

the Order. Defendant never heard from Plaintiff's counsel again on this and was never served a copy of the Order, pursuant to Fla. R. Civ. P. 1.080 and Fla. R. Jud. Admin 2.516.¹

5. On June 3, 2013, Defendant filed her Verified Answer and Affirmative Defenses.

II. RECENT ENACTMENT OF AMENDMENTS TO FLORIDA STATUTE §702.10

6. On June 7, 2013, Governor Scott signed into law amendments to §702.10. Section 10 of the legislation states, "[t]his act shall take effect upon becoming a law." Further, section 8 states "*the amendments to s. 702.10, Florida Statutes, and the creation of s. 702.11, Florida Statutes, by this act, apply to causes of action pending on the effective date of this act.*" (emphasis added). (See attached Final "Enrolled" Version of the legislation" and the Pre-June 7, 2013 Version of 702.10).

7. Before June 7, 2013, §702.10(1) read as follows:

After a complaint in a foreclosure proceeding has been filed, the mortgagee may request an order to show cause for the entry of final judgment and the court shall immediately review the complaint. If, upon examination of the complaint, the court finds that the complaint is verified and alleges a cause of action to foreclose on real property, the court shall promptly issue an order directed to the defendant to show cause why a final judgment of foreclosure should not be entered.

8. Prior to June 7, 2013, the Order to Show cause was issued by a mere confirmation by the court that the complaint was verified and alleged a cause of action.

9. After June 7, 2013, an Order to Show Cause shall be issued only "[i]f, upon examination of the court files, the court finds that the complaint is verified, complies with s. 702.015, and alleges a cause of action to foreclosure on real property." Fla. Stat. §702.10 (2013).

¹ To date, Defendant has still never received a copy, in any form, of the signed Order. All that is available to Defendant is an entry on the Broward County Clerk of Court online docket reflecting the Agreed Order was entered on May 10, 2013. Further, despite agreeing to "walk in" the Agreed Order, Plaintiff's counsel instead immediately submitted to the court an Order to Show Cause and then, apparently three days later, the aforementioned Agreed Order.

10. The amended statute now requires compliance with §702.015 which states:

702.015 Elements of complaint; lost, destroyed, or stolen note affidavit.—

(1) The Legislature intends that this section expedite the foreclosure process by ensuring initial disclosure of a plaintiff's status and the facts supporting that status, thereby ensuring the availability of documents necessary to the prosecution of the case.

(2) A complaint that seeks to foreclose a mortgage or other lien on residential real property, including individual units of condominiums and cooperatives, designed principally for occupation by from one to four families which secures a promissory note **must**:

(a) **Contain affirmative allegations** expressly made by the plaintiff at the time the proceeding is commenced **that the plaintiff is the holder of the original note secured by the mortgage; or**

(b) **Allege with specificity the factual basis by which the plaintiff is a person entitled to enforce the note under s. 673.3011.**

...

(4) If the plaintiff is in possession of the original promissory note, the **plaintiff must file under penalty of perjury a certification with the court, contemporaneously with the filing of the complaint for foreclosure, that the plaintiff is in possession of the original promissory note.** The certification **must** set forth the **location of the note, the name and title of the individual giving the certification, the name of the person who personally verified such possession, and the time and date on which the possession was verified.** Correct copies of the note and all allonges to the note must be attached to the certification. The original note and the allonges must be filed with the court before the entry of any judgment of foreclosure or judgment on the note.

III. IF LAW AT TIME ORDER ENTERED APPLIES

11. If this court finds that the law of the land, in effect, at the time of the entry of the Order to Show Cause is controlling to the disposition of this issue, the Order is defective under that prior standard and, even if the Order was proper, Defendant has shown cause.

12. The relevant portions of the pre-June 7, 2013 version of 702.10(1)(a) stated:

“the Order shall:... 2. Direct the time within which service of the order to show cause and the complaint must be made upon the defendant. . . . 8. Attach the final judgment of foreclosure the court

will enter, if the defendant waives the right to be heard at the hearing on the order to show cause."

13. The Order to Show Cause entered on May 7, 2013, fails to do either.

14. Furthermore, 702.10(1) states "[a]ny final judgment of foreclosure entered under this subsection is for in rem relief only."

15. Yet, the proposed Final Judgment filed and served on June 10, 2013, contains money damages and allows the Court to reserve jurisdiction for a deficiency. This is certainly not "in rem relief only."

16. Perhaps most compelling as to why judgment should not be entered, should this court find that the law in effect on May 7, 2013 is controlling, is found in Florida Statutes 702.10(1)(a)3, as it existed at that time, as well as paragraph three of the current Order to Show Cause. Both state:

3. The filing of defenses by motion or verified answer at or before the hearing *constitutes cause for the court not to enter the attached final judgment.*

17. Because the Defendant filed a Verified Answer and Affirmative Defenses on June 3, 2013, Defendant has shown sufficient cause to preclude entry of final judgment.

IV. IF LAW IN EFFECT AT TIME OF HEARING APPLIES

18. As per the amendments to §702.10, an Order to Show Cause shall be issued only "[i]f, upon examination of the court files, the court finds that the complaint is verified, **complies with s. 702.015**, and alleges a cause of action to foreclosure on real property." Fla. Stat. §702.10 (2013).

19. Plaintiff's **complaint fails to** meet §702.015(2)(a) or (b) as it does not state **that the plaintiff** is the holder of the **original note** secured by the mortgage nor does it allege with

specificity the factual basis by which the plaintiff is a person entitled to enforce the note under §673.3011. Instead paragraph five of the Plaintiff's complaint merely states that:

Plaintiff is the holder of all real and beneficial interests in the subject Promissory Note and Mortgage, including but not limited to the right to maintain this foreclosure action, by virtue of an unconditional transfer to the Plaintiff of all real and beneficial interests in the subject Promissory Note and Mortgage which occurred prior to the commencement of this action.

20. The factual basis for the Plaintiff's right to enforce the note is not listed with any kind of specificity. It does not state who transferred the beneficial interest, when, or how. It also does not state whether the Plaintiff has actual possession of the original note or where the original note is located.

21. Assuming that Plaintiff does have possession of the original note, since no lost note count was alleged, Plaintiff must file under penalty of perjury a certification with the court, contemporaneously with the filing of the complaint for foreclosure, that the Plaintiff is in possession of the original promissory note pursuant to §702.015(4). Further, under §702.015(4), the certification must set forth the "**location of the note, the name and title of the individual giving the certification, the name of the person who personally verified such possession, and the time and date on which the possession was verified.**" Plaintiff has not done ANY of this and as such, the Order to Show Cause is defective.

22. Plaintiff may argue that §702.015 only applies to foreclosure cases filed on or after July 1, 2013 and therefore the Plaintiff does not have to comply with this section. However, as per sections 8 and 10 of the enacted bill, the changes to §702.10 took effect immediately on June 7, 2013 and as amended, §702.10 requires compliance with §702.015.

23. Plaintiff cannot have it both ways; it cannot pick and choose which parts of a statute to enforce while ignoring the other parts. If Plaintiff wishes to seek an Order under the recent amendment to the statute, which contains a heightened burden for Defendants, it cannot reap those benefits while traveling under an Order to Show Cause using the more lenient requirements of the old §702.10.

24. Amended §702.10 entitles a Plaintiff to an Order to Show Cause but **only if** Plaintiff complies with §702.015. Plaintiffs that filed suit prior to July 1, 2013 do not have to comply with §702.015, **unless** they seek to expedite the case pursuant to §702.10. This is the only way to harmonize the two statutes during this transition period and give legal effect to the legislature's intent as required by the Florida Supreme Court.

