IF THIS PROPERTY IS SOLD AT PUBLIC AUCTION, THERE MAY BE ADDITIONAL MONEY FROM THE SALE AFTER PAYMENT OF PERSONS WHO ARE ENTITLED TO BE PAID FROM THE SALE PROCEEDS PURSUANT TO THIS FINAL JUDGMENT.

IF YOU ARE A SUBORDINATE LIENHOLDER CLAIMING A RIGHT TO FUNDS REMAINING AFTER THE SALE, YOU MUST FILE A CLAIM WITH THE CLERK NO LATER THAN 60 DAYS AFTER THE SALE. IF YOU FAIL TO FILE A CLAIM, YOU WILL NOT BE ENTITLED TO ANY REMAINING FUNDS.

(b) If the property being foreclosed on has qualified for the homestead tax exemption in the most recent approved tax roll, the final judgment shall additionally contain the following statement in conspicuous type:

IF YOU ARE THE PROPERTY OWNER, YOU MAY CLAIM THESE FUNDS YOURSELF. YOU ARE NOT REQUIRED TO HAVE A LAWYER OR ANY OTHER REPRESENTATION AND YOU DO NOT HAVE TO ASSIGN YOUR RIGHTS TO ANYONE ELSE IN ORDER FOR YOU TO CLAIM ANY MONEY TO WHICH YOU ARE ENTITLED. PLEASE CHECK WITH THE CLERK OF THE COURT, (INSERT INFORMATION FOR APPLICABLE COURT) WITHIN TEN (10) DAYS AFTER THE SALE TO SEE IF THERE IS ADDITIONAL MONEY FROM THE FORECLOSURE SALE THAT THE CLERK HAS IN THE REGISTRY OF THE COURT.

IF YOU DECIDE TO SELL YOUR HOME OR HIRE SOMEONE TO HELP YOU CLAIM THE ADDITIONAL MONEY, YOU SHOULD READ VERY CAREFULLY ALL PAPERS YOU ARE REQUIRED TO SIGN, ASK SOMEONE ELSE, PREFERABLY AN ATTORNEY WHO IS NOT RELATED TO THE PERSON OFFERING TO HELP YOU, TO MAKE SURE THAT YOU UNDERSTAND WHAT YOU ARE SIGNING AND THAT YOU ARE NOT TRANSFERRING YOUR PROPERTY OR THE EQUITY IN YOUR PROPERTY WITHOUT THE PROPER INFORMATION. IF YOU CANNOT AFFORD TO PAY AN ATTORNEY, YOU MAY CONTACT (INSERT LOCAL OR NEAREST LEGAL AID OFFICE AND TELEPHONE NUMBER) TO SEE IF YOU QUALIFY FINANCIALLY FOR THEIR SERVICES. IF THEY CANNOT ASSIST YOU, THEY MAY BE ABLE TO REFER YOU TO A LOCAL BAR REFERRAL AGENCY OR SUGGEST OTHER OPTIONS. IF YOU CHOOSE TO CONTACT (NAME OF LOCAL OR NEAREST LEGAL AID OFFICE) FOR ASSISTANCE, YOU SHOULD DO SO AS SOON AS POSSIBLE AFTER RECEIPT OF THIS NOTICE.

(c) A copy of the final judgment shall be furnished by the clerk by first class mail to the last known address of every party to the action or to the attorney of record for such party. Any irregularity in such mailing, including the failure to include this statement in any final judgment or order, shall not affect the validity or finality of the final judgment or order or any sale held pursuant to the final judgment or order. Any sale held more than 35 days after the final judgment or order shall not affect the validity or finality of the final judgment or order or any sale held pursuant to such judgment or order.

(2) Publication of sale.--Notice of sale shall be published once a week for 2 consecutive weeks in a newspaper of general circulation, as defined in chapter 50, published in the county where the sale is to be held. The

second publication shall be at least 5 days before the sale. The notice shall contain:

(a) A description of the property to be sold.

(b) The time and place of sale.

(c) A statement that the sale will be made pursuant to the order or final judgment.

(d) The caption of the action.

(e) The name of the clerk making the sale.

(f) A statement that any person claiming an interest in the surplus from the sale, if any, other than the property owner as of the date of the lis pendens must file a claim within 60 days after the sale.

The court, in its discretion, may enlarge the time of the sale. Notice of the changed time of sale shall be published as provided herein.

(3) Conduct of sale; deposit required.--The sale shall be conducted at public auction at the time and place set forth in the final judgment. The clerk shall receive the service charge imposed in s. 45.035 for services in making, recording, and certifying the sale and title that shall be assessed as costs. At the time of the sale, the successful high bidder shall post with the clerk a deposit equal to 5 percent of the final bid. The deposit shall be applied to the sale price at the time of payment. If final payment is not made within the prescribed period, the clerk shall readvertise the sale as provided in this section and pay all costs of the sale from the deposit. Any remaining funds shall be applied toward the judgment.

(4) Certification of sale.--After a sale of the property the clerk shall promptly file a certificate of sale and serve a copy of it on each party in substantially the following form:

(Caption of Action)

CERTIFICATE OF SALE

The undersigned clerk of the court certifies that notice of public sale of the property described in the order or final judgment was published in _____, a newspaper circulated in _____ County, Florida, in the manner shown by the proof of publication attached, and on _____, (year) , the property was offered for public sale to the highest and best bidder for cash. The highest and best bid received for the property in the amount of $ _____ was submitted by _____, to whom the property was sold. The proceeds of the sale are retained for distribution in accordance with the order or final judgment or law. WITNESS my hand and the seal of this

court on _____, (year) .

(Clerk) By (Deputy Clerk)

(5) Certificate of title.--If no objections to the sale are filed within 10 days after filing the certificate of sale, the clerk shall file a certificate of title and serve a copy of it on each party in substantially the following form:

(Caption of Action)

CERTIFICATE OF TITLE

The undersigned clerk of the court certifies that he or she executed and filed a certificate of sale in this action on _____, (year) , for the property described herein and that no objections to the sale have been filed within the time allowed for filing objections.

The following property in _____ County, Florida:

(description)

was sold to _____

WITNESS my hand and the seal of the court on _____, (year) .

(Clerk) By (Deputy Clerk)

(6) Confirmation; recording.--When the certificate of title is filed the sale shall stand confirmed, and title to the property shall pass to the purchaser named in the certificate without the necessity of any further proceedings or instruments. The certificate of title shall be recorded by the clerk.

(7) Disbursements of proceeds.--

(a) On filing a certificate of title, the clerk shall disburse the proceeds of the sale in accordance with the order or final judgment and shall file a report of such disbursements and serve a copy of it on each party, and on the Department of Revenue if the department was named as a defendant in the action or if the Agency for Workforce Innovation or the former Department of Labor and Employment Security was named as a defendant while the Department of Revenue was providing unemployment tax collection services under contract with the Agency for Workforce Innovation through an interagency agreement pursuant to s. 443.1316.

(b) The certificate of disbursements shall be in substantially the following form:

(Caption of Action)

CERTIFICATE OF DISBURSEMENTS

The undersigned clerk of the court certifies that he or she disbursed the proceeds received from the sale of the property as provided in the order or final judgment to the persons and in the amounts as follows:

Name
Amount

Total disbursements: $_____

Surplus retained by clerk, if any: $_____

IF YOU ARE A PERSON CLAIMING A RIGHT TO FUNDS REMAINING AFTER THE SALE, YOU MUST FILE A CLAIM WITH THE CLERK NO LATER THAN 60 DAYS AFTER THE SALE. IF YOU FAIL TO FILE A CLAIM, YOU WILL NOT BE ENTITLED TO ANY REMAINING FUNDS. AFTER 60 DAYS, ONLY THE OWNER OF RECORD AS OF THE DATE OF THE LIS PENDENS MAY CLAIM THE SURPLUS.

WITNESS my hand and the seal of the court on _____, (year) .

(Clerk) By (Deputy Clerk)

(c) If no objections to the report are served within 10 days after it is filed, the disbursements by the clerk shall stand approved as reported. If timely objections to the report are served, they shall be heard by the court. Service of objections to the report does not affect or cloud the title of the purchaser of the property in any man- ner.

(d) If there are funds remaining after payment of all disbursements required by the final judgment of foreclosure and shown on the certificate of disbursements, the surplus shall be distributed as provided in this section and ss. 45.0315-45.035.

(8) Value of property.--The amount of the bid for the property at the sale shall be conclusively presumed to be sufficient consideration for the sale. Any party may serve an objection to the amount of the bid within 10 days after the clerk files the certificate of sale. If timely objections to the bid are served, the objections shall be heard by the court. Service of objections to the amount of the bid does not affect or cloud the title of the purchaser in any manner. If the case is one in which a deficiency judgment may be sought and application is made for a deficiency, the amount bid at the sale may be considered by the court as one of the factors in de-

termining a deficiency under the usual equitable principles.

(9) Execution sales.--This section shall not apply to property sold under executions.

(10) Electronic sales.--The clerk may conduct the sale of real or personal property under an order or judgment pursuant to this section by electronic means. Such electronic sales shall comply with the procedures provided in this chapter, except that electronic proxy bidding shall be allowed and the clerk may require bidders to advance sufficient funds to pay the deposit required by subsection (3). The clerk shall provide access to the electronic sale by computer terminals open to the public at a designated location and shall accept an advance credit proxy bid from the plaintiff of any amount up to the maximum allowable credit bid of the plaintiff. A clerk who conducts such electronic sales may receive electronic deposits and payments related to the sale.

45.0315. Right of redemption

At any time before the later of the filing of a certificate of sale by the clerk of the court or the time specified in the judgment, order, or decree of foreclosure, the mortgagor or the holder of any subordinate interest may cure the mortgagor's indebtedness and prevent a foreclosure sale by paying the amount of moneys specified in the judgment, order, or decree of foreclosure, or if no judgment, order, or decree of foreclosure has been rendered, by tendering the performance due under the security agreement, including any amounts due because of the exercise of a right to accelerate, plus the reasonable expenses of proceeding to foreclosure incurred to the time of tender, including reasonable attorney's fees of the creditor. Otherwise, there is no right of redemption.

45.032. Disbursement of surplus funds after judicial sale

(1) For purposes of ss. 45.031-45.035, the term:

(a) "Owner of record" means the person or persons who appear to be owners of the property that is the subject of the foreclosure proceeding on the date of the filing of the lis pendens. In determining an owner of record, a person need not perform a title search and examination but may rely on the plaintiff's allegation of ownership in the complaint when determining the owner of record.

(b) "Subordinate lienholder" means the holder of a subordinate lien shown on the face of the pleadings as an encumbrance on the property. The lien held by the party filing the foreclosure lawsuit is not a subordinate lien. A subordinate lienholder includes, but is not limited to, a subordinate mortgage, judgment, tax warrant, assessment lien, or construction lien. However, the holder of a subordinate lien shall not be deemed a subordinate lienholder if the holder was paid in full from the proceeds of the sale.

(c) "Surplus funds" or "surplus" means the funds remaining after payment of all disbursements required by the final judgment of foreclosure and shown on the certificate of disbursements.

(d) "Surplus trustee" means a person qualifying as a surplus trustee pursuant to s. 45.034.

(2) There is established a rebuttable legal presumption that the owner of record on the date of the filing of a lis pendens is the person entitled to surplus funds after payment of subordinate lienholders who have timely filed a claim. A person claiming a legal right to the surplus as an assignee of the rights of the owner of record must prove to the court that such person is entitled to the funds. At any hearing regarding such entitlement, the court shall consider the factors set forth in s. 45.033 in determining whether an assignment is sufficient to overcome the presumption. It is the intent of the Legislature to abrogate the common law rule that surplus proceeds in a foreclosure case are the property of the owner of the property on the date of the foreclosure sale.

(3) During the 60 days after the clerk issues a certificate of disbursements, the clerk shall hold the surplus pending a court order.

(a) If the owner of record claims the surplus during the 60-day period and there is no subordinate lienholder, the court shall order the clerk to deduct any applicable service charges from the surplus and pay the remainder to the owner of record. The clerk may establish a reasonable requirement that the owner of record prove his or her identity before receiving the disbursement. The clerk may assist an owner of record in making a claim. An owner of record may use the following form in making a claim:

(Caption of Action)

OWNER'S CLAIM FOR

MORTGAGE FORECLOSURE SURPLUS

State of ____

County of ____

Under penalty of perjury, I (we) hereby certify that:

1. I was (we were) the owner of the following described real property in ____ County, Florida, prior to the foreclosure sale and as of the date of the filing of the lis pendens:

(Legal description of real property)

2. I (we) do not owe any money on any mortgage on the property that was foreclosed other than the one that was paid off by the foreclosure.

3. I (we) do not owe any money that is the subject of an unpaid judgment, tax warrant, condominium lien, co-operative lien, or homeowners' association.

4. I am (we are) not currently in bankruptcy.

5. I (we) have not sold or assigned my (our) right to the mortgage surplus.

6. My (our) new address is: ____.

7. If there is more than one owner entitled to the surplus, we have agreed that the surplus should be paid ____ jointly, or to: ____, at the following address: ____.

8. I (WE) UNDERSTAND THAT I (WE) AM (ARE) NOT REQUIRED TO HAVE A LAWYER OR ANY OTHER REPRESENTATION AND I (WE) DO NOT HAVE TO ASSIGN MY (OUR) RIGHTS TO ANY-ONE ELSE IN ORDER TO CLAIM ANY MONEY TO WHICH I (WE) MAY BE ENTITLED.

9. I (WE) UNDERSTAND THAT THIS STATEMENT IS GIVEN UNDER OATH, AND IF ANY STATE-MENTS ARE UNTRUE THAT I (WE) MAY BE PROSECUTED CRIMINALLY FOR PERJURY.

(Signatures)

Sworn to (or affirmed) and subscribed before me this ____ day of ____, (year) , by (name of person making statement) .

