

## IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO RULES OF  
CIVIL PROCEDURE AND FORMS FOR  
USE WITH RULES OF CIVIL PROCEDURE

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Case No. 09-1460

### **COMMENTS OF THE HOUSING UMBRELLA GROUP AND CONSUMER UMBRELLA GROUP OF FLORIDA LEGAL SERVICES, INC.**

The Housing Umbrella Group of Florida Legal Services, Inc. (hereafter Housing Umbrella Group) and the Consumer Umbrella Group of Florida Legal Services, Inc. (hereafter Consumer Umbrella Group) pursuant to the notice published in the September 15, 2009, issue of *The Florida Bar News* file these comments to the *Final Report and Recommendations on Residential Mortgage Foreclosure Cases* dated August 17, 2009.

#### **INTRODUCTION**

The Housing Umbrella Group and Consumer Umbrella Group are organizations with a combined membership of approximately 200 legal services and legal aid attorneys from throughout the state of Florida who specialize in housing and consumer issues, including defense of homeowners facing foreclosure. We provided extensive comments to the Honorable Jennifer Bailey to share with the other task force members, attached as Exhibit A. We support efforts to address the avalanche of foreclosures through court-ordered mediation. We make the

following suggestions to improve the mediation process and require greater accountability from the servicers involved in mediation.

RULE 1.110. GENERAL RULES OF PLEADING

This proposed rule change addresses the initial hurdle that must be crossed for any successful mediation program: the proper party seeking foreclosure must be determined. If standing is not established there is no one with the authority to negotiate. Verification of the pleadings and documents is a step in the right direction. We support the comments of Terry Rankin of the Florida Bar Civil Rules Committee who suggests adding the following to the Rule, with some changes as noted below by the underlining (for additions) and strikethrough (for deletions):

(g) In all actions to foreclose a mortgage

(1) the action shall be brought in the name of the ~~all~~ legal, beneficial, and other derivative owner(s) of the mortgage and ~~any~~ promissory notes or any other instruments secured by the mortgage;

(2) any holder of the promissory notes or other instruments secured by the mortgage who is not an owner shall be made a party ~~defendant~~;

(3) if the originals ~~of the~~ promissory notes with all required endorsements or other instruments secured by the mortgage ~~are~~ is not

filed with the initial complaint ~~when the action is filed~~ the foreclosure action shall be stayed until an evidentiary hearing is held under Sec. 673.3091 Fla. Stat. to set the terms of a bond, or other security to protect the obligor(s). This hearing shall be required whether or not the note meets the requirements of negotiability.

(4) prior to or contemporaneous with the filing of the action there must be recorded in the public records of the counties where the property subject to the mortgage is located a complete and consecutive chain of assignments of mortgage(s) executed contemporaneously with transfer of the mortgage and any other instruments showing the ownership of the mortgage(s) sued upon to be in the plaintiff(s).

#### NEW FORM FOR AFFIDAVIT OF DILIGENT SEARCH AND INQUIRY

We concur with the Task Force's desire that "the goal is to locate defendants and make sure they are on notice as efficiently as possible." *Final Report and Recommendations on Residential Mortgage Foreclosure Cases*, 44. We support the implementation of this new affidavit.

#### NEW FORM FOR MOTION TO CANCEL AND RESCHEDULE FORECLOSURE SALE

We strongly concur with the Task Force's efforts for "keeping properties out of extended limbo between final judgment and sale." *Id.* Residential properties

remaining in limbo create blighted neighborhoods; multifamily properties in limbo leave the innocent tenants with no responsible landlord to maintain the premises or provide utilities. We support the implementation of this new form; however, we urge that the form should be available to all parties.

FORM 1.997 CIVIL COVER SHEET

We support the proposed changes to the Civil Cover Sheet.

SUGGESTED FORM REVISION TO FORM 1.996 FINAL JUDGMENT OF FORECLOSURE

The Protecting Tenants at Foreclosure Act (PTFA), Public Law 111-22, effective May 20, 2009, applies to virtually all mortgaged rental properties in the U.S. (and the American Recovery and Reinvestment Act of 2009, Public Law 111-5 effective February 17, 2009, applies to Neighborhood Stabilization Program (NSP) affected properties) and requires that the initial successor in interest after a foreclosure must allow tenants to remain to the end of their lease term if they have a lease, with some exceptions, or if there is no lease, the initial successor in interest must provide tenants a minimum 90 days written notice to vacate. The purpose of the PTFA is to protect tenants, as evidenced by the title of the Act. The PTFA is currently set to expire on December 31, 2012. Civil Procedure Form 1.996 Final Judgment of Foreclosure includes language that contradicts the federal law and should be amended as follows:

6. On filing the certificate of title defendant and all persons claiming under or against defendant since the filing of the notice of *lis pendens* shall be foreclosed of all estate or claim in the property and the purchaser at the sale shall be let into possession of the property. Notwithstanding anything to the contrary in this Paragraph 6, a tenant's rights in the property shall not be foreclosed except in compliance with the provisions of The Protecting Tenants at Foreclosure Act of 2009, Public Law 111-22.