25. In *Larimore*, the Florida Supreme Court held that:

A court's purpose in construing a statute is to give effect to legislative intent, which is the polestar that guides the court in statutory construction. *Bautista v. State*, 863 So.2d 1180, 1185 (Fla.2003). To discern legislative intent, a court must look first and foremost at the actual language used in the statute. *Id.* (citing *Joshua v. City of Gainesville*, 768 So.2d 432, 435 (Fla.2000)). Moreover, a **“statute should be interpreted to give effect to every clause in it, and to accord meaning and harmony to all of its parts.”** *Jones v. ETS of New Orleans, Inc.*, 793 So.2d 912, 914–15 (Fla.2001) (quoting *Acosta v. Richter*, 671 So.2d 149, 153–54 (Fla.1996)). “The doctrine of *in pari materia* is a principle of statutory construction that requires that statutes relating to the same subject or object **be construed together to harmonize the statutes and to give effect to the Legislature's intent.**” *Fla. Dep't of State v. Martin*, 916 So.2d 763, 768 (Fla.2005). Similarly, “[r]elated statutory provisions must be read together to achieve a consistent whole, and ... ‘[w]here possible, courts must give full effect to all statutory provisions and construe related statutory provisions in harmony with one another.’ ” *Heart of Adoptions, Inc. v. J.A.*, 963 So.2d 189, 199 (Fla.2007) (quoting *Woodham v. Blue Cross & Blue Shield, Inc.*, 829 So.2d 891, 898 (Fla.2002)).

...

Equally important is the “elementary principle of statutory construction that significance and effect must be given to every

word, phrase, sentence, and part of the statute if possible, and **words in a statute should not be construed as mere surplusage.**” *Gulfstream Park Racing Ass'n v. Tampa Bay Downs, Inc.*, 948 So.2d 599, 606 (Fla.2006) (quoting *Hechtman v. Nations Title Ins. of N.Y.*, 840 So.2d 993, 996 (Fla.2003)).(emphasis added)

Larimore v. State, 2 So. 3d 101 (Fla. 2008)

26. The Florida Legislature clearly spelled out their intent in §702.105:

702.015 Elements of complaint; lost, destroyed, or stolen note affidavit.—

(1) The Legislature intends that this section **expedite the foreclosure process by ensuring initial disclosure of a plaintiff's status and the facts supporting that status, thereby ensuring the availability of documents necessary to the prosecution** of the case.

27. Requiring that all plaintiffs seeking an Order to Show Cause, pursuant to §702.10, must comply with §702.015 ensures that the foreclosure process is expedited by having all documents necessary for prosecution available at the hearing to Show Cause.

28. This analysis is sound and logical because, unlike §702.10, §702.015, on its own, is not retroactive and only applies to cases filed on or after July 1, 2013. Failure to construe the statutes as suggested above would mean that the tens of thousands of foreclosure complaints currently filed in Florida would not have to comply with §702.015 while still being allowed to use the new §702.10 to issue an Order to Show Cause, **effectively ignoring part of the requirement of the amended §702.10** in derogation of Florida law. *Larimore v. State*, 2 So. 3d 101 (Fla. 2008).

29. The Plaintiff, however, is not without redress. Plaintiff may, easily and without prejudice, amend the complaint to comply with §702.015 and thus be entitled to an Order to Show Cause. However, given the current state of the Plaintiff's Complaint, the Order to Show Cause is invalid.

V. IMPROPRIETY OF ENTERING FINAL JUDGMENT

30. If this Court finds that the current Order to Show Cause is valid AND that the heightened standard under the amendments to §702.10 applies, final judgment cannot be entered.

31. As amended, §702.10(1)(a)5 states that “if a the defendant files defenses by a motion, a verified or sworn answer, affidavits, or other papers or appears personally or by way of an attorney at the time of the hearing, the hearing time will may be used to hear and consider whether the defendant's motion, answer, affidavits, other papers, and other evidence and argument as may be presented by the defendant or the defendant's attorney **raise a genuine issue of material fact which would preclude the entry of summary judgment** or otherwise constitute a legal defense to foreclosure.

32. Summary judgment cannot be granted unless the pleadings, depositions, answers to interrogatories, and admissions on file together with affidavits, if any, **conclusively** show that there are no genuine issues as to any material fact and that the moving party is entitled to a judgment as a matter of law. FLA. R. CIV. P. 1.510(c).

33. Summary judgments are extraordinary in that they deprive the losing party of his or her day in court. As a result, summary judgment should be entered cautiously and only in cases where there are no genuine issues of material fact to be resolved by the trial. Unless the facts of a case have been developed sufficiently to enable the court to determine that no issue of fact exists, summary judgment must not be entered. *Villages at Mango key Homeowners Assoc., Inc., v. Hunter Development Inc.*, 600 So. 2d 337 (Fla. 5th DCA 1997)(citing *Singer v. Star*, 510 So. 2d 637 (Fla. 4th DCA 1987)).

34. Summary judgment is improper if the record raises even the slightest doubt that an issue of material fact exists. *Williams v. Lake City*, 62 So. 2d 732 (Fla. 1953); *Connell v. Sledge*, 306 So. 2d 194 (Fla. 1st DCA 1975).

35. The law is well settled in Florida that when considering a motion for Summary Judgment the court must draw every possible inference in favor of the non-moving party. *Wills v. Sears*,

Roebuck & Co., 351 So. 2d 29 (Fla. 1977); *Hance v. The Dime Savings Bank of New York, FSB*, 678 So. 2d 11 (Fla. 1st DCA 1996)(citing *Moore v. Morris*, 475 So. 2d 666 (Fla. 1985)).

a. Failure to Refute Defendant's Affirmative Defenses

36. First, Defendant filed a responsive pleading in the form of a Verified Answer and Affirmative Defenses and Plaintiff has failed to refute the Affirmative Defenses, which is required in order to obtain a summary Final Judgment. *Cerron v. GMAC Mortgage LLC*, 93 So. 3d 456 (Fla. 2d DCA 2012).

37. In *Cerron*, the Second District Court Appeals held that in order to obtain a summary judgment, a plaintiff must refute a defendant's affirmative defenses. *Id.*

38. Florida law is well established on this issue. "A plaintiff moving for summary judgment must either conclusively refute the factual bases for the defendant's affirmative defenses or show that the defenses are legally insufficient." *Id.*; *Knight Energy Services, Inc. v. Amoco Oil Co.*, 660 So. 2d 786 (Fla. 4th DCA 1995); *Sanchez, et. al. v. Soleil Builders, Inc.*, 98 So. 3d 251 (Fla. 5th DCA 2012); *Shahar v. Green Tree Servicing LLC*, 2013 WL 811612 (Fla. 4th DCA 2013). *Thomas v. Ocwen Loan Servicing, LLC*, 84 So.3d 1246 (Fla. 1st DCA 2012).

