Seeking Equality Through Justice

LEGAL ADVOCACY CENTER
OF CENTRAL FLORIDA, INC

THE VOLUNTEER LAWYER'S PROJECT

A collaboration with Community Legal Services of Mid-Florida, Inc.

Basic Foreclosure Litigation Defense Manual

SEEKING EQUALITY THROUGH JUSTICE

LEGAL ADVOCACY CENTER
OF CENTRAL FLORIDA, INC

and THE VOLUNTEER LAWYERS PROJECT of COMMUNITY LEGAL SERVICES OF MID FLORIDA, INC.

PRESENT:

Basic Foreclosure Litigation Defense Training

WITH GUEST LECTURER:

APRIL CHARNEY

JACKSONVILLE AREA LEGAL AID, INC.

Live Presentation:
July 11, 2008 - Orlando

FL Bar C.L.E.R. Credits: 7
Course No. 5434 8

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Preface

Acknowledgments

The course materials for this booklet were prepared for the use by the registrants attending our Continuing Legal Education course during the lectures and later as part of the Volunteer Lawyers Program.

The Legal Advocacy Center of Central Florida, Inc. (LACCF) and Community Legal Services of Mid-Florida, Inc. (CLSMF) is especially indebted to the lecturer **April Charney** of Jacksonville Area Legal Aid, Inc. (JALA) for her donation of time and talent. Moreover, we wish to recognize the authors for their contribution: Roberto Cruz, Esq., LACCF Staff Attorney; and Jamie Owen, LACCF Senior Intern (Northwestern University School of Law, Chicago, IL); the LACCF Planning Committee members: Mary Raspet, Esq., LACCF Advocacy Director; Roberto Cruz, Esq., LACCF Staff Attorney; Janette Hernandez, LACCF Outreach Coordinator; and Jamie Owen, LACCF Senior Intern; and also the CLSMF Planning Committee: William H. Abbuehl, Esq., CLSMF Executive Director; Glenn Shuman, CLSMF Advocacy Director; Robert K. Dwyer, CLSMF Regional Director and Housing Substantive Law Unit Leader; Larry Glinzman, CLSMF Public Relations Manager; and Lena Smith, Volunteer Lawyers Program Manager.

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1. Type **5434 8** in the number of the course you wish to post in the Course Number box.
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Next, adjust the amount of credit hours in each category you wish to post to your record. Hours may only be posted in full and half hour increments. Once you have adjusted the credit amounts, input the date that the course was taken. After the date has been set, click Continue. You will then be asked to review your information and click a checkbox to affirm the validity of your submission. Upon doing so, click on Submit to post the credits to your record. If you notice an error, click Go Back to apply changes and re-Submit. You will be directed to a confirmation page to confirm that your record has been updated. You may print this page for your records.

Additional Information & Phone Support

Please call (866) 854-5050

Lecturer

APRIL CHARNEY is a Senior Staff Attorney with Jacksonville Area Legal Aid, Inc. (JALA. Ms. Charney received a B.A. in Political Science from Florida International University and at age 22, a J.D. from the University of Miami. She practiced privately for seven years, and then spent four years at a legal services program in Fayetteville, Arkansas. From 1991 to 2003, April managed a county office in Sarasota, Florida for Gulfcoast Legal Services. In 2004, Ms. Charney joined JALA as a consumer lawyer. Being one of more than thirty (30) attorneys with JALA gives Ms. Charney the opportunity to pursue consumer law in many directions. She advocates against all manner of predatory consumer practices. During 2005-2006 the Consumer Unit of JALA defended over $10 million dollars worth of homes from foreclosure in Northeast Florida. April's work includes legislative and community outreach, and advocacy, financial literacy education, trial practice and litigation, class actions and appeals in state and federal court and bankruptcy.

Ms. Charney was recently featured in the 6.18.07 Forbes Magazine's article called *Paper Chase*, here are some excerpts:

In 2006 Michelle Tucker, a 35-year-old UPS package processor and mother of two, was hit by a one-two punch. Her husband had surgery on his shoulder and was forced to stop taking construction jobs around town that helped pay the bills. Worse, the adjustable mortgage with the low teaser rate she took out on her three-bedroom home in Jacksonville, Fla. adjusted, now to 10%, nearly double her old rate. She defaulted. Soon after, the lender filed suit to foreclose.

Then a stroke of luck: A Legal Aid lawyer, April Charney, got the foreclosure withdrawn after discovering that the company that filed to foreclose didn't own the Tuckers' loan. The owner was actually a securitized pool of loans overseen by ***Deutsche Bank.*** *And Charney has documents showing the pool bought the loan after the Tuckers defaulted–an illegal purchase for most pools, including this one. That means a court might refuse to recognize it owns the loan. Charney is arguing it should do just that.*

"I buy time, then get lenders to cut interest rates and fees," says Charney, who claims she's stopped dozens of foreclosures over ownership issues. Other lawyers are making similar moves in Maryland, New York, Massachusetts, Ohio, Kansas and Washington State–often forcing sloppy lenders to offer generous terms to avoid litigation.

Charney, the Tuckers' lawyer in Jacksonville, stumbled upon the industry's paperwork problem two years ago after noticing that nearly all lenders seeking to foreclose against clients were filing "affidavits of lost notes"–essentially requests that a judge assume they own the loan since no proof is at hand."

Writers

ROBERTO CRUZ is Staff Attorney with the Legal Advocacy Center of Central Florida, Inc. (LACCF) practicing civil and consumer rights. Mr. Cruz received a B.A. in Social Sciences from the University of Puerto Rico in 1994, and a JD from the InterAmerican University School of Law in 1997, where he was a member of the Law Review. He is member of the American Immigration Lawyers Association, the United States Court of Appeals for the Armed Forces, the United States Court of Appeals for the First and Eleventh Circuits, the United States District Court for the District of Puerto Rico and Middle District of Florida, the Puerto Rico and Florida Bar Associations, and the Puerto Rico Civil Notary Bar. While in the Puerto Rico Attorney General's office, Mr. Cruz has managed high profile civil rights cases, including the matter of *PAC v. Commonwealth of Puerto Rico*, 531 U.S. 920, reviewed by the Supreme Court of the United States. In private practice, he represented *Fortune 100* companies, along with major real estate developers and landlords, and lead the Consumer Rights Unit of William Estrtella Law Offices, PSC, which is listed by the *National Law Journal* as one of the Firms that represents Corporate America. As a solo practitioner in Florida, Mr. Cruz represented minority small businesses and low income consumers, and later became involved in public interest law. Mr. Cruz is listed in the *Who's Who of Executives and Professionals*, and has been awarded with a Letter of Commendation by Puerto Rico's Attorney General, the Above and Beyond Award by LACCF, and the Hero of Advocacy Award by the League of United Latin American Citizens (LULAC).

JAMIE L. OWEN is a Florida Bar Foundation Fellow and Senior Intern with the Legal Advocacy Center of Central Florida, Inc. (LACCF). and rising third year student at Northwestern University School of Law in Chicago, IL. At Northwestern, she has been involved with various volunteer activities and the Student Bar Association. She graduated in 2005 from the University of Miami (B.A. in English and Political Science; *cum laude*, Phi Beta Kappa).

Lecture Program

DEFENDING FORECLOSURES IN FLORIDA
Orange County Public Library (OCPL)
101 E. Central Boulevard
Orlando, Florida 32801
Friday, July 11th, 2008
Presenter – April Charney
Senior Staff Attorney
Jacksonville Area Legal Aid, Inc.
TENTATIVE PROGRAM

(NOTICE: GARAGE PARKING IS AVAILABLE IN FRONT OF THE OCPL)

9:00am – 9:20am - Registration

9:20am – 9:30am – Introduction

9:30am – 11:30am – Defending Foreclosures in Florida

- Reasons to defend foreclosures
- Client intake/statements of fact/collecting documents
- Realistic expectations and outcomes
- Attorney's fees-how to get them
- Costs
- Enforcement actions-government contacts
- Negotiation/education
- Mediation
- Case management
- Settlements, valuation, loan restructuring

11:30am – 12:30pm – Lunch

(WARNING: LUNCH WILL NOT BE PROVIDED AT THE LIVE PRESENTATION)

12:30pm – 1:15pm - Federal Laws that Govern Mortgage Origination and Servicing

- Truth-in-lending act
- Homeownership and equity protection act
- Equal credit opportunity act
- Real estate settlement and procedures act
- Fair housing act
- FTC "holder" rule
- Fair Debt Collection Practices Act

- Racketeer influence and corrupt organizations act
- Securitation
- Mortgage owners and servicers

1:15pm – 1:30pm – Break

1:30pm – 2:30pm – Laws and Regulations that Govern Mortgage Lending and Servicing

- OCC Guidelines for Residential Mortgage Lending Practices 2003
- FRB Proposed Statement on Sub-prime Lending 2007
- FHA/HUD laws and regulations on default servicing/loss mitigation
- Federally related mortgage loans
- VA insured home loan Servicing Handbook
- Fannie Mae/Freddie Mac and Private Label Loan Servicing
- 12 USC 1701x – Homeownership Counseling Act
- Foreclosure Prevention: Comptroller of the Currency Report 2007
- Service Members Civil Relief Act (SCRA)

2:30pm – 3:30pm – Understanding Loan Documents, Origination and Closing Process

- Broker agreements
- Home improvement contracts/
- Residential loan application
- Good faith estimate
- Underwriting directives/closing instructions
- Pre-approval forms
- Broker and lender worksheets and forms
- Credit reports
- Appraisals
- Title opinions/commitments
- Settlement statements
- Settlement checks
- Truth in lending disclosure statements/forms
- Public records
- Mortgages, notes fixed, ARMS, balloon, riders, addendums
- Notices of right to cancel

3:30pm – 4:30pm - Post-Origination issues – Servicing Problems

- Life of loan/transaction histories and codes
- Attorney's fees, charges and costs
- Pooling and servicing agreements
- Servicing bad acts

LIST OF RESTAURANTS IN THE DOWNTOWN ORLANDO AREA

NAME	ADDRESS	TELEPHONE NO.	DISTANCE FROM LOCATION
Z Café	Inside the Public Library		
Breakfast Club of Orlando	63 E. Pine Street		1 min. – 0.23 miles
Daily News	229 Magnolia Avenue		0.90 min. – 0.19 miles
Empire Szechuan	341 N. Orange Avenue		2 min. – 0.69 miles
Anthony's Next Door	106 N. Summerlin Ave	(407) 648-2772	2 min. – 0.65 miles
Anthony's Pizza Café	100 N. Summerlin Ave	(407) 648-0009	2 min. – 0.64 miles
Baraka Grill	37 S. Orange Ave	(407) 839-8500	0.70 min. – 0.12 miles
Brick & Fire Pizza & Wine	116 W. Church Street	(407) 426-8922	2 min. – 0.68 miles
Dan's Sandwich Shoppes	28 S. Orange Ave	(407) 425-8881	0.70 min. – 0.11 miles
Gargis Italian Restaurant	1421 N. Orange Ave	(407) 894-7907	5 min. – 1.75 miles
Gino's Pizza	120 S. Orange Ave	(407) 999-0227	0.80 min. – 0.17 miles
Gino's Pizza	54 W. Church Street	(407) 447-0793	2 min. – 0.74 miles
La Fontanella Ristorante	900 E. Washington St	(407) 425-0033	2 min. – 0.76 miles
Metro Expresso	431 E. Central Blvd	(407) 422-5282	0.90 min. – 0.30 miles
NYPD	373 N. Orange Ave	(407) 872-6973	2 min. – 0.65 miles
Pebbles Downtown	17 W. Church St	(407) 839-0892	2 min. – 0.78 miles
Piattini	595 W. Church St	(407) 419-3773	2 min. – 0.70 miles
Pizza Hut	1621 S. Orange Ave	(407) 425-2442	4 min. – 1.42 miles
Pizzeria Uno's Chicago Bar & Grill	55 W. Church Street Suite 248	(407) 839-1800	2 min. – 0.74 miles
Planet Pizza	14 W. Washington St	(407) 650-8859	1 min. – 0.21 miles
Sergio's	355 N. Orange Ave	(407) 428-6162	2 min. – 0.67 miles
Doc's Restaurant	1315 S. Orange Ave	(407) 839-3627	4 min. – 1.24 miles
Absinthe Bistro and Bar	116 W. Church St	(407) 401-8932	2 min. – 0.68 miles
Amura Japanese Restaurant	55 W. Church Street	(407) 316-8500	2 min. – 0.74 miles
Aztex Restaurant	429 W. Church St	(407) 839-1373	2 min. – 0.54 miles
Bar-B-Q Bar	64 N. Orange Ave	(407) 648-5441	1 min. – 0.23 miles
Beyond Juice	250 S. Orange Ave	(407) 999-2574	1 min. – 0.30 miles
Big Belly Brewery	33 E. Church Street	(407) 649-4270	1 min. – 0.25 miles
Eola Wine Company	500 E. Central Blvd	(407) 481-9100	1 min. – 0.37 miles
HUE	629 E. Central Blvd	(407) 849-1800	1 min. – 0.48 miles
Sushi Hatsu Japanese	24 E. Washington St	(407) 422-1551	0.80 min. – 0.17 miles

WARNING: LUNCH WILL NOT BE PROVIDED AT THE LIVE PRESENTATION

Table of Contents

DISCLAIMER: This Manual is for Volunteer Lawyers Project's use and future reference, and supplements the materials prepared by the Lecturer.

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www.LACCF.org

Introduction

The Legal Advocacy Center of Central Florida, Inc. (**LACCF**) is a non-profit non- Legal Services Corporation restricted law firm dedicated to enforcing the legal rights of eligible low-income clients and disabled persons in Florida Legal Services Region III by providing advice and counsel, legal representation on "impact matters" and class action lawsuits, community education and outreach, and legislative advocacy.

We are a proud recipient of funds from the Florida Bar Foundation and we are also able to collect attorney's fees from opposing parties. Nonetheless, our services are free of charge to our clients.

In order to obtain free assistance, a client must be eligible for services by meeting guidelines that are very similar to those of our state agencies. These guidelines are based primarily on income, assets, and household size. We will be happy to speak with anyone to determine if they are eligible for free services.

We are located in Sanford, FL, but we serve eligible clients in twelve counties: Brevard, Citrus, Flagler, Hernando, Lake, Marion, Orange, Osceola, Putnam, Seminole, Sumter and Volusia, through an understanding with Community Legal Services of Mid-Florida, Inc. (**CSLMF**).

The Volunteer Lawyers Project, a program of LACCF and CLSMF, matches volunteer private attorneys with low-income individuals in need of civil legal assistance. Central Florida lawyers have a tradition of helping their low-income neighbors through pro bono work. The Volunteer Lawyers Project, which is administered by LACCF and CLSMF, works in conjunction with local bar associations to provide pro bono legal assistance to the disadvantaged in Central Florida. We attribute our success to many attorneys who have donated their time to this project. However, due to the growing class of people unable to afford legal representation, the need of volunteer lawyers is great. What is asked of you is not a lot. What you will get in return is great experience, exposure, fulfillment of your professional obligation to help the less fortunate, and the satisfaction of knowing that you have made a difference in your community.

As part of your registration to this training, you have been identified as an attorney who would like to volunteer with the Volunteer Lawyers Project of Mid-Florida.

In the future, we will contact you indicating in which of the following areas you can assist. Feel free to contact us. We will get back to you shortly to discuss your generous participation.

Chapter 1

How the Mortgage Industry Operates

Mortgage Products

A Mortgage is a loan in which the borrower puts up the title to real estate as security (collateral) for a loan. If the borrower doesn't pay back the debt on time, the lender can foreclose on the real estate and have it sold to pay off the loan.

Four types of mortgage products are the most common in the real estate industry.

MORTGAGE PRODUCTS

- Fixed Rate Mortgage
- Adjustable Rate Mortgage
- Purchase Money Mortgage
- Reverse Mortgage

Fixed Rate Mortgage. A fixed rate mortgage has a fixed interest rate for the life of the loan. Payments generally remain the same amount for the life of the loan.

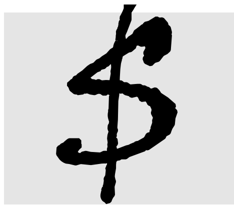
Adjustable Rate Mortgage. An adjustable rate mortgage, or ARM, has a fluctuating interest rate is varies over the term of the loan. The interest rate is adjusted at intervals specified in the mortgage contract and is adjued according to a set formula. Usually, the monthly payments for an ARM increase as the interest rate increases.

Purchase Money Mortgage. A mortgage obtained to purchase a residence.

Reverse Mortgage. Reverse mortgages, also known as home equity conversion mortgages, allow people – generally over 62 years old – who own their homes to access the equity in their homes through a monthly or lump sum payment. The loan does not have to be paid back as long as the borrower lives in the home.

Any debt on the home has to be paid off before obtaining the reverse mortgage or by using a cash advance from the reverse mortgage.

Mortgage Managers, Servicers and Other Players



Mortgage Brokers.

Mortgage Brokers, historically, are a third party that brings a lender and a borrower together. Today, however, mortgage brokers can work in their own interests or in the interests of the lender. Some brokers are both the lender and the broker. Brokers can originate the loan by using money provided by a pre-arranged purchaser of the loan ("table funding" the loan), originate the loan using credit given by some other entity, originate the loan using their own funds or bring the lender and borrower together in a way that they do not originate.

Mortgage Originator.

A mortgage originator is the original lender of the loan that appears on the loan note, and other documents.

Mortgage Holder.

A mortgage holder is the entity that has a right to foreclose on the home. It may be the original lender, but mortgages are often sold to investors.

Secondary Mortgage Market.

The secondary mortgage market is the term given to the process when lenders sell their loans, usually in bulk, to buyers.

Mortgage Servicer.

A mortgage servicer is interacts with the homeowner on the lender's behalf. The servicer collects payment, negotiates any repayment or loss mitigation plan with the homeowner, and hires a foreclosure attorney to foreclose the property if necessary.

Closing Attorney or Agent.

A closing agent is often an attorney who works for the lender. He or she conducts the closing and performs pre-closing tasks like conducting a title search and preparing documents. A borrower sometimes thinks that the closing agent works for him because the borrower pays the agent's fee, but the agent works for the lender.

Securitization: Mortgage Backed Securities

Securitization is the process where a mortgage becomes a commodity. The original lender sells a large pool of mortgages to a third party who issues securities to be used to be sold to investors around the world.

This process raises funds for the original lender at a lower cost than the lender would have had in obtaining a loan. The financial health of the original lender is less important to investors than the important to investors than the potential return on the purchase of the securities. In this process, the original lender is no longer the owner of the loan. Instead, the loan is usually held in trust for the investors. The interest on monthly payments must be high enough to pay the servicer, the trustee and the investors.

Foreclosure Rescue Fraud

Foreclosure rescue fraud is a variety of schemes targeted at home owners already facing foreclosure and financial distress. Typically, a home owner is identified using public notices of foreclosure by a "rescuer" and is promised that the "rescuer" will save the home owner's home. These schemes generally come in three forms. One, known as "phantom help," is when a "rescuer" charges the home owner unreasonable fees for paperwork and/or phone calls that could have easily been performed by the home owner or makes a promise for assistance that never occurs. The home owner is usually left without enough assistance to save the home and no time to find some other assistance. The second is a bait-and-switch scam where the home owner signs documents that he typically believes is an agreement to make the mortgage current, but he is really signing over the ownership of the home. Many of this type of scheme involve fraud and forgeries of deeds. The third is a bailout that typically involves the home owner signing over the ownership of the home with the belief that he will be able to get the home back. Generally, the home owner becomes a tenant of the "rescuer" on terms that are often unaffordable and oppressive. This type of scam is often interpreted by courts not as a conveyance of the home, but as an equitable mortgage – a loan by the "rescuer" to the home owner.

Chapter

2

Defending Foreclosures in Florida

The reasons to defend foreclosures stem from the most valued of American Dreams: homeownership. The troubled lending industry is not only robbing many people of that dream, but significantly, is affecting the country as a whole. The wave of foreclosures has over burdened government resources, has been blamed for destabilizing the economy and the falling stock market, and has made obtaining credit for consumers and businesses more difficult. As Congress and state legislatures have failed to tackle the issue, consumer attorneys are doing their part to manage or curb the trend, and hopefully, help stabilize the economy.

To protect our clients' most valued asset, we need to be prepared to raise a defense against foreclosure actions. Our ability to raise that defell depend on our ability to discover all relevant facts. Here are the three steps to perform a preliminary fact finding:

First Step: Client Intake

When interviewing a client for the first time, information that should be obtained from the client includes:

- Biographical and contact information.
- Employment and any other sources of income.
- Name and contact information of the creditor.
- Name and contact information of the broker, if any.
- What information that the client has received since defaulting, whether the client received counseling information, whether the client participated in counseling and whether any other loss mitigation steps were taken by the lender.

- What the client wants: To sell the home? Reinstate the mortgage? File bankruptcy?

See Appendix 1: Client's Intake

Second Step: Statements of Fact.

A signed statement of fact, preferably notarized, documenting the client's view on the mortgage transaction and the communications that the client has had with the lender or the servicer leading up to foreclosure should be done at intake. The client's recollection of the events is likely to fade over the course of the litigation. If the client is a couple, a statement of fact should be signed by both parties. This protects the lawyer from being accused of filing a frivolous suit and can be used, if necessary, as an affidavit later.

See Appendix 5: Client's Affidavit in Opposition to Motion for Summary Judgment

Third Step: Collecting Documents.

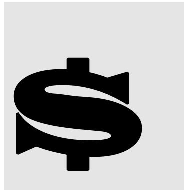
Obtain any and all documentation that the client has received from the lender, servicer or broker. The client may also sign a release so that documents can be requested from the closing agent or attorney.

See Appendix 1: Client's Authorization for the Release of Records

Realistic Expectations and Outcomes

The goals of consumer lawyers in defending mortgage foreclosures are: (1) to assist the client in raising affirmative defenses in order to either voluntarily surrender the home or to renegotiate the terms of the mortgage; and (2) to file any counter claims for violation of consumer law statutes to make an impact on predatory lending practices.

Attorney's Fees- How to Get Them



There are many different rules and statutes that allows for attorney's to collect fees. Under Florida Rule of Civil Procedure 57.105, an attorney can collect fees if the lender fails to establish a cause of action – usually can be claimed if the plaintiff does not attach the correct documents to support its allegation. TILA, HOEPA and other federal statutes also allow for the recovery of attorney's fees. Civil conspiracy and civil theft claims also allow for the recovery of attorney's fees.

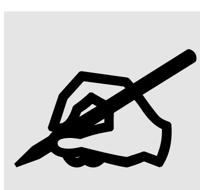
Costs

Under Florida Rules of Civil Procedure, costs can be obtained under 1.429(d), if the opposing party voluntarily dismisses the complaint. See Appendix B *In Re: Amendments to Unif. Guidelines for Taxation of Costs*, 915 So.2d 612 (Fla. 2005)(discussing permissible costs that can be charged). Costs can also be obtained under HOEPA and FDCPA.

Keeping Good Faith

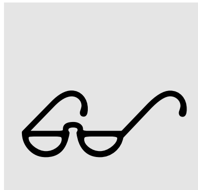
In order for a client to prove that he has good faith toward paying the mortgage, he must deposit an amount in the attorney's trust account. This amount should be equivalent to the monthly mortgage payment, but can be the amount that the client can afford if the payment is too large.

Media



If and when the media becomes involved in the matter that one is working on, one should maintain a good working relationship with the reporter by being accurate, honest and timely. Also, one should make sure to be very clear about what is "on" and "off" the record. News articles can help influence legislators and their constituents to address an issue and help to educate the community.

