

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 Banking and Insurance Committee

BILL: CS/CS/SB 1890

INTRODUCER: Banking and Insurance Committee, Judiciary Committee, and Senator Latvala

SUBJECT: Mortgage Foreclosure Proceedings

DATE: February 29, 2012 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Munroe</u>	<u>Cibula</u>	<u>JU</u>	Fav/CS
2.	<u>Johnson/Knudson</u>	<u>Burgess</u>	<u>BI</u>	Fav/CS
3.	_____	_____	_____	_____
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 streamlines the foreclosure litigation process. The bill revises a number of laws affecting foreclosure in an attempt to remove disincentives to moving forward with a foreclosure action. Specifically, the bill:

- Requires plaintiffs to provide relevant information to support a foreclosure action and file such information at the time of filing a foreclosure.
- Reduces the amount of time within which a lender may pursue a deficiency judgment against a borrower after a foreclosure sale.
- Establishes a mechanism for courts to identify abandoned properties.
- Specifies the required contents of a foreclosure complaint.
- Revises procedures and expands the class of persons who seek an expedited foreclosure action.
- Revises procedures for a show cause why payments should not be ordered during the pendency of a foreclosure action to clarify that the second type of proceeding only applies to an action for a mortgage foreclosure on a property other than a homestead.

The bill creates the following sections of the Florida Statutes: 702.015, 702.11, and two undesignated sections of Florida law.

This bill amends the following sections of the Florida Statutes: 95.11, 702.06, and 702.10.

II. Present Situation:

Approximately 14 percent of all Florida mortgage loans¹ were in foreclosure² as of December 31, 2011.³ In contrast, the percentage of all U.S. loans in the foreclosure process on that date was 4.38 percent.

Litigating a Foreclosure Action

Foreclosure is a remedy that a lender initiates when a borrower defaults or fails to make payments on his or her mortgage. The mortgage is a contract between the borrower and lender.⁴ Foreclosure of a mortgage is a civil action in Florida that is filed in the county where the property is located.⁵ Typically, the complaint alleges that the plaintiff, as holder of the note and mortgage, seeks to foreclose the mortgage and note on the identified parcel of real property. The plaintiff must serve the complaint on all parties affected by the action. A notice of *lis pendens* is recorded in the records of the county where the property is located to give notice to creditors and others whose interests may be affected by the pending foreclosure litigation. After a *lis pendens* is filed, any subsequently created lien may not be enforced against the property unless the holder of that lien intervenes in the foreclosure proceedings within 30 days.⁶

Litigating a foreclosure action is comparable to litigating any other civil action in Florida.⁷ Elements that are essential to pleading a foreclosure complaint include: the execution and date of delivery of the note and mortgage along with their recordation; attachment of the note and mortgage as exhibits to the complaint; a legal description of the property; an allegation that the mortgagee (lender) presently owns and holds the note and mortgage; identification of the person holding title to the property; identification of the person holding possession of the property; a description of the default, along with a statement of the amount of principal due and the date from which interest is due; a statement that the mortgage has been accelerated; and reference to the hiring of an attorney along with any attorney's fees and other costs for the suit.⁸

¹ These loans would include prime fixed, prime adjustable rate, subprime fixed, FHA, and VA mortgages.

² Also known as the foreclosure inventory rate.

³ National Delinquency Survey Results Q4 2011, Mortgage Bankers Association, February 16, 2012.

⁴ See e.g., *Gulf Life Ins. Co. v. Pringle*, 216 So. 2d 468 (Fla. 2d DCA 1968), and *Guynn v. Brentmoore Farms, Inc.*, 253 So. 2d 136, 138 (Fla. 1st DCA 1971).

⁵ *Georgia Casualty Co. v. O'Donnell*, 109 Fla. 290, 291, 147 So. 267, 268 (Fla. 1933).

⁶ Section 48.23(1)(d), F.S.

⁷ See Kendall Coffey, *Foreclosures in Florida: Remedies, Defenses and Liabilities* (second edition), s. 13.01 (2008).

⁸ *Id.* at s. 11.01 (discussing the use of Fla. R. Civ. P. Form 1.944, relating to mortgage foreclosure). See also Fla. R. Civ. P. 1.130(a), which requires all bonds, notes, bills of exchange, contracts, accounts, or documents upon which an action may be brought or defense made to be incorporated in or attached to the relevant pleading or complaint.