39. The Defendant in *Cerron* raised affirmative defenses in his answer, amongst them was the affirmative defense of failure to comply with the condition precedent/lack of notice of the default letter. *Cerron v. GMAC Mortgage LLC*, 93 So. 3d 456 (Fla. 2d DCA 2012). Plaintiff filed an affidavit of amount due and owing, an affidavit of attorney's fees and costs, a note indorsed in blank, and an assignment of mortgage but never refuted the affirmative defenses. *Id.* Accordingly, the Second District found that summary judgment was not proper because genuine issues of material fact existed due to Plaintiff's failure to refute affirmative defenses or show that they were legally insufficient. *Id.*

40. The relevant facts in *Cerron* are similar to the above styled case. In this case, the Plaintiff has essentially requested a summary final judgment from this court. Defendant has filed affirmative defenses and Plaintiff has failed to refute them or show legal insufficiency. Therefore, because the law is well established that the Plaintiff cannot receive a summary final judgment without refuting Defendants affirmative defenses or showing that the defenses are legally insufficient, final judgment cannot be entered in this case as genuine issues of material fact exist.

b. Genuine Issues of Material Fact Exist Precluding Entry of Final Judgment

41. Even if Plaintiff had refuted the affirmative defenses, genuine issues of material fact would still exist which must be decided at a trial on the merits.

i. Lack of Standing

42. Defendant has raised a number of affirmative defenses including lack of standing.

43. First, Plaintiff claims to be the holder of the Note and Mortgage and has attached a copy of a Note, with an undated indorsed in blank, to its Complaint.

44. "While it is true that standing to foreclose can be demonstrated by the filing of the original note with a special endorsement in favor of the plaintiff, this **does not alter the rule that a party's standing is determined at the time the lawsuit was filed.**" *McLean v. JP Morgan Chase Bank Nat. Ass'n*, 79 So. 3d 170 (Fla. 4th DCA 2012); *See Progressive Exp. Ins. Co. v. McGrath Cmty. Chiropractic*, 913 So. 2d 1281 (Fla. 2d DCA 2005). This is also true for notes indorsed in blank.

45. The Plaintiff in the above style case has not filed an original Note nor indicated where the original Note is located. More importantly, there is no evidence to prove that the Plaintiff was entitled to enforce the Note at the time the lawsuit was filed.

46. Without this evidence, Plaintiff cannot prove standing. Even if the Plaintiff currently holds the original Note, the law is clear that “the plaintiff’s lack of standing at the inception of the case is not a defect that may be cured by the acquisition of standing after the case is filed.” *McLean* at 173 (quoting *Progressive Exp. Ins. Co. v. McGrath Cmty. Chiropractic*, 913 So.2d 1281 (Fla. 2d DCA 2005)).

47. The fact that the Plaintiff apparently possessed a copy of an indorsed note at the time of filing does not mean that they had the original at that time. This must still be proven. (See *Green v. JPMorgan Chase*, 109 So.3d 1285, (Fla. 5th DCA 2013)).

48. Even if Plaintiff can prove standing to enforce the note at the inception of the lawsuit, the Plaintiff would not be able to enforce the Mortgage, without further proof. The Plaintiff has not filed an assignment of mortgage nor has the Plaintiff filed proof of purchase of the debt.

49. While it is true that the Mortgage can equitably transfer along with the Note in the absence of an Assignment of Mortgage, the Florida Supreme Court has held that this can **only** happen upon proof of purchase of the Note. *Johns v. Gillian*, 184 So. 140 (Fla. 1938).

50. The reasoning behind the ruling in *Johns* is fairly simple. Under the UCC, it is well settled that a thief can enforce a note. (See Official Comment 1, U.C.C. §3-203 (2012)). In order for a Court to order equitable relief, such as an equitable assignment, the Plaintiff must show cleans hands. Proof of purchase of the debt meets this burden.

51. In the absence of an assignment of mortgage or proof of purchase of the debt, Plaintiff cannot foreclose on the Mortgage.

ii. Failure to Comply with Condition Precedent

52. Defendant has also raised an affirmative defense of failure to comply with the condition precedent/lack of notice of default letter.

53. Under Florida law, contracts are construed in accordance with their plain language, as bargained for by the parties. *See Auto-Owners Ins. Co. v. Anderson*, 756 So. 2d 29, 34 (Fla. 2000). Moreover, if the provisions of a contract are unambiguous, the court may not violate the clear meaning of the words in order to create an ambiguity, and certainly the Court may not rewrite the contract. *Florida Recycling Services, Inc. v. Greater Orlando Auto Auction, Inc.*, 898 So. 2d 129 (Fla. 5th DCA 2005).

54. Paragraph 22 of the Mortgage Contract, drafted by the Plaintiff and the only paragraph in all bold, requires the Plaintiff not only to send a default letter, but to include specific language in the default letter.

55. Plaintiff has plead that all conditions precedent have been met but has failed to provide any documentary evidence that such letters exists and complies with the mandates of paragraph 22 of the Mortgage contract. This failure bars the Plaintiff from pursuing the current foreclosure action.

iii. Failure to Prove Damages

56. In order to prevail in its breach of contract action, Plaintiff has the burden of presenting evidence “sufficient to satisfy the mind of a prudent, impartial person”, as to the amount of awardable damages. *Sea World of Florida v. Ace American Ins. Companies, Inc.*, 28 So. 3d 158 (Fla. 5th DCA 2010).

57. The Third District Court of Appeals has held that “[i]t is well established that before damages may be awarded, there must be evidence authorizing or justifying the award of a definite amount.” *Berwick Corp. v. Kelinginna Inv. Corp.*, 143 So. 2d 684 (Fla. 3d DCA 1962)(citing *Florida Ventilation Awning Co. v. Dickson*, 67 So. 2d 215 (Fla. 1953)).

58. There is no documentation whatsoever attached to Plaintiff's proposed Final Judgment package filed on June 10, 2013, which would be admissible in evidence, to substantiate the amount due.

59. Further, the one-page Account Information Statement(AIS) and one page Loan History provided along with Plaintiff's Affidavit Supporting Motion for Summary Final Judgment, are deficient on their face as they do not accurately reflect the total amount due and owing. The blatant contradictions contained in the affidavit, AIS, and Loan History create a genuine issue of material fact which precludes summary final judgment.

60. The AIS has a "Based on Date" of October 4, 2012. The Loan History shows it was prepared on September 28, 2012. However, the AIS claims to include transactions up through **January 3, 2013**. There is nothing in the Loan History which demonstrates entries after February 1, 2012. More than a year and four months of payment history is missing.

61. The Plaintiff has the burden of proving that it is entitled to summary judgment and, according to Rule of Civil Procedure 1.510, shall specifically identify all evidence, as would be admissible, **upon which it relies**.

62. Plaintiff has failed to specifically identify and provide all of the evidence upon which it relied and the gap in the Loan History provided creates a genuine issue of material fact as to the actual amount due and owing to date.

63. Given the many genuine issues of material fact which exists in the current case, summary final judgment cannot be entered.

c. Pending Discovery

64. Finally, summary final judgment cannot be entered because discovery is pending on this case.

65. The Fourth District Court of Appeals has held that a trial court should not entertain a motion for summary judgment until discovery is concluded.” *Osorto v. Deutsche Bank Nat. Trust Co.*, 88 So. 3d 261 (Fla. 4th DCA 2012). This is the established law in Florida. *Harvey Covington & Thomas, LLC v. WMC Mortg. Corp.*, 85 So. 3d 558 (Fla. 1st DCA 2012); *Crowell v. Kaufmann*, 845 So. 2d 325 (Fla. 2d DCA 2003); *Henderson v. Reyes*, 702 So. 2d 616 (Fla. 3d DCA 1997).

66. On June 12, 2013, Defendant propounded a Request for Admission, Request for Production and Interrogatories upon the Plaintiff. Plaintiff has yet to answer discovery.

