FOCHT OPINION HINTS AT MORTGAGE ATTACK STRATEGY

foreclosure salvation

ABSTRACT

Bob Hurt explains why Florida's 2nd DCA' Focht v Wells Fargo opinion heralds a new era in flouting of standing requirements by foreclosure courts. He also shows how foreclosure defenders can undercut all traditional foreclosure defenses by attacking causes of action underlying the mortgage.

Bob Hurt

law

Focht Opinion Hints at Mortgage Attack Strategy

Does Foreclosure Defense Constitute Legal Malpractice?

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Introduction

In his blog* entry, a writer I shall call "Lawyer-Blogger" seems resigned to impending loss of a bogus standing argument. Last week the Florida 2nd District Court of Appeals in Focht v Wells Fargo (appended below) reversed and remanded a foreclosure judgment because the bank didn't supply proof of standing till months after filing the law suit. But the judges lead a movement to obliterate standing challenges in foreclosure cases where no question exists as to whether the mortgagor breached the note and must forfeit the collateral. The Court certified this question to the Florida Supreme Court:

> CAN A PLAINTIFF IN A FORECLOSURE ACTION CURE THE INABILITY TO PROVE STANDING AT THE INCEPTION OF SUIT BY PROOF THAT THE PLAINTIFF HAS SINCE ACQUIRED STANDING?

They want to follow the lead of the US Bank v Guillaume opinion from New Jersey's Supreme Court. There, the courts no longer require standing to order foreclosure.

Lawyer-Blogger writes this:

> *"Specifically as it relates to Foreclosure cases, at some point in time we will all wake up the horrifying reality that no one, not anyone…knows who is actually taking possession of hundreds of millions of dollars of mortgage payments….and where that money is going.*
>
> *"That's the real issue that bubbles below the surface…right beneath the surface, but that will rear its head…"*

I write in response:

Dear Lawyer-Blogger:

The Lesson of Focht v. Wells Fargo

I, like most prudent judges, such as the trial judge in Florida's 12th Circuit who issued the Focht foreclosure order, think the trial courts should go ahead with the foreclosure in such a circumstance, even though it saddens me to see Deborah Focht lose her house after years of harassment and interference with her business interests and income by the lender's agents. In her defense, I also believe courts should sanction plaintiffs like Wells Fargo, and their counsel, who arrive at court poorly prepared for the action. I wonder why you didn't suggest that.

Why do you think no one knows who gets the mortgage payments? What does this have to do with the standing question? Why dismiss the case and make the bank file all over again? Why does it matter who gets the payment money or foreclosure property, so long as the borrower gives them up as the loan documents require? Have you seen any lawsuits where an erstwhile plaintiff whined "Hey judge, you gave that other plaintiff MY foreclosure?" I haven't.

These foreclosures in EQUITY require the courts to settle the matter FAIRLY. Florida's Constitution provides in Article I in section 10 "No law shall impair the obligation of contracts" and in section 21 "All persons shall have access to the courts for redress of injury, and justice shall be administered without sale, denial, or delay."

So, first of all, sending the plaintiff back to refile would constitute delay, a violation of section 21. Secondly, pretending any reason not to foreclose under pressure of a just complaint would violate the spirit of section 10. Thirdly, if the court asked the borrower "Did you take out a loan and make payments and stop paying and receive proper notice of acceleration and fail to pay and receive notice of foreclosure and a subpoena and lawsuit?" what do you imagine the borrower will answer? Of course the borrower will answer "YES." Won't that mean the borrower MUST forfeit the collateral toward satisfaction of the note?

The court has the duty to redress the injury and we have no question about WHOM the borrower must pay. We can see this in the mortgage security instrument and servicer change notices. So, why would YOU vote not to allow the bank to foreclose if the borrower breached the note and admitted it? ESPECIALLY if the bank produces the note indorsed in blank? Oh, I get it. It foils your plan to delay the foreclosure by any available means, driving up costs for the client.

