

**The Florida Senate**  
**PROFESSIONAL STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: Banking and Insurance Committee

BILL: CS/SB 1460

INTRODUCER: Senator Joyner

SUBJECT: Judicial & Execution Sales; Property

DATE: April 9, 2007

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Daniell	Maclure	JU	<b>Fav/1 amendment</b>
2.	Knudson	Deffenbaugh	BI	<b>Fav/CS</b>
3.				
4.				
5.				
6.				

**I. Summary:**

This bill requires a lienholder to provide notice with the original service of process to a property owner whose property is subject to judicial sale (foreclosure) of the possibility of retaining the property through the filing of a bankruptcy petition. The fact of service of the notice is to be noted on the summons and the return of service so that the lienholder's compliance with the notice requirement can be verified by a court, judicial officer, and title examiners.

Under this bill, a writ of execution cannot be issued prior to the judgment creditor filing the required notice to a judgment debtor of the possibility of relief through the U.S. Bankruptcy Code.

The bill modifies legal notice required pursuant to a foreclosure proceeding in counties that have a population of over 1 million people. It requires the use of the 2000 US Decennial Census to determine which counties have a population of over 1 million people. The second change is to provide that the requirement that notice be published 5 days a week and that the newspaper in which notice is placed be published 5 days a week, is exclusive of legal holidays.

This bill creates section 45.0321, Florida Statutes. This bill substantially amends sections 56.021 and 702.0, Florida Statutes.

## II. Present Situation:

### Judicial Sales Procedure

Currently under the law, a lienholder or creditor must serve a complaint, *lis pendens*, and a summons on the debtor in order to initiate foreclosure proceedings.<sup>1</sup>

The procedure for the sale of real or personal property, otherwise known as a judicial sale, is provided for in s. 45.031, F.S. This section provides that a final judgment from a foreclosure proceeding must include a statement notifying the property owner and subordinate lienholders, if any, that there may be additional money from the foreclosure sale and notifying the property owner that he or she may claim such additional funds without representation by a lawyer or other person, if the subject property qualified for a homestead exemption in the most recent tax year.<sup>2</sup> The sale must be conducted at public auction at the time and place set forth in the final judgment.<sup>3</sup>

After the sale, the Certificate of Sale, which is filed and served on all parties by the clerk of court, must include the amount the property was sold for and to whom it was sold.<sup>4</sup> The clerk is also required to serve all parties with a copy of the Certificate of Disbursement detailing the amount of payments made to parties pursuant to the sale and any remaining surplus.<sup>5</sup> The Certificate of Disbursement must notify persons claiming a right to any excess funds that they must make a claim within 60 days, or forfeit the right to make a claim to the owner of record at the *lis pendens* date.<sup>6</sup> Essentially, the surplus will be paid to the owner at the *lis pendens* date, unless another person (such as a subordinate lienholder or assignee of the right to collect the funds) claims an interest in the proceeds during the 60-day period. If such a claim is made, the court shall set an evidentiary hearing to determine entitlement to the surplus.

### Expedited Show-Cause Foreclosure Procedure

The Florida Legislature created an optional “speedy” foreclosure procedure for residential foreclosures in 1993, codified at s. 702.10, F.S.<sup>7</sup> This section provides a fast track foreclosure process through an order to show cause, whereby a lender can obtain an *in rem* judgment. Upon filing a foreclosure complaint, the mortgagee can request an order to show cause for the entry of a final judgment. The judge must then read the complaint and verify that it states a cause of action.<sup>8</sup> If the complaint is verified, the judge will issue an order to the defendant to show cause why a final judgment should not be entered.<sup>9</sup> If a defendant waives the right to be heard, the judge shall promptly enter a final judgment of foreclosure.<sup>10</sup> Upon receipt of a final judgment, the procedures set out in s. 45.031, F.S., for a judicial sale should be followed.

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<sup>1</sup> E-mail correspondence from U.S. Bankruptcy Judge Catherine Peek McEwen to Senator Joyner’s office, March 7, 2007 (on file with the Senate Committee on Judiciary).

