

September 1962

Foreclosure of Conventional and Governmental Insured Mortgages in Florida

Robert E. Gunn

James F. Durham II

Follow this and additional works at: <https://scholarship.law.ufl.edu/flr>



Part of the [Law Commons](#)

Recommended Citation

Robert E. Gunn and James F. Durham II, *Foreclosure of Conventional and Governmental Insured Mortgages in Florida*, 15 Fla. L. Rev. 185 (1962).

Available at: <https://scholarship.law.ufl.edu/flr/vol15/iss2/2>

This Article is brought to you for free and open access by UF Law Scholarship Repository. It has been accepted for inclusion in Florida Law Review by an authorized editor of UF Law Scholarship Repository. For more information, please contact kaleita@law.ufl.edu.

FORECLOSURE OF CONVENTIONAL AND GOVERNMENT INSURED MORTGAGES IN FLORIDA

JAMES F. DURHAM, II and ROBERT E. GUNN*

The State of Florida has recently been plagued with large numbers of mortgage foreclosures. In Dade County alone 3,572 foreclosure suits were filed in the year 1961, and an additional 575 were filed in the first two months of 1962. This is to be compared with a total of 786 foreclosures filed in the same county in the year 1957. The Federal Housing Administration, which insures most of the mortgages now being foreclosed, reports that it has repossessed some 5,000 homes in seven Florida counties — nearly one-fourth of all FHA repossessions in the entire nation.

It is not the purpose of this article to explore the complex reasons underlying this sudden upsurge in foreclosures. Our concern here is with its effect on the legal profession. Lawyers throughout the state have been swamped with foreclosure requests from mortgagees. Some of the mortgages now in foreclosure are conventional,¹ but the majority of them are insured by the Federal Housing Administration or the Veterans Administration. The purpose of this article is briefly to set down a practical, step-by-step procedure which an attorney may use as a general guide in foreclosing either conventional or government insured mortgages.²

FORECLOSURE INSTRUCTIONS AND ABSTRACT

The attorney's initial instructions to foreclose should come directly from the mortgagee or his local servicing agent. Since some judges may require the attorney to prove that he has authority to foreclose,

*James F. Durham, II, B.A. 1952, LL.B. 1954, Vanderbilt University; member of Kentucky and Miami, Florida Bars.

Robert E. Gunn, B. Ch. E. 1959, LL.B. 1962, University of Florida; member Miami, Florida Bar.

1. Mortgages not insured by the federal government are described herein as "conventional."

2. No attempt has been made to inquire intensively into many substantive points of Florida law that may arise in particular cases; nor is it intended to present a detailed analysis of the complex statutory and regulatory provisions governing VA and FHA procedures. The basic VA and FHA materials are to be found in 38 U.S.C. §1801-24 (1958); 12 U.S.C. §1707-15s (1958); and applicable regulations. Valuable information concerning FHA requirements is to be found in the FHA MORTGAGEE'S HANDBOOK, a copy of which may be obtained from the Superintendent of Documents, United States Government Printing Office, Washington 25, D.C., at a cost of \$1.00.

the instructions should be in the form of a letter. In addition to authorizing the attorney to foreclose, the letter should provide the date of default, the remaining amount of unpaid principal, whether or not the property is occupied, and, if so, the names of the present occupants. Enclosed with the letter should be the original promissory note, mortgage, assignment (if any) and mortgagee title insurance policy (if any). If the mortgagee or his servicing agent has an abstract of title, this too should be enclosed.

When the above papers are received, a letter should be written to the sender acknowledging receipt of the foreclosure instructions and all enclosed original instruments. At the same time, a partial abstract should be ordered covering the property in question commencing with the execution date of the mortgage being foreclosed.

As soon as the partial abstract is received it should be examined to determine who the defendants will be. The complaint should then be filed immediately. The longer the delay in filing the complaint, the greater will be the chance that someone may record an instrument before the *lis pendens* is filed and thereby necessitate amending the complaint to join him as a new defendant. In FHA and VA cases there is an additional incentive to file the complaint promptly. When the action is concluded and the property is conveyed to the FHA or VA, the debentures given to the mortgagee in exchange accumulate interest from the date foreclosure proceedings were instituted.³

DEFENDANTS

In a foreclosure action, the only indispensable party is the title holder himself.⁴ However, any person having an interest in the property who is not joined in the suit will retain his interest in the property after the suit is completed.

Since an interest superior to the mortgage being foreclosed cannot be affected in any way by the foreclosure of a junior interest, a prior mortgagee, lien holder or other claimant is neither a necessary nor proper party.⁵

As proper parties to the action, therefore, there should be included all subsequent mortgagees, judgment creditors, junior lien holders, parties in possession (with or without a lease), and any other person who appears to have an inferior interest in the property. If it is uncertain whether a person's interest is prior or subsequent to that of the plaintiff, the best practice is to join that person as a defendant and determine the priority of his interest during the foreclosure suit.

