

Appendix E

Presenters' Written Statements

- a. Arden Shank, Neighborhood Housing Services, presenting May 22, 2009
- b. Roy Diaz, Smith, Hyatt and Diaz, P.A., presenting May 29, 2009
- c. Ron Wolfe, Florida Default Law Group, presenting June 18, 2009
- d. James Kowalski, Law Offices of James Kowalski, Jr., P.L., presenting July 14, 2009

The following made presentations, but did not submit prepared statements.

- a. Rod Petrey, Collins Center for Public Policy, presenting June 24, 2009
- b. Marie Day and William Merrell, Wells Fargo-Wachovia, presenting June 24, 2009
- c. Beverly McComas, David J. Stern, P.A., presenting July 7, 2009

**Arden Shank, Neighborhood Housing Services
Foreclosure Counselors**

From: Arden Shank [mailto:ardens@mdnhs.org]
Sent: Thursday, May 21, 2009 9:38 PM
To: Bailey, Jennifer
Subject: RE: task force conference call.

Judge Bailey,
Here's the basis of what I'll say tomorrow morning...
Arden

I will do an initial introduction; there are four basic questions that we need you to start with that I will ask you:

Describe the different kind of HUD and NW certified counselors and what the differences are: (home ownership, credit, foreclosure) and who certifies and what standards generally govern.

HUD certifies counselors in a general way--like an all purpose certification for housing counseling, pre-purchase homeownership counseling, post purchase counseling, foreclosure counseling

NWA oversees the National Industry Standards for Homeownership Education and Counseling that makes a clear distinction between pre-purchase homeownership counseling and training on the one hand and foreclosure counseling and intervention on the other hand. NHSSF has adopted these standards and all of our staff involved have signed the ethics statement. Credit counseling does not figure in here--that is a different thing related to personal financial management not buying or keeping a house.

The most effective foreclosure counselors come from mortgage finance or real estate background and have more experience than homeownership counselors or credit counselors.

How is counseling paid for/what is the cost to the borrower

We do not charge our customers for either homeownership training/counseling or foreclosure counseling. Most nonprofits either do not charge at all or charge a nominal fee of \$50 for homeownership training and counseling. Most nonprofits do not charge for foreclosure counseling.

We get grants from local government and banks to cover homeownership training and counseling costs. We get grants from NFMC and banks to cover foreclosure counseling.

What info do the borrowers need to provide the counselors for foreclosure workouts

Last 2 mortgage statements (if there is more than one mortgage, bring statements from each lender)

Recent correspondence from all lenders

1 month's pay stubs (most current)

2 months' bank statements (most current)

W2 for 2 years, 2007 and 2008

Driver's license

Social Security card

Court documents received pertaining to the mortgages, if applicable

Simple household budget

Explanation of the cause for default (loss of income/employment, divorce, medical condition, insurance premium increase, etc.)

Credit report - will cost \$12 for an individual borrower, \$21 for a couple

What info should lenders provide counselors for foreclosure workouts

They need to respond to our packages and proposals on behalf of their borrowers within a week or two, not three months.

Is this generally done live or over the phone

Both--we do much more on the phone than in person. Borrowers call us, email us, fax us, and walk in.

How available are what kinds of counselors all over the state? Go to: <http://www.findaforeclosurecounselor.org> which lists dozens of organizations around the state.

The National Industry Standards website shows 12 entities across the state have adopted the standards.

The HUD website has foreclosure counseling organizations listed.

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http://www.homeownershipstandards.com/adopter_list.php?org_name=&state=FL&zip=&service=2&submit=Search

NISHEC

Search

Organization:

State:

Zip Code:

Service:

<u>Organization</u>	<u>State</u>	<u>Zip</u>	
Center for Financial Independence, Inc.	FL	34205	View
Centro Campesino Farmworker Center	FL	33034	View
Consumer Credit Counseling Service of Central Florida and The Florida Gulf Coast, Inc.	FL	32803	View
Consumer Credit Management Services, Inc.	FL	33444	View
Credit Card Management Services, Inc.	FL	33417	View
Dream Home Organization	FL	33324	View
Freedom Debt Management, Inc.	FL	33481	View
Home Ownership Resource Center of Lee County	FL	33916	View
Neighborhood Housing Services of South Florida	FL	33128	View
Second Chance Help Center, Inc.	FL	32208	View
Solita's House, Inc.	FL	33602	View
The Housing Corporation	FL	33980	View

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Guide to Avoiding Foreclosure - HUD - Windows Internet Explorer

http://www.hud.gov/foreclosure/index.cfm

Guide to Avoiding Foreclosure - HUD

Homes & Communities
 US Department of Housing and Urban Development

HUD News
 Newsroom
 Priorities
 About HUD

Homes
 Buying
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 HUD homes
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 FHA refunds
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 About communities
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 Economic development

Working with HUD
 Grants
 Programs
 Contracts
 Work online
 HUD jobs
 Complaints

RESOURCES
 Library
 Handbooks / forms
 Common questions

Foreclosure

Guide to Avoiding Foreclosure

Whether you're in foreclosure now, or worried about it in the future, we have information that can help.

Get Help Now!

- ▶ [Talk to a foreclosure avoidance counselor](#)
- ▶ [Talk to your lender](#)
- ▶ [Find state and local foreclosure resources](#)
- ▶ [Contact HOPE NOW](#)

Keep Your Home

- ▶ [Are you at risk of foreclosure?](#)
- ▶ [Tips for avoiding foreclosure](#)
- ▶ [Foreclosure scams](#)

Refinance Options

- ▶ [Making Home Affordable Program](#)
- ▶ [Learn about HOPE for Homeowners](#)
- ▶ [Who to call when a lender won't work with you](#)

If You Can't Keep Your Home

- ▶ [Redemption period](#) - your last chance to save your home
- ▶ [Local renting resources](#)
- ▶ [Rental assistance](#)
- ▶ [Relocation resources](#)
- ▶ [U.S. Postal Service Movers Guide](#)

Feedback

Related information

- ▶ [PD&R Foreclosure Kit](#)
- ▶ [Foreclosure process](#)
- ▶ [Glossary of terms](#)
- ▶ [Common questions about foreclosure](#)

Housing Discrimination Foreclosure

Have you been discriminated against in either the lending or foreclosure process? You may find an online discrimination complaint form at:

- ▶ [In English](#)
- ▶ [In Spanish](#), or
- ▶ Toll-free housing discrimination hotline at 1-800-368-7888

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And then I will ask the task force if they have any questions.

Roy Diaz, Smith, Hyatt and Diaz, P.A.
Plaintiffs' Bar

Smith,
Hiatt &
Diaz, P.A.
ATTORNEYS

2691 East Oakland Park Boulevard
Suite 303
Fort Lauderdale, Florida 33306
(954) 564-0071 Telephone
(954) 564-9252 Facsimile

Reply to: Roy A. Diaz
rdiaz@smith-hiatt.com

TO: The Florida Supreme Court Task Force
on Residential Mortgage Foreclosure Cases

FROM: Roy A. Diaz, Esq.

RE: Foreclosure and Mediation Process

DATE: May 27, 2009

I would like to thank you for the opportunity to speak to the committee. The issues assigned to this committee to address are complex. The realities of this national issue are not easy to accept, much less resolve. This is compounded by the fact that the Florida Judiciary is overwhelmed, creating an urgency that must be tempered to avoid implementing rules which will only result in escalating the current crisis.

The Supreme Court seeks recommendation of “. . . *procedures, strategies and methods for easing the backlog of pending residential mortgage foreclosure cases while protecting the rights of the parties.*” Accordingly, the rights of *all* parties must be balanced with the need to administer the backlog of cases.

One thing that the committee must understand is that the lender/investor Plaintiff's are not the “winners” in this crisis. They are all losing millions of dollars on a monthly basis, with no chance to recover those losses. The largest losses are incurred in cases where the property is foreclosed and then marketed for re-sale. Accordingly, both the Plaintiff's and the borrowers have a compelling interest to have as many defaulted mortgage contracts resolved to result in a performing loan, within the current ability of a borrower *and* current market conditions.

The national focal point of resolution has been mortgage modification. The Plaintiffs in these cases agree, all loans that can be modified, should be modified. Since this crisis began, the industry has invested tremendous resources into loss mitigation in an effort to modify as many defaulted loans as possible. Notwithstanding, the issues associated with (i) the volume of defaulted loans, (ii) establishing processes and training, (iii) communication between the parties, and (iv) general economic downturn, have resulted in an inability to prevent this from becoming a crisis.

The following is an overview of the issues I believe the committee must consider in order to submit meaningful recommendations.

Mandatory Mediation: Florida Statute § 44 and Rule 1.700 - 1.750 FRCP govern mediation. Both provide for mediation in cases that are in *dispute* and/or cases that are *contested*. Therefore the law contemplates use of “traditional” mediation in cases wherein a dispute exists.

A mandatory mediation process created for foreclosure cases will not result in a “traditional” mediation, as it will be designed to include cases where the default is not in dispute.¹

The only cases that can be resolved will be those wherein the borrower has *(i)* the desire, *and (ii)* the ability to modify or otherwise resolve. It is therefore reasonable and consistent with Florida Law that any mandatory mediation recommendation include the following:

- Limit the mediation to cases wherein the Defendant/*Borrower* has expressed a desire to mediate;²
- Require the borrower to “opt-in” by providing the Plaintiff with the requisite financial information to permit the Plaintiff the opportunity to conduct an appropriate analysis. This must be a condition precedent to exercise the right to mediate because meaningful mediation cannot succeed without the information;
- Require the borrower to contribute equally to the financial requirement of the mediation process, which is consistent with protecting the rights of *all* parties;

Dignify the Borrower: I have attended various Court meetings throughout the state regarding these issues. I have found a commonly expressed concern that borrowers are so unsophisticated that they are incapable of assisting themselves in the foreclosure process. I do not believe that is an accurate depiction. It certainly is not accurate of the borrowers we deal with, and it is certainly not true of the borrowers we have reached settlement with. I do not believe a policy that is premised on viewing borrowers in this light will ultimately succeed. Borrowers now involved in foreclosure were once quite capable enough to locate a property to purchase, negotiate a purchase price, retain assistance, complete the mortgage financing process, arrange to move into their homes, arrange for phone and utilities and maintain banking relationships in order to handle their financial affairs. The majority of borrowers we deal with are *not* incompetent people and the policies recommended should reflect their competence.

¹ To the extent a case is truly disputed, the matter would be litigated and the traditional statutory mediation process would apply, prior to trial.

² The Plaintiff can only settle cases with the Borrower.

Delegated Authority: Plaintiff's utilize corporate servicing companies ("Servicers") to manage mortgage activity. Servicers are provided with delegated authority to manage the loans, including loss mitigation. To the extent a loan can be modified, the Servicer has the ability to do so. However, the process includes the need to access computer systems, similar to what a loan origination would require.

Unlike traditional cases involving a subjective dispute, the most effective process for resolving the foreclosure cases referenced in the Supreme Court Administrative Order, would permit the Plaintiff representative to appear at the mediation by phone. The following points support this conclusion:

- The Plaintiff will have received the necessary financial information from the borrower in advance of the mediation;
- The Plaintiff will be in a position to either (i) submit settlement proposals or (ii) should additional information be required, make inquiry of the final information. In the latter case, the Plaintiff would process the acquired information within its system to reach a settlement proposal;
- There is no benefit to requiring the lending industry to hire and train hundreds of mediation representatives who will do nothing more than relay information to the Servicer offices for processing. To the contrary, the expense associated with staffing and travel will be a cost in the settlement analysis which will have a negative impact on the ability to settle with the borrower.

Cost Factor: The committee must recognize that the Plaintiffs are not the terrible entities that they have been *demonized* to be by the defense bar and the media. The majority of the Plaintiff's are investors who acquired highly rated mortgage loans³ pursuant to long established business custom. The beneficiaries of these investments are entities such as the Teachers Retirement Fund of Florida. Ultimately the losses of these investments impact individuals who have invested their retirement into these mortgage backed investments. The committee must understand that traditionally, mortgage backed securities were among the safest investments. However, with the advent of an inflated housing bubble coupled with the general economic downturn has resulted in the current crisis.

