IN THE SUPREME COURT OF FLORIDA

CASE NO. 81,765

ALEXDEX CORPORATION, a Florida corporation,

Petitioner,

v.

NACHON ENTERPRISES, INC., a Florida corporation,

Respondent.

On Appeal from the District Court of Appeal,
Third District of Florida
Case No. 92-01456
Circuit Court Case No. 92-3925 CA 27

BRIEF OF AMICUS CURIAE STEWART TITLE GUARANTY CORP., ATTORNEY'S TITLE INSURANCE FUND, FIRST AMERICAN TITLE INSURANCE COMPANY, COMMONWEALTH LAND TITLE INSURANCE CORP., the FLORIDA LAND TITLE ASSOCIATION, OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY and AVATAR PROPERTIES, INC.

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TABLE OF CONTENTS

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TABLE OF AUTHORITIES

Keith, Mack, Lewis, Cohen & Lumpkin

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Other Authorities

PREFACE

STEWART TITLE GUARANTY CORP., ATTORNEY'S TITLE INSURANCE FUND, FIRST AMERICAN TITLE INSURANCE COMPANY, COMMONWEALTH LAND TITLE INSURANCE CORP., OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY, the FLORIDA LAND TITLE ASSOCIATION and AVATAR PROPERTIES, INC. have sought leave to appear in this Court to express their views on an issue of signal importance to those who have any involvement with the transaction of real estate in the State of Florida: which court or courts have subject matter jurisdiction over actions to foreclose consensual or statutory liens under a statute enacted in 1990, enabling county courts to exercise equitable jurisdiction under certain circumstances.

As discussed below, these Amici believe the circuit and county courts have concurrent jurisdiction, as any other interpretation would be productive of confusion and uncertainty among the Amici, and others similarly situated who have already commenced or completed foreclosures, or insured title out of foreclosures subsequent to the enactment of § 34.01(4), Fla. Stat. (1990) on October 1, 1990.

Conventions Used in this Brief

Alexdex Corporation will be referred to as the Petitioner, and Nachon Enterprises as the Respondent. The Amicus Curiae, the Real Property, Probate and Trust Law Section of the Florida Bar will simply be referred to as the Florida Bar and references to its Amended Brief shall be as follows: (Florida Bar Brief at __).

The title insurance companies named above, together with the Florida Land Title Association and Avatar Properties, Inc. will be referred to here collectively as the Amici, unless the context used requires otherwise, in which case a clear abbreviation will be used.

Unless otherwise indicated, all emphasis is the writers'.

STATEMENT OF THE CASE AND FACTS

On September 15, 1993, this Court issued its Order accepting jurisdiction to review Nachon Enterprises, Inc. v. Alexdex Corporation, 615 So. 2d 245 (Fla. 3d DCA 1993) (hereinafter Nachon). Because of the import of the decision to the AMICI, they filed a Motion for Leave to Appear and to File a Brief as Amicus Curiae, which was granted by this Court by Order dated October 6, 1993.

As with the Florida Bar, the Amici are of the opinion that the District Court's decision "has unequivocally cast doubt on the jurisdiction of courts to hear lien foreclosure cases and adversely impacts the stability of land titles coming through foreclosures." Florida Bar Brief at 1. However, the Amici disagree with the Florida Bar's conclusion that the circuit courts of this State have exclusive jurisdiction in foreclosure actions (Florida Bar Brief at 3), because while offering some prospective certainty, the rule advocated by the Florida Bar will have a devastating and unwarranted effect on those foreclosures which have gone to judgment in the county courts. It is only by a rule of concurrent jurisdiction, that the legislative intent can be fully effectuated as this Brief will demonstrate.

The Facts

The facts presented by the Petitioner and Respondent are adopted by reference.

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SUMMARY OF THE ARGUMENT

The circuit and county courts of this State have concurrent equitable jurisdiction to hear and determine lien foreclosures within the jurisdictional limits of the county courts, because any other interpretation runs contrary to established principles of constitutional and statutory construction, is inconsistent with case law from this Court favoring concurrent jurisdiction, and would be productive of much litigation and insecurity which a reasonable construction of the Constitution and statutes can avoid.

The Amici, comprising a group of title insurers transacting title insurance business in the State of Florida, and a lender which owns and forecloses properties which stand as security for debt owed to it (Avatar), are deeply concerned with the adverse impact on the stability of land titles coming through foreclosures by virtue of the District Court's decision in Nachon. Plainly, if a rule of exclusive jurisdiction in the circuit courts as advocated by the Florida Bar is adopted by this Court, foreclosures which have already gone to judgment in the county courts will be rendered void ab initio, engendering years of expensive and time-consuming litigation, as those who presently own such properties endeavor to clear title. It is this Court's duty to search out a reasonable construction of the Constitution and jurisdictional statutes which would avoid this result.

