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FLORIDA: THE STATE OF FORECLOSURE

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I. INTRODUCTION

The foreclosure crisis that began with skyrocketing default notices in 2006 has engulfed the nation.[1] Some have compared it

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1. Beginning in 2006, the number of foreclosures, including default notices, auction sales, and bank repossessions, soared to more than 1.3 million nationally and increased a year later to 2.2 million. MSNBC.com, *Number of Foreclosures Soared in 2007*, http://www.msnbc.msn.com/id/22893703/ns/business-real_estate/t/number-foreclosures-soared/#.Trh35M14eLk (last updated Jan. 29, 2008, 9:56:11 a.m. ET). Of those 2.2 million foreclosure actions occurring in 2007, 1.6 million were home foreclosure filings. Hope Now, *Appendix—Mortgage Loss Mitigation Statistics Industry Extrapolations (Monthly for Dec 2008 to Nov 2009)*, at 5, http://www.hopenow.com/industry-data/HOPE%20NOW%20National%20Data%20July07%20to%20Nov09%20v2%20(2).pdf (Nov. 2009). From December 2007 to mid-2010, another 2.3 million homes fell into foreclosure. Associated Press, FoxNews.com, *U.S. Homes Lost to Foreclosure Up 25 Percent*, http://www.foxnews.com/us/2010/09/16/homes-lost-foreclosure-percent/ (Sept. 16, 2010). One expert recently estimated that eight million homeowners are behind on their mortgages and some six million would likely lose their homes within two years, plunging homeownership in the U.S. to its lowest level in fifty years. Haya El Nasser, USAToday.com, *Homeownership Rate Continues to Slide*, http://www.usatoday.com/money/economy/housing/2010-08-02-1Ahomeowners02_ST_N.htm (updated Aug. 2, 2010, 11:21 a.m.). In *In re Amended Certification of the Need for Additional Judges*, the Supreme Court of Florida observed that "the number of mortgage foreclosures has increased by ninety-seven percent statewide over the

to the grim realities of another massive foreclosure crisis in the Great Depression[2] when, in 1934, the Supreme Court in *Home Building and Loan Association v. Blaisdell*[3] recognized that:

> The present nation wide and world wide business and financial crisis has the same results as if it were caused by flood, earthquake, or disturbance in nature. It has deprived millions of persons in this nation of their employment and means of earning a living for themselves and their families; it has destroyed the value of and the income from all property on which thousands of people depended for a living; . . . it has resulted in such widespread want and suffering among our people . . . .[4]

But no other state has confronted the challenges faced by Florida.[5] Compounding the calamitous consequences for the State's real estate driven economy are floodtides of litigation—Florida lawsuits represent half of the pending foreclosure lawsuits among the twenty-three judicial foreclosure states.[6] Thus, in contrast to most states that employ abbreviated processes for deeding the mortgaged property back to the lender, every foreclosure action in Florida is a lawsuit governed by the same rules for pleadings and court hearings that apply to other civil litigation.[7] In emphasizing that a mortgage holder acquires ownership rights concerning the mortgaged property only through the litigation process, one Florida court explained that "in order to protect a borrower's due process rights, the courts have determined that a mortgagee can acquire possession upon default only through judi-

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last twelve months." 980 So. 2d 1045, 1049 (Fla. 2008). Florida ranked second in the nation as of year-end 2007. Fla. Exec. Or. 08-27, § 1.01 (2008); HALT: The Governor's Interagency Task Force to Halt Abusive Lending Transactions as of April 30, 2008, 13 (2008).

2. Grant S. Nelson, *Confronting the Mortgage Meltdown: A Brief for the Federalization of State Mortgage Foreclosure Law*, 37 Pepp. L. Rev. 583, 583 (2010).

3. 290 U.S. 398 (1934).

4. *Id.* at 423 (quoting *Blaisdell v. Home Bldg. & Loan Ass'n*, 249 N.W. 334, 340 (Minn. 1933) (Olsen, J. concurring)).

5. Pew Ctr. on Sts., *Beyond California: States in Fiscal Peril* 41–43, http://www.pewstates.org/uploadedFiles/PCS_Assets/2009/BeyondCalifornia.pdf (Nov. 2009).

6. Mark D. Killian, *AG's Office Pursues Foreclosure Solutions*, Fla. B. News (Feb. 1, 2011) (available at http://www.floridabar.org/DIVCOM/JN/JNNews01.nsf/Articles/D51852650877D48885257822004A1588).

7. Nat'l L. Ctr. on Homelessness & Poverty, *Without Just Cause: A 50-State Review of the (Lack of) Rights of Tenants in Foreclosure* 7, http://www.nlchp.org/content/pubs/Without_Just_Cause1.pdf (Feb. 25, 2009).

cial foreclosure . . . ."[8] Furthermore, the court noted that "'[t]he mortgagor's possession must be respected until foreclosure and sale, unless meanwhile the equitable rights of the mortgagee require the interposition of a court of equity to protect the security by way of injunction or receivership.'"[9]

As a result, at a time when financial resources are depleted by a badly shaken economy, Florida's judicial system has faced unprecedented challenges. In 2009, the Supreme Court of Florida observed:

> At the beginning of the last quarter of 2009, foreclosure filings statewide totaled in excess of 296,000. Florida has the third highest mortgage delinquency rate, the worst foreclosure inventory, and the most foreclosure starts in the nation. At the close of 2009, it is estimated there will be an inventory of approximately 456,000 pending foreclosure cases statewide. The crisis continues unabated.[10]

With foreclosures exploding across our communities,[11] collateral damage can be seen in every sector of life. The collapsing real estate market inflicted waves of unemployment,[12] massive losses in the financial and real estate industries,[13] and an untold human cost for the families forced out of homes auctioned at public

8. *DeSilva v. First Community Bank of Am.*, 42 So. 3d 285, 290 (Fla. 2d Dist. App. 2010) (citations and internal quotes omitted).

9. *Id.*

10. *In re Final Rpt. & Recommendations on Residential Mortg. Foreclosure Cases*, 2009 WL 5227471 at *1 (Fla. Dec. 28, 2009). One recent report indicated that Florida's backlog of foreclosure cases was reduced by more than forty percent from June 2010 to June 2011. Gary Blankenship, *Foreclosure Backlog Cut by 40%*, Fla. B. News (Sept. 15, 2011) (available at https://www.floridabar.org/__85256AA9005B9F25.nsf/0/43AE82302E5EBAC4852579090041ED36?OpenDocument). But the same article indicated that with a quarter of the state's mortgaged properties in default, the tidal wave may not be subsiding. *Id.*

11. Michael Corkery, *A Florida Court's 'Rocket Docket' Blasts through Foreclosure Cases*, Wall St. J., http://online.wsj.com/article/SB123491755140004565.html (Feb. 18, 2009). In late 2007, foreclosures were filed on one of every thirty-two homes in Miami-Dade County and one of every thirty in Broward. Monica Hatcher, *1 in 32 Miami-Dade Homes in Foreclosure*, Miami Herald C1 (Dec. 7, 2007).

