

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1361 Unclaimed Funds Held by the Clerks of Court

SPONSOR(S): Civil Justice & Claims Subcommittee and Clemons

TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice & Claims Subcommittee	15 Y, 0 N, As CS	Bond	Bond
2) Appropriations Committee	27 Y, 0 N	Gusky	Leznoff
3) Judiciary Committee			

SUMMARY ANALYSIS

The Florida Disposition of Unclaimed Property Act provides that property held for the benefit of another must be turned over to the state if unclaimed for the statutory length of time. The Department of Financial Services (DFS) administers the program. DFS is responsible for receiving the property, attempting to locate the owner, and returning the property to the owner. Holders of unclaimed property file an annual report and transmit the unclaimed property by May 1st regarding all property that becomes classified by statute as unclaimed in the previous calendar year.

The process differs for unclaimed surplus funds that remain after a foreclosure. Upon the conclusion of a foreclosure, the clerk is to disburse the bid according to the final judgment. If any funds remain undisbursed for 60 days without a legal claim, the clerk is required to appoint a "surplus trustee." A surplus trustee is a private entity who earns a statutory commission if the trustee is able to locate the owner and assist the owner in claiming the foreclosure surplus. The appointment lasts for one year, after which the surplus is turned over to DFS. The 60 day time period starting at the date of the foreclosure sale is the only time during which subordinate lienholders may file a claim seeking monies they may be owed from the surplus.

CS/HB 1361 amends procedures relating to the disbursement of surplus funds after a foreclosure, treating unclaimed foreclosure surpluses similar to any other unclaimed property held by a clerk of court. The bill repeals the statutory authorization for surplus trustees. The bill extends the claim period of subordinate lienholders, providing that any party claiming entitlement to the surplus may file a claim with the court at any time up to the point where the clerk transmits the surplus to DFS. Once transmitted to DFS, only the owner of record may claim the surplus.

Current law contains conflicting statutes regarding unclaimed funds generally held by the clerk of court (outside of foreclosure actions). One statute presumes funds held by a clerk of court are unclaimed after 5 years, requires turnover to DFS after such 5 year period, and requires a court order for DFS to pay the unclaimed monies to the owner; whereas the Act presumes funds are unclaimed after 1 year and provides for claims and payment through DFS without court order. The bill repeals the 5 year provision and its court order requirement.

The bill has an indeterminate, but likely insignificant, fiscal impact on the Department of Financial Services and the clerks of the court.

The effective date of the bill is July 1, 2019.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Unclaimed Property, In General

In 1987, the state enacted the Florida Disposition of Unclaimed Property Act. The Act is based on the Uniform Unclaimed Property Act adopted by the Uniform Law Commission. The Act protects the interests of missing owners of property while the state derives a benefit from the unclaimed and abandoned property until the property is claimed, if ever.

Under the Act, the Bureau of Unclaimed Property, a division within the Department of Financial Services (DFS), is responsible for receiving abandoned property, attempting to locate the rightful owner, and returning the property or proceeds to the owner. There is no statute of limitations in the Act; the owner may claim his or her property at any time and at no cost.

Current law provides varying time periods to trigger a finding that the property is presumed unclaimed and must be turned over to the DFS:

- 5 years if held by a person or entity in the private sector.¹
- 5 years if held by a clerk of court in the court registry.²
- 3 years if the property is the unclaimed equity of debt of a business association,³ except that the period is 6 months if the business is in the course of dissolution.⁴
- 2 years if held by a one in a fiduciary capacity for the benefit of another person under a trust instrument.⁵
- 2 years if resulting from the demutualization, rehabilitation, or reorganization of an insurance company.⁶
- 1 year if held by any public agency, including a clerk of court.⁷
- 1 year if a utility deposit.⁸
- 1 year if a court-ordered refund held by a business.⁹
- 1 year if owed as wages.¹⁰

Holders of unclaimed property are required to file an annual report with DFS, and must transmit the unclaimed property with the report, between January 1 and May 1 of each year. The report and transmittal must include all property considered unclaimed in the previous calendar year. In the report, the holder of property must indicate the apparent owner of the property.¹¹

Upon the payment or delivery of unclaimed property to DFS, the state assumes custody and responsibility for the safekeeping of the property.¹² 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

¹ s. 717.102(1), F.S.

² s. 43.19, F.S. This section conflicts with the 1 year provision in s. 717.113, F.S., see further discussion below.

³ s. 717.1101, F.S.

⁴ s. 717.111, F.S.

⁵ s. 717.1125, F.S.

⁶ s. 717.1071, F.S.

⁷ s. 717.113, F.S. This section conflicts with the 5 year provision in s. 43.19, F.S., see further discussion below.

