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Florida Supreme Court
Task Force on Residential Mortgage Foreclosure Cases
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Dear Task Force Members:

Thank you for the opportunity to be heard on an issue that is central to our practice which is dedicated to the representation of homeowners in foreclosure. We represent more than two hundred homeowners across eight different counties, but primarily in Palm Beach County. We are on the frontlines of the morass that is foreclosure court in Palm Beach and are in a position better than most to speak about what would help the judicial system and the homeowners.

Because some of my contribution on this subject may be counter-intuitive, I should mention that I have been a litigator for 24 years, am AV-rated and have trial experience in four counties and in the federal courts. My perspective is unique since most of my career was spent defending corporate giants while at firms such as Holland & Knight and Carlton Fields.

The composition of the Task Force is not balanced. My first concern is that the average homeowner in foreclosure has no representation on the Task Force. The banks are certainly well-represented, as well as the alternative dispute resolution industry, which, of course, stands to profit from any new rule that requires mediation. Out of the fifteen members of the Task Force, only one could be said to represent the interests of any homeowners, and I worry that even that member's experience and perspective may be focused on the most impoverished end of the spectrum of homeowners in foreclosure.

Identification and confirmation of the problem. The Task Force should be wary of the assumptions underlying its task. The stated purpose of the Task Force is to "ease" the backlog of foreclosure cases that "is adversely impacting the competiveness of the State to create, retain, and expand jobs and private sector enterprises" and which "directly results in an estimated $9.9 billion of added costs and lost property values for Floridians each year."[1] These dire, the-sky-is-

[1] Interim Report of the Forida Supreme Court Task Force on Residential Mortgage Foreclosure Cases, May 8, 2009, citing *The Economic Impacts of Delays in Civil Trials in Florida's State Courts Due to Under-Funding*, The Washington Economic Group February 9, 2009.

falling predictions are based upon an economic report[2] which was intended for use in advocating for additional court funding, not to rationalize the wholesale restructuring of rules that affect the rights of parties.

The critical assumptions of that report (the WEG Report)[3] are completely unsupported. For example, the report estimates that $4.3 billion are lost "resulting from properties being vacant and not properly maintained during the foreclosure process." Aside from the fact that many properties are not vacant during the foreclosure process (or, if vacant, are being maintained by their owners or the banks), the "decline in value due to foreclosure process" is estimated at 20% with no citation to supporting studies, statistics or other documentation. Nor is there any offsetting calculation to quantify the adverse impact on home values should the market be suddenly flooded with vacant, bank-owned properties as a result of streamlining the foreclosure process.

Similarly, according to the report, nearly half of the backlog costs incurred by "Florida citizens" is the "interest income foregone annually by financial institutions and other mortgage investors while they wait for case disposition" (estimated figure $4.6 billion). When most of these financial institutions are not Florida corporations, why this computation is included as a "direct" expense to "Florida's citizens" is a complete mystery. Moreover, the estimate is unsupported with evidence that resolution of the foreclosure cases – much less, earlier resolution of the cases – will restart the income stream for these investors at anywhere near the inflated interest rates they commanded before the real estate bubble burst.[4]

In summary, the Task Force should take great care to identify the specific problem to be resolved, taking time to obtain real evidence to support whether the problem being decried is of the proportions being reported, before changing court rules that have been crafted over years of trial and error. Trumped up claims of urgency, or self-interested characterizations of the problem as a crisis, should not override caution and common-sense.

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[2] *The Economic Impacts of Delays in Civil Trials in Florida's State Courts Due to Under-Funding*, The Washington Economic Group February 9, 2009 ("WEG Report").

[3] The Task Force should be extremely skeptical of the value of the report by the Washington Economic Group as an independent assessment of the foreclosure problem. Its client base includes 17 financial institutions and its principal is a bank director and self-described "bank economist." Keynote Address by Tony Villamil, CEO The Washington Economics Group, Inc., Focus Americas at The Crossroad Conference, Bankers Association for Finance and Trade April 20, 2005.

[4] Inexplicably, the percentage rate used to calculate the loss is 7.39% based on "FED of New York data on Sub-Prime and "Alt-A" mortgage loans for October 2008. (WEG Report, p. 24, n. 3). Even if every foreclosure case were instantaneously resolved, there is no evidence that this interest rate can be achieved again by these investors in today's market.