(Signature of Notary Public -State of Florida)

(Print, Type, or Stamp Commissioned Name of Notary Public)

Personally Known ____ OR Produced Identification ____

Type of Identification Produced _____

(b) If any person other than the owner of record claims an interest in the proceeds during the 60-day period or if the owner of record files a claim for the surplus but acknowledges that one or more other persons may be entitled to part or all of the surplus, the court shall set an evidentiary hearing to determine entitlement to the surplus. At the evidentiary hearing, an equity assignee has the burden of proving that he or she is entitled to some or all of the surplus funds. The court may grant summary judgment to a subordinate lienholder prior to or at the evidentiary hearing. The court shall consider the factors in s. 45.033 when hearing a claim that any

person other than a subordinate lienholder or the owner of record is entitled to the surplus funds.

(c) If no claim is filed during the 60-day period, the clerk shall appoint a surplus trustee from a list of qualified surplus trustees as authorized in s. 45.034. Upon such appointment, the clerk shall prepare a notice of appointment of surplus trustee and shall furnish a copy to the surplus trustee. The form of the notice may be as follows:

(Caption of Action)

NOTICE OF APPOINTMENT
OF SURPLUS TRUSTEE

The undersigned clerk of the court certifies that he or she disbursed the proceeds received from the sale of the property as provided in the order or final judgment to the persons named in the certificate of disbursements, and that surplus funds of $_____ remain and are subject to disbursement to the owner of record. You have been appointed as surplus trustee for the purpose of finding the owner of record in order for the clerk to disburse the surplus, after deducting costs, to the owner of record.

WITNESS my hand and the seal of the court on _____, (year).

(Clerk) By (Deputy Clerk)

(4) If the surplus trustee is unable to locate the owner of record entitled to the surplus within 1 year after appointment, the appointment shall terminate and the clerk shall notify the surplus trustee that his or her appointment was terminated. Thirty days after termination of the appointment of the surplus trustee, the clerk shall treat the remaining funds as unclaimed property to be deposited with the Chief Financial Officer pursuant to chapter 717.

(5) Proceedings regarding surplus funds in a foreclosure case do not in any manner affect or cloud the title of the purchaser at the foreclosure sale of the property.

45.033. Sale or assignment of rights to surplus funds in a property subject to foreclosure

(1) There is established a rebuttable presumption that the owner of record of real property on the date of the filing of a lis pendens is the person entitled to surplus funds after payment of subordinate lienholders who have timely filed a claim. A person claiming a legal right to the surplus as an assignee of the rights of the owner of record must prove entitlement to the surplus funds pursuant to this section. It is the intent of the Legislature to abrogate the common law rule that surplus proceeds in a foreclosure case are the property of the owner of the property on the date of the foreclosure sale.

(2) The presumption may be rebutted only by:

(a) The grantee or assignee of a voluntary transfer or assignment establishing a right to collect the surplus funds or any portion or percentage of the surplus funds by proving that the transfer or assignment qualifies as a voluntary transfer or assignment as provided in subsection (3); or

(b) The grantee or assignee proving that the grantee or assignee is a grantee or assignee by virtue of an involuntary transfer or assignment of the right to collect the surplus. An involuntary transfer or assignment may be as a result of inheritance or as a result of the appointment of a guardian.

(3) A voluntary transfer or assignment shall be a transfer or assignment qualified under this subsection, thereby entitling the transferee or assignee to the surplus funds or a portion or percentage of the surplus funds, if:

(a) The transfer or assignment is in writing and the instrument:

1. If executed prior to the foreclosure sale, includes a financial disclosure that specifies the assessed value of the property, a statement that the assessed value may be lower than the actual value of the property, the approximate amount of any debt encumbering the property, and the approximate amount of any equity in the property. If the instrument was executed after the foreclosure sale, the instrument must also specify the foreclosure sale price and the amount of the surplus.

2. Includes a statement that the owner does not need an attorney or other representative to recover surplus funds in a foreclosure.

3. Specifies all forms of consideration paid for the rights to the property or the assignment of the rights to any surplus funds.

(b) The transfer or assignment is filed with the court on or before 60 days after the filing of the certificate of disbursements.

(c) There are funds available to pay the transfer or assignment after payment of timely filed claims of subordinate lienholders.

(d) The transferor or assignee is qualified as a surplus trustee, or could qualify as a surplus trustee, pursuant to s. 45.034.

(e) The total compensation paid or payable, or earned or expected to be earned, by the transferee or assignee does not exceed 12 percent of the surplus.

(4) The court shall honor a transfer or assignment that complies with the requirements of subsection (3), in

which case the court shall order the clerk to pay the transferor or assignee from the surplus.

(5) If the court finds that a voluntary transfer or assignment does not qualify under subsection (3) but that the transfer or assignment was procured in good faith and with no intent to defraud the transferor or assignor, the court may order the clerk to pay the claim of the transferee or assignee after payment of timely filed claims of subordinate lienholders.

(6) If a voluntary transfer or assignment of the surplus is set aside, the owner of record shall be entitled to payment of the surplus after payment of timely filed claims of subordinate lienholders, but the transferee or assignee may seek in a separate proceeding repayment of any consideration paid for the transfer or assign- ment.

(7) This section does not apply to a deed, mortgage, or deed in lieu of foreclosure unless a person other than the owner of record is claiming that a deed or mortgage entitles the person to surplus funds. Nothing in this section affects the title or marketability of the real property that is the subject of the deed or other instrument. Nothing in this section affects the validity of a lien evidenced by a mortgage.

45.034. Qualifications and appointment of a surplus trustee in foreclosure actions

(1) A surplus trustee is a third-party trustee approved pursuant to this section by the Department of Financial Services. A surplus trustee must be willing to accept cases on a statewide basis; however, a surplus trustee may employ subcontractors that are not qualified as a surplus trustee provided the surplus trustee remains primarily responsible for the duties set forth in this section.

(2) A surplus trustee is an entity that holds and administers surplus proceeds from a foreclosure pursuant to ss. 45.031-45.035.

(3) To be a surplus trustee, an entity must apply for certification with the Department of Financial Services. The application must contain:

(a) The name and address of the entity and of one or more principals of the entity.

(b) A certificate of good standing from the Secretary of State indicating that the entity is an entity registered in this state.

(c) A statement under oath by a principal of the entity certifying that the entity, or a principal of the entity, has a minimum of 12 months' experience in the recovery of surplus funds in foreclosure actions.

(d) Proof that the entity holds a valid Class "A" private investigator license pursuant to chapter 493.

(e) Proof that the entity carries a minimum of $500,000 in liability insurance, cash reserves, or bonding.

(f) A statement from an attorney licensed to practice in this state certifying that the attorney is a principal of the entity or is employed by the entity on a full-time basis and that the attorney will supervise the management of the entity during the entity's tenure as a surplus trustee.

(g) A statement under oath by a principal of the entity certifying that the principal understands his or her duty to immediately notify the department if the principal ever fails to qualify as an entity entitled to be a surplus trustee.

(h) A nonrefundable application fee of $25.

(4) The Department of Financial Services shall certify any surplus trustee that applies and qualifies. Applications must be filed by June 1, and all applications that qualify shall be certified by the department by June 30 and shall be effective for 1 year commencing July 1. The department shall renew a certification upon receipt of the $25 fee and a statement under oath from a principal of the surplus trustee certifying that the surplus trustee continues to qualify under this section.

(5) The Department of Financial Services shall develop a rotation system for assignment of cases to all qualified surplus trustees.

(6) The primary duty of a surplus trustee is to locate the owner of record within 1 year after appointment. Upon locating the owner of record, the surplus trustee shall file a petition with the court on behalf of the owner of record seeking disbursement of the surplus funds. If more than one person appears to be the owner of record, the surplus trustee shall obtain agreement between such persons as to the payment of the surplus or file an interpleader. The interpleader may be filed as part of the foreclosure case.

(7) A surplus trustee is entitled to the following service charges and fees which shall be disbursed by the clerk and payable from the surplus:

(a) Upon obtaining a court order, a cost advance of 2 percent of the surplus.

(b) Upon obtaining a court order disbursing the surplus to the owner of record, a service charge of 10 percent of the surplus.

45.035. Clerk's fees

In addition to other fees or service charges authorized by law, the clerk shall receive service charges related to the judicial sales procedure set forth in ss. 45.031-45.034 and this section:

(1) The clerk shall receive a service charge of $70 for services in making, recording, and certifying the sale and title, which service charge shall be assessed as costs and shall be advanced by the plaintiff before the sale.

(2) If there is a surplus resulting from the sale, the clerk may receive the following service charges, which shall be deducted from the surplus:

(a) The clerk may withhold the sum of $28 from the surplus which may only be used for purposes of educating the public as to the rights of homeowners regarding foreclosure proceedings.

(b) The clerk is entitled to a service charge of $15 for notifying a surplus trustee of his or her appointment.

(c) The clerk is entitled to a service charge of $15 for each disbursement of surplus proceeds.

(d) The clerk is entitled to a service charge of $15 for appointing a surplus trustee, furnishing the surplus trustee with a copy of the final judgment and the certificate of disbursements, and disbursing to the surplus trustee the trustee's cost advance.

(3) If the sale is conducted by electronic means, as provided in s. 45.031(10), the clerk shall receive an additional service charge not to exceed $70 for services in conducting or contracting for the electronic sale, which service charge shall be assessed as costs and paid by the winning bidder. If the clerk requires advance electronic deposits to secure the right to bid, such deposits shall not be subject to the fee under s. 28.24(10). The portion of an advance deposit from a winning bidder required by s. 45.031(3) shall, upon acceptance of the winning bid, be subject to the fee under s. 28.24(10).

45.04. Repealed by Laws 1967, c. 67-254, § 49

45.041. Amendment of bonds

When any bond required or authorized in any action is defective in form or substance, the party giving the bond may give a new bond which is sufficient in form and substance and the new bond is as sufficient as though given in the first instance. The new bond may be given at any time before a motion attacking the sufficiency of the bond is served. Thereafter the new bond may be given by leave of court and on such terms as the court fixes. Leave to file an amended bond shall be freely given when justice so requires. If any amendment is made to a bond, the amended bond relates back to the commencement of the action and affords protection to the person in whose favor it is given from commencement although it was not theretofore binding on the surety.

45.045. Limitations on supersedeas bond; exception

(1) Except for certified class actions subject to s. 768.733, in any civil action brought under any legal theory, the amount of a supersedeas bond necessary to obtain an automatic stay of execution of a judgment granting any type of relief during the entire course of all appeals or discretionary reviews, may not exceed $50 million for each appellant, regardless of the amount of the judgment appealed. The $50 million amount shall be adjusted annually to reflect changes in the Consumer Price Index compiled by the United States Department of Labor.

(2) In any civil action brought under any legal theory, a party seeking a stay of execution of a judgment pending review of any amount may move the court to reduce the amount of a supersedeas bond required to obtain such a stay. The court, in the interest of justice and for good cause shown, may reduce the supersedeas bond or may set other conditions for the stay with or without a bond. The court may not reduce the supersedeas bond if the appellant has an insurance or indemnification policy applicable to the case. This subsection does not apply to certified class actions subject to s. 768.733.

(3) If an appellant has posted a supersedeas bond for an amount less than that which would be required for an automatic stay pursuant to Rule 9.310(b)(1), Florida Rules of Appellate Procedure, the appellee may engage in discovery for the limited purpose of determining whether the appellant has dissipated or diverted assets outside the course of its ordinary business or is in the process of doing so.

(4) If the trial or appellate court determines that an appellant has dissipated or diverted assets outside the course of its ordinary business or is in the process of doing so, the court may enter orders necessary to protect the appellee, require the appellant to post a supersedeas bond in an amount up to, but not more than, the amount that would be required for an automatic stay pursuant to Rule 9.310(b)(1), Florida Rules of Appellate Procedure, and impose other remedies and sanctions as the court deems appropriate.

45.05. Renumbered as 46.011 by Laws 1967, c. 67-254, § 2

45.051. Execution of supersedeas bond when required of the state or its political subdivisions

(1) When a supersedeas bond is required by the appellate court under Rule 9.310(b)(2), Florida Rules of Appellate Procedure or an appeal or other proceeding is taken in any court and there is no court rule or statute exempting the parties from giving supersedeas, cost, or other required bond, the parties are authorized to make and execute the required bond with a corporate surety thereon duly licensed to do business in this state. The premium or other cost for the bond may be paid from the general necessary and regular appropriation of the party taking the appeal, in the case of the state or any of its officers, boards, commissioners or other agencies, and from the county general fund, district school general fund, or otherwise as the case may be, in the case of a political subdivision of the state or any of its officers, boards, commissions or other agencies. The officers of the state and its political subdivisions and the executive officers of their boards, commissions, and other agencies aforesaid, are authorized to make and execute the bonds on behalf of the parties.

(2) In connection with an appeal taken by a state employee or official of a judgment against that employee or

official in an individual capacity, as part of the legal defense being provided by the state risk management program, the Division of Risk Management may enter into an indemnification agreement for the purpose of securing an appellate supersedeas bond, provided that, under any such agreement, the liability of the State of Florida is limited to the amount of the judgment being appealed and any costs imposed by law or the appropriate court.

45.06. Repealed by Laws 1955, c. 29737, § 1

45.061. Offers of settlement

(1) At any time more than 60 days after the service of a summons and complaint on a party but not less than 60 days (or 45 days if it is a counteroffer) before trial, any party may serve upon an adverse party a written offer, which offer shall not be filed with the court and shall be denominated as an offer under this section, to settle a claim for the money, property, or relief specified in the offer and to enter into a stipulation dismissing the claim or to allow judgment to be entered accordingly. The offer shall remain open for 45 days unless withdrawn sooner by a writing served on the offeree prior to acceptance by the offeree. An offer that is neither withdrawn nor accepted within 45 days shall be deemed rejected. The fact that an offer is made but not accepted does not preclude the making of a subsequent offer. Evidence of an offer is not admissible except in proceedings to enforce a settlement or to determine sanctions under this section.

