

FORECLOSING IN A HURRICANE: FLORIDA COURTS STRUGGLE TO DEAL WITH A CRISIS OF EPIC PROPORTIONS*

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In the Florida Supreme Court's 2009 Report, it described the coming foreclosure crisis in terms every Floridian would understand: the Court compared it to a hurricane bearing down on the state.¹ Today, nearly three years later, the analogy remains very appropriate, but the situation has only gotten much worse. The hurricane remains stalled over the state, and it shows no signs of leaving anytime soon.

I. INTRODUCTION

Any critical discussion of the problems facing Florida's court system must begin with a simple and staggering fact: Florida's entire court budget accounts for less than one percent of Florida's

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1. Fla. Sup. Ct. Task Force on Residential Mortg. Foreclosure Cases, *Final Report and Recommendations on Mortgage Foreclosure Cases*, http://www.floridasupremecourt.org/pub_info/documents/Filed_08-17-2009_Foreclosure_Final_Report.pdf (Aug. 17, 2009).

overall state government budget.² Consider this fact as well: “In 2009, Florida lawmakers changed the court system’s funding system, making it dependent on filing fees rather than money from the state budget. Some [eighty percent] of the court’s \$462 million budget comes from filing fees.”³ Recently, the courts have been overburdened with the number of foreclosure filings and “projected that [seventy-seven percent] of their fees would come from real estate filings [in 2011].”⁴ Because of the economic crash, the discovery of widespread abuses in court processes, and violations of laws and ethics guidelines, however, Florida’s courts faced a sharp drop in mortgage foreclosure filing fees, which led to a \$72.3 million shortfall in court funding in 2011.⁵

Indeed, the foreclosure crisis that has impacted Florida’s entire judicial system has exposed profound challenges to our entire system of civil justice. These challenges will not be solved with so-called “foreclosure rocket docket,” in which the courts give priority to quickly disposing of cases rather than following long-established rules of civil procedure as well as substantive law. Furthermore, current proposals to circumvent Florida’s judicial system entirely for any version of a non-judicial foreclosure process merely avoid the much larger issues.

While stopping short of officially recognizing that Florida courts are underfunded to the degree that they no longer perform their constitutionally mandated duties, this quotation from the Florida Supreme Court crystallizes the catastrophe facing Florida’s judiciary in one sentence: “[T]his Court has stated that Florida’s court system is operationally underfunded”⁶ Nowhere is the strain more acutely felt than in the world of foreclosure litigation.⁷

The financial crisis, as it is aptly named, is the product of years of loose lending regulations, “securitization” of mortgages into mortgage-backed securities, and a robust secondary market

2. Fla. St. Cts., *Current Court Funding, FY 2012–2013 State of Florida Budget*, http://www.flcourts.org/gen_public/funding/CurrentFunding.shtml (accessed July 29, 2012).

3. CNN News, *Florida Courts Face \$72.3 Million Deficit from Foreclosure Freeze*, http://money.cnn.com/2011/03/23/news/economy/florida_courts_foreclosures/index.htm (Mar. 23, 2011, 5:51 p.m. ET).

4. *Id.*

5. *Id.*

6. *Crist v. Ervin*, 56 So. 3d 745, 752 (Fla. 2010).

7. *Id.*

for debt whose players include none other than the United States Government.⁸ The foreclosure crisis was created when the financial crisis moved into our state's courtrooms. The clash between the judicial-funding crisis and the foreclosure crisis spawned judicial chaos and has resulted in disparate appellate opinions,⁹ questionable foreclosure plaintiffs' practices,¹⁰ and overall confusion and frustration in the state trial courts.¹¹

This Article surveys the foreclosure world by examining the diverging appellate opinions, particularly in the area of standing and real party in interest; discussing the Florida Supreme Court's "response" to the foreclosure crisis; and examining the senior judge "rocket docket." The Article ends with a conversation regarding "robo-signing."

II. STANDING AND THE REAL PARTY IN INTEREST

Before engaging in a substantive discussion regarding standing in foreclosure actions, it is necessary to give a brief overview of the related yet different notions of judicial "standing" and "real party in interest."¹² The Third District Court of Appeal notes, "In its broadest sense, standing is no more than having, or representing one who has, 'a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy.'"¹³ Stated another way, standing "concerns . . . the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."¹⁴ In *Association of Data Processing Service Organizations, Inc. v. Camp*,¹⁵ the Supreme Court of the United States noted, "That interest, at times, may reflect 'aesthetic, conservational, and recreational' as

8. See Nestor M. Davidson & Rashmi Dyal-Chand, *Property in Crisis*, 78 Fordham L. Rev. 1607, 1624–1626 (2010) (noting that commentators on the housing crisis have called the merging of these circumstances the "perfect storm").

9. *Infra* pt. II (discussing the inconsistency of appellate decisions).

10. *Infra* pt. II–III (discussing the early rationale strategy of foreclosure plaintiffs).

11. *Infra* pt. IV (discussing bizarre legal precedent established by Florida courts).

12. *Kumar Corp. v. Nopal Lines, Ltd.*, 462 So. 2d 1178, 1182 (Fla. 3d Dist. App. 1985).

13. *Id.* at 1182–1183 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 731 (1972)).

14. *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970).

15. 397 U.S. 150.

well as economic values.”¹⁶ Consequently, standing may arise from both economic injury and noneconomic values.¹⁷

Standing, however, includes not only the notion that the party has a “sufficient stake” in the litigation’s outcome but also that the party is in fact the “real party in interest.”¹⁸ This is the “at least equally-important requirement that the claim be brought by or on behalf of one . . . ‘in whom rests, by substantive law, the claim sought to be enforced.’”¹⁹ The underlying function of the real-party-in-interest rule is “to protect a defendant from facing a subsequent similar action brought by one not a party to the present proceeding and to ensure that any action taken to judgment will have its proper effect as *res judicata*.”²⁰ Under Florida Rule of Civil Procedure 1.210(a), either the real party in interest or an individual acting in that party’s name may prosecute a claim in Florida civil court;²¹ thus, “where a plaintiff is either the real party in interest or is maintaining the action on behalf of the real party in interest, its action cannot be terminated on the ground that it lacks standing.”²²

Applying these principles to foreclosure actions, the correct party-plaintiff would therefore be the party who suffered some injury, either economic or noneconomic, by the mortgagor sufficient to stake a claim in the dispute;²³ or be an entity who is maintaining the action on behalf of the aggrieved party.²⁴ Simply put, if these two prongs are met, then standing has been con-

16. *Id.* at 154 (quoting *Scenic Hudson Preservation Conf. v. F. Power Comm’n*, 354 F.2d 608, 616 (1965)).

17. *Id.*; see e.g. *Sierra Club*, 405 U.S. at 734 (providing that “[a]esthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process”); *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 223 n. 9 (1963) (holding that a person or family may have a spiritual stake in First Amendment values sufficient to give standing to raise issues concerning Establishment Clause and the Free Exercise Clause).

18. *Kumar Corp.*, 462 So. 2d at 1182, 1183.

19. *Id.* at 1183 (quoting Author’s Comment to Fla. R. Civ. P. 1.210).

20. *Id.* (emphasis added) (quoting *Prevor-Mayorsohn Carib., Inc. v. P.R. Marine Mgt., Inc.*, 620 F.2d 1, 4 (1st Cir. 1980)).

21. *Id.*

22. *Id.*

23. *Sierra Club*, 405 U.S. at 734.

24. *Kumar Corp.*, 462 So. 2d at 1182, 1183.

ferred; if not, the named plaintiff lacks standing and is not a proper party-plaintiff.

A. Standing in Foreclosure Actions: Who Is Suing Whom and for What?

As with any civil action, foreclosures must be instituted through the filing of a formal complaint.²⁵ Also, as with any civil action, the complaint for foreclosure must allege each and every element of mortgage foreclosure in order to withstand a motion to dismiss for failure to state a claim made pursuant to Florida Rule of Civil Procedure 1.140(b)(6).²⁶ This begs the question: what exactly are the elements of mortgage foreclosure?

The Florida Supreme Court approved Form 1.944, simply titled “Mortgage Foreclosure.”²⁷ Significantly, a complaint that follows any of the forms approved by the Florida Supreme Court states a cause of action.²⁸ With respect to standing and real party in interest in foreclosure actions, Paragraph Three of Form 1.944 is of particular interest. It provides, in whole, that “[p]laintiff owns and holds the note and mortgage.”²⁹ Thus, according to the form the Supreme Court authorized, it appears that to state a cause of action for mortgage foreclosure, the plaintiff must allege that it both “holds” (i.e., is the holder of) the note and mortgage and that it also “owns” (i.e., is the owner of) the note and mortgage.³⁰

While the difference between a holder and an owner may appear to be a matter of mere semantics, substantive law sug-

25. Kendall Coffey, *Foreclosures in Florida* § 11.01, 101 (2d ed., LexisNexis 2008).

26. See e.g. *Kislak v. Kreedian*, 95 So. 2d 510, 514 (Fla. 1957) (stating that a complaint sufficient to support a grant of decree in its favor “must allege a cause of action recognized under law against the defendants”); Henry P. Trawick, Jr., *Trawick’s Fla. Prac. & Proc.* § 10-4, 176 (West 2004) (providing that “[a]ll of the elements of a cause of action must be properly alleged in a pleading that seeks affirmative relief”).

27. *In re Amends. to the Fla. R. of Civ. P.*, 604 So. 2d 1110, 1200 (Fla. 1992).

28. See Trawick, *supra* n. 26, at § 6-5, 85; Fla. Stat. Ann. § 1.900(a)–(b) (West 2004) (stating that if the complaints drafted follow the forms, then they will be sufficient); *Muller v. Muller*, 205 So. 2d 558 (Fla. 2d Dist. App. 1967) (holding that the complaint filed was sufficient because it emulated the Florida Supreme Court’s form for such a complaint).

29. *In re Amends. to the Fla. R. of Civ. P.*, 604 So. 2d at 1200.

