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YESTERDAY I WAS LYING: CREEPING PRECLUSION OF RECIPROCAL FEE AWARDS IN RESIDENTIAL FORECLOSURE LITIGATION

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INTRODUCTION

“Yesterday, I was lying. Today I’m telling the truth.”
- Bob Arum, Boxing Promoter and Attorney¹

As a result of the high volume of foreclosure litigation in the wake of the Great Recession, scholars have explored several outgrowths of the foreclosure crisis, developing a burgeoning body of research. Scholars and commentators have authored studies about a wide variety of foreclosure-related topics, ranging from the disparate racial effects of the housing crisis² to the many legislative and court-instituted policies enacted to ameliorate the harsh reality faced by financially distressed homeowners, all the way through books examining the aftermath of the crisis and lessons learned from the entire experience.³

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¹ Kevin Iole, *Bob Arum Explains Infamous ‘Yesterday I Was Lying, Today I’m Telling the Truth’ Line*, YAHOO SPORTS (Mar. 29, 2016, 4:16 PM), <https://sports.yahoo.com/blogs/boxing/bob-arum-explains-infamous—yesterday-i-was-lying—today-i-m-telling-the-truth—line-201538810.html> (“On the first night, Arum championed the cause of one fighter. The next night, under the same circumstances with everyone drinking heavily again, Arum reignited the argument. This time, though, instead of arguing for the fighter he had the night before, he was arguing for the other fighter. Bob Waters, a sports writer at Newsday in New York, called him on it. ‘Bob said, “Hey, last night you said A was better and now you’re saying it’s B,” ’ Arum said. ‘And so I smiled and I said, “Well, yesterday I was lying. Today I’m telling the truth.” ’”).

² See André Douglas Pond Cummings, *Families of Color in Crisis: Bearing the Weight of the Financial Market Meltdown*, 55 HOW. L.J. 303, 303 (2012).

³ See Dustin A. Zacks, *The Grand Bargain: Pro-Borrower Responses to the Housing Crisis and Implications for Future Lending and Homeownership*, 57 LOY. L. REV. 541, 557 (2011) [hereinafter Zacks, *The Grand Bargain*]. See generally CHRISTOPHER K. ODINET, *FORECLOSED: MORTGAGE SERVICING AND THE HIDDEN*

Our previous contributions to this evolving body of research primarily focused on idiosyncratic and troubling doctrinal developments in foreclosure litigation. This Article provides another data point, consistent with our other findings—namely, that in response to the record levels of foreclosure cases, judges and legislatures largely chose symbolic palliative actions to give an appearance of helping distressed homeowners, while at the same time systematically narrowing borrower defenses.⁴ In previous research, we offered support for these two points in several different contexts:

- Legislative and judicial efforts at ameliorating externalities of the foreclosure crisis;⁵
- Disciplinary actions or investigations regarding a host of questionable or unethical foreclosure attorney conduct;⁶
- Judicial treatment of borrower defenses to fraudulent or problematic assignments of mortgage or other title transfer documentation commonly used in foreclosure litigation;⁷
- Application of statutes of limitation and the doctrine of *res judicata* to lender claims in foreclosure cases;⁸ and

ARCHITECTURE OF HOMEOWNERSHIP IN AMERICA (2019); LINDA E. FISHER & JUDITH FOX, *THE FORECLOSURE ECHO: HOW THE HARDEST HIT HAVE BEEN LEFT OUT OF THE ECONOMIC RECOVERY* (2019).

⁴ As one small emblematic example, at the same time the Florida Legislature was forced to enact additional pleading and documentation requirements for banks to ensure that bank attorneys would not continue to falsely assert that promissory notes had been lost in thousands of cases, the legislature simultaneously enacted laws that would allow banks and their attorneys to progress towards final judgments with less hindrance. *See* H.R. 87, 23d Leg., 1st Reg. Sess. (Fla. 2013) (creating an easier pathway for banks to litigate using orders to show cause for final judgments of foreclosure at the very outset of litigation, an alternative to the traditional rules of pleading in civil procedure).

⁵ Zacks, *The Grand Bargain*, *supra* note 3, at 542.

⁶ Dustin A. Zacks, *Robo-Litigation*, 60 CLEV. ST. L. REV. 867, 869–70 (2013) [hereinafter Zacks, *Robo-Litigation*]. As mentioned in *Robo-Litigation*, in one case the chief judge of a county plagued with an enormous backlog of foreclosure cases quit his post as judge to take a position at a high-volume foreclosure firm under investigation by the state attorney general. *Id.* at 886.

⁷ *See* Eric A. Zacks & Dustin A. Zacks, *Not a Party: Challenging Mortgage Assignments*, 59 ST. LOUIS U. L.J. 175, 179–83 (2014); Eric A. Zacks & Dustin A. Zacks, *A Standing Question: Mortgages, Assignment, and Foreclosure*, 40 J. CORP. L. 705, 718–26 (2015) [hereinafter Zacks & Zacks, *A Standing Question*].

⁸ *See* Eric A. Zacks & Dustin A. Zacks, *No Brakes: Loan Acceleration and Diminishing Foreclosure Defenses*, 18 WAKE FOREST J. BUS. & INTELL. PROP. L. 389, 390 (2018) [hereinafter Zacks & Zacks, *No Brakes*].

- Borrower challenges to Mortgage Electronic Registration Systems, Inc. and its fundamental alteration of traditional American recording practices.⁹

Our previous research articulated a new understanding of the reasoning behind many of the attacks upon, or narrowing of, borrower defenses and the lack of strict accountability for questionable bank litigation practices. In sum, it appears that state actors systemically frame the foreclosure context differently from other types of civil litigation. The consequence of this framing is that judges are emboldened to modify or dispense with traditional civil practice procedures or doctrines, typically to the detriment of financially distressed homeowners facing foreclosing entities with significantly more resources.¹⁰

This Article extends this analysis and theory of systemic framing to yet another area of longstanding jurisprudence facing attack and overhaul in the context of distressed homeowner litigation—namely, the applicability and availability of attorneys’ fees awards to the successful homeowner-litigant. Most, if not all, mortgage contracts specifically allow for the foreclosing entity to recover their attorneys’ fees in the event of default and foreclosure.¹¹ Many state statutes contain automatic reciprocity provisions for such one-sided attorneys’ fees provisions regardless of the type of contract.¹² Yet, perhaps unsurprisingly in the wake of our prior research, traditional application of such reciprocity has begun to deteriorate and erode in the face of judicial

⁹ See Dustin A. Zacks, *Standing in Our Own Sunshine: Reconsidering Standing, Transparency, and Accuracy in Foreclosures*, 29 QUINNIPIAC L. REV. 551, 552–53 (2011) [hereinafter Zacks, *Standing in Our Own Sunshine*]; Dustin A. Zacks, *Revenge of the Clerks: MERS Confronts County Clerk and Qui Tam Lawsuits*, 32 BANKING & FIN. SERVS. POL’Y REP. 17, 17–18 (2013).

¹⁰ Zacks & Zacks, *No Brakes*, *supra* note 8, at 434 (“Thus, while we have previously posited that judges preview the merits of individual foreclosure claims and discount homeowner claims accordingly, we now suggest that the overall systemic frame of court administration responses to the foreclosure crisis enforced and created an atmosphere of almost ministerial enforcement or of a collection mechanism rather than serving any truth-seeking function. Framing lawsuits primarily in terms of efficiency rather than factfinding renders foreclosure a foregone conclusion, especially when judges have an incentive to clear a large backlog of foreclosure cases such as those pending after the 2008 financial crisis.”).

¹¹ For an example of such language in a typical mortgage, see *Florida Single Family Mortgage Uniform Instrument Form 3010*, FANNIE MAE ¶ 22, https://www.fanniemae.com/content/legal_form/3010w.doc (last visited Feb. 9, 2020) (“If the default is not cured . . . [l]ender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, reasonable attorneys’ fees . . .”).

¹² See, e.g., FLA. STAT. ANN. § 57.105(7) (West 2019).

skepticism towards awarding homeowners' attorneys' fees.¹³ Accordingly, this Article continues the same narrative, in another context, of state actors viewing and treating distressed homeowners differently than other civil litigants, to the detriment of those homeowners. Lenders are allowed to plead for recovery under the mortgage, but in those rare instances when they lose for standing or for title reasons, they may then seek to avoid paying attorneys' fees under the fee recovery statute because of that lack of standing or title. In other words, courts permit lenders to "lie yesterday" about being the proper party to enforce the contract and believe that they are "telling the truth" today about not being a party to the contract, which otherwise would require paying the homeowners' attorneys' fees.

Part I begins with an explanation of the American Rule of awarding attorneys' fees and discusses the standard for fee shifting statutes in the face of one-sided contract provisions. Part II discusses and analyzes how judges and litigants have successfully begun attacking traditional application of fee-shifting statutes in the context of foreclosure litigation. Part III concludes with the policy implications of narrowing the availability of reciprocal fee awards.

I. AMERICAN RULE; FEE-SHIFTING STATUTES; STANDARDS

A. *The American Rule and Its Implications*

In civil litigation conducted within the United States, each party is generally responsible for bearing its own litigation fees and is generally prohibited from recovering attorneys' fees from the losing party.¹⁴ This principle is known as the American Rule.¹⁵ The rule is subject to criticism because it may not make the prevailing party "whole" and compensate it sufficiently.¹⁶ This

¹³ See *infra* Part III.

