

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 Committee on Judiciary

BILL: CS/CS/SB 1666

INTRODUCER: Judiciary Committee; Banking and Insurance Committee; and Senator Latvala

SUBJECT: Mortgage Foreclosures

DATE: April 17, 2013 **REVISED:** _____

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

Please see Section VIII. for Additional Information:

- | | | |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

CS/CS/SB 1666 is designed to revise Florida’s mortgage foreclosure statute and related statutory provisions to expedite mortgage foreclosure actions and associated proceedings before the courts while providing additional rights for homeowners.

The bill expedites foreclosure proceedings by:

- Requiring the plaintiff to establish possession of a valid promissory note or authority to enforce the note in the foreclosure complaint
- Requiring financial institutions to post a bond or other financial means of providing adequate protection when alleging to be the holder of a note or entitled to enforce a lost, stolen, or destroyed note.
- Allowing any lienholder, instead of just the mortgagee, to use the expedited foreclosure process.
- Allowing the defendant to file other documents in defense of the foreclosure.
- Creating a higher standard for the defendant to show cause why a final judgment of foreclosure should not be entered.

- Exempts foreclosures of owner-occupied residences from provisions authorizing the plaintiff to request the court to enter an order to show cause why it should not enter an order to make payments during the pendency of the foreclosure proceedings or an order to vacate the premises.

The bill also:

- Prevents a good faith purchaser of property from being dispossessed in a later challenge after the foreclosure is final.
- Limits the amount of deficiency decrees.
- Reduces the statute of limitations from 5 years to 1 year for deficiency judgments related to mortgages on residential property that is a one-family to four-family dwelling unit. The period of limitation for an action for a deficiency judgment arising from a mortgage foreclosure commences to run on the day after the certificate of title is issued after the foreclosure sale.
- Creates a program to use retired justices and senior judges to assist with foreclosure proceedings.

The bill is effective upon becoming a law.

This bill amends the following sections of the Florida Statutes: 25.073, 95.11, 121.021, 121.091, 121.591, 702.06, and 702.10. The bill creates the following sections of the Florida Statutes: 702.015, 702.036, and 702.11.

II. Present Situation:

Background

Approximately 16.75 percent of all mortgage loans in Florida were 90 days or more delinquent or in the process of foreclosure, as of third quarter 2012.¹ In contrast, the national average delinquency rate was 7.03 percent. In addition, the foreclosure start rate in Florida was 1.50 percent, which was significantly higher than the national average of 1.08 percent.²

The Office of the State Court Administrator provided the following information concerning the number of mortgage foreclosure filings, dispositions, and estimated pending cases for calendar years 2011 and 2012.³

¹ Mortgage Bankers Association, *State Mortgage Market Profile of Florida, Third Quarter 2012*.

² *Id.*

³ Office of the State Court Administrator, *Real Property/Mortgage Foreclosures* (on file with the Senate Committee on Judiciary).

Real Property/Mortgage Foreclosures All Circuits			
	Number of Filings	Number of Dispositions	Estimated Pending Cases, As of December
Calendar Year 2011	139,015	200,107	363,660
Calendar Year 2012	202,768	195,309	371,119

In 2012, the attorneys general of 49 states and the District of Columbia, the federal government, and five banks and mortgage servicers (Ally/GMAC, Bank of America, Citi, JPMorgan Chase and Wells Fargo) reached an agreement on a mortgage settlement that will create new servicing standards, provide loan modification relief to distressed homeowners and provide funding for state and federal governments.⁴ The settlement was made formal and binding on April 5, 2012, when the U.S. District Court in Washington, D.C. entered the consent judgments containing the settlement terms.⁵ The settlement provides as much as \$25 billion in relief to distressed borrowers and direct payments to states and the federal government. The agreement settles state and federal investigations regarding the mortgage loan and foreclosure abuses. The settlement requires new servicing standards that will prevent “robosigning,”⁶ improper documentation, and lost paperwork. The new standards also provide for stricter oversight of foreclosure processing, including third-party vendors.

