

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: The Professional Staff of the Committee on Judiciary

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BILL: SB 904

INTRODUCER: Senator Powell

SUBJECT: Lis Pendens

DATE: January 29, 2018

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cibula	Cibula	JU	<b>Pre-meeting</b>
2.	_____	_____	CM	_____
3.	_____	_____	RC	_____

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**I. Summary:**

SB 904 clarifies a statute describing how long a notice of lis pendens precludes the attachment of liens or other interests on a property that is sold in a judicial sale. As clarified by the bill, a notice of lis pendens precludes the attachment of liens or other interests on the property until the instrument transferring title to the property is recorded.

The bill is a response to a recent appellate court opinion interpreting the lis pendens statute. Due to its particular wording, the opinion could be read to allow liens to be enforced against a foreclosed property during the gap between the date that the property is sold at a judicial sale and the date that the instrument transferring title is recorded.

**II. Present Situation:**

A notice of lis pendens,<sup>1</sup> upon recording in the official records of the county, provides notice that a property is the subject of litigation. The notice essentially warns parties who are not involved in the litigation, such as subsequent purchasers or encumbrancers, that any interest they acquire in the property while the litigation is pending may be adversely affected by the outcome of the case.<sup>2</sup> In other words, the notice of lis pendens helps potential purchasers or encumbrancers of a property avoid becoming embroiled in the dispute and protects the plaintiff from intervening liens and interests that would impair any property rights claimed.<sup>3</sup>

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<sup>1</sup> “Lis pendens” is Latin for a pending lawsuit. BLACK’S LAW DICTIONARY (10th ed. 2014).

<sup>2</sup> *Chiusolo v. Kennedy*, 614 So. 2d 491, 492 (Fla. 1993).

<sup>3</sup> *Id.* (Thus, lis pendens exists at least in part to prevent third-party purchasers from “buying” a lawsuit when they purchase the property.) *Id.* at n. 1.

## The Lis Pendens Statute

The current statutory scheme regulating the procedural requirements and effect of notices of lis pendens had its origins in common law. As modified by statute, “[a]n action in any of the state or federal courts in this state operates as a lis pendens on any real or personal property involved therein or to be affected thereby only if a notice of lis pendens is recorded in the official records of the county where the property is located.”<sup>4</sup>

The following information must be contained in a notice of lis pendens:

- The names of the parties to the lawsuit.
- The date that the lawsuit was filed, the date of the clerk’s electronic receipt, or the case number of the lawsuit.
- The name of the court in which the suit is pending.
- A description of the property involved or to be affected.
- A statement of the relief sought as to the property.<sup>5</sup>

Once a lis pendens is filed, a holder of an unrecorded interest or lien who fails to timely intervene in the proceedings may lose the right to those interests as described below:

[T]he recording of such notice of lis pendens . . . constitutes a bar to the enforcement against the property described in the notice of all interests and liens, including, but not limited to, federal tax liens and levies, unrecorded at the time of recording the notice unless the holder of any such unrecorded interest or lien intervenes in such proceedings within 30 days after the recording of the notice. If the holder of any such unrecorded interest or lien does not intervene in the proceedings and *if such proceedings are prosecuted to a judicial sale of the property described in the notice, the property shall be forever discharged from all such unrecorded interests and liens.*<sup>6</sup>

## The Ober Opinions

### *Ober I, the Withdrawn Opinion*

On August 24, 2016, the Fourth District Court of Appeal issued an opinion in *Ober v. Town of Lauderdale-by-the-Sea*, which was later withdrawn and replaced with a substitute opinion.<sup>7</sup> The issue in the opinions required the court to interpret the meaning of the foregoing portions of the lis pendens statute. Specifically, the court sought to determine whether the statute bars the enforcement of liens recorded after a final judgment of foreclosure but before a judicial sale of the property.

Under the facts of the case, a bank recorded a notice of lis pendens on a property as part of a foreclosure proceeding that it initiated on November 26, 2007. On September 22, 2008, the bank

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<sup>4</sup> Section 48.23(1)(a), F.S.

<sup>5</sup> Section 48.23(1)(c), F.S.

<sup>6</sup> Section 48.23(1)(d), F.S.

<sup>7</sup> *Ober v. Town of Lauderdale-by-the-Sea* No. 4D14-4597 (Fla. 4th DCA 2016). The withdrawn opinion is no longer available on Westlaw, but it is available without reference, pages, or volume numbers at findlaw.com at <http://caselaw.findlaw.com/fl-district-court-of-appeal/1746796.html>.

obtained a foreclosure judgment on the property. Then, between July 13, 2009, and October 27, 2011, the Town of Lauderdale-by-the-Sea recorded seven code enforcement liens. Finally, the property was sold at a judicial sale to James Ober on September 27, 2012, more than 4 years after the foreclosure judgment. After purchasing the property, Mr. Ober filed suit to quiet title and the town counterclaimed to foreclose on its liens.