67. According to Florida law, because good faith discovery is pending, summary final judgment is improper at this time. *Osorto v. Deutsche Bank Nat. Trust Co.*, 88 So. 3d 261 (Fla. 4th DCA 2012).

VI. CONCLUSION

68. Under the prior and amended standard, the Order to Show Cause is deficient.

69. However, if this Court finds that it is valid, then Defendant has shown cause. The filing of Defendant's Verified Answer and Affirmative Defenses is sufficient cause to preclude the entry of final judgment, pursuant to paragraph three of the Order.

70. In the alternative, if this Court finds that changes in the law regarding §702.10 require that the Plaintiff now needs to meet the requirements of §702.015, the Order to Show Cause is deficient and should be quashed.

71. Lastly, even if the Order to Show Cause is found valid and the amended 702.10 is applied, final judgment cannot be entered because genuine issues of material fact exist in this case. Especially since plaintiff has failed to refute Defendant's affirmative defenses or show that they are legally insufficient or respond to pending discovery requests.

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1
2 An act relating to mortgage foreclosures; amending s.
3 95.11, F.S.; revising the limitations period for
4 commencing an action to enforce a claim of a
5 deficiency judgment after a foreclosure action;
6 providing for applicability to actions commenced on or
7 after a specified date; providing a time limitation
8 for commencing certain actions; creating s. 702.015,
9 F.S.; providing legislative intent; specifying
10 required contents of a complaint seeking to foreclose
11 on certain types of residential properties with
12 respect to the authority of the plaintiff to foreclose
13 on the note and the location of the note; authorizing
14 sanctions against plaintiffs who fail to comply with
15 complaint requirements; providing for nonapplicability
16 to proceedings involving timeshare interests; creating
17 s. 702.036, F.S.; requiring a court to treat a
18 collateral attack on a final judgment of foreclosure
19 on a mortgage as a claim for monetary damages under
20 certain circumstances; prohibiting such court from
21 granting certain relief affecting title to the
22 foreclosed property; providing for construction
23 relating to the rights of certain persons to seek
24 specified types of relief or pursue claims against the
25 foreclosed property under certain circumstances;
26 amending s. 702.06, F.S.; limiting the amount of a
27 deficiency judgment; amending s. 702.10, F.S.;
28 revising the class of persons authorized to move for

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29 expedited foreclosure to include lienholders; defining
30 the term "lienholder"; providing requirements and
31 procedures with respect to an order directed to
32 defendants to show cause why a final judgment of
33 foreclosure should not be entered; providing that
34 certain failures by a defendant to make certain
35 filings or to make certain appearances may have
36 specified legal consequences; requiring the court to
37 enter a final judgment of foreclosure and order a
38 foreclosure sale under certain circumstances; revising
39 a restriction on a mortgagee to request a court to
40 order a mortgagor defendant to make payments or to
41 vacate the premises during an action to foreclose on
42 residential real estate to provide that the
43 restriction applies to all but owner-occupied
44 residential property; providing a presumption
45 regarding owner-occupied residential property;
46 creating s. 702.11, F.S.; providing requirements for
47 reasonable means of providing adequate protection
48 under s. 673.3091, F.S., in mortgage foreclosures of
49 certain residential properties; providing for
50 liability of persons who wrongly claim to be holders
51 of or entitled to enforce a lost, stolen, or destroyed
52 note and cause the mortgage secured thereby to be
53 foreclosed in certain circumstances; providing
54 legislative findings; providing for applicability;
55 requesting the Florida Supreme Court to adopt rules
56 and forms to expedite foreclosure proceedings;

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57 | providing an effective date.

58 |

59 | Be It Enacted by the Legislature of the State of Florida:

60 |

61 | Section 1. Paragraph (b) of subsection (2) of section
62 | 95.11, Florida Statutes, is amended, and paragraph (h) is added
63 | to subsection (5) of that section, to read:

64 | 95.11 Limitations other than for the recovery of real
65 | property.—Actions other than for recovery of real property shall
66 | be commenced as follows:

67 | (2) WITHIN FIVE YEARS.—

68 | (b) A legal or equitable action on a contract, obligation,
69 | or liability founded on a written instrument, except for an
70 | action to enforce a claim against a payment bond, which shall be
71 | governed by the applicable provisions of paragraph (5)(e), s.
72 | 255.05(10), s. 337.18(1), or s. 713.23(1)(e), and except for an
73 | action for a deficiency judgment governed by paragraph (5)(h).

74 | (5) WITHIN ONE YEAR.—

75 | (h) An action to enforce a claim of a deficiency related
76 | to a note secured by a mortgage against a residential property
77 | that is a one-family to four-family dwelling unit. The
78 | limitations period shall commence on the day after the
79 | certificate is issued by the clerk of court or the day after the
80 | mortgagee accepts a deed in lieu of foreclosure.

81 | Section 2. The amendments made by this act to s. 95.11,
82 | Florida Statutes, apply to any action commenced on or after July
83 | 1, 2013, regardless of when the cause of action accrued.

84 | However, any action that would not have been barred under s.

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85 95.11(2)(b), Florida Statutes 2012, before the effective date of
86 this act must be commenced within 5 years after the action
87 accrued or by July 1, 2014, whichever occurs first.

88 Section 3. Section 702.015, Florida Statutes, is created
89 to read:

90 702.015 Elements of complaint; lost, destroyed, or stolen
91 note affidavit.—

92 (1) The Legislature intends that this section expedite the
93 foreclosure process by ensuring initial disclosure of a
94 plaintiff's status and the facts supporting that status, thereby
95 ensuring the availability of documents necessary to the
96 prosecution of the case.

97 (2) A complaint that seeks to foreclose a mortgage or
98 other lien on residential real property, including individual
99 units of condominiums and cooperatives, designed principally for
100 occupation by from one to four families which secures a
101 promissory note must:

102 (a) Contain affirmative allegations expressly made by the
103 plaintiff at the time the proceeding is commenced that the
104 plaintiff is the holder of the original note secured by the
105 mortgage; or

106 (b) Allege with specificity the factual basis by which the
107 plaintiff is a person entitled to enforce the note under s.
108 673.3011.

109 (3) If a plaintiff has been delegated the authority to
110 institute a mortgage foreclosure action on behalf of the person
111 entitled to enforce the note, the complaint shall describe the
112 authority of the plaintiff and identify, with specificity, the

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113 document that grants the plaintiff the authority to act on
114 behalf of the person entitled to enforce the note. This
115 subsection is intended to require initial disclosure of status
116 and pertinent facts and not to modify law regarding standing or
117 real parties in interest. The term "original note" or "original
118 promissory note" means the signed or executed promissory note
119 rather than a copy thereof. The term includes any renewal,
120 replacement, consolidation, or amended and restated note or
121 instrument given in renewal, replacement, or substitution for a
122 previous promissory note. The term also includes a transferrable
123 record, as defined by the Uniform Electronic Transaction Act in
124 s. 668.50(16).

125 (4) If the plaintiff is in possession of the original
126 promissory note, the plaintiff must file under penalty of
127 perjury a certification with the court, contemporaneously with
128 the filing of the complaint for foreclosure, that the plaintiff
129 is in possession of the original promissory note. The
130 certification must set forth the location of the note, the name
131 and title of the individual giving the certification, the name
132 of the person who personally verified such possession, and the
133 time and date on which the possession was verified. Correct
134 copies of the note and all allonges to the note must be attached
135 to the certification. The original note and the allonges must be
136 filed with the court before the entry of any judgment of
137 foreclosure or judgment on the note.

