

Brevard County Mortgage Foreclosure Division

**The Moore Justice Center
2825 Judge Fran Jamieson Way
3rd Floor
Viera, FL 32940
321-637-5470 – main number
321-637-5642 – fax**

***REVISED* POLICIES and PROCEDURES**

Residential Mortgage Foreclosures Homestead and Non-Homestead

Pursuant to a grant, a Mortgage Foreclosure Division has been created in Brevard County to handle all residential Foreclosure of Mortgage cases filed in the County.

Senior Circuit Judge Charles M. Holcomb presides over Division A and Senior Circuit Judge Lawrence V. Johnston presides over Division B.

We have conferred and agreed on a few practice procedures which may lessen the stress and save time and money and will accommodate all persons with more convenience.

POLICIES AND PROCEDURES

MORTGAGE FORECLOSURE DIVISION – BREVARD COUNTY

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Introduction:

First, below is a form which should be completed by your staff in each case when Summary Judgment is scheduled to assist the court in reviewing the file in advance and minimize the time required to track service of process and defaults. Please distribute the form to all your attorneys and staff and require them to be completed and filed.

Second, if you have a Motion for Summary Judgment scheduled, include in your cover letter sent with the packet a statement that you will be available for one hour after the hearing time scheduled and provide a valid number where you may be reached by telephone. You are **NOT** required to call in. If no defendant appears and there is no problem in the file, we will enter the Summary Judgment and get it out to the Clerk and a copy to you and all parties. If a defendant does appear or if there is a problem with the file, we will telephone you for a hearing on the motion or the problem found in the file. Please be aware that this procedure only applies to Motions for Summary Judgment. Please inform the attorneys, paralegals and secretaries in your firm of this new procedure.

IN THE CIRCUIT COURT IN AND FOR
BREVARD COUNTY, FLORIDA

CASE # 05-20__-CA-_____-XXXX-XX

Plaintiff,

v.

Defendant.

_____ /
I HEREBY CERTIFY THE FOLLOWING:

Plaintiff's Status

NAMED DEFENDANTS	DATE OF SERVICE	TYPE OF SERVICE	DATE DEFAULTED	DATE ANSWERED

Submitted on _____, 20__.

Attorney

PROCEDURES FOR SETTING MOTION FOR SUMMARY JUDGMENT HEARINGS/OTHER HEARINGS:

Summary judgment motions are being scheduled for hearing with the Court prior to the attorney handling the file fully preparing the case for hearing. As a result, the Court spends time examining the file and discovering that a party has not been defaulted, a motion to dismiss is pending, no notice of hearing is in the file, no note has been filed and no summary judgment packet has been received, among other problems with the file.

To remedy this practice, **PRIOR** to scheduling hearings on motions for summary judgment, an attorney who has prepared or reviewed the file must fax a certification to the Court at (321)-637-5642 that the file has been examined, that the packet containing the final judgment, note and mortgage, if not already filed, and sale documents will be transmitted to the Court at least five (5) days prior to the hearing and that the case is ready for summary judgment. A Certification is attached to these instructions as *Exhibit "A"* for your use.

Please fax the Certification along with the contact information (e-mail address/phone number) of the person who the Court can contact to schedule the hearing. The Court will then contact the person designated and set the hearings or you may call (321)-637-5470 after 3:00 pm to coordinate the hearing time.

No hearings on motions for summary judgment will be scheduled until the procedure outlined above is satisfied.

Any scheduled hearing on motions for summary judgment, if cancelled, must be cancelled by a written notice of cancellation, sent at least five (5) days before the hearing date.

Please cooperate in order to move your cases along expeditiously to a conclusion. It will be greatly appreciated by the Court. Working together, we can accomplish resolution of cases in a smooth and timely fashion.

To set other hearing requests please e-mail your request to trish.matarazzo@flcourts18.org. All hearing requests **MUST** include the following information either in the e-mail request/fax certification and can be in the form of a word or excel attachment.

- **Subject Line:** please state the type of hearing that you are requesting and DO NOT request MSJ hearings with requests for Motions to Dismiss or other types of hearings as your response will be delayed
- **Time Needed for Hearing:** All MSJ hearings are set for 5 minutes unless otherwise specified. If you do not specify the amount of time needed for your hearing you will be given FIVE (5) minutes. Your requests will be answered sooner if you group all your requests together vs. one at a time. You may request blocks of time and/or a full day for hearings.

- **Case Number**
- **Style**
- **Judge** the case was assigned to originally
- **Time Frame** your hearing is needed – i.e. – Immediately; first available; 30-60-90 days. If this information is not included, the Court will give you a date.
- **Attorney/Opposing Counsel**
- **Contact Information** for all parties
- If you need to coordinate the hearing with opposing counsel, please state this in your e-mail, otherwise you will be given ONE date.

Example: Motion to Dismiss
 5 minutes
 05-2010-CA-100000
 Judge John Smith
 Wells Fargo v Jackson, Jim
 90 days
 Attorneys: Sue Jones 321-555-5555 ext 1234
 ssmith@lawfirm.com
 Jane Doe 321-666-6666 ext 1234 opposing
 counsel jdoe@opposinglawfirm.com

NOTICE OF HEARING:

When preparing the Notice of Hearing, all hearings are heard before the Presiding Judge – Mortgage Foreclosure Division, The Moore Justice Center 3rd Floor, 2825 Judge Fran Jamieson Way, Viera, FL 32940 321-637-5470. Please include in your notice if you are appearing telephonically and follow the procedures outlined herein. Please provide this office a courtesy copy of the Notice of Hearing only.

ATTENDING HEARING IN PERSON:

If you are attending the hearing in person, please check in with the Court Information Specialist on the 3rd Floor and/or proceed to the end of the hall past the Court Information Specialist and have a seat and wait for the Court Deputy to call you. All hearings are on the 3rd Floor – Mortgage Foreclosure Division at The Moore Justice Center in Viera.

CROSS NOTICING OF HEARINGS:

There will be **NO** cross noticing or “piggybacking” of motions unless counsel first has gotten approval from the Court.

CANCELING HEARINGS:

The last minute cancellation of reserved hearing time wastes the courts time and there are multitudes of attorneys and pro se litigants requiring hearing time. If you need to cancel reserved time, you must notify this office at least **FIVE (5) BUSINESS DAYS** prior to the date of the hearing so the time can be utilized by others. The Court will not allow any cancellations, other than in extraordinary circumstances and after a hearing on the issue, except for matters which are resolved, which were the issues for which the time was reserved. Any hearing time cancelled will require the moving attorney or pro se to file a written Notice of Cancellation including resolution of the issue. Failure to cancel prior to five business days, except in circumstances approved by the Court or settlement of the issues addressed, will result in the hearing remaining on the docket and, if counsel does not appear, denial of the relief requested. You may fax the Notice of Cancellation to this office at 321-637-5642 – no cover letter is needed. Only the person who scheduled the hearing may cancel it.

MATTERS NOT REQUIRING A HEARING:

- a. Appointment of Special Process Server
- b. Stipulated Modifications
- c. Stipulated Temporary Orders
- d. Motions to Substitute Party
- e. Plaintiff's Motion for Cancellation and rescheduling a foreclosure sale; Plaintiff's Motions to cancel or set sale dates in mortgage foreclosures. In Motions to Reset Sale date after previous cancellation, the Clerk requires that the reason causing cancellation of the previous sale be set forth in the Order as well as the Motion and that the circumstance has been resolved.
- f. Motion to Dismiss based upon failure to state a cause of action
ONLY
- g. Motions for judgment on the pleadings
- h. Motions for a more definite statement
- i. Motions for leave to file a counterclaim or cross claim
- j. Motions to amend pleadings
- k. Motions to compel answers to interrogatories or to compel response to request for production
- l. Objections to Production or Interrogatories

- m. Motions for a new trial, reconsideration or rehearing or amendments of judgments pursuant to Rule 1.530, Fla. R. Civ. P.
- n. Motions for relief from judgment due to clerical mistakes pursuant to Rule 1.540(a), Fla. R. Civ. P.
- o. Plaintiff's Motions to require Clerk to return original documents because of dismissal of the case. Please attach a copy of Notice of Voluntary Dismissal to Motion.
- p. Plaintiff's Motions for Writs of Possession. Please attach a copy of the Certificate of Title, **not** all the other documents such as Final Judgment, etc.
- q. Motions to Withdraw/Substitute counsel **ONLY** if written consent of the client is obtained, otherwise you will need to schedule a hearing pursuant to Florida Rules of Court; Judicial Administration Rules 2.505 (e) & (f).

Please note that if you want your correspondence/orders to be signed in a timely manner please submit them to the Mortgage Foreclosure Division as sending correspondence to the original assigned Judge will delay its receipt in the Mortgage Foreclosure Division.

TELEPHONE CONFERENCE HEARINGS:

Some motion hearings, motions for summary judgment, etc. may be handled by telephone conference. However, the Notice of Hearing **MUST** set the hearing up as a telephonic hearing and contain the correct information. Otherwise, the privilege of appearing by telephone will not be granted.

