

**IN THE SUPREME COURT OF FLORIDA**

**Case No. SC17-954**

**2ND DCA Case No. 2D15-5198**

**Trial Court Case No.: 41 2014CA002512AX**

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**THE BANK OF NEW YORK MELLON  
FKA THE BANK OF NEW YORK, as  
Successor trustee to JPMorgan Chase  
Bank, N.A., as Trustee on behalf of the  
Certificateholders of the CWHEQ, Inc.,  
CWHEQ Revolving Home Equity Loan  
Trust, Series 2006-D,**

**Petitioner,**

**v.**

**DIANNE D. GLENVILLE A/K/A DIANE  
D. GLENVILLE A/K/A DIANE  
GLENVILLE and MARK S. GLENVILLE,**

**Respondents.**

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**ON DISCRETIONARY REVIEW FROM  
THE SECOND DISTRICT COURT OF APPEAL OF FLORIDA  
CASE NO. 2D15-5198**

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**PETITIONER'S INITIAL BRIEF ON THE MERITS**

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## **PREFACE**

In this brief, The Bank of New York Mellon fka The Bank of New York as Successor Trustee to JPMorgan Chase Bank, N.A., as Trustee on Behalf of the Certificateholders of the CWHEQ Inc., CWHEQ Revolving Home Equity Loan Trust, Series 2006-D, will be referred to as “Petitioner” or “BONY;” and Dianne D. Glenville and Mark S. Glenville will be referred to as the “Respondents” or “Owners.” References to the original Record on Appeal will be designated as (R.Vol. #, Page #). References to the Second District’s Record on Appeal will be designated as (SC. Page #). Along with this Brief, the Petitioner files an Appendix as prescribed by Fla. R. App. P. 9.130(e) and 9.220. When applicable, references to matters of record contained in the Petitioner’s Appendix will be made by the Letter “A” and the appropriate appendix number.

## **ISSUE PRESENTED**

When is a foreclosure “sale” deemed to have been completed in order to trigger the requirements under Fla. Stat. § 45.031(1)(a) that a subordinate lienholder file a claim for any remaining surplus funds within sixty (60) days of the “sale” or lose any right to the surplus funds after expiration of the sixty days? Is the “sale” defined as the actual day of the foreclosure auction, the day the clerk issues the certificate of sale, or the day the clerk issues the certificate of title?

## **STATEMENT OF THE CASE AND FACTS**

### **Overview**

This appeal arose out of an Order in the Circuit Court of Manatee County (the “Circuit Court”) rendered in favor of the Respondents in which the Circuit Court denied the Petitioner’s claim against the surplus funds by ruling that the Petitioner’s claim was filed untimely under Fla. Stat. § 45.031(1)(a). The Second District Court of Appeal (“Second District”) upheld the Circuit Court, which ruled that the Petitioner’s claim was untimely filed since it was not filed within sixty (60) days of the “sale,” defined as the actual date of the foreclosure auction. The foreclosure auction was held on Thursday, July 2, 2015; the certificate of sale was issued by the Clerk on July 6, 2015 upon the Clerk’s return from the Court observed Fourth of July holiday on Friday, July 3, 2015; and the certificate of title was issued by the Clerk on July 15, 2015. (R. Vol. # 2, Page 307-10 and 313-15). Petitioner filed its claim on September 2, 2015, which was sixty-two (62) days after the foreclosure auction, however, it was **within** the sixty (60) days of the issuance of the certificate of sale on July 6, 2015 and well within sixty (60) days of the issuance of the certificate of title issued on July 14, 2015. It is only upon the issuance of the certificate of title that the sale is confirmed as completed and title passes which is after the time frame to object to any irregularity, misconduct, or any other issues with the foreclosure auction.

### **Statement of the Facts**

On January 25, 2006, Mark S. Glenville and Dianne D. Glenville borrowed \$199,000.00 (the “Loan”) from Home Loan Center, Inc., dba Lending Tree Loans. (R. Vol. #2, Page # 343-64). The Loan is evidenced by a Home Equity Credit Line Agreement (the “Note”) executed by Mark S. Glenville and Dianne D. Glenville and secured by a second mortgage (the “Second Mortgage”) on certain real property (the “Property”) in Manatee County. See id. The Second Mortgage was recorded as a lien against the Property in the official records of Manatee County on February 23, 2006. See id. The Note and Second Mortgage were subsequently conveyed to the Petitioner, The Bank of New York Mellon f/k/a The Bank of New York as Successor Trustee to JPMorgan Chase Bank, N.A., as Trustee on Behalf of the Certificateholders of the CWHEQ Inc., CWHEQ Revolving Home Equity Loan Trust, Series 2006-D. See id. The Respondents eventually defaulted on the Note for failure to make payments. See id.