¹⁴ See 10 FERN M. SMITH, MOORE'S FEDERAL PRACTICE CIVIL § 54.171(1)(a); James R. Maxeiner, *The American "Rule": Assuring the Lion His Share*, in COST AND FEE ALLOCATION IN CIVIL PROCEDURE: A COMPARATIVE STUDY 288 (Mathias Reimann ed., 2012) (IUS GENTIUM: COMPARATIVE PERSPECTIVES ON LAW AND JUSTICE SER. NO. 11).

¹⁵ James R. Maxeiner, *supra* note 14, at 288. The "English Rule," which generally permits the prevailing party to recover its fees and costs from the losing party, seems to predominate among legal systems in the West. *Id.*

¹⁶ *Id.* at 288, 293 ("Through control of litigation, lawyers can force opposing parties to devote resources to litigation; thanks to the no indemnity practice [of the American Rule], those resources are forever lost.").

failure to adequately compensate prevailing parties can therefore deter plaintiffs from pursuing valid claims.¹⁷ For example, a potential suit for a few thousand dollars with no hope of recovering attorneys' fees may simply not be worth a litigant's time or effort, and an aggrieved party may find it impossible to find an attorney to bring an otherwise valid claim.¹⁸

In such a situation, an attorney might only take such a small matter on either (i) an hourly basis, which in the course of routine civil litigation could easily dwarf the total amount of the judgment sought, rendering pursuit of such judgment entirely wasteful; or (ii) a contingency basis, which could involve such a large portion of any potential recovery that a client determines litigation would not be worth the effort. These two scenarios, of course, assume that an attorney would actually consider taking such a small case on either fee basis with no possibility of recovering attorneys' fees.

Aside from deterring potential plaintiffs from bringing otherwise valid claims, application of the American Rule may also be criticized because it causes innocent defendants a loss. In other words, a defendant may successfully and conclusively argue that her conduct was not negligent, that she did not breach a contract, or that a plaintiff's case does not otherwise satisfy the elements of a given claim. Yet, just as in the above case of a plaintiff deterred from bringing an otherwise valid claim, this otherwise successful defendant may not be made whole because she will not be recompensed for her attorneys' fees in defending the meritless or unproven claim.¹⁹ In this way, the American Rule may also insufficiently deter plaintiffs from bringing meritless or tenuous claims to court.²⁰ Just as in the case of a plaintiff who secures victory on a valid claim only to see that judgment rendered a nullity by her attorney's bills, a successful defendant may feel that

¹⁷ *See id.* at 293 (“[The American Rule] destroys meritorious claims and promotes baseless ones.”).

¹⁸ *See id.*

¹⁹ *See id.*

²⁰ *Id.* at 294 (“The public takes greater notice, however, of baseless claims that are enabled by no indemnity and lawyer control. This combination permits weak parties with weak claims to extract settlements even from strong parties with strong defenses.”).

defeat of an opponent's claim is entirely hollow, given that she spent potentially thousands of dollars on the defense and suffered the emotional effects of enduring protracted litigation.²¹

On the other hand, the American Rule may protect vulnerable litigants without sufficient litigation resources from bearing the risk of paying their opponent's fees should they be defeated in court.²² The indigent or low-income litigant, even if represented on a contingency basis and with no capital outlay at the inception of a case, might still refrain from bringing a suit against a more sizable or powerful entity based on the possibility of an adverse attorneys' fees award. In this way, the American Rule may be said to ameliorate the imbalance of power and resources between parties.²³

If attorneys' fees awards for losing parties were a risk in bringing claims or defenses, then this would induce powerful parties to always hire the most expensive counsel possible and to litigate solely for the purpose of increasing possible fee awards so as to raise barriers to entry to litigation.²⁴ Few, if any, indigent or low-income clients would bother to bring any sort of small claim against a powerful entity if they were to bear the risk of paying their opponent to employ an army of expensive lawyers.

As a result of these issues raised by the American Rule, many exceptions to the rule have developed at the federal and state level. These exceptions can be mandatory in nature and require the losing party to pay the prevailing party's fees or costs or may be permissive in allowing a court discretion in awarding such fees.²⁵ For example, the indigent or low-income client who may be deterred from bringing an otherwise valid claim may find relief in

²¹ See, e.g., Zacks, *The Grand Bargain*, *supra* note 3, at 543–44 (discussing the toll foreclosure litigation may take on homeowners, including harm to financial, physical, and emotional health).

²² See Terese A. West, *Everybody Pays: Attorneys Fees and the American Rule*, MOSS & BARNETT (Feb. 1, 2013), <http://www.lawmoss.com/pp/publication-everybody-pays-attorneys-fees-and-the-american-rule.pdf?77489>.

²³ See *id.* (“[T]he American rule presumes the existence of legitimate disputes and ensures that neither party need fear an undue financial burden for turning to an impartial forum for resolution.”).

²⁴ See *id.* (citing *Oelrichs v. Spain*, 82 U.S. 211, 231 (1872) (“When both client and counsel know that the fees are to be paid by the other party there is danger of abuse.”)).

²⁵ In regard to costs, for example, see FLA. R. CIV. P. 1.420(d) (“Costs in any action dismissed under this rule shall be assessed and judgment for costs entered in that action . . .”). In regard to fees, see *Nationstar Mortg. LLC v. Glass*, 219 So. 3d 896, 897 (Fla. Dist. Ct. App. 2017) (“[I]t is well established that Florida follows the ‘American Rule’; thus, attorney’s fees may only be awarded when authorized by contract or statute.”).

a statute designed to encourage attorneys to bring such lawsuits. Such statutes might explicitly provide that attorneys' fees awards are available in suits alleging fair housing violations, discrimination against a protected class, or whistleblower actions.²⁶ The clear goals and implications of such statutes abrogating the American Rule are that public policy ought to encourage bringing certain actions and that public interest statutes would rarely be enforced or sought to be enforced if fees awards were not possible.²⁷ Similarly, other statutes or rules may lessen the harsh application of the American Rule for litigants defending against tenuous claims by allowing for attorneys' fees awards in the cases of frivolous actions or claims, or by allowing sanctions that include discretionary attorneys' fees awards in cases of improper or dilatory conduct.²⁸

Separate and apart from statutory regimes or rules of procedure modifying the American Rule in a specific context, state law generally treats the American Rule as a default rule that can be changed by contract.²⁹ Consequently, it is routine for parties to enter into contracts that include provisions requiring the losing party to pay the attorneys' fees of the prevailing party.³⁰

²⁶ See Samuel R. Bagenstos, *Thurgood Marshall, Meet Adam Smith: How Fee-Shifting Statutes Provide a Market-Based System for Promoting Access to Justice (Though Some Judges Don't Get It)* 6–7 (Univ. of Mich. Law Sch. Pub. Law & Legal Theory Working Paper Series, Paper No. 150, 2009), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1407275.

²⁷ See *id.* at 7.

²⁸ See FLA. STAT. ANN. § 57.105(1) (West 2019):

“Upon the court’s initiative or motion of any party, the court shall award a reasonable attorney’s fee, including prejudgment interest, to be paid to the prevailing party in equal amounts by the losing party and the losing party’s attorney on any claim or defense at any time during a civil proceeding or action in which the court finds that the losing party or the losing party’s attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial:

- (a) Was not supported by the material facts necessary to establish the claim or defense; or
- (b) Would not be supported by the application of then-existing law to those material facts.”

²⁹ See *Nationstar Mortg. LLC*, 219 So. 3d at 897. Contracts typically are governed by state law, and more specifically, by the law of the jurisdiction in which the contract is made or enforced. Federal law may preempt the enforceability of fee-shifting provisions to the extent that a particular legal area has been “federalized.” Smith, *supra* note 14, § 54.171(1)(a). In addition, federal law also may specifically mandate, or permit a federal court to rule, that the American Rule does not apply and specifically provide for the prevailing party to be able to recover its attorneys’ fees. See *id.* § 54.171(3)(a).

³⁰ See SMITH, *supra* note 14, § 54.171(1)(a).

The American Rule and its exceptions have played an increasingly important part in mortgage foreclosure litigation since the beginning of the Great Recession. Most, if not all, lenders include fee-shifting provisions that require the borrower to pay the costs and fees of the lender if the lender prevails in litigation concerning the mortgage, such as a foreclosure action.³¹ These provisions are obviously one-sided as written in that they only require one party to pay if it loses but do not explicitly provide the same benefit if that same party actually prevails. Such one-sided provisions are particularly punitive in the context of consumer form contracts or other agreements where contracts are offered on a take-it-or-leave-it basis.³²

In the mortgage context, strict application of such unilateral contractual provisions leads to a bevy of problematic implications. A lender, for example, would be permitted to pursue tenuous claims or engage in wasteful litigation practices designed to increase defense costs, and the successfully defending borrower would not be entitled to any relief from its fees expended in defending against the claims. Lenders would likewise face no consequences for filing questionable or insufficiently proven claims, dismissing them, and then refiling such claims *ad infinitum* until eventually winning a judgment. The costs to a major financial institution or large servicer of bringing a lawsuit, which include court filing fees and the fees paid to outside counsel—often hired on the basis of ability to provide low-cost, high-volume representation—have clearly not been effective deterrents to stopping foreclosing entities from perpetrating questionable tactics in litigation.³³

For example, attorneys in judicial foreclosure states—where a lender must bring a lawsuit as a plaintiff in order to foreclose a homeowner and in which the lenders faced and paid attorneys' fees awards for case dismissals during the height of the housing crisis—still did not effectively eliminate a host of problematic practices in state courts.³⁴ Even when faced with the risk of a fee award to their opponents after a dismissal or a court-awarded

³¹ Indeed, the Fannie Mae uniform mortgage contains such a fee-shifting provision. See *Florida Single Family Mortgage Uniform Instrument Form 3010*, *supra* note 11, ¶ 22.