(2) If, upon a motion by the offeror within 30 days after the entry of judgment, the court determines that an offer was rejected unreasonably, resulting in unnecessary delay and needless increase in the cost of litigation, it may impose an appropriate sanction upon the offeree. In making this determination the court shall consider all of the relevant circumstances at the time of the rejection, including:

(a) Whether, upon specific request by the offeree, the offeror had unreasonably refused to furnish information which was necessary to evaluate the reasonableness of the offer.

(b) Whether the suit was in the nature of a "test case," presenting questions of far-reaching importance affecting nonparties.

An offer shall be presumed to have been unreasonably rejected by a defendant if the judgment entered is at least 25 percent greater than the offer rejected, and an offer shall be presumed to have been unreasonably rejected by a plaintiff if the judgment entered is at least 25 percent less than the offer rejected. For the purposes of this section, the amount of the judgment shall be the total amount of money damages awarded plus the amount of costs and expenses reasonably incurred by the plaintiff or counter-plaintiff prior to the making of the offer for which recovery is provided by operation of other provisions of Florida law.

(3) In determining the amount of any sanction to be imposed under this section, the court shall award:

(a) The amount of the parties' costs and expenses, including reasonable attorneys' fees, investigative expenses, expert witness fees, and other expenses which relate to the preparation for trial, incurred after the making of the offer of settlement; and

(b) The statutory rate of interest that could have been earned at the prevailing statutory rate on the amount that a claimant offered to accept to the extent that the interest is not otherwise included in the judgment.

The amount of any sanction imposed under this section against a plaintiff shall be set off against any award to the plaintiff, and if such sanction is in an amount in excess of the award to the plaintiff, judgment shall be entered in favor of the defendant and against the plaintiff in the amount of the excess.

(4) This section shall not apply to any class action or shareholder derivative suit or to matters relating to dissolution of marriage, alimony, nonsupport, eminent domain, or child custody.

(5) Sanctions authorized under this section may be imposed notwithstanding any limitation on recovery of costs or expenses which may be provided by contract or in other provisions of Florida law. This section shall not be construed to waive the limits of sovereign immunity set forth in s. 768.28.

(6) This section does not apply to causes of action that accrue after the effective date of this act.

45.062. Settlements, conditions, or orders when an agency of the executive branch is a party

(1) In any civil action in which a state executive branch agency or officer is a party in state or federal court, the officer, agent, official, or attorney who represents or is acting on behalf of such agency or officer may not settle such action, consent to any condition, or agree to any order in connection therewith, if the settlement, condition, or order requires the expenditure of or the obligation to expend any state funds or other state resources exceeding $1 million, the refund or future loss of state revenues exceeding $10 million, or the establishment of any new program, unless:

(a) The expenditure is provided for by an existing appropriation or program established by law.

(b) At the time settlement negotiations have begun in earnest, written notification is given to the President of the Senate, the Speaker of the House of Representatives, the Senate and House of Representatives minority leaders, the chairs of the appropriations committees of the Legislature, and the Attorney General.

(c) Prior written notification is given at least 5 business days, or as soon thereafter as practicable, before the date the settlement or presettlement agreement or order is to be made final to the President of the Senate, the Speaker of the House of Representatives, the Senate and House of Representatives minority leaders, the chairs of the appropriations committees of the Legislature, and the Attorney General. Such notification shall specify how the agency involved will address the costs in future years within the limits of current appropriations.

1. The Division of Risk Management need not give the notification required by this paragraph when settling any claim covered by the state self-insurance program for an amount less than $250,000.

2. The notification specified in this paragraph is not required if:

a. The only settlement obligation of the state resulting from the claim is to pay court costs in an amount less than $10,000;

b. Notification would preclude the state's participation in multistate litigation;

c. Notification is precluded by federal law or regulation;

d. Notification is precluded by court rule or sanction;

e. The head of the primary state agency involved in the litigation certifies to the President of the Senate and the Speaker of the House of Representatives, in writing within 5 days after the settlement, the specific reasons prior notification could not be provided;

f. Settlement or presettlement negotiations are being conducted with fewer than all of the opposing parties; or

g. The President of the Senate and the Speaker of the House of Representatives or the chairs of the appropriations committees of the Legislature, acting in the best interest of the state, waive notification.

(2) The state executive branch agency or officer shall negotiate a closure date as soon as possible for the civil action.

(3) The state executive branch agency or officer may not pledge any current or future action of another branch of state government as a condition for settling the civil action.

(4) Any settlement that commits the state to spending in excess of current appropriations or to policy changes inconsistent with current state law shall be contingent upon and subject to legislative appropriation or statutory amendment. The state agency or officer may agree to use all efforts to procure legislative funding or statutory amendment.

(5) When a state agency or officer settles an action or legal claim in which the state asserted a right to recover money, all moneys paid to the state by a party in full or partial exchange for a release of the state's claim shall be placed into the General Revenue Fund or the appropriate trust fund.

(6) State executive branch agencies and officers shall report to each substantive and fiscal committee of the Legislature having jurisdiction over the reporting agency on all potential settlements that may commit the state to:

(a) Spend in excess of current appropriations; or

(b) Make policy changes inconsistent with current state law.

The state executive branch agency or officer shall provide periodic updates to the appropriate legislative committees on these issues during the settlement process.

45.07. Repealed by Laws 1955, c. 29737, § 1

45.075. Expedited trials

Upon the joint stipulation of the parties to any civil case, the court may conduct an expedited trial as provided in this section. Where two or more plaintiffs or defendants have a unity of interest, such as a husband and wife, they shall be considered one party for the purpose of this section. Unless otherwise ordered by the court or agreed to by the parties with approval of the court, an expedited trial shall be conducted as follows:

(1) All discovery shall be completed within 60 days after the court enters an order adopting the joint expedited trial stipulation.

(2) All interrogatories and requests for production must be served within 10 days after the court enters the order adopting the joint expedited trial stipulation, and all responses must be served within 20 days after receipt.

(3) The court shall determine the number of depositions required.

(4) The case may be tried to a jury.

(5) The case may be tried within 30 days after the 60-day discovery cutoff, if such schedule would not impose an undue burden on the court calendar.

(6) The trial must be limited to 1 day.

(7) The jury selection must be limited to 1 hour.

(8) The plaintiff will have no more than 3 hours to present its case, including the opening, all testimony and

evidence, and the closing.

(9) The defendant will have no more than 3 hours to present its case, including the opening, all testimony and evidence, and the closing.

(10) The jury may be given "plain language" jury instructions at the beginning of the trial as well as a "plain language" jury verdict form. The parties must agree to the jury instructions and verdict form.

(11) The parties may introduce a verified written report of any expert and an affidavit of the expert's curriculum vitae instead of calling the expert to testify at trial.

(12) At trial the parties may use excerpts from depositions, including video depositions, regardless of where the deponent lives or whether the deponent is available to testify.

(13) Except as otherwise provided in this section, the Florida Evidence Code and the Florida Rules of Civil Procedure apply.

(14) The court may refuse to grant continuances of the trial absent extraordinary circumstances.

45.08. Repealed by Laws 1955, c. 29737, § 1

45.10. Repealed by Laws 1955, c. 29737, § 1

45.11. Renumbered as 46.021 by Laws 1967, c. 67-254, § 2

45.12. Repealed by Laws 1955, c. 29737, § 1

45.13. Repealed by Laws 1955, c. 29737, § 1

45.14. Repealed by Laws 1955, c. 29737, § 1

45.15. Repealed by Laws 1955, c. 29737, § 1

45.16. Repealed by Laws 1955, c. 29737, § 1

45.17. Repealed by Laws 1955, c. 29737, § 1

45.18. Repealed by Laws 1967, c. 67-254, § 49

45.19. Repealed by Laws 1967, c. 67-254, § 49

45.20. Renumbered as 741.24 by Laws 1967, c. 67-254, § 40

END OF DOCUMENT

H.R. 1728 This is an amendment to the Truth in Lending Act 15 U.S.C.S. § 1601.

SEC. 220. TENANT PROTECTION.

(a) Tenant Protection Generally-

(1) IN GENERAL- In the case of any foreclosure on any dwelling or residential real property, after the date of the enactment of the Mortgage Reform and Anti-Predatory Lending Act, the immediate successor in interest in such property pursuant to the foreclosure shall assume such interest subject to--

(A) except as provided in paragraph (2), the rights of any bona fide tenant, as of the date of foreclosure under any bona fide lease entered into before the date of foreclosure, to occupy the premises until the end of the remaining term of the lease; and

(B) the rights of any bona fide tenant, as of the date of foreclosure, without a lease or with a lease terminable at will under State law, subject to the provision by the immediate successor in interest and the receipt by the tenant in the unit, of a notice to vacate at least 90 days before the effective date of such notice.

(2) EXCEPTION FOR SUBSEQUENT OWNER-OCCUPANT- Notwithstanding paragraph (1), if the immediate successor in interest of any dwelling or residential real property that is otherwise subject to paragraph (1) is a purchaser who will occupy a unit of the dwelling or residential real property as a primary residence, or such successor in interest sells the dwelling or residential real property to a purchaser who will occupy a unit of the dwelling or residential real property, as a primary residence--

(A) such purchaser may terminate a lease relating to such unit on the effective date of a notice to vacate; and

(B)(i) such notice to vacate shall be provided by the purchaser to the tenant in such unit at least 90 days before the effective date of such notice; and (ii) with respect to a single-family residence for which the borrower rented the unit in violation of the mortgage contract, such notice to vacate shall be provided by the purchaser to the tenant in such unit at least 30 days before the effective date of such notice, and shall include a copy of the mortgage contract prohibiting the rental of the unit.

(3) BONA FIDE LEASE OR TENANCY- For purposes of this subsection, a lease or tenancy shall be considered bona fide only if--

(A) the mortgagor under the contract is not the tenant;

(B) the lease or tenancy was the result of an arms-length transaction; and

(C) the lease or tenancy requires the receipt of rent that is not substantially less than fair market rent for the property or the unit's rent is reduced or subsidized due to a Federal, State, or local subsidy.

(4) RULE OF CONSTRUCTION- Except for the specific provisions of this subsection, no provision of this subsection shall be construed as affecting the requirements for termination of any Federal- or State-subsidized tenancy. The provisions of this subsection shall not be construed to limit any State or local law that provides longer time periods or other additional protections for tenants.

(b) Corresponding Provision Relating to Effect of Foreclosures on Section 8 Tenancies-Paragraph (7) of section 8(o) of the United States Housing Act of 1937 (42 U.S.C. 1437f(o)(7)) is amended--

(1) in subparagraph (C), by inserting before the semicolon at the end the following: `, and in the case of an owner who is an immediate successor in interest pursuant to foreclosure--

`(i) during the initial term of the tenant's lease, having the property vacant prior to sale shall not constitute good cause; and

`(ii) in subsequent lease terms of the tenant's lease, who will occupy the unit as a primary residence, who sells the property to a purchaser who will occupy a unit of the property as a primary residence, or if the unit is unmarketable while occupied, such owner may terminate a lease relating to such unit for good cause on the effective date of the notice to vacate, where such notice is provided by the owner to the tenant in such unit at least 90 days before the effective date of such notice;'.

(2) in subparagraph (E), by striking `and' at the end;

(3) by redesignating subparagraph (F) as subparagraph (G); and

(4) by inserting after subparagraph (E) the following:

`(F) shall provide that in the case of any foreclosure on any residential real property in which a recipient of assistance under this subsection resides, the immediate successor in interest in such property pursuant to the foreclosure shall assume such interest subject to the lease between the prior owner and the tenant and to the housing assistance payments contract between the prior owner and the public housing agency for the occupied unit; if a public housing agency is unable to make payments under the contract to the immediate successor in interest after foreclosure, due to action or inaction by the successor in interest, including the rejection of payments or the failure of the successor to maintain the unit in compliance with paragraph (8) or an inability to identify the successor, the agency may use funds that would have been used to pay the rental amount on behalf of the family--

`(i) to pay for utilities that are the responsibility of the owner under the lease or applicable law, after taking reasonable steps to notify the owner that it intends to make payments to a utility provider in lieu of payments to the owner, except prior notification shall not be required in any case in which the unit will be or has been rendered uninhabitable due to the termination or threat of termination of service, in which case the public housing agency shall notify the owner within a reasonable time after making such payment; or

`(ii) for the family's reasonable moving costs, including security deposit costs;

except that this subparagraph and the provisions related to foreclosure in subparagraph (C) shall not affect any State or local law that provides longer time periods or other additional protections for tenants.'.

(c) Landlord Notice to Tenants- Notwithstanding the law of any State or the terms of any consumer residential lease, each person who owns a dwelling or residential real property-

-

(1) which is leased to a bona fide tenant (including a tenancy terminable at will), or which the landlord offers to lease to a prospective tenant; and

(2) which, pursuant to the terms of a valid loan to such person which is secured by such dwelling or property, is or becomes subject to foreclosure or with respect to which the person is in default,

shall promptly notify any such tenant or prospective tenant of the circumstances prevailing with respect to such property and the effect of any such default or foreclosure. The requirements of this subsection shall have no effect on any State or local law that provides additional notice or other additional protections for tenants.

(d) Effective Date- Notwithstanding section 217, this section and the amendments made by this section shall take effect on the date of the enactment of this Act.

http://www.thomas.gov/cgi-bin/query/F?c111:4:./temp/~c111oclS4B:e97751:

H.R.1728.RFS

Westlaw

50 App. U.S.C.A. § 521 Page 1

Formerly cited as 50 App. USCA § 520

C

Effective: January 28, 2008

United States Code Annotated Currentness
Title 50 Appendix. War and National Defense (Refs & Annos)
Servicemembers Civil Relief Act
Act Oct. 17, 1940, C. 888, 54 Stat. 1178, as Amended Dec. 19, 2003, Pub.L. 108-189, Sec. 1, 117 Stat. 2835 (Refs & Annos)
Title II. General Relief (Refs & Annos)
→ **§ 521. Protection of servicemembers against default judgments**

(a) Applicability of section

This section applies to any civil action or proceeding, including any child custody proceeding, in which the defendant does not make an appearance.