The committee must be sensitive to the financial impact that any recommendation will have on the Plaintiff who have a duty to individuals who depend on the value of the securities. As it stands, it appears that foreclosure cases will be singled out for an unprecedented increase in filing fees. Imposing the entire financial burden of a mediation process on the Plaintiff is unfair and ineffective. As stated earlier, such a decision will have a negative impact on settling cases.

Standing: The issue of standing is one that has been presented in many of the meetings I have attended. There is no systemic issue regarding a Plaintiff's standing to enforce a mortgage. Florida law is well established regarding this issue and I will simply state that this issue has no place within the goals

³ It is well established that rating agencies such as Standard and Poor's and Fitch rated many of the mortgages at issue with the highest "Triple A" rating, which has now proven to have been erroneous.

of this committee. Due to the legal presentation that would be necessary for this discussion I will not be extensive within this memorandum. However, to the extent the committee believes this is an issue, it can be briefed as a follow up to this meeting.

Conclusion: Foreclosure rates remain high and will not be reduced in the foreseeable future. As such, any policy that fails to identify the cases that qualify for settlement will cause further backup in a system that is already inundated. If the cases which have no ability to be settled become stalled by a mediation process, those cases will remain within the backlog of foreclosure cases and new cases will compound the backlog. This will have the opposite result of the Supreme Court goals.

Accordingly, I respectfully submit that the committee recommendation include the considerations set forth above. I look forward to the opportunity to speak to each of you and answer any questions you may have.

Roy A. Diaz
SMITH, HIATT & DIAZ P.A.

**Ron Wolfe, Florida Default Law Group, P.L.
Large Volume Filers**



ATTORNEYS AT LAW
POST OFFICE BOX 25018
TAMPA, FLORIDA 33622-5018
TELEPHONE 813.342.2200
FAX 813.251.1541

To: Florida Supreme Court Task Force On Residential Foreclosure Cases

From: Ron Wolfe

Date: June 12, 2009

I would like to thank you for the opportunity to speak to the committee. The volume of foreclosures facing our nation and in particular our state creates unprecedented challenges. The goal set forth for this committee is complex and multifaceted.

Traditionally, we experienced two types of files, contested and uncontested matters. Our current system is adequate to deal with contested matters, and uncontested matters alike, however the economic crisis created a new "breed" of foreclosure. Historically, the equity in the property was the driver of settlements and workouts. The debtor was able to sell the property to satisfy the debt or the lender was secure in their position because they had a favorable loan to value ratio. Since neither of these conditions exist currently, the new foreclosure population amount to "uncontested" litigation (there is an admission that a debt is owed and unable to be serviced by the debtor) and the lender acknowledges those facts and is willing to make reasonable accommodations based upon disclosure of financial data from the borrower and an evaluation of the value of the underlying property. These types of matters are not traditional adversarial dialogues; they are a discussion to reach a mutually beneficial solution for both parties. In contested matters and adversarial proceedings there are clear winners and losers, in this new breed of troubled assets there is a possibility for a win/win (of course both parties are deserving: meaning lender and borrower are proceeding honestly and in good faith)

The nature of foreclosure litigation is a conflict within itself. The courts require the application of the rules of procedure however the equitable principles can be applied any time within the litigation. In an adversarial system, approximately 90% of the time one party is not represented by an attorney. The inconsistent application of the rules frustrate everyone involved (judges, attorneys, borrowers and lenders). However the fundamental issue is rather simple...one party provided money, the other party promised to repay that money.

In my experience the more complex or convoluted the problem or process appears focusing on the fundamental issue rather than the symptom results in the greatest success. Additionally, time must be spent on determine what behavior we want to encourage to create a win/win for all parties and draft policies to include incentives for those behaviors. To effectively manage a high volume process, it is critical that all parties involved are "bought" into the system. Both sides of the table have to feel respected and valued each side



9119 Corporate Lake Drive, Suite 300, Tampa, Florida 33634 • 9830 SW 77th Avenue, Suite 210, Miami, Florida 33156





FLORIDA DEFAULT
LAW GROUP, P.L.

ATTORNEYS AT LAW
POST OFFICE BOX 25018
TAMPA, FLORIDA 33622-5018
TELEPHONE 813.342.2200
FAX 813.251.1541

Contributing to the process. If the balance is tipped too greatly in either direction the process will unhinge.

The Supreme Court has asked this committee to recommend ". . . procedures, strategies and methods for easing the backlog of pending residential mortgage foreclosure cases while protecting the rights of the parties."

In my opinion the fundamental task is two fold; to provide responsible borrowers and lenders the opportunity to have a meaningful contact thereby limiting foreclosure volume where possible, while retooling the current approach to efficiently processing foreclosure current and future foreclosure litigation.

Unofficial statistics*

- Approximately 60% of the referrals received by our firm qualify under one of the current Administrative Orders.
- In 60 days, 3000 cases with our firm qualify for a potential mediation under existing programs. This equates to 6000 man hours not including travel time.
- Recent filing fee significantly increases costs to lenders impacting settlement process. Will any additional mandatory costs further "chill" the ability to resolve cases?
- Broad application of policies without requiring both parties to exchange information is unnecessarily delaying cases; creating backlog, wasting resources.

Reviewing current strategies already implemented through out the state; are the changes imposed creating the desired results? What are the success rates?

- Percentage of cases resolved prior to adoption of court administrative order
- Mandatory mediation
- Telephone conciliation

What are the unintended consequences of those strategies? Which consequences are acceptable and what can be changed to address those undesirable consequences?

- Policies use to unnecessary stall foreclosures
- Additional litigation on overly burdensome strategies (funding mediations that do not occur, motions to return funds, exclusion of counsel from process creating double work)
- Extending the length of time to process foreclosures where borrower does not have the desire or ability to settle negatively impacts market values (supply vs. demand)

Does the strategy contemplate a review process; collection of data to celebrate successes or generate ideas on what changes is needed to obtain success?

There is more than one strategy that can be adopted and multiple ways of addressing the situation.



9119 Corporate Lake Drive, Suite 300, Tampa, Florida 33634 • 9830 SW 77th Avenue, Suite 210, Miami, Florida 33156





FLORIDA DEFAULT
LAW GROUP, P.L.

ATTORNEYS AT LAW
POST OFFICE BOX 25018
TAMPA, FLORIDA 33622-5018
TELEPHONE 813.342.2200
FAX 813.251.1541

In my opinion this situation requires a non-traditional approach. Why force one type of resolution...why not make the system or model flexible enough to cover as many types of "meaningful" settlement contacts as possible i.e. telephone, internet, mail or mediation*. Encourage early communication and settlement discussions by creating an "opt-in" approach that rewards responsible borrowers and lenders. How do we apply this approach pre-suit? Create a voluntary program that encourages both parties to engage early in the process to avoid costs and provides plaintiff the ability to opt out of any mandatory program by documenting previous efforts.

Exchange of information is absolutely vital to the success of any potential settlement therefore to force one party to the table without requiring the other party to contribute is unfair and gives rise to litigation (see attached flow chart).

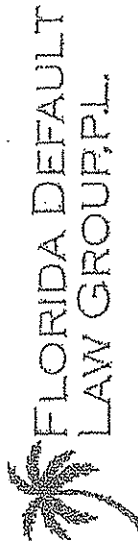
In conclusion, the foreclosure industry is unique and the challenges facing this committee are unprecedented. By focusing on the fundamental issue; encouraging both parties to have a meaningful exchange of information early in the process and providing an avenue to efficiently complete those cases that can not be settled, the policy adopted by our state has the highest likelihood of success. If our firm can contribute in any additional capacity, please do not hesitate to contact me.

Ron Wolfe
Managing Partner
Florida Default Law Group

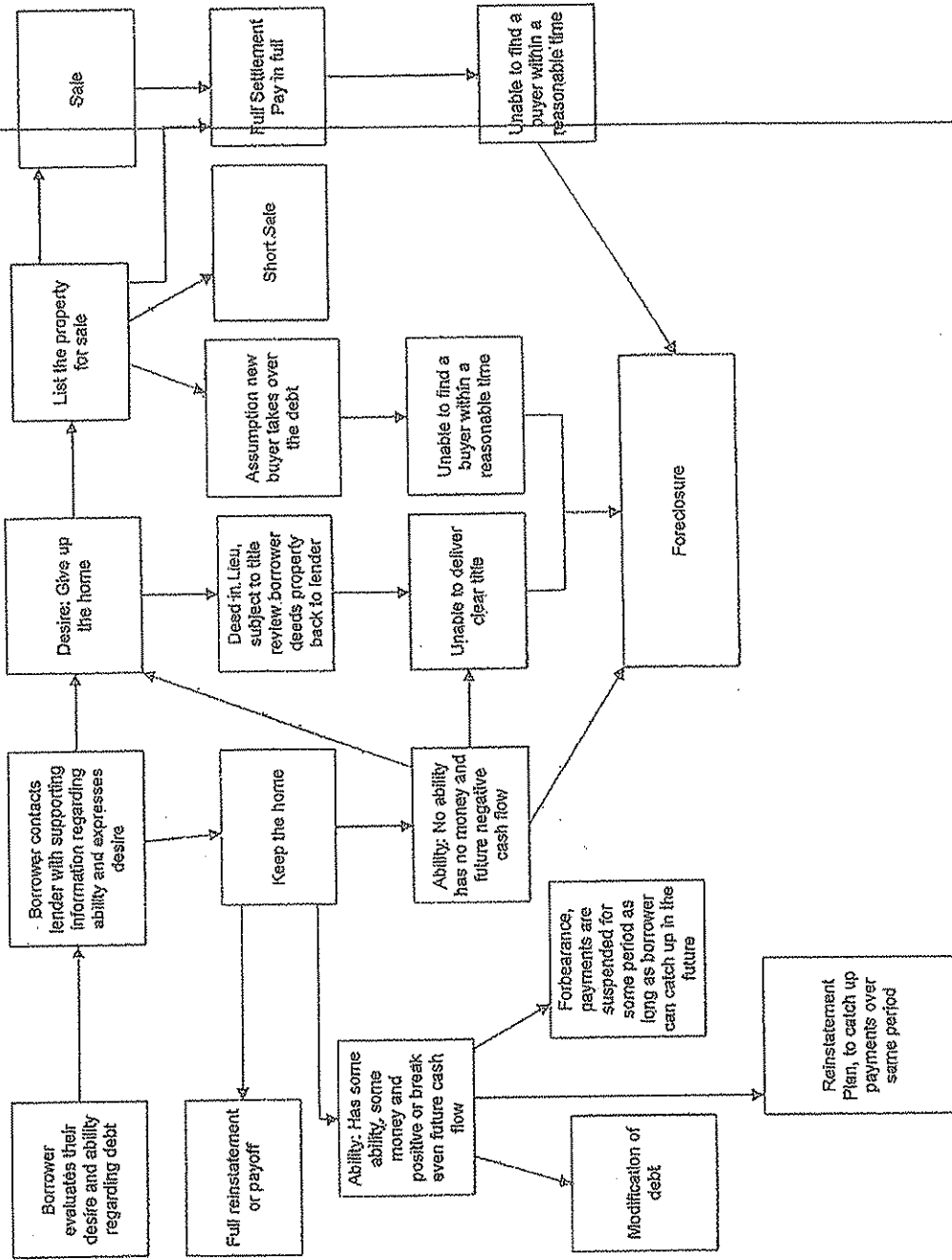


9119 Corporate Lake Drive, Suite 300, Tampa, Florida 33634 • 9830 SW 77th Avenue, Suite 210, Miami, Florida 33156





ATTORNEYS AT LAW
 POST OFFICE BOX 25018
 TAMPA, FLORIDA 33622-5018
 TELEPHONE 813.251.4766
 FAX 813.251.1541



**James Kowalski, Law Offices of James Kowalski, Jr., P.L.
Defense Bar**

July 9, 2009

The Florida Supreme Court Task Force
on Residential Mortgage Foreclosure Cases
c/o General Counsel's Office
Office of the State Courts Administrator
500 South Duval Street
Tallahassee, Florida 32399

Re: Foreclosure and Mediation

Dear Members of the Committee:

Thank you for the opportunity to present on the issues facing the Committee and the state court system as a whole. As we all know, Florida has been particularly affected by the overall economic crisis, with specific harm coming to the state's citizens in the form of overwhelmingly high mortgage foreclosure rates. Respectfully, the state judicial system has not been able to keep up with the ever-increasing number of foreclosures filed in Florida.

