INSIDE THE MINDS

Strategies for Defending Florida Foreclosures

Leading Lawyers on Understanding Florida's Foreclosure Crisis and Providing Expert Insights to Achieve Successful Outcomes

ASPATORE

For customer service inquiries, please e-mail West.customer.service@thomson.com.

If you are interested in purchasing the book this chapter was originally included in, please visit www.west.thomson.com.

The Land Battle in Florida: Fighting Foreclosures

Michael E. Chionopoulos

Owner

Absolute Law PA

ASPATORE

Introduction

The foreclosure crisis is one of the foremost issues plaguing the state of Florida today. Over the last few years, citizens have lost their homes at an alarming rate. Some statistics tell us that "the market" is getting better, but there are still thousands of residential foreclosure cases pending in southwest Florida.[1] A recently completed study by the Washington Economics Group Inc. has estimated that delay in processing mortgage foreclosure cases costs Florida's economy $17 billion a year.[2]

Backlogged cases are not the only foreclosure challenge in Florida. Many times the documents the banks use to seek foreclosure are insufficient as a matter of law, which creates the problem of figuring out how to proceed without creating a windfall for either party. Under these circumstances, the distinction between actions at law and actions in equity becomes an important one.

The United States patterned its judicial system after England, where there were courts of different jurisdictions. Some were courts of law and some were courts of equity, with the difference being the remedy that is meted out. The English courts each had a different color robe signifying its jurisdiction. However, when a member of the royal family died, the courts donned black robes for a mourning period appropriate to the decedents' royal rank. During the American Revolution, the English courts were in mourning and the American courts never switched back to jurisdictional robes. Hence, American judges wear black robes. Doing so makes sense because we have merged the courts of law and equity into one court.

Fundamental Contributions to the Foreclosure Crisis

The factors that were most instrumental in driving the rates of foreclosure, not only in residential properties but in investment properties as well, were

[1] CoreLogic, CoreLogic Reports 57,000 Completed Foreclosures in September, (Oct. 31, 2012), *available at* www.corelogic.com/research/national-foreclosure-report-september-2012.pdf; Marketpulse (2012), www.corelogic.com/about-us/researchtrends/the-marketpulse.aspx.

[2] *The Economic Impacts of Inadequate Funding for Florida's Courts*, Florida State Courts, www.flcourts.org/gen_public/funding/publications.shtml (follow *The Economic Impacts of Inadequate Funding for Florida's Courts Slideshow* hyperlink under Economic Impact Reports).

an artificial increase in market value due to a decreased supply or a steady and constant supply with an increase in demand.

Dubious Lending Practices

The Federal Reserve reduced interest to stimulate the economy, and that move succeeded. When money was cheap to borrow, the lenders were trying to make as many loans as possible to secure a future revenue stream. Many lenders, but more so mortgage brokers, were engaging in questionable practices. So-called "no doc loans," where the borrower presents scant documentation such as a most recent pay stub to get a mortgage loan, were quite commonplace. Lending qualification standards became so minimal that people were given loans their income simply could not service. Many people received loans that were under-collateralized and, in some cases, woefully under-collateralized because the general belief was the market was going to grow annually and those loans would be substantially collateralized. An alarming number of people bought real estate speculating that the market would continue to annually sustain double-digit growth. Well, the old saying "What goes up must come down" came to pass. The free market corrected itself, which almost always happens proportionate to the artificial inflation. In some, if not many, instances the market was 50 percent inflated. An anticipated free-market correction would be a 60 percent decrease, rebuilding back to and settling in at a sustained 50 percent decrease, thereby bringing the market back in line with traditional economics.

HELOC Loans

Lenders were making loans betting that the market was going to continue to grow, but when the market started to slow down, all of those questionable loans began to fail and that was the spark that ignited the mortgage foreclosure crisis. On top of that, we had home equity line of credit (HELOC) companies participating in the market frenzy. The HELOC companies were offering loans at, sometimes, a greater percentage than the available equity in people's homes.

For example, if you had initially bought a home for $250,000 and a HELOC company gave you a loan for 150 percent of market value, not

even available equity, now you could borrow up to $375,000 against that house, for a total of $625,000 in mortgage and HELOC loans for your house. If you bought the house in 2004, by 2006, due to market increase only, that house had almost tripled in value. In that context, owing $625,000 on a house that is worth more does not seem like a bad deal. Nobody is under-collateralized.

When our market value evaporated into Chinese coffers and one's house went back to being worth $225,000, the purchase mortgage security interest (PMSI) lender was barely collateralized and, in some cases, when such a house dropped to $150,000, the PMSI lender was woefully under-collateralized. They had to foreclose and take whatever money they could in judgment, leaving the HELOC loan as a completely unsecured, uncollateralized debt, no different from a credit card debt, and that debt is uncollectible when the debtor does not have the money. The judgment obtained by the HELOC or second mortgagee is not worth the paper it is written on.

That sent out ripples into the rest of the economy. These financial institutions were supporting bigger financial institutions and the market crisis began to unfold as the market imploded and died under its own weight. The bankers walked away with all the money, though they suffered substantial market evaporation as well, so even though these banks made hundreds of millions of dollars when the market evaporated, they lost a great deal of their net worth as well.

The Beginning of the Crisis

Everybody understood there was going to be a torrent of mortgage foreclosures filed in 2009; in fact, everyone began to understand in 2008 that there was going to be a torrent of mortgage foreclosures filed. By 2009, everyone understood a tsunami was on the horizon and, by 2010, everyone understood it was an absolute, full-blown crisis. Immediate governmental management and intervention were necessary to keep the entire market from collapsing.

The Twentieth Judicial Circuit, made up of Collier County, Lee County, Charlotte County, Hendry County, and Glades County, was one of the hardest-hit circuits in Florida.

The Drastic Increase in Foreclosure Cases

The number of judges in a circuit is determined by the population of the circuit. Since our population had not grown, we could not go to the state legislature and say we needed more judges.[3] From fiscal year 2005–2006 to fiscal year 2006–2007, filings increased by 7 percent in circuit court. Growth in civil filings by 38 percent is the main contributing factor to the statewide increase in circuit court. Real property and mortgage foreclosure case filings nearly doubled from the previous fiscal year, representing an increase of 55,568 filings and an increase of 171,426 filings for the following year.[4]

The first thing that happened was the court clerks were able to get authorization to raise the filing fees. The fee for filing a civil action, depending on the type, was anywhere from $100 to $150. Now the filing fees for mortgage foreclosures, depending on the amount in controversy in the foreclosure, can be over $1,000 just for the filing fee.[5]

Also, one was never charged a filing fee for a counterclaim, and now there is a filing fee in the same amount as the original filing fee.[6] Court clerks were able to generate significant money, and that money was used directly to address the mortgage foreclosure crisis in the number of cases put into the court system.