<sup>2</sup> Section 45.031(1)(a) and (b), F.S.

<sup>3</sup> Section 45.031(3), F.S.

<sup>4</sup> Section 45.031(4), F.S.

<sup>5</sup> Section 45.031(7), F.S.

<sup>6</sup> *Id.*

<sup>7</sup> Conversation with U.S. Bankruptcy Judge Catherine Peek McEwen (March 12, 2007).

<sup>8</sup> Section 702.10(1), F.S.

<sup>9</sup> *Id.*

<sup>10</sup> Section 702.10(1)(d), F.S.

### **Sheriff's Sale**

Chapter 56, F.S., governs sheriff's sales, which occur when a lienholder obtains a money judgment from a formerly unsecured debt.<sup>11</sup> Upon entry of a money judgment, the court issues a writ of execution, which is effective during the life of the judgment.<sup>12</sup> An execution is a "court order directing a sheriff or other officer to enforce a judgment, usually by seizing and selling the judgment debtor's property."<sup>13</sup> Upon receipt of the writ of execution, the sheriff must publicize the upcoming sale and then an auction is held on a specified date.<sup>14</sup>

### **Current Rate of Foreclosures in Florida**

Mortgage delinquency and foreclosure rates are on the rise nationwide, but Florida has been particularly affected. In the first quarter of 2006, Florida had more foreclosures than any other state in the nation except Texas.<sup>15</sup> May of 2006 produced one foreclosure for every 821 households – the eighth-highest foreclosure rate nationally.<sup>16</sup> Further statistics, as reported in the media, show:

- In January 2007, lenders filed 1,787 foreclosure lawsuits in Central Florida, more than twice the number compared with a year earlier.
- In the first two weeks of February 2007, the number of lawsuits climbed 63 percent compared with all of February 2006.
- Foreclosure lawsuits rose 20 percent nationwide in the third quarter; in Central Florida, foreclosure lawsuits rose 43 percent in the same period. In January 2007, the increase reached 106-percent.
- St. Lucie County had a total of 1,329 foreclosure cases in 2006, which was a 170-percent increase from 2005's total of 485 cases. By way of example, on February 28, 2007, the St. Lucie clerk's office received 30 new foreclosure cases. That single day accounted for more cases than the office received in the entire month of October in 2004.
- Both Martin County and Palm Beach County saw increased foreclosure filings, with a 99-percent increase and 58-percent increase respectively for 2006.<sup>17</sup>

One of the reported reasons for the drastic increase in foreclosure filings is due to the predominant use of "subprime mortgages" with adjustable interest rates during the housing boom. Subprime mortgages are "higher interest loans for people who have blemished credit records and who are considered higher risks."<sup>18</sup> Accordingly, when interest rates rise, as happened last spring, the adjustable interest rate associated with subprime mortgages causes a

<sup>11</sup> Conversation with U.S. Bankruptcy Judge Catherine Peek McEwen (March 12, 2007).

<sup>12</sup> Section 56.021, F.S.

<sup>13</sup> Black's Law Dictionary 590 (7th ed. 1999).

<sup>14</sup> Conversation with U.S. Bankruptcy Judge Catherine Peek McEwen (March 12, 2007).

<sup>15</sup> Michael Pollick, *Foreclosures are back*, Herald Tribune, July 7, 2006, available at <http://www.heraldtribune.com/apps/pbcs.dll/article?Date=20060707&Category=BUSINESS&ArtNo=607070411&SectionCat=&Template=>.

<sup>16</sup> *Id.*

<sup>17</sup> See Rene Stutzman, *Owners struggle to keep home: Many in area find it's not easy to make mortgage payments*, The Orlando Sentinel, March 4, 2007, at A1; Sarah Prohaska, *Ballooning Foreclosures Place Strain on Courts*, The Palm Beach Post, March 4, 2007, at 1A.

