Florida Supreme Court
Local Rules Advisory Committee

In re: Fifteenth Circuit Administrative Order: [redacted]

PETITION FOR REVIEW OF ADMINISTRATIVE ORDER UNDER FLA. R. JUD. ADMIN. 2.214(e)(2)

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Rules

Other Authorities

INTRODUCTION

This petition challenges the propriety and authority of an Administrative Order issued by the Fifteenth Circuit Chief Judge and a related Standing Order issued by the Judge for Division "AW"—the Foreclosure Division (collectively, "the Orders").

The Administrative Order[1] (amended from a previous order already being reviewed by the Committee) purports to delegate to the judge assigned to the Foreclosure Division in the Fifteenth Circuit the authority to enter an order that effectively deems abandoned any motion in that division that has not been heard within ninety days of the filing of the motion. As the Committee will recall the original amended administrative order, when challenged, was amended by the Chief Judge of the Fifteenth Circuit to remove a similar provision that simply deemed such motions denied. The amended Administrative Order and the Standing Order seek to accomplish what the Chief Judge apparently agreed was impermissible by delegating to the assigned judge of the Foreclosure Division the same power.

[1] In re: timely Resolution of Motions in Foreclosure Division "AW", Administrative Order 3.314-4/14, dated April 30, 2014 ("Administrative Order," App. 1).

The Standing Order,[2] in reliance on the amended Administrative Order, purports, as one single order, to deny all motions directed to the pleadings that have been pending more than ninety days in any of the more than 16,000 cases pending in the Foreclosure Division, apparently without entering an order in any of those actual pending cases.

The Standing Order is an improper delegation of the Chief Judge's authority to issue administrative orders.

The Standing Order should be considered by this Rules Committee as another Administrative Order issued by the Chief Judge because it is a *de facto* delegation of the Chief Judge's power to issue administrative orders. Not only is its broad scope—applying as it does to thousands of foreclosure cases—suggestive of, and more appropriate for, an administrative order, its timing and objective appears designed to carry out the intent of an earlier administrative order the review of which is pending before this Committee.

The original order—Administrative Order 3.314-3/14—was issued by Chief Judge Colbath on March 13, 2014. Approximately a month later, the Petitioner

[2] In Re: Standing Order On Outstanding Motions in Division "AW," dated May 1, 2014 (App. 3).

here sought review of that Order by this Committee.[3] The Chief Judge responded to the petition about two weeks later by issuing a new order which is the subject of this Petition. On the same day, the Chief Judge wrote this Committee a letter saying that the new order was intended to address the Petitioner's concerns that the original order not only mandated that Circuit judges deny motions as "abandoned," but encouraged them to do so without a written order.[4]

The following day, however, the Foreclosure Division Judge issued the Standing Order that declared that, for all the foreclosure cases in the County (reportedly more than 16,000), every pre-answer motions directed to the pleadings or the court's jurisdiction had been denied as of the ninety-first day that the motion had been pending.

Thus, the objective of the original Administrative Order was accomplished by way of the Standing Order such that the amendment reported to this Committee was entirely illusory. The Administrative Order no longer needed to be mandatory, because the lone judge presiding over all the foreclosure cases had already agreed to implement the new "abandonment" rule. Likewise, the

[3] Letter from Thomas Erskine Ice to Judge Robert T. Benton, II, Chair of the Florida Supreme Court Local Rules Advisory Committee, April 14, 2014 (App. 43).

[4] Letter from Chief Judge Colbath to Bart Schneider, Esq., April 30, 2014 (App. 47).

Administrative Order no longer needed to declare that motions could be denied without a court order, because they were now being denied by a "court order"—albeit a single standing order that was not filed or served in any of the cases to which it purports to apply. This coordination of effort between the Chief Judge and the Foreclosure Judge, demonstrates an attempt to skirt the rules which restrict the Chief Judge's administrative powers by way of an informal delegation.

The Standing Order injects additional issues such as the authority of a Division Judge to: 1) enter standing orders that deny motions in individual cases without a written order filed and served in each of those cases; and 2) deny motions to quash *nunc pro tunc* such that it can be argued that the time to file non-final appeals has expired.

NATURE OF THE RELIEF SOUGHT

The Petitioner asserts that the following portion of the Fifteenth Circuit's Administrative Order impinges upon the Supreme Court of Florida's rule-making authority because it is not administrative in nature, but instead, meets the definition of a local rule or rule of procedure that would require Supreme Court approval pursuant to the Rules of Judicial Administration:[5]

> Motions to Dismiss, Motions for Extension of Time which seek additional time to respond to a complaint, counterclaim, cross-claim or third party claim, Motions to Quash, and other motions which prevent a matter from being at issue filed in Foreclosure Division "AW" and which have not been set and heard by the Court within ninety (90) days from filing, may be considered by the judge assigned to Foreclosure Division "AW" as having been abandoned.

Accordingly, the Petitioner requests a decision on the question be reported to the Florida Supreme Court in accordance with Fla. R. Jud. Admin. 2.215(e)(2).

In conjunction with this request, the Petitioner asks this Committee to treat the following portion of the Standing Order—which relies entirely upon the above-

[5] In Re: Timely Resolution of Motions in Foreclosure Division "AW," Administrative Order: 3.314-4/14 (App. 1).

quoted portion of the Administrative Order as its authority—as an extension of that order by way of a *de facto* delegation of the Chief Judge's authority:[6]

> ORDERED that unless good cause has been found as to why there has not been compliance with Administrative Order 3.314, any (1) Motion to Dismiss; (2) Motion for Extension of Time which seeks additional time to respond to a complaint, counterclaim, cross-claim or third party claim; (3) Motion to Quash; or (4) other motion which prevents a matter filed in the foreclosure division from being at issue and which has not been heard by the Court shall, upon the ninety-first (91) day following the day the motion is filed, be deemed abandoned.

[6] In Re: Standing Order On Outstanding Motions in Division "AW," dated May 1, 2014 (App. 3).