First and foremost, a reasonable interpretation of the Constitution and statutes involved compels the conclusion that the Legislature intended for the circuit and county courts to have

concurrent jurisdiction of foreclosures where the amount in controversy is less than fifteen thousand (15,000.00) dollars. This is so, because § 26.012, Fla. Stat. (1991) vests exclusive jurisdiction in the circuit courts to hear all cases in equity, and actions involving the title and boundaries of real property. In the same vein, the Legislature has seen fit in § 34.01(4) (1990) to grant the judges of the county courts permissive jurisdiction to hear "all matters in equity". Since a clear conflict exists, the latest expression of the legislative will should govern. Moreover, since the Legislature used the word "may" in § 34.01(4) to describe the scope of the county courts' equitable jurisdiction, and as concurrent jurisdiction is the norm rather than the exception, the jurisdiction of the courts involved should be concurrent. In this manner, the plaintiff may select his or her forum in those actions falling within the jurisdictional limits of the county courts.

This interpretation would avoid the untoward results described above, and comports with the language actually chosen by the Legislature to restrict the jurisdiction of the county courts. If section 34.01 is viewed as a whole, the Legislature's choice to restrict the equity jurisdiction of the county courts by reference to the "laws of Florida" appears not to be directed towards § 26.012(2)(g), Fla. Stat. (1991), which gives circuit courts jurisdiction over lawsuits involving both title and boundary disputes. Rather, the Legislature must have intended to refer to

other laws of general application, which vest exclusive jurisdiction in the circuit courts over certain types of claims.

Even if the reference to other laws of Florida contained in § 34.01(4) can be construed so as to encompass the exclusive grant of jurisdiction to the circuit court to hear cases involving title and boundaries of real property, foreclosures do not necessarily fit within that description. A suit to foreclose a mortgage is a quasi in rem proceeding with its principal object being to secure repayment of the underlying debt, and its incidental object being to convert the lien represented by the mortgage by foreclosure and sale of the security for that debt. Certainly, a foreclosure does not involve both the title and boundaries of real property, giving full effect to the conjunctive "and", expressly provided by the statute.

Alternatively, and only if this Court determines that the circuit courts have exclusive jurisdiction to hear lien foreclosures, then this Court must craft appropriate protections to safeguard the validity of judgments arising out of foreclosures which have been prosecuted in the county courts since the effective date of § 34.01(4) Fla. Stat. (1990). Pursuant to Art. V, § 2(b), Fla. Const. (1972), the Chief Judge of this Court has the power to assign any judge who is qualified to so act, to temporary duty as an acting circuit court judge. Rule 2.050(a), Fla. R. Jud. Admin. specifically preserves this power: a power which this Court has previously recognized. This Court should accordingly issue an order signed by the Chief Justice of this Court assigning those

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county court judges who have presided over lien foreclosures to temporary duty as acting circuit court judges, nunc pro tunc to the effective date of § 34.01(4) Fla. Stat. (1990), in those cases which have already gone to judgment.

ARGUMENT

I.

THE CIRCUIT AND COUNTY COURTS OF THE STATE HAVE CONCURRENT EQUITABLE JURISDICTION TO HEAR AND DETERMINE LIEN FORECLOSURES WITHIN THE JURISDICTIONAL LIMITS OF THE COUNTY COURT, BASED UPON APPLICABLE RULES OF CONSTITUTIONAL AND STATUTORY CONSTRUCTION

The Amici believe a proper reconciliation of Article V of the Florida Constitution, and § 34.01(4), Fla. Stat. (1990) and §§ 26.012(2)(c) and (g) Fla. Stat. (1991), viewed through the clarifying imaging of constitutional and statutory construction, requires the conclusion that the circuit and county courts have concurrent jurisdiction over foreclosures where the amount in controversy is less than fifteen thousand dollars.[1] Thus, the Amici necessarily disagree with the Florida Bar and its assertion that the Circuit Court has exclusive jurisdiction over foreclosures, regardless of the amount in controversy. While the Florida Bar avows a concern over the stability of land titles and admits that "[c]ourts should . . . avoid a statutory interpretation 'which would throw the meaning or administration of the law, or the forms of business, into hopeless confusion or uncertainty'", that is precisely what would happen if the Florida Bar's position is adopted by this Court as the Amici explain below. Florida Bar Brief at 10.

In this Brief, the Amici will first discuss the nature of their interests and why placing exclusive jurisdiction in the

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[1] There is no dispute that the circuit courts have exclusive jurisdiction over foreclosures where the amount in controversy exceeds that amount.

