

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.)

Prepared By: The Professional Staff of the Banking and Insurance Committee

BILL: CS/SB 656

INTRODUCER: Banking and Insurance Committee and Senator Joyner

SUBJECT: Judicial and Execution Sales of Property

DATE: March 4, 2008 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Daniell	Maclure	JU	Favorable
2.	Knudson	Deffenbaugh	BI	Fav/CS
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE..... Statement of Substantial Changes

B. AMENDMENTS..... Technical amendments were recommended

Amendments were recommended

Significant amendments were recommended

I. Summary:

This bill requires a lienholder to provide notice to a natural person property owner whose homestead property is subject to a judicial or sheriff's sale (foreclosure) of the possibility of retaining the property through the filing of a bankruptcy petition. The failure of the lienholder to provide the notice required by this section constitutes an affirmative defense to the natural person property owner in a foreclosure action against the homestead property.

Under this bill, if the judgment debtor is a natural person, a writ of execution cannot be issued prior to the judgment creditor filing the required notice to the judgment debtor of the possibility of relief through the U.S. Bankruptcy Code.

This bill creates section 702.55, Florida Statutes. This bill substantially amends section 56.021, Florida Statutes.

II. Present Situation:

Judicial Sales Procedure

Currently under the law, a lienholder or creditor must serve a complaint, a notice of *lis pendens*,¹ and a summons on the debtor in order to initiate foreclosure proceedings.²

The procedure for the sale of real or personal property, otherwise known as a judicial sale, is provided for in s. 45.031, F.S. This section provides that a final judgment from a foreclosure proceeding must include a statement notifying the property owner and subordinate lienholders, if any, that there may be additional money from the foreclosure sale and notifying the property owner that he or she may claim such additional funds without representation by a lawyer or other person, if the subject property qualified for a homestead exemption in the most recent tax year.³ The sale must be conducted at public auction at the time and place set forth in the final judgment.⁴

After the sale, the Certificate of Sale, which is filed and served on all parties by the clerk of court, must include the amount the property was sold for and to whom it was sold.⁵ The clerk is also required to serve all parties with a copy of the Certificate of Disbursement detailing the amount of payments made to the parties pursuant to the sale and any remaining surplus.⁶ The Certificate of Disbursement must notify persons claiming a right to any excess funds that they must make a claim to the clerk within 60 days, or forfeit the right to make a claim to the owner of record at the *lis pendens* date.⁷ Essentially, the surplus will be paid to the owner at the *lis pendens* date, unless another person (such as a subordinate lienholder or assignee of the right to collect the funds) claims an interest in the proceeds during the 60-day period. If such a claim is made, the court shall set an evidentiary hearing to determine entitlement to the surplus.

Expedited Show-Cause Foreclosure Procedure

The Legislature created an optional “speedy” foreclosure procedure for residential foreclosures in 1993, codified at s. 702.10, F.S.⁸ This section provides a fast track foreclosure process through an order to show cause, whereby a lender can obtain an *in rem* judgment. Upon filing a foreclosure complaint, the mortgagee can request an order to show cause for the entry of a final judgment. The judge must then read the complaint and verify that it states a cause of action.⁹ If

¹ The definition of “lis pendens,” as appropriate for this analysis, is “[a] notice, recorded in the chain of title to real property, required or permitted in some jurisdictions to warn all persons that certain property is the subject matter of litigation, and that any interests acquired during the pendency of the suit are subject to its outcome.” BLACK’S LAW DICTIONARY (8th ed. 2004). Essentially, “[t]he purpose of a notice of lis pendens is to alert creditors, prospective purchasers and others to the fact that the title to a particular piece of property is involved in litigation.” 35 FLA. JUR. 2D *Lis Pendens* § 3 (2008).

² E-mail correspondence from U.S. Bankruptcy Judge Catherine Peek McEwen to the Senate Committee on Judiciary, March 8, 2007 (on file with the Senate Committee on Judiciary).

³ Section 45.031(1)(a) and (b), F.S.

⁴ Section 45.031(3), F.S.

⁵ Section 45.031(4), F.S.

⁶ Section 45.031(7), F.S.

⁷ *Id.* The *lis pendens* date is the date the lienholder records the notice of *lis pendens* in the public land records of the county clerk’s office in which the property is located. E-mail correspondence from U.S. Bankruptcy Judge Catherine Peek McEwen to the Senate Committee on Judiciary, Feb. 4, 2008 (on file with the Senate Committee on Judiciary).

