The Florida Senate

COMMITTEE MEETING EXPANDED AGENDA

JUDICIARY
Senator Flores, Chair
Senator Joyner, Vice Chair

MEETING DATE: Tuesday, October 4, 2011
TIME: 10:45 a.m.—12:45 p.m.
PLACE: *Toni Jennings Committee Room,* 110 Senate Office Building

MEMBERS: Senator Flores, Chair; Senator Joyner, Vice Chair; Senators Braynon, Gardiner, Richter, Simmons, and Thrasher

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
1	Update on issues related to mortgage foreclosure, with invited presentations from:		
	The Office of Economic and Demographic Research		Presented
	The Florida Bar		Presented
	The Office of the Attorney General		Presented
	The State Courts System		Presented
	Distribution and brief explanation of the following issue briefs:		
2	**Issue Brief 2012-219** (Issues in Evidence Law)		Presented
3	**Issue Brief 2012-227** (Review of the Sunshine in Litigation Act)		Presented
	Other Related Meeting Documents		

Florida:
An Overview of Foreclosures

October 4, 2011

Presented by:

The Florida Legislature
Office of Economic and
Demographic Research
850.487.1402
http://edr.state.fl.us

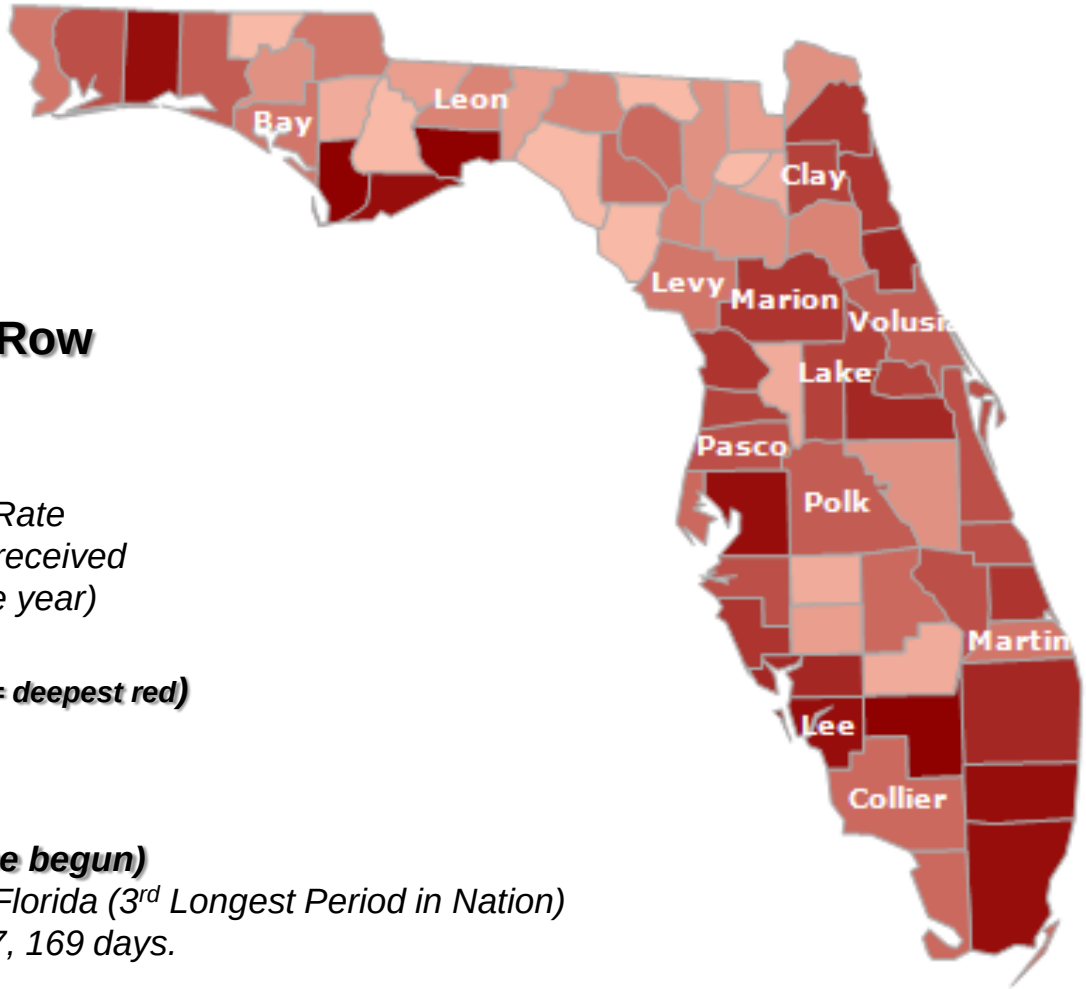
Foreclosure Process

- There are 20 states that practice judicial foreclosure only --- Florida is one of them.
- The judicial foreclosure process typically begins after a period of delinquency that results in an alleged default, with the lender filing a pending complaint and a Lis Pendens (notice of intent to begin the foreclosure process in court) with the Clerk of the Court.
- Relative to a non-judicial process:
  - Judicial process takes longer--- can be twice as long.
  - Judicial process has been affected to a greater degree by “Robo-Signing” scandal. In this regard, the shadow inventory pipeline in judicial states has become much larger.

Upstream from Foreclosure...

- **"Exotic" financing practices during the boom.**
  - In 2006, almost 47% of all mortgages in the state were considered to be innovative (interest only and pay option adjustable rate mortgages).
- **High unemployment – and – high long-term unemployment**
  - Florida's August unemployment rate of 10.7% was the 5th highest among states. In 2010, 49.5% of all FL unemployed were at 27 weeks or more.
- **Underwater Homes (owe more than the home is worth)**
  - According to CoreLogic data for the 2nd quarter of CY 2011, Nevada had the highest negative equity percentage with 60% of all of its mortgaged properties underwater, followed by Arizona (49%), Florida (45%), Michigan (36%) and California (30%). At that time, Florida had a projected 1,970,756 underwater homes.
- **Declining Property Values from Peak**
  - Florida's August median sales price for existing homes was down 46.7% from its peak.

Foreclosure Filings Remain Daunting



2010...2nd Year in a Row

2nd Highest # of Filings
(485,286 properties)

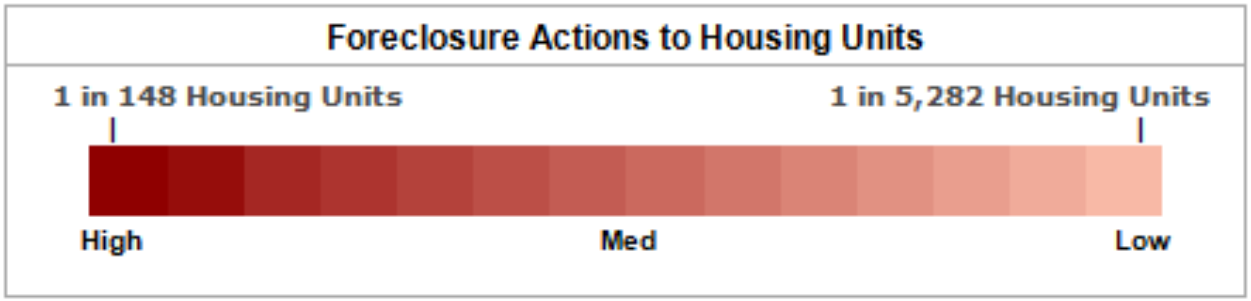
3rd Highest Foreclosure Rate
(5.51% of housing units received
at least 1 filing during the year)

August 2011 ***(highest rate = deepest red)***

FILINGS: 2nd in US
RATE: 7th in US

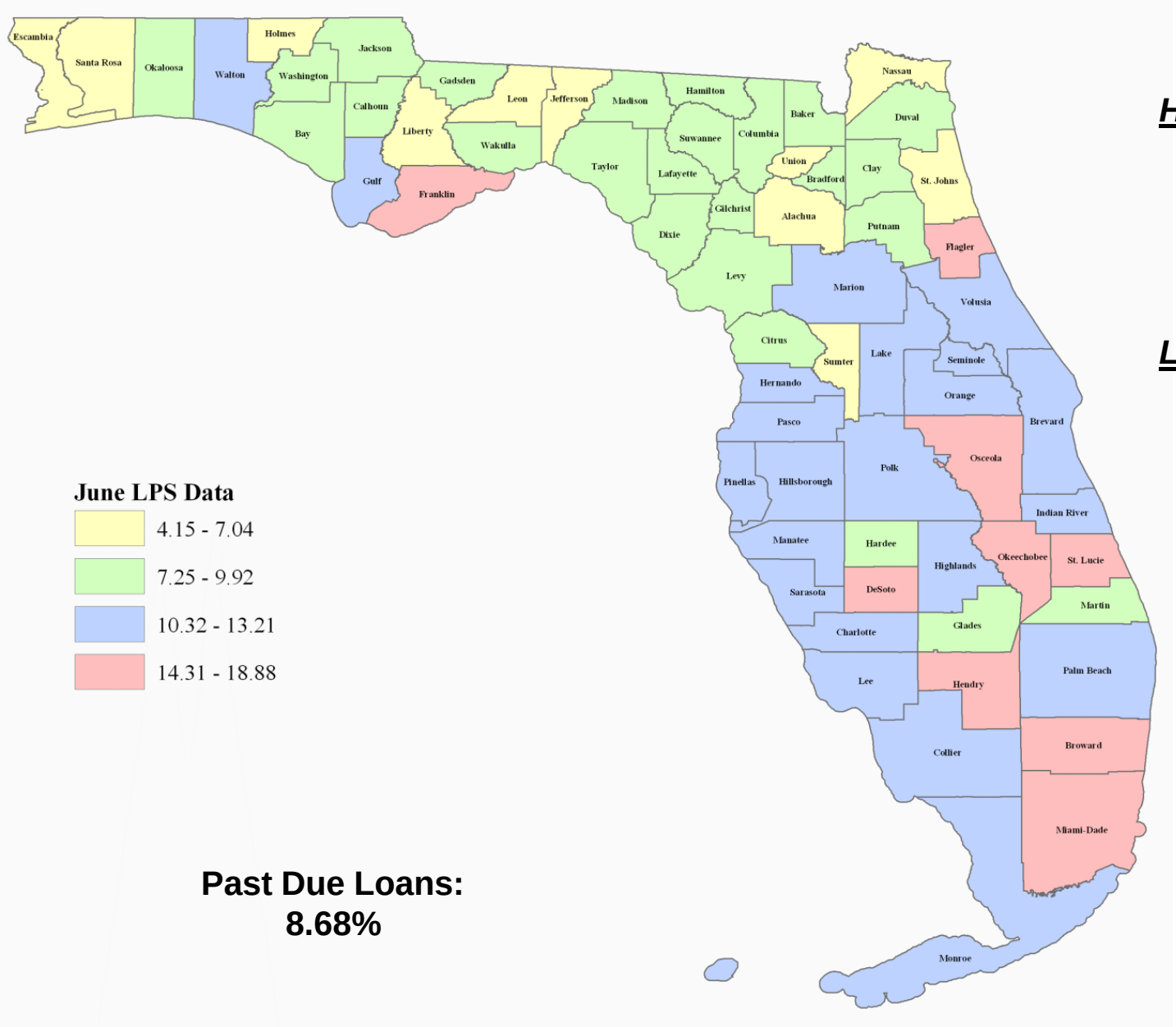
Foreclosure Process (once begun)

676 Days - 1.8 yrs - in Florida (3rd Longest Period in Nation)
At the beginning of 2007, 169 days.



Data from RealtyTrac

Percent of Loans in Foreclosure



Highest Counties:

- ***Miami-Dade at 18.88%***
- ***Osceola at 16.92%***
- ***St. Lucie at 16.12%***

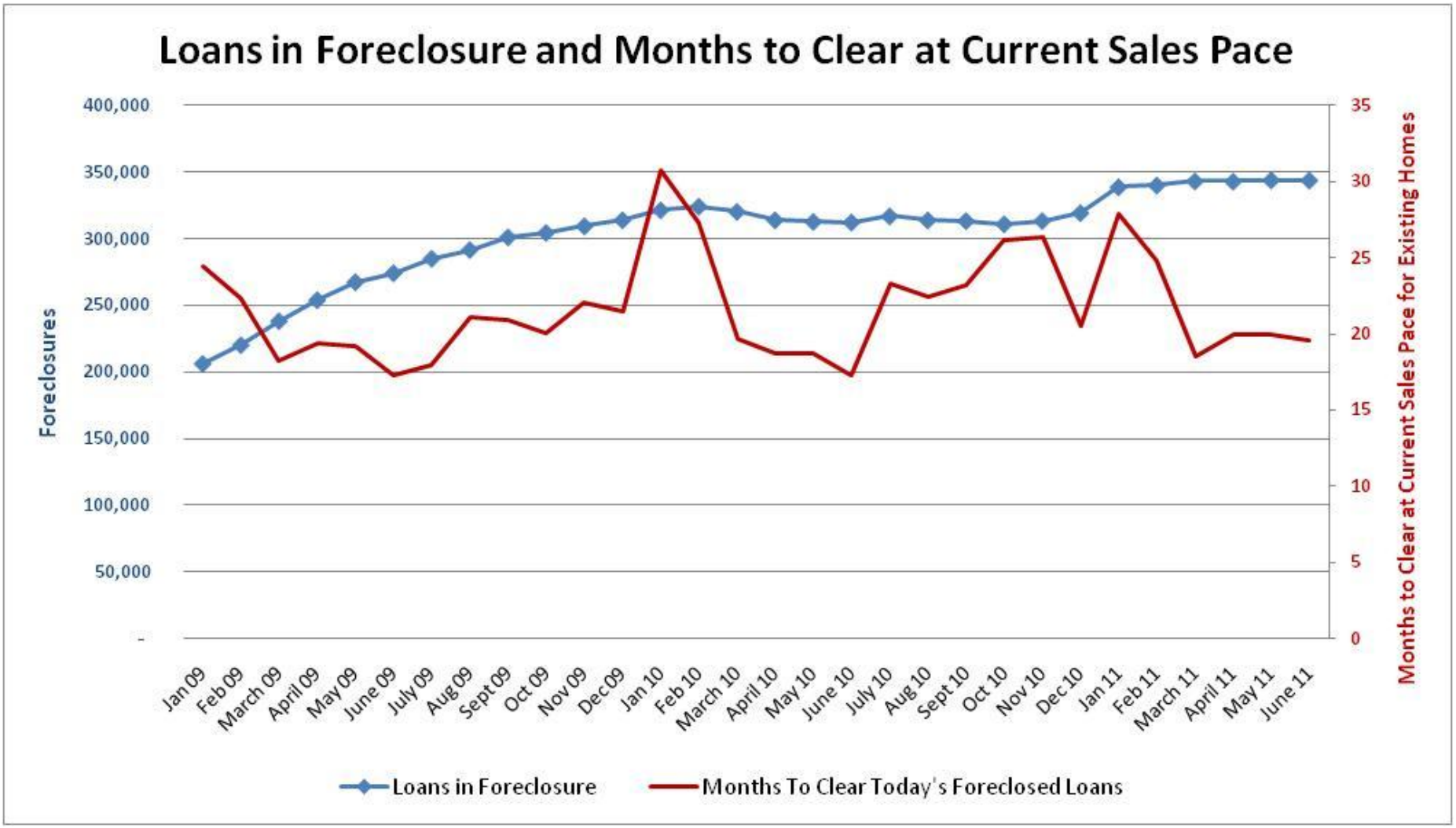
Lowest Counties:

- ***Jefferson at 4.15%***
- ***Sumter at 5.13%***
- ***Leon at 5.21%***

Past Due Loans:
8.68%

Foreclosure Inventory:
12.29%

Residential Loans in Foreclosure



Loan Data from LPS

Foreclosures & Shadow Inventory

State	Del %	FC %	Non-Curr %	Del/FC
National	8.34%	4.11%	12.45%	203%
FL	9.1%	13.8%	22.9%	66%
MS	14.6%	3.5%	18.1%	422%
NV	10.6%	7.1%	17.7%	150%
NJ	7.8%	7.3%	15.2%	107%
IL	8.2%	6.6%	14.8%	124%
GA	11.5%	3.1%	14.6%	373%
OH	9.7%	4.8%	14.4%	203%
IN	9.8%	4.7%	14.4%	209%
LA	10.4%	3.3%	13.6%	315%
MD	10.0%	3.2%	13.2%	313%
SC	9.4%	3.8%	13.2%	250%
RI	8.8%	4.3%	13.1%	205%
TN	10.6%	2.5%	13.1%	429%
NY	7.9%	5.2%	13.1%	152%
WV	10.3%	2.5%	12.9%	409%
AL	10.8%	1.8%	12.5%	615%
MI	9.8%	2.7%	12.5%	364%

State	Del %	FC %	Non-Curr %	Del/FC
National	8.34%	4.11%	12.45%	203%
ME	7.5%	5.0%	12.4%	149%
CT	7.4%	4.9%	12.3%	150%
NC	9.1%	2.9%	12.0%	309%
DE	8.0%	4.0%	12.0%	202%
KY	8.4%	3.5%	11.9%	237%
PA	8.4%	3.3%	11.6%	257%
AZ	7.9%	3.4%	11.4%	231%
CA	8.2%	3.0%	11.2%	273%
HI	6.5%	4.6%	11.1%	142%
WI	7.1%	3.9%	11.0%	182%
AR				
OK				
MO				
MA				
TX				
DC				
NM				

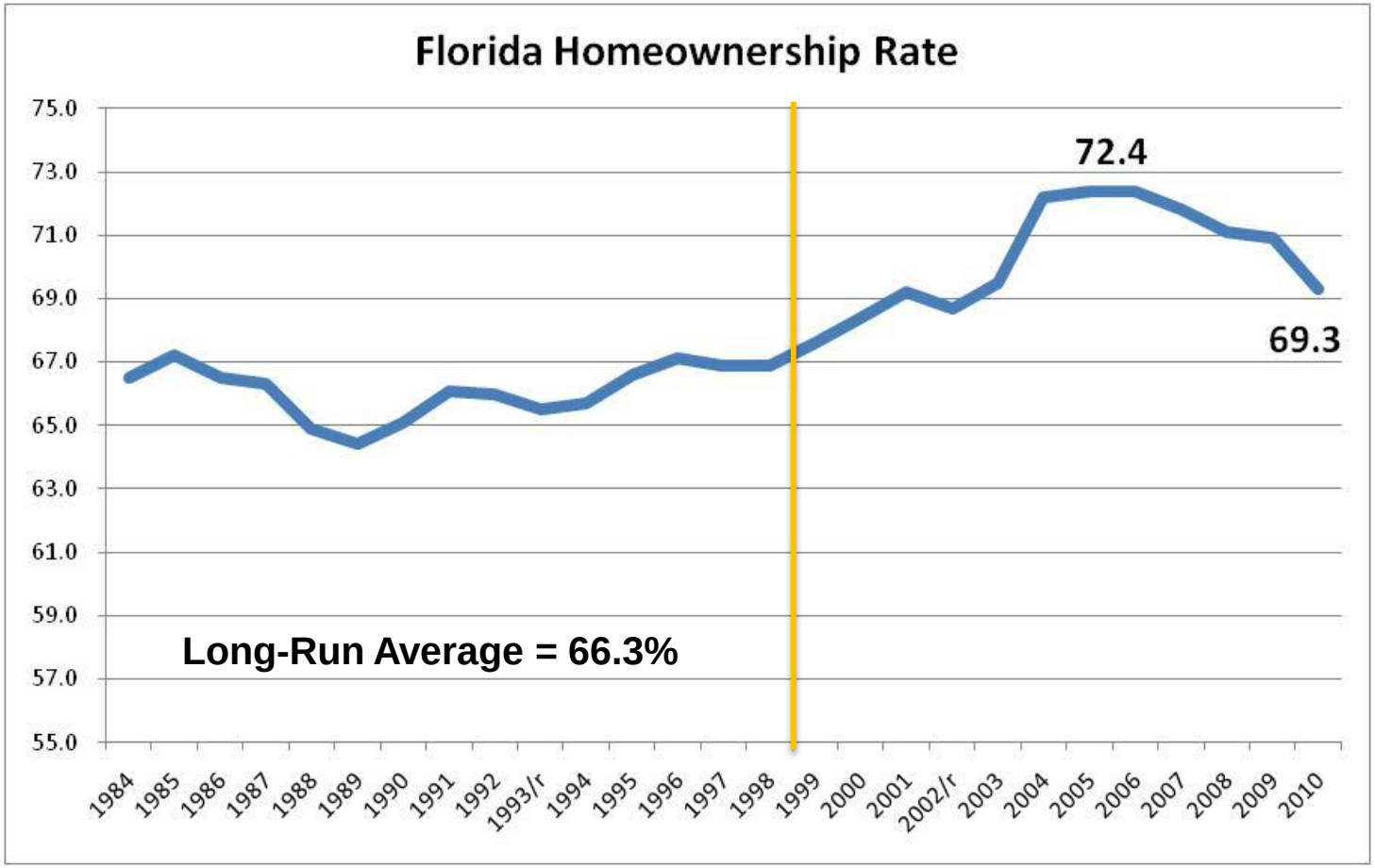
State	Del %	FC %	Non-Curr %	Del/FC
National	8.34%	4.11%	12.45%	203%
WA	6.8%	2.6%	9.5%	259%
KS	7.1%	2.1%	9.2%	341%
NH	7.0%	2.2%	9.2%	323%
UT	7.1%	2.0%	9.1%	354%
OR	5.5%	3.4%	8.9%	161%
ID	6.2%	2.6%	8.8%	241%
IA	5.9%	2.9%	8.8%	203%
VA	6.7%	1.8%	8.6%	366%
VT	5.3%	3.2%	8.5%	165%
MN	5.4%	2.0%	7.4%	271%
			2%	404%
			1%	301%
			7%	236%
			9%	426%
			9%	481%
			4%	229%
			5%	320%

State	Del %	FC %	Non-Curr %
National	8.34%	4.11%	12.45%
FL	9.1%	13.8%	22.9%

Foreclosures adding more to inventory than Sales are subtracting – nationally 3:1.
Average delinquency at Florida foreclosure start --- 385 days.