Circuit Court would lead to the very result sought to be avoided by the Florida Bar and the Amici. Second, the Amici briefly lay out the appropriate principles of statutory and constitutional construction. Third, the Amici will apply those rules of construction to the relevant statutes, proving that concurrent jurisdiction is the logical and workable end result stemming from that analysis. Last, and as an alternative argument, the Amici will explain how this Court can save most foreclosures which have gone to judgment - perhaps in the wrong court - depending upon this Court's conclusion.

A. Interpreting the Statutes and Constitution to Provide the Circuit Courts With Exclusive Jurisdiction Over Lien Foreclosures Would Throw the Real Estate Business Into Hopeless Confusion or Uncertainty, and Must be Rejected in Favor of Concurrent Jurisdiction Between the Circuit and County Courts.

While the Florida Bar and the Amici are each concerned with the adverse impact on the stability of land titles coming through foreclosures by virtue of the District Court's decision in Nachon, the interpretation advocated by the Florida Bar does not provide a logical or desirable retrospective solution. An interpretation of the Constitution and statutes to provide for exclusive circuit court jurisdiction over lien foreclosures would be productive of much litigation and would throw the title insurance business and those who engage in the purchase, sale, and financing of real property into hopeless confusion and uncertainty. For this reason, the Amici believe that concurrent jurisdiction is the appropriate solution, thereby giving vigor to the legislative intent, while

leaving all statutes with a field of operation separate from each other.

The Problem

The Amici do not disagree with the Florida Bar that a rule of exclusive jurisdiction in the circuit courts prospectively has tremendous appeal. Certainly, such a result would avoid amount in controversy questions, and preserve in the circuit courts their traditional role of having exclusive jurisdiction over lien foreclosures, regardless of the amount in controversy.[2] However, the Florida Bar has studiously ignored what has happened, and is happening every day: the filing, prosecution, and termination of lien foreclosures in the county courts throughout the State.

Effective October 1, 1990, the jurisdiction of the county courts was expanded so as to enable judges of county courts to "hear all matters in equity involved in any case within the jurisdictional amount of the county court". Ch. 90-269 § 1, at 1676, Laws of Fla. As a consequence of this Amendment, the Third District Court of Appeal has already held in two cases that the county court has exclusive jurisdiction of lien foreclosures within the jurisdictional limits of the county court as expanded in § 34.01(1)(c), Fla. Stat. (1990): Nachon and Brooks v. Ocean Village Condominium Association, Inc., 18 Fla. L. Weekly D2211 (Fla. 3d

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[2] The Amici do not view the amount in controversy issue to be the bogeyman portrayed by the Florida Bar. It has long been the rule that jurisdiction is determined by the amount claimed and put into controversy in good faith. Williams v. Gund, 334 So. 2d 314 (Fla. 2d DCA 1976). Thus, the amount claimed to be due under the lien sought to be foreclosed would control.

DCA, Oct. 12, 1993). Indeed, as the Amici pointed out in their Motion for Leave to Appear, the Lee and Collier County Circuit Courts, in Administrative Order Number 1.7, **require** that "all mortgage and lien foreclosure actions filed within the Twentieth Judicial Circuit shall come within the jurisdiction of the County Court if the amount in controversy does not exceed Fifteen Thousand ($15,000.00) Dollars."[3] Thus, it may be presumed that hundreds, if not thousands of lien foreclosures, whether of mortgages, condominium association assessments, mechanic's liens, and other liens are either pending, or have gone to judgment in the past three years in the county courts in this State. It may also be reasonably assumed that some of those foreclosed properties have been sold to third party purchasers, with title insurance companies insuring the interests of the buyer or the mortgagee. Properties may well have changed hands more than once.

The Florida Bar argues that exclusive jurisdiction of all lien foreclosures lies in the circuit courts. If that is so, all judgments entered on lien foreclosures filed in the county court would be absolutely void. As this Court stated in Roberts v. Seaboard Surety Co., 158 Fla. 686, 29 So. 2d 743 (1947), "[w]here judicial tribunals have no jurisdiction of the subject matter on which they assume to act, their proceedings are absolutely void in the strictest sense of the term". Id. at 748; 13 Fla. Jur. 2d

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[3] The Amici have not performed an exhaustive search throughout the sixty-seven counties in Florida, but believe that as a result of the Florida Bar survey, other circuits have issued like orders.

Courts and Judges § 107 (1979). Each and every one of those judgments would be subject to challenge under Fla. R. Civ. P. 1.540(b)(4), subject only to the proviso that "the motion shall be made within a reasonable time". In addition, these judgments could be collaterally attacked in an independent action.