3. See 48 Stat. 1251 (1934); 12 U.S.C. §1710 (d) (1948).

4. *Jordan v. Sayre*, 24 Fla. 1, 3 So. 329 (1888).

5. *E.g., Cone Bros. Constr. Co. v. Moore*, 141 Fla. 420, 193 So. 288 (1940).

THE SOLDIERS' AND SAILORS' CIVIL RELIEF ACT

Once the defendants are identified, letters should be sent to the various military services and the Public Health Service inquiring as to the military status of each individual defendant. This information is needed to comply with the Soldiers' and Sailors' Civil Relief Act of 1940 as amended⁶—an act which has a profound effect on mortgage foreclosures.

Section 302 (3) of the act provides that no foreclosure of property for the nonpayment of any sum due under any mortgage obligation shall be valid if made during the period of military service of the obligor or within three months thereafter. However, section 302 (1) makes this apply only if the obligation was incurred *before* the debtor entered military service. Thus, the purpose of the act is to protect the serviceman who, upon entering military service, suffers a reduction in income and is unable to keep up with his monthly obligations; it does not protect a man, who, *after* entering service, undertakes an obligation knowing full well the limitations of his military income.

If it becomes necessary to seek a decree *pro confesso* against any defendant for his failure to file an appearance, plaintiff's attorney must next consider the effect of section 200 of the act. Under this section, before a default judgment may be entered in any action the plaintiff must file an affidavit that the defendant is not in the military service. If the plaintiff is unable to file this affidavit, he must file an affidavit stating that the defendant is in the military service or that the plaintiff is without knowledge as to whether the defendant is or is not in the military service. If the plaintiff cannot file an affidavit that the defendant is not in the military service, no judgment may be entered against the defendant without a court order, and no such order can be made until the court appoints an attorney to represent the defendant and protect his interests.

From the foregoing it is clear that a non-military affidavit must be filed with respect to any defendant who does not answer or otherwise plead, whether he be the mortgagor, a judgment creditor, or an inferior lien holder. If a defendant is in the military service, an affidavit to that effect must be filed and an attorney *ad litem* appointed. If the mortgagor is in the military service, the court must first ascertain whether the obligation under the mortgage was incurred by the mortgagor before or after entering the military service. If after, the foreclosure may proceed. If before, the court must determine whether the mortgagor's ability to pay was materially affected by his induction into the armed service. If so, the proceedings must

6. 50 U.S.C. App. §501 (1958); 54 Stat. 1178 (1940).

be stayed, or the court may "make such other disposition of the case as may be equitable to conserve the interests of all parties."⁷

The military status of a defendant may be determined in a number of ways. If he can be located, the defendant himself may provide the information. If any of his friends or relatives can be located, they may also be of some assistance. The most reliable procedure, however, is to write letters to each of the five armed services and the Public Health Service.⁸

COMPLAINT AND *LIS PENDENS*

The foreclosure complaint should allege the execution and delivery of the promissory note and mortgage, the present ownership of same in the plaintiff, the description of the real property, the names of the present title holders, the default and the amount remaining due on the debt.⁹ In addition, the original note and mortgage (or copies thereof) must be attached to and made a part of the complaint.¹⁰ It is not necessary, however, to attach copies of assignments.¹¹

Under prevailing case law, it is not necessary to specifically allege the interest of each defendant.¹² It is sufficient to state that whatever the defendant's interest may be, it is subordinate and inferior to the mortgage being foreclosed.¹³ As a practical matter, however, it is good practice to specifically allege the interest of large institutional defendants since such defendants frequently have numerous holdings, and may have difficulty ascertaining their interest from the property description alone.

Together with the complaint, the plaintiff should file a notice of *lis pendens*.¹⁴ The *lis pendens* cuts off the rights of any person whose

7. 50 U.S.C. App. §532 (2)b (1958); 54 Stat. 1183 (1940).

8. Letters to the various services should be sent to the following Washington 25, D.C. addresses: (1) The Adjutant General, Dep't of the Army; (2) The Air Adjutant General, Dep't of the Air Force; (3) The Bureau of Naval Personnel, Dep't of the Navy; (4) Headqrs., U.S. Marine Corps, Dep't of the Navy; (5) Headqrs., U.S. Coast Guard, U.S. Treasury; (6) The Surgeon General, U.S. Public Health Service, Division of Commissioner Officers. If the mortgage is conventional, each service will require a fee of \$2.50. If the mortgage is FHA or VA insured, the services will provide the information free of charge. In the latter case the letter should state that the information is requested with respect to a foreclosure action, the costs of which will ultimately be paid by the federal government.

9. An illustrative complaint is included as Form 1 in the Appendix of Forms following this article.

10. FLA. STAT. §702.02 (1961).

11. *Powell v. New York Life Ins. Co.*, 141 Fla. 758, 194 So. 232 (1940).

12. If the United States is made a party defendant, however, it should be noted that 28 U.S.C. §2410(b) (1958) provides, "The complaint shall set forth with particularity the nature of the interest or lien of the United States."

