RESIDENTIAL

FORECLOSURE

BENCH BOOK

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TABLE OF CONTENTS

Introduction

1. Foreclosure is the enforcement of a security interest by judicial sale of collateral. All mortgages shall be foreclosed in equity. § 702.01, Fla. Stat. (2013).

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. (2013).

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. (2013); *Fla. Nat'l Bank & Trust Co. of Miami v. Brown,* 47 So. 2d 748 (Fla. 1949).

(b) Mortgagee: refers to the lender; the secured party or holder of the mortgage lien. § 721.82(6), Fla. Stat. (2013).

(c) Mortgagor: refers to the obligor or borrower; the individual or entity who has assumed the obligation secured by the mortgage lien. § 721.82(7), Fla. Stat. (2013). 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. (2013).

Lender's Right to Foreclose

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

(a) Right unaffected by defendant's misfortune. *Lee County Bank v. Christian Mut. Foundation, 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. 2d DCA 1981).

Even though mortgage foreclosure proceedings are equitable proceedings, Florida courts may not alter mortgagee's contractual rights based on equitable considerations. *David v. Sun Federal Sav. & Loan Ass'n,* 461 So. 2d 93 (Fla. 1984); *Smiley v. Manufactured Housing Assoc. III Ltd. Partnership,* 679 So. 2d 1229 (Fla. 2d DCA 1996); *see also In re Sundale Ltd.,* 410 B.R. 101, 105 (Bankr. S.D. Fla. 2009).

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 Federal 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 Fed. 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. (2013); *Farmers & Merch. Bank v. Riede,* 565 So. 2d 883, 885 (Fla. 1st DCA 1990).

(a) In the absence of a contractual provision regarding governing law, a contract is governed by the law of the state in which the contract was made. *Sims v. New Falls Corporation,* 37 So. 3d 358, 360 (Fla. 3d DCA 2010) (Florida statute of limitations law applied to action on the promissory note).

2. One-year statute of limitations period for deficiency judgments. § 95.11(5)(h), Fla. Stat. (2013). This 2013 change applies "to any action commenced on or after July 1, 2013, regardless of when the cause of action accrued. However, any action that would not have been barred under s. 95.11(2)(b), Florida Statutes 2012, before the effective date of this act must be commenced within 5 years after the action accrued or by July 1, 2014, whichever occurs first." Ch. 2013-137, § 2, Laws of Fla.

3. 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. (2013); *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).

4. 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. (2013); *Cadle Co. 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

Foreclosure Actions

1. Court's judicial authority over real property is 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), Florida Statutes (2013). *Alexdex Corp. v. Nachon Enter., Inc.*, 641 So. 2d 858 (Fla. 1994) (concurrent equity jurisdiction over lien foreclosures of real property that fall within statutory monetary limits). *Id.* at 863.

(b) Jurisdictional authority over real property only in the circuit where the land is situated. *Hammond v. DSY Developers, LLC.,* 951 So. 2d 985, 988 (Fla. 2d DCA 2007); *Goedmakers v. Goedmakers,* 520 So. 2d 575, 578 (Fla. 1988) (court lacks *in rem* jurisdiction over real property located outside the court's circuit). If real property lies in two counties, the foreclosure suit may be maintained in either county; however, the notice of sale must be published in both. § 702.04, Fla. Stat. (2013).

Suit on the Promissory Note

1. A suit on the promissory note is *in personam*, imposing personal liability on the mortgagor. In contrast, a judgment of foreclosure applies only to the property secured by the mortgage.

2. It is well established Florida law that the mortgagee has three remedies upon mortgagor's default, all of which he may pursue at the same time: "that he may bring suit at law, upon the bond or note secured by the mortgage; institute an action for ejectment, to put himself in possession of the rents and profits of the estate; and file a bill in Chancery, to foreclose the mortgage." *Royal Palm Corporate Center Ass'n, Ltd. v. PNC Bank, NA,* 89 So. 3d 923, 931 (Fla. 4th DCA 2012), citing *Manley v. Union Bank of Florida,* 1 Fla. 160 (1846). "The mortgagee may sue either on the note or

foreclose on the mortgage, and may pursue all remedies at the same time or consequently." *Id.*

3. A suit on the note and a foreclosure action are not inconsistent remedies and therefore pursuit of either of those remedies without satisfaction is not a bar to pursuit of the other. *Fort Plantation Investments, LLC v. Ironstone Bank,* 85 So. 3d 1169, 1171 (Fla. 5th DCA 2012). As such, the mortgagee may pursue legal and equitable remedies at the same time.

Standing to Prosecute Foreclosure

Standing has been ***the*** hot topic of foreclosure defense litigation. In a foreclosure case, standing means that the plaintiff had the right to enforce the note or has authority to enforce the note at the time it filed the complaint. In the run-up to the foreclosure crisis, the securitization of mortgages created a situation where notes and mortgages were being transferred immediately after origination and frequently were transferred multiple times. The most frequent way standing is established is by possession of the original note with a blank endorsement. An endorsement transfers the rights under the note, and if it is left blank, the note is enforceable by anyone in physical possession of the note. At times, it is necessary to examine the note and look for the chain of endorsements: A originated the loan, then A endorsed the note to B, then B endorsed to C, and C endorsed in blank. Frequently endorsements are located on the back side of pages, so look at all pages of the note front and back for endorsements.

In addition, careless plaintiff's attorneys frequently attached the origination file scanned copy of the note to a complaint, which does not carry the endorsements, or failed to copy the backside of pages which contained the endorsement, setting up standing issues. In addition, a note can be transferred by allonge, which is essentially just an endorsement on a separate page from a note. The note can also be transferred by a separate assignment document.

Standing is important because of the chaos in the mortgage industry. It has not been unusual in Florida for multiple law firms or multiple plaintiffs to bring a

foreclosure case on the same note. Recent 2013 statutory amendments are directed at clarifying and streamlining standing issues in foreclosure cases.

1. Definition - "[S]tanding is no more than having, or representing one who has, 'a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy.'" *Elston/Leetsdale, LLC v. CWCapital Asset Management, LLC,* 87 So. 3d 14, 16 (Fla. 4th DCA 2012). In the mortgage foreclosure context, standing is broader than just actual ownership of the beneficial interest in the note. *Id.*

(a) Real Party in Interest - Rule 1.210(a), Florida Rules of Civil Procedure (2013), permits action to be prosecuted in the name of someone other than, but acting for, the real party in interest. "Where a plaintiff is either the real party in interest or is maintaining the action on behalf of the real party in interest, its action cannot be terminated on the ground that it lacks standing." *Elston,* 87 So. 3d at 17. "The proper party with standing to foreclose a note and/or mortgage is the holder of the note and mortgage or the holder's representative." *BAC Funding Consortium Inc. v. Jean-Jacques,* 28 So. 3d 936, 938 (Fla. 2d DCA 2010). A servicer may be considered a party in interest as long as the trustee confers or ratifies its action. *Elston,* 87 So. 3d at 17. (In *Elston,* the servicer failed to prove standing; there was an absence of evidence, affidavits, or other documents which would prove the allegation that the servicer was authorized to prosecute the foreclosure.)

(b) Prosecution requirement - Sufficient stake in the dispute or be a real party in interest; a representative that can prove its authority to prosecute.

2. Burden - Plaintiff has the burden to demonstrate the right, on the date of the filing of the complaint, to enforce the note (standing), even if the defendant/borrower did not raise this issue in their pleading even if the defendant has been defaulted. *Boumarate v. HSBC Bank USA, N.A.,* 109 So. 3d 1239, 1240 (Fla. 5th DCA 2013).

3. Pleading of Standing

(a) As of June 7, 2013, section 702.015, Florida Statutes, requires that in a verified complaint foreclosing on residential real property, the plaintiff must allege affirmative allegations that the plaintiff is the holder of the original note,

702.015(2)(a), or allege with specificity the factual basis by which the plaintiff is entitled to enforce the note, section 702.015(2)(b).

(b) If the plaintiff has been delegated authority to enforce the note, the complaint must describe the authority of the plaintiff and identify with specificity the document that granted the plaintiff the authority to act on behalf of the person entitled to enforce the note. § 702.015(3), Fla. Stat.

4. Proof of Standing

(a) Standing may be established by either an assignment or an equitable transfer of the mortgage *prior* to the filing of the complaint. *Cromarty v. Wells Fargo Bank, NA,* 110 So. 3d 988 (Fla. 4th DCA 2013) (undated, blank endorsement on note and affidavit in support of summary judgment motion did not contain any sworn statement that plaintiff owned note prior to date complaint was filed); *Green v. JPMorgan Chase Bank, N.A.,* 109 So. 3d 1285, 1288 (Fla. 5th DCA 2013) (undated, blank endorsement and post-complaint affidavit in present tense that bank "holds the note" was insufficient to show that bank acquired right to enforce mortgage before filing suit); *Hall v. REO Asset Acquisitions, LLC,* 84 So. 3d 388 (Fla. 3d DCA 2013); *Charley v. Green Tree Servicing, LLC,* 2013 WL 811650 (Fla. 4th DCA March 6, 2013) (court noted two different plaintiffs had filed suit on same note); *Vidal v. Liquidation Properties, Inc.,* 104 So. 3d 1274, 1277 (Fla. 4th DCA 2013) (neither back-dated assignment nor affidavit which did not state when note and mortgage were transferred could establish standing prior to filing complaint); *McLean v. JP Morgan Chase Bank Nat'l Ass'n,* 79 So. 3d 170, 173 (Fla. 4th DCA 2012) (bank failed to prove standing, having filed assignment dated after filing of complaint, together with affidavit in support of summary judgment that did not state date mortgage or note was transferred to bank).

(b) Steps in proof of standing - (1) a special endorsement on the note in favor of the plaintiff or a blank endorsement; (2) evidence of an assignment from the payee to the plaintiff; or (3) an affidavit of ownership. *Saver v. JP Morgan Chase Bank,* 114 So. 3d 352 (Fla. 4th DCA 2013); *Rigby v. Wells Fargo Bank, N.A.,* 84 So. 3d 1195 (Fla. 4th DCA 2012).

(c) Affidavits - If the plaintiff relies on an affidavit of ownership to prove status as a holder of the note on the date the lawsuit was filed, it is sufficient if the body of the affidavit indicates that the plaintiff was the owner of the note and mortgage before suit was filed. *Vidal,* 104 So. 3d at 1277 (blank, undated endorsement, undated allonge, and assignment of mortgage, not note, could not meet standing requirements; affidavit filed after suit was filed did not specifically state when Chase became owner of note or establish ownership prior to suit). Successor lenders/servicers can establish prior records, such as loan payment histories and default records, by affidavit from the previous custodian of the business record, whether it be a servicer or lender. § 90.803(6)(a), Fla. Stat. (2013).

(d) Testimony - Even though bank had an undated, blank endorsement, court found competent, substantial evidence presented to establish standing based on testimony of bank employee demonstrating bank's ownership through purchase assumption agreement. *Stone v. BankUnited,* 2013 WL 1845584 (Fla. 2d DCA May 3, 2013) (bank employee was qualified witness, with special knowledge of bank's acquisition of mortgage loan and servicing of that loan).

5. Dismissal for failure to prove standing - In *Wells Fargo Bank, N.A. v. Bohatka,* 112 So. 3d 596 (Fla. 1st DCA 2013), at a hearing on the defendant's motion to dismiss, the trial court dismissed with prejudice based on the plaintiff's filing of a note, payable to a different bank, with no endorsement, setting up a conflict between the allegation of the complaint and the attached document. The appellate court ruled that dismissal with prejudice was error and opined that amendment, within reason, should be permitted to establish the bank's standing.

6. Summary: The following is a basic list which details how to prove standing based on the origin of the plaintiff's authority to prosecute.

- Plaintiff is the original lender listed on the note and mortgage - The documents are sufficient evidence of the authority to prosecute foreclosure.
- Blank, undated endorsement on the original note and the plaintiff is different than the original lender - Plaintiff must be the holder of the note and establish that the endorsement, evidencing the transfer of interest, occurred prior to the

filing of the complaint. An affidavit or testimony at trial must establish that the date of acquisition of the note precedes the filing of the complaint. Case law precedent demonstrates that servicing agreements, loan purchase and assumption agreements, and trust agreements can support standing when bolstered by confirming affidavits and testimony.

- *Elston* - In *Elston* the court held that a verified complaint stating that the plaintiff was duly authorized by the trust that owned the loan to prosecute the action was not sufficient because the plaintiff did not file any evidence, affidavits, or other documents to support the allegation. The complaint was verified by the senior vice-president of the plaintiff, not by the trust, which was the real party in interest.
- Assignments of mortgage - Mortgage assignee and holder of the note has the right to pursue foreclosure. *Lizio v. McCullom,* 36 So. 3d 927, 929 (Fla. 4th DCA 2010); § 701.01, Fla. Stat. (2013).
- Bank takeovers, name changes, and acquisitions - In cases in which the original lender has ceased to exist, such as a takeover by the FDIC, the successor entity must be able to establish a clear chain of title of the respective loan from the originator to the successor. Merger documents, such as the certificate of corporate existence from bank regulators, can be self-authenticated when certified and bearing the agency seal. § 90.902(1)(a), Fla. Stat. (2013). Records from the MERS electronic database can also provide a chain of title to prove standing when confirmed by testimony or affidavits.
- E-notes - Section 668.50, Florida Statutes (2013), the Uniform Electronic Transaction Act, addresses legal recognition of electronic signatures, records, and contracts. It is important to note that "[i]n a proceeding, evidence of a record or signature may not be excluded solely because the record or signature is in electronic form." § 668.50(13), Fla. Stat. (2013). Further, section 668.50(16), Florida Statutes (2013), addresses the transferability of electronic records and contracts. E-notes should be reviewed carefully for uniqueness, authenticity, and security.

7. Appellate Standard of Review: Standing is a question of law subject to de novo review on appeal. *Elston*.

Parties to the Foreclosure Action

Plaintiff

The party entitled to enforce the promissory note is defined in section 673.3011, Florida Statutes (2013), as the (1) holder of the instrument; (2) a non-holder in possession of the instrument who has the rights of a holder; and (3) a person who is not in possession of the instrument who is entitled to enforce the instrument pursuant to section 673.3091 or section 673.4181(4), Florida Statutes (2013).