(LPS Data for July)

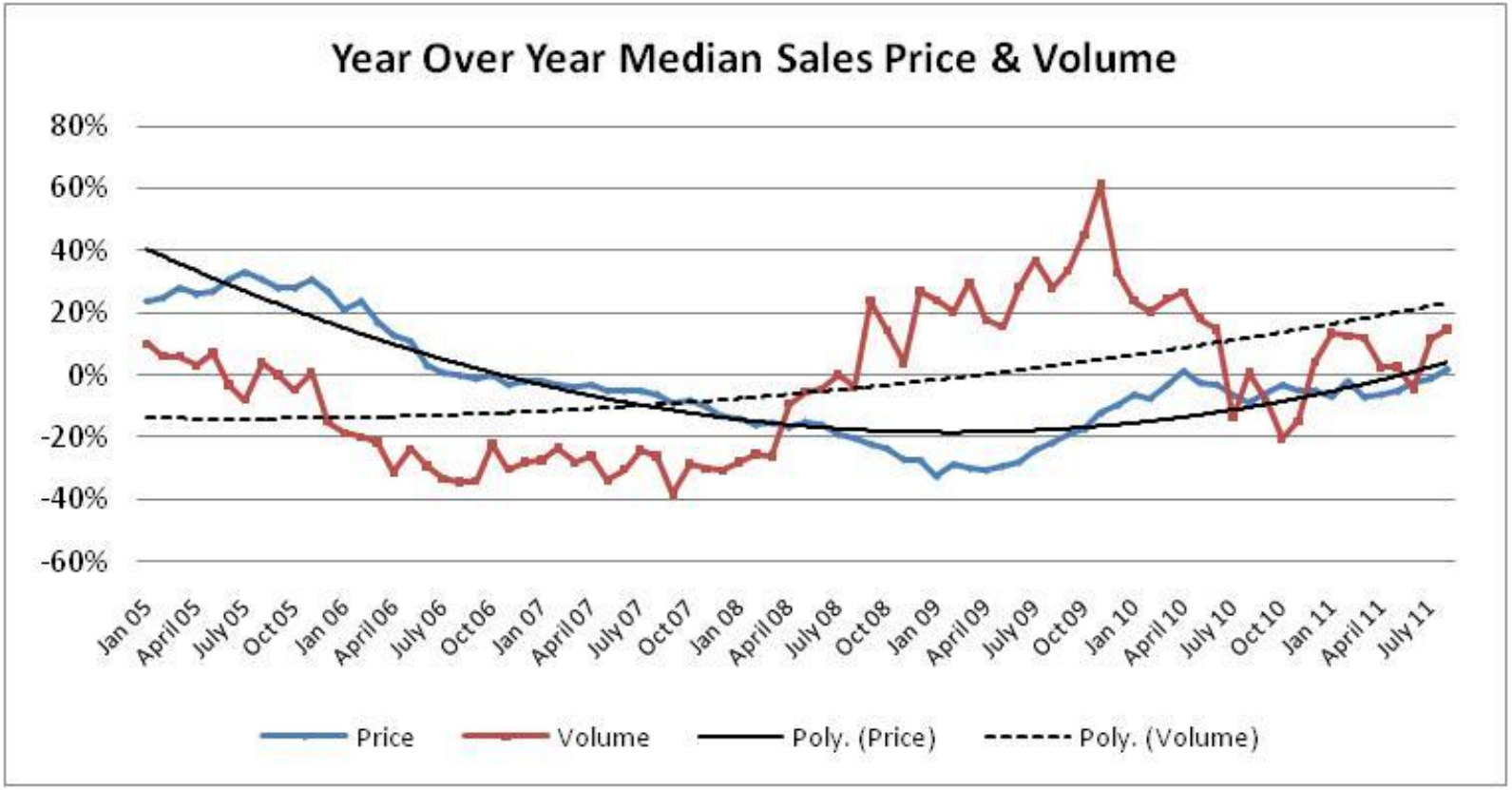
Vulnerability



The 2010 percentage is the lowest since 2002. If the 2010 rate dropped immediately back to the long-run average, about 222,600 homeowners would be affected and $30.8 billion of value.

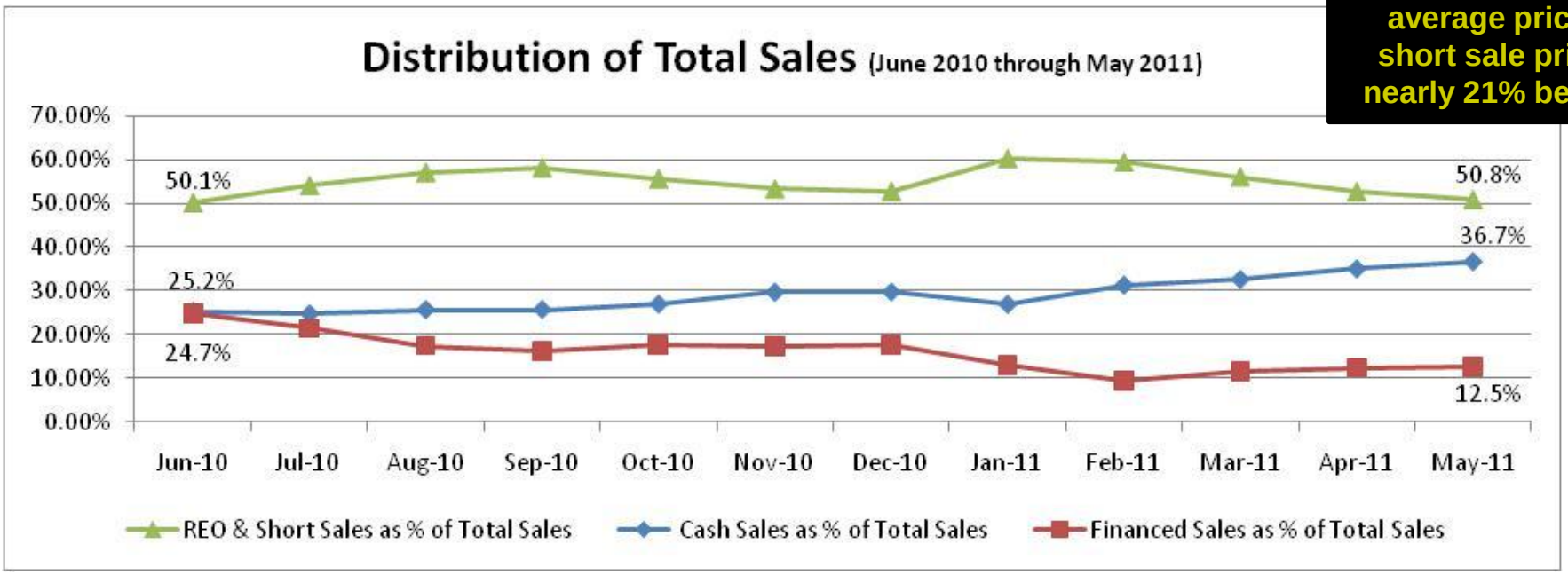
Effect on Market

- All else being equal, foreclosures initially increase the supply of homes for sale and depress prices. After a period of time, the low prices attract buyers. As the inventory reduces, prices rise. However, the entire process can take years.



Sales Mix Points to Lower Prices

REO price nearly 40% lower than average price; short sale price nearly 21% below



LPS: Lender Processing Services

Cash Sales have been growing as a percentage of all sales and financed sales have been declining. While short sales have been increasing in some states, that is not yet the case in Florida.

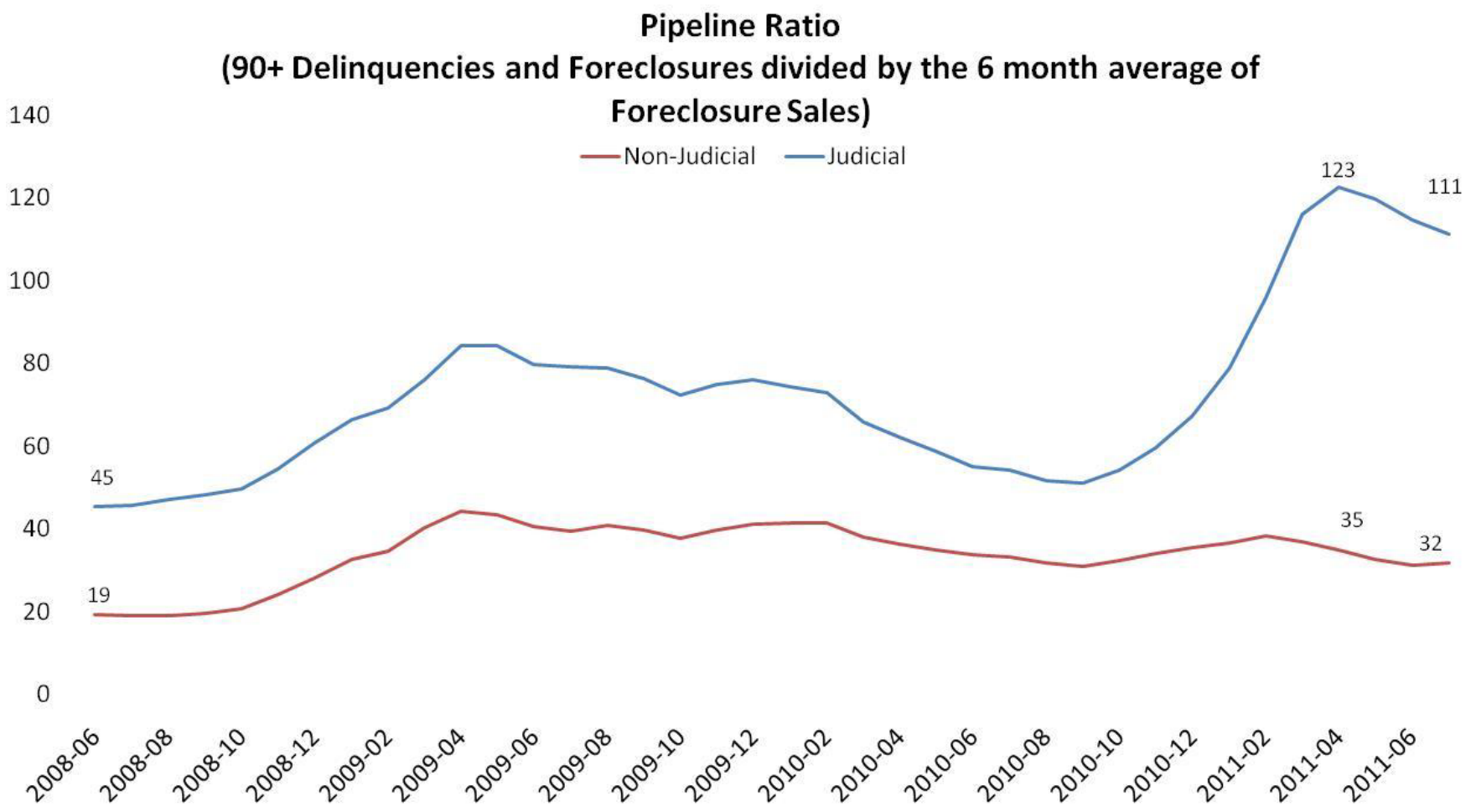
Credit Conditions Remain Tight

Question to Senior Loan Officers:
Over the past three months, how have your bank's credit standards for approving applications from individuals for **prime residential mortgage loans** to purchase homes changed?

	All Respondents				
	July '11%	**April '11 %**	**Jan '11 %**	**Oct '10 %**	**July '10 %**
Tightened considerably	0.0	0.0	0.0	0.0	0.0
Tightened somewhat	**5.7**	**3.8**	**3.7**	**13.0**	**3.6**
Remained basically unchanged	**86.8**	**92.5**	**94.4**	**83.3**	**87.3**
Eased somewhat	7.5	2.0	1.9	3.7	9.1
Eased considerably	0.0	0.0	0.0	0.0	0.0
Total	100.0	100.0	100.0	100.0	100.0

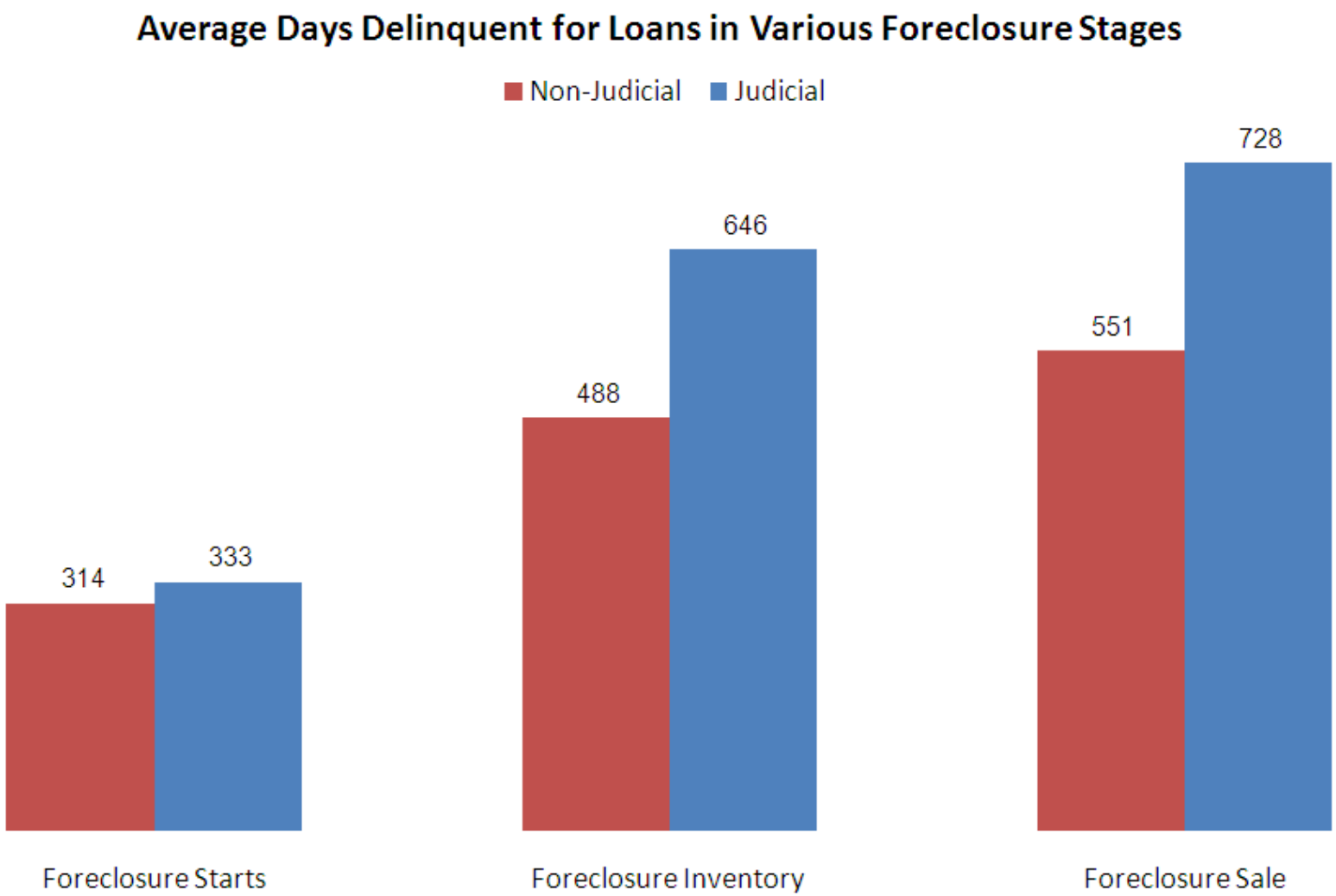
July 2011 Senior Loan Officer Opinion Survey on Bank Lending Practices (Federal Reserve Board)

Moratorium impact has dropped, but remains very high in judicial states



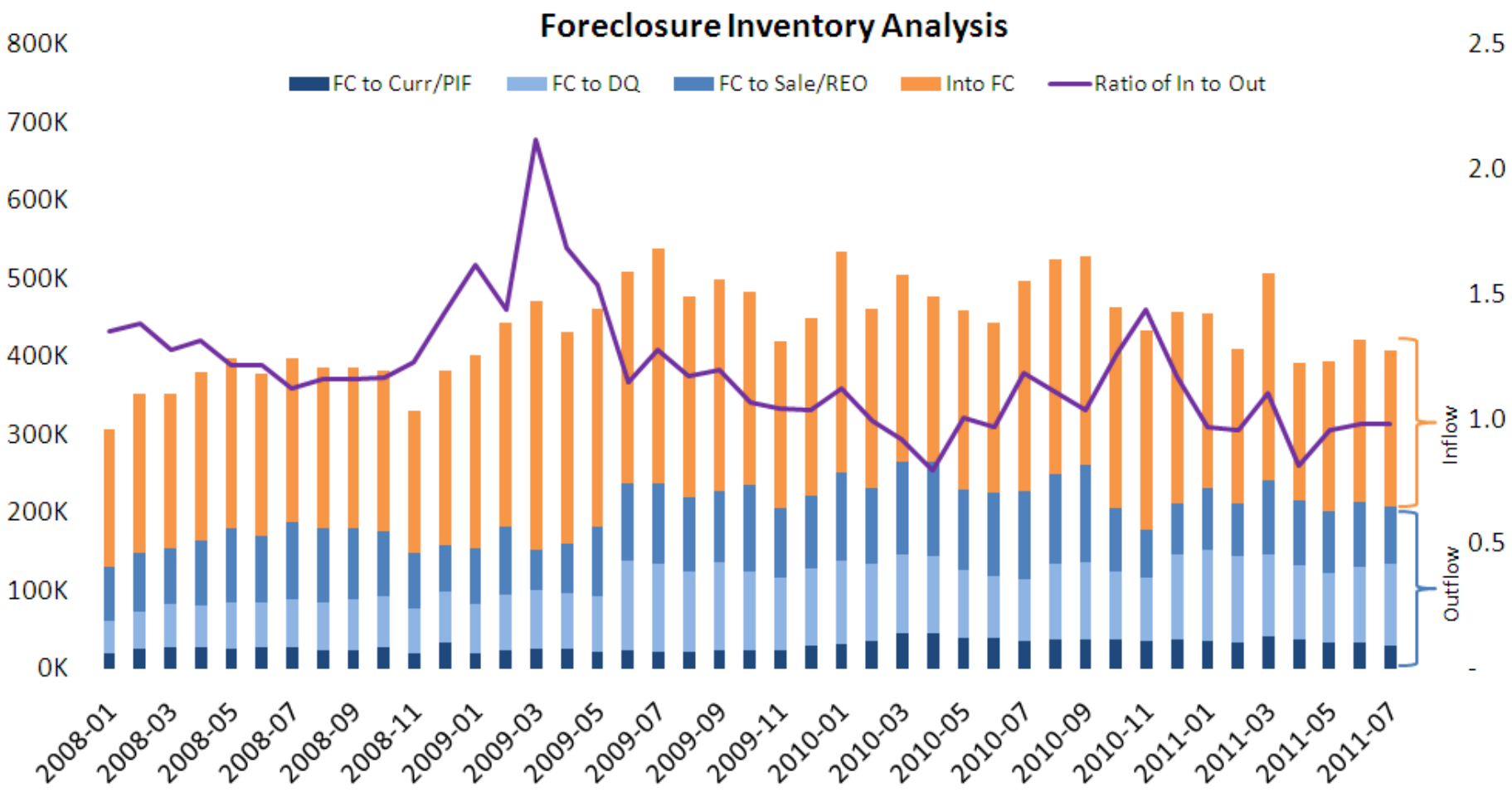
Slide Reproduced from LPS Presentation Based on July Data

Loans in foreclosure are 158 days more delinquent in judicial states



Slide Reproduced from LPS Presentation Based on June Data

Most of the foreclosure "outflow" is back into delinquency



Slide Reproduced from LPS Presentation Based on July Data

REC Foreclosure Forecast

Calendar Year	2005	2006	2007	2008	2009	2010	2011 Est	2012 Est	2013 Est
Total	57,106	73,981	182,044	368,743	399,118	243,114	144,067	287,340	205,236

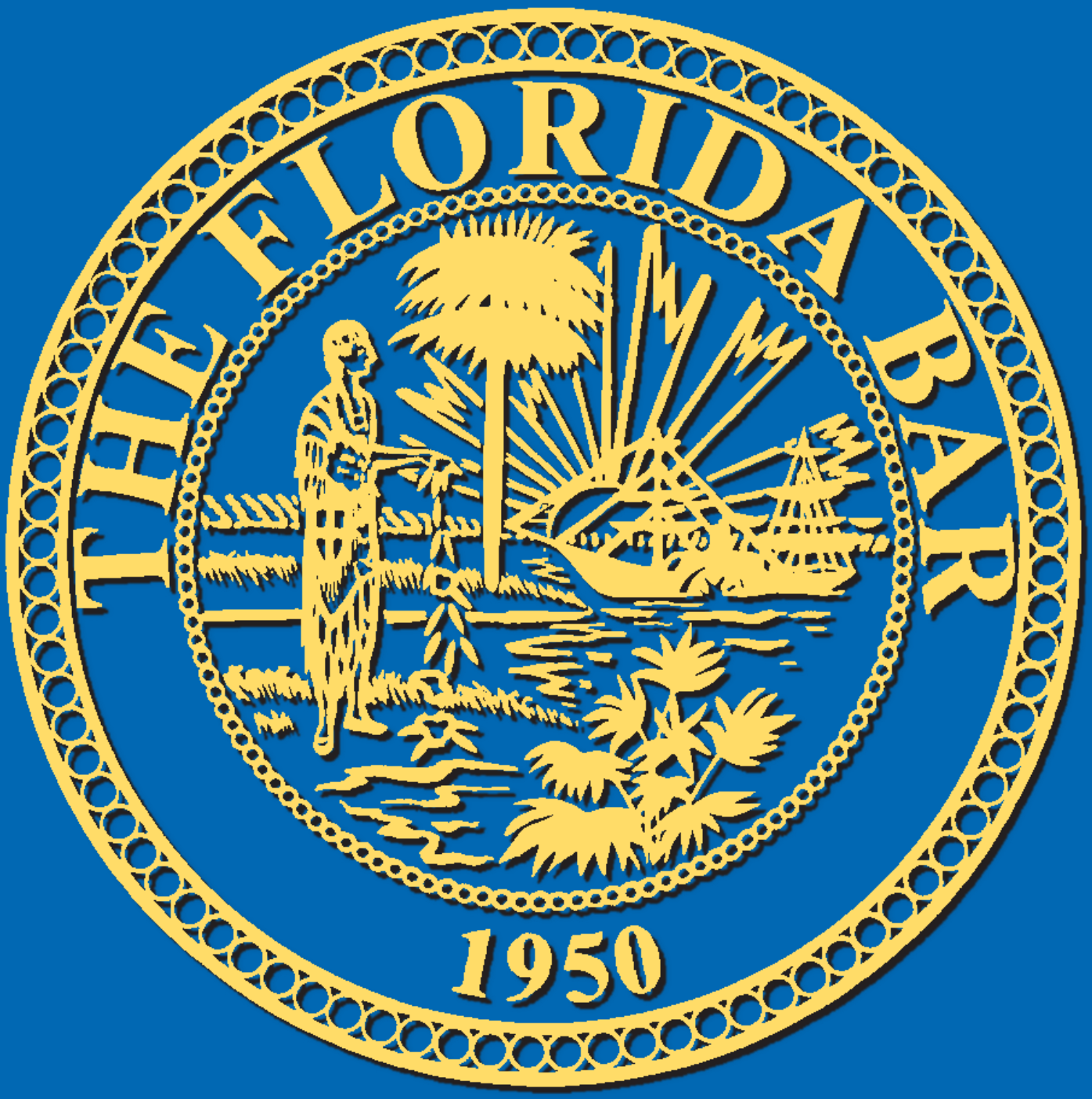
REC Foreclosure Filings: Lagged By One Month to Reflect Receipts

FY	FY 2011-12												
Month	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	TOTAL
FY 2011-12 Mo. Filings	11,675	11,014	12,812	13,942	15,172	16,511	17,967	19,552	21,277	23,154	25,197	27,420	215,695
FY 2011-12 Actual Filings	11,675	11,014	13,035										
Difference	0	0	223										

FY	FY 2012-13												
Month	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	TOTAL
FY 2012-13 Mo. Filings	29,839	31,009	27,039	24,043	20,103	19,603	19,103	18,603	18,103	17,603	17,203	16,803	259,054

FY	FY 2013-14												
Month	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	TOTAL
FY 2013-14 Mo. Filings	16,703	16,703	16,703	16,703	16,703	16,703	16,703	16,702	16,702	16,702	16,702	16,702	200,431

Robo-Signing Disruption and Moratorium: October 2010


THE FLORIDA BAR
1950

Overview of The Florida Bar

The Florida Bar is the statewide professional and regulatory organization for the practice of law. As an official arm of the Florida Supreme Court, The Florida Bar is charged with administering a statewide disciplinary system to enforce Supreme Court rules of professional conduct for the 90,000-plus lawyers admitted to practice law in Florida.

