

## **Schatzberg, Beth**

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**From:** Schatzberg, Beth  
**Sent:** Monday, September 13, 2010 10:06 AM  
**To:** Sequeira, Maria  
**Subject:** Attorney Ad Litem

Here's another name for an attorney ad litem that Marshall Watson & some of the judges use frequently to add to our list –

Julia B. Kite-Powell, Esq.  
Julia B. Kite-Powell, P.A.  
P.O. Box 18645  
Tampa, Florida 33679-8672  
813-288-9594 telephone  
813-354-3529 facsimile

**Beth M. Schatzberg**  
Case Manager  
Sect. II Mortgage Foreclosures  
Hillsborough County Courthouse  
800 E. Twiggs St., Ste. 425  
(813) 272-8578

## Moreno,Elisa

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**From:** Moreno,Elisa  
**Sent:** Monday, August 09, 2010 3:50 PM  
**To:** 'Payne, Phylcia'; Section1  
**Cc:** Hickmon,Angelina  
**Subject:** RE: Originals not in the file

I sent the request in a separate email ;)

**From:** Payne, Phylcia [<mailto:Paynep@hillsclerk.com>]  
**Sent:** Monday, August 09, 2010 3:49 PM  
**To:** Moreno,Elisa; Section1  
**Cc:** Hickmon,Angelina  
**Subject:** RE: Originals not in the file

Ok, no problem. What is the case # for this particular document?

**From:** Moreno,Elisa [<mailto:morenoem@fljud13.org>]  
**Sent:** Monday, August 09, 2010 3:47 PM  
**To:** Section1  
**Cc:** Hickmon,Angelina  
**Subject:** Originals not in the file  
**Importance:** High

Good afternoon,

I have a file where Banner indicates that we have received the original note and mortgage; however, they are not in the file. The date, notice of filing, per Banner is July 19<sup>th</sup>. We've been asked to reach out and obtain the originals for the file prior to the hearing.

Angelina and I will be requesting these documents via email but we are open to suggestions. 😊

Please let me know if you have any questions or concerns.

Thank you!

Elisa

## **Wells, Tracy**

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**From:** Wells, Tracy  
**Sent:** Tuesday, August 03, 2010 10:24 AM  
**To:** Melendi, Rick  
**Subject:** RE: HELP FROM STAFF

Ok.

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**From:** Melendi, Rick  
**Sent:** Tuesday, August 03, 2010 10:24 AM  
**To:** Wells, Tracy  
**Subject:** RE: HELP FROM STAFF

Come on over

---

**From:** Wells, Tracy  
**Sent:** Tuesday, August 03, 2010 10:14 AM  
**To:** Melendi, Rick  
**Subject:** HELP FROM STAFF

Rick,

I don't think that it was a good idea to list what we had for staff to do. Everyone so far has volunteered to do research. We will not need that much research. We should not have given them an option, this may create a problem.

Banner should not be installed on all of their computers so that they can assist for only a couple of hours a week. It does not make sense to me.

When you have some time, let's get together to go over the lists that I have from the Executive Team.

Thank you.

T.

## Wells, Tracy

---

**From:** Wells, Tracy  
**Sent:** Friday, September 17, 2010 11:41 AM  
**To:** Melendi, Rick  
**Subject:** RE: Sylvia Landis Requests re: Section I & II Dockets

Am I suppose to give her the information?

T.

---

**From:** Melendi, Rick  
**Sent:** Friday, September 17, 2010 11:29 AM  
**To:** Wells, Tracy  
**Subject:** Re: Sylvia Landis Requests re: Section I & II Dockets

Thank you.

---

**From:** Wells, Tracy  
**To:** Melendi, Rick  
**Sent:** Fri Sep 17 11:24:44 2010  
**Subject:** RE: Sylvia Landis Requests re: Section I & II Dockets  
Rick,

I just opened your e-mail, will get that information for you.

Note: The lady is in the lobby asking for me am I suppose to give her this information?

---

**From:** Melendi, Rick  
**Sent:** Thursday, September 16, 2010 6:14 PM  
**To:** Wells, Tracy  
**Subject:** Sylvia Landis Requests re: Section I & II Dockets

Tracy,

I spoke with Dave regarding Ms. Landis' request. Please pull and bring me copies of the dockets you have from Monday, August 16, 2010 for both Sections I & II.

Thanks.

**Bridenback, Mike**

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**From:** Bridenback, Mike  
**Sent:** Tuesday, May 11, 2010 11:09 AM  
**To:** Menendez, Manuel; Barton, James  
**Subject:** Alternative Allocation Plans  
**Attachments:** FORECLOSURE AND ECONOMIC RECOVERY PROGRAM.docx

Attached are 2 alternatives for your consideration. Alternative 1 reduces the circuit senior judge allocation by 100 days which would be equivalent to going to a 4 day work schedule for 2 senior judges instead of a 5 day work schedule. As a result, we can maintained 5 case manager and 2 secretary positions with a significant reduction in operating expenses. Alternative II restores the circuit senior judge day allocation to 520 days which would be a 5 day work schedule for 2 senior judges, reduces the case manager positions from 5 to 4, maintains the 2 secretary positions and slightly increases the expense allocation in comparison to Alternative 1.

The difference between the 2 alternatives is that alternative 2 trades 1 case manager for 100 senior judge days.

\*\*\*\*\*

*Michael L. Bridenback*  
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**FORECLOSURE AND ECONOMIC RECOVERY PROGRAM**

**Original Plan**

**Alternative 1**

**Alternative 2**

780 Senior Judge Days

420 Senior Judge Days

520 Senior Judge Days

7 Case Managers

5 Case Managers

4 Case Managers

3 Admin Secretaries

2 Admin Secretaries

2 Admin Secretaries

\$40,612 – Expenses

\$22,194 – Expenses

\$23,820 - Expenses

Total Budget - \$687,264

Total Budget - \$427,504

Total Budget - \$427,504

**Bridenback, Mike**

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**From:** Laura Rush [REDACTED]  
**Sent:** Tuesday, October 19, 2010 11:43 AM  
**To:** Bridenback, Mike  
**Subject:** RE: YOUR REQUEST

Mike,  
Yes – if we are indeed the custodians of these records. If we are, he should direct his request to me at [REDACTED]  
[REDACTED]  
Laura

---

**From:** Bridenback, Mike [REDACTED]  
**Sent:** Tuesday, October 19, 2010 11:41 AM  
**To:** Laura Rush  
**Subject:** FW: YOUR REQUEST

Should I inform this man that he would need to make his public records request to OSCA since you are the custodian of these records?

\*\*\*\*\*

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[REDACTED]  
[www.fljud13.org](http://www.fljud13.org)



---

**From:** Wells, Tracy  
**Sent:** Tuesday, October 19, 2010 11:38 AM  
**To:** Bridenback, Mike  
**Subject:** YOUR REQUEST

Mike,  
This is the gentlemen that called last week asking for this information and I asked him to do a public records request and this is what he sent.

Should I forward it to Heather or David?

**Note:** I am not sure if I already sent this to you. He called me about it again and I could not find it in my e-mails.

T.

---

**From:** David Caldwell [REDACTED]  
**Sent:** Tuesday, October 19, 2010 10:44 AM  
**To:** Wells, Tracy  
**Subject:** Fw: YOUR REQUEST

----- Forwarded Message -----

**From:** David Caldwell <[REDACTED]>  
**To:** "Wells, Tracy" <[REDACTED]>  
**Sent:** Wed, October 13, 2010 3:26:34 PM  
**Subject:** Re: YOUR REQUEST

Tracy Wells,

Hello my name is David Caldwell president and founder of Father's For Children's Rights. We are a 527 Non-Profit Political Action Committee. I am formally requesting the state funding for the 13th judicial circuit as well as the 2nd district court of appeals. I would like this to include administrative costs & salary's, judges salary's, judges assistants, and any other expenses that are funded by the state for the 13th judicial & 2nd DCA. Please have it in a format that is broken down decisively.

Thank You,  
David Caldwell  
813-390-7043 cell  
[REDACTED]

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**From:** "Wells, Tracy" <[REDACTED]>  
**To:** [REDACTED]  
**Sent:** Wed, October 13, 2010 11:44:47 AM  
**Subject:** YOUR REQUEST

Mr. Caldwell,

I received your request on voice mail for the 13<sup>th</sup> Judicial Circuit. However, I have to request this information in writing as a public records request. Please send me the information that you need (exactly ) in writing.

Thank you.

Tracy Wells.



## Melendi, Rick

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**From:** Bridenback, Mike  
**Sent:** Monday, November 15, 2010 10:20 AM  
**To:** Melendi, Rick  
**Subject:** FW: Letter to Chief Justice Canady  
**Attachments:** Ltr to Chief Justice Canady.FINAL.pdf

**Importance:** High

Let's discuss

\*\*\*\*\*

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**From:** Menendez, Manuel  
**Sent:** Monday, November 15, 2010 10:17 AM  
**To:** Bridenback, Mike; Barton, James  
**Subject:** FW: Letter to Chief Justice Canady  
**Importance:** High

We made it first on the list of evil doers! We MUST train everyone who deals with the public to emphasize that our court proceedings are indeed OPEN to the public. Do we have a record of who took this alleged call, and who it was who called? I'd like advise the Chief Justice TODAY.

---

**From:** Lisa Goodner [<mailto:goodnerl@flicourts.org>]  
**Sent:** Monday, November 15, 2010 9:51 AM  
**To:** Trial Court Chief Judges; Trial Court Administrators  
**Cc:** OSCA-MANAGERS  
**Subject:** FW: Letter to Chief Justice Canady

FYI.

Lisa

---

**From:** Larry Schwartztol [<mailto:lschwartztol@aclu.org>]  
**Sent:** Friday, November 12, 2010 7:07 PM  
**To:** Craig Waters  
**Subject:** Letter to Chief Justice Canady

Craig,

I hope this email finds you well. As I mentioned earlier today, the ACLU is working with a coalition of organizations representing members of the Florida news media to protest barriers to access to foreclosure proceedings around the state of Florida. The attached letter will be delivered by UPS to the Chief Justice on Monday morning, and we expect to issue a

press release that afternoon. In order to give the Chief Justice advance notice, we wanted to send this to you now. If you wouldn't mind forwarding this to the Chief Justice, I would greatly appreciate it.

Best,

Larry

Larry Schwartztol | Staff Attorney

*Racial Justice Program*

**The American Civil Liberties Union**

125 Broad Street, 18<sup>th</sup> Floor | New York, NY 10004

Phone: 212-519-7849

This e-mail message is intended only for the named recipient(s) above, and may contain information that is confidential or privileged. If you are not the intended recipient, please advise the sender immediately by reply e-mail and delete this message and any attachments without retaining a copy.



**Florida Press Association**  
336 E. College Avenue, Suite 203  
Tallahassee, FL 32301  
(850) 521-1199  
Fax (850) 577-3629

Chief Justice Charles T. Canady  
Florida Supreme Court  
500 South Duval Street  
Tallahassee, FL 32399-1925

November 12, 2010

Dear Chief Justice Canady,

We write to express our concern that the right to open access to judicial proceedings is being unduly impeded in foreclosure proceedings around the state. Our organizations have received numerous reports that extraordinary barriers to access are preventing members of the general public, as well as representatives of the news media, from observing foreclosure proceedings in judicial circuits around the state. We believe these barriers undercut the transparency of the judicial process; they also violate the strong presumption of open access to judicial proceedings under Florida law. We urge you to take action to secure the public's right to observe the workings of the judicial system.

As you know, Florida law recognizes a strong presumption in favor of open access to judicial proceedings. We have no objection, of course, to ordinary security screening measures. We are concerned, however, that the barriers to access here go far beyond such measures, leaving members of the public and press subject to the discretion of individual foreclosure judges to admit or exclude them.

The reports we have received come from all around the state, and although the precise nature of the barriers to access varies, a troubling pattern emerges: foreclosure divisions recently established by the judicial circuits have been operating under a presumption of closure to members of the general public, rather than the presumption of openness mandated by Florida law. An illustrative, but not exhaustive, list of encounters that have been reported to our organizations since August 2010 follows:

- A court observer in Hillsborough County called the court to ask about the rules governing attendance at foreclosure proceedings and was told that the proceedings were not open to the public.
- A pro se defendant in Duval County was told by a member of court security that she could not access foreclosure proceedings because only attorneys were permitted.
- A court observer called the Orange County courthouse to ask about attending foreclosure proceedings. She was informed that foreclosure hearings were held "in private chambers" and therefore not open to the public.

- In Citrus County, an individual preparing to mount a pro se defense in his own foreclosure case attempted to attend foreclosure hearings in advance of his own so that he could know what to expect when his case was heard. He was told that foreclosure hearings are “private” and take place in judges’ chambers, and that he would not be permitted to observe them.
- Most recently, a legal aid attorney in Jacksonville attended a foreclosure proceeding accompanied by a reporter from Rolling Stone Magazine. Neither the attorney nor the reporter did anything disruptive to the proceedings. At one point the reporter left the proceedings in order to interview a pro se litigant whose case had just been heard. Later that day, the judge sent an email to the attorney castigating her for bringing the reporter into the proceedings. He stated that, while “attorneys are welcome in Chambers at their leisure,” members of the media are “permitted” entry only upon “proper request to the security officer.” He further informed the attorney that she “did not have authority to take anyone back to chambers without proper screening” and stated that her “apparent authorization that the reporter could pursue a property owner immediately out of Chambers into the hallway for an interview” may be “sited [sic] for possible contempt charges in the future.”<sup>1</sup>

In raising our concerns about this pattern of exclusion, we rely on the extensive body of case law that has made Florida a model for open government. Systematically excluding members of the press and public from judicial foreclosure proceedings violates the robust guarantee of open access to courts provided by Florida law. This Court has held that “both civil and criminal court proceedings in Florida are public events and adhere to the well established common law right of access to court proceedings and records.” *Barron v. Fla. Freedom Newspapers, Inc.*, 531 So. 2d 113, 116 (Fla. 1988); see also Fla. R. Jud. Admin. 2.420 (codifying public right of access to records of the judiciary). *Barron* articulated this right of access in forceful terms. It emphasized that “a strong presumption of openness exists for all court proceedings” and outlined the carefully circumscribed exceptions to this broad rule:

[C]losure of court proceedings or records should occur only when necessary (a) to comply with established public policy set forth in the constitution, statutes, rules, or case law; (b) to protect trade secrets; (c) to protect a compelling governmental interest [e.g., national security; confidential informants]; (d) to obtain evidence to properly determine legal issues in a case; (e) to avoid substantial injury to innocent third parties [e.g., to protect young witnesses from offensive testimony; to protect children in a divorce]; or (f) to avoid substantial injury to a party by disclosure of matters protected by a common law or privacy right not generally inherent in the specific type of civil proceeding sought to be closed.

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<sup>1</sup> Since the incident in Duval County was particularly egregious, we have also asked that Chief Judge Moran consider appropriate action.