Opposing counsel must be apprised of your intent to appear by telephone to decide whether or not they will appear by telephone also. ***The moving attorney has the obligation to place the telephone conference call and conference in the opposing counsel or pro se.*** The Judicial Assistant does not have the time to place these calls and/or to conference in any parties. Testimony will not be allowed to be taken by telephone unless all affected parties stipulate and agree to such testimony or the Court finds it is reasonable and necessary to take the testimony by telephone. Telephonic hearings are allowed as they tend to decrease the expense and needless expenditure of time in litigation.

It is the responsibility of each attorney involved to notify the moving attorney and any other attorney involved of the intent to appear by

telephone. It is the sole responsibility of the moving attorney to place a conference call including all other attorneys or pro se defendants who will appear by telephone and get them on the conference line prior to the time set for hearing. If all parties are not on the call at the time of the hearing, the call will not be placed into the hearing room. Abuse of this procedure may result in revocation of the privilege to attend hearings by telephone.

AFFIDAVITS/ACKNOWLEDGEMENTS:

The Court continues to see hybrid jurats on affidavits and some affidavits which conclude with "to the best of my knowledge and belief." To be an affidavit, the Notary Public or other officer taking the oath must state in the jurat that the party was sworn and that the matters in the affidavit are true.

There also appears to be a misconception as to the meaning of a verified pleading when allowed by a statute or rule of procedure. There also appears to be a misconception of the meaning of language necessary for an oath or affirmation versus an acknowledgement. The question arises frequently in certain actions under the prejudgment writ of replevin statute and prejudgment writ of garnishment statutes.

An oath or verification requires a swearing or affirmation which would subject the person signing the pleading to a prosecution for perjury if the facts sworn to be true are false and the person knew they were false when sworn to or affirmed.

An acknowledgement is a statement by a person qualified to take oaths and acknowledgements that the person purporting to sign the document (such as a deed) produced identification or was known personally and stated that he or she was the person who signed the document, not that the content of the document is true.

An oath or verification which is qualified by "to the best of my knowledge and belief" does not fulfill the requirements of verification or oath or affirmation unless specifically permitted by the applicable rule or statute such as a personal representative of an estate who cannot have personal knowledge of all the facts but must rely on others. See Rule 5.020(e), Fla. Prob.R. and Section 731.104, Florida Statutes 2009 as examples.

A recent change in Rule 1.10, Fla.R.Civ.P. adds the following language:

When filing an action for foreclosure of a mortgage on residential real property the complaint shall be verified. When verification of a document is

required the document filed shall include an oath, affirmation, or the following statement:

"Under penalty of perjury, I declare that I have read the foregoing, and the facts alleged therein are true and correct to the best of my knowledge and belief."

This is allowed because the affiant could not have personal knowledge of all the facts but must rely upon others.

The standard form for an oath or affirmation is substantially as follows:

Long form (preferred):

"Before me, an officer duly qualified to take oaths, personally appeared _____, (known by me personally) (who produced identification), and after being placed under oath, swears or affirms that the facts stated above are true and correct."

Short form:

"Sworn to and subscribed before me"

An acknowledgement is totally different. A representative form is as follows:

"Before me, an officer duly qualified to take oaths and acknowledgements, _____ personally appeared _____, (known by me personally) (who produced identification) and acknowledged before me that he/she was the person who signed the foregoing instrument."

Section 92.525, Florida Statutes 2009, defines verified pleadings or documents as the word is used in statutes, rules, etc. It includes an oath or affirmation before an officer qualified pursuant to Section 92.50, Florida Statutes, OR a written declaration stating "under penalties of perjury, I declare that I have read the foregoing [document] and that the facts stated in it are true," followed by the signature of the person making the declaration. The operative language is "under penalties of perjury" because this takes the place of an oath or affirmation before an official and allows a verification which is untrue to be prosecuted as perjury. See Section 92.525(3) Florida Statutes, 2009. To only state that the facts are true and correct is insufficient and does not constitute a verified pleading. The

statement must be under oath or affirmation before an authorized officer OR be verified by the words, "UNDER PENALTIES OF PERJURY."

Various hybrid forms of purported jurats are in use and do not meet the requirements. One seen often is as follows:

"Before me appeared _____ who acknowledged before me that he/she signed the above [document] and did take an oath."

The missing part is that the person did not say that the statements alleged were true or what oath the person took. Could it be an oath that the person is who he/she said he/she is?

Please make sure your clients and employees utilize a proper oath or affirmation when signing affidavits. Otherwise your case may be delayed as defective affidavits create additional work and time on the part of all concerned.

LOST DOCUMENTS:

The Court is experiencing cases in which the promissory note secured by the mortgage is alleged to have been lost, stolen or destroyed. The practice is to attach to the complaint a "ledger sheet" purporting to list origination date, amount of the loan, a payment amount and due date. These exhibits are not even sworn to.

The Court requires what the statute, §673.3091(2), Florida Statutes (2009), requires. That is a person seeking to reestablish and enforce such note must PROVE the terms of the instrument and the person's right to enforce it.

The Court will require an affidavit or live testimony of a person who was personally familiar with the terms of the note by virtue of preparing it or reading it or other reliable evidence of knowledge of its terms in order to "prove" the terms. This is an evidentiary issue and, unless proved, will neither be reestablished nor enforced. Below is a list of the minimum areas of proof required.

BASIC STATEMENTS TO PROVE LOST OR DESTROYED PROMISSORY NOTE

- Name and address of original lender
- Names of initial borrowers
- Loan number and property address
- Original loan amount
- Date of Note (origination date)

- Fixed rate or adjustable rate loan
- If fixed rate, what the rate is
- If adjustable rate, beginning interest rate, rate at time of default, and maximum rate in note
- Amount and frequency of payments
- Maturity date of note (when required to be paid in full)
- Right to prepay with or without penalty, in full or in part, and if penalty, what it is
- If note provides notice upon default and right to cure default, how many days after written notice. (if notice given by U.S. Mail, add 5 additional days)
- Right to cure default after complaint filed

AFFIDAVIT OF INDEBTEDNESS:

The Court has observed that many law firms submit an affidavit of indebtedness in a summary judgment motion in which the affiant is described as an "agent" of the Plaintiff/Service; attorney in fact for servicer; limited signing agent, etc. The affidavit of indebtedness must be accurate and must clearly identify who the signing affiant is employed by and affiant's position with his employer and that the affiant has personal knowledge of the account. An officer of the Plaintiff is always preferred. One prevalent affidavit states that the affiant is an employee of the servicer but never identifies who the servicer is.

Counsel should review Rule 1.510, Florida Rules of Civil Procedure periodically to make sure the affidavits filed will comply with summary judgment requirements. Rule 1.510(c) requires that you file your motion and shall also send copies of all summary judgment evidence relied upon and not already filed with the Court, at least twenty (20) days prior to the hearing. This includes affidavits of indebtedness, attorney fee affidavits, corroborating attorney fee affidavits and unless being reestablished when actually lost, destroyed or stolen, the note and mortgage.

If you schedule the motion before discovery is closed, the motion may be premature. The following cases hold that summary judgment should not be entered while discovery is pending because it is premature. *Sanchez v. Sears, Roebuck and Co.*, 807 So.2d 196 (Fla. 3rd DCA 2002); *Kimball v. Publix Supermarkets, Inc.*, 901 So.2d 293 (Fla. 2nd DCA 2005), *Henderson v. Reyes*, 702 So.2d 616 (Fla. 3rd DCA 2008); and *Payne v. Cudjoe Gardens Property Owners Association, Inc.*, 837 So.2d 458 (Fla. 3rd DCA 2002).

Any affirmative defenses raised must be factually refuted or disproved or you must establish that the defenses are insufficient as a matter of law. This may be done prior to the motion and is encouraged rather than trying to do it in a Motion for Summary Judgment. However, it can be a part of the Motion for Summary Judgment.

Rule 1.510(e) requires that supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein. If the affidavit would not be admissible at trial, the Court cannot consider it.

In the future, such affidavits **MUST** identify the employer, and if not the Plaintiff, the name of the entity with whom the affiant is employed and the relationship to the plaintiff. They must be made by a custodian of the records or one with personal knowledge of the records and business practices relating to the business records, and must delineate how the affiant has the knowledge to be competent to sign the affidavit as proof of the amounts due. Otherwise it will not suffice to support a Motion for Summary Judgment. An affidavit by an "attorney-in-fact" will not support a Summary Judgment.

PROOF OF STANDING:

Many notes are filed without a proper endorsement to Plaintiff. Those notes do not self prove standing even if there is an assignment of mortgage filed which pre-dates the filing of the complaint. In those cases, the Court requires an Affidavit or other satisfactory proof that the note and mortgage was actually delivered to Plaintiff or that Plaintiff was given the right to enforce the note and mortgage, specifying the date of receipt if delivered or the name and address of the party giving Plaintiff the right to enforce it along with the date of the acquisition of the right and a general statement that the person providing the information has personal knowledge and is an officer of Plaintiff, specifying the office. If the note is endorsed to Plaintiff or if Plaintiff is the original mortgagee or if endorsed in blank (a "bearer" endorsement), the Affidavit or other proof is not required, unless challenged by a Defendant. If the Plaintiff is Plaintiff due to a merger of the entity holding the note, evidence of the merger must be filed. It should be noted that lack of standing is an affirmative defense that should be filed with the answer. See *Glynn v. First Union Nat'l Bank*, 912 So.2d 357 (Fla. 4th DCA 2005); and *Kissman v Panizzi*, 891 So. 2d 1147 (Fla. 4th DCA 2005).

