

PUBLICATION

Florida Residential Foreclosure Trials: Use of Subpoenas

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In Florida, nearly every circuit court now favors the use of bench trials as a means to process a high volume of residential foreclosures. Courts preside over blocks of uncontested trials, processing a high volume of foreclosures on properties when there is no opposition. "Contested" trials are set before any judge with the time to hear them. But with attorneys for both sides scrambling to prepare for trial, and bank representatives spending hours reviewing documents and analyzing pay histories so that they will be ready to testify, I've often wondered - where is the borrower?

Attorneys who appear on behalf of the borrowers at trial are careful to refer to their clients as the "homeowner," hoping to gain good will, or even sympathy, from judges. They stress that the lender is attempting to "take their home" and frequently recite personal information about their clients in order to personalize them. But where are the concerned "homeowners" at trial? Often, they've been encouraged not to appear. Many attorneys' borrowers never intend to call their clients to the stand to testify. If the "homeowners" did testify, they would be under oath and the judge would learn that they almost always admit to taking out the loan and defaulting on their obligation. So it's easier to paint a picture if the borrower isn't present.

The only way a lender's attorney can ensure the borrower is present at trial is to issue a trial subpoena. Attorneys do this with very little effort and minimal cost, but the outcome can produce significant savings on the cost of preparation for trial. Why? The reason is simply that most litigation expense is caused by borrowers' attorneys, not the borrowers themselves. The borrowers' attorneys are the ones devising endless roadblocks to avoid lawful foreclosures. Borrowers, on the other hand, do not know the court system and often do not even care to appear before a judge. So when they are served with a trial subpoena, their willingness to settle suddenly grows exponentially.

In fact, once a subpoena is served, lender's counsel should reach out to attempt settlement. The opportunity to settle is often greatest just after service of the subpoena. Even if settlement is not reached in the days prior to trial, the parties always have an opportunity on the courthouse steps.

Trial subpoenas require everyone to come together. They encourage early settlement, or at least require the borrower to be part of the process.