I have been provided with a copy of Roy Diaz's prepared remarks to the Committee, and will use this as a template for my comments. My testimony is intended to make the point that you should not discard any ideas you are considering, simply because those ideas or suggestions do not fit the model of what judges are accustomed to doing or supposed to do, or how the mediation process is supposed to work – we are dealing here with a new type of litigation and an unprecedented stressor to the economy, and nothing should be taken off the table.

At Sharon Press's suggestion, I have included a bio, at Exhibit A. As you can see, I have been a trial attorney in Florida for almost twenty years.

First, let me start with Roy's reference to the demonization of the foreclosure plaintiffs. I do not see the securitized trusts and their mill law firms as demons – I see them as an entirely new legal vehicle for separating homeowners from their homes, with little or no resemblance to the normal attorney-client relationship we are familiar with, and little or no systemized review of individual cases. These are not our grandfather's banks, and the legal product that has been introduced into our state court system is not like anything we have seen before.

As an aside, these comments do not pertain to the banks which own and service their own loans, or to the law firms hired by these banks to foreclose. There, you see

attention to the detail of a specific case, and an opportunity to speak meaningfully with the attorney actually working on the file.

By contrast, the system in place, with the mill firms being merely an extension of contractors to the servicing industry for securitized loans, represents a facial violation of Rule 4-2.1, Rules Regulating the Florida Bar, which requires an attorney to exercise "independent professional judgment." Pleadings are routinely drafted by the client (not the plaintiff) with no little or no meaningful review by the attorney.

These actions are forced, in part, by the timing pressures imposed by the servicing industry. In 2004, Fidelity National Information Services, a Jacksonville-based company which provides much of the software interface technology used by mill firms and servicers, implemented an "Attorney Performance Report" (APR). (A copy of a portion of a Fidelity newsletter from late 2007, addressing improvements to the APR, is attached as Exhibit B.) The APR is designed to reward high-scoring attorneys, who are ranked on the basis of a number of factors -- as you can see, the factors are primarily based on timing. The faster the case is shoved through the foreclosure process, the higher the score. Firms are then color coded as "green light", "yellow light" and "red light," with the slower "red light" firms receiving less and less business.

The need for speed is also reflected in the actions of the servicers themselves. Most of the servicers now use "Signing Officers" -- rows of individuals who sit before reams of documents prepared by others, with not even a modest attempt at complying with the business records exception to the hearsay rule, and who sign the documents only to have the document transported across the business campus to rows of notaries, who attest to the signatures without ever complying with the basics of their state's notary laws. See, Order Granting Defendant's Motion for Sanctions, entered May 1, 2006, attached as Exhibit C. (As an aside, I do not attach an Order in one of Roy's cases to embarrass him -- this case was simply the first time that I became aware of this practice, which is continuing unabated to this day, as referenced below.)

Some of the mill firms now employ their own "Signing Officers" -- individuals who will sign Assignments of Mortgage on behalf of the owners of the pool, supposedly authorized by the servicer pursuant to the Pooling and Servicing Agreement which applies to the particular securitized trust. The documents are prepared entirely by the servicer, and then "reviewed" by the attorney. Excerpts from a recent deposition (taken in June 2009) of an employee of the Law Offices of David Stern illustrate this point:

Q. What's the process when you do execute an assignment of mortgage, do you prepare the assignment?

A. No.

Q. Who prepares it?

A. The paralegals.

Q. So when you prepare -- when you execute an assignment, it has been prepared pursuant to title work prepared by another company?

- A. Correct.
- Q. At what point do you determine that an assignment is needed?
- A. If the title work calls for one.
- Q. How would you know by looking at the title work that it called for one?
- A. It would be marked assignment required.
- Q. Is that frequently the case, when a file comes into your department that an assignment is needed?
- A. Yes.
- Q. What percentage of the time when a file comes into your office is an assignment needed?
- A. I'm going to guess 90 percent.
- Q. Do you ever speak with anyone before you execute an assignment?
- A. No.
- Q. Do you review any documents before you execute an assignment?
- A. The attorney reviews the documents before I sign them.
- Q. Okay. Do you ever ask the attorney questions about the -- about the assignment that you're preparing to execute?
- A. No.
- Q. There's um, on all of the assignments obviously there's a date. Who determines what date to put on the assignment?
- A. The date is the referral from the client.
- Q. So the date on the assignment is always going to be the date that the file was referred to your office from the client, which will ultimately become the plaintiff?
- A. The date is given to us by the client.
- Q. The date to put on the assignment is provided by the plaintiff?
- A. The servicer, which is our client.
- Q. Which will not necessarily be the plaintiff; is that correct?
- A. Correct.
- Q. Now, the language after the date it was executed the assignment provides, "but effective as of the 11th day of September, 2008," what does that language mean?
- Q. You don't know?
- A. (Nodding.)
- Q. Do you read the assignments before you execute them?
- A. It's a form. It's the same form for every assignment.
- Q. So you do not read them?
- A. They're checked by an attorney before I sign.
- Q. So you rely on the attorney?
- A. Yes.

The law firm employees also sign the Affidavits in support of motions for summary judgment filed by the law firms – here, the lawyer’s office staff *becomes the material witness for the lawyer’s client*. From the same deposition excerpted above:

Q. I want to show you another document, entitled Affidavit in Support of Plaintiff’s Motion for Summary Judgment, and this will be Defendant’s 4. Do you recognize that document?

A. Yes.

(Defendant’s Exhibit No. 4 was marked for identification.)

Q. What is – what is this that we’ve marked?

A. Affidavit in support.

Q. Okay. And you recognize your signature on the third page?

A. Yes.

Q. And in -- on this affidavit, you’re an authorized signatory of the Law Offices of David J. Stern; is that correct?

A. As Attorney-in-Fact for GMAC Mortgage.

Q. What does that mean?

A. That we have power of attorney.

Q. So is that the same power of attorney that you used to execute the assignment?

A. No. It’s a different document.

Q. So you have a separate power of attorney for -- you have one power of attorney to execute the assignment, and another power of attorney to execute the affidavit?

A. Yes.

Q. Did you prepare this affidavit?

A. No.

Q. Who prepared it?

A. The paralegal on the file.

Q. When you executed this affidavit, what documents did you review prior to executing it?

A. The figures given to us by the client.

Q. In what form did they give those figures to you?

A. They provided them to us - excuse me - via an e-mail.

Q. So when you say they provided the figures, they gave -- did they give you the underlying data as to how they arrived - and I’m looking at second the page - of the principal balance of the note of 63,464.17?

A. No.

Q. Did they give you the underlying information relating to how they arrived at the interest amount of 3569.85?

A. No.

Q. Same answer for late charges, did you have the underlying data?

A. No.

Q. Same answer for inspections, did you have the underlying data?

A. No.

Q. Is -- do you -- you've executed more than one of these affidavits; is that correct?

A. Yes.

Q. Is it the standard procedure that you will be -- you would be provided with an affidavit, with figures provided by the Plaintiff and you would execute it?

A. Correct.

Q. Do you ever look at any other documents prior to executing the affidavit?

A. No.

Q. Do you ever look at any other information relating to numbers, account histories, statements, any of that from the client?

A. No.

Q. Do you know how they gather the information they give to you to put in the affidavit?

A. No.

Q. Who from the client gives you this information, what -- what position do they hold?

A. I don't know what their positions are within the company.

Q. Did you ever look at the mortgage accounts or records of GMAC, prior to executing the affidavit we've marked as four?

A. No.

Right or wrong, you can see from this system there is no real separation between the servicers and the mill firms. The law firm employee is signing documents prepared by the client / servicer (who also has not independently reviewed the substance contained therein). I can provide numerous other examples of this -- depositions, Orders permitting punitive damages amendments where the abuses occurred primarily because the mill firm was filing documents in cases it never reviewed and which did not make sense in the first place, or simply were not true. This lack of attention to any detail extends to scheduling -- all of us who defend foreclosures can point to example after example of inappropriate *ex parte* "Agreed" orders being submitted and of summary judgment hearings being scheduled while discovery is pending. I recently resolved a case where, after obtaining a dismissal of the complaint without prejudice (i.e., while the case was still pending and I was expecting the filing of an amended complaint), the mill firm filed a new foreclosure action against the same client in a different division (without notifying either the first trial judge or myself), obtained a default judgment alleging the defendant could not be located (she had moved because of hurricane damage, and the servicer knew this, and of course the mill firm knew where to find me), and *then refused to voluntarily set aside the default*. Neither of the trial judges involved was pleased, and I was amazed at the lack of professionalism, even though I have been dealing with foreclosure defense issues for some time.

The recent Sarasota Herald-Tribune article "Lies a new tool in foreclosure" (May 10, 2009) also contains examples; I attach a copy of the article at Exhibit D. The bankruptcy judges around the country have been imposing sanctions based on fraudulent or improper conduct both as to the issue of standing (see, Memorandum issued by the

Honorable Joan N. Feeney, United States Bankruptcy Judge, District of Massachusetts (which also illustrates how complex the issue of standing is)) and as to false affidavits (see, In Re Haque, 395 B.R. 799 (S.D. Fla.), both attached as Exhibit E.

I raise these issues to make this point – the core problem with the development of the securitized trusts, the invention of the servicing industry, and the creation of the mill firm system, is that all problems, concerns or issues raised by the borrower / homeowner / defendants are not only ignored, but that the system provides incentives for this practice. This is the single biggest issue facing President Obama's attempts to slow the pace of foreclosures, and the single biggest issue with implementing a standard mediation program for foreclosure cases in Florida.

A study released this week by the Federal Reserve Bank of Boston makes this clear: Mortgage lenders don't try to rework most home loans held by borrowers facing foreclosure because it would probably mean losing money. According to news reports, the Boston Fed's findings suggest the Obama administration's major effort to solve the foreclosure crisis by giving the lending industry \$75 billion to rewrite delinquent loans to more affordable levels is not likely to work. One of the study's coauthors, Boston Fed senior economist Paul S. Willen, said the government would be better off giving the money directly to struggling borrowers to help them with their payments, rather than to lenders that are averse to working out the troubled loans. "Loan modification is not profitable for lenders," Willen said. "If it were profitable, they would go out and hire staff."

The Fed's study found that only 3 percent of seriously delinquent borrowers - those more than 60 days behind - had their loans modified to lower monthly payments; about 5.5 percent received loan modifications that did not result in lower payments. The study focused on 665,410 loans that were originated between 2005 and 2007 and subsequently became seriously delinquent. It also followed about 150,000 borrowers for six months after they received help, through the end of 2008.

"A lot of people you give assistance to would default either way or won't default either way," Willen said. "They are trying to maximize profits, and at this point maximizing profits does not mean modifying loans."

We also see this at the state level, with many servicers and lenders who have signed on to receive TARP funds, and are therefore contractually obligated to stay foreclosure lawsuits and comply with the Treasury's HAMP and HARP programs, denying to borrowers that they even participate in the programs or have received federal money.

So – what to do, given the creation of the industry, the servicing abuses outlined above, and the fact that the mill firm system provides no meaningful checks and balances to the foreclosure process sought by the servicer?

First, as I mentioned at the outset, nothing should be taken off the table. Second, any workable solution is going to be expensive, and I don't know where you are going to

find the money (as an aside, one of the industry's biggest creations, MERS, single-handedly removed hundreds of thousands of dollars in filing fees for the clerks of court throughout the country by purportedly dispensing with the need to record assignments, which may have been a major reason for MERS to exist in the first place).

You will need to build in a review from the top down -- of standing, of any servicing abuses raised by the borrower / homeowner, and of the ability to force a modification, where appropriate, along the lines of the Treasury programs. The mill firms are simply not structured or incentivized to do this, and, while I understand the reluctance to have our state court judges take on new roles they were not intended to play, someone has to examine the issue of standing -- the examples of multiple claims by a multiple lenders and servicers, of servicers suing on loans they have sold or transferred, of servicers who never owned the loan, are simply too numerous to ignore. (Some commentators have suggested that the rush to create more loans to feed the need for securitized trusts resulted in little or no oversight of any of the paperwork involved, or of compliance with even the most basic UCC rules or PSA transfer requirements.)

