

**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 Judiciary

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BILL: CS/SB 286

INTRODUCER: Banking and Insurance Committee and Senator Powell

SUBJECT: Legal Instruments

DATE: February 20, 2023

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Moody</u>	<u>Knudson</u>	<u>BI</u>	<u>Fav/CS</u>
2.	<u>Bond</u>	<u>Cibula</u>	<u>JU</u>	<u>Pre-meeting</u>
3.	_____	_____	<u>RC</u>	_____

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

COMMITTEE SUBSTITUTE - Substantial Changes

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**I. Summary:**

CS/SB 286 amends laws relating to various legal instruments. The bill:

- Expands the scope of existing law on the finality of a clerk's deed following foreclosure sale to apply to any form of lien. Currently, only foreclosure of a mortgage is governed by the statute on finality of a clerk's deed.
- Requires the foreclosure court to award attorney fees to a senior lienholder when a junior lienholder wrongfully tries to foreclose a senior lien. The bill also reaffirms the common law rule that a superior lien may not be foreclosed by a junior lienholder.
- Expands application of an assignment of rents to apply to a successor landowner and adds that regular association fees (HOA, condo or co-op) may be paid from the rent collected. An assignment of rents (if authorized by the mortgage terms) is a temporary relief allowing a foreclosing lienholder to collect rents from the property during the pendency of the foreclosure case and use those rents for upkeep of the property.
- Makes a technical change to the statute authorizing electronic signatures by adding a clarification of the term "witness."
- Expands application of an order to show cause procedure in foreclosure law to allow use of the procedure when a successor landowner is being foreclosed. The current order to show cause procedure compels the defendant to either resume making regular payments or vacate the premises, but is only applicable when the mortgagor still holds title to the property.

The bill is effective July 1, 2023.

## II. Present Situation:

### Finality of Foreclosure Judgments

In 1940, the Florida Supreme Court stated that “[t]he law is pretty well settled that a first or senior mortgagee is not a necessary or even proper party to foreclosure proceedings brought by a second or junior mortgagee,” and held that a prior mortgagee cannot be forced to be a party to a suit by a junior encumbrancer foreclosing a lien.<sup>1</sup> The Fourth District Court of Appeal applied this law recently when it held that a junior lienholder cannot require the senior lienholder to be a party to its foreclosure action, and that the judgment could not foreclose the interests of the senior lienholder.<sup>2</sup> The court ruled, however, that while the foreclosure judgment was void, the senior lienholder’s request to set aside the clerk’s deed that followed the judgment and foreclosure sale could not be granted, citing s. 702.036, F.S. That statute “precluded the court from granting relief that ‘adversely affects the quality and character of the title to the property’” when the specified criteria under the section were met.<sup>3</sup>

Section 702.036, F.S., provides that if a party seeks to set aside, invalidate, or challenge any final judgment of foreclosure of a mortgage, the court is required to treat such request as a claim for money damages and may not grant relief that adversely affects the quality or character of the title to the property if certain conditions are met, including, in summary:

- The party seeking relief was properly served in the foreclosure action.
- The final judgment was entered as to the property.
- All applicable appeals periods have run with no unresolved appeals.
- The property has been acquired for value, by a person not affiliated with the foreclosing lender or the foreclosed owner, when no lis pendens regarding the suit appears in the official county records where the property is located.<sup>4</sup>

Persons affiliated with the foreclosing lender include:

- The foreclosing lender or any loan servicer;
- Any past or present owner or holder of the loan;
- Any maintenance company, holding company, foreclosure services company, or law firm under contract with any of the entities listed above; or
- Any parent entity, subsidiary, or other person who directly or indirectly controls or is under the control of any of the entities listed above.<sup>5</sup>

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<sup>1</sup> *Cone Bros. Const. Co. et. al. v. Moore*, 141 Fla. 420 (1940) (citing Jones on Mortgages, 8<sup>th</sup> Edition, Section 1830; Wiltsie on Mortgage Foreclosure, 4<sup>th</sup> Edition, Section 404, which states: “It may be stated as a general rule that persons holding mortgages or liens prior to the mortgage under foreclosure are neither necessary nor proper parties to the action,” citing numerous cases among them, *Broward v. Hoeg*, 15 Fla. 370 (1875).

<sup>2</sup> *Wells Fargo Bank, N.A. v. Tan*, 320 So.3d 782, 784 (Fla. 4<sup>th</sup> DCA 2021).

<sup>3</sup> *Id.* at 784-786.

<sup>4</sup> Section 702.036(1), F.S.

<sup>5</sup> Section 702.036(2), F.S.