As a unified bar in which membership is mandatory, The Florida Bar and its committees concentrate legislative advocacy on matters affecting the administration of justice and the fundamental rights of Floridians. Also, through its substantive law sections (which have voluntary memberships) the profession may take positions on legislation if the subjects are within the section's expertise not divisive among a substantial segment of Bar members. The Bar's committees and sections may also provide expert counsel to legislative committees on legal and court-related matters.

The Florida Bar is governed by a 52-member board composed of lawyers representing the constituents in the judicial circuits where they practice and two non-lawyer members appointed by the Supreme Court. Headquartered in Tallahassee, the Bar also has offices in Orlando, Tampa, Fort Lauderdale, and Miami for its lawyer regulation and unlicensed practice of law operations.

The Florida Bar operates solely on fees and other revenue at no cost to Florida taxpayers.

Unlicensed Practice of Law Procedure

The Unlicensed Practice of Law (UPL) program was established by the Supreme Court of Florida to protect the public against harm caused by unlicensed individuals practicing law. The Court has given The Florida Bar the authority to investigate and take action against the unlicensed practice of law.

Complaints regarding the unlicensed practice of law are initiated by anyone who has information about the conduct. Supreme Court rules require that complaints be in writing and signed under penalty of perjury. The Bar may proceed with a complaint in its own name without a sworn complaint. The complaint may be referred to a local unlicensed practice of law committee composed of lawyers and nonlawyers located in the judicial circuit where the nonlawyer resides or where the events occurred. The Bar's primary remedy is to obtain civil injunctive relief ordering the individual to stop practicing law without a license. The Bar may also bring an action for indirect civil contempt.

Engaging in the unlicensed practice of law is a first degree felony. Criminal prosecutions are handled by the State Attorneys Offices. The Bar works closely with the State Attorney when criminal charges are brought. The Bar also works closely with the Attorney General's Office, the Office of Financial Regulation and other state agencies. The Bar hosts a quarterly consumer roundtable where the Bar and various agencies, including the Governor's Office, meet to discuss issues facing the Florida consumer.

Grievance Procedure

Inquiries into the conduct of an attorney may be initiated by a member of the public, the Bar, or any other person who has information regarding alleged misconduct. Inquiries are screened by ACAP and reviewed by Bar staff attorneys. If a possible violation warranting action is indicated, the inquiry is treated as a complaint.

Supreme Court rules require that complaints be in writing and signed under penalty of perjury. The Bar may proceed with a complaint in its own name without a sworn complaint. If the complaint cannot be proved or does not warrant discipline, Bar attorneys may dismiss the complaint. The complaint may be referred to a local grievance committee composed of lawyers and nonlawyers located in the judicial circuit where the attorney practices or where the events occurred.

The grievance committee is responsible for continuing the investigation of possible lawyer misconduct. If the committee finds probable cause to believe unprofessional conduct has occurred and further proceedings are warranted, a formal complaint against the accused attorney is filed with the Supreme Court of Florida. The court then appoints a judge as a referee to hear the case.

The referee hears testimony and receives evidence. Bar attorneys act as prosecutors before the referee, and the accused attorney is entitled to participate in the trial and may be represented by counsel.

The referee makes a report regarding whether the accused attorney has been proven guilty or not. If there is a finding of guilt, the referee will then make a recommendation to the Supreme Court as to the appropriate discipline. This report is filed with the Supreme Court of Florida. The report is reviewed by the Board of Governors to decide whether the Bar will appeal. The accused attorney also has the right to have the report reviewed. The court will ultimately issue an order regarding disciplinary sanctions that may include an admonishment, a public reprimand, suspension, or disbarment.

The Florida Bar News

November 15, 2010

Bar ramps up foreclosure-related activities

By Gary Blankenship
Senior Editor

As Florida courts struggle with a mountain of foreclosure filings and a flood of delays caused by the banking industry's paperwork difficulties, The Florida Bar has stepped up efforts to prevent mortgage-related fraud and to discipline attorneys who may be contributing to the foreclosure mess.

The Bar also has increased its cooperation with the Florida Attorney General in that office's efforts to combat foreclosure fraud. In addition, the Bar has made more resources available to lawyers and the public about foreclosure issues.

As part of its enforcement effort, Bar President Mayanne Downs has written every chief circuit judge in the state asking for help.

Downs requested that the Bar be copied with any judicial order that finds any Bar members have not acted according to the Rules Regulating The Florida Bar.

"[T]here has been intense media coverage concerning allegations of fraud in foreclosure cases, including references to circuit court orders that have found misrepresentations in filings by lawyers," Downs said in her letter. "Both The Florida Bar and our courts have a mutual interest in these serious allegations, however we haven't received many complaints about this misconduct from the judiciary. . . .

"We are asking you to request your judges to copy The Florida Bar with any order that finds members of The Florida Bar have conducted themselves contrary to the Rules Regulating The Florida Bar. I can assure you that we will act on these matters pursuant to our rules and discipline procedures."

In a separate October 19 letter to Attorney General Bill McCollum, Downs noted that the Bar has been part of the AG's Mortgage Fraud Inter-Agency Task Force, which looked at fraudulent mortgages and deceptive mortgage modifications schemes, for the past 18 months.

The Bar also has met with AG officials looking into possible misconduct by lawyers related to mortgage issues.

"Continued cooperation between our organizations can only benefit the public and restore confidence in the integrity of our legal system. Please advise me on how we can supplement these efforts and be of greater assistance," Downs wrote.

The Bar has been involved in the housing crisis through investigations related to fraud in obtaining mortgages and in scams (involving both lawyers and nonlawyers) attempting to victimize those facing foreclosure by falsely offering help in modifying loans.

More recently, the Bar has opened investigations following complaints that lawyers have been involved in reported cases of forged documents, false affidavits, forged notarized signatures, and other shortcuts taken as part of the ongoing tidal wave of foreclosures clogging courtrooms.

The Bar had already established "mortgage fraud," "loan modification," and "advertising loan modification" as separate categories of potential rules violations. It recently added "foreclosure fraud" to that list.

As of early November, the Bar had 43 pending cases involving 32 attorneys in that new category.

As of last summer, the Bar had 142 cases pending against 42 lawyers involving loan modifications, and 13 pending cases against 13 lawyers for loan modification advertisements. In the prior year, the Bar had closed 85 cases involving 72 lawyers without discipline, while 32 cases had been closed that resulted in discipline for four lawyers.

About 12 percent of the cases involving loan modification advertisements resulted in discipline, and 27 percent of those involving loan modifications resulted in discipline.

On mortgage fraud, the Bar had 19 pending cases against 18 lawyers as of last summer. In the prior year, the Bar closed 37 cases involving 32 lawyers without discipline, while another 40 cases involving 29 lawyers resulted in discipline, including 15 disbarments. Overall, 52 percent of the cases the Bar had investigated related to mortgage fraud have resulted in discipline.

Bar Ethics Counsel Elizabeth Tarbert said the Bar's Ethics Hotline has received more than 300 foreclosure-related calls from attorneys since July 1. For the 2009-10 fiscal year, the hotline got about 880 foreclosure-related calls.

The hotline is among several services the Bar is providing both for lawyers and the public.

Of particular interest to attorneys, the Bar will soon offer a free online CLE course on foreclosure filing in Florida, said Terry Hill, director of the Bar's Programs Division.

Hill said the three-and-a-half to four hours online/downloadable program will be heavily focused on the plaintiff side to provide training and education to those representing lenders, who are actually filing foreclosure cases.

Some of the training topics being considered include emphasizing the specifics of the summary judgment rule; mandatory mediation; the importance of filing defaults; what is necessary for a legitimate affidavit of diligent search; when a lost note count is legitimate; the business records exception to the hearsay rule; the role of paralegals; when bonds are necessary; a review of the holders in due course/negotiable instruments law; and service of process do's and don'ts.

Hill anticipates rolling out the free online program in December.

Twelfth Circuit Chief Judge Lee Haworth also has suggested the Bar look into the possibility of developing a foreclosure training "boot camp" for poorly performing plaintiff lawyers.

"Judges could use it as a sanction when we have repeat noncompliance," Haworth said.

The Florida Bar Consumer Protection Law Committee has made extensive resources available on the homepage of the Bar's website for both consumers and attorneys, including:

- Schedules of housing help/foreclosure workshops and clinics throughout the state.
- Information on finding an attorney and legal aid resources.
- Tips and resources on avoiding foreclosure rescue scams.
- Explanations of relevant terms in foreclosure and loan modification.
- Links to the Florida Attorney General's website and the U.S. Department of Housing and Urban Development.
- For attorneys, the site provides training resources, ethics alerts, and federal and state agency resources.

Bar Unlicensed Practice of Law Counsel Lori Holcomb said her office continues to monitor the housing crisis for UPL, but has yet to see any UPL problems associated with the fraud being uncovered in foreclosure documents, "because it is dealing with the law firms, and the nonlawyers are working under the supervision and direction of attorneys."

The UPL Department was active in filing injunctions where nonlawyers were offering loan modification services that stepped over the line into the practice of law.

"We are just not seeing that as much anymore, because of changes in the laws that preclude nonlawyers from taking up-front fees," Holcomb said.

Holcomb, who also serves as counsel for the Florida Registered Paralegal Program, cautioned that if FRPs are working for firms engaged in unethical foreclosure activities, "that could affect their registration, and they could have their registration revoked."

So far, she said, none of the paralegals involved in current investigations are FRPs.

Other Bar activities include:

• The Florida Bar has had a representative on the Attorney General's Mortgage Fraud Inter-Agency Task Force since April 2009. The Bar participated in each of the housing forums presented by the AG and the task force and has been monitoring the information exchange for both lawyer regulation and the prosecution of the unlicensed practice of law functions.

• The Florida Bar is coordinating with other state agencies, including the Office of Financial Regulation, and federal authorities in gathering information and investigating allegations.

• The Bar issued an Ethics Alert to lawyers on providing legal services to distressed homeowners, posted on the Bar's website. It was prompted by the loan modification, short sales, and other rescue services issues.

• The Bar's prosecutors in Lawyer Regulation have been working at the local level and in Tallahassee to share information with the Attorney General's Office on investigations of mutual interest and to identify any misconduct by lawyers.

The Florida Bar News

February 1, 2011

Free Bar foreclosure CLE ready for download

"Foreclosure Litigation in Florida," The Florida Bar's foreclosure plaintiff education program, is now available to all Bar members at no charge through The Florida Bar 24/7 Online CLE Catalog as an online or downloadable program.

Terry Hill, director of the Bar's Programs Division, said the four-hour program includes an overview of foreclosure filings in Florida, the players and the process, managed mediation in Florida, verified complaints, securitization, pitfalls to avoid, and rules of civil procedure.

The topics are presented by members of the judiciary as well as practitioners, including 12th Circuit Chief Judge Lee Haworth, 19th Circuit Judge Burton Conner, Boca Raton attorney Margery Golant, and Bar Ethics Counsel Elizabeth Tarbert.

The program is available at floridabar.org.

As part of the ethics segment of the presentation, Tarbert discussed the issue of what to do when false affidavits have been filed in foreclosure cases.

Tarbert said the Professional Ethics Committee has opined that an attorney has an affirmative obligation, under Rule 4-3.3 of the Rules Regulating The Florida Bar, to notify the court of a potential fraud when the attorney knows that a client has deliberately lied at a deposition. That also applies if the attorney receives information that clearly establishes that the client has perpetrated a fraud on the court by filing a false affidavit, such as when a false statement has been made in the affidavit or the affidavit has been improperly verified or notarized. Then the attorney's duty to the court supersedes the attorney's duty to the client, and the attorney must reveal the fraud to the court.

"An attorney's obligation to make disclosures under Rule 4-3.3 is triggered when the attorney knows that a client or a witness for the client has made material false statements to a tribunal and the client or witness refuses to rectify the fraud," according to Tarbert.

Tarbert said if an attorney knows that any material false representations have been made on the record by a client to any court or tribunal, then the attorney must follow the instructions in the Comment to Rule 4-3.3 and ask the client to correct these false statements on the record. If the client will consent to the appropriate disclosure to the court, then the attorney may do so. The disclosure needs to be made to the court that the affidavit was improperly verified and notarized or otherwise false.

With regard to the cases that have already been closed and judgment has already been entered, the duties and obligations under Rule 4-3.3 continue beyond the conclusion of the proceeding, Tarbert said. She stated that disclosure to the court needs to occur in cases involving closed cases as well as pending ones, noting the attorney would have to discuss this with the client and obtain consent.

Tarbert said whether the case is currently pending or already closed, if the client refuses to give consent to disclose, then the attorney must make these disclosures, preferably in an in camera proceeding if possible, adding that the court may be willing to give guidance to the attorney.

As set forth in the Comment to Rule 4-3.3, such action causes a conflict with the client, requiring withdrawal of the attorney from the representation in pending cases, where the client refuses to consent to disclosure.

Other Rules of Professional Conduct are also implicated with this issue. Rule 4-1.2(d) prohibits a lawyer from assisting a client in conduct that the lawyer knows or reasonably should know is criminal or fraudulent. Similarly, Rule 4-3.4(b) prohibits a lawyer from fabricating evidence or assisting a witness to testify falsely. Rule 4-8.4(a) prohibits a lawyer from violating the Rules of Professional

Conduct or knowingly assisting another to do so. Finally, Rule 4-8.4(c) prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, and Rule 4-8.4(d) prohibits a lawyer from engaging in conduct that is prejudicial to the administration of justice.

Tarbert said although not ethically required to withdraw if the client will permit the attorney to make the required disclosure. However, if the attorney feels compelled to withdraw, the attorney should do so in a manner that neither breaches the duty of confidentiality to the client nor materially prejudices the client. Therefore, any motion to withdraw should state only general grounds. Even if the duties of the attorney under Rule 4-3.3 are triggered, putting the information into a motion to withdraw is not a recommended way to inform the court. The Comment to Rule 4-1.6 explains that where disclosure of confidential information is necessary, the attorney should avoid any unnecessary disclosure, should limit disclosure to persons having a need to know, and obtain protective orders or make other appropriate arrangements to minimize risk of disclosure.

The Comment to Rule 4-3.3 summarizes the issue: "If perjured testimony or false evidence has been offered, the advocate's proper course ordinarily is to remonstrate with the client confidentially if circumstances permit. In any case, the advocate should ensure disclosure is made to the court. It is for the court then to determine what should be done — making a statement about the matter to the trier of fact, ordering a mistrial, or perhaps nothing."

The Florida Bar News

May 15, 2011

Beware of contracting with nonlawyers on foreclosure-related rescue services

The Florida Bar's Ethics Hotline has received many calls from lawyers who have been contacted by nonlawyers wanting to set up arrangements involving loan modifications, short sales, and other foreclosure-related rescue services on behalf of distressed homeowners.

The Bar has updated its ethics alert about providing legal services to distressed homeowners, after a Federal Trade Commission rule, effective January 31, 2011, banned providers of mortgage foreclosure rescue and loan modification services from collecting fees until homeowners have a written offer from their lender or servicer that they decided is acceptable.

The FTC issued the Mortgage Assistance Relief Services (MARS) Rule to protect distressed homeowners from mortgage relief scams that have sprung up during the mortgage crisis. Bogus operations falsely claim that, for a fee, they will negotiate with the consumer's mortgage lender or services to obtain a loan medication, a short sale, or other relief from foreclosure, according to the FTC. Many of these operations pretend to be affiliated with the government and government housing assistance programs. The FTC has brought more than 30 cases against operations like these, and state and federal law enforcement partners have brought hundreds more.

New language in the Bar's ethics alert is as follows:

> "State statutes and federal rules impose restrictions on providers of foreclosure rescue and/or loan modification services. Although The Florida Bar cannot provide legal advice, lawyers should be aware of and comply with the requirements of state and federal law. State statutes prohibit accepting advance fees and require registration of service providers. There are exceptions for lawyers, but only under specific circumstances. *See* Florida Statutes, Sections 501.1377 and 494.00115(1)(d). The Federal Trade Commission has adopted a rule on Mortgage Assistance Relief Services (MARS). The rule bans providers of mortgage foreclosure rescue and loan modification services from collecting fees *until* homeowners accept a written offer from their lender or servicer. There is an exception for lawyers who meet specific requirements **and** who place their fees into a trust account. This rule effectively bans nonrefundable fees in Florida in these cases, because nonrefundable fees cannot be placed into a trust account under the Rules Regulating The Florida Bar. *See* Rule 5-1.1(a)(1) and Florida Ethics Opinion 93-2."

According to the Bar's ethics counsel, lawyers can charge clients fees in advance if: 1) they're providing mortgage assistance relief services as part of practice of law; 2) they're licensed in the state in which their client or their client's home is located; 3) they're complying with state laws and regulations concerning attorney conduct; and 4) before they perform any services, they place the fees in a client trust account that complies with state laws and regulations. Nonattorneys who offer mortgage assistance relief services can't collect fees until their customer has accepted a written offer of mortgage relief from their lender or servicer.

Under the rule, attorneys can't withdraw fees in the client trust account before earning the fee or incurring the expense. To maintain their exemption from the rule's ban on upfront fees, attorneys must comply with all state requirements related to use of client trust accounts. Laws and regulations for attorneys vary by state, but examples of activities that likely could cause attorneys to lose their exemption include:

1) Withdrawing money from a client trust account before the attorney earns fees or incurs expenses;

2) "Front-loading" fees for mortgage relief assistance services to expedite the withdrawal of funds from a client trust account;

3) Failing to keep complete records of transactions associated with a client trust account;

4) Failing to notify a client of a withdrawal so that he or she has an opportunity to review the transaction and, if necessary, contest it; or

5) If a client contests a withdrawal, failing to keep those funds separate from other clients' and attorneys' funds.

The rule doesn't restrict the type of fees attorneys may charge their clients. Attorneys may charge any kind of fee, including flat fees, contingency fees, hourly fees, or some combination. However, before performing promised services, attorneys must deposit any fee in a client trust account. Regardless of the type of fee an attorney charges, he or she can't withdraw money from the account until fees are earned or expenses incurred. [**Note: Under Florida Bar rules, a nonrefundable retainer is earned on receipt and cannot be placed in the trust account. Therefore, the legislation does restrict what fees a lawyer can charge, because a Florida Bar member would not be able to charge a nonrefundable retainer, because the statute requires that it be placed in trust until the fees are earned.**]

This alert does not address every potential problem or concern. If you are a Florida Bar member with specific questions about your own conduct related to this type of situation, contact The Florida Bar Ethics Hotline at (800) 235-8619.

The Florida Bar News

July 15, 2011

Lawyers obligated to disclose faulty foreclosure paperwork

By Gary Blankenship
Senior Editor

Lawyers representing banks and other mortgage service companies must tell the courts if they know of paperwork problems in their clients' foreclosure cases, according to the Bar's Professional Ethics Committee.

The committee, at its June 24 meeting during the Bar's Annual Convention, voted 20-6 to uphold a Bar staff opinion which advised a lawyer representing a bank in thousands of foreclosure cases.

According to the attorney, the bank used two employees to prepare and review necessary affidavits needed for the foreclosures. One employee always verified the figures in the necessary affidavits and signed the necessary paperwork in the presence of a notary. The second signer relied on a conscientious assistant to verify the figures before signing that he had personally reviewed the figures. Also, those signatures were sometimes notarized when the signer was not present, as required by law. The second signer's practices extended back for 20 years.

The lawyer wanted to know if the court had to be informed of those irregularities, since it was unlikely to change the outcome of any pending case. He also inquired whether it made any difference if the case was pending or closed, the stage of pending cases, or that the second signer had reverified information in the improperly notarized forms.

A Bar staff opinion held it makes no difference whether the case was open or closed or what stage an open case is at in terms of the lawyer's duty. The opinion said that under Rule 4-3.3 (Candor Toward the Tribunal), the improperly prepared affidavits constitute false evidence, and the lawyer has a duty to disclose that to the courts.

Other rules must also be considered, the opinion said, including Rule 4-1.2(d) which prohibits assisting a client in criminal or fraudulent conduct, Rule 4-3.4(b) which prohibits a lawyer from fabricating evidence or assisting a witness who offers false testimony, Rule 4-8.4(a) which prohibits violating the Rules of Professional Conduct or assisting another to do so, Rule 4-8.4(c) which bars an attorney from conduct that constitutes dishonesty, fraud, deceit, or misrepresentation, and Rule 4-8.4(d) which prohibits a lawyer from conduct that is prejudicial to the administration of justice.

The staff opinion concluded that, "the inquiring attorney first should attempt to have the client correct the improperly verified and notarized affidavits. The inquiring attorney should advise the client that if the client fails to correct the affidavits, then the inquiring attorney will have to withdraw and will have to reveal the truth to the court. If the client refuses to take the required corrective action, the inquiring attorney will have to reveal the fact that there has been an improperly verified and notarized affidavit filed in each of these cases, whether they are pending or already closed. The inquiring attorney also will have to move to withdraw from further representation of the client in pending cases, where the client refuses to correct the affidavits, while making as minimal a disclosure as necessary when doing so."

The committee discussed changing the staff opinion to say the lawyer would have a duty to disclose only if it would make a material difference in the case, but in the end left it unchanged.

"I strongly urge against watering down this opinion," said committee member Ana Maria Martinez. "I understand the practical problem, but we can't approve lying for 20 years."

Added committee member Deborah A'Hearn: "Anything other than affirming the opinion, as is, is the functional equivalent of suborning perjury. We shouldn't make allowances regardless of the practical problems. It is never OK to lie."

Committee member Tim Chinaris voted to affirm the staff opinion, but said it's questionable whether it affects foreclosures done years ago.

"Our rule refers to the requirement that when there's been false evidence submitted to the court and you know about it, you have a duty to take reasonable remedial measures," he said after the meeting.

"What do you do with an 18-year-old case when no one is around, the judge is gone, the parties are gone? Is there any remedial measure at that point? Is there any way to reopen the case?" he added. "According to the people who do that work, unless a very narrow standard is met, it's a final judgment. If you have to take a reasonable remedial measure, but there's nothing that can be done, there is no remedial measure."

At the same time, it's clear that lawyers have a duty under Bar rules to act, or they could be subject to disciplinary action, Chinaris said, noting that Bar rules in this area are stricter than the ABA model rules. ABA rules specify that the duty to disclose ends when the proceeding ends, while the Bar extends it past the end of the proceeding and leaves it open-ended.