1. Plaintiff must be the owner or holder of the note as of the date of filing suit, or be authorized to act on behalf of the person entitled to enforce the note. *Jeff-Ray Corp. v. Jacobsen,* 566 So. 2d 885 (Fla. 4th DCA 1990); *see also WM Specialty Mortgage, LLC v. Salomon,* 874 So. 2d 680, 682 (Fla. 4th DCA 2004). Plaintiff's lack of standing at the inception of the case cannot be cured by the acquisition of standing *after* the case is filed; a party is not permitted to establish the right to maintain an action retroactively by acquiring standing to file a lawsuit after the fact. *McLean v. JP Morgan Chase Bank Nat'l Ass'n,* 79 So. 3d 170, 174 (Fla. 4th DCA 2012) (mortgage assigned to Chase three days after the filing of the foreclosure complaint insufficient to confer standing – trial court should dismiss the lawsuit and Chase file a new complaint). Summary judgment reversed against bank that did not yet own the note and mortgage when it filed the foreclosure action. *Ruscalleda v. HSBC Bank USA,* 43 So. 3d 947 (Fla. 3d DCA 2010) (unique situation where two banks simultaneously attempted to foreclose). Caveat: However, a holder of lost note had standing to bring foreclosure action against title holder even if the mortgage itself had not been transferred prior to the initiation of the action. *U.S. Bank Nat'l Ass'n v. Knight,* 90 So. 3d 824 (Fla. 4th DCA 2012) (an owner or holder of a note, endorsed in blank, need only show that he possessed the note at the institution of a foreclosure suit; the mortgage necessarily and equitably follows 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. (2013). The mortgage follows the note.

(b) A promissory note is a negotiable instrument and the mortgage provides the security for the repayment of the note; the person having standing to foreclose a note may be either the holder of the note or a non-holder in possession of the note who has the rights of a holder. *Taylor v. Deutsche Bank National Trust Co.,* 44 So. 3d 618, 621 (Fla. 3d DCA 2010). This standing must be established through admissible evidence, proof of the purchase of the debt, evidence of an effective transfer, or proof that plaintiff holds the note and mortgage it seeks to foreclose. *BAC Funding Consortium Inc. v. Jean-Jacques,* 28 So. 3d 936, 939 (Fla. 2d DCA 2010). Assignment of the mortgage alone, without assignment of the note, is insufficient to establish standing. *Lindsey v. Wells Fargo Bank, N.A.,* 2013 WL 692825 (Fla. 1st DCA Feb. 27, 2013) (note payable to original lender did not include special endorsement to Wells Fargo or blank endorsement, assignment of mortgage did not purport to transfer note, and affidavits did not support Wells Fargo's ownership of note); *Mazine v. M & I Bank,* 67 So. 3d 1129, 1132 (Fla. 1st DCA 2011).

(1) Endorsement in blank – makes the note payable to bearer and allows the note to be negotiated by transfer of possession alone. Possession of the original promissory note, endorsed in blank, was sufficient under Florida's Uniform Commercial Code (UCC) to establish that it was it was the lawful holder of the note, entitled to enforce its terms. *Riggs v. Aurora Loan Services, LLC,* 36 So. 3d 932, 933 (Fla. 4th DCA 2010); § 673.2051(2), Fla. Stat. (2013). A holder of the original note, endorsed in blank, has standing to enforce the note regardless of any recorded assignments. *Harvey v. Deutsche Bank Nat'l Trust Co.,* 69 So. 3d 300, 303 (Fla. 4th DCA 2011) (a recording of an assignment after filing the complaint does not alter the status of a note holder). Caveat: Plaintiff must have the requisite standing when the complaint is filed. *Rigby v. Wells Fargo Bank, N.A.,* 84 So. 3d 1195, 1196 (Fla. 4th DCA 2012).

(a) The holder may be the owner or a nominee, such as a servicer, assignee, or a collection and litigation agent. Rule 1.210(a), Florida Rules of Civil Procedure (2013), provides that an action may be prosecuted in the name of an authorized person without joinder of the party for whose benefit the action is brought. *See also Kumar Corp. v. Nopal Lines, Ltd.,* 462 So. 2d 1178, 1184 (Fla. 3d DCA 1985).

(b) 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 holder by delivery of note); *Mortgage Electronic 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). A nominal party, such as an agent, may bring suit in its own name for the benefit of the real party in interest; the principal may subsequently ratify its agent's act, even if originally unauthorized and such ratification relates back and supplies the original authority. *Juega v. Davidson,* 8 So. 3d 488, 490 (Fla. 3d DCA 2009).

2. Assignment of note and mortgage - Plaintiff should assert assignee status in complaint if relying upon that status. 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,* 184 So. 140, 143 (Fla. 1938) (possession of note, bolstered by uncontested testimony, was sufficient to constitute Gillian equitable owner of mortgage and entitle him to foreclose); *Warren v. Seminole Bond & Mortg. Co.,* 172 So. 696 (Fla. 1937) (security follows note; assignee of note secured by mortgage is entitled to benefits of security). Assignments must be recorded to be valid against creditors and subsequent purchasers. § 701.02, Fla. Stat. (2013). *See also Glynn v. First Union Nat'l Bank,* 912 So. 2d 357, 358 (Fla. 4th DCA 2005).

(a) No requirement of a written and recorded assignment of the mortgage to maintain foreclosure action where evidence establishes plaintiff as owner or holder of the note on date of filing suit. *Perry,* 888 So. 2d 725 at 726; *Harvey v. Deutsche Bank Nat'l Trust Co.*, 69 So. 3d 300 (Fla. 4th DCA 2011); *WM Specialty Mortgage, LLC,* 874 So. 2d 680 at 682; *Chemical Residential Mortgage v. Rector,* 742 So. 2d 300 (Fla.

1st DCA 1998); *Clifford v. Eastern Mortg. & Sec. Co.,* 166 So. 562 (Fla. 1936). However, the incomplete, unsigned, and unauthenticated assignment of mortgage attached as an exhibit to purported mortgage holder and note holder's response to motion to dismiss did not constitute admissible summary judgment evidence sufficient to establish standing. *BAC Funding,* 28 So. 3d 936. If plaintiff has an assignment of mortgage recorded prior to the date of filing suit, then he can enforce even if possession of note never physically delivered. Florida courts recognize constructive delivery. "The absence of the note does not make a mortgage unenforceable." *Lawyers Title Ins. Co., Inc. v. Novastar Mortgage, Inc.,* 862 So. 2d 793, 798 (Fla. 4th DCA 2004). Assignment may be by physical delivery (provide evidence) or by written assignment. Therefore, even in the absence of a valid written assignment, the mere delivery of a note and mortgage, with intention to pass title, upon a proper consideration, will vest the equitable interest in the person to whom it is delivered. *Johns v. Gillian,* 184 So. 140, 143 (Fla. 1938).

3. MERS – What is it? Mortgage Electronic Registration Systems (MERS) is a corporation which maintains an electronic registry tracking system of servicing and ownership rights to mortgages throughout the United States. In many cases MERS is the mortgagee of record and is identified in the mortgage (not the note). On each MERS loan there is an 18-digit number used for tracking. Through the MERS servicer ID number, homeowners can identify their lender with borrower name and property address. While the original mortgage is publicly recorded, subsequent transfers of servicing and interest in the MERS system are not. Instead, they are tracked electronically in the MERS Record System. Through multiple transfers, the MERS mortgage is maintained in an electronic database, documenting transfers of ownership and servicing of the mortgage loan.

4. Since the promissory note is a negotiable instrument, plaintiff must present the original note or give a satisfactory explanation for its absence. § 90.953(1), Fla. Stat. (2013); *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. (2013). Reestablishment of the note is governed by section 673.3091(2), Florida Statutes (2013).

Necessary and Proper Defendants

1. The owner of the fee simple title - only indispensable party defendant to a foreclosure action. *English v. Bankers Trust Co. of Calif., N.A.,* 895 So. 2d 1120, 1121 (Fla. 4th DCA 2005). Foreclosure is void if titleholder omitted. *Id.* If a spouse fails to sign the mortgage, lender may still foreclose on property owned by husband and wife when both spouses knew of loan and purchased in joint names. *Countrywide Home Loans v. Kim,* 898 So. 2d 250 (Fla. 2005).

(a) Indispensable parties defined - necessary parties so essential to a suit that no final decision can be rendered without their joinder. *Sudhoff v. Federal Nat'l Mortgage Ass'n,* 942 So. 2d 425, 427 (Fla. 5th DCA 2006).

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

3. Omitted party defendants - only remedies are to compel redemption or the re-foreclosure in a suit de novo, due to lack of diligent pursuit. *Id.; Quinn Plumbing Co. v. New Miami Shores Corp.,* 129 So. 690, 693 (Fla. 1930). If a plaintiff has raised the issue of omitted defendants, it should request a specific reservation of jurisdiction in the final judgment of foreclosure. Generally, the trial court loses jurisdiction after final judgment in the absence of a specific reservation. *Ross v. Wells Fargo Bank,* 114 So. 3d 256 (Fla. 3d DCA 2013) (trial court lacked jurisdiction to allow supplemental post-judgment proceeding for foreclosure in absence of specific reservation).

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.* Therefore, suit against a decedent alone will result in abatement, unless tenants by entireties and suggestion of death.

(b) Post-judgment death of titleholder, these parties are not deemed indispensable parties. *Davis v. Scott,* 120 So. 1 (Fla. 1929).

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

(a) Includes: junior mortgagees, holders of judgments and liens acquired after the superior mortgage, lessees and tenants/parties in possession of the real property. *Posnansky v. Breckenridge Estates Corp.,* 621 So. 2d 736, 737 (Fla. 4th DCA 1993); *Commercial Laundries, Inc. v. Golf Course Towers Associates,* 568 So. 2d 501, 502 (Fla. 3d DCA 1990); *Crystal River Lumber Co. v. Knight Turpentine Co.,* 67 So. 974, 975 (Fla. 1915).

(b) If junior lien holders are not joined, their rights in the real property survive the foreclosure action.

(c) Joinder of original parties to the deed or mortgage is 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). Therefore, the original grantor and grantee are necessary parties in an action to reform a deed. *Id.*

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

(a) Mortgagee seeks entry of a deficiency judgment against the prior unreleased mortgagors in the foreclosure action. *PMI Ins. Co. v. Cavendar,* 615 So. 2d 710, 711 (Fla. 3d DCA 1993).

Superior Interests

1. First or senior mortgagees are never necessary or proper parties to the foreclosure action by the junior mortgagee. *Gonzalez v. Chase Home Finance LLC,* 37 So. 3d 955, 957 (Fla. 3d DCA 2010); *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.

(b) Priority - First-recorded mortgage was sufficient to place second-recorded mortgage on constructive notice of the earlier mortgage, thereby retaining priority over the second-recorded mortgage, despite scrivener's error which misidentified the page of the plat book in which the property was described. *Fidelity Bank of Florida v. Nguyen,* 44 So. 3d 1238 (Fla. 5th DCA 2010).

(c) Municipal ordinance that established superpriority for municipal code enforcement liens held invalid; city lien could not take priority over prior recorded mortgage. *City of Palm Bay v. Wells Fargo Bank, N.A.,* 2013 WL 2096257 (Fla. May 16, 2013).

2. **Purchase money mortgage defined** - proceeds of the loan are used to acquire the real estate or to construct improvements on the real estate. RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 7.2(a) (2012). 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

(a) Section 718.116(1)(b), Florida Statutes (2013), establishes the liability of the first mortgagee, its successor, or purchaser for condominium assessments and maintenance as the lesser of:

- unit's unpaid common expenses and regular periodic assessments which came due six months prior to title acquisition; or
- one percent of the original mortgage debt (provided condominium association is joined as a defendant).

(b) The law is clear that the purchaser of a condominium unit has liability for unpaid condominium assessments. § 718.116, Fla. Stat. (2013). The appellate court has rejected the notion that equity and fairness support an order requiring a bank to pay condominium assessments while foreclosure proceedings are pending, since the statute makes it clear that the first mortgagee is required to pay assessments only after acquiring title and equity follows the law. *Deutsche Bank Nat'l Trust Co. v. Coral Key Condominium Ass'n,* 32 So. 3d 195 (Fla. 4th DCA 2010); *U.S. Bank Nat'l Ass'n v. Tadmore,* 23 So. 3d 822 (Fla. 3d DCA 2009).

(c) The statutory cap limits the liability of foreclosing mortgagees for unpaid condominium assessments that become due prior to acquisition of title. This safe harbor applies only to the first mortgagee or a subsequent holder of the first mortgage. *Bay Holdings, Inc. v. 2000 Island Boulevard Condo. Ass'n,* 895 So. 2d 1197 (Fla. 3d DCA 2005). The term "successor or assignee" as used with respect to a first mortgagee includes only a subsequent holder of the first mortgage. § 718.116(1)(g), Fla. Stat. (2013). Other entities that acquire title are not entitled to this limitation of liability and are "jointly and severally liable . . . for all unpaid assessments that come due up to the time of transfer of title." § 718.116(1)(a), Fla. Stat. (2013).

(d) There is no exception for joint and several liability for unpaid assessments that come due up to the transfer of title when the previous owner is the condominium association. *Barnes v. Castle Beach Club Condominium Ass'n,* 106 So. 3d 86 (Fla. 3d DCA 2013); *Aventura Management, LLC v. Spiaggia Ocean Condominium Ass'n,* 105 So. 3d 637 (Fla. 3d DCA 2013).

2. Homeowners' Associations

(a) Section 720.3085(2)(c), Florida Statutes (2013), establishes the liability of the first mortgagee, its successor, or purchaser for homeowner's assessments and maintenance as the lesser of:

- parcel's unpaid common expenses and regular periodic or special assessments which accrued 12 months prior to acquisition of title; or
- one percent of the original mortgage debt.

(b) 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 Villages v. Avatar Properties, Inc.,* 724 So. 2d 585, 587 (Fla. 5th DCA 1999).

(c) 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. (2013).

(d) Statutory revisions of the 2008 Legislature failed to remedy the potential super-priority of liens recorded prior to July 1, 2008. (Prior statutory version amended by the 2007 Legislature gave homeowner's association liens a priority, even if the mortgage was filed first in time.) Arguably, many homeowners' associations have subordination language in their declaration of covenants providing that their lien is subordinate to the mortgage. However, the subordination language is not standard in all declarations. Notwithstanding section 720.3085(2), Florida Statutes (2013), challenges to the mortgage's priority have been resolved on the principle that "no degree of contract impairment is tolerable." *Coral Lakes Community Ass'n, Inc. v. Busey Bank, N.A.,* 30 So. 3d 579, 584 (Fla. 2d DCA 2010) (court upheld bank's rights as third party beneficiary to declaration of condominium restriction which homeowner's association had employed to entice lenders to finance purchases in its community).

3. "Reverse foreclosures" defined - where association takes title and pursues lender or where association sets down the motion for summary judgment due to delays by lenders.

4. Cannot force lenders to pay association fees during pendency of foreclosure. *U.S. Bank Nat'l Ass'n v. Tadmore,* 23 So. 3d 822 (Fla. 3d DCA 2009).

Judgment Liens

1. Section 55.10(1), Florida Statutes (2013), 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. (2013).

Filing of the Lis Pendens

1. Filing of lis pendens - cuts off the rights of any person whose interest arises after filing. *Bowers v. Pearson,* 135 So. 562 (Fla. 1931).

