

**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 Appropriations Subcommittee on Criminal and Civil Justice

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BILL: CS/SB 536

INTRODUCER: Banking and Insurance Committee and Senator Brandes

SUBJECT: Unclaimed Funds Held by the Clerks of Court

DATE: March 22, 2017

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Billmeier</u>	<u>Knudson</u>	<u>BI</u>	<u>Fav/CS</u>
2.	<u>Harkness</u>	<u>Sadberry</u>	<u>ACJ</u>	<u>Favorable</u>
3.	_____	_____	<u>AP</u>	_____

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**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Substantial Changes

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**I. Summary:**

CS/SB 536 repeals statutes relating to surplus trustees. A surplus trustee is an entity that holds and administers surplus proceeds from a foreclosure sale. The primary duty of a surplus trustee is to locate the owner of record and return the surplus funds to the owner. The bill repeals the surplus trustee statute and requires unclaimed surplus funds to be remitted to the Department of Financial Services (DFS) after 1 year and be distributed pursuant to the Florida Disposition of Unclaimed Property Act. Under the Act, the owner obtains the money by filing a claim with the DFS. If the DFS denies the claim, the owner is entitled to a hearing and an appeal to contest the denial.

The bill repeals section 43.19, Florida Statutes, relating to money held in the court registry. The statute provides that in cases where the right to withdraw money from the court registry is not in dispute and has remained with the court for 5 years, the court shall direct the money be deposited with DFS. The repeal of section 43.19, Florida Statutes, means that the court will remit the unclaimed money to the DFS after 1 year, instead of 5 years, for disposition pursuant to the Florida Disposition of Unclaimed Property Act.

The bill has an indeterminate, but likely insignificant, fiscal impact on the DFS and the Clerks of the Court. The bill has an indeterminate fiscal impact on surplus trustees.

The bill has an effective date of July 1, 2017.

## II. Present Situation:

### Unclaimed Property Pursuant to Chapter 717, F.S., and Section 43.19, F.S.

Section 43.19, F.S., provides for the disposition of unclaimed money paid into the court registry. Section 43.19(1), F.S., provides that in a case in which the right to withdraw money in the court registry is not in dispute and the money has remained in the registry for 5 years or more, the court shall direct that the money be deposited with the Chief Financial Officer (CFO) to the credit of the State School Fund. A person entitled to any of the money may obtain an order directing the payment of the money to the claimant by petitioning the court and providing written notice to the state attorney and proof of entitlement to the money.<sup>1</sup> A court has noted that the state attorney is not required to appear at the proceeding so there could be a case where no representative of the state is party to the proceeding.<sup>2</sup>

Chapter 717, F.S., is the Florida Disposition of Unclaimed Property Act.<sup>3</sup> It provides that intangible property held for the owner by a court that has not been claimed by the owner for more than 1 year after it became payable is presumed unclaimed.<sup>4</sup> Upon the payment or delivery of unclaimed property to the DFS, the state assumes custody and responsibility for the safekeeping of the property.<sup>5</sup> Section 717.118, F.S., requires the DFS to attempt to locate owners of unclaimed property if the value is more than \$250. The original property owner retains the right to recover the proceeds of the property, and any person claiming an interest in the property delivered to the DFS may file a claim for the property, subject to certain requirements.<sup>6</sup> The DFS is required to make a determination on a claim within 90 days. If a claim is determined in favor of the claimant, the DFS must deliver or pay to the claimant the property or the amount the DFS actually received or the proceeds, if it has been sold by the DFS.<sup>7</sup> Any person aggrieved by a decision of the DFS may petition for a hearing pursuant to ss. 120.569 and 120.570, F.S.<sup>8</sup>

If the property remains unclaimed, all proceeds from abandoned property are then deposited by the DFS into the Unclaimed Property Trust Fund.<sup>9</sup> The DFS is allowed to retain up to \$15 million to make prompt payment of verified claims and to cover costs incurred by the DFS in administering and enforcing the Florida Disposition of Unclaimed Property Act. All remaining funds received are deposited into the State School Fund.<sup>10</sup>

Section 43.19, F.S., provides that if the right to withdraw money in the court registry is not in dispute and the money has remained in the registry for 5 years or more, the court shall direct that the money be deposited with the CFO. Section 717.113, F.S., provides that money held by a

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<sup>1</sup> s. 43.19(3), F.S.

<sup>2</sup> *Crescenzo v. Atwater*, 136 So.3d 1248, 1256 (Fla. 2d DCA 2014).

<sup>3</sup> s. 717.001, F.S.

<sup>4</sup> s. 717.113, F.S. One court has called the legal effect of the presumption that the property is unclaimed “unclear.” See *Crescenzo v. Atwater*, 136 So.3d 1248, 1255 (Fla. 2d DCA 2014).

<sup>5</sup> s. 717.1201, F.S.

