

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/CS/HB 1523

Homeowner Relief

**SPONSOR(S):** Insurance, Business & Financial Affairs Policy Committee, Civil Justice & Courts Policy Committee; Grady and others

**TIED BILLS:** None

**IDEN./SIM. BILLS:** SB 2270

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Civil Justice & Courts Policy Committee	10 Y, 4 N, As CS	Bond	De La Paz
2)	Insurance, Business & Financial Affairs Policy Committee	11 Y, 1 N, As CS	Kliner	Cooper
3)	Criminal & Civil Justice Policy Council		Bond	Havlicak
4)				
5)				

### SUMMARY ANALYSIS

It is common to borrow money and pledge an asset as security for the loan. If the loan is not timely paid, the creditor may take the property, sell it, and apply the proceeds of sale against the debt. Where personal property is pledged, a creditor has the option of judicial or nonjudicial process for taking the property and selling it. Where real property is pledged, however, current law only allows for judicial process known as foreclosure to take the property and sell it for the benefit of the creditor.

This bill creates an optional nonjudicial foreclosure process modeled on the Uniform Nonjudicial Foreclosure Act. Where current judicial foreclosure only allows for sale by auction, this bill gives the creditor the option of foreclosure by auction, foreclosure by negotiated sale, or foreclosure by appraisal. A creditor may simultaneously pursue auction and sale or auction and appraisal.

The process under this bill requires, at a minimum, that a debtor receive at least 30 days notice of the potential foreclosure, and a formal notice that the foreclosure will be finalized 90 days or more in the future. A debtor must be given the name and phone number of an individual who will discuss the default. During the process, the creditor must, upon request, meet with the debtor regarding the foreclosure. There is a limited right of a debtor to object to nonjudicial foreclosure and insist on judicial foreclosure.

As in judicial foreclosure, under this bill debtors maintain their equity of redemption, which is the right to pay off the debt and keep the property, all the way through the process up to the time of auction sale or completion of the process.

Current real estate foreclosure law provides that a court may enter a deficiency judgment, which is the difference between what was owed minus the value of the property foreclosed. Under this bill, a foreclosing creditor may sue for a deficiency, except that a debtor foreclosed out of a homestead property and who acts in good faith during the process is not liable for a deficiency judgment.

This bill will only apply to debts where the debtor has agreed that this process may be used.

This bill has a recurring negative fiscal impact on state revenues, estimated at \$199 million in FY 2010-11, \$151.3 million in FY 2011-12, and \$105 million in FY 2012-13. This bill does not appear to have a fiscal impact on local governments.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

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## HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

It is common to borrow money and pledge an asset as security for the loan. If the loan is not timely paid, the creditor may take the property, sell it, and apply the proceeds of sale against the debt. Where personal property is pledged, a creditor has the option of judicial or nonjudicial process for taking the property and selling it. Where real property is pledged, however, current law only allows for judicial process known as foreclosure to take the property and sell it for the benefit of the creditor.

The writers of the Uniform Nonjudicial Foreclosure Act believe that:

In the great majority of foreclosures, judicial involvement is unnecessary because there is no dispute between the debtor and creditor. Using the time of judges and the machinery of the courts to conduct routine foreclosures is often a misallocation of public funds as well as a waste of the secured creditor's resources. The delays and inefficiency associated with foreclosure by judicial action are costly. They increase the risk of vandalism, fire loss, depreciation, damage, and waste. The resulting costs raise the price of private mortgages and erode the economic value of government subsidy program involving mortgages. The availability of a uniform, less expensive, and more expeditious foreclosure procedure will ameliorate these conditions, and will facilitate the secondary market sale and resale of real estate loans

Judicial foreclosures in Florida are clogging the courts. In February, the Florida Supreme Court, in an opinion asking the Legislature to appropriate funds for additional judgeships and additional court resources, said:

Although the dramatic increase in mortgage foreclosure filings is expected to abate at some future date and therefore may not be a part of the long-term sustained net need, there is evidence that a second wave of foreclosures is now entering the court system and that this workload issue will persist. Various media reports note that many of these new foreclosures are fueled by double digit unemployment, declining housing prices, and the lingering recession. Over a 36-month period (Fiscal Year 2005-2006 to Fiscal Year 2007-2008), real property/mortgage foreclosure filings increased by 396 percent in our trial courts. During the same time period, the clearance rate for real property/mortgage foreclosure cases decreased by 52 percent, from 94 percent in Fiscal Year 2005-2006 to 42 percent in Fiscal Year 2007-2008.

