

AMERICAN PREDATORY LENDING AND THE GLOBAL FINANCIAL CRISIS

ORAL HISTORY PROJECT

Interview with

Judge Jennifer D. Bailey

Bass Connections

Duke University

2021

## PREFACE

The following Oral History is the result of a recorded interview with Judge Jennifer Bailey conducted by Jon Rosen on June 8, 2021. This interview is part of the Bass Connections American Predatory Lending and the Global Financial Crisis project.

Readers are asked to bear in mind that they are reading a transcript of spoken word, rather than written prose. The transcript has been reviewed and approved by the interviewee.

Transcriber: Jon Rosen                      Session: 1  
Interviewee: Jennifer D. Bailey      Location: Zoom  
Interviewer: Jon Rosen                      Date: June 8, 2021

Jon Rosen:                      I'm Jon Rosen, a student at Duke Law School and a member of the Bass Connections, American Predatory Lending and Global Financial Crisis team and it is Tuesday, June 8th, 2021. I am speaking with Judge Jennifer Bailey, the Administrative Judge for the Circuit Civil Division of the 11th Judicial Circuit of Florida, for an oral history interview. Judge Bailey joins me via Zoom. Thank you so much for joining me.

Judge Bailey :                      Thank you for inviting me.

Jon Rosen:                      I'd like to start by establishing a little bit about your background. I believe that you went to the University of Georgia for college and law school. Is that right?

Judge Bailey :                      I did. I went to the University of Georgia, both for undergrad and law school. And by way of relationship to this project, completed my L.L.M. in Judicial Studies at Duke in 2018.

Jon Rosen:                      And prior to joining the bench, did you work with any residents with residential mortgages in any way?

Judge Bailey :                      No. I was a product liability defense trial lawyer.

Jon Rosen:                      And when you were on the bench, what were the nature of the foreclosure cases that you saw pre-crisis and how did those kinds of cases change as caseloads started to really balloon?

Judge Bailey :                      I've been on the bench a long time, this is my thirtieth year. — [S]tate court judges typically rotate, as opposed to federal judges that stay in the same place and hear a blended docket. In large jurisdictions, state court judges tend to rotate between divisions. You might hear criminal cases for a couple of years, then Civil, then Family, et cetera. So I've sat in all the divisions. I had done a previous tour of duty in Civil and left Civil, I was trying to remember this for this interview, I think I left at the end of 2006, and I was supposed to do a three-year tour in Family, but for some procedural reasons, someone left [and] they need me to fill in. So I came back early,... sometime in 2008.

And when I left, work had been pretty routine. I live in Miami, that's where I work. It's one of the largest [judicial] circuits in the country. It's the fourth largest circuit, by accident of geography. We're just a really huge county of 2.5 million people. So when I left, everything was pretty normal. You had foreclosures, but they weren't by any means a noticeable or dominant aspect of your caseload. And I came back in 2008 and all of a sudden I'm going, "whoa wait a minute, there's more foreclosures, what's going on?" And they weren't bank foreclosures anymore, they were "trust" foreclosures. "What's the deal

with these securitized trusts?" So, as a conscientious judge, I started trying to figure out a little bit about what was going on. And at the time I was just one of a number of judges serving in Circuit Civil.

And my concern was, as was I think a huge concern for judges across the country during the crisis, [that] people in foreclosure cases, defendants, are not represented for most of circuit court. People have lawyers on both sides for car accidents, for medical malpractice products cases; most of what we see has lawyers on two sides. The cases that don't, tend to go by default, nobody even shows up. Those are like credit card collection cases and things. But in these foreclosure cases, we had people showing up, telling us really sad stories about trying to work with banks and so on and so forth. And this was not so much at the beginning, but it was starting to accumulate in [2008] and it began to worry me.

In particular, part of the reason why I was worried is because we don't have interpreters in civil court. We have a substantial Haitian American community, we obviously have a huge Spanish-speaking community and these people were showing up and I didn't have a very effective way to communicate with them, other than to ask a staff member to interpret on an ad hoc basis. The then Administrative Judge of Circuit Civil was a fine judge, but was retiring at the end of 2008. [He was] not really ready to engage on this at the end of 2009. So I started setting up my own systems in 2008 to try and assure that I would have somebody available to provide interpretation when I needed, on an ad hoc basis, not court-provided formal interpretation. And then just started trying to figure out what the law was that dealt with these securitized trusts and tried to figure out what the issues were. In the category of be careful what you wish for, I then became the Administrative Judge of our division of twenty-five judges, about sixty days after Lehman Brothers collapsed. So that was when it really became a challenge to communities across the country, not just ours. But Florida, we're one of the sand states - Arizona, Nevada, Florida - that got hammered with foreclosures.

Jon Rosen: Can you talk a little bit more about kind of the types of borrowers you were seeing as the crisis started to balloon? Were there any changes from what you had seen before in the normal run of foreclosure cases?

Judge Bailey : I think in the previous years, you would see people that — it was similar to bankruptcy court. There had been some kind of crisis that put them into this situation - a health crisis where they were swamped with medical bills, a situation where somebody had lost their job very suddenly - kind of the normal financial travails. You saw *The Big Short*? *The Big Short* was right. The change in what I was seeing was regular people who thought they were real estate investors and who had bought multiple properties on the assumption that the market could only go up and up and up. And who bought [homes] intending to flip them, with or without fixing them up, buying pre-construction condo contracts, soup to nuts, but it was people that were regular firefighters and teachers and regular business people who had become mini-real estate

investors. In addition, on an anecdotal basis, I felt like as the arc of the crisis progressed, we were seeing a significant impact in disadvantaged communities, due to the amount of subprime lending and the careless underwriting practices that informed that lending.