STATEMENT OF THE CASE AND FACTS

Although it is the plaintiff[7] that normally bears the burden of prosecuting its case (and the consequences of not doing so), the Chief Judge issued an Administrative Order that shifts that burden to the defendant homeowners in foreclosure cases. Specifically, it purported to mandate a new procedure by which motions directed to the pleadings or the court's jurisdiction will be automatically denied without a hearing and without a written order by simply declaring them "abandoned."[8]

After this Committee's review of the Order had been invoked, the Chief Judge issued a new Administrative Order that still purports to authorize a procedure for automatically denying pre-answer motions without a hearing:[9]

> Motions to Dismiss, Motions for Extension of Time which seek additional time to respond to a complaint, counterclaim, cross-claim or third party claim, Motions to Quash, and other motions which prevent a matter from being at issue filed in Foreclosure Division "AW" and which have not been set and heard by the Court within ninety (90) days from filing, may be considered by the judge assigned to Foreclosure Division "AW" as having been abandoned.

[7] The typical plaintiff in the "foreclosure crisis" cases are financial institutions which include trustees of securitized trusts, servicers, and to a lesser degree, actual lenders—all of which are referred to herein as "banks."

[8] In Re: Timely Resolution of Motions in Foreclosure Division "AW," Administrative Order: 3.314-3/14. (App. 4).

[9] In Re: Timely Resolution of Motions in Foreclosure Division "AW," Administrative Order: 3.314-4/14 (App. 1).

The day following the entry of this Administrative Order—and in express reliance on that Order—the judge assigned to the Foreclosure Division issued a Standing Order that denies all pre-answer motions that have been pending for more than ninety days as "abandoned":[10]

> ORDERED that unless good cause has been found as to why there has not been compliance with Administrative Order 3.314, any (1) Motion to Dismiss; (2) Motion for Extension of Time which seeks additional time to respond to a complaint, counterclaim, cross-claim or third party claim; (3) Motion to Quash; or (4) other motion which prevents a matter filed in the foreclosure division from being at issue and which has not been heard by the Court shall, upon the ninety-first (91) day following the day the motion is filed, be deemed abandoned.

Similar Orders in Other Circuits

Apparently spurred by the Supreme Court's own administrative order directing the Chief Judges of the Circuit Courts to establish case management plans to expedite the resolution of foreclosure cases,[11] the Fifteenth Circuit is not alone in attempting the extraordinary measure of automating the denial of motions.

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[10] In Re: Standing Order On Outstanding Motions in Division "AW," dated May 1, 2014 (App. 3).

[11] In Re: Final Report and Recommendations of the Foreclosure Initiative Workgroup, Florida Supreme Court Administrative Order, AOSC13-28, dated June 21, 2013, p. 4, requiring case management plans consistent with Fla. R. Jud. Admin 2.215 and 2.545 to optimize utilization of resources in the resolution of foreclosure cases (App. 53).

A. Eleventh Circuit

The Eleventh Circuit Administrative Judge promulgated her own version of the abandonment rule—which may have inspired the Fifteenth Circuit's order:[12]

> **Exhibit I, C. PLEADINGS**
>
> c. Motions
>
> The Eleventh Circuit Civil Division continues to hold separate foreclosure motion calendars. For each judge's procedure, please consult the circuit website at: http://www.judll.flcourts.org All Motions must be promptly set for hearing upon filing. Failure to set motions for hearing may result in these motions being deemed abandoned or denied without hearing by the Presiding Judge.[13]
>
> * * *
>
> **Exhibit V, Uniform Case Management Procedures**:
>
> 4. **Motion Calendar.** Any motion filed should generally be set for a hearing date within 30 days of filing.
>
>   a. Motions which are filed and which have not been set for hearing within 30 days may be deemed abandoned or withdrawn and, thus, denied without hearing.[14]

This order was preceded by another order from the Eleventh Circuit Administrative Judge, also purporting to establish an abandonment rule:[15]

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[12] Administrative Memorandum No. 13-C, *2013-2014, Case Management Plan for Foreclosure Cases and Use of Case Managers Funded in 2013 Trial Court Budget*, dated August 2, 2013 (App. 65).

[13] *Id*. at 5 (App. 69) (emphasis added).

[14] *Id*. at 17 (App. 81) (emphasis added).

> Motions
>
> …All Motions must be promptly set for hearing upon filing. Failure to set motions for hearing may result in these motions being deemed abandoned or denied without hearing by the Presiding Judge.

The Eleventh Circuit Administrative Judge has acknowledged that she implemented the rule "which allows division judges to deem a motion to dismiss abandoned" as a solution to the court being routinely "confronted with cases in which the Plaintiffs have failed to get the case at issue."[16]

B. Sixteenth Circuit

In the Sixteenth Circuit, the Key West Foreclosure Division has issued orders in individual cases that, without warning, deny motions directed to the pleadings as abandoned and simultaneously find (erroneously) that the cases are, as a result, at issue:[17]

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[15] Administrative Memorandum Civ 12-E 24 CA 01, *In re: Residential Mortgage Foreclosure Cases*, dated September 10, 2012 (App. 57).

[16] Interim Report—Foreclosure Backlog Reduction Initiative, p. 4 (App. 86).

[17] Order Denying All Motions Directed to the Pleadings Not Timely Set for Hearing and Order Setting Cause for Trial by Court in *JPMorgan Chase Bank, N.A. v. Burns*, Case No. 09-CA-766-K (Monroe County) (App. 91).

ORDER DENYING ALL MOTIONS DIRECTED TO THE PLEADINGS
NOT TIMELY SET FOR HEARING
AND
ORDER SETTING CAUSE FOR TRIAL BY COURT

Due to the age and the status of this case, all pending motions directed to the pleadings that have not been set for hearing are hereby deemed abandoned by the moving party, and are therefore, **DENIED**. Affected parties may seek relief pursuant to FL.R.Civ.Pro. 1.530, which will only be granted upon good cause shown, with adequate explanation to the Court for the failure to set these motions for hearing in a timely fashion. If there are any pending motions directed to the pleadings that have been noticed for hearing but not yet heard, the trial setting herein is stayed, pending resolution of such motion, and the trial setting dates set forth herein will come into effect immediately upon determination of the motion, unless made moot by the outcome of the motion.

