

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 Judiciary Committee

BILL: PCS/SB's 1646 & 1038 (444674)

INTRODUCER: Judiciary Committee

SUBJECT: Foreclosures

DATE: March 31, 2009

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Sumner	Maclure	JU	Pre-meeting
2.	_____	_____	_____	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

The bill amends the judicial procedures in foreclosure actions to include notices to tenants occupying the property when a final judgment has been entered and when the foreclosed property is sold at a foreclosure sale. The notices must be provided by the clerk of court, and the plaintiff is required to pay a fee for the notices.

The bill provides that property owners whose property has been sold at foreclosure sale must return the security deposits to tenants within five calendar days after the sale is final. It provides that failure to timely pay over a deposit results in commission of a theft punishable under s. 812.014, F.S.

The bill allows a tenant the unilateral right to declare that a lease is terminated once a foreclosure sale of the leased property is set.

The bill provides for a pre-suit mediation pilot program to facilitate the resolution of disputes between mortgagees and mortgagors in order to assist homeowners facing imminent foreclosure and to reduce the number of foreclosure filings in the state courts system.

This bill substantially amends the following sections of the Florida Statutes: 45.031, 83.49, 83.50, and 83.56. The bill creates an unnumbered section of the Florida Statutes.

II. Present Situation:

Current Rate of Foreclosures in Florida

The Office of the State Courts Administrator (OSCA) reports that foreclosure filings tripled from 2005-06 and then tripled again for 2007-08. As of January 2009, the counties with the highest number of filings included, Dade, Broward, Palm Beach, Orange, Lee, and Duval counties. Some courts have addressed the crisis with detailed administrative orders outlining the foreclosure process.¹ In response to the number of administrative orders being issued by the different circuits, concerned attorneys from the private bar and legal service organizations filed a petition with the Florida Supreme Court requesting an emergency rule to require mediation in all new and pending cases involving mortgage foreclosure of owner-occupied residential properties.² The Florida Supreme Court responded on March 12, 2009, stating that the court had decided not to make the emergency petition into a case. Instead, the Court issued an administrative order establishing a statewide task force on residential mortgage foreclosure cases “to recommend to the Supreme Court policies, procedures, strategies, and methods for easing the backlog of pending residential mortgage foreclosure cases while protecting the rights of parties.”³

Foreclosures

A foreclosure is a lawsuit filed by a lender when the borrower has failed to make the payments. The lender asks the court to sell the property so that the lender can recover the missed payments or the whole balance due on the loan. Once the foreclosure action is filed, parties to the action must be served. When a property subject to foreclosure is being rented, service of the proceedings is often made on a “Jane or John Doe” at the address of the property in addition to the borrower.⁴

Once the foreclosure lawsuit is filed, a tenant’s rights are limited. If the property is sold at auction, a writ of possession is entered, which requires the tenants to vacate the premises.⁵ A tenant’s options before a writ of possession is entered can include moving out before an eviction or delaying the foreclosure process by filing a motion to delay the auction.

Judicial Sales Procedure

Currently under the law, a mortgage company must serve a complaint, a notice of *lis pendens*,⁶ and a summons on the borrower in order to initiate foreclosure proceedings.

¹ *Foreclosure Mediation is Gaining Momentum*, The Florida Bar News (March 15, 2009).

² *In Re: Emergency Amendment to the Florida Rules of Civil Procedure to Require Pre-Judgment Mediation in Residential Mortgage Foreclosures*, February 6, 2009 (on file with the Judiciary Committee).

³ *In Re: Task Force on Residential Mortgage Foreclosure Cases*, No. AOSC09-8 (Fla. March 9, 2009).

⁴ See *Kurz v. Pappas*, 156 So. 737 (Fla. 1934), *Rhyne v. Miami-Dade Water and Sewer Auth.*, 402 So. 2d 54 (Fla. 3rd DCA 1981), and *Burns v. Bankamerica National Trust Co.*, 719 So. 2d 999 (Fla. 5th DCA 1998).

⁵ Fla. R. Civ. P. 1.580

⁶ 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).

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.⁷ The sale must be conducted at public auction at the time and place set forth in the final judgment.⁸

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.⁹ 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.¹⁰ 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.¹¹ 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.¹² 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.¹³ 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.¹⁴ If a defendant waives the right to be heard, the judge shall promptly enter a final judgment of foreclosure.¹⁵ Upon receipt of a final judgment, the procedures set out in s. 45.031, F.S., for a judicial sale should be followed.

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).

⁷ Section 45.031(1)(a) and (b), F.S.

⁸ Section 45.031(3), F.S.

⁹ Section 45.031(4), F.S.

¹⁰ Section 45.031(7), F.S.

¹¹ *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).