⁸ Facsimile from U.S. Bankruptcy Judge Catherine Peek McEwen to the Senate Committee on Judiciary, March 12, 2007 (on file with the Senate Committee on Judiciary).

⁹ Section 702.10(1), F.S.

the complaint is verified, the judge will issue an order to the defendant to show cause why a final judgment should not be entered.¹⁰ If a defendant waives the right to be heard, the judge shall promptly enter a final judgment of foreclosure.¹¹ Upon receipt of a final judgment, the procedures set out in s. 45.031, F.S., for a judicial sale should be followed.

Sheriff's Sale

Chapter 56, F.S., governs sheriff's sales, which occur when a lienholder obtains a money judgment on a formerly unsecured debt.¹² Upon entry of a money judgment, the court issues a writ of execution, which is effective during the life of the judgment.¹³ An execution is a "court order directing a sheriff or other officer to enforce a judgment, [usually] by seizing and selling the judgment debtor's property."¹⁴ Upon receipt of the writ of execution, the sheriff must publicize the upcoming sale, and then an auction is held on a specified date.¹⁵

Current Rate of Foreclosures in Florida

Mortgage delinquency and foreclosure rates are on the rise nationwide, but Florida has been particularly affected. According to RealtyTrac®,¹⁶ Florida had the second highest state foreclosure rate for 2007.¹⁷ The total number of foreclosure filings reported in the state for 2007 was 279,325 (on 165,291 properties), more than twice the number of filings for 2006.¹⁸ The negative trend is continuing as of January 2008, as foreclosures rose 8 percent nationally from the previous months and 57 percent from January of the previous year.¹⁹ Florida's January 2008 foreclosure rate ranked third nationally and the Cape Coral/Ft. Myers metro area had the highest foreclosure rate in the nation. Further statistics, as reported in the media, show:

- At the close of the third quarter in 2007, the following Florida cities ranked in the upper third of cities nationwide regarding foreclosures: Fort Lauderdale (4), Miami (8), Tampa/St. Petersburg/Clearwater (19), Palm Beach (21), Sarasota/Bradenton/Venice (25), Orlando (27), and Jacksonville (33).²⁰

¹⁰ *Id.*

¹¹ Section 702.10(1)(d), F.S.

¹² Conversation with U.S. Bankruptcy Judge Catherine Peek McEwen (March 12, 2007).

¹³ Section 56.021, F.S.

¹⁴ BLACK'S LAW DICTIONARY (8th ed. 2004).

¹⁵ Conversation with U.S. Bankruptcy Judge Catherine Peek McEwen (March 12, 2007).

¹⁶ RealtyTrac, the leading online marketplace for foreclosure properties, "publishes the largest and most comprehensive national database of foreclosure and bank-owned properties, with over 1 million properties from nearly 2,500 counties across the country." REALTYTRAC, *Foreclosure Activity up 30 percent in Third Quarter*, <http://www.realtytrac.com/ContentManagement/pressrelease.aspx?ChannelID=9&ItemID=3567&acct=64847> (last visited Jan. 29, 2008).

¹⁷ REALTYTRAC, *U.S. Foreclosure Activity Increases 75 percent in 2007*, <http://www.realtytrac.com/ContentManagement/pressrelease.aspx?ChannelID=9&ItemID=3988&acct=64847> (last visited Feb. 4, 2008).

¹⁸ *Id.*

¹⁹ REALTYTRAC, *Foreclosure Activity Increases 8 percent in January*, <http://www.realtytrac.com/ContentManagement/pressrelease.aspx?ChannelID=9&ItemID=4148&acct=64847> (last visited Feb. 28, 2008).

²⁰ The number in parentheses is the city's ranking for foreclosure activity in the nation's 100 largest metropolitan areas. See REALTYTRAC, *Stockton, Detroit, Riverside-San Bernardino Post Top Metro Foreclosure Rates in Q3*, <http://www.realtytrac.com/ContentManagement/pressrelease.aspx?ChannelID=9&ItemID=3609&acct=64847> (last visited Jan. 30, 2008).

