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Assumptions and Unintended Consequences of Florida's HB 87 and the Foreclosure Crisis: A Pragmatic Analysis

Caroline Joan S. Picart* & Marlowe Fox**

ABSTRACT

Florida's Fair Foreclosure Act, House Bill 87 ("HB 87"), is a legislative enactment that expedites the foreclosure process in Florida. The rationale is simple: the sooner the foreclosure mess is cleaned up, the sooner the housing market and economy can recover. Despite the idea's inherent soundness, HB 87 makes assumptions that will lead to unintended consequences.

This Article analyzes HB 87 in terms of its constituent elements and, through legal reasoning, deduces the legal rights and duties created thereby. We then use the rights and duties created by HB 87 as a premise to infer the competing policies behind HB 87's rationale. Lastly, this Article attempts an economic analysis of HB 87's rationale to determine if its pragmatic effects are consistent therewith.

This Article concludes that the uncertain consequences of the mortgage foreclosure crisis are best mitigated by affording the time inherent in the legal process and maintaining the elasticity of courts to make judgments based on interpretative case law and equity.

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INTRODUCTION

Friday, June 7, 2013. Five days before the bill would have automatically become law, Governor Rick Scott signed House Bill 87, An Act Relating to Mortgage Foreclosures (“HB 87”).¹ HB 87 became law on the date it was signed, although most of the provisions took effect on July 1, 2013.² House Bill 87 introduced changes in rules of civil procedure governing the foreclosure process; in short, it speeds up the foreclosure process.³ In the following sections, we explore the rationale behind HB 87, demonstrate HB 87’s inherent inconsistencies, and forecast some unintended consequences.

This Article explores HB 87 in a three-fold manner: from within, from without, and from above. From within, this Article’s analysis will

1. Shawn M. Yesner, *HB 87 – Speedy Foreclosures Come to Florida*, YESNER LAW (July 2, 2013), <http://yesnerlaw.com/hb-87-speedy-foreclosures-come-to-florida/>.

2. *Id.*

3. Toluse Olorunnipa, *New Florida Bill Would Speed up the Foreclosure Process*, MIAMI HERALD (Jan. 14, 2013), <http://www.miamiherald.com/2013/01/04/3167640/new-florida-bill-would-speed-up.html>.

be based largely on legal doctrine and legal reasoning.⁴ From the outside, this Article analyzes HB 87 from an economic perspective. From above, this Article explores HB 87 from policy-oriented and rights-related frameworks; specifically, it analyzes HB 87's attempt to balance the competing policies of efficiency versus justice and utilitarianism versus individual rights.

Part I explains how HB 87 has been rhetorically framed in the media and sets up the key theses of this Article. Part II provides a legal analysis of the constituent elements of HB 87. By analyzing the legal rights and duties created by HB 87, this Article aims to draw out the competing policies behind HB 87. In addition, this Article analyzes the House of Representatives Final Bill Analysis and points out some crucial weaknesses. One such glaring weakness is that the Florida Legislature's analysis is based on non-credible data from RealtyTrac.⁵ The Florida Legislature's failure to scrutinize the RealtyTrac data probably indicates bureaucratic posturing—taking a position merely for its political advantages.

Part III attempts to provide a method-based economic analysis of HB 87, borrowing from the fields of uncertainty theory and cognitive psychology.⁶ From there, the Article analyzes the larger philosophical

4. RICHARD A. POSNER, *FRONTIERS OF LEGAL THEORY* 2 (2004). For a similar breakdown on different types of analysis, see Yesner, *supra* note 1.

5. RealtyTrac, according to its website, is “the leading provider of comprehensive housing data and analytics for the real estate and financial services industries, Federal, State and local governments, academic institutions, and the media.” *About RealtyTrac*, REALTYTRAC, <http://www.realtytrac.com/company-info> (last visited June 4, 2014).

6. “Uncertainty theory,” as used in this article, is derived from John Maynard Keynes’ *The General Theory of Employment, Interest and Money*. Keynes distinguished between “uncertain knowledge,” which has “no scientific basis on which to form any calculable probability whatever” and “calculable risk,” which does. John Maynard Keynes, *The General Theory of Employment, Interest and Money*, 51 Q.J. ECON. 209, 214 (1937) [hereinafter Keynes, *General Theory*]. The ambiguity is partially in Keynes’ work. He speaks of “extreme uncertainty,” implying some kind of continuum, but the majority of the time, when he talks about “uncertainty,” he is referring to something beyond the pale of what is calculable or predictable. JOHN MAYNARD KEYNES, *THE GENERAL THEORY OF EMPLOYMENT, INTEREST AND MONEY* 85–86, 91, 100, 104, 108, 116, 156 (1936) [hereinafter KEYNES, *INTEREST AND MONEY*]. Of course, in a real world setting, the key issue is isolating “uncertain knowledge” from “calculable risk”—if they can indeed be completely and neatly parsed apart, even if they interact with each other as variables.

Examples of uncertainty include “the prospect of a European war[,] . . . or the price of copper and the rate of interest twenty years hence, or the obsolescence of a new invention, or the position of private wealth-owners in the social system of 1970.” Keynes, *General Theory*, *supra*, at 214. Yet despite uncertainty, economic actors behave as if they had “good Benthamite calculations of a series of prospective advantages and disadvantages, each multiplied by its inappropriate probability, waiting to be summed.” *Id.* The practical offshoot of such reasoning is that “investment decisions are often made in a setting of uncertainty, because by the time the investment can begin to yield a return the conditions determining its profitability may have changed.” RICHARD A. POSNER,

questions involved in HB 87, including its underlying policies. Without making *ex-ante* normative judgments about these policies, this Article looks to the pragmatic and foreseeable consequences of promoting one policy over another.

In *Frontiers of Legal Theory*, Richard Posner breaks down economics into two basic conceptions: the subject matter-based study of markets and the method-based rational-actor model of human behavior.⁷ Posner notes that the latter seems to be on a collision course with psychology, i.e., behavioral schools of economics.⁸ This Article builds upon the rational-actor model but acknowledges the model's limitations regarding behavioral economics. Hence, this Article draws from the inter-related fields of uncertainty, philosophy, and cognitive psychology to bridge the gap. The Article's interdisciplinary framework provides nuance to the rational-actor model and ultimately opts for an "optimization under constraints"-actor model.

THE CRISIS OF CAPITALIST DEMOCRACY 291 (2010); see also NATE SILVER, THE SIGNAL AND THE NOISE: WHY SO MANY PREDICTIONS FAIL—BUT SOME DON'T 29 (2012) ("Risk . . . is something that you can put a price on . . . Uncertainty, on the other hand, is risk that is hard to measure . . . [Y]ou have no real idea how many [demons] there are or when they might strike.").

As used in this Article, "cognitive psychology" also has a Keynesian historical origin. "Cognitive psychology" deals with how economic actors make decisions—ranging from hoarding to investing—despite the pervasiveness of uncertainty. Investors and other business actors, far from being frozen into inaction by the unknown, make decisions in the face of uncertainty, spurred less by rational Benthamite calculation of "pleasure" and "pain" or benefit and cost, than by "animal spirits," which Keynes characterized as "a spontaneous urge to action rather than inaction, and not as the outcome of a weighted average of quantitative benefits multiplied by quantitative probabilities." KEYNES, INTEREST AND MONEY, *supra*, at 144–45. This does not mean that economic actors or agents make decisions purely irrationally, but rather pragmatically. There is a liminal space in between "pure reason" and irrationality or a-rationality. Richard Posner, in his review of George A. Akerlof and Robert J. Schiller's *Animal Spirits: How Human Psychology Drives the Economy, and Why It Matters for Global Capitalism*, critiqued Akerlof and Schiller's interpretation of "animal spirits" as meaning exclusively "noneconomic motives and irrational behaviors." Cf. Richard A. Posner, *Shorting Reason*, THE NEW REPUBLIC ONLINE (Apr. 16, 2009), http://www.powells.com/review/2009_04_16.html. At a more contemporary and supplementary level, Nobel Laureate Daniel Kahneman's recently published work in cognitive psychology demonstrates that "people rely on a limited number of heuristic principles which reduce the complex tasks of assessing probabilities and predicting values to simpler judgmental operations." DANIEL KAHNEMAN, THINKING, FAST AND SLOW 419 (2011). For example, Kahneman notes that "[p]eople tend to access the relative importance of issues by the ease with which they are retrieved from memory—and this is largely determined by the extent of coverage in the media." *Id.* at 8.

This Article both draws from and engages these multidisciplinary sources, but further, specifically focuses on how, against the backdrop of HB 87, individuals make decisions based on limited heuristic biases that are further reinforced by information asymmetries and political rhetoric.

7. POSNER, *FRONTIERS OF LEGAL THEORY*, *supra* note 4, at 225.

8. *Id.*

This Article concludes that the uncertain results of the mortgage foreclosure crisis are best ameliorated not by the procedures of HB 87, but by granting homeowners the time that the usual judicial processes take, as well as preserving, as much as possible, the elasticity of the common law tradition in American courts.

I. PERSPECTIVES ON HB 87 AND LIMITATIONS ON THEIR APPLICABILITY

Touted as the antidote to Florida's foreclosure crisis, HB 87 received a fair bit of polemical coverage. MoveOn, a liberal nonprofit political action committee, denounced HB 87 as "another brazen attempt to further deprive U.S. citizens of their constitutional rights to due process of law in Florida's courts."⁹ In contrast, the Community Advocacy Network ("CAN"), a statewide not-for-profit advocacy network that promotes favorable community association legislation, enthusiastically advocated the new law.¹⁰ CAN's spokesperson and founder, Donna DiMaggio Berger, rhetorically positioned HB 87 as diluting the power of banks in delaying the foreclosure process, which is damaging to community associations:

Far too many associations have been held in limbo waiting for banks to foreclose on delinquent properties in their communities. HB 87 will give associations a new tool in the form of an Order to Show Cause to force banks to proceed expeditiously with their foreclosure actions unless they can produce a compelling reason they cannot do so.¹¹

But foreclosure defense attorney, Mark Stopa, decried the bill as giving already powerful banks even more leverage, to the detriment of homeowners. He declared:

The biggest reason foreclosure cases go slowly in Florida is because banks want them to go slowly. Sure, foreclosure cases often go slower when lawyers like myself are involved. However, even with the increasing number of lawyers defending foreclosures nowadays, the vast majority of foreclosure cases in Florida remain unopposed. . . . [A]dvocates of this proposed legislation complain

9. *Kill House Bill 87*, MOVEON, <http://petitions.moveon.org/sign/kill-house-bill-87> (last visited Apr. 1, 2014).

10. Marianela Toledo, *Florida's Foreclosure Act May End up in Legal Battle*, FLORIDA WATCHDOG (June 4, 2013), <http://watchdog.org/88338/floridas-foreclosure-act-may-end-up-in-legal-battle/>.

11. Donna DiMaggio Berger, *Speedier Bank Foreclosures on the Horizon Thanks to HB 87!*, SUN SENTINEL (May 6, 2013), <http://blogs.sun-sentinel.com/condoblog/2013/05/speedier-bank-foreclosures-on-the-horizon-thanks-to-hb-87.html>.

about how long it takes to adjudicate a foreclosure case, yet most cases are unopposed. . . . [T]here is absolutely no excuse for banks to be unable to finish a foreclosure case in, say, less than a year when a case is unopposed. . . .¹²

Notwithstanding the rhetorical finger-pointing regarding who is to blame in the current foreclosure crisis, there is consensus on at least one point. Namely, that the principal group that will bear the brunt of HB 87's social costs is less affluent private homeowners already embattled in a fight to save their homes. Thus, State Senator Darren Soto, D-Orlando, who wanted Governor Rick Scott to veto the bill, declared: "[t]his legislation would mark the biggest reduction of homeowner (and) homestead rights in generations."¹³ And although DiMaggio Berger stressed that there are some Florida homeowners whose interests are "protected" by the bill, such as those who are "paying members of homeowners' associations,"¹⁴ and those who "have fallen victim to foreclosure while paying for the budget shortfalls created by their neighbors who preceded them on the foreclosure path,"¹⁵ she did acknowledge that "mortgage defense attorneys would likely not support the bill since their clients benefit from longer foreclosure proceedings."¹⁶

Above and beyond the inflated rhetorical positioning, this Article argues for a balanced, neo-pragmatic approach in assessing the probable outcomes of the passage of HB 87. The theoretical core of this Article reflects recent trends in law and economics that attempt to nuance the emphasis on the "efficiency" implications of the Chicago School with an analysis of the distributive consequences of the law.¹⁷ Therefore, the Article reflects the law and economics movement's shift away from a deterministic analysis to a more functional, adaptive, and pragmatic approach, forged in part as a response to the postmodernist critique.¹⁸ This Article follows the post-Chicago recognition that although "[i]t may have appeared useful at one time to distinguish the efficiency of legal

12. Mark Stopa, *The Problems with House Bill 87*, STOPA LAW FIRM (Feb. 17, 2013), <http://www.stayinmyhome.com/the-problems-with-house-bill-87/>.

