

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 91 Judicial Process
SPONSOR(S): Judiciary Committee, Civil Justice Subcommittee, Altman
TIED BILLS: **IDEN./SIM. BILLS:** CS/CS/SB 462

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	14 Y, 0 N, As CS	Mawn	Poche
2) Judiciary Committee	17 Y, 0 N, As CS	Mawn	Poche

SUMMARY ANALYSIS

A notice of lis pendens, meaning "pending lawsuit," provides written notice that a lawsuit has been filed concerning title to or some interest in real property. Where a party records a notice of lis pendens, the final disposition of the court relates back to the recording of the notice of lis pendens, generally barring any document recorded after the notice of lis pendens from affecting the determination. In 2016, the Fourth District Court of Appeal held that a notice of lis pendens remains valid through the judicial sale. In doing so, the court may have inadvertently created a temporal gap between the judicial sale and the recording of an instrument transferring title during which time liens and other interests could attach to a property and affect title.

"Process" is used by a court or administrative body to acquire or exercise jurisdiction over a person or property. Ch. 48, F.S., establishes who may serve process, how to serve process, and special requirements for service upon specified individuals, such as a spouse, and upon specified entities, such as a limited liability company (LLC).

CS/CS/HB 91:

- Provides that, in a foreclosure proceeding, a valid recorded notice of lis pendens remains in effect through the recording of an instrument transferring title pursuant to a judicial sale;
- Authorizes special and certified process servers to serve any nonenforceable civil process;
- Authorizes out-of-state service by any person authorized to serve process in that state and deletes the requirement that a person serving out-of-state process file an affidavit setting forth specified information;
- Authorizes substituted service on a spouse in any county within the state;
- Authorizes substituted service on the registered agent, member, or manager of an LLC at a virtual office, executive office, or mini suite, if the address provided by the LLC for service of process on the registered agent, member, or manager is a virtual office, executive office, or mini suite;
- Authorizes all process servers to sign return-of-service forms electronically and deletes the requirement that the sheriff certify any such electronic signatures;
- Requires return-of-service forms to list all pleadings and documents served;
- Authorizes anyone serving process to initial or sign the first page of processes served and requires such person to include his or her identification number, if applicable; and
- Exempts vehicles owned or leased by certified process servers from window tint restrictions.

The bill does not appear to have a fiscal impact on state or local governments.

The bill takes effect upon becoming law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Lis Pendens

The term “real property” refers to parcels or tracts of land and includes any rights running with the land, such as an appurtenant easement,¹ and any structures added or other improvements made to the land.² A party wanting to legally establish an interest in real property must record a legal instrument in the public records of the county where the property is located.³ Generally, the first recorded instrument takes priority over any instrument recorded later.⁴ Thus, Florida operates as a “notice” state, protecting future property owners from most claims arising but not recorded before the purchase of a property.⁵

A notice of lis pendens⁶ provides constructive notice to all persons of pending litigation relating to certain identified property.⁷ A valid notice of lis pendens must contain:

- The names of the parties to the lawsuit;
- The date the lawsuit was filed, the date of the clerk’s electronic receipt, or the case number of the lawsuit;
- The name of the court in which the lawsuit is pending;
- A description of the property involved or to be affected; and
- A statement of the relief sought as to the property.⁸

After the recording of a notice of lis pendens, the holder of any unrecorded interest or lien who fails to timely intervene in the proceedings may lose his or her right to enforce those interests:

“ . . . [T]he recording of such notice of lis pendens . . . , constitutes a bar to the enforcement against the property described in the notice of all interests and liens, . . . unrecorded at the time of recording the notice unless the holder of any such unrecorded interest or lien intervenes in such proceedings within 30 days after the recording of the notice. If the holder of any such unrecorded interest or lien does not intervene in the proceedings and **if such proceedings are prosecuted to a judicial sale of the property described in the notice, the property shall be forever discharged from all such unrecorded interests and liens.** . . . ”⁹

¹ A parcel with an appurtenant easement benefits from a right to use the land of another for a special purpose. Black’s Law Dictionary 352 (6th ed. 1995).