On April 1, 2013, Mark S. Glenville and Dianne Glenville borrowed \$42,000.00 (the “Third Note”) from Florida Housing Finance Corporation (“Florida Housing”). (R. Vol. #2, Page #322-34). The Third Note was secured by a Third Subordinate Mortgage (the “Third Mortgage”) executed by Mark S. Glenville and Dianne D. Glenville and was another lien on the Property in Manatee County. See id. The Third Mortgage was recorded as a lien against the Property in

the official records of Manatee County on April 16, 2013 almost seven (7) years after the Petitioner's interest. See id.; (R. Vol. #2, Page # 343-64).

On May 20, 2014, JPMorgan Chase Bank, National Association ("JPMorgan") filed a complaint seeking to foreclose its interest on the Property pursuant to a First Mortgage. (R. Vol. #1, Page #2-27). JPMorgan named the Petitioner as a Defendant due to its interest in the Property from the Second Mortgage which had been assigned to the Petitioner after it was taken out by the Respondents. See id. On January 13, 2015, the Petitioner filed its Answer to the Complaint and Petition to Participate in Surplus pursuant to its interest in the subject property through the Second Mortgage and Note. (R. Vol. #1, Page #89-91).

On May 28, 2015, the Final Judgment of Foreclosure was entered and the online auction was set for July 2, 2015. (R. Vol. #2, Page #286-90). The final judgment of foreclosure included the following language, as required by section 45.031(1), Florida Statutes (2015):

**IF THIS PROPERTY IS SOLD AT PUBLIC AUCTION, THERE MAY BE ADDITIONAL MONEY FROM THE SALE AFTER PAYMENT OF PERSONS WHO ARE ENTITLED TO BE PAID FROM THE SALE PROCEEDS PURSUANT TO THIS FINAL JUDGMENT. IF YOU ARE SUBORDINATE LIENHOLDER CLAIMING A RIGHT TO FUNDS REMAINING AFTER THE SALE, YOU MUST FILE A CLAIM WITH THE CLERK NO LATER THAN 60 DAYS AFTER THE SALE. IF YOU FAIL TO FILE A CLAIM, YOU WILL NOT BE ENTITLED TO ANY**



**REMAINING FUNDS. IF YOU ARE THE PROPERTY OWNER, YOU MAY CLAIM THESE FUNDS YOURSELF.**

The Clerk held the online foreclosure auction on July 2, 2017; and the Clerk issued the Certificate of Sale early Monday, July 6, 2015 after returning from the Fourth of July Court observed holiday on Friday, July 3, 2015. (R. Vol. #2, Page # 307-10). On July 14, 2015, the Clerk issued a Certificate of Title. (R. Vol. #2, Page # 313-15). The Clerk of Court issued the Certificate of Disbursements on July 29, 2015, and included the following language as required by Fla. Stat. § 45.031(7)(b):

**If you are a person claiming a right to funds remaining after the sale, you must file a claim with the clerk no later than 60 days after the sale. If you fail to file a claim, you will not be entitled to any remaining funds. After 60 days, only the owner of record as of the date of the lis pendens may claim the surplus.**

(R. Vol. #2, Page # 317-19). On August 4, 2015, Florida Housing filed its Motion Directing Clerk to Distribute Excess Funds. (R. Vol. #2, Page # 320-34). On September 1, 2015, the Respondents filed their Verified Claim for Mortgage Foreclosure Surplus. (R. Vol. #2, Page # 335-38). On September 2, 2015, the Petitioner filed its Motion to Distribute Excess Funds which was substantially identical to the motion filed by Florida Finance. (R. Vol. #2, Page #339-64). On November 5, 2015, the court entered an Order (the “Order”) stating the following: (1) that Florida Finance had filed a timely claim and was entitled to the surplus, (2) that the Petitioner submitted a claim, but that claim was not submitted within sixty (60) days of the foreclosure sale held on July 2, 2015, and was therefore filed