The immediate consequences are apparent. Since the underlying foreclosure judgments would be void, any title transferred to a third party would be defective and unmarketable. A worst case scenario is readily evident. A person purchases vacant land at a foreclosure sale, or buys the property from the successful bidder. The new purchaser builds his or her dream home on the land. Since the underlying judgment would be void, and the title defective, a title pirate could buy the foreclosed owner's interest for a nominal sum, and then hold the title for ransom at the expense of the innocent buyer or the title insurance company which insured the title out of foreclosure.[4]

This is not the stuff of mere speculation, but a harsh reality were the Florida Bar's interpretation of the statutes and Constitution followed by this Court. It is this Court's duty to search out an interpretation which would avoid this precise result.

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[4] Title insurance is usually issued for the purchase price. In the example, the owner would lose the value of the property to the extent it exceeded his purchase price. Even if fully insured at the time of purchase, the owner would lose any increase in value in the months or years before the foreclosed owner or his assignee appeared.

B. A Reasonable interpretation of the Constitution and Statutes Compels the Conclusion that the Legislature Intended the Circuit and County Courts to have Concurrent Jurisdiction of Foreclosures where the Amount in Controversy is Less than Fifteen Thousand Dollars.

Application of principles of constitutional and statutory construction lead inexorably to the conclusion that concurrent jurisdiction between the circuit and county courts over small foreclosures is what was intended by the Legislature when amending Chapter 34. It is only in this fashion that the results described in the preceding section of this Brief can be substantively avoided. By adopting a scheme of concurrent jurisdiction, this Court can preserve to the plaintiff the choice of forum in smaller foreclosures.

The Constitution

The 1968 version of the Florida Constitution vested in the circuit courts "exclusive original jurisdiction in all cases in equity except such equity jurisdiction as may be conferred on juvenile courts . . . [and] all actions involving the titles or boundaries of real estate." Article V, § 6(3), Fla. Const. (1968). In the special election of March 14, 1972, the Constitution was substantially revised and renumbered, including significant changes to the jurisdictional description of the circuit courts. New Art. V, § 5(b), Fla. Const. (1972) provided that "[t]he circuit courts shall have original jurisdiction not vested in the county courts, and jurisdiction of appeals when provided by general law." Accordingly, as opposed to expressly stating the jurisdiction of

the circuit courts in detailed terms, the Amendment of 1972 simply gave the circuit courts "original jurisdiction not vested in the county courts". The precise confines of that jurisdiction was left to the Legislature. Article V, § 6(b), Fla. Const. (1972) gave to the county courts "the jurisdiction prescribed by general law." By the express language of the Constitution, therefore, the circuit courts cannot exercise jurisdiction provided to the county courts by general law, for that is an express constitutional exception to the powers of the circuit court.

The Statutes

Section 26.012 Fla. Stat. (1991) describes the jurisdiction of the circuit courts. Prior to 1974, amongst other things, circuit courts were vested with exclusive original jurisdiction ". . . in all cases in equity . . . [and] all actions involving title, boundaries or rights of possession of real property". In 1974, the Legislature deleted the right of a circuit court to hear actions involving possession of real property, which are now heard by the county court. By virtue of that Amendment, § 26.012(2)(g), Fla. Stat. (1991) now reads "[i]n all actions involving the title and boundaries of real property." The Legislature dropped the disjunctive "or", adding the copulative "and". The circuit court continue to have "exclusive jurisdiction" of all cases in equity. § 26.012(2)(c), Fla. Stat. (1991).

Prior to 1990, the county courts, by general law, were granted original jurisdiction of misdemeanor cases not cognizable by the circuit courts, violations of municipal and county ordinances and,

those actions at law within the jurisdictional limits stated in the statutes. However, the Legislature uniformly excepted those actions at law "within the exclusive jurisdiction of the circuit court". See §§ 34.01(1)(c) 1. and 2., Fla. Stat. (1980). Section 34.01(2), Fla. Stat. (1980) maintained this disclaimer, stating that "[t]he county courts shall have jurisdiction previously exercised by county judges' courts other than that vested in the circuit court by § 26.012 . . .".

The same scheme and language was carried forward to the 1990 amendments. Section 34.01(1)(c) (1990) was amended effective October 1, 1990 to increase the jurisdictional limits of the county courts, but each subsection of that statute limits the types of actions at law cognizable by the county courts to those which do not fall within "the exclusive jurisdiction of the circuit courts". This same limitation does not appear in § 34.01(4). That statute states:

> [The] [j]udges of county courts may hear all matters in equity involved in any case within the jurisdictional amount of the county court, except as otherwise restricted by the State Constitution or the laws of Florida.

Without any doubt, this Amendment creates a conflict, because the Legislature maintained the exclusive jurisdiction of the circuit courts to hear "all cases in equity", while appearing to permit the county courts to exercise like jurisdiction of "all matters in equity" within certain limits. Similarly, a conflict appears between the jurisdiction of circuit courts to hear cases involving title and boundaries of real property, to the extent such

proceedings are equitable in nature. Indeed, pursuant to § 702.01, Fla. Stat. (1987), mortgages must be foreclosed in equity, and lien foreclosures are merely a subset of equitable claims which involve, at least to a degree, title to property (but not necessarily the boundaries). To reconcile this conflict, one must resort to the rules of statutory interpretation.

