

IN THE FLORIDA SUPREME COURT

**Case No. SC17-954
DCA No. 2D15-5198**

**THE BANK OF NEW YORK MELLON FKA
THE BANK OF NEW YORK AS SUCCESSOR
TRUSTEE TO JP MORGAN CHASE BANK N.A.
AS TRUSTEE ON 10N BEHALF OF THE CERTIFICATE-
HOLDERS OF THE CWHEQ INC. CWHEQ
REVOLVING HOME EQUITY
LOAN TRUST SERIES 2006-D
*Petitioner***

v.

**DIANNE D. GLENVILLE A/K/A DIANE
D. GLENVILLE A/K/A DIANE GLENVILLE
and MARK S. GLENVILLE,
*Respondent***

*On Discretionary Review from the
Second District Court of Appeal – L.T. Case No. 2D15-5198*

APPENDIX TO ANSWER BRIEF OF RESPONDENT

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been efiled with the e-portal for the Second District Court of Appeal and that true and correct copies of the foregoing were sent by eservice on October 30, 2017, to the parties listed below:

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Respectfully submitted,

/s/ Sheryl A. Edwards

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APPENDIX 1

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

THE BANK OF NEW YORK MELLON
FKA THE BANK OF NEW YORK, as
successor trustee to JPMorgan Chase
Bank, N.A., as trustee on behalf of the
Certificateholders of the CWHEQ, Inc.,
CWHEQ Revolving Home Equity Loan
Trust, Series 2006-D,

Appellant,

v.

DIANNE D. GLENVILLE A/K/A DIANE
D. GLENVILLE A/K/A DIANE
GLENVILLE and MARK S. GLENVILLE,

Appellees.

Case No. 2D15-5198

Opinion filed January 20, 2017.

Appeal from the Circuit Court for Manatee
County; John F. Lakin, Judge.

Anthony R. Smith and Kendra J. Taylor
of Sirote & Permutt, P.C., Winter Park;
and Shaun K. Ramey and Matthew R.
Feluren of Sirote & Permutt, P.C.,
Fort Lauderdale, for Appellant.

Sheryl A. Edwards of The Edwards Law
Firm, PL, Sarasota, for Appellees.

SLEET, Judge.

The Bank of New York Mellon appeals the trial court's order denying its claim for surplus funds from a foreclosure sale.¹ Because the bank's claim was untimely, we affirm.

Under section 45.031(7)(b), Florida Statutes (2015), any person claiming a right to surplus funds must file a claim with the clerk of court within sixty days of the foreclosure sale. The record reflects that the underlying property was sold at public auction on July 2, 2015, and that the bank filed its claim for surplus funds as a subordinate lienholder on September 2, 2015, sixty-two days after the date the property was sold. The trial court denied the bank's claim as untimely filed. On appeal, the bank argues that a foreclosure sale is not complete until the clerk issues the certificate of sale. Because the certificate of sale in this case was issued on July 6, 2015, the bank claims that it had until September 4, 2015, to file a claim and that therefore its September 2, 2015, filing was timely. We disagree.

"The interpretation of a statute is a question of law, and it is therefore subject to a de novo review." Mathews v. Branch Banking & Tr. Co., 139 So. 3d 498, 500 (Fla. 2d DCA 2014) (citing W. Fla. Reg'l Med. Ctr., Inc. v. See, 79 So. 3d 1, 8 (Fla. 2012)). "[W]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious

¹Diane and Mark Glenville were the property owners and defendants in the foreclosure action. They are entitled to the surplus funds remaining with the clerk more than sixty days after the foreclosure sale pursuant to section 45.031(7)(b), Florida Statutes (2015).

meaning." Gulf Atl. Office Props., Inc. v. Dep't of Revenue, 133 So. 3d 537, 539 (Fla. 2d DCA 2014) (quoting Hess v. Walton, 898 So. 2d 1046, 1049 (Fla. 2d DCA 2005)).

This court has previously explained that "the language in section 45.031(7)(b) is clear and unambiguous: any person claiming a right to the surplus funds must file a claim with the clerk no later than sixty days after the sale." Dever v. Wells Fargo Bank Nat'l Ass'n, 147 So. 3d 1045, 1047 (Fla. 2d DCA 2014); see also Mathews, 139 So. 3d at 500 ("The language of section 45.031(7)(b) is clear and unambiguous in requiring that any person claiming a right to the surplus funds 'MUST FILE A CLAIM WITH THE CLERK NO LATER THAN 60 DAYS AFTER THE SALE.' " (emphasis omitted)). This subsection only refers to the "sale," not the "certificate of sale." § 45.031(7)(b). This is significant because section 45.031 assigns particular and distinct meanings to the terms "sale" and "certificate of sale" and does not use them interchangeably. See § 45.031(4) ("After a sale of the property the clerk shall promptly file a certificate of sale and serve a copy of it on each party" (emphasis added)); .031(5) ("If no objections to the sale are filed within [ten] days after filing the certificate of sale, the clerk shall file a certificate of title and serve a copy of it on each party." (emphasis added)). Reading subsection (7)(b) to require a claim for surplus funds to be filed within sixty days of the certificate of sale—instead of the actual sale itself—would render subsection (4) meaningless and would confuse the meaning of other subsections of the statute.

Additionally, such a reading would be inconsistent with this court's prior case law interpreting section 45.031(7)(b). In Mathews, this court explained that the bank "was required to file a claim with the clerk within sixty days after the sale of the

property to preserve any claim it may have had to the surplus funds." 139 So. 3d at 500 (emphasis added). Similarly, in Dever, this court used the date the property was sold at auction, not the date the certificate of sale was issued, as the start date for the sixty-day period. 147 So. 3d at 1047. Although using either date would not have changed the fact that the banks' claims were untimely, in both cases this court interpreted the language of the statute to refer to the date of the actual sale, not the issuance of the certificate of sale. See Mathews, 139 So. 3d at 499-500; Dever, 147 So. 3d at 1047.

Accordingly, the bank filed its claim outside the statutory window, and we must affirm the trial court's order denying the claim. In so doing, we note that the two cases on which the bank relies on appeal—In re Jaar, 186 B.R. 148, 154 (Bankr. M.D. Fla. 1995), and Shlishey the Best, Inc. v. CitiFinancial Equity Services, Inc., 14 So. 3d 1271, 1275 (Fla. 2d DCA 2009)—are inapplicable here because they both concern a mortgagor's right of redemption, which is governed by section 45.0315, not section 45.031.

Affirmed.

LaROSE and BADALAMENTI, JJ., Concur.

APPENDIX 2

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

THE BANK OF NEW YORK MELLON,
f/k/a THE BANK OF NEW YORK, as
successor trustee to JPMorgan Chase
Bank, N.A., as trustee on behalf of the
Certificateholders of the CWHEQ, Inc.,
CWHEQ Revolving Home Equity Loan
Trust, Series 2006-D,

Appellant,

v.

DIANNE D. GLENVILLE, a/k/a DIANE D.
GLENVILLE, a/k/a DIANE GLENVILLE;
and MARK S. GLENVILLE,

Appellees.

Case No. 2D15-5198

Opinion filed April 26, 2017.

Appeal from the Circuit Court for
Manatee County; John F. Lakin, Judge

Anthony R. Smith and Kendra J.
Taylor of Sirote & Permutt, P.C.,
Winter Park; and Shaun K. Ramey and
Matthew R. Feluren of Sirote &
Permutt, P.C., Fort Lauderdale, for
Appellant.

Sheryl A. Edwards of The Edwards
Law Firm, PL, Sarasota, for Appellees.

SLEET, Judge.

The Bank of New York Mellon appeals the trial court's order denying its claim for surplus funds from a foreclosure sale.¹ Because the bank's claim was untimely, we affirm.

Under section 45.031(7)(b), Florida Statutes (2015), any person claiming a right to surplus funds must file a claim with the clerk of court within sixty days of the foreclosure sale. The record reflects that the underlying property was sold at public auction on July 2, 2015, and that the bank filed its claim for surplus funds as a subordinate lienholder on September 2, 2015, sixty-two days after the date the property was sold. The trial court denied the bank's claim as untimely filed. On appeal, the bank argues that a foreclosure sale is not complete until the clerk issues the certificate of sale. Because the certificate of sale in this case was issued on July 6, 2015, the bank claims that it had until September 4, 2015, to file a claim and that therefore its September 2, 2015, filing was timely. We disagree.

