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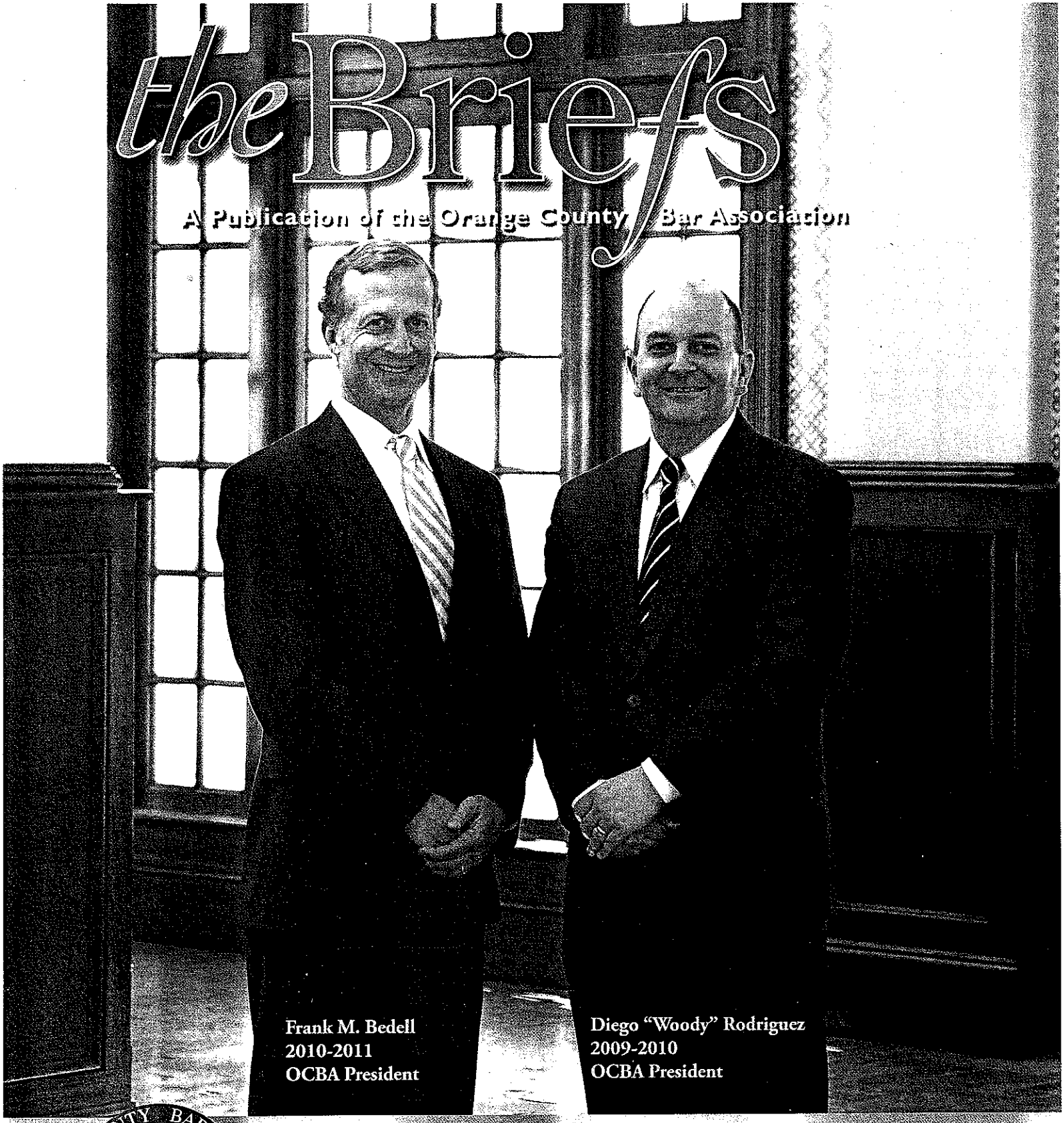

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Residential Mortgage Foreclosure: Burdens of Proof, Real Defenses, Blind Alleys, and Recent Developments **Part One**

David Fleming and Christopher Roach[1]

Due to space limitations, this article is being printed in two parts. The second part will be printed in the next edition.

