

By Senator Campbell

32-218-06

See HB

1 A bill to be entitled

2 An act relating to residential foreclosure

3 proceedings; creating s. 45.0311, F.S.;

4 providing a definition; providing requirements

5 and procedures for disbursement of surplus

6 funds from a judicial sale; authorizing a court

7 to determine reasonable attorney's fees for

8 motions to disburse surplus funds; providing a

9 right of certain parties to petition a court to

10 set aside certain deeds or assignments under

11 certain circumstances; entitling certain

12 parties to recover all fees and costs incurred

13 in certain surplus funds proceedings; providing

14 for the court to determine reasonable

15 attorney's fees in such proceedings; creating

16 s. 48.184, F.S.; specifying a required notice

17 form to be served with a summons and complaint

18 in actions to foreclose an interest in a

19 mortgagor's primary dwelling; requiring the

20 notice to be included in the service of

21 process; requiring certain verification of

22 service; amending s. 48.21, F.S.; specifying an

23 additional notice requirement for return of

24 service of process forms made for foreclosures

25 of a mortgagor's primary dwelling; authorizing

26 a clerk of court to collect a fee for attempts

27 of service of process; requiring the clerk of

28 court to use fee proceeds for certain public

29 education purposes; amending s. 49.08, F.S.;

30 requiring certain notices of action to contain

31 an additional notice of potential surplus and

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

1 application procedures information; creating s.
2 501.2078, F.S.; providing definitions;
3 providing a civil penalty for knowingly using
4 unfair or deceptive homeowner victimization
5 methods, acts, or practices in residential
6 foreclosure proceedings; specifying a time
7 period during which a person may not contact a
8 homeowner for certain purposes; specifying
9 higher priority of an order of restitution or
10 reimbursement over imposition of a civil
11 penalty; providing for deposit of civil
12 penalties into the Legal Affairs Revolving
13 Trust Fund of the Department of Legal Affairs;
14 allocating such funds for certain purposes;
15 creating s. 689.251, F.S.; requiring documents
16 transferring a mortgagor's primary dwelling to
17 disclose certain information; authorizing a
18 seller to void a transaction under certain
19 circumstances; requiring the seller to repay
20 certain amounts to a purchaser, minus certain
21 amounts, under such circumstances; amending s.
22 702.035, F.S.; providing that certain
23 advertisements, publications, or notices
24 relating to foreclosure proceedings must
25 include the procedure for collecting surplus
26 funds or list a telephone number or website at
27 which the procedure will be explained; amending
28 s. 702.065, F.S.; prohibiting a court or clerk
29 of court from entering a default or default
30 judgment against a mortgagor in a proceeding to
31 foreclose a mortgagor's primary dwelling if a

1 return of service does not contain a required
2 notice; amending s. 702.10, F.S.; including a
3 reference to a required notice for proceedings
4 to foreclose a mortgagor's primary dwelling in
5 certain orders to show cause in final judgment
6 of foreclosure entries; providing an effective
7 date.

8

9 Be It Enacted by the Legislature of the State of Florida:

10

11 Section 1. Section 45.0311, Florida Statutes, is
12 created to read:

13

45.0311 Disbursement of surplus funds.--

14

(1) As used in this subsection, the term "surplus
15 funds" means all funds existing after all valid liens have
16 been paid. Any person claiming a right to disbursement of
17 proceeds from a judicial sale, other than the original
18 mortgagor, shall produce a deed satisfying the requirements of
19 s. 689.251, if applicable, or an assignment of the proceeds
20 from the original mortgagor, or homeowner if not the original
21 mortgagor, executed with the formality of a deed and
22 acknowledged and conspicuously including the assessed value of
23 the property, a disclosure that the assessed value may be
24 lower than the actual value of the property, the approximate
25 amount of any debt encumbering the property, the approximate
26 amount of any equity in the property, and a statement that the
27 assignor does not need an attorney or other representative to
28 recover the surplus funds. The deed or assignment shall
29 conspicuously set forth all forms of consideration paid for
30 the rights to the property or the assignment of the rights to
31 any surplus funds.

