Introduction

The goal of this book is to assist attorneys throughout the country in their practice of foreclosure defense law. As most Americans know, our country is in the midst of a foreclosure epidemic which has settled more in certain states than others but affects us all nonetheless. This book is about how homeowners all across this country can save their homes and how we as lawyers can help them. There are things we can do for homeowners that they cannot do for themselves.

I have worked in litigation for almost 14 years and am going on my third year in the foreclosure field. I am not a mortgage broker, a title examiner, or a financial expert, and I don’t pretend to be one. I was an American Studies major at Rutgers College and have always been fascinated by American culture; this crisis seems to be a crucible that reveals who we really are. That is not to say that everyone working for the banks to prosecute foreclosures wants to be on that side; I know, as I used to be one of them. I have been on all sides of this mortgage crisis in Florida, one of the worst foreclosure war zones. I have represented banks and handled as many as 500 litigation foreclosure files at a time.

*What This Book Is and Is Not*

I am only licensed to practice in Florida, so what applies here may not apply in your state, and none of the information or proposed forms contained in this book are legal advice, as everyone’s situation is different; all content in this book is supplied for informational purposes only. For each issue, consult the rules and law of the appropriate jurisdiction, which may also be constantly changing. Readers are also cautioned to review any subsequent history, whether positive or negative, of all authorities cited herein.
The book includes sample forms that are intended to assist attorneys nationwide and serve as templates for your own foreclosure defense documents. Many of the court forms are obtained from the Manatee County, Florida, website, which is one of the few counties in the country at this time that permits free online access to court-filed documents. It is truly a wealth of free information. The website Pacer.gov is a one-stop portal to federal cases from all 50 states; it charges a fee for downloading and viewing of documents.

For several years now, we have heard numerous theories about how this foreclosure crisis arose. I will not attempt to offer theories about how we got into this predicament. My purpose here is to offer the benefit of experience I have gained as a litigation attorney in the foreclosure industry. This book does not encompass all available law applicable to foreclosure defense, and it should not be relied upon as your only tool in this field. The book does focus on a number of issues raised in recent law or news or issues that often recur in foreclosure cases. As a caveat, some of the cases discussed in this book are virtually brand-new law and are still subject to appeal or reconsideration. I also make a point to discuss legal issues that have come up frequently in my own foreclosure experience.

This book is written from a foreclosure defense perspective, and my goal has been to provide current relevant law to assist homeowners and their attorneys. As such I do not present many cases for the proposition of supporting the banks’ arguments.

My focus is on litigation practice in the court where the plaintiff files the initial foreclosure complaint. General principles of appellate practice and bankruptcy are discussed, but these are complex fields of law requiring special expertise and discussion beyond the scope of this book. The book also does not focus on actual trial procedure, as this area of law also requires special expertise, and trial procedures vary greatly among jurisdictions.

This book endeavors to assist you in navigating alternative dispute resolutions to avert a foreclosure action from even being filed against your client. If an action is filed, however, it will help guide you through possible litigation strategies and defenses in the court where the foreclosure action is initially filed, which is
usually state court (see flowchart, page xvi). Federal practice is also very complex, and litigants must follow numerous rules and procedures established by the appellate rules of civil procedure, the particular court, and judges themselves. Banks\(^1\) are usually looking to get their judgments as quickly and easily as possible and find that state court is the easier route for them.

Right now, multiple government investigations into the foreclosure crisis are ongoing, which hopefully will eventually give us a remedy for the epidemic of bank fraud and sloppiness in foreclosure filings. Law professor Kurt Eggert commented on the December 2010 Senate hearings regarding the foreclosure crisis where federal agencies testified about problems they have experienced with servicers:\(^2\)

> At the recent Senate testimony where all the federal agencies came forward and testified about servicer problems, it was telling that they didn’t talk about what they have already done about it. . . . Instead they talked about the investigations they are conducting that they hoped would inform them on what to do next. How many years are we into this crisis? We are long past the point of where we should be investigating to see what’s happening.\(^3\)

Professor Eggert indicates that we should have had more solutions from the government by now; the foreclosure crisis has been dragging on for years. When in the news we hear of a token homeowner receiving a happy ending to a mortgage nightmare, it

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1. When I use the term “bank” in this book, I am aware that the terms bank, investor, servicer, plaintiff, and owner of the loan are not always interchangeable, although they sometimes can be one and the same. However, for the sake of convenience, unless stated otherwise in this book, I use the term “bank” to denote the party who claims authority (whether validly or not) to own the loan, file the foreclosure action, and grant a loss mitigation solution.

