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DATE: April 3, 2001

**HOUSE OF REPRESENTATIVES
AS FURTHER REVISED BY THE
COUNCIL FOR READY INFRASTRUCTURE
ANALYSIS**

BILL #: HB 959
RELATING TO: Mortgage Foreclosure Proceedings
SPONSOR(S): Representatives Gottlieb & others
TIED BILL(S): none

ORIGINATING COMMITTEE(S)/COUNCIL(S)/COMMITTEE(S) OF REFERENCE:

- (1) BANKING YEAS 8 NAYS 0
 - (2) JUDICIAL OVERSIGHT YEAS 8 NAYS 0
 - (3) COUNCIL FOR READY INFRASTRUCTURE
 - (4)
 - (5)
-

I. SUMMARY:

A mortgage is an agreement by the owner of real property that the real property can be taken and sold upon default in an underlying debt. If there is no default in the terms agreement regarding the underlying debt, the mortgage lies dormant and is eventually released upon full satisfaction of all of the terms of the loan. If the loan goes into default, the lender has the right to foreclose, that is, the lender may sue on the loan, and if the loan is not paid by a time certain, the property is sold at public auction.

This bill provides that, in any uncontested mortgage foreclosure action in which the lender waives the right to recoup any deficiency judgment, a trial court must enter the final judgment within 90 days from the date of the close of pleadings; and that if attorney's fees claimed by the plaintiff's attorney are less than 3 percent of the original principal balance, the court need not conduct a hearing on attorney's fees.

This bill further amends the expedited foreclosure process to require that a hearing be held within 60 days of when the defendant is served with process.

The fiscal impact of this bill on state and local government is unknown.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|---|-----------------------------|---|
| 1. <u>Less Government</u> | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

B. PRESENT SITUATION:

A mortgage is an agreement by the owner of real property that the real property can be taken and sold upon default in an underlying debt. If there is no default in the terms agreement regarding the underlying debt, the mortgage lies dormant and is eventually released upon full satisfaction of all of the terms of the loan. If the loan goes into default, the lender has the right to foreclose, that is, the lender may sue on the loan, and if the loan is not paid by a time certain, the property is sold at public auction.

The plaintiff in a mortgage foreclosure proceeding can elect to proceed as in any other lawsuit, or may elect to utilize the expedited foreclosure procedure found in s. 702.10, F.S.

In a typical foreclosure lawsuit, the plaintiff files a complaint and obtains a summons from the clerk. The summons and a copy of the complaint are then served on the defendant. Each defendant has 20 days from the date of service to file an answer. If a defendant fails to file an answer, the plaintiff may ask the clerk to issue a default judgment. Upon default, the defendant is deemed to have admitted the allegations in the complaint.

Entry of a default judgment against all defendants in a mortgage foreclosure case is a common occurrence. The entry of default, however, does not obviate the need for a court hearing. Most mortgage instruments contain an attorney's fee provision. Where a contract provides for the payment of reasonable attorney fees the courts have found those fees to be unliquidated damages that must be proved at trial. *Parker v. Dekle*, 35 So. 4 (Fla. 1903), *Bowman v. Kingsland Dev., Inc.*, 432 So.2d 660 (Fla. 5th DCA, 1983), *Roggerman v. Boston Safe Deposit & Trust Co.*, 670 So.2d 1073 (Fla. 4th DCA, 1996). An owner of property in foreclosure may redeem the property at any time prior to sale of the property by the clerk. The redemption amount is the amount of the final judgment. Redemptions are common. A default only gives a plaintiff the right to a final judgment for the liquidated damages, which is the outstanding principal balance plus interest. Thus, a foreclosing plaintiff is left with two choices: take the default and risk losing the right to reimbursement of the foreclosure attorney's fees, or set the matter for a final hearing in order to preserve the right to reimbursement for costs and fees. In practice, lenders rarely waive the right to seek fees.¹

¹ A lender foreclosing a conventional home mortgage (guaranteed by FHA, VA, or FNMA), is prohibited from doing so. The vast majority of foreclosure cases involve conventional home mortgages.

If one or more defendants file an answer to the complaint, the case is considered a contested case. In a contested case, or a case in which the plaintiff wishes to preserve the right to attorney's fees, the case must go to trial. The plaintiff cannot ask for a trial until 20 days has elapsed after the answer was filed.² Once a request for trial is entered, the parties are subjected to the time pressures of a court calendar.

Few mortgage foreclosure cases go to a formal trial. The rules of civil procedure provide for a "motion for summary judgment." To prevail on a motion for summary judgment, a foreclosing plaintiff must show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. There must be at least 20 days between the filing of a motion for summary judgment and the hearing thereon. In most foreclosure cases, a final judgment of foreclosure is entered when the motion for summary judgment is heard.