¹² 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).

¹³ Section 702.10(1), F.S.

¹⁴ *Id.*

¹⁵ 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 on a formerly unsecured debt. Upon entry of a money judgment, the court issues a writ of execution, which is effective during the life of the judgment.¹⁶ 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."¹⁷ Upon receipt of the writ of execution, the sheriff must publicize the upcoming sale, and then an auction is held on a specified date.

Florida Landlord Tenant Law

The Florida Residential Landlord and Tenant Act, first enacted in 1973, governs the relationship between landlords and tenants in a residential lease agreement.¹⁸ A rental agreement specifies the terms and conditions of a tenant's occupation in a dwelling unit for a specific period of time.¹⁹ The provisions of the Act specifically address the payment of rent,²⁰ duration of leases,²¹ security deposits,²² maintenance of the dwelling and premises,²³ termination of rental agreements,²⁴ liquidated damages for failure to provide notice before vacating,²⁵ penalty for holding over,²⁶ and a landlord's remedies for the breach of a lease.²⁷

Deposit Money or Advance Rent; Duty of Landlord and Tenant

When a tenant gives a deposit as security on a rental agreement, the landlord must hold the total amount of the deposit in either:

- A separate non-interest-bearing account in a Florida banking institution for the benefit of the tenant(s). The deposit cannot be commingled with any other funds or pledged or used in other way until the moneys are actually due to the landlord;
- A separate interest-bearing account in a Florida banking institution for the benefit of the tenant(s), in which case the tenant shall receive and collect interest in an amount of at least 75 percent of the annualized average interest rate payable on the account or interest at the rate of 5 percent per year, simple interest, whichever the landlord elects; or
- The landlord may post a surety bond in the total amount of the deposits.²⁸

¹⁶ Section 56.021, F.S.

¹⁷ BLACK'S LAW DICTIONARY (8th ed. 2004).

¹⁸ Part II of ch. 83, F.S. This part applies to the rental of a "dwelling unit," which is defined as a structure or part of a structure rented for use as a home, residence, or sleeping place. It also includes mobile homes rented by a tenant. Section 83.43, F.S.

¹⁹ Section 83.43(7), F.S., provides that: "Rental agreement" means any written agreement, or oral agreement if for less duration than one year, providing for use and occupancy of premises.

²⁰ Section 83.46, F.S.

²¹ *Id.*

²² Section 83.49, F.S.

²³ Sections 83.51 and 83.52, F.S.

²⁴ Section 83.56, F.S.

²⁵ Section 83.58, F.S.

²⁶ Section 83.575, F.S.

²⁷ Section 83.595, F.S.

²⁸ Section 83.49(1), F.S.

Disclosure by the Landlord

The landlord must disclose to the tenant in writing at or before the beginning of the tenancy, the name and address of the landlord or a person authorized to receive notices and demands on the landlord's behalf.²⁹ Upon completion of construction of a building exceeding three stories that contains dwelling units, the landlords shall disclose to the tenants initially moving into the building the availability or lack of availability of fire protection.³⁰

III. Effect of Proposed Changes:

Judicial Sales Procedure

The bill amends s. 45.031, F.S., to require the clerk of court furnish a copy of the final judgment of foreclosure to the occupant of the property that is the subject of the foreclosure sale. The notice must be furnished by first class mail and include a copy of the court order. The envelope must be addressed to "Occupant" and shall have a statement that reads "IMPORTANT – NOTICE OF FORECLOSURE SALE ENCLOSED" on the face of the envelope. A copy of the final judgment shall be included with the notice, and the notice shall contain a statement that provides information about the date of the foreclosure, the possibility of eviction, and the option of contacting an attorney.

It provides that the trial court, the chief judge of the circuit, or the Rules of Civil Procedure may direct that any additional information be included in the notice. It requires the plaintiff to pay a \$10 fee to the clerk of court for mailing the notice, which cost includes the cost of copying, postage, notice, and docketing.

In addition, the bill requires that the clerk furnish notice to a tenant that the foreclosed property the tenant is residing in was sold at a foreclosure sale. The notice provides information regarding the eviction process and the consequences for failure to comply with an eviction notice. It provides that the trial court, the chief judge of the circuit, or the Rules of Civil Procedure may direct that any additional information be included in the notice. It requires the landlord to pay a \$5 fee to the clerk of court for mailing the notice, which cost includes the cost of copying, postage, notice, and docketing. The bill provides that if the property is a multi-family or multi-occupant structure, a separate notice must be mailed to each dwelling unit.

The bill provides that in a foreclosure of a multi-family or multi-occupant property, the plaintiff may elect to forego the above-referenced notice requirements. In such cases, the clerk shall not send notices or collect fees, and the clerk shall not issue a writ of possession to the purchaser after the sale of the property. This provision appears to address situations in which the purchaser of the multi-family property will assume the leases or initiate separate legal actions regarding the property.

