

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 65 Residential Foreclosure Proceedings
SPONSOR(S): Porth
TIED BILLS: None **IDEN./SIM. BILLS:** SB 166

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Civil Justice Committee		Bond	Bond
2) Economic Development, Trade & Banking Committee			
3) Justice Appropriations Committee			
4) Justice Council			
5)			

SUMMARY ANALYSIS

Foreclosure is the legal process for enforcing a lien or mortgage encumbering real property. The foreclosure process results in forced sale of the property. In some foreclosure cases, the sale price exceeds the amount owed to pay off the lien or mortgage, and therefore the property owner is entitled to proceeds from the sale.

This bill requires a lender who files a foreclosure case against a borrower to notify the borrower that the clerk of the court may have funds due to the borrower following the foreclosure sale. The bill also requires detailed disclosures in any legal transfer of the right to collect funds that may be owed to the borrower after the foreclosure sale. This bill also provides that it is deceptive and unfair trade practice to victimize a person whose home is in foreclosure, creating a civil cause of action for such persons.

This bill significantly increases the procedural requirements in foreclosure actions, and may have an adverse title insurance consequence that could complicate real estate transactions in general. See "Drafting Issues or Other Comments" herein.

This bill does not appear to have a fiscal impact on state or local government.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide Limited Government -- This bill complicates foreclosure actions, and creates a new cause of action.

Ensure Lower Taxes -- This bill creates a fee.

Promote Personal Responsibility -- This bill increases personal responsibility for injurious behavior by creating a cause of action for deceptive and unfair trade practices.

B. EFFECT OF PROPOSED CHANGES:

Background

Foreclosure is the legal process for enforcement of a security interest in real property. Subject to the owner's right to redemption¹, property subject to foreclosure is sold and the proceeds of the sale are applied against the debt. In most foreclosures, the debt exceeds the net proceeds of the sale.² However, due to recent economic forces that have led to substantial inflation in real property values, a growing number of properties are being sold at foreclosure for more than the debt owed on the property. The proceeds of a sale in excess of the debt owed is referred to as the surplus from the sale. In general, the property owner is entitled to the surplus.

A property owner facing foreclosure can seek help from numerous sources. The property owner can negotiate with the foreclosing lender. A different lender may be willing to refinance the property, or offer a second mortgage. The property owner can seek bankruptcy protection. The property owner can sell the property prior to the foreclosure sale. The property owner can borrow from friends and family. Most foreclosure cases are resolved by agreement or redemption of the property.

It has been reported that, with the growing number of foreclosures that may result in a surplus, there is a growing number of entrepreneurs who are offering services to property owners subject to foreclosure. Some of these entrepreneurs are receiving significant profits while the property owners they contract with receive little of their equity in the property. Some of the common means are:

- A lawyer, or a person claiming to be a lawyer, will offer to file the legal papers required to obtain the court order required for the clerk to distribute the surplus to the now (or soon to be) former property owner. The fee arrangement may be a contingency fee. The property owner does not realize that the paperwork is basic enough that most lay persons could easily complete it.³
- The entrepreneur offers the property owner a small sum of cash in exchange for an assignment of the surplus.

¹ Redemption is the right of any property owner to pay the debt at any time prior to the sale, and thereby stop the sale and keep the property. See generally, s. 45.0315, F.S.

² Where the debt exceeds the sale proceeds, the lender can usually sue for the difference, known as a deficiency. See generally s. 702.06, F.S.

³ In a related scheme, the Florida Bar has suspended the license of an attorney who was allegedly filing the paperwork necessary to obtain the surplus funds, but without receiving the owner's authority. The lawyer would deduct a 40% fee from the proceeds, and prepare a check payable to the former owner for the remainder. In some cases, the partners would intercept and cash the owner's check. Daily Business Review, *South Florida lawyer accused in mortgage scam is suspended*, Vol. 46, No. 45 (Feb. 11, 2005).

- The entrepreneur offers the property owner a small sum of cash for a quitclaim deed to the property, thereby obtaining the legal right to the surplus.

The procedure for judicial foreclosure sales is set forth in s. 45.031, F.S. The section does not specify how the clerk is to handle a surplus, thus requiring a court order for distribution of the surplus. The section also does not restrict any sale or transfer of the real property, or the right to the surplus, prior to foreclosure.

Effect of Bill

Notification

This bill requires that a homeowner involved in a residential foreclosure proceeding be notified:

- in a newspaper, either by an advertisement, publication, or notice,
- in the summons and complaint to the homeowner, and
- in the copy of the order to show cause why the home should not be foreclosed on,

that the clerk of the court may have funds due to the homeowner following the foreclosure sale and how the homeowner may learn of the procedure to collect such funds, if any.

