

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: SB 1890

INTRODUCER: Senator Latvala

SUBJECT: Mortgage Foreclosure Proceedings

DATE: February 17, 2012

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Munroe	Cibula	JU	Pre-meeting
2.			BI	
3.				
4.				
5.				
6.				

I. Summary:

The bill creates the “Florida Fair Foreclosure Act.”

The bill streamlines the foreclosure litigation process by requiring plaintiffs to research and gather relevant information to support a foreclosure action and file such information at the time of filing a foreclosure. The bill expands the duty of mortgage holders to timely provide estoppel statements which may assist the flow of real estate commerce in the state; requires a party who is seeking to enforce a lost, destroyed, or stolen negotiable instrument that is affiliated with a mortgage to provide adequate protection from claims of the rightful note holder; requires lenders to pursue deficiency judgments sooner rather than later for owner-occupied one-to-four family residences. The bill revises a number of laws affecting foreclosure in an attempt to remove disincentives to moving forward with a foreclosure action. The bill:

- Reduces the amount of time within which a lender may pursue a deficiency judgment against a borrower after a foreclosure sale.
- Expands the persons to whom a lender must provide an “estoppel statement” to include persons authorized to act on behalf of the borrower having a mortgage on real property. An “estoppel statement” provides information on the unpaid balance of a loan and other relevant information to expedite pay-off.
- Places in provisions of statute which deal with foreclosure, the procedures for a lender to establish a lost note.
- Requires that foreclosing lenders must provide additional notices to property owners and renters.

- Limits the remedies available in an action to set aside a final judgment of foreclosure to monetary damages under certain circumstances involving negotiable instruments.
- Creates a right to a conciliation conference or mediation for borrowers in foreclosure proceedings.
- Establishes a mechanism for courts to identify abandoned properties.
- Requires 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.
- Requires a person who receives full payment of a judgment lien to deliver a statement to the judgment debtor specifying that the lien has been satisfied and released.
- Specifies the required contents of a foreclosure complaint
- Requires the certificates of title to foreclosed property to be recorded in every county in which the property is located.
- Specifies a threshold amount of a claim of attorney fees below which parties are not required to file affidavits of reasonable attorney fees and the court is not required to hold a hearing or adjudge the requested fees as reasonable.
- 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.

Additionally, the bill streamlines and modernizes the language in a number of provisions that relate to the foreclosure process.

The bill creates the following sections of the Florida Statutes: 701.045, 702.015, 702.034, 702.036, 702.11, 702.12, 702.13, 702.14, 702.15, 702.16, and three undesignated sections.

This bill amends the following sections of the Florida Statutes: 95.11, 701.04, 702.035, 702.04, 702.06, 702.065, and 702.10.

II. Present Situation:

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.¹ Foreclosure of a mortgage is a civil action in Florida that is filed in the county where the property is located.² 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*

¹ 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).

² *Georgia Casualty Co. v. O'Donnell*, 109 Fla. 290, 291, 147 So. 267, 268 (Fla. 1933).

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.³

Litigating a foreclosure action is comparable to litigating any other civil action in Florida.⁴ 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.⁵

In Florida, the proper party to commence a foreclosure complaint is the holder of the note and mortgage.⁶ The Florida Supreme Court amended the Rules of Civil Procedure in 2010 to require verification of mortgage foreclosure complaints involving residential property.⁷ 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."⁸ 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.⁹ A foreclosure action that is based on defective service may be vacated years after the judgment is entered and the property sold.¹⁰

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.¹¹ In an effort to accommodate the increased number of foreclosure filings and improve case processing, the Court adopted a Motion to Cancel and

³ Section 48.23(1)(d), F.S.

⁴ See Kendall Coffey, *Foreclosures in Florida: Remedies, Defenses and Liabilities* (second edition), s. 13.01 (2008).

⁵ *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.

⁶ *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).

⁷ 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.*

⁸ *Id.* at 556-57

⁹ Fla. R. Civ. P. 1.510(a).

¹⁰ See *Wagner v. Roberts*, 320 So. 2d 408 (Fla. 2d DCA 1975), *cert. denied*, 330 So. 2d 20 (Fla. 1976).

¹¹ 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).

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.¹² Under s. 45.031(1)(a), F.S., a judicial sale is scheduled following the order of judgment, and the sale is public.¹³ Documentary stamps must be paid on the sale.¹⁴ 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.¹⁵

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

Section 702.10, F.S., involves two types of proceedings.

