# The Florida Senate

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Committee on Judiciary

## REVIEW ISSUES AND OPTIONS RELATED TO FORECLOSURE PROCESSES

## Issue Description

During the nation's mortgage foreclosure crisis, Florida has sustained one of the highest foreclosure rates in the country. In Florida, foreclosure – the process by which a lender terminates a borrower's interest in property secured by a loan – is currently subject to judicial scrutiny for all commercial or residential property other than timeshare property. Litigating a foreclosure action is comparable to litigating other civil actions in Florida, in that the lender must file a complaint and obtain a court order to foreclose a mortgage. The exponential volume and the unsteady pace of foreclosures filings in this state significantly strain the state courts system.

Starting in late 2010, some large banks put a freeze on foreclosures due to potential problems with foreclosure and loan documents or insufficient service of process. In particular, attention was being drawn to "robo-signing," a practice under which someone signs many affidavits each day. The person signing the affidavit may have no personal knowledge of the case but swears to processes that may or may not have taken place. The reduction in new foreclosure filings, in turn, placed pressure on the budget for the state courts system, which is based significantly on fees generated from these filings.

Although details of the process vary among states that employ it, nonjudicial foreclosure generally is a mechanism under which the lender does not have to secure a court order to foreclose the property. During the 2010 Regular Session, the Florida Legislature enacted a measure authorizing nonjudicial foreclosure of timeshare properties,[1] under which an appointed trustee conducts the sale and distributes proceeds. In recent legislative sessions, proposals have also been introduced, but not ultimately adopted, to authorize nonjudicial foreclosure generally or for commercial property in particular.[2] Recently enacted federal legislation imposes limits on the use of nonjudicial foreclosure for most residential mortgages. Specifically, the Dodd-Frank Wall Street Reform and Consumer Protection Act, signed into law on July 21, 2010, prohibits any contractual requirement that would impose the use of nonjudicial foreclosure as the process for mortgages on principal dwellings and for closed-end mortgages on secondary dwellings.

The mortgage foreclosure crisis has renewed attention on the foreclosure process and on related real property issues. Practitioners and judges cite variables that can separately or in convergence impede foreclosures. Examples include lending industry practices of assigning mortgages, which can complicate establishing who has authority to foreclose; failure on the part of some plaintiffs to produce documents or submit filings integral to adjudication of the matter; litigation strategies of some defendants which may be designed to forestall foreclosure for as long as possible; workload constraints that prevent judges from reviewing case files to identify problems in advance of hearings; and a depressed housing market that may create a disincentive for lenders to proceed with a foreclosure sale and assume ownership responsibility for the property.

This interim report identifies differences between judicial and nonjudicial foreclosure; examines issues that may be impeding the progress of cases through Florida's judicial foreclosure process; reviews responses by the state courts system to the mortgage foreclosure crisis; and analyzes prior statutory reforms designed to expedite foreclosures in this state. The purpose of the report is to provide legislators with potential avenues for reform, as well as a foundation for evaluating proposals that may arise to expedite the foreclosure process.

[1] Chapter 2010-134, Laws of Fla.
[2] See CS/CS/HB 1523 and SB 2270 (2010 Reg. Sess.); SB 1288 and HB 799 (2011 Reg. Sess.).

## Background

### Foreclosure

Foreclosure is a remedy that a lender initiates when a borrower defaults or fails to make payments on his or her mortgage. The mortgage is a contract between the borrower and lender.[3] Under Florida law, a mortgage is a specific lien on the property and not a conveyance of the legal title or the right to possession.[4] "All conveyances, obligations conditioned or defeasible, bills of sale or other instruments of writing conveying or selling property, either real or personal, for the purpose or with the intention of securing the payment of money, whether such instrument be from the debtor to the creditor or from the debtor to some third person in trust for the creditor, shall be deemed and held mortgages, and shall be subject to the same rules of foreclosure and to the same regulations, restraints and forms as are prescribed in relation to mortgages."[5]

By initiating a foreclosure, a lender is opting for a serious remedy "to declare the whole of the principal sum and interest secured by the mortgage due and payable."[6] Foreclosure of a mortgage is a civil action in Florida that is filed in the county where the property is located.[7] Typically, the complaint alleges that the plaintiff, as holder of the note and mortgage, seeks to foreclose the mortgage and note on the identified parcel of real property. The plaintiff must serve the complaint on all parties affected by the action. Additionally, a notice of *lis pendens*[8] is recorded in the records of the county where the property is located to give notice to creditors and others whose interests may be affected by the pending foreclosure litigation. After a *lis pendens* is filed, any subsequently created lien cannot be enforced against the property unless the holder of that lien intervenes in the foreclosure proceedings within 30 days.[9]

In 1991, the Legislature created the Foreclosure Study Commission to: review the existing mortgage foreclosure process to identify problems in the existing system, including problems that are particular to condominiums; identify ways the system could operate more efficiently; review other states' foreclosure systems to identify any ideas that may improve Florida's system; and review alternatives to the existing process, including nonjudicial foreclosure.[10] The Commission recommended that the Legislature: provide for the right of redemption and place limitations upon such right; enact a power-of-sale statute that allows for a nonjudicial means for a lender to take title to its collateral in an expeditious manner when the borrower has defaulted on a loan greater than $100,000 involving a commercial transaction; revise the statutes to speed and simplify the process by which lenders can enforce assignment-of-rent clauses against borrowers who have defaulted on their mortgage loans; revise Florida's long-arm statute to make persons holding a mortgage or lien on real property in Florida subject to jurisdiction of the courts in this state; revise requirements for lender's liability for condominium assessments under specified circumstances; provide for alternative service of process in foreclosure proceedings; require additional information in final judgments that affect foreclosure proceedings such as liens on real property; clarify an ambiguity in statutory requirements for *lis pendens*; change the time for sale of property by the clerk of court; create a statute that establishes a means for a court to enter an order to show cause in foreclosure proceedings to be used when the lender anticipates that a borrower will not respond to the complaint after being served; and enact other minor substantive changes to streamline foreclosure processes.[11] With some modifications, the Legislature in 1993 enacted many of the recommendations of the commission.[12]

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[3] *See, e.g., Gulf Life Ins. Co. v. Pringle*, 216 So. 2d 468 (Fla. 2d DCA 1968), and *Guynn v. Brentmoore Farms, Inc.*, 253 So. 2d 136, 138 (Fla. 1st DCA 1971).
[4] Section 697.02, F.S.
[5] Section 697.01(1), F.S.
[6] *Kreiss Potassium Phosphate Co. v. Knight*, 98 Fla. 1004, 1013, 124 So. 751, 755 (Fla. 1929).
[7] *Georgia Casualty Co. v. O'Donnell*, 109 Fla. 290, 291, 147 So. 267, 268 (Fla. 1933).
[8] Henry P. Trawick Jr., *Trawick's Florida Practice and Procedure*, s. 8:25 (2007 edition).
[9] Section 48.23(1)(d), F.S.
[10] Chapter 91-116, ss. 1-2, Laws of Fla.
[11] State of Florida Foreclosure Study Commission, *Final Report of the Foreclosure Study Commission* (January 1992).
[12] *Id.* and ch. 93-250, Laws of Fla.

As a part of the legislation to revise the foreclosure process, the Legislature created a fast-track procedure under s. 702.10, F.S., for mortgage foreclosure.[13] This summary mortgage foreclosure involves two types of proceedings. The first is initiated in a hearing based on an order to show cause why the foreclosure judgment should not be entered at that hearing.[14] The "order to show cause" hearing must be scheduled at least 20 days following service of the order or 30 days following service by publication. Any final judgment of foreclosure entered under s. 702.10(1), F.S., is for *in rem* relief[15] only, but it does not preclude the entry of a deficiency judgment where otherwise allowed by law.

The judge must verify that the complaint filed pursuant to s. 702.10(1), F.S., states a cause of action. If the judge finds the complaint is verified, the judge must issue an order to the defendant to show cause why a final judgment should not be entered. If the defendant waives the right to be heard, the judge must promptly enter a final judgment of foreclosure.[16] Attorney's fees may be adjudged no greater than 3 percent of the principal amount owed in a foreclosure in which the defendant waives the right to be heard.[17] If the defendant files any defenses by a motion, or by a verified or sworn answer at or before the hearing, it constitutes cause and precludes the entry of a final judgment and is sufficient to deny summary relief.[18]

The second type of proceeding, under s. 702.10(2), F.S., specifies a procedure to be used for nonresidential real estate in an action for foreclosure. A defendant must show cause why an order to make payments to the mortgagee (lender) during the pendency of the foreclosure proceedings or an order to vacate the premises should not be entered. The order to show cause must detail the requirements of s. 702.10(2), F.S. The "order to show cause" hearing must be scheduled at least 20 days following service of the order or 30 days following service by publication. If service of process has already been made on the defendant, the order may be served in a manner provided in the Florida Rules of Civil Procedure. If the defendant waives the right to be heard on the order, the court may promptly enter an order requiring payment or an order to vacate.[19] At the "order to show cause" hearing, the court may enter an order requiring the defendant to make payments in intervals pending the determination of the action based on the likelihood that the mortgagee will prevail in the foreclosure action.[20] If the court enters an order requiring payments, the order must also provide that the lender is entitled to possession of the premises if the defendant fails to make payment as required by the order unless the court finds good cause to order some other method of enforcement of the order.

