

c Rule 1.10(a), Fla. R. Civ. P. 2010 mandates that a copy of the note and mortgage be attached to the complaint. *Eigen F. IC*, 42 So. 2d 2, Fla. 2d CA 1

d In note and mortgage assigned, complaint should allege assignment. Attachment of the assignment is required but may not be required since the cause of action is based on the mortgage; not the assignment. Rule 1.10(a), Fla. R. Civ. P. 2010, *MS Specialty Mortgage, LLC v. Salomon*, 4 So. 2d 0, 2 Fla. 4th CA 2004; *Chemical Residential Mortgage v. Rector*, 42 So. 2d 00 Fla. 1st CA 1; *Johns v. Gillian*, 14 So. 140, 144 Fla. 1

e Junior lien holder's allegation is sufficient if it states that the interest of a defendant accrued subsequent to the mortgage and he is a party. *InterNational Kaolin Co. v. Cause*, 4 So. , Fla. 10

Federal tax lien allegation must state interest of the United States of America, including: the name and address of the taxpayer, the date and place the tax lien was filed, the identity of the Internal Revenue Office which filed the tax lien and if a notice of tax lien was filed. Title 26 S.C. 2410(b). A copy of the tax lien must be attached as an exhibit.

g Local taxing authority or State of Florida party defendant allegation should state with particularity the nature of the interest in the real property. 041.2, Fla. Stat. 2010

h Complaint must include statement of default based on unpaid taxes or insurance must be alleged with particularity. *Siah v. Oosh* *Nor Pro s*, So. 2d , Fla. 4th CA 1

i Complaint should allege compliance with condition precedent, particularly notices

Legal description of the subject real property

k Attorneys must be named or it is waived. *Stockman v. owns*, 5 So. 2d 5, Fla. 1-1. Allegation as to obligation to pay a reasonable attorney fee is sufficient to claim entitlement. *allace v. Gage*, 150 So. , 00 Fla. 1. The claim of attorneys is based on contractual language in the note and mortgage.

Additional counts include: reestablishment of the note and reformation. Reestablishment of the note is necessary if the note is lost; reformation of the note is needed if material terms are missing. Reformation of the mortgage applies if there is a legal description discrepancy; reformation of deed if there is a deed problem.

If a plaintiff seeks a deficiency, the guarantors must be sued.

Original Document Filing and Reestablishment of the Note

1. Note Lender is required to either present the original promissory note or give a satisfactory explanation of the lender's failure to present it prior to it being enforced. *Natl Loan Investors, LP v Joymar Associates*, 90 So 2d 54, 550 Fla D CA 2000.

a. A limited exception applies to lost, destroyed or stolen instruments. *Id*

2. A lost promissory note is a negotiable instrument. 1041.1, Fla Stat 200; *Thomson First Union Bank*, 4 So 2d 11 Fla 5th CA 1 4.

a. Loss or unintentional destruction of a note does not affect its validity or enforcement.

Reestablishment of the lost note. An owner of a lost, stolen or destroyed instrument may maintain an action by showing proof of his ownership, facts that prevent the owner from producing the instrument and proof of the terms of the lost instrument. 101.2, Fla Stat 2004; *Lawyer's Title Ins Co, Inc v No Astar Mortgage, Inc*, 2 So 2d , Fla 4th CA 2004; *Gutierrez Bermude*, 540 So 2d , 0 Fla 5th CA 1.

a. Owner of note is not required to have held possession of the note when the loss occurred to maintain an action against the mortgagor. *Bank of America v Menendez*, 90 So 2d 124, 12 Fla D CA 2002. Further, plaintiff is not required to prove the circumstances of the loss or destruction of the note to seek enforcement. *Id*, at 12. Plaintiff must show only that it was entitled to enforce the note at the time of loss or that it has directly or indirectly acquired ownership of the instrument from a person who was entitled to enforce the instrument when loss of possession occurred.

0 1 1 a , Fla Stat 2010 ; *MERS Badra*, 1 So 2d 10 , 10 Fla 4th CA 200

b I lainti is not in ossession o the original note and did not reestablish it, lainti cannot oreclose on the note and mortgage 0 1 1 , Fla Stat 2004 ; *asma In est , LLC Realty Associates Fund III, L P* 45 F Su 2d 12 4, 1 02 S Fla 200

c The iling o a du licate co y o the note is su icient to satis y statutory re uirements in a oreclosure action *Perry Fairbanks Ca ital Cor* , So 2d 25 Fla 5th CA 2004 I there is no co y, Plainti should ile a lost note a ida it, ledger or a summary o loan terms

1 Checklist for lost note affidavit:

- a original rinci al balance;
- b signators and date note e ecuted;
- c rate o interest;
- d un aid balance and de ault date;
- e a iant status must be banking re resentati e with knowledge o the articular loan;
- indemnity language, re cluding subse uent oreclosure udgment on the same note

d here the original note is lost, the court may re uire indemnification o the borrower or subse uent rosecution on the note and may re uire a bond to secure same *Lo ingood Butler Construction Co* , 1 1 So 12 , 1 5 Fla 1 0 Consider bonds articularly where there is a securiti ed trust

1 Mortgage Co y o mortgage is su icient *Perry*, So 2d at 2

a Mortgage must contain correct legal descri tion *Lucas Barnett Bank o Lee County*, 05 So 2d 115, 11 Fla 2d CA 1 I not, inal udgment must be set aside owe er, this can be corrected rior to inal udgment

Fair Debt Collection Practices Act (FDCPA)

1 Purpose eliminate abusive debt collection practices by debt collectors and to
 promote consistent State action to protect consumers against debt collection abuses

15 S.C. 1-2 e

2 Some Florida courts held attorneys engaged in regular foreclosure work met
 the general definition of debt collector and are subject to the FDCPA. *Sandlin
 Shafer*, 1 F.Supp. 154, 15 M. Fla. 1, law firm engaged in collection
 foreclosure work was considered a debt collector where the firm sent correspondence
 advising of payoff and reinstatement figures and directed mortgagors to pay the law
 firm

Under FDCPA, a debt collector's obligation to send a Notice of Debt is triggered
 by an initial communication with the consumer. *McKnight Benite*, 1 F.Supp.
 101, 104 M. Fla. 2001

a Filing of suit is not an initial communication which otherwise would have
 given rise to notice and verification rights. *Acosta Campbell*, 200 L. 042
 M. Fla. 200

b Foreclosure law firms have adopted the practice of attaching to their
 complaint: Notice Required under the Fair Debt Collection Practice Act. This notice
 held ineffective in *Martinez Law Offices of David J. Stern*, 2 B.R. 52 Bank S.
 Fla. 2001

Mandatory Mediation of Homestead Foreclosures

1 Based on the exponential increase in filings of mortgage foreclosure cases in
 the Eleventh Judicial Circuit Court, the Chief Judge implemented our Administrative
 Orders in the following sequence:

a Administrative Order 000 applies to all residential foreclosure actions
 involving homestead properties filed on or after May 1, 2000. AO 000 established
 the 11th Circuit Homestead Access to Mediation Program (CAMP) mandating
 mandatory mediation of homestead foreclosures prior to the matter being set for final
 hearing. At the time of filing the complaint, Plaintiff is required to transmit to the

Program Manager, the Collins Center, a notice form Form A with borrower's contact information within five days of filing the complaint, Plaintiff must tender a cost check in the amount of \$50.00 to cover the administrative costs of the mediation. The Collins Center responsibilities include: contacting the borrower, referring the borrower to financial counseling and making financial documentation available electronically to the Plaintiff. Plaintiff's counsel and the borrower are required to be physically present at mediation; the lender's representative must attend, but is allowed to participate by telephone. Within ten days of the completion of the mediation, the mediator must report the mediation results to the court.

b. Administrative Order 0-0 revised the following forms: the civil cover sheet, Plaintiff's certification of settlement authority, Plaintiff's certification of residential mortgage foreclosure case status and the final judgment of foreclosure.

This Administrative Order specifically exempts condominium and homeowners association fee foreclosures, private in rem mortgage foreclosures, foreclosures of non-homestead properties and construction lien foreclosures.

c. Administrative Order 0-0 A1 acknowledged the statutory authority of the Clerk of the Courts to conduct the sale of real or personal property by electronic means. This Administrative Order further proscribed adherence to certain procedures concerning tenant occupied residential properties under the Protecting Tenants at Foreclosure Act of 2009. Amending the specific format of the final judgment of foreclosure, this Administrative Order prohibited the issuance of immediate writs of possession.

d. Administrative Order 0-1 responded to the Clerk of the Court's request for formal approval to conduct online auctions, in lieu of on-site auctions or the sale of real property.

2. On December 2, 2009, the Florida Supreme Court issued Administrative Order 0-54, adopting the recommendations of the Task Force on Residential Mortgage Foreclosure Cases and establishing a uniform, statewide managed mediation program. The Florida Supreme Court approved the Task Force's Model Administrative Order, with minor changes to be implemented by each circuit chief judge.

On February 2 , 2010, the Eleventh Judicial Circuit Court issued Administrative Order 10 0 A1 requiring mandatory mediation of all homestead mortgage foreclosure actions subject to the federal Truth in Lending Act, Regulation Z. Administrative Order 10 0 A1 applies to actions filed after March 2 , 2010. Specifically exempted from this Administrative Order are condominium and homeowners association fee foreclosures and mechanics and construction lien foreclosures. This Administrative Order constitutes a formal referral to mediation through the Residential Mortgage Foreclosure Mediation (RMFM) Program; parties are ineligible for default judgment, a summary judgment or final hearing until they have fully complied with mediation requirements.

Basic Procedural Requirements of Administrative Order 10 0 A1 include:

a. When suit is filed, Plaintiff must file a completed Form A with the Clerk listing the last known mailing address and phone number for each party. One business day after filing the complaint, Plaintiff must transmit Form A to the Program Manager of the RMFM along with the case number of the action. The Collins Center for Public Policy, Inc. is the contract Program Manager in the Eleventh Judicial Circuit. At the time of the filing of the complaint, the Plaintiff must tender RMFM fees in the amount of \$400.00; the balance of fees in the amount of \$50.00 must be paid by Plaintiff within 10 days after notice of the mediation conference.

b. Upon receipt of Form A, the Program Manager must contact the borrower and refer the borrower to an approved mortgage foreclosure counselor. Foreclosure counseling must be completed no later than 30 days from the Program Manager's initial contact with the borrower. If the Program Manager is unable to contact the borrower within this time frame, the borrower will have been deemed to elect non-participation in the RMFM Program.

c. The Program Manager must transmit the borrower's financial disclosure or mediation no later than 30 days after the Program Manager receives Form A from Plaintiff.

d. The Program Manager shall schedule a mediation session no earlier than 30 days and no later than 120 days after suit is filed.

e. Plaintiff's representative may appear by telephone upon 5 days notice prior to the mediation; Plaintiff's attorney, the borrower and the borrower's attorney, if any, must attend in person. The court may dismiss the action without prejudice or impose other sanctions for failure to attend. Within 10 days after completion of mediation, the mediator must issue a report advising the court as to the parties' attendance and result.

Service of Process

1. Due service of process is essential to satisfy jurisdictional requirements over the subject matter and the parties in a foreclosure action. Rule 1.000, Fla. R. Civ. P. 2010 and Chapters 4 and 4 of the Florida Statutes.

2. Service of process must be made upon the defendant within 120 days after the filing of the initial pleading. Rule 1.000, Fla. R. Civ. P. 2010. Absent a showing of excusable neglect or good cause, the failure to comply with the time limitations may result in the court's dismissal of the action without prejudice or the dropping of the defendant.

Personal Service

1. Section 4.011, Fla. Stat. 2010 requires that service of process be effectuated by a certified process server on the person to be served by delivery of the complaint or other pleadings at the usual place of abode or by leaving the copies at the individual's place of abode with any person residing there, who is 15 years of age or older and informing them of the contents. § 4.02, Fla. Stat. 2010.

a. Ineffective service. Leaving service of process with a doorman or with a tenant, when the defendant does not reside in the apartment is ineffective service. *Grosheim v. Greenpoint Mortgage Funding, Inc.*, 1 So.2d 0, 0 Fla.4th CA 2002. Evidence that person resides at a different address from service address is ineffective service. *Alare v. State Farm Mut. Ins. Co.*, 5 So.2d 11 Fla.4th CA 14.

b. Judgment subject to collateral attack where plaintiff did not substantially comply with the statutory requirements of service.

2 Substitute service authorized by Section 401.2, Fla Stat 2010
 Substitute service may be made upon the spouse of a person to be served, if the
 cause of action is not an adversary proceeding between the spouse and the person to
 be served, and if the spouse resides with the person to be served

a Statutes governing service of process are strictly construed *General de
 Seguros, S A Consol Pro Cas Ins Co*, 50 So 2d 10, 1 Fla d CA
 2001 reversed with directions to vacate deault judgment and quash service of
 process since substituted service was not effected

b Use of private couriers or Federal Express held invalid *Id; FNMA
 Fandino*, 51 So 2d 52, 5 Fla d CA 2000, trial courts voiding judgment
 affirmed based on plaintiff's failure to strictly comply with substitute service of process
 which employed Federal

c Evading service of process defined by statute as concealment of
 whereabouts 401.11, Fla Stat 2010; *Bodden Young*, 422 So 2d 1055 Fla
 4th CA 1 2

1 The Florida case which clearly illustrates concealment is *Luckey
 Smathers Thomson*, 4 So 2d 5 Fla d CA 1 In *Luckey*, the
 defendant had for the purpose of avoiding all legal matters, sequestered
 himself from the world and lived in isolation in a high security apartment
 refusing to answer the telephone or even to open his mail *Id* at 54 The
 Third District Court of Appeal affirmed the trial court's decision denying
 defendant's motion to vacate the writ of execution and levy of sale based on a
 record of genuine attempts to serve the defendant The Third District Court
 further opined that there is no rule of law which requires that the officers of
 the court be able to breach the self-imposed isolation in order to inform the
 defendant that a suit has been filed against him *Id*

2 Effective proof of evading service must demonstrate plaintiff's attempts in
 light of the facts of the case despite process server's unsuccessful attempts
 at service, evasion was not proved based on evidence that the property was
 occupied and defendant's vehicle parked there *ise arner*, 2 So 2d

5 1, 5 2 Fla 5th CA 200 working whose place of employment was known to the sheriff was not concealing herself or avoiding process, sheriff only attempted service at the residence during work hours *Styles v. United Fidelity Guaranty Co*, 42 So 2d 104 Fla 5th CA 1 2

Statutory requirements satisfied if papers left at a place from which the person to be served can easily retrieve them and in the process server takes reasonable steps to call the delivery to the attention of the person to be served *Olin Corporation v. Anney*, 245 So 2d 104 Fla 4th CA 1 1

Service on a corporation may be served on the registered agent, officer or director Section 4 0 1 2 b, Fla Stat 2010 if the address provided for the registered agent, officer, director, or principal place of business is a residence or private mailbox, service on the corporation may be made by serving the registered agent, officer or director in accordance with 4 0 1, Fla Stat 2010

Constructive Service by Publication

1 Section 4 0 1 1, Fla Stat 2010 identifies the enforcement of a claim of lien to any title or interest in real property such as foreclosure actions

2 Sections 4 0 2 1 40 0 4 1, of the Florida Statutes govern constructive service or service by publication Constructive service statutes are strictly construed against the party seeking to obtain service *Leenson v. McCarty*, 20 So 2d 1, 1 Fla 4th CA 2004

Service by publication only available when personal service cannot be made *Godsell v. United Guaranty Residential Insurance*, 2 So 2d 120, 1212 Fla 5th CA 200, service by publication is void when plaintiff knew of the defendant's Canadian residency, but merely performed a ski trace in Florida and made no diligent search and inquiry to locate Canadian address; *Gross v. Fidelity Federal Savings Bank of Fla*, 5 So 2d 4, 4 Fla 4th CA 1 1, appellate court reversed and remanded to wash service process and default based on plaintiff's knowledge of defendant's out of state residence address and subsequent failure to attempt personal service

a Plaintiff must demonstrate that an honest and conscientious effort, reasonably appropriate to the circumstances, was made to acquire the necessary information and comply with the applicable statute *or Cha, Inc v Hollingsworth*, 2010 So 2d 1110, 1112 Fla 4th CA 2004, default judgment reversed based on plaintiff's crucial misspelling of defendant's name and subsequent search on wrong individual

b Condition precedent to service by publication Section 4 041, Fla Stat, 2010, requires that the plaintiff file a sworn statement that shows 1 a diligent search and inquiry has been made to discover the name and residence of such person, 2 whether the defendant is over the age of 18, or if unknown, the statement should set forth that it is unknown, and 3 the status of the defendant's residence, whether unknown or in another state or country Section 4 051, Fla Stat 2010 applies to service by publication on a corporation

c Plaintiff is entitled to have the clerk issue a notice of action subsequent to the filing of its sworn statement Pursuant to 4 040, Fla Stat, 2010, the notice requires defendant to file defenses with the clerk and serve same upon the plaintiff's attorney within 30 days after the first publication of the notice

1 Notice published once each week or two consecutive weeks, with proof of publication filed upon final publication

4 10 1 c 2, Fla Stat 2010

d Affidavit of diligent search need only allege that diligent search and inquiry have been made; it is not necessary to include specific facts *Floyd v FNMA*, 2010 So 2d 1110, 1112 Fla 5th CA 1, final judgment and sale vacated based on plaintiff's failure to conduct diligent search to discover deceased mortgagor's heirs residence and possession of the subject property *Howe v*:

1 Better practice is to file an affidavit of diligent search that contains all details of the search *emars v Hill v Sandalwood Lakes Homeowners Ass'n*, 2010 So 2d 121, 1222 Fla 4th CA 1, plaintiff's attorney failed to conduct diligent search and

inquiry by neglecting to follow up on leads which he knew were likely to yield defendant's residence

a **Diligent search and inquiry checklist**

Form 1-24, Fla. R. Civ. P. 2010 contains a basic checklist of a diligent search and inquiry to establish constructive service. This Form adds consideration of inquiry of tenants as to the location of the owner/landlord of tenant occupied property. Further, the Form utilizes the following sources:

- 1 Inquiry as to occupants in possession of the subject property;
- 2 Inquiry of neighbors;
Public records search of criminal civil actions;
- 4 Telephone listings;
- 5 Tax collector records;
Utility Company records;
Last known employer;
US Post Office;
- Local police department, correctional department;
- 10 Local hospitals;
- 11 Armed Forces of the US;
- 12 Department of Highway Safety Motor Vehicles;
- 13 School board enrollment verification, if defendant has children;
- 14 An inquiry of the Division of Corporations, State of Florida, to determine if the defendant is an officer, director or registered agent;
- 15 Other registration records

The plaintiff bears the burden of proof to establish the legal sufficiency of the affidavit when challenged. *Id.* If constructive service process is disputed, the trial court has the duty of determining: 1) if the affidavit of diligent search is legally sufficient; and 2) whether the plaintiff conducted an adequate search to locate the defendant. *First Homeview Corp. v. Guggino*, 10 So. d 14, 15 Fla. d. CA 200

g **Diligent search test** whether plaintiff reasonably employed the knowledge at his command, made diligent inquiry, and exercised an honest and conscientious effort appropriate to the circumstances. *She heard Deutsche Bank Trust Co Americas*, 22 So 2d 40, 4 Fla 5th CA 200 , reversed and voided judgment as to defendant wife based on plaintiff's failure to strictly comply with statute, when they had been informed of defendant's correct address in England. Plaintiff's reliance on constructive service, when a doorman in New York repeatedly informed the process server of the defendant's location in Florida, reflects an insufficient amount of reasonable efforts to personally serve the defendant to justify the use of constructive service. *Reico Chase Manhattan Bank*, 2 So 2d 15, 1 Fla 4d CA 2002. Similarly, failure to inquire of the most likely source of information concerning whereabouts of a corporation, or an officer or agent, does not constitute reasonable diligence. *Redfield Investments, A Billage o Pinecrest*, 10 So 2d 115, 11 Fla 4d CA 200

h defective service of process judgment based on lack of diligent search and inquiry constitutes improper service and lacks authority of law. *Batchin Barnett Bank o Southwest Fla*, 4 So 2d 211, 21 Fla 2d CA 1 4

1 Judgment rendered void when defective service of process amounts to no notice of the proceedings. *She heard*, 22 So 2d at 45. Void judgment is a nullity that cannot be validated by the passage of time and may be attacked at any time. *Id*

2 Judgment rendered voidable irregular or defective service actually gives notice of the proceedings. *Id*

i Limitations of constructive service only concern in rem or quasi in rem jurisdiction; restricted to the recovery of mortgaged real property

1 No basis for deficiency judgment constructive service of process cannot support a judgment that determines an issue of personal liability. *Carter Kingsley Bank*, 5 So 2d 5 , 5 Fla 1st CA 1 1 , deficiency judgment cannot be obtained absent personal service of process

Service of Process outside the State of Florida and in Foreign Countries

1 Section 4 1 4 1 , Fla Stat , 2010 authori es ser ice o rocess in the same manner as ser ice within the state, by an o icer in the state where the erson is being ser ed Section states that ser ice o rocess outside the nited States may be re uired to con orm to the ro isions o ague Con ention o 1 concerning ser ice abroad o udicial and e tra udicial documents in ci il or commercial matters

2 The ague Con ention creates a ro riate means to ensure that udicial and e tra udicial documents to be ser ed abroad shall be brought to the addressee in su icient time *Koechli BIP Int l* , 1 So 2d 501, 502 Fla 5th CA 200

a Procedure rocess sent to a designated central authority, checked or com liance, ser ed under oreign nation s law, and certi cate re ared which documents the lace and date o ser ice or an e lanation as to lack o ser ice *Id* return by the central authority o a oreign nation o com leted certi cate o ser ice was rima acie e idence that the authority s ser ice on a de endant in that country was made in com liance with the ague Con ention and with the law o that oreign nation

b Com liance issues see *i ellman Int l Nat l Forwarders*, 11 So 2d 1 Fla d CA 1 2 , lainti ro ided a aulty address to the S anish authorities and the trial udge entered a de ault udgment, which a ellate court re ersed

Ser ice by registered mail authori ed by Section 4 1 4 2 , Fla Stat 2010 Permits ser ice by registered mail to nonresidents where the address o the erson to be ser ed is known

a Section 4 1 2 2 b , Fla Stat 2010 , ro ides that lainti must ile an a ida it which sets orth the nature o the rocess, the date on which the rocess was mailed by registered mail, the name and address on the en elo e containing the rocess that was mailed, the act that the rocess was mailed by registered mail and was acce ted or re used by endorsement or stam The return en elo e rom the attem t to mail rocess should be attached to the a ida it

Service of process and timeshare real property:

1 Foreclosure proceedings involving timeshare estates may join multiple defendants in the same action § 21 , Fla Stat 2010

2 There are additional options to effectuating service of process on a timeshare foreclosure

a Substitute service may be made upon the obligor's appointed registered agent § 21 5 1 , Fla Stat 2010

b When quasi in rem or in rem relief only is sought, service may be made on any person whether the person is located inside or outside the state by certified or registered mail, addressed to the person to be served at the notice address § 21 5 a , Fla Stat 2010

Substitution of Parties

1 Substitution is not mandatory; the action may proceed in the name of the original party owner, to substitute a new party based on a transfer of interest requires a court order *Tinsley Mangonia Residence 1, Ltd*, So 2d 1 , 1 Fla 4th CA 200 , Rule 1 2 0, Fla R Ci P

2 Order of substitution must precede an adjudication of rights of parties, including default *Floyd Wallace*, So 2d 5 Fla 1 ; *Cambell Napoli*, So 2d 12 2 Fla 2d CA 2001 , error to enter judgment without a real party against whom judgment could be entered

When substitution is permitted, plaintiff must show the identity of the new party's interest and the circumstances

Entry of Default

1 Without proof of service demonstrating adherence to due process requirements, the Plaintiff is not entitled to entry of default or a default final judgment

a Failure to effectuate service places the jurisdiction in a state of dormancy during which the trial court or clerk is without authority to enter a default *Armet*

SNC di Ferronato Gioanni Coombs, 44 So 2d 111, 1121 Fla 1st CA 1; *Tetley Lett*, 42 So 2d 112 Fla 4th CA 14

Legal effect of default admission of every cause of action that is sufficiently well led to properly invoke the jurisdiction of the court and to give due process notice to the party against whom relief is sought *Fiera Com, Inc v. Gigicast New Media Group, Inc*, So 2d 451, 452 Fla 4th CA 200. Default terminates the defendant's right to further defend, except to contest the amount of unliquidated damages *Donohue v. Brightman*, So 2d 112, 114 Fla 4th CA 200

Plaintiff is entitled to entry of default if the defendant fails to file or serve any answer 20 days after service of process Rule 1.040(a)(1), Fla R. Civ. P. 2010

a. State of Florida has 40 days in which to file or serve any answer in accordance with Section 41.21, Fla Stat. 200

b. United States of America has 30 days to file under the provisions of 28 S.C.A. 2410(b); Rule 12(a), Fed. R. Civ. P.

4 **Service Members Civil Relief Act of 2003 (formerly, Soldier's & Sailors Act)**

a. Codified in 50 A.S.C.A. 521 tolls proceedings during the period of time that the defendant is in the military service

b. Act precludes entry of default; there is no need for the service member to demonstrate hardship or prejudice based on military service *Conroy v. Anisko*, 50

S. 511, 512(1). Service member with notice of the foreclosure action, may obtain a stay of the proceedings for a period of 90 days 50 A.S.C.A. 521(d) was superseded by the Housing and Economic Recovery Act of 2008, § 220, which expires on 12/31/10. Upon expiration, the original 90 day period will re take effect

c. Termination of military status to obtain default, plaintiff must file an affidavit stating:

1. Defendant is not in military service; or

2 Plaintiff is unable to determine if the decedent is in the
military service 50 A S C A 521 b 1

d Unknown military status the court may require the plaintiff to file a bond
prior to entry of judgment 50 A S C A 521 b

5 Plaintiff is required to serve the decedent with notice of the application for
deed Failure to notify decedent's attorney entry of subsequent deed is invalid;
rendering resulting judgment void *S Bank Nat'l Ass'n v Lloyd*, 1 So 2d ,
4 Fla 2d CA 200

Non Military Affidavit required must be based on: personal knowledge, attest
to the fact that inquiry was made of the Armed Forces, and affiant must state that the
decedent is not in the armed forces *The Fla Bar Re: A Formal Form*, 21 So 2d
1025, 10 4 Fla 1 Affidavits based on information and belief are not in
compliance

a Non military affidavit is valid for one year

Appointment of a Guardian ad Litem

1 The best practice is appointment when unknown parties are joined and service
effected through publication For example, a guardian ad litem should be appointed
to represent the estate of a deceased decedent or when it is unknown if the
decedent is deceased 0 , Fla Stat 2010

a Section 50 1 2 , Fla Stat 2010 states that a guardian ad litem shall
not be appointed unless it affirmatively appears that the interest of minors, persons of
unsound mind, or conflicts are involved

b Rule 1 210 b , Fla R Ci P 2010 provides that the court shall appoint a
guardian ad litem for a minor or incompetent person not otherwise represented or
the protection of the minor or incompetent person Similarly, Rule 1 511 e , Fla R
Ci P 2010 maintains that final judgment after deed may be entered by the
court at any time, but no judgment may be entered against an infant or incompetent
person unless represented by a guardian

c The party seeking a judgment must show that there is a substantial likelihood that it will prevail on the merits at the conclusion of the case and must present sufficient proof that a judgment of a receiver is warranted. *Keybank National Association v. Knuth, Ltd.*, 200 WL 24410, 24411 Fla. d. CA, Aug 12, 200

d A final prerequisite to a judgment of a receiver is that the motion must post a bond, or either the plaintiff or the receiver. Rule 1.20(c), Fla. Rules of Civil Procedure 2010; *Boyd v. Banc One Mortgage Corp.*, 50 So. 2d , Fla. d. CA 1

Summary Final Judgment of Foreclosure

1 Legal standard No genuine issue of material fact and motion is entitled to a judgment as a matter of law. Also, outstanding discovery can preclude summary judgment.

2 Burden of Proof The plaintiff bears the burden of proof to establish the nonexistence of disputed issues of material fact. *elandro v. Am's Mortgage Servicing, Inc.*, 4 So. 2d 14, 1 Fla. d. CA 1; *Roll v. Talcott*, 11 So. 2d 40, 4 Fla. 1

Content of motion for summary judgment plaintiff should allege:

1 execution of note and mortgage; 2 plaintiff's status as owner and holder or representative; 3 date of default; 4 notice of default and acceleration; 5 amount due and owing; 6 relief sought; and 7 address affirmative defenses, if any.

4 Filing of the Motion at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party. Rule 1.510(a), Fla. R. Civ. P. 2010. The motion for summary judgment, supporting affidavits and notice of hearing must be served on a defendant at least 20 twenty days before the summary judgment hearing. Rule 1.510(c), Fla. R. Civ. P. 2010; *First v. Bank of New York*, 2010 WL 112 Fla. 2 CA Mar , 2010; *Mack v. Commercial Industrial Park, Inc.*, 541 So. 2d 00, 01 Fla. 4th CA 1

a Opposition materials and evidence supporting a denial of a motion for summary judgment must be identified. Rule 1.510(c), Fla. R. Civ. P. 2010. Notice of opposition must be mailed to the movant's attorney at least five days prior to the day of hearing or delivered no later than 5:00 P.M., two business days prior to the day of the hearing on the summary judgment.

b The movant for summary judgment must factually refute or disprove the affirmative defenses raised, or establish that the defenses are insufficient as a matter of law. *Leal v. Deutsche Bank Nat'l. Trust Co.*, 21 So. 3d 10, 10 Fla. 3d DCA 200.

c Filing of cross motions is subject to the 20 day notice period. *Wikowski v. Hillsborough County*, 51 So. 2d 122, Fla. 2d CA 15. Requirement of motion for summary judgment, due notice and a hearing. Proof of mailing of notice of the final summary judgment hearing created presumption that notice of hearing was received. *Blanco Kinas*, 51 So. 2d 1, 2 Fla. 3d CA 200.

