

# 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.)

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Prepared By: Judiciary Committee

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BILL: CS/CS/SB 1258

SPONSOR: Judiciary Committee, Banking and Insurance Committee, and Senator Atwater

SUBJECT: Mortgages/Certificates of Release

DATE: April 14, 2005

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Knudson</u>	<u>Deffenbaugh</u>	<u>BI</u>	<u>Fav/CS</u>
2.	<u>Cibula</u>	<u>Maclure</u>	<u>JU</u>	<u>Fav/CS</u>
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
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6.	_____	_____	_____	_____

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## I. Summary:

The committee substitute permits a title insurer to execute and record a certificate of release of a mortgage in the event that a satisfaction or release of a mortgage with a principal amount of \$500,000 or less has not been executed and recorded after the mortgage has been paid in full. The certificate of release operates as a release of the mortgage described in the certificate. The certificate of release is to be recorded in the real property records of each county in which the mortgage is recorded. A title insurer who records a certificate of release is liable to the holder of an obligation under the mortgage (mortgagee) for actual damage sustained due to the recording of the certificate of release, unless the title insurer relied upon a payoff statement provided by the mortgagee and can prove that the mortgage was paid in full in accordance with the payoff statement.

The committee substitute repeals s. 701.05, F.S., which provides that any person entitled to and receiving payment for money due upon a mortgage, lien, or judgment who fails for 30 days after written demand made to cancel and satisfy the record (as provided in s. 701.04, F.S.) is guilty of a second degree misdemeanor.

This committee substitute creates section 701.041, Florida Statutes, and repeals section 701.05, Florida Statutes.

## II. Present Situation:

### Title Insurance

Title insurance is defined by s. 624.608, F.S., as “insurance of owners of real property or others having an interest in real property or contractual interest derived therefrom, or liens or

encumbrances on real property, against loss by encumbrance, or defective titles, or invalidity, or adverse claim to title.” Put simply, title is the formal right of ownership of property.<sup>1</sup> Title insurance is a policy issued by a title insurer that, after performing a search of the title, represents the state of that title and insures the accuracy of its search against claims of title defects.<sup>2</sup> The title insurer keeps complete sets of abstracts or duplicates of the records and employs title-examiners to complete its task. Title insurance is usually taken out by the purchaser of property or an entity that is loaning money on a mortgage. That entity is attempting to establish that title is “clear”—the property is free from encumbrances;<sup>3</sup> “good”—the property is free from litigation, palpable defects, and grave doubts; “marketable”—title is willing to be accepted in ordinary business practice; and “merchantable”<sup>4</sup>—title is clear and will enable the owner to hold the property in peace and sell it.

In Florida, purchasers of real property and lenders utilize title insurance to protect themselves against claims by others that they are the rightful owner of the property. Most lenders require title insurance when they underwrite loans for real property. Title insurance provides a duty to defend related to an adverse claim against title, and also promises to indemnify the policyholder for damage to the lender’s security interest created by a cloud on title, unmarketable title, or adverse title that was not discovered by the title insurer.

In a purchase of real estate, a title insurer must determine whether any mortgages on the property have been paid. Section 701.04, F.S., requires the holder of a mortgage (the mortgagee) to send, within 14 days of a written request, an estoppel letter setting forth the unpaid principal balance on the mortgage, any interest due, and the per diem rate. If the mortgage, lien, or judgment is fully paid, then a satisfaction letter must be issued to the party making the request. Within 60 days after a mortgage is fully paid, the mortgagee must cancel the mortgage. If a civil action arises out of the provisions of s. 701.04, F.S., the prevailing party is entitled to attorney’s fees and costs.

Because a title may not be clear until verification is received that all mortgages on the property have been satisfied, it is necessary that such information be obtained and filed with the appropriate jurisdiction in a timely manner. However, representatives from the Real Property, Probate, and Trust Law Section of The Florida Bar have indicated that in a number of circumstances, the release or satisfaction of a mortgage is not presented in a timely fashion or is never presented to the title insurer or its authorized agent. To help remedy this problem, a number of states have adopted a “self-help” procedure whereby, upon meeting certain conditions, a title insurer or its authorized agents may record an affidavit that releases the lien of a mortgage from property that has been paid in full.<sup>5</sup>

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<sup>1</sup> BLACK’S LAW DICTIONARY (8th ed. 2004).

<sup>2</sup> BLACK’S LAW DICTIONARY (8th ed. 2004).

<sup>3</sup> BLACK’S LAW DICTIONARY (8th ed. 2004).

<sup>4</sup> BLACK’S LAW DICTIONARY (8th ed. 2004).

<sup>5</sup> REAL PROPERTY, PROBATE, AND TRUST LAW SECTION OF THE FLORIDA BAR, WHITE PAPER ON A PROPOSED BILL TO PERMIT TITLE INSURERS AND THEIR AUTHORIZED AGENTS TO RELEASE THE LIENS OF MORTGAGES THAT HAVE BEEN PAID IN FULL (undated).

### III. Effect of Proposed Changes:

The committee substitute permits title insurers to file a certificate in the public records to release real property of an encumbrance of a recorded mortgage, of \$500,000 or less, that has been paid in full. In filing the certificate, a title insurer may rely on a payoff statement from a lender to determine whether the mortgage has been satisfied. If the payoff statement contains errors, the lender must seek recourse from the borrower. The lender may not proceed against the property for amounts that the lender neglected to show were unpaid on the payoff statement.

