

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: SB 2270

INTRODUCER: Senator Bennett

SUBJECT: Foreclosure Proceedings for Nonhomestead Property

DATE: April 9, 2010

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Messer/Snider	Burgess	BI	Pre-meeting
2.	_____	_____	JU	_____
3.	_____	_____	CM	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

This bill creates ch. 702, F.S., entitled the “Nonjudicial Foreclosure Act for Nonhomestead Properties” (the “Act”). The Act may be used, at the option of a foreclosing creditor, to effect a nonjudicial foreclosure of a security instrument, such as a mortgage, in any real or personal property other than a homestead.¹ Generally, the Act authorizes the nonjudicial foreclosure of every form of security interest in non-homestead real property located in the state, whether entered into before, on, or after July 1, 2010, if the notice of foreclosure is given on or after July 1, 2010. In order to effect a foreclosure authorized by the Act the debtor must agree that the security interest may be foreclosed by the terms of the Act, as opposed to a standard judicial foreclosure proceeding. This agreement may be incorporated in the contract that created the original security interest or the parties may create a novation to the contract in which the debtor agrees to the Act’s provisions in the event of a foreclosure. Three methods for which a foreclosing creditor may pursue nonjudicial foreclosure are specified, they are: 1) auction, 2) negotiated sale and 3) appraisal. Foreclosing creditors under the Act are prohibited from seeking deficiency judgments against residential debtors who are foreclosed upon pursuant to the Act. The bill provides that the proposed nonjudicial remedies do not preclude foreclosure of security interests in real property by judicial means, and that the nonjudicial remedies may not be used, with state exceptions, if a judicial proceeding to foreclosure a security interest is pending.

Other key provisions of the bill include:

- Specified notice of foreclosure and notice of right to cure during nonjudicial foreclosure.

¹ The definition of homestead property in s. 4, Art. X of the Florida Constitution applies to this bill, see lines 167-168 and 216-218 of the bill.

- Monetary penalties in specified circumstances against a creditor who fails to give timely notice of foreclosure to a person who has recorded a request for such notice.
- Procedures that allow a person with an interest in the property that is the subject of the foreclosure to object to the foreclosure.
- Procedures for transferring title of the foreclosed property to the person who has become the owner through either auction or negotiated sale; additionally, the bill provides procedures for transferring title to the foreclosing creditor in the case of a foreclosure by appraisal.
- Judicial supervision of a nonjudicial foreclosure, allowing an aggrieved person to assert a violation of the nonjudicial process, applicable laws, or principles of equity.
- A method for procuring a judicial determination as to whether property claimed to be homestead has been abandoned.

This bill creates part II of ch. 702, F.S.

II. Present Situation:

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.²

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.³ A tenant’s options before a writ of possession is entered include moving out before an eviction or delaying the foreclosure process by filing a motion to delay the auction.

Current Rate of Foreclosures in Florida

The Office of the State Courts Administrator (OSCA) reports that foreclosure filings doubled from FY 2005-2006 to FY 2006-2007 and nearly tripled from FY 2006-2007 to FY 2007-2008.⁴ 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.⁵

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

² See e.g., *Burns v. Bankamerica National Trust Co.*, 719 So. 2d 999 (Fla. 5th DCA 1998).

³ Fla. R. Civ. P. 1.580

⁴ Foreclosures have increased by 549% since December 2006 and 1 in every 163 units is now in foreclosure. This makes Florida third in the nation in foreclosures. BALANCING ECONOMIC INTERESTS AND FAIRNESS IN FLORIDA’S RESIDENTIAL MORTGAGE FORECLOSURE SYSTEM, Collins Center for Public Policy, April 2010. On file with the Committee on Banking and Insurance.

⁵ *Foreclosure Mediation is Gaining Momentum*, The Florida Bar News (March 15, 2009).

Florida Supreme Court requesting an emergency rule to require mediation in all new and pending cases involving mortgage foreclosure of owner-occupied residential properties.⁶ 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.”