SUMMARY OF THE ARGUMENT

The Fifteenth Circuit Orders create a new "abandonment" rule in foreclosure cases to dispose of pre-answer motions, without a hearing on, or consideration of, the merits. The Administrative Order and its progeny, the Standing Order, exceed the authority of the Chief Judge because it contradicts specific Rules of Civil Procedure, as well as their overall procedural scheme.

Moreover, the Orders unnecessarily impinge upon the litigants' rights of due process, equal protection, and access to courts because they do not accomplish their stated goal of getting the cases "at issue" and because there already exists an alternative, less restrictive method of having pending motions heard on their merits. Additionally, the Orders impermissibly choose sides in the litigation by deeming the motions denied (due to the inaction of the defendant) rather than granted (due to the inaction of the plaintiff—which has the burden of prosecuting its case). The Orders also unnecessarily discriminate against foreclosure defendants as compared to foreclosure plaintiffs or defendants in other types of cases.

Accordingly, the new "abandonment" rule is one that should be subject to approval by the Florida Supreme Court as a local rule or a rule of procedure.

ARGUMENT

I. The Administrative Order Exceeds the Authority of the Chief Judge Because Deeming Motions "Abandoned" Contradicts Existing Rules of Procedure.

A. Purpose and motivation of the Orders.

The stated intent of the amended Administrative Order under review is to help reduce unresolved motions that **"have languished for months and years without any attempt or effort on the part of any party to set the matter for hearing."** (emphasis original). **"These unresolved motions delay the proceedings and frustrate the timely disposition of foreclosure cases in the Fifteenth Judicial Circuit."** (emphasis original)**.**

The author of the Administrative Order, Chief Judge Colbath, has publicly acknowledged that foreclosure cases are unusual in that the plaintiffs have little incentive to prosecute their cases to judgment.[18] The motivation for the

[18] *See also*, In Re: Final Report and Recommendations of the Foreclosure Initiative Workgroup, Florida Supreme Court Administrative Order, AOSC13-28, dated June 21, 2013, pp. 2-3 (App. 51-52) which states that the Trial Budget Commission's Final Report and Recommendations of the Foreclosure Initiative Workgroup identified "two fundamental causes of delay in the resolution of mortgage foreclosure cases: first, plaintiffs [banks, lenders, and lien holders] do not appear to be inclined to seek disposition of pending foreclosure cases; and second, paperwork and procedural problems continue to exist in foreclosure cases."; Interim Report—Foreclosure Backlog Reduction Initiative, p. 4 (App. 86) in which the Administrative Judge of the Eleventh Circuit acknowledged that both parties to a foreclosure action often seek to avoid trial and emphasized that "[t]his avoidance

Administrative Order, therefore, was "to push banks and homeowners to a quicker resolution – something he said neither side appears to want."[19] The Chief Judge is quoted as saying that the reason for the court's intervention in the pacing of the litigation that the parties have set for themselves was a "crisis [that] began to manifest itself in neighborhoods."[20]


Colbath said it's not in the nature of the courts to push cases along, but in most other lawsuits, one side or the other wants a judgment. In foreclosure, he said banks don't want to own any more homes, and homeowners don't want the property repossessed.

"It was a benign problem initially," Colbath said. "But the crisis continued to grow and began to manifest itself in neighborhoods."

PALM BEACH POST

The Administrative Order alludes to its own motivation—the aspirational goal set by the Florida Rule of Judicial Administration that non-jury civil cases be resolved in twelve months. Fla. R. Jud. Admin. 2.250(a)(1)(B). This "presumptively reasonable time period," however, never contemplated the present

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includes Plaintiffs." She stated that plaintiff banks even use "bogus motions to amend" to allege the case is not at issue. *Id*.

[19] Kimberly Miller, *New 'fix' aims to speed up foreclosure backlog*. Palm Beach Post, April 30, 2014 at A1 (App. 6).

[20] Petitioner asserts that there is no evidence of a "crisis in neighborhoods." Indeed, the very same article mentions the judicially noticeable fact that "the housing crisis is in the rearview mirror for much of the country." *See also*, Joe Capozzi, *Property market 'back to normal'*; Palm Beach Post, May 29, 2014 at A1 (available at: http://www.palmbeachpost.com/news/news/local-govt-politics/palm-beach-county-appraiser-property-market-back-t/nf8qZ/). Even if there were a demonstrable housing crisis, such broad social and economic policy implications are within the purview of the legislature, not the court system.

circumstance where, not only have a large number of cases flooded the system, but the litigants are not themselves pressing for resolution within this time frame.

B. The limits of the Chief Judge's authority.

The Rules of Judicial Administration provide a chief judge with the power to issue administrative orders for the purpose of managing the affairs of the court. Fla. R. Jud. Admin. 2.215(b)(2). But such orders cannot be inconsistent with court rules already approved by the Florida Supreme Court. Fla. R. Jud. Admin. 2.120(c). Administrative orders that attempt to amend the rules, or undercut the overall scheme or design of the rules are invalid because they exceed the authority granted under the Florida Rules of Judicial Administration. *Payret v. Adams,* 471 So.2d 218, 220 (Fla. 4th DCA 1985) ("[C]ourts of this state are not empowered to develop local rules which contravene those promulgated by the Supreme Court.

Nor may courts devise practices which skirt the requirements of duly promulgated rules.") (quoting *Berkheimer v. Berkheimer,* 466 So.2d 1219, 1221 (Fla. 4th DCA 1985)); *Obando v. Bradshaw*, 920 So. 2d 198, 200 (Fla. 4th DCA 2006) (same); *see also Melkonian v. Goldman*, 647 So. 2d 1008, 1009 (Fla. 3d DCA 1994) (administrative judge's memorandum order may not be inconsistent with local rules approved by the Florida Supreme Court); *United Services Auto. Ass'n v. Goodman*, 826 So. 2d 914, 915 (Fla. 2002) (order prohibiting defense

counsel employed as full-time insurance company staff from using individual firm names in pleadings improperly encroached upon the Supreme Court's jurisdiction to adopt rules for the courts).