Affidavits in support of Summary Judgment

Affidavits in support of the motion must be made based on personal knowledge and set forth facts that would be admissible in evidence, and demonstrate that the affiant is competent to testify on the matters presented.

a Affidavit of Indebtedness Must be signed by a custodian of business record with knowledge. In general, the plaintiff's affidavit items are:

1 Property address,

2 Principal balance,

interest calculated from default until the entry of judgment, when the mortgage provides for automatic acceleration upon

default, *T FN Realty Co v. Kirkman Conroy, Ltd*, 54 So. 2d 115

Fla. 5th CA 1. Best practice is to include per diem interest,

4 late charges re acceleration only, *Fowler v. First Fed Sa*

Loan Ass'n, 4 So. 2d 10, Fla. 1st CA 14,

5 prepayment penalties unavailable in foreclosure actions, *Fla. Nat'l*

Bank Atlantic, 5 So 2d 255, 25 Fla 1 1 , unless specifically authorized in note in the event of acceleration and foreclosure *Feinstein Ashlant*, 1 So 2d 10 4 Fla 4th CA 200

property inspections appraisals,
 hazard insurance premiums and taxes

b Award of Costs This award details:

- 1 the filing fee,
- 2 service process,
 and abstracting costs

c Award of attorney's time references the actual time the attorney expended on the foreclosure file and references the actual hourly billable rate or the flat fee rate which the client has agreed to pay. The Fla Supreme Court endorsed the lodestar method *Bell S B Acquisition Co*, 4 So 2d 40 , 40 Fla 1. The hours may be reduced or enhanced in the discretion of the court, depending on the novelty and difficulty of questions involved *Fla Patient's Compensation Fund Rowe*, 4 2 So 2d 1145, 1150 Fla 1 5. With regard to uncontested time, plaintiff is not required to keep contemporaneous time records since the lender is contractually obligated to pay a flat fee for that time. *Id*

d Award as to reasonableness of attorney's fee Award of attorney's fee must be signed by a practicing attorney not affiliated with the plaintiff's firm, attesting to the rate as reasonable and customary in the circuit. Plaintiff should reference and evaluate the attorney fee claim based on the eight factors set forth in Rule 4 1 5 b 1 Rules Regulating the Fla Bar. Of these, relevant factors, such as the time and labor required, the customary fee in the locality for legal services of a similar nature, and the experience and skill of the lawyer performing the service must be examined. An award of attorney fees must be supported by expert evidence *Palmetto Federal Savings and Loan Association v. [unclear]*, 512 So 2d 2 Fla d CA 1

1 Where there is a default judgment and the promissory note or mortgage contains a provision for an award of attorney fees,

Section 62.052, Fla. Stat. 2010 provides that it is not necessary for the court to hold a hearing or adjudicate the requested attorney's fees to be reasonable if the fees do not exceed ten percent of the principal amount owed at the time of the filing of the complaint. *Florida Patient's Compensation Fund v. Rowe*, 42 So. 2d 1145, Fla. 1st DCA 1950. *Id.* This statutory provision confirms that such fees constitute liquidated damages in any proceeding to enforce the note or mortgage. *Id.*

2. The judgment must contain findings as to the number of hours and the reasonable hourly rate. *Id.* at 1152. The requirements of *Rowe* are mandatory and failure to make the requisite findings is reversible error. *Home Insurance Co. v. Gonale*, 4 So. 2d 21, 22 Fla. 1st DCA 1950. An award of attorney's fees must be supported by competent substantial evidence in the record and contain express findings regarding the number of hours reasonably expended and a reasonable hourly rate for the type of litigation involved. *Stack v. Lakeside Lending, Inc.*, 20 So. 2d 1, 20 Fla. 2d CA 200.

Affirmative Defenses

1. Genuine existence of material fact precludes entry of summary judgment. *Manassas Investments Inc. v. O'Arrahan*, 1 So. 2d 100, Fla. 2d CA 2002.

2. Legal sufficiency of defenses. Certainty is required when pleading affirmative defenses; conclusions of law unsupported by allegations of ultimate fact are legally insufficient. *Bliss v. Carmona*, 41 So. 2d 101, 101 Fla. 1st DCA 1950.

Affirmative defenses do not simply deny the facts of the opposing party's claim; they raise some new matter which defeats an otherwise apparently valid claim. *Jiggins v. Protmy*, 40 So. 2d 541, 542 Fla. 1st DCA 1950. Plaintiffs must either actually refute affirmative defenses or establish that they are legally insufficient. *Frost v. Regions Bank*, 15 So. 2d 05, 0 Fla. 4th CA 200.

Affirmative defenses commonly raised:

a Payment Here debtors alleged advance payments and plaintiff failed to refute this defense, plaintiff not entitled to summary judgment *Morrone Household Fin Cor III*, 10 So 2d 11, 12 Fla 2d CA 2005. Usually, if the affidavit of indebtedness is inconclusive or, for example, includes a credit or unaffiliated funds without explanation, and the borrower alleges a the defense of inaccurate accounting, then summary judgment should be denied *Kanu Pointe Bank*, 1 So 2d 4 Fla 4th CA 200. However, summary judgment will be deeded if payment was attempted, but due to misunderstanding or excusable neglect coupled with lender's conduct, contributed to the failure to pay *Cambell Turner*, 22 So 2d 252, 25 Fla d CA 10; *Lieberbaum Surcomberotel Cor*, 122 So 2d 2, 2 Fla d CA 10, Court dismissed foreclosure complaint where plaintiff knew that some excusable oversight was the cause of non payment, said payment having been re used and subsequently deposited by debtors into the court registry

b Failure to comply with conditions precedent such as Plaintiff's failure to send the Notice of default letter Failure to receive any information does not preclude summary judgment *Walker Midland Mortgage Co*, 5 So 2d 51, 520 Fla d CA 200

c Estoppel is usually based on: a representation as to a material fact that is contrary to a later asserted position; reliance on that representation; and a change in position detrimental to the party claiming estoppel, caused by the representation and reliance thereon *arris Natl Recovery Agency*, 1 So 2d 50, 54 Fla 4th CA 2002; *Jones City of Inter a en*, 10 So 2d 52, 55 Fla 2d CA 200, defendant deeded city's foreclosure based on evidence presented which indicated that the city had agreed to stop fines or noncompliance with property code if homeowner hired a licensed contractor to make repairs

d waiver the knowing and intentional relinquishment of an existing right *Taylor Kenco Chem Mg Co*, 45 So 2d 51, 5 Fla 1st CA 15. When voluntarily led, affirmative defenses that sound in waiver and estoppel present

genuine issues of material fact which are inappropriate for summary judgment
Schiebe Bank of Am, 22 So 2d 555 Fla 5th CA 2002

1. Acceptance of late payments common defense asserting waiver is the lender's acceptance of late payments. However, the lender has the right to elect to accelerate or not to accelerate a term default. *Scarborough Peer*, 405 So 2d 104, 105 Fla 5th CA 1981. The default recited on defendant's failure to pay real estate taxes, could not be overcome by defendant's claim of estoppel due to misapplication of non-escrow payments. *Lunn v. Lows Lowery*, 5 So 2d 105, 106 Fla 2d CA 1941.

2. Fraud in the inducement defined as situation where parties to a contract appear to negotiate freely, but where in fact the ability of one party to negotiate fair terms and make an informed decision is undermined by the other party's fraudulent behavior. *TP, Ltd v. Lineas Aereas Costarricenses, S.A.*, 5 So 2d 121, 122 Fla 1941.

3. A fraudulent defense of fraud in the inducement based on allegation that seller failed to disclose the extent of termite damage resulted in reversal of foreclosure judgment. *Inton v. Brooks*, 20 So 2d 25 Fla 5th CA 2001. Note that purchasers had first filed fraud in the inducement case and seller retaliated with foreclosure suit. Further, the appellate court opined in the *Inton* case that fraud in the inducement was not barred by the economic loss rule. *Id.*

4. Usury defined by § 680, Fla Stat 2010, as a contract or the payment of interest upon any loan, advance of money, line of credit, or forbearance to enforce the collection of any debt, or upon any obligation whatever, at a higher rate of interest than the equivalent of 1 percent per annum simple interest. If the loan exceeds \$500,000 in amount or value, then the applicable statutory section is § 681, Fla Stat 2010. A usurious contract is unenforceable according to the provisions of Section 681, Fla Stat 2010.

5. Forbearance agreement. Appellate court upheld summary judgment based on defendant's failure to present any evidence as to the alleged forbearance.

agreement or prior servicer to delay foreclosure until the settlement of his personal injury case *Walker Midland Mortgage Co*, 5 So 2d at 520. If evidence of forbearance is submitted, it may defeat summary judgment.

h. Statute of limitations. Property owner successfully asserted that foreclosure filed five years after mortgage maturity date was barred by statute of limitations; mortgage lien was no longer valid and enforceable under Section 521.1(a), Fla Stat 2010; *American Bankers Life Assurance Co v Fla 22 5 est Cor*, 05 So 2d 1, 1 Fla d CA 2005.

i. Failure to pay documentary stamps. Section 201.0, Fla Stat 2010 precludes enforcement of notes and mortgages absent the payment of documentary stamps. *RJ e, Inc v North Ring Limited*, So 2d 104, 104 Fla d CA 200; *Bonifiglio Bankers Trust Co v Cali*, 44 So 2d 10, 10 Fla 4th CA 200.

1. This is a limitation on judicial authority; not a genuine affirmative defense.

Truth in Lending (TILA) violations. Technical violations of TILA do not impose liability on lender or defeat foreclosure. *Kasket v Chase Manhattan Mortgage Cor*, 5 So 2d 2 Fla 4th CA 2000; 15 S C A 1 00. Exception to TILA one year statute of limitations applies to defenses raised in foreclosure. *Ailey Leshin*, 2 So 2d 52, 52 Fla 4th CA 2001; 15 S C A 1 40 e.

TILA issues include:

1. Improper adjustments to interest rates (ARMS);

2. Borrower must be given 2 copies of notice of rescission rights. Written acknowledgement of receipt is only a rebuttable presumption. *Cintron Bankers Trust Co*, 2 So 2d 1 Fla 2d CA 1.

TILA rescission or up to three years after the transaction or failure to make material disclosures to borrower. Such as, APR of loan, amount financed, total payment and payment schedule. Rescission relieves borrower only of payment of interest. Must be within three years of closing. 15 S C 1 01 1 1 4; *Beach v Great Eastern Bank*, 2 So 2d 14, 15 Fla 1.

a. If a homestead interest in mortgaged property gives her right to

TILA disclosure *Gancedo elCar io*, 1 So d 4 , 44 Fla 4th CA 200

k Res udicata Foreclosure and acceleration based on the same default bars a subsequent action unless recited upon separate, different defaults *Singleton Greymar Assoc*, 2 So 2d 1004, 100 Fla 2004

Additional cases: *Limehouse Smith*, So 2d 15 Fla 4th CA 2001 , mistake ; *O'Brien Fed Trust Bank, F S B*, 2 So 2d 2 Fla 5th CA 1 , fraud, RICO and duress ; *Biondo Powers*, 4 So 2d 1 1 Fla 4th CA 1 , usury ; *eimmermann First nion Mortgage Cor* , 05 F 2 d 125 11th Circ 2002 , Real Estate Settlement Procedures Act RESPA violations

Summary Judgment Hearing

1 Plaintiff must file the original note and mortgage at or before the summary judgment hearing Since the promissory note is negotiable, it must be surrendered in the foreclosure proceeding so that it does not remain in the stream of commerce *Perry Fairbanks Capital Cor* , So 2d 25, 2 Fla 5th CA 2001 Copies are sufficient with the exception that the note must be reestablished *Id* Best practice is for judge to cancel the signed note upon entry of summary judgment

a Failure to produce note can preclude entry of summary judgment *Natl Loan Investors, L P Joymar Assoc*, So 2d 54 , 550 Fla d CA 2000

Final Judgment

1 Section 45 0 1, Fla Stat 2010 governs the contents of the final judgment Final Judgment Form 1 , Fla R Ci P 2010

2 Amounts due Plaintiff's recovery limited to items listed in complaint or affidavit or based on a mortgage provision

Court may award costs agreed at inception of contractual relationship ; costs must be reasonable *Nemours Found Gauldin*, 01 So 2d 5 4, 5 Fla 5th CA 1 2 , assessed costs consistent with mortgage provision rather than prevailing party statute ; *Maw Abinales*, 4 So 2d 1245, 124 Fla 2d CA 1 5 , award of costs governed by mortgage provision

4 Checklist or Final Summary Judgment

a Final Judgment:

1 Check service, defaults, dropped parties

2 Check for evidence of ownership of note

Check affidavits signed and correct case number parties

4 Amounts due and costs should match affidavits filed. If interest has increased due to resets a daily interest rate should be indicated so you can verify it

5 Check principal, rate calculation of interest through date of judgment

Late fees re acceleration is recoverable; post acceleration is not *Fowler First Fed Sav Loan Assoc v Uniak Savings*, 4 So 2d 0, Fla 1st CA 14

All expenses and costs, such as service of process should be reasonable, market rates. Items related to protection of security interest, such as encing and boarding up property are recoverable if reasonable

Beware hidden charges fees or default letters, correspondence related to workout efforts. Court's discretion to deny recovery

Attorney fees must not exceed contract rate with client and be supported by an affidavit as to reasonableness. Attorney fee cannot exceed principal owed. 02-05-2, Fla Stat 2010. Beware add-ons or litigation fees. make sure that they are not double billing. late fee

10 Bankruptcy fees not recoverable. Correct forum is bankruptcy court. *Martine Giacobbe*, 51 So 2d 02, 04 Fla 1d CA

200 ; *Orak First Family Bank*, So 2d 10, 10 Fla 5th

CA 14. Bankruptcy costs incurred to obtain stay relief recoverable. *Nemours*, 01 So 2d at 55

11 Sale date may not be set in less than 20 days or more than 5 days, unless parties agree 450 11 a, Fla Stat 2010, *JRBL e, Inc Maiello*, 2 So 2d 2, Fla 2d CA 2004

5 I summary judgment denied, foreclosure action proceeds to trial on contested issues

a Trial is before the court without a jury 02 01, Fla Stat 2010

Motion for rehearing abuse of discretion to deny rehearing where multiple legal issues, including prepayment penalties and usury, remain unresolved by the trial court *Bonilla Yale Mortgage Corporation*, 15 So d 4, 45 Fla d CA 200

After entry of final judgment and expiration of time to file a motion for rehearing or for a new trial, the trial court loses jurisdiction of the case *Ross Amas*, 2010 L 5 2 12 Fla d CA Feb 1, 2010; 45 So 2d 4 5 Fla d CA 1 4
 Exception: when the trial court reserves in the final judgment the jurisdiction of post judgment matters, such as deficiency judgments *Id*

Right of Redemption

1 Mortgagor may exercise his right of redemption at any time prior to the issuance of the certificate of sale 45 0 15, Fla Stat 2010

a Court approval is not needed to redeem *Indian River Farms YBF Partners*, So 2d 10, 1100 Fla 4th CA 2001; *Saidi Asko*, So 2d 10, 1 Fla 5th CA 1

b Court of equity may extend time to redeem *Pere Kossow*, 02 So 2d 1 2 Fla d CA 1 2

2 To redeem, mortgagor must pay the entire mortgage debt, including costs of foreclosure and attorney fees *CSB Realty, Inc Eurobuilding Cor*, 25 So 2d 12 5, 12 Fla d CA 1; 45 0 15, Fla Stat 200

Right to redeem is incident to every mortgage and can be assigned by anyone claiming under him *OSR Indus, Inc Martin Properties, Inc*, 1 So 2d 554, 55 Fla 4th CA 200 There is no statutory prohibition against the assignment, including the assignment of bid at sale

a Right of redemption extends to holders of subordinate interests Junior mortgage has an absolute right to redeem from senior mortgage *Marina Funding Group, Inc v Peninsula Pro Holdings, Inc*, 50 So 2d 42, 42 Fla 4th CA 200 ; *Wynn Plumbing Co v New Miami Shores Cor*, 12 So 3d 4, 4 Fla 1st CA 4 Fed right of redemption United States has 120 days following the foreclosure sale to redeem the property if its interest is based on an IRS tax lien For any other interest, the Fed go ernment has one year to redeem the property 11 S C 541, 2 S C 5

Judicial Sale

Scheduling the judicial sale

1 The statutory prescribed time frame for scheduling a sale is not less than 20 days or more than 5 days after the date of the order or judgment § 450.11 a, Fla Stat 2010 The statute applies unless agreed otherwise

2 Cancellations, continuances and postponements are within the discretion of the trial court Motion must have reasons Judicial action based on benevolence or compassion constitutes an abuse of discretion *Republic Federal Bank v Boyle*, 200

L 10210 Fla 1st CA 200 , Appellate court reversed trial court's continuance of sale based on compassion to homeowners claiming they needed additional time to sell the home There should be no across the board policy But see, *Wells Fargo*

Luisica, 2010 L 22154 Fla 5th CA 410 denial of lender's unused motion to cancel and subsequent motion to vacate sale reversed Counsel alleged a

loan modification agreement had been reached Court rejected asking for evidence of agreement The Fifth District Court ruled, there was no basis for the trial court to

reject Wells Fargo's counsel's representation, as an officer of the court, that an agreement had been reached *Id* Look at language in motions, AMP Review and

loss mitigation do not constitute an agreement Include language in the order indicating the court's rationale, even if you have a form order Ask counsel to make

a personal representation as an officer of the court See also, *Chemical Mortgage v Jackson*, 51 So 2d 125, 12 Fla 4th CA 15 Error not to cancel sale and

reschedule where plaintiff did not receive bidding instructions on a federally guaranteed mortgage. However, this case found no extraordinary circumstances warranting rescheduling. Suggestion: we live in extraordinary times

Notice of sale

1 Notice of sale must be published once a week, or 2 consecutive weeks in a publication of general circulation. 450 11, Fla Stat 2010. The second publication shall be at least five days before the sale. 450 12, Fla Stat 2010

a Notice must include: property description; time and place of sale; case style; clerk's name and a statement that sale will be conducted in accordance with final judgment

b Effective notice can constitute grounds to set aside sale. *Richardson Chase Manhattan Bank*, 41 So 2d 45, 4 Fla d CA 200; *Ingoria Horton*, 1 So 2d 125 Fla 2d CA 2002

Judicial sale procedure

1 Judicial sale is public, anyone can bid. *eilman Suburban Coastal Cor*, 50 So 2d 10 Fla 4th CA 1. Property is sold to the highest bidder

2 Plaintiff is entitled to a credit bid in the amount due under final judgment, plus interest and costs through the date of sale. *Robinson Phillips*, 11 So 2d 1, 1 Fla d CA 1 5

Amount bid is conclusively presumed sufficient consideration. 450 1, Fla Stat 2010

Certificate of sale

1 Upon sale completion certificate of sale must be served on all parties not defaulted. The right of redemption for all parties is extinguished upon issuance of certificate of sale. 450 15, Fla Stat 200

2 Documentary stamps must be paid on the sale. 201 02, Fla Stat 2010. The amount of tax is based on the highest and best bid at the foreclosure sale. *Id*

a Assignment of successful bid at foreclosure sale is a transfer of an interest in realty subject to the documentary stamp tax. Fla Admin Code Rule 12B 4 01 25. Rule 12B 4 01 provides that the tax is also applicable to the certificate of title

issued by the clerk of court to the holder of the successful foreclosure bid, resulting in a double stamp in the bid is assigned and the assignee receives the certificate of title

b Assignment prior to foreclosure sale holder of a mortgage foreclosure judgment that needs to transfer title to a different entity and anticipates that the new entity would be the highest bidder, should assign prior to the foreclosure sale to avoid double stamp

c Documentary stamps are due only in consideration or an exchange of value takes place *Crescent Miami Center, LLC v. Fla. et al. Re enue*, 90 So 2d 11, 11 Fla 2005, Transfer of unencumbered realty between a grantor and wholly owned grantee, absent consideration and a purchaser, not subject to documentary stamps; *et al. Re enue Mesmer*, 45 So 2d 4, Fla 1st CA 1, based on assignment of interest and tender of payment, documentary stamps should have been paid

d Eminent governmental agencies, which do not pay documentary stamps include: Fannie Mae, Freddie Mac, Federal Home Administration and the Veterans Administration Fla Admin Code Rules 12B 4 014 11; 11 O Atty Gen 0 1 1, Section 1, 1 1

Objection to sale

1 Any party may file a verified objection to the amount of bid within 10 days 45 0 1, Fla Stat 2010 The court may hold a hearing within judicial discretion hearing must be noticed to everyone, including third party purchasers *Shlishey the Best v. Citi Inancial E uity Services, Inc*, 14 So d 12 1 Fla 2d CA 200

2 Court has broad discretion to set aside sale *Long Beach Mortgage Corporation v. Bebble*, 5 So 2d 11, 14 Fla 4th CA 200, appellate court reversed sale unilateral mistake resulted in outrageous windfall to buyer who made *de minimis* bid The court may consider a settlement agreement in considering whether to vacate a sale *JRBL v. Element, Inc v. Maiello*, 2 So 2d 2, Fla 2d CA 2004

Test: sale may be set aside i :

1 bid was grossly or startlingly inadequate; and 2 inadequacy of bid resulted from some mistake, fraud, or other irregularity of sale *Blue Star Investments, Inc v Johnson*, 91 So 2d 21 Fla 4th CA 2001 ; *Mody v Cali Fed Bank*, 4 So 2d 101 , 101 Fla d CA 1 Mere inadequacy of price is not enough *Arlt v Buchanan*, 10 So 2d 55, 55 Fla 10 Burden on party seeking to vacate sale

a Plaintiff's delay in providing information cannot be sole basis for setting aside sale *Action Realty Investments, Inc v Grandison*, 90 So 2d 4, Fla 4th CA 200

b Stranger to foreclosure action does not have standing to complain of defects in the absence of fraud *REO Properties Corp v Binder*, 4 So 2d 52, 54 Fla 2d CA 200

c Sale may be set aside if plaintiff misses sale, based on appropriate showing *Wells Fargo Financial System Fla, Inc v GRP Financial Services Corp*, 90 So 2d Fla 2d CA 2004

d Court may refuse to set aside sale where objection is beyond statutory period *Ryan v Countrywide Home Loans, Inc*, 45 So 2d , Fla 2d CA 1 , untimely motion filed 90 days following the sale

Sale vacated

1 If sale vacated mortgage and lien relieved with all effects from foreclosure and returned to their original status 920 , Fla Stat 2010

a Upon readvertisement and resale, a mortgagor's lost redemption rights temporarily re-vest *YEMC Const v Belmont, Inc, v Inter Serv, S A, Inc*, 4 So 2d 44 , 44 Fla d CA 2004

Post Sale Issues**Certificate of title**

1 No objections to sale Sale is confirmed by the Clerk's issuance of the certificate of title to purchaser Title passes to the purchaser subject to parties whose interests were not extinguished by foreclosure, such as omitted parties

a Plaintiff may reforeclose or sue to compel an omitted junior lienholder to redeem within a reasonable time *Winn*, 12 So 2d at 4

b Foreclosure is void if titleholder omitted *England Bankers Trust Co v Cali, N A*, 5 So 2d 1120, 1121 Fla 4th CA 2005

Right of possession

1 Purchaser has a right to possess the property upon the issuance of the certificate of title, provided the interest holder was properly joined in the foreclosure

2 Right of possession enforced through writ of possession Rule 1.500, Fla R Civ P 2010

Summary writ of possession procedure:

a Purchaser of property moves for writ of possession;

b The writ can be issued against any party who had actual or constructive knowledge of the foreclosure proceedings and adjudication; *Redding Stockton, Hatley, a in Co*, 4 So 2d 54, 54 Fla 5th CA 1 ;

c Best practice is to require notice and a hearing before issuance of a writ

1 Protecting Tenants at Foreclosure Act of 2009 provides for a 90 day pre-foreclosure notice applicable to bona fide tenants See following section

d At hearing, judge orders immediate issuance of writ of possession unless a person in possession raises defenses which warrant the issuance of a writ of possession on a date certain;

e The order or writ of possession is executed by the sheriff and personal property removed to the property line

Protecting Tenants at Foreclosure Act of 2009

1 Federal legislation, known as Senate Bill 1147, P L 111 22, provides for a nationwide 90 day pre-foreclosure notice requirement for bona fide tenants in foreclosed properties The provisions of the original bill were extended under R 41, the Dodd-Frank Wall Street Reform and Consumer Protection Act, which became law on 7/21/10

2 The application of the new law is restricted to any dwelling or residential property that is being foreclosed under a federally related mortgage loan as defined by Section 3 of the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. 202. In short, the originating lender must be the Federal National Mortgage Association (FNMA), the Government National Mortgage Association (GNMA), the Federal Home Loan Mortgage Corporation or a financial institution insured by the Federal Government.

2 Three prerequisites must be satisfied to qualify as a bona fide tenant under the new Act:

- 1 The tenant cannot be the mortgagor or a member of his immediate family;
- 2 The tenancy must be an arms length transaction; and
The lease or tenancy requires the receipt of rent that is not substantially lower than the fair market rent of the property.

4 The buyer or successor in interest at a foreclosure sale must provide bona fide tenants:

- a With leases – the right to occupy the property until the expiration of the lease term. The exception is if the buyer intends to occupy the property as a primary residence, in which case he must give 90 days notice.
- b Without leases – the new buyer must give the tenant 90 days notice prior to lease termination.

5 The single other exception to the foregoing is Section 4 – buying. In this case, the buyer assumes the interest of the prior owner and the lease contract. The buyer cannot terminate in the absence of good cause.

These provisions of the new law went into effect on May 20, 2009. The bill sunsets on 12/31/2014.

Disbursement of Sale Proceeds

Surplus

1 Surplus the remaining funds after payment of all disbursements required by the final judgment of foreclosure and shown on the certificate of disbursements 450.21(c), Fla Stat 2010 Disbursement of surplus funds is governed by Section 450.1, Fla Stat 2010

2 Entitlement to surplus is determined by priority; in order of time in which they became liens *Household Fin Services, Inc Bank of Am, N A*, 90 So 2d 4, 4 Fla 4th CA 2004 It is the duty of the court to prioritize the interests of the competing junior lien holders and the amounts due each *Citibank PNC Mortgage Corporation America*, 1 So 2d 00, 01 Fla 2d CA 1

a The adult does not waive lienholder's rights to surplus funds *Golindano v. Wells Fargo Bank*, 1 So 2d 14 Fla 4th CA 2005 A junior lienholder has priority over the priority holder of surplus funds *Id*, 15

b A senior lienholder is not entitled to share in surplus funds *Garcia v. Stewart*, 90 So 2d 111, 1121 Fla 4th CA 2005, senior lienholder liens unaffected; inferior party to junior lienholder foreclosure

c Entitlement to balance of surplus after payment of priority interests payable to the record owner as of the date of the filing of the lis pendens *Suarez v. Edgehill*, 200 L 2 1 50 Fla App 4d CA Oct 14, 200

Deficiency Judgment

1 Deficiency is the difference between the fair market value of the security received and the amount of the debt *Mandell v. Fortenberry*, 20 So 2d 1, 4 Fla 1 4; *Grace v. Hendricks*, 140 So 2d 0 Fla 1 2

2 A deficiency can be obtained only if a request for that relief is made in the pleadings and in personam jurisdiction has been obtained over the defendant or defendants against whom the deficiency is sought *Bank of Florida in South Florida v. Keenan*, 51 So 2d 51, 52 Fla 4th CA 1 The granting of a deficiency judgment is the rule rather than the exception *Thomas v. Premier Capital, Inc*, 90 So 2d 11, 1140 Fla 4th CA 2005

a The deficiency judgment not allowable is based on constructive service process

b New service process on defendant was not required for deficiency judgment where personal jurisdiction had been originally conferred by service of foreclosure complaint *L A Property Ventures, Inc First Bank*, 200 L 204 Fla A 2d CA Oct 14, 200 The law contemplates a continuance of the proceedings or entry of a deficiency judgment as a means of avoiding the expense and inconvenience of an additional suit at law to obtain the balance of the obligation owed by a debtor *Id*

Trial court has discretion to enter deficiency decree 020 , Fla Stat 200 ; *Thomas*, 0 So 2d at 1140 The court needs to hold an evidentiary hearing *Merrill Nu um*, 41 So 2d 12 , 12 Fla d CA1 5 The court can enter a default judgment provided the defendant was properly noticed *Semlar Savings of Florida*, 541 So 2d 1 , 10 Fla 4th CA 1

a The exercise of discretion in denial of a deficiency decree must be supported by disclosed equitable considerations which constitute sound and sufficient reasons for such action *Larsen Allocca*, 1 So 2d 0 , 04 Fla d CA 1

4 A cause of action for deficiency cannot accrue until after entry of final judgment and a sale of the assets to be applied to the satisfaction of the judgment *Chrestensen Eurogest, Inc*, 0 So 2d 4 , 45 Fla 4th CA 2005 The amount of deficiency is determined at the time of the foreclosure sale *Estes a Jordan*, So 2d Fla 5th CA 1 The amount bid at foreclosure sale is not conclusive evidence of the property's market value *Century Group, Inc Premier Financial Services*, 24 So 2d 1, Fla 2d CA 1

a The appraisal determining the fair market value must be properly admitted into evidence and be based on the sale date *Flagship State Bank of Jacksonville reu E uiment Company*, 2 So 2d 0 , 10 Fla 5th CA 1 1

b The formula to calculate a deficiency judgment is the final judgment of foreclosure total debt minus the fair market value of the property *Morgan Kelly*, 42 So 2d 111 Fla d CA 1 4

c The amount paid by a mortgage assignee or a debt is legally irrelevant to the issue of whether the assignee is entitled to a deficiency award after a foreclosure sale *Thomas*, 0 So 2d at 1141

4 Burden: The secured party has the burden to prove that the fair market value of the collateral is less than the amount of the debt *Chidnese McCollem*, 5 So 2d , Fla 4th CA 1 , *Este a* So 2d at owe er, the Third District Court has held that the burden is on the mortgagor resisting a deficiency judgment to demonstrate that the mortgagee obtained property in foreclosure worth more than the bid price at the foreclosure sale *Addison Mortgage Co eit*, 1 So 2d 104 Fla d CA 1 See also, *Thunderbird, Ltd Great American Ins Co*, 5 So 2d 12 , 12 Fla 1st CA 1 0 , court held that introduction of the certificate of sale from the foreclosure sale showing that the bid amount at the foreclosure sale was less than the amount of the debt shifted the burden to the mortgagee to go forward with other evidence concerning the fair market value of the property

5 denial of deficiency decree in foreclosure suit on jurisdictional reasons, as distinguished from equitable grounds, is not res judicata so as to bar an action for deficiency *Frumkes Mortgage Guarantee Cor* , 1 So 2d , 40 Fla d CA 1 5 ; *Klondike, Inc Blair*, 211 So 2d 41, 42 Fla 4th CA 1

Reservation of jurisdiction in the final judgment of foreclosure If jurisdiction is reserved, new or additional service of process on defendant is not required *Este a*,

So 2d at The motion and the notice of hearing must be sent to the attorney of record for the mortgagor *Id, NCNB Nat'l Bank of Fla Pyramid Cor* , 4 So 2d 15 , 155 Fla 4th CA 1 , defaulted defendant entitled to notice of deficiency hearing owe er, the motion for deficiency must be timely filed If untimely, the deficiency claim could be barred upon a prolate motion by the defendant under Rule 1.420 e , Fla R Ci P 2010 , *Frohman Bar Or*, 0 So 2d , Fla 1 5 ; *Steketee Ballance Homes, Inc* , So 2d , 5 Fla 2d CA 1

a No reservation of jurisdiction in the final judgment motion or deficiency must be made within ten (10) days of issuance of title *Frumkes*, 1 at 40

b The lender can file a separate action or post-foreclosure deficiency Section 02.0, Fla Stat 2010 In a separate action, the defendant has the right to demand a trial by jury *obbs Florida First Nat'l Bank of Jacksonville*, 40 So 2d 15, 15 Fla 1st CA 15; *Bradberry Atlantic Bank of St Augustine*, So 2d 124, 1250 Fla 1st CA 1, no jury trial right within foreclosure action Section 55.012, Fla Stat 2010 mandates that final judgments in a separate action or deficiency contain the address and social security number of the judgment debtor, if known This requirement is not imposed in a mortgage foreclosure action, in which an *in rem* judgment is sought

Statute of limitations

a A deficiency judgment or decree is barred when an action on the debt secured by the mortgage is barred *Barnes Escambia County Employees Credit Union*, 4 So 2d, 0 Fla 1st CA 1, abrogated on other grounds

b Section 5.11, Fla Stat 2010 imposes a five-year statute of limitations on a foreclosure deficiency judgment

c A cause of action or deficiency does not accrue, and thus the statute of limitations does not begin to run, until the final judgment of foreclosure and subsequent foreclosure sale *Chrestensen*, 0 So 2d at 45

There are statutory limitations imposed on a deficiency judgment when a purchase money mortgage is being foreclosed Section 02.0, Fla Stat 2010 includes language that impairs the entitlement to a deficiency judgment with respect to a purchase money mortgage, when the mortgagee becomes the purchaser at foreclosure sale Specifically, this statutory limitation provides: the complainant shall also have the right to sue at common law to recover such deficiency, provided no suit at law to recover such deficiency shall be maintained against the original mortgagor in cases where the mortgage is for the purchase price of the property involved and where the original mortgagee becomes the purchaser thereof at foreclosure sale and also is granted a deficiency decree against the original mortgagor Essentially, if the

lender purchases the subject property he has not incurred the damages and in fact may recoup or profit at a later sale. See also, *United Postal Savings Ass'n Nagelbush*, 55 So 2d 1 Fla 1st CA 1, *Taylor Prine*, 12 So 2d 44, 45 Fla 1st CA 1

a One Florida court ruled in a case where the purchase money mortgagee was also the purchaser that the all important distinction in the case was that the purchaser at the foreclosure sale was not the mortgagee but an utter stranger to the parties, a third party purchaser, warranting reversal of the trial court's denial of deficiency judgment. *Lloyd Cannon*, So 2d 105, 10 Fla 1st CA 1

Bankruptcy

1 The automatic stay provisions of 11 S.C. 2 enjoin proceedings against the debtor and against property of the bankruptcy estate

a To avail, the subject real property must be listed in the bankruptcy schedules as part of the estate 11 S.C. 541

2 Foreclosure cannot proceed until the automatic stay is lifted or terminated. If property ceases to be property of the bankruptcy estate, the stay is terminated

a The automatic stay in a second case filed within one year of dismissal of a prior Chapter 11 or 12 automatically terminates 90 days after the second filing, unless good faith is demonstrated 11 S.C. 2 c

b The third filing within one year of dismissal of the second bankruptcy case, lacks entitlement to the automatic stay and any party in interest may request an order confirming the inapplicability of the automatic stay

c Multiple bankruptcy filings where the bankruptcy court has determined that the debtor has attempted to delay, hinder or defraud a creditor may result in the imposition of an order or relief from stay in subsequent cases over a two year period 11 S.C. 2 d 4

debtor's discharge in bankruptcy only protects the subject property to the extent that it is part of the bankruptcy estate

4 Foreclosure cannot proceed until relief from automatic stay is obtained or otherwise terminated, or upon dismissal of the bankruptcy case

Florida's Expedited Foreclosure Statute

1 Enacted by 2010, Fla Stat 2010

2 Upon filing of a verified complaint, plaintiff may seek immediate review of foreclosure by an order to show cause. These complaints are easily distinguishable from the usual foreclosure by the order to show cause.

a The failure to file defenses or to appear at the show cause hearing presumptively constitutes conduct that clearly shows that the defendant has relinquished the right to be heard. *Id.*

Not the standard practice among foreclosure practitioners, due to limitations:

- a Statute does not foreclose junior liens;
- b Procedures differ as to residential and commercial properties; and
- c Statute only provides for entry of an *in rem* judgment; a judgment on the note or a deficiency judgment cannot be entered under the show cause procedure.