13. Toledo, *supra* note 10.

14. *Id.*

15. *Id.*

16. *Id.*

17. See Jules L. Coleman, *Afterword: The Rational Choice Approach to Legal Rules*, 65 CHI.-KENT L. REV. 177, 179 (1989).

18. See, e.g., Symposium, *The Future of Law and Economics*, 20 HOFSTRA L. REV. (1992); Symposium, *Post-Chicago Law and Economics*, 65 CHI.-KENT L. REV. (1989); see also Randy E. Barnett, *Introduction: A New Era of Law and Economics*, 65 CHI.-KENT L. REV. 3 (1989) (summarizing the more pragmatic dimensions of a "post-Chicago" law and economics movement).

rules from their distributive dimension . . . it was never analytically possible, nor is it now normatively defensible to do so.”¹⁹

Proponents of HB 87 argue that “Florida’s judicial-based foreclosure process has been blamed for slowing and prolonging the recovery of the state’s housing markets.”²⁰ Proponents look to the more speedy economic recovery of non-judicial states, where the foreclosure process is on a much more abbreviated time horizon.²¹ However, this premise draws from certain assumptions that have unintended consequences. For example, statistical probabilities are unknown until after the fact.²² Thus, one cannot easily parse out causation from correlation. There is value in statistical inference, but its scope must be limited; as Nasim Taleb quips, “[s]tatistical and applied probabilistic knowledge is the core of knowledge . . . but . . . let’s not be suckers.”²³

On the other hand, we are not persuaded by populist rhetoric that obviates any responsibility on the part of homeowners.²⁴ Borrowers are not free from culpability. They often make poor financial decisions based on heuristic biases as opposed to deliberate and rational thought.²⁵

Banking systems are important as the primary allocator of capital and play an instrumental role in speculation.²⁶ Nonetheless, lending institutions and mortgage servicers should not be allowed to capitalize on the information asymmetries inherent in loan origination and servicing. Borrower reliance on imperfect information is two-fold: first, borrowers rely on imperfect information when taking out mortgages and, second, they rely on incomplete information to explore foreclosure prevention alternatives. Worse yet, the government has given borrowers ineffective information by championing programs like the Home Affordable Modification Program (“HAMP”)²⁷ and consent orders like the National

19. Coleman, *supra* note 17, at 177.

20. Mary Shanklin, *Group Asks Scott to Veto Speedier-Foreclosure Bill*, ORLANDO SENTINEL (May 29, 2013), http://articles.orlandosentinel.com/2013-05-29/business/os-foreclosure-law-veto-20130529_1_florida-gov-foreclosures-florida-bill.

21. See generally H.R. 2013-h0087z.CJS, Reg. Sess. (Fla. 2013), available at <http://www.myfloridahouse.gov/Sections/Documents/loadoc.aspx?FileName=h0087z.CJS.DOCX&DocumentType=Analysis&BillNumber=0087&Session=2013>.

22. Nassim Nicholas Taleb, *The Fourth Quadrant: A Map of the Limits of Statistics*, in THINKING: THE NEW SCIENCE OF DECISION-MAKING, PROBLEM-SOLVING, AND PREDICTION 225, 232 (John Brockman ed., 2013) [hereinafter Brockman, THINKING]. In addition, advocates may be subject to confirmation bias—the tendency to find samples that confirm one’s theory. See also *id.* at 240.

23. *Id.* at 226.

24. See, e.g., JOHN CASSIDY, HOW MARKETS FAIL 10 (2009) (noting that “mortgage brokers . . . steered hard-up working-class families toward risky subprime mortgages”).

25. See, e.g., KAHNEMAN, *supra* note 4, at 419.

26. See CASSIDY, *supra* note 24, at 331.

27. Under the Economic Stabilization Act of 2008 (“EESA”), the United States Treasury instituted a number of programs, including the Making Home Affordable Act.

Mortgage Settlement Agreement (“NMSA”).²⁸ Servicers are not complying with either program,²⁹ and there is no private right of action for borrowers to sue for noncompliance.³⁰

II. DESCRIPTION AND UNDERLYING ASSUMPTIONS OF HB 87

This section explains three features of HB 87: (1) the statute of limitations for deficiency judgments, (2) the final judgment rule on foreclosures, and (3) the shortened time frame homeowners have to challenge foreclosure. A legal analysis of HB 87 demonstrates that it greatly promotes utilitarian values over individual rights. Practically speaking, HB 87 promotes the greater economic good to the detriment of individual borrowers facing a foreclosure legal action. In addition, HB 87 endorses an expedited legal process. HB 87 fosters judicial economy notwithstanding the significant detriment to the due process rights of distressed borrowers. In a similar vein, HB 87 adopts formal rules that greatly undercut the elasticity of foreclosure courts. Instrumentalist judicial doctrines, like equity, will be ossified by HB 87’s formal language and rules. Hence, HB 87 promotes the formal language of rules over the more flexible (instrumentalist) language of standards typical in equity.

Housing, U.S. DEP’T OF THE TREASURY, <http://www.treasury.gov/initiatives/financial-stability/TARP-Programs/housing/Pages/default.aspx> (last visited Oct. 24, 2012). HAMP was part of the Making Home Affordable initiative. *Id.*

28. The NMSA is a part-federal, part-state government contract whose purpose is to provide more modifications to a greater number of borrowers by obligating servicers to comply with new servicing standards. *See* Press Release, U.S. Dep’t of Justice, Federal Government and State Attorneys General Reach \$25 Billion Agreement with Five Largest Mortgage Servicers to Address Mortgage Loan Servicing and Foreclosure Abuses (Feb. 9, 2012), *available at* <http://www.justice.gov/opa/pr/2012/February/12-ag-186.html>.

29. *See, e.g.,* Jessica Silver-Greenberg, *2 Big Banks Face Suits in Mortgage Pact Abuses*, N.Y. TIMES (May 6, 2013), <http://dealbook.nytimes.com/2013/05/06/new-york-to-sue-bank-of-america-and-wells-fargo-over-settlement-violations/>. New York Attorney General Eric Schneiderman stated that “Bank of America [has] flagrantly violated [the consent judgment] obligations, putting hundreds of homeowners across New York at greater risk of foreclosure.” *Id.* Martha Coakley, Massachusetts Attorney General, recently sent a letter to the settlement monitor “outlining ‘recurring issues’ with mortgage servicers.” *Id.*

30. *See* Arsen Sarapinian, Comment, *Fighting Foreclosure: Using Contract Law to Enforce the Home Affordable Modification Program (HAMP)*, 64 HASTINGS L.J. 905, 909 n.27.

A. *Description and Legal Analysis of Key Provisions of HB 87*

1. HB 87 Decreases the Statute of Limitations on Deficiency Judgments.

HB 87 reduces the statute of limitations for deficiencies created by mortgage foreclosure and deed-in-lieu of foreclosure. Specifically, HB 87 reduces the timetable from five years to one year for deficiencies created by a foreclosure sale or deed-in-lieu of foreclosure.³¹

Unfortunately, HB 87 fails to anticipate the effects of third party debt collection. HB 87 is ineffectual in its goal to deter third party debt collectors from attempting to collect debts and instead may facilitate such debt collection through the one-year statute of limitations. Consider the following hypothetical example.

Sam, the borrower, has a foreclosure judgment entered against him. Sam's house sells for \$100,000, but he was \$170,000 in debt. Thus, the mortgage servicer has the option of pursuing a deficiency judgment. The servicer owns many such deficiency judgments that it may never pursue because borrowers have little to no assets, especially considering the truncated one-year statute of limitations. Nonetheless, the deficiency judgments do have value, albeit cents on the dollar. Who would buy deficiency judgments that will not be *legally enforceable* within one year? Steve, working out of his basement in Coral Gables, will buy these debts regardless of whether or not they are legally enforceable, and the servicer will sell them. The servicer will expressly disclaim all representations and guarantees with regard to the debt, including its validity and legality. The servicer's disclaimer will not stop Steve from purchasing Sam's debt. Steve is betting that Sam will not know about HB 87's one-year statute of limitations for pursuing a deficiency judgment. Thus, Steve has incentive to collect on Sam's debt even though the debt is legally unenforceable.

Moreover, HB 87 does not seem to provide clear statutory damages for a violation thereof. Ergo, servicers will likely be able to continue to sell "expired debt," and Steve will continue to buy it. What if Sam the borrower wants to sue over the unfair debt collection? Consumer attorneys will want a clear statutory provision regarding damages and attorney fees to determine the financial advantages of providing legal representation. Certainly, there are other causes of action, such as Fair

31. H.R. 87 § 95.11(2)(b)(5), 2013 Leg., Reg. Sess. (Fla. 2013), available at http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=_h0087er.docx&DocumentType=Bill&BillNumber=0087&Session=2013.

Debt Collection Practices Act (“FDCPA”) violations,³² but statutory damages for the debtor are capped at \$1000.³³ Moreover, there is not an abundant supply of attorneys willing or able to work without a retainer and solely on the possibility of prevailing in court. Thus, the one-year limitation may have little pragmatic effect as it merely renders the deficiency judgment legally unenforceable without providing any sufficient remedy for illegal collection efforts.

Why would legislators pass a provision in HB 87 that has no teeth and will do little to curb the collection efforts of third party debt collectors? Most likely the particular provision is merely political rhetoric to take the sting out of some of the more anti-borrower provisions of HB 87. However, there is a noteworthy loophole. HB 87 makes no mention of a change in restrictions on short sale transactions. Thus, one may argue that the statute of limitations to collect on a deficiency following the short sale of a house is still five years. However, if the homeowner enables the bank to foreclose or negotiates a deal to give the house back to the bank, the statute of limitations to sue for deficiency is reduced to only one year³⁴—a stark and significant difference. These subtleties would escape typical consumers like our hypothetical “Sam,” who represents the majority of buyers negatively impacted by the bill.

2. HB 87 Makes Foreclosure Judgments Difficult to Overturn.

One of the most polemical provisions of the bill concerns the entry of a mortgage foreclosure final judgment. If a third party unaffiliated with the lender purchases the repossessed property, notwithstanding the validity of the actual foreclosure proceedings, the borrower’s sole remaining remedy is to sue the bank for money damages.³⁵ Pointedly, HB 87 bars the mortgagor from suing to reacquire the property.³⁶ Simply put, a mortgagor is barred from getting her home back if final judgment is entered and the property is sold to a bona fide third party purchaser.³⁷ The one caveat is the appeals period that affords 30 days for the borrower to file a notice of appeal from the final judgment.³⁸

32. “A debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt.” Fair Debt Collection Practices Act, 15 U.S.C. § 1692d (2012).

33. 15 U.S.C. § 1692k(a)(2)(A).

34. H.R. 87 § 95.11(2)(b)(5), 2013 Leg., Reg. Sess. (Fla. 2013).

35. *Id.* §§ 702.036(1)(a)–(b).

36. *Id.* § 702.036(1)(a).

37. *Id.* § 702.036(4).

