

**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.)

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Prepared By: The Professional Staff of the Committee on Banking and Insurance

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BILL: SB 1666

INTRODUCER: Senator Latvala

SUBJECT: Mortgage Foreclosures

DATE: March 17, 2013

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Knudson/Johnson	Burgess	BI	<b>Pre-meeting</b>
2.	_____	_____	JU	_____
3.	_____	_____	AP	_____
4.	_____	_____	RC	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

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**I. Summary:**

SB 1666 is designed to revise Florida’s mortgage foreclosure statute and related statutory provisions to expedite mortgage foreclosure actions and associated proceedings before the courts while providing additional rights for homeowners. The bill provides the following changes:

- Creates a program to use retired justices and senior judges to assist with foreclosure proceedings;
- Authorizes publication of a notice of sale on a publically accessible website;
- Reduces the statute of limitations from 5 years to 1 year for deficiency judgments related to mortgages on residential property that is a one-family to four-family dwelling unit;
- Requires financial institutions and lenders to establish possession of a valid promissory note in the foreclosure complaint;
- Requires a sworn affidavit establishing the right to enforce a lost, destroyed, or stolen instrument;
- Requires financial institutions to post a bond or other financial means of providing adequate protection when alleging to be the holder of a note or entitled to enforce a lost, stolen, or destroyed note;
- Makes responses easier for homeowners once the foreclosure is filed by permitting the homeowner to file other documents in defense of the foreclosure;
- Allows any lienholder, instead of just the mortgagee, to use the expedited foreclosure process;
- Exempts foreclosures of owner-occupied residences from provisions authorizing the plaintiff to request the court to enter an order to show cause why it should not enter an order to make

payments during the pendency of the foreclosure proceedings or an order to vacate the premises;

- Protects the rights of non-delinquent homeowners and condominium unit owners who are paying the expenses of a delinquent owner; and
- Protects third-party purchasers from post-judgment claims.

The bill is effective upon becoming a law.

This bill amends the following sections of the Florida Statutes: 25.073, 45.031, 50.011, 95.11, 121.021, 121.091, 121.591, 702.035, 702.06, and 702.10. The bill creates the following sections of the Florida Statutes: 50.015, 702.015, 702.036, and 702.11.

**II. Present Situation:**

**Background**

Approximately 16.75 percent of all mortgage loans in Florida were 90 days or more delinquent or in the process of foreclosure, as of third quarter 2012.<sup>1</sup> In contrast, the national average delinquency rate was 7.03 percent. In addition, the foreclosure start rate in Florida was 1.50 percent, which was significantly higher than the national average of 1.08 percent.<sup>2</sup>

The Office of the State Court Administrator provided the following information concerning the number of mortgage foreclosure filings, dispositions, and estimated pending cases for calendar years 2011 and 2012.<sup>3</sup>

<b>Real Property/Mortgage Foreclosures All Circuits</b>			
	Number of Filings	Number of Dispositions	Estimated Pending Cases, As of December
Calendar Year 2011	139,015	200,107	363,660
Calendar Year 2012	202,768	195,309	371,119

In 2012, the attorneys general of 49 states and the District of Columbia, the federal government, and five banks and mortgage servicers (Ally/GMAC, Bank of America, Citi, JPMorgan Chase and Wells Fargo) reached agreement on a mortgage settlement that will create new servicing standards, provide loan modification relief to distressed homeowners and provide funding for state and federal governments.<sup>4</sup> The settlement was made formal and binding on April 5, when

<sup>1</sup> Mortgage Bankers Association, *State Mortgage Market Profile of Florida, Third Quarter 2012*.

<sup>2</sup> *Ibid.*

<sup>3</sup> Office of the State Court Administrator, *Real Property/Mortgage Foreclosures*. On file with Banking and Insurance Committee staff.

<sup>4</sup> Information concerning the national settlement can be found at <http://www.nationalmortgagesettlement.com/>.

The court documents are available at [http://www.justice.gov/opa/opa\\_mortgage-service.htm](http://www.justice.gov/opa/opa_mortgage-service.htm) (last viewed March 15, 2013.)

the U.S. District Court in Washington, D.C. entered the consent judgments containing the settlement terms. The settlement provides as much as \$25 billion in relief to distressed borrowers and direct payments to states and the federal government. The agreement settles state and federal investigations regarding the mortgage loan and foreclosure abuses. The settlement requires new servicing standards that will prevent robo-signing, improper documentation, and lost paperwork. The new standards also provide for stricter oversight of foreclosure processing, including third-party vendors.