Jon Rosen: And as the cases really started to balloon in 2008, were you seeing specific lenders more than others in foreclosure proceedings that stood out?

Judge Bailey : It would be unfair to speculate, and they switched around. So OneWest was there for a while, GMAC was there for a while. — [A]nd you could not always tell who the lender was. Because the lender was — here's what happened in my humble view. And I've said this at appearances all over CLEs<sup>1</sup> over the past ten years. What happened was real estate got hot. And so people would go and look for a house and look for a house at the most that they could buy. And the mortgage broker would say, "Don't look at the price, look at the payments, and the payments are really affordable." And they were, the payments were very affordable. They were adjustable, they were going to inflate in fifteen minutes, but they were cheap and people weren't careful about the paperwork.

They were not careful about what they were signing. So many people came in and said, "Hey, the mortgage broker had me fill out an application and 'blank.'" And the law says, if you fill out an application and 'blank,' there's not a whole lot anybody can do to help you. You're responsible for whatever gets put on that form. And so what would happen is the mortgage broker would say, "Don't worry about it." And the mortgage broker wasn't worried about it because he was getting rid of that mortgage in fifteen minutes to somebody, an entity, who was then getting rid of it fifteen minutes later, who then was giving it to an aggregator, who is putting it in a securitized trust and ball-parking what tranche it was going to go into.

So nobody was taking any kind of significant [care]— and the appraiser was just saying, more or less, "what do you want it to appraise for?" I mean, the appraisers were just going higher and higher and higher. The underwriting was — I had a guy who bought a \$500,000 condo on Ocean Drive on Miami Beach, and his proof of income was him standing next to his ride-on lawn mower because he had a lawn service. And I think the income level was supposed to be \$7,500 a month. I mean, it was just absent because no one in the financial system was really taking into account. And the back end of it, once you got into the trust, was where you got into the defaults and the swaps. And then you get a crisis because nobody — there was no there, there.

Jon Rosen: As the caseloads really started to balloon, how did you evaluate the state of the plaintiff and defense bars in arguing these cases, at that time?

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<sup>1</sup> Continuing Legal Education Seminars.

Judge Bailey :

Well, first of all, you want me to tell you about how the cases ballooned, because numbers are always good, because I pulled this for you. So in 2006, which was kind of the last really normal year before all this started, we had about 37,000 cases pending in Miami-Dade County Circuit Civil Division, of which that year, about 9,500 foreclosures were filed. And I'll just give you an example of how it goes up. 2007, goes from 9,500 to 25,000. 2008, it goes from 25,000 to 56,000. 2009, it goes up to 63,000. By the end of 2009, from having a typical, pending caseload of about 36,000, we were at 121,000 pending cases, without a single additional judge. Every judge had gone from having around 2,000 cases to having 6,000 cases. The paperwork alone was burying us.

The cases began to decline in 2010, because that's really when, in my estimation, the OCC [Office of the Comptroller of the Currency] and the AGs [state attorneys general] got involved with the robo-signing and the servicing issues, consent decrees were reached, I think around this time, or maybe in 2011 - bottom line is the cases started going down. In 2010, there are only 36,000, only 36,000, which had been my entire caseload in 2006. And in 2011, only about 19,000 were filed. But still, we had this huge backlog we had to deal with. And you know, to the defense of the servicers - before this crisis, their job was to cash the check. They took the check, they matched it to the file and they cashed it. We took those people overnight and said, "We want you to become loss-mitigation experts." They did not have the infrastructure to deal with it, they did not have the systems to deal with it, they did not have the resources to deal with it.

And in addition, in the run-up and to feed the giant maw of the needs for mortgages to go into these securitized trusts and make the money to be made by aggregating, the paper that we rely upon to prove real property ownership and real property burdens wasn't moving with the note. The note was in a document depository in Houma, Louisiana or wherever, the first person to actually take control of the note after signing. And it would move around. You got into the whole Mortgage Electronic Registration Systems [MERS], which make sense from an idea of "Why move the stock certificates when you can just do the entries?" Well, except that, nobody was keeping track of who had what. And with notes, much like stock certificates, [if] you have it, you can pursue it. So who had the note became a huge issue.

And one of the practices that completely added to chaos was, there were very rigid rules established by the government backers, that said, "Okay, if the mortgage is x days old, [for example] 120 days in default, you've got to go ahead and file." So law firms were filing without an actual copy, without having the note in their hands. They'd use the loan file version of the note. Well, the loan file version of the note frequently didn't have the endorsements. So they'd file the complaint with an unendorsed note, permitting, going to your question about how [defense] lawyers performed defenses based on, "This is an unendorsed note. When did the endorsement appear?" The plaintiffs couldn't say because they didn't have the note at that time, it was at some document repository. So the defendants would delay the cases because these paperwork

issues. — Or they would file pro-forma lost note counts. Without even trying to find the note, they'd just file a lost note count in every case. So as a result, you're trying to figure out "Is the note not lost? Is the note not lost? Do you have to amend [the complaint] to eliminate the lost note count?" So trying to keep up with the paperwork, for conscientious judges who [were] trying to make sure that the entities who were foreclosing had standing to foreclose - it was complete chaos.

