders of an interest in the property (if individual, includes spouses with marital interest)
- Signatures of grantors must be properly acknowledged by a notary under seal
 - 7year curative statute for defective acknowledgments (Miss. Code. Ann. § 89-3-13)
 - Clerk's recording of instrument with defective acknowledgement (Miss. Code Ann. § 89-3-1)
- Deed of Trust must be recorded with Chancery Clerk in county where property is located
- Must state maturity date
- Statue of limitations = 6 years from stated maturity date (or accelerated due date)



Recording Tax

- No recording or transfer tax in Mississippi
- Tax existed in past, but statute repealed decades ago

Actions Upon Default

- Send notice of default/acceleration to borrowers and any guarantors (right to cure only if required by loan documents)
- Record Limited Power of Attorney (for CMBS or other loans where holder of the loan is acting via an agent)
- Appoint Substitute Trustee – must be recorded with chancery clerk; gives new trustee duties of original trustee
- Order updated title report
- Be sure loan documents and deed of trust properly assigned to the current holder.
- Conduct updated UCC search



Title Issues

- Confirm all interests held in real estate
- Holder of fee simple and leaseholds
- Easements, restrictions, covenants, etc.
- Existence of Senior liens – title insurance claim if deed of trust is insured as a first lien
- Junior liens – judgment liens, materialman liens, les pendens – need not be listed in foreclosure sale notice
 - good practice to give notice of foreclosure to any significant junior lienholder (particularly if equity exists)
- * Junior Lienholder – Subordination to D/T Modifications?

Title Issues (continued)

- Real estate taxes – county or municipal taxes and assessments prime other liens
 - Irrevocable loss of collateral if past due taxes mature into Tax Deed (which occurs on 2nd anniversary of tax sale)
- IRS liens – special notice of foreclosure required under federal law if junior
- Foreclosure does not “wipe out” property tax liability
 - Property taxes “run with the land”

Foreclosure – Non-Judicial

- Total time to foreclose: approximately 60 day process from start to finish
- Advertisement – notice of sale published once each week for four (4) consecutive weeks (in newspaper circulated in county where the property located)
- Notice of Sale – send copy to borrowers and guarantors on or before the first date of publication. Good practice to use registered or certified mail.
- Posting notice of sale at on public bulletin board at county courthouse (prior to first publication)



Foreclosure – Non-Judicial (continued)

- Place of sale – at the county courthouse in county where property is located. Sale notice must give specific location at the courthouse, (e.g. "North Main Entrance")
- Time – any time between legal hours of 11:00 a.m. and 4:00 p.m.
- Notice must set specific date for conduct of foreclosure sale. Any day other than weekend or legal holiday may be utilized.

Foreclosure – Non-Judicial (continued)

- Combining UCC Article 9 personal property foreclosure w/ real property foreclosure.
 - Notice of Default should contain proper UCC “public sale disposition” language.
- Lender’s counsel may serve as Trustee (no ethical issues).
 - Fiduciary duty to fairly carry out terms of the trust

Foreclosure – Tax Liens

- Additional statutory notice must be given to the IRS. After a foreclosure sale in which the notice of priority is given, taxing authority has 120 days right to redeem the foreclosed property.



Conduct of Sale

- Auction-type process on courthouse steps: Sale to highest bidder (cash or credit bid)
 - “Calling” the sale: must read aloud the entire Sale Notice (w/ legal descriptions)
 - Foreclosure can be abandoned at any time prior to completion of sale (but must start over “from scratch” with new foreclosure)
- If foreclosure process is completed properly, it is “done deal”.
- Borrower has no post-foreclosure Right of Redemption



Conduct of Sale (continued)

- Terms of sale stated in sale notice
- Credit bidding allowed
- Creditor may bid and assign bid to third party
 - Substitution of Trustee should contain authorization for assignment of credit bid
 - Credit Bid amount considerations
 - Posturing for possible pursuit of deficiency judgment?
 - Credit bid can not be so low as to “shock the conscience” of a reviewing court (i.e. grossly insufficient)



Trustee's Deed

- Trustee's Deed to winning bidder (or its assignee) transfers property
- Prevailing cash bidder – strongly advise requiring payment in full (with certified funds) at time of sale.
 - Short adjournment of sale, if needed for cash purchaser
 - Prevailing cash bid is presumed to reflect fair market value
- Witness affidavit re: conduct of foreclosure sale



