

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 Judiciary Committee

BILL: SB 2248

INTRODUCER: Senator Baker

SUBJECT: Judicial Sales/Real of Personal Property

DATE: March 24, 2008

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Sumner</u>	<u>Maclure</u>	<u>JU</u>	Favorable
2.	_____	_____	<u>FT</u>	_____
3.	_____	_____	<u>JA</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

The bill permits the clerk of court to conduct judicial sales of real or personal property by electronic means. The clerk of court shall provide public access to the sale by computer terminals at a designated location. The bill gives the clerk of court authority to receive electronic deposits and payments related to the property sale and provides for a \$100 service charge for the conduct of the sale by electronic means.

This bill amends sections 45.031 and 45.035, 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

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).

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 A service charge of \$60 is required for making, recording, and certifying the sale and title.⁵

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.⁶ 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.⁷ 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.⁸ 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.⁹ 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.¹⁰ If the complaint is verified, the judge will issue an order to the defendant to show cause why a final judgment should not be entered.¹¹ If a defendant waives the right to be heard, the judge shall promptly enter a final judgment of foreclosure.¹² Upon receipt of a final judgment, the procedures set out in s. 45.031, F.S., for a judicial sale should be followed.

³ Section 45.031(1)(a) and (b), F.S.

⁴ Section 45.031(3), F.S.

⁵ Sections 45.031(3) and 45.035(1), F.S.

⁶ Section 45.031(4), F.S.

⁷ Section 45.031(7), F.S.

⁸ *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).

⁹ 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).

¹⁰ Section 702.10(1), F.S.

¹¹ *Id.*

¹² Section 702.10(1)(d), F.S.

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.¹³ Upon entry of a money judgment, the court issues a writ of execution, which is effective during the life of the judgment.¹⁴ 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."¹⁵ Upon receipt of the writ of execution, the sheriff must publicize the upcoming sale, and then an auction is held on a specified date.¹⁶

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®,¹⁷ Florida had the second highest state foreclosure rate for 2007.¹⁸ 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 2006.¹⁹ According to one report, "[t]he state's foreclosure filing total in December was up 275 percent from December 2006, and its fourth quarter total was up 211 percent from the fourth quarter of 2006."²⁰ 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).²¹
- 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.

¹³ Conversation with U.S. Bankruptcy Judge Catherine Peek McEwen (March 12, 2007).

¹⁴ Section 56.021, F.S.

¹⁵ BLACK'S LAW DICTIONARY (8th ed. 2004).

¹⁶ Conversation with U.S. Bankruptcy Judge Catherine Peek McEwen (March 12, 2007).

¹⁷ 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).

¹⁸ 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).

¹⁹ *Id.*

²⁰ *Id.*

²¹ 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).

- Both Martin County and Palm Beach County saw increased foreclosure filings in 2007, with a 215-percent increase and 189-percent increase respectively from 2006.²²

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.²³ During the housing boom, lenders used “creative financing,” such as subprime loans with adjustable rates, in order to attract this growing pool of borrowers.²⁴ In 2006, subprime loans had expanded to 20 percent of the mortgage market, up from 9 percent a decade earlier.²⁵ 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.²⁶ 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 of 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.²⁷

III. Effect of Proposed Changes:

The bill permits the clerk of court to conduct judicial sales of real or personal property by electronic means. The Clerk shall provide public access to the sale by computer terminals at a designated location shall. The bill gives the clerk of court authority to receive electronic deposits and payments related to the property sale and provides for a \$100 service charge for the conduct of the sale by electronic means. Currently, a service charge of \$60 is required for making, recording, and certifying the sale and title.²⁸

The bill provides an effective date of July 1, 2008.

²² 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.

²³ 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).

²⁴ 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).

²⁵ *Id.*

²⁶ 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).

²⁷ *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).

²⁸ *Supra* note 5.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

Plaintiffs will have to pay \$a 100 service charge for conducting electronic foreclosure sales.

B. Private Sector Impact:

Judicial sales through electronic means will in all probability increase the number of bidders and competition in the sale.

C. Government Sector Impact:

A representative for the Florida Association of Court Clerks and Comptrollers note that since the language in the bill provides for the process to be permissive, the bill will affect each clerk of court differently depending on discretionary funds available in the budget of each clerk and the means and choice of each clerk to utilize the system.

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.)

None.

B. Amendments:

None.

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