

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/CS/SB's 1646 and 1038

INTRODUCER: Banking and Insurance Committee; and Judiciary Committee and Senators Constantine and Joyner

SUBJECT: Foreclosures

DATE: April 14, 2009 **REVISED:** _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Sumner</u>	<u>Maclure</u>	<u>JU</u>	<u>Fav/CS</u>
2.	<u>Messer</u>	<u>Burgess</u>	<u>BI</u>	<u>Fav/CS</u>
3.	_____	_____	<u>GA</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

Please see Section VIII. for Additional Information:

- | | | |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

The bill amends the judicial procedures in foreclosure actions to provide that if the purchaser of a foreclosed residential dwelling unit that is subject to a rental agreement wishes to take possession of the property, the purchaser must provide 30 days' advance notice to the tenant. The clerk of court cannot issue of a writ of possession unless the purchaser shows that the tenant was notified.

The bill provides that once a foreclosure action is filed the landlord must hold security deposits and advance rents from current and prospective tenants in an interest bearing account; the landlord must notify prospective tenants of the foreclosure filing and that their rights to enjoy the property may be affected; and if the landlord does not maintain the security deposit or advance rents, the subsequent purchaser must give the tenant credit for those payments.

The bill provides, subject to appropriations, for a voluntary, pre-suit mediation pilot program to facilitate the resolution of disputes between mortgagees and mortgagors in order to assist homeowners facing imminent foreclosure and to reduce the number of foreclosure filings in the state courts system. The bill authorizes the Office of Financial Regulation to contract with a not-

for-profit entity to provide such mediations. Communications during the mediation must remain confidential as provided in the mediation statute.

This bill creates section 83.495 of the Florida Statutes and unnumbered sections of the Florida Statutes.

II. Present Situation:

Current Rate of Foreclosures in Florida

The Office of the State Courts Administrator (OSCA) reports that foreclosure filings doubled from FY 2005-06 to FY 2006-07 and nearly tripled from FY 2006-07 to FY 2007-08. As of January 2009, the counties with the highest number of filings included Dade, Broward, Palm Beach, Orange, Lee, and Duval counties. Some courts have addressed the crisis with detailed administrative orders outlining the foreclosure process.¹

In response to the number of administrative orders being issued by the different circuits, concerned attorneys from the private bar and legal service organizations filed a petition with the Florida Supreme Court requesting an emergency rule to require mediation in all new and pending cases involving mortgage foreclosure of owner-occupied residential properties.² The Florida Supreme Court responded on March 12, 2009, stating that the court had decided not to make the emergency petition into a case. Instead, the court issued an administrative order establishing a statewide task force on residential mortgage foreclosure cases “to recommend to the Supreme Court policies, procedures, strategies, and methods for easing the backlog of pending residential mortgage foreclosure cases while protecting the rights of parties.”³

Foreclosures

A foreclosure is a lawsuit filed by a lender when the borrower has failed to make the payments. The lender asks the court to sell the property so that the lender can recover the missed payments or the whole balance due on the loan. Once the foreclosure action is filed, parties to the action must be served. When a property subject to foreclosure is being rented, service of the proceedings is often made on a “Jane or John Doe” at the address of the property in addition to the borrower.⁴

Once the foreclosure lawsuit is filed, a tenant’s rights are limited. If the property is sold at auction, a writ of possession is entered, which requires the tenants to vacate the premises.⁵ A tenant’s options before a writ of possession is entered can include moving out before an eviction or delaying the foreclosure process by filing a motion to delay the auction.

¹ *Foreclosure Mediation is Gaining Momentum*, The Florida Bar News (March 15, 2009).

² *In Re: Emergency Amendment to the Florida Rules of Civil Procedure to Require Pre-Judgment Mediation in Residential Mortgage Foreclosures*, February 6, 2009 (on file with the Judiciary Committee).

³ *In Re: Task Force on Residential Mortgage Foreclosure Cases*, No. AOSC09-8 (Fla. March 9, 2009).

⁴ See *Kurz v. Pappas*, 156 So. 737 (Fla. 1934); *Rhyne v. Miami-Dade Water and Sewer Auth.*, 402 So. 2d 54 (Fla. 3rd DCA 1981); and *Burns v. Bankamerica National Trust Co.*, 719 So. 2d 999 (Fla. 5th DCA 1998).

⁵ Fla. R. Civ. P. 1.580

Judicial Sales Procedure

Currently under the law, a mortgage company must serve a complaint, a notice of *lis pendens*,⁶ and a summons on the borrower in order to initiate foreclosure proceedings.