Judicial Sales Procedure

Currently, a mortgage company must serve a complaint, a notice of *lis pendens*,⁷ 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.⁸ The sale must be conducted at public auction at the time and place set forth in the final judgment.⁹

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.¹⁰ 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.¹¹ 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.¹² 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.

⁶ *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 Committee on Banking & Insurance).

⁷ 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).

⁸ Section 45.031(1)(a) and (b), F.S.

⁹ Section 45.031(3), F.S.

¹⁰ Section 45.031(4), F.S.

¹¹ Section 45.031(7), F.S.

¹² *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).

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.¹³ 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.¹⁴ 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.¹⁵ If a defendant waives the right to be heard, the judge shall promptly enter a final judgment of foreclosure.¹⁶ 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.¹⁷ 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.”¹⁸ Upon receipt of the writ of execution, the sheriff must publicize the upcoming sale, and then an auction is held on a specified date.

Task Force on Residential Mortgage Foreclosure Cases

This tremendous increase in mortgage foreclosure filings caused and continues to cause a strain on the courts. The Florida Supreme Court Task Force on Residential Mortgage Foreclosure Cases was formed in March 2009 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.”¹⁹ The Florida Supreme Court charged the task force with including in its recommendations to the Court alternative dispute resolution strategies, case management techniques, and approaches to providing pro bono or low-cost legal assistance to homeowners. The Court also directed the task force to examine existing court rules and propose any changes to the rules that would “facilitate early, equitable resolution of residential mortgage foreclosure cases.”²⁰

The recommendations were released on August 17, 2009. Noting the limited resources available, the task force recommended a uniform, statewide managed mediation program that is implemented through a model administrative order issued by the chief judge of each circuit. It will require that every foreclosure case that involves residential homestead property be referred

¹³ 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).

¹⁴ Section 702.10(1), F.S.

¹⁵ *Id.*

¹⁶ Section 702.10(1)(d), F.S.

¹⁷ Section 56.021, F.S.

¹⁸ BLACK’S LAW DICTIONARY (8th ed. 2004).

¹⁹ FLORIDA SUPREME COURT TASK FORCE ON RESIDENTIAL MORTGAGE FORECLOSURE CASES, INTERIM REPORT, May 8, 2009, 3.

²⁰ *Id.*

to mediation unless the plaintiff and borrower agree otherwise or unless a pre-suit mediation was conducted. Some of the features of the administrative order include referral of the borrower to foreclosure counseling prior to mediation, early exchange of borrower and lender information, and the ability of the plaintiff's representative to appear by telephone and borrowers will not be charged a fee. The task force also recommended processing the foreclosure cases by three distinct categories:

- Homestead properties that are referred to mediation and are likely to resolve through the managed mediation program;
- Vacant and abandoned properties that can move through the courts quickly through expedited foreclosure processes; and
- Other foreclosure cases, which may include tenant-occupied or non-borrower-occupied properties, in which the borrower has been unable to communicate with the plaintiff to resolve the case, and which may be referred to the managed mediation program at equal cost to both parties.²¹

The task force also recommended changes to the Rules of Civil Procedure along with the forms to use with the rules for those cases that will not be resolved through the mediation program.

Uniform Nonjudicial Foreclosure Act

In 2002, the National Conference of Commissioners on Uniform State Laws (NCCUSL) adopted the Uniform Nonjudicial Foreclosure Act. According to the NCCUSL, there are approximately 20 states that have no practical form of nonjudicial foreclosure. 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.