The bill provides a standard notice form that must be served on the homeowner and provides that the return of service must indicate whether the notice was included. The standard notice form also informs the homeowner that he or she may want to contact their local Legal Aid office for assistance. If the notice is not included, a court or clerk may not enter a default against the homeowner. A clerk of court may collect a \$25 fee for each attempt of service on a homeowner from the registry of the court following the foreclosure sale, which funds are to be used to educate the public about the rights of homeowners in foreclosure proceedings.

Transfer of Interest

The bill also provides procedures that must be followed if a person wishes to transfer a homeowner's interest in any funds remaining from a foreclosure sale. Any document, other than a deed in lieu of foreclosure, that transfers an interest must disclose:

- the assessed value of the property;
- that the assessed value may be lower than the actual value of the property;
- the approximate amount of any debt encumbering the property;
- the approximate amount of any equity in the property; and
- any and all forms of consideration paid for the rights to the property or the assignment of the rights to any surplus funds.

The bill provides a procedure for a seller to void a transfer that does not meet the above requirements.

Disbursement of Surplus Funds

The bill defines surplus funds and provides a procedure for the disbursement of any surplus funds. The bill provides that any person claiming a right to disbursement of proceeds from a judicial sale, other than the original mortgagor, must produce a deed or assignment that discloses the following:

- the assessed value of the property;
- that the assessed value may be lower than the actual value of the property;
- the approximate amount of any debt encumbering the property;
- the approximate amount of any equity in the property;

- a statement that the assignor does not need an attorney or other representative to recover the surplus funds;
- any and all forms of consideration paid for the rights to the property or the assignment of the rights to any surplus funds.

The bill also provides how a person may set aside a deed or assignment that does not meet the above requirements, and that the person may be entitled to fees and costs in an action to set aside a nonconforming deed or assignment if he or she is the prevailing party.

Victimization of a Homeowner

The bill provides a civil penalty of up to \$15,000 for victimizing a homeowner during a residential foreclosure proceeding. Further, the bill provides that a person may not contact the homeowner to offer to help the homeowner collect any surplus funds, to help with a foreclosure by buying the house, lend the homeowner money, or take an assignment until after 30 days after the homeowner receives the notice of foreclosure. A person may be subject to the civil penalty provided for in the bill for violating the no-contact provision. The bill also provides that it is not a violation if the dwelling subject to the foreclosure is encumbered with a substitute or additional lien.

C. SECTION DIRECTORY:

Section 1. Creates s. 45.0311, F.S., to define “surplus funds,” and to provide a procedure for the transfer of an interest in the proceeds of a judicial sale. This section also provides a procedure for the rescinding of an assignment of an interest, and also provides that the court shall determine any attorney’s fees for a motion to disburse surplus funds. This section also provides that in any proceeding to set aside an assignment of an interest in the proceeds of a judicial sale, if the homeowner is the prevailing party, then the homeowner is entitled to collect all fees and costs in such a proceeding. A court will determine reasonable attorney fees in such a proceeding.

Section 2. Creates s. 48.184, F.S., to provide an additional notice to be included with a residential foreclosure summons and complaint to a homeowner which informs the homeowner that surplus funds may be due to the homeowner following the foreclosure and to contact the clerk of court about any surplus funds following the foreclosure sale. The notice also informs the homeowner that the homeowner does not need an attorney to collect any surplus funds, and that companies or attorneys may not contact the homeowner until after 30 days after the homeowner receives this notice. This notice also informs the homeowner that he or she may contact their local Legal Aid office for assistance.

Section 3. Amends s. 48.21, F.S., to provide that any return of service for a foreclosure of an interest in a mortgagor’s primary dwelling must include a confirmation that the notice described in section 3 of the bill was included in the service. This section allows a clerk to collect a fee of \$25 for each attempt of service from the court’s registry following a foreclosure sale but after any valid liens have been paid. Any funds collected must be used to educate the public about the rights of homeowners in foreclosure proceedings.

Section 4. Amends s. 49.08, F.S., to provide that the notice of action issued by a clerk or judge in a residential foreclosure proceeding must include a statement that the homeowner may be due surplus funds following the foreclosure sale, who to contact about any surplus funds, and that an attorney is not needed to collect any surplus funds.

Section 5. Creates s. 501.2078, F.S., to provide a civil penalty of not more than \$15,000 to victimize or attempt to victimize a homeowner during a residential foreclosure proceeding. This section also prohibits a person from contacting a homeowner in a residential foreclosure proceeding until after 30 days after the homeowner receives notice. Any violation of this prohibition is subject to the civil penalty. This section also provides priority to any order of restitution or reimbursement to a homeowner over a

civil penalty for a violation of this section. This section also provides that any civil penalty collected must be deposited into the Legal Affairs Revolving Trust Fund to be used for consumer education of homeowners regarding residential foreclosure proceedings. The bill also provides that it is not a violation if the dwelling subject to the foreclosure is encumbered with a substitute or additional lien.

