HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 181 Enforcement of Instruments
SPONSOR(S): Allen
TIED BILLS: None **IDEN./SIM. BILLS:** SB 282

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Banking and Securities (Sub)	5 Y, 0 N	Sheheane	Billmeier
2) Commerce		Sheheane	Billmeier
3)			
4)			
5)			

SUMMARY ANALYSIS

HB 181 amends s. 673.3091, F.S., relating to lost, destroyed, or stolen instruments. This bill adopts the language of the recent 2002 amendment to the Uniform Commercial Code in order to allow a person to enforce a lost instrument, such as a promissory note, if that person can (1) prove entitlement to enforce the instrument when loss of possession occurred, or (2) acquired ownership of the instrument from a person who was entitled to enforce the instrument when a loss of possession occurred. The bill deletes the requirement that a person must have been in possession of the instrument when loss occurred in order to enforce the instrument. Other states recently adopting this Uniform Commercial Code update are Minnesota, Nebraska, and Tennessee.

This bill does not appear to significantly affect local or state governments; however this bill could have a significant impact on the private sector because it would allow mortgage companies to foreclose on underlying promissory notes if that person can prove entitlement to enforce the instrument when loss of possession occurred, or acquired ownership of the instrument from a person who was entitled to enforce the instrument when a loss of possession occurred.

This bill will take effect upon becoming law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

1. Reduce government?	Yes[]	No[]	N/A[X]
2. Lower taxes?	Yes[]	No[]	N/A[X]
3. Expand individual freedom?	Yes[]	No[]	N/A[X]
4. Increase personal responsibility?	Yes[]	No[]	N/A[X]
5. Empower families?	Yes[]	No[]	N/A[X]

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

B. EFFECT OF PROPOSED CHANGES:

Background

Section 673, Florida Statutes, is Florida's version of the Uniform Commercial Code ("Code") on negotiable instruments. The Code provides a regulatory scheme for commercial transactions. To date, the National Conference of Commissioners on Uniform State Laws have approved more than two hundred uniform laws, of which more than one hundred have been adopted by at least one state.

Section 673.3091, Florida Statutes, provides for the enforcement of instruments that have been lost, stolen, or destroyed. Section 673.3091, Florida Statutes, provides:

> **(1) A person not in possession of an instrument is entitled to enforce the instrument if:**
>
> **(a) The person was in possession of the instrument and entitled to enforce it when loss of possession occurred;**
>
> (b) The loss of possession was not the result of a transfer by the person or a lawful seizure; and
>
> (c) The person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.

(emphasis added).

In a recent case, the Fourth District Court of Appeal applied s. 673.9091, F.S., in a mortgage foreclosure situation.[1] In that case, State Street Bank attempted to foreclose a mortgage it had obtained from EMC Mortgage Corporation ("EMC").[2] The original mortgage note was lost so neither State Street Bank nor EMC ever had possession of it.[3] Under s. 673.3091, F.S., a person not in possession of the original note cannot enforce it unless that person had possession when the note was lost. Accordingly, the court held that State Street Bank could not foreclose because the note was lost

[1] See State Street Bank and Trust Company v. Lord, 851So. 2d 790 (Fla. 4th DCA 2003).
[2] See State Street Bank 851 So. 2d at 791.
[3] See Id.

before it gained physical possession of the note.[4] Further, the court held that EMC could not assign its right to foreclose because it never had physical possession of the note.[5]

The court recognized that the strict application of the statute could result in a situation where the holder of the note could not enforce it and suggested that legislative action was necessary to prevent this situation from occurring in the future:

> We recognize that applying the statute as we do will result in a windfall to the mortgagor and a likely injustice to the mortgagee, unless it is able to obtain new evidence. In Dennis Joslin Company v. Robinson Broadcasting Corp., 977 F.Supp. 491 (D.D.C.1997), the district court rejected the right to assign the enforcement of a lost note. **Apparently, in response to that opinion, the Uniform Commercial Code was amended to delete the requirement that the transferee be in possession at the time the instrument was lost and now provides that the person seeking to enforce the instrument either was entitled to enforce the instrument when loss of possession occurred, or acquired ownership of the instrument from a person who was entitled to enforce the instrument when loss of possession occurred.** See U.C.C. § 3-309(a)(1) (2002). **Florida, however, has not similarly amended its code and still requires possession either by the assignor at the time of loss or by the person seeking to enforce the note. Any remedy must, therefore, be left to the legislature.** [6]

Effect of this Bill

This bill modifies s. 673.3071, F.S., to permit a person not in possession of an instrument to enforce the instrument (1) if the person was entitled to enforce the instrument when the instrument was lost; or (2) if the person directly or indirectly acquired ownership of the instrument from a person who was entitled to enforce the instrument when the loss of the instrument occurred. This change would permit a party like State Street to enforce the note since it would have acquired ownership from the person (EMC) who was entitled to enforce it when the note was lost.

Other states recently adopting this Uniform Commercial Code update are Minnesota, Nebraska, and Tennessee.

C. SECTION DIRECTORY:

Section 1: Amends s. 673.3091, F.S., relating to lost, destroyed, or stolen instruments.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

According to a representative for the State of Florida's Office of Financial Regulation, in its current form, the bill would have a minimal but undetermined fiscal impact on state and local governments.

[4] See Id. At 792-93.
[5] See Id. At 792-93.
[6] State Street Bank, 851 So. 2d at 792-793. (emphasis added).

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

According to a representative of mortgage companies throughout the state, this bill could have a significant impact on the private sector because it would allow mortgage companies to foreclose on underlying promissory notes that they previously would have been unable to foreclose.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   The bill does not require counties or municipalities to take an action requiring the expenditure of funds, does not reduce the authority that counties or municipalities have to raise revenues in the aggregate, and does not reduce the percentage of state tax shared with counties or municipalities.

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

None.