untimely (3) no other claims were filed; and (4) Dianne D. Glenville and Mark S. Glenville were the owners of records of the subject property as of the date of the filing of the lis pendens and the remaining surplus funds after Florida Housing's claim was paid were ordered to be paid to the Respondents. (R. Vol. #3, Page # 408-09). The Order made no ruling on the sufficiency of the evidence provided by the Petitioner, however, the Petitioner's claim was in substantially the identical form as Florida Housing's claim which was deemed to be sufficient evidence by both the Respondents and the Circuit Court. Further, it must be noted that the Respondents sole argument in the Circuit Court was that the Petitioner did not file its claim timely as required by Fla. Stat. § 45.031. See id. There was no ruling on the sufficiency of the evidence provided by the Petitioner. See id. On November 6, 2015, the Petitioner served its Notice of Appeal of the "Order to Disburse Funds entered on November 5, 2015." (R. Vol. #3, Page # 408-09).

On appeal, the Second District reviewed the decision of the trial court and issued its first opinion ("First Opinion") on January 20, 2017 finding that the Petitioner did not timely file its claim for the surplus funds because it had not filed its claim within sixty (60) days of the "sale" as defined by the Second District to be the actual date the foreclosure auction is held. (A-1, First Opinion). On February 4, 2017, the Petitioner filed a Motion for Rehearing, Motion for Rehearing *En Banc*, and Request for Certification to the Second District requesting a rehearing based

upon the opinion issued in the Fourth District, Straub v. Wells Fargo Bank, N.A., 182 So.3d 878 (Fla. 4th DCA January 6, 2016.) (A-2, Motion for Rehearing). On April 26, 2017, the Second District issued an order denying the Motion for Rehearing and substituting the April 26, 2017 opinion (“Second Opinion”) which certifies conflict with the Fourth District opinion to the Supreme Court of Florida. (A-3, Second Opinion). On May 18, 2017, the Petitioner invoked the discretionary jurisdiction of the Supreme Court of Florida pursuant to Fla.R.App.P. 9.030(a)(2)(A)(vi) since the decision of the Second District had been certified to be in direct conflict with the decision of Fourth District. See id. On September 5, 2017, this Court accepted jurisdiction, and this Brief on the Merits follows.

### **SUMMARY OF THE ARGUMENT**

This Court should uphold its ruling in Allstate Mortgage Corp. of Florida v. Strasser, 286 So.2d 201 (Fla. 1973) and the Fourth District’s opinion in Straub v. Wells Fargo Bank, N.A. 182 So.3d 878,881 (Fla. 4<sup>th</sup> DCA 2016). In Strasser, this Court ruled on an earlier version of Fla. Stat. § 45.031 that defined the sale as being completed upon the transfer of the ownership interest of the property which takes place upon the issuance of the certificate of title. See Strasser at 202-03. In Straub, the Fourth District adopted the Strasser Court’s definition of “sale” for the current version of Fla. Stat. §45.031 in ruling that a sale takes place only upon the issuance of the certificate of title, as at this point the sale is confirmed and the

ownership interest in the property is transferred. See id., and Straub at 881. The certificate of title was issued by the Clerk on July 14, 2015, therefore, the expiration of the sixty (60) day window to file a claim for the surplus expired on September 14, 2015. (R. Vol. #2, Page #313-15). The Petitioner filed its claim for surplus on September 2, 2015 which was well within the sixty day window created under Strasser and Straub. See Allstate Mortgage Corp. of Florida v. Strasser, 286 So.2d 201 (Fla. 1973); Straub v. Wells Fargo Bank, N.A. 182 So.3d 878,881 (Fla. 4<sup>th</sup> DCA 2016).

### **STANDARD OF REVIEW**

The interpretation of a statute is a question of law, and it is therefore subject to a de novo review. W. Fla. Reg'l Med. Ctr., Inc. v. See, 79, So.3d 1,8 (Fla. 2012). “It is well settled that legislative intent is the polestar that guides a court’s statutory construction analysis. In determining that intent, we have explained that we look first to the statute’s plain meaning. Normally, [w]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning.” Gulf Atl. Office Props., Inc. v. Dep’t of Revenue, 133 So.3d 537,539 (Fla. 2d DCA 2014) (alteration in original) (quoting Hess v. Walton, 898 So.2d 1046, 1049 (Fla. 2d DCA 2005)).