13. *International Kaolin Co. v. Vause*, 55 Fla. 641, 46 So. 3 (1908).

14. FLA. STAT. §47.49 (1961).

interest arises, or is not recorded, until after the filing of the notice of *lis pedens*.¹⁵

Attention should be given, however, to sections 6321 through 6326 of the Internal Revenue Code of 1954. These sections deal with the attachment of federal income tax liens and provide that such liens attach at the time of assessment. Section 6323 provides that as against mortgagees, pledgees, purchasers and judgment creditors, tax liens do not attach until filed for record. It is not clear when a tax lien attaches as against a mortgagee who files a notice of *lis pedens* in the foreclosure of his mortgage, but since this situation is not among the exceptions, presumably the tax lien attaches when recorded. The effect of this is that if the federal government records a tax lien any time before the foreclosure sale, the complaint must be amended to include the United States as a party defendant. The writers feel that this is manifestly unjust and should be corrected by proper legislation.

As soon as the complaint and notice of *lis pedens* have been filed, the abstract should be continued to show the *lis pedens*.

SERVICE OF PROCESS

Although an extensive discussion of service of process is beyond the scope of this article, recurrent problems peculiar to foreclosures warrant some discussion of this subject.

When it is possible to achieve personal service, there is, generally speaking, no particular problem for the plaintiff's attorney. The statutes in this area are virtually self-explanatory.¹⁶ When the United States is made a party, however, it is important to note carefully section 2410 (b) of Title 28, *U.S. Code*. This section sets out in detail how one must serve the United States Government.¹⁷ Failure to comply with every detail of this provision frequently causes considerable and unnecessary delay.

In the area of constructive service of process, the most common problems are those arising in the interpretation and application of the

15. *O'Bryan v. Dr. P. Phillips & Sons*, 123 Fla. 302, 166 So. 820 (1936). *But cf.*, *Bowers v. Pearson*, 101 Fla. 714, 135 So. 562 (1931); *Freligh v. Maurer*, 111 So. 2d 712 (2d D.C.A. Fla. 1959).

16. FLA. STAT. §§47.03-.51 (1961).

17. Section 2410 (b) provides that service on the United States shall be made by serving the process of the court together with a copy of the complaint upon the United States Attorney for the district in which the action is brought or upon an Assistant United States Attorney or clerical employee designated by the United States Attorney, and by sending copies of the *process and complaint* by certified or registered mail to the Attorney General of the United States, at Washington, D. C. Note, further, that the same statute allows the United States sixty days to file an answer.

phrase, "diligent search and inquiry."¹⁸ In a large number of cases, the property owners desert their homes and leave no trace of their whereabouts. In such a situation, the constructive service statute¹⁹ allows service by publication only upon affidavit that plaintiff, or someone acting in his behalf, has made a diligent search and inquiry to locate the defendants, but is unable to do so.²⁰

The Florida Supreme Court, in construing diligent search and inquiry, has held that extraordinary steps to ascertain the whereabouts of the parties are not required. It is only necessary that the complainant reasonably employ knowledge at his command, make diligent inquiry, and exert an honest and conscientious effort appropriate to the circumstances of each case to acquire the information necessary to enable him to effect personal service on the defendant.²¹

In specific cases, the Florida courts have indicated that a diligent search and inquiry should include the following:

- (1) An inquiry of tenants in possession of the property.²²
- (2) A check of the records of the Clerk of the Circuit Court with respect to any transaction to which the defendants were parties as indicated in the partial abstract obtained before the filing of the foreclosing suit.²³
- (3) If the defendant is known to be an officer, resident agent or director of a corporation, an inquiry of the Florida Secretary of State.²⁴
- (4) A check of the phone book and city directory.²⁵
- (5) A telephone call to the grantor of the deed to the defendant.²⁶
- (6) An inquiry of any real estate broker whose sign appears on the property.²⁷

In addition to the above, the writers have often found the following sources of information to be fruitful:

- (1) Neighbors or friends of the defendants.
- (2) The post office. (Send a certified letter to the property address requesting a receipt showing the place of delivery.)

18. FLA. STAT. §48.04 (1961).

19. FLA. STAT. §§48.01-18 (1961).

20. FLA. STAT. §48.04 (1961).

21. *McDaniel v. McElvy*, 91 Fla. 770, 108 So. 820 (1926).

22. *MacKay v. Bacon*, 155 Fla. 577, 20 So. 2d 904 (1945).

23. *Adams v. Fielding*, 148 Fla. 552, 4 So. 2d 678 (1941); *Klinger v. Milton Holding Co.*, 136 Fla. 50, 186 So. 526 (1938); *Eldridge v. E. C. Fitz & Co.*, 126 Fla. 548, 171 So. 509 (1936).

24. *Adams v. Fielding*, 148 Fla. 552, 4 So. 2d 678 (1941).