On top of that, you had these giant law firms that were operating on an assembly line fashion all over the country, and [they were] themselves doing servicing work on the side. The largest example in Florida, [and] in a number of states, was David Stern, who ultimately lost his license to practice law. But for a while there, he had a servicing business that was trading on one of the exchanges, making millions. Yet, his office was manufacturing assignments, with the blessings of the banks, to try and document the right to foreclose as these things were being filed, which is not how it's supposed to be done under the law.

The plaintiffs had, to your question about the law firms, had a huge volume of work and a poor history of documentary evidence as to what actually was going on, with the note and where it was at any given time. The defendants, defense lawyers, were problematic in their own right. Many of the defense lawyers would simply say, "Give me \$500 a month and I'll keep you in your house." Well, that's money that didn't go to a modification that could have gone to a modification. Frequently, people would spend thousands with lawyers, who were just taking this monthly amount, and then when we finally pushed their case forward, the lawyer withdrew because he wasn't getting paid anymore. And they were essentially left defenseless, not because there were so many defenses that could have been raised - they were not paying their mortgage. There weren't, in many cases, genuine defenses that applied in any individual case. There was a lot of gnashing of teeth about robo-signing and bad endorsements.

All of which I understand. But as a judge, once somebody is standing before me with the actual note endorsed in 'blank,' that doesn't really affect whether or not a party can foreclose. It may affect what rights I give you as a defendant - I may order [the plaintiffs] to post a bond to make sure that nobody else collects on this note because they had a specious lost note count, but you're probably going to get foreclosed upon.

The other thing that was really frustrating was — it would really benefit individuals to come to court, even if they didn't have a defense. If they came in and talked to the lawyers, frequently the lawyer would get them on the right track with a modification or get them on the right track with cash for keys, or get them on the right track with some kind of relief. Even if there was no relief, they'd at least give them an extended sale date.

And so many people missed those opportunities because they just gave up and did not come to court. And they needed to do that because they could not get through to the bank or the servicer or the law firm any other way. I'm sure you've heard this over and over again - there was no effective way to communicate. And so for much of the crisis, it was just ships passing in the night. I remember one couple, it was just heart-wrenching, they were young people who walked in the door of my courtroom. I call the case and they walked up and said, "Judge, we know we bought more house than we can afford and we can't make these payments and they are right to foreclose. And here's the keys, we can't figure out who to give them to. We will get out." I mean, that's just heartbreaking. So, good people who tried to take responsibility, even they couldn't figure out how to solve this problem on an ongoing basis, just to get it over with.

Jon Rosen: As the foreclosure crisis started, you developed a foreclosure manual, which eventually turned into a foreclosure bench book,<sup>2</sup> for judges to use during these foreclosure proceedings. Can you talk a little bit about that project?

Judge Bailey : It was hysterical because it went viral. This was before going viral was cool and it was all over the internet. And *pro se* [litigants], self-represented, would walk in all the time with the bench book. And great, good on them, I'm glad that it was useful to them.

So as I said, I come back [to Circuit Civil], and I'm thinking, "whoa, I have a lot more of these foreclosure cases than I used to." I used to not really give them a whole lot of thought because generally, nobody was really contesting them. [So] I need[ed] to look at this. And most of what was out there was just - it was too long, too big, too cumbersome. I needed a SparkNotes, the SparkNotes for foreclosure, because, when you're in court, you don't have time to be looking through *War and Peace* to figure out what you need to do.

And the lawyers, quite honestly, by and large, were not as prepared as one might otherwise wish. So I sat down with one of the staff attorneys from our circuit's General Counsel's office and we basically just started out. I think it started at like thirty-five pages that just said, "Here's a mortgage, here's what you do with MERS, here's what the note endorsement should look like - if it's weird like this, that's not a good thing." And just tried to go through the basic affirmative defenses, what the elements were, just very simple and very crisp. We didn't cite ten cases, we cited the one case that mattered most. And we kept it up. I think ultimately I turned it over to the Florida Office of Court Education and said, "you guys gotta do this. I can't do this anymore."

But we kept it up for about four years and as soon as we put out an iteration - there was a copyright on it, but [to litigants], "who cares, just use it and God go with you." People found it very useful and would cite it to me all the time. And

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<sup>2</sup> Bailey, Jennifer D., and Doris Bermudez-Goodrich. [Residential Foreclosure Bench Book](#), 2010.

I'm tremendously pleased that the self-represented folks found it useful. They didn't always agree with me, which was frustrating because generally what was in there was pretty black and white. Sometimes it was what they didn't want to hear, but at least they had some guidance to help them navigate through the court system. That was my fame because it made me popular with folks who were fighting the banks and I'm just happy to try and even the playing field. But my goal was to really just help out my colleagues to deal with this crush of cases.

Jon Rosen: With the *pro se litigants*, can you talk about your experience hearing those cases...?