<sup>6</sup> ss. 717.117 and 717.124, F.S.

<sup>7</sup> s. 717.124, F.S.

<sup>8</sup> s. 717.126, F.S.

<sup>9</sup> s. 717.123, F.S.

<sup>10</sup> s. 717.123, F.S.

court for more than 1 year after it becomes payable is presumed unclaimed. A court has described the legal effect of the presumption as “unclear.”<sup>11</sup>

Claims under s. 43.19, F.S., may be assigned in accordance with contract law. In *Crescenzo v. Atwater*, an entity called Interest Recovery, Inc., obtained an assignment of the right to \$13,857.69 placed in the registry of the court for \$10.<sup>12</sup> Section 717.135, F.S., requires certain disclosures or a fee limitation before a claimant’s representative can obtain unclaimed property from the DFS on a claimant’s behalf.

### **Judicial Sales of Real Property**

Foreclosure is the legal process for enforcement of a security interest in real property. In most foreclosures, the property is sold and the proceeds of the sale are applied against the debt. In some cases, the property is sold for more than the debt. The difference is known as the surplus. Section 45.032, F.S., governs the disbursement of surplus funds after a judicial sale.

Section 45.031(1), F.S., requires a final judgment in a foreclosure action to contain:

- A notice of potential surplus;
- A statement indicating that a subordinate lienholder must file a claim for surplus funds no later than 60 days after the sale;
- A statement indicating that the property owner does not need to assign his or her rights in the property to claim surplus funds; and
- A statement indicating that the owner does not need any type of representation to claim such funds.

The clerk of the court conducts the sale, files a certificate of sale, files a certificate of title, and disburses the proceeds pursuant to the final judgment.<sup>13</sup> If there are funds remaining after the disbursement, the clerk holds the surplus funds for 60 days pending a court order.<sup>14</sup> If the owner of record claims the surplus during the 60-day period and there is no subordinate lienholder, the court orders the clerk to deduct applicable service charges<sup>15</sup> and pay the remainder to the owner of record.<sup>16</sup> If any person other than the owner of record claims an interest in the surplus, the court holds a hearing to determine who is entitled to the surplus.<sup>17</sup> If no one claims the surplus, the clerk appoints a surplus trustee to find the owner of record.<sup>18</sup> The DFS has a rotation system for assignment of cases to all qualified surplus trustees.<sup>19</sup>

In *Saulnier v. Bank of America*,<sup>20</sup> the court held that a subordinate lienholder was not entitled to the surplus because the subordinate lienholder did not make a claim within the 60-day statutory

<sup>11</sup> *Crescenzo v Atwater*, 136 So.3d 1248, 1255 (Fla. 2d DCA 2014).

<sup>12</sup> *Crescenzo v. Atwater*, 136 So.3d 1248, 1251-1252 (Fla. 2d DCA 2014).

<sup>13</sup> s. 45.031(3)-(7), F.S.

<sup>14</sup> s. 45.032(3), F.S.

<sup>15</sup> s. 45.035, F.S., provides that the clerk may charge specified service charges relating to judicial sales.

<sup>16</sup> s. 45.032(3)(a), F.S.

<sup>17</sup> s. 45.032(3)(b), F.S.

<sup>18</sup> s. 45.032(c), F.S.

<sup>19</sup> s. 45.034(5), F.S.

<sup>20</sup> 187 So.3d 854 (Fla. 4<sup>th</sup> DCA 2015).

time limit. The court rejected the subordinate lienholder's claim that it should be excused from missing the time limit because it did not receive actual notice. The court stated that the statutes do not contain provisions excusing a lienholder for lack of actual notice. Even assuming there was not actual notice, the court said notice by publication is sufficient.

### Surplus Trustees

A surplus trustee is an entity that holds and administers surplus proceeds from a foreclosure.<sup>21</sup> The primary duty of a surplus trustee is to locate the owner of record within 1 year after appointment. When the surplus trustee locates the owner of record, it files a petition with the court seeking disbursement of the surplus funds.<sup>22</sup> A surplus trustee is entitled to the following service charges and fees:

- Upon obtaining a court order, a cost advance of 2 percent of the surplus; and
- Upon obtaining a court order disbursing the surplus to the owner of record, a service charge of 10 percent of the surplus.<sup>23</sup>

If the surplus trustee is unable to locate the owner of record within 1 year of appointment, the clerk notifies the surplus trustee that the appointment is terminated. The clerk treats the remaining funds as unclaimed property to be deposited with the CFO pursuant to ch. 717, F.S.<sup>24</sup>

Surplus trustees are certified by the DFS.<sup>25</sup> Persons wishing to be certified must submit an application and a \$25 fee to the DFS by June 1. The DFS must approve or deny the application by June 30. Certifications are effective from July 1 until June 30. The DFS renews a certification upon receipt of a \$25 fee and sworn statement certifying the surplus trustee continues to meet the statutory qualifications.<sup>26</sup>

