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A Little Bit of Foreclosure Soap Won't Wash Away Those Unclean Hands

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"One who comes into equity must come with clean hands else all relief will be denied him regardless of merit of his claim and is not essential that act be a crime; it is enough that it be condemned by honest and reasonable men" Roberts v Roberts, 84 So.2d 717 (Fla. 1956)

It sounds almost biblical; a pronouncement from up high and a warning that those who crave riches must do so by ethical means: so-called "clean hands." In other words: the ends don't justify the means and it's actually a legal theory with a bit of provenance and the quote itself is from a Florida decision, circa 1956, which is now being used with some efficacy in foreclosure cases; albeit in states where the courts oversee the process (Florida being one).

A little bit of soap may — as the Jarmels famously sung — wash the lipstick off your face or powder from you chin but it will never, never wash away the fraud

— according to this doctrine — perpetrated by those in the financial services industry who relentlessly pursue home seizures via fraudulent note endorsements, mortgage assignments and robo-signed affidavits; supporting materials necessary to prove the right (a/k/a "standing") to pursue a foreclosure.

Unfortunately, in all too many cases the banking/foreclosure industry has have gotten away with it. One only needs to review the collateral damage (think, "homeowners") that followed the 2008 subprime meltdown to see the devastation wrought to communities around the country and let's not forget those impacted were folk of all political leanings.

Bruce Jacobs, a Miami based lawyer and former state prosecutor, is riding point in a legal charge to make good use of "unclean hands" as a foreclosure defense and his arguments have begun to resonate with some Florida judges.

One of his cases — *Wells Fargo v John Riley* — was dismissed last December in a Palm Beach, Florida Circuit Court, after the Judge found plaintiffs had failed to scrub unclean hands; to wit: Wells Fargo and its servicer, JP Morgan Chase (both parties to the $25 billion National Mortgage Settlement) relied on false testimony and failed to explain how an endorsement from the original lender, Washington Mutual (remember them? The financial institution notable for being history's biggest bank failure) came to be affixed to the note years after WAMU went out of business. Finally, the court found that the "purported mortgage loan schedules" was a phony; missing essential data (plaintiff's witness first claimed that this was done to protect the borrower's "privacy." The Judge forced the witness, upon cross-examination, to admit that it had nothing to do with privacy. It was simply missing).

It seemed that the plaintiffs had taken one too many Mulligans in trying to justify how Wells Fargo had obtained the mortgage and note which finally led the Judge to this conclusion:

The court finds Plaintiff failed to prove every element of its case by substantial competent evidence and has unclean hands, and enters judgement in favor of the Defendant, John Riley.

In short, the good guys — at least in this case — win.

In the arcane world of mortgage securitization, where tens of millions of loans are sliced, diced and parceled out to third party investors the process of proving who really owns a loan, and who has the legal standing to foreclose, is much like asking a medieval alchemist to give a step by step description — with verification — of how lead is turned to gold.

Wall Street's alchemists, flush with post-2008 bail-out money, devised grand schemes to by-pass long enshrined traditions of recording mortgage assignments with county clerks — time consuming and costly — for the easier route of simply creating their own paper and to hell with so-called "chain of title" (necessary to prove ownership of a mortgage). With a foreclosure Shangri-La looming — so many homes to seize and sell — scrubbing close to the law was a pesky irritation; better to employ an army of low-wage "robo-signers" trained to sign a name that wasn't theirs in front of friendly notaries who simply looked the other way and present these "affidavits" in evidence: so, damn the defendants and let's disgorge Daddy/Mommy/Kiddies/Pets (maybe Granny and Grandpa) with alacrity.

Several years back I wrote about an ex-Federal prosecutor — Cynthia Kouril — and her outrage over the mass creation of on-demand phony paper created by DocX; a company highly sought after by bottom-feeding law firms (a/k/a "foreclosure mills") for expertise in creating all sorts of foreclosure fiction which, in turn, provided many an uncritical judge with enough evidence to rule against protesting homeowners. With the mainstream press picking up on the story even Eric Holder's Wall Street-friendly Department of Justice had to send out head of the Criminal Division, Lanny Breuer, to force a prosecution of DocX CEO, Lorraine Brown. She was that very rare bird: a foreclosure industry lackey who actually spent hard time in the slammer and considering that Breuer was the guy who admitted, in a 2013 episode of PBS's Frontline, that he didn't want to go too hard on Wall Street for fear of causing executive job loss, you know that DocX had done something extraordinarily egregious.

Unfortunately, as Bruce Jacobs and other lawyers of similar mind can attest to: this particular episode did not end the fraud.

