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LEGISLATIVE ACTION

Senate

House

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Floor: 1/AD/2R

04/29/2010 11:28 AM

Senator Gardiner moved the following:

Senate Amendment (with title amendment)

Delete lines 798 - 1248

and insert:

(14) ACTIONS FOR FAILURE TO FOLLOW THE TRUSTEE FORECLOSURE
PROCEDURE.—

(a) An action for actual damages for a material violation
of this section may be brought by an obligor against the
lienholder for the failure to follow the trustee foreclosure
procedure contained in this section.

(b) Any trustee who intentionally violates the provisions
of this section concerning the trustee foreclosure procedure
commits a felony of the third degree, punishable as provided in



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14 s. 775.082, s. 775.083, or s. 775.084.

15 Section 10. Section 721.856, Florida Statutes, is created
16 to read:

17 721.856 Procedure for the trustee foreclosure of mortgage
18 liens.—The provisions of this section establish a trustee
19 foreclosure procedure for mortgage liens.

20 (1) APPOINTMENT OF TRUSTEE.—

21 (a) A trustee or a substitute trustee may be appointed by a
22 lienholder at any time by recording a notice of appointment of
23 trustee or notice of substitution of trustee in the official
24 records of the county or counties in which the timeshare
25 interest is located. A lienholder may appoint multiple trustees
26 in a single appointment, and any appointed trustee may be used
27 by the lienholder regarding the trustee foreclosure of any
28 mortgage lien.

29 (b) A trustee shall use good faith, skill, care, and
30 diligence in discharging all of the trustee duties under this
31 section and shall deal honestly and fairly with all parties.

32 (c) The recorded notice of appointment of trustee or notice
33 of substitution of trustee shall contain the name and address of
34 the trustee or substitute trustee, the name and address of the
35 lienholder, and the name and address of the timeshare plan.

36 (2) INITIATING THE TRUSTEE FORECLOSURE OF MORTGAGE LIENS.—

37 (a) Before initiating the trustee foreclosure against a
38 timeshare interest, the mortgage, or an amendment to a mortgage
39 executed by the obligor before the effective date of this
40 section, must contain a statement in substantially the following
41 form:



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43 If the mortgagor fails to make timely payments under
44 the obligation secured by this mortgage, or is
45 otherwise deemed in uncured default of this mortgage,
46 the lien against the mortgagor's timeshare interest
47 created by this mortgage may be foreclosed in
48 accordance with either a judicial foreclosure
49 procedure or a trustee foreclosure procedure and may
50 result in the loss of your timeshare interest. If the
51 mortgagee initiates a trustee foreclosure procedure,
52 the mortgagor shall have the option to object and the
53 mortgagee may proceed only by filing a judicial
54 foreclosure action.

55
56 (b)1. In order to initiate a trustee foreclosure procedure
57 against a timeshare interest, the lienholder shall deliver an
58 affidavit to the trustee that identifies the obligor, the notice
59 address of the obligor, the timeshare interest, the official
60 records book and page number where the mortgage is recorded, and
61 the name and notice address of any junior interestholder. The
62 affidavit shall be accompanied by a title search of the
63 timeshare interest identifying any junior interestholders of
64 record, and the effective date of the title search must be a
65 date that is within 60 calendar days before the date of the
66 affidavit.

67 2. The affidavit shall also state the facts that establish
68 that the obligor has defaulted in the obligation to make a
69 payment under a specified provision of the mortgage or is
70 otherwise deemed in uncured default under a specified provision
71 of the mortgage.



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72 3. The affidavit shall also specify the amounts secured by
73 the lien as of the date of the affidavit and a per diem amount
74 to account for further accrual of the amounts secured by the
75 lien.

76 4. The affidavit shall also state that the appropriate
77 amount of documentary stamp tax and intangible taxes has been
78 paid upon recording of the mortgage, or otherwise paid to the
79 state.

80 5. The affidavit shall also state that the lienholder is
81 the holder of the note and has complied with all preconditions
82 in the note and mortgage to determine the amounts secured by the
83 lien and to initiate the use of the trustee foreclosure
84 procedure.

