

CHAMBER ACTION

1 The Civil Justice Committee recommends the following:

2
3 **Council/Committee Substitute**

4 Remove the entire bill and insert:

5 A bill to be entitled

6 An act relating to foreclosure proceedings; amending s.
7 45.031, F.S.; revising provisions for distribution of
8 proceeds from a judicial sale; creating s. 45.032, F.S.;
9 providing for disbursement of surplus funds after a
10 judicial sale; providing definitions; specifying a form;
11 establishing a presumption of entitlement to surplus funds
12 in certain filings; providing for disbursement of surplus
13 funds by the clerk of court; requiring notice to potential
14 claimants; providing notice requirements; providing for
15 service charges and fees for the clerk; authorizing the
16 clerk to expend certain surplus funds for certain
17 purposes; providing for treatment of surplus funds as
18 unclaimed property under certain circumstances; requiring
19 a disposition hearing under certain circumstances;
20 specifying burden of proof; requiring the clerk to use
21 certain fees for certain purposes; creating s. 45.033,
22 F.S.; providing for a sale or assignment of rights to
23 surplus funds in a foreclosure proceeding; creating a

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24 rebuttable presumption of entitlement to certain funds;
25 providing requirements for transfers or assignments in
26 rebuttal; providing for court action to set aside or
27 rescind certain transfers or assignments under certain
28 circumstances; providing for recovery of attorneys' fees;
29 providing for nonapplication to certain instruments;
30 specifying absence of effect on title or marketability of
31 certain property or validity of certain liens; creating s.
32 501.2078, F.S.; providing definitions; providing a civil
33 penalty for knowingly using unfair or deceptive homeowner
34 victimization methods, acts, or practices in residential
35 foreclosure proceedings; specifying higher priority of an
36 order of restitution or reimbursement over imposition of a
37 civil penalty; providing for deposit of civil penalties
38 into the Legal Affairs Revolving Trust Fund of the
39 Department of Legal Affairs; allocating such funds for
40 certain purposes; specifying nonapplication to certain
41 encumbrances; amending s. 702.035, F.S.; limiting costs
42 chargeable in a foreclosure proceeding; providing an
43 effective date.

44
45 Be It Enacted by the Legislature of the State of Florida:

46
47 Section 1. Subsection (7) of section 45.031, Florida
48 Statutes, is amended to read:

49 45.031 Judicial sales procedure.--In any sale of real or
50 personal property under an order or judgment, the following

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51 procedure may be followed as an alternative to any other sale
52 procedure if so ordered by the court:

53 (7) DISBURSEMENTS OF PROCEEDS.--

54 (a) On filing a certificate of title, the clerk shall
55 disburse the proceeds of the sale in accordance with the order
56 or final judgment and shall file a report of such disbursements
57 and serve a copy of it on each party not in default, and on the
58 Department of Revenue if the department was named as a defendant
59 in the action or if the Agency for Workforce Innovation or the
60 former Department of Labor and Employment Security was named as
61 a defendant while the Department of Revenue was providing
62 unemployment tax collection services under contract with the
63 Agency for Workforce Innovation through an interagency agreement
64 pursuant to s. 443.1316.

65 (b) The certificate of disbursements shall be~~r~~ in
66 substantially the following form:

67

68 (Caption of Action)

69

70 CERTIFICATE OF DISBURSEMENTS

71

72 The undersigned clerk of the court certifies that he or she
73 disbursed the proceeds received from the sale of the property as
74 provided in the order or final judgment to the persons and in
75 the amounts as follows:

76 Name Amount

77

78 Total

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79
80 WITNESS my hand and the seal of the court on _____, (year) .
81 (Clerk)
82 By (Deputy Clerk)
83

84 (c) If no objections to the report are served within 10
85 days after it is filed, the disbursements by the clerk shall
86 stand approved as reported. If timely objections to the report
87 are served, they shall be heard by the court. Service of
88 objections to the report does not affect or cloud the title of
89 the purchaser of the property in any manner.

90 (d) If there are funds remaining after payment of all
91 disbursements required by the final judgment of foreclosure and
92 shown on the certificate of disbursements, the provisions of ss.
93 45.032 and 45.033 apply.