7. Jurisdiction of this action is retained to enter further orders that are proper including, ~~without limitation,~~ writs of possession, subject to the tenant's rights in the property in compliance with the provisions of The Protecting Tenants at Foreclosure Act of 2009, Public Law 111-22, and deficiency judgment.

#### SUGGESTED RULE REVISION TO RULE 1.580 WRIT OF POSSESSION

Rule 1.580 currently provides that a judgment or order shall direct the clerk to issue a writ of possession when a judgment is for delivery of possession of real property. This language as well contradicts the PTFA. We suggest the following language to address this conflict:

**(a) Issuance.** When a judgment or order is for the delivery of possession of real property, the judgment or order shall direct the clerk to issue a writ of possession, except where the Protecting Tenants at Foreclosure Act of 2009,

Public Law 111-22 applies. The clerk shall issue the writ forthwith and deliver it to the sheriff for execution.

### COMMENTS ON THE TASK FORCE'S PROPOSALS

Subsequent to the publication of the Task Force's Report and Recommendation, the National Consumer Law Center (NCLC) published its *State and Local Foreclosure Mediation Programs: Can They Save Homes?* dated September 2009. This report reviews the existing mediation programs in the nation, including those in the 1st, 9th, 11th, 12th, 18th and 19th Judicial Circuits of Florida. The report makes specific recommendations for a successful mediation program. We have attached a copy of the NCLC report as Exhibit B. Based on our experience and a reading of the report, we argue that specific elements must be added to the Task Force's Model Administrative Plan for the mediation program to have the success we all desire.

#### Required Documents

Page 7, Appendix J of the Task Force's Plan provides for the Plaintiff's Disclosure for Mediation. The borrower may request documents showing Plaintiff is the owner and holder of the note, a life of loan history, a statement of net present value of the mortgage loan, and the most current appraisal of the property available to the Plaintiff. To insure success of the mediation program, some changes to these disclosures must be made.

First, the servicers must provide the physical copy of the actual net present value (NPV) calculations. This Court has the authority to require this crucial information that must be calculated in 85% of the home mortgages in foreclosure today under the Home Affordable Modification Program (HAMP). Without documentation of how the servicer arrives at the NPV, neither the Defendant nor the mediator has any basis for understanding or contesting a denial of a modification based on the NPV.

Second, a current appraisal is needed for valid negotiation. The most current appraisal "available to the plaintiff" could be years old. With the rapid decline in property values since 2007, the only way to determine the workout option best for the Defendant is to have a current, recent appraisal.

Finally, the pooling and servicing agreement, HUD 1 and Truth in Lending Disclosure should be added to the list of required documents.

These documents are crucial to the Defendant and to the success of the mediation. Providing these documents must be mandatory and the Defendant should not be required to make a request. See Appendix J, page 42 for the request form.

#### Costs of Mediation

Costs of Mediation are discussed on page 35 of the Task Force Report. As advocates for homeowners, we appreciate the Taskforce providing that the initial

cost for the program must be borne by the Plaintiff. However, this is a shifting fee, recoverable by the Plaintiff if a final judgment of foreclosure is entered. Though we understand the reasoning, in practice allowing these costs to be taxed as part of the judgment will be a deterrent to mediation in cases where the homeowner is concerned about these costs being charged to them. It also acts to provide unfair leverage to the Plaintiff to force a mediation resolution that may not be in the best interest of the Defendant. Optimally funds would be available so that neither party has to bear the expense. In avoiding unfair advantage to the Plaintiff in the mediation, the fee liability should not shift.

### CONCLUSION

The members of the Housing and Consumer Umbrella Groups appreciate the hard work done by the Task Force members and the thoroughness of the Report. We feel with a strong mediation program requiring mandatory production of documents and a fair assessment of cost, this Court will be creating a program that will be successful. We ask that the Court move quickly in reaching its final decision on the statewide court-ordered mediation program. Our clients are in urgent need of a strong mediation program.

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CERTIFICATE OF SERVICE

I certify that a copy of the Comments of the Housing Umbrella Group and Consumer Umbrella Group of Florida Legal Services, Inc. has been sent by U.S. Mail to the Honorable Jennifer D. Bailey, Task Force chair, 73 W. Flagler Street, Suite 1307, Miami, Florida 33130-4764 this \_\_\_\_\_ day of October, 2009.

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Alice M. Vickers