Foreclosure Procedure

Statutory process and the Florida Rules of Civil Procedure govern the foreclosure 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,⁷ which must allege that the plaintiff is the present owner and holder of the note

⁴ Information concerning the national settlement can be found at <http://www.nationalmortgagesettlement.com/> (last visited on Apr. 5, 2013). The court documents are available at http://www.justice.gov/opa/opa_mortgage-service.htm (last visited March 15, 2013.)

⁵ Office of Mortgage Settlement Oversight, *First Take: Progress Report from the Monitor of the National Mortgage Settlement* (Aug. 29, 2012), available at <https://www.mortgageoversight.com/wp-content/uploads/2012/08/ProgressReport08292012.pdf>.

⁶ This is a practice of an authorizing an employee to sign thousands of documents and affidavits without verifying the information in the document or affidavit that he or she is signing.

⁷ Rule 1.944, Fla. R. Civ. P.

and mortgage,⁸ contain a copy of the note and mortgage,⁹ and allege a statement of default,¹⁰ along with a filing fee,¹¹ and a *lis pendens*, which serves to cut off the rights of any person whose interest arises after filing.¹² A foreclosure is like any other civil action and generally has the following elements:

- Service of process must be made on defendants within 120 days after the filing of the initial pleadings.¹³
- If a defendant has not filed an answer or another paper indicating intent to respond to the suit, then the plaintiff is entitled to an entry of default against the defendant.¹⁴
- 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.¹⁵
- 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, the court renders a final judgment.¹⁶
- If summary judgment is denied, the foreclosure proceeds to a trial without a jury.¹⁷
- 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.¹⁸
- A notice of sale must be published once a week, for 2 consecutive weeks, in a publication of general circulation, and the second publication must be at least 5 days prior to the sale.¹⁹
- The winning bid at a public judicial sale is conclusively presumed to be sufficient consideration for the sale.²⁰
- Parties have 10 days to file a verified objection to the amount of the bid or the sale procedure.²¹
- 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,²² and the court may, in its discretion, enter a deficiency decree for market value of the security received and the amount of the debt.²³

⁸ *Edason v. Cent. Farmers Trust Co.*, 129 So. 698, 700 (Fla. 1930).

⁹ Rule 1.130(a), Fla. R. Civ. P.

¹⁰ *Siahpoosh v. Nor Props.*, 666 So.2d 988, 989 (Fla. 4th DCA 1996).

¹¹ 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. Section 28.241(a)(1)(d), F.S.

¹² Section 48.23, F.S.

¹³ Rule 1.070(j), Fla. R. Civ. P. *See also* chs. 48 and 49, F.S.

¹⁴ Rule 1.040(a)(1), Fla. R. Civ. P.

¹⁵ Rule 1.510(a), Fla. R. Civ. P.

¹⁶ Section 45.031, F.S.

¹⁷ Section 702.01, F.S. The summary judgment motion is optional. A plaintiff can elect to go to trial without the filing of a summary judgment motion.

¹⁸ Section 45.031(1)(a), F.S.

¹⁹ Section 45.031, F.S.

²⁰ Section 45.031(8), F.S.

²¹ Section 45.031(7)(c), F.S.

²² Section 45.031, F.S.

²³ Section 702.06, F.S.

Alternative Foreclosure Procedure

Section 702.10, F.S., provides an alternative procedure that is designed to speed up the foreclosure process in uncontested cases or cases where there is no legitimate defense. 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.²⁴ Attorney 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.²⁵ 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.²⁶

Section 702.10(1), F.S., does not specify a standard for the court to use when considering a defendant's defensive motions or answers to the show cause order. If the defendant files any defenses by a motion, or by a verified or sworn answer, it constitutes cause and precludes the entry of a final judgment and is sufficient to deny summary relief.²⁷ Some legal commentators believe that the "show cause proceeding" under both s. 702.10(1) and (2), F.S., is modeled on ss. 78.065 and 78.067, F.S., which outline a procedure for an order to show cause why a prejudgment writ of replevin should not be issued.²⁸ Under the replevin statute, "the court shall at the hearing on the order to show cause consider the affidavits and other showings made by the parties appearing and make a determination of which party, with reasonable probability, is entitled to the possession of the claimed property pending final adjudication of the claims of the parties. This determination shall be based on a finding as to the probable validity of the underlying claim against the defendant."²⁹

