HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1411 Timeshares
SPONSOR(S): Dorworth
TIED BILLS: None **IDEN./SIM. BILLS:** SB 2358

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Civil Justice & Courts Policy Committee		Bond	De La Paz
2)	Criminal & Civil Justice Policy Council			
3)				
4)				
5)				

SUMMARY ANALYSIS

It is common to borrow money and pledge an asset as security for the loan. If the loan is not timely paid, the creditor may take the property, sell it, and apply the proceeds of sale against the debt. Where personal property is pledged, a creditor has the option of judicial or nonjudicial process for taking the property and selling it. However, current law only allows for judicial process known as foreclosure to take a timeshare interest and sell it for the benefit of the creditor.

A timeshare is a vacation product that allows an owner to stay in a vacation property for a short period of time each year. Timeshare owners may mortgage the timeshare interest, usually in order to pay the purchase price. All timeshare owners owe regular assessments to the managing entity to pay their share of the continuing expenses of operating the timeshare.

The bill provides a nonjudicial process for the foreclosure of liens against timeshare interests. The bill creates separate but similar procedures for the foreclosure of liens based on unpaid assessments and for mortgage liens.

Under either process, a trustee is appointed to give notice of the foreclosure to the owner and all other interested parties, conduct an auction sale, distribute the proceeds of the sale, and transfer title to the prevailing bidder. In either process, the timeshare owner may object to the nonjudicial foreclosure process and to contest the foreclosure through a judicial process. A timeshare owner that does not object is not subject to a deficiency judgment.

This process is applicable to all timeshare interests in which a default in payment of assessments occurs after the effective date of the bill. The process is applicable only to mortgages that include specific language and that are executed after the effective date of the bill. A mortgage may be amended after the effective date of this bill to include the specific language allowing for nonjudicial foreclosure.

The Revenue Estimating Conference has not met regarding this bill. It is anticipated that this bill will have a negative fiscal impact on the State Courts Revenue Trust Fund. This bill does not appear to have a fiscal impact on local governments.

HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

It is common to borrow money and pledge an asset as security for the loan. If the loan is not timely paid, the creditor may take the property, sell it, and apply the proceeds of sale against the debt. Where personal property is pledged, a creditor has the option of judicial or nonjudicial process for taking the property and selling it. Where real property is pledged, however, current law only allows for judicial process known as foreclosure to take the property and sell it for the benefit of the creditor.

A timeshare is a vacation product where an owner owns the right to occupy a vacation property for time. Originally, developers would create a condominium and then sell persons a fixed week in the year in a specific unit in a specific resort. While single weeks are the most common, some timeshares are sold as multiple weeks and some are quarters of the year. Seeking flexibility, the market evolved to create trade programs, where persons could trade this year's week with another timeshare owner. The market moved away from fixed weeks and fixed units by creating reservation programs, where buyers purchase the right to an unspecified week (or more) in one or a few resorts. The market has also created points programs, where buyers buy the right to reserve time in resorts worldwide, which plans also give the flexibility to save points from year to year to upgrade the level of accommodations or the time available.

A timeshare purchase requires a person to pay an initial purchase price, and requires an owner to pay periodic assessments. The initial purchase pays for construction, development and marketing costs, and the periodic assessments pay for ongoing operating expenses such as maintenance, utilities, staff, property taxes, and hotel costs[1]. Many buyers take out a mortgage for the initial purchase price.

Statutory regulation of timeshare plans is in ch. 721, F.S. The responsibility for timeshare regulation by the state is in the Division of Florida Condominiums, Timeshares, and Mobile Homes, a division of the Department of Business and Professional Regulation. Part III of ch. 721, F.S., provides for judicial foreclosure of timeshare interests upon a default in payment of mortgage or regular assessment obligations. A judicial foreclosure of a timeshare estate is similar to judicial foreclosure of real property interests, except:

- Up to 15 timeshare estates within one association may be foreclosed in one action.[2]

[1] Maid service, sheets, towels, and the like.
[2] Section 721.83(1)(e), F.S.