According to Realty Trac, Florida has the third highest rate of mortgage foreclosures in the country with one in every 158 housing units in foreclosure.<sup>1</sup>

This bill creates an optional nonjudicial foreclosure process modeled on the Uniform Nonjudicial Foreclosure Act. The bill creates ch. 52, F.S.

### **Application**

This bill authorizes the nonjudicial foreclosure of any security interest in real property provided that the debtor has agreed in substance in the security instrument that foreclosure may be made by nonjudicial process. The original notice of foreclosure must be given after July 1, 2010.

Nonjudicial foreclosure may not be used to foreclose statutory liens other than those owed to a common interest community<sup>2</sup>, property in a common interest community where such property is considered personal property, or a security interest in rents or proceeds of real property.

Nonjudicial foreclosure may not be pursued if a judicial foreclosure case is pending, or if a judicial proceeding challenging the note or mortgage is pending.

### **Protection of the Process**

In general, the parties to a contract may vary their legal rights and remedies in the contract. This bill provides that the parties to a mortgage generally may not vary their rights and obligations under ch. 52, F.S., unless the chapter specifically allows variance. For instance, under this bill the parties may agree to longer notice periods, and commercial debtors may agree that a guarantor will not receive notice of a foreclosure.

### **Form of Notice**

Current law does not require a creditor to give any notice to a debtor prior to commencing foreclosure proceedings.<sup>3</sup> Judicial foreclosure is commenced by formal service of process upon every defendant. Formal service is accomplished by hand delivery of a summons and complaint to the person. Where a defendant cannot be found, service of process for the foreclosure may be accomplished by publication pursuant to ch. 49, F.S., although no deficiency judgment can be entered against a defendant served by publication.

As to homestead property, this bill requires that notices of default and notices of foreclosure must be provided to the owner by both regular United States mail and by a commercially reasonable carrier other than the U.S. Postal Service. As to all other property, those notices may be by hand delivery, mail, private carrier, or electronic. The parties may agree to limit the available forms of notice. If a person cannot be found, a person sending notice must make a reasonable effort to find the person; following the requirements under ch. 49, F.S., are deemed sufficient.

### **Notice of Default, Cure**

This bill requires that a notice of default be furnished to a debtor before foreclosure. The notice must contain:

- Facts supporting the claim that the mortgage is in default.
- What the debtor must do to cure the default.
- The name, address and telephone number of an individual who represents the creditor and who can be contacted regarding the default.
- A statement that foreclosure may be started if the default is not timely cured.

<sup>1</sup> *In Re: Certification of Need for Additional Judges*, Supreme Court Case No. 10-320, February 25, 2010.

<sup>2</sup> A common interest community would be condominium association or a homeowners association.

<sup>3</sup> Mortgage lenders commonly communicate with delinquent debtors on numerous occasions prior to filing a foreclosure action.

The creditor must wait at least 30 days after the notice of default was given before giving the notice of foreclosure that commences the foreclosure process. If the default is monetary, the debtor may cure the default within those 30 days. If the default is non-monetary<sup>4</sup>, the debtor must commence the cure within 30 days and must complete it within 90 days in order to avoid foreclosure. A nonresidential creditor need not be given a second chance to cure a nonmonetary default that occurs within 1 year. A creditor must cooperate with a debtor in default by promptly providing, upon request, information regarding the default.

## Notice of Foreclosure

In judicial foreclosure, the formal process is started by filing a complaint with the clerk of court, and serving a summons and a copy of the complaint on each defendant. Under this bill, delivery of a notice of foreclosure starts the formal nonjudicial foreclosure process.

In judicial foreclosure, the plaintiff records a lis pendens in the public records, which gives notice to the general public of the pending judicial foreclosure. Under this bill, the notice of foreclosure is recorded and acts like a lis pendens. Like a lis pendens, there is no requirement to notify persons who may assert an interest in the real property that is recorded in the public records after the recording of the notice of foreclosure, as their interest will be terminated should the foreclosure be completed.

Within 5 days after the filing of a notice of foreclosure in the public records, the creditor is required to furnish a copy (see notice requirements above) to the following persons:

- Any debtor under the mortgage.
- Any person specified in the mortgage to receive notice.
- Any person listed in the public records as an owner of the real property.
- Any other person who may hold a real property interest.
- Any person who has recorded a request for notice.
- An officer or director of an applicable common interest community.