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.³⁰

- 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.³¹
- 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.³²
- The court may enter an order requiring payment or an order to vacate if the defendant has waived the right to be heard.³³

²⁴ Section 702.10(1)(d), F.S.

²⁵ Section 702.10(1)(c), F.S.

²⁶ Henry P. Trawick Jr., *Trawick's Florida Practice and Procedure*, s. 31:7 (2007 edition).

²⁷ *Id.*

²⁸ Gary Walk and Mark J. Wolfson, *An Analysis of the 1993 Mortgage Foreclosure Act*, 67 FLA. B.J. 68, 70 (Oct. 1993) (discussing the show cause mortgage foreclosure procedure under s. 702.10, F.S.).

²⁹ Section 78.067(2), F.S.

³⁰ Section 702.10(2), F.S.

³¹ Section 702.10(2)(a), F.S.

³² Section 702.10(2)(b), F.S.

³³ Section 702.10(2)(c), F.S.

- 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.³⁴

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.³⁵

III. Effect of Proposed Changes:

The Foreclosure Complaint: Requiring the Plaintiff to Establish Possession of a Valid Promissory Note or Authority to Enforce the Note

Section 7 creates s. 702.015, F.S., to require the plaintiff (i.e., the lender) to certify physical possession of the original promissory note or to provide sworn evidence to support a lost note. This new burden on the lender is intended to expedite the foreclosure process and avoid a repeat of some of the “robot signing,” fraud and other problems of the past. A court may sanction the plaintiff for failure to comply with the requirements of this section. The section does not apply to foreclosure proceedings involving timeshare interests under part III of ch. 721, F.S.

The requirements must be met under this section to bring a complaint to foreclose a mortgage or other lien on residential real property designed principally for occupation by 1 to 4 families (including condominiums and cooperatives) which secure a promissory note.

Facts Regarding Plaintiff Holding Note or Entitlement to Enforce Note [s. 702.015(2) and (3), F.S.]

The complaint must establish that the plaintiff holds the original note or is entitled to enforce a promissory note by:

- Containing affirmative allegations made by the plaintiff at the time the proceeding is commenced that the plaintiff holds the original note secured by the notice; or
- Alleging with specificity the factual basis by which the plaintiff is a “person entitled to enforce” the promissory note under s. 673.3011, F.S.
 - Under s. 673.3011, a “person entitled to enforce” an instrument is the holder of the instrument, a nonholder in possession of the instrument with the rights of a holder, or a person not in possession of the instrument who may enforce it under s. 673.3091, F.S., (enforcement of a lost, destroyed or stolen instrument) or s. 673.4181(4), F.S., (mistaken payment or acceptance).

An “original note” or original promissory note” is defined as the signed or executed promissory note. It includes any renewal, replacement, consolidation, or amended and restated note or instrument that renews, replaces, or substitutes for a previous promissory note. The term also includes a transferrable record as provided in s. 668.50(16), F.S.

³⁴ Section 702.10(2)(d), F.S.

³⁵ *Id.*

Facts Regarding Delegation of Authority to Plaintiff to Institute a Foreclosure Action [s. 702.015(3), F.S.]

If a plaintiff has been delegated the authority to institute a mortgage foreclosure action on behalf of the person entitled to enforce the note, the complaint must describe with specificity:

- The authority of the plaintiff, and
- The document that grants such authority to the plaintiff.

These requirements are not intended to modify laws regarding standing or real parties in interest.

Plaintiff's Possession of Original Promissory Note [s. 702.015(4), F.S.]