Requiring mediation or alternative dispute resolution will do little to ease the courts' case load. The entities driving the foreclosure filings are the loan servicers even though they usually are not the owners of the notes or mortgages and often have limited rights to modify the loans. Some servicers, nevertheless, instruct counsel to file the cases with their own company name as plaintiff and falsely allege that that they are "owner and holder" of the note and mortgage. Others use their own name as plaintiff, truthfully alleging they are merely an agent for the real party in interest, but refusing to identify their principal (the "stealth plaintiff"). Still other servicers use third-party entities as the plaintiff, such as MERS (even though MERS prohibits the use of its name as a foreclosure plaintiff in Florida). While there are some servicers who use the name of the "investor" (the trustee of a securitized loan) as the plaintiff, the actual relationship between counsel filing the suit and the named plaintiff is tenuous or nonexistent.

As a result, meaningful dialogue between homeowners and the real party in interest is often impossible. The pooling and servicing agreements often restrict the servicers' ability (and even the trustee's ability) to modify loans. Some servicers have even been sued by their principals for executing unapproved modifications. Moreover, when the real note-owner is kept secret and far removed from the judicial process, a homeowner cannot negotiate with the real decision-maker. The banks' attorneys cannot produce the real party in interest for mediation or deposition, and often have little or no contact with the very client for which they are appearing.

Requiring mediation or alternative dispute resolution will benefit the banks more than the homeowners. From experience, I can say that foreclosure mediations are not mediations at all. They are refinancing sessions with the servicer brokering a new loan in much the same manner as the original loan was brokered, but with the added threat of losing one's home to coerce the homeowner into unfavorable agreements. In one case, the bank's mediation "offer" was a payment that was actually higher than the one that had landed the homeowners in foreclosure court. To add insult to injury, the bank's representative told the homeowners not to worry about the higher payment because the value of the home would undoubtedly increase soon and they could refinance. This, of course, is the same predatory persuasion technique behind many of the existing loans in default. While only anecdotal, this incident should give the Task Force cause for concern that forcing homeowners to mediate with banks – particularly where the homeowners are unrepresented by counsel – would unfairly favor the banks.

Similarly, rules that require a one-way exchange of information prior to mediation[5] are *per se* unfair. This unfairness is even more palpable when one considers that the financial information the bank requests is also the information they need to aid in the execution of a judgment. The Miami-Dade CHAMP program makes a small step in the right direction, by requiring the bank to bring the applicable Pooling and Servicing Agreement ("PSA") to mediation, but oddly, restricts this requirement to cases where the residence is owner-occupied and where "it may affect the plaintiff's ability to settle and to resolve the foreclosure suit." Unfortunately, these exceptions will swallow the rule, and engender additional litigation. Moreover, the significance of the PSA will be lost on unrepresented homeowners and any attorney not trained in foreclosure defense.

[5] For example, Palm Beach County Administrative Order No. 3.305-1/09.

Streamlining the foreclosure process may be counterproductive. One bank's attorney confessed to me that the banks send the non-performing loans to foreclosure because it is a way of inexpensively out-sourcing the handling of the flood of defaults. Loan modifications are time-consuming and require costly manpower. Having negotiated flat fees with their volume attorneys in the neighborhood of $1,200 per case, it is more expedient and cost-effective for the banks to let the courts handle the problem for them.

While this may be but one insider's opinion, there is abundant evidence of the banks' headlong race to the courthouse, such as the use of factually false lost note counts to excuse the failure to attach original notes,[6] the backdating of assignments of mortgage, etc. The courts are already equipped with gate-keeping rules[7] and the means of enforcing them.[8] If these gate-keeping rules were enforced by the courts, foreclosure would become a less-attractive first option for the banks. But because the vast majority of cases are undefended, the courts would have to raise these issues *sua sponte*.[9]

[6] Currently, judges in Palm Beach will not enter summary judgment for the bank based on a lost note affidavit, but instead require live testimony. The judges have commented in open court that, once they created the new rule, nearly all the notes were miraculously found before summary judgment. While I applaud this unwritten rule as an example of the court's self-help regulation of the litigants' truthfulness, there is still a noticeable absence of shock and indignation at this widespread disregard for the truth. At a hearing, one judge said (regarding false lost note counts): "I understand why they're doing it. That doesn't surprise me. That's business to do it the most expedient way as possible. Whether I like it or not, that's the way the world is." Hearing in *Chevy Chase Bank v. Berman*, Case No. 502008CA016892XXXXMB, 2/23/09. The two sentiments here – that lying to the court is an acceptable part of doing business and that the court cannot prevent it – are both untenable and a far cry from Judge Boyko's well-known pronouncement that the integrity of the federal court is "priceless."

[7] Such as, Rule 1.130 Fla.R.Civ.P.; *Jeff-Ray Corp. v. Jacobson*, 566 So.2d 885 (Fla. 4th DCA 1990); *WM Specialty Mortgage, LLC v. Salomon*, 874 So.2d 680 (Fla. 4th DCA 2004); *Safeco Ins. Co. of America v. Ware*, 401 So.2d 1129 (Fla. 4th DCA 1981); *Fladell v. Palm Beach County Canvassing Board*, 772 So.2d 1240 (Fla. 2000).