Judge Bailey : So let me talk about overall how it worked and then we can go from there. You can't judge your way out of a backlog like this, not enough hours in the day. At the beginning of the crisis, for those of us that really check the paperwork, and there are judges with different philosophies about that, but I would always check the paperwork. I would make sure that the note was endorsed or there was a proper lost note affidavit, that everything was squared away. I'd check the address, because sometimes [plaintiffs] put the wrong note on the case. So you just checked everything to make sure it was in order. And so [plaintiffs] had to deliver a packet to me at the hearing and there was a list of what I wanted. I wanted to know everybody was served. I wanted to see the defaults. If they weren't defaulted, I wanted to see the service and the non-military affidavit and the proof of service. So that I knew everybody that was in there was supposed to be in there. If there were parties that they dropped, I wanted to see something dropping those parties. I wanted to see the affidavit of indebtedness and look at the math and make sure that it made sense. There were things that I would routinely knock off of the affidavits of indebtedness because they represented costs that should not be taxed against the borrower. One famous move that was very prevalent was [plaintiffs] would issue four summonses for unknown tenants in a house that was owner-occupied. Well, I'm not paying at 75 bucks a pop for unknown tenants that aren't in the house. No -- black line, black line, black line [through the summons] [eliminating the charge to the defendant for those costs, fictitious defendant service is not a recoverable cost..

But when these accrued in the thousands of thousands of cases, that's real money, so I'd go through that. So what we figured out really early on is, we'd set these cases for hearing and they're all one hearing cases. They're all just summary judgment cases, by and large. In 70% of the hearings, there was a problem with the paperwork. So it was a waste of time and the case had to be reset. Well, I have 121,000 pending civil cases. I don't have time to have wasted hearings. So we set up a system, a case management system, and I've been an advocate of case management throughout my entire career. And I wrote my thesis on it at Duke. And so we created a system of case management where we used some of the money that the Florida legislature was kind enough to give us,

some of the settlement money from the AG recovery,<sup>3</sup> for the robo-signing fiasco.

And we used that to hire case managers. We created a system by which everything had to be uploaded in advance. It was pre-screened by the case manager, the case manager wouldn't rule, but they would top sheet every file — and we were on paper at this time. So you can imagine files everywhere, but they would top sheet the file with, "Did the attorney's fee affidavit seem excessive? Are there cost items, such as service of process, that seem excessive? Was the note properly endorsed?" Anything that was a red flag, they would flag for the sitting judge. What the judge did with that or not was a matter of that judge's judicial philosophy and their satisfaction as to the proof. But the bottom line is there was not a case that went through there that I felt I could not pick up and explain to the *Miami Herald* or my grandmother, because that was my standard. If I couldn't explain what I did to the *Miami Herald* or my grandmother, we should not be doing it.

And so then we set the cases for hearing after they were screened so that the event would actually count and it would move the case forward. Either summary judgment would be granted, or summary judgment would be denied and we could set it for a bench trial and get it moving. That was one way we dealt with it.

The other way we dealt with the backlog was we couldn't force the plaintiffs to set summary judgment motions. And they had so many cases and they were buried too. So we just started setting them for trial. So to your question about what I did, I tried a lot of foreclosure cases. I don't even want to estimate how many thousands of foreclosure cases I tried, one bench trial at a time. Typically if nobody appeared, they would be brief. I'd look at the paperwork, make sure everything was in order. Sometimes the plaintiff would appear and they take longer. And you know what, that's their right. That's why I'm here. So we would just try the cases. And I would typically try the cases that were the most recalcitrant.<sup>4</sup>

Jon Rosen: And can you expand a little more on the role of summary judgment in these cases and trials?

Judge Bailey : Florida is a judicial foreclosure state, obviously. And typically these cases would move forward. There might be an answer filed with affirmative defenses, if we were lucky. If not, it was a default kind of scenario. But typically the plaintiff would either file a motion for default judgment or a motion for summary

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<sup>3</sup> [National Mortgage Settlement](#), 2012; Department 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](#)", 2012.

<sup>4</sup> And judgments varied, for the Plaintiff or the Defendant borrower, because at times the lender or servicer could not prove their case due to the paperwork issues or other failure to comply with prerequisites to foreclosure.

judgment. And typically they would file motions for summary judgment, was the practice in Florida.

Summary judgment is what it sounds like. It's - "I'm summarizing the evidence for you, Judge. And here's all the evidence, it's established in this affidavit. And [so], I win". They have to negate the affirmative defenses, so that it's clear that those do not prevent entry of judgment and they need to lay the groundwork. They need to show they have standing, they need to show that this is the date of default, that they sent the breach letter out, that they gave the proper notices with the breach letter, that they calculated the amounts in controversy, the amount of indebtedness accurately, [t]he claim for attorney's fees, [t]he affidavit supporting the claim for attorney's fees, [t]he affidavit of costs. All those things need to be in order. All of that, when you think about it, is under the control of the plaintiff. If they don't get busy and file it, there's nothing I can do to force them to file. We learned that early on.

In 2010, we ran the beta version of our case management program and plaintiffs would come in having done nothing, for months. And we'd say, "look, what are you going to do with this case?" They'd say, "give me thirty days to file a foreclosure summary judgment." We go, "okay, fine, thirty days." Thirty days came and went. They didn't file. We dismissed the case. — I got reversed for that. So we couldn't do that anymore. So instead we just shifted our practice to just setting them for trial.

And in fact, we just gave up waiting on them and just started things, set things for trial. And we'd set them for trial in sixty days, enough time for anybody to get whatever they needed to get. And — we'd set a lot at a time. We sometimes set fifty during the course of a day, but that's because [for] the vast majority of [trials], people would show up and they'd either work out some kind of extended sale date or they'd — show that they were in a modification or it would be a relatively quick trial because honestly there's not that many defenses to a foreclosure case where you haven't paid [and so many defendants had already been defaulted for failing to respond timely to the foreclosure complaint.]

Jon Rosen: You just mentioned how the Florida state legislature provided some funding to hire case managers to ease the backlog in cases. Can you talk a little more about how you evaluated the Florida state response to the foreclosure crisis?