ATTACHMENT OF NOTE AND MORTGAGE TO COMPLAINT:

Arguments are being made to the Court when Plaintiff fails to attach a copy of the note to the complaint, that later filing the original note in the Court file and giving notice of its filing to the Defendants cures the failure to attach it to the complaint. Cited for this proposition is *Hughes v. Home Savings of America*, 675 So.2d 649 (Fla. 2nd DCA 1996) which distinguishes *Eigen v. Federal Deposit Insurance Corporation*, 492 So.2d 826 (Fla. 2nd DCA 1986).

In *Hughes*, the Plaintiff had attached a copy of the note and mortgage to the *original* complaint. An amended complaint was filed and neither the note nor the mortgage was attached to it. The Court held that the defect could have been cured by filing the *original* note and mortgage in the court file with notice given to Defendants. In *Holmes*, the notice of filing of the original documents was *not* served on defendants. In *Eigen*, the same fact circumstance occurred except that the Defendants were served notice of the filing of the documents which cured the defect. The fact that the note and mortgage were attached to the original complaint does not breathe life into the amended complaint which was void of exhibits.

Both cases cited dealt with amended complaints, not the original complaint. Failure to attach copies of the documents sued upon may fail to state a cause of action. This court questions the logic in the case cited but until the Fifth District rules on this issue, the court is bound by the ruling of the Second District.

ADDITIONAL INFORMATION:

- The Mortgage Foreclosure Division of Brevard County **DOES NOT** have an ex-parte calendar for emergency hearings.
- The Mortgage Foreclosure Division of Brevard County **DOES NOT** use the JACS Internet system for scheduling.
- Commercial Mortgage Foreclosures are to be heard by the original Judge assigned to the case and **NOT** the Mortgage Foreclosure Division.

Please check back frequently for updated information.

EXHIBIT "A"

IN THE CIRCUIT COURT OF THE EIGHTEENTH
JUDICIAL CIRCUIT OF BREVARD COUNTY,
FLORIDA

CASE NO. 05 - 20____-CA - _____

MORTGAGE FORECLOSURE DIVISION

Plaintiff(s)

v.

Defendant(s)

CERTIFICATION

The undersigned attorney hereby certifies the following:

1. I am the (Attorney of Record) (Reviewing Attorney) in the above styled case.
2. I have examined the file and certify that all pleadings, defaults, voluntary dismissals, etc. are contained in the file and that the matter is appropriate for summary judgment.
3. I further certify that the Final Judgment, Notice of Sale, etc. will be provided to the court at a minimum of five (5) days prior to the scheduled hearing.

Submitted on _____, 20_____.

Examining Attorney
Firm Name/Address/Contact Info

IN THE CIRCUIT COURT OF THE
EIGHTEENTH JUDICIAL CIRCUIT IN
AND FOR BREVARD COUNTY, FLORIDA

05-20____ - CA - _____

Plaintiff

Vs.

Defendant

_____ /

HEARING REQUEST

The undersigned hereby requests that the following motion be scheduled with the Mortgage Foreclosure Division:

- _____ Motion for Summary Final Judgment of Foreclosure
- _____ Motion to Dismiss
- _____ Other Hearing: _____
- _____ There is no opposing counsel
- _____ There is opposing counsel — *The undersigned has coordinated hearing with opposing counsel. If hearing is to be attended telephonically, The moving attorney has the obligation to place the telephone conference call and conference in opposing counsel or pro se.*

Opposing counsel:

Attorney Name: _____

Law Firm: _____

Address: _____

Telephone Number: _____

E-mail: _____

Submitted this _____ day of _____, 20_____.

Law Firm: _____

Address: _____

Phone: _____

E-Mail: _____

Designated plaintiff liaison: _____

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 the payment of arrearages, thereby reinstating the mortgage. *Pici v. First Union 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. (2010); *Farmers & Merch. Bank v. Riede*, 565 So. 2d 883, 885 (Fla. 1st DCA 1990).
2. Commencement of limitations period:
 - (a) General rule - commencement upon accrual of the cause of action; this occurs when the last element of the cause of action is satisfied (for example, default).

§ 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, *Kumar Corp. 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. *Mortgage Electronic Registration Systems, Inc. v. Revoredo*, 955 So. 2d 33 (Fla. 3d DCA 2007), (*MERS* was the holder by delivery of the note); *Mortgage Elec. Registration Systems, Inc. v. Azize*, 965 So. 2d 151 (Fla. 2d DCA 2007); *Philogene v. ABN AMRO Mortgage Group, Inc.*, 948 So. 2d 45 (Fla. 4th DCA 2006).

2. Assignment of note and mortgage - Plaintiff should assert assignee status in complaint. Absent formal assignment of mortgage or delivery, the mortgage in equity passes as an incident of the debt. *Perry v. Fairbanks Capital Corp.*, 888 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, these parties are not deemed indispensable parties. *Davis v. Scott*, 120 So. 1 (Fla. 1929).

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

(a) Includes: junior mortgagees, holders of judgments and liens acquired after the superior mortgage, lessees and tenants/parties in possession of the real property. *Posnansky v. Breckenridge Estates Corp.*, 621 So. 2d 736, 737 (Fla. 4th DCA 1993); *Commercial Laundries, Inc., v. Golf Course Towers Associates*, 568 So. 2d 501, 502

(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. Tadmor*, 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 11th Circuit Homestead Access to Mediation Program (CHAMP) mandating mandatory mediation of homestead foreclosures prior to the matter being set for final hearing. At the time of filing the complaint, Plaintiff is required to transmit to the

Program Manager, the Collins Center, a notice form (Form A) with borrower's contact information. Within five days of filing the complaint, Plaintiff must tender a cost check in the amount of \$750.00 to cover the administrative costs of the mediation. The Collins Center responsibilities include: contacting the borrower, referring the borrower to financial counseling and making financial documentation available electronically to the Plaintiff. Plaintiff's counsel and the borrower are required to be physically present at mediation; the lender's representative must attend, but is allowed to participate by telephone. Within ten days of the completion of the mediation, the mediator must report the mediation results to the court.

(b) Administrative Order 09-09 revised the following forms: the civil cover sheet, Plaintiff's certification of settlement authority, Plaintiff's certification of residential mortgage foreclosure case status and the final judgment of foreclosure.

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

(c) Administrative Order 09-09 A1 acknowledged the statutory authority of the Clerk of the Courts to conduct the sale of real or personal property by electronic means. This Administrative Order further proscribed adherence to certain procedures concerning tenant occupied residential properties under the "Protecting Tenants at Foreclosure Act of 2009." Amending the specific format of the final judgment of foreclosure, this Administrative Order prohibited the issuance of immediate writs of possession.

(d) Administrative Order 09-18 responded to the Clerk of the Court's request for formal approval to conduct on-line auctions, in lieu of on-site auctions for the sale of real property.

2. On December 28, 2009, the Florida Supreme Court issued Administrative Order 09-54, adopting the recommendations of the Task Force on Residential Mortgage Foreclosure Cases and establishing a uniform, statewide managed mediation program. The Florida Supreme Court approved the Task Force's Model Administrative Order, with minor changes to be implemented by each circuit chief judge.

3. On February 26, 2010, the Eleventh Judicial Circuit Court issued Administrative Order 10-03 A1 requiring mandatory mediation of all homestead mortgage foreclosure actions subject to the federal Truth in Lending Act, Regulation Z. Administrative Order 10-03 A 1 applies to actions filed after March 29, 2010. Specifically exempted from this Administrative Order are condominium and homeowners' association fee foreclosures and mechanics and construction lien foreclosures. This Administrative Order constitutes a formal referral to mediation through the Residential Mortgage Foreclosure Mediation (RMFM) Program; parties are ineligible for default judgment, a summary judgment or final hearing until they have fully complied with mediation requirements.

Basic Procedural Requirements of Administrative Order 10-03 A1 include:

(a) When suit is filed, plaintiff must file a completed Form A with the Clerk listing the last known mailing address and phone number for each party. One business day after filing the complaint, plaintiff must transmit Form A to the Program Manager of the RMFM along with the case number of the action. The Collins Center for Public Policy, Inc. is the contract Program Manager in the Eleventh Judicial Circuit. At the time of the filing of the complaint, the Plaintiff must tender RMFM fees in the amount of \$400.00; the balance of fees in the amount of \$350.00 must be paid by Plaintiff within 10 days after notice of the mediation conference.

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

(c) The Program Manager must transmit the borrower's financial disclosure for mediation no later than 60 days after the Program Manager receives Form A from Plaintiff.

(d) The Program Manager shall schedule a mediation session no earlier than 60 days and no later than 120 days after suit is filed.

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

Service of Process

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 defenses with the clerk and serve same upon the plaintiff's attorney within 30 days after the first publication of the notice.

(1) Notice - published once each week for two consecutive weeks, with proof of publication filed upon final publication.

§49.10(1)(c)(2), Fla. Stat. (2010).