The fee increases were intended to finance the hiring of additional judges, but the problem was the circuit could not hire additional judges even on a temporary basis because the number of judges authorized in a circuit is limited by the population and the population had not grown. There was no legal mechanism by which the chief judge could increase the number of judges, so, thinking creatively, the circuit then used that money to bring back retired judges to hear additional cases. Those judges were assigned to

---

[3] CoreLogic, CoreLogic Reports 57,000 Completed Foreclosures in September, (Oct. 31, 2012), *available at* www.corelogic.com/research/national-foreclosure-report-september-2012.pdf; Marketpulse (2012), www.corelogic.com/about-us/researchtrends/the-marketpulse.aspx.

[4] CoreLogic, *supra* note 1; Marketpulse (2012), www.corelogic.com/about-us/research trends/the-marketpulse.aspx.

[5] Clerk of Court for the Twentieth Judicial Circuit, in and for Lee County, LeeClerk.org, http://leeflclerk.govoffice3.com/index.asp.

[6] *Id.*

what had become known as "the rocket docket," because some lawyers felt they were trying to push cases through without giving them justice, but I am of the opinion that they were doing their best to handle what had become, literally, an epidemic and an uncontrollable situation.

The Continuing Backlog of Cases

Between 2010 and 2011, a plethora of foreclosures were funneled through Lee County and disposed of by the retired judges. The filings kept coming while the backlog was being addressed, so when the funding ran out for the retired judges we were still left with a backlog of foreclosure cases in Lee County that had not yet even been addressed by a judge. That backlog had built up over a three-year period.

Foreclosure: The Interesting Animal

Foreclosure is an interesting animal in that it is an equitable action that cannot arise until a legal action is sufficiently proven. When a foreclosure is filed it is a case of equitable cognizance. A judgment of foreclosure applies only to the property secured by the mortgage, and does not impose any personal liability on the mortgagor.[7] Although, under the traditional common law rule, upon default by the mortgagor, a mortgagee has independent remedies he or she may pursue. The mortgagee may sue either on the note or foreclose on the mortgage, and may pursue all remedies at the same time or consequently. As long as there is no double recovery on the debt, the mortgagee may pursue either or both remedies.[8]

The Distinction between and Rights to Remedies

The distinction between the two remedies, foreclosure and suit on the note, is found in the historic view that a foreclosure action is purely *quasi in rem*, affording relief only against the secured property, and a suit on a bond or note is *in personam*.[9] The traditional common law rule wherein the mortgagee can exercise multiple independent remedies is the majority rule

[7] *Royal Palm Corporate Ctr. Ass'n, Ltd. v. PNC Bank, NA*, 89 So.3d 923, 929-30 (Fla. Dist. Ct. App. 2012).
[8] *Id.* at 929.
[9] *Id.*

in the United States. However, some jurisdictions have adopted legislation providing for "one action" that requires mortgagees to file only one action in which all remedies for a debt secured by a mortgage are pursued.[10]

Right to Trial by Jury

Are people entitled to a jury as a matter of law with respect to these foreclosures? The answer is typically no, and the reason for that is the standard promissory note and mortgage includes a jury trial waiver. Is that a knowing and voluntary waiver of a constitutional right?[11]

As a matter of law, for a legal action a person is entitled to a jury. The Seventh Amendment to the US Constitution guarantees us a jury trial in a civil action when the amount in controversy is over $20.[12] However, there is no legal right to a jury trial for an action in equity[13] such as a divorce, where the remedy is fashioned by the judge and tailored to the specific circumstances of the case.

My answer is no, but there is an interesting wrinkle in Florida. The Fourteenth Amendment[14] is known as "the incorporation amendment" because it applies the first ten amendments of the US Constitution, known as the Bill of Rights, to the states. Before the Fourteenth Amendment, the Bill of Rights only applied to the federal government. The Fourteenth Amendment then incorporated the Bill of Rights and applied it to the states. However, the Florida Supreme Court has held "Florida's constitutional right to jury trial guarantees a right to trial by jury in those cases in which such right was recognized when Florida's first constitution became effective in 1845."[15] As the common law in 1845 did not confer a right to jury trial in equity

[10] *Kepler v. Slade*, 119 N.M. 802, 896 P.2d 482-85 (1995).
[11] Many of the loans at issue are government backed, which is likely enough government involvement to conclude that one must make a knowing and voluntary waiver of a constitutional right for that waiver to be effective.
[12] "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." US Const. amend. VII.
[13] In Florida, the right to a jury trial does not extend to causes of action in equity. *Boyce v. Hort*, 666 So.2d 972, 973 (Fla. Dist. Ct. App. 1996) citing *Hawkins v. Rellim Inv. Co.*, 110 So. 350, 351 (1926); FLA. CONST. art. I, § 22.
[14] U.S. Const. amend. XIV.
[15] *Lanman Lithotech, Inc. v. Gurwitz*, 478 So. 2d 425, 427 (Fla. Dist. Ct. App. 1985), citing *Dudley v. Harrison, McCready & Co.*, 173 So. 820 (1937).

actions, the court quashed the trial court order that denied the motion to strike plaintiffs' demand for jury trial as of right by jury.[16]

To add confusion to this issue, the Florida Supreme Court has also held that the filing of a compulsory counterclaim for relief cognizable at law in an action for equitable relief does not constitute the counterclaimant's waiver to the right to a jury trial of the issues raised by said compulsory counterclaim.[17] This holding has been applied to mortgage foreclosure actions. The Florida Supreme Court considered the sole issue of whether a jury trial is constitutionally guaranteed in a mortgage foreclosure proceeding when usury is raised in a counterclaim. The court held:

> The right to a jury trial, in the absence of specific statutory authorization, depends upon whether the nature of the cause of action is legal or equitable. However, where both legal and equitable issues are presented in a single case only under the most imperative circumstances…can the right to a jury trial of legal issues be lost through prior determination of equitable claims.[18]

Thus, one must conclude that an action for foreclosure alone will not provide a jury trial to the defendant. In the event of a compulsory counterclaim (i.e., breach of contract, fraud, etc.), however, a "jury trial must be accorded to the person requesting it even though the legal issues are incidental to the equitable issues.[19] As a word of caution for drafting a counterclaim, however, the practitioner must bear in mind that "what is essentially an equitable cause of action cannot be transformed into a legal cause of action simply by the use of legal terminology."[20]

Impediments to Jury Trial

One of the largest impediments to obtaining a jury trial in a Florida foreclosure action is the lack of available docket time. Notwithstanding the

---

[16] *Lanman Lithotech*, 478 So.2d at 427.
[17] *Hightower v. Bigoney*, 156 So.2d 501, 509 (Fla. 1963).
[18] *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510-11, 79 S.Ct. 948, 956, 957, 3 L.Ed.2d 988 (1959).
[19] *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed.2d 44 (1962). *Cerrito v. Kovitch*, 457 So. 2d 1021, 1022 (Fla. 1984).
[20] *Cerrito*, 457 So.2d at 1023.

law or the Constitution, the reality faced by our judges is that there are often, depending on the circuit, more than 30,000 backlogged foreclosure cases. Some circuits schedule 100 "trials" for a morning docket (9:00 a.m. to 12:00 p.m.) and an additional 100 cases for "trials" on the afternoon docket (1:30 p.m. to 4:30 p.m.). It is mathematically impossible to secure any constitutional right in one minute and forty-eight seconds.