As a primary matter, there is nothing in the character or nature of jurisdiction to render it inconsistent or exclusive. This Court found in State v. Wiseheart, 245 So. 2d 849 (Fla. 1971), that "jurisdiction is concurrent, not exclusive. The exception is where it is exclusive." Id. at 851, quoting Hays' Administratrix v. McNealy, 16 Fla. 409 (1878). One or more courts may have jurisdiction of the same subject matter, and when the Constitution or a statute in specific terms vests jurisdiction in any tribunal without the qualifying term "exclusive", or words of similar import, the Legislature may in its discretion vest the like jurisdiction in another court or tribunal. Id. at 851; State v. Sullivan, 95 Fla. 191, 116 So. 255 (1928); State v. Beckham, 160 Fla. 810, 36 So. 2d 769 (1948). While constitutional jurisdiction cannot be restricted or taken away, it can be enlarged by the Legislature in all cases where such enlargement does not result in a diminution of the constitutional jurisdiction of some other court, or where such enlargement is not forbidden by the Constitution. South Atlantic S.S. Co. of Delaware v. Tutson, 139 Fla. 405, 190 So. 675 (1939); Harry E. Prettyman, Inc. v. Florida R. E. Comm., 92 Fla. 515, 109 So. 442 (1926).

The difficulty here lies in the grant of original jurisdiction in the circuit court, with the modifying word "exclusive", to hear equity cases and cases involving the title and boundaries of real property. By later enactment, the Legislature seems to grant the county courts, in permissive terms, all equity jurisdiction. That grant is permissive because of the use of the word "may". Brooks v. Anastasia Mosquito Control Dist., 148 So. 2d 64 (Fla. 1st DCA 1963); McDonald v. Roland, 65 So. 2d 12 (Fla. 1953). See generally 49 Fla. Jur. 2d Statutes § 18 (1984). Over a hundred years ago, this Court resolved similar problems in State v. Butt, 25 Fla. 258, 5 So. 597 (1889).

> A mere grant of jurisdiction to one court to try a certain class of criminal offenses, is not a withdrawal from another court of an existing jurisdiction to try the same offenses. An act whose terms purport simply to grant to the circuit court jurisdiction of an offense which such act makes a misdemeanor, will not be held as having been intended to deny to the county criminal courts of record their constitutional jurisdiction of such offense, but should be construed as simply a grant of concurrent jurisdiction to the circuit court.

Id. at 597 (quoting from the syllabus of the Court). Thus, applying the principles of construction applicable to jurisdictional grants, one must conclude that the Legislature intended concurrent jurisdiction over lien foreclosures between the circuit and county courts. In this manner, the aggrieved party may select his or her forum in those actions involving an amount in controversy less than the jurisdictional limit of the county courts. 13 Fla. Jur. 2d Courts and Judges § 111 (1979).

The same conclusion is required under settled general principles of statutory construction, adverted to by the Florida

Bar in its Brief pages 9 and 10. As presently drawn, §§ 34.01(4) and 26.012(2), are "materially lacking in the attributes of good draughtsmanship". State v. Sullivan, 95 Fla. 191, 116 So. 255, 261 (1928). Construction of the statutes is thus required, using the legislative intent as the polestar by which to be guided. Id. at 261; Sunshine State News Company v. State, 121 So. 2d 705, 707 (Fla. 3d DCA 1960); Devin v. City of Hollywood, 351 So. 2d 1022 (Fla. 4th DCA 1976). In interpreting a statute:

> [A] court should be astute in avoiding a construction which may be productive of much litigation and insecurity, or which would throw the meaning or administration of the law, or the forms of business, into hopeless confusion or uncertainty.

49 Fla. Jur. 2d Statutes § 183 (1984); Garcia v. Allstate Insurance Company, 327 So. 2d 784 (Fla. 3d DCA 1976), cert. denied, 345 So. 2d 422 (Fla. 1977). If a statutory change is involved, the Legislature is presumed to have intended some objective. Sunshine State News, supra at 707. The uncertainty should be resolved by an interpretation that best accords with the public benefits. Devin v. City of Hollywood, supra; Rhoades v. Southwest Florida Regional Medical Center, 554 So. 2d 1188 (Fla. 2d DCA 1989).

In Spradley v. Doe, 612 So. 2d 722 (Fla. 1st DCA 1993), the Court resolved the conflict between the pertinent statutes, by determining that § 34.01(4) prevails as the last expression of the legislative will. Id. at 724.[5] City of Jacksonville Beach v.