(d) Affidavit of diligent search - need only allege that diligent search and inquiry have been made; it is not necessary to include specific facts. *Floyd v. FNMA*, 704 So. 2d 1110, 1112 (Fla. 5th DCA 1998), (final judgment and sale vacated based on plaintiff's failure to conduct diligent search to discover deceased mortgagor's heirs residence and possession of the subject property). However:

(1) Better practice is to file an affidavit of diligent search that contains all details of the search. *Demars v. Vill. of Sandalwood Lakes Homeowners Ass'n.*, 625 So. 2d 1219, 1222 (Fla. 4th DCA 1993), (plaintiff's attorney failed to conduct diligent search and

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

(a) **Diligent search and inquiry checklist**

Form 1.924, Fla. R. Civ. P. (2010) contains a basic checklist of a diligent search and inquiry to establish constructive service. This Form adds consideration of inquiry of tenants as to the location of the owner/landlord of tenant occupied property. Further, the Form utilizes the following sources:

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

(f) The plaintiff bears the burden of proof to establish the legal sufficiency of the affidavit when challenged. *Id.* If constructive service of process is disputed, the trial court has the duty of determining: (1) if the affidavit of diligent search is legally sufficient; and (2) whether the plaintiff conducted an adequate search to locate the defendants. *First Home View Corp. v. Guggino*, 10 So. 3d 164, 165 (Fla. 3d DCA 2009).

(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 or defective service actually gives notice of the proceedings. *Id.*

(i) Limitations of constructive service – only confers in rem or quasi in jurisdiction; restricted to the recovery of mortgaged real property.

(1) No basis for deficiency judgment - constructive service of process cannot support a judgment that determines an issue of personal liability. *Carter v. Kingsley Bank*, 587 So. 2d 567, 569 (Fla. 1st DCA 1991), (deficiency judgment cannot be obtained 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. *Koehli 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 the identity of the new party's interest and the circumstances.

Entry of Default

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

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

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. *Wizikowsji 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 lender is contractually obligated to pay a flat fee for that time. *Id.*

(d) Affidavit as to reasonableness of attorneys' fee - Affidavit of attorney's fee must be signed by a practicing attorney not affiliated with the plaintiff's firm, attesting to the rate as reasonable and customary in the circuit. Affiant should reference and evaluate the attorney fee claim based on the eight factors set forth in Rule 4-1.5(b)(1) Rules Regulating the Fla. Bar. Of these, relevant factors, such as the time and labor required, the customary fee in the locality for legal services of a similar nature, and the experience and skill of the lawyer performing the service must be examined. An award of attorney fees must be supported by expert evidence. *Palmetto Federal Savings and Loan Association v. Day*, 512 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.*, 935 So. 2d 519, 520 (Fla. 3d DCA 2006).

(c) Estoppel is usually based on: a representation as to a material fact that is contrary to a later-asserted position; reliance on that representation; and a change in position detrimental to the party claiming estoppel, caused by the representation and reliance thereon. *Harris v. Nat'l. Recovery Agency*, 819 So. 2d 850, 854 (Fla. 4th DCA 2002); *Jones v. City of Winter Haven*, 870 So. 2d 52, 55 (Fla. 2d DCA 2003), (defendant defeated city's foreclosure based on evidence presented which indicated that the city had agreed to stop fines for noncompliance with property code if homeowner hired a licensed contractor to make repairs).

(d) Waiver – the knowing and intentional relinquishment of an existing right. *Taylor v. Kenco Chem. & Mfg. Co.*, 465 So. 2d 581, 588 (Fla. 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. 2d 1257 (11th Cir. 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. *Natl. 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 client and be supported by an affidavit as to reasonableness. Attorney fee cannot exceed 3% of principal owed. § 702.065(2), Fla. Stat. (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 vacate sale reversed. Counsel alleged a loan modification agreement had been reached. Court rejected asking for evidence of agreement. The Fifth District Court ruled, “there was no basis for the trial court to reject Wells Fargo’s counsels representation, as an officer of the court, that an agreement had been reached.” *Id.* Look at language in motions, “HAMP Review” and “loss mitigation” do not constitute an agreement. Include language in the order indicating the court’s rationale, even if you have a form order. Ask counsel to make a personal representation as an “officer of the court.” See also, *Chemical Mortgage v. 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. Any party may file a verified objection to the amount of bid within 10 days. § 45.031(8), Fla. Stat. (2010). The court may hold a hearing – within judicial discretion. Hearing must be noticed to everyone, including third party purchasers. *Shlishey the Best v. Citifinancial Equity Services, Inc.*, 14 So. 3d 1271 (Fla. 2d DCA 2009).
2. Court has broad discretion to set aside sale. *Long Beach Mortgage Corp. v. Bebble*, 985 So. 2d 611, 614 (Fla. 4th DCA 2008), (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 by the sheriff and personal property removed to the property line.

Protecting Tenants at Foreclosure Act of 2009

1. Federal legislation, known as Senate Bill 896, P. L. 111-22, provides for a nationwide 90 day pre-eviction notice requirement for bona fide tenants in foreclosed properties. The provisions of the original bill were extended under 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. *Gollindano 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 suit for jurisdictional reasons, as distinguished from equitable grounds, is not res judicata so as to bar an action for deficiency. *Frumkes v. Mortgage Guarantee Corp.*, 173 So. 2d 738, 740 (Fla. 3d DCA 1965); *Klondike, Inc. v. Blair*, 211 So. 2d 41, 42 (Fla. 4th DCA 1968).

6. Reservation of jurisdiction in the final judgment of foreclosure – If 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 hearing must be sent to the attorney of record for the mortgagor. *Id.*, *NCNB Nat'l. Bank of Fla. v. Pyramid Corp.*, 497 So. 2d 1353, 1355 (Fla. 4th DCA 1986), (defaulted defendant entitled to notice of deficiency hearing). However, the 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, 636 (Fla. 1995); *Steketee v. Ballance Homes, Inc.*, 376 So. 2d 873, 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).

(e) Certificate of title – a “genuine” scrivener’s error in the certificate of title can be amended. However, there is no statutory basis for the court to direct the clerk to amend the certificate of title based on post judgment transfers of title, faulty assignments of bid or errors in vesting title instructions.

(1) An error in the certificate of title which originates in the mortgage and is repeated in the deed and notice of sale requires the cancellation of the certificate of title and setting aside of the final judgment. *Lucas v. Barnett Bank of Lee County*, 705 So. 2d 115 (Fla. 2d DCA 1998). (For example, plaintiff’s omission of a mobile home and its vehicle identification number (VIN) included in the mortgage legal description, but overlooked throughout the pleadings, judgment and notice of sale, cannot be amended in the certificate of title.) Due process issues concerning the mobile home require the vacating of the sale and judgment.

Mortgage Workout Options

1. Reinstatement: Repayment of the total amount in default or payments behind and restoration to current status on the note and mortgage.
2. Forbearance: The temporary reduction or suspension of mortgage payments.
3. Repayment Plan: Agreement between the parties whereby the homeowner repays the regularly scheduled monthly payments, plus an additional amount over time to reduce arrears.
4. Loan Modification: Agreement between the parties whereby one or more of the mortgage terms are permanently changed.
5. Short Sale: Sale of real property for less than the total amount owed on the note and mortgage.

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

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

Parker Delaney, 186 F. 2d 455, 459 (1st Cir. 1950). However,

✓ federal legislation has temporarily suspended imputation of income upon the cancellation of debt.

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

Revised 7/14/10



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October 19, 2010

Chief Judge J. Preston Silvernail
Eighteenth Judicial Circuit Court of Florida
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RICHARD ZACKS
TREASURER

Dear Chief Judge Silvernail:

The following is a formal request for public records pursuant to Florida Rule of Judicial Administration Rule 2.420 (2010) and Article I, § 24(a) of the Florida Constitution. We hereby request copies of public records dating from January 1, 2009 until the present that contain the information enumerated below.

1. All records of the judicial branch relating to the establishment of any division, section, or case management unit within the Eighteenth Judicial Circuit created to manage, adjudicate, or dispose of proceedings related to foreclosure cases,¹ including but not limited to administrative orders, memoranda, correspondences, and minutes of meetings.
2. All records of the judicial branch relating to the rules, procedures, and practices established to manage, adjudicate or dispose of foreclosure cases in the Eighteenth Judicial Circuit.
3. All records of the judicial branch indicating the names, job titles, and responsibilities of all judges, senior judges, magistrates, and clerks assigned to preside in any division, section, or case management unit within the Eighteenth Judicial Circuit created to manage, adjudicate, or dispose of foreclosure cases.
4. All records of the judicial branch relating to the training of general magistrates or senior judges to preside over foreclosure cases. This request includes, but is not limited to, any manuals or other training materials provided to general magistrates or senior judges assigned to preside over foreclosure cases.

¹ For purposes of these requests, "foreclosure case" means any civil litigation initiated to foreclose on residential real property.

Note per KW

*-AO
✓
- Kathy*

5. All records of the judicial branch relating to the rules governing public access to civil proceedings in the Eighteenth Judicial Circuit, including but not limited to public access to proceedings in foreclosure cases.
6. All records of the judicial branch containing data maintained in the Case Tracking System for submission to the Office of State Court Administration, as provided in the State Courts System FY 2010-2011 Foreclosure and Economic Recovery Funding Plan. This data includes, but is not limited to, clearance rates, the number of cases disposed, the percent of backlogged cases, and the average age of target cases. This request encompasses each tracking workbook provided to the Office of State Court Administration from June 30, 2010 until the present.