The courts here are forced into a position in which they are unable to enforce the law without creating an unjust windfall for the homeowner when the banks do not have the right paperwork to prove as a matter of law that they are entitled to foreclose on and take the home in satisfaction of the promissory note that has been breached, but there is no doubt that someone lent the homeowner the money, so where does that leave the court?

If the court says the bank has not proven its case to the appropriate and required legal standard, the lien is dissolved as unenforceable and the homeowner walks away with a home free and clear, which is not a just result. It is certainly an unjust windfall to homeowners because they admit that someone lent them a substantial amount of money to buy that home, and they admit they have not paid it back.

But what if the court grants judgment to the bank, saying that, although the bank does not have the paperwork, it is obvious the homeowner owes someone the money? That bank sells the house at a foreclosure sale and goes on with the process as we know it today, but within the statute of limitations another financial institution might come forward with the correct paperwork. Payment of a debt to the wrong party does not bar recovery by the right party.[21]

To deal with the potential inequity of a homeowner being twice liable, some courts have required the banks to include an indemnification clause in the final judgment. Typically, the plaintiff bank obtaining the foreclosure judgment will include language in the final judgment agreeing to hold the homeowner harmless from judgment, attorneys' fees, and costs if the homeowner is subsequently sued by one with superior interests (i.e., if another bank subsequently produces the original promissory note). Thus, in

[21] *Pollo Operations, Inc. v. Tripp*, 906 So.2d 1101, 1105 (Fla. Dist. Ct. App. 2005).

the event anyone else comes forward during the five-year statute of limitations period, the payee bank must fully indemnify, including attorneys' fees and costs, the homeowner with any subsequent action that might be made by an institution alleging to be a holder in due course of the promissory note and mortgage.

The equitable remedy the courts have seemed to fashion through their power of common law is ineffective from a practical standpoint because these banks are constantly being bought and sold and the banking industry is still consolidating. To the extent that Bank A indemnifies the homeowner, but then is consumed by Bank B and Bank C comes forward during the statute of limitations period and produces the original promissory note, and the mortgage always follows the promissory note, it would appear that Bank B has the legal obligation to indemnify the homeowner against Bank C. We have not yet seen this scenario, at least not in a published option, but such circumstances will undoubtedly further stress the already over-stressed and ineffective judicial system.

At the end of the day, the banks are the grand heirs of all windfalls. There can be no doubt that it would be unjust to deny a foreclosure because a bank does not possess the right paperwork (i.e., original promissory note). The homeowner would then experience a significant windfall because someone lent them a substantial amount of money to buy the home and now, as a result of inept administration, that homeowner will walk away from the debt and keep the property free and clear. Certainly, that is not a just result. Conversely, to grant foreclosure when a bank cannot produce the original promissory note, and without giving the homeowner a full opportunity to examine bank records and witnesses, is a windfall in the opposite direction and equally as unjust.

Hay-Day Complications

Mortgage Trusts

Significant complications arise when a mortgage has been sold to a trust. Some banks securitized a portion of their mortgages. That is to say, they sold the mortgages to a trust that then used the trust's collective financial resources to support and secure other financial instruments. Some trusts

were used to support retirement funds by public entities, such as firefighter or police retirement funds. Some trusts even used their portfolios, many of which contained a significant portion of mortgages, to underwrite other financial instruments or transactions such as initial public offerings.

The conventional school of thought was that mortgages are the safest instrument in the marketplace because people are not going to lose their house. It is an industry that has historically always grown and never shrunk; even if it has had a rolling value, it has always maintained growth over time. The point being missed during the hyper-market, however, was that many of the mortgages, unlike in years gone by, were either under-collateralized or given to borrowers with insufficient income to service the debt, or both.

Searching for Mortgage Pieces

When the equity was drained out of the market, all of the instruments that were being supported or securitized by mortgages began to fail and nobody could find the mortgages because they were broken into pieces. Not only were they put in a trust to securitize other financial instruments, but they were divided because a certain financial rating is needed to support a security. The security lawyers were taking mortgages and dividing them, putting portions of mortgages A, B, and C together to make one mortgage. The credit rating would average to be high enough, though one of those ratings by itself would not be high enough, to support a security.

Reassembling the Pieces

When the mortgages were diced up, combined, and averaged, they supported the security. Now portions of these mortgages are in different places and it is impossible for anyone to bring back together all the pieces and put them in the legal manner necessary to support a foreclosure by meeting the legal requirements to foreclose. What do we do with those mortgages? Do we simply say the banking industry divided them among the securities industry, so now they are just out of luck? They have wasted their money and the windfall goes to the homeowner, who has clean hands notwithstanding the inability to make the mortgage payment.

There are many more questions than there are answers at this point, but if you are defending a mortgage foreclosure action in Florida, these are the issues you need to understand and aggressively pursue on behalf of your client. Unfortunately, I have seen, more often than not, that the judiciary either does not understand these technical and complex legal issues or simply believes that someone lent the homeowner the money, so they are going to rule in favor of the bank and let the appellate court figure it out.

MERS and the Issue of Legal Standing

Many times the mortgage electronic registration system (MERS) has been the servicer and the representative of the true mortgage holder, but MERS often lacks standing because it is not a real party in interest.

The MERS system was developed in 1993 by the Federal National Mortgage Association,[22] the Federal Home Loan Mortgage Corporation, the Government National Mortgage Association, the Mortgage Bankers Association of America, and several other major participants in the real estate mortgage field to track ownership interests in residential mortgages electronically.[23] Under this program, MERS members subscribe to the system and pay annual fees for the electronic processing and tracking of ownership and transfers of mortgages. The participants agree to appoint MERS to act as their common agent on all mortgages registered by them in the MERS system, thus simplifying the packaging and transfer of mortgages on individual parcels.[24] As the third district has pointed out, it is the rub between the expanding use of electronic technology to track real estate transactions and our familiar and venerable real property laws that has generated the heat that led to this appeal and to countless others nationally.[25]

---

[22] *See generally* Federal National Mortgage Association, www.fanniemae.com/portal/index.html; Federal Home Loan Mortgage Corporation, www.freddiemac.com/; Government National Mortgage Association, www.ginniemae.gov/; Mortgage Bankers Association of America, www.mbaa.org/default.htm.

[23] *Taylor v. Deutsche Bank Nat'l Trust Co*., 44 So.3d 618, 621 (Fla. Dist Ct. App. 2010).

[24] *MERSCORP, Inc. v. Romaine*, 8 N.Y.3d 90, 101, 828 N.Y.S.2d 266, 861 N.E.2d 81, 83 (N.Y.2006).

[25] *Mortgage Elec. Registration Sys., Inc., v. Revoredo*, 955 So.2d 33, 34 (Fla. Dist. Ct.