Negotiation/Education

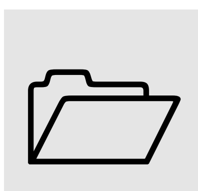


A number of organizations exist that can aid a person facing foreclosure. These organizations help people learn about the foreclosure process and negotiate with the lender. Under the Home Ownership Counseling Act, a lender is required to provide a borrower in trouble with a list of the lender's counseling resources, if any, and HUD certified counselors. For example, ACORN (Association of Community Organization for Reform Now; http://www.acorn.org) is HUD certified and offers counseling services for those facing foreclosure.

Mediation

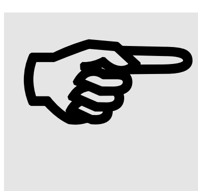
Mediation could potentially help the borrower. The lender could agree to restructure the loan in a way that the borrower can afford and help to keep the borrower in the home.

Case Management



Mortgage foreclosure cases can become complicated very quickly. Keeping separate binders for documents received from the client, closing agent and lender is highly recommended. Using a spreadsheet to track any differences in the documents is also recommended.

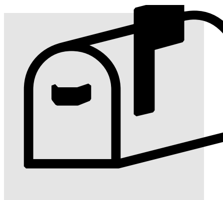
Managing the Client



An attorney taking a pro bono foreclosure case must keep in mind a number of things. First is that the client may be very different from the clients that he is used to dealing with. A foreclosure client is likely to be less educated, unsophisticated and may have trouble understanding the complexities of the case. The client may also have unreliable transportation and be without a phone. Second, meet with the client periodically to make sure that his goal remains the same and to guide him to have realistic expectations. If a couple, make sure that both parties want the same thing. Keep the client informed on developments in the case. Pro bono clients can get just as frustrated as regular clients.

Settlements, Valuation, Loan Restructuring

Settlements. Settling with the lender on a foreclosure case can keep the client in the home. A lot of settlements include restructuring the loan.



Valuation. Valuation is a determination of how much the home is worth on the market at a specific time.

Loan Restructuring. Loan restructuring is when the original loan is restructured in order to make the payments more affordable to the borrower to avoid foreclosure. An example would be to extend the loan term to make the monthly payments smaller.

Chapter 3

Federal Laws that Govern Mortgage Origination and Servicing

FEDERAL LAWS

- Truth in Lending Act (TILA)
- Home Ownership and Equity Protection Act (HOEPA)
- Equal Credit Opportunity Act (ECOA)
- Real Estate Settlement and Procedures Act (RESPA)
- Fair Housing Act (FHA)
- Federal Trade Commission Holder Rule
- Fair Debt Collection Practices Act (FDCPA)
- Racketeer Influenced and Corrupt Organization Act (RICO)

8 There are eight (8) major federal laws pertinent to mortgage origination and servicing.

Truth-in-Lending Act (TILA); 15 U.S.C. § 1638.

Purpose. TILA is largely a disclosure statute that requires that lenders make certain disclosures to borrowers and potential borrowers. The Act is meant to insure that borrowers are informed of all of the terms of the loan before they take out the loan and can make an informed decision.

Scope. TILA applies to consumer credit – both closed end credit (like mortgages) and open ended credit (like credit cards) – extended by a creditor.

To constitute as **"consumer credit"** under the statute:

- The consumer must be a natural person.
- Credit is the right to defer payment of debt or to incur debt and defer payment.

- The credit must be payable, by written agreement, by more than four installments or subject to finance charges.

Under TILA, a **"creditor"** is:

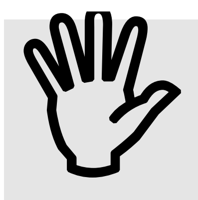
- An entity that regularly extends consumer credit. Regularly means six or more real estate secured loans, two or more high cost loans (or one or more if made through a broker), or 26 or more in other cases per year.

- The creditor is the entity to which the obligation is payable to on its face. Arrangers, like brokers, are not covered by TILA.

Exceptions.

- Business, agricultural, organizational and commercial credit.
- Credit over $25,000 unless secured by real estate or a dwelling.
- Public utility credit in some instances.
- Securities or commodities accounts.
- Certain student loans.
- Home fuel budget plans if no finance charge is imposed.

Protections.



Fundamentals. Lenders must disclose the following terms and conditions:

1. Amount Financed. The amount financed is the amount of money that the borrower receives for his own benefit. Generally, this would include the proceeds of the loan, the purchase price of the goods/services being purchased, and the amount of pre-existing debts being paid off by consolidation or refinancing. Amount financed is roughly the same as the concept of "principle" but it is distinct from how principle is construed under state usury laws.

2. Finance Charge. Any charge that a consumer pays, directly or indirectly, that is charged by the creditor, directly or indirectly, as incident to or a condition of the extension of credit. Examples include interest, service charges, points, origination fees, and many other costs associated with credit.

3. Annual Percentage Rate (APR). The cost of credit as a yearly rate.

Required Disclosures for Closed End Credit – Failure to disclose the following terms and conditions gives rise to Statutory Claims.

1. Total Finance Charge. Consists of all finance charges as defined above.

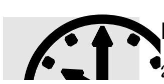
Exceptions

a. Under certain conditions, charges by third parties, closing agent fees, debt cancellation coverage, and overdraft fees.
b. Application fees so long as they are charged to all applicants, whether or not credit is extended.
c. Late fees.
d. Certain closing costs, so long as they are bona fide and reasonable.
e. Voluntary credit life, health, accident and loss of income insurance so long as the voluntary nature, cost and term are disclosed and the consumer separately agrees to the insurance in writing.
f. Credit property insurance premiums so long as the consumer is aware that he can purchase insurance elsewhere.
g. Certain security interest related charges.
h. Annual fees or fees periodically charged as a condition to credit.
i. Seller's points.
j. Interest reductions in time deposits.

2. Amount Financed. The principle part of the loan minus all charges deemed to be finance charges.
3. Annual Percentage Rate.
4. Payment Schedule.
5. Total Number of Payments.
6. Security Interests.
7. Special Formatting Rules.

The disclosures must be clear, obvious, separate from other information and in a form that the borrower can keep. Disclosures must be provided in a timely manner, in a way that the borrower can keep before the consummation of the loan.

Lenders must also give the borrower a Notice of Right to Cancel, which informs the borrower of his right to rescind and contains the forms that the borrower needs to exercise that right.



Relief and Statute of Limitations. Under TILA, the borrower has an absolute right to rescind for three business days after the consummation of the loan. After three business days, a borrower may have the right to rescind up to three years if the disclosures were not made to the client. Damages and attorney's fees are recoverable under the statute.

Home Ownership and Equity Protection Act (HOEPA); 15 U.S.C. § 1639

Purpose. HOEPA is designed to protect all borrowers, but especially borrowers that apply for and take out high cost loans. HOPEA is associated with TILA and is often considered a part of TILA.

Scope. Same as TILA.

Protections. Special Disclosures for Variable Rate Closed End Loans (like ARMS)

1. The lender must disclose the maximum interest rate that could be charged over the life of the loan in the loan note.
2. The lender must give the borrower a copy of the ARM brochure that contains generic information about ARMs as well as more specific explanations of the aspects of each variable rate plan that the borrower is considering.
3. These disclosures must be given when the application is furnished or before the payment of a nonrefundable fee, which ever is first.
4. During the life of the loan, the lender must send rate adjustment or change notices before the loan rate will change.

HOEPA prohibits prepayment charges and balloon payments in a limited amount of cases, higher interest rates after default, negative amortization, more than two payments being made from the loan proceeds, pattern/practice of extending credit without taking into consideration the borrower's ability to pay, and payments directly to home improvement contractors.

Relief and Statute of Limitations. A party can recover damages and rescind under HOEPA. Attorney's fees and costs are also available. The statute of limitations for affirmative actions is one year. For rescission, the statute of limitation is three years.

Equal Credit Opportunity Act (ECOA); 15 U.S.C. § 1691

Purpose. The purpose of the ECOA is to stop discrimination in the lending industry.

Protections. ECOA has three important aspects:

1. First, it prohibits discrimination in any aspect of credit based on race, color, religion, national origin, sex, marital status, age, and public assistance income.
2. Second, the ECOA requires creditors to take specific actions when approving or denying credit, prevents certain factors from being used to determine creditworthiness, mandates when an existing account may be closed, and restricts the ways that information is reported to credit reporting agencies concerning spouses.
3. Third, the Act imposes certain notice requirements on the credit issuer when a loan application is approved or denied. If the creditor makes a counter offer (for more or less credit), then it must notify the borrower in writing of the new terms.

How ECOA Protection Can Be Applied to Foreclosure Fraud

Bait and switch tactics may give rise to a claim under the ECOA. If a creditor gives credit in a much larger amount than the borrower requested and never gives the borrower an opportunity to deny the additional amount, then the creditor violated the procedural terms of the ECOA by failing to provide the borrower with written notice of all action taken on the original loan application. This tactic is often used in predatory lending. A creditor will give more credit to pay borrower's debts that the borrower expressed no interest in paying. The new amount is often disclosed too late in the process for the borrower to feel as if he can object.

Relief and Statute of Limitations. The ECOA allows home owners to pursue relief higher on the food chain than the original lender, and provides for actual and punitive damages (up to $10,000 in an individual action), equitable relief and attorney's fees. The statute of limitations is one year.

Real Estate Settlement and Procedures Act (RESPA); 12 U.S.C. § 2601 *et seq*.

Purpose. The purpose of RESPA is to protect home buyers from abusive practices in the residential real estate industry. The Act controls the manner in which settlement services for a residential real estate loan are provided and compensated.

Scope. RESPA applies to federally related mortgages, meaning those made by federally-insured depository lenders, HUD-related loans, loans intended to be sold on the secondary market to Fannie Mae or Freddie Mac or to creditors who make or invest more than a million dollars per year in residentially secured loans. Most home equity loans (as well as refinancings), mobile home purchase loans and construction loans are covered by RESPA. A loan for vacant land is excluded unless a structure will be constructed or a manufactured home will be placed on the property within two years of settlement of the loan. There are some exceptions to RESPA. If a lender makes a loan from its own funds, holds the loan for varying periods of time and then sells the loan on the open market, it is not covered. Also, certain lenders that originate loans through a computer system are generally exempt from RESPA's requirements.

Protections. RESPA requires that no later than three business days after the application, the consumer must receive a "good faith estimate" of settlement costs (usually via the HUD-1 settlement statement) along with a booklet explaining the costs. At closing, all settlement agents must use the HUD-1 settlement statement to clearly itemize the costs. RESPA also prohibits kickbacks and unearned fees. No person shall give or accept any fee, kickback or gift for a referral of a settlement service. Additionally, RESPA requires servicers to notify consumers about the possibility that their mortgages may be transferred and when one is imminent, and to have a mechanism that allows borrowers to make inquiries about their account to a servicer and to have corrections made to their accounts, if necessary. Servicers have a substantive duty to pay the property taxes, homeowner's insurance and other escrowed monies to the appropriate recipients as long as the borrower is current. Further, RESPA limits the amount that a lender can require that a borrower place in escrow, and prohibits a lender or servicer from charging the borrower for the preparation of statements required by TILA, the HUD-1 settlement statement, or escrow account statement.

Statute of Limitations. The statute of limitations is one year except for servicer violations which has a 3 year limitation.

Fair Housing Act (FHA); 42 U.S.C. § 3605

Purpose. The FHA prohibits discrimination on the basis of race, color, religion, sex, handicap, familial status, or national origin in the making of or purchasing of residential real estate loans and any other related financial assistance.

Scope. The FHA applies to loan brokers, financing consultants and anyone else providing financial assistance related to the making of the loan as well as the secondary market in the purchasing of loans, debts or securities, the pooling or packaging of these instruments, and the marketing or the sale of securities issued on the basis of loans or debts.

Protection. To prove discrimination, the consumer must show that the defendants intentionally targeted on the basis of a protected class when trying to obtain credit or that there was a credit-grant policy that had a disparate impact on that basis.

Relief and Statute of Limitations. Under the FHA, the court can award actual and punitive damages, attorney's fees and costs. The statute of limitations is two years from the occurrence or from the termination of the discriminatory practice for affirmative claims.

Federal Trade Commission "Holder" Rule

The FTC's "Holder" rule, or the FTC Rule on Preservation of Consumers' Claims and Defenses, allows a consumer to make a claim against a subsequent holder of a loan for the acts of the original lender. The original lender may be judgment proof, and it is unlikely that a consumer would effectively be able to defend against a collection action and bring an affirmative suit against the original lender. The rule creates an incentive for the lending industry to police itself and subsequent holders of a debt are in a better position to sue the original lender than the borrower.

Fair Debt Collection Practices Act (FDCPA); 15 U.S.C. § 1692 et seq.

Purpose. FDCPA restricts debt collector's efforts to obtain payment and to choose venue. The Act protects debtors from abusive or harassing debt collection practices.

Scope. The Act is generally used in the non-mortgage context because mortgage servicers are exempt because they usually acquire servicing rights before the mortgage goes into default. A debt collector generally includes collection agencies, creditors using false names or collecting for other creditors, collection attorneys, purchasers of delinquent debts, repossession companies, and suppliers or designers of deceptive forms, but generally excludes companies collecting their own debts.

Protections. The Act protects the consumer from an invasion of privacy, harassment, abuse, false or deceptive representations, and unfair or unconscionable collection methods. Specific acts that are prohibited include late night or repetitive phone calls, false threats of legal action or criminal prosecution and communications with most third parties regarding the debt.

FDCPA provides the consumer the ability to stop all debt collection action with a letter, makes the collector deal with the consumer's attorney if the consumer has one, and gives the consumer the right to dispute the existence, legality or amount of the disputed debt.

Relief and Statute of Limitations. The plaintiff can recover actual damages, statutory damages (up to $1000), attorney's fees and costs and perhaps punitive damages and injunctive relief. Class actions are also authorized and the statute of limitations for all actions is one year for affirmative claims.

Racketeer Influence and Corrupt Organizations Act (RICO); 18 U.S.C. §§ 1961-1968

Purpose. RICO can be used to provide a civil remedy to abusive consumer credit practices.

Scope. Any cause of action under RICO must have the following elements: the existence of an enterprise, the enterprise is engaged in interstate or foreign commerce, the defendant has engaged in one or more of four prohibited activities in section 1962, and the prohibited conduct cased injury to the plaintiff's business or property.

Protections. Every RICO violation involves a collection of an unlawful debt (gambling debts or usury under state or federal law, at a rate at least twice the enforceable usury rate) or a pattern of racketeering activity. RICO can provide a remedy when a lender misrepresents that its rates are better than other lenders' rates or that its loan will pay off other debts when it will not. A well-plead allegation may state a claim for mail fraud in a loan flipping case under RICO. A borrower may also successfully plead a claim under RICO when there is a spread premium case where the payment of the premium is not revealed and the cost of the premium is passed onto the borrower in the form of a higher interest rate and where the broker represented that it would provide the lowest available rate, money was exchanged between the broker, the assignee, the funding lender and the title company and mail was used in furtherance of the scheme.

Remedy and Statute of Limitations. A person injured in his business or property can sue for treble damages but no physical or emotional damage claim can be made. The statute of limitations is four years in affirmative cases.

Chapter

4

Laws and Regulations that Govern Mortgage Lending and Servicing

LAWS AND REGULATION

- OCC Guidelines
- Fed's Statement on Subprime Lending
- HUD Regulations
- Federally Regulated Loan
- VA Loans
- Fannie Mae/Freddie Mac and Private Label Loan Servicing
- Homeownership Counseling Act
- 2007 OCC Report
- Servicemembers Civil Relief Act (SCRA)

9

There are nine (9) major laws and regulation pertinent to mortgage lending and servicing.

Office of the Comptroller of Currency's Guidelines for Residential Mortgage Lending Practices 2005; 12 CFR part 30 Appendix C

Most importantly, the OCC's regulations provide for the implementation of standards by lenders to prevent abusive, predatory, unfair and deceptive lending practices. Lenders should avoid certain unfavorable loan terms and sparingly use other terms that are unfriendly to consumers. They should also avoid consumer confusion.

Federal Reserve Board's Proposed Statement on Subprime Lending 2007; 72 FR 10533

Regulations were proposed by a number of different agencies in order to compel the industry to educate consumers on the ramifications of loan terms (like ARMs and balloon payments), so that consumers will not be shocked by any financial terms or compromised in their ability to pay.

FHA/HUD LAWS AND REGULATIONS ON DEFAULT LOAN SERVICING/LOSS MITIGATION

HUD regulations require mortgage servicers to report all FHA mortgages that go into default within 30 days of default. HUD also has a procedure in place for loss mitigation, a process in which a lender helps a borrower who's delinquent in loan payments. In an FHA mortgage, the FHA will reimburse the lender for certain costs if the borrower meets the guidelines, such as the length of time that the borrower has owned the home and the like. Loss mitigation plans include receiving a special forbearance (where the borrower pays a lower payment or stops payments for a period of time), a partial claim (where a borrower can get an interest free loan from HUD to bring his payments up to date) and mortgage modification (where the life of the loan is lengthened so that the borrower can make smaller payments each month).

Federally Related Mortgage Loans.

Federally related mortgage loans are loans that are made by federally insured depository lenders (unless for temporary financing), HUD-related loans, and loans intended to be sold on the secondary mortgage market to Fannie Mae or Freddie Mac or to creditors who make or invest over one million dollars a year in residentially secured loans.

Veterans Administration -Insured Home Loan Servicing Handbook.

The Handbook is a manual that contains servicing guidelines for loans guaranteed by the Veterans Administration. Regulates access by the borrower to the servicer, the fees that the servicer can charge and caps the amount of the charges, servicing transfers, and procedures for collection actions.

Fannie Mae/Freddie Mac and Private Label Loan Servicing.

Fannie Mae (Federal National Mortgage Association) is a federally-chartered enterprise owned by private investors. Fannie Mae purchase mortgage-backed securities on the secondary mortgage market with the goal of providing funds so that lenders can afford to offer low cost loans. Freddie Mac (Federal Home Loan

Mortgage Corporation) is a federally-chartered corporation that purchases home loans, securitizes them and sells them to investors with the goal of helping to keep the cost of a mortgage low. Fannie Mae and Freddie Mac use private companies to service the loans that they purchase.

Homeownership Counseling Act; 12 U.S.C. § 1701x

The Homeownership Counseling Act requires that lenders give information about available counseling resources to qualifying homeowners who fail to pay any amount due. Homeowners who qualify are those whose loan is secured by their primary residence, those whose loan is not assisted by the Farmers Home Administration, and those who are not expected to be able to make up a deficiency in a reasonable amount of time due to an unexpected loss or reduction of employment income by the homeowner or someone who contributes to the household income. The notice must provide information about any of the lender's counseling services (if any) and a list of HUD-approved non-profit homeownership counseling organizations or HUD's toll free number where the department will provide a list of such organizations.

Foreclosure Prevention: Comptroller of the Currency Report 2007

The Foreclosure Prevention report details how the lending industry is reacting to the foreclosure epidemic and details why lenders should want to prevent foreclosures, how to contact borrowers, what are the regulatory risks of foreclosure prevention, and the barriers that have impeded foreclosure prevention.

Servicemembers Civil Relief Act (SCRA); 50 U.S.C. §§ 501-506

Purpose. SCRA provides special protections for active duty military personnel and their dependents.

Scope. The Act applies to active duty members of the Army, Navy, Marine Corps, Air Force and Coast Guard, the commissioned corps of the National Oceanic and Atmospheric Administration and the Public Health Service, members of the National Guard who have been called to active service by the President or Defense Secretary for more than thirty consecutive days in order to respond to a national emergency, reservists ordered to report for military service, persons ordered to report under the Military Selective Service Act and United States citizens serving with the allied forces.

Protections. The Act places limitations on foreclosures of the real property owned by active duty servicemembers, protects servicemembers from default judgments, tolling of the statute of limitations, reduces the interest rate on pre-active duty loans to six percent, places restrictions on eviction from rental property and gives the right to terminate vehicle and residential leases.

Chapter

5

Understanding Loan Documents, Origination and Closing Process

Broker Agreements. The only way that a mortgage broker can collect a fee under Florida law is if there is a broker agreement. The agreement is required to contain a description of the services that the brokerage business will provide, and the terms of the fee that the business will charge. The written agreement must be executed within three business days after the mortgage application is accepted must describe the services to be provided by the mortgage brokerage business and specify the amount and terms of the mortgage brokerage fee that the mortgage brokerage business is to receive. The written mortgage brokerage agreement must be executed within 3 business days after a mortgage loan application is accepted if the borrower is present when the application is accepted. If the borrower is not present when such an application is accepted, the licensee shall forward the written mortgage brokerage agreement to the borrower within 3 business days after the licensee's acceptance of the application and the licensee bears the burden of proving that the borrower received and approved the written mortgage brokerage agreement. Fla. Stat. 494.0038(1)(a)(2).

Home Improvement Contracts. Home improvement contracts are agreements between the home owner and the contractor as to what improvements are to be made on the home. The contracts are necessary when dealing with a home improvement loan matter.

Residential Loan Application. A residential loan application is a document or series of documents that are filled out by the borrower in order to get a mortgage. The documents usually inquire into the potential lender's financial and personal information.

Good Faith Estimate. Under RESPA, the lender must give the borrower a good faith estimate of all closing costs.

Underwriting Directives/Closing Instructions. Closing Instructions are given to a settlement agent by the lender with instructions on what documents should be given to the borrower and what actions should be taken before and during the closing. Underwriting directives are steps that have to be taken by the closing agent before title insurance will be issued.

Pre-Approval Forms. Pre-approval forms are forms that the borrower fills out before being approved for a loan.

Broker and Lender Worksheets and Forms. Forms and worksheets that are used by the brokers and lenders in processing the loan.

Credit Reports. A credit report may be contained in the lender's file. The report reveals when the lender inquired into the borrower's credit. The credit report can be used in a variety of ways, like proving that a loan or another notice was back dated if it predates the date of the credit report, whether an entity is responsible for a loan if an agent of the entity check the borrower's credit and the like.

Appraisals. An estimate of the value of the property made by a qualified professional called an "appraiser." Appraisals vary in price depending upon whether it contains a full report with a market analysis involving comparable sales or a simple "drive by."

Title Opinions/Commitments. Title opinions are drafted by an attorney, usually working for the lender, after a title search. Typically, a title opinion would contain a description of the property, a statement as to who holds the title, and whether the property is subject to any leases, debts or other claims. A title commitment is a preliminary statement by a title insurance company that states who is being insured, the amount of the insurance, what is being insured (a legal description of the property), what is required to insure (proof of taxes being paid, etc.) and what is not insured.

Settlement Statements. RESPA requires lenders to give this statement at closing, or one day in advance of closing if the consumer requests it. The statement is a final tallying of settlement costs and should be itemized.

Settlement Checks. Settlement checks are checks that distribute funds from the mortgage to pay different costs at closing such as the fee to the clerk's office for recording the loan, payment to the settlement agent and attorney's fees.

Truth in Lending Disclosure Statements/Forms. Under TILA, certain disclosures have to be made. For closed-end loans, creditors must clearly disclose the amount financed, the APR, the finance charge, the schedule of payments, the total payments, whether or not it has or will acquire a security interest in the property being purchased, an itemization of the amount financed, the identity of the creditor, whether there is a prepayment penalty and any late payment charges. For open-end credit, also known as revolving accounts, the creditor must disclose the APR, the regular rate if a teaser rate is used, how the rate is determined if a variable rate is used, penalty rates, minimum finance charges, and any additional fees. The disclosures required for open-end credit are less comprehensive so unscrupulous lenders may try to disguise closed-end loans as open-end.

Public Records. A number of public records can be used to understand a lender's practices and paint a larger picture than an individual case.

1. *Local Land Records.* Local land records can be used to see if the lender has an unusually high number of foreclosures, is repeatedly flipping loans or to get an idea of the mortgage assets held by the lender.