25. *Ibid.*

26. *Klinger v. Milton Holding Co.*, 136 Fla. 50, 186 So. 526 (1938).

27. *Smetal Corp. v. West Lake Inv. Co.*, 126 Fla. 595, 172 So. 58 (1936).

- (3) If the mortgage being foreclosed is guaranteed by the VA, an inquiry should be made of the local VA office.
- (4) Present or last known employer.
- (5) The Motor Vehicle Commissioner.
- (6) If the defendants are known to have children, the local school board.
- (7) The telephone information operator.²⁸

DECREE PRO CONFESSO AND NON-MILITARY AFFIDAVIT

In the majority of foreclosure actions, the title holders do not file an answer. It is usually necessary therefore, to seek a decree *pro confesso*.²⁹ A decree *pro confesso* in a foreclosure suit is exactly the same as in any other action, and therefore will not be discussed at length. It should be noted, however, that whether the decree *pro confesso* will be entered by the judge or by the clerk will depend upon local rules of practice. In some counties the judge enters all decrees *pro confesso*. In others, the clerk may enter it unless (1) the defendants are served by publication under an affidavit stating the residence of the defendant to be unknown, or (2) the defendants are served by publication under an affidavit alleging defendant's residence address as particularly as it is known to the plaintiff, and the copies of the summons and complaint sent to that address by the clerk are returned unclaimed. In the latter cases the judge must enter the order.

Together with the motion for decree *pro confesso*, the plaintiff must file a non-military affidavit to comply with the Soldiers' and Sailors' Civil Relief Act, as explained above. This affidavit may be executed by plaintiff's attorney on the strength of the certificates provided him by the military services pursuant to the letters written to them at the time suit was filed. In the usual case, all certificates will have been received by the time the decree *pro confesso* becomes due.

FINAL DECREE

Immediately following the entry of the decree *pro confesso*, a motion for final decree should be filed. The motion must be accompanied by a number of supporting affidavits, the original note, mortgage, and assignments (if any), and the proposed final decree itself. Examples of each affidavit and the final decree may be found in Forms 2 through 6 in the Appendix of Forms following this article.

When the judge signs the final decree, he (or in some counties the clerk) will enter thereon the date of the foreclosure sale in accord-

28. For a good discussion see Kooman, *Constructive Service in Florida*, 9 U. FLA. L. REV. 1 (1956).

29. FLA. R. CIV. P. 3.9.

ance with the provisions of section 702.02 (2) of the Florida statutes. The FHA and VA require that they be notified of the date as soon as it is set. The FHA is usually notified by the servicing agent upon receipt from counsel of a conformed copy of the sale final decree. The VA must be notified directly, however, and a conformed copy of the final decree will suffice here, also. (The VA requires copies of the complaint, final decree, and certificate of sale, title and disbursements. The FHA does not require copies of any of the foregoing instruments.)

Since both the FHA and the VA require that the original note and mortgage be surrendered to them at the completion of the foreclosure, it is necessary in those cases to prepare a motion and order allowing the substitution of copies for the originals. The motion and order usually may be submitted along with the final decree, although some judges prefer not to sign the order until after the sale.

Sometime before the sale, the plaintiff should file a certificate stating that the amount due in the final decree has not been paid (assuming, of course, that this is true). Although paragraph 6 of the final decree included in the Appendix of Forms allows the defendant five days to pay the full amount due, this period may be any length of time up to the date of the sale. If no time limit is set out in the final decree, the defendant may pay the debt any time before foreclosure sale and issuance of a deed.³⁰

At least seven days before the sale, a notice of foreclosure sale must be published in a local newspaper.³¹ In some counties this is taken care of automatically by the clerk. In others, however, the attorney must prepare the notice and send it to the clerk, who then has it published.

FORECLOSURE SALE AND BIDDING

The foreclosure sale is normally conducted by the Clerk of the Circuit Court pursuant to section 702.02 of the Florida statutes. The plaintiff or his representative should attend the sale to preclude a third party from obtaining the property for an inadequate consideration. Most clerks will not hold the sale if the plaintiff is not represented. If the sale is not held, the plaintiff must seek an amended final decree setting a new sale date.

The amount that the plaintiff should bid at the sale is determined by a number of considerations. First, the plaintiff is allowed to credit against the amount of his bid, the amount due him under the final decree plus interest through the date of the sale. The plaintiff's bid

30. *Van Huss v. Prudential Ins. Co.*, 123 Fla. 20, 165 So. 896 (1936).

31. FLA. STAT. §702.02 (2) (1961).

should not exceed this total amount unless the property is commensurately valuable to him and he is prepared to pay cash for the overage.

Second, section 702.02 (5) of the Florida statutes provides that the value of the property sold at a foreclosure sale shall be conclusively presumed to be the amount for which the property was bid in, unless objections thereto are filed within ten days of the sale. Since it is unlikely that the court will allow the plaintiff to object to his own bid, a bid of the full amount due under the decree, when the property is worth substantially less, will preclude the plaintiff from recovering a deficiency decree. In no case, therefore, should plaintiff's bid exceed the value of the property.