## Mediation

Foreclosure mediation has been encouraged in a number of states to encourage borrowers and lenders to work out a compromise in lieu of foreclosure.[21] The mediation serves as a vehicle for the parties to explore mutual benefits such as the borrower's ability to remain in the mortgaged home and the lender's reduction in losses by avoiding the costly remedy of foreclosure. The authority to establish mediation arises in at least three ways: state legislatures have enacted laws to create mediation programs; state courts have established programs as a part of their jurisdiction; and, finally, local courts have created programs within their jurisdiction and locality.[22]

In December 2009, the Chief Justice of the Florida Supreme Court issued an administrative order that required each circuit to establish a managed mediation program for mortgage foreclosure cases involving homestead

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[13] Chapter 93-250, s. 14, Laws of Fla.
[14] Section 702.10(1), F.S.
[15] "[A] proceeding *in rem* is one which is taken directly against property or one which is brought to enforce a right in the thing itself." BLACK'S LAW DICTIONARY 404 (5th ed. Abridged 1983).
[16] Section 702.10(1)(d), F.S.
[17] Section 702.10(1)(c), F.S.
[18] Trawick, *supra* note 8, at s. 31:7.
[19] Section 702.10(2)(c), F.S. See also s. 702.065(2), F.S., which provides for summary adjudication of attorney's fees in mortgage foreclosure when a default is entered.
[20] Section 702.10(2)(d) and (e), F.S.
[21] Geoffry Walsh and National Consumer Law Center, Inc., *State and Local Foreclosure Mediation Programs: Can They Save Homes?* (September 2009), *available at* http://www.nclc.org/images/pdf/foreclosure_mortgage/mediation/report-state-mediation-programs.pdf (last visited Sept. 11, 2011).
[22] *Id.* at 2-3.

properties. The order was based on recommendations from a task force on residential foreclosure cases.[23] The procedures and results of the mediation program are addressed in the "Findings and/or Conclusions" section of this report.

### Florida Legislative Action on Nonjudicial Foreclosure

In 2010, the Legislature enacted a nonjudicial process for the foreclosure of liens on timeshare interests, referred to as a trustee foreclosure process.[24] There are separate but similar trustee procedures for the foreclosure of liens based on unpaid assessments and for mortgage liens. Each procedure gives the timeshare interest owner (obligor) an opportunity to object to the trustee foreclosure process and to contest the foreclosure through a judicial process. If the owner does not object to the use of the trustee foreclosure procedure, he or she will not be subject to a deficiency judgment even if the proceeds from the sale of the timeshare interest are insufficient to offset the amounts secured by the lien.

The trustee foreclosure process for assessment liens applies to any default that gives rise to an assessment lien after the effective date of the law. If a timeshare instrument[25] contains a provision that prevents the use of a trustee foreclosure procedure, or if the managing entity determines that the timeshare instrument should be amended to specifically provide for the trustee foreclosure procedure, an amendment to the timeshare instrument must be adopted and recorded prior to using the trustee foreclosure procedure.[26]

The trustee foreclosure process for mortgage liens can only be used if the mortgage, or an amendment to a mortgage executed by the obligor before the effective date of the law, contains a notice that informs the obligor that the mortgagee (the mortgage lender) has the right to elect to use the nonjudicial or the judicial foreclosure procedure. It also provides that, if the mortgagee elects the nonjudicial procedure, the obligor would have the option to object and proceed with a judicial foreclosure action.[27]

The law requires the payment of a $50 administrative fee per trustee deed for each deed recorded pursuant to the trustee foreclosure procedures. The revenues from the administrative fee are to be remitted to the Department of Revenue in the same manner as documentary stamp taxes and deposited in the State Courts Revenue Trust Fund.[28]

During that same session, legislation was proposed but not enacted to authorize nonjudicial foreclosure more generally. The proposals allowed the use of a nonjudicial foreclosure process, at the option of the creditor, in the case of most real property.[29] During the 2011 Regular Session, measures proposed the creation of the "Nonjudicial Foreclosure of Commercial Real Property Act." The measures would have given creditors the option of foreclosing on a security instrument in commercial real property using a trustee foreclosure procedure.[30]

## Findings and/or Conclusions

### Judicial and Nonjudicial Foreclosure

A significant number of states require judicial foreclosure, and other states allow nonjudicial proceedings to occur. In judicial foreclosure states, lenders must obtain a court order or other judicial action to foreclose a

[23] Final Report and Recommendations on Residential Mortgage Foreclosure Cases, Admin. Order No. AOSC09-54 (Fla. Dec. 28, 2009), *available at* http://www.floridasupremecourt.org/clerk/adminorders/2009/AOSC09-54.pdf (last visited Sept. 11, 2011).
[24] Chapter 2010-134, ss. 9-10, Laws of Fla. (codified in ss. 721.855 and 721.856, F.S.).
[25] A timeshare instrument is "one or more documents, by whatever name denominated, creating or governing the operation of a timeshare plan." Section 721.05(35), F.S.
[26] Section 721.855, F.S.
[27] Section 721.856, F.S.
[28] Chapter 2010-134, s. 13, Laws of Fla.
[29] See CS/CS/HB 1523 and SB 2270 (2010 Reg. Sess.). The Senate measure, which died in the Senate Committee on Banking and Insurance, applied to nonhomestead property. The House measure died in the House Criminal and Civil Justice Policy Council.
[30] See SB 1288 and HB 799 (2011 Reg. Sess.). The Senate measure died in the Senate Committee on Judiciary. The similar House measure died in the House Civil Justice Subcommittee.

mortgage. The states are almost evenly divided in whether their laws require lenders to seek judicial action to foreclose a mortgage.[31] In general, judicial foreclosure typically involves a number of tasks to obtain the court's action: the filing of a foreclosure complaint and *lis pendens* notice; the service of process on any party who may be prejudiced by the proceeding; a hearing before a judge or a person who reports to the court; the entry of a decree or judgment; the notice of sale; a public foreclosure sale; the post-sale adjudication regarding the disposition of the foreclosure proceeds; and, if it applies, a deficiency judgment.[32]

In contrast, nonjudicial foreclosure is believed to be a relatively simpler, quicker, and cheaper method.[33] Although a creature of statute, nonjudicial foreclosure is a private procedure involving private parties, which is performed pursuant to an agreement.[34] A nonjudicial foreclosure occurs outside of a court, and usually is based on the authority granted in a power-of-sale agreement between the lender and borrower giving the power to a trustee or some other party who is named in a mortgage, deed of trust, or in a separate agreement.[35] The party given the power to foreclose by sale must do so in accordance with relevant state law.[36] If the foreclosure is a foreclosure of a mortgage rather than a deed of trust, most lenders will appoint an independent party to conduct the sale. If the foreclosure involves a deed of trust, the trustee conducts the sale. Under a deed of trust, a trustee is considered as a fiduciary for both the borrower and lender.[37] The sale must follow any notice requirements of the applicable jurisdiction. Notice must be given to the borrower or any other person with an interest in the mortgaged property, and the public, that foreclosure is pending and that a forced sale of the property will occur at a specific time and place.[38] For example, under a deed of trust a trustee may send a notice of default to the borrower and then publish a notice of sale in local newspapers.

The notice requirements for a nonjudicial foreclosure are important because they allow the borrower or any aggrieved person to set aside the sale if the lender or the designated party improperly exercises the power of sale in violation of applicable law.[39] The borrower or any junior interest under the mortgage or deed of trust may dispute the lender's authority to foreclose. Unless a nonjudicial foreclosure is contested by the borrower or other aggrieved person by filing a lawsuit in court seeking to enjoin the foreclosure based on an improper exercise of authority, the lender or other person foreclosing on the property generally does not submit to any supervision by a court or any other entity to ensure state foreclosure law is being strictly followed. Several nonjudicial foreclosure states have recently amended their notice requirements to require longer periods of notice to parties or to ensure that specified information is available prior to foreclosure.[40] In 2010, Tennessee amended requirements for notice of foreclosure to impose an additional 60-day notice requirement on lenders before the first date of publication for

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[31] Grant S. Nelson and Dale A. Whitman, *Reforming Foreclosure: The Uniform Nonjudicial Foreclosure Act*, 53 DUKE L.J. 1399, 1403 (March 2004) (stating that about 40 percent of the states require judicial action as the sole method to foreclose a mortgage).