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.¹⁶ The “order to show cause” hearing must be scheduled at least 20 days following service of the order or 30 days following service by publication. Any final judgment of foreclosure entered under s. 702.10(1), F.S., is for in rem relief¹⁷ 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.¹⁸ 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.¹⁹ 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.²⁰

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 following service by publication. If service of

¹² 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.

¹³ See *Heilman v. Suburban Coastal Corp.*, 506 So. 2d 1088 (Fla. 4th DCA 1987), *rev. denied*, 518 So. 2d 1275 (Fla. 1987).

¹⁴ Section 201.02(9), F.S. (the tax assessed is based on the highest and best bid at the foreclosure sale).

¹⁵ Sections 702.06 and 95.11(2), F.S.

¹⁶ Section 702.10(1), F.S.

¹⁷ “An action in which the named defendant is real or personal property.” BLACK’S LAW DICTIONARY (9th ed. 2009).

¹⁸ Section 702.10(1)(d), F.S.

¹⁹ Section 702.10(1)(c), F.S.

²⁰ Henry P. Trawick Jr., *Trawick’s Florida Practice and Procedure*, s. 31:7 (2007 edition).

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.²¹ 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.²² If the court enters an order requiring payments, the order must also provide that the lender is entitled to possession of the premises if 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.

Release of Mortgage Information

Chapter 701, F.S., allows the person who has a mortgage (the mortgagor) to obtain from the mortgage holder (the mortgagee) information about the unpaid balance of the loan secured by the mortgage within 14 days after a written request.²³ The information requested is returned in a document known as an estoppel letter. Generally, only the mortgagor is able to receive this information from the mortgagee.

Current law does not require the mortgagee to provide information relating to the mortgagor’s loan to anyone other than the mortgagor of the encumbered property. However, persons who may have a legitimate interest in knowing the loan information include, an heir or devisee through probate, homestead laws, a surviving spouse that was not on the note, or a junior lienholder that has foreclosed on the property against the mortgagor.

Privacy Laws Related to the Release of Mortgage Information

According to advocates of the bill, some mortgagees are not furnishing the mortgage information citing the privacy requirements of the federal Gramm-Leach-Bliley Act. The federal Gramm-Leach-Bliley Act, 15 USC ss. 6801-6809, addresses privacy requirements and disclosure or nonpublic personal information. Except as otherwise provided in this subchapter, a financial institution may not, directly or through any affiliate, disclose to a nonaffiliated third party any nonpublic personal information, unless such financial institution provides or has provided to the consumer a notice disclosing the institution’s privacy policy that complies with applicable federal law.²⁴ Under the Gramm-Leach-Bliley Act, states may enact laws to require financial institutions to disclose loan information to persons other than the mortgagor.²⁵

²¹ 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.

²² Section 702.10(2)(d) and (e), F.S.

²³ Section 701.04, F.S.

²⁴ *See* 15 U.S.C.A. § 6803 which provides requirements for the disclosure of a financial institution’s privacy policy.

²⁵ “[T]o comply with Federal, State, or local laws, rules, and other applicable legal requirements; to comply with a properly authorized civil, criminal, or regulatory investigation or subpoena or summons by Federal, State, or local authorities; or to respond to judicial process or government regulatory authorities having jurisdiction over the financial institution for examination, compliance, or other purposes as authorized by law.” 15 U.S.C. § 6802(e)(8).

Pursuant to s. 655.059, F.S., the records of a financial institution²⁶ are confidential and are made available for inspection and examination only in specifically enumerated circumstances or to specifically listed individuals or entities. Under current law, if the mortgagee is a financial institution, the mortgagee may violate privacy laws and face penalties for releasing the mortgagor's mortgage information.

III. Effect of Proposed Changes:

Section 1. Creates an undesignated section of law designating the bill as the “Florida Fair Foreclosure Act.”

Section 2. Creates an undesignated section of law. The section specifies public policy to encourage borrowers and lenders to pursue alternatives to mortgage foreclosure. The section also outlines legislative findings that the public interest is served by maintaining the strong tradition of judicial due process in mortgage foreclosure cases while moving these cases expeditiously to final resolution so that real property may return to the stream of commerce.

Section 3. Limitation on Deficiency Claims Amends s. 95.11, F.S., to 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, to 2 years from 5 years.