Judge Bailey : I think Florida really tried. One resource that you might want to check out is the Florida Supreme Court Task Force on Residential Mortgage Foreclosure Cases,<sup>5</sup> which I chaired. We created an elaborate Managed Mediation Program.<sup>6</sup> We thought this was great because we had all these people who weren't able to talk

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<sup>5</sup> Florida Supreme Court, [Final Report and Recommendations on Residential Mortgage Foreclosure Cases](#), August 2009.

<sup>6</sup> Florida Supreme Court, [Administrative Order, In re: Final Report and Recommendations on Residential Mortgage Foreclosure Cases](#), December 2009.

to the bank. And we thought if we can get the bank and the borrower in the same place, we can determine what can be mediated and what can't. And we trained mediators and the borrowers didn't have to pay anything. And we said, "we're going to do this right at the beginning of the case, before the arrearages get so bad!"

It was a bust. I learned so much about behavioral economics from this project. And Florida really tried. I mean, we had piloted this in three circuits and it had been successful. We realized relatively early on the contact information that the banks had was frequently stale or bad. A lot of these people didn't live in these houses. We didn't know where to get in touch with them. We didn't know how to get in touch with them. A lot of the defense bar was whispering in people's ear saying, "Don't go into this program, work with me. I can keep you in your house for two years, if you pay me x dollars a month. You don't need to do this." And thirdly, I think it's just a behavioral economics 101. It's Richard Thaler that says none of us wants to deal with this stuff until it's the last bitter moment. So we tended to see far more modifications on the verge of a foreclosure sale on the courthouse steps versus at the inception of the case. So Florida really tried, that's the mediation side of it.

The second part of it is, Florida really created opportunities to employ case management and tried to deploy technology. The courts were really behind on tech. And so, [the state legislature] tried to use this opportunity with, again, some of the money from the [AGs] settlement to ramp up tech, so we could keep track of what was happening with these cases. The Florida Supreme Court had no way to know how many foreclosure cases were pending in the state of Florida. We didn't have a case count. That's how backwards we were on technology, because the technology for the court system in Florida is controlled by individual counties. And it wasn't that people weren't trying. It's just that none of the systems talk to each other. So I think Florida really worked hard to get a hold of this, in the middle of a financial industry crisis, where the entire market had fundamentally changed with the advent of securitized trusts and the wheeling and dealing that went on with the risk.

I don't know how you could have predicted that the market value of risk would become so distorted or so attenuated that nobody felt that they were actually holding the risk and therefore no one was actually looking at what was going on. Given the national and international character of the crisis, I thought Florida did pretty well. Miami — because we approached this with case management [and] didn't simply try to judge our way out, we were one of the earliest, if not the earliest, county out from under this. Basically by 2015, we were out the other side. We worked like crazy and everyone did. We had senior judges, we had case managers, we had the division judges. Everybody worked as hard as they could to get through these cases. They were affecting our communities, empty houses. The scene from *The Big Short*, with the alligator in the pool - that was a thing. That was real. We couldn't let wide swaths of Miami or wide swaths of Florida just sit vacant. So it was really important to preserving communities that

we manage this and get on top of it. So I think overall, Florida's heart was certainly in the right place and Florida did everything that we knew what to do.

I think the challenges were more [about] trying to get the industry to do what the industry needed to do than the courts. Because I think the courts tried to respond, not just on a legal basis, but on a humane basis with the mediation program. And really tried to give folks every opportunity and every bit of help they could to keep people living in their houses. And then with the investors, there was just not a lot you could do to help those folks. They just made some bad financial choices. They ended up holding the bag for the financial choices that a lot of other people had encouraged them to make. But you know, at the end of the day they made those choices.

Jon Rosen: On the industry side of things, looking back on it now, is there anything you think the Florida state legislature should have done to stem the tide of foreclosure cases?

Judge Bailey : —[T]he Florida legislature tightened up the foreclosure pleading rules and practice rules and civil rules to require — you had to establish at the outset, whether or not you had the note. You had to establish a chain of custody on the note. It became much more rigorous in terms of the pleading requirement - so that this craziness of the prophylactic lost note counts, the "who's on first" about where the note is and when the endorsement showed up - that all was resolved, statutorily, pretty crisply and for a legislative process pretty quickly. I mean, I think those went into place in [2015 or 2016], which I know seems really late, but for legislative change, that's like a world speed record. And so, by doing that, the Florida legislature sort of encapsulated some of the craziness and created a system going forth where we could have confidence in the record before us, and confidence in the real property records. I mean, you had to make sure who owned what.

Jon Rosen: And as you mentioned in April 2009, you were asked to chair the Task Force on Residential Mortgage Foreclosure Cases. Can you just talk about that project and your decision to chair it?

Judge Bailey : Well, somebody had to do something. — By that time, we'd done the bench book. And listen, judges don't love foreclosures. This is not like a great, meaty case that you want to try with really interesting issues. Having said that, and I'll come back to the ethics of foreclosure in a minute, but it's really important. I mean, it alters people's lives. And so that's what generated the bench book. I said, we all got to figure this out. And then once I wrote the bench book, I became the queen of a land no one wanted to be in. In other words, I became the queen of foreclosures because nobody wanted to be in that space. In much of my career, my advancement has been by virtue of doing the jobs that nobody else really wants to do, but are really important and somebody needs to do it.