"I thought the [staff] opinion assumed a little too much and went a little too far," said committee member D. Culver "Skip" Smith, who voted against the final motion.

He noted the committee didn't have any of the affidavits in question, and it was unclear whether anything was wrong with them other than the affidavit that the signer had personal knowledge of the information in the affidavit.

"It seems to me the opinion quickly assumed this qualified as 'false evidence,'" Smith said. "The rule talks about a lawyer making a false statement of law or fact. This is not what this is. The staff opinion just assumed it should be false evidence, even if the only thing untrue in it was a notarization statement."

He also questioned what he said was the assumption in the staff opinion that such a problem would be "material," adding, "I think the lawyer should make that decision rather than us."

The question could be appealed to the Bar Board of Governors but has not been as this *News* went to press.

The issue of foreclosure paperwork and shortcuts taken in preparing it is a sensitive one in Florida, where hundreds of thousands of foreclosure cases are pending in court.

The Legislature granted extra funding last year and the courts worked to create programs to handle the extra work, but the effort was hindered when faulty paperwork came to light. That included the use of "robosigners" who signed off on, in some cases, thousands of affidavits without personally verifying the information and improper notarizations, as well as errors in paperwork.

Revelations of those problems caused banks and mortgage companies to drop many cases they had filed and slowed down the filing of new cases. At the same time, it led to more challenges to foreclosures in courts, which lengthened the time it takes for the courts to process those cases.

The Florida Bar News

August 15, 2011

Attorney suspended for involvement with nonlawyers in loan modification business

By Jan Pudlow
Senior Editor

The Florida Supreme Court granted an emergency suspension of a South Florida lawyer who participated with nonlawyers in a loan modification business, so the nonlawyers could receive upfront fees from clients they would be prohibited from receiving themselves.

The lawyer told Bar investigators that he has between 2,500 and 3,000 clients from that illegal arrangement, and admitted he has so many files he does not know the status of the clients' cases.

"This particular lawyer was apparently taken advantage of by these nonlawyers; they ended up making lots of money, and he didn't," said Kenneth Marvin, staff counsel of The Florida Bar's Lawyer Regulation Department.

"We hope to alert our members to be suspicious if they are enticed into association with nonlawyers in the loan modification business," Marvin said

The Bar's petition for emergency suspension said the lawyer is currently the subject of 20 Bar disciplinary matters filed by his clients, and the facts "establish clearly and convincingly" that the lawyer "appears to be causing great public harm."

On July 25, in case SC11-1384, the Supreme Court ordered the lawyer suspended from the practice of law until further order of the court, to accept no new clients, to cease representing any clients after 30 days of the court's order, and to stop disbursing or withdrawing any monies from any trust account related to his law practice without approval of the court.

"It is clear from their action that the Supreme Court of Florida will not tolerate this type of conduct," said Jan K. Wichrowski, chief discipline counsel in the Bar's Orlando Branch.

To protect homeowners who were in default on their mortgages or in foreclosure from fraud, deception, and unfair dealings with foreclosure-rescue consultants, in 2008, the Florida Legislature enacted §501.1377, called the Foreclosure Rescue Act.

The Bar has repeatedly warned Florida lawyers that they should be wary of associating with nonlawyer foreclosure-rescue consultants who are trying to avoid the up-front fee limitations of the statute. There have been warnings published in The Florida Bar *News* and ethics updates are posted on the Bar's website.

According to the petition, the lawyer was deposed on June 28 and admitted his law firm represents homeowners in loan modifications and foreclosure defense.

Since at least March 2010, the Bar's investigation found, the lawyer associated with a nonlawyer who is the subject of a complaint brought by the Office of the Attorney General, alleging the nonlawyer "engaged in a systematic pattern of conduct designed and intended to induce consumers to purchase their loan modification and foreclosure-related services via a series of false and fraudulent representations."

According to the Bar's investigation, the lawyer allowed nonlawyers to "improperly solicit clients on his behalf for loan modifications and foreclosure defense on a nationwide basis, despite the fact that he can only practice law in the state of Florida."

The lawyer admitted that he is aware that nonlawyers buy leads that provided names of potential clients for his law firm, according to the petition, and that he was aware that "nonlawyers telephoned potential clients to solicit their business by promising them results, such as a rate reduction on their loans."

The lawyer split fees with nonlawyers, including paying one nonlawyer $21,000 of the $26,000 fees the lawyer was paid by another law firm to take over their cases, according to the petition, and the lawyer admitted he does not supervise or train any of the nonlawyers who worked on his clients' files.

The lawyer "admits that he allows almost exclusive control of the office to the nonlawyers who control all the contact with the client from the initial call, to the fee agreement, to negotiations with the bank, and then advising the client of the outcome of their case," according to the Bar's petition.

The lawyer "admits his clients are charged between $1,500 and $3,000 up front, and that the nonlawyers determine the fee that will be charged. Respondent admits he becomes involved in his clients' cases when the client needs representation in foreclosure defense," according to the petition.

The lawyer did not return a call and email from the Bar *News* seeking comment.

*(**Editor's Note:** The name, offense, and case number of every Bar member disciplined by the Florida Supreme Court appears in the* News' *Disciplinary Actions column. The* News *does not write a separate story on every lawyer disciplined; however, when the* News *does, its intention is to inform and educate the membership about acts of first impression or when the court specifically states in its opinion that all members should be on notice that the offending conduct will not be tolerated.)*

Weathering Florida's Foreclosure Crisis

The Florida Bar provides information for the public on certain general areas of law as well as specific legal issues in our Consumer Pamphlets.

A service of the Bar's Consumer Protection Law Committee

On This Page

Help in the foreclosure crisis
Help for Consumers
Help for Attorneys
News Coverage

Help in the foreclosure crisis

The Consumer Protection Law Committee has foreclosure information for consumers and attorneys. Free housing counseling is available from www.hud.gov and NeighborhoodWorks America for people facing foreclosure. If you have been served papers, contact your local legal office immediately: www.floridalawhelp.org. The Florida Bar Lawyer Referral Service offers referrals to attorneys for low-fee consultations.

Supreme Court ruling on mediation in foreclosure cases and links to local implementing orders

Help for Consumers

Resources for Florida homeowners who are out of work, facing financial problems and trying to save their homes.

Special Housing Help/Foreclosure Workshops
A calendar of foreclosure, bankruptcy and housing help workshops and clinics being held through Florida.

Free Ongoing Clinics
A listing of workshops and clinics in Florida

Finding an Attorney/Legal Aid
Information about The Florida Bar Lawyer Referral Service, Legal Aid agencies and questions to ask an attorney.

Avoiding Foreclosure and Housing Scams
Homeowners can find tips and help from state and federal agencies to deal with housing issues and avoid becoming victims of scammers. Also relevant terms to know.

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Help for Attorneys

Resourcers for attorneys that are being asked to handle foreclosure defense and other consumer law cases that they may not have handled before; and for lawyers that are being contacted by companies offering to hire them for foreclosure-rescue or loan-modification work.

Training
The Florida Bar is offering a four-hour CLE on foreclosure free of charge. The program includes an overview of foreclosure filings in Florida, the players and the process, managed mediation in Florida, verified complaints, securitization, pitfalls to avoid, and rules of civil procedure.

Liability
Be wary of offers for hire regarding housing issues and work that seem to good to be true.

Ethics' Alerts
Be aware of what you can and cannot in helping consumers with their mortgages under Florida and U.S law as well as the Rules Regulating The Florida Bar.

Resources
Federal and state agencies have materials to help attorneys assist their clients. Also includes new cases filed with Florida Supreme Court regarding foreclosure fraud.

News Coverage

The Florida Bar ramps up foreclosure-related activities. *The Bar News* reports on what The Florida Bar is doing during the foreclosure crisis.

Foreclosure stories and editorials

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[Revised: 06-02-2011]

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THE FLORIDA SENATE

COMMITTEE APPEARANCE RECORD

(Submit to Committee Chair or Administrative Assistant)

10/4/11
Date

Bill Number

Barcode

Name John Berry

Phone 850-561-5600

Address Florida Bar
651 E. Jefferson St.
Street

E-mail

Tallahassee FLA. 32399
City State Zip

Job Title

Speaking: ☐ For ☐ Against ☒ Information

Appearing at request of Chair ☐

Subject

Representing

Lobbyist registered with Legislature: ☐ Yes ☒ No

Pursuant to s. 11.061, *Florida Statutes*, state, state university, or community college employees are required to file the first copy of this form with the Committee, unless appearance has been requested by the Chair as a witness or for informational purposes.

If designated employee: Time: from ____ ___ .m. to ____ ___ .m.

S-001 (04/14/10)

THE FLORIDA SENATE

COMMITTEE APPEARANCE RECORD

(Submit to Committee Chair or Administrative Assistant)

10/4/11
Date

Bill Number

Barcode

Name Scott Palmer

Phone

Address PL01 The Capitol
Street

E-mail

Tallahassee FL 32301
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Job Title Attorney

Speaking: ☐ For ☐ Against ☑ Information

Appearing at request of Chair ☑

Subject Foreclosures

Representing Attorney General

Lobbyist registered with Legislature: ☐ Yes ☑ No

Pursuant to s. 11.061, *Florida Statutes*, state, state university, or community college employees are required to file the first copy of this form with the Committee, unless appearance has been requested by the Chair as a witness or for informational purposes.

If designated employee: Time: from ____ ___.m. to ____ ___.m.

S-001 (04/14/10)

Florida's Court System:
Addressing the Foreclosure Crisis and Working Toward Stable Funding

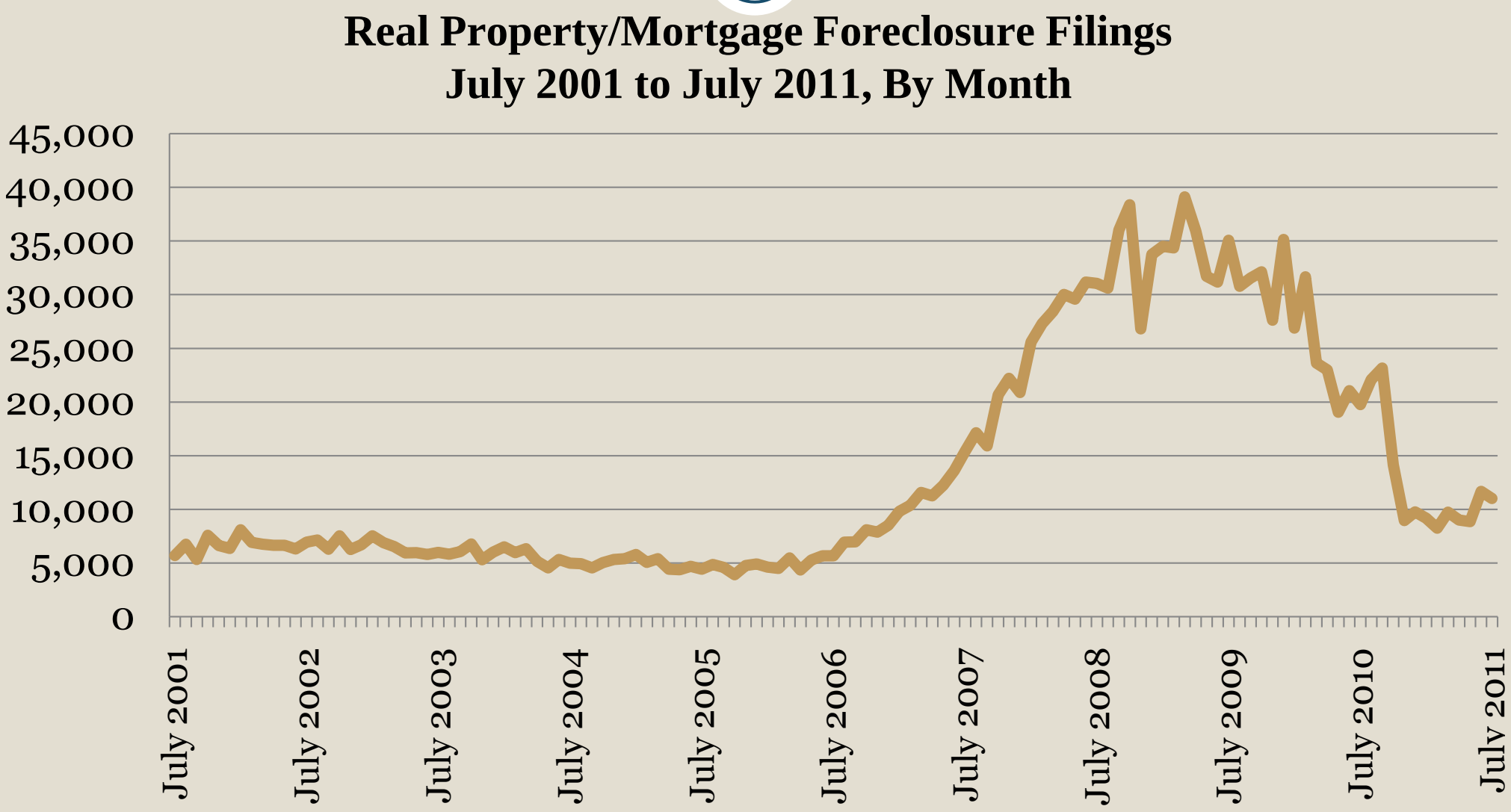
LISA GOODNER
STATE COURTS ADMINISTRATOR

OCTOBER 4, 2011

Florida Courts' Three-Prong Approach to the Foreclosure Crisis

1. Foreclosure and Economic Recovery Initiative
2. Revised Procedural Rules to Improve Case Processing
3. Managed Mediation of Mortgage Foreclosure Cases Involving Homestead Properties

Florida Foreclosure Filing Trends



Note: July 2001 to June 2010 filings were extracted from static file and are the official statistics.
July 2010 to July 2011 filings were extracted from dynamic file and may be amended at a later date.

Foreclosure and Economic Recovery Initiative

During 2010 Session, Legislature approved a statewide Foreclosure and Economic Recovery Plan to mitigate rising backlog of real property and foreclosure cases

- Authorized courts to use $6 million out of the State Courts Revenue Trust Fund
- Authorized county clerks of court to use $3.6 million from Clerk of Court Trust Fund

Foreclosure and Economic Recovery Initiative

- ✓ **43.6% of Foreclosure Backlog Cleared**
- ✓ **Clearance Rates Jumped Dramatically**

Reasons Backlog Continues

- Paperwork Problems, Resulting in:
  - Voluntary Moratorium by Major Lenders
  - Voluntary Cancellation of Hearings by Major Lenders
  - Voluntary Dismissals of Cases by Major Lenders
- Foreclosure Mills Discontinue Operations:
  - Withdrawal of David Stern Law Firm from estimated 140,000 Cases
  - Fannie Mae Pulled 15,000 Cases from Ben-Ezra & Katz Law Firm

Revised Procedural Rules to Improve Case Processing

- Amended rules to **require verification of mortgage foreclosure complaints** involving residential real property

- Adopted new form **Affidavit of Diligent Search and Inquiry** to standardize affidavits and provide information to court regarding methods used to attempt to locate and serve defendant

Revised Procedural Rules to Improve Case Processing

- Adopted new **Motion to Cancel and Reschedule Foreclosure Sale** form that requires the plaintiff to explain reason, thereby promoting effective case management and keeping properties out of extended limbo

Revised Procedural Rules to Improve Case Processing

- Amended **Final Judgment of Foreclosure** form to, among other changes:
  - Add a notice to lienholders and directions to property owners as to how to claim a right to funds remaining after public auction
  - Accommodate the option of clerks conducting judicial sales via electronic means

Managed Mediation of Foreclosure Cases Involving Homestead Properties

- In December 2009, Supreme Court established Residential Mortgage Foreclosure Mediation Program
- Mandatory adoption of a uniform, statewide managed mediation program to be implemented through a model administrative order to be issued by each circuit chief judge

Managed Mediation of Foreclosure Cases Involving Homestead Properties

- All foreclosure cases that involve residential homestead property are referred to mediation, unless:
  - plaintiff and borrower agree otherwise, or
  - effective pre-suit mediation that substantially complies with the managed mediation program requirements has been conducted

Key Determinant Report:
Residential Mortgage Foreclosure Managed Mediation Programs

Based on Referrals Received from March 2010 to March 2011

Percentage cases referred to program resulting in program manager successfully contacting borrowers	42.0%
Percentage of mediations conducted resulting in written agreement	25.4%
Percentage of mediations conducted that did not result in a written agreement	66.6%

Key Determinant Report:
Residential Mortgage Foreclosure Managed Mediation Programs

Based on Referrals Received from March 2010 to March 2011

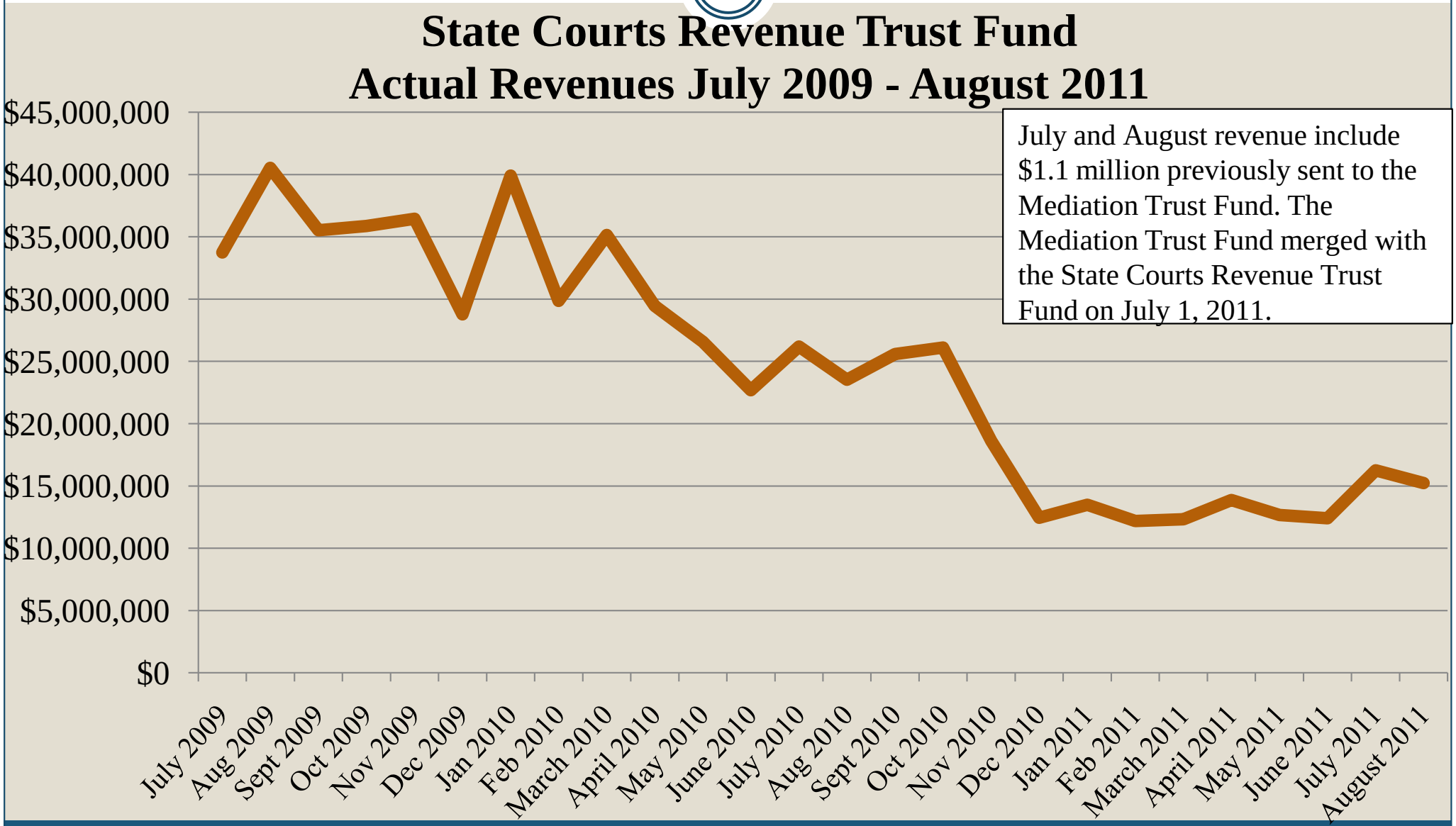
- Mediations occurred in 14% of the total referred cases
- Written settlements reached in 3.6% of total referred cases

Assessment of Statewide Managed Mediation Program

- On September 26, 2011, Chief Justice called for assessment of Statewide Managed Mediation Program
- A Workgroup will examine the data; consider information such as reduction in the backlog of foreclosure cases by other means; and make recommendations regarding the continuation, modification, or elimination of the program
- Workgroup to resent its report and recommendations to the Supreme Court on October 26, 2011

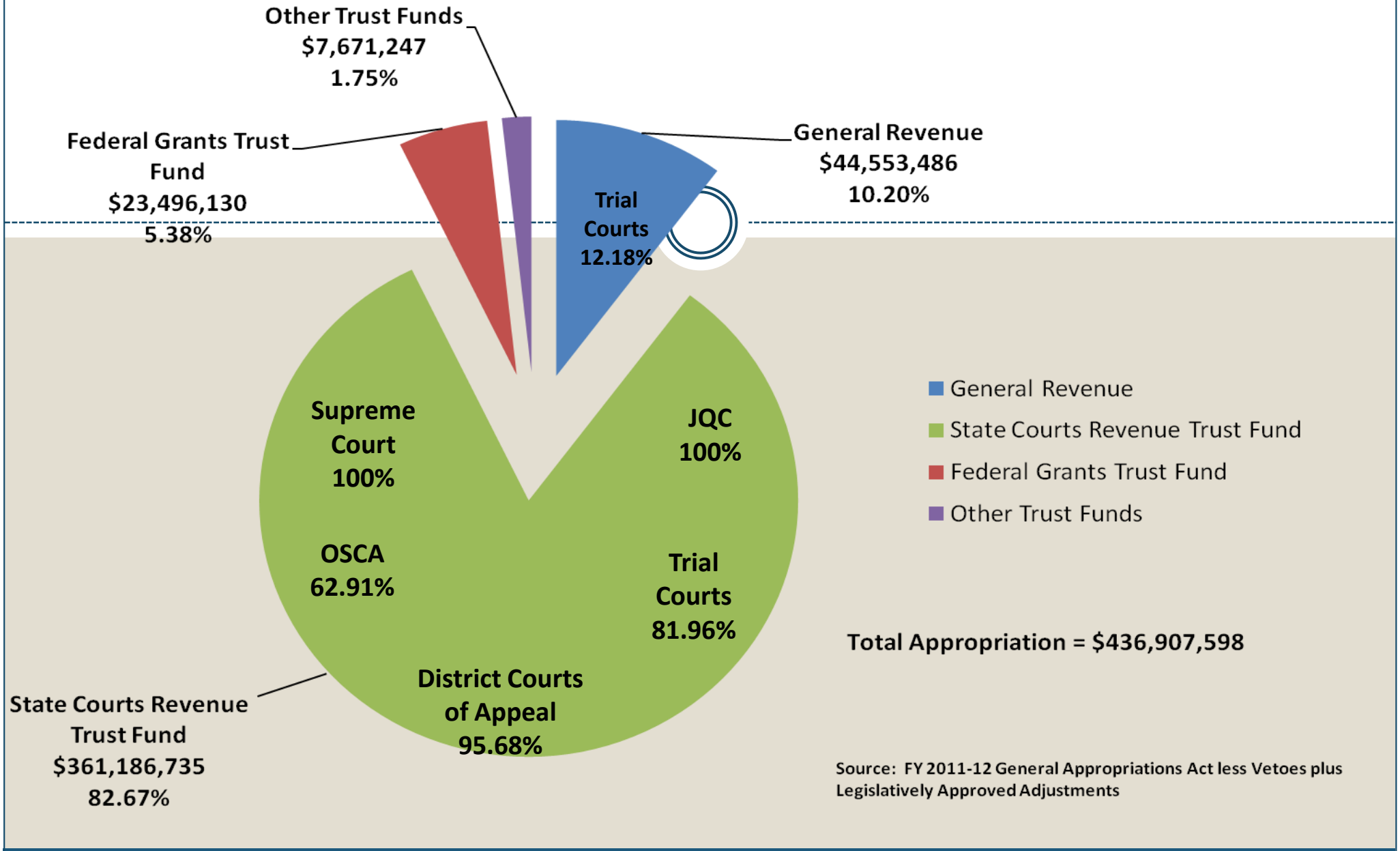
Impact of the Foreclosure Situation on Court Funding

Court Funding



Note: As reported in the Department of Revenue Consolidation Report and OSCA, Finance and Accounting.

