

# Morcom, Focht, and Foreclosure Pretense Defense

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## To All Foreclosure Defense Attorneys and Their Mortgage and Foreclosure Victims:

A Florida District Court of Appeal (DCA) in *Wells Fargo Bank, N.A., v. Morcom*, 2013 WL 5575634 (Fl. Ct. App., 5th Dist. 2013), held last October that the law does not require a mortgagee to both hold and own the promissory note in order to have standing to foreclose. See the opinion below.



You might recall that in *Focht v. Wells Fargo Bank, NA* (Fl. Ct. App., 2nd Dist. 2013), the 2nd DCA held that the plaintiff bank could not foreclose because it had become holder of the note after filing the foreclosure lawsuit. See the opinion below. The court seemed to me to have good reason to question the prudence of Florida's standing doctrine because the plaintiff, now having standing, would merely refile the case and win. This issue worried the judge so badly that he certified a question about it to the Florida Supreme Court.

As I see it, commonsense dictates that both of these cases constituted a monumental waste of court resources because the defendants knew they would end up losing.

Furthermore, the cases suggest pandemic legal malpractice by foreclosure defense attorneys who seem determined to bilk their clients for dilatory defenses they absolutely know will ultimately result in loss of the house by the client. Admittedly, Focht sued *pro-se*, but attorneys know defenses against foreclosure of valid mortgage loans lose because they know the Florida Constitution requires courts to provide redress of injury to all persons, including banks whom mortgagors injured by failing to repay valid loans timely. They also know it because they only occasionally get temporary dismissals, such as for standing or capacity to sue problems, and the plaintiffs virtually always refile or appeal and win.

Mortgages stipulate that borrowers who breach the note by failing to maintain the property or make timely payments must forfeit the collateral house. The mortgagor has already transferred the property to the bank for expressly that purpose. Read this reality in the first provision of the standard Fannie Mae / Freddie Mac Florida mortgage security instrument (compressed here for reading convenience):

"TRANSFER OF RIGHTS IN THE PROPERTY - This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's covenants

and agreements under this Security Instrument and the Note. For this purpose, Borrower does hereby mortgage, grant and convey to Lender, the following described property located in the \_\_\_\_ [Type of Recording Jurisdiction] of \_\_\_\_ [Name of Recording Jurisdiction]: \_\_\_\_ which currently has the address of \_\_\_\_ [Street]\_\_\_\_, Florida \_\_\_\_ [City] [Zip Code] (“Property Address”): TOGETHER WITH all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property. All replacements and additions shall also be covered by this Security Instrument. All of the foregoing is referred to in this Security Instrument as the “Property.” BORROWER COVENANTS that Borrower is lawfully seised of the estate hereby conveyed and has the right to mortgage, grant and convey the Property and that the Property is unencumbered, except for encumbrances of record. Borrower warrants and will defend generally the title to the Property against all claims and demands, subject to any encumbrances of record. "

See this in light of statutes like this from Florida:

**697.02 Nature of a mortgage.**—A mortgage shall be held to be a specific lien on the property therein described, and not a conveyance of the legal title or of the right of possession.

It should by now have become common knowledge that the lenders of America nearly universally cheated their borrower customers in mortgage transactions. The Financial Crisis Inquiry Commission issued its [Report](#) in January 2011 detailing the collusion between the lending industry and government that led to widespread predatory lending that collapsed jobs and homeowner equity throughout the land. I have determined through various means that lenders or their agent appraisers, mortgage brokers, title companies, and closers have injured upwards of 90% to 95% of single family home mortgagors throughout the past 15 years.

That means the lenders or courts should grant 9 out of 10 home mortgagors some financial compensation or loan balance set-off to compensate the mortgagors for those injuries. But this will never happen unless and until mortgagors and their attorneys learn to attack the lenders, note holders, and their agents for torts, breaches, and legal errors underlying the mortgage.

And that will not happen until the attorneys of the several states evolve a mortgage-attack culture as they have a foreclosure-pretense-defense culture. These days most attorneys deal with a mortgage dispute not by attacking the mortgage issues, but rather by attacking the virtually irrelevant issues related to the foreclosure: chain of ownership of the note, bifurcation of note from mortgage, vapor money, securitization, standing, etc. I don't say those issues have no relevance per se; I say that in the end attention to them becomes futile because the foreclosure plaintiffs will correct the related errors, then appeal or refile and win the foreclosure anyway. And

that means mortgage victims will have wasted their hard-earned, precious savings on worthless litigation directed by scurrilous, malpracticing, pretense-defense attorneys.

Foreclosure Pretender-Defender Attorneys, please stand up and...