(b) Affidavit requirement

(1) Plaintiff to file affidavit

In any action or proceeding covered by this section, the court, before entering judgment for the plaintiff, shall require the plaintiff to file with the court an affidavit--

(A) stating whether or not the defendant is in military service and showing necessary facts to support the affidavit; or

(B) if the plaintiff is unable to determine whether or not the defendant is in military service, stating that the plaintiff is unable to determine whether or not the defendant is in military service.

(2) Appointment of attorney to represent defendant in military service

If in an action covered by this section it appears that the defendant is in military service, the court may not enter a judgment until after the court appoints an attorney to represent the defendant. If an attorney appointed under this section to represent a servicemember cannot locate the servicemember, actions by the attorney in the case shall not waive any defense of the servicemember or otherwise bind the servicemember.

(3) Defendant's military status not ascertained by affidavit

If based upon the affidavits filed in such an action, the court is unable to determine whether the defendant is in military service, the court, before entering judgment, may require the plaintiff to file a bond in an amount ap-

proved by the court. If the defendant is later found to be in military service, the bond shall be available to indemnify the defendant against any loss or damage the defendant may suffer by reason of any judgment for the plaintiff against the defendant, should the judgment be set aside in whole or in part. The bond shall remain in effect until expiration of the time for appeal and setting aside of a judgment under applicable Federal or State law or regulation or under any applicable ordinance of a political subdivision of a State. The court may issue such orders or enter such judgments as the court determines necessary to protect the rights of the defendant under this Act [sections 501 to 596 of this Appendix].

(4) Satisfaction of requirement for affidavit

The requirement for an affidavit under paragraph (1) may be satisfied by a statement, declaration, verification, or certificate, in writing, subscribed and certified or declared to be true under penalty of perjury.

(c) Penalty for making or using false affidavit

A person who makes or uses an affidavit permitted under subsection (b) (or a statement, declaration, verification, or certificate as authorized under subsection (b)(4)) knowing it to be false, shall be fined as provided in title 18, United States Code, or imprisoned for not more than one year, or both.

(d) Stay of proceedings

In an action covered by this section in which the defendant is in military service, the court shall grant a stay of proceedings for a minimum period of 90 days under this subsection upon application of counsel, or on the court's own motion, if the court determines that--

(1) there may be a defense to the action and a defense cannot be presented without the presence of the defendant; or

(2) after due diligence, counsel has been unable to contact the defendant or otherwise determine if a meritorious defense exists.

(e) Inapplicability of section 202 procedures

A stay of proceedings under subsection (d) shall not be controlled by procedures or requirements under section 202 [section 522 of this Appendix].

(f) Section 202 protection

If a servicemember who is a defendant in an action covered by this section receives actual notice of the action, the servicemember may request a stay of proceeding under section 202 [section 522 of this Appendix].

(g) Vacation or setting aside of default judgments

Formerly cited as 50 App. USCA § 520

(1) Authority for court to vacate or set aside judgment

If a default judgment is entered in an action covered by this section against a servicemember during the servicemember's period of military service (or within 60 days after termination of or release from such military service), the court entering the judgment shall, upon application by or on behalf of the servicemember, reopen the judgment for the purpose of allowing the servicemember to defend the action if it appears that--

(A) the servicemember was materially affected by reason of that military service in making a defense to the action; and

(B) the servicemember has a meritorious or legal defense to the action or some part of it.

(2) Time for filing application

An application under this subsection must be filed not later than 90 days after the date of the termination of or release from military service.

(h) Protection of bona fide purchaser

If a court vacates, sets aside, or reverses a default judgment against a servicemember and the vacating, setting aside, or reversing is because of a provision of this Act [sections 501 to 596 of this Appendix], that action shall not impair a right or title acquired by a bona fide purchaser for value under the default judgment.

CREDIT(S)

(Oct. 17, 1940, c. 888, § 201, as added Dec. 19, 2003, Pub.L. 108-189, § 1, 117 Stat. 2840, and amended Jan. 28, 2008, Pub.L. 110-181, Div. A, Title V, § 584(a), 122 Stat. 128.)

2003 Acts. Amendments by Pub.L. 108-189 applicable to any case that is not final before Dec. 19, 2003, see Pub.L. 108-189, § 3, set out as a note under 50 App. U.S.C.A. § 501.

Current through P.L. 111-190 (excluding P.L. 111-148, 111-152, 111-159, and 111-173) approved 6-9-10

END OF DOCUMENT

The Servicemembers Civil Relief Act: A Judge's Checklist

[NOTE: For more detailed information on any of these points, see "The Judges' Guide to the Servicemembers Civil Relief Act" at www.abanet.org/family/military. The SCRA can be found at 50 U.S.C. Appendix § 501 et seq.]

In using this checklist, keep in mind the purpose of the Act: to enable servicemembers (SMs) to devote their entire energy to the defense needs of the Nation, and to provide for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of SMs during their military service. (50 U.S.C. App. § 502)

✓ **Who is covered?** (50 U.S.C. App. § 511) Those covered include:
❑ Members of the Army, Navy, Air Force, Marine Corps and Coast Guard on active duty under 10 U.S.C. 101(d)(1)
❑ National Guard members called to active duty by President or Secretary of Defense for over 30 days under 32 U.S.C. 502(f) (national emergency declared by the President and supported by federal funds)
❑ Commissioned members of the Public Health Service and the National Oceanographic and Atmospheric Administration

✓ **Default situation** no appearance by SM (servicemember) (50 U.S.C. App. § 521). You must -
❑ 1. Require affidavit of military status by moving party
❑ 2. Inquire into whether missing party is in military service by requesting check of records by Dept. of Defense[1]
❑ 3. Don't enter default decree against SM appoint an attorney to represent him/her
❑ 4. If cannot determine whether missing party is in military, require movant to post bond to indemnify the non-movant
a. there may be a defense, and presence of SM is needed to make it, OR
b. with due diligence, appointed attorney can't contact client or otherwise determine whether defense exists

✓ **Use of bond?** (50 U.S.C. App. § 522(b)(3))
❑ As condition of entry of default judgment, require bond if you cannot determine whether defendant is in military service.
❑ Bond may be used to indemnify defendant against loss/damage from default judgment (if later set aside) should he/she later be found to be a SM.

✓ **Request for stay** SM or attorney requests suspension of case (50 U.S.C. App. § 522)
❑ Grant stay of proceedings (discretionary on court's own motion, mandatory on SM's motion, for at least 90 days if motion includes-
1. Statement as to how the SM's current military duties materially affect his ability to appear, and
2. stating a date when the SM will be available to appear, and
3. Statement from the SM's commanding officer stating that SM's current military duty prevents his appearance, and
4. military leave is not authorized for the SM at the time of the statement

✓ **Grant additional stay (beyond initial 90 days)?**
❑ Yes if continuing effect of military duty on his ability to appear.
❑ Same info required as above.

✓ **Deny additional stay?**
❑ Only if you appoint attorney to represent the SM in the action or proceeding (50 U.S.C. App. § 522(d)(2)).
❑ Expect attorney to renew stay request since he/she cannot prepare, present case without assistance from the unavailable SM.

✓ **Unsure whether to grant or deny additional stay?**

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[1] Upon application by either side or the court, the military service must issue a statement as to military service. 50 U.S.C. App. § 582. Contact: Defense Manpower Data Center, 1600 Wilson Blvd., Suite 400, Attn: Military Verification, Arlington, VA 22209-2593, [telephone 703-696-6762 or -5790 fax 703-696-4156]

A project of the Military Committee of the American Bar Association's Family Law Section, this Checklist was prepared by Mark E. Sullivan, a board-certified specialist in family law and a retired Army Reserve JAG colonel who practices with Sullivan & Grace, P.A. of 600 Wade Avenue, Raleigh, NC. Mr. Sullivan is a frequent writer and speaker on military divorce, custody, support and military pension division issues. He can be reached at 919-832-8507 or at law8507@aol.com.>

❑ Ask for a copy of the SM's LES (Leave and Earnings Statement), issued twice a month, to see how much leave SM has accrued, used in the past few months.
❑ Propound questions from the court to SM's commanding officer as to duty hours, days for the SM, his or her availability to attend court or to participate by telephone, Internet or videoteleconference

✓ **Execution of orders, judgments** (50 U.S.C. App. § 524)
❑ Must stay execution of any judgment, order entered against SM if SM shows military duties materially affect his/her ability to comply with court decree
❑ Also vacate or stay any attachment or garnishment of property, money or debts in possession of the SM or third party

✓ **Anticipatory relief** (50 U.S.C. App. § 591)
❑ Grant relief from obligation or liability incurred by SM before his/her military service
❑ Also for tax or assessment falling due before or during the SM's military service

✓ **Reopen judgment** (50 U.S.C. App. § 521(g))
❑ Must reopen order, judgment against SM if
1. SM was materially affected due to military service in asserting defense, and
2. He/she has meritorious defense

✓ **Are waivers allowed?** (50 U.S.C. App. § 517)
❑ Only effective if made during period of military service.
❑ Usually must be in writing.

✓ **Don't penalize SM in stay request.** (50 U.S.C. App. § 522(c))
❑ Request for stay does not constitute appearance for jurisdictional purposes.
❑ Also doesn't constitute waiver of any defense, substantive or procedural

✓ **Statute of limitations** (50 U.S.C. App. § 526)
❑ Period of military service may not be included in computing any limitation period for filing suit, either by or against SM.

✓ **Protect against mortgage foreclosure** (50 U.S.C. § 533)
❑ Court may stay foreclosure proceedings until SM can answer, extend mortgage maturity date to allow reduced monthly payments, grant foreclosure subject to being reopened if challenged by SM, or extend the period of redemption by period equal to the SM's military service.
❑ Conditions for above: if
1. Relief is sought on security interest in real/personal property
2. Obligation originated before active duty
3. Property owned by SM or dependent before active duty
4. Property still owned by SM or dependent
5. Ability to meet financial obligation is materially affected by SM's military service
6. Action is filed during (or within 90 days after) SM's military service. (50 U.S.C. App. § 533)

✓ **Protect SM-tenant.**
❑ If the rent paid in advance, require landlord to refund unearned portion. The member is required to pay rent only for those months before the lease is terminated. (50 U.S.C. § 535(f))
❑ It is a misdemeanor for landlord to If a security deposit was required, it must be refunded to the member upon termination of the lease. (50 U.S.C. § 535(h)(1))

* * *

FORECLOSURE

BENCHBOOK

Prepared by

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

and

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Introduction

1. Foreclosure is the enforcement of a security interest by judicial sale of collateral.

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. (2003).

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. (2008); *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. (2000).

(c) **Mortgagor:** refers to the obligor; the individual or entity who has assumed the obligation secured by the mortgage lien. § 721.82(7), Fla. Stat. (2000). 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. (2008).

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. (2006); *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. (2003); *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. (2008); *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. (2004). *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).

Parties to the Foreclosure Action

Plaintiff

1. Must be the owner/holder of the note.

(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. (2008).

(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. (2008) 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.

(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).

(a) No requirement of a written and recorded assignment of the mortgage to maintain foreclosure action. *WM Specialty Mortgage, LLC v. Salomon,* 874 So. 2d 680, 682 (Fla. 4th DCA 2004); *Chem. Residential Mortgage v. Rector,* 742 So. 2d 300 (Fla. 1st DCA 1998); *Clifford v. Eastern Mortg. & Sec.*

Co., 166 So. 562 (Fla. 1936).

3. 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. (2008); *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. (2004). Reestablishment of the note is governed by § 673.3091(2), Fla. Stat. (2004).

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.*

(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 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 necesary 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. (2008) 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.

2. Homeowners' Association's - Section 720.3085(2)(c)(1), Fla. Stat. (2008) 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. (2008).

(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 homeowner's associations have subordination language in their declaration of covenants providing that their lien is subordinate to the mortgage. However, the subordination language is not standard in all declarations. Any challenge to the priority if the mortgage will likely be resolved on the basis of impairment of contract.

Judgment Liens

1. Section 55.10(1), Fla. Stat. (2004) 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. (2004).

Filing of the Lis Pendens

1. Filing of lis pendens - cuts off the rights of any person whose interest arises after filing.

(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. (2007).

2. Validity of a notice of lis pendens is one year from filing. § 48.23(2), Fla. Stat. (2007).

(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.

(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 - Rule 1.944, Fla. R. Civ. Proc. Requisite allegations assert: jurisdiction, default, acceleration and the legal description of the real property.

(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. (2008). 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. Proc. 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 not required since the cause of action is based on the mortgage; not the assignment. Rule 1.130(a), Fla. R. Civ. P., *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. (2003).

(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) Legal description of the subject real property.

(j) 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.

Original Document Filing and Reestablishment of the Note

1. Lender is required to either present the original promissory note or give a satisfactory explanation for the lender's failure to present it prior to it being enforced. *Nat'l. Loan Investors, L.P. v. Joymar Associates,* 767 So. 2d 549, 550 (Fla. 3d DCA 2000).

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

2. A lost promissory note is a negotiable instrument. § 673.1041(1), Fla. Stat. (2008), *Thompson v. First Union Bank*, 643 So. 2d 1179 (Fla. 5th DCA 1994).

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

3. Reestablishment of the lost note - An owner of a lost, stolen or destroyed instrument may maintain an action by showing proof of his ownership, facts that prevent the owner from producing the instrument and proof of the terms of the lost instrument. § 673.3091(2), Fla. Stat. (2004); *Lawyer's Title Ins. Co., Inc. v. Novastar Mortgage, Inc.,* 862 So. 2d 793, 798 (Fla. 4th DCA 2004); *Gutierrez v. Bermudez,* 540 So. 2d 888, 890 (Fla. 5th DCA 1989).

(a) Owner of note is not required to have held possession of the note when the loss occurred to maintain an action against the mortgagor. *Deaktor v. Menendez,* 830 So. 2d 124, 126 (Fla. 3d DCA 2002). Further, plaintiff is not required to prove the circumstances of the loss or destruction of the note to seek enforcement. *Id.,* at 127.