In its first *Ober* decision, the district court recognized that the lis pendens statute “does not provide an end date for the lis pendens.” Then the court sought to identify an end date to “avoid the absurd result of a lis pendens precluding any lien from ever being placed on the property in perpetuity.”

Upon reviewing a portion of the lis pendens statute which states, “[a]n action in any of the state or federal courts in this state operates as a lis pendens . . . only if a notice of lis pendens is recorded,”<sup>8</sup> the court declared that the

plain meaning of [the] provision indicates that the action itself is the actual lis pendens, which takes effect if and when a notice is filed. The lis pendens therefore logically must terminate along with the action. The “action” in this case was the foreclosure action initiated by the non-party bank, which terminated thirty days after the court’s issuance of a final judgment.

The court ultimately held that “a lis pendens bars liens only through final judgment, and does not affect the validity of liens after that date, even if they are before the actual sale of the property.” The court went on to state that the *Ober* “case appears to reveal a misstatement of the law” in the Final Judgment of Foreclosure form incorporated into the Florida Rules of Civil Procedure. The form, according to the court, incorrectly suggests that “all liens from the filing of the lis pendens until the certificate of sale<sup>9</sup> is filed are discharged.”

### ***Ober II, the Substitute Opinion***

The Fourth District Court of Appeal’s initial opinion in *Ober* “shocked the mortgage lending community by holding that the protections traditionally afforded by the recordation of a lis pendens terminated 30 days after the entry of final judgment of foreclosure even when the sale had not yet occurred.”<sup>10</sup> The opinion, going against the traditional understanding of the statute, was expected to disrupt the sale of title insurance, the real estate market, and reduce bids on properties at foreclosure sales, which would result more in foreclosed property owners facing liability for deficiency judgments.<sup>11</sup>

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<sup>8</sup> Section 48.23(1)(a), F.S.

<sup>9</sup> A certificate of sale is a document that the clerk of court will file and serve on the affected parties after the judicial sale of the property. The certificate will identify when notices of the sale were published in a newspaper and identify the purchaser and the amount paid for the property. Afterwards, the clerk will record a certificate of title transferring title of the property to the purchaser. Section 45.031(4) and (6), F.S.

<sup>10</sup> Lauren Reynolds, *The Resurrection of Lis Pendens: Ober Reversed on Rehearing*, 20 No. 17 CONSUMER FIN. SERVICES L. REP. 26 (Feb. 28, 2017).

<sup>11</sup> *Id.*

However, the court granted Ober’s motion for rehearing and issued a substitute opinion, essentially reversing its initial opinion.<sup>12</sup> In the substitute opinion, the court stated:

We reject the Town’s argument that the statute applies only to liens existing or accruing prior to the date of the final judgment. The language of the statute is broad, applying to “all interests and liens.” Significantly, the statute expressly contemplates that its preclusive operation continues through a “judicial sale.” This is consistent with how foreclosure suits operate in the real world.<sup>13</sup>

The court’s opinion also indicates that several groups that are active participants in real estate transactions filed amicus briefs in opposition to the court’s initial decision. The Florida Bankers Association advised the court that foreclosure suits are “unlike many civil lawsuits in that ‘much remains to be accomplished after entry of final judgment, including the foreclosure sale, the issuance of certificates of sale and title, and, in many instances, the prosecution of a deficiency claim, all under court supervision.’”<sup>14</sup> The court also noted that the Business Law Section of The Florida Bar explained that the statement of law, which the court previously criticized, in the Final Judgment of Foreclosure form “reflects the common understanding of the operation of the lis pendens statute.”<sup>15</sup>

In concluding its substitute opinion, the court recognized that precluding the attachment of local code enforcement liens between a final judgment of foreclosure and the judicial sale of a foreclosed property presents the practical problem of collecting fines for code violations. This problem, according to the court, is in the province of the Legislature.<sup>16</sup>

### **Real Property Probate & Trust Law Section of The Florida Bar**

Although, the Fourth District Court of Appeal reversed itself, the Real Property, Probate, and Trust Law Section of The Florida Bar is pursuing legislative changes to the lis pendens statute.<sup>17</sup> The wording of the court’s substitute opinion in *Ober* described the preclusive effect of a notice of lis pendens as continuing “through a ‘judicial sale.’”<sup>18</sup> As such, the court may have inadvertently created a gap between a judicial sale and the recording of a certificate of title during which liens may attach to a foreclosed property. This gap in some cases, may last “days, weeks, or months.”<sup>19</sup>