The Fifth District Court of Appeal enumerated specific language that gave MERS legal standing.[26] The holding in Taylor was based upon language contained in the promissory note specifying that anyone who takes the note by transfer or who is entitled to receive payment is the "note holder." The mortgage defined the "lender" and included "MERS as a separate corporation acting solely as nominee for lender and lender's successors and assignees." The mortgage also contained language stating that MERS has the right to exercise any and all rights of the lender, including foreclosure. Finally, the court noted that an assignment of mortgage was attached to the complaint and indicated MERS as nominee of the original lender assigned the mortgage to the institution filing foreclosure. Under those facts, MERS has standing.[27]

This case is instructive for the practitioner because, presumably, if the cited language is absent from any or all of the documents, MERS would not have standing, thus creating a checklist from Taylor and view it in juxtaposition to documents presented in each case presented for defense.

The Problem of Excessive Supply

What is keeping banks from granting loans to scoop up these properties? We have a glut of residential homes on the market, so we have a significantly excessive supply. It becomes a buyer's market and the buyers want to pick these foreclosed homes up for ten cents on the dollar, and that does not make it economically feasible to grant loans, even from a bank's perspective.

Even though money is cheap, the banks have tightened their standards to qualify for a mortgage. Steady tax returns and higher credit scores than what had typically been required are criteria for current mortgage candidates. Hardly anybody can satisfy these more stringent requirements and qualify for a mortgage because they have taken hits on being late for car loans or credit card payments as a result of this crisis. In addition, many people have bankruptcies and foreclosures on their records, which bring

App. 2007).
[26] *Taylor*, 44 So.3d at 621.
[27] *Id.*

their credit scores down, and the banks are being tightfisted about lending money because they were too loose about lending money previously.
The pendulum swung too far right and now it has swung back left and, as is true with any free market, the further the pendulum swings right, the further it is going to swing left because it has to swing in proportion. What we are seeing and dealing with today is the market pendulum back out to the left, and it is likely going to take another five to ten years before it stops swinging and settles in towards zero.

Building a Defense Strategy

Initial Analysis

People usually bring me foreclosure cases when they have been served with a summons and complaint. As with any other lawsuit, the first step is to evaluate the summons and complaint from a procedural standpoint. Was the lawsuit filed in the proper jurisdiction? Is the venue for the lawsuit proper? Were the defendants properly served? In the cases where basic procedure was not properly followed, a motion to dismiss is proper. However, as all practitioners know, a judge will almost never grant such a motion. Rather, the motion will most likely be denied without prejudice and the plaintiff given ten days within which to amend. In the interest of professional courtesy, filing a motion to dismiss and then offering a stipulation to permit an amended complaint is often best. In many instances, a *quid pro quo* can be had wherein the defendant can negotiate additional time within which to respond to the amended complaint. The end result is the defendant is provided additional time without running afoul of the ethical rules that require us not to take an action for the purpose of delay.

Knowing When to Fight

When the documents presented by the bank are clearly insufficient to result in a successful foreclosure, I advise my clients to fight a foreclosure proceeding.

Insufficiencies include not being able to produce the original note and mortgage, having a promissory note that is defective in that it failed to

properly comply with the federal Real Estate Settlement Procedures Act,[28] 12 U.S.C. Chapter 27, or failed to properly comply with Florida's Fair Lending Act or the federal Truth in Lending Act, or when the bank failed to give proper notice of accelerating the loan or when the bank failed to properly put the note and mortgage in a real estate trust, called a real estate mortgage investment conduit (REMIC), so a REMIC was not properly formed or used.[29] Those are the main considerations for me in evaluating whether a homeowner should fight the foreclosure attempt.

Often, the strategy is to slow down the mortgage foreclosure to give the homeowner the opportunity to modify the loan. Banks are doing what is called dual tracking; several large banks were recently compelled to undergo an audit by the Federal Reserve, which determined that they were engaged in dual tracking.

Does the Foreclosure Action Have Merit?

The key to determining if a foreclosure action has merit is in the documents. If the documents have been collateralized or securitized, I feel confident that the homeowner will prevail. In the years I have been doing this type of law, I have never seen a mortgage that was properly put into the trust, so when we ask for documents such as the master trust list and the other documents required by law to form the trust, so the trust can take legal title to the mortgages, those documents do not exist or have not been produced.

By aggressive discovery, I have, more often than not, forced the bank into a corner where they settle under terms favorable to the homeowner because they do not want to set a precedent. They will settle behind the scenes and ask for a nondisclosure clause as part of the settlement agreement.

Checking the Documents

If the answer to all those questions is in the affirmative, I next examine the mortgage documents that are attached. To file a foreclosure, the

[28] Real Estate Settlement Procedures Act, 12 U.S.C. §§ 2601-17 (1974).
[29] 12 U.S.C. § 2601; Truth in Lending Act, 15 U.S.C. §§ 1601-67, 12 C.F.R. § 226 (1968); FLA. STAT. ANN. § 494.0078 (West 2002).

bank is required to attach a copy of the note and mortgage, so a legal analysis must begin with looking at the promissory note to determine who the original lender was, because in almost every case the original lender will not be the current owner or holder of the note. After determining the original lender, assuming that entity is not the Plaintiff, one must next look for assignments or endorsements.

Lost documents are always a fertile ground for affirmative defenses. The bank has to prove their case, a borrower does not have to prove anything. When a bank does not have the original documents, many times because the loan has been bought and sold so many times, plaintiff lawyers will move to establish lost documents. Such a count in the complaint gives rise to viable legal defenses. Of course, standing becomes the first issue. If the plaintiff bank does not have the original note and mortgage, the case cannot proceed. If, on the other hand, the bank is able to establish that it has the right to collect on the note, the bank may move forward.

A bank employee was once asked under oath if he remembered seeing a particular mortgage with his signature. He claimed he had. The employee agreed that the notes and mortgages were bought and sold by the thousand, but he was sure he had seen this mortgage. He announced with Stentorian tone that he was confident, with reasonable certainty, that he saw this particular note and mortgage. However, when asked what he had for breakfast that morning and what color tie he had worn the day he saw that mortgage, he did not remember. Yet, he wanted the court to believe he was able to discern this one mortgage from the other 999 he saw that day.

Rarely do we see an actual assignment; rather, what we see is an endorsement in blank, which is similar to endorsing a check. If you wrote me a check and I signed it on the back and wrote "Pay to the order of Joe Smith," I have endorsed that check to Joe Smith and Joe Smith has the right to cash that check. I look at the promissory note for an endorsement, but usually we see an endorsement in blank, which means that whoever bears the instrument has the right to collect on the instrument. If I sign a check on the back and on my way to the bank I drop it, the person who picks it up can cash it and keep the money because that person is the bearer of that instrument.

Determining the Original Holder

One must check to make sure everything is in order and done correctly and that all of the appropriate fairness in lending act language is in there and the real estate settlement procedures act language is in there. If everything has been done appropriately and there is an endorsement in blank, we are often unable to determine who the appropriate holder is or the bearer who has the right to collect on that instrument because the original instrument is not being produced. This works must like a check. For instance, if one brought a copy of a check endorsed in blank to the bank, the bank would not pay the money. Rather, to pay on the instrument, the bank would require the original.

Because the promissory notes have been bought and sold so often, there is no evidence as to the whereabouts of the original Note. There is a way, under Florida law, to do what is called "establish lost documents." Using that law, there has to be an affidavit showing that the bank once had the original note and now, due to excusable neglect, can no longer produce the original, but the bank can state under oath this is a true, correct, and accurate copy of the original.[30] Excusable neglect is an imprecise term. It often means what the trier of fact wants it to mean, and as such it is a subjective standard.