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.⁷ The sale must be conducted at public auction at the time and place set forth in the final judgment.⁸

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.⁹ 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.¹⁰ 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.¹¹ 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.¹² 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.¹³ If the complaint is verified, the judge will issue an order to the defendant to show cause why a final

⁶ 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* s. 3 (2008).

⁷ Section 45.031(1)(a) and (b), F.S.

⁸ Section 45.031(3), F.S.

⁹ Section 45.031(4), F.S.

¹⁰ Section 45.031(7), F.S.

¹¹ *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).

¹² 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).

¹³ Section 702.10(1), F.S.

judgment should not be entered.¹⁴ If a defendant waives the right to be heard, the judge shall promptly enter a final judgment of foreclosure.¹⁵ 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. Upon entry of a money judgment, the court issues a writ of execution that is effective during the life of the judgment.¹⁶ 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."¹⁷ Upon receipt of the writ of execution, the sheriff must publicize the upcoming sale, and then an auction is held on a specified date.

Florida Landlord Tenant Law

The Florida Residential Landlord and Tenant Act, first enacted in 1973, governs the relationship between landlords and tenants in a residential lease agreement.¹⁸ A rental agreement specifies the terms and conditions of a tenant's occupation in a dwelling unit for a specific period of time.¹⁹ The provisions of the Act specifically address the payment of rent,²⁰ duration of leases,²¹ security deposits,²² maintenance of the dwelling and premises,²³ termination of rental agreements,²⁴ liquidated damages for failure to provide notice before vacating,²⁵ penalty for holding over,²⁶ and a landlord's remedies for the breach of a lease.²⁷

Deposit Money or Advance Rent; Duty of Landlord and Tenant

When a tenant gives a deposit as security on a rental agreement, the landlord must hold the total amount of the deposit in either:

- A separate non-interest-bearing account in a Florida banking institution for the benefit of the tenant(s). The deposit cannot be commingled with any other funds or pledged or used in other way until the moneys are actually due to the landlord;

¹⁴ *Id.*

¹⁵ Section 702.10(1)(d), F.S.

¹⁶ Section 56.021, F.S.

¹⁷ BLACK'S LAW DICTIONARY (8th ed. 2004).

¹⁸ Part II of ch. 83, F.S. This part applies to the rental of a "dwelling unit," which is defined as a structure or part of a structure rented for use as a home, residence, or sleeping place. It also includes mobile homes rented by a tenant. Section 83.43, F.S.

¹⁹ Section 83.43(7), F.S., provides that: "Rental agreement" means any written agreement, or oral agreement if for less duration than one year, providing for use and occupancy of premises.

²⁰ Section 83.46, F.S.

²¹ *Id.*

²² Section 83.49, F.S.

²³ Sections 83.51 and 83.52, F.S.

²⁴ Section 83.56, F.S.

²⁵ Section 83.575, F.S.

²⁶ Section 83.58, F.S.

²⁷ Section 83.595, F.S.

- A separate interest-bearing account in a Florida banking institution for the benefit of the tenant(s), in which case the tenant shall receive and collect interest in an amount of at least 75 percent of the annualized average interest rate payable on the account or interest at the rate of 5 percent per year, simple interest, whichever the landlord elects; or
- The landlord may post a surety bond in the total amount of the deposits.²⁸

Disclosure by the Landlord

The landlord must disclose to the tenant in writing at or before the beginning of the tenancy, the name and address of the landlord or a person authorized to receive notices and demands on the landlord's behalf.²⁹ Upon completion of construction of a building exceeding three stories that contains dwelling units, the landlords shall disclose to the tenants initially moving into the building the availability or lack of availability of fire protection.³⁰

III. Effect of Proposed Changes:

Possession of Foreclosed Residential Dwelling and Notice to Tenant

The bill provides that if the purchaser of a foreclosed residential dwelling unit that is subject to a rental agreement wants to take possession of the property, the purchaser must provide 30 days' advance notice to the tenant. The clerk of court cannot issue of a writ of possession unless the purchaser shows that the tenant was properly notified.

Upon receipt of the notice, the tenant is authorized to terminate the lease by giving at least 7 days' written notice to the purchaser. The bill also provides that nothing in section eliminate the common-law requirement to make the occupant of property a party to a foreclosure action as a condition precedent to the court authorizing the clerk of court to issue a writ of possession as part of the foreclosure.