³² See Eric A. Zacks, *Contracting Blame*, 15 U. PA. J. BUS. L. 169, 176–77, 180–82 (2012) [hereinafter Zacks, *Contracting Blame*].

³³ See Zacks, *Robo-Litigation*, *supra* note 6, at 884–88, 890, 901–03.

³⁴ See *id.* at 891–92.

sanction, lenders or their attorneys still submitted thousands of improperly verified affidavits and assignments.³⁵ Thus, when this risk of extra expense or penalty for blameworthy conduct is removed, foreclosing entities and their attorneys might be even more cavalier about their adherence to ethical standards in litigation.

Further, for distressed or financially at-risk homeowners, the possibility of not recouping attorneys' fees after defending successive meritless or unproven suits may cause the further deterioration of their household financial situation, decreasing the likelihood of any possibility to save their homes through reinstatement or settlement.³⁶ Foreclosing entities would or could, in this scenario, eventually prevail regardless of the underlying merit of their claims, as they could simply exhaust the resources of homeowners in continually defending lawsuits to a point where hiring counsel becomes impossible.

This is not an idle threat. One of the benefits to homeowners of a judicially supervised—and therefore elongated—foreclosure process is the ability to bolster financial resources during the process in order to reinstate or to appear more favorable for a settlement, such as a modification of loan terms.³⁷ This effect, however, can be tempered in cases in which foreclosing entities conduct their litigation more vigorously through, for example, taking extensive discovery and depositions and through delaying settlement negotiations.³⁸ Each dollar borrowers spend on counsel is an opportunity cost insofar as that dollar was not spent on trying to reinstate their loans. Given that the borrowers' legal fees may not be recouped, lenders may be incentivized to litigate more extensively, thus lowering the possibility of optimal settlement or workout for distressed homeowners.

³⁵ See *id.* at 902, 906, 907.

³⁶ See Zacks, *The Grand Bargain*, *supra* note 3, at 544 (noting the mere fact of a filed foreclosure on one's credit history, to give one example, can result in job termination or other catastrophic financial harm).

³⁷ See *id.* at 563.

³⁸ See, e.g., *id.* at 564 n.117 (citing empirical research showing longer foreclosure processes may simply result in higher indebtedness). In this way, elongating the foreclosure process through pro-homeowner rulings could actually work to a borrower's detriment.

In a practice area where, during the recent recession, some counties reported that more than ninety percent of homeowners facing foreclosure failed to retain counsel, this is a serious issue.³⁹ Foreclosing entities already enjoy a large disparity in resources and ability to conduct litigation. Removing the slight risk of paying their opponents' attorneys' fees only encourages the exploitation of this disparity of resources in such cases when borrowers actually hire counsel. It also makes the borrower's choice of whether to devote dollars to defense lawyers or to a possible reinstatement payment more stark. Therefore, as a result of the harsh implications of the American Rule, states have enacted statutes to dull the sharp edges that strict application of such unilateral contractual fees clauses could bring.

B. Fee-Shifting State Statutes

Some state statutes permit, but do not require, a court to award fees to the prevailing party if the contract would otherwise have required that same party to pay its opponent's fees if it had lost.⁴⁰ Such regimes are generally an attempt to restore the mutuality of risk relative to success in the litigation and to restore the balance that may not have existed when the contract was executed and the one-sided clause was included.⁴¹ As suggested in the prior section, such statutes appear well-suited to the foreclosure context, where lenders normally insert one-sided fee-shifting clauses and are more likely to institute claims based upon the contracts, thus potentially leaving borrowers who successfully defend foreclosures without a remedy for the attorneys' fees they necessarily incurred.

³⁹ See Melanca Clark & Maggie Barron, *Foreclosures: A Crisis in Legal Representation*, BRENNAN CTR. for JUST. 14, 16 (2009), available at <https://www.brennancenter.org/our-work/research-reports/foreclosures-crisis-legal-representation>. Indeed, this logic is parallel to our arguments against eliminating any functional statute of limitations in mortgage foreclosures.

⁴⁰ See, e.g., FLA. STAT. ANN. § 57.105(7) (West 2019) ("If a contract contains a provision allowing attorney's fees to a party when he or she is required to take any action to enforce the contract, the court may also allow reasonable attorney's fees to the other party when that party prevails in any action, whether as plaintiff or defendant, with respect to the contract. This subsection applies to any contract entered into on or after October 1, 1988.").

⁴¹ See *Hsu v. Abbara*, 891 P.2d 804, 809 (Cal. 1995) ("As this court has explained, '[s]ection 1717 [the fee-shifting statute] was enacted to establish mutuality of remedy where [a] contractual provision makes recovery of attorney's fees available for only one party, and to prevent oppressive use of one-sided attorney's fee provisions.'").

The borrower in the context of mortgage contract formation and bargaining is likely in a substantially inferior position relative to the lender in many respects. The borrower is likely unaware of such one-sided attorneys' fees provisions or, even if she is aware of them, she is likely unable to negotiate away those provisions.⁴² If borrowers are unaware of such provisions, they are unlikely to seek alternatives, like lenders that do not require such a provision. This means that there is no competition incentivizing lenders to provide less one-sided provisions.⁴³ Indeed, courts recognize this basis for paternalistically imposing reciprocity upon unilateral attorneys' fees clauses:

[S]ome bad bargains pervade frequently occurring transactions and have adverse consequences for society. Unilateral fee provisions are usually seen in form contracts prepared by commercial entities. Many of these forms govern consumer transactions. The unilateral fee provision tucked away in the legal text of a form contract effectually deprives many consumers of access to the courts to redress contractual breaches. But typically consumers lack sufficient bargaining power to coax business entities into recasting such fee provisions. And commercial parties need no leveling in negotiating contract terms. Thus the purpose behind section 57.105(7) is obviously that the Legislature found bilateral provisions necessary to enable consumers to have representation and, thereby, meaningful access to the machinery of justice in contractual disputes affecting important consumer and family interests.⁴⁴

Unilateral fee clauses also favor lenders in the sense that a lender is much more likely to be the party pursuing claims based on the nature of the lender-borrower relationship, such as those relating to nonpayment of the underlying debt. This means that the borrower more often will be defending claims as opposed to seeking recovery under the contract. The provision accordingly removes the risk of fee-shifting from the lender, the party most likely to be pursuing meritless claims, while heightening the risk of potential loss by the borrower, the party most likely to be defending claims, in each instance even when the borrower prevails. In this instance, even when the borrowers win,

⁴² See Zacks, *Contracting Blame*, *supra* note 32, at 176–77.

⁴³ See *id.*

⁴⁴ *Mediplex Constr. of Fla., Inc. v. Schaub*, 856 So. 2d 13, 16 (Fla. Dist. Ct. App. 2003) (Farmer, C.J., dissenting).

they still suffer a loss because they will not be compensated for the attorneys' fees they have paid while defending their foreclosure cases.

Accordingly, statutes that mandate fee-shifting in the foreclosure context, or otherwise permit a court to award fees to the prevailing party, can provide substantial benefits to borrowers that prevail in foreclosure proceedings. As indicated above, one of the purposes of such provisions is to attempt to put the borrower back into the same place in which the borrower otherwise would have been had the lender not improperly or ineffectively prosecuted its litigation.⁴⁵ Within the context of the litigation, the borrower is not actually coming out ahead in any sense, since the borrower is only recovering the fees that she otherwise would have to pay out of pocket.

Courts that award fees to attorneys may also determine whether an enhanced fee recovery, such as a multiplier, is appropriate to compensate the attorney adequately for having taken on such a risky representation—that is, a contingency fee arrangement.⁴⁶ In the case of a foreclosure dismissal, no actual dollar recovery is awarded to the homeowner-defendant. Thus, the court has to determine what the value of the attorney's representation was in light of the hours worked, the risk involved with such an arrangement, and the ability of the borrower to obtain adequate compensation without the attorney's ability to seek a contingent recovery of fees.⁴⁷ This is particularly important with respect to indigent or insolvent borrowers, who may be able to retain adequate counsel solely on a contingency basis or with some sort of contingency fee arrangement. In some markets, borrower-defendants pay their attorney or attorneys a flat fixed monthly fee that does not equate to the amount that would have been paid if the homeowner had retained the attorney on an hourly basis.⁴⁸ As such, borrowers' attorneys often build in incentives for

⁴⁵ See *supra* notes 40–41 and accompanying text.

⁴⁶ See *Bank of N.Y. v. Williams*, 979 So. 2d 347, 348 (Fla. Dist. Ct. App. 2008) (finding no abuse of discretion in granting an award multiplying the attorney's actual fees by a factor of 2.5); *Vivot v. Bank of Am., NA*, 115 So. 3d 428, 429–30 (Fla. Dist. Ct. App. 2013); *J.P. Morgan Mortg. Acquisition Corp. v. Golden*, 98 So. 3d 220, 224 (Fla. Dist. Ct. App. 2012).

⁴⁷ See *Fla. Patient's Comp. Fund v. Rowe*, 472 So. 2d 1145, 1150–51 (Fla. 1985); *Standard Guar. Ins. Co. v. Quanstrom*, 555 So. 2d 828, 830–31 (Fla. 1990).