Under judicial foreclosure, there is no requirement to post notice of the foreclosure on the property.<sup>5</sup> Under this bill, within 10 days after recording the notice of foreclosure, the creditor must attach a copy upon a conspicuous place on the real property.

This bill provides the requirements of a notice of foreclosure. The notice must:

- Have this heading: NOTICE OF FORECLOSURE. YOU ARE HEREBY NOTIFIED THAT YOU MAY LOSE YOUR RIGHTS TO CERTAIN PROPERTY. READ THIS NOTICE IMMEDIATELY AND CAREFULLY.
- Contain the date, owner name, property description, and a list of personal property secured by the mortgage.
- Contain the date and recording information of the mortgage or other security instrument.
- State that a default exists, with the facts supporting the default.
- State that a foreclosure is being initiated and include a statement of whether the creditor is electing to accelerate the debt.
- Include redemption information.
- State the method of foreclosure elected.
- Include notice that the foreclosure will terminate legal rights.
- Include an explanation of a debtor's right to avoid a deficiency, if applicable.
- Include, if applicable, information regarding objection to negotiated sale or appraisal.
- If homestead, include information on the right to request a meeting with the creditor.

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<sup>4</sup> Non-monetary defaults occur significantly less often than monetary defaults. An example of a non-monetary default is a failure to maintain the property where the failure is so significant that it impairs the value of the security interest.

<sup>5</sup> Which is one reason that many tenants fail to learn of a pending foreclosure action.

- Include the name, address and phone number of a representative of the creditor.
- Include a statement informing the recipient that he or she can file an objection to the foreclosure in the courts, and the time within which such objection must be filed.

This bill also provides that any person may record in the public records a request for notice of foreclosure. If a creditor later commences a nonjudicial foreclosure by the filing of a notice of foreclosure, but fails to timely give a notice of foreclosure to someone who has properly recorded a request, the creditor must pay a \$500 penalty to such person. If the recorded request for notice states that the person has a legal interest in the property and that person is not timely given notice, that person's legal interest in the property will not be foreclosed.<sup>6</sup> There is no provision in current law for a person to demand notice should a foreclosure be filed in the future.

### **Meeting Between Creditor and Debtor**

Current statutory judicial foreclosure law does not require a foreclosing creditor to meet with a debtor on the debtor's request, although many local courts have enacted such requirements. Those requirements are usually tied to a recently enacted requirement that the creditor pay a mediator as much as \$750 a case.<sup>7</sup>

Under this bill, if a person who has received a notice of foreclosure requests a meeting with the creditor within 30 days of receipt of the notice, the creditor must schedule and attend a meeting with that person. The representative who attends the meeting must be given the authority to cancel the foreclosure if the representative determines that there is no legal basis for the foreclosure. The meeting is not required to be in person, it may be conducted over the phone. At the meeting, the representative must have records to show entitlement to the foreclosure. If the debtor wishes to discuss modification, the debtor must bring financial statements to the meeting. Within 10 days after the meeting, the representative must inform the persons who attended the meeting of any decision regarding discontinuation of the foreclosure or modification of the mortgage. Statements made by any person at the meeting are inadmissible in any litigation. The form of this meeting, including the confidentiality, is similar to the mediated meetings required by local court orders, albeit without the presence of a mediator.

### **Foreclosure Time**

A foreclosure under this bill must be completed no less than 90 days after the notice of foreclosure, nor more than 1 year after. These time periods are tolled should any court enjoin or stay the foreclosure (including during a bankruptcy stay). There is no time limit for completion of a judicial foreclosure.

### **Moving Foreclosure to Court**

This bill provides that a creditor may file a court action for violation of ch. 52, F.S. The court may issue any order necessary. This action may be filed at any time prior to the time of foreclosure.

This bill also provides that any person who was required to be given a notice of foreclosure may file an action demanding that the foreclosure proceed through legal process. As to homestead residential real property, the complaint must be filed within 45 days of receipt of the notice of foreclosure. The complaint must state a bona fide defense to the foreclosure, and must include a certificate under oath certifying that the complaint is not being filed for the purpose of delay. If the court finds that the complaint was filed solely for delay, the court must dismiss the action. If the homestead debtor files an affidavit certifying that payment of the court filing fee is a hardship, the foreclosing creditor must pay the

<sup>6</sup> For instance, a tenant could file this request when commencing a tenancy, and thereby guarantee adequate advance notice should a nonjudicial foreclosure be filed against the leased property sometime in the future.