The final judgment of foreclosure, whether by trial or by motion for summary judgment, will make a finding of all monies due to the plaintiff, and will set a date and time for the foreclosure sale. The sale can be no less than 45 days from the date of the hearing unless the plaintiff consents. Because the notice of sale must first be published at least 20 days prior to the date of the sale, foreclosure sales are usually set approximately 30 days after the hearing date in order to allow time for transmitting the notice of sale to the publisher.

At the foreclosure sale, the plaintiff is entitled to a credit bid of up to the amount of the final judgment. As a result, the plaintiff is the most common winning bidder at a foreclosure sale. The plaintiff is not required to bid the amount of the final judgment, and can elect to let the property sell for a lesser amount. When the property is sold for a lesser amount, the plaintiff is entitled to a judgment against the defendant for the difference, which is called the "deficiency." A plaintiff who is the winning bidder may also be entitled to a deficiency judgment. To get the deficiency judgment, the plaintiff must prevail at a hearing, at which the plaintiff must prove that the value of the property foreclosed was less than the outstanding balance owed.

Section 702.10, F.S., provides an expedited process for foreclosure through the use of an order to show cause. This process provides that the lender may request the court for an "order to show cause for the entry of final judgment." The court then issues an order to show cause for an expedited hearing process.

The order to show cause must state:

- The date and time for the hearing. With proper service the hearing may be held 20 days or more from service. With service by publication the hearing may be held 30 days or more from service.
- The time in which service of the order on the defendant must be obtained.
- That the filing of defenses in a motion or answer by the date of the hearing constitutes cause for the court not to enter a final judgment.
- That the defendant has the right to file affidavits or other papers at the hearing and may appear in person.
- That if the defendant files defenses by motion, the hearing time will be used to hear those defenses.
- That if the defendant fails to appear or file defenses, the defendant may be deemed to have waived the right to a hearing and the court may enter a final judgment of foreclosure.

² Fla.R.Civ.P. 1.440(a) provides that a notice of cause at issue cannot be filed until 20 days after the last pleading is filed.

Additionally, a copy of the proposed final judgment must be attached.

If a defendant, who has been properly served with the order to show cause, fails to file an answer or defenses, or fails to appear at the hearing, the court can presume that the defendant has relinquished his or her right to be heard on the petition. Where the court finds that the defendant waived the right to be heard, the court may promptly enter a final judgment of foreclosure.

If the court determines that the defendant has not waived his or her right to be heard, the court must determine whether the defendant has stated sufficient cause for the court not to enter the final judgment. If no cause is found, the judgment must be entered. However, when the defendant has filed defenses in a motion or answer the court must find cause not to enter the final judgment at the hearing on the order to show cause. When the court finds cause not to enter a judgment, the case will move forward as a regular foreclosure action, not an expedited action.

Section 687.06, F.S., provides that "it shall not be necessary for the court to adjudge an attorney's fee, provided in any note or other instrument of writing, to be reasonable and just, when such fee does not exceed 10 percent of the principal sum named in said note, or other instrument in writing." Where a contract provides for the payment of "reasonable attorney fees" without more specificity the courts have found those fees to be unliquidated damages which must be proved at trial. *Parker v. Dekle*, 35 So. 4 (Fla. 1903), *Bowman v. Kingsland Dev., Inc.*, 432 So. 2d 660 (Fla. 5th DCA, 1983), *Roggerman v. Boston Safe Deposit & Trust Co.*, 670 So.2d 1073 (Fla. 4th DCA, 1996).

The provisions in s. 687.06, F.S., have been held to apply only when the actual percent is stated in the mortgage, not a range of percent. Specifically, this section was found not to apply to a mortgage that requires payment of a reasonable fee but which did not specify the percentage. *Sepler v. Emanuel*, 388 So.2d 28 (Fla. 3rd DCA 1980). In *Sepler*, the court found that to uphold the lower court judgment in the case the court would have to find that in every case where a reasonable attorney's fee was specified a 10 percent attorney fee was reasonable. *Sepler* at 29. The court determined this would not be appropriate.

However, in reviewing s. 687.06, F.S., another appellate court, held that a fee stated in the mortgage that was 10 percent or less is not to be examined by the courts for reasonableness or fairness absent a plea for equitable considerations such as unconscionability. *Dean v. Coyne*, 455 So.2d 576 (Fla. 4th DCA 1984). *Dean* applied this in the circumstance where the mortgage stated a fee of 10 percent or more. The court found, based on the provisions of s. 687.06, F.S., that while the contract provided a right to seek a fee of greater than 10 percent there was also a right of the appellee to show that the fee was excessive. The court stated that a contrary construction of the statute could potentially violate an appellee's constitutional right to equal protection or access to the courts. *Dean*, at 577.

C. EFFECT OF PROPOSED CHANGES:

This bill creates a new section of law applicable to mortgage foreclosure cases. Specifically, in uncontested mortgage foreclosure proceedings in which the lender waives the right to recoup any deficiency judgment, a trial court must enter the final judgment within 90 days from the date of the close of pleadings. A mortgage foreclosure proceeding is "uncontested" if the defendant files an answer which does not contest the foreclosure, or a default judgment has been entered by the court.