<sup>18</sup> Marcy Gordon, *Mortgage Defaults Threaten Dream*, The Tampa Tribune, Dec. 12, 2006, available at <http://www.tbo.com/news/money/MGBL8RQRLVE.html>.

homeowner's monthly payment to increase, sometimes to a point where the homeowner can no longer pay.<sup>19</sup>

### **United States Bankruptcy Code**

Since its enactment in 1978, the U.S. Bankruptcy Code has undergone many revisions. Chapter 13 of the Bankruptcy Code<sup>20</sup> fosters rehabilitation of home owners by providing protection to those facing a foreclosure action. Specifically, Chapter 13 "provides a means for individuals with regular income to adjust their debts."<sup>21</sup> Furthermore, the intent of Chapter 13 is to "encourage the flow of capital into the home lending market."<sup>22</sup>

Any person with a regular income, whose debts do not exceed a statutorily set amount, may file for Chapter 13.<sup>23</sup> Chapter 13 provides a home owner immediate relief from the sale of his or her home by creating an automatic stay the day he or she files a Chapter 13 plan.<sup>24</sup> The plan is configured to repay the individual's debts and must provide "for a portion of the debtor's income to be submitted to the bankruptcy trustee over a period which typically is at least three years but which cannot exceed five years."<sup>25</sup> Upon completion of the payments, the debtor is discharged and has no obligation to pay any additional amounts.<sup>26</sup> Under Chapter 13, debtors have a continuing obligation to report additional assets, but they also remain in possession of their assets.<sup>27</sup>

### **III. Effect of Proposed Changes:**

**Section 1.** Creates s. 45.0321, F.S., to require a lienholder to serve with the original service of process a separate notice to the property owner stating that under certain circumstances, if a bankruptcy petition is filed before the judicial or sheriff's sale of the owner's property occurs, the United States Bankruptcy Code may provide a property owner the ability to retain the lien property and reorganize the claimed indebtedness. The service may be made in the same manner permitted for service of a complaint. Service of such notice is a condition to the entry of a final judgment pursuant to s. 45.031, F.S. (judicial sales of property) or s. 702.10, F.S., (entry of final judgment of foreclosure) and should be served with the complaint in an action pursuant to s 720.10, F.S.

The fact of service of the notice is to be noted on the summons and the return of service so that the lienholder's compliance with the notice requirement can be verified by a court, judicial

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<sup>19</sup> *Id.*

<sup>20</sup> Although other provisions exist under the U.S. Bankruptcy Code that may provide property owner's help during a foreclosure action, Chapter 13 is commonly known as the "home-saving chapter," and therefore, is discussed in this analysis.

<sup>21</sup> Mark S. Scarberry and Scott M. Reddie, *Home Mortgage Strip Down in Chapter 13 Bankruptcy: A Contextual Approach to Sections 1322(B)(2) and (B)(5)*, 20 Pepp. L. Rev. 425, 427 (1993).

<sup>22</sup> *In re Bateman*, 331 F.3d 821, 826 (11th Cir. 2003) (quoting *Nobelman v. Am. Savs. Bank*, 508 U.S. 324, 332 (1993)).

<sup>23</sup> *What is Chapter 13 Bankruptcy, and Why Do I Need a Chapter Thirteen Bankruptcy Attorney*, Bankruptcy Law Firms, <http://bankruptcylawfirms.com/national-content.cfm/Article/9771/> (last visited March 6, 2007).

<sup>24</sup> *Foreclosure Help*, Bankruptcy Law Firms, <http://www.bankruptcylawfirms.com/Foreclosures.cfm> (last visited March 6, 2007).

<sup>25</sup> Scarberry, *supra* note 21, at 427.

<sup>26</sup> Theresa M. Beiner and Robert B. Chapman, *Take What You Can, Give Nothing Back: Judicial Estoppel, Employment Discrimination, Bankruptcy, and Piracy in the Courts*, 60 U. Miami L. Rev. 1, 9 (2005).

<sup>27</sup> *Id.*

officer, and title examiners. The lienholder's failure to deliver this notice is an affirmative defense for the property owner. If the defense is not raised, a final judgment for in rem relief may be entered against the property owner, but not a money judgment. An in rem action is an action instituted against the thing in question—here real property. When an in rem relief order is entered, the lienholder may move forward with the mortgage proceedings and will not have to seek stay relief orders in the event that additional bankruptcy petitions are filed.