85 (3) OBLIGOR'S RIGHTS.—

86 (a) The obligor may object to the lienholder's use of the
87 trustee foreclosure procedure for a specific default any time
88 before the sale of the timeshare interest under subsection (7)
89 by delivering a written objection to the trustee using the
90 objection form provided for in subsection (5). If the trustee
91 receives the written objection from the obligor, the trustee may
92 not proceed with the trustee foreclosure procedure as to the
93 default specified in the notice of default and intent to
94 foreclose under subsection (5), and the lienholder may proceed
95 thereafter only with a judicial foreclosure action as to that
96 specified default.

97 (b) At any time before the trustee issues the certificate
98 of sale under paragraph (7) (f), the obligor may cure the default
99 and redeem the timeshare interest by paying the amounts secured
100 by the lien in cash or certified funds to the trustee. After the



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101 trustee issues the certificate of sale, there is no right of
102 redemption.

103 (4) CONDITIONS TO TRUSTEE'S EXERCISE OF POWER OF SALE.—A
104 trustee may sell an encumbered timeshare interest foreclosed
105 under this section if:

106 (a) The trustee has received the affidavit from the
107 lienholder under paragraph (2) (b);

108 (b) The trustee has not received a written objection to the
109 use of the trustee foreclosure procedure under paragraph (3) (a)
110 and the timeshare interest was not redeemed under paragraph
111 (3) (b);

112 (c) There is no lis pendens recorded and pending against
113 the same timeshare interest, and the trustee has not been served
114 notice of the filing of any action to enjoin the trustee
115 foreclosure sale;

116 (d) The trustee is in possession of the original promissory
117 note executed by the mortgagor and secured by the mortgage lien;

118 (e) The trustee has provided written notice of default and
119 intent to foreclose as required under subsection (5) and a
120 period of at least 30 calendar days has elapsed after such
121 notice is deemed perfected under subsection (5); and

122 (f) The notice of sale required under subsection (6) has
123 been recorded in the official records of the county in which the
124 mortgage was recorded.

125 (5) NOTICE OF DEFAULT AND INTENT TO FORECLOSE.—

126 (a) In any foreclosure proceeding under this section, the
127 trustee is required to notify the obligor of the proceeding by
128 sending the obligor a written notice of default and intent to
129 foreclose to the notice address of the obligor by certified



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130 mail, registered mail, or permitted delivery service, return
131 receipt requested, and by first-class mail or permitted delivery
132 service, postage prepaid, as follows:

133 1. The notice of default and intent to foreclose shall
134 identify the obligor, the notice address of the obligor, the
135 legal description of the timeshare interest, the nature of the
136 default, the amounts secured by the lien, and a per diem amount
137 to account for further accrual of the amounts secured by the
138 lien and shall state the method by which the obligor may cure
139 the default, including the period of time after the date of the
140 notice of default and intent to foreclose within which the
141 obligor may cure the default.

142 2. The notice of default and intent to foreclose shall
143 include an objection form with which the obligor can object to
144 the use of the trustee foreclosure procedure by signing and
145 returning the objection form to the trustee. The objection form
146 shall identify the obligor, the notice address of the obligor,
147 the timeshare interest, and the return address of the trustee
148 and shall state: "The undersigned obligor exercises the
149 obligor's right to object to the use of the trustee foreclosure
150 procedure contained in section 721.856, Florida Statutes."

151 3. The notice of default and intent to foreclose shall also
152 contain a statement in substantially the following form:

153
154 If you fail to cure the default as set forth in this
155 notice or take other appropriate action with regard to
156 this foreclosure matter, you risk losing ownership of
157 your timeshare interest through the trustee
158 foreclosure procedure established in section 721.856,



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159 Florida Statutes. You may choose to sign and send to
160 the trustee the enclosed objection form, exercising
161 your right to object to the use of the trustee
162 foreclosure procedure. Upon the trustee's receipt of
163 your signed objection form, the foreclosure of the
164 lien with respect to the default specified in this
165 notice shall be subject to the judicial foreclosure
166 procedure only. You have the right to cure your
167 default in the manner set forth in this notice at any
168 time before the trustee's sale of your timeshare
169 interest. If you do not object to the use of the
170 trustee foreclosure procedure, you will not be subject
171 to a deficiency judgment even if the proceeds from the
172 sale of your timeshare interest are insufficient to
173 offset the amounts secured by the lien.

