

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

THEODORA BRYANT, MARY L.
WALKER, EARNEST JACK WELCH,
and BARBARA JEAN SLOCUM,
individually and on behalf of all others
similarly situated,

Plaintiffs,

CASE NO. 4:99CV317-RH
CLASS REPRESENTATION

vs.

LAW OFFICES OF DAVID J.
STERN, P.A., and DAVID J. STERN,
individually

Defendants.

**PLAINTIFFS' STATEMENT OF MATERIAL FACTS
PURSUANT TO N. D. FLA. LOC. R. 56.1A**

Plaintiffs, Theodora Bryant, Mary L. Walker, Earnest Jack Welch, and Barbara Jean Slocum, individually and on behalf of all others similarly situated, hereby file their statement of materials facts as to which they contend a genuine issue remains to be tried pursuant to N.D. Fla. Loc. R. 56.1A in response to the statement of facts filed by the Defendants in support of their Motion for Summary Judgment. The paragraphs referred to herein correspond with similarly numbered paragraphs in Defendants' Statement of Material Facts.

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2. The Defendants' statement that "each Plaintiff borrowed money from Stern's clients to facilitate the purchases of residential real estate" is not true. As evidenced by the notes and mortgages attached as Exhibit "A" to the Defendants' Statement of Material Facts, the Plaintiffs borrowed money from various lenders who then referred the notes and mortgages to Stern for foreclosure.

3. Plaintiffs contend that issues of material fact exist as to the recoverable expenses owed and incurred by the lenders under the terms of the various mortgages. The mortgages generally provided that the "lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this paragraph 21, including, but not limited to, reasonable attorneys' fees and costs of title evidence." (Emphasis supplied.) (See, e.g., Exhibit "A" to Defendants' Statement, Slocum mortgage at ¶ 21). The Welch mortgage authorized the lender to collect all expenses incurred including "reasonable attorneys' fees and costs of title evidence." (See, Exhibit "A" to Defendants' Statement, Welch mortgage at ¶ 21). The mortgages required the Plaintiffs to pay only those expenses incurred by the lender. Additionally, each of the subject mortgages involved in this action specifically granted to the mortgagor a right to reinstate the mortgage upon the condition that the mortgagor pay the lenders "expenses incurred in enforcing the security instrument, including but not limited to reasonable attorneys' fees." (See for example Slocum mortgage at ¶ 18; Welch mortgage at ¶ 18; Exh. "A" to Defendants' Statement.) Additionally, mortgagors have the right to redeem under section 45.0315, Florida Statutes (1999). This statute provides a right to redeem a mortgage prior to sale by tendering amounts due "plus the

reasonable expenses of proceeding to foreclosure incurred to the time of the tender, including reasonable attorneys' fees of the creditor." (Emphasis supplied.) It is not the amounts allegedly incurred by the Defendants which are recoverable, but only those reasonable fees and expenses incurred by the lenders. The amounts sought by Defendants as fees and costs were in excess of the amounts authorized under the mortgages and/or under Florida Law. (Boyd aff., ¶¶ 1, 2, 4, 5, 6, 7, attached hereto as **Appendix ("App.") A.**) Defendant Stern recently testified that he has oral agreements with clients which authorize him to charge higher fees and costs than his client is obligated to pay as long as the mortgagor or a third party pays the fee or cost. (**App. B:** Stern dep., Vol. III, p. 87, ll. 7-21; p. 96, ll. 20-23; p.105, ll. 5-10; p.111, ll. 14-25; p.112, ll. 1-5.) However, a representative of Mellon Mortgage deposed this week stated that she is not aware of any oral agreements with the Stern firm. The referral letter from Mellon Mortgage to the Stern firm transmitted with each foreclosure case sets forth the terms and conditions of representation. (**App. C:** Viner dep., p. 6, l. 25, p. 7, l. 1-15.)

4. Genuine issues of material fact exist as to the purported authority of the Federal National Mortgage Association ("FNMA") to determine the appropriateness of "charges or fees" in connection with loans issued by FNMA. Defendants cite to 12 U.S.C. § 1719(a)(2) as providing authority to FNMA to determine the appropriateness of "charges or fees" in connection with its foreclosures. This provision states:

The volume of the corporation's lending activities and the establishment of its loan ratios, interest rates, maturities and charges or fees in its secondary market operations under this section, should be determined by the corporation from time to time . . . (Emphasis supplied.)