⁸ s. 717.108, F.S.

⁹ s. 717.109, F.S.

¹⁰ s. 717.115, F.S.

¹¹ s. 717.117, F.S.

¹² s. 717.1201, F.S.

DFS may file a claim for the property, subject to certain requirements.¹³ Claims for recovery of unclaimed property may be filed by or on behalf of any person with an interest in the property.¹⁴ While the Act provides the opportunity for the owner to recover the full value of their property at no cost, provision is made for claimants to designate someone who may perfect the claim for them. The claimant may designate and empower a representative to pursue the claim by executing a power of attorney agreement. The claimant may also sell the right to the property to certain individuals who are registered with DFS for this purpose.¹⁵ In either case, the transaction is subject to a fee limitation, unless a disclosure statement is provided to the claimant, in the form and with the content specified in the Act.¹⁶

DFS is required to make a determination on a claim within 90 days. If a claim is determined in favor of the claimant, DFS must deliver or pay over to the claimant the property or the amount DFS actually received or the proceeds, if it has been sold by DFS.¹⁷ All proceeds from unclaimed property are deposited by DFS into the Unclaimed Property Trust Fund.¹⁸ DFS is allowed to retain up to \$15 million to make prompt payment on verified claims and to cover costs incurred by DFS in administering and enforcing the Act. All remaining funds must be deposited into the State School Fund to be used for public education.¹⁹

Unclaimed Property Laws Related to the Clerk of Courts

There are conflicting and overlapping laws regarding unclaimed property held by a clerk of court:

- Section 43.19, F.S., provides for the disposition of unclaimed money paid into the court registry. If such unclaimed funds remain in the registry for 5 years or more, the court must direct that the money be deposited with the Chief Financial Officer to the credit of the State School Fund. A person, firm or corporation 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.²⁰ Thus, while most unclaimed funds are distributed to the owner upon application approved by DFS, unclaimed funds from the clerks may only be distributed upon court order.
- Section 717.113, F.S., a part of the Florida Disposition of Unclaimed Property Act, provides that property held by the clerk is presumed unclaimed after 1 year, and must be paid to DFS after the 1 year period. Disposition is as provided in the Act.
- Property held by the clerk as a result of a foreclosure sale is subject to the surplus trustee process at ss. 45.032 - .035, F.S. See description below.

Sections 43.19 and 717.113, F.S., appear to conflict with one another. A recent appellate decision attempted to reconcile the two, calling the interaction between the statutes "confusing" and "unclear."²¹

¹³ s. 717.117 and 717.124, F.S.

¹⁴ s. 717.124, F.S.

¹⁵ s. 717.1351, F.S. A person desiring to acquire ownership of or entitlement to property reported to DFS must be an attorney licensed to practice law in this state, a licensed Florida-certified public accountant, a licensed private investigator, or an employer of a licensed private investigator.

¹⁶ All contracts to acquire ownership of or entitlement to unclaimed property must have a purchase price that discounts the value of the unclaimed property at the time the agreement is executed by the seller at no greater than 20 percent per account held by DFS. The amount paid to the seller for an unclaimed property account must not be discounted in excess of \$1,000 unless full disclosure is provided to the owner of the unclaimed property. Section 717.1351(2), F.S.

¹⁷ s. 717.124, F.S.

¹⁸ s. 717.123, F.S.

¹⁹ *Id.*

²⁰ s. 43.19(3), F.S.

²¹ *Crescenzo v. Atwater (In re Payment of \$13,857.69)*, 136 So.3d 1248 (Fla. 2nd DCA 2014).

Judicial Sales of Real Property and Surplus Trustees

Foreclosure is the legal process for enforcement of a security interest in real property. Where the parties do not settle or resolve the foreclosure, the property is sold at auction. There are three possible results of a foreclosure sale:

- Where the foreclosing lender is the winning bidder with a bid of the final judgment or some lesser amount, no monies are paid to the clerk for distribution.
- Where the winning bidder is a third party who bid less than the amount of the final judgment, the full amount of the bid minus clerk's fees is distributed to the foreclosing lender.
- Where the winning bidder is any party who bid more than the amount of the final judgment, the foreclosing lender is paid the full amount of the final judgment (or has the amount of the judgment credited against its bid) and the remaining funds are processed according to the statutory procedures for a foreclosure surplus.