## ARGUMENT

### **I. THE SECOND DISTRICT'S OPINION THAT PETITIONER FAILED TO TIMELY FILE ITS CLAIM FOR SURPLUS FUNDS FOR ITS ALLEGED FAILURE TO FILE A CLAIM WITHIN THE SIXTY DAYS FROM THE DATE OF THE FORECLOSURE AUCTION CONFLICTS WITH THE FOURTH DISTRICT HOLDING THAT A CLAIM IS TIMELY FILED IF IT IS FILED WITHIN SIXTY DAYS OF THE ISSUANCE OF THE CERTIFICATE OF TITLE.**

In 1973, this Court was presented with a similar issue in Allstate Mortgage Corp. of Florida v. Strasser, 286 So.2d 201 (Fla. 1973). In Strasser this Court interpreted the earlier version of Fla. Stat. § 45.031 which applied to the mortgagor's right of redemption. See id. In Strasser, the property owner had exercised the right of redemption after the public sale and the issuance of the certificate of title, but before the issuance of the certificate of title. See id. The Strasser Court was presented with the exact issue as in this case regarding the definition of the word "sale" following a judicial foreclosure. See id. The court found:

“[I]n enacting this statute, the Legislature failed to define or indicate the intended meaning of the word ‘sale’. Therefore, it is necessary that we do so.

Webster defines ‘sale’ as ‘a contract whereby the absolute or general ownership of property is transferred from one person to another for a price or a sum or money, or, loosely, for any consideration.’

A sale has similarly been defined in Edwards v. Baldwin Piano [Co.], 79 Fla. 143, 83 So. 915 (Fla. 1920)]; Matthews v. Holloway, 83 Fla. 30 [90 So. 924 Fla. 1922)]; State [ex rel. Benevolent & Protective Order of Elks, Lodge No. 1529 v. Livingston], 159 Fla. 63, 30 So.2d

740 (Fla. 1947)]. In accordance therewith, a judicial sale has been held not to be final and complete until, confirmed by the trial court. Macfarlane v. Macfarlane, 50 Fla. 570 [39 So.995 (Fla. 1905)]. In as much as the Legislature is presumed to know the meanings of words and rules of grammar (State ex. rel. Hanbury v. Tunncliffe, 98 Fla. 731 [124 So.279 (Fla. 1929)]), we hereby find that the Legislature intended to adopt the recognized meaning of the word ‘sale’ and that the sale did not take place until ownership of the property was transferred. Said transfer takes place according to s. 45.031(3), Fla. Stat., ten days after the day of the sale, upon no objections being filed thereto and issuance of the certificate of title.”

Id. at 202-03 (quoting Allstate Mortgage Corp. of Florida v. Strasser, 286 So.2d 201 (Fla. 1973)).

The Fourth District in Straub recognized that Strasser was superseded in part by the Florida Legislature’s enactment of Fla. Stat. § 45.0315 regarding the right of redemption; however, the Straub court reasoned that the legislature simply created a specific window for exercising the right of redemption which was either the specific time delineated within the judgment or upon the filing of the “certificate of sale” by the Clerk of the court ... “[i]n doing so, there is no indication that the legislature intended to change the plain meaning of the word ‘sale’ used elsewhere in the statute.” See Straub v. Wells Fargo Bank, N.A. at 881.

The Fourth District in Straub ruled that “under section 45.031(1)(a), (2)(f), and (7)(b), a foreclosure ‘sale’ takes place when ownership of the property is transferred upon filing of the certificate of title.” See id. at 881. It is only after the issuance of the certificate of title that a sale is confirmed and cures any

“irregularities, misconduct and unfairness in the making of the sale.” McClanahan v. Mayne, 103 Fla. 600, 138 So. 36, 38 (1931); see also Fla. Stat. § 45.031(6) (2014). Therefore, under the Fourth District’s opinion in Straub, a subordinate lienholder’s claim to the surplus from a foreclosure sale is considered timely when it is filed within sixty days of the issuance of the certificate of title. See id. at 881. In this case, the certificate of title was issued by the Clerk on July 14, 2015, therefore, the Petitioner would have had until September 14, 2015 to timely file its claim against the surplus. The Petitioner filed its claim against the surplus on September 2, 2015 and was well within the required time to file a claim against the estate after the “sale” was completed.