(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.

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).

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. (2008) 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. (2008). 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 with prejudice or the dropping of the defendant.

Personal Service

1. Section 48.031 (1), Fla. Stat. (2004) requires that service of process be effectuated 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.

(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. (2004). 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 (Fedex) 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. (2004); *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 defendant 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. (2004) - 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. (2003).

Constructive Service

1. Section 49.011(1), Fla. Stat. (2008) 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., (2008), requires that the plaintiff file a sworn statement that shows (1) a diligent search and inquiry has been made to discover the name and residence of such person, (2) whether the defendant is over the age of 18, of if unknown, the statement should set forth that it is unknown, and (3) the status of the

defendant's residence, whether unknown or in another state or country. Section 49.051, Fla. Stat. (2006) 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., (2008), 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. (2003).

(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).

(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**

A basic checklist of a diligent search and inquiry to establish constructive service generally 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 Corp.s, 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.*

(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. *Shepheard 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. *Shepheard,* 922 So. 2d at 345. Void judgment is a nullity that cannot be validated by the passage of time and may beattacked 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., (2008) - authorizes service of process in the same manner as service within the state, by an officer in the state where the person is being served. Section states that service of process outside the United States may be required to conform to the provisions of Hague Convention of 1969 concerning service abroad of judicial and extrajudicial documents in civil or commercial matters.

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

(a) Procedure - process sent to a designated central authority, checked for compliance, served under foreign nation's law, and certificate prepared which documents the place and date of service or an explanation as to lack of service. *Id.* (return by the central authority of a foreign nation of completed certificate of

service was prima facie evidence that the authority's service on a defendant in that country was made in compliance with the Hague Convention and with the law of that foreign nation).

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

3. Service by registered mail - authorized by Section 48.194(2), Fla. Stat. (2008). 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. (2008), 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.

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.

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.

(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 90 days, provided he has a defense which requires his presence and despite due diligence, counsel has been unable to contact the servicemember. 50 App. U. S. C. A. § 521(d).

(c) Determination of military status – to obtain default, plaintiff must file an affidavit stating:

(1) the defendant is not in military service; or

(2) the 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.

7. **Appointment of a Guardian ad Litem** - 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. (2002).

(a) Section 65.061(2), Fla. Stat. (2004) 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. 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. 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."

(c) Apparent conflict between the statute and the rules discussed herein, must be resolved in favor of the rules. Art. V, § 2, Fla. Const.; *State v. Raymond,* 06 So. 2d 1045, 1047 (Fla. 2005).

Summary Final Judgment of Foreclosure

1. 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. The motion for summary judgment, supporting affidavits and notice of hearing must be served on a defendant at least 20 days before the summary judgment hearing. Rule 1.510(c), Fla. R. Civ. P.

(a) Other discovery materials and evidence used in support of or in opposition to a motion for summary judgment are subject to the different notice requirements. Specifically, Rule 1.510(c) proscribes that the adverse party shall identify evidence on which the adverse party relies: by notice mailed to the movant's attorney at least five days prior to the day of hearing or delivered no later than 5:00 P. M., two business days prior to the day of the hearing on the summary judgment. In short, the adverse party must serve copies on the movant by mailing them at least five days prior to the summary judgment hearing.

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

2. 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).

3. **Affidavits in support of Summary Judgment**

(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). ,

(4) late charges (pre-acceleration only), *Fowler v. First Fed. Sav. & Loan Ass'n.*, 643 So. 2d 30, 33(Fla. 1st DCA 1994).),

(5) property inspections & appraisals,

(6) 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.*

(1) 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.

4. 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).

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. 1 st DCA 1983).

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. *Morroni v. Household Fin. Corp. III,* 903 So. 2d 311, 312 (Fla. 2d DCA 2005). 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.

(c) Estoppel – elements include: 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 vendors 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 vendor 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. (2008), 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. (2008).

(1) A usurious contract is unenforceable according to the provisions of Section 687.071(7), Fla. Stat. (2003).

(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 519, 520 (Fla. 3d DCA 2006).

(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. (2002); *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. (2008) 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).

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

Additional cases: *Limehouse v. Smith,* 797 So. 2d 15 (Fla. 4th DCA 2001), (mistake); *O'Brien v. Fed. Trust Bank, F. S. B.,* 727 So. 2d 296 (Fla. 5th DCA 1999), (fraud, RICO and duress); *Biondo v. Powers,* 743 So. 2d 161 (Fla. 4th DCA 1999), (usury); *Heimmermann v. First Union Mortgage Corp.,* 305 F. 23d 1257 (11th Circ. 2002), (Real Estate Settlement Procedures Act (RESPA) violations.

Summary Judgment Hearing

1. Plaintiff must file the original note and mortgage at or before the summary judgment hearing. Since the promissory note is negotiable, it must be surrendered in the foreclosure proceeding so that it does not remain in the stream of commerce. *Perry v. Fairbanks Capital Corp.,* 888 So. 2d 725, 726 (Fla. 5th DCA 2001). Copies are sufficient with the exception that the note must be reestablished. *Id.* Best practice is for judge to cancel the signed note upon entry of summary judgment.

(a) Failure to produce note - can preclude entry of summary judgment. *Nat'l. Loan Investors, L. P. v. Joymar Assoc.,* 767 So. 2d 549, 550 (Fla. 3d DCA 2000).

Final Judgment

1. Section 45.031, Fla. Stat. (2008) governs the contents of the final judgment.

2. AO 09- 09 incorporates statutory requirements and requires the use of the adopted form for final summary judgment of foreclosure. Supplemental language must be submitted for review by separate order in the Eleventh Judicial Circuit.

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

4. 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).

5. Checklist

(a) Final Judgment:

(1) 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.

(2) Check principal, rate & calculation of interest through date of judgment.

(3) 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).

(4) 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.

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

(6) 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. (2001).

(7) 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.

(8) 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. (2008), *JRBL Dev., Inc. v. Maiello,* 872 So. 2d 362, 363 (Fla. 2d DCA 2004).

6. 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. (2008).

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. (2008).

(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. (2008).

2. Continuances and postponements are within the discretion of the trial court, but judicial action based on benevolence or compassion constitutes an abuse of discretion. *Republic Federal Bank v. Doyle,* WL 3102130 (Fla. 3d DCA 2009), (Appellate court thoroughly disapproved of trial court's continuance of sale based on compassion to homeowners claiming they needed additional time to sell their 8,300 sq. foot home valued at $2.5 million).

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. (2008). The second publication shall be at least five days before the sale. § 45.031(2), Fla. Stat. (2008).

(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. (2008).

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. (2006). 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. (2008). The court may hold a hearing – within judicial discretion.

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).

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). 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).

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. (2008).

(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.

3. **Summary of 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.

(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.

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. (2007). Disbursement of surplus funds is governed by Section 45.031, Fla. Stat. (2006).

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

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

(b) A senior lienholder is not entitled to share in surplus funds. *Garcia v. Stewart,* 906 So. 2d 1117, 1121 (Fla. 4th DCA 2005), (senior lienholder liens unaffected; improper party to junior lienholder foreclosure).

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. Trial court has discretion to enter deficiency decree. § 702.06, Fla. Stat. (2008); *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.

3. 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).

4. 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).

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. (2001).

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).

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; deficiency must be sought in separate action.

Common Procedural Errors

1. Incorrect legal description contained in the:

(a) Original mortgage – requires a count to reformation count. An error in the legal description of the deed requires the joinder of the original parties as necessary parties to the reformation proceedings. *Chanral 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. 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 the amended in the certificate of title.) Due process issues concerning the mobile home require the vacating of the sale and judgment.

Hope for Homeowner's Act of 2008

1. The Nat'l. Housing Act, also known as the Hope for Homeowner's Act of 2008, became effective on October 1, 2008 and sunsets on September 1, 2011. 12 U. S. C. A. § 1701 (2001). According to a recent NBC News report, only 312 homeowners nationwide have been helped.

2. Under the provisions of this new Act, eligible homeowners can refinance their primary residence with a FHA guaranteed 30-year fixed rate mortgage. When the homeowner sells the primary residence or refinances the FHA loan, he must share his profit on a sliding scale with the FHA.

3. To qualify: (a) the homeowner must demonstrate the inability to afford their mortgage payment; (b) only the homeowner's primary residence is eligible, not investment property; (c) any existing subordinate liens, such as a home equity loans must be paid off; (d) the homeowner must spend 31% of gross

monthly income on housing as of March 1, 2008; and (e) the homeowner must meet the same guidelines as an FHA mortgage, such as credit and income verification.

4. Lender participation in the program is entirely voluntary. The lender must be willing to accept a discounted value on its current mortgage.

Tenant 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.

2. The buyer or successor in interest after foreclosure sale must give tenants without leases 90 days notice prior to termination of tenancy; or allow tenants with leases to occupy the property until the end of the lease term. If the buyer intends to occupy the home as a primary residence, he must serve the tenant with a 90 day notice.

3. This provisions of the new law went into effect on May 20, 2009. The bill Sunsets on 12/31/2012.

Supreme Court of Florida

No. SC09-1460

IN RE: AMENDMENTS TO THE FLORIDA RULES OF CIVIL PROCEDURE.

No. SC09-1579

IN RE: AMENDMENTS TO THE FLORIDA RULES OF CIVIL PROCEDURE - FORM 1.996 (FINAL JUDGMENT OF FORECLOSURE).

[February 11, 2010]
REVISED ON REHEARING

PER CURIAM.

In case number SC09-1460, the Task Force on Residential Mortgage Foreclosure Cases has proposed an amendment to Florida Rule of Civil Procedure 1.110 (General Rules of Pleading) and two new Forms for Use with Rules of Civil Procedure. In case number SC09-1579, the Civil Procedure Rules Committee has proposed amendments to form 1.996 (Final Judgment of Foreclosure) of the Forms for Use with Rules of Civil Procedure. We have consolidated these cases for the purposes of this opinion. We have jurisdiction. See art. V, § 2(a), Fla. Const.

Case No. SC09-1460

By administrative order on March 27, 2009, the Task Force on Residential Mortgage Foreclosure Cases (Task Force) was "established to recommend to the Supreme Court policies, procedures, strategies, and methods for easing the backlog of pending residential mortgage foreclosure cases while protecting the rights of parties." In re Task Force on Residential Mortgage Foreclosure Cases, Fla. Admin. Order No. AOSC09-8, at 2 (March 27, 2009) (on file with Clerk of the Florida Supreme Court). The recommendations could "include mediation and other alternate dispute resolution strategies, case management techniques, and approaches to providing pro bono or low-cost legal assistance to homeowners." Id. The Task Force was also specifically asked to "examine existing court rules and propose new rules or rule changes that will facilitate early, equitable resolution of residential mortgage foreclosure cases." Id.

In response to this charge, the Task Force has filed a petition proposing amendments to the civil procedure rules and forms. [1] After submission to the

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1. The Task Force also submitted a companion report entitled "Final Report and Recommendations on Residential Mortgage Foreclosure Cases." The report urges the adoption of the proposed rule amendments and also contains administrative recommendations. The main recommendation in the report is the approval of a Model Administrative Order for a managed mediation program for residential mortgage foreclosure actions for use by the chief judges. The report was address separately as an administrative matter. The Task Force's petition also

Court, the proposals were published for comment on an expedited basis. Comments were received from Legal Services of Greater Miami, the Florida Justice Institute and Florida Legal Services, Inc; the Housing and Consumer Umbrella Groups of Florida Legal Services; Legal Services of North Florida, Inc., and North Florida Center for Equal Justice, Inc.; the Florida Bankers Association; Florida Default Law Group; Ben-Ezra & Katz, P.A.; Thomas H. Bateman III and Janet E. Ferris; Henry P. Trawick, Jr.; and Lisa Epstein. Oral argument was heard in this matter on November 4, 2009. Upon consideration of the Task Force's petition, the comments filed and responses thereto, and the presentations of the parties at oral argument, we adopt the Task Force's proposals with minor modifications as discussed below.

First, rule 1.110(b) is amended to require verification of mortgage foreclosure complaints involving residential real property. The primary purposes of this amendment are (1) to provide incentive for the plaintiff to appropriately investigate and verify its ownership of the note or right to enforce the note and

---

recommended amendments to form 1.997 (Civil Coversheet). However, the Civil Coversheet was the subject of another case, case number SC08-1141, and the Task Force's proposals with regard to the Civil Coversheet were addressed in that case. See In re Amendments to Florida Rules of Civil Procedure—Management of Cases Involving Complex Litigation, 34 Fla. L. Weekly S576 (Fla. Oct. 15, 2009).

ensure that the allegations in the complaint are accurate; (2) to conserve judicial resources that are currently being wasted on inappropriately pleaded "lost note" counts and inconsistent allegations; (3) to prevent the wasting of judicial resources and harm to defendants resulting from suits brought by plaintiffs not entitled to enforce the note; and (4) to give trial courts greater authority to sanction plaintiffs who make false allegations.

Next, the Task Force proposed a new form Affidavit of Diligent Search and Inquiry. In its petition, the Task Force explained that many foreclosure cases are served by publication. The new form is meant to help standardize affidavits of diligent search and inquiry and provide information to the court regarding the methods used to attempt to locate and serve the defendant. We adopt this form as new form 1.924, with several modifications.

The form, as proposed by the Task Force, provides spaces for the affiant to check off, from a list, the various actions taken to discover the current residence of the defendant and provides a "catch-all" section where the affiant can "List all additional efforts made to locate defendant." Additionally, it provides a section where the affiant can describe "Attempts to Serve Process and Results." One comment to this form, voiced by several interested parties, was that the form should be signed by the person actually performing the diligent search and inquiry, likely a process server, and not the plaintiff as the form, as originally proposed,

provided. The Task Force agreed with this comment. Thus, we modify the form to incorporate this change.