94 Section 2. Section 45.032, Florida Statutes, is created to
95 read:

96 45.032 Disbursement of surplus funds after judicial
97 sale.--

98 (1) For purposes of this section and s. 45.033, the term:

99 (a) "Notice of surplus funds" means a document in
100 substantially the following form:

101
102 (Caption of Action)

103
104 NOTICE OF SURPLUS FUNDS

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

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

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

125
 126 WITNESS my hand and the seal of the court on _____, (year) _____.
 127 _____ (Clerk)
 128 By _____ (Deputy Clerk)

129
 130 (b) "Owner of record" means the person or persons who
 131 appear to be the owner of the property on the date of the filing
 132 of the lis pendens. The clerk need not perform a title search

133 and examination but may rely on the plaintiff's allegation of
 134 ownership in the complaint when determining the owner of record.

135 (c) "Surplus funds" means the funds remaining after
 136 payment of all disbursements required by the final judgment of
 137 foreclosure and shown on the certificate of disbursements.

138 (2) There is established a legal presumption that the
 139 owner of record on the date of the filing of a lis pendens is
 140 the person entitled to surplus funds. The surplus funds shall be
 141 paid to the owner of record on the date of the filing of the lis
 142 pendens unless a court rules otherwise.

143 (3) (a) If the surplus funds are less than \$200, the clerk,
 144 after deducting a \$5 service charge, shall pay the surplus funds
 145 to the owner of record. The payment instrument may be furnished
 146 by regular mail to the last known address of the owner of
 147 record.

148 (b) If the surplus funds are \$200 or more, the following
 149 provisions apply:

150 1. The clerk shall furnish a notice of surplus funds by
 151 certified mail to the following persons:

152 a. The owner of record.

153 b. All defendants in the action listed on the final
 154 judgment of foreclosure, except that:

155 (I) A defendant whose claim was paid in full as shown on
 156 the certificate of disbursements need not be furnished a notice
 157 of surplus funds.

158 (II) Any defendant named by position and not by actual
 159 name need not be furnished a notice of surplus funds. Examples

160 of such defendants include, but are not limited to, defendants
161 designated as "unknown tenant" or "unknown heir."

162 c. If a suggestion of bankruptcy was filed in the action,
163 the bankruptcy trustee.

164 d. Any other person who appears from the record to be a
165 person who may be entitled to the surplus funds. The plaintiff
166 need not be given a notice of surplus funds.

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

171 (4) The clerk shall be entitled to a service charge of \$5
172 for each notice of surplus funds. The clerk may draw the service
173 charge from the surplus funds upon mailing.

174 (5) Unless an objection is filed within 30 days after the
175 mailing of the notice of surplus funds, the clerk shall pay the
176 surplus funds to the owner of record. If the location of the
177 owner of record is unknown, the clerk may expend up to \$250 of
178 the surplus funds to conduct or contract for a search for the
179 owner of record. If the search is unsuccessful and more than 90
180 days have elapsed, the clerk shall treat the funds as unclaimed
181 property, to be deposited with the Chief Financial Officer
182 pursuant to chapter 717.

183 (6) If an objection is filed or if the clerk is unable to
184 determine the owner of record, the court shall set a hearing to
185 determine the disposition of the surplus funds. The clerk shall
186 prepare a notice of the hearing and shall furnish the notice by
187 certified mail to all persons who received a notice of surplus

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188 funds and to any other person who has requested notice of the
 189 hearing on surplus funds. The clerk shall be entitled to an
 190 additional service charge of \$5 per notice of hearing, which may
 191 be drawn from the surplus funds.

192 (7) At the hearing, any person other than the owner of
 193 record has the burden of proving that he or she is entitled to
 194 some or all of the surplus funds. The court shall consider the
 195 factors in s. 45.033 when hearing a claim that a person other
 196 than the owner of record is entitled to the surplus funds.

197 (8) The clerk of court may additionally collect a fee of
 198 \$25 from any surplus funds remaining in the court registry
 199 following a foreclosure sale. The clerk shall use the proceeds
 200 of such fee solely for purposes of educating the public as to
 201 the rights of homeowners regarding foreclosure proceedings.

202 Section 3. Section 45.033, Florida Statutes, is created to
 203 read:

204 45.033 Sale or assignment of rights to surplus funds in a
 205 property subject to foreclosure.--

206 (1) There is created a rebuttable presumption that the
 207 owner of real property as of the date of the filing of a lis
 208 pendens is entitled to surplus funds available in a foreclosure
 209 of that real property.

210 (2) The presumption may be rebutted only by proving that a
 211 transfer or assignment of the right to collect the surplus funds
 212 or any portion or percentage of the surplus funds has been
 213 executed as required by this section.

