

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

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

Prepared By: The Professional Staff of the Finance and Tax Committee

BILL: CS/SB 2248

INTRODUCER: Finance and Tax Committee and Senator Baker

SUBJECT: Judicial Sales/Real or Personal Property

DATE: March 26, 2008      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Sumner	Maclure	JU	<b>Favorable</b>
2.	Fournier	Johansen	FT	<b>Fav/CS</b>
3.			JA	
4.				
5.				
6.				

**Please see Section VIII. for Additional Information:**

- |                              |                                     |   |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes        |
| B. AMENDMENTS.....           | <input type="checkbox"/>            | Technical amendments were recommended   |
|                              | <input type="checkbox"/>            | Amendments were recommended             |
|                              | <input type="checkbox"/>            | Significant amendments were recommended |

**I. Summary:**

The bill permits the clerk of court to conduct judicial sales of real or personal property by electronic means. The clerk of court shall provide public access to the sale by computer terminals at a designated location, and must accept an advance proxy bid from the plaintiff of any amount up to the plaintiff's maximum allowable credit. The bill gives the clerk of court authority to receive electronic deposits and payments related to the property sale and provides for an additional \$40 service charge for the conduct of the sale by electronic means. If the clerk requires advance electronic deposits these are not subject to the fee under s. 28.24(10), F.S., however, the required portion of an advanced deposit for a winning bid is subject to that fee.

The bill permits any clerk of court who conducts electronic foreclosure sales to conduct electronic tax deed sales. All other procedures provided for such sales in ch. 197, F.S., must be complied with, and the clerk must provide access to the sale by computer terminals open to the public at a designated location. The clerk may require bidders to advance sufficient funds to pay the deposit required in s. 197.542(2), F.S., and the required advance deposit made by the winning bidder is subject to the fee under s. 28.24(10), F.S., upon acceptance of the bid.

This bill amends sections 45.031, 45.035, and 197.542, Florida Statutes.

## II. Present Situation:

### Judicial Sales Procedure

Currently under the law, a lienholder or creditor must serve a complaint, a notice of *lis pendens*,<sup>1</sup> and a summons on the debtor in order to initiate foreclosure proceedings.<sup>2</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>3</sup> The sale must be conducted at public auction at the time and place set forth in the final judgment.<sup>4</sup> A service charge of \$60 is required for making, recording, and certifying the sale and title.<sup>5</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>6</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 the parties pursuant to the sale and any remaining surplus.<sup>7</sup> The Certificate of Disbursement must notify persons claiming a right to any excess funds that they must make a claim to the clerk within 60 days, or forfeit the right to make a claim to the owner of record at the *lis pendens* date.<sup>8</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 Legislature created an optional “speedy” foreclosure procedure for residential foreclosures in 1993, codified at s. 702.10, F.S.<sup>9</sup> This section provides a fast track foreclosure process through

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<sup>1</sup> The definition of “lis pendens,” as appropriate for this analysis, is “[a] notice, recorded in the chain of title to real property, required or permitted in some jurisdictions to warn all persons that certain property is the subject matter of litigation, and that any interests acquired during the pendency of the suit are subject to its outcome.” BLACK’S LAW DICTIONARY (8th ed. 2004). Essentially, “[t]he purpose of a notice of lis pendens is to alert creditors, prospective purchasers and others to the fact that the title to a particular piece of property is involved in litigation.” 35 FLA. JUR. 2D *Lis Pendens* § 3 (2008).

<sup>2</sup> E-mail correspondence from U.S. Bankruptcy Judge Catherine Peek McEwen to the Senate Committee on Judiciary, March 8, 2007 (on file with the Senate Committee on Judiciary).

<sup>3</sup> Section 45.031(1)(a) and (b), F.S.

<sup>4</sup> Section 45.031(3), F.S.

<sup>5</sup> Sections 45.031(3) and 45.035(1), F.S.

<sup>6</sup> Section 45.031(4), F.S.

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

<sup>8</sup> *Id.* The *lis pendens* date is the date the lienholder records the notice of *lis pendens* in the public land records of the county clerk’s office in which the property is located. E-mail correspondence from U.S. Bankruptcy Judge Catherine Peek McEwen to the Senate Committee on Judiciary, Feb. 4, 2008 (on file with the Senate Committee on Judiciary).

<sup>9</sup> Facsimile from U.S. Bankruptcy Judge Catherine Peek McEwen to the Senate Committee on Judiciary, March 12, 2007 (on file with the Senate Committee on Judiciary).

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>10</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>11</sup> If a defendant waives the right to be heard, the judge shall promptly enter a final judgment of foreclosure.<sup>12</sup> Upon receipt of a final judgment, the procedures set out in s. 45.031, F.S., for a judicial sale should be followed.