### Foreclosure Procedure

Statutory process and the Florida Rules of Civil Procedure govern the foreclosure procedure. It is initiated by the lender or servicer, known as a mortgagee, when the borrower, or mortgagor, fails to perform the terms of his or her mortgage, usually by defaulting on payments. Most mortgages contain an 'acceleration clause,' which gives the mortgagee the authority to declare the entire mortgage obligation due and payable immediately upon default. If the borrower is not able to pay the entire mortgage obligation upon proper notice, the holder of the note or its servicing agent may begin the foreclosure process in a court of proper jurisdiction. The following is a brief outline of the judicial foreclosure process, with the caveat that litigation is driven by the parties, so the process may be slightly different from case to case:

- Upon proper notice of default to the defendant, the mortgage servicer files a foreclosure complaint<sup>5</sup>, which must allege that the plaintiff is the present owner and holder of the note and mortgage<sup>6</sup>, contain a copy of the note and mortgage<sup>7</sup>, and allege a statement of default<sup>8</sup>, along with a filing fee<sup>9</sup> and a *lis pendens*, which serves to cut off the rights of any person whose interest arises after filing.<sup>10</sup>
- Service of process must be made on defendants within 120 days after the filing of the initial pleadings.<sup>11</sup>
- If a defendant has not filed an answer or another paper indicating intent to respond to the suit, then the plaintiff is entitled to an entry of default against the defendant.<sup>12</sup>
- If an answer is filed (thus negating the possibility of a default judgment), the plaintiff may then file for a motion of summary judgment or proceed to trial, however the vast majority of plaintiffs file a motion for summary judgment.<sup>13</sup>
- Following the proper motions, answers, affidavits, and other evidence being filed with the court, the judge holds a summary judgment hearing and if he or she finds in the favor of the plaintiff, the court renders a final judgment.<sup>14</sup>
- If summary judgment is denied, the foreclosure proceeds to a trial without a jury.<sup>15</sup>

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<sup>5</sup> Rule 1.944, Fla. R. Civ. P.

<sup>6</sup> *Edason v. Cent. Farmers Trust Co.*, 129 So. 698, 700 (Fla. 1930).

<sup>7</sup> Rule 1.130(a), Fla. R. Civ. P.

<sup>8</sup> *Siahpoosh v. Nor Props.*, 666 So.2d 988, 989 (Fla. 4th DCA 1996).

<sup>9</sup> The filing fee for foreclosure actions depends on the value of the claim. When the claim is for \$50,000 or less, the fee is \$395; when the claim is over \$50,000 but less than \$250,000, the fee is \$900; and when the claim is \$250,000 or more, the fee is \$1900, according to s. 28.241(1)(d), F.S.

<sup>10</sup> Section 48.23, F.S.

<sup>11</sup> Rule 1.070(j), Fla. R. Civ. P. *See also* chs. 48 and 49, F.S.

<sup>12</sup> Rule 1.040(a)(1), Fla. R. Civ. P.

<sup>13</sup> Rule 1.1510(a), Fla. R. Civ. P.

<sup>14</sup> Section 45.031, F.S.

- The court schedules a judicial sale of the property not less than 20 days, but no more than 35 days after the judgment if the plaintiff prevails at summary judgment or trial.<sup>16</sup>
- A notice of sale must be published once a week, for 2 consecutive weeks, in a publication of general circulation, and the second publication must be at least 5 days prior to the sale.<sup>17</sup>
- The winning bid at a public judicial sale is conclusively presumed to be sufficient consideration for the sale.<sup>18</sup>
- Parties have 10 days to file a verified objection to the amount of the bid or the sale procedure.<sup>19</sup>
- After 10 days, the sale is confirmed by the clerk's issuance of the certificate of title to the purchaser, sale proceeds are disbursed in accordance with the statutory procedure<sup>20</sup>, and the court may, in its discretion, enter a deficiency decree for market value of the security received and the amount of the debt.<sup>21</sup>

### **Alternative Foreclosure Procedure**

Section 702.10, F.S., provides an alternative procedure that is designed to speed up the foreclosure process in uncontested cases or cases where there is no legitimate defense. The following is a brief outline of this alternative foreclosure process:

- After a complaint has been filed, the plaintiff may request an order to show cause for the entry of final judgment and the court must immediately review the complaint.<sup>22</sup>
- If the court finds that the complaint is verified, and alleges a proper cause of action, the court must issue an order directing the defending the show cause why a final judgment should not be entered.<sup>23</sup>
- The order must set a date and time for the hearing, not sooner than 20 days after the service of the order, or 30 days if service is obtained by publication, and no later than 60 days after the date of service.<sup>24</sup>
- The defendant can file defenses by a motion or by sworn or verified answer or appear at the hearing, which prevents entry of a final judgment.<sup>25</sup>
- The court need not hold a hearing for determination of reasonable attorney fees if the requested fees do not exceed percent of the principal owed on the note at the time of filing.<sup>26</sup>
- The court may enter a final judgment if the defendant has waived the right to be heard or has not shown cause why a final judgment should not be entered.<sup>27</sup>

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<sup>15</sup> Section 702.01, F.S. The summary judgment motion is optional. A plaintiff can elect to go to trial without the filing of a summary judgment motion.

<sup>16</sup> Section 45.031(1)(a), F.S.

<sup>17</sup> Section 45.031, F.S.

<sup>18</sup> Section 45.031(8), F.S.

<sup>19</sup> *Id.*

<sup>20</sup> Section 45.031, F.S.

<sup>21</sup> Section 702.06, F.S.

<sup>22</sup> Section 702.10(1), F.S.

<sup>23</sup> *Id.* While this appears to create a right to the order to show cause, many courts interpret this subsection to require an initial hearing.

<sup>24</sup> Section 702.10(1)(a), F.S.

<sup>25</sup> Section 702.10(1)(b), F.S.

<sup>26</sup> Section 702.10(1)(c), F.S.

<sup>27</sup> Section 702.10(1)(d), F.S.

Additionally, if the property is not residential real estate, the plaintiff may request a court order directing the defendant to show cause why an order to make payments during the pendency of the proceedings or an order to vacate the premises should not be entered.<sup>28</sup>

- The order must set a date and time for the hearing, not sooner than 20 days after the service of the order, or 30 days if service is obtained by publication.<sup>29</sup>
- The defendant can file defenses by a motion or by sworn or verified answer or appear at the hearing, which prevents entry of a final judgment.<sup>30</sup>
- The court may enter an order requiring payment or an order to vacate if the defendant has waived the right to be heard.<sup>31</sup>
- If the court finds that the defendant has not waived the right to be heard, after reviewing affidavits and evidence, the court can determine if the plaintiff is likely to prevail in the foreclosure action, and enter an order requiring the defendant to make the payments or provide another remedy.<sup>32</sup>
- The court order must be stayed pending final adjudication of the claims if the defendant posts bond with the court in the amount equal to the unpaid balance of the mortgage.<sup>33</sup>

### **Reemployment after State Retirement or Deferred Retirement Option Plan Termination**

Under current law, a 6 calendar month termination period after the effective retirement date or DROP termination date must be met to finalize retirement during which a Florida Retirement System (FRS) retiree cannot work for a participating employer without voiding retirement.<sup>34</sup> In the 6 calendar months immediately following termination period, the FRS retiree cannot receive retirement benefits in any month the retiree is employed by a participating employer.

Investment Plan retirees who have reached normal retirement can receive up to a 10 percent distribution after the first calendar month of termination with the remainder becoming available after three calendar months.<sup>35</sup> Retirees who do not meet normal retirement cannot receive a distribution until after three calendar months of termination. An Investment Plan member is retired when a distribution is received with the termination and reemployment limitation periods applicable in the 12 calendar months immediately after termination.

## **III. Effect of Proposed Changes:**

### **Use of Retired Justices or Senior Judges to Assist with Foreclosure Proceedings**

**Section 1** creates s. 25.073(4), F.S., to authorize retired justices or retired senior judges to assist with the foreclosure proceedings on “as needed” basis. A retired justice or senior judge is eligible for temporary reemployment as a senior judge if he or she meets the following conditions:

<sup>28</sup> Section 702.10(2), F.S.

<sup>29</sup> Section 702.10(2)(a), F.S.

<sup>30</sup> Section 702.10(2)(b), F.S.

<sup>31</sup> Section 702.10(2)(c), F.S.

<sup>32</sup> Section 702.10(2)(d), F.S.

<sup>33</sup> *Id.*

<sup>34</sup> Sections 121.021 and 121.091, F.S.

<sup>35</sup> Section 121.591, F.S.