Third, if the court finds that the amount for which the plaintiff bid in the property is grossly less than its true value, the sale may be set aside and a resale ordered. The writers have witnessed many attorneys bid in property worth \$15,000 for \$100 or \$1,000 to save money on the documentary stamps which must be affixed to the certificate of title issued by the clerk. It should be emphasized that if the court feels that the plaintiff may bring a suit at law on the note for a deficiency, the court may under its broad equitable powers refuse to confirm the sale and order a resale.³²

Fourth, Internal Revenue Service Regulation section 1.166-6 (b) provides that the amount of gain to be recognized by a mortgagee acquiring property at a foreclosure sale is measured by the excess of the fair market value of the property acquired over the amount of the debt against which it is applied. The same regulation adds that the fair market value of the property, in the absence of clear and convincing proof to the contrary, is defined to be the amount for which it is bid in by the mortgagee. From this it should be clear that if the plaintiff's bid includes the unpaid interest on the loan, he will be taxed on interest that he has not received.

At the same time, section 1.166-6 (b) provides an incentive to bid an amount approximating the true value of the property. For example, assume that the debt due on the mortgage is \$15,000 and the property appears to be worth between \$15,000 and \$20,000. If the plaintiff bids \$15,000, this will probably be deemed to be the fair market value of the property and he will have no recognized gain. If, on the other hand, the plaintiff bids \$100, it would be a simple matter for the Internal Revenue Service to produce clear and convincing evidence that the property is worth much more. If litigation ensues, a court may ultimately find the value of the property to be as much as \$20,000.

32. *Mutual Life Ins. Co. v. Moscovitz*, 119 Fla. 708, 161 So. 80 (1935); *Borson v. Lisonby*, 115 Fla. 333, 156 So. 10 (1934).

Fifth, a number of federal court decisions have held that when the United States files a notice of tax lien after the recordation of the mortgage, the United States' lien, under the "inchoate lien" test is inferior to the principal and interest due on the mortgage, but superior to any lien not choate at the time of the attachment of the federal tax lien.³³ Thus, although most mortgages give the mortgagee a lien on the property for any advancements he must make for property taxes and foreclosure expenses (including attorney's fees), any such advancements made after the attachment of the tax lien may be inferior to the lien of the federal government.

To avoid the possible consequences of these decisions, the plaintiff should be extremely careful not to include in his bid any costs of foreclosure, attorney's fees, or any other advancements made after the filing of the tax lien; provided, of course, the bid still bears a reasonable relationship to the true value of the property.

Sixth, in VA cases the attorney will receive a letter from the regional VA office giving bidding instructions. In these cases the property should be bid in according to the instructions.

POST-SALE PROCEDURE

After the sale, the clerk will issue the certificate of sale, title, and disbursements in accordance with the provisions of section 702.02 of the Florida statutes. In some counties the clerk will issue these automatically. In others, the attorney must prepare the certificates and present them to the clerk for his signature.

In the foreclosure of a conventional mortgage, the duties of the attorney are concluded upon receipt of the certificate of title, unless it is necessary to seek a writ of assistance³⁴ to evict the former mortgagors or other parties in possession. In FHA and VA cases, however, there are still a number of things to be done. Since the post-sale procedures of the VA and FHA differ, they will be considered separately.³⁵

FHA INSURED MORTGAGES

Assuming that the plaintiff is the successful bidder at the sale, the mortgagee's servicing agent should be notified to this effect immediately

33. *United States v. Bond*, 279 F.2d 837 (4th Cir.), *cert. denied*, 364 U.S. 895 (1960); *United States v. Christensen*, 269 F.2d 624 (9th Cir. 1959); *cf. United States v. City of New Britain*, 347 U.S. 81 (1954); *United States v. Atlantic Municipal Corp.*, 212 F.2d 709 (5th Cir. 1954). *But see United States v. American Nat. Bank*, 255 F.2d 504 (5th Cir. 1958); *United States v. Bond*, *supra* (dissenting opinion); *Ornisbee v. United States*, 23 F.2d 926 (Fla. 1928).

34. FLA. R. CIV. P. 3.17.

35. It will be assumed in the following discussion that the mortgagee is the

after the sale and be given the amount of the bid. Next, a special warranty deed from the plaintiff to the Federal Housing Commissioner should be prepared and sent, together with the original promissory note (which should have been withdrawn from the court file by this time), to the mortgagee. The mortgagee should execute the deed, endorse the note over to the Federal Housing Commissioner, his successors and assigns, and return the instruments.

While the special warranty deed and the note are in the hands of the mortgagee, the attorney should be busy taking whatever steps are necessary to evict the mortgagors, if they have not already vacated. A letter demanding possession of the premises will often suffice; occasionally, however, it is necessary to obtain a writ of assistance. The FHA requires that all occupants and personal property be removed before the property is conveyed to the Commissioner.

