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**HOUSE OF REPRESENTATIVES
COMMITTEE ON
BANKING
ANALYSIS**

BILL #: HB 959
RELATING TO: Mortgage foreclosure proceedings
SPONSOR(S): Representative Gottlieb
TIED BILL(S):

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) BANKING
 - (2) JUDICIAL OVERSIGHT
 - (3) COUNCIL FOR READY INFRASTRUCTURE
 - (4)
 - (5)
-

I. SUMMARY:

In general, a mortgage is a loan to finance the purchase of real estate. Usually there are established payment periods and interest rates, and the real estate is used as collateral for the loan. In the event that the borrower defaults, and cannot repay the loan the lender has the legal and equitable option of seizing the property through a foreclosure proceeding. The lender may file a complaint in a court of law and receive a judgment transferring title of the land from the borrower to the lender.

This bill amends section 702.10, F.S., to require that the hearing on the order to show cause in a mortgage foreclosure suit must be held within 90 days of the date of service. This provides a period of 60 days in which the hearing may be held since the hearing may not be set less than 30 days after notice. The section is amended to add that if the defendant files an answer that does not contest the foreclosure the defendant may be deemed by the court to have waived the right to a hearing. Then the court may enter a final judgment of foreclosure.

The section is also amended to provide a definition of reasonable attorney's fees that the court may use when a default judgment has been entered. Where the note or mortgage provides for reasonable attorney's fees and a default judgment has been entered against the mortgagor the court is not required to hold a hearing or to adjudge the requested attorney fees as reasonable where the fees do not exceed 3 percent of the principal amount owed on the note or mortgage at the time of filing. This provision applies even if the note or mortgage does not specify the percentage that would be paid as liquidated damages (contract-specified damages). Notice of this provision must be provided in the order to show cause.

The provisions related to the attorney fees would provide a statutory definition of reasonable attorney's fees which would allow for the fee to be determined and dealt with as liquidated damages when there is a default judgment. This would remove the necessity of a hearing on attorney fees when there were no objections filed by the defendant. However, the provision does not remove the court's right to hold a hearing.

Finally, the bill requires the court to promptly enter final judgment of foreclosure where the defendant has waived the right to contest the foreclosure.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|---|-----------------------------|---|
| 1. <u>Less Government</u> | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

B. PRESENT SITUATION:

Mortgage and foreclosure

In general, a mortgage is a loan to finance the purchase of real estate. Usually there are established payment periods and interest rates, and the real estate is used as collateral for the loan. In the event that the borrower defaults, and cannot repay the loan the lender has the legal and equitable option of seizing the property through a foreclosure proceeding. The lender may file a complaint in a court of law and receive a judgment transferring title of the land from the borrower to the lender.

Legal proceeding for foreclosure

A mortgage foreclosure proceeding, like any other action filed in court, requires several communications called "pleadings" between the parties, a complaint, an answer with affirmative defenses, if any, and usually a reply to the answer. Florida Rules for Civil Procedure provide a twenty-day "window" for response pleading preparation and delivery. For example, in a typical mortgage foreclosure suit a lender files a complaint seeking judgment to foreclose on a piece of property. The defendant/borrower then has twenty days in which to respond to the complaint.¹ If the lender amends their complaint after the defendant files an answer, another twenty-day window is opened for a second defendant response. Staff contacted several real estate law practitioners who corroborated that due to the exigencies of motion practice, hearing schedules, continuances, and myriad other procedural quirks, a mortgage foreclosure proceeding may take anywhere from four to eight months from the first pleading to the final court order. These delays cause hardship on entities such as condominium associations who, by statute, may only recoup a total of six months worth of maintenance fees in a foreclosure.

Chapter 702, F.S., provides for foreclosure of mortgages, and section 702.10, F.S., provides an expedited process for foreclosure. This process requires that the lender ("mortgagee") to move the court for an order to show cause for the entry of final judgment after a complaint in foreclosure has been filed. If service of process is obtained, the final hearing and final judgment can be entered 20 days after service. If constructive service is obtained, the hearing may not be set less than 30 days after the first publication.

¹ See Fla. R. Civ. P. 1.140(a).

The order to show cause must provide:

- The date and time for the hearing;
- The time in which service must be obtained;
- The filing of defenses in a motion or answer by the date of the hearing constitutes cause for the court not to enter a final judgment;
- The right for the defendant to file affidavits or other papers at the hearing and to appear in person;
- Time to hear defenses if the defendant filed defenses by motion;
- That if the defendant fails to appear or file defenses, the defendant may be deemed to have waived the right to a hearing and the court may enter a final judgment of foreclosure.

Additionally, a copy of the proposed final judgment must be attached.

The final judgment entered based on the order to show cause shall provide only relief that are proprietary in nature; related to the ownership of property and not based on any personal relationship. The section does not preclude the entry of a deficiency judgment that serves to cover the gap between what was owed and what the property sold for in auction.

Where the court finds that the defendant waived the right to be heard the court may promptly enter a final judgment of foreclosure. If the defendant has not waived his or her right to be heard, the court shall determine whether there is cause not to enter the final judgment, and if no cause is found, the judgment must be entered.

Attorney fees in foreclosure

Where the order to show cause is not requested by the mortgagee and the defendant does not answer the complaint a default may be entered pursuant to rule 1.160, Fla. Rules of Civ.Proc. In order to then collect on the judgment and to collect attorney fees, the mortgagee will need to request a hearing to determine unliquidated damages, which includes attorney fees unless the mortgage or note specifically provide the amount of such fees.

Section 702.01, F.S., provides that mortgage foreclosures are an action in equity. The court is required to sever all counterclaims against the mortgagee for a separate trial and the foreclosure action is to be tried before the court without a jury.