- Service of process may be made on a registered agent if the timeshare owner has nominated a registered agent.[3]

- Service of process may be by certified or registered mail.[4]

Effect of Bill -- Nonjudicial Foreclosure of Assessment Liens

This bill creates s. 721.855, F.S., to create an optional nonjudicial foreclosure process applicable to regular assessments owed by the owner of a timeshare interest to the managing entity. The procedure applies to any assessment that becomes delinquent after the effective date of the bill.

Before a timeshare entity may utilize the nonjudicial foreclosure process, the entity must:

- Appoint a trustee or trustees. The appointment must be recorded in the public records of the county or counties in which the timeshare interest is located. A trustee must be an attorney or a title insurer. A list of the appointed trustees and substitute trustees must be maintained by the lienholder and provided to an owner within three days of a written request.

- Inform the owners of the timeshare interests that the managing entity has the right to use a nonjudicial foreclosure process. The notice may be provided by mailing a special notice to each owner, by inclusion in the notice of an annual or special meeting of the owners, by posting the notice on the website of the applicable timeshare plan, or by any other owner communication used by the managing entity. The notice for the nonjudicial foreclosure of an assessment does not need to be included in the timeshare instrument or in the mortgage for the timeshare interest.[5]

To start the process, this bill requires that a creditor:

- Properly record a claim of lien against the timeshare interest;

- Deliver an affidavit to the trustee that identifies the obligor, where the lien is recorded, the amounts secured by the lien, and other specified information; and

- Attach to the affidavit a title search no more than 60 days old.

The timeshare owner may object to nonjudicial foreclosure at any time. The objection must be in writing and delivered to the trustee. If the objection is delivered more than 30 days after the notice of default and intent to sell was furnished to the owner, the managing entity may, in a subsequent judicial foreclosure, collect all of the costs incurred in the nonjudicial foreclosure procedure.

Upon receipt of the affidavit and title search, the trustee must provide the timeshare owner with a notice of default and intent to sell. The notice must be sent by certified or registered mail, return receipt requested, or by a permitted delivery service,[6] return receipt requested. The notice must include:

- A notice of default that includes a description of the timeshare interest, the name and address of the owner, a detail of the amounts due, and a description of how the owner may cure the default.

- A form that the owner may use to object to nonjudicial foreclosure.

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[3] Section 721.84, F.S.
[4] Section 721.85, F.S.
[5] *See* s. 721.855(13), F.S.
[6] The bill creates s. 721.82(11), F.S., to define "permitted delivery service" as any nationally recognized common carrier delivery service or international airmail service requiring a signed return receipt.

- A statement, set forth in the bill, notifying the owner that if he or she fails to cure the default the owner may lose ownership of the timeshare interest, that he or she may object to nonjudicial foreclosure, that the owner may cure the default at any time prior to sale of the timeshare interest, and the consequences of objecting to nonjudicial foreclosure.

The trustee must also furnish a copy of the notice of default to any junior lienholder shown on the title search. The owner and junior lienholders are collectively referred to in this analysis as "interested parties."

Notice to a party is effective upon receipt by that party. If the trustee does not receive within 30 days a signed receipt that clearly shows that the proper person signed for the notice, the trustee must send the notice again by registered mail, certified mail, or delivery service, return receipt requested. If the receipt from the second notice similarly does not have a legible receipt, the trustee must send a third copy of the notice, this time by regular U.S. mail.

If a notice from the trustee is returned undeliverable and the trustee cannot determine an address for the person, the trustee may perfect notice by publication. Publication must be in a newspaper of general circulation in the county where the timeshare is located, and must be published once a week for 2 consecutive weeks.

A trustee must prepare an affidavit detailing the method of service of the notice of the foreclosure.