III. Effect of Proposed Changes:

General Provisions

This bill creates a new section of the Florida Statutes entitled the "Nonjudicial Foreclosure Act for Nonhomestead Properties" (the "Act"). The Act may be used, at the option of a foreclosing

²¹ FLORIDA SUPREME COURT TASK FORCE ON RESIDENTIAL MORTGAGE FORECLOSURE CASES, FINAL REPORT AND RECOMMENDATIONS, August 17, 2009, 8.

creditor, to effect a foreclosure of a security instrument, such as a mortgage, in any real or personal property other than a homestead.²² A foreclosure that is effected pursuant to the Act may be completed outside of the typical judicial arena. Generally, the Act authorizes the nonjudicial foreclosure of every form of security interest in nonhomestead real property located in the state, whether entered into before, on, or after July 1, 2010 if the notice of foreclosure is given on or after July 1, 2010. In order to effect a foreclosure of a security authorized by the Act the debtor must agree that the security interest may be foreclosed by the terms of the Act, as opposed to a standard judicial foreclosure proceeding. This agreement may be incorporated in the contract that created the original security interest or the parties may create a novation to the contract in which the debtor agrees to the Act's provisions in the event of a foreclosure.

Nonjudicial Foreclosure

The bill allows creditors a right to foreclose nonjudicially, this right manifests once all notices have been given and any applicable opportunity to cure has expired.²³ The time of foreclosure must be at least 90 days, but not more than one year after an original notice of foreclosure is recorded and at least 30 days after any subsequent notice of foreclosure. At this point, the secured creditor may proceed with the nonjudicial foreclosure process as outlined in the Act; the Act provides three methods for effecting a nonjudicial foreclosure: 1) by auction, 2) by negotiated sale, or 3) by appraisal.

Nonjudicial Foreclosure by Auction

Foreclosure by auction is a process by which the foreclosing creditor arranges a meeting of potential buyers who bid on the property being foreclosed on; the property is then sold to the highest bidder. Sections 702.2201-2213 of the Act provide the guidelines that a secured creditor must follow to effect a foreclosure by auction. After compliance with the notice requirements for nonjudicial foreclosure, a foreclosing creditor may begin a foreclosure by auction by advertising the auction through the specified publication procedures in the Act.²⁴ At least 21 days prior to the auction the foreclosing creditor must provide the debtor with a copy of the advertisement.

The auction must be conducted by a person designated by the foreclosing creditor in a county in which some or all of the real property collateral is located. At the auction the foreclosing creditor must make a copy of the evidence of title available upon request to any prospective bidders. Any person, including the debtor and the foreclosing creditor, may bid at the auction. Additionally, a fixed bid of a person who is not attending the auction may be submitted in writing but must be received at least 24 hours before the time of the auction.²⁵ After all bids are made the sale must be made to the person bidding the highest amount and who complies with all the requirements of

²² The definition of homestead property in s. 4, Art. X of the Florida Constitution applies to this bill, see lines 167-168 and 216-218 of the bill.

²³ See s. 702.211 of the Act and the "Notice of Nonjudicial Foreclosure" section below.

²⁴ Section 702.2203 specifies detailed criteria that must be met for the different manners of publication; for example, one method requires placing an advertisement in a newspaper of general circulation in each county in which any part of the real property collateral is located and running the advertisement at least once per week for three consecutive weeks.

²⁵ Any such bid must be accompanied by funds sufficient to cover the deposit on the property in the event that the bid is the winning bid.

the Act. Up until the announcement that the property is “sold” to the highest bidder the foreclosing creditor may elect to discontinue with the foreclosure.

Immediately after the close of the auction the winning bidder must pay a deposit to the person conducting the sale. The deposit must be equal to the required deposit amount that was advertised. Within seven days of the close of the auction the winning bidder must pay the remainder of the purchase price. If the remainder is not paid within seven days the foreclosing creditor may reschedule the auction and retain the deposit amount. If the full purchase price is paid within the seven day period the foreclosing creditor must record and deliver the deed to the winning bidder. Additionally, the foreclosing creditor must execute and record an affidavit that identifies the security instrument being foreclosed, identifies the debtor, describes the collateral property, identifies the persons who were notified of the foreclosure, states any persons who received special notice, and identifies the person acquiring title to the collateral property.