⁴⁸ See, e.g., Polyana da Costa, *Attorney Defends Taking on Mortgages as Contingency Fee*, DAILY BUS. REV. (Nov. 29, 2010, 12:00 AM), <https://www.law.com/almID/1202475433460/>.

further compensation if in fact they are able to succeed in defending their clients. As a result, many require their clients to include contingency fee features that demand their clients compensate them for the value of any recovery.⁴⁹ The fee-shifting statutory regime and the possibility of a multiplied fee award accordingly allow courts to compensate borrower-defendants' attorneys appropriately based on the contingent nature of their representation.

Permitting borrowers to recover their fees thus may provide a substantial benefit to attorneys that defend borrowers as well as an incentive for attorneys to engage in such representation in the first place. Furthermore, recovery of fees may allow homeowners in many cases to remain in their homes without making regular payments while the foreclosure litigation is being fought. Contrarily, if one views attorneys defending foreclosures as, in the words of one high-volume foreclosure firm attorney, "hordes of lawyers defending on the specious ground that their clients are not sure who to pay,"⁵⁰ then allowing for fee awards only encourages such superficial or hypertechnical defense work.⁵¹

Extrapolating this counterargument further, if attorneys' fees awards make representation and dilatory defense tactics more likely, then one may say it is not only the individual litigants or opponents of such conduct who are harmed by the creation of additional incentives to represent homeowners. Foreclosing entities might also argue that needlessly increasing costs of

⁴⁹ *See id.*

⁵⁰ American Legal and Financial Network's Amended Amicus Curiae Brief in Support of Respondent at 13, *Glass v. Nationstar Mortg. LLC*, 219 So. 3d 896 (Fla. Dist. Ct. App. 2017) (No. SC17-1387).

⁵¹ We briefly note that we do not refer to the amicus brief's signator as working for a "high-volume foreclosure firm[]" without cause. *See Zacks, Robo-Litigation, supra* note 6, at 875. The attorney signing and submitting the amicus brief to the Florida Supreme Court is apparently employed by Choice Legal Group. *See* Brief in Support of Respondent, *supra* note 50, at 21. Choice Legal Group is a firm formerly known as the Law Offices of Marshall C. Watson; the firm changed its name because the firm's namesake pleaded guilty to bar offenses in conducting foreclosure litigation and was temporarily suspended from practicing law. *See* Kim Miller, *Foreclosure Mill Head Faces Florida Bar Discipline*, PALM BEACH POST (Jan. 7, 2013), <https://web.archive.org/web/20130123012852/http://blogs.palmbeachpost.com/realtime/2013/01/07/foreclosure-mill-head-faces-florida-bar-discipline/>. Among other accusations, the Watson firm reportedly assigned attorneys to impossible caseload numbers. *See Zacks, Robo-Litigation, supra* note 6, at 886 & n.167 (noting that an attorney for Watson testified to handling between five and six thousand cases at any one time). Watson's firm eventually paid \$2 million to settle the Florida Attorney General's investigation into their foreclosure litigation practices. *Id.* at 886 & n.171.

litigation creates externalities for society as a whole in jurisdictions where reciprocal fee awards are allowed, including making future lending less likely or reducing the size of future loan offers in such jurisdictions.⁵² Similarly, these tactics are commonly blamed for tying up court dockets and delaying resolution of innumerable valid claims by months or years by grinding the resolution of civil dockets to a halt.⁵³ Thus, although homeowners might argue that imposing reciprocity into unilateral fee provisions is the only way to ensure that litigants are made whole when facing unequal bargaining power combined with endless or sloppy litigation, foreclosing entities may correspondingly argue that such imposition results in damage to the judicial and financial systems and is wasteful in light of the overwhelming validity of most foreclosure claims.

C. *Fee-Shifting Requirements*

Fee-shifting statutes and case law interpreting them typically require the prevailing party that did not otherwise have the benefit of the contractual fee-shifting provision to demonstrate that it succeeded in some respect on the merits of the suit.⁵⁴ This standard varies in practice from state to state, but generally can be satisfied by receiving some or all of the benefit sought in instituting the suit, such as some sort of damage recovery.⁵⁵

Whether the defendant is the prevailing party is a more difficult question than might otherwise appear. Obviously, if the plaintiff does not win a final judgment, then it seems that the defendant should be deemed to be the prevailing party with respect to receiving the benefit of fee-shifting. If one does not win at litigation, then one has inherently lost at litigation. This is actually the situation, however, only when the defendant has succeeded in preventing the plaintiff from receiving any sort of

⁵² See Karen M. Pence, *Foreclosing on Opportunity: State Laws and Mortgage Credit* 1 (Bd. of Governors of Fed. Reserve Sys., Working Paper No. 2003-16, 2001), <http://ssrn.com/abstract=410768>.

⁵³ See Brief in Support of Respondent, *supra* note 50, at 13–14 (referring to Florida courts as “bursting” with the aforementioned “hordes of [borrower defense] lawyers”).

⁵⁴ See, e.g., *Blue Infiniti, LLC v. Wilson*, 170 So. 3d 136, 138 (Fla. Dist. Ct. App. 2015) (discussing prevailing party status in the context of voluntary dismissals).

⁵⁵ Under federal law, the prevailing party standard is typically based on whether the relief “materially alters the legal relationship between the parties by modifying the defendant’s behavior in a way that directly benefits the plaintiff.” *Lefemine v. Wideman*, 568 U.S. 1, 4 (2012) (quoting *Farrar v. Hobby*, 506 U.S. 103, 111–12 (1992)).

relief.⁵⁶ Similarly, a dismissal without prejudice may not indicate that a plaintiff definitively has not or will not recover some of the relief demanded, since the plaintiff may refile the same claim later.⁵⁷

In the foreclosure context, it may be difficult for a defendant to achieve prevailing party status. Lenders, when confronted with defenses based on procedural deficiencies such as those related to service of process or notice of breach, may choose to voluntarily dismiss the case without prejudice and refile after fixing any procedural problems.⁵⁸ As noted above, forcing the foreclosing entity into a voluntary dismissal, or even winning a preliminary motion to dismiss, may not be sufficient to qualify the borrower-defendant as a prevailing party for fee-shifting purposes.⁵⁹

II. ANOTHER BARRIER FOR DEFENDANTS IN FORECLOSURE CASES

A. *A Successful Defense as Justification for Avoiding Fee-Shifting*

This Article focuses on another area where courts have begun to limit the defenses and remedies available to borrower-defendants and their attorneys. Lenders have creatively attempted to circumvent the application of such statutory fee-shifting regimes by using the borrower-defendants' successful trial court arguments against them. As mentioned above, borrower-defendants may employ an array of defenses to defeat the foreclosure claim instituted by the lender. These defenses can include any number of lender deficiencies, such as the failure to comply with service of process requirements, failure to provide notice of breach in accordance with the requirements of the note

⁵⁶ See *Blue Infiniti, LLC*, 170 So. 3d at 139 (discussing cases in which payment of a majority of a plaintiff's demanded amount resulted in a voluntary dismissal but not a reciprocal fee award).

⁵⁷ See, e.g., Jeffrey C. Regan, Note, *Plaintiffs' Absolute Right to Voluntary Dismissal: Legitimate Right or Abuse of Judicial Process?*, 36 U. FLA. L. REV. 118, 130 (1984). Under federal law, this would be analyzed based on whether the legal relationship had been changed between the parties, and since the dismissal without prejudice does not change the legal relationship between the parties, the defendant would not be deemed the prevailing party. See *Lefemine*, 568 U.S. at 4 (citing *Farrar*, 506 U.S. at 111–12).

⁵⁸ See Regan, *supra* note 57, at 120.

⁵⁹ See, e.g., *Kelly v. BankUnited, FSB*, 159 So. 3d 403, 407 (Fla. Dist. Ct. App. 2015) (granting dismissal by virtue of a short sale not sufficient to merit prevailing party status).

or mortgage, or standing or real party in interest-based defenses.⁶⁰ During the rise of mortgage securitization, many lenders failed to document transfers in interest with assignments of mortgage or otherwise lost or destroyed key loan documents, which made it more difficult to demonstrate the rights to enforce the notes and mortgages that were the basis for the foreclosure claims.⁶¹ In some cases, the pressure to pursue foreclosure claims as fast as possible in the face of such documentation issues resulted in fraudulent practices such as backdating assignments, forging signatures, improper notarization, and other problematic practices.⁶² Despite documentation of these practices, few lenders or lender attorneys have received punishment for such actions.⁶³

Borrowers' attorneys have relied upon these documentation problems and problematic assignment practices to construct defenses attacking the foreclosing entity's standing or right to enforce the loan documents.⁶⁴ Under these defense theories, if the foreclosing entity cannot properly document or is relying upon inaccurate or fraudulent documentation to support its enforcement of the note and mortgage, then the entity should not be granted final judgment and the right to foreclose.⁶⁵ As indicated above, there appears to have been widespread fraud as well as negligent documentation practices in the assignment of mortgages and the prosecuting of foreclosure claims in the wake of the Great Recession.⁶⁶ Presumably, such defenses have been employed in thousands of cases.⁶⁷ These defenses are fairly intuitive and often conclusive, although courts have liberally permitted foreclosures in such instances despite the applicability of such defenses.⁶⁸

⁶⁰ See Joseph William Singer, *Foreclosure and the Failures of Formality, or Subprime Mortgage Conundrums and How to Fix Them*, 46 CONN. L. REV. 497, 501, 515, 520–23, 525 (2013).

⁶¹ See *id.* at 514–21, 550.

