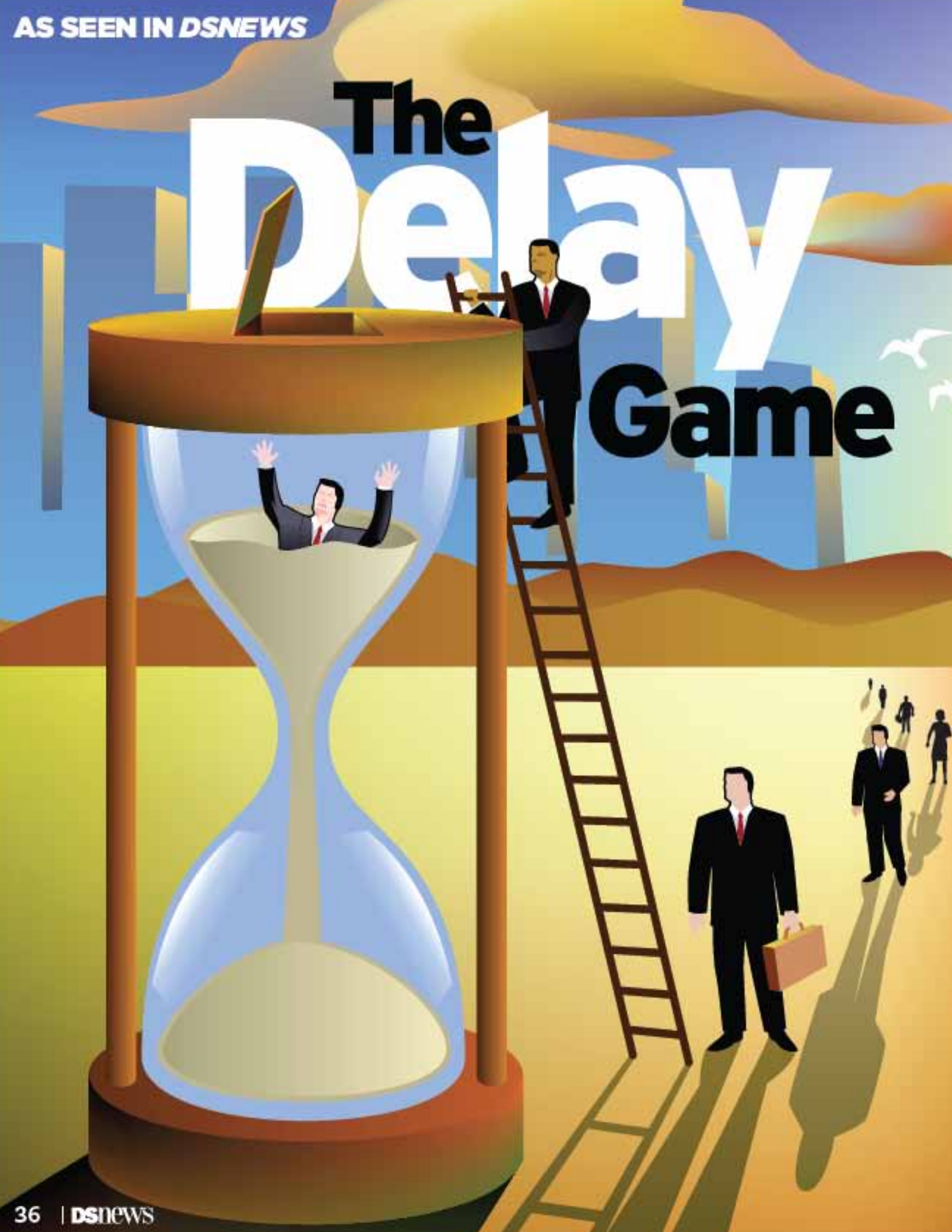
The Delay Game



BEST PRACTICES

When it comes to contested residential foreclosures, justice is commonly deferred.

By Michael J. Barker, Frank G. Cosmen, and David L. Ward

Famed 19th century British statesman William Ewart Gladstone once stated, "Justice delayed is justice denied." This axiom is as widely accepted as true today as it was nearly 200 years ago. However, in the contentious and messy world of contested residential mortgage foreclosures, delays are an increasing obstacle for bank attorneys. The improper use of delay tactics unnecessarily complicates cases that are, in essence, basic breaches of contract. Excess delays burden lender plaintiffs with higher litigation costs and attorneys' fees, waste court resources, clog already overburdened court dockets, and, as Gladstone would say, deny justice.