In Florida, the proper party to commence a foreclosure complaint is the holder of the note and mortgage.⁹ The Florida Supreme Court amended the Rules of Civil Procedure in 2010 to require verification of mortgage foreclosure complaints involving residential property.¹⁰ The Court also adopted a new form Affidavit of Diligent Search and Inquiry “to help standardize affidavits of diligent search and inquiry and provide information to the court regarding the methods used to attempt to locate and serve the defendant.”¹¹ After the complaint is filed and served on the borrower, and any other party affected by the foreclosure action such as junior lienholders, under the Florida Rules of Civil Procedure, the borrower has 20 days to serve an answer or respond with a motion.¹² A foreclosure action that is based on defective service may be vacated years after the judgment is entered and the property sold.¹³

The usual rules for discovery and for scheduling the trial and trying the case also apply to foreclosure actions. The action proceeds just like any other civil action. Once the matter is litigated, the court may issue a final judgment of foreclosure that adjudges principal, interest, taxes, costs, and attorney’s fees.¹⁴ In an effort to accommodate the increased number of foreclosure filings and improve case processing, the Court adopted a Motion to Cancel and Reschedule Foreclosure Sale form that requires plaintiffs in a foreclosure to explain the reason for cancellation and request that the court reschedule the sale to provide better case management of foreclosure sales.¹⁵ Under s. 45.031(1)(a), F.S., a judicial sale is scheduled following the order of judgment, and the sale is public.¹⁶ Documentary stamps are paid on the sale.¹⁷ If no objections arise to the sale, the clerk issues a certificate of title to the purchaser. If the proceeds of the sale fall short of satisfying the judgment, the lender may file a post-foreclosure deficiency claim, and there is a 5-year statute of limitations on pursuing a legal action to enforce the claim.¹⁸ “A deficiency judgment is ‘an imposition of personal liability upon a mortgagor for an unpaid balance of a secured obligation after foreclosure of the mortgage has failed to yield the full amount of the underlying debt.’”¹⁹

⁹ *Chem. Residential Mortgage v. Rector*, 742 So. 2d 300, 300 (Fla. 1st DCA 1998), *rev. denied*, 727 So. 2d 910 (Fla. 1999), and *Philogene v. ABN Amro Mortgage Group, Inc.*, 948 So. 2d 45, 46 (Fla. 4th DCA 2006). Florida Rule of Civil Procedure 1.210(a) permits an action to be prosecuted in the name of the authorized person without joinder of the party for whose benefit the action is brought. *See also Kumar Corp. v. Nopal Lines, Ltd.*, 462 So. 2d 1178, 1183-84 (Fla. 3d DCA 1985), *rev. denied*, *S.E.L. Maduro, Inc. v. Kumar Corp.*, 476 So. 2d 675 (Fla. 1985).

¹⁰ *See In re Amendments to Fla. Rules of Civil Pro.*, 44 So. 3d 555, 556 (Fla. 2010). The amendments provide an incentive for the plaintiff in a foreclosure case to appropriately investigate and verify its ownership of the note and the right to enforce the note and ensure that the allegations in the complaint are accurate; conserve and prevent the wasting of judicial resources; and give trial courts greater authority to sanction plaintiffs who make false allegations. *Id.*

¹¹ *Id.* at 556-57

¹² Fla. R. Civ. P. 1.510(a).

¹³ *See Wagner v. Roberts*, 320 So. 2d 408 (Fla. 2d DCA 1975), *cert. denied*, 330 So. 2d 20 (Fla. 1976).

¹⁴ *See* Fla. R. Civ. P. Form 1.996(a), Final Judgment of Foreclosure. *See also In re Amendments to Fla. Rules of Civil Pro.*, 44 So. 3d at 558 (the form was amended to add notice to lienholders and provide directions to property owners as to how to claim a right to funds remaining after public auction, and to allow the clerk of court to electronically conduct judicial sales).

¹⁵ *See* Fla. R. Civ. P. Form 1.996(b), Motion to Cancel and Reschedule Foreclosure Sale. *See also In re Amendments to Fla. Rules of Civil Pro.*, 44 So. 3d at 557-58.

¹⁶ *See Heilman v. Suburban Coastal Corp.*, 506 So. 2d 1088 (Fla. 4th DCA 1987), *rev. denied*, 518 So. 2d 1275 (Fla. 1987).