How a debtor can stop the foreclosure sale

- Reinstatement (Miss. Code Ann. § 89-1-59)
- Bankruptcy filing stops a sale of debtor's property
 - Trigger of guarantor liability?
- Injunctions to stop foreclosure:



Typical defenses to foreclosure

- Could be used as grounds for injunction/TRO pre-foreclosure
 - most commonly: post foreclosure in judicial action to set aside foreclosure as invalid (borrower must initiate the action)
- Defect in foreclosure process
- Absence of monetary default
- Servicing error
 - misapplication of payments
 - rejection of payments
 - unauthorized establishment of escrow account
 - failure to honor loan modification
 - failure to offer loan modification
 - dual tracking
 - misrepresentation regarding date of sale
 - failure to accept tender of reinstatement payment
- Lack of standing to enforce deed of trust

Receiverships

- Receivership is an action in equity for the safekeeping, management, collection, and disposition of property
 - Chancery court is exclusive venue for receiver's appointment (under MS law)
 - Federal vs. state venue choices
- Statutory authority and case law give court wide discretion to fashion the relief granted
- Prior consent to appointment of receiver by borrower in loan documents can be persuasive (but not absolute)
- Even with consent to appointment language, judge retains discretion to appoint or not to appoint
- Receivership funded by property's cash flow (or lender's advances)



Receiverships (continued)

- Injunctive relief usually sought in conjunction with receivership to compel cooperation of borrower and its agents with receiver
- Receiver must post receiver's bond. Miss. Code Ann. 11-5-159.
- Five (5) days notice must be given to Defendants (absent "good cause shown"). Miss. Code Ann. §11-5-153
- Receivers can sell property but need court approval
 - Strategy Issue: Include sale authority in Order Appointing Receiver?
- Order should expressly preserve right for lender to proceed with remedy of foreclosure

Receiverships (continued)

- Receiver is "ancillary" remedy: Compliant for receiver must assert equitable claims against borrower (e.g. request for accounting of rents)
 - Chancery vs. Circuit Court distinction in Mississippi
- Hearing Date: Scheduled at Court Administrator's discretion (request for TRO will usually expedite hearing date)
- Don't "cry wolf": If TRO is requested, must have facts showing potential for "irreparable injury" (i.e. an injury that monetary award can not cure)

Receiverships (continued)

- No Adjudication of Merits: Receiver's appointment does not determine outcome of the lawsuit
 - Property owner continues to have right to make workout proposals
 - Property owner can solicit purchase offers and present offers to the Receiver
 - Property owner can gain property access (w/ Receiver's approval)
- Don't overreach w/ content of Order Appointing Receiver (e.g. inclusion of findings on issues court did not consider)

Receiverships (continued)

- Key Evidentiary Issues:
 - Health/Safety risks
 - Deferred maintenance
 - Waste
 - Borrower's misuse of rents/profits
- Receiver can be natural person or legal entity
 - "Point Person" should attend hearing on Receiver Motion
 - Should inspect property pre-hearing and be prepared to testify
 - Receiver is Officer of the Court w/ fiduciary duty to all parties.
 - Communications w/ Receiver are not privileged!

Post-Foreclosure Deficiency

- Statute of limitations – one (1) year after date of foreclosure sale
- Absent fraud, collusion, misconduct or irregularity in the sale process – deficiency shall be total debt plus costs of sale, less fair market value of the property at the time of the sale
- Burden of Proof: Lender must establish that the credit bid price is equal to the fair market value at the time of the sale
 - Essentially mandates pre-foreclosure Appraisal

Deficiency (continued)

- Decide whether you are going to pursue prior to conducting the sale.
- Hire an appraiser who has testified and been accepted as an expert before by other courts.
- Have the appraisal dated to the date of the foreclosure sale.
- Get a detailed appraisal.
 - Do not rely on a “Drive By” appraisal or “Brokers Opinion of Value”.