[32] *Id.*

[33] *See* Karen M. Pence, *Foreclosing on Opportunity: State Laws and Mortgage Credit*, *available at* http://www.federalreserve.gov/pubs/feds/2003/200316/200316pap.pdf (last visited Sept. 28, 2011) (judicial procedures, on average, take 148 days longer than nonjudicial foreclosures (citing C. Wood, *The Impact of Mortgage Foreclosure Laws on Secondary Market Loan Losses*, Ph.D. thesis, Cornell University (1997)).

[34] 55 AM. JUR 2D *Mortgages* s. 472 (2011).

[35] United States Government Accountability Office, *Mortgage Foreclosures: Documentation Problems Reveal Need for Ongoing Regulatory Oversight*, GAO-11-433 (May 2011), and Baxter Dunaway, Law of Distressed Real Estate, 2 L. Distressed Real Est. ss. 17.2 and 17.3 (2010).

[36] *Id.* See also *In re InterBank Funding Corp.*, 310 B.R. 238 (Bankr. S.D. N.Y. 2004), which provides that under Georgia state law applicable in this case wrongful foreclosure is a tort. Wrongful foreclosure is a tort that exists as a statutory duty to exercise fairly and in good faith the power of sale in a deed to secure a debt.

[37] *Spires v. Edgar*, 513 S.W.2d 372, 378 (Mo. 1974).

[38] 1 The Law of Debtors and Creditors s. 8:17 (2011).

[39] *Id.*

[40] Massachusetts, a nonjudicial foreclosure state, provides a 14-day pre-foreclosure notice of sale before a lender may sell the property in foreclosure. A diverse workgroup of stakeholders examining the state's mortgage foreclosure process with an aim to assist the state's consumers and communities concluded that the notice was inadequate to inform borrowers of a pending foreclosure sale. Massachusetts Mortgage Summit Working Groups, *Report of the Mortgage Summit Working Groups* 10 (April 11, 2007), *available at* http://www.mass.gov/Eoca/docs/dob/Mortgage_Summit_Final_20070409.pdf (last visited Sept. 30, 2011).

certain owner-occupied residences.[41] Nevada, a nonjudicial foreclosure state that has been hit hard by the foreclosure crisis, recently revised its foreclosure law to require, rather than authorize, all mortgage documents needed for foreclosure to be recorded.[42] As of July 2008, an estimated 25 states use nonjudicial foreclosure as their primary method of foreclosure, 19 states use a judicial foreclosure process, and about six states use both judicial and nonjudicial processes to foreclose on mortgaged property.[43] With some exceptions, the states that require judicial foreclosure in which a lender proceeds through the courts to foreclose on property tend to be geographically concentrated in the northeastern and midwestern regions of the country.[44]

The Uniform Nonjudicial Foreclosure Act (Uniform Act) was adopted by the Commissioners on Uniform Laws in 2002, and it provides a nonjudicial model of foreclosing security interests in real estate.[45] The Uniform Act applies to both residential and nonresidential mortgages.[46] The Uniform Act is available only if the security instrument provides that the act's procedures may be used to foreclose it or contains general language authorizing foreclosure of the security interest by nonjudicial process.[47] The Uniform Act does not provide an exclusive method of foreclosure, so judicial foreclosure would still be available if a state that provides for judicial foreclosure adopts the act. The Uniform Act requires the debtor to receive a notice of default (such as a failure to pay) and an opportunity to cure the default (such as a monetary default by making payments to eliminate any delinquent payments and accrued interest and costs) before foreclosure can be initiated.[48] The Uniform Act has three different types of foreclosure: (1) foreclosure by auction, which requires a mailed notice to the debtor and all persons holding junior or subordinate interests in the property; (2) foreclosure by negotiated sale, which involves a contract with a buyer and the lender to purchase the property, and the lender informs the debtor of specified information regarding the amount the lender agrees to allow against the debt; and (3) foreclosure by appraisal as outlined in the act.[49]

Various requirements of the Uniform Act afford borrowers legal protections and rights that may not exist currently under nonjudicial state laws. For example, Massachusetts, a nonjudicial state, does not provide borrowers the opportunity to cure a default to forestall a foreclosure power of sale.[50] Under Massachusetts law, once the foreclosure sale is completed the borrower's defenses to the sale are extinguished. The lack of notice to information regarding the foreclosure sale may be exploited by an"[u]nscrupulous lender [who] use[s] [the absence of any statutory requirement] to retain excess sale proceeds unlawfully or to inflate sale fees and costs."[51]

The federal Dodd-Frank Act prohibits any contractual requirement that would impose the use of nonjudicial foreclosure as the process for mortgages on principal dwellings and for closed-end mortgages on secondary dwellings.[52] Legal practitioners are still trying to interpret the effects of the Dodd-Frank Act on state foreclosure laws and anticipate guidance from any litigation that more clearly delineates the requirements of the federal law on the rights and obligations between borrowers and lenders. To the extent the Dodd-Frank Act prohibition may be interpreted to prohibit contracts that would rely on the use of nonjudicial foreclosure as a means to foreclose a mortgage, it may have a chilling effect on any state's consideration of nonjudicial foreclosure options.[53]

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[41] T.C.A. 35-5-117(a), (b), and (g) (2011).
[42] 2011 Nevada Laws Ch. 81 (A.B. 284).
[43] United States Government Accountability Office, *supra* note 35, at 6 n.9.
[44] Pence, *supra* note 33, at 3.
[45] See Dale A. Whitman, *New Directions in Mortgage Law: Restatements and Uniform Laws*, 33 N.Y.ST. B.A. REAL PROPERTY L. J. 14, 17-19 (Winter 2005), and Nelson and Whitman, *supra* note 31, at 1401 (providing an extensive discussion of the features of the Uniform Nonjudicial Foreclosure Act, including the likelihood of its passage by any state).
[46] Whitman, *New Directions in Mortgage Law: Restatements and Uniform Laws*, *supra* note 45.
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] Massachusetts Mortgage Summit Working Groups, *supra* note 40, at16.
[51] *Id.*
[52] The Dodd-Frank Act (P.L. 111-203) was signed into law on July 21, 2010, and is aimed at reforming the mortgage lending industry and providing consumer protection.
[53] Section 1414 of the Dodd-Frank Act, codified at 15 U.S.C.A. 1639c(e)(1), reads: "No residential mortgage loan and no extension of credit under an open end consumer credit plan secured by the principal dwelling of the consumer may include

## Foreclosure Litigation in Florida

Except for timeshare properties, Florida uses judicial foreclosure in which a court presides over the foreclosure for residential and commercial property. Litigating a foreclosure action is comparable to litigating any other civil action in Florida.[54] Elements that are essential to pleading a foreclosure complaint include: the execution and date of delivery of the note and mortgage along with their recordation; attachment of the note and mortgage as exhibits to the complaint; a legal description of the property; an allegation that the mortgagee (lender) presently owns and holds the note and mortgage; identification of the person holding title to the property; identification of the person holding possession of the property; a description of the default, along with a statement of the amount of principal due and the date from which interest is due; a statement that the mortgage has been accelerated; and reference to the hiring of an attorney along with any attorney's fees and other costs for the suit.[55]

In Florida, the proper party to commence a foreclosure complaint is the holder of the note and mortgage.[56] The Florida Supreme Court amended the Rules of Civil Procedure in 2010 to require verification of mortgage foreclosure complaints involving residential property.[57] The Court also adopted a new form Affidavit of Diligent Search and Inquiry "to help standardize affidavits of diligent search and inquiry and provide information to the court regarding the methods used to attempt to locate and serve the defendant."[58] After the complaint is filed and served on the borrower, and any other party affected by the foreclosure action such as junior lienholders, under the Florida Rules of Civil Procedure, the borrower has 20 days to serve an answer or respond with a motion.[59] A foreclosure action that is based on defective service may be vacated years after the judgment is entered and the property sold.[60]

The usual rules for discovery and for scheduling the trial and trying the case also apply to foreclosure actions. The action proceeds just like any other civil action. Once the matter is litigated, the court may issue a final judgment of foreclosure that adjudges principal, interest, taxes, costs, and attorney's fees.[61] In an effort to accommodate the increased number of foreclosure filings and improve case processing, the Court adopted a Motion to Cancel and Reschedule Foreclosure Sale form that requires plaintiffs in a foreclosure to explain the reason for cancellation and request that the court reschedule the sale to provide better case management of foreclosure sales.[62] Under s. 45.031(1)(a), F.S., a judicial sale is scheduled following the order of judgment, and the sale is public.[63] Documentary stamps must be paid on the sale.[64] If no objections arise to the sale, the clerk issues a certificate of

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terms which require arbitration or any other nonjudicial procedure as the method for resolving any controversy or settling any claims arising out of the transaction."

[54] See Kendall Coffey, Foreclosures in Florida: Remedies, Defenses and Liabilities (second edition), s. 13.01 (2008).