And this was one of them. They needed a judge that had experience in the field. [And] because Miami is so big, we tend to be a mega-trend kind of jurisdiction.

We see the issues early and we see them bigger and quicker than other jurisdictions that are smaller. And so it just needed to be done. And there was a remarkable group of judges, mediators, lawyers that worked on this, we went out and we were on a really tight timeframe. I think —they put us up in January and the report was due in August. It was short because it takes some time to kind of get everybody on the same page. And we made it a point - we went out and tried to hear everybody we could hear from, with no money and no budget. So everything was conducted by phone because it was before Zoom. Zoom would have been so much better. We heard from the bankers, we heard from the law firms, plaintiffs and defense. We really tried to get as much information as we could about what everybody thought would work. And generated the report, recommended the managed mediation program, recommended case management and out it went.

Jon Rosen: And to expand on that a little bit, you mentioned that the project didn't have a very large budget. Can you talk about how that impacted the report and the eventual recommendations you were able to put out?

Judge Bailey : I don't think it, well, I think [it was] time more than anything else. Time and contacts, because everything in that world, there was a lot of trade secret-y kinds of things. Like how the servicers serviced and how they calculated the - there was a calculation and I can't remember the name for it, but there was a calculation that they use to decide whether or not to foreclose. That was secret sauce. All these things about how they serviced, when they serviced what they did - secret sauce. The approach that the plaintiffs took - secret sauce. The defense, etc. So everybody had secret sauce. Nobody wanted to be really transparent about what was going on. So you would have to just kind of ferret out what everybody's agenda was and what would seem to produce a good result.

Because everybody wanted the same thing. Everybody wanted to move the cases that needed to be moved. They wanted to modify the cases that deserved and needed modification, could support it. And they wanted to not destroy the housing market. All laudable and good goals. "Yes, we should do this, mom and apple pie!"

But, how to do it was a real challenge. Getting people to talk to us about the problems in that, was challenging. We did our best in a really tight timeframe. I think it was an excellent report for what we could do. I mean, the report itself notes, we didn't do a lot of public hearings. I considered a foreclosure docket kind of like a public hearing. I don't know how much people — people would have just come and talked to us about their really sad stories. And there were tragic stories out there, but I don't know that it would have made that much difference, in terms of getting the facts that we needed to decide about what we needed to do.

: What we did not capture in that report that subsequently became apparent, and what I think is a huge tragedy that came out of this, is within certain

communities there were community members that took advantage of other people and other people's trust. So there were individuals who were trusted within certain immigrant communities, that they would go to people who were in trouble would go to, and they'd be told, "Oh, it's okay. I'm going to help you." And some of these folks, and many of them ultimately were disbarred, would set themselves up as straw men and take the mortgage and take out these people's equity out of their homes. There was a lot of troubling behavior in connection with that, that I saw. That was not part of the report because that hadn't really manifested yet. That really manifested once the workouts really started to gather steam and because people would then go to these people for workouts and they just take their money and vanish. Or would take title to their property because the people that they were dealing with were not well-educated or informed. So that was troubling in that that was something we didn't have an opportunity to find out during the course of the report. But remember, our report was rendered by August of 2009. Literally, again, we started this within three months of Lehman Brothers collapsing and we rendered the report. But at that time, that was before the robo-signing, that was before all the crazy stuff really started to come out.

Jon Rosen: And I know the report mentions a recommendation to break up different types of foreclosure cases into different categories. Can you talk a little bit about the difference between those types of cases and you know, why it was necessary to break those up?

Judge Bailey : Well in the end, I don't know how much that really happened. That was a recommendation for differentiated case management, based on the types of potential programs that folks might qualify for. So obviously if it's a single family owner-occupied home, the programs for that were very different than if it was an investment rental property. And so the idea was, could we break these cases up according to what program and to match people with programs and to also determine how the cases were going to proceed? So if somebody had twenty cases because they have twenty investment properties - if they're in twenty different judges, they can [be saying to each judge], "I'm going to work this out. I'm going to work this out. I'm going to work this out." If it's down in front of one judge, the judge can say, "How are you going to work out twenty of them?" So trying to coordinate the cases in a way that would minimize exploitation of process and take advantage of opportunities of process was the end goal with trying to break those cases up. But in the end, I don't know how much that really happened. It was a recommendation, but I think people were more focused on just trying to get through the case load.

Jon Rosen: Can you talk a little bit about the role of case managers in working through the foreclosure docket?

Judge Bailey : Again, full disclosure - huge advocate of case management, not just in the foreclosure docket, but across the entire civil docket. So the role of case managers is this - think of it this way: judges are the most expensive and highest level of resource in the court system. They sit at the top of the pyramid. We cost

a lot of money. We're very highly trained and our services should be used for judging the judicial decisions that require application of the law and the discretion that goes with being a judge. The tasks of justice should be associated with the level of expertise needed to perform them, at the lowest possible level. So, for example, you don't need me to review a service return and see whether Joe was personally served with service or not. That's a binary decision, depending on which box was checked. You don't need a judge for that. In a perfect world, you'd use tech for that, but barring tech, that's kind of an administrative decision that somebody can just log a note. Now, I need to know that that person got served, so that I can make a decision about whether or not to enter a judgment against him, but I don't need to be screening for the service.