Nonjudicial Foreclosure by Negotiated Sale

Nonjudicial foreclosure by negotiated sale is a process by which the foreclosing creditor arranges for a prospective purchaser to contract and purchase the collateral property in foreclosure. Sections 702.231-236 of the Act provide the guidelines that a secured creditor must follow to effect a foreclosure by negotiated sale.

The foreclosing creditor may advertise the collateral property for sale to perspective purchasers by whatever methods the foreclosing creditors regard as appropriate. Once a prospective buyer is found, the foreclosing creditor may enter into a conditional contract of sale, however, the date of sale must be at least 30 days after the parties specified in s. 702.213 of the Act are given a notice of proposed sale. If any person who holds an interest in the collateral property objects, prior to seven days before the date of proposed sale, the foreclosing creditor must either: discontinue the foreclosure, give notice to objector that the objector’s interest in the collateral will be preserved from termination by the foreclosure, or discharge the interest in exchange for a sum that is acceptable to the objecting interest holder. Once the foreclosing creditor takes one of these prescribed actions, or once the time for objections has expired without objections being filed, the foreclosure by negotiated sale may be completed. Upon compliance by the purchaser with the contract for negotiated sale, the foreclosing creditor must execute and record an affidavit that identifies the security instrument being foreclosed, identifies the debtor, describes the collateral property, identifies the persons who were notified of the foreclosure, states any persons who received special notice, and identifies the person acquiring title to the collateral property. Upon completion of the recording the foreclosure by negotiated sale is complete and the buyer holds title to the collateral property.

Nonjudicial Foreclosure by Appraisal

Nonjudicial foreclosure by appraisal is a foreclosure process by which title to the foreclosed property passes from the debtor directly to the foreclosing creditor. Sections 702.242-245 of the Act provide the guidelines that a secured creditor must follow to effect a foreclosure by appraisal. The first step in this process is for the foreclosing creditor to obtain a written appraisal of the collateral real estate by an independent appraiser certified by the American Institute of Real Estate Appraisers. Once the value of the collateral real estate is established by the appraisal,

and once 30 days have passed after compliance with the notice requirements for nonjudicial foreclosure, a foreclosing creditor may begin a foreclosure by appraisal. The notice requirements in a foreclosure by appraisal must contain an explanation of the foreclosure amount, which is the amount that the foreclosing creditor intends to apply towards the secured obligation.²⁶

Once the appraisal and notice requirements have been completed, the foreclosing creditor must allow seven days to pass in which no objections to the foreclosure are filed by other interest holders. If an objection is filed by another interest holder in the collateral property within the seven day period, then the foreclosing creditor must either: discontinue the foreclosure, give notice to objector that the objector's interest in the collateral will be preserved from termination by the foreclosure, or discharge the interest in exchange for a sum that is acceptable to the objecting interest holder. However, if no objections are filed by other interest holders during this time, the foreclosing creditor must execute and record an affidavit that identifies the security instrument being foreclosed, identifies the debtor, describes the collateral property, identifies the persons who were notified of the foreclosure, states any persons who received special notice, and identifies the person acquiring title to the collateral property. Upon this recording the foreclosing creditor becomes the title holder to the collateral and the foreclosure by appraisal is complete.

Notice of Nonjudicial Foreclosure

Section 702.211(b) of the Act requires that in order to effect a nonjudicial foreclosure by any of the three previously mentioned methods the creditor must provide certain notices to the debtor. The required notice includes 1) a notice of default and right to cure, and 2) a notice of foreclosure.