[55] *Id.* at s. 11.01 (discussing the use of Fla. R. Civ. P. Form 1.944, relating to mortgage foreclosure). See also Fla. R. Civ. P. 1.130(a), which requires all bonds, notes, bills of exchange, contracts, accounts, or documents upon which an action may be brought or defense made to be incorporated in or attached to the relevant pleading or complaint.

[56] *Chem. Residential Mortgage v. Rector*, 742 So. 2d 300, 300 (Fla. 1st DCA 1998), *rev. denied*, 727 So. 2d 910 (Fla. 1999), and *Philogene v. ABN Amro Mortgage Group, Inc.*, 948 So. 2d 45, 46 (Fla. 4th DCA 2006). Florida Rule of Civil Procedure 1.210(a) permits an action to be prosecuted in the name of the 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, 1183-84 (Fla. 3d DCA 1985), *rev. denied, S.E.L. Maduro, Inc. v. Kumar Corp.*, 476 So. 2d 675 (Fla. 1985).

[57] See *In re Amendments to Fla. Rules of Civil Pro.*, 44 So. 3d 555, 556 (Fla. 2010). The amendments provide an incentive for the plaintiff in a foreclosure case to appropriately investigate and verify its ownership of the note and the right to enforce the note and ensure that the allegations in the complaint are accurate; conserve and prevent the wasting of judicial resources; and give trial courts greater authority to sanction plaintiffs who make false allegations. *Id.*

[58] *Id.* at 556-57

[59] Fla. R. Civ. P. 1.510(a).

[60] *See Wagner v. Roberts*, 320 So. 2d 408 (Fla. 2d DCA 1975), *cert. denied*, 330 So. 2d 20 (Fla. 1976).

[61] *See* Fla. R. Civ. P. Form 1.996(a), Final Judgment of Foreclosure. See also *In re Amendments to Fla. Rules of Civil Pro.*, 44 So. 3d at 558 (the form was amended to add notice to lienholders and provide directions to property owners as to how to claim a right to funds remaining after public auction, and to allow the clerk of court to electronically conduct judicial sales).

[62] See Fla. R. Civ. P. Form 1.996(b), Motion to Cancel and Reschedule Foreclosure Sale. See also *In re Amendments to Fla. Rules of Civil Pro.*, 44 So. 3d at 557-58.

[63] *See Heilman v. Suburban Coastal Corp.*, 506 So. 2d 1088 (Fla. 4th DCA 1987), *rev. denied*, 518 So. 2d 1275 (Fla. 1987).

[64] Section 201.02(9), F.S. (the tax assessed is based on the highest and best bid at the foreclosure sale).

title to the purchaser. If the proceeds of the sale fall short of satisfying the judgment, the lender may file a post-foreclosure deficiency claim, and there is a five-year statute of limitations on the claim.[65]

***Motion for Summary Judgment Practice to Expedite Foreclosure***

Typically, a foreclosure action is expedited when a litigator uses a motion for summary judgment. Under Florida Rule of Civil Procedure 1.510(c), a final judgment may be obtained through a summary judgment when no material issues of fact are in dispute and the moving party is entitled to a judgment as a matter of law. The procedures for summary judgment must be diligently followed. The motion for summary judgment may be filed with or without supporting affidavits at any time after the expiration of 20 days following the commencement of the foreclosure action.[66] Supporting and opposing affidavits filed must be made on personal knowledge and must show affirmatively that the affiant is competent to testify to the matters stated therein.[67] The motion for summary judgment may identify any affidavits, answers to interrogatories, and other materials admissible in evidence, and "[i]f this evidence, taken in the light most favorable to the non-moving party, shows no genuine issue of material fact, the moving party is entitled to judgment as a matter of law."[68] Under this standard if the borrower raises any defensive motions or answers, the foreclosure litigation may proceed as any other trial and may be subject to prolonged litigation depending on the merits of the borrower's defenses or counterclaims.

A number of stakeholders have raised concerns regarding the current foreclosure litigation process in Florida. The plaintiff's foreclosure bar has indicated that it has become a common practice of the defense foreclosure bar to raise frivolous claims and delay tactics to protract the proceedings. Section 57.105, F.S., is applicable to sanction counsel who interposes frivolous defenses to a mortgage foreclosure action for the primary purpose of unreasonable delay. "Section 57.105[, F.S.,] provides the basis for sanctions against parties and counsel who assert frivolous claims or defenses or pursue litigation for the purpose of unreasonable delay."[69] In *Korte v. U.S. Bank National Association*, the Fourth District of Appeal affirmed that s. 57.105, F.S., is applicable in mortgage foreclosure actions to sanction defendants and their counsel for asserting defenses that they know or should know are not supported by the material facts of the case, but are nonetheless asserted for the primary purpose of delaying the entry of a final judgment.

Several circuit court judges who routinely hear foreclosure cases have expressed concern over the manner in which both plaintiffs and defendants are litigating foreclosure cases. In particular, they assert, parties prosecuting foreclosures in Florida have not always been adequately prepared to meet the exacting standard needed for entry of summary judgment. This is in part due to issues under the control of litigating parties, and such parties may have their motions for summary judgment denied or overturned because they have not shown in their affidavits or other evidence that there are not any material issues of fact in the foreclosure cases.[70] In *Glarum v. Lasalle Bank National Association*, the Fourth District Court of Appeal found that an affidavit filed in the foreclosure case was inadmissible hearsay because the plaintiff failed to demonstrate that the documentary evidence in question met the requirements of the business-record hearsay exception.[71] The affiant lacked personal knowledge of the record to demonstrate that the record was made contemporaneously and was kept in the ordinary course of business and that it was a regular practice of the business to make the record.[72]

The trial court in *Glarum* entered sanctions under s. 57.105, F.S., against the borrower's counsel for filing a "form affidavit," in which the same affidavit was filed in 10 different cases, and the court awarded the lender its

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[65] Sections 702.06 and 95.11(2), F.S.
[66] Fla. R. Civ. P. 1.510(a).
[67] Fla. R. Civ. P. 1.510(e).
[68] *Glarum v. LaSalle Bank Nat'l Ass'n*, 2011 WL 3903161, at *1 (Fla. 4th DCA 2011) (citing *Volusia Cnty v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000)). See also Fla. R. Civ. P. 1.510(c).
[69] *Korte v. U.S. Bank Nat'l Ass'n*, 64 So. 3d 134, 135 (Fla. 4th DCA 2011) (citing *Bionetics Corp. v. Kenniasty*, 2011 WL 446205 (Fla. 2011)).
[70] *See, e.g., Glarum*, 2011 WL 3903161, at *1. The Fourth District Court of Appeal reversed the trial court's entry of summary judgment in favor of the bank's foreclosure action because there was insufficient evidence and the evidence supporting the motion for summary judgment was not based on personal knowledge of the affiant.
[71] *Id.*
[72] *Id.*

reasonable attorney's fees for having to file a motion to strike the affidavit.[73] In reversing the trial court's award of sanctions, the appellate court noted that the trial court did not find the claims of the borrower's attorney frivolous and failed to conclude that "[the affiant's] affidavit was filed to cause unreasonable delay."[74] The court concluded that s. 57.105, F.S., could not serve as a basis for the award of sanctions.[75] Additionally, the appellate court in *Glarum*, in the alternative, found that the trial court, in exercising its inherent authority to impose sanctions on parties or their attorneys, did not make an "express finding of bad faith conduct" which was "supported by detailed factual findings describing the specific acts of bad faith conduct that resulted in the unnecessary incurrence of attorneys' fees."[76]

***Negotiability – Lost or Destroyed Notes***

Loan originators sell mortgages to other financial institutions that as transferees obtain the right to receive principal and interest payments from the borrower. In the process of securization, the mortgages or deeds of trust may then be sold in a secondary market.[77] The mortgages are pooled together and issued as mortgage-backed securities. One scholar has noted that it has become a widespread industry custom to retain rather than transfer promissory notes when mortgages are sold.[78]

The industry practice of bundling mortgages has led to problems of proof when plaintiffs are submitting documents to prove ownership to a court in a foreclosure suit. The plaintiff who prosecutes a foreclosure action may establish a prima facie case by the introduction of the note and mortgage along with relevant testimony in evidence that the borrower has failed to pay the debt under the note.[79] The Florida Supreme Court's recent amendment to Florida Rule of Civil Procedure 1.110(b), to require verification of the foreclosure complaints, is in part a response to the need for attorneys of foreclosure plaintiffs to verify the ownership and right to enforce promissory notes attached to foreclosure complaints filed as part of the pleadings for a foreclosure action. If the lender does not produce an original note and mortgage during a hearing on a summary judgment motion, and the borrower fails to object to the production of the note, the borrower cannot raise this objection on appeal.[80]

In a foreclosure action, the production of the original promissory note protects the borrower from being liable to a holder in due course where the original lender fraudulently obtained payment in an action using a copy of the note.[81] Under Florida law, to enforce a note in a foreclosure action the lender must produce the original promissory note or follow the procedures under ch. 673, F.S., for lost or destroyed notes.[82]