Section 4. Estoppel Statement Amends s. 701.04, F.S., to modify and update the current requirement for a lender to provide the mortgagor (borrower) with an estoppels statement setting forth the unpaid balance of a mortgage in order to facilitate sales and refinancing by expanding the parties who can request the estoppel statement to include others who hold an interest in the property (e.g., the purchaser upon foreclosure of a subordinate lien.²⁷

The estoppel letter must include the following detail:

- Unpaid amounts due as of the date specified in the request;
- A minimum of 20 days of per diem interest after that date;
- Certification that the party providing the estoppel statement is the holder of the original promissory note securing the property or is the entity entitled to enforce the note under s. 673.3011, F.S.; and
- A commitment that upon receipt of funds, the entity will return a recorded mortgage satisfaction and the original promissory note marked “paid in full” or a lost note affidavit and adequate protections as required by s. 702.11, F.S., which is created by the bill.

²⁶ Section 55.005(1)(i), F.S., defines “financial institution” as a state or federal savings or thrift association, bank, savings bank, trust company, international bank agency, international banking corporation, international branch, international representative office, international administrative office, international trust company representative office, credit union, or an agreement corporation operating pursuant to s. 25 of the Federal Reserve Act, 12 U.S.C. ss. 601 et seq. or Edge Act corporation organized pursuant to s. 25(a) of the Federal Reserve Act, 12 U.S.C. ss. 611 et seq.”

²⁷ The lender has a separate obligation to provide certain information fee of charge to the borrower. Real Estate Settlement Procedures Act, 12 U.S.C. § 2605 and the Federal Truth in Lending Act, 15 U.S.C. § 1641. The provision of such information is without restriction as to the number of requests. *Id.*

If the person or party executing the satisfaction is not shown as the owner of the mortgage in the official records, the satisfaction must be supplemented by an affidavit that the person executing the satisfaction is in physical possession of the original promissory note. If the party providing the estoppel statement was entitled only to enforce the note, but was not in possession of the note, the person must provide in the affidavit the specific factual basis for such authority.

The lender may not charge a fee for the preparation or delivery of the first two estoppel statements requested for any one mortgage in any calendar month. Subsequent owners of the property, creditors, and lienholders may rely on and enforce the estoppel statement.

The payor of the mortgage may designate in writing where the original note should be returned. If the satisfaction of mortgage, the original promissory note, the lost note affidavit along with evidence of adequate protections are not delivered within 60 days, the party who received payment on the note or mortgage is subject to a penalty. The penalty is \$100 per day until the documents are delivered up to \$5,000.

Section 5. Cancellation of Liens and Judgments Creates s. 701.045, F.S., to provide requirements for liens other than a mortgage or judgment which are comparable to the requirements in section 4 of the bill when such liens are fully paid. The creditor or assignee to whom payment has been made must execute a written instrument acknowledging satisfaction of the lien or judgment, have the instrument acknowledged or proven and recorded in the official records in the proper county. Within 60 days after receipt of payment of the lien or judgment, the person required to acknowledge satisfaction must send a certified copy of the recorded satisfaction to the person who made the full payment. Whenever a writ of execution has been issued and the judgment upon which it was issued has been fully paid, the party receiving payment must request, in writing and addressed to the sheriff, return of the writ of execution as fully satisfied. Additionally, the party receiving payment of any judgment must comply with s. 55.206, relating to statements releasing a judgment lien.

Section 6. Elements of Complaint; Lost, Destroyed, or Stolen Note Affidavit Creates s. 702.15, 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 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 7. Notice of Rights and Obligations of Mortgagors and Tenants by Foreclosing Party The foreclosing party in a mortgage foreclosure action is required 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. The notice must include delivered with specified information.

Section 8. Publication Requirements for Legal Notices Concerning Foreclosure Proceedings Amends s. 702.035, F.S., to make technical and editorial changes.

Section 9. Finality of Mortgage Foreclosure Judgment Creates s. 702.036, F.S., to provide for monetary damages or other appropriate relief in an action or proceeding in which a party seeks to set aside, invalidate, or challenge the validity of a final judgment of foreclosure of a mortgage, or to reestablish a lien or encumbrance on the property in abrogation of the final judgment of foreclosure of a mortgage. In such case, the court must treat the request for relief solely as a claim for monetary damages and may not grant relief that adversely affects the quality or character of the title to the property if the following circumstances exist:

- A final judgment of foreclosure of a mortgage has been entered as to a property;
- All applicable appeal periods have run as to the final judgment of foreclosure and an appeal has not been filed or, if an appeal has been filed, it has not been finally resolved; and
- The party seeking relief from the final judgment of foreclosure has been properly served.

A person who is not a party to the foreclosure but who claims to be the actual holder of the promissory note secured by the foreclosed mortgage does not have a claim against the foreclosed property after it has been conveyed for valuable consideration to a person not affiliated with the foreclosed owner or the foreclosing lender.

