IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO THE FLORIDA RULES OF CIVIL PROCEDURE **CASE NO: SC13-2384**

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COMMENTS TO: ***IN RE: AMENDMENTS TO THE FLORIDA RULES OF CIVIL PROCEDURE***

The attorneys, signed below, pursuant to the notice published in the January 15, 2015 issue of The Florida Bar News file these comments.

INTRODUCTION

The undersigned attorneys have represented hundreds homeowners in foreclosure in Circuit Courts throughout Florida. As such, we appreciate the efforts of this Court and The Florida Bar's Civil Procedure Rules Committee to interpret the 2013 legislative changes to the foreclosure process. The undersigned also participated in advocating for homeowners during the 2012 and 2013 legislative process. We take this opportunity to raise issues with certain aspects of the proposed Rules that will conflict with the stated purpose of the Legislature to "expedite the foreclosure process by ensuring initial disclosure of a plaintiff's status and the facts supporting that status, thereby ensuring the availability of documents necessary to the prosecution of the case." § 702.015(1), Fla. Stat.

Specifically, the proposed rules are incomplete and do not address the category of nonnegotiable instruments and, by this omission fail to fully address the standing of servicers to bring foreclosure actions.

I. The proposed requirement that the claim of mortgage foreclosure be brought under Article 3 of the Uniform Commercial Code ignores, and potentially abolishes, other grounds for enforcing the lien.

Proposed Rule 1.115 begins with listing only two means of enforcing a mortgage or other lien on real property which secures a promissory note, both of which fall under Article 3 of the Uniform Commercial Code ("UCC")—i.e. the claimant must be a "holder" (a person in possession of a negotiable instrument endorsed to him or her or in blank)[1] or be otherwise entitled to enforce the note under § 673.3011, Fla. Stat. [Florida's equivalent of §3-301 of the UCC]:

> **(a) Claim for Relief.** A claim for relief that seeks to foreclose a mortgage or other lien on residential real property, including individual units of condominiums and cooperatives designed principally for occupation by one to four families which secures a promissory note, must: (1) contain affirmative allegations expressly made by the claimant at the time the proceeding is commenced that the claimant is the holder of the original note secured by the mortgage; or (2) allege with specificity the factual basis by which the claimant is a person entitled to enforce the note under section 673.3011, Florida Statutes.

[1] If, as is assumed here, the word "holder" is intended to refer to someone in possession of a properly endorsed negotiable instrument as those terms are defined under Article 3 of the UCC (Chapter 673, Fla. Stat.), then the rule should clearly state that.

While this language tracks § 702.015, Fla. Stat., there is no evidence from the text or history of the statute that the legislature intended to preclude other means of alleging entitlement to enforce a lien securing a promissory note or, for that matter, to preclude a claimant from enforcing a lien securing a note that is not negotiable. It is beyond dispute that some promissory notes are not negotiable.[2] Under the rule as currently worded, even an original lender could not allege a foreclosure action if the note was not negotiable.

Moreover, due to the difficulty of proving when negotiable instruments were endorsed (that they were endorsed before the action was filed), claimants have begun turning to other methods of proving standing, such as actual ownership of the loan and the status of assignee of the loan—both of which occur outside the confines of Article 3.[3] Additionally, outside the litigation context, financial

[2] *Holly Hill Acres, Ltd. v. Charter Bank of Gainesville*, 314 So. 2d 209 (Fla. 2d DCA 1975); Peterson, David E., *Cracking the Mortgage Assignment Shell Game*, The Florida Bar Journal, Vol. 85, No. 9 (November 2011) at p. 10, n. 32 (Home Equity Lines of Credit are not negotiable and not covered under Article 3 of the UCC); Renuart, Elizabeth, *Uneasy Intersections: the Right to Foreclose and the U.C.C.*, 48 Wake Forest Law Review 1205, at p. 1228-29 and cases cited therein (a HELOC note is not negotiable because it does not contain a provision requiring payment of a fixed amount of money); Ice, Thomas Erskine, *Negotiating the American Dream: A Critical Look at the Role of Negotiability in the Foreclosure Crisis*, The Florida Bar, Vol. 86, No. 10 (December 2012), at p. 8. (pointing out that the form Fannie Mae/Freddie Mac Uniform Instrument Note does not meet the definition of a negotiable instrument and was never intended to).