38. *Id.* § 702.036(1)(a)(3). “Jurisdiction of the court under this rule shall be invoked by filing a notice, accompanied by any filing fees prescribed by law, with the

However, along those lines, HB 87 seems to conflict with Florida Rule of Civil Procedure 1.540, which provides a party with relief from final judgment.³⁹ The first three prongs of Rule 1.540 provide relief for excusable neglect, newly discovered evidence, and fraud; motions pursuant thereto are to be brought within one year following the judgment.⁴⁰ Other grounds for relief include that the judgment or decree is void or that “it is no longer equitable that the judgment or decree should have prospective application.”⁴¹ The latter two grounds are required to be brought within a “reasonable time.”⁴²

One of the most powerful remedies for a borrower is a motion to vacate final judgment. The underlying premise of the motion is normative; namely the borrower’s home is at stake and not affording a litigant substantial justice⁴³ or her day in court⁴⁴ would seem inequitable. Absent the borrower’s ability to keep her home through relief from final judgment, this underlying normative premise disappears.

Let’s continue the thought experiment with Sam to illustrate some of the unintended consequences described in the points above. After losing his job due to the economic recession, Sam stretches his limited savings until he eventually defaults on his mortgage. Sam contacts his mortgage servicer who advises that Sam need only send some financial documentation in order to be considered for a loan modification. Whether through Sam’s indolence or his servicer’s shenanigans, he does not receive a modification. Sam receives a summons and immediately calls his servicer, who informs him that his options include a short sale or “cash for keys.” Over the next two weeks, Sam must determine his deficiency (specifically whether the deficiency will be waived and whether he has to pay taxes thereon), the relative damage to his credit score, and the cost of a foreclosure attorney, and begin the process of contacting a realtor who specializes in short sales. Shortly thereafter, a default is entered against Sam, and the mortgage servicer is granted final judgment.

Sam will have to bring a motion to vacate the judgment against him, which typically requires showing excusable neglect, meritorious defense,

clerk of the lower tribunal within 30 days of rendition of the order to be reviewed.” FLA. R. APP. P. 9.110(b).

39. FLA. R. CIV. P. 1.540.

40. *Id.*

41. *Id.*

42. *Id.*

43. For example, vacating a final judgment (typically summary judgment) when there is excusable neglect and a meritorious defense. *See* FLA. R. CIV. P. 1.540(b)(1).

44. This is in the event a default judgment has been entered.

and due diligence.⁴⁵ Grounds for excusable neglect are generally liberal.⁴⁶ Courts only consider the due diligence exercised in remedying the default judgment and not the defaulted party's conduct prior thereto.⁴⁷ A meritorious defense, while required to be set forth in a verified answer, sworn motion, or affidavit, is typically not a difficult burden of proof.⁴⁸ A meritorious defense can range from the insufficiency of the foreclosing party's affidavit to a dispute regarding the amounts due and owing. Notwithstanding the required elements, the normative implications of a homeowner losing his home as a result of servicer malfeasance may often be the tipping point for judges.

Rule 1.540(b)(4) also provides for relief, if brought within a reasonable time, for a judgment or decree that is void. However, Rule 1.540(b)(4) appears already to have limited context in the area of borrower relief from foreclosure judgments.⁴⁹ The Fourth District Court of Appeals held that even when a plaintiff lacked standing to pursue foreclosure, the judgment was merely voidable, not void.⁵⁰ Accordingly, the judgment could not be set aside under 1.540(b)(4) because the defaulted borrower failed to raise standing as an affirmative defense.⁵¹ In contrast, other jurisdictions hold standing to be a jurisdictional prerequisite or a matter of sound judicial policy.⁵² Lack of standing is

45. FLA. R. CIV. P. 1.540; *see* *Net One, LLC v. Christian Telecom Network, LLC*, 901 So. 2d 417, 419 (Fla. Dist. Ct. App. 2005).

46. *Somero v. Hendry Gen. Hosp.*, 467 So. 2d 1103, 1106 (Fla. Dist. Ct. App. 1985) (“[W]here inaction results from clerical or secretarial error, reasonable misunderstanding, a system gone awry or any other of the foibles to which human nature is heir, then upon timely application accompanied by a reasonable and credible explanation the matter should be permitted to be heard on the merits.”).

47. *Zeigler v. Huston*, 626 So. 2d 1046, 1047 n.3 (Fla. Dist. Ct. App. 1993).

[T]he diligence which must be shown by a movant in connection with a motion to vacate, is the due diligence demonstrated in seeking relief *after* learning that a default has been entered, not in keeping abreast of the litigation prior to entry of a default as the trial court concluded.

Id. (emphasis in original); *see also* *Cinkat Transp., Inc., v. Maryland Casualty Co.*, 596 So. 2d 746, 747 (Fla. Dist. Ct. App. 1992) (noting that an attorney's prompt contact to opposing counsel upon learning of default was found to be diligent despite the fact that the attorney did not file a motion to vacate for over two months after entry of default).

48. *See, e.g., Am. Network Transp. Mgmt. v. A Super-Limo Co.*, 857 So. 2d 313, 315 (Fla. Dist. Ct. App. 2003) (finding that the defendant demonstrated the existence of a legal defense sufficient to vacate a judgment by alleging that the plaintiff failed to state a cause of action and that both the statute of limitations and laches applied).

49. *See, e.g., Phadael v. Deutsche Bank Trust Co. Ams.*, 83 So. 3d 893, 894–95 (Fla. Dist. Ct. App. 2012).

50. *Id.* at 895.

51. *See id.*

52. *See, e.g., State ex rel. First Nat'l Bank v. M & I Peoples Bank*, 290 N.W.2d 321, 325 n.5 (Wis. 1980) (string citation omitted) (“While no case can be found holding standing to be a jurisdictional prerequisite, the doctrine has generally been applied as a

commensurate with the court's competency to hear the case and is inextricably linked to subject matter jurisdiction.⁵³ Ergo, standing can be brought at any time and sua sponte by the court.⁵⁴

While Florida courts have not held a judgment to be void if a plaintiff lacked standing at the commencement of action, failure to provide proper service is sufficient grounds for relief under 1.540(b)(4).⁵⁵ Specifically, courts have held the failure of service of process renders a decision void ab initio; hence, relief from judgment can be granted at any time.⁵⁶ To recap, 1.540(b)(4) provides relief when there is no service of process and thus no personal jurisdiction over the movant. However, *Phadael v. Deutsche Bank Trust Co. Ams.*⁵⁷ indicates that a plaintiff's standing is not a jurisdictional prerequisite, and any

matter of 'sound judicial policy.'"); *Crippin Printing Corp. v. Abel*, 441 N.E.2d 1002, 1005 (Ind. Ct. App. 1982) (internal citations omitted).

Standing is jurisdictional. 'Without the jurisdictional element of a case or controversy any court is without power to render a decision. Therefore, it is the law that a court must first determine that a party with standing has brought the cause and that he brings a justiciable issue before the court. If such is not the situation, there is nothing before the court and the court is totally without jurisdiction to decide any issue in the cause.'

Id. *Fleet Nat'l Bank v. Nazareth*, 818 A.2d 69, 70–71 (Conn. App. Ct. 2003) (internal citations and quotations omitted) (noting that a party must have standing to assert a claim in order for the court to have subject matter jurisdiction over the claim).

Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy. . . . [Our Supreme Court] has often stated that the question of subject matter jurisdiction, because it addresses the basic competency of the court, can be raised by any of the parties, or by the court sua sponte, at any time. . . . Where a party is found to lack standing, the court is consequently without subject matter jurisdiction to determine the cause.

Id.; *Saratoga Cnty. Chamber of Commerce v. Pataki*, 798 N.E.2d 1047, 1053–54 (N.Y. 2003) ("Standing to sue is critical to the proper functioning of the judicial system. It is a threshold issue. If standing is denied, the pathway to the courthouse is blocked."); *Deutsche Bank v. Brumbaugh*, 270 P.3d 151, 154 (Okla. 2012) ("Standing, as a jurisdictional question, may be correctly raised at any level of the judicial process or by the Court on its own motion.") (internal quotation omitted).

53. *Saratoga Cnty. Chamber*, 798 N.E.2d at 1053–54.

54. *Brumbaugh*, 270 P.3d at 154.

55. *Dor Cha, Inc. v. Hollingsworth*, 876 So. 2d 678, 679 (Fla. Dist. Ct. App. 2004) (holding that the trial court erred in denying motion to set aside default brought under 1.540(b)(4), which was based on inadequate service of process).

56. *Dep't of Revenue ex rel. Prinze v. Thurmond*, 721 So. 2d 827, 828 (Fla. Dist. Ct. App. 1998) (noting that "this legal principle is grounded in the notion that the passage of time cannot make valid that which has always been void") (internal citations and quotations omitted).

57. *See Phadael v. Deutsche Bank Trust Co. Ams.*, 83 So. 3d 893, 894–95 (Fla. Dist. Ct. App. 2012).

order entered in regard thereto is merely voidable, thereby precluding relief under 1.504(b)(4).

Now, assume Sam never receives service of process with regard to the foreclosure action instituted against him. Sam does not file a responsive pleading because he does not know that he faces foreclosure. Nonetheless, and unbeknownst to Sam, the foreclosing party is awarded final judgment. Thirty-one days after the final judgment, Sam discovers that his home was sold to a third party purchaser. Pursuant to Florida statute § 702.036, because all applicable appeals periods have run, Sam is only entitled to monetary damages.⁵⁸ The house now belongs to the third party purchaser. Despite the final judgment being void ab initio and subject to relief pursuant to Rule 1.540(b), Sam is unable to recover his home. In sum, HB 87 seems to preempt or otherwise obviate a borrower's rights under Rule 1.540.

3. HB 87 Allows Secondary Lien Holders to Expedite Foreclosure Action.

The “show cause” procedure in the law appears to have been the most rhetorically explosive feature of the bill.⁵⁹ Generally described, the show cause procedure shifts the burden of proof from the plaintiff-bank, who must show why it is entitled to foreclose, to the defendant-homeowner, who must prove why the bank is not entitled to the foreclosure. This is a disturbing development to opponents of the bill. Roy Oppenheim scathingly commented:

Florida State Rep. Kathleen Passidomo, who introduced the bill, would argue that it protects consumers by ensuring that banks and lenders prove they own a mortgage before they can file a foreclosure action. What she doesn't say is that the banks will be permitted to provide these certifications and the court will have to accept them on face as being truthful. *The onus falls on the homeowner to prove that the banks are not telling the truth.*

And to add insult to injury, they are only given 20 days to challenge the bank, hardly enough time to find a lawyer and track down other documentation to prove a wrongful foreclosure.⁶⁰

58. See FLA. STAT. § 702.036 (2013).

59. See H.R. 87 § 702.10, 2013 Leg., Reg. Sess. (Fla. 2013), available at http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=_h0087er.docx&DocumentType=Bill&BillNumber=0087&Session=2013.

60. Roy Oppenheim, *Florida's 'Fair Foreclosure Act' is Anything But Fair*, U.S. NEWS & WORLD REPORT (Feb. 20, 2013), <http://www.usnews.com/news/blogs/home-front/2013/02/20/floridas-fair-foreclosure-act-is-anything-but-fair> (emphasis added).

If the defendant fails to raise any defenses, then judgment is entered and a foreclosure sale date is scheduled.⁶¹ Even if the defendant presents defenses at the show cause hearing, the judge can enter judgment regardless if the judge finds that the defenses have no merit.⁶² Critics of the bill raise an additional cautionary note: “[t]he allowance of the retired senior judges to continue to serve in their capacity also is a constitutional question, it allows such judges to basically continue to serve while not facing either re-election or re-appointment as required by the Florida constitution.”⁶³

In brief, HB 87 provides lienholders the option to mobilize the show cause procedure in the bank’s foreclosure action, thus accelerating the foreclosure process.⁶⁴ Lienholders include the plaintiff and any defendant who holds a lien encumbering the property or who may file a lien against the real property of a condominium association or homeowners’ association.⁶⁵

When Sam is issued a foreclosure summons, he is on an expedited time horizon to determine his legal position, which requires consulting a legal professional. Ideally, Sam could consult a local legal aid organization and receive some legal guidance without having to pay a retainer fee. Unfortunately, legal aid organizations often have limited resources and are understaffed. At best, the local legal aid organization will advise that he may have a cause of action and should consult an experienced foreclosure attorney. Now, Sam must determine if he should spend his limited resources defending against a foreclosure action for which he may have a complete, or at least partial, defense.