<sup>7</sup> *In Re: Final Report and Recommendations on Residential Mortgage Foreclosure Cases*, Florida Supreme Court Case No. AOSC09-54, December 28, 2009.

filing fee. If the debtor is represented by an attorney, the attorney filing the action must certify to the facts represented by the debtor. A lawyer representing a debtor in such action must also, in writing, inform the debtor that electing court action means that the debtor may be subject to a deficiency judgment and a negative credit rating. The writing must be acknowledged by the debtor. The bill provides that failure to provide this notice is "negligence per se." If the court finds that the affidavits are false or without a reasonable basis, the debtor and his or her attorney are jointly and severally liable for the costs and fees of the foreclosing creditor.

As to nonhomestead property, the complaint must be filed within 20 days of receipt of the notice of foreclosure. The complaint must state a bona fide defense to the foreclosure, and must include a certificate under oath certifying that the complaint is not being filed for the purpose of delay. If the court finds that the complaint was filed solely for delay, the court must dismiss the action.

This bill also provides a judicial means to set aside a wrongful foreclosure (see below).

## **Equity of Redemption**

Under current judicial foreclosure law, any person with an interest in the property being foreclosed may redeem the property at any time prior to the auction sale.<sup>8</sup> Redemption is the right to stop the foreclosure by payment of the underlying debt. This bill provides the same right in ch. 52, F.S., namely, that any person with an interest in the property may redeem it at any time prior to the time of foreclosure set in the notice of foreclosure. A creditor must cooperate with any request for the redemption amount.

## **Creditor Option: Foreclosure by Auction**

This bill provides for foreclosure by auction. It is one of the three options available to a creditor. A foreclosing creditor who elects foreclosure by auction must obtain evidence of title and provide a copy of such evidence to any bidder at the sale. The evidence of title must state that the issuer is willing to provide evidence of title to the winning bidder. By contrast, buyers at a judicial foreclosure sale are not given any evidence of title and therefore purchase the property as if receiving a quit claim deed.<sup>9</sup>

Current judicial foreclosure law requires advertisement of the sale. This bill similarly requires the creditor to advertise the foreclosure sale. The creditor must elect one of two methods for advertising the sale:

- The creditor may advertise the sale under s. 45.031, F.S., which is current law providing advertising requirements for judicial sales. Section 45.031(2), F.S., requires that notice of sale must be published once a week for 2 consecutive weeks, published in a newspaper of general circulation in the county in which the property is located, the second of which must be at least 5 days prior to the sale.
- The creditor may advertise the sale once per week for 3 consecutive weeks in a newspaper of general circulation in the county in which the property is located. The 3rd notice must be no fewer than 7 days prior to the auction nor more than 30 days.

Current judicial foreclosure law does not require a creditor to furnish a copy of the advertisement of the sale to the parties, although only defendants who have filed papers in the case will receive a copy of the court order setting the sale date. This bill requires the creditor to furnish a copy of the advertisement to all persons entitled to a notice of foreclosure at least 21 days prior to the sale date.

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<sup>8</sup> Section 45.0315, F.S.

<sup>9</sup> Unsophisticated bidders sometimes bid on and buy properties that have title problems, such as a federal tax lien or a superior lien.

Current judicial foreclosure law does not address whether a foreclosing creditor may place a sign advertising the auction on the property. This bill allows, but does not require, a creditor to place a sign on the property advertising the sale.

An auction sale under this bill must be conducted at a date, time and place that is authorized for judicial sales.

Where multiple parcels are under one security interest, this bill allows a creditor to sell the parcels separately or together, or both, in order to obtain the highest price. If sold separately, the auctions must stop once the total bids exceed the amount owed.

Under current judicial foreclosure law, a creditor must obtain court permission to postpone the auction sale. This bill allows the person conducting a nonjudicial auction sale to postpone the sale for any reason. The postponement must be announced at the sale. A postponement may not extend for more than 30 days.

Judicial foreclosure auctions are either conducted by a deputy clerk of the court by verbal auction, requiring personal attendance by persons who wish to bid, or conducted by vendors by electronic auction conducted over this internet. This bill provides that a nonjudicial foreclosure sale is generally conducted like a judicial auction by a deputy clerk. In addition, in an auction under this bill:

- The auctioneer may demand that prospective bidders verify that they can make the required deposit before they are allowed to bid.
- The auctioneer may enter credit bids for the creditor.
- A bidder not in attendance may submit a fixed written bid in advance.

In a sale under this bill, the winning bidder must immediately deposit 10 percent of the bid amount, unless the creditor agrees to a smaller deposit. The advertisement for the auction must state the required deposit.