I. Introduction

The most prominent political, business, and legal stories of the last several years arise from the bursting of the housing bubble and the massive number of residential foreclosures that have ensued. The foreclosure crisis has affected the states unequally. California, Nevada, Arizona, and Florida have seen the largest proportion of foreclosures. The coming "reset" of Alt-A loans, high unemployment, and the continuing stagnation of the housing market suggest that the high volume of residential foreclosures will continue in the near future.[2]

The sheer numbers of foreclosure are staggering, and these numbers have strained lenders, courts, clerks of court, law firms, government relief funds, and others necessary for providing lenders and debtors with their day in court. In 2009, more than 500,000 Florida homeowners received a foreclosure notice.[3] Florida clerks of court report increases in foreclosure filings of 1,400%.[4] Foreclosures have become more complicated because of issues arising from poorly documented assignments of mortgage and related standing issues stemming from the trend of securitization of mortgages over the last decade.[5]

Individuals facing foreclosure have many places to turn, but some have been led astray by unscrupulous consultants and bad advice. A number of widely reported decisions have contributed to the myth that minor technicalities would relieve borrowers completely from the burdens of their mortgage, while allowing them to stay in their homes.[6] Underwater homeowners also have been buoyed by new government programs that incentivize lenders to reduce mortgage payments to make them more affordable. But the slow implementation of these programs, coupled with difficulties of communication between borrowers and lenders, have left many frustrated.[7] Worse, scam artists have exploited this situation and promised to protect their clients from foreclosure, all the while fleecing borrowers' of their limited funds.[8]

The authors' goal is to describe and evaluate various burden of proof and defensive issues in residential foreclosure cases, distinguishing frivolous tactics that provide false hopes and merely delay the inevitable, from the more appropriate and realistic defenses that can provide *bona fide* relief.

II. Issues Surrounding the Lender's Case in Chief

Many homeowners who default on the mortgage loans secured by their homes are seeking counsel to help them remain in their homes. For those who can afford an attorney, these homeowners rightfully expect that the attorney they hire will be fully versed in foreclosure law and, in particular, the defenses and strategies that give the homeowner an opportunity to avoid or reduce their mortgage indebtedness, whether through modification, a short sale, a "deed in lieu," or otherwise.

Foreclosure is an equitable remedy.[9] A foreclosure action in principal is no different from any other equitable matter. Thus, it is the plaintiff mortgagee that bears the burden of proof, and competent defense counsel can be expected to challenge the plaintiff to prove its case. Certain aspects of that burden of proof can sometimes be challenging for the plaintiff. These hurdles are addressed below.

A. Note Ownership and Conditions Precedent

"To grant a judgment of foreclosure in favor of the [mortgage holder], the trial court would have to find, among other things, that the [mortgage holder] owned the mortgage and had performed all conditions precedent, if any, to enforce the mortgage."[10] These elements and conditions may seem to be simple enough to prove, but the transformation of the mortgage market (and the sometimes shoddy record-keeping of lenders) have made proof of mortgage ownership a complicated affair. For several decades, originators have been selling mortgages to investors in the secondary market. Once a mortgage is sold, ownership must be proved in a foreclosure through an endorsement of the note and an assignment, which may or may not have been formalized at the time the mortgage was transferred to an assignee.

To further complicate matters, the consolidation of many home mortgages into pools of mortgage-backed-securities has created another level of distance from the plaintiff and the original lender, insofar as the mortgages are often joined with other mortgages held by an institutional trustee for the benefit of a group of investors that own securities issued by the lender-sponsor.[11] Many such securities are guaranteed by Fannie Mae or Freddie Mac, both of which mandate servicing requirements for the mortgages they guarantee. In most cases, the servicer is likely to be an institution other than the trustee. Because of the number of parties involved and the separation of the plaintiff from the original lender, both proof of ownership and proof of performance of conditions precedent may be difficult for a plaintiff to prove. Plaintiff's counsel should ensure that assignments are clear and attached to their complaint, while defense counsel should be prepared to challenge the plaintiff's standing and right to sue in cases where no such assignment is present or there are unexplained gaps in the chain of assignment.

B. Amount Disputed

If a borrower has accepted money from the lender and has not repaid it, and if there are no affirmative defenses, then the mortgage holder is clearly entitled to receive a foreclosure judgment in order to have the collateral sold and the proceeds applied to the borrower's outstanding debt. However, the mortgage holder is required to prove the amount owed and its failure to do so will result in denial of judgment.[12] This includes not only the principal and interest owed but also amounts claimed for insurance premiums paid by the lender and other monetary claims, including costs and attorney's fees. The amount of unpaid principal and interest, as well as the reasonableness of fees and costs, must be established by competent evidence. Issues of fact surrounding each of the foregoing may provide competent defense counsel with an opportunity to delay the foreclosure.

