

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. SC09-1460

**RESPONSE OF THE TASK FORCE ON
RESIDENTIAL MORTGAGE FORECLOSURE CASES**

The Honorable Jennifer D. Bailey, Chair, Task Force on Residential Mortgage Foreclosure Cases, files this response to comments submitted by Henry P. Trawick, P.A.; the Florida Bankers Association (FBA); Legal Services of Greater Miami, Inc., Coffey Burlington, L.L.P., Florida Justice Institute, Inc., and Florida Legal Services, Inc.; Thomas H. Bateman III and Janet E. Ferris; Ben-Ezra & Katz, P.A.; Sixth Judicial Circuit; Florida Default Law Group, P.L. (FDLG); Housing Umbrella Group (Housing Umbrella Group) and Consumer Umbrella Group of Florida Legal Services, Inc.(Consumer Umbrella Group); and Legal Service of North Florida, Inc., and the North Florida Center for Equal Justice, Inc.

The Task Force on August 17, 2009, filed a petition requesting the Court to approve the following rules and form changes: (1) amendment of rule 1.110, Florida Rules of Civil Procedure to require verification of complaints in residential mortgage foreclosure cases; (2) amendment of Form 1.997, Civil Cover Sheet, to differentiate among residential, non-residential and commercial foreclosure cases; (3) adoption of new Affidavit of Diligent Search form to require disclosure of efforts made by plaintiffs to locate defendants; and (4) adoption of new Motion to Cancel and Reschedule Foreclosure Sales to require disclosure of reasons for the cancellation of the sale. The Task Force's proposed changes to the Civil Cover Sheet are now pending before the Court in In Re: Amendments to the Florida Rules of Civil Procedure – Management of Cases Involving Complex Litigation, Case No. SC08-1141.

Prior to filing its petition with the Court, the Task Force submitted its rule and form proposals to The Florida Bar Rules of Civil Procedure Committee for comment. The committee comments are appended to the Final Report of the Task

Force as Appendix J. The Task Force takes this opportunity to respond to the committee comments.

The rule and form changes proposed in this petition are intended to implement Task Force recommendations presented in the Task Force report, “Recommendations for Managing Residential Foreclosure Cases,” which was submitted to Chief Justice Peggy A. Quince contemporaneously with the filing of this petition on August 14.

The Task Force appreciates the efforts of those who filed comments to the rule proposals.

I. Amendment to Rule 1.110. General Rules of Pleading

The Task Force acknowledges the support of Florida Legal Services of Greater Miami, Inc., Corey Burlington, L.L.P., Florida Justice Institute, Inc., and Florida Legal Services, Inc., former judges Bateman and Ferris and Housing Umbrella Group and Consumer Umbrella Group support this proposal.

Henry P. Trawick, P.A., Florida Bankers Association, Ben-Ezra & Katz, P.A., and FDLG oppose the proposed rule amendment to require verification of complaints in mortgage foreclosure cases.

Trawick

Trawick states that the requirement for verification of complaints is unnecessary, but in any event, the propose place for the requirement is rule 1.030, as an exception to language providing that written pleadings of a party represented by an attorney need not be verified.

The Task Force recommended the amendment to rule 1.110 to address the unprecedented circumstances of the mortgage foreclosure crisis, in which the note may have been transferred multiple times or lost, and the identity of the owner and holder frequently is in question. The Task Force believes the amendment is necessary and appropriately located in rule 1.110(b), which contains the general rules of pleading.

Florida Bankers Association

Florida Bankers Association states that the proposed verification requirement will not deter plaintiffs who are not entitled to enforce the note from

bringing foreclosure actions, borrowers already are protected from unauthorized foreclosure actions under section 673.3091, F.S., the court's inherent authority to impose sanctions is a sufficient to deter improper foreclosure claims, and a requirement for verification in court rule intrudes upon legislative powers.