Another alternative to having the judges conduct the review of each file referred to mediation would be to involve the legal services organizations around Florida, and press their staff into service on this issue. Again, I do not know where you would find the money for this, but the legal aid groups are almost the only entities with an acceptable level of knowledge, and many of their attorneys are begging for increased training on foreclosure defense.

It seems to me you need to build the mediation system with the goal of assisting both sides, and to do so you will have to provide *increased* help to the homeowner / defendant of a sort not normally seen in a state court mediation program -- you simply have to build in some way to increase leverage on the part of the homeowner. Otherwise, you are throwing more good money after a bad, unworkable problem.

Thank you for allowing me the opportunity to share these comments.

Sincerely,


James A. Kowalski, Jr.

EXHIBIT A

James A. Kowalski Jr.

Law Offices of James A. Kowalski, Jr., PL
12627 San Jose Blvd., Suite 203
Jacksonville, FL 32223
Telephone: (904) 268-1146
Facsimile: (904) 268-1342

E-mail: Kowalski.law@mac.com
www.kowalski-law.com

Jim Kowalski is an AV-rated civil trial attorney based in Jacksonville, Florida, specializing in consumer protection litigation, including wrongful foreclosure and consumer fraud, complex personal injury, wrongful death, and premises liability litigation. Jim is licensed to practice law in Florida and California and focuses on litigation in the northeast Florida area.

Jim has lived in the Jacksonville area since moving to Florida from Northern California in 1989, after graduating from the University of California, Berkeley, and the University of San Francisco School of Law. Jim served as an Assistant State Attorney from 1989-1996 under Ed Austin and Harry Shorstein, acting as Division Chief (County Court; Public Corruption Unit) and Senior Trial Attorney in the Special Assault/Sex Crimes and ROC (Repeat Offender Court) Divisions. Jim was also a member of the on-call homicide team and received the Trial Award in 1992.

After leaving the State Attorney's Office in 1996, Jim joined the small insurance defense and workers' compensation firm of Boyd & Jenerette, and then joined the Law Offices of Fred Tromberg (later Tromberg & Kowalski) in 1998. While at Tromberg and Kowalski, Jim specialized in litigation and handled matters involving consumer protection, including wrongful foreclosure and consumer fraud, complex personal injury, wrongful death, and premises liability litigation. He opened his own practice in late 2006.

Jim has taught and written in the area of crime victimization, including the use of victim impact testimony in death penalty cases, and in the area of consumer fraud, including presentations on mortgage foreclosure litigation. He is a member of the Bar in Florida and California, a member of NACA (the National Association of Consumer Advocates) and the Florida Justice Association. Jim is a current member of the Child Protection Team (CPT) Advisory Board, has served on the board of Compassionate Families, Inc., a Jacksonville non-profit dedicated to assisting the families of homicide victims, and is the past vice-chair of the Mayor's Victim's Assistance Advisory Council (VAAC). He is a recipient of the Jacksonville Legal Aid Pro Bono award for 2006 and 2008, and received the Florida Bar President's Pro Bono Service Award in 2009, for service rendered in the Fourth Judicial Circuit.

Recent lectures in the area of consumer litigation include:

- June 2009: Legal Services of North Florida
"Weathering the Financial Storm" seminar
- Representation of Financially Distressed Homeowners
- October 2008: Jacksonville Bankruptcy Bar Association
Annual Seminar
- The Real Estate Crisis: Issues Relating to Creditor Standing, Securitization and Affidavit Inadequacies and Other Bankruptcy Topics
- September 2008: NACA 2008 Mortgage Lending Litigation
Conference (Cleveland)
- Damages: Evaluating a Case's Value, Proving Damages Through Testimony and Expert Witnesses
 - Understanding Defendants: Tactics, Mediation and Solvency Issues
- April 2008: Jacksonville Human Rights Commission / Fair
Housing Awareness Symposium
- Predatory Lending
- September 2007: NACA 2007 Mortgage Lending Litigation
Conference (St. Louis)
- Understanding Loan Documents, Origination and Closing Process
 - Ethical Representation of Mortgage Lending Fraud Victims
- April 2007: Jacksonville Human Rights Commission / Fair
Housing Symposium
- Predatory Lending

Recent lectures in the area of crime victimization include:

- January 2008: Compassionate Families, Inc. (Advocate Training)
- Florida Laws Relating to Crime Victims and Advocates
- April, 2007: Mayor's Victim's Assistance Advisory Council
- "Reflected Pain: The Psychological Impact of Violence on Families and the Community" – moderated panel discussion / annual Victims' Rights Week Seminar

EXHIBIT B

ATTORNEY PERFORMANCE REPORT

by Lindsey Lesch

Since its initial release in 2004, the Attorney Performance Report (APR) has proven beneficial to FIS Foreclosure Solutions network firms and clients alike, creating a valuable marketing tool for firms and reducing loss severity for clients. Changes to the APR model have been limited to only one or two releases each year to maintain the stability of the report. Enhancements since the original model include the introduction of data normalization, weighting adjustments, allowable delay adjustments, a client-specific data section, and the addition of the color-coding section and corresponding tenure and volume requirements. The Attorney Roundtable, established in 2005, has helped FIS' reporting department prioritize changes to the model.

In 2007, FIS proposed additional enhancements to the Attorney Roundtable members for review and feedback. The proposed enhancements included changes to the stages within the Motion for Relief (MFR) scorecard, separation of Chapter seven and Chapter 13 files within the MFR scorecard, and inclusion of inherited files on stages in which the first event of the stage occurs after the date of transfer. Based on the feedback received from network firms and through continued discussion with the roundtable members, additional changes were requested for the next APR enhancement release.

FIS Foreclosure Solutions is please to announce the next set of APR enhancements scheduled for release in Q1 2008:

MFR APR Scorecard stage and weighting adjustments: In addition to weighting adjustments for current stages on the MFR scorecard, proposed changes include the addition of an "Agreed Order Submitted to Court" event in Process Management and an increase in the APR scoring period from 90 days to 120 days.

New stages and weighting for the MFR scorecard include:

MFR Referred to MFR Filed	35 percent
MFR Filed to Hearing/Objection Date	5 percent
Hearing/Obj. Date to Hearing/Obj. Results	5 percent
MFR Referred to Results	25 percent
AO Results to AO Submitted	10 percent
MFR Referred to Order Entered	5 percent
MFR Referred to Received	3 percent
Event Completion Percentage	4 percent
Approved Reprojection	4 percent
Reprojection Completion Percentage	4 percent

Initial Stage Measurement: The initial stage measurement on both the Foreclosure and MFR scorecards will be changed from "File Received" to "File Referred."

Illustration of Chapter seven and Chapter 13 distribution: The distribution of Chapter seven and Chapter 13 files will be shown in the State Attorney Section of the APR.

Inherited Files Stage Update: Stages for which the completion of the first event of the stage occurs after the date of transfer will be included in the APR for inherited files.

To ensure firms understand the changes that will go into effect, updated APR guides and a network announcement outlining the changes will be released prior to the effective date of these changes. Notes from the roundtable meetings during which these changes were discussed are available on the Attorney Roundtable Notes Web site at <http://fndsportal.com/attorneyroundtable/>

For questions related to these changes, please contact attyfeedback@fnfs.net.

EXHIBIT C

IN THE CIRCUIT COURT OF THE FOURTH
JUDICIAL CIRCUIT, IN AND FOR DUVAL
COUNTY, FLORIDA

CASE NUMBER: 16-2004-CA-4835-XXXX-MA

DIVISION: CV-E

TCIF REO2, LLC,

Plaintiff,

v.

MARTIN L. LEIBOWITZ, AS TRUSTEE,
etc., et al.,

Defendants.



FILED 05/02/06 PM 01:00 IN FILER

ORDER GRANTING DEFENDANTS' MOTION FOR SANCTIONS

This cause came before the Court on April 5, 2006 on Defendants Robert Jackson and Lillian Jackson's Motion for Sanctions for Fraud Upon the Court. The Court has reviewed the pleadings, considered arguments of counsel, and is otherwise fully advised in the premises.

The Court finds Plaintiff, through its servicing entity, GMAC Mortgage Corporation, submitted false testimony to the Court in the form of Affidavits of Indebtedness signed and subscribed by Margie Kwiatanowski, a "Limited Signing Officer" with GMAC Mortgage Corporation. The submission of the false Affidavits was pursuant to protocols and procedures wherein Ms. Kwiatanowski, as Limited Signing Officer, would attest to review of the relevant loan documents, the Complaint, and the loan payment records, when in fact (as sworn to by Ms. Kwiatanowski in her deposition) she neither reviewed the referenced records nor was familiar with the manner in which the records were created by GMAC on behalf of Plaintiff. In her deposition, Ms. Kwiatanowski admitted none of the Affidavits were signed before a Notary, and that Affidavits of the sort filed by Plaintiff would be signed and then left in a folder, to be notarized at a different

time. The admissions by Ms. Kwiatanowski in her deposition directly contradict the sworn testimony to the Court in the form of the referenced Affidavits, both as to the substance of the Affidavits and with regard to whether the Affidavits were sworn to before a notary.

The Court recognizes the statements made by Plaintiff's counsel at the hearing to the effect that the procedures in place at GMAC with regard to servicing of this Plaintiff's loans were being corrected. The Court finds the submission of false testimony to the Court in the manner described does not rise to the level required in order for this Court to dismiss the action. Cox v. Burke, 706 So.2d 43 (Fla. 5th DCA 1998.) The Court will not condone Plaintiff's actions in filing false testimony, however, and the Court has both the inherent authority to sanction Plaintiff's actions, based upon the findings set forth above, and finds sanctions to be appropriate. It is therefore:

ORDERED AND ADJUDGED:

1. Defendants' Motion for Sanctions for Fraud Upon the Court is GRANTED.
2. The subject Affidavits as completed by Ms. Kwiatanowski are and same be stricken.
3. The Court orders Plaintiff to pay Defendants' attorneys' fees and costs for the efforts related to the taking of Ms. Kwiatanowski's deposition. Based upon a review of the record and the Affidavit filed by Defendants' counsel, the Court finds a reasonable sanction to be 30 hours of attorney's time and further finds a reasonable, local hourly rate to be \$250.00, and further awards costs in the amount of \$634.55. Therefore, the Plaintiff, TCIF REO2, LLC, Inc. shall forward to defense counsel payment of \$ 8,134.55 in sanctions for the reasons set forth above within 30 days from the date of this Order.

4. Counsel for Plaintiff shall file with the Court GMAC's written explanation and confirmation, on behalf of Plaintiff, that GMAC's policies and procedures with regard to the servicing of all of this Plaintiff's loans within the State of Florida have been modified, in accord with

representations made by counsel to the Court that such modifications were being made, to confirm the affidavits filed in future foreclosure actions in Florida accurately memorialize the actions and conduct of the affiants. The written confirmation of policy changes, and an explanation for the policies now in place, shall be filed with the Court within 30 days of the date of this Order.

DONE AND ORDERED, in Chambers, at Jacksonville, Duval County, Florida, this 19th day of May, 2006.



Circuit Court Judge

Copies to: James A. Kowalski, Jr., Esquire
Roy A. Diaz, Esquire

EXHIBIT D

[back to article](#)



Printed on page A1

Lies a new tool in foreclosure

Lawyers, in rush to regain properties, can exploit judges' workload

By Todd Ruger

Published: Sunday, May 10, 2009 at 1:00 a.m.

Foreclosure lawyers want to take back property as fast as possible, and sometimes they do not let the facts slow them down.

In case after case, lawyers representing banks are giving false statements in court about who owns mortgages, or whether the homeowner is willing to negotiate, or whether they have completed all the legal steps to put a foreclosed house back on the market.