² S. 475.801(10), F.S.

³ S. 695.01, F.S.

⁴ *F.J. Holmes Equip., Inc. v. Babcock Bldg. Supply, Inc.*, 553 So. 2d 748 (Fla. 5th DCA 1989) (“The first rule is that competing interests in land have priority in order of their creation in point of time...”)

⁵ *Lesnoff v. Becker*, 135 So. 146 (Fla. 1931) (“Under our recording statutes, subsequent purchasers, acquiring title without notice of a prior unrecorded deed, mortgage, or transfer of real property, or any interest therein, will be protected against such unrecorded instrument ...”).

⁶ “Lis pendens” means a pending lawsuit. Black’s Law Dictionary 643 (6th ed. 1195).

⁷ S. 48.23, F.S.

⁸ S. 48.23(1)(c), F.S.

⁹ S. 48.23(1)(d), F.S.

Ober Opinion, Withdrawn

On August 24, 2016, the Fourth District Court of Appeal (Fourth DCA) issued an opinion in *Ober v. Town of Lauderdale-by-the-Sea* (*Ober*).¹⁰ The court, seeking to determine whether the lis pendens statute bars the enforcement of liens recorded after a final judgment of foreclosure but before a judicial sale of the property, recognized that the lis pendens statute “does not provide an end date for the lis pendens.”¹¹ Seeking to identify an end date to “avoid the absurd result of a lis pendens precluding any lien from ever being placed on the property in perpetuity,” the court declared that:

The plain meaning of [the] provision indicates that the action itself is the actual lis pendens, which takes effect if and when a notice is filed. The lis pendens therefore logically must terminate along with the action. The “action” in this case was the foreclosure action...which terminated thirty days after the court’s issuance of a final judgment.¹²

In consideration of the foregoing, the court ultimately held that “a lis pendens bars liens only through final judgment, and does not affect the validity of liens [recorded] after that date, even if they are [recorded] before the actual sale of the property.”¹³

Ober, the Substituted Opinion

On January 25, 2017, the Fourth DCA granted rehearing and issued a substitute opinion essentially reversing its *Ober* opinion.¹⁴ In the substitute opinion, the court stated:

The language of the [lis pendens] statute is broad, applying to “all interests and liens.” Significantly, the statute expressly contemplates that its preclusive operation continues through a “judicial sale.” This is consistent with how foreclosure suits operate in the real world.¹⁵

In issuing this substituted opinion and describing the exclusive effect of a notice of lis pendens as continuing “through a ‘judicial sale,’” the court may have inadvertently created a temporal gap between a judicial sale and the recording of an instrument transferring title during which liens may attach to a foreclosed property.¹⁶ In some cases, this gap may last “days, weeks, or months.”¹⁷ Furthermore, the court may have rejected “the widely understood interpretation of the statute, that...a lis pendens remains in effect through the recording of an instrument transferring title pursuant to a judicial sale.”¹⁸

Ober, Certiorari Denied

The Fourth DCA concluded its substituted *Ober* opinion by recognizing that extending the effect of a lis pendens on a foreclosed property through the judicial sale creates a potential code enforcement problem, as it likely prevents the attachment of a code enforcement lien¹⁹ during this window.²⁰ The court recognized that, if a code enforcement violation arises on a property in foreclosure after the 30-

¹⁰ *Ober v. Town of Lauderdale-by-the-Sea*, 4D14-4597 (Fla. 4th DCA 2016), withdrawn. The withdrawn opinion is available without reference, pages, or volume numbers at <https://caselaw.findlaw.com/fl-district-court-of-appeal/1746796.html> (last visited Mar. 7, 2019).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Ober v. Town of Lauderdale-by-the-Sea*, 218 So. 3d 952, 954 (Fla. 4th DCA 2017).