In a judicial sale, the winning bidder must pay the full bid on the day of the sale, or lose the deposit. Under this bill, a winning bidder in a nonjudicial sale has 7 days to pay the remainder of the bid price before losing the deposit

In judicial foreclosure, the clerk gives the winning bidder a certificate of title, which is the equivalent of a quitclaim deed. In a sale under this bill, the creditor must record for the winning bidder a warranty deed together with an affidavit certifying that the foreclosure procedure was completed correctly.

### **Creditor Option: Foreclosure by Negotiated Sale**

Foreclosure by negotiated sale is not a remedy available to the court in a judicial foreclosure. It is common for judicial foreclosures to be resolved through a short sale, where the creditor and debtor agree to a sale. However, under current law only debtors initiate short sales because a creditor cannot easily market the property prior to taking title and possession after auction.

Under this bill, the creditor may elect foreclosure by negotiated sale. The creditor may list the property for sale through a broker, and may place a sign on the property. If the creditor receives a contract, the creditor must notify all persons entitled to notice of the foreclosure at least 30 days prior to the closing date of the date of closing and the expected proceeds of the negotiated sale.

At closing, the creditor must give the buyer a warranty deed and an affidavit certifying that the foreclosure procedure was completed correctly. The deed and affidavit must be recorded to transfer title.

Any person who receives the notice of the negotiated sale may object to the sale by giving notice to the creditor at least 7 days prior to closing. Upon receipt of the notice, the creditor must elect one of the following options:

- Discontinue the foreclosure.
- Give notice to the objecting person that the person's interest in the real property will be preserved from termination by the foreclosure.
- Pay the person a liquidated sum for that person's interest.<sup>10</sup>

If a person fails to timely object, the person may not claim that the sale price was inadequate.

### **Creditor Option: Foreclosure by Appraisal**

Foreclosure by appraisal is not a remedy available to the court in a judicial foreclosure. In short, foreclosure by appraisal under this bill is a means by which the creditor takes title to the property at the conclusion of the foreclosure, crediting the debtor's account with the appraised value of the property.<sup>11</sup>

Under this bill, the foreclosing creditor seeking foreclosure by appraisal must obtain an appraisal of the property dated no more than 60 days prior to the date of foreclosure. At least 30 days prior to the date of foreclosure, the creditor must give notice to all persons entitled to notice of the foreclosure by appraisal which includes:

- A copy of the appraisal report.
- The date that the foreclosure by appraisal will be finalized.
- The amount to be credited to the debtor and the amount, if any, to be paid to junior creditors.
- Notice that title will be transferred.
- Notice that any objection must be filed no later than 7 days prior to the date that the foreclosure by appraisal will be finalized.

If there is no timely objection, the foreclosure by appraisal is completed by recording an affidavit of the creditor stating that the process has been properly completed. The bill provides that this affidavit serves to transfer title to the creditor.

Any person who receives the notice of foreclosure by appraisal may object to the foreclosure by appraisal by giving notice to the creditor at least 7 days prior to the date of foreclosure. Upon receipt of the notice, the creditor must elect one of the following options:

- Discontinue the foreclosure.
- Give notice to the objecting person that the person's interest in the real property will be preserved from termination by the foreclosure.
- Pay the person a liquidated sum for that person's interest.

If a person fails to timely object, the person may not claim that the foreclosure amount was inadequate.

### **Application of Proceeds**

In judicial foreclosure, the proceeds of a judicial sale are paid to the clerk, and applied in the following order, until exhausted:

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<sup>10</sup> This option is only available to persons whose interests can be resolved by payment of money. For instance, should a second mortgage holder timely object to the sale, the creditor would have to pay the second mortgage in full in order to clear the interest.

<sup>11</sup> An appraisal determines fair market value of a negotiated sale. In general, property sells at auction for far less than it would at a negotiated sale.

- To clerk's fees that are outstanding.
- To the plaintiff, up to the amount of the final judgment. The final judgment will include costs of the foreclosure and attorney's fees.
- To a surplus trustee, for distribution to junior creditors or the former owner, as their interests appear.

Under this bill, the proceeds of the foreclosure are applied as follows, until exhausted:

- Expenses of the foreclosure.
- The debt owed to the creditor.
- Other liens, in the order of their priority.
- The former owner.

A creditor acting in good faith in making a distribution is not liable for making an erroneous distribution.