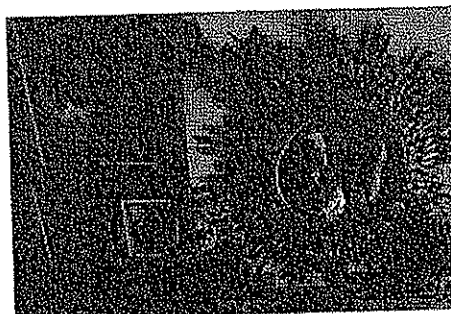
The errors and fabrications in the court files are seldom caught by judges with hundreds of foreclosure cases before them.

The judges say they can only hope to catch a few of the offending lawyers in hopes of keeping the rest honest.

The courts usually rely on defendants to point out problems in the cases against them. But in foreclosure court, many homeowners make no attempt to defend themselves. Judges cannot step into that role.

"Even the IRS can't audit every return," said 12th Circuit Chief Judge Lee Haworth. "We're an impartial party. You don't ask the referee at a baseball game to tell whether the people coming in the game are on drugs."

Since the real estate market in Florida began to slide in 2006, the number of foreclosure cases has gone up 600 percent.



STAFF PHOTO / CHIP LITHELAND
Betty Kellogg stands for a portrait in her condo, which is being foreclosed on by Washington Mutua in Sarasota. She is facing foreclosure and is having to hold her own estate sale of items collected over years of traveling.

In the first quarter of this year, 4,991 foreclosures were filed in the Sarasota-Bradenton-Venice market, which remains among the top 25 for foreclosures in the nation.

At the same time, judges handling the cases have seen their budgets fall 13 percent.

Most of the foreclosures are filed by out-of-town attorneys from a handful of firms who rarely appear in court in person.

Minutes after a foreclosure attorney told her everything was in order in a recent case, Circuit Judge Donna Berlin was ready to sign off.

Then she happened to glance at the file, and realized that the two properties were in Miami, a few hundred miles outside her jurisdiction.

"I didn't have time to go through and read it," Berlin told a group of attorneys at a meeting last weekend. "And it was not something that I normally look at."

Foreclosure defense attorneys say that even homeowners who plan to walk away from a property should be checking the court file and making sure the lenders' attorneys are sticking to the truth.

"It's all across the country, it's not just here," said April Charney, a Jacksonville attorney who is a nationally recognized expert in foreclosure defense.

"It's whatever's expedient."

Troubling findings

Nobody knows how common it is for foreclosure cases to be based on untrue statements or incomplete proof.

More than half of all foreclosure defendants simply walk away, and never show up in court to defend themselves.

A Sarasota attorney, Richard Kessler, enlisted a few friends to go through 180 foreclosure cases in Sarasota County looking for errors.

They found three out of four cases proceeded with incomplete or improper documentation.

For instance, the survey found that only one in 12 cases had the documents to prove the company foreclosing on the property was also the company holding the mortgage note.

In half of the cases reviewed, the plaintiff said the mortgage note had been lost.

Kessler contacted Haworth and offered to have his business double check the paperwork for the courts, proposing that his fee could be charged to the company filing the case.

Haworth declined, saying he cannot add such a filing fee, and the courts have no money to pay for the service.

Instead, Haworth is recruiting volunteer law students to review all the cases for foreclosure judges this summer to verify documents.

"We think having cops on the beat will help," Haworth said.

'Any old pleading'

Haworth changed court rules earlier this year to address some of the problems with the out-of-town firms that handle most of the foreclosures in Manatee and Sarasota counties.

He required them to meet with homeowners and try to settle the case.

Lenders widely ignored the rule, and the number of foreclosures being resolved went from 400 a month to just over 100.

Lenders also must file complete paperwork, including proof that they met or tried to meet with the homeowner. Otherwise, their hearings get canceled, costing them money.

But some foreclosure attorneys have simply filed paperwork saying the homeowners declined to have the meeting, whether that was true or not.

Ronald and Sandra Smith requested the mediation meeting with their lender in January. Then they sent financial documents in preparation for the meeting.

A few weeks later, the attorney for the lender, HSBC Bank, filed court papers saying the Smiths had "no interest in the program or declined."

There is no way to know whether it was a mistake or deliberate, said the Smiths' attorney, David Morrill of Legal Aid of Manasota. But he is asking for the case to be dismissed because of it.

"I don't believe an attorney would deliberately do that," Morrill said. "I just don't know what happens to all this paperwork we send them."

Other false statements provided to the courts are more suspect, like the attorney for Deutsche Bank who, to avoid having to refile a case, claimed the international financial giant had changed its name to Aurora Loan Services.

A judge in Miami fined Wells Fargo bank \$95,000 late last year because of sloppy paperwork filed by Florida Default Law Group, one of a handful of companies that handle the majority of foreclosures in the state.

Judge John K. Olson blasted Florida Default, saying the firm seemed to believe that "filing any old pleading without undertaking any investigation into its accuracy is perfectly acceptable practice."

Wells Fargo and the Florida Default Law Group told the judge that the mistakes were employee errors, and that staff at all levels were warned to be more careful.

Phone and e-mail messages left by a reporter for lender attorneys involved in those cases, including Florida Default Law Group vice-president Ronald Wolfe, were not returned.

The notorious Kellogg case

The most notorious case in Sarasota County is that of Betty Kellogg, a 71-year-old disabled widow who twice had her villa put up for foreclosure sale, even though she worked out a settlement with her lender.

Kellogg bought the villa in 2000 after her husband and other relatives died. To pay her medical bills and consolidate her debt, she took a \$180,000 loan against her home.

The mortgage broker had inflated her income on the application -- she makes \$380 a month working part-time; the mortgage broker said she made \$2,300 a month.

Kellogg could not afford the loan payments.

"I asked them, 'Why would you accept me, I don't really have enough money to qualify for this. They said, 'Just pay for a couple months and we'll refinance again,'" Kellogg said.

So when she fell behind and the foreclosure lawsuit was filed last year, she begged with the bank to help her.

"I am just lost. I don't know what to do," Kellogg wrote to the lender, Washington Mutual. "Please help me."

The bank told her it would not proceed with the foreclosure case while they negotiated.

But at the same time, the bank's lawyers were telling Judge Berlin that Kellogg was not defending herself, and were granted a default judgment. They put Kellogg's home up for sale.

Kellogg went to an attorney.

Berlin cancelled the sale when she found out what happened.

Less than a month later, the bank filed another motion, saying that the first sale had been canceled because it was not advertised.

Berlin signed the order, and the bank scheduled another sale.

Kellogg, who got a lawyer through Legal Aid of Manasota, went back to the judge again, and the sale was canceled. Again.

"I got so afraid, and I have no money to pay attorneys to fight for me," Kellogg said. "It's very confusing. I am not talking to anybody on the phone anymore."

This story appeared in print on page A1

EXHIBIT E

UNITED STATES BANKRUPTCY COURT
FOR THE
DISTRICT OF MASSACHUSETTS

~~~~~  
In re  
ANN C. JONES,  
Debtor

Chapter 13  
Case No. 07-15662-JNF

~~~~~

MEMORANDUM

I. INTRODUCTION

The matter before the Court is the "Objection to Claim filed by Carrington Mortgage" filed by the Debtor, Ann C. Jones (the "Debtor"). On August 29, 2008, the Court heard the Debtor's Objection and the Response filed by Carrington Mortgage Services, LLC ("Carrington"), as "Successor to New Century Mortgage Corporation." At the hearing, the parties agreed to the submission of numerous documents. Additionally, they agreed that their pleadings could be construed as cross-motions for summary judgment in this contested matter. *See* Fed. R. Bankr. P. 9014(c). Neither party called witnesses or requested an evidentiary hearing. The issue presented is whether Carrington established its standing to file a proof of claim in the sum of \$393,211.09, either as the successor servicer for

Deutsche Bank National Trust Company, as Indenture Trustee for New Century Home Equity Loan Trust 2005-2, or as the current holder of the mortgage executed by the Debtor in favor of Ameripath Mortgage Corporation ("Ameripath"). The Court makes the following findings of fact and rulings of law in accordance with Fed. R. Bankr. P. 7052 and Fed. R. Bankr. P. 9014(c).

II. FACTS¹

The parties submitted a Joint Pre-Trial Memorandum in which they agreed to the following facts. On February 11, 2005, the Debtor executed an adjustable rate note in the original principal amount of \$335,500,² as well as a mortgage in favor of Ameripath secured by her multi-family property located at 114 Radcliffe Street, Dorchester, Massachusetts.

¹ For ease of reference, a timeline is set forth as an exhibit to the Court's decision.

² The note provided for an initial 7.1% rate of interest and a monthly payment of \$2,254.67. On Schedule I-Current Income of Individual Debtor(s), the Debtor disclosed that she is an employee of the Registry of Motor Vehicles with monthly income of \$3,0666 (net \$2,074), which she supplements with income from her rental property in the sum of \$1,200 and social security income of \$796 for her disabled son. On Schedule J-Current Expenditures of Individual Debtor(s), the Debtor set forth monthly expenditures of \$3,848, excluding a monthly mortgage payment, resulting in net income of \$222. Assuming the interest rate applicable to the Debtor's mortgage obligation did not adjust, her annual mortgage obligation, excluding the payment of insurance and taxes, would be \$27,048, compared with her annual income of \$48,840 (\$44,941 per Form 22C), an obligation which would consume 55.38% of her income. The interest rate applicable to her note had the potential to adjust as high as 14.1%. Pursuant to her Chapter 13 plan, filed on September 24, 2007, the Debtor proposed to pay no mortgage arrears, and to sell the Radcliffe Street property "as soon as practicable, but in no event more than three months after confirmation." The Debtor subsequently filed a Second Amended Chapter 13 plan, proposing to cramdown the mortgage, fixing the interest rate at 7.1% and paying \$1,500 per month toward the claim, amortized over 30 years.

On February 15, 2005, Ameripath assigned the note to New Century Mortgage Corporation. Carrington attached a copy of the assignment of the note to its proof of claim.

On April 22, 2005, New Century Mortgage Corporation, as Master Servicer, New Century Home Equity Loan Trust 2005-2, as Issuer, and Deutsche Bank National Trust Company, as Indenture Trustee, executed a Servicing Agreement. The Servicing Agreement identified New Century Mortgage Securities LLC as the Depositor who would acquire "Mortgage Loans" pursuant to the terms of a Mortgage Loan Purchase Agreement. New Century Mortgage Securities LLC, as Depositor, was also charged with creating New Century Home Equity Loan Trust 2005-2 (the Issuer) and with transferring the Mortgage Loans and all of its rights under the Mortgage Loan Purchase Agreement to the New Century Home Equity Loan Trust 2005-2 (the Issuer) in exchange for certificates issued by New Century Home Equity Loan Trust 2005-2. New Century Home Equity Loan Trust 2005-2, in turn, was obliged to issue and transfer to, or at the direction of, the Depositor (New Century Mortgage Securities LLC) the Trust Certificates, Series 2005-2. Additionally, pursuant to the terms of an Indenture dated April 22, 2005 between New Century Home Equity Loan Trust 2005-2 and Deutsche Bank National Trust Company, as Indenture Trustee, New Century Home Equity Loan Trust 2005-2 was obliged to pledge the Mortgage Loans and issue and transfer to, or at the direction of, the Purchaser various asset backed notes identified by series and class.³ Finally, New Century Mortgage Corporation was to

³ The term "Purchaser" was not defined and the identity of the Purchaser was not specifically disclosed in the Servicing Agreement.

service the Mortgage Loans set forth on the Mortgage Loan Schedule, which was attached to the Service Agreement as Exhibit A, either directly or through one or more Sub-Servicers. The Servicing Agreement filed with the Court indicated that the actual schedule of mortgages was "filed in paper pursuant to a continuing hardship exemption available pursuant to "Rule 202 fo Regulation S-T."

The Servicing Agreement executed on April 22, 2005 incorporated by reference the Indenture and its definitions, which were contained in an appendix to the Indenture identified as Appendix A. Neither the Indenture nor Appendix A were submitted into evidence. The Mortgage Loans which New Century Mortgage Securities LLC, as Depositor, transferred to Deutsche Bank National Trust Company as Indenture Trustee, supposedly were included on a Schedule A, which, as noted above, was not attached to the Servicing Agreement filed with the Court. Moreover, because the Indenture was not filed with the Court, the Court does not have a definition of what constitute "Mortgage Loans."