12. Nelson, *supra* n. 2, at 584.

13. *Id.* at 583–586.

sales.[14] The mortgage meltdown has also battered local governments with a deteriorating tax base.[15]

II. THE STATE OF FORECLOSURE LAW IN A STATE OF CRISIS

As Florida has grappled with the foreclosure challenges in economic as well as human terms,[16] courts have confronted a tide of foreclosures presenting a dizzying range of factual circumstances—from heartbreaking stories about struggling homeowners to appalling chronicles about financial predators.[17] Although the crisis may test the boundaries of current law, any dramatic revision concerning existing foreclosure law would collide with legal traditions that demand respect for contracts.[18] In Florida, where the state constitution includes its own proscription of impairment of contracts,[19] the courts embrace a philosophy of contract enforcement:

> While the [S]upreme [C]ourt has stated that some degree of impairment of contract by legislative action is tolerable, in practice, the [C]ourt "has generally prohibited any form of contract impairment."
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> Where there are no allegations of fraud, restraint, oppression, usury, mistake or other facts disclosing an unconscionable advantage, courts of equity have not been permitted to suspend a mortgagee's right to enforce substantive provisions of a mortgage contract through foreclosure.[20]

14. *Id.* at 583–584; Monica Hatcher, *Cities Struggle to Fight Foreclosure Blight*, Miami Herald A1 (June 22, 2008).

15. Nelson, *supra* n. 2, at 609 n. 155.

16. *Supra* nn. 12–15.

17. Corkery, *supra* n. 11.

18. *W.B. Worthen Co. ex rel. Bd. of Comm'rs of St. Improvement Dist. No. 513 of Little Rock, Ark. v. Kavanaugh*, 295 U.S. 56, 60 (1935). Even in the dark shadow cast by the Great Depression, the Supreme Court of the United States made it plain that laws cannot rewrite existing mortgage agreements. *Id.* "To know the obligations of a contract we look to the laws in force at its making." *Id.*

19. Fla. Const. art. I, § 10.

20. *Lee Co. Bank v. Christian Mut. Found., Inc.*, 403 So. 2d 446, 448–449 (Fla. 2d Dist. App. 1981) (quoting *Fla. Dep't of Trans. v. Chadbourne, Inc.*, 382 So. 2d 293, 297 (Fla. 1980)).

In the determination of foreclosure cases, two jurisprudential realities have been transcendent. In substantive terms, courts have declined to alleviate borrower hardship by softening the black-letter legal principles that ordinarily support the enforcement of loan documents.[21] At the same time, courts have also refused to relax the procedures that lenders must follow to prosecute their cases, especially in the summary-judgment context.[22] Stated broadly, lenders will generally have a right to enforce their mortgages but need to follow the rules faithfully if foreclosure is to be decreed.

III. BLACK LETTERS FOR BORROWERS

In multiple contexts, courts have acknowledged "the constitutional sanctity of the home"[23] and emphasized that "the home is the citadel of every citizen."[24] In the mortgage foreclosure scenario, though, Florida's judicial philosophy toward homeownership has focused on black-letter legal principles rather than broader concerns about human hardship.[25] In one such case, the court summarily affirmed an order directing the clerk to issue a certificate of title to the successful foreclosure-sale bidder.[26] As the court explained in its denial of relief to the pro se borrower:

> His reason for requesting vacation of the order involves the difficulty in which loss of this property will put his entire family. Although all may be sympathetic to the appellant's

21. *Supra* n. 18 and accompanying text.

22. *See infra* pt. V(B) (discussing how several Florida courts have declined to extend lenders any procedural leniency while filing for summary judgment).

23. *Butterworth v. Caggiano*, 605 So. 2d 56, 61 (Fla. 1992) (emphasizing the importance of homestead protection); *see also Benefield v. State*, 160 So. 2d 706, 709 (Fla. 1964) (stressing "the sanctity of the home in a free country" in the Fourth Amendment context); *Cable v. State*, 18 So. 3d 37, 39 (Fla. 2d Dist. App. 2009) (quoting *Benefield*, 160 So. 2d at 710) (noting that Florida's knock-and-announce statute is a "codification of the English common law which recognized the fundamental sanctity of one's home").

24. *Vaughn v. Fla. Dep't of Agric. & Consumer Servs.*, 920 So. 2d 650, 655 (Fla. 4th Dist. App. 2005).

25. *Ponzi v. SunTrust Mortg., Inc*., 4 So. 3d 3, 4 (Fla. 4th Dist. App. 2009).

26. *Id.*

> problems, this is not a ground for denying a certificate of title to the successful bidder in a foreclosure action.[27]

In *Republic Federal Bank, N.A. v. Doyle*,[28] a well-regarded trial judge postponed the judicial sale for five weeks, explaining that "I give extensions on these because I don't want anybody to lose their house . . . people are having a hard time now."[29] In reversing the trial court's extension, the appellate court said:

> In this regard, we note the cautionary words of Justice Cardozo concerning the discretionary power of judges:
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> > "The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence."[30]

Another decision emphasized its insistence that only legally valid defenses would be recognized, saying, "The mortgagors had provided no true defense to the foreclosure but had merely pled their victimhood in various ways."[31] The court found that "[u]nfortunately, neither the ground of fairness nor 'the "ground" of benevolence and compassion'" provide, without more, a legal basis for denying the lender's legal rights in foreclosure cases.[32]

Correspondingly, in commercial transactions, the judiciary relies on written documents rather than extenuating circumstances.[33] As one Florida court emphasized:

> The world of commercial real estate is not a warm and fuzzy place. . . . "Get it in writing" is the watchword, for better or

27. *Id.*
28. 19 So. 3d 1053, 1053 (Fla. 3d Dist. App. 2009).
29. *Id.* at 1054 n. 1.
30. *Id.* at 1054–1055 (citations omitted).
31. *Phoenix Holding, LLC v. Martinez*, 27 So. 3d 791, 792 (Fla. 3d Dist. App. 2010).
32. *Id.* at 793 (quoting *Republic Fed. Bank*, 19 So. 3d at 1054).
33. *Coral Reef Drive Land Dev., LLC v. Duke Realty LP*, 45 So. 3d 897, 903 (Fla. 3d Dist. App. 2010).