Common Procedural Errors

1 Incorrect legal description contained in the:

a Original mortgage requires a correction. An error in the legal description of the deed requires the joinder of the original parties as necessary parties to the correction proceedings. *Chanrai In , Inc , Clement*, 5 So 2d , 40 Fla 5th CA 1 0

b Complaint and lis pendens requires amendment

c Judgment. Rule 1.540 a , Fla R Ci P 2010 governs. For example, an incorrect judgment amount which omitted the undisputed payment of real estate taxes could be amended. *LPP Mortgage Ltd Bank o America*, 2 So 2d 4 2, 4 Fla d CA 2002

d Notice of Sale requires vacating the sale and subsequent resale of property. *yte e elo ment Cor General Electric Credit Cor* , 5 So 2d 1254 Fla d CA 1

e Certificate of title a genuine scrivener's error in the certificate of title can be amended. However, there is no statutory basis for the court to direct the clerk to amend the certificate of title based on a post-judgment transfer of title, faulty assignments of bid or errors in listing title instructions.

1. An error in the certificate of title which originates in the mortgage and is repeated in the deed and notice of sale requires the cancellation of the certificate of title and setting aside of the final judgment. *Lucas v. Barnett Bank of Lee County*, 05 So.2d 115 Fla.2d CA 1. For example, plaintiff's omission of a mobile home and its vehicle identification number VIN included in the mortgage legal description, but overlooked throughout the pleadings, judgment and notice of sale, cannot be amended in the certificate of title. Due process issues concerning the mobile home require the vacating of the sale and judgment.

Mortgage Workout Options

1. Reinstatement: Reayment of the total amount in default or payments behind and restoration to current status on the note and mortgage.

2. Forbearance: The temporary reduction or suspension of mortgage payments.

Reayment Plan: Agreement between the parties whereby the homeowner repays the regularly scheduled monthly payments, plus an additional amount over time to reduce arrears.

4. Loan Modification: Agreement between the parties whereby one or more of the mortgage terms are permanently changed.

5. Short Sale: Sale of real property for less than the total amount owed on the note and mortgage.

a. If the lender agrees to the short sale, the remaining portion of the mortgage debt, the difference between the sale price of the property and mortgage balance, the deficiency, may be forgiven by the lender.

1. Formerly, the amount of debt forgiven was considered income imputed to the seller and taxable as a capital gain by the IRS.

Parker v. Laney, 1 F.2d 455, 45 1st Cir. 1950. However,

ederal legislation has temporarily suspended imputation of income
upon the cancellation of debt

eed in lieu of Foreclosure: The homeowner's voluntary transfer of the
home's title in exchange for the lender's agreement not to file a foreclosure action

Revised 14 10

From: Winesett, Sherra </O=SAO20/OU=CACJIS/CN=RECIPIENTS/CN=SWINESETT>

To: Hamsharie, Deborah

CC:

Date: 10/14/2010 5:14:54 PM

Subject: ?FW: New Publication Announcement from Judge Mark King Leban, Chair, FCEC Publication Committee

Please print for me.

From: Aloia, Nancy K

Sent: Thursday, October 14, 2010 1:16 PM

To: McHugh, Michael; Winesett, Sherra; Rosman, Jay; Fuller, Joseph; Gerald, Lynn; Starnes, Hugh E; Thompson, James; Diamond, Stella; Hawthorne, Amy; Crongeyer, Robert L.

Subject: FW: New Publication Announcement from Judge Mark King Leban, Chair, FCEC Publication Committee

New Bench Book on residential foreclosures being sent to us by OSCA. *Link below*

20th Circuit - Integrity, Fairness, Service

From: Melissa Henderson <HendersM@flcourts.org>

Date: Oct 14, 2010 12:11 PM

Subject: New Publication Announcement from Judge Mark King Leban, Chair, FCEC Publication Committee

To: Trial Court Chief Judges <TrialCourtChiefJudges@flcourts.org>; Trial Court Administrators <TrialCourtAdministrators@flcourts.org>

CC: Susan Leseman <LesemanS@flcourts.org>; OSCA-JUDED <JUDED@flcourts.org>; Blan Teagle <teagleb@flcourts.org>

To: Chief Judges and Trial Court Administrators

From: Judge Mark King Leban, Chair, Florida Court Education Council's Publications Committee

Re: New Publication: *Residential Foreclosure Bench Book*

The Publications Committee of the Florida Court Education Council is pleased to announce the posting of the *Residential Foreclosure Bench Book* in the Court Education Resource Library on the Florida State Courts intranet. The *Residential Foreclosure Bench Book* was written by the Eleventh Circuit's Judge Jennifer Bailey and Assistant General Counsel Doris Bermudez-Goodrich. Used for a recent judicial education course for judges assigned to hear foreclosure cases, this bench book presents readers with the nuts and bolts of current foreclosure law and procedures.

In addition to this bench book, the Court Education Resource Library, developed by OSCA's Court Education Section and Publications Unit, contains a plethora of judicial education materials, among them, court publications (benchguides, bench books, toolkits, and case summaries); court education program materials; and other useful resources (a catalog of books, manuals, and other publications, including materials by state and national organizations).

A PDF of the bench book is attached, but you can also access it from the Court Education Resource Library, at https://intranet.flcourts.org/osca/Judicial_Education/Library/librarymain.shtml (As the bench book will be periodically updated to reflect changes in foreclosure law and procedure, please visit the site for update notifications.)

Please share this information with judges and court staff who are handling residential mortgage foreclosure cases.

If you have any questions, contact Susan Leseman, OSCA Publications Attorney, at (850) 922-5085 or lesemans@flcourts.org

20TH CIR 00318

RESIDENTIAL FORECLOSURE BENCH BOOK

Prepared by

Honorable Jennifer Bailey
Administrative Judge
Circuit Civil Jurisdiction Division
Eleventh Judicial Circuit of Florida

and

Chris Bermude Goodrich
Assistant General Counsel
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2010

Introduction

1 Foreclosure is the enforcement of a security interest by judicial sale of collateral. All mortgages shall be foreclosed on the date of maturity. § 202.01, Fla. Stat. 2010

2 Definitions:

a **Mortgage:** any written instrument securing the payment of money or advances including liens to secure payment of assessments for condominiums, cooperatives and homeowners associations. § 202.01, Fla. Stat. 2010

A mortgage creates only a specific lien against the property; it is not a conveyance of legal title or of the right of possession. § 202.01, Fla. Stat. 2010; *Fla Nat'l Bank Trust Co of Miami v. Brown*, 4 So. 2d 414

b **Mortgagee:** refers to the lender; the secured party or holder of the mortgage lien. § 202.01, Fla. Stat. 2010

c **Mortgagor:** refers to the obligor or borrower; the individual or entity who has assumed the obligation secured by the mortgage lien. § 202.01, Fla. Stat. 2010. The mortgagor holds legal title to the mortgaged property. *o man Semet*, 1 So. 2d 414, 52 Fla. 4th CA 115

To foreclose the mortgage lien and extinguish the duties of redemption, secured parties must file a civil action. § 45.015, Fla. Stat. 2010

Lender's Right to Foreclose

1 Constitutional obligation to uphold mortgage contract and right to foreclose. F.S.A. Const. Art. 1, § 10

a Right unaffected by defendant's misfortune. *Lee County Bank v. Christian Mut. Found., Inc.*, 40 So. 2d 44, 44 Fla. 2d CA 111; *Morris v. Aite*, 10 So. 51, 51 Fla. 115

b Right not contingent on mortgagor's health, good fortune, ill fortune, or the regularity of his employment. *Home Owners Loan Corp. v. Aite*, 10 So. 111, 114 Fla. 1

c Contract impairment or imposition of moratorium is prohibited by court. *Lee County Bank v. Christian Mut. Foundation, Inc.*, 40 So. 2d 44, 44 Fla. 111

Default

- 1 Right to foreclosure accrues upon the mortgagor's default
- 2 Basis of default:
 - a mortgagor's failure to tender mortgage payments; or
 - b impairment of security, including failure to pay taxes or maintain casualty insurance

Acceleration

- 1 Acceleration gives the mortgagee the authority to declare the entire mortgage obligation due and payable immediately upon default
- 2 Mortgage Acceleration Clause confers a contract right upon the note or mortgage holder which he may elect to enforce upon default *and Sun Fed Sa Loan Ass'n*, 41 So 2d 10, 4 Fla 1 4
 - a Absent acceleration clause, lender can only sue for amount in default *Kirk an Petten*, 21 So 2d 10, Fla 1 4
 - Commencement upon delivery of written notice of default to the mortgagor; prior notice is not required unless it is a contractual term *Millett Pere*, 41 So 2d 10, Fla d CA 1 2; *Fowler First Sa Loan Ass'n of the Uniak S rings*, 4 So 2d 10, 4 Fla 1st CA 1 4, filing of complaint is notice of acceleration
- 4 Pre acceleration mortgagor may defeat foreclosure by the payment of arrearages, thereby reinstating the mortgage *Pici First Union Nat'l Bank of Florida*, 21 So 2d 10, Fla 2d CA 1

Statute of Limitations

- 1 Five year statute of limitations period applies specifically to mortgage foreclosure actions 5112 c, Fla Stat 2010; *Farmers Merch Bank Riede*, 55 So 2d 10, 5 Fla 1st CA 1 0
- 2 Commencement of limitations period:
 - a General rule commencement upon accrual of the cause of action; this occurs when the last element of the cause of action is satisfied or example, default

5011, Fla Stat 2010; *Maggio et al v Labor Employment Sec*, 10 So 2d , Fla 2d CA 2005

b A note or other written instrument when the first written demand or payment occurs *Ruhl Perry*, 10 So 2d 5, 5 Fla 1 0

c Oral loan payable on demand commencement upon demand or payment *Mosher Anderson*, 1 So 2d 12, 1 Fla 2002

Tolling of the limitations period acknowledgment of the debt or partial loan payments subsequent to the acceleration notice toll the statute of limitations 50511, Fla Stat 2010; *Cadle Company v McCartha*, 20 So 2d 144, 145 Fla 5th CA 200

a Tolling effect starts the running anew of the limitations period on the debt *ester Rigdon*, 110 So 2d 40, 44 Fla 1st CA 1 5

Jurisdiction

1 Court's judicial authority over real property based on *in rem* jurisdiction

2 Two part test to establish *in rem* jurisdiction: 1 jurisdiction over the class of cases to which the case belongs, and 2 jurisdictional authority over the property or *res* that is the subject of the controversy *Ruth et al v Legal Affairs*, 4 So 2d 11, 15 Fla 1

a Class of case jurisdictional parameters defined by Article Section 5 b, Florida Constitution, implemented by Section 2012.2 g, Fla Stat 2010 *Ale de Cor Nachon Enter, Inc*, 41 So 2d 5 Fla 1 4, concurrent equity jurisdiction over lien enclosures of real property that fall within statutory monetary limits *Id*, at

b Jurisdictional authority over real property only in the circuit where the land is situated *ammond SY e lopers, LLC*, 51 So 2d 5, Fla 2d CA 200 *Goedmakers Goedmakers*, 520 So 2d 55, 5 Fla 1 ; court lacks *in rem* jurisdiction over real property located outside the court's circuit If real property lies in two counties, the enclosure suit may be maintained in either county, however, the notice of sale must be published in both 0204, Fla Stat 2010

Parties to the Foreclosure Action

Plaintiff

1 Must be the owner holder of the note as of the date of filing suit. *Je Ray Cor Jacobsen*, 5 So 2d 5 Fla 4th CA 10; see also, *M Specialty Mortgage, LLC Salomon*, 4 So 2d 0, 2 Fla 4th CA 2004

a The holder of a negotiable instrument means the person in possession of the instrument payable to bearer or to the identified person in possession

1 201 21, Fla Stat 2010

1 Endorsement in blank where unsigned and unauthenticated, an original note is insufficient to establish that the plaintiff is the owner and holder of the note. Must have a affidavit or deposition testimony establishing plaintiff as owner and holder. *Riggs Aurora Loan Services, LLC*, 2010 WL 151 Fla 4th CA 4 21 10

b The holder may be the owner or a nominee, such as a servicer, assignee or a collection and litigation agent. Rule 1 210 a, Fla R Civ P 2010 provides that an action may be prosecuted in the name of an authorized person without joinder of the party or whose benefit the action is brought. See also, *Kumar Cor No al Lines, Ltd*, 4 2 So 2d 11, 11 4 Fla d CA 1 5

c Plaintiff's nominee has standing to maintain foreclosure based on real party in interest rule. *Mortgage Electronic Registration Systems, Inc Re oredo*, 55 So 2d Fla d CA 200, *MERS* was the holder by delivery of the note; *Mortgage Elec Registration Systems, Inc A i e*, 5 So 2d 151 Fla 2d CA 200; *Philogene ABN AMRO Mortgage Group, Inc*, 4 So 2d 45 Fla 4th CA 200

2 Assignment of note and mortgage Plaintiff should assert assignee status in complaint. Absent formal assignment of mortgage or delivery, the mortgage in entirety passes as an incident of the debt. *Perry Fairbanks Capital Cor*, So 2d 25, 2 Fla 5th CA 2004; *Johns Gillian*, 1 4 Fla 5 5, 5 Fla 1; *arren Seminole Bond Mortg Co*, 12 Fla 10 Fla 1, security follows the note, the assignee of the note secured by a mortgage is entitled to the benefits of the security. Assignments must be recorded to be valid against creditors and subsequent

urchasers 01 02, Fla Stat 2010 See also, *Glynn First Union Nat'l Bank*, 12 So 2d 5 , 5 Fla 4th CA 2005

a No requirement of a written and recorded assignment of the mortgage to maintain foreclosure action where evidence establishes plaintiff as owner and holder of the note on date of filing suit *Perry*, So 2d at 2 ; *M Specialty Mortgage, LLC*, 4 So 2d at 2; *Chem Residential Mortgage Rector*, 42 So 2d 00 Fla 1st CA 1 ; *Clifford Eastern Mortgage Sec Co*, 1 So 5 2 Fla 1

owner, the incomplete, unsigned and unauthenticated assignment of mortgage attached as an exhibit to purported mortgage holder and note holder's response to motion to dismiss did not constitute admissible summary judgment evidence sufficient to establish standing *BAC Funding Consortium, Inc ISAOA ATIMA Jean Jacques*, 2010 WL 4 41 Fla A 2 CA Feb 12, 2010 Plaintiff has an assignment of mortgage recorded prior to the date of filing suit, then he can enforce enforcement of note never physically delivered Florida courts recognize constructive delivery The absence of the note does not make a mortgage unenforceable *Lawyers Title Ins Co Inc Noastar Mortgage, Inc*, 2 So 2d , Fla 4th CA 2004 Assignment may be by physical delivery or by written assignment

MERS that is it Mortgage Electronic Registration Systems is a corporation which maintains an electronic registry tracking system of servicing and ownership rights to mortgages throughout the United States In many cases MERS is the mortgagee of record and is identified in the mortgage On each MERS loan there is an 11 digit number used for tracking Through the MERS servicer ID number, homeowners can identify their lender with borrower name and property address

4 Since the promissory note is a negotiable instrument, plaintiff must present the original note or give a satisfactory explanation of its absence 0 5 1 , Fla Stat 2010 ; *State Street Bank and Trust Co Lord*, 51 So 2d 0, 1 Fla 4th CA 200 A satisfactory explanation includes loss, theft, destruction and wrongful possession of the note 0 1 1 , Fla Stat 2010 Reestablishment of the note is governed by 0 1 2 , Fla Stat 2010

Necessary and Proper Defendants

1 The owner of the fee simple title only indispensable party defendant to a foreclosure action *English Bankers Trust Co of Cali, N A*, 5 So 2d 1120, 1121 Fla 4th CA 2005 Foreclosure is void if titleholder omitted *Id* If a spouse fails to sign the mortgage, lender may still foreclose on property owned by husband and wife when both spouses knew of loan and purchased in joint names *Countrywide Home Loans Kim*, So 2d 250 Fla 2005

a Indispensable parties defined necessary parties so essential to a suit that no final decision can be rendered without their joinder *Sudho Federal Nat'l Mortgage Ass'n*, 42 So 2d 425, 42 Fla 5th CA 200

2 Failure to join other necessary parties they remain in the same position as they were in prior to foreclosure *Abdoney York*, 0 So 2d 1, Fla 2d CA 2005

Omitted party only remedies are to compel redemption or the re-foreclosure in a suit de novo *Id; Quinn Plumbing Co New Miami Shores Cor*, 12 So 2d 0, Fla 1 0

4 Death of titleholder prior to entry of final judgment beneficiaries of the titleholder and the personal representative are indispensable parties *Cambell Napoli*, So 2d 12 2 Fla 2d CA 2001

a If indispensable parties not joined, action abated pending joinder *Id* As such, suit against a decedent alone will result in abatement

b Post judgment death of titleholder, these parties are not deemed indispensable parties *avis Scott*, 120 So 1 Fla 1 2

5 Necessary parties to the foreclosure action all subordinate interests recorded or acquired subsequent to the mortgage

a Includes: junior mortgagees, holders of judgments and liens acquired after the superior mortgage, lessees and tenants parties in possession of the real property *Posnansky Breckenridge Estates Cor*, 21 So 2d , Fla 4th CA 1 ; *Commercial Laundries, Inc, Golf Course Towers Associates*, 5 So 2d 501, 502

Fla d CA 1 0 ; *Crystal River Lumber Co Knight Tur entine Co*, So 4, 5 Fla 1 15

b Junior lien holders are not joined, their rights in the real property survive the foreclosure action

c Joinder of original parties to the deed or mortgage are essential when a reformation court is needed to remedy an incorrect legal description contained in the deed and or mortgage *Chanrai In , Inc Clement*, 5 So 2d , 40 Fla 5th CA 1 0 As such, the original grantor and grantee are necessary parties in an action to reform a deed *Id*

Prior titleholders that signed the note and mortgage do not have to be named in the foreclosure action unless:

a Mortgagee seeks entry of a deficiency judgment against the prior unreleased mortgagors in the foreclosure action *PMI Ins Co Ca endar*, 15 So 2d 10, 11 Fla d CA 1

Superior Interests

1 First or senior mortgagees are never necessary or proper parties to the foreclosure action by the junior mortgagee *Garcia Stewart*, 0 So 2d 111 , 111 Fla 4th CA 2005 ; *Poinciana Hotel o Miami Beach, Inc Kasden*, 0 So 2d , 401 Fla d CA 1

a Senior liens are unaffected by the foreclosure of a junior mortgage

2 **Purchase money mortgage defined** proceeds of the loan are used to acquire the real estate or to construct improvements on the real estate 2 a , Restatement Third of Property; Mortgages 200 The purchase and conveyance of real property occur simultaneously and are given as security for a purchase money mortgage

a Purchase money mortgages priority over all prior claims or liens that attach to the property through the mortgagor, even if latter be prior in time *BancFlorida Hayward*, So 2d 1052, 1054 Fla 1 ; *Sarmiento Stockton, Hatley, a in Co*, So 2d 105 , 105 Fla d CA 1 1

1 Priority does not extend beyond the amount of the purchase money advanced *Citibank Carteret Sa Bank, FA*, 12 So 2d 5 , 01 Fla 4th CA 1 2

Association Liens and Assessments

1 Condominium Associations Section 1 11 1 b , Fla Stat 2010 establishes the liability of the first mortgagee, its successor or purchaser or condominium assessments and maintenance as the lesser of :

a units unpaid common expenses and regular periodic assessments which came due 12 months prior to title acquisition; or

b one percent of the original mortgage debt provided condominium association is joined as a defendant

1 The law is clear that the purchaser of a condominium unit has liability for unpaid condominium assessments 1 11 , Fla Stat 2010 This statutory cap , limits the liability of reclosing mortgagees or unpaid condominium assessments that become due prior to acquisition of title This safe harbor applies only to the first mortgagee or a subsequent holder of the first mortgage *Bay Holdings, Inc 2000 Island Boulevard Condo Assn*, 5 So 2d 11 Fla d CA 2005 The term successor or assignee as used with respect to a first mortgagee includes only a subsequent holder of the first mortgage 1 11 1 g , Fla Stat 2010 Other entities that acquire title are not entitled to this limitation of liability and are jointly and severally liable for all unpaid assessments that come due up to the time of transfer of title 1 11 1 a , Fla Stat 2010

2 Homeowners Associations Section 20 0 5 2 c 1 , Fla Stat 2010 establishes the liability of the first mortgagee, its successor or purchaser or homeowner's assessments and maintenance as the lesser of :

a parcels unpaid common expenses and regular periodic or special assessments which accrued 12 months prior to acquisition of title; or

b one percent of the original mortgage debt

c homeowners Association's lien or assessments had priority over purchase money mortgage where Association's declaration of covenants contained express

provision establishing priority *Ass'n of Poinciana, Ill. v. Astar Procs.*, 24 So. 2d 555, Fla. 5th CA 1.

d. The limitations on the first mortgagee's liability only apply if the lender filed suit and initially joined the homeowner's association as a defendant. 2005-2 c., Fla. Stat. 2010.

e. Statutory revisions of the 200 Legislature failed to remedy the potential superior priority of liens recorded prior to July 1, 200. Prior statutory version amended by the 200 Legislature gave homeowner's association liens a priority, even if the mortgage was filed first in time. Arguably, many homeowner's associations have subordination language in their declaration of covenants providing that their lien is subordinate to the mortgage. However, the subordination language is not standard in all declarations. Any challenge to the priority of the mortgage will likely be resolved on the basis of interpretation of contract.

Reverse foreclosures defined where association takes title and pursues lender or where association sets done the motion or summary judgment due to delays by lenders.

4. Cannot force lenders to pay association fees during pendency of foreclosure. *S. Bank Nat'l Ass'n as Trustee v. Tadmore*, 200 L 42-1-01 Fla. 1d CA 12-2-0.

Judgment Liens

1. Section 55.10-1, Fla. Stat. 2010 applies to judgment liens.

a. Requirements: 1. must contain address of the party in the judgment or in an accompanying affidavit; and 2. a certified copy of judgment lien must be recorded in the official records of the county.

b. Judgment liens recorded after July 1, 1994 retain their judgment lien status for a period of 10 years from recording. A judgment lien is renewable by recording a certified copy of the judgment containing a current address prior to the expiration of the judgment lien. 55.10-2, Fla. Stat. 2010.

Filing of the Lis Pendens

1 Filing of lis pendens cuts off the rights of any person whose interest arises
 after filing *Bowers Pearson*, 15 So 5 2 Fla 1 1

a Constitutes bar to the enforcement against the subject real property of any
 other unrecorded interests and liens unless the holder of the unrecorded interest
 intervenes within twenty days of the notice of the lis pendens 4 2 1 b , Fla
 Stat 2010

2 Validity of a notice of lis pendens is one year from filing 4 2 2 , Fla Stat
 2010

a Exception: One year period may be tolled by the trial court's exercise of
 discretion or appellate review *Olesh Greenberg*, So 2d 2 , 242 Fla 5th CA
 200 ; *onmitschke Collande Kramer*, 41 So 2d 4 1, 4 2 Fla d CA 2002

Lis pendens automatically dissolved upon dismissal of foreclosure Rule
 1 420 , Fla R Ci P 2010

a Lis pendens refiled or reinstated upon the reversal of dismissal
onmitschke Collande, 41 So 2d at 4 2

The Foreclosure Complaint

1 Florida Supreme Court Form of foreclosure Form 1 44, Fla R Ci P
 2010 Requisite allegations assert: jurisdiction, default, acceleration and the legal
 description of the real property As of 2 11 10, complaint must be verified Rule
 1 110 b , Fla R Ci P 2010

a Plaintiff must allege that he is the present owner and holder of the note
 and mortgage *Edason Cent Farmers Trust Co*, 12 So , 00 Fla 1 0

b If plaintiff is a nonresident corporation, it must comply with the condition
 precedent of filing a nonresident bond, upon commencement of the action 5 011,
 Fla Stat 2010 If plaintiff has failed to file the requisite bond within 0 days after
 commencement, the defendant may move for dismissal after 20 days notice to
 plaintiff

c Rule 1.10(a), Fla. R. Civ. P. 2010 mandates that a copy of the note and mortgage be attached to the complaint. *Eigen F. IC*, 42 So. 2d 2, Fla. 2d CA 1

d If note and mortgage assigned, complaint should allege assignment. Attachment of the assignment is required but may not be required since the cause of action is based on the mortgage; not the assignment. Rule 1.10(a), Fla. R. Civ. P. 2010, *MS Specialty Mortgage, LLC v. Salomon*, 4 So. 2d 0, 2 Fla. 4th CA 2004; *Chemical Residential Mortgage v. Rector*, 42 So. 2d 00 Fla. 1st CA 1; *Johns v. Gillian*, 14 So. 140, 144 Fla. 1

e Junior lien holder's allegation is sufficient if it states that the interest of a defendant accrued subsequent to the mortgage and he is a party. *InterNational Kaolin Co. v. Cause*, 4 So. , Fla. 10

Federal tax lien allegation must state interest of the United States of America, including: the name and address of the taxpayer, the date and place the tax lien was filed, the identity of the Internal Revenue Office which filed the tax lien and if a notice of tax lien was filed. Title 26 S.C. 2410(b). A copy of the tax lien must be attached as an exhibit.

g Local taxing authority or State of Florida party defendant allegation should state with particularity the nature of the interest in the real property. 041.2, Fla. Stat. 2010

h Complaint must include statement of default based on unpaid taxes or insurance must be alleged with particularity. *Siah v. Oosh* *Nor Pro s*, So. 2d , Fla. 4th CA 1

i Complaint should allege compliance with condition precedent, particularly notices

Legal description of the subject real property

k Attorneys must be named or it is waived. *Stockman v. owns*, 5 So. 2d 5, Fla. 1-1. Allegation as to obligation to pay a reasonable attorney fee is sufficient to claim entitlement. *allace v. Gage*, 150 So. , 00 Fla. 1. The claim of attorneys is based on contractual language in the note and mortgage.

Additional counts include: reestablishment of the note and reformation. Reestablishment of the note is necessary if the note is lost; reformation of the note is needed if material terms are missing. Reformation of the mortgage applies if there is a legal description discrepancy; reformation of deed if there is a deed problem.

If a deficiency judgment is sought, the guarantors must be sued.

Original Document Filing and Reestablishment of the Note

1. Note Lender is required to either present the original promissory note or give a satisfactory explanation of the lender's failure to present it prior to it being enforced. *Natl Loan Investors, LP v Joymar Associates*, 90 So 2d 54, 550 Fla D CA 2000.

a. A limited exception applies to lost, destroyed or stolen instruments. *Id*

2. A lost promissory note is a negotiable instrument. 1041.1, Fla Stat 200; *Thomson First Union Bank*, 4 So 2d 11, Fla 5th CA 1, 4.

a. Loss or unintentional destruction of a note does not affect its validity or enforcement.

Reestablishment of the lost note. An owner of a lost, stolen or destroyed instrument may maintain an action by showing proof of his ownership, facts that prevent the owner from producing the instrument and proof of the terms of the lost instrument. 101.2, Fla Stat 2004; *Lawyer's Title Ins Co, Inc v No Astar Mortgage, Inc*, 2 So 2d, Fla 4th CA 2004; *Gutierrez Bermudez*, 540 So 2d, Fla 5th CA 1.

a. Owner of note is not required to have held possession of the note when the loss occurred to maintain an action against the mortgagor. *Bank of America v Menendez*, 90 So 2d 124, 12 Fla D CA 2002. Further, plaintiff is not required to prove the circumstances of the loss or destruction of the note to seek enforcement. *Id*, at 12. Plaintiff must show only that it was entitled to enforce the note at the time of loss or that it has directly or indirectly acquired ownership of the instrument from a person who was entitled to enforce the instrument when loss of possession occurred.