## Assignment of Rents

Florida law provides that a mortgage or separate document may provide for an assignment of rents of real property as security for repayment of an indebtedness.<sup>6</sup> The mortgagee holds a lien on the rents when an assignment is made, and the lien is perfected and effective against third parties upon recordation of the mortgage or separate document in the public records of the county in which the real property is located.<sup>7</sup> Unless otherwise agreed to in writing, the mortgagee may enforce the assignment of rents upon the mortgagor's default by written demand for the rents to the mortgagor.<sup>8</sup> The mortgagor is then required to provide the mortgagee with all rents, less payment of any expenses authorized by the mortgagee in writing, that are in his or her possession or control.<sup>9</sup>

During the pendency of final adjudication in a foreclosure proceeding, the mortgagee or mortgagor may apply to the court, and the court may require, the mortgagor to deposit rents collected into the registry of the court or in such other registry designated by the court. In 2018, the Second District Court of Appeal reversed a trial court order that required the owner of the property, which was the subject of a foreclosure action by a senior lienholder, to deposit rents collected on the real property into the trust account of the senior lienholder's attorney pending resolution of the foreclosure action.<sup>10</sup> The court noted the title passed to the owner through a junior-lien foreclosure that could not bind the owner to the terms of the mortgage as a third party who is not an assignee of the mortgagors. The court stated "[s. 697.07, F.S.,] does not require that the third-party title owner assign to the mortgagee rents owed to it under a separate document not subject to the foreclosure action."<sup>11</sup> The court commented on the potential benefit of third parties purchasing properties at junior-lien foreclosure sales and subsequently renting them, and the potential detriment "...including significant delay of mortgage foreclosure proceedings, 'that ought to be regulated or prohibited.'"<sup>12</sup> The court opined:

In instances of unwarranted delay, the inability of the mortgagee to sequester rents as against the third-party title owners—particularly where that third party is collecting rent but not paying the homeowners' association dues, property taxes, or property insurance, let alone the mortgage—further discourages a speedy resolution of the mortgage foreclosure action from the third party's perspective. However, we must apply the language of the mortgage and section 697.07 as they are plainly written.<sup>13</sup>

Before the rents are deposited into a registry, the court may authorize the rents collected to be used to make payments to the mortgagee, or for reasonable expenses or required escrow sums. Reasonable expenses may include real estate taxes, insurance, or other expenses solely for the

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<sup>6</sup> Section 697.07(1), F.S.

<sup>7</sup> Section 697.07(2), F.S.

<sup>8</sup> Section 697.07(3), F.S.

<sup>9</sup> *Id.*

<sup>10</sup> *Green Emerald Homes, LLC v. Residential Credit Opportunities Trust*, 256 So. 3d 211, 213 (Fla. 2d DCA 2018).

<sup>11</sup> *Id.* at 215.

<sup>12</sup> *Id.* at 216 (citing *Bonafide Props. v. Wells Fargo Bank, N.A., ex. rel. Certificate Holders of Banc of Am. Alt. Loan Tr. 2006-5, Mortg. Pass-Through Certificates, Series 2006-5m* 198 So. 3d 694, 696-98 (Fla. 2d DCA 2016) (Altenbernd, J., concurring)).

<sup>13</sup> *Id.*

purpose of protecting, preserving, and operating the real property.<sup>14</sup> Assessments for community associations are not explicitly listed as one of the reasonable expenses that may be paid from rents collected.

The mortgagor is required to account to the court and the mortgagee for the use of rents collected and the court may place other restrictions on the mortgagor's use of them.<sup>15</sup> The court has discretion to grant other relief with respect to the rents collected, but such rents must be disbursed at the conclusion of the foreclosure proceeding.<sup>16</sup> The terms "mortgagee" and "mortgagor" currently are not defined in this section on assignment of rents.

### Orders to Show Cause

During the pendency of a foreclosure proceeding, the plaintiff may request the court to make an order directing the mortgagor to show cause why an order to make payments or to vacate the premises should not be entered.<sup>17</sup> If the court enters an order, the order must, in short:

- Set the date and time for the hearing on the order to show cause.
- Direct the time within which service of the order and complaint must be made upon the defendant.
- State that the defendant has the right to file affidavits or other papers at the time of the hearing and may appear personally or by way of an attorney.
- State that, if the defendant fails to appear and fails to file a defense, the defendant is deemed to have waived the right to a hearing and the court may enter an order for the requested relief.
- Require the movant to serve a copy of the order to show cause on the mortgagor in the specified manner.<sup>18</sup>

The right of the defendant to be heard at a hearing to show cause is waived if the defendant's conduct clearly shows that the defendant has relinquished the right to be heard. Failure to file a defense or to appear at the hearing presumptively constitutes conduct that clearly shows that the defendant has relinquished the right to be heard,<sup>19</sup> and the court then has the discretion to enter an order for the requested relief.<sup>20</sup> This section does not apply to foreclosure of an owner-occupied residence.<sup>21</sup>

Importantly, because the order to show cause provisions only apply to a "mortgagor," the order to show cause remedy may not apply where the original mortgagor no longer holds title to the property even though the property is still encumbered by the mortgage.