Any attempt to establish a lost Note provides a significant legal defense. Florida law is quite demanding, yet most often simply unenforced by the courts. Florida requires:

> A person not in possession of an instrument is entitled to enforce the instrument if: the person seeking to enforce the instrument ***was entitled to enforce the instrument when loss of possession occurred***, ***or*** has directly or indirectly ***acquired ownership of the instrument from a person who was entitled to enforce the instrument when loss of possession occurred***.[31]

[30] FLA. STAT. ANN. § 71.011 (West 2012); FLA. STAT. ANN. § 673.3091 (West 2004).

[31] FLA. STAT. ANN. § 673.3091(1)(a) (West 2004) (emphasis added).

Thus, a party seeking to establish a lost Promissory Note must prove that they were entitled, either as the enumerated lender or the assignee, to enforce the instrument when it was lost. Most Foreclosure Plaintiffs simply cannot do so because they do not know how, why or even have any idea when the original Promissory Note went missing. In the alternative, assuming that an assignee bank did not ever obtain possession of the original Promissory Note, the Plaintiff bank may show that the Promissory Note was lost when its predecessor had a right to enforce it. Again, it will be a very rare case in which a Plaintiff bank can show that a predecessor in interest lost the original Promissory Note.

Absent compliance with the above statute, a Plaintiff bank cannot properly establish a lost Promissory Note and, at least according to Florida law, cannot thereafter maintain an action. This seemingly unambiguous Florida law, however, does not stop overwhelmed courts from using summary judgment in favor of the bank(s) as a docket management tool. All too often, beleaguered homeowners simply do not have the resources to appeal a decision in flagrant violation of Florida law. Hence, the doors of justice are closed to them. In these cases Justice is defined and purchased by the party who can afford it – the bank – and everyone else is compelled to live with that definition.

Essentially, at least in parts of Florida, the naked reality is that some trial courts have suspended constitutional due process by virtue of judicial fiat and justified this revocation of fundamental constitutional rights by deluding themselves into believing if they actually followed the law the system would be paralyzed by the sheer number of cases requiring an evidentiary hearing and/or resulting in a "windfall" to the homeowner.

This is a dangerous practice and one that our founding fathers strictly discouraged, as evidenced by the emphasis of due process safeguards found in our Constitution. Moreover, for hundreds of years the courts – at least the appellate courts – have embraced due process and held it inviolate. Today, however, the majority of those cases in which the Constitution is being ignored cannot reach the appellate system for want of resources. The result is that some trial courts have created a whole new Constitutional standard --- that the law dispenses with fundamental rights when providing them impedes effective administration. Should this practice be tolerated,

each citizen should be gravely concerned about the Constitutional rights that will next be disposed of in favor of convenience.

Waiving Affirmative Defenses

When served, people often write a letter to the judge; it is inappropriate, but they do it and they explain the economic hardship that has caused them to be unable to pay their mortgage, but communicate that they want to pay their mortgage. That letter is deemed an answer and because it is an answer, they have waived all the legal affirmative defenses available to them under Florida Civil Procedure Rule 1.140(b).[32]

There are specifically enumerated legal defenses that, if you do not file them, you waive. People waive those legal defenses and then they waive the ability to state affirmative defenses, even those recognized as common law, because they did not file them with their answer, so when they come to me they have waived all their legal defenses. It would be a waste of their money to hire me because there is nothing I can do to help them after they have waived all their defenses.

Challenges in Defending Foreclosure Actions

The biggest challenge a lawyer defending a foreclosure action faces in Florida is the validity of the documents relied upon to support the foreclosure action. In more cases than not, we see documents that are legally insufficient to support a foreclosure action, leaving the court in the conundrum mentioned earlier.

Question Jurisdiction or Diversity Jurisdiction

Mortgage foreclosures have been litigated, almost exclusively, on a state-by-state basis and have not gone to federal court. The reason for that is there is not a federal question that typically arises. Certainly, there is no federal question arising from the banks' perspective, so there is an inability to gain access through federal question jurisdiction on their part. In almost every case, with limited exceptions, there is complete diversity and there are two

[32] FLA. R. CIV. P. 1.140(b).

ways to get into federal court, through federal question jurisdiction or through diversity jurisdiction.[33]

To have diversity jurisdiction, there must be complete diversity between the parties.[34] Most of the banks that do business in Florida have local offices, even though they may not be domiciled here or incorporated here, and that destroys diversity for the purposes of federal court jurisdiction. Therefore, these cases are almost exclusively litigated in state court and, here in Florida, that means circuit court because those cases meet the monetary jurisdictional limit to go to circuit court.[35]

The Adversarial System

The interesting part about our adversarial system is the private bar practices on behalf of the homeowner and has no interest in helping the court navigate the problem. We are set up in an adversarial manner, so systematically there cannot be any significant cooperation between lawyers and the courts to address the problems. The lawyer hired has a duty to zealously assert every legal position that is ethical and in favor of the client, so there is no motivation or even mechanism within the system for private lawyers to collaborate with the banks and work towards a mutual solution in the best global interest of the economy.

When Homeowners Cannot Afford Justice

The problem is if homeowners do not have the money to pay their mortgage, they certainly do not have the money to avail themselves of the appellate court's jurisdiction, and so many of the homeowners are being shortchanged and having their constitutional rights, particularly that of due process, trampled upon with impunity by the trial court. In addition, some judges are including indemnification clauses when they rule in favor of the initial lending institution, and some are not. The rulings are inconsistent.

[33] 28 U.S.C.A. § 1331 (West 2012); 28 U.S.C.A. § 1332 (West 2012).
[34] 28 U.S.C.A. § 1332.
[35] FLA. STAT. ANN. § 34.01 (West 2004).

As most borrowers are unrepresented and most foreclosure cases proceed to final summary judgment after default or without any paper or defense being asserted by the borrower, lawyers and bar associations should aim pro bono efforts at dealing with the borrowers in these cases to the extent that their resources allow. Perhaps a pro bono program funded by the Florida Legislature should be considered; after all, such a program would undoubtedly be more economical than the effect of *pro se* litigation on judicial economy. The Supreme Court of Florida has addressed the issue of the increasing number of self-represented litigants within circuit and county civil divisions, observing that they are "unprepared for the rigors of presenting evidence, following rules of procedure, and generally representing themselves in court" and, "consequently, they often require enhanced judicial involvement, which entails lengthier hearings, rescheduled hearings, and court delay."[36]

Foreclosure Alternatives

There are other options available to homeowners facing foreclosure besides foreclosure itself. First, homeowners are often able to modify the terms of their loan agreement, and this is the best option for those who want to keep their houses. The loan modification process can be lengthy and homeowners often find themselves in the "dual tracking" situation where they are served with foreclosure papers, despite their not yet finalized efforts to make payments based on the modification.

Another alternative, short sale, can be advantageous to both the lender and the borrower upon the event that the borrower can demonstrate a hardship to the extent that it prevents an ability to pay. This is often the lenders' first choice because they do not end up owning the property.