The bill specifies that the notice requirement contained in this section does not affect the title or marketability of real property subject to a judicial sale, nor does it affect the validity of the title conveyed which results from a judicial sale.

**Section 2.** Makes a conforming change in ss. 56.021, F.S. specifically, s. 56.021, F.S., is amended to provide that an execution of a lien cannot be issued before the judgment creditor has filed and served the notice relating to potential bankruptcy relief on the judgment debtor.

**Section 3.** Amends s. 702.0321, F.S., regarding the legal notice required pursuant to a foreclosure proceeding. Under current law, when a legal advertisement, publication or notice must be published in a newspaper in a county with a population of over 1 million according to the most recent US Decennial Census., the notice requirement is met if notice is placed: (1) in a newspaper that is published at least 5 days a week and entered as a periodical matter at a post office in that county, and (2) published a minimum of 5 days a week for one year. The amendment makes two changes. First, it states that the 2000 US Decennial Census must be used to determine which counties have a population of over 1 million people. The use of this census means that there will be no change in the counties that qualify under this notice provision; current law allows for the provision to change based on the most recent census. The second change is to provide that the requirement that notice be published 5 days a week and that the newspaper in which notice is placed be published 5 days a week, is exclusive of legal holidays.

**Section 4.** The bill is effective July 1, 2007.

#### **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:**

None.

**B. Private Sector Impact:**

To the extent the bill makes property owners aware of their options under the U.S. Bankruptcy Code, it has the potential of helping those property owners on the verge of foreclosure be able to keep their homes.

Proponents of the bill state that the notice requirement of the bill adds one piece of paper to the usual initial foreclosure complaint package (complaint, lis pendens, summons) that is served on a debtor. The bill also has a potential impact on the lending industry by generating revenue for the lenders during the time the case is pending in bankruptcy.<sup>28</sup> Additionally, the timing of the notice (requiring it to be served with the original process) may also minimize a lender's outlay for attorney's fees in the foreclosure process by prompting a home owner to file for bankruptcy sooner.<sup>29</sup>

Representatives from the Real Property, Probate and Trust Law Section of the Florida Bar have expressed concerns regarding the legislation. The service requirement of the bill could cause increased delays and costs in the mortgage foreclosure process. Additionally, it is noted that the proposed legislation would require notice not only on homestead properties but also on commercial properties, multifamily properties, investment properties and vacation properties which are generally owned by parties that are more sophisticated regarding the availability of bankruptcy. Finally, these representatives also note that if the goal of the legislation is to protect homestead properties from judgment execution sales, such homes are already protected under Article X, Section 4 of the Florida Constitution which exempts homestead properties from judgment execution sales, except for obligations contracted for their purchase.

**C. Government Sector Impact:**

To the extent that consumers on the verge of foreclosure avail themselves of the bankruptcy option, this bill may also reduce the workload and costs of the courts, related to the increased caseload of foreclosure cases.<sup>30</sup> Additionally, this bill has the potential of reducing the strain on the court system by lowering the number of foreclosure filings.<sup>31</sup>

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<sup>28</sup> E-mail correspondence from U.S. Bankruptcy Judge Catherine Peek McEwen to Senator Joyner's office, March 7, 2007 (on file with the Senate Committee on Judiciary).

<sup>29</sup> *Id.*

<sup>30</sup> Prohaska, *supra* note 17.

<sup>31</sup> Circuit Judge Ben Bryan told The Palm Beach Post that in past years he spent approximately two hours a month handling foreclosure cases, whereas now he spends approximately 15 hours a month. *See* Prohaska, *supra* note 17.

This bill also has the potential of reducing the number of days scheduled for foreclosure auctions.<sup>32</sup>

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

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This Senate Professional Staff Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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<sup>32</sup> St. Lucie County scheduled auctions on seven or eight days in January and February of this year, whereas in past years auctions only consumed one to four days a month. *See* Prohaska, *supra* note 17.





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

None.

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