- In 2007, Florida had a total of 165,291 properties with foreclosure filings, more than any other state in the nation except California.
- Florida had more than 2 percent of its properties in some state of foreclosure last year.
- The Florida Supreme Court has asked for 19 new circuit court judges, in part, because of a near-doubling of foreclosures.
- Nearly 5,000 St. Lucie County households defaulted on their mortgages in 2007.
- At one point, the Volusia County Clerk of Court advertised 40 foreclosure sales in a one-week period.
- Both Martin County and Palm Beach County saw increased foreclosure filings in 2007, with a 215 percent increase and 189 percent increase respectively from 2006.²¹

One of the reported reasons for the drastic increase in foreclosure filings is due to the predominant use of “subprime mortgages” with adjustable interest rates during the housing boom. Subprime mortgage loans are generally made to borrowers with high credit risk due to bad or little credit history or because of their debt to income ratio.²² During the housing boom, lenders used “creative financing,” such as subprime loans with adjustable rates, in order to attract this growing pool of borrowers.²³ In 2006, subprime loans had expanded to 20 percent of the mortgage market, up from 9 percent a decade earlier.²⁴ These types of mortgages were premised on the idea that house prices would continue to rise rapidly, allowing borrowers to build equity and then refinance their homes when the “teaser” rate expired, thereby avoiding the increased payments associated with the reset in the rate of the original mortgage.²⁵ However, when home prices began to decline, borrowers were unable to refinance and found themselves locked into a payment they could not afford. As of January 2008, 21 percent of subprime adjustable rate mortgages were 90 days or more delinquent, leading some to predict that subprime borrowers would probably default on \$200-300 billion of mortgages.²⁶

United States Bankruptcy Code

Since its enactment in 1978, the U.S. Bankruptcy Code has undergone many revisions. Chapter 13 of the Bankruptcy Code²⁷ fosters rehabilitation of home owners by providing protection to those facing a foreclosure action. Specifically, Chapter 13 “provides a means for

²¹ See correspondence from U.S. Bankruptcy Judge Catherine Peek McEwen to the Senate Committee on Judiciary, Jan. 29, 2008 (on file with the Senate Committee on Judiciary); *Foreclosures*, DAYTONA BEACH NEWS J., Jan. 13, 2008, at 5F; Associated Press, *Top Court says Florida needs more judges – Crime and foreclosures add to the workload, justices say in their request to lawmakers*, THE ORLANDO SENTINEL, Jan. 18, 2008, at B2; Linda Rawls, *Treasure Coast’s Foreclosure Rate Surges*, THE PALM BEACH POST, Jan. 16, 2008, at 1D; Associated Press, *Florida ranks No. 2 in foreclosures, up 275 percent over last year*, THE PALM BEACH POST, Jan. 29, 2008; Les Christie, *Foreclosures up 75% in 2007*, CNNMONEY.COM.

²² Elizabeth Laderman, *Subprime Mortgage Lending and the Capital Markets*, FRBSF ECONOMIC LETTER, No. 2001-38, Dec. 28, 2001, available at <http://www.frbsf.org/publications/economics/letter/2001/el2001-38.pdf> (last visited Jan. 30, 2008).

²³ Veena Trehan, *The Mortgage Market: What Happened?*, NAT’L PUBLIC RADIO, April 26, 2007, <http://www.npr.org/templates/story/story.php?storyId=9855669> (last visited Jan. 30, 2008).

²⁴ *Id.*

²⁵ Ben S. Bernanke, *Financial Markets, the Economic Outlook, and Monetary Policy*, BD. OF GOVERNORS OF THE FED. RESERVE SYS., Jan. 10, 2008, <http://www.federalreserve.gov/newsevents/speech/bernanke20080110a.htm> (last visited Jan. 30, 2008).

²⁶ *Id.*; see also *Postcards from the ledge*, THE ECONOMIST, Dec. 19, 2007, available at http://www.economist.com/opinion/displaystory.cfm?story_id=10334574 (last visited Jan. 30, 2008).