At common law, the owner of the real property immediately prior to the sale is entitled to any surplus, subject to claims by inferior creditors whose interest was foreclosed.²² Current statutory law presumes that the owner of the real property on the day of the filing of the lis pendens is entitled to the surplus,²³ and junior lienholders have a 60 day time limit from the date of the foreclosure sale to file a claim against the surplus.²⁴

Prior to sale, there are two documents that include notices to all parties regarding a potential surplus. First is the final judgment of foreclosure, which gives notice of the 60 day period.²⁵ Second is the notice of sale, which must be published twice in a newspaper of general circulation, and which also warns junior lienholders of the 60 day period.²⁶ After the sale, the clerk must prepare a certificate of disbursements, a copy of which must be furnished to every party to the case.²⁷ The certificate again informs junior lienholders that they have 60 days from the date of the sale in which to file a claim against the surplus. The certificate of disbursements also clearly lists the amount of the surplus.

The statute provides a form for the prior owner of the property to claim the surplus, and provides that junior lienholders may, during that 60 day period, seek a court order for disbursement of the surplus to satisfy the junior lienholder's claim. This 60 day limit has been upheld by the courts.²⁸ If no legal claim is made for the surplus within the 60 day period, claims of junior lienholders are barred and the clerk is required to appoint a surplus trustee to locate the owner of the surplus. As part of the process, the clerk is authorized to deduct certain fees from the surplus funds.²⁹

A surplus trustee is an entity that holds and administers surplus proceeds from a foreclosure. The primary duty of a surplus trustee is to locate the owner of record within 1 year after appointment. Surplus trustees are certified by DFS.³⁰ The clerks assign the surplus trustees to cases using a rotational system developed by DFS.³¹

A surplus trustee is entitled to service charges and fees which are disbursed by the clerk and payable from the surplus. Surplus trustees receive a cost advance of 2 percent of the surplus and upon

²² *Jelic v. Sears Mortgage Corp.*, 614 So. 2d 1149 (Fla. 4th DCA 1993)(" It appears to be settled beyond all question that one claiming a surplus or the right to share in a surplus resulting from a sale under foreclosure must either own the equity of redemption at the time of the sale or must be one then holding a lien or vested right in the property.")

²³ s. 45.032(1)(a), F.S.

²⁴ s. 45.032, F.S.

²⁵ s. 45.031(1)(a), F.S.

²⁶ s. 45.031(2)(f), F.S.

²⁷ s. 45.031(7), F.S.

²⁸ *Saulnier v. Bank of Am., N.A.*, 187 So. 3d 854 (Fla. 4th DCA 2015).

²⁹ s. 45.035, F.S.

³⁰ s. 45.034(4), F.S.

³¹ ss. 45.034 and 45.035, F.S.

obtaining a court order disbursing the surplus to the owner of record, the surplus trustee then receives an additional 10 percent of the surplus.³² Upon locating the owner of record, the surplus trustee files a petition with the court on behalf of the owner of record seeking disbursement of the surplus funds. 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 then treats the remaining funds as unclaimed property to be deposited with DFS pursuant to ch. 717, F.S.

According to DFS, there are currently 83 surplus trustee entities.³³ Surplus trustees have been appointed in 10,033 cases.³⁴ 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).³⁵

Effect of the Bill

CS/HB 1361 repeals s. 43.19, F.S., relating to money in the court registry. As a result, s. 717.113, F.S. will apply to all funds in the court registry. Funds in the court registry after 1 year are presumed unclaimed and will be turned over to DFS pursuant to the Florida Disposition of Unclaimed Property Act. The 1 year time period does not start until the court adjudicates who is entitled to the monies being held by the clerk. This resolves the conflict between statutes noted above.

The bill amends procedures relating to the disbursement of surplus funds after a foreclosure. The bill repeals statutory provisions regarding surplus trustees. No surplus trustees will be appointed in foreclosure cases. The bill also repeals related clerk's fees related to the appointment of a surplus trustee.

The bill provides that a claim by the owner of record, a subordinate lienholder, an assignee by involuntary transfer, or a voluntary assignee against the surplus may be made at any time prior to when the clerk reports the unclaimed surplus to DFS. The bill amends statutory notices in the foreclosure final judgment, the notice of sale, and the certificate of disbursements to conform.

If the owner of record, a subordinate lienholder, an assignee by involuntary transfer, or a voluntary assignee files a claim for the remaining surplus before the clerk remits the surplus to DFS, the funds are not unclaimed and the clerk will hold the funds pending court order. Otherwise, a surplus will be considered unclaimed and subject to transmittal to DFS one year after the foreclosure sale. Because of the timing of the report, a foreclosure surplus under this bill may remain with the clerk and be subject to claims for approximately 13 to 27 months from the foreclosure sale depending upon the sale date and the timing of the clerk's annual transmittal.³⁶

The bill provides that, once the surplus is transmitted to DFS, only the owner of record reported by the clerk, 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 and thus is not transmitted to DFS.

