

# 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/SB 166

INTRODUCER: Judiciary Committee and Senator Campbell

SUBJECT: Residential Foreclosure Proceedings

DATE: January 30, 2006

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cibula	Maclure	JU	Fav/CS
2.	_____	_____	BI	_____
3.	_____	_____	JA	_____
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. If surplus funds exist, the bill directs the clerk of court to notify all defendants of the foreclosure action of their existence. 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, a court must determine who is entitled to the surplus funds.

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.

## 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

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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).

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:

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> That presumption, however, can be rebutted with a properly executed assignment of the funds. If surplus funds exist, the bill directs the clerk of court to notify all defendants of the foreclosure action of their existence. 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, a court must determine who is entitled to the surplus funds.

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.

#### Procedure for Release of Surplus Funds

Under the bill, if a surplus of less than \$200 exists, the funds must be mailed to the former property owner at his or her last address. That address could potentially be the address of the foreclosed property. In that event, the letter containing the funds may be returned to the clerk as undeliverable. As a consequence, the check for the surplus funds will not be cashed. The bill,

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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*.

however, does not address whether these funds will become unclaimed property. The Legislature may wish to revise the bill to provide that at some point, the funds are to be delivered to the chief financial officer as unclaimed property.

A surplus of \$200 or more will be paid to the former property owner, if no objection to the payment is received by the court. If an objection is filed, the court will determine who is entitled to the surplus funds. The court clerk can spend up to \$250 of the surplus to locate the former property owner. If the former property owner cannot be located after the search, the funds must be deposited as unclaimed property with the chief financial officer. Unclaimed property may be claimed from the chief financial officer under ch. 717, F.S.

### **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*. This presumption can be rebutted by a properly executed assignment.

A properly executed assignment must be “executed with the formality of a deed” and contain information that will allow the assignor to easily calculate the potential gain expected by the assignee. In other words, the information that must be in an assignment will allow the assignor to calculate his or her potential loss by agreeing to an assignment. However, based on the information that is required to be in an assignment, the bill does not appear to contemplate that the right to surplus funds can be assigned after, rather than before, a foreclosure sale. The Legislature may wish to amend the bill to provide that an assignment of surplus funds made after a foreclosure sale must specify the amount of the surplus.

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.

### **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.

The bill does not clearly specify what conduct or type of conduct victimizes or attempts to victimize a person. The Legislature may wish to clarify its intent by specifying what acts constitute victimization.

### **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 may charge \$5 to mail surplus funds to a former property owner whose property was sold at a foreclosure sale.

A clerk of court may deduct \$5 from surplus funds remaining from a foreclosure sale for each notice of the existence of surplus funds that is mailed.

A clerk of court may deduct \$5 from surplus funds remaining from a foreclosure sale for each notice of hearing to determine disposition of surplus funds that is mailed.

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.

A clerk may collect up to \$250 from surplus funds remaining after a foreclosure sale to locate the former property owner.

**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 authorizes the clerk of court to deduct \$25 from each foreclosure sale in which surplus funds exist to educate the public on their rights in foreclosure proceedings.

The bill requires court clerks to mail surplus funds and notices of the existence 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:**

The notice of the existence of surplus funds required by the bill states: “IF YOU ARE AN INDIVIDUAL AND *ARE* THE OWNER OF THE PROPERTY . . . .” This notice is mailed after the foreclosure sale. As a result, the provision should be written to state: “IF YOU . . . . *WERE* THE OWNER . . . .”

#### **VII. Related Issues:**

This bill appears to be intended to prevent people in the midst of foreclosure proceedings from being victimized. The various versions of this bill impliedly contemplate that people are victimized when they are: (1) charged too much for obtaining surplus funds; (2) paid too little for an assignment of surplus funds or real property; or (3) given incomplete or false information related to the value of their property, the amount of equity in the property, the amount of surplus funds that may exist, and procedures for obtaining surplus funds. This bill may not carry out the apparent intent of the Legislature, unless the Legislature more clearly identifies the conduct that it is trying to prevent.

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

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

None.

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