(1) The justice or judge attains the later of his or her normal retirement age or age when vested and retires under ch. 131, F.S., (2) The justice or judge meets the definition of “termination” as provided in s. 121.021(39)(d); (3) The reemployment provisions as provided in s. 121.091(9)(c), F.S., do not apply to justices or judges reemployed under these provisions; and (4) Renewed membership in the Florida Retirement System is not authorized under these provisions. The sections of the bill authorizing the use of retired or senior judges (sections 1, 7, 8, 9, 17, and 18) will take effect only if the Legislature appropriates funding during the 2013 Session the sum of \$1.6 million from the General Revenue Fund on a recurring basis to the judicial branch in order to fund the increased employer contributions associated with the costs of the retirement benefits authorized in this bill and if the Governor does not veto the appropriation.

**Sections 7-9** amend ss. 121.021, 121.091, and 121.591, F.S. to provide conforming changes to implement the availability of retired justices and senior judges to assist with the foreclosure backlog. These sections provide that the act of termination for a justice or judge occurs when the justice or judge has reached the later of his or her retirement age or, when vested, has terminated all employment under the Florida Retirement System for at least 1 calendar month, and retires from the system. The judge or justice must subsequently return to temporary employment as a senior judge in any court, as assigned by the Chief Justice of the Supreme Court.

**Section 17** adjusts specified employer contributions rates for retired justices and senior judges who are reemployed to assist with foreclosure proceedings as authorized by Section 1 of the bill. The employer contribution changes are needed to fund the benefit changes required to allow retired justices and senior judges to participate in the program.

**Section 18** provides a conforming change to the senior judge authorization via a legislative finding that the act fulfills an important state interest and that a proper and legitimate state purpose is served if employees and retirees of the state and its political subdivisions, and their dependents, survivors and beneficiaries are extended basic protections afforded by governmental retirement systems.

**Section 21** repeals the senior judge authorization effective July 1, 2016.

### **Publication of Notice of Sale on a Publicly Accessible Website**

**Section 2** amends s. 45.031, F.S., to provide an option for publishing the “notice of sale” on a publicly accessible website maintained by the clerk of the court. Currently, the notice of sale is required to be published once a week for 2 consecutive weeks in a newspaper of general circulation in the county where the sale is to held.

**Section 3** amends s. 50.011, F.S., to provide a conforming change to permit publication of a notice of sale on a website maintained by the clerk of the court.

**Section 4** creates s. 50.015, F.S. to provide a conforming change to permit publication on a website maintained by the clerk of the court. This section establishes standards for establishing an accessible Internet website for the publication of a notice of foreclosure.

**Section 11** amends s. 702.035, F.S., to provide a conforming change to permit publication on a website maintained by the clerk of the court.

### **Reduction of Statute of Limitations on Certain Deficiency Actions**

**Section 5** amends s. 95.11, F.S., to reduce the statute of limitations period for a lender to enforce a deficiency judgment following the foreclosure of an owner-occupied, one-family to four-family dwelling unit years from 5 years to 1 year.

**Section 6** creates an undesignated section of law that applies the amendments to s. 95.11, F.S. The amendments to s. 95.11, F.S., reduce the statute of limitations to bring an action to enforce a deficiency judgment related to the foreclosure of an owner-occupied, one-family to four-family dwelling unit from 5 years to 1 year. This section applies the 1-year statute of limitations to any such deficiency action that commences on or after July 1, 2013, regardless of when the cause of action accrued. An exception is created for causes of action that accrue before the effective date of the bill and have not expired under the current 5-year statute of limitations. Such actions must be commenced within the 5-year statute of limitations or by July 1, 2014, whichever comes first. Pursuant to Section 19 of the bill, this section will not take effect unless the Legislature appropriates \$1.6 million from the General Revenue Fund on a recurring basis to the judicial branch in order to fund the increased employer contributions associated with the costs of the retirement benefits authorized in this bill and if the Governor does not veto the appropriation.

### **Establishing Possession of a Valid Promissory Note in a Complaint**

**Section 10** creates s. 702.015, F.S., to require the lender to certify physical possession of the original promissory note, or provided sworn evidence to support a lost note. This new burden on the lender is intended to expedite the foreclosure process and avoid a repeat of some of the “robosigning,” fraud and other problems of the past. A court may sanction the plaintiff for failure to comply with the requirements of this section. The section does not apply a foreclosure proceeding involving timeshare interests under part III of ch. 721, F.S.

