



LARRY COLLETON  
PRESIDENT

KENT R. SPUHLER  
DIRECTOR

April 24, 2009

The Honorable Jennifer Bailey  
Circuit Court Judge, Eleventh Judicial Circuit  
Chair, Supreme Court of Florida Task Force on Residential Mortgage Foreclosure Cases  
73 W. Flagler Street, Room 1307  
Miami, Florida 33130

Sent via e-mail to: DRCmail@flcourts.org

Dear Judge Bailey:

The Housing Umbrella Group and the Consumer Umbrella Group of Florida Legal Services, Inc. is writing in response to the April 1, 2009 *Florida Bar News* article. In the article you request comments for the Supreme Court appointed Task Force on lawyers' experiences in handling foreclosure cases and any suggestions for uniform procedures to deal with foreclosures.

The Housing and Consumer Umbrella Groups are comprised of legal services and legal aid attorneys throughout the state of Florida whose practice includes housing and consumer related issues. Approximately 200 attorneys participate in these groups. Because of the overwhelming volume of foreclosure cases our legal services attorneys are defending, we created a Housing Preservation Taskforce to address issues specific to the Florida foreclosure crisis. Our comments are drawn from our attorneys' experiences and expertise in handling these cases.

## **I. Disturbing Trends in Foreclosure Cases**

The issues we are seeing most in our foreclosure cases fall into two general categories: 1) the nationwide trend of plaintiffs/servicers being unable to substantiate their claim they own and hold the note; 2) the complexity of defenses in foreclosure cases and the loss of these defenses for pro se litigants. We address each of these issues separately and discuss concerns with mediation as it relates to these issues.

### **1. a. Problem: Plaintiffs' failure to substantiate they own and hold the note**

The majority of mortgages are not held by the original lender and a large percentage of these loans have been bundled and sold as securities now owned by trusts. It is often



difficult, as the homeowner's attorney, to determine who owns the note and mortgage. We have seen foreclosures based upon assignments manufactured well after the time of purported transfer, assignments created by attorneys and members of their staff claiming to be employees of their clients' predecessor in interest and assignments originating from third-party foreclosure support organizations. All of these assignments are created by entities other than the actual note and mortgage holder. It is not unusual to find two different plaintiffs filing a foreclosure lawsuit based upon the same mortgage.

The integrity of the judicial and mediation process will be undermined if the plaintiff is not required to prove it is the real party in interest and has standing to bring the lawsuit prior to mediation. Florida rules and case law require that the "real party in interest" file and prosecute the lawsuit<sup>1</sup> and require all notes and documents upon which the claim may be brought to be attached to the complaint.<sup>2</sup> A plaintiff may not merely attach the original note and mortgage to establish standing when these documents conflict with the ownership allegations.<sup>3</sup> Most foreclosures are filed with a lost note claim because the plaintiff can not even produce the note.

b. Solution: Requiring copies and ownership of note and mortgage

Cases should not be routinely sent to mediation without copies of the note and mortgage and proof through assignments that the plaintiff owns and holds the note and mortgage. It is our strong recommendation that plaintiffs should be required to produce documentation and information to substantiate the mediation is between the right parties and that all options are explored. Unless otherwise stated, the onus to provide information will fall solely on the borrower who will be required to provide financial information with no corresponding requirement upon the plaintiff/servicer.

c. Current orders: How issue is addressed

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<sup>1</sup> See *In re: Shelter Development Group, Inc.*, 50 B.R. 588 (Bankr.S.D.Fla. 1985), [a foreclosure cannot be prosecuted to foreclose a mortgage which secures the payment of a promissory note unless the Plaintiff actually holds the original note, citing *Downing v. First National Bank of Lake City*, 81 So.2d 486 (Fla. 1955)], See *also* 37 Fla. Jur. Mortgages and Deeds of Trust §240 (One who does not have the ownership, possession, or the right to possession of the mortgage and the obligation secured by it, may not foreclose the mortgage)

<sup>2</sup> *Fla.R.Civ.P.* Rule 1.130(a) requires a Plaintiff to attach copies of all bonds, notes, bills of exchange, contracts, accounts, or documents upon which action may be brought to its complaint.

<sup>3</sup> *Greenwald v. Triple D Properties, Inc.*, 424 So. 2d 185, 187 (Fla. 4th DCA 1983), *Pepper & Associates, Inc. v. Lasseter*, 247 So.2d 736 (Fla.3rd DCA 1971), *Kent Electric Company v. Jacksonville Electric Authority*; 395 So.2d 277 (Fla. 1<sup>st</sup> DCA 1981).