1 (2) The court shall determine reasonable attorney's
2 fees charged for a motion to disburse surplus funds.

3 (3) A party who has executed an assignment or deed
4 that does not conform to the requirements of this section or
5 s. 689.251 has the right to petition the court presiding over
6 the foreclosure proceeding to set aside the nonconforming deed
7 or assignment. In any such proceeding in which the mortgagor,
8 or original homeowner if not the same as the mortgagor, is the
9 prevailing party, he or she is entitled to recover all fees
10 and costs incurred in connection with such proceeding. The
11 court shall determine reasonable attorney's fees in such
12 proceedings.

13 Section 2. Section 48.184, Florida Statutes, is
14 created to read:

15 48.184 Notice form for actions to foreclose an
16 interest in a mortgagor's primary dwelling.--In any action to
17 foreclose an interest in a mortgagor's primary dwelling, a
18 notice, in substantially the following form and printed on
19 orange paper, shall be served with the summons and complaint
20 and shall be included in the service of process. The return of
21 service shall verify that such notice was served with the
22 summons and the complaint:

23
24 (Caption of Action)

25 ATTENTION

26 TO ALL NAMED PARTIES LISTED

27 IN THIS FORECLOSURE LAWSUIT:

28
29 A FORECLOSURE ACTION HAS BEEN FILED AGAINST YOU FOR FAILURE TO
30 MAKE TIMELY MORTGAGE PAYMENTS ON YOUR RESIDENCE. IF A JUDGMENT
31 OF FORECLOSURE IS ENTERED AND YOUR PROPERTY IS SOLD AT PUBLIC

1 AUCTION, THERE MAY BE ADDITIONAL MONEY FROM THE SALE THAT
2 BELONGS TO YOU AFTER PAYMENT OF LIENHOLDERS.
3
4 YOU MAY CLAIM THESE FUNDS YOURSELF. YOU ARE NOT REQUIRED TO
5 HAVE A LAWYER OR ANY OTHER REPRESENTATION AND YOU DO NOT HAVE
6 TO ASSIGN YOUR RIGHTS TO ANYONE ELSE IN ORDER FOR YOU TO CLAIM
7 ANY MONEY TO WHICH YOU ARE ENTITLED.
8
9 PLEASE CHECK WITH THE CLERK OF THE COURT, [INSERT INFORMATION
10 FOR APPLICABLE COURT] WITHIN TEN (10) DAYS AFTER THE SALE TO
11 SEE IF THERE IS ADDITIONAL MONEY FROM THE FORECLOSURE SALE
12 THAT THE CLERK HAS IN THE REGISTRY OF THE COURT.
13
14 IF THERE IS ADDITIONAL MONEY, YOU MAY ASK THE COURT TO
15 INSTRUCT THE CLERK TO GIVE YOU THE MONEY THAT BELONGS TO YOU.
16
17 IT IS POSSIBLE THAT YOU WILL BE CONTACTED BY COMPANIES OR
18 LAWYERS OFFERING TO HELP YOU COLLECT THIS MONEY OR OFFERING TO
19 HELP YOU WITH THE FORECLOSURE BY BUYING YOUR HOUSE, LENDING
20 YOU MONEY, OR TAKING AN ASSIGNMENT. THESE COMPANIES OR LAWYERS
21 MAY NOT CONTACT YOU UNTIL AFTER 30 DAYS AFTER YOU RECEIVED
22 THIS NOTICE. IF YOU WANT TO CHECK WHETHER THE PERSON OR
23 COMPANY CALLING YOU HAS A COMPLAINT HISTORY WITH THE STATE,
24 YOU MAY CALL [INSERT CONTACT INFORMATION, INCLUDING ANY HOT OR
25 WEBSITE]. [PLEASE CALL THE ATTORNEY GENERAL'S HOTLINE AT
26 1-866-9-NO-SCAM (966-7226) OR GO TO WWW.MYFLORIDALEGAL.COM.]
27
28 IF YOU DECIDE TO SELL YOUR HOME OR HIRE SOMEONE TO HELP YOU
29 CLAIM THE ADDITIONAL MONEY, YOU SHOULD READ VERY CAREFULLY ALL
30 PAPERS YOU ARE REQUIRED TO SIGN, ASK SOMEONE ELSE, PREFERABLY
31 AN ATTORNEY WHO IS NOT RELATED TO THE PERSON OFFERING TO HELP