The requirements that must be met under this section to bring a complaint to foreclose a mortgage or other lien on residential real property designed principally for occupation by 1 to 4 families (including condominiums and cooperatives) which secures a promissory note are:

#### ***Facts Regarding Plaintiff Holding Note or Entitlement to Enforce Note***

The complaint must establish that the plaintiff holds the original note or is entitled to enforce a promissory note by:

- Containing affirmative allegations made by the Plaintiff at the time the proceeding is commenced that the Plaintiff holds the original note secured by the notice; or
- Alleging with specificity the factual basis by which the plaintiff is a “person entitled to enforce” the promissory note under s. 673.3011, F.S.
  - Under s. 673.3011, a “person entitled to enforce” an instrument is the holder of the instrument, a nonholder in possession of the instrument with the rights of a holder, or is not in possession of the instrument who may enforce it under

- s. 673.3091, F.S., (enforcement of a lost, destroyed or stolen instrument) or
- s. 673.4181(4), F.S., (mistaken payment or acceptance).

An “original note” or original promissory note” is defined as the signed or executed promissory note. It includes any renewal, replacement, consolidation, or amended and restated note or instrument that renews, replaces, or substitutes for a previous promissory note. The term also includes a transferrable record per s. 668350(16), F.S. The term does not include a copy of any of the foregoing.

***Facts Regarding Delegation of Authority to Plaintiff to Institute a Foreclosure Action***

If a plaintiff has been delegated the authority to institute a mortgage foreclosure action on behalf of the person entitled to enforce the note, the complaint must describe with specificity:

- The authority of the plaintiff, and
- The document that grants such authority to the plaintiff.

These requirements are not intended to modify laws regarding standing or real parties in interest.

***Plaintiff’s Possession of Original Promissory Note***

A plaintiff in possession of the original promissory note must file with the court, under penalty of perjury, a certification that the plaintiff possesses the original promissory note. The filing must be made contemporaneously with the foreclosure complaint. The certification must set forth:

- The location of the note;
- The name and title of the individual giving the certification;
- The name of the person who personally verified such possession; and
- The time and date on which possession was certified.

The certification must also have attached to it correct copies of the note and all allonges. The original note and allonges must be filed with the court before the entry of any judgment of foreclosure or judgment on the note.

***Affidavit Required to Enforce a Lost, Destroyed, or Stolen Instrument***

A plaintiff seeking to enforce a lost, destroyed or stolen instrument must attach to the complaint an affidavit executed under penalty of perjury. The affidavit must:

- Detail a clear chain of all endorsements, transfers, or assignments of the promissory note;
- Set for facts showing the plaintiff is entitled to enforce a lost, destroyed, or stolen instrument. Adequate protection as required under s. 673.3091(2) must be provided before final judgment.
  - Adequate protection refers to adequately protecting the party required to pay the instrument against loss that might occur caused by a claim by another person to enforce the instrument.
- Include as exhibits to the affidavit evidence of the acquisition, ownership, and possession of the note as may be available to the plaintiff. Such evidence includes, but is not limited to, copies of the note, copies of allonges, and audit reports showing receipt of the original note.

## **Finality of Mortgage Foreclosure Judgment**

**Section 12** creates s. 702.036, F.S., to provide protection and certainty to a good faith purchaser will not be dispossessed in a later challenge after the foreclosure is final. The section provides that the former owner may continue to pursue money damages against the lender even after the trial and appeals have concluded, but the claims cannot impact the marketability of the property in the new owner.

An action to set aside, invalidate, or challenge the validity of a final judgment of mortgage foreclosure, or to establish or re-establish a lien or encumbrance of property in abrogation of a mortgage foreclosure final judgment is limited to monetary damages to monetary damages if the following apply:

- The party seeking relief from the final judgment of mortgage foreclosure was properly served in the foreclosure lawsuit.
- The final judgment of mortgage foreclosure was entered as to the property.
- All applicable appeals periods have run as to the final judgment with no appeals having been taken or any appeals having been finally resolved.
- The property has been acquired for value by a person not affiliated with the foreclosing lender or the foreclosed owner, at a time in which no lis pendens regarding the suit to set aside, invalidate, or challenge the foreclosure appears in the official records of the county where the property was located.
  - Affiliates of the foreclosing lender include the foreclosing lender, any loan servicer for the loan being foreclosed, and any past or present owner or holder of the loan being foreclosed. It also includes:
    - (a) A parent entity, subsidiary, or other person who directly or indirectly controls, is controlled by, or under common control of such entities
    - (b) A maintenance company, holding company, foreclosure services company or law firm under contract with such entities.

