

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 87 Mortgage Foreclosures

SPONSOR(S): Appropriations Committee, Judiciary Committee; Passidomo and others

TIED BILLS: None **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	10 Y, 3 N	Cary	Bond
2) Justice Appropriations Subcommittee	9 Y, 2 N	McAuliffe	Jones Darity
3) Judiciary Committee	12 Y, 6 N, As CS	Cary	Havlicak
4) Appropriations Committee	17 Y, 8 N, As CS	McAuliffe	Leznoff

SUMMARY ANALYSIS

The foreclosure crisis has impacted Florida's economy and negatively affected the judicial branch in terms of both funding and caseload. Foreclosing on a mortgage in Florida is a lengthy process. The average time between the first foreclosure filing and bank repossession is 853 days while the national average is 414 days.

Current law provides for an alternative procedure that is designed to speed up the foreclosure process in uncontested cases or cases where there is no legitimate defense. 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.

As to foreclosure of real property, the bill:

- Reduces the statute of limitations for deficiency judgments on a foreclosure action from 5 years to 1 year and limits the recoverable amount of the deficiency in some cases.
- Requires the plaintiff in a foreclosure action to provide information to the court upon filing of the case regarding a lost, destroyed or stolen promissory note.
- Provides finality of a mortgage foreclosure judgment for certain purchasers of a property at a foreclosure sale while allowing for monetary damages.
- Amends the expedited foreclosure process to allow any lienholder, instead of just the mortgagee, to use the procedures; reduces the number of hearings from 2 to 1; and prohibits service by publication when using the expedited process unless the property is abandoned.
- Allows any party to request a case management conference to expedite the lawsuit.
- Defines adequate protections where there is a lost, destroyed or stolen note.

The bill applies to existing mortgages and to pending cases.

This bill may result in a short term increase in the workload of the courts and an increase in revenues from filing fees. See fiscal comments section.

The bill provides an effective date of upon becoming a law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

The foreclosure crisis has greatly impacted the economy of the state of Florida. It has also negatively affected the judicial branch in terms of both funding and caseload. Florida has the largest share of foreclosure inventory of any state in the nation, with 305,766 properties in some stage of foreclosure or bank-owned as of the end of 2012.¹ Seven of the top 10 highest foreclosure markets in the nation are in Florida, with Palm-Bay-Melbourne-Titusville having the highest rate of foreclosure of any metro area in the nation.²

Foreclosing on a mortgage in Florida is an unusually long process. Florida trails only New York and New Jersey in terms of the length of time between the first foreclosure filing and bank repossession, at 853 days. The national average is less than half that, at 414 days.³

The state court system is struggling with a backlog of foreclosure cases. In 2005, before the housing market crash, there were only 57,106 foreclosure filings statewide. By 2009, the number of filings exploded to 399,118. Courts did not have the resources to quickly and efficiently deal with this litigation explosion. Due to constitutional and statutory requirements to provide speedy trials to criminal defendants, civil filings take the brunt of any caseload backlog.⁴ There had been a significant decline in filings in fiscal year 2010-11 due to problems with title and the robo-signing situation⁵, with only 155,380 filings, compared to 338,281 in 2009-10 and a peak of 403,473 in 2008-09, but filings have begun to increase as those issues are worked out by mortgage servicers, with 186,651 filings in 2011-12 and more expected this year.⁶

Furthermore, the caseload backlog is not spread evenly across the state. While the statewide average is 11.02% of residential loans in foreclosure, certain areas, particularly those located in South Florida, have a much greater percentage of loans in foreclosure than other circuits. For instance, Miami-Dade has 15.56% of loans in foreclosure compared to only 5.26% in Sumter County.⁷

Foreclosure Procedure

The foreclosure procedure is governed by statutory process and the Florida Rules of Civil 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:

¹ RealtyTrac, 4th quarter data, presented to the Civil Justice Subcommittee by the Legislature's Office of Demographics and Research on January 24, 2013.

² *Id.*

³ *Id.*

⁴ Florida Office of the State Courts Administrator, *Summary Reporting System (SRS)*, August 19, 2011.

⁵ Susan Miller, *RealtyTrac: Robo-signing Scandal Cuts into 2010 Foreclosures*, South Florida Business Journal, January 13, 2011. <http://www.bizjournals.com/southflorida/news/2011/01/13/realtytrac-robo-signing-scandal-cuts.html> (last viewed February 1, 2013).

⁶ RealtyTrac, 4th quarter data, presented to the Civil Justice Subcommittee by the Legislature's Office of Demographics and Research on January 24, 2013.