Continuing with the hypothetical, Sam noticed forced-place hazard insurance payments that were over five times his previous payments. These specious fees may have obviated his ability to secure a modification or otherwise reinstate the loan. His mortgage servicer also failed to proactively solicit him for a modification. Similarly, Sam was the one always calling the servicer, waiting on hold, and getting different representatives asking for documentation which he had already sent. The scenario is oddly reminiscent of one of Kafka’s nightmarish narratives.

Does Sam have a private right of action under any of the aforementioned scenarios? Do the new laws instituted by the Consumer

61. FLA. STAT. § 702.10(1)(b), (d) (2013).

62. *Id.*

63. Brian Bandell, *Governor Scott Signs Foreclosure Fast Track Bill*, SOUTH FLORIDA BUSINESS JOURNAL (June 10, 2013), <http://www.bizjournals.com/southflorida/news/2013/06/10/governor-scott-signs-foreclosure-fast.html> (quoting Roy Oppenheim).

64. FLA. STAT. § 702.10(1) (2013).

65. *Id.*

Financial Protection Bureau⁶⁶ allow for a private right of action? Sam has no way of answering these complicated questions. Similarly, it is difficult for Sam to evaluate whether he should invest his limited resources in exploring a legal defense, let alone pursuing one. HB 87 now allows second mortgage holders, as well as condominium and homeowners' associations, the right to expedite the bank's foreclosure action. As a consequence, Sam now faces a myriad of likely well represented stakeholders, with little time to make a rational decision. Thus, time would seem a logical and fair requisite to ensure due process and substantive justice.

B. Invalidity of the House of Representatives Final Bill Analysis of HB 87

The House of Representatives Final Bill Analysis (the "Report") is largely supported by non-credible data from RealtyTrac.⁶⁷ After a bill is filed, it is reviewed by several committees which discuss amendments or other changes.⁶⁸ The Final Bill Analysis appears to be one of the final reviews before the bill is put before the senate or the governor.⁶⁹ RealtyTrac, according to its website, is "the leading provider of comprehensive housing data and analytics for the real estate and financial services industries, Federal, State and local governments, academic institutions, and the media."⁷⁰

The Report begins with a finding that "[t]he foreclosure crisis has greatly impacted the economy of the state of Florida."⁷¹ Curiously, no data supports this statement in the Report. The "Background" section, which sets forth the Report's factual premises, then cites RealtyTrac data five times and cites an article based thereon. The only non-RealtyTrac related source cited in the first four paragraphs of the background section is the Florida Office of the State Courts Administrator, which documents

66. New servicing guidelines went into effect on January 10, 2014, that, inter alia, require servicers to solicit distressed borrowers for foreclosure provision alternatives, provide continuity of contact, and prohibit dual tracking. 12 C.F.R. §§ 1024.40–41 (2014).

67. See H.R. 2013-h0087z.CJS, Reg. Sess., at 2 (Fla. 2013), available at <http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=h0087z.CJS.DOCX&DocumentType=Analysis&BillNumber=0087&Session=2013>.

68. *How a Bill Becomes a Florida Law*, FLORIDA FAMILY COUNCIL, <http://flfamily.org/wp-content/uploads/2012/01/How-Bill-Become-A-Law-2004-06.pdf> (presenting the legislative process in a convenient flow chart) (last visited Sept. 2, 2014).

69. See *id.*

70. *About RealtyTrac*, REALTYTRAC, <http://www.realtytrac.com/company-info> (last visited June 4, 2014).

71. H.R. 2013-h0087z.CJS, at 2.

and explains the disparity between the backlog of civil and criminal dockets.⁷²

Further, citing to RealtyTrac, the Report states that Florida has the largest share of foreclosure inventory of any state in the nation.⁷³ Moreover, it notes that the average length of time to file for foreclosure in Florida is 853 days, whereas the national average is 414 days.⁷⁴ RealtyTrac aggregated this data using an “abstractor,” who collects property information at local courthouses.⁷⁵ RealtyTrac states that “[w]e know the people, processes and forms so your data is accurate.”⁷⁶ However, RealtyTrac may have not have Florida consumers’ best interests at heart. RealtyTrac describes itself as “as the foremost source of foreclosure data, and continues to offer the only major real estate website featuring foreclosure, auction, bank-owned, for-sale-by-owner, and resale properties.”⁷⁷ RealtyTrac’s primary revenue stream appears to come from monthly subscriptions to its foreclosure listings. Benefits of a subscription include access to 1.2 million foreclosures nationwide, saving up to 50 percent when purchasing a foreclosed home, robust property information, and online training on how to buy a foreclosed home. One may infer from the subscription package that RealtyTrac has an incentive to boost foreclosures statistics whenever possible. If foreclosures are on the decline, RealtyTrac subscriptions will wane and revenue streams will drop.

Colorado state official Ryan McMaken has criticized RealtyTrac for its inaccurate reporting of foreclosure data in Colorado.⁷⁸ McMaken compared Colorado’s numbers of the second quarter in 2009 with the figures reported by RealtyTrac. While Colorado showed a 16 percent drop in the foreclosures, RealtyTrac showed a 4.7 percent increase over the same period.⁷⁹ McMaken stated that RealtyTrac’s methodology is

72. *See id.*

73. H.R. 2013-h0087z.CJS, at 2.

74. *Id.*

75. *RealtyTrac*, REALTYTRAC, <http://www.realtytrac.com/> (last visited Mar. 27, 2014).

76. *Id.*

77. *About RealtyTrac*, REALTYTRAC, <http://www.realtytrac.com/company-info> (last visited July 27, 2014).

78. *See RealtyTrac’s Foreclosure Data Wrong, State Official Says*, INSIDE REAL ESTATE NEWS (Aug. 13, 2010), <http://insiderealestatenews.com/2010/08/13/realtytracs-foreclose-data-wrong-state-officials-says/> [hereinafter *McMaken Report*] (containing a copy of McMaken’s report criticizing RealtyTrac’s calculation methods).

79. McMaken even tried a similar methodology to RealtyTrac but still found the combined total to be down 5.9%. *Id.*

flawed; namely, its collection methods are obscure,⁸⁰ and it double—sometimes triple—counts foreclosures.⁸¹

Andrew Galvin, a journalist for the *Orange County Register*, noted that one reason for the inaccurate figures is that RealtyTrac counts every step in the foreclosure process, which explains the discrepancies.⁸² For example, if a home goes into default, is scheduled for auction, and is then repossessed, RealtyTrac counts the home three times.⁸³ Galvin reported on McMaken's efforts to collect accurate foreclosure information, during which McMaken obtained data from all 64 Colorado counties.⁸⁴ While RealtyTrac reported 54,747 "foreclosure actions," McMaken's data revealed that only 28,435 homes entered into the foreclosure process.⁸⁵ McMaken concluded that RealtyTrac data "wasn't useful because it didn't reflect how many homeowners were actually in danger of losing their homes."⁸⁶ He stated that "[w]e couldn't really use those numbers for having serious discussions."⁸⁷ Yet the Florida Legislature has done just that by using RealtyTrac data as the material basis for HB 87.

The best treatment of the lack of credible data regarding foreclosures is found in Levitin and Goodman's work. Authors Adam J. Levitin and Joshua S. Goodman acknowledged that "there is no authoritative source on foreclosure statistics."⁸⁸ Their research paper

80. *Id.* ("The details of RealtyTrac's data collection remain a mystery."); accord Lance George & Keith Wiley, *Foreclosure in Rural America: An Update*, HOUS. ASSISTANCE COUNCIL, Mar. 2011, at 18, available at <http://hac.nonprofitsoapbox.com/storage/documents/rcbiforeclosurebrief.pdf> ("RealtyTrac does not openly disclose its methodology for data collection . . ."); Toby Tobin, *Media Citing RealtyTrac Foreclosure Stats are Misleading Their Audiences*, GOTOBY.COM (June 18, 2013), <http://gotoby.com/news/article/2096/Media-Citing-RealtyTrac-Foreclosure-Stats-are-Misleading-Their-Audiences> ("[RealtyTrac's] data sources apparently do not include the Clerk of Courts. . . . [Which] is where all foreclosure activity is officially documented").

81. *McMaken Report*, *supra* note 78. For a more detailed exegesis noting several empirical flaws in the collection effort, see *id.*

82. Andrew Galvin, *Tracking the Truth on Foreclosures*, ORANGE COUNTY REG. (Nov. 18, 2007), http://images.kw.com/docs/0/0/4/004237/1195513957508_Tracking_the_Truth_on_Foreclosures__2007_11_18.pdf.

83. *Id.* (noting that Colorado state officials and the Atlanta Journal Constitution both revealed statistical inaccuracies for Colorado and Georgia respectively).

84. *Id.*

85. *Id.*

86. *Id.* (relaying McMaken's statements).

87. Galvin, *supra* note 82 (quoting statement made by McMaken on behalf of the Colorado Division of Housing).

88. Adam J. Levitin & Joshua S. Goodman, *Resolving the Foreclosure Crisis: Modification of Mortgages in Bankruptcy* 1 n.1 (Georgetown Univ. Law Ctr. Pub. Law & Legal Theory Working Paper Series, Research Paper No. 1071931, 2008). Compare *id.*, with Adam J. Levitin, *Resolving the Foreclosure Crisis: Modification of Mortgages in*

explains that neither the federal government nor states have instituted meaningful measures of foreclosures.⁸⁹ Though citing RealtyTrac figures, the authors admitted that the reliability of these figures is open to question.⁹⁰ Specifically, foreclosure start statistics are typically much higher than completed foreclosures because multiple filings are counted in duplicate.⁹¹ Moreover, a modification or other foreclosure prevention alternatives may obviate many foreclosure proceedings.⁹²

Lastly, a reporter for the *Phoenix Business Journal*, Kristena Hansen, uncovered another flaw in RealtyTrac's foreclosure statistics—the foreclosure rate calculations.⁹³ According to Daren Blomquist, RealtyTrac's vice president and spokesman, the rate is calculated by “tak[ing] the total number of properties with foreclosure filings and then divid[ing] that by the total number of housing units in the metro area or state area.”⁹⁴ Hansen pointed out that the total number of housing units is derived from 2010 U.S. Census Bureau information.⁹⁵ Further, Hansen noted that RealtyTrac data assumes that every standing house has a mortgage.⁹⁶

However, of course, not every standing house has a mortgage. For example, considering the number of distressed homes that cash investors have picked up, the rate may be significantly inaccurate.⁹⁷ Blomquist admitted that “ideally it would be better to use the total mortgages” and “if we had that mortgage data when we started this report, we probably would've use[d] [it].”⁹⁸ This begs the question of why RealtyTrac would even use this data, given its problematic assumption.⁹⁹ Blomquist stated

Bankruptcy, 2009 WIS. L. REV. 565 (omitting the acknowledgement that there is uncertainty regarding foreclosure statistics).

89. Levitin & Goodman, *supra* note 88, at 1 n.1.

90. *Id.*

91. *Id.*

92. *Id.*

93. Kristena Hansen, *The Real Story Behind RealtyTrac's Foreclosure Data*, PHOENIX BUS. J. (July 27, 2012), <http://www.bizjournals.com/phoenix/blog/business/2012/07/the-real-story-behind-realtytracs.html?page=all>.

94. *Id.* (quoting Daren Blomquist of RealtyTrac).

95. *Id.*

96. *Id.*

97. *Id.*

98. Hansen, *supra* note 93.

99. Blomquist advised that RealtyTrac has since subscribed to the data regarding mortgaged homes as opposed to merely standing homes data from the U.S. Census Report, but had not incorporated that data into its calculations. *See id.* Accordingly, it is unclear as to the methodology used to determine the foreclosure rates employed by RealtyTrac upon which the House of Representatives' Bill Analysis is based.

that consistency and avoiding confusion were the main reasons behind the continued use of flawed data.¹⁰⁰

But the real economic reason appears to be two-fold: (1) it would cost too much money to change; and (2) it would deflate the high foreclosure rates upon which their subscriptions primarily depend. The question is not why RealtyTrac would skew these figures. Using a rational actor model, that's easy-money! The more pressing question is: why would the Florida Legislature rely on these figures to pass legislation, assuming it is aware of the problematic assumptions from which the data springs? It is simply not logical.