174
175 4. The trustee shall also mail a copy of the notice of
176 default and intent to foreclose, without the objection form, to
177 the notice address of any junior interestholder by certified
178 mail, registered mail, or permitted delivery service, return
179 receipt requested, and by first-class mail or permitted delivery
180 service, postage prepaid.

181 5. Notice under this paragraph is considered perfected upon
182 the trustee receiving the return receipt bearing the signature
183 of the obligor or junior interestholder, as applicable, within
184 30 calendar days after the trustee sent the notice under this
185 paragraph. Notice under this paragraph is not perfected if the
186 notice is returned as undeliverable within 30 calendar days
187 after the trustee sent the notice, if the trustee cannot



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188 ascertain from the receipt that the obligor or junior
189 interestholder, as applicable, is the person who signed the
190 receipt, or if the receipt from the obligor or junior
191 interestholder, as applicable, is returned or refused within 30
192 calendar days after the trustee sent the notice.

193 (b) If the notice required by paragraph (a) is returned as
194 undeliverable within 30 calendar days after the trustee sent the
195 notice, the trustee shall perform a diligent search and inquiry
196 to obtain a different address for the obligor or junior
197 interestholder. For purposes of this paragraph, any address
198 known and used by the lienholder for sending regular mailings or
199 other communications from the lienholder to the obligor or
200 junior interestholder, as applicable, shall be included with
201 other addresses produced from the diligent search and inquiry,
202 if any.

203 1. If the trustee's diligent search and inquiry produces an
204 address different from the notice address, the trustee shall
205 mail a copy of the notice by certified mail, registered mail, or
206 permitted delivery service, return receipt requested, and by
207 first-class mail or permitted delivery service, postage prepaid,
208 to the new address. Notice under this subparagraph is considered
209 perfected upon the trustee receiving the return receipt bearing
210 the signature of the obligor or junior interestholder, as
211 applicable, within 30 calendar days after the trustee sent the
212 notice under this subparagraph. Notice under this subparagraph
213 is not perfected if the trustee cannot ascertain from the
214 receipt that the obligor or junior interestholder, as
215 applicable, is the person who signed the receipt or the receipt
216 from the obligor or junior interestholder, as applicable, is



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217 returned refused. If the trustee does not perfect notice under
218 this subparagraph, the trustee shall perfect service in the
219 manner set forth in paragraph (c).

220 2. If the trustee's diligent search and inquiry does not
221 locate a different address for the obligor or junior
222 interestholder, as applicable, the trustee may perfect notice
223 against that person under paragraph (c).

224 (c) If the notice is not perfected under subparagraph
225 (a)5., and such notice was not returned as undeliverable, or if
226 the notice was not perfected under subparagraph (b)1., the
227 trustee may perfect notice by publication in a newspaper of
228 general circulation in the county or counties in which the
229 timeshare interest is located. The notice shall appear at least
230 once a week for 2 consecutive weeks. The trustee may group an
231 unlimited number of notices in the same publication, if all of
232 the notices pertain to the same timeshare plan. Notice under
233 this paragraph is considered perfected upon publication as
234 required in this paragraph.

235 (d) If notice is perfected under subparagraph (a)5., the
236 trustee shall execute an affidavit in recordable form setting
237 forth the manner in which notice was perfected and attach the
238 affidavit to the certificate of compliance set forth in
239 subsection (9). The affidavit shall state the nature of the
240 notice, the date on which the notice was mailed, the name and
241 address on the envelope containing the notice, the manner in
242 which the notice was mailed, and the basis for that knowledge.

243 (e) If notice is perfected under subparagraph (b)1., the
244 trustee shall execute an affidavit in recordable form setting
245 forth the manner in which notice was perfected and attach the



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246 affidavit to the certificate of compliance set forth in
247 subsection (9). The affidavit shall state the nature of the
248 notice, the dates on which the notice was mailed, the name and
249 addresses on the envelopes containing the notice, the manner in
250 which the notice was mailed, the fact that a signed receipt from
251 the certified mail, registered mail, or permitted delivery
252 service was timely received, and the name and address on the
253 envelopes containing the notice.