(a) Constitutes bar to the enforcement against the subject real property of any other unrecorded interests and liens unless the holder of the unrecorded interest intervenes within 20 days of the notice of the lis pendens. § 48.23(1)(b), Fla. Stat. (2013). Appellate court upheld the constitutionality of the lis pendens statute and denied an untimely motion to intervene. *Adhin v. First Horizon Home Loans,* 44 So. 3d 1245, 1250 (Fla. 5th DCA 2010).

(b) There must be a connection between the claim and the property or the notice of lis pendens cannot stand. *Lennar Florida Holdings Inc. v. First Family Bank,* 660 So. 2d 1122 (Fla. 5th DCA 1995). In *Sunrise Point, Inc. v. Foss,* 373 So. 2d 438, 439 (Fla. 3d DCA 1979), the court discharged the lis pendens as to the filing against the entire condominium, when plaintiff only had a claim against two units.

(c) In the absence of a direct claim cognizable under the law against or upon the property, burdened by the lis pendens, no lis pendens may be asserted against the realty. *Cimbler v. Brent,* 963 So. 2d 812 (Fla. 3d DCA 2007).

2. Validity of a notice of lis pendens is one year from filing. § 48.23(2), Fla. Stat. (2013).

(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. Fla. R. Civ. P. 1.420(f) (2013).

(a) Lis pendens revived or reinstated upon the reversal of dismissal. *Vonmitschke-Collande,* 841 So. 2d 481 at 482.

(b) The court may control and discharge the notice of lis pendens; trial court's discretion is not limited to cases of irreparable harm. Court may consider the likelihood of other damages which do not meet the standard of irreparable harm. § 48.23(3), Fla. Stat. (2013); *Nickerson v. Watermark Marina of Palm City, L.L.C.,* 978 So. 2d 187, 188 (Fla. 4th DCA 2008).

The Foreclosure Complaint

1. Florida Supreme Court Form for foreclosure - Form 1.944, Fla. R. Civ. P. (2013). Requisite allegations assert: jurisdiction, default, acceleration and the legal description of the real property. As of 2/11/10, the complaint must be verified. Fla. R. Civ. P. 1.110(b) (2013). See section 702.015, Florida Statutes (2013), which requires new specificity in pleading standing as of 6/7/13. *See also U.S. Bank, N.A. v. Wanio-Moore*, 111 So. 3d 941 (Fla. 5th DCA 2013) (trial court erred in concluding that verification must state signer's authority).

2. Section 702.015, Florida Statutes (2013), contains new complaint requirements for residential real property designed for one to four families. The complaint must contain affirmative allegations expressly made by the plaintiff that the plaintiff is the holder of the original note or must allege with specificity the factual basis by which the plaintiff is a person entitled to enforce the note. If the plaintiff is not the holder of the note, the complaint must describe the authority of the plaintiff and identify the document that grants the plaintiff the authority to file the complaint on behalf of the holder of the note. Plaintiff is further required to file, together with the complaint, either the original promissory note or certification, under penalty of perjury, that the plaintiff is in physical possession of the original note. (In the Eleventh Judicial Circuit, the plaintiff must provide the certification and should not file the original note but present it at the final hearing.) Plaintiff is required to file supportive exhibits: copies of the note, allonge, audit reports, or other evidence of possession. Noncompliance is subject to sanctions under section 702.015(6), Florida Statutes (2013).

(a) Plaintiff's lack of standing at the inception of the case is not a defect that can be cured by acquisition of standing after the case is filed. *McLean v. JP Morgan Chase Bank Nat'l Ass'n,* 79 So. 3d 170, 174 (Fla. 4th DCA 2012).

(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. (2013). 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), Florida Rules of Civil Procedure (2013), 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). *See also Diaz v. Bell MicroProducts-Future Tech, Inc.,* 43 So. 3d 138, 139 (Fla. 3d DCA 2010) (purpose of procedural rule is to apprise defendant of nature and extent of cause of action alleged). IMPORTANT, particularly when e-filing: originals should not be filed with the complaint unless specifically requested by your circuit. However, an accurate copy including all endorsements (even on the back pages) and allonges should be filed. While failure to attach required documents subjects the complaint to dismissal (*Safeco Ins. Co. of America v. Ware,* 401 So. 2d 1129 (Fla. 4th DCA 1981)), failure to attach other documents related solely to the right to bring an action did not require dismissal of the complaint. *Braz v. Professional Ins. Corp.,* 101 So. 2d 594, 595 (Fla. 3d DCA 1958). Exhibits attached to the complaint should support the allegations of the complaint. Where there is a discrepancy, the contents of the exhibits control over the allegations of the complaint. *Duke v. HSBC Mortgage Services, LLC,* 79 So. 3d 778, 779 (Fla. 4th DCA 2011). *But see Wells Fargo Bank, N.A. v. Bohatka,* 112 So. 3d 596 (Fla. 1st DCA 2013), discussed earlier.

(d) If note and mortgage are held by assignment, complaint should allege assignment. Attachment of the assignment is preferred but may not be required since the cause of action is based on the note as secured by the mortgage; not the assignment. Fla. R. Civ. P. 1.130(a) (2013); *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 (Fla. 1938) (absent assignment, proof of purchase of the debt is sufficient to entitle transferee to foreclose).

(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. 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. (2013).

(h) Complaint must include statement of default. Default based on unpaid taxes or insurance must describe default with particularity. *Siahpoosh v. Nor Props.,* 666 So. 2d 988, 989 (Fla. 4th DCA 1996).

(i) Complaint should allege compliance with condition precedent, particularly notices.

(j) Legal description of the subject real property.

(k) Attorney fees - must be pled or it is waived. *Stockman v. Downs,* 573 So. 2d 835, 838 (Fla. 1991). *See also BMR Funding, LLC v. DDR Corp.,* 67 So. 3d 1137 (Fla. 2d DCA 2011). 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. As to the defendant's claim for fees, it may be pled or raised by timely motion prior to adjudication of the case.

(l) Additional counts include: reestablishment of the note and reformation. Reestablishment of the note is necessary if the note is lost; reformation of the note is needed if material terms are missing. Reformation of the mortgage applies if there is

a legal description discrepancy; reformation of deed if there is a deed problem. Check for necessary parties to the complaint depending on the reformation issue.

Original Document Filing and Reestablishment of the Note

1. Note - Lender is required under the new requirements 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 Assoc.,* 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. (2013); *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/holder 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, Fla. Stat. (2013); *Lawyers Title Ins. Co., Inc. v. Novastar Mortgage, Inc.,* 862 So. 2d 793, 798 (Fla. 4th DCA 2004); *Gutierrez v. Bermudez,* 540 So. 2d 888, 890 (Fla. 5th DCA 1989).

(a) Owner of note is not required to have held possession of the note when the loss occurred to maintain an action against the mortgagor. *Deaktor v. Menendez,* 830 So. 2d 124, 126 (Fla. 3d DCA 2002). Further, plaintiff is not required to prove the circumstances of the loss or destruction of the note to seek enforcement. *Id.* at 127. Plaintiff must show only that it was entitled to enforce the note at the time of loss or that it has directly or indirectly acquired ownership of the instrument from a person who was entitled to enforce the instrument when loss of possession occurred. § 673.3091(1)(a), Fla. Stat. (2013); *MERS v. Badra,* 991 So. 2d 1037, 1039 (Fla. 4th DCA 2008). Precise allegations and evidence are important on this issue.

(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. (2013); *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, the plaintiff should file a lost note affidavit, ledger, or detailed summary of loan terms.

(1) Affidavit requirements enhanced under section 702.015(5), Florida Statutes (2013), provide that the affidavit must:

- detail clear chain of all endorsements, transfers, or assignments of the subject note;
- set forth the facts showing that the plaintiff is entitled to enforce the note; and
- attach as exhibits copies of the note and other documents, including audit reports and other evidence of acquisition, ownership, or possession.

(2) Best practice for the affidavit would be to describe the chain of custody and include the following, or efforts to locate the following:

- original principal balance;
- signators and date note executed;
- rate of interest;
- unpaid balance and default date;
- affiant status (must be banking representative with knowledge of the particular loan);
- indemnity language, precluding subsequent foreclosure judgment on the same note and holding borrower harmless

(3) Under section 702.015(5)(b), Florida Statutes (2013), "[a]dequate protection as required under s. 673.3091(2) shall be provided before the entry of final judgment." Section 702.11, Florida Statutes (2013), establishes a reasonable means

of adequate protection for lost, destroyed, or stolen instruments (section 673.3091(2), Florida Statutes (2013)). Section 702.11 specifies reasonable means of adequate protection include: a written indemnification agreement executed by a person reasonably believed to be solvent; a surety bond; a letter of credit from a financial institution; a deposit of cash collateral with the clerk; or any other security as the court may deem appropriate under the circumstances. The provisions of the statute are remedial in nature and apply to causes of action pending on June 7, 2013, the effective date of chapter 2013-137, Laws of Florida.

(d) Historically, case law precedent provided that the court may require indemnification of the borrower for subsequent prosecution on the note and may require a bond to secure same. *Lovingood v. Butler Construction Co.,* 131 So. 126, 135 (Fla. 1930). Bonds are particularly important in the case of securitized trusts, which could potentially leave the borrower unprotected as the terms of the trust control its expiration.

4. Mortgage - Copy of mortgage is sufficient. *Perry,* 888 So. 2d 725 at 726.

(a) Mortgage must contain correct legal description. *Lucas v. Barnett Bank of Lee County,* 705 So. 2d 115, 116 (Fla. 2d DCA 1998). If not, final judgment must be set aside. However, this can be corrected prior to final judgment through reformation.

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. Note: Shapiro was held to be a debt collector because of an unauthorized pre-payment fee charge on a payoff in violation of the terms of the mortgage).

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. 2d 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 Practices Act." This notice was held ineffective in *Martinez v. Law Offices of David J. Stern, P.A.,* 266 B.R. 523 (Bankr. S.D. Fla. 2001).

4. Note: there is recent case activity debating the litigation privilege in Florida. *See Trent v. Mortgage Electronic Registration Systems, Inc.,* 618 F. Supp. 2d 1356 (M.D. Fla. 2007); *Kelly v. Palmer, Reifler, & Assoc.,* 681 F. Supp. 2d 1356 (S.D. Fla. 2010); *North Star Capital Acquisitions, LLC v. Krig*, 611 F. Supp. 2d 1324 (M.D. Fla. 2009).

Termination of Mandatory Mediation of Homestead Foreclosures

On December 19, 2011, the Florida Supreme Court issued Administrative Order AOSC 11-44, terminating the statewide mandatory mediation program and directing each circuit to develop its own procedures consistent with statutes and case law. The Eleventh Judicial Circuit Court issued Administrative Order 12-01, on January 27, 2012, terminating the mandatory residential mortgage foreclosure program nunc pro tunc, as to cases filed on or after December 20, 2011. Check which procedures are applicable in your circuit.

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. Fla. R. Civ. P. 1.070 (2013) and chs. 48, 49, Florida Statutes.

2. Service of process must be made upon the defendant within 120 days after the filing of the initial pleading. Fla. R. Civ. P. 1.070(j) (2013). Absent a showing of excusable neglect or good cause, the failure to comply with the time limitations may result in the court's dismissal of the action without prejudice or the dropping of the defendant.

Personal Service

1. Section 48.031(1), Florida Statutes (2013), requires that service of process be effectuated by a certified process server on the person to be served by delivery of the complaint or other pleadings at the usual place of abode or by leaving the copies at the individual's place of abode with any person residing there, who is 15 years of age or older and informing them of the contents. § 48.27, Fla. Stat. (2013).

(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 indicates ineffective service. *Alvarez v. State Farm Mut. Auto Ins. Co.,* 635 So. 2d 131 (Fla. 3d DCA 1994). Where service issues have been raised with the plaintiff by pro se borrowers, candor to the tribunal requires that the issue be communicated to the court. Plaintiff should not proceed to summary judgment where service has been called into question without resolving the issue or bringing it to the court's attention.

(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), Florida Statutes (2013). 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). Failure to write the date and time of service of process and the identification number of the process server on the return of service renders the service void. *Vidal v. Suntrust Bank,* 41 So. 3d 401, 403 (Fla. 4th DCA 2010).

(b) Use of private couriers or Federal Express held invalid. *Id.; FNMA v. Fandino,* 751 So. 2d 752, 753 (Fla. 3d DCA 2000) (trial court's 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. (2013); *Bodden v. Young,* 422 So. 2d 1055 (Fla. 4th DCA 1982).

(1) The most extreme Florida case which 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.* However, recent statutory changes make it difficult to avoid service of process. Section 48.031(7), Florida Statutes (2013), requires allowance of unannounced entry into gated residential communities to a person attempting to service process.

(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 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), Florida Statutes (2013) - 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 section 48.031, Florida Statutes (2013).

Constructive Service by Publication

1. Section 49.011(1), Florida Statutes (2013), identifies, as a case where service may be made by publication, the enforcement of a claim of lien to any title or interest in real property such as foreclosure actions.

2. Sections 49.011–49.12, 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,* 876 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). Florida's form affidavit of due and diligent search is form 1.924, Florida Rules of Civil Procedure. The affidavit should be specific in terms of the actions undertaken and in what state or country the search was conducted.

(b) Condition precedent to service by publication - Section 49.041, Florida Statutes (2013), requires that the plaintiff file a sworn statement that shows (1) a diligent search and inquiry has been made to discover the name and residence of such person, (2) whether the defendant is over the age of 18, or if unknown, the statement should set forth that it is unknown, and (3) the status of the defendant's residence, whether unknown or in another state or country. Section 49.051, Florida Statutes (2013), 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 section 49.09, Florida Statutes (2013), 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. (2013).

(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 heir's residence and possession of the subject property). However:

(1) Best 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).

(e) Diligent search and inquiry checklist - Form 1.924, Fla. R. Civ. P. (2013), contains a basic checklist of a diligent search and inquiry to establish constructive service. This form adds consideration of inquiry of occupants of the property as to the location of the borrower. Further, the form lists the following sources in a checklist:

___ 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.

(f) The plaintiff bears the burden of proof to establish the legal sufficiency of the affidavit when challenged. *Demars*. If constructive service of process is disputed, the trial court has the duty of determining: (1) if the affidavit of diligent search is legally sufficient; and (2) whether the plaintiff conducted an adequate search to locate the defendants. *First Home View Corp. v. Guggino,* 10 So. 3d 164, 165 (Fla. 3d DCA 2009). The court affirmed the sufficiency of the affidavit of diligent search in *Lewis v. Fifth Third Mortgage Co.,* 38 So. 3d 157, 160 (Fla. 3d DCA 2010), reasoning that the affidavit was sufficient on its face and a diligent search was performed but did not result in discovery of another address for the mortgagor. Lewis had sought to vacate a judgment where the property had been purchased at foreclosure sale by a third party, and the bona fide purchaser had relied on the public record. The evidence established the bank was in correspondence with Lewis by email and via her post office box, which correspondence provided substantial evidence from which to conclude she had notification that the mortgage was being foreclosed upon.