“Logic is the lifeblood of American law” and is based largely on deductive, inductive, and analogical reasoning.¹⁰¹ Deductive reasoning is used to derive a conclusion from two other propositions.¹⁰² Syllogistic reasoning is the primary form of deductive reasoning used in law and consists of a major premise, a minor premise, and a conclusion. Cicero is attributed with saying “there is in fact a true law—namely right reason.”¹⁰³ Without delving into ontology, we can still derive pragmatic value from reason as applied in contemporary law. Reason is essential to keep legal professionals, including legislators, from making “untethered, unprincipled, and undisciplined” hunches.¹⁰⁴

Consider the classic example of a syllogism:

1. Major Premise: All men are mortal.
2. Minor Premise: Socrates is a man.
3. Conclusion: Therefore, Socrates is mortal.

A quickly drawn-up (and imperfect) syllogism applied to HB 87 would look something like this:

1. Expediting the foreclosure process is necessary to alleviate the economic repercussions of the foreclosure crisis.
2. The provisions of HB 87 expedite the foreclosure process.
3. Therefore, HB 87 will alleviate the economic repercussions of the foreclosure crisis.

Unfortunately, the major premise is not a generally accepted rule like “all men are mortal.” Instead, HB 87’s major premise must be induced from fresh empirical evidence. Inductive reasoning involves

100. *Id.*

101. Ruggero J. Aldisert et al., *Logic For Law Students: How To Think Like A Lawyer*, 69 U. PITT. L. REV. 1, 1–2 (2007).

102. *Id.* at 2.

103. MARCUS TULLIUS CICERO, ON THE COMMONWEALTH 215 (George Holland Sabine & Stanley Barney Smith trans., The Ohio State Univ. Press 1929).

104. Aldisert, *supra* note 101, at 3 (citing JOHN DEWEY, HOW WE THINK: A RESTATEMENT OF THE RELATION OF REFLECTIVE THINKING TO THE EDUCATIVE PROCESS 17 (1933)).

deriving general principles from many small events.¹⁰⁵ While deductive reasoning is able to arrive at a logically inescapable conclusion, inductive reasoning is not so absolute.¹⁰⁶ The Report plainly shows that HB 87 is based on non-credible data from RealtyTrac.¹⁰⁷ In other words, the “many small events”—or better yet the “one small event”—of RealtyTrac data from which to induce HB 87’s major premise are not credible. Ergo, the induction of the major premise is invalid and, so too, are any conclusions deduced therefrom.

Thus, two inferences can probably be made: (1) the legislature did not exercise due diligence to uncover sufficient empirical evidence for HB 87, or (2) ulterior but not necessarily corrupt motives were at play. If the former is true, then any ameliorative effects of HB 87 will be merely coincidental, and this is no way for government to make consistently sound decisions. If the latter is true, the subterfuge employed by the legislature stands in stark contrast to their role as representatives of the people’s will. Either way, the long-term unintended effects, principally on financially distressed private homeowners struggling to keep their homes, may include a disenfranchisement from civil participation and an alienation from the legal process.

III. UNINTENDED CONSEQUENCES OF HB 87

This Part employs areas outside of law, such as economics, to demonstrate that HB 87 will unintentionally undercut the policies it seeks ultimately to promote. In this Part, we attempt to perform rationally based thought experiments regarding the probable pragmatic effects of HB 87 through the lens of growing disciplines like cognitive psychology and uncertainty theory. These experiments reveal that HB 87 will likely result in unintended consequences that may chill the economy and disenfranchise Floridians from the legal process. This Article maintains that HB 87 is an unwise risk in an uncertain economic future and suggests that the time afforded in litigation and the decision making of elastic courts are the best means to promote certainty.

A. *Assumptions and Unintended Consequences of HB 87*

The fundamental issue with HB 87 is its failure to recognize the inherent lack of certainty and predictability in the current foreclosure process. In particular, HB 87 advocates a quick cleanup of the foreclosure crisis as opposed to remedying any of the underlying

105. See *id.* at 12.

106. See *id.* at 13.

107. See discussion *supra* notes 75-100 and accompanying text.

information asymmetries. Servicer guidelines and the surrounding political rhetoric have muddied the borrower's information pool. As a result, borrowers are unable to make efficient decisions to maximize their own welfare.¹⁰⁸ Individuals can make rational decisions by operating under known constraints. More so, individuals are able to cognize uncertainty and, accordingly, can tailor their decision-making process. However, HB 87 does little to remedy any of these information asymmetries and instead only adds further confusion.

HB 87 largely ignores the individual crises faced by distressed homeowners in favor of utilitarian values. HB 87 demonstrates an acute theoretical naiveté with regard to the difficulties encountered by distressed borrowers. Namely, it fails to consider the time horizon in which unsophisticated borrowers have to make life-changing financial and legal decisions. Conversely, if the *modus operandi* is “borrowers, you made your bed, now lie in it”—then merely say so. Of course, elected officials would be wary of the corresponding political backlash of any such statement. However, borrowers would be better able to gauge the probability of affordable modifications and pursue other loss mitigation avenues. Needless to say, this has not been the case. As a result, individuals may be disenfranchised from a legal system, especially a court of equity, which is otherwise meant to provide relief. In sum, HB 87's failure to consider the rights of distressed homeowners may result in short-term economic gains, but the bill's ultimate effect is likely to compromise sustained economic growth. Long-term consequences range from a chill in the housing economy to mass disenfranchisement from legal process.

The following issues have blurred the social costs and lead to unintended consequences: assumptions regarding borrower decision making, the inherent complexity of debt fracturing, political rhetoric, and equivocating risk and uncertainty. Lastly, HB 87 effectively eliminates a borrower's last procedural safeguard: time.

1. Inherent Complexity of Debt Fracturing and Assumptions Regarding Borrower Decision Making

The foreclosure process is ripe with information asymmetries that would leave a sophisticated actor bewildered, let alone an emotionally distressed borrower. Mortgage servicers often have competing

108. It is important to note that we employ “rationale” in its more progressive sense, i.e., “in an uncertain world there is no optimal solution known for most interesting and urgent problems.” Brockman, *THINKING*, *supra* note 22, at 40 (2013) (quoting Gerd Gigerenzer). Instead we make decisions based on bounded rationality otherwise referred to as “optimization under constraints.” *Id.* at 47–48.

incentives which are in direct opposition to the investors' interests. Diane Thompson aptly breaks down the competing incentives involved in debt fracturing. She notes that the servicer's main function is to collect and process payments on mortgage loans from homeowners, and, typically, they do not have any ownership interest in the mortgage loan.¹⁰⁹ Servicers, unlike investors, recover all of their hard costs after a foreclosure, even if the home sells for less than the mortgage loan balance.¹¹⁰ Servicers may even profit from foreclosures by charging borrowers and investors fees that are ultimately recouped from a mortgage backed security.¹¹¹ Debt fracturing and its repercussions are extremely complicated, and borrowers lack the sophistication to establish their financial and legal positions without expert advice. Assuming borrowers have the financial means, they must decide whether to hire counsel to oppose the foreclosure or to allocate those resources to relocating.

Typically borrowers, without expert advice, are unable to make sound legal or financial decisions. The informational barriers inherent in the foreclosure process often "prevent borrowers from identifying errors that would justify halting the foreclosure process."¹¹² Worse yet, the expectation is that investors and servicers are acting with rational economic behavior, which is not necessarily the case.¹¹³ In other words, investors and services might make decisions in which they lose money.

In judicial foreclosure states like Florida, time was the one ally that borrowers had before HB 87 became law.¹¹⁴ Conversely, HB 87 gives second mortgage holders and condominium and homeowners associations the right to expedite the bank's foreclosure action. Moreover, the bill makes foreclosure judgments extremely difficult to overturn. Hence, HB 87 constrains a borrower's ability to rationally

109. See DIANE E. THOMPSON, NAT'L CONSUMER LAW CTR., WHY SERVICERS FORECLOSE WHEN THEY SHOULD MODIFY AND OTHER PUZZLES OF SERVICER BEHAVIOR, at v (2009), available at <https://www.nclc.org/images/pdf/pr-reports/report-servicers-modify.pdf>.

110. See *id.*

111. See *id.*

112. Andrew J. Kazakes, *Protecting Absent Stakeholders in Foreclosure Litigation: The Foreclosure Crisis, Mortgage Modification, and State Court Responses*, 43 LOY. L.A. L. REV. 1383, 1400 (2010).

113. See Gretchen Morgenson, *So Many Foreclosures, So Little Logic*, N.Y. TIMES, July 5, 2009, at BU1 (quoting Professor Alan M. White's conclusion that in many cases the decision to foreclose "is not rational economic behavior" based on his study of almost 32,000 liquidation sales conducted in June 2009, for which the average loss was 64.7% of the original loan balance).

114. See, e.g., Rebekah Cook-Mack & Sarah Parady, *Home Affordable Modification Program Enforcement Through the Courts*, 40 HOUSING L. BULL. 136, 140 (2010), available at https://nhlp.org/files/NHLP_Bull_Jun10_052710.pdf ("As program documentation develops . . . , possibilities for affirmative litigation expand.").

evaluate the borrower's legal and financial positions both *ex-ante* and *ex-post* with respect to foreclosure. Time is essential for a borrower to overcome the informational barriers inherent in the foreclosure process and, based on that information, make rational decisions regarding their future. Time is also essential to properly evaluate the premises and assumptions of proposed legislation in order to properly forecast its long-term effects. Hence, time is the best insurance against risk in an uncertain future. Time also allows regulators, like state attorneys general, the opportunity to fully investigate the mortgage servicing industry and bring suit when appropriate. All of these considerations lend to the importance of the elasticity of foreclosure courts in basing decisions on equity and interpretive case law.

2. Political Rhetoric: Mixing the Signal and the Noise

Nate Silver, statistician and writer, in his work *The Signal and the Noise*, describes the difficulty in attaining a clear signal amidst a superfluity of information.¹¹⁵ The distressed borrower is a prime example of a signal-seeker amidst the informational chaos of HAMP,¹¹⁶ the NMSA,¹¹⁷ the OCC Amended Consent Judgments,¹¹⁸ and so forth. The information sought is the borrower's legal rights during a foreclosure. HB 87 does little to alleviate this confusion with its hand-waving provisions to borrowers.

Another hand-waving statute, the California Foreclosure Prevention Acts ("CFPA"), has been passed in California to protect homeowners

115. See generally SILVER, *supra* note 6.

116. See discussion *supra* note 27 and accompanying text.

117. See discussion *supra* note 28 and accompanying text.

118. A press release explains the OCC Amended Consent Judgments:

The Office of the Comptroller of the Currency (OCC) and the Federal Reserve Board today released amendments to their enforcement actions against 13 mortgage servicers for deficient practices in mortgage loan servicing and foreclosure processing. The amendments require the servicers to provide \$9.3 billion in payments and other assistance to borrowers.

The amendments memorialize agreements in principle announced in January with Aurora, Bank of America, Citibank, Goldman Sachs, HSBC, JPMorgan Chase, MetLife Bank, Morgan Stanley, PNC, Sovereign, SunTrust, U.S. Bank, and Wells Fargo. The amount includes \$3.6 billion in cash payments and \$5.7 billion in other assistance to borrowers such as loan modifications and forgiveness of deficiency judgments.

