From: **Business Litigation Committee**
To: **Executive council Members:**
Re: **Opportunity to File Amicus Brief in *Rigby v. Bank of New York Mellon. 1st DCA***

Analysis

The First DCA has voted to consider the *en banc* the issue whether to recede from the standing-at-inception rule and has solicited the input of amicus on the issue. A brief discussion follows.

The standing-at-inception rule has recently come under a great deal of scrutiny. See, e.g., Walton v. Deutsch Bank Nat'l Trust Co., 201 So. 3d 831, 834 (Fla. 1st DCA 2016) (Winokur, J., concurring); Corrigan v. Bank of America, N.A., 124 So. 3d 308, 312 (Fla. 2d DCA 2016) (Lucas, J., concurring); Focht v. Wells Fargo Bank, N.A., 124 So. 3d (Fla. 2d DCA 2013). This continued criticism was quoted by the First District in its order determining *en banc* review is proper. See Rigby v. Bank of New York Mellon, Case No. 1D16-0665 (Fla. 1st DCA 2017).

The Business Litigation Committee endorses the repeal of the standing-at-inception rule as it does not appear to be solidly based on law and appears to be more based on previous misunderstandings of the rule. For example, the generally well-regarded case of McLean v. JP Morgan Chase Bank Nat. Ass'n, 79 So. 3d 170 (Fla. 4th DCA 2012) , states:

> **To summarize, the plaintiff must prove that it had standing to foreclose when the complaint was filed. See Country Place Cmty. Ass'n v. J.P. Morgan Mortg. Acquisition Corp., 51 So.3d 1176, 1179 (Fla. 2d DCA 2010) ("Because J.P. Morgan did not own or possess the note and mortgage when it filed its lawsuit, it lacked standing to maintain the foreclosure action."); see also Jeff–Ray Corp. v . Jacobson, 566 So.2d 885, 886 (Fla. 4th DCA 1990) (holding that a foreclosure complaint failed to state a cause of action where plaintiffs relied on assignment of mortgage that was dated four months after the lawsuit was filed).**
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> **However, Jeff-Ray does not explicitly refer to standing-at-inception and arguably instead stands for the proposition that exhibits attached to a complaint must not conflict with the complaint. The entire portion of Jeff-Ray upon which the standing-at-inception rule for foreclosures is based reads as follows:**
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> > **Our opinion in Safeco Insurance Co. v. Ware, 401 So.2d 1129 (Fla. 4th DCA 1981), would support dismissal of the action based on failure to comply with Florida Rule of Civil Procedure 1.130. Given the scenario before us, appellees' complaint could not have stated a cause of action at the time it was filed, based on a document that did not exist until some four months later. Marianna & B.R. Co. v. Maund, 62 Fla. 538, 56 So. 670 (Fla.1911). If appellees intend to proceed on the April 18, 1988, assignment, they must file a new complaint.**
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> **Jeff-Ray, 566 So. 2d at 866. Arguably, the Jeff-Ray decision stands for compliance with Florida Rule of Civil Procedure 1.130 more so than it stands for the proposition of the need for standing-at-inception in foreclosure cases.**

Moreover, some have taken the position that standing is a jurisdictional question. Early decisions did not comment on it, and the rules provide that it is an affirmative defense, which suggests it can be waived. The Business Litigation Committee likewise recommends the Executive

Council adopt a position that the standing-at-inception rule is not jurisdictional but is instead an affirmative defense which can be waived and can be cured.

The genesis of the 'standing at inception' rule is found in *Marianna & B.R. Co. v. Maund,* 56 So. 670 (Fla. 1911). However, this was not a foreclosure case, it was a damages case based upon trespass. The standing issue in trespass cases manifests itself differently, but simply stated, if you didn't own the property where the trespass occurred when the suit was brought, you are not the injured party.