138 (5) If the plaintiff seeks to enforce a lost, destroyed,
139 or stolen instrument, an affidavit executed under penalty of
140 perjury must be attached to the complaint. The affidavit must:

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141 (a) Detail a clear chain of all endorsements, transfers,
142 or assignments of the promissory note that is the subject of the
143 action.

144 (b) Set forth facts showing that the plaintiff is entitled
145 to enforce a lost, destroyed, or stolen instrument pursuant to
146 s. 673.3091. Adequate protection as required under s.
147 673.3091(2) shall be provided before the entry of final
148 judgment.

149 (c) Include as exhibits to the affidavit such copies of
150 the note and the allonges to the note, audit reports showing
151 receipt of the original note, or other evidence of the
152 acquisition, ownership, and possession of the note as may be
153 available to the plaintiff.

154 (6) The court may sanction the plaintiff for failure to
155 comply with this section.

156 (7) This section does not apply to any foreclosure
157 proceeding involving timeshare interests under part III of
158 chapter 721.

159 Section 4. Section 702.036, Florida Statutes, is created
160 to read:

161 702.036 Finality of mortgage foreclosure judgment.—

162 (1) (a) In any action or proceeding in which a party seeks
163 to set aside, invalidate, or challenge the validity of a final
164 judgment of foreclosure of a mortgage or to establish or
165 reestablish a lien or encumbrance on the property in abrogation
166 of the final judgment of foreclosure of a mortgage, the court
167 shall treat such request solely as a claim for monetary damages
168 and may not grant relief that adversely affects the quality or

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169 character of the title to the property, if:

170 1. The party seeking relief from the final judgment of
171 foreclosure of the mortgage was properly served in the
172 foreclosure lawsuit as provided in chapter 48 or chapter 49.

173 2. The final judgment of foreclosure of the mortgage was
174 entered as to the property.

175 3. All applicable appeals periods have run as to the final
176 judgment of foreclosure of the mortgage with no appeals having
177 been taken or any appeals having been finally resolved.

178 4. The property has been acquired for value, by a person
179 not affiliated with the foreclosing lender or the foreclosed
180 owner, at a time in which no lis pendens regarding the suit to
181 set aside, invalidate, or challenge the foreclosure appears in
182 the official records of the county where the property was
183 located.

184 (b) This subsection does not limit the right to pursue any
185 other relief to which a person may be entitled, including, but
186 not limited to, compensatory damages, punitive damages,
187 statutory damages, consequential damages, injunctive relief, or
188 fees and costs, which does not adversely affect the ownership of
189 the title to the property as vested in the unaffiliated
190 purchaser for value.

191 (2) For purposes of this section, the following, without
192 limitation, shall be considered persons affiliated with the
193 foreclosing lender:

194 (a) The foreclosing lender or any loan servicer for the
195 loan being foreclosed;

196 (b) Any past or present owner or holder of the loan being

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197 foreclosed;

198 (c) Any maintenance company, holding company, foreclosure
199 services company, or law firm under contract to any entity
200 listed in paragraph (a), paragraph (b), or this paragraph, with
201 regard to the loan being foreclosed; or

202 (d) Any parent entity, subsidiary, or other person who
203 directly, or indirectly through one or more intermediaries,
204 controls or is controlled by, or is under common control with,
205 any entity listed in paragraph (a), paragraph (b), or paragraph
206 (c).

207 (3) After foreclosure of a mortgage based upon the
208 enforcement of a lost, destroyed, or stolen note, a person who
209 is not a party to the underlying foreclosure action but who
210 claims to be the person entitled to enforce the promissory note
211 secured by the foreclosed mortgage has no claim against the
212 foreclosed property after it is conveyed for valuable
213 consideration to a person not affiliated with the foreclosing
214 lender or the foreclosed owner. This section does not preclude
215 the person entitled to enforce the promissory note from pursuing
216 recovery from any adequate protection given pursuant to s.
217 673.3091 or from the party who wrongfully claimed to be the
218 person entitled to enforce the promissory note under s.
219 702.11(2) or otherwise, from the maker of the note, or from any
220 other person against whom it may have a claim relating to the
221 note.

222 Section 5. Section 702.06, Florida Statutes, is amended to
223 read:

224 702.06 Deficiency decree; common-law suit to recover

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225 | deficiency.—In all suits for the foreclosure of mortgages
 226 | heretofore or hereafter executed the entry of a deficiency
 227 | decree for any portion of a deficiency, should one exist, shall
 228 | be within the sound discretion of the court; however, in the
 229 | case of an owner-occupied residential property, the amount of
 230 | the deficiency may not exceed the difference between the
 231 | judgment amount, or in the case of a short sale, the outstanding
 232 | debt, and the fair market value of the property on the date of
 233 | sale. For purposes of this section, there is a rebuttable
 234 | presumption that a residential property for which a homestead
 235 | exemption for taxation was granted according to the certified
 236 | rolls of the latest assessment by the county property appraiser,
 237 | before the filing of the foreclosure action, is an owner-
 238 | occupied residential property. ~~shall be within the sound~~
 239 | ~~judicial discretion of the court, but~~ The complainant shall also
 240 | have the right to sue at common law to recover such deficiency,
 241 | unless the court in the foreclosure action has granted or denied
 242 | a claim for a deficiency judgment ~~provided no suit at law to~~
 243 | ~~recover such deficiency shall be maintained against the original~~
 244 | ~~mortgagor in cases where the mortgage is for the purchase price~~
 245 | ~~of the property involved and where the original mortgagee~~
 246 | ~~becomes the purchaser thereof at foreclosure sale and also is~~
 247 | ~~granted a deficiency decree against the original mortgagor.~~

248 | Section 6. Section 702.10, Florida Statutes, is amended to
 249 | read:

250 | 702.10 Order to show cause; entry of final judgment of
 251 | foreclosure; payment during foreclosure.—

252 | (1) A lienholder ~~After a complaint in a foreclosure~~

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253 ~~proceeding has been filed, the mortgagee~~ may request an order to
 254 show cause for the entry of final judgment in a foreclosure
 255 action. For purposes of this section, the term "lienholder"
 256 includes the plaintiff and a defendant to the action who holds a
 257 lien encumbering the property or a defendant who, by virtue of
 258 its status as a condominium association, cooperative
 259 association, or homeowners' association, may file a lien against
 260 the real property subject to foreclosure. Upon filing, and the
 261 court shall immediately review the request and the court file in
 262 chambers and without a hearing ~~complaint~~. If, upon examination
 263 of the court file ~~complaint~~, the court finds that the complaint
 264 is verified, complies with s. 702.015, and alleges a cause of
 265 action to foreclose on real property, the court shall promptly
 266 issue an order directed to the other parties named in the action
 267 ~~defendant~~ to show cause why a final judgment of foreclosure
 268 should not be entered.

269 (a) The order shall:

270 1. Set the date and time for a hearing ~~on the order~~ to
 271 show cause. ~~However,~~ The date for the hearing may not occur ~~be~~
 272 ~~set~~ sooner than the later of 20 days after the service of the
 273 order to show cause or 45 days after service of the initial
 274 complaint. When service is obtained by publication, the date for
 275 the hearing may not be set sooner than 30 days after the first
 276 publication. ~~The hearing must be held within 60 days after the~~
 277 ~~date of service. Failure to hold the hearing within such time~~
 278 ~~does not affect the validity of the order to show cause or the~~
 279 ~~jurisdiction of the court to issue subsequent orders.~~

280 2. Direct the time within which service of the order to

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281 show cause and the complaint must be made upon the defendant.