C. Notice of Right to Cure

As in the issue of note ownership, the plaintiff mortgage holder is obligated to prove the performance or occurrence of any conditions precedent. Most mortgages guaranteed or insured by

a government agency or entity backed by the federal government will contain provisions that requires notice of default to the borrower and an opportunity to cure **before** foreclosure can be filed. Such provisions contain specific requirements regarding required notice.

Consider the 2009 case of *Frost v. Regions Bank*, in which the complaint included as an exhibit the mortgage, which stated:

> Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument ... The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding and sale of the Property.[13]

Because the bank did not meet its burden of refuting the [borrowers'] lack of notice and opportunity to cure affirmative defenses, the bank was not entitled to final summary judgment of foreclosure.

This issue arises in a surprising number of cases, most often because the servicer has no idea what the mortgage requires and will give whatever notice, if any, that is the servicer's standard practice. Thus, competent defense counsel will examine the mortgage's notice provision and determine whether or not it has been followed. Similarly, plaintiff's counsel should advise its client, when possible, to ensure that proper notice mandated by the loan documents is made. Such default notice should be made again by counsel when assigned to the case to cure any possible defects.

III. Available Defenses

As with any other litigation, if the plaintiff mortgage holder can meet its burden of proof, the court must still consider any affirmative defenses asserted by the defendant borrower. In nearly every case, the plaintiff mortgage holder will file a motion for summary judgment. Considering the number of foreclosures that are being filed today, without availability and predictability of summary judgment, it could be years before a final, evidentiary hearing would be obtained. Thus, summary judgment is a critical tool for mortgage holders, and also for courts, to ensure a swift determination of cases where there are no real defenses on the part of the borrower. On the other hand, improvident summary judgment may be a Pyrrhic victory for the lender; it can be reversed on appeal, and the foreclosure sale will be vacated, leading to greater expense and time before a resolution.[14]

The standard for reviewing the entry of summary judgment is well established. Rule 1.510(c) of the Florida Rules of Civil Procedure mandates that a party moving for summary judgment must conclusively show the absence of any genuine issue of material fact and obligates the trial court to draw every reasonable inference in favor of the non-moving party.[15]

The most important issue in the foreclosure arena is the existence (or not) of affirmative defenses. "A court cannot grant summary judgment where a defendant asserts legally sufficient affirmative defenses that have not been rebutted."[16] When the "non-moving party has raised affirmative defenses, it is incumbent upon the moving party to 'either disprove [those] affirmative defenses or establish their legal insufficiency.'"[17] Various affirmative defenses commonly used in foreclosure defense are discussed below.

A. Estoppel and Cure

There are often direct communications between the lender or servicer and the borrower that occur prior to the referral of the loan to an attorney for foreclosure. Lender assurances to borrowers that rise to the level where borrowers reasonably rely upon them to make additional payments (or otherwise change their position) may impair the acceleration of indebtedness needed for a lender to pursue a foreclosure.

The case of *Knight Energy Services, Inc. v. Amoco* discussed the matter as follows:

> Foreclosure on an accelerated basis may be denied when the right to accelerate has been waived or the mortgagee estopped to assert it, because of conduct of the mortgagee from which the mortgagor (or owner holding subject to the mortgage) reasonably could assume that the mortgagee, for or upon a certain default, would not elect to declare the full mortgage indebtedness to be due and payable or foreclose therefore; or where the mortgagee failed to perform some duty upon which the exercise of his right to accelerate was conditioned; or where the mortgagor tenders payment of defaulted items, after the default but before notice of the mortgagee's election to accelerate has been given . . . ; or where there was intent to make timely payment, and it was attempted, or steps taken to accomplish it, but nevertheless the payment was not made due to a misunderstanding or excusable neglect, coupled with some conduct of the mortgagee which in a measure contributed to the failure to pay when due or within the grace period.[18]

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As a matter of substantive law, it is a good defense to foreclosure that "the mortgagor tenders payment of defaulted items, after the default but before notice of the mortgagee's election to accelerate has been given (by actual notice or by filing suit to foreclose for the full amount of the mortgage indebtedness)...."[19] If a good and timely tender of cure has occurred, then the borrower is entitled to have the foreclosure dismissed. Ordinary resumption of payments, however, would not qualify if they are not under the terms of an agreement, proffered as a cure, or are otherwise inadequate to restore the loan from its default condition.