Just ask attorney, Linda Tirelli, who has kicked over many, many rocks to reveal fraudulent foreclosure documents in cases she's defended in Westchester County, New York. I've asked her this question several times and repeated her Sherlock Holmes response in articles I've written for American Banker and Huffington Post:

I can dissect a bogus document in three minutes or less and find them in 98% of all cases

Unclean hands, as a legal doctrine, injects a healthy dose of ethics into the courtroom and essentially hangs the notion that the end-justify-the-means on its own legal petard. It's astonishing to discover — as I did — that this nostrum is rooted in an 19th century United States Supreme Court decision which proclaimed that "equitable powers can never be exerted in behalf of one who has acted fraudulently, or who, by deceit or any unfair means, has gained an advantage." (*Bein v Heath*, 1848)

April Charney, an attorney licensed in Florida and Arkansas, has seen much home snatching and it's the kind of thing that pisses her off to no end. First called to the bar in 1980 she immediately immersed herself in the thanklessly underfunded world of legal services representing poor people and then, in 1999, spinning off into representing poor people fighting foreclosure (she's handled hundreds of cases) and like Tirelli she's become expert in the "put up" (the proper documents) or "shut up," and explain to the judge why fabricated documents are being filed in court. Her expertise in parsing the wording of such mortgage critical documents as PSA's ("Pooling and Servicing Agreements") and uncovering the finer points of assignment fraud earned her the title, "The Loan Ranger," in a 2009 New York Post article. Charney, who continues to work on foreclosure cases with lawyers around the country, can sometimes be found traveling in an RV — together with her husband, a retired legal aid lawyer — offering advice, on-line, from her mobile perch.

I would be remiss if I didn't point out that one of the first jurists to take on the weighty challenge of providing legal truth to power — and giving support to the unclean hands notion — was the late Brooklyn State Supreme Court Judge Arthur Shack (sprung from this mortal coil well before his time). Despised by foreclosure mill lawyers for his integrity in holding fast to the letter and spirit of

the law — throwing out most of the foreclosure cases he suspected were built on a foundation of fraud — his sentiments were captured in this quote I used for an RIP piece:

I want to see the servicing agent's power of attorney. I want to see all the paperwork before I approve it... If the paperwork is garbage, I deny it. If you're going to take away someone's home, it should be done properly.

Bruce Jacobs, April Charney and Linda Tirelli all give major props to the lawyer they consider a mentor: O Max Gardner — founder of Bankruptcy Boot Camp — a 160 acre enclave nestled in the hills of North Carolina. Max is a legend, rightfully so, and since 2006 he's weaponized consumer attorneys with the skills necessary to dig deep into foreclosure filings and see what lies beneath. His formula is simple: become like the bankers and lawyers you do battle with; learn their tricks — the short cuts they take — the reasons why they succeed while many foreclosure defense lawyers don't. Then take this knowledge and do battle with those on Wall Street who've made themselves rich while making Main Street house-poor. With a determination that rivals R Lee Ermey (in that classic opening scene in Full Metal Jacket) Gardner instills in his charges a veritable St. George's passion to slay the foreclosure dragons.

Max offered me his vision of the work and a response to the oft-heard criticism that homeowners fighting foreclosure are simply deadbeats who want a "free house."

Reporters and judges have often asked me this question and I answer that it is better that some mortgage bankers lose their rights to recovery than it would be for any homeowner to lose a home due to dishonest, mistaken, inaccurate or even fraudulent evidence. This is the only incentive that we have to keep the bankers and mortgage servicers honest in their court cases. Is this fair or just? Damn right it is!

Bruce Jacobs has taken skills honed at Boot Camp and used them in good measure in *HSBC v Buset,* where Miami Dade Circuit Court Judge, Beatrice Butchko, dismissed a foreclosure case against his client. Her decision is peppered with through-the looking-class legal sentiments when discussing the

servicer — Ocwen — and the evidence they brought to court. Selected sub-section headings: A *Specific Endorsement and Assignment of Mortgage that Both Reflect a Transaction that Never Happened.* In referencing the problem-ridden mortgage servicing platform that Ocwen relies on — known as REALServicing — Judge Butchko pens a heading that is unmistakable in its sarcasm: *The Legal Fiction That Ocwen's Loan Boarding Process In This Case Verifies the Accuracy, Reliability of Correctness of the Prior Servicer's Records.* Judge Butchko also found (as in *Riley*) that plaintiffs relied on false testimony to try and create evidence of standing and violated a court order that made their "unclean hands" obvious.

The Buset case is currently on appeal in Florida's Third District Court of Appeals and I'll leave it to Jacobs to offer some parting sentiments.

> *The Riley and Buset decisions were David v. Goliath battles that fell perfectly into place. I have faith that the Third District Court of Appeals will see the pattern in both the Riley and Buset decisions and decide now is the time to vindicate the integrity of the courts. The doctrine of unclean hands is not enough. Courts have inherent contempt powers to deal with parties to the National Mortgage Settlement who still disobey court orders, present false testimony, and rely on false evidence in equitable actions. It would be patriotic and greatly strengthen our democracy to impose sanctions that holds these most powerful banks accountable. Can I get an amen?*

Yes, Amen!

Joel Sucher is a co-founder of Pacific Street Films *(together with Steven Fischler) and has written for a number of platforms including* American Banker, In These Times, HuffPostand Observer.com. *Currently he's penning two memoirs: one based on his experiences arriving in the US via the* Displaced Persons Act; *the other on his nearly half-century in the world of documentary film.*