30. See Coffey, *supra* n. 25, at 101 (providing, in pertinent part, that “[t]he essential elements . . . [that] should be included in any foreclosure complaint, includ[e] . . . an allegation that the mortgagee presently holds and owns the note and mortgage”).

gests that it is not.³¹ Specifically, Florida's version of the Uniform Commercial Code, Florida Statutes Section 671.201(21)(a), defines a "holder" as "[t]he person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession."³² A holder is one of three "people" (along with a "non-holder in possession of the instrument [with] the rights of a holder" and "[a] person not in possession" who may nevertheless enforce through certain statutory powers) who is entitled to enforce a negotiable instrument under Florida Statutes, Section 673.3011.³³ Section 673.3011 is particularly significant in the context of mortgage foreclosure actions because by the statute's clear language, the person who is entitled to enforce the negotiable instrument (i.e., the purported holder of the note and mortgage) may not necessarily have to be the instrument's owner.³⁴

The conundrum presented by the statute is thus evident. If Form 1.944 requires the plaintiff to allege that it both holds and owns the note and mortgage in question, then in order to have standing to sue in a foreclosure action, the plaintiff must be both the holder and either the owner or an entity who is maintaining the action on behalf of the owner. Unfortunately, especially recently, many foreclosure complaints merely allege that the party seeking affirmative relief is the owner or holder of the note and mortgage, or is entitled to enforce the note and mortgage under Section 673.3011 without specifying which of the three the party claims to be and without any mention of who owns the debt.³⁵ As highlighted below, recent appellate decisions appear to

31. It should be noted that the typical mortgage foreclosure case involves both a promissory note and a mortgage. The note is the contract to pay the underlying debt, and the action on this is governed by the rules of the Uniform Commercial Code, while the action to foreclose the mortgage is governed by the long established laws of real property. It is the clash of these two bodies of law (and the application of the rules of evidence) that provide much of the quagmire and conflict that have developed.

32. Fla. Stat. § 671.201(21)(a) (2010).

33. Fla. Stat. § 673.3011 (2010).

34. *Id.*

35. See Dan Bushell, Fla. App. Rev., *More Evidence of Changing Winds in Florida Foreclosure Appeals*, <http://www.floridaappellatereview.com/florida-district-courts-of-appeal/more-evidence-of-changing-winds-in-florida-foreclosure-appeals> (May 16, 2011) (citing appellate decisions in mid-2011 that signaled to trial courts that they could no longer grant judgments for plaintiffs without evidence that supports standing); G.J. Beckus, Fla. Foreclosure Law., *MERS Role in the Foreclosure Epidemic and Lack of Standing*, <http://blog.floridaforeclosurelawyer.org/2010/01/02/mers-role-in-the-foreclosure>

vacillate between endorsing and repudiating this type of pleading, with some opinions appearing to both endorse and repudiate the practice at the same time.³⁶ What is developing throughout the Florida appellate courts is a hodgepodge of contradictory caselaw that fails to provide guidance on the essential substantive allegation in every foreclosure case.

Sundry problems beyond mere pleading deficiencies arise in failing to delineate exactly who may sue for foreclosure, and have been caused primarily by the mad rush to securitize, or package, the underlying promissory notes so that they can be sold on the secondary market. These problems include: (1) whether the promissory note sued upon is even a negotiable instrument and therefore whether a plaintiff may claim standing under Section 673.3011; (2) if the note is in fact negotiable, how a transfer of it merely through negotiation can transfer the non-negotiable mortgage; and (3) whether the suing plaintiff is the party responsible for certain pre-suit conditions precedent, or whether this can be delegated to a non-suing party. These issues will all be examined below.

B. “The Mortgage Follows the Note”: *Johns v. Gillian*,
Equitable Assignment, the Original Sin

Perhaps the opinion most often cited in recent foreclosure actions by plaintiffs, to support the utterly deficient pleadings that plague Florida’s court system, is the Florida Supreme Court’s decision in *Johns v. Gillian*.³⁷ In *Johns*, a homeowner bought building materials from a lumber company and executed, in exchange for the debt, a promissory note and mortgage.³⁸ After this purchase, the lumber company fell on hard times and received a monetary advance from Gillian, who received the

-epidemic-and-lack-of-standing (Jan. 2, 2010) (explaining that, nationally, much of the standing issues originate in the structure of the Mortgage Electronic Registration System (MERS)).

36. See *infra* pt. IV (discussing divergence from the doctrine that a plaintiff in foreclosure must be both the holder and owner of the note and mortgage).

37. 184 So. 140 (Fla. 1938).

38. *Id.* at 142. One need not be a bank or other financial institution to buy a mortgage. There is an entire industry in private-party mortgage-note purchasing. *E.g.* Hard Money Bankers, LLC, *Private Mortgage Note Investing*, <http://hardmoneybankers.com/private-mortgage-note-investing/> (Oct. 23, 2009).

Johns' promissory note and mortgage as security for that extension; however, there was never any formal execution of an assignment of note and mortgage from the company to Gillian.³⁹ In 1937, Gillian instituted foreclosure proceedings in the lumber corporation's name against the homeowner's heirs. During litigation, it was discovered that no formal execution of assignment had been produced. Upon discovery of the oversight, the lumber company's directors executed an assignment of note and mortgage to Gillian to correct this technical deficiency.⁴⁰

While the Florida Supreme Court eventually found the assignment defective because it did not contain the lumber company's seal,⁴¹ the Court nevertheless held that an equitable interest in the note and mortgage had been passed to Gillian because "[i]f the note or other debt secured by a mortgage be transferred without any formal assignment of the mortgage, or even a delivery of it, the mortgage in equity passes as an incident to the debt, unless there be some plain and clear agreement to the contrary, if that be the intention of the parties."⁴² The Court thus concluded that "[a]lthough the assignment of the mortgage from Everglade Lumber Company to Gillian was defectively executed, it may be taken as evidence to show that the company had, before the commencement of the suit, sold and transferred to Gillian its entire interest in the note and mortgage."⁴³

Over seventy years later, *Johns* has become somewhat like gospel to foreclosing plaintiffs who often allege that there need not be any formal assignment of mortgage and note as long as the plaintiffs are in possession of the original note that is either endorsed in blank or endorsed specifically to the named party. The magic language often repeated—"the mortgage follows the note"—stands for the proposition that merely being holder of a negotiable instrument (often endorsed in blank) confers standing to sue under the doctrine of equitable assignment.

This misapplied mantra, however, ignores the *Johns* opinion's plain language as well as cited testimony from the actual

39. *Johns*, 184 So. at 142.

40. *Id.* (citing *Dougherty v. Randall*, 3 Mich. 581, 582 (Mich. 1855)).

41. *Id.* at 143; *but see* Fla. Stat. § 694.08 (2011) (validating certain instruments, notwithstanding defects in seals).

42. *Johns*, 184 So. at 143.

43. *Id.* (citing *Dougherty*, 3 Mich. at 581).

case. Specifically, applying this “magic language” disregards the conclusion made by the *Johns* Court that the defective assignment “sold and transferred to Gillian” the lumber company’s “entire interest in the note and mortgage.”⁴⁴ Said another way, the sale of the note and mortgage from the lumber company to Gillian divested the lumber company of any ownership interest in the documents and passed them to Gillian. The Court noted that Gillian’s uncontested testimony “was sufficient to constitute Gillian the equitable owner of the mortgage and entitle him to foreclose the same.”⁴⁵ The point is, in *Johns*, there was evidence submitted to the court, in addition to possession of the documents, that supported both the ownership and the authority to act.

Consequently, the ruling in *Johns* in no way contradicts the conclusion that the proper party-plaintiff to a foreclosure action must be both the owner and holder of the note and mortgage; rather, it bolsters the claim. Gillian, through an equitable assignment, became the owner and the holder of the note and mortgage originally executed on behalf of the lumber company. As the owner and holder of the note and mortgage, and because he had suffered an injury by the mortgagor, Gillian was the real party in interest and therefore had standing to sue. More important is to contrast the *Johns* fact pattern with today’s foreclosure cases. In *Johns*, there was actual record evidence that supported ownership, whereas in many of the recent cases that apply *Johns* and the misapplied magic language, there is no record evidence of ownership to support the assumption of ownership and standing.⁴⁶

44. *Id.*

45. *Id.* at 144. Gillian testified that he owned the mortgage at trial:

Q: And who is the owner of this note at the present time? . . .

A: I am. . . .

Q: When did you become the owner of this mortgage then?

A: It was back probably in 1927 or '28. . . .

Q: But you owned the mortgage from 1927?

A: Yes, down to date, from whatever time the transfers were made, of a bunch of securities

Id.

46. Bushell, *supra* n. 35 (discussing certain 2011 cases in which there was no evidence that the plaintiff owned the notes).

C. Carapezza v. Pate:⁴⁷ Ownership Is Requisite
to Summary Judgment

Between 1938 and the early 1960s, there was little in terms of caselaw regarding whether a foreclosing plaintiff must own the debt in order to sue, perhaps because the mortgage-backed security had not gained any real use or application in mortgage loan transactions. Anecdotal evidence is clear that during this time period, lenders who originated loans secured by real property retained the ownership interest in the debt.⁴⁸ In this scenario, the foreclosure action is simple: the plaintiff originated the loan and retained ownership of the debt, and the defendant subsequently defaulted on the loan, resulting in judgment for the plaintiff.

This rather seamless world of foreclosure law changed, however, in 1962. In *Carapezza v. Pate*,⁴⁹ the defendant, Carapezza, executed a mortgage to Shinn Construction Company and was later sued for foreclosure by the plaintiff, Pate.⁵⁰ In her answer, the defendant denied the plaintiff's allegation that she was the owner and holder of the note and mortgage.⁵¹ The plaintiff filed an unverified motion to strike the answer and an entry for final judgment.⁵² The trial court heard the plaintiff's motions, struck the defendant's answer, and entered summary judgment in favor of the plaintiff.⁵³

The Third District Court of Appeal reversed the trial court's order on two grounds: (1) the procedural ground that the motion to strike was not verified, as required by the Florida Rules of Civil Procedure; and (2) the substantive ground that the record was

47. 143 So. 2d 346 (Fla. 3d Dist. App. 1962).

48. *E.g.* Jack M. Guttentag, *The Mortgage Professor's Website: Why Do Most Lenders Sell Their Mortgages?* http://www.mtgprofessor.com/A%20-%20Type%20of%20Loan%20Provider/why_do_most_lenders_sell_their_mortgages.htm (revised June 30, 2009) (contrasting former lending practices with modern ones that proliferated during the mortgage securitization explosion of the 1980s).

49. 143 So. 2d 346.

50. *Id.* at 346.

51. *Id.*

52. *Id.* As of 1962, Florida Rule of Civil Procedure 1.14(b) stated that a "motion to strike shall be sworn to and shall set forth fully the facts on which the movant relies and may be supported by affidavit." *Id.* at n. 1; Fla. R. Civ. P. 1.14(b) (superseded in 1967 by Fla. R. Civ. P. 1.150(b)).

53. *Carapezza*, 143 So. 2d at 347. The court also reversed on the grounds that the Florida Rules of Civil Procedure required that a motion to strike be verified, and Pate's motion to strike was unverified. *Id.*

devoid of any evidence that the plaintiff had an ownership interest in the note and mortgage.⁵⁴ In fact, the court explicitly held that “[o]wnership having been put in issue by the answer it followed that ownership of the note and mortgage became one of the issues in the case and was a material fact to be proved by the plaintiff.”⁵⁵

Carapezza, like *Johns*, requires not only that a foreclosing plaintiff hold the note and mortgage, but also mandates that the party own the debt. Actually, *Carapezza* takes this conclusion one step further by requiring proof of ownership to be established before a court may enter summary judgment.⁵⁶ Because by the express language of Section 673.3011, someone other than the owner might be the holder,⁵⁷ *Carapezza* appears to stand for the proposition that merely producing an original note endorsed in blank is not sufficient to confer standing.