The opinion issued by the Second District dated April 26, 2017 defines the foreclosure sale as the actual date of the foreclosure auction. (A-3, Second Opinion). Therefore, the actual date of the foreclosure sale is the alleged point in which a subordinate lienholder would need to begin its calculation of the sixty (60) day time period to file a claim against any remaining surplus before being completely barred. (A-3, Second Opinion). However, the Second District’s opinion completely overlooks several practical issues that arise if the definition of “sale” is defined as the date of the actual foreclosure auction. The first issue is that several counties do not require payment by the Winning Bidder of the balance due on the actual date of the foreclosure auction. Specifically, some counties, including

Manatee County from which this appeal was taken, do not require funds to be paid until 9:00 a.m. EST on the next business day **after** the auction occurs. (A-4, Manatee County Real Foreclose information). In light of the fact that funds are not even required to be paid until the next business day, the Second District's definition of "sale" being the actual auction date does not make sense. The Clerk's issuance of the certificate of sale is to show that the foreclosure auction was completed and to cut off any Defendants right of redemption to prevent a foreclosure sale. Moreover, it is quite common for foreclosure auctions to be held where the Winning Bidder does not return with the balance of their bid within the time frame required by the clerk, which requires that the clerk issue a certificate of no sale and the sale to be forfeited. If a certificate of no sale is issued then the Plaintiff must request the court set yet another auction. See id. Therefore, logically a sixty (60) day time period in which to claim the surplus cannot begin to run until at the very least the Clerk confirms they have held the auction and have received the remaining funds.

A common related issue can occur when a Defendant files a bankruptcy petition on the eve of a foreclosure sale and whether through mistake or inadvertence fails to advise the trial court and the foreclosure auction is held in violation of the provisions of the Bankruptcy Code, 11 U.S.C. § 362. In this case, the foreclosure sale that was held was *void ab intitio* even though all other



technical requirements to complete the foreclosure occurred. Moreover, a Plaintiff may inadvertently fail to publish a Notice of Sale as required by Fla. Stat. § 45.031(2), which by law renders the foreclosure sale invalid and requires that another foreclosure sale be held. See Castelo Development, LLC v. Aurora Loan Services, LLC, 85 So.3d 515 (Fla. 4th DCA 2012). Based upon issues that multiple sales can occur and the Second District's definition of "sale" as the date the actual foreclosure auction is held, it would leave the law unclear if a claim is required to be filed within the sixty (60) days of the first held auction date, where the sale might have been completed but was deemed invalid or an objection was filed and upheld, as opposed to a later occurring foreclosure auction when the sale is finally deemed completed and valid upon the issuance of the certificate of title. Thus, if a subordinate lienholder is required to file a claim at the first foreclosure auction that occurs and for some reason this auction is deemed to be invalid, the subordinate lienholder would have to file a speculative claim within sixty days of the first auction without knowing whether there is an actual surplus, much less whether the amount is sufficient to pay off a third or fourth place lienholder.

Further, as a practical matter, objections to the sale can frequently take over sixty days to be heard by the Circuit Court due to the availability of the Court. Therefore, if one were to calculate the time period to claim the surplus based upon the Second District's definition of sale, the subordinate lienholder would be

required to file a claim for surplus before the court ruled on the outstanding objection, therefore, the lienholder would waste money on unnecessary attorney's fees and costs if the objection to the sale is upheld and another auction has to be scheduled. Moreover, prior to the court's ruling on the objection to sale, the subordinate lienholder's interest in the surplus is only speculative and non-justiciable since the issue of entitlement does not exist until after the objection is resolved. Therefore, it is only upon the Clerk's issuance of the certificate of title that causes a justiciable issue to arise for a subordinate lienholder regarding filing a claim to any surplus proceeds. In essence the issue of an award of surplus funds is not ripe for consideration by the Court until after there is a determination that title has validly passed, which only occurs based upon the Clerk's issuance of the certificate of title. In all these scenarios, more than one foreclosure auction or "sale" as defined by the Second District can be held in a single case, therefore, it calls into question and remains unclear which is the operative foreclosure auction within which a subordinate lienholder must file its claim to retain its rights under Fla. Stat. § 45.031.

