

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/CS/HB 213 Mortgage Foreclosures

**SPONSOR(S):** Judiciary Committee; Civil Justice Subcommittee; Passidomo; Steube and others

**TIED BILLS:** None **IDEN./SIM. BILLS:** CS/CS/SB 1890

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	13 Y, 1 N, As CS	Cary	Bond
2) Economic Affairs Committee	12 Y, 4 N	Barnum	Tinker
3) Judiciary Committee	14 Y, 2 N, As CS	Cary	Havlicak

### SUMMARY ANALYSIS

The foreclosure crisis has impacted Florida's economy and negatively affected the judicial branch, in terms of both funding and caseload. Foreclosing on a mortgage in Florida is a long process. The average length of time between the first foreclosure filing and bank repossession is 676 days while the national average is 318 days. Due in part to constitutional and statutory requirements to provide speedy trials to criminal defendants, civil filings take the brunt of any caseload backlog. Furthermore, the caseload backlog is not spread evenly across the state. Certain circuits, particularly those located in South Florida, have a much greater percentage of loans in foreclosure than other circuits.

The foreclosure procedure is governed by statutory process and the rules of civil procedure. Most mortgages contain an 'acceleration clause,' which gives the mortgagee the authority to declare the entire mortgage obligation due and payable immediately upon default. If the borrower is not able to pay the entire mortgage obligation upon proper notice, the holder of the note or its servicing agent may begin the foreclosure process in a court of proper jurisdiction.

Current law provides for an alternative procedure that is designed to speed up the foreclosure process in uncontested or meritless cases. If the property is not residential real estate, the plaintiff may request a court order directing the defendant to show cause why an order to make payments during the pendency of the proceedings or an order to vacate the premises should not be entered.

As to foreclosure of real property, the bill:

- Reduces the statute of limitations for deficiency judgments on a foreclosure action from five years to one year.
- Amends the expedited foreclosure process to allow all lienholders to use the procedures, instead of just the mortgagee; reduces the number of hearings from 2 to 1; and prohibits service by publication when using the expedited process, unless the property is abandoned.
- Requires the plaintiff in a foreclosure action to provide information to the court upon filing of the case regarding lost, destroyed or stolen promissory notes.
- Allows any party to request a case management conference to expedite the lawsuit.

The bill applies to existing mortgages and to pending cases.

The bill does not appear to have a fiscal impact on state or local governments.

The bill provides an effective date of upon becoming a law, however, the amendments to s. 702.10 F.S., and the creation of s. 702.11, F.S., are remedial in nature and apply to causes of action pending on the effective date of the act, while s. 702.015, F.S., applies to cases filed on or after July 1, 2012.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h0213d.JDC

DATE: 2/23/2012

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Background**

The foreclosure crisis has greatly impacted the economy of the state of Florida. It has also negatively affected the judicial branch, in terms of both funding and caseload.

Foreclosing on a mortgage in Florida is an unusually long process. Florida trails only New York and New Jersey in terms of the length of time between the first foreclosure filing and bank repossession, at 676 days. The national average is less than half that, at 318 days.<sup>1</sup>

Courts are struggling with a backlog of foreclosure cases, which courts were not prepared for. In 2005, before the housing market crash, there were only 57,106 foreclosure filings statewide. By 2009, the number of filings exploded to 399,118. Courts did not have the resources to quickly and efficiently deal with this litigation explosion. Due to constitutional and statutory requirements to provide speedy trials to criminal defendants, civil filings take the brunt of any caseload backlog.<sup>2</sup> There has been a significant recent decline in filings due to problems with title and the robo-signing situation<sup>3</sup>, with only 123,793 filings through November, 2011, but filings are expected to increase as those issues are worked out by mortgage servicers.<sup>4</sup>

Furthermore, the caseload backlog is not spread evenly across the state. Certain circuits, particularly those located in South Florida, have a much greater percentage of loans in foreclosure than other circuits. At the county level, Miami-Dade has 18.88% of loans in foreclosure compared to only 4.15% in Jefferson County. Put another way, the number of housing units in foreclosure varies from a low of 1 in 5282 to a high of 1 in 148.<sup>5</sup>