(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. Americas,* 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 it 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 be attacked at any time. *Id.*

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

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

(1) No basis for deficiency judgment - constructive service of process cannot support a judgment that determines an issue of personal liability. *Carter v. Kingsley Bank,* 587 So. 2d 567, 569 (Fla. 1st DCA 1991) (deficiency judgment cannot be obtained absent personal service of process).

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

Section 48.193(1)(a)3, Florida Statutes (2013), provides that "owning, using, possessing, or holding a mortgage or other lien on any real property within this state" gives rise to personal jurisdiction. This extension of personal long-arm jurisdiction has been upheld in recent case law. *Holt v. Wells Fargo Bank, N.A.,* 32 So. 3d 194 (Fla. 4th DCA 2010).

1. Section 48.194(1), Florida Statutes (2013) - 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. Hellmann Int'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(3), Florida Statutes (2013). Permits service by registered mail to nonresidents where the address of the person to be served is known.

(a) Section 48.194(4), Florida Statutes (2013), provides that if service is made by registered mail under section 48.194(2), the 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, who signed the return receipt, and the relationship between that person and the person to be served, if known. The return receipt must be attached to the affidavit.

(b) If the registered mail is returned "refused," process can be made by first-class mail under section 48.194(3). The affidavit setting forth the return of service must state the nature of the process, the date the process was mailed by registered mail, the name and address on the envelope containing that process, the fact that the process was returned "refused," the date (if known) the process was refused, the date process was then mailed by first-class mail, the name and address on the envelope containing that process, and the fact that the process was mailed by first-class mail in an envelope that had the return address of the party or the party's attorney. The return envelope from the attempt to mail process by registered mail

and the return envelope, if any, from the attempt to mail the envelope by first-class mail shall be attached to the affidavit.

Service of process and timeshare real property

1. Foreclosure proceedings involving timeshare estates may join multiple defendants in the same action. § 721.83, Fla. Stat. (2013).

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

(a) Substitute service may be made upon the obligor's appointed registered agent. § 721.85(1), Fla. Stat. (2013).

(b) When *quasi in rem* or *in rem* relief only is sought, service may be made on any person whether the person is located inside or outside the state by certified or registered mail, addressed to the person to be served at the notice address. § 721.85(1)(a), Fla. Stat. (2013).

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 I, Ltd.,* 937 So. 2d 178, 179 (Fla. 4th DCA 2006); Fla. R. Civ. P. 1.260 (2013).

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. Warning: Don't try to substitute in a proper plaintiff when the original plaintiff did not have standing at the time of filing of the complaint—it may not be fraud on the court, but it may subject you to section 57.105 claims. *See Comcast SCH Holdings, Inc. v. Rolling Greens MHP, L.P.,* 864 So. 2d 519 (Fla. 5th DCA 2004).

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).

(b) Defenses to a complaint are not waived by the filing of an unauthorized pro se answer on behalf of a corporation which had not been served with process. *Opella v. Bayview Loan Servicing, LLC.,* 48 So. 3d 185, 186 (Fla. 3d DCA 2010).

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). *See also Beaulieu v. JPMorgan Chase Bank,* 80 So. 3d 365 (Fla. 4th DCA 2012) (defaulted defendant cannot raise standing issue in post-judgment motion).

3. Plaintiff is entitled to entry of default if the defendant fails to file or serve any paper 20 days after service of process. Fla. R. Civ. P. 1.140(a)(1) (2013).

(a) State of Florida generally has 40 days in which to file or serve any paper in accordance with section 48.121, Florida Statutes (2013); Fla. R. Civ. P. 1.140(a)(2) (2013).

(b) United States of America has 60 days to file under the provisions of 28 U.S.C. § 2410(b); Fed. R. Civ. P. 12(a)(2).

4. **Servicemembers Civil Relief Act of 2003 (formerly, Soldiers' & 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: note, applies to all military

branches including Coast Guard, active duty reservists and guardsmen, and the commissioned corps of the Public Health Service and NOAA.

(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). Active duty service member with notice of the foreclosure action may obtain a stay of the proceedings for a period of nine months. 50 App. U.S.C.A. § 521(d) was superseded by the Housing and Economic Recovery Act of 2008, section 2203, which expired on 12/31/12. Upon expiration, the original 90-day period took effect. For further details, there is an excellent resource on the ABA's website:

http://apps.americanbar.org/family/military/scrajudgesguidecklist.pdf

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

(1) defendant is not in military service; Defense Manpower Certificate is the gold standard, or

(2) plaintiff is unable to determine if the defendant is in the military service. 50 App. U.S.C.A. § 521(b)(1).

(d) Unknown military status - the court may require the plaintiff to file a bond prior to entry of judgment. 50 App. U.S.C.A. § 521(b)(3).

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

6. Non-Military Affidavit required - must be based on: personal knowledge, attest to the fact that inquiry was made of the Armed Forces, and affiant must state that the defendant is not in the armed forces. *The Fla. Bar re: Approval of Forms,* 621 So. 2d 1025, 1034 (Fla. 1993). Affidavits based on information and belief are not in compliance. Again, Defense Manpower Certificate is the gold standard, at https://www.dmdc.osd.mil/appj/scra/scraHome.do. Best practices dictate that the non-military affidavit be made contemporaneously with the motion for default.

Appointment of a Guardian ad Litem

1. The best practice is appointment when unknown parties are joined and service is 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. (2013).

(a) Section 65.061(2), Florida Statutes (2013), states that a "guardian ad litem shall not be appointed unless it shall affirmatively appear that the interest of minors, persons of unsound mind, or convicts are involved."

(b) Rule 1.210(b), Florida Rules of Civil Procedure (2013), 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 1.500(e), Florida Rules of Civil Procedure (2013), maintains that "Final judgments 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" or the court has ordered that no representative is necessary.

Appointment of a Receiver

1. During a foreclosure, appointment of a receiver for condominium and homeowners' associations is governed by statute, although it may also be authorized by association by-laws. Pay attention to notice issues and where and how notice is given.

(a) Section 718.116(6)(c), Florida Statutes (2013), provides that the court in its discretion may require the resident condominium unit owner to pay a reasonable rental for the unit. During the "pendency of the foreclosure action, the association is entitled to the appointment of a receiver to collect the rent." *Id.*

(b) Similarly, section 720.3085(1)(d), Florida Statutes (2013), governs homeowners' associations. Post judgment, this section provides that the court may require the parcel owner to pay a reasonable rent for the parcel. If the parcel is rented or leased during the pendency of the foreclosure, the homeowners' association is entitled to the appointment of a receiver. *Id.*

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

2. The movant for appointment of a receiver for real property which does not qualify under the condominium or homeowners' association statutes must satisfy basic prerequisites. These basic prerequisites are the same legal standards applicable to non-foreclosure proceedings, as injunctive relief.

(a) Section 607.1432(1), Florida Statutes (2013), specifically states that the court should hold a hearing prior to the appointment of a receiver and after notifying all parties to the proceeding and any interested parties designated by the court. This equitable prejudgment remedy must be exercised with caution as it is in derogation of the legal owner's fundamental right of possession of his property and only warranted if there is a showing that the secured property is being wasted or otherwise subject to serious risk of loss. *Alafaya Square Ass'n, Ltd. v. Great Western Bank,* 700 So. 2d 38, 41 (Fla. 5th DCA 1997); *Twinjay Chambers Partnership v. Suarez,* 556 So. 2d 781, 782 (Fla. 2d DCA 1990); *Electro Mechanical Products, Inc. v. Borona,* 324 So. 2d 638 (Fla. 3d DCA 1976). A receiver might be appropriate without notice and a hearing if the property is being diverted, dissipated, destroyed, or allowed to deteriorate or waste. *DeSilva v. First Community Bank,* 42 So. 3d 285, 290 (Fla. 2d DCA 2010). Follow the procedures under the temporary injunction rule, rule 1.610, Florida Rules of Civil Procedure (2013).

(b) In the absence of a showing that the property is being wasted or otherwise subject to serious risk of loss, appointment of a receiver is unjustified. *Seasons Partnership I v. Kraus-Anderson, Inc.,* 700 So. 2d 60 (Fla. 2d DCA 1997).

(c) The party seeking appointment must show that there is a substantial likelihood that it will prevail on the merits at the conclusion of the case and must present sufficient proof that appointment of a receiver is warranted. *Keybank Nat'l Ass'n v. Knuth, Ltd.,* 15 So. 3d 939, 940 (Fla. 3d DCA 2009).

(d) A final prerequisite to appointment of a receiver is that the movant must post a bond, for either the plaintiff or the receiver. Fla. R. Civ. P. 1.620(c) (2013); *Boyd v. Banc One Mortgage Corp.,* 509 So. 2d 966, 967 (Fla. 3d DCA 1987).

Summary Final Judgment of Foreclosure

1. Legal standard - No genuine issue of material fact and movant is entitled to a judgment as a matter of law. Outstanding discovery can preclude summary judgment. *Harvey Covington & Thomas, LLC v. WMC Mortgage Corp.,* 85 So. 3d 558 (Fla. 4th DCA 2012) (summary judgment should not be granted until the material facts have been sufficiently developed for the court to be reasonably certain that no genuine issue of material fact exists). *Id.* The trial court should not entertain a motion for summary judgment until discovery is concluded. *Osorto v. Deutsche Bank Nat'l Trust Co.,* 88 So. 3d 261, 263 (Fla. 4th DCA 2012). In the *Osorto* case, the appellate court reversed the trial court, holding that an outstanding request for production concerning items pertaining to the pooling and servicing agreement already provided could potentially be material, thereby precluding entry of summary judgment. *Id.* Notwithstanding this, the appellate court acknowledged that if the incomplete discovery will not raise future disputed issues of material fact, summary judgment may be granted. *Id.,* citing *Estate of Herrera v. Berlo Indus., Inc.,* 840 So. 2d 272 (Fla. 3d DCA 2003) ("summary judgment is proper where 'future discovery would not yield any new information that the trial court either did not already know, or needed to make its ruling'"). Borrower's noncompliance with a court order requiring filing a timely answer does not preclude granting summary judgment. *McColman v. Deutsche Bank Nat'l Trust Co.,* 112 So. 3d 668 (Fla. 4th DCA 2013).

2. Burden of Proof - The plaintiff bears the burden of proof to establish the nonexistence of disputed issues of material fact. *Delandro v. Americas Mortgage Servicing, Inc.,* 674 So. 2d 184, 186 (Fla. 3d DCA 1996); *Holl v. Talcott,* 191 So. 2d 40, 43 (Fla. 1966). Plaintiff must provide evidence which supports its right to judgment. *See also Feltus v. U.S. Bank Nat'l Ass'n,* 80 So. 3d 375, 377 (Fla. 2d DCA 2012) (in action to reestablish note, bank's reply to defendant's answer and

affirmative defenses, alleging promissory note was no longer lost and attaching copy of original note, could not serve as amended complaint without leave of court or defendant's written consent); *Goncharuk v. HSBC Mortg. Serv's, Inc.,* 62 So. 3d 680, 681 (Fla. 2d DCA 2011) (if plaintiff moves for summary judgment before defendant answers complaint, burden is more difficult in that plaintiff must also assert that defendant could not raise any issues of material fact if permitted to answer).

3. Content of motion for summary judgment - plaintiff should allege:

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

4. Filing of the Motion - at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party. Fla. R. Civ. P. 1.510(a) (2013). 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. Fla. R. Civ. P. 1.510(c) (2013); *Verizzo v. Bank of New York,* 28 So. 3d 976, 977 (Fla. 2d DCA 2010); *Mack v. Commercial Industrial Park, Inc.,* 541 So. 2d 800, 801 (Fla. 4th DCA 1989).

(a) The filing of a forged document warrants disbarment. *The Florida Bar v. Hall,* 49 So. 3d 1254, 1259 (Fla. 2010) (attorney deliberately and intentionally engaged in felonious conduct by recording a fraudulent lease and agreement for sale).

(b) Opposition materials and evidence supportive of a denial of a motion for summary judgment must be identified. Fla. R. Civ. P. 1.510(c) (2013). Notice of opposition must be mailed to the movant's attorney at least five days prior to the day of hearing or delivered no later than 5:00 p.m. two business days prior to the day of the hearing on the summary judgment.

(1) Borrower's affidavit in opposition to summary judgment must be made on personal knowledge and must set forth facts; mere conclusions are insufficient. *770 PPR, LLC v. TJCV Land Trust,* 30 So. 3d 613, 616 (Fla. 4th DCA 2010)

(borrower's conclusory affidavit that he didn't owe the amount of money alleged by the bank insufficient). Warning: filing unsupported affirmative defenses or, by extension, affidavits to delay foreclosures may support section 57.105 sanctions, see *Korte v. U.S. Bank Nat'l Ass'n*, 64 So. 3d 134, 139 (Fla. 4th DCA 2011).

(c) The movant for summary judgment **must** factually refute or disprove the affirmative defenses raised, or establish that the defenses are insufficient as a matter of law. *Kurian v. Wells Fargo Bank, Nat'l Ass'n,* 114 So. 3d 1052 (Fla. 4th DCA 2013); *Alejandre v. Deutsche Bank Trust Co. Americas*, 44 So. 3d 1288 (Fla. 4th DCA 2010); *Leal v. Deutsche Bank Nat'l Trust Co.,* 21 So. 3d 907, 908 (Fla. 3d DCA 2009).

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

5. Requirement for motion for summary judgment - due notice and a hearing. Proof of mailing of notice of the final summary judgment hearing created presumption that notice of hearing was received. *Blanco v. Kinas,* 936 So. 2d 31, 32 (Fla. 3d DCA 2006).

6. Trial court cannot enter summary judgment on claims for reestablishment and reformation of legal description unless raised by motion. *Gee v. U.S. Bank Nat'l Ass'n,* 72 So. 3d 211, 216 (Fla. 5th DCA 2011).

Affidavits in Support of Motion for Summary Judgment

Affidavits in support of the motion must be made based on personal knowledge and set forth facts that would be admissible in evidence, and demonstrate that the affiant is competent to testify on the matters presented. *Jaffer v. Chase Home Finance LLC,* 92 So. 3d 240 (Fla. 4th DCA 2012) (bank's filing of a letter to cancel sale premised on the affiant's lack of personal review of affidavits of indebtedness placed the authenticity of its affidavits in issue, such that the trial court erred when it failed to set aside default and summary judgment). To the extent that the affiant relies on business records, the sworn and certified copies of the records must be attached pursuant to rule 1.510(e), Florida Rules of Civil Procedure, and the business records exception should be established.