*Id.*, at 118. Even in these exceptional circumstances, “before entering a closure order, the trial court shall determine that no reasonable alternative is available to accomplish the desired result, and, if none exists, the trial court must use the least restrictive closure necessary to accomplish its purpose.” *Id.*

The protection of public access to judicial proceedings serves fundamental constitutional values. In particular, the “value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known.” *Sarasota Herald-Tribune v. State*, 924 So. 2d 8, 12 (Fla. 2d DCA 2005) (quoting *Press-Enter. Co. v. Super. Ct.*, 464 U.S. 501, 508 (1984)). “A trial courtroom is a public place where people have a general right to be present, and what transpires in the courtroom is public property.” *Plaintiff B v. Francis*, No. 5:08-cv-79, 2010 WL 503067, \*2 (N.D. Fla. Feb. 5, 2010). Foreclosure proceedings are currently a matter of intense public interest. Indeed, the media has, in recent months, scrutinized them for possible procedural deficiencies. *See, e.g.*, Gretchen Morgenson and Geraldine Fabrikant, *Florida’s High-Speed Answer to a Foreclosure Mess*, N.Y. TIMES, Sept. 14, 2010; Polyana da Costa, *Before Foreclosing, Judges Must Hear Out Homeowners*, MIAMI DAILY BUS. REV., Oct. 14, 2010.

As the examples outlined above show, Florida’s presumption of openness is being inverted in the context of foreclosure proceedings: courts across the state are effectively imposing a presumption of closure, which may be overcome only by special permission to observe proceedings. In effect, only those who actively assert their right of access in the face of initial barriers, and then ultimately receive permission, may exercise their right to observe foreclosure hearings.

Under Florida law, there are few justifications that can counterbalance the right to access. Even when those exceptional circumstances exist, the court must still determine that no more narrowly tailored alternative is available. *Barron*, 531 So. 2d at 118; *see also Globe Newspaper Co. v. Super. Ct. for the County of Norfolk*, 457 U.S. 596 (1982) (invalidating statute closing trials for certain sex offenses involving minors where state had a “compelling” interest in protecting minors’ privacy but where the court “offered no empirical support” that closure would effectively further that interest). There is no indication that closure of foreclosure courts occurs only when such rigorous analysis has taken place. Indeed, the opposite appears to be true: by choosing to conduct foreclosure hearings in “private” conference rooms or judicial chambers and treat those as closed proceedings, the burden shifts to members of the press or public to convince the court to allow access.

We recognize that the heavy volume of foreclosure cases has led to difficulties finding judges and courtrooms to hear the cases. As a result, some cases are being held in chambers for lack of an available traditional courtroom. Nevertheless, the proceedings must be open, even if they are held temporarily in a smaller and less formal physical

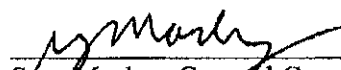
setting than usual. While we understand the necessity for ordinary and uniform security screening procedures, the unavailability of a traditional courtroom cannot justify a deprivation of the rights established under Florida law and the U.S. Constitution.

This Court has noted that the press plays an indispensable role in maintaining "the judicial system's credibility in a free society." *Barron*, 531 So. 2d at 116. That credibility cannot be maintained when members of the public and media are dependent on the indulgence of the presiding judge to allow them to observe important judicial proceedings.

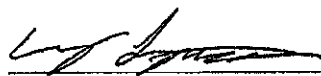
It is our sincere hope that we, and other representatives of the media, will be able to avoid instituting litigation over the issue of access to foreclosure proceedings. We do face certain time constraints, however, because Florida Rule of Appellate Procedure 9.100(d) provides for expedited review of orders excluding the public and media from judicial proceedings, and it requires such petitions to be filed within 30 days of an exclusion order.<sup>2</sup>


Accordingly, we respectfully urge you to take corrective action to ensure citizen and press access as guaranteed by Florida's right-of-access jurisprudence. In particular, we ask that you promulgate an Administrative Order or take other expeditious and appropriate action to ensure that both the public and media may observe proceedings consistent with Florida law and subject only to ordinary security measures

We thank you for your attention to this important matter.

  
Sam Morley, General Counsel  
The Florida Press Association


  
Talbot D'Alemberte, Bar No. 0017529  
The Florida Press Association

  
Larry Schwartz, Staff Attorney  
The American Civil Liberties Union

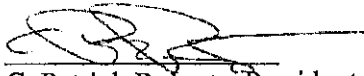
  
Randall Marshall, Legal Director  
The American Civil Liberties Union of Florida

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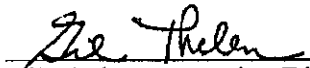
<sup>2</sup> The incident in Duval County occurred on October 26<sup>th</sup>. Accordingly, the last day to file a petition for review pursuant to Rule 9.100(d) is November 29<sup>th</sup>.



James Parker Rhea, Director & General Counsel  
The First Amendment Foundation



C. Patrick Roberts, President & CEO  
Florida Association of Broadcasters



Gil Thelen, Executive Director  
The Florida Society of Newspaper Editors



James Denton, Editor  
The Florida Times-Union

## Albury, Janice

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**From:** Bridenback, Mike  
**Sent:** Tuesday, August 03, 2010 1:41 PM  
**To:** Melendi, Rick; Albury, Janice  
**Subject:** FW: Sr. Judge Web-based System for FY 2010/11 Economic Recovery Funding  
**Attachments:** sr. judge foreclosure administration.pdf; 2010 Supplemental Payroll Schedule.pdf; INSTRUCTIONS FOR ENTERING SENIOR JUDGE DAYS OUT OF FORECLOSURE ALLOCATION.PDF

**Importance:** High

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*Michael L. Bridenback*

Court Administrator  
800 E. Twiggs Street, Suite 604  
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[bridenml@fljud13.org](mailto:bridenml@fljud13.org)  
[www.fljud13.org](http://www.fljud13.org)



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**From:** Charlotte Jerrett [<mailto:jerrettc@flcourts.org>]

**Sent:** Tuesday, August 03, 2010 1:37 PM

**To:** Trial Court Administrators

**Cc:** Lisa Goodner; Blan Teagle; Gary Phillips; Dorothy Wilson; Delcynth Schloss; Michelle Ogletree; Denise Overstreet; Don Lubbers; Mandy Couch; Steven Hall; Kristine Slayden; Heather Thuotte-Pierson; Jackie Knight

**Subject:** Sr. Judge Web-based System for FY 2010/11 Economic Recovery Funding

**Importance:** High

Hi All –

Attached is the information I promised to send from yesterday's call. The system is up and running and all circuit allocations have been input. See attached files:

1. General Policy Memorandum
2. Supplemental Payroll Schedule
3. Instructions to Input Requests for Payment

Thanks again for your patience and please feel free to call if you have any questions.

C.

Charlotte Jerrett  
Administrative Services Division  
Office of the State Courts Administrator  
(850) 488-9922  
(850) 488-3744 fax



**Office of the State Courts Administrator**

Charlotte Jerrett  
Director of Administrative Services  
Phone: (850) 488-9922 Fax: (850) 488-3744  
e-mail: jerrettc@flcourts.org

**M E M O R A N D U M**

**TO:** Trial Court Administrators

**FROM:** Charlotte Jerrett *Charlotte*

**DATE:** August 3, 2010

**SUBJECT:** Policy Guidelines for the Administration of Resources and Use of the Sr. Judge Web-based System for FY 2010/11 Economic Recovery Funding

This information is provided to you in follow-up to our conference call yesterday regarding payment request processing for sr. judges who work on real property/mortgage foreclosure cases for the special initiative targeted to dispose of 62% of backlogged cases. It is critical that these resources are only used for this purpose and remain segregated from payment and reporting of your regular allotment of sr. judge days. Listed below is a summary of the main points we discussed on the call:

- ✓ Sr. Judges will no longer have the ability to request payment directly in the web-based system. This change is necessary to prohibit potential errors or miscalculation in keeping the resources and funds separately accounted for. All payment requests must be submitted through Court Administration with the appropriate documentation. A "timesheet" form has been provided on the system log-in page for this purpose, or circuits may use their own system of documentation. This documentation is necessary for prudent resource management and audit tracking purposes.
- ✓ Upon log-in to the payment processing screen, you will see the addition of a drop-down menu and must now choose between the "regular" and "foreclosure" allocation when processing requests for payment. Accordingly, you will make the selection based on the type of payment request you are processing.

Memorandum  
August 2, 2010  
Page Two

- ✓ If a sr. judge works on caseload assigned from the “regular” allocation for part of the day and then works on caseload assigned from the “foreclosure” allocation for another part of the same day, the entire eight hour request for payment must be submitted from the “regular” allocation, as no portion of the “foreclosure” allocation may be used to pay for caseload associated with and assigned through the “regular” allocation. We simply do not have the ability to split-pay for hours worked between the two different funding sources.
- ✓ Payment for days worked from the “regular” allocation of resources must be submitted separately from payment for days worked from the “foreclosure” allocation. As such, you may have two separate submissions for one judge in any given 2-week submission period, depending on how you assign the caseload and resources.
- ✓ If a sr. judge works on “foreclosure” cases and also works on cases assigned through the “regular” allocation, the judge will receive two separate payment vouchers – one for hours worked from the “foreclosure” allocation and one for hours worked from the “regular” allocation.
- ✓ Travel expenses associated with days worked from the “foreclosure” allocation must be paid from the 22 20 XX 00 375 Organization Code, while travel expenses associated with days worked from the “regular” allocation of resources will continue to be paid from your local circuit expense budget. Forms for travel reimbursement requests have been updated and are available on the log-in screen.
- ✓ Attached are the TCBC approved allocations of both “regular” and “foreclosure” sr. judge days – Cost Centers 630 and 375, respectively.

Thank you again for your patience while we worked through the necessary administrative changes to the web-based system. If you or your judges have any questions, please do not hesitate to contact me directly at (850) 488-9922.

Attachments

cc: Lisa Goodner  
Blan Teagle  
Dorothy Wilson  
Jackie Knight  
Gary Phillips  
Delcynth Schloss  
Michelle Ogletree  
Denise Overstreet  
Mandy Couch  
Don Lubbers

13TH CIR 00718

**Trial Court Budget Allocations  
FY 2010-2011**

Budget Allocation	
Circuit	FY 2010-11 Allotment
0	100
1	249
2	162
3	89
4	359
5	298
6	440
7	281
8	151
9	442
10	263
11	761
12	196
13	398
14	138
15	348
16	47
17	549
18	276
19	197
20	343
<b>Total</b>	<b>6,087</b>

Personnel and Economic Development Funding Proposal FY 2010-2011	
Circuit	FY 2010-11 Allotment
0	0
1	106
2	60
3	0
4	493
5	206
6	237
7	260
8	50
9	705
10	52
11	490
12	270
13	557
14	92
15	716
16	142
17	250
18	744
19	240
20	438
<b>Total</b>	<b>6,108</b>

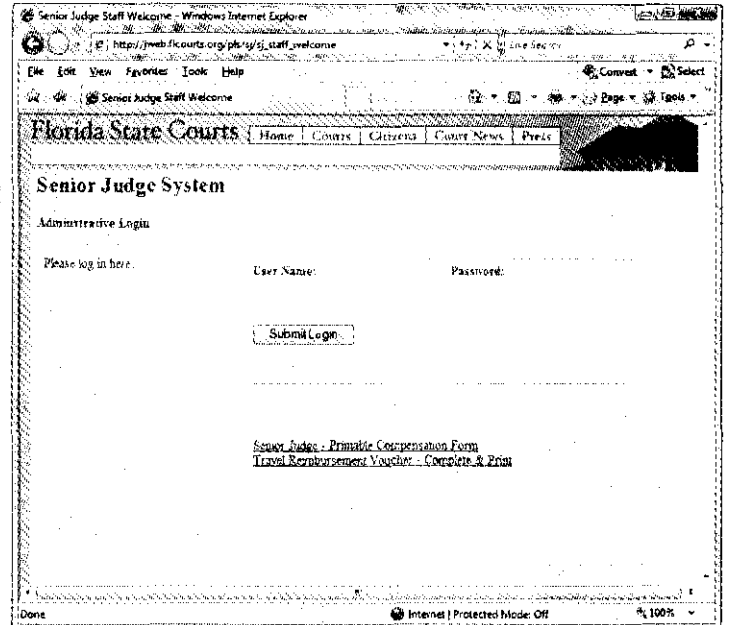
**2010 SUPPLEMENTAL PAYROLL DEADLINES FOR  
PERSONNEL PROCESSING**

<b>MONTH</b>	<b>PAYROLL DEADLINE</b>	<b>SUPPLEMENTAL PAY DATE</b>
JANUARY	12/31/09	01/11/10
	01/14/10	01/25/10
FEBRUARY	01/28/10	02/08/10
	02/11/10	02/22/10
MARCH	02/25/10	03/08/10
	03/11/10	03/22/10
APRIL	03/25/10	04/05/10
	04/08/10	04/19/10
MAY	04/22/10	05/03/10
	05/06/10	05/17/10
JUNE	05/20/10	06/01/10
	06/03/10	06/14/10
	06/17/10	06/28/10
JULY	07/01/10	07/12/10
	07/15/10	07/26/10
AUGUST	07/29/10	08/09/10
	08/12/10	08/23/10
SEPTEMBER	08/26/10	09/07/10
	09/09/10	09/20/10
OCTOBER	09/23/10	10/04/10
	10/07/10	10/18/10
NOVEMBER	10/21/10	11/01/10
	11/04/10	11/16/10
	11/18/10	11/29/10
DECEMBER	12/02/10	12/13/10
	12/16/10	12/27/10
JANUARY	12/30/10	01/10/11
	01/13/11	01/24/11
	01/27/11	02/07/11

## INSTRUCTIONS FOR ENTERING SENIOR JUDGE DAYS OUT OF THE FORECLOSURE ALLOCATION

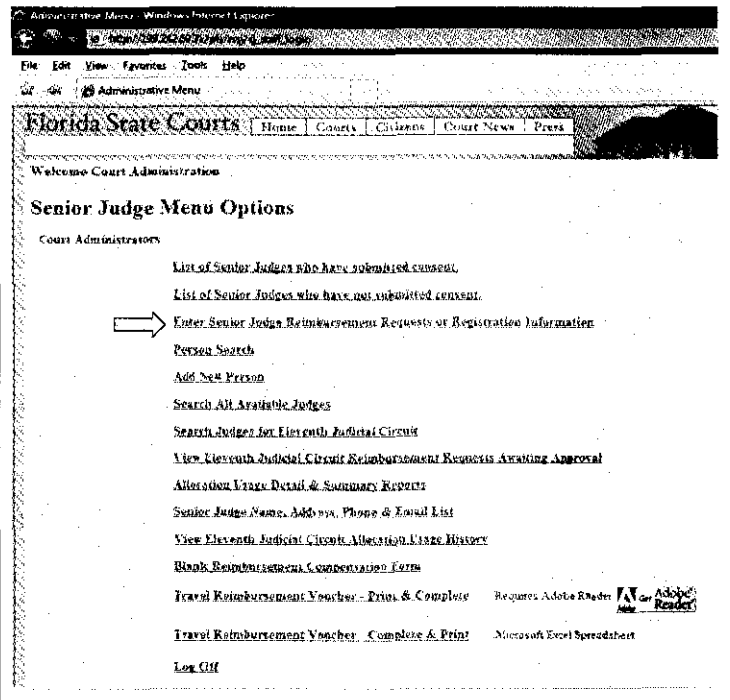
### LOGGING IN

1. Open your internet browser and go to the Senior Judge System login page.  
**[http://jweb.flcourts.org/pls/sj/sj\\_staff\\_welcome](http://jweb.flcourts.org/pls/sj/sj_staff_welcome)**
2. Enter your user name and password and click **Submit Login**.
3. If you do not have a user name and password or have forgotten your user name or password, please request them at [SrJudgeSystemHelp@flcourts.org](mailto:SrJudgeSystemHelp@flcourts.org).
4. If you only need to print a compensation form, click the **Senior Judge - Printable Compensation Form** link.
5. If you only need to complete and print a travel reimbursement voucher, click the **Travel Reimbursement Voucher - Complete & Print** link.