282 3. State that the filing of defenses by a motion, a
283 responsive pleading, an affidavit, or other papers ~~or by a~~
284 ~~verified or sworn answer at or~~ before the hearing to show cause
285 that raise a genuine issue of material fact which would preclude
286 the entry of summary judgment or otherwise constitute a legal
287 defense to foreclosure shall constitute ~~constitutes~~ cause for
288 the court not to enter ~~the attached~~ final judgment.

289 4. State that a ~~the~~ defendant has the right to file
290 affidavits or other papers before ~~at~~ the time of the hearing to
291 show cause and may appear personally or by way of an attorney at
292 the hearing.

293 5. State that, if a ~~the~~ defendant files defenses by a
294 motion, a verified or sworn answer, affidavits, or other papers
295 or appears personally or by way of an attorney at the time of
296 the hearing, the hearing time will ~~may~~ be used to hear and
297 consider whether the defendant's motion, answer, affidavits,
298 other papers, and other evidence and argument as may be
299 presented by the defendant or the defendant's attorney raise a
300 genuine issue of material fact which would preclude the entry of
301 summary judgment or otherwise constitute a legal defense to
302 foreclosure. The order shall also state that the court may enter
303 an order of final judgment of foreclosure at the hearing and
304 order the clerk of the court to conduct a foreclosure sale.

305 6. State that, if a ~~the~~ defendant fails to appear at the
306 hearing to show cause or fails to file defenses by a motion or
307 by a verified or sworn answer or files an answer not contesting
308 the foreclosure, such ~~the~~ defendant may be considered to have

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309 waived the right to a hearing, and in such case, the court may
310 enter a default against such defendant and, if appropriate, a
311 final judgment of foreclosure ordering the clerk of the court to
312 conduct a foreclosure sale.

313 7. State that if the mortgage provides for reasonable
314 attorney ~~attorney's~~ fees and the requested attorney ~~attorney's~~
315 fees do not exceed 3 percent of the principal amount owed at the
316 time of filing the complaint, it is unnecessary for the court to
317 hold a hearing or adjudge the requested attorney ~~attorney's~~ fees
318 to be reasonable.

319 8. Attach the form of the proposed final judgment of
320 foreclosure which the movant requests the court to will enter,
321 ~~if the defendant waives the right to be heard~~ at the hearing on
322 the order to show cause.

323 9. Require the party seeking final judgment ~~mortgagee~~ to
324 serve a copy of the order to show cause on the other parties ~~the~~
325 ~~mortgagor~~ in the following manner:

326 a. If a party ~~the mortgagor~~ has been served pursuant to
327 chapter 48 with the complaint and original process, or the other
328 party is the plaintiff in the action, service of the order to
329 show cause on that party ~~order~~ may be made in the manner
330 provided in the Florida Rules of Civil Procedure.

331 b. If a defendant ~~the mortgagor~~ has not been served
332 pursuant to chapter 48 with the complaint and original process,
333 the order to show cause, together with the summons and a copy of
334 the complaint, shall be served on the party ~~mortgagor~~ in the
335 same manner as provided by law for original process.

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337 Any final judgment of foreclosure entered under this subsection
338 is for in rem relief only. ~~Nothing in~~ This subsection does not
339 ~~shall~~ preclude the entry of a deficiency judgment where
340 otherwise allowed by law. The Legislature intends that this
341 alternative procedure may run simultaneously with other court
342 procedures.

343 (b) The right to be heard at the hearing to show cause is
344 waived if a ~~the~~ defendant, after being served as provided by law
345 with an order to show cause, engages in conduct that clearly
346 shows that the defendant has relinquished the right to be heard
347 on that order. The defendant's failure to file defenses by a
348 motion or by a sworn or verified answer, affidavits, or other
349 papers or to appear personally or by way of an attorney at the
350 hearing duly scheduled on the order to show cause presumptively
351 constitutes conduct that clearly shows that the defendant has
352 relinquished the right to be heard. If a defendant files
353 defenses by a motion, or by a verified or sworn answer,
354 affidavits, or other papers or presents evidence at or before
355 the hearing which raise a genuine issue of material fact which
356 would preclude entry of summary judgment or otherwise constitute
357 a legal defense to foreclosure, such action constitutes cause
358 and precludes the entry of a final judgment at the hearing to
359 show cause.

360 (c) In a mortgage foreclosure proceeding, when a final
361 ~~default~~ judgment of foreclosure has been entered against the
362 mortgagor and the note or mortgage provides for the award of
363 reasonable attorney ~~attorney's~~ fees, it is unnecessary for the
364 court to hold a hearing or adjudge the requested attorney

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365 | ~~attorney's~~ fees to be reasonable if the fees do not exceed 3
366 | percent of the principal amount owed on the note or mortgage at
367 | the time of filing, even if the note or mortgage does not
368 | specify the percentage of the original amount that would be paid
369 | as liquidated damages.

370 | (d) If the court finds that all defendants have ~~the~~
371 | ~~defendant has~~ waived the right to be heard as provided in
372 | paragraph (b), the court shall promptly enter a final judgment
373 | of foreclosure without the need for further hearing if the
374 | plaintiff has shown entitlement to a final judgment and upon the
375 | filing with the court of the original note, satisfaction of the
376 | conditions for establishment of a lost note, or upon a showing
377 | to the court that the obligation to be foreclosed is not
378 | evidenced by a promissory note or other negotiable instrument.
379 | If the court finds that a ~~the~~ defendant has not waived the right
380 | to be heard on the order to show cause, the court shall ~~then~~
381 | determine whether there is cause not to enter a final judgment
382 | of foreclosure. If the court finds that the defendant has not
383 | shown cause, the court shall promptly enter a judgment of
384 | foreclosure. If the time allotted for the hearing is
385 | insufficient, the court may announce at the hearing a date and
386 | time for the continued hearing. Only the parties who appear,
387 | individually or through an attorney, at the initial hearing must
388 | be notified of the date and time of the continued hearing.

389 | (2) Except as provided in paragraph (i), in any ~~an~~ action
390 | for foreclosure, other than owner-occupied residential real
391 | estate, in addition to any other relief that the court may
392 | award, the plaintiff ~~the mortgagee~~ may request that the court

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393 enter an order directing the mortgagor defendant to show cause
394 why an order to make payments during the pendency of the
395 foreclosure proceedings or an order to vacate the premises
396 should not be entered.

397 (a) The order shall:

398 1. Set the date and time for hearing on the order to show
399 cause. However, the date for the hearing may ~~shall~~ not be set
400 sooner than 20 days after the service of the order. If ~~Where~~
401 service is obtained by publication, the date for the hearing may
402 ~~shall~~ not be set sooner than 30 days after the first
403 publication.

404 2. Direct the time within which service of the order to
405 show cause and the complaint shall be made upon each ~~the~~
406 defendant.

407 3. State that a ~~the~~ defendant has the right to file
408 affidavits or other papers at the time of the hearing and may
409 appear personally or by way of an attorney at the hearing.

410 4. State that, if a ~~the~~ defendant fails to appear at the
411 hearing to show cause and fails to file defenses by a motion or
412 by a verified or sworn answer, the defendant is ~~may be~~ deemed to
413 have waived the right to a hearing and in such case the court
414 may enter an order to make payment or vacate the premises.