##### Foreclosure Procedure

The foreclosure procedure is governed by statutory process and the rules of civil procedure. It is initiated by the lender or servicer, known as a mortgagee, when the borrower, or mortgagor, fails to perform the terms of his or her mortgage, usually by defaulting on payments. Most mortgages contain an 'acceleration clause,' which gives the mortgagee the authority to declare the entire mortgage obligation due and payable immediately upon default. If the borrower is not able to pay the entire mortgage obligation upon proper notice, the holder of the note or its servicing agent may begin the foreclosure process in a court of proper jurisdiction. The following is a brief outline of the judicial foreclosure process, with the caveat that litigation is driven by the parties, so the process may be slightly different from case to case:

- Upon proper notice of default to the defendant, the mortgage servicer files a foreclosure complaint<sup>6</sup>, which must allege that the plaintiff is the present owner and holder of the note and mortgage<sup>7</sup>, contain a copy of the note and mortgage<sup>8</sup>, and allege a statement of default,<sup>9</sup> along

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<sup>1</sup> RealtyTrac, 2nd Quarter, 2011 data, on file with Judiciary Committee.

<sup>2</sup> Florida Office of the State Courts Administrator, *Summary Reporting System (SRS)*, August 19, 2011.

<sup>3</sup> Susan Miller, *RealtyTrac: Robo-signing Scandal Cuts into 2010 Foreclosures*, South Florida Business Journal, January 13, 2011. <http://www.bizjournals.com/southflorida/news/2011/01/13/realtytrac-robot-signing-scandal-cuts.html> (last viewed January 23, 2012).

<sup>4</sup> Michael Braga, *Going Up: Filings to Foreclose*, Sarasota Herald-Tribune, January 12, 2012.

<http://www.heraldtribune.com/article/20120112/ARCHIVES/201121043/-1/todayspaper?p=all&tc=pgall> (last viewed January 23, 2012).

<sup>5</sup> The Florida Legislature, Office of Economic and Demographic Research, *Florida: An Overview of Foreclosures*, September 20, 2011.

<sup>6</sup> Rule 1.944, Fla. R. Civ. P.

<sup>7</sup> *Edason v. Cent. Farmers Trust Co.*, 129 So. 698, 700 (Fla. 1930).

<sup>8</sup> Rule 1.130(a), Fla. R. Civ. P.

<sup>9</sup> *Siahpoosh v. Nor Props.*, 666 So.2d 988, 989 (Fla. 4th DCA 1996).

with a filing fee<sup>10</sup> and a *lis pendens*, which serves to cut off the rights of any person whose interest arises after filing.<sup>11</sup>

- Service of process must be made on defendants within 120 days after the filing of the initial pleadings.<sup>12</sup>
- If a defendant has not filed an answer or another paper indicating an intent to respond to the suit, then the plaintiff is entitled to an entry of default against the defendant.<sup>13</sup>
- If an answer is filed (thus negating the possibility of a default judgment), the plaintiff may then file for a motion of summary judgment or proceed to trial, however the vast majority of plaintiffs file a motion for summary judgment.<sup>14</sup>
- Following the proper motions, answers, affidavits, and other evidence being filed with the court, the judge holds a summary judgment hearing and if he or she finds in the favor of the plaintiff, renders a final judgment.<sup>15</sup>
- If summary judgment is denied, the foreclosure proceeds to a trial without a jury.<sup>16</sup>
- The court schedules a judicial sale of the property not less than 20 days, but no more than 35 days after the judgment if the plaintiff prevails at summary judgment or trial.<sup>17</sup>
- A notice of sale must be published once a week, for 2 consecutive weeks, in a publication of general circulation, where the second publication must be at least five days prior to the sale.<sup>18</sup>
- The winning bid at a public judicial sale is conclusively presumed to be sufficient consideration for the sale.<sup>19</sup>
- Parties have 10 days to file a verified objection to the amount of the bid or the sale procedure.<sup>20</sup>
- After 10 days, the sale is confirmed by the clerk's issuance of the certificate of title to the purchaser, sale proceeds are disbursed in accordance with the statutory procedure<sup>21</sup>, and the court may, in its discretion, enter a deficiency decree in the amount of the fair market value of the security received and the amount of the debt.<sup>22</sup>