Finally, a deed in lieu of foreclosure is an additional option. However, this will only be considered where there is one lien and the borrower must, again, demonstrate a hardship because lenders will generally require an attempt at a short sale prior to accepting.

[36] *In re Certification of Need for Additional Judges*, SC12-2398, 2012 WL 6619382 (Fla. Dec. 20, 2012).

How Dual Tracking Works

Dual tracking means the banks are accepting documents or requesting documents, either one, from homeowners with the intent to modify the loan to see if the homeowners qualified for any federal modification programs or any private modification programs offered by that institution. At the same time, the bank files foreclosure.

In many cases, we see people call their bank seeking a mortgage modification and the bank tells them it will not consider modifying anybody who is current on their mortgage. In the bank's view, if you are paying your mortgage, that means you can pay, so you should continue to pay. Until more recently, it had become all too familiar that, unless you were ninety days past due on your mortgage, the bank would not consider you as a modification candidate. These people would then ask the bank if they should not pay their mortgage so as to qualify for a mortgage modification, and the bank would say yes.

Once the homeowners quit paying their mortgage and, ninety days later, they submit the modification paperwork, the bank's modification department begins working on the paperwork to determine if these homeowners qualify for relief, but at the same time that the modification division accepts the documents and begins to explore the homeowners' eligibility for relief, the legal department is triggered into action because the homeowners are now more than ninety days past due. The legal department sends out an acceleration notice letter and begins foreclosure proceedings.

This is referred to as "dual tracking" because those two actions, one administrative and one legal, run parallel to each other. Homeowners get served with a foreclosure and are confused because they think the bank is trying to work out a modification. In many cases, the homeowners call the modification department and talk to the modification specialist they are working with to find out what to do since they think they are having their loan modified, but now they have been served with foreclosure paperwork. More often than not, the modification specialist says not to worry about the foreclosure; that is just something legal. The bank will modify the loan before it will foreclose, so the homeowners should not even answer the foreclosure. The homeowners do not answer and default judgment gets

taken against them. That default judgment is finalized in a final judgment and the house is sold at a sheriff's sale ten days after the sale certificate of title issues to the bank.

The bank takes that certificate of title to the judge to get a writ of possession and they put a twenty-four-hour vacate notice on the door. The homeowners think they are in modification negotiations with the bank, but now they have twenty-four hours to get out of their house. When they do not, the sheriff shows up and the bank sends movers who move all their belongings onto the street. They change the locks and a real estate agent lists the home.

I do not believe there is evil intent; rather, there is a total lack of communication where the left hand of the bank does not know what the right hand of the bank is doing. The modification department has no communication with the legal department, and there is no central repository of information to which both of those departments can look to find out what is going on with a particular lender's file.

Modification

Loan modifications are one available option for homeowners facing foreclosure. While it was previously standard practice to only consider modifying one's loan after a ninety-day default period, borrowers, as of recently, are no longer required to be late on payments to qualify.[37] Lenders determine whether a homeowner qualifies for modification based on minimal financial information; usually, a recent paystub and expense information will suffice. Once this information is provided and the homeowner is determined to qualify for modification, lenders will lower their interest rate and extend the amount of time to pay. While the rate and term are proportionally modified, lenders are not yet reducing principle balances.[38]

Loan modifications are also preferable to foreclosure because, apart from achieving new terms that more adequately conform to one's ability to pay, there is no tax impact unless modification is granted under the "Making Home Affordable Initiative." Additionally, there is no negative credit

[37] *Short Sales: Current Requirements and Legal Issues*, Nat'l Business Inst. (Nov. 2012).
[38] *Id.*

impact unless one is late on their modified payments. In general, there are no costs or fees associated with loan modifications because they are handled by the borrower; however, sometimes a third-party loan modification specialist may expedite the overall process, usually for a flat fee for a fixed term, on behalf of the borrower.

Short Sale

Short sales are another alternative to foreclosure where the homeowner must demonstrate a hardship that prevents them from being able to pay; simply not wanting to pay your mortgage for whatever reason will not suffice. Hardships include involuntary reductions in income, such as unemployment, mandatory reduction of work hours or hourly wage, under-employment after loss of previous job, death of a borrower, decline in business earnings if self-employed, permanent or short-term disability, serious illness of household member, or divorce, as well as unavoidable increases in expenses, such as major medical expenses, disaster, urgent property repairs, increase in child care expenses, and mortgage loan and payment changes, such as an ARM adjustment. Successful short sales require that the homeowner provide extensive financial information, including bank statements, tax returns, and personal financial statements. The borrower is also responsible for late fees, default interest, attorney fees, and court costs. Overall, the timeframe for a short sale can range anywhere from two weeks to more than three months.[39]

Legally, the promissory note may be requested by the lender—if so, generally there is 0 or 1 percent interest and the length of time to pay is based upon balance due.[40] Lenders may pursue deficiency judgments; however, there is potential forgiveness of debt and each lender has the choice of whether to require a promissory note, cancel the debt, or seek a deficiency judgment. There may be income tax liability as a result of cancelled or forgiven debt (1099-C) with two methods to reduce or eliminate tax: the Mortgage Forgiveness Debt Relief Act of 2007[41] and insolvency exclusion.

---

[39] *Id.*
[40] *Id.*
[41] Mortgage Forgiveness Debt Relief Act of 2007, Pub. L. No. 110-142, 121 Stat. 1803 (codified in scattered sections of 26 U.S.C.).

The financial impacts of a short sale are reported on your credit for two years after the sale is completed; however, you will have impaired credit from the first month of late payment. Fees for short sale negotiation usually range from $1,000 to $2,000, but some realtors will do it for free.

Deed in Lieu

Deeds in lieu of foreclosure are similar to short sales in what is financially required on the part of the borrower: the borrower is also financially responsible for all late fees, default interest, attorney fees, court costs, etc., which adds to an outstanding balance due. As such, there are generally less costs involved for the lender than foreclosure, and the timeframe to obtain lender approval varies by lender; it could take anywhere from two weeks to in excess of three months.

Legally, the promissory note may be requested by the lender and lenders may pursue deficiency judgments; however, there is, similar to short sales, potential forgiveness of debt. There may be income tax liability as a result of cancelled or forgiven debt (1099-C) with two methods to reduce or eliminate tax: the Mortgage Forgiveness Debt Relief Act of 2007[42] and insolvency exclusion.[43]

The financial impacts of a deed in lieu are reported on your credit for five years after the transfer is completed; however, you will have impaired credit from the first month of late payment. The fees for a deed in lieu are generally included for a short sale negotiation, which usually ranges from $1,000 to $2,000, but realtors are not involved in this process.

Reworking a Mortgage

I have also had success with the bank reworking the mortgage in a case where the bank did not have the proper documents. I was able to prove that the trust had not taken effective title to the mortgage and the bank rewrote a new promissory note and a new mortgage at current market value

[42] Mortgage Forgiveness Debt Relief Act of 2007, Pub. L. No. 110-142, 121 Stat. 1803 (codified in scattered sections of 26 U.S.C.).
[43] *Short Sales: Current Requirements and Legal Issues*, *supra* note 35.

and lent the homeowner the money for a new mortgage at current market value. Under these specific circumstances, this tactic proved to be successful and potentially useful in similar circumstances.