214 (3) For a transfer or assignment to qualify as a transfer
 215 or assignment entitling the transferee or assignee to the

216 surplus funds, or any portion or percentage of the surplus
 217 funds, the instrument must:

218 (a) Include a financial disclosure that specifies the
 219 assessed value of the property, a statement that the assessed
 220 value may be lower than the actual value of the property, the
 221 approximate amount of any debt encumbering the property, and the
 222 approximate amount of any equity in the property.

223 (b) Include a statement that the owner does not need an
 224 attorney or other representative to recover surplus funds in a
 225 foreclosure.

226 (c) Specify all forms of consideration paid for the rights
 227 to the property or the assignment of the rights to any surplus
 228 funds.

229 (4) A transfer or assignment that does not qualify under
 230 subsection (3) may nevertheless qualify if the court finds that
 231 the instrument was procured in good faith and with no intent to
 232 defraud the transferee or assignee.

233 (5) A party who has executed a transfer or assignment that
 234 does not conform to the requirements of this section may
 235 petition the court presiding over the foreclosure proceeding to
 236 set aside the nonconforming transfer or assignment. If the
 237 transfer or assignment is set aside, the owner of record shall
 238 be entitled to the surplus funds, but the other party, in a
 239 separate proceeding, may seek rescission of contract and
 240 appropriate damages in such proceeding. The prevailing party in
 241 any proceeding under this subsection is entitled to recover all
 242 fees and costs incurred in connection with such proceeding,
 243 including a reasonable attorney's fee.

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244 (6) This section does not apply to a deed, mortgage, or
245 deed in lieu of foreclosure unless a person other than the owner
246 of record is claiming that a deed or mortgage entitles the
247 person to surplus funds. Nothing in this section affects the
248 title or marketability of the real property that is the subject
249 of the deed or other instrument. Nothing in this section affects
250 the validity of a lien evidenced by a mortgage.

251 Section 4. Section 501.2078, Florida Statutes, is created
252 to read:

253 501.2078 Violations involving individual homeowners during
254 the course of residential foreclosure proceedings; civil
255 penalties.--

256 (1) As used in this section:

257 (a) "Homeowner" means any individual who is the owner of
258 the property subject to a residential foreclosure proceeding.

259 (b) "Residential foreclosure proceeding" means any action
260 in a circuit court of this state in which a party seeks to
261 foreclose on a mortgage encumbering the mortgagor's primary
262 dwelling.

263 (2) Any person, other than a financial institution as
264 defined in s. 655.005, who willfully uses, or has willfully
265 used, a method, act, or practice in violation of this part,
266 which method, act, or practice victimizes or attempts to
267 victimize homeowners during the course of a residential
268 foreclosure proceeding, and in committing such violation knew or
269 should have known that such conduct was unfair or deceptive, is
270 liable for a civil penalty of not more than \$15,000 for each
271 such violation.

272 (3) Any order of restitution or reimbursement based on a
 273 violation of this part committed against a homeowner in a
 274 residential foreclosure proceeding has priority over the
 275 imposition of any civil penalty for such violation pursuant to
 276 this section.

277 (4) Civil penalties collected pursuant to this section
 278 shall be deposited into the Legal Affairs Revolving Trust Fund
 279 of the Department of Legal Affairs and allocated solely to the
 280 Department of Legal Affairs for the purpose of preparing and
 281 distributing consumer education materials, programs, and
 282 seminars to benefit homeowners in residential foreclosure
 283 proceedings or to further enforcement efforts.

284 (5) This section does not apply to the act of encumbering
 285 the dwelling subject to a residential foreclosure proceeding
 286 with a substitute or additional lien.

287 Section 5. Section 702.035, Florida Statutes, is amended
 288 to read:

289 702.035 Legal notice concerning foreclosure
 290 proceedings.--Whenever a legal advertisement, publication, or
 291 notice relating to a foreclosure proceeding is required to be
 292 placed in a newspaper, it is the responsibility of the
 293 petitioner or petitioner's attorney to place such advertisement,
 294 publication, or notice. The advertisement, publication, or
 295 notice shall be placed directly by the attorney for the
 296 petitioner, by the petitioner if acting pro se, or by the clerk
 297 of the court. Only the actual costs charged by the newspaper for
 298 the advertisement, publication, or notice may be charged as
 299 costs in the action.

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Section 6. This act shall take effect July 1, 2006.