A plaintiff in possession of the original promissory note must file with the court, under penalty of perjury, a certification that the plaintiff possesses the original promissory note. The filing must be made contemporaneously with the foreclosure complaint. The certification must set forth:

- The location of the note;
- The name and title of the individual giving the certification;
- The name of the person who personally verified such possession; and
- The time and date on which possession was certified.

The certification must also have attached to it correct copies of the note and all allonges. The original note and allonges must be filed with the court before the entry of any judgment of foreclosure or judgment on the note.

Affidavit Required to Enforce a Lost, Destroyed, or Stolen Instrument [s. 702.015(5)]

A plaintiff seeking to enforce a lost, destroyed or stolen instrument must attach to the complaint an affidavit executed under penalty of perjury. The affidavit must:

- Detail a clear chain of all endorsements, transfers, or assignments of the promissory note;
- Set forth facts showing that the plaintiff is entitled to enforce a lost, destroyed, or stolen instrument. Adequate protection as required under s. 673.3091(2), F.S., must be provided before final judgment. Adequate protection refers to adequately protecting the party required to pay the instrument against loss that might occur caused by a claim by another person to enforce the instrument.
- Include as exhibits to the affidavit, copies of the note and the allonges to the note, or other evidence of the acquisition, ownership, and possession of the note as may be available to the plaintiff.

Section 11 creates s. 702.11, F.S., to allow a court to find that the following constitute reasonable means for providing adequate protection under s. 673.3091, F.S.:

- A written indemnification agreement by a person reasonably believed sufficiently solvent to honor the obligation;
- A surety bond;

- A letter of credit issued by a financial institution;
- A deposit of cash collateral with the clerk of the court; or
- Other security the court deems appropriate under the circumstances.

The security must be on terms and in amounts set by the court. The security must run through the statute of limitations for the underlying note and indemnify and hold harmless the maker of the note against any loss or damage that might occur by reason of a claim by another person to enforce the note.

A person who wrongly claims to hold a note or to be entitled to enforce a lost, stolen, or destroyed note who causes the mortgage to be foreclosed is liable to the actual holder, without limitation to any adequate protections given, for actual damages plus attorney fees and costs. The actual holder may also pursue recovery directly against any adequate protections given. This section does not limit the ability of the actual holder of the note to pursue other claims or remedies it may have against the maker of the note, the person who wrongly claimed to be the holder, or any person who facilitated or participated in the claim to the note or enforcement.

The “Show Cause” Foreclosure Procedure: Creating an Expedited Process

Order to Show Cause under s. 702.10(1), F.S.

Section 10 amends s. 702.10, F.S., to establish a “show cause” process that streamlines and expedites foreclosures. The “show cause” process preserves all appropriate due process rights protecting borrowers; it eliminates unnecessary court hearings; and it gives community associations standing to participate when delinquent assessments are due.

The streamlined show cause process is as follows. After filing a complaint, the plaintiff may request an order to show cause for the entry of final judgment. The court must immediately review the request and the court file in chambers without a hearing. The court must promptly issue an order to show cause why a final judgment of foreclosure should not be entered to the other parties named in the action if the complaint is verified, complies with the requirements in s. 702.015, F.S. (created by Section 10 of the bill), and alleges a cause of action to foreclose on real property.

The court must set a hearing, the date and time of which must not occur sooner than the later of 20 days after service of the order to show cause or 45 days after service of the initial complaint. If service is by publication, the hearing date cannot be set sooner than 30 days after the first publication. The hearing is no longer required to be held within 60 days of the date of service.

The bill makes responses easier for homeowners once the foreclosure is filed by permitting the homeowner to file other documents in defense of the foreclosure. The bill specifies that the filing of defenses by motion, responsive pleading, affidavits, or other papers before the hearing may constitute cause for the court not to enter final judgment. Under current law, filing of defenses by motion or by a verified or sworn answer prior to the show cause hearing are needed to show cause for the court not to enter final judgment. Current law, however, states that such filings establish cause, while under the bill the expanded types of filings only “may” show cause.