### **Sheriff's Sale**

Chapter 56, F.S., governs sheriff's sales, which occur when a lienholder obtains a money judgment on a formerly unsecured debt.<sup>13</sup> Upon entry of a money judgment, the court issues a writ of execution, which is effective during the life of the judgment.<sup>14</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>15</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>16</sup>

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

Mortgage delinquency and foreclosure rates are on the rise nationwide, but Florida has been particularly affected. According to RealtyTrac®,<sup>17</sup> Florida had the second highest state foreclosure rate for 2007.<sup>18</sup> The total number of foreclosure filings reported in the state for 2007 was 279,325 (on 165,291 properties), more than twice the number of filings for 2006.<sup>19</sup> According to one report, "[t]he state's foreclosure filing total in December was up 275 percent from December 2006, and its fourth quarter total was up 211 percent from the fourth quarter of 2006."<sup>20</sup> Further statistics, as reported in the media, show:

- At the close of the third quarter in 2007, the following Florida cities ranked in the upper third of cities nationwide regarding foreclosures: Fort Lauderdale (4), Miami (8),

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

<sup>11</sup> *Id.*

<sup>12</sup> Section 702.10(1)(d), F.S.

<sup>13</sup> Conversation with U.S. Bankruptcy Judge Catherine Peek McEwen (March 12, 2007).

<sup>14</sup> Section 56.021, F.S.

<sup>15</sup> BLACK'S LAW DICTIONARY (8th ed. 2004).

<sup>16</sup> Conversation with U.S. Bankruptcy Judge Catherine Peek McEwen (March 12, 2007).

<sup>17</sup> RealtyTrac, the leading online marketplace for foreclosure properties, "publishes the largest and most comprehensive national database of foreclosure and bank-owned properties, with over 1 million properties from nearly 2,500 counties across the country." REALTYTRAC, *Foreclosure Activity up 30 Percent in Third Quarter*, <http://www.realtytrac.com/ContentManagement/pressrelease.aspx?ChannelID=9&ItemID=3567&acct=64847> (last visited Jan. 29, 2008).

<sup>18</sup> REALTYTRAC, *U.S. Foreclosure Activity Increases 75 Percent in 2007*, <http://www.realtytrac.com/ContentManagement/pressrelease.aspx?ChannelID=9&ItemID=3988&acct=64847> (last visited Feb. 4, 2008).

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

<sup>20</sup> *Id.*

- Tampa/St. Petersburg/Clearwater (19), Palm Beach (21), Sarasota/Bradenton/Venice (25), Orlando (27), and Jacksonville (33).<sup>21</sup>
- In 2007, Florida had a total of 165,291 properties with foreclosure filings, more than any other state in the nation except California.
  - Florida had more than 2 percent of its properties in some state of foreclosure last year.
  - The Florida Supreme Court has asked for 19 new circuit court judges, in part, because of a near-doubling of foreclosures.
  - Nearly 5,000 St. Lucie County households defaulted on their mortgages in 2007.
  - At one point, the Volusia County Clerk of Court advertised 40 foreclosure sales in a one-week period.
  - Both Martin County and Palm Beach County saw increased foreclosure filings in 2007, with a 215-percent increase and 189-percent increase respectively from 2006.<sup>22</sup>

One of the reported reasons for the drastic increase in foreclosure filings is the use of “subprime mortgages” with adjustable interest rates during the housing boom. Subprime mortgage loans are generally made to borrowers with high credit risk due to bad or little credit history or because of their debt to income ratio.<sup>23</sup> During the housing boom, lenders used “creative financing,” such as subprime loans with adjustable rates, in order to attract this growing pool of borrowers.<sup>24</sup> In 2006, subprime loans had expanded to 20 percent of the mortgage market, up from 9 percent a decade earlier.<sup>25</sup> These types of mortgages were premised on the idea that house prices would continue to rise rapidly, allowing borrowers to build equity and then refinance their homes when the “teaser” rate expired, thereby avoiding the increased payments associated with the reset in the rate of the original mortgage.<sup>26</sup> However, when home prices began to decline, borrowers were unable to refinance and found themselves locked into a payment they could not afford. As of January of 2008, 21 percent of subprime adjustable rate mortgages were 90 days or more delinquent, leading some to predict that subprime borrowers would probably default on \$200-300 billion of mortgages.<sup>27</sup>

<sup>21</sup> The number in parentheses is the city’s ranking for foreclosure activity in the nation’s 100 largest metropolitan areas. See REALTYTRAC, *Stockton, Detroit, Riverside-San Bernardino Post Top Metro Foreclosure Rates in Q3*, <http://www.realtytrac.com/ContentManagement/pressrelease.aspx?ChannelID=9&ItemID=3609&acct=64847> (last visited Jan. 30, 2008).

<sup>22</sup> See correspondence from U.S. Bankruptcy Judge Catherine Peek McEwen to the Senate Committee on Judiciary, Jan. 29, 2008 (on file with the Senate Committee on Judiciary); *Foreclosures*, DAYTONA BEACH NEWS J., Jan. 13, 2008, at 5F; Associated Press, *Top Court says Florida needs more judges – Crime and foreclosures add to the workload, justices say in their request to lawmakers*, THE ORLANDO SENTINEL, Jan. 18, 2008, at B2; Linda Rawls, *Treasure Coast’s Foreclosure Rate Surges*, THE PALM BEACH POST, Jan. 16, 2008, at 1D; Associated Press, *Florida ranks No. 2 in foreclosures, up 275 percent over last year*, THE PALM BEACH POST, Jan. 29, 2008; Les Christie, *Foreclosures up 75% in 2007*, CNNMONEY.COM.