On August 31, 2005, four months after the execution of the Servicing Agreement and related Indenture, Ameripath recorded with the Suffolk County Registry of Deeds an assignment, dated August 24, 2005, "without recourse in any event said mortgage [from Ann C. Jones] and the note and claim secured thereby to Deutsche Bank National Trust Company, as Indenture Trustee for New Century Home Equity Loan Trust 2005-2 c/o New Century Mortgage Corporation. That document contains a purported assignment of the mortgage, as well as the note executed by the Debtor, to Deutsche Bank as Indenture Trustee for New Century Home Equity Loan Trust 2005-2, although the parties agreed that

the note had been assigned on February 15, 2005 by Ameripath to New Century Mortgage Corporation.

On October 24, 2005, Deutsche Bank National Trust Company, as Indenture Trustee for New Century Home Equity Loan Trust 2005-2, claiming to be the holder of a mortgage covering the Radcliffe Street property, recorded notice that it had filed a complaint in the Land Court, Department of the Trial Court, for authority to foreclose the Debtor's mortgage, "now held by Plaintiff by assignment."

On December 15, 2006, approximately 14 months after Deutsche Bank, as Indenture Trustee for New Century Home Equity Loan Trust 2005-2, recorded notice of its intent to foreclose, and approximately 16 months after Ameripath assigned the mortgage to Deutsche Bank National Trust, as Indenture Trustee for New Century Home Equity Loan Trust 2005-2, New Century Mortgage Corporation recorded an assignment in the Land Court pursuant to which Ameripath assigned the Debtor's mortgage to it, although there was no mention in the assignment of New Century Mortgage Corporation's role as Master Servicer under the Servicing Agreement dated April 22, 2005 or of New Century Mortgage Services LLC.

The parties also agreed to introduce into evidence an order issued by the United States Bankruptcy Court for the District of Delaware pertaining to the sale of New Century Mortgage Corporation's mortgage servicing rights. The Court takes judicial notice that New Century Mortgage Corporation filed a Chapter 11 bankruptcy petition on April 2, 2007. Its case is jointly administered with those of 14 affiliates under the lead case of New

Century TRS Holdings, Inc., whose affiliates include NC Capital Corporation, which together with its affiliates, was referenced in ¶ 2.03 of the Servicing Agreement.

Two days after the commencement of the bankruptcy cases, New Century TRS Holdings, Inc. and its affiliates filed an emergency motion in connection with the proposed sale of certain mortgage loan servicing assets to Carrington. In its emergency motion, it represented the following:

The Debtors' Servicing Business is among the most substantial of the Debtors' operations being offered for sale, as loan servicing has been and remains a very important and profitable part of the Debtors' businesses. The Debtors presently service approximately \$19 billion of loans owned by third parties. The Debtors' mortgage servicing rights ("MSRs") are generally established in servicing contracts with securitization trusts or third party whole loan purchasers. For performing these functions, the servicer (usually NCMC [New Century Mortgage Corporation]) generally receives a servicing fee, one-twelfth of which is paid monthly, or 0.05% per annum of the outstanding principal balance of each loan in the mortgage servicing portfolio. These servicing fees are typically collected from the monthly payments made by the borrowers on the loans. In addition, the Debtors receive remuneration for loan servicing including float benefits representing interest earned on collection accounts where mortgage payments are held pending remittance to investors, as well as mortgagor-contracted fees such as late fees and, in some case, prepayment penalties.

... Carrington and its affiliates own the primary interests in 12 securitization trusts established from 2004-2006 (the "Carrington Securitization Trusts") which hold approximately \$8.6 billion of mortgage loans that the Debtors originated and sold to these securitization trusts. NCMC is the servicer of the mortgage loans held in the Carrington Securitization Trusts; so, the Carrington Securitization Trusts provide a significant portion of the revenue realized by the Debtors' Servicing Business.

On May 23, 2007, the United States Bankruptcy Court for the District of Delaware entered the order referenced above, captioned "Order Pursuant to Sections 105, 363 and

365 of the Bankruptcy Code and Rules 2002, 6004, 6006 and 9014 of the Federal Rules of Bankruptcy Procedure Approving (i) the Sale of Debtors' Servicing Business to Carrington Capital Management, LLC and Carrington Mortgage Services, LLC pursuant to the Second Amended and Restated Asset Purchase Agreement, dated as of May 21, 2007, Free and Clear of Liens, Claims, Encumbrances, and Interests, and (ii) the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases to Carrington as part of Such Sale." The May 21, 2007 Agreement referenced in the caption of the order listed 28 so-called RMBS [residential mortgage-backed securities] Transactions, including New Century Home Equity Loan Trust Series 2005-2.

On April 16, 2008, following the sale of New Century Mortgage Corporation's servicing rights to Carrington, Deutsche Bank National Trust Company executed a Limited Power of Attorney. It provided in pertinent part:

Pursuant to that New Century Home Equity Loan Trust 2005-2, Servicing Agreement dated as of April 22, 2005 (the "Agreement") by and between and [sic] Deutsche Bank National Trust Company and Carrington Mortgage Services, LLC as successor Servicer to New Century Mortgage Corporation (the "Servicer") hereby constitutes and appoints the Servicer, by and through the Servicer's officers, the Trustee's true and lawful Attorney-in-Fact, in the Trustee's name, place and stead and for the Trustee's benefit, in connection with all mortgage loans serviced by the Servicer pursuant to the Agreement solely for the purpose of performing such acts and executing such documents in the name of the Trustee necessary and appropriate to effectuate the following enumerated transactions in respect of any of the mortgages or deeds of trust . . . and promissory notes secured thereby . . . for which the undersigned is acting as Trustee for various certificateholders (whether the undersigned is named therein as mortgagee or beneficiary or has become mortgagee by virtue of endorsement of the Mortgage Note secured by any such Mortgage or Deed of Trust) and for which Carrington Mortgage Services, LLC is acting as Servicer.

In the Limited Power of Attorney, Deutsche Bank National Trust Company did not grant Carrington authority to execute assignments of mortgages, except in connection with the repurchase of mortgage loans or upon payment and discharge of the mortgage.

The final document submitted by the parties was an Assignment dated July 18, 2008. Pursuant to that Assignment, New Century Mortgage Corporation, as the holder of the Debtor's mortgage, assigned the mortgage to Carrington Mortgage Services, LLC.

The Debtor filed her voluntary Chapter 13 petition on September 7, 2007, after the bankruptcy court authorized sale of New Century Mortgage Corporation's servicing rights to Carrington, but before the execution of the Limited Power of Attorney and the July 18, 2008 assignment.

III. DISCUSSION

The Court recently addressed the issue of standing to file both a proof of claim and a motion for relief from the automatic stay in In re Hayes, ___ B.R. ___, No. 07-13967-JNF, 2008 WL 3870820 (Bankr. D. Mass. Aug. 19, 2008). The Court shall not repeat that discussion here and, instead, incorporate its discussion herein. Id. at *5-*7.

Pursuant to Fed. R. Bankr. P. 3001(f), "[a] proof of claim executed and filed in accordance with the Federal Rules of Bankruptcy Procedure constitutes prima facie evidence of the validity and amount of the claim." See In re Long, 353 B.R. 1, 13 (Bankr. D. Mass. 2006). See also Juniper Dev. Group v. Kahn (In re Hemingway Transp., Inc.), 993 F.2d 915, 925 (1st Cir. 1993). An objecting party, in order to rebut the prima facie validity of the proof of claim must produce "substantial evidence," and, if the objecting party

produces substantial evidence in opposition to the proof of claim, rebutting the prima facie evidence, the burden shifts to the claimant to establish the validity of its claim. See Long, 353 B.R. at 13 (citations omitted).

In this case, the evidence submitted by the parties in the form of various documents supports the Debtor's position that Carrington, either as servicer for Deutsche Bank National Trust, as Indenture Trustee under the New Century Home Equity Loan Trust 2005-2, or on its own behalf lacked standing to file a proof of claim. Although Carrington established that it is the successor to New Century Mortgage Corporation as Servicer of the of the New Century Home Equity Loan Trust 2005-2 as a result of the May 23, 2007 order of the United States Bankruptcy Court for the District of Delaware, the Court finds that it failed to establish that the Debtor's mortgage actually was part of the New Century Home Equity Loan Trust 2005-2, or that Ameripath's assignment of the mortgage on August 24, 2005 to Deutsche Bank National Trust as Indenture Trustee for New Century Equity Loan Trust 2005-2 was a nullity. Absent an assignment from Deutsche Bank back to Ameripath, Ameripath's purported assignment of the mortgage to New Century Mortgage Corporation, which was recorded on December 15, 2006, was ineffective to convey an interest it no longer had. Moreover, the defect was not cured by the July 2008 assignment of the mortgage by New Century Mortgage Corporation to Carrington.

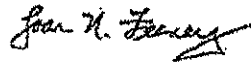
The creation of the New Century Home Equity Loan Trust on April 22, 2005 preceded the August 24, 2005 assignment of the mortgage on the Radcliffe Street property from Ameripath, the original holder, to Deutsche Bank National Trust Company, as

Indenture Trustee for New Century Home Equity Loan Trust 2005-2. The Servicing Agreement dated April 22, 2005 referenced the transfer of "Mortgage Loans" to the New Century Home Equity Loan Trust 2005-2, by New Century Mortgage Securities LLC, but the Court was not provided with a definition of the term "Mortgage Loans" and, thus, cannot conclude whether those loans included the Debtor's mortgage. The evidence established that the note relating to the mortgage on the Radcliffe Street property was assigned by Ameripath to New Century Mortgage Corporation on February 15, 2005, but the assignment of the mortgage from Ameripath to Deutsche Bank National Trust Company post-dated the creation of the New Century Home Equity Loan Trust 2005-2. Further, the Court was not provided with Exhibit A to the Servicing Agreement, and there is no evidence that either the Debtor's mortgage was part of the securitization trust or subsequently added to the trust res pursuant to the terms of the Indenture. Moreover, because New Century Mortgage Securities LLC, as the Depositor under that trust, not New Century Mortgage Corporation, was obligated to transfer "Mortgage Loans" to Deutsche Bank National Trust Company as Trustee of the New Century Home Equity Loan Trust 2005-2, it would appear that an assignment of the mortgage from Ameripath or New Century Mortgage Corporation to New Century Mortgage Securities LLC may have been required to establish an accurate chain of ownership of the mortgage. The documents submitted by the parties, including the Limited Power of Attorney and assignments made in December of 2006 and July of 2008, failed to cure the defects outlined above.

IV. CONCLUSION

Upon consideration of the foregoing, the Court grants the Debtor's motion for summary judgment and denies Carrington's motion for summary judgment. The Court sustains the Debtor's objection to the proof of claim. Pursuant to 11 U.S.C. § 502(j), "[a] claim that has been allowed or disallowed may be reconsidered for cause. A reconsidered claim may be allowed or disallowed according to the equities of the case." Thus, if and when the chain of ownership of the mortgage executed by the Debtor on February 11, 2005 can be conclusively established, the appropriate party may file an amended proof of claim.

By the Court,



Joan N. Feeney
United States Bankruptcy Judge

Dated: October 3, 2008

cc: David G. Baker, Esq., Jessica Rodger, Esq., Carolyn Bankowski, Esq.

EXHIBIT A - TIMELINE

February 11, 2005	Debtor executed Note and Mortgage to Ameripath Mortgage Corporation
February 15, 2005	Ameripath Mortgage Corporation assigned Debtor's Note to New Century Mortgage Corporation
April 22, 2005	New Century Mortgage Corporation, as Master Servicer, Deutsche Bank National Trust Company, as Indenture Trustee, and New Century Home Equity Loan Trust 2005-2, as Issuer, executed a Servicing Agreement for New Century Home Equity Loan Trust 2005-2 regarding certain Mortgage Loans purportedly attached on a schedule as Exhibit A
August 24, 2005	Ameripath Mortgage Corporation assigned Debtor's note and mortgage to Deutsche Bank National Trust Company, as Indenture Trustee for New Century Home Equity Loan Trust 2005-2
October 24, 2005	Deutsche Bank National Trust Company, as Indenture Trustee for New Century Home Equity Loan Trust 2005-2 recorded notice of complaint to foreclose Debtor's mortgage
December 15, 2006	New Century Mortgage Corporation recorded an assignment of Debtor's mortgage from Ameripath Mortgage Corporation to New Century Mortgage Corporation
April 2, 2007	New Century Mortgage Corporation filed Chapter 11 petition in District of Delaware
May 21, 2007	Carrington Mortgage Services LLC executed agreement to purchase servicing assets of New Century Mortgage Corporation and its affiliates
May 23, 2007	United States Bankruptcy Court for the District of Delaware entered order approving sale of New Century Mortgage Corporation's servicing business to Carrington Mortgage Services, LLC and Carrington Capital Management, LLC.