⁷ *Id.*

- Upon proper notice of default to the defendant, the mortgage servicer files a foreclosure complaint⁸, which must allege that the plaintiff is the present owner and holder of the note and mortgage⁹, contain a copy of the note and mortgage¹⁰, and allege a statement of default¹¹, along with a filing fee¹² and a *lis pendens*, which serves to cut off the rights of any person whose interest arises after filing.¹³
- Service of process must be made on defendants within 120 days after the filing of the initial pleadings.¹⁴
- If a defendant has not filed an answer or another paper indicating an intent to respond to the suit, then the plaintiff is entitled to an entry of default against the defendant.¹⁵
- 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.¹⁶
- 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.¹⁷
- If summary judgment is denied, the foreclosure proceeds to a trial without a jury.¹⁸
- 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.¹⁹
- 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 five days prior to the sale.²⁰
- The winning bid at a public judicial sale is conclusively presumed to be sufficient consideration for the sale.²¹
- Parties have 10 days to file a verified objection to the amount of the bid or the sale procedure.²²
- 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 procedure²³, and the court may, in its discretion, enter a deficiency decree in the amount of the fair market value of the security received and the amount of the debt.²⁴

Alternative Foreclosure Procedure

Section 702.10, F.S., creates an alternative procedure that is designed to speed up the foreclosure process in uncontested cases or cases where there is no legitimate defense. The following is a brief outline of this alternative foreclosure process:

- After a complaint has been filed, the plaintiff may request an order to show cause for the entry of final judgment and the court must immediately review the complaint.²⁵

⁸ Rule 1.944, Fla. R. Civ. P.

⁹ *Edason v. Cent. Farmers Trust Co.*, 129 So. 698, 700 (Fla. 1930).

¹⁰ Rule 1.130(a), Fla. R. Civ. P.

¹¹ *Siahpoosh v. Nor Props.*, 666 So.2d 988, 989 (Fla. 4th DCA 1996).

¹² 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, according to s. 28.241(1)(d), F.S.

¹³ Section 48.23, F.S.

¹⁴ Rule 1.070(j), Fla. R. Civ. P. See also chs. 48 and 49, F.S.

¹⁵ Rule 1.040(a)(1), Fla. R. Civ. P.

¹⁶ Rule 1.1510(a), Fla. R. Civ. P.

¹⁷ Section 45.031, F.S.

¹⁸ 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.

¹⁹ Section 45.031(1)(a), F.S.

²⁰ Section 45.031, F.S.

²¹ Section 45.031(8), F.S.

²² *Id.*

²³ Section 45.031, F.S.

²⁴ Section 702.06, F.S.

²⁵ Section 702.10(1), F.S.

- If the court finds that the complaint is verified, and alleges a proper cause of action, the court must issue an order directing the defending the show cause why a final judgment should not be entered.²⁶
- 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, and no later than 60 days after the date of service.²⁷
- 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.²⁸
- The court need not hold a hearing for determination of reasonable attorney fees if the requested fees do not exceed 3% of the principal owed on the note at the time of filing.²⁹
- The court may enter a final judgment if the defendant has waived the right to be heard or has not shown cause why a final judgment should not be entered.³⁰

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.³¹

- 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.³²
- 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.³³
- The court may enter an order requiring payment or an order to vacate if the defendant has waived the right to be heard.³⁴
- 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.³⁵
- 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.³⁶

Effect of the Bill

Alternative Foreclosure Procedure

The bill amends s. 702.10, F.S., the alternative foreclosure procedure, as follows:

- Any lienholder, not just the mortgagee, may initiate the procedure.
- Upon filing, the court must immediately review the request and the court filing in chambers without a hearing.
- If the court finds that the complaint is verified, complies with s. 702.015, F.S., and alleges a cause of action, the court must promptly issue an order to show cause why a final judgment should not be entered.

²⁶ *Id.* While this appears to create a right to the order to show cause, many courts interpret this subsection to require an initial hearing.

²⁷ Section 702.10(1)(a), F.S.

²⁸ Section 702.10(1)(b), F.S.

²⁹ Section 702.10(1)(c), F.S.

³⁰ Section 702.10(1)(d), F.S.

³¹ Section 702.10(2), F.S.

³² Section 702.10(2)(a), F.S.

³³ Section 702.10(2)(b), F.S.

³⁴ Section 702.10(2)(c), F.S.

³⁵ Section 702.10(2)(d), F.S.