"The interpretation of a statute is a question of law, and it is therefore subject to a de novo review." Mathews v. Branch Banking & Tr. Co., 139 So. 3d 498, 500 (Fla. 2d DCA 2014) (citing W. Fla. Reg'l Med. Ctr., Inc. v. See, 79 So. 3d 1, 8 (Fla. 2012)). "[W]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious

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meaning." Gulf Atl. Office Props., Inc. v. Dep't of Revenue, 133 So. 3d 537, 539 (Fla. 2d DCA 2014) (quoting Hess v. Walton, 898 So. 2d 1046, 1049 (Fla. 2d DCA 2005)).

This court has previously explained that "the language in section 45.031(7)(b) is clear and unambiguous: any person claiming a right to the surplus funds must file a claim with the clerk no later than sixty days after the sale." Dever v. Wells Fargo Bank Nat'l Ass'n, 147 So. 3d 1045, 1047 (Fla. 2d DCA 2014); see also Mathews, 139 So. 3d at 500 ("The language of section 45.031(7)(b) is clear and unambiguous in requiring that any person claiming a right to the surplus funds 'MUST FILE A CLAIM WITH THE CLERK NO LATER THAN 60 DAYS AFTER THE SALE.' " (emphasis omitted)). This subsection only refers to the "sale," not the "certificate of sale." § 45.031(7)(b). This is significant because section 45.031 assigns particular and distinct meanings to the terms "sale" and "certificate of sale" and does not use them interchangeably. See § 45.031(4) ("After a sale of the property the clerk shall promptly file a certificate of sale and serve a copy of it on each party" (emphasis added)); .031(5) ("If no objections to the sale are filed within 10 days after filing the certificate of sale, the clerk shall file a certificate of title and serve a copy of it on each party." (emphasis added)). Reading subsection (7)(b) to require a claim for surplus funds to be filed within sixty days of the certificate of sale—instead of the actual sale itself—would render subsection (4) meaningless and would confuse the meaning of other subsections of the statute.

Additionally, such a reading would be inconsistent with this court's prior case law interpreting section 45.031(7)(b). In Mathews, this court explained that the bank "was required to file a claim with the clerk within sixty days after the sale of the

property to preserve any claim it may have had to the surplus funds." 139 So. 3d at 500 (emphasis added). Similarly, in Dever, this court used the date the property was sold at auction, not the date the certificate of sale was issued, as the start date for the sixty-day period. 147 So. 3d at 1047. Although using either date would not have changed the fact that the banks' claims were untimely, in both cases this court interpreted the language of the statute to refer to the date of the actual sale, not the issuance of the certificate of sale. See Mathews, 139 So. 3d at 499-500; Dever, 147 So. 3d at 1047.

For the first time on rehearing, the bank argues that the date of the sale should be calculated from the date of the issuance of the certificate of title. In support, it cites Straub v. Wells Fargo Bank, N.A., 182 So. 3d 878, 881 (Fla. 4th DCA 2016), which was published prior to the filing of the bank's initial brief. In Straub, the Fourth District held that "[u]nder section 45.01(1)(a), (2)(f), and (7)(b), a foreclosure 'sale' takes place when ownership of the property is transferred upon filing of the certificate of title." The bank waived this argument by failing to raise it in its appellate briefs. See Fla. R. App. P. 9.330(a) (stating that a motion for rehearing shall not include "issues not previously raised in the proceeding"); see also Teitelbaum, v. S. Fla. Water Mgmt. Dist., 176 So. 3d 998, 1005 n.3 (Fla. 3d DCA 2015) (holding that an argument raised for the first time in a motion for rehearing was waived), review denied, SC15-1994 (Fla. Mar. 16, 2016); Tillery v. Fla. Dep't of Juvenile Justice, 104 So. 3d 1253, 1255 (Fla. 1st DCA 2013) ("[A]n argument not raised in an initial brief is waived."); Philip Morris USA, Inc. v. Naugle, 103 So. 3d 944, 949 (Fla. 4th DCA 2012) ("It is a rather fundamental principle of appellate practice and procedure that matters not argued in the briefs may not be

raised for the first time on a motion for rehearing." (quoting Ayer v. Bush, 775 So. 2d 368, 370 (Fla. 4th DCA 2000))).

However, we recognize that our holding in this opinion conflicts with the Fourth District's holding in Straub. Therefore we must certify conflict. And we note that construing the term "sale" to refer to the issuance of the certificate of title confuses the meaning of several subsections of section 45.031. See, e.g., § 45.031(1)(a) (requiring the trial court to "direct the clerk to sell the property at a public sale" and stating that "[a] sale may be held more than 35 days after the date of final judgment"); .031(2) (requiring publication of a "[n]otice of sale" that "shall contain . . . [t]he time and place of sale"); .031(3) (stating that "[t]he sale shall be conducted at public auction" and requiring the highest bidder to post a deposit "[a]t the time of the sale"); .031(5) (requiring the clerk to file a certificate of title "[i]f no objections to the sale are filed within 10 days after filing the certificate of sale"); .031(6) ("When the certificate of title is filed the sale shall stand confirmed." (emphasis added)).

Because the bank filed its claim outside the statutory window, we must affirm the trial court's order denying the claim. In so doing, we note that the two cases on which the bank relies on appeal—In re Jaar, 186 B.R. 148, 154 (Bankr. M.D. Fla. 1995), and Shlishey the Best, Inc. v. CitiFinancial Equity Services, Inc., 14 So. 3d 1271, 1275 (Fla. 2d DCA 2009)—are inapplicable here because they both concern a mortgagor's right of redemption, which is governed by section 45.0315, not section 45.031.

Affirmed, conflict certified.

LaROSE and BADALAMENTI, JJ., Concur.

APPENDIX 3

House Bill No. 65

An act relating to foreclosure proceedings; amending s. 45.031, F.S.; revising procedures and requirements for judicial sales; creating s. 45.032, F.S.; providing for disbursement of surplus funds after a judicial sale; providing definitions; establishing a rebuttable presumption of entitlement to surplus funds in certain filings; providing legislative intent; providing requirements and procedures for disbursement of surplus funds by the clerk of court; providing for appointment of a surplus trustee under certain circumstances; providing for notice of appointment; providing for termination of appointment; providing for treatment of surplus funds as unclaimed property under certain circumstances; providing construction relating to title of property in a foreclosure sale; creating s. 45.033, F.S.; providing for a sale or assignment of rights to surplus funds in a property subject to foreclosure; establishing a rebuttable presumption of entitlement to surplus funds; providing requirements for proof; providing legislative intent; providing requirements for rebutting the presumption; providing requirements for transfers or assignments of surplus funds; providing duties and authority of a court in payment of surplus funds under a transfer or assignment; providing for non-application to certain instruments; specifying absence of effect on title or marketability of certain property or validity of certain liens; creating s. 45.034, F.S.; providing qualifications for appointment as a surplus trustee by the Department of Financial Services; providing requirements for appointment as a surplus trustee; providing for application and renewal fees; providing duties of the department in certifying surplus trustees; requiring the department to establish a rotation system for assignment of cases to surplus trustees; providing duties of a surplus trustee; providing entitlement of a surplus trustee to certain service charges and fees; creating s. 45.035, F.S.; specifying service charges for clerks of court for administering judicial sales and surplus funds; creating s. 501.2078, F.S.; providing definitions; providing a civil penalty for knowingly using unfair or deceptive homeowner victimization methods, acts, or practices in residential foreclosure proceedings; specifying higher priority of an order of restitution or reimbursement over imposition of a civil penalty; providing for deposit of civil penalties into the Legal Affairs Revolving Trust Fund of the Department of Legal Affairs; allocating such funds for certain purposes; specifying nonapplication to certain encumbrances, deeds, or actions; amending s. 702.035, F.S.; specifying different newspaper legal notice and process requirements for counties above a certain population size; limiting certain costs chargeable in a foreclosure proceeding; amending s. 201.02, F.S.; correcting a cross-reference; providing effective dates.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 45.031, Florida Statutes, is amended to read:

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45.031 Judicial sales procedure.—In any sale of real or personal property under an order or judgment, the procedures provided in ss. 45.031-45.035 ~~following procedure~~ may be followed as an alternative to any other sale procedure if so ordered by the court.:

(1) FINAL JUDGMENT SALE BY CLERK.—

(a) In the order or final judgment, the court shall direct the clerk to sell the property at public sale on a specified day that shall be not less than 20 days or more than 35 days after the date thereof, on terms and conditions specified in the order or judgment. A sale may be held more than 35 days after the date of final judgment or order if the plaintiff or plaintiff's attorney consents to such time. The final judgment shall contain the following statement in conspicuous type:

IF THIS PROPERTY IS SOLD AT PUBLIC AUCTION, THERE MAY BE ADDITIONAL MONEY FROM THE SALE AFTER PAYMENT OF PERSONS WHO ARE ENTITLED TO BE PAID FROM THE SALE PROCEEDS PURSUANT TO THIS FINAL JUDGMENT.