2. Defined as “the person responsible for servicing of a loan (including the person who makes or holds a loan if such person also services the loan),” except for certain federal agencies. 12 U.S.C. § 2605(i)(2).

Litigation Strategies and Defenses in Foreclosure Actions

Filing of Foreclosure

Contested

Motion to Dismiss, Strike or Quash

Answer and Affirmative Defenses

Disposal of Action, if Amendment Stands Proceed to Answer

Motion for Summary Judgment

Motion for Default

Affidavits of Fees, Costs and Indebtedness

Uncontested

Hearing on Motion for Summary Judgment

Summary Judgment Granted

Summary Judgment Denied

Sale of Property

Trial

Lender Prevails

Borrower prevails and receives permanent loan solution

Interrogatories

Requests for Production

Requests for Admission

Depositions

Affidavits, memoranda and motions in opposition or in support of summary judgment

Homeowner's Motion for Summary Judgment or Judgment on the Pleadings
is still too much of a rarity—like a lottery-winning story. These results need to become commonplace. We are seeing many good results for homeowners from the judicial branch of government and there are a number of legislative programs in place, such as Home Affordable Modification Program (HAMP), that are also yielding results. But the courts will not have to do as much judicial legislating if we have more decisive guidance from state and federal legislatures.

One might think that some banks possess mens rea in their frenzy to push baseless foreclosures through the system. The banks’ conduct, while nonviolent, is reminiscent enough of an established criminal law principle to seem like “depraved-heart” foreclosure: “[e]xtremely negligent conduct, which creates what a reasonable man would realize to be not only an unjustifiable but also a very high degree of risk of . . . injury to another or to others—though unaccompanied by any intent to . . . do serious [] injury—and which actually causes the [injury] of another.” However, real estate developers continue to receive money despite defaulting on their loans. So why has all this money floating around eluded most homeowners who need help to avoid foreclosure? Millions have begged for aid from the government and their pleas remain largely unanswered. Any loan modification program that a bank might participate in is strictly voluntary: No bank has been forced to help any homeowner, except by the courts.

Occasionally there will be David-versus-Goliath stories of individual triumph by individuals fighting the banks on their own. A remarkable story is of one Florida woman who has faced off against the banks for 25 years. The end to this foreclosure saga has not yet come, but this woman, Patsy Campbell, has no intention of giving up: “They’re not going to take this house. . . . I intend to stay in this house and maintain it as my residence until I die.” Ms. Campbell is currently handling her case pro se, and the legal theories on which

she is fighting the foreclosure are not specifically explained, although the article mentions that she has raised issues of standing, improper loan transfer, improper debt, forged documents, laches and discovery violations, and bankruptcy. Other homeowners have been heartened by her example and have hired attorneys in an attempt to buy time, the article says.

However, this article should not be interpreted as carte blanche for homeowners to attack foreclosure without competent legal counsel. The numbers—and almost anyone who attends foreclosure court hearings on a regular basis—will tell you that Ms. Campbell’s story is a definite exception to the rule. The fact that Ms. Campbell’s case has lasted this long may well be mostly by virtue of the judges assigned to her case, their willingness to consider her continued arguments and grant her relief. The article describes Ms. Campbell as a “stern, confident woman who can quote Florida civil-procedure statutes by reference number,” which must certainly help. Another homeowner in similar circumstances as Ms. Campbell could very well experience a very short foreclosure case resulting in the bank’s favor, depending on any number of factors, including the judges, court procedures, opposing counsel, personal relations, and the way that the facts and law are presented to the court.

Ms. Campbell’s case, however, is also an example of how raising articulate, legally supported arguments in the court system is always an effective method of foreclosure defense for both attorneys and pro se litigants alike. Many judges grant relief to the banks only because the law presented to them does not leave room for any other alternative—for example, when the bank has presented a motion for summary judgment and the defendant has no papers in opposition. This is where parties and their attorneys must come in and present a different story to the courts.