So the idea of case managers is to take basically four levels. You've got technology underlying it. Technology was still pretty rudimentary at that time. Some jurisdictions across the country had gone to e-filing, but most folks were still on paper. You can imagine, paper everywhere. The next level would be like administrative. So like at a court clerk level, is there a service, is there not service, kind of binary type decisions. Does all the paper have the proper affidavits, all been filed? Not whether they're good affidavits or bad affidavits, but, you know, are they all filed. Are they all signed? Are they all notarized? That kind of stuff. And then the third level, closest to the judge, is the skilled case management kind of level stuff. That's where you get into the questions that are blurrier. The affidavit is signed, but the affidavit's address is in Louisiana and the notary block is from Florida. How does that work? Or an affidavit of diligent search - "I rolled over in bed and they were not there" is not an affidavit of diligent search [to show] that you searched to see whether you could find somebody to serve them. So that's the level of work — that a case manager can do to support the judge. And not to make the decision, but to flag it for the judge. So the judge is not wasting their time on all this sort of review kind of material. You make sure that all the material the judge needs to make a decision is there present and ready for them when they engage with the case. That's fundamentally what case management is across the docket, for every kind of case, even in a really complex case, case management can target and move the case forward in ways that increase the momentum in the case, exponentially. Huge advocate. If you can't tell. It's important.

Jon Rosen: And in the system of case management, especially with these foreclosure cases, how did you go about balancing the need for case management to effectively get through these cases while ensuring that defendants still had their basic procedural rights protected?

Judge Bailey : Well, in many ways, this is what was protecting their basic procedural rights. Because in many cases, the defendants never appeared. And so a minute ago I told you I was going to come back to the ethical question. Foreclosures presented some of the most significant ethical questions I had as a judge. Because the truth of the matter is many people, by the time the lawsuits filed, they're just beat up. They just give up, they don't show up, they don't

participate, a default is entered against them. They have no hope. And so it's really easy for a judge to just say, "There's a default, here's all the affidavits, I can sign off on this."

What do you do in a case, that's not opposed, where the paperwork's not in order? There's nobody raising it as an affirmative defense.

So judges had to make that individual call about what they felt was right. And it's really easy to say, well, if it's not right, then you shouldn't sign it. But the truth of the matter is if this house is standing empty, nobody's taking care of it. It can be everything from a location that could develop crime and squatters and to a simple problem of lack of care and devaluing the properties around it. A lot of these were in HOAs, homeowners associations, those fees aren't getting paid. How long do I let that house sit there unpaid, because the plaintiff doesn't have their act together on their paperwork? That's one of the reasons why case management was so important because once they knew we were watching and looking, the plaintiffs got much better about their paperwork and the cases could move through.

So in many instances, it was that review that provided a standard because it was standard across all the judges in Miami-Dade, that this is what we're reviewing for. Whether you show up or not, this is what we're going to review for. What the judge does with it is their call. There were judges who, as a matter of judicial philosophy, felt that if the party did not appear in the case, it wasn't their job to look for standing issues or amounts that were inappropriately being asked for, because they didn't come into assert those. I can't say those judges are wrong. I can say I have a different judicial philosophy than that. Again, going back to - if I can't explain it to my grandmother or the *Miami Herald*, I am not doing it. So that's where I drew my ethical line. But they were really difficult cases in terms of trying to figure out what to do, when nobody's shown up to defend the case and there's an alligator in the swimming pool! That never really happened to me, but it was a great scene from *The Big Short*. It did happen in other jurisdictions.

Jon Rosen: Can you talk a little bit about the role of robo-signing that you saw plaintiffs firms engaging in?

Judge Bailey : Well, — what I know about it is what everybody knows about it, which is that, in an effort to move these cases quickly, because of the problems with the paperwork, they were just stamping endorsements and stamping signatures without actually being in the presence of a notary or even really signing them. And that created huge issues. The problem — the way the problem with robo-signing came into our courts is somebody would have a robo-signed affidavit by a known robo-signer. Like [a robo-signer] in the report, I can't remember whether it's an AG report, joint AG report, or an OCC report, but we all knew who the robo-signers were. They were deposed. In other cases, people would walk in with the [robo-signers'] depositions because, just like they got the bench book, they got all the depositions.

I mean, the internet is a marvelous thing. But I did have to be looking at them and say, "But look, where's the fraud in your case? They've got the original note. I know that this lady, whose name I'm not going to say here, but I know it like the back of my hand, signed this and I know that she's mentioned in the Report is a robo-signer, but at the end of the day, I've got Bank of America foreclosing on you and Bank of America here, and Bank America is holding the note. Now I can make sure that nobody else claims against you on this note. I can put a bond." Typically I wouldn't do a bond, I'd order indemnification of any other claim. "But you're not here to tell me you paid and you're not even telling me that they misapplied money." Because I heard that people could be in modifications and the proceeds that they paid during the modification, they'd fall out of it, it could be misapplied. There are a lot of math and word problems in the foreclosure crisis, but at the end of the day, it would just create a situation where people would lose faith in the system. Because [the defendants] say, "How can you foreclose on me when this note is robo-signed?" And I'd say, "It's an endorsement and 'blank.' It's the holder of the note has [the] note, and you made payments to Bank of America for three years. It's not like you're telling me, 'I've never heard of these people.' You were dealing with these people. They were the right people. This is unfortunate, but it doesn't really rise to the kind of evidence of fraud that would obviate their right to foreclose against you."