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[5] Spradley, however, determined that county courts have exclusive jurisdiction: an extreme view, given the fact that jurisdiction is concurrent unless otherwise stated. See cases cited above at pp. 14-15.

Albury, 291 So. 2d 82 (Fla. 1st DCA 1973), cert. denied, 295 So. 2d 297 (Fla. 1974); Floyd v. Bentley, 496 So. 2d 862 (Fla. 2d DCA 1986), rev. denied, 504 So. 2d 767 (Fla. 1987).

The conundrum presented, measured against these statutory maxims, requires that the interpretation favored by the Florida Bar be rejected, and that espoused by the Amici adopted by this Court. First, there is a clear inherent conflict between the statutes, which should be resolved by resort to the rule in Spradley, and the cases cited above. Since the Legislature has seen fit to grant only permissive, rather than exclusive jurisdiction to the county court in cases in equity, the county courts' jurisdiction should be concurrent with the circuit courts under State v. Butt, supra.

Second, holding that the circuit courts have exclusive jurisdiction of foreclosure actions, would result in the Pandora's box of ills described above, with nary Hope left behind. Specifically, the real estate and title industry would be endlessly involved in litigating over the validity of titles derived from liens foreclosed in the county courts, which plainly was neither the legislative intent nor presently in the public interest.

Common sense should prevail here. When the Legislature has chosen to restrict the jurisdiction of the county courts in the past, it has had no difficulty in doing so by the use of the words "except those within the exclusive jurisdiction of the circuit courts." See, e.g. 34.01(1)(c) 1., Fla. Stat. (1990). In the alternative, the Legislature has expressly referred to § 26.012,

which can be seen in § 34.01(2) (1990).[6] These limitations are clear, whereas the reference to the "laws of Florida" contained in § 34.01(4) (1990), is hardly a ringing endorsement of the view that one must necessarily refer to 26.012(2)(g), involving the title and boundaries of real property as an appropriate or required limitation on the county courts' jurisdiction in equitable actions.

The only reasonable, common sense interpretation of the Constitution and statutes compels the conclusion that our Legislature intended for the circuit and county courts to have concurrent jurisdiction of foreclosures where the amount in controversy is less than fifteen thousand (15,000.00) dollars. As this Court has previously found, the later grant by the Legislature of jurisdiction already held by another court should be construed as a grant of concurrent jurisdiction of those foreclosures which are within the amount in controversy limits of the county courts. This construction would avoid litigation and insecurity, and is consistent with the principles of statutory construction discussed above.

C. The Circuit Courts' Exclusive Jurisdiction to Determine Cases Involving the Title and Boundaries of Real Property Does Not Necessarily Confer Exclusive Jurisdiction Over Foreclosure Proceedings.

The Florida Bar's argument may be simply stated. Acknowledging the conflict between §§ 34.01(4) and 26.012, the

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[6] An express statement of concurrent jurisdiction can be found in § 34.011, Fla. Stat. (1991) dealing with landlord-tenant cases, together with clearly stated references to limitations on jurisdiction.

Florida Bar attempts to reconcile that conflict by reference to the exception stated in § 34.01(4): "except as otherwise restricted by . . . the laws of Florida". The Florida Bar then refers back to 26.012(2)(g), as being a law of the State of Florida, which gives the circuit courts exclusive jurisdiction "in all actions involving the title and boundaries of real property." There are several flaws to the Florida Bar's reasoning.

First, § 26.012(2)(g) does not appear to be a "law of the State of Florida" within the contemplation of the Legislature. As discussed above, in setting limitations on the county courts' jurisdiction, the Legislature has historically either used the language "except those within the exclusive jurisdiction of the circuit court", or made specific reference to 26.012. See, e.g. § 34.01(1)(c) 1.; § 34.01(2). It would have been a simple matter for the Legislature to employ the same conventions were it intending to limit the jurisdiction of the county courts in equity actions by reference to § 26.012(2)(g). It chose not to do so.

Second, § 26.012(2)(g) cannot restrict the jurisdictional grant to the county court in § 34.01(4). This is so because Article V, § 5(b) (1972) of the Constitution grants to the circuit courts jurisdiction only over matters "not vested in the county courts". Since § 34.01(4) creates jurisdiction of all equity matters within certain limits in the county courts, the primacy, if any, is in that court.

Third, a foreclosure action, as a function of the power of a particular court to adjudicate a controversy, does not necessarily

involve the title and boundaries of real property. The case law is clear in Florida that a mortgagee does not have an interest in real estate by virtue of its mortgage. As this Court stated in Shavers v. Duval County, 73 So. 2d 684 (Fla. 1954), "a mortgagee does not have an estate or interest in mortgaged lands, by virtue of his mortgage, but is merely the owner of a chose in action creating a lien on the property." Id. at 687. Florida is a lien theory state. United of Florida, Inc. v. Illini Federal Savings & Loan Association, 341 So. 2d 793 (Fla. 2d DCA 1977). Section 697.02, Fla. Stat. (1927) provides that a "mortgage shall be held to be a specific lien on the property therein described, and not a conveyance of the legal title or of the right of possession". See also Boyer Florida Real Estate Transactions, § 32.01; Southern Colonial Mortgage Company, Inc. v. Medeiros, 347 So. 2d 736, 738 (Fla. 4th DCA 1977).