Invalid administrative orders include those that create time limits for a party to exercise a right where the rules of civil procedure have no such limits. In *Bathurst v. Turner*, 533 So. 2d 939, 941 (Fla. 3d DCA 1988), the appellate court granted a writ of mandamus which challenged an order which created a five-day time limit for objecting to a referral to a magistrate. Because the rule of civil procedure required a party's "consent"—an affirmative, voluntary action—mere acquiescence through inaction during the five-day period was insufficient. While the opinion in this case addressed a trial court's order, the court noted that the result would be the same if an existing administrative order were interpreted the same way. *Id*. at 941, n. 4.

Here, the Orders create a time limit for obtaining a ruling on motions that are timely under the rules by deeming them "abandoned" after ninety days. This newly minted waiver through inaction undercuts the Rules of Civil Procedure in several ways.

Pre-answer motions must be determined by hearing.

First, the Rules of Civil Procedure already specify the manner in which preliminary motions must be determined. Rule 1.140(d) Fla. R. Civ. P. unequivocally states that pre-answer motions "shall be heard and determined before trial on application of any party unless the court orders that the hearing and determination shall be deferred until the trial." (emphasis added). The directive that the courts "shall" hear and determine such motions leaves no room for a new rule that allows the court to dispose of them without a hearing by deeming them abandoned. *See S. R. v. State*, 346 So. 2d 1018, 1019 (Fla. 1977) (in statutory interpretation, "shall," is normally meant to be mandatory).

Additionally, to the extent that the Orders also apply to unrebutted motions to quash service of process that present a factual dispute, they deny the movants' right to an evidentiary hearing. *See Linville v. Home Sav. of Am., FSB*, 629 So. 2d 295 (Fla. 4th DCA 1993); *Talton v. CU Members Mortg.*, 126 So. 3d 446 (Fla. 4th DCA 2013).

Impermissible creation of a new waiver rule.

Second, the Rules themselves provide what constitutes a waiver of matters that can be raised in preliminary, pre-answer motions. Rules 1.140(b) and (h) of the Florida Rules of Civil Procedure specify that a party waives defenses and

objections (such as insufficiency of service) if they are not raised in the answer or a pre-answer motion. The Rules provide time limits for raising these defenses—twenty days from service for the typical defendant, or ten days from the denial of a pre-answer motion. Fla. R. Civ. P. 1.140(a). The Rules also provide a method for waiving the right to file motions directed to the pleadings by way of an affirmative, voluntary action (reminiscent of the "consent" rule discussed in *Bathurst*)—the filing of a notice for trial. Fla. R. Civ. P. 1.440(a).

The Rules and decades of case law also address how jurisdictional objections may be waived. For example, they may be waived by seeking affirmative relief. *See Brown v. U.S. Bank Nat. Ass'n*, 117 So. 3d 823, 824 (Fla. 4th DCA 2013) (making discovery requests and moving for sanctions were not requests for affirmative relief that would waive service); *Am. Exp. Ins. Services Europe Ltd. v. Duvall*, 972 So. 2d 1035, 1040 (Fla. 3d DCA 2008) (attendance at deposition did not waive challenge to personal jurisdiction); *Alvarado v. Cisneros*, 919 So. 2d 585, 588 (Fla. 3d DCA 2006) ("[I]f a defending party timely raises an objection to personal jurisdiction or service of process, then that defendant may plea to the merits and actively defend the lawsuit without waiving the objection."), *quoting*, *Berne v. Beznos*, 819 So.2d 235, 238 (Fla. 3d DCA 2002). If actively participating in the litigation does not waive a jurisdictional objection, then

certainly inaction—i.e. choosing to rely on an absence of jurisdiction—cannot do so.

Nevertheless, the Orders now add another method of waiver never approved by the Florida Supreme Court and establishes a new time limit (for obtaining a hearing on preliminary motions) not found in the Rules. However, the Florida Supreme Court's express declaration describing the manner in which defenses may be waived through inaction implies the exclusion of other methods. *See Subirats v. Fid. Nat. Prop.*, 106 So. 3d 997, 999 (Fla. 3d DCA 2013) (applying the "expressio unius est exclusio alterius" rule of construction to conclude that the Florida Department of Financial Services exceeded its rulemaking authority when it created a five-day waiver rule). Accordingly, a chief judge has no authority to invent new rules which can operate to waive a party's rights.

Impermissible shifting of the burden to prosecute.

Third, an underlying theme in the design of the Rules of Civil Procedure is that the plaintiff bears the burden of prosecuting the case. Rule 1.420(e) provides that an action may be dismissed after a period of inactivity of one year. A defendant, therefore, is entitled to a dismissal if a plaintiff does not set a pending pre-answer motion for hearing for a year (provided the parties or the court take no other action in the interim). *Patton v. Kera Tech., Inc.*, 895 So. 2d 1175, 1178 (Fla.

5th DCA 2005) *approved,* 946 So. 2d 983 (Fla. 2006) ("The plaintiff bears responsibility to expedite litigation and Plaintiff's failure to take steps within Plaintiff's control to resolve the case or to ensure prompt dispatch of court orders warrants dismissal."); *see Dashew v. Marks,* 352 So.2d 554 (Fla. 3d DCA 1977) (court's failure to enter a written order on an oral decision did not relieve plaintiff of the duty to proceed and did not affect the defendant's right to dismiss the case for lack of prosecution); *Sewell Masonry Co. v. DCC Const. Inc.,* 862 So.2d 893 (Fla. 5th DCA 2003) (it is not the role of the trial judge to schedule hearings on motions for parties who do not themselves seek rulings on their pleadings).

The Administrative Order, however, impermissibly shifts the burden to the defendant to prosecute the plaintiff's action against him or her. Because the candidly stated purpose of the new "abandonment" rule is to force cases to be at issue so they may be tried, it eviscerates the existing lack of prosecution rule, ensuring that no foreclosure plaintiff can suffer dismissal for failure to prosecute. Given the Chief Judge's apparent goal of clearing the court's dockets of a backlog of stagnant foreclosure cases, stripping away the potential to dismiss cases for lack of prosecution is seemingly self-defeating.

