- (b) If 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 count is needed to remedy an incorrect legal description contained in the deed and/or mortgage. *Chanrai Inv., Inc. v. Clement,* 566 So. 2d 838, 840 (Fla. 5th DCA 1990). As such, the original grantor and grantee are necessary parties in an action to reform a deed. *Id.*
- 6. 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. Cavendar*, 615 So. 2d 710, 711 (Fla. 3d DCA 1993).

Superior Interests

- 1. First or senior mortgagees are never necessary or proper parties to the foreclosure action by the junior mortgagee. *Garcia v. Stewart,* 906 So. 2d 1117, 1119 (Fla. 4th DCA 2005); *Poinciana Hotel of Miami Beach, Inc. v. Kasden,* 370 So. 2d 399, 401 (Fla. 3d DCA 1979).
 - (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. § 7.2(a), Restatement (Third) of Property; Mortgages (2008). 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, 689 So. 2d 1052, 1054 (Fla. 1997); Sarmiento v. Stockton, Whatley, Davin & Co., 399 So. 2d 1057, 1058 (Fla. 3d DCA 1981).

(1) Priority does not extend beyond the amount of the purchase money advanced. *Citibank v. Carteret Sav. Bank, F.A.,* 612 So. 2d 599, 601 (Fla. 4th DCA 1992).

Association Liens and Assessments

- 1. Condominium Associations Section 718.116(1)(b), Fla. Stat. (2010) establishes the liability of the first mortgagee, its successor or purchaser for condominium assessments and maintenance as the lesser of:
- (a) unit's unpaid common expenses and regular periodic assessments which came due 6 months prior to title acquisition; or
- (b) one per cent 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. § 718.1176, Fla. Stat (2010). This statutory cap, limits the liability of foreclosing mortgagees for 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. v. 2000 Island Boulevard Condo. Ass'n.*, 895 So. 2d 1197 (Fla. 3d DCA 2005. The term "successor or assignee" as used with respect to a first mortgagee includes only a subsequent holder of the first mortgage. § 718.116(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." § 718.116(1)(a), Fla. Stat. (2010).
- 2. Homeowners' Association's Section 720.3085(2)(c)(1), Fla. Stat. (2010) establishes the liability of the first mortgagee, its successor or purchaser for homeowner's assessments and maintenance as the lesser of:
- (a) parcel's unpaid common expenses and regular periodic or special assessments which accrued 12 months prior to acquisition of title; or
 - (b) one per cent of the original mortgage debt.
- (c) Homeowners' Association's lien for assessments had priority over purchase money mortgage where Association's declaration of covenants contained express

provision establishing priority. *Ass'n. of Poinciana Vill. v. Avatar Props.,* 724 So. 2d 585, 587 (Fla. 5th DCA 1999).

- (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. § 720.3085(2)(c), Fla. Stat. (2010).
- (e) Statutory revisions of the 2008 Legislature failed to remedy the potential super-priority of liens recorded prior to July 1, 2008. (Prior statutory version amended by the 2007 Legislature gave homeowner's association liens a priority, even if the mortgage was filed first in time.) Arguably, many homeowners' 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 if the mortgage will likely be resolved on the basis of impairment of contract.
- 3. "Reverse foreclosures" defined where association takes title and pursues lender or where association sets done the motion for summary judgment due to delays by lenders.
- 4. Cannot force lenders to pay association fees during pendency of foreclosure. U. S. Bank Nat'l. Ass'n. as Trustee v. Tadmore, 2009 WL 4281301 (Fla. 3d DCA 12/2/09).

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 v. Pearson,* 135 So. 562 (Fla. 1931).
- (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. § 48.23(1)(b), Fla. Stat. (2010).
- 2. Validity of a notice of lis pendens is one year from filing. § 48.23(2), Fla. Stat. (2010).
- (a) Exception: One year period may be tolled by the trial court's exercise of discretion or appellate review. *Olesh v. Greenberg,* 978 So. 2d 238, 242 (Fla. 5th DCA 2008); *Vonmitschke-Collande v. Kramer,* 841 So. 2d 481, 482 (Fla. 3d DCA 2002).
- 3. Lis pendens automatically dissolved upon dismissal of foreclosure. Rule 1.420(f), Fla. R. Civ. P. (2010).
- (a) Lis pendens revived or reinstated upon the reversal of dismissal. Vonmitschke-Collande, 841 So. 2d at 482.