A suit to foreclose a mortgage is most accurately viewed as a quasi in rem proceeding with its principal object being to secure repayment of the underlying debt, and its incidental object being to convert the lien interest by foreclosure and sale of the security for that debt post-judgment. Georgia Casualty Co. v. O'Donnell, 109 Fla. 290, 147 So. 267 (1933). Thus, while a foreclosure may ultimately work a change in title after the entry of judgment, if the owner does not cure the default or redeem prior to sale, this is an incidental result created by the nature of the security taken. Certainly, the vast majority of foreclosures do

not involve the title **and** boundaries of real property, giving full effect to the copulative "and" expressly provided by the statute.[7]

The cases always cited for the proposition that foreclosures involve the title or boundaries of real property are cases dealing with the local action rule. See, e.g. Spector v. Old Town Key West Development, Ltd., 567 So. 2d 1017 (Fla. 3d DCA 1990); Board of Trustees of Internal Improvement Trust Fund v. Mobil Oil Corporation, 455 So. 2d 412 (Fla. 2d DCA 1984), aff'd. in part, quashed in part sub nom. Coastal Petroleum Co. v. American Cyanamid Co., 492 So. 2d 339 (Fla. 1986), cert. denied, Mobil Oil Corporation v. Board of Trustees of Internal Improvement Trust Fund, 479 U.S. 1065 (1987); Royal v. Parado, 462 So. 2d 849 (Fla. 1st DCA 1985); Jutagir v. Marlin, 453 So. 2d 503 (Fla. 3d DCA 1984). However, the local action rule concerns itself with the power of a given court to adjudicate controversies involving land within its territorial limits. While a species of subject matter jurisdiction, it is not the same as the power of a court to adjudicate a particular **type** of action. This distinction was carefully explained in the Mobile case, supra. In a truly local action, involving an in rem proceeding, the court involved has subject matter jurisdiction only if it has the jurisdictional power to adjudicate the class of cases to which the cause belongs, and

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[7] Most cases ignore the actual wording of the statute subsequent to the constitutional and statutory changes in the early 1970's. For example, the court in Kugeares v. Casino, Inc., 372 So. 2d 1132, 1133 (Fla. 2d DCA 1979), refers to § 26.012 as embracing actions which involve the title **or** boundaries of real property. The Florida Bar sins in the same manner. Florida Bar Brief at 13.

the jurisdictional authority over the land which is the subject matter of the controversy. Id. at 415. However, the latter, being jurisdictional power over the land, is far different than a statutory grant of jurisdiction to try a particular class of cases, and the two should not be confused. The Legislature has seen fit to limit the classes of actions to which the circuit court has exclusive jurisdiction, inter alia, to those involving both the title and boundaries of real property. A foreclosure proceeding, while local in nature, is not an action of that type.

II.

ALTERNATIVELY, SHOULD THIS COURT DETERMINE THAT THE CIRCUIT COURTS HAVE EXCLUSIVE, RATHER THAN CONCURRENT JURISDICTION WITH THE COUNTY COURTS OVER LIEN FORECLOSURES, THIS COURT SHOULD DESIGNATE THE COUNTY COURT JUDGES IN THIS STATE AS TEMPORARY ACTING CIRCUIT COURT JUDGES, NUNC PRO TUNC TO THE EFFECTIVE DATE OF § 34.01(4), SO AS TO PRESERVE THE VALIDITY OF FORECLOSURE JUDGMENTS HERETOFORE ENTERED IN THE COUNTY COURTS, AND THE VALIDITY OF TITLE DERIVING FROM THOSE JUDGMENTS

Alternatively, and only if this Court accepts the argument made by the Florida Bar that the circuit courts have exclusive original jurisdiction over lien foreclosures, this Court should enter an Order, executed by the Chief Justice of this Court, assigning the county judges of this State to temporary duty as acting circuit court judges in lien foreclosure cases brought in the county courts, nunc pro tunc to the effective date of § 34.01(4) Fla. Stat. (1990). In this way, this Court can preserve the validity of the numerous lien foreclosures already pursued to judgment in the county courts as mandated by extant Administrative Orders, as well as the marketability of title in the hands of new

owners who may have purchased properties out of foreclosure, or have been the successful bidders at foreclosure sales.