This seems all very simple and clear cut to me, regardless of your plans. The court MUST enforce a valid mortgage for a valid note which the defendant breached- the court MUST order the FORECLOSURE SALE of the mortgaged property. Focht's Judge Altenbernd sees it as I see it, as a practical matter.

Okay, how do you imagine Debbie Focht's case working out? Now she has some more time to enjoy the fruits of possessing the house. But as surely as the sun will come up tomorrow, the

plaintiff will refile the foreclosure action, pile even more costs onto Debbie's shoulders, and prevail. Debbie will lose the house and will have lost every penny and all that time she put into the litigation. And since the loan is surely underwater, she could owe a whopping deficiency damage obligation.

Could Debbie have hired you, a crack foreclosure defense Lawyer-Blogger to save her house? Maybe she could have afforded you, but I doubt it. And even if she did, I doubt that you would have prevailed any better than she did with the standing argument she used. Unless I miss my guess, the grounds around Tampa Bay have become littered with your foreclosure victim clients' figurative corpses. I wonder how you ever became an expert at foreclosure defense. Your real expertise seems stronger in the area of dragging out the inevitable foreclosure with failing legal arguments, and then watching as your clients trudge away broker than ever, and in tears.

Back to Enforcement of the Note – What About Note Validity?

What if the mortgage or note lacks validity? What if the lender or lender's agents INJURED THE BORROWER at the inception of the loan, such as by fraudulent inducement through overvaluing the property, falsifying the loan application, etc.? If such acts rendered the note invalid, the court must NOT enforce the note. In fact, it must give redress to the borrower, IF the borrower's counsel has the moxie to file a complaint in order to get the court to compensate the borrower and PUNISH the lender.

This also becomes simple and clear cut. You have only one fiscally sound way to help the borrower – find out where, when, and how the lender or lender's agents injured the borrower - at the *inception* of the loan. If you find causes of action there, you can make the foreclosure disappear for good, and get your client a cram-down or wad of money. But if you win a temporary dismissal of the foreclosure, the client will still lose the house, so why bother?

Are You on the Road to Legal Malpractice?

I hate to embarrass you, Lawyer-Blogger, but please answer some questions for me:

1. How many foreclosure victim clients you have had, total?
2. How many of them have lost their homes to foreclosure?
3. How many of them have taken a loan modification for which you earned a fee?
4. For how many of them have you comprehensively examined the mortgage transaction for evidence of torts, breaches, or legal errors?
5. For how many did you actually find torts, breaches, or errors?
6. With how many lenders or their agents did you negotiate and obtain settlements favorable for your clients using those torts, breaches, or errors as a negotiating hammer?

7. How many lenders or their agents did you sue for torts, breaches, or errors that injured your foreclosure victim clients?

8. In how many of those cases did you win a loan balance cram-down, financial compensation, or the house free and clear?

Lawyer-Blogger, if your answers to 4, 5, 6, 7, and 8 are ZERO or nearly ZERO, you need to call me to find out how to start winning for your clients. But don't bother asking me how to defend against the legal malpractice complaints you might deserve.

You might want to brush up on Marc Wites' *Florida Causes of Action* for 2011, particularly topic 2:20 on Legal Malpractice actions. He cited the elements in the 2nd District where you practice as follows:

§2:20 MALPRACTICE, LEGAL

§2:20.1 Elements of Cause of Action - Florida Supreme Court

We find that, in a claim for legal malpractice, a plaintiff must plead and prove the following elements:

1. the attorney's employment;
2. the attorney's neglect of a reasonable duty; and
3. the attorney's negligence was the proximate cause of the client's loss.

With respect to a legal malpractice suit brought by one convicted of a crime, a majority of jurisdictions have held that appellate or postconviction relief is a prerequisite to maintaining the action.

SOURCE
Larson & Larson, P.A. v. TSE Indus., Inc., 22 So.3d 36, 39 (Fla. 2009).

SEE ALSO
1. Steele v. Kehoe, 747 So.2d 931, 933 (Fla. 1999), rehearing denied, 780 So.2d 915 (Fla. 1999).