This section deals with FNMA's fees and costs in the purchase and sale of loans on the secondary market and has nothing to do with establishing costs or fees which must be charged in connection with the foreclosures of loans between borrowers and lenders. As a FNMA representative testified, the terms of the note and mortgage control a borrower's liability for attorneys' fees and costs, not any agreement between FNMA and the lender. (**App. D:** Reid dep., p. 127, l. 14-18.) FNMA has established a set of guidelines under which it agrees to reimburse a lender for the expenses which the lender incurs in prosecuting the foreclosure. (**App. D:** Reid dep., p. 16, l. 16-21.) These "guidelines" are not mandatory, but rather are suggestions. (**App. D:** Reid dep., p. 16, l. 9-15.) Failure to follow the guidelines will result in the lender or servicer not being reimbursed by FNMA. (**App. D:** Reid dep., p. 16, l. 16-21.)

FNMA guidelines provide that FNMA will reimburse a lender the maximum amount of \$1,000 in attorneys' fees for an uncontested foreclosure. (**App. D:** Reid dep., p. 69, l. 9-12.) FNMA will reimburse costs which a lender or servicer incurs in a foreclosure under its guidelines under the following terms:

Specifically, we will reimburse the servicer for any of the following out-of-pocket costs that it pays to third-party vendors or the courts, as long as the costs are actual, reasonable and necessary . . .

(**App. D:** Reid dep., p. 96, l. 19-25, Exh. 137.) With regard to overhead items which will be reimbursed, the FNMA Guidelines provide that:

We will not reimburse a servicer . . . for expenses that are properly allocated to the attorney's . . . overhead expenses (since such expenses are taken into consideration when we establish our standard fee schedule). Expenses that are considered to be overhead costs include travel time and expenses, document preparation charges,

secretarial and word processing time charges, fees for notary services, postage, photo copy charges, . . . and most telephone charges. . . . (Emphasis added.)

(**App. D:** Reid dep., p. 93, l. 22-25; pg. 94, l. 1-24; p. 154, l. 21-25; p. 155, l. 1-11; Exh. 137.) A lender or servicer may agree to reimburse its counsel for costs or fees outside the FNMA Guidelines but FNMA will not reimburse the lender. (**App. D:** Reid dep., p. 156, l. 7-11.) There are no specific FNMA guidelines which apply to title search examination or update other than a footnote contained in the 1993 guidelines which provides that “the costs of a title examination or abstract are reimbursable as a separate expense—up to \$150 in most areas, but up to \$235 in Palm Beach, Broward and Dade Counties.” (**App. B:** Stern dep., Vol. III, p. 45, l. 15-25, p. 46, l. 13-24, Exh. 12.) More recent guidelines adopted in 1996 by FNMA do not address reimbursements for title search examination or update. (**App. D:** Reid dep., p. 99, l. 9-17, Exh. 137.) However, in an October 31, 1995 letter, a representative of FNMA stated to the Defendant that a charge of \$150 for a title examination and \$175 for a title search would be acceptable to FNMA. (**App. D:** Reid dep., p. 74, l. 24-25; p. 75, l. 1-7; **App. B:** Stern dep., Vol. III, p. 19, l. 16-25; p. 20, l. 1-7; Exh. 12.) The representative of FNMA who made this statement however had no information as to whether the charges for a title search and examination were in-house services provided by the Stern law firm or out-of-pocket third-party costs. (**App. D:** Reid dep., p. 72, l. 18-25; p. 73, l. 1-4.) Defendant Law Firm is a part of FNMA’s “Attorney Network.” (**App. B:** Stern dep., Vol. III, p. 11, ll. 20-25.) FNMA’s agreement with Stern required that he comply with all provisions of the Fair Debt Collection Practice Act. (**App. D:** Reid dep., p. 36, l. 10-15; Exh. 134.) Sheila Teimourian,

Assistant General Counsel for FNMA directed Stern to stop charging many of these fees in early 1999. (**App. B:** Stern dep., Vol. III, p. 127, ll. 18-25; p.128, ll. 1-7.)

5. A genuine issue of material fact exists as to whether Defendants' attorneys' fees and costs were reasonable. Pursuant to a written agreement dated April 17, 1996, FNMA retained the Defendant firm to prosecute FNMA mortgage foreclosures. (**App. E:** Samons dep., p. 95, Exh. 46.) The agreement provides that "your legal fees for foreclosure . . . shall be as set forth in the Fannie Mae servicing guide, as amended from time to time. [\$1,000.00] You will be reimbursed for your ACTUAL, necessary and reasonable third-party costs." The agreement further provides that:

In general, you will bill Fannie Mae and Fannie Mae will pay your fees and ACTUAL THIRD-PARTY COSTS. Under no circumstances may you directly charge the borrower for any services.

With regard to reinstatements the agreement states:

For reinstatements, pay offs . . . you must bill the service for all legal fees (prorated to reflect the actual amount of work you did prior to the reinstatement, pay off or modification, which amount shall not be in excess of the amount you would otherwise be entitled to if you completed the foreclosure, and out-of-pocket expenses . . . under no circumstances may you directly charge the borrower for any services.