Once foreclosure of a mortgage occurs based upon enforcement of a lost, destroyed, or stolen note, a person who was not a party to the foreclosure action but claims entitlement to enforce the promissory note secured by the mortgage has no claim against the foreclosed property once it is conveyed to a person not affiliated with the foreclosing lender or the foreclosed owner. That person may still pursue recovery from any adequate protection given pursuant to s. 673.3091, F.S., or from the party who wrongfully claimed entitlement to enforce the promissory note, from the maker of the note, or any other person against whom a claim may be made.

## **Limitation on the Amount of a Deficiency Decree**

**Section 13** amends s. 702.06, F.S., to limit the amount of a deficiency judgment on owner-occupied residential property to the difference between the judgment amount and the “fair market value” on the date of the foreclosure sale. Similarly, the deficiency for a short sale may not exceed the difference between the outstanding debt and the fair market value of the property on the date of the sale.

### **“Show Cause” Expedited Foreclosure Procedure**

**Section 14** amends s. 702.10, F.S, to establish a “show cause” process that streamlines and expedites foreclosures. The “show case” process preserves all appropriate due process rights protecting borrowers; it eliminates unnecessary court hearings; and it permits community associations standing to participate when there are delinquent assessments due.

The streamlined show cause process is as follows:

After filing a complaint, the plaintiff may request an order to show cause for the entry of final judgment. The court must immediately review the request and the court file in chambers without a hearing. The court must promptly issue an order to show cause why a final judgment of foreclosure should not be entered to the other parties named in the action if the complaint is verified, complies with the requirements in s. 702.015, F.S. (created by Section 10 of the bill), and alleges a cause of action to foreclose on real property.

The court must set a hearing, the date and time of which must not occur sooner than the later of 20 days after service of the order to show cause or 45 days after service of the initial complaint. If service is by publication, the hearing date cannot be set sooner than 30 days after the first publication. The hearing is no longer required to be held within 60 days of the date of service.

The bill makes responses easier for homeowners once the foreclosure is filed by permitting the homeowner to file other documents in defense of the foreclosure. The bill specifies that the filing of defenses by motion, responsive pleading, affidavits, or other papers before the hearing may constitute cause for the court not to enter final judgment. Under current law, filing of defenses by motion or by a verified or sworn answer prior to the show cause hearing are needed to show cause for the court not to enter final judgment. Current law, however, states that such filings establish cause, while under the bill the expanded types of filings only “may” show cause.

If the defendant files defenses by motion, an answer, affidavits, other papers, and other evidence and argument or if the defendant or defendant’s attorney appears at the hearing, the hearing time will be used to consider whether a genuine issue of material fact exists that precludes the entry of summary judgment or that constitutes a legal defense to foreclosure. The order to show cause must notify the defendant that the court may enter an order of final judgment of foreclosure at the hearing and order the clerk of the court to conduct a foreclosure sale.

The bill creates a higher standard for the defendant to show cause. Under the bill, the defendant shows cause (why the court should not grant final judgment of foreclosure) if the defendant raises a genuine issue of material fact which precludes entry of summary judgment or is a legal defense to foreclosure in a motion, a verified answer, affidavits, or other papers or in evidence presented at or before the hearing. Current law states that the defendant shows cause merely by filing defenses by a motion or by a verified or sworn answer at or before the hearing.

The court may enter a final judgment of foreclosure if the court finds that all defendants have waived the right to be heard, the court shall promptly enter a final judgment of foreclosure without the need for further hearing if the plaintiff shows entitlement to final judgment and files the original note, establishes a lost note, or shows the court the obligation to be foreclosed is not

evidenced by a promissory note or other negotiable instrument. If the court finds that any defendant has not waived the right to be heard on the order to show cause, the court must determine whether there is cause to enter a final judgment of foreclosure. If the hearing time is insufficient, the court may announce a continued hearing on the order to show cause. The court may enter a final judgment of foreclosure if the defendant does not show cause why a final judgment should not be entered.

The Legislature intends that alternative procedure may run simultaneously with other court procedures.

The bill also exempts foreclosures of owner-occupied residences from provisions authorizing the plaintiff to request the court to enter an order to show cause why it should not enter:

- An order to make payments during the pendency of the foreclosure proceedings, or
- An order to vacate the premises.