¹⁷ Section 201.02(9), F.S. (the tax assessed is based on the highest and best bid at the foreclosure sale).

¹⁸ Sections 702.06 and 95.11(2), F.S.

¹⁹ 1 THE LAW OF DEBTORS AND CREDITORS s. 8:20 (internal citations omitted).

Fast-Track Foreclosure Procedure under s. 702.10, F.S.

Section 702.10, F.S., involves two types of proceedings, show cause proceedings under s. 702.10, F.S., and proceedings to foreclose an interest on nonresidential real estate under s. 702.10(2), F.S.

Section 702.10(1), F.S.

The first proceeding is initiated in a hearing based on an order to show cause why the foreclosure judgment should not be entered at that hearing.²⁰ The “order to show cause” hearing must be scheduled at least 20 days following service of the order or 30 days after service by publication. Any final judgment of foreclosure entered under s. 702.10(1), F.S., is for in rem relief²¹ only, but it does not preclude the entry of a deficiency judgment where otherwise allowed by law.

The judge must verify that the complaint filed pursuant to s. 702.10(1), F.S., states a cause of action. If the judge finds the complaint is verified, the judge must issue an order to the defendant to show cause why a final judgment should not be entered. If the defendant waives the right to be heard, the judge must promptly enter a final judgment of foreclosure.²² Attorney’s fees may be adjudged no greater than 3 percent of the principal amount owed in a foreclosure in which the defendant waives the right to be heard.²³ If the defendant files any defenses by a motion, or by a verified or sworn answer at or before the hearing, it constitutes cause and precludes the entry of a final judgment and is sufficient to deny summary relief.²⁴

Section 702.10(2), F.S.

The second type of proceeding, under s. 702.10(2), F.S., specifies a procedure to be used for nonresidential real estate in an action for foreclosure. A defendant must show cause why an order to make payments to the mortgagee (lender) during the pendency of the foreclosure proceedings or an order to vacate the premises should not be entered. The order to show cause must detail the requirements of s. 702.10(2), F.S. The “order to show cause” hearing must be scheduled at least 20 days following service of the order or 30 days after service by publication. If service of process has already been made on the defendant, the order may be served in a manner provided in the Florida Rules of Civil Procedure. If the defendant waives the right to be heard on the order, the court may promptly enter an order requiring payment or an order to vacate.²⁵ At the “order to show cause” hearing, the court may enter an order requiring the defendant to make payments in intervals pending the determination of the action based on the likelihood that the mortgagee will prevail in the foreclosure action.²⁶ If the court enters an order requiring payments, the order must also provide that the lender is entitled to possession of the premises if

²⁰ Section 702.10(1), F.S.

²¹ “An action in which the named defendant is real or personal property.” BLACK’S LAW DICTIONARY (9th ed. 2009).

²² Section 702.10(1)(d), F.S.

²³ Section 702.10(1)(c), F.S.

²⁴ Henry P. Trawick Jr., *Trawick’s Florida Practice and Procedure*, s. 31:7 (2007 edition).

²⁵ Section 702.10(2)(c), F.S. See also s. 702.065(2), F.S., which provides for summary adjudication of attorney’s fees in mortgage foreclosure when a default is entered.

²⁶ Section 702.10(2)(d) and (e), F.S.

the defendant fails to make payment as required by the order unless the court finds good cause to order some other method of enforcement of the order.

Statute of Limitations for Filing a Claim for a Deficiency Judgment

In Florida, the statute of limitations for the right to enforce a claim for a deficiency judgment following foreclosure is 5 years. Some states,²⁷ such as Idaho, Nebraska, New Jersey, Oklahoma, and Utah have a 3-month limitation period for filing mortgage deficiency claims with a court.²⁸ If the mortgage holder does not initiate legal action within this period, the deficiency claim is permanently barred. Other states,²⁹ such as Montana, Nevada, and New York, require the mortgage holder to seek a deficiency when it forecloses or in the confirmation of sale proceedings.³⁰ Ohio, a judicial foreclosure state, allows the enforcement of a deficiency judgment up to 2 years after the date of the confirmation of judicial sale.³¹ North Carolina, which allows judicial and nonjudicial foreclosures, authorizes the enforcement of a deficiency judgment within 1 year after the foreclosure.³² Texas, a judicial and nonjudicial foreclosure state, limits the enforcement of a claim for a deficiency judgment within 2 years after the foreclosure sale.³³

III. Effect of Proposed Changes:

Section 1. Limitation on Deficiency Claims. — Amends s. 95.11, F.S., to limit the right to enforce a claim for a deficiency judgment, following the foreclosure of an owner-occupied, one-family to four-family dwelling unit, from 5 years to 1 year.