Next, although the Task Force stated in its petition that a significant provision of the new form was the "additional criteria [sic] that if the process server serves an occupant in the property, he inquires of that occupant whether he knows the location of the borrower-defendant," the proposed form does not include this provision. The Honorable Thomas McGrady, Chief Judge of the Sixth Judicial Circuit, raised this point in his comment and suggested the following provision be added to the form: "I inquired of the occupant of the premises whether the occupant knows the location of the borrower-defendant, with the following results: _____." Again, the Task Force agreed with this suggestion, and we modify the form to incorporate it.

Finally, section 49.041, Florida Statutes (2009), sets forth the minimum requirements for an affidavit of diligent search and inquiry and states as follows:

> The sworn statement of the plaintiff, his or her agent or attorney, for service of process by publication against a natural person, shall show:
>
> (1) That diligent search and inquiry have been made to discover the name and residence of such person, and that the same is set forth in said sworn statement as particularly as is known to the affiant; and
>
> (2) Whether such person is over or under the age of 18 years, if his or her age is known, or that the person's age is unknown; and
>
> (3) In addition to the above, that the residence of such person is, either:
>
> (a) Unknown to the affiant; or

(b) In some state or country other than this state, stating said residence if known; or

(c) In the state, but that he or she has been absent from the state for more than 60 days next preceding the making of the sworn statement, or conceals himself or herself so that process cannot be personally served, and that affiant believes that there is no person in the state upon whom service of process would bind said absent or concealed defendant.

§ 49.041, Fla. Stat. (2009). The form as proposed by the Task Force contains the required information, except for a statement whether the person is over or under the age of eighteen or that the person's age is unknown. Thus, we modify the affidavit form to include this information.

Finally, we adopt the Task Force's proposed Motion to Cancel and Reschedule Foreclosure Sale as new form 1.996(b). The Task Force recommended adoption of this new form in which the plaintiff would provide the court with an explanation of why the foreclosure sale needs to be cancelled and request that the court reschedule the sale. As the reason for this proposal, the Task Force stated in its petition:

> Currently, many foreclosure sales set by the final judgment and handled by the clerks of court are the subject of vague last-minute motions to reset sales without giving any specific information as to why the sale is being reset. It is important to know why sales are being reset so as to determine when they can properly be reset, or whether the sales process is being abused. . . . Again, this is designed at promoting effective case management and keeping properties out of extended limbo between final judgment and sale.

We adopt this form with minor stylistic and grammatical modifications as suggested in the comments and agreed to by the Task Force.

Case No. SC09-1579

In this case, the Civil Procedure Rules Committee has filed an out-of-cycle report under Florida Rule of Judicial Administration 2.140(e), proposing amendments to Florida Rule of Civil Procedure Form 1.996 (Final Judgment of Foreclosure). The Committee proposes amendments to this form in order to bring it into conformity with current statutory provisions and requirements. The Committee's proposal also includes several changes suggested by The Florida Bar's Real Property, Probate, and Trust Law Section to improve the form's clarity and readability and better conform to prevailing practices in the courts.[2] Upon consideration, we adopt the proposed amendments to form 1.996, with one exception, as further explained below.

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2. Prior to submitting this proposal to the Court, the committee published it for comment. One comment was received suggesting that, in addition to the other amendments proposed by the committee, provisions for specific findings as to the reasonable number of hours and the reasonable hourly rate for an award of attorneys' fees be added to paragraph one of the form. The committee initially took the position that the comment suggested a change unrelated to its proposed amendments and that the committee would consider it in its 2013 regular-cycle report. Subsequently, however, the committee filed an additional response in which it agreed with the comment and recommended that the suggested change be made in this case. We agree with the committee that this additional change is appropriate and, accordingly, we include it in the amendments adopted in this case.

First, to conform to current statutory requirements, a notice to lienholders and directions to property owners as to how to claim a right to funds remaining after public auction is added to the form. See § 45.031(1), Fla. Stat. (2009). Additionally, to conform to current statutory provisions allowing the clerk of court to conduct judicial sales via electronic means, the form is amended to accommodate this option. See § 45.031(10), Fla. Stat. (2009).

Other amendments are as follows: (1) in order to provide greater clarity and prevent errors, paragraph one of the form is amended to set out amounts due in a column format; (2) paragraph two is amended to allow for the possibility that there may be more than one defendant, and out of concern for privacy interests, the lines for an address and social security number are deleted; (3) paragraph four is amended to conform to existing practice and require a successful purchaser to pay the documentary stamps on the certificate of title; (4) paragraph six is amended to accommodate the possibility that there may be multiple defendants, to adapt to the requirements of section 45.0315, Florida Statutes (2009), stating that the right of redemption expires upon the filing of the certificate of sale, unless otherwise specified in the judgment, to recognize the potential survival of certain liens after foreclosure as provided in chapter 718 (the Condominium Act) and chapter 720 (Homeowners' Association), Florida Statutes (2009), and to allow a purchaser to obtain a writ of possession from the clerk of court without further order of the

court.[3] As noted, these amendments were suggested to the committee by The Florida Bar's Real Property, Probate, and Trust Law Section to improve the form's clarity and readability and better conform to prevailing practices in the courts.

However, one of the changes suggested by the Real Property, Probate, and Trust Law Section and incorporated by the committee into its proposal was the addition of a new paragraph stating that a foreclosure sale shall not begin until a representative of the plaintiff is present and that the plaintiff has the right to cancel the sale upon notice to the clerk. Obviously, including such a provision, as standard, in the final judgment of foreclosure form would be at odds with our adoption of new form 1.996(b) (Motion to Cancel and Reschedule Foreclosure Sale). Accordingly, we decline to adopt this particular amendment. Also, in light of our adoption of the Motion to Cancel and Reschedule Foreclosure Sale as new form 1.996(b), we renumber the Final Judgment of Foreclosure Form as form 1.996(a).

Conclusion

Accordingly, the Florida Rules of Civil Procedure and the Forms for Use with Rules of Civil Procedure are hereby amended as set forth in the appendix to this opinion. New language is underscored; deleted language is struck through.

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3. An explanatory committee note is also added.

Committee notes are offered for explanation only and are not adopted as an official part of the rules. The amendments shall become effective immediately upon the release of this opinion. Because the amendments to form 1.996(a) (Final Judgment of Foreclosure) were not published by the Court for comment prior to their adoption, interested persons shall have sixty days from the date of this opinion in which to file comments, on those amendments only, with the Court.[4]

It is so ordered.

QUINCE, C.J., and PARIENTE, LEWIS, LABARGA, and PERRY, JJ., concur.
CANADY, J., concurs in part and dissents in part with an opinion, in which POLSTON, J., concurs.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

CANADY, J., concurring in part and dissenting in part.

Because I am concerned that requiring prior judicial approval for the cancellation of foreclosure sales may produce untoward results, I dissent from the

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4. An original and nine paper copies of all comments must be filed with the Court on or before April 12, 2010, with a certificate of service verifying that a copy has been served on the Committee Chair, Mark A. Romance, 201 S. Biscayne Blvd, Suite 1000, Miami, FL 33131-4327, as well as separate request for oral argument if the person filing the comment wishes to participate in oral argument, which may be scheduled in this case. The Committee Chair has until May 3, 2010, to file a response to any comments filed with the Court. Electronic copies of all comments and responses also must be filed in accordance with the Court's administrative order in In re Mandatory Submission of Electronic Copies of Documents, Fla. Admin. Order No. AOSC04-84 (Sept. 13, 2004).

adoption of form 1.996(b). I would have instead adopted the proposal suggested by the Real Property, Probate, and Trust Law Section for the addition of a paragraph to the form final judgment of foreclosure stating that a foreclosure sale shall not begin until a representative of the plaintiff is present and that the plaintiff has the right to cancel the sale upon notice to the clerk.

POLSTON, J., concurs.

Two Cases:

Original Proceeding – Florida Rules of Civil Procedure

Mark A. Romance, Chair, Civil Procedure Rules Committee, Miami, Florida; Jennifer D. Bailey, Chair, Task Force on Residential Mortgage Foreclosure Cases, Eleventh Judicial Circuit, Miami, Florida and Alan B. Bookman, Task Force on Residential Mortgage Foreclosures, Pensacola, Florida; John F. Harkness, Jr., Executive Director, and Madelon Horwich, Bar Staff Liaison, The Florida Bar, Tallahassee, Florida,

for Petitioners

Henry P. Trawick, Jr., Sarasota, Florida; Virginia Townes of Akerman, Senterfitt, Orlando, Florida on behalf of The Florida Bankers Association; Marc A. Ben-Ezra of Ben-Ezra and Katz, P.A., Fort Lauderdale, Florida; Carolina A. Lombardi, Marcia K. Cypen, and John W. McLuskey, Legal Services of Greater Miami, Inc., Miami, Florida, Kendall Coffey and Jeffrey B. Crockett of Coffey Burlington, LLP, Miami, Florida, Randall C. Berg, Jr. and Joshua A. Glickman, Florida Justice Institute, Inc., Miami, Florida, and Kent R. Spuhler, Florida Legal Services, Inc., Tallahassee, Florida; B. Elaine New, Court Counsel, on behalf of J. Thomas McGrady, Chief Judge, Sixth Judicial Circuit, St. Petersburg, Florida; Alice M. Vickers, Florida Legal Services, Inc., Tallahassee, Florida, Lynn Drysdale, Jacksonville Area Legal Aid, Inc., Jacksonville, Florida, Jeffrey Hearne, Legal Services of Greater Miami, Inc., Miami, Florida, and James R. Carr, Florida Rural

Legal Services, Inc., Lakeland, Florida, on behalf of the Housing Umbrella Group and the Consumer Umbrella Group of Florida Legal Services, Inc.; Scott Manion, Tallahassee, Florida, on behalf o f Legal Services of North Florida, Inc.; Edward J. Grunewald, Tallahassee, Florida, on behalf of The North Florida Center for Equal Justice, Inc.; Thomas H. Bateman, III of Messer, Caparello, and Self, P.A., Tallahassee, Florida, and Janet E. Ferris, Tallahassee, Florida; Ronald R. Wolfe, Tampa, Florida, Suzanne Barto Hill of Rumberger, Kirk and Caldwell, Orlando, Florida, and Roy A. Diaz of Smith, Hiatt and Diaz, P.A., Fort Lauderdale, Florida, on behalf of Florida Default Law Group, P.L.; Judge William D. Palmer, Chair, Committee on ADR Rules and Policy, Fifth District Court of Appeal, Daytona Beach, Florida, on behalf of the Supreme Court Committee on Alternative Dispute Resolution Rules and Policy; Lisa Epstein, West Palm Beach, Florida, and Terry Resk of Haile, Shaw and Pfaffenberger, P.A., North Palm Beach, Florida,

Responding with comments

APPENDIX

RULE 1.110. GENERAL RULES OF PLEADING

(a) [no change]

(b) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, crossclaim, or third-party claim, must state a cause of action and shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the ultimate facts showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which the pleader deems himself or herself entitled. Relief in the alternative or of several different types may be demanded. Every complaint shall be considered to demand general relief.

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."

(c) - (h) [no change]

Committee Notes
[no change]

FORM 1.924. AFFIDAVIT OF DILIGENT SEARCH AND INQUIRY

I, *(full legal name)* _____ (individually or an Employee of _____), being sworn, certify that the following information is true:

1. I have made diligent search and inquiry to discover the current residence of _____, who is [over 18 years old] [under 18 years old] [age is unknown] (circle one). **Refer to checklist below and identify all actions taken (any additional information included such as the date the action was taken and the person with whom you spoke is helpful) (attach additional sheet if necessary):**

[check **all** that apply]

_____ Inquiry of Social Security Information

_____ Telephone listings in the last known locations of defendant's residence

_____ Statewide directory assistance search

_____ Internet people finder search {specify sites searched}

_____ Voter Registration in the area where defendant was last known to reside.

_____ Nationwide Masterfile Death Search

_____ Tax Collector's records in area where defendant was last known to reside.

_____ Tax Assessor's records in area where defendant was last known to reside

_____ Department of Motor vehicle records in the state of defendant's last known address

_____ Driver's License records search in the state of defendant's last known address.

_____ Department of Corrections records in the state of defendant's last known address.

_____ Federal Prison records search.

_____ Regulatory agencies for professional or occupational licensing.

_____ Inquiry to determine if defendant is in military service.

_____ Last known employment of defendant.

{List all additional efforts made to locate defendant}

_____

_____

_____

_____

Attempts to Serve Process and Results

_____

_____

_____

_____

_____ I inquired of the occupant of the premises whether the occupant knows the location of the borrower-defendant, with the following results:

_____

_____

_____

2. _____ **current residence**

[check **one** only]

_____ a. _____'s current residence is unknown to me

_____ b. _____'s current residence is in some state or country other than Florida and _____'s last known address is:

_____

_____

_____ c. The _____, having residence in Florida, has been absent from Florida for more than 60 days prior to the date of this affidavit, or conceals him (her) self so that process cannot be served personally upon him or her, and I believe there is no person in the state upon whom service of process would bind this absent or concealed _____.

I understand that I am swearing or affirming under oath to the truthfulness of the claims made in this affidavit and that the punishment for knowingly making a false statement includes fines and/or imprisonment.

Dated: _____

Signature of Affiant
Printed Name: _____
Address: _____
City, State, Zip: _____
Phone: _____
Telefacsimile: _____

STATE OF _____
COUNTY OF _____

_____ Sworn to or affirmed and signed before me on this _____ day of _____, 20____ by _____.

_____
NOTARY PUBLIC, STATE OF _____

_____
(Print, Type or Stamp Commissioned Name of Notary Public)

_____ Personally known
_____ Produced identification
_____ Type of identification produced: _____

NOTE: This form is used to obtain constructive service on the defendant.