worse. In this case, the borrowers admitted default in writing and hoped for mercy.[34]

IV. SETTLED DOCTRINE IN UNSETTLING TIMES

While borrowers battling lenders have attempted to push the boundaries of existing doctrines, the courts have pushed back. For example, in circumscribing the limits of a party's duty to act in good faith, Florida cases such as *Three Keys, Ltd. v. Kennedy Funding, Inc.*[35] followed prior caselaw and held that any such duty does not create a separate contract provision, but is instead, in effect, a modification that "attaches to the performance of a specific or express contractual provision."[36] Additionally, the court in *Three Keys* observed that "the implied covenant of good faith cannot be used to vary the terms of an express contract."[37] Therefore, while a written contract with a provision that is silent concerning methodologies would be subject to good faith, fair dealing, and commercial reasonableness, explicit terms are not to be overridden by one's implied covenant.[38]

Another doctrine that borrowers have attempted to expand is the equitable defense of unclean hands.[39] While this remains a doctrine of varying definitions, even seeming flexibility, it too has spawned few borrower success stories.[40] In *Tribeca Lending Corp. v. Real Estate Depot, Inc.*,[41] the court emphasized that for the injured party, the "clean hands doctrine 'applies not only to fraudulent and illegal transactions, but to any unrighteous, unconscientious, or oppressive conduct . . . .'"[42] Such criteria for unclean hands would seemingly envelop a broad range of alleged misconduct by foreclosing lenders. In examining a defense based

34. *Id.*

35. 28 So. 3d 894 (Fla. 5th Dist. App. 2009).

36. *Id.* at 903 (citing *Snow v. Ruden, McClosky, Smith, Schuster & Russell, PA*, 896 So. 2d 787, 792 (Fla. 2d Dist. App. 2005)).

37. *Id.* (citing *Beach St. Bikes, Inc. v. Bourgett's Bike Works, Inc.*, 900 So. 2d 697, 700 (Fla. 5th Dist. App. 2005)).

38. *Id.*

39. *See Citibank, N.A. v. Dalessio*, 756 F. Supp. 2d 1361, 1367 (M.D. Fla. 2010) (citing *Quality Roof Servs. v. Intervest Nat'l Bank*, 21 So. 3d 883, 885 (Fla. 4th Dist. App. 2009)) (recognizing that the defense of unclean hands is sufficient to prevent foreclosure).

40. *See e.g. id.*; *Tribeca Lending Corp. v. Real Estate Depot, Inc.*, 42 So. 3d 258 (Fla. 4th Dist. App. 2010).

41. 42 So. 3d 258.

42. *Id.* at 262 (quoting *Dale v. Jennings*, 107 So. 175, 180 (Fla. 1925)).

on the doctrine, though, the court found that at most, the foreclosing plaintiff could only be blamed for negligence and that the facts failed to show "any trickery, fraud, or oppressive conduct" that would invoke unclean hands sufficient to bar an equitable lien.[43]

V. THE BORROWER'S NEW BEST FRIEND: SLOPPY FORECLOSURE PRACTICES

A. The Standing Controversy

While on the merits, Florida courts have consistently imposed the words of written agreements upon borrowers, they have also held lenders to the letter of the law of civil procedure.[44] Foreclosure defense lawyers have thus frequently relied on procedural arguments as well as overwhelmed court dockets to stave off foreclosure and keep clients in their homes.[45] Some of the foreclosure defense lawyers' tactics focus on challenges to the standing of collection agents who frequently sue without possessing the loan documents or a documented authorization to act for the loan's actual owners.[46] Other borrower strategies rely on exploiting weaknesses in lenders' efforts to secure summary judgment—foreclosures based on paper submissions rather than a trial—which is almost invariably the favored vehicle of lenders seeking foreclosure.[47]

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43. *Id.* at 263.

44. Gary Blankenship, *Faulty Filings Hamper Clearing Foreclosures*, Fla. B. News (Oct. 1, 2010) (available at http://www.floridabar.org/divcom/jn/jnnews01.nsf/8c9f13012b96736985256aa900624829/ea7677d1e30f1032852577a400663455!OpenDocument) [*hereinafter* Blankenship, *Faulty Filings*].

45. *Id.*

46. An even more controversial strategy is the practical advice from some who counsel clients to stop paying their mortgages. "The biggest mistake homeowners make is to keep paying when they know they're in trouble," advises one Florida lawyer. James Thorner, *Delaying Foreclosure Can Lead to Ethical 'Heebie Jeebies'*, St. Petersburg Times B1 (Oct. 16, 2009) (available at http://www.tampabay.com/news/business/realestate/delaying-foreclosure-can-lead-to-ethical-heebie-jeebies/1044330). Another attorney, while recommending against specifically advising a client whether to pay or not to pay, nonetheless advises that "it is *far easier* for us to negotiate with the lender if the payments are late, but it is almost never a requirement." Richard Zaretsky, Z's Legal Experience Blog, *Should I Pay My Mortgage? When Should I Stop Paying My Mortgage?* http://activerain.com/blogsview/1125842/should-i-pay-my-mortgage-should-i-stop-paying-my-mortgage (June 23, 2009, 7:25 a.m. ET).

47. *See Verizzo v. Bank of N.Y.*, 28 So.3d 976, 978 (Fla. 2d Dist. App. 2010) (finding in favor of borrower when nothing in record reflected assignment or endorsement of a promissory note to plaintiff).

Standing challenges test the issue of whether the foreclosing plaintiff has the right to enforce loan documents originally executed in favor of a different party. Traditionally, Florida law provided a practical, even flexible, view of allowing assignees the ability to enforce rights assigned to them by the original parties to transactions.[48]

In recent times, though, Florida courts have applied exacting standards to foreclosing plaintiffs.[49] For a company acting on behalf of investors to have standing, it must, through assignment or other agreement, enjoy the status of an authorized agent or must also be the holder of the note and mortgage.[50] Accordingly, Florida's governing decisions confer standing on authorized agents, including collection agencies, to bring foreclosure actions on behalf of the real party in interest, so long as consent is properly established and the agents hold the debt instruments.[51] If a defendant denies standing to foreclose, though, the plaintiff must be prepared to prove its entitlement.[52]

When standing is controverted, and if the note, mortgage, and other exhibits to the complaint do not identify the foreclosing plaintiff as the lender, the complaint may be defective.[53] Along the

48. Courts have held that standing is broader than actual ownership of the beneficial interest in the note. "The Florida real party in interest rule, Fla. R. Civ. P. 1.210(a), permits an action to be prosecuted in the name of someone other than, but acting for, the real party in interest." *Kumar Corp. v. Nopal Lines, Ltd.*, 462 So. 2d 1178, 1183 (Fla. 3d Dist. App. 1985). Florida's flexibility concerning the authority of agents to act on behalf of the real party in interest was further demonstrated in *Juega v. Davidson*, 8 So. 3d 488, 489 (Fla. 3d Dist. App. 2009), in which the court held: "Because the plaintiff is an agent who had been granted full authority to act for the real party in interest, there was no violation of Rule 1.210(a), and the dismissal order must be reversed."