If the owner does not cure the default before the sale date, the trustee auctions the timeshare. Before the trustee may auction the timeshare, the trustee must:

- Have received the affidavit of the managing entity detailing the default.

- Not have received an objection to the nonjudicial process.

- Check that there is no pending judicial foreclosure action related to the timeshare.

- Have sent notice of the foreclosure to the owner and other interested parties, and have either received confirmation of delivery or have otherwise complied with the notice requirement.

- Have recorded a notice of sale, published it, and sent a copy to interested parties.

Before the trustee may sell the property, the trustee must record in the official records, and deliver to interested parties, a notice of sale. The notice must give details of the debt, information on cure of the default, and the date and time of the sale. The notice of sale is given the same legal effect as a lis pendens. The notice of sale must be published once a week for 2 consecutive weeks in a newspaper of general circulation in the county in which the timeshare interest is located.

The sale must be conducted by auction. The trustee is the auctioneer. To be valid, a sale must be held in the county in which the timeshare interest is located, within 30 days of the recording of the notice of sale, and between the hours of 9:00 a.m. and 4:00 p.m. In lieu of a sale at a physical location, the trustee may utilize the statutory electronic sale procedure if the clerk of that county utilizes the electronic sale procedure.[7] The managing entity may bid by written instruction. If the trustee postpones the sale, the trustee must announce the postponement at the time, date and place that the sale was to occur.

The highest bidder must pay the trustee the bid price in cash or certified funds on the day of the sale. On the day of the sale and after receipt of the sale funds from the highest bidder, the trustee must issue a certificate of sale to the winning bidder and must mail a copy of the certificate of sale to interested parties.

[7] See s. 45.031(10), F.S.

Within 3 days after the sale the trustee must prepare and record a certificate of compliance, which must be recorded in the official records of the county in which the timeshare is located. The certificate must confirm that the notices were sent to interested parties, that the owner did not cure the default, and that the notice of sale was published.

A trustee's sale has the effect of extinguishing all interests in the timeshare interest of all persons given notice of the foreclosure. A trustee's sale also extinguishes the financial obligations of the now former timeshare owner, which has the effect of prohibiting deficiency judgments.

If 10 days has elapsed after the sale and the trustee has not received any objection to the sale, the trustee must give the winning bidder a trustee's deed. The trustee must record the deed and must also record a certificate of compliance certifying that the trustee followed the procedures required by statute. A trustee's deed is equivalent to the clerk's certificate of title recorded at the conclusion of a judicial foreclosure.

From the sale proceeds, the trustee is to pay each category of claims in full in the order of their priority until the sale proceeds are exhausted. The categories are:

- Expenses of the sale, including trustee compensation.

- The amount owed to the managing entity.

- Junior lienholders. Unless they can be paid in full and there is no objection to payment to such junior lienholders, the trustee must file an interpleader action naming the junior lienholders.

- The now former owner.

If the governing documents of a timeshare association currently prohibit nonjudicial foreclosure, the governing documents may be amended to allow for nonjudicial foreclosure provided that the association obtains a 15% quorum.

After the sale, an owner aggrieved by a failure to follow the procedures required by this section has a cause of action for money damages. The bill does not authorize an action to set aside a sale, meaning that an action for money damages is the sole remedy.

Effect of Bill -- Nonjudicial Foreclosure of Mortgage Liens

This bill creates s. 721.856, F.S., to create an optional nonjudicial foreclosure process applicable to mortgages encumbering a timeshare interest. The procedure only is available to mortgages that include a specific clause authorizing nonjudicial foreclosure, whether such clause is included in the original mortgage or is in an amendment to the mortgage, and only if the mortgage or amendment to the mortgage was signed after the effective date of the bill.

