

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.)

Prepared By: The Professional Staff of the Banking and Insurance Committee

BILL: CS/SB 1890

INTRODUCER: Judiciary Committee and Senator Latvala

SUBJECT: Mortgage Foreclosure Proceedings

DATE: February 23, 2012 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Munroe</u>	<u>Cibula</u>	<u>JU</u>	Fav/CS
2.	<u>Johnson/Knudson</u>	<u>Burgess</u>	<u>BI</u>	Pre-meeting
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE..... Statement of Substantial Changes

B. AMENDMENTS..... Technical amendments were recommended

Amendments were recommended

Significant amendments were recommended

I. Summary:

The bill streamlines the foreclosure litigation process. The bill revises a number of laws affecting foreclosure in an attempt to remove disincentives to moving forward with a foreclosure action. Specifically, the bill streamlines the foreclosure litigation process in the following ways:

- Requires plaintiffs to provide relevant information to support a foreclosure action and file such information at the time of filing a foreclosure.
- Reduces the amount of time within which a lender may pursue a deficiency judgment against a borrower after a foreclosure sale.
- Expands the persons to whom a lender must provide an “estoppel statement” to include a holder of an interest in the mortgaged property. An “estoppel statement” provides information on the unpaid balance of a loan and other relevant information to expedite pay-off.
- Places in provisions of statute that deal with foreclosure, the procedures for a lender to establish a lost note.
- Limits the remedies available in an action to set aside a final judgment of foreclosure to monetary damages under certain circumstances involving negotiable instruments.
- Establishes a mechanism for courts to identify abandoned properties.

- Requires certain persons to execute instruments acknowledging the satisfaction of liens and judgments and to provide a certified copy of the recorded satisfaction to the person who made the full payment.
- Requires a person who receives full payment of a judgment lien to deliver a statement to the judgment debtor specifying that the lien has been satisfied and released.
- Specifies the required contents of a foreclosure complaint.
- Revises procedures and expands the class of persons who seek an expedited foreclosure action.
- Revises procedures for a show cause why payments should not be ordered during the pendency of a foreclosure action to clarify that the second type of proceeding only applies to an action for a mortgage foreclosure on a property other than a homestead.

The bill creates the following sections of the Florida Statutes: 701.045, 702.015, 702.036, 702.11, 702.13, and two undesignated sections of Florida law.

This bill amends the following sections of the Florida Statutes: 95.11, 701.04, 702.06, and 702.10.

II. Present Situation:

Approximately 14 percent of all Florida mortgage loans¹ were in foreclosure² as of December 31, 2011.³ In contrast, the percentage of all U.S. loans in the foreclosure process at the end of the fourth quarter 2011 was 4.38 percent.

Litigating a Foreclosure Action

Foreclosure is a remedy that a lender initiates when a borrower defaults or fails to make payments on his or her mortgage. The mortgage is a contract between the borrower and lender.⁴ Foreclosure of a mortgage is a civil action in Florida that is filed in the county where the property is located.⁵ Typically, the complaint alleges that the plaintiff, as holder of the note and mortgage, seeks to foreclose the mortgage and note on the identified parcel of real property. The plaintiff must serve the complaint on all parties affected by the action. A notice of *lis pendens* is recorded in the records of the county where the property is located to give notice to creditors and others whose interests may be affected by the pending foreclosure litigation. After a *lis pendens* is filed, any subsequently created lien may not be enforced against the property unless the holder of that lien intervenes in the foreclosure proceedings within 30 days.⁶

Litigating a foreclosure action is comparable to litigating any other civil action in Florida.⁷ Elements that are essential to pleading a foreclosure complaint include: the execution and date of

¹ These loans would include prime fixed, prime adjustable rate, subprime fixed, FHA, and VA mortgages.

² Also known as the foreclosure inventory rate.

³ National Delinquency Survey Results Q4 2011, Mortgage Bankers Association, February 16, 2012.

⁴ See e.g., *Gulf Life Ins. Co. v. Pringle*, 216 So. 2d 468 (Fla. 2d DCA 1968), and *Guynn v. Brentmoore Farms, Inc.*, 253 So. 2d 136, 138 (Fla. 1st DCA 1971).

⁵ *Georgia Casualty Co. v. O'Donnell*, 109 Fla. 290, 291, 147 So. 267, 268 (Fla. 1933).

⁶ Section 48.23(1)(d), F.S.