Section 673.3011, F.S., defines the persons entitled to enforce a negotiable instrument, which include: the holder of the instrument; a nonholder in possession of the instrument who has the rights of a holder; or a person not in possession of the instrument who is entitled to enforce the instrument pursuant to s. 673.3091, F.S., dealing with enforcement of lost, destroyed, or stolen negotiable instruments, or s. 673.4181(4), F.S. Under s. 673.3011, F.S., "[a] person may be a person entitled to enforce the instrument even though the person is *not the owner of the instrument* or is *in wrongful possession of the instrument*" (emphasis added). When a person enforces a lost, destroyed, or stolen promissory note, liability arises because a holder in due course may later surface with the

[73] *Id.* at *2.
[74] *Id.*
[75] *Id.*
[76] *Id.* (citing *Moakley v. Smallwood*, 826 So. 2d 221, 226-27 (Fla. 2002)) ("[A] trial court possesses the inherent authority to impose attorneys' fees against an attorney for bad faith conduct.").
[77] *See* United States Government Accountability Office, *supra* note 35 (providing a discussion of mortgages and mortgage market participants and the process of securization).
[78] Dale A. Whitman, *How Negotiability Has Fouled Up the Secondary Mortgage Market, and What To Do About It*, 37 PEPP. L. REV. 737, 757-59 (2010).
[79] See Coffey, *supra* note 54, at s. 13.07. *See Telephone Utility Terminal Co., Inc. v. EMC Industries, Inc.*, 404 So. 2d 183, 184 (Fla. 5th DCA 1981). *See Downing v. First Nat'l Bank of Lake City*, 81 So. 2d 486, 488 (Fla. 1955); *Figueredo v. Bank Espirito Santo*, 537 So. 2d 1113 (Fla. 3d DCA 1989); *Abbott v. Penrith*, 693 So. 2d 67 (Fla. 5th DCA 1997).
[80] *See Rolfs v. First Union Nat'l Bank of Fla.*, 604 So. 2d 1269, 1270 (Fla. 4th DCA 1992), and *Glynn v. First Union Nat. Bank*, 912 So. 2d 357, 357-58 (Fla. 4th DCA 2005), *rev. denied*, 933 So. 2d 521 (Fla. 2006).
[81] *Telephone Utility Terminal Co.*, 404 So. 2d at 184.
[82] Article 3 of the Uniform Commercial Code governs the negotiability of promissory notes, and ch 673, F.S., closely tracks the Uniform Commercial Code to reflect changes in the banking and mercantile industry.

note and attempt to enforce the note. A person who seeks to enforce a lost, destroyed, or stolen note must prove he or she was entitled to enforce the instrument when the loss of possession occurred or directly or indirectly acquired ownership of the instrument from a person who was entitled to enforce the instrument when loss of possession occurred.[83]

The right to possess or rightful possession of the mortgage note is a means to enforce the note and is based on commercial law.[84] Prior to 2004, banks and other lenders in Florida had difficulty enforcing lost negotiable instruments in certain situations due to the possession requirements of s. 673.3091, F.S., which governs the enforcement of lost or stolen negotiable instruments.[85] As late as 2003 in Florida, a bank could not maintain a cause of action to enforce a missing promissory note or foreclose a mortgage without proof that the bank had possession of the missing promissory note when the loss occurred.[86] Section 673.3091, F.S., was amended in 2004 to conform to changes that were made in 2002 to the Uniform Commercial Code, section 3-309.[87] The "lost note" issue may continue to affect foreclosure litigation in Florida because s. 673.3091(2), F.S., requires the lender seeking to enforce the note in court to prove the terms of the instrument and the lender's right to enforce the instrument. Additionally, in a foreclosure the court must ensure that the borrower required to pay the instrument is adequately protected against any loss that might occur if another person makes a claim to enforce the instrument.[88]

Borrowers have challenged the authority of lenders to enforce lost notes when it involves assignments of mortgage notes.[89] Before the Florida Supreme Court's issuance of an administrative order requiring plaintiffs in foreclosure actions to verify their ownership of the note or right to enforce the note, there were numerous instances of lenders who failed to adequately prove their right to enforce the mortgage notes.[90] Without careful diligence by lenders, procedural and substantive elements of litigating a motion for summary judgment may require additional litigation and make it more difficult for lenders to prove their authority to enforce lost notes.[91]

An equitable assignment is "[a]n assignment that, although not legally valid, will be recognized and enforced in equity."[92] To enforce a note for a foreclosure, a plaintiff with inadequate legal proof that an assignment was executed may ask a court for an equitable remedy. If granted, this would allow the plaintiff to show other evidence that an assignment of the mortgage note occurred. Under Florida law a lender may ask a court to find an equitable assignment of note occurred if it was the intent of the parties to assign the mortgage. If the mortgage is

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[83] Section 673.3091(1)(a), F.S.

[84] See Whitman, *supra* note 78, at 757. The Uniform Commercial Code more specifically governs a mortgage note when it is a negotiable promissory note. Under sections 3-301 and 3-203 of the Uniform Commercial Code, the right to enforce a negotiable note requires a person who is enforcing the note to possess the note.

[85] Senate Staff Analysis and Economic Impact Statement for SB 282 (2004 Reg. Sess.) by the Senate Committee on Judiciary (Jan. 20, 2004). Before the Legislature changed the law in 2004, a person seeking enforcement of a lost or stolen instrument had to satisfy three requirements: (1) the person had to be both in *possession* and entitled to enforce the instrument when it was lost; (2) the loss of possession of the instrument could not have been due to transfer or lawful seizure of the instrument; and (3) the person must not have been able reasonably to obtain possession of the instrument. Section 673.3091(1), F.S. (2003).

[86] *See State Street Bank & Trust Co. v. Lord*, 851 So. 2d 790, 791-93 (Fla. 4th DCA 2003).

[87] *Id.* at 793. Chapter 2004-3, s. 1, Laws of Fla. Staff Analysis for SB 282, *supra* note 85. Whitman, *supra* note 78, at 759-60 (The 2002 amendment by the Permanent Editorial Board of the Uniform Commercial Code to s. 3-309 of the U.C.C. "authorizes enforcement of a note by a person who 'has directly or indirectly acquired ownership of the instrument from a person who was entitled to enforce the instrument when loss of possession occurred.'" The 2002 amendment to s. 3-309 of the U.C.C. has been adopted in 10 states.).

[88] Section 673.3091(2), F.S.

[89] *See Verizzo v. Bank of New York*, 28 So. 3d 976 (Fla. 2d DCA 2010), and *Servedio v. U.S. Bank Nat. Ass'n*, 46 So. 3d 1105 (Fla 4th DCA 2010).

[90] *Id.*

[91] *See Verizzo*, 28 So. 3d at 977 (citing *E.J. Assocs., Inc. v. John E. & Aliese Price Found., Inc.*, 515 So. 2d 763, 764 (Fla. 2d DCA 1987)) ("If a plaintiff files a motion for summary judgment before the defendant answers the complaint, 'the plaintiff must conclusively show that the defendant cannot plead a genuine issue of material fact.'").

[92] BLACK'S LAW DICTIONARY 115 (7th ed. 1999).

not formally assigned, "[a]ny form of assignment of a mortgage, which transfers the real and beneficial interest in the securities unconditionally to the assignee, will entitle [the assignee] to maintain an action for foreclosure."[93]

***Potential Abusive Practices***

Also complicating foreclosure litigation in Florida, as well as nationally, are allegations that some lending-industry businesses or legal practitioners falsified or failed to properly verify foreclosure-related documents or engaged in other mortgage-related abuses. For example, assertions arose in fall 2010 that, amid the exponential increase in defaults and filings, some companies or firms engaged in "robo-signing" of documents, a practice in which, for example, mortgage affidavits or other documents integral to foreclosure cases were signed in mass without proper review or verification.[94]

The characterization of robo-signing as a fraudulent practice and the lack of verification of documents are believed by some lenders to only be an issue in judicial foreclosure states due to those states' requirements for verification of the documentation necessary to enforce foreclosure.[95] Judicial and adversarial scrutiny may be considered among the advantages that judicial foreclosure processes have over power of sale foreclosures that involve little or no judicial scrutiny to enforce rights of the parties to the foreclosure – the enforcement of a contract between borrower and lender.[96] Lenders assert that defects in documentation may be due to clerical errors and errant business practices in which lenders and mortgage servicers failed to take into account the legal need to verify by personal knowledge certain information necessary to enforce foreclosure.[97] Foreclosure documents come under more scrutiny because the legitimacy of the documents must be authenticated by the mortgage servicing company and the legal counsel prior to enforcing foreclosure documents in court.[98]

A law firm hired by Fannie Mae issued a report in 2006 in which it found that certain law firms that represented Fannie Mae filed false documents and that Fannie Mae did not take any steps to ensure the quality of its foreclosure attorneys' conduct, the legal pleadings, or the manner in which the attorneys processed foreclosures on its behalf.[99]

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[93] *WM Specialty Mortgage, LLC v. Salomon*, 874 So. 2d 680, 682 (Fla. 4 DCA 2004) (citing *Johns v. Gillian*, 134 Fla. 575, 184 So. 140, 143-44 (Fla. 1938)).