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<sup>14</sup> Section 697.07(4), F.S.

<sup>15</sup> *Id.*

<sup>16</sup> Section 697.07(5), F.S.

<sup>17</sup> Section 702.10(2), F.S.

<sup>18</sup> Section 702.10(2)(a), F.S.

<sup>19</sup> Section 702.10(2)(b), F.S.

<sup>20</sup> Section 702.10(2)(c), F.S.

<sup>21</sup> Section 702.10(2)(a) and (i), F.S.

## Remote Online Notarization of Documents

In 2019, the Florida Legislature passed a bill relating to electronic legal documents<sup>22</sup> that established Part II of ch. 117, F.S., for online notarization, which is defined as the performance of a notarial act using electronic<sup>23</sup> means in which the principal<sup>24</sup> or any witness appears before the notary public by means of audio-video communication technology.<sup>25</sup> The effective date for most provisions of this part was January 1, 2020, and the term “witness” is not defined in it.

Compliance with the online electronic witnessing standards under s. 117.285, F.S., and any applicable rules satisfy the requirement of a provision that requires a signature or an act to be witnessed.<sup>26</sup> A notary public may supervise the witnessing of electronic records by complying with several conditions, including, in part:

- The witness may be in the principal’s physical presence or remote from the principal so long as they are using audio-video communication technology at the time the principal affixes the electronic signature and the witness hears the principal verbally confirm that the principal has signed the electronic record.
- If the witness is remote from the principal, the principal’s and witness’s identities must be verified.
- The witness verbally confirms that he or she is a resident of and physically located within the United States or a territory at the time of witnessing.<sup>27</sup>

The section sets out additional requirements for several types of electronic estate planning documents when fewer than two witnesses are in the physical presence of the principal.<sup>28</sup> The laws of the state of Florida determine the validity of an online notarization performed by an online notary public registered in the state regardless of the physical location of any witness at the time of the notarization.<sup>29</sup>

### III. Effect of Proposed Changes:

#### Finality of Foreclosure Judgments

**Section 3** of the bill amends s. 702.036(1), F.S., relating to proceedings to set aside, invalidate, or challenge the validity of a final judgment of foreclosure of a mortgage to add that all forms of

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<sup>22</sup> Chapter 2019-71, Laws of Fla.

<sup>23</sup> Section 117.201(4), F.S., states that the term “electronic” has the same meaning as provided in s. 668.50, F.S., which defines the term to mean relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

<sup>24</sup> Section 117.201(12), F.S., defines “principal” as an individual whose electronic signature is acknowledged, witnessed, or attested to in an online notarization or who takes an oath or affirmation administered by the online notary public.

<sup>25</sup> Section 117.201(9), F.S. “Audio-video communication technology” is defined as technology in compliance with applicable law which enables real-time, two-way communication using electronic means in which participants are able to see, hear, and communicate with one another.

<sup>26</sup> Section 117.215(2), F.S.

<sup>27</sup> Section 117.285(1)-(4), F.S.

<sup>28</sup> Section 117.285(5), F.S. (specifying that the requirements apply when the electronic record to be signed is a will under ch. 732, F.S., revocable trust with testamentary aspects as described in s. 736.0403(2)(b), F.S., a health care advance directive, an agreement concerning succession or a waiver of spousal rights under s. 732.701, F.S., or s. 732.702, F.S., respectively, or a power of attorney authorizing any of the transactions enumerated in s. 709.2208, F.S.).

<sup>29</sup> Sections 117.209(4) and 117.285(8), F.S.

liens, such as community association liens and construction liens, are governed by s. 702.036, F.S.

The section is also amended to discourage junior lienholders from initiating improper foreclosure proceedings against senior lienholders. The bill creates subsection (5) to require the court to award reasonable attorney fees to a prevailing party who seeks relief from a final judgment foreclosing a mortgage or lien, or files a separate action attacking such a final judgment, if the party claims that it holds or held a lien superior in right, priority, or dignity to the mortgage or lien foreclosed. This provision applies regardless of whether the action to challenge the final judgment is in the case in which the judgement is entered or in a separate cause of action. This new provision makes a junior lienholder liable for a senior lienholder's attorney fees if the junior lienholder wrongfully attempts to foreclose on a senior lien.

The bill also defines the term "property" for use in only section 702.036, F.S., to clarify that the term means real property.