September 7, 2007 Ann C. Jones filed Chapter 13 petition in District of Massachusetts

September 28, 2007 Carrington Mortgage Services, LLC, as successor to New Century Mortgage Corporation, filed secured proof of claim for \$393,211.09 in Ann C. Jones's Chapter 13 case

April 16, 2008 Deutsche Bank National Trust Company, as Indenture Trustee, executed Limited Power of Attorney to New Century Mortgage Corporation

July 18, 2008 New Century Mortgage Corporation assigned Debtor's mortgage to Carrington Mortgage Services, LLC

United States Bankruptcy Court,
 S.D. Florida,
 Fort Lauderdale Division.
 In re Fazlul HAQUE, Debtor.
 No. 08-14257-BKC-JKO.

Oct. 28, 2008.

Background: After creditor filed motion for stay relief, evidentiary hearings were held regarding charge of \$2,114.10 in "penalty interest" which ultimately was conceded to have been made in error.

Holding: The Bankruptcy Court, John K. Olson, J., held that creditor's counsel, which acknowledged that it had filed on behalf of creditor "less than 50" false stay relief affidavits claiming entitlement to default interest, including the affidavit filed in the present case, would be assessed sanctions in the amount of \$2,114.10 for each of the 45 affidavits which the court assumed that it had filed, for a total sanction of \$95,130.45, and because creditor shared culpability with its counsel, such sanctions would be imposed jointly and severally.

Sanctions imposed.

West Headnotes

[1] Bankruptcy 51 ↪2124.1

51 Bankruptcy
 5111 Courts; Proceedings in General
 5111(A) In General
 51k2124 Power and Authority
 51k2124.1 k. In General. Most Cited Cases
 Bankruptcy court has an independent responsibility to ensure that the relief it grants is both procedurally and substantively proper.

[2] Bankruptcy 51 ↪2187

51 Bankruptcy

5111 Courts; Proceedings in General
 5111(C) Costs and Fees
 51k2182 Grounds and Circumstances
 51k2187 k. Frivolity or Bad Faith;

Sanctions. Most Cited Cases
 Bankruptcy court's power to sanction resides both in the section of the Bankruptcy Code authorizing the court to issue any order necessary or appropriate to carry out the provisions of title 11 and in the inherent power of the federal courts to sanction improper conduct. 11 U.S.C.A. § 105(a).

[3] Bankruptcy 51 ↪2187

51 Bankruptcy
 5111 Courts; Proceedings in General
 5111(C) Costs and Fees
 51k2182 Grounds and Circumstances
 51k2187 k. Frivolity or Bad Faith;
 Sanctions. Most Cited Cases
 Inherent power of the federal court to sanction parties is well established, and reaches both conduct before the court and that beyond the court's confines.

[4] Contempt 93 ↪20

93 Contempt
 931 Acts or Conduct Constituting Contempt of Court
 93k19 Disobedience to Mandate, Order, or Judgment
 93k20 k. In General. Most Cited Cases
 Underlying concern that gave rise to the contempt power of the federal court was not merely the disruption of court proceedings; rather, it was disobedience to the orders of the judiciary, regardless of whether such disobedience interfered with the conduct of trial.

[5] Courts 106 ↪78

106 Courts
 10611 Establishment, Organization, and Procedure

106II(F) Rules of Court and Conduct of Business

106k78 k. Power to Regulate Procedure.

Most Cited Cases

Judicial branch has the overall ability to control judicial proceedings, that is, to maintain the decorum of the institution, which includes the conduct of parties involved.

[6] Bankruptcy 51 ↪2162

51 Bankruptcy

51II Courts; Proceedings in General

51II(B) Actions and Proceedings in General

51k2162 k. Pleading; Dismissal. Most

Cited Cases

Bankruptcy 51 ↪2164.1

51 Bankruptcy

51II Courts; Proceedings in General

51II(B) Actions and Proceedings in General

51k2164 Judgment or Order

51k2164.1 k. In General. Most Cited

Cases

Criminal Law 110 ↪636(1)

110 Criminal Law

110XX Trial

110XX(B) Course and Conduct of Trial in

General

110k636 Presence of Accused

110k636(1) k. In General. Most Cited

Cases

Federal Courts 170B ↪3.1

170B Federal Courts

170BI Jurisdiction and Powers in General

170BI(A) In General

170Bk3 Jurisdiction in General; Nature and Source

170Bk3.1 k. In General. Most Cited

Cases

Federal Courts 170B ↪45

170B Federal Courts

170BI Jurisdiction and Powers in General

170BI(B) Right to Decline Jurisdiction; Ab-stention Doctrine

170Bk45 k. Forum Non Conveniens. Most Cited Cases

Inherent powers of the federal court include the court's ability to investigate and vacate its own judgment upon proof that a fraud has been perpetrated upon the court, to bar from the courtroom a criminal defendant who disrupts a trial, and to dismiss an action on grounds of forum non conveniens, and it may act sua sponte to dismiss a suit for failure to prosecute.

[7] Bankruptcy 51 ↪2187

51 Bankruptcy

51II Courts; Proceedings in General

51II(C) Costs and Fees

51k2182 Grounds and Circumstances

51k2187 k. Frivolity or Bad Faith;

Sanctions. Most Cited Cases

Circumstances which may dictate the exercise of a federal court's inherent power to assess attorney fees against counsel include those where a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons.

[8] Bankruptcy 51 ↪2187

51 Bankruptcy

51II Courts; Proceedings in General

51II(C) Costs and Fees

51k2182 Grounds and Circumstances

51k2187 k. Frivolity or Bad Faith;

Sanctions. Most Cited Cases

Behavior must be tantamount to "bad faith," that is, it must be knowing or reckless behavior, for a federal court to exercise its inherent power to assess attorney fees against counsel.

[9] Bankruptcy 51 ↪2187

51 Bankruptcy

51II Courts; Proceedings in General

5111(C) Costs and Fees

51k2182 Grounds and Circumstances

51k2187 k. Frivolity or Bad Faith;

Sanctions. Most Cited Cases

Federal court must exercise caution in invoking its inherent power to sanction.

[10] Bankruptcy 51 ⇨ 2126

51 Bankruptcy

5111 Courts; Proceedings in General

5111(A) In General

51k2124 Power and Authority

51k2126 k. Carrying Out Provisions of

Code. Most Cited Cases

Section of the Bankruptcy Code authorizing the court to issue any order necessary or appropriate to carry out the provisions of title 11 gives bankruptcy courts the broad power to implement the provisions of the Code and to prevent an abuse of the bankruptcy process. 11 U.S.C.A. § 105.

[11] Bankruptcy 51 ⇨ 2187

51 Bankruptcy

5111 Courts; Proceedings in General

5111(C) Costs and Fees

51k2182 Grounds and Circumstances

51k2187 k. Frivolity or Bad Faith;

Sanctions. Most Cited Cases

Where creditor's counsel acknowledged that, apparently due to human error, it had prepared and filed on behalf of creditor "less than 50" false stay relief affidavits claiming entitlement to default interest, including the affidavit filed in the Chapter 7 case currently before the bankruptcy court, which sought \$2,114.10 in "penalty interest," the court would assess sanctions in the amount of \$2,114.10 for each of the 45 affidavits which the court assumed that counsel had filed, for a total sanction of \$95,130.45, and, because creditor shared culpability, such sanctions would be imposed jointly and severally. 11 U.S.C.A. § 105(a).

*801 Andrew M. Bellinson, Esq., Miami, FL, for Debtor.

**ORDER GRANTING WELLS FARGO BANK,
N.A.'S MOTION FOR RELIEF FROM STAY
AND IMPOSING SANCTIONS FOR NEGLI-
GENT PRACTICE AND FALSE REPRESENTA-
TIONS**

JOHN K. OLSON, Bankruptcy Judge.

THIS MATTER came on for continued hearing on September 18, 2008, pursuant to the Motion For Relief From Stay (the "Motion") [DE 14] filed by Wells Fargo Bank, N.A. (the "Creditor"). Since the Creditor has provided sufficient evidence to support the relief requested the Motion will be granted. However, given the nature of the circumstances surrounding the fictitious claim for money owed, sanctions are warranted.

The Motion was filed on April 21, 2008, under the Court's negative notice procedures pursuant to Local Rule 4001-1(C), to which there was no response. *See* Certificate of No Response [DE 15]. After reviewing the Motion, I was concerned about certain charges listed in the affidavit signed by a representative of the Creditor, and accordingly set an evidentiary hearing for June 24, 2008. Of specific worry was a charge for \$2,114.10 in "penalty interest." FN1 At the June 24th hearing it became abundantly clear that neither the Creditor's representative nor its counsel, the Florida Default Law Group, P.L. ("FDLG"), could explain this charge. *See* Transcript of 6/24/2008 Hearing [DE 39]. At the request of Creditor's counsel I continued the evidentiary hearing on the Motion so as to provide the Creditor and its counsel ample time to explain the basis for the "penalty interest" charge. *Id.*

FN1. There were other charges claimed by the Creditor which initially concerned the court, however, those concerns have been resolved through further disclosures by the Creditor. Thus, no further action is needed as to those matters.

For reasons relating in part to the Chapter 7 Trustee's independent investigation into this issue, the

second hearing did not take place until September 18, 2008, or approximately three months after the original hearing. At that September 18th hearing the Creditor was represented by Niall T. McLachlan, a very able lawyer who works for Carlton Fields, P.A., a well respected firm of a high reputation. FDLG represented itself at the hearing.^{FN2} As to the "penalty interest," both the Creditor and FDLB conceded at the hearing that this was an erroneous charge and that the Creditor was never entitled to payment on this sum. Penalty interest under the terms of the loan in question is a fee chargeable for prepayment of the loan during the first three years of the loan term. Since the Debtor is in bankruptcy and the Motion was filed based on the Debtor's default, the notion that the Debtor paid off his loan in full to the Creditor is absurd. It is utterly perplexing to me how the Creditor or its law firm could or did assert such a claim.

FN2. This brings to mind the classic aphorism that "A lawyer who represents himself has a fool for a client." It would have been prudent for FDLG to have hired counsel. Its decision not to do so is a reflection of the firm's casual attitude toward this matter.

Christine L. Herendeen, a lawyer at FDLG, testified as to the circumstances encompassing this case. Creditor's new counsel examined Ms. Herendeen, and provided a disclaimer prior to her testimony^{*802} that, "[s]he has independently done a brief review and has a rough idea of the numbers and she can testify to that, but she won't be able to say with exactitude the cases that these were filed in ..." Transcript of 9/18/2008 Hearing at pg. 44. I asked Ms. Herendeen who at FDLG had prepared the false affidavit; she could not tell me. I asked her in how many cases penalty interest charges had falsely been included in stay relief affidavits the firm prepared for Wells Fargo. She informed me that FDLG "had run a search on all of the districts. I don't remember the exact numbers even close to this district, because, of course, I was most focused

on the Southern; however, I can tell you that it was there was a spreadsheet that had been prepared and it was less than one page".