[3] *See* §673.20131(4), Fla. Stat. ("If a transferor purports to transfer less than the entire instrument, negotiation of the instrument does not occur. The transferee obtains no rights under this chapter and has only the rights of a partial assignee.")

institutions rely on Article 9 as the basis for their transfers[4] and the rule should be broad enough for them to allege that as a basis for bringing the action. Further, there are mortgage documents that are not negotiable instruments. When non-negotiable notes are the basis for foreclosure, Article 3 is not an available option, again requiring the claimant to rely on Article 9 to provide a basis for it to claim a basis for relief.

Accordingly, adopting a rule that appears to restrict the enforcement of liens to those which secure negotiable instruments would deprive lienholders of their rights and only create more chaos for Florida foreclosure law.

[4] Dale Whitman, *Transfers of Mortgage Notes under New Article 9*, *available at* http://dirt.umkc.edu/files/newart9i.htm (apparent purpose of change was to insulate issuers of mortgage-backed securities from attacks by bankruptcy trustees "without the bother of taking physical possession of the notes in question, a process that they often consider irksome"). These changes were enacted in Florida in 2001, effective 2002, §§679.1011-.709, Fla. Stat. (2012); Steven Schwarcz, *The Impact of Securitization of Revised UCC Article 9*, 74 Chicago-Kent L. Rev. 947 (1999); H. Bruce Bernstein, *Commercial Finance Association: Summary of the Uniform Commercial Code Revised Article 9*, *available at* https://www.cfa.com/eweb/DynamicPage.aspx?Site=cfa&WebKey=9d83ef78-8268-4aae-95e1-7f4085764e46 (revised Article 9 facilitated mortgage-backed securitization); David Peterson, *Cracking the Mortgage Assignment Shell Game*, 85 Fla. Bar J. 11, 12 (November 2011) (revisions to Article 9 addressed the needs of banks in the securitization chain by treating mortgages as personal property that could be transferred without regard to the real estate records).

II. By equating the ability to obtain a money judgment on the note with the right to foreclose a lien, the proposed rule overturns the long line of case law that foreclosure is an equitable action.

Foreclosure is an equitable remedy.[5] Nevertheless, many written foreclosure opinions in the past few years simply state, without analysis or careful draftsmanship, that establishing oneself as a holder of the note under Article 3 of the UCC is sufficient proof of standing to foreclose—as if the UCC applies to nonnegotiable instruments such as mortgages. In reality, the plaintiff must also prove itself to be the mortgagee to prevail on its claim in equity to enforce the mortgage lien. While it appears that the litigants in these cases never raised the fact that the foreclosure of a lien is an entirely different kind of action than the legal action for enforcing a note (i.e. obtaining a money judgment), this Court should not adopt a rule that forever abolishes the courts' equitable jurisdiction which governs the taking of homes from the citizens of this state. The Court should jealously guard this power given that there exists a deeply-rooted public policy of promoting and defending home ownership—a policy that has found expression in the Florida Constitution's homestead protections.[6]

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[5] *Singleton v. Greymar Associates*, 882 So. 2d 1004, 1008 (Fla. 2004).

[6] Florida Constitution, Article X, Section 4; *see Snyder v. Davis*, 699 So. 2d 999 (Fla. 1997) ("As a matter of public policy, the purpose of the homestead exemption is to promote the stability and welfare of the state by securing to the householder a home…").