⁷ See Kendall Coffey, *Foreclosures in Florida: Remedies, Defenses and Liabilities* (second edition), s. 13.01 (2008).

delivery of the note and mortgage along with their recordation; attachment of the note and mortgage as exhibits to the complaint; a legal description of the property; an allegation that the mortgagee (lender) presently owns and holds the note and mortgage; identification of the person holding title to the property; identification of the person holding possession of the property; a description of the default, along with a statement of the amount of principal due and the date from which interest is due; a statement that the mortgage has been accelerated; and reference to the hiring of an attorney along with any attorney's fees and other costs for the suit.⁸

In Florida, the proper party to commence a foreclosure complaint is the holder of the note and mortgage.⁹ The Florida Supreme Court amended the Rules of Civil Procedure in 2010 to require verification of mortgage foreclosure complaints involving residential property.¹⁰ The Court also adopted a new form Affidavit of Diligent Search and Inquiry "to help standardize affidavits of diligent search and inquiry and provide information to the court regarding the methods used to attempt to locate and serve the defendant."¹¹ After the complaint is filed and served on the borrower, and any other party affected by the foreclosure action such as junior lienholders, under the Florida Rules of Civil Procedure, the borrower has 20 days to serve an answer or respond with a motion.¹² A foreclosure action that is based on defective service may be vacated years after the judgment is entered and the property sold.¹³

The usual rules for discovery and for scheduling the trial and trying the case also apply to foreclosure actions. The action proceeds just like any other civil action. Once the matter is litigated, the court may issue a final judgment of foreclosure that adjudges principal, interest, taxes, costs, and attorney's fees.¹⁴ In an effort to accommodate the increased number of foreclosure filings and improve case processing, the Court adopted a Motion to Cancel and Reschedule Foreclosure Sale form that requires plaintiffs in a foreclosure to explain the reason for cancellation and request that the court reschedule the sale to provide better case management of foreclosure sales.¹⁵ Under s. 45.031(1)(a), F.S., a judicial sale is scheduled following the order of judgment, and the sale is public.¹⁶ Documentary stamps are paid on the sale.¹⁷ If no objections

⁸ *Id.* at s. 11.01 (discussing the use of Fla. R. Civ. P. Form 1.944, relating to mortgage foreclosure). See also Fla. R. Civ. P. 1.130(a), which requires all bonds, notes, bills of exchange, contracts, accounts, or documents upon which an action may be brought or defense made to be incorporated in or attached to the relevant pleading or complaint.

⁹ *Chem. Residential Mortgage v. Rector*, 742 So. 2d 300, 300 (Fla. 1st DCA 1998), *rev. denied*, 727 So. 2d 910 (Fla. 1999), and *Philogene v. ABN Amro Mortgage Group, Inc.*, 948 So. 2d 45, 46 (Fla. 4th DCA 2006). Florida Rule of Civil Procedure 1.210(a) permits an action to be prosecuted in the name of the authorized person without joinder of the party for whose benefit the action is brought. See also *Kumar Corp. v. Nopal Lines, Ltd.*, 462 So. 2d 1178, 1183-84 (Fla. 3d DCA 1985), *rev. denied*, *S.E.L. Maduro, Inc. v. Kumar Corp.*, 476 So. 2d 675 (Fla. 1985).

¹⁰ See *In re Amendments to Fla. Rules of Civil Pro.*, 44 So. 3d 555, 556 (Fla. 2010). The amendments provide an incentive for the plaintiff in a foreclosure case to appropriately investigate and verify its ownership of the note and the right to enforce the note and ensure that the allegations in the complaint are accurate; conserve and prevent the wasting of judicial resources; and give trial courts greater authority to sanction plaintiffs who make false allegations. *Id.*

¹¹ *Id.* at 556-57

¹² Fla. R. Civ. P. 1.510(a).

¹³ See *Wagner v. Roberts*, 320 So. 2d 408 (Fla. 2d DCA 1975), *cert. denied*, 330 So. 2d 20 (Fla. 1976).

¹⁴ See Fla. R. Civ. P. Form 1.996(a), Final Judgment of Foreclosure. See also *In re Amendments to Fla. Rules of Civil Pro.*, 44 So. 3d at 558 (the form was amended to add notice to lienholders and provide directions to property owners as to how to claim a right to funds remaining after public auction, and to allow the clerk of court to electronically conduct judicial sales).

¹⁵ See Fla. R. Civ. P. Form 1.996(b), Motion to Cancel and Reschedule Foreclosure Sale. See also *In re Amendments to Fla. Rules of Civil Pro.*, 44 So. 3d at 557-58.