254 (f) If notice is perfected under paragraph (c), the trustee
255 shall execute an affidavit in recordable form setting forth the
256 manner in which notice was perfected and attach the affidavit to
257 the certificate of compliance set forth in subsection (9). The
258 affidavit shall include all the information contained in either
259 paragraph (d) or paragraph (e), as applicable, shall state that
260 the notice was perfected by publication after diligent search
261 and inquiry was made for the current address for the person,
262 shall include a statement that notice was perfected by
263 publication, and shall set forth the information required by s.
264 49.041 in the case of a natural person or s. 49.051 in the case
265 of a corporation, whichever is applicable. No other action of
266 the trustee is necessary to perfect notice.

267 (6) NOTICE OF SALE.—

268 (a) The notice of sale shall set forth:

269 1. The name and notice addresses of the obligor and any
270 junior interestholder.

271 2. The legal description of the timeshare interest.

272 3. The name and address of the trustee.

273 4. A description of the default that is the basis for the
274 foreclosure.



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275 5. The official records book and page numbers where the
276 mortgage is recorded.

277 6. The amounts secured by the lien and a per diem amount to
278 account for further accrual of the amounts secured by the lien.

279 7. The date, location, and starting time of the trustee's
280 sale.

281 8. The right of and the method by which the obligor may
282 cure the default or the right of any junior interestholder to
283 redeem its interest up to the date the trustee issues the
284 certificate of sale in accordance with paragraph (7) (f).

285 (b) The trustee shall send a copy of the notice of sale
286 within 3 business days after the date it is submitted for
287 recording, by first-class mail or permitted delivery service,
288 postage prepaid, to the notice addresses of the obligor and any
289 junior interestholder.

290 (c) After the date of recording of the notice of sale,
291 notice is not required to be given to any person claiming an
292 interest in the timeshare interest except as provided in this
293 section. The recording of the notice of sale has the same force
294 and effect as the filing of a lis pendens in a judicial
295 proceeding under s. 48.23.

296 (d)1. The trustee shall publish the notice of sale in a
297 newspaper of general circulation in the county or counties in
298 which the timeshare interest is located at least once a week for
299 2 consecutive weeks before the date of the sale. The last
300 publication shall occur at least 5 calendar days before the
301 sale.

302 2. The trustee may group an unlimited number of notices of
303 sale in the same publication, if all of the notices of sale



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304 pertain to the same timeshare plan.

305 (7) MANNER OF SALE.—

306 (a) The sale of a timeshare interest by the trustee in a
307 public auction shall be held in the county in which the
308 timeshare interest is located, on the date, location, and
309 starting time designated in the notice of sale, which shall be
310 after 9:00 a.m. but before 4:00 p.m. on a business day not less
311 than 30 calendar days after the recording of the notice of sale.
312 The trustee's sale may occur online at a specific website on the
313 Internet or in any other manner used by the clerk of the court
314 for a judicial foreclosure sales procedure in the county or
315 counties in which the timeshare interest is located.

316 (b) The trustee shall conduct the sale and act as the
317 auctioneer.

318 (c) The lienholder and any person other than the trustee
319 may bid at the sale. In lieu of participating in the sale, the
320 lienholder may send the trustee written bidding instructions
321 that the trustee shall announce as appropriate during the sale.

322 (d) The trustee may postpone the sale from time to time. In
323 such case, notice of postponement must be given by the trustee
324 at the date, time, and location contained in the notice of sale.
325 The notice of sale for the postponed sale shall be mailed under
326 paragraph (6) (b), recorded under paragraph (4) (f), and published
327 under paragraph (6) (d). The effective date of the initial notice
328 of sale under paragraph (6) (b) is not affected by a postponed
329 sale.

330 (e) The highest bidder of the timeshare interest shall pay
331 the price bid to the trustee in cash or certified funds on the
332 day of the sale. If the lienholder is the highest bidder, the



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333 lienholder shall receive a credit up to the amount set forth in
334 the notice of sale as required under subparagraph (6) (a)6.

