

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

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

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Civil Justice Committee</u>	<u>7 Y, 0 N, w/CS</u>	<u>Bond</u>	<u>Bond</u>
2) <u>Economic Development, Trade & Banking Committee</u>	<u></u>	<u>Olmedillo</u>	<u>Carlson</u>
3) <u>Justice Appropriations Committee</u>	<u></u>	<u></u>	<u></u>
4) <u>Justice Council</u>	<u></u>	<u></u>	<u></u>
5) <u></u>	<u></u>	<u></u>	<u></u>

SUMMARY ANALYSIS

Foreclosure is the legal process for enforcing a lien or mortgage encumbering real property. The foreclosure process results in a forced sale of the property. In some foreclosure cases, the sale price exceeds the amount owed to pay off the lien or mortgage. In such cases, the former property owner may be entitled to proceeds from the sale. Current law does not provide a procedure for distribution of that surplus to the former property owner, requiring the former owner to file court papers to obtain a court order directing the clerk to pay the surplus to the former owner.

This bill creates a legal presumption that the former owner of the property is entitled to the surplus, requires the clerk of court to notify other parties in the foreclosure action of the surplus, gives those parties an opportunity to object to the distribution of the surplus to the owner, and provides that if no person objects within 30 days the surplus will be paid to the former owner without court order. This bill also requires that certain disclosures be made before a court will honor a transfer or assignment of the surplus. 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.

This bill creates service fees payable to the clerk of court related to foreclosure surplus, and increases costs to clerks related to the activities for which the fees are charged. This bill does not appear to have a fiscal impact on state or local governments.

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 new fees.

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

Disbursement of Surplus Funds

This bill creates s. 45.032, to provide for disbursement of surplus funds after a judicial foreclosure sale. The section creates a legal presumption that the owner of the property that was foreclosed, as of the date of the filing of the lis pendens, is entitled to the surplus funds unless some other person proves entitlement to the funds. The bill also provides procedures for the clerks of court to follow in disbursing surplus funds.

The bill defines the following terms:

- "Owner of record" means the person or persons who appear to be the owner of the property on the date of the filing of the lis pendens. The clerk need not perform a title search and examination, but may rely on the plaintiff's allegation of ownership in the complaint when determining the owner of record.
- "Surplus funds" means the funds remaining after payment of all disbursements required by the final judgment of foreclosure and shown on the certificate of disbursements.

If the surplus funds are less than \$200, the clerk of court may deduct a \$5 service charge, and is to pay the balance of the surplus funds to the owner of record. The clerk may mail the check to the last known address of the owner of record.

If the surplus funds are \$200 or more, the clerk is required to send a Notice of Surplus Funds to all persons who appear from the pleadings to be a person who may be interested in the surplus funds; except that the clerk is not required to send a notice to the plaintiff, to a defendant who was a junior lienholder and who was paid all of the monies required by the final judgment, nor to an unknown defendant. The form of the "Notice of Surplus Funds" for use by the clerk of court to notify persons that may have a claim or interest in the surplus funds is:

(Caption of Action)

NOTICE OF SURPLUS FUNDS

The undersigned clerk of the court certifies that he or she disbursed the proceeds received from the sale of the property as provided in the order or final judgment to the persons named in the certificate of disbursements, and that surplus funds of \$_____ remain and are subject to disbursement by the court.

It appears that _____, as owner(s) of the property at the time that the foreclosure was filed, (is/are) entitled to payment of the surplus funds. The clerk of court will pay the surplus funds to the owner(s) unless an objection to payment of the surplus funds is filed with the court on or before _____. If an objection is timely filed, a hearing will be set in order for the court to determine who is entitled to receive the surplus funds.

IF YOU ARE AN INDIVIDUAL AND ARE THE OWNER OF THE PROPERTY, YOU MAY CLAIM THESE FUNDS YOURSELF. YOU ARE NOT REQUIRED TO HAVE A LAWYER OR ANY OTHER REPRESENTATION AND YOU DO NOT HAVE TO ASSIGN YOUR RIGHTS TO ANYONE ELSE IN ORDER FOR YOU TO CLAIM ANY MONEY TO WHICH YOU ARE ENTITLED.

WITNESS my hand and the seal of the court on _____, (year) .
(Clerk)

By (Deputy Clerk)

If the clerk is unsure as to whom the owner of record is, the clerk may write "unknown" on the form, and send the notice of surplus funds with a notice of hearing. The clerk may only receive one service charge for the mailing.