²⁷ Although other provisions exist under the U.S. Bankruptcy Code that may provide property owner’s help during a foreclosure action, Chapter 13 is commonly known as the “home-saving chapter” and, therefore, is discussed in this analysis.

individuals with regular income to adjust their debts.”²⁸ Furthermore, the intent of Chapter 13 is to ““encourage the flow of capital into the home lending market.””²⁹

Any person with a regular income, whose debts do not exceed a statutorily set amount, may file for Chapter 13.³⁰ Chapter 13 provides a home owner immediate relief from the sale of his or her home by creating an automatic stay once a Chapter 13 petition is filed with the court.³¹ A repayment plan must be filed with the petition, in which the debtor agrees that all of his disposable income will go toward the payment of unmet claims.³² Disposable income is defined as any income left over after paying necessary living expenses, including insurance and mortgage payments.³³ The proposed plan is typically scheduled to be carried out in three years, but it cannot exceed five years.³⁴ When a petition is filed, a trustee is appointed to serve as a mediator between the debtor and creditors, as well as to collect payments from the debtor and distribute them to the creditors.³⁵ Upon completion of the payments, the debtor is discharged and has no obligation to pay any additional amounts.³⁶ Under Chapter 13, debtors have a continuing obligation to report additional assets, such as salary increases, but they remain in possession of their assets.³⁷

III. Effect of Proposed Changes:

Section 1. This bill creates s. 702.55, F.S., requiring that, in a foreclosure action against homestead property, the lienholder must serve a separate notice with the original service of process to the natural person property owner stating that under certain circumstances the United States Bankruptcy Code may provide the property owner the ability to retain the lien property and reorganize the claimed indebtedness. In order to qualify for this relief, the property owner must file the bankruptcy petition before the judicial or sheriff’s sale occurs. The notice further warns the property owner of the possibility of home-saving scams and directs the property owner to call the United States Department of Housing and Urban Development to obtain the names and telephone numbers of organizations willing to provide helpful information about the foreclosure process.

²⁸ Mark S. Scarberry and Scott M. Reddie, *Home Mortgage Strip Down in Chapter 13 Bankruptcy: A Contextual Approach to Sections 1322(B)(2) and (B)(5)*, 20 PEPP. L. REV. 425, 427 (1993).

²⁹ *In re Bateman*, 331 F.3d 821, 826 (11th Cir. 2003) (quoting *Nobelman v. Am. Savs. Bank*, 508 U.S. 324, 332 (1993)).

³⁰ *What is Chapter 13 Bankruptcy, and Why Do I Need a Chapter Thirteen Bankruptcy Attorney*, BANKRUPTCY LAW FIRMS, <http://www.bankruptcylawfirms.com/national-content.cfm/Article/9771/What-Is-Chapter-13-Bankruptcy.html> (last visited Jan. 30, 2008).

³¹ Jeffrey R. Drobish, *The Forbidden Crystal Ball: Interpreting “Projected Disposable Income” for Chapter 13 Bankruptcy Plans after BAPCPA*, 85 WASH. U. L. REV. 185, 188 (2007).

³² Hulya Eraslan, Wenli Li, and Pierre-Daniel Sarte, *The Realities of U.S. Personal Bankruptcy under Chapter 13*, Feb. 14, 2007 (committee staff has been unable to locate the original version of this article, but a version of it may be found at http://www.chicagofed.org/cedric/2007_res_con_papers/car_41_li_eraslan_sarte_les_final%20submission_2-15-2007.pdf) (last visited Jan. 30, 2008).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ Theresa M. Beiner and Robert B. Chapman, *Take What You Can, Give Nothing Back: Judicial Estoppel, Employment Discrimination, Bankruptcy, and Piracy in the Courts*, 60 U. MIAMI L. REV. 1, 9 (2005).

³⁷ *Id.*

The service of the notice may be made in the same manner permitted for service of the complaint, and the fact of the service is to be noticed on the summons and the return of service so that the clerk of the court and the judicial officer can verify the lienholder's compliance with the notice requirement. In the case of service of process by publication, the notice can be published with the service of process.

The bill provides that if the lienholder fails to serve the notice with the original process, the lienholder can cure the failure by serving the notice up to five business days before the natural person property owner's answer is due. The notice is only required to be served on the natural person who is listed as the record owner of the property at the time the *lis pendens*³⁸ is recorded.