The Foreclosure Complaint

- 1. Florida Supreme Court Form for foreclosure Form 1.944, Fla. R. Civ. 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. Civ. P. (2010).
- (a) Plaintiff must allege that he is the present owner and holder of the note and mortgage. *Edason v. Cent. Farmers Trust Co.,* 129 So. 698, 700 (Fla. 1930).
- (b) If plaintiff is a nonresident corporation, it must comply with the condition precedent of filing a nonresident bond, upon commencement of the action. § 57.011, Fla. Stat. (2010). If plaintiff has failed to file the requisite bond within 30 days after commencement, the defendant may move for dismissal (after 20 days notice to plaintiff).

- (c) Rule 1.130(a), Fla. R. Civ. P. (2010) mandates that a copy of the note and mortgage be attached to the complaint. *Eigen v. FDIC*, 492 So. 2d 826 (Fla. 2d DCA 1986).
- (d) If note and mortgage assigned, complaint should allege assignment. Attachment of the assignment is preferred but may not be required since the cause of action is based on the mortgage; not the assignment. Rule 1.130(a), Fla. R. Civ. P. (2010), WM Specialty Mortgage, LLC v. Salomon, 874 So. 2d 680, 682 (Fla. 4th DCA 2004); Chemical Residential Mortgage v. Rector, 742 So. 2d 300 (Fla. 1st DCA 1998); Johns v. Gillian, 184 So. 140, 144 (Fla. 1938).
- (e) Junior lien holders allegation is sufficient if it states that the interest of a defendant accrued subsequent to the mortgage and he is a proper party. *InterNat'l. Kaolin Co. v. Vause*, 46 So. 3, 7 (Fla. 1908).
- (f) 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 28 U. 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. § 69.041(2), Fla. Stat. (2010).
- (h) Complaint must include statement of default. Default based on unpaid taxes or insurance must be allege default with particularity. *Siahpoosh v. Nor Props.*, 666 So. 2d 988, 989 (Fla. 4th DCA 1996).
- (i) Complaint should allege compliance with condition precedent, particularly notices.
 - (j) Legal description of the subject real property.
- (k) Attorney fees must be pled or it is waived. *Stockman v. Downs*, 573 So. 2d 835, 838 (Fla. 1991). Allegation as to obligation to pay a reasonable attorney fee is sufficient to claim entitlement. *Wallace v. Gage*, 150 So. 799, 800 (Fla. 1933). The claim of attorney fees is based on contractual language in the note and mortgage.

- (I) 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 is there is a deed problem.
- (m) Deficiency judgment if 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 for the lender's failure to present it prior to it being enforced. *Nat'l. Loan Investors, L.P. v. Joymar Associates,* 767 So. 2d 549, 550 (Fla. 3d DCA 2000).
 - (a) A limited exception applies to lost, destroyed or stolen instruments. Id.
- 2. A lost promissory note is a negotiable instrument. § 673.1041(1), Fla. Stat. (2008); *Thompson v. First Union Bank*, 643 So. 2d 1179 (Fla. 5th DCA 1994).
- (a) Loss or unintentional destruction of a note does not affect its validity or enforcement.
- 3. 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. § 673.3091(2), Fla. Stat. (2004); *Lawyer's Title Ins. Co., Inc. v. Novastar Mortgage, Inc.*, 862 So. 2d 793, 798 (Fla. 4th DCA 2004); *Gutierrez v. Bermudez*, 540 So. 2d 888, 890 (Fla. 5th DCA 1989).
- (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. *Deaktor v. Menendez*, 830 So. 2d 124, 126 (Fla. 3d DCA 2002). Further, plaintiff is not required to prove the circumstances of the loss or destruction of the note to seek enforcement. *Id.*, at 127. 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.

§ 673.3091(1)(a), Fla. Stat. (2010); *MERS v. Badra*, 991 So. 2d 1037, 1039 (Fla. 4th DCA 2008).