2. *Consumer Complaints.* Through Freedom of Information Act requests, records of consumer complaints to local consumer agencies, state attorney generals, licensing entities and banking entities may be obtained, in order to see if similar complaints have been made about the lender in the past. The Better Business Bureau should also be contacted for copies of any complaints.

3. *Newspapers and the Internet.* Newspaper articles and internet searches can be useful to discover information about a lender.

4. *SEC Filings.* The Security Exchange Commission (SEC; www.sec.gov) requires that publicly traded companies file periodic reports which include information about the financial viability of a company to pay a judgment. They also may provide default or foreclosure data and reveal company policies that may be helpful in proving patter or practice claims in a HOPEPA case or for punitive damages.

5. *State Corporate Filings.* State corporate filings can be used to determine who is behind the company and whether the corporate veil can be pierced. They can also reveal whether or not the entity is formally linked and whether a large net of liability can be cast.

6. *Other Lawsuits.* Information about other lawsuits against a party can be obtained in PACER for federal court cases and on most county clerk of court websites. Private firms such as D&B provide corporate information, including lawsuit data, but can be very costly.

7. *Home Mortgage Disclosure Act.* Home Mortgage Disclosure Act data can show the number of mortgage applicants of a company by race, income, and geographical location based on the census which is useful in FHA or ECOA cases.

Mortgages, notes -fixed, ARMS, balloon, riders, addendums.

1. A fixed rate mortgage is a mortgage where the interest rate is set for the term of the loan.

2. An adjustable rate mortgage (ARM) is a mortgage where the interest rate can be adjusted at certain intervals according to a given formula; if the interest rate goes up, it generally means a larger monthly payment.

3. A balloon mortgage is a mortgage in which the final payment (usually termed a balloon payment) or the principle balance due and payable upon maturity is greater than twice the amount of the regular monthly payment of the mortgage.

4. Riders are additional provisions that are attached to a contract for sale and considered to be a part of the contract.

5. Addendums are appendixes to the sale contract.

Notices of Right to Cancel. Under TILA, a lender is required to give the borrower a notice of the right to cancel to notify the lender of the right to rescind and how the borrower can rescind the loan if he chooses to do so. The notice must have a form which the borrower can mail into the lender to rescind the loan.

Chapter

6

Post-Origination Issues - Servicing Problems

Life of Loan/Transaction Histories and Codes

Servicers are supposed to keep transaction histories for the life of the loan. However, as the servicer of the loan does not always remain the same until the end of the loan term, sometimes the transaction history is not accurate, the borrower does not get the required notice about the switching of servicers, and it is difficult to determine who the servicer of the loan is. Also, the distinction between servicer and mortgage holder can make it challenging to determine what entity is the holder of the loan. Often, when the originating lender sells the loan on the secondary mortgage market, the original lender stays on as the servicer but is no longer the holder of the loan.

Attorney's fees, Charges and Costs

A borrower is liable for costs and fees if a foreclosure is decided against him. However, sometimes these fees and costs are inflated or are not valid and can be challenged.

Pooling and Servicing Agreements

Pooling and servicing agreements are agreements between a servicer and the trust which holds the securities after mortgages have been sold and securitized on the secondary mortgage market.

Servicing Bad Acts

RESPA

There may be a private cause of action against a servicer under RESPA if:

1. A servicer receives a kick back from the settlement agent for anything other than services actually performed.
2. A servicer misuses escrow funds.
3. A servicer directs a borrower to a title insurance company.

RESPA does not provide for a private cause of action for disclosure violations.

RICO

There may be a civil cause of action under the federal or state RICO statute if the servicer of the mortgage was a part of racketeering.

Chapter 7

Common Law/State Law Causes of Action and Affirmative Defenses

Civil Conspiracy

Florida has its own RICO act. F.S. 895.01-895.06. F.S. 895.05 provides for civil remedies.

Fraud

Traditional fraud can be a more difficult claim to make than under Florida's UDAP statute. To sustain an action for fraud, a material representation of fact must be proven to have been untrue and known to have been untrue by the party making the representation or recklessly made. Another party had to have relied upon the representation and acted in his detriment.

Aiding and Abetting/Willful Blindness/Deepening Indebtedness

With the prevalence of the secondary mortgage market, lenders were not as careful as they should have been and issued loans to people who they knew or should have known would not be able to pay.

Breach of Contract

Claims of breach of contract, with the standard contract remedies, may be available where a lender has breached an express or implied term of the contract. For example, a home improvement loan in which the contractor does not perform or complete the work that he was supposed to do.

Declaratory and Injunctive Relief

Declaratory Relief. Statutorily created, declaratory relief allows a plaintiff to ask the court to rule on the validity of a statute or contract. F.S. 86.021. A contract can be construed by a court before or after it has been breached. F.S. 86.031. Declaratory relief is generally read broadly, but is not available in all circumstances. If there is another specific statutory remedy available, declaratory relief is precluded. Also, if there is another equitable or legal remedy, the court in some cases has not granted declaratory relief but has in other cases.

Injunctive Relief Injunctive relief allows a plaintiff to ask the court to stop a defendant from doing something. Injunctive relief is a common law remedy that will only be granted under limited circumstances. To make a claim for injunctive relief, a plaintiff must show: (1) that irreparable harm will occur unless the court steps in; (2) that the plaintiff has no other adequate remedy; (3) the plaintiff has a clear legal right to relief requested; and (4) the public interest favors the issuance of an injunction.

Florida Deceptive and Unfair Trade Practices Act

The Florida Deceptive and Unfair Trade Practices Act prohibits "[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce." F.S. 501.204(1). The Act explicitly gives weight to the FTC's and federal court's interpretation to the Federal Trade Commission Act. F.S. 501.204(2).

Illegal Consumer Debt Collection

Florida law prohibits several debt collection practices. A collector cannot:

1. Impersonate law enforcement or an agent of another government agency. F.S. 559.72(1).
2. Use force or threaten violence. F.S. 559.72(2).
3. Inform a debtor that disputes the debt that he will disclose to a third party in any way information that would effect the debtor's reputation for creditworthiness, without informing the debtor that there are requirements that the dispute must also be disclosed. F.S. 559.72(3).
4. Communicate or threaten to communicate with a debtor's employer before obtaining a final judgment against the debtor, unless the debtor gives permission in writing and acknowledges in writing the existence of the debt after it has been placed in collection. The provision does not prevent a collector from informing a debtor that his employer will be informed of the debt if a final judgment is obtained by the collector. F.S. 559.72(4).
5. Disclose information to anyone but the debtor and the debtor's family that would affect the debtor's reputation for creditworthiness with knowledge or reason to know that the third party does not have a legitimate

business reason for needing the information or that the information is false. F.S. 559.72(5).

6. Disclose information about a disputed debt without disclosing the fact that the debt is disputed. If the information is disclosed before a reasonable dispute, upon request of the debtor, the collector will notify within 30 days of the existence of the dispute to anyone that a disclosure was made to in the previous 90 days. F.S. 559.72(6).

7. Willfully contact the debtor or debtor's family with a frequency that or engage in other conduct that can reasonably be expected to harass or abuse the debtor or the debtor's family. F.S. 559.72(7).

8. Use obscene, profane, vulgar or willfully abusive language when communicating with the debtor or the debtor's family. F.S. 559.72(8).

9. Knowingly claim or threaten to try to claim a debt that does not exist or assert a legal right that does not exist. F.S. 559.72(9).

10. Use a communication that appears to have been issued by the government or an attorney when it was not, or appears to simulate the judicial or legal process when it does not. F.S. 559.72(10).

11. Communicate with a debtor under the guise of being an attorney or using instruments which only attorneys are allowed to prepare. F.S. 559.72 (11).

12. Speak to a debtor in way that gives the impression that the debtor is speaking to an attorney or someone associated with an attorney. F.S. 559.72(12).

13. Advertise the sale of any debt in order to force payment or threaten to do so unless the collector has a court order stating that he can do so or when acting as an assignee for the benefit of a creditor. F.S. 559.72(13).

14. Attempt to enforce the debt by publishing or posting the name of any debtor or threaten to do so. F.S. 559.72(14).

15. Refusing to reveal the identity of the collector or the entity that the collector is working on behalf of when the debtor requests. F.S. 559.72(15).

16. Send any communication via the mail service with information on the outside of an envelope or on a postcard with the intent to embarrass the debtor. For example, addressing the envelope to "Deadbeat, John Doe." F.S. 559.72(16).

17. Communicate to the debtor between 9 p.m. and 8 a.m. without the permission of the debtor. F.S. 559.72(17).

18. Communicate with the debtor if the collector knows that the collector has an attorney to represent him in respect to the debt and can reasonably obtain the attorney's contact information unless the attorney has failed to respond to a communication about the debt in a reasonable time or consents to direct contact with the debtor or the debtor initiates contact. F.S. 559.72(18).

19. Cause the debtor to be charged for communications by concealing their true purpose. For example, collect telephone calls that appear to be something else. F.S. 559.72(19).

Unjust Enrichment

In the mortgage context, an unjust enrichment claim can be made when a borrower has paid a lender an amount that the lender has knowledge of and has accepted the amount and the circumstances are such, that it would be inequitable for the lender to keep the payment.

Breach of Fiduciary Duties

Traditionally, there has been no duty read into the creditor-debtor relationship. However, the presence of certain factors in the relationship may give rise to special duties to the borrower, up to and including a fiduciary duty. If the lender acts as an advisor or should have known that the borrower trusted him, then a quasi-fiduciary relationship of trust and confidence may have been created, which at least gives rise to a duty of disclosure. Also, a lender who gives kickbacks to a broker (motivating the broker to breach his fiduciary duty to the borrower) may be held liable for intentional interference with the relationship between a broker and a borrower.

Conversion

Conversion, or theft, is obtaining property by fraud or false pretenses. F.S. 812.014.

Civil Theft

Civil theft, or conversion, is a civil remedy for theft granted by F. S. 812.035. Theft is defined as a person knowingly obtaining or uses or attempts to obtain or use another's property with the intent to temporarily or permanently deprive the other person a right to or a benefit from the property or to appropriate the property for his own use or the use of any person not entitled to use the property. F.S. 812.014.

Negligence

Because the risk of loss was able to be transferred when the loan was sold, many lenders were negligent and gave loans to people who they knew or should have known that they would be unable to pay the loan.

Chapter 8

Drafting, Discovery, & Motion Practice

Standing

Standing can be an issue in some mortgage foreclosure cases because there can be many different players/parties. For example, Debt Buyers and/or Trustees under a Pooling and Servicing Agreement (PSA) might not be a party in interest if they can't show that they are the owners of the debt. Failure to attach an assignment or affidavit of a transfer of a note could be grounds for dismissal.

Stating a Cause of Action

See Appendix 6: Cause of Action and Defenses

Depositions/Written

See Appendix 5: Interrogatories

Discovery/Inspections/Affidavits

See Appendix 5: Request to Produce

Administrative Complaints

Complaints may be obtained from consumer agencies and other governmental or regulatory bodies, like the consumer portion of the Florida Attorney General's office or the Office of the Comptroller of the Currency, by using a Freedom of Information Act (FOIA) request or a Sunshine Law public Records request. The Better Business Bureau has a website search engine for business complaints. These can be used to establish pattern of practice.

Business Complaints

Complaints to the Better Business Bureau, Florida Attorney General's Office, County Consumer Fraud Units, HUD Certified Counselors, and other consumer agencies can also be used to establish a pattern of practice in predatory lending schemes.

Internet and Research Tools

The National Consumer Law Center publishes a number of books about consumer law, including one of foreclosures, which can be a good resource. Its website, consumerlaw.org, has a helpful glossary of terms and some examples of litigation that was done. Binder's Forms and other pleading books can give you guidelines for how to structure pleadings.

The National Association of Consumer Advocates is a nationwide organization of more than 1000 attorneys who represent and have represented hundreds of thousands of consumers victimized by fraudulent, abusive and predatory business practices. Members have access to their *listservs,* an electronic mailing list typically used by a broad range of discussion groups regarding foreclosures, deceptive practices and other consumer issues.

Other useful *listservs* include: Florida Consumer Umbrella Group, Florida Housing Umbrella Group, and National Housing Law Project.

Government websites, like HUD.gov, FRB.gov, OCC.gov and others, can be helpful to understand the basics of the programs that the agencies administrate and to keep one's self updated on proposed and new regulations as well as any new legislation.

Summary Judgment/Motions to Dismiss/Strike

See Appendix 5: Affidavit in Opposition

Law/Trial Briefs

See Appendix 2, 3 , 4 and 5

Protective Orders

See Appendix 5: Protective Order

Motions to Compel

See Appendix 5: Motion to Compel

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Legal Advocacy Center of Central Florida, Inc.

Appendix

Legal Advocacy Center of Central Florida, Inc.

Appendix 1

Client Questionaire and Checklist

CLIENT FORECLOSURE INTERVIEW SHEET

Client Name:____

Address :____

Phone Number/Email: ____

Place of Employment:____

Other sources of income:____

Age:____

Education:____

Ability to Read English:____

Business Experience:____

Date of Purchase:____

CREDITOR

Name:____

Address:____

____

Phone Number:____

Account Number:____

MORTGAGE BROKER

Name:____

Address:____

____

Phone Number:____

Agent Name:____

Was sale handled as home solicitation? ____

Do you know of other sales in the neighborhood? ______________________

Did client contact mortgage broker directly? ______________________

Did Mortgage broker arrange and obtain financing? ______________________

Did mortgage broker send/take client to lender? ______________________

Did mortgage broker recommend lender to client? ______________________

Did mortgage broker complete the credit application? ______________________

Did client verify information on the credit application? ______________________

Did mortgage broker suggest some of the information that client put on the credit application? __

____

Were the credit terms discussed and agreed upon before the closing? ______________

Were there any unexpected changes in terms at the closing? ______________

Prior to closing, did client know who the lender would be? ______________

Are there insurance charges in the loan? ______________________

Was the client aware that insurance would be added? ______________________

Is there a prepayment penalty? ______________________

How many years? ______________________

Was the client aware of the prepayment penalty before the closing? ______________

Were any unsecured creditors paid off at the closing? ______________________

Did the client know that these would be paid off prior to closing? ______________

PAYMENTS

Mortgage payment amount:______________________

Does it include escrow items?______________________

When did client make the last payment?______________________

What was the amount of that payment?______________________

Why did client stop making payments?______________________________

____

Does client agree with the default amount? ______________________________

Did client receive any letters once client defaulted?______________________

Did client receive a housing counseling letter?__________________________

What other letters did client receive after default?_____________________________

____

Has client sought housing counseling?______________________________

Has lender attempted loss mitigation with client?_____________________

What does client want?___________________________________

Sell house? ______________________________________

Reinstate? _______________________________________

File bankruptcy? ___________________________________

DATES FROM DOCUMENTS	Client Authenticates Signatures
Date of Credit Application________________	____________________
Notices of Right of Cancellation____________	____________________
TILA Disclosures______________________	____________________
Mortgage___________________________	____________________
Promissory Note______________________	____________________
Closing Statement_____________________	____________________

APPLICATION OF TIL RECISSION

- Is this the clients principal dwelling?__________________________

Was the mortgage used to purchase the home?__________________________

- Or was it a refinanced mortgage?______________________________

Is this a consolidation by same creditor involved?_______________________

- Have three years passed since consummation?_______________________

Was the client given two copies of TIL Recission Notice?____________________________

Are points and fees or interest rates high enough to make a HOEPA analysis advisable? ____

RESPA ISSUES

In the process of obtaining the mortgage loan, was the client's credit declined? ______________

____

Was the client notified by the mortgage broker or the lender about the denial and the reasons? __

____

Has the loan been transferred from the original lender? ________________________

Did the client get notice of the transfer?_____________________________________

When did the client get notice of the transfer (was it within 30 days of the transfer)? _________

____

Has the client requested information from the lender or servicer about the loan? ______________

____

Was the information provided in a timely manner (60 days)? ____________________

Does client have an escrow account? _____________________________________

Has client had any problems with distributions from the escrow account? ___________

Z:\FORMS\foreclosure\Client foreclosure interview sheet.doc

INFORMATION & RECORDS RELEASE

TO WHOM IT MAY CONCERN:

YOU ARE HEREBY AUTHORIZED and requested to furnish to ____., from time to time, as requested by any staff attorney or paralegal, any information or opinion concerning the undersigned, including, records, information or documents that you have in your custody or under your control with reference to the undersigned.

Any previous similar authorization heretofore granted by me is hereby expressly revoked and you are requested to furnish such information only to said representative:

DATED this _____ day of ___________________ 200__.

____
Signature

____
(name printed or typed)

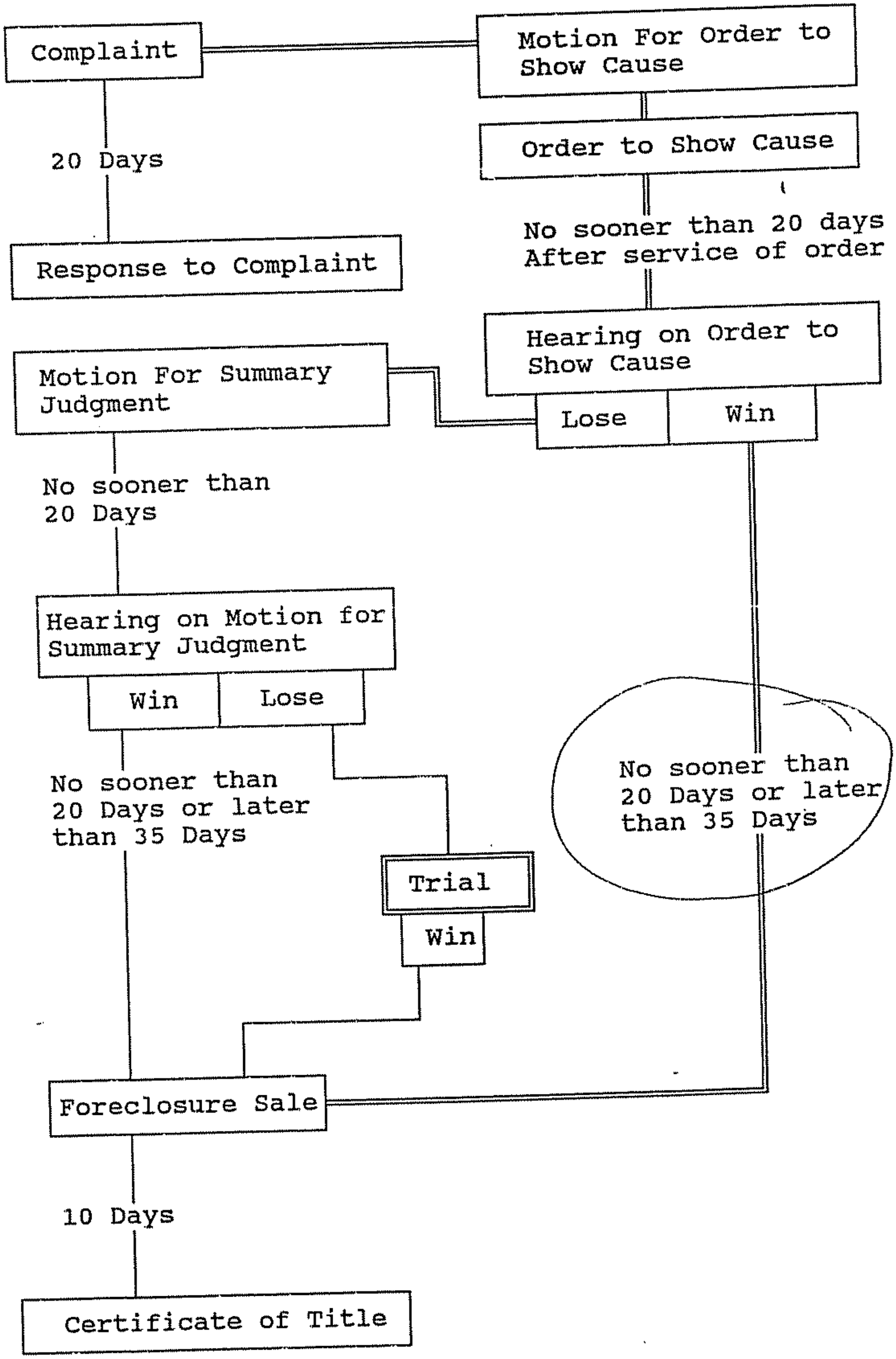
____
(Social Security #)

Legal Advocacy Center of Central Florida, Inc.

Appendix 2

Timeline for Foreclosures

FORECLOSURE TIME LINE UNDER NEW LAW



FORECLOSURE TIME LINE ESTIMATE

EVENT	NUMBER OF DAYS	CUMULATIVE NUMBER OF DAYS
SERVED WITH FORECLOSURE COMPLAINT	20 DAYS TO ANSWER (Note: if client fails to file an answer they are not entitled to any further notice. So client should file an answer just to continue to receive notices)	20
MOTION FOR SUMMARY JUDGMENT MOTION HEARING	15 DAYS AFTER SERVICE (TYPICALLY 30 DAYS AFTER ANSWER)	50
SALE DATE	5 WEEKS AFTER SJM HEARING	87
WRIT OF POSSESSION AFTER SALE	TYPICALLY 15 DAYS	**102 DAYS** – TYPICAL FOR CLIENT TO HAVE TO VACATE AFTER SERVICE OF COMPLAINT

THIS TIME LINE IS APPROXIMATE AND HAS AN ERROR FACTOR
(+ or -) 10 DAYS TYPICALLY.

TYPICAL INTERVENING FACTORS THAT INCREASE THE TIME:

ATTORNEY FILES THE SJM LATE
CLIENT FILES AN ANSWER
SUMMARY JUDGMENT MOTION DENIED
BANKRUPTCY FILED
REINSTATEMENT AGREEMENT FILED

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Appendix 3

How to Avoid Foreclosure

HOW TO AVOID FORECLOSURE

U.S. DEPT. OF HOUSING AND URBAN DEVELOPMENT

Q. What happens when I miss my mortgage payments?

Foreclosure may occur. This is the legal means that your lender can use to repossess (take over) your home. When this happens, you must move out or your house. If your property is worth less than the total amount you owe on your mortgage loan, your lender or HUD could seek a deficiency judgment. If that happens, you not only lose your home, you also would owe your lender or HUD an additional debt.

Foreclosure or a deficiency judgment could seriously affect your ability to qualify for credit in the future. So you should avoid it if all possible!

Q. What should I do?

1. Do not ignore letters from your lender. If you are having problems making your payments, contact your lender immediately. Explain your situation. Be prepared to provide them with financial information, such as your monthly income and expenses. Without this information, they may not be able to help.

You can qualify if:

1. you are in default and don't qualify any of the other options;
2. your attempts at selling the house

2 Stay in your home for now. You may not qualify for assistance if you abandon your property.

3 Contact a HUD-approved housing counseling agency. They have information on services and programs that could help you. The housing counseling agency may also offer credit counseling. These services are usually free of charge.

4 If you bought your home with a Veterans Administration (VA) guaranteed loan, call the VA office nearest you.

Q. What are my alternatives?

Your options include the following:

Special forbearance. Your lender may be able to arrange a repayment plan based on your financial situation. Your lender may even provide for a temporary reduction or suspension of your payments. You may qualify for this if you have recently lost your job or your source of income or if you had an unexpected increase in living expenses. You must furnish information to your lender to show that you would be able to meet the requirements of the new payment plan.

Mortgage modification. You may be able to refinance the debt and/or extend the term of your mortgage loan. This may help you catch up by reducing the monthly payments to a more affordable level. You may qualify if you have recovered from a financial problem but your net income is before foreclosure were unsuccessful; and

3. you don't have another FHA mortgage in default.

less than it was before the default (failure to pay).

Partial claim. Your lender may be able to work with you to obtain an interest-free loan from HUD to bring your mortgage current.

