

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 890

SPONSOR: Banking and Insurance Committee and Senator Campbell

SUBJECT: Mortgage-Foreclosure Proceedings

DATE: April 2, 2001 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Johnson</u>	<u>Johnson</u>	<u>JU</u>	<u>Fav/2 amendments</u>
2.	<u>Johnson</u>	<u>Deffenbaugh</u>	<u>BI</u>	<u>Favorable/CS</u>
3.	_____	_____	<u>RC</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

The committee substitute amends provisions related to foreclosure proceedings. The bill requires the court to enter final judgment within 90 days of the close of pleadings in an uncontested mortgage-foreclosure. Further, where a default judgment has been entered and the note or mortgage provides for reasonable attorney’s fees, the court is not required to hold a hearing or to adjudge the requested attorney fees as reasonable where the fees do not exceed 3 percent of the original principal amount owed at the time of the filing of the complaint. These provisions would not preclude a challenge to the reasonableness of the attorney’s fees.

The bill amends s. 702.10, F.S., which provides an expedited process for mortgage foreclosure proceedings. The changes provide:

- 1) that the hearing on the order to show cause must be held within 90 days of service of the order on the defendant;
- 2) that the order to show cause must state that when an answer does not contest the foreclosure the court may determine that the defendant waived the right to a hearing and shall enter a final judgment of foreclosure;
- 3) where a default judgment has been entered and the note or mortgage provides for reasonable attorney’s fees, the court is not required to hold a hearing or to adjudge the requested attorney fees as reasonable where the fees do not exceed 3 percent of the principal amount owed at the time of the filing of the complaint.

This bill amends section 702.10 and creates an unnumbered section of the Florida Statutes.

II. Present Situation:

Chapter 702, F.S., provides for foreclosure of mortgages.

Section 702.01, F.S., provides that a mortgage foreclosure is an action in equity. The court is required to sever all counter claims against the mortgagee for a separate trial and the foreclosure action is to be tried to the court without a jury.

Section 702.07, F.S., authorizes the court to rescind, vacate, and set aside any foreclosure at any time prior to the sale of the property and the court may dismiss the foreclosure proceeding when all court costs are paid. Such an action by the court will restore the lien and the debt secured by the lien to the position they were prior to the filing of the foreclosure action.

When a complaint has been filed to initiate a foreclosure proceeding, s. 702.10, F.S., provides an expedited process for foreclosure through the use of an order to show cause. This process provides that the mortgagee may move the court for an “order to show cause for the entry of final judgment.” The court then issues an order to show cause for an expedited hearing process.

The order to show cause must state:

- the date and time for the hearing;
 - with proper service the hearing may be held 20 days or more from service;
 - with service by publication the hearing may be held 30 days or more from service;
- the time in which service of the order on the defendant must be obtained;
- that the filing of defenses in a motion or answer by the date of the hearing constitutes cause for the court not to enter a final judgment;
- that the defendant has the right to file affidavits or other papers at the hearing and may appear in person;
- That if the defendant files defenses by motion, the hearing time will be used to hear those defenses;
- that if the defendant fails to appear or file defenses, the defendant may be deemed to have waived the right to a hearing and the court may enter a final judgment of foreclosure.

Additionally, a copy of the proposed final judgment must be attached.

If a defendant, who has been properly served with the order to show cause, fails to file an answer or defenses or fails to appear at the hearing the court can presume that the defendant has relinquished their right to be heard on the petition. Where the court finds that the defendant waived the right to be heard the court may promptly enter a final judgment of foreclosure.

If the court determines that the defendant has not waived his or her right to be heard, the court must determine whether the defendant has stated sufficient cause for the court not to enter the final judgment. If no cause is found, the judgment must be entered. However, when the defendant has filed defenses in a motion or answer the court must find cause not to enter the final judgment at the hearing on the order to show cause. When the court finds cause not to enter a default judgment, the case will move forward as a regular foreclosure action, not an expedited action.

The final judgment entered based on the order to show cause shall provide only in rem relief.¹

¹ Black’s Legal Dictionary defines “in rem” is to determine a claimant’s right in a specific property.

Where the expedited process in s. 702.10, F.S. is not used a default judgment may be entered pursuant to rule 1.160, Fla. Rules of Civ. Proc. when the mortgagee files the complaint and the defendant does not answer.

Where the mortgage provides for the payment of attorney's fees those fees can be collected pursuant to s. 687.06, F.S. It states in part:

[I]t shall not be necessary for the court to adjudge an attorney's fee, provided in any note or other instrument of writing, to be reasonable and just, when such fee does not exceed 10 percent of the principal sum named in said note, or other instrument in writing.