At the very least the Petitioner argues that the definition of the "sale" should be upon the issuance of the certificate of sale as opposed to the date of the auction. This is because up until that point the holder of any subordinate interest can still "cure the mortgagor's indebtedness and prevent a foreclosure sale." Fla. Stat. §

45.0315 (emphasis added). Therefore, if, as in this case, the foreclosure auction occurred on July 2, 2015, but the certificate of sale was not issued until the morning of July 6, 2015, there was a sufficient enough gap in time for any of the Defendants to redeem the property and prevent the foreclosure sale from being completed. Therefore, you cannot prevent a foreclosure sale if that very same sale has already been completed as defined by the Second District and the Circuit Court. Further, it is not until after the certificate of sale issues that the mortgagor's equity right of redemption is divested and the time period to object to the sale and to object to the value established by the sale begins. See id.; Fla. Stat. § 45.031; In re Jaar, 186 B.R. 148, 154 (Bankr. M.D. Fla. 1995). Accord, Shlishey v. CitiFinancial, 14 So.3d 1271, 1275 (Fla. 2d DCA 2009) (citing Jaar with approval). Moreover, it is not until the clerk issues the Certificate of Sale that the purchaser in the foreclosure sale begins to have inchoate rights to the property during the ten (10) day objection period and must be put on notice as to any objections to the sale. See Shlishey v. CitiFinancial at 1275. However, even using the certificate of sale as the operative date in which a "sale" has been completed can cause issues when calculating the date by which one must file a claim against the surplus. Objections to sales are frequently filed within the ten day time period after the issuance of the certificate of sale, and those objections are not necessarily heard within a sixty (60) day time frame. This scenario also points out an additional difficulty with "sale"

date (the foreclosure auction date) as defined by the Second District. Objections to sale are frequently heard over sixty days after the auction and the issuance of the certificate of sale due to the availability of the court and counsels' calendar. Often these objections to sale are overruled, however, sometimes they are upheld and another foreclosure auction must be scheduled.

Moreover, the Second District overlooked or misapprehended controlling points of law in deciding the issue in favor the Respondent defining "sale" solely by relying on Fla. Stat. §45.031(7) and not considering the roll of Fla. Stat. § 45.032, which is titled Disbursement of Surplus Funds after Judicial Sale. Fla. Stat. § 45.032 expressly declares that the deadline for the filing of a claim for surplus funds falls sixty (60) days after the issuance of the certificate of disbursements. See Fla. Stat. § 45.032. Notably, the certificate of disbursement cannot be issued until the sale has been confirmed, which would have followed the issuance of the certificate of title, which follows the certificate of sale.

This declaration does not conflict with the statement relied upon by the Petitioner in Section 45.031 which provides that a surplus claim must be filed within sixty (60) days of the "sale" because Section 45.031 does not define when the date of the "sale" should be deemed to fall. Rather, that definition is found in Section 45.032. Furthermore, Section 45.032 (specifically entitled "Disbursements of Surplus Funds after Judicial Sale") overrides any statement in Section 45.031

(generally entitled “Judicial Sales Procedure”) with regards to ascertaining the deadline to file a claim for disbursement of surplus funds. Thus, Petitioner’s claim for surplus funds was timely filed since it was filed well within sixty (60) days of the certificate of disbursements. Further, if the sixty (60) day time frame begins from the issuance of the certificate of disbursements as defined by Section 45.032, the Petitioner would have had until September 28, 2015 to file a timely claim upon the surplus funds.

To further exacerbate confusion regarding the definition of “sale,” when the Clerk issues the certificate of disbursements, it includes language required by Fla. Stat. § 45.031(7)(b) stating the following: “If you are a person claiming a right to funds remaining after the sale, you must file a claim with the clerk on later than 60 days after the sale. If you fail to file a claim, you will not be entitled to any remaining funds.” See Fla. Stat. § 45.037(7)(b). The certificate of disbursements is issued after the foreclosure auction, after the issuance of the certificate of sale, and after the issuance of the certificate of title. First, a layperson receiving the certificate of disbursement, including the language required by Fla. Stat. § 45.037(7)(b), could cause confusion in that a layperson may believe the sixty (60) day time period should begin to be counted from the date of the issuance of the certificate of disbursement as that is the last notice received by the Clerk. Second, the certificate of disbursement which is issued **after** the certificate of title further

reinforces that the actual “sale” of the property is not completed until the Clerk issues the certificate of title because it is only at that point that the ownership interest in the property is transferred.