FORM 1.996(a). FINAL JUDGMENT OF FORECLOSURE

FINAL JUDGMENT

This action was tried before the court. On the evidence presented

IT IS ADJUDGED that:

1. Plaintiff, ...(name and address)....., is due ~~..... as principal, $..... as interest to date of this judgment, $..... for title search expense, $..... for taxes, $..... for insurance premiums, $..... for attorneys' fees, with $..... for court costs now taxed, less $..... for undisbursed escrow funds and less $..... for unearned insurance premiums, under the note and mortgage sued on in this action, making a total sum of $....., that shall bear interest at the rate of .....% a year.~~

Principal	$.....
Interest to date of this judgment	.....
Title search expense	.....
Taxes	.....
Attorneys' fees	
Finding as to reasonable number of hours:	.....
Finding as to reasonable hourly rate:	.....
Attorneys' fees total	.....
Court costs, now taxed	.....
Other:	.....
Subtotal	$.....
LESS: Escrow balance	.....
LESS: Other	.....
TOTAL	$.....

that shall bear interest at the rate of .....% a year.

2. Plaintiff holds a lien for the total sum superior to ~~any~~all claims or estates of defendant(s), ~~.....(name and address, and social security number if known).....,~~ on the following described property in ..... County, Florida:

(describe property)

3. If the total sum with interest at the rate described in paragraph 1 and all costs accrued subsequent to this judgment are not paid, the clerk of this court shall sell the property at public sale on .....(date)....., ~~between 11:00 a.m. and 2:00 p.m.~~ to the highest bidder for cash, except as prescribed in paragraph 4, at the ~~..... door of the~~ courthouse ~~in~~located at .....(street address of courthouse)..... in ..... County in ~~.....~~.....(name of city)....., Florida, in accordance with section 45.031, Florida Statutes~~.~~, using the following method (CHECK ONE):

☐ At .....(location of sale at courthouse; *e.g.*, north door)....., beginning at .....(time of sale)..... on the prescribed date.

☐ By electronic sale beginning at .....(time of sale)..... on the prescribed date at .....(website).....

4. Plaintiff shall advance all subsequent costs of this action and shall be reimbursed for them by the clerk if plaintiff is not the purchaser of the property for sale, provided, however, that the purchaser of the property for sale shall be responsible for the documentary stamps payable on the certificate of title. If plaintiff is the purchaser, the clerk shall credit plaintiff's bid with the total sum with interest and costs accruing subsequent to this judgment, or such part of it~~,~~ as is necessary to pay the bid in full.

5. On filing the certificate of title the clerk shall distribute the proceeds of the sale, so far as they are sufficient, by paying: first, all of plaintiff's costs; second, documentary stamps affixed to the certificate; third, plaintiff's attorneys' fees; fourth, the total sum due to plaintiff, less the items paid, plus interest at the rate prescribed in paragraph 1 from this date to the date of the sale; and by retaining any remaining amount pending the further order of this court.

6. On filing the certificate of ~~title~~sale, defendant(s) and all persons claiming under or against defendant(s) since the filing of the notice of lis pendens shall be foreclosed of all estate or claim in the property ~~and the purchaser at the sale~~, except as to claims or rights under chapter 718 or chapter 720, Florida Statutes, if any. Upon the filing of the certificate of title, the person named on the certificate of title shall be let into possession of the property. If any defendant remains in possession of the property, the clerk shall without further order of the court issue forthwith a writ of possession upon request of the person named on the certificate of title.

7. Jurisdiction of this action is retained to enter further orders that are proper including, without limitation, ~~writs of possession and~~ a deficiency judgment.

IF THIS PROPERTY IS SOLD AT PUBLIC AUCTION, THERE MAY BE ADDITIONAL MONEY FROM THE SALE AFTER PAYMENT OF PERSONS WHO ARE ENTITLED TO BE PAID FROM THE SALE PROCEEDS PURSUANT TO THE FINAL JUDGMENT.

IF YOU ARE A SUBORDINATE LIENHOLDER CLAIMING A RIGHT TO FUNDS REMAINING AFTER THE SALE, YOU MUST FILE A CLAIM WITH THE CLERK

NO LATER THAN 60 DAYS AFTER THE SALE. IF YOU FAIL TO FILE A CLAIM, YOU WILL NOT BE ENTITLED TO ANY REMAINING FUNDS.

[If the property being foreclosed on has qualified for the homestead tax exemption in the most recent approved tax roll, the final judgment shall additionally contain the following statement in conspicuous type:]

IF YOU ARE THE PROPERTY OWNER, YOU MAY CLAIM THESE FUNDS YOURSELF. YOU ARE NOT REQUIRED TO HAVE A LAWYER OR ANY OTHER REPRESENTATION AND YOU DO NOT HAVE TO ASSIGN YOUR RIGHTS TO ANYONE ELSE IN ORDER FOR YOU TO CLAIM ANY MONEY TO WHICH YOU ARE ENTITLED. PLEASE CHECK WITH THE CLERK OF THE COURT, (INSERT INFORMATION FOR APPLICABLE COURT) **WITHIN 10 DAYS AFTER THE SALE TO SEE IF THERE IS ADDITIONAL MONEY FROM THE FORECLOSURE SALE THAT THE CLERK HAS IN THE REGISTRY OF THE COURT.**

IF YOU DECIDE TO SELL YOUR HOME OR HIRE SOMEONE TO HELP YOU CLAIM THE ADDITIONAL MONEY, YOU SHOULD READ VERY CAREFULLY ALL PAPERS YOU ARE REQUIRED TO SIGN, ASK SOMEONE ELSE, PREFERABLY AN ATTORNEY WHO IS NOT RELATED TO THE PERSON OFFERING TO HELP YOU, TO MAKE SURE THAT YOU UNDERSTAND WHAT YOU ARE SIGNING AND THAT YOU ARE NOT TRANSFERRING YOUR PROPERTY OR THE EQUITY IN YOUR PROPERTY WITHOUT THE PROPER INFORMATION. IF YOU CANNOT AFFORD TO PAY AN ATTORNEY, YOU MAY CONTACT (INSERT LOCAL OR NEAREST LEGAL AID OFFICE AND TELEPHONE NUMBER) **TO SEE IF YOU QUALIFY FINANCIALLY FOR THEIR SERVICES. IF THEY CANNOT ASSIST YOU, THEY MAY BE ABLE TO REFER YOU TO A LOCAL BAR REFERRAL AGENCY OR SUGGEST OTHER OPTIONS. IF YOU CHOOSE TO CONTACT** (NAME OF LOCAL OR NEAREST LEGAL AID OFFICE AND TELEPHONE NUMBER) **FOR ASSISTANCE, YOU SHOULD DO SO AS SOON AS POSSIBLE AFTER RECEIPT OF THIS NOTICE.**

ORDERED at ....., Florida, on .....(date).....

_____

Judge

NOTE: Paragraph 1 must be varied in accordance with the items unpaid, claimed, and proven. The form does not provide for an adjudication of junior lienors' claims nor for redemption by the United States of America if it is a defendant. The address of the person who claims a lien as a result of the judgment must be included in the judgment in order for the judgment to become a lien on real estate when a certified copy of the judgment is recorded. Alternatively, an affidavit with this information may be simultaneously recorded. For the specific requirements, see section 55.10(1), Florida Statutes; *Hott Interiors, Inc. v. Fostock*, 721 So. 2d 1236 (Fla. 4th DCA 1998). ~~The address and social security number (if known) of each person against whom the judgment is rendered must be included in the judgment, pursuant to section 55.01(2), Florida Statutes.~~

Committee Notes

1980 Amendment. The reference to writs of assistance in paragraph 7 is changed to writs of possession to comply with the consolidation of the 2 writs.

2010 Amendment. Mandatory statements of the mortgagee/property owner's rights are included as required by the 2006 amendment to section 45.031, Florida Statutes. Changes are also made based on 2008 amendments to section 45.031, Florida Statutes, permitting courts to order sale by electronic means.

Additional changes were made to bring the form into compliance with chapters 718 and 720 and section 45.0315, Florida Statutes, and to better align the form with existing practices of clerks and practitioners. The breakdown of the amounts due is now set out in column format to simplify calculations. The requirement that the form include the address and social security number of all defendants was eliminated to protect the privacy interests of those defendants and in recognition of the fact that this form of judgment does not create a personal final money judgment against the defendant borrower, but rather an in rem judgment against the property. The address and social security number of the defendant borrower should be included in any deficiency judgment later obtained against the defendant borrower.

FORM 1.996(b). MOTION TO CANCEL AND RESCHEDULE FORECLOSURE SALE

Plaintiff moves to cancel and reschedule the mortgage foreclosure sale because:

1. On this Court entered a Final Judgment of Foreclosure pursuant to which a foreclosure sale was scheduled for , 20 .

2. The sale needs to be canceled for the following reason(s):

a. Plaintiff and Defendant are continuing to be involved in loss mitigation;

b. Defendant is negotiating for the sale of the property that is the subject of this matter and Plaintiff wants to allow the Defendant an opportunity to sell the property and pay off the debt that is due and owing to Plaintiff.

c. Defendant has entered into a contract to sell the property that is the subject of this matter and Plaintiff wants to give the Defendant an opportunity to consummate the sale and pay off the debt that is due and owing to Plaintiff.

d. Defendant has filed a Chapter Petition under the Federal Bankruptcy Code;

e. Plaintiff has ordered but has not received a statement of value/appraisal for the property;

f. Plaintiff and Defendant have entered into a Forbearance Agreement;

g. Other

_____

_____

_____

3. If this Court cancels the foreclosure sale, Plaintiff moves that it be rescheduled.

I hereby certify that a copy of the foregoing Motion has been furnished by U.S. mail postage prepaid, facsimile or hand delivery to this day of , 20 .

NOTE. This form is used to move the court to cancel and reschedule a foreclosure sale.

ADMINISTRATIVE ORDER
NO. 2010-11

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

ADMINISTRATIVE ORDER GOVERNING CASE MANAGEMENT OF RESIDENTIAL FORECLOSURE CASES AND MANDATORY REFERRAL OF MORTGAGE FORECLOSURE CASES INVOLVING HOMESTEAD RESIDENCES TO MEDIATION, ORANGE COUNTY

WHEREAS, pursuant to Article V, section 2(d) of the Florida Constitution, and section 43.26, Florida Statutes, the Chief Judge of each judicial circuit is charged with the authority and power to do everything necessary to promote the prompt and efficient administration of justice, and rule 2.215(b)(3), Florida Rules of Judicial Administration, mandates the Chief Judge to "develop an administrative plan for the efficient and proper administration of all courts within the circuit;" and

WHEREAS, rule 2.545 of the Rules of Judicial Administration requires that the trial courts "...take charge of all cases at an early stage in the litigation and...control the progress of the case thereafter until the case is determined...", which includes "...identifying cases subject to alternative dispute resolution processes;" and

WHEREAS, Chapter 44, Florida Statutes, and rules 1.700-1.750, Florida Rules of Civil Procedure, provide a framework for court-ordered mediation of civil actions, except those matters expressly excluded by rule 1.710(b), which does not exclude residential mortgage foreclosure actions; and

WHEREAS, residential mortgage foreclosure case filings have increased substantially in the Ninth Judicial Circuit, and state and county budget constraints have limited the ability of the courts in the Ninth Judicial Circuit to manage these cases in a timely manner; and

WHEREAS, the Supreme Court of Florida has determined that **mandatory mediation of homestead residential mortgage foreclosure actions prior to the matter being set for final hearing** will facilitate the laudable goals of communication, facilitation, problem-solving between the parties with the emphasis on self-determination, the parties' needs and interests, procedural flexibility, full disclosure, fairness, and confidentiality. Referring these cases to mediation will also

facilitate and provide a more efficient use of limited judicial and clerk resources in a court system that is already overburdened;

NOW, THEREFORE, I, Belvin Perry, Jr., pursuant to the authority vested in me as Chief Judge of the Ninth Judicial Circuit of Florida under Florida Rule of Judicial Administration 2.215, order the following, **effective July 2, 2010**, and to continue until further order:

Scope

1. ***Residential Mortgage Foreclosures.*** This Administrative Order shall apply to all residential mortgage foreclosure actions filed in Orange County in which the origination of the note and mortgage sued upon was subject to the provisions of the Federal Truth in Lending Act, Regulation Z. However, compliance with this Order varies depending on whether the property secured by the mortgage is a homestead residence.

The parties to the foreclosure action shall comply with the conditions and requirements imposed by this Order.

Upon the effective date of this Order, **all newly filed** mortgage foreclosure actions filed against a homestead residence shall be referred to the Residential Mortgage Foreclosure Mediation (RMFM) Program unless:

(a) the plaintiff and borrower agree in writing otherwise; or

(b) unless pre-suit mediation was conducted in accordance to paragraph 24.

In actions to foreclose a mortgage on a homestead residence, the plaintiff and borrower **shall attend at least one mediation session**, unless:

(a) the plaintiff and borrower agree in writing not to participate in the RMFM Program; or

(b) the Program Manager files a notice of borrower nonparticipation.

Upon the effective date of this Order, **all newly filed** residential mortgage foreclosure actions involving property that is not a homestead residence shall comply with the requirements of filing a Form A as required by paragraph 5 below and the requirements of paragraph 18 below (plaintiff's certification as to settlement authority).

At the discretion of the presiding judge, compliance with this Order may also be required:

(a) for homestead residential mortgage foreclosure actions filed prior to the effective date of this Order;

(b) to residences which are not homestead residences; and

(c) any other residential foreclosure action the presiding judge deems appropriate.

A party requesting that the case be sent to mediation with the RMFM Program at the discretion of the presiding judge shall make the request in the format of Exhibit 3 attached.

2. ***Referral to Mediation***. This Order constitutes a formal referral to mediation pursuant to the Florida Rules of Civil Procedure in actions involving a mortgage foreclosure of a homestead residence. The plaintiff and borrower are deemed to have stipulated to mediation by a mediator assigned by the Program Manager unless pursuant to rule 1.720(f), Florida Rules of Civil Procedure, the plaintiff and borrower file a written stipulation choosing not to participate in the RMFM Program. Referral to the RMFM Program is for administration and management of the mediation process and assignment of a Florida Supreme Court certified circuit civil mediator who has been trained in mediating residential mortgage foreclosure actions and who has agreed to be on the panel of available certified circuit civil mediators. Mediation through the RMFM Program shall be conducted in accordance with Florida Rules of Civil Procedure and Florida Rules for Certified and Court-Appointed Mediators.