49. *BAC Funding Consortium, Inc. ISOA/ATIMA v. Jean-Jacques*, 28 So. 3d 936, 938 (Fla. 2d Dist. App. 2010).

50. *Id.* at 939 (holding that the bank "was nevertheless required to prove that it validly held the note and mortgage" before it sought to foreclose).

51. *Mortg. Elec. Registration Sys., Inc. v. Revoredo*, 955 So. 2d 33 (Fla. 3d Dist. App. 2007) (holding that a collection and litigation agent has standing to bring mortgage foreclosure action); *E. Inv., LLC v. Cyberfile, Inc.*, 947 So. 2d 630, 632 (Fla. 3d Dist. App. 2007) (finding that an action may be maintained by an assignee: "Florida Rule of Civil Procedure 1.210(a) permits an action to be prosecuted in the name of someone other than, but acting for the real party in interest."); *see also Mortg. Elec. Registration Sys., Inc. v. Azize*, 965 So. 2d 151, 154 (Fla. 2d Dist. App. 2007) (holding that mortgagee's lack of beneficial interest in note did not deprive mortgagee of standing).

52. *Lizio v. McCullom*, 36 So. 3d 927, 929 (Fla. 4th Dist. App. 2010).

53. *BAC Funding*, 28 So. 3d at 938 (finding that because the exhibit to the bank's complaint "conflicts with its allegations concerning standing and the exhibit does not show that [the bank] has standing to foreclose the mortgage, [it] did not establish its entitlement to foreclose the mortgage as a matter of law").

same line, in *Kontos v. American Home Mortgage Servicing, Inc.*,[54] the court vacated summary judgment due to the lack of a proper chain of assignments.[55]

Thus, the outcomes turn upon, in effect, the legal sufficiency of the paper trail that connects the note and mortgage to the plaintiff.[56] In *Verizzo v. Bank of New York*,[57] the Second District Court of Appeal underscored the need to demonstrate that the loan documents attached to the complaint are properly connected to the foreclosing plaintiff.[58] A disconnect in that linkage ordinarily means a gap in standing to foreclose.[59] Reversing summary judgment in favor of Bank of New York, the court found nothing in the record that reflected "assignment or endorsement" of the note to the plaintiff.[60] Accordingly, there was "a genuine issue of material fact as to whether the Bank of New York owns and holds the note and has standing to foreclose the mortgage."[61]

B. Foreclosures and Summary Judgment

With the downpour of foreclosures, lenders understandably view motions for summary judgment of foreclosure as the preferred vehicle for case disposition, even encouraging courts to overlook minor shortcomings in the lenders' paper submissions.[62] Furthermore, to minimize the expenses of prosecuting myriad

54. 40 So. 3d 929 (Fla. 1st Dist. App. 2010).

55. *Id.* at 929 ("As all parties acknowledge, however, the uncontested facts of record do not establish that appellee is presently entitled to foreclose because the record contains no evidence of any assignment or comparable transaction.").

56. *Lizio*, 36 So. 3d at 928 (finding that plaintiff provided prima facie evidence of ownership when plaintiff held the original note and had an assignment granting him interest); *see also Taylor v. Deutsche Bank Nat'l Trust Co., Etc.*, 44 So. 3d 618, 623 (Fla. 5th Dist. App. 2010) (finding that the written assignment of a note and mortgage was not defective when transferor lawfully acted in place of the holder).

57. 28 So. 3d at 976.

58. *Id.* at 978.

59. *Id.*

60. *Id.*

61. *Id.* (citing *Azize*, 965 So. 2d at 153; *Philogene v. ABN Amro Mortg. Group, Inc.*, 948 So. 2d 45, 46 (Fla. 4th Dist. App. 2006)). To establish standing, a documentary linkage may not always require that the note be endorsed in favor of the plaintiff. Courts find that if a note is not endorsed by name to the plaintiff but is endorsed in blank, such endorsement can suffice for standing. *Riggs v. Aurora Loan Servs., LLC*, 36 So. 3d 932, 933 (Fla. 4th Dist. App. 2010) (stating that "Aurora's possession of the original note, [e]ndorsed in blank, was sufficient under Florida's Uniform Commercial Code to establish that it was the lawful holder of the note, entitled to enforce its terms").

62. Blankenship, *Faulty Filings*, *supra* n. 44.

foreclosures, lenders have engaged inexpensive law firms, which, in turn, minimize attorney staffing to reduce costs.[63] Courts have refused, however, to engraft a foreclosure exception upon the rules for summary judgments.[64] Nor have they tolerated litigation shortcuts resulting from cost cuts that lead to mistakes.[65] Illustrating the strict compliance that is typically required, the court in *Terra Firma Holdings v. Fairwinds Credit Union*[66] reversed summary judgment when the complaint had relied on the failure to make a specific payment, and yet the record contained evidence that this particular payment may have been made.[67] When the creditor attempted to argue on appeal that in any event, the loan had already matured, the court emphasized that "maturity as a basis of default was not pleaded."[68] Moreover, because issues are made "'solely by the pleadings,'"[69] courts may only address unpled issues when tried by consent of the parties, a scenario not present in *Terra Firma Holdings*.[70]

Another chronic issue that has recently crystallized is a lender's failure, in its summary-judgment papers, to sufficiently address the borrower's affirmative defenses.[71] Borrowers contesting summary judgment obviously increase their chances for success by submitting facts that contradict a lender's assertions on a material point.[72] Often, though, an honest borrower may have no truthful facts to dispute the lender's submission. Even without affidavits, borrowers can overcome summary judgment if the lender fails to comply carefully with the rules.[73] One recent

63. Thorner, *supra* n. 46.

64. *See* Blankenship, *Faulty Findings*, *supra* n. 44 (noting that courts are only willing to process foreclosures that have been properly filed).