"It was not-for example, I could tell you it was definitely less than 50. I feel confident that the number had been less than 50 out of hundreds of cases that we would have filed, hundreds of stay relief motions." Transcript of 9/18/2008 Hearing at pg. 48, 11. 10-20. As to what she described as around "five to ten" cases in this district in which penalty interest was included, she was unable to describe whether the debtors in those cases had any equity in the properties in question. Transcript of 9/18/2008 Hearing at pgs. 45-47. She did claim that at no point "on the foreclosure side in State Court" would that penalty interest be included since, "no payoff quote would be generated with penalty interest without going through the attorney for review and that attorney would review the state of the case, as well as the specific language in the note and mortgage to determine whether or not it was permissible to be included in the payoff quote." Transcript of 9/18/2008 Hearing at pg. 52. She did not, however, make any representation that she (or anyone else at FDLG) had, in fact, reviewed any of the state court files in any of the foreclosure cases in which FDLG had filed false affidavits on behalf of Wells Fargo in the bankruptcy courts to assure the accuracy of that assertion. I accordingly take her assurance on this point with a certain skepticism.

[1] Of perhaps greater relevance is the question as to whether the lawyers at FDLG are examining any of the documents they are filing "on the bankruptcy side." FDLG seems to suggest that state court foreclosure actions are real and important proceedings but that the bankruptcy court is merely an administrative hurdle that warrants no particular consideration as a legal body, and that filing any old pleading without undertaking any investigation into its accuracy is perfectly acceptable practice. That position is unacceptable. A bankruptcy court has an independent responsibility to ensure that the relief it grants is both procedurally and substantively prop-

er. That obligation becomes extraordinarily difficult when law firms like FDLG treat the stay relief process with casual disdain.

Wells Fargo and FDLG chalk this mistake up to human error in that an FDLG employee pulled information from "one particular screen that is utilized when generating payoff statements pursuant to the note or, in this case, the addendum, and it was simply a mistake." Transcript of 9/18/2008 Hearing at pg. 47. What is evident is that FDLG prepared the affidavit in this case and the Creditor's employee signed it without any review. See Transcript of 6/24/2008 Hearing [DE 39] at pg. 29-34. I asked both the Creditor and FDLG what measures they have undertaken to rectify this problem, to which both stated that the professionals at all levels have been notified of the problem and the ramifications for including such improper *803 charges. Transcript of 9/18/2008 Hearing at pgs. 48-49.

Although I applaud such remedial actions, I remain troubled that neither FDLG nor the Creditor thought it necessary to undertake any thorough analysis as to the extent or the ramifications of their incompetent behavior. Three months is more than a sufficient time period to undertake an internal investigation, draw conclusions, and provide a complete and detailed report as to the injurious conduct which I uncovered only because something didn't seem right in the stay relief motion filed in this case. The actual ramifications of this conduct are still unclear to me. What is even more troublesome is that this conduct was not unique to this case. Once counsel and Creditor realized their wayward accounting, it should have set off alarms, not just a "brief review." Instead, a lackadaisical approach was taken in which the parties threw up their hands and said "no harm, no foul," but without, in fact, determining either the full extent of the false affidavit problem in the bankruptcy court stay relief motions or that no false affidavits had been filed in the subsequent state court foreclosure proceedings. And the "no harm, no foul" assertion is itself premised on Wells Fargo's contention that since

there was no equity in the properties in question—which neither Wells Fargo nor FDLG could confirm—and the Creditor was thus never going to collect penalty interest. Again, it is unclear to this court whether there is no harm to the debtors involved or to their estates. If the properties sold for more than the alleged debt, then there would indeed be harm. If the Creditor was able to write off the "loss" of spurious penalty interest on its books (and perhaps on its tax returns) then that would appear to constitute harm. And so on.

Since FDLG has provided no more than a cursory estimate as to the cases in which FDLG filed false affidavits claiming "penalty interest" and vaguely fleshed out an analysis as to this conduct, I am left baffled by FDLG's lack of appreciation for the severity of the problem presented and by its casual response. It is well worth noting that this is not the first occasion in which I have witnessed sloppy and unprofessional conduct in FDLG's practice of law. On numerous occasions I have confronted FDLG lawyers about incomplete and insufficient motions for relief from stay. Based on this discussion, sanctions will be levied for purposes of deterrence.

[2] The Court's power to sanction resides both in 11 U.S.C. § 105(a), *Hardy v. Internal Revenue Service (In re Hardy)*, 97 F.3d 1384, 1390 (11th Cir.1996); *Placid Refining Co. v. Terrebonne Fuel & Lube, Inc. (In re Terrebonne Fuel & Lube, Inc.)*, 108 F.3d 609 (5th Cir.1997), and in the inherent power of the federal courts to sanction improper conduct, *Glatter v. Mroz (In re Mroz)*, 65 F.3d 1567, 1574-75 (11th Cir.1995); *Eck v. Dodge Chemical Co.*, 950 F.2d 798 (1st Cir.1991).^{FN3}

FN3. Some courts have taken the position that Section 105(a) was intended to imbue the bankruptcy courts with the inherent power to sanction recognized in other federal courts. See, e.g., *Jones v. Bank of Santa Fe (In re Courtesy Inns)*, 40 F.3d 1084, 1089 (10th Cir.1994).

[3][4] The inherent power of the federal court to

sanction parties is well established and this power reaches both conduct before the court and that beyond the court's confines, for "the underlying concern that gave rise to the contempt power was not ... merely the disruption of court proceedings. Rather, it was disobedience to the orders of the Judiciary, regardless of whether such disobedience interfered with the conduct of trial." *Young v. United*804 States ex rel. Vuitton et Fils S. A.*, 481 U.S. 787, 798, 107 S.Ct. 2124, 95 L.Ed.2d 740 (1987) (citations omitted).

[5][6][7][8] In *Chambers v. NASCO, Inc.*, 501 U.S. 32, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991), the Supreme Court addressed the nature and scope of the inherent power vested in the federal courts. The judicial branch has the overall ability to control judicial proceedings, i.e., to maintain the decorum of the institution, which includes the conduct of parties involved. *Chambers*, at 501 U.S. at 43-44, 111 S.Ct. 2123. Such inherent powers, for example, include a federal court's ability to investigate and vacate its own judgment upon proof that a fraud has been perpetrated upon the court, to bar from the courtroom a criminal defendant who disrupts a trial, to dismiss an action on grounds of *forum non conveniens*, and it may act *sua sponte* to dismiss a suit for failure to prosecute. *Id.* at 44, 111 S.Ct. 2123. In *Chambers*, the Supreme Court discussed the ability of the judiciary to sanction counsel by awarding attorney's fees as a penalty for inappropriate conduct. 501 U.S. at 42-43, 111 S.Ct. 2123. For example, circumstances which may dictate the exercise of inherent power to assess attorney fees against counsel, include those where a party has acted in "bad faith, vexatiously, wantonly, or for oppressive reasons." *Id.* at 45-46, 111 S.Ct. 2123 (internal citations omitted). Thus, the behavior must be tantamount to bad faith, i.e., be knowing or reckless behavior. *Thomas v. Tenneco Packaging Co.*, 293 F.3d 1306, 1320 (11th Cir.2002).

[9] However, the Supreme Court, in *Chambers*, warned that a court must "exercise caution in invoking its inherent power," stating:

Because of their very potency, inherent powers must be exercised with restraint and discretion. A primary aspect of that discretion is the ability to fashion an appropriate sanction for conduct which abuses the judicial process.

501 U.S. at 44, 111 S.Ct. 2123 (internal citations omitted). The Court goes on to note:

[W]hen there is bad-faith conduct in the course of litigation that could be adequately sanctioned under the Rules, the court ordinarily should rely on the Rules rather than the inherent power. But if in the informed discretion of the court, neither the statute nor the Rules are up to the task, the court may safely rely on its inherent power.

Id. at 50, 111 S.Ct. 2123.

Sanctions under my inherent powers would be warranted given the filing of such reckless papers. However, in light of my clear authority to sanction the conduct under § 105, I will heed the Supreme Court's and the Eleventh Circuit's caution in utilizing inherent powers where statutory authority exists under which I may act, thus, I choose to look solely to § 105 for the following sanctions imposed.^{FN4}

FN4. The practical effect of the distinction between the inherent power of courts to sanction and the section 105(a) authority, may be illusory.

[10] Section 105 of the Bankruptcy Code grants statutory powers in the bankruptcy context, stating, "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). Section 105 gives bankruptcy courts the broad power to implement the provisions of the bankruptcy code and to prevent an abuse of the bankruptcy process. See *Karsch v. LaBarge (In re Clark)*, 223 F.3d 859, 864 (8th Cir.2000); *In re Volpert*, 110 F.3d 494, 500 (7th Cir.1997); *Caldwell v. Unified Capital Corp. *805 (In re Rainbow Magazine, Inc.)*, 77 F.3d 278, 284 (9th Cir.1996).

[11] I stated the following at the September 18th hearing: "my concern is with the integrity of the process and whether people are viewing what gets filed as a serious matter or whether it's sort of being done on the fly and with all of the diligence and attention that goes into sausage making." Transcript at pp. 52-3. After carefully reviewing the transcript of that hearing I conclude that Wells Fargo and FDLG parties have engaged in the systematic process of churning out unrefined and unexamined form pleadings, instead of producing and filing carefully considered legal papers. This has resulted in an abuse of the system and sanctions to deter continued recklessness are warranted.

FDLG has acknowledged that it filed on behalf of Wells Fargo "less than 50" false affidavits claiming entitlement to default interest. The amount of such interest wrongfully claimed in this case is \$2,114.10. Having provided me with no greater detail as to the number of such affidavits actually filed or the amount of default interest falsely claimed in each, I shall assume for purposes of assessing sanctions that FDLG filed 45 such false affidavits on behalf of Wells Fargo and that the amount of default interest in each was equal to the amount falsely claimed here. Therefore, I shall impose sanctions in an amount equal to \$2,114.10 for each such false affidavit, for a total sanction amount of \$95,130.45. Because both FDLG (which prepared and filed the false affidavits) and Wells Fargo (whose employees swore to their accuracy without any review) have culpability here, the sanctions will be imposed jointly and severally.

Accordingly, having reviewed the Motion, the file, the evidence presented and considering the argument of counsel, it is **ORDERED** that:

1. The Motion [DE 14] is **GRANTED**.
2. The automatic stay provided by 11 U.S.C. § 362 is modified as to Wells Fargo Bank, N.A., its Successors and Assigns. Accordingly, the automatic stay is modified to permit the Movant to continue its pending mortgage foreclosure action in state

court against real property, the legal description of which is described below.

COMMENCE AT THE SOUTHEAST CORNER OF SAID TRACT A; THENCE NORTH 0 DEGREES 00 MINUTES 37 SECONDS EAST FOR 602.35 FEET TO THE CENTER LINE OF SOUTHWEST 2ND STREET, THENCE SOUTH 89 DEGREES 53 MINUTES 38 SECONDS WEST FOR 344.72 FEET; THENCE NORTH 15 DEGREES 06 MINUTES 22 SECONDS WEST FOR 30.35 FEET; THENCE NORTH 74 DEGREES 53 MINUTES 38 SECONDS EAST FOR 42.50 FEET; THENCE NORTH 15 DEGREES 06 MINUTES 22 SECONDS WEST FOR 24.335 FEET TO THE POINT OF BEGINNING; THENCE CONTINUE NORTH 15 DEGREES 06 MINUTES 22 SECONDS WEST FOR 24.00 FEET; THENCE NORTH 74 DEGREES 53 MINUTES 38 SECONDS EAST FOR 50.0 FEET; THENCE SOUTH 15 DEGREES 07 MINUTES 22 SECONDS EAST FOR 24.00 FEET; THENCE SOUTH 74 DEGREES 53 MINUTES 38 SECONDS WEST FOR 50.00 FEET TO THE POINT OF BEGINNING.

3. This Order is entered to allow Wells Fargo Bank, N.A., its Successors and/or Assigns, to commence, prosecute and complete through judgment, sale, certificate of title and possession, a mortgage foreclosure against the property described above. Wells Fargo Bank, N.A., its Successors *806 and/or Assigns, shall not seek or obtain an *in personam* judgment against the Debtor(s).

4. The Florida Default Law Group, P.L. and Wells Fargo Bank, N.A., are **DIRECTED**, jointly and severally, to pay a monetary fine in the amount of **\$95,130.45** to the Clerk of this Court for their repeated misrepresentations to this court and to other bankruptcy courts in Florida. Payment shall be made within ten days of this order and Florida Default Law Group, P.L. and Wells Fargo Bank, N.A., are directed to file a notice of compliance on the docket.

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