1 YOU, TO MAKE SURE THAT YOU UNDERSTAND WHAT YOU ARE SIGNING AND
2 THAT YOU ARE NOT TRANSFERRING YOUR PROPERTY OR THE EQUITY IN
3 YOUR PROPERTY WITHOUT THE PROPER INFORMATION. IF YOU CANNOT
4 AFFORD TO PAY AN ATTORNEY, YOU MAY CONTACT (INSERT LOCAL OR
5 NEAREST LEGAL AID OFFICE AND TELEPHONE PHONE NUMBER) TO SEE IF
6 YOU QUALIFY FINANCIALLY FOR THEIR SERVICES. IF THEY CANNOT
7 ASSIST YOU, THEY MAY BE ABLE TO REFER YOU TO A LOCAL BAR
8 REFERRAL AGENCY OR SUGGEST OTHER OPTIONS. THEIR MAILING
9 ADDRESS IS: (INSERT ADDRESS). IF YOU CHOOSE TO CONTACT (NAME
10 OF LOCAL OR NEAREST LEGAL AID OFFICE) FOR ASSISTANCE, YOU
11 SHOULD DO SO AS SOON AS POSSIBLE AFTER RECEIPT OF THIS NOTICE.

12 Section 3. Section 48.21, Florida Statutes, is amended
13 to read:

14 48.21 Return of execution of process.--Each person who
15 effects service of process shall note on a return-of-service
16 form attached thereto, the date and time when it comes to
17 hand, the date and time when it is served, the manner of
18 service, the name of the person on whom it was served and, if
19 the person is served in a representative capacity, the
20 position occupied by the person. A failure to state the
21 foregoing facts invalidates the service, but the return is
22 amendable to state the truth at any time on application to the
23 court from which the process issued. On amendment, service is
24 as effective as if the return had originally stated the
25 omitted facts. A failure to state all the facts in the return
26 shall subject the person effecting service to a fine not
27 exceeding \$10, in the court's discretion. When service of
28 process is made for foreclosure of an interest in a
29 mortgagor's primary dwelling, the return of service form shall
30 include a confirmation that the notice required by s. 48.184
31 is included in the service of process. The clerk of court may

1 collect a fee of \$25 from any surplus funds remaining in the
2 court registry following a foreclosure sale for each attempt
3 of service upon the mortgagor. The fee may be collected after
4 all valid liens have been paid but before any surplus funds
5 have been distributed to a mortgagor. The clerk shall use the
6 proceeds of such fee solely for purposes of educating the
7 public as to the rights of homeowners regarding foreclosure
8 proceedings.

9 Section 4. Subsection (5) is added to section 49.08,
10 Florida Statutes, to read:

11 49.08 Notice of action, form.--On filing the sworn
12 statement, and otherwise complying with the foregoing
13 requirements, the plaintiff is entitled to have issued by the
14 clerk or judge, not later than 60 days after filing the sworn
15 statement, a notice of action which notice shall set forth:

16 (5) Notice of a potential surplus and information
17 advising the defendant of the procedures to apply for the
18 surplus, in substantially the following form:

19
20 If you are the owner of real estate that is being foreclosed,
21 there may be money owed to you after the sale. You may contact
22 [insert contact information for clerk's office until hotline
23 and website are set up] for information on what you need to do
24 to get the funds. You do not need to hire an attorney or other
25 representative to get this money.