2. Weekley v. Knight, 156 So. 625, 626 (Fla. 1934) ("We think there can be no question that one has a cause of action ex contractu against an attorney who neglects to perform the services which he agrees to perform for a client or which by implication he agrees to perform when he accepts employment by a client.").

3. Law Office of David J. Stern, P.A. v. Security National Servicing Corp., 969 So.2d 962, 966 (Fla. 2007).

§2:20.1.2 Elements of Cause of Action - 2nd DCA

A cause of action for legal malpractice has three elements:

1. the attorney's employment and
2. his neglect of a reasonable duty; which
3. is the proximate cause of loss to the client.

SOURCE
Rocco v. Glenn, Rasmussen, Fogarty & Hooker, P.A., 32 So.3d 111, 116 (Fla. 2d DCA 2009).

Maybe we should examine the foregoing text in light of the situation of a client who comes to you for help defending against a complaint that the client breached a mortgage note (contract). Instead of digging into and examining the contract and documents and circumstances surround it, like possible unconscionability or fraud in the appraisal and loan application, any damage to the client's credit rating, possible violations of state and federal regulations regarding closing, disclosures, collection practices, etc., what if you ignore that stuff and merely attack the manner of the foreclosure, like standing of the plaintiff?

Any good lawyer knows that if the plaintiff breached the contract first, the defendant had only limited duty, if any, to comply with the terms of the contract, right?

So, let's have a look. Did you breeze right past the possible causes of action underlying the mortgage itself, and jump at the chance to defend against an ultimately indefensible foreclosure? Did you neglect to examine any mortgages for those causes of action? Did your clients lose their houses as a result of your negligence? Did your clients lose their rights to sue because of tolling of statutes of limitations because you busied yourself with other matters? Did the client lose the house as a result of your neglect of the duty to examine their mortgages for causes of action, reasons to sue the lender or lender's agents? Might your clients have gotten their houses free and clear and a big wad of damages money, but for your negligence?

Actually, I have a hard time imagining ANY good lawyer would put himself and his career into harm's way by such profoundly damaging neglect of duty. But, I guess it happens sometimes, doesn't it? So I might as well continue quoting from Wites, in case any of your clients decide to sue you for legal malpractice, such as because they lost their houses to foreclosure you could have prevented had you only examined their mortgages for causes of action before the statute of limitations tolled.

§2:20.6 Sample Cause of Action

COUNT FOR LEGAL MALPRACTICE

[INSERT PARAGRAPH NUMBER - #]. Plaintiff realleges and incorporates the allegations set forth in paragraphs __-__ above as if set forth herein in full.

Defendant attorney was employed by Plaintiff as Plaintiff's legal counsel.
Defendant neglected a reasonable duty owed to Plaintiff.
Defendant's negligence was the proximate cause of Plaintiff's damages, which is the amount Plaintiff would have recovered but for the Defendant's negligence.

Plaintiff suffered damages

WHEREFORE, Plaintiff demands damages against Defendant for legal malpractice and such other relief this Court deems just and proper.

How to Stop Losing and Start Winning for Mortgage Victims

Lawyer-Blogger, I encourage you to call me right away to discuss how you can get someone competent to examine your clients' mortgages comprehensively for causes of action. You might start winning houses and money for your clients instead of losing both due to neglect of duty or sheer incompetence.

Why should you call me? Well, I have explained to many attorneys the futility of defending against foreclosures, not that they have not learned that from personal experience. And I have explained how a comprehensive, professional mortgage examination can reveal tortious conduct, contract breaches, and legal errors that justify suing the lender or lender's agents.

Such causes of action, if one presses them in the face of the servicer or foreclosure plaintiff, will usually lead them away from court and to the negotiating table for a settlement conference. Lenders and their lawyers do not want the general public to know that they have egregiously cheated the mortgagor, so they will offer a variety of concessions to placate the mortgagor:

1. Reduction of the loan balance to the value of the house
2. Adjustment of the loan balance downward to compensate for injuries
3. Refinance of the reduced balance for 30 years at a favorable fixed interest rate.
4. Forgiveness of legal fees, costs, and accrued interest
5. Financial compensation (hush money).