This Court should uphold its prior decision in Strasser and the Fourth District’s opinion in Straub and disapprove the Second District’s decision, and hold that it is only upon the issuance of the certificate of title that the sixty (60) day time period to file a claim against the surplus begins to run. In this case, the Petitioner filed its claim on September 2, 2015, which was within the sixty (60) day time frame from the date of the issuance of the certificate of title which was issued on July 14, 2015. As such, the Circuit Court incorrectly concluded that the foreclosure “sale” meant the actual date of the foreclosure auction and not the date upon which the certificate of title was issued by the Clerk, which is the established law via Strasser and Straub. Therefore, the Petitioner timely filed its claim to the surplus funds **before** the expiration of the sixty (60) day time limit pursuant to Fla. Stat. § 45.031(7)(b) and § 45.0315. See Straub v. Wells Fargo Bank, N.A. at 881. For all of these reasons, the Second District’s decision in this case must be quashed.

**II. IF THIS COURT APPROVES THE FOURTH DISTRICT’S OPINION IN THIS CASE, IT MUST REMAND THE CASE TO THE CIRCUIT COURT FOR FURTHER PROCEEDINGS BECAUSE NEITHER THE SECOND DISTRICT NOR CIRCUIT COURT REVIEWED THE SUFFICIENCY OF THE CLAIM FILED BY THE PETITIONER DUE TO RULING THE CLAIM HAD NOT BEEN FILED TIMELY.**

Before the Second District’s opinion in this case and since 1973, the law in this state was clear that it was only upon the issuance of the certificate of title that a “sale” was deemed completed. See Strasser at 203. The Circuit Court ruled that the Petitioner filed an untimely claim for its alleged failure to file a claim within sixty (60) days of the foreclosure auction held on July 2, 2015. However, the Petitioner’s claim would have been filed within the sixty (60) day time period if the time period was calculated either by the issuance of the certificate of sale and even the latter date of the issuance of the certificate of title. The Circuit Court made no findings of fact regarding the sufficiency of the evidence provided by the Petitioner in its claim, the Petitioner notes that its claim is in substantially the same form as Florida Housing’s claim which was deemed sufficient by the Circuit Court and the Respondents’ attorney. The sole issue with the Petitioner’s claim is its alleged untimely filing. Based upon this Court’s prior ruling in Strasser and the Fourth District’s ruling in Straub, the Second District’s conclusion that the foreclosure sale is the actual date of the auction on July 2, 2015 is clearly incorrect and the petitioner had sixty (60) days from the date of the issuance of the certificate of title

on July 14, 2015 or until Monday, September 14, 2015 to timely file its claim against the surplus. See id.; see also Straub v. Wells Fargo Bank, N.A. at 881. Since no ruling was made on the sufficiency of the evidence provided by the Petitioner which included a Motion to Distribute Excess Funds with accompanying Affidavit of Indebtedness this Court should remand to the Circuit Court with directions to conduct an evidentiary hearing to review the sufficiency of the Petitioner's claim.

### **CONCLUSION**

As explained more fully above, this Court should reverse the Second District and Circuit Court's denial of the Petitioner's Motion to Distribute Excess Funds pursuant to Fla. Stat. § 45.031(7)(b) and § 45.0315 because the Petitioner timely filed its claim on September 2, 2015 for surplus; within sixty (60) days of the completion of the foreclosure sale and upon the issuance of the Clerk's certificate of title on July 14, 2015. September 14, 2015 was the deadline to timely file claims for the surplus of funds based upon Straub and Strasser. See id. This Court should uphold its prior ruling in Strasser which defined the sale to be completed only upon issuance of the certificate of title when the sale is confirmed, curing any irregularities or misconduct in the sale. See id.



**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent via U.S. Mail, postage prepaid and E-Mail, to the following on this   10th   day of October, 2017:

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**CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that this Brief complies with Florida Rule of Appellate Procedure 9.210(a)(2) and has been formatted in Times New Roman, 14 point font.

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