This is not to say that attorneys do not have a professional responsibility to "make reasonable efforts to expedite litigation consistent with the interests of the

client." R. Regulating Fla. Bar 4-3.2. But the Comment to the Rule, and the cases applying it, make clear that it applies when an attorney neglects the client, routinely delays proceedings for personal reasons, or files frivolous motions that do not have "some substantial purpose other than delay." Comment to R. Regulating Fla. Bar 4-3.2. It would not apply to require an attorney to expedite litigation inconsistent with the interests of the client, such as helping an opponent prosecute its case against the client or taking unnecessary action that extinguishes the opportunity for the case to be dismissed for lack of prosecution. The Administrative Order, therefore, cannot be supported by reference to the Rules of Professional Conduct.

Nor can it be supported by the Order's express reference to Fla. R. Jud. Admin. 2.515:

> Florida Rule of Judicial Administration 2.515 provides that a signature of an attorney shall constitute a certificate by the attorney that to the best of the attorney's knowledge, information and belief there is good grounds to support the court filing and that the court filing is not interposed for delay.[21]

That the attorney filing the motion opted to rely upon the rules that place the onus on his or her opponent to set the hearing does not mean that the motion was

[21] Administrative Order, p. 1.

frivolous or that it was improperly interposed solely for delay.[22] Nor should defense counsel be castigated for conducting the case in a way that could lead to a dismissal for lack of prosecution. Indeed, the reference to this Rule of Judicial Administration is so glaringly out of place, it appears to manifest a belief that all pre-answer motions filed by homeowners are without merit.

Impermissible deviation from the established method by which the courts manage their cases.

Fourth, while the plaintiff bears the burden of prosecuting its case, the Petitioner acknowledges that the trial court has the concomitant responsibility to prevent cases from languishing on its docket. As Justice Harding, in a special concurring opinion in *Fuster-Escalona v. Wisotsky*, 781 So. 2d 1063, 1066 (Fla. 2000), explained:

> Trial judges have a duty to periodically review their dockets and bring up matters which the attorneys have not set for hearing. …[I]t is the judge's, not the attorneys', responsibility to ensure that cases move through the system appropriately.

[22] The term "delay," like the term "prejudice" is often misused. Every motion will delay the proceedings (in the sense that it will require court time to resolve), just as every motion will prejudice an opponent (in the sense that it is intended to damage the opponent's case). With prejudice, the issue is always whether an opponent has been unfairly prejudiced. With delay, the issue is always whether the motion was interposed solely for delay. *See*, Comment to R. Regulating Fla. Bar 4-3.2 (requiring "some substantial purpose other than delay"). Thus, in most instances the issue of delay is secondary to, and subsumed within, the analysis of whether the motion itself is frivolous.

But, the Rules of Civil Procedure already provide a mechanism for the courts to manage their cases—a method that does not involve adopting a legal fiction that litigants have abandoned their motions. Rule 1.200(a) Fla. R. Civ. P. provides that the court may order a status conference so that it may "determine…matters that may aid in the disposition of the action." The court, therefore, may call a status conference and, with notice to the parties (and coordination with their schedules), rule upon any pending motions directed to the pleadings. *See also*, Fla. R. Civ. P. 1.090(d) (Notice of hearing for motions which may not be heard *ex parte* must "be served a reasonable time before the time specified for the hearing.").

The Administrative Order, however, creates a new shortcut to the established rules, purporting to permit the foreclosure judge to dispose of pre-answer motions without spending the time to read them, hear argument on them, rule upon them, and enter orders on them. Such automated resolution of disputed issues, where the rules contemplate case-by-case decision-making by judges, is itself a basis for declaring an administrative order null and void. *Tallahassee Democrat, Inc. v. Willis*, 370 So. 2d 867 (Fla. 1st DCA 1979) (Blanket administrative order requiring all deposition transcripts in all cases to be sealed

quashed as in conflict with the Rules of Civil Procedure which contemplate case-by-case consideration.)

Impermissible attempt to shield rulings from appellate review (violations of due process and access to courts)

Fifth, the Rules of Civil Procedure and the Rules of Appellate Procedure, as well as the Florida and United States Constitutions were specifically and carefully designed to provide litigants with a fundamental right of due process—appellate review. Art. I, §§ 9, 21, Fla. Const.; Art. V, § 4, Fla. Const.; Amend. XIV, § 1, U.S. Const.; *Lehmann v. Cloniger*, 294 So. 2d 344, 347 (Fla. 1st DCA 1974) ("Access to the courts and appellate review are constitutionally recognized rights and any restrictions thereon should be liberally construed in favor of the right.")

The entire edifice of the judicial system presumes that the trial courts will determine motions on their merits and erroneous decisions can be rectified by the appellate court. *See Combs v. State*, 420 So. 2d 316, 317 (Fla. 5th DCA 1982) *approved*, 436 So. 2d 93 (Fla. 1983) (equating rulings that effectively deny appellate review with violations of due process rights); *Bain v. State*, 730 So. 2d 296, 298 (Fla. 2d DCA 1999) (Art. V, Section 4(b)(1), Fla. Const. provides a right to appeal all final orders and that the Florida Supreme Court determines which non-final orders may be appealed).

The Administrative Order, however, constructs a method by which the trial court can dispose of motions without deciding them upon their merits. Deeming them "abandoned" when there was no such intent, falsely clothes these decisions with the appearance of a waiver, which could prevent appellate review. *See e.g. Melara v. Cicione*, 712 So. 2d 429, 430 (Fla. 3d DCA 1998) (issue not preserved for appellate review where there was a "clear waiver or abandonment").

The Standing Order further shields the automated decisions from appellate review because a denial of a motion without a written order filed and served in the case is not appealable. Fla. R. App. P. 9.020 (defining "Rendition (of an Order)" as when a signed, written order is filed with the clerk); Committee Notes to 1977 Amendment to Fla. R. App. P. 9.020 ("It was intended that this rule encourage the entry of written orders in every case."); *Florida Citrus Comm'n v. Griffin*, 249 So. 2d 42 (Fla. 2d DCA 1971) (appeal dismissed where there was no written order); *Rivera v. Dade County*, 485 So. 2d 17 (Fla. 3d DCA 1986) (appellate court lacked jurisdiction to review trial court's ruling on a service of process issue because it had not been reduced to writing); *State v. Simpson*, 313 So. 2d 470 (Fla. 4th DCA 1975) (writ of certiorari denied due to lack of written order).