If the defendant files defenses by motion, an answer, affidavits, other papers, and other evidence and argument or if the defendant or defendant's attorney appears at the hearing, the hearing time will be used to consider whether a genuine issue of material fact exists that precludes the entry of summary judgment or that constitutes a legal defense to foreclosure. The order to show cause must notify the defendant that the court may enter an order of final judgment of foreclosure at the hearing and order the clerk of the court to conduct a foreclosure sale.

The bill creates a higher standard for the defendant to show cause. Under the bill, the defendant shows cause (why the court should not grant final judgment of foreclosure) if the defendant raises a genuine issue of material fact which precludes entry of summary judgment. The defendant's showing or legal defenses may be raised in a motion, responsive pleading, affidavit, or other papers or in evidence presented at or before the hearing. Current law states that the defendant shows cause merely by filing defenses by a motion or by a verified or sworn answer at or before the hearing.

The court may enter a final judgment of foreclosure if the court finds that all defendants have waived the right to be heard. The court shall promptly enter a final judgment of foreclosure without the need for further hearing if the plaintiff shows entitlement to final judgment and files the original note, establishes a lost note, or shows the court the obligation to be foreclosed is not evidenced by a promissory note or other negotiable instrument. If the court finds that any defendant has not waived the right to be heard on the order to show cause, the court must determine whether there is cause to enter a final judgment of foreclosure. If the hearing time is insufficient, the court may announce a continued hearing on the order to show cause. The court may enter a final judgment of foreclosure if the defendant does not show cause why a final judgment should not be entered.

The Legislature intends that alternative procedures may run simultaneously with other court procedures.

Order to Show Cause under s. 702.10(2), F.S.

The bill also exempts foreclosures of owner-occupied residences from provisions authorizing the plaintiff to request the court to enter an order to show cause why it should not enter:

- An order to make payments during the pendency of the foreclosure proceedings, or
- An order to vacate the premises. Additionally, the bill makes it clear that the expedited show-cause proceedings for foreclosure of commercial real estate under s. 702.10(2), F.S., are cumulative to any other relief that a court may award.

Finality of Mortgage Foreclosure Judgment

Section 8 creates s. 702.036, F.S., to prevent a good faith purchaser of property from being dispossessed in a later challenge after the foreclosure is final. The section provides that the former owner may continue to pursue money damages against the lender even after the trial and appeals have concluded, but the claims cannot impact the marketability of the property in the new owner.

An action to set aside, invalidate, or challenge the validity of a final judgment of mortgage foreclosure, or to establish or re-establish a lien or encumbrance of property in abrogation of a mortgage foreclosure final judgment is limited to monetary damages if the following apply:

- The party seeking relief from the final judgment of mortgage foreclosure was properly served in the foreclosure lawsuit.
- The final judgment of mortgage foreclosure was entered as to the property.
- All applicable appeals periods have run as to the final judgment with no appeals having been taken or any appeals having been finally resolved.
- The property has been acquired for value by a person not affiliated with the foreclosing lender or the foreclosed owner, at a time in which no lis pendens regarding the suit to set aside, invalidate, or challenge the foreclosure appears in the official records of the county where the property was located.
 - Affiliates of the foreclosing lender include the foreclosing lender, any loan servicer for the loan being foreclosed, and any past or present owner or holder of the loan being foreclosed. It also includes:
 - (a) A parent entity, subsidiary, or other person who directly or indirectly controls, is controlled by, or is under common control of such entities
 - (b) A maintenance company, holding company, foreclosure services company or law firm under contract with such entities.

Once foreclosure of a mortgage occurs based upon enforcement of a lost, destroyed, or stolen note, a person who was not a party to the foreclosure action but claims entitlement to enforce the promissory note secured by the mortgage has no claim against the foreclosed property once it is conveyed to a person not affiliated with the foreclosing lender or the foreclosed owner. That person may still pursue recovery from any adequate protection given pursuant to s. 673.3091, F.S., or from the party who wrongfully claimed entitlement to enforce the promissory note, from the maker of the note, or any other person against whom a claim may be made.