[94] See, e.g., David Streitfeld, "JPMorgan Suspending Foreclosures," The N.Y. Times, Sept. 29, 2010, *available at* http://www.nytimes.com/2010/09/30/business/30mortgage.html?scp=10&sq=robo-signing&st=Search&pagewanted=print (last visited Sept. 27, 2011); Nick Timiraos, "Fannie, Freddie Cut Ties to Law Firm, The Wall Street Journal, Nov. 3, 2010, *available at* http://online.wsj.com/article/SB10001424052748704462704575590342587988742.html; David Segal, "Debt Collectors Face a Hazard: Writer's Cramp," The N.Y. Times, Sept. 29, 2010, *available at* http://www.nytimes.com/2010/11/01/business/01debt.html (last visited Sept. 30, 2011).

[95] Mortgage Bankers Association and Housing Policy Council, *Understanding the Foreclosure Paperwork Situation*, *available at* http://www.mortgagebankers.org/files/ResourceCenter/ForeclosureProcess/MBAandHPCUnderstandingtheForclosurePaperworkSituation.pdf (last visited Sept. 30, 2011). *But see* Christopher J. DeCosta, *U.S. Bank v. Ibanez: the Mortgage Industry's Documentation Practices in Focus*, 55-SPG B. B.J. 23 (Spring 2011), and Gary Blankenship, "Who owns the note?," The Florida Bar News (Sept. 15, 2011), *available at* http://www.floridabar.org/divcom/jn/jnnews01.nsf/RSSFeed/1ECF0330FF80AED5852579090042EF92 (last visited Sept. 30 2011).

[96] See 51.07 Power of Sale Foreclosure, Debtor-Creditor Law ¶51.07 (Matthew Bender 2011), and Blankenship, *supra* note 95.

[97] Mortgage Bankers Association, *supra* note 95.

[98] 51.07 Power of Sale Foreclosure, Debtor-Creditor Law ¶51.07, *supra* note 96. See also Blankenship, *supra* note 95.

[99] Federal Housing Finance Agency, Office of Inspector General, *Evaluation of FHFA's Oversight of Fannie Mae's Management of Operational Risk*, Sept. 23, 2011, *available at* http://www.fhfaoig.gov/Content/Files/EVL-2011-006.pdf (last visited Sept. 30, 2011).

Meanwhile, the Florida Attorney General is participating in a 50-state coalition of attorneys general that is in settlement negotiations with leading entities in the mortgage-servicing industry over lending and foreclosure practices.[100] Attorney generals in all 50 states have launched investigations into foreclosure practices.[101]

## Judicial Foreclosure Filings in Florida

The number of foreclosure filings continues to be volatile in Florida. Florida and four other states together accounted for more than half of the foreclosure activity in the nation in August 2011.[102] Florida, the second-highest state with properties with foreclosure filings, had 23,569 properties with foreclosure filings, an increase of 5 percent from July 2011, but down from 59 percent from August 2010.[103] The State Courts Revenue Trust Fund is the funding source for approximately 83 percent of the fiscal year 2011-2012 budget for the state courts system. In turn, mortgage foreclosure filings were expected to account for approximately 80 percent of the revenue in the trust fund. Thus, the decline in foreclosure filings has reduced significantly the moneys available in the trust fund to fund the current year appropriation.[104] During fiscal year 2009-2010, the Legislature provided nonrecurring funding to assist courts statewide with increased foreclosure cases. In Florida, the backlog of mortgage foreclosure cases was significantly reduced during the year-long initiative. With more than 200,000 cases disposed, the backlog fell from more than 462,000 cases to under 261,000 cases.[105]

As of June 30, 2011, there were 180,180 inactive foreclosure cases and 196,212 active foreclosure cases pending in circuit courts in Florida.[106] Beginning in the second quarter of 2011, the number of cases disposed decreased significantly, and that trend continued for the rest of the year, in part due to the voluntary moratorium imposed by major lenders in Florida.[107]

The Fifteenth Circuit in Palm Beach County has been significantly affected by foreclosure filings. The circuit had approximately 4,500 foreclosure cases filed for 2006.[108] In 2007, the number of foreclosure filings rose to over 13,000, nearly a threefold increase. The number of annual foreclosure filings climbed over 29,000 in 2008, and in 2009 they went above 30,000 cases.[109] The Fifteenth Circuit was able to hire four case managers, four assistants, and two senior judges to work exclusively on foreclosure cases, and the circuit was able to reduce its local backlog of almost 60,000 cases to under 30,000 cases.[110]

A federal bankruptcy order issued for a condominium conversion in Palm Beach County notes that over 180 mortgage foreclosure proceedings were initiated against unit owners within that condominium and that in most of the proceedings the foreclosure plaintiffs faced "token or no opposition."[111] The condominium association's

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[100] See, e.g., Brady Dennis, "State attorneys general tackle mortgage servicing," The Wash. Post, Mar. 17, 2011, *available at* http://www.washingtonpost.com/business/economy/state-attorneys-general-tackle-mortgage-servicing/2011/03/17/ABGmNCn_story.html (last visited Sept. 30 2011).

[101] Margaret Cronin Fisk, "Attorneys General in 50 States Open Foreclosure Probe," Bloomberg Businessweek, Oct. 13, 2010, *available at* http://www.businessweek.com/news/2010-10-13/attorneys-general-in-50-states-open-foreclosure-probe.html (last visited Sept. 30 2011).

[102] RealtyTrac, *U.S. Foreclosure Activity Increases 7 Percent in August, Defaults Surge 33 Percent*, Sept. 13, 2011, *available at* http://www.realtytrac.com/content/press-releases/august-2011-us-foreclosure-market-report-6836 (last visited Sept. 18, 2011).

[103] *Id.*

[104] Source: Florida Office of State Courts Administrator.

[105] *Id.*

[106] Source: Florida Office of State Courts Administrator, Research and Data (on file with the Senate Committee on Judiciary).

[107] *Id.*

[108] Correspondence from representatives of the Fifteenth Circuit (on file with the Senate Committee on Judiciary).

[109] *Id.*

[110] *Id.*

[111] Order Granting in Part Debtor's Motion for Surcharge Pursuant to 11 U.S.C. Section 506(c) against OneWest Bank, Case No. 10-33758-PGH (Bankr. S.D. Fla. July 13, 2011).

assessments are substantially all of its revenue, and under Florida law it could not compel the lenders in foreclosure to complete the foreclosure and pay assessments for the units.[112]

As of June 21, 2011, the average first mortgage debt against the units was about $218,000 per unit, and the average value of a unit was about $48,000.[113] Over 100 mortgage foreclosure proceedings were pending as of the bankruptcy confirmation hearing. The mortgage foreclosure cases were pending for an average of 736 days, with the oldest one-third pending for an average of over 1,011 days.[114] The parties to the bankruptcy hearing, the condominium association and one bank, "stipulate[d] that there [was] no good reason for an undefended mortgage foreclosure case in Palm Beach County to last more than 180 days."[115] The plaintiff for one of the pending foreclosure cases filed the case in July 2008; moved for summary judgment in December 2008; filed a notice of hearing for his summary judgment motion in October 2009, a delay of 10 months; and scheduled the hearing on the summary judgment motion for January 13, 2010, but cancelled the hearing on December 21, 2009. Then in April 2010 the defendant filed a motion for a suggestion of bankruptcy, which requires a stay of the proceedings.[116] A similar history is indicated for a mortgage foreclosure case involving another unit in the same condominium association.[117] Although the volume of foreclosure filings created some unavoidable delays in Palm Beach County, it is unclear why the delay was so protracted in these cases. The foreclosure plaintiff has some discretion in managing the litigation through the process.

## Foreclosure Managed Mediation in Florida

In 2009, the Florida Supreme Court issued an administrative order that incorporated the recommendations of a task force on residential foreclosure cases.[118] The order required a managed mediation program to be implemented through a model administrative order issued by each circuit's chief judge. In its order, the Supreme Court recognized that state law and budgetary considerations prohibit the courts from collecting fees to support a foreclosure mediation program.[119] Therefore, the Court required the mediation to be implemented by nonprofit organizations that are "independent of the judicial branch, capable of sustained operation without fiscal impact to the courts, politically and professionally neutral, and have a demonstrated ability to efficiently manage the extremely high volume of foreclosure actions in the circuit or circuits in which services are to be provided."[120] Under the mediation program, all foreclosure cases in the state courts that involve residential homestead property will be referred to mediation unless the plaintiff and borrower agree otherwise or the parties have gone through pre-suit mediation.