0 1 1 a , Fla Stat 2010 ; *MERS Badra*, 1 So 2d 10 , 10 Fla 4th CA 200

b I lainti is not in ossession o the original note and did not reestablish it, lainti cannot oreclose on the note and mortgage 0 1 1 , Fla Stat 2004 ; *asma In est , LLC Realty Associates Fund III, L P* 45 F Su 2d 12 4, 1 02 S Fla 200

c The iling o a du licate co y o the note is su icient to satis y statutory re uirements in a oreclosure action *Perry Fairbanks Ca ital Cor* , So 2d 25 Fla 5th CA 2004 I there is no co y, Plainti should ile a lost note a ida it, ledger or a summary o loan terms

1 Checklist for lost note affidavit:

- a original rinci al balance;
- b signators and date note e ecuted;
- c rate o interest;
- d un aid balance and de ault date;
- e a iant status must be banking re resentati e with knowledge o the articular loan;
- indemnity language, re cluding subse uent oreclosure udgment on the same note

d here the original note is lost, the court may re uire indemnification o the borrower or subse uent rosecution on the note and may re uire a bond to secure same *Lo ingood Butler Construction Co* , 1 1 So 12 , 1 5 Fla 1 0 Consider bonds articularly where there is a securiti ed trust

1 Mortgage Co y o mortgage is su icient *Perry*, So 2d at 2

a Mortgage must contain correct legal descri tion *Lucas Barnett Bank o Lee County*, 05 So 2d 115, 11 Fla 2d CA 1 I not, inal udgment must be set aside owe er, this can be corrected rior to inal udgment

Fair Debt Collection Practices Act (FDCPA)

1 Pur pose eliminate abusive debt collection practices by debt collectors and to
 2 promote consistent State action to protect consumers against debt collection abuses

15 S C 1 2 e

2 Some Florida courts held attorneys engaged in regular foreclosure work met
 the general definition of debt collector and are subject to the FCPA *Sandlin*
Shapiro, 1 F Su 15 4, 15 M Fla 1 , law firm engaged in collection
 foreclosure work was considered a debt collector where the firm sent correspondence
 advising of payoff and reinstatement figures and directed mortgagors to pay the law
 firm

Under FCPA, a debt collector's obligation to send a Notice of debt is triggered
 by an initial communication with the consumer *McKnight Benite*, 1 F Su
 1 01, 1 04 M Fla 2001

a Filing of suit is not an initial communication which otherwise would have
 given rise to notice and verification rights *Acosta Campbell*, 200 L 04 2
 M Fla 200

b Foreclosure law firms have adopted the practice of attaching to their
 complaint: Notice Required under the Fair Debt Collection Practice Act This notice
 held ineffectual in *Martinez Law Offices of David J Stern*, 2 BR 52 Bank S
 Fla 2001

Mandatory Mediation of Homestead Foreclosures

1 Based on the exponential increase in filings of mortgage foreclosure cases in
 the Eleventh Judicial Circuit Court, the Chief Judge implemented our Administrative
 Orders in the following sequence:

a Administrative Order 0 0 applies to all residential foreclosure actions
 involving homestead properties filed on or after May 1, 2000 AO 0 0 established
 the 11th Circuit Homestead Access to Mediation Program (CAMP) mandating
 mandatory mediation of homestead foreclosures prior to the matter being set for final
 hearing At the time of filing the complaint, Plaintiff is required to transmit to the

Program Manager, the Collins Center, a notice form Form A with borrower's contact information within five days of filing the complaint, Plaintiff must tender a cost check in the amount of \$50.00 to cover the administrative costs of the mediation. The Collins Center responsibilities include: contacting the borrower, referring the borrower to financial counseling and making financial documentation available electronically to the Plaintiff. Plaintiff's counsel and the borrower are required to be physically present at mediation; the lender's representative must attend, but is allowed to participate by telephone. Within ten days of the completion of the mediation, the mediator must report the mediation results to the court.

b. Administrative Order 0-0 revised the following forms: the civil cover sheet, Plaintiff's certification of settlement authority, Plaintiff's certification of residential mortgage foreclosure case status and the final judgment of foreclosure.

This Administrative Order specifically exempts condominium and homeowners association fee foreclosures, private in rem mortgage foreclosures, foreclosures of non-homestead properties and construction lien foreclosures.

c. Administrative Order 0-0 A1 acknowledged the statutory authority of the Clerk of the Courts to conduct the sale of real or personal property by electronic means. This Administrative Order further prescribed adherence to certain procedures concerning tenant occupied residential properties under the Protecting Tenants at Foreclosure Act of 2009. Amending the specific format of the final judgment of foreclosure, this Administrative Order prohibited the issuance of immediate writs of possession.

d. Administrative Order 0-1 responded to the Clerk of the Court's request for formal approval to conduct online auctions, in lieu of on-site auctions or the sale of real property.

2. On December 2, 2009, the Florida Supreme Court issued Administrative Order 0-54, adopting the recommendations of the Task Force on Residential Mortgage Foreclosure Cases and establishing a uniform, statewide managed mediation program. The Florida Supreme Court approved the Task Force's Model Administrative Order, with minor changes to be implemented by each circuit chief judge.

On February 2 , 2010, the Eleventh Judicial Circuit Court issued Administrative Order 10 0 A1 requiring mandatory mediation of all homestead mortgage foreclosure actions subject to the federal Truth in Lending Act, Regulation Z. Administrative Order 10 0 A1 applies to actions filed after March 2 , 2010. Specifically exempted from this Administrative Order are condominium and homeowners association foreclosure and mechanics and construction lien foreclosures. This Administrative Order constitutes a formal referral to mediation through the Residential Mortgage Foreclosure Mediation (RMFM) Program; parties are ineligible for default judgment, a summary judgment or final hearing until they have fully complied with mediation requirements.

Basic Procedural Requirements of Administrative Order 10 0 A1 include:

a. When suit is filed, Plaintiff must file a completed Form A with the Clerk listing the last known mailing address and phone number for each party. One business day after filing the complaint, Plaintiff must transmit Form A to the Program Manager of the RMFM along with the case number of the action. The Collins Center for Public Policy, Inc. is the contract Program Manager in the Eleventh Judicial Circuit. At the time of the filing of the complaint, the Plaintiff must tender RMFM fees in the amount of \$400.00; the balance of fees in the amount of \$50.00 must be paid by Plaintiff within 10 days after notice of the mediation conference.

b. Upon receipt of Form A, the Program Manager must contact the borrower and refer the borrower to an approved mortgage foreclosure counselor. Foreclosure counseling must be completed no later than 30 days from the Program Manager's initial contact with the borrower. If the Program Manager is unable to contact the borrower within this time frame, the borrower will have been deemed to elect non-participation in the RMFM Program.

c. The Program Manager must transmit the borrower's financial disclosure or mediation no later than 30 days after the Program Manager receives Form A from Plaintiff.

d. The Program Manager shall schedule a mediation session no earlier than 30 days and no later than 120 days after suit is filed.

e. Plaintiffs representative may appear by telephone upon 5 days notice prior to the mediation; plaintiffs attorney, the borrower and the borrowers attorney, if any, must attend in person. The court may dismiss the action without prejudice or impose other sanctions for failure to attend within 10 days after completion of mediation, the mediator must issue a report advising the court as to the parties attendance and result.

Service of Process

1. Due service of process is essential to satisfy jurisdictional requirements over the subject matter and the parties in a foreclosure action. Rule 1.000, Fla. R. Civ. P. 2010 and Chapters 4 and 4 of the Florida Statutes.

2. Service of process must be made upon the defendant within 120 days after the filing of the initial pleading. Rule 1.000, Fla. R. Civ. P. 2010. Absent a showing of excusable neglect or good cause, the failure to comply with the time limitations may result in the courts dismissal of the action without prejudice or the dropping of the defendant.

Personal Service

1. Section 4.011, Fla. Stat. 2010 requires that service of process be effectuated by a certified process server on the person to be served by delivery of the complaint or other pleadings at the usual place of abode or by leaving the copies at the individuals place of abode with any person residing there, who is 15 years of age or older and informing them of the contents. 4.2, Fla. Stat. 2010.

a. Ineffective service. Leaving service of process with a doorman or with a tenant, when the defendant does not reside in the apartment is ineffective service. *Grosheim v. Greenpoint Mortgage Funding, Inc.*, 1 So.2d 0, 0 Fla.4th CA 2002. Evidence that person resides at a different address from service address is ineffective service. *Alare v. State Farm Mut. Ins. Co.*, 5 So.2d 11 Fla. d. CA 14.

b. Judgment subject to collateral attack where plaintiff did not substantially comply with the statutory requirements of service.

2 Substitute service authorized by Section 401.2, Fla Stat 2010
 Substitute service may be made upon the spouse of a person to be served, if the
 cause of action is not an adversary proceeding between the spouse and the person to
 be served, and if the spouse resides with the person to be served

a Statutes governing service of process are strictly construed *General de
 Seguros, S A Consol Pro Cas Ins Co*, 50 So 2d 10, 1 Fla d CA
 2001 reversed with directions to vacate de ault judgment and quash service of
 process since substituted service was not effected

b Use of private couriers or Federal Express held invalid *Id; FNMA
 Fandino*, 51 So 2d 52, 5 Fla d CA 2000, trial courts voiding judgment
 affirmed based on plaintiff's failure to strictly comply with substitute service of process
 which employed Federal

c Evading service of process defined by statute as concealment of
 whereabouts 401.11, Fla Stat 2010; *Bodden Young*, 422 So 2d 1055 Fla
 4th CA 1 2

1 The Florida case which clearly illustrates concealment is *Luckey
 Smathers Thom son*, 4 So 2d 5 Fla d CA 1 In *Luckey*, the
 defendant had for the purpose of avoiding all legal matters, sequestered
 himself from the world and lived in isolation in a high security apartment
 refusing to answer the telephone or even to open his mail *Id* at 54 The
 Third District Court of Appeal affirmed the trial court's decision denying
 defendant's motion to vacate the writ of execution and levy of sale based on a
 record of genuine attempts to serve the defendant The Third District Court
 further opined that there is no rule of law which requires that the officers of
 the court be able to breach the self-imposed isolation in order to inform the
 defendant that a suit has been filed against him *Id*

2 Effective retroactive service must demonstrate plaintiff's attempts in
 light of the facts of the case despite process server's unsuccessful attempts
 at service, revision was not voided based on evidence that the property was
 occupied and defendant's vehicle parked there *ise arner*, 2 So 2d

5 1, 5 2 Fla 5th CA 200 working whose place of employment was known to the sheriff was not concealing herself or avoiding process, sheriff only attempted service at the residence during work hours *Styles v. United Fidelity Guaranty Co*, 42 So 2d 104 Fla 5th CA 1 2

Statutory requirements satisfied if papers left at a place from which the person to be served can easily retrieve them and in the process server takes reasonable steps to call the delivery to the attention of the person to be served *Olin Corporation v. Anney*, 245 So 2d 104 Fla 4th CA 1 1

Service on a corporation may be served on the registered agent, officer or director Section 4 0 1 2 b, Fla Stat 2010 if the address provided for the registered agent, officer, director, or principal place of business is a residence or private mailbox, service on the corporation may be made by serving the registered agent, officer or director in accordance with 4 0 1, Fla Stat 2010

Constructive Service by Publication

1 Section 4 0 1 1, Fla Stat 2010 identifies the enforcement of a claim of lien to any title or interest in real property such as foreclosure actions

2 Sections 4 0 2 1 40 0 4 1, of the Florida Statutes govern constructive service or service by publication Constructive service statutes are strictly construed against the party seeking to obtain service *Leenson v. McCarty*, 20 So 2d 1, 1 Fla 4th CA 2004

Service by publication only available when personal service cannot be made *Godsell v. United Guaranty Residential Insurance*, 2 So 2d 120, 1212 Fla 5th CA 200, service by publication is void when plaintiff knew of the defendant's Canadian residency, but merely performed a ski trace in Florida and made no diligent search and inquiry to locate Canadian address; *Gross v. Fidelity Federal Savings Bank of Fla*, 5 So 2d 4, 4 Fla 4th CA 1 1, appellate court reversed and remanded to wash service process and default based on plaintiff's knowledge of defendant's out of state residence address and subsequent failure to attempt personal service

a Plaintiff must demonstrate that an honest and conscientious effort, reasonably appropriate to the circumstances, was made to acquire the necessary information and comply with the applicable statute *or Cha, Inc v Hollingsworth*, 2010 So 2d 1110, 1112 Fla 4th CA 2004, default judgment reversed based on plaintiff's crucial misspelling of defendant's name and subsequent search on wrong individual

b Condition precedent to service by publication Section 4 041, Fla Stat, 2010, requires that the plaintiff file a sworn statement that shows 1 a diligent search and inquiry has been made to discover the name and residence of such person, 2 whether the defendant is over the age of 18, or if unknown, the statement should set forth that it is unknown, and 3 the status of the defendant's residence, whether unknown or in another state or country Section 4 051, Fla Stat 2010 applies to service by publication on a corporation

c Plaintiff is entitled to have the clerk issue a notice of action subsequent to the filing of its sworn statement Pursuant to 4 040, Fla Stat, 2010, the notice requires defendant to file defenses with the clerk and serve same upon the plaintiff's attorney within 30 days after the first publication of the notice

1 Notice published once each week or two consecutive weeks, with proof of publication filed upon final publication

4 10 1 c 2, Fla Stat 2010

d Affidavit of diligent search need only allege that diligent search and inquiry have been made; it is not necessary to include specific facts *Floyd v FNMA*, 2010 So 2d 1110, 1112 Fla 5th CA 1, final judgment and sale vacated based on plaintiff's failure to conduct diligent search to discover deceased mortgagor's heirs residence and possession of the subject property *Howe v*:

1 Better practice is to file an affidavit of diligent search that contains all details of the search *emars v Hill v Sandalwood Lakes Homeowners Ass'n*, 2010 So 2d 121, 1222 Fla 4th CA 1, plaintiff's attorney failed to conduct diligent search and

inquiry by neglecting to follow up on leads which he knew were likely to yield defendant's residence

a **Diligent search and inquiry checklist**

Form 1-24, Fla. R. Crim. P. 2010 contains a basic checklist of a diligent search and inquiry to establish constructive service. This Form adds consideration of inquiry of tenants as to the location of the owner/landlord of tenant occupied property. Further, the Form utilizes the following sources:

- 1 Inquiry as to occupants in possession of the subject property;
- 2 Inquiry of neighbors;
Public records search of criminal/civil actions;
- 4 Telephone listings;
- 5 Tax collector records;
Utility Company records;
Last known employer;
US Post Office;
Local police department, correctional department;
- 10 Local hospitals;
- 11 Armed Forces of the States;
- 12 Department of Highway Safety/Motor Vehicles;
- 13 School board enrollment verification, if defendant has children;
- 14 An inquiry of the Division of Corporations, State of Florida, to determine if the defendant is an officer, director or registered agent;
- 15 Other registration records

The plaintiff bears the burden of proof to establish the legal sufficiency of the affidavit when challenged. *Id.* If constructive service process is disputed, the trial court has the duty of determining: 1) if the affidavit of diligent search is legally sufficient; and 2) whether the plaintiff conducted an adequate search to locate the defendant. *First Home View Corp. v. Guggino*, 10 So. 3d 14, 15 Fla. DCA 200

g **Diligent search test** whether plaintiff reasonably employed the knowledge at his command, made diligent inquiry, and exerted an honest and conscientious effort appropriate to the circumstances. *She heard Deutsche Bank Trust Co Americas*, 22 So 2d 40, 4 Fla 5th CA 200 , reversed and voided judgment as to defendant wife based on plaintiff's failure to strictly comply with statute, when they had been informed of defendant's correct address in England. Plaintiff's reliance on constructive service, when a doorman in New York repeatedly informed the process server of the defendant's location in Florida, reflects an insufficient amount of reasonable efforts to personally serve the defendant to justify the use of constructive service. *Reico Chase Manhattan Bank*, 2 So 2d 15, 1 Fla 4d CA 2002. Similarly, failure to inquire of the most likely source of information concerning whereabouts of a corporation, or an officer or agent, does not constitute reasonable diligence. *Redfield Investments, A Billage o Pinecrest*, 10 So 2d 115, 11 Fla 4d CA 200

h defective service of process judgment based on lack of diligent search and inquiry constitutes improper service and lacks authority of law. *Batchin Barnett Bank o Southwest Fla*, 4 So 2d 211, 21 Fla 2d CA 1 4

1 Judgment rendered void when defective service of process amounts to no notice of the proceedings. *She heard*, 22 So 2d at 45. Void judgment is a nullity that cannot be validated by the passage of time and may be attacked at any time. *Id*

2 Judgment rendered voidable irregular or defective service actually gives notice of the proceedings. *Id*

i Limitations of constructive service only concern in rem or quasi in jurisdiction; restricted to the recovery of mortgaged real property

1 No basis for deficiency judgment constructive service of process cannot support a judgment that determines an issue of personal liability. *Carter Kingsley Bank*, 5 So 2d 5 , 5 Fla 1st CA 1 1 , deficiency judgment cannot be obtained absent personal service of process

Service of Process outside the State of Florida and in Foreign Countries

1 Section 4 1 4 1 , Fla Stat , 2010 authori es ser ice o rocess in the same manner as ser ice within the state, by an o icer in the state where the erson is being ser ed Section states that ser ice o rocess outside the nited States may be re uired to con orm to the ro isions o ague Con ention o 1 concerning ser ice abroad o udicial and e tra udicial documents in ci il or commercial matters

2 The ague Con ention creates a ro riate means to ensure that udicial and e tra udicial documents to be ser ed abroad shall be brought to the addressee in su icient time *Koechli BIP Int l* , 1 So 2d 501, 502 Fla 5th CA 200

a Procedure rocess sent to a designated central authority, checked or com liance, ser ed under oreign nation s law, and certi cate re ared which documents the lace and date o ser ice or an e lanation as to lack o ser ice *Id* return by the central authority o a oreign nation o com leted certi cate o ser ice was rima acie e idence that the authority s ser ice on a de endant in that country was made in com liance with the ague Con ention and with the law o that oreign nation

b Com liance issues see *i ellman Int l Nat l Forwarders* , 11 So 2d 1 Fla d CA 1 2 , lainti ro ided a aulty address to the S anish authorities and the trial udge entered a de ault udgment, which a ellate court re ersed

Ser ice by registered mail authori ed by Section 4 1 4 2 , Fla Stat 2010 Permits ser ice by registered mail to nonresidents where the address o the erson to be ser ed is known

a Section 4 1 2 2 b , Fla Stat 2010 , ro ides that lainti must ile an a ida it which sets orth the nature o the rocess, the date on which the rocess was mailed by registered mail, the name and address on the en elo e containing the rocess that was mailed, the act that the rocess was mailed by registered mail and was acce ted or re used by endorsement or stam The return en elo e rom the attem t to mail rocess should be attached to the a ida it

Service of process and timeshare real property:

1 Foreclosure proceedings involving timeshare estates may join multiple defendants in the same action § 21.09, Fla Stat 2010

2 There are additional options to effectuating service of process on a timeshare foreclosure

a Substitute service may be made upon the obligor's appointed registered agent § 21.051, Fla Stat 2010

b When quasi in rem or in rem relief only is sought, service may be made on any person whether the person is located inside or outside the state by certified or registered mail, addressed to the person to be served at the notice address § 21.05a, Fla Stat 2010

Substitution of Parties

1 Substitution is not mandatory; the action may proceed in the name of the original party, owner, to substitute a new party based on a transfer of interest requires a court order *Tinsley Mangonia Residence 1, Ltd*, 50 So 2d 1, 1 Fla 4th CA 200, Rule 1.20, Fla R Ci P

2 Order of substitution must precede an adjudication of rights of parties, including default *Floyd Wallace*, 50 So 2d 5 Fla 1; *Cambell Napoli*, 50 So 2d 122 Fla 2d CA 2001, error to enter judgment without a real party against whom judgment could be entered

When substitution is permitted, plaintiff must show the identity of the new party's interest and the circumstances

Entry of Default

1 Without proof of service demonstrating adherence to due process requirements, the Plaintiff is not entitled to entry of default or a default final judgment

a Failure to effectuate service places the jurisdiction in a state of dormancy during which the trial court or clerk is without authority to enter a default *Armet*

SNC di Ferronato Gioanni Coombs, 44 So 2d 111, 1121 Fla 1st CA 1; *Tetley Lett*, 42 So 2d 112 Fla 4th CA 14

2 Legal effect of default admission of every cause of action that is sufficiently well led to properly invoke the jurisdiction of the court and to give due process notice to the party against whom relief is sought *Fiera Com, Inc v. Gigicast New Media Group, Inc*, So 2d 451, 452 Fla 4th CA 200. Default terminates the defending party's right to further defend, except to contest the amount of unliquidated damages *Donohue v. Brightman*, So 2d 112, 114 Fla 4th CA 200

Plaintiff is entitled to entry of default if the defendant fails to file or serve any answer 20 days after service of process Rule 1.040(a)(1), Fla R Civ P 2010

a State of Florida has 40 days in which to file or serve any answer in accordance with Section 41.21, Fla Stat 200

b United States of America has 90 days to file under the provisions of 28 SCA 2410(b); Rule 12(a), Fed R Civ P

4 **Service Members Civil Relief Act of 2003 (formerly, Soldier's & Sailors Act)**

a Codified in 50 A SCA 521 tolls proceedings during the period of time that the defendant is in the military service

b Act precludes entry of default; there is no need for the service member to demonstrate hardship or prejudice based on military service *Conroy v. Anisko*, 50

S 511, 512(1) Service member with notice of the foreclosure action, may obtain a stay of the proceedings for a period of 90 months 50 A SCA 521(d) was superseded by the Housing and Economic Recovery Act of 2008, § 220, which expires on 12/31/10. Upon expiration, the original 90 day period will re take effect

c Termination of military status to obtain default, plaintiff must file an affidavit stating:

1 defendant is not in military service; or

2 Plaintiff is unable to determine if the decedent is in the military service 50 A S C A 521 b 1

d Unknown military status the court may require the plaintiff to file a bond prior to entry of judgment 50 A S C A 521 b

5 Plaintiff is required to serve the decedent with notice of the application for default Failure to notice decedent's attorney entry of subsequent default is invalid; rendering resulting judgment void *S Bank Nat'l Ass'n v Lloyd*, 1 So 2d , 4 Fla 2d CA 200

Non Military Affidavit required must be based on: personal knowledge, attest to the fact that inquiry was made of the Armed Forces, and affiant must state that the decedent is not in the armed forces *The Fla Bar Re: A Formal Form*, 21 So 2d 1025, 10 4 Fla 1 Affidavits based on information and belief are not in compliance

a Non military affidavit is valid for one year

Appointment of a Guardian ad Litem

1 The best practice is appointment when unknown parties are joined and service effected through publication For example, a guardian ad litem should be appointed to represent the estate of a deceased decedent or when it is unknown if the decedent is deceased 0 , Fla Stat 2010

a Section 50 1 2 , Fla Stat 2010 states that a guardian ad litem shall not be appointed unless it affirmatively appears that the interest of minors, persons of unsound mind, or conflicts are involved

b Rule 1 210 b , Fla R Ci P 2010 provides that the court shall appoint a guardian ad litem for a minor or incompetent person not otherwise represented or the protection of the minor or incompetent person Similarly, Rule 1 511 e , Fla R Ci P 2010 maintains that final judgment after default may be entered by the court at any time, but no judgment may be entered against an infant or incompetent person unless represented by a guardian

Appointment of a Receiver

1 During a foreclosure, the appointment of a receiver for condominium and homeowners associations is governed by statute, although it may also be authorized by association bylaws.

a Section 111.07, Fla. Stat. 2010, provides that the court in its discretion may require the resident condominium unit owner to pay a reasonable rental for the unit during the pendency of the foreclosure action, the condominium association is entitled to the appointment of a receiver to collect the rent. *Id.*

b Similarly, Section 200.51(1)(d), Fla. Stat. 2010 governs homeowners associations. Post judgment, this Section provides that the court may require the parcel owner to pay a reasonable rental for the parcel. If the parcel is rented or leased during the pendency of the foreclosure, the homeowners association is entitled to the appointment of a receiver. *Id.*

c Blanket motions for appointment of a receiver for units prior to the filing of a foreclosure action do not meet the requirements of either statutory provision.

2 The motion for appointment of a receiver for real property which does not qualify under the condominium or homeowners association statutes must satisfy basic prerequisites. These basic prerequisites are the same legal standards applicable to non-foreclosure proceedings, as in *uncti e relie*.

a This equitable remedy must be exercised with caution as it is in derogation of the legal owner's fundamental right of possession of his property and only warranted if there is a showing that the secured property is being wasted or otherwise subject to serious risk of loss. *Alaya Square Association, Ltd v. Great Eastern Bank*, 90 So.2d 41, 41 Fla.5th CA 1; *Twin Bay Chambers Partnershi Square*, 55 So.2d 1, 2 Fla.2d CA 10; *Electro Mechanical Products, Inc v. Borona*, 24 So.2d Fla. d CA 1.

b In the absence of a showing that the property is being wasted or otherwise subject to serious risk of loss, appointment of a receiver is unjustified. *Seasons Psh 1 Kraus Anderson, Inc*, 90 So.2d 01, 02 Fla.2d CA 1.

c The party seeking a judgment must show that there is a substantial likelihood that it will prevail on the merits at the conclusion of the case and must present sufficient proof that a judgment of a receiver is warranted. *Keybank National Association v. Knuth, Ltd.*, 200 WL 24410, 24411 Fla. d. CA, Aug 12, 200

d A final prerequisite to a judgment of a receiver is that the mortgagor must post a bond, or either the plaintiff or the receiver. Rule 1.20(c), Fla. Rules of Civil Procedure 2010; *Boyd v. Banc One Mortgage Corp.*, 50 So. 2d , Fla. d. CA 1

Summary Final Judgment of Foreclosure

1 Legal standard No genuine issue of material fact and mortgagor is entitled to a judgment as a matter of law. Also, outstanding discovery can preclude summary judgment.

2 Burden of Proof The plaintiff bears the burden of proof to establish the nonexistence of disputed issues of material fact. *elandro v. Am's Mortgage Servicing, Inc.*, 4 So. 2d 14, 1 Fla. d. CA 1; *Roll v. Talcott*, 11 So. 2d 40, 4 Fla. 1

Content of motion for summary judgment plaintiff should allege:

1 execution of note and mortgage; 2 plaintiff's status as owner and holder or representative; 3 date of default; 4 notice of default and acceleration; 5 amount due and owing; 6 relief sought; and 7 address affirmative defenses, if any.

4 Filing of the Motion at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party. Rule 1.510(a), Fla. R. Civ. P. 2010. The motion for summary judgment, supporting affidavits and notice of hearing must be served on a defendant at least 20 twenty days before the summary judgment hearing. Rule 1.510(c), Fla. R. Civ. P. 2010; *First v. Bank of New York*, 2010 WL 112 Fla. 2 CA Mar , 2010; *Mack v. Commercial Industrial Park, Inc.*, 541 So. 2d 00, 01 Fla. 4th CA 1

a Opposition materials and evidence supporting or opposing a denial of a motion for summary judgment must be identified. Rule 1.510(c), Fla. R. Civ. P. 2010. Notice of opposition must be mailed to the movant's attorney at least five days prior to the day of hearing or delivered no later than 5:00 P.M., two business days prior to the day of the hearing on the summary judgment.

b The movant for summary judgment must factually refute or disprove the affirmative defenses raised, or establish that the defenses are insufficient as a matter of law. *Leal v. Deutsche Bank Nat'l. Trust Co.*, 21 So. 3d 10, 10 Fla. 3d DCA 200.

c Filing of cross motions is subject to the 20 day notice period. *Wikowsi v. Hillsborough County*, 51 So. 2d 122, Fla. 2d CA 15. 5. Requirement for motion for summary judgment: due notice and a hearing. Proof of mailing of notice of the final summary judgment hearing created presumption that notice of hearing was received. *Blanco Kinas*, 51 So. 2d 1, 2 Fla. 3d CA 200.

Affidavits in support of Summary Judgment

Affidavits in support of the motion must be made based on personal knowledge and set forth facts that would be admissible in evidence, and demonstrate that the affiant is competent to testify on the matters presented.

a Affidavit of Indebtedness Must be signed by a custodian of business record with knowledge. In general, the plaintiff's affidavit items are:

1 Property address,

2 Principal balance,

interest calculated from default until the entry of judgment, when the mortgage provides for automatic acceleration upon

default, *T FN Realty Co v. Kirkman Conroy, Ltd*, 54 So. 2d 115

Fla. 5th CA 1. Best practice is to include per diem interest,

4 late charges re acceleration only, *Fowler v. First Fed Sa Loan Ass'n*, 4 So. 2d 10, Fla. 1st CA 14,

5 prepayment penalties unavailable in foreclosure actions, *Fla. Nat'l*

Bank Atlantic, 5 So 2d 255, 25 Fla 1 1 , unless specifically authorized in note in the event of acceleration and foreclosure *Feinstein Ashlant*, 1 So 2d 10 4 Fla 4th CA 200

property inspections appraisals,
 hazard insurance premiums and taxes

b Award of Costs This award details:

- 1 the filing fee,
- 2 service process,
 and abstracting costs

c Award of attorney's time references the actual time the attorney expended on the foreclosure file and references the actual hourly billable rate or the flat fee rate which the client has agreed to pay. The Fla Supreme Court endorsed the lodestar method *Bell S B Acquisition Co*, 4 So 2d 40 , 40 Fla 1. The hours may be reduced or enhanced in the discretion of the court, depending on the novelty and difficulty of questions involved *Fla Patient's Compensation Fund Rowe*, 4 2 So 2d 1145, 1150 Fla 1 5. With regard to uncontested time, plaintiff is not required to keep contemporaneous time records since the lender is contractually obligated to pay a flat fee for that time. *Id*

d Award as to reasonableness of attorney's fee Award of attorney's fee must be signed by a practicing attorney not affiliated with the plaintiff's firm, attesting to the rate as reasonable and customary in the circuit. Plaintiff should reference and evaluate the attorney fee claim based on the eight factors set forth in Rule 4 1 5 b 1 Rules Regulating the Fla Bar. Of these, relevant factors, such as the time and labor required, the customary fee in the locality for legal services of a similar nature, and the experience and skill of the lawyer performing the service must be examined. An award of attorney fees must be supported by expert evidence *Palmetto Federal Savings and Loan Association v*, 512 So 2d 2 Fla 4th CA 1

1 Where there is a default judgment and the promissory note or mortgage contains a provision for an award of attorney fees,

Section 92.052, Fla. Stat. 2010 provides that it is not necessary for the court to hold a hearing or adjudicate the requested attorney's fees to be reasonable if the fees do not exceed ten percent of the principal amount owed at the time of the filing of the complaint. *Florida Patient's Compensation Fund v. Rowe*, 42 So. 2d 1145, Fla. 1st DCA 1950. *Id.* This statutory provision confirms that such fees constitute liquidated damages in any proceeding to enforce the note or mortgage. *Id.*

2. The judgment must contain findings as to the number of hours and the reasonable hourly rate. *Id.* at 1152. The requirements of *Rowe* are mandatory and failure to make the requisite findings is reversible error. *Home Insurance Co. v. Gonzalez*, 4 So. 2d 21, 22 Fla. 1st DCA 1950. An award of attorney's fees must be supported by competent substantial evidence in the record and contain express findings regarding the number of hours reasonably expended and a reasonable hourly rate for the type of litigation involved. *Stack v. Lakeside Lending, Inc.*, 20 So. 2d 1, 20 Fla. 2d CA 200.