### **Actions Against a Creditor, Setting Aside a Foreclosure**

In judicial foreclosure, a person seeking relief from a wrongful foreclosure has the following remedies:

- A defendant can file an appeal of the final judgment of foreclosure. The appeal must be filed within 30 days of the final judgment of foreclosure.<sup>12</sup>
- A person may challenge the auction itself by motion filed with the trial court within 10 days after the sale.
- A defendant can ask the trial court to set aside the final judgment of foreclosure. An allegation of mistake, inadvertence, surprise, or excusable neglect; newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial or rehearing; or fraud, misrepresentation, or other misconduct of an adverse party must be filed within 1 year of the final judgment. If on any other ground, it must be filed within a reasonable period of time.
- Any interested person may file a new lawsuit to set aside the prior judgment.

Under this bill, a person seeking relief from, or damages related to, a nonjudicial foreclosure has the following remedies (which must be pursued in a civil court action):

- A person has an action for damages against a foreclosing creditor for any violation of ch. 52, F.S., or applicable law or principle of equity. The complaint must be filed within 3 years of the time of foreclosure.
- A person may seek to set aside the foreclosure or correct a violation of ch. 52, F.S. The complaint must be filed within 1 year of the time of foreclosure.

In any action, the recording of the affidavits required at the time of foreclosure conclusively establishes compliance with the requirements of ch. 52, F.S. Accordingly, a person challenging the nonjudicial foreclosure has the burden of proof.

### **Possession of the Foreclosed Real Property**

In judicial foreclosure, the clerk may issue to the winning bidder a writ of possession<sup>13</sup> if more than 10 days has elapsed since the sale and provided that no person has filed a motion challenging the sale.

<sup>12</sup> Florida Rules of Appellate Procedure 9.110(b).

<sup>13</sup> A writ of possession is an order to the sheriff directing the sheriff to put a person into possession of real property by removing any other person from the property. Upon service, any person in possession has 24 hours to remove his or her

Under this bill, the person who has taken title to the real property may obtain a writ of possession from the clerk or may file an action for ejectment or unlawful detainer.

## Deficiency Judgment

In judicial foreclosure, the foreclosing creditor may seek a deficiency judgment against any person who is legally liable for the foreclosed debt. A deficiency judgment is a money judgment that, like any other money judgment, is collectable for up to 20 years.

This bill allows a foreclosing creditor to similarly seek a deficiency judgment in a court action. However, a debtor will not be liable for a deficiency judgment if the debtor acted in good faith in the process. A debtor acted in good faith if the debtor:

- Peacefully and timely vacated the real property at the conclusion of the process.
- Did not significantly damage the property or significantly contaminate the property with hazardous materials, and leave such damage or contamination.
- Did not commit fraud against the creditor.
- Did not engage in criminal activity on the property that significantly reduced the property value.
- Did not allow significant damage to the property to occur resulting from a failure to take reasonable precautions.
- Allowed reasonable access to the property for inspection and, if the creditor elected foreclosure by negotiated sale, reasonable access to prospective purchasers.

This provision does not prohibit a deficiency judgment that may be owed to someone other than the foreclosing creditor.<sup>14</sup>

In judicial foreclosure, the foreclosing creditor is entitled to a deficiency judgment for the unpaid amount on the mortgage less the fair market value of the property securing the mortgage.<sup>15</sup> Under this bill, where a deficiency may be owed, the deficiency must be determined in a judicial proceeding. The deficiency under foreclosure by negotiated sale or foreclosure by appraisal is calculated by taking the amount owed to the creditor (principal, interest, and costs of foreclosure) and subtracting the net sale proceeds or the appraisal value. Under sale by auction, the deficiency is the amount owed minus the greater of the winning bid or 90 percent of the fair market value of the property.

## Effect on Credit Rating

In judicial foreclosure, credit rating agencies usually learn of the foreclosure and reduce any debtor's credit rating as a result of the foreclosure. Credit rating agencies learn of the foreclosure both as a result of reporting by creditors and by examination of the public records. This bill creates s. 52.607, F.S., to provide that if a debtor acts in good faith as regards the nonjudicial foreclosure (see discussion of good faith above), the debtor is not considered to have been in default and the foreclosing creditor is required to report to such agencies that the debtor is not in default under the obligation.

There are concerns regarding this provision, see DRAFTING ISSUES OR OTHER COMMENTS.

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belongings. If the belongings are not timely removed or the other person refuses to leave, the sheriff may, at the conclusion of the 24 hours, forcibly remove such persons and their belongings.

<sup>14</sup> For instance, if the first mortgage is the foreclosing creditor, the holder of a second mortgage could still seek a deficiency judgment.