⁶² See Zacks, *Robo-Litigation*, *supra* note 6, at 869–70.

⁶³ See *id.* at 890–94.

⁶⁴ See Brief in Support of Respondent, *supra* note 50, at 13 (reporting “hordes” of lawyers denying that the foreclosing plaintiff has standing).

⁶⁵ See John B. Leach, *Taking a Stand on Standing: The Real Party in Interest Conflict in Ohio Foreclosure Actions*, 40 CAP. U. L. REV. 1099, 1099–100 (2012).

⁶⁶ See *supra* notes 61–62 and accompanying text.

⁶⁷ See Raymond H. Brescia, *Leverage: State Enforcement Actions in the Wake of the Robo-Sign Scandal*, 64 ME. L. REV. 17, 19, 33–34 (2011).

⁶⁸ See, e.g., Zacks, *Standing in Our Own Sunshine*, *supra* note 9, at 609 (noting that courts largely accepted whichever of the numerous theories for standing attorneys created by Mortgage Electronic Registration Systems, Inc.); *cf.* Zacks & Zacks, *No Brakes*, *supra* note 8, at 410 (noting that courts disregard the reason for

Even where these defenses have been successful, lenders have begun to seek to avoid paying the borrower's attorneys' fees by using prevailing defense theories, such as standing, against the borrower's attorney.⁶⁹ While admitting that the statutory regime requiring a lender to pay the fees would generally apply if a borrower were successful, lenders argue that this regime only applies if the lender is in fact bound by the mortgage contract with the fee-shifting provision.⁷⁰ Where borrowers have been successful in demonstrating that lenders do not have standing or the right to enforce the note and mortgage, lenders argue that, accordingly, they should not be bound by the fee-shifting provisions in contracts that otherwise would permit the court, under the fee-shifting statute, to require lenders to pay borrowers' fees.⁷¹ An analogous argument suggests that when a borrower has successfully argued that a contract is void or unenforceable, then the same reasoning should follow. Homeowners argue that these contentions, if accepted, create a "heads you win, tails I lose" scenario in which their successful defenses against meritless claims create the basis upon which to deny them recovery of their attorneys' fees spent in proving the baselessness of the claims brought.

B. Formalism to Protect Foreclosing Entities

A lender that seeks to avoid fee-shifting by using a borrower's successful standing or title defense against the borrower is often successful where the court is receptive to a formalistic argument.⁷² Employed literally, a borrower that successfully demonstrated

dismissals of foreclosure suits—whether due to outright fraud or mere technical deficiencies—when considering whether or not to apply statutes of limitation or *res judicata* against foreclosing banks).

⁶⁹ See *Wells Fargo Bank, N.A. v. Elkind*, 254 So. 3d 1153, 1153–54 (Fla. Dist. Ct. App. 2018) (finding the bank unsuccessfully appealed an award of fees after voluntary dismissal, contending that a borrower who successfully asserts a standing defense cannot obtain reciprocity of fees under contract when a bank is held not a party to that contract).

⁷⁰ See, e.g., *Rodriguez v. Wilmington Sav. Fund Soc'y, FSB*, 270 So. 3d 367, 368, 369 (Fla. Dist. Ct. App. 2018) (finding the bank unsuccessfully asserted same argument as was used in *Elkind*, whereafter the court ruled that a voluntary dismissal means the borrower's standing argument has not been reached).

⁷¹ See, e.g., *Harris v. Bank of N.Y. Mellon*, No. 2D17-2555, 2018 WL 6816177, at *3 (Fla. Dist. Ct. App. Dec. 28, 2018) (“[W]e recognize that the Third, Fourth, and Fifth Districts each have held that when a party prevails by establishing that the plaintiff completely failed to prove standing, there is no longer a contract between the parties and no basis upon which to enforce a fee provision.”).

⁷² See, e.g., *Fla. Med. Ctr., Inc. v. McCoy*, 657 So. 2d 1248, 1251 (Fla. Dist. Ct. App. 1995) (“[W]e must return to the precise text of the agreement.”).

that the foreclosing entity lacked standing—for example, because it could not demonstrate the right to enforce the mortgage contract—would be unable to recover attorneys' fees *because* it was successful in showing that the foreclosing entity was not a party to the contract.⁷³ Since the foreclosing entity is not a party to the contract, it is not bound by the fee-shifting provision, which means that the borrower would not be entitled to rely upon the fee-shifting provision—or the statutory regime permitting attorneys' fees recovery if there was a one-sided fee-shifting provision.⁷⁴ Again, this logic would hold for the homeowner-defendant successful in alleging the contract was void, and it appears that such reasoning is now the majority rule in Florida.⁷⁵

For example, in *Nationstar Mortgage LLC v. Glass*, the circuit court dismissed Nationstar's case with prejudice based on the argument from Glass, the borrower, that Nationstar, the lender, lacked standing to enforce the note and mortgage.⁷⁶ Nationstar appealed and Glass filed a motion for appellate attorneys' fees and costs. On appeal, Glass argued that the court correctly dismissed the lender's complaint for lack of standing, but also argued that she was entitled to appellate attorneys' fees based upon the

⁷³ See, e.g., *Harris*, 2018 WL 6816177, at *3 (discussing Florida decisions in accord with this proposition).

⁷⁴ Cf. *Fla. Med. Ctr., Inc.*, 657 So. 2d at 1251–52 (“[I]n order to be responsible for fees, one first had to be responsible for the bill. But the unappealed result of trial was that under the agreement Mrs. McCoy had not assumed a responsibility for payment of the hospital bill. It follows that she also did not incur an obligation to pay attorney's fees. Without an obligation to pay fees, there is no basis to invoke the compelled mutuality provision of section 57.105(2).”). In other mortgage foreclosure cases, lenders had sought to argue that an earlier dismissal—even with prejudice—did not mean that the defendant had prevailed with respect to standing issues to the extent that the lender had instituted new litigation that would address the same issues. Courts were less receptive to these arguments. See *Bank of N.Y. v. Williams*, 979 So. 2d 347, 347–48 (Fla. Dist. Ct. App. 2008) (“The refiling of the same suit after the voluntary dismissal does not alter the [defendants]’ right to recover prevailing party attorney’s fees incurred in defense of the first suit.”). Presumably, if these cases were relitigated now, the foreclosing entities would make the formalistic arguments we discuss herein and likely prevail.

⁷⁵ See, e.g., *Harris*, 2018 WL 6816177, at *4. Note, however, that *Nationstar Mortg. LLC v. Glass*, 219 So. 3d 896 (Fla. Dist. Ct. App. 2017), was accepted for review by the Florida Supreme Court, and a substantive opinion was issued; after some membership changes on the court, a new opinion was issued reversing its prior decision to hear the matter and the original opinion was vacated. Nevertheless, the state of affairs as of the date of this writing demonstrates an immense progression in the acceptance of such arguments that preclude fee awards for homeowners' attorneys.

⁷⁶ 219 So. 3d at 898.

application of reciprocity contemplated in § 57.105(7) into the unilateral fee clause in the mortgage.⁷⁷ Florida's Fourth District Court of Appeals denied Glass's motion for appellate attorneys' fees, holding that "[a] party that prevails on its argument that dismissal is required because the plaintiff lacked standing to sue upon the contract cannot recover fees based upon a provision in that same contract."⁷⁸

Other Florida cases follow similar reasoning. In *Bank of New York Mellon Trust Co., N.A. v. Fitzgerald*, the court denied attorneys' fees to Fitzgerald, a borrower who had successfully prevailed on her standing argument.⁷⁹ Fitzgerald had prevailed because the note produced was specially endorsed to JPMorgan Chase—not the foreclosing party—and because no other evidence of negotiation or transfer, such as an assignment of mortgage, was produced.⁸⁰ Because the defendant demonstrated that Bank of New York Mellon was not a party to the contract and therefore not entitled to enforce it, the defendant could not invoke reciprocity of the attorneys' fees provision.⁸¹ Even in cases where borrowers have obtained a dismissal based in part on their assertions that signatures on loan documents may have been forgeries, borrowers have been unable to recover attorneys' fees because a forged document renders the document a "nullity," meaning that there was no contract upon which to base a recovery of attorneys' fees.⁸² Notwithstanding the lender's reliance on a fraudulent document, the court questioned how it could award attorneys' fees under a contract that never existed.⁸³

⁷⁷ See *id.* at 899.

⁷⁸ *Id.*

⁷⁹ 215 So. 3d 116, 119 (Fla. Dist. Ct. App. 2017).

⁸⁰ See *id.* at 118.

⁸¹ See *id.* at 121.

⁸² See, e.g., *Bank of N.Y. Mellon v. Mestre*, 159 So. 3d 953, 956 (Fla. Dist. Ct. App. 2015). This line of reasoning has been adopted from other contexts. See, e.g., *HFC Collection Ctr., Inc. v. Alexander*, 190 So. 3d 1114, 1118 (Fla. Dist. Ct. App. 2016) (finding that the borrower was estopped from relying on the contract to obtain attorneys' fees award in the credit card borrowing context because Alexander had succeeded in proving there was no contract between the parties); *Fla. Med. Ctr. Inc., v. McCoy*, 657 So. 2d 1248, 1252 (Fla. Dist. Ct. App. 1995) (finding that because the defendant had prevailed on her theory that she was not liable under a contract with respect to paying her husband's hospital bill, she also could not invoke the mutuality provision of the fee-shifting statute).

⁸³ See *Mestre*, 159 So. 3d at 957.