(**App. E:** Exh. 46.)

6. A genuine issue of material fact exists with regard to Defendants' use of forms pertaining to cost and fee affidavits. Where the Defendants' attorneys' fee affidavits are submitted in connection with motions for summary judgment, they are prepared by a paralegal. (**App. E:** Samons dep., p. 82, l. 11-13.) No time records are kept which reflect attorney time spent on any individual file. (**App. E:** Samons dep., p. 67, l. 5-9; **App. F:** Tapia dep., p. 24, l. 14-23; **App. G:** Gay dep., p. 10, l. 24-25.) Paralegals estimate the legal time spent on each task. (**App. G:** Gay dep.,

p. 12, l. 11-13.) Where attorneys' fees are charged in a reinstatement letter, a paralegal determines the charge based upon a review of the file. (**App. H:** Smith dep., Vol. II, p. 20, l. 13-25; p. 21, l. 1-12.) No attorney reviews the attorneys' fee charge contained in a reinstatement letter. (**App. H:** Smith dep., Vol. II, p. 23, l. 23-25; p. 24, l. 1-16.) Additionally, attorneys' fees may be charged pursuant to a schedule provided to the paralegal. (**App. H:** Smith dep., Vol. II, p. 21, l. 4-12.) The paralegal quoting the attorneys' fee has no information as to the agreement between the Stern firm and the lender on attorneys' fees or costs. (**App. H:** Smith dep., Vol. II, p. 22, l. 2-17.) The reinstatement letter form includes a standard charge of \$60 for copies, postage and faxes. (**App. H:** Smith dep., Vol. II, p. 19, l. 3-5; p. 19, l. 24.; **App. B:** Stern dep. Vol. III, p. 121, l. 5-25; p. 122, l. 1.) No attempt is made to determine whether these costs have actually been incurred. (**App. H:** Smith dep., Vol. II, p. 14, l. 18-22.) The paralegal does not know whether the lender is obligated to pay the costs. (**App. H:** Smith dep., Vol. II, p. 13, l. 18-22.) The \$60 amount remains the same from the inception of the proceeding through the completion of the foreclosure, regardless of how many copies were made or postage incurred. (**App. H:** Smith dep., Vol. II, p. 19 and 20.) The supervisor of the reinstatement department, Claudia Bunge, stated that the \$60 charge for postage, copies, etc., was imposed based upon instructions from David Stern. (**App. I:** Bunge dep., p. 8, l. 7-25; p. 9, l. 1-11.) Defendants acknowledge that courts will not award this \$60 charge as an item of cost, thus it is not included in the affidavits submitted to the court at the summary judgment stage. (**App. B:** Stern dep., Vol. III, p. 125, ll. 12-22.) It is also not a cost which the mortgagor is obligated to pay under the terms of the mortgage. (**App. A:** Boyd aff., ¶ 2.)

On affidavits of costs filed with the court in connection with motions for summary judgment, it was the *understanding* of the attorneys who signed the affidavits that the costs are out-of-pocket costs actually incurred by the firm although they had no invoices or other supporting documentation. (**App. F:** Tapia dep., p. 44, l. 21-25; p. 45, l. 1; **App. G:** Gay dep., p. 23, l. 4.)

A \$400 charge for title search, exam, and update was regularly imposed on borrowers. (**App. H:** Smith dep., Vol. II, p. 12, l. 2-5; **App. J:** Smith dep., Vol. I, p. 10, l. 7-11.) The firm claims a standard amount of \$325 for “abstracting.” This is a standard fee on every foreclosure. (**App. K:** Stern dep., Vol. 1, p. 70, l. 19-25; p. 71, l. 1-25; p. 72, l. 1-9; **App. I:** Bunge dep., p. 6, l. 5-17.) If a mortgagor or the court requested an invoice as to the cost, bogus invoices on the letterhead of Professional Title and Abstract were routinely provided. (**App. E:** Samons dep., p. 85, l. 3-14; p. 87, l. 12-13.) Samons acknowledges that the invoices were inaccurate and did not truthfully reflect the actual work performed. (**App. E:** Samons dep., p. 78, l. 19-25.)