In *Glarum v. LaSalle Bank Nat'l Ass'n,* 83 So. 3d 780, 782 (Fla. 4th DCA 2011), summary judgment based on inadmissible hearsay was reversed due to the inability of the current servicer's business records affiant to authenticate data entries from the prior servicer which would establish the disputed debt. There was an absence of competent evidence since the affiant was unable to state if the previous servicer's records were made in the regular course of business and had no knowledge of the accuracy of the predecessor bank's data or how it was produced. *Id.* In a subsequent motion for rehearing and clarification, the appellate court withdrew its earlier opinion, then reversed the judgment of foreclosure since the affidavit of indebtedness constituted inadmissible hearsay. *Id.* at 783. Without competent evidence to show damages, the amount of judgment remains at issue, to be decided on remand for further proceedings. *Id.* In a subsequent case, the Fourth District Court of Appeal distinguished the *Glarum* case from *Weisenberg v. Deutsche Bank Nat'l Trust Co.,* 89 So. 3d 1111 (Fla. 4th DCA 2012). In *Weisenberg,* the court found that the lender's affidavit complied with the requirements of the business records exception and affirmed the entry of final judgment of foreclosure. Unlike in *Glarum,* the records custodian testimony demonstrated that she knew how the loan data was produced, elaborating as to the servicing of the loan through the mortgage servicing platform program, which she used to verify the specific figures in her affidavit. *Id.* Best practice for plaintiffs is to secure a business records affidavit from all prior servicers, pursuant to sections 90.803(6)(c) and 90.902(11), Florida Statutes (2013).

Affidavit of indebtedness used to support summary judgment and signed by loan servicer secretary who had given testimony in a different foreclosure case in which the affiant lacked personal knowledge was insufficient to demonstrate fraud; the amounts stated in the affidavit were correct, the affiant attested to the amounts due and charges, and borrower did not deny default. *Freemon v. Deutsche Bank Trust Co. Americas,* 46 So. 3d 1202, 1204 (Fla. 4th DCA 2010). *See also Vilvar v. Deutsche Bank Trust Co. Americas,* 83 So. 3d 853 (Fla. 4th DCA 2011).

(a) Affidavit of Indebtedness - Must be signed by a custodian of business records with knowledge. Affidavit should establish enforcement authority prior to filing of complaint. In general, the plaintiff's affidavit itemizes:

(1) property address,

(2) principal balance,

(3) interest (calculated from default up until the entry of judgment, when the mortgage provides for automatic acceleration upon default, *THFN Realty Co. v. Kirkman/Conroy, Ltd.,* 546 So. 2d 1158 (Fla. 5th DCA 1989) (best practice is to include per diem interest),

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

(5) prepayment penalties - unavailable in foreclosure actions, *Fla. Nat'l Bank of Miami v. Bankatlantic,* 589 So. 2d 255, 259 (Fla. 1991), unless specifically authorized in note in the event of acceleration and foreclosure, *Feinstein v. Ashplant,* 961 So. 2d 1074 (Fla. 4th DCA 2007),

(6) property inspections & appraisals,

(7) hazard insurance premiums and taxes.

(b) Affidavit of Costs - This affidavit details:

(1) the filing fee,

(2) service of process,

(3) and abstracting costs.

(c) Affidavit of attorney's time - references the actual time the attorney expended on the foreclosure file and references the actual hourly billable rate or the flat fee rate which the client has agreed to pay. Reasonable attorney fees sought by a mortgagee from a mortgagor generally are not liquidated damages in a contested case and require a hearing; absent an evidentiary hearing, the fee award will be reversed for a hearing unless there is an indication that the right to a hearing was waived. *Zumpf v. Countrywide Home Loans, Inc.,* 43 So. 3d 764, 766 (Fla. 2d DCA 2010).

(1) The Florida Supreme Court had previously endorsed the lodestar method, but Florida Supreme Court Opinion No. SC09-1579 revised form 1.996(a) (Final Summary Judgment of Foreclosure), Florida Rules of Civil Procedure, to provide for the flat rate attorney's fee agreements common in the mortgage foreclosure industry.

(2) The hours may be reduced or enhanced in the discretion of the court depending on the novelty and difficulty of questions involved. *Fla. Patient's Compensation Fund v. Rowe,* 472 So. 2d 1145, 1150 (Fla. 1985). With regard to uncontested time, plaintiff is not required to keep contemporaneous time records since the lender is contractually obligated to pay a flat fee for that time. *Id.*

(d) Affidavit as to reasonableness of attorney's fee - Affidavit of attorney's fee must be signed by a practicing attorney not affiliated with the plaintiff's firm, attesting to the rate as reasonable and customary in the circuit. Affiant should reference and evaluate the attorney fee claim based on the eight factors set forth in rule 4-1.5(b)(1), Rules Regulating The Florida Bar. Of these, relevant factors, such as the time and labor required, the customary fee in the locality for legal services of a similar nature, and the experience and skill of the lawyer performing the service must be examined. An award of attorney fees must be supported by expert evidence. *Palmetto Federal Savings and Loan Ass'n v. Day,* 512 So. 2d 332 (Fla. 3d DCA 1987).

(1) Where there is a default judgment and the promissory note or mortgage contains a provision for an award of attorney fees, section 702.065(2), Florida Statutes (2013), provides that "it is not necessary for the court to hold a hearing or adjudge the requested attorney's fees to be reasonable if the fees do not exceed 3 percent of the principal amount owed at the time of filing the complaint." This statutory provision confirms that "[s]uch fees constitute liquidated damages in any proceeding to enforce the note or mortgage."

(2) The judgment must contain findings as to an award of a reasonable flat fee or the number of hours and the reasonable hourly rate. *Fla. Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145, 1152 (Fla. 1985). The requirements of *Rowe* are mandatory and failure to make the requisite findings is

reversible error. *Home Insurance Co. v. Gonzalez,* 648 So. 2d 291, 292 (Fla. 3d DCA 1995). "An award of attorneys' fees must be supported by competent substantial evidence in the record and contain express findings regarding the number of hours reasonably expended and a reasonable hourly rate for the type of litigation involved." *Stack v. Homeside Lending, Inc.,* 976 So. 2d 618, 620 (Fla. 2d DCA 2008).

Affirmative Defenses

1. Genuine existence of material fact - precludes entry of summary judgment. *Manassas Investments, Inc. v. O'Hanrahan,* 817 So. 2d 1080 (Fla. 2d DCA 2002).

2. Legal sufficiency of defenses - Certainty is required when pleading affirmative defenses; conclusions of law unsupported by allegations of ultimate fact are legally insufficient. *Bliss v. Carmona,* 418 So. 2d 1017, 1019 (Fla. 3d DCA 1982). "Affirmative defenses do not simply deny the facts of the opposing party's claim; they raise some new matter which defeats an otherwise apparently valid claim." *Wiggins v. Portmay Corp.,* 430 So. 2d 541, 542 (Fla. 1st DCA 1983). Laundry list of 19 affirmative defenses legally insufficient on its face and without any facts resulted in an affirmed judgment on appeal. *Tacher v. Helm Bank,* 50 So. 3d 1239 (Fla. 4th DCA 2011) (it is not the appellate court's responsibility to sift through the pleadings and affidavits to determine if there are any material issues of fact).

3. Plaintiff must either factually refute affirmative defenses or establish that they are legally insufficient. *Kurian v. Wells Fargo Bank, Nat'l Ass'n,* 114 So. 3d 1052 (Fla. 4th DCA 2013); *Shahar v. Green Tree Servicing LLC,* 2013 WL 811612 (Fla. 4th DCA March 6, 2013) (plaintiff asserted bare legal argument that unclean hands defense was legally insufficient; appellate court reversed since borrower had asserted specific facts including altered income information on loan application); *Alejandre v. Deutsche Bank Trust Co. Americas*, 44 So. 3d 1288, 1289 (Fla. 4th DCA 2010). *Frost v. Regions Bank,* 15 So. 3d 905, 906 (Fla. 4th DCA 2009). Where the defendant denies that the party seeking foreclosure has an ownership interest in the mortgage, the issue of ownership becomes an issue plaintiff must prove. *Lizio v. McCullom,* 36 So. 3d 927, 928 (Fla. 4th DCA 2010).

4. Section 57.105, Florida Statutes, is applicable in mortgage foreclosure cases to sanction defendants and/or their counsel for asserting defenses which they know or should know are not supported by material facts of the case, but are asserted for the primary purpose of delaying entry of final judgment. This liability is not limited to the opposing party's attorney's fees, but also other losses that a trial court finds resulted from improper delay. *Korte v. U.S. Bank Nat'l Ass'n,* 64 So. 3d 134, 139 (Fla. 4th DCA 2011). Trial court could not strike affirmative defenses sua sponte on the grounds of legal insufficiency because the party subsequently may be able to prove his or her allegations. *Sanchez v. LaSalle Bank Nat'l Ass'n,* 44 So. 3d 227, 228 (Fla. 3d DCA 2010).

Affirmative Defenses Commonly Raised

The following is a list of the most commonly raised affirmative defenses. Some defenses, such as standing, are discussed throughout this bench book.

(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). Equally, if the affidavit of indebtedness is inconclusive (for example, includes a credit for unapplied funds without explanation), and the borrower alleges the defense of inaccurate accounting, then summary judgment should be denied. *Kanu v. Pointe Bank,* 861 So. 2d 498 (Fla. 4th DCA 2004). Also, it is insufficient for defendants to simply allege an erroneous application of payments; they must identify the misapplication of funds. *770 PPR, LLC v. TJCV Land Trust,* 30 So. 3d 613, 619 (Fla. 4th DCA 2010). 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).

Caution: Prior modification attempts or untimely default letters represent genuine issues as to payment applications.

(b) Failure to comply with conditions precedent - such as plaintiff's failure to send the Notice of Default letter, or an untimely letter. *Lazuran v. Citimortgage, Inc.,* 35 So. 3d 189 (Fla. 3d DCA 2010) (reversal of summary judgment based on lender's failure to provide the notice of acceleration pursuant to the contractual terms of the mortgage, Paragraph 22). Failure to receive payoff information does not preclude summary judgment. *Finnegan v. Deutsche Bank Nat'l Trust Co.,* 96 So. 3d 1093, 1094 (Fla. 4th DCA 2012) (bank did not address affirmative defense as to lack of notice of default, thereby precluding summary judgment); *Walker v. Midland Mortgage Co.,* 935 So. 2d 519, 520 (Fla. 3d DCA 2006).

(c) Estoppel is usually based on: a representation as to a material fact that is contrary to a later-asserted position; reliance on that representation; and a change in position detrimental to the party claiming estoppel, caused by the representation and reliance thereon. *Harris v. Nat'l Judgment Recovery Agency, Inc.,* 819 So. 2d 850, 854 (Fla. 4th DCA 2002); *Jones v. Fla. ex rel. 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). Lender was not estopped from foreclosing on note after borrower failed to pay the remaining principal balance on the note's maturity date, despite contention that lender had acted contrary to its long-standing custom and practice of notifying guarantors when payments were due and withdrawing funds from accounts, absent evidence that any such custom was ever established. *Alonso v. Ocean Bank,* 43 So. 3d 170, 172 (Fla. 4th DCA 2010). *See also Locke v. Wells Fargo Home Mortgage,* 2010 WL 3927695 (S.D. Fla. 2010). Promissory estoppel is an equitable doctrine for the enforcement of agreements, not a device to nullify an expressly-agreed, written contractual term. *Coral Reef Drive Land Development, LLC v. Duke Realty Limited Partnership,* 45 So. 3d 897, 900 (Fla. 3d DCA 2010).

(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. *Scheibe v. Bank of Am.,* 822 So. 2d 575 (Fla. 5th DCA 2002).

(1) Acceptance of late payments - common defense asserting waiver is the lender's acceptance of late payments. However, the lender has the right to elect to accelerate or not to accelerate 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 - Elements of fraud must be pled using specific, ultimate facts. Moreover, fraud cannot form the basis for recovery of damages unless the damages directly arise from the fraud and are causally connected to the fraud. *Simon v. Celebration Co.,* 883 So. 2d 826, 829 (Fla. 5th DCA 2004).

(1) Movant alleging fraud must plead the "who, what, when and where" of the fraud before access to discovery is granted. Failure to allege a specific element of fraud in a complaint is fatal when challenged by a motion to dismiss. 15 U.S.C. § 1635(e)(1);

(2) Statements of opinion cannot form the basis for fraud. The circumstances alleged to constitute fraud must be pled with sufficient particularity. Affirmative defenses must clearly and concisely set out the essential facts of the fraud, not just legal conclusions. *Thompson v. Bank of New York,* 862 So. 2d 768, 769 (Fla. 4th DCA 2003). Statements about another's ability to make payments are opinions and, as such, do not constitute grounds for fraud. *Collins v. Countrywide Home Loans, Inc.,* 680 F. Supp. 2d 1287, 1294 (S.D. Fla. 2010).

(3) Party may not recover in fraud for an alleged oral misrepresentation which is adequately dealt with in a later contract. *Englezios v. Batmasian,* 593 So. 2d 1077, 1078 (Fla. 4th DCA 1992).

(4) Because the borrowers were not aware that the bank's employees had misrepresented the borrowers' income on their loan application, so they would appear to meet underwriting standards, the borrowers could not have relied on these falsifications as required to support their claim against the bank. *Matthys v. Mortgage Electronic Registration Systems, Inc.,* 2009 WL 3762632 (S.D. Fla. 2009) (elements of fraud and false statements in loan application were intended to induce action on the part of lender and not borrowers, so they can't be basis for fraud).

(f) 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).

(1) Affirmative defense of fraud in the inducement based on allegation that seller failed to disclose extensive termite damage resulted in reversal of foreclosure judgment. *Hinton v. Brooks,* 820 So. 2d 325 (Fla. 5th DCA 2001). (Note that purchasers had first filed fraud in the inducement case and seller retaliated with foreclosure suit.) Further, the appellate court opined in the *Hinton* case that fraud in the inducement was not barred by the economic loss rule. *Id.* (But, economic loss rule limited to product liability cases.)

(g) Usury - defined by section 687.03, Florida Statutes (2013), as a contract for the payment of interest on any loan, advance of money, line of credit, forbearance to enforce the collection of any debt, or any other obligation, 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 section 687.071, Florida Statutes (2013). A usurious contract is unenforceable according to the provisions of section 687.071(7), Florida Statutes (2013).

(h) 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). If evidence of forbearance is submitted, it may defeat summary judgment.

(i) 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), Florida Statutes (2013). *American Bankers Life Assurance Co. of Fla. v. 2275 West Corp.,* 905 So. 2d 189, 191 (Fla. 3d DCA 2005).

(j) Failure to pay documentary stamps - Section 201.08, Florida Statutes (2013), precludes enforcement of mortgage notes absent the payment of documentary stamps. *Solis v. Lacayo,* 86 So. 3d 1147 (Fla. 3d DCA 2012); *WRJ Dev., Inc. v. North Ring Limited,* 979 So. 2d 1046, 1047 (Fla. 3d DCA 2008).

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

(k) 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). 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).

1. RESPA (Real Estate Settlement Procedures Act): Requires notification of a change of servicers within 30 days. 12 U.S.C. § 2605(b); *Green v. JPMorgan Chase Bank, N.A.*, 109 So. 3d 1285 (Fla. 5th DCA 2013).