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

"Records of the judicial branch" is defined, under Florida Rule of Judicial Administration 2.420(b)(1), to mean all records, regardless of physical form, characteristics, or means of transmission, made or received in connection with the transaction of official business by any judicial branch entity.

Please provide this information on a CD-ROM or in an electronic format. Where electronic records cannot be provided, please supply instead paper copies of all responsive documents. Please direct all records to:

Rachel Goodman
American Civil Liberties Union
125 Broad Street, 18th Floor
New York, NY 10024

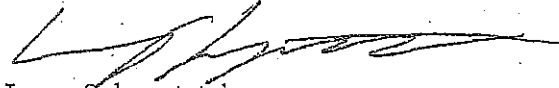
If you believe that an exemption applies to any portion of the records requested, Florida Rule of Judicial Procedure 2.420(i)(2) requires you to state in writing the reasons for your conclusion that the record is exempt. Please also state the basis for any alleged exemptions with specificity as to the reasons for your assertions and excise or delete from the records only that portion of the record for which an exemption is being asserted and validly applies.

Please note that Rule 2.420(i) requires that your response to this request be reasonable. We therefore request that you produce these records within 20 days from the date of this request.

The American Civil Liberties Union is a non-profit organization, and the disclosure of the data requested in this letter is pursuant to the public interest. Therefore, we request that your compliance with this request be provided free of charge. However, if you are unable to do so, and if the fee will exceed \$100.00, please contact us before the charges are incurred.

If you have any questions regarding this request, please feel free to contact Rachel Goodman at (212) 549-2588 or rgoodman@aclu.org.

Sincerely,



Larry Schwartzol
Rachel Goodman
ACLU Racial Justice Program

Muslima Lewis
ACLU of Florida

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

18TH CIR 00072

Laurie Rice

From: Andrea Butler
Sent: Thursday, May 06, 2010 8:41 AM
To: Laurie Rice
Subject: FW: foreclosure sales

DIRECT
637-6520
[Signature]

From: Andrea Butler
Sent: Tuesday, May 04, 2010 11:37 AM
To: Susan Phillips; Laurie Rice
Subject: RE: foreclosure sales

or
internally

Good Morning,

February: 535 cases scheduled for auction; 324 cases auctioned
March: 600 cases scheduled for auction; 400 cases auctioned
April: 541 cases scheduled for auction; 367 cases auctioned

Please let me know if you require any additional information.

Sincerely,
Andrea Butler

From: Laurie Rice
Sent: Tuesday, May 04, 2010 10:22 AM
To: Susan Phillips
Cc: Andrea Butler
Subject: RE: foreclosure sales

Of course.

Andrea: Please provide Susan with a monthly total of cases scheduled for sale and those that actually went to sale.

Laurie

From: Susan Phillips [Redacted]
Sent: Tuesday, May 04, 2010 10:17 AM
To: Laurie Rice
Subject: RE: foreclosure sales

Both?

From: Laurie Rice [Redacted]
Sent: Tuesday, May 04, 2010 10:19 AM
To: Susan Phillips
Subject: RE: foreclosure sales

Susan: Do you want the total scheduled for sale or the actual number that went to sale?

From: Laurie Rice [REDACTED]
 To: larryjohnstonfi@aol.com
 Subject: FW: Foreclosure statistics
 Date: Thu, May 6, 2010 8:14 am

Judge Johnston: I hope this information is helpful. Should you need additional information prior to your meeting, please let me know. My direct number is 637-6520.

Laurie

From: Laurie Rice
Sent: Monday, April 05, 2010 12:32 PM
To: Deborah Haataja-Deratany; J. Preston Silvernail; Robert Wohn; Lisa Davidson; Mark VanBever
Cc: Brenda Anderson; Nancy Brown
Subject: Foreclosure statistics

Deborah: Below is a spreadsheet for the residential foreclosure filings for July 2009 through March 2010. Please note that March totals are preliminary as all work may not have been completed yet for the month.

Laurie

	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar
County Ct Residential Fcl	4	4	8	4	4	7	5	5	4
Residential \$0-\$50K	47	25	34	44	25	44			
Residential \$50K-\$250K	592	578	544	550	503	646			
Residential > \$250K	137	99	100	131	100	126			
Homestead \$0-\$50K							14	25	21
Homestead \$50K-\$250K							364	413	376
Homestead > \$250K							63	67	63
Non-Homestead \$0-\$50K							19	13	28
Non-Homestead \$50K-\$250K							174	198	189
Non-Homestead > \$250K							38	40	29

ROUGH DRAFT

MORTGAGE FORECLOSURE DIVISION
MINUTES FROM 5/6/10

QUESTIONS RAISED:

1. Will the division be funded for residential mortgages only or for commercial mortgages as well?
2. Will the division be funded for County Court foreclosures as well? (Jurisdiction?)
- 3.

FACTUAL CONSIDERATIONS:

1. The Clerk now sells approximately 100 properties per week at auction. Many more than that are actually scheduled.
2. The Clerk has an outside number of sales it can handle on any one day. That number is approximately _____.
3. The Clerk has considered and will add another day of sales (Tuesdays) if an overload develops.
4. There are approximately 5,000 foreclosure cases now pending in Brevard County.
- 5.

ADMINISTRATIVE DETAILS:

1. All MFD hearings will be held in Viera, visiting judges' chambers.
2. Cases and files now in Titusville will be handled in Viera as well.
3. Correspondence will be addressed to "Presiding Judge" in order to allow continuity between LVJ and CH. Each judge will sign orders and judgments for the other.
4. Motions for Summary Judgment will be scheduled at the rate of 20-30 per hour on residential cases and 5-10 per hour for commercial ones.
5. Judicial Assistants will be requested to send a Notice of Rescheduling to all parties for all cases in their division to reset time and place of hearings but not date. Information for call-in telephone number will also be provided.

6. The MFD will schedule at least one day every two weeks for motions, hearings and trials other than in the nature of Summary Judgments.

7. Foreclosure cases will NOT be reassigned by the clerk. They will retain their status with the assigned judge but handled and disposed by the MFD judges.

8. Special attention will be paid to disposing of outstanding cases by the liberal use of Lack of Prosecution (LOP) notices. This will be accomplished in main part by August 30, 2010.

9.

SPECIAL REQUESTS:

1. The MFD will require a full-time judicial assistant.

2. The MFD will need a regularly assigned deputy. Rotating, musical chair deputies would not be conducive to an orderly administration of this new and unique division.

3. Due to the expectation of high volume, for the first 60 days, the MFD will need the assistance of a clerk (on hearing days only) to help organize files and paperwork.

4.

WORK TO BE DONE:

1. LVJ will contact Civil Division Chief Wohn to begin an interface with him.

2. CH will create a Foreclosure worksheet for presiding judges to use to increase uniformity of procedures.

3. LVJ will contact Lee and Orange Counties to determine what they are doing with mediation and "Rocket Dockets."

4. LR will identify and capture all mortgage cases for each judge and provide that information to LVJ and CH.

5. Copies of all civil hearing schedules for each judge from July 1 and thereafter should be provided to LVJ and CH as soon as practicable.

6.

May 21, 2010

Mortgage Foreclosure Division

Dear Preston:

Pursuant to your request, I am submitting this to help you evaluate the plan Judge Holcomb and I have devised in order to have an orderly and efficient transition of the foreclosures in Brevard County.

As I indicated when I spoke to you, we have four goals:

1. To begin setting Summary Judgment hearings on the new MFD calendar immediately.

To accomplish this goal, we distributed a calendar to each of the JA's on May 21. Each JA is now able to stop putting any more Summary Judgments on his or her judge's calendar. Judge Holcomb and I will begin conducting hearings on July 2.

2. To remove cases now on already on judges' calendars.

It will not be feasible to fully accomplish this goal until after July 1 when both Judge Holcomb and I are working and able to review our workload and determine how each judge wishes to shed the cases now calendared. Sending letters or calling each litigant is impractical. Sending orders unilaterally with new dates is likely to cause more problems than it solves. However, we are open to any suggestions the Judges may have to transfer matters already on their dockets to us. In the meantime, JA's are invited to reschedule any and all Motions for Summary Judgment on the new MFD, to the extent they are able to do so if it does not cause undue hardship.

3. To reduce the backlog of stagnant cases.

By specializing in one type of case, more attention can be given to monitoring the Clerk's responsibility to report dormant files and for Judge Holcomb and I to schedule Status Conferences and send out Orders To Show Cause for Lack of Prosecution.

4. To absorb and monitor all remaining foreclosures tasks, whether residential or commercial and whether in Circuit or County Court.

More will be expected of the MFD than to just do Summary Judgments for the five hours each day we now have in place. It will be a fulltime job to handle these and the other types of motions, file review, a high volume of orders to sign and even an occasional trial. It is contemplated that from two to three hours each day will be spent reviewing files scheduled for the next day. A cover sheet identifying any problems with the file will be prepared so the Party or Parties may be advised in order to clear the problem and have the case resolved expeditiously.