Section 2. Applicability of Limitation on Deficiency Claims. — Creates an undesignated section of law. The section states that the amendments to s. 95.11, F.S., made by the bill, which limit the right to enforce a claim of a deficiency judgment, following the foreclosure of an owner-occupied, one-family to four-family dwelling unit, from 5 years to 1 year, apply to any action commenced on or after July 1, 2012, regardless of when the cause of action accrues. Any action that would have been barred before the bill's changes to the statutes of limitations applicable to deficiency judgments may be commenced no later than 5 years after the action accrues and no later than July 1, 2013. If the action is not commenced by July 1, 2013, it is barred.

Section 3. Elements of Complaint; Lost, Destroyed, or Stolen Note Affidavit — Creates s. 702.015, F.S., to reschedule the timing of aspects of the foreclosure process, for such actions involving residential real property. The complaint must contain express allegations at the commencement of the proceeding that the plaintiff is the holder of the original note secured by the mortgage or allege with specificity the factual basis by which the plaintiff may enforce the

²⁷ John Rao and Geoff Walsh, *Foreclosing a Dream—State Laws Deprive Homeowners of Basic Protections*. National Consumer Law Center, Inc., February 2009.

²⁸ *Id.* Idaho, Nebraska, and Utah are nonjudicial foreclosure states. New Jersey is a judicial foreclosure state. Oklahoma has judicial and nonjudicial foreclosure.

²⁹ John Rao and Geoff Walsh, *Foreclosing a Dream—State Laws Deprive Homeowners of Basic Protections*. National Consumer Law Center, Inc., February 2009.

³⁰ *Id.* Montana and Nevada are a nonjudicial foreclosure state. New York is a judicial foreclosure state.

³¹ Ohio Rev. Code Ann. ss. 2329.17 and 2329.20.

³² NCGSA s. 1-54.

³³ Tex. Popr. Code Ann s. 51.003.

note. The complaint must describe the authority of the plaintiff with specificity. The plaintiff must file the original promissory note with the court as a condition precedent to filing the complaint for foreclosure, certifying under penalty of perjury that the plaintiff is in physical possession of the original promissory note. The certification must set forth the physical location of the note, name, and title of the individual giving the certification, the name of the person who personally verified physical possession, and the time and date on which possession was verified.

If the plaintiff seeks to enforce a lost, destroyed, or stolen instrument, an affidavit executed under penalty of perjury must be attached to the complaint. The affidavit must:

- Detail a clear chain of all assignments for the promissory note that is the subject of the action;
- Set forth all facts showing the plaintiff is entitled to enforce the note; and
- Include pertinent exhibits.

Section 4. Deficiency Decrees. — Amends s. 702.06, F.S., to bar a party from pursuing a deficiency judgment if not commenced within 1 year after the sale date of mortgaged property pursuant to a court foreclosure sale or short sale. The amount of the deficiency judgment may not exceed the difference between the judgment amount or, in the case of a short sale, the outstanding debt and the fair market value of the property on the date of the sale.

With respect to an owner-occupied, one-family to four-family dwelling unit, the party to whom a deficiency is owing may move for the entry of a deficiency judgment in the foreclosure action or file a separate action for collection of the deficiency. If a separate action is pursued, it must be filed within 1 year after the property has vested in the foreclosing lender or purchaser at the foreclosure sale. The separate action must be filed within 1 year after the property has vested in the foreclosing lender or other purchaser at the foreclosure sale.

The complainant has the right to recover the deficiency unless the court in the foreclosure action has granted or denied a claim for a deficiency judgment.

Section 5. Order to Show cause hearings. — Amends s. 702.10, F.S., to revise the requirements for a fast-track mechanism to litigate mortgage foreclosure involving two types of proceedings.

Foreclosure on an Expedited Basis Under s. 702.10(1), F.S. by a Lienholder

The first type of proceeding involves an order to show cause why a final judgment should not be issued in a foreclosure case on an expedited basis.