¹⁶ See *Heilman v. Suburban Coastal Corp.*, 506 So. 2d 1088 (Fla. 4th DCA 1987), *rev. denied*, 518 So. 2d 1275 (Fla. 1987).

¹⁷ Section 201.02(9), F.S. (the tax assessed is based on the highest and best bid at the foreclosure sale).

arise to the sale, the clerk issues a certificate of title to the purchaser. If the proceeds of the sale fall short of satisfying the judgment, the lender may file a post-foreclosure deficiency claim, and there is a 5-year statute of limitations on pursuing a legal action to enforce the claim.¹⁸

Fast-Track Foreclosure Procedure under s. 702.10, F.S.

Section 702.10, F.S., involves two types of proceedings.

Section 702.10(1), F.S.

The first proceeding is initiated in a hearing based on an order to show cause why the foreclosure judgment should not be entered at that hearing.¹⁹ The “order to show cause” hearing must be scheduled at least 20 days following service of the order or 30 days after service by publication. Any final judgment of foreclosure entered under s. 702.10(1), F.S., is for in rem relief²⁰ only, but it does not preclude the entry of a deficiency judgment where otherwise allowed by law.

The judge must verify that the complaint filed pursuant to s. 702.10(1), F.S., states a cause of action. If the judge finds the complaint is verified, the judge must issue an order to the defendant to show cause why a final judgment should not be entered. If the defendant waives the right to be heard, the judge must promptly enter a final judgment of foreclosure.²¹ Attorney’s fees may be adjudged no greater than 3 percent of the principal amount owed in a foreclosure in which the defendant waives the right to be heard.²² If the defendant files any defenses by a motion, or by a verified or sworn answer at or before the hearing, it constitutes cause and precludes the entry of a final judgment and is sufficient to deny summary relief.²³

Section 702.10(2), F.S.

The second type of proceeding, under s. 702.10(2), F.S., specifies a procedure to be used for nonresidential real estate in an action for foreclosure. A defendant must show cause why an order to make payments to the mortgagee (lender) during the pendency of the foreclosure proceedings or an order to vacate the premises should not be entered. The order to show cause must detail the requirements of s. 702.10(2), F.S. The “order to show cause” hearing must be scheduled at least 20 days following service of the order or 30 days after service by publication. If service of process has already been made on the defendant, the order may be served in a manner provided in the Florida Rules of Civil Procedure. If the defendant waives the right to be heard on the order, the court may promptly enter an order requiring payment or an order to vacate.²⁴ At the “order to show cause” hearing, the court may enter an order requiring the defendant to make payments in intervals pending the determination of the action based on the likelihood that the mortgagee will prevail in the foreclosure action.²⁵ If the court enters an order requiring

¹⁸ Sections 702.06 and 95.11(2), F.S.

¹⁹ Section 702.10(1), F.S.

²⁰ “An action in which the named defendant is real or personal property.” BLACK’S LAW DICTIONARY (9th ed. 2009).

²¹ Section 702.10(1)(d), F.S.

²² Section 702.10(1)(c), F.S.

²³ Henry P. Trawick Jr., *Trawick’s Florida Practice and Procedure*, s. 31:7 (2007 edition).

²⁴ Section 702.10(2)(c), F.S. *See also* s. 702.065(2), F.S., which provides for summary adjudication of attorney’s fees in mortgage foreclosure when a default is entered.

²⁵ Section 702.10(2)(d) and (e), F.S.

payments, the order must also provide that the lender is entitled to possession of the premises if the defendant fails to make payment as required by the order unless the court finds good cause to order some other method of enforcement of the order.

Statute of Limitations for Filing Deficiency Judgments

In Florida, the statute of limitations for the right to enforce a claim of a deficiency judgment following foreclosure is 5 years. Some states,²⁶ such as Idaho, Nebraska, New Jersey, Oklahoma, and Utah have a three-month limitation period for filing mortgage deficiency claims with a court.²⁷ If the mortgage holder does not initiate legal action within this period, the deficiency claim is permanently barred. Other states,²⁸ such as Montana, Nevada, and New York, require the mortgage holder to seek a deficiency when it forecloses or in the confirmation of sale proceedings.²⁹ Ohio, a judicial foreclosure state, allows the enforcement of a deficiency judgment up to 2 years from the date of the confirmation of any judicial sale.³⁰ North Carolina, which allows judicial and nonjudicial foreclosures, provides for the enforcement of a deficiency judgment within one year after the foreclosure.³¹ Texas, a judicial and nonjudicial foreclosure state, limits the enforcement of a deficiency judgment within 2 years of the foreclosure sale.³²

Release of Mortgage Information

Chapter 701, F.S., allows the person who has a mortgage (the mortgagor) to obtain from the mortgage holder (the mortgagee) information about the unpaid balance of the loan secured by the mortgage within 14 days after a written request.³³ The information requested is returned in a document known as an estoppel letter. Generally, only the mortgagor is able to receive this information from the mortgagee.