You may qualify if:

1. your loan is at least 4 months delinquent but no more than 12 months delinquent;
2. your mortgage is not in foreclosure; and
3. you are able to begin making full mortgage payments.

Pre-foreclosure sale. This will allow you to sell your property and pay off your mortgage loan to avoid foreclosure and damage to your credit rating.

You may qualify if:

1. the "as is" appraised value is at least 70% of the amount you owe and the sales price is 95% of the appraised value;
2. the loan is at least 2 months delinquent prior to the pre-foreclosure sale closing date; and
3. you are able to sell your house within 3 to 5 months (depending on what your lender agrees to).

An additional benefit to this option is the assistance you will receive with the Seller-paid closing costs.

Deed-in-lieu of foreclosure. As a last resort, you may be able to voluntarily "give back" your property to the lender. This won't save your house, but it will help your chances of getting another mortgage loan in the future.

Q. How do I know if I qualify for Any of these alternatives?

A housing counseling agency can help you determine which, if any, of these options may meet your needs. You shoul so discuss the situation with your lender.

Q. Should I be aware of anything else?

Yes. Beware of scams! Solutions that sound too simple or too good to be true usually are. If you're selling your home without professional guidance, beware of buyers who try to rush you through the process. Unfortunately, there are people who may try to take advantage of your financial difficulty. Be especially alert to the following:

Equity skimming. In this type of scam, a "buyer" approaches you, offering to get you out of financial trouble by promising to pay off your mortgage or give you a sum of money when the property is sold. The "buyer" may suggest that you move out quickly and deed the property to him or her. The "buyer" then collects rent for a time, does not make any mortgage payments, and allows the lender to foreclose. Remember that signing over your deed to someone else does not necessarily relieve you of your obligation on your loan.

Phony counseling agencies. Some groups calling themselves "counseling agencies" may approach you and offer to perform certain services for a fee. These could well be services you could do for yourself, for free, such as negotiating a new payment plan with your lender, or pursuing a pre-foreclosure sale. If you have any doubts about paying for such services call a HUD-approved housing counseling agency. Do this before you pay anyone or sign anything.

Q. Are there any precautions I can take?

Here are several precautions that should help you avoid being taken by scam artist:

1. Don't sign any papers you don't fully understand.
2. Make sure you get all promises" in writing.
3. Beware of any loan assumption where you are not formally released from liability for your mortgage debt and contracts of sale.
4. Check with a lawyer or your mortgage company before entering into any deal involving your home.
5. If you're selling to avoid foreclosure, check to see if there are any complaints against the prospective buyer. You can contact your state's Attorney General, the State Real Estate Commission, or the local District Attorney's Consumer Fraud Unit for this type information.

Q. What are the main points I should remember?

1. Don't lose your home and damage your credit history if you can help it.
2. Call or write your mortgage lender immediately.
3. Stay in your home to make sure you qualify for assistance.
4. Arrange an appointment with a HUD-approved counselor to explore your options.
5. Cooperate with the counselor or lender trying to help you.
6. Explore every alternative to losing your home.
7. Beware of scams.
8. Do not sign anything you don't understand. And remember that signing over the deed to someone else does not necessarily relieve you of your loan obligation.
9. Act now. Delaying can't help.
10. If you do nothing, You will lose your home and your good credit rating.

HUD Housing Counseling -
www.hudhcc.org

FOR FURTHER INFORMATION CONTACT

COMMUNITY LEGAL SERVICES OF MID-FL, INC

Legal Advocacy Center of Central Florida, Inc.

Appendix 4

Florida Mortgage Law and Foreclosure Defense

FLORIDA MORTGAGE LAW AND FORECLOSURE DEFENSE

MAY 2005

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Table of Contents

1. MORTGAGES

1a. Definitions

Mortgage: A mortgage is any instrument pledging an interest in real and/or personal property to secure a debt Arcus v. Hull 195 So. 170(Fla 1940).

> 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 of 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 prescribed in relation to mortgages. F.S. 797.01

A mortgage usually secures the payment of a principal debt, interest and payments to be made or advanced by a lender for expenses to protect the property (i.e. taxes, insurance, repairs, payments due on superior mortgages), in addition to reasonable attorney's fees and costs incurred in foreclosure, depending on the terms of the contract.

A **Mortgagor** is the person giving the mortgage.

A **Mortgagee** is the lender who provides the money and accepts the mortgage as security for the loan.

1.b. Types of Mortgages

1. **Chattel Mortgage**: A mortgage on personal property.

2. **Balloon Mortgage**: "[e]very mortgage in which the final payment or the principal balance due and payable upon maturity is greater than twice the amount of the regular monthly or periodic payment of the said mortgage.." F.S. § 697.05 (2)(A).

   Most Balloon mortgages require a bold face disclosure however, there are some statutory exceptions. Failure to include the disclosure causes the lender to forfeit the right to demand the balloon payment. F.S § 697.05 (3); Lage v. Pan American Bank, 529 So.2d 1242 (Fla. 3d 1988); *See* Slomovic v. Petryk, 341 So.2d 208 (Fla. 4th DCA 1976).

3. **Purchase Money Mortgage**: A mortgage securing money lent to purchase land.

4. **<u>Equitable Mortgage</u>**: A mortgage implied by law. <u>Reed v. Dyal</u>, 397 So.2d 389 (Fla. 1st DCA 1981); <u>Kirkland v. Miller</u>, 702 So.2d 620 (Fla. 4th DCA 1997); <u>Holmes v. Dunning</u>, 133 So.557 (Fla.1931).

5. **<u>Wraparound Mortgage</u>**: A secondary lender extends credit by including all previous obligations in the new financing resulting in one all-inclusive mortgage. The debtor will make one mortgage payment on the wraparound mortgage, and the holder of the wraparound mortgage makes the payments due under the prior included mortgage obligations.

   A Wraparound Mortgage is enforceable regardless of the circumstances of the superior mortgage. <u>Szenay v. Schaub</u>, 496 So.2d 883 (Fla. 2d DCA 1986).

6. **<u>Disguised Mortgages</u>**: In Florida all mortgages are treated the same and enforcement is only by judicial foreclosure. Mortgagees cannot avoid the necessity of judicial foreclosure by disguising the mortgage. **"Agreements for Deed", "Conditional Sales Contracts"** and **"Land Sale Contracts"** have to be judicially foreclosed. Such documents usually recite that possession is transferred upon execution, and title is conveyed only upon payment in full. The payment schedule usually extends over a term of years and often the right of possession is claimed to the lender upon default. Such contracts and agreements are considered to be mortgages and are subject to the same constraints. Equity will declare the true character of the conveyance whenever property belonging to one person is held by another as security for a debt. <u>Lunn Woods v. Lowery</u>, 577 So.2d 705 (Fla.2d DCA1991); <u>White v. Brousseau</u>, 566 So.2d 832 (Fla.5th DCA 1990); <u>Williams v. Roundtree</u>, 478 So.2d 1171 (Fla. 1st DCA 1985); <u>Adkinson v. Nyberg</u>, 344 So.2d 614 (Fla. 2d DCA 1977); <u>Hoffman v. Semet</u>, 316 So.2d 649 (Fla. 4th DCA 1975).

Florida Case Notes:

F.S. § 697.01 is liberally construed to bestow the rights that are reserved to mortgagors and in disputed cases, the mortgagor is given the benefit of the doubt. <u>First Mortgage Corp. of Stuart v. DeGive</u>, 177 So.2d 741 (Fla. 2d DCA 1965); <u>Thomas v. Thomas</u>, 96 So.2d 771 (Fla. 1957).

A mortgage without a note is a nullity and is not enforceable. <u>Bank of Miami Beach v. Fid. & Cas. Co. of N.Y.</u>, 239 So.2d 97 (Fla. 1970).

A pre-existing debt can be consideration for a mortgage. <u>Crum v. United States Fid. & Guar. Co.</u>, 468 So.2d 1004 (Fla. 1st DCA 1985).

Future advances can be secured by a mortgage. F.S.A. § 697.04 (1)(a). Priority of the mortgage attaches at the time it is recorded and extends after the mortgage is executed and advances are made.

What is secured by a mortgage:

The real property securing a mortgage normally includes improvements and fixtures. Issues concerning these items are resolved by focusing on the intention of the parties and whether removal will cause damage. Goldberger v. Regency Highland Condominium Association, 452 So.2d 585 (Fla. 4th DCA 1984); Florida Fed. Sav. & Loan v. Britt's Inc., 455 So.2d 1345 (Fla. 5th DCA 1984).

2. Default

The terms of the mortgage define and give context to default and authorize the mortgagee to foreclose. Gulf Life Ins. Co. v. Pringle, 216 So.2d 468 (Fla. 2d DCA 1968). Defaults are usually the result of a failure to pay but a non-monetary breach of the mortgage such as a failure to maintain insurance or the commission of waste can be the basis of a default. Foreclosure is not appropriate where the breach is merely technical. Haven Fed. Sav. & Loan Ass'n v. Carl, 456 So.2d 1290 (Fla. 2d DCA 1984); Clark v. Lachenmeier, 237 So.2d 583 (Fla. 2d DCA 1970).

3. Acceleration

Creditors often specify in the mortgage that if the debtor is delinquent on an installment or otherwise breaches a condition of the promissory note, the creditor has the option to accelerate the debt due under the note. The full unpaid balance of the debt becomes due immediately upon the affirmative exercise by the creditor of the right of acceleration. Unless a debtor pays off the loan immediately, acceleration will lead to default on the total balance of the loan. The creditor can enforce its remedies to recover the total remaining balance of the debt, including forcing a public sale of the collateral to satisfy the debtor's obligation to pay all the remaining installments as accelerated.[1]

Acceleration can be avoided by tendering the arrears before the lender notifies the mortgagee of the acceleration. Bensman v. DeLuca, 498 So.2d 645 (Fla. 4th DCA 1986); Yelen v. Bankers Trust Co. 476 So.2d 767 (Fla. 3d DCA 1985); New England Mut. Life Ins. Co. v. Luxury Home Builders, 311 So.2d 160 (Fla. 3d DCA 1975).

If the lender accepts part or all of the arrearage, acceleration is waived. Amerifirst Fed. Sav. & Loan Ass'n of Miami v. Century 21 Commodore Plaza, Inc., 416 So.2d 45 (Fla. 3d DCA 1982); *See* Barnes v. Resolution Trust Corporation, 664 So.2d 1171 (Fla. 4th DCA 1995).

4. Foreclosure Procedure

The owner and holder of the note and mortgage files an action in either county or circuit court, usually in the county where the property is located, to obtain a judicial decree authorizing a foreclosure sale. To obtain a judgment, the lender must prove that there is a valid mortgage

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[1] *See* National Consumer Law Center, Repossessions and Foreclosures, § 4.1.3 (5th ed. 2002). This manual should be required reading and was relied on in creating this outline.

between the parties, that the borrower is in default on the note, that the lender is entitled to foreclose and that the proper procedure has been followed.

In Florida, foreclosure is based on statute but granted in equity. Southern Floridabanc Fed. Sav. & Loan Ass'n, 529 So.2d 303 (Fla. 4th DCA 1988); Clark v. Lachenmeier, 237 So.2d 583 (Fla. 2d DCA 1970). Most foreclosures are resolved on summary judgment.

F.S.A. § 702.01 et. seq. establishes the following procedure for foreclosure actions: (Note: these procedures are not widely used):

1. The Plaintiff files a verified complaint;
2. If the judge determines the complaint is verified and states a cause of action, an order to show cause why foreclosure should not be entered is authorized providing for a hearing at least 20 days after the Complaint is served on the Defendant.
3. The Plaintiff must serve the Summons, Complaint, Order to Show Cause and draft of the proposed judgment on the Defendant.
4. The Defendant must show cause at the hearing why foreclosure should not be entered. This right to object is deemed waived if the Defendant fails to show cause or appear at the hearing.
5. The sale cannot be held less than 20 days or more than 35 days after the date of the hearing, on terms and conditions specified in the order or judgment. F.S.A § 45.031(1).
6. Objections to the sale must be filed within 10 days of the sale and if the objections are filed before the certificate of title is issued, the certificate will not issue until the objections are heard.
7. A writ of possession can issue after the sale. Fla. R. Civ. P 1.580.
8. A deficiency is authorized by F.S.A § 702.06.

A mortgage is not extinguished until the underlying debt is satisfied. Judgment on the note does not preclude a foreclosure. Floorcraft Dist., Inc. v. Horne-Wilson, Inc., 251 So.2d 138 (Fla. 1st DCA 1971). See §11a, Deficiency Judgment.

5. Elements of the Foreclosure Complaint

The essential elements of a foreclosure complaint are:

1. Execution of a note and mortgage, evidence of recording with copies attached;
2. A legal description of the property;
3. Documentation of the Plaintiff's status as owner and holder of the note and mortgage;
4. Joinder of persons with title and/or possessory interests;
5. A description of the default and the balance due;
6. Evidence of acceleration.

5a. Jurisdiction

Circuit courts and county courts have concurrent jurisdiction in foreclosure actions. The amount of the debt in County court foreclosure actions must fall within the monetary jurisdiction of $15,000.00. Fla. Stat. Ch. 26.012(2)(a), (c), (g) Fla. Stat. Ch. 34.01(4) Alexdex Corporation v. Nachon Enterprises, Inc. 641 So. 2d 858 (Supreme Court 1994) Coral Springs Tower Club v. DiZafelo, et al. 667 So. 2d 966 (4th Dt. 1996).

5b. Venue

Venue is in the county where the property is situated F.S.A. § 702.04.

5c. Statute of Limitation

Usually within five (5) years of maturation (acceleration) of the mortgage. F.S.A. §§ 95.281 (1),(3). Travis Co v. Mayes, 36 So.2d 264 (Fla. 1948); Monte v. Tipton, 612 So.2d 714 (Fla. 2d DCA 1993); Locke v. State Farm & Casualty Co., 509 So.2d 1375 (Fla. 1st DCA 1987).

5d. Service of Process

A lack of personal jurisdiction over the mortgagor renders a foreclosure judgment voidable and subject to being vacated at any time. Wagner v. Roberts, 320 So.2d 408 (Fla.2d DCA 1975).

6. Additional Considerations with Foreclosures

6a. Notice of Lis Pendens

A Notice of Lis Pendens is filed in public records to warn all persons that the title to the property is in litigation and that they are in danger of being bound by an adverse judgment. It does NOT create a lien. It can refer to real and/or personal property and should be filed by the borrower ensuing counterclaims against the lender.

6b. Servicemembers' Civil Relief Act (AS AMENDED DECEMBER 2003)

The Servicemembers Civil Relief Act (SCRA) revises the Soldier and Sailors Civil Relief Act of 1940. The SCRA applies to any civil judicial or administrative proceeding commended in any federal or state court or agency. Stays of proceedings, reopening of judgments and other relief can be initiated by the court, the servicemember or their legal representative. 50 USC App., §501 et seq.

The act's provisions extend to servicemembers' dependents 50 USC App.,§ 511, 514, 538. Relief may also be available to persons secondarily liable such as guarantors or co-makers. 50 USC App., § 513. SCRA protection may be waived by the servicemember in a stand-alone document during or after the period of service. 50 USC App. § 517.

Courts may stay proceedings to enforce mortgage obligations in cases of a pre-service secured debt on real property. Automatic 90 day stays are available upon application of the servicemember. Additional stays for up to the period of service plus 90 days may be granted if the servicemember is unavailable to prosecute or defend the action. 50 USC § 522, 525. The court may equitably adjust the obligation to preserve the interests of all parties upon application of the servicemember. 50 USC App § 533.

Anticipatory relief from pre-service mortgage obligations is available to servicemembers upon a showing that the service has a material affect on the servicemembers ability to comply. 50 USC § 591.

Absent a court order or enforceable waiver, a sale or foreclosure or the property is not valid if made during or within 90 days of military service. The court may order that the servicemember's equity be paid to the servicemember as a condition of permitting foreclosure. 50 USC App § 533.

The SCRA places a cap of 6% per annum on all pre-service loans incurred by a servicemember. All interest in excess of 6% is forgiven unless the creditor can demonstrate material affect. The cap does not apply to guaranteed student loans. 50 USC § 527.

7. Summary Judgment

Plaintiff can move for Summary Judgment 20 days after the action is filed. Summary judgment is not proper until pending discovery is completed. Societe Euro-Suisse v. Citizens & Southern Int'l Bank, 394 So.2d 533 (Fla. 3d DCA 1981); Fleet Fin. & Mortgage v. Carey, 707 So.2d 949 (Fla. 4th DCA 1998); Commercial Bank of Kendall v. Heiman, 322 So.2d 564 (Fla. 3d DCA 1975).

Affidavits opposing summary judgment must be served at least two (2) complete days before the summary judgment hearing and must be based on personal knowledge that demonstrates why the Plaintiff lacks the right to foreclosure and establishes the legitimacy of the affirmative defenses. The affidavits cannot be conclusory in nature and should stick to the facts which should be highly detailed. A memorandum of law arguing against Summary Judgment should always be filed.

8. Procedural Defenses

Before a foreclosure sale can take place, there must be a valid mortgage between the parties, a default by the borrower, proper foreclosure procedure, and no cure (if permitted) or redemption by the borrower.

8a. Failure to meet Procedural Prerequisites

In most jurisdictions, foreclosures are seldom contested by the homeowner. Foreclosing lenders fail to comply with procedural and substantive foreclosure requirements. By raising a lack of compliance, the homeowner can force the lender to rethink the foreclosure process, or at least to correct the defect, providing the homeowner with additional opportunities for loss mitigation, modification, loan restructuring, devising a workout, refinancing, a private sale and/or bankruptcy.

Careful review of the mortgage contract, applicable state statutes, and case law interpreting those statues to determine if the lender has fully complied is required. A mortgage is a contract. Its terms must be strictly followed to validate foreclosure

8b. Real Party In Interest

Naming the Plaintiff

The holder of the mortgage and the owner of the note at the time suit is filed are the proper parties to pursue a foreclosure. Any assignment of the note or mortgage must be supported by the record and must pre-date the filing of the complaint. Jeff-Ray Corp. v. Jacobson, 566 So.2d 885 (Fla. 4th DCA 1990). Assignment need not be attached to the complaint as long as the complaint alleges the plaintiff owns and holds the note and mortgage.

Naming the Defendant(s)

A foreclosure action must name all the title holders. Joining junior lienholders is optional. They are not indispensable parties. If not joined, the interest of the junior lienholder cannot be foreclosed. Cooper v. Wolkowitz, 375 So.2d 1099 (Fla. 3d DCA 1979). Co-tenants/mortgagees must be named. Lambert v. Dracos, 403 So.2d 481 (Fla. 1st DCA 1981). Persons with a lease or an option to purchase may be joined. A separate eviction action is not required if the tenant is named and served in the foreclosure. Redding v. Stockton, Whatley, Davin & Co., 488 So.2d 548 (Fla. 5th DCA 1986). Unless priority is an issue, superior lienholders are not necessary parties. Cone Brothers Constr. Co. v. Moore, 193 So.288 (Fla. 1940); Poinciana Hotel of Miami Beach, Inc. v. Kasden, 370 So.2d 399 (Fla. 3d DCA 1979), *cert. denied*, 381 So.2d 768 (1980).

8c. Default: Waiver and Estoppel

The terms of the note and mortgage or deed of trust define the elements of a default by the homeowner and what events give the lender the right to accelerate, demanding payment of all of the remaining payments at once.

Courts refuse to enforce acceleration provisions when the lender accepts late payments from the homeowner and fails to give notice of the lender's intention to insist on timely future payments.

Florida Case Notes:

When a lender's right to payment is contractually dependent upon compliance with certain conditions, acceleration and foreclosure should be denied until the conditions are met. F.A. Chastain Construction v. Pratt, 146 So.2d 910 (Fla. 3d DCA 1962) *aff'd with directions*, 157 So.2d 101 (1963); *See also* Gomez v. American Sav. & Loan Ass'n; 515 So.2d 301 (Fla 4th DCA 1987).

Compliance with **notice requirements** is critical to the lender's entitlement to foreclosure. Rashid v. Newberry Federal Savings & Loan Ass'n, 502 So.2d 1316 (Fla. 3d DCA 1987), *appeal after remand*, 526 So.2d 772 (1988) (30 day notice of default not given); Maniscalco v. Hollywood Federal Savings & Loan Ass'n, 397 So.2d 453 (Fla. 4th DCA 1981) (Notice required upon subsequent default after prior default cured). Notice of sale shall be published once a week for 2 consecutive weeks in a newspaper of general circulation, as defined in chapter 50, published in the county where the sale is to be held. The second publication shall be at least 5 days before the sale. Content must conform with the requirements of F.S.A § 45.031.

Failure to produce the original note and mortgage or to re-establish these instruments precludes foreclosure. Pastore-Borroto Development, Inc. v. Marevista Apartments, 596 So.2d 526 (Fla. 3d DCA 1992); Roberts v. Hart, 573 So.2d 12 (Fla. 4th DCA 1990); Emerald Plaza West v. Stalter, 466 So.2d 1129 (Fla. 3d DCA 1985).

A **waiver** occurs when the lender misleads the homeowner or some other legitimate misunderstanding occurs which causes the homeowner to not perform according to the terms of the contract. Lunn Woods v. Lowery, 577 So.2d 705 (Fla. 2d DCA 1991); Parker v. Dinsmore Co., 443 So.2d 356 (Fla. 1st DCA 1983); *See* Barnes v. Resolution Trust Corp., 664 So.2d 1171 (Fla. 4th DCA 1995). Under these circumstances, no consideration is required for the waiver to be effective. Flagler Center Bldg. Loan Corp. v. Chemical Realty Corp., 363 So.2d 344 (Fla. 3d DCA 1978), *cert. denied* 372 So.2d 467 (1979); Gilman v. Butzloff, 22 So.2d 263 (Fla. 1945).

Estoppel is involved when the conduct of the mortgagee induces the mortgagor to believe the strict terms of the mortgage will not be enforced and to act upon such belief. La Boutique of Beauty Academy v. Meloy, 436 So.2d 396 (Fla. 2d DCA 1983); Lambert v. Dracos: *See* Bensman v. Deluca, 498 So.2d 645 (Fla. 4th DCA 1986); 403 So.2d 481 (Fla. 1st DCA 1981) (Clear showing required).

9. Substantive Defenses

9 a. Fraud/Misrepresentation

The traditional elements of fraud and misrepresentation are more difficult to establish than a claim of unfairness or deception under Florida's Unfair and Deceptive Acts and Practices (UDAP) statute. To sustain an action for fraud it must be proven that a material representation of fact was made which was untrue and known to be untrue by the party making it or else recklessly made and that another party did in fact rely on it and was induced thereby to act to his detriment. When parties to a contract have a prior understanding about the contract's terms and the party responsible for drafting the contract includes contrary terms and then allows the other party to sign it without informing him of changes, the drafter's conduct is fraudulent. Peoples Trust & Savings Bank v. Humphrey 451 N.E. 1104 (1983)

Lender's actions in negotiation and execution of the loan documents contained all the elements necessary to render a contract void for fraud and misrepresentation. Lender through affirmative statements and material misrepresentations regarding the essential terms of the proposed contract (the true price of the loan, the attempted waiver of consumer protections) reasonably induced apparent assent (borrower's signature) by one who neither knew or had reasonable opportunity to know what the essential terms were. Greene v. Gibraltar Mortgage Investment Corp. 488 F. Supp. 177 (D.D.C. 1980)

Actions of home improvement contractor which constituted fraudulent inducement and failure of consideration were imputed to Mortgage corporation which subsequently purchased note. Mahaffey v. Investors National Security Co., 747 P.2d 890 (Nev. 1987).

The general rule is that where a competent, literate person signs or accepts a formal contract affecting his pecuniary interests, it is their duty to read and notice its contents will be imputed for negligent failure to do so. This rule only applies if nothing has been said or done to mislead person sought to be charged or to put a person of reasonable business prudence off guard. First Chapter National Bank v. Ross 617 A.2d 909 (1992).