3. ***Compliance Prior to Judgment.*** The parties must comply with this Order and the mediation process must be completed ***before*** the plaintiff applies for default judgment, a summary judgment hearing, or a final hearing in an action to foreclose a mortgage on a homestead residence unless a notice of nonparticipation is filed by the Program Manager.

4. ***Delivery of Notice of RMFM Program with Summons.*** After the effective date of this Order, in all actions to foreclose a mortgage on residential property the clerk of court shall attach to the summons to be served on each defendant a notice regarding managed mediation for homestead residences in the format of Exhibit 2 attached.

Additionally, the clerk of court shall provide a daily list of each homestead foreclosure filing, with the case number, to the Program Manager.

Procedure

5. ***Responsibilities of Plaintiff's Counsel; Form A.*** When suit is filed, counsel for the plaintiff must file a completed Form A with the clerk of court. If the property is a homestead residence, all certifications in Form A must be filled out completely. Within one (1) business day after Form A is filed with the clerk of court, counsel for plaintiff shall also electronically transmit a copy of Form A to the Program Manager along with the court case number of the action and contact information for all of the parties. The contact information must include at a minimum the last known mailing address and phone number for each party.

Within ten (10) days after Form A is filed with the clerk of court, counsel for the plaintiff shall send a check or money order made payable to the Orange County Bar Association, 800 North Orange Avenue, Orlando, Florida 32801 in the amount of $700.00. PLAINTIFF SHALL ATTACH A PHOTOCOPY OF FORM A TO THE CHECK. This amount includes the $400.00 administrative fee component of the RMFM Program and the $300.00 mediation fee component as detailed in paragraph 20 of this Order. The check

must match the information provided on Form A and the court case number must be included on the check. NO PERSONAL CHECKS WILL BE ACCEPTED.

Counsel for the plaintiff shall also send borrower, at borrower's last known mailing address, a copy of the complaint, a copy of the summons and a copy of Exhibit 2 of this Order, Notice of RMFM Program to be Served with Summons, via U.S. Mail within forty-eight (48) hours of filing the complaint.

As different payment options become available, the Program Manager may change payment acceptance terms without the necessity of amending this Administrative Order.

In Form A, plaintiff's counsel must affirmatively certify whether the origination of the note and mortgage sued upon was subject to the provisions of the Federal Truth in Lending Act, Regulation Z. In Form A, plaintiff's counsel must also affirmatively certify whether the property is a homestead residence. Plaintiff's counsel is not permitted to respond to the certification with "unknown," "unsure," "not applicable," or similar nonresponsive statements.

If the property is a homestead residence and if the case is not exempted from participation in the RMFM Program because of pre-suit mediation conducted in accordance with paragraph 24 below, plaintiff's counsel shall further certify in Form A the identity of the plaintiff's representative who will appear at mediation. Plaintiff's counsel may designate more than one plaintiff's representative. At least one of the plaintiff's representatives designated in Form A must attend any mediation session scheduled pursuant to this Order.

Form A may be amended to change the designated plaintiff's representative, and the amended Form A must be filed with the court no later than five (5) days prior to the mediation session. All amended Forms A must be electronically transmitted to the Program Manager via a secure dedicated e-mail address or on the web-enabled information platform described in paragraph 8 no later than one (1) business day after being filed with the clerk of court.

6. ***Responsibilities of Borrower.*** Upon the Program Manager receiving a copy of Form A, the Program Manager shall begin efforts to contact the borrower to explain the RMFM Program to the borrower and the requirements that the borrower must comply with to obtain a mediation. The Program Manager shall also ascertain whether the borrower wants to participate in the RMFM Program.

The borrower must do the following prior to mediation being scheduled:

(a) consult with an approved mortgage foreclosure counselor; and

(b) provide to the Program Manager the information required by the Borrower's Financial Disclosure for Mediation in the format of Exhibit 5 attached within thirty (30) days from the date suit is filed.

The Borrower's Financial Disclosure for Mediation will vary depending on the type of modification, short sale or other relief sought in mediation. It shall be the responsibility of the Program Manager to transmit the Borrower's Financial Disclosure for Mediation via a secure dedicated e-mail address or to upload same to the web-enabled information platform described in paragraph 8; however, the Program Manager is not responsible or liable for the accuracy of the borrower's financial information.

7. ***Plaintiff's Disclosure for Mediation.*** Within the time limit stated below, prior to attending mediation the borrower may make a written request for any of the following information and documents from the plaintiff:

Documentary evidence the plaintiff is the owner and holder in due course of the note and mortgage sued upon.

A history showing the application of all payments by the borrower during the life of the loan.

A statement of the plaintiff's position on the present net value of the mortgage loan.

The most current appraisal of the property available to the plaintiff.

A separate line item for any fees, costs, interest, penalties or other charges that the plaintiff is asserting may be due and owing.

The borrower must deliver a written request for such information to the Program Manager in the format of Exhibit 6 attached no later than twenty-five (25) days prior to the mediation session. The Program Manager shall promptly electronically transmit the request for information to plaintiff's counsel.

Plaintiff's counsel is responsible for ensuring that the Plaintiff's Disclosure for Mediation is electronically transmitted via a secure dedicated e-mail address or to the web-enabled information platform described in paragraph 8 below no later than twenty (20) business days before the mediation session. The Program Manager shall immediately deliver a copy of Plaintiff's Disclosure for Mediation to the borrower.

8. ***Information to be Provided on Web-Enabled Information Platform.*** All information to be provided to the Program Manager to advance the mediation process, such as Form A, Borrower's Financial Disclosure for Mediation, Plaintiff's Disclosure for Mediation, as well as the case number of the action and contact information for the parties, should be submitted via a secure dedicated e-mail address or in a web-enabled information platform with XML data elements.

9. ***Nonparticipation by Borrower.*** If the borrower does not want participate in the RMFM Program, or if the borrower fails or refuses to cooperate with the Program Manager, or if the Program Manager is unable to contact the borrower, the Program Manager shall file a notice of nonparticipation in the format of Exhibit 4 attached. The notice of nonparticipation shall be filed no later than thirty (30) days after suit is filed. A copy of the notice of nonparticipation shall be served on the parties by the Program Manager.

10. ***Referral to Foreclosure Counseling***. The Program Manager shall be responsible for referring the borrower to a foreclosure counselor prior to scheduling mediation. Selection from a list of foreclosure counselors certified by the United States Department of Housing and Urban Development shall be by rotation or by such other procedures as may be adopted by the Chief Judge in the county in which the action is pending. The borrower's failure to participate in foreclosure counseling shall be cause for terminating the case from the RMFM Program.

11. ***Referrals for Legal Representation***. In actions referred to the RMFM Program, the Program Manager shall advise any borrower who is not represented by an attorney that the borrower has a right to consult with an attorney at any time during the mediation process and the right to bring an attorney to the mediation session. The Program Manager shall also advise the borrower that the borrower may apply for a volunteer pro bono attorney in programs run by lawyer referral, legal services, and legal aid programs as may exist within this Circuit.

If the borrower applies to one of those agencies and is coupled with a legal services attorney or a volunteer pro bono attorney, the attorney shall file a notice of appearance with the clerk of the court and provide a copy to the attorney for the plaintiff and the Program Manager. The appearance may be limited to representation only to assist the borrower with mediation but, if a borrower secures the services of an attorney, counsel of record must attend the mediation.

12. ***Scheduling Mediation***. The plaintiff's representative, plaintiff's counsel, and the borrower are all required to comply with the time limitations imposed by this Order and attend a mediation session as scheduled by the Program Manager.

Within forty-five (45) days after suit is filed, the Program Manager shall schedule a mediation session.

The mediation session shall be scheduled for a date and time convenient to the plaintiff's representative, the borrower, and counsel for the plaintiff and the borrower, using a mediator

from the panel of Florida Supreme Court certified circuit civil mediators who have been specially trained to mediate residential mortgage foreclosure disputes. Mediation sessions will be held at a suitable location(s) within this Circuit obtained by the Program Manager for mediation. Mediation shall be completed within the time requirements established by rule 1.710(a), Florida Rules of Civil Procedure. Mediation shall not be scheduled until the borrower has had an opportunity to meet with an approved foreclosure counselor.

Mediation shall not be scheduled earlier than fifteen (15) days after the Borrower's Financial Disclosure for Mediation has been transmitted to the plaintiff via a secure dedicated e-mail address or uploaded to the web-enabled information platform described in paragraph 8. Once the date, time, and place of the mediation session have been scheduled by the Program Manager, the Program Manager shall promptly file with the clerk of court and serve on all parties a notice of the mediation session.

13. ***Attendance at Mediation***. The following persons are required to be physically present at the mediation session: (a) the borrower; (b) the borrower's counsel of record, if any; (c) the plaintiff's lawyer; and (d) the plaintiff's representative with full authority to settle as designated in the most recently filed Form A. However, the plaintiff's representative may appear at mediation through the use of communication equipment, if plaintiff files and serves at least five (5) days prior to the mediation a notice in the format of Exhibit 7 attached advising that the plaintiff's representative will be attending through the use of communication equipment and designating the person who has full authority to sign any settlement agreement reached. Plaintiff's counsel may be designated as the person with full authority to sign the settlement agreement.

At the time that the mediation is scheduled to physically commence, but prior to the commencement of the mediation conference, and prior to any discussion of the case in the

presence of the mediator, the Program Manager or designee shall take a written roll consisting of the signature and printed name of each party present. That written roll is a determination of the presence of: (a) the borrower; (b) the borrower's counsel of record, if any; (c) the plaintiff's lawyer; and (d) the plaintiff's representative with full authority to settle. Determination of plaintiff's representative's full authority to settle shall be verified through completion of a certificate affirming said representative has full authority to settle. Said certificate must be signed by the plaintiff's representative appearing at the mediation, or by plaintiff's counsel, and may be provided to the Program Manager prior to the mediation, or signed at the mediation.

If the Program Manager, or designee, determines that anyone is not present, it shall be reported as a nonappearance on the written roll. If the Program Manager, or designee, determines that the plaintiff's representative present does not have full authority to settle, it shall be reported on the written roll that the plaintiff's representative did not appear with full settlement authority as required by this Order. If a party appears via telephonic means, that should be notated by the Program Manager, or designee, or the mediator on the written roll. The written roll and communication of authority to the Program Manager, or designee, is not a mediation communication.

The authorization by this Order for the plaintiff's representative to appear through the use of communication equipment is pursuant to rule 1.720(b), Florida Rules of Civil Procedure (court order may alter physical appearance requirement), and in recognition of the emergency situation created by the massive number of residential foreclosure cases being filed in this Circuit and the impracticality of requiring physical attendance of a plaintiff's representative at every mediation. Additional reasons for authorizing appearance through the use of communication equipment for mortgage foreclosure mediation include a number of protective factors that do not exist in other civil cases, namely the administration of the program by a program manager, pre-

mediation counseling for the borrower, and required disclosure of information prior to mediation. The implementation of this Order shall not create any expectation that appearance through the use of communication equipment will be authorized in other civil cases.

If the plaintiff's representative attends mediation through the use of communication equipment, the person authorized by the plaintiff to sign a settlement agreement must be physically present at mediation. If the plaintiff's representative attends mediation through the use of communication equipment, the plaintiff's representative must remain on the communication equipment at all times during the entire mediation session. If the plaintiff's representative attends through the use of communication equipment, and if the mediation results in an impasse, within five (5) days after the mediation session, the plaintiff's representative shall file in the court file a certification in the format of Exhibit 8 attached as to whether the plaintiff's representative attended mediation. If the mediation results in an impasse after the appearance of the plaintiff's representative through the use of communication equipment, the failure to timely file the certification regarding attendance through the use of communication equipment shall be grounds to impose sanctions against the plaintiff, including requiring the physical appearance of the plaintiff's representative at a second mediation, taxation of the costs of a second mediation to the plaintiff, or dismissal of the action.

Junior lienholders may appear at mediation by a representative with full settlement authority. If a junior lienholder is a governmental entity comprised of an elected body, such junior lienholder may appear at mediation by a representative who has authority to recommend settlement to the governing body. Counsel for any junior lienholder may also attend the mediation. The participants physically attending mediation may consult on the telephone during the mediation with other persons as long as such consultation does not violate the provisions of sections 44.401-406, Florida Statutes.

14. ***Failure to Appear at Mediation.*** If either the plaintiff's representative designated in the most recently filed Form A or the borrower fails to appear at a properly noticed mediation and the mediation does not occur, or when a mediation results in an impasse, the Mediation Report shall notify the presiding judge regarding who appeared at mediation without making further comment as to the reasons for an impasse. The Program Manager shall attach a copy of the written roll as described in paragraph 13 of this Order to the Mediation Report.

If the borrower fails to appear, or if the mediation results in an impasse with all required parties present, and if the borrower has been lawfully served with a copy of the complaint, and if the time for filing a responsive pleading has passed, the matter may proceed to a final hearing, summary judgment, or default final judgment in accordance with the rules of civil procedure without any further requirement to attend mediation.

If plaintiff's counsel or the plaintiff's representative fails to appear, the court may dismiss the action without prejudice, order plaintiff's counsel or the plaintiff's representative(s) to appear at mediation, or impose such other sanctions as the court deems appropriate including, but not limited to, attorney's fees and costs if the borrower is represented by an attorney. If the borrower or borrower's counsel of record fails to appear, the court may impose such other sanctions as the court deems appropriate, including, but not limited to, attorney's fees and costs.

15. ***Written Settlement Agreement; Mediation Report.*** If a partial or final agreement is reached, it shall be reduced to writing and signed by the parties and their counsel, if any. Pursuant to rule 1.730(b), Florida Rules of Civil Procedure, if a partial or full settlement agreement is reached, the mediator shall report the existence of the signed or transcribed agreement to the court without comment. If the parties do not reach an agreement as to any matter as a result of mediation, the mediator shall report the lack of an agreement to the court without comment or recommendation. In the case of an impasse, the report shall advise the court