D. *Laing* and *Troupe*: The Holder Doctrine Takes Form

Four years after *Carapezza* was decided, the First District rendered its decision in *Laing v. Gainey Builders, Inc.*,⁵⁸ in which the court planted the seed that a foreclosing plaintiff need only be the holder of the debt in order to have standing.⁵⁹ In *Laing*, Gainey Builders executed and delivered a note and mortgage to Leila D. Hurst. The note and mortgage were subsequently assigned to Laing, who thereafter assigned and endorsed the mortgage and note, as collateral security, to S.A. McDaniel and Ruby McDaniel.⁶⁰ After Laing’s endorsement and assignment to the McDaniels, Laing instituted a foreclosure action against Gainey Builders without joining the McDaniels, who were the holders of the note and mortgage but had no knowledge that Laing had commenced the action.⁶¹

54. *Id.*

55. *Id.*

56. *Id.* Under *Carapezza*, to prevent summary judgment for the plaintiff, a defendant need only raise the genuine issue of ownership, which is a question of material fact. *Id.*

57. *Id.*; Fla. Stat. § 673.3011(3) (2010) (noting that “a person may be entitled to enforce the instrument even though the person is not the owner”).

58. 184 So. 2d 897 (Fla. 1st Dist. App. 1966).

59. *Id.* at 900–901.

60. *Id.* at 898.

61. *Id.* at 899.

The trial court entered a summary judgment in favor of Gainey Builders because Laing had failed to join the McDaniels. Laing appealed, contending that because the endorsement and the assignment were only as collateral security, “ownership was retained by the plaintiff so as to authorize her to foreclose in her own name only without the knowledge of the assignees,’ since she retained such ownership ‘by virtue of the facts that the assignment to the McDaniels was for collateral security.’”⁶² After a lengthy discussion regarding the rights of an assignee of a mortgage for collateral security and the payment of a negotiable instrument to the pledgee of the instrument, the First District concluded that “[u]nder the decisional law of Florida, then, as well as the general rule recognized in other jurisdictions, we think that the plaintiff, having assigned the subject mortgage and note to the McDaniels, was not entitled to file the instant mortgage foreclosure suits in her own name alone”⁶³

Thus, *Laing* was one of the first cases to determine that the “holder” of the note and mortgage was the real party in interest in a foreclosure action. What is unclear about the opinion, however, is whether the result would have differed if Laing had joined the McDaniels as party-plaintiffs. Indeed, the opinion refers to the McDaniels as having “legal title to the mortgage and note, and that [the McDaniels], not the assignor, [are] the proper part[ies] to file a suit to foreclose the mortgage.”⁶⁴ By discussing “legal title,” the *Laing* court still seems to refer to ownership, something that a holder may or may not have.

The Second District Court of Appeal cited *Laing* in *Troupe v. Redner*.⁶⁵ In *Troupe*, Redner borrowed money from Troupe—as evidenced by an unsecured promissory note.⁶⁶ Troupe then pledged this promissory note—as evidenced by an agreement between Troupe and the bank wherein the bank would have the right to enforce the note’s collection—to the Central Bank of Tampa as collateral for a loan between the bank and third-party

62. *Id.* Laing argued that although she assigned the mortgage to the McDaniels, who then became holders, Laing retained ownership because the assignment was for collateral security. *Id.*

63. *Id.* at 900.

64. *Id.* at 899.

65. 652 So. 2d 394, 395 (Fla. 2d Dist. App. 1995).

66. *Id.*

debtors.⁶⁷ The third-party debtors defaulted on their obligation to Central Bank of Tampa and the bank, for some reason, assigned to Redner the very note he had executed in favor of Troupe.⁶⁸ Redner, now in possession of the note, stopped payment on it, and Troupe sued him for a declaration of her rights and acceleration of the debt.⁶⁹ Redner moved to dismiss Troupe's action on the basis of the assignment of the note to him from the Central Bank of Tampa, and the trial court granted the motion with prejudice.⁷⁰

On appeal, Troupe argued that because the third-party debtors' obligation to the Central Bank of Tampa was satisfied by the forced sale of the debtors' collateral, she had an "equity of redemption" enforceable against Redner.⁷¹ The Second District disagreed and offered the following words, which would further give weight to the holder doctrine: "To foreclose upon a promissory note, the plaintiff must be the 'holder' in order to be the real party in interest."⁷²

Other than the unique (and, frankly, bizarre) facts of the case, *Troupe* is distinguishable from foreclosure actions on at least one key ground: the subject promissory note in *Troupe* was unsecured.⁷³ Consequently, the only remedy that would have been available to Troupe against Redner would be an in personam action for money damages as opposed to an in rem action for foreclosure on real property.⁷⁴ Indeed, *Troupe*, like *Laing*, discusses the transfer of legal title from Troupe to the Central Bank of Tampa when Troupe pledged the note as collateral security.⁷⁵ Regardless, *Troupe's* conclusion that a note's holder has standing to foreclose the note would be the source from which divergent opinions would arise in the next decade.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* (quoting *Withers v. Sandlin*, 18 So. 856 (Fla. 1896)).

73. *Id.*

74. See *Thomas v. Hartman*, 553 So. 2d 1256, 1257 (Fla. 5th Dist. App. 1989) (suggesting that the holder of a secured debt may proceed by foreclosure to enforce a lien, while the holder of an unsecured debt is forced to hold the debtor personally liable).

75. See *Troupe*, 652 So. 2d at 396 (stating that Troupe may still have a remedy by seeking to enforce the right of redemption in collateral).

E. *Johns v. Gillian* in the Twenty-First Century:
Jeff-Ray and *WM Specialty*

By 2005, the housing and real estate markets were in full bloom, and with the bloom came the continued, explosive expansion of mortgage securitization and the mortgage secondary market.⁷⁶ During this time period, the appellate courts saw an increase in cases in which the originator did not transfer the interests in mortgage and notes to the suing foreclosure plaintiff.⁷⁷ One of the early cases illustrating this changing landscape was *WM Specialty Mortgage, LLC v. Salomon*.⁷⁸

WM Specialty filed a foreclosure complaint against Salomon on December 3, 2002, and when Salomon failed to respond to the suit, the court entered a default against him.⁷⁹ Then, Salomon hired an attorney who moved to vacate the default and filed a motion to dismiss for failure to comply with Florida Rules of Civil Procedure 1.130(a).⁸⁰ Salomon argued that the complaint contained a note and mortgage executed in favor of Fremont Investment and Loan, but no assignment of note and mortgage.⁸¹ In response, WM Specialty filed an assignment that “reflected that the mortgage was transferred to WM Specialty by Fremont on November 25, 2002; however, the [documents] indicated that the assignment was not executed until January 3, 2003.”⁸² After a hearing, the trial court vacated the default, finding that WM Specialty did not own and hold the note and mortgage when it filed

76. See *Assignee Liability in the Secondary Mortgage Market: Position Paper of the American Securitization Forum* 8–9, 11 (Am. Securitization Forum 2007) (available at http://www.americansecuritization.com/uploadedFiles/Assignee%20Liability%20Final%20Version_060507.pdf) (indicating that the increase in subprime lending has resulted from the emergence of a secondary market).

77. *E.g. Glynn v. First Union Nat'l Bank*, 912 So. 2d 357, 358 (Fla. 4th Dist. App. 2005); *WM Specialty Mortg., LLC v. Salomon*, 874 So. 2d 680, 682–683 (Fla. 4th Dist. App. 2004).

78. 874 So. 2d 680.

79. *Id.* at 680–681.

80. *Id.* at 681. Fla. R. Civ. P. 1.130(a) requires that “[a]ll bonds, notes, bills of exchange, contracts, accounts, or documents upon which action may be brought or defense made, or a copy thereof or a copy of the portions thereof material to the pleadings, shall be incorporated in or attached to the pleading. No papers shall be unnecessarily annexed as exhibits. The pleadings shall contain no unnecessary recitals of deeds, documents, contracts, or other instruments.”

81. *WM Specialty*, 874 So. 2d at 681.

82. *Id.*

its complaint and therefore the complaint was “void *ab initio*.”⁸³ The cumulative effect of the trial court’s order was eventually discovered in a subsequent order entitled “Final Order,” in which the trial court denied a motion to compel discovery and essentially provided that its order vacating the default had the effect of dismissing the complaint without prejudice and without leave to amend.⁸⁴

On appeal, the Fourth District noted that the dismissal appeared to be in response to *Jeff-Ray Corp. v. Jacobson*,⁸⁵ a Fourth District decision from fourteen years before *WM Specialty*. In *Jeff-Ray*, the Fourth District reversed the denial of a motion to dismiss because the complaint for foreclosure, which had been filed on January 4, 1988, had alleged an assignment of mortgage dated in 1986, but the assignment was not attached to the complaint.⁸⁶ “When the . . . assignment was . . . produced, it was dated April 18, 1988, some four months after the lawsuit was filed.”⁸⁷

After first noting that “[i]n *Jeff-Ray*, there was no mention in the opinion as to whether, although the assignment was executed after the complaint was filed, equitable transfer of the mortgage occurred prior,” the *WM Specialty* court declined to apply *Jeff-Ray* to the facts of the case and instead chose the “equitable assignment” rationale of *Johns*.⁸⁸ Under this analysis, the court concluded that the trial court

should have upheld the complaint because it stated a cause of action, but considered the issue of WM Specialty’s interest on a motion for summary judgment. An evidentiary hearing would have been the appropriate forum to resolve the conflict which was apparent on the face of the assignment, i.e., whether WM Specialty acquired interest in the mortgage prior to the filing of the complaint.⁸⁹

Conspicuously absent from the opinion is any mention of whether WM Specialty alleged that it was the owner and holder

83. *Id.*

84. *Id.*

85. 566 So. 2d 885 (Fla. 4th Dist. App. 1990).

86. *Id.* at 886.

87. *Id.*

88. 874 So. 2d at 682.

89. *Id.* at 682–683.

of the note and mortgage. Granted, this issue was not before the court, but a murky issue was about to get murkier.