State Courts System FY 2011-12 Budget by Funding Source



Source: FY 2011-12 General Appropriations Act less Vetoes plus Legislatively Approved Adjustments

Funds Needed to Support Appropriations

- Fiscal Year 2010/11
  - ✓ $14.3 Million from Other State Court Trust Funds
  - ✓ $19.5 Million from Other State Funds
  - ✓ $19.4 Million Supplemental Appropriation

  $53 Million to Support Appropriated Budget

- Fiscal Year 2011/12
  - ✓ $54.0 Million Loan Authorized by Legislature
  - ✓ $45.6 Million Pending Request

  $99.6 Million to Get Through March 2012

Working to Stabilize Court Funding

[T]he Office of the State Courts Administrator shall work with the Clerk of Courts Operations Corporation to jointly develop and recommend … appropriate Article V revenue streams to be directed to the State Courts Revenue trust fund and the Clerk of Court Trust Fund to eliminate problems with cash flow in both funds and to ensure revenue streams are adequate to support appropriations.

Proviso Language, Conference Report, SB 2000

Revenue Stabilization Workgroup

Judges and Clerks of Court working collaboratively on report to the Legislature on November 1.

Questions?

Key Determinant 120 Day Quarterly Status Report

Residential Mortgage Foreclosure Managed Mediation Programs

Number of Events - Based on Referrals Received from March 2010 to March 2011 (Each Referral Tracked 120 Days)

As of August 2011

State Total by Type of Event and Quarter

	120 Day Status for Referrals Received from March 2010 to March 2011					
Type of Event	March 2010	Fourth Quarter FY 2009-10 (April 2010 to June 2010)	First Quarter FY 2010-11 (July 2010 to September 2010)	Second Quarter FY 2010-11 (October 2010 to December 2010)	Third Quarter FY 2010-11 (January 2011 to March 2011)	Total (March 2010 to March 2011)
Total Form A Referrals Received for the Month - Case Eligible	3,196	10,390	28,505	21,212	14,773	78,076
Total Borrowers Contacted	1,575	4,420	11,318	8,891	6,594	32,798
Total Mediations Scheduled	878	2,596	4,709	3,567	2,669	14,419
Total Mediations Conducted	540	1,838	3,844	2,877	2,052	11,151
Total Form A Referrals Closed with Failure to Appear - Borrower Only	39	116	279	206	150	790
Total Form A Referrals Closed with Failure to Appear - Lender Only	11	66	156	60	60	353
Total Form A Referrals Closed with Failure to Appear - Both Borrower and Lender	0	2	24	10	16	52
Total Form A Referrals Closed with Written Agreements	204	596	946	644	445	2,835
Total Form A Referrals Closed without Written Agreements	331	1,184	2,517	1,957	1,437	7,426
Total Form A Referrals Pending After 120 Days	227	838	2,282	1,917	1,311	6,575

Notes:

1. March 2010 includes Circuits 1, 4, 11, and 19. April 2010 and May 2010 include Circuits 1, 3, 4, 11, 14, and 19. June 2010 includes Circuits 1, 2, 3, 4, 11, 14, 17, 18, and 19. July 2010 includes all circuits except Circuit 13 (program began in August 2010). All circuits are included from August 2010 forward.
2. Total Form A Referrals Pending After 120 Days includes, but is not limited to, cases in Bankruptcy, returned cases after a notice of non participation was issued, mediations adjourned, plaintiff's counsel withdrawing, unpaid fees, cases dismissed, and mediations re-scheduled.
3. This report does not include statistics for Osceola and Seminole Counties.

Key Determinant 120 Day Quarterly Status Report

Residential Mortgage Foreclosure Managed Mediation Programs

Percentages - Based on Referrals Received from March 2010 to March 2011 (Each Referral Tracked 120 Days)

As of August 2011

State Total by Type of Event and Quarter

	120 Day Status for Referrals Received from March 2010 to March 2011					
Type of Event	March 2010	Fourth Quarter FY 2009-10 (April 2010 to June 2010)	First Quarter FY 2010-11 (July 2010 to September 2010)	Second Quarter FY 2010-11 (October 2010 to December 2010)	Third Quarter FY 2010-11 (January 2011 to March 2011)	Total (March 2010 to March 2011)
The percentage of cases referred to the program that result in the program manager successfully contacting borrowers.	49.3%	42.5%	39.7%	41.9%	44.6%	42.0%
The percentage of scheduled mediations failing to go forward because plaintiff's representative did not appear.	1.3%	2.5%	3.3%	1.7%	2.2%	2.4%
The percentage of scheduled mediations failing to go forward because the borrower did not appear.	4.4%	4.5%	5.9%	5.8%	5.6%	5.5%
The percentage of scheduled mediations failing to go forward because the borrower and lender did not appear.	0.0%	0.1%	0.5%	0.3%	0.6%	0.4%
The percentage of mediations conducted resulting in a written agreement.	37.8%	32.4%	24.6%	22.4%	21.7%	25.4%
The percentage of mediations conducted that did not result in a written agreement.	61.3%	64.4%	65.5%	68.0%	70.0%	66.6%

Notes:

1. March 2010 includes Circuits 1, 4, 11, and 19. April 2010 and May 2010 include Circuits 1, 3, 4, 11, 14, and 19. June 2010 includes Circuits 1, 2, 3, 4, 11, 14, 17, 18, and 19. July 2010 includes all circuits except Circuit 13 (program began in August 2010). All circuits are included from August 2010 forward.
2. This report does not include statistics for Osceola and Seminole Counties.

Key Determinant 120 Day Quarterly Status Report

Residential Mortgage Foreclosure Managed Mediation Programs

Number of Events - Based on Referrals Received from March 2010 to March 2011 (Each Referral Tracked 120 Days)

As of August 2011

By Circuit and Type of Event

Circuit	Total Form A Referrals Received for the Month-Case Eligible	Total Borrowers Contacted	Total Mediations Scheduled	Total Mediations Conducted	Referrals Closed with Failure to Appear-Borrower Only	Total Form A Referrals Closed with Failure to Appear-Lender Only	Referrals Closed with Failure to Appear-Both Borrower and Lender	Total Form A Referrals Closed with Written Agreements	Total Form A Referrals Closed without Written Agreements	Total Form A Referrals Pending After 120 Days
1	2,962	1,446	761	584	44	33	2	277	307	348
2	829	511	307	272	6	29	0	126	92	81
3	411	174	84	79	1	6	0	28	41	3
4	6,630	2,073	695	534	25	8	2	108	349	204
5	4,266	1,449	766	725	29	12	0	155	545	146
6	5,680	3,011	1,287	1,105	56	2	0	229	715	245
7	2,873	877	332	50	2	0	2	7	39	496
8	597	274	90	85	4	1	2	27	36	42
9	4,258	1,291	536	404	19	1	1	73	326	263
10	2,042	772	351	306	19	6	4	76	230	200
11	16,806	7,335	3,668	2,611	209	73	5	740	1,871	2,488
12	2,333	830	335	292	11	6	0	90	202	395
13	3,567	1,764	446	348	18	7	0	82	213	149
14	796	363	171	156	7	4	0	82	74	85
15	4,632	1,407	699	419	45	8	2	77	340	336
16	416	299	80	72	2	6	0	31	37	80
17	7,238	3,303	1,279	1,213	159	53	16	206	687	160
18	3,019	1,320	558	511	47	52	15	78	294	68
19	4,750	2,316	1,079	849	47	35	1	213	636	481
20	3,971	1,983	895	536	40	11	0	130	392	305
Total	**78,076**	**32,798**	**14,419**	**11,151**	**790**	**353**	**52**	**2,835**	**7,426**	**6,575**

Notes:

1. March 2010 includes Circuits 1, 4, 11, and 19. April 2010 and May 2010 include Circuits 1, 3, 4, 11, 14, and 19. June 2010 includes Circuits 1, 2, 3, 4, 11, 14, 17, 18, and 19. July 2010 includes all circuits except Circuit 13 (program began in August 2010). All circuits are included from August 2010 forward.
2. Total Form A Referrals Pending After 120 Days includes, but is not limited to, cases in Bankruptcy, returned cases after a notice of non participation was issued, mediations adjourned, plaintiff's counsel withdrawing, unpaid fees, cases dismissed, and mediations re-scheduled.
3. This report does not include statistics for Osceola and Seminole Counties.

Key Determinant 120 Day Quarterly Status Report

Residential Mortgage Foreclosure Managed Mediation Programs

Percentages - Based on Referrals Received from March 2010 to March 2011 (Each Referral Tracked 120 Days)

As of August 2011

By Circuit and Key Determinate

Circuit	Borrower Contacted Percentage	Mediations- Lender Failure to Appear Percentage	Mediations- Borrower Failure to Appear Percentage	Mediations- Both Borrower and Lender Failure to Appear Percentage	Mediations With Written Agreement Percentage	Mediations Without Agreement Percentage
1	48.8%	4.3%	5.8%	0.3%	47.4%	52.6%
2	61.6%	9.4%	2.0%	0.0%	46.3%	33.8%
3	42.3%	7.1%	1.2%	0.0%	35.4%	51.9%
4	31.3%	1.2%	3.6%	0.3%	20.2%	65.4%
5	34.0%	1.6%	3.8%	0.0%	21.4%	75.2%
6	53.0%	0.2%	4.4%	0.0%	20.7%	64.7%
7	30.5%	0.0%	0.6%	0.6%	14.0%	78.0%
8	45.9%	1.1%	4.4%	2.2%	31.8%	42.4%
9	30.3%	0.2%	3.5%	0.2%	18.1%	80.7%
10	37.8%	1.7%	5.4%	1.1%	24.8%	75.2%
11	43.6%	2.0%	5.7%	0.1%	28.3%	71.7%
12	35.6%	1.8%	3.3%	0.0%	30.8%	69.2%
13	49.5%	1.6%	4.0%	0.0%	23.6%	61.2%
14	45.6%	2.3%	4.1%	0.0%	52.6%	47.4%
15	30.4%	1.1%	6.4%	0.3%	18.4%	81.1%
16	71.9%	7.5%	2.5%	0.0%	43.1%	51.4%
17	45.6%	4.1%	12.4%	1.3%	17.0%	56.6%
18	43.7%	9.3%	8.4%	2.7%	15.3%	57.5%
19	48.8%	3.2%	4.4%	0.1%	25.1%	74.9%
20	49.9%	1.2%	4.5%	0.0%	24.3%	73.1%
Total	**42.0%**	**2.4%**	**5.5%**	**0.4%**	**25.4%**	**66.6%**

Notes:

1. March 2010 includes Circuits 1, 4, 11, and 19. April 2010 and May 2010 include Circuits 1, 3, 4, 11, 14, and 19. June 2010 includes Circuits 1, 2, 3, 4, 11, 14, 17, 18, and 19. July 2010 includes all circuits except Circuit 13 (program began in August 2010). All circuits are included from August 2010 forward.
2. This report does not include statistics for Osceola and Seminole Counties.

Foreclosure and Economic Recovery Status Report

Number of Additional Real Property/Mortgage Foreclosure Cases Added to Backlog and Percent of Cases Disposed

Quarter Ending September 2006 through June 2011

Quarter	Number of Additional Backlog Cases Added[1]	Clearance Rate[2]
July - September 2006	4,184	78.6%
October - December 2006	8,689	64.5%
January - March 2007	13,748	57.0%
April - June 2007	16,808	54.7%
July - September 2007	26,192	45.9%
October - December 2007	38,778	39.8%
January - March 2008	49,989	38.5%
April - June 2008	50,937	43.9%
July - September 2008	52,864	45.9%
October - December 2008	49,103	50.4%
January - March 2009	50,025	53.7%
April - June 2009	36,397	63.2%
July - September 2009	35,012	64.0%
October - December 2009	28,887	69.5%
January - March 2010	13,392	83.7%
April - June 2010	-17,393	127.6%
July - September 2010	-16,508	125.4%
October - December 2010	-17,866	154.4%
January - March 2011	-24,790	191.5%
April - June 2011	-30,946	205.0%

[1] Number of Additional Backlog Cases Added was determined by subtracting the number of SRS dispositions from the number of SRS filings for the quarters ending September 30, 2006 through June 30, 2011.

[2] Clearance Rate was determined by dividing the number of SRS dispositions by the number of SRS filings for the quarters ending September 30, 2006 through June 30, 2011.

Note: The backlog of mortgage foreclosure cases was significantly reduced during the year-long initiative. With more than 200,000 cases disposed, the backlog fell from more than 462,000 cases to under 261,000 cases. The clearance rates, as can be seen above, jumped dramatically during the initiative.

It is important to note that beginning in the second quarter of the year, the number of cases disposed decreased significantly and that trend continued for the rest of the year. However, this was due in large part to the voluntary moratorium imposed by some of the major lenders in Florida. In addition, it was reported that almost half of scheduled hearings were cancelled due to the voluntary moratorium in late 2010.

It is also important to note that half of the total cases disposed during the year were dismissed. Dismissals, which can occur for a number of reasons, may take place after a hearing by a judge, at the request by the plaintiffs' attorney or following a review by a case manager. Variances in case management practices may influence which cases are scheduled for hearings, which would affect the number of dismissals and summary/final judgments.

Foreclosure and Economic Recovery Status Report
Balance of Backlog
First, Second, Third, and Fourth Quarters in FY 2010-11

Circuit	Real Property/ Mortgage Foreclosure Backlog as of June 30, 2010[1]	First Quarter in FY 2010-11 Initiative Dispositions[2] (July 2010 to September 2010)	Second Quarter in FY 2010-11 Initiative Dispositions[2] (October 2010 to December 2010)	Third Quarter in FY 2010-11 Initiative Dispositions[2] (January 2011 to March 2011)	Fourth Quarter in FY 2010-11 Initiative Dispositions[2] (April 2011 to June 2011)	Total FY 2010-11 Initiative Dispositions[2]	Balance of Backlog After FY 2010-11 Initiative[3]
1	10,979	1,098	983	842	1,433	4,356	6,623
2	3,460	417	370	399	335	1,521	1,939
3	1,115	220	211	245	152	828	287
4	17,916	2,436	1,739	3,407	2,768	10,350	7,566
5	16,281	1,008	1,105	1,084	800	3,997	12,284
6	31,791	3,575	1,750	868	745	6,938	24,853
7	18,440	3,792	2,086	1,643	1,854	9,375	9,065
8	1,926	536	519	446	375	1,876	50
9	39,700	7,816	5,322	4,478	4,747	22,363	17,337
10	11,045	3,159	1,614	1,378	1,805	7,956	3,089
11	75,326	5,553	5,154	8,177	12,164	31,048	44,278
12	21,617	2,305	3,122	1,405	2,048	8,880	12,737
13	32,843	4,207	1,720	449	380	6,756	26,087
14	3,897	854	506	388	546	2,294	1,603
15	46,438	10,234	3,948	3,949	4,582	22,713	23,725
16	2,259	183	233	372	245	1,033	1,226
17	48,675	9,651	3,768	3,670	3,838	20,927	27,748
18	27,117	3,557	2,375	1,767	2,152	9,851	17,266
19	19,061	1,273	501	932	800	3,506	15,555
20	32,453	9,707	4,717	6,210	4,322	24,956	7,497
Total	**462,339**	**71,581**	**41,743**	**42,109**	**46,091**	**201,524**	**260,815**

[1] Real Property/Mortgage Foreclosure Backlog as of June 30, 2010 was determined by subtracting the number of SRS dispositions from the number of SRS filings for July 1, 2006 through June 30, 2010.

[2] Initiative Dispositions are based on data that is provided to the OSCA on a monthly basis by each trial court. First, second, third, and fourth quarter data are the reported information on cases disposed using the new resources. Total represents the sum of the first, second, third, and fourth quarters. In addition, Desoto County and Okeechobee County did not receive Foreclosure and Economic Recovery funding and are not included above.

[3] Balance of Backlog After FY 2010-11 Initiative was determined by subtracting the Total FY 2010-11 Initiative Dispositions from the number of Real Property/Mortgage Foreclosure Backlog as of June 30, 2010.

Foreclosure and Economic Recovery Status Report

Type of Dispositions[1]

July 1, 2010 through June 30, 2011

Circuit	Dismissed	Summary/ Final Judgment	Trial	Other[2]	Unidentified	Total Disposed
1	2,727	1,624	3	2	0	4,356
2	794	676	4	47	0	1,521
3	512	309	0	7	0	828
4	5,531	4,615	1	1	202	10,350
5	2,877	1,082	3	35	0	3,997
6	1,329	5,602	1	6	0	6,938
7	4,254	5,103	11	7	0	9,375
8	931	759	6	180	0	1,876
9	8,830	13,529	3	1	0	22,363
10	3,517	4,430	1	8	0	7,956
11	23,794	7,224	30	0	0	31,048
12	5,067	3,728	79	6	0	8,880
13	226	6,530	0	0	0	6,756
14	1,187	1,107	0	0	0	2,294
15	11,638	11,044	31	0	0	22,713
16	729	303	1	0	0	1,033
17	8,838	12,088	1	0	0	20,927
18	5,695	4,075	19	62	0	9,851
19	2,042	1,454	4	2	4	3,506
20	13,608	11,348	0	0	0	24,956
Total	**104,126**	**96,630**	**198**	**364**	**206**	**201,524**

[1] Type of Dispositions are based on the initiative data that is provided to the OSCA on a monthly basis by each trial court. These data represent the reported information on cases disposed from July 1, 2010 through June 30, 2011 using the new resources. In addition, Desoto County and Okeechobee County did not receive Foreclosure and Economic Recovery funding and are not included above.

[2] Other is used to report cases disposed when they are: administratively dismissed, consolidated into a primary case, transferred or have a change of venue, etc.

Note: Numerous methods are used by the circuits to calendar real property/mortgage foreclosure cases which could affect the number of dismissals and summary/final judgments within a circuit. These methods are: 1) following a review by a case manager; 2) at the request of the plaintiffs' attorney; and 3) after hearing by a judge. The majority of circuits calendar hearings following a case review by a case manager. These cases are calendared for either a case management or lack of prosecution hearing. A number of circuits also calendar cases at the request of the plaintiffs' attorneys. These cases are either calendared based upon the request alone or based upon the request and ensurance that the case meets the threshold for a summary/final judgment.

Foreclosure and Economic Recovery Status Report

Case Status[1]

As of June 30, 2011

Circuit	Cases Disposed	Cases Active[2]	Cases Inactive[3]	Cases Stayed[4]
1	4,356	113	6,586	61
2	1,521	1,190	1,407	15
3	828	184	249	35
4	10,350	11,743	6,557	304
5	3,997	705	13,431	1
6	6,938	5,332	24,178	218
7	9,375	5	10,721	389
8	1,876	1,466	641	21
9	22,363	7,154	31,273	16
10	7,956	6,020	4,614	168
11	31,048	50,785	1,730	0
12	8,880	3,390	10,405	166
13	6,756	26,757	379	9
14	2,294	2,461	1,380	54
15	22,713	32,157	5,619	142
16	1,033	1,040	755	26
17	20,927	24,781	28,202	0
18	9,851	103	22,466	26
19	3,506	16,757	4,017	91
20	24,956	4,069	5,570	518
Total	**201,524**	**196,212**	**180,180**	**2,260**

[1] Cases Status is based on the initiative data that is provided to the OSCA on a monthly basis by each trial court. Cases Disposed represent the reported information on dispositions from July 1, 2010 through June 30, 2011 using the new resources and the status of the remaining pending cases. In addition, Desoto and Okeechobee Counties did not receive Foreclosure and Economic Recovery funding and are not included above.

[2] Cases Active represents those cases the court is actively working to resolve. Court administration may not be made aware immediately when a case moves from inactive to active status.

[3] Cases Inactive represents cases where judicial action cannot be concluded due to extenuating circumstances. This includes, but is not limited to, cases inactive due to attorney inactivity, cases with insufficient pleadings or documentation, cases involved in mediation/settlement negotiations, and other similar matters. It is important to note that all cases at the beginning of the initiative in July 2010 were identified as inactive.

[4] Cases Stayed includes bankruptcy cases, cases pending resolution of another case, cases where there is an agreement of the parties, and cases pending appeal.

Form completed by Erin Madura, staff director

THE FLORIDA SENATE

COMMITTEE APPEARANCE RECORD

(Submit to Committee Chair or Administrative Assistant)

10/4/11
Date

NA
Bill Number

Barcode

Name Lisa Goodner

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Job Title

Speaking: ☐ For ☐ Against ☑ Information

Appearing at request of Chair ☐

Subject Invited presenter on mortgage foreclosure

Representing

Lobbyist registered with Legislature: ☒ Yes ☐ No

Pursuant to s. 11.061, *Florida Statutes*, state, state university, or community college employees are required to file the first copy of this form with the Committee, unless appearance has been requested by the Chair as a witness or for informational purposes.

If designated employee: Time: from ___ .m. to ___ .m.

S-001 (04/14/10)

The Florida Senate

Issue Brief 2012-219 *September 2011*

Committee on Judiciary

ISSUES IN EVIDENCE LAW

Statement of the Issue

The Legislature and the Florida Supreme Court share jurisdiction related to evidence law. The Florida Evidence Code, codified in ch. 90, F.S., is a product of the Legislature. Section 90.102, F.S., specifies that the chapter replaces and supersedes existing statutory or common law in conflict with its provisions. However, the Supreme Court has constitutional authority over practice and procedure in all courts. Recognizing that the Evidence Code is both substantive and procedural in nature, the Court has adopted the Evidence Code as originally enacted as well as later amended by the Legislature. However, the Court has on occasion declined to adopt amendments enacted by the Legislature.