Section 687.06, F.S., provides for the payment of attorney fees for enforcement of contracts either in law or equity. It states in part:

[I]t shall not be necessary for the court to adjudge an attorney's fee, provided in any note or other instrument of writing, to be reasonable and just, when such fee does not exceed 10 percent of the principal sum named in said note, or other instrument in writing.

In reviewing this provision the 4th DCA held that a fee of 10 percent or less is not to be examined by the courts for reasonableness or fairness absent a plea for equitable considerations such as unconscionability (shocking the conscience of the court). *Dean v. Coyne*, 455 So.2d 576 (1984). However, this provision has been found to apply only when the percentage is stated in the mortgage document. Specifically, this section was found not to apply to a mortgage that requires payment of a reasonable fee but which did not specify the percentage. *Sepler v. Emanuel*, 388 So.2d 28 (Fla. 3d DCA, 1980). In *Sepler*, the court discussed the effect of not requiring the contract to specify the percentage of the fee:

It is often the case that where there is an agreement to pay a reasonable attorney's fee, it is shown that a fee of more than 10% is reasonable. The plaintiff would retain that right but deny to the defendant an opportunity to be heard when the defendant could show that a fee of less than 10% was reasonable. In our view such an interpretation of the statute would render it unconstitutional.

Dean, supra., applied this in the circumstance where the mortgage stated a fee of 10 percent or more. The court found based on the provisions of s. 687.06, F.S., that there was also a right of the appellee to show that the fee was excessive. The court stated that if the statute was not construed in that manner it could be found to be unconstitutional as to violate the appellee's right to equal protection or access to the courts. Dean, at 577.

Further, where a contract provides for the payment of reasonable attorney fees the courts have found those fees to be unliquidated damages that must be proved at trial. Parker v. Dekle, 35 So. 4(1903), Bowman v. Kingsland Dev., Inc., 432 So. 2d 660(Fla. 5th DCA, 1983), Roggerman v. Boston Safe Deposit & Trust Co., 670 So.2d 1073(Fla. 4th DCA, 1996).

The Florida Bar Rules, which regulate the practice of law in Florida, provide enforceability of a contract provision which provides for a reasonable attorney fee. Rule 4-1.5 provides for fees for legal services and discusses what is a clearly excessive fee and sets out factors to be considered in determining a reasonable fee. Finally, the rule provides that all the factors should be considered in establishing a reasonable attorney fee.

C. EFFECT OF PROPOSED CHANGES:

This bill amends s. 702.10, F.S., to require that the hearing on the order to show cause must be held within 90 days of the date of service. This provides a period of 60 days in which the hearing may be held since the hearing may not be set less than 30 days after notice.

The section is amended to add that if the defendant files an answer that does not contest the foreclosure the defendant may be deemed by the court to have waived the right to a hearing. Then the court may enter a final judgment of foreclosure.

The section is also amended to provide a definition of reasonable attorney's fees that the court may use when a default judgment has been entered. Where the note or mortgage provides for reasonable attorney's fees and a default judgment has been entered against the mortgagor the court is not required to hold a hearing or to adjudge the requested attorney fees as reasonable where the fees do not exceed 3 percent of the principal amount owed on the note or mortgage at the time of filing. This provision applies even if the note or mortgage does not specify the percentage that would be paid as liquidated damages. Notice of this provision must be provided in the order to show cause.

The provisions related to the attorney fees would provide a statutory definition of reasonable attorney's fees which would allow for the fee to be determined and dealt with as liquidated damages when there is a default judgment. This would remove the necessity of a hearing on attorney fees when there were no objections filed by the defendant. However, the provision does not remove the court's right to hold a hearing.

Finally, the bill requires the court to promptly enter final judgment of foreclosure where the defendant has waived the right to contest the foreclosure.

D. SECTION-BY-SECTION ANALYSIS:

Section 1 creates un-numbered sections in Florida Statutes, providing that in certain uncontested mortgage foreclosure proceedings the court must enter final judgment within 90 days from the date of the close of the pleadings. In addition, this section provides that when a default judgment has been entered against a mortgagor and the note provides for reasonable attorneys fees, the court need not hold a hearing or adjudge the requested fees to be reasonable if the fees do not exceed three percent of the original principal amount. This section provides that such attorney's fees constitute liquidated damages.

Section 2 amends s. 702.10, F.S., providing that a hearing on an order to show cause after a complaint has been filed must be held within 60 days after the date of service of the order. This section also adds criteria to be included within the order to show cause, including the statement that a defendant's answer not contesting the foreclosure is a waiver of the right to a hearing. The order must also state that a hearing on attorneys' fees is unnecessary if the mortgage provides for reasonable attorney's fees and the requested fees do not exceed 3 percent of the principal amount owed at the time of filing the complaint. This statement must be included within the court's final order.

Section 3 establishes an effective date of July 1, 2001.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

No apparent fiscal impact on General Revenue

2. Expenditures:

None

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

See, Part III.D. FISCAL COMMENTS

2. Expenditures:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The provisions of the bill would eliminate the need for parties obtaining a default judgment on a mortgage foreclosure to request a hearing on attorney fees in each case, which speeds the process and saves banks, condominium boards and other lien holders time and money.

D. FISCAL COMMENTS:

The Court will no longer be required to review awards of attorney fees that do not exceed 3 percent of the principal amount owed on the note or mortgage at the time where there is a default judgment

in the underlying mortgage foreclosure. There is no information regarding how often the courts do this so the exact savings cannot be calculated.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

N/A

B. REDUCTION OF REVENUE RAISING AUTHORITY:

N/A

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

N/A

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

None found.

B. RULE-MAKING AUTHORITY:

None granted.

C. OTHER COMMENTS:

N/A

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON BANKING:

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