Already suspect in the minds of many Americans, the reputation of the banking industry was tarnished by the housing crisis and current economic recession. Most critics attributed the lion's share of the blame for the bursting of the housing market bubble and the subsequent recession squarely on the shoulders of the banking industry. However, objectively speaking, given the enormous complexity and variables involved, it is impossible to ascertain with any degree of accuracy a singular cause or even group of causes for the current foreclosure crisis and economic downturn. Like the collapse of the stock market in 1929 and the subsequent Great Depression, historians and academics will debate and promulgate various and divergent interpretations of the current economic recession for decades to come. In the meantime, some feel justified employing dilatory tactics in straightforward foreclosure cases simply because of the stigma against banks.

Common Methods of Delay

Perhaps the most common delay tactic is claiming frivolous and/or inapplicable affirmative defenses. Often, these affirmative defenses include alleged violations of the Truth in Lending Act (TILA), the Real Estate Settlement Procedures Act (RESPA), and Home Ownership and Equity Protection Act (HOEPA). In many cases, foreclosure defense attorneys are successful in using these complex federal statutes to delay proceedings and thwart summary judgment, thereby forcing the suit to trial. Even in cases where creditors' rights attorneys are successful in eliminating a debtor's frivolous affirmative defenses, often a great amount of time and effort is expended doing so, further wasting court resources and increasing litigation costs.

Another common delay tactic is to file a motion with the court seeking leave to amend the defaulting borrower's affirmative defenses on the eve of summary judgment. In most jurisdictions, a plaintiff may move for summary judgment only when the pleadings are "closed" (i.e., there are no outstanding motions directed at a party's last pleading). Many states have a liberal policy regarding the amendment of pleadings, which is commonly abused. For example, seeking leave of court to amend a defendant's answer is often a sure way to push off a summary judgment. Some foreclosure defense attorneys will utilize this tactic multiple times in a single case.

In recent years, filing for bankruptcy protection for the sole purpose of stalling summary judgment or stopping a foreclosure sale has become increasingly popular. Some defendants are serial filers and file multiple petitions with the bankruptcy court during the course of a single lawsuit. When a defaulting borrower who is a defendant in a foreclosure action files for bankruptcy, the underlying foreclosure action is subject to an automatic stay. The lender plaintiff must move the bankruptcy court to have the stay lifted and/or move to dismiss the petition for bad faith. Typically, this tactic will delay the underlying foreclosure action for a few months or more.

Some foreclosure defense attorneys routinely respond to a foreclosure complaint by filing groundless motions to dismiss or motions to strike instead of answering the complaint. In many cases, these motions contain baseless boilerplate arguments such as claiming the lender lacks standing or has failed to state a cause of action. No matter how baseless the argument, the lender must eliminate the motion to dismiss before the foreclosure action can move forward. This means setting the motion for hearing and raising oral arguments before the court. In jurisdictions where the courts are already clogged with foreclosure cases, getting hearing time can be difficult, resulting in further delays.

Another delay tactic involves inundating the lender plaintiff with burdensome and unnecessary discovery requests and/or seeking unnecessary depositions. Some debtors, at the behest of their attorneys, will avoid service of process for as long as possible. In some instances, debtors were reported intentionally defaulting when served with a foreclosure complaint. Then, just before the hearing, they moved the court to have the clerk's default set aside. Others agree to hearing or mediation dates and then cancel at the last minute,

filing frivolous "emergency" motions just before a property is scheduled to be sold at foreclosure sale. Some file baseless objections to sale after a foreclosure sale in order to stall transfer of title to the lender. In a few cases, some foreclosure defense attorneys even filed groundless appeals simply to stall a foreclosure sale or delay issuance of the certificate of title.

Delaying the Inevitable

There appear to be two major reasons for contesting and delaying a foreclosure action. The first is to force the lender to negotiate with the defaulting borrower. Unlike the common stereotype, the majority of defaulting borrowers are not unsophisticated people tricked into agreeing to the onerous terms of subprime mortgages by the predatory lending practices of morally corrupt bankers. Instead, many defaulting borrowers possess fixed-rate mortgages that were obtained during the housing boom between 2001 and 2007 when values in the housing market were inflated. Now the bubble has burst, and many borrowers are upside down on their mortgages. In many foreclosure actions, the defaulting borrowers can still afford to pay their mortgages. However, they simply do not want to pay for a home that today is worth less (in some cases, significantly less) than what they originally paid for it.