Affirmative Defenses

1. Genuine existence of material fact precludes entry of summary judgment. *Manassas Investments Inc. v. Olanrahan*, 1 So. 2d 100, Fla. 2d CA 2002.
2. Legal sufficiency of defenses. Certainty is required when pleading affirmative defenses; conclusions of law unsupported by allegations of ultimate fact are legally insufficient. *Bliss v. Carmona*, 41 So. 2d 101, 101 Fla. 1st DCA 1950. Affirmative defenses do not simply deny the acts of the opposing party's claim; they raise some new matter which defeats an otherwise apparently valid claim. *Jiggins v. Protmy*, 40 So. 2d 541, 542 Fla. 1st DCA 1950. Plaintiffs must either actually refute affirmative defenses or establish that they are legally insufficient. *Frost v. Regions Bank*, 15 So. 2d 05, 0 Fla. 4th CA 200.

Affirmative defenses commonly raised:

a Payment Here debtors alleged advance payments and plaintiff failed to refute this defense, plaintiff not entitled to summary judgment *Morrone Household Fin Cor III*, 10 So 2d 11, 12 Fla 2d CA 2005. Usually, if the affidavit of indebtedness is inconclusive or, for example, includes a credit or unaffiliated funds without explanation, and the borrower alleges a the defense of inaccurate accounting, then summary judgment should be denied *Kanu Pointe Bank*, 1 So 2d 4 Fla 4th CA 200. However, summary judgment will be deeded if payment was attempted, but due to misunderstanding or excusable neglect coupled with lender's conduct, contributed to the failure to pay *Cambell Turner*, 22 So 2d 252, 25 Fla d CA 10; *Lieberbaum Surcomberotel Cor*, 122 So 2d 2, 2 Fla d CA 10, Court dismissed foreclosure complaint where plaintiff knew that some excusable oversight was the cause of non-payment, said payment having been re-used and subsequently deposited by debtors into the court registry.

b Failure to comply with conditions precedent such as Plaintiff's failure to send the Notice of default letter. Failure to receive any information does not preclude summary judgment *Walker Midland Mortgage Co*, 5 So 2d 51, 520 Fla d CA 200.

c Estoppel is usually based on: a representation as to a material fact that is contrary to a later asserted position; reliance on that representation; and a change in position detrimental to the party claiming estoppel, caused by the representation and reliance thereon *arris Natl Recovery Agency*, 1 So 2d 50, 54 Fla 4th CA 2002; *Jones City of Inter a en*, 10 So 2d 52, 55 Fla 2d CA 200, defendant deeded city's foreclosure based on evidence presented which indicated that the city had agreed to stop fines or noncompliance with property code if homeowner hired a licensed contractor to make repairs.

d waiver the knowing and intentional relinquishment of an existing right *Taylor Kenco Chem Mg Co*, 45 So 2d 51, 5 Fla 1st CA 15. When voluntarily led, affirmative defenses that sound in waiver and estoppel present

genuine issues of material fact which are inappropriate for summary judgment
Schiebe Bank of Am, 22 So 2d 555 Fla 5th CA 2002

1. Acceptance of late payments common defense asserting
 waiver is the lender's acceptance of late payments. However, the
 lender has the right to elect to accelerate or not to accelerate a term
 default. *Scarborough Peer*, 405 So 2d 104, 105 Fla 5th CA
 1981. The default recited on defendant's failure to pay real estate
 taxes, could not be overcome by defendant's claim of estoppel due
 to misapplication of non-escrow payments. *Lunn Woods Lowery*,
 5 So 2d 05, 0 Fla 2d CA 1981

2. Fraud in the inducement defined as situation where parties to a contract
 appear to negotiate freely, but where in fact the ability of one party to negotiate fair
 terms and make an informed decision is undermined by the other party's fraudulent
 behavior. *TP, Ltd Lineas Aereas Costarricenses, S A*, 5 So 2d 12, 12
 Fla 1

A prima facie defense of fraud in the inducement based on allegation that seller
 failed to disclose the tensile termite damage resulted in reversal of foreclosure
 judgment. *inton Brooks*, 20 So 2d 25 Fla 5th CA 2001. Note that
 purchasers had first filed fraud in the inducement case and seller retaliated with
 foreclosure suit. Further, the appellate court opined in the *inton* case that fraud in
 the inducement was not barred by the economic loss rule. *Id*

3. Usury defined by § 190, Fla Stat 2010, as a contract or the
 payment of interest upon any loan, advance of money, line of credit, or forbearance
 to enforce the collection of any debt, or upon any obligation whatever, at a higher
 rate of interest than the equivalent of 1 percent per annum simple interest. If the
 loan exceeds \$500,000 in amount or value, then the applicable statutory section is
 § 191, Fla Stat 2010. A usurious contract is unenforceable according to the
 provisions of Section 191, Fla Stat 2010.

4. Forbearance agreement. Appellate court upheld summary judgment based
 on defendant's failure to present any evidence as to the alleged forbearance

agreement or prior servicer to delay foreclosure until the settlement of his personal injury case. *Walker v. Midland Mortgage Co.*, 5 So 2d at 520. If evidence of forbearance is submitted, it may defeat summary judgment.

h. Statute of limitations. Property owner successfully asserted that foreclosure filed five years after mortgage maturity date was barred by statute of limitations; mortgage lien was no longer valid and enforceable under Section 521.11a, Fla Stat. 2010; *American Bankers Life Assurance Co. v. Fla. 225 Est. Cor.*, 05 So 2d 1, 1 Fla d. CA 2005.

i. Failure to pay documentary stamps. Section 201.0, Fla Stat. 2010, requires enforcement of notes and mortgages absent the payment of documentary stamps. *RJ v. Inc. North Ring Limited*, So 2d 104, 104 Fla d. CA 200; *Bonifiglio v. Bankers Trust Co. of Cali*, 44 So 2d 10, 10 Fla 4th CA 200.

1. This is a limitation on judicial authority; not a genuine affirmative defense.

Truth in Lending (TILA) violations. Technical violations of TILA do not impose liability on lender or defeat foreclosure. *Kasket v. Chase Manhattan Mortgage Cor.*, 5 So 2d 2, Fla 4th CA 2000; 15 S C A 1 00. Exception to TILA one year statute of limitations applies to defenses raised in foreclosure. *Ailey v. Leshin*, 2 So 2d 52, 52 Fla 4th CA 2001; 15 S C A 1 40 e.

TILA issues include:

1. Improper adjustments to interest rates (ARMS);

2. Borrower must be given 2 copies of notice of rescission rights. Written acknowledgement of receipt is only a rebuttable presumption. *Cintron v. Bankers Trust Co.*, 2 So 2d 1, Fla 2d CA 1.

TILA rescission or up to three years after the transaction or failure to make material disclosures to borrower. Such as, APR of loan, amount financed, total payment and payment schedule. Rescission relieves borrower only of payment of interest. Must be within three years of closing. 15 S C 1 01 1 1 4; *Beach v. Great Eastern Bank*, 2 So 2d 14, 15 Fla 1.

a. If a homestead interest in mortgaged property gives her right to

TILA disclosure *Gancedo elCar io*, 1 So d 4 , 44 Fla 4th CA 200

k Res udicata Foreclosure and acceleration based on the same default bars a subsequent action unless redicated u on se arate, di erent defaults *Singleton Greymar Assoc*, 2 So 2d 1004, 100 Fla 2004

Additional cases: *Limehouse Smith*, So 2d 15 Fla 4th CA 2001 , mistake ; *O'Brien Fed Trust Bank, F S B*, 2 So 2d 2 Fla 5th CA 1 , fraud, RICO and duress ; *Biondo Powers*, 4 So 2d 1 1 Fla 4th CA 1 , usury ; *eimmermann First nion Mortgage Cor* , 05 F 2 d 125 11th Circ 2002 , Real Estate Settlement Procedures Act RESPA iolations

Summary Judgment Hearing

1 Plainti must ile the original note and mortgage at or be ore the summary udgment hearing Since the romissory note is negotiable, it must be surrendered in the oreclosure roceeding so that it does not remain in the stream o commerce *Perry Fairbanks Ca ital Cor* , So 2d 25, 2 Fla 5th CA 2001 Co ies are su icient with the e ce tion that the note must be reestablished *Id* Best ractice is or udge to cancel the signed note u on entry o summary udgment

a Failure to roduce note can reclude entry o summary udgment *Nat / Loan In estors, L P Joymar Assoc*, So 2d 54 , 550 Fla d CA 2000

Final Judgment

1 Section 45 0 1, Fla Stat 2010 go erns the contents o the inal udgment Final Judgment Form 1 , Fla R Ci P 2010

2 Amounts due Plainti s reco ery limited to items led in com laint or a ida it or based on a mortgage ro ision

Court may award costs agreed at ince tion o contractual relationshi ; costs must be reasonable *Nemours Found Gauldin*, 01 So 2d 5 4, 5 Fla 5th CA 1 2 , assessed costs consistent with mortgage ro ision rather than re ailing arty statute ; *Maw Abinales*, 4 So 2d 1245, 124 Fla 2d CA 1 5 , award o costs go erned by mortgage ro ision

4 Checklist or Final Summary Judgment

a Final Judgment:

1 Check service, defaults, dropped parties

2 Check for evidence of ownership of note

Check affidavits signed and correct case number parties

4 Amounts due and costs should match affidavits filed. If interest has increased due to resets a daily interest rate should be indicated so you can verify it

5 Check principal, rate calculation of interest through date of judgment

Late fees re acceleration is recoverable; post acceleration is not *Fowler First Fed Sav Loan Assoc v Uniak Savings*, 4 So 2d 0, Fla 1st CA 14

All expenses and costs, such as service of process should be reasonable, market rates. Items related to protection of security interest, such as encing and boarding up property are recoverable if reasonable

Beware hidden charges fees or default letters, correspondence related to workout efforts. Court's discretion to deny recovery

Attorney fees must not exceed contract rate with client and be supported by an affidavit as to reasonableness. Attorney fee cannot exceed principal owed. 02-052, Fla Stat 2010. Beware add-ons or litigation fees. make sure that they are not double billing late fee

10 Bankruptcy fees not recoverable. Correct forum is bankruptcy court. *Martine Giacobbe*, 51 So 2d 02, 04 Fla 1d CA

200 ; *Orak First Family Bank*, So 2d 10, 10 Fla 5th

CA 14. Bankruptcy costs incurred to obtain stay relief recoverable. *Nemours*, 01 So 2d at 55

11 Sale date may not be set in less than 20 days or more than 5 days, unless parties agree 450 11 a, Fla Stat 2010, *JRBL e, Inc Maiello*, 2 So 2d 2, Fla 2d CA 2004

5 I summary judgment denied, foreclosure action proceeds to trial on contested issues

a Trial is before the court without a jury 02 01, Fla Stat 2010

Motion for rehearing abuse of discretion to deny rehearing where multiple legal issues, including prepayment penalties and usury, remain unresolved by the trial court *Bonilla Yale Mortgage Corporation*, 15 So d 4, 45 Fla d CA 200

After entry of final judgment and expiration of time to file a motion for rehearing or for a new trial, the trial court loses jurisdiction of the case *Ross Amas*, 2010 L 5 2 12 Fla d CA Feb 1, 2010; 45 So 2d 4 5 Fla d CA 1 4
 Exception: when the trial court reserves in the final judgment the jurisdiction of post judgment matters, such as deficiency judgments *Id*

Right of Redemption

1 Mortgagor may exercise his right of redemption at any time prior to the issuance of the certificate of sale 450 15, Fla Stat 2010

a Court approval is not needed to redeem *Indian River Farms YBF Partners*, So 2d 10, 1100 Fla 4th CA 2001; *Saidi Asko*, So 2d 10, 1 Fla 5th CA 1

b Court of equity may extend time to redeem *Pere Kossow*, 02 So 2d 1 2 Fla d CA 1 2

2 To redeem, mortgagor must pay the entire mortgage debt, including costs of foreclosure and attorney fees *CSB Realty, Inc Eurobuilding Cor*, 25 So 2d 12 5, 12 Fla d CA 1; 450 15, Fla Stat 200

Right to redeem is incident to every mortgage and can be assigned by anyone claiming under him *OSR Indus, Inc Martin Properties, Inc*, 1 So 2d 554, 55 Fla 4th CA 200 There is no statutory prohibition against the assignment, including the assignment of bid at sale

a Right of redemption extends to holders of subordinate interests Junior mortgage has an absolute right to redeem from senior mortgage *Marina Funding Group, Inc v Peninsula Pro Holdings, Inc*, 50 So 2d 42, 42 Fla 4th CA 200 ; *Winn Plumbing Co v New Miami Shores Cor*, 12 So 3d 4, 4 Fla 1st CA 4 Fed right of redemption United States has 120 days following the foreclosure sale to redeem the property if its interest is based on an IRS tax lien For any other interest, the Fed go ernment has one year to redeem the property 11 S C 541, 2 S C 5

Judicial Sale

Scheduling the judicial sale

1 The statutory prescribed time frame for scheduling a sale is not less than 20 days or more than 5 days after the date of the order or judgment § 450.11 a, Fla Stat 2010 The statute applies unless agreed otherwise

2 Cancellations, continuances and postponements are within the discretion of the trial court Motion must have reasons Judicial action based on benevolence or compassion constitutes an abuse of discretion *Republic Federal Bank v Boyle*, 200 L 10210 Fla 1st CA 200 , Appellate court reversed trial court's continuance of sale based on compassion to homeowners claiming they needed additional time to sell the home There should be no across the board policy But see, *Wells Fargo v Luica*, 2010 L 22154 Fla 5th CA 410 denial of lender's unused motion to cancel and subsequent motion to vacate sale reversed Counsel alleged a loan modification agreement had been reached Court rejected asking for evidence of agreement The Fifth District Court ruled, there was no basis for the trial court to reject Wells Fargo's counsel's representation, as an officer of the court, that an agreement had been reached *Id* Look at language in motions, AMP Review and loss mitigation do not constitute an agreement Include language in the order indicating the court's rationale, even if you have a form order Ask counsel to make a personal representation as an officer of the court See also, *Chemical Mortgage v Jackson*, 51 So 2d 125, 12 Fla 4th CA 15 Error not to cancel sale and

reschedule where plaintiff did not receive bidding instructions on a federally guaranteed mortgage. However, this case found no extraordinary circumstances warranting rescheduling. Suggestion: we live in extraordinary times

Notice of sale

1 Notice of sale must be published once a week, or 2 consecutive weeks in a publication of general circulation. 450 11, Fla Stat 2010. The second publication shall be at least five days before the sale. 450 12, Fla Stat 2010

a Notice must include: property description; time and place of sale; case style; clerk's name and a statement that sale will be conducted in accordance with final judgment

b Effective notice can constitute grounds to set aside sale. *Richardson Chase Manhattan Bank*, 41 So 2d 45, 4 Fla d CA 200; *Ingoria Horton*, 1 So 2d 125 Fla 2d CA 2002

Judicial sale procedure

1 Judicial sale is public, anyone can bid. *Neilman Suburban Coastal Cor*, 50 So 2d 10 Fla 4th CA 1. Property is sold to the highest bidder

2 Plaintiff is entitled to a credit bid in the amount due under final judgment, plus interest and costs through the date of sale. *Robinson Phillips*, 11 So 2d 1, 1 Fla d CA 1 5

Amount bid is conclusively presumed sufficient consideration. 450 1, Fla Stat 2010

Certificate of sale

1 Upon sale completion certificate of sale must be served on all parties not defaulted. The right of redemption for all parties is extinguished upon issuance of certificate of sale. 450 15, Fla Stat 200

2 Documentary stamps must be paid on the sale. 201 02, Fla Stat 2010. The amount of tax is based on the highest and best bid at the foreclosure sale. *Id*

a Assignment of successful bid at foreclosure sale is a transfer of an interest in realty subject to the documentary stamp tax. Fla Admin Code Rule 12B 4 01 25. Rule 12B 4 01 provides that the tax is also applicable to the certificate of title

issued by the clerk of court to the holder of the successful foreclosure bid, resulting in a double stamp in the bid is assigned and the assignee receives the certificate of title

b Assignment prior to foreclosure sale holder of a mortgage foreclosure judgment that needs to transfer title to a different entity and anticipates that the new entity would be the highest bidder, should assign prior to the foreclosure sale to avoid double tax

c Documentary stamps are due only if consideration or an exchange of value takes place *Crescent Miami Center, LLC v. Fla. et al. Re enue*, 90 So 2d 11, 11 Fla 2005, Transfer of unencumbered realty between a grantor and wholly owned grantee, absent consideration and a purchaser, not subject to documentary stamps; *et al. Re enue Mesmer*, 45 So 2d 4, Fla 1st CA 1, based on assignment of interest and tender of payment, documentary stamps should have been paid

d Eminent governmental agencies, which do not pay documentary stamps include: Fannie Mae, Freddie Mac, Federal Home Administration and the Veterans Administration Fla Admin Code Rules 12B 4 014 11; 11 O Atty Gen 0 1 1, Section 1, 1 1

Objection to sale

1 Any party may file a verified objection to the amount of bid within 10 days 45 0 1, Fla Stat 2010 The court may hold a hearing within judicial discretion hearing must be noticed to everyone, including third party purchasers *Shlishey the Best v. Citi Inancial Equity Services, Inc*, 14 So d 12 1 Fla 2d CA 200

2 Court has broad discretion to set aside sale *Long Beach Mortgage Corp v. Bebble*, 5 So 2d 11, 14 Fla 4th CA 200, appellate court reversed sale unilateral mistake resulted in outrageous windfall to buyer who made *de minimis* bid The court may consider a settlement agreement in considering whether to vacate a sale *JRBL v. Element, Inc v. Maiello*, 2 So 2d 2, Fla 2d CA 2004

Test: sale may be set aside i :

1 bid was grossly or startlingly inadequate; and 2 inadequacy of bid resulted from some mistake, fraud, or other irregularity of sale *Blue Star Investments, Inc. v. Johnson*, 91 So. 2d 211 Fla. 4th CA 2001 ; *Mody v. Cali Fed Bank*, 4 So. 2d 101, 101 Fla. d. CA 1. Mere inadequacy of price is not enough *Arlt v. Buchanan*, 10 So. 2d 555, 555 Fla. 10. Burden on party seeking to vacate sale

a Plaintiff's delay in providing information cannot be sole basis for setting aside sale *Action Realty, Inc. v. Grandison*, 90 So. 2d 4, Fla. 4th CA 200

b Stranger to foreclosure action does not have standing to complain of defects in the absence of fraud *REO Properties Corp. v. Binder*, 4 So. 2d 52, 54 Fla. 2d CA 200

c Sale may be set aside if plaintiff misses sale, based on appropriate showing *Wells Fargo Financial System Fla., Inc. v. GRP Financial Services Corp.*, 90 So. 2d Fla. 2d CA 2004

d Court may refuse to set aside sale where objection is beyond statutory period *Ryan v. Countrywide Home Loans, Inc.*, 45 So. 2d, Fla. 2d CA 1, untimely motion filed 90 days following the sale

Sale vacated

1 If sale vacated mortgage and lien relieved with all effects from foreclosure and returned to their original status 920, Fla. Stat. 2010

a Upon readvertisement and resale, a mortgagor's lost redemption rights temporarily re-vest *YEMC Const. v. Belmont, Inc., Inter Serv. S.A., Inc.*, 4 So. 2d 44, 44 Fla. d. CA 2004

Post Sale Issues**Certificate of title**

1 No objections to sale. Sale is confirmed by the Clerk's issuance of the certificate of title to purchaser. Title passes to the purchaser subject to parties whose interests were not extinguished by foreclosure, such as omitted parties

a Plaintiff may reforeclose or sue to compel an omitted junior lienholder to redeem within a reasonable time *Winn*, 12 So 2d at 4

b Foreclosure is void if titleholder omitted *England Bankers Trust Co of Cali, N A*, 5 So 2d 1120, 1121 Fla 4th CA 2005

Right of possession

1 Purchaser has a right to possess the property upon the issuance of the certificate of title, provided the interest holder was properly joined in the foreclosure

2 Right of possession enforced through writ of possession Rule 1.500, Fla R Civ P 2010

Summary writ of possession procedure:

a Purchaser of property moves for writ of possession;

b The writ can be issued against any party who had actual or constructive knowledge of the foreclosure proceedings and adjudication; *Redding Stockton, Hatley, a in Co*, 4 So 2d 54, 54 Fla 5th CA 1 ;

c Best practice is to require notice and a hearing before issuance of a writ

1 Protecting Tenants at Foreclosure Act of 2009 provides for a 90 day pre-foreclosure notice applicable to bona fide tenants See following section

d At hearing, judge orders immediate issuance of writ of possession unless a person in possession raises defenses which warrant the issuance of a writ of possession on a date certain;

e The order or writ of possession is executed by the sheriff and personal property removed to the property line

Protecting Tenants at Foreclosure Act of 2009

1 Federal legislation, known as Senate Bill 11122, P L 111 22, provides for a nationwide 90 day pre-foreclosure notice requirement for bona fide tenants in foreclosed properties The provisions of the original bill were extended under R 41, the Dodd-Frank Wall Street Reform and Consumer Protection Act, which became law on 11/21/10

2 The application of the new law is restricted to any dwelling or residential property that is being foreclosed under a federally related mortgage loan as defined by Section 3 of the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 202). In short, the originating lender must be the Federal National Mortgage Association (FNMA), the Government National Mortgage Association (GNMA), the Federal Home Loan Mortgage Corporation or a financial institution insured by the Federal Government.

2 Three prerequisites must be satisfied to qualify as a bona fide tenant under the new Act:

- 1 The tenant cannot be the mortgagor or a member of his immediate family;
- 2 The tenancy must be an arms length transaction; and
The lease or tenancy requires the receipt of rent that is not substantially lower than the fair market rent of the property.

4 The buyer or successor in interest at a foreclosure sale must provide bona fide tenants:

- a With leases – the right to occupy the property until the expiration of the lease term. The exception is if the buyer intends to occupy the property as a primary residence, in which case he must give 90 days notice.
- b Without leases – the new buyer must give the tenant 90 days notice prior to lease termination.

5 The single other exception to the foregoing is Section 4 on buying. In this case, the buyer assumes the interest of the prior owner and the lease contract. The buyer cannot terminate in the absence of good cause.

These provisions of the new law went into effect on May 20, 2009. The bill sunsets on 12/31/2014.

Disbursement of Sale Proceeds

Surplus

1 Surplus the remaining funds after payment of all disbursements required by the final judgment of foreclosure and shown on the certificate of disbursements 450.21(c), Fla Stat 2010 Disbursement of surplus funds is governed by Section 450.1, Fla Stat 2010

2 Entitlement to surplus is determined by priority; in order of time in which they became liens *Household Fin Services, Inc Bank of Am, N A*, 90 So 2d 4, 4 Fla 4th CA 2004 It is the duty of the court to prioritize the interests of the competing junior lien holders and the amounts due each *Citibank PNC Mortgage Corporation America*, 1 So 2d 00, 01 Fla 2d CA 1

a The court does not waive lienholder's rights to surplus funds *Golindano v Wells Fargo Bank*, 1 So 2d 14 Fla 4th CA 2005 A junior lienholder has priority over the priority holder of surplus funds *Id*, 15

b A senior lienholder is not entitled to share in surplus funds *Garcia Stewart*, 90 So 2d 111, 1121 Fla 4th CA 2005, senior lienholder liens unaffected; inferior party to junior lienholder foreclosure

c Entitlement to balance of surplus after payment of priority interests payable to the record owner as of the date of the filing of the lis pendens *Suarez Edgehill*, 200 L 2 1 50 Fla App 4d CA Oct 14, 200

Deficiency Judgment

1 Deficiency is the difference between the fair market value of the security received and the amount of the debt *Mandell Fortenberry*, 20 So 2d , Fla 1 4; *Grace Hendricks*, 140 So 2d 0 Fla 1 2

2 A deficiency can be obtained only if a request for that relief is made in the pleadings and if personal jurisdiction has been obtained over the defendant or defendants against whom the deficiency is sought *Bank of Florida in South Florida v Keenan*, 51 So 2d 51, 52 Fla 4th CA 1 The granting of a deficiency judgment is the rule rather than the exception *Thomas Premier Capital, Inc*, 90 So 2d 11, 1140 Fla 4th CA 2005

a Deficiency judgment not allowable if based on constructive service process

b New service process on defendant was not required for deficiency judgment where personal jurisdiction had been originally conferred by service of foreclosure complaint. *L.A. Property Ventures, Inc. v. First Bank*, 2004 Fla. App. 2d CA Oct 14, 2004. The law contemplates a continuance of the proceedings for entry of a deficiency judgment as a means of avoiding the expense and inconvenience of an additional suit at law to obtain the balance of the obligation owed by a debtor. *Id.*

Trial court has discretion to enter deficiency decree. 702.01, Fla. Stat. 2007; *Thomas*, 40 So. 2d at 1140. The court needs to hold an evidentiary hearing. *Merrill v. Num*, 41 So. 2d 12, 12 Fla. d. CA 15. The court can enter a default judgment provided the defendant was properly noticed. *Semlar Savings of Florida*, 541 So. 2d 1, 10 Fla. 4th CA 1.

a The exercise of discretion in denial of a deficiency decree must be supported by disclosed equitable considerations which constitute sound and sufficient reasons for such action. *Larsen v. Allocca*, 1 So. 2d 0, 04 Fla. d. CA 1.

4 A cause of action for deficiency cannot accrue until after entry of final judgment and a sale of the assets to be applied to the satisfaction of the judgment. *Chrestensen v. Eurogest, Inc.*, 40 So. 2d 4, 45 Fla. 4th CA 2005. The amount of deficiency is determined at the time of the foreclosure sale. *Estes v. Jordan*, So. 2d Fla. 5th CA 1. The amount bid at foreclosure sale is not conclusive evidence of the property's market value. *Century Group, Inc. v. Premier Financial Services*, 24 So. 2d 1, Fla. 2d CA 1.

a The appraisal determining the fair market value must be properly admitted into evidence and be based on the sale date. *Flagship State Bank of Jacksonville v. New Equipment Company*, 2 So. 2d 0, 10 Fla. 5th CA 1.

b The formula to calculate a deficiency judgment is the final judgment of foreclosure total debt minus the fair market value of the property. *Morgan v. Kelly*, 42 So. 2d 111 Fla. d. CA 1.

c The amount paid by a mortgage assignee or a debt is legally irrelevant to the issue of whether the assignee is entitled to a deficiency award after a foreclosure sale *Thomas*, 0 So 2d at 1141

4 Burden: The secured party has the burden to prove that the fair market value of the collateral is less than the amount of the debt *Chidnese McColem*, 5 So 2d , Fla 4th CA 1 , *Este a* So 2d at owe er, the Third District Court has held that the burden is on the mortgagor resisting a deficiency judgment to demonstrate that the mortgagee obtained property in foreclosure worth more than the bid price at the foreclosure sale *Addison Mortgage Co eit*, 1 So 2d 104 Fla d CA 1 See also, *Thunderbird, Ltd Great American Ins Co*, 5 So 2d 12 , 12 Fla 1st CA 1 0 , court held that introduction of the certificate of sale from the foreclosure sale showing that the bid amount at the foreclosure sale was less than the amount of the debt shifted the burden to the mortgagee to go forward with other evidence concerning the fair market value of the property

5 denial of deficiency decree in foreclosure suit on jurisdictional reasons, as distinguished from equitable grounds, is not res judicata so as to bar an action for deficiency *Frumkes Mortgage Guarantee Cor* , 1 So 2d , 40 Fla d CA 1 5 ; *Klondike, Inc Blair*, 211 So 2d 41, 42 Fla 4th CA 1

Reservation of jurisdiction in the final judgment of foreclosure. Jurisdiction is reserved, new or additional service of process on defendant is not required *Este a*,

So 2d at The motion and the notice of hearing must be sent to the attorney of record for the mortgagor *Id, NCNB Nat'l Bank of Fla Pyramid Cor* , 4 So 2d 15 , 155 Fla 4th CA 1 , defaulted defendant entitled to notice of deficiency hearing owe er, the motion for deficiency must be timely filed. If untimely, the deficiency claim could be barred upon a prolate motion by the defendant under Rule 1.420 e , Fla R Ci P 2010 , *Frohman Bar Or*, 0 So 2d , Fla 1 5 ; *Steketee Ballance Homes, Inc* , So 2d , 5 Fla 2d CA 1

a No reservation of jurisdiction in the final judgment motion or deficiency must be made within ten (10) days of issuance of title *Frumkes*, 1 at 40

b The lender can file a separate action or post-foreclosure deficiency Section 02.0, Fla Stat 2010 In a separate action, the defendant has the right to demand a trial by jury *obbs Florida First Nat'l Bank of Jacksonville*, 40 So 2d 15, 15 Fla 1st CA 15; *Bradberry Atlantic Bank of St. Augustine*, So 2d 124, 1250 Fla 1st CA 1, no jury trial right within foreclosure action Section 55.012, Fla Stat 2010 mandates that final judgments in a separate action or deficiency contain the address and social security number of the judgment debtor, if known This requirement is not imposed in a mortgage foreclosure action, in which an *in rem* judgment is sought

Statute of limitations

a A deficiency judgment or decree is barred when an action on the debt secured by the mortgage is barred *Barnes Escambia County Employees Credit Union*, 4 So 2d, 0 Fla 1st CA 1, abrogated on other grounds

b Section 5.11, Fla Stat 2010 imposes a five-year statute of limitations on a foreclosure deficiency judgment

c A cause of action or deficiency does not accrue, and thus the statute of limitations does not begin to run, until the final judgment of foreclosure and subsequent foreclosure sale *Chrestensen*, 0 So 2d at 45

There are statutory limitations imposed on a deficiency judgment when a purchase money mortgage is being foreclosed Section 02.0, Fla Stat 2010 includes language that impairs the entitlement to a deficiency judgment with respect to a purchase money mortgage, when the mortgagee becomes the purchaser at foreclosure sale Specifically, this statutory limitation provides: the complainant shall also have the right to sue at common law to recover such deficiency, provided no suit at law to recover such deficiency shall be maintained against the original mortgagor in cases where the mortgage is or the purchase price of the property involved and where the original mortgagee becomes the purchaser thereof at foreclosure sale and also is granted a deficiency decree against the original mortgagor Essentially, if the

lender purchases the subject property he has not incurred the damages and in fact may recoup or profit at a later sale. See also, *United Postal Savings Ass'n Nagelbush*, 55 So 2d 1 Fla 1st CA 1, *Taylor Prine*, 12 So 2d 44, 45 Fla 1st CA 1

a One Florida court ruled in a case where the purchase money mortgagee was also the purchaser that the all important distinction in the case was that the purchaser at the foreclosure sale was not the mortgagee but an utter stranger to the parties, a third party purchaser, warranting reversal of the trial court's denial of deficiency judgment. *Lloyd Cannon*, So 2d 105, 10 Fla 1st CA 1

Bankruptcy

1 The automatic stay provisions of 11 S.C. 2 enjoin proceedings against the debtor and against property of the bankruptcy estate

a To avail, the subject real property must be listed in the bankruptcy schedules as part of the estate 11 S.C. 541

2 Foreclosure cannot proceed until the automatic stay is lifted or terminated. If property ceases to be property of the bankruptcy estate, the stay is terminated

a The automatic stay in a second case filed within one year of dismissal of a prior Chapter 11 or 12 automatically terminates 90 days after the second filing, unless good faith is demonstrated 11 S.C. 2 c

b The third filing within one year of dismissal of the second bankruptcy case, lacks entitlement to the automatic stay and any party in interest may request an order confirming the inapplicability of the automatic stay

c Multiple bankruptcy filings where the bankruptcy court has determined that the debtor has attempted to delay, hinder or defraud a creditor may result in the imposition of an order or relief from stay in subsequent cases over a two year period 11 S.C. 2 d 4

debtor's discharge in bankruptcy only protects the subject property to the extent that it is part of the bankruptcy estate

4 Foreclosure cannot proceed until relief from automatic stay is obtained or otherwise terminated, or upon dismissal of the bankruptcy case

Florida's Expedited Foreclosure Statute

1 Enacted by 2010, Fla Stat 2010

2 Filing of a complaint, motion or immediate review of foreclosure by an order to show cause. These complaints are easily distinguishable from the usual foreclosure by the order to show cause

a The failure to file defenses or to appear at the show cause hearing presumptively constitutes conduct that clearly shows that the defendant has relinquished the right to be heard. *Id*

Not the standard practice among foreclosure practitioners, due to limitations:

a Statute does not foreclose junior liens;

b Procedures differ as to residential and commercial properties; and

c Statute only provides for entry of an *in rem* judgment; a judgment on the note or a deficiency judgment cannot be entered under the show cause procedure

Common Procedural Errors

1 Incorrect legal description contained in the:

a Original mortgage requires a correction. An error in the legal description of the deed requires the joinder of the original parties as necessary parties to the correction proceedings. *Chanrai In , Inc , Clement*, 5 So 2d , 40 Fla 5th CA 1 0

b Complaint and lis pendens requires amendment

c Judgment. Rule 1.540 a , Fla R Ci P 2010 governs. For example, an incorrect judgment amount which omitted the undisputed payment of real estate taxes could be amended. *LPP Mortgage Ltd Bank o America*, 2 So 2d 4 2, 4 Fla 4th CA 2002

d Notice of Sale requires vacating the sale and subsequent resale of property. *yte e elo ment Cor General Electric Credit Cor* , 5 So 2d 1254 Fla 4th CA 1

e Certificate of title a genuine scrivener's error in the certificate of title can be amended. However, there is no statutory basis for the court to direct the clerk to amend the certificate of title based on a post-judgment transfer of title, faulty assignments of bid or errors in listing title instructions.