The 'standing at inception' rule has been elevated from an affirmative defense, which could be waived, to one of jurisdiction which could be raised at any time. *Corrigan v. Bank of America, NA,* 189 So.3d 187 (2nd DCA 2016). The facts of the Corrigan case aggravated several of the 2nd DCA Judges. The Corrigans failed to pay their mortgage for six years. They raised a single affirmative defense…Bank of America did not have the note at the time the action was commenced. As the litigation dragged on, another plaintiff was substituted who did produce the original note. The trial judge rejected the standing argument and the 2nd DCA affirmed with an excellent analysis by Judge Altenbrand in his concurring opinion:

Corrigan v. Bank of America, NA 189 So.3d 187 (2nd DCA 2016)

Altenbrand, J. Concurring

As axioms go, this one is quite rigid,[1] as our court's decision in the case at bar exemplifies. That Bank of America may have had every right to pursue the Corrigans' loan default in foreclosure when the trial commenced is of no moment; because it could only connect another entity's possession of the Corrigans' note to the time of filing an amended complaint, Bank of America's right to foreclose on its note's security, in this case, is lost. The failure to prove a historic point of standing precluded any consideration of the substantive merits of Bank of America's claim. Under the law, the court's resolution of this case is both inarguable and inescapable. That is so because, equity notwithstanding, this unbending rule of standing has become a "jurisdictional prerequisite" in effect, if not in name. *Cf. Focht v. Wells Fargo Bank, N.A.,* 124 So.3d 308, 312 (Fla. 2d DCA 2013) (Altenbernd, J., concurring) (observing that with the requirement to prove standing at the time a foreclosure complaint is filed, "[t]he courts have erroneously transformed what should be a defendant's affirmative defense ... into a jurisdictional prerequisite that must

[189 So.3d 192]

be established by the plaintiff to avoid a dismissal of the action"); *Dickson,* ___ So.3d at ___ n. 1, 40 Fla. L. Weekly D2520 at n. 1, 2015 WL 6777155, n. 1 ("The rule requiring a plaintiff to prove its standing at the inception of suit at any point up to and through trial does present difficult issues both as a matter of legal doctrine and as a matter of practical application.").[2]

For such stringency to have evolved in an equitable proceeding like foreclosure is a curious development. *Cf. Schroeder v. Gebhart,* 825 So.2d 442, 446 (Fla. 5th DCA 2002) ("A court of equity `should not be shackled by rigid rules of procedure and thereby preclude justice being administered according to good conscience.'" (quoting *Wicker v. Bd. of Pub. Instruction of Dade Cty.,* 106 So.2d 550, 558 (Fla. 1958))); *White v. Brousseau,* 566 So.2d 832, 835 (Fla. 5th DCA 1990) ("Equity disregards all form and looks to the substance and essence of every matter."); *see also NL Indus., Inc. v. MAXXAM, Inc.* (*In re MAXXAM, Inc./Federated Dev. S'holders Litig.*),

698 A.2d 949, 954 (Del. Ch.1996) (denying defendants' motion to dismiss shareholders' derivative action where the original plaintiffs to the lawsuit were not shareholders and thus lacked standing, and observing that "[u]nless some positive rule of law mandates a dismissal no matter what the equities may be, it makes no sense, in terms of equity, justice or judicial economy, for the [c]ourt to do what the defendants ask"). That development was by no means inevitable or, in my opinion, necessarily even intentional. When one delves into the origins of this standing rule in Florida law, a notable dissonance emerges between its genesis and how it has come to be applied today in mortgage foreclosure cases.

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> So assuming as we must that the rule appropriately applies in all foreclosure cases, it is still fair to ask: what compelled the court in *Marianna* to adopt such a rule? The answer, it seems, derives from two quotations that the *Marianna* opinion recited and then applied to resolve the controversy before it.

A.

