

# 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: Banking and Insurance Committee

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BILL: CS/CS/SB 166

INTRODUCER: Banking and Insurance Committee, Judiciary Committee and Senator Campbell

SUBJECT: Residential Foreclosure Proceedings

DATE: March 29, 2006

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

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

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## I. Summary:

Surplus funds may exist after a foreclosure sale, if property is sold for more than the amount of all disbursements required by a foreclosure order. The bill creates a presumption that these surplus funds belong to the owner of the real property on the date of the filing of a *lis pendens*.<sup>1</sup> The presumption, however, can be rebutted with a properly executed assignment of the funds. The bill directs the clerk of court include information regarding surplus funds in the final judgment, certificate of sale, and certificate of disbursements. The funds will be paid to the former owner of the property, unless an objection to the payment is filed. If an objection is filed by a subordinate lienholder or assignee, a court must determine who is entitled to the surplus funds.

The bill creates the position of surplus trustee to find the owner of real property as of the *lis pendens* date if no claims of surplus funds are made. The surplus trustee is entitled to an advance of 2 percent of the surplus for his services, and 10 percent of the surplus upon obtaining a court order disbursing the surplus to the owner of record.

The bill also authorizes penalties of up to \$15,000 for unspecified conduct that “victimizes or attempts to victimize” a homeowner during the course of a residential foreclosure proceeding.

This bill substantially amends sections 45.031 and 702.035, Florida Statutes. This bill creates the following sections of the Florida Statutes: 45.032, 45.033, and 501.2078.

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<sup>1</sup> A *lis pendens* is a “notice, recorded in the chain of title to real property, . . . to warn all persons that certain property is the subject matter of litigation, and that any interests acquired during the pendency of the suit are subject to its outcome.” BLACK’S LAW DICTIONARY (8th ed. 2004).

## II. Present Situation:

According to news articles, “surplus chasers” or “foreclosure vultures” locate real estate foreclosures in which the price paid at a foreclosure auction exceeds the owner’s outstanding indebtedness.<sup>2</sup> These individuals will help the former owners of foreclosed property claim the surplus funds. The fees charged for recovering the surplus may be up to 40 percent of the funds recovered.

Foreclosures on homestead property can result from causes including the failure to make mortgage payments,<sup>3</sup> failure to pay certain taxes,<sup>4</sup> and failure to satisfy mechanics liens.<sup>5</sup> If the selling price of real estate exceeds the debt that led to the foreclosure, a surplus exists. After a foreclosure sale, surplus funds are deposited in the registry of the court. These funds may remain unclaimed if the persons entitled to the funds cannot be located. According to the Florida Association of Court Clerks and Comptroller, the bulk of surplus or unclaimed funds in court registries result from mortgage foreclosure sales and tax foreclosure sales.

Surplus funds from a foreclosure sale belong to the former owner or lien holders of the property at the time of the sale.<sup>6</sup> However, only after lien holders have been paid may any surplus be disbursed to the owner.<sup>7</sup> To obtain release of the surplus funds, a person must petition the court for the funds, and the court must order the release of the funds.<sup>8</sup>

## III. Effect of Proposed Changes:

### Procedure for Release of Surplus Funds and Notice Requirements

Surplus funds may exist after a foreclosure sale, if property is sold for more than the amount of all disbursements required by a foreclosure order. The bill creates a presumption that these surplus funds belong to the owner of the real property on the date of the filing of a *lis pendens*<sup>9</sup> after payment has been made to subordinate lienholders who have timely filed a claim within 60 days of the sale. That presumption, however, can be rebutted with a properly executed assignment of the funds.

The final judgment from a foreclosure proceeding must include a statement notifying the property owner and subordinate lien holders that there may be additional money from the foreclosure sale and notifying the property owner that he or she may claim such additional funds without representation by a lawyer or other person. The sale must be conducted at public auction at the time and place set forth in the final judgment. After the sale, the Certificate of Sale filed by the Clerk of Court must include the amount the property was sold for. The Clerk is required to

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<sup>2</sup> See Natalie P. McNeal, ‘Surplus chasers’ make the most of rising home prices, MIAMIHERALD.COM, Jul. 24, 2005; Proposed Florida law targets ‘foreclosure vultures,’ INMAN NEWS, Feb. 11, 2005; Julie Kay, Lawyer Accused in Mortgage Scam is Suspended, DAILY BUSINESS REVIEW, Feb. 11, 2005.

<sup>3</sup> See ch. 702, F.S.

<sup>4</sup> See, e.g., ch. 173, F.S.; ch. 197, F.S.

<sup>5</sup> See ch. 713, F.S.

<sup>6</sup> *Jelic v. Sears Mtg. Corp.*, 614 So. 2d 1149, 1150 (Fla. 4th DCA 1993) (quoting *Rosen v. Dorn-Korthe, Inc.*, 171 So. 646 (Fla. 1936)).

<sup>7</sup> *Garcia v. Stewart*, 906 So. 2d 1117, 1121 (Fla. 4th DCA 2005).

<sup>8</sup> Section 43.19, F.S.; s. 173.11, F.S.