Florida Case Notes:

The elements of fraud (misrepresentation or omission of a material fact made with the intent to deceive and to induce reliance, justifiable reliance and damages) must be proved by clear and convincing evidence. The remedy is rescission and cancellation of the mortgage or damages. Deemer v. Hallett Pontiac, Inc., 288 So.2d 526 (Fla. 3d DCA 1974); Bliss and Laughlin Industries Inc. v. Malley 364 So.2d 65 (Fla. 4th DCA 1978). (The two remedies are mutually exclusive)

If the agreement contains waiver provisions or an arbitration clause, the borrower must challenge the validity of the clause itself. Beaver Coaches, Inc. v. Revels Nationwide R.V. Sales, Inc., 543 So.2d 359 (Fla. 1st DCA 1989).

9b. Duress

Unjustified pressure to sign a mortgage, particularly in a home improvement or solicitation setting or upon a refinancing could provide equitable defenses and counterclaims based on economic oppression.

9c. Unclean Hands

Mortgage foreclosure is an equitable action and all the principles of equity apply. Cross v. Federal National Mortgage Ass'n, 359 So.2d 464 (Fla. 4th DCA 1978).

9d. Truth in Lending

Most home mortgages are subject to the disclosure requirements of the Truth in Lending Act (TILA). 15 U.S.C. § 1638. The Truth In Lending Act (TILA) requires disclosure of accurate information about loan transactions to facilitate informed use of credit by consumers. A homeowner is entitled to a TILA disclosure statement summarizing the credit terms prior to consummating a credit transaction. A homeowner has a TILA right to rescind most transactions for which the home is taken as collateral, other than transactions for the purchase of the home. Home equity loans and home improvement loans are rescindable transactions. TILA rescission remedies reflect Congress' intent to keep homeowners from placing their homes in jeopardy without a reasonably clear understanding of the financial risks and benefits of the transaction. The requisite number of covered transactions should be identified to establish TILA coverage. Some of the required disclosures are: the annual percentage rate, finance charge, amount financed, security interest, total of payments and a payment schedule. Notice of the right to rescind is also required for non-purchase money mortgages. 15 U.S.C. § 1635 (a). Statutory damages can also be awarded together with the costs and attorney fees. 15 U.S.C. §§ 1640 (a), 1635 (g).

Florida Case Notes:

Recession voids the mortgage and is a complete defense to foreclosure. Yslas v. D.K. Guenther Builders, Inc., 342 So.2d 859 (Fla. 2d DCA 1977); *See* Beach v. Great Western Bank, 670 So.2d 986 (Fla. 4th DCA 1996).

Important Note: The Truth-In-Lending Manual published by the National Consumer Law Center has an irreplaceable and complete analysis of TILA.

9e. Usury

Currently preemption of state usury laws limits usury as a defense in a foreclosure action. Even when the state (or federal) law places no restrictions on interest rates, other than the interest shall be as the contract provides, the loan may be usurious, if there is "hidden interest". **Hidden interest** can be unauthorized charges for lender services that are not included in the stated interest rate. For example, inclusion of an inflated appraisal fee should be characterized as a hidden finance charge, if the law only permits the "bona fide actual cost" of such fee to be excluded from the interest calculation and disclosure. Excessive "points" and "junk", "padded" and "bogus" charges should be the basis for a challenge as hidden interest.

Usury statutes protect borrowers by penalizing the money lender. Courts look beyond the form of the transaction to its substance for purposes of usury calculations.

9 e.i. Usury Defined

Usury Defined Generally: A loan is usurious when the interest actually charged exceeds the lawful rate.

A usurious transaction has four (4) elements:

(1.) an express or implied loan;
(2.) an understanding between the parties that the money loaned shall be returned;
(3.) an agreement that a greater rate of interest than is allowed by law shall be paid or agreed to be paid; and
(4.) the existence of a corrupt intent to take more than the legal rate for the use of the money loaned. Rollins v. Odom, 519 So.2d 652 (Fla. 1st DCA) *rev. den.* 529 So.2d 695 (Fla. 1988); Sharp v. Dixon, 252 So.2d 805 (Fla. 4th DCA 1971).

Usurious Contracts Defined by Florida Statute: All contracts for the payment of interest upon any loan, advance of money, line of credit, or forbearance to enforce the collection of any debt, or upon any obligation whatever, at a higher rate of interest than the equivalent of 18 percent per annum simple interest are hereby declared usurious. However, if such loan, advance of money, line of credit, forbearance to enforce the collection of a debt, or obligation exceeds $500,000 in amount or value, then no contract to pay interest thereon is usurious unless the rate of interest exceeds the rate prescribed in s. 687.071. **F.S.A.§ 687.02.**

9 e.ii. Federal Exemptions

<u>**Exemptions**</u> **from Florida's Usury Law**: The provisions of § 687.03 and of § 687.02 shall not apply to loans or other advances of credit made pursuant to:

1. A commitment to insure by the *Federal Housing Administration.*

2. A commitment to guarantee by the *United States Department of Veterans Affairs.*

3. A commitment to purchase a loan issued by the *Federal National Mortgage Association; Government National Mortgage Association; Federal Home Loan Mortgage Corporation;* any department, agency, or instrumentality of the Federal Government; or any successor of any of them, pursuant to any provision of the acts of Congress or federal regulations.

<u>**Federal exemptions**</u> **to state constitutions or statues limiting mortgage interest, discount points and other finance charges**: The Depository Institutions Deregulation and Monetary Control Act of 1980 preempts state interest ceilings of state usury law, when the Act is applicable. Act 12 U.S.C.

§§1735 f-7, f-7a. First American Bank & Trust Co. v. Windjammer Time Sharing Resort, Inc., 483 So.2d 732 (Fla.4th DCA 1986).

9 e.iii. Unlawful Rates of Interest Defined

Unlawful rates of Interest Defined by Florida statute:
" [i]t shall be usury and unlawful for any person, or for any agent, officer, or other representative of any person, to reserve, charge, or take for any loan, advance of money, line of credit, forbearance to enforce the collection of any sum of money, or other obligation a rate of interest greater than *the equivalent of 18 percent per annum simple interest*, either directly or indirectly, by way of commission for advances, discounts, or exchange, or by any contract, contrivance, or device whatever whereby the debtor is required or obligated to pay a sum of money greater than the actual principal sum received". F.S.A § 687.03(1).

Statutory Exempt fees from usury computation: This chapter shall not be so construed as to prevent provision for the payment of such **attorney's fees** as the court may determine in cases brought before the court to be reasonable and just **for legal services rendered in enforcing nonusurious contracts, either at law or in equity**. This chapter shall not be construed so as to prohibit mortgagees from contracting for or **collecting premiums for insurance actually issued on the property mortgaged**, with the usual loss payable or mortgage clause attached thereto; provided further, that it shall not be necessary for the court to adjudge an attorney's fee, provided in any note or other instrument of writing, to be reasonable and just, when such fee does not exceed 10 percent of the principal sum named in said note, or other instrument in writing. F.S. 687.06

Florida Case Notes:

Exempt fees from usury computation: Brokerage fees are not included in the calculation of interest unless the broker and the lender are under some form of common control or pursing a joint enterprise. Swanson v. Gulf West Int'l Corp., 429 So.2d 817 (Fla. 2d DCA 1983); North American Mortgage Invest. v. Cape San Blas Joint Venture, 378 So.2d 287 (Fla. 1979) (If the broker has a fiduciary duty to inform the borrower about the interest rate, late payments and other financial aspects of the transaction, the failure to make such disclosures are grounds for a tort claim based on breach or misrepresentation).

9 e.iii. (1) Interest Computation

Interest computed by Florida Statue: '[t]he rate of interest on any loan, advance of money, line of credit, forbearance to enforce the collection of a debt, or other obligation to pay interest **shall be determined and computed upon the assumption that the debt will be paid according to the agreed terms,** whether or not said loan, ... or other obligation is paid or collected by court action prior to its term, **and any payment or property charged, reserved, or taken as an advance or forbearance, which is in the nature of, and taken into account in**

the calculation of, interest shall be valued as of the date received and shall be spread over the stated term of the loan, ...for the purpose of determining the rate of interest. The spreading of any such advance or forbearance for the purpose of computing the rate of interest shall be calculated by first computing the advance or forbearance as a percentage of the total stated amount of such loan, ... or other obligation. This percentage shall then be divided by the number of years, and fractions thereof, of the loan, ...or other obligation according to its stated maturity date, without regard to early maturity in the event of default. The resulting annual percentage rate shall then be added to the stated annual percentage rate of interest to produce the effective rate of interest for purposes of this chapter...." F.S.A § 687.03 (3). *See* St. Petersburg Bank & Trust Co. v. Hamm, 414 So.2d 1071 (Fla. 1982); Cerrito v. Kovitch, 423 So.2d 1008 (Fla. 4th DCA 1982).

Florida Case Notes:

A bank cannot charge fees to cover overhead; a bank can only charge the borrower for the reasonable expenses of making the loan. Anything else is interest. First American Bank & Trust v. Windjammer Time Share Resort, Inc., 483 So.2d 732 (Fla. 4th DCA 1986), *rev. denied.* 494 So.2d 1150 (1986).

The interest ceiling is determined by the law in effect at the time the documents are executed. Century National Bank v. Williams, 422 So.2d 1065 (Fla. 1st DCA 1982).

A mortgagee who commits usury has unclean hands and cannot foreclose. Indianapolis Morris Plan Corp. v. Portela, 364 So.2d 840 (Fla. 3d DCA 1978).

Usury is determined upon the assumption that the loan will be repaid pursuant to its terms established as of the date of the contract. A corrupt purpose or bad faith on the part of the lender to get more interest than the law allows must be shown. Dixon v. Sharp, 276 So.2d 817 (Fla.1973).

9 f. Unconscionability

The common law contract defense of unconscionability may be applied to stop a foreclosure, when either the mortgage terms are unreasonably favorable to the lender and/or other aspects of the transaction render it unconscionable. **Substantive unconscionability** deals with the terms of the contract. **Procedural unconscionability** concerns the process of making the contract. Both must be proven.

Unconscionability references outrageous tactics and business practices that abuse, violate and victimize consumers and involves deceitful conduct and bad acts that result in excessive price, oppressive terms, coercion and a lack of bargaining power. All shocking to the conscience.

Upon finding unconscionability, the court has the power to refuse to enforce the entire contract or just the unconscionable provision. The Court can restrict the operation of the terms of the contract to avoid an unconscionable result. Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965) is the starter case on unconscionability.

Florida Case Notes:

Equity will provide relief to avoid an unconscionable contract. Hunt v. First National Bank of Tampa, 381 So.2d 1194 (Fla. 2d. DCA 1980); Federal Home Loan Mortgage Corp. v. Taylor, 318 So.2d 203 (Fla. 1st DCA 1975); Althouse v. Kenney, 182 So.2d 270 (Fla. 2d DCA 1966).

9 g. Florida Deceptive and Unfair Trade Practices Act (UDAP)

Many of the defenses discussed also constitute UDAP violations. F.S. § 501.201, et seq. The statue applies to a holder in due course.

9. h. Failure of Consideration

The failure of the lender to advance funds or to otherwise comply with the contract should cause a foreclosure to be denied. Rivers v. Amara, 40 So.2d 364 (Fla. 1949).

10. Counterclaims

Counterclaims can be asserted based on fraud, Truth-In-Lending violations, usury, unfair or deceptive practices, slander of credit, violations of the Florida Consumer Collection Practices Act, etc. Counterclaims seeking damages based on factual issues common to the foreclosure and to the mortgagor's claims are actions at law to which the right to a jury attaches.

11. The Judgment of Foreclosure and Aftermath

A judgment of foreclosure generally includes principal, interest, expenses reasonably incurred and the costs of the action. Pre-judgment interest cannot accrue interest post-judgment.

A certificate of title issued by the clerk passes title to the purchaser and the title relates back to the date of the mortgage being foreclosed. The clerk does not warrant the title and the buyer is subject to any liens not extinguished by the foreclosure. The buyer is entitled to a Writ of Possession as to all persons joined in the foreclosure and to receive all rents from the property.

Real property taxes, ad valorem and non-ad valorem tax liens, valid municipal assessment liens and deed restriction related liens for assessments are superior to all mortgages. F.S.A § 197.122. Judgment liens that are recorded in the county where the property is located prior to the recordation of the mortgage are superior as are valid mechanics liens if the notice is recorded prior to the mortgage. The priority of the federal lien is determined by the date the notice of the lien is filed with the county.

Proceeds from the sale are paid out pursuant to the foreclosure judgment, then to junior lien holders in order of priority. Any surplus goes to the owner of the equity of redemption at the time of sale.

11 a. Deficiency Judgment

If a foreclosure sale price is not enough to pay off the loan balance and allowable expenses the lender may sue the borrower to recover the deficiency. The deficiency may not exceed the difference between the sale price and the amount of indebtedness secured by the final judgment of foreclosure. Hatton v Barnett Bank of Palm Beach County, 550 So. 2d 65 (Fla. 1989).

It is within the discretion of the Court to issue a deficiency decree in the foreclosure action itself. F.S.A. 702.06. The lender may also institute a separate legal action to recover the deficiency from the mortgagor personally. This remedy is not available to mortgagees who purchase the property involved at the foreclosure sale. F.S.A. 702.06

12. Mechanisms to "undo" a finalized foreclosure.

12. a. The Appeal

Fla. R. App. Pro 9.310 provides for a stay pending appeal upon the posting of a good and sufficient bond. The effect is to stay the foreclosure sale. Evidence of damages sustained by the lender (based on the fair market value of the property, the extent of other liens, waste and interest accruing) as a result of the delay is considered in setting the bond. Cerrito v. Kovitch, 423 So.2d 1008 (Fla. 4th DCA 1982). There is some precedent in Florida for the approval of a bond executed by two personal sureties. An appeal will likely affect the marketability of the property.

12. b. Setting aside a Completed Foreclosure Sale

Homeowners in default and at risk of losing their home rarely seek legal advice.

A claim to set aside the sale must be based on more than the inadequacy of price. Fraud, mistake or some other egregious and material irregularity must be demonstrated. Fla. R. Civ. Pro. Rule 1.540(b) allows for relief within one year of judgment. Arlt v. Buchanan, 190 So.2d 575 (Fla. 1966). The judgment cannot require that the Plaintiff be present for the sale to occur.

13. Alternatives to Foreclosure

1. Evaluate the circumstances:
   - What is the value of the property and the benefits of delay?
   - Are there opportunities to reinstate?
   - Is there a possibility of refinancing?

- Will the lender accept a discounted payoff?
- Can a resale prevent the loss of equity?
- Consumer Loan Restructuring/Special Forebearance
- Loss Mitigation/Loan Modifications
- Should a deed in lieu of foreclosure be considered? If so, the lender should waive any deficiency. The mortgagee should not sign a Warranty Deed. This won't work if there are junior lien holders.

2. Redemption

The mortgagee has the right to redeem the property (thereby extinguishing the underlying debt and mortgage) up to the date of sale. F.S.A. § 45.0315.

Florida Case Notes:

Redemption requires payment of the amount of the judgment, together with all costs and attorney's fees and is effective upon tender of the amount of the judgment with the Clerk. Cain & Bultman, Inc. v. Miss Sam, Inc., 409 So. 2d 114 (Fla. 5th DCA 1982).

The property can also be redeemed by a junior lienholder prior to judgment and by a vendee under contract for deed. White v. Brousseau, 566 So.2d 832 (Fla. 5th DCA 1990).

14. Bankruptcy and Foreclosure

A consumer facing the loss of his or her home through foreclosure or execution on a judgment may be able to secure temporary or permanent relief in the bankruptcy court. A complete discussion of the bankruptcy process can be found in *Consumer Bankruptcy Law and Practice (6th ed. 2000 and Supp.).* Generally a Chapter 13 bankruptcy is an opportunity for the debtor to cure a default over an extended period of time by making regular mortgage payments and monthly payments on the arrears. At the very least bankruptcy will delay the foreclosure giving the mortgagor time to sell the property and possibly avoid losing equity.

The Petition for bankruptcy must be filed prior to the sale and it automatically stops the foreclosure from proceeding. A Suggestion of Bankruptcy should be filed in the foreclosure action giving notice of the filing of the bankruptcy petition. The lender can pursue adequate protection or relief from the stay to pursue the foreclosure.

15. Taxes

First, forgiveness of the debt is not income. The rationale for taxing forgiveness of debt as income is that there is some initial benefit to the borrower, which is not taxed.

Second, this is a bargained-for exchange, and not a gift. Borrower is giving up her right to continue legal action in exchange for the debt forgiveness. Her surrender of that right is something of value, which suggests that the debt has not so much been forgiven as redeemed.

Third, the code specifically excludes forgiveness of debt income where the debtor is insolvent or the fair market value of assets is less than liabilities. 26 U.S.C. § 108(a)(1)(B) and (d)(3). The homestead value of the assets is also excluded. See Fifth Avenue-Fourteenth St. Corp. v. Commissioner, 147 F. 2d 453 (2d Cir. 1944).

Legal arguments to lender against issuing a 1099 for discharge of indebtedness income:

1. There is no cancellation of indebtedness income pursuant to 26 U.S.C. § 5060P, but settlement of a contested liability.
2. There is no discharge of indebtedness income but a nontaxable purchase price reduction.
3. There is no requirement to issue a 1099 if the borrower is insolvent. 26 U.S.C. §108(a)(1)(B)
4. Lenders only have an obligation to issue a 1099 to report "cancellation of indebtedness," pursuant to 26 U.S.C. § 5060P. The "cancellation of indebtedness" doctrine originated in the case of United States v. Kirby Lumber Co., 284 U.S. 1 (1931).
5. There is no discharge of indebtedness but a nontaxable purchase price reduction if the debt is reduced because of "infirmities" in the original sale, like "the seller's inducement of a higher purchase price by misrepresentation of a material fact or by fraud." Rev. Ruling 92-99, affirming Commissioner v. Sherman, 135 F.2d 70.
6. No benefit to the borrower. The borrower is not enriched by the settlement.
7. There is no penalty in the Internal Revenue Code "with respect to any failure" to issue an information return "if it is shown that such failure is due to reasonable cause and not to willful neglect." See 26 U.S.C. § 6724(a).

(borrowed and modified from the work of Diane E. Thompson
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Appendix 5

Answers and Affirmative Defenses

IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

CASE NO.: **

DIVISION: **

**,

Plaintiff,

vs.

**,

Defendant.
_______________________________/

ANSWER AND AFFIRMATIVE DEFENSES

Defendant,**,answers the complaint as follows:

1. Admitted.

2. Defendant lacks sufficient knowledge to admit or deny paragraph 2.

3. Admitted.

4. Defendant lacks sufficient knowledge to admit or deny paragraph 4.

5. Denied.

6. Defendant denies that the full amount payable under the note is due.

7. Denied.

8. Defendant lacks sufficient knowledge to admit or deny paragraph 8.

9. Denied.

10. Admitted

11. Defendant lacks sufficient knowledge to admit or deny

paragraph 11.

FARMERS HOME DEFENSES

[FMHA.not delinquent enough]

** Plaintiff cannot maintain this foreclosure action because all of the conditions precedent to this action have not been satisfied.

** Plaintiff is required to comply with regulations promulgated by the United States Department of Agriculture at 7 C.F.R. §1951.312 concerning the servicing of loans.

** Regulations at 7 C.F.R. §1951.312 provide that a Farmers home mortgage will not be accelerated unless at least three payments are past due, or the account remains two payments past due for at least three consecutive months.

** Plaintiff accelerated Defendant's farmers home mortgage even though Defendant's account was not three payments past due or two payments past due for at least three consecutive months.

[FMHA.failure to service]

** Plaintiff cannot maintain this foreclosure action because all of the conditions precedent to this action have not been satisfied.

** Regulations at 7 C.F.R. §1951.312(e) require the Farmers Home Administration to promptly and systematically service delinquent accounts to attempt to have the problems resolved so the borrower's homeownership is not jeopardized.

** Plaintiff failed to satisfy the servicing requirements in that Plaintiff failed to effectively notify the Defendant of options and procedures that would have helped her/him avoid the foreclosure and alleged delinquency.

[FMHA.denial of grievance hearing]

** Plaintiff cannot maintain this foreclosure action because all of the conditions precedent to this action have been satisfied. ** Regulations at 7 C.F.R. §1900.53(a)(2)(3) require that persons directly and adversely affected by a Farmers Home Administration decision must be given specific reasons for adverse action within ten (10) days of the decision.

** The notice must advise the individual that she/he may attend a meeting with the decision-maker for the decision maker to explain the adverse action before the formal appeals process is undertaken.

** Defendant made a request to Plaintiff for a hearing on Plaintiff's decision to accelerate.

** Plaintiff failed to provide a meeting with the Defendant to discuss the adverse decision.

** Plaintiff's refusal to give Defendant a hearing violates 7 C.F.R. §1900.53(a)(2).

HUD DEFENSES

[HUD.failure to comply with servicing regs]

** The mortgage which is the subject of this action is insured by the federal Single-Family Loan Insurance Program, 12 U.S.C. §1709. Therefore, Plaintiff must service the mortgage according to the applicable federal regulations. Plaintiff failed to comply with these regulations as detailed below, precluding the initiation of foreclosure proceedings.

(a) Failed to send a delinquency notice as required by 24 C.F.R. §203.602.

(b) Failed to contact or make reasonable attempts to contact Defendants as required by 24 C.F.R. §203.604.

(c) Refused to accept partial payments which it was required to accept under 24 C.F.R. §203.556.

(d) Failed to provide Defendant with a pre-foreclosure counseling notice within forty-five (45) days of having missed a payment, as required by U.S.C. §1701x(c)(5).

(e) Failed to provide a default notice as required by 24 C.F.R. §203.650.

CONTRACT DEFENSES

[CONTRACT.failure to condition precedent]

** Plaintiff seeks to enforce an agreement for deed through foreclosure when Plaintiff himself has failed to perform under the terms and conditions of the agreement for deed.

** Plaintiff's failure to perform under the agreement for deed bars him/her from claiming a default based _______________

[CONTRACT.refusal of payment

** Defendant tendered payment in **[month,year] and Plaintiff returned said payment to Defendant.

** Defendant further tendered payment to Plaintiff in **[month, year] and that payment was also returned to Defendant.

** Plaintiff is not entitled to maintain this foreclosure for non-payment because Plaintiff wrongfully refused tender of payment.

[CONTRACT.escrow]

** Plaintiff failed to promptly repay to Defendant or credit to Defendant's account excess escrow funds as required by the terms of the mortgage.

[CONTRACT.escrow]

** Plaintiff paid real estate ad valorem taxes due on the property with actual knowledge that the taxes paid were nearly double any previous amount paid, thus reducing the amount of escrow funds which would have been available to apply to the amounts owed under the note and mortgage.

[CONTRACT.bad notice with too much demanded]

** The mortgage obligated the Plaintiff to send a notice to Defendant permitting reinstatement, prior to the filing of a foreclosure.

** The notice permitting reinstatement was to inform the Defendant of the amount payments past due, the interest and late charges thereon, and any other amounts that were then due and owing under the terms of the mortgage.

** Plaintiff's notice to Defendant improperly demanded advance payments of amounts coming due in the future under the mortgage.

[CONTRACT.Unconscionability]

** The mortgage is unconscionable in that it purports to waive rights to which the mortgagor is entitled by law.

** Specifically, the mortgage is unconscionable in that it seeks to have the mortgagor waive his right to a notice mandated by federal law at 12 U.S.C. §1701(x)(c)(5).

** Specifically, the mortgage is unconscionable in that it seeks to have the mortgagor waive his right to due process prior to entry upon the land he owns.