1. An error in the certificate of title which originates in the mortgage and is repeated in the deed and notice of sale requires the cancellation of the certificate of title and setting aside of the final judgment. *Lucas v. Barnett Bank of Lee County*, 95 So. 2d 115, Fla. 2d CA 1. For example, plaintiff's omission of a mobile home and its vehicle identification number VIN included in the mortgage legal description, but overlooked throughout the pleadings, judgment and notice of sale, cannot be amended in the certificate of title. Due process issues concerning the mobile home require the vacating of the sale and judgment.

Mortgage Workout Options

1. Reinstatement: Reayment of the total amount in default or payments behind and restoration to current status on the note and mortgage.

2. Forbearance: The temporary reduction or suspension of mortgage payments.

Reayment Plan: Agreement between the parties whereby the homeowner repays the regularly scheduled monthly payments, plus an additional amount over time to reduce arrears.

4. Loan Modification: Agreement between the parties whereby one or more of the mortgage terms are permanently changed.

5. Short Sale: Sale of real property for less than the total amount owed on the note and mortgage.

a. If the lender agrees to the short sale, the remaining portion of the mortgage debt, the difference between the sale price of the property and mortgage balance, the deficiency, may be forgiven by the lender.

1. Formerly, the amount of debt forgiven was considered income imputed to the seller and taxable as a capital gain by the IRS.

Parker v. Laney, 1 F. 2d 455, 45 1st Cir. 1950. However,

ederal legislation has temporarily suspended imputation of income
upon the cancellation of debt

paid in lieu of Foreclosure: The homeowner's voluntary transfer of the
home's title in exchange for the lender's agreement not to file a foreclosure action

Revised 14 10

From: Greider, Christine </O=SAO20/OU=CACJIS/CN=RECIPIENTS/CN=CGREIDER>

To: Hendrickx, Jo-Ann

CC: Greider, Christine

Date: 10/19/2010 10:43:38 AM

Subject:

Please PRINT, place in three ring binder with TYPED label that says 2010 Residential Foreclosure bench book. Without a label, I will not find it. Put in a big binder, as I expect to add more to it. Thanks

RESIDENTIAL FORECLOSURE BENCH BOOK

Prepared by

Honorable Jennifer Bailey
Administrative Judge
Circuit Civil Jurisdiction Division
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2010

Introduction

1 Foreclosure is the enforcement of a security interest by judicial sale of collateral. All mortgages shall be foreclosed on the date of maturity. § 202.01, Fla. Stat. 2010

2 Definitions:

a **Mortgage:** any written instrument securing the payment of money or advances including liens to secure payment of assessments for condominiums, cooperatives and homeowners associations. § 202.00, Fla. Stat. 2010

A mortgage creates only a specific lien against the property; it is not a conveyance of legal title or of the right of possession. § 202, Fla. Stat. 2010; *Fla Nat'l Bank Trust Co of Miami v. Brown*, 4 So. 2d 414

b **Mortgagee:** refers to the lender; the secured party or holder of the mortgage lien. § 21.2, Fla. Stat. 2010

c **Mortgagor:** refers to the obligor or borrower; the individual or entity who has assumed the obligation secured by the mortgage lien. § 21.2, Fla. Stat. 2010. The mortgagor holds legal title to the mortgaged property. *o man Semet*, 1 So. 2d 4, 52 Fla. 4th CA 15

To foreclose the mortgage lien and extinguish the duties of redemption, secured parties must file a civil action. § 45.015, Fla. Stat. 2010

Lender's Right to Foreclose

1 Constitutional obligation to uphold mortgage contract and right to foreclose. F.S.A. Const. Art. 1, § 10

a Right unaffected by defendant's misfortune. *Lee County Bank v. Christian Mut. Found., Inc.*, 40 So. 2d 44, 44 Fla. 2d CA 11; *Morris v. Aite*, 10 So. 51, 51 Fla. 15

b Right not contingent on mortgagor's health, good fortune, ill fortune, or the regularity of his employment. *Home Owners Loan Corp. v. Aite*, 1 So. 11, 14 Fla. 1

c Contract impairment or imposition of moratorium is prohibited by court. *Lee County Bank v. Christian Mut. Foundation, Inc.*, 40 So. 2d 44, 44 Fla. 11

Default

1 Right to foreclosure accrues upon the mortgagor's default

2 Basis of default:

a mortgagor's failure to tender mortgage payments; or

b impairment of security, including failure to pay taxes or maintain casualty insurance

Acceleration

1 Acceleration gives the mortgagee the authority to declare the entire mortgage obligation due and payable immediately upon default

2 Mortgage Acceleration Clause confers a contract right upon the note or mortgage holder which he may elect to enforce upon default *and Sun Fed Sa Loan Ass'n*, 41 So 2d 10, 4 Fla 1 4

a Absent acceleration clause, lender can only sue for amount in default *Kirk an Petten*, 21 So 2d 10, Fla 1

Commencement upon delivery of written notice of default to the mortgagor; prior notice is not required unless it is a contractual term *Millett Pere*, 41 So 2d 10, Fla d CA 1 2; *Fowler First Sa Loan Ass'n of the Uniak S rings*, 4 So 2d 0, 4 Fla 1st CA 1 4, filing of complaint is notice of acceleration

4 Pre acceleration mortgagor may defeat foreclosure by the payment of arrearages, thereby reinstating the mortgage *Pici First Union Nat'l Bank of Florida*, 21 So 2d 2, Fla 2d CA 1

Statute of Limitations

1 Five year statute of limitations period applies specifically to mortgage foreclosure actions 5112 c, Fla Stat 2010; *Farmers Merch Bank Riede*, 55 So 2d 10, 5 Fla 1st CA 1 0

2 Commencement of limitations period:

a General rule commencement upon accrual of the cause of action; this occurs when the last element of the cause of action is satisfied for example, default

5011, Fla Stat 2010; *Maggio et al v Labor Employment Sec*, 10 So 2d , Fla 2d CA 2005

b A note or other written instrument when the first written demand or payment occurs *Ruhl Perry*, 10 So 2d 5, 5 Fla 1 0

c Oral loan payable on demand commencement upon demand or payment *Mosher Anderson*, 1 So 2d 12, 1 Fla 2002

Tolling of the limitations period acknowledgment of the debt or partial loan payments subsequent to the acceleration notice toll the statute of limitations

50511, Fla Stat 2010; *Cadle Company v McCartha*, 20 So 2d 144, 145 Fla 5th CA 200

a Tolling effect starts the running anew of the limitations period on the debt *ester Rigdon*, 110 So 2d 40, 44 Fla 1st CA 1 5

Jurisdiction

1 Court's judicial authority over real property based on *in rem* jurisdiction

2 Two-part test to establish *in rem* jurisdiction: 1 jurisdiction over the class of cases to which the case belongs, and 2 jurisdictional authority over the property or *res* that is the subject of the controversy *Ruth et al v Legal Affairs*, 4 So 2d 11, 15 Fla 1

a Class of case jurisdictional parameters defined by Article Section 5 b, Florida Constitution, implemented by Section 2012.2 g, Fla Stat 2010 *Ale de Cor Nachon Enter, Inc*, 41 So 2d 5 Fla 1 4, concurrent equity jurisdiction over lien enclosures of real property that fall within statutory monetary limits *Id*, at

b Jurisdictional authority over real property only in the circuit where the land is situated *ammond SY e lopers, LLC*, 51 So 2d 5, Fla 2d CA 200 *Goedmakers Goedmakers*, 520 So 2d 55, 5 Fla 1 ; court lacks *in rem* jurisdiction over real property located outside the court's circuit If real property lies in two counties, the enclosure suit may be maintained in either county, however, the notice of sale must be published in both 0204, Fla Stat 2010

Parties to the Foreclosure Action

Plaintiff

1 Must be the owner holder of the note as of the date of filing suit. *Je Ray Cor Jacobsen*, 5 So 2d 5 Fla 4th CA 10; see also, *M Specialty Mortgage, LLC Salomon*, 4 So 2d 0, 2 Fla 4th CA 2004

a The holder of a negotiable instrument means the person in possession of the instrument payable to bearer or to the identified person in possession

1 201 21, Fla Stat 2010

1 Endorsement in blank where unsigned and unauthenticated, an original note is insufficient to establish that the plaintiff is the owner and holder of the note. Must have affidavits or deposition testimony establishing plaintiff as owner and holder. *Riggs Aurora Loan Services, LLC*, 2010 WL 151 Fla 4th CA 4 21 10

b The holder may be the owner or a nominee, such as a servicer, assignee or a collection and litigation agent. Rule 1 210 a, Fla R Civ P 2010 provides that an action may be prosecuted in the name of an authorized person without joinder of the party or whose benefit the action is brought. See also, *Kumar Cor No al Lines, Ltd*, 4 2 So 2d 11, 11 4 Fla d CA 1 5

c Plaintiff's nominee has standing to maintain foreclosure based on real party in interest rule. *Mortgage Electronic Registration Systems, Inc Re oredo*, 55 So 2d Fla d CA 200, *MERS* was the holder by delivery of the note; *Mortgage Elec Registration Systems, Inc A i e*, 5 So 2d 151 Fla 2d CA 200; *Philogene ABN AMRO Mortgage Group, Inc*, 4 So 2d 45 Fla 4th CA 200

2 Assignment of note and mortgage Plaintiff should assert assignee status in complaint. Absent formal assignment of mortgage or delivery, the mortgage in entirety assesses as an incident of the debt. *Perry Fairbanks Capital Cor*, So 2d 25, 2 Fla 5th CA 2004; *Johns Gillian*, 1 4 Fla 5 5, 5 Fla 1; *arren Seminole Bond Mortg Co*, 12 Fla 10 Fla 1, security follows the note, the assignee of the note secured by a mortgage is entitled to the benefits of the security. Assignments must be recorded to be valid against creditors and subsequent

urchasers 01 02, Fla Stat 2010 See also, *Glynn First Union Nat'l Bank*, 12 So 2d 5 , 5 Fla 4th CA 2005

a No requirement of a written and recorded assignment of the mortgage to maintain foreclosure action where evidence establishes plaintiff as owner and holder of the note on date of filing suit *Perry*, So 2d at 2 ; *M Specialty Mortgage, LLC*, 4 So 2d at 2; *Chem Residential Mortgage Rector*, 42 So 2d 00 Fla 1st CA 1 ; *Clifford Eastern Mortgage Sec Co*, 1 So 5 2 Fla 1

owner, the incomplete, unsigned and unauthenticated assignment of mortgage attached as an exhibit to purported mortgage holder and note holder's response to motion to dismiss did not constitute admissible summary judgment evidence sufficient to establish standing *BAC Funding Consortium, Inc ISAOA ATIMA Jean Jacques*, 2010 WL 4 41 Fla A 2 CA Feb 12, 2010 Plaintiff has an assignment of mortgage recorded prior to the date of filing suit, then he can enforce beneficial possession of note never physically delivered Florida courts recognize constructive delivery The absence of the note does not make a mortgage unenforceable *Lawyers Title Ins Co Inc Noastar Mortgage, Inc*, 2 So 2d , Fla 4th CA 2004 Assignment may be by physical delivery or by written assignment

MERS that is it Mortgage Electronic Registration Systems is a corporation which maintains an electronic registry tracking system of servicing and ownership rights to mortgages throughout the United States In many cases MERS is the mortgagee of record and is identified in the mortgage On each MERS loan there is an 11 digit number used for tracking Through the MERS servicer ID number, homeowners can identify their lender with borrower name and property address

4 Since the promissory note is a negotiable instrument, plaintiff must present the original note or give a satisfactory explanation of its absence 0 5 1 , Fla Stat 2010 ; *State Street Bank and Trust Co Lord*, 51 So 2d 0, 1 Fla 4th CA 200 A satisfactory explanation includes loss, theft, destruction and wrongful possession of the note 0 1 1 , Fla Stat 2010 Reestablishment of the note is governed by 0 1 2 , Fla Stat 2010

Necessary and Proper Defendants

1 The owner of the fee simple title is the only indispensable party defendant to a foreclosure action. *English Bankers Trust Co of Cali, N A*, 5 So 2d 1120, 1121 Fla 4th CA 2005. Foreclosure is void if titleholder omitted. *Id*. If a spouse fails to sign the mortgage, lender may still foreclose on property owned by husband and wife when both spouses knew of loan and purchased in joint names. *Countrywide Home Loans Kim*, So 2d 250 Fla 2005.

a Indispensable parties defined: necessary parties so essential to a suit that no final decision can be rendered without their joinder. *Sudho Federal Nat'l Mortgage Ass'n*, 42 So 2d 425, 42 Fla 5th CA 200

2 Failure to join other necessary parties: they remain in the same position as they were in prior to foreclosure. *Abdoney York*, 0 So 2d 1, Fla 2d CA 2005.

Omitted party: only remedies are to compel redemption or the re-foreclosure in a suit de novo. *Id*; *Quinn Plumbing Co New Miami Shores Cor*, 12 So 2d 0, Fla 1 0.

4 Death of titleholder prior to entry of final judgment: beneficiaries of the titleholder and the personal representatives are indispensable parties. *Cambell Napoli*, So 2d 12 2 Fla 2d CA 2001.

a If indispensable parties not joined, action abated pending joinder. *Id*. As such, suit against a decedent alone will result in abatement.

b Post judgment death of titleholder, these parties are not deemed indispensable parties. *as Scott*, 120 So 1 Fla 1 2.

5 Necessary parties to the foreclosure action: all subordinate interests recorded or acquired subsequent to the mortgage.

a Includes: junior mortgagees, holders of judgments and liens acquired after the superior mortgage, lessees and tenants: parties in possession of the real property. *Posnansky Breckenridge Estates Cor*, 21 So 2d , Fla 4th CA 1 ; *Commercial Laundries, Inc*, *Golf Course Towers Associates*, 5 So 2d 501, 502.

b Junior lien holders are not joined, their rights in the real property survive the foreclosure action

c Joinder of original parties to the deed or mortgage are essential when a reformation court is needed to remedy an incorrect legal description contained in the deed and or mortgage *Chanrai In , Inc v Clement*, 5 So 2d , 40 Fla 5th CA 1 0 As such, the original grantor and grantee are necessary parties in an action to reform a deed *Id*

Prior titleholders that signed the note and mortgage do not have to be named in the foreclosure action unless:

a Mortgagee seeks entry of a deficiency judgment against the prior unreleased mortgagors in the foreclosure action *PMI Ins Co v Caendar*, 15 So 2d 10, 11 Fla d CA 1

Superior Interests

1 First or senior mortgagees are never necessary or proper parties to the foreclosure action by the junior mortgagee *Garcia v Stewart*, 0 So 2d 111 , 111 Fla 4th CA 2005 ; *Poinciana Hotel v Miami Beach, Inc v Kasden*, 0 So 2d , 401 Fla d CA 1

a Senior liens are unaffected by the foreclosure of a junior mortgage

2 **Purchase money mortgage defined** proceeds of the loan are used to acquire the real estate or to construct improvements on the real estate 2 a , Restatement Third of Property; Mortgages 200 The purchase and conveyance of real property occur simultaneously and are given as security for a purchase money mortgage

a Purchase money mortgages priority over all prior claims or liens that attach to the property through the mortgagor, even if latter be prior in time *BancFlorida v Hayward*, So 2d 1052, 1054 Fla 1 ; *Sarmiento v Stockton, Hatley, v a in Co*, So 2d 105 , 105 Fla d CA 1 1

1 Priority does not extend beyond the amount of the purchase money advanced *Citibank Carteret Sa Bank, FA*, 12 So 2d 5 , 01 Fla 4th CA 1 2

Association Liens and Assessments

1 Condominium Associations Section 1 11 1 b , Fla Stat 2010 establishes the liability of the first mortgagee, its successor or purchaser or condominium assessments and maintenance as the lesser of :

a units unpaid common expenses and regular periodic assessments which came due 12 months prior to title acquisition; or

b one percent of the original mortgage debt provided condominium association is joined as a defendant

1 The law is clear that the purchaser of a condominium unit has liability for unpaid condominium assessments 1 11 , Fla Stat 2010 This statutory cap , limits the liability of reclosing mortgagees or unpaid condominium assessments that become due prior to acquisition of title This safe harbor applies only to the first mortgagee or a subsequent holder of the first mortgage *Bay Holdings, Inc 2000 Island Boulevard Condo Assn*, 5 So 2d 11 Fla d CA 2005 The term successor or assignee as used with respect to a first mortgagee includes only a subsequent holder of the first mortgage 1 11 1 g , Fla Stat 2010 Other entities that acquire title are not entitled to this limitation of liability and are jointly and severally liable for all unpaid assessments that come due up to the time of transfer of title 1 11 1 a , Fla Stat 2010

2 Homeowners Associations Section 20 0 5 2 c 1 , Fla Stat 2010 establishes the liability of the first mortgagee, its successor or purchaser or homeowner's assessments and maintenance as the lesser of :

a parcels unpaid common expenses and regular periodic or special assessments which accrued 12 months prior to acquisition of title; or

b one percent of the original mortgage debt

c homeowners Association's lien or assessments had priority over purchase money mortgage where Association's declaration of covenants contained express

provision establishing priority *Ass'n of Poinciana, Ill. v. Astar Procs.*, 24 So. 2d 555, Fla. 5th CA 1.

d. The limitations on the first mortgagee's liability only apply if the lender filed suit and initially joined the homeowner's association as a defendant. 2005-2 c., Fla. Stat. 2010.

e. Statutory revisions of the 200 Legislature failed to remedy the potential superiority of liens recorded prior to July 1, 200. Prior statutory version amended by the 200 Legislature gave homeowner's association liens a priority, even if the mortgage was filed first in time. Arguably, many homeowner's associations have subordination language in their declaration of covenants providing that their lien is subordinate to the mortgage. However, the subordination language is not standard in all declarations. Any challenge to the priority of the mortgage will likely be resolved on the basis of interpretation of contract.

Reverse foreclosures defined where association takes title and pursues lender or where association sets done the motion or summary judgment due to delays by lenders.

4. Cannot force lenders to pay association fees duringendency of foreclosure. *S. Bank Nat'l Ass'n as Trustee v. Tadmore*, 200 L 42 1 01 Fla. d. CA 12 2 0.

Judgment Liens

1. Section 55 10 1, Fla. Stat. 2010 applies to judgment liens.

a. Requirements: 1. must contain address of the party in the judgment or in an accompanying affidavit; and 2. a certified copy of judgment lien must be recorded in the official records of the county.

b. Judgment liens recorded after July 1, 1994 retain their judgment lien status for a period of 10 years from recording. A judgment lien is renewable by recording a certified copy of the judgment containing a current address prior to the expiration of the judgment lien. 55 10 2, Fla. Stat. 2010.

Filing of the Lis Pendens

1 Filing of lis pendens cuts off the rights of any person whose interest arises
after filing *Bowers Pearson*, 15 So 5 2 Fla 1 1

a Constitutes bar to the enforcement against the subject real property of any
other unrecorded interests and liens unless the holder of the unrecorded interest
interposes within twenty days of the notice of the lis pendens 4 2 1 b , Fla
Stat 2010

2 Validity of a notice of lis pendens is one year from filing 4 2 2 , Fla Stat
2010

a Exception: One year period may be tolled by the trial court's exercise of
discretion or appellate review *Olesh Greenberg*, So 2d 2 , 242 Fla 5th CA
200 ; *onmitschke Collande Kramer*, 41 So 2d 4 1, 4 2 Fla d CA 2002

Lis pendens automatically dissolved upon dismissal of foreclosure Rule
1 420 , Fla R Ci P 2010

a Lis pendens refiled or reinstated upon the reversal of dismissal
onmitschke Collande, 41 So 2d at 4 2

The Foreclosure Complaint

1 Florida Supreme Court Form of foreclosure Form 1 44, Fla R Ci P
2010 Requisite allegations assert: jurisdiction, default, acceleration and the legal
description of the real property As of 2 11 10, complaint must be verified Rule
1 110 b , Fla R Ci P 2010

a Plaintiff must allege that he is the present owner and holder of the note
and mortgage *Edason Cent Farmers Trust Co*, 12 So , 00 Fla 1 0

b If plaintiff is a nonresident corporation, it must comply with the condition
precedent of filing a nonresident bond, upon commencement of the action 5 011,
Fla Stat 2010 If plaintiff has failed to file the requisite bond within 0 days after
commencement, the defendant may move for dismissal after 20 days notice to
plaintiff

c Rule 1.10(a), Fla. R. Civ. P. 2010 mandates that a copy of the note and mortgage be attached to the complaint. *Eigen F. IC*, 42 So. 2d 2, Fla. 2d CA 1

d In note and mortgage assigned, complaint should allege assignment. Attachment of the assignment is required but may not be required since the cause of action is based on the mortgage; not the assignment. Rule 1.10(a), Fla. R. Civ. P. 2010, *MS Specialty Mortgage, LLC v. Salomon*, 4 So. 2d 0, 2 Fla. 4th CA 2004; *Chemical Residential Mortgage v. Rector*, 42 So. 2d 00 Fla. 1st CA 1; *Johns v. Gillian*, 14 So. 140, 144 Fla. 1

e Junior lien holder's allegation is sufficient if it states that the interest of a defendant accrued subsequent to the mortgage and he is a party. *InterNational Kaolin Co. v. Cause*, 4 So. , Fla. 10

Federal tax lien allegation must state interest of the United States of America, including: the name and address of the taxpayer, the date and place the tax lien was filed, the identity of the Internal Revenue Office which filed the tax lien and if a notice of tax lien was filed. Title 26 S.C. 2410(b). A copy of the tax lien must be attached as an exhibit.

g Local taxing authority or State of Florida party defendant allegation should state with particularity the nature of the interest in the real property. 041.2, Fla. Stat. 2010

h Complaint must include statement of default based on unpaid taxes or insurance must be alleged with particularity. *Siah v. Oosh Nor Pro s*, So. 2d , Fla. 4th CA 1

i Complaint should allege compliance with condition precedent, particularly notices

Legal description of the subject real property

k Attorneys must be listed or it is waived. *Stockman v. owns*, 5 So. 2d 5, Fla. 1-1. Allegation as to obligation to pay a reasonable attorney fee is sufficient to claim entitlement. *allace v. Gage*, 150 So. , 00 Fla. 1. The claim of attorneys is based on contractual language in the note and mortgage.

Additional counts include: reestablishment of the note and reformation. Reestablishment of the note is necessary if the note is lost; reformation of the note is needed if material terms are missing. Reformation of the mortgage applies if there is a legal description discrepancy; reformation of deed if there is a deed problem.

If a deficiency judgment is sought, the guarantors must be sued.

Original Document Filing and Reestablishment of the Note

1. Note Lender is required to either present the original promissory note or give a satisfactory explanation of the lender's failure to present it prior to it being enforced. *Natl Loan Investors, LP v Joymar Associates*, 90 So 2d 54, 550 Fla D CA 2000.

a. A limited exception applies to lost, destroyed or stolen instruments. *Id*

2. A lost promissory note is a negotiable instrument. 1041.1, Fla Stat 200; *Thomson First Union Bank*, 4 So 2d 11, Fla 5th CA 1, 4.

a. Loss or unintentional destruction of a note does not affect its validity or enforcement.

Reestablishment of the lost note. An owner of a lost, stolen or destroyed instrument may maintain an action by showing proof of his ownership, facts that prevent the owner from producing the instrument and proof of the terms of the lost instrument. 101.2, Fla Stat 2004; *Lawyer's Title Ins Co, Inc v No Astar Mortgage, Inc*, 2 So 2d, Fla 4th CA 2004; *Gutierrez Bermudez*, 540 So 2d, Fla 5th CA 1.

a. Owner of note is not required to have held possession of the note when the loss occurred to maintain an action against the mortgagor. *Bank of America v Menendez*, 90 So 2d 124, 12 Fla D CA 2002. Further, plaintiff is not required to prove the circumstances of the loss or destruction of the note to seek enforcement. *Id*, at 12. Plaintiff must show only that it was entitled to enforce the note at the time of loss or that it has directly or indirectly acquired ownership of the instrument from a person who was entitled to enforce the instrument when loss of possession occurred.

0 1 1 a , Fla Stat 2010 ; *MERS Badra*, 1 So 2d 10 , 10 Fla 4th CA 200

b I lainti is not in ossession o the original note and did not reestablish it, lainti cannot oreclose on the note and mortgage 0 1 1 , Fla Stat 2004 ; *asma In est , LLC Realty Associates Fund III, L P* 45 F Su 2d 12 4, 1 02 S Fla 200

c The iling o a du licate co y o the note is su icient to satis y statutory re uirements in a oreclosure action *Perry Fairbanks Ca ital Cor* , So 2d 25 Fla 5th CA 2004 I there is no co y, Plainti should ile a lost note a ida it, ledger or a summary o loan terms

1 Checklist for lost note affidavit:

- a original rinci al balance;
- b signators and date note e ecuted;
- c rate o interest;
- d un aid balance and de ault date;
- e a iant status must be banking re resentati e with knowledge o the articular loan;
- indemnity language, re cluding subse uent oreclosure udgment on the same note

d here the original note is lost, the court may re uire indemnification o the borrower or subse uent rosecution on the note and may re uire a bond to secure same *Lo ingood Butler Construction Co* , 1 1 So 12 , 1 5 Fla 1 0 Consider bonds articularly where there is a securiti ed trust

1 Mortgage Co y o mortgage is su icient *Perry*, So 2d at 2

a Mortgage must contain correct legal descri tion *Lucas Barnett Bank o Lee County*, 05 So 2d 115, 11 Fla 2d CA 1 I not, inal udgment must be set aside owe er, this can be corrected rior to inal udgment

Fair Debt Collection Practices Act (FDCPA)

1 Purpose eliminate abusive debt collection practices by debt collectors and to
 promote consistent State action to protect consumers against debt collection abuses

15 S.C. 1-2 e

2 Some Florida courts held attorneys engaged in regular foreclosure work met
 the general definition of debt collector and are subject to the FDCPA. *Sandlin
 Shafer*, 1 F.Supp. 154, 15 M. Fla. 1, law firm engaged in collection
 foreclosure work was considered a debt collector where the firm sent correspondence
 advising of payoff and reinstatement figures and directed mortgagors to pay the law
 firm

Under FDCPA, a debt collector's obligation to send a Notice of Debt is triggered
 by an initial communication with the consumer. *McKnight Benite*, 1 F.Supp.
 101, 104 M. Fla. 2001

a Filing of suit is not an initial communication which otherwise would have
 given rise to notice and verification rights. *Acosta Campbell*, 200 L. 042
 M. Fla. 200

b Foreclosure law firms have adopted the practice of attaching to their
 complaint: Notice Required under the Fair Debt Collection Practice Act. This notice
 held ineffectual in *Martinez Law Offices v. J Stern*, 2 B.R. 52 Bank S.
 Fla. 2001

Mandatory Mediation of Homestead Foreclosures

1 Based on the exponential increase in filings of mortgage foreclosure cases in
 the Eleventh Judicial Circuit Court, the Chief Judge implemented our Administrative
 Orders in the following sequence:

a Administrative Order 000 applies to all residential foreclosure actions
 involving homestead properties filed on or after May 1, 2000. AO 000 established
 the 11th Circuit Homestead Access to Mediation Program (CAMP) mandating
 mandatory mediation of homestead foreclosures prior to the matter being set for final
 hearing. At the time of filing the complaint, Plaintiff is required to transmit to the

Program Manager, the Collins Center, a notice form Form A with borrower's contact information within five days of filing the complaint, Plaintiff must tender a cost check in the amount of \$50.00 to cover the administrative costs of the mediation. The Collins Center responsibilities include: contacting the borrower, referring the borrower to financial counseling and making financial documentation available electronically to the Plaintiff. Plaintiff's counsel and the borrower are required to be physically present at mediation; the lender's representative must attend, but is allowed to participate by telephone. Within ten days of the completion of the mediation, the mediator must report the mediation results to the court.

b. Administrative Order 0-0 revised the following forms: the civil cover sheet, Plaintiff's certification of settlement authority, Plaintiff's certification of residential mortgage foreclosure case status and the final judgment of foreclosure.