Joint Press Release, Bd. of Governors of the Fed. Reserve Sys. & Office of the Comptroller of the Currency, Amendments to Consent Orders Memorialize \$9.3 Billion Foreclosure Agreement (Feb. 28, 2013), available at <http://www.occ.gov/news-issuances/news-releases/2013/nr-ia-2013-35.html>.

from unnecessary foreclosures.¹¹⁹ California homeowners are already at a disadvantage because California is a non-judicial foreclosure state. The lender is merely required to “send a notice of sale to the homeowner, place an advertisement in a local paper, and hire an auctioneer to sell the property.”¹²⁰ Thus, the borrower must file an affirmative court action to stop a foreclosure sale in a non-judicial state.¹²¹

The California Governor and Legislature designed legislation that attempted to promote the creation of loan modification programs and support sustainable foreclosure prevention alternatives.¹²² In contrast, Assembly member Todd Lieu, co-author of the original 2009 bill, stated “there is no guarantee in the law or anywhere else that anybody is going to get a loan modification.”¹²³ A recent decision out of the First District of California seems to reflect as much when it held that the statute “merely expresses the hope that lenders will offer loan modifications on certain terms” and “conspicuously does not require lenders to take any action.”¹²⁴ On the other hand, the Fourth District reads the relevant statutes as “establish[ing] a natural, logical whole, and one wholly consonant with the Legislature’s intent in enacting 2923.5 to have individual borrowers and lenders ‘assess’ and ‘explore’ alternatives to

119. California Foreclosure Prevention Act, CAL. CIV. CODE §§ 2923.52–55 (West 2011) (repealed 2011); see ROGER BERNHARDT ET AL., CALIFORNIA MORTGAGES, DEEDS OF TRUST, AND FORECLOSURE LITIGATION § 2.62C (Bonnie C. Maly 4th ed. 2014).

120. Frank S. Alexander et al., *Legislative Responses to the Foreclosure Crisis in Nonjudicial Foreclosure States*, 31 REV. BANKING & FIN. L. 341, 343 (2011–2012) (citing WASH. REV. CODE §§ 61.24.030(8), 61.24.031(1)(a), 61.24.040(3)(2011)).

121. *Id.* at 394.

122. See Press Release, Office of the Governor, Governor Schwarzenegger Works with Lenders to Help Homeowners Avoid Foreclosure (Nov. 20, 2007) (on file with the McGeorge Law Review), available at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0CCkQFjAB&url=http%3A%2F%2Fskaddenpractices.skadden.com%2Fcf%2Fattach.php%3FdocumentID%3D776&ei=IqutU9rmOoieqAb3x4HYBQ&usg=AFQjCNE4kyjxwIwganbdEhT5UK6_LJAgLA&sig2=dIf_YdM1Cib5Q8d_phMAfA&bvm=bv.69837884,d.b2k; see also 2008 Cal. Stat. 225 (adding a 30 day delay to the foreclosure process and requiring lenders to assist borrowers in default to avoid foreclosure).

123. See Carolyn Said, *Foreclosure Freeze Prods Banks to Modify Loans*, SFGATE (June 16, 2009, 4:00 AM), <http://www.sfgate.com/business/article/Foreclosure-freeze-prods-banks-to-modify-loans-3228860.php> (quoting Mark Leyes, Department of Corporations spokesperson).

124. *Intengan v. BAC Home Loans Servicing LP*, 214 Cal. App. 4th 1047, 1056 (Cal. Ct. App. 2013) (“Civil Code section 2923.6 does not grant a right to a loan modification.”); see also *Hamilton v. Greenwich Investors XXVI, LLC*, 195 Cal. App. 4th 1602, 1617 (Cal. App. 2d Dist. 2011) (“There is no duty under Civil Code section 2923.6 to agree to a loan modification. [§ 2923.6 merely expresses the hope that lenders will offer loan modifications on certain terms; the statute conspicuously does not require lenders to take any action.]”) (internal citations and quotations omitted).

foreclosure.”¹²⁵ Otherwise, the legislature would have conferred a right on individual borrowers without any means of enforcing it.¹²⁶

The Homeowner’s Bill of Rights (“HBR”) took effect on January 1, 2013.¹²⁷ The HBR includes, among other things, a restriction on dual track foreclosure, guaranteed single point of contact, enforceability, and verification of documents.¹²⁸ It is no wonder that California Attorney General, Kamala Harris, was listed as one of *Time*’s 2013 100 Most Influential People in the World for “[taking] on the big banks to secure a bill of rights for California homeowners and up to \$20 billion to help struggling families.”¹²⁹ Notwithstanding the paucity of case law in regards thereto, the HBR may have a limited scope of application. For example, there is no indication that the law is to be applied retroactively.¹³⁰ Other courts have deftly avoided the issue of retroactive application of the HBR.¹³¹ At best, the HBR is a means to postpone foreclosure sales prior to the occurrence, and it is not grounds for relief post-foreclosure. It remains undecided whether the HBR has retroactive application, but the outlook is not favorable.

To summarize, some California politicians seem largely detached from the realities of the pragmatic consequences of their proposed legislation. Instead, they focus on garnering political capital. The political rhetoric and the real world disconnect is analogous to the National Mortgage Settlement Agreement (“NMSA”) and Florida Attorney General Pam Bondi’s handling thereof as described below.

125. *Skov v. U.S. Bank Nat’l Ass’n*, 207 Cal. App. 4th 690, 698 (Cal. Ct. App. 2012) (citing *Mabry v. Superior Court*, 185 Cal. App. 4th 208, 223–24 (Cal. Ct. App. 2010)).

126. *Id.*

127. *California Homeowner Bill of Rights*, ST. CAL. DEP’T JUST., OFF. ATT’Y GEN., <http://oag.ca.gov/hbor> (last visited June 9, 2014).

128. *Id.*

129. *The 2013 Time 100*, TIME, <http://time100.time.com/2013/04/18/time-100/slide/kamala-harris/> (last visited Jan. 11, 2014).

130. *See, e.g., Valenzuela v. Wells Fargo Bank N.A.*, No. CV F 13–1620 LJO JLT, 2014 U.S. Dist. LEXIS 10449, at *28 (E.D. Cal. Jan. 28, 2014) (finding that the complaint’s HBR claims are not subject to retroactive operation and are thus barred.); *Didak v. Merrill Lynch Mortg. Investors*, No. B240704, 2013 Cal. App. Unpub. LEXIS 4102, at *23 (Cal. Ct. App. June 12, 2013); *see also, Long v. Onewest Bank*, No. G046402, 2013 Cal. App. Unpub. LEXIS 3158, at *5 n.4 (Cal. Ct. App. May 3, 2013) (“Because the California Homeowner Bill of Rights became effective on January 1, 2013, after Defendants foreclosed on the Longs’ property, we do not address its application to this case.”) (internal citations omitted).

131. *Lueras v. BAC Home Loans Servicing, LP*, 221 Cal. App. 4th 49, 86 (Cal. Ct. App. 2013) (“We do not address either argument because Lueras alleged that Bank of America engaged in conduct that amounted to fraudulent practices, independent of the California Homeowner Bill of Rights.”).

In April 2012, five of the largest mortgage services entered into the NMSA with 49 state attorneys general.¹³² However, servicers are now refusing to honor the terms of the agreement notwithstanding copious political rhetoric.¹³³

On March 12, 2012, the Florida Attorney General's Office released a press release stating that Pam Bondi filed a complaint "requiring the nation's five largest mortgage servicers to comply with comprehensive new mortgage loan servicing standards, to provide substantial direct consumer relief and monetary payments, and to submit to an independent monitor."¹³⁴ Pam Bondi stated:

Today's filings pave the way for court orders that will provide substantial relief to Florida's homeowners, hold banks accountable and reform the mortgage servicing industry . . . We are one of the states on the monitoring committee, and we will ensure that banks comply with this agreement and that they are held accountable.¹³⁵ Further press releases stated Florida's share of the total monetary benefits is approximately \$8.4 billion.¹³⁶

Nonetheless, the major servicers continue to flout the NMSA with impunity in Florida and around the nation.¹³⁷ Unfortunately, the settlement does not include a private right of action that would allow borrowers and their advocates to pursue claims for noncompliance.¹³⁸ Servicers have routinely failed to meet the following obligations: provide a single point of contact ("SPOC"), provide appropriate written reason for denials, input correct data in NPV tests,¹³⁹ and, otherwise, engage in sustainable and meaningful modifications.

132. U.S. Dep't of Justice, *supra* note 28. Various state mortgage regulatory agencies, the Consumer Financial Protection Bureau, and the U.S. Department of the Treasury also took part in the settlement. *Id.*

133. *See, e.g.,* Silver-Greenberg, *supra* note 29.

134. *Attorney General Bondi Announces Court Filings in \$25 Billion National Mortgage Servicing Settlement*, FLA. OFF. ATT'Y GEN. (Mar. 12, 2012), http://myfloridalegal.com/_852562220065EE67.nsf/0/C8B451271F3BBC01852579BF006AF66C?Open&Highlight=0,national,mortgage,settlement,agreement.

135. *Id.*

136. *State-Federal Foreclosure Settlement*, FLA. OFF. ATT'Y GEN., http://myfloridalegal.com/_85256CC5006DFCC3.nsf/0/94816CAD8E86B0778525799F00595D98?Open&Highlight=0,national,mortgage,settlement,agreement (last visited July 17, 2014).

137. *See, e.g.,* Silver-Greenberg, *supra* note 29.

138. Peggy P. Lee, *Using the National Mortgage Settlement to Help Clients in Foreclosure*, 47 CLEARINGHOUSE REV. 16, 17 (2013).

139. Special Inspector General of the Troubled Assets Relief Program ("SIGTARP"), Christy Romero, issued a memorandum to the Secretary of Treasury documenting mortgage servicers' erroneous inputting of information into the Net Present Value Test. Within SIGTARP's judgmental sample of 149 applications that were reviewed for HAMP modifications between 2009 and early 2011 by three of the largest servicers—Ocwen, Wells Fargo, and GMAC Mortgage—SIGTARP found that the servicers could

However, the press releases continue to portray a different narrative. In a news release, the Florida Attorney General's office cited figures that more than 23,000 Floridians have received an excess of \$1.7 billion in relief under the NMSA; relief included principal forgiveness, forgiveness of past forbearance, refinancing, and deficiency waivers.¹⁴⁰ Interestingly, the synopsis does not provide a breakdown of the ratio of principal forgiveness to deficiency waivers.¹⁴¹

If the settlement allocation is largely designated to deficiency waivers, it is essentially meaningless. Specifically, lenders do not pursue deficiencies as they are, for the most part, uncollectable.¹⁴² After a foreclosure, the debt is no longer secured and could be easily discharged in a Chapter 7 bankruptcy.¹⁴³ Alternatively, the lender will merely charge off the debt and sell it to a second party debt collector for cents on the dollar.¹⁴⁴ Lastly, the debtor may have the debt discharged in bankruptcy, and the lender will, nonetheless, sell the debt to a third party debt collector.¹⁴⁵

The chimera of the NMSA has resulted in some disastrous unintended consequences. For example, borrowers have rejected

provide both accurate inputs and documentation for only two of the HAMP applications. Memorandum from Christy L. Romero, Special Inspector Gen. for the Troubled Asset Relief Program to Timothy F. Geithner, Sec'y of the Treasury, The Net Present Value Test's Impact on the Home Affordable Modification Program (June 18, 2012)[hereinafter SIGTARP Memo], available at http://www.sig tarp.gov/Audit%20Reports/NPV_Report.pdf.

140. *Monitor Issues Interim Report on Relief Provided to Homeowners Under the National Mortgage Settlement*, FLA. OFFICE ATT'Y GEN. (Aug. 29, 2012), http://myfloridalegal.com/_852562220065EE67.nsf/0/D26614DB96D8561085257A69005FD592?Open&Highlight=0,national,mortgage,settlement,agreement [hereinafter *Monitor Issues*].

141. See generally *id.*

142. Kimbriell Kelly, *Lenders Seek Court Actions Against Homeowners Years After Foreclosure*, WASH. POST (June 15, 2013), http://www.washingtonpost.com/investigations/lenders-seek-court-actions-against-homeowners-years-after-foreclosure/2013/06/15/3c6a04ce-96fc-11e2-b68f-dc5c4b47e519_story.html ("A recent government audit [of foreclosure deficiency judgments] found the recovery rate at one-fifth of 1 percent.").