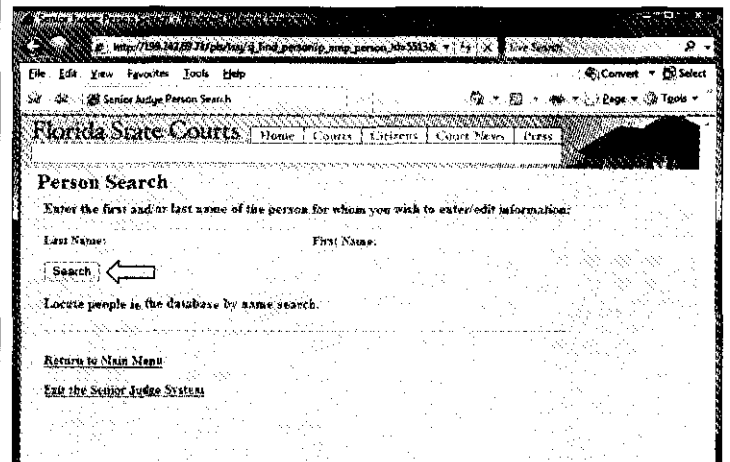
### ENTER REQUEST FOR REIMBURSEMENT

1. Click on the **Enter Senior Judge Reimbursement Requests or Registration Information** link.



2. Type the senior judge's last name in the **Last Name** box and/or type the senior judge's first name in the **First Name** box.

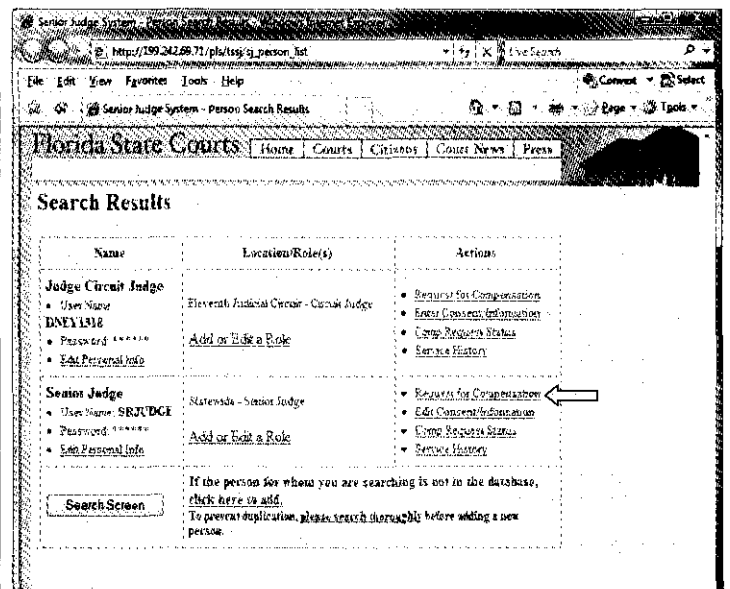
3. Click **Search**.



4. Find the appropriate senior judge in the search results.

**Note:** Look under the second column (Location/Role(s)) for a "Statewide - Senior Judge" role.

5. Click the **Request for Compensation** link.



6. Select the appropriate fiscal year from the **Select Fiscal Year of Service** dropdown.

**Note:** The selection defaults to the current fiscal year.

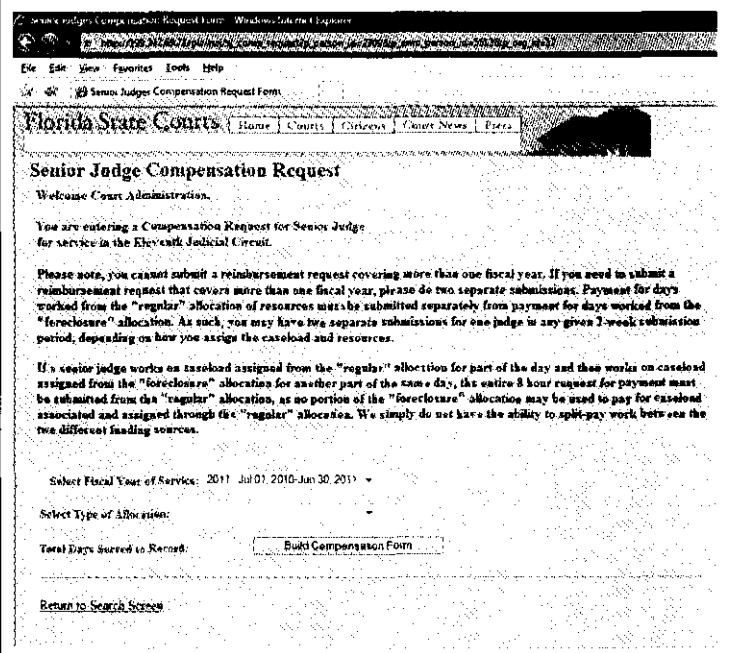
7. Select the appropriate allocation fund from the **Select Type of Allocation** dropdown.

**Note:** You must select either "Regular Senior Judge Allocation" or "Foreclosure Senior Judge Allocation." The selection cannot be blank.

8. Type the number of days served in the **Total Days Served to Record** box.

**Note:** You must enter at least one day to build the compensation form. This field cannot be blank. Payment for days worked from the "regular" allocation of resources must be submitted separately from payment for days worked from the "foreclosure" allocation.

9. Click **Build Compensation Form**



10. Select a county from the **Select a county if applicable** dropdown.

11. Enter the actual dates of service under the **Service Date** column.

**Note:** Dates must be entered in MM/DD/YYYY format.

12. Enter the number of hours worked for the appropriate division.

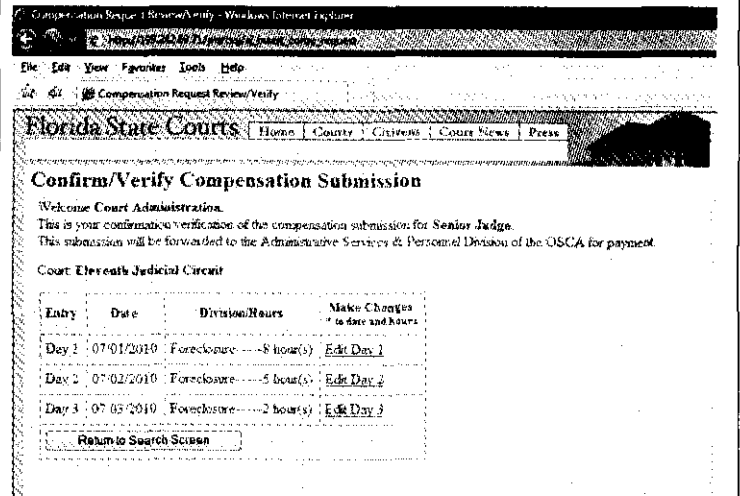
**Note:** If you are entering senior judge days for the "foreclosure" allocation, then you will only be able to submit hours for the foreclosure division. See the following screenshot for a view of the compensation form for "regular" allocation.

13. Click **Submit Compensation Form** once all days and hours have been entered.

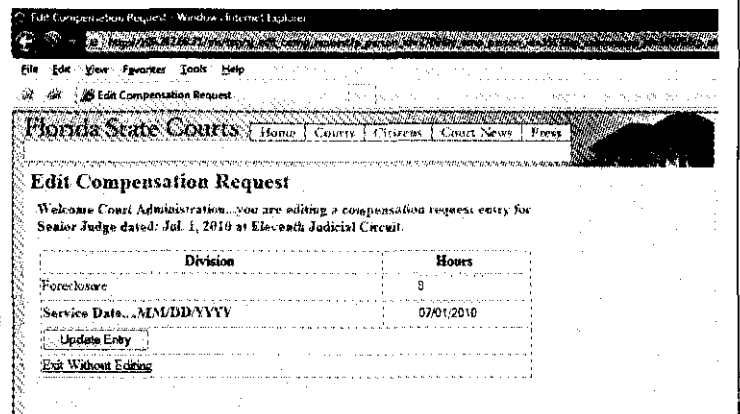
### Foreclosure Allocation Compensation Form:

### Regular Allocation Compensation Form:

14. Confirm your compensation submission and print for your records. Click **Return to Search Screen** to exit.
15. If you have entered an incorrect date or incorrect hours, click **Edit Day #** link to make corrections.

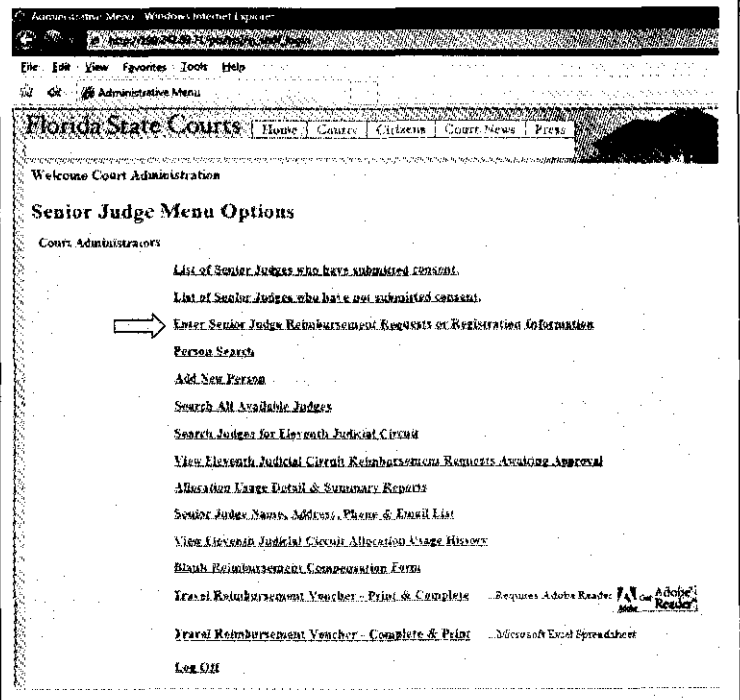


16. Make appropriate corrections and click Update Entry.  
**Note: If you have submitted a compensation request from an incorrect allocation fund, please contact [SrJudgeSystemHelp@flcourts.org](mailto:SrJudgeSystemHelp@flcourts.org).**



## CHECK STATUS OF COMPENSATION REQUEST

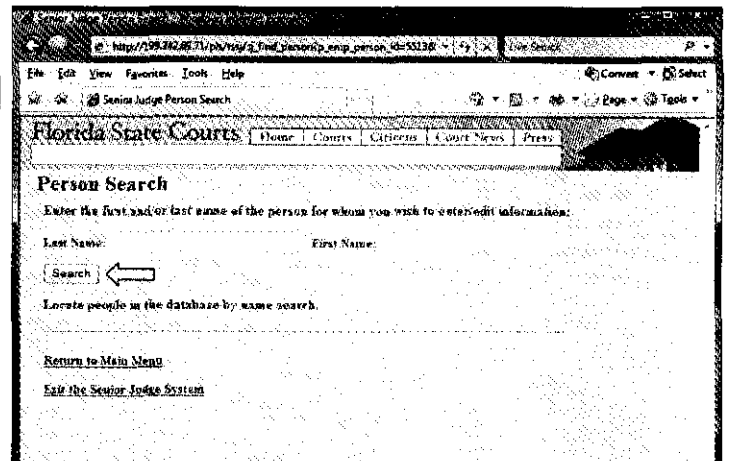
1. Click on the **Enter Senior Judge Reimbursement Requests or Registration Information** link.





2. Type the senior judge's last name in the **Last Name** box and/or type the senior judge's first name in the **First Name** box.

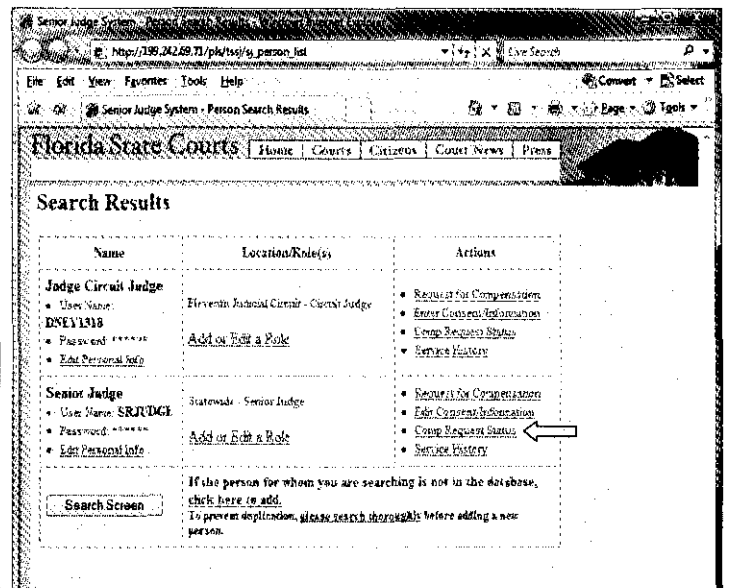
3. Click **Search**.



4. Find the appropriate senior judge in the search results.

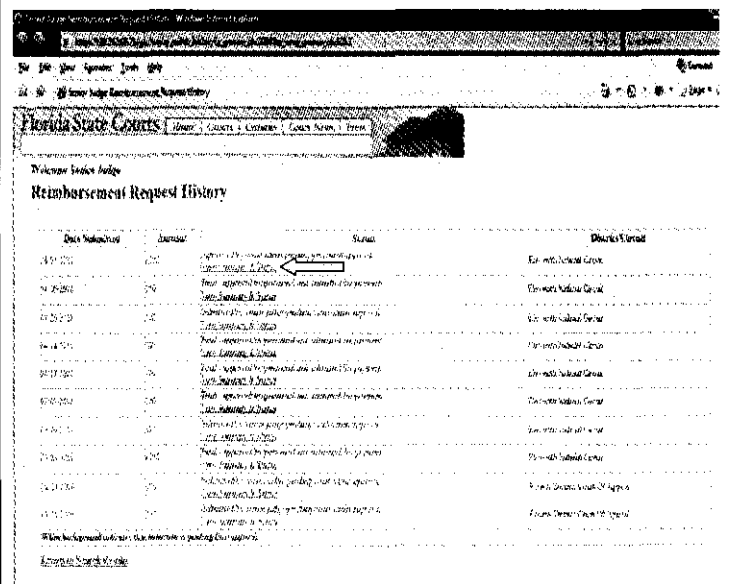
**Note:** Look under the second column (Location/Role(s)) for a "Statewide - Senior Judge" role.