- (b) If plaintiff is not in possession of the original note and did not reestablish it, plaintiff cannot foreclose on the note and mortgage. § 673.3091(1), Fla. Stat. (2004); Dasma Invest., LLC v. Realty Associates Fund III, L.P. 459 F. Supp. 2d 1294, 1302 (S.D. Fla. 2006).
- (c) The filing of a duplicate copy of the note is sufficient to satisfy statutory requirements in a foreclosure action. *Perry v. Fairbanks Capital Corp.*, 888 So. 2d 725 (Fla. 5th DCA 2004). If there is no copy, Plaintiff should file a lost note affidavit, ledger or a summary of loan terms.

(1) Checklist for lost note affidavit:

- (a) original principal balance;
- (b) signators and date note executed;
- (c) rate of interest;
- (d) unpaid balance and default date;
- (e) affiant status must be banking representative with knowledge of the particular loan;
- (f) indemnity language, precluding subsequent foreclosure judgment on the same note.
- (d) Where the original note is lost, the court may require indemnification of the borrower for subsequent prosecution on the note and may require a bond to secure same. *Lovingood v. Butler Construction Co.*, 131 So. 126, 135 (Fla. 1930). Consider bonds particularly where there is a securitized trust.
- Mortgage Copy of mortgage is sufficient. Perry, 888 So. 2d at 726.
- (a) Mortgage must contain correct legal description. *Lucas v. Barnett Bank of Lee County,* 705 So. 2d 115, 116 (Fla. 2d DCA 1998). If not, final judgment must be set aside. However, this can be corrected prior to final judgment.

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 U.S.C. § 1692(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 v. Shapiro*, 919 F. Supp. 1564, 1567 (M.D. Fla. 1996), (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).
- 3. Under FDCPA, a debt collector's obligation to send a Notice of Debt is triggered by an initial communication with the consumer. *McKnight v. Benitez,* 176 F. Supp. 1301, 1304 (M.D. Fla. 2001).
- (a) Filing of suit is not "an initial communication which otherwise would have given rise to notice and verification rights." *Acosta v. Campbell,* 2006 WL 3804729 (M.D. Fla. 2006).
- (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 v. Law Offices of David J. Stern,* 266 B.R. 523 (Bank. S.D. Fla. 2001).

Mandatory Mediation of Homestead Foreclosures

- Based on the exponential increase in filings of mortgage foreclosure cases in the Eleventh Judicial Circuit Court, the Chief Judge implemented four Administrative Orders in the following sequence:
- (a) Administrative Order 09-08 applies to all residential foreclosure actions involving homestead properties filed on or after May 1, 2009. AO 09-08 established the 11th Circuit Homestead Access to Mediation Program (CHAMP) 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 \$750.00 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 09-09 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 investor mortgage foreclosures, foreclosures of non-homestead properties and construction lien foreclosures.

- (c) Administrative Order 09-09 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 09-18 responded to the Clerk of the Court's request for formal approval to conduct on-line auctions, in lieu of on-site auctions for the sale of real property.
- 2. On December 28, 2009, the Florida Supreme Court issued Administrative Order 09-54, 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.

3. On February 26, 2010, the Eleventh Judicial Circuit Court issued Administrative Order 10-03 A1 requiring mandatory mediation of all homestead mortgage foreclosure actions subject to the federal Truth in Lending Act, Regulation Z. Administrative Order 10-03 A 1 applies to actions filed after March 29, 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 10-03 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 \$350.00 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 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 nonparticipation in the RMFM Program.
- (c) The Program Manager must transmit the borrower's financial disclosure for mediation no later than 60 days after the Program Manager receives Form A from Plaintiff.
- (d) The Program Manager shall schedule a mediation session no earlier than 60 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

- Due service of process is essential to satisfy jurisdictional requirements over the subject matter and the parties in a foreclosure action. Rule 1.070, Fla. R. of Civ. P. (2010) and Chapters 48 and 49 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 1.070(j), 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 48.031 (1), 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. § 48.27, 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 defective service. *Grosheim v. Greenpoint Mortgage Funding, Inc.*, 819 So. 2d 906, 907 (Fla. 4th DCA 2002). Evidence that person resides at a different address from service address is ineffective service. *Alvarez v. State Farm Mut. Ins. Co.*, 635 So. 2d 131 (Fla. 3d DCA 1994).
- (b) Judgment subject to collateral attack where plaintiff did not substantially comply with the statutory requirements of service.