143. *Bankruptcy & Deficiency Judgments After Foreclosure*, NOLO LAW FOR ALL, <http://www.nolo.com/legal-encyclopedia/bankruptcy-deficiency-judgments-after-foreclosure.html> (last visited July 27, 2014).

144. Karen Weise, *The Debt Collection Business Isn't Pretty*, BLOOMBERG BUSINESSWEEK (Feb. 1, 2013), <http://www.businessweek.com/articles/2013-02-01/the-debt-collection-business-isn-t-pretty> (noting that "[o]n average, a buyer will pay 4¢ on the dollar").

145. Robert Berner & Brian Grow, *Prisoners of Debt*, BLOOMBERG BUSINESSWEEK (Nov. 1, 2007), <http://www.businessweek.com/stories/2007-11-01/prisoners-of-debtbusinessweek-business-news-stock-market-and-financial-advice>.

affordable monthly payments under HAMP¹⁴⁶ because they want a principle reduction under the NMSA.¹⁴⁷ These borrowers end up losing their homes when they otherwise could have secured an affordable modification.¹⁴⁸ The rhetoric would have borrowers believe that Pam Bondi is “work[ing] with the monitor to ensure that the mortgage servicers fulfill their obligations under the settlement agreement.”¹⁴⁹ The political rhetoric preys on the heuristic biases of borrowers to garner political capital, i.e., positive media coverage that will hopefully elicit public favor, government funds, and votes. Borrowers have lost their homes by rejecting bona fide HAMP modifications because the media has cast the \$25 billion NMSA as a panacea to all borrowers' ills. The rejection of HAMP modifications serves as a prime example of the signal being lost in the noise of political rhetoric.

In sum, borrowers could make better decisions regarding debt obligations if they had access to better information or, in the alternative, were not misled by politically charged information. This Article proposes that politicians, attorneys general, and other regulating bodies should have either: (a) informed borrowers that they were on their own (an unlikely scenario) or (b) provided private rights of action under foreclosure legislature, the NMSA, HAMP, and the OCC Amended Consent Judgment. Instead, the prevailing political rhetoric appears to provide borrowers a legal remedy, but in reality affords no private right of action.

146. This is a heroic achievement in and of itself considering the success rate is 7.6% nationally. ALYS COHEN ET AL., NAT'L CONSUMER LAW CTR., AT A CROSSROADS: LESSONS FROM THE HOME AFFORDABLE MODIFICATION PROGRAM (HAMP) 8 (2013), available at http://www.nclc.org/images/pdf/foreclosure_mortgage/loan_mod/hamp-report-2013.pdf.

147. David Dayen, *Just 83,000 Homeowners Get First-Lien Principal Reductions from National Mortgage Settlement, 90 Percent Less Than Promised*, NAKED CAPITALISM (Mar. 19, 2014), <http://www.nakedcapitalism.com/2014/03/just-83000-homeowners-get-first-lien-principal-reductions-national-mortgage-settlement-90-percent-less-promised.html>. But see Tom Miller, *The National Mortgage Settlement: One Year Later*, NAT'L ASS'N ATT'YS GEN., <http://www.naag.org/the-national-mortgage-settlement-one-year-later.php> (last visited July 27, 2014).

148. See Shahien Nasiripour, *National Mortgage Settlement Monitor Finds Few Flaws As Consumer Advocates Cry Foul*, HUFFINGTON POST (June 19, 2013), http://www.huffingtonpost.com/2013/06/19/national-mortgage-settlement-monitor_n_3463180.html (“The banks are systematically violating the terms of the National Mortgage Settlement.”) (quoting Josh Zinner, co-director of the Neighborhood Economic Development Advocacy Project in New York).

149. *Monitor Issues*, supra note 140.

3. Equivocating Risk and Uncertainty

In the housing boom, ratings agencies were able to disguise uncertainty as risk by stamping a triple-A rating on a tranche of mortgage backed securities.¹⁵⁰ This resulted in a seemingly unquenchable thirst for mortgage-backed securities and their derivatives. The influx of money incentivized investment banks to further leverage themselves.¹⁵¹ The more leveraged a bank is, the more money that can be made; conversely, increased leverage leads to increased exposure to financial ruin. For example, in 2007, Lehman Brothers had a leverage ratio of 33 to 1.¹⁵² This means that Lehman Brothers held \$1 for every \$33 in financial positions.¹⁵³ Hence, shocks in the housing market resulted in catastrophic financial consequences. Similarly, the Florida Legislature's ideological stubbornness, failure to accept uncertainty, and reliance on specialists rather than engaging in a more multi-disciplinary approach has unnecessarily leveraged its socioeconomic future.

Securitization was thought to usher in a new era of risk allocation. Specifically, securitization was able to tranche risk and allow risk-adverse investors to accept the most risk. However, these securities failed to adequately account for the collective action problems that would result upon default. For example, upon default the collateral may be sufficient to repay senior, but not subordinated, investors in full.

This is in fact the most common default scenario.¹⁵⁴ As an illustrative hypothetical, Irwin is a Super Senior Tranche ("SST") holder. In the hypothetical, SST holders consist of ten percent of the mortgage-backed securities ("MBS") in the loan. The remaining tranche holders will be considered junior tranche holders and consist of 90 percent of the investors in the MBS. SSTs are different from junior tranche holders in that SSTs will be repaid on their investment first.

Assume the following premises are true: (1) the MBS consists of 100 mortgages; (2) each mortgage is valued at \$1000; (3) each mortgage represented the approximate value of the home at purchase; (4) all the mortgages in the MBS defaulted; and (5) given premises (1) and (2)

150. David M. Levy & Sandra J. Peart, *Tullock on Motivated Inquiry: Expert-Induced Uncertainty Disguised as Risk*, PUB. CHOICE (forthcoming), available at <http://ssrn.com/abstract=1661207> ("What makes expert-induced uncertainty particularly troublesome is that we may easily confuse it for simple risk...").

151. Banks lend money to individuals and businesses and invest in financial assets. Banks also borrow money; for example, they issue bonds and take loans, sometimes with maturity terms as short as a day. If a bank's return on its financial position is greater than the cost of borrowing, then the bank makes money. See CASSIDY, *supra* note 24, at 211.

152. SILVER, *supra* note 6, at 53.

153. *Id.*

154. Steven L. Schwarcz, *Fiduciaries with Conflicting Obligations*, 94 MINN. L. REV. 1867, 1884 (2010).

above, the total value of the MBS is \$100,000. Irwin and the rest of the SST would benefit most from foreclosing upon its collateral even if the homes went to foreclosure sale for as low as \$100—ten percent of their original value. One thousand homes going up for foreclosure at \$100 is \$100,000, enough to secure a full return for the SST but completely wiping out the junior interests. Hence, the SST has a strong incentive to liquidate in order to secure a full return on their investment as opposed to modifying a debt, which may result in a greater return for all investors.¹⁵⁵

Although modifications may be better for the MBS as a whole—the homeowner, property values in the surrounding community, and the housing economy in general—SSTs had a strong incentive to foreclose on the secured collateral to ensure a full return on their investment. This and other issues have caused investors to lose an average of \$145,000 during a foreclosure compared with less than \$24,000 on a modified loan.¹⁵⁶ In sum, the creative risk allocation failed to account for collective action problems, which ultimately have created significant, unforeseen negative externalities.¹⁵⁷

Likewise, Florida's Legislature relies on fallacious assumptions that elicited the current crisis. The legislature has equivocated risk with uncertainty or, in simpler terms, “known unknowns” and “unknown unknowns.”¹⁵⁸ The former can be accessed and insured against through risk management. The latter covers the ground of uncertainty, and some theoreticians are hesitant to accept its parameters as such.¹⁵⁹ In a world of information and algorithms, what event cannot be reduced down to a probability and the risk thereof sufficiently insured against? The

155. Dan Magder, *Mortgage Loan Modifications: Program Incentives and Restructuring Design* 9 (Peterson Inst. for Int'l Econ., Working Paper No. 09-13, 2009) (“At least one industry representative has indicated that several large investors with significant holdings of senior tranches of MBS are working quietly but aggressively (and effectively) behind the scenes to slow the progress of loan modifications.”); Schwarcz, *supra* note 154, at 1893 (“[U]nchecked super-senior investor voting control may well have contributed to the increase in foreclosures on financial assets underlying the securities.”).

156. Magder, *supra* note 155, at 9 (“Holders of AAA tranches may prefer foreclosures since they are shielded from any loss by their seniority.”); Schwarcz, *supra* note 154, at 1892 (“[S]uper-senior investors usually have contractual power to direct liquidation in the event of certain contingencies . . .”).

157. This Article ignores a more in-depth discussion on other collective action problems including, but not limited to, the influence of bond insurers and or super senior tranche holders. For further discussion, see Diane E. Thompson, *Foreclosing Modifications: How Servicer Incentives Discourage Loan Modifications*, 86 WASH. L. REV. 755, 774 (2011).

158. See *supra* note 6.

159. See, e.g., SILVER, *supra* note 6, at 53–54. Silver would describe these theoreticians as Hedgehogs. Building on Isaiah Berlin's classic essay the “Fox and the Hedgehog,” he describes hedgehogs as stubborn, highly specialized, inadaptible, and intolerant of complexity.

financial crisis featured some notorious consequences of this type of theoretical arrogance.

For example, one credit rating agency (“CRA”), Standard and Poor (“S&P”), rated a complex type of security known as a collateralized debt obligation (“CDO”). S&P rated these CDO’s to be AAA, which meant it had only a one out of 850 (or a 0.12 percent) chance of not paying out over five years.¹⁶⁰ Unfortunately, approximately 28 percent of these AAA-rated CDO’s defaulted; the actual default rates were over *200 times higher* than S&P predicted.¹⁶¹ In short, a substantial portion of the CDOs were not sound investments warranting AAA ratings. Thus, Nate Silver described CRA’s ability as an alchemy able to “spin uncertainty in what feel[s] like risk.”¹⁶²

The Florida Legislature has reduced the foreclosure crisis into a simple legislative response that will expedite the foreclosure process, reduce the foreclosure crisis, and spur economic recovery. Similar to the S&P’s speculative rating of CDOs as AAA, the Florida Legislature’s Bill Analysis is based on non-credible data.¹⁶³ Assuming the validity of the foreclosure data, HB 87 compromises the legal rights of distressed borrowers and risks alienating Floridians from the legal and political process.

4. The Illusion of Predictability: Inverse Problems

Along a more systemic analysis, proponents of HB 87 point to the disparity between the economic recovery in non-judicial foreclosure states and judicial foreclosure states.¹⁶⁴ State law governs real estate foreclosures. In the United States, there are two predominant means of foreclosure: judicial and non-judicial foreclosure.¹⁶⁵

The foreclosing party’s advantages in non-judicial states are significant, as compared with judicial states. Alan M. White’s *Losing the Paper - Mortgage Assignments, Note Transfers and Consumer Protection*, analyzes the California Court of Appeals decision *Gomes v. Countrywide Home Loans, Inc.*¹⁶⁶ White contends that the *Gomes* Court held that “a borrower could not assert a legal challenge to a trustee’s sale

160. *Id.*

161. *Id.*

162. *Id.* at 29.

163. See *supra* notes 69-104 and accompanying text.

164. Shanklin, *supra* note 20 (“States that do not require lenders and mortgage servicers to go through the court system have rebounded faster from the real-estate downturn than has Florida.”).

165. Alan M. White, *Losing the Paper – Mortgage Assignments, Note Transfers and Consumer Protection*, 24 LOY. CONSUMER L. REV. 468, 472 (2012).