2. TILA issues include:

a. Improper adjustments to interest rates (ARMS);

b. Borrower must be given two copies of notice of rescission rights. Written acknowledgment of receipt is only a rebuttable presumption. *Cintron v. Bankers Trust Co.,* 682 So. 2d 616 (Fla. 2d DCA 1996).

c. TILA rescission for up to three years after the transaction for failure to make material disclosures to borrower. Such as, APR of

loan, amount financed, total payment, and payment schedule. Rescission relieves borrower only for payment of interest. Must be within three years of closing. 15 U.S.C. §§ 1601–1667f; *Beach v. Great Western Bank,* 692 So. 2d 146, 153 (Fla. 1997).

- TILA-based right to rescission does not apply to "residential mortgage transactions." *Infante v. Bank of America Corp.,* 680 F. Supp. 2d 1298, 1303 (S.D. Fla. 2009).
- Wife's homestead interest in mortgaged property gives her right to TILA disclosure. *Gancedo v. Del Carpio,* 17 So. 3d 843, 844 (Fla. 4th DCA 2009).

(l) 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).

(m) Fair Debt Collection Practices Act (FDCPA) and HAMP - FDCPA applies only to debt collectors. Defendant failed to sufficiently plead that Wells Fargo, the servicer, was a debt collector. *Locke v. Wells Fargo Home Mortgage,* 2010 WL 4941456 (S.D. Fla. 2010). There is no private right of action under Home Affordable Modification Program (HAMP). *Id.*

(n) Florida Consumer Collection Practices Act (FCCPA) - To plead a FCCPA claim, a party must allege "knowledge or intent by the debt collectors in order to state a cause of action." *Reese v. JPMorgan Chase & Co.,* 686 F. Supp. 2d 1291, 1309 (S.D. Fla. 2009). A pleading must contain "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action" to survive a motion to dismiss. *Id.* at 1310.

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); *Velletri v. Dixon,* 44 So. 3d 187, 192 (Fla. 2d DCA 2010) (payments to third parties at closing, such as origination fees, can render a loan usurious);

Heimmermann v. First Union Mortgage Corp., 305 F.3d 1257 (11th Cir. 2002) (Real Estate Settlement Procedures Act (RESPA) violations).

Summary Judgment Hearing

1. Plaintiff must submit the original note and mortgage at or before the summary judgment hearing. As a practical matter, different jurisdictions may or may not recommend pre-hearing filing. In the Eleventh Circuit it is required that the original documents be submitted at 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 2004). Copies are sufficient with the exception that the note must be reestablished. *Id.* Best practice for the court is 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).

(b) Standing - Without evidence to demonstrate the movant's status as the owner or holder of the note and mortgage, genuine issues of material fact remain, precluding summary judgment. *Boumarate v. HSBC Bank USA, N.A.,* 109 So. 3d 1239 (Fla. 5th DCA 2013) (to be entitled to summary judgment, plaintiff has burden to prove its right to enforce note as of date of summary judgment hearing, including how it obtained note and circumstances of its loss; borrower did not lose right to raise issue since burden remained with bank); *Servedio v. U.S. Bank Nat'l Ass'n,* 46 So. 3d 1105, 1107 (Fla. 4th DCA 2010) (mortgage documents filed several days after entry of summary judgment were not part of the record at the time the summary judgment was granted, and bank failed to comply with summary judgment rules requiring the documents to be authenticated, filed, and served more than 20 days prior to the summary judgment hearing).

Standing issue raised by borrower arguing that the plaintiff failed to comply with the pooling and servicing agreement when it took possession of the note and mortgage from the trust (in violation of the trust documents) could not defeat

summary judgment due to lack of privity. *Castillo v. Deutsche Bank Nat'l Trust Co.,* 89 So. 3d 1069 (Fla. 3d DCA 2012). Borrower was "neither a party to nor a third party beneficiary of the trust, and lacks standing to raise this issue." *Id.*

2. The tactic of repetitive attempts at disqualification of a judge cannot be used to achieve strategic advantage and/or frustrate the efficient function of the foreclosure division. *Nudel v. Flagstar Bank, FSB,* 52 So. 3d 692, 694 (Fla. 4th DCA 2010). Ex parte communications concerning purely administrative, non-substantive matters, such as scheduling, do not require disqualification. *Id.*

Final Judgment

At final judgment, the mortgage "merges" into the judgment, losing its separate identity. *One 79th Street Estates, Inc. v. American Investment Services,* 47 So. 3d 886, 889 (Fla. 3d DCA 2010). Similarly, judgment cancels the note, the judgment itself taking the place of the promissory note. *Deutsche Bank Nat'l Trust Co. v. Clarke,* 87 So. 3d 58 (Fla. 4th DCA 2012).

1. Section 45.031, Florida Statutes (2013), governs the contents of the final judgment. Final Judgment Form 1.996(a), Fla. R. Civ. P. (2013).

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

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

4. Checklist for Final Summary Judgment

(a) Proposed Final Judgment:

(1) Check service, defaults, dropped parties.

(2) Check for evidence of ownership of note.

(3) Check affidavits - signed and correct case number/parties.

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

(5) Check principal, rate, and calculation of interest through date of judgment.

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

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

(8) Beware - hidden charges and fees for default letters, correspondence related to workout efforts. It is within the court's discretion to deny recovery.

(9) Attorney's fees must not exceed contract rate with client and be supported by an affidavit as to reasonableness. Attorney's fee cannot exceed 3% of principal owed. § 702.065(2), Fla. Stat. (2013). Beware – add-ons for litigation fees – make sure that they are not double-billing flat fee.

(10) Bankruptcy fees generally 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). But bankruptcy costs incurred to obtain stay relief are recoverable. *Nemours,* 601 So. 2d 601 at 575.

(11) Sale date - may not be set in less than 20 days or more than 35 days, unless parties agree. § 45.031(1)(a), Fla. Stat. (2013), *JRBL Dev., Inc. v. Maiello,* 872 So. 2d 362, 363 (Fla. 2d DCA 2004).

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

Foreclosure Trials

1. Trial is before the court without a jury. § 702.01, Fla. Stat. (2013).

2. Rule 1.440, Florida Rules of Civil Procedure (2013), governs the setting of an action for trial. A court's failure to give the minimum 30-day notice required by subdivision (c) of the rule renders any judgment defective. *Simpson v. Simpson,* 700 So. 2d 170 (Fla. 4th DCA 1997).

(a) When parties have received actual timely notice of trial, they are precluded from arguing prejudice based upon a technical violation. *Labor Ready Southeast Inc. v. Australian Warehouses Condominium Ass'n,* 962 So. 2d 1053, 1056 (Fla. 4th DCA 2007) (court's allowance of amended complaint in three-and-a-half year old case with responsive pleading filed less than 30 days before date set for final hearing did not support reversal, notwithstanding rule 1.440 issues). Similarly, trial court is within its discretion to disregard technical violation of notice rule and deny the defendant's untimely objection. *Davis v. Hagin,* 330 So. 2d 42, 43 (Fla. 1st DCA 1976) (no prejudice to mortgagor who received 21 days notice of trial but waited until two days before trial to object).

(b) However, the Third District has held that "failure to adhere to the mandates of rule 1.440 is reversible error." *Lopez v. U.S. Bank, N.A.,* 2013 WL 3336895 (Fla. 3d DCA July 3, 2013) (trial was held less than 20 days after service of Lopez's answer and affirmative defenses), citing to *Precision Constructors, Inc. v. Valtec Const Corp.,* 825 So. 2d 1062, 1063 (Fla. 3d DCA 2002).

3. Incomplete discovery does not prevent an action from being trial-ready. *Kubera v. Fisher,* 483 So. 2d 836, 838 (Fla. 2d DCA 1986).

4. Evidentiary issues may arise with regard to hearsay objections to prior servicer records. A records custodian witness for the current servicer generally cannot lay the business records predicate for a prior servicer's records. Unless that predicate is laid, simply incorporating those records from the prior servicer's records into the current servicer's records may not meet hearsay exception requirements. *Sas v. Federal National Mortgage Assoc.,* 112 So. 3d 778 (Fla. 2d DCA 2013). *See* also

§§ 90.803(6)(c) and 90.902(11). Current case law addresses the issue only in the summary judgment context; see, e.g., *Glarum* and *Weisenberg*.

Voluntary Dismissal

1. Voluntary Dismissal - The trial court has no authority or discretion to deny voluntary dismissal of an action. Fla. R. Civ. P. 1.420(a)(1) (2013). Such dismissal is effective upon service.

2. Trial court does not have jurisdiction to strike a notice of voluntary dismissal unless the fraud, if proven, resulted in the plaintiff securing affirmative relief to the detriment of the defendant. *Pino v. Bank of New York,* 2013 WL 452109 (Fla. Feb. 7, 2013) (since bank did not obtain affirmative relief before taking voluntary dismissal, trial court did not have jurisdiction to reinstate dismissed foreclosure for purpose of dismissing with prejudice).

3. Florida courts have consistently interpreted rule 1.420(d), Florida Rules of Civil Procedure (2013), as authorizing a trial court to award attorney's fees as costs to a defendant as a prevailing party when such award is provided for either by statute or contract between the parties. It is not necessary for there to be an adjudication on the merits to be entitled to fees as a prevailing party. *Valcarcel v. Chase Bank USA NA,* 54 So. 3d 989, 991 (Fla. 4th DCA 2010). Dismissal without prejudice that is not on the merits entitles the defendant to attorney fees. *Id. See also Smith v. Loews Miami Beach Hotel Operating Co.,* 35 So. 3d 101 (Fla. 3d DCA 2010) (appellate court opined that involuntary dismissal, dismissal with prejudice, and second voluntary dismissal (which serves as an adjudication on the merits pursuant to rule 1.420(d)) all qualify as basis for award of attorney fees (under section 768.79).

(a) The court rejects the view that a party taking a voluntary dismissal can do so for strategic reasons and thereby prevent the other party from being determined the prevailing party. *Shepheard v. Deutsche Bank Trust Co. Americas,* 38 So. 3d 825, 826 (Fla. 5th DCA 2010). However, if the mortgagee ultimately prevails in the refiled action, then it may recoup from the borrower the costs it paid for its voluntary dismissal. *Id. See also Country Place Community Ass'n v. J.P. Morgan*

Mortgage Acquisition Corp., 51 So. 3d 1176, 1180 (Fla. 2d DCA 2010) (court may assess attorney fees against party who has unsupportable claim (no ownership of note) or defense, even though that party might ultimately prevail on some other ground).

(b) Trial court abused discretion in denying bank's motion for dismissal of foreclosure, cancellation of lis pendens, and return of original loan documents following successful settlement of foreclosure action, under section 702.07, Florida Statutes, and rule 1.540, Florida Rules of Civil Procedure. *Wells Fargo Bank, NA v. Giglio,* 2013 WL 949989 (Fla. 4th DCA March 13, 2013).

Post Judgment Issues

1. After entry of final judgment and expiration of time to file a motion for rehearing or for a new trial, the trial court loses jurisdiction of the case. *Ross v. Damas,* 31 So. 3d 201 (Fla. 3d DCA 2010); *Patin v. Popino,* 459 So. 2d 435 (Fla. 3d DCA 1984). Exception: when the trial court reserves in the final judgment the jurisdiction of post judgment matters, such as deficiency judgments. *Id.*

2. Rule 1.530 - time is short; motion for new trial or rehearing shall be filed no later than 10 days after the filing of a judgment in a non-jury action. The trial court has no authority to extend this time period beyond those times authorized by rule 1.530, Florida Rules of Civil Procedure (2013). Once the trial court has denied a 1.530 motion, it was divested of jurisdiction to hear any additional motions for rehearing under the rule. *Balmoral Condominium Ass'n v. Grimaldi,* 107 So. 3d 1149 (Fla. 3d DCA 2013).

3. Rule 1.540 provides an exception to the loss of jurisdiction upon voluntary dismissal and allows the trial court to hear the motion to vacate. *Wells Fargo Bank, NA v. Haecherl,* 56 So. 3d 892, 893 (Fla. 4th DCA 2011). Time for filing 1.540 motion begins to run from entry of final judgment, not from resolution of appeal; the pendency of an appeal does not extend one-year limit. *Molinas del S.A. v. E. I. DuPont de Nemours & Co.,* 947 So. 2d 521, 524 (Fla. 4th DCA 2007). Motion to vacate time-barred after one-year limit after judgment; trial court is without

jurisdiction. *IndyMac Federal Bank FSB v. Hagan,* 104 So. 3d 1232, 1233 (Fla. 3d DCA 2012); *Mumemthaler v. Williams,* 37 So. 3d 959, 960 (Fla. 3d DCA 2010).

4. Excusable neglect supporting a motion for relief from judgment under rule 1.540, Florida Rules of Civil Procedure (2011), must be proven by sworn statements or affidavits; unsworn assertions of excusable neglect are insufficient. *Halpern v. Houser,* 949 So. 2d 1155, 1157 (Fla. 4th DCA 2007); *Novastar Mortgage, Inc. v. Vargas,* 76 So. 3d 369 (Fla. 3d DCA 2011). *See also Acosta v. Deutsche Bank Nat'l Trust Co.,* 88 So. 3d 415 (Fla. 4th DCA 2012).

(a) The movant under rule 1.540 must plead three elements: (1) the failure to file a responsive pleading was the result of excusable neglect; (2) the moving party has a meritorious defense; and (3) the moving party acted with due diligence in seeking relief. *Wells Fargo Bank, N.A. v. Jidy,* 44 So. 3d 162, 164 (Fla. 3d DCA 2010). Motion which did not plead due diligence was legally insufficient. *Id.* Trial court erred in denying motion for relief from judgment where there is a colorable claim for relief showing excusable neglect and a demonstration of meritorious defense. *Henry v. Henry,* 39 So. 3d 557 (Fla. 2d DCA 2010); *S.K.D. v. J.P.D.,* 36 So. 3d 858, 860 (Fla. 5th DCA 2010). *See also Mendoza v. Chase Home Finance, LLC,* 2013 WL 1629251 (Fla. 3d DCA April 17, 2013) (1.540 motion should have been granted since defendants had not received notice of trial which resulted in judgment even if no defense had been raised).

5. An attorney's errors, even if constituting mistakes of law, tactical errors, or judgmental mistakes, do not constitute excusable neglect sufficient to support vacating a judgment. *Geer v. Jacobsen,* 880 So. 2d 717, 720 (Fla. 2d DCA 2004).

6. There is a distinction between a judgment that is void and one that is voidable. A void judgment is so defective that it is deemed to never to have had legal force and effect, while a voidable judgment is a judgment based on error in procedure that allows a party to have the judgment vacated, but the judgment has legal force and effect unless and until it is vacated. *Sterling Factors Co. v. U.S. Bank Nat'l Ass'n,* 968 So. 2d 658, 667 (Fla. 2d DCA 2007). A judgment based on no personal jurisdiction over defendant is a void judgment. *Id. See also Bank of New York Mellon v. Reyes,*

2013 WL 1136449 (Fla. 3d DCA March 20, 2013) (judgment held void based on cancellation of promissory note in counterclaim; borrower had not sought this relief and it was not supported by pleadings).