335 (f) On the date of the sale and upon receipt of the cash or
336 certified funds due from the highest bidder, the trustee shall
337 issue to the highest bidder a certificate of sale stating that a
338 foreclosure conforming to the requirements of this section has
339 occurred, including the time, location, and date of the sale,
340 that the timeshare interest was sold, the amounts secured by the
341 lien, and the amount of the highest bid. A copy of the
342 certificate of sale shall be mailed by certified mail,
343 registered mail, or permitted delivery service, return receipt
344 requested, to all persons entitled to receive a notice of sale
345 under subsection (6).

346 (g) Before a sale conducted pursuant to this subsection, a
347 junior interestholder may pursue adjudication by court, by
348 interpleader, or in any other authorized manner respecting any
349 matter that is disputed by the junior interestholder.

350 (8) EFFECT OF TRUSTEE'S SALE.—

351 (a) A sale conducted under subsection (7) forecloses and
352 terminates all interests of any person with notice to whom
353 notice is given under paragraph (4) (e) and paragraph (6) (b), and
354 of any other person claiming interests by, through, or under any
355 such person, in the affected timeshare interest. A failure to
356 give notice to any person entitled to notice does not affect the
357 validity of the sale as to the interests of any person properly
358 notified. A person entitled to notice but not given notice has
359 the rights of a person not made a defendant in a judicial
360 foreclosure.

361 (b) On the issuance of a certificate of sale under



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362 paragraph (7) (f), all rights of redemption that have been
363 foreclosed under this section shall terminate.

364 (c) A sale conducted under subsection (7) releases the
365 obligor's liability for all amounts secured by the lien. The
366 lienholder has no right to any deficiency judgment against the
367 obligor after a sale of the obligor's timeshare interest under
368 this section.

369 (d) The issuance and recording of the trustee's deed is
370 presumed valid and may be relied upon by third parties without
371 actual knowledge of any irregularities in the foreclosure
372 proceedings. If for any reason there is an irregularity in the
373 foreclosure proceedings, a purchaser becomes subrogated to all
374 the rights of the lienholder to the indebtedness that it secured
375 to the extent necessary to reforeclose the mortgage lien in
376 order to correct the irregularity and becomes entitled to an
377 action de novo for the foreclosure of such mortgage lien. Any
378 subsequent reforeclosure required to correct an irregularity may
379 be conducted under this section.

380 (9) TRUSTEE'S CERTIFICATE OF COMPLIANCE.-

381 (a) Within 10 calendar days after the trustee conducts a
382 sale, the trustee shall execute and acknowledge a certificate of
383 compliance which:

384 1. Confirms delivery of the notice of default and intent to
385 foreclose and attaches the affidavit required under subsection
386 (5).

387 2. States that the default was not cured, that the trustee
388 did not receive any written objection under paragraph (3) (a),
389 and that the timeshare interest was not redeemed under paragraph
390 (3) (b).



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391 3. States that the trustee is in possession of the original
392 promissory note executed by the mortgagor and secured by the
393 mortgage lien.

394 4. Confirms that the notice of sale was published as
395 required under paragraph (6) (d) and attaches an affidavit of
396 publication for the notice of sale.

397 5. Confirms that the notice of sale was mailed under
398 paragraph (6) (b) together with a list of the parties to whom the
399 notice of sale was mailed.

400 (b) In furtherance of the execution of the certificate of
401 compliance required under this subsection, the trustee is
402 entitled to rely upon an affidavit or certification from the
403 lienholder as to the facts and circumstances of default and
404 failure to cure the default.

405 (10) TRUSTEE'S DEED.—

406 (a) The trustee's deed shall include the name and address
407 of the trustee, the name and address of the highest bidder, the
408 name of the former owner, a legal description of the timeshare
409 interest, and the name and address of the preparer of the
410 trustee's deed. The trustee's deed shall recite that the
411 certificate of compliance was recorded and shall contain no
412 warranties of title from the trustee. The certificate of
413 compliance shall be attached as an exhibit to the trustee's
414 deed.