415 5. Require the movant ~~mortgagee~~ to serve a copy of the
416 order to show cause on the defendant ~~mortgagor~~ in the following
417 manner:

418 a. If a defendant ~~the mortgagor~~ has been served with the
419 complaint and original process, service of the order may be made
420 in the manner provided in the Florida Rules of Civil Procedure.

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421 b. If a defendant ~~the mortgagor~~ has not been served with
422 the complaint and original process, the order to show cause,
423 together with the summons and a copy of the complaint, shall be
424 served on the defendant ~~mortgagor~~ in the same manner as provided
425 by law for original process.

426 (b) The right of a defendant to be heard at the hearing to
427 show cause is waived if the defendant, after being served as
428 provided by law with an order to show cause, engages in conduct
429 that clearly shows that the defendant has relinquished the right
430 to be heard on that order. A ~~The~~ defendant's failure to file
431 defenses by a motion or by a sworn or verified answer or to
432 appear at the hearing duly scheduled on the order to show cause
433 presumptively constitutes conduct that clearly shows that the
434 defendant has relinquished the right to be heard.

435 (c) If the court finds that a ~~the~~ defendant has waived the
436 right to be heard as provided in paragraph (b), the court may
437 promptly enter an order requiring payment in the amount provided
438 in paragraph (f) or an order to vacate.

439 (d) If the court finds that the mortgagor has not waived
440 the right to be heard on the order to show cause, the court
441 shall, at the hearing on the order to show cause, consider the
442 affidavits and other showings made by the parties appearing and
443 make a determination of the probable validity of the underlying
444 claim alleged against the mortgagor and the mortgagor's
445 defenses. If the court determines that the plaintiff ~~mortgagee~~
446 is likely to prevail in the foreclosure action, the court shall
447 enter an order requiring the mortgagor to make the payment
448 described in paragraph (e) to the plaintiff ~~mortgagee~~ and

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449 provide for a remedy as described in paragraph (f). However, the
450 order shall be stayed pending final adjudication of the claims
451 of the parties if the mortgagor files with the court a written
452 undertaking executed by a surety approved by the court in an
453 amount equal to the unpaid balance of the lien being foreclosed
454 ~~the mortgage on the property~~, including all principal, interest,
455 unpaid taxes, and insurance premiums paid by the plaintiff ~~the~~
456 ~~mortgagee~~.

457 (e) ~~If In the event~~ the court enters an order requiring
458 the mortgagor to make payments to the plaintiff ~~mortgagee~~,
459 payments shall be payable at such intervals and in such amounts
460 provided for in the mortgage instrument before acceleration or
461 maturity. The obligation to make payments pursuant to any order
462 entered under this subsection shall commence from the date of
463 the motion filed under this section ~~hereunder~~. The order shall
464 be served upon the mortgagor no later than 20 days before the
465 date specified for the first payment. The order may permit, but
466 ~~may shall~~ not require, the plaintiff ~~mortgagee~~ to take all
467 appropriate steps to secure the premises during the pendency of
468 the foreclosure action.

469 (f) ~~If In the event~~ the court enters an order requiring
470 payments, the order shall also provide that the plaintiff is
471 ~~mortgagee shall be~~ entitled to possession of the premises upon
472 the failure of the mortgagor to make the payment required in the
473 order unless at the hearing on the order to show cause the court
474 finds good cause to order some other method of enforcement of
475 its order.

476 (g) All amounts paid pursuant to this section shall be

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477 credited against the mortgage obligation in accordance with the
478 terms of the loan documents; ~~provided, however, that any~~
479 payments made under this section do ~~shall~~ not constitute a cure
480 of any default or a waiver or any other defense to the mortgage
481 foreclosure action.

482 (h) Upon the filing of an affidavit with the clerk that
483 the premises have not been vacated pursuant to the court order,
484 the clerk shall issue to the sheriff a writ for possession which
485 shall be governed by ~~the provisions of~~ s. 83.62.

486 (i) This subsection does not apply to foreclosure of an
487 owner-occupied residence. For purposes of this paragraph, there
488 is a rebuttable presumption that a residential property for
489 which a homestead exemption for taxation was granted according
490 to the certified rolls of the latest assessment by the county
491 property appraiser, before the filing of the foreclosure action,
492 is an owner-occupied residential property.

493 Section 7. Section 702.11, Florida Statutes, is created to
494 read:

495 702.11 Adequate protections for lost, destroyed, or stolen
496 notes in mortgage foreclosure.—

497 (1) In connection with a mortgage foreclosure, the
498 following constitute reasonable means of providing adequate
499 protection under s. 673.3091, if so found by the court:

500 (a) A written indemnification agreement by a person
501 reasonably believed sufficiently solvent to honor such an
502 obligation;

503 (b) A surety bond;

504 (c) A letter of credit issued by a financial institution;

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505 (d) A deposit of cash collateral with the clerk of the
506 court; or

507 (e) Such other security as the court may deem appropriate
508 under the circumstances.

509
510 Any security given shall be on terms and in amounts set by the
511 court, for a time period through the running of the statute of
512 limitations for enforcement of the underlying note, and
513 conditioned to indemnify and hold harmless the maker of the note
514 against any loss or damage, including principal, interest, and
515 attorney fees and costs, that might occur by reason of a claim
516 by another person to enforce the note.

517 (2) Any person who wrongly claims to be the holder of or
518 pursuant to s. 673.3011 to be entitled to enforce a lost,
519 stolen, or destroyed note and causes the mortgage secured
520 thereby to be foreclosed is liable to the actual holder of the
521 note, without limitation to any adequate protections given, for
522 actual damages suffered together with attorney fees and costs of
523 the actual holder of the note in enforcing rights under this
524 subsection. In addition, the actual holder of the note may
525 pursue recovery directly against any adequate protections given.

526 (a) The actual holder of the note is not required to
527 pursue recovery against the maker of the note or any guarantor
528 thereof as a condition precedent to pursuing remedies under this
529 section.

530 (b) This section does not limit or restrict the ability of
531 the actual holder of the note to pursue any other claims or
532 remedies it may have against the maker, the person who wrongly

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533 claimed to be the holder, or any person who facilitated or
534 participated in the claim to the note or enforcement thereof.

535 Section 8. The Legislature finds that this act is remedial
536 in nature and applies to all mortgages encumbering real property
537 and all promissory notes secured by a mortgage, whether executed
538 before, on, or after the effective date of this act. In
539 addition, the Legislature finds that s. 702.015, Florida
540 Statutes, as created by this act, applies to cases filed on or
541 after July 1, 2013; however, the amendments to s. 702.10,
542 Florida Statutes, and the creation of s. 702.11, Florida
543 Statutes, by this act, apply to causes of action pending on the
544 effective date of this act.

545 Section 9. The Supreme Court is requested to amend the
546 Florida Rules of Civil Procedures to provide expedited
547 foreclosure proceedings in conformity with this act and is
548 requested to develop and publish forms for use in such expedited
549 proceedings.

550 Section 10. This act shall take effect upon becoming a
551 law.

Select Year:

The 2012 Florida Statutes

[Title XL](#)
REAL AND PERSONAL
PROPERTY

[Chapter 702](#)
FORECLOSURE OF MORTGAGES AND STATUTORY
LIENS

[View Entire
Chapter](#)

702.10 Order to show cause; entry of final judgment of foreclosure; payment during foreclosure.—

(1) After a complaint in a foreclosure proceeding has been filed, the mortgagee may request an order to show cause for the entry of final judgment and the court shall immediately review the complaint. If, upon examination of the complaint, the court finds that the complaint is verified and alleges a cause of action to foreclose on real property, the court shall promptly issue an order directed to the defendant to show cause why a final judgment of foreclosure should not be entered.