Once the executed deed is received from the mortgagee, and the mortgagors and all their personal belongings are removed from the premises, the deed should be recorded. The FHA requires that the deed be recorded within thirty days after the sale. But if unavoidable delays are encountered, extensions of this deadline may be granted.

On the date the deed is filed for record, the mortgagee must submit to the FHA Assistant Commissioner Comptroller, FHA Form No. 1025, Notice of Property Transfer and Application for Debentures. This form must be accompanied by FHA Form No. 1125, Debenture Verification Statement, which is signed by the attorney. Form No. 1125 is supplied to the attorney by the servicing agent and may be completed and returned to the servicer at any time after the filing of the complaint.

The FHA requires that all title evidence, fiscal data, the special warranty deed, and other supporting documents be forwarded to the Federal Housing Commissioner within thirty days after the recording of the special warranty deed. The required title evidence may consist of any one of the following:

- (1) Fee owner's title policy issued by a title company duly authorized by law and qualified by experience to issue such;
- (2) An abstract of title accompanied by a legal opinion of the quality of such title signed by an attorney experienced in examination of titles, covering a period of time at least forty years prior to the date of the certificate to a well recognized source of good title; or

successful bidder at the foreclosure sale and that he desires to convey the property to the VA or FHA rather than retain it himself.

(3) The mortgagee's policy of title insurance supplemented by a partial abstract and attorney's certificate of title. The partial abstract must cover the period of time beginning with the date of the mortgage and running through the recorded deed to the Commissioner. The terms of the policy must be such that the liability of the title company continues in favor of the Commissioner after title is conveyed to him.

The latter of the three types of title evidence is the one most commonly used. It requires the attorney to prepare a certificate of title covering only that period of time from the date of the mortgage through the date of the recording of the deed to the Commissioner.

It is still necessary for the servicing agent to prepare numerous forms including fiscal data and a claim for debentures. Some of the information for these forms is furnished by the attorney. Therefore, all original instruments, special warranty deed, attorney's certificate of title, abstract, and various receipts should be sent to the servicing agent within approximately two weeks following the recording of the special warranty deed.

VA INSURED MORTGAGES

The attorney must notify the VA Regional Office directly by mail that the plaintiff was the successful bidder at the sale, giving the amount of the bid and informing the VA that the plaintiff has elected to convey the property to the VA (unless, of course, the mortgagee advises counsel otherwise). Upon receiving this notice the VA sends its own special warranty deed form to the mortgagee, who executes it and forwards it to the attorney.

The VA also requires the property to be vacant when they receive title. If the mortgagors are still living on the property, eviction proceedings should be instituted.

When the deed is received from the mortgagee and the mortgagor is removed from the premises, the original instruments, the unrecorded special warranty deed, partial abstract, and various receipts should be forwarded to the servicing agent—and the attorney's job is finished.

CONCLUSION

At the writing of this article, there appears to be no indication that the present high rate of foreclosures will decrease in the immediate future. The Veterans Administration has recently reported that the total number of guaranty claims paid on home loans during the year 1961 was 16,060, compared with 11,052 in 1960, or an increase of forty-five per cent. It would seem therefore that increasing numbers of attorneys will be called upon to foreclose. A close liaison

with the mortgagee's servicing agent is essential to the efficient processing of each case. The length of time required to complete the foreclosure will vary with each case, depending primarily upon the problems created by the various defendants. As a general rule, no case will be completed in less than three months, and when several defendants are involved or when service of process is by publication, four, five, or even six months may be required. All parties concerned must recognize that the "paper work" is voluminous and often times a "diligent search" takes untold hours of persistent investigating by both the attorney and the servicing agent. It has not been the purpose of the writers to delve into all facets of the substantive law involved in foreclosing a mortgage, but it is hoped that the foregoing will provide a useful general guide to the basic procedure.

APPENDIX OF FORMS

Form 1.

COMPLAINT TO FORECLOSE MORTGAGE

COMES NOW the plaintiff, *A.B.* a New York banking corporation, by and through its undersigned attorneys, and brings this complaint against the defendants whose names appear in the caption hereof, and says:

(1) On or about the date set forth in the mortgage note, a copy of which is attached hereto, made a part hereof and marked "Exhibit A," the makers thereof were indebted to the payee thereof in the principal sum stated in said mortgage note, which was executed and delivered to the payee.

(2) To secure the payment of said mortgage note, the makers thereof, being then the owners of record of the fee simple title to the hereinafter described property, executed and delivered to the payee thereof a certain mortgage, a copy

of which is attached hereto, made a part hereof and marked "Exhibit B," which mortgage encumbers the following described property:

[Description]

(3) The plaintiff is now the owner and holder of said mortgage note and mortgage.

(4) The installments which became due on said mortgage note and mortgage on September 1, 1962, and on the first day of each and every month thereafter until the filing of this complaint have not been paid to the plaintiff by the defendants or by anyone else on behalf of the defendants, and by reason thereof said mortgage note and mortgage are in default.