³² s. 45.034(7), F.S.

³³ Florida Department of Financial Services, Agency Bill Analysis for HB 681 (2017) (on file with Appropriation Committee). A list of the surplus trustees can be found online at: <https://www.myfloridacfo.com/division/documents/SurplusTrusteeEntitiesB2017-2018.pdf> (last accessed January 18, 2018).

³⁴ Agency Bill Analysis for HB 681 (2017).

³⁵ *Id.*

³⁶ For instance, if a foreclosure sale in early January 2018 results in a surplus, it would not be unclaimed until January 2019, with a deadline for the clerk to report and transmit the funds to DFS of May 1, 2020 (which may be just shy of 28 months from sale to transmittal). On other hand, a late December 2017 sale would be unclaimed December 2018 and the clerk could file the report and transmittal in January 2019 (which may be just over 12 months later). This variation in timing is typical in all unclaimed property laws because of the requirement of a single annual report.

B. SECTION DIRECTORY:

- Section 1:** Repeals s. 43.19, F.S., relating to the disposition of certain money paid into a court which is unclaimed.
- Section 2:** Amends s. 45.031, F.S., relating to judicial sales procedure.
- Section 3:** Amends s. 45.032, F.S., regarding disbursement of surplus funds after judicial sale.
- Section 4:** Amends s. 45.033, F.S., regarding sale or assignment of rights to surplus funds.
- Section 5:** Repeals s. 45.034, F.S., relating to qualifications and appointment of a surplus trustee in foreclosure actions.
- Section 6:** Amends s. 45.035, F.S., regarding clerk's fees.
- Section 7:** Amends s. 717.113, F.S., regarding property held by courts and public agencies.
- Section 8:** Amends s. 717.124, F.S., regarding unclaimed property claims.
- Section 9:** Amends s. 717.138, F.S., regarding rulemaking authority.
- Section 10:** Amends s. 717.1401, F.S., regarding repeal.
- Section 11:** Provides an effective date of July 1, 2019.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

Since inception of the surplus trustee program, the Department of Financial Services (DFS) has received \$10,525 in application fees.³⁷ Future collection of these fees is eliminated by this bill.

2. Expenditures:

The Department of Financial Services estimates the total cost to administer the surplus trustee program for the last 10 years has been approximately \$235,000. The bill will require DFS to administer the surplus property directly through the Bureau of Unclaimed Property. This change will result in a negligible workload impact for DFS.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill eliminates two fees in s. 45.035, F.S.: a \$15 fee for notifying the surplus trustee and a \$15 fee for appointing a surplus trustee and supplying them with the copy of the final judgment and the certificate of disbursements, and disbursing to the surplus trustee the trustee's cost advance.³⁸

Since 2006, there have been 10,033 cases assigned to surplus trustees. Assuming the Clerk of Courts are collecting both \$15 fees, this equates to a roughly \$30,000 reduction in revenue statewide for the clerks of court per year.³⁹ The Clerks of Court Operation Corporation determined the loss of this revenue would have a negligible impact.⁴⁰

2. Expenditures:

The clerks of court will no longer be required to notify surplus trustees nor furnish them with a copy of a final judgment. The impact on workload is expected to be neutral.⁴¹

³⁷ Correspondence from DFS dated 1/18/2018, on file with the Civil Justice & Claims Subcommittee.

³⁸ s. 45.035, F.S.

³⁹ Florida Department of Financial Services, Agency Bill Analysis for HB 681 (2017) (on file with Appropriation Committee).

⁴⁰ Florida Clerks of Court Operations Corporation, Legislative Bill Analysis for SB 536 (2017) (on file with Appropriations Committee).

⁴¹ *Id.*

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

According to the DFS analysis, the value of the surplus property assigned to surplus trustees was \$85,032,758, since the inception of the surplus trustee program in 2006. The maximum amount that the surplus trustee industry could have charged for their services is \$10,203,931, which represents 12 percent of the total value of the disbursed property.⁴² The minimum amount is \$1,700,655, representing the 2% search fee. There will be an indeterminate impact on surplus trustees.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The Department of Financial Services formerly enacted Rule 69I-44.021, a rule that attempted to reconcile the conflicts between s. 43.19 and ch. 717, F.S. The department repealed this rule effective July 25, 2016.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On January 23, 2018, the Civil Justice & Claims Subcommittee adopted one amendment changing the effective date of the bill to July 1, 2019. This analysis is drafted to bill as amended by the Civil Justice & Claims Subcommittee.

⁴² Florida Department of Financial Services, Agency Bill Analysis for HB 681 (2017) (on file with Appropriation Committee).