Even if a denial of a motion were appealable on the basis of the Standing Order alone, because it purports to deny motions as of some arbitrary point in the

past, it creates substantial uncertainty as when a writ or non-final appeal must be commenced. Indeed, in many cases, the appellate time period will have expired before the Standing Order ever existed.[23]

II. The Administrative Order Is More Prejudicial to Homeowner-Defendants Than Bank-Plaintiffs (An Impermissible Choosing of Sides).

The Chief Judge has recognized that, in a majority of the current foreclosure cases, neither of the parties appear to want a "quicker resolution."[24] Despite laying the blame squarely at the feet of both parties, the remedy he devised is asymmetrically prejudicial to homeowners. First, it elevates a plaintiff-oriented goal of obtaining a judgment of foreclosure over the defense-oriented goal of dismissal for lack of prosecution—a remedy to which homeowners are entitled under the rules. Indeed, it places an additional economic burden on homeowners (the party who can least afford it) to coordinate, notice and attend hearings that

[23] The Standing Order denies all pre-answer motions "upon the ninety-first day following the day the motion is filed." The Order does not "grandfather in" existing motions or motions that have already been pending for more than ninety days. The Standing Order, therefore, may be interpreted as backdating the denial of motions such that any motion that has been pending more than 121 days at the entry of this Order could be said to have been denied more than thirty days before the Order. This would deny Homeowners in foreclosure their right to appellate review of the denial—even though the order to be appealed from was never filed in the case, never served on the parties, and never existed until after the appellate time expired.

[24] Kimberly Miller, *New 'fix' aims to speed up foreclosure backlog*. Palm Beach Post, April 30, 2014 at A1 (App. 6).

may never have been necessary. And by eliminating hearings at which the banks must address the merits of their opponents' motions, the Administrative Order actually encourages the banks not to set hearings—which promotes, rather than deters, delay.

Indeed, it could be said with equal (or perhaps greater) logic that, because the plaintiff is tasked by the rules to prosecute its case, failure to set a hearing on a motion to dismiss indicates acquiescence to the motion. Thus, the Administrative Order could have declared that the judges should deem the motion to dismiss granted or the complaint abandoned—a resolution that would also help reduce the backlog. That the Orders choose sides in the litigation, assisting one party to the detriment of the other, casts a shadow of impropriety over the Orders.

Second, because the "abandonment" shortcut is only applied to motions directed at the pleadings, the vast majority of which are defense motions, homeowners take the brunt of these automated denials. Notably, homeowners actively litigating their cases are often stymied by objections to discovery and motions to extend the time for responding to discovery, which the banks generally do not set for hearing, but which are not deemed abandoned. Thus, the cases are to

be rushed to trial, but pending discovery issues are left unresolved, which will leave homeowners unarmed to adequately defend themselves.[25]

Third, the Orders prejudice homeowners because the Orders apply only to foreclosure cases. There are other types of litigation where thousands of cases languish—such as tobacco litigation (pending *Engle* cases[26])—but which the courts do not push to resolution. Unlike plaintiffs in foreclosure litigation, plaintiffs in tobacco litigation are anxious to obtain trial dates. Yet, there are no administrative orders designed to accelerate the process for setting tobacco trials even for the cases that are already at issue. The singling out of homeowners for this new waiver rule raises equal protection concerns and is generally incompatible with a court system dedicated to the impartial treatment of litigants.

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[25] *See e.g.*, typical Order Setting Case Management Conference in the Fifteenth Circuit which states that counsel must notice all matters "that would prevent the case from being at issue." (App. 93); see also, Transcript of Case Management Conference in which the court states at page 4:

> The purpose of the case management conference is not to hear everything and not to hear all the problems with the case, but it's simply to get the cases set for trial or have you set hearings at this conference that are properly noticed that will get the case at issue.

(App. 100).

[26] According to press reports, about 8,000 *Engle* plaintiffs have cases pending in Florida Courts. Richard Craver, *Setback for R.J. Reynolds in decision emerging from class-action suit*, Winston-Salem Journal, September 6, 2013 (available at: http://www.journalnow.com/business/business_news/local/article_8197876e-1754-11e3-9f59-0019bb30f31a.html). These cases have not been resolved within the eighteen month goal of Fla. R. Jud. Admin. 2.250(a)(1)(B).

III. The Orders Violate the Due Process, Access to Courts, and Equal Protection Rights of Homeowners.

Vital to the concept of procedural due process is the notion that valuable property interests must not be "arbitrarily undermined." *Aldana v. Holub*, 381 So. 2d 231, 236 n. 9 (Fla. 1980). Here, the Orders arbitrarily encroach upon the homeowners' property rights without due process by disposing of motions without hearings or any consideration of the merits. *See Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) ("It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'"). The Orders also impinge upon due process, access to courts, and equal protection by placing additional barriers to appellate review that discriminate against foreclosure defendants when compared to foreclosure plaintiffs or defendants in other types of cases. *Griffin v. Illinois*, 351 U.S. 12, 18 (1956) (while a state is not required to provide appellate review, a state that does grant appellate review may not do so in a discriminatory way).

The Committee should consider, therefore, whether the problem sought to be resolved by the Orders is genuine (and an appropriate concern of the judicial system), whether the Orders resolve the perceived problem, and whether there exists another, less harmful way of resolving the perceived problem. *See Westerheide v. State*, 831 So. 2d 93, 104 (Fla. 2002) ("To ascertain whether the

encroachment can be justified, courts have considered the propriety of the state's purpose; the nature of the party being subjected to state action; the substance of that individual's right being infringed upon; the nexus between the means chosen by the state and the goal it intended to achieve; whether less restrictive alternatives were available; and whether individuals are ultimately being treated in a fundamentally unfair manner in derogation of their substantive rights.")