F. *Philogene* and the *MERS* Cases: The Holder Doctrine on Steroids

Late in 2006, the Fourth District Court of Appeal released a short opinion that helped fuel the argument that foreclosing plaintiffs need only be holders of the note and mortgage in order to sue. In *Philogene v. ABN Amro Mortgage Group, Inc.*,⁹⁰ the court stated, “[W]e conclude that ABN had standing to bring and maintain a mortgage foreclosure action since it demonstrated that it held the note and mortgage in question.”⁹¹ The opinion cites the 1998 case *Chemical Residential Mortgage v. Rector*,⁹² in which the First District explained that the complaint properly stated a cause of action by the holder of the note and mortgage.⁹³ The *Rector* decision opines, however, that “[w]hen they did not timely respond to the complaint, the appellees/mortgagees waived any denial of its allegations that the appellant was the owner and holder of the note and mortgage and that the appellees had defaulted on the note and mortgage.”⁹⁴ The *Rector* opinion, then, appears to suggest that Chemical Residential Mortgage, the mortgagor, did in fact allege in its complaint that it was the owner and holder of the note and mortgage.⁹⁵

Enter MERS, the four-letter acronym for Mortgage Electronic Registration Systems, Inc.⁹⁶ While much has been made about this company in recent years, all MERS has ever been, and all MERS ever will be, is an attempt to digitally record transfers of interests in mortgages.⁹⁷ MERS never contemplated any interest in the promissory note; in fact, the note never referred to MERS, even though MERS was listed as nominee of the mortgagee on a mortgage, and it is doubtful whether MERS was ever in posses-

90. 948 So. 2d 45 (Fla. 4th Dist. App. 2006).

91. *Id.* at 46.

92. 742 So. 2d 300 (Fla. 1st Dist. App. 1998).

93. *Philogene*, 948 So. 2d at 46 (citing *Rector*, 742 So. 2d at 300).

94. *Rector*, 742 So. 2d at 300.

95. *Id.*

96. Christopher L. Peterson, *Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System*, 78 U. Cin. L. Rev. 1359, 1361 (2010).

97. *Id.*

sion of the note. MERS presents challenges when it either tries to assign notes (that it never held any interest in) and mortgages on behalf of an originator to another entity or, as was the case in early 2007, when it tries to foreclose as a named party-plaintiff.

The first appellate case to tackle the MERS conundrum was *Mortgage Electronic Registration Systems, Inc. v. Azize*.⁹⁸ The trial court judge, the Honorable Walt Logan, Circuit Judge of the Sixth Circuit, issued an order to show cause for why twenty-one cases pending in the Sixth Judicial Circuit with MERS as a plaintiff should not be dismissed, questioning “how MERS could file as plaintiff in the capacity of nominee of another corporation.”⁹⁹ After a lengthy hearing, Judge Logan concluded in an elaborate order that because MERS did not have a beneficial ownership interest in the note, “MERS could not properly bring the foreclosure action.”¹⁰⁰

The Second District reversed, citing both *Troupe* and *Philogene* for the proposition that “[t]he holder of a note has standing to seek enforcement of the note,” even though *Troupe* was an in personam action for money damages, and that the note itself is not the instrument which allows for foreclosure (more on this later).¹⁰¹ The court also cited *Kumar* for the proposition that the real-party-in-interest rule encompasses both the person in whom the action lies, as well as that person’s agent.¹⁰² From the perspective of analyzing the mess in Florida’s courts today, the most important determination from *Azize* comes in a footnote. Noting that *Azize* filed no response in the action, the Second District declined to offer an opinion regarding MERS’ failure to “allege how or why it came to be the owner and holder of the note” and whether that renders the complaint defective for failure to plead a cause of action.¹⁰³ Perhaps from a standing perspective, it is crucial to note that MERS did allege that it was the owner and holder of the note and mortgage in its complaint.¹⁰⁴ The *Azize* court appears to conclude its opinion with a contradiction, stating

98. 965 So. 2d 151 (Fla. 2d Dist. App. 2007).

99. *Id.* at 152–153.

100. *Id.* at 153.

101. *Id.*

102. *Id.*

103. *Id.* at 152, 154 n. 2.

104. *Id.* at 154.

that “MERS would have standing as the owner and holder of the note and mortgage to proceed with the foreclosure.”¹⁰⁵ In this way, the *Azize* opinion is as confusing as the *Rector* opinion in that both decisions conclude that the “holder” has standing to sue in one breath, while providing that the foreclosing plaintiff was both the “owner” and “holder” in the next.¹⁰⁶

An innocent footnote in a subsequent 2007 MERS case further complicates matters. In *Mortgage Electronic Registration Systems, Inc. v. Revoredo*,¹⁰⁷ the Third District Court of Appeal largely echoed the *Azize* court’s conclusion that MERS may have standing to sue.¹⁰⁸ Footnote Two of the opinion, however, is of particular importance because the Third District goes so far as to claim that even though MERS was only the “holder” of the note and was not the “owner,” the court “simply [does not] think that this makes any difference.”¹⁰⁹ Consequently, as a mere “holder” of the mortgage and note, MERS (and, by extension, any suing plaintiff) had standing to sue. The court’s conclusion that the distinction “simply [does not] make a difference” appears to fly in the face of the clear language of Section 673.3011 and Form 1.944.¹¹⁰ Was this the end of the owner/holder distinction?

III. 2010 AND BEYOND: WHICH WAY IS WHICH?

A. The High Court Speaks Out: The Verification Rule

As the calendar turned to 2010, the global economy worsened, and the foreclosure crisis showed no signs of slowing down.¹¹¹ If anything, new foreclosure case filings were increasing at a seem-

105. *Id.*

106. *Id.* at 153–154; *Rector*, 742 So. 2d at 300.

107. 955 So. 2d 33 (Fla. 3d Dist. App. 2007).

108. *Id.* at 33–34.

109. *Id.* at 34 n. 2.

110. Fla. Stat. § 673.3011 (2011) (defining the people who are entitled to enforce an instrument); Fla. R. Civ. P. Form 1.944 (requiring plaintiff to own and hold the note and mortgage).

111. See generally Lynn Adler, *U.S. 2009 Foreclosures Shatter Record Despite Aid*, <http://www.reuters.com/article/2010/01/14/us-usa-housing-foreclosures-idUSTRE60D0LZ20100114> (Jan. 14, 2010) (stating that the number of foreclosures in 2009 surpassed previous records and predicting the same for 2010); Venessa Wong, *Foreclosures: An Increase of 21% in 2009 and Climbing*, http://www.businessweek.com/print/lifestyle/content/jan2010/bw20100113_985068.htm (Jan. 14, 2010) (discussing the increase of foreclosures in 2009 and suggesting that 2010 would not be much better).

ingly unimaginable rate as Americans in general, and Floridians in particular, were unable to meet their mortgage obligations.¹¹² The trial courts, however, were beginning to cast a wary eye on the complaints, questioning, for example, why so many of them contained the so-called lost note count.¹¹³

On February 11, 2010, the Florida Supreme Court decided it was time to step in, releasing *In re Amendments to the Florida Rules of Civil Procedure*.¹¹⁴ Among other things, this opinion called for an amendment to Rule 1.110(b) of the Florida Rules of Civil Procedure “to require verification of mortgage foreclosure complaints involving residential real property.”¹¹⁵ Apparently fed up with the wasting of precious judicial resources by foreclosing plaintiffs, the Supreme Court now requires parties to verify, under penalty of perjury, that the information contained in the complaint was true and correct to the best of their knowledge and belief.¹¹⁶

The foreclosure defense community hailed the verification rule as a game-changer and something that would level the otherwise uneven playing field.¹¹⁷ Unfortunately, the rule went

112. See generally Mark Puente, *Florida Ranks Second in Number of Foreclosures for 2010*, St. Petersburg Times (Jan. 13, 2011) (available at <http://www.tampabay.com/news/business/banking/florida-ranks-second-in-number-of-foreclosures-for-2010/1145229>) (indicating that a record 2.9 million properties throughout the U.S. were marked for foreclosure in 2010, and Florida had the second most foreclosure filings in the country).

113. See e.g. *M&T Bank v. Smith*, 17 Fla. L. Wkly. Supp. 656a, 656a–657a (Fla. 7th Cir. June 10, 2010) (finding the plaintiff mortgagor lacked standing because the plaintiff misled the court about the lost note and noting the court was concerned with the authenticity of the documents the plaintiff filed); *Suntrust Mortg., Inc. v. Fullerton*, 16 Fla. L. Wkly. Supp. 1146b, 1146b (Fla. 6th Cir. Oct. 28, 2009) (ordering the plaintiff to amend its complaint and “[a]llege additional ultimate facts, not conclusions of law, that sustain the allegation that it owns and holds the note and mortgage”); *U.S. Bank Nat’l Ass’n v. Rose*, 16 Fla. L. Wkly. Supp. 1044a, 1044a (Fla. 9th Cir. Sept. 14, 2009) (ordering the plaintiff to amend its complaint to show that it owned the mortgage and note).

114. 44 So. 3d 555 (Fla. 2010).

115. *Id.* at 556.

116. *Id.* at 556, 560.

117. See e.g. David M. Goldman, Florida Foreclosure Defense Lawyers Blog, *Florida Supreme Court New Foreclosure Rules Could Help Homeowners*, <http://www.floridaforeclosuredefenselawyersblog.com/2010/06/florida-supreme-court-new-foreclosure-rules-could-help-homeowners.html> (June 19, 2010, 1:50 p.m. ET) (describing the verification rule and discussing how it will help homeowners facing foreclosure); Matt Weidner, *Fighting with the American People, Part I-New Rules on Residential Foreclosures Published by the Florida Supreme Court Today*, <http://mattweidnerlaw.com/blog/2010/02/part-i-new-rules-on-residential-foreclosures-published-by-the-florida-supreme-court-today/> (Feb. 12, 2010) (suggesting that the verification rule “provides hope that justice and the law of order may actually prevail”).

largely ignored by foreclosing plaintiffs during the first six months of the year, and more than two years after the rule was enacted, the plaintiffs were still ignoring it and finding ways to dodge the rule's requirements.¹¹⁸ Even as late as February 2012, the foreclosing plaintiffs' law firms were arguing in appellate court cases that they could not comply with the "new" rule enacted by the Florida Supreme Court—the plaintiffs in foreclosure cases could not in fact comply with the simple requirement to verify their own complaints.¹¹⁹ It is largely unclear what, if any, "incentive" the verification rule has provided to foreclosing plaintiffs and further unclear whether any plaintiff ever suffered any consequence for violating the rule's requirements.