7-15. Genuine issues of material fact exist as to whether the Stern law firm performs “title abstracting” as described on affidavits of costs filed by its attorneys in support of motions for summary judgment. On these affidavits, Defendants seek \$325 for title abstracting. Defendants do not perform abstracting and therefore the statement is false. (**App. A:** Boyd aff., ¶ 6.) The Stern firm does not perform this activity. Rather, a clerical person identified as a “searcher” orders specific documents of the public records reflected on an “ATIDS computer” located in Stern’s office. This is a clerical activity and takes about 30 minutes for a routine case. (**App. L:** Pence dep., p. 17, l. 20-25; p. 18, l. 1-6; **App. M:** Kozlowski dep., p. 13, l. 5-10.) Similar records are provided by

Attorneys' Title Insurance Fund ("ATIF") at a cost of about \$70. (**App. L**: Pence dep., p. 16, l. 1-10; **App. N**: Hughes aff., ¶ 4.) The Stern firm charges \$175 for the "title search." (**App. K**: Stern dep., Vol. I, p. 71, l. 16-18.) This is a standard charge imposed in every foreclosure. (**App. K**: Stern dep., Vol. I, p. 71, l. 16-18.) A charge of \$175 for a title search is not a reasonable and customary expense of foreclosure nor is it an item of cost under the mortgage. (**App. A**: Boyd aff., ¶ 1, 5)

A title examination to determine the necessary parties to the foreclosure suit is performed by an attorney or in house examiner employed by the Stern firm. (**App. K**: Stern dep., Vol. I, p. 32, l. 19-24; p. 33, l. 1-5.) The ordering of the title documents or "title search" and title exam performed by the Stern firm is the same thing as a "foreclosure report" which can be ordered from ATIF. (**App. E**: Samons dep., p. 33, l. 10-14.) Foreclosure reports are routinely provided by ATIF for a cost of between \$175 and \$200. (**App. N**: Hughes aff., ¶ 5.) The firm incurs no actual out-of-pocket cost payable to a third party in connection with the title exam. (**App. B**: Stern dep., Vol. III, p. 48, l. 5-14.) The charge of \$150 for each title examination as a "cost" is false as it is a fee. (**App. O**: Stern dep., Vol. II, p. 8, l. 12-25; p. 9, l. 1-11; **App A**: Boyd aff., ¶ 4.) The total amount claimed by Stern for the title search and title exam is \$325. Stern is required to use Landsafe Title on any Countrywide Mortgage foreclosures. (**App. E**: Samons dep., p. 134, l. 18-25; p. 135, l. 1.; **App. K**: Stern dep., Vol. I, p. 42, l. 14-17.) The foreclosure report provided by Landsafe is an "examined product." (**App. P**: Silverglate dep., p. 40, l. 21-23.) Foreclosure reports which are examined products are routinely available from ATIF in the amount of \$175 to \$200. (**App. N**: Hughes aff., ¶ 5.) The examination of title involves a determination of the necessary parties to the

foreclosure action. This is a legal service and is included under the attorneys' fee agreement with the client. (**App. A**: Boyd aff., ¶ 4.)

16-17. Disputed issues of material fact exist as to Defendants' Statements 16-17. A paralegal prepares the complaint from a case template which an attorney reviews. (**App. K**: Stern dep., Vol. I, p. 39, l. 21-25; p. 40, l. 1-8; **App. E**: Samons dep., p. 107, l. 15-25; p. 108, l. 1-10.) Review of the complaint to determine that the necessary parties are included is a legal service included in the attorneys' fee. (**App. A**: Boyd aff., ¶ 4.)

18-20. Disputed issues of material fact exist as to Defendants' Statements 18-20. The Stern firm routinely charges \$75 as a "fee" for performing a title update or gap search. (**App. E**: Samons dep., p. 25, l. 11-16.) It is a fee and not a cost. (**App. A**: Boyd aff., ¶ 5.) Gap searches and updates cover the period between the filing of the complaint and the notice of lis pendens. (**App. P**: Silvergate dep., p. 13, l. 4-12.) In most instances, the Stern firm does not incur any third-party expense for the gap search or title update. (**App. E**: Samons dep., p. 25, l. 3-5; **App. K**: Stern dep., Vol. I, p. 44, l. 9-23.) A gap search or title update is provided free of charge by ATIF when the initial title information is provided within six months of the request for the update or gap search. (**App. N**: Hughes aff., ¶ 6.) The documents filed in this case show that in the Slocum foreclosure the complaint and lis pendens were filed approximately one week apart. Thus, Stern did not incur any cost to a third party for a gap search in the Slocum foreclosure. Further, Stern admits that he did not incur any cost for the gap search in the Walker case. (**App. O**: Stern dep., Vol. II, p. 38, l. 17-19.)