** Because the mortgage is unconscionable, it cannot be enforced in this action.

[CONTRACT.Breach of Contract]

** The mortgage obligates the Plaintiff to notify the Defendant of a default prior to acceleration and to give the Defendant thirty days in which to cure the default.

** Here, the Plaintiff sent a notice to the Defendant, informing him of a default in the lapse of insurance and giving the Defendant **days in which to cure the default.

** On the twentieth day after sending the notice to the Defendant, the Plaintiff sent a letter to the Defendant, accelerating the mortgage debt.

** Plaintiff's breach of the terms of the mortgage now prohibit it from seeking foreclosure in this action.

STATUTE

[STATUTE.Failure of Condition Precedent]

** The Plaintiff failed to provide Defendant with a pre-foreclosure counseling notice within 45 days of having missed a payment, as required by 12 U.S.C. §1701(x)(c)(5).

[STATUTE.Failure to Comply with 12 U.S.C. §1701(x)(c)(5)]

** Plaintiff failed to comply with the requirements of 12 U.S.C. §1701(x)(c)(c), prior to instituting this foreclosure action and is therefore estopped from proceeding with this action.

** Plaintiff filed this foreclosure action concerning the conventional mortgage under which Defendant is obligated and which is the subject of this cause.

** Defendant defaulted on the mortgage due to an involuntary reduction in his/her income.

** Plaintiff is required by the Housing and Community Development Act of 1987, as amended, to send a notice of the availability of financial counseling to the Defendant who became delinquent due to an involuntary loss of income before Plaintiff can legally initiate a foreclosure action against Defendant. United Companies Financial Corp. vs. McClane, (Fla. Cir. Ct., Orange County, 1991, Case Number 90-10345); 54 Fed. Reg. 210964, 20965 (May 15, 1989); U.S. vs. Trimble, 86 F.R.D. 435 (S.D. Fla. 1980).

** 12 U.S.C. §1701(x)(c)(5), was first passed as a provision of the Housing and Community Development Act of 1987. Congress has extended this pre-foreclosure notice requirement through 1994. See, Housing and Community Education and Development Act of 1992, Section 162; P. 102-550; 106 Stat. 3719-3722.

** The Federal Regulations issued pursuant to the statute require the creditor to send notification before the expiration of the 45 day period beginning on the date on which the failure to pay occurs.

** Plaintiff is required under the statute and regulations to advise Defendant of any home ownership counseling Plaintiff may offer together with information about counseling offered by the U.S. Department of Housing and Urban Development.

** The Department of Housing and Urban Development has determined that the act creates an affirmative legal duty on the part of the creditor which the homeowner/mortgager can enforce and that the creditor's non-compliance with the law's requirements may be an actionable event that could affect a mortgagee's liability to carry out foreclosure in a timely manner. 54 Fed. Reg. 20964-65 (May 15, 1988).

** Plaintiff never sent Defendant the required notice.

** Plaintiff has no valid cause of action for foreclosure unless and until it can demonstrate compliance with 12 U.S.C. §1701(x)(c)(5). Cross vs. Federal National Mortgage Association, 359 So.2d 464, 465 (4th DCA 1978); First Union Home Equity Corp. vs. Joshua, Sarasota Circuit Court Case No. 92-4728-CA-01 (11/01/93).

EQUITY DEFENSES

[EQUITY.inequitable agreement]

** Plaintiff is not permitted to profit from his own inequity. Plaintiff seeks to foreclose an agreement for deed that is abhorrent under the law.

** The agreement for deed is inequitable in that it does not allow for recordation in the official records of (county) County, Florida.

** The agreement for deed is inequitable in that it included a promise by the Plaintiff to perform an act which the Plaintiff knew he was incapable of performing. Specifically, the Plaintiff was prohibited from alienating or transferring any interest in the property.

** The agreement for deed is inequitable because it attempts to forego rights created by the laws and Constitution of Florida. Specifically, the agreement for deed attempts to grant the Plaintiff the right to unlawfully reenter the premises without benefit of legal action.

** The agreement for deed is inequitable because it attempts to forego rights created by the laws and Constitution of Florida. Specifically, the agreement for deed attempts to deprive the Defendant of her right to notices required by law.

[EQUITY.unclean hands]

** Plaintiff cannot foreclose the agreement for deed because he is not free of inequitable conduct relative to the controversy.

** Plaintiff entered into the agreement for deed in bad faith in that he knew he was unable to perform under the terms of the agreement for deed.

** When Plaintiff and Defendant entered into the agreement for deed, Plaintiff represented that he was able to transfer the property to the Defendant upon the Defendant's satisfaction of the terms of the agreement for deed.

** When the Plaintiff and Defendant entered into the agreement for deed, Plaintiff was subject to a mortgage on the property that proscribed alienation or transfer of any interest in the property. Plaintiff did not disclose the existence of the mortgage to the Defendant, nor disclose the proscription against alienation or transfer.

** The Defendant was without legal counsel at the time the parties entered into the agreement for deed.

** The Plaintiff entered into the agreement for deed knowing he lacked the authority to transfer any interest in the property to the Defendant.

** Plaintiff's actions show he has acted in an inequitable fashion which bars him from seeking the equitable relief of foreclosure.

[EQUITY.unclean hands]

** Plaintiff cannot foreclose the agreement for deed because he is not free of inequitable conduct relative to the controversy.

** Plaintiff entered into the agreement for deed in bad faith in that he did not intend to perform under the terms of the agreement for deed.

** The Defendant was without legal counsel at the time the parties entered into the agreement for deed.

** Plaintiff transferred the home to the Defendant "as is" and knew that the Defendant intended to perform certain ordinary repairs and improvements to the property.

** Plaintiff knew or should have known there were serious defects with the property but did not disclose these to the Defendant.

** Plaintiff knew or should have know the serious defects would affect the Defendant's ability to live in the home.

** The Defendant performed numerous repairs to the property, including a repair to correct a defect in the septic drain field which was not disclosed by the Plaintiff prior to the agreement for deed.

** The repairs performed by the Defendant enriched and enhanced the property.

** Subsequent to the repairs, the Plaintiff sought to regain possession of the property by pressuring the Defendant to sign a quitclaim deed.

** The process of entering into an unrecordable agreement for deed, allowing improvements to the property, and then seeking to regain the property through a quitclaim deed, at a time when the Plaintiff lacked authority to transfer the property, evidences a lack of good faith and an intent of the Plaintiff's to enrich himself at the expense of the Defendant.

** Plaintiff's actions show he has acted in an inequitable fashion which bars him from seeking the equitable relief of foreclosure.

[EQUITY.waiver.acceptance of payments after acceleration]

** Plaintiff waived his right to foreclose the mortgage by accepting payments from Defendant subsequent to the letter of acceleration. **(This may actually be a defense to a summary judgment and not a actual defense to the foreclosure unless the entire amount due was tendered)**

[EQUITY.unclean hands.failure to follow law]

** Plaintiff is barred by the doctrine of "unclean hands" from the foreclosure that it seeks in connection with the subject transaction because the transaction violates a federal consumer protection statute and because Plaintiff has violated 12 U.S.C. §1701(x)(c)(5), which requires mortgagees to send a pre-foreclosure notice to a mortgagor regarding home ownership counseling prior to instituting a foreclosure proceeding.

[EQUITY.equity follows the law.Supremacy of Federal Law]

** Plaintiff cannot obtain equitable relief because it is incompatible with the remedy provided to Defendants by Federal Law, which must prevail.

[EQUITY.Fraud]

** The Plaintiff is barred from foreclosure because it engaged in fraud in the procurement of the mortgage.

** On xx, 200x, the parties met to close a transaction whereby the Defendant would become the owner of property located at (address), (city), (county), Florida and would become indebted to the Plaintiff for the sum of dollar amount ($). In exchange, the Plaintiff would accept and hold a mortgage, securing his interest in the property.

** As part of that transaction, the Plaintiff executed and delivered to the Defendant an affidavit declaring that there were no other claims, liens, or encumbrances upon the property that was being transferred.

** Relying upon the representations of the Plaintiff, the Defendant executed the mortgage note and mortgage.

** At the time of the transaction, Plaintiff knew and concealed information about an outstanding judgment lien on the property, representing a debt of ($$$$$$$) to Barnett Bank.

** At the time of the transaction, Plaintiff knew and concealed information about an outstanding judgment lien on the property, representing a debt of ($$$$$$$) to the Internal Revenue Service of the United States of America.

** The Defendant's reliance on the Plaintiff's representation that the property was clear of claims, liens, or encumbrances was reasonable.

** But for the fraudulent misrepresentation of the Plaintiff, the Defendant would not have entered into the transaction and would not have granted the mortgage to the Plaintiff.

** Plaintiff's fraud upon the Defendant bars him from obtaining foreclosure in this action.

[EQUITY.Estoppel]

** Plaintiff is estopped to foreclose the mortgage by consistently accepting late and partial payments from defendant.

CONSUMER DEFENSES

[CONSUMER.Violation of Truth in Lending.Offset]

** Plaintiff has violated the Truth in Lending Act, 15 U.S.C. §1601, et. seq., as more fully stated in Defendant's counterclaim, entitling Defendant to offset her damages for that violation against any amount she owes Plaintiff.

[CONSUMER.Violation of Truth in Lending.Rescission]

This applies only to non-purchase money mortgages.

** The transaction upon which the present foreclosure is based ("transaction"), including the promissory note and the mortgage is subject to the provisions of the Truth-in-Lending Act, 15 U.S.C. §1601-1641 ("Act"), and Regulation Z, 12 C.F.R. §226 ("Regulation").

** The transaction is subject to the rescission provisions in the Act at 15 U.S.C. §1635 and the Regulation at 12 C.F.R. §226.23.

** In connection with the transaction, Defendants have not been given a notice of their right to rescind that complies with 12 C.F.R. §226.33(b). One defect in the notice is an erroneous date for expiration of the rescission period.

** In connection with the transaction, Defendants have not been given a disclosure statement that complies with the Act and Regulation. One defect in the disclosure statement is an under-statement of the finance charge.

** On December 2, 1993, Defendants exercised their right to rescind the transaction by sending through counsel a letter of rescission attached hereto as Exhibit A.

** As a result of Defendant's rescission, the transaction including the mortgage sought to be foreclosed herein, is completely unenforceable.

[CONSUMER.civil usury]

** Plaintiff charged the Defendant civilly usurious interest, as that term is defined at §687.03, Fla. Stat.

** Because Plaintiff engaged in unlawful lending, he is prohibited from foreclosing on the mortgage instrument.

[CONSUMER.criminal usury]

** Plaintiff charged the Defendant criminally usurious interest, as that term is defined at §687.071, Fla. Stat.

** Because the Plaintiff engaged in unlawful lending, he is prohibited from foreclosing on the mortgage instrument.

[CONSUMER.unfair and deceptive practices]

WHEREFORE, Defendant prays this Court will dismiss Plaintiff's Complaint, assess costs and attorney fees against the Plaintiff, and grant such other relief as is appropriate.

[OR]

WHEREFORE, Defendants request the Court dismiss the Plaintiff's Complaint with prejudice, enter an Order declaring the subject transaction rescinded with the result that Plaintiff's security is void and unenforceable and Defendants are released from all contractual liability; award Defendants' attorney fees and costs and all such other relief as Defendants may prove themselves entitled.

Attorneys for **

By:________________________________

Attorney-at-Law
FLA. BAR NO:

paragraph 11.

FARMERS HOME DEFENSES

[FMHA.not delinquent enough]

** Plaintiff cannot maintain this foreclosure action because all of the conditions precedent to this action have not been satisfied.

** Plaintiff is required to comply with regulations promulgated by the United States Department of Agriculture at 7 C.F.R. §1951.312 concerning the servicing of loans.

** Regulations at 7 C.F.R. §1951.312 provide that a Farmers home mortgage will not be accelerated unless at least three payments are past due, or the account remains two payments past due for at least three consecutive months.

** Plaintiff accelerated Defendant's farmers home mortgage even though Defendant's account was not three payments past due or two payments past due for at least three consecutive months.

[FMHA.failure to service]

** Plaintiff cannot maintain this foreclosure action because all of the conditions precedent to this action have not been satisfied.

** Regulations at 7 C.F.R. §1951.312(e) require the Farmers Home Administration to promptly and systematically service delinquent accounts to attempt to have the problems resolved so the borrower's homeownership is not jeopardized.

** Plaintiff failed to satisfy the servicing requirements in that Plaintiff failed to effectively notify the Defendant of options and procedures that would have helped her/him avoid the foreclosure and alleged delinquency.

[FMHA.denial of grievance hearing]

** Plaintiff cannot maintain this foreclosure action because all of the conditions precedent to this action have been satisfied. ** Regulations at 7 C.F.R. §1900.53(a)(2)(3) require that persons directly and adversely affected by a Farmers Home Administration decision must be given specific reasons for adverse action within ten (10) days of the decision.

** The notice must advise the individual that she/he may attend a meeting with the decision-maker for the decision maker to explain the adverse action before the formal appeals process is undertaken.

** Defendant made a request to Plaintiff for a hearing on Plaintiff's decision to accelerate.

** Plaintiff failed to provide a meeting with the Defendant to discuss the adverse decision.

** Plaintiff's refusal to give Defendant a hearing violates 7 C.F.R. §1900.53(a)(2).

HUD DEFENSES

[HUD.failure to comply with servicing regs]

** The mortgage which is the subject of this action is insured by the federal Single-Family Loan Insurance Program, 12 U.S.C. §1709. Therefore, Plaintiff must service the mortgage according to the applicable federal regulations. Plaintiff failed to comply with these regulations as detailed below, precluding the initiation of foreclosure proceedings.

(a) Failed to send a delinquency notice as required by 24 C.F.R. §203.602.

(b) Failed to contact or make reasonable attempts to contact Defendants as required by 24 C.F.R. §203.604.

(c) Refused to accept partial payments which it was required to accept under 24 C.F.R. §203.556.

(d) Failed to provide Defendant with a pre-foreclosure counseling notice within forty-five (45) days of having missed a payment, as required by U.S.C. §1701x(c)(5).

(e) Failed to provide a default notice as required by 24 C.F.R. §203.650.

CONTRACT DEFENSES

[CONTRACT.failure to condition precedent]

** Plaintiff seeks to enforce an agreement for deed through foreclosure when Plaintiff himself has failed to perform under the terms and conditions of the agreement for deed.

** Plaintiff's failure to perform under the agreement for deed bars him/her from claiming a default based ______________

[CONTRACT.refusal of payment

** Defendant tendered payment in **[month,year] and Plaintiff returned said payment to Defendant.

** Defendant further tendered payment to Plaintiff in **[month, year] and that payment was also returned to Defendant.

** Plaintiff is not entitled to maintain this foreclosure for non-payment because Plaintiff wrongfully refused tender of payment.

[CONTRACT.escrow]

** Plaintiff failed to promptly repay to Defendant or credit to Defendant's account excess escrow funds as required by the terms of the mortgage.

[CONTRACT.escrow]

** Plaintiff paid real estate ad valorem taxes due on the property with actual knowledge that the taxes paid were nearly double any previous amount paid, thus reducing the amount of escrow funds which would have been available to apply to the amounts owed under the note and mortgage.

[CONTRACT.bad notice with too much demanded]

** The mortgage obligated the Plaintiff to send a notice to Defendant permitting reinstatement, prior to the filing of a foreclosure.

** The notice permitting reinstatement was to inform the Defendant of the amount payments past due, the interest and late charges thereon, and any other amounts that were then due and owing under the terms of the mortgage.

** Plaintiff's notice to Defendant improperly demanded advance payments of amounts coming due in the future under the mortgage.

[CONTRACT.Unconscionability]

** The mortgage is unconscionable in that it purports to waive rights to which the mortgagor is entitled by law.

** Specifically, the mortgage is unconscionable in that it seeks to have the mortgagor waive his right to a notice mandated by federal law at 12 U.S.C. §1701(x)(c)(5).

** Specifically, the mortgage is unconscionable in that it seeks to have the mortgagor waive his right to due process prior to entry upon the land he owns.

** Because the mortgage is unconscionable, it cannot be enforced in this action.

[CONTRACT.Breach of Contract]

** The agreement for deed is inequitable because it attempts to forego rights created by the laws and Constitution of Florida. Specifically, the agreement for deed attempts to grant the Plaintiff the right to unlawfully reenter the premises without benefit of legal action.

** The agreement for deed is inequitable because it attempts to forego rights created by the laws and Constitution of Florida. Specifically, the agreement for deed attempts to deprive the Defendant of her right to notices required by law.

[EQUITY.unclean hands]

** Plaintiff cannot foreclose the agreement for deed because he is not free of inequitable conduct relative to the controversy.

** Plaintiff entered into the agreement for deed in bad faith in that he knew he was unable to perform under the terms of the agreement for deed.

** When Plaintiff and Defendant entered into the agreement for deed, Plaintiff represented that he was able to transfer the property to the Defendant upon the Defendant's satisfaction of the terms of the agreement for deed.

** When the Plaintiff and Defendant entered into the agreement for deed, Plaintiff was subject to a mortgage on the property that proscribed alienation or transfer of any interest in the property. Plaintiff did not disclose the existence of the mortgage to the Defendant, nor disclose the proscription against alienation or transfer.

** The Defendant was without legal counsel at the time the parties entered into the agreement for deed.

** The Plaintiff entered into the agreement for deed knowing he lacked the authority to transfer any interest in the property to the Defendant.

** Plaintiff's actions show he has acted in an inequitable fashion which bars him from seeking the equitable relief of foreclosure.

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** The Defendant was without legal counsel at the time the parties entered into the agreement for deed.

** Plaintiff transferred the home to the Defendant "as is" and knew that the Defendant intended to perform certain ordinary repairs and improvements to the property.

** Plaintiff knew or should have known there were serious defects with the property but did not disclose these to the Defendant.

** Plaintiff knew or should have know the serious defects would affect the Defendant's ability to live in the home.

** The Defendant performed numerous repairs to the property, including a repair to correct a defect in the septic drain field which was not disclosed by the Plaintiff prior to the agreement for deed.

** The repairs performed by the Defendant enriched and enhanced the property.

** Subsequent to the repairs, the Plaintiff sought to regain possession of the property by pressuring the Defendant to sign a quitclaim deed.

** The process of entering into an unrecordable agreement for deed, allowing improvements to the property, and then seeking to regain the property through a quitclaim deed, at a time when the Plaintiff lacked authority to transfer the property, evidences a lack of good faith and an intent of the Plaintiff's to enrich himself at the expense of the Defendant.

** Plaintiff's actions show he has acted in an inequitable fashion which bars him from seeking the equitable relief of foreclosure.

[EQUITY.waiver.acceptance of payments after acceleration]

** Plaintiff waived his right to foreclose the mortgage by accepting payments from Defendant subsequent to the letter of acceleration. **(This may actually be a defense to a summary judgment and not a actual defense to the foreclosure unless the entire amount due was tendered)**

[EQUITY.unclean hands.failure to follow law]

** Plaintiff is barred by the doctrine of "unclean hands" from the foreclosure that it seeks in connection with the subject transaction because the transaction violates a federal consumer protection statute and because Plaintiff has violated 12 U.S.C. §1701(x)(c)(5), which requires mortgagees to send a pre-foreclosure notice to a mortgagor regarding home ownership counseling prior to instituting a foreclosure proceeding.

[EQUITY.equity follows the law.Supremacy of Federal Law]

** Plaintiff cannot obtain equitable relief because it is incompatible with the remedy provided to Defendants by Federal Law, which must prevail.

[EQUITY.Fraud]

** The Plaintiff is barred from foreclosure because it engaged in fraud in the procurement of the mortgage.

** On xx, 200x, the parties met to close a transaction whereby the Defendant would become the owner of property located at (address), (city), (county), Florida and would become indebted to the Plaintiff for the sum of dollar amount ($). In exchange, the Plaintiff would accept and hold a mortgage, securing his interest in the property.

** As part of that transaction, the Plaintiff executed and delivered to the Defendant an affidavit declaring that there were no other claims, liens, or encumbrances upon the property that was being transferred.

** Relying upon the representations of the Plaintiff, the Defendant executed the mortgage note and mortgage.

** At the time of the transaction, Plaintiff knew and concealed information about an outstanding judgment lien on the property, representing a debt of ($$$$$$$) to Barnett Bank.

** At the time of the transaction, Plaintiff knew and concealed information about an outstanding judgment lien on the property, representing a debt of ($$$$$$$) to the Internal Revenue Service of the United States of America.

** The Defendant's reliance on the Plaintiff's representation that the property was clear of claims, liens, or encumbrances was reasonable.

** But for the fraudulent misrepresentation of the Plaintiff, the Defendant would not have entered into the transaction and would not have granted the mortgage to the Plaintiff.

** Plaintiff's fraud upon the Defendant bars him from obtaining foreclosure in this action.

[EQUITY.Estoppel]

** Plaintiff is estopped to foreclose the mortgage by consistently accepting late and partial payments from defendant.

CONSUMER DEFENSES

[CONSUMER.Violation of Truth in Lending.Offset]

** Plaintiff has violated the Truth in Lending Act, 15 U.S.C. §1601, et. seq., as more fully stated in Defendant's counterclaim, entitling Defendant to offset her damages for that violation against any amount she owes Plaintiff.

[CONSUMER.Violation of Truth in Lending.Rescission]

This applies only to non-purchase money mortgages.

** The transaction upon which the present foreclosure is based ("transaction"), including the promissory note and the mortgage is subject to the provisions of the Truth-in-Lending Act, 5 U.S.C. §1601-1641 ("Act"), and Regulation Z, 12 C.F.R. §226 ("Regulation").

** The transaction is subject to the rescission provisions in the Act at 15 U.S.C. §1635 and the Regulation at 12 C.F.R. §226.23.

** In connection with the transaction, Defendants have not been given a notice of their right to rescind that complies with 12 C.F.R. §226.33(b). One defect in the notice is an erroneous date for expiration of the rescission period.

** In connection with the transaction, Defendants have not been given a disclosure statement that complies with the Act and Regulation. One defect in the disclosure statement is an under-statement of the finance charge.

** On December 2, 1993, Defendants exercised their right to rescind the transaction by sending through counsel a letter of rescission attached hereto as Exhibit A.

** As a result of Defendant's rescission, the transaction including the mortgage sought to be foreclosed herein, is completely unenforceable.

[CONSUMER.civil usury]

** Plaintiff charged the Defendant civilly usurious interest, as that term is defined at §687.03, Fla. Stat.

** Because Plaintiff engaged in unlawful lending, he is prohibited from foreclosing on the mortgage instrument.

[CONSUMER.criminal usury]

** Plaintiff charged the Defendant criminally usurious interest, as that term is defined at §687.071, Fla. Stat.

** Because the Plaintiff engaged in unlawful lending, he is prohibited from foreclosing on the mortgage instrument.

[CONSUMER.unfair and deceptive practices]

WHEREFORE, Defendant prays this Court will dismiss Plaintiff's Complaint, assess costs and attorney fees against the Plaintiff, and grant such other relief as is appropriate.

[OR]

WHEREFORE, Defendants request the Court dismiss the Plaintiff's Complaint with prejudice, enter an Order declaring the subject transaction rescinded with the result that Plaintiff's security is void and unenforceable and Defendants are released from all contractual liability; award Defendants' attorney fees and costs and all such other relief as Defendants may prove themselves entitled.

Attorneys for **

By: ____________________________

Attorney-at-Law
FLA. BAR NO:

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
VOLUSIA COUNTY, FLORIDA.