<sup>15</sup> 37 Fla.Jur.2d Mortgages, s. 373.

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## Discontinuation of Foreclosure

In judicial foreclosure, the foreclosing creditor may file a voluntary dismissal of the case at any time, unless a defendant has filed a counterclaim. Court rules require the foreclosing creditor to mail a copy of the notice of dismissal. The notice of dismissal simply states that the case is dismissed.

Under this bill, the foreclosing creditor may discontinue the foreclosure at any time prior to completion of the sale by auction, closing of the negotiated sale, or the time of foreclosure as set in the notice of foreclosure by appraisal. The foreclosing creditor must give notice to every person entitled to a notice of foreclosure that informs such persons that the foreclosing creditor intends to either:

- Pursue a new foreclosure by the same method.
- Continue to foreclose by another authorized method and under the notice of foreclosure previously given.
- Commence foreclosure by a different authorized method and under a new notice of foreclosure.
- Commence judicial foreclosure, provided the foreclosing creditor does not seek a deficiency.
- Abandon foreclosure.

However, this bill penalizes a foreclosing creditor for abandoning a foreclosure and then commencing a judicial foreclosure. Such creditor will not be entitled to a deficiency judgment and will have the limit on assessments owed to a condominium or homeowners association.

## Documentary Stamp Taxes

In a judicial foreclosure, the documentary stamp tax is calculated based on the winning bid price.<sup>16</sup> In a foreclosure under this bill, the documentary stamp tax is calculated based on:

- The winning bid, if foreclosure by auction;
- The sale price, if foreclosure by negotiated sale; or
- The appraised price, if foreclosure by appraisal.

## Miscellaneous

This bill is to be interpreted by the courts in conformity with judicial decisions in other states that have adopted the Uniform Nonjudicial Foreclosure Act.

This bill modifies, limits and supersedes the federal Electronic Signatures in Global and National Commerce Act.

The statutory limits on liability of a first mortgage holder for unpaid assessments owed to a condominium or homeowners association at the time of a judicial foreclosure sale apply to a nonjudicial foreclosure under this bill.

The provisions for judicial foreclosure, at s. 702.01, F.S., are amended to allow for foreclosure under ch. 52, F.S.

### B. SECTION DIRECTORY:

Section 1 creates Part I of ch. 52, F.S., creating general provisions for nonjudicial foreclosure.

Section 2 creates Part II of ch. 52, F.S., creating procedures that are required prior to foreclosure.

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<sup>16</sup> Section 201.02(9), F.S.

Section 3 creates Part III of ch. 52, F.S., creating procedures for foreclosure by auction.

Section 4 creates Part IV of ch. 52, F.S., creating procedures for foreclosure by negotiated sale.

Section 5 creates Part V of ch. 52, F.S., creating procedures for foreclosure by appraisal.

Section 6 creates Part VI of ch. 52, F.S., setting forth rights of the parties after foreclosure.

Section 7 creates Part VII of ch. 52, F.S., providing for discontinuation of a foreclosure.

Section 8 creates Part VIII of ch. 52, F.S., creating miscellaneous provisions related to nonjudicial foreclosure.

Section 9 amends s. 702.01, F.S., to provide for nonjudicial foreclosure.

Section 10 provides an effective date of July 1, 2010.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

The Revenue Estimating Conference has determined the following impact of this bill as first filed, in millions<sup>17</sup>:

	FY 2010-11	FY 2011-12	FY 2012-13
General Revenue	(\$ 14.0)	(\$ 10.4)	(\$ 7.3)
G.R. Service Charge	(\$ 14.8)	(\$ 11.3)	(\$ 7.8)
State Court Revenue T.F.	(\$170.2)	(\$129.6)	(\$ 89.9)
Total	(\$199.0)	(\$151.3)	(\$105.0)

The amendments do this bill do not appear to affect the assumptions behind this estimate.

#### 2. Expenditures:

None.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

#### 1. Revenues:

None.

#### 2. Expenditures:

None.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill is likely to have a substantial positive fiscal impact on the private sector. Foreclosure is expensive to creditors. A foreclosing creditor will save court filing fees of as much as \$1,900 a case, plus court costs of several hundred dollars a case. Foreclosing creditors under this bill will realize smaller losses from uncollected interest as this process should be significantly faster than judicial foreclosure.