Not only is enforcement of the lien a separate equitable action, the concept of the "mortgage follows the note" is merely shorthand for the legal fiction that there is an "equitable transfer" of the mortgage to the new, rightful owner of the note.[7] In other words, this evidentiary shortcut of a mortgage following a note is dependent upon the court's finding of an equitable transfer, which, like foreclosure itself, arises from the powers of the court's equitable jurisdiction. The shortcut, therefore cannot apply to mere holders who are given the legal right to enforce a note even if they have taken possession of it under inequitable circumstances (indeed, the drafters' commentary to Article 3 itself talks in terms of a "thief's entitlement" to enforce a note). Thus mortgages may only "follow the note" to its owner, not its Article 3 holder—i.e. only note owners may foreclose without proof that they are the mortgagee by purchase or assignment. Expressed in the hyperbolic tones of the UCC itself, while a "thief can get a money judgment on a stolen note," in Florida, a thief cannot take one's home for non-payment of that note.

This inherent problem with the rule is best exemplified by the proposed change to Form 1.944(a) which substitutes an allegation that the "Plaintiff owns and holds the note and mortgage" with a statement that "Plaintiff is the holder of the original note secured by the mortgage." Most remarkable, and most telling, is

[7] *Johns v. Gillian*, 184 So. 140 (Fla. 1938).

the proposed removal of any need for the Plaintiff to allege this it has any entitlement to enforce the mortgage. Note that "owns and holds" in the original form did not refer to an Article 3 holder, but simply to an owner.[8] Therefore, the original form, based on decades of case law, required the plaintiff to plead that—in addition to owning the note—it was the owner of the mortgage. While broadening the basis for enforcing the note to include Article 3 holdership better reflects the current state of the law with respect to alleging an action at law to enforce a promissory note, dropping the need for any separate allegation of a right to enforce the mortgage is to abolish the court's equitable jurisdiction over lien enforcement.

[8] For example, when Form 1.934 Fla. R. Civ. P. (Promissory Note Complaint) was amended in 1980, this Court added "the Plaintiff owns and holds the note" specifically "to show ownership of the note." Committee Note to Form 1.934 Fla. R. Civ. P. adopted by *The Florida Bar*, *In re Rules of Civil Procedure*, 391 So. 2d 165 (Fla. 1980). No doubt the Court recognized that the phrase "owns and holds" is a ubiquitous legalism which has been used in many contexts outside of negotiable instruments. Indeed, the term "holds" in "owns and holds" could not have referred to Article 3 holdership, because one cannot be the holder of a mortgage—mortgages are not a negotiable instruments.

Additionally, because mortgage foreclosure is premised upon the right to collect on a promissory note, it is apparent that Forms 1.944(a) and 1.934 should use similar language with respect to the note—as they do now. The proposed change to Form 1.944(a) will put that form in conflict with Form 1.934.

Moreover, this Court's equitable jurisdiction cannot be ousted by a procedural rule, particularly when that rule has been dictated by the legislature.[9] Accordingly, the Court should insure that its procedural rules and forms reflect that foreclosure of a lien is an equitable action, that claimants must plead and prove entitlement to enforce the lien (not just the note), and that equitable principles apply to determining whether transfers of mortgages have occurred when there is no formal assignment of the mortgage.

III. The proposed rule section (b) regarding pleading of "Delegated Claim for Relief" is ambiguous and conflicts with section (a) "Claim for Relief."

Section (a) requires that the claimant plead that it is the Article 3 holder. If, however, the claimant is an agent of the "person entitled to enforce the note," it need only plead that the claimant has been authorized to act on behalf of that person—without specifying how that person is entitled to enforce the note. Because section (a) is limited to what the claimant must plead about itself, rather than its principal, there is no requirement for an agent to plead that its principal is either a holder or otherwise entitled to enforce the note under §673.3011, Fla. Stat. It is doubtful that the legislature intended that agents be permitted to plead and prove the entitlement to bring the action with less specificity than if they were

[9] *See Poling v. Petroleum Carrier Corp.*, 194 So. 2d 925, 926 (Fla. 1st DCA 1967); Art. V, § 20(c)(3), Fla. Const.

bringing the action on their own behalf. This conflict could be resolved by amending section (a) to substitute "claimant or its principal" for the word "claimant" where appropriate:

> …(1) contain affirmative allegations expressly made by the claimant at the time the proceeding is commenced that the claimant or its principal is the holder of the original note secured by the mortgage; or (2) allege with specificity the factual basis by which the claimant or its principal is a person entitled to enforce the note under section 673.3011, Florida Statutes.[10]

IV. The proposed rule section (b) regarding pleading of "Delegated Claim for Relief" is also inconsistent with (c) and (d).

