

## Florida Foreclosure Litigation

### Part 1: Proving the Case

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#### Elements of a Foreclosure

### Foreclosure Actions Based on Breach of Contract

- Existence of a contract (obligation between the parties)
- Breach of the contract
- Damages (must be caused by breach)

## Existence of a Contract

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There must be an obligation between the parties to a foreclosure action (*Standing to foreclose*)

The original payee may enforce when there is no evidence of a transfer

If the party attempting to enforce the obligation is not the original payee, the transfer and/or negotiability of the note becomes important

- The note is transferred when delivered for purposes of giving the right to enforce
- Transfer gives the right to enforce

## Existence of a Contract (continued)

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### Permitted Plaintiffs according to the UCC:

- Holder
- Nonholder in possession with rights of holder
- Person not in possession who is entitled to enforce

\*It is not required that the person enforcing the instrument is the *owner*. A person may even be entitled to enforce if they are in wrongful possession.

## Existence of a Contract (continued)

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Standing is acquired on the date which the Plaintiff obtained its status. A specific date is not required, as long as evidence proves the transfer occurred before the filing of the Complaint.



Use any of the following to determine the time of standing:

- Pooling and Servicing Agreement
- "Screen shots" from servicing system
- Assignments of mortgage
- Bailee Letters (document transfer records)

## Existence of a Contract (continued)

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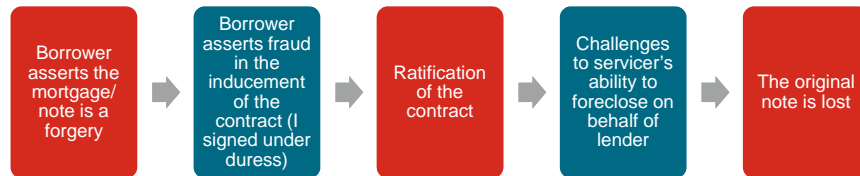
### The note as a negotiable instrument

- Special Indorsement: Made payable to the bearer or to a specifically named person or entity.
- Blank Indorsement: Indorsement doesn't specify any recipient, so by default becomes payable to bearer
- UCC §3-205

Note: If the note is transferred for value but not indorsed, the transferee has a right to the unqualified indorsement, but negotiation doesn't occur until the note is indorsed. (UCC §3-203)

## Contract Problems

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## Enforcing a Lost Note

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- **Lost Note Count in a Complaint must be accompanied by an affidavit as to the following (per Fla. Stat. 702.015):**
  - Clear chain of indorsements, transfers or assignments
  - Set forth facts showing entitlement to enforce
  - Include copies of the note and allonges and evidence of acquisition
- **Re-establishing a lost note requires testimony:**
  - The party seeking to enforce was entitled to enforce at the time of loss
  - Loss was not the result of a transfer or seizure
  - Party cannot reasonably obtain the instrument because it is lost or destroyed
- **To enforce a lost note, you must prove the terms**

## Breach of the Contract

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The breach = failure to pay

Is notice of lender's intent to accelerate required? *Not always!*

When the mortgage requires that a borrower be provided notice of intent to accelerate, proper notice is not given until the requisite information is communicated:

## Breach of the Contract (continued)

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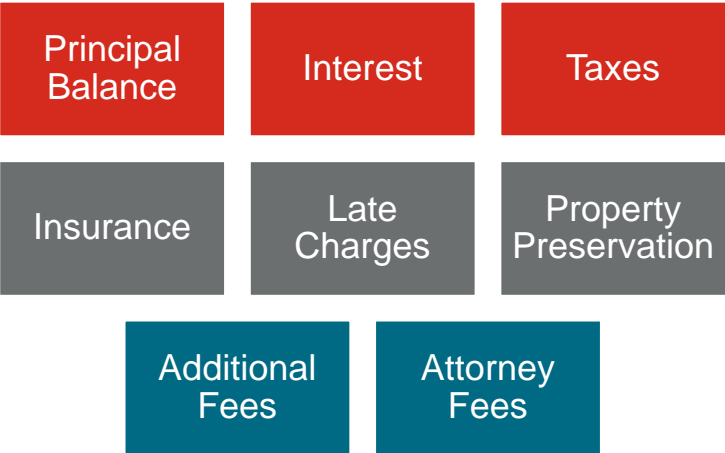
### Standard Fannie/Freddie mortgage requirements for notice are included in paragraph 22:

- Advise of the default
- Identify action required to cure default
- Identify date (not less than 30 days) by which default must be cured
- Notify that failure to timely cure may result in acceleration, foreclosure and judicial sale
- Inform of right to reinstate after acceleration
- Inform of right to assert defenses in foreclosure action

## And now...a word about acceleration

- Having a copy of the notice letter is not sufficient! You must be able to demonstrate that it was sent
- Acceleration occurs upon the filing of the foreclosure Complaint
- Florida's statute of limitations requires that acceleration occur within five years of the date of default
- Currently, the law in Florida permits a lender to accelerate on any date of default within 5 years, even if prior attempts to accelerate were unsuccessful (U.S. Bank v. Bartram)

## Damages



## Florida Foreclosure Webinar Series

### Part 2: Litigation Tools in a Foreclosure Action

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### Discovery – Written

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- Written Discovery
  - Request for Admissions – Fla. R. Civ. P. 1.370
    - Automatically deemed admitted if not timely answered
  - Request for Production – Fla. R. Civ. P. 1.350
  - Interrogatories – Fla. R. Civ. P. 1.340
    - The power of 1.340(a) - limited to thirty (inclusive of sub-parts) absent leave of court

## Discovery - Depositions

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- Corporate Representative – Fla. R. Civ. P. 1.310(b)(6)
  - Topics for the deposition, what is “reasonable particularity”
  - Duces tecum?
  - Narrowing the scope of the deposition
- Fact Witnesses
  - Location of the deposition
  - Proper issuance of subpoenas
  - The deponent is not the Plaintiff, the “client” conundrum

## Discovery - Depositions

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- Should you depose the borrower?
  - Opportunity for settlement
  - Determine specific allegations and challenges to your foreclosure
  - Secure documents that you cannot otherwise locate (through duces tecum request)



## Defensive Motions

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- Motions to Compel Discovery
- Motions to Quash
- Motions to Dismiss

## Motions to Compel Discovery

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- Motions to Compel Responses vs. Motions to Compel Better Responses
  - The importance of framing the scope of permissible discovery
- Effects of a Motion for Extension of Time
- What constitutes a “good faith effort”
- When is a possible objection waived
  - Privilege
  - Relevance

## Motions to Quash

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- Service of Process is governed by FSA 48.031 and requires strict compliance
- Requirements of FSA 48.031(5)
  - 1<sup>st</sup> Page- Date and Time of service
  - Process Server's identification number and initials
  - List on Return of Service form all initial pleadings delivered and served
  - Return of Service must be filed with the court
- Types of Service
  - Personal
  - Substitute
  - Publication

## Motions to Quash

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- A facially valid return of service shifts the burden to the defendant to show that service was otherwise improper
  - Evidentiary Question: Any determination to fight a Motion to Quash should include a time and money analysis in addition to any analysis with respect to the actual merits of the motion

## Motions to Dismiss

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- Elements of a foreclosure complaint are now governed by FSA 702.015
- Rooted in Fla. R. Civ. P. 1.140(b) and any ground provided for in 1.140(b) not enumerated in the motion is deemed waived
- Confined to the four corners of the Complaint
- Allegations in the Complaint accepted as true (pleading vs. proof)

## FSA §57.105

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- Fee paid to prevailing party when:
  - At any time during a civil proceeding
  - Regarding any claim or defense
  - Court finds that the losing party knew or should have known that the claim or defense was not supported by facts or law
  - Based on knowledge of party at the time claim or defense was first presented, or at any time prior to trial.

## FSA §57.105

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- Safe Harbor:
  - Serve a copy of the motion, but do not file it
  - Give opposing counsel an opportunity to withdraw the questioned claim or defense
  - If not withdrawn within 21 days, the motion may be filed
  - Considered at a hearing by preponderance of the evidence standard

## Motion for Summary Judgment

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- Fla. R. Civ. P. 1.510(c)
  - Must identify the “summary judgment evidence” on which movant is relying
  - Motion must be served at least 20 days prior to hearing and include a copy of all “summary judgment evidence”
- What is a “genuine issue of material fact”
  - Affidavits in opposition
- The effect of outstanding discovery

## Motion for Summary Judgment

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- Strategic considerations - MSJ or trial?
  - Do affidavits invite more depositions
  - No genuine issue of material fact vs preponderance of the evidence
  - Appellate standards of review

## Contact Us

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