This bill also provides, as to all mortgage foreclosure proceedings, that when a default judgment is entered against the borrower and the note or mortgage provides for the award of reasonable attorney's fees, it is not necessary for the court to hold a hearing or adjudge the requested attorney's fees to be reasonable if the fees do not exceed 3 percent of the original principal amount

stated in the note or mortgage, even if the note or mortgage does not specify the percentage of the original amount that would be paid as liquidated damages. Such fees constitute liquidated damages in any proceeding to enforce the note or mortgage. This provision does not, however, preclude a borrower from challenging the reasonableness of an attorney's fees sought by the plaintiff.

This bill further amends the expedited foreclosure provisions in s. 702.10, F.S., to:

- Require that the hearing on the order to show cause must be held within 90 days of the date of service. This provides a period of 60 days in which the hearing may be held since the hearing may not be set less than 30 days after notice.
- Provide that if the defendant files an answer that does not contest the foreclosure, the defendant may be considered to have waived the right to a hearing. In such case, the court may enter a final judgment of foreclosure without hearing.
- Provide that if the mortgage provides for reasonable attorney's fees and the requested attorney's fees do not exceed 3 percent of the principal amount owed at the time of filing the complaint, it is unnecessary for the court to hold a hearing or adjudge the requested attorney's fees to be reasonable, notwithstanding whether the mortgage provides a specific percentage amount.

D. SECTION-BY-SECTION ANALYSIS:

Section 1 creates a new section in Florida Statutes, providing that in certain uncontested mortgage foreclosure proceedings the court must enter final judgment within 90 days from the date of the close of the pleadings. In addition, this section provides that when a default judgment has been entered against a mortgagor and the note provides for reasonable attorneys fees, the court need not hold a hearing or adjudge the requested fees to be reasonable if the fees do not exceed three percent of the original principal amount. This section provides that such attorney's fees constitute liquidated damages.

Section 2 amends s. 702.10, F.S., providing that a hearing on an order to show cause after a complaint has been filed must be held within 60 days after the date of service of the order. This section also adds criteria to be included within the order to show cause, including the statement that a defendant's answer not contesting the foreclosure is a waiver of the right to a hearing. The order must also state that a hearing on attorneys' fees is unnecessary if the mortgage provides for reasonable attorney's fees and the requested fees do not exceed 3 percent of the principal amount owed at the time of filing the complaint. This statement must be included within the court's final order.

Section 3 establishes an effective date of July 1, 2001.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Comments by the Committee on Banking:

The provisions of the bill would eliminate the need for parties obtaining a default judgment on a mortgage foreclosure to request a hearing on attorney fees in each case, which speeds the process and saves banks, condominium boards and other lien holders time and money.

Comments by the Committee on Judicial Oversight:

There is no apparent direct economic impact on the private sector, although there may perhaps be indirect impacts.

D. FISCAL COMMENTS:

Comments by the Committee on Banking:

The Court will no longer be required to review awards of attorney fees that do not exceed 3 percent of the principal amount owed on the note or mortgage at the time where there is a default judgment in the underlying mortgage foreclosure. There is no information regarding how often the courts do this so the exact savings cannot be calculated.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that counties or municipalities have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

Comments by the Committee on Judicial Oversight:

The provisions of this bill may perhaps be interpreted to be rules of practice and procedure applicable to the court system. Art. V. s. 2(a), Fla.Const., provides that the "Supreme Court shall adopt rules for the practice and procedure in all courts". This provision is interpreted to mean that the Legislature may not enact a rule of procedure. For example, the Florida Supreme Court ruled that a statute requiring mandatory severance of a mortgage foreclosure trial from a trial on any counterclaims in the action to be unconstitutional as a rule of procedure. *Haven Federal Saving & Loan Association v. Kirian*, 579 So.2d 730 (Fla. 1991).

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

None.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On March 27, 2001, the Committee on Judicial Oversight adopted two amendments to this bill:

1. Section 697.07, F.S., provides for assignment of rents. An assignment of rents agreement is commonly utilized in relation to a commercial mortgage. Section 697.07(4)(b), F.S., incorrectly refers to "mortgagor" instead of "mortgagee". This amendment corrects the error, provides that an assignment of rents may be applicable to rents in the "possession or control" of the mortgagor instead of just rents in the "possession" of the mortgagor, and makes grammar changes to the section.
2. This amendment changes "may" to "shall" to conform to the same change made earlier in the paragraph.

The bill was then reported favorably as amended.

VII. SIGNATURES:

COMMITTEE ON BANKING:

Prepared by:

Michael A. Kliner

Staff Director:

Susan F. Cutchins

AS REVISED BY THE COMMITTEE ON JUDICIAL OVERSIGHT:

Prepared by:

Nathan L. Bond, J.D.

Staff Director:

Lynne Overton, J.D.

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AS FURTHER REVISED BY THE COUNCIL FOR READY INFRASTRUCTURE:

Prepared by:

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