B. Misrepresentation

Misrepresentation made by the lender at the time the mortgage was originated may give rise to a defense.[20] However, this defense is problematic for at least two reasons. First, in those instances where the mortgage has been sold or pooled, there are (at least) two arguably innocent parties whose rights the court must consider and try to balance. As an equitable action, the rights of these innocent parties – assignees and stakeholders in pools of mortgage backed securities – will not be completely ignored. Second, even if the original mortgagee is the plaintiff, it is likely that the most this defense will achieve is a rescission, which would require repayment of the funds advanced by the mortgagee. This is often a paper remedy from which insolvent borrowers cannot benefit. This same obstacle exists with respect to claims made under the Truth in Lending Act ("TILA") and Real Estate Settlement Procedures Act ("RESPA").[21]

C. Fraud in the Inducement

"It is well established that fraud can be a valid defense in a foreclosure action."[22] If fraud can be alleged in good faith and with the requisite particularity, it can be a strong weapon in the arsenal of the defense attorney, because "[t]he issue of fraud generally should not be disposed of by summary judgment."[23] Fraud is also a legal action for damages that can be raised as a counterclaim.[24]

At least in some, if not all, cases, fraud in the inducement of a note or mortgage is a compulsory counterclaim to an action in foreclosure on the note or mortgage, which may entitle the mortgagor to a jury trial.[25]

Florida Rule of Civil Procedure 1.120(b) mandates that "the circumstances constituting fraud . . . shall be stated with such particularity as the circumstances may permit." This means that an affirmative defense or claim "must clearly and concisely set out the essential facts of the fraud, and not just legal conclusions."[26]

Thus, lender's counsel will want to move to strike a defense that fails to plead fraud with specificity and use a motion for summary judgment to test the defense's ability to prove fraud. Likewise, a borrower's counsel should be wary of raising unfounded or fanciful allegations of fraud. They are difficult to prove, could be met with sanctions, and, in any case, would also open the inquiry into whether the borrower has "clean hands"[27] at the time the note originated. That said, insofar as a colorable fraud claim exists, it should be pled because it creates factual issues requiring a trial on the merits, may defeat summary judgment, and may create lender interest in a workout that did not otherwise exist.

This concludes Part One. Part Two will contain discussion of additional Affirmative Defenses and of the Impact of Mandatory Mediation

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[2]Diana Elboghdady, *New Round of Foreclosures Looms in U.S.*, HOUSTON CHRONICLE, October 3, 2009.

[3]Kimberly Miller, *Half of Homes in South Florida Sell for a Loss*, PALM BEACH POST, February 10, 2010.

[4]Gary Blankenship, *Courts strained by foreclosure filings*, FLORIDA BAR NEWS, November 1, 2008.

[5]Ellen Simon, *Figuring Out Who Owns a Mortgage*, WASHINGTON POST, November 1, 2008.

[6]Tom Leonard, *Judge wipes out couple's mortgage after bank's 'repulsive' behavior*, UK TELEGRAPH, November 26, 2009 (discussing *Indymac Bank F.S.B. v Yano-Horoski* 2009 NY Slip Op 52333 (N.Y. Sup. Ct. November 19, 2009)); *Landmark National Bank v. Kesler*, 2009 LEXIS 834 (Kan. August 28. 2009) (holding that Mortgage Electronic Registration System [MERS] lacked standing to prosecute foreclosure when no evidence of assignment from original lender to MERS); *see also In re Wilhelm*, 407 B.R. 392 (Bankr. D. Idaho 2009) (holding that standard mortgage note language does not expressly or implicitly authorize MERS to transfer the note); *In re Vargas*, 396 B.R. 511, 517 (Bankr. C.D. Cal. 2008) ("[I]f FHM has transferred the note, MERS is no longer an authorized agent of the holder unless it has a separate agency contract with the new undisclosed principal. MERS presents no evidence as to who owns the note, or of any authorization to act on behalf of the present owner."); *Saxon Mortgage Services, Inc. v. Hillery*, 2008 WL 5170180 (N.D. Cal. 2008) (unpublished opinion) ("[F]or there to be a valid assignment, there must be more than just assignment of the deed alone; the note must also be assigned... MERS purportedly assigned both the deed of trust and the promissory note. . . . However, there is no evidence of record that establishes that MERS either held the promissory note or was given the authority . . . to assign the note.").