This Administrative Order specifically exempts condominium and homeowners association fee foreclosures, private in rem mortgage foreclosures, foreclosures of non-homestead properties and construction lien foreclosures.

c. Administrative Order 0-0 A1 acknowledged the statutory authority of the Clerk of the Courts to conduct the sale of real or personal property by electronic means. This Administrative Order further proscribed adherence to certain procedures concerning tenant occupied residential properties under the Protecting Tenants at Foreclosure Act of 2009. Amending the specific format of the final judgment of foreclosure, this Administrative Order prohibited the issuance of immediate writs of possession.

d. Administrative Order 0-1 responded to the Clerk of the Court's request for formal approval to conduct online auctions, in lieu of on-site auctions or the sale of real property.

2. On December 2, 2009, the Florida Supreme Court issued Administrative Order 0-54, adopting the recommendations of the Task Force on Residential Mortgage Foreclosure Cases and establishing a uniform, statewide managed mediation program. The Florida Supreme Court approved the Task Force's Model Administrative Order, with minor changes to be implemented by each circuit chief judge.

On February 2 , 2010, the Eleventh Judicial Circuit Court issued Administrative Order 10 0 A1 requiring mandatory mediation of all homestead mortgage foreclosure actions subject to the federal Truth in Lending Act, Regulation Z. Administrative Order 10 0 A 1 applies to actions filed after March 2 , 2010. Specifically exempted from this Administrative Order are condominium and homeowners association fee foreclosures and mechanics and construction lien foreclosures. This Administrative Order constitutes a formal referral to mediation through the Residential Mortgage Foreclosure Mediation (RMFM) Program; parties are ineligible for default judgment, a summary judgment or final hearing until they have fully complied with mediation requirements.

Basic Procedural Requirements of Administrative Order 10 0 A1 include:

a. When suit is filed, Plaintiff must file a completed Form A with the Clerk listing the last known mailing address and phone number for each party. One business day after filing the complaint, Plaintiff must transmit Form A to the Program Manager of the RMFM along with the case number of the action. The Collins Center for Public Policy, Inc. is the contract Program Manager in the Eleventh Judicial Circuit. At the time of the filing of the complaint, the Plaintiff must tender RMFM fees in the amount of \$400.00; the balance of fees in the amount of \$50.00 must be paid by Plaintiff within 10 days after notice of the mediation conference.

b. Upon receipt of Form A, the Program Manager must contact the borrower and refer the borrower to an approved mortgage foreclosure counselor. Foreclosure counseling must be completed no later than 30 days from the Program Manager's initial contact with the borrower. If the Program Manager is unable to contact the borrower within this time frame, the borrower will have been deemed to elect non-participation in the RMFM Program.

c. The Program Manager must transmit the borrower's financial disclosure or mediation no later than 30 days after the Program Manager receives Form A from Plaintiff.

d. The Program Manager shall schedule a mediation session no earlier than 30 days and no later than 120 days after suit is filed.

e. Plaintiff's representative may appear by telephone upon 5 days notice prior to the mediation; Plaintiff's attorney, the borrower and the borrower's attorney, if any, must attend in person. The court may dismiss the action without prejudice or impose other sanctions for failure to attend. Within 10 days after completion of mediation, the mediator must issue a report advising the court as to the parties' attendance and result.

Service of Process

1. Due service of process is essential to satisfy jurisdictional requirements over the subject matter and the parties in a foreclosure action. Rule 1.000, Fla. R. Civ. P. 2010 and Chapters 4 and 4 of the Florida Statutes.

2. Service of process must be made upon the defendant within 120 days after the filing of the initial pleading. Rule 1.000, Fla. R. Civ. P. 2010. Absent a showing of excusable neglect or good cause, the failure to comply with the time limitations may result in the court's dismissal of the action without prejudice or the dropping of the defendant.

Personal Service

1. Section 4.011, Fla. Stat. 2010 requires that service of process be effectuated by a certified process server on the person to be served by delivery of the complaint or other pleadings at the usual place of abode or by leaving the copies at the individual's place of abode with any person residing there, who is 15 years of age or older and informing them of the contents. § 4.02, Fla. Stat. 2010.

a. Ineffective service. Leaving service of process with a doorman or with a tenant, when the defendant does not reside in the apartment is ineffective service. *Grosheim v. Greenpoint Mortgage Funding, Inc.*, 1 So. 2d 10, 10 Fla. 4th CA 2002. Evidence that person resides at a different address from service address is ineffective service. *Alare v. State Farm Mut. Ins. Co.*, 5 So. 2d 111 Fla. 1st CA 1964.

b. Judgment subject to collateral attack where plaintiff did not substantially comply with the statutory requirements of service.

2 Substitute service authorized by Section 401.2, Fla Stat 2010
 Substitute service may be made upon the spouse of a person to be served, if the
 cause of action is not an adversary proceeding between the spouse and the person to
 be served, and if the spouse resides with the person to be served

a Statutes governing service of process are strictly construed *General de
 Seguros, S A Consol Pro Cas Ins Co*, 50 So 2d 10, 1 Fla d CA
 2001 reversed with directions to vacate de ault judgment and quash service of
 process since substituted service was not effected

b Use of private couriers or Federal Express held invalid *Id; FNMA
 Fandino*, 51 So 2d 52, 5 Fla d CA 2000, trial courts voiding judgment
 affirmed based on plaintiff's failure to strictly comply with substitute service of process
 which employed Federal

c Evading service of process defined by statute as concealment of
 whereabouts 401.11, Fla Stat 2010; *Bodden Young*, 422 So 2d 1055 Fla
 4th CA 1 2

1 The Florida case which clearly illustrates concealment is *Luckey
 Smathers Thom son*, 4 So 2d 5 Fla d CA 1 In *Luckey*, the
 defendant had for the purpose of avoiding all legal matters, sequestered
 himself from the world and lived in isolation in a high security apartment
 refusing to answer the telephone or even to open his mail *Id* at 54 The
 Third District Court of Appeal affirmed the trial court's decision denying
 defendant's motion to vacate the writ of execution and levy of sale based on a
 record of genuine attempts to serve the defendant The Third District Court
 further opined that there is no rule of law which requires that the officers of
 the court be able to breach the self-imposed isolation in order to inform the
 defendant that a suit has been filed against him *Id*

2 Effective retro evading service must demonstrate plaintiff's attempts in
 light of the facts of the case despite process server's unsuccessful attempts
 at service, reversal was not proper based on evidence that the property was
 occupied and defendant's vehicle parked there *ise arner*, 2 So 2d

5 1, 5 2 Fla 5th CA 200 working whose place of employment was known to the sheriff was not concealing herself or a voiding process, sheriff only attempted service at the residence during work hours *Styles v. United Fidelity Guaranty Co*, 42 So 2d 04 Fla 5th CA 1 2

Statutory requirements satisfied in a letter at a place from which the person to be served can easily retrieve them and in the process server takes reasonable steps to call the delivery to the attention of the person to be served *Olin Corporation v. Anney*, 245 So 2d Fla 4th CA 1 1

Service on a corporation may be served on the registered agent, officer or director Section 4 0 1 2 b, Fla Stat 2010 if the address provided for the registered agent, officer, director, or principal place of business is a residence or private mailbox, service on the corporation may be made by serving the registered agent, officer or director in accordance with 4 0 1, Fla Stat 2010

Constructive Service by Publication

1 Section 4 011 1, Fla Stat 2010 identifies the enforcement of a claim of lien to any title or interest in real property such as foreclosure actions

2 Sections 4 021 40 041, of the Florida Statutes govern constructive service or service by publication Constructive service statutes are strictly construed against the party seeking to obtain service *Leenson v. McCarty*, So 2d 1, 1 Fla 4th CA 2004

Service by publication only available when personal service cannot be made *Godsell v. United Guaranty Residential Insurance*, 2 So 2d 120, 1212 Fla 5th CA 200, service by publication is void when plaintiff knew of the defendant's Canadian residency, but merely performed a ski trace in Florida and made no diligent search and inquiry to locate Canadian address; *Gross v. Fidelity Federal Savings Bank of Fla*, 5 So 2d 4, 4 Fla 4th CA 1 1, appellate court reversed and remanded to wash service process and default based on plaintiff's knowledge of defendant's out of state residence address and subsequent failure to attempt personal service

a Plaintiff must demonstrate that an honest and conscientious effort, reasonably appropriate to the circumstances, was made to acquire the necessary information and comply with the applicable statute *or Cha, Inc v Hollingsworth*, 2010 So 2d 1110, 1112 Fla 4th CA 2004, default judgment reversed based on plaintiff's crucial misspelling of defendant's name and subsequent search on wrong individual

b Condition precedent to service by publication Section 4 041, Fla Stat, 2010, requires that the plaintiff file a sworn statement that shows 1 a diligent search and inquiry has been made to discover the name and residence of such person, 2 whether the defendant is over the age of 18, or if unknown, the statement should set forth that it is unknown, and 3 the status of the defendant's residence, whether unknown or in another state or country Section 4 051, Fla Stat 2010 applies to service by publication on a corporation

c Plaintiff is entitled to have the clerk issue a notice of action subsequent to the filing of its sworn statement Pursuant to 4 040, Fla Stat, 2010, the notice requires defendant to file defenses with the clerk and serve same upon the plaintiff's attorney within 30 days after the first publication of the notice

1 Notice published once each week or two consecutive weeks, with proof of publication filed upon final publication

4 10 1 c 2, Fla Stat 2010

d Affidavit of diligent search need only allege that diligent search and inquiry have been made; it is not necessary to include specific facts *Floyd v FNMA*, 2004 So 2d 1110, 1112 Fla 5th CA 11, final judgment and sale vacated based on plaintiff's failure to conduct diligent search to discover deceased mortgagor's heirs residence and possession of the subject property *Howe v*:

1 Better practice is to file an affidavit of diligent search that contains all details of the search *emars v Hill o Sandalwood Lakes Homeowners Ass'n*, 2005 So 2d 121, 1222 Fla 4th CA 11, plaintiff's attorney failed to conduct diligent search and

inquiry by neglecting to follow up on leads which he knew were likely to yield defendant's residence

a **Diligent search and inquiry checklist**

Form 1-24, Fla. R. Civ. P. 2010 contains a basic checklist of a diligent search and inquiry to establish constructive service. This Form adds consideration of inquiry of tenants as to the location of the owner/landlord of tenant occupied property. Further, the Form utilizes the following sources:

- 1 Inquiry as to occupants in possession of the subject property;
- 2 Inquiry of neighbors;
Public records search of criminal/civil actions;
- 4 Telephone listings;
- 5 Tax collector records;
Utility Company records;
Last known employer;
US Post Office;
- Local police department, correctional department;
- 10 Local hospitals;
- 11 Armed Forces of the US;
- 12 Department of Highway Safety/Motor Vehicles;
- 1 School board enrollment verification, if defendant has children;
- 14 An inquiry of the Division of Corporations, State of Florida, to determine if the defendant is an officer, director or registered agent;
- 15 Other registration records

The plaintiff bears the burden of proof to establish the legal sufficiency of the affidavit when challenged. *Id.* If constructive service process is disputed, the trial court has the duty of determining: 1) if the affidavit of diligent search is legally sufficient; and 2) whether the plaintiff conducted an adequate search to locate the defendants. *First Homeview Corp. v. Guggino*, 10 So. d 14, 15 Fla. d. CA 200

g **Diligent search test** whether plaintiff reasonably employed the knowledge at his command, made diligent inquiry, and exercised an honest and conscientious effort appropriate to the circumstances. *She heard Deutsche Bank Trust Co Americas*, 22 So 2d 40, 4 Fla 5th CA 200 , reversed and voided judgment as to defendant wife based on plaintiff's failure to strictly comply with statute, when they had been informed of defendant's correct address in England. Plaintiff's reliance on constructive service, when a doorman in New York repeatedly informed the process server of the defendant's location in Florida, reflects an insufficient amount of reasonable efforts to personally serve the defendant to justify the use of constructive service. *Reico Chase Manhattan Bank*, 2 So 2d 15, 1 Fla 4d CA 2002. Similarly, failure to inquire of the most likely source of information concerning whereabouts of a corporation, or an officer or agent, does not constitute reasonable diligence. *Redfield Investments, A Billage o Pinecrest*, 0 So 2d 115, 11 Fla 4d CA 200

h defective service of process judgment based on lack of diligent search and inquiry constitutes improper service and lacks authority of law. *Batchin Barnett Bank o Southwest Fla*, 4 So 2d 211, 21 Fla 2d CA 1 4

1 Judgment rendered void when defective service of process amounts to no notice of the proceedings. *She heard*, 22 So 2d at 45. Void judgment is a nullity that cannot be validated by the passage of time and may be attacked at any time. *Id*

2 Judgment rendered voidable irregular or defective service actually gives notice of the proceedings. *Id*

i Limitations of constructive service only concern in rem or quasi in jurisdiction; restricted to the recovery of mortgaged real property

1 No basis for deficiency judgment constructive service of process cannot support a judgment that determines an issue of personal liability. *Carter Kingsley Bank*, 5 So 2d 5 , 5 Fla 1st CA 1 1 , deficiency judgment cannot be obtained absent personal service of process

Service of Process outside the State of Florida and in Foreign Countries

1 Section 4 1 4 1 , Fla Stat , 2010 authori es ser ice o rocess in the same manner as ser ice within the state, by an o icer in the state where the erson is being ser ed Section states that ser ice o rocess outside the nited States may be re uired to con orm to the ro isions o ague Con ention o 1 concerning ser ice abroad o udicial and e tra udicial documents in ci il or commercial matters

2 The ague Con ention creates a ro riate means to ensure that udicial and e tra udicial documents to be ser ed abroad shall be brought to the addressee in su icient time *Koechli BIP Int l* , 1 So 2d 501, 502 Fla 5th CA 200

a Procedure rocess sent to a designated central authority, checked or com liance, ser ed under oreign nation s law, and certi cate re ared which documents the lace and date o ser ice or an e lanation as to lack o ser ice *Id* return by the central authority o a oreign nation o com leted certi cate o ser ice was rima acie e idence that the authority s ser ice on a de endant in that country was made in com liance with the ague Con ention and with the law o that oreign nation

b Com liance issues see *i ellman Int l Nat l Forwarders* , 11 So 2d 1 Fla d CA 1 2 , lainti ro ided a aulty address to the S anish authorities and the trial udge entered a de ault udgment, which a ellate court re ersed

Ser ice by registered mail authori ed by Section 4 1 4 2 , Fla Stat 2010 Permits ser ice by registered mail to nonresidents where the address o the erson to be ser ed is known

a Section 4 1 2 2 b , Fla Stat 2010 , ro ides that lainti must ile an a ida it which sets orth the nature o the rocess, the date on which the rocess was mailed by registered mail, the name and address on the en elo e containing the rocess that was mailed, the act that the rocess was mailed by registered mail and was acce ted or re used by endorsement or stam The return en elo e rom the attem t to mail rocess should be attached to the a ida it

Service of process and timeshare real property:

1 Foreclosure proceedings involving timeshare estates may join multiple defendants in the same action § 21.09, Fla Stat 2010

2 There are additional options to effectuating service of process on a timeshare foreclosure

a Substitute service may be made upon the obligor's appointed registered agent § 21.051, Fla Stat 2010

b When quasi in rem or in rem relief only is sought, service may be made on any person whether the person is located inside or outside the state by certified or registered mail, addressed to the person to be served at the notice address § 21.05a, Fla Stat 2010

Substitution of Parties

1 Substitution is not mandatory; the action may proceed in the name of the original party, owner, to substitute a new party based on a transfer of interest requires a court order *Tinsley Mangonia Residence 1, Ltd*, 50 So 2d 1, 1 Fla 4th CA 200, Rule 1.20, Fla R Ci P

2 Order of substitution must precede an adjudication of rights of parties, including default *Floyd Wallace*, 50 So 2d 5 Fla 1; *Cambell Napoli*, 50 So 2d 122 Fla 2d CA 2001, error to enter judgment without a real party against whom judgment could be entered

When substitution is permitted, plaintiff must show the identity of the new party's interest and the circumstances

Entry of Default

1 Without proof of service demonstrating adherence to due process requirements, the Plaintiff is not entitled to entry of default or a default final judgment

a Failure to effectuate service places the jurisdiction in a state of dormancy during which the trial court or clerk is without authority to enter a default *Armet*

SNC di Ferronato Gioanni Coombs, 44 So 2d 111, 1121 Fla 1st CA 1; *Tetley Lett*, 42 So 2d 112 Fla 4th CA 14

2 Legal effect of default admission of every cause of action that is sufficiently well led to properly invoke the jurisdiction of the court and to give due process notice to the party against whom relief is sought *Fiera Com, Inc v. Gigicast New Media Group, Inc*, So 2d 451, 452 Fla 4th CA 200. Default terminates the defendant's right to further defend, except to contest the amount of unliquidated damages *Donohue v. Brightman*, So 2d 112, 114 Fla 4th CA 200

Plaintiff is entitled to entry of default if the defendant fails to file or serve any answer 20 days after service of process Rule 1.040(a)(1), Fla R. Civ. P. 2010

a State of Florida has 40 days in which to file or serve any answer in accordance with Section 41.21, Fla Stat. 200

b United States of America has 30 days to file under the provisions of 28 S.C.A. 2410(b); Rule 12(a), Fed R. Civ. P.

4 **Service Members Civil Relief Act of 2003 (formerly, Soldier's & Sailors Act)**

a Codified in 50 A.S.C.A. 521 tolls proceedings during the period of time that the defendant is in the military service

b Act precludes entry of default; there is no need for the service member to demonstrate hardship or prejudice based on military service *Conroy v. Anisko*, 50

S 511, 512(1). Service member with notice of the foreclosure action, may obtain a stay of the proceedings for a period of 90 days 50 A.S.C.A. 521(d) was superseded by the Housing and Economic Recovery Act of 2008, § 220, which expires on 12/31/10. Upon expiration, the original 90 day period will re take effect

c Termination of military status to obtain default, plaintiff must file an affidavit stating:

1. Defendant is not in military service; or

2 Plaintiff is unable to determine if the decedent is in the
military service 50 A S C A 521 b 1

d Unknown military status the court may require the plaintiff to file a bond
prior to entry of judgment 50 A S C A 521 b

5 Plaintiff is required to serve the decedent with notice of the application for
deed Failure to notice decedent's attorney entry of subsequent deed is invalid;
rendering resulting judgment void *S Bank Nat'l Ass'n v Lloyd*, 1 So 2d ,
4 Fla 2d CA 200

Non Military Affidavit required must be based on: personal knowledge, attest
to the fact that inquiry was made of the Armed Forces, and affiant must state that the
decedent is not in the armed forces *The Fla Bar Re: Affidavits Forms*, 21 So 2d
1025, 10 4 Fla 1 Affidavits based on information and belief are not in
compliance

a Non military affidavit is valid for one year

Appointment of a Guardian ad Litem

1 The best practice is appointment when unknown parties are joined and service
effected through publication For example, a guardian ad litem should be appointed
to represent the estate of a deceased decedent or when it is unknown if the
decedent is deceased 0 , Fla Stat 2010

a Section 50 1 2 , Fla Stat 2010 states that a guardian ad litem shall
not be appointed unless it affirmatively appears that the interest of minors, persons of
unsound mind, or conflicts are involved

b Rule 1 210 b , Fla R Ci P 2010 provides that the court shall appoint a
guardian ad litem for a minor or incompetent person not otherwise represented or
the protection of the minor or incompetent person Similarly, Rule 1 511 e , Fla R
Ci P 2010 maintains that final judgment after deed may be entered by the
court at any time, but no judgment may be entered against an infant or incompetent
person unless represented by a guardian

c The party seeking a judgment must show that there is a substantial likelihood that it will prevail on the merits at the conclusion of the case and must present sufficient proof that a judgment of a receiver is warranted. *Keybank National Association v. Knuth, Ltd.*, 200 WL 24410, 24411 Fla. d. CA, Aug 12, 200

d A final prerequisite to a judgment of a receiver is that the mortgagor must post a bond, or either the plaintiff or the receiver. Rule 1.20(c), Fla. Rules of Civil Procedure 2010; *Boyd v. Banc One Mortgage Corp.*, 50 So. 2d , Fla. d. CA 1

Summary Final Judgment of Foreclosure

1 Legal standard No genuine issue of material fact and mortgagor is entitled to a judgment as a matter of law. Also, outstanding discovery can preclude summary judgment.

2 Burden of Proof The plaintiff bears the burden of proof to establish the nonexistence of disputed issues of material fact. *elandro v. Am's Mortgage Servicing, Inc.*, 4 So. 2d 14, 1 Fla. d. CA 1; *Roll v. Talcott*, 11 So. 2d 40, 4 Fla. 1

Content of motion for summary judgment plaintiff should allege:

1 execution of note and mortgage; 2 plaintiff's status as owner and holder or representative; 3 date of default; 4 notice of default and acceleration; 5 amount due and owing; 6 relief sought; and 7 address affirmative defenses, if any.

4 Filing of the Motion at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party. Rule 1.510(a), Fla. R. Civ. P. 2010. The motion for summary judgment, supporting affidavits and notice of hearing must be served on a defendant at least 20 twenty days before the summary judgment hearing. Rule 1.510(c), Fla. R. Civ. P. 2010; *First v. Bank of New York*, 2010 WL 112 Fla. 2 CA Mar , 2010; *Mack v. Commercial Industrial Park, Inc.*, 541 So. 2d 00, 01 Fla. 4th CA 1

a Opposition materials and evidence supporting or opposing a denial of a motion for summary judgment must be identified. Rule 1.510(c), Fla. R. Civ. P. 2010. Notice of opposition must be mailed to the movant's attorney at least five days prior to the day of hearing or delivered no later than 5:00 P.M., two business days prior to the day of the hearing on the summary judgment.

b The movant for summary judgment must factually refute or disprove the affirmative defenses raised, or establish that the defenses are insufficient as a matter of law. *Leal v. Deutsche Bank Nat'l. Trust Co.*, 21 So. 3d 10, 10 Fla. 3d DCA 200.

c Filing of cross motions is subject to the 20 day notice period. *Wikowski v. Hillsborough County*, 51 So. 2d 122, Fla. 2d CA 15. 5 Requirement for motion for summary judgment: due notice and a hearing. Proof of mailing of notice of the final summary judgment hearing created presumption that notice of hearing was received. *Blanco Kinas*, 51 So. 2d 1, 2 Fla. 3d CA 200.

Affidavits in support of Summary Judgment

Affidavits in support of the motion must be made based on personal knowledge and set forth facts that would be admissible in evidence, and demonstrate that the affiant is competent to testify on the matters presented.

a Affidavit of Indebtedness Must be signed by a custodian of business record with knowledge. In general, the plaintiff's affidavit items are:

- 1 Property address,
- 2 Principal balance,
- 3 interest calculated from default until the entry of judgment, when the mortgage provides for automatic acceleration upon default, *T FN Realty Co v. Kirkman Conroy, Ltd*, 54 So. 2d 115, Fla. 5th CA 1. Best practice is to include per diem interest,
- 4 late charges re acceleration only, *Fowler v. First Fed Sav Loan Ass'n*, 4 So. 2d 10, Fla. 1st CA 14,
- 5 Prepayment penalties unavailable in foreclosure actions, *Fla. Nat'l*

Bank Atlantic, 5 So 2d 255, 25 Fla 1 1 , unless specifically authorized in note in the event of acceleration and foreclosure *Feinstein Ashlant*, 1 So 2d 10 4 Fla 4th CA 200

property inspections appraisals,
 hazard insurance premiums and taxes

b Award of Costs This award details:

- 1 the filing fee,
- 2 service process,
 and abstracting costs

c Award of attorney's time references the actual time the attorney expended on the foreclosure file and references the actual hourly billable rate or the flat fee rate which the client has agreed to pay. The Fla Supreme Court endorsed the lodestar method *Bell S B Acquisition Co*, 4 So 2d 40 , 40 Fla 1. The hours may be reduced or enhanced in the discretion of the court, depending on the novelty and difficulty of questions involved *Fla Patient's Compensation Fund Rowe*, 4 2 So 2d 1145, 1150 Fla 1 5. With regard to uncontested time, plaintiff is not required to keep contemporaneous time records since the lender is contractually obligated to pay a flat fee for that time. *Id*

d Award as to reasonableness of attorney's fee Award of attorney's fee must be signed by a practicing attorney not affiliated with the plaintiff's firm, attesting to the rate as reasonable and customary in the circuit. Plaintiff should reference and evaluate the attorney fee claim based on the eight factors set forth in Rule 4 1 5 b 1 Rules Regulating the Fla Bar. Of these, relevant factors, such as the time and labor required, the customary fee in the locality for legal services of a similar nature, and the experience and skill of the lawyer performing the service must be examined. An award of attorney fees must be supported by expert evidence *Palmetto Federal Savings and Loan Association v. [unclear]*, 512 So 2d 2 Fla d CA 1

1 Where there is a default judgment and the promissory note or mortgage contains a provision for an award of attorney fees,

Section 62.052, Fla. Stat. 2010 provides that it is not necessary for the court to hold a hearing or adjudicate the requested attorney's fees to be reasonable if the fees do not exceed ten percent of the principal amount owed at the time of the filing of the complaint. *Florida Patient's Compensation Fund v. Rowe*, 42 So.2d 1145, Fla. 1st DCA 1951. *Id.* This statutory provision confirms that such fees constitute liquidated damages in any proceeding to enforce the note or mortgage. *Id.*

2. The judgment must contain findings as to the number of hours and the reasonable hourly rate. *Id.* at 1152. The requirements of *Rowe* are mandatory and failure to make the requisite findings is reversible error. *Home Insurance Co. v. Gonzalez*, 42 So.2d 21, 22 Fla. 1st DCA 1951. An award of attorney's fees must be supported by competent substantial evidence in the record and contain express findings regarding the number of hours reasonably expended and a reasonable hourly rate for the type of litigation involved. *Stack v. Lakeside Lending, Inc.*, 20 So.2d 1, 20 Fla. 2d CA 200.

Affirmative Defenses

1. Genuine existence of material fact precludes entry of summary judgment. *Manassas Investments Inc. v. O'Arrahan*, 11 So.2d 100, Fla. 2d CA 2002.

2. Legal sufficiency of defenses. Certainty is required when pleading affirmative defenses; conclusions of law unsupported by allegations of ultimate fact are legally insufficient. *Bliss v. Carmona*, 41 So.2d 101, 101 Fla. 1st DCA 1951.

Affirmative defenses do not simply deny the acts of the opposing party's claim; they raise some new matter which defeats an otherwise apparently valid claim. *Jiggins v. Protmy*, 40 So.2d 541, 542 Fla. 1st DCA 1951. Plaintiffs must either actually refute affirmative defenses or establish that they are legally insufficient. *Frost v. Regions Bank*, 15 So.2d 05, 0 Fla. 4th CA 200.

Affirmative defenses commonly raised:

a Payment here defendants alleged advance payments and plaintiff failed to refute this defense, plaintiff not entitled to summary judgment *Morrone Household Fin Cor III*, 10 So 2d 11, 12 Fla 2d CA 2005. Equally, if the affidavit of indebtedness is inconclusive or, for example, includes a credit for unapplied funds without explanation, and the borrower alleges that the defense of inaccurate accounting, then summary judgment should be denied *Kanu Pointe Bank*, 1 So 2d 4 Fla 4th CA 200. However, summary judgment will be defeated if payment was attempted, but due to misunderstanding or excusable neglect coupled with lender's conduct, contributed to the failure to pay *Cambell Turner*, 22 So 2d 252, 25 Fla d CA 10; *Lieberbaum Surcomberotel Cor*, 122 So 2d 2, 2 Fla d CA 10, Court dismissed foreclosure complaint where plaintiff knew that some excusable oversight was the cause of non-payment, said payment having been re-used and subsequently deposited by defendants into the court registry.

b Failure to comply with conditions precedent such as Plaintiff's failure to send the Notice of default letter. Failure to receive any information does not preclude summary judgment *Walker Midland Mortgage Co*, 5 So 2d 51, 520 Fla d CA 200.

c Estoppel is usually based on: a representation as to a material fact that is contrary to a later asserted position; reliance on that representation; and a change in position detrimental to the party claiming estoppel, caused by the representation and reliance thereon *arris Natl Recovery Agency*, 1 So 2d 50, 54 Fla 4th CA 2002; *Jones City of Inter a en*, 10 So 2d 52, 55 Fla 2d CA 200, defendant defeated city's foreclosure based on evidence presented which indicated that the city had agreed to stop fines or noncompliance with property code if homeowner hired a licensed contractor to make repairs.

d waiver the knowing and intentional relinquishment of an existing right *Taylor Kenco Chem Mg Co*, 45 So 2d 51, 5 Fla 1st CA 15. Whenever orally led, affirmative defenses that sound in waiver and estoppel present

genuine issues of material fact which are inappropriate for summary judgment
Schiebe Bank of Am, 22 So 2d 55 Fla 5th CA 2002

1. Acceptance of late payments common defense asserting
 waiver is the lender's acceptance of late payments. However, the
 lender has the right to elect to accelerate or not to accelerate a term
 default. *Scarborough Peer*, 405 So 2d 104, 105 Fla 5th CA
 11. The default recited on defendant's failure to pay real estate
 taxes, could not be overcome by defendant's claim of estoppel due
 to misapplication of non-escrow payments. *Lunn Woods Lowery*,
 5 So 2d 05, 0 Fla 2d CA 11

2. Fraud in the inducement defined as situation where parties to a contract
 appear to negotiate freely, but where in fact the ability of one party to negotiate fair
 terms and make an informed decision is undermined by the other party's fraudulent
 behavior. *TP, Ltd Lineas Aereas Costarricenses, S A*, 5 So 2d 12, 12
 Fla 1

A prima facie defense of fraud in the inducement based on allegation that seller
 failed to disclose the tensile termite damage resulted in reversal of foreclosure
 judgment. *inton Brooks*, 20 So 2d 25 Fla 5th CA 2001. Note that
 purchasers had first filed fraud in the inducement case and seller retaliated with
 foreclosure suit. Further, the appellate court opined in the *inton* case that fraud in
 the inducement was not barred by the economic loss rule. *Id*

3. Usury defined by § 10, Fla Stat 2010, as a contract or the
 payment of interest upon any loan, advance of money, line of credit, or forbearance
 to enforce the collection of any debt, or upon any obligation whatever, at a higher
 rate of interest than the equivalent of 1 percent per annum simple interest. If the
 loan exceeds \$500,000 in amount or value, then the applicable statutory section is
 § 1, Fla Stat 2010. A usurious contract is unenforceable according to the
 provisions of Section 101, Fla Stat 2010.

4. Forbearance agreement. Appellate court upheld summary judgment based
 on defendant's failure to present any evidence as to the alleged forbearance

agreement or prior servicer to delay foreclosure until the settlement of his personal injury case. *Walker v. Midland Mortgage Co.*, 5 So. 2d at 520. If evidence of forbearance is submitted, it may defeat summary judgment.

h. Statute of limitations. Property owner successfully asserted that foreclosure filed five years after mortgage maturity date was barred by statute of limitations; mortgage lien was no longer valid and enforceable under Section 521.11a, Fla. Stat. 2010; *American Bankers Life Assurance Co. v. Fla. 22.5.1st Cor.*, 05 So. 2d 1, 11 Fla. d. CA 2005.

i. Failure to pay documentary stamps. Section 201.0, Fla. Stat. 2010, requires enforcement of notes and mortgages absent the payment of documentary stamps. *RJ v. Inc. North Ring Limited*, So. 2d 104, 104 Fla. d. CA 200; *Bonifiglio v. Bankers Trust Co. of Cali.*, 44 So. 2d 10, 10 Fla. 4th CA 200.