B. The Second District Returns: *BAC Funding* and *Verizzo*

One day after the verification rule was passed, the Second District Court of Appeal, in *BAC Funding Consortium Inc. v. Jean-Jacques* overturned a summary judgment entered in favor of a foreclosing plaintiff because:

U.S. Bank was required to establish, through admissible evidence, that it held the note and mortgage and so had standing to foreclose the mortgage The incomplete, unsigned, and unauthenticated assignment attached as an exhibit to U.S. Bank's response to BAC's motion to dismiss did not constitute admissible evidence establishing U.S. Bank's standing to foreclose.¹²⁰

Like the *Azize* decision, *BAC Funding* appears inconsistent with its approach to standing because it discusses extensively the concept of merely "holding" the note and mortgage (and gives apparent affirmation to *Troupe* and *Philogene*) but concludes that

118. See e.g. *Deutsche Bank Nat'l Trust Co. v. Decker*, 18 Fla. L. Wkly. Supp. 60, 60b, 61b (Fla. 6th Cir. Oct. 21, 2010) (finding that the plaintiff's amended complaint does not relate back to the initial filing date, and, accordingly, the new verification rule does apply to plaintiff's amended complaint); *Chase Home Fin. v. Fong*, 18 Fla. L. Wkly. 189a–189b (Fla. 13th Cir. Oct. 14, 2010) (ordering plaintiff to amend its complaint to comply with the verification requirement as set forth in Fla. R. Civ. Pro. 1.110(b)).

119. *Pino v. Bank of New York Mellon*, 57 So. 3d 950, 959 (Fla. 4th Dist. App. 2011) (Polen, J., dissenting).

120. *BAC Funding Consortium, Inc. v. Jean-Jacques*, 28 So. 3d 936, 939 (Fla. 2d Dist. App. 2010).

“because U.S. Bank failed to establish its status as legal owner . . . of the note and mortgage, the trial court acted prematurely in entering final summary judgment of foreclosure in favor of U.S. Bank.”¹²¹ Despite these inconsistencies (or perhaps interchangeably using “holder” for “owner”), *BAC Funding* must be lauded for the following guideline:

[G]iven the vastly increased number of foreclosure filings in Florida’s courts over the past two years, which volume has taxed both litigants and the judicial system and increased the risk of paperwork errors, it is especially important that trial courts abide by the proper standards and apply the proper burdens of proof when considering a summary judgment motion in a foreclosure proceeding.¹²²

The Second District followed up on this opinion with another reversal of summary judgment in favor of a foreclosing plaintiff less than one month later in *Verizzo v. Bank of New York*.¹²³ There, the court reversed summary judgment on the procedural ground that not all summary judgment evidence had been filed with the trial court twenty days before the hearing on the motion, and on the substantive ground that “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.”¹²⁴ From a literal reading of *Verizzo*, it appears that the Second District was requiring not only that Bank of New York show that it held the note and mortgage, but also that it owned the same before being entitled to foreclose.

C. *Riggs* and the Rehearing

Following *BAC Funding* and *Verizzo* was another appellate opinion that required strict adherence with existing rules of procedure and substantive law, at least at the onset. Initially decided on April 21, 2010, *Riggs v. Aurora Loan Services, LLC*¹²⁵ involved

121. *Id.*

122. *Id.*

123. 28 So. 3d 976 (Fla. 2d Dist. App. 2010).

124. *Id.* at 978.

125. 2010 WL 1561873 (Fla. 4th Dist. App. 2010), *superseded*, 36 So. 3d 932 (Fla. 4th Dist. App. 2010).

a pro se litigant, Jerry Riggs, and Aurora Loan Services, which claimed to be the “owner and holder” of an underlying promissory note that contained an endorsement in blank.¹²⁶ Over Riggs’ objection that Aurora did not own and hold the note, the trial court granted summary judgment in favor of the plaintiff.¹²⁷

Initially finding that “the endorsement in blank is unsigned and unauthenticated, creating a genuine issue of material fact as to whether Aurora is the lawful owner and holder of the note and/or mortgage,” the Fourth District reversed and remanded for further proceedings;¹²⁸ however, this did not end the inquiry.

Aurora sought and was granted a motion for rehearing, and upon this motion, the Fourth District withdrew its April 21, 2010 opinion and entered a far different one.¹²⁹ In the “revised” opinion, the court provided that “Aurora’s possession of the original note, endorsed in blank, was sufficient under Florida’s Uniform Commercial Code to establish that [Aurora] was the lawful holder of the note, entitled to enforce its terms.”¹³⁰ The Fourth District thereafter affirmed the trial court’s decision.¹³¹ What is almost lost in the opinion is one sentence, which appears to contradict the entire first decision, located in the third paragraph of the revised opinion: “The note had an endorsement in blank with the hand printed signature of Humberto Alday, an agent of the endorser, First Mangus.”¹³² This sentence completely repudiates the finding in the original decision that the endorsement was not signed.

Missing from the decision is exactly when Alday’s signature appeared on the note. Did it appear at some time between the motion for rehearing and the original oral argument before the appellate court? Was it properly before the trial court when that court granted summary judgment in favor of Aurora? Curiously, the “signature” that was attached to Aurora’s motion for rehearing is not actually a “signature” but a block letter spelling of Alday’s name. Thus, *Riggs* is a prime example of how the trial

126. 36 So. 3d at 933.

127. *Id.*

128. *Riggs v. Aurora Loan Servs., LLC*, 35 Fla. L. Wkly. D879a (Fla. 4th Dist. App. Apr. 21, 2010), *superseded*, 36 So. 3d 932.

129. 36 So. 3d 932.

130. *Id.* at 932.

131. *Id.* at 934.

132. *Id.* at 933.

court chaos, caused by the massive backlog of foreclosure cases, spilled over into the appellate courts.

The world will probably never know the details surrounding the mysterious Alday endorsement and why the essential element of that now-reported case was so confusing. But, the case illustrates how hundreds of millions of dollars in mortgage notes were transferred in courts all across this state based on nothing more than squiggles, lines, block signatures, and other undated, unauthenticated, and questionable endorsements that most often provide no evidence of true ownership but merely purport to convert these notes to bearer obligations, despite the fact that it is unlikely the obligations should be treated as negotiable instruments under the Uniform Commercial Code at all.

D. *Carapezza* Resurrected? *Lizio v. McCullom*¹³³

Carapezza, the 1962 case holding that questions regarding ownership of the debt precluded the entry of summary judgment, appeared to be revived in *Lizio v. McCullom*.¹³⁴ In *Lizio*, the Fourth District favorably quoted *Philogene* and *Verizzo* to stand for the proposition that “[t]he party seeking foreclosure must present evidence that it owns and holds the note and mortgage in question in order to proceed with a foreclosure action.”¹³⁵ The court thus “[found] that the production of the original note, mortgage, and assignment did constitute prima facie evidence of ownership.”¹³⁶ It appears from *Lizio* that the pendulum regarding standing in foreclosure actions had swung back to a joint showing of both owning and holding the debt.

E. The Other Problem with MERS: *Taylor v. Deutsche Bank National Trust Co., Etc.*¹³⁷

The summer of 2010 also saw the reemergence of MERS, but this time in a different context than in *Azize* and *Revoredo*. In *Taylor v. Deutsche Bank National Trust Co., Etc.*,¹³⁸ Taylor exe-

133. 36 So. 3d 927 (Fla. 4th Dist. App. 2010).

134. *Id.*

135. *Id.* at 929.

136. *Id.* at 928.

137. 44 So. 3d 618 (Fla. 5th Dist. App. 2010).

138. *Id.*

cuted and delivered a note and mortgage to First Franklin.¹³⁹ Thereafter, Deutsche Bank sued Taylor for foreclosure and produced the original note made out to First Franklin, but which contained no endorsement, either in blank or specifically to Deutsche Bank.¹⁴⁰ The Fifth District noted that while the mortgage listed MERS as the nominee to First Franklin, MERS is not listed anywhere in the note.¹⁴¹ After a discussion regarding Florida Statutes Section 673.3011, the Fifth District held:

[A]s a nonholder in possession of the instrument who had the rights of a holder, MERS assigned to Deutsche Bank its explicit power, granted by the mortgage, to enforce the note by foreclosing the mortgage on the subject property. We conclude, accordingly, that the written assignment of the note and mortgage from MERS to Deutsche Bank properly transferred the note and mortgage to Deutsche Bank.¹⁴²

What is perhaps most shocking about the *Taylor* case is that the Fifth District's conclusion that MERS was a nonholder of the note and therefore could transfer this status to Deutsche Bank does not appear to be supported by the facts of the case. As stated in the Official Comment of the Uniform Commercial Code (UCC) Section 3-301, "[a] nonholder in possession of an instrument includes a person that acquired rights of a holder by subrogation or under Section 3-203(a)."¹⁴³ UCC Section 3-203(a) refers to the "transfer" of an instrument.¹⁴⁴ Florida Statutes Section 673.2031(1) provides that a negotiable "instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument."¹⁴⁵

Additionally, Section 673.2031(2) provides that the "[t]ransfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the

139. *Id.* at 620.

140. *Id.* at 620–621.

141. *Id.* at 620.

142. *Id.* at 623.

143. U.C.C. § 3-301 (West 2011).

144. U.C.C. § 3-203 (West 2011).

145. Fla. Stat. § 673.2031(1) (2011).

instrument.”¹⁴⁶ This is commonly referred to as the “shelter rule.”¹⁴⁷ Therefore, if the transferee is not the holder because the transferor did not endorse the instrument, the transferee is nevertheless a person entitled to enforce the instrument under Article 3 of the UCC (and, by extension, Florida Statutes Section 673.1101). If the transferor was a holder at the time of the transfer, however, because the transferee’s rights are derivative of the transferor’s rights, the transferor’s rights must be proven.¹⁴⁸ In fact, as Official Comment 2 to the UCC Section 3-203 expressly states,

[because] [t]he instrument, by its terms, is not payable to the transferee . . . the transferee must account for possession of the unendorsed instrument by proving the transaction through which the transferee acquired it. Proof of a transfer to the transferee by a holder is proof that the transferee has acquired the rights of a holder.¹⁴⁹

In *Taylor*, the record was completely devoid of any mention that First Franklin, the note’s original holder, had transferred the note to MERS with the intention of MERS having enforcement power of the note.¹⁵⁰ Indeed the opinion provides that while MERS was the nominee on the mortgage, First Franklin was the lender under the note.¹⁵¹ This epitomizes the MERS problem in a nutshell. The Fifth District combined the terms of the note with the terms of the mortgage to create one “super” document containing all of the terms of the two separate documents. This also conflicted with MERS’ own position stated in the mortgage at bar that it only had a legal interest in the mortgage, but remained silent as to the note.¹⁵² Incredibly, MERS has consistently taken the opinion in litigation nationwide that it did not take any interest in the promissory notes that are secured by the mortgages it

146. *Id.* at § 673.2031(2).

147. *See generally id.* (referring to the statute embodying the rule).

148. *Id.*

149. U.C.C. § 3-203.

150. *Taylor*, 44 So. 3d at 618–623.

151. *Id.* at 620.