[7]*See generally* David Streitfeld, *Treasury Streamlines Its Mortgage Program*, NEW YORK TIMES, January 29, 2010; Andrea Fuller, *US Effort Aids Only 9% of Eligible* Homeowners, NEW YORK TIMES, August 5, 2009.

[8]Federal Trade Commission, *Federal and State Agencies Target Mortgage Relief Scams*, November 24, 2009 *available at* http://www.ftc.gov/opa/2009/11/stolenhope.shtm (last visited February 23, 2010).

[9]*Singleton v. Greymar Assoc.*, 882 So.2d 1004, 1008 (Fla. 2004).

[10]*Dykes v. Trustbank Savings, F.S.B.*, 567 So.2d 958 (Fla. 2d DCA 1990).

[11]FRANK J. FABOZZI, THE HANDBOOK OF MORTGAGE BACKED SECURITIES (5th ed. 2001).

[12]*Douglas v. Deutsche Bank Trust Co.*, 995 So.2d 1144 (5th DCA 2008) (summary judgment reversed).

[13]*Frost v. Regions Bank*, 15 So.3d 905 (4th DCA 2009).

[14]*See O'Brien v. VFederal Trust Bank*, 727 So.2d 296 (Fla. 5th DCA 1999).

[15]*Holl v. Talcott*, 191 So.2d 40 (Fla. 1966).

[16]*Winter Haven Federal Savings & Loan Assoc. v. Kirian*, 579 So.2d 730 (Fla. 1991).

[17]*Johnson v. Claims Prevention & Management Serv., Inc.*, 673 So.2d 558 (Fla. 1st DCA 1996).

[18]*Knight Energy Services, Inc. v. Amoco Oil Co.*, 660 So.2d 786 (Fla. 4th DCA 1995).

[19]*DeLandro v. America's Mortgage Servicing, Inc.*, 674 So.2d 184 (Fla. 3rd DCA 1996).

[20]*Profitable Princess Properties, Inc. v. Rodriguez*, 523 So.2d 751 (Fla. 2d DCA 1988); *Lake Region Hotel Co. v. Gollick*, 110 Fla. 324, 149 So. 204 (1933) (misrepresentation of size of acreage).

[21]TILA, 15 USC §1601 *et seq.*; RESPA, 12 USC § 1201 *et seq.*

[22]*Norris v. Paps*, 615 So.2d 735 (Fla. 2d DCA 1993).

[23]*Barrios v. Duran*, 496 So.2d 239 (Fla. 3d DCA 1986), *cited in Sunchase Apartments v. Sunbelt Service Corp.*, 596 So.2d 119 (Fla. 1st DCA 1992).

[24]*Spring v. Ronel Refining, Inc.*, 421 So.2d 46 (Fla. 3d DCA 1982).

[25]*Yost v. American Nat'l Bank*, 570 So.2d 350 (Fla. 1st DCA 1990).

[26]*Flemenbaum v. Flemenbaum*, 636 So. 2d 579, 580 (Fla. 4th DCA 1994).

[27]*Yost v. Rieve Enterps., Inc.*, 461 So. 2d 178 (Fla. 1st DCA 1984).

Residential Mortgage Foreclosure: Burdens of Proof, Real Defenses, Blind Alleys, and Recent Developments Part Two

David Fleming and Christopher Roach[1]

Due to space limitations, this article is being printed in two parts. Part One was printed in May's edition of The Briefs. Part Two begins with a continuation of the discussion of Affirmative Defenses, which was published in Part One.

D. TILA

One fairly common type of foreclosure defensive response is to make claims based on TILA, either in the form of a counterclaim or a preemptive declaratory judgment action.[2] Sometimes TILA provides a realistic basis for rescission or damages, particularly where mandatory disclosures are absent from loan documents provided by the original lender. However, TILA does not apply at all to regular residential loans (only to refinance or home equity loans)[3] and, equally important, TILA requires a tender of the loan principal upon rescission, a prohibitively expensive requirement for all but a few borrowers.

Florida courts have dispatched dozens of TILA claims in foreclosure actions on motions to dismiss and summary judgment for the foregoing reasons.[4] Any attorney that raises a TILA or similar claim is well advised to familiarize himself with the case law, the statute, and the associated "Regulation Z"[5] before he gives his client false hopes or gets sanctioned.