The bill further provides that the failure of the lienholder to serve the required notice constitutes an affirmative defense to the natural person property owner in an action to foreclose on homestead property. If the affirmative defense is raised, the natural person property owner has the burden of proving that the property was the property owner's homestead on the date the foreclosure action was filed. If the defense is timely raised and proved, an *in personam* or deficiency judgment may not be entered against the property owner.³⁹ However, an *in rem* final judgment⁴⁰ may still be entered against the property owner. Essentially, this means that the judgment is limited to the property of the property owner that is within the jurisdiction of the court, and that the lienholder cannot obtain a judgment affecting the property owner's personal rights or interests, such as wage garnishment.⁴¹ If the affirmative defense is not timely raised or proved, the failure of the lienholder to serve the notice does not preclude the entry of an *in personam* or deficiency judgment. Additionally, failure to serve the notice does not affect the validity of the judgment of foreclosure, the validity of title or marketability of the real property, or the validity of title conveyed by the judicial sale.

Section 2. This bill also makes conforming changes in s. 56.021, F.S., to provide that a writ of execution may not be issued before the judgment creditor has filed and served the notice relating to potential bankruptcy relief on the property owner.

Section 3. This act would take effect July 1, 2008, and apply only to foreclosure proceedings commenced, and to writs of execution issued, after that date.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

³⁸ A notice of *lis pendens* is a notice that there is pending litigation regarding a particular piece of property. See footnote 1.

³⁹ An "*in personam* judgment" is one that imposes a personal liability or obligation on one person in favor of another and can be enforced wherever the person the judgment is against is located. 46 AM. JUR. 2D JUDGMENTS § 171 (2007). A "deficiency judgment" is a "personal judgment against a mortgagor for the mortgage debt remaining unsatisfied out of the proceeds of sale of the mortgaged property." 59A C.J.S. *Mortgages* § 933 (2007).

⁴⁰ A judgment affecting a specific piece of property is an "*in rem* judgment." 49 C.J.S. *Judgments* § 12 (2007).

⁴¹ E-mail correspondence from U.S. Bankruptcy Judge Catherine Peek McEwen to the Senate Committee on Judiciary, Feb. 4, 2008 (on file with the Senate Committee on Judiciary).

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

To the extent the bill makes property owners aware of their options under the U.S. Bankruptcy Code, it has the potential of helping those property owners on the verge of foreclosure to be able to keep their homes. However, the bankruptcy process may prevent a homeowner from receiving mortgage loan modifications through Project Lifeline, an effort from Bank of America, Chase, Citigroup, Countrywide, Washington Mutual, and Wells Fargo that attempts to help homeowners who are seriously delinquent with their mortgage payments. The program is not available to persons who are in active bankruptcy.

This bill also has a potential impact on the lending industry by generating revenue for the lenders during the time the case is pending in bankruptcy, because the trustee is collecting mortgage payments from the property owner that go to the mortgage holder.⁴² Additionally, the timing of the notice (requiring it to be served with the original process) may also minimize a lender's outlay for attorney's fees in the foreclosure process by prompting a homeowner to file for bankruptcy sooner.⁴³

It does not appear that there would be any additional costs placed upon the lending industry by requiring this notice as long as the lender serves the notice with the initial complaint.

C. Government Sector Impact:

To the extent that consumers on the verge of foreclosures avail themselves of the bankruptcy option, this bill has the potential of reducing the strain on the court system by lowering the number of foreclosure filings.⁴⁴ This bill also has the potential of reducing the number of days scheduled for foreclosure auctions.⁴⁵

⁴² E-mail correspondence from U.S. Bankruptcy Judge Catherine Peek McEwen to Senator Joyner's office, March 7, 2007, and Feb. 1, 2008 (on file with the Senate Committee on Judiciary).

⁴³ *Id.*

⁴⁴ Judge Ben Bryan of the 19th Circuit told The Palm Beach Post that in past years he spent approximately two hours a month handling foreclosure cases, where in March 2007 he was spending approximately 15 hours a month. Sarah Prohaska, *Ballooning Foreclosures Place Strain on Courts*, THE PALM BEACH POST, March 4, 2007, at 1A. Moreover, some areas of

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

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

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

The CS amends the foreclosure notice required by the bill, directing the reader to contact the U.S. Department of Housing and Urban Development for information regarding the foreclosure process.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

the state are experiencing waits of six months or more to get a court date for a foreclosure case. *Foreclosure Debate Dominates – Real Estate and Law Summit*, THE BRADENTON HERALD, Nov. 7, 2007, at 1.

⁴⁵ In January and February of 2007, St. Lucie County was scheduling auctions for seven or eight days out of the month, whereas auctions only consumed one to four days a month in past years. Prohaska, *supra* note 44.