152. *See id.* at 620, 622 (providing that “MERS holds only legal title to the interests granted by Borrower in this Security Instrument”).

records and transfers.¹⁵³ How then could MERS transfer the note at issue in the *Taylor* case, especially when this key fact was never argued, never proven at trial, never raised in any trial court pleading or appellate court briefing, and never was even an assertion made by the appellant in the oral arguments before the court? Nevertheless, the Fifth District issued an opinion that ignored those facts and twisted the legal analysis that a mortgage assignment can transfer a note from a party (MERS) that had no interest in the note and was not in possession of the note to another party.¹⁵⁴

F. Enough Is Enough: *South Bay Lakes*

As 2010 drew to a close, the number of foreclosure cases continued to suffocate both the trial court and appellate court dockets. By early 2011, the Second District had apparently become fed up with the trial courts' confusion. In *South Bay Lakes Homeowners Association, Inc. v. Wells Fargo Bank, N.A.*,¹⁵⁵ pursuant to Florida Statutes Section 57.105(1), the Second District reversed and remanded for an award of attorneys' fees pursuant to a prevailing homeowners' association that was granted a summary judgment over a foreclosing plaintiff.¹⁵⁶ South Bay Lakes moved for and was granted summary judgment after Wells Fargo's counsel failed to respond to a request for admissions.¹⁵⁷ Yet, the trial court denied South Bay Lakes' motion for attorneys' fees pursuant to Florida Statutes Section 57.105(1), and South Bay Lakes appealed.¹⁵⁸

After explaining why attorneys' fees were appropriate in this case (because Wells Fargo offered no explanation for its failure to respond to South Bay Lakes' request for admissions), the Second District (as it did in *BAC Funding*) turned an eye to the larger

153. *In re Vargas*, 396 B.R. 511 (Bankr. C.D. Cal. 2008); *Landmark Nat'l Bank v. Kesler*, 216 P.3d 158 (Kan. 2009); *In re Foreclosure Cases*, 521 F. Supp.2d 650 (S.D. Ohio 2007); *In re Walker*, Case No. 10-21656-E-11 (Bankr. E.D. Cal. 2010); *LaSalle Bank v. Lamy*, 824 N.Y.S.2d 769 (N.Y. 2006).

154. *Taylor*, 44 So. 3d at 623 (agreeing with the trial court in finding that Deutsche Bank had standing).

155. 53 So. 3d 1239 (Fla. 2d Dist. App. 2011).

156. *Id.* at 1241.

157. *Id.* at 1240.

158. *Id.*

foreclosure crisis and once again issued a stern warning. The court stated,

At oral argument, the bank's attorney tried to justify this improper filing due to the vast volume of foreclosure cases in the judicial system. While this court is well aware of the volume of these cases, that circumstance is not a matter that relieves the bank and its attorneys of their obligation to file pleadings that are adequately supported by a reasonable investigation prior to suit. If anything, the volume of these cases and the obvious detrimental effect that such volume has upon the legal system should be a factor requiring attorneys who file the actions to engage in a higher degree of professionalism.¹⁵⁹

The court's words regarding professionalism should remain permanently engrained in the minds of every attorney who either prosecutes a foreclosure action or defends one. It is these attorneys' responsibilities, as officers of the court, to ensure that the legal system does not become lost in a large number of cases.¹⁶⁰

G. The Summer of 2011: *Harvey*, *Bouskila*, *Paul*, and *Gee*

Recent foreclosure opinions have further muddied the waters regarding the "owner" and "holder" question and will be briefly examined. The first opinion is *Harvey v. Deutsche Bank National Trust Company*,¹⁶¹ in which the Fourth District simply held that "because the note at issue is payable to AHMSI, and endorsed in blank, and because Deutsche possessed the original note and filed it with the circuit court, its standing may be established from its status as the note holder, regardless of any recorded assignments."¹⁶² As in *Riggs*, the Fourth District did not analyze whether Deutsche Bank was the owner of the note and mortgage. Also *Harvey* is a cautionary tale in the dangers of pro se representation as the facts of *Harvey* include: (1) that a pro se answer was filed but not in the record; and (2) that Deutsche Bank had origi-

159. *Id.* at 1241.

160. *See id.* (indicating that the volume of cases in the court should play a role in requiring attorneys "to engage in a higher degree of professionalism" before filing these actions).

161. 69 So. 3d 300 (Fla. 4th Dist. App. 2011).

162. *Id.* at 304.

nally filed a “lost note” complaint but subsequently filed the original, a material fact that should have precluded summary judgment.¹⁶³

Critical to all these decisions is the fact that while the appellate courts treat the mortgage note as a negotiable instrument as defined by the UCC (a necessary prerequisite to finding its possessor could be a “holder” of that document), no appellate court in Florida has ever analyzed the notes to make a determination as to whether they are in fact “negotiable instruments” as defined by the UCC, and accordingly, whether they are subject to transfer by negotiation at all. In fact, at press time, academics and practicing attorneys are challenging the entire notion that mortgage notes are negotiable at all.

Harvey was followed by *Mazine v. M & I Bank*,¹⁶⁴ which explicitly held that “[t]he party seeking foreclosure must present evidence that it owns and holds the note and mortgage to establish standing to proceed with a foreclosure action.”¹⁶⁵ This is a nod to *Carapezza*, *Verizzo*, and *Lizio*, all of which held that in addition to merely holding the note and mortgage, the foreclosing plaintiff must also own the same.¹⁶⁶ The *Mazine* decision also appears to be in conflict with *Harvey*, which provides that one only need to be the holder of the note in order to foreclose.¹⁶⁷

The Second District was up next, and in an apparent retreat from its decision in *Verizzo*, it held that a foreclosing plaintiff’s “possession of the original note, indorsed in blank, [is] sufficient under Florida’s Uniform Commercial Code to establish that it was the lawful holder of the note, entitled to enforce its terms.”¹⁶⁸ Apparently the Second District will no longer require any evidence of ownership because it definitively said it “need [not] say [anything] further on this issue.”¹⁶⁹ Once again, however, the opinion was devoid of any analysis of the note at issue in the case

163. *Id.* at 301–302.

164. 67 So. 3d 1129 (Fla. 1st Dist. App. 2011).

165. *Id.* at 1131–1132.

166. *Carapezza*, 143 So. 2d at 347; *Verizzo*, 28 So. 3d at 978; *Lizio*, 36 So. 3d at 928–929.

167. *Harvey*, 69 So. 3d at 304.

168. *Paul v. Wells Fargo Bank, N.A.*, 68 So. 3d 979, 981 (Fla. 2d Dist. App. 2011) (quoting *Riggs*, 36 So. 3d at 933).

169. *Id.*

and whether it was in fact a negotiable instrument subject to holder status.

Perhaps the single most inconsistent opinion is the Fifth District's decision in *Gee v. U.S. Bank National Association*,¹⁷⁰ which quotes nearly every single case previously discussed. The opinion starts out citing *BAC Funding* for the proposition that "[t]he proper party with standing to foreclose a note and mortgage is the holder of the note and mortgage or the holder's representative."¹⁷¹ This is consistent with *Harvey* and *Paul*, as well as older cases such as *Philogene*, *Liang*, *Troupe*, and *Rector*, all of which at least appear to provide that ownership of the debt is of no consequence.¹⁷² But, the very next line of the *Gee* opinion provides that "[t]he party seeking foreclosure must present evidence that it owns and holds the note and mortgage in question in order to proceed with a foreclosure action."¹⁷³ Such a position is consistent with *Verizzo*, *Lizio*, *Carapezza*, and *Johns* (to an extent) in that ownership is a requisite to final judgment of foreclosure.¹⁷⁴

Two sentences later, however, the opinion states that "the plaintiff may submit . . . an affidavit of ownership to prove its status as a holder of the note."¹⁷⁵ It now appears that the Fifth District is in fact interchangeably using the words "holder" and "owner"; the court was either ignoring the plain text of Florida Statutes Section 673.3011 that a holder may in fact not be an owner, or the court was espousing the Third District's footnote in *Reveredo* that the terms simply do not matter.¹⁷⁶ The court concludes its standing analysis with a play on *Carapezza* by explaining that "[w]hen Ms. Gee denied that U.S. Bank had an interest in the Mortgage, ownership became an issue that U.S. Bank, as the plaintiff, was required to prove."¹⁷⁷

Thus, *Gee* is a microcosm of the larger problem dealing with standing in foreclosure cases. Does the foreclosing plaintiff have

170. 72 So. 3d 211 (Fla. 5th Dist. App. 2011).

171. *Id.* at 213.

172. *Harvey*, 69 So. 3d at 304; *Paul*, 68 So. 3d at 981; *Philogene*, 948 So. 2d at 46; *Liang*, 184 So. 2d at 900; *Troupe*, 652 So. 2d at 395–396; *Chemical Residential Mortg.*, 742 So. 2d at 300.

173. 72 So. 3d at 213 (quoting *Lizio*, 36 So. 3d at 929).

174. *Verizzo*, 28 So. 3d at 978; *Lizio*, 36 So. 3d at 928–929; *Carapezza*, 143 So. 2d at 347; *Johns*, 184 So. at 144.

175. *Gee*, 72 So. 3d at 213.

176. Fla. Stat. § 673.3011 (2011); *Reveredo*, 955 So. 2d at 34 n. 2.

177. *Gee*, 72 So. 3d at 213.

to prove that it is the owner (or the owner's agent), or is simply being a holder enough to confer standing and real party in interest?

IV. JOHNSON v. HUDLETT: A CASE STUDY IN WHAT'S WRONG WITH FORECLOSURE ACTIONS

The foregoing discussion attempted to provide the technical differences between two words, which have seemingly been used in place of each other. A 2010 case shows just how standing and who the real party in interest is in foreclosure actions may have an effect on litigation going forward.

In *Johnston v. Hudlett*,¹⁷⁸ the Fourth District affirmed a final judgment of foreclosure but took care to mention a practice viewed as troubling.¹⁷⁹ Specifically, the court stated “[w]e are, however, concerned of what appears to be a practice in Broward County of the clerk’s office returning exhibits immediately after the end of a trial, to the attorneys for the parties who introduced such exhibits.”¹⁸⁰ The court was particularly concerned about original mortgages and promissory notes because “they are not merely exhibits but instruments which *must be surrendered* prior to the issuance of a judgment. The judgment takes the place of the promissory note. Surrendering the note is essential so that it cannot thereafter be negotiated.”¹⁸¹

And therein lies the rub. If the purpose of the real-party-in-interest rule, as previously stated, is “to protect a defendant from facing a subsequent similar action . . . and to ensure that any action taken to judgment will have its proper effect as res judicata,” then making sure that the correct party brings the foreclosure action is critical to giving the foreclosure judgment res judicata effect.¹⁸² For instance, some parties from Broward County have already lost their homes in foreclosure, but the notes were thereafter removed and are now floating in the stream of commerce. At any time these defendants could face another action by an entirely different party now claiming holder status of the

178. 32 So. 3d 700 (Fla. 4th Dist. App. 2010).