I hope this helps explain how we envision the new Division to operate. Please contact Judge Holcomb or myself if you have any questions.

Very truly yours,



STATE OF FLORIDA
CIRCUIT COURT EIGHTEENTH JUDICIAL CIRCUIT

Lawrence V. Johnston
Circuit Judge, Retired

May 21, 2010

The Honorable Preston Silvernail
2825 Jamieson Way
Viera, FL 32940....

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3. To reduce the backlog of stagnant cases.

By specializing in one type of case, more attention can be given to monitoring the Clerk's responsibility to report dormant files and for Judge Holcomb and I to schedule Status Conferences and send out Orders to Show Cause for Lack of Prosecution.

4. To absorb and monitor all State funded approved foreclosures tasks.

More will be expected of the MFD than to just do Summary Judgments for the five hours each day we now have in place. It will be a full-time job to handle these and the other types of motions, file review, a high volume of orders to sign, and even an occasional trial. It is contemplated that from two to three hours each day will be spent reviewing files scheduled for the next day. To identify problems and allow the parties to resolve them expeditiously, we will use a cover checklist to verify that the file and paperwork is in order before each hearing.

Statutory constraints require this division to limit its work to real property and mortgage foreclosure cases until the outstanding backlog is reduced. When that is accomplished, this Circuit may make a written request for permission from the TCBC and OSCA for the MFD to handle two additional types of matters: "a) contracts and indebtedness cases and b) county civil cases from \$5,001 to \$15,000." Fulfillment of those tasks will not be permitted until approved by Tallahassee.

I hope this helps explain how we envision the new division to operate. Please contact Judge Holcomb or myself if you have any questions.

Very truly yours,

Lawrence V. Johnston



STATE OF FLORIDA
CIRCUIT COURT EIGHTEENTH JUDICIAL CIRCUIT

Lawrence V. Johnston
Circuit Judge, Retired

May 21, 2010

The Honorable Preston Silvernail
2825 Jamieson Way
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I hope this helps explain how we envision the new division to operate. Please contact Judge Holcomb or myself if you have any questions.

Very truly yours,



Lawrence V. Johnston

From: Larry Johnston [REDACTED]
To: CHolcomb@cfl.fl.com
Subject: MFD
Date: Wed, May 26, 2010 5:44 pm

Hey Charlie

I have been working in Osceola the last few days.

I had an opportunity to sit in with their foreclosure judge. She says she schedules as many as 15 per 15 minutes but I didn't see that many go through. A lot must cancel.

Anyway, here are some things to consider.

1. Bring in ALL defendants at the same time rather than sending deputy out to find each individual. The defendants can then wait for the plaintiff to call in or show up. This streamlines things a lot.
2. They are getting ready to go to a "no phone conference" procedure. This forces the attorney to show up, have his or her paperwork in order and look ashamed if they have wasted a trip from Tampa or Miami for nothing. Very interesting.
3. The judge had TWO clerks and TWO deputies looking for files and paperwork the whole time. I think we can improve on that with less personnel.
4. A major issue comes in with Spanish speaking defendants. The defendant shows up because that is what someone told them to do but does not understand a word of what the judge is saying. If we can't figure out how to get a Spanish speaking clerk or deputy, perhaps we can create a set of written explanations we can point to so they can at least read what just happened.

Will be interested to talk with you about these things.

Larry

From: Larry Johnston [REDACTED]

To: CHolcomb@cfl.rr.com

Subject: MFD

Date: Wed, May 26, 2010 5:44 pm

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Will be interested to talk with you about these things.

Larry

Jamie Connors

From: Ted Vulpus
Sent: Friday, June 11, 2010 3:14 PM
To: Kyle Postlethwaite; Jamie Connors
Subject: FW: backlogged foreclosure
Attachments: Book1.xls

Please pull what we have Monday. Attach a copy of the e-mail to the stack of files prior to transfer to Viera.

Thanks,
Ted

From: Laurie Rice
Sent: Friday, June 11, 2010 3:08 PM
To: Ted Vulpus
Cc: 'Larry Johnston'; [REDACTED]; Megan Davis
Subject: backlogged foreclosure

Ted: As you are aware, the legislature has appropriated funds from the State Courts Trust-Fund for a one year project to address backlogged foreclosure cases. Judges Johnston and Holcomb will be the senior judges addressing those cases. They will be sharing a JA. This project will begin July 1, 2010.

To get a jump start on this effort, Judge Johnston has requested that we begin sending him files for review. Please have the files in the attached document, pulled, checked out to Judge Johnston, and delivered to Judge Atkin's hearing room.

Please let me know if you have any questions.

Laurie

Larry Johnston

From: Laurie Rice (Brevard Clerk of Courts)
Sent: Thursday, June 10, 2010 12:44 PM
To: Mark VanBever
Cc: Susan Phillips; Chris Dugan (Brevard Clerk of Courts); Cindy Rabe (Brevard Clerk of Courts)
Subject: RE: Foreclosure and Economic Recovery Funding - Reporting Issues

Mark: Thank you for the heads up.

As stated in the email, SRS reporting requirements do not include reporting of reopen dispositions. However, in Brevard County, we close each of our reopens. So, we should be able to provide only those cases that are pending (original or reopen). Please note, however, that since we track each motion that is filed after the case is disposed, one case may have multiple reopen records. The case status will remain reopen pending until all pending reopen motions have been disposed.

It appears that this data will only be requested once to get a baseline on the backlog. Any actions the senior judges take on cases filed after this list is generated will not be reflected. Depending on what you require, we may be able to help with the tracking. For example, if you are to track only activity on these cases that is taken by a senior judge, we would not be able to tell you whether a senior judge or the assigned judge disposed a case - only that the case was disposed.

Laurie

From: Mark VanBever [REDACTED]
Sent: Thursday, June 10, 2010 11:47 AM
To: Wayne Fountain; Alan Dickey; Susan Phillips; Laurie Rice
Subject: FW: Foreclosure and Economic Recovery Funding - Reporting Issues

From: Kristine Slayden [REDACTED]
Sent: Thu 6/10/2010 10:42 AM
To: Trial Court Administrators
Cc: Lisa Goodner; P.J. Stockdale; Arlene Johnson; Randy Long; 'John Dew'
Subject: Foreclosure and Economic Recovery Funding - Reporting Issues

Trial Court Administrators - On June 4, 2010, the Trial Court Budget Commission (TCBC) discussed the monitoring of the Foreclosure and Economic Recovery Funding Initiative. As reported in an earlier email from me, the TCBC voted at their May meeting that the focus for this project will be on Real Property/Mortgage Foreclosure cases and adopted as the primary goal of the Foreclosure and Economic Recovery Funding Initiative:

- ❖ 62% of all Real Property/Mortgage Foreclosure cases pending (non-disposed and reopened) will be disposed in FY2010-11

In order to monitor the success of this initiative, the following statistics will be calculated:

- Clearance rates

6/11/2010

18TH CIR 00085

- The number of cases disposed
- The percent of backlogged cases
- The average age of target cases

To calculate the above statistics, you will need to track the foreclosure cases throughout the year. As a starting point, you will need information on the cases pending in your circuit at the beginning of this initiative. The following information will need to be requested from the clerks of court:

1. Circuit,
2. County,
3. Uniform Case Number,
4. The date the case was initiated,
5. The applicable SRS case type of the case
6. The date the case was reopened, if applicable
7. The date the case was originally disposed (for reopened cases only)
8. The SRS disposition category (for reopened cases only)

We met with the FACC yesterday and are planning to send out a letter to all 67 clerks of court asking them to send this data to the OSCA. **Please allow us to contact the clerks for this data so that the request can be uniform across the state and the timeframe will be consistent.** Once we get the data from the clerks (we are hoping to get it by July 9, 2010), we will format it in a reporting worksheet and send it out to you to track the cases, along with detailed instructions.

One issue that came up during the meeting yesterday was the issue of reopened cases not being reported as closed due to the SRS reporting requirements. We believe that the list of open cases that the clerks will provide may include some cases that are actually closed. Our instructions will request that you review the list to identify those cases that need to be removed due to the fact that they are already closed. Information from the JIS should allow your case manager to determine the status of the cases. Please let us know if the staff person that will be tracking the cases doesn't have access to JIS and we will make sure they get it.

In addition, the OSCA will include in its audit schedule additional time to audit this data to ensure that the data reported is accurate. The Court Statistics and Workload Committee of the Trial Court Performance and Accountability Commission will oversee the data collection instruments and reporting elements.

Please contact me if you have any questions or concerns about this reporting. 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)



STATE OF FLORIDA
COUNTY COURT EIGHTEENTH JUDICIAL CIRCUIT

THE MOORE JUSTICE CENTER
2825 JUDGE FRAN JAMIESON WAY
VIERA, FLORIDA 32940
(321) 617-7274 (TEL) / (321) 637-5655

ROBERT A. WOHN, JR.
CIRCUIT COURT JUDGE

KATHLEEN M. SILVA
JUDICIAL ASSISTANT

MEMO

TO: BREVARD BAR ASSOCIATION
FROM: ROBERT A. WOHN, JR., CIRCUIT JUDGE
RE: NOTICE FOR ATTORNEYS FILING FORECLOSURE CASES
DATE: MAY 21, 2010

On February 11, 2010, the Florida Supreme Court issued a per curium opinion amending the Florida Rules of Civil Procedure and adopting an additional form pertaining to final judgments of foreclosure.