65. As veteran Judge Thomas Gallen explained the problem, "[Faulty paperwork] appears quite often[,] and we require that they correct the bad paperwork." *Id.*

66. 15 So. 3d 885 (Fla. 2d Dist. App. 2009).

67. *Id.* at 886.

68. *Id.*

69. *Id.* (quoting *Hart Props., Inc. v. Slack*, 159 So. 2d 236, 239 (Fla. 1963)).

70. *Id.*

71. *See e.g. Alejandre v. Deutsche Bank Trust Co. Ams.*, 44 So. 3d 1288, 1289–1290 (Fla. 4th Dist. App. 2010) (denying mortgagee's motion for summary judgment because mortgagee did not meet its burden to factually refute the mortgagor's affirmative defenses).

72. *See City of Hallandale v. State ex rel. Sage Corp.*, 298 So. 2d 437, 438 (Fla. 4th Dist. App. 1974) (explaining that it is well-settled that the trial court can "grant a party's motion for summary judgment only when there is no issue as to any material fact").

73. *See e.g. Frost v. Regions Bank*, 15 So. 3d 905, 906–907 (Fla. 4th Dist. App. 2009) (holding that the bank was not entitled to final summary judgment of foreclosure because

decision, *Frost v. Regions Bank*,[74] concerned a summary-judgment motion that lacked the requisite specificity. In that case, the borrowers submitted no written opposition to the motion and instead pursued the riskier strategy of raising the defensive issues at the hearing on the motion.[75] Even so, the appellate court reversed summary judgment, which entered a final judgment of foreclosure, because the plaintiff failed to demonstrate specifically that the defense of lack of notice and opportunity to cure was "legally insufficient."[76] Even more striking was *Alejandre v. Deutsche Bank Trust Co. Americas*, in which the court reversed summary judgment of foreclosure without even examining the merits of the borrower's affirmative defenses.[77] Based essentially on procedural grounds—the bank's failure "to address affirmative defenses raised by the mortgagor"—the court found that summary judgment was improper and reversed the foreclosure.[78]

Summary-judgment affidavits, the evidentiary basis for most foreclosures, were transformed from filling bit parts to playing leading villains in the wake of the "robo-signing" controversies.[79] Securing summary judgment requires affidavit testimony by someone with personal knowledge of the facts.[80] Ordinarily, this means an affiant with knowledge of the loan who reviewed relevant business records to establish the basis for factual statements.[81] Like a witness at a trial, the affidavit's signer must swear, on personal knowledge, to such facts "as would be admissi-

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the bank failed to show specifically that the borrower's defense of lack of notice and opportunity to cure was not legally sufficient).

74. *Id.*

75. *Id.* at 906.

76. *Id.* at 906–907 (quoting *Knight Energy Servs., Inc. v. Amoco Oil Co.*, 660 So. 2d 786, 788 (Fla. 4th Dist. App. 1995)).

77. 44 So. 3d at 1290.

78. *Id.*

79. *See* Kurt Eggert, *Foreclosing on the Federal Power Grab: Dodd-Frank, Preemption, and the State Role in Mortgage Servicing Regulation*, 15 Chapman L. Rev. 171, 175–176 (2010) (explaining that "[j]ournalists reported nationwide evidence of 'robo-signing[ ]' by mortgage servicers seeking to foreclose on homes[,]" a practice in which bank employees sign hundreds or thousands of foreclosure documents in a month and allege they have personally reviewed the documents when they have not, and noting that such a practice constitutes fraud on the court if the affidavits are submitted to the court as evidence).

80. Fla. R. Civ. P. 1.510(e).

81. *See Johnson v. Dep't of Health & Rehabilitative Servs.*, 546 So. 2d 741, 743 (Fla. 1st Dist. App. 1989) (noting that when the "custodian or other qualified witness" is testifying about the proceeding concerning the records, he or she must be "acting within the scope of *that* business").

ble in evidence."[82] "Robo-signers," on the other hand, are individuals with minimal knowledge of the loan transaction and foreclosure issues, who sign piles of barely reviewed affidavits in violation of these requirements.[83] This abusive practice was so widespread that major lenders imposed a temporary moratorium in the fall of 2010 on foreclosures in order to investigate and address the mountains of false papers.[84]

Fueled by the outcry over the systematic use of false declarations of personal knowledge, borrowers' attorneys have aggressively challenged lender affidavits as lacking the foundation of competent evidence needed for the entry of final judgment.[85] In response, many courts have closely scrutinized affidavits of indebtedness, and many cases fail to satisfy that scrutiny.[86] While not a classic case of robo-signing, the affidavit relied on for summary judgment in *Glarum v. LaSalle Bank National Association*[87] illustrates this meticulous judicial examination.[88] With zero tolerance for a lender's inattention to detail, the court said:

> Orsini explained that he derived the $340,000 figure from his company's computer system. However, Orsini did not know who entered the data into the computer, and he could not verify that the entries were correct at the time they were

82. Fla. R. Civ. P. 1.510(e); *see also Servedio v. US Bank Nat'l Ass'n*, 46 So. 3d 1105, 1107 (Fla. 4th Dist. App. 2010) (noting that the party seeking foreclosure can submit to the court an affidavit of ownership in order to prove that he or she owns the note and mortgage in question).

83. Eggert, *supra* n. 79, at 176.

84. N.Y. Times, *Mortgages and the Markets*, http://topics.nytimes.com/top/reference/timestopics/subjects/m/mortgages/index.html?8qa&scp=1-spot&sq=Mortgages+and+the+Markets&st=nyt (Aug. 25, 2011); *see also* Gary Blankenship, *Sloppy Paperwork Exacerbates the Foreclosure Crisis*, Fla. B. News (Oct. 15, 2010) (available at http://www.floridabar.org/DIVCOM/JN/JNNews01.nsf/Articles/6C7B03BE77F32EA3852577B2006673A5) (reporting that an employee for GMAC Mortgage admitted in depositions that he signed documents for thousands of foreclosures each month without knowing whether all the information was correct, and indicating that because of cases like this, the Legislature has allocated $9.6 million to the courts to clean up the fraudulent foreclosure cases).

85. Paola Iuspa-Abbot, *Foreclosure Crisis: New Strategy Attacks Validity of Affidavits*, http://msfraud.org/foreclosure-crisis.html (Aug. 26, 2010) (originally published on DailyBusinessReview.com).