26 Section 5. Section 501.2078, Florida Statutes, is
27 created to read:

28 501.2078 Violations involving individual homeowners
29 during the course of residential foreclosure proceedings;
30 civil penalties.--

31 (1) As used in this section:

1 (a) "Residential foreclosure proceeding" means any
2 action in a circuit court of this state in which a party seeks
3 to foreclose on a mortgage encumbering the mortgagor's primary
4 dwelling.

5 (b) "Homeowner" means any individual who is the owner
6 of the property subject to a residential foreclosure
7 proceeding.

8 (2)(a) Any person who willfully uses, or has willfully
9 used, a method, act, or practice in violation of this part,
10 which method, act, or practice victimizes or attempts to
11 victimize homeowners during the course of a residential
12 foreclosure proceeding, and in committing such violation knew
13 or should have known that such conduct was unfair or
14 deceptive, is liable for a civil penalty of not more than
15 \$15,000 for each such violation. The act of encumbering the
16 dwelling subject to a residential foreclosure proceeding with
17 a substitute or additional lien shall not constitute a
18 violation of this section.

19 (b) Any person desiring to contact a homeowner to
20 offer to help the homeowner collect any surplus money or to
21 help with a foreclosure by buying the homeowner's house, lend
22 the homeowner money, or take an assignment may not contact the
23 homeowner until after 30 days after the homeowner receives the
24 notice provided in s. 48.184. Any such contact before such
25 30-day period has elapsed constitutes a violation of this
26 part, subject to the penalty provided in paragraph (a).

27 (3) Any order of restitution or reimbursement based on
28 a violation of this part committed against a homeowner in a
29 residential foreclosure proceeding has priority over the
30 imposition of any civil penalty for such violation pursuant to
31 this section.

1 (4) Civil penalties collected pursuant to this section
2 shall be deposited into the Legal Affairs Revolving Trust Fund
3 of the Department of Legal Affairs and allocated solely to the
4 Department of Legal Affairs for the purpose of preparing and
5 distributing consumer education materials, programs, and
6 seminars to benefit homeowners in residential foreclosure
7 proceedings or to further enforcement efforts.

8 Section 6. Section 689.251, Florida Statutes, is
9 created to read:

10 689.251 Transfer of mortgagor's primary dwelling
11 subject to default.--

12 (1) Any document other than a deed in lieu of
13 foreclosure prepared by or on behalf of a purchaser of legal
14 or equitable title to a mortgagor's primary dwelling when the
15 mortgagor is in default of his or her obligations must
16 disclose, in the instrument itself or in a separate writing
17 executed by the seller and the purchaser with the formality of
18 a deed and acknowledged by a notary public or civil notary of
19 this state, the assessed value of the property, that the
20 assessed value may be lower than the actual value of the
21 property, the approximate amount of any debt encumbering the
22 property, and the approximate amount of any equity in the
23 property. The deed or assignment shall conspicuously set forth
24 any and all forms of consideration paid for the rights to the
25 property or the assignment of the rights to any surplus funds.

26 (2) If such document fails to comply with the
27 requirements of subsection (1), the seller may void the
28 transaction. If the seller voids the transaction, the seller
29 shall repay any consideration paid by the purchaser to the
30 seller, less, however, all costs incurred by the seller as a
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1 result of the purchaser's failure to comply with subsection
2 (1), including attorney's fees and costs.

3 Section 7. Section 702.035, Florida Statutes, is
4 amended to read:

5 702.035 Legal notice concerning foreclosure
6 proceedings; procedure for collection of surplus
7 funds.--Whenever a legal advertisement, publication, or notice
8 relating to a foreclosure proceeding is required to be placed
9 in a newspaper, it is the responsibility of the petitioner or
10 petitioner's attorney to place such advertisement,
11 publication, or notice. The advertisement, publication, or
12 notice shall be placed directly by the attorney for the
13 petitioner, by the petitioner if acting pro se, or by the
14 clerk of the court. The advertisement, publication, or notice
15 must state the procedure for collecting surplus funds, if any,
16 or list a telephone number or website at which the procedure
17 will be explained.