Usually, these borrowers first attempt to get their lender to agree to refinance or modify the mortgage but to no avail. Frustrated, sometimes with the advice of an attorney, these borrowers intentionally default on the loan in an attempt to force the lender to agree to a loan modification or, in some cases, to agree to a deed-in-lieu of foreclosure or short sale. Some of these borrowers may hire a foreclosure defense attorney simply to delay the foreclosure proceedings, thereby increasing the costs. If all goes as planned, under the pressure of mounting losses on the property, the lender will agree to negotiate a loan modification that is more favorable to the borrowers.

The second major reason to delay foreclosure is simply to allow the defaulting borrower to remain in possession of the property for as long as possible. This enables the borrower to pocket as much money as he or she can instead of paying mortgage payments, insurance, HOA fees, condo dues/assessments, and/or taxes. By not making these payments, sometimes for years, some defaulting borrowers are able to amass large sums of cash at the expense of the lender.

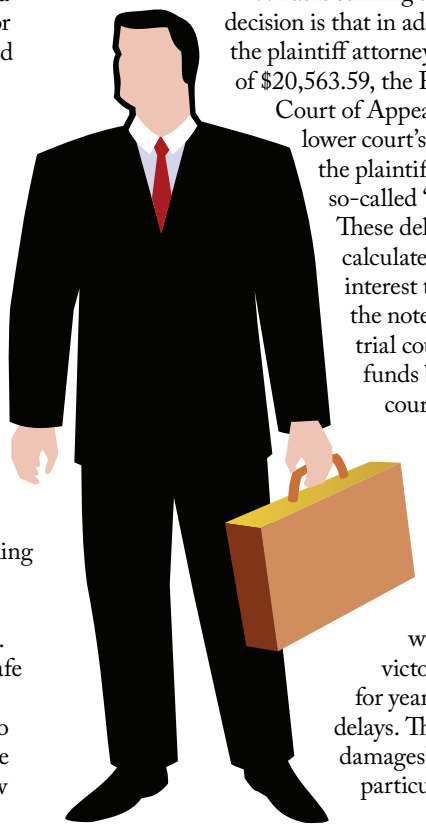
Of course, the foreclosure defense attorney receives a monthly fee for his or her services. This is particularly frustrating when the property in litigation is a rental property. In Florida, a vacation destination where rental property is commonplace, some defaulting borrowers pocket rental payments for years while not making their monthly mortgage payments, paying insurance, or paying taxes on the property. Although courts in some jurisdictions permit lenders to collect such rents, many of the firms handling such cases are simply overwhelmed and fail to pursue this remedy.

Combating Dilatory Tactics–Seeking Sanctions

During the course of litigation, bank attorneys must attempt to explain to their frustrated clients why the remedy they seek from the courts takes years to obtain at great expense. Increasingly, many bank attorneys are beginning to use what is really their only effective weapon for combating dilatory tactics: seeking sanctions against opposing counsel. Once a rarely used remedy of last resort, motions for sanctions are becoming more commonplace. Sometimes just threatening sanctions is enough to persuade an unscrupulous foreclosure defense attorney to withdraw a frivolous affirmative defense or baseless motion. This increased readiness to seek sanctions is already beginning to bear fruit in Florida, a state where the foreclosure crisis is particularly acute.

In Florida, a party is permitted to seek sanctions, including attorneys' fees and costs, against a party who asserts a claim or defense not supported by the material facts and/or files baseless motions, discovery, claims, or defenses for purposes of "unreasonable delay." This statute requires the party seeking sanctions to provide opposing counsel 21 days' notice of his or her intent to seek sanctions. Commonly referred to as a "safe harbor letter," the motion for sanctions is usually attached to a letter, thereby permitting the other side 21 days to withdraw the offensive motion or frivolous affirmative defense. If the opposing party fails to withdraw the motion or affirmative defense, the motion for sanctions may then be filed with the court. More often than not, sending a safe harbor letter is enough to convince an adversary to stop improperly delaying litigation.

Recently, an appellate decision in Florida caused a bit of a stir for attorneys playing the delay game. In the matter, *Korte v. U.S. Bank Nat. Ass'n,* the Florida 4th District Court of Appeal upheld the lower court's decision to sanction foreclosure defense counsel for raising frivolous affirmative defenses for purposes of delay. In *Korte*, defense counsel raised several defenses for failure to comply with the disclosure requirements required by TILA. Plaintiff's counsel filed a motion for sanctions claiming that the borrowers' defenses were "knowingly false and frivolous." Defense counsel admitted that he did not verify the validity of the affirmative defenses with his clients. Moreover, one of the borrowers testified during deposition that defense counsel never discussed the defense with her and that she had never seen them. The trial court sanctioned defense counsel by striking the affirmative defenses and awarding attorneys' fees in the amount of $39,246.58.