Current law does not require the mortgagee to provide information relating to the mortgagor's loan to anyone other than the mortgagor of the encumbered property. However, persons who may have a legitimate interest in knowing the loan information include, an heir or devisee through probate, homestead laws, a surviving spouse that was not on the note, or a junior lienholder that has foreclosed on the property against the mortgagor.

Privacy Laws Related to the Release of Mortgage Information

According to advocates of the bill, some mortgagees are not furnishing the mortgage information citing the privacy requirements of the federal Gramm-Leach-Bliley Act. The federal Gramm-Leach-Bliley Act, 15 USC ss. 6801-6809, addresses privacy requirements and disclosure or

²⁶ John Rao and Geoff Walsh, *Foreclosing a Dream—State Laws Deprive Homeowners of Basic Protections*. National Consumer Law Center, Inc., February 2009.

²⁷ *Id.* Idaho, Nebraska, and Utah are nonjudicial foreclosure states. New Jersey is a judicial foreclosure state. Oklahoma has judicial and nonjudicial foreclosure.

²⁸ John Rao and Geoff Walsh, *Foreclosing a Dream—State Laws Deprive Homeowners of Basic Protections*. National Consumer Law Center, Inc., February 2009.

²⁹ *Id.* Montana and Nevada are a nonjudicial foreclosure state. New York is a judicial foreclosure state.

³⁰ Ohio Rev. Code Ann. ss. 2329.17 and 2329.20.

³¹ NCGSA s. 1-54.

³² Tex. Popr. Code Ann s. 51.003.

³³ Section 701.04, F.S.

nonpublic personal information. Except as otherwise provided in this subchapter, a financial institution may not, directly or through any affiliate, disclose to a nonaffiliated third party any nonpublic personal information, unless such financial institution provides or has provided to the consumer a notice disclosing the institution's privacy policy that complies with applicable federal law.³⁴ Under the Gramm-Leach-Bliley Act, states may enact laws to require financial institutions to disclose loan information to persons other than the mortgagor.³⁵

Pursuant to s. 655.059, F.S., the records of a financial institution³⁶ are confidential and are made available for inspection and examination only in specifically enumerated circumstances or to specifically listed individuals or entities. Under current law, if the mortgagee is a financial institution, the mortgagee may violate privacy laws and face penalties for releasing the mortgagor's mortgage information.

III. Effect of Proposed Changes:

Section 1. Limitation on Deficiency Claims.-- Amends s. 95.11, F.S., to limit the right to enforce a claim for a deficiency judgment, following the foreclosure of an owner-occupied, one-family to four-family dwelling unit, from 5 years to 1 year.

Section 2. Applicability of Limitation on Deficiency Claims.-- Creates an undesignated section of law. The section states that the amendments to s. 95.11, F.S., made by the bill, which limit the right to enforce a claim of a deficiency judgment, following the foreclosure of an owner-occupied, one-family to four-family dwelling unit, from 5 years to 1 year, apply to any action commenced on or after July 1, 2012, regardless of when the cause of action accrues. Any action that would have been barred before the bill's changes to the statutes of limitations applicable to deficiency judgments may be commenced no later than 5 years after the action accrues and no later than July 1, 2014. If the action is not commenced by July 1, 2014, it is barred.

Section 3. Estoppel Statement.-- Amends s. 701.04, F.S., to modify and update the current requirement for a lender to provide the mortgagor (borrower) with an estoppel statement setting forth the unpaid balance of a mortgage in order to facilitate sales and refinancing by expanding the parties who can request the estoppel statement to include others who hold an interest in the property (e.g., the purchaser upon foreclosure of a subordinate lien).³⁷

³⁴ See 15 U.S.C.A. § 6803 which provides requirements for the disclosure of a financial institution's privacy policy.

³⁵ "[T]o comply with Federal, State, or local laws, rules, and other applicable legal requirements; to comply with a properly authorized civil, criminal, or regulatory investigation or subpoena or summons by Federal, State, or local authorities; or to respond to judicial process or government regulatory authorities having jurisdiction over the financial institution for examination, compliance, or other purposes as authorized by law." 15 U.S.C. § 6802(e)(8).