Under the revised procedure, any lienholder, not just the senior mortgagee, may initiate the procedure. A “lienholder” includes the plaintiff and a defendant to the action who holds a lien encumbering the property or a defendant who, by virtue of its status as a condominium association, cooperative association, or homeowners’ association, may file a lien against the real property subject to foreclosure.

Under the modified procedure, a filing of a request for review may be filed with the court in chambers and without a hearing. If the court finds the request for review is verified and complies with the requirements for a foreclosure complaint, the court must promptly issue an order directed to the other parties named in the foreclosure complaint to show cause why a final judgment of foreclosure should not be entered.

The order must set the date and time for a hearing on the order to show cause. The date of the hearing may not be sooner than 20 days after the service of the order. The hearing must be held within 45 days after the date of service. The order must:

- State that the filing of defenses by a motion, responsive pleading, affidavits, or other papers before the hearing to show cause may constitute cause for the court not to enter final judgment.
- State that a defendant has the right to file affidavits or other papers before the time of the hearing to show cause and may appear personally or by way of an attorney at the hearing.
- State that if a defendant files defenses by a motion, a verified or sworn answer, affidavits, or other papers or appears personally or by way of an attorney at the time of the hearing, the hearing will be used to consider and such evidence and argument as may be presented by the defendant.
- State that if defendant fails to appear at the hearing to show cause or fails to file defenses or an answer not contesting the foreclosure, the defendant may be considered to have waived the right to a hearing, and the court may enter a default against the defendant, and if appropriate, a final judgment of foreclosure ordering the clerk to conduct a foreclosure sale.
- Attach the form of the proposed final judgment of foreclosure, which the movant requests the court to enter at the hearing on the order to show cause. The form may contain blanks for the court to enter the amounts due.
- Require the party seeking final judgment to serve a copy of the order to show cause on the other parties as specified in the bill.

If a party has been served with the complaint and the original process, or the other party is the plaintiff in the action, service of the order to show cause on that party may be made in the manner provided in the Florida Rules of Civil Procedure. If a defendant has not been served with the complaint or original process, the order to show cause, together with the summons and a copy of the complaint, must be served on the party in the same manner as the original process.

The modified “order to show cause” procedure may run simultaneously with other court procedures. The plaintiff (lienholder) must file the original note, a satisfaction of the conditions for establishment of a lost note, or show that the obligation to be foreclosed is not evidenced by a promissory note or other negotiable instrument. If the court determines, and the arguments presented support entry of a final judgment of foreclosure, the court must enter a final judgment of foreclosure ordering the clerk to conduct a foreclosure sale.

Order to Show Cause Payments During Pendency of Foreclosure Action Under s. 702.10(2), F.S.

The second type of proceeding under s. 702.10(2), F.S., deals with the issuance of an order to show cause why payments should not be entered during the pendency of a foreclosure action.

Section 702.10(2), F.S., is amended to clarify that the second type of proceeding does not apply to an owner-occupied residence. Subsection 702.10(2), F.S., creates a rebuttable presumption that a residential property for which a homestead exemption for taxation was granted according to the certified rolls of the latest assessment by the county property appraiser, before the filing of the foreclosure action, is an owner-occupied residential property.

Section 6. Forms for Order to Show Cause as Modified in the Bill — Creates s. 702.10(3), F.S., and requests that the Florida Supreme Court amend the Florida Rules of Civil Procedure to provide for expedited foreclosure proceedings in conformity with the changes to s. 702.10, F.S. The bill also requests that the Court develop and publish forms for use under s. 702.10, F.S., as amended by the bill.

Section 7. Expedited Foreclosure of Abandoned Residential Real Property. — Creates s. 702.13, F.S., to establish a procedure to determine whether residential real property is abandoned. Residential real property is deemed abandoned upon a showing that a duly licensed process server has made at least three attempts to locate an occupant of the residential real property. The process server must not be affiliated with the owner or servicer of any mortgage on the residential real property or with the attorney or law firm representing such owner or servicer. The attempts must be made at least 72 hours apart, and at least one each of such attempts must have been made before 12 p.m., between 12 p.m. and 6 p.m., and between 6 p.m. and 10 p.m. Each attempt must include physically knocking or ringing at the door of the residential real property and such other efforts as are sufficient to obtain a response from an occupant. Two or more of these conditions must exist:

- Windows or entrances to the premises are boarded up or closed off or multiple windowpanes are broken and unrepaired.
- Doors to the premises are smashed through, broken off, unhinged, or continuously unlocked.
- Rubbish, trash, or debris has accumulated on the mortgaged premises.
- The premises are deteriorating and are below or in imminent danger of falling below minimum community standards for public safety and sanitation.
- If the premises are a part of a condominium or are governed by a mandatory homeowners' association, the manager or other representative of the association has confirmed that assessments for the unit or home are at least 90 days delinquent.
- Interviews with at least two neighbors in different households indicate that the residence has been abandoned. The neighbors must be adjoining, across the street in view of the home, or across the hall or adjacent to the unit in a condominium or cooperative.