¹⁵ *Id.*

¹⁶ Real Property, Probate, and Trust Law Section of the Florida Bar, *White Paper: Proposal to Amend Section 48.23, Fla. Stat. (Lis Pendens)* (Oct. 10, 2017).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Local governments may issue daily fines if a property owner fails to timely correct a code violation. Once recorded, these fines become a lien against the real property on which the code violation occurred, known as a code enforcement lien. See Ch. 162, F.S., generally.

²⁰ *Id.*

day intervention window and fines accrue, a local government could not use a code enforcement lien to collect said fines until after title to the property transfers pursuant to a judicial sale. This problem, according to the court, falls within the province of the Legislature.²¹

On February 7, 2017, Lauderdale-by-the-Sea filed a Motion for Certification of a Question of Great Public Importance to the Florida Supreme Court.²² On March 22, 2017, the Fourth DCA granted the motion and certified the following question:

“Whether, pursuant to section 48.23(1)(d), Florida Statutes, the filing of a notice of lis pendens at the commencement of a bank's foreclosure action prevents a local government from exercising authority granted to it by Chapter 162, Florida Statutes, to enforce code violations existing on the foreclosed property after final foreclosure judgment, where the local government's interest or lien on the property arises after final judgment and did not exist within 30 days after the recording of the notice of lis pendens.”²³

On September 6, 2017, the Florida Supreme Court issued an order declining to exercise jurisdiction and denying Lauderdale-by-the-Sea's Petition for Review.²⁴

Judicial Process

“Process” is used by a court or administrative body to acquire or exercise jurisdiction over a person or property.²⁵ Process is either enforceable or nonenforceable.²⁶ Enforceable process²⁷ involves a court order requiring the sheriff to take action.²⁸ Nonenforceable process²⁹ places another party on notice that he or she must take action.³⁰

Who Serves Process

The sheriff of the county where the person or entity to be served is found must serve all process, except that private special process servers appointed by the sheriff (special process servers)³¹ and private certified process servers approved by the chief judge of the circuit court where service is to be made (certified process servers)³² may serve:

- Initial non-enforceable civil process;
- Criminal summonses; and
- Criminal witness subpoenas.³³

Civil witness subpoenas may be served by any person authorized by the rules of civil procedure.³⁴

²¹ *Id.*

²² *Ober v. Town of Lauderdale-by-the-Sea*, No. 4D14-4597 (Fla. 4th DCA 2017).

²³ *Id.*

²⁴ *Town of Lauderdale-by-the-Sea v. Ober*, 2017 WL 3883662 (Fla. 2017).

²⁵ Black's Law Dictionary, 837 (6th ed. 1995)

²⁶ The Florida Senate, Committee on Justice Appropriations, *Sheriff Costs- Service of Process*, Interim Project Report 2006-144 (Aug. 2005), http://archive.flsenate.gov/data/Publications/2006/Senate/reports/interim_reports/pdf/2006-144ja.pdf (last visited Mar. 7, 2019).

²⁷ Enforceable process includes writs of replevin and possession. A writ of replevin is a court order to seize property for a plaintiff in a judicial proceeding, while a writ of possession is a court order to evict. See The Florida Senate, *supra*, at 26.

²⁸ The Florida Senate, *supra*, at 26.

²⁹ Nonenforceable service of process includes subpoenas ad testificandum and subpoenas duces tecum. A subpoena ad testificandum commands a person to appear at a certain time and place to give testimony upon a certain matter. A subpoena ad testificandum commands a person to produce specified documents and other material relevant to a judicial proceeding. See The Florida Senate, *supra*, at 26; see also Blacks Law Dictionary 995 (5th ed. 1995).

³⁰ The Florida Senate, *supra*, at 26.

³¹ See generally s. 48.021(2), F.S.

³² See generally s. 48.29, F.S.

³³ S. 48.021(1), F.S.

³⁴ S. 48.021(1), F.S., and Fla. R. Civ. P. 1.070. Persons authorized to serve civil witness subpoenas include state officers and any competent person disinterested in the action and appointed by a court to serve the process.