Stern characterizes the cost of providing the service as an overhead cost. (**App. O**: Stern dep., Vol. II, p. 10, l. 15-20.) No attempt is made to actually assess the time spent in performing the gap search or title update. (**App. E**: Samons dep., p. 25, l. 24-25.) When the Stern firm seeks an award of costs pursuant to a motion for summary judgment, it does not include the \$75 charge for the update or gap search. (**App. O**: Stern dep., Vol. II, p. 13, l. 1-25; p. 14, l. 1-2.) However, a \$75 charge is routinely imposed if a borrower seeks to reinstate the mortgage. (**App. O**: Stern dep., Vol. II, p. 14, l. 3-14.) Landsafe did not impose any charge for a gap search during the Welch foreclosure. (**App. O**: Stern dep., Vol. II, p. 16, l. 6-9.) The head of the title examination department, Sam Silverglate, was not aware of any charge from Landsafe Title for performing title updates. (**App. P**: Silverglate dep., p. 54, l. 14-17.) When Mr. Stern's deposition was taken in this case, he was asked about this charge but was unaware of any invoice for this charge. (**App. O**: Stern dep., Vol. II, p. 16, l. 6-9.) Mr. Stern subsequently realized that he had never received an invoice from Landsafe Title and therefore requested an invoice in April, 1999, which was subsequently paid. (**App. B**: Stern dep., Vol. III, p. 249, l. 17-25; p. 250, l. 1-9.) It is not customary or reasonable to charge for a gap search because in residential foreclosures, it is provided at no cost by ATIF or another abstract company in most instances. (**App. N**: Hughes aff., ¶ 6.) Further, review of the update is a legal service included in the attorneys' fee. (**App. A**: Boyd aff., ¶ 4.)

21-22. There are disputed issues of material fact as to Defendants' Statements 21-22. Professional Title and Abstract of Florida, Inc. (PTAF) had no employees, no equipment, and no operations and did not perform title searches, examination or updates from January 1, 1996 until

spring 1999. (**App. K**: Stern dep., Vol. I, p. 59, l. 12-21, p. 60, l. 1-25; **App. E**: Samons dep., p. 68-71.) Paralegals routinely prepared invoices under the letterhead of PTAF which identified as charges \$175 for performing a title search, \$150 for performing a title exam, and \$75 for performing a title update. (**App. O**: Stern dep., Vol. II, p. 25, l. 16-25; p. 26, l. 1-3, 9-13, Exh. 37.) The head of the title examination department, Sam Silverglate, did not know who or what PTAF was. (**App. P**: Silverglate dep., p. 4, l. 23-24; p. 6, l. 12-23; p. 7, l. 1-6.) Lawyers employed by the Law Offices of David Stern who submitted cost affidavits for title services in support of motions for summary judgment assumed that PTAF had actually performed title services. (**App. F**: Tapia dep., p. 19, l. 7-25.) The head of the reinstatement department, Claudia Bunge, was told to provide a PTAF invoice to any mortgagor who requested information about the charge by David Stern or Cheryl Samons. (**App. I**: Bunge dep., p. 11, l. 22-25, p. 13, l. 1 3-25, p. 15, l. 12-14.) If a mortgagor, mortgagee, attorney or the court requested information as to the amount of the charges, they were provided invoices of PTAF. (**App. E**: Samons dep., p. 73, l. 11-23; p. 74; p. 75, l. 1-19; **App. O**: Stern dep., Vol. II, p. 27, l. 21-25; p. 28, l. 1-10; **App. I**: Bunge dep., pp. 11-15.) It is acknowledged by the office manager of the Defendants, Cheryl Samons, that the invoices were not accurate and true as to the services which they represented had been performed. (**App. E**: Samons dep., p. 78, l. 24-25.)

23. There are disputed issues of material fact as to Defendants' Statement 23 as to whether its charges for title work were consistent with those of third-party vendors. Stern was required to use Landsafe Title by Countrywide Mortgage. (**App. E**: Samons dep., p. 134, l. 11-25;

p. 135 l. 1.) Stern uses Landsafe Title only on Countrywide files. (**App. E:** Samons dep., p. 134, l. 20-22.) The amounts charged by Stern for title work in the amount of \$400 are in excess of reasonable and customary charges for a necessary parties determination and title update which are routinely available from ATIF in an amount of between \$150 and \$200. (**App. N:** Hughes aff., ¶ 5.)

24-30. There are disputed issues of material fact as to Defendants' Statements 24 through 30. In the Bryant foreclosure, Stern was employed by Northwest Legal Services, P.A., pursuant to an agreement which it had with the lender, First Nationwide. (**App. O:** Stern dep., Vol. II, p. 44-45.) Pursuant to the agreement with Northwest, Stern was entitled to be paid pursuant to the standard FNMA guidelines (\$1,000 for attorneys' fees) and was not entitled to be paid for telephone calls, document preparation, postage and mailing costs, facsimile costs, or photocopy charges. (**App. B:** Stern dep., Vol. III, p. 196, l. 10-16; p. 198, l. 14-25; p. 199, l. 1-13; Exh. 122.) A reinstatement letter was provided to Bryant and claimed the following amounts were due (**App. Q:** McCann dep., p. 58, Exh. 106):

Title search/exam	\$400.00
Postage, copies, faxes	\$ 25.00
Attorneys' fees	\$900.00
Litigation	\$187.50