The Legislature regularly considers changes to the Evidence Code. In recent sessions, measures have been proposed, but not ultimately adopted, to revise the standard for Florida courts to admit expert witness testimony and to bring that standard into conformity with Federal Rule of Evidence 702 and the standard articulated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). *Daubert* requires a federal judge, upon a proffer of expert testimony, to serve as gatekeeper to determine whether the methodology underlying the testimony is scientifically valid. In making the determination, the judge under *Daubert* may consider additional factors specified in *Daubert* and other decisions applying the case. Currently, Florida courts employ the standard articulated in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), which requires the party who wants to introduce the expert opinion testimony into evidence to show that the methodology or principle has sufficient reliability.

Aside from the issue of expert witness testimony, other evidence issues periodically arise as a result of decisions of courts and through experiences of trial practitioners. For example, according to a recent Florida Supreme Court decision, Florida statutes barring the admission of evidence of settlements do not contain implicit exceptions to admit the evidence – even to impeach or show bias.[1] Additionally, Florida's Evidence Code does not recognize the hearsay exception of forfeiture by wrongdoing, unlike numerous other states' evidence codes and the Federal Rules of Evidence. This fact could give defendants in Florida the ability to exclude hearsay statements made by a witness who would be available to testify but for wrongdoing by the defendant for the purpose of preventing the witness from testifying.

The purpose of this issue brief is to review recent, current, and emerging issues in the area of evidence law.

Discussion

Article II, section 3 of the Florida Constitution provides that "[t]he powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein."[2] The Florida Supreme Court has explained that the separation-of-powers doctrine recognizes two fundamental prohibitions imposed on each branch of government.[3] The Court explained that "'[t]he first is that no branch may encroach upon the powers of another. The second is that no branch may delegate to another branch its constitutionally assigned

[1] *Saleeby v. Rocky Elson Construction, Inc.*, 3 So. 3d 1078, 1086 (Fla. 2009).
[2] *See also Bush v. Schiavo*, 885 So. 2d 321, 329 (Fla. 2004).
[3] *Whiley v. Scott*, 2011 WL 3568804 at 3 (Fla. 2011) (quoting *Chiles v. Children A, B, C, D, E, & F*, 589 So. 2d 260, 264 (Fla. 1991).

power.'"[4] Under the state's constitutional framework, the Legislature has authority to enact substantive laws, while the Florida Supreme Court has authority to govern practice and procedure in all state courts.[5]

The Florida Evidence Code is statutory, as enacted and amended by the Legislature and codified in ch. 90, F.S. There is a balance between the jurisdiction of Legislature and the Florida Supreme Court on matters relating to evidence. The Legislature continues to revise ch. 90, F.S., and the Supreme Court tends to adopt these changes as rules. The Supreme Court regularly adopts amendments to the Evidence Code as rules of court when it is determined that the matter is procedural rather than substantive. The Court has on very infrequent occasions rejected legislative amendments to the Evidence Code as rules of court.[6]

There has not been tremendous activity in the area of Florida evidence law in the past few years. This discussion, however, provides an overview of some recent revisions to the Evidence Code and the applicable rules of court procedure, as well as some current and emerging issues in the law of evidence.

Repeal of Deadman's Statute

The "Deadman's Statute" was codified in s. 90.602, F.S. (2004), and provided that no person interested in an action or proceeding could testify as a witness against the personal representative, heir at law, assignee, legatee, devisee, or survivor of a deceased person, or against an assignee, committee, or guardian of a mentally incompetent person, regarding any oral communication between the interested person and the person who is deceased or is now mentally incompetent.

The prohibition of the Deadman's Statute did not apply if any of the representatives of the deceased or incompetent person testified on his or her own behalf regarding the communication. The prohibition also did not apply if any of the representatives of the deceased or incompetent person offered evidence of the subject matter of the oral communication.

Section 90.602, F.S., was Florida's version of a traditional common law rule of evidence which declared that "certain interested persons are incompetent to testify in an action against an estate."[7] The Deadman's Statute prohibited an interested party from testifying regarding any oral communication between the interested person and the person who is deceased or mentally incompetent.[8] The main purpose of the prohibition on testimony by an interested party was to protect the decedent's estate from false or fraudulent claims.[9]

The Legislature abolished the Deadman's Statute in 2005.[10] The Legislature also enacted a hearsay exception to allow the introduction of written or oral statements previously made by an unavailable declarant, when other testimony from the declarant on the same subject matter had already been introduced by an adverse party.[11] The Florida Supreme Court in 2007 adopted the changes to the Evidence Code previously enacted by the Legislature.[12]

Character Evidence – Other Crimes, Wrongs, or Acts of Child Molestation

The Legislature amended s. 90.404(2), F.S., to allow for the admission of evidence of other crimes, wrongs, or acts of child molestation when a defendant is charged with a crime involving child molestation and to provide that

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[4] *Id*.
[5] *See, e.g., Benyard v. Wainwright*, 322 So. 2d 473, 475 (Fla. 1975).
[6] *See, e.g., In re Amendments to the Fla. Evidence Code*, 782 So. 2d 339 (Fla. 2000) (Florida Supreme Court adopting Evidence Code to the extent it is procedural and rejecting hearsay exception as a rule of court); *compare with In re Florida Evidence Code*, 372 So. 2d 1369 (Fla. 1979) (Florida Supreme Court adopting Florida Evidence Code to the extent it is procedural), *clarified by* 376 So. 2d 1161 (Fla. 1979).
[7] 24 FLA. JUR. 2D *Evidence and Witnesses* s. 773 (2011).
[8] *Id.*
[9] *Moneyhun v. Vital Industries, Inc.*, 611 So. 2d 1316, 1320 (Fla. 1st DCA 1993).
[10] Chapter 2005-46, s. 1, Laws of Fla.
[11] *Id*. at s. 2 (amending s. 90.804, F.S.). *See also* The Florida Bar Continuing Legal Education Materials, "Topics in Evidence 2010" (Mar. 4, 2010).
[12] *See In re Amendments to the Fla. Evidence Code*, 960 So. 2d 762 (Fla. 2007).

such evidence may be considered for its bearing on any matter to which it is relevant.[13] The amendments added a new paragraph (b) to s. 90.404(2), F.S., to bring the statute into conformity with Federal Rule of Evidence 414, Evidence of Similar Crimes in Child Molestation Cases.[14] The Code and Rules of Evidence Committee of the Florida Bar recommended against adopting the amendments to s. 90.404(2), F.S., "based upon the inherent conflicts between the new legislation and sections 90.104(2) (the court should prevent inadmissible evidence from being suggested to the jury), 90.404(1) (character evidence is inadmissible to prove person acted in conformity with that character trait), and 90.404(2)(a) (similar fact evidence is inadmissible when relevant only to prove bad character or propensity)."[15]

The Florida Supreme Court declined to follow the committee's recommendation and adopted the changes as enacted by the Legislature to extent they were procedural.[16] The Court adopted s. 90.404(2)(b), F.S., in a divided opinion that did not address the constitutional issues.[17] In a subsequent decision, the Court considered the constitutionality of s. 90.404(2)(b), F.S., and held that the law comports with due process when applied in a case in which the identity of the defendant is not an issue, the provision is used to corroborate the testimony of the alleged victim of child molestation, and the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.[18]

In 2008, the Legislature further amended the statute to incorporate additional acts within the definition of child molestation.[19] For purposes of s. 90.404(2)(b), F.S., the definition of child molestation was modified to include conduct prohibited under s. 847.0135(5), F.S.[20] Under the amended definition of child molestation, such conduct includes the commission of lewd or lascivious exhibition when a person transmits certain acts over the computer when he or she knows or has reason to believe it is being viewed by a victim under 16 years. The prohibited acts include intentionally masturbating, exposing the genitals in a lewd or lascivious manner, or committing other sexual acts not involving actual physical or sexual contact with the victim. In 2011, the Supreme Court adopted the legislative amendments to s. 90.404(2)(b), F.S., to the extent they are procedural.[21]

Psychotherapist-Patient Privilege

In 2006, the Legislature amended s. 90.503, F.S., to revise the definition of psychotherapist for purposes of the psychotherapist-patient privilege.[22] The expanded definition includes advanced registered nurse practitioners whose primary scope of practice is the diagnosis or treatment of mental or emotional conditions, including chemical abuse, as provided within the scope of practice of the advanced nurse's practice as outlined by the Nurse Practice Act under ch. 464, F.S. An evidentiary privilege prohibits the discovery, subpoena, or admission of what otherwise might be admissible evidence in a legal proceeding.[23] Under the psychotherapist-patient privilege, a patient's records and communications between a psychotherapist and a patient are generally confidential when made for the purposes of diagnosis or treatment of a mental or emotional condition.[24] For purposes of the psychotherapist-patient privilege in s. 90.503, F.S., the Supreme Court adopted the broadened definition of psychotherapist in 2007.[25]

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[13] Chapter 2001-221, s. 1, Laws of Fla.
[14] *See In re Amendments to the Fla. Evidence Code*, 825 So. 2d 339, 340 n. 1 (Fla. 2002).
[15] See the concurring opinion by Justice Pariente in *In re Amendments to the Fla. Evidence Code*, 825 So. 2d at 341.
[16] *In re Amendments to the Fla. Evidence Code*, 825 So. 2d at 340-41.
[17] *See id.* at 341-42.
[18] *McLean v. State*, 934 So. 2d 1248, 1261-63 (Fla. 2006).
[19] Chapter 2008-172, s. 9, Laws of Fla.
[20] *Id.*
[21] *See In re Amendments to the Fla. Evidence Code*, 53 So. 3d 1019 (Fla. 2011).
[22] Chapter 2006-204, s. 1, Laws of Fla.
[23] *See The Florida Bar v. Forrester*, 818 So. 2d 477, 481-82 (Fla. 2002).
[24] Section 90.503(2), F.S.
[25] *In re Amendments to the Fla. Evidence Code*, 960 So. 2d 762, 763 (Fla. 2007).

Doctrine of Forfeiture by Wrongdoing

Under the doctrine of forfeiture by wrongdoing, a person who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation of his or her witnesses.[26] The doctrine of forfeiture by wrongdoing is in part an equitable doctrine in which courts curtail attempts by a defendant who seeks to undermine the judicial process by procuring or coercing silence from witnesses and victims.[27] At least one legal scholar has argued that the common law doctrine of forfeiture by wrongdoing is a part of Florida's common law confrontation jurisprudence incorporated under the Sixth Amendment via the Fourteenth Amendment of the United States Constitution.[28]

Additionally, forfeiture by wrongdoing is a common law hearsay exception in many jurisdictions.[29] Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.[30] Under the Florida Evidence Code, except as provided by statute, hearsay evidence is inadmissible.[31]

Section 90.803, F.S., lists 24 hearsay exceptions that do not depend upon the availability of the declarant as a witness. Although the hearsay exceptions listed in s. 90.803, F.S., are out-of-court statements, they are believed to provide trustworthy and reliable information so that, despite the lack of in-court testimony, exclusion of the evidence may be avoided.[32] Section 90.804, F.S., specifies a category of five hearsay exceptions that apply when a declarant is unavailable due to a privilege against testifying, lack of memory, death or then-existing illness or infirmity, refusal to testify, or an inability to procure the person's presence at the hearing.

Under Federal Rule of Evidence 804(b)(6), the doctrine of forfeiture by wrongdoing is codified as a hearsay exception to make admissible "[a] statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." Additionally, several states have adopted a comparable hearsay exception that allows out-of-court statements to be admitted where the witness is unavailable to testify at trial and proof is established that the unavailability of the witness was due to misconduct on the part of the defendant.[33]

In *Chavez v. State*, the Florida First District Court of Appeal held that the trial court was in error as a matter of law to admit hearsay evidence of a criminal defendant's threats to harm his wife based on the legal doctrine of forfeiture by wrongdoing.[34] The First District Court of Appeal rejected the state's argument that the doctrine of forfeiture by wrongdoing is applicable in Florida as a common law hearsay exception under s. 90.102, F.S., "which provides that the Florida Evidence Code replaces or supersedes only conflicting statutory or common law."[35] The court reasoned that s. 90.802, F.S., "prohibits courts from admitting hearsay 'except as provided by statute.'"[36] The court additionally found that under the facts in *Chavez*, "[t]here [was] no evidence that [the] Appellant killed his wife with the intent to make her unavailable as a witness."[37] Based on the express statutory exclusion of the hearsay testimony under s. 90.802, F.S., the court declined to create a broad rule allowing the admission of the testimony in *Chavez*.[38] The court noted "that if a broader view of the forfeiture by wrongdoing doctrine was accepted by [the] court, [the court] would be required to craft procedures to ensure the reliability of

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[26] 21A AM. JUR. 2D *Criminal Law* s. 1094 (2011).
[27] *Cf.* 21A AM. JUR. 2D *Criminal Law* s. 1094 (2011).
[28] Timothy M. Moore, *Forfeiture by Wrongdoing: A Survey and An Argument for Its Place in Florida*, 9 FLA. COASTAL L. REV. 525, 572-74 (2008).
[29] *See Chavez v. State*, 25 So. 3d 49, 51 (Fla. 1st DCA 2009).
[30] Section 90.801, F.S.
[31] Section 90.802, F.S.
[32] *Cf.* Charles W. Ehrhardt, *Florida Evidence*, s. 803 (2006 edition).
[33] *See* 23 C.J.S. *Criminal Law* s. 1174; *see also* Moore, *supra* note 28, at 562-63.
[34] *Chavez*, 25 So. 3d at 51.
[35] *Id*. at 52.
[36] *Id*. at 51.
[37] *Id*. at 52.
[38] *Id*. at 53.

such statements, as well as a procedure to make a factual determination that the defendant had engaged in the wrongdoing."[39]

Florida's Evidence Code does not recognize the hearsay exception of forfeiture by wrongdoing, unlike numerous other states' evidence codes and the Federal Rules of Evidence.

Admission of Settlement Evidence for Impeachment Purposes

Section 768.041(3), F.S., provides that the fact of a release or covenant not to sue or that any defendant has been dismissed by order of the court shall not be made known to the jury. Florida courts have interpreted the statute as a prohibition on informing the jury that a witness was a prior defendant, whether the defendant was dismissed by release or settlement or by court order.[40] Under s. 90.408, F.S., evidence of an offer to compromise a claim that was disputed as to validity or amount, as well as any relevant conduct or statements made in negotiations concerning a compromise, is inadmissible to prove liability or absence of liability for the claim or its value. Thus, "[s]ection 90.408[, F.S.,] only excludes evidence of a compromise or settlement which is offered to prove 'liability or absence of liability for the claim or its value.'"[41] Until the Florida Supreme Court decided the case of *Saleeby v. Rocky Elson Construction, Inc.*,[42] it appeared that if the evidence of settlement or compromise was offered under s. 90.408, F.S., for another purpose, it could be admitted for that purpose, such as to show proof of bias or prejudice.[43] Evidence that a testifying witness has previously settled may be probative to show the motive or self-interest of a testifying witness.[44]

In *Saleeby*, the Supreme Court dealt with the issue of whether evidence of a prior settlement may be admitted to impeach the testimony of a witness.[45] The Supreme Court reviewed the decision of the Fourth District Court of Appeal in *Saleeby*, which directly conflicted with the decision of the Third District Court of Appeal in *Ellis v. Weisbrot*, and held that ss. 768.041 and 90.408, F.S. (2006), prohibit the admission at trial of any evidence of settlement or dismissal of a defendant.[46] In *Saleeby*, the plaintiff, a construction worker who was injured and rendered a paraplegic when roof trusses collapsed on him, sued both the company that installed the roof trusses and the manufacturer of the trusses.[47] The president of the manufacturer of the roof trusses testified in a deposition before trial that the trusses were manufactured properly but collapsed due to faulty installation.[48] The manufacturer was dismissed from the suit after entering a settlement with the plaintiff. The plaintiff called the president of the manufacturer as a witness who testified during trial that the trusses collapsed due to improper installation.[49] The trial court overruled the construction company's objection that the manufacturer's president, who was offered as a fact witness, be prohibited from testifying as an expert witness on industry building standards and the construction company's conformity with such standards.[50] The trial court granted the construction company motion that it be allowed to impeach the manufacturer's president with evidence that the manufacturer had previously been a defendant and had subsequently settled with the plaintiff.[51]

The trial court's rationale in *Saleeby* was founded on a belief "that the evidence went to the witness's bias because [the manufacturer's president's] trial testimony was based on the opinions he formulated when [the manufacturer] was a defendant in the case."[52] The jury returned a verdict for the construction company. The injured construction worker appealed to the Fourth District Court of Appeal, arguing that ss. 768.041 and 90.408, F.S. (2006),

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[39] *Id.*
[40] *See, e.g.*, *Ellis v. Weisbrot*, 550 So. 2d 15 (Fla. 3d DCA 1989).
[41] Charles W. Ehrhardt, 1 Fla. Prac., Evidence s. 408.1 (2011 edition).
[42] *Saleeby v. Rocky Elson Construction, Inc.*, 3 So. 3d 1078 (Fla. 2009).
[43] *Cf.* Ehrhardt, *supra* note 41.
[44] *Cf. id.*
[45] *Saleeby*, 3 So. 3d 1078.
[46] *Id.* at 1080.
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.* at 1080-81.
[51] *Id.* at 1081.
[52] *Id.*

prohibited the admission of evidence of settlement and that violation of these statutes is clear and reversible error.[53]

The Fourth District Court of Appeal affirmed the trial court reasoning in applying *Dosdourian v. Carsten*,[54] a previous Florida Supreme Court decision that held "[s.] 90.408[, F.S.,] excludes evidence of a settlement to prove liability; courts may, however, admit settlement-related evidence if offered for other purposes, such as proving witness bias or prejudice."[55] The Supreme Court rejected this reasoning in *Saleeby* because the facts did not involve Mary Carter agreements between the witness and the parties to the litigation.[56] The Supreme Court found the facts dissimilar to those in *Dosdourian*, where the Court expressly found the settlement agreement requiring the defendant to remain and participate in the litigation was a Mary Carter style agreement.[57] A Mary Carter agreement is a contract by which one or more, but not all, codefendants settle with the plaintiff and obtain a release, along with a provision granting them a portion of any recovery from the nonparticipating defendants.[58] The *Saleeby* Court interpreted "the plain language of sections 768.041(3) and 90.408[, F.S., as] expressly prohibit[ing] the admission at trial of evidence of settlement and that a defendant has been dismissed from the suit."[59] Legal scholars have criticized the decision's exclusion of evidence relating to a prior settlement when such evidence is offered for other relevant purposes other than to show liability or the invalidity or amount of the pending claim.[60]

Admission of Expert Testimony (*Daubert* or *Frye* Standard)

Expert testimony has been used to assist the trier of fact in both civil and criminal trials for a wide range of subjects, including polygraph examination, battered woman syndrome, child abuse cases, and serum blood alcohol. The Florida Rules of Civil Procedure define an "expert witness" as a person duly and regularly engaged in the practice of a profession who holds a professional degree from a university or college and has had special professional training and experience, or one possessed of special knowledge or skill about the subject upon which called to testify.[61] Courts use expert witness testimony when scientific, technical, or other specialized knowledge may assist the trier of fact in understanding evidence or determining facts in issue during litigation. The Florida Evidence Code provides that the facts or data upon which an expert bases an opinion or inference may be those perceived by, or made known to, the expert at or before trial. If the facts or data are of a type reasonably relied upon by experts in the subject to support the opinion expressed, the facts or data need not be admissible in evidence.[62] The Florida Supreme Court has considered the issue of whether experts can testify on direct examination that they relied on the hearsay opinions of other experts in forming their opinions.[63] The Supreme Court has held that an expert is not permitted to testify on direct examination that the expert relied on consultations with colleagues or other experts in reaching his or her opinion because it impermissibly permits the testifying experts to bolster their opinions and creates the danger that the testifying experts will serve as conduits for the opinions of others who are not subject to cross-examination.[64] The Court emphasized that its holding did not preclude experts from relying on facts or data that are not independently admissible if the facts or data are a type reasonably relied upon by experts in the subject.[65]

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[53] *Id.*
[54] *Dosdourian v. Carsten*, 624 So. 2d 241 (Fla. 1993).
[55] *Saleeby v. Rocky Elson Construction, Inc.*, 965 So. 2d 211, 215-16 (Fla. 4th DCA 2007), *review granted*, 977 So. 2d 577 (Fla. 2008), *and decision quashed*, 3 So. 3d 1078 (Fla. 2009).
[56] *Saleeby*, 3 So. 3d at 1083-86.
[57] *Id.*
[58] BLACK'S LAW DICTIONARY 989 (7th ed. 1999). *See, e.g.*, *Booth v. Mary Carter Paint Co.*, 202 So. 2d 8 (Fla. 2d DCA 1967).
[59] *Saleeby*, 3 So. 3d at 1086.
[60] Michael L. Seigel, Robert J. Hauser, and Allison D. Sirica, "An Unsettling Outcome: Why the Florida Supreme Court Was Wrong to Ban All Settlement Evidence in *Saleeby v. Rocky Elson Construction, Inc.*, 3 So. 3d 1078 (Fla. 2009)," ExpressO, *available at* http://works.bepress.com/michael_seigel/3 (unpublished paper as of Aug. 25, 2011).
[61] Fla. R. Civ. P. 1.390(a).
[62] Section 90.704, F.S.
[63] *Linn v. Fossum*, 946 So. 2d 1032 (Fla. 2006).
[64] *Id.* at 1033.
[65] *Id.*

Frye Standard

To admit scientific testimony into evidence, Florida courts currently use the standard governing the admissibility of scientific expert testimony imposed in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).[66] If the subject matter involves new or novel scientific evidence, the *Frye* standard requires the party who wants to introduce the expert opinion into evidence to show that the methodology or principle has sufficient reliability. In *Frye*, the court held that the "principle or discovery" must be sufficiently established to "have gained general acceptance in the particular field in which it belongs."[67]

The Florida Supreme Court imposes four steps in its articulation of the *Frye* test:

1. The trial judge must determine whether such expert testimony will assist the jury in understanding the evidence or in determining a fact in issue.
2. The trial judge must decide whether the expert's testimony is based on a scientific principle or discovery that is "sufficiently established to have gained general acceptance in the particular field in which it belongs."
3. The trial judge must determine whether a particular witness is qualified as an expert to present opinion testimony on the subject in issue.
4. The judge may then allow the expert to render an opinion on the subject of his or her expertise, and it is then up to the jury to determine the credibility of the expert's opinion, which it may either accept or reject.[68]

The Florida Supreme Court noted that, under *Frye*, the court's inquiry focuses only on the general acceptance of the scientific principles and methodologies upon which an expert relies to give his or her opinion.[69] The *Frye* test is satisfied through the court's finding of proof of general acceptance of the basis of an expert's opinion.[70] Once the basis or foundation is established for an expert's opinion, the finder of fact may then assess and weigh the opinion for its value.[71]