- 2. Substitute service authorized by Section 48.031 (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. v. Consol. Prop. & Cas. Ins. Co.,* 776 So. 2d 990, 991 (Fla. 3d DCA 2001). (reversed with directions to vacate default judgment and quash service of process since substituted service was not perfected).
- (b) Use of private couriers or Federal Express held invalid. *Id.; FNMA v. Fandino, 751 So. 2d 752, 753* (Fla. 3d DCA 2000), (trial courts voiding of judgment affirmed based on plaintiff's failure to strictly comply with substitute service of process which employed Fedex).
- (c) Evading service of process defined by statute as concealment of whereabouts. § 48.161(1), Fla. Stat. (2010); *Bodden v. Young,* 422 So. 2d 1055 (Fla. 4th DCA 1982).
 - (1) The Florida case which clearly illustrates concealment is *Luckey v. Smathers & Thompson,* 343 So. 2d 53 (Fla. 3d DCA 1977). In *Luckey,* the defendant had "for the purpose of avoiding all legal matters, secreted 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 13 unsuccessful attempts at service, evasion was not proved based on evidence that the property was occupied and defendant's vehicle parked there.) *Wise v. Warner*, 932 So. 2d

- 591, 592 (Fla. 5th DCA 2006). 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 Fid. & Guaranty Co.*, 423 So. 2d 604 (Fla. 3d DCA 1982).
- (3) Statutory requirements satisfied if papers left at a place from which the person to be served can easily retrieve them and if the process server takes reasonable steps to call the delivery to the attention of the person to be served. *Olin Corp. v. Haney*, 245 So. 2d 669 (Fla 4th DCA 1971).
- 3. Service on a corporation may be served on the registered agent, officer or director. Section 48.081(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 § 48.031, Fla. Stat. (2010).

Constructive Service by Publication

- 1. Section 49.011(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 49.021-40.041, of the Florida Statutes govern constructive service or service by publication. Constructive service statutes are strictly construed against the party seeking to obtain service. *Levenson v. McCarty*, 877 So. 2d 818, 819 (Fla. 4th DCA 2004).
- 3. Service by publication only available when personal service cannot be made. Godsell v. United Guaranty Residential Insurance, 923 So. 2d 1209, 1212 (Fla. 5th DCA 2006), (service by publication is void when plaintiff knew of the defendant's Canadian residency, but merely performed a skip trace in Florida and made no diligent search and inquiry to locate Canadian address); Gross v. Fidelity Fed. Sav. Bank of Fla., 579 So. 2d 846, 847 (Fla. 4th DCA 1991), (appellate court reversed and remanded to quash service of 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. *Dor Cha, Inc. v. Hollingsworth,* 8786 So. 2d 678, 679 (Fla. 4th DCA 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 49.041, 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, of 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 49.051, 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 § 49.09, 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 for two consecutive weeks, with proof of publication filed upon final publication. §49.10(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, 704 So. 2d 1110, 1112 (Fla. 5th DCA 1998), (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). However:
 - (1) Better practice is to file an affidavit of diligent search that contains all details of the search. *Demars v. Vill. of Sandalwood Lakes Homeowners Ass'n.*, 625 So. 2d 1219, 1222 (Fla. 4th DCA 1993), (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 1.924, 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;
- (3) Public records search of criminal/civil actions;
- (4) Telephone listings;
- (5) Tax collector records;
- (6) Utility Co. records;
- (7) Last known employer;
- (8) U. S. Post Office;
- (9) Local police department, correctional department;
- (10) Local hospitals;
- (11) Armed Forces of the U.S.;
- (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) Voter registration records.
- (f) The plaintiff bears the burden of proof to establish the legal sufficiency of the affidavit when challenged. *Id.* If constructive service of 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 Home View Corp. v. Guggino,* 10 So. 3d 164, 165 (Fla. 3d DCA 2009).