**Section 1.** Creates s. 704.041, F.S., to allow title insurers to execute a certificate of release for a mortgage or mortgage lien that has a principal amount of \$500,000 or less, and to record the certificate of release if a satisfaction or release of the mortgage has not been executed and recorded after the loan is paid in full. The \$500,000 restriction on filing the certificate does not apply to a mortgage securing an open-end or revolving credit agreement.

The certificate of release may be executed by an officer or duly appointed agent of a title insurer on behalf of the mortgagor or a person who acquired title to the property described in the mortgage. The certificate is to be recorded in the real property records of each county in which the mortgage is recorded (where the real property securing the mortgage is located). The certificate is for use when the satisfaction or release of the mortgage has not been executed and recorded after payment in full of the mortgage was made in accordance with a payoff statement furnished by the mortgagee or mortgage servicer.

#### *Requirements Regarding the Content and Filing of a Certificate of Release*

A certificate of release must contain the following:

- The name of the title insurer filing the certificate, the mortgagor, original mortgagee, and (if any) the mortgage servicer. The date of the mortgage and recording. The volume and page or document number in the real property records in which the mortgage is recorded along with similar information for the last recorded assignment of the mortgage.
- A statement that the mortgage, and any modifications, were in the principal amount of \$500,000 or less.
- A statement that the person executing the certificate of release is an officer or duly appointed agent of a Florida licensed title insurer under ch. 624 or ch. 626 of the Florida Statutes.
- A statement that the certificate of release is made on behalf of the mortgagor or a person who acquired title from the mortgagor to all or part of the property described in the mortgage.
- A statement that the mortgagee or mortgage servicer provided a payoff statement which was used to make payment in full of the unpaid balance of the loan secured by the mortgage.
- A statement that payment in full of the unpaid balance of the loan secured by the mortgage was made in accordance with the payoff statement.
- A statement that a copy of the certificate was sent to the mortgagee or mortgage servicer.

A copy of the certificate of release must be sent to the mortgagee or mortgage services company that provided the payoff statement. The certificate must be sworn to or affirmed under penalty of perjury before a notary public.

If a mortgage is recorded in more than one county and a certificate of release is recorded in one of such counties, a certified copy of the certificate of release may be recorded in another such county where the mortgage is recorded with the same effect as the original certificate of release. The certificate of release must be entered and indexed as satisfactions of a mortgage are entered and indexed.

#### ***Agents of the Title Insurer Filing a Certificate of Release***

A certificate of release may be executed, acknowledged, and recorded by an officer or duly appointed agent of a title insurer. Delegation to an agent by the title insurer does not relieve the title insurer of liability for damages caused by a wrongful or erroneous execution of a certificate of release. In fact, the title insurer named in a certificate of release filed by an appointed agent is liable for damages regardless of whether the insurer authorized the specific certificate recorded by the agent.

The appointment of an agent must be executed, acknowledged, and recorded by an officer of the title insurer and state the title insurer as principal, the identity of the authorized agent, and that the agent has full authority to execute and record certificates of release on behalf of the title insurer. A separate appointment of an agent is not necessary for each certificate of release if at least one such appointment is recorded in the county in which the mortgaged property is located. The agent's authority continues until a revocation of appointment is recorded in the office of the county recorder in which the appointment of agent was recorded.

#### ***Effects of a Certificate of Release***

A properly executed certificate of release is entitled to be recorded with the county recorder and operates as a release of the mortgage. The county recorder must rely upon the certificate of release to release the mortgage. The certificate fulfills any other obligation of the mortgagee or mortgage servicer to file a satisfaction or release of mortgage.

Any liability of a title insurer for damages under this section is considered to be a title insurance claim on real property in Florida under s. 627.7865, F.S. Recording of a certificate of release does not relieve the mortgagor, or the mortgagor's successors or assigns, from any personal liability on the loan or other obligations secured by the mortgage. In addition to remedies provided by law, a title insurer that records a certificate of release is liable to the holder of the obligation secured by the mortgage for the actual damages sustained due to the recording of the certificate of release. Reasonable costs and attorneys' fees are to be awarded to the prevailing party in such an action.

A title insurer has no liability under this section if it can show that the mortgage was paid in full in accordance with the payoff statement furnished by the mortgage servicer.

***Premiums Charged for Certificates of Release***

The Financial Services Commission shall adopt rules establishing an actuarially sound premium to be charged for a certificate of release.

**Section 2.** Repeals s. 701.05, F.S. That section provides that any person entitled to and receiving payment for money due upon a mortgage, lien, or judgment who fails for 30 days after written demand made to cancel and satisfy the record (as provided in s. 701.04, F.S.) is guilty of a second-degree misdemeanor.

**Section 3.** The committee substitute takes effect July 1, 2005.

**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 committee substitute should help real estate closings to be completed expeditiously when a mortgagee or mortgage servicer has failed to file a release or satisfaction of mortgage, creating a more efficient real estate market in the state. The additional premium charge for filing a certificate of mortgage release will result in additional revenue for title insurers, and additional costs for entities purchasing the service.

**C. Government Sector Impact:**

County court clerks will have to accept filings of certificates of release in lieu of satisfactions of mortgages. Additionally, county court clerks will have to accept filings of agency status of title insurance agents.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

Under s. 701.05, F.S., the failure to record a satisfaction of mortgage after 30 days of a written demand is a second-degree misdemeanor. The policy underlying the repeal of s. 701.05, F.S., is not apparent under the provisions of the committee substitute. The Legislature may wish to preserve s. 701.05, F.S., as an incentive for mortgagees to file a satisfaction of mortgage whenever a mortgage is paid in full.

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

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## **VIII. Summary of Amendments:**

None.

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