### Alternative Foreclosure Procedure

Section 702.10, F.S., creates an alternative procedure that is designed to speed up the foreclosure process in uncontested or meritless cases. The following is a brief outline of this alternative foreclosure process:

- After a complaint has been filed, the plaintiff may request an order to show cause for the entry of final judgment and the court must immediately review the complaint.<sup>23</sup>
- If the court finds that the complaint is verified, and alleges a proper cause of action, the court must issue an order directing the defending the show cause why a final judgment should not be entered.<sup>24</sup>
- The order must set a date and time for the hearing, not sooner than 20 days after the service of the order, or 30 days if service is obtained by publication, and no later than 60 days after the date of service.<sup>25</sup>

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<sup>10</sup> The filing fee for foreclosure actions depends on the value of the claim. When the claim is for \$50,000 or less, the fee is \$395; when the claim is over \$50,000 but less than \$250,000, the fee is \$900; and when the claim is \$250,000 or more, the fee is \$1900, according to s. 28.241(1)(d), F.S.

<sup>11</sup> Section 48.23, F.S.

<sup>12</sup> Rule 1.070(j), Fla. R. Civ. P. *See also* chs. 48 and 49, F.S.

<sup>13</sup> Rule 1.040(a)(1), Fla. R. Civ. P.

<sup>14</sup> Rule 1.1510(a), Fla. R. Civ. P.

<sup>15</sup> Section 45.031, F.S.

<sup>16</sup> Section 702.01, F.S.

<sup>17</sup> Section 45.031(1)(a), F.S.

<sup>18</sup> Section 45.031, F.S.

<sup>19</sup> Section 45.031(8), F.S.

<sup>20</sup> Section 45.031(8), F.S.

<sup>21</sup> Section 45.031, F.S.

<sup>22</sup> Section 702.06, F.S.

<sup>23</sup> Section 702.10(1), F.S.

<sup>24</sup> *Id.* While this appears to create a right to the order to show cause, many courts interpret this subsection to require an initial hearing.

<sup>25</sup> Section 702.10(1)(a), F.S.

- The defendant can file defenses by a motion or by sworn or verified answer or appear at the hearing, which prevents entry of a final judgment.<sup>26</sup>
- The court need not hold a hearing for determination of reasonable attorney fees if the requested fees do not exceed 3% of the principal owed on the note at the time of filing.<sup>27</sup>
- The court may enter a final judgment if the defendant has waived the right to be heard or has not shown cause not to enter a final judgment.<sup>28</sup>

Additionally, if the property is not residential real estate, the plaintiff may request a court order directing the defendant to show cause why an order to make payments during the pendency of the proceedings or an order to vacate the premises should not be entered.<sup>29</sup>

- The order must set a date and time for the hearing, not sooner than 20 days after the service of the order, or 30 days if service is obtained by publication.<sup>30</sup>
- The defendant can file defenses by a motion or by sworn or verified answer or appear at the hearing, which prevents entry of a final judgment.<sup>31</sup>
- The court may enter an order requiring payment or an order to vacate if the defendant has waived the right to be heard.<sup>32</sup>
- If the court finds that the defendant has not waived the right to be heard, after reviewing affidavits and evidence, the court can determine if the plaintiff is likely to prevail in the foreclosure action, and enter an order requiring the defendant to make the payments or provide another remedy.<sup>33</sup>
- The court order must be stayed pending final adjudication of the claims if the defendant posts bond with the court in the amount equal to the unpaid balance of the mortgage.<sup>34</sup>

## Effect of the Bill

### Statute of Limitations on Deficiency Judgment

Under current law, a lender has 5 years from the foreclosure sale to file a deficiency action.<sup>35</sup> This bill amends s. 95.11, F.S., to provide a one-year statute of limitations for an action to enforce a claim of a deficiency related to a note secured by a mortgage against residential property that is a one-family to four-family dwelling unit. The limitations period begins on the 11th day after a foreclosure sale or the day after the mortgagee accepts a deed in lieu of foreclosure.