What is striking about the *Korte* decision is that in addition to awarding the plaintiff attorneys' fees in the amount of $20,563.59, the Florida 4th District Court of Appeal also upheld the lower court's decision to award the plaintiff $18,682.99 in so-called "delay damages." These delay damages were calculated summing up the interest that accumulated on the note for 357 days. The trial court ordered that these funds be deposited in the court's registry pending the outcome of the case. For bank attorneys playing the delay game in a state saturated with foreclosure actions, the *Korte* decision was a much welcomed victory and vindication for years of frustrating delays. The concept of "delay damages" as a sanction is particularly important.

Traditionally, sanctions imposed by a court usually consist of dismissing a frivolous, pleading, motion, claim, or defense and/or the award of attorneys' fees and litigation costs. The *Korte* decision creates an additional category of damages. Foreclosure defense attorneys who partake in dilatory tactics now risk being held liable for the interest that accrues during the time period that the foreclosure proceedings are delayed by their frivolous defenses or baseless motions. As exemplified by the *Korte* matter, the amount of the delay damages can be quite high. In addition, not only does the *Korte* decision provide precedent for the award of "delay damages," but it also provides impetus for bank attorneys to more readily seek sanctions against unscrupulous adversaries.

In the recent matter *JPMorgan Chase Bank v. Hernandez*, the Florida 3rd District Court of Appeal imposed sanctions against foreclosure defense counsel and the debtors for filing fabricated documents with the court in order to delay a foreclosure sale. The facts of this case show the extremes to which some foreclosure defense attorneys will go to delay foreclosure proceedings. In *JPMorgan Chase Bank v. Hernandez*, the defaulting borrowers failed to file affirmative defenses, and the trial subsequently entered final judgment of mortgage foreclosure on behalf of JPMorgan Chase (successor in interest to Washington Mutual Bank). Just prior to the foreclosure sale, defaulting borrowers "inexplicably recorded a new, unilateral promissory note, which, by its terms, purported to change Washington Mutual into a borrower and the debtors into lenders." In addition to the fraudulent unilateral promissory note, the defaulting borrowers also filed a Notice of Intent to Discharge, which, incredibly, purported to release the bank from its obligation to the loan under the terms of the fabricated unilateral note. Despite blatant recording errors, conflicting dates on the documents, and the sheer absurdity of the terms of the fraudulent unilateral note, defense counsel somehow convinced the trial court that the entire debt had been discharged and to vacate the final judgment, discharge the lis pendens, and dismiss the complaint for foreclosure. On appeal, the Florida 3rd District Court of Appeal was incensed at the "abuse of legal processes, which demands a more detailed review, and clear message that frivolous appeals will be sanctioned." Beacause both defense counsel and his clients were culpable, the appellate court ordered that both defense counsel and the defaulting borrowers be jointly and severally liable for the appellant's attorneys' fees and sanctions. In addition, the appellate court referred defense counsel to the Florida Bar to determine whether professional discipline was warranted.

Similar holdings are beginning to emerge in other states as well. For example, the Court of Appeals in Georgia recently imposed a "frivolous appeal penalty," where foreclosure defense counsel, in order to delay the foreclosure proceedings, filed a baseless appeal "for purposes of delay only." In Texas, the Court of Appeals recently upheld the trial court's decision to impose sanctions in the amount of $25,000 against defense counsel who utilized dilatory tactics to delay foreclosure, including filing four petitions for bankruptcy for purposes of delay, all of which were dismissed.

It remains to be seen whether decisions such as *Korte* are a harbinger for a new phase in the delay game where bank attorneys more aggressively play the sanction card against foreclosure defense attorneys who improperly utilize dilatory tactics. At minimum, foreclosure defense attorneys should now at least be on notice that they may be held liable for the delays caused by filing frivolous defense and baseless motions. Some interpret these recent decisions to indicate more willingness on the part of the judiciary to impose sanctions on defense counsel whose dilatory tactics continue to clog already overburdened dockets with foreclosure actions. If this interpretation is true, seeking sanctions against unscrupulous foreclosure defense attorneys may be one of the keys to getting the country out of this foreclosure mess. Then maybe, as the foreclosure crisis continues to unfold, lender plaintiffs will have the justice that has been improperly delayed for so long and the foreclosure crisis will begin to fade away. Only then will the housing market begin to recover and, perhaps, even finally put an end to the Great Recession. DS

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