The costs of the managed mediation program are paid by the plaintiff in a mortgage foreclosure case, and the total fee per case may not exceed $750.[121] About $400 of the $750[122] fee covers administrative costs including outreach

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[112] Section 718.116(1)(b), F.S., prevents the first mortgagee from becoming liable for the condominium assessments until it acquires title to a unit. See also *Deutsche Bank Nat'l Trust Co. v. Coral Key Condo. Ass'n*, 32 So. 3d 195 (Fla. 4th DCA 2010).

[113] Order Granting in Part Debtor's Motion for Surcharge Pursuant to 11 U.S.C. Section 506(c) against OneWest Bank, Case No. 10-33758-PGH (Bankr. S.D. Fla. July 13, 2011).

[114] *Id.*

[115] *Id.*

[116] Correspondence from representatives of the Fifteenth Circuit (on file with the Senate Committee on Judiciary). See *Indymac Bank v. Tejada*, Case No. 502008CA020473XXXXMB, 15th Cir. Ct. Fla.

[117] Correspondence from representatives of the Fifteenth Circuit (on file with the Senate Committee on Judiciary). See *Indymac Bank v. Saavedr*a, Case No. 502008CA018608XXXXMB, 15 Cir. Ct. Fla.

[118] Final Report and Recommendations on Residential Mortgage Foreclosure Cases, Admin. Order No. AOSC09-54 (Fla. Dec. 28, 2009), *available at* http://www.floridasupremecourt.org/clerk/adminorders/2009/AOSC09-54.pdf (last visited Sept. 11, 2011).

[119] *Id.*

[120] *Id.* As part of the order in exhibit 13, the Court also specified parameters for providers of managed medication services, including characteristics of the program manager. The Court later clarified its intent that managed mediation providers be non-profit organizations. Guidance Concerning Managed Mediation Programs for Residential Mortgage Foreclosure Cases, Admin. Order No. AOSC10-57 (Fla. Nov. 10, 2010), *available at* http://www.floridasupremecourt.org/clerk/adminorders/2010/AOSC10-57.pdf (last visited Sept. 14, 2011).

[121] *Id.*

and counseling fees, and the remaining $350 is payment for the services of the mediator.[123] The Court acknowledged that "[r]equiring borrowers to pay a portion of mediation up front would operate as a barrier to [its] goal of efficiently managing these cases to avoid waste of judicial and party resources." The mediation payments are staggered: a portion is paid at the time the case is filed with the balance due after mediation is scheduled. Plaintiffs may recover the mediation costs in the final judgment of foreclosure. Plaintiffs may receive a refund of the fee for foreclosure counseling if the borrower does not participate. Additionally, plaintiffs may obtain a refund if cases settle before mediation or if borrowers decline to participate in the program before mediating the case.

The model administrative order requires the mediation manager to schedule mediation no earlier than 60 days and no later than 120 days after a foreclosure case is filed. The mediation manager refers the borrower to a foreclosure counselor. Each mediation manager must also obtain financial information from the borrower that will be used during the mediation between the lender and borrower. Giving appropriate notice, the borrower may request information from the plaintiff before the mediation session, which typically includes: documentation that the plaintiff is a holder in due course of the mortgage note; the life history of the loan showing all payments; a statement of the current net value of the loan; and the most current appraisal report of the subject property available to the lender.

The borrower and his or her legal counsel, if represented, must appear at the mediation session in person, and the plaintiff's representative may appear through the use of the telephone or other electronic equipment.[124] The plaintiff's representative must have the full authority to sign the settlement agreement and bind the plaintiff to any mediated settlement.[125] The plaintiff may be subject to sanctions for failure to appear, including dismissal of the case without prejudice.[126] The Court issued an another administrative order in November 2010, which clarified the eligibility requirements for foreclosure mediators in the managed mediation program so that requirements in local court orders do not exceed those in its order.[127] Under the order, any Florida Supreme Court certified circuit court mediator who has completed special foreclosure mediation training is eligible to participate in a local managed mediation program.[128]

The mediator must take a written roll of the participants before mediation starts and note whether the plaintiff's representative has authority to settle, and such written roll and communication of authority are not considered mediation communication.[129] All mediation communication occurring pursuant to the Court's order is confidential and inadmissible in any legal proceeding.[130]

Some stakeholders have voiced concern that the required mediation extends the foreclosure process in Florida and that the costs should be equally borne by all parties to the litigation.[131] Many of the stakeholders have indicated that the program is an inefficient use of their time. Some borrowers purport that the process does not result in a loan modification. Lenders and servicers representing lenders are indicating that they may have authority to settle but often are lacking in sufficient information at the mediation to make any binding agreement. Some consumer advocates have argued nationally that mediation programs do not go far enough to require lenders to produce essential documents to modify borrowers' loans and do not require a lender to consider a loan modification in

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[122] The $400 includes a $275 administrative fee for the program manager and a $125 fee for the foreclosure counseling service provider.
[123] Final Report and Recommendations on Residential Mortgage Foreclosure Cases, Admin. Order No. AOSC09-54, *supra* note 118.
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] Guidance Concerning Managed Mediation Programs for Residential Mortgage Foreclosure Cases, Admin. Order No. AOSC10-57, *supra* note 120.
[128] *Id.*
[129] Final Report and Recommendations on Residential Mortgage Foreclosure Cases, Admin. Order No. AOSC09-54, *supra* note 118.
[130] *Id.*
[131] Florida Supreme Court Committee on Alternative Dispute Resolutions Rules and Policy, Report and Recommendations Relating to the Residential Mortgage Foreclosure Mediation Program, 10 (Dec. 28, 2010).

good faith.[132] Despite such limitations, judges in Florida believe that the managed mediation program is the first meaningful contact that a borrower ever has with his or her lender or servicer before the foreclosure and may be their last contact if the mediation fails and the case goes to foreclosure.

One researcher noted that none of the existing foreclosure mediation programs he has studied nationwide have produced any solid evidence demonstrating that these programs result in the production of long-term settlements which "preserve homeownership for households facing foreclosures."[133] Other researchers have indicated that an important consideration for all states implementing foreclosure mediation is "how mediation is scheduled and how the results of the programs are tracked."[134]

The model administrative order issued by the Florida Supreme Court requires mediation where the borrower may opt out, and directs the compilation of statistical information regarding the status of cases in the residential-mortgage mediation program.[135] The data collected provide some information on the program, but a majority of the circuits did not start their program until July 1, 2010, so it has been difficult for the Court to accurately provide meaningful data regarding the impact of the foreclosure-mediation program. The Federal National Mortgage Association (Fannie Mae) is implementing a pre-suit mediation program in all 20 circuits in Florida which is modeled after the residential-mortgage mediation program adopted by the Court.[136]

Based on the August 2011 report, which covers the period March 2010 to March 2011 and includes data from 19 of the 20 circuits in the state, the percentage of borrowers referred to the residential-mortgage mediation program and actually contacted by the mediation program was about 42 percent, or about 32,798 borrowers.[137] During that period, about 25 percent of the residential-mortgage mediations conducted resulted in a written agreement. In other words, over the period March 2010 to March 2011, the total number of borrowers who were found eligible for the program and who were contacted by the program was about 33,000. Of that 33,000, about 11,150 went through mediation, and 2,835 went through mediation resulting in a written agreement.

In October 2011, the Florida Supreme Court convened a workgroup to assess the performance of the statewide managed mediation program and to make recommendations based on the available data to continue, modify, or eliminate the statewide program.[138] The Court also charged the workgroup with recommending steps for the management of pending and new residential-mortgage foreclosure cases if the mandate for the statewide program is eliminated.[139] Among the workgroup's findings is that the emergency in residential-mortgage foreclosure filings continues to exist.[140] As a part of the workgroup's recommendation to the Court, the workgroup voted to eliminate the mandate for a statewide managed mediation program and to allow circuits to opt in to a new, revised uniform model administrative order for consistent implementation throughout the state.[141] Circuits could create a plan for discontinuing the local managed mediation program or opt in to a modified model administrative order. The workgroup agreed that significant modification must be made to the Court's existing model order to address