This bill amends s. 702.06, F.S., to limit a deficiency decree to the difference between the judgment amount, or in the case of a short sale, the outstanding debt, and the fair market value of the property on the date of sale. The bill also eliminates the common law recovery of such a deficiency when the court in the foreclosure action grants or denies a claim for a deficiency judgment.

### Lost, Destroyed or Stolen Notes

The bill creates s. 702.015, F.S., providing that every complaint in a foreclosure proceeding on residential real property designed principally for one to four families must contain affirmative allegations expressly made by the plaintiff that the plaintiff is the holder of the original note or must allege with specificity the factual basis by which the plaintiff is a person entitled to enforce the note. If the plaintiff is

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<sup>26</sup> Section 702.10(1)(b), F.S.

<sup>27</sup> Section 702.10(1)(c), F.S.

<sup>28</sup> Section 702.10(1)(d), F.S.

<sup>29</sup> Section 702.10(2), F.S.

<sup>30</sup> Section 702.10(2)(a), F.S.

<sup>31</sup> Section 702.10(2)(b), F.S.

<sup>32</sup> Section 702.10(2)(c), F.S.

<sup>33</sup> Section 702.10(2)(d), F.S.

<sup>34</sup> *Id.*

<sup>35</sup> Section 95.11(2), F.S.

not the holder of the note, the complaint must describe the authority of the plaintiff and identify the document that grants the plaintiff to file the complaint on behalf of the holder of the note.

The plaintiff must file either the original promissory note or certification that the plaintiff is in physical possession of the original note, unless it is lost, destroyed or stolen. In such a case, the complaint must contain an affidavit that details a clear chain of all assignments, sets forth facts showing the plaintiff is entitled to enforce the note, and includes exhibits providing evidence of the acquisition, ownership and possession of the note.

Failure by the plaintiff to comply with this section may result in a court sanction, but does not affect the validity of a foreclosure sale or title to real property subsequent to the foreclosure sale.

### Alternative Foreclosure Procedure

The bill amends s. 702.10, F.S., the alternative foreclosure procedure, with the following changes:

- Any lienholder, not just the mortgagee, may initiate the procedure.
- Upon filing, the court must immediately review the request and the court filing in chambers without a hearing.
- If the court finds that the complaint is verified, complies with s. 702.015, F.S., and alleges a cause of action, the court must promptly issue an order to show cause why a final judgment should not be entered.
- The date for the hearing may not occur sooner than the later of 20 days after service of the order or 45 days after the service of the initial complaint, or no sooner than 55 days after the first publication if service is obtained by publication.
- Provides that the order to show cause must state that if a defendant files defenses, the hearing time will be used to hear and consider the defendant's motion and arguments, and that the order must state that the court may enter an order of final judgment of foreclosure at the hearing, and if such a determination is entered, the court must enter a final judgment ordering the clerk of the court to conduct a foreclosure sale.
- Allows the court to enter a final judgment of foreclosure without the need for further hearing if the plaintiff is entitled to a final judgment and upon filing of the original note or satisfaction of the conditions for establishing a lost note or upon a showing that the obligation to be foreclosed is not evidenced by a promissory note or other negotiable instrument.
- Provides legislative intent that the alternative procedure may run simultaneously with other court procedures.
- Provides a rebuttable presumption that a homestead property is an owner-occupied residential property.

The bill also requests that the Supreme Court amend the Rules of Civil Procedure to provide for expedited foreclosure proceedings and related forms in conformity with s. 702.10, F.S.