5. Click the **Comp Request Status** link.



6. Click **View Summary & Status** to see more specific information regarding the request for compensation.

7. Click **Return to Search Results** to exit screen.



## Albury, Janice

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**From:** Bridenback, Mike  
**Sent:** Thursday, July 29, 2010 6:07 PM  
**To:** Melendi, Rick; Albury, Janice  
**Subject:** Fwd: Conference Call - Sr. Judge System Payment Requests for Foreclosure Caseload

Sent from my iPhone

Begin forwarded message:

**From:** "Charlotte Jerrett" <[jerrettc@flcourts.org](mailto:jerrettc@flcourts.org)>  
**Date:** July 29, 2010 6:05:42 PM EDT  
**To:** "Trial Court Administrators" <[TrialCourtAdministrators@flcourts.org](mailto:TrialCourtAdministrators@flcourts.org)>  
**Cc:** "Delcynth Schloss" <[schlossd@flcourts.org](mailto:schlossd@flcourts.org)>, "Mandy Couch" <[CouchM@flcourts.org](mailto:CouchM@flcourts.org)>, "Michelle Ogletree" <[ogletrem@flcourts.org](mailto:ogletrem@flcourts.org)>, "Connie Sundquist" <[sundquistc@flcourts.org](mailto:sundquistc@flcourts.org)>, "Don Lubbers" <[lubbersd@flcourts.org](mailto:lubbersd@flcourts.org)>  
**Subject:** Conference Call - Sr. Judge System Payment Requests for Foreclosure Caseload

Hi All,

I have scheduled a conference call for Monday, August 2, 2010, to discuss changes to the web-based system to allow for payment requests to be made from the separate "foreclosure" allocation of sr. judge days. I am hopeful you will find that these changes are easy to use, but want to make sure we have covered all the bases and are available to answer any questions you may have. It is our intent to roll this system out for use by close of business on Monday, assuming all goes well on the call and there are no further adjustments that need to be made. It would be a good idea to have the staff that use this system attend the call as we will be discussing actual payment procedures/processes. We anticipate the call will take less than the scheduled hour.

### Conference Call Information:

Monday, August 2, 2010

10am – 11am

1-888-808-6959

Access Code # 4889922

OSCA Staff – The Executive Conference Room has been reserved for this call.

Thanks,  
C.

Charlotte Jerrett

Administrative Services Division

Office of the State Courts Administrator

(850) 488-9922

(850) 488-3744 fax

**Moreno,Elisa**

---

**From:** Hickmon,Angelina  
**Sent:** Friday, July 23, 2010 12:30 PM  
**To:** SECTIONI@HILLSCLERK.COM; Moreno,Elisa; Valdes,Ryan  
**Subject:** Original Notes & Mortgage!!

Good afternoon,

I do not remember if we discussed this but, what should we do when we receive the original note and mortgage with the FJ packets? We do not have the files yet.

Thank you,

## Moreno,Elisa

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**From:** Moreno,Elisa  
**Sent:** Monday, August 09, 2010 3:47 PM  
**To:** Section1  
**Cc:** Hickmon,Angelina  
**Subject:** Originals not in the file

**Importance:** High

Good afternoon,

I have a file where Banner indicates that we have received the original note and mortgage; however, they are not in the file. The date, notice of filing, per Banner is July 19<sup>th</sup>. We've been asked to reach out and obtain the originals for the file prior to the hearing.

Angelina and I will be requesting these documents via email but we are open to suggestions. 😊

Please let me know if you have any questions or concerns.

Thank you!

Elisa

## Nauman, Chris

---

**From:** Nauman, Chris  
**Sent:** Thursday, October 28, 2010 2:00 PM  
**To:** Nauman, Chris  
**Subject:** FW: FW:

ACLU PRR

---

**From:** Rowland, Dave  
**Sent:** Wednesday, June 23, 2010 4:13 PM  
**To:** Nauman, Chris  
**Subject:** Re: FW:

Yes. I originally thought senior judges were only handling backlog cases but I guess that has now changed.

Please fix whatever formatting issues may exist before MM signs it. Thanks.

As of now (5 minutes to go in the games), USA will play Ghana on Saturday at 2:30 p.m. England will play Germany on Sunday at 10:00 a.m.

David A. Rowland  
(813) 340-3880

On Jun 23, 2010, at 3:27 PM, "Nauman, Chris" <[NAUMANKC@fljud13.org](mailto:NAUMANKC@fljud13.org)> wrote:

Is this what they sent you? I asked Kim to send it to me since I never saw it.

When I met with Judge Barton and Judge Menendez about the RMFM Program AO Monday morning at the end of our meeting I asked Judge Barton when he wanted to discuss the details of the Senior Judge AO. He said he had already started drafting it (I had actually started a draft too based on the limited information I had heard from you and Mike) and Judge Barton said he would send me a copy to review when it was done.

Aside from the format being way off, I thought the senior judges were only addressing backlog cases, not newly filed cases? I've never been in the loop on this one so maybe I misunderstood.

---

**From:** Cash, Kim  
**Sent:** Wednesday, June 23, 2010 2:56 PM  
**To:** Nauman, Chris  
**Subject:** FW:

---

**From:** Menendez, Manuel  
**Sent:** Wednesday, June 23, 2010 2:34 PM  
**To:** Cash, Kim  
**Subject:**

*Manuel Menendez, Jr.*

*Chief Judge, 13th Judicial Circuit of Florida*

*800 E. Twiggs St., Suite 602, Tampa, FL 33602*

*813-272-5022*

<RESIDENTIAL Mortgage Foreclosure Procedures for Circuit Civil Sections I & II (2).docx>  
<RESIDENTIAL Mortgage Foreclosure AO (2).docx>

## **Wells, Tracy**

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**From:** Wells, Tracy  
**Sent:** Monday, July 19, 2010 4:51 PM  
**To:** Hickmon, Angelina; Sequeira, Maria; Moreno, Elisa; Wells, Tracy; Schatzberg, Beth; Gammage, Trillany  
**Cc:** Bridenback, Mike; Melendi, Rick  
**Subject:** MEETING WITH CLERK'S STAFF

### **ATTENTION:**

We have a meeting scheduled for Friday, July 23<sup>th</sup> at 9:00 a.m. in the Jury Auditorium, Courthouse Edgecomb, **Room 201**. This meeting is a meet and greet so that you can put a face to the names of the people that we work with in the Clerk's Office.

Please be prompt for the meeting.

T



## Wells, Tracy

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**From:** Melendi, Rick  
**Sent:** Wednesday, September 15, 2010 5:53 PM  
**To:** Wells, Tracy  
**Subject:** Fw: Foreclosure motions

fyi

---

**From:** Barton, James  
**To:** CIRCCIVJUD  
**Cc:** CIRCCIVJA; Melendi, Rick  
**Sent:** Wed Sep 15 16:59:17 2010  
**Subject:** Foreclosure motions

Please make sure that, when an attorney's office calls to schedule a motion hearing in a residential foreclosure case (i.e., motions to dismiss, motions to strike, etc.), the attorney is told to schedule the hearing on JAWS with the appropriate foreclosure Section. If the motion has been referred by a Section senior judge back to the original circuit civil division judge because the motion is complex or for some other reason, the attorney should be told to set the matter on the original circuit civil division judge's calendar.

Mr. Melendi should inform the Section teams to tag the files where a senior judge refers a motion back to a regular division judge and to send those files to the division judge's JA.

Questions?

**Bridenback, Mike**

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**From:** Bridenback, Mike  
**Sent:** Monday, June 28, 2010 11:52 AM  
**To:** Kristine Slayden  
**Subject:** RE: Foreclosure & Econ Funding Meeting

Will do

\*\*\*\*\*

*Michael L. Bridenback*  
Court Administrator  
800 E. Twiggs Street, Suite 604  
Tampa, FL 33602  
p: 813.272.5894  
f: 813.301.3800  
[REDACTED]  
[www.fjud13.org](http://www.fjud13.org)



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**From:** Kristine Slayden [REDACTED]  
**Sent:** Monday, June 28, 2010 11:50 AM  
**To:** Bridenback, Mike  
**Cc:** Arlene Johnson; P.J. Stockdale  
**Subject:** FW: Foreclosure & Econ Funding Meeting

Mike – Are you available to chair the issue directed by TCBC to have the CSWC approve the reporting requirement for the foreclosure initiative? The tentative schedule to implement the reporting requirement is July 16<sup>th</sup>, so we would need to get committee approval some time before then. We assumed it would have to be handled by the committee via email discussion/approval? Once we get the format set, would you mind sending it out to the committee members as temporary chair? Thanks. Kris

Kris Slayden  
Research and Data  
Office of the State Courts Administrator  
Florida Supreme Court  
500 S. Duval Street  
Tallahassee, Florida 32399  
850-922-5106 (wk)  
850-556-2335 (cell)  
850-414-1342 (fax)

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**From:** Grubbs, Linda [REDACTED]  
**Sent:** Monday, June 28, 2010 11:41 AM  
**To:** Kristine Slayden  
**Subject:** Foreclosure & Econ Funding Meeting

Hi Kris,  
Judge Master's wanted me to express to everyone how sorry she was about this meeting. She totally agrees that Mike should sit in for her if possible.  
Thanks,  
Linda

Linda Grubbs  
Judicial Assistant for  
Ellen S. Masters, Circuit Judge  
P.O. Box 9000 Drawer J145  
Bartow, FL 33831



863-534-4669

## Bridenback, Mike

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**From:** Bridenback, Mike  
**Sent:** Monday, October 04, 2010 8:40 AM  
**To:** Melendi, Rick; Barton, James  
**Subject:** FW: foreclosure article from 12th

\*\*\*\*\*

*Michael L. Bridenback*  
Court Administrator  
800 E. Twiggs Street, Suite 604  
Tampa, FL 33602  
p: 813.272.5894  
f: 813.301.3800  
[REDACTED]  
[www.fjud13.org](http://www.fjud13.org)



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**From:** Walt Smith [REDACTED] [wsmith@fjud13.org](mailto:wsmith@fjud13.org)  
**Sent:** Thursday, September 30, 2010 8:30 AM  
**To:** Lisa Goodner; Trial Court Administrators  
**Subject:** foreclosure article from 12th

## Foreclosure firm challenges judge who fined it

By *Todd Ruger*

*Published: Thursday, September 30, 2010 at 1:00 a.m.*

A foreclosure firm that was scolded and fined for unprofessional conduct by a Manatee County circuit judge last month has fired back, saying the judge is prejudiced against them and broke the rules herself.

The vice president of Smith, Hiatt and Diaz law firm has filed motions accusing Circuit Judge Janette Dunnigan of violating judicial ethics when she leveled a \$49,000 fine against them last month for repeatedly scheduling hearings and then not showing up.

The Fort Lauderdale firm asked for a rehearing and requested Dunnigan be disqualified from the case where she found the firm in civil contempt of court. The firm "fears that it will not receive fair consideration due to prejudice and bias of the presiding judge."

The clash over reputations -- both of the judge and lawyers who could be punished for their behavior -- underscores the growing imbroglio caused by a glut of foreclosures as local judges assert themselves to re-establish control in their courtrooms.

Judges and court dockets are overwhelmed with foreclosure cases in the wake of the housing market downturn, and large foreclosure firms are handling cases en masse, frequently filing messy and sometimes fraudulent filings to retake properties, judges say.

In a judicial district where judges have taken a hard line on improper filings, Dunnigan's ruling stood out as the first time a court officer openly attacked the methods of one of the firms responsible for filing thousands of foreclosures statewide.

The judge ruled the firm's attorneys filed what amounted to "sham" paperwork in a 2007 Manatee County foreclosure, setting seven hearings over two years and then failing to appear in court or tell the judge or other parties when they were canceled.

The order went viral in the online Florida legal community and among troubled homeowners who watchdog the so-called "foreclosure mills."

Smith, Hiatt and Diaz now has defended itself in 24 pages of motions that fault Dunnigan for breaking rules preventing judges from independently investigating facts in a case or considering evidence from other cases in front of other judges.

Roy Diaz, the firm's vice-president, said in the motions that Dunnigan essentially "blind-sided" the firm with information from other cases -- conduct that would violate judicial canons. To make it worse, he said, that information turned out to be false.

At the August hearing, the most dramatic part of the hearing came after Diaz spent about 20 minutes explaining how his firm had created a "safety net" to fix the chronic absences at hearings after Dunnigan had ordered the firm to appear on contempt of court charges.

Dunnigan retorted with information from another case the firm was handling: "Well, it's not very thorough because the same thing happened today, this morning... no one appeared and no one cancelled the hearing."

Diaz responded that the absence should have been caught in their new system. And in the new motions, Diaz says his firm actually had cancelled the other case hearing six days earlier.

"Unfortunately, due to the ongoing crisis of volume faced by all parties involved in the foreclosure litigation process, it appears that the Manatee County Circuit Court Clerk failed to timely update the Manatee County Court docket," Diaz wrote.

Smith, Hiatt and Diaz is not the only law firm firing back.

Judges have started throwing out foreclosure cases that do not follow simple court rules in the 12th Judicial Circuit, including Manatee and Sarasota counties.

Firms are challenging retired Judge Harry Rapkin's decision to throw 61 cases out of court on Friday, raising the stakes on following court rules.

Dismissing the cases forces lenders to pay another court filing fee to restart the case -- up to \$1,900.

## Foreclosure and Economic Recovery – Case Tracking System

This document provides guidance on procedures to be used when completing the Foreclosure and Economic Recovery – Case Reporting System (FERCTS). For ease of use, this document is divided into three (3) major sections: 1) Instructions for use, 2) Definitions, and 3) Instructions for reporting to the OSCA.

FERCTS is an Excel based case tracking system that is intended to capture essential case activity data over the life of the initiative. The FERCTS provides one workbook for each county in a circuit. The workbooks have been preloaded with a list of non-disposed and reopened cases for a specific county. This list was provided by the Clerk of Courts and includes all non-disposed, reopened and pending cases outstanding as of close of business June 30, 2010. New cases, filed or reopened after June 30, 2010, that are transferred to the initiative will need to be entered into the tracking application by court administration staff either individually or in bulk.

**WARNING!** To provide maximum flexibility for all jurisdictions, this Excel application is provided with basic capabilities only. It is not provided as a case management tool.

Please keep in mind that it is an Excel application.  
**Save your work! And save often!**

### 1. INSTRUCTIONS FOR USE

#### General

FERCTS is an Excel based case tracking system that is intended to capture certain essential case activity data over the life of the initiative. FERCTS is not intended to provide case management capabilities. Nor is it intended to capture every event, reopen or status change in the life of the case. Instead, this application will provide a mechanism to capture and report, to the OSCA, specific and limited case information. This information will then be used as part of the final report to the Legislature describing the outcomes of the Foreclosure and Economic Recovery Initiative.

The TCBC has directed that each circuit be given the maximum latitude possible in accomplishing the goals of this Initiative. Consequently, the FERCTS was designed to provide basic data reporting capabilities as part of a programmed application while making available the full data management capabilities inherent in Excel. The application provides basic data entry and search capabilities. More advanced data manipulation should be accomplished through Excel search, sort and filter functions.

#### Installation

The case tracking application is almost entirely driven by macro computer code written specifically for this initiative. Most Microsoft Office installations are installed with a high level of security set by default which prevents most macros from running correctly. To ensure that macros can run for this workbook, there a few installation steps you must take before you open the workbook. Please see the separate FERCTS Installation Guide for detailed installation instructions.

**If the installation was successful, the user should see the following case tracking screen after opening the workbook:**

**CAUTION**

If you do not see the above user form, see only the underlying spreadsheet or receive an error message, please contact Court Services, PJ Stockdale, 850-410-1523, [stockdap@flcourts.org](mailto:stockdap@flcourts.org) for assistance.

**Workbooks**

The FERCTS provides one workbook for each county in a circuit. The workbooks have been preloaded with a list of non-disposed and reopened cases for a specific county. This list was provided by the Clerk of Courts and includes all non-disposed, reopened and pending cases outstanding as of close of business June 30, 2010. New cases, filed or reopened after June 30, 2010, that are transferred to the initiative will need to be entered into the tracking application by court administration staff either individually or in bulk.