7. A voidable judgment can be challenged by motion for rehearing or appeal and may be the subject of collateral attack, but it cannot be challenged at any time as void under rules governing relief from judgment. *Id.* A judgment that is entered based upon some error in procedure may be vacated but, unlike a void judgment, it has legal force and effect unless it is vacated. *Jones-Bishop v. Estate of Catherine Sweeney,* 27 So. 3d 176, 177 (Fla. 5th DCA 2010).

8. A court may relieve a party from final judgment for fraud. Rule 1.120(b), Florida Rules of Civil Procedure (2013), requires the fraud to "be stated with such particularity as the circumstances may permit." This means that a 1.540(b)(3) motion must clearly and concisely set out the essential facts of the fraud, not just legal conclusions. To entitle a movant to an evidentiary hearing, a rule 1.540(b)(3) motion must specify the fraud. *Davenport v. Dimitrijevic,* 857 So. 2d 957, 963 (Fla. 4th DCA 2003). The allegations of fraud warrant an evidentiary hearing. *Bock v. Marchese Services, Inc.,* 42 So. 3d 325, 326 (Fla. 4th DCA 2010).

9. Trial court's refusal to allow a mortgagor to participate in evidentiary hearing on post judgment motion violated mortgagor's procedural due process rights. *Vollmer v. Key Development Properties, Inc.,* 966 So. 2d 1022, 1024 (Fla. 2d DCA 2007). The right to be heard includes the right to introduce evidence at a meaningful time and in a meaningful manner, and the opportunity to cross-examine witnesses. *Id.* Court's failure to properly notice a party of a ruling may adversely affect that party's right to due process. *Boelter v. Boelter,* 39 So. 3d 1282, 1284 (Fla. 2d DCA 2010).

10. Mortgagor failed to establish in foreclosure action that he was "adversely affected" by mortgagee's voluntary dismissal; mortgagor may have actually benefitted from the stalling of the foreclosure. *Pino v. Bank of New York Mellon,* 57 So. 3d 950, 953 (Fla. 4th DCA 2011). The district court certified the question as to whether the trial court may "grant relief from a voluntary dismissal where the motion alleges a fraud on the court in the proceedings but no affirmative relief on behalf of the plaintiff

has been obtained from the court." In *Pino v. Bank of New York,* 2013 WL 452109 (Fla. Feb. 7, 2013), the Supreme Court approved the Fourth District Court's opinion and answered the certified question in the negative, stating:

> [W]hen a defendant alleges fraud on the court as a basis for seeking to set aside a plaintiff's voluntary dismissal, the trial court has jurisdiction to reinstate the dismissed action only when the fraud, if proven, resulted in the plaintiff securing affirmative relief to the detriment of the defendant and, upon obtaining that relief, voluntarily dismissing the case to prevent the trial court from undoing the improperly obtained relief.

11. Motion for rehearing - abuse of discretion to deny rehearing where multiple legal issues, including prepayment penalties and usury, remain unresolved by the trial court. *Bonilla v. Yale Mortgage Corp.,* 15 So. 3d 943 (Fla. 3d DCA 2009).

12. Post judgment motions to enforce - trial courts have the authority to enter orders to enforce their judgments; however, they do not have the power to modify a judgment once it becomes final, absent an appropriate motion. *Vargas v. Deutsche Bank Nat'l Trust Co.,* 104 So. 3d 1156, 1165 (Fla. 3d DCA 2013).

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. (2013).

(a) Court approval is not needed to redeem. *Verneret v. Foreclosure Advisors, LLC,* 45 So. 3d 889, 892 (Fla. 3d DCA 2010); *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. (2013).

3. Right to redeem is incident to every mortgage and can be assigned by anyone claiming under the mortgagor. *VOSR Industries, 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. Federal 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 federal 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 statutorily proscribed timeframe 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. (2013). The statute applies unless agreed otherwise.

2. Cancellations, continuances, and postponements are within the discretion of the trial court. Movant must have reasons. They must be accurate and factual reasons, not canned standard form pleadings, for example claiming HAMP when the condo association has taken title to the property. *See Jade Winds Ass'n, Inc. v. Citibank, N.A.,* 63 So. 3d 819 (Fla. 3d DCA 2011). Judicial action based on benevolence or compassion constitutes an abuse of discretion. *Republic Federal Bank, N.A. v. Doyle,* 19 So. 3d 1053, 1054 (Fla. 3d DCA 2009) (appellate court disapproved trial court's continuance of sale based on compassion to homeowners claiming they needed additional time to sell home). There should be no across the board policy. *But see Wells Fargo Bank, N.A. v. Lupica,* 36 So. 3d 875, 876 (Fla. 5th DCA 2010) (denial of lender's unopposed motion to cancel and subsequent motion to vacate sale reversed). Counsel alleged a loan modification agreement had been reached. Court

rejected asking for evidence of agreement. The Fifth District Court ruled, "there was no basis for the trial court to reject Wells Fargo's counsel's representation, as an officer of the court, that an agreement had been reached." *Id.* Look at language in motions; "HAMP Review" and "loss mitigation" do not constitute an agreement. Include language in the order indicating the court's rationale, even if you have a form order. Ask counsel to make a personal representation as an "officer of the court." Also, look at the service list. If the borrower is not living at the property, HAMP is questionable. *See also Chemical Mortgage Co. v. Dickson,* 651 So. 2d 1275, 1276 (Fla. 4th DCA 1995). Error not to cancel sale and reschedule where plaintiff did not receive bidding instructions on a federal-guaranteed mortgage. However, this case found "no extraordinary circumstances" preventing rescheduling. Suggestion: we live in extraordinary times.

(a) Where fraud is alleged, trial court was required to conduct an evidentiary hearing before entering the order denying motion to vacate and set aside order allowing sale of real property. *Seal v. Brown,* 801 So. 2d 993, 994 (Fla. 1st DCA 2001).

Notice of sale

1. Notice of sale must be published once a week, for two consecutive weeks in a publication of general circulation. § 45.031(1), Fla. Stat. (2013). The second publication shall be at least five days before the sale. § 45.031(2), Fla. Stat. (2013).

(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. Pursuant to Administrative Order 09-18, the Clerk of the Court conducts on-line auctions, in lieu of on-site auctions, for the sale of real property in the Eleventh Judicial Circuit Court. See also Administrative Order 09-09 A1, which acknowledged

the statutory authority of the clerks of court to conduct the sale of real or personal property by electronic means, and section 45.031(10), Florida Statutes (2013).

2. 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.

3. 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).

4. Amount bid is conclusively presumed sufficient consideration. § 45.031(8), Fla. Stat. (2013).

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. (2013). *See also AG Group Investments LLC v. All Realty Alliance Corp.,* 106 So. 3d 950 (Fla. 3d DCA 2013) (junior lien not extinguished by entry of summary judgment; extinguished only upon filing of certificate of sale).

2. Documentary stamps must be paid on the sale. § 201.02(9), Fla. Stat. (2013). 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.

Finality of Mortgage Foreclosure Judgment

Section 702.036, Florida Statutes (2013), provides for the finality of mortgage foreclosure judgments. This new provision protects bona fide purchasers of a property at a foreclosure sale and ensures the validity of title when a party seeks to set aside, invalidate, or challenge validity of a final judgment or to establish or re-establish a lien. Prior to this new legislation, many innocent buyers found themselves in a costly legal challenge. Section 702.036 provides that title may not be disturbed provided: the party seeking relief was properly served, final judgment was entered, the appeal time periods have expired, no appeals have been filed, and the purchaser for value has no affiliation with the lender or owner. While the movant/party may be entitled to monetary damages, title will remain undisturbed, thereby protecting the bona fide purchaser. Subsequent to the foreclosure of a mortgage based on a lost, destroyed, or stolen note, a non-party to the action who claims to be the actual holder of the note has no claim against the property once it is conveyed to a bona fide purchaser, with no affiliation with either lender or owner, for valuable consideration. However, the actual holder of the note will have a claim for monetary damages against the party who wrongfully claimed ownership of the note. Specifically, the actual holder of

the note would be entitled to pursue recovery from adequate protection given under section 673.3091, Florida Statutes (2013).

Objection to sale

1. Any party may file a verified objection to the amount of bid within 10 days. § 45.031(8), Fla. Stat. (2013). The court may hold a hearing – within judicial discretion. Hearing must be noticed to everyone, including third party purchasers. *Shlishey the Best, Inc. v. CitiFinancial Equity Services, Inc.,* 14 So. 3d 1271 (Fla. 2d DCA 2009).

2. Court has broad discretion to set aside sale. *Long Beach Mortgage Corp. v. Bebble,* 985 So. 2d 611, 614 (Fla. 4th DCA 2008) (appellate court reversed sale - unilateral mistake resulted in outrageous windfall to buyer who made *de minimis* bid). The court may consider a settlement agreement in considering whether to vacate a sale. *JRBL Dev., Inc. v. Maiello,* 872 So. 2d 362, 363 (Fla. 2d DCA 2004).

3. **Test**: Commonly the test applied to determine if a sale should be set aside was two-pronged: (1) bid was grossly or startlingly inadequate; and (2) inadequacy of bid resulted from some mistake, fraud, or other irregularity of sale. *Arlt v. Buchanan,* 190 So. 2d 575, 577 (Fla. 1966); *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). However, the appellate court has receded from *Blue Star* to the extent that it indicates that inadequacy of price must *always* be part of the legal equation. *Arsali v. Chase Home Finance, LLC,* 79 So. 3d 845, 847 (Fla. 4th DCA 2012), *approved,* 2013 WL 3466800 (Fla. July 11, 2013) (trial court could vacate foreclosure sale without finding that sale price was grossly inadequate, and thus court was not required to hold evidentiary hearing as to adequacy of price before granting motion to vacate). In *Arsali,* the defendant had reinstated prior to sale and the sale was supposed to be cancelled. The court opined that the two-part test does not apply to *every* attempt to set aside a sale and cites to the statement of law articulated in the Florida Supreme Court case of *Moran-Alleen Co. v. Brown,* 123 So. 561, 562 (Fla. 1929) (court further opined, "this court is committed to the doctrine that a judicial sale may on a proper

showing made, be vacated and set aside on any or all of these [enunciated] grounds"). Burden on party seeking to vacate sale. *See also CitiMortgage v. Synuria,* 86 So. 3d 1237 (Fla. 4th DCA 2012) (bank's excusable neglect and disparity in sales price which was 1.9% of the foreclosure judgment warranted setting aside the sale to the third party purchaser).

(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). Failure to send a defaulted party a copy of the final judgment to the proper address, does not warrant setting aside the foreclosure sale. *Phoenix Holding, LLC v. Martinez,* 27 So. 3d 791, 793 (Fla. 3d DCA 2010).

(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). The sufficiency of mistake is shown if the owner is deprived of an opportunity to bid at the sale when, because of inadvertence or mistake, an attorney who was to represent him there for that purpose was not present. *U.S. Bank National Ass'n v. Bjeljac,* 43 So. 3d 851, 853 (Fla. 5th DCA 2010).

(d) Court may refuse to set aside sale where objection is beyond statutory period. *Ryan v. Countrywide Home Loans, Inc.,* 743 So. 2d 36, 38 (Fla. 2d DCA 1999) (untimely motion filed 60 days following the sale).

Sale vacated

1. If sale vacated - mortgage and lien "relieved of all effects" from foreclosure and returned to their original status. § 702.08, Fla. Stat. (2013).

(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 re-foreclose or sue to compel an omitted junior lienholder to redeem within a reasonable time. *Quinn Plumbing Co. v. New Miami Shores Corp.,* 129 So. 690, 692 (Fla. 1930).

(b) Foreclosure is void if titleholder omitted. *English v. Bankers Trust Co. of Calif., N.A.,* 895 So. 2d 1120, 1121 (Fla. 4th DCA 2005).

2. Priorities and equitable subrogation

Equitable subrogation is not allowed if it works any injustice to the rights of others. *Velazquez v. Serrano,* 43 So. 3d 82, 84 (Fla. 3d DCA 2010).

(a) Equitable lien or equitable subrogation to position of prior mortgagee was necessary for mortgagee that paid off prior mortgage after mortgagors sold the property and received it back by allegedly fraudulent quitclaim deed, even if mortgagee knew of purchaser's claim that the quitclaim deed was a forgery; mortgagee had clean hands, purchaser was not entitled to windfall and purchaser's claim was subordinate to that of prior mortgage. *Tribeca Lending Corp. v. Real Estate Depot, Inc.,* 42 So. 3d 258, 263 (Fla. 4th DCA 2010). *See also Sherman v. Deutsche Bank Nat'l Trust Co.,* 100 So. 3d 95, 97 (Fla. 3d DCA 2012) (second mortgage recorded prior in time to newly refinanced mortgage held priority over refinanced mortgage despite express provision and characterization as second mortgage – refinanced mortgage not entitled to priority lien by virtue of "equitable subrogation" based on analysis of the equities).

(b) Vendor who took back a third mortgage against the property was prejudiced by the failure of a subsequent mortgage in connection with a second sale of the property, and thus assignee of such subsequent mortgage was not entitled to be equitably subrogated to the priority of the original first and second mortgages. *Velazquez,* 43 So. 3d at 83.

3. Right of possession

(a) 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.

(b) Right of possession enforced through writ of possession. Fla. R. Civ. P. 1.580 (2013).

4. Summary writ of possession procedure

(a) Purchaser of property moves for writ of possession;

(b) The writ can be issued against any party who had actual or constructive knowledge of the foreclosure proceedings and adjudication; *Redding v. Stockton, Whatley, Davin & Co.,* 488 So. 2d 548, 549 (Fla. 5th DCA 1986);

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

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

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

(e) The order for writ of possession is executed by the sheriff and personal property removed to the property line.

Protecting Tenants at Foreclosure Act of 2009

1. Federal legislation, known as Senate Bill 896, P.L. 111-22, provides for a nationwide 90-day pre-eviction notice requirement for bona fide tenants in foreclosed properties. The provisions of the original bill were extended until 12/31/14 under the Dodd-Frank Wall Street Reform and Consumer Protection Act, which became law on July 21, 2010.

2. The new law is applicable to any foreclosure on a federally related mortgage loan on any dwelling or residential real property as defined by Section 3 of the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. § 2602). In short, the originating lender must be the Federal National Mortgage Association (FNMA), the Government National Mortgage Association (GNMA), the Federal Home Loan Mortgage Corporation, or a financial institution insured by the Federal Government.

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

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

4. The buyer or successor in interest after foreclosure sale must provide bona fide tenants:

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

5. Tenants who are Section 8 voucher participants are entitled to similar protections. The buyer assumes the interest of the prior owner and the Section 8 lease contract. The buyer cannot terminate the lease in the absence of "good cause."