#1
Rule 1.110, Florida Rules of Civil Procedure, now requires that when filing an action for foreclosure of a mortgage on residential real property the complaint shall be verified. When verification of a document is required, the document file shall include an oath, affirmation, or the following statement:

"Under penalty of perjury, I declare that I have read the foregoing, and the facts alleged therein are true and correct to the best of my knowledge and belief."

#2
Secondly, a new form Affidavit of Diligent Search and Inquiry has been adopted as Form 1.924 of the Florida Rules of Civil Procedure. The form requires that the person signing the form be the person that actually performed the diligent search and inquiry. The form also requires that the process server inquire of any occupant whether the occupant knows the location of the borrower/defendant and indicate the results of that inquiry.

For the full text of the Supreme Court opinion, sc09-1579, please view at <http://www.floridasupremecourt.org/decisions/2010/sc09-1460.pdf>.

Larry Johnston

From: Susan Phillips
Sent: Wednesday, July 14, 2010 11:41 AM
To: Larry Johnston
Subject: Clerk commitment

See last sentence, directly below....

Susan J. Phillips, Family Court Manager
Court Administration - 18th Judicial Circuit
ph 321.637.5673

From: Laurie Rice [REDACTED]
Sent: Friday, June 11, 2010 8:19 AM
To: Susan Phillips
Subject: RE: Foreclosure backlog

Susan: We haven't received a firm commitment, but, based on the information provided to the CCOC by Judge Silvernail and agreement with the split by both Scott and Ms. Morse, it appears we're looking at approximately \$125,000. I spoke with Scott and he will commit to providing a court clerk for each judge for 60 days.

Laurie

From: Susan Phillips [REDACTED]
Sent: Friday, June 11, 2010 8:12 AM
To: Laurie Rice
Subject: RE: Foreclosure backlog

Laurie.....have you heard anything about the exact funding you will get?

Susan J. Phillips, Family Court Manager
Court Administration - 18th Judicial Circuit
ph 321.637.5673

From: Laurie Rice [REDACTED]
Sent: Wednesday, June 09, 2010 9:45 AM
To: Susan Phillips
Subject: RE: Foreclosure backlog

Susan: First of all, do the judges know you are calling them "seniors"? What does that make us????

I'll need to discuss this with Scott as providing two court clerks full time may be problematic for us. Our expected funding will allow for 3-3.5 FTE's - dedicating 2 of those positions (even if only for 60 days) solely to court clerks will keep us from getting the paper generated from the initial push docketed, scanned, etc., and may not allow us to add a sale date to each week. I'll let you know as soon as possible.

Laurie

From: Susan Phillips [REDACTED]
Sent: Wednesday, June 09, 2010 9:18 AM
To: Laurie Rice
Subject: RE: Foreclosure backlog

Laurie,

When you met with the Judges, that was the plan to have one senior here at a time. However, our funding is such that we can have two seniors full-time for one year. Coincidentally, Judge Johnston was in my office when your email came in. He confirmed that both Judges will need a clerk for the first 60 days. The reason is because of the sheer volume of cases they expect to process during that timeframe. After 60 days, at a maximum only one clerk will be needed, and possibly none depending on how the division is running by then. They expect the workload in this division to definitely be on the front end.

Does this help? Sorry for the breakdown in communication on this subject.....S

Susan J. Phillips, Family Court Manager
Court Administration - 18th Judicial Circuit
ph 321.637.5673

From: Laurie Rice [REDACTED]
Sent: Wednesday, June 09, 2010 9:04 AM
To: Susan Phillips
Subject: Foreclosure backlog

Susan: Brenda just informed me that Judges Holcomb and Johnston will both be here for the first 70 days. I must have completely misunderstood when I met with them – my understanding was that only one would be here at a time. Do both judges expect a court clerk?

Laurie

Laurie

From: Susan Phillips [REDACTED]
Sent: Wednesday, June 09, 2010 9:18 AM
To: Laurie Rice
Subject: RE: Foreclosure backlog

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When you met with the Judges, that was the plan to have one senior here at a time. However, our funding is such that we can have two seniors full-time for one year. Coincidentally, Judge Johnston was in my office when your email came in. He confirmed that both Judges will need a clerk for the first 60 days. The reason is because of the sheer volume of cases they expect to process during that timeframe. After 60 days, at a maximum only one clerk will be needed, and possibly none depending on how the division is running by then. They expect the workload in this division to definitely be on the front end.

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Court Administration - 18th Judicial Circuit
ph 321.637.5673

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To: Susan Phillips
Subject: RE: Foreclosure backlog

Susan: We haven't received a firm commitment, but, based on the information provided to the CCOC by Judge Silvernail and agreement with the split by both Scott and Ms. Morse, it appears we're looking at approximately \$125,000. I spoke with Scott and he will commit to providing a court clerk for each judge for 60 days.

Laurie

From: Laurie Rice [mailto: [REDACTED]]
Sent: Monday, July 12, 2010 2:59 PM
To: Larry Johnston
Subject: RE: Extra help

Judge Johnston: We will provide a court clerk for you and/or Judge Holcomb for any time that court is scheduled. If Brittany is not available at a time when court is scheduled, another court clerk will fill in. Once Brittany leaves at the end of the summer, another court clerk will take her place if it is determined that you still need a court clerk.

Laurie

From: Larry Johnston [REDACTED]
Sent: Tuesday, July 13, 2010 8:26 AM
To: Laurie Rice
Subject: RE: Extra help

Hey Laurie

I understand the predicament you are in and not wanting to start a precedent within the courthouse.

The situation here for the next 6 weeks now is different. We are creating a new division and doing things that should have been done a long time ago. We have been trying to absorb and readjust the procedures of 7 different judges and get the attorneys to learn new ways. I have two volunteers working to do the LOP's. We are awash in a backlog of things that need to be done whether court is in session or not.

I appeal (please don't make me beg) to you to provide what I thought the Clerk's office agreed to do last month, i.e., provide two clerks to us for 60 days. I did not understand that to be 1 and one-half clerks and only when "there was court."

I know you received money from the State to provide help and I don't think we have had any impact on the number of sales yet, so you should be ahead of the game until September 1.

We need full-time, reliable full-time assistance from the Clerk's office. May I count on it?

If this is something we all need to meet with the Chief Judge and Scott, I will be happy to put my hat in my hat and beg there.

Thanks.

Larry

Larry Johnston

From: Laurie Rice [REDACTED]
Sent: Wednesday, July 14, 2010 3:45 PM
To: Larry Johnston
Cc: Charles Holcomb; Scott Ellis (Brevard Clerk of Courts)
Subject: RE: Extra help

Judge Johnston: Again, I apologize for the delay in responding. I have spoken to Mr. Ellis about this issue and he confirmed the below.

As you are aware, we currently do not provide court clerks for civil proceedings except in limited circumstances. However, as part of this initiative, Mr. Ellis agreed to provide a court clerk for the first 60 days (and has amended that to provide 2 court clerks and to re-evaluate the need after 60 days). I apologize if my June 11, 2010, email was not clear as to when the court clerks would be available.

While this initiative will allow the court to address the influx of foreclosure cases for the next year, we have been dealing with these cases for over 2 years without additional funding – to the contrary, our budget has been significantly reduced each of the past two years. We have allocated these funds to one of the court clerks (Brittany) as well as an additional sale clerk and records management staff (an equivalent of approximately 3.5 FTEs). Barbara is not being paid with these funds and is being provided from our existing limited budget. The additional sale clerk is assisting with the workload that currently exists for the sales that are scheduled. The records management staff are concentrating on scanning foreclosure pleadings so that the images are available quicker allowing either images or updated files to be available to the court and the public in a more timely manner. So, although there has not been additional work (sales) generated by you and Judge Holcomb yet, a backlog still exists from our perspective.

Barbara works 76 hours per pay period. She will work her schedule around the court's schedule to ensure that she is available when court is in session. Brittany works approximately 28 hours per pay period and also will work her schedule around the court's schedule. If either Brittany or Barbara is not available when court is in session, we will provide a court clerk for the proceeding. You are receiving all of Brittany's hours and essentially all of Barbara's hours and we are ensuring that a court clerk is present during all proceedings. This is the best that we can do for you with the resources we have.

I certainly would not want to make you beg, but would hope that you understand that we are providing you with as much support as we can with the resources that we have. If you would like to meet with Mr. Ellis and Judge Silvernail, please let me know and I would be happy to set up a meeting.