E. RESPA

RESPA and its related regulations are designed to prohibit kickbacks and unearned fees paid to those that provide services in connection with a real estate transaction involving a "federally related mortgage loan."[6] This prohibition includes side payments to mortgage brokers, closing agents, and other third parties, when such payments are not disclosed and are otherwise not in conformity with RESPA's strict regulations. A violation of RESPA at the inception of a real estate loan creates a right of action for damages by the borrower. At least one significant 2009 federal case emanating from the federal Third Circuit, *Alston v. Countrywide Financial Corporation*, held that RESPA created a private right of action, even in the absence of an overcharge allegation, entitling borrowers to seek treble damages for the "infected" service.[7] A Florida decision relying on common law equity principles suggested the same remedy may be available here, as it denied a foreclosure when the amount allegedly owed to the lender could have been offset by "additional, unnecessary insurance on the property" when the amount due in premiums was obtained in the foreclosure.[8]

A RESPA counterclaim in an ordinary foreclosure may be only of theoretical benefit. RESPA has fairly strict limitations (of one year), which likely have long passed from the time of the loan's inception to a foreclosure.[9] There is also some disagreement in the case law about when, if at all, RESPA can defeat a mortgage foreclosure under recoupment and setoff principles.[10] Many of these issues remain to be decided under Florida law.

F. Holder In Due Course and D'oench Duhme

The value of the above-discussed defenses could be suspect in many foreclosure cases, because the holder of the mortgage at the time of foreclosure is not the original mortgagor, due to a sale of the mortgage on the secondary market and/or inclusion in a mortgage-backed securities pool. In that case, the current mortgage holder can presumably claim holder-in-due-course status and not be subject to defenses of which it did not have actual knowledge at the time of the assignment. There are, however, also important exceptions. If the mortgage was in default or the assignee did not receive the mortgage in good faith, then HIDC status cannot be claimed.[11] These defenses will also be of questionable benefit in cases involving a failed bank that has been taken over by the Federal Deposit Insurance Company, due to the applicability of the D'oench Duhme Doctrine, which gives super HIDC status to both FDIC and any successor bank or assignee from FDIC.[12]

IV. The Impact of Mandatory Foreclosure Mediation

Most Florida circuits have an administrative order in place that requires mandatory mediation of foreclosure cases.[13] In 2009, the Florida Supreme Court issued a model administrative order which would make foreclosure mediation a uniform, state-wide system.[14] The most significant procedural difference between the model order and the administrative orders in place in most Central Florida counties is that the model order makes mediation mandatory unless the defendant homeowner opts out, whereas the present orders make mediation mandatory only if it is requested by the homeowner. Another significant difference is that present court programs utilize a panel of mediators that have agreed to mediate for a reduced fee, whereas under the model order, fees allowed to mediators are somewhat higher and an additional administrative fee will be charged by a new administrator created by the model order, thus increasing the cost of mediation. What remains to be seen is whether there are improvements in practice under the model order that justify the additional cost, which is an issue outside the scope of this article.

Turning then to mediation of foreclosure cases, it is important to be aware that while foreclosure mediations are similar to other civil case mediations, there are some significant differences. Most homeowners that request mediation are doing so because they desire to find a way to stay in the home. Thus, there is a different dynamic in which both parties work to determine whether or not this can be realistically achieved through a loan modification. This is why the aforementioned mediation orders require the homeowner to provide detailed financial information prior to mediation, which parties are rarely required to collect and disclose in an ordinary civil case.[15]

In order to promote modification of home loans that are in foreclosure, the U.S. Department of Treasury has established a program, know as The Home Affordable Modification Program (HAMP), that is applicable to all residential mortgages owned, insured or guaranteed by an agency of the federal government, including FHA, VA, Fannie Mae, and Freddie Mac.[16] Thus, HAMP is applicable to the vast majority of home mortgages, and lenders and servicers that have such loans are required to determine whether or not they can be modified under HAMP. Attorneys for both parties, as well as mediators, should be intimately familiar with HAMP's requirements.

HAMP's goal is to find a way to reduce the mortgage payment to 31% of the homeowner's family income, without causing the lender/investor to suffer a loss. Once available income is determined, there is a process that begins with

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capitalization (adding to principal) of all delinquent interest and lender expenses and then reduction of the monthly payment by: (1) decreasing the interest rate, (2) extension of the loan term, and (3) deferral of a portion of the principal balance, in that order.[17] After applying the foregoing steps, if the new payment amount is within the 31% target range, then the lender performs a "net present value" analysis, which compares the present value of payments received pursuant to the modification with the present value of the collateral (home). If the former exceeds the latter, then no modification is required.