The process is basically the same as for foreclosure of an assessment. A trustee is appointed to manage the process. The mortgagee must deliver an affidavit to the trustee detailing the default. The owner may object to this nonjudicial foreclosure process, but an owner who does so may be subject to a deficiency judgment. The trustee must prepare and deliver notice of the foreclosure to interested parties, notice of the sale, and certificate of compliance. Service on parties may be by certified mail, return receipt requested, commercial delivery with a return receipt, or, where a party cannot be found, by publication. Notice of sale must be published, and the trustee conducts the sale. A mortgagor may redeem at any time prior to the sale. Sale extinguishes all liens and the interest of junior lienors who were given notice of the foreclosure. After the time for objection to the sale has expired, the trustee issues a trustee's deed and disburses the sale proceeds.

This bill also:

- Requires disclosure to timeshare purchasers that the managing entity may utilize judicial or nonjudicial foreclosure should a timeshare owner fail to timely pay assessments.
- Changes the term "timeshare estate" to "timeshare interest".
- Changes the provision on service of process of a judicial foreclosure by registered or certified mail to require in addition that the sender use the return receipt service. Alternatively, this bill allows service of process by a delivery service that requires a return receipt.
- Provides that, in the event of conflict with other statutory law, the nonjudicial provisions prevail.

B. SECTION DIRECTORY:

Section 1 amends s. 721.07, F.S., amending requirements of public offering statements.

Section 2 amends s. 721.16, F.S., allowing nonjudicial foreclosure of timeshare interests.

Section 3 renames Part III of ch. 721, F.S.

Section 4 amends s. 721.81, F.S., amending and adding legislative purpose statements.

Section 5 amends s. 721.82, F.S., amending definitions.

Section 6 amends s. 721.83, F.S., related to judicial foreclosure auctions.

Section 7 amends s. 721.85, F.S., related to service of process related to timeshare interests.

Section 8 creates s. 721.855, F.S., creating a nonjudicial foreclosure process related to timeshare assessments.

Section 9 creates s. 721.856, F.S., creating a nonjudicial foreclosure process related to mortgages on timeshares.

Section 10 amends. s. 721.86, F.S., providing that Part III of ch. 721, F.S., prevails over other conflicting laws.

Section 11 provides an effective date of upon becoming law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   This bill may have a negative fiscal impact on state government revenues related to court filing fees. The Revenue Estimating Conference has not yet determined the fiscal impact of this bill.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill is likely to have a substantial positive fiscal impact on the private sector. Foreclosure is expensive to creditors. A foreclosing creditor foreclosing timeshare estates (up to 15 timeshare estates may be foreclosed in one case[8]) will save court filing fees of between $395 and $1,900 per case[9], plus an additional $10 per timeshare in consolidated cases[10], plus court costs. Foreclosing creditors under this bill will realize smaller losses from uncollected interest as this process should be significantly faster than judicial foreclosure.

Debtors facing foreclosure of their timeshare interest will qualify under this bill to avoid a deficiency judgment. These debtors should realize financial savings.

D. FISCAL COMMENTS:

Foreclosures are clogging the courts, leading to delays not just in foreclosures but in all litigation. One economist estimated in 2009 that such delays cost Florida businesses $10.1 billion in direct costs and another $7.3 billion in indirect costs annually.[11] In that this bill may reduce the delays occasioned by foreclosure cases, this bill may have a significant positive fiscal impact on Florida's business climate.

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:

   None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Section 702.01, F.S., may require judicial foreclosure of any mortgage. If this bill passes, it will supercede s. 702.01, F.S. as the last expression of the legislature; nevertheless, it may be preferable to amend s. 702.01, F.S., to conform to the changes made by this bill.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

n/a

[8] Section 721.83(1)(e), F.S.
[9] Foreclosure filing fees are based on the value of the property being foreclosed. The fee increases to $900 for property valued between $50,000 and $250,000, and to $1,900 for property valued in excess of $250,000. Most timeshares should be valued at less than $50,000.
[10] Section 721.83(3), F.S.
[11] *The Economic Impacts of Delays in Civil Trial in Florida's State Courts Due to Under-Funding*, by the Washington Economics Group, February 2009.