Further, if a claimant is filing a foreclosure complaint as a result of "delegated authority." It must describe the authority and identify the documents which grant the claim of authority to act on behalf of the person entitled to enforce the debt. Although the authority must be stated and the documentation described with specificity there is no requirement that the statements of authority be filed under penalty of perjury. Again, it is unlikely the legislature intended that agents be permitted to plead and prove the entitlement to bring the action under a lesser standard of reliability than if they were bringing the action on their own behalf. This conflict could be resolved by amending section (b) to include the "under penalty of perjury" standard.

[10] Alternatively, section (b) should be clarified to state that, when a claimant has been delegated the authority to sue on behalf of someone else, the claimant must also allege with specificity how that person is entitled to enforce the note.

V. The verification rule (section (e)) is unenforceable.

The requirement for verification of a mortgage foreclosure complaint has—like the remainder of the procedural changes that were made to avert what was thought to be a "crisis"[11]—was a spectacular failure. The laudable purpose of the verification rule was:

> 1) to provide incentive for the plaintiff to appropriately investigate and verify its ownership of the note or right to enforce the note and ensure that the allegations in the complaint are accurate; (2) to conserve judicial resources that are currently being wasted on inappropriately pleaded "lost note" counts and inconsistent allegations; (3) to prevent the wasting of judicial resources and harm to defendants resulting from suits brought by plaintiffs not entitled to enforce the note; and (4) to give trial courts greater authority to sanction plaintiffs who make false allegations.

In re Amendments To The Florida Rules Of Civil Procedure, 44 So. 3d 555, 556 (Fla. 2010), *as modified on denial of reh'g* (June 3, 2010). But except for the disappearance of inappropriately pleaded lost note counts, there is no evidence that complaints are any more accurate today or that trial courts have used the verification rule to sanction plaintiffs.

The primary reason for this failure is because, for reasons unknown, the verification rule for foreclosures was given no teeth. To comply with Fla. R. Civ.

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[11] *See, In Re: Managed Mediation Program for Residential Mortgage Foreclosure Cases, Administrative Order No. AOSC11-44*, Florida Supreme Court (discontinuing managed mediation program) available at:

> http://www.floridasupremecourt.org/pub_info/documents/foreclosure_orders/12-19-2011_Order_Managed_Mediation.pdf

P. 1.110(b), the affiant need only verify based on information and belief. The typical standard (such as that embodied in § 92.525, Fla. Stat.—a sworn statement that the facts are true) was not adopted for the rule and is inapplicable to foreclosure verifications. *Trucap Grantor Trust 2010-1 v. Pelt*, 84 So. 3d 369, 372 (Fla. 2d DCA 2012). Thus the verifier may safely rely on hearsay information or simply unfounded speculation without fear of the "penalties of perjury." As a result, verification quickly became a pro-forma function delegated to robo-signers with no personal knowledge of the facts.

Accordingly, the rule should be amended to remove the phrase "to the best of my knowledge and belief."

Respectfully submitted,

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Certificate of Service

I HEREBY CERTIFY that on February 9, 2015, a copy of the foregoing document was served by e-mail to Kevin B. Cook (kcook@rtlaw.com) , Rogers Towers, P.S., 818 A1A N., Suite 208, Ponte Vedra Beach, Florida 32082-8217 and to the Bar Staff Liaison to the Committee, Ellen Sloyer, (esloyer@flabar.org), 651 E. Jefferson Street, Tallahassee, FL 32399-2300.

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