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[132] Walsh and National Consumer Law Center, *supra* note 21, at 13.
[133] *Id.* at 3-6.
[134] Dan Immergluck, Frank S. Alexander, Katie Balthrop, Philip Schaeffing, and Jesse Clark, *Legislative Responses to the Foreclosure Crisis in Nonjudicial States*, 18 (Jan. 27, 2011), *available through* Social Science Research Network: http://ssrn.com/abstract=1749609 (last visited Sept. 14, 2011).
[135] Final Report and Recommendations on Residential Mortgage Foreclosure Cases, Admin. Order No. AOSC09-54, *supra* note 118, and Guidance Concerning Managed Mediation Programs for Residential Mortgage Foreclosure Cases, Admin. Order No. AOSC10-57, *supra* note 120.
[136] Florida Supreme Court Committee on Alternative Dispute Resolutions Rules and Policy, *supra* note 131, at 14.
[137] Florida Office of State Courts Administrator, Key Determinant 120 Day Quarterly Status Report, Residential Mortgage Foreclosure Managed Mediation Programs, for March 2010 to March 2011. The data does not include statistics for Osceola and Seminole counties.
[138] In re: Statewide Managed Mediation Program Assessment Workgroup, Admin. Order No. AOSC11-33 (Fla. Sept. 26, 2011), *available at* http://www.floridasupremecourt.org/clerk/adminorders/2011/AOSC11-33.pdf (last visited Nov. 2, 2011).
[139] *Id.*
[140] Florida Supreme Court Assessment Workgroup for the Managed Mediation Program for Residential Mortgage Foreclosure Cases, Report and Recommendations (Oct. 21, 2011), *available at* http://www.floridasupremecourt.org/pub_info/documents/Foreclosure/10-21-2011_Workgroup_Final_Report.pdf (last visited Nov. 2, 2011).
[141] *Id.*

program weaknesses and recommended that the Court establish a separate workgroup to develop modifications to the order.[142]

## Costs of Foreclosure

State law governs the foreclosure process and timeline. The timeliness of foreclosure varies across states. The average time nationally between a missed payment signaling a default and a foreclosure sale is about one year, and it may take additional time to clear title and take possession of the foreclosed property.[143] Lenders incur a variety of costs due to delinquent property loans on foreclosed property, and such costs include condominium and homeowners' association fees for maintenance of the property, taxes and insurance, lost principal and interest, collection fees, and legal costs.[144]

One scholar has indicated that judicial foreclosure may prove more costly than nonjudicial "power of sale" foreclosure; however, the titles to property may be considered less stable in states that use nonjudicial foreclosure where a court does not supervise the process.[145] Benefits of judicial foreclosure may not be apparent in a pure economic context but may serve as a mechanism to more effectively prevent ongoing title defects. Judicial foreclosure gives finality to titles by: preventing defects in the documentation; deterring overt and intentional defects; encouraging regularity in the foreclosure process; and identifying potential defects in an adversarial proceeding between opposing parties.[146]

Under the current judicial process used in Florida, the following are a rough estimate of some of the average times for a litigated case to proceed from filing to foreclosure sale and the final issuance of a certificate of title to the plaintiff. On average, it takes about 24 months for a party to litigate a foreclosure in Florida if it results in a trial and several hearings on the matter. More commonly, parties to foreclosure proceedings in Florida use the motion for summary judgment and file the appropriate supporting affidavits. When a motion for summary judgment is used, and with service of process, and time for responsive motions from the defendant borrower, it may take a little more than 120 days to obtain a final judgment ending in a sale of the property to transfer title to the plaintiff.[147] On average, and with due diligence on behalf of the plaintiff, it takes about 70 to 90 days to foreclose on a property using the show cause proceeding under s. 702.10(1), F.S.[148]

The plaintiff's foreclosure bar has expressed concerns that the show cause procedure under s. 702.10, F.S., has not been fully utilized, in part, because attorneys consider the proceedings under that section to be limited to nonresidential property. The order to show cause procedure was designed to be used as a fast-track mechanism to litigate mortgage foreclosure and involves two types of proceedings. Under the first, in s. 702.10(1), F.S., a procedure is established for a judge to issue an order to show cause why a final judgment should not be entered on an expedited basis. First, the judge must verify that the plaintiff's filed complaint states a cause of action, and this is completed without any communication to the defendant of the action. Once the judge has verified the complaint, the judge must issue an order to show cause why a final foreclosure judgment should not be entered against the defendant. Without proof of service, the plaintiff is not entitled to entry of default or a default final judgment. After the defendant is served and given the opportunity to respond to the order, a hearing is scheduled.

Section 702.10(1), F.S., does not provide guidance on how junior liens may be foreclosed under the subsection, and it is unclear whether a judgment on the note or a deficiency judgment can be entered under the subsection.[149] Any final judgment of foreclosure entered under s. 702.10(1), F.S., is for *in rem* relief only but does not preclude

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[142] *Id.*
[143] *See* Mortgage Bankers Association, *Lenders' Cost of Foreclosure, Congressional Education Series Briefing* (May 28, 2008), *available at* http://www.mortgagebankers.org/files/Advocacy/2008/LendersCostofForeclosure.pdf (last visited Sept. 18, 2011).
[144] *Id.*
[145] Nelson and Whitman, *supra* note 31, at 1498-1507.
[146] *Id.*
[147] Conversations with attorneys who litigate foreclosure cases.
[148] *Id.*
[149] See also Honorable Jennifer D. Bailey and Doris Bermudez-Goodrich, *Residential Foreclosure Bench Book* (2010) (on file with the Senate Committee on Judiciary).

the entry of a deficiency judgment where otherwise allowed by law. The defendant's failure to file defenses by a motion, or by sworn or verified answer, or to appear at the show cause hearing presumptively constitutes conduct that clearly shows that the defendant has relinquished the right to be heard.[150] The plaintiff's foreclosure bar has indicated that the show cause proceeding under s. 702.10(1), F.S., has not been widely used because a defendant may protract the litigation by filing a defensive motion or a verified or sworn answer. However, the order to show cause must state that, if the defendant files defenses by a motion, the hearing time may be used to hear the defendant's motion.[151]

Section 702.10(1), F.S., does not specify a standard for the court to use when considering a defendant's defensive motions or answers to the show cause order. If the defendant files any defenses by a motion, or by a verified or sworn answer, it constitutes cause and precludes the entry of a final judgment and is sufficient to deny summary relief.[152] Some legal commentators believe that the "show cause proceeding" under both s. 702.10(1) and (2), F.S., is modeled on ss. 78.065 and 78.067, F.S., which outline a procedure for an order to show cause why a prejudgment writ of replevin should not be issued.[153] Under the replevin statute, "the court shall at the hearing on the order to show cause consider the affidavits and other showings made by the parties appearing and make a determination of which party, with reasonable probability, is entitled to the possession of the claimed property pending final adjudication of the claims of the parties. This determination shall be based on a finding as to the probable validity of the underlying claim against the defendant."[154]

The second type of proceeding, under s. 702.10(2), F.S., provides a mechanism in foreclosure cases involving property "other than residential real estate," for the issuance of an order to show cause why payments should not be entered during the pendency of a foreclosure action. Stakeholders have suggested that this subsection needs modification to clarify that property "other than residential real estate" also applies to property that is residential and not homestead but whose debt is commercial in character. Stakeholders have indicated that defendants who are corporations and who may not maintain homestead and who own the property as an investment have argued that s. 702.10(2), F.S., does not apply to such property.

## Options and/or Recommendations

Policy and procedural considerations relating to the manner in which a lender forecloses on a mortgage, and a borrower defends against that foreclosure, are complex. This report examines factors affecting the resolution of cases through the current judicial foreclosure process in Florida, but it does not offer recommendations on an alternative foreclosure process for use in this state. Based on the research and findings presented in this report, there are approaches the Legislature may consider if it wishes to enact policy in this area, recognizing that some of the approaches may face challenges to obtain consensus among the diverse stakeholders affected by mortgage foreclosure. In addition, a state's adoption of a nonjudicial foreclosure process may raise preemption concerns under the recently enacted federal Dodd-Frank Act, which limits the ability of lenders to require nonjudicial foreclosure in certain mortgage agreements. Although not fully discussed in this report, the adoption of a nonjudicial foreclosure process in Florida may require significant substantive and procedural modifications to the state's existing property laws, particularly those affecting the transfer of title.

There is a lack of uniformity among the approaches that states have developed to address both judicial and nonjudicial foreclosure to provide a fair and efficient mechanism to return collateral to a lender upon a sufficient showing that a borrower has defaulted on obligations under a security instrument and promissory note. Each state based on its unique history has developed a foreclosure process to address its needs. Some scholars argue that, at least in some instances, judicial foreclosure deters unnecessary foreclosures and voids wrongful foreclosures. Foreclosure is a costly and drastic legal remedy that accelerates the sum of a debt owed under a mortgage. Florida's judicial foreclosure process affords equitable remedies to borrowers and lenders, and reflects the

[150] Section 702.10(1)(b), F.S.
[151] Section 702.10(1)(a)5., F.S.
[152] Trawick, *supra* note 8, at s. 31:7.
[153] Gary Walk and Mark J. Wolfson, *An Analysis of the 1993 Mortgage Foreclosure Act*, 67 FLA. B.J. 68, 70 (Oct. 1993) (discussing the show cause mortgage foreclosure procedure under s. 702.10, F.S.).
[154] Section 78.067(2), F.S.

delicate balance of the rights of the parties affected by the action. The current process provides litigating parties notice and opportunity before a neutral decision maker to settle disputes, and a means for the borrower to assert defenses to foreclosure before acceleration of the mortgage. Florida has a show cause procedure under s. 702.10, F.S., which may be underutilized and could be modified to more efficiently hear foreclosure cases without any party to the foreclosure proceeding losing his or her access to court.