IF YOU ARE A SUBORDINATE LIENHOLDER CLAIMING A RIGHT TO FUNDS REMAINING AFTER THE SALE, YOU MUST FILE A CLAIM WITH THE CLERK NO LATER THAN 60 DAYS AFTER THE SALE. IF YOU FAIL TO FILE A CLAIM, YOU WILL NOT BE ENTITLED TO ANY REMAINING FUNDS.

(b) If the property being foreclosed on has qualified for the homestead tax exemption in the most recent approved tax roll, the final judgment shall additionally contain the following statement in conspicuous type:

IF YOU ARE THE PROPERTY OWNER, YOU MAY CLAIM THESE FUNDS YOURSELF. YOU ARE NOT REQUIRED TO HAVE A LAWYER OR ANY OTHER REPRESENTATION AND YOU DO NOT HAVE TO ASSIGN YOUR RIGHTS TO ANYONE ELSE IN ORDER FOR YOU TO CLAIM ANY MONEY TO WHICH YOU ARE ENTITLED. PLEASE CHECK WITH THE CLERK OF THE COURT, [INSERT INFORMATION FOR APPLICABLE COURT] WITHIN TEN (10) DAYS AFTER THE SALE TO SEE IF THERE IS ADDITIONAL MONEY FROM THE FORECLOSURE SALE THAT THE CLERK HAS IN THE REGISTRY OF THE COURT.

IF YOU DECIDE TO SELL YOUR HOME OR HIRE SOMEONE TO HELP YOU CLAIM THE ADDITIONAL MONEY, YOU SHOULD READ VERY CAREFULLY ALL PAPERS YOU ARE REQUIRED TO SIGN, ASK SOMEONE ELSE, PREFERABLY AN ATTORNEY WHO IS NOT RELATED TO THE PERSON OFFERING TO HELP YOU, TO MAKE SURE THAT YOU UNDERSTAND WHAT YOU ARE SIGNING AND THAT YOU ARE NOT TRANSFERRING YOUR PROPERTY OR THE EQUITY IN YOUR PROPERTY WITHOUT THE PROPER INFORMATION. IF YOU CANNOT AFFORD TO PAY AN ATTORNEY, YOU MAY CONTACT (INSERT LOCAL

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OR NEAREST LEGAL AID OFFICE AND TELEPHONE PHONE NUMBER) TO SEE IF YOU QUALIFY FINANCIALLY FOR THEIR SERVICES. IF THEY CANNOT ASSIST YOU, THEY MAY BE ABLE TO REFER YOU TO A LOCAL BAR REFERRAL AGENCY OR SUGGEST OTHER OPTIONS. IF YOU CHOOSE TO CONTACT (NAME OF LOCAL OR NEAREST LEGAL AID OFFICE) FOR ASSISTANCE, YOU SHOULD DO SO AS SOON AS POSSIBLE AFTER RECEIPT OF THIS NOTICE.

(c) A copy of the final judgment shall be furnished by the clerk by first class mail to the last known address of every party to the action or to the attorney of record for such party. Any irregularity in such mailing, including the failure to include this statement in any final judgment or order, shall not affect the validity or finality of the final judgment or order or any sale held pursuant to the final judgment or order. Any sale held more than 35 days after the final judgment or order shall not affect the validity or finality of the final judgment or order or any sale held pursuant to such judgment or order thereto.

(2) PUBLICATION OF SALE.—Notice of sale shall be published once a week for 2 consecutive weeks in a newspaper of general circulation, as defined in chapter 50, published in the county where the sale is to be held. The second publication shall be at least 5 days before the sale. The notice shall contain:

- (a) A description of the property to be sold.
- (b) The time and place of sale.
- (c) A statement that the sale will be made pursuant to the order or final judgment.
- (d) The caption of the action.
- (e) The name of the clerk making the sale.
- (f) A statement that any person claiming an interest in the surplus from the sale, if any, other than the property owner as of the date of the lis pendens must file a claim within 60 days after the sale.

~~The clerk shall receive a service charge of up to \$60 for services in making, recording, and certifying the sale and title that shall be assessed as costs. The court, in its discretion, may enlarge the time of the sale. Notice of the changed time of sale shall be published as provided herein.~~

(3)(2) CONDUCT OF SALE; DEPOSIT REQUIRED.—The sale shall be conducted at public auction at the time and place set forth in the final judgment. The clerk shall receive the service charge imposed in s. 45.035 for services in making, recording, and certifying the sale and title that shall be assessed as costs. At the time of the sale, the successful high bidder shall post with the clerk a deposit equal to 5 percent of the final bid. The deposit shall be applied to the sale price at the time of payment. If final payment is not made within the prescribed period, the clerk shall readvertise the sale

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as provided in this section and pay all costs of the sale from the deposit. Any remaining funds shall be applied toward the judgment.

~~(4)~~(3) **CERTIFICATION OF SALE.**—After a sale of the property the clerk shall promptly file a certificate of sale and serve a copy of it on each party ~~not in default~~ in substantially the following form:

(Caption of Action)

CERTIFICATE OF SALE

The undersigned clerk of the court certifies that notice of public sale of the property described in the order or final judgment was published in ..., a newspaper circulated in ... County, Florida, in the manner shown by the proof of publication attached, and on ..., ...(year)..., the property was offered for public sale to the highest and best bidder for cash. The highest and best bid received for the property in the amount of \$... was submitted by ..., to whom the property was sold. The proceeds of the sale are retained for distribution in accordance with the order or final judgment or law. WITNESS my hand and the seal of this court on ..., ...(year)....

...(Clerk)...

By ...(Deputy Clerk)...

~~(5)~~(4) **CERTIFICATE OF TITLE.**—If no objections to the sale are filed within 10 days after filing the certificate of sale, the clerk shall file a certificate of title and serve a copy of it on each party ~~not in default~~ in substantially the following form:

(Caption of Action)

CERTIFICATE OF TITLE

The undersigned clerk of the court certifies that he or she executed and filed a certificate of sale in this action on ..., ...(year)..., for the property described herein and that no objections to the sale have been filed within the time allowed for filing objections.

The following property in ... County, Florida:

(description)

was sold to.

WITNESS my hand and the seal of the court on ..., ...(year)....

...(Clerk)...

By ...(Deputy Clerk)...

~~(6)~~(5) **CONFIRMATION; RECORDING.**—When the certificate of title is filed the sale shall stand confirmed, and title to the property shall pass to

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the purchaser named in the certificate without the necessity of any further proceedings or instruments.

~~(6) RECORDING.~~—The certificate of title shall be recorded by the clerk.

(7) DISBURSEMENTS OF PROCEEDS.—

(a) On filing a certificate of title, the clerk shall disburse the proceeds of the sale in accordance with the order or final judgment and shall file a report of such disbursements and serve a copy of it on each party ~~not in default~~, and on the Department of Revenue if the department was named as a defendant in the action or if the Agency for Workforce Innovation or the former Department of Labor and Employment Security was named as a defendant while the Department of Revenue was providing unemployment tax collection services under contract with the Agency for Workforce Innovation through an interagency agreement pursuant to s. 443.1316.

(b) The certificate of disbursements shall be, in substantially the following form:

(Caption of Action)

CERTIFICATE OF DISBURSEMENTS

The undersigned clerk of the court certifies that he or she disbursed the proceeds received from the sale of the property as provided in the order or final judgment to the persons and in the amounts as follows:

Name	Amount
Total <u>disbursements</u> : \$	
<u>Surplus retained by clerk, if any</u> : \$	

IF YOU ARE A PERSON CLAIMING A RIGHT TO FUNDS REMAINING AFTER THE SALE, YOU MUST FILE A CLAIM WITH THE CLERK NO LATER THAN 60 DAYS AFTER THE SALE. IF YOU FAIL TO FILE A CLAIM, YOU WILL NOT BE ENTITLED TO ANY REMAINING FUNDS. AFTER 60 DAYS, ONLY THE OWNER OF RECORD AS OF THE DATE OF THE LIS PENDENS MAY CLAIM THE SURPLUS.