A notice of default and right to cure must be given to each debtor and interest holder whose interest gives a right of possession on the real property collateral before a right to foreclose under the Act will manifest. Unless agreed to otherwise by the parties, a right to cure must provide the debtor with 30 days to cure the default by paying the amount in default to the creditor.²⁷

Once the period to cure has expired a creditor may issue a notice of foreclosure. A notice of foreclosure must be recorded in the public records of each county in which the real property collateral is located. Within five days after such recording the secured creditor must give a notice of foreclosure to the following persons:

- A person that the secured creditor knows to be a debtor,
- A person specified by the debtor in the security instrument to receive notice on the debtor's behalf,
- A person that is shown by the public records of a county in which any part of the real property collateral is located to be an interest holder in the collateral,
- A person who is entitled to notice with respect to the disposition of the personal property collateral under the secured transactions section of the Florida Uniform Commercial Code

²⁶ The foreclosure amount is calculated as the net value of the collateral after taking into account the appraised value of the collateral minus the expenses of foreclosure.

²⁷ Section 702.212(6)(b) of the Act on lines 613-615 provides that the parties may agree to shorten this 30 day period, however, the parties may not agree to any period less than 10 days.

section of the Florida Statutes,²⁸ if the secured creditor holds and intends to foreclose on a security interest in personal property,

- A person who the foreclosing creditor knows is an interest holder in the real property collateral,
- A person that has recorded in the public records, of a county in which any part of the real property collateral is located, a request for notice of foreclosure.²⁹

A notice of foreclosure must provide the debtor with the contact information of an individual who is either the foreclosing creditor or a representative of the foreclosing creditor. The notice must also contain a statement of the procedures of foreclosure and the rights of the debtor. In some circumstances the notice must also include instructions on the process of objecting to the foreclosure; such an objection requires a meeting between the debtor and the secured creditor.³⁰

Homestead Property

The Act provides that nonjudicial foreclosure may not be used when the property being foreclosed is homestead property. In the definitions section of the Act “Homestead Property” is defined as property that is exempted from forced sale under process of court pursuant to the State Constitution.³¹ However, s. 702.209 of the Act extends the application to abandoned mortgaged homestead property. Abandoned homestead property includes property that the homeowner:

- Affirmatively represents in writing that the homeowner’s intent is to abandon,
- Affirmatively acts in a manner that manifests the intent to surrender the property owner’s interest in the property to the secured creditor,
- Establishes a homestead in a property other than the property subject to the secured creditor’s security interest,
- Enters into a contract to lease the secured property for a period of more than one year,
- Leaves the secured property vacant for a period of more than three months and does not provide for the maintenance or physical security of the property during that time, and
- Fails to pay ad valorem taxes and maintain property insurance on the property for a period of 1 year.

The Act provides that a determination of whether a homestead property has been abandoned may be made by a judicial determination pursuant to the provisions in s. 702.218 of the Act on lines 863-872.³²

Meeting to Object to Foreclosure

Section 702.216 of the Act provides that a residential debtor may request a meeting to object to a foreclosure. The Act is unclear as to whether such meetings must be requested within 15 or 30

²⁸ Florida has adopted a version of the Uniform Commercial Code; the secured transactions portion of that statute is found in ch. 679, F.S.

²⁹ The guidelines for recording such a request are found in s. 702.215 of the Act on lines 759-799.

³⁰ See “Meeting to Object to Foreclosure” below.

³¹ See s. 702.201(9) of the Act on lines 216-218.

³² See “Judicial Supervision of Foreclosure” section below.

days after a notice of foreclosure has been delivered to the debtor.³³ If a debtor or interest holder requests a meeting within the prescribed time period, the secured creditor or a representative of the secured creditor must attend a meeting with the person making the request; however, if there are more than one such requests then the secured creditor may consolidate to one meeting with all of the requestors. All parties to such meetings may be represented by counsel, however, the meetings are informal and the rules of evidence do not apply. Additionally, any statement made at such meetings may not be introduced as evidence in a later judicial proceeding. Once a meeting to object to foreclosure has concluded the secured creditor must notify all persons who requested the meeting as to the secured creditor's decision to continue with or forgo the foreclosure.

Judicial Supervision of Foreclosure

This bill creates s. 702.218, F.S., which provides that an aggrieved person may, prior to the time of foreclosure, commence a court proceeding for any violation of the Act or of any other law or principle of equity related to the conduct of the foreclosure. Such actions may also be commenced in order to procure a judicial determination as to whether any property claimed by the debtor as homestead property has been abandoned.