Guarantor Liability

- Mississippi law recognizes Guaranty like any other contract
- Mississippi law enforces contracts “as written”, particularly when the parties are sophisticated business persons and/or person who was represented by legal counsel
- Caution: Pursuit of guarantor may trigger counter claim for “lender liability”
 - Possibility of getting “bogged down” with discovery, etc.
 - Recommend evaluation of Guarantor’s potential assets before filing suit

Alan Smith

asmith@bakerdonelson.com

601.351.8932

Lee Lott

lott@bakerdonelson.com

601.351.2464



Remedial Action in Alabama: Foreclosure Process, Receivership and Recent Litigation Issues

Natalie Bolling

nbolling@bakerdonelson.com

205.244.3802

Eric Pruitt

epruitt@bakerdonelson.com

205.244.3836

<http://www.bakerdonelson.com/natalie-r-bolling/>

<http://www.bakerdonelson.com/eric-l-pruitt/>

BAKER DONELSON

EXPAND YOUR EXPECTATIONS[®]

Baker Donelson Offices



Alabama Foreclosure - Non-Judicial by Power of Sale

- 3 weeks publication in newspaper
- 18 days from first publication to sale date
 - Sale date can be postponed or re-set
- Consider assignment of loan documents or bid to SPE
- Call sale on courthouse steps
- Record deed (title vests immediately in winning bidder)
- Deed Tax (\$1 per \$1000 if applicable)
- Time: 30 – 60 Days
- Online Foreclosure Guide -
<http://www.bakerdonelson.com/interactive-foreclosure-map/>

Alabama Judicial Foreclosure

- Title Problems
- Documentation Deficiencies (reform legal description)
- Reputational risk (not applicable to CMBS servicers)
- Rarely used

Alabama Right of Redemption

- Does not cloud title – title vests immediately upon sale
- One year from date of foreclosure
- Allows parties to recover property
 - If from Holder – amount based on full debt
 - If from third party – amount based on foreclosure bid
 - Redemption Amount = base + interest (12%) + expenses + improvements
- Can be waived but only after foreclosure
 - Title companies will not remove notation on title

Alabama Receivership

- Bring as civil action in Federal or State Court
 - Court / Judge can and do make a big difference
- Bond required by statute (but sometimes waived)
- Three Requirements
 - Clear legal right to be protected
 - No other adequate remedy
 - Threat of irrevocable damage
- Motion for expedited hearing to speed up process
- Must notify borrower/mortgagor unless extreme circumstances
- Include power to market and sale Receivership property

Common Defenses to Foreclosure Raised by Borrowers

LAWSUITS

- Lawsuit for injunctive relief to prevent foreclosure
- Refusal to vacate, requiring eviction action by REO owner
- Lawsuit for wrongful eviction

CLAIMS

- Breach of contract
- Negligence/Wantonness
- Fraud
- Intentional infliction of emotional distress
- Wrongful foreclosure

REMOVAL TO FEDERAL COURT

Typical Defenses to Foreclosure, Specifics

- Could be used as grounds for injunction/TRO pre-foreclosure
 - most commonly: post foreclosure in judicial action to set aside foreclosure as invalid (borrower must initiate the action)
- Defect in foreclosure process
- Absence of monetary default
- Servicing error
 - misapplication of payments
 - rejection of payments
 - unauthorized establishment of escrow account
 - failure to honor loan modification
 - failure to offer loan modification
 - misrepresentation regarding date of sale
 - failure to accept tender of reinstatement payment
- Lack of standing to enforce mortgage

Litigation Pitfalls: Assignment of Loan (Timing)

- Foreclosure is proper so long as the power of sale is obtained prior to the execution of the foreclosure deed, even if this is subsequent to what had previously been mistakenly referred to as the “initiation of foreclosure proceedings.”
- See *Ex parte GMAC Mortgage, LLC*, --- So.3d ----, No. 1110547, 2013 WL 4873071 (Ala. Sept. 13, 2013) and *Ex parte BAC Home Loans Servicing, LP*, --- So.3d ----, Nos. 1110373 and 1110458, 2013 WL 4873061 (Ala. Sept. 13, 2013).
- Those opinions also rejected the idea that standing is at issue when the right to foreclose is challenged.



Party With Right to Foreclose

- Plaintiff's Most Common Argument – Party foreclosing did not possess legal right to foreclose.
- Under recent Alabama foreclosure law, a plaintiff cannot state a viable claim for wrongful foreclosure unless they allege facts or allegations that the foreclosure occurred for any reason other than to secure the debt. See *Jackson v. Wells Fargo Bank, N.A.*, 90 So. 3d 168, 171 (Ala. 2012).