Shortly thereafter, the borrower filed a motion for summary judgment and in support of the motion filed an affidavit of fees and costs seeking completely different amounts. The affidavit sought \$1,725 for attorney's fees. (**App. F:** Tapia dep., p. 23, l. 8-16; Exh. 22.) Additionally, the affidavit of costs sought reimbursement for abstracting in the amount of \$325. (**App. F:** Tapia dep., p. 27, l. 20-25; Exh. 23.) On behalf of Bryant, Claude R. Walker

filed objections to costs and fees in the circuit court proceeding. (**App. R:** Glick dep., p. 13, ll. 24-25.) He was provided false affidavits on behalf of Professional Title and Abstract, Inc. (**App. R:** Glick dep., p. 61, ll. 2-12, p. 66, ll. 10-14.) Before these objections could be heard, Defendant caused Stewart Title, who was holding refinance funds on behalf of Bryant, to pay the disputed amounts to Stern. (**App. R:** Glick dep., p. 39, ll. 2-14; Exh. 82.) Defendant then dismissed the foreclosure action. (**App. R:** Glick dep., p. 13; p. 68, ll. 18-25; p. 69, ll. 1-5.) Walker demanded a refund of fees and costs which had been objected to. (**App. R:** Glick dep., p. 43, ll. 5-11; Exh. 84.)

Plaintiffs further incorporate the disputed issues in paragraphs 3 through 22 herein.

31-36. There are disputed issues of material fact as to Defendants' Statements 31 through 36 concerning the Walker foreclosure. Stern was retained by Colonial Mortgage Company to prosecute the foreclosure. (**App. B:** Stern dep., Vol. III, p. 178, l. 2-7.) The foreclosure referral letter from Colonial provided that "the attorney's fee will be \$1,000. The attorneys fee includes all costs for postage, travel and telephone calls." (**App. B:** Stern dep., Vol. III, p. 177, l. 23-25; p. 178, l. 1-24; Exh. 121.) On November 11, 1997, a letter providing the amount to reinstate the mortgage which charged the following amounts:

Title search and exam	\$ 325.00
Title update	\$ 75.00
Postage/copies/faxes	\$ 60.00
Attorneys' fees	\$1,000.00

(**App. J:** Smith dep., Vol I, p. 12, l. 1-13.) Thereafter, Defendant law firm transmitted to Plaintiff a motion for summary judgment with an affidavit of fees in which it sought attorneys' fees in the

amount of \$1,875. (**App. G:** Gay dep., p.13, l. 21-25; p. 14, l. 7, Exh. 14.) Additionally, Defendants transmitted to Plaintiff an affidavit of costs for “abstracting” in the amount of \$325. (**App. G:** Gay dep., p.17-19; Exh. 15.). On March 16, 1998, the Honorable Terry P. Lewis entered a Final Judgment of Foreclosure awarding the costs sought but reduced the attorneys fees to the amount of \$1,000. (See Exhibit “M” to Defendant’s Statement.) The amount of fees claimed in the letter of reinstatement and affidavit of fees were in excess of the amount actually performed and were in excess of Defendants’ agreement with its client or permitted by law. (**App. A:** Boyd aff. ¶¶ 1-7.) Walker ultimately filed bankruptcy. (See Paragraph 35, Defendant’s Statement.)

Further, Plaintiffs’ statements in paragraphs 3 through 22 are incorporated herein.

37-42. There are disputed issues of material fact as to Defendants’ Statements 37 through 42. The Welch mortgage was subject to FNMA guidelines. (**App. K:** Stern dep., Vol. I, p. 17, l. 11-22; Vol. III, p. 108, l. 12-20.) Pursuant to the FNMA guidelines, the attorneys’ fee was limited to a \$1,000 amount. Stern asserts an attorney-client privilege as to the terms of his employment by Countrywide Homes as to the Welch mortgage. (**App. B:** Stern dep., Vol. III, p. 130, l. 14-23.) Shortly after filing the complaint, on April 20, 1998, Defendant transmitted to Welch a letter stating the amounts which must be paid to reinstate the loan the following amount:

Title search and exam	\$ 325.00
Title update	\$ 75.00
Postage/copies/faxes	\$ 60.00
Attorneys’ fees	\$1,000.00

At the time that the reinstatement letter was sent, no title update charge had been incurred. (**App. O:** Stern dep., Vol. II, p. 16, l. 6-9.) Stern acknowledged that the update charge was not an expense paid

to a third party but was an overhead charge. (**App. K:** Stern dep., Vol. I, p. 83, l. 7-23.) As of the date of the letter, Stern had not incurred \$1,000 in attorneys' fees. (**App. A:** Boyd aff., ¶ 3.) Stern has no records to substantiate the cost of copies, postage and faxes. The \$60 is a standard charge on every file. (**App. B:** Stern dep., Vol. III, p. 121; p. 122).