179. *Id.* at 703, 705.

180. *Id.* at 703.

181. *Id.* at 704. (emphasis in original).

182. *Kumar*, 462 So. 2d at 1183.

note and demanding payment. This will undoubtedly throw the trial courts into further pandemonium and call into question whether the first foreclosing plaintiff actually had the authority to do so in the first place.

A. Other Considerations with Respect to Standing: Are Mortgage Promissory Notes Even Negotiable Instruments at All?

It bears repeating that in all the decades of reported decisions on issues related to the status of owner and holder of plaintiffs in mortgage foreclosure actions, no appellate decision in Florida has provided any analysis of the standard promissory note to determine whether such notes fulfill the exacting technical definitions of a “negotiable instrument” under the UCC. There are three other considerations regarding standing, which shall be touched upon briefly. The first is whether the note is even a negotiable instrument at all. A negotiable instrument, by definition, “[d]oes not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money.”¹⁸³ While the appellate courts have seemingly assumed that all notes are negotiable, an interesting Second District case is *General Motors Acceptance Corp. v. Honest Air Conditioning & Heating*, in which the court determined that a retail installment sales contract was in fact not a negotiable instrument because it contained undertakings or instructions other than the payment of money.¹⁸⁴

A typical mortgage promissory note, like the contract at issue in *GMAC*, contains undertakings and instructions other than the payment of money. These obligations normally include (1) the borrower’s obligation to pay a late charge if the lender has not received payment within fifteen calendar days from the date payment is due; (2) the borrower’s duty to tell the lender, in writing, if the borrower opts to prepay; (3) the lender’s obligation to send any required notices to the borrower under the terms of the subject note by either delivering it or mailing it by first class mail; (4) the borrower’s obligation to waive the right of presentment and notice of dishonor; and (5) the lender’s obligation to give

183. Fla. Stat. § 673.1041(1)(c) (2011).

184. 933 So. 2d 34, 36–37 (Fla. 2d Dist. App. 2006).

the borrower notice of acceleration if any of the subject property is sold.¹⁸⁵ The penultimate effect of the lack of negotiability is that the note cannot be transferred by delivery and endorsement alone, as such a transfer is especially reserved only for those instruments deemed negotiable.¹⁸⁶

Assuming that the note is in fact negotiable, the second consideration is how the negotiable promissory note can transfer, through negotiation alone, the non-negotiable mortgage. As explained above in the discussion regarding *Taylor*, the note and the mortgage are separate documents.¹⁸⁷ In fact, this exact conclusion was reached in *Sims v. New Falls Corporation*, where the Third District concluded

The appellee, New Falls, does not dispute there are two instruments involved in this case. Nor can there be any dispute that while the subject matter of those instruments was the same, namely a \$50,000 loan to Sims, there actually were two entirely separate transactions. On the one hand, there was a mortgage involving real property. On the other hand, there was a promissory note involving money.¹⁸⁸

This analysis is generally lacking in cases such as *Harvey* and *Paul*, which provide that simply holding the note entitles that party to the right to enforce it.¹⁸⁹ While this statement is generally correct, it fails to take into account that it is not the “terms of the note” that allow a plaintiff to foreclose, but the terms of the mortgage. Taking the typical residential mortgage as an example, Section 22 of that document, entitled “Acceleration; Remedies,” is the provision that allows for foreclosure of the security interest.¹⁹⁰ How this provision of a separate, non-negotiable document could

185. Fla. Stat. §§ 673.1061(2)(a), 5031(1)(b), 5041(1)–(2), 6031(1); *C. Home Trust Co. of Elizabeth v. Lippincott*, 392 So. 2d 931, 933 (Fla. 5th Dist. App. 1980) (stating that a creditor only has the right to accelerate payments if he or she sends notice to the debtor).

186. Fla. Stat. § 673.1021 (providing that Article 3 of the UCC only applies to negotiable instruments).

187. *Taylor*, 44 So. 3d at 622.

188. *Sims v. New Falls Corp.*, 37 So. 3d 358, 360 (Fla. 3d Dist. App. 2010).

189. *Harvey*, 69 So. 3d at 303; *Paul*, 68 So. 3d at 981.

190. *Konsulian v. Busey Bank, N.A.*, 61 So. 3d 1283, 1284 (Fla. 2d Dist. App. 2011); Entitle Direct Ins., *Sample Closing Documents*, http://www.entitledirect.com/sample_documents (accessed July 14, 2012).

be transferred by negotiation of a negotiable instrument has never been explored.

Finally, the standing issue gives rise to the collateral issue of who may fulfill certain required pre-suit conditions. Specifically, Section 22 of the mortgage discussed *supra* also contains the requirement that the “Lender” of the mortgage send a certain notice to the “Borrower” before acceleration.¹⁹¹ This notice is a prerequisite to filing a foreclosure action.¹⁹² A dilemma occurs if the plaintiff is different than the “servicer” of the mortgage, or the entity with whom the borrower routinely works, and if the servicer, rather than the plaintiff, sends the requisite notice.¹⁹³ Quite simply, if the servicer sends the notice and states that it will accelerate the mortgage and note if the default is not cured and then a different party actually accelerates, does the servicer’s notice suffice to fulfill the pre-suit condition precedent?

V. THE HIGH COURT’S PUNTS: 770 PPR AND PINO

As previously mentioned, in early 2010, the Florida Supreme Court spoke out against the pervasive and perhaps abusive practices happening in foreclosure actions when it amended Florida Rule of Civil Procedure 1.110(b) to require verification of the foreclosing plaintiff.¹⁹⁴ This gave hope throughout the consumer protection community that the High Court would continue to tackle the foreclosure problem and provide some guidance to practitioners, especially given the “operationally underfunded” nature of Florida courts.¹⁹⁵ While the Court would encounter the foreclosure problem in two separate cases within eighteen months of the passage of the verification rule, each case ended without an opinion—essentially a “punt” by the Court.

191. *Id.*

192. See *Konsulian*, 61 So. 3d at 1284; see e.g. *Rashid v. Newberry Fed. Sav. & Loan Ass’n*, 526 So. 2d 772, 773 (Fla. 3d Dist. App. 1988).

193. David E. Peterson, *Cracking the Mortgage Assignment Shell Game*, 85 Fla. B.J. 9, 14 (Nov. 2011) (stating that an agent for the holder of the promissory note has standing to foreclose).

194. *In re Amends. to the Fla. R. of Civ. P.*, 44 So. 3d at 556.

195. *Crist v. Ervin*, 56 So. 3d 745, 752 (Fla. 2010) (citing *In re Certification of Need for Additional Judges*, 29 So. 3d 1110 (Fla. 2010)).

The first case scheduled before the Court was the Fourth District's decision in *770 PPR, LLC v. TJC Land Trust*.¹⁹⁶ There, the Fourth District held that the National Bank Act preempted national associations from the requirement of Florida Statutes, Section 607.1502(1), which requires foreign corporations to register and obtain a certificate of authority from the Department of State before conducting business in the state.¹⁹⁷ The Florida Supreme Court granted certiorari to determine whether an implicit federal preemption analysis renders Section 607.1502(1) inapplicable to national associations.¹⁹⁸ After hearing oral arguments, however, the Court dismissed the appeal in a two-page per curiam order.¹⁹⁹

Failing to provide any guidance on this critical issue was a blow to the foreclosure defense community, which is often confronted with complaints that are so vague and ambiguous that it is hard to determine who is suing whom. This is particularly troublesome in cases in which the foreclosing plaintiff is either a trustee for, or a party representing, a "securitized trust" or real estate mortgage investment conduit. In these cases, it is often impossible to determine what the entity presenting itself to the court actually is. This is compounded by the plaintiff's failure to plead, within the body of its complaint, any facts regarding its entity status.

The Court's second chance to firmly set some ground rules came in an even more compelling case, *Pino v. Bank of New York*.²⁰⁰ There, the Florida Supreme Court granted review of the following certified question:

Does a trial court have jurisdiction and authority under [Florida] Rule [of Civil Procedure] 1.540(b), or under its inherent authority[,] to grant relief from a voluntary dismissal, where the motion alleges a fraud on the court in the

196. 30 So. 3d 613 (Fla. 4th Dist. App. 2010).

197. *Id.* at 618.

198. *140 Assocs., Ltd. v. Seacoast Nat'l Bank*, 67 So. 3d 1019, 1020 (Fla. 2011).

199. *Id.*

200. *Pino v. Bank of N.Y.*, 58 So. 3d 261 (Fla. 2011) (granting review); *Pino v. Bank of N.Y. Mellon*, 57 So. 3d 950 (Fla. 4th Dist. App. 2011).

proceedings but no affirmative relief on behalf of the plaintiff has been obtained from the court?²⁰¹

While appearing to answer no, the Fourth District Court of Appeal certified this question as one of great public importance, “as many, many mortgage foreclosures appear tainted with suspect documents.”²⁰² After years of what foreclosure defense attorneys had been calling an abuse of process, it appeared that they would finally get their day in court.²⁰³ Nevertheless, the Florida Supreme Court allowed the matter to go away quietly, as the parties entered into a voluntary stipulation to dismiss the appeal.²⁰⁴ While it is the system’s goal to encourage settlements between the parties,²⁰⁵ it was disappointing that the Supreme Court did not weigh in on such an important issue.

VI. THE ROCKET DOCKET, THE ACLU, AND FREEDOM OF SPEECH

Much has been made of the foreclosure “rocket docket,” which was the setting of mass-hearing calendars before non-elected senior judges.²⁰⁶ In 2010, the Florida Legislature appropriated \$9.6 million to hire senior judges and case managers to help the “mortgage foreclosure backlog” of cases.²⁰⁷ In early 2011, however, the Florida Supreme Court stated that “[t]he attendant workload associated with the total volume of foreclosure filings far outweighs current judicial capacity, notwithstanding the additional senior judge and case manager resources provided by the Legislature to assist with this crisis.”²⁰⁸ This language from the High

201. *Bank of N.Y. Mellon*, 57 So. 3d at 955.

202. *Id.* at 954.

203. *Id.*

204. Dkt., *Pino v. Bank of N.Y.*, http://jweb.flcourts.org/pls/docket/ds_docket?p_caseyear=2011&p_casenumbr=697&psCourt=FSC&psSearchType= (Fla. July 25, 2011) (No. SC11-697).

205. *Thompson v. Wal-Mart Stores, Inc.*, 60 So. 3d 440, 443 (Fla. 3d Dist. App. 2011) (quoting *Binger v. King Pest Control*, 401 So. 2d 1310, 1313 (Fla. 1981)) (stating that “[t]he goals of [the] procedural rules [are] ‘to eliminate surprise, to encourage settlement, and to assist in arriving at the truth’”).