1. Learn from your personal injury attorney colleagues how to find the torts, breaches, and legal errors underlying your clients' mortgages.
2. Learn how to negotiate settlements with scurrilous lenders.
3. Learn how to use government agencies like the [Consumer Financial Protection Bureau](#) and [HUD](#) to force recalcitrant lenders into a settlement favorable to your clients.
4. Learn to engineer the defeat of the lenders and their agents by finding proof of causes of action against them in the mortgage-related documents so that any judge can see them clearly.
5. Learn to prepare complaints, counter-claims, and cross-claims that will beat the lenders and their agents into submission and win the hearts of the judge and jury.
6. Learn to demand and get compensatory and punitive damages, loan cram-downs, and/or financial set-offs against the amount your client owes the lender.

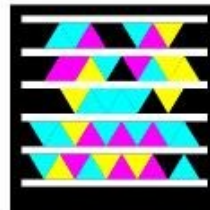
I hope you realize I mean you win MONEY judgments and fees that the cash-flush BANK or insurers pay, not what your cash-strapped clients pay.

And I mean you don't need to limit your client base to foreclosure victims. You can advertise to and serve those wealthy clients stuck with underwater loans they hate, but have no trouble paying. Win a few multi-million-dollar judgments for them and when the word gets out, more clients who can afford your services will flock to you.

If you don't have a clue how to manage this, CALL ME NOW at 727 669 5511 or [Email me](#). I will get you the professional guidance you need to win ACTUAL MONEY for your clients in the vast majority of these cases.



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# Wells Fargo v. Morcom

[http://scholar.google.com/scholar\\_case?case=6757966525643470496](http://scholar.google.com/scholar_case?case=6757966525643470496)

**WELLS FARGO BANK, N.A., Appellant,**  
**v.**  
**DANIEL P. MORCOM AND SHARON MORCOM, Appellees.**

Case No. 5D11-4089.

**District Court of Appeal of Florida, Fifth District.**

Opinion filed October 11, 2013.

Michael K. Winston, Dean A. Morande and Donna L. Eng of Carlton Fields, P.A., West Palm Beach, for Appellant.

Steven P. Combs, Deborah L. Greene, Robert S. Jeffrey, Shane Herbert and Andrea Combs Jevic of Combs Greene McLester, Jacksonville, for Appellees.

WALLIS, J.

Appellant appeals the lower court's order granting summary judgment in favor of Appellees, in which the trial court held that to have standing to foreclose a mortgage, a party must be the holder and owner of the promissory note. Because the Florida Uniform Commercial Code ("Florida UCC") and our previous decision in [Deutsche Bank National Trust Co. v. Lippi, 78 So. 3d 81 \(Fla. 5th DCA 2012\)](#), require a party seeking foreclosure to be the holder of the note, we reverse.

Appellant filed a complaint on August 6, 2010, seeking to foreclose a mortgage issued by Appellees. Appellant alleged, *inter alia*, that "Mortgagee shown on the Mortgage attached as an exhibit is the original Mortgagee" and "Plaintiff is now entitled to enforce Mortgage and Mortgage Note pursuant to Florida Statutes § 673.3011." Appellant attached to the complaint copies of the mortgage and the promissory note.<sup>[1]</sup> The note is endorsed "pay to the order of \_\_\_\_ without recourse," with the blank space populated with a stamp of Wells Fargo Bank, N.A.

On August 9, 2011, Appellees filed a motion for summary judgment, arguing Appellant was not the owner of the note and mortgage. At the hearing on Appellees' motion for summary judgment, Appellees argued that Appellant conceded in its response to request for admissions that Appellant was not the owner of the note or mortgage. However, Appellees agreed that Appellant held the original note. In its order, the lower court indicated that the issue before the lower court was whether "standing in a classic foreclosure case requires evidence that the plaintiff is the owner of the note and mortgage, even though the plaintiff has the right to enforce the note pursuant to the [Florida UCC]." Furthermore, the lower court sustained the objection to any evidence that Appellant was proceeding in a representative capacity because this was not pled in the complaint. The order also found that Appellant is the holder of the note, but that the production of the note provides no evidence of ownership. The lower court denied Appellant's motion for rehearing.

The standard of review governing the ruling of a trial court on a motion for summary judgment posing a pure question of law is de novo. [Delta Fire Sprinklers, Inc. v. OneBeacon Ins. Co., 937 So. 2d 695,](#)

[697 \(Fla. 5th DCA 2006\)](#) (citations omitted). We review findings regarding standing de novo. [Fox v. Profl Wrecker Operators of Fla., Inc., 801 So. 2d 175, 178 \(Fla. 5th DCA 2001\)](#).