(5) The principal balance due on said mortgage note and mortgage is dollars, together with interest thereon at the rate of per cent per annum, from 196

(6) By reason of the default in the payment of the installments due under the terms of said mortgage note and mortgage, the plaintiff has elected to and does hereby accelerate the payment of the entire principal sum together with accrued interest, all of which are hereby declared to be due and payable to the plaintiff.

(7) The mortgage of the plaintiff is a lien superior in dignity to any right, title, claim, lien or interest of the defendants to this cause, or any of them.

(8) The defendants, *C.D.*, and *E.F.*, his wife, are now the owners of record of the aforesaid property.

(9) That the defendant, *G.H.*, a Florida banking corporation, claims some interest in the above described property by virtue of that certain mortgage dated , filed , under Clerk's File No. of the Public Records of County, Florida, from *C.D.* and *E.F.*, his wife, to *G.H.*, in the original amount of That this mortgage is subject to and inferior to the mortgage held by the plaintiff herein.

(10) That the defendant, *I.J.*, a Florida corporation, claims some interest in the above described property by virtue of that certain claim of lien dated , filed , under Clerk's File No. of the Public Records of County, Florida, in the original amount of That this claim of lien is subject to and inferior to the mortgage held by the plaintiff herein.

(11) The plaintiff has expended and will expend during the pendency of this suit certain necessary costs to protect its security, all of which are secured by the lien of said mortgage.

(12) The plaintiff has employed the undersigned law firm as its attorneys to institute and prosecute this suit and has agreed to pay the said attorneys a reasonable fee for their services herein; such fee is an additional indebtedness secured by the lien of the said mortgage.

WHEREFORE, plaintiff prays that an accounting be had and taken under the direction of this court of what is due the plaintiff for principal and interest on said mortgage note and for late charges, abstracting, taxes, expenses and costs, including attorney's fees, which plaintiff is entitled to recover in this suit, plus interest thereon; that in default of the payment to the plaintiff of the amounts so found to be due, the said mortgaged property be sold under the direction of this court to satisfy the decree therefor.

Signed: _____

Attorneys

Address:

Form 2.

AFFIDAVIT

BEFORE ME, the undersigned authority, this day appeared *K.L.*, who upon being duly sworn, deposes and says:

(1) That I am a practicing attorney in . . [city] County, Florida, and as such I have examined a policy of title insurance and partial abstract of title in connection with the following described property, to-wit:

[Description]

(2) That the title to this property is presently vested in *C.D.* and *E.F.*, his wife, subject to that certain first mortgage held by *A.B.*, a New York banking corporation, dated and recorded in Official Records Book . . . at page . . . of the Public Records of County, Florida. The said mortgage which is the subject matter of this suit is a valid existing mortgage on the above described property and that the plaintiff herein is the holder thereof, and that said mortgage constitutes a lien on the above described property which is superior in dignity to any and all liens of the defendants herein.

FURTHER AFFIANT SAYETH NOT.

[Jurat] /s/ _____
A.B.

Form 3.

AFFIDAVIT

BEFORE ME, the undersigned authority, this day appeared *M.N.*, who upon being duly sworn, deposes and says:

My name is *M.N.* and I am Assistant Secretary of . . . Mortgage Company, with offices located at , Florida, which is a local servicing contractor for the plaintiff, *A.B.*, a New York banking corporation; that *A.B.* is the owner and holder of a mortgage and note which is in default in that the payments due for the months of , , and . . . 196 . . . , have not been paid as of the date of this affidavit; that the plaintiff has agreed to pay counsel the sum of . . . dollars for services rendered herein; that the amount due upon said mortgage as of the . . . day of is in the following amounts:

Principal due on said note and mortgage	
. . . . to	\$ _____
Interest from to	_____
Late Charges	_____
Less Escrow Balance	_____
TOTAL	\$ _____
Plus interest at the rate of \$ _____	
per day from _____	

[Jurat] /s/ _____
M.N.

Form 4.

AFFIDAVIT OF ATTORNEYS AS TO COSTS

BEFORE ME, the undersigned notary public, this day appeared *K.L.*, who upon being duly sworn, deposes and says that he is a member of the law firm of of, Florida, the attorneys for the plaintiff herein, that he is familiar with the costs advanced by said law firm in connection with said foreclosure, which are as follows:

Partial abstract of title	\$
Clerk of circuit court — costs
Sheriff of County — costs
Continuation of abstract of title
Photostats
Total advanced on expenses	\$

[Jurat]

/s/.....

K.L.

Form 5.