Deficiency Judgments: Limiting the Amount of a Deficiency Decree

Section 9 amends s. 702.06, F.S., to limit the amount of a deficiency judgment on owner-occupied residential property to the difference between the judgment amount and the “fair market value” on the date of the foreclosure sale. Similarly, the deficiency for a short sale may not exceed the difference between the outstanding debt and the fair market value of the property on the date of the sale.

Actions to Enforce Deficiency Judgments: Reducing the Statute of Limitations on Certain Actions

Section 2 amends s. 95.11, F.S., to reduce the statute-of-limitations period for a lender to enforce a deficiency judgment following the foreclosure of an owner-occupied, one-family to four-family dwelling unit years from 5 years to 1 year. The statute-of-limitations period for an action for a deficiency judgment arising from a mortgage foreclosure commences to run on the day after the certificate of title is issued after the foreclosure sale.

Section 3 creates an undesignated section of law that applies the amendments to s. 95.11, F.S. The amendments to s. 95.11, F.S., reduce the statute of limitations to bring an action to enforce a deficiency judgment related to the foreclosure of an owner-occupied, one-family to four-family dwelling unit from 5 years to 1 year. This section applies the 1-year statute of limitations to any such deficiency action that commences on or after July 1, 2013, regardless of when the cause of action accrued. An exception is created for causes of action that accrue before the effective date of the bill and have not expired under the current 5-year statute of limitations. Such actions must be commenced within the 5-year statute of limitations or by July 1, 2014, whichever comes first. Pursuant to Section 19 of the bill, this section will not take effect unless the Legislature appropriates \$1.6 million from the General Revenue Fund on a recurring basis to the judicial branch in order to fund the increased employer contributions associated with the costs of the retirement benefits authorized in this bill and if the Governor does not veto the appropriation.

Use of Retired Justices or Senior Judges to Assist with Foreclosure Proceedings

Sections 4-6 amend ss. 121.021, 121.091, and 121.591, F.S., to allow courts to employ retired justices and judges to assist with the foreclosure backlog. These sections provide that, effective July 1, 2013, through June 30, 2016, the act of termination for a justice or judge who has reached the later of his or her normal retirement age or the age when vested and subsequently returns to temporary employment as a judge in any court, occurs when the justice or judge has terminated all employment under the Florida Retirement System (FRS) for at least 1 calendar month prior to reemployment as a senior judge. Retired justices and judges who return to such temporary employment are exempt from the limitations on reemployment for purposes of the FRS in s. 121.091(2), F.S., and may continue receiving distributions from his or her FRS account under s. 121.591(1)(a)4., F.S.

Section 1 amends s. 25.073, F.S., to restrict chief judges of circuit courts from selecting retired judges from outside of the circuit to serve on a temporary judicial assignment. A chief judge may select a retired judge from outside of the circuit if the chief judge certifies to the Chief Justice of the Supreme Court that no qualified retired judges from the circuit are available.

Section 13 adjusts specified employer contributions rates for retired justices and senior judges who are reemployed to assist with foreclosure proceedings as authorized by the bill. The employer contribution changes are needed to fund the benefit changes required to allow retired justices and senior judges to participate in the program.

Section 14 provides a legislative finding that the act fulfills an important state interest and that a proper and legitimate state purpose is served if employees and retirees of the state and its political subdivisions, and their dependents, survivors and beneficiaries are extended basic protections afforded by governmental retirement systems. The Legislature further finds that the assignment of former justices and judges to temporary employment would assist the State Courts System in managing caseloads and providing individuals and businesses with access to courts. In particular, these assignments are critically important in assisting with the disposition of the current backlog in foreclosure cases. The section also provides a legislative finding that this act fulfills an important state interest by facilitating the ability of justices and judges who retire under the Florida Retirement System to return to temporary employment as a judge in a timely manner.