86. *See id.* During an April 7 hearing, Pinellas Circuit Judge Anthony Rondolino said he personally has not seen a lot of defense lawyers try and use the flawed-affidavit defense, "but when they do raise these issues, I listen to the argument carefully." *Id.*

87. 83 So. 3d 780 (Fla. 4th Dist. App. 2011).

88. *Id.* at 782–783.

> made. To calculate appellants' payment history, Orsini relied in part on data retrieved from Litton Loan Servicing, a prior servicer of appellants' loan.
>
> • • •
>
> Orsini did not know who, how, or when the data entries were made into Home Loan Services'[ ] computer system. He could not state if the records were made in the regular course of business.
>
> • • •
>
> He relied on data supplied by Litton Loan Servicing, with whose procedures he was even less familiar. Orsini could state that the data in the affidavit was accurate only insofar as it replicated the numbers derived from the company's computer system.[89]

As a result of this analysis, the summary judgment of foreclosure was reversed.[90] The court's identification of the gaps in the personal knowledge of the affidavit witness provides a warning for lenders and a roadmap to borrowers seeking to defeat summary judgment.

C. The Courts Respond: The Managed-Mediation Experiment

As the issues of the foreclosure crisis have continued to evolve, Florida's judiciary endeavored to find constructive solutions to one of the great case-management challenges of modern times.

Following a task force study, the Supreme Court of Florida examined the need to provide meaningful dialogue and increase prospects for dispute resolution amid unrelenting waves of foreclosures.[91] The court noted:

> In its report, the Task Force identified lack of communication between plaintiffs and borrowers as the most significant

89. *Id.*

90. *Id.* at 783.

91. *In re Final Rpt. & Recommendations on Residential Mortg. Foreclosure Cases*, 2009 WL 5227471 at *1.

> issue impeding early resolution of foreclosure cases, and concluded that effective case management and mediation techniques are the best methods the courts can employ to ensure that such communications occur early enough in the case to avoid wasted time and resources for the courts and the parties.[92]

As a result, the Court decided to effectuate a statewide mediation program for residential foreclosures by approving a model administrative order to be issued by the chief judge in each of Florida's twenty judicial circuits. Additionally, the Court adopted the Task Force's recommended written parameters to address pervasive problems found in many foreclosure cases, specifically, "for qualifying providers of managed mediation services."[93] Considerable skepticism arose, however, about the effectiveness of the program.[94] According to figures provided by the Office of the State Courts Administrator, only 3.6 percent of the foreclosure cases that were eligible for mediation resulted in written agreements between borrower and lender.[95] Some observers expressed the concern that because these mediations were faceless—with the lender's decision-maker appearing by phone—they would be largely fruitless.[96] To assess the disappointing results, a new working group was appointed to determine whether mandatory mediation should be jettisoned or whether the process could be modified to improve upon the disappointing results.[97] In December 2011, the Supreme Court of Florida followed the recommendation of the Assessment Working Group for the Management Mediation Program and terminated the mediation program.[98] Despite the mandatory program's cancellation, courts

92. *Id.*

93. *Id.*

94. *See* Gary Blankenship, *Foreclosure Options Explored*, Fla. B. News 1 (Oct. 15, 2011) (available at http://www.floridabar.org/DIVCOM/JN/JNNews01.nsf/Articles/471782B1F296CEBD852579250040D862) [hereinafter Blankenship, *Options Explored*] (noting that the lack of success via mediation has led Governor Rick Scott and others "to say they might be open to a nonjudicial foreclosure process in Florida").

95. *Id.*

96. *See* James R. Coben & Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation about Mediation*, 11 Harv. Negot. L. Rev. 43, 142 (2006) (explaining that phone participation may not be enough to facilitate meaningful mediation).

97. Blankenship, *Options Explored*, *supra* n. 94, at 1, 5.

98. *In Re: Managed Mediation Program for Residential Mortgage Foreclosure Cases*, No. AOSC11-44. (Dec. 19, 2011).

may still order mediation on a case-by-case basis, pursuant to Florida Rule of Civil Procedure 1.700(a).[99]

As a statewide mandatory program, the well-intended mediation initiative may have been doomed from the start because of the chronic absenteeism of several vital components. Seasoned mediators recognize the critical role of face-to-face interaction with the true decision-makers in successful mediations.[100] A representative sitting in an out-of-state office, appearing by phone, is no substitute for in-person mediations.[101] Nevertheless, the statewide program was usually implemented with the lender's representatives participating telephonically.[102] Many would also say that the parties phoning in had limited authority and even less flexibility.[103]

Faceless and powerless mediations are usually exercises in futility.[104] For that reason, the Florida Rules of Civil Procedure require each party to be "physically present" at mediation absent stipulation or order of court.[105] Along with a party's physical presence at mediation, another issue is who needs to be present. In November 2011, one month before the Florida Supreme Court cancelled the mandatory mediation program for residential foreclosures, it enacted changes to the rule governing mediation

99. *Id.* at 1 (terminating the managed mediation program and stating that courts are not prohibited from referring cases to mediation under pursuant to Florida Statutes and the Florida Rules of Civil Procedure); Fla. R. Civ. P. 1.700(a) (stating that a judge may order the parties to any civil matter to participate in mediation). For more detail about the mediation program, see generally Gregory Firestone & Leslie Reicin Stein, *Florida's Statewide Approach to the Residential Mortgage Foreclosure Crisis: The Residential Mortgage Foreclosure Mediation Model*, 41 Stetson L. Rev 719 (2012).

100. Coben & Thompson, *supra* n. 96, at 142.

101. *See e.g. Segui v. Margrill*, 844 So. 2d 820, 821 (Fla. 5th Dist. App. 2003) (stating that the court ordered the party "to attend mediation because a party's actual presence at mediation is often critical to its success").

102. As one foreclosure attorney put it, "It was a loan-mod opportunity which was often lost because of paperwork problems. You could never get the actual owner of the note at the table. At best, you could get the servicer on the phone." Jeff Ostrowski, *Admitting Failure, Florida Supreme Court Ends Foreclosure Mediation Program*, Palm Beach Post 1A (Dec. 19, 2011) (available at http://www.palmbeachpost.com/money/foreclosures/admitting-failure-florida-supreme-court-ends-foreclosure-mediation-2041550.html).

103. *Id.*

104. Kimberly Miller, *Foreclosure Mediation Program Produces Dismal Results Statewide*, Palm Beach Post 1A (Apr. 27, 2011) (available at http://www.palmbeachpost.com/money/foreclosures/foreclosure-mediation-program-produces-dismal-results-statewide-1436732.html) (noting that a mere four percent of Florida's struggling homeowners leave the negotiating table with a resolution under the program).