³⁶ Section 655.005(1)(i), F.S., defines "financial institution" as a state or federal savings or thrift association, bank, savings bank, trust company, international bank agency, international banking corporation, international branch, international representative office, international administrative office, international trust company representative office, credit union, or an agreement corporation operating pursuant to s. 25 of the Federal Reserve Act, 12 U.S.C. ss. 601 et seq. or Edge Act corporation organized pursuant to s. 25(a) of the Federal Reserve Act, 12 U.S.C. ss. 611 et seq."

³⁷ The lender has a separate obligation to provide certain information free of charge to the borrower. Real Estate Settlement Procedures Act, 12 U.S.C. § 2605 and the Federal Truth in Lending Act, 15 U.S.C. § 1641. The provision of such information is without restriction as to the number of requests. *Id.*

The estoppel letter must include the following detail:

- Unpaid amounts due as of the date specified in the request;
- A minimum of 20 days of per diem interest after that date;
- Certification that the party providing the estoppel statement is the holder of the original promissory note securing the property or is the entity entitled to enforce the note under s. 673.3011, F.S.; and
- A commitment that upon receipt of funds, the entity will return a recorded mortgage satisfaction and the original promissory note marked “paid in full” or a lost note affidavit and adequate protections as required by s. 702.11, F.S., which is created by the bill.

If the person or party executing the satisfaction is not shown as the owner of the mortgage in the official records, the satisfaction must be supplemented by an affidavit that the person executing the satisfaction is in physical possession of the original promissory note. If the party providing the estoppel statement was entitled only to enforce the note, but was not in possession of the note, the person must provide in the affidavit the specific factual basis for such authority.

The lender may not charge a fee for the preparation or delivery of the first two estoppel statements requested for any one mortgage in any calendar month. Subsequent owners of the property, creditors, and lienholders may rely on and enforce the estoppel statement.

The payor of the mortgage may designate in writing where the original note should be returned. If the satisfaction of the mortgage, the original promissory note, the lost note affidavit along with evidence of adequate protections are not delivered within 60 days, the party who received payment on the note or mortgage is subject to a penalty. The penalty is \$100 per day until the documents are delivered up to \$5,000.

Section 4. Cancellation of Liens and Judgments.-- Creates s. 701.045, F.S., to provide requirements for liens other than a mortgage or judgment, which are comparable to the requirements in section 3 of the bill when such liens are fully paid. The creditor or assignee to whom payment has been made must execute a written instrument acknowledging satisfaction of the lien or judgment, have the instrument acknowledged or proven and recorded in the official records in the proper county. Within 60 days after receipt of payment of the lien or judgment, the person required to acknowledge satisfaction must send a certified copy of the recorded satisfaction to the person who made the full payment. Whenever a writ of execution has been issued and the judgment upon which it was issued has been fully paid, the party receiving payment must request, in writing and addressed to the sheriff, return of the writ of execution as fully satisfied. Additionally, the party receiving payment of any judgment must comply with s. 55.206, relating to statements releasing a judgment lien.

Section 5. Elements of Complaint; Lost, Destroyed, or Stolen Note Affidavit.-- Creates s. 702.015, F.S., to reschedule the timing of aspects of the foreclosure process, for such actions involving residential real property. The complaint must contain express allegations at the commencement of the proceeding that the plaintiff is the holder of the original note secured by the mortgage or allege with specificity the factual basis by which the plaintiff may enforce the note. The complaint must describe the authority of the plaintiff with specificity. The plaintiff must file the original promissory note with the court as a condition precedent to filing the

complaint for foreclosure, certifying under penalty of perjury that the plaintiff is in physical possession of the original promissory note. The certification must set forth the physical location of the note, name, and title of the individual giving the certification, the name of the person who personally verified physical possession, and the time and date on which possession was verified.

If the plaintiff seeks to enforce a lost, destroyed, or stolen instrument, an affidavit executed under penalty of perjury must be attached to the complaint. The affidavit must:

- Detail a clear chain of all assignments for the promissory note that is the subject of the action;
- Set forth all facts showing the plaintiff is entitled to enforce the note; and
- Include pertinent exhibits.