Application and Implementation of Bill

Section 12 creates an undesignated section that provides that changes to the foreclosure process contained in the bill are remedial and not substantive in nature. The act applies to all mortgages encumbering real property and all promissory notes secured by a mortgage, regardless of when the instruments are executed. The following sections are exempt from this general rule of application:

- Section 702.015, F.S., only applies to cases filed on or after July 1, 2013.
- The amendments to s. 702.10, F.S., and the entirety of s. 702.11, F.S., apply to causes of action pending on the act's effective date.

Section 15 requests the Supreme Court to amend the Rules of Civil Procedure to implement the expedited foreclosure process.

Section 16 provides that sections 4, 5, 6, 13, and 14 of this act will take effect only if the Legislature appropriates funding during the 2013 Session the sum of \$1.6 million from the General Revenue Fund on a recurring basis to the judicial branch in order to fund the increased employer contributions associated with the costs of the retirement benefits authorized in this bill and if the Governor does not veto the appropriation.

Section 17 provides the act will take effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

To the extent this bill requires a local government to expend funds to comply with its terms, the provisions of section 18(a) of Article VII of the State Constitution may apply. If those provisions do apply, in order for the law to be binding upon the cities and counties, the Legislature must find that the law fulfills an important state interest (included in section 18 of the bill), and one of the following relevant exceptions must be met:

- Funds estimated at the time of enactment sufficient to fund such expenditures are appropriated;
- Counties and cities are authorized to enact a funding source not available for such local government on February 1, 1989, that can be used to generate the amount of funds necessary to fund the expenditures;
- The expenditure is required to comply with a law that applies to all persons similarly situated; or
- The law must be approved by two-thirds of the membership of each house of the Legislature.

Section 16 of the bill provides that provisions relating to the reemployment of retired justices and the increased employer contributions associated with the costs of the

retirement benefits authorized in the bill will not be implemented unless the Legislature appropriates funds and the Governor does not veto the appropriation.

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.

C. Government Sector Impact:

Impact on State Courts³⁶

State Courts Revenue: The fiscal impact of this legislation on revenues to the State Courts' trust funds from civil filing fees cannot be accurately determined due to the unavailability of data needed to establish the increase resulting from a spike in filings due to a shortened statute of limitations for bringing actions established in the bill.

Expenditures: The fiscal impact on expenditures of the State Courts System cannot be accurately determined due to the unavailability of data needed to quantify the increase in judicial workload.

Judicial or Court Workload: The courts expect to experience a short-term increase in court workload in consequence of provisions permitting additional lienholders to seek show cause orders under modified procedures expediting the foreclosure process. A related longer-term increase in judicial time may be expected under show cause provisions requiring judges immediately review court files to ensure compliance with numerous additional criteria. A near-term increase in court workload may also be

³⁶ Office of the State Courts Administrator 2013 Judicial Impact Statement, SB 1666 (Jan. 8, 2013) (on file with the Senate Committee on Judiciary).

anticipated in light of a shortened statute of limitations for bringing actions to enforce claims of deficiency.

Court Rules/Jury Instructions: Newly created s. 702.10(3), F.S., requests the Supreme Court amend the Florida Rules of Civil Procedure to provide for expedited foreclosure proceedings and development of related forms. The bill's effective date, upon becoming law, will afford the Court little time to act upon the requested rule making.

Judiciary: Provisions potentially expediting the foreclosure process and reducing related court workload over a period of years will require a corresponding near-term expenditure of court resources. Additional revenue may be anticipated, however, in consequence of an increase in near-term filings by lienholders initiating expedited foreclosure proceedings.

Impact on the Florida Retirement System (FRS)

The Department of Management Services provided an analysis³⁷ of the provision relating to the FRS Pension Plan, a defined benefit plan and the FRS Investment Plan, which is a defined contribution plan. The department administers the FRS Pension Plan and the State Board of Administration administers the FRS Investment Plan.

The costs in the bill are based on a 2012 actuarial special study conducted by Milliman, Inc.,³⁸ that did not assume a termination period. The termination period included in this bill is not expected to have a material impact on the choices of senior judges to accept temporary duties or the costs determined in the 2012 special study.