<sup>23</sup> Elizabeth Laderman, *Subprime Mortgage Lending and the Capital Markets*, FRBSF ECONOMIC LETTER, No. 2001-38, Dec. 28, 2001, available at <http://www.frbsf.org/publications/economics/letter/2001/el2001-38.pdf> (last visited Jan. 30, 2008).

<sup>24</sup> Veena Trehan, *The Mortgage Market: What Happened?*, NAT’L PUBLIC RADIO, April 26, 2007, <http://www.npr.org/templates/story/story.php?storyId=9855669> (last visited Jan. 30, 2008).

<sup>25</sup> *Id.*

<sup>26</sup> Ben S. Bernanke, *Financial Markets, the Economic Outlook, and Monetary Policy*, BD. OF GOVERNORS OF THE FED. RESERVE SYS., Jan. 10, 2008, <http://www.federalreserve.gov/newsevents/speech/bernanke20080110a.htm> (last visited Jan. 30, 2008).

<sup>27</sup> *Id.*; see also *Postcards from the ledge*, THE ECONOMIST, Dec. 19, 2007, available at [http://www.economist.com/opinion/displaystory.cfm?story\\_id=10334574](http://www.economist.com/opinion/displaystory.cfm?story_id=10334574) (last visited Jan. 30, 2008).

## **Tax Deed Sales**

A “tax deed” is a deed showing the transfer of title to real property sold for the nonpayment of taxes.<sup>28</sup> Section 197.542, F.S., provides for the sale at public auction of lands for which the holder of a tax certificate on that land has applied for a tax deed. The clerk of the circuit court of the county where the lands are located must conduct this sale at a designated place during the regular hours the clerk’s office is open. The statute requires the clerk to read the notice of sale and for the lands described in the notice for sale to the highest bidder for cash at “public outcry.” The high bidder is required to post a nonrefundable cash deposit of \$200 at the time of the sale, to be applied to the sale price when full payment is made.

Since 2003, the county tax collector has been allowed to conduct the sale of tax certificates for unpaid taxes by electronic means.

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

The bill permits the clerk of court to conduct judicial sales of real or personal property by electronic means. The Clerk shall provide public access to the sale by computer terminals at a designated location shall. The bill allows the clerk to require electronic bidders to pay the deposit required in current law and requires the clerk to accept an advance credit proxy bid from the plaintiff. The bill gives the clerk of court authority to receive electronic deposits and payments related to the property sale and provides for an additional \$40 service charge for the conduct of the sale by electronic means. Currently, a service charge of \$60 is required for making, recording, and certifying the sale and title.<sup>29</sup> If the clerk requires advance electronic deposits these are not subject to the fee under s. 28.24(10), F.S., however, the required portion of an advanced deposit for a winning bid is subject to that fee.

The bill amends s. 197.542, F.S, to permit any clerk of court who conducts electronic foreclosure sales to conduct electronic tax deed sales. All other procedures provided for such sales in ch. 197, F.S., must be complied with, and the clerk must provide access to the sale by computer terminals open to the public at a designated location. The clerk may require bidders to advance sufficient funds to pay the deposit required in s. 197.542(2), F.S., and the required advance deposit made by the winning bidder is subject to the fee under s. 28.24(10), F.S., upon acceptance of the bid.

The bill provides an effective date of July 1, 2008.

### **IV. Constitutional Issues:**

#### **A. Municipality/County Mandates Restrictions:**

None.

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<sup>28</sup> *Black’s Law Dictionary*, 7th ed., (St. Paul: West Publishing Group, 1999), p. 424.

<sup>29</sup> *Supra* note 5.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

**V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

Plaintiffs will have to pay an additional \$40 service charge for conducting electronic foreclosure sales. If tax deeds are sold by electronic means, advance deposits made by successful bidders for tax deeds will be subject to the fees imposed by s. 28.24(10),F.S.

B. Private Sector Impact:

Judicial sales and tax deed sales through electronic means will in all probability increase the number of bidders and competition in the sale.

C. Government Sector Impact:

A representative for the Florida Association of Court Clerks and Comptrollers note that since the language in the bill provides for the process to be permissive, the bill will affect each clerk of court differently depending on discretionary funds available in the budget of each clerk and the means and choice of each clerk to utilize the system.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Additional Information:**

A. Committee Substitute – Statement of Substantial Changes:  
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS by Finance and Tax Committee on March 26, 2008:**

The committee substitute for SB 2248 adds requirements for deposits and acceptance of advance proxy bids when conducting judicial sales by electronic means, and replaces the \$100 fee called for by the bill by a \$40 fee, and clarifies that the existing \$60 fee applies to these sales.

The committee substitute also permits any clerk of court who conducts electronic foreclosure sales to conduct electronic tax deed sales.

**B. Amendments:**

None.

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

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