In some cases, lenders balk at a settlement because of bad legal advice. That can necessitate a lawsuit to obtain remedy. Most foreclosure defense lawyers have no experience at such lawsuits, but they could better earn their fees by learning that craft than by bilking the client $500 a month "for as long as I can keep you in the house." Mortgage victims often have a difficult time finding attorneys to represent them in such actions. I see that as a substantial opportunity for foreclosure defenders who want to become mortgage attackers.

Let us see this pragmatically. The attorney must do more work to examine the mortgage and prepare a lawsuit. And most attorneys don't have a clue how to examine the mortgage, even if they yearned to do so. Fortunately, I know the leading combined mortgage examiner and litigation expert in America and I shall gladly make the connection for any attorney who requests it.

In spite of the work involved, attorneys have a much better chance of prevailing with compensatory and punitive damages for their client by suing the injurious lender than by defending against a breach of contract/foreclosure lawsuit by the mortgagee. In fact, the best foreclosure defense attorney can seldom win more than a temporary dismissal, and the plaintiff nearly always defeats that by fixing the case problems and refiling, then taking the house from the defender's client. But, by attacking the mortgage, the lawyer can make the foreclosure go away, and set the client up for a favorable settlement or damages:

1. Compensatory damages;
2. Punitive damages;
3. Substantial legal fees and costs;
4. Widespread fame (instead of defamation)

The mortgage attack lawyer's only real worry in such a strategy lies with former clients against whom he engaged in legal malpractice out of failure to examine the mortgage for causes of action. When they learn of the new fame of the attorney for winning big damage awards for the client, they might start filing malpractice lawsuits against the attorney who could have won for them but instead made them lose their homes to foreclosure.

There you have it, Lawyer-Blogger – your reason to call me. You know that the method I prescribe works beautifully for the mortgage victim, and it can make an attorney wealthy. Here's a case in point: http://fe.gd/JYF. This could be your win. But it isn't. So call me if you like winning for a change. 727 669 5511.

*

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NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL OF FLORIDA SECOND DISTRICT

DEBORAH E. FOCHT,)

Appellant,)

v.) Case Nos. 2D11-4511, 2D11-4980

WELLS FARGO BANK, N.A., SUCCESSOR)
BY MERGER TO WELLS FARGO BANK)
CONSOLIDATED MINNESOTA, NATIONAL ASSOCIATION,)
AS TRUSTEE, IN TRUST FOR THE)
HOLDERS OF STRUCTURED ASSET)
SECURITIES CORPORATION –)
AMORTIZING RESIDENTIAL)
COLLATERAL TRUST MORTGAGE PASS)
THROUGH CERTIFICATES, SERIES)
2002-BC10,)
)

Appellee.)

_____)

Opinion filed September 25, 2013.

Appeal from the Circuit Court for Sarasota County; Charles E. Williams, Judge.

Deborah E. Focht, pro se.

Jeffrey S. Lapin of Lapin & Leichtling, LLP, Coral Gables, and Ronnie H. Bitman of Powell & Pearson, LLP, Winter Park, for Appellee.

SILBERMAN, Judge.

In case number 2D11-4511, Deborah E. Focht seeks review of the final summary judgment of foreclosure entered in favor of Wells Fargo Bank, N.A. In case number 2D11-4980, Focht seeks review of the trial court's subsequent orders denying her motion to stay and/or cancel the foreclosure sale and striking her notice of lis pendens. We reverse the final judgment of foreclosure because a genuine issue of material fact exists regarding Wells Fargo's standing to enforce the note and mortgage. Because the foreclosure sale has already taken place, we dismiss the appeal in case number 2D11-4980 as moot.

In October 2002, Focht executed an adjustable rate note that was secured by a mortgage on her property in Nokomis, Florida. The original lender was BNC Mortgage, Inc., but the loan was later transferred into a trust for which Wells Fargo is the trustee. Wells Fargo filed a foreclosure complaint in January 2008. The complaint included a count to reestablish a lost note, but Wells Fargo produced and filed the original note in July 2008.