Taxes and Debt Forgiveness

Under the Internal Revenue Service (IRS) code,[44] forgiveness of the debt is taxable as ordinary income; the US Congress has suspended that portion of the IRS code through December 31, 2012, so that if it is a homestead and it is the first time you are having mortgage debt forgiveness, it is not taxable.[45]

There are many people who have their second home here in Florida and are going through foreclosure. They do not fall under that exception to the IRS code, so to the extent the bank gives in excess judgment or deficiency judgment, that homeowner now gets a 1099 from the bank for the amount and has to pay income tax at the end of the year. As a result, we are now seeing people get in trouble with the IRS because they were not paid actual cash out of which they could withhold the tax dollars. The money is only on paper; it is an economic chimera, if you will, so they have no ability to pay that tax and now they have an IRS issue.

The Role of Lawyers in Real Estate

Usually, people buying homes do not hire or even consult counsel. They use mortgage brokers to get their mortgages and they use real estate agents to close on their mortgages. The bank always has a lawyer, and often the homebuyer, particularly a new or first-time homebuyer, labors under the misconception that a lawyer has looked over everything and it is all fair. They do not understand that the lawyer works for the bank and is there to protect the bank's interest and not theirs.

People do not want to pay lawyers. Many foreclosure clients come to me after they have already defaulted on their mortgages because they have waited longer than twenty days to answer the complaint or, in many cases, they have filed what is deemed to be an answer, but it is completely and legally insufficient.

---

[44] U.S.C. Title 26.

[45] *Short Sales: Current Requirements and Legal Issues*, *supra* note 35.

Measuring Success in Foreclosure Actions

Achieving those types of settlement is where I have encountered the largest measure of success on the homeowner's behalf, but success has other measures as well. Sometimes success is simply a forgiveness of any excess debt or a waiver of a deficiency judgment. For example, if the home being foreclosed upon is worth $200,000, but there is $500,000 owed on it, the bank will agree to take the house back and waive any excess debt, which raises a potential tax trigger.

Seeking Remedies for Homeowners

The remedy for homeowners who have suffered under dual tracking is fraud proceedings because they were fraudulently induced into ignoring the lawsuit. The elements of fraudulent inducement are that the bank made a statement or omission of a material fact that the bank should have known was false with the intent that the homeowner or the borrower would rely on it. The homeowner or borrower did in fact rely on it and the homeowner or borrower did in fact suffer damages and those damages were directly caused by the reliance on the false material fact.[46]

Pursuing Fraud Actions

I have sued banks for such fraud in federal court, but there are difficulties because the federal court will often look at the fraudulent action as a previously adjudicated matter and action that should have been brought within the foreclosure proceedings. The problem is we did not know about the fraud until after the foreclosure, so several of my cases in federal court have survived initial motions to dismiss.

More often than not, we will move to set aside the judgment. Florida Rule of Civil Procedure 1.540, Paragraph b, states that if there has been fraud

[46] *Butler v. Yusem*, 44 So. 3d 102, 105 (Fla. 2010): ("There are four elements of fraudulent misrepresentation: (1) a false statement concerning a material fact; (2) the representor's knowledge that the representation is false; (3) an intention that the representation induce another to act on it; and (4) consequent injury by the party acting in reliance on the representation.").

we can move to set aside the judgment that was issued based upon fraud.[47] Invariably and consistently, those motions with the greatest of legal merit have been denied by the circuit judges; even those cases that have overwhelming merit and legal basis have been summarily denied by the circuit court.

That decision can be appealed. Florida has five district courts of appeal; from the district court of appeals the next step is the Florida Supreme Court, but that is by *certiorari*, or permission only, so when an adverse ruling is issued on a motion to set aside a judgment based upon fraud, we can then take that on appeal to the assigned district court of appeals.

The problem is that the homeowner has no money with which to pursue the case because a lawyer will not be provided. These are civil actions, not criminal actions, so the government will not provide a lawyer and private lawyers cannot afford to do those cases *pro bono* because they are extensive cases that require significant and specific training, skill, and ability, and the lawyers are scraping the same as everyone else to make a living and keep their heads above water.

I have not seen the issue raised by the banks where they say homeowners induced them to fraudulently enter into a loan transaction by making false income statements to support a loan that the banks otherwise would not have given them. The only time I could see that issue being raised is if the loan was a large, seven-figure loan and the income of the party would not have supported the loan had the bank known the truth about the party's financial statement and, but for that fraud, they would not have made the loan.

We do not see that issue, even though there might be cases where it is an issue, because it has no practical impact. The legal remedy would be rescission of the contract with the goal of putting the parties back in the position they would have been in, but for the contract, which would require the bank getting its money back, and that is what the bank is doing by foreclosure.

[47] FLA. R. CIV. P. 1.540(b).

Foreclosure Action: Avoiding the Unavoidable

In most cases I see, foreclosure is simply unavoidable. What I see are good, hardworking, middle-class Americans who unknowingly overextended themselves financially, either because they understood what they were doing and they were speculating the market would continue to grow annually or because they bought a house they knew was just outside their grasp, intending to flip it and make money.

I see few of the latter cases in my office and the predominant profile for the current mortgage foreclosure defendant is an average, middle-class, hardworking man and woman who did not realize they were overextending themselves because borrowing the money was cheap and the interest rate was low. The banks were actively trying to sell mortgages and mortgage brokers were actively trying to sell mortgages, so they could make their commission.

People thought they could afford the mortgages, but a general rule of thumb is your mortgage payments should not be more than 25 percent of your net pay or the net monthly household income or 33 percent of the gross monthly household income, and we were seeing mortgage payments that were equating to 50 percent of the net monthly income. You cannot support a mortgage at that high rate and pay all your other debts.

When the market began to evaporate and people were losing their jobs, the adjustable rate mortgages were going up and the interest rates were going up, so these people were in a position where they could not afford the mortgage anymore. Those are the people in my office on a daily basis. As for the banks, a select few are behaving in a predatory manner and they are attacking what is left of the middle class, which seems to be shrinking exponentially as we struggle to move forward in the midst of crisis.

A Separate Judiciary?

Having said that, my belief is that the circumstances have risen to an epidemic of a proportion that can be compared to the Black Plague in Europe—only on an economic basis rather than a biological basis. Desperate times necessitate desperate measures, and the legislature should consider constituting a separate arm of the judiciary.

Under Florida's Constitution, the executive powers are described by Article IV, the legislative powers by Article III, and the judicial powers by Article V, but formation in funding of the judiciary below the Supreme Court level is the responsibility of the legislature under Article III.[48] The bicameral body could come together and create a separate judicial entity for the exclusive purpose of addressing mortgage foreclosures and the mortgage crisis, which could be dissolved once the crisis is in fact resolved and has been effectively addressed.