Any person serving process must put, on the first page of at least one of the processes served:

- The date and time of service;
- His or her identification number; and
- His or her initials.³⁵

Service of Process Generally

Generally, service of process is made by:

- Delivering a copy of the process to the person to be served; or
- By leaving the process at his or her usual place of abode³⁶ with any person residing there who is fifteen years of age or older and informing the person of the contents of the process.³⁷

Process against a limited liability company (LLC)³⁸ must generally be served on the registered agent³⁹ designated by the LLC or on an employee of the registered agent.⁴⁰ If service cannot be made in such a manner, process against an LLC may be served:

- On a member⁴¹ of a member-managed LLC (member);⁴²
- On a manager⁴³ of a manager-managed LLC (manager);⁴⁴ or
- On an employee designated by a member or manager to accept service on behalf of the LLC.⁴⁵

Additional requirements exist for service of minors,⁴⁶ incompetent persons,⁴⁷ and state prisoners,⁴⁸ and may exist for service of other specified persons and entities located within the state.⁴⁹

Substituted Service of Process

Substituted service⁵⁰ may be made on the spouse of a person to be served at any place in the county if:

- The cause of action is not an adversarial proceeding⁵¹ between the spouses;
- The spouse of the person to be served requests such service; and
- The spouses reside together in the same dwelling within the county where the service occurs.⁵²

Substituted service may also be made on a person by leaving a copy of the process with a person in charge of a private mailbox, virtual office,⁵³ or an executive office or mini suite⁵⁴ if:

³⁵ S. 48.301(5), F.S.

³⁶ "Usual place of abode" means the place where the party actually lives at the time of service of process. *Shurman v. Atlantic Mortg. & Inv. Corp.*, 795 So. 2d 952 (Fla. 2001).

³⁷ S. 48.031(1)(a), F.S.

³⁸ See ch. 605, F.S.

³⁹ A registered agent is a person or entity that will accept service of process on behalf of a business entity. See Florida Department of State, Division of Corporations, *Instructions for Articles of Organization*, <https://dos.myflorida.com/sunbiz/start-business/efile/fl-llc/instructions/> (last visited Mar. 7, 2019).

⁴⁰ S. 48.062(1), F.S.

⁴¹ "Member" means a person who is a member of an LLC or was a member in a company when the company became an LLC pursuant to ch. 605, F.S., and who has not separated from the company. S. 605.0102(40), F.S.

⁴² "Member-managed LLC" means an LLC that is not a manager-managed LLC. S. 605.0102(41), F.S.

⁴³ "Manager" means a person who, under the operating agreement of a manager-managed LLC, is responsible for performing the management functions of the LLC. S. 605.0102(38), F.S.

⁴⁴ "Manager-managed LLC" means an LLC that is manager-managed by virtue of the operation of statute. S. 605.0102(39), F.S.

⁴⁵ S. 48.062(2), F.S.

⁴⁶ S. 48.041, F.S.

⁴⁷ S. 48.042, F.S.

⁴⁸ S. 48.051, F.S.

⁴⁹ Ch. 48, F.S.

⁵⁰ Substituted service is service of process upon a party in any manner authorized by statute or rule other than personal service within the jurisdiction. Black's Law Dictionary 998 (5th ed. 1995).

⁵¹ An adversarial proceeding involves opposing parties. Examples include divorce and a civil lawsuit. Black's Law Dictionary 34 (5th ed. 1995).

⁵² S. 48.031(2)(a), F.S.

- These are the only discoverable addresses for the person to be served; and
- The process server determines that the person to be served maintains a mailbox, a virtual office, or an executive office or mini suite at that location.⁵⁵

Additionally, if the address provided by an LLC for its registered agent, member, or manager is a residence or a private mailbox, substituted service on the LLC may be made by serving the registered agent, member, or manager pursuant to s. 48.031, F.S., at his or her residence or private mailbox.⁵⁶

Personal Service Outside the State

Service of process on persons outside the state must be made in the same manner as service of process on persons within the state by an officer authorized to serve process in the state where the person to be served is found.⁵⁷ Each officer who serves out-of-state process pursuant to this section must file an affidavit of service stating the time, manner, and place of service.⁵⁸ The use of the term “officer” prevents private process servers from serving out-of-state process pursuant to this section.