18 Section 8. Subsection (3) is added to section 702.065,
19 Florida Statutes, to read:

20 702.065 Final judgment in uncontested proceedings
21 where deficiency judgment waived; attorney's fees when default
22 judgment entered.--

23 (3) In a proceeding to foreclose a mortgage
24 encumbering a mortgagor's primary dwelling, a court or a clerk
25 of the court may not enter a default or default judgment
26 against the mortgagor if the return of service does not
27 include evidence that the notice required by s. 48.184 was
28 served on the mortgagor.

29 Section 9. Paragraph (a) of subsection (1) of section
30 702.10, Florida Statutes, is amended to read:

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1 702.10 Order to show cause; entry of final judgment of
2 foreclosure; payment during foreclosure.--

3 (1) After a complaint in a foreclosure proceeding has
4 been filed, the mortgagee may request an order to show cause
5 for the entry of final judgment and the court shall
6 immediately review the complaint. If, upon examination of the
7 complaint, the court finds that the complaint is verified and
8 alleges a cause of action to foreclose on real property, the
9 court shall promptly issue an order directed to the defendant
10 to show cause why a final judgment of foreclosure should not
11 be entered.

12 (a) The order shall:

13 1. Set the date and time for hearing on the order to
14 show cause. However, the date for the hearing may not be set
15 sooner than 20 days after the service of the order. When
16 service is obtained by publication, the date for the hearing
17 may not be set sooner than 30 days after the first
18 publication. The hearing must be held within 60 days after the
19 date of service. Failure to hold the hearing within such time
20 does not affect the validity of the order to show cause or the
21 jurisdiction of the court to issue subsequent orders.

22 2. Direct the time within which service of the order
23 to show cause and the complaint must be made upon the
24 defendant.

25 3. State that the filing of defenses by a motion or by
26 a verified or sworn answer at or before the hearing to show
27 cause constitutes cause for the court not to enter the
28 attached final judgment.

29 4. State that the defendant has the right to file
30 affidavits or other papers at the time of the hearing and may
31 appear personally or by way of an attorney at the hearing.

1 5. State that, if the defendant files defenses by a
2 motion, the hearing time may be used to hear the defendant's
3 motion.

4 6. State that, if the defendant fails to appear at the
5 hearing to show cause or fails to file defenses by a motion or
6 by a verified or sworn answer or files an answer not
7 contesting the foreclosure, the defendant may be considered to
8 have waived the right to a hearing and in such case the court
9 may enter a final judgment of foreclosure ordering the clerk
10 of the court to conduct a foreclosure sale.

11 7. State that if the mortgage provides for reasonable
12 attorney's fees and the requested attorney's fees do not
13 exceed 3 percent of the principal amount owed at the time of
14 filing the complaint, it is unnecessary for the court to hold
15 a hearing or adjudge the requested attorney's fees to be
16 reasonable.

17 8. Attach the final judgment of foreclosure the court
18 will enter, if the defendant waives the right to be heard at
19 the hearing on the order to show cause.

20 9. Require the mortgagee to serve a copy of the order
21 to show cause on the mortgagor in the following manner:

22 a. If the mortgagor has been served with the complaint
23 and original process, service of the order may be made in the
24 manner provided in the Florida Rules of Civil Procedure.

25 b. If the mortgagor has not been served with the
26 complaint and original process, the order to show cause,
27 together with the summons and a copy of the complaint and, in
28 the case of a proceeding to foreclose a mortgagor's primary
29 dwelling, the notice required by s. 48.184, shall be served on
30 the mortgagor in the same manner as provided by law for
31 original process.

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Any final judgment of foreclosure entered under this subsection is for in rem relief only. Nothing in this subsection shall preclude the entry of a deficiency judgment where otherwise allowed by law.

Section 10. This act shall take effect July 1, 2006.