The best, smartest, most economical way this crisis could be addressed would be to create such a branch within the judiciary to address only these issues. That would unclog the circuit court's docket so they could go back to handling the day-to-day business of its citizens. Divorces and civil lawsuits between companies and all of the other day-to-day cases handled by the circuit courts are currently being significantly delayed because the courts are inundated with tens of thousands of foreclosure cases.[49]

By creating a separate branch within the judiciary, the legislature could unclog the Circuit Court dockets, which would significantly improve economic conditions because there are many commercial issues that need to be decided for commerce to continue to grow. Allowing the business of the court to be administrated in an effective and timely manner would support business growth, particularly small and midsized business growth, and would provide a specific resource dedicated to not only administrating, but actually coming up with new common law to deal with the equitable issues within a mortgage foreclosure that had been created by a lack of sufficient documents.

The Suspension of Due Process

What we are typically seeing now is that due process is being suspended; it is almost like when a major crisis happens and certain rights are suspended to declare martial law to maintain order in society. There has been, essentially, an official suspension of several constitutional rights, including substantive and procedural due process, because it is impossible to address

[48] FLA. CONST. art. III, IV, V.
[49] FLA. CONST. art. III, § 1.

the number of issues being thrown at the court while maintaining the substantive and procedural due process rights afforded the citizens by our constitution. By judicial fiat, constitutional rights have been suspended.

The cries of the property owners go unheard, even though there are large numbers of them, because they have no money to make a meaningful stand. This is one of the few times throughout the history of our nation where we have truly seen that justice belongs only to those who have the money to seek it. Our country has afforded justice to citizens from all walks of life to allow the minority to speak out about important issues.

Important Factors in Real Estate

The Florida residential market is very unlikely to recover completely for at least another ten years, though we will likely see improvements in the next five years. We are not going to see significant new construction any time soon; we first must fill the excess inventory, particularly of residential homes that now exist on the market.

There is not much we can do specific to the real estate market. Cutting interest rates is not going to help because the banks are tightening their standards. We have to support the growth and the establishment of small business, and we have to create an environment in which small businesses can thrive because those businesses provide jobs and when there are jobs, people can buy homes. It is not a matter of treating the real estate market in isolation. That would be to treat one symptom rather than treating the cause, and to treat the cause is to treat all symptoms.

There are many procedural complexities in real estate law, and before lawyers who are unfamiliar with the law take on new clients in this area of the law they should attend a series of continuing legal education courses or otherwise embark upon a course of self-study, because failure to comply with some of the procedures could result in significant harm to clients and put lawyers in danger of a potential malpractice lawsuit. This is not an area of the law you want to wade into unprepared.

Conclusion

In late 2008 as 2009 dawned, lawyers began to understand there was a foreclosure hurricane headed straight for southwest Florida. By late 2009, as the storm's front edge made landfall, it had built to a category V storm that would rival the destruction of Katrina.

As the main storm battered the already weakened economic structure, courts were flooded with an overwhelming number of foreclosure filings. Struggling to keep a judicial nose above the water mark, retired judges were brought in to assist. The typical civil filing fee did not create enough revenue to pay for necessary resources. A special category of filing fees was created for foreclosures. Moreover, filing fees were established (not only in foreclosure cases) for the filing of counterclaims and third-party complaints. Still, the crisis continued to grow as more waves battered the beleaguered system and our judicial corps regrouped.

Today, while some believe the worst is over, many parts of Florida continue to experience continued ramifications. It remains to be seen if those continued high winds are outer storm bands or if the eye of the storm is passing overhead, giving us a false sense of security. Bearing in mind that very few commercial foreclosures have been filed, it appears that, at least in southwest Florida, the eye of the storm is overhead. Our judicial system and lawyers should brace for the rest of the storm.

Success in fighting the land battle is of vital importance to the state. Indeed, the battle before us paves a road to either economic safety or economic ruin. Planning is of vital importance. Aggressive planning will cause our bench and bar to be first in the field, ahead of the impending wave of commercial foreclosures.

It is now that our system must resource and install administrative hurricane shutters. The creation of a separate court (i.e., foreclosure court) should be strongly urged upon our political leaders. Lawyers who anticipate practicing in this area should aggressively seek additional education, and a statewide system to share information and rulings should be immediately established. Moreover, the availability and lowered cost of electronic resources should be established to share information between lawyers and judges and to disseminate helpful, practical information to the public.

Key Takeaways

- Foreclosure actions are litigated on a state-by-state basis, so know the laws that apply in your jurisdiction. Does your client have a right to a trial by jury? Are there deadlines or notices you must be aware of to properly pursue your case?
- Check and double-check the documents in your case. Mortgages in foreclosure cases are often broken apart into pieces and, without the whole document, you may face difficulties in making your case.
- If your client was on the wrong end of a dual tracking procedure, verify that there was no fraudulent intent on the lender's part. If you have cause to doubt, pursuing a fraud case can lead you to a decent opportunity for settlement.

Michael E. Chionopoulos was previously a judge in Oklahoma. He was decorated by the US Army for his service as an officer with the 1/180th Infantry in the Middle East. Prior to the war, he was senior vice president and general counsel at a public company in Oklahoma City. Currently, he is the owner of Absolute Law, a civil law firm in Fort Myers. He is a noted author and has been published by the American Bar Association, the Oklahoma Bar Journal*, Juris Notes, and the Lee County Bar Association. Additionally, he is a constitutional scholar and has litigated, written about, and taught a wide variety of constitutional issues.*

Acknowledgments: *I am compelled to acknowledge Taryn ("T-Rex") Spotts, legal intern with Absolute Law, and to express my sincere appreciation for her research and tireless editing contributions. Her dedication to Absolute Law as a whole and her contribution to this particular work are truly invaluable. Thank you, T-Rex.*

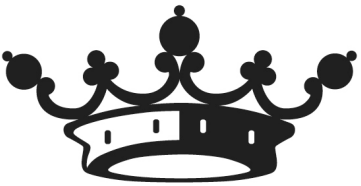
I would also like to thank Emily Rose Hogentogler for her editing contributions. She, too, is a legal intern with Absolute Law. Her dedication to the firm is unconditional and most appreciated.

Dedication: *Accordingly, this work is dedicated to T-Rex and Emily Rose. It is their bright, young minds that fill not only our profession but our world with hope of being a better place. Absolute Law is so very proud of each of you and to assist and support you as our next generation of lawyers.*

ASPATORE

Aspatore Books, a Thomson Reuters business, exclusively publishes C-Level executives and partners from the world's most respected companies and law firms. Each publication provides professionals of all levels with proven business and legal intelligence from industry insiders—direct and unfiltered insight from those who know it best. Aspatore Books is committed to publishing an innovative line of business and legal titles that lay forth principles and offer insights that can have a direct financial impact on the reader's business objectives.

Each chapter in the *Inside the Minds* series offers thought leadership and expert analysis on an industry, profession, or topic, providing a future-oriented perspective and proven strategies for success. Each author has been selected based on their experience and C-Level standing within the business and legal communities. *Inside the Minds* was conceived to give a first-hand look into the leading minds of top business executives and lawyers worldwide, presenting an unprecedented collection of views on various industries and professions.



ASPATORE