166. *Gomes v. Countrywide Home Loans, Inc.*, 121 Cal. Rptr. 3d 819 (Cal. Ct. App. 2011), *cert. denied*, 132 S. Ct. 419 (2011).

before the sale occurred based on alleged defects in the chain of ownership of the loan, namely the invalidity of a MERS mortgage assignment.”¹⁶⁷

White contends that courts in other non-judicial states have followed suit based on the rationale that a trustee's sale is presumed to be bona fide and that “it is not the obligation of the trustee to prove to anyone that it is authorized to foreclose by the proper beneficial owner of the mortgage.”¹⁶⁸ White summarizes the plight of borrowers who reside in non-judicial states:

[There is a] critical difference between judicial and nonjudicial foreclosure – the borrower cannot simply put the foreclosing party to its proof in a nonjudicial state. As a result, the ability of borrowers generally to assert mortgage transfer issues is considerably diminished in nonjudicial states, simply because of the burden of going forward.¹⁶⁹

Non-judicial procedures appear to correlate with economic recovery, at least in the short-term and at the macroeconomic level. In judicial foreclosure states, homeowners have greater access to the judicial process and are better assured their day in court. Homeowners who take legal action before a foreclosure judgment and sale “can prevent or delay foreclosure for extended periods of time, and in significant numbers.”¹⁷⁰ Thus, the court system requires that plaintiff-banks prove their right to foreclose, and defendant-homeowners have the ability to challenge foreclosures, presuming they have a capable attorney. Based on this analysis, HB 87 appears to be a step towards procedurally converting Florida into a non-judicial state.

At a general level, the implementation of HB 87 seems to largely favor the policy goal of utilitarianism over individual rights. At a more particular level, HB 87 ultimately speeds up the foreclosure process, thereby compromising the individual rights of distressed borrowers. While there is some empirical evidence demonstrating that a speedy resolution to the foreclosure process correlates with a quicker economic recovery in general, the likelihood of its successful application in Florida has not been demonstrated. As this Article posits, the risks associated with HB 87 are not worth any conjectured short-term gain in the housing economy. It is unfortunate that the same illusion of predictability that preceded the current foreclosure crisis, similar to the creation of

167. White, *supra* note 165, at 490.

168. *Id.* (citing Trotter v. Bank of N.Y. Mellon, 152 Idaho 842 (Idaho 2012)).

169. White, *supra* note 165, at 490.

170. *Id.* at 493.

subprime mortgage backed securities, is now ironically justifying rhetorically minimizing the detrimental effects of this illusion.¹⁷¹

B. Time: A Borrower's Last Procedural Safeguard

Prior to the passage of HB 87, Florida allowed a plaintiff to file a request for an order to show cause for the entry of final judgment.¹⁷² If the court found that the complaint was verified and alleged a proper cause of action, the court had to issue an order directing the defendant show cause as to why a final judgment should not be entered.¹⁷³ In comparison, HB 87 allows any lienholder to initiate the procedure.¹⁷⁴ Thus, HB 87 effectively obviates the regulatory efforts of governmental entities to curb the unsafe and unsound practices of the nation's largest servicers.¹⁷⁵ For example, a servicer's obligations to meet certain evidentiary requirements may be obviated by a secondary lienholder filing a motion to show cause. HB 87 is an effective shift toward a non-judicial regime as it reduces the duties of the foreclosing party and shifts

171. The "illusion of predictability" in this context is used to describe the financial engineering employed in the creation of subprime mortgage backed securities. Subprime mortgages are those made to borrowers with the following characteristics: a low credit score, no proof of steady income, and a high debt-to-income ratio. Accordingly, a subprime mortgage would have difficulty finding a risk-adverse investor on the secondary mortgage market. Hence mortgage-backed securitization, which aggregated several subprime mortgages and divided the mortgages into tranches based on their level of risk, emerged. The safest tranche, typically known as super senior tranche, offered a low interest rate, but was the first to be paid out of the cash flow. Accordingly, one subprime mortgage could never garner a triple A-rating, but 3500 pooled together and tranced based on risk could garner such a rating.

172. H.R. 2013-h0087z.CJS, Reg. Sess., at 4 (Fla. 2013) (citing FLA. STAT. § 702.10(1) (2012)), available at <http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=h0087z.CJS.DOCX&DocumentType=Analysis&BillNumber=0087&Session=2013>.

173. *Id.*

174. *Id.*

175. See, e.g., FED. RESERVE SYS., OFFICE OF THE COMPTROLLER OF THE CURRENCY & OFFICE OF THRIFT SUPERVISION, INTERAGENCY REVIEW OF FORECLOSURE POLICIES & PRACTICES 1 (2011), available at <http://www.occ.gov/news-issuances/news-releases/2011/nr-occ-2011-47a.pdf> (noting that in 2010, the four federal bank regulators—OCC, OTS, FRB, and FDIC—conducted on-site reviews of the foreclosure policies and procedures of 14 major servicers); *Mortgage Servicing: An Examination of the Role of Federal Regulators in Settlement Negotiations and the Future of Mortgage Servicing Standards: Joint Hearing Before the Subcomm. on Fin. Insts. & Consumer Credit and the Subcomm. on Oversight & Investigations of the Comm. on Fin. Servs.*, 112th Cong. 147 (2011) (statement of Bd. of Governors of the Fed. Reserve Sys.) [hereinafter Federal Reserve Board Statement] (noting that in July 2010, the Federal Reserve Board and other bank regulators conducted a horizontal review of same servicers); U.S. Dep't of Justice, *supra* note 28 (noting that five major servicers entered into a settlement agreement with 49 state attorneys general and the federal government for unsound and unsafe foreclosure practices).

burdens of proof and persuasion to the borrower challenging the foreclosure process.¹⁷⁶

In other words, a party may effectively shift its burden of proof and persuasion to the defendant-borrower. Moreover, a defense filed as a response to an order to show cause pleading must currently raise a genuine issue of material fact that would preclude the entry of a summary judgment or otherwise constitute a valid legal defense to foreclosure.¹⁷⁷ HB 87 largely ignores the informational barriers inherent in the foreclosure process that prevent borrowers from identifying errors that would justify halting the foreclosure process. Andrew J. Kazakes notes that “[f]oreclosing parties—generally servicers—routinely file incomplete or unreviewed legal documents with courts, while borrowers and their advocates simultaneously struggle with those same servicers to obtain loan documents crucial to foreclosure defense.”¹⁷⁸

HB 87 purports to ensure due process by providing a hearing to consider the defendant’s motion and arguments.¹⁷⁹ However, this claim of a hearing as a safeguard is based on the assumption that the defendant will file competent defenses within the afforded time horizon. HB 87 incorrectly assumes that: (1) homeowners have perfect information upon which to base financial decisions; (2) homeowners will act rationally to maximize their own self-interest; and (3) homeowners have the financial resources to adequately evaluate and pursue the appropriate course of action. However, borrowers do not have perfect information regarding the foreclosure itself or the legal repercussions thereof.

In addition, borrowers have limited resources to employ legal and financial professionals to assist them in the decision-making process. Similarly, emotionally distressed borrowers are not aptly suited to make rational and coherent decisions regarding their financial and legal interests. The only procedural safeguard that Florida’s distressed homeowners have on their side is time.

Time is essential for borrowers to overcome the stigma of foreclosure and realize that they have rights in the foreclosure process. In addition, it allows borrowers to assess their finances and determine the best course of action—whether to pursue legal redress or to look to loss mitigation alternatives. Lastly, time enables borrowers the ability rationally to evaluate legal and financial avenues in order to make the best decision for their families. Time, in other words, allows borrowers

176. See Alexander et al., *supra* note 120, at 343.

177. FLA. STAT. § 702.10(1)(a)(3) (2011).

178. Kazakes, *supra* note 112, at 1400.

179. H.R. 2013-h0087z.CJS, Reg. Sess., at 5 (Fla. 2013), available at <http://www.myfloridahouse.gov/Sections/Documents/loadaddoc.aspx?FileName=h0087z.CJS.DOCX&DocumentType=Analysis&BillNumber=0087&Session=2013>.

to extricate themselves from the morass of “rational irrationality,” as described by Cassidy:

People aren’t stupid, but they don’t necessarily know what they really want or where their best interests lie. The problem is internal and external. The efficient market/rational expectations approach assumes transparent self-knowledge: in order to maximize our self-interests, we must know what they are. But people are often subject to rival impulses. Their System One brain tells them to plan ahead, save for retirement, and act cautiously, but their System Two brain screams at them to enjoy the moment, make a quick buck, and get ahead of the other fellow. At the same time, as Keynes emphasized, people’s knowledge about the outside world, especially knowledge about the future, is often strictly limited. Even if they sit down and try to calculate all the pros and cons of a certain purchase, or investment, the figures rarely give an unequivocal answer.¹⁸⁰

Florida’s current judicial process allows borrowers time to secure information from servicers via a qualified written request (“QWR”).¹⁸¹ This information may expose servicing abuses that precipitated the foreclosure or precluded any bona fide modification attempt. Similarly, the QWR allows borrowers to learn about the obligations that some servicers have under government programs, HAMP, and the NMSA.

HB 87 effectively eliminates time, often the last beacon of hope for distressed borrowers. For Posner, the act of “freezing” when confronted with something risky and unknown has adaptive, evolutionary value. As Posner phrases it:

Uncertainty aversion is captured in such common expressions as “fear of change” and “fear of the unknown.” These are evolutionarily plausible emotions, and a common (and again, an evolutionarily plausible) reaction to them is to freeze. That is a way of *gaining time* [italics added] to analyze an uncertain situation and perhaps reduce its uncertainty¹⁸²

Assuming HB 87 leads to a speedier economic bargain, it may be a Faustian bargain of sorts. Namely, borrowers may feel disenfranchised from homeownership process, and the housing economy may suffer a resultant chill. After all, the ultimate insurance against the risk of taking out huge loans to secure housing is judicial intervention. Is the

180. CASSIDY, *supra* note 24, at 204.

181. Section 2605 of RESPA imposes on loan servicers the duty to timely respond to inquiries concerning a consumer's mortgage loan whenever the loan servicer "receives a qualified written request from the borrower (or an agent of the borrower)." 12 U.S.C. § 2605(e)(1)(A) (2012).

182. POSNER, *THE CRISIS OF CAPITALIST DEMOCRACY*, *supra* note 6, at 297.

American dream so strong as to obviate guarding against risk with regard to the uncertainty involved in assuming long-term debt? If true, this may be the scariest notion of all. Namely, prospective homeowners would remain ripe for exploitation and constantly be subject to the unfair practices of lending and servicing institutions. Further, borrowers would continue to take on unfavorable loans despite the overwhelming uncertainty.

Notwithstanding state and federal legislators' attempts to curb unsafe and unsound lending and servicing practices, the system remains ripe for exploitation. Unfortunately, the law's aspirational teloi—certainty, predictability, and uniformity—are also its most susceptible points. In other words, any stagnant system of law, void of dynamic judicial interpretation, is capable of being gamed. Ergo, there is a need for safeguarding the elasticity and contextually based remedial measures of the judicial system. Judges should be able to look at the facts before them and make decisions based on substantial justice. As one of its many unintended consequences, HB 87 would effectively hamstring judges and reduce foreclosure proceedings to a mere paper trial.

CONCLUSION

This Article has analyzed HB 87 in terms of its constituent elements and, through legal reasoning, deduced the legal rights and duties created therefrom. We have used the rights and duties created by HB 87 as beginning premises from which to infer the competing policies behind HB 87's rationale. Finally, this Article has attempted an economic analysis of HB 87's rationale to determine if its pragmatic effects are consistent therewith.

Drawing from the post-Chicago law and economics movement, this Article has used tools derived from a pragmatic and reality-based approach to analyze some of the consequences, intended or not, of the passing of bills like House Bill 87. The purpose of this Article has not been to demonize banks, utilitarian policy objectives, or efficiency-based economic calculations. Rather, it has sought to access the complexities of using a pragmatic, reality-based approach in the attempt to predict probable consequences. Overall, this Article has hoped effectively to engage in a dialogue about some of the significant macroeconomic ramifications flowing from enacting bills like HB 87.

In summary, this Article has analyzed how Florida's Fair Foreclosure Act, House Bill 87 ("HB 87"), is a legislative enactment that aims to expedite the foreclosure process in Florida. In spite of the appeal of quicker and more expedient closure, this Article has argued that HB

87 makes assumptions that will eventually lead to unintended consequences.

Consequently, this Article ultimately concludes that the uncertain consequences of the mortgage foreclosure crisis are best mitigated by affording the time inherent in the legal process and maintaining the elasticity of courts to make judgments based on interpretative case law and equity.