<sup>9</sup> See note 1, *supra*.

serve all parties with a copy of the Certificate of Disbursements detailing the total amount of payments made to parties pursuant to the sale and any remaining surplus. The Certificate of Disbursement must notify person's claiming a right to excess funds to make a claim within 60 days, or forfeit the right to make a claim to the owner of record at the *lis pendens* date. The funds will be paid to the owner at the *lis pendens* date, unless another person (such as a subordinate lienholder or assignee of the right to collect the funds) claims an interest in the proceeds during the 60 day period. If such a claim is made, the court shall set an evidentiary hearing to determine entitlement to the surplus.

### **Assignment of Surplus Funds**

Under existing law, surplus funds from a foreclosure sale belong to the former owner of the property at the time of the sale. This bill, however, creates a presumption that the funds belong to the record owner on the date of the filing of the *lis pendens* after payment is made to appropriate secondary lienholders. This presumption can be rebutted by a properly executed assignment.

An assignee of the rights of the owner of record claiming a legal right to the surplus must prove their entitlement to the surplus funds. The assignee must either show that a voluntary transfer of the right to collect the surplus funds was made in accordance with the following requirements, or that an involuntary transfer occurred (such as pursuant to an inheritance or the appointment of a guardian). If the transfer was voluntary, the assignment must:

- Be in writing;
- Be executed before the foreclosure sale, or if executed after the foreclosure include the foreclosure sale price and the amount of the surplus;
- Include a financial disclosure of the assessed values of the property, a statement that the assessed value may be lower than the actual value of the property, and statement of the approximate amount of debt encumbering the property and the approximate amount of equity in the property;
- State that the owner does not need an attorney or other representative to recover surplus funds; and
- Specify all forms of consideration paid for the rights to the property or the assignment of the right to surplus funds.

Nonconforming assignments may be set aside by a court. The bill implies that if a nonconforming assignment was made in good faith, the assignor seeking to set aside the assignment may be liable for damages. The bill, however, does not clearly identify what constitutes a nonconforming, bad-faith assignment. The Legislature may wish to revise the bill to more clearly identify what is a nonconforming, bad-faith assignment.

### **Surplus Trustees**

Under the bill, if no claim for the surplus from a foreclosure sale is made, a surplus trustee shall be appointed by the Florida Clerks of Court Operations Corporation within 10 days of a request by the Clerk of Court. The surplus trustee shall attempt to locate the owner of record entitled to the surplus for 1 year. If the owner of record cannot be located, the surplus trustee appointment terminates. Thirty days after termination of the appointment of surplus trustee, the remaining funds are treated as unclaimed property and deposited with the Chief Financial Officer pursuant to chapter 717, F.S.

The bill creates requirements for serving as a surplus trustee. The surplus trustee must be willing to accept cases on a statewide basis, but may employ subcontractors who are not surplus trustees so long as the trustee remains primarily responsible for compliance with required duties. The surplus trustee is entitled to a cash advance of 2 percent of the surplus at appointment, and 10 percent of the surplus upon obtaining a court order disbursing the surplus to the owner of record. The surplus trustee must be certified with the Florida Clerks of Court Operations Corporation.

The requirements for certification include:

- A certificate of good standing from the Secretary of State that the entity is a Florida entity;
- Twelve months experience in the recovery of surplus funds in foreclosure proceedings;
- A valid class "A" private investigators license or a letter from a licensed attorney that the attorney is a principal or employee of the entity seeking certification and will supervise the management of the entity; and
- Liability insurance coverage, cash reserves or bonding of \$500,000.

### **Penalties**

The bill provides that a person violates the Florida Deceptive and Unfair Trade Practices Act by conduct that victimizes or attempts to victimize homeowners in the course of a residential foreclosure proceeding, if the person knew or should have known that such conduct was unfair or deceptive. For such conduct, a civil penalty of up to \$15,000 for each violation may be imposed.

### **Effective Date**

This bill takes effect on July 1, 2006.

## **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:**

A clerk of court shall receive \$60 for services in making, recording, and certifying the sale and title, to be assessed as costs and advanced by the plaintiff before the foreclosure sale.

A clerk of court shall receive \$10 for notifying a surplus trustee of his or her appointment.

A clerk of court shall receive \$10 for each disbursement of surplus proceeds.

A court clerk may collect \$25 from the surplus funds remaining after each foreclosure sale to be used to educate the public on their rights during foreclosures.

**B. Private Sector Impact:**

Persons in foreclosure proceedings may have the information to better calculate the implications of some choices they may have during a foreclosure proceeding. Persons who attempt to purchase an assignment of surplus funds or real property under foreclosure may have to provide the property owner with more financial information.

**C. Government Sector Impact:**

The bill places additional requirements on clerks of court regarding the notification and payment of surplus funds.

Penalties for conduct that victimizes or attempts to victimize a person in a foreclosure proceeding must be used by the Department of Legal Affairs to educate the public on their rights in foreclosure proceedings.

Court workloads may be reduced because surplus funds can be disbursed without a hearing if no objection to paying the funds to a former property owner is made.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

Concerns have been raised that the Florida Clerks of Court Operations Corporation may not have the expertise to properly certify trustees. The Legislature may wish to consider moving such responsibilities to another body with expertise in locating owners of property, such as the Bureau of Unclaimed Property in the Department of Financial Services.



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

None.

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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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