206. Tami Luhby, *Florida Pulls Plug on Rocket-Docket Foreclosure Courts*, http://money.cnn.com/2011/05/24/news/economy/florida_foreclosure/index.htm (May 25, 2011).

207. Beth C. Schwartz, *Legislative Update: State Courts Budget & Changes in Benefits*, Full Court Press (newsltr. of the St. Cts. Sys. of Fla.) 2 (Summer 2010).

208. *In re: Certification of Need for Additional Judges*, 60 So. 3d 955, 956 (Fla. 2011).

Court begs the question of whether the taxpayer money set aside for senior judges was money well spent.

The senior judge regime also made news in 2010 regarding allegations of due process violations.²⁰⁹ This culminated with the American Civil Liberties Union (ACLU) filing a writ of prohibition in the Second District Court of Appeal alleging that the senior judges of Lee County had denied foreclosure defendant, George Merrigan, procedural and substantive due process.²¹⁰ The ACLU's fifty-page writ was accompanied by a 432-page appendix, which claimed to support its argument that the Lee County senior-judge system was unconstitutionally unjust,²¹¹ however, on June 24, 2011, the Second District summarily denied the ACLU's writ of prohibition and failed to respond in any way to the substantive issues raised by the writ.²¹²

On June 29, 2011, the ACLU of Florida was defeated again when the Second District decided *Forrest v. Citi Residential Lending*.²¹³ A prominent foreclosure defense attorney had taken video depositions of notorious "robo-signers" and posted the depositions on YouTube.²¹⁴ Attorneys for these witnesses, who were not parties to the underlying litigation, applied for and obtained an ex parte injunction that required the posters to remove the depositions from YouTube.²¹⁵ The appellants argued that the injunction amounted to "an unconstitutional prior restraint on their [protected First Amendment] speech," but the Second District found that it was not.²¹⁶

209. ACLU, *ACLU Seeks Public Records to Determine Constitutionality of Foreclosure Proceedings in Florida*, <http://www.aclu.org/racial-justice/aclu-seeks-public-records-determine-constitutionality-foreclosure-proceedings-florida> (Oct. 19, 2010) (stating that the Florida special foreclosure courts staffed by retired judges may be taking shortcuts that may violate homeowners' due process rights).

210. Pet. for Writ of Cert. or Writ of Prohibition, *Merrigan v. Bank of N.Y. Mellon*, https://www.aclu.org/files/assets/florida_foreclosure_20110407_0.pdf at 7, 35, 47–48 (Fla. 2d Dist. App. Apr. 6, 2011) (No. 2D11-1728).

211. *Id.* at 8; Appx., *Merrigan v. Bank of N.Y. Mellon*, https://www.aclu.org/files/pdfs/racialjustice/merrigan_appendix_20110407.pdf (Fla. 2d Dist. App. Apr. 6, 2011) (No. 2D11-1728).

212. ACLU, *ACLU Calls for Immediate Reform of High-Speed Florida Foreclosure Courts*, <http://www.aclu.org/racial-justice/aclu-calls-immediate-reform-high-speed-florida-foreclosure-courts> (June 27, 2011).

213. 73 So. 3d 269 (Fla. 2d Dist. App. 2011).

214. *Id.* at 272–273.

215. *Id.* at 274.

216. *Id.* at 275.

An interesting aside in the senior-judge discussion is whether the regime, which appeared to constitute a de facto permanent division, was in fact constitutional.²¹⁷ While the Florida Constitution and the Florida Rules of Judicial Administration grant the Chief Justice of the Florida Supreme Court administrative authority over the court system and the ability to delegate this authority to the chief judges of the circuits, there are certain guidelines regarding senior judge work.²¹⁸ Specifically, the assignments of senior judges must be “temporary” to be constitutional.²¹⁹ As the Florida Supreme Court explained in *Crusoe v. Rowls*,

“Temporary” is an antonym for “permanent.” It is a comparative term. It can be said that if a duty is not permanent it is temporary. If a county judge is assigned to perform solely circuit court work, the assignment must be for a relatively short time for it to be temporary. If a county judge is assigned to spend a portion of his time performing circuit work, the assignment can be longer, but the assignment cannot usurp, supplant, or effectively deprive [the] circuit court jurisdiction of a particular type of case on a permanent basis.²²⁰

Moreover, in determining whether an assignment is permanent or temporary in nature, the Florida Supreme Court will look not only at the assignment’s duration, but also at “the type of case covered by the assignment, and the practical effect of the assignment on the Court’s jurisdiction over a particular type of case.”²²¹

Before July 2011, foreclosure defense attorneys were prepared to file a writ of prohibition in the Florida Supreme Court arguing that the senior judge rocket-docket system had begun to constitute a permanent division of non-elected senior judges based upon the duration of the assignment, the fact that it only

217. See generally *Crusoe v. Rowls*, 472 So. 2d 1163, 1165 (Fla. 1985) (holding that the assignment of county court judges to temporarily serve in circuit court was permissible under the Florida Constitution even though the assignment lasted two and a half years).

218. Fla. Const. art. V, § 2(b); Fla. R. Jud. Admin. 2.205(a)(2)(B)(i)–(iii), (a)(3)(A), (a)(4)(C).

219. Fla. Const. art. V, § 2(b).

220. 472 So. 2d at 1165 (footnotes omitted).

221. *Phys. Healthcare Plans v. Pfeifler*, 846 So. 2d 1129, 1134 (Fla. 2003) (citing *Wild v. Dozier*, 672 So. 2d 16, 19 (Fla. 1996)).

covered one type of case, and the practical effect that the assignment had over the circuit court's jurisdiction over foreclosure actions.²²² As it appears that the rocket docket has been shelved for now, these plans have been put on hold.

VII. A WORD REGARDING ROBO-SIGNING

No foreclosure survey article would be complete without at least some mention of "robo-signing," a word that has entered the common lexicon based upon its pervasiveness in foreclosure actions.²²³ Robo-signing is the process through which various documents, including affidavits, assignments, and possibly verifications of foreclosure complaints, are mass-signed by agents of foreclosing plaintiffs.²²⁴ The issue first came to light in *GMAC Mortgage, LLC v. Visicaro*.²²⁵ There, Pinellas County Judge Anthony Rondolino, after carefully considering a targeted motion for rehearing, granted the motion and vacated a summary judgment order previously entered on behalf of a foreclosing plaintiff.²²⁶ Judge Rondolino based his decision on foreclosure defense attorney Michael Wasylik's argument that the affidavit filed in support of the plaintiff's motion for summary judgment

222. *E.g.* Pet. For Writ of Cert. or Writ of Prohibition, *Merrigan v. Bank of N.Y. Mellon*, <http://www.acluf.org/pdfs/2011-04-MerriganPetition.pdf> (Fla. 2d Dist. App. Apr. 6, 2011) (No. 09-CA-055758).

223. *E.g.* David Streitfeld, *JPMorgan Suspending Foreclosures*, http://www.nytimes.com/2010/09/30/business/30mortgage.html?_r=1&src=mv (Sept. 29, 2010) (announcing that JPMorgan Chase was suspending 56,000 foreclosure actions because of allegations of robo-signing).

224. *Id.*; see also Michelle Conlin, *Banks' Foreclosure "Robo-Signers" Were Hair Stylists, Teens, Walmart Workers: Lawsuit*, http://www.huffingtonpost.com/2010/10/13/meet-banks-robosigners-fo_n_761698.html (updated May 25, 2011) (discussing depositions of alleged robo-signers in Florida foreclosure lawsuits and also discussing depositions of alleged robo-signers in Florida foreclosure lawsuits in which affiants testified they did not understand the terms "mortgage," "affidavit," or "personal property").

225. See Transcr., *GMAC Mortg. v. Visicaro*, <http://livinglies.files.wordpress.com/2010/06/vesicaro-transcript.pdf> at 5:11-7:14 (Fla. 6th Cir. Apr. 7, 2010) (No. 07013084CI) [hereinafter *Visicaro* Transcript] (discussing recent events in foreclosure cases that have caused Judge Rondolino to lose confidence in the validity of documents filed with the court).

226. Or. Granting Mot. Rehearing and Setting Aside Foreclosure Judm., *GMAC Mortgage v. Visicaro*, http://livinglies.files.wordpress.com/2010/04/5035scan4838_000-vesicaro-briefs.pdf (Fla. 6th Cir. Apr. 15, 2010) (No. 07013084CI) [hereinafter *Visicaro* Order]; *Visicaro* Transcript, *supra* n. 225, at 4:25-5:4; Homeowners' Mot. for Rehearing of Pl.'s Mot. for S.J., *GMAC Mortg. v. Visicaro*, http://livinglies.files.wordpress.com/2010/04/5035scan4838_000-vesicaro-briefs.pdf at 5, 12-13 (Fla. 6th Cir. Jan. 28, 2010) (No. 07013084CI).

constituted inadmissible hearsay as there was no way the affiant had any personal knowledge of the facts stated therein.²²⁷

In November 2011, the Fourth District endorsed Judge Rondolino's conclusion.²²⁸ In *Glarum v. LaSalle Bank National Association*,²²⁹ a case argued by the esteemed foreclosure defense firm Ice Legal, P.A., the court reversed a summary judgment previously granted to a plaintiff in a foreclosure lawsuit because the affiant of purported business records "did not know who, how, or when the data entries were made into [the] computer system."²³⁰ The court concluded that despite the affiant's knowledge of how the company's computer system works, the affiant

could state that the data in the affidavit was accurate only insofar as it replicated the numbers derived from the company's computer system. [He] had no knowledge of how his own company's data was produced, and he was not competent to authenticate that data. Accordingly, [the affiant's] statements could not be admitted under section 90.803(6)(a), and the affidavit of indebtedness constituted inadmissible hearsay.²³¹

Glarum is therefore a victory for foreclosure defense in particular and for civil litigation in general. It stands for the proposition that despite the crisis and its far-reaching effects, the rule of law must be respected.²³²

VIII. CONCLUSION

This Article surveyed how the crisis hitting Florida courts has affected foreclosure actions. It examined the wide-range of diverging appellate opinions about standing and real party in interest, discussed the Florida Supreme Court's response to the crisis, and then finished with a piece regarding the rocket docket and robo-signing.

227. *Visicaro* Order, *supra* n. 226 (finding that plaintiff's affidavit was inadmissible hearsay); *Visicaro* Transcript, *supra* n. 225, at 3:17–22, 20:8–23:7.

228. *Glarum v. LaSalle Bank N.A.*, 83 So. 3d 780 (Fla. 4th Dist. App. 2011).

229. *Id.*

230. *Id.* at 782.

231. *Id.* at 783.

232. *Id.* at 780–784.