Wells Fargo subsequently filed a motion for summary judgment, and Focht filed a cross-motion for summary judgment based on numerous affirmative defenses which included Wells Fargo's lack of standing. At the hearing on the motions, Wells Fargo dismissed its lost note claim. Wells Fargo asserted that it had standing by virtue of an assignment of the note and mortgage dated September 2008, which was several months after the complaint was filed. Wells Fargo alternatively asserted that it had standing as the holder of the original note endorsed in blank. In opposition to Focht's cross-motion for summary judgment, counsel for Wells Fargo addressed Focht's affirmative defenses and argued that each was either factually or legally insufficient.

The trial court granted Wells Fargo's motion for summary judgment, denied Focht's cross-motion for summary judgment, and entered a final judgment of foreclosure. Focht filed a notice of appeal of the final judgment and a motion to stay the foreclosure sale pending appeal and a notice of lis pendens. The trial court denied the motion to stay and granted Wells Fargo's motion to strike the notice of lis pendens. Focht then filed a notice of appeal of those orders. The foreclosure sale took place in September 2011, and Wells Fargo was the successful bidder.

Focht makes several arguments on appeal. We reverse the final judgment in case number 2D11-4511 based on the existence of a genuine issue of material fact regarding Wells Fargo's standing to enforce the note and mortgage at the time it filed the complaint. We reject the remainder of Focht's arguments in that appeal without further discussion. And we dismiss the appeal in case number 2D11-4980 as moot because the foreclosure sale has already taken place.

A plaintiff who is not the original lender may establish standing to foreclose a mortgage loan by submitting a note with a blank or special endorsement, an assignment of the note, or an affidavit otherwise proving the plaintiff's status as the holder of the note.[1] McLean v. JP Morgan Chase Bank Nat'l Ass'n, 79 So. 3d 170, 173 (Fla. 4th DCA 2012). But standing must be established as of the time of filing the foreclosure complaint. Country Place Cmty. Ass'n v. J.P. Morgan Mortg. Acq. Corp., 51 So. 3d 1176, 1179 (Fla. 2d DCA 2010); McLean, 79 So. 3d at 173. Thus, Wells Fargo's submission of a postfiling assignment of the note and mortgage does not establish that it had standing when it filed the lawsuit. See Gonzalez v. Deutsche Bank Nat'l Trust Co., 95 So. 3d 251, 253 (Fla. 2d DCA 2012); McLean, 79 So. 3d at 173.

Wells Fargo alternatively argues that it established standing by submitting the original note endorsed in blank. See Cutler v. U.S. Bank Nat'l Ass'n, 109 So. 3d 224, 225-26 (Fla. 2d DCA 2012); Everhome Mortg. Co. v. Janssen, 100 So. 3d 1239,

1240 (Fla. 2d DCA 2012); Green v. JPMorgan Chase Bank, N.A., 109 So. 3d 1285, 1288 (Fla. 5th DCA 2013). As with the assignment, however, Wells Fargo did not submit the original note until several months after it had filed the complaint. To establish standing as the holder of a note endorsed in blank, a party must be in possession of the original note. See § 671.201(21)(a), Fla. Stat. (2007) (defining "holder" as "[t]he person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession"); Everhome, 100 So. 3d at 1240; Green, 109 So. 3d at 1288. Thus, Wells Fargo was required to submit evidence that it was in possession of the original note with the blank endorsement at the time it filed the complaint to establish standing. See Green, 109 So. 3d at 1288.

In this case, the blank endorsement, which is apparently located on the back of the note, did not get copied for the record. Thus, the record does not reflect whether the endorsement was dated. Even if it did bear a date that was prior to the filing of the complaint in January 2008, nothing in the record establishes that Wells Fargo was in possession of the note at the time the complaint was filed. Although Wells Fargo alleged in its unsworn complaint that it was the owner and holder of the note and mortgage, it asserted that the original note had been lost or destroyed and "is not now in the custody and control of [Wells Fargo]." Notably, the affidavit of indebtedness filed in support of summary judgment relies on the postfiling assignment for standing and states as follows: "By way of corporate assignment from BNC Mortgage, Inc., [Wells Fargo] now owns and holds the Note and Mortgage." (Emphasis added.) No evidence established when Wells Fargo acquired the original note.