1. This is a limitation on judicial authority; not a genuine affirmative defense.

Truth in Lending (TILA) violations. Technical violations of TILA do not impose liability on lender or defeat foreclosure. *Kasket v. Chase Manhattan Mortgage Cor.*, 5 So. 2d 2, Fla. 4th CA 2000; 15 S.C.A. 100. Exception to TILA one-year statute of limitations applies to defenses raised in foreclosure. *Ailey v. Leshin*, 2 So. 2d 52, 52 Fla. 4th CA 2001; 15 S.C.A. 140e.

TILA issues include:

1. Improper adjustments to interest rates (ARMS);

2. Borrower must be given 2 copies of notice of rescission rights. Written acknowledgement of receipt is only a rebuttable presumption. *Cintron v. Bankers Trust Co.*, 2 So. 2d 1, Fla. 2d CA 1.

TILA rescission or up to three years after the transaction or failure to make material disclosures to borrower. Such as, APR of loan, amount financed, total payment and payment schedule. Rescission relieves borrower only of payment of interest. Must be within three years of closing. 15 S.C. 101.1, 14; *Beach v. Great Eastern Bank*, 2 So. 2d 14, 15 Fla. 1.

a. If a homestead interest in mortgaged property gives her right to

TILA disclosure *Gancedo elCar io*, 1 So d 4 , 44 Fla 4th CA 200

k Res udicata Foreclosure and acceleration based on the same default bars a subsequent action unless redicated upon separate, different defaults *Singleton Greymar Assoc*, 2 So 2d 1004, 100 Fla 2004

Additional cases: *Limehouse Smith*, So 2d 15 Fla 4th CA 2001 , mistake ; *O'Brien Fed Trust Bank, F S B*, 2 So 2d 2 Fla 5th CA 1 , fraud, RICO and duress ; *Biondo Powers*, 4 So 2d 1 1 Fla 4th CA 1 , usury ; *eimmermann First nion Mortgage Cor* , 05 F 2 d 125 11th Circ 2002 , Real Estate Settlement Procedures Act RESPA iolations

Summary Judgment Hearing

1 Plaintiff must file the original note and mortgage at or before the summary judgment hearing Since the promissory note is negotiable, it must be surrendered in the foreclosure proceeding so that it does not remain in the stream of commerce *Perry Fairbanks Capital Cor* , So 2d 25, 2 Fla 5th CA 2001 Copies are sufficient with the exception that the note must be reestablished *Id* Best practice is for judge to cancel the signed note upon entry of summary judgment

a Failure to produce note can preclude entry of summary judgment *Natl Loan Investors, L P Joymar Assoc*, So 2d 54 , 550 Fla d CA 2000

Final Judgment

1 Section 45 0 1, Fla Stat 2010 governs the contents of the final judgment Final Judgment Form 1 , Fla R Ci P 2010

2 Amounts due Plaintiff's recovery limited to items listed in complaint or affidavit or based on a mortgage provision

Court may award costs agreed at inception of contractual relationship ; costs must be reasonable *Nemours Found Gauldin*, 01 So 2d 5 4, 5 Fla 5th CA 1 2 , assessed costs consistent with mortgage provision rather than prevailing party statute ; *Maw Abinales*, 4 So 2d 1245, 124 Fla 2d CA 1 5 , award of costs governed by mortgage provision

4 Checklist or Final Summary Judgment

a Final Judgment:

1 Check service, defaults, dropped parties

2 Check for evidence of ownership of note

Check affidavits signed and correct case number parties

4 Amounts due and costs should match affidavits filed. If interest has increased due to resets a daily interest rate should be indicated so you can verify it

5 Check principal, rate calculation of interest through date of judgment

Late fees re acceleration is recoverable; post acceleration is not *Fowler First Fed Sav Loan Assoc v Uniak Savings*, 4 So 2d 0, Fla 1st CA 14

All expenses and costs, such as service of process should be reasonable, market rates. Items related to protection of security interest, such as encing and boarding up property are recoverable if reasonable

Beware hidden charges fees or default letters, correspondence related to workout efforts. Court's discretion to deny recovery

Attorney fees must not exceed contract rate with client and be supported by an affidavit as to reasonableness. Attorney fee cannot exceed principal owed 02052, Fla Stat 2010. Beware add-ons or litigation fees. make sure that they are not double billing late fee

10 Bankruptcy fees not recoverable. Correct forum is bankruptcy court *Martine Giacobbe*, 51 So 2d 02, 04 Fla 1d CA

200 ; *Orak First Family Bank*, So 2d 10, 10 Fla 5th

CA 14. Bankruptcy costs incurred to obtain stay relief recoverable *Nemours*, 01 So 2d at 55

11 Sale date may not be set in less than 20 days or more than 5 days, unless parties agree 450 11 a, Fla Stat 2010, *JRBL e, Inc Maiello*, 2 So 2d 2, Fla 2d CA 2004

5 I summary judgment denied, foreclosure action proceeds to trial on contested issues

a Trial is before the court without a jury 02 01, Fla Stat 2010

Motion or rehearing abuse of discretion to deny rehearing where multiple legal issues, including prepayment penalties and usury, remain unresolved by the trial court *Bonilla Yale Mortgage Corporation*, 15 So d 4, 45 Fla d CA 200

After entry of final judgment and expiration of time to file a motion or rehearing or for a new trial, the trial court loses jurisdiction of the case *Ross amas*, 2010 L 5 2 12 Fla d CA Feb 1, 2010; 45 So 2d 4 5 Fla d CA 1 4
 Exception: when the trial court reserves in the final judgment the jurisdiction of post judgment matters, such as deficiency judgments *Id*

Right of Redemption

1 Mortgagor may exercise his right of redemption at any time prior to the issuance of the certificate of sale 450 15, Fla Stat 2010

a Court approval is not needed to redeem *Indian River Farms YBF Partners*, So 2d 10, 1100 Fla 4th CA 2001; *Saidi asko*, So 2d 10, 1 Fla 5th CA 1

b Court of equity may extend time to redeem *Pere Kossow*, 02 So 2d 1 2 Fla d CA 1 2

2 To redeem, mortgagor must pay the entire mortgage debt, including costs of foreclosure and attorney fees *CSB Realty, Inc Eurobuilding Cor*, 25 So 2d 12 5, 12 Fla d CA 1; 450 15, Fla Stat 200

Right to redeem is incident to every mortgage and can be assigned by anyone claiming under him *OSR Indus, Inc Martin Properties, Inc*, 1 So 2d 554, 55 Fla 4th CA 200 There is no statutory prohibition against the assignment, including the assignment of bid at sale

a Right of redemption extends to holders of subordinate interests Junior mortgage has an absolute right to redeem from senior mortgage *Marina Funding Group, Inc v Peninsula Pro Holdings, Inc*, 50 So 2d 42, 42 Fla 4th CA 200 ; *Winn Plumbing Co v New Miami Shores Cor*, 12 So 3d 4, 4 Fla 1st CA 4 Fed right of redemption United States has 120 days following the foreclosure sale to redeem the property if its interest is based on an IRS tax lien For any other interest, the Fed go ernment has one year to redeem the property 11 S C 541, 2 S C 5

Judicial Sale

Scheduling the judicial sale

1 The statutory prescribed time frame for scheduling a sale is not less than 20 days or more than 5 days after the date of the order or judgment § 450.11 a, Fla Stat 2010 The statute applies unless agreed otherwise

2 Cancellations, continuances and postponements are within the discretion of the trial court Motion must have reasons Judicial action based on benevolence or compassion constitutes an abuse of discretion *Republic Federal Bank v Boyle*, 200

L 10210 Fla 1st CA 200 , Appellate court reversed trial court's continuance of sale based on compassion to homeowners claiming they needed additional time to sell the home There should be no across the board policy But see, *Wells Fargo*

Luica, 2010 L 22154 Fla 5th CA 410 denial of lender's unused motion to cancel and subsequent motion to vacate sale reversed Counsel alleged a

loan modification agreement had been reached Court rejected asking for evidence of agreement The Fifth District Court ruled, there was no basis for the trial court to

reject Wells Fargo's counsel's representation, as an officer of the court, that an agreement had been reached *Id* Look at language in motions, AMP Review and

loss mitigation do not constitute an agreement Include language in the order indicating the court's rationale, even if you have a form order Ask counsel to make

a personal representation as an officer of the court See also, *Chemical Mortgage v Jackson*, 51 So 2d 125, 12 Fla 4th CA 15 Error not to cancel sale and

reschedule where plaintiff did not receive bidding instructions on a federally guaranteed mortgage. However, this case found no extraordinary circumstances warranting rescheduling. Suggestion: we live in extraordinary times

Notice of sale

1 Notice of sale must be published once a week, or 2 consecutive weeks in a publication of general circulation. 450 11, Fla Stat 2010. The second publication shall be at least five days before the sale. 450 12, Fla Stat 2010

a Notice must include: property description; time and place of sale; case style; clerk's name and a statement that sale will be conducted in accordance with final judgment

b Effective notice can constitute grounds to set aside sale. *Richardson Chase Manhattan Bank*, 41 So 2d 45, 4 Fla d CA 200; *Ingoria Horton*, 1 So 2d 125 Fla 2d CA 2002

Judicial sale procedure

1 Judicial sale is public, anyone can bid. *Neilman Suburban Coastal Cor*, 50 So 2d 10 Fla 4th CA 1. Property is sold to the highest bidder

2 Plaintiff is entitled to a credit bid in the amount due under final judgment, plus interest and costs through the date of sale. *Robinson Phillips*, 11 So 2d 1, 1 Fla d CA 1 5

Amount bid is conclusively presumed sufficient consideration. 450 1, Fla Stat 2010

Certificate of sale

1 Upon sale completion certificate of sale must be served on all parties not defaulted. The right of redemption for all parties is extinguished upon issuance of certificate of sale. 450 15, Fla Stat 200

2 Documentary stamps must be paid on the sale. 201 02, Fla Stat 2010. The amount of tax is based on the highest and best bid at the foreclosure sale. *Id*

a Assignment of successful bid at foreclosure sale is a transfer of an interest in realty subject to the documentary stamp tax. Fla Admin Code Rule 12B 4 01 25. Rule 12B 4 01 provides that the tax is also applicable to the certificate of title

issued by the clerk of court to the holder of the successful foreclosure bid, resulting in a double stamp in the bid is assigned and the assignee receives the certificate of title

b Assignment prior to foreclosure sale holder of a mortgage foreclosure judgment that needs to transfer title to a different entity and anticipates that the new entity would be the highest bidder, should assign prior to the foreclosure sale to avoid double stamp

c Documentary stamps are due only in consideration or an exchange of value takes place *Crescent Miami Center, LLC v. Fla. et al. Reenue*, 90 So 2d 11, 11 Fla 2005, Transfer of unencumbered realty between a grantor and wholly owned grantee, absent consideration and a purchaser, not subject to documentary stamps; *et al. Reenue Mesmer*, 45 So 2d 4, Fla 1st CA 1, based on assignment of interest and tender of payment, documentary stamps should have been paid

d Eminent governmental agencies, which do not pay documentary stamps include: Fannie Mae, Freddie Mac, Federal Home Administration and the Veterans Administration Fla Admin Code Rules 12B 4 014 11; 11 O Atty Gen 0 1 1, Section 1, 1 1

Objection to sale

1 Any party may file a verified objection to the amount of bid within 10 days 45 0 1, Fla Stat 2010 The court may hold a hearing within judicial discretion hearing must be noticed to everyone, including third party purchasers *Shlishey the Best v. Citi Inancial Equity Services, Inc*, 14 So d 12 1 Fla 2d CA 200

2 Court has broad discretion to set aside sale *Long Beach Mortgage Corporation v. Bebble*, 5 So 2d 11, 14 Fla 4th CA 200, appellate court reversed sale unilateral mistake resulted in outrageous windfall to buyer who made *de minimis* bid The court may consider a settlement agreement in considering whether to vacate a sale *JRBL v. Element, Inc v. Maiello*, 2 So 2d 2, Fla 2d CA 2004

Test: sale may be set aside i :

1 bid was grossly or startlingly inadequate; and 2 inadequacy of bid resulted from some mistake, fraud, or other irregularity of sale *Blue Star Investments, Inc v Johnson*, 91 So 2d 21 Fla 4th CA 2001 ; *Mody v Cali Fed Bank*, 4 So 2d 101 , 101 Fla 4th CA 1 Mere inadequacy of price is not enough *Arlt v Buchanan*, 10 So 2d 55, 55 Fla 10 Burden on party seeking to vacate sale

a Plaintiff's delay in providing information cannot be sole basis for setting aside sale *Action Realty Investments, Inc v Grandison*, 90 So 2d 4, Fla 4th CA 200

b Stranger to foreclosure action does not have standing to complain of defects in the absence of fraud *REO Properties Corp v Binder*, 4 So 2d 52, 54 Fla 2d CA 200

c Sale may be set aside if plaintiff misses sale, based on appropriate showing *ells Fargo Financial System Fla, Inc v GRP Financial Services Corp* , 90 So 2d Fla 2d CA 2004

d Court may refuse to set aside sale where objection is beyond statutory period *Ryan v Countrywide Home Loans, Inc* , 45 So 2d , Fla 2d CA 1 , untimely motion filed 90 days following the sale

Sale vacated

1 If sale vacated mortgage and lien relieved with all effects from foreclosure and returned to their original status 920 , Fla Stat 2010

a Upon readvertisement and resale, a mortgagor's lost redemption rights temporarily re-vest *YEMC Const v Belmont, Inc, Inter Serv, S A, Inc* , 4 So 2d 44 , 44 Fla 4th CA 2004

Post Sale Issues**Certificate of title**

1 No objections to sale Sale is confirmed by the Clerk's issuance of the certificate of title to purchaser Title passes to the purchaser subject to parties whose interests were not extinguished by foreclosure, such as omitted parties

a Plaintiff may reforeclose or sue to compel an omitted junior lienholder to redeem within a reasonable time *Uinn*, 12 So 2d at 4

b Foreclosure is void if titleholder omitted *England Bankers Trust Co of Cali, N A*, 5 So 2d 1120, 1121 Fla 4th CA 2005

Right of possession

1 Purchaser has a right to possess the property upon the issuance of the certificate of title, provided the interest holder was properly joined in the foreclosure

2 Right of possession enforced through writ of possession Rule 1.50, Fla R Ci P 2010

Summary writ of possession procedure:

a Purchaser of property moves for writ of possession;

b The writ can be issued against any party who had actual or constructive knowledge of the foreclosure proceedings and adjudication; *Redding Stockton, Hatley, a in Co*, 4 So 2d 54, 54 Fla 5th CA 1 ;

c Best practice is to require notice and a hearing before issuance of a writ

1 Protecting Tenants at Foreclosure Act of 2009 provides for a 90 day pre-foreclosure notice applicable to bona fide tenants See following section

d At hearing, judge orders immediate issuance of writ of possession unless a person in possession raises defenses which warrant the issuance of a writ of possession for a date certain;

e The order for writ of possession is executed by the sheriff and personal property removed to the property line

Protecting Tenants at Foreclosure Act of 2009

1 Federal legislation, known as Senate Bill 1147, P L 111 22, provides for a nationwide 90 day pre-foreclosure notice requirement for bona fide tenants in foreclosed properties The provisions of the original bill were extended under R 41, the Dodd-Frank Wall Street Reform and Consumer Protection Act, which became law on 7/14/10

2 The application of the new law is restricted to any dwelling or residential property that is being foreclosed under a federally related mortgage loan as defined by Section 3 of the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 202). In short, the originating lender must be the Federal National Mortgage Association (FNMA), the Government National Mortgage Association (GNMA), the Federal Home Loan Mortgage Corporation or a financial institution insured by the Federal Government.

2 Three prerequisites must be satisfied to qualify as a bona fide tenant under the new Act:

- 1 The tenant cannot be the mortgagor or a member of his immediate family;
- 2 The tenancy must be an arms length transaction; and
The lease or tenancy requires the receipt of rent that is not substantially lower than the fair market rent of the property.

4 The buyer or successor in interest at a foreclosure sale must provide bona fide tenants:

- a With leases – the right to occupy the property until the expiration of the lease term. The exception is if the buyer intends to occupy the property as a primary residence, in which case he must give 90 days notice.
- b Without leases – the new buyer must give the tenant 90 days notice prior to lease termination.

5 The single other exception to the foregoing is Section 4 – buying. In this case, the buyer assumes the interest of the prior owner and the lease contract. The buyer cannot terminate in the absence of good cause.

These provisions of the new law went into effect on May 20, 2009. The bill sunsets on 12/31/2014.

Disbursement of Sale Proceeds

Surplus

1 Surplus the remaining funds after payment of all disbursements required by the final judgment of foreclosure and shown on the certificate of disbursements 450.21(c), Fla Stat 2010 Disbursement of surplus funds is governed by Section 450.1, Fla Stat 2010

2 Entitlement to surplus is determined by priority; in order of time in which they became liens *Household Fin Services, Inc Bank of Am, N A*, 90 So 2d 4, 4 Fla 4th CA 2004 It is the duty of the court to prioritize the interests of the competing junior lien holders and the amounts due each *Citibank PNC Mortgage Corporation America*, 1 So 2d 00, 01 Fla 2d CA 1

a The court does not waive lienholder's rights to surplus funds *Golindano v Wells Fargo Bank*, 1 So 2d 14 Fla 4th CA 2005 A junior lienholder has priority over the property holder or surplus funds *Id*, 15

b A senior lienholder is not entitled to share in surplus funds *Garcia Stewart*, 90 So 2d 111, 1121 Fla 4th CA 2005, senior lienholder liens unaffected; inferior party to junior lienholder foreclosure

c Entitlement to balance of surplus after payment of priority interests payable to the record owner as of the date of the filing of the lis pendens *Suarez Edgehill*, 200 L 2 1 50 Fla App 4d CA Oct 14, 200

Deficiency Judgment

1 Deficiency is the difference between the fair market value of the security received and the amount of the debt *Mandell Fortenberry*, 20 So 2d, Fla 1 4; *Grace Hendricks*, 140 So 2d 0 Fla 1 2

2 A deficiency can be obtained only if a request for that relief is made in the pleadings and if personal jurisdiction has been obtained over the defendant or defendants against whom the deficiency is sought *Bank of Florida in South Florida v Keenan*, 51 So 2d 51, 52 Fla 4th CA 1 The granting of a deficiency judgment is the rule rather than the exception *Thomas Premier Capital, Inc*, 90 So 2d 11, 1140 Fla 4th CA 2005

a. The deficiency judgment not allowable is based on constructive service process

b. New service process on defendant was not required for deficiency judgment where personal jurisdiction had been originally conferred by service of foreclosure complaint. *L.A. Property Ventures, Inc. v. First Bank*, 200 L 204 Fla A 2d CA Oct 14, 200. The law contemplates a continuance of the proceedings for entry of a deficiency judgment as a means of avoiding the expense and inconvenience of an additional suit at law to obtain the balance of the obligation owed by a debtor. *Id.*

Trial court has discretion to enter deficiency decree. 020, Fla Stat 200; *Thomas*, 0 So 2d at 1140. The court needs to hold an evidentiary hearing. *Merrill v. Num*, 41 So 2d 12, 12 Fla d CA1 5. The court can enter a default judgment provided the defendant was properly noticed. *Semlar Savings of Florida*, 541 So 2d 1, 10 Fla 4th CA 1.

a. The exercise of discretion in denial of a deficiency decree must be supported by disclosed equitable considerations which constitute sound and sufficient reasons for such action. *Larsen v. Allocca*, 1 So 2d 0, 04 Fla d CA 1.

4. A cause of action for deficiency cannot accrue until after entry of final judgment and a sale of the assets to be applied to the satisfaction of the judgment. *Chrestensen v. Eurogest, Inc.*, 0 So 2d 4, 45 Fla 4th CA 2005. The amount of deficiency is determined at the time of the foreclosure sale. *Estes v. Jordan*, So 2d Fla 5th CA 1. The amount bid at foreclosure sale is not conclusive evidence of the property's market value. *Century Group, Inc. v. Premier Financial Services*, 24 So 2d 1, Fla 2d CA 1.

a. The appraisal determining the fair market value must be properly admitted into evidence and be based on the sale date. *Flagship State Bank of Jacksonville v. New Equipment Company*, 2 So 2d 0, 10 Fla 5th CA 1 1.

b. The formula to calculate a deficiency judgment is the final judgment of foreclosure total debt minus the fair market value of the property. *Morgan v. Kelly*, 42 So 2d 111 Fla d CA 1 4.

c The amount paid by a mortgage assignee or a debt is legally irrelevant to the issue of whether the assignee is entitled to a deficiency award after a foreclosure sale *Thomas*, 0 So 2d at 1141

4 Burden: The secured party has the burden to prove that the fair market value of the collateral is less than the amount of the debt *Chidnese McCollem*, 5 So 2d , Fla 4th CA 1 , *Este a* So 2d at owe er, the Third District Court has held that the burden is on the mortgagor resisting a deficiency judgment to demonstrate that the mortgagee obtained property in foreclosure worth more than the bid price at the foreclosure sale *Addison Mortgage Co et*, 1 So 2d 104 Fla d CA 1 See also, *Thunderbird, Ltd Great American Ins Co*, 5 So 2d 12 , 12 Fla 1st CA 1 0 , court held that introduction of the certificate of sale from the foreclosure sale showing that the bid amount at the foreclosure sale was less than the amount of the debt shifted the burden to the mortgagee to go forward with other evidence concerning the fair market value of the property

5 denial of deficiency decree in foreclosure suit on jurisdictional reasons, as distinguished from equitable grounds, is not res judicata so as to bar an action for deficiency *Frumkes Mortgage Guarantee Cor* , 1 So 2d , 40 Fla d CA 1 5 ; *Klondike, Inc Blair*, 211 So 2d 41, 42 Fla 4th CA 1

Reservation of jurisdiction in the final judgment of foreclosure. Jurisdiction is reserved, new or additional service of process on defendant is not required *Este a*, So 2d at The motion and the notice of hearing must be sent to the attorney of record for the mortgagor *Id, NCNB Nat'l Bank of Fla Pyramid Cor* , 4 So 2d 15 , 155 Fla 4th CA 1 , defaulted defendant entitled to notice of deficiency hearing owe er, the motion for deficiency must be timely filed. If untimely, the deficiency claim could be barred upon a proper motion by the defendant under Rule 1.420 e , Fla R Ci P 2010 , *Frohman Bar Or*, 0 So 2d , Fla 1 5 ; *Steketee Ballance Homes, Inc* , So 2d , 5 Fla 2d CA 1

a No reservation of jurisdiction in the final judgment motion or deficiency must be made within ten (10) days of issuance of title *Frumkes*, 1 at 40

b The lender can file a separate action or post-foreclosure deficiency Section 02.0, Fla Stat 2010 In a separate action, the defendant has the right to demand a trial by jury *obbs Florida First Nat'l Bank of Jacksonville*, 40 So 2d 15, 15 Fla 1st CA 15; *Bradberry Atlantic Bank of St. Augustine*, So 2d 124, 1250 Fla 1st CA 1, no jury trial right within foreclosure action Section 55.012, Fla Stat 2010 mandates that final judgments in a separate action or deficiency contain the address and social security number of the judgment debtor, if known This requirement is not imposed in a mortgage foreclosure action, in which an *in rem* judgment is sought

Statute of limitations

a A deficiency judgment or decree is barred when an action on the debt secured by the mortgage is barred *Barnes Escambia County Employees Credit Union*, 4 So 2d, 0 Fla 1st CA 1, abrogated on other grounds

b Section 5.11, Fla Stat 2010 imposes a five-year statute of limitations on a foreclosure deficiency judgment

c A cause of action or deficiency does not accrue, and thus the statute of limitations does not begin to run, until the final judgment of foreclosure and subsequent foreclosure sale *Chrestensen*, 0 So 2d at 45

There are statutory limitations imposed on a deficiency judgment when a purchase money mortgage is being foreclosed Section 02.0, Fla Stat 2010 includes language that impairs the entitlement to a deficiency judgment with respect to a purchase money mortgage, when the mortgagee becomes the purchaser at foreclosure sale Specifically, this statutory limitation provides: the complainant shall also have the right to sue at common law to recover such deficiency, provided no suit at law to recover such deficiency shall be maintained against the original mortgagor in cases where the mortgage is or the purchase price of the property involved and where the original mortgagee becomes the purchaser thereof at foreclosure sale and also is granted a deficiency decree against the original mortgagor Essentially, if the

lender purchases the subject property he has not incurred the damages and in fact may recoup or profit at a later sale. See also, *United Postal Savings Ass'n Nagelbush*, 55 So 2d 1 Fla 1st CA 1, *Taylor Prine*, 12 So 2d 44, 45 Fla 1st CA 1

a One Florida court ruled in a case where the purchase money mortgagee was also the purchaser that the all important distinction in the case was that the purchaser at the foreclosure sale was not the mortgagee but an utter stranger to the parties, a third party purchaser, warranting reversal of the trial court's denial of deficiency judgment. *Lloyd Cannon*, So 2d 105, 10 Fla 1st CA 1

Bankruptcy

1 The automatic stay provisions of 11 S.C. 2 enjoin proceedings against the debtor and against property of the bankruptcy estate

a Typically, the subject real property must be listed in the bankruptcy schedules as part of the estate 11 S.C. 541

2 Foreclosure cannot proceed until the automatic stay is lifted or terminated. If property ceases to be property of the bankruptcy estate, the stay is terminated

a The automatic stay in a second case filed within one year of dismissal of a prior Chapter 11 or 12 automatically terminates 90 days after the second filing, unless good faith is demonstrated 11 S.C. 2 c

b The third filing within one year of dismissal of the second bankruptcy case, lacks entitlement to the automatic stay and any party in interest may request an order confirming the inapplicability of the automatic stay

c Multiple bankruptcy filings where the bankruptcy court has determined that the debtor has attempted to delay, hinder or defraud a creditor may result in the imposition of an order or relief from stay in subsequent cases over a two year period 11 S.C. 2 d 4

debtor's discharge in bankruptcy only protects the subject property to the extent that it is part of the bankruptcy estate

4 Foreclosure cannot proceed until relief from automatic stay is obtained or otherwise terminated, or upon dismissal of the bankruptcy case

Florida's Expedited Foreclosure Statute

1 Enacted by 2010, Fla Stat 2010

2 Filing of a complaint, motion or immediate review of foreclosure by an order to show cause. These complaints are easily distinguishable from the usual foreclosure by the order to show cause

a The failure to file defenses or to appear at the show cause hearing presumptively constitutes conduct that clearly shows that the defendant has relinquished the right to be heard. *Id*

Not the standard practice among foreclosure practitioners, due to limitations:

- a Statute does not foreclose junior liens;
- b Procedures differ as to residential and commercial properties; and
- c Statute only provides for entry of an *in rem* judgment; a judgment on the note or a deficiency judgment cannot be entered under the show cause procedure

Common Procedural Errors

1 Incorrect legal description contained in the:

a Original mortgage requires a court reformation. An error in the legal description of the deed requires the joinder of the original parties as necessary parties to the reformation proceedings. *Chanrai In , Inc , Clement*, 5 So 2d , 40 Fla 5th CA 1 0

b Complaint and lis pendens requires amendment

c Judgment. Rule 1.540 a , Fla R Ci P 2010 governs. For example, an incorrect judgment amount which omitted the undisputed payment of real estate taxes could be amended. *LPP Mortgage Ltd Bank o America*, 2 So 2d 4 2, 4 Fla d CA 2002

d Notice of Sale requires vacating the sale and subsequent resale of property. *yte e elo ment Cor General Electric Credit Cor* , 5 So 2d 1254 Fla d CA 1

e Certificate of title a genuine scrivener's error in the certificate of title can be amended. However, there is no statutory basis for the court to direct the clerk to amend the certificate of title based on a judicial judgment transfers of title, faulty assignments of bid or errors in listing title instructions

1 An error in the certificate of title which originates in the mortgage and is repeated in the deed and notice of sale requires the cancellation of the certificate of title and setting aside of the judicial judgment *Lucas v Barnett Bank of Lee County*, 05 So 2d 115 Fla 2d CA 1. For example, plaintiff's omission of a mobile home and its vehicle identification number VIN included in the mortgage legal description, but overlooked throughout the pleadings, judgment and notice of sale, cannot be amended in the certificate of title. Due process issues concerning the mobile home require the vacating of the sale and judgment

Mortgage Workout Options

1 Reinstatement: Reayment of the total amount in default or payments behind and restoration to current status on the note and mortgage

2 Forbearance: The temporary reduction or suspension of mortgage payments

Reayment Plan: Agreement between the parties whereby the homeowner repays the regularly scheduled monthly payments, plus an additional amount of time to reduce arrears

4 Loan Modification: Agreement between the parties whereby one or more of the mortgage terms are permanently changed

5 Short Sale: Sale of real property for less than the total amount owed on the note and mortgage

a If the lender agrees to the short sale, the remaining portion of the mortgage debt, the difference between the sale price of the property and mortgage balance, the deficiency, may be forgiven by the lender

1 Formerly, the amount of debt forgiven was considered income imputed to the seller and taxable as a capital gain by the IRS

Parker v Laney, 1 F 2d 455, 45 1st Cir 1 50. However,

Federal legislation has temporarily suspended imputation of income
upon the cancellation of debt

Deed in lieu of Foreclosure: The homeowner's voluntary transfer of the
home's title in exchange for the lender's agreement not to file a foreclosure action

Revised 14 10

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To: [Kiesel, Lisa](#)

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Subject: ?FW: Supplement to Supreme Court Opinion SC08-1141

From: Miriam Jugger[SMTP:JUGGERM@FLCOURTS.ORG]

Sent: Wednesday, October 21, 2009 4:21:56 PM

To: Trial Court Administrators; Trial Court Chief Judges

Cc: Blan Teagle; Greg Youchock; Kristine Slayden; P.J. Stockdale;
Arlene Johnson

Subject: FW: Supplement to Supreme Court Opinion SC08-1141

Auto forwarded by a Rule

Dear Trial Court Administrators and Trial Court Chief Judges,

Please find attached a copy of an e-mail that was sent to all the Trial Court Clerks regarding Supreme Court Opinion SC08-1141. Please forward this information to your staff as needed. Please contact me if you have any comments or questions regarding this matter.

Thank you

Miriam Jugger

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From: Miriam Jugger

Sent: Wednesday, October 21, 2009 4:14 PM

20TH CIR 00426

To: Trial Court Clerks

Cc: Blan Teagle; Greg Youchock; Kristine Slayden; Miriam Jugger; Bradley Rich; P.J. Stockdale; Arlene Johnson; Heather Thuotte-Pierson; Rosie Graham; Jim Brown; Vicki Charlton

Subject: Supplement to Supreme Court Opinion SC08-1141

Dear Clerks,

Please review the attached regarding the recent supplement to Supreme Court Opinion SC08-1141 from Mr. Greg Youchock, Chief of Court Services. Please forward this information to all staff involved in Civil and Family court.

Thanks you for your time and commitment to SRS standards

Miriam Jugger

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