

PUBLICATION

Florida Update – No Standing, No Fees is Dead: Borrowers Can Recover Fees When They Prevail on a Standing Defense

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In an opinion issued on December 31, 2020, the Florida Supreme Court resolved a certified conflict between several of the Florida appellate courts as to whether borrowers who prevail on an argument that the lender lacked standing at the time of filing of a foreclosure complaint can recover their attorneys' fees as the prevailing party. In *Page v. Deutsche Bank Trust Co. Americas, et al.*, Case No. SC19-1137 (Fla. Dec. 31, 2020), the Florida Supreme Court answered that question with a clear and decisive "YES."

The Court determined that the fee-shifting provision outlined in Florida Statute, §57.105(7) allows prevailing borrowers to recover attorneys' fees when the underlying mortgage contract contains a unilateral fee provision. The Court found that the issue boiled down to statutory interpretation, and that borrowers cannot be prohibited from using the fee-shifting argument to recover fees, even if there is a determination of the lender's lack of standing at the time the foreclosure lawsuit is filed.

While the "No Standing, No Fees" mantra had been standard in and around South Florida – the stomping grounds of Florida's Fourth District Court of Appeal – and has been argued as rule-of-law in the First and Third Districts (which had not yet decided the issue), the Second and Fifth Districts of Florida had ruled conversely that borrowers who defeated foreclosure on a standing argument could recover their fees as the prevailing party. The Florida Supreme Court's *Page* decision affirms that the Second and Fifth District Courts of Appeal got it right and quashed the prior contrary decisions out of the Fourth District.

What does this mean in practice? Lenders can expect hefty fee awards to borrowers who prevail on standing defenses. So lenders who have commenced foreclosure actions in which evidence of standing is less than crystal-clear may want to consider pushing settlement, avoiding appeal of unfavorable rulings, and factoring in an attorneys' fees award as part of litigation expenses.

If you have any questions about this topic, contact [Eve A. Cann](#) or [Linda S. Finley](#) or an attorney in our Fort Lauderdale, Orlando or Tallahassee offices.