Wells Fargo noted that the trust in which Focht's mortgage loan was held was created years before Wells Fargo filed the foreclosure action. But the record does not reflect that, at the time the trust was created, Focht's mortgage loan was an asset of the trust. Thus, a genuine issue of material fact remains regarding standing that precludes the entry of summary judgment. See Cutler, 109 So. 3d at 226 (reversing summary judgment where a plaintiff who was not the original lender filed a claim to reestablish a lost note with its foreclosure claim and subsequently found and filed the original note but failed to present evidence establishing when the plaintiff became the proper holder of the note); McLean, 79 So. 3d at 174 (same).

Accordingly, we reverse the final judgment in case number 2D11-4511 and remand for further proceedings, and we dismiss as moot the appeal in case number 2D11-4980. We also certify a question based on some of the same concerns articulated by Judge Altenbernd in his concurrence. We recognize that trial courts have been overwhelmed by foreclosure filings and that the number is mounting.[2] See In re Amendments to Fla. R. Civ. P. 1.490, 113 So. 3d 777, 778 (Fla. 2013). And the supreme court has taken action to relieve the backlog of foreclosure cases by various means within its authority. See id. at 779; In re Certification of Need for Additional Judges, 29 So. 3d 1110, 1115-16 (Fla. 2010).

For our part, appellate courts have seen a recent influx of appeals in which defendants have successfully argued that the trial court erred in entering a foreclosure judgment in favor of the plaintiff because the plaintiff failed to establish standing at the time of filing. See, e.g., Cutler, 109 So. 3d at 225; Gonzalez, 95 So. 3d at 253-54; Green, 109 So. 3d at 1288; McLean, 79 So. 3d at 174. In many of these cases, the plaintiff presented unrefuted proof of

standing acquired after filing but prior to the final hearing. See id. The appellate courts are nonetheless compelled to reverse based on the district courts' application of a long line of supreme court cases applying the general principle 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." Progressive Express Ins. Co. v. McGrath Cmty. Chiropractic, 913 So. 2d 1281, 1284-85 (Fla. 2d DCA 2005) (following Voges v. Ward, 123 So. 785 (Fla. 1929), and Marianna & B.R. Co. v. Maund, 56 So. 670 (Fla. 1911)); see also Jeff-Ray Corp. v. Jacobson, 566 So. 2d 885, 886 (Fla. 4th DCA 1990) (following Marianna, 56 So. 670).

We note that the supreme court has not applied this standing principle in the exact context presented in this case. And we question whether, in light of the ongoing foreclosure crisis in this State, the supreme court would adhere to this principle in cases in which a plaintiff has acquired standing by the time judgment is entered. Accordingly, we certify the following question as one of great public importance:

> CAN A PLAINTIFF IN A FORECLOSURE ACTION CURE THE INABILITY TO PROVE STANDING AT THE INCEPTION OF SUIT BY PROOF THAT THE PLAINTIFF HAS SINCE ACQUIRED STANDING?

Reversed and remanded.

DAVIS, C.J., Concurs.

ALTENBERND, J., Concurs with opinion.

ALTENBERND, Judge, Concurring.