Return of Execution of Process

Once a person serves process, the person must note on a return-of-service form⁵⁹:

- A list of all initial pleadings served along with the process;
- The date and time of service;
- The manner of service;
- The name of the person on whom service was made;
- The position of any person served in a representative capacity; and
- His or her signature.⁶⁰

Currently, only special process servers may sign a return-of-service form electronically, and the sheriff must certify all such electronic signatures.⁶¹

Window Tinting

Sunscreening, also called window tinting, refers to the placement of a product or material, including film, glaze, and perforated sunscreening, to the windshield or windows of a motor vehicle which reduces the effects from the reflection and transmission of the sun.⁶² Window tint restrictions apply to windshields,⁶³ side windows,⁶⁴ and windows behind the driver.⁶⁵ These restrictions include a prohibition on operating a motor vehicle with tinting that makes the window nontransparent, alters the window’s color, increases its reflectivity, or reduces the transmission of light.⁶⁶ A person who operates a motor vehicle in violation of the window tint restrictions commits a noncriminal traffic infraction.⁶⁷ A person

⁵³ “Virtual office” means an office that provides communications services, such as telephone service, and address services without providing dedicated office space, where all communicates route through a common receptionist. S. 48.031(6)(b), F.S.

⁵⁴ “Executive office or mini suite” means an office that provides communications services without providing dedicated office space, and where all communications are routed through a common receptionist. S. 48.031(6)(b), F.S.

⁵⁵ S. 48.031(6)(a), F.S.

⁵⁶ S. 48.062(4), F.S.

⁵⁷ S. 48.194(1), F.S.

⁵⁸ *Id.*

⁵⁹ All return of service must be made on a form reviewed and approved by the court and filed with the court by either the person requesting service or the process server. Ss. 48.031(5) and 48.29(6), F.S.

⁶⁰ S. 48.21(1), F.S.

⁶¹ *Id.*

⁶² 316.2951(4), F.S.

⁶³ S. 316.2952(2), F.S.

⁶⁴ S. 316.2953, F.S.

⁶⁵ S. 316.2954, F.S.

⁶⁶ Ss. 316.2952(2), 316.2953, and 316.2954(1), F.S.

⁶⁷ S. 316.2956(1), F.S.

who sells or installs window tinting in violation of any of the window tint restrictions commits a second degree misdemeanor.⁶⁸

Section 316.29545, F.S., exempts the following persons or vehicles from window tint restrictions:

- Persons afflicted with Lupus, any autoimmune disease, or other medical conditions which require limited exposure to light;⁶⁹
- Law enforcement vehicles used in undercover or canine operations;⁷⁰ and
- Vehicles owned or leased by private investigators or licensed private investigative agencies.⁷¹

Effect of Proposed Changes

Notice of Lis Pendens

CS/CS/HB 91 amends s. 48.23, F.S., to clarify that a notice of lis pendens precludes the attachment of liens or other interests on a foreclosed property until after the recording of an instrument transferring title pursuant to a judicial sale. This clarification effectively eliminates the temporal gap possibly created by the substituted *Ober* opinion and preserves the widely understood interpretation of the lis pendens statute.

Judicial Process

Service of Process Generally

The bill authorizes special process servers and certified process servers to serve any nonenforceable civil process, not just initial non-enforceable civil process.

The bill also requires that any person serving process must put, on only the first page of at least one of the processes served:

- The date and time of service;
- His or her identification number, if applicable;⁷² and
- His or her initials or signature.⁷³

Substituted Service of Process

The bill authorizes substituted service of process on the spouse of a person to be served:

- In any county within the state, not just the county of shared residence; and
- If the spouse is also a party to the action, whether or not the spouse requested such service.

However, if the spouse is not a party to the action, the spouse must request substituted service, and in no case may substituted service be made on a spouse if the cause of action is an adversarial proceeding between the spouses.