The process server may provide, by affidavit and photographic or other documentation, evidence of the condition of the residential real property.

The party entitled to enforce the note and mortgage encumbering the real property appearing to be abandoned must file a petition before the court seeking to determine the status of the residential real property and to invoke an expedited foreclosure proceeding relating to the property. Upon the filing of an affidavit of diligent search and inquiry and the affidavit or documentary evidence of property abandonment, the court must, upon request of the petitioner, issue one or more subpoenas to the utility companies serving the residential real property commanding disclosure of the status of utility service and whether any utility payments have

been made, and if so by whom. If, after review, the court determines that the property has been abandoned, the party entitled to enforce the note and mortgage encumbering the property shall be entitled to foreclose the mortgage using the expedited mortgage procedures set forth in s. 702.10, F.S., upon service by publication. Service must be made on any condominium, cooperative, or homeowners' associations having a lien interest in the property and all other junior lienholders as required by law.

The sheriffs or process servers who are required to make attempts to locate the occupants of the property may charge a reasonable fee for the attempts and for any affidavit or other documentation evidencing the condition of the residential real property.

Section 8. Remedial Nature of Legislation. — Creates an undesignated section of law, to provide that the bill is intended to be remedial in nature and applies to any action filed on or after the effective date of this act.

Section 9. Effective Date. — This act takes effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The bill creates s. 702.015, F.S., to specify what a foreclosure complaint must expressly allege and what documents or other information must be included with the complaint. These requirements generally track the requirements in the rules of procedure and forms already adopted by the Florida Supreme Court.³⁴ Generally, the Florida Supreme Court has upheld the constitutionality of potentially procedural provisions which have been found by the Court to be “intimately related to” and “intertwined with the substantive provisions enacted as long as they do not infringe on the procedural authority of the Court to adopt rules.”³⁵

³⁴ See e.g., Fla. R. Civ. P. Form 1.944, relating to mortgage foreclosure). See also Fla. R. Civ. P. 1.130(a), which requires all bonds, notes, bills of exchange, contracts, accounts, or documents upon which an action may be brought or defense made to be incorporated in or attached to the relevant pleading or complaint, supra note 5. See also *In re Amendments to Fla. Rules of Civil Pro.*, 44 So. 3d 555, 556 (Fla. 2010), supra note 10.

³⁵ *Cartwright v. State of Florida*, 870 So. 2d 152, 157-158 (quoting *Caple v. Tuttle's Design-Build, Inc.*, 753 So. 2d 49, 54 (Fla. 2000)).

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

Sheriffs and process servicers who are required to make attempts to locate the occupants of the property that may have been abandoned may charge a reasonable fee for the attempts and for any affidavit or other documentation evidencing the condition of the residential real property.

B. Private Sector Impact:

To the extent that the bill streamlines the foreclosure litigation process, it may reduce costs and delays associated with bringing a foreclosure suit.

The expedited foreclosure of abandoned real property will allow such properties to be rehabilitated and sold sooner, thereby generating additional capital and employment in the local communities and increasing the appreciation of the fair market value of properties in a community.

C. Government Sector Impact:

The Office of the State Court Administrator³⁶ provided comments on the anticipated judicial or court workload impact associated with the bill. A shortened statute of limitations for an action for a deficiency judgment may result in an increase in near-term filings and a temporary increase in court workload. This effect will be mitigated, however, by a grandfathering provision extending the limitations period in some cases to a date no later than July 1, 2013. The overall impact on the courts may be offset, in part, by provisions limiting the size of deficiencies, which may render further litigation a less attractive option. The expedited foreclosure of abandoned residential properties will potentially reduce the continuing backlog of foreclosure cases, likely exerting a positive impact on court operations.