WITNESS my hand and the seal of the court on ..., ...(year)...

...(Clerk)...

By ...(Deputy Clerk)...

(c) If no objections to the report are served within 10 days after it is filed, the disbursements by the clerk shall stand approved as reported. If timely objections to the report are served, they shall be heard by the court. Service of objections to the report does not affect or cloud the title of the purchaser of the property in any manner.

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(d) If there are funds remaining after payment of all disbursements required by the final judgment of foreclosure and shown on the certificate of disbursements, the surplus shall be distributed as provided ss. 45.031-45.035.

(8) **VALUE OF PROPERTY.**—The amount of the bid for the property at the sale shall be conclusively presumed to be sufficient consideration for the sale. Any party may serve an objection to the amount of the bid within 10 days after the clerk files the certificate of sale. If timely objections to the bid are served, the objections shall be heard by the court. Service of objections to the amount of the bid does not affect or cloud the title of the purchaser in any manner. If the case is one in which a deficiency judgment may be sought and application is made for a deficiency, the amount bid at the sale may be considered by the court as one of the factors in determining a deficiency under the usual equitable principles.

(9) **EXECUTION SALES.**—This section shall not apply to property sold under executions.

Section 2. Section 45.032, Florida Statutes, is created to read:

45.032 Disbursement of surplus funds after judicial sale.—

(1) For purposes of ss. 45.031-45.035, the term:

(a) “Owner of record” means the person or persons who appear to be the owner of the property that is the subject of the foreclosure proceeding on the date of the filing of the lis pendens. In determining an owner of record, a person need not perform a title search and examination but may rely on the plaintiff’s allegation of ownership in the complaint when determining the owner of record.

(b) “Subordinate lienholder” means the holder of a subordinate lien shown on the face of the pleadings as an encumbrance on the property. The lien held by the party filing the foreclosure lawsuit is not a subordinate lien. A subordinate lienholder includes, but is not limited to, a subordinate mortgage, judgment, assessment lien, or construction lien. However, the holder of a subordinate lien shall not be deemed a subordinate lienholder if the holder was paid in full from the proceeds of the sale.

(c) “Surplus funds” or “surplus” means the funds remaining after payment of all disbursements required by the final judgment of foreclosure and shown on the certificate of disbursements.

(d) “Surplus trustee” means a person qualifying as a surplus trustee pursuant to s. 45.034.

(2) There is established a rebuttable legal presumption that the owner of record on the date of the filing of a lis pendens is the person entitled to surplus funds after payment of subordinate lienholders who have timely filed a claim. A person claiming a legal right to the surplus as an assignee of the rights of the owner of record must prove to the court that such person is entitled to the funds. At any hearing regarding such entitlement, the court

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shall consider the factors set forth in s. 45.033 in determining whether an assignment is sufficient to overcome the presumption. It is the intent of the Legislature to abrogate the common law rule that surplus proceeds in a foreclosure case are the property of the owner of the property on the date of the foreclosure sale.

(3) During the 60 days after the clerk issues a certificate of disbursements, the clerk shall hold the surplus pending a court order.

(a) If the owner of record claims the surplus during the 60-day period and there is no subordinate lienholder, the court shall order the clerk to deduct any applicable service charges from the surplus and pay the remainder to the owner of record. The clerk may establish a reasonable requirement that the owner of record prove his or her identity before receiving the disbursement. The clerk may assist an owner of record in making a claim. An owner of record may use the following form in making a claim:

(Caption of Action)

OWNER'S CLAIM FOR MORTGAGE FORECLOSURE SURPLUS

State of

County of

Under penalty of perjury, I (we) hereby certify that:

1. I was (we were) the owner of the following described real property in County, Florida, prior to the foreclosure sale and as of the date of the filing of the lis pendens:

(Legal description of real property)

2. I (we) do not owe any money on any mortgage on the property that was foreclosed other than the one that was paid off by the foreclosure.

3. I (we) do not owe any money that is the subject of an unpaid judgment, condominium lien, cooperative lien, or homeowners' association.

4. I am (we are) not currently in bankruptcy.

5. I (we) have not sold or assigned my (our) right to the mortgage surplus.

6. My (our) new address is:

7. If there is more than one owner entitled to the surplus, we have agreed that the surplus should be paid jointly, or to:, at the following address:

8. I (WE) UNDERSTAND THAT I (WE) AM (ARE) NOT REQUIRED TO HAVE A LAWYER OR ANY OTHER REPRESENTATION AND I (WE) DO NOT HAVE TO ASSIGN MY (OUR) RIGHTS TO ANYONE ELSE IN ORDER TO CLAIM ANY MONEY TO WHICH I (WE) MAY BE ENTITLED.

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9. I (WE) UNDERSTAND THAT THIS STATEMENT IS GIVEN UNDER OATH, AND IF ANY STATEMENTS ARE UNTRUE THAT I (WE) MAY BE PROSECUTED CRIMINALLY FOR PERJURY.

...(Signatures)...

Sworn to (or affirmed) and subscribed before me this day of, ... (year)...., by ... (name of person making statement)....

...(Signature of Notary Public - State of Florida)...

...(Print, Type, or Stamp Commissioned Name of Notary Public)...

Personally Known OR Produced Identification

Type of Identification Produced

(b) If any person other than the owner of record claims an interest in the proceeds during the 60-day period or if the owner of record files a claim for the surplus but acknowledges that one or more other persons may be entitled to part or all of the surplus, the court shall set an evidentiary hearing to determine entitlement to the surplus. At the evidentiary hearing, an equity assignee has the burden of proving that he or she is entitled to some or all of the surplus funds. The court may grant summary judgment to a subordinate lienholder prior to or at the evidentiary hearing. The court shall consider the factors in s. 45.033 when hearing a claim that any person other than a subordinate lienholder or the owner of record is entitled to the surplus funds.

(c) If no claim is filed during the 60-day period, the clerk shall appoint a surplus trustee from a list of qualified surplus trustees as authorized in s. 45.034. Upon such appointment, the clerk shall prepare a notice of appointment of surplus trustee and shall furnish a copy to the surplus trustee. The form of the notice may be as follows:

(Caption of Action)

NOTICE OF APPOINTMENT OF SURPLUS TRUSTEE

The undersigned clerk of the court certifies that he or she disbursed the proceeds received from the sale of the property as provided in the order or final judgment to the persons named in the certificate of disbursements, and that surplus funds of \$.... remain and are subject to disbursement to the owner of record. You have been appointed as surplus trustee for the purpose of finding the owner of record in order for the clerk to disburse the surplus, after deducting costs, to the owner of record.

WITNESS my hand and the seal of the court on, ... (year)....

...(clerk)...

By ... (Deputy Clerk)...

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(4) If the surplus trustee is unable to locate the owner of record entitled to the surplus within 1 year after appointment, the appointment shall terminate and the clerk shall notify the surplus trustee that his or her appointment was terminated. Thirty days after termination of the appointment of the surplus trustee, the clerk shall treat the remaining funds as unclaimed property to be deposited with the Chief Financial Officer pursuant to chapter 717.

(5) Proceedings regarding surplus funds in a foreclosure case do not in any manner affect or cloud the title of the purchaser at the foreclosure sale of the property.

Section 3. Section 45.033, Florida Statutes, is created to read:

45.033 Sale or assignment of rights to surplus funds in a property subject to foreclosure.—

(1) There is established a rebuttable presumption that the owner of record of real property on the date of the filing of a lis pendens is the person entitled to surplus funds after payment of subordinate lienholders who have timely filed a claim. A person claiming a legal right to the surplus as an assignee of the rights of the owner of record must prove entitlement to the surplus funds pursuant to this section. It is the intent of the Legislature to abrogate the common law rule that surplus proceeds in a foreclosure case are the property of the owner of the property on the date of the foreclosure sale.

(2) The presumption may be rebutted only by:

(a) The grantee or assignee of a voluntary transfer or assignment establishing a right to collect the surplus funds or any portion or percentage of the surplus funds by proving that the transfer or assignment qualifies as a voluntary transfer or assignment as provided in subsection (3); or

(b) The grantee or assignee proving that the grantee or assignee is a grantee or assignee by virtue of an involuntary transfer or assignment of the right to collect the surplus. An involuntary transfer or assignment may be as a result of inheritance or as a result of the appointment of a guardian.