To accommodate all jurisdictions and users, workbook compatibility has been set to Excel 2003. However, this limits the number of cases that can be recorded in any one workbook to approximately 65,000. For the larger circuits, workbooks can be split into county and year (e.g. 11\_13MiamiDade\_CY2009\_FERCTS.xls). If a jurisdiction has Excel 2007 available, the workbook can be converted to Excel 2007 format with the increased capabilities associated with that format. Please contact PJ Stockdale (850-410-1523, [stockdap@flcourts.org](mailto:stockdap@flcourts.org)) for assistance.

Unfortunately, Excel does not have multi-user capabilities in any version. This means that a single workbook cannot be updated by two different persons at the same time. However, it is possible to make copies of the workbooks for different individuals. If multiple persons will be performing data entry, it is recommended that the workbooks be divided into calendar years or case number blocks for each individual so that each case appears in only one workbook. This practice will reduce duplication of effort and will greatly simplify updating. We ask that you save these workbooks using a standard naming format. Some examples of workbook names are

01\_17Escambia\_0001-4999\_FERCTS.xls  
01\_17Escambia\_5000-9999\_FERCTS.xls  
01\_17Escambia\_CY2009\_FERCTS.xls

**WARNING**

To provide maximum flexibility for all jurisdictions, this Excel application is provided with basic capabilities. It is not provided as case management tool.

**NOTE**

To ensure the SAVE feature of the workbook is operational, please be sure to enter the exact, full name of the workbook in the App Workbook cell of the TABLES worksheet. (cell reference TABLES!B7)

Please contact PJ Stockdale (850-410-1523, [stockdap@flcourts.org](mailto:stockdap@flcourts.org)) for assistance

If you choose to bulk load data directly into the spreadsheet, it is imperative that the user use the SRS case category, case disposition category and the Type of Event category exactly as they are listed on the worksheet Tables for SRS Case Category (column D), Case Disposition (column E) and Type of Status (Column F). If these values are not entered exactly, the data entry user form will not recognize the value and will not display the record on the form. Additionally, these case records will be not be considered valid when the data is sent to the OSCA as they cannot be cross referenced to one of these categories.

**CAUTION**

Please keep in mind that it is an Excel application.

**Save your work! And save often!**



**Data Entry Screen**

The application provides a one page data entry and display user form with a second search tab. New cases can be added through the main user form or directly into the spreadsheet. The underlying Excel spreadsheet does allow for basic bulk loading of data to make this task easier for larger circuits. However, care must be taken to ensure the correct format and field order is maintained. Please see the Definitions section for a more detailed description of these fields.

**Foreclosure and Economic Recovery Initiative  
Case Tracking Form**

Case Data | Search | About | Glossary |

**Case Identification**  
 UCN: 592009CA005172AXXNC      Filing Date: 3/26/2009  
 SRS Case Category: Real Property/Mortgage Foreclosure

**Disposition/Status**  
 Date Disposed: 11/20/2009  
 Disposition Type: Summary/Final Judgement  
 Date Status Change: 7/1/2010  
 Case Status: Inactivity - Other (see Case Comments)  
 Case Closed for Court Action       Date Case Closed: \_\_\_\_\_

**Case Age**  
 13  
 New  
 Update

**Post-Judgement**  
 Open Date: 7/6/2010      Closed Date: \_\_\_\_\_  
 Previous  
 Next

Case Comments: \_\_\_\_\_  
 Exclude

Record 24 of 12264      Save FERCTS      Close FERCTS

**NOTE:**

All pre-loaded backlogged cases assigned to this initiative have been assigned a default status of "Inactivity – Other". Please ensure that this status is changed to "Active" when either the judicial officer or support staff begins work on the case.

### How to update a case record

The FERCTS is designed to capture essential case activity data. Consequently, it will be necessary for staff to update case records. For example, assume that the court is ready to take action on the case represented by the data entry screen above.

- The first action required is to reset the case status from “Inactive – Other” to “Active”. Since it is unlikely that every record to be updated will be the first record in the spreadsheet, the user will need to search for the record by UCN. See the section [How to search for a record](#) for more information on searching.

The screenshot shows the FERCTS Case Tracking Form for case UCN 582009CA008325AXXXNC, filed on 5/15/2009. The ERS Case Category is 'Real Property/Mortgage Foreclosure'. The Disposition Status is 'Inactive', Date Disposed is blank, Disposition Type is 'Judicial/Paid Judgment', and Date Status Change is 7/16/2010. The Case Status is 'Inactive'. There are checkboxes for 'Case Closed for Court Action' and 'Date Case Closed'. The Post-Judgment section includes 'Open Date' and 'Closed Date' fields. A 'Case Comments' box is at the bottom with a note to 'Enter brief comments about case here' and an 'Exclude' button. The footer shows 'Record 31 of 12264', 'Save FERCTS', and 'Close FERCTS'.

This screenshot shows the same FERCTS Case Tracking Form as the previous one, but the Case Status has been updated to 'Active'. The Disposition Status is now 'Active', and the Date Case Closed field is populated with 7/19/2010. The 'Case Closed for Court Action' checkbox is checked. The 'Date Case Closed' field is also populated with 7/19/2010. The 'Post-Judgment' section remains the same. The footer is identical to the previous screenshot.

Additional status changes may occur as this action proceeds and staff should update the status as required.

- When a case is finally disposed for judicial action whether by disposition or resolution of a post-judgment action (see [Definitions](#)), the user should enter the date of the disposition along with the appropriate disposition type. Please note that for a post-judgment case, the user need only supply the date of re-opening or of closing. The “Case Closed for Court Action” checkbox and the “Date Case Closed” fields will be completed automatically whenever a valid disposition date or a valid post-judgment closed date is entered.
- To reduce the amount of data entry, the case status may be left as “Active” since it is redundant to require a status change of “Disposed”

### How to search for a record

The tracking application provides basic search capabilities via the Search tab. Since the user has ready access to the full searching capabilities of Excel, the search function provides search capability on the three fields determined most useful during field tests; 1) Uniform case number, 2) Case status and 3) Case age. For this

initiative, case age is calculated to be the number of days from filing to the current date or from the reopen date (whichever is later) to current date.

The application search function will then allow the user to move through all of items meeting the search criteria using the “Find Next” and “Find Previous” buttons. The search function allows wildcards so that more than one case can be identified such as all cases with a UCN in 2008 (172008\*) or with a case age greater than 180 days (>180). Please use the “Tips” button located on the Search tab for additional information on using wildcards.

**TIP:**

For more advanced data manipulation, please use the inherent processing capabilities of Excel. The user form may be closed by clicking on the red X in the top right corner of the form. The user form may be reactivated by pressing the shortcut key, CTRL-m, or from the menu by clicking the Developer option, then selecting Macros. Select the ShowDataForm macro and click the “run” button. The initial splash screen will not display but after a few moments, the user form will appear.

**How to exclude case records**

Due to limitations in some Clerk of Court systems, the initial set of cases pre-loaded into these workbooks may include cases that are not appropriate candidates for this initiative. The FERCTS provides an “Exclude” button on in the bottom right corner of the data entry screen which will allow the user to mark these record as ineligible. The record will not be deleted from the spreadsheet but will appear as grayed out on the data entry form.

**How to add a new case record**

New records may be added by clicking on the “Add” button. This will place the application in insert mode which will blank the data entry screen and will position the cursor on the first blank row at the end of the spreadsheet that is visible behind the data entry form. The user must enter, at a minimum, a Uniform Case Number, filing date and case status. The application will enter the SRS case type automatically. When initially entering a case into the tracking system, please assign the appropriate case status from the list provided.

Once the appropriate data is entered, the user must click the “Update” button to commit the record to the spreadsheet. Most buttons will not work in insert mode. To cancel the new record, click the “Cancel New” button. This will delete the new data and return the cursor to the record that was active before the “New” button was selected. Clicking the “New” button while in insert mode will save the current record and advance the cursor to the next blank record.

The Search and the Insert modes are complimentary in that the user can enter insert mode while search criteria are active. However, the reverse is not true; the user cannot enter search mode while in insert mode.

### How to save your work

There are three methods for saving a FERCTS workbook: 1) Click on the "Save FERCTS" on the data entry screen. This will save the workbook and return the user to the data entry screen. 2) Click on the "Close FERCTS" button on the data entry screen. This will save and close the FERCTS workbook. It will not affect other Excel workbooks that may be open. 3) use the SAVE (CTRL-S) option from Excel

**CAUTION**

Please keep in mind that it is an Excel application.

**Save your work! And save often!**

### Automatic Validity Checks

The FERCTS will perform a variety of data entry validity checks both when the data is entered and when an update is applied. Certain fields such as the UCN and date fields are checked for validity as the data is entered. The user will not be able to advance until the errors are corrected. In the case of a new record, all date errors must be corrected before the "Update" (add record) or "Cancel New" button will work. In addition to field level checks, the entire record is also checked for consistency before it is committed to the spreadsheet. At this stage, the FERCTS will check that the case record is consistent by looking at each field and ensuring that together, the information makes sense. For example, the application will check that a valid disposition category is associated with a valid disposition date.

**WARNING:**

**Please take care if you are bulk loading data directly into the underlying spreadsheet.**

It is possible to enter invalid data when entering bulk data directly into the spreadsheet (for example entering a UCN without a filing date). These records will be displayed by the data entry form. However, the application will not allow the user to leave the record until the errors are corrected. A large number of erroneous records could significantly reduce the usability of the FERCTS.

### Notes on Specific Data Fields

#### Case Status:

Case Status captures information on the state of a case as it relates to judicial activity. Status is subdivided into three broad categories which identify whether the court is actively working to resolve a case or whether the case cannot be concluded due to extenuating circumstances and just what those circumstances are. The primary purpose of the tracking application is to identify why cases are not moving through the system

All cases transferred into the initiative have been assigned a default status of "Inactivity – Other (see Case Comments)". When there is activity on these cases, please change the status from "Inactivity – Other" to "Active".

**NOTE:**

When changing a case status to “Inactivity – Other”, please include a brief description of the reason in the case comments field of the record. In particular, if the case is inactive due to loss mitigation review, please add the notation “**loss mitigation review**” to the case comments. Comments are not required for those cases that were pre-loaded into these workbooks.

Case Closed For Court Action (checkbox and date):

These fields provide a convenient way of flagging a case record when no additional court action is required. They are set automatically when a case is disposed or when a reopened case is closed. Since it is not possible to predict all of the ways a case may move through the court system, the user may manually change the Date Case Closed for Court Action field or may override the status by un-checking the "Case Closed for Court Action" check box. If this box is unchecked, then the case will be considered to require additional court action before the case can be moved to sale so, please, be sure that action is required.

Date Reopen and Reopen Closed:

If the Reopen Date and the Reopen Closed date are both filled in, changing the Reopen date to a value that is greater than the current Reopen Closed date will cause the application to assume a new reopen action is pending. The application will blank out the Reopen Closed date and clear the "Case Closed for Court Action Status."

## 2. DEFINITIONS

Definitions for this initiative come primarily from the Summary Reporting System Manual (January 2002) with the exception of Case Status and Date Reopen Closed.

For purposes of this initiative, case status captures information on the state of a case as it relates to judicial activity and date reopen closed captures the date that a previously reopened case was closed.

Definitions for these fields are provided below.

- Circuit
- County
- Uniform Case Number – full 20 character UCN as defined by the Supreme Court
- Filing Date – initial document stamp date per the SRS Manual
- SRS Case Category – ‘Real Property/Mortgage Foreclosure’
- Date of Case Status Change – captures the date case status changed from one category to another.
- Current Case Status – captures information on the state of a case as it relates to judicial activity. Over broad categories, it identifies whether the court is actively working to resolve a case or whether the judicial action cannot be concluded due to extenuating circumstances.
  - Active
  - Stayed – Bankruptcy
  - Stayed - Pending resolution of another case
  - Stayed - by Agreement of the parties
  - Stayed - Appeal pending
  - Inactivity - Attorney inactivity
  - Inactivity - Insufficient pleadings or documentation
  - Inactivity - Mediation/Settlement negotiations
  - Inactivity - Other (see Case Comments). Please include a brief description of the reason in the case comments field of the record. In particular, if the case is inactive due to loss mitigation review, please add the notation “loss mitigation review” to the case comments
- Date of Disposition – Per the SRS Manual, report cases as disposed after the final judicial decision which terminates a civil proceeding by a summary/final judgment or ordered entered by the court.
- Disposition Type – Summary/Final Judgment, Trial, and Dismissed
- Date of Reopen Event – Report the date that a post-judgment motion is filed and the \$50 fee is paid.
- Date Reopen Event Closed – Report the date on which the reopened case is closed after the motion which reopened the case has been resolved by judicial decision/order which completes court proceedings on the issue raised by the motion (ex. Motion to reschedule foreclosure sale, Order rescheduling sale)

### 3. INSTRUCTIONS FOR REPORTING TO OSCA

These instructions establish the reporting standards to be followed when entering and submitting FERCTS information. The FERCTS workbook encapsulates all real property/mortgage foreclosure cases that are non-disposed or reopened (i.e. pending) as of June 30, 2010. The data from this tracking system will be used to provide the Supreme Court with information on the number of dispositions, average age and clearance rate of backlogged real property/mortgage foreclosure cases. Trial court administrators are to submit a copy of the tracking system workbook on a monthly basis to the Office of the State Courts Administrator (OSCA.) OSCA is to receive the copy no more than the 10<sup>th</sup> of the month following the end of the monthly period.

Following are the procedures to use when submitting a copy of the tracking system workbook to the OSCA.

- ✓ This workbook is almost entirely macro driven. Most Microsoft Office installations are installed with a high level of security set by default. To ensure that macros can run for this workbook, there are a few installation steps you must take before you open the workbook. Please see the separate FERCTS Installation Guide for installation instructions.
- ✓ The first transmission of the FERCTS workbook should include updates through July 30, 2010.
- ✓ A copy of the FERCTS workbook must be submitted to the OSCA by the 10<sup>th</sup> of the month following the end of the month being reported. For example, a copy of the workbook updating information through July 30, 2010 is to be sent to the OSCA by August 10, 2010.
- ✓ The workbook copy must be submitted via e-mail to [FERCTS@flcourts.org](mailto:FERCTS@flcourts.org). When submitting, the e-mail, the subject line must contain the following words: “foreclosure and economic recovery” and the date the workbook is submitted for. For example, a workbook submitted on August 9, 2010 for the July 2010 period would contain the subject line “Foreclosure and Economic Recovery Report – 2010/07”.
- ✓ The workbook must be submitted in the Excel form provided by the OSCA. To ensure proper operation of the application, the file name is fixed as circuit number, underscore followed by county number and name ending with FERCTS.xls. An example file name is 01\_17Escambia\_FERCTS.XLS.
- ✓ Once the trial court administrators submit a report to OSCA, an error check process will be performed by the OSCA. If reporting errors are identified, the circuit will be notified and errors must be corrected. Corrections will be verified on the next monthly submission.

**Bridenback, Mike**

---

**From:** Bridenback, Mike  
**Sent:** Tuesday, July 06, 2010 2:16 PM  
**To:** Barton, James  
**Cc:** Wells, Tracy  
**Subject:** Re: foreclosure mail

Tracy

Sent from my iPhone

On Jul 6, 2010, at 2:14 PM, "Barton, James " [REDACTED]  
wrote:

> Who would tell the mail people to deliver the mail to the two new  
> foreclosure section offices?