As explained in the Task Force's Report, the proposed amendment to require verification of complaints in residential mortgage foreclosure actions is intended to address the new and unprecedented era of mortgage-backed securities in which the plaintiff's status as the owner and holder of the note may be in question, and is a significant issue. Verification of the complaint will provide an incentive to plaintiffs and their counsel to ensure that the allegations contained in the complaint are accurate and that investigation is conducted prior to filing to establish that the plaintiff is the owner and holder of the note. A primary goal of the verification requirement is not only to protect borrowers from defending against unauthorized claims in foreclosure actions, but also to conserve limited judicial resources that are squandered on cases in which a plaintiff with no legal entitlement to pursue foreclosure files a complaint.

The fact that notes are converted and transferred in electronic form has no bearing upon the proposed verification requirement. The proposed language does not require the plaintiff to physically produce the original paper document. It only requires the plaintiff to verify that the facts alleged in the complaint are true.

The section 673.3091(2), F.S., protection, which provides that, after the plaintiff has plead and proven a lost note count, the court may not enter judgment in favor of the person seeking enforcement unless it finds that the person required to pay the instrument is adequately protected against loss that might occur by reason of a claim by another person to enforce the instrument, does not protect borrowers from the necessity of defending against unauthorized actions, or prevent misuse of judicial resources. Furthermore, the purpose of the proposed verification requirement is consistent with the protection offered in section 673.3091(2).

The same inadequacy applies to the imposition of sanctions. Sanctions imposed after the filing of an unauthorized complaint do not protect the borrower from defending against an unauthorized foreclosure action, and impose additional, unnecessary burdens on judicial resources. Furthermore, the imposition of sanctions does not address the documented

prevalent communications gap between plaintiff lenders and their counsel in residential mortgage foreclosure actions.

The proposed amendment to rule 1.110 to require verification of the complaint is within the Supreme Court's authority to adopt. The requirement is procedural, rather than substantive, and has ample precedence in existing court rules. The requirement for verification of a motion to strike for sham is imposed by rule 1.150, Florida Rules of Civil Procedure. Verification of a motion to disqualify a judge is imposed by rule 2.160, Florida Rules of Judicial Administration. Verification of proof of service and documents in probate actions is required by rules 5.020 and 5.040, Florida Probate Rules. The Court has asserted its authority to require verification by court rule in rule 1.030, Florida Rules of Civil Procedure, which states that: "Except as otherwise provided by rule or an applicable statute, every written pleading or other paper of a party represented by an attorney need not be verified or accompanied by an affidavit."

The Task Force believes that the proposed amendment to rule 1.110 to require verification of complaints in residential mortgage foreclosure actions is necessary and within the Court's authority to adopt.

Ben-Ezra & Katz, P.A.

Ben-Ezra & Katz, P.A., state that the Task Force rule and form proposals impose unreasonable burdens on foreclosure plaintiffs, which will drive up costs to borrowers and make credit scarce. Regarding the proposed verification of complaints, Ben-Ezra & Katz state that ownership of the note is not a requirement for foreclosure and a foreclosure defendant may not raise standing as a defense unless the defendant has another bona fide defense that is viable against the real plaintiff, but not the filing plaintiff.

The Task Force intended the rule 1.110 amendment requiring verification of complaints to serve two purposes. First, to allow the foreclosure defendant to know whether the plaintiff in the pending action is authorized to sue on the note, and second, to conserve judicial resources in the event the plaintiff is not authorized, and the "real" plaintiff later files a foreclosure action. These matters are distinct from the availability of a legal defense to the foreclosure action. Similarly, the proposed new motion to cancel and reschedule foreclosure sale is intended to prevent abuse of the judicial process and the squandering of judicial resources by requiring disclosure of the reasons for the cancellation and

rescheduling of sales. In order to truly conserve judicial resources, renegotiation of the loan should occur either prior to filing or early in the foreclosure action, not after final judgment issues.

FDLG

The FDLG states that it agrees with and adopts the comments of Don Christopher, a member of the Florida Bar Rules of Civil Procedure Committee who opposes the proposed amendment to rule 1.110. In the alternative, FDLG suggests that an equivalent verification requirement be imposed in rule 1.110(b), (c) and (d) upon defendant pleadings in residential mortgage foreclosure cases.