The Florida UCC<sup>[2]</sup> and recent cases from this court stand for the proposition that a plaintiff has standing to bring a foreclosure action if the plaintiff is the holder of a promissory note, endorsed in blank, secured by a mortgage. The controlling law found in the Florida UCC defines the "person entitled to enforce an instrument" as:

- (1) The holder of the instrument;
- (2) A nonholder in possession of the instrument who has the rights of a holder; or
- (3) A person not in possession of the instrument who is entitled to enforce the instrument pursuant to s. 673.3091 or 673.4181(4).

A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.

§ 673.3011, Fla. Stat. (2010).

We have previously held that "[t]he party that holds the note and mortgage in question has standing to bring and maintain a foreclosure action." [Deutsche Bank Nat'l. Trust Co. v. Lippi, 78 So. 3d 81, 84 \(Fla. 5th DCA 2012\)](#) (citing [Philogene v. ABN Amro Mortg. Grp. Inc., 948 So. 2d 45, 46 \(Fla. 4th DCA 2006\)](#)). "[T]he person having standing to foreclose a note secured by a mortgage may be either the holder of the note or a nonholder in possession of the note who has the rights of a holder." [Lippi, 78 So. 3d at 84](#) (quoting [Taylor v. Deutsche Bank Nat'l Trust Co., 44 So. 3d 618, 622 \(Fla. 5th DCA 2010\)](#)). In [Lippi](#), Deutsche Bank's second amended complaint contained the language that it "is now the holder of the Mortgage Note and Mortgage and/or is entitled to enforce the Mortgage Note and Mortgage." [Lippi, 78 So. 3d at 84](#). The facts in [Lippi](#) are almost identical to Appellant's complaint in the present case, which provides that the "Mortgagee shown on the Mortgage attached as an exhibit is the original Mortgagee" and "Plaintiff is now entitled to enforce Mortgage and Mortgage Note pursuant to Florida Statutes § 673.3011." The [Lippi](#) court held, where the note was endorsed in blank, meaning it was "payable to the bearer and could be transferred simply by possession," Deutsche Bank's standing was established because it was the note holder, regardless of any recorded assignments. [Lippi, 78 So. 3d at 85](#) (citing [Harvey v. Deutsche Bank Nat'l Trust Co., 69 So. 3d 300, 304 \(Fla. 4th DCA 2011\)](#)); see also § 673.2051, Fla. Stat. (2010).

In the present case, the original note Appellant attached was endorsed in blank with Appellant's name stamped in the blank endorsement field, which, paired with section 673.3011(1), established that Appellant was the holder entitled to enforce the instrument.

Applying portions of the Florida UCC, other district courts of appeal have determined that a party that holds a note endorsed in blank has standing to foreclose a mortgage. [U.S. Bank Nat'l Ass'n v. Knight, 90 So. 3d 824, 825-26 \(Fla. 4th DCA 2012\)](#); [Riggs v. Aurora Loan Servs., LLC, 36 So. 3d 932, 933 \(Fla. 4th DCA 2010\)](#); [Mortg. Elect. Registration Sys., Inc. v. Azize, 965 So. 2d 151 \(Fla. 2d DCA 2007\)](#); [Mortg. Elect. Registration Sys., Inc. v. Revoredo, 955 So. 2d 33, 34 \(Fla. 3d DCA 2007\)](#).

Appellees cite Florida Supreme Court precedent dating back to the late 1800s to suggest Appellant must both hold and own the note and mortgage to satisfy the standing requirement for a foreclosure action. The cases Appellees cite are not persuasive because the supreme court decided the cases prior to

the adoption of the now-instructive and binding Florida UCC.<sup>[3]</sup>

Based on this court's precedent in Lippi and the applicability of the Florida UCC, we reverse the lower court's order granting summary judgment and remand for further proceedings.

REVERSED and REMANDED.

SAWAYA and LAWSON, JJ., concur.

[1] Subsequently, Appellant filed the original note with the lower court on September 15, 2011.

[2] Florida adopted the UCC on January 1, 1967. See [Suburbia Fed. Sav. & Loan Ass'n v. Bel-Air Conditioning Co.](#), 385 So. 2d 1151, 1154 (Fla. 4th DCA 1980); see also [Warren Fin., Inc. v. Barnett Bank of Jacksonville, N.A.](#), 552 So. 2d 194, 196 n.2 (Fla. 1989) ("Florida has adopted the provisions of the Uniform Commercial Code by statute in chapters 671-680, Florida Statutes.").

[3] Because we hold the holder of a note endorsed in blank has standing to foreclose, it is unnecessary to address any issues regarding deficiencies in Appellant's complaint.