On June 15, 1998, Defendant transmitted to Plaintiff and filed with the court an affidavit as to attorneys' fees in the amount of \$1,200. (**App. K:** Stern dep., Vol. I, p. 67, l. 4-10, Exh. 3.) On the same date, Defendant transmitted to Plaintiff and filed an affidavit of cost with the court indicating "abstracting" had been performed in the amount of \$325. (**App. K:** Stern dep, Vol. I, p. 70, l. 2-18, Exh. 4.) On July 13, 1998, a summary final judgment was entered by the Honorable P. Kevin Davey which award limited the attorneys' fees in the amount of \$1,000. (See Exhibit "O" to Defendant's Statement.) Subsequently, on September 3, 1998, Defendant transmitted to Welch a letter stating that the amount which must be paid to reinstate the mortgage. (**App. K:** Stern dep., Vol. I, p. 84, l. 1-12, Exh. 9.) Although the final judgment did not include charges for title updates or postage, copies, and other charges, these amounts were included in the reinstatement letter following the judgment. (**App. K:** Stern dep., Vol. I, p. 84, l. 1-12). Some of the costs and fees which Defendants sought to collect in the reinstatement letter were:

Title search and exam	\$ 325.00
Title update	\$ 75.00
Postage/copies/faxes	\$ 60.00
Attorneys' fees	\$1,000.00
Motion/order to vacate judgment	\$ 150.00
Attend sale fee	\$ 50.00

Welch was not able to reinstate his mortgage and a foreclosure sale was held on August 27, 1998. (See Exhibit "P" of Defendant's Statement.) The costs and fees described in the reinstatement letters and affidavits were in excess of the amounts incurred and not authorized by the mortgage or substantive law. (**App. A:** Boyd aff., ¶¶ 1-7.)

43-47. There are disputed issues of material fact as to paragraphs 43 through 47 of Defendant's Statement regarding the Slocum foreclosure. The referral letter to Defendant dated July 1, 1998 is identified as a "FNMA program loan." (**App. B:** Stern dep., Vol. III, p. 78, l. 10-25; p. 79, l. 1-25, Exh. 119.) The terms of the referral letter provided that Defendant was to be paid as follows:

4. For the professional services to be rendered, you will be paid the sum of \$1,000 as an agreed fee for all services necessary in connection with this matter, regardless of the time expended on Clients' behalf. In no event should your fees exceed this amount without prior written approval. Said fee will be payable at the conclusion of the foreclosure action.

* * *

Postage, stationary, photocopying, telephone, routine travel expenses and other items customarily incurred to transact business are included within the fee structure. Accordingly, such items are ordinarily not reimbursable. Other foreclosure costs, such as court costs, service fees, filing or recording fees, title search, etc., which are reasonably incurred in your representation would be repaid to you upon billing for the same.

(**App. B:** Stern dep., Vol. III, p. 78, l. 1-15, Exh. 119.) On July 15, 1998, the day before the complaint was filed, Defendants transmitted to Plaintiff Slocum a letter stating that the law firm was

attempting to collect a debt from the debtor and required that the following sums be paid in order to reinstate the mortgage:

Title search/exam	\$325.00
Title update	\$ 75.00
Postage/copies/faxes	\$ 60.00
Attorneys' fees	\$850.00

(**App. E:** Samons dep., p. 86, l. 4-20, Exh. 44.) Defendants had not incurred attorneys' fees in the sum of \$850 as of July 15, 1998. (**App. A:** Boyd aff., ¶ 3.) As of July 20, 1998, Stern had invoiced Mellon Mortgage for attorneys' fees in the sum of \$500 and title search and examination in the amount of \$325. (**App. E:** Samons dep., p. 62-64.) The invoice did not include amounts for postage, copies or faxes or title update. (**App. E:** Samons dep., p. 83-86, l. 4, Exh. 43.) The invoice was never paid by Mellon. (**App. C:** Viner dep., p. 70, l. 22-24.) Mellon has no records to determine whether the invoice was received. (**App. C:** Viner dep., p. 29.) On October 1, 1998, Defendants transmitted to Plaintiff and filed with the State court an affidavit as to attorneys' fees in support of its motion for summary judgment in the amount of \$1,350. (**App. E:** Samons dep., p. 127-129, Exh. 48.) At the same time, it submitted an affidavit of costs which included a statement that the firm had expended the following sum on costs:

Abstracting	\$325.00
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(**App. E:** Samons dep., p. 127-129, Exh. 48.) The affidavit did not include amounts as costs for postage, copies or expenses or for a title update. (**App. E:** Samons dep., p. 127-129, Exh. 48.) Prior to a final hearing on summary judgment, Defendants transmitted a letter to Plaintiff indicating that

the law firm was attempting to collect a debt from the debtor and sought payment of the following amounts to reinstate the mortgage:

Title search/exam	\$ 325.00
Postage/copies/faxes	\$ 60.00
Attorneys' fees	\$1,350.00
Title update	\$ 75.00

(**App. H:** Smith dep., Vol. II, p. 31, l. 6-18, Exh. 52.) No summary judgment hearing was held. On October 26, 1998, Plaintiff paid the amount of \$15,026.36 to Defendant's Trust Account. (See Paragraph 46, Defendants' Statement.) On the same date, Defendant prepared an invoice to Mellon Mortgage Company for attorneys' fees (reinstatement) in the amount of \$850, title update in the amount of \$75, and Federal Express/postage/copies/telephone/faxes of \$60. (**App. E:** Samons dep., p. 116-118, Exh. 47.) Mellon does not know if the invoice was ever received or whether it paid the invoice. (**App. C:** Viner dep., p. 29; p. 70; p. 71.) The amount of fees sought in the reinstatement letter and attorney's fee affidavit were in excess of the amount of work performed or amounts that had been agreed to with Defendants' client and were in excess of that permitted by substantive law. (**App. A:** Boyd aff., ¶¶ 1-7.). Paragraphs 3-22 are incorporated.

49. With regard to Defendants' Statement 49 concerning the summary judgment, there are disputed issues of material fact as to the matters considered and the holding of the court. On May 5, 1999, Defendants filed a motion for summary judgment arguing that section 559.72(9), Florida Statutes, did not control because Defendants' lender clients have a contractual right to collect from the plaintiffs the costs they incur for abstracting services; that the allegations as to the amount of the charges were mere challenges to the reasonableness of the amounts charged; that

section 559.72(9), Florida Statutes, did not regulate the reasonableness of costs; that Welch's claim was without merit because the amount collected for abstracting had been paid to a third party; and that the doctrines of res judicata, estoppel and waiver preclude the Bryant and Welch claims. (Defendants' Motion for Summary Judgment, dated May 5, 1999.) After considering depositions, exhibits and memoranda which were filed, the trial court rendered an order on May 28, 1999. The court held as follows:

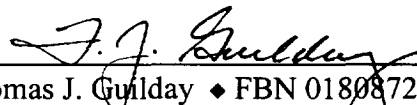
Defendant argues that lenders authorize the title search charges Defendant collected or attempted to collect from the debtors and having been so authorized by the lenders, the amounts charged the debtors were legitimate. No lender can authorize the attorney to collect payment in the form of attorneys' fees or costs for work not done, nor can a lender authorize an attorney to inflate costs of the action or to collect those costs twice, once under the label of attorneys' fees and again under the label of costs.

(Order of May 28, 1999.) As to Welch, the trial court granted summary judgment that the amount charged by Stern for abstracting had been paid to Landsafe Title Company and therefore granted summary judgment in Defendants' favor. (Order of May 28, 1999.)

50. As to Defendants' Statement 50, there are disputed issues of material fact remaining in that the court granted leave for Plaintiff Welch to file an amended complaint. The amended complaint filed on behalf of Welch pled that Defendants "claimed, attempted or threatened to collect costs which were in excess of the amount allowed by law including costs of a title update." (First Amended Complaint, ¶¶ 23, 24.) Subsequently, Plaintiffs filed a Second Amended Complaint. With regard to all Plaintiffs, the Second Amended Complaint alleged that the Defendants claimed they incurred a cost of \$75 for a title update when they had not; that they had sought attorneys' fees in

excess of the amounts authorized by their clients or permitted by law; that as to Walker, Slocum and Welch they had charged the amount of \$60 for postage, copies and faxes when they had not incurred such amounts; and that as to Walker, Slocum and Bryant, they had charged the amount of \$325 for abstracting when they had not incurred or paid such amounts. (Second Amended Complaint, dated October 5, 1999, ¶ 16, 22, 27, 33.)

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to: **W. WYNDHAM GEYER, JR., ESQUIRE, and STEVEN R. BRATEN, ESQUIRE**, Ruden, McClosky, Smith, Schuster & Russell, P.A., Post Office Box 1900, Fort Lauderdale, FL 33302; **DAVID M. SCHULTZ, ESQUIRE**, Hinshaw & Culbertson, 222 North La Salle Street, Suite 300, Chicago, IL 60601-1081; and **SCOTT A. FRICK, ESQUIRE**, Hinshaw & Culbertson, First Union Center, Suite 830, 100 South Ashley Drive, Suite 830, Tampa, FL 33602; by regular U. S. Mail this 4th day of February, 2000.



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