105. *In re Amends. Fla. R. Civ. P. 1.720*, 75 So. 3d 264, 265 (Fla. 2011).

procedures to insist that a party's representative be "the final decision maker with respect to all issues presented by the case,"[106] and not a subordinate. Ironically, even though the Florida Rules of Civil Procedure recognize that physical presence and a final decision-maker are essential for most successful mediations, these critical components were missing in the vast majority of mediations under the failed statewide program.[107]

Each circuit is empowered to develop its own administration rules[108] and could implement its own standardized procedures for foreclosure mediation. To address the vast numbers of foreclosures that still confront our courts, circuits should consider whether implementing their own programs for residential foreclosure mediation could be far more successful than the state's initiatives. So long as circuits ordinarily require a lending officer with final decision-making authority to be physically present—just as the homeowners would be—results would almost assuredly improve. Lenders may complain about the inconvenience of appearing personally, and out-of-town mortgage holders may not like the travel expense.[109] And yet, while those may be legitimate concerns, the cost of plane tickets pales in comparison to the impact of foreclosures on neighborhoods, property values, local government revenues, and—most especially—our traditions that respect the importance and sanctity of a family's home. Every reasonable effort to foster successful mediations should be made. Just as every homestead lost can be a personal tragedy for that family, each home saved through mediation provides a crucial and positive impact on the lives of homeowners just as it creates broader benefits throughout our communities.

D. The Courts Respond: Changes to Rules of Procedure

In addition to the administrative order for mediation, the Supreme Court of Florida promulgated, through its rule-making

106. *Id.* at 266.

107. *Id.* at 265–266; Ostrowski, *supra* n. 102, at 1A.

108. Fla. Const. art. V, § 2(2), Fla. Stat. § 43.26 (2011).

109. Presumably, mediations could be scheduled so that the number of sessions invalidating the same lender could be scheduled within a short period to minimize cost and inconvenience.

authority, several changes to the Florida Rules of Civil Procedure.[110]

First, a verified complaint is required for residential foreclosures, which means that a plaintiff's representative must make a sworn declaration attesting to the allegations in the foreclosure complaint.[111] Amid allegations of chronic sloppiness in pleading such basic matters as the plaintiff's ownership and possession of the loan documents or even the dates of default, the Court explained the need "to provide incentive for the plaintiff to appropriately investigate and verify its ownership of the note or right to enforce the note and ensure that the allegations in the complaint are accurate."[112]

Another change is a new form for the affidavit of diligent search and inquiry when constructive service—service effectuated by publishing notice in a newspaper—is used to foreclose.[113] In endeavoring to standardize such affidavits, the form includes a specific checklist of necessary steps and does not allow "to the best of my knowledge and belief" to be used to dilute the certainty of the affiant's factual declarations concerning the efforts to locate the missing defendant.[114]

Another procedural change applies to a plaintiff's decision to try to cancel and reschedule a foreclosure sale.[115] Based on the new rules, plaintiffs can no longer cancel a sale with a letter, but instead must submit a motion to "provide the court with an explanation of why the foreclosure sale needs to be cancelled and request that the court reschedule the sale."[116]

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110. *In re Amends. to Fla. R. Civ. P.*, 44 So. 3d 555, 560 (Fla. 2010).

111. The amendment changes the general rules of pleading by adding the following language to subsection (b):

> When filing an action for foreclosure of a mortgage on residential real property the complaint shall be verified. When verification of a document is required, the document filed shall include an oath, affirmation, or the following statement: "Under penalty of perjury, I declare that I have read the foregoing, and the facts alleged therein are true and correct to the best of my knowledge and belief."

Id.

112. *Id.* at 556.

113. *See id.* at 560 (setting forth Form 1.924).

114. *Id.*

115. *See id.* at 557–558 (explaining the adoption of new Form 1.996(b)). In past practice, lender's counsel typically exercised wide latitude in choosing whether and even how to cancel sales, often in order to accommodate borrowers struggling to come up with last-minute payments to save their homes.

116. *Id.*

Finally, the Court's new rules require additional changes to Form 1.916, the rule prescribing the form for foreclosure judgments.[117] As described by the Court, the changes include, among other things:

> a notice to lienholders and directions to property owners as to how to claim a right to funds remaining after public auction is added to the form. Additionally, to conform to current statutory provisions allowing the clerk of court to conduct judicial sales via electronic means, the form is amended to accommodate this option.[118]

Overall, the rule changes appear to reflect thoughtful assessments of emerging problems and constructive measures to address them. Some of the few positives generated by the foreclosure onslaught are procedural enhancements that will better serve the process long after the current crisis.

E. Is New Legislation the Answer?

Analysis of the foreclosure crisis has included not only thoughtful judicial responses but also a possible need for legislative reform. Proposals have included instituting non-judicial foreclosure in Florida as well as extending statutory remedies for commercial properties to residential foreclosures.[119] In other states, procedures for non-judicial foreclosures generally permit a lender to take title to the property from a defaulting borrower quickly and without any need for a lawsuit to secure title through foreclosure judgment and a judicial sale.[120] Ordinarily, non-judicial foreclosure states allow the borrower, after the lender takes the deal, to contest the taking or to recover the property by paying off the loan.[121]

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117. *Id.* at 558.

118. *Id.* (internal citations omitted).

119. *See e.g.* Blankenship, *Options Explored*, *supra* n. 94, at 5 (noting that Florida legislators were considering non-judicial foreclosure).

120. Grant S. Nelson & Dale A. Whitman, *Reforming Foreclosure: The Uniform Nonjudicial Foreclosure Act*, 53 Duke L.J. 1399, 1403–1404 (2004).

121. Timothy A. Froehle, *Standing in the Wake of the Foreclosure Crisis: Why Procedural Requirements Are Necessary to Prevent Further Loss to Homeowners*, 96 Iowa L. Rev. 1719, 1738 (2011).

To date, leaders in Florida's legal community have opposed such measures, especially for residential mortgages, due to strong traditions in Florida that profoundly respect homeownership and property owners' due process rights.[122] In expressing the opposition of the Florida Bar's Real Property Probate and Trust Law Section to non-judicial foreclosure, its representative observed that such procedures do not "meet the exacting standards of the Florida Constitution and Florida's history dealing with homestead and other real property issues."[123] Although the debate over non-judicial foreclosures will continue as long as judicial foreclosures keep piling up, no such drastic sacrifice of fundamental rights seems justified. And if non-judicial foreclosures were instituted, constitutional challenges would likely add years of delay before the alleged solution could be definitely settled by state and federal courts.