AFFIDAVIT AS TO ATTORNEYS' IN MORTGAGE FORECLOSURE

On this day personally appeared before me, the undersigned officer duly authorized to administer oaths and take acknowledgments, *O.P.*, who after being by me first duly cautioned and sworn, upon his oath deposes and says that he is a practicing attorney at the Bar of the Circuit Court of the Judicial Circuit in and for County, Florida, and as such he has had experience in the foreclosure of mortgages; that he is familiar with the amount customarily charged by attorneys and allowed by the court for attorneys' fees for foreclosing mortgages in said court, that he knows the reasonable value of such services and that he has been advised as to the amount due on the mortgage sought to be foreclosed in the above-styled cause, and as to the extent of the services rendered by the plaintiff's attorneys in the above-styled cause, and that in his opinion the sum of \$ would be a reasonable attorney's fee to be allowed the plaintiff's attorneys for said services.

[Jurat]

/s/.....

O.P.

Form 6.

FINAL DECREE IN FORECLOSURE

THIS CAUSE coming on for final hearing this day on the motion for final decree of the plaintiff, upon the plaintiff's complaint to foreclose mortgage, and the evidence offered in support thereof, and the court being duly advised in the premises, it is upon consideration,

ORDERED, ADJUDGED AND DECREED that:

(1) Due and legal service of process has been had upon all of the defendants and that all of the decrees *pro confesso* heretofore entered in this cause are hereby ratified and confirmed; that this court has jurisdiction of the parties in this cause and the subject matter hereof; that the allegations contained in the complaint have been proved by competent evidence and that the equities in this cause are with the plaintiff.

(2) The mortgage sued upon by the plaintiff in this cause constitutes a valid first lien upon the property hereinafter described and that said mortgage is in default as alleged in the complaint.

(3) The reasonable fee for the services rendered by the attorneys for the plaintiff is the sum of \$. . . and this court hereby finds and decrees that \$. . . is a reasonable attorney's fee to be allowed for the services of its attorneys herein, which sum is also due and owing.

(4) There is due to the said plaintiff upon the mortgage note and mortgage sued upon, the following sums:

Principal due on mortgage note and mortgage	\$_____
Interest thereon at . . . %	
from through	_____
Late charges	_____
Less escrow balance	_____
Abstracting expenses	_____
Costs of suit and expense incidental	
thereto to date hereof	_____
Attorney's fee	_____
TOTAL DUE	\$_____

The above itemized sums are now due and owing to the plaintiff and in addition thereto, such further sums as may be paid by the plaintiff for court costs, plus interest at six percent (6%) from the date of this decree until paid, and any further sums in connection herewith.

(5) The plaintiff has a lien to secure the payment of the aforesaid sums against the following described property in . . . County, Florida, to-wit:

[Description]

The aforesaid lien of the plaintiff is prior, paramount and superior to all rights, claims, liens, interests, encumbrances and equities of the defendants and all persons, firms or corporations claiming by, through or under said defendants or any of them and that said property will be sold free and clear of any claims of said defendants.

(6) Unless the defendants shall, within five (5) days from the entry of this decree, pay the plaintiff or its attorneys the sum hereinabove specified in paragraph 4, and any and all other costs of this suit as aforesaid, the clerk of this court, after publication of notice as required by chapter 702 of the Florida statutes as amended, is hereby directed to sell the mortgaged property as described above in paragraph 5, to the highest and best bidder for cash, at public sale at the south door of the county courthouse,, Florida, free, clear and discharged of any and all claims, liens, encumbrances, rights, equities and interest of the defendants hereto, and any and all persons, firms or corporations claiming by, through or under the said defendants, said sale to be held at 11:00 o'clock, a.m. on the day of, 196 . . ., all as provided by chapter 702 of the Florida statutes.

(7) That out of the proceeds arising from the sale of the property herein ordered to be sold, the clerk shall retain his fee and shall pay to the attorneys for the plaintiff the attorney's fee herein allowed; that out of the remainder of the said proceeds as far as the same shall apply there shall be paid to the plaintiff herein the sums heretofore provided together with costs of this suit advanced by the plaintiff, and that if said property shall sell for more than enough to pay the plaintiff the aforesaid sum with interest thereon, the clerk shall report said surplus to this court for the court's further order; that in the event the amount realized at such sale be insufficient to pay the total of the several amounts herein ordered to be paid, the clerk shall report such deficiency to the court for such further orders as the court shall deem proper.

(8) The plaintiff may bid at the said sale and if the plaintiff is the successful bidder, it shall be entitled to credit on its bid up to the full amount due under this decree.

(9) That upon the said sale being had in accordance with chapter 702 of the Florida statutes, and upon the clerk filing the certificate of sale, and upon the clerk filing the certificate of title as provided by chapter 702 of the Florida statutes, the sale shall stand confirmed and the defendants and all persons claiming by, through and under them shall be forever barred and foreclosed of any and all equity or right of redemption in and to the above described property, and the purchaser at said sale or the purchasers, their heirs, representatives, successors or assigns shall without delay be let into possession of the said premises so conveyed.

(10) That this court retains jurisdiction of this cause for the purpose of making any and all further orders and decrees as may be necessary and proper.

DONE AND ORDERED in chambers at . [city] County, Florida
this day of, 196 . . .

Circuit Judge