**Bridenback, Mike**

---

**From:** Bridenback, Mike  
**Sent:** Monday, July 12, 2010 3:49 PM  
**To:** Wells, Tracy  
**Subject:** FW: Foreclosures

Please set up meeting with clerk staff and our project staff. I do not have to be there.

\*\*\*\*\*

*Michael L. Bridenback*  
Court Administrator  
800 E. Twiggs Street, Suite 604  
Tampa, FL 33602  
p: 813.272.5894  
f: 813.301.3800  
[REDACTED]  
[www.fljud13.org](http://www.fljud13.org)



---

**From:** Snavely, Carla [REDACTED]  
**Sent:** Monday, July 12, 2010 3:45 PM  
**To:** Melendi, Rick; Bridenback, Mike  
**Cc:** Pride, Lisa; Gary, Angela; Healy, Donna  
**Subject:** Foreclosures

*Can we get our teams together so they can meet each other and talk a little about how everyone envisions this project? I think it would be good for everyone.*

*Carla S. Snavely*  
Chief Deputy of Court Operations  
Clerk of the Circuit Court  
(813) 276-8100 Ext. 6100

# **RESIDENTIAL FORECLOSURE BENCH BOOK**

Prepared by

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

and

Doris Bermudez-Goodrich  
Assistant General Counsel  
Eleventh Judicial Circuit of Florida

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## **Introduction**

1. Foreclosure is the enforcement of a security interest by judicial sale of collateral. All mortgages shall be foreclosed of equity. § 702.01, 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. § 702.09, 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. § 697.02, Fla. Stat. (2010); *Fla. Nat'l. Bank & Trust Co. of Miami v. Brown*, 47 So. 2d 748 (1949).

(b) **Mortgagee:** refers to the lender; the secured party or holder of the mortgage lien. § 721.82(6), 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. § 721.82(7), Fla. Stat. (2010). The mortgagor holds legal title to the mortgaged property. *Hoffman v. Semet*, 316 So. 2d 649, 652 (Fla. 4th DCA 1975).

3. To foreclosure the mortgage lien and extinguish equities of redemption, secured parties must file a civil action. § 45.0315, 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.*, 403 So. 2d 446, 449 (Fla. 2d DCA 1981); *Morris v. Waite*, 160 So. 516, 518 (Fla. 1935).

(b) Right not contingent on mortgagor's health, good fortune, ill fortune, or the regularity of his employment. *Home Owners' Loan Corp. v. Wilkes*, 178 So. 161, 164 (Fla. 1938).

(c) Contract impairment or imposition of moratorium is prohibited by court. *Lee County Bank v. Christian Mut. Foundation, Inc.*, 403 So. 2d 446, 448 (Fla. 1981).

## **Default**

1. Right to foreclosure accrues upon the mortgagor's default.
2. Basis for 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. *David v. Sun Fed. Sav. & Loan Ass'n.*, 461 So. 2d 93, 94 (Fla. 1984).
  - (a) Absent acceleration clause, lender can only sue for amount in default. *Kirk v. Van Petten*, 21 So. 286 (Fla. 1896).
3. Commencement - upon delivery of written notice of default to the mortgagor; prior notice is not required unless it is a contractual term. *Millett v. Perez*, 418 So. 2d 1067 (Fla. 3d DCA 1982); *Fowler v. First Sav. & Loan Ass'n. of Defuniak Springs*, 643 So. 2d 30, 34 (Fla. 1st DCA 1994) (filing of complaint is notice of acceleration).
4. Pre-acceleration - mortgagor may defeat foreclosure by payment of arrearages, thereby reinstating the mortgage. *Pick v. First Nat'l. Bank of Florida*, 621 So. 2d 732, 733 (Fla. 2d DCA 1993).

## **Statute of Limitations**

1. Five year statute of limitations period - applies specifically to mortgage foreclosure actions. § 95.11(2)(c), Fla. Stat. (2008); *Farmers & Merch. Bank v. Riede*, 565 So. 2d 883, 885 (Fla. 1st DCA 1990).
2. Commencement of limitations period.
  - (a) General rule – commencement upon filing of action; this occurs when the last element of the cause of action is satisfied (for example, default).

§ 95.031(1), Fla. Stat. (2010); *Maggio v. Dept. of Labor & Employment Sec.*, 910 So. 2d 876, 878 (Fla. 2d DCA 2005).

(b) A note or other written instrument - when the first written demand for payment occurs. *Ruhl v. Perry*, 390 So. 2d 353, 357 (Fla. 1980).

(c) Oral loan payable on demand - commencement upon demand for payment. *Mosher v. Anderson*, 817 So. 2d 812, 813 (Fla. 2002).

3. Tolling of the limitations period - acknowledgment of the debt or partial loan payments subsequent to the acceleration notice toll the statute of limitations. § 95.051(1)(f), Fla. Stat. (2010); *Cadle Company v. McCartha*, 920 So. 2d 144, 145 (Fla.5th DCA 2006).

(a) Tolling effect - starts the running anew of the limitations period on the debt. *Wester v. Rigdon*, 110 So. 2d 470, 474 (Fla. 1st DCA 1959).

### **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 v. Dept. of Legal Affairs*, 684 So. 2d 181, 185 (Fla. 1996).

(a) Class of case - jurisdictional parameters defined by Article V Section 5(b), Florida Constitution, implemented by Section 26.012(2)(g), Fla. Stat. (2010). *Alexdex Corp. v. Nachon Enter., Inc.*, 641 So. 2d 858 (Fla. 1994), (concurrent equity jurisdiction over lien foreclosures of real property that fall within statutory monetary limits). *Id.*, at 863.

(b) Jurisdictional authority over real property only in the circuit where the land is situated. *Hammond v. DSY Developers, LLC.*, 951 So. 2d 985, 988 (Fla. 2d DCA 2007). *Goedmakers v. Goedmakers*, 520 So. 2d 575, 578 (Fla. 1988); (court lacks *in rem* jurisdiction over real property located outside the court's circuit). If real property lies in two counties, the foreclosure suit may be maintained in either county, however, the notice of sale must be published in both. § 702.04, 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. *Jeff-Ray Corp. v. Jacobsen*, 566 So. 2d 885 (Fla. 4th DCA 1990); see also, *WM Specialty Mortgage, LLC v. Salomon*, 874 So. 2d 680, 682 (Fla. 4th DCA 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. § 671.201(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 v. Aurora Loan Services, LLC*, 2010 WL 1561873 (Fla. 4th DCA 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 for whose benefit the action is brought. See also, *Bank of America v. Nopal Lines, Ltd.*, 462 So. 2d 1178, 1184 (Fla. 3d DCA 1985).

(c) Plaintiff's nominee has standing to maintain foreclosure based on real party in interest rule. *Atlantic Title & Trust Co. v. First System Bank of Florida*, 955 So. 2d 33 (Fla. 3d DCA 2007), (*ATTC* was the holder by assignment of the note); *Mortgage Elec. Registration Systems, Inc. v. Atlantic Title & Trust Co.*, 965 So. 2d 1112 (Fla. 2d DCA 2007); *Philogene v. ABN AMRO Mortgage Group*, 922 So. 2d 45 (Fla. 4th DCA 2006).

2. Assignment of mortgage – plaintiff should assert assignee status in complaint. Absence of assignment of mortgage does not prevent mortgage in equity payment as an incident of the debt. *Perry v. Fairbanks*, 838 So. 2d 725, 726 (Fla. 5th DCA 2004); *Johns v. Gillian*, 134 Fla. 575, 579 (Fla. 1938); *Warren v. Seminole Bond & Mortg. Co.*, 127 Fla. 107 (Fla. 1937), (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

purchasers. § 701.02, Fla. Stat. (2010). See also, *Glynn v. First Union Nat'l. Bank*, 912 So. 2d 357, 358 (Fla. 4th DCA 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*, 888 So. 2d at 726; *WM Specialty Mortgage, LLC*, 874 So. 2d at 682; *Chem. Residential Mortgage v. Rector*, 742 So. 2d 300 (Fla. 1st DCA 1998); *Clifford v. Eastern Mortg. & Sec. Co.*, 166 So. 562 (Fla. 1936). However, 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 v. Jean Jacques*, 2010 WL 476641 (Fla. App. 2 DCA Feb. 12, 2010). If plaintiff has an assignment of mortgage recorded prior to the date of filing suit, then he can enforce even if 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 v. Novastar Mortgage, Inc.*, 862 So. 2d 793, 798 (Fla. 4th DCA 2004). Assignment may be by physical delivery (provide evidence) or by written assignment.

3. MERS – What 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 18 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 for its absence. § 90.953(1), Fla. Stat. (2010); *State Street Bank and Trust Co. v. Lord*, 851 So. 2d 790, 791 (Fla. 4th DCA 2003). A satisfactory explanation includes loss, theft, destruction and wrongful possession of the note. § 673.3091(1), Fla. Stat. (2010). Reestablishment of the note is governed by § 673.3091(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 v. Bankers Trust Co. of Calif., N. A.*, 895 So 2d 1120, 1121 (Fla. 4th DCA 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 v. Kim*, 898 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. *Sudhoff v. Federal Nat'l. Mortgage Ass'n.*, 942 So. 2d 425, 427 (Fla. 5th DCA 2006).

2. Failure to join other necessary parties - they remain in the same position as they were in prior to foreclosure. *Abdoney v. York*, 903 So. 2d 981, 983 (Fla. 2d DCA 2005).

3. Omitted party - only remedies are to compel redemption or the re-foreclosure in a suit de novo. *Id.*; *Quinn Plumbing Co. v. New Miami Shores Corp.*, 129 So. 2d 690, 693 (Fla. 1930).

4. Death of titleholder prior to entry of final judgment - beneficiaries of the titleholder and the personal representative are indispensable parties. *Campbell v. Napoli*, 786 So. 2d 1232 (Fla. 2d DCA 2001).

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

(b) Post-judgment death of titleholder, the beneficiaries are not deemed indispensable parties. *Davis v. Scott*, 127 So. 2d 1000 (Fla. 1956).

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

(a) Includes: junior mortgages recorded or acquired after the superior mortgage, lessees and tenants/parties in possession of the real property. *Posnansky v. Breckenridge Estates Corp.*, 568 So. 2d 736, 737 (Fla. 4th DCA 1993); *Commercial Laundries, Inc., v. Golf Course Towers Associates*, 568 So. 2d 501, 502 (Fla. 4th DCA 1993).

(Fla. 3d DCA 1990); *Crystal River Lumber Co. v. Knight Turpentine Co.*, 67 So. 974, 975 (Fla. 1915).

(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. Tadmire*, 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.

(l) 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. *Natl. 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.

1. 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**

1. 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 11<sup>th</sup> 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 shall 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 borrower fails to contact the borrower within this time frame, the borrower is 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**

1. 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, 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 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 the defense and serve same upon the plaintiff's attorney within 30 days after the filing of the notice of action.

(1) Plaintiff must file a sworn statement on or before each week for the first two weeks, with proof of publication filed with the court. § 49.05(1)(c)(2), Fla. Stat.

(d) Affidavit of diligent search - Plaintiff alleges that diligent search and inquiry have been made and necessary facts. *Floyd v. FNMA*, 704 So. 2d 1110, 1112 (Fla. 5th DCA 1997), (default judgment and sale vacated based on plaintiff's failure to conduct diligent search to discover defendant's heirs residence and possession of subject property). However,

(1) Better practice is to file an affidavit of diligent search that contains all details of the search. *Dor Cha, Inc. v. Hollingsworth Lakes Homeowners Ass'n*, 525 So. 2d 119, 122 (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).



(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. *Shepherd v. Deutsche Bank Trust Co. Am.s*, 922 So. 2d 340, 343 (Fla. 5th DCA 2006), (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. *De Vico v. Chase Manhattan Bank*, 823 So. 2d 175, 176 (Fla. 3d DCA 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. V. V. v. Village of Pinecrest*, 990 So. 2d 1135, 1139 (Fla. 3d DCA 2008).

(h) Defective service of process - judgment based on lack of diligent search and inquiry constitutes improper service and lacks authority of law. *Batchin v. Barnett Bank of Southwest Fla.*, 647 So. 2d 211,213 (Fla. 2d DCA 1994).

(1) Judgment rendered void - when defective service of process amounts to no notice of the proceedings. *Shepherd*, 922 So. 2d at 345. 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 defective service actually gives notice of the proceedings. *Id.*

(i) Limitations on consumer creditors 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 liability of personal liability. *De Vico*, 823 So. 2d at 175, 176 (Fla. 1st DCA 1991), (defendant was constructively served absent personal service of process).

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

1. Section 48.194(1), Fla. Stat., (2010) - authorizes service of process in the same manner as service within the state, by an officer in the state where the person is being served. Section states that service of process outside the United States may be required to conform to the provisions of Hague Convention of 1969 concerning service abroad of judicial and extrajudicial documents in civil or commercial matters.

2. The Hague Convention creates - appropriate means to ensure that judicial and extra-judicial documents to be served abroad shall be brought to the addressee in sufficient time. *Koechli v. BIP Int'l.*, 861 So. 2d 501, 502 (Fla. 5th DCA 2003).

(a) Procedure - process sent to a designated central authority, checked for compliance, served under foreign nation's law, and certificate prepared which documents the place and date of service or an explanation as to lack of service. *Id.* (return by the central authority of a foreign nation of completed certificate of service was prima facie evidence that the authority's service on a defendant in that country was made in compliance with the Hague Convention and with the law of that foreign nation).

(b) Compliance issues - see *Diz v. Hellman Int'l. Nat'l. Forwarders*, 611 So. 2d 18 (Fla. 3d DCA 1992), (plaintiff provided a faulty address to the Spanish authorities and the trial judge entered a default judgment, which appellate court reversed).

3. Service by registered mail - authorized by Section 48.194(2), Fla. Stat. (2010). Permits service by registered mail to nonresidents where the address of the person to be served is known.

(a) Section 48.192(2)(b), Fla. Stat. (2010), provides that plaintiff must file an affidavit which sets forth the nature of the process, the date on which the process was mailed by registered mail, the name and address on the envelope containing the process that was mailed, the fact that the process was mailed by registered mail and was accepted or refused by endorsement or stamp. The return envelope from the attempt to mail process should be attached to the affidavit.

**Service of process and timeshare real property:**

1. Foreclosure proceedings involving timeshare estates may join multiple defendants in the same action. § 721.83, Fla. Stat. (2010).
2. There are additional options to effectuating service of process for a timeshare foreclosure.

(a) Substitute service may be made upon the obligor's appointed registered agent. § 721.85(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. § 721.85(a), Fla. Stat. (2010).

**Substitution of Parties**

1. Substitution is not mandatory; the action may proceed in the name of the original party. However, to substitute a new party based on a transfer of interest requires a court order. *Tinsley v. Mangonia Residence 1, Ltd.*, 937 So. 2d 178, 179 (Fla. 4th DCA 2006), Rule 1.260, Fla. R. Civ. P.
2. Order of substitution must precede an adjudication of rights of parties, including default. *Floyd v. Wallace*, 339 So. 2d 653 (Fla. 1976); *Campbell v. Napoli*, 786 So. 2d 1232 (Fla. 2d DCA 2001), (error to enter judgment without a real party against whom judgment could be entered)
3. When substitution is permitted, plaintiff must show continuity 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 prohibited from entering 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*

*S.N.C. di Ferronato Giovanni & Co. v. Hornsby*, 744 So. 2d 1119, 1121 (Fla. 1st DCA 1999); *Tetley v. Lett*, 462 So. 2d 1126 (Fla. 4th DCA 1984).