²⁹ Section 83.50(1), F.S.

³⁰ Section 83.50(2), F.S.

Deposit Money or Advance Rent; Duty of Landlord and Tenant

The bill amends s. 83.49, F.S., to provide that property owners whose property has been sold at foreclosure sale must return the security deposits to tenants within five calendar days after the sale is final. Failure to timely pay over a deposit as required by this section results in a commission of a theft punishable under s. 812.014, F.S. The bill also provides that the court shall award the tenant restitution upon conviction of the plea.

Disclosure by a Landlord/Termination of Rental Agreement

The bill provides that the landlord or the landlord's authorized representative must inform a prospective or current tenant if the premises is in a foreclosure proceeding or if there are any problems that may cause the premises to be subject to a foreclosure proceeding.

The bill makes a series of legislative findings regarding the landlord tenant relationship to allow a tenant the unilateral right to declare that a lease is terminated once a foreclosure sale of the leased property is set. It provides that once a foreclosure sale has been set for the rented property, the tenant may terminate the lease agreement upon seven written notice to the landlord. Once the lease is terminated under this section, the tenant is entitled to receive a prorata refund of advance rents paid. This tenant is not liable for any sum that might be due under the remedies provision in ch. 83, F.S., and the tenant is not liable to the landlord for any liquidated damages, penalty, or early termination fee. The bill further provides that if at the time of termination there were three or more months remaining in the lease and the landlord failed to notify the tenant of the foreclosure at the time of the lease, the landlord is liable to the tenant for all of the tenant's costs to move, including actual moving costs and attorney's fees.

Pilot Program for Mortgage Foreclosure Pre-suit Mediation

The bill provides for a pre-suit mediation pilot program to facilitate the resolution of disputes between mortgagees and mortgagors in order to assist homeowners facing imminent foreclosure and to reduce the number of foreclosure filings in the state courts system. It creates a voluntary statewide program in which the Department of Financial Services contracts with a qualified not-for-profit organization to assist in the administration of the program.

It provides for the not-for profit organization to, at a minimum:

- Charge an administrative fee separate from the mediator's fee to use to support the administration of the program;
- Recruit mediators certified by the Florida Supreme Court;
- Provide training to participating mediators;
- Assist in the identification of locations to conduct mediations; and
- Establish procedures to be followed in mediations.

The bill provides that prior to filing a lawsuit, a mortgagee that elects to participate in the program shall contact the mortgagor with an invitation to participate in mediation. The mortgagee shall give the mortgagor options for selecting a mediator. The mortgagor shall agree to withhold filing a foreclosure action for 90 days, or until the mortgagor declines to participate

or fails to respond to the invitation to participate. The bill allows for a certified mediator to charge a fee not in excess of \$1,000, which is to be paid in advance of the mediation. The mortgagee shall pay the fee in advance, but the parties can negotiate a sharing of the fee.

The bill allows for the chief judge of the circuit to exempt a mortgagee who participate in good faith in pre-suit mediation under this section from mandatory participation in any program established by the circuit that compels mediation following the filing of a foreclosure action and prior to the entry of judgment.

The bill provides that the effect of participating in the mediation by the mortgagor and the mortgagee does not constitute a defense to a foreclosure action by the mortgagee. It also provides that the participation by the mortgagor in a loan modification or other financial arrangement negotiated with the mortgagee as a result of the mediation does not preclude the mortgagee from proceeding to foreclosure if the mortgagor fails to comply with the terms of that modification or other financial arrangement. It also provides that mediation under this section does not entitle the mortgagor or mortgagee to successive pre-suit mediation under this section.

The bill provides that before February 1, 2011, the Department of Financial Services shall report to the President of the Senate and the Speaker of the House of Representatives on the mediation program, including the data on use of the program, a recommendation on whether to extend the program, and any recommendation for revising the program. The bill sets an expiration date of June 30, 2011, for the program.

The bill provides an effective date of July 1, 2009.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The notice and return of deposit moneys given to tenants in foreclosure actions in this bill may result in significant savings to the tenants if upon notice they are able to leave the premises in a timely fashion and not forego any initial deposits.

Plaintiffs in foreclosure actions would be subject to \$10 and \$5 fees to the clerk of court for the cost of mailing required notices to occupants of the property.

Landlords may be subject to imposition of attorney's fees and expenses of a tenant if the tenant terminates the lease under certain conditions.

C. Government Sector Impact:

There may be some costs to the Department of Financial Services involved in the initiation of mediation pilot program.

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.)

None.

B. Amendments:

None.