³⁶ *Id.*

- The date for the hearing may not occur sooner than the later of 20 days after service of the order or 45 days after the service of the initial complaint, or no sooner than 30 days after the first publication if service is obtained by publication.
- The order to show cause must state that if a defendant files defenses, the hearing time will be used to hear and consider the defendant's motion and arguments. The order must state that the court may enter an order of final judgment of foreclosure at the hearing, and if such a determination is made, the court must enter a final judgment ordering the clerk of the court to conduct a foreclosure sale.
- A defense filed as a response to an order to show cause pleading must raise a genuine issue of material fact which would preclude the entry of a summary judgment or otherwise constitute a valid legal defense to foreclosure.
- If the court finds that all defendants have waived the right to be heard, the court may enter a final judgment of foreclosure without the need for further hearing if the plaintiff is entitled to a final judgment and upon filing of the original note or satisfaction of the conditions for establishing a lost note or upon a showing that the obligation to be foreclosed is not evidenced by a promissory note or other negotiable instrument.
- The bill includes legislative intent that the alternative procedure may run simultaneously with other court procedures.

The bill provides new provisions relating to court orders requiring the defendant to show cause why an order to make payments during the pendency of the foreclosure proceedings or an order to vacate the premises should not be entered:

- The court may order the defendant to make payments or to vacate the property in addition to any other relief that the court may order.
- A residential property is subject to this relief unless it is an owner-occupied residence. However the bill provides a rebuttable presumption that a homestead property is an owner-occupied residential property.

The bill also requests that the Supreme Court amend the Rules of Civil Procedure to provide for expedited foreclosure proceedings and related forms in conformity with s. 702.10, F.S.

Adequate Protections for Lost, Destroyed, or Stolen Notes in a Mortgage Foreclosure

The bill creates s. 702.11, F.S., providing reasonable means of providing adequate protection under s. 673.3091, F.S., which is the statutory provision relating to the enforcement of a lost, destroyed or stolen instrument. As it relates to a mortgage foreclosure, adequate protection would include:

- A written indemnification agreement by a person reasonably believe to be sufficiently solvent to honor such an 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
- Such other security as the court may deem appropriate under the circumstances.

Any security given must be on terms and in amounts set by the court and must run through the applicable statute of limitations for enforcement of the note. The security also must indemnify 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. Recovery of damages and costs and attorney fees may be sought against the person who wrongly claims to be the holder of a lost, stolen, or destroyed note or against the adequate protections described above. The actual holder of the note need not pursue recovery against the maker of the note or any guarantor.

Deficiency Judgments

Under current law, a lender has 5 years from the foreclosure sale to file a deficiency action.³⁷ This bill amends s. 95.11, F.S., to provide a one-year statute of limitations for an action to enforce a claim of a deficiency related to a note secured by a mortgage against residential property that is a one-family to four-family dwelling unit. The limitations period begins on the 11th day after a foreclosure sale or the day after the mortgagee accepts a deed in lieu of foreclosure.

This bill amends s. 702.06, F.S., to limit a deficiency decree in the case of an owner-occupied home to 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 sale. This appears to codify the current practice of the courts when rendering a deficiency judgment.³⁸ The bill provides a rebuttable presumption that if a county property appraiser has granted a homestead exemption to a residential property, that property is owner-occupied.

The bill also eliminates the common law recovery of such a deficiency when the court in the foreclosure action grants or denies a claim for a deficiency judgment. This provision appears to simplify the language of the current law without providing a substantive change in the law.³⁹

Lost, Destroyed or Stolen Notes

The bill creates s. 702.015, F.S., to provide that every complaint in a foreclosure proceeding on residential real property designed principally for one to four families must contain affirmative allegations expressly made by the plaintiff that the plaintiff is the holder of the original note or must allege with specificity the factual basis by which the plaintiff is a person entitled to enforce the note. If the plaintiff is not the holder of the note, the complaint must describe the authority of the plaintiff and identify the document that grants the plaintiff the authority to file the complaint on behalf of the holder of the note.

The plaintiff must file either the original promissory note or certification that the plaintiff is in physical possession of the original note, unless it is lost, destroyed or stolen. If the plaintiff is in possession of the original note, he or she must file a certification with the court with the filing of the complaint, under penalty of perjury. If the plaintiff claims that the note is lost, destroyed or stolen, the complaint must contain an affidavit that details a clear chain of all assignments or endorsements of the promissory note, set forth facts showing the plaintiff is entitled to enforce the note, and include exhibits providing evidence of the acquisition, ownership and possession of the note. The bill requires adequate protection to the plaintiff under the Uniform Commercial Code (UCC).⁴⁰

Finality of Mortgage Foreclosure Judgment

The bill creates s. 702.036, F.S., to provide for finality of mortgage foreclosure judgments. This provision protects bona fide purchasers of a property at a foreclosure sale and ensures the validity of the title where a party seeks to set aside, invalidate, or challenge the validity of a final judgment or to establish or reestablish a lien. Under current law, an innocent purchaser could be at risk of losing a property he or she purchased in good faith. Under this bill, as long as the party seeking relief was properly served, final judgment was entered, and the appeals periods have run as to the final judgment with no appeals having been filed, and the purchaser was not affiliated with the foreclosing lender or owner, the party may recover monetary damages, but may not disturb the title, thus protecting the innocent purchaser and providing security in title. The bill does not limit the right to other forms of relief that do not adversely affect the ownership of title.