Where a contract provides for the payment of "reasonable attorney fees" without more specificity the courts have found those fees to be unliquidated damages which must be proved at trial. *Parker v. Dekle*, 35 So. 4(Fla. 1903), *Bowman v. Kingsland Dev., Inc.*, 432 So. 2d 660(Fla. 5th DCA, 1983), *Roggerman v. Boston Safe Deposit & Trust Co.*, 670 So.2d 1073(Fla. 4th DCA, 1996).

The provisions in s. 687.06, F.S., have been held to apply only when the actual percent is stated in the mortgage, not a range of percent. Specifically, this section was found not to apply to a mortgage that requires payment of a reasonable fee but which did not specify the percentage. *Sepler v. Emanuel*, 388 So.2d 28 (Fla. 3d DCA, 1980). In *Sepler* the court found that to uphold the lower court judgment in the case, the court would have to find that in every case where a reasonable attorney's fee was specified a 10 percent attorney fee was reasonable. *Sepler* at 29. The court determined this would not be appropriate.

However, in reviewing s. 687.06, F.S., another appellate court, held that a fee stated in the mortgage that was 10 percent or less is not to be examined by the courts for reasonableness or fairness absent a plea for equitable considerations such as unconscionability. *Dean v. Coyne*, 455 So.2d 576 (Fla. 4th DCA 1984). *Dean* applied this in the circumstance where the mortgage stated a fee of 10 percent or more. The court found, based on the provisions of s. 687.06, F.S., that while the contract provided a right to seek a fee of greater than 10 percent there was also a right of the appellee to show that the fee was excessive. The court stated that a contrary construction of the statute could potentially violate an appellee's constitutional right to equal protection or access to the courts. *Dean*, at 577

III. Effect of Proposed Changes:

The bill provides that in an uncontested mortgage-foreclosure the court must enter final judgment within 90 days of the close of pleadings. The section then provides that a mortgage-foreclosure proceeding is uncontested if an answer not contesting the foreclosure has been filed or a default judgment has been entered. This would require a judge to enter a final order assessing damages within 90 days of the default judgment or an answer not contesting the foreclosure.

The second subsection of the bill provides for attorney fees. Where the note or mortgage provides for reasonable attorney's fees and a default judgment has been entered against the mortgagor the court is not required to hold a hearing or to adjudge the requested attorney fees as

reasonable where the fees do not exceed 3 percent of the principal amount owed at the time of the filing of the complaint. This provision applies even if the note or mortgage does not specify the percentage of the original amount that would be paid as liquidated damages. The bill then provides that in any proceeding to enforce the note or mortgage, the fees assessed as provided in the subsection constitute liquidated damages. The subsection also provides that this section does not preclude a challenge to the reasonableness of the attorney fees.

The provisions related to the attorney fees would provide a statutory definition of reasonable attorney's fees which would allow for the fee to be determined and dealt with as liquidated damages when there is a default judgment. This would remove the necessity of a hearing on attorney fees when there were no objections filed by the defendant. However, the provision does not remove the court's right to hold a hearing.

The bill amends s. 702.10, F.S., to require that the hearing on the order to show cause must be held within 90 days of the date of service. This provides a period of 60 days in which the hearing may be held since the hearing may not be set less than 30 days after notice.

The section is amended to add that if the defendant files an answer that does not contest the foreclosure the defendant may be deemed by the court to have waived the right to a hearing. Then the court shall enter a final judgment of foreclosure.

The section is also amended to provide a definition of reasonable attorney's fees that the court may use in place of holding a hearing when a default judgment has been entered. Where the note or mortgage provides for reasonable attorney's fees and a default judgment has been entered against the mortgagor, the court is not required to hold a hearing or to adjudge the requested attorney's fees as reasonable where the fees do not exceed 3 percent of the principal amount owed on the note or mortgage at the time of filing. This provision applies even if the note or mortgage does not specify the percentage that would be paid as liquidated damages. Notice of this provision must be provided in the order to show cause. This definition could remove the necessity of a hearing on attorney's fees when there were no objections filed by the defendant. However, the provision does not remove the court's right to hold a hearing.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

The provisions of the bill could eliminate the need for parties obtaining a default judgment on a mortgage foreclosure to request a hearing on attorney's fees in each case.

C. Government Sector Impact:

The court will no longer be required to review awards of attorney's fees that do not exceed 3 percent of the original principal of the mortgage where there is a default judgment in the underlying mortgage foreclosure. There is no information regarding how often the courts do this so the exact savings cannot be calculated.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