The clerk is entitled to a service charge of \$5 for each notice of surplus funds that is mailed.

If no objection to payment of the surplus funds to the owner of record is filed within 30 days of the mailing of the notice of surplus funds, the clerk must pay the surplus funds to the owner of record. If the location of the owner of record is unknown, the clerk may expend up to \$250 of the surplus funds to conduct or contract for a search for the owner of record. If the search is unsuccessful, and more than 90 days has elapsed, the clerk is to treat the funds as unclaimed property, to be deposited with the Chief Financial Officer pursuant to ch. 717, F.S.

If an objection is filed or if the clerk is unable to determine the owner of record, the court must also set a hearing to determine the disposition of the surplus funds. The clerk must prepare a notice of the hearing and furnish the notice of hearing by certified mail to all persons who received a notice of surplus funds and to any other person who has requested notice of the hearing on surplus funds. The clerk is entitled to an additional service charge of \$5 per notice of hearing, which may be drawn from the surplus funds.

At a hearing on disposition of surplus funds, the owner of record is presumed to be the person entitled to payment of the surplus funds. Any person other than the owner of record who claims the surplus funds has the burden of proving that he or she is entitled to some or all of the surplus funds. The court must consider the factors in s. 45.033, created by this bill, when hearing a claim that a person other than the owner of record is entitled to the surplus funds.

The clerk of court may also collect a fee of \$25 from any surplus funds remaining in the court registry following a foreclosure sale. The clerk must use the proceeds of such fee solely for purposes of educating the public as to the rights of homeowners regarding foreclosure proceedings.

Transfer or Assignment of Right to Surplus Funds

This bill creates s. 45.033, to provide criteria for determining whether a sale or assignment of the right to surplus proceeds in a property subject to foreclosure is a valid sale or assignment. The bill creates a rebuttable presumption that the owner of real property as of the date of the filing of a lis pendens is entitled to surplus funds available in a foreclosure of that real property. Another person may rebut that presumption only by proving that a transfer or assignment of the right to collect the surplus funds, or any portion or percentage of the surplus funds:

- Includes a financial disclosure that specifies the assessed value of the property, a statement 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.

- Includes a statement that the owner does not need an attorney or other representative to recover surplus funds in a foreclosure.

Specifies all forms of consideration paid for the rights to the property or the assignment of the rights to any surplus funds.

A transfer or assignment that does not follow these requirements may nevertheless be allowed by the court if the court finds that the instrument was procured in good faith and with no intent to defraud the former owner.

A person who has executed a transfer or assignment that does not conform to the requirements of this section has the right to petition the court presiding over the foreclosure proceeding to set aside the nonconforming transfer or assignment. If the transfer or assignment is set aside, the owner of record will be entitled to the surplus funds; but the other party may, in a separate proceeding, seek rescission of contract and appropriate damages therein. The prevailing party in any proceeding to set aside a transfer, or rescission of the assignment, is entitled to recover all fees and costs incurred in connection with such proceeding, including a reasonable attorney's fee.

The provisions regarding the requirements of an assignment or transfer of the right to collect surplus funds do not apply to a deed, a mortgage, or a deed in lieu of foreclosure, unless a person other than the owner of record is claiming that a deed or mortgage entitles the person to surplus proceeds. Nothing in this section shall affect the title or marketability of the real property that is the subject of the deed or other instrument. The provisions regarding the requirements of an assignment or transfer of the right to collect surplus funds do not affect the validity of a lien evidenced by a mortgage.

Deceptive and Unfair Trade Practices Related to Surplus Funds

This bill creates s. 501.2078, within the Florida Deceptive and Unfair Trade Practices Act (FDUTPA).⁴ The FDUTPA creates a number of civil causes of action by which a state attorney, or the Attorney General, may seek injunctive relief, an injunction, and a civil penalty against a person engaging in a deceptive or unfair trade practice. The FDUTPA also creates a civil cause of action by which a person harmed by a deceptive or unfair trade practice may seek a civil judgment against the a person engaging in a deceptive and unfair trade practice.⁵

This bill provides that deceptive and unfair trade practices occurring in a foreclosure proceeding of a homeowner may give rise to a civil cause of action under FDUTPA. The bill also defines "homeowner". The foreclosure must be a "residential foreclosure proceeding", defined as "any action in a circuit court of this state in which a party seeks to foreclose on a mortgage encumbering the mortgagor's primary dwelling."