Borrowers have also been denied relief in cases where the action was dismissed before the issue of standing was litigated.⁸⁴ In one instance, a court created a new burden of proof, requiring a *borrower* to demonstrate that it was a proper party to the contract. Indeed, that defendant sought to demonstrate that she never signed the mortgage contract and that any purported mortgage documents contained fraudulent borrower signatures.⁸⁵ Although the defendant had not prevailed on those issues because the foreclosing entity chose instead to voluntarily dismiss her case, the court reasoned that she could not demonstrate that she was a proper party to the contract permitted to enforce the fee-shifting statute and related provision in the mortgage contract.⁸⁶ The formalism of these approaches also can be seen in how such decisions distinguish earlier cases, such as *Nudel v. Flagstar Bank, FSB*.

In *Nudel*, the court awarded attorneys' fees to the borrower after it dismissed the foreclosure action without prejudice based on a standing argument.⁸⁷ In that case, the circuit court dismissed Flagstar's foreclosure action without prejudice based on Nudel's argument that Flagstar lacked standing because Mortgage Electronic Registration Systems, Inc., the named mortgagee under the applicable mortgage, did not assign the mortgage to Flagstar until after the inception of the lawsuit.⁸⁸ Nudel then "moved for attorney's fees and costs . . . relying in part on the attorney's fee provision in the mortgage."⁸⁹ The circuit court denied Nudel's motion for attorneys' fees, and she appealed.⁹⁰

On appeal, Flagstar argued that Nudel was estopped from seeking attorneys' fees under the mortgage after successfully arguing that Flagstar lacked standing to foreclose under the

⁸⁴ See Fla. Cmty. Bank, N.A. v. Red Rd. Residential, LLC, 197 So. 3d 1112, 1116 (Fla. Dist. Ct. App. 2016) (finding that the borrower-defendant had the burden of proving that she was a party to the contract, which she failed to do).

⁸⁵ See *id.* at 1114.

⁸⁶ See *id.* at 1115–16. The court did note in its dicta that its decision should not be construed as to state that a party can never recover prevailing party fees when the defense is that they were not a party to the contract. See *id.* at 1116. A party could obtain sanctions, or if they are unsuccessful in their defense that they are not a party to the contract and ultimately prevail, then § 57.105(7)'s reciprocity may apply. See *id.*

⁸⁷ 60 So. 3d 1163, 1164 (Fla. Dist. Ct. App. 2011).

⁸⁸ See *id.*

⁸⁹ *Id.*

⁹⁰ See *id.*

mortgage.⁹¹ The court rejected this argument, holding that Nudel was entitled to recover her attorneys' fees.⁹² Importantly, in rejecting Flagstar's estoppel argument, the court explained that "Flagstar and Nudel were described as the 'lender' and 'borrower' respectively in the mortgage and" therefore, "they [were] bound by it."⁹³ Courts denying attorneys' fees to successful borrower-defendants have distinguished the *Nudel* case because Flagstar was named as the original party to the contract as the original lender. In other instances, by contrast, the foreclosing entity has not been the original lender and could not rely on this distinction.⁹⁴

C. Normative Distinctions

The above approaches do have some intuitive sense to them. If the borrower wants to argue that the foreclosing entity is not a party to the contract and is successful with respect to that defense, then the borrower seemingly should not be entitled to take advantage of any benefits in the contract that otherwise would have been binding had the foreclosing entity been a party. This argument is fairly straightforward and attractive when applied to procedure and estoppel.⁹⁵ However, many arguments support the opposite conclusion.

If the foreclosing entity had prevailed after initiating foreclosure proceedings, then it would have been entitled to the benefits of the fees provision and to collect its fees from the

⁹¹ See *id.* at 1165.

⁹² See *id.*

⁹³ *Id.*

⁹⁴ See *Nationstar Mortg. LLC v. Glass*, 219 So. 3d 896, 898 (Fla. Dist. Ct. App. 2017).

⁹⁵ This line of reasoning is more compelling in the absence of a fee-shifting statute designed to provide mutuality of risk and remedy. *Brown v. M St. Five, LLC*, 56 A.3d 765, 780 (D.C. 2012) ("[W]e are troubled by M Street Five's attempt to enforce a discrete provision of a contract that M Street Five *itself* argued was void ab initio; by doing so, M Street Five is essentially attempting to 'have its cake and eat it too.'"). Although not a mortgage foreclosure case, *Brown* outlines the basic estoppel arguments relative to a defendant who successfully argues that a contract is void and then attempts to invoke the protection of a fee-shifting provision in a contract—and, notably, not the application of a fee-shifting statute. Judicial estoppel may be appropriate to prevent a party from changing positions if that party has already "taken a position before a court of law, whether in a pleading, in a deposition, or in testimony . . ." *Id.* The "broader doctrine of 'equitable estoppel'" prevents a party that knowingly accepts the benefits of a particular legal position or outcome from "subsequently tak[ing] an inconsistent position to avoid the corresponding obligations or effects." *Id.* at 780–81 (citation omitted).

borrower. If anything, the foreclosing entity should be estopped from arguing that it is not a party to the contract—and should be deemed to have stipulated to this fact—for purposes of the fee-shifting regime. Once the foreclosing entity has initiated the foreclosing proceeding, it is in fact arguing that it is a party to the contract or entitled to all of the benefits and also ought to be bound by all of the obligations of the contract.⁹⁶ The formalist approach described above creates the exact “heads I win, tails you lose” situation referenced above, wherein the defendant borrower will be stuck with the fee-shifting provision if the foreclosing entity wins, but unable to recover her fees—and thus, still lose—under the fee-shifting regime designed to create mutuality under such provisions, even if she in fact prevails on a title or standing defense.⁹⁷

Indeed, even in Florida, which is the focus of this Article and other studies showing judicially created, singular exceptions to longstanding rules to the benefit of foreclosing entities, courts previously seemed to recognize the inherent inequity and inanity of allowing a party to argue such contradictory positions. In *Nudel*, for example, the court noted that “Flagstar may not seek affirmative relief under the mortgage and then take the position that provisions of the mortgage do not apply to it.”⁹⁸ This logic was the same as in earlier litigation calling for specific performance of a condition of a contract:

[The losing plaintiff] contended before the trial court that as a result of the contract being cancelled prior to its assignment, the provision for attorney’s fees ceased to exist. We hold that the

⁹⁶ One may note here that in no small part due to a number of ghastly ethical headlines made by banks and their attorneys in the conducting of foreclosure litigation, the Florida Supreme Court was forced to create an additional rule requiring verifications in foreclosure complaints. See Zacks, *Robo-Litigation*, *supra* note 6, at 871; *In re Amendments to the Fla. Rules of Civil Procedure*, 44 So. 3d 555, 556 (Fla. 2010) (per curiam). The major thrust behind requiring bank or servicer employees to verify what their lawyers plead in court is “to provide incentive for the plaintiff to appropriately investigate and verify its ownership of the note or right to enforce the note and ensure that the allegations in the complaint are accurate . . .” *Id.*

⁹⁷ See *Hsu v. Abbara*, 891 P.2d 804, 809 (Cal. 1995) (“The [fee-shifting] statute would fall short of this goal of full mutuality of remedy if its benefits were denied to parties who defeat contract claims by proving that they were not parties to the alleged contract or that it was never formed.”).

⁹⁸ *Nudel*, 60 So. 3d at 1165.

plaintiff is estopped to maintain such a position in an action in which he has sought specific performance of a contract providing for attorney's fees.⁹⁹

In other jurisdictions, courts have concluded that "it is extraordinarily inequitable to deny a party who successfully defends an action on a contract, which claims attorney's fees, the right to recover its attorney's fees and costs simply because the party initiating the case has filed a frivolous lawsuit."¹⁰⁰ California courts, for example, have looked to the underlying purpose and policies of the fee-shifting statutory regime as well as equitable principles, which are not as reconcilable with the more formalist approach described above.¹⁰¹ Since the purpose of such fee-shifting statutes is to ensure that each party bears an equal risk relative to paying the other party's attorneys' fees, California courts have concluded that a successful defense to a contract action, including a defense based on the "inapplicability, invalidity, unenforceability, or nonexistence" of the subject contract, justifies an award of attorneys' fees to the defendant.¹⁰²

⁹⁹ *Ross v. Hacker*, 284 So. 2d 399, 399 (Fla. Dist. Ct. App. 1973).

¹⁰⁰ *Jones v. Drain*, 196 Cal. Rptr. 827, 831 (Cal. Ct. App. 1983). *Jones* involved the enforceability of the compelled mutuality fee-shifting statute with respect to a real estate purchase contract. It is, however, worth noting that in California, the statutory language lends itself to a more liberal interpretation of who is entitled to take advantage of the compelled fee-shifting provision because it recognizes that a party may be sued on a contract even though it is not actually a party. Part 1717 of the California Civil Code allows for fees to be awarded to the prevailing party "whether he or she is the party specified in the contract or not . . ." *Hsu*, 891 P.2d at 809 (tracing the development of Part 1717 and the subsequent amendments by the California legislature to clarify that, among other issues, final judgments were not necessary for an award of fees and that success on non-contractual claims was irrelevant to fee awards under the statute).

¹⁰¹ *See, e.g., Jones*, 196 Cal. Rptr. at 831 ("The courts have consistently held that the award of Civil Code section 1717 contractual attorney's fees is to be governed by equitable principles."); *Hsu*, 891 P.2d at 813 ("*In determining litigation success*, courts should respect substance rather than form, and to this extent should be guided by 'equitable considerations.'").