That was hard for people to comprehend. And it was hard to stomach because you don't want to reward that kind of casual disregard for the rigors of appropriate UCC and real property documentation. But again, at the end of the day, you're trying to figure out the right thing to do for your community in all these cases. And as long as there was a genuine proof that the defendant owed the money, the defendant owed the money to this entity and that they were in default, hopefully had been given an opportunity to cure it, but were unable to do it. At some point in time, we have to give the relief to which parties are entitled. And that was another thing. People forget banks, they did lend money. Like there was real money that went out the door. And at the end of the day, there's people on the other end of banks as well. That's how the financial system operates.

Jon Rosen: As you mentioned before, Florida had some of the higher foreclosure rates in the country. I just wanted to get your perspective on why you think the foreclosure problem was more pronounced in Florida?

Judge Bailey : Florida builds. A huge economic driver is the housing market in Florida, we build stuff. We build over things. Not always happy about that, but that's what we do. I don't know why it was bigger here other than - that's a really good question. I don't know. I really don't know because there are other, I mean, there's concentrated communities with opportunities for fraud because we have a lot of recent immigrants. [But] that's true in other places. It was just very visible in the judicial sand states. It was really visible in ways that it might've been less visible in states that had an administrative foreclosure process. I can't say, but, it was something.

Jon Rosen: — In 2013, the Florida Foreclosure Initiative Working Group released recommendations to deal with the backlog in cases later on. How did you see those recommendations and their effectiveness?

Judge Bailey : ...I thought the response by recommending the use of technology, case management and the managed mediation program, to the extent that it was still up at that time was a robust response. It was a responsible response, that recognized that both parties have rights and obligations here. And we needed to try to be evenhanded while giving people every opportunity to work out what they could work out. And yet at the same time, try to avoid process exploitation.

Jon Rosen: More broadly, over the last decade, we've seen a number of different narratives as to what caused the financial crisis. How do you understand what caused the crisis?

Judge Bailey : Nobody took the risk. Everybody just passed the buck. So the homeowners were looking at beautiful houses that they were going to buy to live in or invest in and thought, "Oh, this is good." Because the mortgage broker was saying, "Don't look at the cost. Don't look at the price of the house. Look at the cost of the payments. You can manage these payments." And they were saying, "Yeah, I could," without really reading the paperwork and understanding that the payments were subject to increas[e]. They assumed that the property values were going to continue to go up. The appraisers were appraising to match to the value of whatever was being lent, irrespective of whether it looked like it was sustainable. I mean, how many people can afford a \$700,000, two bedroom, one bath starter home? I don't think so. And then the mortgage brokers would flip it the minute they could to an aggregator, the aggregator would just throw them all together and bundle them into a securitized mortgage. Securitized mortgage didn't care what went in there because they were selling bits and pieces and tranches to everybody left and right.

And everybody just thought "It's mortgages. What could go wrong?" The risk became so dissipated and then people were betting for and against the risk, that the fundamental assumptions of market capitalism, that you're going to search out the value and evaluate the risks associated with the delivery of that value just completely evaporated. And you got what you got.

Jon Rosen: And just looking back on the crisis, what do you see as the most important lessons for state-level policy makers?

Judge Bailey : Well, for courts, I think the most important lesson is when we face surges like this, you've got to really employ case management to deal with them. It's, it's really impossible to judge your way out. There were circuits that did it, but they did it and a long and drawn out and laborious, burdensome set of tasks. Then with regard to overall policy and what it meant for communities. — I testified in front of either a house or senate committee for the Florida legislature, because what I was worried about in many respects is what happened. What saved Miami's economy was out-of-town, frequently out-of-country, investors coming

in and snapping up the property. And in many respects, we lost a significant proportion, I believe, and this is anecdotal, so you'd have to look this up a significant proportion of home ownership.

And so we are a community of properties who pay property taxes, who are owned by non-residents. That's not a good thing. That's not a good thing — that breeds investment based on return and not on community. And so there are some costs to that. In addition, I think the ability of folks who are starting out to acquire a single family home still remains substantially constrained. At some level we're right back where we were. I mean, the housing market in Miami right now is completely insane. People are, multiple bids on a house that goes to market, multiple cash buyers. A lot of it is people who are out-of-town. So the, the risks to the character and democratic, civic relationship of a community, little "d" democratic, civil relationship of a community, I think was fundamentally marginalized as a result of the financial crisis. And to some extent, at least in my community, remains significantly marginal. We are a community where the people that live here don't own their homes, by and large, I think.

Jon Rosen: And we're nearing the end of the interview. Is there anything else that I didn't ask about that you'd like to talk about?

Judge Bailey : No, I think, I think the only other thing I'd like to say is the unsung heroes are — there are administrative people that assist in running the courts. People tend to think that it's just the judges. The case managers, the people that ran the case managers, the people that connected the case manager's computers and kept them running, the senior judges that came out of retirement to help. I mean, all these folks contributed as well. It truly took an army to get Florida out of this and onto the other side. People that joined the effort at mediation, even though it wasn't as successful as we hoped, it did have some success, people stood up for that. People stood up to become guardians *ad litem* for missing homeowners. It took an army of effort to move this caseload.

I think it's really easy to talk to judges. We're at the top of the pyramid, but there are number of layers that contribute to a successful court system. And those folks were every bit as important. And the leadership that came out of the Florida Supreme Court, I think really did their level best with an extraordinarily difficult situation in connection with this crisis. So I just offer that up. I hope, I hope we come back to a time where housing is more affordable. And I think the lack of affordability really began with the financial crisis and has continued to occur.

Jon Rosen: Thank you so much for your time, Judge Bailey. I really enjoyed speaking with you.

[END OF SESSION]