Christopher's comment states that verification of a complaint is a statutory matter. The Task Force believes the proposed requirement for verification of a complaint is a matter relating to practice and procedure within the Supreme Court's authority to adopt by court rule, and that such adoption is appropriate. The Task Force takes no position on the suggestion for imposition of an equivalent requirement on defendants in residential mortgage foreclosure cases.

Legal Services of North Florida, Inc. and the North Florida Center for Equal Justice, Inc.

Legal Service of North Florida, Inc. and the North Florida Center for Equal Justice, Inc., urges adoption of new rule 1.110 language proposed by Terry Rankin, a member of The Florida Bar Rules of Civil Procedure Committee, except for paragraph 2 of the proposed language. Rankin suggested the following new Rule 1.110 language in comments submitted to the Rules of Civil Procedure Committee:

In all actions to foreclosure a mortgage on real property:

- (1) the action shall be brought in the name of 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;
- (3) 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).

(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 instruments showing the ownership of the mortgage(s) sued upon to be in the plaintiff(s). (*technical corrections made to numbering*)

The Task Force does not oppose either of these proposals.

II. Affidavit of Diligent Search Form

The Task Force proposed adoption of the Affidavit of Diligent Search as a new form. The proposed form was adapted from Forms 12.913(b) and (c), Florida Family Law Forms.

Trawick comments that the proposed Affidavit of Diligent Search form is unnecessary, since the form of the affidavit already is addressed in Rule 1.070(i), Florida Rules of Civil Procedure. He also noted that if the new form is approved, it will conflict with the rule provision.

The Task Force notes that the rule 1.070(h) provision addresses service on a nonresident of Florida and does not address concerns regarding the diligence of searches for defendant borrowers, the use of service by publication in foreclosure cases, concerns about applications to the court for default when diligent searches were not performed, or the goal of locating defendants and making sure they are on placed on notice of foreclosure actions. The substance and content of the statutory verification language contained in section 92.525(2), F.S., is virtually indistinguishable from the verification language contained in the proposed affidavit form. The statutory “under penalty of perjury” language is a more concise manner of stating that “punishment for knowingly making a false statement includes fines and/or imprisonment. The Task Force believes the proposed new form serves the purposes outlined in the Final Report of the Task Force.

Bateman and Ferris suggest the addition of new language to the proposed affidavit of diligent search form to address the requirements of the Service Members Civil Relief Act, 50 App. U.S.C. s. 501 *et seq*, which mandates the court in a civil action in which the defendant is a serviceman unable to appear, to determine, through affidavit provided by the plaintiff, whether the defendant is in the military. The Task Force notes that an inquiry “to determine if defendant is in military service” is included in the proposed forms.

Ben-Ezra & Katz state that the form imposes burdens on the plaintiff beyond those required by chapter 49, Florida Statutes, constructive search requirements, and the additional efforts required to complete a more detailed affidavit will result in additional costs to be borne by consumers. Ben-Ezra & Katz also state that the requirement on the affidavit for a signature of the plaintiff is improper because the plaintiff typically does not conduct the search. The Task Force believes that the circumstances of the mortgage foreclosure crisis warrant adoption of the new form. The Task Force agrees with Ben-Ezra & Katz and FDLG, who also raised this point, that the person signing the affidavit should be the individual who performed the search and has personal knowledge of the information contained in the affidavit. FDLG also

Sixth Judicial Circuit

The Sixth Judicial Circuit states that the proposed new form lacks a statement for the process server to assert: “I inquired of the occupant of the premises whether the occupant knows the location of the borrower-defendant, with the following results _____.” The Task Force does not oppose this suggestion. The Sixth Judicial Circuit also states that Paragraph 2 of the proposed form is not clear. The Task Force believes that further clarification of Paragraph 2 is unnecessary.