(3) A voluntary transfer or assignment shall be a transfer or assignment qualified under this subsection, thereby entitling the transferee or assignee to the surplus funds or a portion or percentage of the surplus funds, if:

(a) The transfer or assignment is in writing and the instrument:

1. If executed prior to the foreclosure sale, includes a financial disclosure that specifies the assessed value of the property, a statement that the assessed value may be lower than the actual value of the property, the approximate amount of any debt encumbering the property, and the approximate amount of any equity in the property. If the instrument was executed after the foreclosure sale, the instrument must also specify the foreclosure sale price and the amount of the surplus.

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2. Includes a statement that the owner does not need an attorney or other representative to recover surplus funds in a foreclosure.

3. Specifies all forms of consideration paid for the rights to the property or the assignment of the rights to any surplus funds.

(b) The transfer or assignment is filed with the court on or before 60 days after the filing of the certificate of disbursements.

(c) There are funds available to pay the transfer or assignment after payment of timely filed claims of subordinate lienholders.

(d) The transferor or assignee is qualified as a surplus trustee, or could qualify as a surplus trustee, pursuant to s. 45.034.

(e) The total compensation paid or payable, or earned or expected to be earned, by the transferee or assignee does not exceed 12 percent of the surplus.

(4) The court shall honor a transfer or assignment that complies with the requirements of subsection (3), in which case the court shall order the clerk to pay the transferor or assignee from the surplus.

(5) If the court finds that a voluntary transfer or assignment does not qualify under subsection (3) but that the transfer or assignment was procured in good faith and with no intent to defraud the transferor or assignor, the court may order the clerk to pay the claim of the transferee or assignee after payment of timely filed claims of subordinate lienholders.

(6) If a voluntary transfer or assignment of the surplus is set aside, the owner of record shall be entitled to payment of the surplus after payment of timely filed claims of subordinate lienholders, but the transferee or assignee may seek in a separate proceeding repayment of any consideration paid for the transfer or assignment.

(7) This section does not apply to a deed, mortgage, or deed in lieu of foreclosure unless a person other than the owner of record is claiming that a deed or mortgage entitles the person to surplus funds. Nothing in this section affects the title or marketability of the real property that is the subject of the deed or other instrument. Nothing in this section affects the validity of a lien evidenced by a mortgage.

Section 4. Effective upon this act becoming a law, section 45.034, Florida Statutes, is created to read:

45.034 Qualifications and appointment of a surplus trustee in foreclosure actions.—

(1) A surplus trustee is a third-party trustee approved pursuant to this section by the Department of Financial Services. A surplus trustee must be willing to accept cases on a statewide basis; however, a surplus trustee may employ subcontractors that are not qualified as a surplus trustee provided the surplus trustee remains primarily responsible for the duties set forth in this section.

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(2) A surplus trustee is an entity that holds and administers surplus proceeds from a foreclosure pursuant to ss. 45.031-45.035.

(3) To be a surplus trustee, an entity must apply for certification with the Department of Financial Services. The application must contain:

(a) The name and address of the entity and of one or more principals of the entity.

(b) A certificate of good standing from the Secretary of State indicating that the entity is an entity registered in this state.

(c) A statement under oath by a principal of the entity certifying that the entity, or a principal of the entity, has a minimum of 12 months' experience in the recovery of surplus funds in foreclosure actions.

(d) Proof that the entity holds a valid Class "A" private investigator license pursuant to chapter 493.

(e) Proof that the entity carries a minimum of \$500,000 in liability insurance, cash reserves, or bonding.

(f) A statement from an attorney licensed to practice in this state certifying that the attorney is a principal of the entity or is employed by the entity on a full-time basis and that the attorney will supervise the management of the entity during the entity's tenure as a surplus trustee.

(g) A statement under oath by a principal of the entity certifying that the principal understands his or her duty to immediately notify the department if the principal ever fails to qualify as an entity entitled to be a surplus trustee.

(h) A nonrefundable application fee of \$25.

(4) The Department of Financial Services shall certify any surplus trustee that applies and qualifies. Applications must be filed by June 1, and all applications that qualify shall be certified by the department by June 30 and shall be effective for 1 year commencing July 1. The department shall renew a certification upon receipt of the \$25 fee and a statement under oath from a principal of the surplus trustee certifying that the surplus trustee continues to qualify under this section.

(5) The Department of Financial Services shall develop a rotation system for assignment of cases to all qualified surplus trustees.

(6) The primary duty of a surplus trustee is to locate the owner of record within 1 year after appointment. Upon locating the owner of record, the surplus trustee shall file a petition with the court on behalf of the owner of record seeking disbursement of the surplus funds. If more than one person appears to be the owner of record, the surplus trustee shall obtain agreement between such persons as to the payment of the surplus, or file an interpleader. The interpleader may be filed as part of the foreclosure case.

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(7) A surplus trustee is entitled to the following service charges and fees which shall be disbursed by the clerk and payable from the surplus:

(a) Upon obtaining a court order, a cost advance of 2 percent of the surplus.

(b) Upon obtaining a court order disbursing the surplus to the owner of record, a service charge of 10 percent of the surplus.

Section 5. Section 45.035, Florida Statutes, is created to read:

45.035 Clerk's fees.—In addition to other fees or service charges authorized by law, the clerk shall receive service charges related to the judicial sales procedure set forth in ss. 45.031-45.034 and this section:

(1) The clerk shall receive a service charge of \$60 for services in making, recording, and certifying the sale and title, which service charge shall be assessed as costs and shall be advanced by the plaintiff before the sale.

(2) If there is a surplus resulting from the sale, the clerk may receive the following service charges, which shall be deducted from the surplus:

(a) The clerk may withhold the sum of \$25 from the surplus which may only be used for purposes of educating the public as to the rights of homeowners regarding foreclosure proceedings.

(b) The clerk is entitled to a service charge of \$10 for notifying a surplus trustee of his or her appointment.

(c) The clerk is entitled to a service charge of \$10 for each disbursement of surplus proceeds.

(d) The clerk is entitled to a service charge of \$10 for appointing a surplus trustee, furnishing the surplus trustee with a copy of the final judgment and the certificate of disbursements, and disbursing to the surplus trustee the trustee's cost advance.

Section 6. Section 501.2078, Florida Statutes, is created to read:

501.2078 Violations involving individual homeowners during the course of residential foreclosure proceedings; civil penalties.—

(1) As used in this section:

(a) "Homeowner" means any individual who is the owner of the property subject to a residential foreclosure proceeding.

(b) "Residential foreclosure proceeding" means any action in a court of this state in which a party seeks to foreclose on a mortgage encumbering the mortgagor's primary dwelling.

(c) "Victimize" means any course of action intended to dupe, swindle, or cheat a homeowner subject to a residential foreclosure proceeding. The factors that a court shall review when determining whether a course of action is victimizing a homeowner are:

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1. The compensation received relative to the risk and the amount of work involved.
2. The number of homeowners involved.
3. The relative bargaining position of the parties.
4. The relative knowledge and sophistication of the parties.
5. Representations made in the inducement.
6. The timing of the agreement.

(2) Any person, other than a financial institution as defined in s. 655.005, who willfully uses, or has willfully used, a method, act, or practice in violation of this part, which method, act, or practice victimizes or attempts to victimize homeowners during the course of a residential foreclosure proceeding, and in committing such violation knew or should have known that such conduct was unfair or deceptive, is liable for a civil penalty of not more than \$15,000 for each such violation.

(3) Any order of restitution or reimbursement based on a violation of this part committed against a homeowner in a residential foreclosure proceeding has priority over the imposition of any civil penalty for such violation pursuant to this section.

(4) Civil penalties collected pursuant to this section shall be deposited into the Legal Affairs Revolving Trust Fund of the Department of Legal Affairs and allocated solely to the Department of Legal Affairs for the purpose of preparing and distributing consumer education materials, programs, and seminars to benefit homeowners in residential foreclosure proceedings or to further enforcement efforts.

(5) This section does not apply to:

(a) The act of encumbering the dwelling subject to a residential foreclosure proceeding with a substitute or additional lien.

(b) A deed in lieu of foreclosure, a workout agreement, a bankruptcy plan, or any other agreement between a foreclosing lender and a homeowner.

(c) A foreclosure sale, eminent domain proceeding, forfeiture, or any other legal process.