A. There is no evidence of a genuine problem that affects the litigants, the court, or the public.

The author of the Administrative Order has acknowledged that foreclosure litigants on both sides are content with the pace of the litigation and are not pressing for early resolution by the court. Benchmarks for the court's performance (such as those in the Rules of Judicial Administration) were set prior to the glut of foreclosure cases and assume that one of the parties would be anxious for judicial resolution (rather than, for example, resolution through settlement or loan renegotiation).

Stagnant cases do not consume the court's resources or the public at large. And while it is beyond the jurisdiction of the judicial system to concern itself about the effect "languishing" cases may have on the housing market or neighborhoods, there is no evidence that hurrying to provide an overabundance of homes for sale will benefit that market, rather than damage it.

Accordingly, the stated purpose of the Orders should be viewed with some skepticism as to whether there is a valid basis for taking any unusual action that threatens the integrity of the judicial system.

B. The Orders do not accomplish their stated purpose of getting the cases "at issue."

The Administrative Order is expressly aimed at any "motion which prevents a matter filed in the foreclosure division from being at issue."[27] The presumption appears to be that simply disposing of pre-answer motions will make the case "at issue" and ready to be set for trial. In reality, the pleadings are not closed until the defendants file an answer and the bank has an opportunity to reply. If the defendants do not file an answer, the case will still not be at issue until the bank moves for and obtains a judicial default or drops the party. *Zeigler v. Huston*, 626 So. 2d 1046, 1048 (Fla. 4th DCA 1993) ("Under either rule 1.200(c) or 1.500(b), it is fundamental that in order to properly enter a default after a party has appeared, notice of the intention to enter a default must be served on the party."). This means that, in cases where the homeowners fail to answer, the plaintiff banks will still ultimately control the pacing of the case, but will now have the advantage of having their opponents' defensive motions automatically denied.

[27] Administrative Order, ¶¶ 1, 2.

The Orders also set the stage for a wave of default judgments that will generate its own collateral litigation. First, using the "backdating" language of the Standing Order, the plaintiff banks may argue that the time for filing an answer in many cases has already expired. Fla. R. Civ. P. 1.140(a)(3) (responsive pleading must be served within ten days after notice of the court's action on a pre-answer motion).[28] Second, because no order is being served to the parties in individual cases, the homeowners (particularly those litigating *pro se*) may be unaware of the need to file an answer. The morass created by these Orders, therefore, threatens to decrease the efficiency of the judicial system, rather than increase it.

C. There already exists an alternative, less restrictive method of remedying the perceived problem.

If the intent of the Orders was to encourage litigants to set and attend actual hearings on their pre-answer motions (rather than a wholesale denial of motions without hearings), then there would be no efficiency gain over simply holding a status conference—as the court is already permitted to do—and hearing the motions on the merits.

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[28] A case in point: in *Wells Fargo Bank, N.A. v. Katz*, Case No. 502010CA023143XXXXMB, the bank has already moved for a default citing to the first version of the Administrative Order and arguing that the Katzes failed to file an answer after their motions to quash were deemed abandoned. Plaintiff's Motion to Deem Defendants' Motions to Quash Denied as Abandoned and Motion for Judicial Default, dated April 8, 2014 (App. 30).

The determination of whether the Orders unconstitutionally infringe upon the rights of due process, equal protection, and access to courts depends on whether there is an alternative, less-restrictive method of correcting the problem. *Mitchell v. Moore*, 786 So. 2d 521, 527 (Fla. 2001) ("there is no relevant difference between the 'compelling governmental interest/strict scrutiny' test [used in due process and equal protection analysis] and the 'no alternative method of correcting the problem/overpowering public necessity' test [used in access to courts analysis]..."). Further, because due process is a fundamental right,[29] the strict scrutiny test is applicable. *See Jackson v. State*, 39 Fla. L. Weekly D635 (Fla. 4th DCA 2014) ("fundamental rights include those guaranteed by the Bill of Rights…"). Thus, the method for remedying the asserted malady must be strictly tailored to remedy the problem in the most effective way and must not restrict a person's rights any more than absolutely necessary. *Mitchell v. Moore*, 786 So. 2d at 527.

Assuming there were a proven public need to sweep lethargic cases from the court system, status conferences are a less restrictive, alternative method of resolving unheard motions on the merits (provided there is notice, coordination

[29] Notably, dispossession of the homestead also impinges upon deeply rooted and constitutionally protected concerns. Art. X, § 4, Fla. Const.; *Snyder v. Davis*, 699 So. 2d 999 (Fla. 1997).

with schedules and adequate time to argue[30]). The Orders, therefore, violate this test of constitutionality. *See G.B.B. Investments, Inc. v. Hinterkopf*, 343 So. 2d 899, 901 (Fla. 3d DCA 1977) (In a foreclosure case, order imposing financial pre-condition reversed under Art. I, § 21, Fla. Const.: "Any restrictions on such access to the courts must be liberally construed in favor of the constitutional right.")

Accordingly, the Orders should be subject to review and approval by the Florida Supreme Court on the additional ground that they: 1) are unduly discriminatory against homeowners; 2) do not accomplish any permissible objective of the court; and 3) are not the least restrictive means of achieving their stated goal.

[30] Another practice in foreclosure cases that degrades the professionalism of the bar and the court system is the scheduling of trials and hearings without coordination with, or consideration of, the schedules of the attorneys and parties. *See*, discussion of the professionalism guidelines in a Motion to Cancel Motion for Summary Judgment Hearing (App. 111); *see also, e.g.*, Transcript of Case Management Conference (App. 97) in which the court unilaterally chooses a date for trial despite a conflict with counsel's schedule for six other trials. If the exigency of the circumstances is such that ordinary rules of professionalism cannot be observed (which Petitioner disputes is the case), the Petitioner would propose that the Court set status conferences on a regular, predictable basis, such as every sixty days, so that parties and their counsel may plan accordingly.

IV. The Cases Cited by the Administrative Order Do Not Support the Notion That the Court May Automate the Denial of Motions by Declaring Them Abandoned.