Disclosure by Landlord of Pending Foreclosure and Termination of Rental Agreement

The bill requires the landlord or the landlord's authorized representative to notify prospective tenants, prior to the signing of the lease, of a pending foreclosure proceeding. This notification must be disclosed in writing prior to the execution of any rental agreement. This disclosure must inform the prospective tenants that their rights to enjoy the property may be affected by the foreclosure proceedings. A person authorized to enter into a rental agreement on the landlord's behalf shall not be individually liable for failure to make such disclosure unless the individual received notice of the existence of the pending foreclosure from the landlord.

²⁸ Section 83.49(1), F.S.

²⁹ Section 83.50(1), F.S.

³⁰ Section 83.50(2), F.S.

Deposit Money; Duty of Landlord and Tenant

The bill provides that once a foreclosure action is filed on a residential dwelling unit, the landlord must hold security deposits and advance rents from current and prospective tenants in an interest-bearing account. If the landlord fails to maintain the security deposit or advance rents, the subsequent purchaser must give the tenant credit for those payments if the tenant can document proof of payment.

Pilot Program for Mortgage Foreclosure Pre-suit Mediation

The bill authorizes the establishment of a voluntary pre-suit mediation pilot program to facilitate the resolution of disputes between mortgagees and mortgagors in order to assist homeowners facing imminent foreclosure and to reduce the number of foreclosure filings in the state courts system. Subject to an appropriation, the Office of Financial Regulation is required to administer this statewide program. The OFR is authorized to contract with a qualified not-for-profit organization to assist in the administration of this statewide mediation program without competitive solicitation. Or, as an alternative, the office shall perform these functions internally.

A contract with a not-for profit organization will require the provision of the following services, at a minimum:

- Recruit mediators certified by the Florida Supreme Court;
- Provide training to participating mediators;
- Assist in the identification of locations to conduct mediations;
- Establish procedures to be followed in mediations; and
- Market the availability of the program.

The bill provides that prior to filing a lawsuit, a mortgagee that elects to participate in the program shall contact the mortgagor with an invitation to participate in mediation. The invitation shall inform the mortgagor that participation in the mediation is strictly voluntary and it shall identify any options that the mortgagee may be willing to negotiate in an effort to avoid foreclosure. The bill allows for a certified mediator to charge a fee not to exceed \$1,000. The invitation shall explain to the mortgagor his or her options for selecting a mediator and shall notify the mortgagor of the mortgagor's payment obligations for the mediation. Additionally, the invitation shall encourage the mortgagor to have an attorney accompany him or her to the mediation. The mortgagee shall agree to withhold filing a foreclosure action for 90 days after mailing the invitation unless the mortgagor declines to participate or fails to respond to the invitation to participate.

The bill requires a mortgagor, who receives an invitation for mediation, to respond within 20 days by using the form provided in the invitation. The response shall make an election regarding the designation of a mediator, provide the mortgagor's contact information, and provide any documents requested by the mortgagee that are relevant to the foreclosure.

Prior to the mediation, the mediator shall request from both parties any relevant documentation and shall, with the agreement of both parties, invite other persons with an interest in the property to participate in the mediation. The mediator shall be bound to the Mediation Confidentiality and

Privilege Act (ss. 44.401-44.406, F.S.). At the conclusion of the mediation, the bill mandates that the mediator provides both parties with an affidavit attesting to the result of the mediation.

The bill allows for the chief judge of the circuit to exempt a mortgagee who participates in good faith in pre-suit mediation under this section from mandatory participation in any program established by the circuit that compels mediation following the filing of a foreclosure action and prior to the entry of judgment.

The bill provides that the effect of participating in the mediation by the mortgagor and the mortgagee does not constitute a defense to a foreclosure action by the mortgagee. It also provides that the participation by the mortgagor in a loan modification or other financial arrangement negotiated with the mortgagee as a result of the mediation does not preclude the mortgagee from proceeding to foreclosure if the mortgagor fails to comply with the terms of that modification or other financial arrangement. It also provides that mediation under this section does not entitle the mortgagor or mortgagee to successive pre-suit mediation under this section.

The bill provides that before February 1, 2011, the Office of Financial Regulation shall report to the President of the Senate and the Speaker of the House of Representatives on the mediation program, including the data on use of the program, a recommendation on whether to extend the program, and any recommendations for revising the program. The bill sets an expiration date of June 30, 2011, for this program.

The bill provides an effective date of July 1, 2009.

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:

None.

B. Private Sector Impact:

The notice and return of deposit moneys given to tenants in foreclosure actions may result in significant savings to the tenants if upon notice they are able to leave the premises in a timely fashion and not forego any initial deposits.