The surplus trustee program began in 2007. Since that time, surplus trustees have been appointed in 10,033 cases.<sup>27</sup> The total value of those cases is \$85,032,758 (6,970 cases involved a surplus of less than \$5,000 and 3,063 cases involved a surplus greater than \$5,000).<sup>28</sup>

### III. Effect of Proposed Changes:

**Section 1** repeals s. 43.19, F.S. Once s. 43.19, F.S., is repealed, money in the court registry that has not been claimed after 1 year is presumed unclaimed.<sup>29</sup> Once the property is unclaimed, the clerk will report the property to DFS pursuant to s. 717.117, F.S. Claimants or their representatives may claim the money by filing a claim with the DFS.<sup>30</sup>

**Section 2** amends s. 45.032, F.S., relating to the disbursement of surplus funds after a judicial sale. This section provides that if no claim is filed during the 60-day period after the clerk issues

<sup>21</sup> s. 45.034(2), F.S.

<sup>22</sup> s. 45.034(6), F.S.

<sup>23</sup> s. 45.034(7), F.S.

<sup>24</sup> s. 45.032(4), F.S.

<sup>25</sup> s. 45.034(3), F.S.

<sup>26</sup> s. 45.034(4), F.S.

<sup>27</sup> Department of Financial Services, *Analysis of SB 536* (February 19, 2017) at p. 5.

<sup>28</sup> *Id.*

<sup>29</sup> s. 717.113, F.S.

<sup>30</sup> s. 717.124, F.S.

a certificate of disbursement or if any surplus funds remain after payment to a subordinate lienholder, the clerk shall report and remit the surplus to DFS pursuant to ss. 717.117 and 717.119, F.S. The clerk will report and remit the surplus after 1 year as provided in s. 717.113, F.S.

Section 2 provides that, for purposes of establishing entitlement to the property, only the owner of record or the estate or beneficiary of a deceased owner of record is entitled to the surplus. Any surplus of less than \$10 escheats to the clerk.

**Section 4** repeals s. 45.034, F.S., to eliminate the qualifications and appointment of a surplus trustee in foreclosure actions.

**Section 5** amends s. 45.035, F.S., to delete service charges relating to a surplus trustee that the clerk of court can collect for:

- Notifying a surplus trustee of his or her appointment;
- Furnishing the surplus trustee with a copy of the final judgment;
- Furnishing the surplus trustee with the certificate of disbursements; and
- Disbursing the surplus trustee's cost advance.

According to the DFS, there are 79 surplus trustee entities. Some people own more than one surplus trustee entities.<sup>31</sup> Representatives of surplus trustees believe that surplus trustees help discover and correct errors, such as when the owner of record is incorrect or when a surplus trustee is erroneously appointed after a subordinate lienholder has timely filed a claim.<sup>32</sup>

**Sections 3, 6, 7, and 8** amend ss. 45.033, 717.124, 717.138, and 717.401, F.S., respectively, to delete references to ss. 43.19 and 45.034, F.S., made obsolete by this act.

The bill takes effect July 1, 2017.

#### **IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

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<sup>31</sup> Department of Financial Services, *Analysis of SB 536* (February 19, 2017) at p. 2. A list of the surplus trustees can be found at <http://www.myfloridacfo.com/aadir/SurplusTrustees/SurplusTrusteeEntities2016-2017.pdf> (last accessed February 28, 2017).

<sup>32</sup> White Paper by the Citizens for Judicial Process (on file with the Committee on Banking and Insurance).

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

None.

**B. Private Sector Impact:**

There will be an indeterminate fiscal impact on current surplus trustees.

**C. Government Sector Impact:**

The DFS anticipates a negligible decrease in recurring revenues. The DFS has received \$8,400 in application and renewal fees since the implementation of the surplus trustee law in 2007.<sup>33</sup>

The Florida Clerk of Courts Operations Corporation anticipates a negligible indeterminate fiscal impact to the clerks of court due to the elimination of the fee for notification and appointment of the surplus trustees.<sup>34</sup>

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 45.032, 45.033, 45.035, 717.124, 717.138, and 717.1401.

This bill repeals the following sections of the Florida Statutes: 43.19 and 45.034.

**IX. Additional Information:****A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS by Banking and Insurance on March 6, 2017:**

The CS provides that clerks of court should report unclaimed surplus funds pursuant to the Disposition of Unclaimed Property Act. The effect of this change is to require the clerks to hold the unclaimed money for 1 year instead of 60 days.

<sup>33</sup> Department of Financial Services, *Analysis of SB 536* (February 19, 2017) at p. 3.

<sup>34</sup> Clerk of the Courts Operations Corporation, *Analysis of SB 536* (February 14, 2017) at p. 3.

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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