Section 6. Finality of Mortgage Foreclosure Judgment.--Creates s. 702.036, F.S., to provide for monetary damages or other appropriate relief in an action or proceeding in which a party seeks to set aside, invalidate, or challenge the validity of a final judgment of foreclosure of a mortgage, or to reestablish a lien or encumbrance on the property in abrogation of the final judgment of foreclosure of a mortgage. In such case, the court must treat the request for relief solely as a claim for monetary damages and may not grant relief that adversely affects the quality or character of the title to the property if the following circumstances exist:

- A final judgment of foreclosure of a mortgage has been entered as to a property;
- All applicable appeal periods have run as to the final judgment of foreclosure and an appeal has not been filed or, if an appeal has been filed, it has been finally resolved; and
- The party seeking relief from the final judgment of foreclosure has been properly served.

A person who is not a party to the foreclosure but who claims to be the actual holder of the promissory note secured by the foreclosed mortgage does not have a claim against the foreclosed property after it has been conveyed for valuable consideration to a person not affiliated with the foreclosed owner or the foreclosing lender.

The actual holder of the note is not precluded from pursuing recovery from any adequate protection given under s. 673.3091, F.S., by the person who enforced the note or from the party who wrongfully claimed to be the owner or holder of the promissory note or maker of the note or from any other person against whom the actual holder of the note may have a claim relating to the note.

Section 7. Deficiency Decrees.-- Amends s. 702.06, F.S., to bar a party from pursuing a deficiency judgment if not commenced within 1 year after the sale date of mortgaged property pursuant to a court foreclosure sale or short sale. The amount of the deficiency judgment may not exceed 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 the sale. The amount of the deficiency judgment may be set off by the amount collected by the servicer or lender pursuant to any mortgage insurance held on the property purchased by the borrower.

With respect to an owner-occupied, one-family to four-family dwelling unit, the party to whom a deficiency is owing may move for the entry of a deficiency judgment in the foreclosure action or

file a separate action for collection of the deficiency. If a separate action is pursued, it must be filed within 1 year after the property has vested in the foreclosing lender or purchaser at the foreclosure sale. The separate action must be filed within 1 year after the property has vested in the foreclosing lender or other purchaser at the foreclosure sale.

The complainant has the right to recover the deficiency unless the court in the foreclosure action has granted or denied a claim for a deficiency judgment. If a deficiency is not pursued within 1 year after the property has vested in the foreclosing lender or other purchaser at the foreclosure sale, the vesting of the property or proceeds of sale must be to be in full satisfaction of the judgment debt. Under these circumstances, the right to recover any deficiency is extinguished. The authority of the court to determine the entitlement to any assets held by a receiver or assignee of rents is not restricted.

Section 8. Order to Show cause hearings.-- Amends s. 702.10, F.S., to revise the requirements for a fast-track mechanism to litigate mortgage foreclosure involving two types of proceedings.

Foreclosure on an Expedited Basis Under s. 702.10(1), F.S. by a Lienholder

The first type of proceeding involves a order to show cause why a final judgment should not be issued in a foreclosure case on an expedited basis.

Under the revised procedure, any lienholder, not just the senior mortgagee, may initiate the procedure. A “lienholder” includes the plaintiff and a defendant to the action who holds a lien encumbering the property or a defendant who, by virtue of its status as a condominium association, cooperative association, or homeowners’ association, may file a lien against the real property subject to foreclosure.

Under the modified procedure, a filing of a request for review may be filed with the court in chambers and without a hearing. If the court finds the request for review is verified and complies with the requirements for a foreclosure complaint, the court must promptly issue an order directed to the other parties named in the foreclosure complaint to show cause why a final judgment of foreclosure should not be entered.

The order must set the date and time for a hearing on the order to show cause. The date of the hearing may not be sooner than 20 days after the service of the order. The hearing must be held within 90 days after the date of service. The order must:

- State that the filing of defenses by a motion, responsive pleading, affidavits, or other papers before the hearing to show cause may constitute cause for the court not to enter final judgment.
- State that a defendant has the right to file affidavits or other papers before the time of the hearing to show cause and may appear personally or by way of an attorney at the hearing.
- State that if a defendant files defenses by a motion, a verified or sworn answer, affidavits, or other papers or appears personally or by way of an attorney at the time of the hearing, the hearing will be used to consider and such evidence and argument as may be presented by the defendant.
- State that the court may enter an order of final judgment of foreclosure, which must be based on clear and convincing evidence and the arguments presented.
- State that if defendant fails to appear at the hearing to show cause or fails to file defenses or an answer not contesting the foreclosure, the defendant may be considered to have waived the right to a hearing, and the court may enter a default against the defendant, and if appropriate, a final judgment of foreclosure ordering the clerk to conduct a foreclosure sale.
- Attach the form of the proposed final judgment of foreclosure, which the movant requests the court to enter at the hearing on the order to show cause. The form may contain blanks for the court to enter the amounts due.
- Require the party seeking final judgment to serve a copy of the order to show cause on the other parties as specified in the bill.