Section 7. Section 702.035, Florida Statutes, is amended to read:

702.035 Legal notice concerning foreclosure proceedings.—Whenever a legal advertisement, publication, or notice relating to a foreclosure proceeding is required to be placed in a newspaper, it is the responsibility of the petitioner or petitioner's attorney to place such advertisement, publication, or notice. For counties with more than 1 million total population as reflected in the most recent Official Decennial Census of the United States Census Bureau as shown on the official website of the United States Census Bureau, any notice of publication required by this section shall be deemed to have

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been published in accordance with the law if the notice is published in a newspaper that has been entered as a periodical matter at a post office in the county in which the newspaper is published, is published a minimum of 5 days a week, and has been in existence and published a minimum of 5 days a week for 1 year or is a direct successor to a newspaper that has been in existence for 1 year that has been published a minimum of 5 days a week. The advertisement, publication, or notice shall be placed directly by the attorney for the petitioner, by the petitioner if acting pro se, or by the clerk of the court. Only the actual costs charged by the newspaper for the advertisement, publication, or notice may be charged as costs in the action.

Section 8. Subsection (9) of section 201.02, Florida Statutes, is amended to read:

201.02 Tax on deeds and other instruments relating to real property or interests in real property.—

(9) A certificate of title issued by the clerk of court under s. 45.031(5)(4) in a judicial sale of real property under an order or final judgment issued pursuant to a foreclosure proceeding is subject to the tax imposed by subsection (1). However, the amount of the tax shall be computed based solely on the amount of the highest and best bid received for the property at the foreclosure sale. This subsection is intended to clarify existing law and shall be applied retroactively.

Section 9. Except as otherwise expressly provided in this act, this act shall take effect July 1, 2006.

Approved by the Governor June 12, 2006.

Filed in Office Secretary of State June 12, 2006.

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APPENDIX 4

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 65 CS Foreclosure Proceedings
SPONSOR(S): Porth and others
TIED BILLS: None **IDEN./SIM. BILLS:** CS/CS/SB 166

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Civil Justice Committee</u>	<u>7 Y, 0 N, w/CS</u>	<u>Bond</u>	<u>Bond</u>
2) <u>Economic Development, Trade & Banking Committee</u>	<u>13 Y, 0 N, w/CS</u>	<u>Olmedillo</u>	<u>Carlson</u>
3) <u>Judiciary Appropriations Committee</u>	<u>4 Y, 0 N, w/CS</u>	<u>Brazzell</u>	<u>DeBeaugrine</u>
4) <u>Justice Council</u>	<u>11 Y, 0 N, w/CS</u>	<u>Bond</u>	<u>De La Paz</u>
5) _____	_____	_____	_____

SUMMARY ANALYSIS

Foreclosure is the legal process for enforcing a lien or mortgage encumbering real property. The foreclosure process results in a forced sale of the property. In some foreclosure cases, the sale price exceeds the amount owed to pay off the lien or mortgage. In such cases, the former property owner may be entitled to proceeds from the sale. Current law does not provide a procedure for distribution of that surplus to the former property owner, requiring the former owner to file court papers to obtain a court order directing the clerk to pay the surplus to the former owner.

This bill seeks to address problems and abuses related to handling surpluses. It:

- Creates a legal presumption that the former owner of the property is entitled to the surplus after payment of subordinate lienholders who timely filed their claim. It requires the clerk of court to mail a copy of the final judgment rendered in a foreclosure proceeding to every party to the action, including parties in default. The final judgment must include notice of a potential surplus.
- Requires that certain disclosures be made before a court will honor a transfer or assignment of the surplus.
- Provides that it is deceptive and unfair trade practice to victimize a person whose home is in foreclosure, creating a civil cause of action.
- Creates a new class of entities to be known as "surplus trustees" and provides for their certification by the Department of Financial Services.
- Creates service fees payable to the clerk of court and the surplus trustee related to foreclosure surpluses.

This bill appears to have a fiscal impact on state and local governments. See "Fiscal Comments", below.

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This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h0065f.JC.doc
DATE: 4/20/2006

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide Limited Government -- This bill provides additional procedures for foreclosure actions and creates a new cause of action. It also provides for the regulation of surplus trustees and expands the duties of the Department of Financial Services.

Ensure Lower Taxes -- This bill creates new fees.

Promote Personal Responsibility -- This bill increases personal responsibility for injurious behavior by creating a cause of action for deceptive and unfair trade practices.

B. EFFECT OF PROPOSED CHANGES:

Background

Foreclosure is the legal process for enforcement of a security interest in real property. Subject to the owner's right to redemption¹, property subject to foreclosure is sold and the proceeds of the sale are applied against the debt. In most foreclosures, the debt exceeds the net proceeds of the sale.² However, due to recent economic forces that have led to substantial inflation in real property values, a growing number of properties are being sold at foreclosure for more than the debt owed on the property.

The net proceeds of a foreclosure sale in excess of the debt owed is referred to as the surplus from the sale. In general, the foreclosed property owner is entitled to the surplus. However, subordinate mortgages are entitled to payment from the surplus prior to payment to the foreclosed property owner, and judgment lienholders may be entitled to payment from the surplus if the foreclosed property was not homestead property. Before distribution of a surplus to the foreclosed property owner, the court must determine the priorities between the foreclosed property owner and any lienholders.³ There is no time limit under current law for subordinate lienholders to claim their entitlement to a part of the surplus.

A property owner facing foreclosure can seek help from numerous sources. The property owner can negotiate with the foreclosing lender. A different lender may be willing to refinance the property, or offer a second mortgage. The property owner can seek bankruptcy protection. The property owner can sell the property prior to the foreclosure sale. The property owner can borrow from friends and family. Most foreclosure cases are resolved by agreement or redemption of the property.

It has been reported that, with the growing number of foreclosures that may result in a surplus, there is a growing number of entrepreneurs who are offering services to property owners subject to foreclosure. Some of these entrepreneurs are receiving significant profits while the property owners they contract with receive little of their equity in the property. Some of the common means are:

- A lawyer, or a person claiming to be a lawyer, will offer to file the legal papers required to obtain the court order required for the clerk to distribute the surplus to the now (or soon to be) former property owner. The fee arrangement may be a contingency fee. The property owner does not

¹ Redemption is the right of any property owner to pay the debt at any time prior to the sale, and thereby stop the sale and keep the property. See generally s. 45.0315, F.S.

² Where the debt exceeds the sale proceeds, the lender can usually sue for the difference, known as a deficiency. See generally s. 702.06, F.S.

³ *General Bank F.S.B. v. Westbrooke Pointe, Inc.*, 548 So.2d 736 (Fla. 3rd DCA 1989); *Goldindano v. Wells Fargo Bank*, 913 So.2d 614 (Fla. 3rd DCA 2005).

realize that the paperwork is basic enough that most lay persons could easily complete the paperwork.⁴

- The entrepreneur offers the property owner a small sum of cash in exchange for an assignment of the surplus.
- The entrepreneur offers the property owner a small sum of cash for a quitclaim deed to the property, thereby obtaining the legal right to the surplus.

The procedure for judicial foreclosure sales is set forth in s. 45.031, F.S. The section does not specify how the clerk is to handle a surplus, thus requiring a court order for distribution of the surplus. The section also does not restrict any sale or transfer of the real property, or the right to the surplus, prior to foreclosure.

Effect of Bill

The bill attempts to address problems and abuses in the handling of surpluses from foreclosures.

Disbursement of Surplus Funds

This bill creates s. 45.032, F.S., to provide for disbursement of surplus funds after a judicial foreclosure sale. The bill creates a rebuttable legal presumption that the owner of the property that was foreclosed, as of the date of the filing of the lis pendens, is entitled to the surplus funds unless some other person proves entitlement to the funds. The bill provides a method to rebut the presumption. In addition, the bill specifically states that the legislature intends to abrogate the common law rule that surplus proceeds in a foreclosure case are the property of the owner on the date of the foreclosure sale.

The bill requires the clerk to furnish a copy of the final judgment to every party in the action or to their attorney of record. The final judgment shall provide certain language including a notice of potential surplus, a statement indicating that a subordinate lienholder must file a claim for surplus funds no later than 60 days after the sale, a statement indicating that the property owner does not need to assign his or her rights in the property to claim surplus funds, and a statement indicating that the owner does not need any type of representation to claim such funds.

The bill requires that the publication of sale, which includes the time and place of the sale, now include language stating that any person claiming an interest in the surplus fund must file such claim within 60 days of the date of the sale. The sale of the foreclosed property must be conducted at the time and place indicated in the final judgment.