Section 6. Creates s. 689.251, F.S., to establish the requirements of any document, other than a deed in lieu of foreclosure, used to transfer an interest in the proceeds of a judicial sale of a mortgagor's primary dwelling. This section also provides that if the document does not meet the requirements established in this section, that the seller may void the transaction.

Section 7. Amends s. 702.035, F.S., to provide that any advertisement, publication, or notice in a newspaper relating to a foreclosure proceeding must state the procedure for collecting surplus funds, if any, or list a telephone number or website at which the procedure will be explained.

Section 8. Amends s. 702.065, F.S., to provide that a court or clerk may not enter a default or default judgment against a mortgagor if the return of service does not indicate that the required notice was served on the mortgagor.

Section 9. Amends s. 702.10, F.S., to provide that the copy of the notice to show cause provided by a mortgagee to a mortgagor must include the notice that the mortgagor may be due surplus funds following the foreclosure sale.

Section 10. Provides that the bill takes effect July 1, 2005.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill allows the clerk of court to collect a \$25 fee in any foreclosure case in which there are surplus funds. It is unknown how many foreclosure cases have surplus funds.

2. Expenditures:

This bill requires clerks of court to create an education program regarding foreclosures. The cost of such program is unknown.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill will require additional court costs payable by lenders. This bill will require additional work by attorneys representing lenders, the cost of which will be charged to lenders.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

The United State Supreme Court has addressed the issue of placing restrictions on commercial speech raised by this bill. The bill prohibits a person from contacting a homeowner until after 30 days have passed since the homeowner has received a notice of foreclosure. In *Florida Bar v. WENT FOR IT, INC.*, 515 U.S. 618 (1995), the U.S. Supreme Court reviewed whether the Florida Bar, under the First and Fourteenth Amendments of the Constitution, could restrict an attorney from contacting a potential personal injury client within 30 days of an accident.⁴ The Court used the *Central Hudson* test for commercial speech which requires that: (1) the government assert a substantial interest in support of its regulation; (2) the government must demonstrate that the restriction on commercial speech directly and materially advances that interest; and (3) the regulation must be narrowly drawn.⁵ The court found that: (1) the Florida Bar had a substantial interest in the restriction on direct mail solicitation in order to help bolster the reputation of Florida lawyers; (2) the restriction directly and materially advanced that interest because it prevented direct mail solicitation which, according to a Bar study, was found by the public to be intrusive on victim's and their families; and (3) the Bar's rule was reasonably well-tailored to meet its objective. The court did note that untargeted solicitation was different because the "untargeted letter involves no willful or knowing affront to or invasion of the tranquility or bereaved or injured individuals and simply does not cause the same kind of reputational harm to the profession."⁶ It could be argued that the restriction in this bill is similarly designed to prevent intrusion by an attorney into a difficult time for a homeowner.

However, the bill uses the term "person" and does not limit the restriction to attorneys. Arguably, persons other than attorneys who seek to assist homeowners during a foreclosure do not face the same perceived reputational difficulties as attorneys. In considering a claim by a person that the bill's provisions are an unconstitutional restriction on commercial speech, a court would consider whether: (1) the government asserted a substantial interest in support of its regulation; (2) the government demonstrated that the restriction on commercial speech directly and materially advanced that interest; and (3) the regulation was narrowly drawn.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

This bill places significant burdens upon all foreclosure cases. A lender that fails to properly give the required notification in the proper form and at the proper time could be significantly delayed in the foreclosure action.

This bill requires that a deed for a property whose mortgage is in default must contain significant disclosures. This requirement may cause significant problems with title insurance. The condition that requires the disclosure, a default in the mortgage, is not apparent in the public records, and thus may not be easily discoverable. The condition is also common, as a mortgage can be in default not only if a

⁴ *Florida Bar v. WENT FOR IT, INC.*, 515 U.S. 618, 620 (1995).

⁵ *Id.* at 624.

⁶ *Id.* at 630.

payment is one day or one penny short, but may also be in default if any one of the numerous conditions of the note or mortgage is not being adhered to at the time of the sale. Significantly, if the disclosures are not made, the deed is void. The effect of a void deed is that it can be challenged at any time in the future, up through the running of the statute of limitations years later. The net effect is that lawyers and title insurance companies conducting real estate closings would, in order to protect themselves, impose the significant disclosure requirements in every future real estate closing in the state.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

n/a