If a party has been served with the complaint and the original process, or the other party is the plaintiff in the action, service of the order to show cause on that party may be made in the manner provided in the Florida Rules of Civil Procedure. If a defendant has not been served with the complaint or original process, the order to show cause, together with the summons and a copy of the complaint, must be served on the party in the same manner as the original process.

The modified “order to show cause” procedure may run simultaneously with other court procedures. If the court determines, based upon clear and convincing evidence and the arguments presented, to support entry of a final judgment of foreclosure, the court must enter a final judgment of foreclosure ordering the clerk to conduct a foreclosure sale.

Order to Show Cause Payments During Pendency of Foreclosure Action Under s. 702.10(2), F.S.

The second type of proceeding under s. 702.10(2), F.S., deals with the issuance of an order to show cause why payments should not be entered during the pendency of a foreclosure action.

Section 702.10(2), F.S., is amended to clarify that the second type of proceeding does not apply to an owner-occupied residence. Subsection 702.10(2), F.S., creates a rebuttable presumption that a residential property for which a homestead exemption for taxation was granted according to the certified rolls of the latest assessment by the county property appraiser, before the filing of the foreclosure action, is an owner-occupied residential property.

Forms for Order to Show Cause as Modified in the Bill The bill creates s. 702.10(3), F.S., and requests that the Florida Supreme Court amend the Florida Rules of Civil Procedure to provide for expedited foreclosure proceedings in conformity with the changes to s. 702.10, F.S. The bill also requests that the Court develop and publish forms for use under s. 702.10, F.S., as amended by the bill.

Section 9. Adequate Protections for Lost, Destroyed, or Stolen Notes in Mortgage Foreclosure.-- Creates s 702.11, F.S., to codify the requirements for adequate protection outlined in s. 673.3091, F.S., relating to negotiable instruments, when a note is alleged to be lost, destroyed, or stolen in connection with proceedings for a mortgage foreclosure. Under s. 673.3091(2), F.S., in a foreclosure the court must ensure that the borrower required to pay the instrument is adequately protected against any loss that might occur if another person makes a claim to enforce the instrument. The court may find that the person required to pay the note securing the mortgage is adequately protected against a loss that may occur because of a claim by another person to enforce the mortgage if the person seeking to enforce the mortgage provides:

- A written indemnification agreement by a person reasonably believed sufficiently solvent to honor such obligation;
- A surety bond;
- A letter of credit issued by a financial institution;
- A deposit of cash collateral with the clerk of court; or
- Such other security as the court may deem appropriate under the circumstances.

Any person who wrongfully claimed to be the holder of or wrongfully claimed to be entitled to enforce a lost, stolen, or destroyed note and caused the mortgage secured by the note to be foreclosed is liable to the actual holder of the note for actual damages suffered, together with attorneys fees and costs of the actual holder of the note in his or her enforcing rights under this section. The extent of liability is not limited to any adequate protections given under s. 673.3091, F.S. The actual holder of the note may pursue any other claims or remedies it may have against the maker, the person who wrongfully claimed to be the holder, or any person who facilitated or participated in the claim to the note or enforcement of the note.

Section 10. Expedited Foreclosure of Abandoned Residential Real Property.-- Creates s. 702.13, F.S., to establish a procedure to determine whether residential real property is abandoned. Residential real property is deemed abandoned upon a showing that a duly licensed process server has made at least three attempts to locate an occupant of the residential real property. The process server must not be affiliated with the owner or servicer of any mortgage on the residential real property or with the attorney or law firm representing such owner or servicer. The attempts must be made at least 72 hours apart, and at least one each of such attempts must have been made before 12 p.m., between 12 p.m. and 6 p.m., and between 6 p.m. and 10 p.m. Each attempt must include physically knocking or ringing at the door of the residential real property and such other efforts as are sufficient to obtain a response from an occupant. Two or more of these conditions must exist:

- Windows or entrances to the premises are boarded up or closed off or multiple windowpanes are broken and unrepaired.

- Doors to the premises are smashed through, broken off, unhinged, or continuously unlocked.
- Rubbish, trash, or debris has accumulated on the mortgaged 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 a part of a condominium or are governed by a mandatory homeowners' association, the manager or other representative of the association has confirmed that assessments for the unit or home are at least 90 days delinquent.
- Interviews with at least two neighbors in different households indicate that the residence has been abandoned. The neighbors must be adjoining, across the street in view of the home, or across the hall or adjacent to the unit in a condominium or cooperative.