2. Legal effect of default - admission of every cause of action that is sufficiently well-pled 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. Digicast New Media Group, Inc.*, 837 So. 2d 451, 452 (Fla. 3d DCA 2003). Default terminates the defending party's right to further defend, except to contest the amount of unliquidated damages. *Donohue v. Brightman*, 939 So. 2d 1162, 1164 (Fla. 4th DCA 2006).

3. Plaintiff is entitled to entry of default if the defendant fails to file or serve any paper 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 paper in accordance with Section 48.121, Fla. Stat. (2008).

(b) United States of America has 60 days to file under the provisions of 28 U.S.C.A. § 2410(b); Rule 12(a)(3), Fed. R. Civ. P.

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

(a) Codified in 50 App. U. 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. Aniskoff*, 507 U.S. 511, 512 (1993). Service member with notice of the foreclosure action, may obtain a stay of the proceedings for a period of 9 months. 50 App. U. S. C. A. § 521 (d) was superseded by the Housing and Economic Recovery Act of 2008, § 2203, which expires on 12/31/10. Upon expiration, the original 90 day period will re-take effect.

(c) Determination 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 defendant is in the military service. 50 App. U. 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 App. U. S. C. A. § 521(b)(3).

5. Plaintiff is required to serve the defendant with notice of the application for default. Failure to notice defendant's attorney entry of subsequent default is invalid; rendering resulting judgment void. *U.S. Bank Nat'l. Ass'n. v. Lloyd*, 981 So. 2d 633, 634 (Fla. 2d DCA 2008).

6. 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 defendant is not in the armed forces. *The Fla. Bar Re: Approval of Forms*, 621 So. 2d 1025, 1034 (Fla. 1993). 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 defendant or when it is unknown if the defendant is deceased. § 733.308, Fla. Stat. (2010).

(a) Section 65.061(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 convicts are involved."

(b) Rule 1.210(b), Fla. R. Civ. P. (2010) provides that the court "shall appoint a guardian ad litem for a minor or incompetent person not otherwise represented...for the protection of the minor or incompetent person." Similarly, Rule 1.511(e), Fla. R. Civ. 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, appointment of a receiver for condominium and homeowners' associations is governed by statute, although it may also be authorized by association by-laws.

(a) Section 718.116(6)(c), 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 720.3085(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 rent 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 movant 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 injunctive relief.

(a) This equitable prejudgment 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. *Alafaya Square Association, Ltd. v. Great Western Bank*, 700 So. 2d 38, 41 (Fla. 5th DCA 1997); *Twinjay Chambers Partnership v. Suarez*, 556 So. 2d 781, 782 (Fla. 2d DCA 1990); *Electro Mechanical Products, Inc. v. Borona*, 324 So. 2d 638 (Fla. 3d DCA 1976).

(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 P'ship 1 v. Kraus-Anderson, Inc.*, 700 So. 2d 6061, 6062 (Fla. 2d DCA 1997).

(c) The party seeking appointment 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 appointment of a receiver is warranted. *Keybank National Association v. Knuth, Ltd.*, 2009 WL 2448160, 2448161 (Fla. 3d DCA, Aug. 12, 2009).

(d) A final prerequisite to appointment of a receiver is that the movant must post a bond, for either the plaintiff or the receiver. Rule 1.620(c), Fla. Rules of Civ. P. (2010); *Boyd v. Banc One Mortgage Corp.*, 509 So. 2d 966,967 (Fla. 3d DCA 1987).

### **Summary Final Judgment of Foreclosure**

1. Legal standard – No genuine issue of material fact and movant 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. *Delandro v. Am.'s. Mortgage Servicing, Inc.*, 674 So. 2d 184, 186 (Fla. 3d DCA 1996); *Holl v. Talcott*, 191 So. 2d 40, 43 (Fla. 1966).
3. 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); *Verizzo v. Bank of New York*, 2010 WL 711862 (Fla. 2 DCA Mar. 3, 2010); *Mack v. Commercial Industrial Park, Inc.*, 541 So. 2d 800, 801 (Fla. 4th DCA 1989).

(a) Opposition materials and evidence supportive of 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., (2) 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 907, 908 (Fla. 3d DCA 2009).

(c) Filing of cross motions is subject to the 20-day notice period. *Wizikowski v. Hillsborough County*, 651 So. 2d 1223 (Fla. 2d DCA 1995).

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 v. Kinas*, 936 So. 2d 31, 32 (Fla. 3d DCA 2006).

#### 6. **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 itemizes:

- (1) property address,
- (2) principal balance,
- (3) interest (calculated from default up until the entry of judgment, when the mortgage provides for automatic acceleration upon default, *THFN Realty Co. v. Kirkman/Conroy, Ltd.*, 546 So. 2d 1158 (Fla. 5th DCA 1989). (best practice is to include per diem interest),
- (4) late charges (pre-acceleration only), *Fowler v. First Fed. Sav. & Loan Ass'n.*, 643 So. 2d 30, 33(Fla. 1st DCA 1994).),
- (5) prepayment penalties – unavailable in foreclosure actions, *Fla. Nat'l*



*Bank v. Bankatlantic*, 589 So. 2d 255, 259 (Fla. 1991), unless specifically authorized in note in the event of acceleration and foreclosure. *Feinstein v. Ashplant*, 961 So. 2d 1074 (Fla. 4th DCA 2007).

- (6) property inspections & appraisals,
- (7) hazard insurance premiums and taxes.

(b) Affidavit of Costs - This affidavit details:

- (1) the filing fee,
- (2) service of process,
- (3) and abstracting costs.

(c) Affidavit 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 v. U. S. B. Acquisition Co.*, 734 So. 2d 403, 406 (Fla. 1999). 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 v. Rowe*, 472 So. 2d 1145, 1150 (Fla. 1985). With regard to uncontested time, plaintiff is not required to keep contemporaneous time records since the defendant is contractually obligated to pay a flat fee for attorney's time.

(d) Affidavit of reasonable attorney's fee - The award of attorney's fee must be signed by a practicing attorney from the law firm, attesting to the reasonableness of the fee. The award should reference and be 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 complexity of the litigation must be examined. An award of attorney's fees must be based on the facts. See *Immetto Federal Savings and Loan Association v. Day*, 511 So. 2d 332 (Fla. 3d DCA 1987).

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

Section 702.065(2), Fla. Stat. (2010) provides that "it is not necessary for the court to hold a hearing or adjudge the requested attorney's fees to be reasonable if the fees do not exceed 3 per cent of the principal amount owed at the time of the filing of the complaint." *Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145 (Fla. 1985). *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*, 648 So. 2d 291, 292 (Fla. 3d DCA 1995). "An award of attorneys' 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. Homeside Lending, Inc.* 976 So. 2d 618, 620 (Fla. 2d DCA 2008).

### **Affirmative Defenses**

1. Genuine existence of material fact - precludes entry of summary judgment. *Manassas Investments Inc. v. O'Hanrahan*, 817 So. 2d 1080 (Fla. 2d DCA 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*, 418 So. 2d 1017, 1019 (Fla. 3d DCA 1982) "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." *Wiggins v. Protmay*, 430 So. 2d 541, 542 (Fla. 1st DCA 1983). Plaintiff must either factually refute affirmative defenses or establish that they are legally insufficient. *Frost v. Regions Bank*, 15 So. 3d 905, 906 (Fla. 4th DCA 2009).

### 3. **Affirmative defenses commonly raised:**

(a) Payment – Where defendants alleged advance payments and plaintiff failed to refute this defense, plaintiff not entitled to summary judgment. *Morrone v. Household Fin. Corp. III*, 903 So. 2d 311, 312 (Fla. 2d DCA 2005). Equally, if the affidavit of indebtedness is inconclusive (for example, includes a credit for unapplied funds without explanation), and the borrower alleges a the defense of inaccurate accounting, then summary judgment should be denied. *Kanu v. Pointe Bank*, 861 So. 2d 498 (Fla. 4th DCA 2003). 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. *Campbell v. Werner*, 232 So. 2d 252, 256 (Fla. 3d DCA 1970); *Lieberbaum v. Surfcomber Hotel Corp.*, 122 So. 2d 28, 29 (Fla. 3d DCA 1960), (Court dismissed foreclosure complaint where plaintiffs knew that some excusable oversight was the cause for non-payment, said payment having been refused 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 payoff information does not preclude summary judgment. *Walker v. Midland Mortgage Co.*, 905 So. 2d 519, 520 (Fla. 3d DCA 2006).

(c) Estoppel is usually based on 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 that representation and reliance thereon. *Harris v. Nat'l*, 919 So. 2d 850, 854 (Fla. 4th DCA 2002); *Jones v. City of Winter Haven*, 870 So. 2d 1000 (Fla. 3d DCA 2003), (defendant defeated city's foreclosure to provide services which indicated that the city had agreed to stop enforcing its property code if homeowner hired a licensed contractor to make repairs).

(d) Waiver – the knowing and intentional relinquishment of an existing right. *Taylor v. Kenco Chem. & Mfg. Co.*, 465 So. 2d 581, 588 (1st DCA 1985). When properly pled, affirmative defenses that sound in waiver (and estoppel) present

genuine issues of material fact which are inappropriate for summary judgment. *Schiebe v. Bank of Am.*, 822 So. 2d 575 (Fla. 5th DCA 2002).

(1) Acceptance of late payments - common defense asserting waiver is the lenders acceptance of late payments. However, the lender has the right to elect to accelerate or not to accelerate after default. *Scarfo v. Peever*, 405 So. 2d 1064, 1065 (Fla. 5th DCA 1981). Default predicated 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 v. Lowery*, 577 So. 2d 705, 707 (Fla. 2d DCA 1991).

(e) 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. *HTP, Ltd. v. Lineas Aereas Costarricenses, S. A.*, 685 So. 2d 1238, 1239 (Fla. 1996).

Affirmative defense of fraud in the inducement based on allegation that seller failed to disclose extensive termite damage resulted in reversal of foreclosure judgment. *Hinton v. Brooks*, 820 So. 2d 325 (Fla. 5th DCA 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 *Hinton* case that fraud in the inducement was not barred by the economic loss rule. *Id.*

(f) Usury – defined by § 687.03, Fla. Stat. (2010), as a contract for 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 18 percent per annum simple interest. If the loan exceeds \$500,000 in amount or value, then the applicable statutory section is § 687.071, Fla. Stat. (2010). A usurious contract is unenforceable according to the provisions of Section 687.071(7), Fla. Stat. (2010).

(g) Forbearance agreement - Appellate court upheld summary judgment based on Defendant's failure to present any evidence as to the alleged forbearance

agreement of prior servicer to delay foreclosure until the settlement of his personal injury case. *Walker v. Midland Mortgage Co.*, 935 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 95.281(1)(a), Fla. Stat. (2010); *American Bankers Life Assurance Co. of Fla. v. 2275 West Corp.*, 905 So. 2d 189, 191 (Fla. 3d DCA 2005).

(i) Failure to pay documentary stamps – Section 201.08, Fla. Stat. (2010) precludes enforcement of notes and mortgages absent the payment of documentary stamps. *WRJ Dev., Inc. v. North Ring Limited*, 979 So. 2d 1046, 1047 (Fla. 3d DCA 2008); *Bonifiglio v. Banker's Trust Co. of Calif.*, 944 So. 2d 1087, 1088 (Fla. 4th DCA 2007).

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

(j) Truth in Lending (TILA) violations – Technical violations of TILA do not impose liability on lender or defeat foreclosure. *Kasket v. Chase Manhattan Mortgage Corp.*, 759 So. 2d 726 (Fla. 4th DCA 2000); 15 U. S. C. A. § 1600. Exception to TILA one year statute of limitations applies to defenses raised in foreclosure. *Dailey v. Leshin*, 792 So. 2d 527, 532 (Fla. 4th DCA 2001); 15 U. S. C. A. § 1640(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.*, 682 So. 2d 616 (Fla. 2d DCA 1996).

(3) TILA rescission for up to 3 years after the transaction for failure to make material disclosures to borrower. Such as, APR of loan, amount financed, total payment and payment schedule. Rescission relieves borrower only for payment of interest. Must be within three years of closing. 15 U. S. C. § 1601-166 (1994); *Beach v. Great Western Bank*, 692 So. 2d 146, 153 (Fla. 1997).

(a) Wife's homestead interest in mortgaged property gives her right to

TILA disclosure. *Gancedo v. DelCarpio*, 17 So. 3d 843, 844 (Fla. 4th DCA 2009).

(k) Res judicata – Foreclosure and acceleration based on the same default bars a subsequent action unless predicated upon separate, different defaults. *Singleton v. Greymar Assoc.*, 882 So. 2d 1004, 1007 (Fla. 2004).

Additional cases: *Limehouse v. Smith*, 797 So. 2d 15 (Fla. 4th DCA 2001), (mistake); *O'Brien v. Fed. Trust Bank, F. S. B.*, 727 So. 2d 296 (Fla. 5th DCA 1999), (fraud, RICO and duress); *Biondo v. Powers*, 743 So. 2d 161 (Fla. 4th DCA 1999), (usury); *Heimmermann v. First Union Mortgage Corp.*, 305 F. 23d 1257 (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 v. Fairbanks Capital Corp.*, 888 So. 2d 725, 726 (Fla. 5th DCA 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. *Nat'l. Loan Investors, L. P. v. Joymar Assoc.*, 767 So. 2d 549, 550 (Fla. 3d DCA 2000).

### **Final Judgment**

1. Section 45.031, Fla. Stat. (2010) governs the contents of the final judgment. Final Judgment Form 1.996, Fla. R. Civ. P. (2010).

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

3. Court may award costs agreed at inception of contractual relationship; costs must be reasonable. *Nemours Found. v. Gauldin*, 601 So. 2d 574, 576 (Fla. 5th DCA 1992), (assessed costs consistent with mortgage provision rather than prevailing party statute); *Maw v. Abinales*, 463 So. 2d 1245, 1247 (Fla. 2d DCA 1985), (award of costs governed by mortgage provision).

4. Checklist for Final Summary Judgment

(a) Final Judgment:

(1) Check service, defaults, dropped parties.

(2) Check for evidence of ownership of note.

(3) 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.

(6) Late fees – pre-acceleration is recoverable; post acceleration is not. *Fowler v. First Fed. Sav. & Loan Assoc. of Defuniak Springs*, 643 So. 2d 30, 33 (Fla. 1st DCA 1994).

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

(8) Beware - hidden charges & fees for default letters, correspondence related to workout efforts. Court's discretion to deny recovery.

(9) Attorney fees must not exceed contract rate with interest and be supported by an affidavit as to reasonableness. Attorney fee cannot exceed 3% of principal owed. § 702.065(2), F.S. (2010). Beware – add-ons for litigation fees – make sure that they are not double-billing flat fee.

(10) Bankruptcy fees not recoverable - Correct forum is bankruptcy court. *Martinez v. Giacobbe*, 951 So. 2d 902, 904 (Fla. 3d DCA 2007); *Dvorak v. First Family Bank*, 639 So. 2d 1076, 1077 (Fla. 5th DCA 1994). Bankruptcy costs incurred to obtain stay relief - recoverable. *Nemours*, 601 So. 2d at 575.

(11) Sale date – may not be set in less than 20 days or more than 35 days, unless parties agree. § 45.031(1)(a), Fla. Stat. (2010), *JRBL Dev., Inc. v. Maiello*, 872 So. 2d 362, 363 (Fla. 2d DCA 2004).

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

(a) Trial is before the court without a jury. § 702.01, Fla. Stat. (2010).