Auction sales of real property commonly have a sale price less than fair market value. The options created by this bill (foreclosure by negotiated sale, foreclosure by appraisal) are expected to lead to

<sup>17</sup> Revenue Estimating Conference, 2010 results, page 370.

higher sale prices. Higher foreclosure returns to creditors don't just benefit the foreclosing creditor, they benefit the real estate market (higher comparable sales prices), second mortgage holders (higher chance of payment of some or all of the debt), and in some cases debtors (where there are funds remaining at the conclusion of the process).

Most debtors facing foreclosure of their homestead property will qualify under this bill to avoid a deficiency judgment. These debtors should realize significant financial savings plus a financial fresh start.

This bill may have a negative fiscal impact on some vendors of foreclosure-related services whose services would not be required in nonjudicial foreclosure actions, such as private process servers.

#### D. FISCAL COMMENTS:

Foreclosures are clogging the courts, leading to delays not just in foreclosures but in all litigation. One economist estimated in 2009 that such delays cost Florida businesses \$10.1 billion in direct costs and another \$7.3 billion in indirect costs annually. In that this bill may reduce the delays occasioned by foreclosure cases, this bill may have a significant positive indirect fiscal impact on Florida's business climate.

### III. COMMENTS

#### A. CONSTITUTIONAL ISSUES:

##### 1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

##### 2. Other:

None.

#### B. RULE-MAKING AUTHORITY:

None.

#### C. DRAFTING ISSUES OR OTHER COMMENTS:

##### Other Comments - Possible Conflict with Federal Credit Reporting Laws

Section 52.607, F.S., created by this bill, requires a foreclosing creditor to report that a debtor who acts in good faith is not in default of the debtor's obligation to pay the debt owed to the creditor. However, such debtor has defaulted, which is why the debtor is in foreclosure. Credit reporting agencies (credit bureaus) and businesses that grant credit are regulated by the federal Fair Credit Reporting Act. 15 U.S.C. s. 1681s-2 requires that any business furnishing information to a credit reporting agency must report accurate information. 15 U.S.C. s. 1681t(b)(1)(F) prohibits states from enacting any law modifying this requirement. Where they are in conflict with one another, federal law controls over state law.<sup>18</sup> It is possible that proposed s. 52.607, F.S., conflicts with federal law.

### IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

On March 22, 2010, the Civil Justice & Courts Policy Committee adopted 1 amendment to this bill. The amendment provides that, as to foreclosure of homestead real property, the owner may object to nonjudicial foreclosure within 90 days of receiving notice of the foreclosure. If the owner timely objects, the foreclosing creditor must abandon nonjudicial foreclosure and must utilize the judicial foreclosure procedure. The bill was then reported favorably as a committee substitute.

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<sup>18</sup> See art. VI, cl. 2 of the federal constitution.

On March 25, 2010, the Insurance, Business & Financial Affairs Committee adopted a strike-all amendment to the CS that made a number of technical changes and corrected scrivener's errors. Substantive changes are as follows:

- As to a notification of nonjudicial foreclosure of homestead real property, the debtor has 45 days, rather than 20 days, in which to file a complaint demanding that the foreclosure proceed through the court process. The complaint must include a notice of demand of judicial foreclosure. Only the homestead property owner may apply to have the creditor pay the court filing fee.
- As to a sale by appraisal, the creditor is directed to record the deed in the public records.
- In the event a creditor, after initiating a nonjudicial foreclosure proceeding, abandons the nonjudicial process to commence a judicial proceeding, the creditor is prohibited from pursuing a deficiency judgment against the debtor. If the creditor commences a nonjudicial foreclosure proceeding that involves a condominium (regulated by Chapter 718, F.S.) or homeowner's association (regulated by Chapter 720, F.S.), the statutory limitations on liability for unpaid assessments and expenses will not be available to a creditor that abandons the nonjudicial foreclosure to commence a judicial proceeding.<sup>19</sup>
- The amendment provides statutory references for the calculation of documentary stamp taxes for foreclosure by auction, negotiated sale, and appraisal.

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<sup>19</sup> Pursuant to s. 718.116, F.S., regarding a condominium foreclosure, the creditor is liable for the unpaid assessments that are the lesser of the unit's unpaid expenses and assessments which accrued during the 6 months immediately preceding the acquisition of title or one percent of the original mortgage debt. Pursuant to s. 720.3085, F.S., regarding homeowner's associations, the creditor is liable for the unpaid assessments of a non-condo unit that are the lesser of the unit's unpaid expenses and assessments which accrued during the 12 months immediately preceding the acquisition of title or one percent of the original mortgage debt.