The clerk continues to be responsible to serve a copy of the Certificate of Sale and Certificate of Title on each party to the action; however, the clerk must now also serve parties in default and include the dollar amount of the sale. The disbursement and available surplus amounts now must be included in the Certificate of Disbursement. In addition, the Certificate of Disbursement must state that any person, other than the rightful owner, must file a claim to surplus funds within 60 days after the sale for such claim to be valid. The form for the Certificate of Disbursement is amended to add a line for the clerk to state the amount of surplus resulting from the sale, if any.

The clerk shall hold the surplus funds 60 days after issuance of the Certificate of Disbursement, pending a court order. In the event no one files a claim within 60 days, the clerk shall appoint a

⁴ In a related scheme, the Florida Bar has suspended the license of an attorney who was allegedly filing the paperwork necessary to obtain the surplus funds, but without receiving the owner's authority. The lawyer would deduct a 40% fee from the proceeds, and prepare a check payable to the former owner for the remainder. In some cases, the partners would intercept and cash the owner's check. Daily Business Review, *South Florida lawyer accused in mortgage scam is suspended*, Vol. 46, No. 45 (Feb. 11, 2005).

“surplus trustee.” Upon such appointment, the clerk shall furnish the surplus trustee a copy of a Notice of Appointment of Surplus Trustee, which must include the amount of the available surplus.

The bill allows the surplus trustee one year from the date of appointment to locate the property owner. If after such time the surplus trustee fails to locate the property owner, the clerk shall terminate the appointment and shall treat the remaining surplus funds as unclaimed property to be deposited with the Chief Financial Officer 30 days after such termination.

Any person other than the owner of record who claims the surplus funds has the burden of proving that he or she is entitled to some or all of the surplus funds. The court must consider the factors in s. 45.033, F.S., created by this bill, when hearing a claim that a person other than the owner of record is entitled to the surplus funds.

Transfer or Assignment of Right to Surplus Funds

This bill creates s. 45.033, F.S., to provide criteria for determining whether a sale or assignment of the right to surplus proceeds in a property subject to foreclosure is a valid sale or assignment. The bill creates a rebuttable presumption that the owner of real property as of the date of the filing of a lis pendens is entitled to surplus funds available in a foreclosure of that real property after payment of subordinate lienholders who have timely filed a claim. Another person may rebut that presumption only by proving that:

- The grantee or assignee is a grantee or assignee by virtue of an involuntary transfer or assignment of the right to collect the surplus. An involuntary transfer or assignment may be as a result of inheritance or as a result of the appointment of a guardian.
- A voluntary transfer or assignment shall be a transfer or assignment qualified under this subsection if:
 - The transfer or assignment is in writing, and the instrument:
 - Was executed prior to the foreclosure sale and includes a financial disclosure that specifies the assessed value of the property, a statement that the assessed value may be lower than the actual value of the property, the approximate amount of any debt encumbering the property, and the approximate amount of any equity in the property. If the instrument was executed after the foreclosure sale, the instrument must also specify the foreclosure sale price and the amount of the surplus.
 - Includes a statement that the owner does not need an attorney or other representative to recover surplus funds in a foreclosure.
 - Specifies all forms of consideration paid for the rights to the property or the assignment of the rights to any surplus funds.
 - The transfer or assignment is filed with the court on or before 60 days after the filing of the Certificate of Disbursements.
 - There are funds available to pay the transfer or assignment after payment of timely filed claims of subordinate lienholders.
 - The transferee or assignee is qualified as a surplus trustee, or could qualify as a surplus trustee, pursuant to s. 45.034, F.S.
 - The compensation to the transferee or assignee does not exceed 12%.

A transfer or assignment that does not follow these requirements may nevertheless be allowed by the court if the court finds that the instrument was procured in good faith and with no intent to defraud the former owner.

A person who has executed a transfer or assignment that does not conform to the requirements of this section has the right to petition the court presiding over the foreclosure proceeding to set aside the

nonconforming transfer or assignment. If the transfer or assignment is set aside, the owner of record will be entitled to the surplus funds after payment of timely filed claims by subordinate lienholders; but the other party may, in a separate proceeding, seek rescission of contract and appropriate damages therein.

The provisions regarding the requirements of an assignment or transfer of the right to collect surplus funds do not apply to a deed, a mortgage, or a deed in lieu of foreclosure, unless a person other than the owner of record is claiming that a deed or mortgage entitles the person to surplus proceeds. Nothing in this section shall affect the title or marketability of the real property that is the subject of the deed or other instrument. The provisions regarding the requirements of an assignment or transfer of the right to collect surplus funds do not affect the validity of a lien evidenced by a mortgage.

Surplus Trustee

The bill authorizes a surplus trustee to locate the owner of surplus funds under certain circumstances. The surplus trustee must apply for certification with the Department of Financial Services (DFS). Applications must be filed by June 1 of each year, and are effective for the following July 1 to June 30.

The primary duty of a surplus trustee is to locate the owner of record within one year of appointment. An application for certification must include the following:

- The name and address of the entity and one or more of its principals;
- A certificate of good standing from the Florida Secretary of State indicating that the entity is a Florida entity;
- A statement under oath by a principal certifying that the entity, or a principal of the entity, has a minimum of 12 months experience in the recovery of surplus funds in foreclosure actions;
- Proof that the entity holds a valid Class "A" private investigators license;
- Proof that the entity carries a minimum of \$500,000 in liability insurance, cash reserves or bonding;
- A statement from an attorney licensed to practice in Florida certifying that the attorney is a principal of the entity or is employed by the entity on a full-time basis, and that the attorney will supervise the management of the entity;
- A statement under oath by a principal that he or she understands his or her duty to immediately notify the DFS of the entity's failure to continue to qualify under the relevant statute; and
- A non-refundable fee of \$25.

A surplus trustee may renew its qualification by providing the DFS a \$25 renewal fee and a statement under oath as to its continued qualification under s. 45.035, F.S.

The DFS shall develop a rotation system for appointment of surplus trustees.

The bill authorizes the surplus trustee to collect service fees, payable from surplus funds, related to its duties.

Deceptive and Unfair Trade Practices Related to Surplus Funds

This bill creates s. 501.2078, F.S., within the Florida Deceptive and Unfair Trade Practices Act (FDUTPA).⁵ The FDUTPA creates a number of civil causes of action by which a state attorney, or the Attorney General, may seek injunctive relief, an injunction, and a civil penalty against a person engaging in a deceptive or unfair trade practice. The FDUTPA also creates a civil cause of action by which a person harmed by a deceptive or unfair trade practice may seek a civil judgment against a person engaging in a deceptive and unfair trade practice.⁶

⁵ See Part II of ch. 501, F.S.

⁶ Section 501.211, F.S.

This bill provides that deceptive and unfair trade practices occurring in a foreclosure proceeding of a homeowner may give rise to a civil cause of action under the FDUPTA. The bill also defines "homeowner". The foreclosure must be a "residential foreclosure proceeding", defined as "any action in a circuit court of this state in which a party seeks to foreclose on a mortgage encumbering the mortgagor's primary dwelling."

This bill provides that any person, other than a financial institution as defined by s. 655.005, F.S.,⁷ who willfully uses, or has willfully used, a method, act, or practice in violation of FDUPTA, which method, act, or practice victimizes or attempts to victimize homeowners during the course of a residential foreclosure proceeding, and in committing such violation knew or should have known that such conduct was unfair or deceptive, is liable for a civil penalty of not more than \$15,000 for each such violation.

Restitution or reimbursement to a homeowner is to be paid first, before payment of any civil penalty. Civil penalties collected are deposited into the Legal Affairs Revolving Trust Fund of the Department of Legal Affairs and allocated solely to the Department of Legal Affairs for "the purpose of preparing and distributing consumer education materials, programs, and seminars to benefit homeowners in residential foreclosure proceedings or to further enforcement efforts."

This bill provides that the following do not constitute grounds for suit under this section of the FDUPTA:

- The act of encumbering the dwelling subject to a residential foreclosure proceeding with a substitute or additional lien.
- A deed in lieu of foreclosure, a workout agreement, a bankruptcy plan, or any other agreement between a foreclosing lender and a homeowner.
- Any action taken by a lender, mortgage broker, assignee of a mortgage, or counsel for any such entity, in foreclosing a mortgage or collecting on the note.

Legal Notices

The prevailing party in any civil action may be entitled to reimbursement of court costs from a non-prevailing party. This bill amends s. 702.035, F.S., to limit an award of costs for a legal advertisement, publication, or notice relating to a foreclosure proceeding to the actual costs charged by the newspaper for the advertisement, publication or notice.