C. Government Sector Impact:

The Office of Financial Regulation will incur indeterminate costs associated with the implementation and administration of the pre-suit mediation pilot program.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Typically, prior to foreclosure, mortgagee and mortgagor will engage in informal negotiations to determine if the loan can be refinanced or modified. Mortgagors may use the services of credit counselors provided by the U.S. Housing and Urban Development, or other not-for-profit agencies, at no cost or on a sliding scale basis, in attempt to rework some of these mortgages with the lender. If the parties participate in the pre-suit foreclosure mediation program, the mortgagor is subject to a mediation fee of up to \$1,000 per mediation. The mortgagor may negotiate reimbursement by the borrower of a portion of the mediation fee paid by the mortgagor. If the mortgagee is unable to pay, the mortgagee may tax up to one-half of the costs of the mediation against the mortgagor or add up to one-half of the cost to the indebtedness.

The bill provides statutory authority for the Office of Financial Regulation to engage in the development of a contractual program that allows a specified group of mediators to negotiate a modification or refinancing of a mortgage loan between a mortgagor and mortgagee.

The bill contemplates that the office will engage the services of an unnamed party to affect this, presumably on a statewide basis, using the negotiating medium of mediation. Mediation services contracts are exempt from competitive solicitation under ch. 287, F.S. Mediation and arbitration services are governed by ch. 44, F.S., and contemplate that activity occurring through the courts system and among the parties to the security transaction themselves.

The focus of the bill is at the pre-suit stage and the Supreme Court is currently undertaking a review of this activity with the possibility of issuance of an administrative order identifying a more cross-circuit, pre-suit set of practices or policy development different from that for post-suit disposition provided in ch. 44, F.S. The bill appears to inject another institutional party into mediation and arbitration, different from that provided in law, and appears to develop a pre-suit mediation process through the Executive Branch of state government by sponsorship of an unnamed independent contractor.

Mediator qualifications are governed by s. 44.106, F.S., but this bill establishes a parallel qualifications process that could conflict with existing standards for such personnel established by the Supreme Court. The independent contractor will act as an agent of the department, but it is the Supreme Court, and not the office, which is vested with the statutory authority for arbitration and mediation under law.

Although the intent of the voluntary pre-suit mediation is to avoid foreclosure and expedite the possible resolution of a loan in default through refinancing or modification, the time table associated with the process could cause considerable delays in the ultimate resolution of the loan.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

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

CS by Banking and Insurance on April 14, 2009:

The committee substitute:

- Provides that if the purchaser of a foreclosed residential dwelling unit that is subject to a rental agreement wishes to take possession of the property, the purchaser must provide 30 days' advance notice to the tenant. The clerk of court cannot issue a writ of possession unless the purchaser shows that the tenant was notified.
- Provides, that once a foreclosure action is filed:
 - The landlord must hold security deposits and advance rents from current and prospective tenants in an interest bearing account;
 - The landlord must notify prospective tenants of the foreclosure filing and that their rights to enjoy the property may be affected; and
 - If the landlord does not maintain the security deposit or advance rents, the subsequent purchaser must give the tenant credit for those payments if the tenant documents payment.
- Eliminates the bill's dual notice by the clerk associated with the foreclosure judgment and sale in favor of the pre-possession notice, as described above.
- Eliminates the requirement to return rent five days after a sale.
- Eliminates the tenant's ability to break the lease upon the foreclosure sale and instead authorizes the tenant to break the lease upon being notified by the purchaser of his or her intent to take possession.
- Revises the pre-suit mediation pilot program by:
 - Assigns administration of the program to the Office of Financial Regulation rather than the Department of Financial Services.
 - Makes the program subject to appropriation.
 - Clarifies what documents must be provided during the mediation.
 - Clarifies that the mediator must charge an hourly fee, however, the total fee may not exceed \$1,000.
 - Authorizes, rather than requiring, the Office to contract with a not-for-profit organization for assistance in administering the program.

- Eliminates administrative fee that the not-for-profit organization could charge in addition to the mediator's fee.

CS by Judiciary on April 1, 2009:

The committee substitute:

- Amends the judicial procedures in foreclosure actions to include notices to tenants occupying the property when a foreclosure sale is scheduled and when the foreclosed property is sold at a foreclosure sale. The notices must be provided by the clerk of court, and the plaintiff is required to pay a fee for the notices.
- Provides that property owners whose property has been sold at foreclosure sale must return the security deposits to tenants within five calendar days after the sale is final, and provides that failure to timely pay over a deposit results in commission of a theft punishable under s. 812.014, F.S.
- Allows a tenant the unilateral right to declare that a lease is terminated once a foreclosure sale of the leased property is set.

B. Amendments:

None.