The first quotation was from a treatise, 1 Joseph F. Randolph, *Cyclopedia of Law and Procedure* 744 (William Mack & Howard P. Nash eds., 1903). *Marianna,* 56 So. at 672 ("It is said in 1 Cyc. P. 744: `A plaintiff cannot supply the want of a valid claim at the commencement of the acquisition or accrual of one during the pendency of the action.'"). The entire extent of Mr. Randolph's discussion on this topic is the quote that *Marianna* recounts. A footnote in the cyclopedia indicates that thirty-three case opinions from seventeen jurisdictions issued between 1817 to 1898 support this sweeping pronouncement.[3] Yet,

- **[189 So.3d 194]**

of those cases, only two concerned foreclosure, and of those, only one, *Hovey v. Sebring,* 24 Mich. 232, 232 (1872), examined the precise issue we see litigated so frequently in foreclosure cases today: that of holding a mortgage note at the time a complaint is filed. That case is worth a brief examination.

In *Hovey,* the Supreme Court of Michigan agreed with the general proposition that "whatever may be the state of facts which authorizes the suit to be brought in the name of any particular person, that state of facts must, as a general rule, exist at the time the suit is instituted." *Id.* at 233. However, the court in *Hovey* never suggested that a plaintiff's failure to prove this point would warrant the dismissal of its foreclosure lawsuit; rather, a prior plaintiff's lack of standing raised a potential affirmative defense to challenge *the strength of the foreclosing plaintiff's* claim:

[T]he ownership or title can be inquired into, only for the purpose of letting in any defense or set-off the maker would have had as against a former holder (when transferred after maturity or with notice), or for the purpose of showing that the plaintiff's possession of the note is not in good faith.

Id. (emphasis added).

Thus, under *Hovey,* the want of standing by a prior plaintiff is merely a *facet of a defense* that a defendant can raise against the plaintiff. *Accord Dage,* 95 So.3d at 1023 ("[L]ack of standing is an affirmative defense that must be raised by the defendant...." (quoting *Phadael v. Deutsche Bank Trust Co. Ams.,* 83 So.3d 893, 895 (Fla. 4th DCA 2012))); *Jaffer,* 155 So.3d at 1202 ("We have repeatedly held that standing is an affirmative defense....").

A substantive justification for the defense can be found in the second quotation recounted in the *Marianna* opinion, which came from the case of *Wadley, Jones & Co. v. Jones,* 55 Ga. 329, 330 (1875). In that case, the Georgia Supreme Court gave the following laudatory explanation for the standing-at-inception rule:

It is a rule of law to which there is, perhaps, no exception, either at law or in equity, that to recover at all there must be some cause of action at the commencement of suit.... [T]here are

reasons of public policy, as well as of private justice, why there should be no needless haste in fomenting litigation, and why people who are in no default and have committed no wrong should not be summoned before the public tribunals to answer complaints which are groundless.

Id. (emphasis added). According to *Jones,* then, the standing-at-inception rule emanates from the litigants' relative equities; its focus rests on the substance of the controversy, not its form.

B.

Relegated to an affirmative defense within an equitable proceeding, the standing-at-inception rule may hold merit in some foreclosure cases. *See id.* at 330. Certainly one can more readily glean

- **[189 So.3d 195]**

alignment between the defensive application of this common law rule and the "public policy" and "private justice" considerations that the *Jones* court alluded to (and which were implicitly adopted in *Marianna*). But that is not how the rule is applied in Florida today. Somehow, and without any obvious explanation, *Marianna*'s rule of standing at the inception of a case became intertwined with foreclosure proceedings and then transformed from what was arguably an affirmative defense for those "who are in no default" into a jurisdictional threshold that a foreclosing plaintiff must cross to claim relief, regardless of a defendant's default. *Cf. May v. PHH Mortg. Corp.,* 150 So.3d 247, 248-49 (Fla. 2d DCA 2014) (holding that bank's failure to present evidence that it held defendant's note prior to inception of its foreclosure lawsuit was a "failure to prove a prima facie case" that warranted dismissal). Whatever its merits, the standing-at-inception rule has strayed beyond the trajectory of its origin.