Laurie

CASE MANAGEMENT CONFERENCE PROCEDURE

1. Susan creates a list of 50 cases eligible for Case Management. Notify her when you are ready for a new list of cases.
2. Clerk requests the files from said list.
3. Judge reviews the files. (Susan will have already removed cases set for LOP from the list of CMC cases.)
 - A. Files which have had no recent record activity and appear to still be open should be set for Case Management.
 - B. Files which are closed or confusing need to be referred to Laurie Rice for clarification.
 - C. Cases which already have a LOP order pending should not be set for Case Management.
4. Consult Trish to find a relatively light day for which to set a maximum of 50 cases for a one hour hearing time.
5. Once a hearing date is known and the files ready for Case Management are isolated, they should be given to Karen King (Judge Murphy) or other volunteer JA (Marilyn-Harris, Lori-Roberts, Theresa-Crawford, Chris-Clarke, Billie-Reinman, Peggy-McKibben, Kathy-Wohn) to create a Case Management Conference Order.
6. Volunteer JA's should make an extra copy of all Orders and deliver them to the MFD clerk.
7. All incoming correspondence and returned, undelivered mail should be placed with the Judge's copy of the Orders.
8. MFD clerk should have all files available for Judge's inspection on hearing day.
9. On hearing day, Judge will sign Order of Dismissal or instruct attorney to prepare an appropriate order.
10. Results of hearing will be noted by the clerk on the daily docket and given to Susan Phillips for reporting purposes.

Larry Johnston

Commission on Trial Court Performance and Accountability
Court Statistics and Workload Committee

Foreclosure and Economic Recovery Initiative - Case Reporting System

Background:

The backlog of real property/mortgage foreclosure cases has been accumulating for more than three years. The intent of the legislature in funding this initiative is to reduce the backlog currently in the court system to get properties on the market in order to stimulate the economy.

On May 20, 2010, the Trial Court Budget Commission (TCBC) approved the FY 2010/11 circuit allocations for the Foreclosure and Economic Recovery Funding and approved the effective date for the implementation of the circuits' plans so resources can be deployed on July 1, 2010.

On June 4, 2010, the TCBC requested the Court Statistics and Workload Committee to 1) oversee and approve the development of a case reporting system for the Foreclosure and Economic Recovery initiative; and 2) monitor the results from the data capture in the case reporting system.

Discussion:

There are two distinct measurements relevant to this initiative. The first measure was provided by the TCBC as the goal for this project.

Measurement #1:

- ❖ Dispose 62% of all backlogged Real Property/Mortgage Foreclosure cases (non-disposed and reopened) in FY 2010-11. This measure will be evaluated at the end of the initiative period using the same methodology as used initially to describe the project to the legislature. This methodology uses the official SRS filing and disposition statistics to calculate backlog.

Measurement #2:

The second measurement will provide case specific information during the initiative period. It will allow the courts to generally describe how and why cases are moving or failing to move through the system. Specifically, this second measurement will identify:

- The average age of target cases
- The status of target cases

This measurement effort will need to be collected as a separate reporting requirement as this data is not captured in SRS. To facilitate this case tracking and reporting effort, Court Services is developing a tracking application and each clerk of court will be providing a list of backlogged cases as of close of business June 30, 2010, which will be used to pre-populate the case tracking application for each county in each circuit.

Since this is a temporary project (12 months), data reporting should be self-contained and targeted to the specific project goals. Consequently, it is recommended that, for the duration of

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this short term project, a new data reporting mechanism, the Foreclosure and Economic Recovery Case Tracking System (FERCTS), be developed to capture the data required for this project. For simplicity and ease of use, this system should collect only the data required for the successful tracking for program goals as listed below. FERCTS is not intended to provide case management capabilities. 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.

It is anticipated that a portion of the resources funded for the initiative will be used for this data reporting endeavor. There could be an extensive amount of workload associated with the data reporting system. Nevertheless, this information is essential in summarizing the effort of the courts' in reducing the real property/mortgage foreclosure backlog.

In support of the Foreclosure and Economic Recovery Funding project, the following data reporting plan is proposed.

Data Reporting Plan

Case data required to achieve project goals include the following:

- Circuit
- County
- Uniform Case Number
- Filing Date – initial document stamp date as per the SRS Manual (January 2002)
- SRS Case Category – ‘Real Property/Mortgage Foreclosure’ (see Issue 2 below)
- Date of Case Status Change – captures the date case status changed from one category to another (See Issue 2 below)
- Current Case Status – captures data on the status of a case in broad categories (see Issue 2 below).
- Date of Disposition – As 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 (see Issue 2 below)
- Date of Reopen Event – Report the date that a post-judgment motion is filed and the \$50 fee is paid. It is not the intent of this tracking application to capture every reopen event.
- 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; See Issue 3 below)

Application:

It is expected that this project will involve a large number of case records (over 400,000) distributed over 67 counties. The maximum expected for a single county is approximately

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65,000. The data entry application must balance ease of development and use and ready availability to all personnel who will use it. Among the several alternatives considered, it was determined that a Microsoft Office application best meets the initiative requirements. Therefore, it is recommended that the data reporting mechanism be developed as a Microsoft Excel spreadsheet application providing basic data entry and case tracking functionality for initiative related data elements. The application will be developed in such a manner that the full sort, filter and related capabilities of Excel will be available to assist staff in updating case information as well as provide a basic user interface to simplify routine case information updating.

The OSCA will divide the cases by circuit and county and initially populate the FERCTS workbooks for each trial court administrator with the pending case data provided by the clerks. The OSCA will transmit the data reporting workbooks to each trial court administrator. Cases transferred into the initiative after July 1, 2010 will have to be entered manually by court administration staff. Court administration will provide an updated copy of these tracking workbooks to the OSCA bi-weekly for monitoring, analysis and reporting.

Issue 1: Workload

OSCA staff is very sensitive to the additional workload any reporting mechanism will impose on initiative staff. Staff has also extensively considered the practicality of collecting certain data elements. Throughout the development process, staff has attempted to balance the need for and value of information to report to the legislature against the workload necessary to capture it. However, the workload involved could be significant for some circuits. This committee needs to decide if the need for results justifies the workload required.

Issue 2: Case Type and Status Reporting:

In an effort to reduce the administrative burden on initiative staff, staff has identified two data elements that can benefit from category reduction. There are thirteen SRS case types describing foreclosure cases. However, most of these groups are designed to capture information related to filing fees and other legislative issues and are not relevant to the processing of cases in this initiative. Similarly, the eleven disposition types also provide more detail than is relevant. Consequently, staff recommends that for purposes of this initiative, the thirteen SRS cases types be reduced to one case type "Real Property/Mortgage Foreclosure" and the eleven disposition categories be consolidated to three categories, Summary/Final Judgment, Trial, and Dismissed.

Case status is a more difficult proposition. Since the primary purpose of the tracking application is to identify why cases are not moving through the system, case status is, arguably, the most important field. The question boils down to what types of status are necessary to adequately describe case activity. Staff has discussed this with various court administration staff and judges and has distilled their suggestions into three options each containing more or less status categories based on consideration of workload and information value:

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Option 1:

- Active
- Stayed – Bankruptcy
- Stayed - Pending resolution of another case
- Stayed - by Agreement of the parties
- Stayed - Appeal pending
- Inactivity or Pending - Attorney inactivity
- Inactivity or Pending - Insufficient pleadings or documentation
- Inactivity or Pending - Other (see comments)

Option 2:

- Active
- Stayed – Bankruptcy
- Stayed - Pending resolution of another case
- Stayed - by Agreement of the parties
- Stayed - Appeal pending
- Inactivity or Pending - Attorney inactivity
- Inactivity or Pending - Insufficient pleadings or documentation
- Inactivity or Pending - Other (see comments)
- Inactivity or Pending – Loss mitigation review
- Inactivity or Pending – Mediation/Settlement negotiations

Option 3:

- Active
- Stayed – Bankruptcy/Other
- Inactivity by Attorney /Abatement
- Closed

In order to more accurately track the case activity of this initiative, staff recommends applying an default status of “Inactivity or Pending – Other (see comments)” (if options 1 or 2 are selected) to each case provided by the clerk of courts since, by direction, clerks are supplying a list of all pending cases. This initial designation will allow the court administration to identify cases when they become active or have some other status changes. The committee may wish to add an appropriate “Inactive – Other” status to option 3.

Also, in light of the potential workload involved, it is not the intent of this application to capture every reopen or status change event. Rather, the bi-weekly submission will provide a point-in-time snapshot of case status which will allow a reasonable picture of court activity over the course of the initiative.

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Issue 3: Definition of Reopen Closed Event

There are two data fields in this application that are not specifically defined by SRS instructions, date reopen closed and case status. However, both are important in identifying the reasons why cases are not moving to final sale. It seems that case status should be something that case managers will be able determine fairly easily since it involves long term changes to case status. On the other hand, reopen closed dates may be more difficult. There isn't a specific definition or criteria in SRS that directs when a reopened case is closed and Judge Bailey and Rick Callanan has suggested that case managers may not know when a reopened case is closed.

We have put together a definition that is consistent with SRS as follows:

Date of Reopen Event – Report the date that a post-judgment motion is filed and the \$50 fee is paid

Date of 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)

Decisions Needed:

- NO
COLLAPSE
1. Determine if the workload associated with the case reporting system is justified for reporting information to the legislature.
 2. Approve the collapse of SRS case categories to one general category 'Real Property/Mortgage Foreclosure'
 3. Approve the collapse of SRS disposition types to three general categories, Summary/Final Judgment, Trial, and Dismissed
 4. Select Option 1, 2 or 3 for case status reporting.
 5. Approve the option to set all case status' initially to "Inactivity or Pending – Other"
 6. Approve the definition of reopen case closure as it applies to the Foreclosure initiative only.