(a) The order shall:

1. Set the date and time for hearing on the order to show cause. However, the date for the hearing may not be set sooner than 20 days after the service of the order. When service is obtained by publication, the date for the hearing may not be set sooner than 30 days after the first publication. The hearing must be held within 60 days after the date of service. Failure to hold the hearing within such time does not affect the validity of the order to show cause or the jurisdiction of the court to issue subsequent orders.

2. Direct the time within which service of the order to show cause and the complaint must be made upon the defendant.

3. State that the filing of defenses by a motion or by a verified or sworn answer at or before the hearing to show cause constitutes cause for the court not to enter the attached final judgment.

4. State that the defendant has the right to file affidavits or other papers at the time of the hearing and may appear personally or by way of an attorney at the hearing.

5. State that, if the defendant files defenses by a motion, the hearing time may be used to hear the defendant's motion.

6. State that, if the defendant fails to appear at the hearing to show cause or fails to file defenses by a motion or by a verified or sworn answer or files an answer not contesting the foreclosure, the defendant may be considered to have waived the right to a hearing and in such case the court may enter a final judgment of foreclosure ordering the clerk of the court to conduct a foreclosure sale.

7. State that if the mortgage provides for reasonable attorney's fees and the requested attorney's fees do not exceed 3 percent of the principal amount owed at the time of filing the complaint, it is unnecessary for the court to hold a hearing or adjudge the requested attorney's fees to be reasonable.

8. Attach the final judgment of foreclosure the court will enter, if the defendant waives the right to be heard at the hearing on the order to show cause.

9. Require the mortgagee to serve a copy of the order to show cause on the mortgagor in the following manner:

a. If the mortgagor has been served with the complaint and original process, service of the order may be made in the manner provided in the Florida Rules of Civil Procedure.

b. If the mortgagor has not been served with the complaint and original process, the order to show cause, together with the summons and a copy of the complaint, shall be served on the mortgagor in the same manner as provided by law for original process.

Any final judgment of foreclosure entered under this subsection is for in rem relief only. Nothing in this subsection shall preclude the entry of a deficiency judgment where otherwise allowed by law.

(b) The right to be heard at the hearing to show cause is waived if the defendant, after being served as provided by law with an order to show cause, engages in conduct that clearly shows that the defendant has relinquished the right to be heard on that order. The defendant's failure to file defenses by a motion or by a sworn or verified answer or to appear at the hearing duly scheduled on the order to show cause presumptively constitutes conduct that clearly shows that the defendant has relinquished the right to be heard. If a defendant files defenses by a motion or by a verified or sworn answer at or before the hearing, such action constitutes cause and precludes the entry of a final judgment at the hearing to show cause.

(c) In a mortgage foreclosure proceeding, when a default judgment has been entered against the mortgagor and the note or mortgage provides for the award of reasonable attorney's fees, it is unnecessary for the court to hold a hearing or adjudge the requested attorney's fees to be reasonable if the fees do not exceed 3 percent of the principal amount owed on the note or mortgage at the time of filing, even if the note or mortgage does not specify the percentage of the original amount that would be paid as liquidated damages.

(d) If the court finds that the defendant has waived the right to be heard as provided in paragraph (b), the court shall promptly enter a final judgment of foreclosure. If the court finds that the defendant has not waived the right to be heard on the order to show cause, the court shall then determine whether there is cause not to enter a final judgment of foreclosure. If the court finds that the defendant has not shown cause, the court shall promptly enter a judgment of foreclosure.

(2) In an action for foreclosure, other than residential real estate, the mortgagee may request that the court enter an order directing the mortgagor defendant to show cause why an order to make payments during the pendency of the foreclosure proceedings or an order to vacate the premises should not be entered.

(a) The order shall:

1. Set the date and time for hearing on the order to show cause. However, the date for the hearing shall not be set sooner than 20 days after the service of the order. Where service is obtained by publication, the date for the hearing shall not be set sooner than 30 days after the first publication.

2. Direct the time within which service of the order to show cause and the complaint shall be made upon the defendant.

3. State that the defendant has the right to file affidavits or other papers at the time of the hearing and may appear personally or by way of an attorney at the hearing.

4. State that, if the defendant fails to appear at the hearing to show cause and fails to file defenses by a motion or by a verified or sworn answer, the defendant may be deemed to have waived the right to a hearing and in such case the court may enter an order to make payment or vacate the premises.

5. Require the mortgagee to serve a copy of the order to show cause on the mortgagor in the following manner:

a. If the mortgagor has been served with the complaint and original process, service of the order may be made in the manner provided in the Florida Rules of Civil Procedure.

b. If the mortgagor has not been served with the complaint and original process, the order to show cause, together with the summons and a copy of the complaint, shall be served on the mortgagor in the same manner as provided by law for original process.

(b) The right to be heard at the hearing to show cause is waived if the defendant, after being served as

provided by law with an order to show cause, engages in conduct that clearly shows that the defendant has relinquished the right to be heard on that order. The defendant's failure to file defenses by a motion or by a sworn or verified answer or to appear at the hearing duly scheduled on the order to show cause presumptively constitutes conduct that clearly shows that the defendant has relinquished the right to be heard.

(c) If the court finds that the defendant has waived the right to be heard as provided in paragraph (b), the court may promptly enter an order requiring payment in the amount provided in paragraph (f) or an order to vacate.

(d) If the court finds that the mortgagor has not waived the right to be heard on the order to show cause, the court shall, at the hearing on the order to show cause, consider the affidavits and other showings made by the parties appearing and make a determination of the probable validity of the underlying claim alleged against the mortgagor and the mortgagor's defenses. If the court determines that the mortgagee is likely to prevail in the foreclosure action, the court shall enter an order requiring the mortgagor to make the payment described in paragraph (e) to the mortgagee and provide for a remedy as described in paragraph (f). However, the order shall be stayed pending final adjudication of the claims of the parties if the mortgagor files with the court a written undertaking executed by a surety approved by the court in an amount equal to the unpaid balance of the mortgage on the property, including all principal, interest, unpaid taxes, and insurance premiums paid by the mortgagee.

(e) In the event the court enters an order requiring the mortgagor to make payments to the mortgagee, payments shall be payable at such intervals and in such amounts provided for in the mortgage instrument before acceleration or maturity. The obligation to make payments pursuant to any order entered under this subsection shall commence from the date of the motion filed hereunder. The order shall be served upon the mortgagor no later than 20 days before the date specified for the first payment. The order may permit, but shall not require the mortgagee to take all appropriate steps to secure the premises during the pendency of the foreclosure action.

(f) In the event the court enters an order requiring payments the order shall also provide that the mortgagee shall be entitled to possession of the premises upon the failure of the mortgagor to make the payment required in the order unless at the hearing on the order to show cause the court finds good cause to order some other method of enforcement of its order.

(g) All amounts paid pursuant to this section shall be credited against the mortgage obligation in accordance with the terms of the loan documents, provided, however, that any payments made under this section shall not constitute a cure of any default or a waiver or any other defense to the mortgage foreclosure action.

(h) Upon the filing of an affidavit with the clerk that the premises have not been vacated pursuant to the court order, the clerk shall issue to the sheriff a writ for possession which shall be governed by the provisions of s. [83.62](#).

History.—s. 14, ch. 93-250; s. 3, ch. 2001-215.