The process server may provide, by affidavit and photographic or other documentation, evidence of the condition of the residential real property.

The party entitled to enforce the note and mortgage encumbering the real property appearing to be abandoned must file a petition before the court seeking to determine the status of the residential real property and to invoke an expedited foreclosure proceeding relating to the property. Upon the filing of an affidavit of diligent search and inquiry and the affidavit or documentary evidence of property abandonment, the court must, upon request of the petitioner, issue one or more subpoenas to the utility companies serving the residential real property commanding disclosure of the status of utility service and whether any utility payments have been made, and if so by whom. If, after review, the court determines that the property has been abandoned, the party entitled to enforce the note and mortgage encumbering the property shall be entitled to foreclose the mortgage using the expedited mortgage procedures set forth in s. 702.10, F.S., upon service by publication. Service must be made on any condominium, cooperative, or homeowners' associations having a lien interest in the property and all other junior lienholders as required by law.

Section 11. Remedial Nature of Legislation.-- Creates an undesignated section of law, to provide that the bill is intended to be remedial in nature and applies to any action filed on or after the effective date of this act.

Section 12. Effective Date.-- This act takes effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

To the extent that the bill streamlines the foreclosure litigation process, it may reduce costs and delays associated with bringing a foreclosure suit.

The expedited foreclosure of abandoned real property would allow such properties to be rehabilitated and sold on the marketplace in a timelier manner, thereby generating additional capital and employment in the local communities and increasing the appreciation of the fair market value of properties in a community.

Entities that fail to meet the deadlines to provide estoppel statements will be subject to a penalty equal to \$100 per day until the documents are delivered up to a maximum of \$5,000.

C. Government Sector Impact:

The Office of the State Court Administrator³⁸ provided comments on the anticipated judicial or court workload impact associated with the bill. A shortened statute of limitations for an action for a deficiency judgment may result in an increase in near-term filings and a temporary increase in court workload. This effect will be mitigated, however, by a grandfathering provision extending the limitations period in some cases to a date no later than July 1, 2014. The overall impact on the courts may be offset, in part, by provisions limiting the size of deficiencies, which may render further litigation a less attractive option. Expedited foreclosure of abandoned residential properties will potentially reduce the continuing backlog of foreclosure cases likely exerting a positive impact on court operations.

VI. Technical Deficiencies:

In s. 702.11(1)(b) 5., F.S. as amended in the bill, a reference should be corrected from “unit” to “parcel or unit.”

VII. Related Issues:

None.

³⁸ Office of the State Courts Administrator, *2012 Judicial Impact Statement on CS/SB 1890*, dated February 20, 2012.

VIII. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Judiciary on February 20, 2012

The bill no longer:

- Designates the bill as the “Florida Fair Foreclosure Act.”
- Requires the foreclosing party in a mortgage foreclosure action to provide notice to the mortgagor and record title owners of the property and all tenants of a dwelling unit on the property if foreclosing the interest of the tenants.
- Includes provisions relating to foreclosing mortgages and liens on lands in more than one county.
- Provides that the amount of the deficiency judgment may be set off by the amount collected by the servicer or lender pursuant to any mortgage insurance held on the property purchased by the borrower.
- Revises the manner in which fees are adjudged reasonable in uncontested foreclosure cases.
- Requires at the time of serving the initial complaint, the plaintiff to give notice to the borrower or owner that he or she has a right to request a conciliation conference or mediation before the entry of final judgment in the case in order to facilitate a loan modification or settlement with the lender.
- Authorizes attorney fees and sanctions for raising unsupported claims or defenses or for causing an unreasonable delay in mortgage foreclosure actions.
- Prohibits the owner or landlord of property subject to the Florida Residential Landlord and Tenant Act that is in the foreclosure process from renting the property without giving full notice and disclosure to the tenants or prospective tenants that the property is in the legal process of foreclosure.
- Requires the plaintiff in a mortgage foreclosure action to file, contemporaneously with the filing of the initial complaint for foreclosure, the necessary documents to support an entry of summary judgment.

Additionally, the committee substitute revises the requirements for an order to show cause why a final judgment should not be issued in a foreclosure case on an expedited basis. The bill revises the requirements for an order to show cause why payments should not be entered during the pendency of a foreclosure action. The bill modifies provisions to expedite foreclosure of abandoned residential real property to add two additional conditions that a court may consider in determining whether a property is abandoned.

- B. **Amendments:**

None.