³⁷ Section 95.11(2), F.S.

³⁸ See *Trustees of Central States Southeast and Southwest Areas, Pension Fund v. Indico Corp.*, 401 So.2d 904 (Fla 1st DCA 1981).

³⁹ See *Cragin v. Ocean & Lake Realty Co.*, 101 So. 795 (Fla. 1931).

⁴⁰ Section 673.3091, F.S., contains the provision relating to the enforcement of lost, destroyed, or stolen instruments. This provision was adopted as part of the Uniform Commercial Code (UCC). The UCC comments on the provision, as reported by Florida Statutes Annotated, indicate that adequate protection is a "flexible concept," and "the type of adequate protection that is reasonable in the circumstances may depend on the degree of certainty about the facts in the case."

After foreclosure of a mortgage based on a lost, destroyed or stolen note, a person who was not a party to the foreclosure action but claims to be the actual holder of the note has no claim against the property after it is conveyed to a bona fide purchaser for valuable consideration who is not affiliated with the foreclosing lender or owner. However, the actual holder may pursue recovery from any adequate protection as required by the UCC.⁴¹ The actual holder may also pursue damages from the party who wrongfully claimed to be the owner or holder of the promissory note, from the maker of the note, or any other person against whom the actual holder may have a claim.

B. SECTION DIRECTORY:

Section 1 amends s. 95.11, F.S., relating to limitations other than for the recovery of real property.

Section 2 provides dates of application for section 1 of the bill.

Section 3 creates s. 702.015, F.S., relating to elements of complaint; lost, destroyed or stolen note affidavit.

Section 4 creates s. 702.036, F.S., relating to finality of mortgage foreclosure judgment.

Section 5 amends s. 702.06, F.S., relating to deficiency decree; common-law suit to recover deficiency.

Section 6 amends s. 702.10, F.S., relating to order to show cause; entry of final judgment of foreclosure; payment during foreclosure.

Section 7 creates s. 702.11, F.S., relating to adequate protections for lost, destroyed, or stolen notes in mortgage foreclosure.

Section 8 provides legislative findings that some of the provisions of the bill are remedial in nature while others apply to causes of action pending on the effective date of the act.

Section 9 requests that the Florida Supreme Court amend the Florida Rules of Civil Procedure.

Section 10 provides an effective date of upon becoming a law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

See fiscal comments.

2. Expenditures:

See fiscal comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

See fiscal comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

⁴¹ *Id.*

The bill does not appear to have any direct economic impact on the private sector.

D. FISCAL COMMENTS:

The Office of State Court Administrator (OSCA) has indicated that they anticipate a short-term increase in court workload due to provisions of the bill which allow additional lienholders to seek show cause orders under the modified foreclosure procedures and due to the provisions of the bill which shorten the statute of limitations for bringing actions to enforce claims of deficiency. OSCA indicates that there is insufficient data to establish the extent of the increased workload. OSCA indicates that the expedited foreclosure process may result in a reduction in court workload over the long-term.

OSCA also indicates that the spike in filings due to a shortened statute of limitations for bringing actions to enforce claims of efficiency may result in an increase in filing fees.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does appear to create a need for rulemaking. The bill requests that the Supreme Court amend the Rules of Civil Procedure to provide for expedited foreclosure proceedings and related forms in conformity to s. 702.10, F.S.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 28, 2013, the Judiciary Committee adopted one strike-all amendment and reported the bill favorably as a committee substitute. The amendment provides: that the plaintiff must file a certification with the court under penalty of perjury if he or she has the original note; a defense to an order to show cause must raise a valid defense; a rebuttable presumption that if a county property appraiser has granted a homestead exemption to a residential property, that property is owner-occupied; and adjusts specified employer contributions rates for retired justices and senior judges who are reemployed to assist with foreclosure proceedings. This analysis is drafted to the committee substitute as passed by the Judiciary Committee.

On April 17, 2013, the Appropriations Committee adopted two amendments and reported the bill favorably as a committee substitute. Amendment one removes the portion of the bill that adjust specified employer contributions rate for retired justices and senior judges who are reemployed to assist with the foreclosure backlog. Amendment two clarifies who the court may award relief to in certain foreclosure actions. This analysis is drafted to the committee substitute as passed by the Appropriations Committee.