¹⁰² *N. Assoc. v. Bell*, 229 Cal. Rptr. 305, 308 (Cal. Ct. App. 1986) (deciding whether a landlord could recover attorneys' fees under a contract in a suit to terminate a month-to-month lease where the original written contract containing a fee-shifting provision had expired); *Reynolds Metals Co. v. Alperson*, 599 P.2d 83, 85 (Cal. 1979) (finding that the fee-shifting statute's "purposes require section 1717 be interpreted to further provide a reciprocal remedy for a nonsignatory defendant, sued on a contract as if he were a party to it, when a plaintiff would clearly be entitled to attorney's fees should he prevail in enforcing the contractual obligation against the defendant").

The estoppel argument outlined above by a formalist approach also ignores the context of these cases. In these instances, the foreclosing entity is the party that instituted litigation and sought legal remedy against the borrowing entity. The estoppel argument might be more compelling if the borrower were actually the instigator of the litigation. For example, if the borrower sought and obtained a declaratory judgment that the purported holder of the mortgage was not a valid lienholder because the mortgage-holder lacked title to the mortgage, then the estoppel argument in that context would make more sense. Since the borrower was affirmatively trying to avoid the contract, it should not be entitled to the benefits of the contract that otherwise would apply—that is, the fee-shifting provision and fee-shifting regime.¹⁰³

If one assumes that the fee-shifting statute concerns parties to the contract rather than the lawsuit, then such a formalistic approach is also consistent with interpretation principles that suggest construing a statute strictly where the statute overrules common law, as in the foreclosure context where the permissive fee-shifting regimes overrule the American Rule otherwise applicable under state law.¹⁰⁴ This formalistic approach, however, ignores both the purpose of the fee-shifting regimes and the consequential effect of requiring a defendant to prove that the plaintiff was a party to the contract.

Fee-shifting regimes, as discussed above, are designed to ensure that parties with inferior bargaining power will have access to adequate counsel even where such parties cannot obtain or sufficiently compensate counsel through traditional fee agreements. In the negotiation or drafting context, the party may have been unable to require mutuality with respect to establishing an exception to the American Rule. In the dispute context, the inability to recover fees from the opposing party empowers the

¹⁰³ See, e.g., *Linear Tech. Corp. v. Tokyo Electron, Ltd.*, 133 Cal. Rptr. 3d 477, 484 (Cal. Ct. App. 2011) (“If section 1717 did not apply in this situation [where a party prevailed in asserting that it was not bound by a contract that contained a fee-shifting provision], the right to attorney fees would be effectively unilateral—regardless of the reciprocal wording of the attorney fee provision allowing attorney fees to the prevailing attorney—because only the party seeking to affirm and enforce the agreement could invoke its attorney fee provision.” (internal quotation marks omitted)).

¹⁰⁴ See, e.g., *Nationstar Mortg. LLC, v. Glass*, 219 So. 3d 896, 898 (“[B]ecause the statute is in derogation of the common law, it must be strictly construed.”); *Fla. Cmty. Bank, N.A. v. Red Rd. Residential, LLC*, 197 So. 3d 1112, 1115 (Fla. Dist. Ct. App. 2016).

more powerful party to be aggressive with respect to instituting claims and also protects the more powerful party, as the less powerful party may find it difficult to find counsel willing to institute or defend claims in the absence of such potential fee recovery. By interpreting the fee-shifting regimes in such a way, courts reinforce the disparity in power between contracting parties. Further, the strict interpretation creates a strange disincentive for a party to seek a certain type of victory or to only assert certain types of defenses in litigation, but not others. It certainly seems problematic for courts to effectively encourage attorneys to focus their defense efforts on some technical or procedural defenses but not defenses based on standing.

III. POLICY IMPLICATIONS

A. *Encouraging Cavalier Litigation and Repeat Offenders, and Discouraging Homeowner Representation*

Borrower-defendants may find it difficult to prevail with traditional legal arguments that otherwise would have provided a successful defense and corresponding prevailing party status.¹⁰⁵ Some courts have recently begun to ignore or rewrite the longstanding precedent that loan acceleration starts the statute of limitations clock or that acceleration consolidates the loan into an indivisible obligation for *res judicata* purposes.¹⁰⁶ Instead, courts have permitted exceptions specifically for foreclosing entities; lenders may accelerate loans repeatedly and potentially refile deficient lawsuits *ad infinitum* with respect to the same underlying debt.¹⁰⁷ Notably, these decisions largely ignore the reasons for prior dismissals and the implications of prior lender conduct in requiring such dismissals.¹⁰⁸ By ignoring lenders' prior acts, then, courts have signaled that banks may attempt to foreclose based on flimsy, nonexistent, or even fraudulent evidence and that will not preclude successful refiling of their claims.

Similarly, in disallowing borrower discovery on assignment of mortgage issues and that in denying defenses based upon assignment problems implicated in chain of title or standing defenses, courts have likewise telegraphed that banks and foreclosing entities do not have to fear the implications of

¹⁰⁵ See *supra* notes 4–10 and accompanying text.

¹⁰⁶ See Zacks & Zacks, *No Brakes*, *supra* note 8, at 394–95.

¹⁰⁷ See *id.*

¹⁰⁸ See *id.* at 409.

filing thousands of forged or fraudulent documents.¹⁰⁹ If these documents and discovery surrounding their production and submittal to courts and county clerks are routinely ruled irrelevant, then banks have no impetus to ensure that such documents are produced and recorded with accuracy upon proper verification.

Much in the same way, denying attorneys' fees for dismissals in foreclosure cases subtly indicates judicial disinterest in incentivizing banks and foreclosing entities to ensure their cases are supported with proper evidence. If a given bank or foreclosing entity faces the decision of whether to proceed to file a case on questionable evidence rather than waiting to properly investigate and ensure the veracity of such evidence, then courts' refusals to award fees in such instances are a clear gesture that banks need not worry about such a decision—little to no risk exists of bearing their adversaries' attorneys' fees.¹¹⁰ Of course, while this pattern of disincentivizing proper vetting of claims seems consistent throughout much of the judicial treatment examined in our prior works, an opposing view might hold that other court strictures are sufficient to prevent the filing of outright false claims and that attorneys' fees awards do not therefore serve as any additional deterrent to cavalier behavior during litigation.¹¹¹

In this contrary view, the inherent power of the court to sanction litigants, or rules of procedure that specifically allow motions for sanctions for asserting baseless claims in the manner modeled after Federal Rule 11(b), is or ought to be enough for litigants to refrain from bringing questionable evidence or claims to court.¹¹² Unfortunately, as our previous research has suggested, this has not been the case.¹¹³ The responses of state bar associations, legislatures, and judges have been notably tepid in the face of a litany of attorney misconduct in foreclosure actions.¹¹⁴ As such, the removal of one of the few checks and balances on bank

¹⁰⁹ See Zacks & Zacks, *A Standing Question*, *supra* note 7, at 731–35.

¹¹⁰ Indeed, empirical evidence shows that foreclosing entities bear a heavy burden of lost money each and every month when foreclosure litigation is elongated or delayed. Zacks, *The Grand Bargain*, *supra* note 3, at 571–72. The perpetual rush to get cases to judgment from both foreclosing entities and their attorneys is a primary contributor to the ethical lapses documented in our previous work. Zacks, *Robo-Litigation*, *supra* note 6, at 904–05.

¹¹¹ See, e.g., FLA. STAT. ANN. § 57.105(1) (West 2019). For full text, see *supra* note 28.

¹¹² FED. R. CIV. P. 11(b)–(c).

¹¹³ See *supra* Introduction.

¹¹⁴ See Zacks, *Robo-Litigation*, *supra* note 6, at 890–94.

conduct—the award of attorneys’ fees to one’s opponent when one’s claim is dismissed—will surely decrease what little incentive banks currently have to verify their claims before bringing them to court.

Further, removal of the possibility of fee awards also potentially deters adequate representation of such borrower-defendants, as alluded to above. Potential homeowners’ attorneys will undoubtedly be aware that winning a case on the basis of one certain argument but not on the basis of another may result in a court refusing to award fees. As such, it is entirely possible that attorneys will focus more on issues where a possibility of fee awards lie, to the detriment of a strategy of focusing on the client’s best defenses whatever the subject area. This could have the deleterious effect of discouraging such attorneys from agreeing to represent indigent borrowers in such risky cases, even where there otherwise would be valid defenses. Or attorneys may simply be forced to charge distressed homeowners more, which would no doubt preclude representation for many indebted households. In a practice area in which most homeowners may not be represented against foreclosing entities with endless wells of resources, further discouraging attorney representation will surely lead to more negative outcomes for such homeowners.¹¹⁵

B. The “Systemic Frame” Here, as Elsewhere, Denigrates Basic Fairness to Civil Litigants

Our previous research has remarked upon the seeming preference for courts to attempt to shorten foreclosure litigation timelines and to institute proceedings, rules, and litigation pathways that are separate and distinct from other routine consumer civil litigation.¹¹⁶ In this manner, courts and court administrators have purposefully placed foreclosures into large dockets, for example, in an effort to clear case backlogs.¹¹⁷ Similarly, many jurisdictions utilized retired, unelected judges for the express purpose of disposing of foreclosure cases.¹¹⁸

Yet part and parcel of this process has been the diminishment of borrowers’ counsel and their arguments. Our previous work has described this kind of classification of foreclosure cases into

¹¹⁵ See Clark & Barron, *supra* note 39, at 2.

¹¹⁶ See *supra* Introduction.

¹¹⁷ See Zacks & Zacks, *No Brakes*, *supra* note 8, at 432–34.