If modification under HAMP is not required, the lender or servicer may still be able to offer a modification under its own in-house program, which usually involves a temporary (usually 3-5 years) reduction in payments or another form of forbearance. Whether under HAMP or an in-house modification, there will usually be trial period of at least 3 months so that the homeowner can demonstrate ability to pay, and a down payment, the amount of which is negotiable, is often required.

Unfortunately, a failure of communication prior to mediation often results in the lender representative not having the necessary information to determine whether or not the homeowner can qualify for a modification. At the very least, this prolongs the mediation while the information is exchanged and may result in a denial of modification that is otherwise authorized. Savvy homeowner's counsel will not assume that a formal application for modification means that it has been received by the appropriate decision-maker and processed. Instead, it makes more sense to communicate with lenders' counsel prior to mediation for assurance that the right information has been received and set up for consideration.

One common complaint from homeowners and their attorneys is that lender/investors and servicers are not complying with HAMP. This state of affairs should concern lenders and their counsel. Non-compliance with HAMP can result in a loss of the federal mortgage insurance guaranty and, for servicers who have entered into HAMP servicing agreements, sizable fines and penalties. However, these sanctions are of little comfort to defendants that face the loss of their homes. Thus, the question becomes whether or not failure to comply with HAMP can be the basis for an affirmative defense or a counterclaim – this question remains unresolved in Florida.

Some guidance is provided by cases that deal with another federal housing regulation. The Secretary of HUD has promulgated a handbook entitled "Administration of Insured Home Mortgages," which contains procedural guidelines for, among other things, handling mortgages in default. Specifically, these guidelines direct that the agency contact a mortgagor in default and make substantial efforts to try to rectify the default by assisting the mortgagor in various ways. In the 1978 case of *Cross v. Federal National Mortgage Association,* the borrower raised the lender's failure to follow these guidelines as a defense. The court stated:

> It seems clear now that the HUD guidelines are not mandatory procedures constituting conditions precedent to foreclosure. However, a mortgage foreclosure is an equitable action and thus equitable defenses are most appropriate. Thus, it appears to us . . . that given the purpose of this federal Act and the recommended efforts to obviate the necessity of foreclosure, any substantial deviation from the recommended norm might be considered by the trial court under the heading of an equitable defense.[18]

Thus, it is unlikely that HAMP can be the basis for a counter claim, but non-compliance may well give rise to an affirmative defense that would preclude foreclosure until the non-compliance is cured. It is recommended that lenders' counsel make their clients aware of this possible consequence of non-compliance with HAMP, which may serve the useful purpose of helping to resolve more cases at mediation.

Another common complaint from borrowers and their attorneys is that the lender or servicer is either not negotiating in good faith or does not have a representative present with sufficient authority. The good faith argument has no merit, because other than those cases in which good faith in settlement negotiations is required by law (i.e. insurance cases), there is no authority that requires a party to mediate in good faith. The only possible exception is failure to comply with HAMP in good faith, discussed above, which would be more appropriately raised directly. The matter of authority is somewhat more problematic. Under Florida Rule of Civil Procedure 1.720, which governs mediation, the failure to appear with full authority is equivalent to the failure to appear at all and can result in sanctions.[19] Although there is a paucity of precedent as to foreclosure mediations, guidance can be found in other types of cases. First, proceeding with mediation without first raising this issue with the court may be deemed to be a waiver.[20] Second, it is difficult to prove that the person sent to represent a corporate party did not have sufficient authority, because if the mediation results in an impasse, possible settlements that might have resulted with another representative present are purely hypothetical, and the court is unlikely

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to find a lack of "sufficient" authority without a clear showing.[21] Many lenders and servicers have mediation specialists attend mediation. These representatives can do little more than gather numbers to determine whether or not the homeowner qualifies for a modification under HAMP or an in-house program, which is accomplished by inputting the information into a computer program which provides either a simple "denied" or the terms of the modification that can be offered. This frustrates many borrowers and their attorneys. The problem is that it would be very difficult to show, at least without extensive discovery, that someone else in the organization could have offered a better or different deal, without which the authority argument will fail.

Unfortunately, neither HAMP nor any other program can help those who simply cannot afford to stay in the home due to unemployment or other reasons. In those cases, what is usually negotiated in mediation is the amount of time the homeowner will be allowed to remain. This is usually accomplished by agreement to a consent judgment with an agreed-upon sale date that is further away in time than the minimum statutory notice for sale. If proper and viable affirmative defenses or a counter claim have been alleged, there will be a better opportunity to negotiate a sale date that is more favorable to the homeowner. Some lenders and servicers also offer "cash for keys" if the homeowner will vacate the home in good and clean condition.