Apparently predicting a legal challenge, the Chief Judge includes citations to cases in the Administrative Order as support for its new abandonment rule. The first, *Bridier v. Burns*, 200 So. 355 (Fla. 1941), was decided more than ten years before the adoption of the Rules of Civil Procedure (in 1954). It simply ruled that an appellant had abandoned appeals where the "appeals have not been perfected or brought to the attention of the Court by counsel entering the appeals; and briefs have not been filed on the part of counsel, or request made for oral argument thereof as required by the rules of this Court…" *Id*. at 356. Thus, this case comports with the structure of the current procedural rules that failure to prosecute will result in dismissal. It did not shift the burden to the appellee to perfect the appeals for the appellant.

The second, *Weatherford v. Weatherford*, 91 So. 2d 179 (Fla. 1956) is a 1956 case which simply held that issues not raised on appeal are "abandoned"—the very same rule that is applied to appeals today (although the more common terms are "waived" or "not preserved"). It did not authorize a trial court to abdicate its responsibility to hear motions by declaring them abandoned.

Lastly, the Chief Judge cites *State, Dept. of Revenue v. Kiedaisch*, 670 So. 2d 1058 (Fla. 2d DCA 1996). That case also did not involve a trial court declaring a motion abandoned, but just the opposite. There, the trial court ruled on a two-and-a-half–year-old motion, the hearing for which had never been set—or more importantly—never been noticed. Even the appellate court did not "deem" it abandoned, but merely came to the conclusion that the petitioner had abandoned the requested relief. The appellate court even acknowledged the possibility that it had not been abandoned:

> He, however, never set that Petition for hearing; thus, we conclude that he abandoned the Petition. Even if he did not abandon it, the father still did not give the mother notice that his Petition would be heard at this hearing.

Id. at 1060 (emphasis added).

None of the three cases, therefore, provides the Chief Judge with the authority to create an abandonment rule in the Circuit.

V. The Sheer Scope of the Abandonment Rule Exceeds the Role of an Administrative Order.

In *State v. Garrett*, 310 So. 2d 751 (Fla. 4th DCA 1975) *vacated as moot sub nom. Smith v. State*, 316 So. 2d 262 (Fla. 1975), the Fourth District addressed a General Order of the Nineteenth Circuit that required trial proceedings to be recorded electronically, rather than by court reporters. The appellate court found

that, because of its "comprehensive scope, impact and seriousness," the General Order was "without question or doubt" a local rule requiring prior approval of the Supreme Court.

In reaching this decision, the court addressed the same question that is now reposed within the jurisdiction of the Local Rules Advisory Committee:

> And so we ask if the General Order is of the kind and nature as to be within the power and duty of the Chief Judge of the Circuit as provided under Rule 1.020(b)(3), without the necessity of supreme court approval, or is it of a stature and nature to qualify it under Rule 1.020(e), supra, so as to require supreme court approval as a condition to its validity.

Id. at 755. The court then examined the rule that empowered the Chief Judge to administer unilaterally (now in the Rules of Judicial Administration) and found that it was restricted to limited in-house "chores" such as the assignment of courtrooms and judges and that the scope presupposes a finite time limitation. *Id.* Additionally, the court "supposed" that the Chief Judge may also "undertake like administrative duties to secure the speedy and efficient administration of the Court's business." *Id.* (emphasis added). In short, in doing his or her part to support the speedy and efficient administration of justice, the Chief Judge is still confined to the limited role of managing court resources.

The General Order in *Garrett*, however, applied to all proceedings where reporting was required, applied to all counsel and litigants, applied Circuit-wide,

and applied indefinitely in the future. Additionally, it represented "a most substantial change in court and lawyer practice and procedure." *Id.* The court concluded that the General Order could only become effective after approval of the Supreme Court and that, without such approval, the Order was void. *Id*. at 756.[31]

Similarly, the Orders here apply to all foreclosure cases, Circuit-wide, and indefinitely into the future. It is unquestionably a substantial change in court and lawyer practice and procedure. It has an even more "comprehensive scope, impact and seriousness" than the General Order in *Garrett* because, by encouraging judges to forsake their duty to rule independently on motions, it also impinges upon the rights of the litigants. And by interfering with procedural rights designed to provide due process (such as appellate review), litigants may be unfairly deprived of their substantive rights.

Accordingly, the Orders are of such a stature and nature so as to require Supreme Court approval.

[31] On rehearing, the court certified a question to the Supreme Court that was rendered moot by the adoption of a general statewide rule relating to electronic court reporting. The Supreme Court, therefore, vacated the decision and remanded the case back to the trial court to consider the new rule. *Smith v. State*, 316 So. 2d 262 (Fla. 1975).

VI. The Sheer Geographic Scope of the Perceived Problem Militates In Favor of Resolution by the Florida Supreme Court.

Another reason why the Orders do not qualify as administrative orders or even local rules is that they attempt to address a perceived problem that is not confined to the Fifteenth Circuit, but rather, has raised concern (whether that concern is justified or not) throughout the state.[32] For purposes of uniformity and efficiency, if any rule change is to be implemented, it should be accomplished by the Florida Supreme Court after the participation and input of the appropriate Florida Bar Committee and the general public.

[32] *See*, similar orders from other Circuits in the Statement of Facts, *supra*.

CONCLUSION

The Orders which declare that unheard motions may be (or have been) automatically denied as "abandoned" impermissibly encroach upon the rule-making power of the Florida Supreme Court. The Orders are inconsistent with the Rules of Civil Procedure and the Florida Constitution. The Committee should, therefore, decide that such Orders cannot stand without undergoing the public review and approval process reserved for local rules and rules of procedure.

Dated: May 29, 2014

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CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

Undersigned counsel hereby certifies that the foregoing Petition complies with Fla. R. App. P. 9.210 and has been typed in Times New Roman, 14 Point.

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CERTIFICATE OF SERVICE AND FILING

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this May 29, 2014 to all parties on the attached service list. Service was by email to all parties not exempt from Rule 2.516 Fla. R. Jud. Admin. at the indicated email address on the service list, and by U.S. Mail to any other parties. I also certify that this petition has been electronically filed this May 29, 2014.

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