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

## Focht v Wells Fargo

[http://scholar.google.com/scholar\\_case?case=13219281734080486137](http://scholar.google.com/scholar_case?case=13219281734080486137)

**DEBORAH E. FOCHT, Appellant,**

**v.**

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

[Case Nos. 2D11-4511, 2D11-4980, Consolidated.](#)

**District Court of Appeal of Florida, Second District.**

Opinion filed September 25, 2013.

Deborah E. **Focht**, pro se.

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

SILBERMAN, Judge.

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

foreclosure sale has already taken place, we dismiss the appeal in case number 2D11-4980 as moot.

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

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

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

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

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

Wells Fargo alternatively argues that it established standing by submitting the original note endorsed in blank. See [Cutler v. U.S. Bank Nat'l Ass'n](#), 109 So. 3d 224, 225-26 (Fla. 2d DCA 2012); [Everhome Mortg. Co. v. Janssen](#), 100 So. 3d 1239, 1240 (Fla. 2d DCA 2012); [Green v. JPMorgan Chase Bank, N.A.](#), 109 So. 3d 1285, 1288 (Fla. 5th DCA 2013). As with the assignment, however, Wells Fargo did not submit the original note until several months after it had filed the complaint. To establish standing as the holder of a note endorsed in blank, a party must be in possession of the original note. See § 671.201(21)(a), Fla. Stat. (2007) (defining "holder" as "[t]he person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession"); [Everhome](#), 100 So. 3d at 1240; [Green](#), 109 So. 3d at 1288. Thus, Wells Fargo was required to submit evidence that it was in possession of the original note with the blank endorsement at the time it filed the

complaint to establish standing. See [Green, 109 So. 3d at 1288](#).

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

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

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

For our part, appellate courts have seen a recent influx of appeals in which defendants have successfully argued that the trial court erred in entering a foreclosure judgment in favor of the plaintiff because the plaintiff failed to establish standing at the time of filing. See, e.g., [Cutler, 109 So. 3d at 225](#); [Gonzalez, 95 So. 3d at 253-54](#); [Green, 109 So. 3d at 1288](#); [McLean, 79 So. 3d at 174](#). In many of these cases, the plaintiff presented unrefuted proof of standing acquired after filing but prior to the final hearing. See *id.* The appellate courts are nonetheless compelled to reverse based on the district courts' application of a long line of supreme court cases applying the general principle that "the plaintiff's lack of standing at the inception of the case is not a defect that may be cured by the acquisition of standing after the case is filed." [Progressive Express Ins. Co. v. McGrath Cmty. Chiropractic, 913 So. 2d 1281, 1284-85 \(Fla. 2d DCA 2005\)](#) (following [Voges v. Ward, 123 So. 785 \(Fla. 1929\)](#), and [Marianna & B.R. Co. v. Maund, 56 So. 670 \(Fla. 1911\)](#)); see also [Jeff-Ray Corp. v. Jacobson, 566 So. 2d 885, 886 \(Fla. 4th DCA 1990\)](#) (following [Marianna, 56 So. 670](#)).

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

CAN A PLAINTIFF IN A FORECLOSURE ACTION CURE THE INABILITY TO  
PROVE STANDING AT THE INCEPTION OF SUIT BY PROOF THAT THE



## PLAINTIFF HAS SINCE ACQUIRED STANDING?

Reversed and remanded.

DAVIS, C.J., Concur.

ALTENBERND, J., Concur with opinion.

ALTENBERND, Judge, Concurring.

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

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

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

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

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

Ms. **Focht** cannot demonstrate that she has been the victim of any legal harm in this case arising from

Wells Fargo's delayed possession of the note. In fact, it appears that she has lived for years in this duplex during the pendency of the foreclosure proceeding, collecting rent from the tenants in the other unit, while making no payments on the note and while forcing the lender to advance \$22,213.35 toward taxes or other escrow expenses.

The trial courts have been overwhelmed by foreclosure filings. In many of these civil lawsuits the defendants, under a duty to plead in good faith, should be expected to admit that they received the money, signed the notes and mortgages, and failed to make the payments. They may often have legitimate affirmative defenses, but the delayed production of the original note and mortgage in a case where the note and mortgage are in default should not justify a dismissal of the legal proceeding. Presumably, our mandate requires the dismissal of this foreclosure action, which in turn will undo the foreclosure sale. Ms. **Focht** will regain possession of her property and apparently continue her free use of the duplex while the lender continues to make advances to cover the expenses typically paid from escrow. Our certified question of great public importance is dispositive of this appeal and worthy of consideration by the supreme court.

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

[1] Case law focuses on standing to enforce the note, as opposed to the mortgage, because the mortgage generally passes as an incident to the debt. [Cutler v. U.S. Bank Nat'l Ass'n, 109 So. 3d 224, 225 \(Fla. 2d DCA 2012\)](#).

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

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