I concur in this decision because existing precedent requires me to do so. A requirement that the plaintiff prove that it owned or possessed a promissory note at the commencement of a foreclosure action may have made sense during earlier periods of economic downturn,[3] but in this era of securitization of mortgage debt and computerized banking, it has proven to be a restriction that often provides a windfall to a borrower who can prove no harm by the fact that the plaintiff obtains possession of the note after the filing of the lawsuit but before the entry of judgment. So long as there is no dispute that the borrower received the money and defaulted on the note, the law should not use "standing" to require the dismissal of a lawsuit. If the defendant raises this issue at the inception of the lawsuit this affirmative defense may warrant a delay in the proceedings while the plaintiff establishes that it can enforce the note. But especially when the original note in default has already been filed in the court record, the law should generally permit a plaintiff to obtain a judgment of foreclosure if the plaintiff establishes that it has a right to enforce the note at the time it seeks to obtain a final judgment. See generally Taylor v. Deutsche Bank Nat'l Trust Co., 44 So. 3d 618 (Fla. 5th DCA 2010). The courts have erroneously transformed what should be a defendant's affirmative defense, permitting the defendant to avoid a judgment of foreclosure by a plaintiff who is a stranger to the note, into a jurisdictional prerequisite that must be established by the plaintiff to avoid a dismissal of the action.

There appears to be no genuine dispute in this case that Ms. Focht borrowed about $110,000 from BNC Mortgage, Inc., in 2002, using her duplex as collateral. She signed a promissory note and executed a mortgage. She did not make the payment due in September 2007 or any payment thereafter. As a result, Wells Fargo filed this foreclosure action in January 2008.

Ms. Focht filed an answer pro se. It included twenty-one affirmative defenses. Many of those defenses were frivolous—contributory negligence, basic rights under Article I, section 2 of the Florida Constitution, improper forum, and piercing the corporate veil. Read generously, I do not believe this answer raised a defense of standing.

In July 2008, Wells Fargo filed the original promissory note with the court. Only then did Ms. Focht raise a defense of standing. At that time and for the last five years, there has been no practical risk that any other entity might claim ownership of or a right to enforce the note. Certainly, Ms. Focht is not claiming that she is making timely payments to some other putative owner of the note.

But for the precedent, there would appear to be no reason to reverse this case. Admittedly, in this case and in numerous other cases the financial institutions have brought these problems upon themselves by the complex methods of securitizaton and their own sloppy recordkeeping. Admittedly, Ms. Focht and many other Floridians believe they were misled by mortgage brokers and others into signing notes and mortgages that were not appropriate for their financial circumstances. Admittedly, some borrowers become confused and frustrated because they do not know whom to contact to discuss their financial difficulties when they fall behind on a note. But none of these concerns are solved by creating a jurisdictional prerequisite of "standing."

Ms. Focht cannot demonstrate that she has been the victim of any legal harm in this case arising from Wells Fargo's delayed possession of the note. In fact, it appears that she has lived for years in this duplex during the pendency of the foreclosure proceeding, collecting rent from the tenants in the other unit, while making no payments on the note and while forcing the lender to advance $22,213.35 toward taxes or other escrow expenses.

The trial courts have been overwhelmed by foreclosure filings. In many of these civil lawsuits the defendants, under a duty to plead in good faith, should be expected to admit that they received the money, signed the notes and mortgages, and failed to make the payments. They may often have legitimate affirmative defenses, but the delayed production of the original note and mortgage in a case where the note and mortgage are in default should not justify a dismissal of the legal proceeding.

Presumably, our mandate requires the dismissal of this foreclosure action, which in turn will undo the foreclosure sale. Ms. Focht will regain possession of her property and apparently continue her free use of the duplex while the lender continues to make advances to cover the expenses typically paid from escrow. Our certified question of great public importance is dispositive of this appeal and worthy of consideration by the supreme court.

[1]Case law focuses on standing to enforce the note, as opposed to the mortgage,

because the mortgage generally passes as an incident to the debt. Cutler v. U.S. Bank Nat'l Ass'n, 109 So. 3d 224, 225 (Fla. 2d DCA 2012).

[2]The Trial Court Budget Commission has filed a petition with the Florida Supreme Court estimating that there will be 680,000 foreclosure cases initiated during the next three years. In re Amendments to Fla. R. Civ. P. 1.490, 113 So. 3d 777, 778 n.2 (Fla. 2013).

[3]See generally Tunno v. Robert, 16 Fla. 738 (1878); Smith v. Kleiser, 107 So. 262 (Fla. 1926).