The actual holder of the note is not precluded from pursuing recovery from any adequate protection given under s. 673.3091, F.S., by the person who enforced the note or from the party who wrongfully claimed to be the owner or holder of the promissory note or maker of the note or from any other person against whom the actual holder of the note may have a claim relating to the note.

Section 10. Foreclosing Mortgages and Liens on Lands in Different Counties Amends s. 702.04, F.S., to delete obsolete references to “decree of confirmation of sale” and “foreign judgment book” and make other technical and editorial changes without making any substantive changes.

Section 11. 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 outstanding debt and the fair market value of the property on the date of the sale. 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.

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. If a deficiency is not pursued within 1 year after the property has vested in the foreclosing lender or other purchaser at the foreclosure sale, the vesting of the property or proceeds of sale must be to be in full satisfaction of the judgment debt. Under these circumstances, the right to recover any deficiency is extinguished. The authority of the court to determine the entitlement to any assets held by a receiver or assignee of rents is not restricted.

Section 12. Final Judgment in Uncontested Mortgage Foreclosure Proceedings Amends s. 702.065, F.S., to revise the manner in which fees are adjudged in uncontested foreclosure cases. The section clarifies that a mortgage foreclosure proceeding is uncontested if a default has been entered against all defendants or no response contesting the foreclosure has been filed. The section specifies a threshold amount of a claim for attorney fees below which the parties are not required to file affidavits of reasonable attorney fees and the court is not required to hold a hearing or adjudge the requested fees as reasonable under the following circumstances:

- The note or mortgage provides for the award of reasonable attorney fees; and
- The fees do not exceed the greater of 1.5 percent of the principal amount owed at the time of filing the complaint or \$1,500.

Section 13. 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.

The first type of proceeding involves a 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 plaintiff who has standing to foreclose a mortgage, not just the senior mortgagee, may initiate the procedure.

Under the modified procedure, after the plaintiff files a complaint which is verified in the form of an affidavit sufficient to support a motion for summary judgment, the plaintiff may request a hearing to show cause why a final judgment of foreclosure should not be entered. The clerk must issue a summons to each defendant to show cause why a final judgment of foreclosure should not be entered.

The summons must set the date for the hearing which may not occur sooner than 20 days after the service of the summons or 45 days after the service of the complaint, whichever is later. If

service is obtained by publication, the date for the hearing may not be set sooner than 50 days after the first publication.

The filing of defenses by a motion or by a responsive pleading at or before the hearing to show cause may constitute cause for the court not to enter a final judgment of foreclosure. If the defendant fails to file an answer not contesting the foreclosure, the defendant is deemed to have waived the right to a hearing and the court must enter a final judgment of foreclosure ordering the clerk of court to conduct a foreclosure sale. The plaintiff must include as an attachment to the summons the proposed final judgment of foreclosure that the plaintiff requests the court to enter at the hearing on the order to show cause. After being served with a show cause summons, if the defendant fails to file a response contesting the foreclosure which would be sufficient to preclude the entry of a summary judgment, and fails to appear at the show cause hearing, then the defendant waives the right to be heard.

If the court finds that each defendant has waived the right to be heard, the court must enter a final judgment of foreclosure without the need for further hearing upon the filing of the original note, satisfaction of the conditions of establishment of a lost note, or a showing the obligations to be foreclosed is not evidenced by a promissory note or other negotiable instrument.

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

The second type of proceeding is 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 only applies to an action for a mortgage foreclosure on a property other than a homestead.

Section 14 Adequate Protections for Lost, Destroyed, or Stolen Notes in Mortgage Foreclosure Creates s 702.11, F.S., to codify the 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. Under s. 673.3091(2), F.S., in a foreclosure the court must ensure that the borrower required to pay the instrument is adequately protected against any loss that might occur if another person makes a claim to enforce the instrument. The court may find that the person required to pay the note securing the mortgage is adequately protected against a loss that may occur by reason of a claim by another person to enforce the mortgage if the person seeking to enforce the mortgage provides:

- A written indemnification agreement by a person reasonably believed sufficiently solvent to honor such obligation;
- A surety bond;
- A letter of credit issued by a financial institution;
- A deposit of cash collateral with the clerk of court; or
- Such other security as the court may deem appropriate under the circumstances.

Any person who wrongfully claimed to be the holder of or wrongfully claimed to be entitled to enforce a lost, stolen, or destroyed note and caused the mortgage secured by the note to be foreclosed is liable to the actual holder of the note for actual damages suffered, together with attorneys fees and costs of the actual holder of the note in his or her enforcing rights under this section. The extent of liability is not limited to any adequate protections given under s. 673.3091, F.S. The actual holder of the note may pursue any other claims or remedies it may have against the maker, the person who wrongfully claimed to be the holder, or any person who facilitated or participated in the claim to the note or enforcement of the note.