This bill also amends s. 50.013, F.S., to provide in counties with populations of over 1 million persons, statutorily-required legal notices must be placed in newspapers published at least 5 days per week.

Fees

This bill authorizes the clerk to take the following deductions from surplus funds:

- A \$25 fee to be used for the purposes of educating the public regarding foreclosure proceedings.
- A \$10 fee to notify surplus trustees of surplus funds.
- A \$10 fee for each disbursement of surplus.
- A \$10 fee to appoint a surplus trustee, furnish the surplus trustee with a copy of the final judgment and a certificate of disbursement, and disburse surplus trustees their costs in advance.

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⁷ Section 655.005(1)(h), F.S., defines "financial institution" as "a state or federal association, bank, savings bank, trust company, international bank agency, international branch, representative office or international administrative office, or credit union."

Moreover, the bill provides that a surplus trustee is entitled to a 2% service fee upon notice of appointment and a 10% service charge upon obtaining the order disbursing surplus funds to the owner, which costs are related to the proper payment of the surplus funds.

C. SECTION DIRECTORY:

Section 1 amends s. 45.031, F.S., relating to notice of surplus funds.

Section 2 creates s. 45.032, F.S., providing for distribution of surplus funds.

Section 3 creates s. 45.033, F.S., providing criteria for determination of a valid transfer or assignment of the right to collect surplus funds.

Section 4 creates s. 45.034, F.S., providing qualification and appointment criteria for surplus trustees.

Section 5 creates s. 45.035, F.S., providing for clerks' fees.

Section 6 amends s. 50.031, F.S., to add additional criteria for the newspapers in which legal notices are placed in counties with populations over 1 million persons.

Section 7 creates s. 501.2078, F.S., to provide that victimization of a homeowner involved in a foreclosure action may be a violation of the Florida Deceptive and Unfair Trade Practices Act.

Section 8 amends s. 702.035, F.S., to limit costs related to newspaper advertising chargeable in a foreclosure action.

Section 9 amends s. 201.02, F.S., to correct a cross-reference.

Section 10 provides an effective date of July 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

It is unknown whether the fees provided in the bill will be sufficient to cover the costs of the increased clerk responsibilities. If they are insufficient, clerks of court may require additional funding and thus may be eligible for the Legislative Budget Commission to approve increases to their maximum annual budgets pursuant to s. 28.36, F.S. Any such increases may reduce the contribution to General Revenue made by clerks with surplus revenues. However, to the degree that clerk workload and related costs do not increase, at least a portion of the additional revenues would be eventually deposited into the General Revenue Fund.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The clerks of court would collect additional revenue; however, since this revenue is court-related, a portion of it ultimately accrues to the state.

2. Expenditures:

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To the degree that a clerk of court's overall workload would increase because of the duties required under this bill, local governments would be impacted.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Certain individuals who are due funds from the surplus remaining after a foreclosure and who would not otherwise claim these funds on their own may be more likely to actually receive those funds given the processes and protections provided by the bill. However, the individual would bear the costs of these processes and protections by being charged fees from the surplus. Fees due to the clerk of court could range up to \$55 and fees due to the surplus trustees would be 12% of the surplus. Individuals who claimed surplus funds after the sale but prior to the appointment of a surplus trustee would be liable only for the \$25 fee for educating the public regarding foreclosure proceedings.

A new class of entities known as "surplus trustees" would be eligible, upon certification by the Department of Financial Services (DFS), for appointment on a rotating basis to locate individuals due surpluses. Upon appointment, a surplus trustee would receive 2% of the surplus and upon locating the individual would receive 10% of the surplus.

D. FISCAL COMMENTS:

During FY 2004-05, there were 59,907 real property and mortgage foreclosures in Florida.⁸ It is unknown how many of these cases involve surplus funds.

This bill authorizes the clerk to take the following deductions from surplus funds:

- A \$25 fee to be used for the purposes of educating the public regarding foreclosure proceedings.
- A \$10 fee to notify surplus trustees of surplus funds.
- A \$10 fee for each disbursement of surplus.
- A \$10 fee to appoint a surplus trustee, furnish the surplus trustee with a copy of the final judgment and a certificate of disbursement, and disburse surplus trustees their costs in advance.

Moreover, the bill provides that a surplus trustee is entitled to a 2% service fee upon notice of appointment and a 10% service charge upon obtaining the order disbursing surplus funds to the owner, which costs are related.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

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C. DRAFTING ISSUES OR OTHER COMMENTS:

⁸ FY 2004-05 *Statistical Reference Guide*, Office of the State Courts Administrator, p. 3-2.

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On January 11, 2006, the Civil Justice Committee adopted one strike-all amendment. The amendment:

- Removed the notification that was to be attached to every summons served in a foreclosure action.
- Removed the prohibition on contacting persons subject to foreclosure.
- Created a presumption that the owner of record as of the date of the lis pendens is the person entitled to payment of the surplus, unless another person proves his or her right to claim the surplus.
- Created fees for the clerk of court.
- Provided that the clerk can distribute the surplus to the former owner if no other person objects.
- Removed limitations on property transfers that would likely have impacted all real estate closings.

The bill was then reported favorably with a committee substitute.

On March 23, 2006, the Economic Development Trade and Banking Committee adopted a strike-all amendment. This amendment:

- Requires the final judgment rendered in a foreclosure proceeding to include information regarding notice of potential surplus, place and time of sale, and claim filing deadlines.
- Requires the clerk to mail a copy of the final judgment to every party or attorney of record in the action.
- Requires that a statement be placed in a publication of sale indicating that a person must file a claim for surplus funds within 60 days after the clerk issues the Certificate of Title.
- Requires that the certificate of sale include the purchase price.
- Requires certain information in a certificate of disbursement, including filing deadlines, disbursement and surplus amounts.
- Creates a rebuttable presumption that the owner is the owner of the property as of the time a lis pendens is filed and provides a method to rebut the presumption.
- Requires certain disclosures for a voluntary transfer or assignment of rights to be valid.
- Specifies that the legislature abrogates the common law rule that surplus proceeds in a foreclosure case are the property of the owner on the date of the foreclosure sale.
- Requires the clerk to hold the surplus funds for 60 days after issuing the certificate of disbursement, pending a court order.
- Provides that the court shall set an evidentiary hearing to determine entitlement to surplus if claims were filed.
- Removes the requirement that the clerk provide notice to certain persons regarding availability of surplus funds.
- Amends the procedure by which the clerk should locate the property owner when a surplus remains, and it provides that after 60 days, the clerk must appoint a surplus trustee to locate the owner.
- Creates qualifications and appointment procedures for surplus trustees in foreclosure actions, including the requirement that a trustee apply for certification with the Department of Financial Services.
- It provides that a trustee has one year to locate the property owner. Thereafter, the clerk shall terminate the appointment and after 30 days of such termination, surplus funds shall be treated as unclaimed property to be deposited with the Chief Financial Officer.
- Specifies that proceedings regarding surplus funds do not affect or cloud title to the property.
- Provides that trustee may employ subcontractors who are not qualified as surplus trustees.
- Authorizes the clerk to take the following deductions from surplus funds:
 - A \$25 fee to be used for the purposes of educating the public regarding foreclosure proceedings.
 - A \$10 fee to notify surplus trustees of surplus funds.
 - A \$10 fee for each disbursement of surplus.

- A \$10 fee to appoint a surplus trustee, furnish the surplus trustee a copy of the final judgment and the certificate of disbursement, and disburse trustees their cost in advance.

Moreover, the bill provides that a surplus trustee is entitled to a 2% service fee upon notice of appointment and a 10% service charge upon obtaining the order disbursing surplus funds to the owner, which costs are related to the proper payment of the surplus funds.

On March 23, 2006, the Judiciary Appropriations Committee adopted a strike-all amendment. This amendment reassigned the responsibilities originally assigned by the bill to the Florida Clerks of Court Operations Corporation from that organization to the Florida Department of Financial Services. This amendment also added a new section to the bill revising s. 50.013, F.S., to specify that in counties with a population of 1 million or more, certain required legal notices must be published in a newspaper published 5 or more days per week.

On April 18, 2006, the Justice Council adopted 4 amendments to this bill. The amendments:

- Correct a description of persons entitled to notice.
- Limit an assignee of a surplus to the same 12% compensation limit that applies to surplus trustees.
- Change the qualification period for surplus trustees from calendar year to state fiscal year basis.
- Correct a statutory reference in the title.

The bill was then reported favorably with a committee substitute.

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