Accordingly, the changes pursued by the Section are intended to “preserve the widely understood interpretation of the statute, that . . . a lis pendens remains in effect through the recording of an instrument transferring title pursuant to a judicial sale.”<sup>20</sup> This change will “provide the

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<sup>12</sup> *Ober v. Town of Lauderdale-by-the-Sea*, 218 So. 3d 952 (Fla. 4th DCA 2017), *cert. denied*, 2017 WL 3883662 (Fla. 2017).

<sup>13</sup> *Id.* at 954.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 954-55.

<sup>17</sup> Real Property, Probate, and Trust Law Section of The Florida Bar, *White Paper: Proposal to Amend Section 48.23, Fla. Stat. (Lis Pendens)* (Oct. 10, 2017) (On file with the Senate Committee on Judiciary).

<sup>18</sup> *Ober v. Town of Lauderdale-by-the-Sea*, 218 So. 3d 952, 954 (Fla. 4th DCA 2017), *cert. denied*, 2017 WL 3883662 (Fla. 2017).

<sup>19</sup> Real Property, Probate and Trust Law Section, *supra* n. 1.

<sup>20</sup> *Id.*

purchaser [of foreclosed property] with title free and clear of intervening subordinate interests or liens.”<sup>21</sup>

### III. Effect of Proposed Changes:

A notice of lis pendens is notice recorded in the official records of a county warning that the outcome of litigation involving the property may affect the interests of future purchasers or encumbrancers, such as those who may enforce a lien against the property. This bill clarifies that a notice of lis pendens precludes the attachment of liens or other interests on a foreclosed property until the instrument transferring title to the property is recorded. This clarification to the lis pendens statute, according to the Real Property, Probate, and Trust Law Section of The Florida Bar, is consistent with “the long established and accepted understanding of the lis pendens statute.”<sup>22</sup>

The bill is a response to a recent appellate court opinion interpreting the current lis pendens statute. Due to its particular wording, the opinion could be read to allow liens to be enforced against a foreclosed property during the gap between the date that the property is sold at a judicial sale and the date that the instrument transferring title is recorded.

The bill declares that because of its clarifying nature, it applies to actions pending on its effective date.<sup>23</sup>

The bill takes effect upon becoming a law.

### IV. Constitutional Issues:

#### A. Municipality/County Mandates Restrictions:

Because of the bill clarifies existing law, it does not require counties or municipalities to spend funds or limit their authority to raise revenue or receive state-shared revenues as specified in article VII, section 18 of the Florida Constitution.

#### B. Public Records/Open Meetings Issues:

None.

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> Courts presume that when the Legislature amends a statute, a change in the meaning of the statute is intended. *Hill v. State*, 143 So. 3d 981, 986 (Fla. 4th DCA 2014) However, courts also “recognize that, at times, a mere change in the language of a statute ‘does not necessarily indicate an intent to change the law’ because the intent may be to clarify what was doubtful and to erase misapprehension as to existing law.” *Id.* (quoting *State ex rel. Szabo Food Servs., Inc. of N.C. v. Dickinson*, 286 So. 2d 529, 531 (Fla.1973)). Similarly, “if the Legislature amends a statute shortly after a controversy arises with respect to the interpretation of the statute, then the amendment may be considered to be a legislative interpretation of the original statute rather than a substantive change to the statute.” *Leftwich v. Florida Dept. of Corr.*, 148 So. 3d 79, 83 (Fla. 2014) (citing *Lowry v. Parole & Prob. Comm’n*, 473 So. 2d 1248, 1250 (Fla. 1985)). Accordingly, these interpretive principles support the assertion in the bill that it clarifies existing law and that the bill may apply to pending actions without violating the constitutional restrictions on retroactive laws.

C. Trust Funds Restrictions:

None.

**V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

By precluding the attachment of liens or other interests to a foreclosed property between the judicial sale and the transfer of title to the new purchaser, the bill may simplify or prevent the complication of real estate transaction.

C. Government Sector Impact:

This bill may limit the ability of local governments to collect fines for code violations by ensuring that local governments cannot enforce a lien against a foreclosed property between the date of the foreclosure sale and the date title to the property is transferred to the purchaser.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends section 48.23, Florida Statutes.

**IX. Additional Information:**

A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.