415 (b) Ten calendar days after a sale, absent the prior filing
416 and service on the trustee of a judicial action to enjoin
417 issuance of the trustee's deed to the timeshare interest, the
418 trustee shall:

419 1. Cancel the original promissory note executed by the



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420 mortgagor and secured by the mortgage lien.
421 2. Issue a trustee's deed to the highest bidder.
422 3. Record the trustee's deed in the official records of the
423 county or counties in which the timeshare interest is located.
424 (c)1. The certificate of compliance and trustee's deed
425 together are presumptive evidence of the truth of the matters
426 set forth in them, and an action to set aside the sale and void
427 the trustee's deed may not be filed or otherwise pursued against
428 any person acquiring the timeshare interest for value.
429 2. The trustee's deed conveys to the highest bidder all
430 rights, title, and interest in the timeshare interest that the
431 former owner had, or had the power to convey, together with all
432 rights, title, and interest that the former owner or his or her
433 successors in interest acquired after the execution of the
434 mortgage.
435 3. The issuance and recording of a trustee's deed shall
436 have the same force and effect as the issuance and recording of
437 a certificate of title by the clerk of the court in a judicial
438 foreclosure action.
439 (11) DISPOSITION OF PROCEEDS OF SALE.-
440 (a) The trustee shall apply the proceeds of the sale as
441 follows:
442 1. To the expenses of the sale, including compensation of
443 the trustee.
444 2. To the amount owed and set forth in the notice as
445 required under subparagraph (6) (a) 6.
446 3. If there are junior interestholders, the trustee may
447 file an action in interpleader, pay the surplus to a court of
448 competent jurisdiction, name the competing junior



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449 interestholders, and ask the court to determine the proper
450 distribution of the surplus. In any interpleader action, the
451 trustee shall recover reasonable attorney's fees and costs.

452 4. If there are no junior interestholders, or if all junior
453 interestholders have been paid, any surplus shall be paid to the
454 former owner. If the trustee is unable to locate the former
455 owner within 1 year after the sale, the surplus, if any, shall
456 be deposited with the Chief Financial Officer under chapter 717.

457 (b) In disposing of the proceeds of the sale, the trustee
458 may rely on the information provided in the affidavit of the
459 lienholder under paragraph (2) (b) and, in the event of a dispute
460 or uncertainty over such claims, the trustee has the discretion
461 to submit the matter to adjudication by court, by interpleader,
462 or in any other authorized manner and shall recover reasonable
463 attorney's fees and costs.

464 (12) JUDICIAL FORECLOSURE ACTIONS.—The trustee foreclosure
465 procedure established in this section does not impair or
466 otherwise affect the lienholder's continuing right to bring a
467 judicial foreclosure action, in lieu of using the trustee
468 foreclosure procedure, with respect to any mortgage lien.

469 (13) ACTIONS FOR FAILURE TO FOLLOW THE TRUSTEE FORECLOSURE
470 PROCEDURE.—

471 (a) An action for actual damages for a material violation
472 of this section may be brought by an obligor against the
473 lienholder for the failure to follow the trustee foreclosure
474 procedure contained in this section.

475 (b) Any trustee who intentionally violates the provisions
476 of this section concerning the trustee foreclosure procedure
477 commits a felony of the third degree, punishable as provided in



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478 s. 775.082, s. 775.083, or s. 775.084.

479

480 ===== T I T L E A M E N D M E N T =====

481 And the title is amended as follows:

482

483 Delete lines 44 - 65

484 and insert:

485

486 foreclosure procedure; creating s. 721.856, F.S.;

487 establishing procedure for the trustee foreclosure of

488 mortgage liens; providing for the appointment of a

489 trustee; providing recording requirements for such

490 liens; providing procedures for the initiation of a

491 trustee foreclosure procedure against a timeshare

492 interest; providing procedures for an obligor's

493 objection to the trustee foreclosure procedure;

494 providing conditions to a trustee's exercise of power

495 of sale; providing requirements for a notice of

496 default and intent to sell; providing requirements for

497 a notice of sale; providing requirements for the sale

498 by auction of foreclosed encumbered timeshare

499 interests; providing requirements for a trustee's

500 certificate of compliance; providing for the effect of

501 a trustee's sale; providing requirements for a

502 trustee's deed; providing for the disposition of

503 proceeds of the sale; providing that the trustee

504 foreclosure procedure does not impair or otherwise

505 affect the right to bring certain actions; providing

506 for actions for failure to follow the trustee



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foreclosure procedure; providing a criminal penalty;
amending s. 721.86, F.S.;