Section 15. Attorney Fees; Sanctions for Raising Unsupported Claims or Defense Creates s. 702.12, F.S., to provide that s. 57.105, F.S., which authorizes attorney fees and sanctions for raising unsupported claims or defenses or for causing an unreasonable delay, applies to mortgage foreclosure actions.

Section 16. 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.

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 associations holding liens for dues and assessments and all other junior lienholders as required by law.

Section 17. Homestead; Owner-occupied Residential Property Creates s. 702.14, F.S., to require 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. This option is only available to borrowers or owners who have filed for homestead exemption on or before the date that the foreclosure complaint has been filed against the property. The owner may decline to exercise their right to a conciliation conference or mediation.

A lender or owner who has engaged in prefiling discussions with the borrower is not exempt from providing the notice. A lender, in its initial letter to the owner or borrower must include a list of all documents required and necessary for the lender to determine whether the borrower qualifies for a loan modification with the lender. Mediation or a conciliation conference is not required if the homestead owner does not notify the plaintiff of the right to conduct a mediation or conciliation conference.

The plaintiff in all residential mortgage foreclosure cases must file with the complaint and attach to the summons a “Notice to Homeowners Facing Foreclosure.” The notice must include certain information regarding a homestead owner’s eligibility to participate in a foreclosure conciliation conference or mediation with the lender to determine if the owner qualifies for a loan modification and to consider alternatives to foreclosure.

The lender’s attorney must schedule the conciliation conference no later than 90 days after the case is filed. The borrower must produce the documents required by the lender at least 14 days before the conciliation conference. An action to foreclose homestead properties may not be scheduled for summary judgment or final hearing in Florida until a conciliation telephone conference or mediation is conducted or attempted between lenders and owners and an attorney’s certificate of compliance with this requirement has been filed with the clerk of the court. Judges must monitor compliance with this requirement.

Mediation is the affirmative duty of the lender or lender’s counsel and may not occur any later than 90 days after notice to the lender from the borrower of borrower’s intent to exercise the borrower’s right to mediation. The lender must submit a list of all documents necessary for the mediation to the borrower with the service of the initial complaint. The borrower must produce the documents required by the lender at least 14 days before mediation. At mediation, the lender must arrange for participation of persons who can confirm the amount and type of default and who are authorized to make binding commitments regarding alternatives to litigation. After completion of mediation, counsel for the lender must file an attorney’s certificate of compliance with the clerk of the court advising the court that litigation is ready to resume or that the case is being voluntarily dismissed. If mediation results in an impasse, or if owners fail to participate, or do not respond to the notice, the attorney’s certificate of compliance may be filed and the case may proceed.

The parties must participate in mediation in good faith, conducting themselves in a civil and respectful manner.

Section 18. Rental of Property in Foreclosure Process Creates s. 702.15, F.S., prohibiting 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. Failure to provide the notice is actionable under the Florida Deceptive and Unfair Trade Practices Act. For purposes of the disclosure, the process of foreclosure includes the time in which the plaintiff files a foreclosure complaint until a certificate of title is issued to the new owner after a final judgment of foreclosure.

Section 19. Required Documents to Accompany Complaint at Initial Filing Creates s. 702.16, F.S., to require 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. The necessary documents, include but are not limited to, the original note, or a lost note affidavit, each mortgage, assignments of all mortgages and notes, and any other documents required for the court to ascertain the owner and holder of each note and mortgage on the property.

Section 20. Remedial Nature of Legislation Creates an undesignated section of law, to provide that this act is intended to be remedial in nature and applies to any action filed on or after the effective date of this act.

Section 21. 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.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

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

Entities that fail to meet the deadlines to provide estoppel statements will be subject to a penalty equal to \$100 per day until the documents are delivered up to a maximum of \$5,000.

C. Government Sector Impact:

The Office of the State Court Administrator indicates that the fiscal impact of this legislation cannot be accurately determined. The Office of the State Court Administrator reports that the shortened statute of limitation applicable to deficiency judgments may result in an increase in judicial workload for the first year, but anticipates that the workload will even out in future years.

The Office of the State Court Administrator reports that the requirements of the bill for conciliation conferences and mediation which require plaintiff's counsel to file an attorney's certificate of compliance will need to be aligned with Florida Rule of Civil Procedure 1.730, relating to completion of mediation.

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.