CASE NO.: **
DIVISION: **

**
Plaintiff,
vs.

**
Defendants.
_________________________________/

DEFENDANT, ** MOTION TO DISMISS
PLAINTIFF'S COMPLAINT, OR IN THE
ALTERNATIVE, MOTION FOR MORE DEFINITE STATEMENT

The Defendant, **, (hereinafter "**") by and though her undersigned attorney, moves the Court, pursuant to Rules 1.210(a), 1.130(a) and 1.140(b)(7) of the Florida Rules of Civil Procedure, to dismiss the Plaintiff's Complaint for failure to join an indispensable party. In the alternative, ** requests this Court to enter an Order requiring Plaintiff to provide a more definite statement. In support of these alternative motions, ** says:

1. ** is the owner of the property which is the subject of this mortgage foreclosure Complaint. She requests the Court dismiss this action pursuant to Rule 1.210(a) and 1.140(7), because it appears on the face of the Complaint that a person other than the Plaintiff is the true owner of the claim sued upon and that the Plaintiff is not the real party in interest and is not shown to be authorized to bring this action. *In re: Shelter Development Group, Inc*., 50 B.R. 588 (Bankr.S.D.Fla. 1985) [It is axiomatic that a suit cannot be prosecuted to foreclose a mortgage which secures the payment of a

promissory note, unless the Plaintiff actually holds the original note, citing *Downing v. First National Bank of Lake City,* 81 So.2d 486 (Fla. 1955)], *See also* 37 Fla. Jur. Mortgages and Deeds of Trust §240 (One who does not have the ownership, possession, or the right to possession of the mortgage and the obligation secured by it, may not foreclose the mortgage)

2. Fla.R.Civ.P. Rule 1.130(a) requires that BNY attach copies of all "bonds, notes, bills of exchange, contracts, accounts, or documents upon which action may be brought" to its complaint. Attached to BNY's Complaint, are a mortgage and note both payable to "EquiCredit Corporation of America." The Plaintiff in the above-styled case is "The Bank of New York, acting solely in its Capacity as Trustee for EquiCredit Corporation Trust 2001-2 ("BNY")."

. 3. Fla.R.Civ.P. Rule 1.310(b) provides that all exhibits attached to a pleading shall be considered a part of the pleading for all purposes. Therefore, the mortgage and note attached to BNY's Complaint must be considered in determining if it is the proper party to bring this action and for purposes of determining if an indispensable party has been overlooked. It appears on the face of BNY's Complaint that it is not the proper party to bring this action based upon the note and mortgage attached to the Complaint payable to EquiCredit Corporation of America.

4. In this case, BNY's allegations of material facts claiming it is the owner of the subject note are inconsistent with the documents attached to the Complaint. BNY has not pled or attached an assignment to the Complaint. BNY also has not pled or attached any documentation memorializing the transfer of the subject note to a trust. Further, BNY has alleged it does not have the original promissory note. When exhibits

are inconsistent with the plaintiff's allegations of material fact as to who the real party in interest is, such allegations cancel each other out. *Fladell v. Palm Beach County Canvassing Board*, 772 So.2d 1240 (Fla. 2000); *Greenwald v. Triple D Properties, Inc.*, 424 So. 2d 185, 187 (Fla. 4th DCA 1983); *Costa Bella Development Corp. v. Costa Development Corp.*, 441 So. 2d 1114 (Fla. 3rd DCA 1983); see also: *Taylor, Bean & Whitaker Mortgage Corp. v. Brown*, 583 S.E. 2d 844 (Ga. 2003).

WHEREFORE, Ms. Bush requests the Court to dismiss the Plaintiff's Complaint with prejudice; order the Plaintiff to add the owner and holder of the subject mortgage as an indispensable party to this foreclosure action, or alternative, to require the Plaintiff to provide a more definite statement of its capacity to act as the sole Plaintiff in this mortgage foreclosure lawsuit.

**

By:______________________________
**

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been forwarded by U.S. Mail and facsimile to **

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

CASE NO: 2003-CA-57158

Bank of America NA f/k/a
NationsBank NA f/k/a
Barnett Bank NA, etc., et al.,

Plaintiff,

vs.

Ruby Lovett, County of Brevard
Ect., et al.,
Defendants,
_________________________________/

MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

The Defendant raises the affirmative defense of estopel based on the Plaintiff's failure to comply with the notice requirements of 12 USC 1701 (x)(c)(5) prioir to commening this foreclosure. Plaintiff replies that it does not have to provide the notice because the mortgage is a conventional mortgage. At no time does the Plaintiff contend that it provided the notice.

Effective 2002 this provision applies to all loans (See Hud letter Mortgagee Letter 2002-12), including conventional mortgage. This notice is required before foreclosure as the intent of the statute is to avoid foreclosure.

The Supreme Court of North Dakota 404 N.W.2d 445 (ND 1987) citing ***Cross v. Federal National Mortgage Association*, 359 So.2d 464 (Fla.Dist.Ct.App. 1978)** reasoned that:

On the theory that the guidelines are sensible, equitable standards of conduct, consistent with, and issued in furtherance of, the national housing goals, foreclosure courts can, and in appropriate instances should, direct the parties to pursue and exhaust the alternatives to foreclosure enumerated in the Handbook.

Merely rubber-stamping mortgagees' foreclosure actions, when they have acted barely within the formal legal bounds of these loosely defined housing programs, will contribute further to the needless **[**11]** loss of homes and to the creation of virtual ghost areas within our inner cities. Foreclosure courts need not woodenly perpetuate the national tragedy surrounding quick foreclosures . . ., but, where appropriate, they should require adherence to the policies and procedures prescribed by the Handbook. Such an approach is not inconsistent with our rulings herein. Applying this rationale, various courts have held that the *HN5* failure of a lender to follow HUD regulations governing mortgage servicing constitutes a valid defense sufficient to deny the lender the relief it seeks in a foreclosure action. *See Federal National Mortgage Association v. Moore*, 609 F. Supp. 194 (N.D.Ill. 1985);"

**IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA**

**CASE NUMBER: 16-2006-CA-005651-XXXX-MA
Div. CV-E**

**U.S. BANK NATIONAL ASSOCIATION, AS
TRUSTEE, ON BEHALF OF THE HOLDERS OF
THE HOME EQUITY ASSET TRUST 2005-2 HOME
EQUITY PASS THROUGH CERTIFICATES,
SERIES 2005-2
Plaintiff,
vs.**

**GLORIA B. WASHINGTON, N/K/A GLORIA MARTIN, et. al.,
Defendants.**
_______________________________________/

**DEFENDANT'S AFFIDAVIT IN OPPOSITION TO
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

1. I am the Defendant and the homeowner in this foreclosure.
2. I have personal knowledge of the facts contained in this affidavit.
3. The plaintiff is a securitized trust and it filed this foreclosure action alleging to the court that it held the note and the mortgage and that it also owned the subject note on August 8, 2006.
4. However, the plaintiff has failed to file any assignment of my mortgage and note or any other documents that establish that the plaintiff actually owed my mortgage or my note on August 8, 2006, the date this foreclosure action was filed.
5. The lack of a timely assignment that predates the commencement of this foreclosure action renders the plaintiff's complaint fatally defective and leaves this court without subject matter jurisdiction.
6. The plaintiff did not own my mortgage or my promissory note on the date this action was filed.
7. As a result, the plaintiff could not and did not have standing and was not the real party in interest in this foreclosure action on August 8, 2006.
8. The promissory note and the mortgage as filed by the plaintiff establishes that

the owner of my note is still the lender named on my mortgage and promissory note which is Freemont Investment & Loan and no effective transfer or assignment of my note or my mortgage is in the court file or presented to the court.

9. I defaulted on this residential mortgage for reasons beyond my control as described in the letter of hardship that I sent to the servicer of my loan on August 15, 2006 and that is attached and incorporated into this affidavit.

10. In June, 2006, I received a notice dated May 31, 2006 from SPS, the servicer of my loan, notifying me that I was behind on my payments. A copy of this notice is attached and incorporated into this affidavit.

11. In that notice from SPS, I was advised that SPS provides consumer assistance programs designed to help resolve delinquencies and avoid foreclosure.

12. The notice from SPS told me that I could be eligible for a loan workout plan or other similar solution and that this service was provided without cost to me.

13. The notice from SPS instructed me to contact a SPS representative at a 1-800 number.

14. In response to this notice from SPS, I called the 1-800 number and spoke with a Loan Specialist in the Customer Service Department of Select Portfolio. I don't recall the name of the man that I spoke with, but he told me that SPS would work with me to keep me from losing my home. He stated that SPS wanted to work out a deal with me and he told me that he would send me a workout package requesting information.

15. I told this customer service person at SPS about my financial difficulties and he told me that I should fill out the workout forms completely and send them back to SPS to see if I qualified for a loan workout plan to help me resolve my delinquency and avoid foreclosure.

16. It took a while, but in August, 2006, I did receive the forms from another employee of SPS named Becca Smith and I filled the financial worksheet out and located copies of my social security benefit information records, my checking account records and my tax returns. My lawyer has the financial worksheet that I filled out and sent back to Becca Smith at SPS and my social security records, checking account documents and my tax returns that I also sent. Because of my concern about identity theft, I have not attached these documents to this affidavit, but my attorney can provide

copies to the court. A copy of the August 10, 2006 letter that I received from Becca Smith is attached and incorporated into this affidavit.

17. I also prepared the hardship letter that is attached to this affidavit and I sent all this information to Becca Smith at SPS as directed. A copy of the cover sheet that I sent with all of this information is attached and incorporated into this affidavit.

18. In my hardship letter I told SPS that I retired from working for 40 years at Maxwell Coffee Co; but that my mother got burned in her home and I had to take care of her which I did until she died at the age of 94. I also described how I got hit by a car and was forced to spend money to deal with the loss of my car. I also had to take care of my 87 year old aunt and that I had other expenses relating to my needs and those of my grandchildren that caused me to get behind on my mortgage. I also told SPS that I was going back to work.

19. Despite my request and need for a loan workout to avoid foreclosure, I did not get any assistance from SPS and I heard nothing further from SPS either on the telephone or in writing.

20. I sent my hardship letter, the financial worksheet and all my records and documents concerning my finances to SPS on or about August 15, 2006.

21. On August 17, 2007, I also mailed a check for $600.00 to SPS in a good faith effort to pay my mortgage and to avoid foreclosure and the loss of my home. A copy of my check is attached and incorporated into this affidavit. On October 17, 2006, SPS returned my $600.00 check.

22. According to the Fair Debt Collection Notice that was attached to the Plaintiff's complaint, Select Portfolio Servicing, Inc. is identified as the "creditor to whom the debt is owed."

23. I did not receive any other notice about my mortgage from SPS or anyone until I was served with this foreclosure.

24. The only notice of default that I ever received (after the May 31, 2006 notice) was the debt collection notice from the plaintiff's attorney that was attached to the summons and complaint for foreclosure that was served on me in this lawsuit.

25. Since I was sued in this foreclosure lawsuit, I have deposited money into my lawyer's trust account for the purpose trying to keep up with my mortgage payments

and to avoid foreclosure and I now have more than $9,000.00 saved.

26. No one, not SPS or my lender or the Plaintiff has ever contacted me or made any attempt to do a loan workout plan that would allow me an opportunity to get on a reasonable payment schedule and avoid this foreclosure since I sent in all the forms.

27. I should have been given a real opportunity to catch up my mortgage payments as the letters from SPS promised and as told to me by the employees of SOS before this foreclosure action was filed so that I could avoid all the fees and costs that have been added into my loan balance, but I have not been given this opportunity in all this time.

28. I specifically dispute that I owe or am in any way obligated to pay plaintiff for any of the foreclosure related fees and charges that the plaintiff has unilaterally added to the balance of my loan.

29. I dispute that the plaintiff has acted in good faith or that the plaintiff has dealt fairly with me in servicing my mortgage loan.

30. I dispute that the plaintiff comes into this court in good faith because the plaintiff's own documents and letters show that the plaintiff has failed to follow or comply with the loan workout promised by my servicer, SPS.

31. Now, I have been damaged by the plaintiff financially by the wrongfully inflated and accelerated amounts added into the balance of my mortgage which the plaintiff has been charging interest on.

32. I have also sustained damage to my credit and I am very anxious and upset about being sued by the plaintiff and threatened with foreclosure and the loss of my home.

33. I do not owe for any of the charges added onto my mortgage loan balance as a result of this foreclosure which should have never been filed.

34. I do not owe and should not have to pay for any lawyer fees which the plaintiff now claims are due and I dispute all of these charges as illegal and unreasonable, not documented or in accordance with my mortgage loan.

35. I have been saving my mortgage payments as best as I have been able during the entire time this foreclosure has been filed and I now have more than $9,000.00 saved.

36. I further specifically dispute that I owe or am in any way obligated to pay plaintiff for any of the charges associated with this foreclosure action that the plaintiff has added to the balance of my mortgage.

37. I could have been successful in working out my mortgage payments and catching up and avoiding this foreclosure in August, 2006 when I was only 4 months behind, but my lender refused my $600.00 payment and failed to follow up on its promise to do a loan workout.

38. I dispute that I owe the plaintiff any interest and I dispute that I owe the plaintiff for any of the charges and fees that have been unilaterally imposed by the plaintiff involved in this foreclosure action.

39. I dispute that the plaintiff has acted in good faith or that the plaintiff has dealt fairly with me in servicing my mortgage loan.

40. I dispute that the plaintiff comes into this court in good faith because the plaintiff's own notices and the filing of this foreclosure show that the plaintiff has failed to follow or comply with the loan workout consideration that SPS promised to me.

41. I do not owe and should not have to pay for any lawyer fees that the plaintiff is trying to charge in this lawsuit and I don't owe any of the lawyer fees that the plaintiff's attorney cannot document with a date of action.

42. There are no attorney's fees that the plaintiff has adequately documented, any such fees are not reasonable and I dispute all of these charges.

43. I am ready, willing and able to enter into a loan modification and repayment workout to reinstate my mortgage loan and get current, but all of the illegal charges and fees have to be removed from my balance and my home loan needs to be restructured into a lower interest loan.

Further Affiant Sayeth Not.

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of this document has been mailed by U.S. Mail and faxed to Jeff Gano, Echevarria, Codilis & Stawiarski, (813) 251-1541 and to P.O.B. 25018, Tampa, Florida 33622-5018, attorney for Plaintiff, this _______________.

JACKSONVILLE AREA LEGAL AID, INC.,

____
April Carrie Charney, Esquire
Fla. Bar. No.: 310425
126 W. Adams Street
Jacksonville, Florida 33202
Telephone: (904) 356-8371, ext. 373
Facsimile: (904) 224-7050
april.charney@jaxlegalaid.org
Attorneys for Separate Defendant

IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA
CASE NO.: 2002-32245-CICI
JUDGE/DIV.: J. David Walsh – Div. 32

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., ITS SUCCESSORS AND ASSIGNS, AS NOMINEE FOR HOUSEHOLD FINANCE CORPORATION, ITS SUCCESSOR AND ASSIGNS,

Plaintiff,

vs.

DENISE M. LaPLANTE A/K/A DENIS LaPLANTE, etc., et al.,

Defendants.
___________________________/

AFFIDAVIT OF DEFENDANT IN SUPPORT OF ANSWER AND OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

1. I, DENISE LAPLANTE, being duly sworn, states that I am the named individual party in this case and have personal knowledge of all facts set forth in this Affidavit.

2. In January 2000, I obtained the mortgage loan that is the subject of this action and signed the Adjustable Rate Note representing a loan and debt due Ameriquest Mortgage Company. A copy of that Note is attached hereto as Exhibit A.

3. Subsequent to the execution of the Note I learned that my mortgage had been transferred to Household Finance Services.

4. I have made payments required by the Note to Household Finance Services.

5. I have never been informed in any manner that a company named Mortgage Electronic Registration Systems, Inc. had any interest in my mortgage transaction or that any sums are due and owing Mortgage Electronic Registration Systems, Inc.

6. That the letter dated June 30, 2002, attached as Exhibit B to the Plaintiff's Motion for Summary Judgment is the only writing of any kind that I have received concerning the possible acceleration of my mortgage loan.

7. I have never received any writing of any kind that informed me that my mortgage loan had accelerated and demanding that I pay the full sum within 30 days.

FURTHER AFFIANT SAITH NAUGHT.

____
Denise LaPlante, Affiant

STATE OF FLORIDA:

COUNTY OF VOLUSIA:

The foregoing instrument was hereby acknowledged before me by DENISE LAPLANTE, who has produced ______________________________ as identification and who did take an oath this __________ day of February, 2005.

____
Notary Public - State of Florida at Large
Commission No:
My Commission Expires:

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have furnished the original hereof to: Diane M. Matousek, Clerk, Circuit Court, Volusia County Courthouse Annex, 125 East Orange Avenue, Daytona Beach, FL 32114; and furnished a copy to: Laura M. Carbo, Attorney for Plaintiff, 1800 N.W. 49th St., Suite 120, Fort Lauderdale, FL 33309; by U. S. Mail, this ____ day of February, 2005.

____
STEPHEN J. BRAUN, ESQUIRE
Fla. Bar. No: 254990
Community Legal Services of Mid-Florida, Inc.
Attorneys for Defendant
128-A Orange Avenue
Daytona Beach, FL 32114-4310
Phone: (386) 255-6573
Fax: (386) 257-6824

IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

CASE NO.: **

JUDGE/DIV.: **

**,

Plaintiff,

vs.

**

Defendants.
_______________________________________/

DEFENDANT'S REQUEST FOR ADMISSIONS

COMES NOW Defendant, ****, by and through undersigned counsel and, request Plaintiff, pursuant to Fla. R. Civ. P. 1.370, within 30 days after service of this Request to make the following admissions, under oath for the purpose of this action only; that each of the following statements is true:

1. Admit that the person making these admissions is an authorized agent for the Plaintiff.

Response:

a. Name and position of person making these admissions:

Response:

2. Admit that the mortgage which is the subject of this action is not a purchase money mortgage.

Response:

3. Admit that all the documents that you provided in response to Defendant's Request for Production, dated February 12, 2003, are as follows:

a. Mortgage dated January 26, 2000, with attached Adjustable Rate Rider dated January 26, 2000, Commitment for Title Insurance Transmission, Schedule A, Mortgagor's Affidavit dated January 7, 2000, and a Uniform Residential Appraisal Report signed by Constance Gallagher, dated January 26, 2000.

Response:

b. 3-page Adjustable Rate Note dated January 26, 2000.

Response:

c. Subrogation Agreement, dated March 7, 2000.

Response:

d. Owner's Survey Affidavit, dated January 7, 2000.

Response:

e. Mortgagor's Affidavit, dated January 7, 2000.

Response:

f. Notice to Cure and Intent to Accelerate, dated June 30, 2002, and mailed by regular and certified mail on June 26, 2002 (see Exhibit B).

Response:

g. Notice of Right to Cancel dated January 26, 2000.

Response:

h. HUD Form 1-A, transaction without seller and not dated.

Response:

i. 3-page Uniform Residential Loan Application, dated January 7, 2000, with 1-page attached Continuation Sheet/Residential Loan Application and 5-page Merged Profile Report , by Chase Credit Research

Response:

j. 3-page Borrower Financial Statement, dated September 23,2003, with attached correspondence from Defendant, To Whom It May Concern letter, H&R Block Income Tax Worksheet, Defendant's 2001 IRS Form SSA- 1099 Social Security Benefit Statement (2), Bank of America Feb, Mar, Apr, May and June 2002, Bank Statement for Account #0025 5802 3463 (3 pages).

Response:

k. FEMA flood hazard determination dated January 3, 2000 (2 pages).

Response:

l. Uniform Appraisal Report, dated January 26, 2002.

Response:

m. Document stamped Exhibit #2 -Household Financial Payment Information, detail by transaction print out dated April 23, 2003

Response:

4. Admit that the Plaintiff has provided to Defendant all documents for loan number 14944979-5689, except privileged and work product documents.

Response:

5. Admit that if a Truth in Lending (TIL) Disclosure form was provided to the consumer in this transaction that it would not be considered privileged or work product.

Response:

6. Admit that the documents in paragraph 3 **(a-j) above** are part of the Plaintiff's regular business activities.

Response:

7. Admit that the records are kept in the course of a regularly conducted business activities.

Response:

8. Admit that the person making these admissions is the custodian of the records or other qualified person.

Response:

9. Admit that in the documents that you provided in your Response to Defendant's Request to Produce, dated May 9, 2003, and signed by Laura M. Carbo, Esq., that you did not provide a (TIL) statement for the subject mortgage.

Response:

10. Admit that you do not have a TIL statement in your possession for the mortgage that is the subject of this action.

Response:

11. Admit that the Defendant sent a TIL recission letter to the Plaintiff on February 12, 2003 (see attached Exhibit A).

Response:

12. Admit that the fees and cost in this transaction are more than $400.00.

Response:

13. Admit that paragraph 21 of the Mortgage requires the Plaintiff to give the Defendant a 30-day notice upon breach, before acceleration.

Response:

14. Admit that Exhibit B letter dated June 30, 2002, is what you provided to Defendant to comply with paragraph 21 of the mortgage.

Response:

15. Admit that you did not provide Defendant with a pre-foreclosure notice of the availability of housing counseling.

Response:

Mortgage Company **, Inc.,

By: ____

____
(Printed Name) as ____________________________

STATE OF ______________________:

COUNTY OF ____________________:

The foregoing instrument was acknowledged before me this _____ day of ______________, 200**, by ____

____
who ***(check appropriate box)*** ☐ is personally known to me or ☐ has produced ________________ ______________________________________ as identification and who ***(check appropriate box)*** ☐ did or ☐ did not take an oath.

Title______________________________ ______________________________________
Notary Public Notary Signature

______________________________________ ______________________________________
Commission Number/Expiration (Notary Printed Name)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have furnished the original hereof to: Diane M. Matousek, Clerk, Circuit Court, Volusia County Courthouse Annex, 125 East Orange Avenue, Daytona Beach, FL 32114; and furnished a copy to: **, Attorney for Plaintiff, **; by U. S. Mail, this ____ day of ________________, 200**.

Central Florida Legal Services, Inc.
Attorneys for Defendant
128-A Orange Avenue
Daytona Beach, FL 32114-4310
Phone: (386) 255-6573
Fax: (386) 257-6824

By:______________________________
SHIRLEY GREEN, ESQUIRE
Fla. Bar. No: 979820

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have furnished the original of this Request for Admissions, together with their responses thereto, to Shirley Green, Attorney for Defendant, Central Florida Legal Services, Inc., 128-A Orange Avenue, Daytona Beach, FL, 32114-4310, by U.S. Mail, this __________ day of _________________, 2003.

____
Plaintiff/Agent

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
VOLUSIA COUNTY, FLORIDA.

CASE NO: **

JUDGE ** - DIV: **

**

Plaintiff,

vs.

**

Defendants.

_______________/

REQUEST TO PRODUCE

COMES NOW the Defendant, **, by and through her undersigned counsel, pursuant to Rule 1.350, Florida Rules of Civil Procedure, and requests Plaintiff to produce within thirty (30) days of the date of this Request the following documents at the offices of Community Legal Services of Mid-FL, Inc., 128-A Orange Avenue, Daytona Beach FL, 32114-4311.

Request No. l: All documents, memoranda, notes, writings, invoices, and correspondence of any kind or nature pertaining in any manner whatsoever to the mortgage loan that is the subject of this action, including but not limited to:

- **a.** All documents provided to the defendant at closing, including closing instructions to the title agent and broker, if any;
- **b.** All documents in a collection file;
- **c.** All documents in a pre-foreclosure file;
- **d.** And all documents in a correspondence file, whether manual or computerized;

This request is naturally qualified to exclude documents considered attorney/client privilege or attorney work product.

Request No. 2: All accounting records including, but not limited to, all computerized accounting records kept in connection with the loan that is the subject of this action.

Request No. 3: All documents and papers, not produced in response to the preceding requests, relating in any manner to the loan that is the subject of this action, including but not limited to letters and correspondence received from third parties where the defendant's loan was the subject of the correspondence whether by letter or e-mail; this request is naturally qualified to exclude documents considered attorney client privilege or attorney work product.