The bill would increase the required employer contribution rates established in s. 121.71(4), F.S., as follows:

- The Elected Officers' Class – Justices, Judges, is increased by 0.45 percentage points.
- The Deferred Retirement Option Program is increased by 0.01 percentage points.

The bill would also increase the required employer contribution rate for the unfunded actuarial liability established in s. 121.71(5), Florida Statutes, for the Elected Officers' Class – Justices, Judges, by 0.91 percentage points.

The provisions of this act relating to senior justices or judges would take effect only if the Legislature appropriates the sum of at least \$1.6 million from the General Revenue Fund on a recurring basis to the judicial branch in order to fund the increased employer contributions associated with the costs of the retirement benefits granted in this act and the appropriations are not vetoed by the Governor. The changes in this bill relating to retired justices and judges shall stand repealed effective July 1, 2016.

³⁷ Department of Management Services Bill Analysis 2013 SB 1666 (Mar. 14, 2013) (on file with the Senate Committee on Judiciary).

³⁸ Milliman, *Study Reflecting the Impact to the Blended Rates of the Florida Retirement System of Exempting Retired Judges from Termination and Reemployment Limitations*, (Feb. 9, 2012) (on file with Senate Committee on Banking and Insurance).

Fiscal Impact on State Agencies

The costs in the bill are based on a 2012 actuarial special study performed by Milliman, Inc., that did not assume a termination period. The termination period included in this bill is not expected to have a material impact on the choices of senior judges to accept temporary duties or the costs determined in the 2012 special study.

- A. Revenues: Not applicable.
- B. Expenditures, Recurring:

7/2013-6/2014	7/2014-6/2015	7/2015-6/2016
\$1,598,000	\$1,662,000	\$1,729,000

Fiscal Impact on Local Governments

The costs in the bill are based on a 2012 actuarial special study performed by Milliman, Inc., that did not assume a termination period. The termination period included in this bill is not expected to have a material impact on the choices of senior judges to accept temporary duties or the costs determined in the 2012 special study. The Division of Retirement of the Department of Management Services provided the following information concerning the impact on local governments, as depicted in the table. There are no associated revenues.

<i>Recurring Expenditures for Local Governments</i>		
7/2013 - 6/2014	7/2014 - 6/2015	7/2015 - 6/2016
\$196,000	\$204,000	\$212,000

VI. Technical Deficiencies:

Due to the changes made by amendment 227122, the Legislature may wish to remove the following phrase from s. 702.10(2), F.S.: “Except as provided in paragraph (i).” As a result of the amendment, paragraph (i) appears to be consistent with subsection (2), rather than an exception to subsection (2).

VII. Related Issues:

None.

VIII. Additional Information:

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

CS/CS by Judiciary on April 15, 2013:

The committee substitute:

- Corrects a technical error in the underlying bill by clarifying that the period of limitation for an action for a deficiency judgment arising from a mortgage foreclosure commences on the day after the certificate of title is issued after the foreclosure sale.
- Imposes additional criteria for the payment or selection of a retired judge.
- Clarifies that the expedited show-cause proceedings for foreclosure of commercial real estate under s. 702.10(2), F.S., are cumulative to any other relief that a court may award.
- Removes provisions in the bill that authorize publication of a notice of sale on a publicly accessible website.
- Specifies that a defendant to a foreclosure action must raise a genuine issue of material fact which would preclude the entry of a summary judgment or other legal defense to defeat an attempt to foreclose in an expedited manner.

CS by Banking and Insurance on March 20, 2013:

CS/SB 1666 provides technical, conforming changes relating to the temporary reemployment of retired justices and judges. The bill also provides a legislative finding that the act fulfills an important state interest by facilitating the ability of justices and judges who retire under the Florida Retirement System to return to temporary employment as judges to assist with the disposition of the current backlog in foreclosure cases.

B. Amendments:

None.