III. New Form for Motion to Cancel and Reschedule Foreclosure Sale

Trawick states that the proposed Motion to Cancel and Reschedule Foreclosure Sale Form is archaic, and he identifies several uses of outdated language in the proposed form. The Task Force agrees with Trawick’s suggested changes to the proposed form.

Bateman and Ferris suggest modification of the proposed new form to allow any party, including pro se lenders, to use the form. The Task Force does not oppose this proposal.

Ben-Ezra & Katz oppose the proposed form because plaintiffs’ unilateral right to cancel a sale by nonappearance permits further negotiation with the foreclosure defendant after final judgment is entered. As stated in its Final Report, the Task Force believes the form will prevent abuse of the judicial process and the squandering of judicial resources by requiring disclosure of the reasons for the cancellation and rescheduling of sales. In order to truly conserve judicial

resources, renegotiation of the loan should occur either prior to filing or early in the foreclosure case, not after final judgment.

IV. Response to Comments of the Rules of Civil Procedure Committee

The Rule of Civil Procedure Committee voted to support the proposed amendment to rule 1.110(b), proposed Affidavit of Diligent Search form and proposed Motion to Cancel and Reschedule Foreclosure Sale form. Comments opposing or suggesting modification of the proposed rule and form changes were received by the committee from members Don Christopher, Neal Sivyver, Tom Bateman and Terry Rankin. The Task Force responds to the other comments below.

Christopher opposed the proposed rule requirement for verification of complaints on grounds that verification is a statutory, not rule, matter. He suggested that a complaint verification requirement be included in chapter 702, Florida Statutes, which contains detailed requirements relating to foreclosure proceedings. As stated above, the Task Force believes that it is within the Court's authority to require verification of a complaint by rule, and that the requirement is appropriately placed in rule 1.110(b).

Sivyver asserted that there are no other verification requirements applicable to complaints, and questioned why foreclosure complaints should be verified. The Task Force responds as stated above.

Bateman supported use of the section 92.925, Florida Statutes, language in the jurat in the verified complaint as clearer and straightforward. He urged use of the statutory language in the Affidavit of Diligent Search. The Task Force responds as above to the Trawick comment.

Rankin urged further amendment to rule 1.110 to address the issue of who may sue to enforce a note. As state above, the Task Force does not oppose the additional new language proposed by Rankin to clarify that issue.

V. Bateman and Ferris Proposal for Amendment of Rule 1.720, Florida Rules of Civil Procedure

In their comment to the Task Force rule proposals, Bateman and Ferris proposed amendment of rule 1.720 to allow a mediator to report to the court if a party or representative did not comply with the appearance requirements of rule

1.720(b), which states, in part, that unless stipulated by the parties or changed by order of the court, a party is deemed to appear at mediation conference if the party or its representative having full authority to settle without further consultation is physically present. Bateman and Ferris propose amendment to rule 1.720(b) to state:

Notwithstanding the limitations on reporting to the court in rule 1.730, the mediator shall report to the court if a party or representative has not complied with the appearance requirements of this subdivision. The mediator's report shall be limited to reporting only that a party or representative did not appear, without further explanation or comment. An appearance by a party or representative without full authority to settle without further consultation shall be considered a failure to appear under this subdivision.

The Task Force was divided on this proposal, and has requested the Court to extend the time for comments to permit the Supreme Court Alternate Dispute Resolution Rules and Policy Committee to comment on the Bateman-Ferris proposal. The Task Force will file a separate response to the Alternate Dispute Resolution Committee's comments on the Bateman-Ferris proposal, if the Court grants the request for extension of the time to comment and respond to the Bateman-Ferris proposal.

Respectfully submitted,

/s/ _____
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CERTIFICATIONS

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Response to Comments of the Task Force on Residential Mortgage Foreclosure Cases is submitted in Times New Roman 14-point font, in compliance with rule 9.210(a)(2), Florida Rules of Appellate Procedure.

CERFICIATE OF SERVICE

I HEREBY CERTIFY that a copy of the Response to Comments was provided by U.S. Mail on October 12, 2009 to:

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