¹¹⁸ See *id.* at 433.

separate structures and processes, including employing retired judges to preside over packed dockets, as a “systemic fram[ing]” of all foreclosure litigation as a needlessly wasteful practice based upon dilatory defense tactics and baseless defenses.¹¹⁹

In this view, the creeping refusal to award attorneys’ fees to successful homeowners is yet another outgrowth of this systemic framing of foreclosure litigation. If one accepts the view through the systemic frame that accelerating the timetable of foreclosure litigation is a valid policy goal and that borrower defenses are needless ploys to delay the inevitable “right” substantive result, it follows that foreclosing entities should routinely win cases without answering questions regarding their assignments of mortgage. Statutes of limitation similarly should be amended or interpreted very liberally so as to allow foreclosing entities to refile cases as many times as necessary to eventually win. The creation of new exceptions and rules to effectuate a refusal to award fees in the rare case of a foreclosure dismissal, then, is simply another data point suggesting the movement towards an unrestrained and effectively nonjudicial foreclosure process with increasingly impossible litigation burdens for homeowners.

Put another way, refusing to award attorneys’ fees may simply be another demonstration of state actors’ singular view of foreclosure litigation as something distinct from a traditional and neutral fact-finding civil litigation expedition. First, the systemic frame implicates and ratifies the idea that if “[t]he [borrower] didn’t pay the mortgage, we’re done here.”¹²⁰ Individual cases and therefore individual or novel defenses are not in focus through this frame—the defendant enters the courtroom with a presumption of default and unjustified delay.

The frame also places dismissals or the reasons for such dismissals in a position of little or no importance—indeed, rather uniquely in civil litigation, statutes of limitation and *res judicata* may not apply if one of the parties happens to be a foreclosing bank or servicer.¹²¹ Whether a case was dismissed for missing a deadline by a day or whether a case was dismissed because of fraud is simply not in focus through the frame—because dismissal of a foreclosure claim, for whatever reason, is just a minor

¹¹⁹ See *id.* at 432, 434. One would not expect, for example, judges in other civil litigation involving significant property transfers to remark that “[i]f you can’t do [the foreclosure trial] within an hour, you’re not a trial attorney.” *Id.* at 429 n.271.

¹²⁰ *Id.* at 433.

¹²¹ See *id.* at 390.

roadblock delaying an inevitable judgment against a homeowner assumed to be in default. Finally, in discouraging such dismissals and in dulling the effect of and reasons for such dismissals, it seems to follow that when such dismissals actually occur, they ought not to be rewarded or encouraged through attorneys' fees awards. If one examined each of these noted developments in foreclosure litigation in isolation, then perhaps support for the existence of systemic framing might rightfully be challenged. Taken *in toto*, however, this Article argues that the effects of systemic framing are present throughout all stages of litigation—including after a dismissal when a homeowner is seeking recoupment of her attorneys' fees.

C. Incentivizing Superficiality and Guesswork

The final implications of the development of creeping preclusion of reciprocal fee awards for homeowners are the creation of incentives for litigants to focus on technicalities and the necessity for judges to undertake artificial guesswork when considering whether to award fees. With regard to defenses, some courts now require borrowers to prevail on standing to obtain a dismissal, while later requiring borrowers to demonstrate that the bank had standing, in order to get a fee award.¹²² Attorneys, therefore, may simply choose to focus their clients' limited litigation resources on more technical aspects of defense work if they are aware that winning a dismissal based upon standing defenses may not provide as impactful a victory as a dismissal based upon a technical defense. In a practice area rampant with a host of past ethical failures, one would hope courts would encourage serious examination of whether a foreclosing plaintiff is being truthful. Yet in failing to award fees for successful fact-finding expeditions regarding standing, courts will be presented with fewer of these substantive arguments. As such, courts are less likely to expose those cases where a party is actually attempting to foreclose without a wholly truthful case. If anything, those parties facing dismissal based upon a more technical defense ought to be given the softer landing of not paying their opponent's fees—and not those facing dismissal for creating false evidence on standing or failing to meet the minimal burden of showing entitlement to enforce and collect on a loan.

¹²² Fla. Cmty. Bank, N.A. v. Red Rd. Residential, LLC, 197 So. 3d 1112, 1116 (Fla. Dist. Ct. App. 2016).

Further, the artificial creation of a subject-area exception to reciprocal fee awards in the context of successful standing in mortgage foreclosure-defense litigation can only breed more artificiality and guesswork. Courts that are more sympathetic to homeowners have already been forced to create illogical distinctions in order to award reciprocal fees in such cases. One Florida appellate district, in *Madl v. Wells Fargo Bank, N.A.*, for example, created a strange distinction in awarding fees: when a foreclosing entity does not show evidence of standing at the inception of a case but later produces some evidence of standing at trial, such as an undated allonge to the note filed after the inception of the case, fees may be reciprocally awarded to the successful homeowner if the case is dismissed.¹²³ This of course creates the strange requirement for homeowners to prevail at trial in preventing the foreclosing entity from meeting its burden of proof regarding standing, but to later prove—for purposes of a fee award—that *some* amount of evidence was produced that evidences their opponent's standing. Must a court, under this line of reasoning, specify what percentage of a borrower's defense was devoted to standing, and if so, what percentage of its burden of proof the bank met or what percentage of its standing allegations were proven?

But guesswork and other imprecise approaches to reach a certain result are not restricted to those more pro-homeowner districts. Indeed, because *Nationstar Mortgage LLC v. Glass* has been accepted, ruled upon, and then vacated by the Florida Supreme Court,¹²⁴ the procedural posture makes it difficult to

¹²³ 244 So. 3d 1134, 1138 (Fla. Dist. Ct. App. 2017); *cf.* *Harris v. Bank of N.Y. Mellon*, No. 2D17-2555, 2018 WL 6816177, at *3 (Fla. Dist. Ct. App. Dec. 28, 2018).

¹²⁴ *See generally* *Nationstar Mortg. LLC v. Glass*, 219 So. 3d 896 (Fla. Dist. Ct. App. 2017). We note that our concerns over judicial guesswork were partially concurred with in the Florida Supreme Court's eventual opinion in *Glass v. Nationstar Mortg. LLC*, No. SC17-1387, 2019 Fla. LEXIS 30, at *8–9 (Fla. Jan. 4, 2019). Although the decision was eventually receded from after appointment of new judges to the court, the original decision notes, as we do, that part of its disagreement with the Fourth District's decision stems from a disagreement on the reason for the original trial court dismissal. This is exactly the kind of *ex post* guesswork that we warn against in this Section. *See id.* at *7–8 (discussing the affirmative defenses raised by the borrowers and noting that the trial court did not explicitly state the grounds for dismissal and that the Fourth District incorrectly stated that standing was the only grounds for dismissal). Yet whether one ultimately agrees or disagrees with the outcome of the *Glass* decisions, they support the idea that an entire appellate court sitting *en banc* can directly contravene or omit arguments that litigants have propounded in order to guess or estimate what portion of a dismissal is based upon standing arguments in order to reach a result under the creeping fee preclusion

follow the court's logic in reaching its decision refusing to award attorneys' fees. The court in *Glass* emphatically notes the distinction between cases not awarding fees because a foreclosing entity was not a party to the contract and cases such as *Nudel*.¹²⁵ In *Nudel*, the court noted, the foreclosing entity was named as the original lender.¹²⁶ In this way, the court seemed to intimate that this had some independent significance to show Flagstar was a party to the *Nudel* contract subject to its fees provision. But this decision was made after Flagstar had its claim dismissed for lack of standing. If a litigant has its case dismissed because it cannot prove standing or entitlement to enforce an instrument, then what difference could it make if the written agreement states the litigant is, in fact, a party to the contract? In either event, when forced to assert a *prima facie* case or to meet its burden at trial, the litigant failed to prove standing, rendering such distinctions meaningless: a litigant whose case has been dismissed has proven nothing. Both the anti-homeowner and pro-homeowner sides of the reciprocal fee award court division are increasingly required to stretch all logic to reach their decisions, and we therefore suggest that the newly created anti-reciprocal fee award jurisprudence is regrettable in this respect as well.

In this way, failing to uniformly award reciprocal fee awards forces litigants to channel their inner Bob Arum, the famed boxing promoter, when seeking fee awards: they must effectively argue that "Yesterday I was lying" (when I argued the bank lacked standing), "but today I am telling the truth" (as today I argue for the bank's standing and fees obligation under the contract). Foreclosing entities are similarly pushed into making nonsensical arguments: to avoid reciprocal fee awards, banks in Florida must argue and verify under penalty of perjury that they have standing to enforce the mortgage contract in their written pleadings, but then effectively proclaim after dismissal, "Yesterday I was lying."

jurisprudence we have described. The Florida Supreme Court, at least until its opinion was receded from, noted that the Fourth District, at least in *Glass*, guessed wrong. *See id.* at *7-9. (The Fourth District "both misstates the basis of the trial court's ruling on Glass's motion for dismissal and fails to address Glass's Motion for appellate attorney's fees based on the voluntary dismissal. . . . [T]he Fourth District stated, 'On appeal, [Glass] argued that the court correctly dismissed the Lender's complaint for lack of standing.' This is not an accurate statement of Glass's argument.").

¹²⁵ *Nationstar Mortg. LLC*, 219 So. 3d at 898.

¹²⁶ *Nudel v. Flagstar Bank, FSB*, 60 So. 3d 1163, 1164 (Fla. Dist. Ct. App. 2011).