This bill provides that any person, other than a financial institution as defined by s. 655.005, F.S.,⁶ who willfully uses, or has willfully used, a method, act, or practice in violation of FDUTPA, which method, act, or practice victimizes or attempts to victimize homeowners during the course of a residential foreclosure proceeding, and in committing such violation knew or should have known that such conduct was unfair or deceptive, is liable for a civil penalty of not more than \$15,000 for each such violation.

Restitution or reimbursement to a homeowner is to be paid first, before payment of any civil penalty. Civil penalties collected are deposited into the Legal Affairs Revolving Trust Fund of the Department of

⁴ See Part II of ch. 501, F.S.

⁵ Section 501.211, F.S.

⁶ Section 655.005(1)(h), F.S., defines "financial institution" as "a state or federal association, bank, savings bank, trust company, international bank agency, international branch, representative office or international administrative office, or credit union."

Legal Affairs and allocated solely to the Department of Legal Affairs for "the purpose of preparing and distributing consumer education materials, programs, and seminars to benefit homeowners in residential foreclosure proceedings or to further enforcement efforts."

This bill provides that the "act of encumbering the dwelling subject to a residential foreclosure proceeding with a substitute or additional lien" is not grounds for suit under this section of FDUPTA.

Legal Notice Concerning Foreclosure Proceedings.

The prevailing party in any civil action may be entitled to reimbursement of court costs from a non-prevailing party. This bill limits an award of costs for a legal advertisement, publication, or notice relating to a foreclosure proceeding to the actual costs charged by the newspaper for the advertisement, publication or notice.

C. SECTION DIRECTORY:

Section 1 amends s. 45.031, F.S., to refer to the newly created sections on surplus funds.

Section 2 creates s. 45.032, F.S., to provide for distribution of surplus funds.

Section 3 creates s. 45.033, F.S., to provide criteria for determination of a valid transfer or assignment of the right to collect surplus funds.

Section 4 creates s. 501.2078, F.S., to provide that victimization of a homeowner involved in a foreclosure action may be a violation of the Florida Deceptive and Unfair Trade Practices Act.

Section 5 amends s. 702.035, F.S., to limit taxable costs chargeable in a foreclosure action.

Section 6 provides an effective date of July 1, 2006.

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. The bill further provides that a clerk of court is entitled to \$5 for each notice to a party that is sent by certified mail. Furthermore, the bill authorizes the clerk to expend up to \$250 of the surplus funds to conduct or contract for a search for the owner of record. It is unknown how many foreclosure cases have surplus funds.

2. Expenditures:

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

This bill requires clerks of court to prepare and send notices regarding surplus funds by certified mail. Current postage rates for a one ounce letter sent by certified mail, return receipt requested, is \$4.64.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill deducts certain costs from surplus funds, which costs are related to the proper payment of the surplus funds. A former property owner will have deducted from his or her surplus proceeds a \$25 fee for educational activities, plus \$5 or \$10 for each party to the lawsuit that is notified regarding the surplus.

D. FISCAL COMMENTS:

Given recent postal service increases, the \$5 notice fee to the clerk may be inadequate.

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 language of the bill in regards to criminalizing the practice of victimizing or attempting to victimize a homeowner is unconstitutionally vague.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill creates two distinct definitions for the owner of real property involved in the foreclosure proceeding. First, the bill provides a definition for "owner of record" for purposes of Section 45.032; second, the bill creates a separate definition for "homeowner" for purposes of Section 501.2078. The bill should create one consistent definition throughout.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On January 11, 2006, the Civil Justice Committee adopted one "remove everything after the enactment clause" amendment. The amendment:

- Removed the notification that was to be attached to every summons served in a foreclosure action.
- Removed the prohibition on contacting persons subject to foreclosure.
- Created a presumption that the owner of record as of the date of the lis pendens is the person entitled to payment of the surplus, unless another person proves his or her right to claim the surplus.
- Created fees for the clerk of court.
- Provided that the clerk can distribute the surplus to the former owner if no other person objects.
- Removed limitations on property transfers that would likely have impacted all real estate closings.

The bill was then reported favorably with a committee substitute.