The *Frye* test is not applicable to all expert opinion proffered for admissibility into evidence. If the expert opinion is based solely on the expert's experience and training, and the opinion does not rely on something that constitutes new or novel scientific tests or procedures, then it may be admissible without meeting the *Frye* standard.[72] By example, Florida courts admit medical expert testimony concerning medical causation when based solely on the expert's training and experience.[73] One court in determining the admissibility of medical expert testimony noted that *Frye* was not applicable to medical testimony (pure opinion) because the expert relied on his analysis of medical records and differential diagnosis rather than a study, test, procedure, or methodology that constituted new or novel scientific evidence.[74]

Florida Rules of Evidence

The Florida Evidence Code is codified in ch. 90, F.S. Section 90.102, specifies that the chapter replaces and supersedes existing statutory or common law in conflict with its provisions. As previously noted, the Florida Supreme Court regularly adopts amendments to the Evidence Code as rules of court when it is determined that the matter is procedural rather than substantive. The Florida Evidence Code requires an expert to demonstrate knowledge, skill, experience, training, or education in the subject matter to qualify as an expert.[75] In a concurring opinion, one justice has argued that the Florida Supreme Court has "never explained how *Frye* has survived the

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[66] *Stokes v. State*, 548 So. 2d 188 (Fla. 1989).
[67] *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923).
[68] *Ramirez v. State*, 651 So. 2d 1164, 1166-67 (Fla. 1995).
[69] *Marsh v. Valyou*, 977 So. 2d 543, 548-49 (Fla. 2007).
[70] *Id*.
[71] *Id*.
[72] *Id.* at 548. *See also* Charles W. Ehrhardt, *Florida Evidence*, s. 702.3 (2011 edition).
[73] *See, e.g., Cordoba v. Rodriguez*, 939 So. 2d 319, 322 (Fla. 4th DCA 2006); *Fla. Power & Light Co. v. Tursi*, 729 So. 2d 995, 996 (Fla. 4th DCA 1999).
[74] *Gelsthorpe v. Weinstein*, 897 So. 2d 504, 510-11 (Fla. 2d DCA 2005).
[75] Section 90.702, F.S.

adoption of the rules of evidence."[76] Justice Anstead also noted that the Florida Supreme Court has continued to apply *Frye* in determining the admissibility of scientific expert opinion testimony after the adoption of the Florida Rules of Evidence, but has done so without any mention that the rules do not mention *Frye* or the test set out in *Frye*.[77]

Daubert Standard

The *Frye* standard was used in federal courts until 1993 when the U.S. Supreme Court issued its opinion in the case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[78] The U.S. Supreme Court held that Federal Rule of Evidence 702 had superseded the *Frye* test, and it announced a new standard for determining the admissibility of novel scientific evidence.[79] Under the *Daubert* test, when there is a proffer of expert testimony, the judge as a gatekeeper must make "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue."[80] The Court announced other factors that a court may consider as part of its assessment under the *Daubert* test for the admissibility of expert scientific testimony:

- Whether the scientific methodology is susceptible to testing or has been tested;
- Whether the theory or technique has been subjected to peer review and publication;
- Whether in the case of a particular scientific technique, the court ordinarily should consider the known or potential rate of error; and
- The existence and maintenance of standards controlling the technique's operation.[81]

Federal Rule of Evidence 702 was amended in 2000 to reflect *Daubert* and other decisions applying *Daubert*.[82] In *General Electric Co. v. Joiner*, the U.S. Supreme Court held that abuse of discretion is the appropriate standard of review for an appellate court to apply when reviewing a trial court's decision to admit or exclude evidence under *Daubert*.[83] In *Kumho Tire Co. v. Carmichael*, the Court held that a trial judge is not bound by the specific factors outlined in *Daubert*, but depending on the circumstances of the particular case at issue, the judge may consider other factors in his or her assessment under *Daubert*.[84] Additionally, the Court in *Kumho Tire Co.* held that the trial judge's obligation to be a gatekeeper is not limited to scientific testimony but extends to all expert testimony.[85]

The *Weisgram v. Marley Co.* case, a part of the *Daubert* progeny, was a wrongful death action against a manufacturer of heaters in which the plaintiff introduced expert testimony that the alleged heater defect caused a house fire.[86] The Court held that a federal appellate court may direct the entry of judgment as a matter of law when the court determines that evidence was erroneously admitted at trial and the remaining evidence that was properly admitted is insufficient to support the jury verdict.[87] The plaintiffs obtained a jury verdict based on the expert testimony that the heater was defective and that the heater's defect caused the fire.[88] The U.S. Supreme Court affirmed the Court of Appeals' reversal of the jury verdict, finding that the expert testimony offered by the plaintiff was speculation under Federal Rule of Evidence 702 as explicated in *Daubert* regarding the defectiveness of the heater.[89] The Court found the plaintiff's fears unconvincing that "allowing [federal] courts of appeals to direct the entry of judgment for defendants will punish plaintiffs who could have shored up their cases by other

[76] Justice Anstead concurring in *Marsh*, 977 So. 2d at 551.
[77] *Id.*
[78] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).
[79] *Id.*
[80] *Id.* at 592-93.
[81] *Id.* at 592-94.
[82] Fed. R. Evid. 702, Advisory Committee Notes for 2000 Amendments.
[83] *General Electric Co. v. Joiner*, 522 U.S. 136, 139 (1997).
[84] *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147-52 (1999).
[85] *Id.*
[86] *Weisgram v. Marley Co.*, 528 U.S. 440 (2000).
[87] *Id.* at 445-46.
[88] *Id.*
[89] *Id.* at 445-47.

means had they known their expert testimony would be found inadmissible."[90] The Court stated that *Daubert* put parties on notice regarding the exacting standards of reliability demanded of expert testimony.[91]

Legislative Proposal

In Florida, during the 2011 Regular Session, legislation was introduced, but not adopted, to revise the standard for Florida courts to admit expert witness testimony so that it would be in conformity with Federal Rule of Evidence 702 and the standard articulated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[92] The legislation provided the following additional criteria for a court to consider in determining whether an expert witness may testify in the form of an opinion or otherwise in a case:

- The testimony is based on sufficient facts or data;
- The testimony is the product of reliable principles and methods; and
- The witness has applied the principles and methods reliably to the facts of the case.

The proposed legislation required Florida courts to interpret and apply requirements for the admissibility of expert witness testimony and the determination of the basis of an expert's opinion, in accordance with *Daubert* and subsequent U.S. Supreme Court decisions applying *Daubert*.[93]

As noted, Florida courts currently employ the standard articulated in *Frye v. United States*, which requires the party who wants to introduce the expert opinion testimony into evidence to show that the methodology or principle has sufficient reliability. Under the legislation, *Frye* and subsequent Florida decisions applying or implementing *Frye* would no longer apply to a court's determination of the admissibility of expert witness testimony in the form of opinion and a court's determination of the basis of the expert's opinion.

Exclusion of Witnesses

Section 90.616, F.S., specifies requirements for the exclusion of witnesses. The section states that "[a]t the request of a party the court shall order, or upon its own motion the court may order, witnesses excluded from a *proceeding* so that they cannot hear the testimony of other witnesses" (emphasis added). Section 90.616(2), F.S., specifies that the following may not be excluded as witnesses from a proceeding: a party who is a natural person; in a civil case, an officer or employee of a party that is not a natural person; a person whose presence is shown by the party's attorney to be essential to the presentation of the party's cause; and, in a criminal case, the victim of the crime, the victim's next of kin, the parent or guardian of a minor child victim, or a lawful representative of such person, unless upon motion, the court determines such person's presence to be prejudicial.

It is unclear under current Florida decisions and s. 90.616, F.S., whether the term "proceeding" includes depositions for purposes of the requirements of the statute.[94] The Fourth District Court of Appeal in *Dardashti v. Singer* held that a trial court abused its discretion in denying the defendant's motion to compel the exclusion of the plaintiff's wife during the taking of the plaintiff's deposition.[95] However, the First District Court of Appeal in *Smith v. Southern Baptist Hospital of Florida, Inc.*, disagreed with *Dardashti* because the court found that Florida's unwritten rule of exclusion of witnesses was applicable at the "trial of cases, not depositions."[96]

In the absence of a written Florida law authorizing courts to prohibit witnesses from attending depositions, the First District Court of Appeal noted that "[t]he presence of witnesses at a deposition is controlled by Florida Rule of Civil Procedure 1.280(c), a written rule adopted by the Florida Supreme Court of Florida, which provides that upon a motion by a party and for good cause shown, the court in which an action is pending may enter a

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[90] *Id.* at 455-56.
[91] *Id.*
[92] *See, e.g.*, SB 822 and HB 391 (2011 Reg. Session).
[93] *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).
[94] *See, e.g.*, *Dardashti v. Singer*, 407 So. 2d 1098, 1099-1100 (Fla. 4th DCA 1982); *Smith v. Southern Baptist Hosp. of Florida, Inc.*, 564 So. 2d 1115, 1117 (Fla. 1st DCA 1990).
[95] *Dardashti*, 407 So. 2d at 1099-1100.
[96] *Smith*, 564 So. 2d at 1117.

protective order that discovery may be conducted with no one present except persons designated by the court."[97] The First District Court of Appeal also examined several federal decisions that have held that the applicable exclusion rule, Federal Rule of Evidence 615, applies to court proceedings and Federal Rule of Civil Procedure 26(c), which relates to a duty to disclose and discovery, applies to depositions.[98] A party may request exclusion of a witness and a court on own its motion may order that a witness be excluded from a deposition under s. 90.616, F.S. Section 90.616, F.S., had not yet been adopted as a procedural rule by the Florida Supreme Court when the *Smith* decision was rendered. In 1993, the Florida Supreme Court adopted s. 90.616, F.S., to the extent it concerns court procedure, and such amendments were effective the date the legislation became law.[99]

In the absence of express language in the exclusion law which authorizes courts to prohibit a witness from attending depositions, and in light of the conflicting district court of appeal decisions, the ambiguity as to whether a "proceeding" under s. 90.616, F.S., applies to depositions remains. A 1993 amendment to Federal Rule of Civil Procedure 30(c), which relates to depositions by oral examination, resolved ambiguities as to the applicability of the exclusion rule[100] to depositions for federal litigation.[101] Federal Rule of Civil Procedure 30(c) currently provides that Federal Rule of Evidence 615 does not apply to depositions, although exclusion can be ordered by a federal court under Federal Rule of Civil Procedure 26(c)(5), when appropriate.[102]

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[97] *Id. See also* Humberto H. Ocariz, *Sequestration of Witnesses: Invoking the Rule and Sanctions for Violations* (2010) (on file with the Senate Committee on Judiciary).
[98] *Smith*, 564 So. 2d at 1117.
[99] See ch. 90-174, s. 2, Laws of Fla.; *In re Florida Evidence Code*, 638 So. 2d 920 (Fla. 1993).
[100] Fed. R. Evid. 615.
[101] *See, e.g.*, Ocariz, *supra* note 97.
[102] See Advisory Committee Notes on 1993 Amendments to Federal Rule of Civil Procedure 30(c), 146 F.R.D. 401, 664 (1993) ("[Federal c]ourts have disagreed, some holding that witnesses should be excluded through invocation of Rule 615 of the evidence rules, and others holding that witnesses may attend unless excluded by an order under Rule 26(c)(5). The revision provides that other witnesses are not automatically excluded from a deposition simply by the request of a party. Exclusion, however, can be ordered under Rule 26(c)(5) when appropriate; and, if exclusion is ordered, consideration should be given as to whether the excluded witnesses likewise should be precluded from reading, or being otherwise informed about, the testimony given in the earlier depositions. The revision addresses only the matter of attendance by potential deponents, and does not attempt to resolve issues concerning attendance by others, such as members of the public or press."); *cf.* Ocariz, *supra* note 97.

The Florida Senate

Issue Brief 2012-227 *September 2011*

Committee on Judiciary

REVIEW OF THE SUNSHINE IN LITIGATION ACT

Statement of the Issue

The Sunshine in Litigation Act (Act), s. 69.081, F.S., prohibits a Florida court from entering an order or judgment for the purpose of concealing information related to a public hazard or information that may be useful to the public in avoiding injury resulting from a public hazard. In the years since its enactment in 1990, the Act has been the subject of legal scholarship from various perspectives questioning its effectiveness in fairly balancing the objectives of public safety with protection of business interests and litigant privacy. Some scholars have argued that the statute does not set clear enough guidelines for courts and litigants, and that it suffers from various constitutional infirmities. To date, the Act has not been deemed unconstitutional by the courts, but commentators have called for its revision.

This issue brief addresses legal and policy research related to the Sunshine in Litigation Act, in order to give legislators a foundation for evaluating proposals that may arise on this topic in the future.

Discussion

History of the Sunshine in Litigation Act

Public concern relating to secrecy in the context of civil litigation became part of a national debate in the 1980s. "The basic reform idea—greater transparency—is simple. What it means in practice, however, is complicated. The discussion of openness in the civil justice system often begins and ends with the issue of 'secret settlements.'"[1]

In 1984, the U.S. Supreme Court held in *Seattle Times Co. v. Rhinehart* that a party does not have a First Amendment right to disseminate information it obtained during litigation that is covered by a protective order.[2] A few years later, the Florida Supreme Court followed the reasoning in *Rhinehart* in *Palm Beach Newspapers, Inc. v. Burk*, holding that the press does not have a qualified right under the First Amendment to attend pretrial discovery depositions in a criminal case or to obtain copies of unfiled depositions.[3] The Court explained that "[t]he 'right to speak and publish does not carry with it the unrestrained right to gather information.'"[4] Additionally, the Court looked at the case from a historical perspective and found that pretrial proceedings were not considered public at common law and were still considered private under modern practice; thus, discovered information not admitted at trial is not considered public information.[5] Under the Rules of Civil Procedure, discovery is very broad and allows parties to seek information that may be inadmissible at trial "if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."[6] The *Burk* Court laid out the importance of balancing liberal discovery with privacy interests as follows:

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[1] Ross E. Cheit, *Tort Litigation, Transparency, and the Public Interest*, 13 ROGER WILLIAMS U. L. REV. 232, 233 (Winter 2008).
[2] *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984).
[3] *Palm Beach Newspapers, Inc. v. Burk*, 504 So. 2d 378 (Fla. 1987).
[4] *Id.* at 383 (quoting *Zemel v. Rusk*, 381 U.S. 1, 17 (1965)).
[5] *Burk*, 504 So. 2d at 382.
[6] Fla. R. Civ. P. 1.280(b)(1).

> The discovery rules are aimed at protecting the rights of the parties involved in the judicial proceeding and of non-parties who are brought into the proceedings because of purported knowledge of the subject matter. Transforming the discovery rules into a major vehicle for obtaining information to be published by the press even though the information might be inadmissible, irrelevant, defamatory or prejudicial would subvert the purpose of discovery and result in the tail wagging the dog.[7]

A subsequent case, *Miami Herald Publishing Co. v. Gridley*, held that unfiled discovery materials in civil cases are not accessible to the public and press.[8] As one scholar has analyzed the topic, there is judicial information and litigant-centered information. The former is directly tied to the court's decision-making, such as pleadings, motions, court opinions, court orders, and settlement agreements that are judicially approved or enforced. The latter type of information is comprised of materials that are generated as a result of court processes but are not the basis for the court's decision-making process, including unfiled discovery and private settlement agreements.[9] After cases at the federal and state levels established that there is no constitutional right of public access to unfiled court material, the push in the direction of greater public access shifted "from constitutional challenge to procedural modification" and "transformed the debate into one of policy: what should the practice regarding protective orders be rather than what it must be."[10]

Debate over Secrecy in Civil Litigation

These cases touch on the ongoing philosophical discussion among scholars as to what obligation, if any, the courts should have in ensuring that safety information is shared with the public, which is at the center of the debate over court involvement in confidential settlements and protective orders. Some commentators believe that the sole purpose of the court system is to resolve disputes between the parties. At the other side of the debate, others are adamant that "courts are publicly-funded institutions that serve interests broader than those of the immediate parties. Courts administer justice, explicate and enforce public norms, and protect the broader public interest."[11] Historically, courts have treated judicial records differently than private agreements made outside of court among litigants.

Generally, there is agreement on the social good of settlement because it conserves judicial resources and allows parties to tailor a compromise that works for their particular situation; however, there is no such accord as to whether confidentiality is necessary to achieve the goal of promoting settlement.[12] "The public policy of the State of Florida, as articulated in numerous court decisions, highly favors settlement agreements among parties and will seek to enforce them whenever possible."[13] As a basis for their arguments, both sides of this debate cite the flawed aspect of human nature that leads litigants to pursue self interest. It has been argued that complete court discretion over confidentiality is necessary to temper unethical litigation tactics, such as demanding access to trade secrets and other sensitive information from a business defendant to force a more favorable settlement, or, on the other side, requesting personal or embarrassing information from a plaintiff for a similar objective.[14] The other point of view is that in a case involving a potential public hazard, the parties to the settlement agreement will both look out for their own interests at the peril of the general public. For example, the defendant will offer money to purchase the plaintiff's silence about a potentially dangerous instrumentality or practice, which the

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[7] *Burk*, 504 So. 2d at 384.
[8] *Miami Herald Publ'g Co. v. Gridley*, 510 So. 2d 884 (Fla. 1987).
[9] Andrew D. Goldstein, *Sealing and Revealing: Rethinking the Rules Governing Public Access to Information Generated Through Litigation*, 81 CHI.-KENT L. REV. 375, 379-80 (2006).
[10] Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 445 (Dec. 1991).
[11] Christine Hughes, General Counsel, New England Legal Foundation, *Confidential Settlements: A White Paper*, 12 (Apr. 2003) (on file with the Senate Committee on Judiciary).
[12] *Id.* at 9.
[13] *Sun Microsystems of California, Inc. v. Engineering and Mfg. Systems, C.A.*, 682 So. 2d 219, 220 (Fla. 3d DCA 1996); *see also Robbie v. City of Miami*, 469 So. 2d 1384 (Fla. 1985); *Am. Exp. Travel Related Servs. Co., Inc. v. Marrod, Inc.*, 637 So. 2d 4 (Fla. 3d DCA 1994).
[14] Miller, *supra* note 10, at 473.

plaintiff will typically accept regardless of the harm it may cause to others in the future. As one scholar stated, secret settlements in situations where there could be harm to the public should be regulated because while the plaintiff is compensated for his or her injury, "[p]eople external to the contract—those who either have been or will be harmed by the defendant's products—bear the cost of his silence."[15]

Legislative Responses

In 1988, the Washington Post published a series of articles about secrecy in the civil justice system[16] that reviewed a number of sealed cases and confidential settlements before concluding that these practices were preventing important safety information from becoming public.[17] The Washington Post series is an indication of the growing national sense of awareness at that time about confidentiality in the court system that set into motion legislative reforms in a number of states in the following years. One scholar called the movement "an intense, nationwide campaign…underway to create a 'presumption of public access' to all information produced in litigation that would seriously restrict the court's traditional discretion to issue protective and sealing orders shielding the litigants' documents from view."[18] Also in 1988, the Florida Supreme Court emphatically stated the importance of openness in the courts in *Barron v. Florida Freedom Newspapers*, holding that there is a strong presumption of openness in both civil and criminal proceedings and any exception should be narrowly tailored, with the burden on the party seeking closure.[19] In the following years, proposals similar to Florida's Sunshine in Litigation Act were considered in more than 30 states.[20] In that time period, legislation passed in Florida,[21] Virginia, Arkansas, and Washington, and a Supreme Court rule was adopted in Texas.[22] A federal version of the Sunshine in Litigation Act has been filed in Congress consistently from 1990 to the present, but has not become law.[23] According to a Florida organization that advocated for the Sunshine in Litigation Act when it was before the Legislature, sealed court records and suppressed documents being kept from the public and the media had become a detriment to the public's health and safety. As a result, according to this organization, "unsafe products, negligent behavior on the part of the manufacturers, and disregard for First Amendment rights" were being forced on the public "thereby jeopardizing the public's confidence in the court system."[24]

Florida's Sunshine in Litigation Act (Act), s. 69.081, F.S., prohibits a court in this state from entering an order or judgment for the purpose of concealing information related to a public hazard or information that may be useful to the public in avoiding injury resulting from a public hazard. The Act further states that any agreement or contract having the purpose of concealing information relating to a public hazard is void and unenforceable because such agreements are against public policy. First enacted in 1990, this section is invoked most commonly in products liability cases. "Any substantially affected person" has standing under the Act to contest an order, judgment, agreement, or contract, "including but not limited to representatives of news media." Upon a motion and good cause shown by a party attempting to prevent disclosure of information, the court will examine the disputed information in camera and allow the disclosure of the information if a public hazard is found. The statute defines a public hazard as "an instrumentality, including but not limited to any device, instrument, person, procedure, product, or a condition of a device, instrument, person, procedure or product, that has caused and is likely to cause injury."

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[15] Alan E. Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83 CORNELL L. REV. 261, 280 (Jan. 1998).
[16] Elsa Walsh and Benjamin Weiser, *Public Courts, Private Justice* (pts. 1-4), THE WASHINGTON POST, Oct. 23-26, 1988.
[17] Cheit, *supra* note 1, at 261.
[18] Miller, *supra* note 10, at 429.
[19] *Barron v. Florida Freedom Newspapers, Inc.*, 531 So. 2d 113 (Fla. 1988).
[20] Miller, *supra* note 10, at 428.
[21] Chapter 90-20, Laws of Fla. (SB 278 1990 Reg. Sess.).
[22] Hughes, *supra* note 11, at 21; *see* s. 69.081, F.S.; Va. Code Ann. s. 8.01-420.01; Ark. Code Ann. s. 16-55-122; Wash. Rev. Code s. 4.24.611; Texas R. Civ. P. 76a.
[23] Library of Congress, *Sunshine in Litigation Search Results, available at* http://www.loc.gov/search/?q=sunshine%20in%20litigation&fa=digitized:true.
[24] Press Release, the Academy of Florida Trial Lawyers, *Sunshine in Litigation Bill Filed* (Apr. 13, 1990) (on file with the Senate Committee on Judiciary).

Based on conversations with practitioners, the Act is most commonly used in products liability cases, especially those involving the automotive industry, but is not frequently invoked in general. Attorneys who specialize purely in products liability litigation see a higher percentage of cases involving Sunshine in Litigation issues. Although any substantially affected person has standing under the Act, in most cases it is raised by a party. However, there have been a limited number of circumstances in Florida where members of the media have made requests for disclosure. Additionally, even though the Act applies to private settlement agreements in addition to documents associated with litigation,[25] the former application is rare.

Constitutional Issues Relating to the Act

Since its enactment in 1990, the Sunshine in Litigation Act has been subject to scrutiny both by scholars and the courts. Some of the constitutional concerns raised by commentators have been that it fails to meet the standard of substantive and procedural due process, is a procedural rule improperly enacted by the Legislature, violates the right to contract, and can constitute an unconstitutional taking. Most of the discussion of these constitutional issues has come from scholars writing about the law; Florida courts have rarely addressed the constitutionality of the Act. Although the Act has been criticized by some scholars, it has not been found unconstitutional by a court, and some practitioners report that they can operate effectively under the Act. Following are summaries of some of the principal constitutional issues relating to the Act that have been raised.