Typically, this Court has the power to determine whether its decisions should be prospective or retroactive in application. 13 Fla. Jur. 2d Courts and Judges § 159 (1979) and cases cited therein. Thus, it would seem an appropriate solution for this Court to determine that a decision finding the circuit courts to have exclusive jurisdiction over lien foreclosures should only operate prospectively. However, that solution does not work here because the confines of jurisdiction - the power to decide a particular type of proceeding - are determined by the Legislature. Were this Court to decide that circuit courts have exclusive jurisdiction over lien foreclosures by virtue of statutory construction, it appears logical that such a construction would have to operate both prospectively and retrospectively, because jurisdiction cannot be created if it never existed in the first place. Therefore, the virtual armageddon described in pages 8 through 10 of this Brief would ensue, unless this Court can fashion a remedy, consistent with its constitutional and statutory authority. Fortunately, there is such a solution.

Article V, § 2(b) of the Constitution (1972) provides:

> The chief justice of the supreme court shall be chosen by a majority of the members of the court. He shall be the chief administrative officer of the judicial system. He shall have the power to assign justices or judges, including consenting retired justices or judges, to temporary duty in any court for which the judge is qualified and to delegate to a chief judge of a judicial circuit the

> power to assign judges for duty in his respective circuit.

Pursuant to the Constitution, the Chief Justice of this Court accordingly has the power to assign judges to temporary duty in any court for which the judge is qualified.

Rule 2.050(a) of the Judicial Administration Rules delegates to the Chief Judges of the circuit courts certain powers which are described in 2.050(b), including the power to assign judges to particular courts and divisions on a temporary basis. However, the Rule specifically reserves in this Court the needed authority:

> Nothing in this rule shall restrict the constitutional powers of the chief justice of the supreme court to make such assignments as the chief justice shall deem appropriate.

Fla. R. Jud. Admin. 2.050(b)(4). And, there is authority for what the Amici here are suggesting. In State Ex Rel. Treadwell v. Hall, 274 So. 2d 537 (Fla. 1973), this Court considered the validity of a temporary assignment by the Chief Judge of the Twelfth Judicial Circuit of a judge of the county court to exercise circuit court jurisdiction over certain matters. In finding the assignment to be valid, this Court stated:

> It is our overall view, from a consideration of § 2, 5, 6, 8 and 20 of revised Article V, that county judges who have been members of the Florida Bar for five years proceeding their assignment to judicial service under § 2(b) of Article V, and who have served in such office upon or after the effective date of the revision, are qualified to be assigned as temporary circuit judges for the performance of any judicial service a circuit judge can perform.

Id. at 539. See, also Crusoe v. Rowls, 472 So. 2d 1163 (Fla. 1985).

This Court accordingly has authority under the Constitution and the implementing Rule to issue an order signed by the Chief Justice of this Court assigning those county court judges who have presided over lien foreclosures to temporary duty as acting circuit court judges, nunc pro tunc to the effective date of § 34.01(4) Fla. Stat. (1990), in such cases as have gone to judgment through the date of this Court's opinion. Cases which are pending, but which have not gone to judgment in the county court can simply be transferred for completion in the circuit court.[8]

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[8] This temporary assignment would not be effective as to those county court judges who would not qualify for assignment to the circuit court bench. The Amici believe that the number of such judges who have also entered final judgments on lien foreclosures would necessarily be limited.

CONCLUSION

The Amici respectfully request that this Court determine that the circuit and county courts have concurrent jurisdiction over lien foreclosures within the jurisdictional limits of the county courts, because that sensible result is required by the language of the Florida Constitution, and the statutes which describe the parameters of the jurisdiction to be exercised by those courts.

Alternatively, this Court should enter an order signed by the Chief Justice of this Court appointing those judges who have presided over lien foreclosures filed in the county courts, which have gone to judgment prior to the date of this Court's opinion in this case, as acting circuit court judges nunc pro tunc to the effective date of § 34.01(4), Fla. Stat. (1990).

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished this 28th day of October, 1993 to: Pedro F. Martel, Esq., Counsel for Nachon Enterprises, Inc., 717 Ponce de Leon Blvd., Suite 319, Coral Gables, FL 33134; Larry R. Leiby, Esq., Counsel for the Real Property, Probate and Trust Law Section of the Florida Bar, 290 N.W. 165th Street, Penthouse 2, Miami, FL 33169; Richard J. Burton, Esq., Richard J. Burton & Associates, P.A. 1815 Griffin Road, Suite 403, Ft. Lauderdale, FL 33004, Deborah Marks, 12555 Biscayne Boulevard, Suite 993, North Miami, FL 33181 and Charles R. Gardner, Esq., Gardner , Shelfer, Duggar & Bist, P.A., 1300 Thomaswood Drive, Tallahassee, FL 32312.

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