6. 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 v. Yale Mortgage Corporation*, 15 So. 3d 943, 945 (Fla. 3d DCA 2009).

7. 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 v. Damas*, 2010 WL 532812 (Fla. 3d DCA Feb. 17, 2010); 459 So. 2d 435 (Fla. 3d DCA 1984). 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. § 45.0315, Fla. Stat. (2010).

(a) Court approval is not needed to redeem. *Indian River Farms v. YBF Partners*, 777 So. 2d 1096, 1100 (Fla. 4th DCA 2001); *Saidi v. Wasko*, 687 So. 2d 10, 13 (Fla. 5th DCA 1996).

(b) Court of equity may extend time to redeem. *Perez v. Kossow*, 602 So. 2d 1372 (Fla. 3d DCA 1992).

2. To redeem, mortgagor must pay the entire mortgage debt, including costs of foreclosure and attorney fees. *CSB Realty, Inc. v. Eurobuilding Corp.*, 625 So. 2d 1275, 1276 (Fla. 3d DCA 1993); §45.0315, Fla. Stat. (2008).

3. Right to redeem is incident to every mortgage and can be assigned by anyone claiming under him. *VOSR Indus., Inc. v. Martin Properties, Inc.*, 919 So. 2d 554, 556 (Fla. 4th DCA 2006). 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 Prop. Holdings, Inc.*, 950 So. 2d 428, 429 (Fla. 4th DCA 2007); *Quinn Plumbing Co. v. New Miami Shores Corp.*, 129 So. 690, 694 (Fla. 1930).

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. government has one year to redeem the property. 11 U. S. C. § 541, 28 U. S. C. § 959.

## **Judicial Sale**

### **Scheduling the judicial sale**

1. The statutory proscribed time frame for scheduling a sale is “not less than 20 days or more than 35 days after the date” of the order or judgment. § 45.031(1) (a), Fla. Stat. (2010). The statute applies unless agreed otherwise.

2. Cancellations, continuances and postponements are within the discretion of the trial court. Movant must have reasons. Judicial action based on benevolence or compassion constitutes an abuse of discretion. *Republic Federal Bank v. Doyle*, 2009 WL 3102130 (Fla. 3d DCA 2009), (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. Lupica*, 2010 WL 2218584 (Fla. 5th DCA 6/4/10) – denial of lender’s unopposed motion to cancel and subsequent motion to set aside sale. Counsel alleged a loan modification agreement had been reached. Court was looking 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 the motions. “HAMP Review” and “loss mitigation” do not constitute an agreement. Language in the order indicating the court’s rationale, even if you use a form order. Ask counsel to make a personal representation as an “officer of the court.” See also, *Chemical Mortgage v. Dickson*, 651 So. 2d 1275, 1276 (Fla. 4th DCA 1995). 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" preventing rescheduling. Suggestion: we live in extraordinary times.

### **Notice of sale**

1. Notice of sale must be published once a week, for 2 consecutive weeks in a publication of general circulation. § 45.031(1), Fla. Stat. (2010). The second publication shall be at least five days before the sale. § 45.031(2), 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) Defective notice can constitute grounds to set aside sale. *Richardson v. Chase Manhattan Bank*, 941 So. 2d 435, 438 (Fla. 3d DCA 2006); *Ingorvaia v. Horton*, 816 So. 2d 1256 (Fla. 2d DCA 2002).

### **Judicial sale procedure**

1. Judicial sale is public, anyone can bid. *Heilman v. Suburban Coastal Corp.*, 506 So. 2d 1088 (Fla. 4th DCA 1987). 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 v. Phillips*, 171 So. 2d 197, 198 (Fla. 3d DCA 1965).

3. Amount bid is conclusively presumed sufficient consideration. § 45.031(8), 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. §45.0315, Fla. Stat. (2008).

2. Documentary stamps must be paid on the sale. §201.02(9), 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-4.013(25). (Rule 12B-4.013(3) 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 tax if 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. Dept. of Revenue*, 903 So. 2d 913, 918 (Fla. 2005), (Transfer of unencumbered realty between a grantor and wholly-owned grantee, absent consideration and a purchaser, not subject to documentary stamp tax); *Dept. of Revenue v. Mesmer*, 345 So. 2d 384, 386 (Fla. 1st DCA 1977), (based on assignment of interest and tender of payment documentary stamps should have been paid).

(d) Exempt governmental agencies, which do not pay documentary stamps include: Fannie Mae, Freddie Mac, Fed. Home Administration and the Veteran's Administration. Fla. Admin. Code Rules 12B-4.014(9)-(11); 1961 Op. Atty. Gen. 061-137, Sept. 1, 1961.

### **Objection to sale**

1. An applicant may object to the amount of bid within 10 days. § 45.051, Fla. Stat. (2010). The court may hold a hearing – within judicial discretion. Hearing must be held to every bidder including third party purchasers. *Shlishey the Best v. Citifinancial Bank*, 909 So. 2d 1009 (Fla. 4th DCA 2009).

2. A court has broad discretion to set aside a sale. *Mortgage Corp. v. Bebbie*, 985 So. 2d 614 (Fla. 4th DCA 2007), (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 Development, Inc. v. Maiello*, 872 So. 2d 362, 363 (Fla. 2d DCA 2004).

3. **Test:** sale may be set aside if:

(1) bid was grossly or startlingly inadequate; and (2) inadequacy of bid resulted from some mistake, fraud, or other irregularity of sale. *Blue Star Invs., Inc. v. Johnson*, 801 So. 2d 218 (Fla. 4th DCA 2001); *Mody v. Calif. Fed. Bank*, 747 So. 2d 1016, 1017 (Fla. 3d DCA 1999). Mere inadequacy of price is not enough. *Arlt v. Buchanan*, 190 So. 2d 575, 577 (Fla. 1960). Burden on party seeking to vacate sale.

(a) Plaintiff's delay in providing payoff information cannot be sole basis for setting aside sale. *Action Realty & Invs., Inc. v. Grandison*, 930 So. 2d 674, 676 (Fla. 4th DCA 2006).

(b) Stranger to foreclosure action does not have standing to complain of defects in the absence of fraud. *REO Properties Corp. v. Binder*, 946 So. 2d 572, 574 (Fla. 2d DCA 2006).

(c) Sale may be set aside if plaintiff misses sale, based on appropriate showing. *Wells Fargo Fin. System Fla., Inc. v. GRP Fin. Services Corp.*, 890 So. 2d 383 (Fla. 2d DCA 2004).

(d) Court may refuse to set aside sale where objection is beyond statutory period. *Ryan v. Countrywide Home Loans, Inc.*, 7453 So. 2d 36, 38 (Fla. 2d DCA 1999), (untimely motion filed 60 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. §702.08, Fla. Stat. (2010).

(a) Upon readvertisement and resale, a mortgagor's lost redemptive rights temporarily revest. *YEMC Const. & Development, Inc., v. Inter Ser, U. S. A., Inc.*, 884 So. 2d 446, 448 (Fla. 3d DCA 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. *Quinn*, 129 So. 2d at 694.

(b) Foreclosure is void if titleholder omitted. *England v. Bankers Trust Co. of Calif., N. A.*, 895 So. 2d 1120, 1121 (Fla. 4th DCA 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 1.580, Fla. R. Civ. P. (2010)

3. **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 v. Stockton, Whatley, Davin & Co.*, 488 So. 2d 548, 549 (Fla. 5th DCA 1986);

(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-eviction 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 and the real and personal property removed to the property line.

### **Protecting Tenants at Foreclosure Act of 2009**

1. Federal legislation, known as Section 396, P. L. 111 provides for a nationwide 90 day pre-eviction notice requirement for bona fide tenants in foreclosed properties. The provisions of the original bill were contained in HR 4173, 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. 2602). 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
  - (3) The lease or tenancy requires the receipt of rent that is not substantially lower than the fair market rent for the property.
4. The buyer or successor in interest after 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 8 Housing. 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.”
6. This 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. § 45.032(1)(c), Fla. Stat. (2010). Disbursement of surplus funds is governed by Section 45.031, Fla. Stat. (2010).

2. Entitlement to surplus is determined by priority; in order of time in which they became liens. *Household Fin. Services, Inc. v. Bank of Am., N. A.*, 883 So. 2d 346, 347 (Fla. 4th DCA 2004). It is the duty of the court to prioritize the interests of the competing junior lien holders and the amounts due each. *Citibank v. PNC Mortgage Corp. of America*, 718 So. 2d 300, 301 (Fla. 2d DCA 1998).

(a) Default does not waive lienholder's rights to surplus funds. *Golindano v. Wells Fargo Bank*, 913 So. 2d 614 (Fla. 3d DCA 2005). A junior lienholder has priority over the property holder for surplus funds. *Id.*, 615.

(b) A senior lienholder is not entitled to share in surplus funds. *Garcia v. Stewart*, 906 So. 2d 1117, 1121 (Fla. 4th DCA 2005), (senior lienholder liens unaffected; improper 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*, 2009 WL 3271350 (Fla. App. 3d DCA Oct. 14, 2009).

### **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*, 290 So. 2d 3, 6 (Fla. 1974); *Grace v. Hendricks*, 140 So. 790 (Fla. 1932).

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*, 519 So. 2d 51, 52 (Fla. 3d DCA 1988). The granting of a deficiency judgment is the rule rather than the exception. *Thomas v. Premier Capital, Inc.*, 906 So. 2d 1139, 1140 (Fla. 3d DCA 2005).

(a) Deficiency judgment not allowable if based on constructive service of process.

(b) New service of process on defendant was not required for deficiency judgment where personal jurisdiction had been originally conferred by service of foreclosure complaint. *L. A. D. Property Ventures, Inc. v. First Bank*, 2009 WL 3270846 (Fla. App. 2d DCA Oct. 14, 2009). "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.*

3. Trial court has discretion to enter deficiency decree. § 702.06, Fla. Stat. (2008); *Thomas*, 906 So. 2d at 1140. The court needs to hold an evidentiary hearing. *Merrill v. Nuzum*, 471 So. 2d 128, 129 (Fla. 3d DCA 1985). The court can enter a default judgment provided the defendant was properly noticed. *Semlar v. Savings of Florida*, 541 So 2d 1369, 1370 (Fla. 4th DCA 1989).

(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*, 187 So. 2d 903, 904 (Fla. 3d DCA 1966).

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.*, 906 So. 2d 343, 345 (Fla. 4th DCA 2005). The amount of deficiency is determined at the time of the foreclosure sale. *Estepa v. Jordan*, 678 So. 2d 878 (Fla. 5th DCA 1996). The amount bid at foreclosure sale is not conclusive evidence of the property's market value. *Century Group, Inc. v. Premier Financial Services*, 724 So. 2d 661, (Fla. 2d DCA 1999).

(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. Drew Equipment Company*, 392 So. 2d 609, 610 (Fla. 5th DCA 1981).

(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*, 642 So. 2d 1117 (Fla. 3d DCA 1994).



(c) The amount paid by a mortgage assignee for a debt is "legally irrelevant" to the issue of whether the assignee is entitled to a deficiency award after a foreclosure sale. *Thomas*, 906 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 v. McCollem*, 695 So. 2d 936, 938 (Fla. 4th DCA 1997), *Estepa* 678 So. 2d at 878. However, 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. v. Weit*, 613 So.2d 104 (Fla. 3d DCA 1993). See also, *Thunderbird, Ltd. v. Great American Ins. Co.*, 566 So. 2d 1296, 1299 (Fla. 1st DCA 1990), (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 is on jurisdictional reasons, as distinguished from equitable grounds, is not a bar to an action for deficiency. *Frumkes v. Mortgage Guarantee*, 613 So. 2d 738, 740 (Fla. 3d DCA 1993); *Klondike, Inc.*

6. Reservation of jurisdiction in judgment of foreclosure – jurisdiction is reserved, new or additional service of process on defendant is not required. *Estepa*, 678 So. 2d at 878. The motion and the notice of deficiency must be sent to the attorney of record for the mortgagor. *Id.*, *NCNB v. Pyramid Corp.*, 497 So. 2d 1353, 1355 (Fla. 4th DCA 1986). (The court held that the defendant's failure to give notice of deficiency was not a bar to a deficiency judgment.) However, a motion for deficiency must be timely filed. If untimely, the deficiency claim could be barred upon appropriate motion by the defendant under Rule 1.420(e), Fla. R. Civ. P. (2010), *Frohman v. Bar-Or*, 660 So. 2d 633, 635 (Fla. 2d DCA 1995); *Id.*, 673, 875 (Fla. 2d DCA 1979).

(a) No reservation of jurisdiction in the final judgment - motion for deficiency must be made within ten (10) days of issuance of title. *Frumkes*, 173 at 740.

(b) The lender can file a separate action for post-foreclosure deficiency. Section 702.06, Fla. Stat (2010). In a separate action, the defendant has the right to demand a trial by jury. *Hobbs v. Florida First Nat.'l Bank of Jacksonville*, 480 So. 2d 153, 156 (Fla. 1st DCA 1985); *Bradberry v. Atlantic Bank of St. Augustine*, 336 So. 2d 1248, 1250 (Fla. 1st DCA 1976), (no jury trial right within foreclosure action). Section 55.01(2), Fla. Stat. (2010) mandates that final judgments in a separate action for 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.

7. Statute of limitations –

(a) A deficiency judgment or decree is barred when an action on the debt secured by the mortgage is barred. *Barnes v. Escambia County Employees Credit Union*, 488 So. 2d 879, 880 (Fla. 1st DCA 1986), abrogated on other grounds.

(b) Section 95.11, Fla. Stat. (2010) imposes a five-year statute of limitations for a foreclosure deficiency judgment.

(c) "A cause of action for 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*, 906 So. 2d at 345.

8. There are statutory limitations imposed on a deficiency judgment when a purchase money mortgage is being foreclosed. Section 702.06, 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 v. Nagelbush*, 553 So. 2d 189(Fla. 3d DCA 1989), *Taylor v. Prine*, 132 So. 2d 464, 465 (Fla. 1931).

(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 v. Cannon*, 399 So. 2d 1095, 1096 (Fla. 1st DCA 1981).

### **Bankruptcy**

1. The automatic stay provisions of 11 U. S. C. §362 enjoins proceedings against the debtor and against property of the bankruptcy estate.

(a) To apply, the subject real property must be listed in the bankruptcy schedules as part of the estate. 11 U. 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 7, 11 or 13 automatically terminates 30 days after the second filing, unless good faith is demonstrated. 11 U. S. C. § 362(c)(3).

(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 for relief from stay in subsequent cases over a two year period. 11 U. S. C. §362(d)(4).

3. 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 § 702.10, Fla. Stat. (2010).
2. Upon filing of verified complaint, plaintiff moves for 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.*

3. 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 count for 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 Inv., Inc., v. Clement*, 566 So. 2d 838, 840 (Fla. 5th DCA 1990).
  - (b) Complaint and *lis pendens* – requires amendment.
  - (c) Judgment – Rule 1.540 (a), Fla. R. Civ. P. (2010) governs. For example, an incorrect judgment amount which omitted the undisputed payment of real estate taxes could be amended. *LPP Mortgage Ltd. v. Bank of America*, 826 So. 2d 462, 463 (Fla. 3d DCA 2002).
  - (d) Notice of Sale – requires vacating the sale and subsequent resale of property. *Hyte Development Corp. v. General Electric Credit Corp.*, 356 So. 2d 1254 (Fla. 3d DCA 1978).