### Expedited Foreclosure of Abandoned Residential Property

The bill creates s. 702.11, F.S., providing for expedited foreclosure of abandoned residential real property. Residential real property is deemed to be abandoned if a process server has made three attempts to locate the occupant and two certain conditions exist. The three attempts must be at least 72 hours apart, and during three different times of the day (before noon, between noon and 6 P.M., and between 6 P.M. and 10 P.M.). Each attempt must include physical knocking on the door or ringing of the doorbell, along with other efforts that are normally sufficient to obtain a response from an occupant. Two of the following conditions must exist for the property to be deemed abandoned:

- Windows or entrances to the premises are boarded up or multiple window panes are broken and unrepaired;
- Doors are smashed through, broken off, unhinged, or continuously unlocked;
- Trash or debris has accumulated on the premises;

- The premises are deteriorating and are below or in imminent danger of falling below minimum community standards for public safety and sanitation;
- If the premises are part of a condominium or a homeowners' association, the manager or other representative has confirmed that assessments for the unit are at least 90 days delinquent; and
- Interviews with at least two neighbors indicate that the residence has been abandoned.

The sheriff or process server may provide evidence of the condition of the property to the court.

Any party to the foreclosure of apparently-abandoned property may file a petition seeking to determine the status of the property in order to invoke an expedited foreclosure proceeding. Upon request of the petitioner, the court must issue subpoenas to the utility companies serving the property compelling disclosure of the status of utility service, including whether utilities are turned off and whether outstanding payments have been made. If the court determines the property is abandoned, the plaintiff may use the expedited foreclosure procedures of s. 702.10, F.S., with notice by publication.

## B. SECTION DIRECTORY:

Section 1 amends s. 95.11, F.S., relating to statutes of limitations.

Section 2 provides dates of application for section 1 of the bill.

Section 3 creates s. 702.015, F.S., relating to elements of complaint; lost, destroyed or stolen note affidavit.

Section 4 amends s. 702.06, F.S., relating to deficiency decree; common-law suit to recover deficiency.

Section 5 amends s. 702.10, F.S., relating to expedited foreclosure procedures.

Section 6 creates s. 702.11, F.S., relating to expedited foreclosure of abandoned residential real property.

Section 7 provides dates of application for section 3, 5, and 6 of the bill.

Section 8 provides legislative findings that the provisions of the bill are remedial in nature.

Section 9 provides an effective date of upon becoming a law.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

The bill does not appear to have any impact on state revenues.

#### 2. Expenditures:

The bill does not appear to have any impact on state expenditures.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

#### 1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any direct economic impact on the private sector.

D. FISCAL COMMENTS:

None.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does appear to create a need for rulemaking. The bill requests that the Supreme Court amend the Rules of Civil Procedure to provide for expedited foreclosure proceedings and related forms in conformity to s. 702.10, F.S.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On January 25, 2012, the Civil Justice Subcommittee adopted one amendment to a proposed committee substitute and reported the bill favorably as a committee substitute. The amendment provides for revised dates of application for the bill, making the provision relating to abandoned residential property effective for pending causes of action. The committee substitute differs from the filed bill:

- Changed the provision shortening the statute of limitations for collection of deficiency judgments to 2 years.
- Allows any lienholder to use the alternative foreclosure procedure.
- Provides procedures for foreclosure of abandoned residential real property.
- Removed provisions regarding cancellation of mortgage.
- Removed provisions regarding special foreclosure notices.
- Removed provisions regarding the finality of foreclosure sales.
- Removed requirement to notify the court of extensions.
- Removed provision for transfer of property to foreclosing lender without sale if foreclosure is uncontested.
- Removed changes to law regarding lost, destroyed or stolen promissory notes.
- Removed provisions for sanctions for filing frivolous claims.

On February 22, 2012, the Judiciary Committee adopted one strike-all amendment and reported the bill favorably as a committee substitute. The amendment limits the availability of deficiency judgments in some circumstances and reduces the statute of limitations to file for a deficiency judgment to one year. The

amendment also creates a rebuttable presumption that a residential property for which a homestead exemption has been granted is an owner-occupied residential property. The amendment adds a criteria for finding a property abandoned for condominium units. The amendment removes the section respecting case management conferences. The amendment makes other minor and stylistic changes throughout the bill.

This analysis is drafted to the committee substitute as passed by the Judiciary Committee.