Application of Proceeds of Foreclosure

This bill creates s. 702.251, F.S., which specifies the order in which the proceeds from a foreclosure under the Act, and any investment earnings on the proceeds, shall be applied. Such proceeds are applied under the Act in the following order: 1) to pay or reimburse the expenses of foreclosure in the case of a foreclosure by auction; 2) to pay the obligation secured by the foreclosed security instrument; 3) to pay, in the order of priority, the amounts of all liens and other interests of record terminated by the foreclosure; and 4) to the interest holder who owned the collateral at the time of foreclosure.

Deficiency Judgments

This bill creates s. 702.255 F.S., which provides that, generally, a foreclosure under the Act would not leave a residential debtor liable to the foreclosing creditor for any deficiency that results from the sale of the collateral for an amount less than the value of the debt. The bill specifies that the residential debtor may still be liable for such deficiency amounts if the debtor has not acted in good faith. For the purposes of this section, the bill provides that a residential debtor has acted in good faith if the debtor:

- Peaceably vacated the collateral in a timely manner,
- Did not commit significant affirmative waste to the collateral,
- Did not significantly contaminate the collateral with hazardous materials,
- Did not commit fraud against the foreclosing creditor,
- Did not engage in criminal activity on the secured collateral,
- Did not permit significant uncured damage to be done to the collateral by another party, and
- Did not prevent reasonable access to the collateral for inspection by the foreclosing creditor and perspective purchasers.

³³ See Technical Deficiencies section below.

This bill has an effective date of July 1, 2010.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The State Constitution provides that the circuit courts shall have jurisdiction over matters of equity.³⁴ Present statutory law, which is not amended by this legislation, provides that all mortgages shall be foreclosed in equity.³⁵ Thus, without amending existing statute, this bill would likely violate the State Constitution by permitting mortgages to be foreclosed outside of a circuit court.

The notice provisions of this legislation may be insufficient. The bill appears to allow a nonjudicial foreclosure to proceed even if the mortgagor (homeowner) has not received proper notice. The notice required by due process of law is reasonable notice under that is reasonably calculated to apprise the interested parties of the pendency of the action and to afford them an opportunity to present their objections.³⁶

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

This bill could have a 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

³⁴ Art. V, s. 20(3), State Const.

³⁵ Section 702.01, F.S.

³⁶ See, e.g., *Vosilla v. Rosado*, 944 So.2d 289 (Fla. 2006) (holding that reasonableness depends on the “practicalities and peculiarities” of each case). This case appears to impose a higher standard for reasonable calculation based on the uniqueness of each case – in many cases merely mailing a letter to the address, as this bill seems to permit, is unlikely to satisfy the notice requirements.

under this bill will realize smaller losses from uncollected interest as this process could be quicker than judicial foreclosure.

Auction sales of real property commonly have a sale price less than fair market value.³⁷ The options created by this bill (foreclosure by negotiated sale, foreclosure by appraisal) are expected to lead to higher sale prices. Higher foreclosure returns to creditors do not benefit only the foreclosing creditor; they may 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).

There may be considerable litigation costs to effect the process as envisioned by this bill because of numerous existing questions regarding various provisions. Opponents of this legislation have stated it may take two to three years for courts to decide on these questions. During this time, the litigation would paralyze the residential real estate market, title to all of the properties would be in doubt, and property would uninsurable until the ownership is resolved.

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.

