

## **An Overview of the Enforceability of Dragnet Clauses in Foreclosure Litigation**

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With the economic crisis of recent years and resulting loan defaults, the enforceability of dragnet clauses has become a frequent issue in our practice. Under Florida law, unless the lender has carefully addressed the issue during the negotiation of the loan, it could have an uphill battle to enforce the provision. Still, borrowers may find themselves losing more than they anticipated if they did not consider the implications of signing loan documents with a dragnet clause.

**What is a dragnet clause?** A dragnet clause attempts to extend a mortgage lien to all existing and future debt between the parties. *Boyette v. Cardin*, 347 So.2d 759 (Fla. 1st DCA 1977). It has also been referred to as an “anaconda clause” (our favorite synonym when we are wearing out defense hat). *United National Bank v. Tellam, III*, 644 So.2d 97, 98 (Fla. 3d DCA 1994), *citing Berger v. Fuller*, 21 S.W.2d 419, 421 (Ark. 1929). An example of a boilerplate dragnet clause is:

In addition to the Note, this Mortgage secures all obligations, debts and liabilities, plus interest thereon, of Grantor to Lender, or any one or more of them, as well as all claims by Lender against Grantor or any one or more of them, whether now existing or hereafter arising, whether related or unrelated to the purpose of the Note, whether voluntary or otherwise, whether due or not due, direct or indirect, determined or undetermined, absolute or contingent, liquidated or unliquidated, whether Grantor may be liable individually or jointly with others, whether obligated as guarantor, surety, accommodation party or otherwise, and whether recovery upon such amount may be or hereafter may become barred by any statute of limitations, and whether the obligations to repay such amounts may be or hereafter may become otherwise unenforceable.

**How are dragnet clauses viewed under Florida law?** At first blush, this language appears to cast a very broad net securing all past, present, and future obligations under the mortgage. For instance, a pre-existing unsecured loan would arguably now be secured by the mortgage. However, prior to filing a foreclosure action, the practitioner must consider that dragnet clauses are generally disfavored under Florida law and will be strictly construed against the drafter. *St. Lucie County Bank & Trust v. Aylin*, 114 So. 438, 440 (1927); *United States v. American Nat’l Bank*, 255 F.2d 504, 507 (5th Cir.), *cert. denied*, 358 U.S. 835 (1958). As the Third District Court of Appeal explained, dragnet clauses have a “propensity to ‘enwrap the unsuspecting debtor in the folds of indebtedness embraced and secured in the mortgage which he did not contemplate.’” *United National Bank v. Tellam, III*, 644 So.2d 97, 98 (Fla. 3d DCA 1994), *citing Berger v. Fuller*, 21 S.W.2d 419, 421 (Ark. 1929). Although there is not a volume of Florida case law on this issue, the analysis that has developed certainly points to exercising caution before filing a foreclosure suit based on enforcing a dragnet clause. Moreover, practitioners drafting documents with such clauses must consider the existing case law in the event that the borrower defaults.

**What “tests” have Florida courts developed?** Generally speaking, a dragnet clause will cover future debts “only if the subsequent note specifically refers back to the mortgage’s dragnet clause as providing security for that advance; or when the obligations relate to the same

transaction or are of the same kind or class.” *Garrote v. Ocean Bank*, 713 So.2d 1095, 1096 (Fla. 3d DCA 1998) (citation omitted); *see also Cabot, Cabot and Forbes Land Trust v. First National Bank of Ft. Walton Beach, Ft. Walton Beach, Florida*, 369 So.2d 89 (Fla. 1st DCA 1979); *Uransky v. First Federal Savings & Loan Association of Fort Myers*, 684 F. 2d 750 (11th Cir. 1982); *In re Continental Country Club, Inc.*, 108 B.R. 327 (Bankr. M.D. Fla. 1989) (“A mortgage does not secure future notes where the notes do not refer to the prior mortgage nor specifically identify the real property covered by the prior mortgage as collateral”) (citation omitted).

As to pre-existing debts, the Third DCA requires that the debts be specifically identified in the dragnet clause in order to fall within its reach. This bright-line test “prevents mortgages from being extended to secure debts that were not contemplated by the debtor, and thus not within the intention of the parties.” *Tellam* at 99. Essentially, the argument is that it is easy to specifically reference the then existing debts in the dragnet clause. In contrast, the Fourth DCA has held that dragnet clauses are enforceable even when the pre-existing debt is not specifically referenced, provided that the language of the clause is clear and unambiguous as to the parties’ intent to secure the pre-existing and future debts. *Robert C. Roy Agency, Inc. v. Sun First National Bank of Palm Beach*, 468 So.2d 399, 402 (Fla. 4th DCA 1985).

Another interesting question is whether a dragnet clause may be enforced against a third party. The Fourth DCA addressed this issue in *Starlines International Corp. v. Union Planters Bank, N.A.*, 976 So.2d 1172 (Fla. 4th DCA 2008). Starlines purchased an interest in real estate encumbered by a recorded mortgage with a generic dragnet clause. At the time of the purchase, Starlines asked whether there was any pre-existing debt subject to the dragnet clause and the seller indicated that there was not. Two years later, the seller defaulted on an earlier unrecorded note with the same lender that held the real estate mortgage. The bank filed a foreclosure action, naming Starlines as a non-obligor co-defendant. Interestingly, as to third parties, the Fourth DCA adopted the *Tellam* rule (with one exception) and held that “a dragnet clause will not be enforced against someone other than the borrower unless the dragnet clause specially identifies the pre-existing debt to be included within its terms or unless it can be shown that the third party otherwise had notice that the specific pre-existing debt at issue was to be included within the grasp of the dragnet clause.” *Id.* at 1176.

**Briefly, are dragnet clauses enforceable?** Yes, but there are several traps for those unfamiliar with Florida law. Generic clauses without any further evidence of intent to negotiate a dragnet clause favor borrowers, whereas clauses which specifically reference the related debt rest on the opposite end of the continuum and favor lenders. Prior to foreclosing based on a dragnet clause, the practitioner should review the applicable case law, discuss the loan histories with the client and advise the client as to the potential challenges to the foreclosure. Of course, when representing defendants, the same steps must be undertaken to analyze whether there may be an argument to narrow the attempted reach for collateral by the lender.

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