

IN THE SUPREME COURT OF FLORIDA

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

Case No. 09-1460

The undersigned Petitioners, who filed the *Emergency Petition to Amend the Florida Rules of Civil Procedure to Require Pre-Judgment Mediation in Residential Mortgage Foreclosure Actions*, on or about February 9, 2009, file these comments to the *Final Report and Recommendations on Residential Mortgage Foreclosure Cases* dated August 17, 2009.

**COMMENTS ON THE PROPOSED AMENDMENTS
TO THE RULES OF CIVIL PROCEDURE**

Rule 1.110 General Rules of Pleading

We support the addition of a verification to section (b) of this Rule. Our experience has been that the plaintiff foreclosure law firms routinely assert standing to file the foreclosure case, but when the exhibits are inconsistent with the allegations, the plaintiff attaches no copy of an endorsed note nor assignment of mortgage, does not even allege assignment nor endorsement, and also includes automatically and without investigation, a lost note count. When the plaintiff's lack of standing is challenged by a motion to dismiss or through affirmative defenses, the "lost" note is abruptly produced at the hearing on the motion to dismiss, or at summary judgment. This practice causes the court dockets to be clogged and increases costs to the defendants. Consequently, we

also support the comments of Terry Rankin of the Florida Bar Civil Rules Committee who would add the following to the Rule:

(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 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;

(2) if the originals of the promissory notes or other instruments secured by the mortgage are not filed 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).

(3) 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 instruments showing the ownership of the mortgage(s) sued upon to be in the plaintiff(s).

Form 1.997 Civil Cover Sheet

We support the proposed changes to the Civil Cover Sheet.

New Form for Affidavit of Diligent Search and Inquiry

We support implementation of this new affidavit. Our experience has been that too many defendants in owner-occupied residences are served by publication when they have been living in their homes and should be personally served. Not only is this a basic due process requirement, but it also would reduce court dockets in that these defaulted defendants must file motions to set aside defaults and Final Judgments of Foreclosure. The present, often sloppy practices concerning constructive service also create future title problems since, without proper service in the first place, titles acquired through foreclosure can be later challenged.

New Form for Motion to Cancel And Reschedule Foreclosure Sale

We support implementation of this form motion. However, we believe that the form should not be limited to use by the plaintiff, and should be party-neutral.

COMMENTS ON THE TASK FORCE RECOMMENDATION ON STATEWIDE MANAGED MEDIATION

We support the Task Force's recommendation for statewide managed mediation for the same reasons as outlined in our Petition that centered upon the need for mediation in homestead foreclosure cases. We believe that the *Problems and Recommendations Summary* of the report should be the basis for any statewide managed mediation program. Although there are helpful programs in other circuits, we propose that this Court adopt the managed mediation plan that has been promulgated by the 11th Judicial Circuit pursuant to Administrative Order 09-08, copy attached as Exhibit A.

CERTIFICATE OF SERVICE

I certify that a copy of these Comments were served on The Honorable Jennifer D. Bailey, 73 West Flagler Street, Suite 1307, Miami, Florida 33130-4764, this September 30, 2009, via hand delivery.

_____/s/
Carolina A. Lombardi