Right to Money Secured

- Alabama Courts have universally held that the holder of a promissory note is entitled to exercise the power of sale under Alabama law.
- See *Gray v. Federal Nat. Mortg. Ass'n*, 143 So. 3d 825 (Ala. Civ. App. 2014) (observing holder of obligation can complete foreclosure sale); *Thomas v. Wells Fargo Bank, N.A.*, 116 So. 3d 226 (Ala. Civ. App. 2012) (mortgagee in possession of note endorsed in blank was entitled to exercise power of sale); *Perry v. Federal Nat. Mortg. Ass'n*, 100 So. 3d 1090 (Ala. Civ. App. 2012) (as holder of promissory note, servicer was “entitled to the money thus secured” and entitled to exercise the power of sale pursuant to Alabama’s foreclosure statute); *Coleman v. BAC Servicing*, 104 So. 3d 195, 205 (Ala. Civ. App. 2012) (holder of promissory note endorsed in blank entitled to exercise power of sale).

Right to Money Secured – Cont’d

- A foreclosing party need only have the power of sale, through possession of the original note or otherwise, on the date on which the foreclosure deed is executed in order for the foreclosure sale to be valid.
- See *Coleman v. BAC Servicing*, 104 So. 3d at 205; *Ex parte GMAC Mortgage, LLC*, --- So.3d ----, No. 1110547, 2013 WL 4873071 at *6 (Ala. Sept. 13, 2013).

Right to Money Secured – Cont'd.

- With respect to nonjudicial foreclosures through the exercise of a power of sale, there is no 'initiation of foreclosure proceedings' with the import ascribed to it. Nor does a 'foreclosure' of the mortgagor's rights occur at some midpoint in that process. We are left then with the notion, long established as it turns out, that the 'foreclosure' of a mortgagor's rights does not occur until the 'end,' when a deed divesting the mortgagor of its rights is signed and delivered to a purchaser.”).
- *Ex parte GMAC Mortgage, LLC*, --- So.3d ----, No. 1110547, 2013 WL 4873071 at *6 (Ala. Sept. 13, 2013).

Ejectment Actions - Standing

- Section 6-6-280, Ala. Code governing ejectment actions complaint seeking ejectment is sufficient if it alleges:
- the plaintiff was possessed of the premises or has the legal title thereto, properly designating or describing them, and that the defendant entered thereupon and unlawfully withholds and detains the same.
- If the mortgage and foreclosure deed . . . are produced, as well as proof of . . . refusal to deliver possession, then all the necessary elements of ejectment are established. *Muller v. Seeds*, 919 So. 2d 1174, 1177 (Ala. 2005)
- Court later overruled demand for possession requirement. *Steele v. Fed. Nat'l Mortg. Ass'n*, 69 So. 3d 89, 93 (Ala. 2010).

Standing

- *Ex parte Rhodes*, Case No. 1120824, ---So. 3d ---, 2013 WL 6150818 at *3 (Ala. Nov. 22, 2013)
- The defect in the foreclosure process alleged by plaintiffs does not implicate a party's **standing** to bring the ejectment action against the plaintiffs or, in turn, the subject-matter jurisdiction of the trial court to entertain that claim.

Alabama's Right of Redemption

- Section 6-5-251(a) of the Code of Alabama, referring to the statutory right of redemption upon a foreclosure sale, provides:
- “[t]he possession of the land must be delivered to the purchaser or purchaser’s transferees by the debtor or mortgagor if in their possession or in the possession of anyone holding under them by privity of title, within 10 days after written demand for the possession has been made by, or on behalf of, the purchaser or purchaser’s transferees.” ALA. CODE § 6-5-251(a).
- Failure to do so forfeits right of redemption, which is 1 year in Alabama. *Richardson v. Stanford Props., LLC*, 897 So. 2d 1052, 1055-56 (Ala. 2004).

Settlement

- Loan Modification
- Deed-in-Lieu
- Cash for Keys
- Short Sale
- Discounted Payoff
- Agreed Foreclosure with Waiver of Deficiency



Natalie Bolling

nbolling@bakerdonelson.com
205.244.3802

Eric Pruitt

epruitt@bakerdonelson.com
205.244.3836