We have attached a summary of current administrative orders that has been compiled by Florida Legal Services, Inc., based on orders collected throughout the state by our member attorneys. Our review of these orders finds that the Managed Mediation program in the 1st, 11th and 19th Circuits require "the plaintiff must file with the complaint a copy of the promissory note and mortgage for the property and any pooling and servicing agreements with investors in the property...." See Form "A" of each circuit's order. The Honorable Michael Overstreet, 14th Circuit, Bay County, requires that the original note and mortgage be attached for cases in his court. The Honorable David Krathen, 17th Circuit, Broward County, requires a notarized form verifying that the original note is filed or that a lost note affidavit is included and has been executed by an officer of the institution who has authority to bind the plaintiff. The existence of these requirements is ample support that this is a prevalent issue throughout the state and should be addressed in any statewide process suggested by the Supreme Court Taskforce.

2. a. Problem: Loss of defenses in mediation

The second category of concerns arises from the nature of the defenses generally brought in mortgage foreclosure cases. Generally these defenses fall into two main groups: defenses relating to issues arising out of origination of the loan; and defenses arising out of the servicing (or collection) of the loan. We understand the nature of mediation contemplates both parties will give up something to reach an agreement, however, in a mortgage foreclosure mediation between a *pro se* defendant and a corporate plaintiff the balance of power and knowledge will be greatly skewed. Defendants/homeowners should not be forced into mediation without an opportunity to determine the nature of potential claims and defenses. This would include the ability to identify and determine the legal ramifications of events surrounding the origination of the loan or events which occurred during loan servicing.

An example of the importance of knowledge of origination issues involves violations of the federal Truth in Lending Act. If the defendant/homeowner has TILA claims he/she has the right to rescind the loan. Knowledge of this right can create a great deal of leverage in the mediation.

An example of the importance of the second set of issues relates to pre-foreclosure debt servicing and loss mitigation requirements. Most mortgages require pre-foreclosure "loss mitigation" or loss avoidance efforts prior to foreclosure. It is clear that pre-foreclosure loss mitigation to resolve the delinquency prior to filing the foreclosure lawsuit has not been happening. Homeowners have great difficulty in finding someone with knowledge and authority to meaningful negotiate prior to and after the foreclosure is filed.

b. Solution: Adequate help to homeowner and training for mediators



Several steps will help protect the homeowner in the mediation process. First, plaintiff/servicers must be required to provide adequate information to homeowners so the homeowner can make an informed decision during the mediation process. The most important information for the homeowner is the complete life of loan history – a complete list of all the payments, charges, fees and any other amounts that lead to the balance the plaintiff claims is owed.

Second, defendant/homeowners must have access to legal counsel whenever possible and particularly if any future claims or defenses are waived in the mediation. Otherwise mediation becomes a tool to force a borrower under the threat of losing their home to agree to terms they cannot meet and a bar to future claims.

Finally, mediators need a special certification to understand the issues unique to foreclosure litigation such as the standing, pre-foreclosure default servicing and other procedural and substantive issues inherent in the process.

c. Current Orders: How issue is addressed

Though none of the administrative orders speak to life of loan history, legislation currently before the Florida legislature (SB 1646) creating a pre-foreclosure mediation program does require that a mortgagee participating in the preforeclosure mediation program provide the homeowner a life of loan history. We concur in this important consumer protection requirement.

When armed with an accurate life of loan history, the homeowner is best protected when legal help is available. We recommend the provision found in several of the orders that allows an attorney representing the client in foreclosure mediation to file a notice of appearance that is limited to the mediation only. The limited appearance should terminate at the conclusion of the mediation session or upon the execution of the loan modification by the homeowner. This will insure the pro bono attorney has no obligation beyond the mediation session or the finalization of the mediation agreement. This practice, we believe, would help in encouraging attorneys to accept cases on a pro bono basis.

Combined with the life of loan history and an enhanced opportunity for representation, an adequately trained mediator is crucial to a fair process. The 1st, 11th and 19th Managed Mediation program states that a "certified circuit civil mediator who has been trained in mediating residential mortgage foreclosure actions" will be assigned to mediate cases in those circuits. The other administrative orders providing for mediation do not speak directly to the training of the mediators. The 1st, 11th and 19th Circuits recognize the need for training, but list no specifics on how this training will be provided. We suggest that training similar to that provided to HUD counselors would be a good starting point to explore as a basic training program for foreclosure mediators. HUD counselors participate in an extensive multi-day training. A program similar to this would provide



the opportunity to certify mediators as trained in foreclosure mediation and should be a requirement. This training is imperative particularly if the mediators are not attorneys. To simply state mediators will be trained does not insure adequate training. A nonprofit entity coordinating the mediators and mediation sessions may not be the best entity to be responsible for training the mediators.