Substantive Due Process

The Fifth Amendment and the Fourteenth Amendment of the U.S. Constitution[26] provide that the government cannot deprive a person of life, liberty, or property without due process of law. These amendments provide two different types of protection: substantive due process and procedural due process. Substantive due process relates to whether the government has a legitimate reason for taking one's life, liberty, or property.[27]

The Sunshine in Litigation Act defines a public hazard as "an instrumentality, including but not limited to any device, instrument, person, procedure, product, or a condition of a device, instrument, person, procedure or product, that has caused and is likely to cause injury."[28] A statute will be deemed constitutional from a substantive due process standpoint "if it bears a reasonable relationship to a legitimate public purpose and is not discriminatory, arbitrary, or oppressive."[29] In a recent article, the authors stated that the Act is not reasonably related to the government objective of protecting the public from unreasonable hazards or defects because the definition does not limit the scope of the Act only to those products that cause injury due to a defect. Thus, it could apply to any product because almost any product has caused some past injury and is likely to cause future injury. According to the authors, this definition "could lead to the public hazard label being affixed, and trade secrets destroyed because a product poses risks that the public routinely accepts as a part of daily life."[30]

This leads to the argument that the law is unconstitutionally vague. A law is unconstitutionally vague if a person "of common intelligence must necessarily guess at its meaning."[31] The same authors argue that the law is impermissibly vague and overbroad because it is unclear whether the standard applies only to legally defective products or some larger pool of products; thus the statute does not put potential defendants on notice as to what products may be included and is not rationally related to the legislative purpose of protecting public safety.[32] In practice, the Act is intended to be used where there is a continuing hidden defect known to the manufacturer that

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[25] Section 69.081(4), F.S.
[26] *See also* FLA. CONST. art. I, s. 9.
[27] Erwin Chemerinsky, CONSTITUTIONAL LAW, 521 (2d ed. 2005).
[28] Section 69.081(2), F.S.
[29] *Goodyear Tire & Rubber Co. v. Jones*, 929 So. 2d 1081, 1086 (Fla. 3d DCA 2005) (citing *Haire v. Florida Dep't of Agric. & Consumer Servs.*, 870 So. 2d 774, 782 (Fla. 2004)).
[30] Wendy F. Lumish and Cristina Alonso, *Time for a Legislative Overhaul of the Sunshine in Litigation Act*, 85 May FLA. B.J. 22, 27 (2011).
[31] *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926).
[32] Lumish and Alonso, *supra* note 30, at 27.

could cause unforeseeable injury to others if information about the hazard is not shared with the public.[33] However, the definition of "public hazard" is broadly written and does not narrow the scope of the statute to known hazards that are unforeseen to the public.[34]

Some of the confusion with the definition on its face has since been cleared up by the courts. *Stivers v. Ford Motor Company* held, for example, that a financing company's allegedly improper credit practice was not a "public hazard" within the meaning of the Act in light of the legislative history, which indicates that the term "connotes a tangible danger to public health or safety" and offers no indication that it was meant to include economic fraud leading to financial loss.[35] Similarly, in *State Farm Fire & Casualty Co. v. Sosnowski*, the court refused to set aside a previously agreed upon protective order because the alleged public hazard that would have been subject to disclosure was State Farm's internal procedures that were relevant only to alleged economic fraud.[36]

In *Goodyear Tire & Rubber Co. v. Jones*, Goodyear challenged the validity of the Act for the first time on appeal, which the court found was not permissible unless the error being raised was fundamental to the extent of denying due process.[37] The court found that if the Act were "arbitrary, unreasonable, and not rationally related to a reasonable government objective" as Goodyear alleged, that would rise to the level required for appellate review.[38] Ultimately the court held: "Prohibiting the concealment of information concerning a public hazard is rationally related to the goal of protecting the public from the hazard….We, therefore, find that the Act is not arbitrary or unreasonable, and that it is rationally related to a reasonable government objective, and thus constitutional on its face."[39] In another case, where a party properly raised and preserved constitutional challenges, the court declined to address them, citing judicial restraint, meaning that resolution of the constitutional issues was not necessary for the disposition of the case.[40]

Procedural Due Process

Procedural due process refers to the procedures the government must follow before taking one's life, liberty, or property.[41] "Due process mandates that in any judicial proceeding, the litigants must be afforded the basic elements of notice and opportunity to be heard."[42] The Sunshine in Litigation Act provides that "[u]pon motion and good cause shown by a party attempting to prevent disclosure of information or materials which have not previously been disclosed, including but not limited to alleged trade secrets, the court shall examine the disputed information or materials in camera."[43] Although the statute specifies that the court must examine the disputed information in camera, or in private, it does not address what type of hearing, if any, should be afforded the parties with an interest in the potential disclosure of the information or materials. Although the statute itself is silent on the issue of a hearing to determine whether information will be disclosed, Florida courts have found that such a hearing is required by basic procedural due process standards. However, there seems to be confusion as to the format and timing of the hearing.

The Second District in *DuPont De Nemours & Co. v. Lambert* overturned the trial court's decision to set aside a confidentiality order it had entered previously after the verdict based on evidence it heard during the trial itself,

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[33] Telephone conversation with William Partridge, Legislative Liaison for the Executive Council of the Florida Bar Trial Lawyers Section (Aug. 11, 2011).
[34] *Id.*
[35] *Stivers v. Ford Motor Credit Co.*, 777 So. 2d 1023, 1026 (Fla. 4th DCA 2000).
[36] *State Farm Fire & Casualty Co. v. Sosnowski*, 830 So. 2d 886 (Fla. 5th DCA 2002).
[37] *Goodyear Tire & Rubber Co. v. Jones*, 929 So. 2d 1081, 1086 (Fla. 3d DCA 2005) (quoting *State v. Johnson*, 616 So. 2d 1, 3 (Fla. 1993)).
[38] *Jones*, 929 So. 2d at 1086.
[39] *Id.*
[40] *Ford Motor Co. v. Hall-Edwards*, 21 So. 3d 99, 103 (Fla. 3d DCA 2009) (quoting *North Florida Women's Health and Counseling Services, Inc. v. State*, 866 So. 2d 612, 640 (Fla. 2003)).
[41] Chemerinsky, *supra* note 27, at 521.
[42] *DuPont De Nemours & Co. v. Lambert*, 654 So. 2d 226, 228 (Fla. 2d DCA 1995) (citing *County of Pasco v. Riehl*, 635 So. 2d 17 (Fla. 1994); *Cavalier v. Ignas*, 290 So. 2d 20 (Fla. 1974)).
[43] Section 69.081(7), F.S.

leading to the determination that a chemical at issue in the trial was a public hazard.[44] Although the parties objected, the trial court never held a hearing on the merits of the Sunshine in Litigation Act issues.[45] The appellate court held that denying the litigants a hearing violated due process.[46] "Attention to a proper evidentiary hearing and due process are plainly required. Such a [public hazard] label has significant and far-reaching consequences in a day when court orders can make it around the world before the sun sets on the day they are filed."[47]

The fact that the court has to make determinations based on examining materials in products liability cases, which may often involve highly technical information not within the a judge's expertise, has also presented challenges in cases where the Act is invoked. In one recent case, the trial court directed the parties to conduct discovery under a protective order and bring only those disputes they could not resolve among themselves to the court's attention.[48] Although the Second District acknowledged that the trial court's approach was logical, it concluded that the process ran afoul of the plain language of the statute. The appellate court held that "regardless of how technically difficult the matter may be, the Sunshine in Litigation Act requires the trial court to act as a gatekeeper-it must view and consider the disputed documents and information and determine whether the provisions of the Act apply."[49] One solution that some trial courts have utilized is having the Sunshine in Litigation hearings conducted by a special master.[50] However, the referral of these issues to a special master is not permissible without the consent of the parties.[51]

An additional issue left open by the statute is when the hearing should take place. The courts have articulated some guidelines, but there is still not a clear blueprint of exactly when and how the hearing should be conducted. First, a court has held that the statute is only applicable "if the trial court has entered a confidentiality order, or if there is a pending motion by the defending party for a confidentiality order."[52] Thus, it cannot be used preemptively if confidentiality is not being actively sought. The Third District has also specified that when the Act is raised, a trial court must hold a hearing to determine which documents, if any, are subject to disclosure prior to entering the order, as opposed to deferring the determination until after the trial.[53] The fact that the Sunshine in Litigation determination must be made before the trial could be viewed as problematic because the question of whether the instrumentality in question caused injury is often the central issue to be decided at trial. However, the court must necessarily come to some conclusion on causation in order to determine if a public hazard exists "long before that issue is established at trial, and possibly even before evidence that would inform that conclusion has been requested or produced in discovery."[54]

The lack of clarity as to exactly what procedure should be followed for a Sunshine in Litigation hearing is a subject that has been raised both by proponents and critics of reforms to limit confidentiality in litigation. One proponent suggests that the law is underutilized because of the statute's "fatal flaw" of failing "to provide a framework or standard for courts to apply to effectively and uniformly address Sunshine Act issues during litigation."[55] Another problem with the lack of statutory framework is that there is no protection for the potential damage caused to a defendant whose product is deemed a public hazard initially even if a jury later determines that the harm was not caused by the product or that the product was not defective.[56] However, some practitioners who specialize in products liability have indicated that the Act works well in practice and that attorneys who are familiar with this area of the law are able to effectively work with the Act as currently written.

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[44] *DuPont*, 654 So. 2d 226.
[45] *Id.* at 228.
[46] *Id.* (citing *Riehl*, 635 So. 2d 17; *Fickle v. Adkins*, 394 So. 2d 461 (Fla. 3d DCA 1981)).
[47] *Ford Motor Co. v. Hall-Edwards*, 21 So. 3d 99, 103 (Fla. 3d DCA 2009)
[48] *Goodyear Tire & Rubber Co. v. Schalmo*, 987 So. 2d 142, 146 (Fla. 2d DCA 2008).
[49] *Id.*
[50] *See Goodyear Tire & Rubber Co. v. Jones*, 929 So. 2d 1081 (Fla. 3d DCA 2005).
[51] *Novartis Pharmaceuticals Corp. v. Carnoto*, 798 So. 2d 22 (Fla. 4th DCA 2001).
[52] *Hall-Edwards*, 21 So. 3d at 102 (citing *Jones*, 929 So. 2d at 1084).
[53] *Jones*, 929 So. 2d at 1084.
[54] Hughes, *supra* note 11, at 22.
[55] Roma Perez, *Two Steps Forward, Two Steps Back: Lessons to be Learned from How Florida's Initiatives to Curtail Confidentiality in Litigation Have Missed Their Mark*, 10 FLA. COASTAL L. REV. 163, 193-94 (Winter 2009).
[56] *Id.* at 197.

Separation of Powers

Florida's constitution articulates a separation-of-powers doctrine under section 3 of article II, which prohibits one branch of government from exercising powers appertaining to one of the other branches. The Senate staff analysis for the Sunshine in Litigation Act pointed out that "[i]t has been held that the Supreme Court has the sole authority to promulgate, rescind and modify the Florida Rules of Civil Procedure."[57] The analysis also pointed out that the Florida Constitution states that a statute repealing a rule of procedure must pass the Legislature by a two-thirds vote of the membership of each house.[58] These references in the analysis at the time the bill was being considered signal a potential separation-of-powers concern about the bill encroaching on the judiciary by improperly repealing a court rule. This sentiment has been echoed by scholars and commentators since the bill's passage. The House staff analysis raised the same concern but also noted that "the Court has allowed the legislature to set public policy for purposes of determining the disclosure of judicial records in some cases, and accordingly, there is a basis upon which the legislation may be sustained."[59] The court rule in question provides that a court may enter a protective order upon a motion and showing of good cause.[60] One of the enumerated categories for entering a protective order is to protect from disclosure "a trade secret or other confidential research, development, or commercial information."[61] In order to pass by two-thirds, the Act would have needed 80 favorable votes in the House of Representatives, but only received 79.[62] The bill passed with well over two-thirds of the Senate voting favorably.[63]

In a Third District case, one of the parties challenged the constitutionality of the Act on the grounds that it was a procedural rule improperly enacted by the Legislature. The court did not discuss the merits of this argument because it was raised for the first time on appeal and the court did not consider it a fundamental error sufficient to trigger appellate review under the circumstances.[64] Substantive laws either create rights or impose new obligations or duties, and procedural laws enforce those rights or obligations.[65] In federal proceedings, courts will generally apply the substantive law of the state where the court is sitting and federal procedural law.[66] A federal court has held that the Sunshine in Litigation Act "may apply if this case were in state court. However, this statute does not apply here because F.S. [s.] 69.081 is a procedural rule inapplicable in this federal proceeding."[67]

Right to Contract

Although there has been a long-standing tradition of granting the public presumptive access to judicial records, purely private settlement agreements have generally been considered beyond the reach of public scrutiny unless the settlement is filed with the court or the parties look to the court for enforcement.[68] However, under the Sunshine in Litigation Act and similar laws, private settlement agreements that have no interaction with the court system are subject to disclosure to the public, which has given rise to discussion of potential violation of the right to contract. A contract is a legally enforceable promise; this definition includes confidential settlement agreements.[69] The U.S. Constitution bars a state from passing any law that would impair the obligation of

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[57] *Senate Staff Analysis and Economic Impact Statement*, Senate Bill 278 (Apr. 25, 1990) (citing *Ser-Nestler, Inc. v. General Finance Loan Co. of Miami Northwest*, 167 So. 2d 230 (Fla. 3d DCA 1964)) (on file with the Senate Committee on Judiciary).
[58] FLA. CONST. art. V, s. 2
[59] *House of Representatives Committee on Judiciary Staff Analysis and Economic Impact Statement*, House Bill 839 (May. 8, 1990) (on file with the Senate Committee on Judiciary).
[60] Fla. R. Civ. P. 1.280(c).
[61] Fla. R. Civ. P. 1.280(c)(7).
[62] *House Journal*, Reg. Session, May 28, 1990, 1300.
[63] *Senate Journal*, Reg. Session, May 30, 1990, 708 (the final vote in the Senate was 34-2).
[64] *Goodyear Tire & Rubber Co. v. Jones*, 929 So. 2d 1081, 1086 (Fla. 3d DCA 2005).
[65] *See Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So. 2d 1352, 1358 (Fla. 1994); *In re Florida Rules of Criminal Procedure*, 272 So. 2d 65, 65 (Fla. 1972).
[66] *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).
[67] *Ronque v. Ford Motor Co.*, 1992 WL 415427, at *1 (M.D. Fla.1992) (citing *Erie*, 304 U.S. 64).
[68] Hughes, *supra* note 11, at 2.
[69] Garfield, *supra* note 15, at 268.

contracts.[70] Absent public policy or First Amendment limitations, contracting parties are generally free to agree to be silent about almost anything.[71] As discussed previously, the courts have not found a First Amendment right to litigation materials not filed with the court, making the debate over the disclosure of private agreements one focused on public policy.

Although the Constitution guarantees freedom to contract, that freedom is not absolute. "A contract that contravenes an established interest of society can be found void as against public policy."[72] Courts may derive a public policy against the enforcement of a contract from legislation relevant to the policy or the need to protect public welfare through judicial policies against interference with protected interests.[73] "The first indication that a term violates public policy is when legislation explicitly provides that such a provision is unenforceable. Indeed, there could hardly be a more certain indication of public policy."[74] Through enactment of the Sunshine in Litigation Act, the Florida Legislature has signaled that the right to contract is outweighed by the policy of disclosure of otherwise non-public information when a public hazard exists. In fact, the Act very clearly states that an agreement or contract that conceals a public hazard "is void, contrary to public policy, and may not be enforced."[75]

Takings

The Takings Clause of the Fifth Amendment states that private property shall not "be taken for public use, without just compensation."[76] It has been argued that parties have a property right in their trade secrets, the government disclosure of which, without just compensation, may constitute a taking of private property in violation of the Fifth Amendment.[77] Florida law defines a trade secret as:

> information, including a formula, pattern, compilation, program, device, method, technique, or process that: (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[78]

The Florida Evidence Code provides for an evidentiary privilege with respect to trade secrets, allowing parties to refuse to disclose such information or prevent others from disclosing it.[79] The statute creating the privilege also contemplates exceptions, such as the Sunshine in Litigation Act allowing for disclosure of materials concerning a public hazard "including but not limited to alleged trade secrets,"[80] as it further states that "[w]hen the court directs disclosure, it shall take the protective measures that the interests of the holder of the privilege, the interests of the parties, and the furtherance of justice require."[81] However, scholars have argued that the Act offends the state and federal constitutions because it converts private property for public use without any opportunity for compensation.[82] "Once the data that constitute a trade secret are disclosed to others, or others are allowed to use that data, the holder of the trade secret has lost his property interest in the data."[83]

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[70] U.S. CONST. art. I, s. 10, cl. 1.
[71] Garfield, *supra* note 15, at 268.
[72] *City of Hialeah Gardens v. John L. Adams & Co., Inc.*, 599 So. 2d 1322, 1324 (Fla. 3d DCA 1992) (citing *American Casualty Co. v. Coastal Caisson Drill Co.*, 542 So. 2d 957 (Fla. 1989)); *see also Duplig v. City of South Daytona*, 195 So. 2d 581 (Fla. 1st DCA 1967).
[73] Restatement (Second) of Contracts s. 179 (1981).
[74] Garfield, *supra* note 15, at 296.
[75] Section 69.081(4), F.S.
[76] U.S. CONST. amend. V; *see also* FLA. CONST. art. X s. 6.
[77] Miller, *supra* note 10, at 468.
[78] Section 688.002(4), F.S.
[79] Section 90.506, F.S.
[80] Section 69.081(7), F.S.
[81] Section 90.506, F.S.
[82] Lumish and Alonso, *supra* note 30, at 29; *see also* Miller, *supra* note 10, at 468.
[83] Lumish and Alonso, *supra* note 30, at 29 (quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1011 (1984)).

One scholar has stated that the problem with Florida's law is that it is a categorical ban that does not require a balancing of the parties' interests or provide meaningful exceptions. The only thing the Act excludes is trade secrets "which are not pertinent to public hazards."[84] The scholar argues that this language "excludes nothing in practice since relation to a public hazard is what triggers the law's application in the first place. Thus, under the terms of the statute, even if the 'information concerning a public hazard' is a valuable trade secret or implicates important privacy concerns, it cannot be concealed."[85] However, while not providing specifically for a balancing of interests, the Act does provide that, "[i]f allowing disclosure, the court shall allow disclosure of only that portion of the information or materials necessary or useful to the public regarding the public hazard."[86] This provision provides some protection by directing the court to maintain confidentiality for sensitive information not relating to a hazard, including trade secrets. Additionally, as one practitioner noted, it can also be argued that the court-ordered disclosure of trade secrets in the Sunshine in Litigation context does not constitute a taking because courts generally have the discretion to compel production of a trade secret if the necessity for production outweighs the interest in confidentiality. Thus, the necessity for production will be demonstrated if the trade secret information in question is deemed a public hazard under the Act.[87] The statute is silent as to "what happens when the allegedly-confidential documents sought to be disclosed on 'public hazard' grounds are subject to the attorney-client privilege or work product doctrine."[88]

Summary

The Sunshine in Litigation Act prohibits a court from entering an order or judgment for the purpose of concealing a public hazard and authorizes substantially affected persons to contest such an order or judgment. The Act remains good law, with no court having declared its provisions to be unconstitutional since its original enactment in 1990. However, the constitutional concerns raised by some commentators writing about the Act, as summarized in this issue brief, may provide a framework for litigants to challenge portions of the Act, as well as a framework for advocates to recommend that the Legislature revise the Act.

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[84] Section 69.081(5), F.S.
[85] Goldstein, *supra* note 9, at 424.
[86] Section 69.081(7), F.S.
[87] Telephone conversation with Lauri Ross, appellate attorney handling Sunshine in Litigation Act cases, including *Goodyear Tire & Rubber Co. v. Jones*, 929 So. 2d 1081 (Fla. 3d DCA 2005) (Aug. 25, 2011); *see Am. Exp. Travel Related Servs., Inc. v. Cruz*, 761 So. 2d 1206 (Fla. 4th DCA 2000).
[88] *Ford Motor Co. v. Hall-Edwards*, 21 So. 3d 99, 102 (Fla. 3d DCA 2009); *see* s. 90.502, F.S.; Fla. R. Civ. P. 1.280(b)(3).

THE FLORIDA SENATE

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SENATOR ANITERE FLORES
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38th District

Approved 9/9/11

Mike H

September 7, 2011

The Honorable Mike Haridopolos
President of the Florida Senate
409 The Capitol
404 South Monroe Street
Tallahassee, FL 32399-1100

Dear President Haridopolos:

In the light of the October due date for the birth of my child, I will be unable to travel to Tallahassee for the September, October, and November interim committee meetings. Under Senate policy, I am writing to you in my capacity as chair of the Committee on Judiciary to request approval for excused absences from these meetings. I will work with Senator Joyner, the committee Vice Chair, and with Eric Maclure, the committee staff director, to plan the agendas for the meetings

In addition, I have written to the respective chairs of the committees on which I serve to request excused absences from them. Because I need to miss multiple committee meetings, I wanted to apprise you as well. In this manner, I hope that this letter will serve as a global request to the Senate for an excused absence during this period.

Thank you for your consideration and your understanding. I look forward to working with you leading up to and during the 2012 Regular Session.

Sincerely,

Anitere Flores

Anitere Flores
CC: The Honorable Arthenia Joyner, Vice Chair, Committee on Judiciary
Ms. Debbie Brown, Interim Secretary
Mr. Craig Meyer, Chief of Staff

REPLY TO:
☐ 10691 North Kendall Drive, Suite 309, Miami, Florida 33176 (305) 270-6550
☐ 316 Senate Office Building, 404 South Monroe Street, Tallahassee, Florida 32399-1100 (850) 487-5130

Senator's Website: www.flsenate.gov

MIKE HARIDOPOLOS
President of the Senate

MICHAEL S. "MIKE" BENNETT
President Pro Tempore

CourtSmart Tag Report

Room: EL 110 **Case:** **Type:**
Caption: Senate Judiciary Committee **Judge:**

Started: 10/4/2011 10:48:07 AM
Ends: 10/4/2011 12:26:45 PM **Length: 01:38:39**

10:49:05 AM	Meeting Call to Order by Senator Joyner
10:49:20 AM	Roll Call by CAA
10:49:28 AM	Introduction of Senator Gardiner to the Judiciary Committee
10:49:56 AM	Introduction of Judiciary Staff Intern (Dustin Irwin)
10:52:11 AM	Presentation by Amy Baker with Office of Economic & Demographic Research
11:31:04 AM	Introduction of Mr. John Berry with The Florida Bar
11:32:04 AM	Presentation by John Berry with The Florida Bar
11:41:50 AM	Introduction of Mr. Scott Palmer with Attorney General's Office
11:42:50 AM	Presentation by Scott Palmer with Attorney General's Office
11:48:02 AM	Introduction of Lisa Goodner with State Court Administrator
11:49:02 AM	Presentation by Lisa Goodner with the State Courts System
12:23:06 PM	Chair thank each presenters for their enlighten information on Foreclosure
12:24:11 PM	Barry Munroe, staff - brief explanation on Issue Brief 2012-219
12:24:57 PM	Brittany O'Conner, staff - brief explanation on Issue Brief 2012-227
12:26:21 PM	Senator Braynon motion to adjourn