[8] Such as, sanctions, the "unclean hands doctrine," or dismissal without prejudice.

[9] Judge Schack in New York epitomizes the involved, educated judge enforcing the rules in foreclosure cases, *sua sponte*. *See IndyMac Bank, FSB v. Bethley*, 2009 NY Slip Op 50186(U) (N.Y. Sup. Ct. 2/6/09); *HSBC Bank USA, N.A. v. Charlevagne*, 2008 NY Slip Op 51652(U) (N.Y. Sup. Ct. 8/4/08); *HSBC Bank USA, N.A. v. Valentin*, 2008 NY Slip Op 50164(U) (N.Y. Sup. Ct. 1/30/08).

The Task Force should not underestimate the complexity of foreclosure cases. The securitization of loans has made foreclosure a formidably complex process that the courts[10] – and even the banks' counsel[11] – do not understand. Even the least-traveled of the securitized notes have passed through multiple layers of similarly-named entities before settling into a trust, a journey often tracked by the ever-inscrutable MERS corporation – also the mortgagee in many cases. Understanding the process requires considerable knowledge of trust law, securities law, negotiable instruments under the UCC, and how all these areas often conflict with modern mortgage loan banking practices.

Simplistic solutions that seek to steer homeowners to *pro bono* counsel or other well-meaning attorneys untrained in foreclosure defense will be harmful to the homeowners' interests. Mediators untrained in the area will be ineffective. Judges untrained in the area will make incorrect rulings that will result in a wave of appeals.

Suggestions. If any available resources are to be allocated to the foreclosure problem, they should be directed to educating the judges, counsel, and even the general public regarding foreclosure defenses and the securitization process.

Because the Task Force is also charged with proposing new or amended rules to facilitate <u>equitable</u> resolution of residential mortgage foreclosure cases, those proposals should be aimed at:

1) Stopping fraudulent "lost note" claims;
2) Clarifying what documents the banks should attach to the complaint (such as assignments executed before the filing of the Complaint and copies of promissory notes containing all endorsements and allonges);
3) Requiring the production of certain "proof of loan ownership" documents as a matter of course (such as MERS tracking data) and "proof of agency" documents (such as powers of attorney or other authorizations to represent);

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[10] According to the Wall Street Journal, the Chief Judge of Lee County opposes mediation as a requirement, seemingly on the grounds that foreclosure cases are indefensible: "'A guy hasn't paid his mortgage in over a year,' says Judge Cary. 'What's there to talk about?'" *A Florida Court's 'Rocket Docket' Blasts Through Foreclosure Cases*, by Michael Corkery, February 18, 2009.

[11] In one case, the bank's counsel objected to producing any documentation required to be kept by the trust under the PSA on the grounds that the PSA (usually available on the internet) is "privileged and confidential." (That was topped by another bank who recently claimed that ownership of the note was a "trade secret.") In another case, the court upheld the banks' objections to producing documentation referenced in the PSA, because the 417-page PSA (though specifically identified and available on the internet) was not attached to the request. In several cases, the bank's attorneys have objected to the production of MERS tracking information, and even argued to the judge that such information was irrelevant, only to ask me later what MERS tracking information was.

4) Requiring that the note owner be joined in any action brought in the name of an agent or other third party;

5) If the loan is securitized, requiring the attendance of the trustee at mediation;

6) Prohibiting the practice of banks' attorneys executing their assignments of mortgage in-house to their own clients under the guise of being an officer of MERS or some other bank;

7) Prohibiting the practice of servicers or third-party foreclosure service providers from executing assignments as officers of their principals;

8) Prohibiting the practice of banks' counsel of moving for default against every defendant, whether they have responded to the Complaint or not, forcing the court clerks sort out who should be defaulted;

9) Requiring transparency from MERS regarding ownership of mortgage loans;

10) Prohibiting the use of service of process to deliver advertisements to homeowners entreating them to contact Plaintiff's counsel to "negotiate" their loans;[12]

11) Stopping *ex parte* contact with the Court through the submission of orders to which the opposing party has not agreed or through failure to serve parties who have made an appearance in the case; and

12) Stopping communications by banks' attorneys directly with represented homeowners without consent of their counsel.

Sincerely,

Thomas E. Ice, Esq.

[12] As if negotiating directly with the banks were not lopsided enough, banks' attorneys are using court-ordered informational forms that are served with the Complaint (or including their own color advertising brochures) to coax homeowners to speak with them about foreclosure "alternatives." Because these communications are served with the Complaint – which on its face would seem to violate Rule 1.130 Fla.R.Civ.P. – they usually reach the homeowners before they retain counsel of their own.