A final recommendation is that the negotiation process need not terminate just because the initial mediation is not successful. If the homeowner's circumstances can be shown to have changed favorably prior to the foreclosure sale, most lenders and servicers will delay the sale and reconsider the request for modification or, if the lender refuses, another referral to mediation can be requested of the court.

IV. Conclusion

Because of the sheer volume of their respective caseloads, both plaintiff and defense counsel in contested residential foreclosures often do not assert their claims and defenses with the rigor that civil litigation demands. Likewise, some judges may be less likely to enforce strict burdens of proof when the borrower's claims appear weak and doing so will maintain a case on a judge's already very crowded docket. In many cases, the simplicity of the problem – some homeowners simply cannot pay any reasonable amount for their homes due to unemployment or other misfortune – makes this an understandable form of legal "triage." But in other cases, lenders' counsel can and should expect a vigorous defense, and defense counsel should be familiar enough with the various tools and laws surrounding foreclosure to raise appropriate defenses and to channel appropriate cases into a settlement through mediation.

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[2] 15 USC § 1601 *et seq.*

[3] See 15 U.S.C. § 1635(e)(1); Reg. Z § 226.23(f)(1);

[4] *See, e.g., In re Tomasevic,* 275 B.R. 86 (Bankr. M.D. Fla. 2001) (holding that purchase money loan is non-rescindable and that disclosure violations do not convert a purchase money loan into a loan for which rescission is available); *Murray v. Fifth Third Bank,* 2007 WL 956916 (E.D. Mich. March 28, 2007) (holding that loan to buy home is exempt from rescission); *Moore v. Wells Fargo Bank,* 597 F. Supp. 2d 612, 616 (E.D. Va. 2009) (holding that "[i]n a scenario involving a contested rescission, such as the instant matter, if the trial judge determines that the plaintiff seeking rescission is 'unable to tender the loan proceeds, the remedy of unconditional rescission is inappropriate").

[5] Codified at 12 CFR § 226.1 *et seq.*

[6] 12 USC § 2602.

[7] *Alston v. Countrywide Fin. Corp.,* 585 F.3d 753 (3d Cir. 2009).

[8] *Douglas v. Deutsche Bank Trust Co.,* 995 So.2d 1144 (Fla. 5th DCA 2008).

[9] A RESPA claim for improper "fee splitting" is sub to a one-year statute of limitations. See 12 U.S.C. 2607(b), 2614.

[10] *See In re Wentz,* 393 B.R. 545, 558 n. 13 (Bankr. Ohio 2008) (collecting cases).

[11] *McCourry v. Beneficial Savings Bank,* 530 So.2d 9 (Fla. 5th DCA 1988).

[12] *D'Oench, Duhme & Co. v. FDIC,* 315 U.S. 447 (1942).

[13] Administrative orders have been issued for the er Ninth Circuit (AO 2009-02) and for the Counties Seminole (AO 09-09-S) and Brevard (AO 09-14-I and can be found on the courts' web sites. No suc administrative orders are presently in place for Vol County and Lake County. However, parties in th counties can still request referral to mediation unc Fla.R.Civ.P. 1.700.

[14] Supreme Court of Florida *Admin. Rule No. AOS 09-54* (December 28, 2009).

[15] Such financial disclosure should be protected by mediation confidentiality under Fla. Stat. §44.40 it is advisable that the disclosing party confirm thi agreement with the other party.

[16] HAMP does not apply to so-called non-conform or jumbo loans, but many lenders and servicers w voluntarily consider a modification of such loans HAMP's criteria or their own in-house version.

[17] These steps are all mandatory under HAMP. An ditional step, forgiveness of a portion of the princ is permitted but is not mandatory. Deferral is dis guished from forgiveness in that a deferral reduce principal amount for calculation of monthly payr but does not forgive the principal that is deferred which would be payable if the loan is refinanced home is sold.

[18] *Cross v. Federal Nat'l Mortg. Assoc.,* 359 So.2d 4((Fla. 4th DCA 1978) (internal citations omitted).

[19] Western Waste Industries, Inc. v. Achord, 632 S 680 (Fla. 5th DCA 1994).

[20] *Id.*

[21] *Cf., Insurance Company of North America v. Gai* 765 So.2d 139 (Fla. 1st DCA 2000).