### **Assignment of Rents**

**Section 2** of the bill provides that the assignment of rents, and the statutory lien created by such assignment, is enforceable against the mortgagor, including third parties who may have acquired title to the property. The bill authorizes the court to order that rents collected be used to pay for assessments that become due after the entry of the court's order to a homeowners' association or association,<sup>30</sup> or a corporation regulated under chapter. 718, F.S., relating to condominiums, or chapter 719, F.S., relating to cooperatives. The bill exempts such associations and corporations from the provisions relating to the assignment of rents, provided they hold title to the property that is the subject of the foreclosure action and apply the rents towards the assessments that are then due, or are collecting pursuant to s. 718.116(11), F.S.,<sup>31</sup> s. 719.108(10), F.S.,<sup>32</sup> or s. 720.3085(8), F.S.<sup>33</sup>

The bill defines the term "mortgagee" as a person entitled to enforce an obligation secured by a mortgage. The term "mortgagor" is defined as a person who grants a mortgage or a successor in ownership of the real property described in the mortgage.

### **Orders to Show Cause**

**Section 4** of the bill defines the term "mortgagor," for purposes of issuance of an order to show cause in a foreclosure proceeding under s. 702.10(2), F.S., as:

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<sup>30</sup> Section 720.301(9), F.S., defines "homeowners' association" or "association" as "a Florida corporation responsible for the operation of a community or a mobile home subdivision in which the voting membership is made up of parcel owners or their agents, or a combination thereof, and in which membership is a mandatory condition of parcel ownership, and which is authorized to impose assessments that, if unpaid, may become a lien on the parcel. The term "homeowners' association" does not include a community development district or other similar special taxing district created pursuant to statute."

<sup>31</sup> Section 718.116(11), F.S., authorizes an association to make written demand that a tenant of a condominium pay any future rent to the association until any delinquent monetary obligation has been paid in full.

<sup>32</sup> Section 719.108(10), F.S., provides that a cooperative unit owner is liable for all rents and assessments that become due while the unit owner is in exclusive possession of the unit.

<sup>33</sup> Section 720.3085(8), F.S., authorizes an association to make written demand that a tenant pay any future rent to the association until any delinquent monetary obligation of the parcel owner has been paid in full.

A person who grants a mortgage or a successor in ownership of the real property described in the mortgage. The term does not include a homeowners' association or an association, as those terms are defined in s. 720.301, F.S., or a corporation regulated under the chapter 718, F.S., or chapter 719, F.S., that:

- Acquires title to a parcel or unit through the foreclosure of its claim of lien, or a deed in lieu of foreclosure, provided that title remains vested in the association or corporation and any rents collected are applied to assessments that are then due; or
- Collects rents from the tenants in the parcel or unit pursuant to s. 718.116(11), F.S., s. 719.108(10), F.S., or s. 720.3085(8), F.S.

This definition means that the subsection applies to subsequent owners but not a community association provided it holds title and any rents collected are applied to assessments that are then due. The exception for owner-occupied residential real estate has been struck from s. 702.10(2), F.S., because it is duplicative as it is included in s. 702.10(2)(i), F.S.

### **Remote Online Notarization of Documents**

**Section 1** of the bill defines the term “witness” for purposes of a witness’s role with remote online notarization. When used as a noun, “witness” means an individual whose electronic signature is affixed to an electronic record to attest or subscribe to a principal’s signature on such record.

**Section 5** provides that this definition of “witness” applies retroactively to January 1, 2020, which is the effective date for most of the statutory provisions for online notarization.

The bill is effective July 1, 2023.

## **IV. Constitutional Issues:**

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

None.

### **B. Public Records/Open Meetings Issues:**

None.

### **C. Trust Funds Restrictions:**

None.

### **D. State Tax or Fee Increases:**

None.

E. Other Constitutional Issues:

None identified.

V. **Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

To the extent that the bill expands the scope of several sections relating to the finality of foreclosure judgments, assignment of rents, and orders to show cause that could increase the amount of litigation, or to the extent that the award of attorney fees reduces the amount of litigation, the bill may result in increased legal fees for any lienholders or title owners who engage in additional litigation, but may also lead to increased collections on mortgages in default.

C. Government Sector Impact:

To the extent that the bill expands the scope of several sections relating to the finality of foreclosure judgments, assignment of rents, and orders to show cause, or to the extent that the award of attorney fees reduces the amount of litigation, the bill may result in an indeterminate fiscal impact on the state court system.

VI. **Technical Deficiencies:**

None.

VII. **Related Issues:**

None.

VIII. **Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 117.201, 697.07, 702.036, and 702.

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 Committee on February 8, 2023:**

The committee substitute makes the following changes:

- Amends the definition of “witness” with respect to online remote notarization.



- Amends the definitions of “mortgagee” and “mortgagor” with regards to assignment of rents, and “mortgagor” with respect to orders to show cause in certain foreclosure proceedings.
- Removes the change in the bill as filed to s. 702.10(2), F.S., that modified the provision to apply to a “mortgagor” to refer to a “defendant,” as the respondent in an order to show cause and as provided for under current law.
- Makes other technical changes.

B. Amendments:

None.