Another approach considered by some is extending accelerated judicial procedures that already apply to commercial foreclosures to home foreclosures,[124] Florida Statutes, Section 702.10, which currently governs only non-residential real estate, provides that:

> [T]he mortgagee may request that the court enter an order directing the mortgagor defendant to show cause why an order to make payments during the pendency of the foreclosure proceedings or an order to vacate the premises should not be entered.[125]

In the event the mortgage holder demonstrates that it will likely prevail in the foreclosure action, the court can order the property owner to make the monthly payments.[126] If the court-

122. *See* Mark D. Killian, *Progress Made in Moving Foreclosures, but Courts Brace for Even More Filings to Come*, Fla. B. News 7 (Jan. 1, 2011) (available at http://www.floridabar.org/DIVCOM/JN/JNNews01.nsf/Articles/B53C7D8F6B858B38852577FF006D14C9) (explaining some of the reasons for resistance to non-judicial foreclosure in Florida).

123. *Id.*

124. Blankenship, *Options Explored*, *supra* n. 94, at 5 (noting that Florida legislators were considering non-judicial foreclosure).

125. Fla. Stat. § 702.10(2) (2011).

126. *Id.* at § 702.10(2)(d). The property owner can also post a bond in lieu of making the monthly payments, a remote prospect in most such cases due to the financial strength needed to secure a surety bond. *See id.* (permitting the payment order to be stayed if the mortgagor files a surety "equal to the unpaid balance of the mortgage on the property,

ordered payments are not made, the mortgage holder would be granted possession of the property absent good cause to the contrary.[127] Significantly, this provision would confer possession but not a transfer of title.[128] For homeowners already buried in debt, ordering them to pay what they cannot pay would seem to be a harsh measure. While troubling for homeowners already devastated by hardship, an order to pay or lose possession seems far less troubling in the context of investor-owned units or abandoned former homesteads.

Another existing provision of Section 702.10 prescribes an accelerated method for securing a final judgment of foreclosure if the defendant fails "to show cause why a final judgment of foreclosure should not be entered."[129] Significantly, this provision allows for a defendant to show cause—and defeat the application for expedited judgment—through "the filing of defenses by a motion or by a verified or sworn answer at or before the hearing."[130] Perhaps because of the additional submissions needed to invoke the "show cause" procedure and the modest burden of defeating it, most foreclosure cases do not pursue this remedy.[131] While this process does not provide for money judgment against the borrower, it would secure title to the property through a foreclosure judgment.[132] If pursued more aggressively, this feature of existing law could be a tool for accelerating foreclosures without denying homeowners the safeguards of a judicial process. In concept, it provides a fast-track for a substantial majority of cases because realistically speaking, many—if not most—foreclosure defendants lack a truly viable defense based on Florida's black-

including all principal, interest, unpaid taxes, and insurance premiums paid by the mortgagee").

127. *Farah Real Est. Inv., LLC v. Bank of Miami*, 59 So. 3d 208, 210 n. 5 (Fla. 3d Dist. App. 2011) (citing Fla. Stat. § 702.10(2)(f)).

128. *Id.* at 210.

129. Fla. Stat. § 702.10(1).

130. *Id.* at § 702.10(1)(a)(3).

131. Other reasons have also been cited for why the "show cause" procedure is infrequently invoked, including limitations on remedies. Fla. Hardest Hit Fund, *Some Florida Lawmakers Want to Repossess Foreclosed Homes More Quickly*, http://www .flahardesthitfund.org; *scroll to* December 7, 2011 (Dec. 7, 2011) (stating that "bank lawyers haven't used the ['show cause'] law because they believe it is limited to non-residential property and doesn't allow for a deficiency judgment to be entered against the owner").

132. Fla. Stat. § 702.10(1)(d).

letter law.[133] The limited enthusiasm for this fast-track process to date may result from the scarce caselaw confirming its reliability. Since a successful foreclosure requires a judgment that is not vulnerable to appeal, it may be that greater utilization will come only after appellate decisions unambiguously endorse its efficacy. Nonetheless, this remains an option that if further developed, could dramatically reduce the timetable for foreclosures so long as they feature careful preparation by lenders and truly untenable defenses by borrowers.

A thoughtful and comprehensive Interim Report of the Florida Senate's Committee on Judiciary summarized the issues well:

> Foreclosure is a costly and drastic legal remedy that accelerates the sum of a debt owed under a mortgage. Florida's judicial foreclosure process affords equitable remedies to borrowers and lenders, and reflects the delicate balance of the rights of the parties affected by the action. The current process provides litigating parties notice and opportunity before a neutral decision maker to settle disputes, and a means for the borrower to assert defenses to foreclosure before acceleration of the mortgage. Florida has a show cause procedure under s. 702.10, F.S., which may be underutilized and could be modified to more efficiently hear foreclosure cases without any party to the foreclosure proceeding losing his or her access to court.[134]

VI. CONCLUSION

In critical respects, Florida's judiciary has responded well to the foreclosure crisis. It has resisted powerful temptation to reduce the substantive contract rights of lenders as well as to downgrade the procedural due process rights of borrowers. While

133. *See e.g.* Thomas E. Baynes, Jr., *Florida Mortgages* § 11-3 (Harrison Co. 1999) ("Many defenses alleged by the mortgagor have been ruled by the court to be insufficient.").

134. Fla. Sen. Comm. on Jud., Interim Rpt. 2012-130, *Review Issues and Options Related to Foreclosure Process* 17–18 (Nov. 2011) (available at http://www.flsenate.gov/PublishedContent/Session/2012/InterimReports/2012-130ju.pdf). Although alternatives as well as enhancements to the existing judicial processes will continue to be discussed, recent legislative discussions have "indicated little support for nonjudicial foreclosures." Gary Blankenship, *Foreclosure Backlog Stands at 368,000 with More on the Way*, Fla. B. News (Feb. 1, 2012) (available at http://www.floridabar.org/DIVCOM/JN/JNNews01.nsf/Articles/011A65AC6B4959C28525798A0053B24F).

standing true to its tradition despite the gale-force winds of Florida's Category 5 foreclosure hurricane, the judiciary has also attempted procedural innovations ranging from managed mediation to requiring sworn pleadings when lawsuits are filed to foreclose homes. Although the mediation program was terminated amid extensive criticism and very modest results, the changes to the Rules of Civil Procedure, on the other hand, seem clearly beneficial. The responses of Florida's judiciary may limit the need for legislative experimentation, which could be risky business in an impermanent time of crisis, even if it is truly painful.