(a) The exception here is if the new owner wants to occupy the property, then he or she must give the tenant 90 days written notice.

6. The Extension and Clarification of the PTFA defines the notice of foreclosure as the date on which the complete title is transferred to a successor entity at the end of the foreclosure proceedings, when the certificate of title is issued. As such, the new owner must send the 90-day notice. Any notice sent prior to the issuance of the certificate of title is not in compliance with the PTFA.

7. This provisions of the new law went into effect on May 20, 2009. The PTFA sunsets on December 31, 2014.

Disbursement of Sale Proceeds

Surplus

1. Surplus - the remaining funds after payment of all disbursements required by the final judgment of foreclosure and shown on the certificate of disbursements.

§ 45.032(1)(c), Fla. Stat. (2013). Disbursement of surplus funds is governed by section 45.031, Florida Statutes (2013).

2. Entitlement to surplus is determined by priority; in order of time in which interest 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 FSB 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.* at 615; *S.W. Fla. Paradise Property, Inc. v. Segelke,* 111 So. 3d 268 (Fla. 2d DCA 2013).

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

(c) Entitlement to balance of surplus after payment of priority interests - payable to the record owner as of the date of the filing of the lis pendens. *Suarez v. Edgehill,* 20 So. 3d 410, 411 (Fla. 3d DCA 2009) (former owner, not subsequent owner – legislature abrogated common law rule that surplus proceeds in foreclosure case are property of owner of the property on date of foreclosure sale).

Deficiency Judgment

1. Deficiency – is the difference between the fair market value of the security received and the amount of the debt. *Mandell v. Fortenberry,* 290 So. 2d 3, 6 (Fla. 1974); *Grace v. Hendricks,* 140 So. 790 (Fla. 1932).

2. A deficiency can be obtained only if a request for that relief is made in the pleadings and if personal jurisdiction has been obtained over the defendant or defendants against whom the deficiency is sought. *Bank of Florida in South Florida v. Keenan,* 519 So. 2d 51, 52 (Fla. 3d DCA 1988). The granting of a deficiency judgment is the rule rather than the exception. *Thomas v. Premier Capital, Inc.,* 906 So. 2d 1139, 1140 (Fla. 3d DCA 2005).

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

(b) New service of process on defendant was not required for deficiency judgment where personal jurisdiction had been originally conferred by service of foreclosure complaint. *L.A.D. Property Ventures, Inc. v. First Bank,* 19 So. 3d 1126 (Fla. 2d DCA 2009). "'The law contemplates a continuance of the proceedings for entry of a deficiency judgment' as a means of avoiding the expense and inconvenience of an additional suit at law to obtain the balance of the obligation owed by a debtor." *Id.* at 1127.

3. Trial court has discretion to enter deficiency decree. § 702.06, Fla. Stat. (2013); *Thomas,* 906 So. 2d at 1140. The court needs to hold an evidentiary hearing. *Merrill v. Nuzum,* 471 So. 2d 128, 129 (Fla. 3d DCA 1985). The court can enter a default judgment provided the defendant was properly noticed. *Semlar v. Citicorp Savings of Florida,* 541 So. 2d 1369, 1370 (Fla. 4th DCA 1989). *See also Farah v. Iberia Bank,* 47 So. 3d 850 (Fla. 3d DCA 2010) (mortgagee which specifically waived deficiency judgment and sought to collect money judgment contained in final judgment cannot circumvent valuation of the mortgaged property, the key requirement of deficiency judgments).

(a) The exercise of discretion in denial of a deficiency decree must be supported by disclosed equitable considerations which constitute sound and sufficient reasons for such action. *Larsen v. Allocca,* 187 So. 2d 903, 904 (Fla. 3d DCA 1966).

4. A cause of action for deficiency cannot accrue until after entry of final judgment and a sale of the assets to be applied to the satisfaction of the judgment. *Chrestensen v. Eurogest, Inc.,* 906 So. 2d 343, 345 (Fla. 4th DCA 2005). The amount of deficiency is determined at the time of the foreclosure sale. *Estepa v. Jordan,* 678 So. 2d 876, 878 (Fla. 5th DCA 1996). The amount bid at foreclosure sale is not conclusive evidence of the property's market value. *Century Group, Inc. v. Premier Financial Services East, L.P.,* 724 So. 2d 661 (Fla. 2d DCA 1999).

(a) The appraisal determining the fair market value must be properly admitted into evidence and be based on the sale date. *Flagship State Bank of Jacksonville v. Drew Equipment Co.,* 392 So. 2d 609, 610 (Fla. 5th DCA 1981).

(b) The formula to calculate a deficiency judgment is the final judgment of foreclosure total debt minus the fair market value of the property. *Morgan v. Kelly,* 642 So. 2d 1117 (Fla. 3d DCA 1994). The critical date for establishment of fair market value of the real estate is the date of the foreclosure sale. *Empire Developers Group, LLC v. Liberty Bank,* 87 So. 3d 51 (Fla. 2d DCA 2012). Amended section 702.06, Florida Statutes (2013), limits a deficiency decree in the case of an owner-occupied home to the difference between the judgment amount, or in the case of a short-sale, the outstanding debt, and the fair market value of the property on the date of the sale. (This section provides a rebuttable presumption that the property is owner-occupied if the county property appraiser granted a homestead exemption to a residential property.) These provisions apply to any cause of action commenced on or after July 1, 2013; however, an action that would not have been barred under section 95.11(2)(b), Florida Statutes (2012), must be commenced within five years after the action accrued or by July 1, 2014, whichever occurs first.

(c) The amount paid by a mortgage assignee for a debt is "legally irrelevant" to the issue of whether the assignee is entitled to a deficiency award after a foreclosure sale. *Thomas,* 906 So. 2d at 1141.

5. Burden: The secured party has the burden to prove that the fair market value of the collateral is less than the amount of the debt. *Chidnese v. McCollem,* 695 So. 2d 936, 938 (Fla. 4th DCA 1997); *Estepa,* 678 So. 2d at 878. However, the Third District Court has held that the burden is on the mortgagor resisting a deficiency judgment to demonstrate that the mortgagee obtained property in foreclosure worth more than the bid price at the foreclosure sale. *Addison Mortgage Co. v. Weit,* 613 So. 2d 104 (Fla. 3d DCA 1993). *See also Thunderbird, Ltd. v. Great American Ins. Co.,* 566 So. 2d 1296, 1299 (Fla. 1st DCA 1990) (court held that introduction of the certificate of sale from the foreclosure sale showing that the bid amount at the foreclosure sale was less than the amount of the debt shifted the burden to the

mortgagee to go forward with other evidence concerning the fair market value of the property). *See also Eagle's Crest, LLC v. Republic Bank,* 42 So. 3d 848, 850 (Fla. 2d DCA 2010) (court did not abuse its discretion in rejecting expert's discounting valuation of property).

6. 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).

7. Reservation of jurisdiction in the final judgment of foreclosure - If jurisdiction is reserved, new or additional service of process on defendant is not required. *Estepa,* 678 So. 2d at 878. The motion and the notice of hearing must be sent to the attorney of record for the mortgagor. *Id.*; *NCNB Nat'l Bank of Fla. v. Pyramid Corp.,* 497 So. 2d 1353, 1355 (Fla. 4th DCA 1986) (defaulted defendant entitled to notice of deficiency hearing). However, the motion for deficiency must be timely filed. If untimely, the deficiency claim could be barred upon appropriate motion by the defendant under rule 1.420(e), Florida Rules of Civil Procedure (2013). *Frohman v. Bar-Or,* 660 So. 2d 633, 636 (Fla. 1995); *Steketee v. Ballance Homes, Inc.,* 376 So. 2d 873, 875 (Fla. 2d DCA 1979).

(a) No reservation of jurisdiction in the final judgment - motion for deficiency must be made within 10 days of issuance of title. *Frumkes,* 173 So. 2d at 740.

(b) The lender can file a separate action for post-foreclosure deficiency. § 702.06, Fla. Stat. (2013). In a separate action, the defendant has the right to demand a trial by jury. *Hobbs v. Florida First Nat'l Bank of Jacksonville,* 480 So. 2d 153, 156 (Fla. 1st DCA 1985); *Bradberry v. Atlantic Bank of St. Augustine,* 336 So. 2d 1248, 1250 (Fla. 1st DCA 1976) (no jury trial right within foreclosure action). Section 55.01(2), Florida Statutes (2013), mandates that final judgments in a separate action for deficiency contain the address and social security number of the judgment debtor, if known. This requirement is not imposed in a mortgage foreclosure action, in which an *in rem* judgment is sought.

8. Statute of limitations

(a) A deficiency judgment or decree is barred when an action on the debt secured by the mortgage is barred. *Barnes v. Escambia County Employees Credit Union,* 488 So. 2d 879, 880 (Fla. 1st DCA 1986), *abrogated on other grounds,* 660 So. 2d 633 (Fla. 1995).

(b) Section 95.11, Florida Statutes (2013), imposes a five-year statute of limitations for a foreclosure deficiency judgment which arose prior to July 1, 2013.

(c) For judgments entered prior to July 1, 2013: "[A] cause of action for deficiency does not accrue, and thus the statute of limitations does not begin to run, until the final judgment of foreclosure and subsequent foreclosure sale." *Chrestensen,* 906 So. 2d 343 at 345.

For judgments entered on or after July 1, 2013: Section 95.11, Florida Statutes (2013), has been amended to reduce the statute of limitations period to one year for judgments entered after July 1, 2013 for residential property that is a one-family to four-family dwelling unit. The new limitations period does not start to run until the 11th day after a foreclosure sale or the day after the mortgagee accepts a deed in lieu of foreclosure.

9. There are statutory limitations imposed on a deficiency judgment when a purchase money mortgage is being foreclosed. Section 702.06, Florida Statutes (2013), includes language that impairs the entitlement to a deficiency judgment with respect to a purchase money mortgage, when the mortgagee becomes the purchaser at foreclosure sale. Specifically, this statutory limitation provides: "the complainant shall also have the right to sue at common law to recover such deficiency, provided no suit at law to recover such deficiency shall be maintained against the original mortgagor in cases where the mortgage is for the purchase price of the property involved and where the original mortgagee becomes the purchaser thereof at foreclosure sale and also is granted a deficiency decree against the original mortgagor." *See also United Postal Savings Ass'n v. Nagelbush,* 553 So. 2d 189 (Fla. 3d DCA 1989); *Taylor v. Prine,* 132 So. 464, 465 (Fla. 1931).

(a) One Florida court ruled that the "all important distinction" in the case was that "the purchaser at the foreclosure sale was not the mortgagee, but . . . an utter stranger to the parties," a third party purchaser, warranting reversal of the trial court's denial of deficiency judgment. *Lloyd v. Cannon,* 399 So. 2d 1095, 1096 (Fla. 1st DCA 1981).

Disbursement of Excess Bid Fees - The clerk shall return sums deposited over and above the five percent mandated by law. *STL Realty, LLC v. Belle Plaza Condominium Ass'n,* 45 So. 3d 972 (Fla. 3d DCA 2010).

Bankruptcy

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

(a) For the stay 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. Section 702.10, Florida Statutes (2012), was amended by the 2013 Florida Legislature and is an alternative foreclosure procedure.

2. Upon filing of verified complaint, plaintiff moves for immediate review of foreclosure by an order to show cause. (These complaints are easily distinguishable from the usual foreclosure by the order to show cause.)

(a) The failure to file defenses or to appear at the show cause hearing "presumptively constitutes conduct that clearly shows that the defendant has relinquished the right to be heard." *Id.* Yet, the filing of a defense motion or answer at or before hearing constitutes cause and precludes entry of summary judgment. *BarrNunn, LLC v. Talmer Bank & Trust,* 106 So. 3d 51, 53 (Fla. 2d DCA 2013).

3. Prior to the amendment of section 702.10, this procedure was not the standard practice among foreclosure practitioners, due to limitations. Specifically, the statute did not foreclose junior liens. The amended statute provides that any lienholder, not just the mortgagee, may initiate the procedure. The amended statute applies to causes of action pending on the effective date of the act. Amended provisions include:

(a) A residential property is subject to relief under this section unless it is an owner-occupied residence.

(b) Upon filing of the complaint, the court must immediately review the request and the court file in chambers without a hearing.

(c) If the complaint is verified and in compliance with section 702.015, Florida Statutes (2013), and alleges a cause of action to foreclose on real property, the court shall promptly issue an order to show cause. The date for hearing may not be set sooner than the later of 20 days after service of the order to show cause or 45 days after service of the initial complaint (30 days after publication, if service is by publication). The order to show cause must state that if a defendant files defenses or appears at the hearing, the hearing time will be used to hear and consider whether the defenses raise a genuine issue of material fact that would preclude entry of summary judgment or otherwise constitute a legal defense to foreclosure, and that

the court may enter a final judgment of foreclosure ordering the clerk to conduct a foreclosure sale. If the defendant fails to appear at the hearing or file defenses, or the defendant files an answer not contesting the foreclosure, the defendant may be considered to have waived the right to a hearing and the court may enter default – and, if appropriate, final judgment – against the defendant.

(d) If the court finds that all defendants have waived the right to be heard, the court may enter final judgment without a hearing.

(e) Other relief may be ordered, including requiring the defendant to make payments or to vacate the property.

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

Common Procedural Errors

1. Incorrect legal description contained in the:

(a) Original mortgage - requires a count for reformation. An error in the legal description of the deed requires the joinder of the original parties as necessary parties to the reformation proceedings. *Chanrai Inv., Inc. v. Clement,* 566 So. 2d 838, 840 (Fla. 5th DCA 1990). When a mortgage misdescribes the legal description of the property intended to be mortgaged, the mistake may be corrected by a proper proceeding before judicial foreclosure, but if the mistake has been carried into the decree of foreclosure, the advertisement and deed, the mortgage must be reformed. *Fisher v. Villamil,* 56 So. 559, 563 (Fla. 1911).

(b) Complaint and lis pendens - requires amendment.

(c) Judgment - Rule 1.540(a), Florida Rules of Civil Procedure (2013), 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, N.A.,* 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. Clerical mistakes referred to by rule 1.540, Florida Rules of Civil Procedure (2013), are only errors or mistakes arising from accidental slip or omission, and not error or mistakes in the substance of what is decided by the judgment or order. *Brown v. Cannady-Brown,* 36 So. 3d 166, 168 (Fla. 4th DCA 2010).

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

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. Reinstatement returns a mortgage to its pre-default status. (Reinstatement after the entry of final judgment by definition anticipates the vacating of judgment and lawsuit dismissal. *One 79th Street Estates,* 47 So. 3d 886 at 888.)

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 v. 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.

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Table of Authorities

Cases

United States Code

Federal Rules of Civil Procedure

Florida Constitution

Statutes

Laws of Florida

Florida Administrative Code

Rules Regulating The Florida Bar

Administrative Orders

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