### **Protection of the Actual Holder of the Note in the Event of a Wrongful Claim to Hold the Note or Wrongful Claim of Entitlement to Enforce a Lost, Stolen, or Destroyed Note**

**Section 15** creates s. 702.11, F.S., to provide a conforming change requiring the lender to provide evidence of the note or lost note being foreclosed. The section states that a court may find the following constitute reasonable means for providing adequate protection under s. 673.3091, F.S.

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

The security must be on terms and in amounts set by the court. The security must run through the statute of limitations for the underlying note and indemnify and hold harmless the maker of the note against any loss or damage that might occur by reason of a claim by another person to enforce the note.

A person who wrongly claims to hold a note or to be entitled to enforce a lost, stolen, or destroyed note who causes the mortgage to be foreclosed is liable to the actual holder, without limitation to any adequate protections given, for actual damages plus attorney fees and costs. The actual holder may also pursue recovery directly against any adequate protections given. This section does not limit the ability of the actual holder of the note to pursue other claims or remedies it may have against the maker of the note, the person who wrongly claimed to be the holder, or any person who facilitated or participated in the claim to the note or enforcement.

## **Application and Implementation of Bill**

**Section 16** creates an undesignated section that provides that changes in the process are remedial and not substantive in nature. The act applies to all mortgages encumbering real property and all promissory notes secured by a mortgage, regardless of when executed. The following sections are exempted from this general rule of application:

- Section 702.015, F.S., only applies to cases filed on or after July 1, 2013.
- The amendments to s. 702.10, F.S., and the entirety of s. 702.11, F.S., apply to causes of action pending on the act's effective date.

**Section 19** requests the Supreme Court to amend the Rules of Civil Procedure to implement the expedited foreclosure process.

## **Specified Bill Sections Ineffective Without Legislative Appropriation**

**Section 20** provides that sections 1, 6, 7, 8, 9, 17, and 18 of this act would take effect only if the Legislature appropriates funding during the 2013 Session the sum of \$1.6 million from the General Revenue Fund on a recurring basis to the judicial branch in order to fund the increased employer contributions associated with the costs of the retirement benefits authorized in this bill and if the Governor does not veto the appropriation.

## **Effective Date**

**Section 22** provides the act will be take effect upon becoming a law.

## **IV. Constitutional Issues:**

### **A. Municipality/County Mandates Restrictions:**

To the extent this bill requires a local government to expend funds to comply with its terms, the provisions of section 18(a) of Article VII of the State Constitution may apply. If those provisions do apply, in order for the law to be binding upon the cities and counties, the Legislature must find that the law fulfills an important state interest (included in section 18 of the bill), and one of the following relevant exceptions must be met:

- Funds estimated at the time of enactment sufficient to fund such expenditures are appropriated;
- Counties and cities are authorized to enact a funding source not available for such local government on February 1, 1989, that can be used to generate the amount of funds necessary to fund the expenditures;
- The expenditure is required to comply with a law that applies to all persons similarly situated; or
- The law must be approved by two-thirds of the membership of each house of the Legislature.

## 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 and delays associated with bringing a foreclosure suit.

The expedited foreclosure of abandoned real property would allow such properties to be rehabilitated and sold on the marketplace in a timelier manner, 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:

**Impact on State Courts<sup>36</sup>**

**State Courts Revenue:** The fiscal impact of this legislation on revenues to the State Courts' trust funds from civil filing fees cannot be accurately determined due to the unavailability of data needed to establish the increase resulting from a spike in filings due to a shortened statute of limitations for bringing actions established in the bill.

**Expenditures:** The fiscal impact on expenditures of the State Courts System cannot be accurately determined due to the unavailability of data needed to quantify the increase in judicial workload.

**Judicial or Court Workload:** The courts expect to experience a short-term increase in court workload in consequence of provisions permitting additional lienholders to seek show cause orders under modified procedures expediting the foreclosure process. A related longer-term increase in judicial time may be expected under show cause provisions requiring judges immediately review court files to ensure compliance with numerous additional criteria. A near-term increase in court workload may also be anticipated in light of a shortened statute of limitations for bringing actions to enforce claims of deficiency.

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<sup>36</sup> Office of the State Courts Administrator 2013 Judicial Impact Statement, SB 1666, January 18, 2013. Copy available Banking and Insurance Committee Staff.

***Court Rules/Jury Instructions:*** Newly created s. 702.10(3), F.S., requests the Supreme Court amend the Florida Rules of Civil Procedure to provide for expedited foreclosure proceedings and development of related forms. The bill's effective date, upon becoming law, will afford the Court little time to act upon the requested rule making.