Request No. 4: All records showing a transaction history of itemized debits, credits and a running balance prepared in connection with mortgage history for the subject property, including but not limited to all information concerning advance items paid for the defendant and any all information contained in an escrow file, whether manual or computerized, this request is naturally qualified to exclude documents considered attorney client privilege or attorney work product

Request No. 5: All receipts, cancelled checks, letters, contracts or other documents evidencing the payment of escrow items, including butn ot limited to, back and front of any checks to pay for forced place insurance and a copy of the policy, and any other item for which Plaintiff expects reimbursement from Defendant.

Request No. 6: All documents prepared in connection with or relating to all actions taken by Plaintiff to insure compliance with the Truth in Lending Act in this transaction with respect to finance charges and annual percentage rates.

Request No. 7: All documents relating to any procedures or policies Plaintiff had at the time of this transaction to insure that Plaintiff provided its customers with Truth in Lending disclosures in credit transactions.

Request No. 8: All pleadings, orders and responses to discovery (including interrogatories, transcripts of depositions, etc.) pertaining to all litigation and administrative proceedings initiated within the past 5 years, wherein the opposing party alleges concealment or nondisclosure of the interest rate, finance charges, interest charges, or mistakes or misrepresentations thereto, breach of statutory good faith, violation of Truth in Lending Law, violation of consumer protection laws, and/or violation of the Motor Vehicle

Sales Finance Act.

Request No. 9: All documents containing or relating to any Truth in Lending, HOEPA or RESPA disclosures Plaintiff provided to Defendant in this transaction.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have furnished the original Request to Produce to: Diane M. Matousek, Clerk, Circuit Court, Volusia County Courthouse Annex, 125 East Orange Avenue, Daytona Beach, FL 32114; and furnished a copy to: **, Attorney for Plaintiff, **; by U. S. Mail, this ____ day of **, 200**.

COMMUNITY LEGAL SERVICES OF MID-FL, INC.
Attorneys for Defendant
128-A Orange Avenue
Daytona Beach, FL 32114-4310
(904) 255-6573 Fax: (904) 257-6824

By:________________________________
SHIRLEY GREEN
Fla. Bar. No: 979820

IN THE CIRCUIT COURT, EIGHTEENTH
JUDICIAL CIRCUIT, IN AND FOR
BREVARD COUNTY, FLORIDA.
CASE NO: 05-2003-CA-063147

MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC.
Plaintiff,

vs.

ALFRED CAPERS, et. al.,
Defendants.
______________________________/

NOTICE OF SERVING FIRST SET OF INTERROGATORIES TO PLAINTIFF

The Defendant, ALFRED CAPERS, by and through undersigned counsel, requests the Plaintiff, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., to answer the following interrogatories number one (1) through seven (7) under oath and in writing in compliance with the requirements of Rule 1.340 of the Fl Rules of Civil Procedure, and to forward the original thereof with the answers to same thereon to the undersigned on or before **March 10, 2005**.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have furnished the original Request to Produce to: The Clerk of Court, Brevard County, P.O. Box 219, Titusville, Florida 32781-0219; and furnished a copy to: Steven Ellison, Attorney for Plaintiff, Broad and Cassel, One North Clematis Street, Suite 500, West Palm Beach, Florida 33401; by U. S. Mail, this ____ day of January, 2005.

____
STEPHEN J. BRAUN
Attorney-at-Law
Fla. Bar. No: 254990
Community Legal Services of Mid-Florida, Inc.
Attorneys for Defendant
128-A Orange Avenue
Daytona Beach, FL 32114-4310
(386) 255-6573 Fax: (386) 257-6824

DEFINITIONS

1. The words "you", "yours" and/or "yourselves" means MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. and any other entity similarly situated or other persons acting, or purporting to act, on behalf of Mortgage Electronic Registration Systems, Inc.

2. The singular shall include the plural and vice versa; the terms "and" and "or" shall be both conjunctive and disjunctive; and the term "including" means "including without limitation".

3. "Date" shall mean the exact date, month and year, if ascertainable, if not, the best approximation of the date (based upon relationship with other events).

4. The word "documents" shall mean any writing, recording, or photograph in your actual or constructive possession, custody, care and control, which pertain directly or indirectly, in whole or in part, either to any of the subjects listed below or to any other matter relevant to the issues in this action, or which are themselves listed below as specific documents, including, but not limited to: correspondence, memoranda, notes, messages, diaries, minutes, books, reports, charts, ledgers, invoices, computer printouts, computer memory, e-mails, microfilms, videotapes or tape recordings.

5. "Agent" shall mean any agent, employee, officer, director, attorney, independent contractor or any other person acting at the direction of or on behalf of another.

6. "Person" shall mean any individual, corporation, proprietorship, partnership, trust, association or any other entity.

7. The words "pertain to" or "pertaining to" mean: relates to, refers to, contains, concerns, describes, embodies, mentions, constitutes, constituting, supports, corroborates, demonstrated, proves, evidences, shows, refutes, disputes, rebuts,

controverts or contradicts.

8. The term "third party" or "third parties" refers to individuals or entities that are not parties to this action.

9. The term "action" shall mean the case entitled Mortgage Electronic Registration Systems, Inc,. Alfred Capers, et. al. , Case No. 05-2003-CA-63147, pending in the Circuit Court of the Eighteenth Judicial Circuit in and for Brevard County, Florida.

10. The term "subject property" shall mean 3887 Kennedy Circle, Cocoa, Florida 32922.

11. The word "identify", when used in reference to a document, means and includes the name and address of the custodian of the document, the location of the document, and the general description of the document, including (a) the type of document (correspondence, memorandum, facsimile etc.), (b) the general subject matter of the document; (c) the date of the document; (d) the author of the document; (e) the addressee of the document; and (f) the relationship of the author and addressee to each other.

12. The word "describe" where used with respect to an act, event, occurrence, or course of conduct, rule or procedure shall mean:

    A. State in narrative form all facts relating to such act, event, or occurrences, course of conduct, rule or procedure;

    B. State the time and place of each such act, event, occurrence or course of conduct;

    C. Identify all documents relating to or referring thereto;

    D. Identify all persons present or having knowledge thereto.

INSTRUCTIONS

If you object to fully producing a document because of a privilege, you must nevertheless provide the following information unless divulging the information would disclose the privileged information:

1. the nature of the privilege claimed (including work product);
2. if the privilege is being asserted in connection with a claim or defense governed by state law, the state privilege rule being invoked;
3. the date of the document or oral communication;
4. the type of document (correspondence, memorandum, facsimile etc.), custodian, location, and such other information sufficient to identify the document for a subpoena duces tecum or a document request, including where appropriate, the author, the addressee, and if not apparent, the relationship between the author and addressee;
5. if an oral communication: the place where it was made, the names of the persons present while it was made, and, if not apparent, the relationship of the persons present to the declarant; and
6. the general subject matter of the document or oral communication.

INTERROGATORIES

1. State the name, job title, and business address of each person providing information in response to these interrogatories.

2. Provide the following information for all employees and agents of Mortgage Electronic Registration Systems, Inc. and/or its assignor who had any involvement in the transaction with the Defendant or in administration of the account, including but not limited to the origination, underwriting, disbursement, and assignment of the subject account: full name, present or last known home and business addresses and telephone numbers; date first employed by you; whether presently employed by you; all job title(s) and dates during which each job was held; and if not presently employed, Social Security number and exact date of birth. State, generally, each individual's involvement (e.g., preparation of documents, notarizing signatures, approval of financing terms, communications with the borrower; sending of notices, disbursement of fund, etc.)

3. State the date and subject matter of each communication (oral or written): (a) between or among any of the parties to this action, and (b) between you and any other

person or entity (other than your counsel), relating to the subject account and/or transaction. Identify all documents reflecting or relating to such communications, including but no limited to letters, faxes, notes, internal memoranda, calendars, computer date, and credit applications, etc.

4. State the date and amount of each payment (a) disbursed from the loan proceeds of the subject transaction and/or account; (b) received by you from anyone in connection with the subject account; and (c) paid to or received by anyone else in connection with the subject account (regardless of whether or the payment came from the loan proceeds or another source.). Identify the payor and payee of each such payment made or received, including but not limited to payments made to brokers, appraisers, title companies, credit reporting agencies, couriers and contractors, and identify all documents relating to same, including all canceled checks and receipts.

5. Describe your policy and practice relating to the origination, approval, or underwriting, preparation, disbursement and acceptance of assignment of a residential

mortgage loan such as the subject transaction(s), including but no limited to all agreements which brokers, lenders, title companies, assignors, etc. Identify all documents relating to or reflecting such policy, practices, and agreements, including all documentation required to be in assigned account files, and all forms given or sent to borrowers, information or forms which borrowers are requested to provide in order to obtain a loan, and all instructions, policy an procedure manuals, memoranda and guidelines given to brokers, title companies, lenders and/or closing agents, and any person who review account files for approval and/or acceptance of assignment.

6. With respect to each expert or opinion witness whom you will or may call upon to give evidence in connection with this case, please state: his or her name, address,

telephone number, occupation, and current employment; the subject matter of his or her expertise; any matters which you contend qualify him or her as an expert; the substance of all facts and opinions to which he or she could testify if called as a witness, a summary of the grounds for each such opinion, and identify all documents, reports or statement made by any such expert.

7. State the amount that you believe is the "total loan amount" and the total "points and fees" involved in the subject transaction and explain how you arrived at those figures.

____
Mortgage Electronic Registration Systems, Inc.

STATE OF FLORIDA
COUNTY OF ______________________

I HEREBY CERTIFY that on this day, before me appeared ____________________, who is personally known by me or who has produced ___________________as identification and who executed the foregoing Answers and acknowledged before me that he/she executed the same to the best of his/her knowledge and belief.

WITNESS my hand and official seal this _______ day of ___________, 2005.

____
Notary Public
State of Florida at large
My Commission No.:
My Commission Expires:

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT
IN AND FOR DUVAL COUNTY, FLORIDA
CIVIL ACTION

DEUTSCHE BANK NATIONAL
TRUST COMPANY, et al,
Plaintiff,

v.

CASE NO.: 16-2004-CA-002354-XXXX-MA
DIVISION: C

HERBERT M. McCORMACK, II, et al.,
Defendants.
_______________________________/

SEPARATE DEFENDANT BETTY LEE WRIGHT'S MOTION TO COMPEL DISCOVERY AND MEMORANDUM IN SUPPORT

Defendant, BETTY LEE WRIGHT, moves this Court, pursuant to Rule 1.380 of the Florida Rules of Civil Procedure, for an order compelling the Plaintiff to answer the Defendant's Interrogatories and to respond to Defendant's Request for Production as required by Rules 1.340(a) and 1.350 of the Florida Rules of Civil Procedure and states:

1. On October 8, 2004, Defendant served Interrogatories and a Request for Production of Documents on Plaintiff.
2. On March 7, 2004, Plaintiff filed objections to Defendant's Request for Production of Documents and also filed objections to all but two of the Defendant's Interrogatories. Copies of Defendant's discovery and the Plaintiff's responses and objections thereto are attached.
3. Counsel for Defendant has been unable to resolve this discovery dispute despite all good faith efforts and communication with counsel for Plaintiff.
4. Plaintiff's objections to the Defendant's Interrogatories and Request for Production of Documents are unreasonable, without merit and not made in good faith.
5. Defendant requests reasonable attorney's fees and costs for preparing and defending this motion as provided for by Rule 1.380(c) of the Florida Rules of Civil Procedure.
6. Defendant incorporates herein the following Memorandum of Law.

7. This Separate Defendant raises defenses against the Plaintiff based on information and documents in the Plaintiff's possession and/or control that Plaintiff refuses to disclose concerning the consummation of the subject residential mortgage transaction. Defendant claims that the Plaintiff was on notice of Defendant's interest in the subject property, the existence of a cloud on the title of the subject property at the time the loan was made and that the Plaintiff was or should have been aware of the underlying fraud and misrepresentation by the borrowers and co-Defendants in this foreclosure.

MEMORANDUM OF LAW

8. A party to an action "may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party," Rule 1.280(b)(1) of the Florida Rules of Civil Procedure.

9. "(I)t is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." *Id.*

10. In Florida, the rules of discovery are liberally construed so that the overall purpose of discovery is not compromised. Weyant v. Rawlings, 389 So. 2d 710, 711 (Fla. DCA 2nd 1980), Jones v. Seaboard C.L.R. Co., 297 So. 2d 861, 863 (Fla. DCA 2nd 1974).

11. Exceptions from discovery for information deemed privileged does not protect information because it is or may be deemed private under some other nonjudicial rules or contract.

12. Plaintiff objects to the information sought by the Defendants discovery on the basis that "under the Federal privacy laws, as the Defendant BETTY LEE WRIGHT, did not sign the subject Note and Mortgage, and is not the Borrower on the subject loan. Only the Borrower is entitled to receive this information". Plaintiff also contends that certain documents are "a privileged Trade Secret". No authority is cited for these propositions.

13. The applicable federal privacy laws are the Right to Financial Privacy Act of 1978 (hereinafter the "RFPA"), 12 USC 3401 et seq and the Gramm-Leach-Bliley Act (hereinafter"GLBA") 15 USC 6801 et seq.

14. Neither of these federal statutes bar this Defendant from discovering the non-public personal financial information in the Plaintiff's possession or control concerning the subject mortgage debt that Defendant seeks in her discovery.

15. The two federal privacy laws relied on by the Plaintiff in its effort to avoid discovery govern the release of confidential customer information; however, both statutes contain exemptions for information sought through civil discovery.

16. The RFPA specifically exempts from its application situations involving financial institutions involved in litigation. 12 USC 3413(e)

17. In Marks v. Global Mortgage Group, 218 F.R.D. 492 (S.D.W.Va. 2003), the Court upheld an order compelling discovery of the names and addresses of other borrowers under loans similar to the loan at issue, together with applications, disclosure statements, notes, good faith estimates, settlement summaries, and appraisals involved in all of the loans of borrowers within the court's jurisdiction. In *Marks*, the court squarely rejected the privacy arguments made by the lender and basing its holding on the GLBA provisions cited above stated: "The Court FINDS that 15 USC § 6802(e)(8) permits a financial institution to disclose the non-public personal financial information of its customers to comply with a discovery request." *Id.* at 496 (emphasis in original).

18. The *Marks* court based its finding on an exception in the GLBA that authorizes disclosure "to comply with Federal, State, or local laws, rules, and other applicable legal requirements; to comply with a properly authorized civil, criminal, or regulatory investigation or subpoena or summons by Federal, State, or local authorities; or to respond to judicial process or government regulatory authorities having jurisdiction over the financial institution for examination, compliance, or other purposes as authorized by law." 15 USC § 6802(e)(8).

19 The *Marks* court also held that a party does not have the right to circumvent the discovery process by using a statute such as the GLBA that generally prohibit the disclosure of certain information. *Id.* at 496-497.

20. The GLBA specifically incorporates all the exceptions contained in the RFPA. *See*, 15 USC § 6802(e)(5); 16 C.F.R. § 313.15(a)(4) (GLBA does not prohibit the disclosure of confidential customer information "to the extent specifically permitted...in accordance

with the [RFPA]").

21. The *Marks* court held that even without the GLBA exception for civil discovery, a statute like the GLBA could not trump a defendant's discovery obligations: "Furthermore, even if the GLBA included no exception for civil discovery, the mere fact that a statute generally prohibits the disclosure of certain information does not give parties to a civil dispute the right to circumvent the discovery process." *Id.*

22. In First Southern Baptist Church of Mandarin Florida, Inc. v. the First National Bank of Amarillo, 610 So. 2d 452 (Fla. 1st DCA 1992), the Court held, "if a party has injected into litigation issues going to the very heard of litigation, such party cannot avoid discovery into such issues by invoking attorney-client privilege," quoting Home Ins. Co. v. Advance Mach. Co., 443 So. 2d 165, 168 (Fla. 1st DCA 1983). *See also*, Jobin v. Resolution Trust Corporation, 156 B.R. 834, 837-38 (Bankr.D.Colo. 1993); Sneirson v. Chemical Bank, 108 F.R.D. 159, 162 (D.C.Del. 1985); Clayton Brokerage Company, Inc. v. Clement, 87 F.R.D. 569, 571 (D.C.Md. 1980). (The RFPA expressly exempts information requested "by a Government authority under the Federal Rules of Civil...Procedure...or comparable rules of other courts in connection with litigation to which the Government authority and the customer are parties.") *See*, 12 USC § 3413(e). This exemption equally applies to private parties in civil suits. Sneirson, 108 F.R.D. at 162.

23. Plaintiff in the present case does not have any legitimate or legally nonfrivolous reason to refuse to answer this Defendant's Interrogatories or to produce the documents requested.

WHEREFORE, Separate Defendant requests this Court enter an order compelling Plaintiff to answer the Defendant's Interrogatories and respond to each Request for Production, award this Defendant attorney's fees and costs in pursuing this motion and for all other relief to which Defendant proves herself entitled.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Motion To Compel Discovery And Memorandum In Support has been furnished to ***Herbert M. McCormack, II, Defendant Pro Se, 5405 Lake Margaret Drive, Apartment C, Orlando, FL 32812,*** and ***Brent Del Gaizo, Co-Counsel for Plaintiff, Smith, Hiatt & Diaz, P.A., 2691 East Oakland Park Blvd., Suite 303, Fort Lauderdale, Florida 33306,*** by U.S. Mail on

____________________.

JACKSONVILLE AREA LEGAL AID, INC.

____

APRIL CARRIE CHARNEY, Esquire
Attorney for Separate Defendant
Fla. Bar No.: 310425
126 W. Adams St.
Jacksonville, FL 32202
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Facsimile: (904) 224-7050

F:\WPDATA\Consumer\FORECLOSURES\VA\Clients\TURKNETT\M to Compel Discovery and Memo in Supp wpd

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
VOLUSIA COUNTY, FLORIDA

CASE NO.: **
DIVISION: **

**,
Plaintiff,

vs.

**,
Defendant.
_____________________________/

MOTION IN OPPOSITION TO ** MOTION FOR SUMMARY JUDGMENT

Comes now the ** in opposition to ** motion for summary judgment and says:

1. Plaintiff's Motion for Summary Judgment cannot be granted if any material factual issue exists or "if the proofs supporting the Motion fails to overcome every theory upon which, under the pleadings, the (Defendant's) position might be sustained." Sakowitz v. Marchal, 146 So.2d 105, 107 (Fla. 3d DCA 1962).

2. The following facts are in dispute: **
(SEE Defendant's Affidavit attached as Exhibit 1)
All doubts concerning the existence of a material factual issue must be resolved in favor of Defendant, **. Harvey Building, Inc. v. Haley, 175 So.2d 780 (Fla. 1965).

WHEREFORE, Defendant respectfully requests that the Court deny Plaintiff's Motion for Summary Judgment.

CERTIFICATE OF SERVICE

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
VOLUSIA COUNTY, FLORIDA

CASE NO.: **
DIVISION: **

**,
Plaintiff,

vs.

**,
Defendant.
____________________________/

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AS TO COUNT II

<u>NO COPY OF THE LOST DOCUMENT</u>

Comes Now the ** and moves the court for a Summary Judgment as to Count II to re-establish a lost document and says:

1. Plaintiff cannot re-establish a lost document unless there is at least a copy of the document to be re-established. Plaintiff cannot produce a copy of the document, but instead pleads that **

2. The right to enforce the lost instrument was not properly assigned where neither Plaintiff nor its predecessor in interest possessed the note and did not otherwise satisfy the requirements of section 673.3091, Florida Statutes, at the time of the assignment. See <u>Slizyk v. Smilack, 825 So. 2d 428, 430 (Fla. 4th DCA 2002)</u>. In <u>Mason v. Rubin, 727 So. 2d 283 (Fla. 4th DCA 1999)</u>, the appellant brought a foreclosure action on a second **mortgage,** the trial court denied the **foreclosure,** and this court affirmed on the basis that the appellant had failed to establish the lost note under section 673.3091

3. In order to maintain a mortgage foreclosure, the plaintiff must either present the original promissory note or give a satisfactory explanation for its failure to do so. § 90.953(1), Fla. Stat. (2002); W.H. Downing v. First Nat'l Bank of Lake City, 81 So. 2d 486 (Fla. 1955); **[*3]** Nat'l Loan Investors, L.P. v. Joymar Assocs., 767 So. 2d 549, 551 (Fla. 3d DCA 2000). A limited exception applies for lost, destroyed, or stolen instruments, where it is shown that "the person was in possession of the instrument and entitled to enforce it when loss of possession occurred." § 673.3091, Fla. Stat. (2002).

Section 673.3091 provides, in part:

> (1) A person not in possession of an instrument is entitled to enforce the instrument if:
> (a) The person was in possession of the instrument and entitled to enforce it when loss of possession occurred;
> (b) The loss of possession was not the result of a transfer by the person or a lawful seizure; and
> (c) The person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
VOLUSIA COUNTY, FLORIDA

CASE NO.: **
DIVISION: **

**,
Plaintiff,

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Defendant.
___________________________/

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Legal Advocacy Center of Central Florida, Inc.

Appendix 6

Causes of Action and Defenses

Causes of Action and Defenses

Truth in Lending Act(TILA)

Citation: 15 U.S.C. 1601, et seq.
12 C.F.R. part 226 (Regulation Z)

Liable Parties Creditor (generally the original lender)
Assignee, if violation "apparent on face" of documents

Actionable Wrongs: Failure to disclose credit information or cancellation rights

Remedies: Rescission, unless transaction was for purchase or Construction of home.
Actual damages
Statutory damages up to $2,000
Attorney fees

Limitations: 3 years to rescind under TILA, though limit does not apply to recoupment under state law
1 year to bring damages claim
No limit if used defensively by way of recoupment

The Home Ownership and Equity Protection Act of 1994 (HOPEA)

Citation: 15 U.S.C. 1639
12 C.F.R. part 226(Regulation Z)

Liable Parties: Creditor(generally the original lender)
Assignee

Actionable Wrongs: failure to disclose credit information and give Conspicuous warning
Inclusion of prohibited terms in transaction
Pattern of making loans without regard to ability to Repay

Remedies: Rescission, unless transaction was for purchase or Construction of home
Actual damages
Statutory damages up to $ 2,000
Attorney fees

Limitations: 3 years to rescind under TILA, though limit does not Apply to recoupment under state law

1 year to bring damages claim
No limit if used defensively by way of recoupment

Real Estate Settlement Procedure Act (RESPA)

Citation: 12 U.S.C. 2601, et seq.
24 C.F.R. part 3500(Regulation X)
64 Fed. Reg. 10079 (HUD policy statement on lender paid broker fees)

Liable Parties: Lender
Broker, if not exclusive agent of lender
Servicer
Title Company

Actionable Wrongs: Failure to give Good Faith Estimate, disclose other Credit related information and give HUD-1 Settlement statement and servicing statements
Payment or acceptance of kickbacks or referral Fees
Making charges for which no identifiable services Are provided

Remedies: Three times amount of illegal charges
Attorney fees

Limitations: 1 year to bring affirmative claim
No limit if raised by way of recoupment

Racketeer Influenced and corrupt Organizations Act(RICO)

Citation: 18 U.S.C. 1961, et seq.

Liable Parties: Persons (broadly defined conducting RICO enterprise)

Actionable Wrongs: Pattern of "racketeering activity" as defined in 18 U.S.C. 1961 (a long list of actionable wrongs, but this is a very complex statute in application)

Remedies: Three times actual damages
Attorney fees

Limitations: Four years to bring damages claim

OTHER ACTS TO CONSIDER IN PREDATORY LENDING.

Equal Credit Opportunity Act, 15 U.S.C. 1691, et seq.
Fair Housing Act, 42 U.S.C. 3601, et seq.
Negligent/ intentional misrepresentation
Unjust enrichment
Promissory/ equitable estoppel
Intentional Infliction of emotional distress
Interference with contractual relationship
Mistake
Failure of consideration
Illegality