Finally, the bill authorizes substituted service of process on the registered agent, member, or manager of an LLC at a virtual office, executive office, or mini suite if the address provided for such a person is one of these places. This aligns the options for substituted service of process on registered agents, members, or managers of an LLC with the options for substituted service of process on a person

⁶⁸ S. 316.2956(3), F.S.

⁶⁹ S. 316.29545(1), F.S. Persons afflicted with medical conditions requiring limited exposure to light are exempt from the tint requirements of ss. 316.2951-316.2957, F.S.

⁷⁰ S. 316.29545(2), F.S. Law enforcement vehicles used undercover or in canine operations are exempt from the tint requirements of ss. 316.2951-316.2957, F.S.

⁷¹ S. 316.29545(3), F.S. Vehicles owned or leased by private investigators or licensed private investigative agencies are exempt from the tint requirements of ss. 316.2953, 316.2954, and 316.2956, F.S.

⁷² Both special and certified process servers are issued identification numbers. Ss. 48.021(7)(d) and 48.29(5)(b), F.S.

⁷³ S. 48.301(5), F.S.

pursuant to s. 48.031(6)(a), F.S.

Personal Service Outside the State

The bill allows any person authorized to serve process in another state, including private process servers, to serve process on individuals found within that state. However, such out-of-state service must still be made in the same manner as service of process on persons within the state.

The bill also deletes the requirement that a person serving out-of-state process file an affidavit stating the time, place, and manner of service and permits a court to consider a return-of-service form or any other competent evidence as proof of proper out-of-state service.

Return of Execution of Process

The bill authorizes any person authorized to serve process under ch. 48, F.S., to sign return-of-service forms electronically. The bill also deletes the requirement that the sheriff certify all such electronic signatures.

Finally, the bill requires that return-of-service forms list all pleadings and documents served.

Other

The bill applies to actions pending on the effective date of the act.

The bill takes effect upon becoming law.

B. SECTION DIRECTORY:

Section 1: Amends s. 48.23, F.S., relating to lis pendens.

Section 2: Creates an unnumbered section of law applying the changes to actions pending on the effective date of the bill.

Section 3: Amends s. 48.021, F.S., relating to process; by whom served.

Section 4: Amends s. 48.031, F.S., relating to service of process generally; service of witness subpoenas.

Section 5: Amends s. 48.062, F.S., relating to service on a limited liability company.

Section 6: Amends s. 48.194, F.S., relating to personal service outside state.

Section 7: Amends s. 48.21, F.S., relating to return of execution of process.

Section 8: Amends s. 316.29545, F.S., relating to window sunscreening exclusions; medical examination; certain law enforcement vehicles and private investigative service vehicles exempt.

Section 9: Provides an effective date of upon becoming law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not address the potential code enforcement issue identified by the Fourth DCA in the substituted *Ober* opinion. Where code violations arise on a property in foreclosure after the expiration of the 30-day window for interested parties to intervene in judicial proceedings, local governments could face significant delays in enforcing said code violations through a code enforcement lien. This could also significantly delay the collection of fines for code violations.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On February 13, 2019, the Civil Justice Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment:

- Authorized special and certified process servers to serve any nonenforceable civil process;
- Enabled out-of-state service by any person authorized to serve process in that state;
- Authorized substituted service on a spouse in any county within the state, provided the spouse requests substituted service or is a party to the action;
- Authorized substituted service on registered agents, members, or managers of an LLC at private mailboxes, executive suites, and mini suites if the LLC provided these addresses;
- Allowed all process servers to sign return-of-service forms electronically and deleted the requirement that the sheriff certify such electronic signatures;
- Required return-of-service forms to list all pleadings served;

- Authorized process servers to initial or sign the first page of processes served; and
- Required process servers to include their identification numbers on the first page of processes served, if applicable.

On March 7, 2019, the Judiciary Committee adopted two amendments and reported the bill favorably as a committee substitute. The amendments:

- Exempted vehicles owned or leased by certified process servers from window tint restrictions; and
- Required return-of-service forms to list all documents served.

This analysis is drafted to the committee substitute to the committee substitute as passed by the Judiciary Committee.