C. Government Sector Impact:

This bill is likely to have significant negative fiscal impact on the state government.³⁸ For FY 2009-2010, the entire judicial budget was \$451 million. Based on this budget, the negative impact appears to represent approximately 25% of the judicial budget.³⁹

Article V (Judiciary)	FY 2010-11 (Cash)	FY 2010-11 (Annualized)	FY 2011-12 (Cash)	FY 2012-13 (Cash)	FY 2013-14 (Cash)
General Revenue	(8.0)	(8.7)	(6.0)	(4.1)	(3.0)
Gen. Rev. Service Charge	(8.4)	(9.2)	(6.4)	(4.5)	(3.3)
State Courts Trust Fund	(97.1)	(105.9)	(73.9)	(51.3)	(37.5)
Documentary Stamp Tax	indeterminate	indeterminate	indeterminate	indeterminate	indeterminate
Total	(113.5)	(123.8)	(86.3)	(59.9)	(43.8)

³⁷ One estimate indicates that foreclosed houses sell at a discount of 32%. John Y. Campbell, et. al., FORCED SALES AND HOUSE PRICES, Nov. 2008. Available at: http://www.richmondfed.org/conferences_and_events/research/2008/pdf/forced_sales_and_house_prices.pdf

³⁸ Revenue Estimating Conference, April 5, 2010.

³⁹ In the event of a budget shortfall for the judicial branch, the Chief Justice is charged with “implement[ing] all necessary reductions.” Art. IV, Sec. 13, State. Const.

VI. Technical Deficiencies:

Lines 749-750 provide that a notice of foreclosure must include a provision that informs debtors and interest holders that any request for a meeting to object to foreclosure must be made within 15 days of the delivery of a notice of foreclosure. This is inconsistent with the provision on line 803 which requires such requests to be filed within 30 days of delivery of a notice of foreclosure.

Lines 1328-1392 provide that “A foreclosing creditor may complete the foreclosure as provided in subsection (2) and ss. 702.244 and 702.245...” this provision is redundant since this provision is found in subsection (1) of s. 702.244. The language would be more clearly stated as: “A foreclosing creditor may complete the foreclosure as provided in subsection (2) and s. 702.245...” or “A foreclosing creditor may complete the foreclosure as provided in subsection (2) of s. 702.244 and s. 702.245[.]”

Line 1331 in s. 702.224 of the Act is entitled “Completion of foreclosure by appraisal” however, line 1331 relates to “foreclosure by negotiated sale.” It is unclear as to whether this was intended to be included in the negotiated sale provisions found in ss. 702.231-236 of the Act, or if this was intended to read “foreclosure by appraisal.” In either scenario, the language in this section of the bill contains an error.

VII. Related Issues:

Many existing mortgage documents specify that mortgages in Florida will be judicially foreclosed or do not provide for nonjudicial foreclosure as an option. Thus, unless the parties agree to a novation,⁴⁰ the nonjudicial foreclosure process envisioned by this bill may be unavailable on many properties in the state. Any legislation that impairs the existing contracts to provide for a nonjudicial foreclosure option without a novation would likely run afoul of the Contracts Clauses of both the State and Federal Constitutions.⁴¹ Therefore, the nonjudicial foreclosure process may not be able to be used on many existing mortgages.

This bill provides that a residential debtor may request a meeting to object to a foreclosure. The bill provides that a statement made at this meeting may not be introduced as evidence in a judicial proceeding. This appears to be an amendment by implication of the Florida Rules of Evidence, which would generally permit the admittance of hearsay evidence as admissions by party opponents. However, there is a strong public policy interest in increasing the number of parties that are able to reach an agreement outside of the judicial arena; one way to encourage this is to promote open and honest dialog between the parties in meetings between the parties. This interest may serve as justification to prohibiting the introduction into evidence of statements made during the meetings discussed in lines 823-846. Additionally, because the bill states that the rules of evidence do not apply during these meetings it would be improper for certain statements to be lifted from these meetings and introduced in a court, where the rules of evidence do apply.

⁴⁰ The act of substituting for an old obligation a new one that either replaces an existing obligation with a new obligation or replaces an original party with a new party. BLACK’S LAW DICTIONARY (8th ed. 2004).

⁴¹ See Art. I, s. 10, State Const.; Art. I, sec. 10, U.S. Const.

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.