***Judiciary:*** Provisions potentially expediting the foreclosure process and reducing related court workload over a period of years will require a corresponding near-term expenditure of court resources. Additional revenue may be anticipated, however, in consequence of an increase in near-term filings by lienholders initiating expedited foreclosure proceedings.

### **Impact on the Florida Retirement System (FRS)**

The Department of Management Services provided an analysis<sup>37</sup> of the provision relating to the FRS Pension Plan, a defined benefit plan and the FRS Investment Plan, which is a defined contribution plan. The department administers the FRS Pension Plan and the State Board of Administration administers the FRS Investment Plan.

The costs in the bill are based on a 2012 actuarial special study conducted by Milliman, Inc.,<sup>38 39</sup> that did not assume a termination period. The termination period included in this bill is not expected to have a material impact on the choices of senior judges to accept temporary duties or the costs determined in the 2012 special study.

SB 1666 would increase the required employer contribution rates established in s. 121.71(4), F.S., as follows:

- The Elected Officers' Class – Justices, Judges, is increased by 0.45 percentage points.
- The Deferred Retirement Option Program is increased by 0.01 percentage points.

SB 1666 would also increase the required employer contribution rate for the unfunded actuarial liability established in s. 121.71(5), Florida Statutes, for the Elected Officers' Class – Justices, Judges, by 0.91 percentage points.

The provisions of this act relating to senior justices or judges would take effect only if the Legislature appropriates the sum of at least \$1.6 million from the General Revenue Fund on a recurring basis to the judicial branch in order to fund the increased employer contributions associated with the costs of the retirement benefits granted in this act and the appropriations are not vetoed by the Governor. The changes in this bill relating to retired justices and judges shall stand repealed effective July 1, 2016.

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<sup>37</sup> Department of Management Services Bill Analysis 2013, March 14, 2013. On file with the Senate Banking and Insurance Committee Staff.

<sup>38</sup> Milliman, *Study Reflecting the Impact to the Blended Rates of the Florida Retirement System of Exempting Retired Judges from Termination and Reemployment Limitations*, February 9, 2012. On file with Senate Banking and Insurance Committee Staff.

<sup>39</sup> Milliman, *Study Reflecting the Impact to the Florida Retirement System Defined Benefit Plan of Exempting Retired Judges from Termination and Reemployment Limitations*, February 9, 2012. On file with Senate Banking and Insurance Committee Staff.

***Fiscal Impact on State Agencies***

The costs in the bill are based on a 2012 actuarial special study performed by Milliman, Inc., that did not assume a termination period. The termination period included in this bill is not expected to have a material impact on the choices of senior judges to accept temporary duties or the costs determined in the 2012 special study.

- A. Revenues: Not applicable.
- B. Expenditures, Recurring:

<b>7/2013-6/2014</b>	<b>7/2014-6/2015</b>	<b>7/2015-6/2016</b>
\$1,598,000	\$1,662,000	\$1,729,000

***Fiscal Impact on Local Governments***

The costs in the bill are based on a 2012 actuarial special study performed by Milliman, Inc., that did not assume a termination period. The termination period included in this bill is not expected to have a material impact on the choices of senior judges to accept temporary duties or the costs determined in the 2012 special study. The Division of Retirement of the Department of Management Services provided the following information concerning the impact on local governments, as depicted in the table. There are no associated revenues.

<b><i>Recurring Expenditures for Local Governments</i></b>		
<b>7/2013 - 6/2014</b>	<b>7/2014 - 6/2015</b>	<b>7/2015 - 6/2016</b>
\$196,000	\$204,000	\$212,000

**VI. Technical Deficiencies:**

In lines 788-812 of the bill, it is unclear whether recovery in an action or proceeding to set aside, invalidate, or challenge the validity of a mortgage foreclosure final judgment is limited to monetary damages when all the factual scenarios contained in lines 799-812 are applicable or when any one of those factual scenarios is applicable.

The Department of Management Services suggested that s. 121.053(6), F.S., should also be amended to make conforming changes and provide a cross-reference for the proposed changes in s. 25.073, F.S., provided in the bill. The Department of Management Services also suggested technical conforming changes to Section 7 of the bill (lines 322-330) to clarify that changes to termination apply only to a senior justice or judge, as defined in s. 25.073, F.S.

**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.

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This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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