## **II. Imposition of Sanctions**

In reviewing the current administrative orders, several provide:

In the event of a breach or failure to perform under an agreement reached by the parties at the mediation, the Court may impose sanctions pursuant to Rule 1.730, *Fla.R.Civ.P.*

This provision concerns us. A successful mediation should result in a meaningful loan modification for the homeowner. The foreclosure action should be dismissed upon the court's approval of the mediation agreement that results in the loan modification. We hope it is not anticipated that the homeowner will be subject to ongoing sanctions during the life of the loan. To remain in jeopardy of immediate foreclosure and the assessment of fees, costs and any other "appropriate" remedy because of a late or missed mortgage payment over the life a 30 or 40 year mortgage is unfair to anyone.

Data indicates that current pre-foreclosure loan modifications overwhelmingly result in default by the homeowner within a year of the loan modification. It is our opinion that this is the result of the failure of the lenders/servicers to engage in meaningful negotiations with homeowners and their failure to enter into loan modifications where the homeowner will be successful. We believe that termination of the mediation agreement upon the execution by both parties of the loan modification will result in the plaintiff/servicer engaging in meaningful negotiations and entering into loan modifications where the homeowner will be successful.

## **III. Terms in specific agreements**

We appreciate the effort of the individual circuits to pro-actively address the foreclosure crisis with creative and thoughtful administrative orders. We hope that if the Supreme Court Task Force recommends a uniform procedure that care is given to the details of the rule. We want to highlight several provisions we feel should be considered in addition to the specific issues addressed above.

The institutional plaintiff/servicer, upon filing the residential foreclosure complaint against homestead property must pay the mediation fee. The defendant/homeowner should be notified of the mediation upon service of the complaint. We do not feel it is appropriate for a non-profit or other entity unrelated to the courts or the process servers to attempt to contact the homeowner prior to service of process, particularly if the non-profit



or other entity advises the court of such failure to contact the homeowner and the court may then enter summary judgment. Subsequent to service, if a non-profit or other entity unrelated to the courts or process servers wants to contact homeowners to encourage participation in mediation, that may be helpful. But there should be no adverse consequences to the homeowner based solely on the non-profit organization's inability to make contact with the homeowner.

Several of the orders mention the HUD counselors and the National Foreclosure Mitigation Counseling Program. These programs provided counselors certified in different aspects related to housing issues, including, but not limited to, services for the homeless, renters assistance, prepurchase counseling, postpurchase counseling, money management, predatory lending, and loss mitigation. These counselors are not attorneys, may not give legal advice, and are limited in the assistance they may offer a homeowner. These counselors, though able to provide a valuable service, should not be used in lieu of an attorney. Their assistance might be most useful in conjunction with an attorney in advising the defendant/homeowner, when possible. A defendant/homeowner should not be required to accept the help of the HUD counselor as a condition to participation in the mediation program.

### **Conclusion**

The members of the Housing Umbrella Group and the Consumer Umbrella Group thank you for the opportunity to provide these comments. We remain available to provide additional information to the Supreme Court Task Force on this important issue. As the representatives of hundreds of homeowners currently in foreclosure we are painfully aware of the problems and concerns in litigating these cases. We commend the volunteers of the Task Force for your efforts.

Sincerely,

Lynn Drysdale, co-chair, Consumer Umbrella Group of Florida Legal Services, Inc.  
Consumer Lending Project Lead Attorney, Jacksonville Area Legal Aid  
126 E. Adams Street  
Jacksonville, FL 32202

Jeffrey Hearne, co-chair, Housing Umbrella Group of Florida Legal Services, Inc.  
Senior Attorney, Housing, Legal Services of Greater Miami, Inc.  
3000 Biscayne Boulevard, Suite 500  
Miami, FL 33137



# FLORIDA LEGAL SERVICES, INC.

2425 TORREYA DRIVE TALLAHASSEE, FL 32303 - PHONE: 850.385.7900 - FAX: 850.385.9998

Shawn Boerhinger, co-chair, Consumer Umbrella Group of Florida Legal Services, Inc.  
Director of Litigation, Legal Aid Service of Broward County, Inc.

491 N. State Road 7  
Plantation, Florida 33317

Deborah Rivera, co-chair, Housing Umbrella Group of Florida Legal Services, Inc.  
Attorney, Three Rivers Legal Services, Inc.

334 NW Lake City Avenue  
Lake City, Florida 32056

Alice Vickers, FLS liaison to the Housing and Consumer Umbrella Groups  
Attorney, Florida Legal Services, Inc.

2425 Torreya Drive  
Tallahassee, FL 32303