VI. Technical Deficiencies:

The provisions of the bill that create s. 702.11, F.S., providing for expedited foreclosure of abandoned residential properties, should be modified to provide for the filing of a motion rather than a petition to initiate the action. This change is consistent with the bill's requirement that determination of whether the property may be abandoned should run simultaneously with other court procedures. However, changing the requirements to a motion will not preclude a lienholder from filing a foreclosure complaint or initiating a determination of abandonment.³⁷

The provisions of the bill specifying requirements for courts to determine whether residential property has been abandoned during or in conjunction with a foreclosure action authorize process servers to provide evidence of abandonment. However, the bill also includes sheriffs

³⁶ Office of the State Courts Administrator, *2012 Judicial Impact Statement on CS/SB 1890*, dated February 20, 2012.

³⁷ See *Caple v. Tuttle's Design-Build, Inc.*, 753 So. 2d at 54 (The Florida Supreme Court found that s. 702.10(2), F.S., was designed to protect the property rights of commercial creditors and debtors during litigated foreclosure proceedings.).

along with the process services as eligible to obtain a reasonable charge for such services. The Legislature may wish to revise the bill to clarify that sheriff's officers are authorized to provide evidence of abandonment in the same manner as process servers.

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/CS by Banking and Insurance on February 27, 2012:

The committee substitute deletes the following provisions from the bill:

- Limits on the remedies available in an action to set aside a final judgment of foreclosure to monetary damages under certain circumstances involving negotiable instruments.
- Requirements for certain persons to execute instruments acknowledging the satisfaction of liens and judgments and to provide a certified copy of the recorded satisfaction to the person who made the full payment.
- Requirements for adequate protection outlined in s. 673.3091, F.S., relating to negotiable instruments, when a note is alleged to be lost, destroyed, or stolen in connection with proceedings for a mortgage foreclosure.
- Requirements for a lender to provide an “estoppel statement” to include a holder of an interest in the mortgaged property. An “estoppel statement” provides information on the unpaid balance of a loan and other relevant information to expedite pay-off.
- Removes provisions which would have authorized a party to whom a deficiency is owed as the result of the foreclosure of an owner-occupied, one-family to four-family dwelling unit to move for the entry of a deficiency judgment in the foreclosure action.
- Removes provisions that would have authorized service by publication on the owner of a property that is alleged to be abandoned.
- Requirements that a party in a show cause proceeding to foreclose on a property to prove its case by clear and convincing evidence.

The committee substitute also authorizes process servers and sheriffs to charge a reasonable fee for services provided in conjunction with a motion before a court to determine whether property has been abandoned by its occupants.

CS by Judiciary on February 20, 2012

The bill no longer:

- Designates the bill as the “Florida Fair Foreclosure Act.”
- Requires the foreclosing party in a mortgage foreclosure action to provide notice to the mortgagor and record title owners of the property and all tenants of a dwelling unit on the property if foreclosing the interest of the tenants.

- Includes provisions relating to foreclosing mortgages and liens on lands in more than one county.
- Provides that the amount of the deficiency judgment may be set off by the amount collected by the servicer or lender pursuant to any mortgage insurance held on the property purchased by the borrower.
- Revises the manner in which fees are adjudged reasonable in uncontested foreclosure cases.
- Requires at the time of serving the initial complaint, the plaintiff to give notice to the borrower or owner that he or she has a right to request a conciliation conference or mediation before the entry of final judgment in the case in order to facilitate a loan modification or settlement with the lender.
- Authorizes attorney fees and sanctions for raising unsupported claims or defenses or for causing an unreasonable delay in mortgage foreclosure actions.
- Prohibits the owner or landlord of property subject to the Florida Residential Landlord and Tenant Act that is in the foreclosure process from renting the property without giving full notice and disclosure to the tenants or prospective tenants that the property is in the legal process of foreclosure.
- Requires the plaintiff in a mortgage foreclosure action to file, contemporaneously with the filing of the initial complaint for foreclosure, the necessary documents to support an entry of summary judgment.

Additionally, the bill revises the requirements for an order to show cause why a final judgment should not be issued in a foreclosure case on an expedited basis. The bill revises the requirements for an order to show cause why payments should not be entered during the pendency of a foreclosure action. The bill modifies provisions to expedite foreclosure of abandoned residential real property to add two additional conditions that a court may consider in determining whether a property is abandoned.

B. Amendments:

None.